## I. Adjusting the Constitution at the Margin

A. The U. S. Supreme Court that emerged in the 19th century had several constitutional roles.

i. First, as determined explicitly by the constitution, it serves as a highest court of appeal for federal law, and as the main court for inter-state and international legal disputes.

ii. Second, after Marbury v. Madison (1803) it has taken on the job of defining and defending the constitution.

iii. The Supreme court does this through its **decisions** on court cases that are tried in the Federal court system.

a. Court decisions establish "**precedents**" under American law (which was initially based on British law).

b. A precedent binds other judges (for the most part) in the sense that future cases are supposed to be decided in a manner consistent with earlier decisions (earlier precedents).

- This allows the law to evolve, but in a more or less self-consistent manner.

c. For this reason, **court decisions are very important** in the American legal system in general, and for American constitutional law, in particular.

iv. Normally, Constitutional Law develops through Supreme Court decision on cases filed by individuals, firms, or interest groups that claim "law x" is unconstitutional.

a. In most cases, such law suits are decided by lower federal courts, or in courts of appeal.

b. In difficult cases, these disputes are decided by the Supreme Court.

v. In order to decide whether a law was constitutional or not, the supreme court has to determine both what the constitution says and what the challenged law means.

- **Thus, the Supreme court became the final interpreter of the "true meaning" of the language of the constitution and of its own opinions.**

B. Supreme court decisions are made by majority rule among the justices on the court.

i. The Supreme Court has been composed of 9 justices since 1869.

- In many cases one justice (the median voter) decides the outcome.
- The Chief Justice (when in the majority) determines who writes the court decision, which also affects the exact language of the decision.

ii. Supreme Court Justices have lifetime appointments, and many continue serving until their death.

iii. After a justice dies or retires, replacements are nominated by the president and affirmed by a majority in the Senate.

- For the past half century or so, most justices have had more or less distinguished careers as judges at other levels of the Federal courts or in state courts before their appointments.
- In earlier times, there was more variety in the types of careers that lead to the Supreme Court.
- For example, there used be more former politicians from the House and Senate on the court.
- See Rehnquist, 2001, ch. 11, for examples of how the appointment process operates in practice.

iv. A change in the median justice or chief justice, may, thus, also affect the course of Congressional law, because each justice has a slightly different interpretation of the Constitution and the body of constitutional law.

- At its margins, the law is somewhat ambiguous, because not every conceivable circumstance can be formally incorporated into written law and precedent.
- In the end the court determines what the law really is on a given matter, but before the law is "settled," opinions will vary among both laymen and experts.
- (In some cases, the differences between "extreme" judges may be quite large.)

C. By determining what Constitutional Law is, the U.S. Supreme court plays an important role in determining exactly what the powers of the legislature and president are, *at least at the margin.*

i. Recall that the constitution includes a list of specific powers and areas of law in which is can legislate.

ii. These, in principle, determine what the president and Congress can do.

- Because words are always a bit ambiguous their exact meaning si subject to interpretation.
- In the US, the Supreme Court serves as the final interpreter of Constitutional language.

iii. However, the meaning of words and phrases is always a bit imprecise and, so, subject to interpretation.

D. Constitutional law evolves because (i) new problems arise as society, science, and technology develop, (ii) because interpretations of the constitution change as political and legal theory evolves, and (iii) because the membership of the court changes through time.

E. To appreciate the constitutional role of the Supreme Court, recall that the rationale for the "non-majoritarian" constraints in the U.S. Constitution is contractarian.

- The powers of the central government are delegated **by all the people** of the United States to the government, not simply the majority.
- Thus, minorities opinions and rights, as well as those of majorities, matter in democratic constitutions that are grounded in ideas of social compacts.
- In principle, the Supreme court helps to make sure that the majority lives up to its side of the social compact, and abides by the Constitutional "rules of the game."
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F. Constitutional Law is a surprisingly active area of litigation in the U.S., and, thus, there are many cases decided by the Supreme Court every year.

i. However, only a few of these cases have a broad impact, either in the present, or on the future course of politics and legislation in the U.S.

- Such cases are called "land mark" cases.

ii. Most of this lecture focuses on a few land mark cases in the area of civil rights and election law.

iii. It ends by discussing a few recent Court decisions in "commerce clause" and "first amendment" cases, two other areas of law that often have broad impact.

iv. When reading through the opinions, you should note both the types of arguments applied and the decisions reached.

- The decisions often combine law and legal theory with a bit of political philosophy and economics.
- A surprising number of the land mark cases draw on precedents back to the earliest days of the Republic.

v. Note that in a few areas of Constitutional Law, the opinions of Justices in dissent (those on the losing side of the final decision) often gradually become those of the majority over the course of several decades of litigation.

- At the margin, the U.S. Constitution is a flexible.
- However, it bears noting, that modern interpretations are not that different from those of 1800.
- (This could not be said, for example, of the Norwegian constitution which is the second oldest in existence, nor of the Danish constitution as modified in 1952--not all reforms are written down as formal amendments.)

## II. Supreme Court Decisions on Civil Rights and the scope of governmental powers (1883-2003).

A. One area of law in which judicial rulings have been very important is "civil rights" law.

i. These rulings, for the most part, determine the rights of minorities: racial, religious, and political minorities.

ii. By characterizing minority rights, they indirectly limit the ability of the majority to pass various kinds of laws.

- (There is a sense in which all individual legal rights are "civil," which means that "civil rights" law could be given a much broader interpretation. than it usually is.)
- For a list of important civil right cases on racial issues and very short summaries of them see: http://www.infoplease.com/spot/bhmsupremecourt.html

B. Civil rights law began shortly after the Civil War as the Congress attempted to deal with the legacy of slavery.

C. **Congress passed a series of 5 civil rights laws** designed to regulate the Southern state government's ability to pass discriminatory laws.

- (Some parts of which were superceded by Constitutional Amendments that were adopted and ratified during the same time period.)

i. Civil Rights Act of 1866, 14 Stat. 27 (1866). "All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and **such citizens, of every race and color**, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted**, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property**, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding. SEC. 2. And be it further enacted, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or

imprisonment not exceeding one year, or both, in the discretion of the court.
SEC. 6. And be it further enacted, That any person who shall knowingly and willfully obstruct, hinder, or prevent any officer, or other person charged with the execution of any warrant or process issued under the provisions of this act... [shall] be subject to a fine not exceeding one thousand dollars, and imprisonment not exceeding six months..."

ii. Civil Rights Act of 1870 (The Enforcement Act), 16 Stat. 140 (1870). "All citizens of the United States who are or shall be otherwise qualified by law to vote at any election... shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude....
SEC. 2. And be it further enacted, That it shall be the duty of every person and officer to give to all citizens of the United States the same and equal opportunity to perform [any] prerequisite, and to become qualified to vote without distinction of race, color, or previous condition of servitude; and if any person or officer shall refuse or knowingly omit to give full effect to this section, he shall... be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than five hundred dollars, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court.
***[Anti KKK part]*** SEC. 6. And be it further enacted, That if **two or more persons shall band or conspire together, or go in disguise upon the public highway**, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, **or** intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court,-the fine not to exceed five thousand dollars, and the imprisonment not to exceed ten years,- and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the Constitution or laws of the United States.
SEC. 17. And be it further enacted, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by the last preceding section [giving all persons the same rights as white citizens] of this act, or to different punishment, pains, or penalties on account of such person being an alien, or by reason of his color or race, than is prescribed for **the punishment of citizens, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment** not exceeding one year, or both, in the discretion of the court."

iii. Civil Rights Act of 1871, 17 Stat. 13 (1871). SEC. 2. "**That if two or more persons within any State or Territory of the United States shall conspire together to overthrow, or to put down, or to destroy by force the government of the United States, or to levy war against the United States, or to oppose by force the authority of the government of the United States,** or by force, intimidation, or threat to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, or by force, intimidation, or threat to prevent any person from accepting or holding any office or trust or place of confidence under the United States, or from discharging the duties thereof, or by force, intimidation, or threat to induce any officer of the United States to leave any State, district, or place where his duties as such officer might lawfully be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or to injure his person while engaged in the lawful discharge of the duties of his office ... shall be **punished by a fine not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, as the court may determine, for a period of not less than six months nor more than six years**, as the court may determine, or by both such fine and imprisonment as the court shall determine...."

iv. Civil Rights Act of 1875, 18 Stat. 335 (1875). "Whereas, it is essential to just government we recognize the **equality of all men before the law, and hold that it is the duty of government in its dealings with the people** to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law: Therefore, Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That **all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color**, regardless of any previous condition of servitude.
SEC. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall also, for every such offense, be deemed guilty of a misdemeanor and, upon conviction thereof, **shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned** not less than thirty days nor more than one year...."For a complete copy of the 1875 Act, see http://faculty.washington.edu/qtaylor/documents/civil_rights_act_1875.htm

D. Several law suits challenging the Civil Rights acts were brought by the Southern states. These cases were bundled together and considered by the U. S. Supreme court, in order to make civil rights law more consistent.

i. **The Court had to determine whether Congress had the power to bind the states through "ordinary" legislation in such areas of legislation.**

ii. Those in favor of the civil rights acts, argued that the 13th and 14th amendments empowered Congress to adopt such laws.

- The 13th and 14th amendments were clearly intended to "remove the last vestiges of slavery" from America. To permit private discrimination would be to "permit the badges and incidents of slavery" to linger in the South."

iii. Those against the civil right acts said that those amendments did not address private discrimination or state laws that differentiated among its citizens based on other characteristics than race.

- "Private citizens have a right to decide the conditions under which they operate their businesses. Outside interference (that is, federal intervention) would amount to tyranny."

E. In 1883, the Supreme Court rendered an 8-1 decision declaring most of the civil rights acts unconstitutional--and thereby took civil rights legislation off of Congress's legislative agenda for nearly a century.

i. **Justice Bradley wrote the majority opinion:**

a. **"…. If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop**. Why may not Congress, with equal show of authority, enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property? If it is supposable that the States may deprive persons of life, liberty, and property without due process of law (and the amendment itself does suppose this), **why should not Congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights, in every possible case, as well as to prescribe equal privileges in inns, public conveyances, and theaters**?

b. The truth is that the implication of a power to legislate in this manner is based [p15] upon the assumption that, if the States are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such State legislation or action. The assumption is certainly unsound. **It is repugnant to the Tenth Amendment of the Constitution, which declares that 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**."

ii. The **lone dissent was written by Justice Harlan** (which has become quite famous):

a. "... The Thirteenth Amendment, it is conceded, did something more than to prohibit slavery as an institution resting upon distinctions of race and upheld by positive law. My brethren admit that it established and decreed universal civil freedom throughout the United States. But did the freedom thus established involve nothing more than exemption from actual slavery? Was nothing more intended than to forbid one man from owning another as property? Was it the purpose of the nation simply to destroy the institution, and then remit the race, theretofore held in bondage, to the several States for such protection, in their civil rights, necessarily growing out of freedom, as those States, in their discretion, might choose to provide?

b. Were the States against whose protest the institution was destroyed to be left free, so far as national interference was concerned, to make or allow discriminations against that race, as such, in the enjoyment of those fundamental rights which, by universal concession, inhere in a state of freedom? [p35]

c. Had the Thirteenth Amendment stopped with the sweeping declaration in its first section against the existence of slavery and involuntary servitude except for crime, Congress would have had the power, by implication, according to the doctrines of Prigg v. Commonwealth of Pennsylvania, repeated in Strauder v. West Virginia**, to protect the freedom established, and consequently, to secure the enjoyment of such civil rights as were fundamental in freedom. That it can exert its authority to that extent is made clear, and was intended to be made clear, by the express grant of power contained in the second section of the Amendment**."

iii. Obviously,, the majority decision was important both in terms of their **treatment by fellow citizens**, and indirectly through non-raced based--but perhaps race targeted--laws adopted by state and local governments.

- Essentially, it said that Congress does not have the authority to regulate any relationships between private persons, whether racist or not.

- For a complete text of the opinions see:

http://www.law.cornell.edu/supct/html/historics/USSC_CR_0109_0003_ZS.html

F. **Another very important 19th century Supreme Court civil rights case** involved access to state provided services.

i. It was decided in 1896: **Plessy v. Ferguson**, and is often said to have established the principle of "**separate but equal**" in public services.

ii. In 1890, the State of Louisiana passed a **law that required separate accommodations for blacks and whites on railroads,** including separate railway cars.

a. Plessy purchased a first-class ticket on the East Louisiana Railway from New Orleans. The train provided only third-class cars to black passengers. **He was arrested when he refused to leave his seat.** (Since only 1/8 of his ancestory was black, Plessy appeared to be a white man, and consequently he had to inform the conductor of his heritage before any objection was even made to his seat choice.)

b. Plessy sued the state of Louisiana (actually Judge Ferguson a judge in the criminal court of Orleans) for violating his rights under the 14th amendment.

iii. In 1896, Justice Brown delivered the (7-1) **opinion of the court**:

a. "... While we think the **enforced separation of the races, as applied to the internal commerce of the state, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law**, **nor denies him the equal protection of the laws, within the meaning of the fourteenth amendment**,

b. we are not prepared to say that the conductor, in assigning passengers to the coaches according to their race, does not act at his peril, or that the provision of the second section of the **act that denies to the passenger compensation in damages for a refusal to receive him into the coach in which he properly belongs** is a valid exercise of the legislative power. Indeed, we understand it to be conceded by the state's attorney that such part of the act as exempts from liability the railway company and its officers is unconstitutional.

c. The power to assign to a particular coach obviously implies the power to determine to which race the passenger belongs, as well as the power to determine who, under the laws of the particular state, is to be deemed a white, and who a colored, person. This question, though indicated in the brief of the plaintiff in error, does not properly arise upon the record in this case, since the only issue made is as to the unconstitutionality of the act, so far as it requires the railway to provide separate accommodations, and the conductor to assign passengers according to their race.

d. It is claimed by the plaintiff in error that, in an mixed community, **the reputation of belonging to the dominant race, in this instance the white race, is 'property**,' in the same sense that a right of action or of inheritance is property. Conceding this to be so, for the purposes of this case, we are unable to see how this statute deprives him of, or in any way affects his right to, such property.

e. If he be a white man, and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so-called 'property.' Upon the other hand, if he be a colored man, and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man."

iv. Judge Harlan again **wrote the lone dissent**:

a. "However apparent the injustice of such legislation may be, we have only to consider whether it is consistent with the constitution of the United States....

b. The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. **But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color blind**, and neither knows nor tolerates classes among citizens**. In respect of civil rights, all citizens are equal before the law.**

c. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guarantied by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race. ..."

v. A normative political theory puzzle:

- Seen from the perspective of 2006, Judge Harlan seems "obviously correct."
- However, there is an interesting normative conflict here between majority rule (as in Louisiana--albeit many blacks and poor whites could not vote there) and civil rights.
- Think a bit about this quote from *Wikipedia*:

*William Rehnquist wrote a memo called "A Random Thought on the Segregation Cases" when he was a law clerk in 1952, during early deliberations that led to the Brown v. Board of Education decision. In his memo, Rehnquist argued that "I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues but I think Plessy v. Ferguson was right and should be reaffirmed." He continued, "To the argument... that a majority may not deprive a minority of its constitutional right, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are."*

- Is there a difference between majority rule and constitutional democracy?

G. The **next landmark decision** of the Supreme Court on civil rights occurred sixty years later in 1954.

i. In 1951, a class action suit was filed against the Board of Education of the City of Topeka, Kansas in the U.S. District Court for the District of Kansas. The plaintiffs were thirteen Topeka parents who sued on behalf of their children. The law suit **called for the school district to reverse its policy of racial segregation**.

ii. The case was decided in 1954. Chief Justice Warren delivered the unanimous (9-0) opinion of the Court:

a. "... a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in Plessy v. Ferguson, 163 U.S. 537 . Under **that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate**. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of

their superiority to the Negro schools.
The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction. ...

b. ... Here, unlike Sweatt v. Painter, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. 9 **Our decision, therefore, cannot turn on merely a comparison of these tangible factors** in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout [347 U.S. 483, 493] the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

c. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

- "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." 10

d. Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority. 11 Any language [347 U.S. 483, 495] in Plessy v. Ferguson contrary to this finding is rejected.

e. **We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.**

H. **Brown v Board of Education nearly launched a new civil war**, so intense was the reaction of many persons in the South.

- Some schools closed rather than be “desegregated.”
- Arkansas even called out its national guard to block desegregation of its schools.

i. Fortunately, war was largely fought in the court rooms and at the poles rather than on the battlefield, but it took more than a decade for “Brown” to be implemented

- In several cases, the courts effectively took over local governments and school boards, forced bussing and construction of new facilities to meet the Brown requirements.
- Federal troops (national guard) were called out in several cases to maintain law and order.

ii. (Many southerners and some conservative legal scholars argue that Brown was unconstitutional and was not intended by the 14th amendment. However--essentially the **same Congress that passed the amendment also passed civil rights acts which went beyond Brown**. Thus the original intent of the authors of the 14th amendment was very likely that of the Northern radical Republican Congress, which passed those amendments.)

iii. It bears noting that public disagreement with Brown, was largely theoretical---based on majoritarian, states rights, and precedent arguments.

- In private, however, it is clear that racial myths and racism (especially in the South) played an important role in the intensity of the emotional reaction that many in the South and in other parts of the country had to Brown.
- (In the long run, part of the intent of Brown was to overcome those racial myths.)

iv. See Keyssar, 2000, ch. 8 for an overview of how the development of civil rights law in the 1950s and 60s affected suffrage law, especially in the South.

I. **After Brown, attention shifted back to many of the same issues that had attracted attention in the Republican Congresses just after the civil war.**

i. To what extent may private contracts and public laws directly and indirectly discriminate against people in particular groups?

a. The new arguments and laws, in principle, included consideration of all groups: ethnic groups, racial groups, and religious groups..

b. Note that in correcting past wrongs, as with affirmative action, efforts to “privilege” some groups were deemed acceptable--but only as remedies.

- See Bakke v. Regents of University of California (1978): http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=438&invol=265

ii. **New Civil Rights Laws were passed in 1964 with majorities in the House and Senate of approximately 70%.**

a. This time, however, it was the democratic Presidents that took the lead in pressing forward with new Civil Rights Acts.

- Support as a whole was actually larger from Republicans than Democrats, because southern democrats for the most part voted against the legislation.
- Republicans voted 80+% in favor of the legislation to the democrat’s 60+%.

b. This time, the Supreme Court decided that the central government had some power to regulate private contracts and relationships, particularly with respect to housing, public transport, etc.

- Discrimination based on "race, color, religion, or national origin" in public establishments that had a connection to interstate commerce or was supported by the state is prohibited. (This included: public establishments include places of public accommodation (e.g., hotels, motels, trailer parks), restaurants, gas stations, bars, taverns, and places of entertainment in general.)
- The Civil Rights Act of 1964 and subsequent legislation also declared a strong legislative policy against discrimination in public schools and colleges which aided in desegregation.
- Title VI of the Civil Rights Act prohibits discrimination in federally funded programs.
- Title VII of the Civil Rights Act prohibits employment discrimination where the employer is engaged in interstate commerce. Congress has passed numerous other laws dealing with employment discrimination.
- See: http://www.law.cornell.edu/wex/index.php/Civil_rights

iii. Limits on "affirmative action" (reverse discrimination) were affirmed by the Court in Regents of the University of California v. Bakke (1978) and in Grutter v. Bollinger (2003).

- Although for the most parts the main issues are settled, the extent to which civil rights law requires public and private institutions to be "color blind" is still being argued in courts around the country.
- Moreover, it is not always clear which specific groups will receive preferences to remediate past problems.

## III. In addition to court decisions and new legislation on civil rights and suffrage laws, the Constitution was amended four times to explicitly reduce discrimination in suffrage, clarify secession rules, and reduce opportunities for Congressional corruption:

A. **The twenty fourth amendment bars poll tax** in federal elections

a. This Amendment altered Article 1 Section 2 Part 3 Passed by Congress August 27, 1962. Ratified January 23,1964.

b. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay poll tax or any other tax.

c. Congress shall have power to enforce this article by appropriate legislation.

- (Poll taxes had been widely used in the South to discourage voting by blacks and lower middle class whites.)

B. The **twenty fifth amendment dealt with secession issues**: what happens when a president is incapable of exercising his or her duties?

a. This Amendment altered Article 2 Section 1 Part 5 Passed by Congress July 6, 1965. Ratified February 10, 1967.

b. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take the office upon confirmation by a majority vote of both houses of Congress

c. Whenever the President transmits to the President Pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

d. Whenever **the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide,** transmits to the President Pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

e. Thereafter, when the President transmits to the President Pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmits within four days to the President Pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office.

f. **Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session.** If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

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C. **The twenty sixth amendment lowers the voting age** in Federal elections to 18 years

a. This Amendment altered Article 1 Section 9 Part 4 Passed by Congress March 23, 1971. Ratified June 30, 1971.

b. The right of citizens of the United States, who are 18 years of age or older, to vote shall not be denied or abridged by the United States or any state on account of age.

c. The Congress shall have power to enforce this article by appropriate legislation.

- (The age limits were changed largely in response to demonstrations against the draft army used to fight the Vietnam War. People could be drafted who could not vote their approval for the war or for the draft., which was widely believed to be unfair by both opponents and supporters of U.S. intervention in Vietnam.)

D. The **twenty seventh amendment** - limits Congressional Pay legislation.

a. This Amendment altered Article 1 Section 3 Part 1 and Article 1 Section 3 Part 2. Passed by Congress September 25, 1789. Ratified May 7, 1992.

b. No law, varying the compensation for services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

- (It is interesting to note how long the period is between Congressional approval (1789) and final passage by the states (1992).)

E. Note that two of these amendments, the poll tax and voting age amendments, again dealt the issue of "who is qualified to vote?" which had long been central to suffrage reform debates.

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## IV. Supreme Court Decisions and Economic Regulation

A. Another area of Supreme Court decisions that has had important effects on the scope of central governmental power is based on cases that challenge interpretations of the "interstate commerce" and "takings" clauses of the constitution.

- 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."

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

ii. To what extent does the Congress's ability to regulate interstate commerce give it the authority to regulate economic activity within states?

iii. 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 questions are important, because they determine the regulatory reach of the central government--and thereby affect both the degree to which regulatory authority can be centralizated and thereby partially determine the unwritten "economic constitution" of America.

- Arguments on such matters have been conducted before the Supreme Court at least since Gibbons v. Ogden in 1824.
- See Rehnquist, 2001, ch. 5 for an overview of late 19th century regulatory controversies faced by the Court.
- 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 that Congress can regulate goods and services that physically cross state boundaries.

i. In the 1930s, the court began allowing regulation of all activities that could conceivably affect interstate commerce.

- This reinterpretation, which may be said to have paved the way for the later civil rights reinterpretations, 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 would agree with his interpretation of central government powers, and thus **change the median justice in the court.**)

ii. To a substantial extent, debate over the proper interpretation of these parts of the constitution reflected political and economic theory differences in the U.S. as a whole.

- "Liberals" preferred a narrow reading of enumerated powers.
- "Progressives" preferred a broad reading of enumerated powers.
- (See the Lockner opinion in the lecture 11.)
- (Here I continue using "liberal" in its European sense as right of center liberal, and use the term "progressive" to mean left of center liberal or American social democrat. Recall that mainstream social democrats during the first half of the 20th century were to the right of present day social democrats.)

D. An example of the sort of laws that the progressive 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 to reduce their production (by reducing the acreage farmed), which would raise farm prices.

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 Unconstitutional) The majority opinion was written by Justice Roberts:

a. 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.

b. 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.

c. 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.

d. 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.

e. **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.**

f. **...** 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):**

a. "I think the judgment should be reversed.

b. 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 decisions, Stone’s dissent eventually became the “constitutional norm.” only a few years later.**

v. **In this case the change in the Court’s position was mostly because of turn over in the Justices on the court (who were relatively elderly).**

- **Roosevelt, after failing in his court packing plan, was able to appoint 8 supreme court justices during his 4 terms of office (Rehnquest, 2001, pg 134).**
- **This clearly changed the median voter on the court.**
- **See Rehnquist, 2001, ch. 6 for a thorough history of this episode of U. S. history, the court packing threat and its failure, told from the Courts point of view.**
- **(Chapters 7-9 deal with the subsequent court largely appointed by Roosevelt.)**

E. **Another case was recently tried at the Supreme Court in 2005, that involved somewhat similar issues--although for local governments rather than the federal government.**

i. **The city of New London used its power of eminent domain to take property from 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 majority:**

a. “**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.

b. 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

c. 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.

d. The judgment of the Supreme Court of Connecticut is affirmed.

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

a. 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).

b. **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.

c. ... 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).

d. 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."

v. (You can see that the majority now argues 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.)

## V. Supreme Court Decisions and the First Amendment

A. Another area of constitutional law that has important political implications addresses issues associated with the "first amendment" of the constitution.

- "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."

B. Note that **the first amendment really is 5 amendments in one**.

i. It addresses: (i) religious freedom, (ii) freedom of (political) speech, (iii) freedom of the press, (iv) the right to assemble (and protest), and (v) the right to petition government.

ii. There is a lengthy history of Supreme court decisions on all of these aspects of the first amendment.

- (Indeed, there is an active political interest group, the *American Civil Liberties Union*, whose main purpose is to press for broad interpretations of the first amendment.)

C. An important example of a freedom of the press case is the United States v. the New York Times (1971).

- The NYT had been given a copy of a **top secret** history of American involvement in Vietnam, and proceeded to publish excerpts and summaries from it.
- The Government tried to block publication of the "Pentagon Papers" claming that publication would cause "irreparable injury to the defense interests of the United States."
- The Pentagon Papers were classified--top secret--documents.

i. The **Supreme Court ruled 6-3 against the government**, although most justices had their own slightly different rationalizations for their votes

- There were thus 4 concurring opinions, and 2 dissenting opinions!
- The *NYT* and *Washington Post* were free to publish the Pentagon Papers.

ii. Majority Opinions: Black and Douglas:

a. "I adhere to the view that the Government's case against the Washington Post should have been dismissed and that the injunction against the New York Times should have been vacated without oral argument when the cases were first presented to this Court. I believe [403 U.S. 713, 715] that **every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment.** Furthermore, after oral argument, I agree completely that we must affirm the judgment of the Court of Appeals for the District of Columbia Circuit and reverse the judgment of the Court of Appeals for the Second Circuit for the reasons stated by my Brothers DOUGLAS and BRENNAN. In my view it is unfortunate that some of my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment.

b. Our Government was launched in 1789 with the adoption of the Constitution. The Bill of Rights, including the First Amendment, followed in 1791. **Now, for the first time in the 182 years since the founding of the Republic, the federal courts are asked to hold that the First Amendment does not mean what it says, but rather means that the Government can halt the publication of current news of vital importance to the people of this country**."

iii. Majority Opinion Brennan:

a. The **error that has pervaded these cases from the outset was the granting of any injunctive relief whatsoever**, interim or otherwise. The entire thrust of the Government's claim throughout these cases has been that publication of the material sought to be enjoined "could," or "might," or "may" prejudice the national interest in various ways. But **the First Amendment tolerates absolutely no prior judicial restraints** of the press predicated upon surmise or conjecture that untoward consequences [403 U.S. 713, 726] may result. *

b. Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation "**is at war**," Schenck v. United States, 249 U.S. 47, 52 (1919), during which times "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." Near v. Minnesota, 283 U.S. 697, 716 (1931). **Even if the present world situation were assumed to be tantamount to a time of war,** or if the power of presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in **neither of these actions has the Government**

**presented** or even alleged that publication of items from or based upon the material at issue would cause the happening of an event of that nature.

iv. Majority Opinion Stewart and White:

a. "n he cases before us we are asked neither to construe specific regulations nor to apply specific laws. We are asked, instead, to perform a function that the Constitution gave to the Executive, not the Judiciary. We are asked, quite simply, to prevent the publication by two newspapers of material that the Executive Branch insists should not, in the national interest, be published. I am convinced that the Executive is correct with respect to some of the documents involved.

b. But **I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation** or its people. **That being so, there can under the First Amendment be but one judicial resolution of the issues before us. I join the judgments of the Court.**

v. Majority Opinion Marshall:

a. "The Government contends that the only issue in these cases is whether in a suit by the United States, "the First Amendment bars a court from prohibiting a newspaper [403 U.S. 713, 741] from publishing material whose disclosure would pose a `grave and immediate danger to the security of the United States.'" Brief for the United States 7. **With all due respect, I believe the ultimate issue in these cases is even more basic than the one posed by the Solicitor General. The issue is whether this Court or the Congress has the power to make law.**

b. Thus it would seem that in order for this Court to issue an injunction it would require a showing that such an injunction would enhance the already existing power of the Government to act. See Bennett v. Laman, 277 N. Y. 368, 14 N. E. 2d 439 (1938). It is a traditional axiom of equity that a court of equity will not do a useless thing just **as it is a traditional axiom that equity will not enjoin the commission of a crime. ...**

c. ... it is plain that **Congress has specifically refused to grant the authority the Government seeks from this Court**. In either case this Court does not have authority to grant the requested relief. It is not for this Court to fling itself into every breach perceived by some Government official nor is it for this Court to take on itself the burden of enacting law, especially a law that Congress has refused to pass.

d. I believe that the judgment of the United States Court of Appeals for the District of Columbia Circuit should [403 U.S. 713, 748] **be affirmed** and the judgment of the United States Court of Appeals for the Second Circuit should be reversed insofar as it remands the case for further hearings.

vi. **Dissenting Opinion, Chief Justice Burger:**

a. **So clear are the constitutional limitations on prior restraint** against expression, that from the time of Near v. Minnesota, 283 U.S. 697 (1931), until recently in Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), we have had little occasion to be concerned with cases involving prior restraints against news reporting on matters of public interest.

b. There is, therefore, **little variation among the members of the Court in terms of resistance to prior restraints against publication**. Adherence to this basic constitutional principle, however, does **not** make these cases simple.

c. In these cases, the imperative of a free and unfettered press comes into collision with another imperative, the effective functioning of a complex modern government and specifically the effective exercise of certain constitutional powers of the Executive. Only those who view the First Amendment as an absolute in all circumstances - a view I respect, but reject - can find such cases as these to be simple or easy.

d. **...** The right is asserted as an absolute. **Of course, the First Amendment right itself is not an absolute, as Justice Holmes so long ago pointed out in his aphorism concerning the right to shout "fire" in a crowded theater** if there was no fire. There are other exceptions, some of which Chief Justice Hughes mentioned by way of example in Near v. Minnesota.

e. There are no doubt other exceptions no one has had occasion to describe or discuss. Conceivably such exceptions may be lurking in these cases and would have been flushed had they been properly considered in the trial courts, free from unwarranted deadlines and frenetic pressures. An issue of this importance should be tried and heard in a judicial atmosphere conducive to thoughtful, reflective deliberation, especially when haste, in terms of hours, is unwarranted in light of the long period the Times, by its own choice, deferred publication.

f. I would affirm the Court of Appeals for the Second Circuit and allow the District Court to complete the trial aborted by our grant of certiorari, meanwhile preserving the status quo in the Post case. **I would direct that the District Court on remand give priority to the Times case to the exclusion of all other business of that court but I would not set arbitrary deadlines.**

- **(E.g, Burger wants the case more fully and carefully developed, before making a decision.)**

vii. Dissenting Opinion. Harlan and Blackman:

a. "These cases forcefully call to mind the wise admonition of Mr. Justice Holmes, dissenting in Northern Securities Co. v. United States, 193 U.S. 197, 400 -401 (1904):

- "**Great cases like hard cases make bad law**. For great cases are called great, not by reason of their [403 U.S. 713, 753] real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."

b. With all respect, I consider that **the Court has been almost irresponsibly feverish in dealing with these cases.**

c. ... This frenzied train of events took place in the name of the presumption against prior restraints created by the First Amendment. Due regard for the extraordinarily important and difficult questions involved in these litigations should have led the Court to shun such a precipitate timetable. In order to decide the merits of these cases properly, some or all of the following questions should have been faced:

d. (lists of 6 issues) 7. Whether the threatened harm to the national security or the Government's possessory interest in the documents justifies the issuance of an injunction against publication in light of : (i) The strong First Amendment policy against prior restraints on publication; [403 U.S. 713, 755] (ii) The doctrine against enjoining conduct in violation of criminal statutes; and (iii) The extent to which the materials at issue have apparently already been otherwise disseminated. **These are difficult questions of fact, of law, and of judgment; the potential consequences of erroneous decision are enormous.**

e. Even if there is some room for the judiciary to override the executive determination, it is plain that the scope of review must be exceedingly narrow. I can see no indication in the opinions of either the District Court or the Court of Appeals in the Post litigation that the conclusions of the Executive were given even the deference owing to an administrative agency, much less that owing to a co-equal branch of the Government operating within the field of its constitutional prerogative.

f. Accordingly, I would vacate the judgment of the Court of Appeals for the District of Columbia Circuit on this ground and remand the case for further proceedings in the District Court. Before the commencement of such further proceedings, due opportunity should be afforded the Government for procuring from the Secretary of State or the Secretary of Defense or both an expression of their views on the issue of national security. The ensuing review by the District Court should be in accordance with the views expressed in this opinion. And for the reasons stated above I would affirm the judgment of the Court of Appeals for the Second Circuit.

g. Pending further hearings in each case conducted under the appropriate ground rules, I would continue the [403 U.S. 713, 759] restraints on publication. I cannot believe that the doctrine prohibiting prior restraints reaches to the point of preventing courts from maintaining the status quo long enough to act responsibly in matters of such national importance as those involved here."

D. Overall this case (and the previous ones) shows how difficult "rights" cases are in which several rights conflict--at least at the margin.

i. It also shows, as have the previous cases, that precedent does not always provide clear guidance for the Supreme Court justices (and lower court justices).

ii. In the hard cases, it is clear that political and legal philosophy affect decisions--especially important and difficult ones--at the margin.

## VI. Overall these cases demonstrate that the Supreme Court sometimes plays an important Constitutional role in determining what the central government can and cannot do!

i. Changes in Supreme Court decisions often have affects that are analogous to formal amendments of the Constitution.

- This seems clearly the case with the post WWII civil rights cases, especially Brown v. Board of Education, but has also been the case in other areas of constitutional law as well.

ii. It is for this reason that the Supreme Court, although formally a "static agency" determined by the constitution of 1789, is itself an important source of constitutional development and evolution.