I. This lecture provides a short overview of the US Constitutional History and analyzes in somewhat greater depth two of the most important economic provisions of the constitution: the commerce clause and the takings clause.

II. Introduction to the U. S. Constitution and Law and Economics

A. These notes on the U. S. Constitution and Economic Law provide a short constitutional history of the United State, which focuses for the most part on the relationship between the U. S. Constitution and Economic Law.

i. The lecture notes also cover several other aspects of constitutional law, but in less detail.

- They stress the language of the Constitution, its amendments, and its changing interpretation.
- They also stress the role of Supreme Court decisions in that development.

ii. The notes include a good deal more history and detail than will be covered on the lecture or included on the test.

- When reviewing for the second exam, focus most of your attention on the economically relevant parts of the constitutional history and Supreme Court Decisions.
- Several important Supreme Court cases are discussed.

iii. The two parts of the constitution that are most relevant for economics and the law are the the so called "**commerce clause**" (Article 1, Section 8, Clause 3 of the U.S. Constitution, which gives Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes") and "**takings provision**" (5th Amendment: "nor shall private property be taken for public use, without just compensation")

- Both these provisions have had important effects on the scope of regulation at the national and state levels.
- The *commerce clause* substantially limited both state and national regulatory authority until interpretations changed in the mid 1930s.
- The *takings clause* has recently received more attention as a possible check on regulation, with respect to "partial takings," but has not yet created new limits on such regulatory takings.
- The lectures will develop some of the associated case histories for these two areas of law.
- The remainder of the note provides an overview of US Constitutional history, some of which will be covered in lecture.

III. The Second U. S. Constitution, Written in Philadelphia in 1787, Ratified in 1788, and Entering Service in 1789

A. Before the second U. S. Constitution was ratified in 1788, the 13 original states had functioned as nearly independent nation states for a century and a half, and the central government had already functioned more or less continuously for a quarter of a century.

i. Under the Articles of Confederation (the first constitution of the U. S.), the states were sovereign members of a perpetual union--member states--rather than subordinate states.

ii. Before the new constitution, states could conduct their own foreign policy, had their own tariffs, military, and taxes.

B. The 1788 constitution created an entirely new governmental template for the nation, by making the states subordinate to the central government in several areas of policy.

i. The states, counties, towns and cities, remained the principal suppliers of most public services: roads, law enforcement, welfare, education.

ii. States had their own legislatures, governors and court systems.

iii. Indeed, the total state budget of state and local governments remained larger than the federal government for another 150 years.

iv. However, Article 1 section 9, explicitly forbids states from

- signing treaties, coining money, granting titles of nobility
- impose duties on foreign or domestic trade
- declare war, create formal alliances of the states, or maintain its own army or navy
- (The state militias evidently were not considered armies!)

C. The 1788 Constitution begins with a statement of the principle of **popular sovereignty** and then lays out the architecture of government with a bicameral Congress, a President, and a Supreme Court.

> "We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, 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."

D. The **architecture** of the constitution provides for a bicameral legislature (in Article 1: Senate and House of Representatives), an independently elected president (in Article 2), and a federal court system.

i. Each branch of government has some veto power.

- Each chamber of Congress can veto proposals of the other
- The President can, in turn, veto any bill sent him by the two chambers of Congress.
- (The Congress can, in turn, over ride this veto via a 2/3 super majority in both chambers of the legislature, Section 7)
- The supreme court, as we will see, obtain the power to veto legislation that it deems to be unconstitutional.
- (The Supreme Court can only indirectly be vetoed by "packing" the court. Its independences was assured by lifetime appointments and income guarantees (article 3, section 1).).

ii. Under the 1788 constitution, **only the House of Representatives was directly elected** by citizens. The **senate was appointed by state legislatures** and the president was indirectly elected by selecting state "electors."

iii. All representatives to the House were subject to elections every 2 years (article 1, section 2), and 1/3 of the senate was also selected every 2 years (article 1, section 2. Senators had terms of 6 years.) Presidents were elected every 4 years (article 2, section 1).

iv. Representatives were to be paid for their services and were free from arrest during their attendance at the session of their respective Houses, and going and returning from same (Section 6)

E. The **powers of the Congress are explicitly enumerated** in section 8 of article 1.

i. **The Congress shall have the power**

1. To **lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States**; but all duties, imposts and excises shall be uniform throughout the United States:

2. To **borrow money** on the credit of the United States:

3. To **regulate commerce with foreign nation**s, and **among the several states**, and with the Indian tribes:

- **This is the so-called commerce clause.**
- It is the commerce clause (as interpreted after 1930) that allows the US government to regulate all kinds of activities which have an interstate impact on trade.
- **Regulations allowed include: including health and safety laws, anti-trust laws, environmental laws, and recently healthcare reform (aka Obama care).**

4. To establish an **uniform rule of naturalization**, and uniform laws on the subject of **bankruptcies** throughout the United States:

5. **To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures**:

6. To provide for the **punishment of counterfeiting** the securities and current coin of the United States:

7. To **establish post-offices and post-roads**:

8. To **promote the progress of science** and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries:

9. To **constitute tribunals (courts) inferior to the supreme court**:

10. To **define and punish piracies and felonies committed on the high seas, and offenses against the law of nations:**

11. **To declare war,** grant letters of marque and reprisal, and make rules concerning captures on land and water:

12. **To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years**:

13. To **provide and maintain a navy**:

14. To make **rules for the government and regulation of the land and naval forces**:

15. To provide for **calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions**:

16. To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress:

17. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the **seat of the government** of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings: And,

18. To **make all laws which shall be necessary** and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

ii. [Note that **many of these powers are explicitly economic**: they concern taxation, land regulation, the ability to borrow and print money, responsibility to promote science and road construction, and limits on the period in which monies can be appropriated by Congress.]

iii. It was **felt by many that this list of 18 powers completely defined the scope of the central government and therefore no "bill of rights" was needed**.

- However, number 1's "**general welfare**" and 18's "all other powers vested by this constitution" suggest that the powers could be pretty broad.
- Many of the states were worried that the language was too broad and wanted bills of rights like they had adopted a decade earlier for their state constitutions.

iv. Section 9 of Article 1 further **restricts the Congress from enacting some kinds of laws**--in this it provides a preview of the Bill of Rights that would be added in the next two years.

1. The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808, but a tax or duty may be imposed on such importations, not exceeding 10 dollars for each person.

2. The privilege of the **writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it**.

3. No bill of attainder or ex post facto law shall be passed.

4. **No capitation, or other direct tax** shall be laid unless in proportion to the census or enumeration herein before directed to be taken. (Modified by Amendment XVI in 1914)

5. **No tax or duty shall be laid on articles exported from any state**.

6. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another: nor shall vessels bound to, or from one state, be obliged to enter, clear, or pay duties in another.

7. No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

8. No title of nobility shall be granted by the United States: And no person holding any office or profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

v. [Note that **several of these regulations attempt to limit the economic** authority and impact of government. They restrict the kinds of taxes that can be used, rules out export duties, and requires economic regulations to apply uniformly among the states. Only appropriated money can be spent by the executive branch.]

vi. Section 10 of Article 1 explicitly **limits the power of the states--which** implies that the new constitution "trumps" existing state constitutions.

- 1. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

- 2. No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.
- 3. No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in a war, unless actually invaded, or in such imminent danger as will not admit of delay.

vii. In addition, Article V, explains how the constitution can be amended and essentially blocks certain types of amendments:

- The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which , in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress:
- Provided, that no amendment which may be made prior to the year 1808, shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

F. Election law remained under the control of the States.

i. Most states included explicit requirements for suffrage in their new constitutions. Most required significant holding of land (or wealth) to qualify for suffrage: a country voter had to own 25-50 acres and a town voter a 1/acre of land. [A hectacre includes about 2.5 English acres.]

ii. Women, Indians, and blacks were often explicitly excluded from suffrage as were atheists and, in some cases, those who practiced the wrong form of Christianity.

iii. In a few cases, the property requirements were simply extended to all, and in a few cases simply paying taxes (NY) or being the son of a taxpayer was sufficient (GA).

iv. .Overall, however, electoral participation was larger than it had every been outside of the colonies, with estimates varying from 40-90% of men participating.

- A men's suffrage movement during the next half century would cause most such restrictions to be eliminated.

G. Slavery was not dealt with in the Constitution. Instead the issue of slavery was put off because there was no consensus about how to deal with it.

- (Section 2) "Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons."
- The word "slave" does not appear in the constitution. But this clause in Section 9 was evidently was meant to allow the possibility of regulating the slave trade: " The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808, but a tax or duty may be imposed on such importations, not exceeding 10 dollars for each person."

H. States were prohibited from exercising certain powers in section 10. Section 10 assured internal free trade and made treaties and money the exclusive domain of the federal government.

i. Every state in the union is guaranteed a "republican form of government" and the federal government will protect each against invasion (article 4).

ii. Congress had the power to admit new states (article 4), which of course it did over the next 170 years.

I. The Constitution itself did not include a bill of rights, but for the most part provides a description of how new legislation would be adopted by the federal government

IV. The Bill of Rights (10 Amendments Were Ratified between 1789 and 1791)

A. Several of the states had ratified the constitution, conditioned on passage of a formal bill of rights.

B. A bill of rights was negotiation rather rapidly by the new Congress and sent to the States for ratification. (As noted last time, the list looks very similar to that proposed by the Pennsylvania minority.)

- A Dozen amendments were approved as a block in 1789 and eleven states had ratified ten of them by the end of 1791.
- The ten "new" rights are as follows:

i. **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.

ii. A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

iii. No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

iv. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

v. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without **just compensation**.

- **ANALYSIS: The last clause of the fifth amendment is the so-called "takings clause" which implies that whenever private property is taken for public use, the owners must be compensated for their losses.**
- This has an important effect on the relationship between the government and producers that can be analyzed with a simple game matrix in which producers give up leisure to

produce an output that can be taken by government. (Assume that leisure cannot be taken and one can produce two value units of output by giving up one value unit of leisure. Assume also that Al initially has two units of leisure.)

Simple Illustration of the Effects of a taking clause		
	Gov takes none	**Gov takes all**
Al Produces one	**2, 0**	**2, 0**
Al Produces two	**3, 0**	**1, 2**
Al Produces four	**4, 0**	**0, 4**

- Note that in the above game, the Nash equilibrium is (2, 0) and that a Pareto superior move exists [to (4,0)].
- Under a taking's rule, the government has to pay the full price for what it takes, which eliminates the incentive to take anything in this case.
- (Under a takings rule, property will be taken only if it is worth more to the government than to the original owner. [Explain this using the game matrix above.])
- [In a more complete analysis, one could contrast taxing output with simply taking it, and also take account of the tax cost of paying for a taking (for the exercise of eminant domain).]
- See also the New London Case reviewed at the end of this lecture.

vi. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

vii. In Suits at common law, where the value in controversy shall exceed twenty dollars, the **right of trial by jury shall be preserved**, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

viii. **Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted**.

ix. **The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.**

x. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

V. Analysis of the Bill of Rights

A. Most of the rights listed in the "bill of rights "are short and to the point, and most are what many call "negative rights," protections from various forms of laws that a government (whether following majority will or not) might otherwise of chosen to adopt.

i. Perhaps the most important of these has turned out to be the first amendment which guarantees a free press, freedom of speech, and freedom of religious conscious.

- A close runner up would be the fifth amendment which states that a person can not be forced to be a witness against himself nor deprived of life, liberty or property without due process of law.
- (It is this right the term "pleading the fifth" comes from.)

ii. A surprising amount of Supreme court vetoes of legislation have come and continue to come from these first ten amendments, which implies that they were, in fact, important changes in the constitution (as argued by the proponents of them during the federalist debates).

B. The last two are a bit ambiguous, in that the 9th and 10th amendments do not specify individual or state rights, but essentially claim that there might be natural rights or other legal rights that already exist (in civil or state law) which are not eliminated by the constitution as amended.

- It seems clear that these were some kind of compromise to satisfy those concerned with the centralization of power under the new constitution
- and/or those who believe in nature rights (as in Thomas Paine famous "The Rights of Man" published about this time in 1791).

VI. Marbury vs. Madison: the Empowerment of the Supreme Court

A. During the first two administrations, President George Washington and President John Adams appointed only Federalist Party members to administration and judiciary positions. When Thomas Jefferson won the 1800 election, President Adams, a Federalist, proceeded to rapidly fill the judiciary bench with members of his own party, who would serve for life during "good behavior." In response, Jeffersonian Republicans repealed the Judiciary Act of 1800, which had created several new judgeships and circuit courts with Federalist judges, and threatened impeachment if the Supreme Court overturned the repeal statute.

B. Although President Adams attempted to fill the vacancies prior to the end of his term, he had not delivered a number of commissions. Thus, when Jefferson became President, he refused to honor the last-minute appointments of President John Adams. **As a result, William Marbury, one of those appointees, sued James Madison, the new Secretary of State, and asked the Supreme Court to order the delivery of his commission as a justice of the peace.**

C. While a section of the Judiciary Act of 1789 granted the Court the power to issue writs of mandamus, the (Marshall)Court ruled that this exceeded the authority allotted the Court under Article III of the Constitution and was therefore null and void. **So, while the case limited the court's power in one sense, it greatly enhanced it in another by**

ultimately establishing the court's power to declare acts of Congress unconstitutional.

D. (See http://supreme.lp.findlaw.com/supreme_court/landmark/marbury.html)

VII. Analysis

A. The **Marbury vs. Madison** decision is considered by many to be the most important supreme court decision, because it indirectly establishes the right of the court to review and to veto legislation.

B. This power was not explicitly given it in the constitution, nor did other courts have this power at the time.

- It, thus, represents a significant change in the procedures of creating new laws.
- Indeed, many of the most important revisions to the constitution in the 20th century come from the Supreme court.
- (As we will see, court decision affect decentralization, election law, discrimination, religious practices by state institutions, and even presidential elections.)
- (Note that giving the Supreme Court the power to overturn laws makes it much more likely that the constitution will constraint the government. Why?)

VIII. Economic Development in the late 19th Century

i. We now skip forward to the post Civil War period.

ii. The second half of the 19th century was a period of rapid economic growth, which as in much of Europe, was combined with industrialization, urbanization, and a shift in political ideology.

Table 8.1 : Population and Per Capita Income

year	population	urban	rural	Rgnp/pop
1,860	31,443,321	6,216,518	25,226,803	n/a
1,870	38,558,371	9,902,361	28,656,010	531
1,880	50,189,209	14,129,735	36,059,474	774
1,890	62,979,766	22,106,265	40,873,501	836
1,900	76,212,168	30,214,832	45,997,336	1,011
1,910	92,228,496	42,064,001	50,164,495	1,299
1,920	106,021,537	54,253,282	51,768,255	1,315

Sources: http://www.census.gov/population/censusdata/table-4.pdf
http://www2.census.gov/prod2/statcomp/documents/CT1970p1-07.pdf

iii. Population growth and economic development continued throughout the second half of the nineteenth century.

- Population growth reflected large family size and (net) immigration.
- Immigration was completely open during this time period, and new immigrants could often vote before they were citizens.
- Passports did not yet exist.

iv. Population growth was possible because of a general increase in farm production.

- The general increase in agricultural production reflected technological improvements (better seeds and plows, and subsequent mechanization of planting and harvesting)
- and also larger areas being farmed as settlement gradually increased throughout the U. S.

v. The increase in agricultural productivity (the green revolution) is further evidenced by the increase in the fraction of the total population living in towns and cities.

vi. Of course, people would not choose towns over farms unless real incomes and/or other conditions were preferable to those in the country side.

- Opportunities for life must have been systematically improving in the cities: that is to say income in commerce and manufacturing must have been rising relative to farm income.
- Thus the relative increase in the urban centers implies that an increasing fraction of total production (value added) in the US economy as a whole was non agricultural.
- Note that per capita (average) income was rising throughout this sixty year period.
- From 1870 through 1920, per capita income more than doubled., even as population tripled.
- Total economic output, thus, increased more than sixfold during this period.
- (Per capita income in previous periods of history was far more stable. As population increased or decreased to keep per capita income fairly constant--as noted by Malthus, 1798, and other classical economists.)

vii. Society was undergoing a major transformation of life and livelihood for the first time in 10-12,000 years, when settled agriculture was being worked out

- The use of increasingly expensive, powerful, and productive steam engine in manufacturing and in transport, together with organizational improvements, created new economies of scale in manufacturing and commerce.
- These engines allowed manufacturing to stray further from the banks of rivers than possible in the past,
- Although rivers were still important sources of transport, water, and sanitation, clearly improvements in rail transportation allowed both inputs and outputs to more cheaply reach farms and factories further inland.

viii. Realizing the benefits (profits) from technological improvements and increases in the most efficient scale of production often required new laws to remove internal and external barriers to trade.

- Entrepreneurs had to have access to relatively large markets to make investments in the new equipment and organizations worthwhile.
- In Europe changes in rules that opened up internal and external markets were one of the main policy agendas of manufacturers and importers.

- This also tended to be true in the U. S., but market reform, per se, was mainly required within states and municipalities and with respect to international trade.
- The constitution guaranteed a large integrated national markets, although tariffs remained a national policy concern for economic liberals.
- The latter, allowed industrialization to take place rapidly within the United States.

ix. Such legal changes were taking place throughout the "West" and industrialization (application of new technologies to farming, commerce, and manufacturing) occurred in all countries that adopted the required legal reforms and accepted the changes in social organization.

- Similar changes were also taking place within the industrializing parts of Northern Europe.
- [Farming and commerce were also modernizing and increasing in scale at the same time in many European countries that were not rapidly industrializing (as in NL and DK).]
- Note that in parts of the world where legal reforms were not forthcoming, and application of new technologies were discouraged, industrialization did not take place.
- [Because relatively more democratic governments were more open to reform than other governmental types, there is a very interesting correlation between democratic reform and industrialization in the late 19th century.]

x. Economies of scale, in a many cases, lead to very large and profitable enterprises being created "from scratch, as "self-made" men became millionaires.

- In many, perhaps most cases, economies of scale allowed them to profit by selling new and old products at lower prices than other manufacturers could match.
- Many were skeptical of the ethics of these men in general, or at least a significant subset of them, who were called "robber barons" although the new millionaires rarely resorted to such obviously illegal behavior.
- (This in spite of the fact that many of the new industrial millionaires--Carnegie, Rockefeller, Morgan, Edison, Ford--established large charitable foundations with huge endowments. See, for example, Johnson 1997: 536-560.)

xi. It bears noting that the urbanization associated with the expansion of commerce and manufacturing also generated new demands for public services and regulation.

- Demands for public services (especially education, transport, and sanitary systems) increased with urbanization and industrialization.
- Greater density also increased the level of what economists call "externalities" which voters wanted regulated.
- Thus, at the same time that old trade barriers were eliminated, new regulations were adopted at state and national levels, and many government services increased.

xii. **That is to say, there was a change in what might be called the "economic constitution" of industrializing countries--the rules that determined what is owned and how it may be used without legal (political) interference.**

- Industrialization required trade to became more open and property of all kinds to be more marketable and portable.
  - Property rights over physical goods and services became "individualized" and alienable.
  - This was more obvious in Europe and Japan where:

- Family--birth right--privileges for particular occupations, products, and services largely disappeared, at least as matters of law.
- Debts often became individual rather than family based, and land became freely bought and sold.

xiii. In the U. S. mechanisms for transferring large public properties (undeveloped land) to individual families had to be devised and implemented, as with the various homestead acts..

- Recall that the territory of the US also expanded in the 19th century through the Louisiana and Alaskan purchases, and in the territories in the Southwest won from Mexico during 1846-8. Most of this land was initially held by the central government.
- (The various homestead acts, with their very favorable terms for land sales also implies that urbanization was voluntary in the US rather than the result of a shortage of farm land. In Europe urbanization initially was associated with various enclosure movements which may have generated involuntary urbanization as medieval rights to commons disappeared.)
- There were also new public services and new regulations on how private property could lawfully be used.
- Public education was expanded (mostly by the states, as state university systems were developed) and infrastructure was subsidized in many ways.
  - See for example the Morrill Acts of 1862 and 1890, through which the central government transferred lands to states to fund new public universities focused on engineering, agriculture, and military science.
- Much of the regulatory reform (and suffrage reform) also tended to be at the state and local level.
  - However, some reforms were restrained by local fears of interstate competition (as with work week and minimum wage laws)
  - Others were constrained by both state courts and the U. S. Supreme Court. (See Rehnquist, 2001, ch. 5.)
- Rehnquist, P. 113-14 provides a short summary of "anti-progressive" Supreme Court decisions.

A. Partly because of problems with regulating national firms at local and state levels within an open national economy, there was **a significant increase in the regulatory responsibilities of the central government.** Examples include:

- The Interstate Commerce Act regulated railroads (1887)
- The Sherman Antitrust laws regulated monopolies and other conspiracies to restrict open markets (1890).
- The Pure Food and Drug Act (1906) created the FDA and provided for federal inspections of meat products and forbid poisonous patent medicines.
- The Federal Trade Commission Act (1914) was created to regulate "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices..."
- Clayton Antitrust Act (1914) strengthened the Sherman act and exempted nonprofit institutions and organized labor from anti trust proceedings.

i. Overall, trends toward more "liberal" and open market-based production and consumption continued, but at the same time that other new regulations restricted anti-competitive and fraudulent business practices.

- (It bears noting that several of these "progressive" policies were subsequently used by large firms as new methods of reducing competition, although this was clearly not what the reformers, themselves, had in mind.)
- Much of this history is consistent with Stigler's "capture theory" of regulation.

IX. Political debates and interest groups associated with industrialization in the U. S.

i. New economic regulations and political reform, of course, rarely "spring forth" by themselves.

ii. Normally new regulations are a consequence of organized efforts to persuade (and occasionally bribe) voters or the government to adopt regulatory and other reforms.

- Many of the new politically active groups attempted to advance narrow economic interests.
- A wide variety of new economic interest groups were organized such as business associations and trusts, labor unions, and farmer cooperatives.
- Such groups mainly sought policy reforms that improved the economic well-being (profits, wage rates, working conditions) of their members.
- However, even relatively narrow interest groups often took an interest in broad policy and political debates.
  - They might for example lobby for political, trade, and constitutional reforms as a "matter of principle" rather than of narrow interest.
  - Other interest groups, such as the "progressives" and "liberals," had explicitly ideological agendas.

A. Just before the civil war a women's suffrage movement appeared, which gained support throughout the rest of the century (Keyssar, 2000, ch.6.)

i. This movement is, of course, a large part of the reason that the word "sex" was almost added to the Civil war amendments discussed in the last lecture (see Keyssar, 2000, p.178-9)

ii. The civil war amendments (the 14th guaranteeing equal protection of the law) were, none the less, used in legal challenges of suffrage laws that discriminated against woman, but these challenges were unsuccessful.

iii. Women's suffrage became a broadly supported and well organized mass movement after the turn of the century, which allowed it to secure the support of the male median voter, which allowed reforms at the state level to be passed (Keyssar, 2000, p. 203-6).

B. During approximately the same time period, a "temperance" movement emerged that opposed alcohol consumption (demon rum) and lobbied for new laws restricting alcohol access and consumption.

i. Although the temperance movement was quite old in the United States, it gained membership and political support throughout the 19th century.

ii. The American Temperance Society was founded in 1826.

- (Of course, the **temperance problem** was partly a sypmtom of the new urban lifestyle based on wages rather than household production.)
- Both the temperance and woman's suffrage movements had counter parts in Europe.

- A temperance society was founded in Ireland in 1829, in Sweden in 1837, in Denmark in 1840, Norway in 1845. Energetic temperance movements also emerged in Germany and England.
- Some of these organizations were international in scope, as with the "Independent Order of Good Templars."

iii. And, it was often the case that the temperance and woman's suffrage movements had had overlapping memberships.

- (See Johnson, 1997, and the Catholic Encyclopedia., "Temperance Movements.")

C. The **progressive movement** (party) can be thought of as the American equivalent of the social democratic movement (party) in Europe.

i. They were not opposed to private property or markets, but for the most part were interested in "improving" market outcomes through institutional and regulator reforms and by equalizing bargaining power.

- "What distinguished the economists associated with the Progressive movement from their forebears in the liberal tradition was not their concern for rules per se, rather it was their belief that a free market could be the locus of systematic economic power. They though that the proximate cause of this power was unequal bargaining power between employers and individual laborers. It was their observation that labor was typically constrained by a lack of wealth. this simple fact, operating in conjunction with the need to feed oneself and one' s family, placed a distinct limit on the length of time that labor could "hold out" for a better wage bargain." (Prasch, 1995, 1999).

ii. It bears noting, however, that the progressives, as true of mid-century liberals, were not always in favor of universal suffrage (Keyssar, 2000, p. 159.

- In my terminology, the progressives were "left of center" liberals, as true of most social democrats in Europe.
- (It also bears noting that within academia there was far less specialization in the 19th century than today. Thus, "economists" often wrote about politics and history, and political scientists wrote about law and economics.)

iii. Initially, the "liberal movement" in the United States can be thought of as the equivalent of the right of center liberal movement in nineteenth century Europe.

- These political and social liberals and the early progressives were the abolitionists and free traders of the first half of the 19th century
- However, a shift in the meaning of the word "liberal" occurred in the early twentieth century in the US.
- (It was the **"left of center" liberals who retained the name "liberals" in the United States, in contrast to Europe** [and most of the rest of the world], where the "right of center" liberals kept that political label.)

D. The **Lockner decision and dissent** provide evidence that the split between "liberals" and "progressives" occurred in elite policy circles, as well as among politically active interest groups, political theorists, and editorial writers.

i. The famous **Lockner decision 1905** concerned the permissible scope of central government regulations under the constitution

ii. The majority opinion favoring Lockner develops a "liberal" argument:

- "The general right to make a contract in relation to his business is part of the liberty protected by the Fourteenth Amendment, and this includes the right to purchase and sell labor, except as controlled by the State in the legitimate exercise of its police power.
- **Liberty of contract** relating to labor includes both parties to it; the one has as much right to purchase as the other to sell labor. There is no reasonable ground, on the score of health, for interfering with the liberty of the person or the right of free contract, by determining the hours of labor, in the occupation of a baker. Nor can a law limiting such hours be justified a a health law to safeguard the public health, or the health of the individuals following that occupation...
- ... It is also urged, pursuing the same line of argument, that it is to the interest of the state that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature.."
  - [It is interesting to note that Lockner has recently returned to the news because of President Obama's comments about the Supreme Court's review of "his" health-care reform law.]

iii. The dissent by Oliver Wendall Holmes develops the progressive argument:

- "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract.
- Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Postoffice, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics."
  - The complete case, majority opinion, and dissenting opinions can be found at: http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=198&invol=45

iv. Former Chief Justice Rehnquist (2001, p. 107), a conservative jurist, believes Lockner was wrongly decided.

X. Early 20th Century Amendment to the US Constitution of the United States

A. A number of significant procedural changes in the fundamental procedures and structure of American governance occurred during the "Progressive Period."

B. These "progressive" reforms occurred at all levels of government, and demonstrate that there was continuing majority support (among those who could vote) for such reforms.

i. For example, 19 states constitutions added (or included) direct referenda and recall provisions, which allows voters to decide specific issues, avoiding agency problems associated with representative systems of government.
   - These were mostly adopted by new states in the West that entered after the civil war, but several other states amended their state constitutions to allow such referenda.
   - Direct democracy continued to be used in some New England towns throughout this period, although it had not formerly played a significant role in state governance.
   - (There is still no provision for direct referenda at the national level of government.)

ii. The secret ballot was adopted, which allowed votes to be cast without fear of rebuke by their neighbors, landlords, and employers.
   - Recall that many states and towns continued to used voice voting, from colonial days.
   - Secret ballots were used in presidential election after 1884.
   - (Secret ballots are also known as the "Australian ballot," because the rules and ballots were heavily influenced by Australian reforms in the previous decade. The new ballots included a list of all candidates rather than favored candidates. Paper ballots had been used in many states--New York and Vermont--since the revolution.)

iii. Bureaucracy was reformed to reduce political influence over career bureaucrats.
   - For example, the Pendleton Act (1883) established the US Civil Service Commission which placed most federal employees on the "merit system," greatly reducing the extent to which political parties would determine jobs within the bureaucracy.
   - (After the Pendleton Act, only the senior-most jobs in the U. S. bureaucracy were appointed by the President.)
   - Such "civil service" reform improves efficiency by increasing "institutional memory" and it also reduces the incumbent ability to use the bureaucracy for his or her political campaigns for reelection.

iv. After the turn of the century, several states had also adopted woman's suffrage reforms, after years of persuasive campaigns by "suffragettes" (Keyssar, 2000, p.208-12).
   - The existing median voter had gradually been persuaded that women were qualified to cast their own independent votes.
   - (Clearly there were no credible revolutionary threat from the woman's suffrage movement.)
   - (Note that these state reforms, and the subsequent adoption of the 19th amendment, are consistent with the electoral law equilibrium model developed a few lectures ago. In the absence of ideological interests, as noted in earlier lectures. Otherwise, the existing median voter tends to be quite happy with the existing electoral institutions.)

C. In addition to these formal state constitutional reforms and other quasi-constitutional reforms, three major reforms and one minor reform of the national constitution were adopted between 1909 and 1920.

D. The **Sixteenth Amendment**, allowing income taxes
   - Passed by Congress July 2, 1909. Ratified February 3, 1913.
   - The Congress shall have power to lay and collect taxes on incomes, from whatever sources derived, without apportionment among the several States, and without regard to any census or enumeration.

E. The **Seventeenth Amendment**: Direct Election of Senators

- Passed by Congress May 13, 1912. Ratified April 8, 1913.
- The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislatures.
- When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the Legislature of any State may empower the Executive thereof to make temporary appointments until the people fill the vacancies by election as the Legislature may direct.
- This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

F. The **Eighteenth Amendment** (the great mistake) Prohibits Liquor Sales

- Passed by Congress December 18, 1917. Ratified January 16, 1919.
- (This amendment was finally repealed by by the 21st Amendment in 1933.)
- After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.
- The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.
- This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

G. The **Nineteenth Amendment**: Woman's Suffrage

- Passed by Congress June 4, 1919. Ratified August 18, 1920.
- The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.
- Congress shall have power to enforce this article by appropriate legislation.

H. One of these "progressive" amendments, prohibition, is really a policy matter rather than a constitutional matter, although it required a constitutional amendment to address (at least at that time).

i. Prohibition did reduce alcohol consumption somewhat.

- But, it also generated an enormous illegal market for alcohol, which allowed organized crime to emerge as a major factor in the U. S.

♦ A similar temperance movement was also active in Scandinavia during this same time period, and the result was also often "prohibition."

- Norway, Finland, Iceland, and Russia did go through periods of prohibition at about the same time as in the US.
- The Swedes transferred all sales to state stores and regulated consumption through a coupon system.

- (The temperance movement itself was evidently a European movement, beginning in Sweden in 1819, but impulses from America lead to the first European Temperance socieites. See the Catholic Encyclopedia on "temperance movements.")

ii. The 19th amendment represents a extension of the logic of "qualified voters" to woman.

- ♦ In this, it is a logical extension of the men's suffrage debate carried out in the first half of the 19th century in the US.
  - What is a bit strange in the US case, is that the gap between the last major male suffrage reform, the fifteenth amendment passed in 1869, and woman's suffrage. This simply reaffirms that there is no slippery slope to universal suffrage
  - (In Europe, universal male suffrage and woman's suffrage were often adopted within a decade of each other.)
- ♦ Extending suffrage does not change the fundamental procedures of governance, but does change the median voter.
  - (In the case of woman's suffrage there is evidence that the new median voter had a higher demand for social insurance than the previous one. See Lott and Kenny JPE, 1999.)

I. **The other two progressive amendments fundamentally altered the structure and resources of the federal government.**

i. By changing the electoral basis of the Senate, the central government became a less "federal" system of government.

- No longer were state interests in decentralization directly represented in government.
- On the other hand, state voters were not subject to manipulation in the manner that House voters are because states cannot be "gerrymandered." Thus state results tend to be a more "honest" representation of voter interests than congressional district elections.

ii. The federal government had relied entirely on excise taxes and tariffs for its revenues prior to 1913 (with a short exception during the civil war), because the constitution forbade federal direct taxes--e.g. taxes borne directly by individuals.

- Although the income tax was initially limited to the very wealthiest, it was gradually expanded to include most persons.
- Essentially all contemporary central government (federal) tax revenues in the U. S. are income taxes: the personal income tax, the corporate income tax, and the payroll tax (that funds Social Security and Medicare).
- Income is a much larger tax base than "sin taxes" and tariffs, and thus allows a much larger government to be supported.
- (Holcombe and Lacombe, 1998, argue that the pattern of support for these amendments reflected state interests. Relatively low income states favored the income tax, and states that had already adopted direct election of senators favored the new method of organizing the senate.)

iii. **Together, the 16th, 17th and 19th amendments removed earlier constitutional constraints on the size of the central government and increased the demand for central government services.**

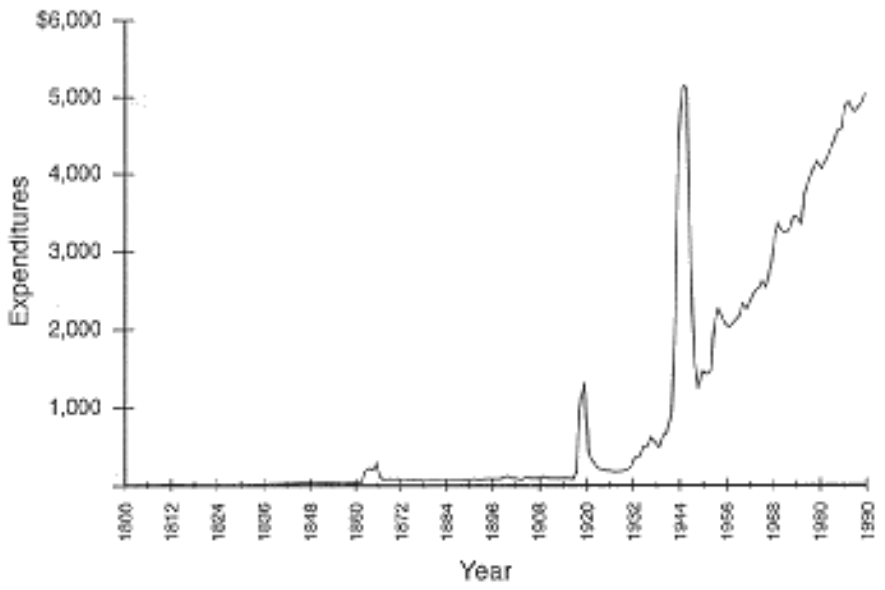
- ♦ Partly as a consequence of these constitutional changes, the relative and absolute size of the central government increased for the next eight decades.

- (Here it should be noted, that median voter interests must have preferred most of these expansions, but it is clear that it is easier to fund new programs with income taxes than with excise taxes (especially those borne by the relative wealth), and that increased centralization is easier without a Senate to "fight for state rights."

- These were fundamental reforms, whose effects could clearly be seen in central government expenditures.
  - Indeed, the "progressive amendments" could be said to be the first truly fundamental reforms of American political procedures and constraints since the bill of rights was adopted.
- These reforms had obvious and nearly immediate affects on public policies adopted by the central government.

iv. See the figure below depicting per capita federal expenditures in constant dollars from 1800 - 1990, [taken from Holcombe (Cato 16 n 2)].

(Real per capita central government expenditures)



- Note that per capita government expenditures were low and very stable in the 120 years prior to the Progressive amendments, and began accelerating after the reforms were adopted.
- State governments had been the main source of public services in the years prior to the "progressive amendments," but this changed in the next two decades.

J. Of course not all of this growth in per capital government expenditures was generated by new political procedures and constraints.

i. For example the federal government took a more active role in world affairs and took over significant responsibilities for social security and welfare.

- National defense quickly became a major area of federal expenditure
- Social security and public support for medicine grew more slowly, but gradually became the largest budget areas of the U. S. Government.

ii. However, **without the income tax and shift of federal decision making away from state governments, such changes would have been very difficult to fund** and more difficult to adopt.

XI. Supreme Court Decisions and Economic Regulation

A. Another area of law that has important effects on the scope of governmental power has to do with the "interstate commerce" clause of the constitution.

i. This area of law attempts to determine the extent to which the "commerce clause" and the "takings clause" limit central government regulatory authority.

- The third enumerated power states that "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes,"
- The 5th amendment states "nor shall private property be taken for public use without just compensation."
- To what extent does the Congress's ability to regulate interstate commerce give it the authority to regulate economic activity within states?
- To what extent does the "takings clause" constrain the central government's ability, and that of state and local governments to regulate or take private property and transfer it to other uses.

B. Answers to these constitutional questions are economically important, because they determine the regulatory reach of the central government--and thereby affect both the degree of centralization and the unwritten Economic Constitution of America.

i. Arguments on such matters have been conducted before the Supreme Court since Gibbons v. Ogden in 1824.

ii. Like the civil rights rulings, decisions have changed through time as the Court gradually adopted a more expansive interpretation of "commerce," a less expansive interpretation of "takings," and more expansive interpretation of "public use."

C. For most of the 19th and early 20th century, the **commerce clause** was interpreted to mean goods and services that cross state boundaries.

- In the 1930s, the court began allowing regulation of all activities that could conceivably affect interstate commerce.
- This reinterpretation, as with the later civil rights reinterpretation, greatly expanded the central government's authority to regulate private commerce.
- (The change in the 30s was partly motivated by threats from Pres Roosevelt to "pack the court," e.g. to add new members that tended to agree with his interpretation of central government powers, and thus **change the median justice in the court.**)

i. To a substantial extent, debate over the proper interpretation of these parts of the constitution reflected political differences.

ii. (Classical) "Liberals" preferred a narrow reading of enumerated powers.

- "Progressives" preferred a broad reading of enumerated powers.

- (See the Lockner opinion in the lecture 11.)

D. An example of the sort of laws that the **Roosevelt administration** had difficulty sustaining was the Agricultural Adjustment Act of 1933. It imposed a tax on processors of agricultural products (except tobacco) and used the revenue from the tax to pay farmers for reducing their production (by reducing the acreage farmed).

i. The **central issue was whether the central government had the authority to used such an "earmarked" tax to regulate agricultural production**. A secondary question was whether such a tax can be used to transfer income from venders to farmers.

ii. The decision was 6-3 and declared that the act was **unconstitutional**. The majority opinion was written by Justice Roberts:

- We have held in A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 , 55 S.Ct. 837, 97 A.L.R. 947, that Congress has no power to regulate wages and hours of labor in a local business. If the petitioner is right, this very end may be accomplished by [297 U.S. 1, 76] appropriating money to be paid to employers from the federal treasury under contracts whereby they agree to comply with certain standards fixed by federal law or by contract.
- Should Congress ascertain that sugar refiners are not receiving a fair profit, and that this is detrimental to the entire industry, and in turn has its repercussions in trade and commerce generally, it might, in analogy to the present law, impose an excise of 2 cents a pound on every sale of the commodity and pass the funds collected to such refiners, and such only, as will agree to maintain a certain price.
- Assume that too many shoes are being manufactured throughout the nation; that the market is saturated, the price depressed, the factories running half time, the employees suffering. Upon the principle of the statute in question, Congress might authorize the Secretary of Commerce to enter into contracts with shoe manufacturers providing that each shall reduce his output, and that the United States will pay him a fixed sum proportioned to such reduction, the money to make the payments to be raised by a tax on all retail shoe dealers on their customers.
- Suppose that there are too many garment workers in the large cities; that this results in dislocation of the economic balance. Upon the principle contended for, an excise might be laid on the manufacture of all garments manufactured and the proceeds paid to those manufacturers who agree to remove their plants to cities having not more than a hundred thousand population. Thus, through the asserted power of taxation, the federal government, against the will of individual states, might completely redistribute the industrial population.
- **A possible result of sustaining the claimed federal power would be that every business group which thought itself underprivileged might demand that a tax be laid on its vendors or vendees, the proceeds to be appropriated to the redress of its deficiency of income. [**297 U.S. 1, 77] These illustrations are given, not to suggest that any of the purposes mentioned are unworthy, but to demonstrate the scope of the principle for which the government contends; to test the principle by its applications; to point out that, by the exercise of the asserted power, Congress would, in effect, under the pretext of exercising the taxing power, in reality accomplish prohibited ends. It cannot be said that they envisage improbable legislation. **The supposed cases are no more improbable than would the present act have been deemed a few years ago.**
- **...** Until recently **no suggestion of the existence of any such power** in the federal government has been advanced. The expressions of the framers of the Constitution, the decisions of this court interpreting that instrument and the writings of great commentators will

be **searched in vain for any suggestion that there exists in the clause under discussion or elsewhere in the Constitution, the authority** whereby every provision and every fair, implication from that instrument may be subverted, the independence of the individual states obliterated, and the United States converted into **a central government exercising uncontrolled police power in every state of the Union, superseding all local control or regulation** of the affairs or concerns of the states. **..."**

iii. **Justice Stone wrote the dissent (and was joined by two other justices):**

- "I think the judgment should be reversed.
- The present stress of widely held and strongly expressed differences of opinion of the wisdom of the Agricultural Adjustment Act makes it important, in the interest of clear thinking and sound result, to emphasize at the outset certain propositions which should have controlling influence in determining the validity of the act. They are:
- 1. **The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness**. One is that courts are concerned **only with the power to enact statutes, not with their wisdom**. The other is that while unconstitutional exercise of power [297 U.S. 1, 79] by the executive and legislative branches of the government is subject to **judicial restraint,** the only check upon our own exercise of power is our own sense of self-restraint. **For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government.**
- 2. The constitutional power of Congress to levy an excise tax upon the processing of agricultural products is not questioned. The present levy is held invalid, not for any want of power in Congress to lay such a tax to defray public expenditures, including those for the general welfare, but because the use to which its proceeds are put is disapproved.
- 3. As the present depressed state of agriculture is nation wide in its extent and effects, there is no basis for saying that the expenditure of public money in aid of farmers is not within the specifically granted power of Congress to levy taxes to 'provide for the ... general welfare.' The opinion of the Court does not declare otherwise. **..."**

iv. **As in the case for some of the early civil rights acts, Stone's dissent eventually became the "constitutional norm." only a few years later.**

- **In this case the change in the Court's position was partly because of Roosevelt's plan to "pack the court," and partly because of turn over in the Justices on the court (who were relatively elderly).**

E. **Another case from the same "family" was tried at the Supreme Court in 2005, that involved somewhat similar issues--although regarding the authority of local governments rather than the federal government.**

i. The city of **New London** used its power of eminent domain to take property fom 115 homeowners and give it to a private developer. 15 people refused to sell, and argued that the town could only take their property for truly public purposes, which private redevelopment was not.

ii. **The constitutional issue was whether the "taking" of land from private parties in order to give or sell it to other private owners was truly for a "public" purpose or not.**

- (It is clearly an important issue, but precedent was clearly on the side of the New London, as private lands are often shifted in this way for purposes of redevelopment, as with a new sports facility, railroad, etc...)

iii. **The decision was 5-4 in favor of New London. Justice Stevens wrote the decision of the majoity:**

- "**Just as we decline to second-guess the City's considered judgments about the efficacy of its development plan, we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project.** "It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch." Berman, 348 U. S., at 35-36.
- In affirming the City's authority to take petitioners' properties, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation.21 We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law,22 while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.23 As the submissions of the parties and their amici make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate.24 This Court's authority, however, extends only to determining whether the City's proposed condemnations are for a "public use" within the meaning of the Fifth Amendment to the Federal Constitution. Because over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek.
- The judgment of the Supreme Court of Connecticut is affirmed.

iv. The **dissent was written by Justice O'Conner**:

- Over two centuries ago, just after the Bill of Rights was ratified, Justice Chase wrote:
- "An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority ... . A few instances will suffice to explain what I mean... . [A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it." Calder v. Bull, 3 Dall. 386, 388 (1798) (emphasis deleted).
- **Today the Court abandons this long-held, basic limitation on government power**. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded--i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public--in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings "for public use" is to wash out any distinction between private and public use of property--and thereby **effectively to delete the words "for public use" from the Takings Clause of the Fifth Amendment**. Accordingly I respectfully dissent.
- ... Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. **The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large**

corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result. "[T]hat alone is a just government," wrote James Madison, "which impartially secures to every man, whatever is his own." For the National Gazette, Property, (Mar. 29, 1792), reprinted in 14 Papers of James Madison 266 (R. Rutland et al. eds. 1983).

- I would hold that the **takings in both Parcel 3 and Parcel 4A are unconstitutional**, reverse the judgment of the Supreme Court of Connecticut, and remand for further proceedings."

F. (You can see that the majority in the 21st century has argued a position similar to the minority in the previous case, while the minority argues a position not so far away from the old majority. The "progressive" v. "liberal" debate continues into the 21 century.)

G. The extent to which the commerce power of the US gives the federal government the authority to regulate essentially all market-like activities remains in play today.

- For example, the Supreme Court is currently reviewing the health-care reform of 2010 (aka Obamacare and the Patient Protection and Affordable Care Act).