

Chapter Sixteen

The Judiciary

Judicial Review

- **Judicial review:** the right of the federal courts to rule on the constitutionality of laws and executive actions
- It is the chief judicial weapon in the checks and balances system

U.S. District and Appellate Courts



Administrative Office of the United States Courts (January 1983).

Constitutional Interpretation

- **Strict construction:** judges are bound by the wording of the Constitution
- **Activist:** judges should look to the underlying principles of the Constitution
- Today, most strict constructionists tend to be conservative, most activists tend to be liberal

Development of the Federal Courts

- Most Founders probably expected judicial review but did not expect the federal courts to play such a large role in policy-making
- But the federal judiciary evolved toward judicial activism, shaped by political, economic, and ideological forces

National Supremacy

- *Marbury v. Madison* (1803): The Supreme Court could declare a congressional act unconstitutional
- *McCulloch v. Maryland* (1819): The power granted to federal government should be construed broadly, and federal law is supreme over state law

1865 to 1936

- The Supreme Court was supportive of private property, but could not develop a principle distinguishing between reasonable and unreasonable regulation of business
- The Court interpreted the Fourteenth and Fifteenth amendments narrowly as applied to blacks—it upheld segregation, excluded blacks from voting in many states

1936 to Present

- The Court establishes tradition of deferring to the legislature in economic regulation cases
- The Warren Court provided a liberal protection of rights and liberties against government trespass

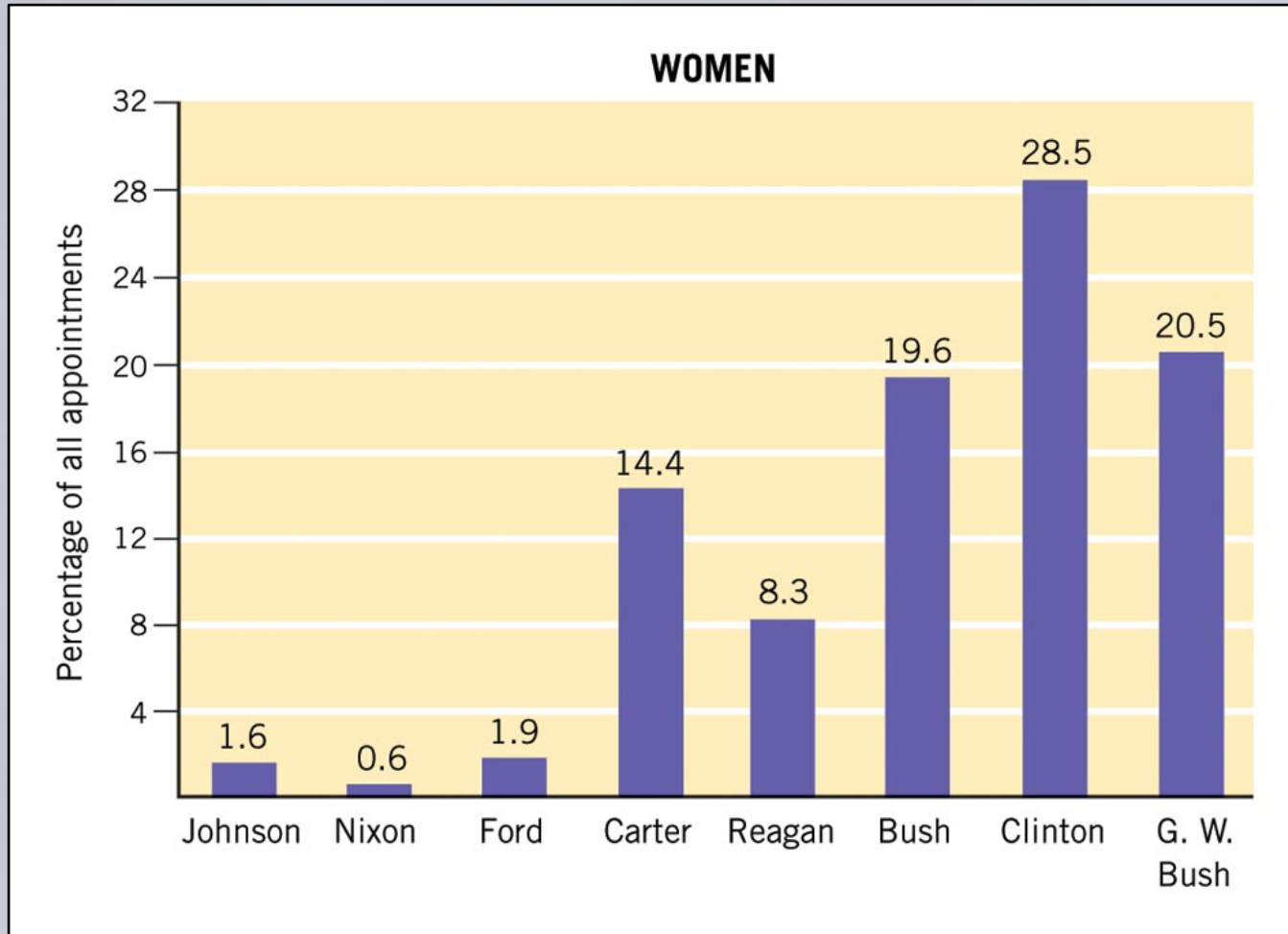
Selecting Judges

- Party background has a strong effect on judicial behavior
- Appointees for federal courts are reviewed by senators from that state, if the senators are of the president's party (particularly for U.S. district courts)

Selecting Judges

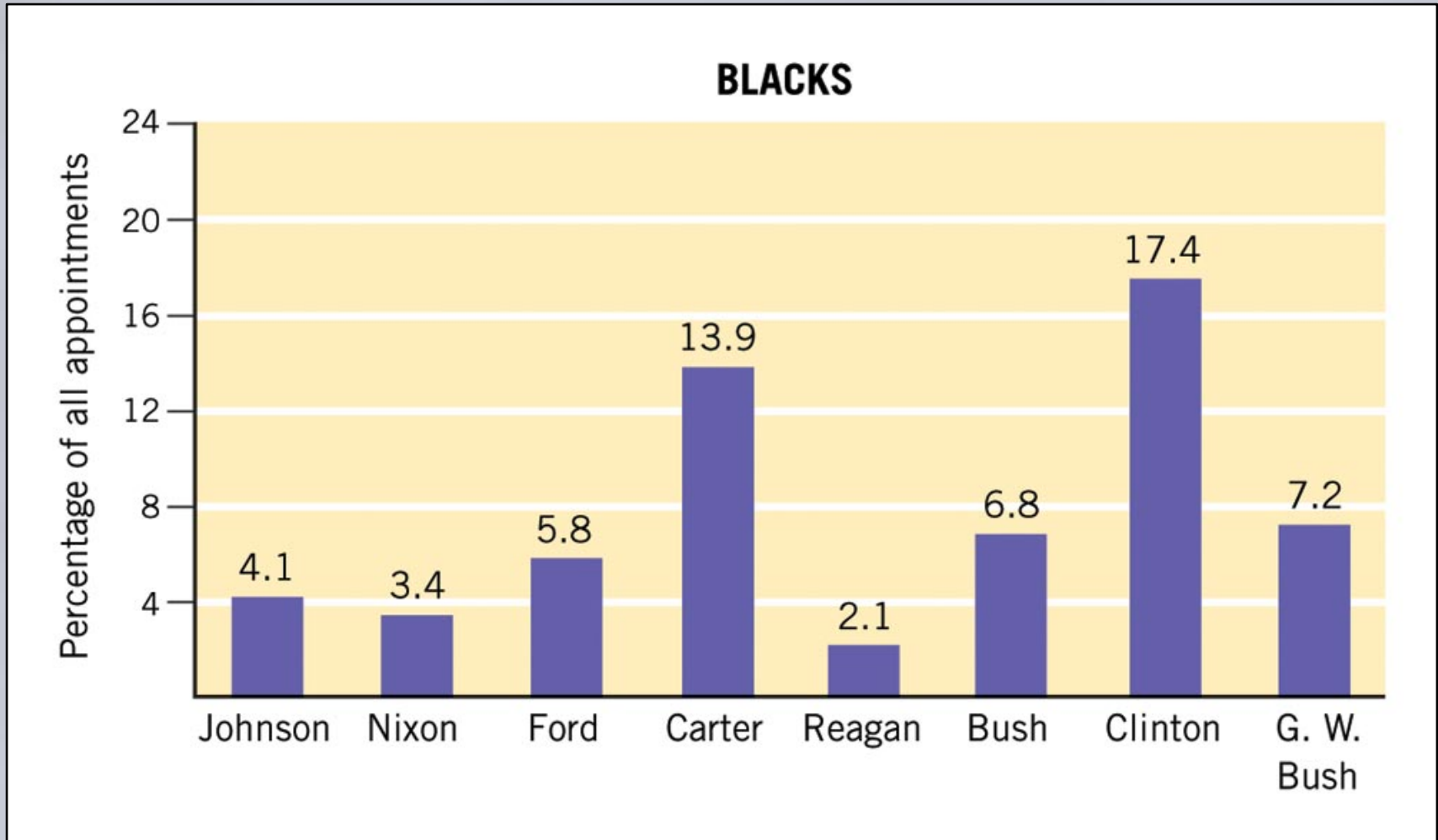
- Presidents seek judicial appointees who share their political ideologies
- This raises concerns that ideological tests are too dominant, and has caused delays in securing Senate confirmations

Figure 16.1: Female and Minority Judicial Appointments, 1963-2003



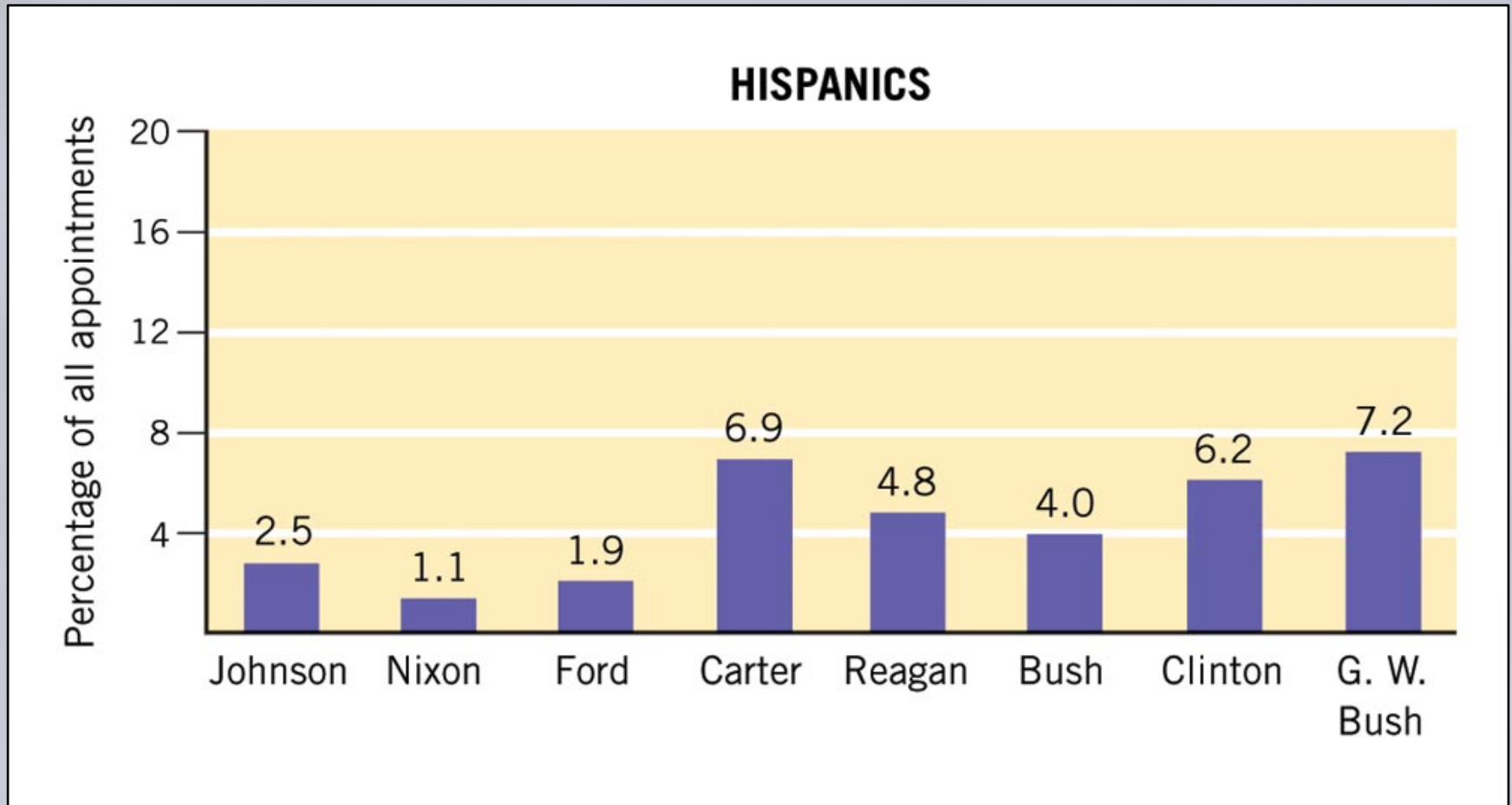
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Federal Cases

- **Federal question cases:** involving the U.S. Constitution, federal law, or treaties
- **Diversity cases:** involving different states, or citizens of different states

Federal Cases

- Some cases that begin in state courts can be appealed to the Supreme Court
- Controversies between two state governments can only be heard by the Supreme Court

Writs of Certiorari

- Requires agreement of four justices to hear the case
- Involves significant federal or constitutional question
- Involves conflicting decisions by circuit courts
- Involves Constitutional interpretation by one of the highest state courts

Standing to Sue

- There must be a real controversy between adversaries
- Personal harm must be demonstrated
- Being a taxpayer does not ordinarily constitute entitlement to challenge federal government action; this requirement is relaxed when the First Amendment is involved

The Supreme Court in Action

- Most cases arrive through a writ of certiorari
- Lawyers then submit briefs that set forth the facts of the case, summarize the lower court decision, give the argument of that side of the case, and discuss other issues
- Oral arguments are given by lawyers after briefs are submitted

Kinds of Court Opinions

- ***Per curiam***: brief and unsigned
- **Opinion of the court**: majority opinion
- **Concurring opinion**: agrees with the ruling of the majority opinion, but modifies the supportive reasoning
- **Dissenting opinion**: minority opinion

Arguments for Judicial Activism

- Courts should correct injustices when other branches or state governments refuse to do so
- Courts are the last resort for those without the power or influence to gain new laws

Arguments Against Judicial Activism

- Judges lack expertise in designing and managing complex institutions
- Initiatives require balancing policy priorities and allocating public revenues
- Courts are not accountable because judges are not elected

Checks on Judicial Power

- Judges have no enforcement mechanisms
- Confirmation and impeachment proceedings
- Changing the number of judges
- Revising legislation
- Amending the Constitution
- Altering jurisdiction
- Restricting remedies

Public Opinion and the Courts

- Defying public opinion frontally may be dangerous to the legitimacy of the Supreme Court, especially elite opinion
- Opinion in realigning eras may energize court
- Public confidence in the Supreme Court since 1966 has varied with popular support for the government generally