Unit 1
Civil Rights Litigation: Purposes, Processes, and Promises

Unit Questions

How do the fundamental values and principles of American constitutional government shape our legal system, including its rules and procedures? How do ordinary people use the legal system to realize the values and principles of American constitutional government?

Overview

The United States system of government and law exists and is structured to protect our rights to liberty, democratic self-governance, and equal protection of the law. Individuals can use the legal system to advocate for their civil rights and work to close any gaps that exist between American constitutional ideals and reality. Civil rights litigation is important in upholding the rights of all Americans, including the most vulnerable members of society. Thousands of civil rights cases over the last fifty years have transformed schools, prisons, mental health facilities, housing authorities, police departments, child welfare agencies and more. Ordinary citizens have used litigation to enforce federal statutes and constitutional provisions that require fair treatment by government and prohibit discrimination on the basis of race, color, sex, disability, religion, familial status and national origin. In the process, they have protected and enforced their own rights as well as the rights of countless others.

This unit introduces students to the concept of civil rights litigation. It asks students to consider how the litigation process reflects fundamental values and principles of American constitutional government. By the end of this unit, students should be prepared to talk about how the civil litigation process reflects these values and principles, and to describe civil rights litigation and its current scope.

Unit Objectives and Standards

By the end of this unit, you will be able to:

- Explain the purpose of litigation in American constitutional government, and differentiate between criminal and civil litigation.
- List and explain the steps in civil litigation, and discuss how the civil litigation process embodies values and principles of American constitutional government.
- Analyze and formulate an argument about how the civil litigation process embodies the values and principles of American constitutional government.
- Identify past and current civil rights cases and explain their significance in American history, noting how people use the legal system to close the gaps between constitutional ideals and reality.

Unit Assessment

You will write a formal, argumentative essay answering the question, “Does civil litigation procedure adequately reflect the values and principles of American constitutional government?”

Handout 1

Introduction to Litigation

What is Litigation?

Individuals, companies, and institutions frequently come into conflict with one another. Many of these conflicts raise no legal issues. For example, two friends may argue about something one of them said about the other. Or a store might open very close to a similar store, and undermine the first store's business. Other times, people come into conflict that *does* involve the law, but they try to resolve the dispute without a lawsuit. But a lawsuit may arise if someone is harmed by the behavior of someone else—an individual or organization—and feels that the harmful behavior violates the Constitution or other laws. Bringing a lawsuit is one way the injured person can seek compensation for the injury, or a change in the harmful behavior. *Litigation*, then, is the legal system's mechanism for resolving disputes.

Types of Litigation: Civil vs. Criminal

There are two basic types of litigation—civil and criminal. *Civil litigation* is the legal system's process for resolving disputes among individuals or groups. It occurs when someone is alleged to violate *civil law*—a set of rules governing people's behavior. Civil litigation has two sides: the *plaintiff*, who feels that he/she has been wronged in some way, and the *defendant*, who the plaintiff alleges committed the wrong. The plaintiff initiates the lawsuit —or *sues*—by filing a complaint against the defendant. In civil litigation, the plaintiff asks the court to order the defendant to remedy a wrong, often in the form of monetary compensation to the plaintiff.

Criminal litigation is the legal system's process for resolving accusations made by the government that an individual (or, occasionally, a corporation) has committed a crime—a behavior that is harmful to society and is for that reason prohibited by the government under criminal law. Criminal litigation also has two sides: the *prosecutor,* a lawyer representing the government (or, as it is sometimes expressed, the people) who intiates litigation, and the *defendant*, who the prosecutor alleges committed the crime. In the modern United States, an individual can never file criminal charges against another person; only the prosecutor, on behalf of the government, can file criminal charges in court. In criminal litigation, the prosecutor asks the judge or jury to find the defendant guilty and punish him/her in someway, often by imprisonment.

Potential Outcomes

One of the most fundamental distinctions between civil and criminal litigation is in the notion of punishment. In criminal litigation, the potential penalty if the defendant is *found guilty*, or *convicted*, of a crime can include a fine, imprisonment, or even the death penalty, which remains the punishment for murder in some states. If the defendant wins, the judgment is called an *acquittal*, or a *not-guilty* verdict.

In contrast, a defendant in civil litigation is *never* incarcerated. Instead, a typical remedy if the defendant is *found liable* (the terms "convicted" or "guilty" are used only for criminal litigation) is a court order to the defendant to pay money damages or to start or stop doing something. A losing defendant in civil litigation often reimburses the plaintiff for losses caused by the

defendant's behavior. The idea of damages is usually not to punish the defendant, but to compensate the plaintiff.

Standards of Proof

The standard of proof is also very different in a criminal case versus a civil case. More evidence is needed to find the accused at fault in criminal cases than to find the defendant at fault in civil ones. To convict someone of a crime, the prosecution must show there is *proof beyond a reasonable doubt* that the person committed the crime. Judges and juries cannot convict someone they believe probably committed the crime or likely is guilty; rather, they must be almost certain. This makes it less likely that an innocent person will be wrongfully convicted and imprisoned. Civil cases, in contrast, usually use looser standards of proof such as "the preponderance of the evidence" standard, which asks if it was "more likely than not" that something occurred in a certain way. The difference in standards exists because civil liability is considered less blameworthy and because civil consequences are not designed to punish, but to repay the plaintiff for loss.

The Same Conduct Can Produce Civil and Criminal Liability

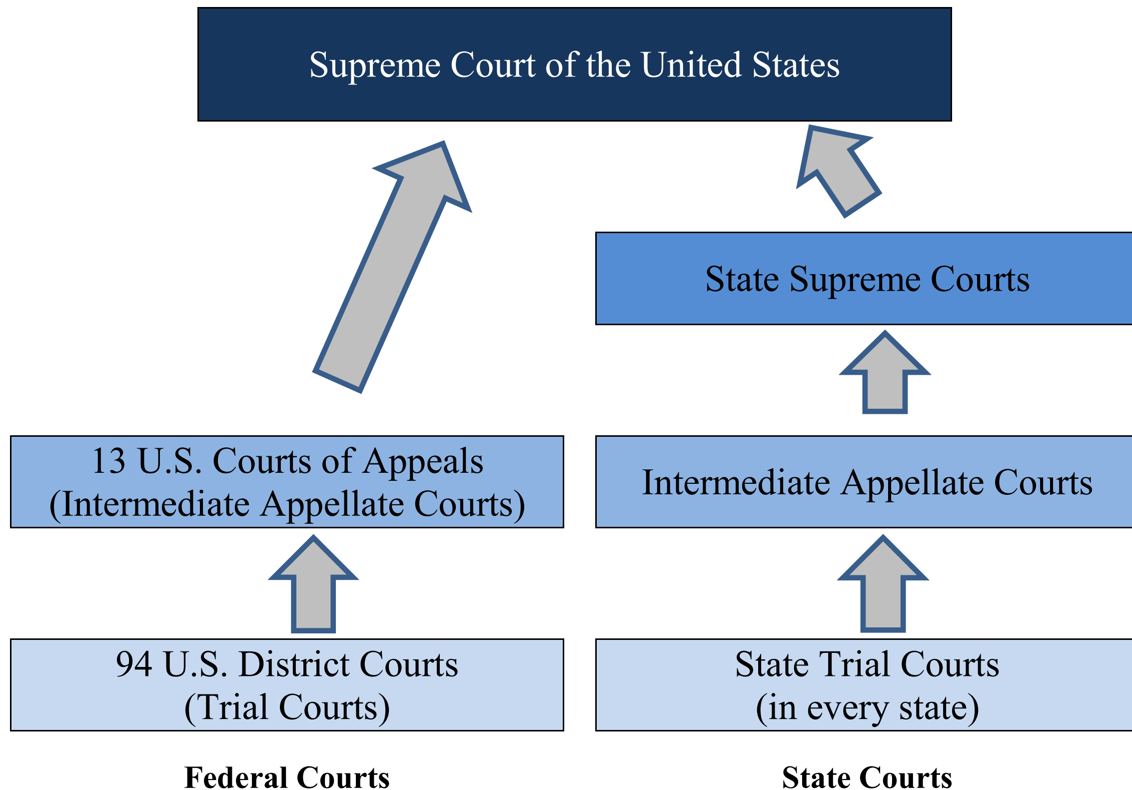
Murder, theft, and robbery are common examples of crimes that, if committed, can result in criminal litigation. Alternatively, divorce proceedings, property disputes, and personal injury claims are all examples of disputes that civil litigation can help resolve. Unlike these standard examples, some conduct is not so easily identifiable as either criminal or civil. In fact, although criminal and civil cases are treated very differently, the very same conduct can result in *both* criminal *and* civil liability. In other words, someone can violate the criminal law *and* the civil law at the same time! For instance, say you intentionally take your friend's iPhone, without his or her permission, and refuse to give it back. In doing so, you would have committed a crime known as *theft*. As a consequence of committing theft, you might be *punished* by criminal penalties—including community service or even jail time. At the same time, you would have also committed a civil law violation known as *conversion*—an obscure way of saying that you took something that didn't belong to you. As a consequence of committing conversion, you would be required to give the iPhone back to your friend or pay him the price of the phone. In the civil context, the goal is to *compensate* your friend for the *injury* that you caused him—in this case, the injury of losing his iPhone.

The Court System

Every state has its own court system. In addition, there is a federal court system, which is for the entire country. Lawsuits can be filed in either state or federal court. Typically, state courts hear criminal and civil cases regarding state law. Federal courts hear cases involving federal law. In certain circumstances, however, a federal court may preside over questions of state law, and vice versa. Each system has its own procedural rules, but the basic structure of the litigation process is the same.

Courts are hierarchical. Cases begin in state or federal *trial courts*. If one of the parties loses their case, they can usually appeal to an intermediate *appellate court*, the next highest level. In state court litigation, parties may be able to appeal next to the state supreme court. The U.S. Supreme Court is the nation's highest court. It can only decide questions of federal law. For

questions about state law, the state supreme courts are the top layer. This diagram illustrates the relationship between these systems:



Types of Disputes: Factual vs. Legal

Litigation can concern *factual disputes*, *legal disputes*, or both. A factual dispute occurs when the parties disagree about what has happened. In *Brown v. Board*, if the school district had disagreed that the schools were segregated, that would have been a factual dispute. However, the issue in *Brown v. Board* was a legal dispute— a disagreement about the legal significance of the facts. Since the parties agreed that the schools were segregated, the court was called upon to determine whether such segregation violated the Fourteenth Amendment of the Constitution. The *Brown v. Board* case raised a legal, not a factual, dispute.

The Pros and Cons of Litigation

Litigation serves many purposes. It can force defendants who have violated the law to stop and compensate those they have harmed. In addition, the possibility of litigation and the penalties that may come from it encourage others to follow the law. Litigation can draw attention to a problem, and help people to organize politically to solve it. Finally, litigation is a way for the values underlying the law to be articulated, reinforced, and worked out in new situations.

At the same time, litigation is frequently criticized. The main criticisms are:

- Expense. Plaintiffs, if they win, typically pay between 30% and 40% of their recovered damages to their lawyers. Defendants typically pay lawyers by the hour—and there can

be many hours. Even defendants who eventually win suits against them have often spent a great deal of money to defend.

- Delay. Lawsuits can take a great deal of time.
- Unduly broad threat. The prospect of lawsuits may induce potential defendants to avoid particular kinds of beneficial activities. For example, some analysts think that doctors are less likely to be obstetricians, because lawsuits are particularly prevalent in that area of medical practice. (The evidence on this point is mixed.)
- Diversion. Lawsuits may divert the parties from other less expensive and perhaps more effective kinds of solutions to their disputes.

Handout 2
The Litigation Process

In both state and federal court, a body of rules, known as court procedure, outlines the process of civil litigation from beginning to end. In order to work within American constitutional government, court procedure must put into practice our constitutional values and principles and conform to our ideas of *fairness*.

Part I: Pretrial

This Part describes the major steps in the litigation process that occur before the trial starts. As you walk through each step, consider what court procedures ensure that the process is fair.

The Complaint
As described in *Handout 1*, the plaintiff begins a lawsuit by filing a complaint in a trial court. The complaint is a formal document accusing the defendant of violating the law. It provides the defendant with notice, and outlines the plaintiff's case against the defendant. Specifically, the complaint:

- identifies the plaintiff and defendant
- describes the facts that show the defendant harmed the plaintiff
- explains what law those facts violate
- requests a remedy—usually court order to the defendant to pay money damages or to start or stop doing something

The Answer
After the plaintiff formally files the complaint against the defendant, the defendant must respond to each allegation. Reponses can deal with facts, law, or both. With respect to the facts, the defendant will typically respond by admitting some of the plaintiff's allegations, denying some of them, and stating that he or she lacks knowledge about some of them. The defendant might also argue that there are additional facts that change the situation. This is done in a document called an *answer.*

Discovery
If the case is not dismissed, then the parties begin a process called *discovery*. This is how attorneys on each side gather evidence from the other side. There are several types of discovery. Parties can obtain information through *depositions*, which are interviews of witnesses, conducted under oath. Parties also find out information through *interrogatories*, which are written questions submitted to the opposing party. The opposing party's written answers to these questions are also under oath. Attorneys for both parties can also demand that the opposing side share documents and other physical evidence relevant to the case.

Since the pre-trial process can be so long, attorneys often try to get witness statements as soon as possible, when events are clearer in people's minds. They can then use those statements to corroborate or dispute what may be said during the trial. Contrary to what is often shown in movies and television, there should be no surprises in a trial, and everyone should have ample time to evaluate information and evidence.

Developing a Theory of the Case

Attorneys take all the statements and evidence they have gathered from discovery and develop a *theory of the case*. A theory of the case is a clear outline of what they hope to prove in court, the facts that will make up their argument, the evidence to support the facts, and the strategy that will lead others to the conclusion they want. Good lawyers develop themes around which the case will be centered, such as equality, human dignity, greed, or vengeance. Lawyers also organize the theory of the case so that it tells a coherent story throughout the trial.

Alternative to Reaching Trial: Settlements

Movies and television usually focus on the trial part of the litigation process but, in fact, most cases never go to trial. The biggest reason is that judges and lawyers try to resolve disputes out of court through negotiation. During negotiation, the opposing parties try to reach a *settlement*—an agreement that is acceptable to all that ends the dispute. Most cases settle, at some point. If they can reach a settlement and avoid trial, both parties save a lot of time, money, and other resources.

Alternative to Reaching Trial: Motions

Even apart from settlement, there is a long process prior to trial, during which many cases are resolved. Remember that litigation can concern *factual disputes*, *legal disputes*, or both. Trials are where facts are developed and decided. But legal disputes are sometimes resolved without a trial. Judges very often decide cases based on the law through *motions*—requests to the court.

Both parties have several chances to file *motions for judgment* in their favor. These are written arguments that claim, based on the law and whatever uncontested evidence exists, that their side should win. A motion of this type can occur before discovery, after discovery, before trial, during trial, and even after trial. In fact, more disputes are resolved by this kind of motion than by a trial.

A *Motion to Dismiss*, for example, seeks to have the case thrown out. A defendant might file a Motion to Dismiss claiming that even if the plaintiff's allegations are true, those allegations do not add up to a legal violation. Many other grounds for filing a Motion to Dismiss exist. For example, if the plaintiff filed the complaint in the wrong court, or failed to properly serve the complaint on the defendant, the judge may dismiss the case. If the judge grants a Motion to Dismiss, the lawsuit is over; the plaintiff has lost.

Part II: Trial

This Part describes the major steps in the litigation process that occur during trial. Although quite infrequent, trials remain the dramatic central moment of civil litigation. Cases are developed and settled based on the parties' expectations about what will happen at trial. So understanding how trials work is critical to understanding all the other possibilities. As you walk through each step, consider what rules ensure that the process is fair.

What Happens at a Trial?

Trials are mostly about disputed facts. During trial, the decision-maker (a judge or jury) finally decides whose facts are true. In order to establish their version of the facts, the parties introduce evidence in court. Evidence can include witness or expert testimony, physical evidence, and documentary evidence. Nearly always, plaintiffs have the *burden of proof*. This means they have to convince the judge or jury of their version of the facts. Unlike in criminal cases, where the prosecutor must establish its version of events *beyond a reasonable doubt*, the plaintiff in a civil case has a lower burden, called the *preponderance of the evidence* standard. To meet the preponderance of evidence standard, civil plaintiffs must show that their version of events is *more likely than not*. The defendant tries to provide enough evidence, or a convincing enough explanation of the evidence, to prevent the plaintiff from meeting that burden of proof.

What Evidence can be Used During a Trial?

Not all of this evidence can be used at trial. The Rules of Evidence regulate what kinds of evidence can be used during the trial.

- First, all evidence and witness questions and answers must be *relevant*—that is, only evidence that is helpful in establishing a legal proposition involved in the case may be considered.
- *Hearsay*, or second-hand testimony, is often inadmissible (not allowed) in court. Witnesses usually must have directly seen, heard or experienced whatever it is they are testifying about. This is to improve the reliability of the testimony.
- *Character evidence,* defined broadly as any evidence showing a person's general tendency to act in a certain way, is nearly always inadmissible. This is because character evidence is often unfairly prejudicial, wastes time, and confuses the jury.
- *Privileged information*, such as conversations between a husband and wife, between a client and a lawyer, or a patient and a doctor, is also excluded from trial. This is because we want to respect these types of private relationships, and not encourage distrust or betrayal.
- Other rules of evidence inform the ways lawyers can ask questions and the ways witnesses can answer them.
    - For example, lawyers in a trial cannot ask their own sides' witnesses *leading questions*—questions phrased in a way that suggests the desired answer to the witness. This is to protect against unreliable, untruthful answers.
    - Further, the witness must answer reasonably specific questions, not provide *narration*. In other words, they must limit their answer to the information that the question calls for. This is to limit testimony so that it is both relevant and time efficient.
    - Except for technical experts, who can give opinions about matters relating to their field, witnesses cannot give opinions in their testimony. Testimony is limited to *facts, not opinions* for witnesses that are not testifying as experts. This is because the opinions of witnesses are typically irrelevant and can confuse the jury.

The Basic Trial Process

Only a very small proportion of civil cases go to trial. Although there is really no "typical" trial, the basic steps in the trial process are outlined below.

1. Jury Election. In criminal cases, and in civil cases, if the plaintiff is seeking damages, either the plaintiff or the defendant usually can choose to have the case presented or tried to a jury. This means the jury will decide factual disputes. Civil cases seeking other kinds of relief—for example, court orders requiring the defendants to do something or stop doing something—are presented to a judge without a jury.

2. Jury Selection. Typically on the first day of trial, a pool of potential jurors—citizens from the same county (for state court) or state (for federal court)—is gathered in the courtroom. During jury selection, the judge and attorneys ask those potential jurors questions about the particular case, including questions about ideological views and life experiences that may indicate some involvement in the dispute or other bias. The questioning is called *voir dire.* If a potential juror's experience makes it difficult for him or her to be fair, the lawyers from either side can seek to exclude that person from the actual jury through a *challenge for cause*. For example, a juror can be excluded from the actual jury if he or she knows one of the parties or witnesses, already has an opinion about the facts of the case, or has himself or herself had an experience similar to the case's subject. In addition, the parties can exclude a set number of the potential jurors without explaining the reason for exclusion. This is called a *peremptory* challenge. However, peremptory challenges may not be based on the race, ethnicity, or gender of the juror.

   Once the jury is chosen, the trial can begin.

3. Opening Statements. At the beginning of trail, the attorneys representing each party introduce the case to the judge and jury as clearly and persuasively as possible. In theory the opening statement is not an argument. Instead, it summarizes the facts that each party sets out to prove. But the opening statement *is* an argument of sorts, since each lawyer tries to persuade the jury to begin to see the case in a certain way. The plaintiff's lawyer delivers the first statement, followed by the defendant's lawyer. Both speak in the future tense, using statements like "the evidence will show," to provide the jury with a helpful overview of what's to come.

4. The Plaintiff's Case. The plaintiff has the first chance to present evidence through witness testimony. If there is non-witness evidence—documents or physical evidence—a witness typically presents and explains that evidence. The plaintiff's lawyer has met with the witnesses in advance, and knows what they are going to say. The defendant's lawyer has usually deposed the witnesses (interviewed the witnesses under oath) during discovery, and therefore also knows what they are going to say.

   a. Direct Examination. To begin with, the plaintiff's lawyer asks the plaintiff's witnesses questions. Attorneys want to question witnesses and present evidence in such a way that tells a compelling story and convinces the judge and jury that the defendant violated the law.

b. Cross-Examination. For each witness, the defendant's attorney has the opportunity to ask questions to show weaknesses in the witness's testimony. This happens after the plaintiff's attorney has completed the direct examination. All questions asked during cross-examination must relate to the questions asked in the direct examination.

c. Redirect Examination. At the close of the cross-examination, the plaintiff gets an opportunity to conduct a redirect examination. Redirect examination is limited to subjects from the cross-examination.

After the plaintiff's attorney has finished presenting the plaintiff's case, the defendant has an opportunity to try to get the case dismissed. The defendant can file a *Motion for Judgment as a Matter of Law*, arguing that the plaintiff has not presented sufficient evidence to meet his or her burden of proof. The judge hears this motion out of the presence of the jury (if there is a jury). If the judge believes that, given the evidence presented, no reasonable jury could find for the plaintiff, the judge may grant the motion. This means that the defendant will win the case without completing the trial.

5. The Defendant's Case. Once the plaintiff has presented all of his or her witnesses and evidence, it's the defendant's turn. The process is the same:

   a. Direct Examination
   b. Cross-Examination
   c. Redirect Examination

6. Plaintiff's Rebuttal. If (but only if) the defendant raises any issues that were not addressed in the plaintiff's initial presentation of evidence, the plaintiff's attorney gets an opportunity to address these issues with additional witnesses and other evidence, if there are any. This is called a rebuttal.

   Plaintiff's rebuttal closes the evidence phase of the trial. At that point, either party may file another *Motion for Judgment as a Matter of Law*, arguing that no reasonable jury could find for his or her opponent. If the judge grants the motion, the trial ends.

7. Closing Arguments. After all the evidence has been presented, the attorneys for each party summarize their main arguments, highlight the most important evidence in their favor, and explain why the jury should not believe or not care about evidence against them. This is called closing arguments. Unlike opening statements, closing arguments are just that—arguments, although they may not go beyond the evidence presented. They are attempts to persuade the judge and jury. Closing arguments give both parties one last chance to address doubts, reinforce sympathies, and explain why the judge or jury should agree with their theory of the case.

8. Deliberation and Verdict. Finally, the judge or jury considers the evidence and delivers a verdict. For a jury trial, the judge first provides instructions to the jury giving them information about the legal standards they should apply to reach their decision. In federal

civil litigation, and in both federal and state criminal litigation, jury verdicts must be unanimous; if any member of the jury disagrees with the other members of the jury, the jury cannot render a verdict, and the case has to be retried. States often allow civil cases to be resolved by jury with one or two dissenting votes. Either way, the verdict ordinarily does not include any explanation. It simply states who wins, and what damages (if any) are awarded.

(Once a jury verdict is reached, the parties can, one last time, file a *Motion for Judgment as a Matter of Law*. Even if the judge disagrees with the jury verdict, usually the verdict stands. This is because judges are supposed to overturn a jury verdict only if "no reasonable jury" could have reached that verdict.)

Part III: Post-Trial

This Part describes the major steps in the litigation process that occur after the trial. As you walk through each step, consider what rules ensure that the process is fair.

What Happens After the Judgment?

In a civil case, after the trial court enters its judgment, the losing party generally has a right to *appeal* the decision—to apply to a higher court for reversal of the lower court's decision. In the federal Courts of Appeals, a three-judge appellate panel is chosen at random from among that particular court's judges. The party that lost in the trial court must choose particular aspects of the process to appeal, making specific claims of trial-court error.

If the appeal deals with the trial court's decisions regarding questions of law, appellate review is undeferential—no weight at all is given to the trial court's opinion. The legal term for this type of review is *de novo* review. (De novo is Latin for "from the beginning" or "anew.")

If, however, the appeal deals with factual decisions, appellate review is highly deferential to the trial court's decisions. Appellate courts will not reverse jury findings unless the findings had "no reasonable basis" in the testimony or other trial evidence. If the case was tried to a judge rather than a jury, appellate courts will not reverse trial judge findings-of-fact unless those findings are "clearly erroneous." In that situation, appellate reversal of the trial judge findings is appropriate only if the appellate judges have a "definite and firm conviction that a mistake has been committed." These high standards make it difficult for the party who lost in the trial court to win any appeal on decisions of fact.

Whichever party loses the appeal may have additional options for further review. For example, the losing party can petition the Supreme Court of the United States to hear the case. The Supreme Court can choose whether or not to hear the case. Nearly always, the Supreme Court chooses against hearing the case. At that point, the decision of the Court of Appeals becomes final.

In state's court systems, cases can be appealed from the intermediate appellate court to the state's supreme court. Depending on the state, this may be rare or routine. If the issues on appeal do not involve the federal Constitution or a federal statute, that is the end. When the issues on appeal *do* involve the federal Constitution or a federal statute, the losing party in the state

supreme court may, seek even further review before the U.S. Supreme Court. However, U.S. Supreme Court review is extremely rare. The Court receives thousands of applications for review each year, and decides to hear well under a hundred of them

Handout 3

Introduction to America's Core Democratic Values

The United States is built on shared ***core democratic values***. These values provide underpinnings of our democracy, unite us as citizens, and help protect individual rights. They are expressed in the Declaration of Independence, the U.S. Constitution, and many other significant documents and speeches. America's core democratic values overlap, and they sometimes conflict with each other. Developing and disputing their meaning and application is a part of our democratic tradition. This handout addresses four core democratic values: *due process*, *equality*, *justice*, and *rule of law*.

Due Process

The phrase "due process of law" appeared first in an English statute in 1354, which codified the 1215 Magna Carta. That first text stated: "No man of what[ever] state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law." In those early days, "due process" meant most crucially that rules should be established in advance, and that court procedures should be fair. In the United States, the Constitution's Fifth Amendment recognizes numerous more specific guarantees against unfair treatment for criminal defendants, and then dictates more generally that "No person shall . . . be deprived of life, liberty, or property, without due process of law." This first Due Process Clause, in the Bill of Rights, was originally applicable only against the federal government. It was joined in 1868 by the Fourteenth Amendment's similar requirement, applicable against the states: "nor shall any State deprive any person of life, liberty, or property, without due process of law." While many procedural protections are, in different circumstances, considered "due," the core of due process is that individuals must be provided notice of the government's claim against them and an opportunity to be heard by a fair decisionmaker at a meaningful time and in a meaningful way.

Equality

American ideals of equality have been central to our self-conception from the dawn of the republic, when the Declaration of Independence proclaimed, "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." Of course, the ideal dramatically outpaced the reality. At various times in American history, American Indians were dislocated and slaughtered; women forbidden to own property or participate in democratic self-governance; Asian immigrants barred from citizenship. And most shamefully, enslavement of African Americans marred American equality for generations, and slavery's aftermath continues to undermine achievement of this key value.

But even as a matter of theory, the claim of equality is not that everyone is equally strong, smart, or talented. It is that governments, to be just, must value all people equally and give them equal respect. As the Universal Declaration of Human Rights puts the idea, "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." A government acts unjustly if it protects the rights of some of its people while denying the same protection to others, because all people share a common humanity and value. Equality claims have been vital and often persuasive over

the course of American history. A claim of equal humanity and worth motivated the movement to abolish slavery in the nineteenth century and the movement to abolish Jim Crow segregation in the 1960s. Similar claims have been pressed by women seeking the vote and more recently seeking equal treatment in employment, education, and other endeavors. Gay and lesbian people, people with disabilities, and members of religious minorities have all founded often-successful civil rights movements on the shared democratic value of equality.

Only after the Civil War and end of American slavery did the Constitution centrally and plainly embrace equality, with the Fourteenth Amendment's Equal Protection Clause. It reads, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." (The Supreme Court has made clear that this requirement applies to the federal government as well.) Ratification of the Fourteenth Amendment was, however, just one step in our nation's hesitant expansion of who is considered part of "We the People" and our still in-progress task of bolstering equality.

Justice

Justice is a vital goal of our Constitution, stated as such in its Preamble:

> "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, 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."

The Constitution's most central drafter, James Madison, explained in The Federalist (#51), "Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit." But what does "justice" really mean? Political, philosophical, and legal thinkers agree that the idea of justice combines "desert" (deservingness), procedural fairness, and distributional fairness.

Some philosophers emphasize "*desert*"—justice, they say, requires that people be treated in accordance with the praiseworthiness or blameworthiness of their conduct. The Roman legal thinker Cicero, for example, wrote that "Justice renders to every one their due." This idea was a key part of Martin Luther King, Jr.'s famous *I Have a Dream* speech, when he described his "dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character."

Procedural justice is a different aspect of justice, encompassing procedural fairness not just in court but in all dealings between individuals and their government. Ideas about procedural justice may be quite a bit broader than *Due Process* (see above). For example, some scholars have identified the key dimensions of procedural justice to include not just the right to a hearing but to decisional transparency and procedural respect for the dignity of participants. Procedural justice helps ensure that societal conflicts are settled in an orderly, non-arbitrary, and respectful manner.

Distributive justice addresses the distribution of good—money, resources, benefits—among people. Public programs that provide medical care, housing, food, money, etc. for people who

need them implement an idea of distributive justice. But of course members of any democracy can and do debate how much resource redistribution justice requires.

Rule of Law

When John Adams, the United States' second President, drafted the Massachusetts Constitution, in 1780, he included a phrase that soon became famous: the state, he wrote, should have "a government of laws and not of men." In Marbury v. Madison, the 1803 Supreme Court case establishing judicial review of the constitutionality of legislation, Chief Justice John Marshall borrowed the phrase and applied it to the whole of the United States. The phrase encapsulates the core democratic value of *rule of law*—as English theorist John Locke put it in 1690, people should "not be subject to the inconstant, uncertain, unknown, and arbitrary will of others," but are, rather entitled to laws and rules that are:

- Developed and adapted under fair procedures.
- Announced in advance.
- Applicable to everyone, including the government.
- Binding and enforced.

Additional Sources:

- DANIELLE ALLEN, OUR DECLARATION: A READING OF THE DECLARATION OF INDEPENDENCE IN DEFENSE OF EQUALITY (2014)
- Yick Wo and the Equal Protection Clause Video (20 mins), available at: http://www.annenbergclassroom.org/page/yick-wo-equal-protection-clause
- "Right to Equal Protection of the Laws" from *Our Rights* by David J. Bodenhamer, available online at: http://www.annenbergclassroom.org/files/documents/books/our rights/chapter_3_our_rights.pdf
- U.S. Constitution: Fourteenth Amendment (History and Meaning), available at: http://www.annenbergclassroom.org/Files/Documents/Books/Our%20Constitution/Fourteenth%20Amendment_Our%20Constitution.pdf
- "We Are All Slaves of the Law" from *The Pursuit of Justice* by Kermit L. Hall and John Patrick, available online at: http://www.annenbergclassroom.org/files/documents/books/the pursuit of justice/200_203_epilogue.pdf
- Law and the Rule of Law, available at: http://judiciallearningcenter.org/law-and-the-rule-of-law/

Handout 4
Court Procedure and Core Democratic Values

Directions: Consider the following values and principles. Then, for each democratic value or principle listed, select one court procedure and explain how it reflects that value or principle.

Democratic Value or Principle	**Exemplary Quotations**	**Court Procedures**	**Explain *how* the procedure you selected reflects the value or principle**
Rule of Law. This principle means that both the government and the governed should be subject to the law. Laws, not individual rulers, should govern—and the laws should apply to everyone.	*If men were angels, no government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.* —James Madison, Federalist Paper No. 51 (1788)	☐ Complaint ☐ Pre-Trial Process ☐ Jury Selection ☐ Opening Statements & Closing Arguments ☐ Direct Examination & Cross Examination ☐ Rules of Evidence ☐ Deliberation & Verdict ☐ Appellate Review	
Justice. People should be treated fairly in the distribution of the benefits and burdens of society. One important component of justice is **"desert"**—people should be treated in accordance with the praiseworthiness or blameworthiness of their conduct.	*Justice renders to every one their due.* —Cicero, De Legibus (43 B.C.) *I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.* —Martin Luther King, Jr. (1963)	☐ Complaint ☐ Pre-Trial Process ☐ Jury Selection ☐ Opening Statements & Closing Arguments ☐ Direct Examination & Cross Examination ☐ Rules of Evidence ☐ Deliberation & Verdict ☐ Appellate Review	

Due Process. This is a constitutional right granted to citizens by clauses of the Fifth and Fourteenth Amendments of the United States Constitution. All persons have rights to "life, liberty, [and] property," and the government cannot take away any of those rights unless it observes "due process of law." The government must follow fair procedures in taking action with respect to an individual and their liberty or property.	*No person shall...be deprived of life, liberty, or property, without due process of law…* —Fifth Amendment, U.S. Constitution (1791) *…[N]or shall any State deprive any person of life, liberty, or property, without due process of law…* —Fourteenth Amendment, U.S. Constitution (1868)	☐ Complaint ☐ Pre-Trial Process ☐ Jury Selection ☐ Opening Statements & Closing Arguments ☐ Direct Examination & Cross Examination ☐ Rules of Evidence ☐ Deliberation & Verdict ☐ Appellate Review	
Equality. The government must treat similarly situated people the same. This clause of the Fourteenth Amendment has been the source of the expansion of rights and antidiscrimination battles during the past half century.	*No State shall...deny to any person within its jurisdiction the equal protection of the laws.* —Fourteenth Amendment, U.S. Constitution (1868)	☐ Complaint ☐ Pre-Trial Process ☐ Jury Selection ☐ Opening Statements & Closing Arguments ☐ Direct Examination & Cross Examination ☐ Rules of Evidence ☐ Deliberation & Verdict ☐ Appellate Review	

Handout 5

What Are Civil Rights and Civil Liberties?

Sometimes, the rights Americans enjoy are divided into the conceptual categories of "civil rights" and "civil liberties." These are phrases whose meanings have shifted over time. And often, even lawyers and scholars use the terms imprecisely or synonymously. The difference is explained below.

It is important to know the differences in the definitions because some sources and texts emphasize the distinction. It is worth noting, though, that very little turns on any difference between civil rights and civil liberties. Violations of civil rights and civil liberties are equally illegal, and the activist and advocacy communities that protest or bring lawsuits about those violations usually do not distinguish them.

Civil Rights

In the 19th century, "civil rights" was used to mean rights relating to property and the court system—the right to inherit and own property, sign an enforceable contract, testify under oath, and the like. In our era, however, civil rights is used to signify something very different. The phrase has become inextricably linked to the Civil Rights Movement of the 1950s and 1960s, and to the kinds of claims of equality and antidiscrimination that participants in that movement made.

Today, antidiscrimination—that is, civil rights—claims can be made against the government or private individuals, organizations, or corporations. Claims against the government may arise under the U.S. Constitution's 14th Amendment, which includes the "Equal Protection Clause":

> **Equal Protection Clause (U.S. Constitution, Amendment 14):**
> Nor shall any state . . . deny to any person within its jurisdiction the **equal protection of the laws.**

There are also a large number of federal and state civil rights statutes that prohibit employment discrimination, housing discrimination, discrimination in contracting and service at stores, voting policies and practices, and more. Each has slightly different coverage, but they enforce many types of equality, including race, gender, disability, and age. Because federal law is, under the Constitution's Supremacy Clause the "supreme law of the land," state or local laws cannot reduce the equality protections provided under federal law, but they can be *more* protective.

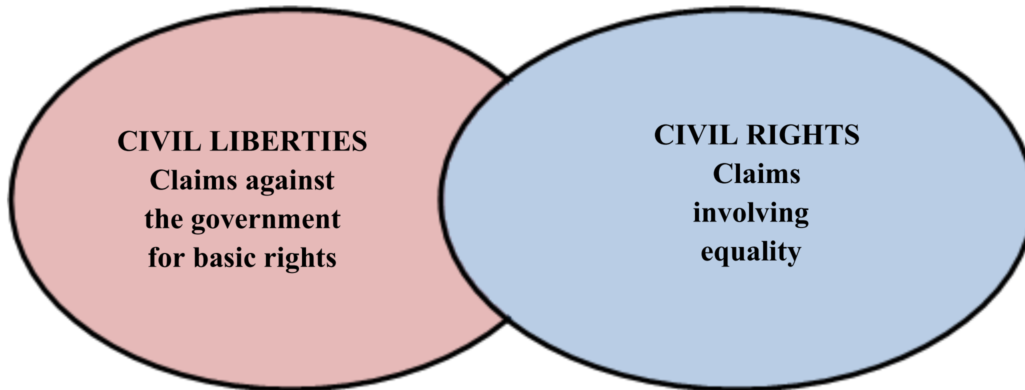
Civil Liberties

If you are being precise, current practice is to use the phrase "civil liberties" to refer to protections against government actions and abuses that are *not* related to discrimination. The core civil liberties are protected by the U.S. Constitution's First Amendment—freedom of speech, press, and assembly, and freedom of religion, but the term is used more broadly to cover the rest of the Bill of Rights, as well.

> **U.S. Constitution, Amendment 1:**
> 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.

In sum, *civil liberties* involve constitutional claims against the government for basic rights. *Civil rights* involve constitutional and statutory antidiscrimination claims against the government, individuals, groups, or corporations.

What are civil rights and liberties?



Civil Liberties (vs. Government)	Civil Rights (vs. Government)	Civil Rights (vs. individuals, groups, corporations)
Freedom of religion, speech, press, peaceable assembly, right to petition the government for redress of grievances; freedom from unreasonable searches and seizures; rights against cruel and unusual punishment; right to privacy, right to marry, to have children, to raise one's children, to fair government procedures; voting rights, etc.	"Equal protection of the laws" (No race or sex discrimination by the government)	No discrimination in employment, housing, education, etc. on the basis of race, sex, national origin, ethnicity, disability, age, etc.

Background on Sources of Civil Rights and Liberties: A Partial List of Consitutional Provisions and Statutes

A. *Bill of Rights* (the U.S. Constitution's first ten amendments). These rights were added to the Constitution shortly after its adoption as a means of protecting individuals against the threat of the newly powerful federal government. Courts have since held that these guarantees apply against state and local governments as well. Highlights include:
- First Amendment: Freedom of religion, speech, press, peaceable assembly, petition the government for a redress of grievances
- Fourth Amendment: Freedom from unreasonable searches and seizures
- Fifth Amendment: Rights against compelled self-incrimination and to fair governmental procedures
- Eighth Amendment: Rights against excessive bail, excessive fines, and cruel and unusual punishments

B. The *Civil War Amendments*. After the Civil War, the Thirteenth, Fourteenth, and Fifteenth Amendments were added to the Constitution to:
- Abolish slavery
- Ensure voting rights to all men
- Guarantee equal protection under the law
- Extend due process requirements to the states

C. In 1920, the *Nineteenth Amendment* was added to the Constitution to extend voting rights to women, and in 1971, the *Twenty-Sixth Amendment* extended the right to vote to citizens eighteen years of age or older.

D. There are many *civil rights statutes*, some emerging from the Civil Rights era of the 1950s and 1960s, of which *Brown v. Board of Education* was a part:
- The Civil Rights Act of 1964: prevents discrimination in public places on the basis of race, color, religion and national origin
- The Voting Rights Act of 1965: prohibits racial discrimination in voting by regulating election administration
- The Fair Housing Act of 1968: prohibits discrimination in sale, rental and financing of housing based on race, religion, national origin and sex

Other statutes have also added important protections:
- The Age Discrimination in Employment Act (1967): prohibits employment discrimination against people 40 years of age or older
- Title IX of the Education Amendments of 1972: forbids educational institutes to discriminate based on gender
- The Rehabilitation Act of 1973: forbids discrimination on the basis of disability by recipients of federal funding
- The Individuals with Disabilities Education Act (1975): requires public schools to provide a free and appropriate public education to kids with disabilities
- The Pregnancy Discrimination Act (1978): prohibits discrimination on the basis of pregnancy, childbirth, or related medical conditions
- The American with Disabilities Act (1990): forbids discrimination on the basis of disability and requires reasonable accommodations of disability by employers, governments, and others
- The Religious Land Use and Institutionalized Persons Act (2000): requires accommodation of religious practice in land use and jails and prisons

Handout 6
Final Writing Assignment

Write an essay responding to the following question: *Do court procedural rules adequately reflect the values and principles of American constitutional government?* Feel free to refer back to previous handouts from this Unit to help you respond; *Handout 4* may be particularly relevant.

Rubric

Quality	**4 - Skilled**	**3 - Proficient**	**2 - Developing**	**1 - Inadequate**	**Points Earned**
INTRODUCTION Background/History Define the Problem Thesis Statement	Well-developed introductory paragraph contains detailed background information, a clear explanation or definition of the problem, and a thesis statement.	Introductory paragraph contains some background information and states the problem, but does not explain using details. States the thesis of the paper.	Introduction states the thesis but does not adequately explain the background of the problem. The problem is stated, but lacks detail.	Thesis and/or problem is vague or unclear. Background details are a seemingly random collection of information, unclear, or not related to the topic.	
CONCLUSION	Conclusion summarizes the main topics without repeating previous sentences; writer's opinions and suggestions for change are logical and well thought out.	Conclusion summarizes main topics. Some suggestions for change are evident.	Conclusion summarizes main topics, but is repetitive. No suggestions for change and/or opinions are included.	Conclusion does not adequately summarize the main points. No suggestions for change or opinions are included	
MAIN POINTS Body Paragraphs Refutation	Three or more main points are well developed with supporting details. Acknowledges the opposing view, and summarizes their main points.	Three or more main points are present but may lack detail and development in one or two. Acknowledges the opposing view, but doesn't summarize points.	Three or more main points, but all lack development. Refutation of opposing arguments missing and/or vague.	Less than three main points, with poor development of ideas. Refutation of opposing arguments missing and/or vague.	
CLARITY, PRECISION, AND ACCURACY OF WRITING Sentence Clarity Proper Grammar, Spelling, Punctuation, etc.	The writer treats the subject seriously using formal language. All sentences are complete, accurate, and clear; the writer controls the point of view appropriately. Punctuation, spelling, and grammar are correct.	The writer uses some informal language and slang. Most sentences are complete, accurate and clear. Some awkward sentences do appear. There are one or two errors in punctuation, spelling, or grammar.	Some unclear or confused sentences. Work contains structural weaknesses and grammatical errors. There are some errors in punctuation, spelling, or grammar.	Many unclear or incomplete sentences. Work contains multiple incorrect sentence structures. There are several errors in punctuation, spelling, or grammar.	
Total:					