Constitutional Law classnotes, Spring 2005. Professor Macdonald.

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Tuesday, January 11

Course introduction

- The exam: in part, it will be multiple choice from old bar exams. The other part will be an essay—and that part will be weighted more heavily.

- What's this course about?
    - Last semester: the constitution as a blueprint for the organization of government.
    - This semester: individual rights and liberties.

  Overall, though, constitutional law is simply about: WHO DECIDES.
    - Which branch? (last semester).
    - States or federal government? (last semester).
    - The individual or the government? (this semester).
        - N.b. how this plays out in:
            - *Barron*
            - *Slaughterhouse*
            - *Saenz*

- State versus federal constitutional law
    - Without a doubt, states were given very broad sovereignty up until the civil war (1789 –1868).
    - Consider the differences since then, especially in the context of:
        - Women (e.g., reproductive rights)
        - LGBT
        - Far-left speakers

      If we turned decisions on these matters back over to the states, what would the U.S. look like?
    - N.b. the one-way ratchet theory: that states can ratchet their individual rights up, but not down (because if they ratcheted down, they'd run into federal restrictions).
- History (which is a huge part of constitutional law—more so than in any other field of law)
    - Ackerman's (YLS) idea is that we've had <u>three constitutional moments</u>, so far:
        1. From ratification until the Civil War (1789–1868)
            - During this time, there wasn't much constitutional litigation at all, except wrt. property interests (i.e., there was no individual rights litigation).
            - *Barron* (1833) (p381)
                - Since the Civil War amendments hadn't yet been enacted, were the states pretty much free to do whatever they

wanted? Well, in a lot of ways, yes! Before the war, we had a pretty loose union of more or less entirely sovereign states.
    - A1§10 was about all that constrained the states.
        - (But keep conflict and field preemption in mind, too.)
    - Under *Barron*, can local government just take citizens' property as it wishes? Is this a "nice" fox guarding the henhouse theory—that the state's just going to have to be nice in order to keep the citizens from being screwed?
- Thurgood Marshall once said that he had *no respect* for the constitution as it was originally ratified. Does this "first" constitution even deserve our respect?

2. Then, with major, new constitutional provisions (especially am14), the second constitutional moment began (1868–1937).

Wednesday, January 12

- Am14: "*No state shall . . .*"
    - The structure of am14§1:
        - Substance: privileges and immunities clause.
        - Procedure: due process clause.
        - Application: equal protection clause.

      This is what § 1 *looks* like, at least, from its plain language.

The Privileges and Immunities clause(s)

- The Privileges and Immunities clause
    - What are "privileges and immunities"? Does this language even help at all?
        - See comments from congressmen during that time on what P&I are—Sen. Howard says they are the fundamental rights and the *first eight amendments'* rights; Rep. Bingham says they are chiefly the *first eight amendments'* rights. (See pp382–383).
        - Is P&I meant to *not* bind itself to some static idea—i.e., is P&I a container that gets more and more (or less??) full as time goes on?

- *The Slaughterhouse Cases* (1873) (p383)
    - First off, why did Louisiana grant this monopoly to certain butchers? To ward off the glut of cattle that was coming from Texas.
    - So, the butchers were alleging a violation of their right to ply their trade—a right contained, they argued, in am13 and am14 P&I, DP, and EqP.
    - The "accident of history": the Court reads the P&I clause right out of the constitution.
        - Rather than overruling itc., the courts have injected P&I into DP—creating the so-called "substantive" due process.
    - Note the false premise in the majority opinion: that the reading of the P&I clause urged by the butchers must be wrong, since it would "radically change[] the whole theory of the relations of the State and Federal governments to each other nd of both of these governments to the people." But, Macdonald notes, *that's exactly what the purpose of am14 was!!! That's what the war was fought over!!!*
    - Also note the majority's more-or-less summary dismissal of the butchers' DP and EqP arguments. *This*, unlike the P&I decision here, has *not* stood the test of time—DP and EqP are now the heavy-hitters of am14 jurisprudence. (So, why has the P&I accident lasted?!)
- *Saenz* (1999) (p390)
    - What right—what "privilege" or "immunity"—is being violated here? The right to (domestic) travel.
        - (N.b. that the federal government has nearly plenary power over foreign travel.)

- Article 4 "privileges and immunities"
    - How does this P&I compare to the am14 P&I?
        - Wrt. just the language:
            - A4 says "P&I of *state*."
            - Am14 says "P&I of citizens of the U.S."
    - The A4 P&I is the "comity clause," mandating respect of one political entity for another (states for other states, here).
        - Am14 P&I, however, is *not* a comity clause. (This is just one of the ways that the *Slaughterhouse* majority went wrong, in fact.)
    - Note how the dormant Commerce Clause and A4 P&I overlap—see p368.
    - *Toomer* (1948) (p370)
    - *Camden* (1984) (p372): the Court uses a two-step method for applying A4 P&I.
    - *Baldwin* (1978) (p373): the Court gets down to a basic question—is the "right" involved "fundamental"?

- Note the dissent here by Brennan and Marshall.

Friday, January 14

- *Piper* (1985) (p375): note the 8–1 holding here, against discrimination of out-of-state lawyers. (However, out-of-state lawyers can still be required to pass the state's bar exam.)

Incorporation

- Recall *Barron*, where the Court said that the Bill of Rights limits the federal government only—not the states.
- *Twining* (1908) (p392)
  - The Court raises, in dicta, the possibility that state action against the Bill of Rights may violate am14. But not because the right is mentioned in the Bill of Rights, but because that right is *also* a violation of *due process*.
- So, now, are we limited to the Bill of Rights, or is the Bill of Rights incorporated *among other things*?
- What gets incorporated?
  - *Gitlow*: am1 speech.
  - *Powell*: counsel, in capital cases.

  Selective or total incorporation?
  - Selective (where you determine which Bill of Rights rights are *fundamental* enough to come in (see ¶2p394 for Cardozo's formulation of selective incorporation)).
    - Frankfurter (¶4p396)
    - Harlan
    - Cardozo

    All of these are conservatives or moderates.
  - Total
    - Black
    - Douglas

    Both liberals.

    Is the political breakdown of the justices surprising? Are we seeing the liberal justices more in fcor of restraining judicial discretion??

Tuesday, January 18

What's conservative and what's liberal, when we're talking about incorporation? Is it conservative to *not* want the constitution to apply (to the states)?

- Frankfurter's states' rights view of incorporation (¶5p396): "[a] construction which gives to due process no independent function but turns it into a summary of the specific provisions of the Bill of Rights would . . . tear up by the roots much of the fabric of law in the several States, and would deprive the States of opportunity for reforms in legal process designed for extending the area of freedom."
    - Is the notion of "states' rights" even coherent?, Macdonald asks.
        - Well, what about the "states as laboratories" argument? The argument that some states will be *more* progressive—i.e., that national uniformity of law makes for not just a floor, but also a *ceiling* on freedom.
        - Macdonald notes:
            1. At the same time that this "states' rights incorporation" argument, the Court waas going the *opposite* direction (away from state sovereignty) with the Commerce Clause.
            2. How can it be that the states should be able to violate the civil rights of U.S. citizens?!
                - Note Madison's theory of the "large republic," arguing that large government is more likely to protect the people that smaller government.
- So, which side "won" the incorporation debate?
    - Well, the state of the law is *selective* incorporation.
        - What is *not* incorporated, currently:
            - Am2
            - Am3
            - Am5 grand jury
            - Am7 civil jury
            - Am8 excessive bail

State action

Here, we have a spectrum:

Purely "Private" Behavior	Small Business	Multinational Corporations	Mixes	Obvious Government Action

Right now, the line is approximately in between "Mixes" and "Obvious Government Action."

Note how the U of Idaho could be "Obvious Government Action," but Gonzaga would be "Purely Private Behavior," Macdonald says.

Still, though—what *is* state action?...

- *The Civil Rights Cases* (1883) (p402)
  - Note that we are ten years after *Slaughterhouse*.
  - The narrow issue itc.: does congress have the power to pass this law, affecting private actors, under am14§5?
    - So—if congress didn't have the power to pass this law, how did was it able to pass the 1964 Civil Rights Act? By using the Commerce Clause, rather than am14§5 (see p127). (So, of course, that act is limited to businesses in interestate commerce.)
  - The rest of the case, though, is about whether am14 applies to the states.

- Why *have* a state action requirement? Why tolerate non-state conduct that violates our most basic, cherished values? (Macdonald asks.)

Wednesday, January 19

- Again—why have a state action doctrine?
  - Macdonald asks: why even *think* about limiting the application of the constitution?
  - Rationales for a state action doctrine (also see ¶0p405):
    - Private autonomy
    - Federalism
  - What about multinational corporations?? Note that only a handful of nation-states have more assets than the largest multinationals.
  - Why did state action make sense when the constitution was young? Because the framers and their peers felt that: common law = natural law (!); and that common law/natural law provided *full protection* from others. So, at that time, *no protection was needed except from the government.*
  - N.b., also, the textual argument—am14 says "no *state* shall." Macdonald thinks this argument is "pinheaded and narrow."
- What about government *inaction*?
  - For instance—*Shelley v. Kraemer*. There, the government *could* have stepped in and stopped the racial discrimination. The problem with this approach is that this could apply to *everything*!
- Note how a holding of "no state action" protects the "violator" at the expense of the "victim." What bothers Macdonald is that the courts will hold there to be no state action without balancing the interests of the "violator" and the "victim."

Friday, January 21

So far, on state action, we've addressed:
- What is it?
- Why have it?

Now, we'll look at the *exceptions* to it.
- There is lots of conceptual inconsitency here (see ¶4p405).
    - Macdonald says he would find state action in *all* of these cases. To him, all of these cases simply ask: "how much do you believe in the constitution?"
- History of this jurisprudence
    1. Early on, the Court seemed to go out of its way to find state action—especially in race cases (but why should that matter?).
    2. Since the 1970s, the cases show a retrenchment and retreat from the earlier, broader application of the state action exceptions.
        - Note the historical changes in the background:
            - The end of the civil rights movement.
            - Statutes like the 1964 Civil Rights Act, filling the constitutional gaps.
            - The right-ward drift of the Court.

Public functions exception
- *Marsh* (1946) (p407)
    - 5–3. With 5 saying, basically, that this is the *classic* public function. And thus the Court created the public function exception.
    - Note the famous line: "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."
    - Macdonald notes that the ideas from this case are pretty ingrained now—there would be no dissent if this case were to come up today, he thinks.
- *Metropolitan Edison* (1974) (p408)
    - This case represents the current state of the law: there's state action only where the function is "traditionally exclusively" reserved to the state.
        - But aren't these *public* utilities?, Macdonald asks.
    - Marhsall, dissenting, argues that if it's a public and essential service, then the debate ought to be over.
    - What's really at stake here? Due process (procedural), with having your electic services cut off.
        - Well, maybe the majority is worried about *every* shutoff

becomeing a trial. (Macdonald replies: the required process can be variable—for an electric shutoff very little would be required (see *Eldridge* (p888)).

Tuesday, January 25

- *Marsh* (1946) (p407) (again)
  - What's the modern equivalent to a company town? Is there one?
    - What about shopping malls? That is, the common areas of shopping malls? Or, have we just lost, completely, our old community millieus?
      - N.b. *Logan Valley* (1968) (p414): "because the shopping center serves as the community business block and is freely accessible and open to the people in the area and those passing through, the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put" (¶6p415).
- *Lloyd* (1972) (p416)
  - The Court here distinguishes *Logan Valley* by saying that the speech in *Logan Valley* was *related* to the shopping center, whereas the speech itc. was not related to the location.
    - But this is a content-based distinction, isn't it!!?, Macdonald asks (he thinks this decision is totally and completely incoherent; and asks, Why not *allow* the speech here, but subject it to time, place, and manner restrictions?).
- *Hudgens* (1976) (p418)
  - The Court here expressly overrules *Logan Valley*, leaving *Marsh* pretty much limited to its anachronistic facts.
    - So, what would the Court do today with a migrant labor camp?, Macdonald asks (suggesting that maybe such a camp is analogous to a company town).

The end result? Macdonald thinks that the public functions exception has been squeezed out of existence.

Entanglement exception

- Macdonald, as usual, highly praises Chemerinsky's summary of the

exception at ¶¶2–3p419.
- Note that we have both "entanglement" and "symbiotic relationship" language.
- The entanglement exception is applicable *if*:
    - Government...
        - affirmatively authorizes, or
        - encourages, or
        - facilitates
    - "bad acts" *in*:
        - courts or law enforcement, or
        - government regulation, or
        - government subsidies, or
        - voter initiatives.

Wednesday, January 26

- The first kind of entanglement—bad acts by courts or law enforcement
    - *Shelley v. Kraemer* (1948) (p419)
        - Why do some suggest that this case needs to be limited? Well, does itc. prohibit evictions based on race?? Racist wills?? And if it does, is that a bad thing??
        - The *Shelley* dilemma: when, or how much, should we allow people to use the courts to enforce private ordering that is contrary to the constitution (or other fundamental values)?
    - *Lugar* (1982) (p422):
        - Note the two part test here:
            1. Deprivation has to be caused by a right or privilege *created by the state*.
            2. The deprivor has to be a person who "may fairly be said" to be a state actor.
    - Other prominent cases in this category:
        - *Flagg Bros.* (1978) (p424 in text)
        - *Edmonson* (1991) (p425)
        - *McCollum* (1992) (p426 in text)
- The second kind of entanglement—government licensing or regulation
    - This entanglement category is sort of related to the public functions exception, Macdonald suggests.
    - In general, to be in this category there has to have been some *encouraging* or *facilitating* of the bad act.
    - *Burton* (1961) (p427)
        - The rule here: when a state leases property as it did here —to a coffee shop in a public parking garage—then the

lessee has to adhere to am14 just as if am14 were written into the lease.
- However, there's a broader theory here than that—the rule isn't quite that limited...

- ...*Moose Lodge* (1972) (p429)
  - The "symbiotic relationship." *That's* the real theory that emanates from *Burton*.
    - And itc. is the classic flip-side of *Burton*.

Friday, January 28

    - [*Moose Lodge*]: *Burton* was a lease; here we have a license.
  - The dissent makes a practical result argument—because of what's happened itc., blacks simply can't get liquor.
- *American Mfrs.* (1999) (p431)
  - What's left of *Burton*'s "symbiotic relationship" theory now? Well, what seems to be happening is that the Court is setting up an additional requirement that the state actually have *encouraged* the action.
  - Also, the *degree of delegation* is at issue here—how much of a task can the state successfully delegate?

- The third kind of entanglement—government subsidies
  - *Norwood* (1973) (p435)
  - *Gilmore* (1974) (p436 in text)
  - *Rendell-Baker* (1982) (p436)
    - Here we have a school that is 90–99% funded by the state—but *no* state action (!!).
    - Who benefits from this decision??, Macdonald asks. (Is it only the private school's administrators??)
  - *Blum* (1982) (p439)
    - Who's being protected here?? (Only the nursing homes (??). What good does that do?!?
- The fourth kind of entanglement—voter initiatives
  - *Reitman* (1967) (p443)
    - A 5–4 decision.
    - Macdonald asks: What does the majority mean by "milieu" (¶1p445)?? ("[T]he California court [was] . . . familiar with the milieu in which the provision would operate . . . [and so we accept its holding].")
    - Note the case line that succeeds itc.:
      - *Hunter* (1969) (p446 in text)
      - *Seattle* (1982) (p446 in text)

- *Crawford* (1982) (p446 in text) (this is the hard one to figure out)

- And, now what is *entwinement*?
  - *Brentwood Academy* (2001) (p146s)
    - Another 5–4 decision.
    - Does "entwinement" mean the same thing as "entanglement"? Or not?
    - Note that there's a good overview of the state action problem in this case: ¶¶3–4p148s.
    - *Cf. Tarkanian* (1989) (p149s): the Court distinguishes it here by noting that the NCAA isn't in a *single* state.
      - (But so what about a Latah County – Whitman County high school athletic organization??, Macdonald asks.)

Tuesday, February 1

N.b. the difference between:
- State action law, and
- Liberty and privacy law
  - Religion
  - Sex
  - Association
  - Thought/speech
  - Homestead

(But see Black in *Marsh*—the more "public" something is, the less private it is.)

The Civil War amendments

- Whom?
  - *The Civil Rights Cases* (1883) (p187 in text)
    - The am13 aspect of itc. has been overruled—congress *can* regulate the private sector when using am13.
      - In this sense, am13 is unique. It is the only amendment that's read to allow, on its face, regulation of the private sector.
    - The am14 aspect, though, is still good law (!!).
  - Civil Rights Act of 1964
    - Which, because of *The Civil Rights Cases* had to be based on the Commerce Clause (!!).
  - *Morrison* (2000) (p189)
    - A 5–4 decision.
    - Is this just *The Civil Rights Cases* all over again?, Macdonald asks.

        - Note how the Court says "no civilized system of justice could fail to provide her a remedy." Is this a self-indictment?? Did the court "abstract" itself into justifying doing the *wrong* thing??
    - So, on the question of "whom?," it's back to the state action doctrine.
- What? (can congress do)
    - There are two views (see ¶2p190):
        - Narrow (conservative)
            - For the *hard* right view, see Harlan's dissent in *Katzenbach*.
        - Expansive (rationalist)

        How does this work? Well, consider the abortion issue—what if *Roe* were overruled—would that say anything about congressional power?
            - Well, for one thing, it would free up the states to outlaw abortion.
            - Would you then get a checkerboard of law? Or could congress till legislate *national* abortion laws? Well, under *Boerne*, probably not.

Wednesday, February 2

- *Katzenbach* (1966) (p192)
    - The Court sees am14§5 as the same, basically, as the Necessary and Proper caluse at a1§8c18 (¶4p192).
    - Harlan, dissenting, argues that because of *Lassiter* (1959) (p194 in text), the § 5 power is limited to the power to rubber-stamp what congress did in *Lassiter*.
        - Macdonald thinks that this view more or less reads § 5 out of the constitution.
    - The one-way ratchet—"§ 5 grants Congress no power to restrict, abrogate, or dilute these guarantess" (n35p193).
        - (This is a different one-way ratchet than the federalism one-way ratchet (which is the argument that the *states* can't dilute).)
        - Hypo: a "human life" bill, using § 5 power to define a fetus as a human "person" for am14 purposes.
            - Is this a strengthening or a dilution? Well, under *existing* law, there are no fetal rights. So, you'd be only *restricting* (i.e., women's rights).
- *Boerne* (1997) (p196)
    - Here, the Court goes back to the more restrictive view of § 5.
    - Macdonald says that itc. and *Smith* (1990) (p195 in text) (the peyote case) are cases that "only a conservative atheist could love."
        - The dissents itc. don't like *Smith*—and would have the Court revisit it in deciding itc.
    - (So, it looks like we're going back to *Marbury*.)

- The Court looks for "congruence" and "proportionality" between means and ends (recall that this same analysis is used in the am11 state sovereignty context).
    - Here, it says there's not enough of a national problem, and so congress doesn't have to power to respond to it.
    - If the "congruence" and "proportionality" test were to be replaced, what would be a good replacement?

Economic liberties

- There are three areas here:
    1. Substantive economic due process (am14; dead)
    2. The Contracts Clause (a1§16; only two cases)
    3. The Takings Clause (am4; *alive*)

Friday, February 4

- Has there been a double standard since 1937? Are economic rights treated as less important than other constitutional rights?
    - And, if so, is there a justificiation for this? (Macdonald suggests that one can be found in social contract theory.)
- Corporations as "persons" under am14 (not am14 "citizens," however).
    - Remember *Slaughterhouse*, too—which eliminated any force the am14 Privileges and Immunities Clause might have had. If that case hadn't happened, corporations would *not* have the bulk of am14 protection, since am14 P&I only protects "citizens."
- History of economic rights
    - (Note also the Commerce Clause jurisprudence and its history.)
    - Previously, the Court read laissez-faire capitalism and social darwinism into the constitution.
        - (Macdonald asks: is socialism/communism unconstitutional??)
    - The modern view can be found in Holmes's dissent in *Lochner* (1905) (p459): the constitution does *not* embody a particular economic theory.
        - (Doesn't the original intent of the am14 get perverted in *Lochner*? I.e., the "original intent" idea that *conservatives* are so enamored with?)
    - Three themes during the *Lochner* era:
        1. "Liberty" in am14 includes freedom of *contract*.
        2. Judicial activism (!! by conservatives), by way of putting the burden of proof on the government's ends and means.
        3. Heightened "means" scrutiny—rationality is not enough.
- Freedom of contract
    - *Lochner* (1905) (p456)
        - The Court holds that *both* parties have liberty in an employment

contract (!!!).
    - This is wrong, Macdonald notes, because employment contracts are usually *extremely* adhesive contracts. (See the modern change in *West Coast Hotel*, at ¶1p472: "their baragaining power is relatively weak.")

Tuesday, February 8

Substantive economic due process

- Again, the three *Lochner* era themes:
    1. Am14 "liberty includes freedom of contract
    2. (Right-wing) judicial activism
        - The ends/means analysis
            - E.g., the majority in *Lochner* appplies the ends/means analysis to the law in that case as if it were a *labor* law—and says that there wasn't even a legitimate *end* (i.e., labor laws aren't legitimate ends).
            - Compare Holmes's *Lochner* dissent, which says the law there was a *health* law.
                - Even so, the majority says that if it's a health law, then the *means* are not legitimate (although the end is). (But compare Harlan's dissent.)
            - (N.b.: the Brandeis brief (see *Muller* (p403)).)
    3. Means scrutiny—rationality is not enough.
        - Note, e.g., how the *Lochner* Court says the law there was "passed from other motives" (¶0p459).
            - What "other motives"?, Macdonald asks. Redistribution of wealth?? (I.e., an interference with social darwinism??)
- The transition out of the *Lochner* era
    - History:
        1. The Great Depression
            - About 16M unemployed in the U.S. With no bargaining power.
            - And so the laissez-faire ideas fade into the background.
        2. Politics: FDR and the court-packing plan
            - The switch: *West Coast Hotel* does for economic substantive due process jurisprudence what *Jones & Laughlin* did for Commerce Clause jurisprudence.
        3. Legal theory: the old formalism gives way to the new realism.
- *Carlone Products* (1938) (p473)
    - Famous footnote 4: perhaps the most famous footnote in american law, Macdonald says.
        - This is the genesis of the modern "double standard." The Court says:

"we're getting out of the business of economic regulation."

- *Lee Optical* (1955) (p475) and *Ferguson* (1963) (p476 in text)
  - Is this:
    - Desirable deference?
    - Judicial abdication?

    In whatever case, one of the results of these cases is *massive* lobbying of congress. You can get now get whatever bills you can afford, Macdonald says, and you don't have to worry about SCOTUS messing them up.
- *BMW* (1996) (p477) and *State Farm* (2003) (p155s)
  - Do these cases indicate that the Court is willing to revive economic substantive due process? Or are they just part of the modern "tort reform"?

Wednesday, February 9

[History of substantive economic due process:] Again, is this:

- Desirable deference to the legislature?, or
- Undesirable abdication by the courts?

What standard could you use if the courts *were* to be involved?

The Contracts Clause

- First of all, note that this clause gives *no* protection against the *federal* government.
- History
  - See ¶1p484—so, the K clause (maybe) mainly acts to prevent states from repudiating private *debts*.
- *Blaisdell* (1934) (p483)
  - The state here is trying to prevent farm foreclosures during the Depression—something that's very similar to what the original intent of the K clause was to prevent.
  - But, the Court marches strongly towards a "living constitution"—"a constitution intended to endure for ages to come [and] be adapted to the various crises of human affairs" (¶0p485).
  - The Court adopts a rational basis test for the K caluse—"the conditions [here] do not appear to be *unreasonable*" (¶#4p485).
    - Is this enough protection??
- *Allied Structural Steel* (1978) (p488)
  - This is the *only* case since *Blaisdell* to use the K caluse to say something is constitutional.
    - And... it hasn't been followed.
    - (Also, the issue here, about pensions, has been preempted, at the federal level, by ERISA.)

- The majority here basically says that this law fails the rational basis test (!!!): "the law was not even *purportedly* enacted to deal with a broad, generalized economic or social problem" (¶4p491).
    - How could the Court say this!!!!?, Macdonald asks.
- Brennan, dissenting, says that there's no impairment here, just an imposition of new obligations.
    - Is this an attempt at resurrecting susbstantive economic due proceed under a different name??

- *US Trust* (1977) (p493)
    - It is the government's *own* contract that's involved here (a security arrangement, here). So, the question becomes: to what extent should we allow *past* legislatures to bind *today's* legislature by using a contract?
        - Brennan, dissenting, argues that the state's police power is inalienable by contract.

Tuesday, February 15

The Takings Clause

- The Takings Clause is *the most* important property rights protection in the constitution as it's interpreted and applied.
- What is the Takings Clause supposed to do?
    - Well, it's loss spreading, for one thing.
- Four questions (p497)
    1. Is there a "taking"?
    2. Is it "property"?
    3. Is it for "public use"?
    4. Is "just compensation" paid?

Is there a "taking"?

- Two types of "takings"
    1. Possessory takings
    2. Regulatory takings
        - (What about, e.g., speed limit reductions, which put some trucking companies out of business? Ask: are they "normal," police power regulations, or are they "constructive eminent domain," "inverse condemnation" regulations?

- Possessory takings
    - *Loretto* (1982) (p499)
        - Here, the Court sets up a "per se," bright line rule. (Is that good?)
        - What was "taken" here? The parts of the building necessary to

run CATV wires—approximately one cubic foot of space (!).
- So, this *really is* a (extreme) per se rule.

- The dissent says that this is a "rigid per se takings rule"; a legal formalism. The dissent is concerned because there is no interest balancing here.

- Regulatory takings
  - *Pennsylvania Coal* (1922) (p501)
    - What's the "taking" here? Depriving Penn. Coal of a future profit opportunity.
    - What's the test? The "too far" test (!!!).
      - Is this a useful rule, at all? Isn't this just a statement of the problem—that we have a line-drawing problem?
    - N.b. Brandeis, dissenting (Brandeis was the Court's first jewish justice).
    - *Cf. Keystone* (1987) (p513 in text): the same deal, in a modern context.
  - *Schoene* (1928) (p503)
  - *Penn Central* (1978) (p505): here, the Court sets out a factor analysis.

Wednesday, February 16

- *Penn Central* (1978) (p505)
  - Factors:
    1. Economic impact of the regulation
    2. How much the regulation interfered with investment-backed expectations
    3. Character of the governmental action
  - Rehnquist, dissenting, wonders who should bear the costs here. (So, he's saying that the *interests* should be weighed—the owners versus the public.)
  - The majority develops a per se rule, more or less—the mere denial of the ability to exploit a property interest is *not* a "taking" (¶2p507).
    - Also note how the majority says that the law itc. doesn't interefere with the *present* uses of the property (¶4p507).
- *Lucas* (1992) (p508)
  - The Court adds to *Loretto* with a second categorical rule:
    1. The *Loretto* "invasion" test, or
    2. The new *Lucas* "all economic benefits" test.
       - "Where regulation denies all economically beneficial or productive use of land" (¶1p510).
  - So, after itc., can the government *ever* take away all economic

use of something without paying for it?
        - Well, it can, itc. suggests, if the proscribed uses weren't in the title to being with (¶1p511).
            - E.g., if the background, common law prohibited the use anyway. (So, is this *only* the limited circumstance where the government statutorizes a part of nuisance law?? And, if so, does this reach modern environmental laws—or is nuisance law frozen in time??)
- Zoning: arguably, zoning laws *never* take away *all* economic use. So, all that's left in attacking zoning laws are the usual procedural attacks.
- *Palazzolo* (2001) (p163s)
    - Procedural questions
        - Ripeness (p167): the government argues that the administrative process never ends—that this could *never* be ripe for court (!!).
            - The Court disagrees.
        - Standing: the title here was acquired *after* the regulation was enacted.
            - The Court says that a state can't grandfather in what would otherwise be "takings" (¶4p168).
    - Takings clause merits
        - A numerator/denominator problem: i.e., what percentage of the economic use was the owner deprived of here? This is important because *Lucas* seems to say that if it's 100%, then it's a per se taking.
- *Tahoe* (2002) (p171s)

Friday, February 18

[Skipped class.]

Tuesday, February 22

Is it "property"?
- IOLTA cases
    - Macdonald, as a legal realist, thinks that the real issue here is whether these legal services organizations should continue to exist. He notes that the Court's language is couched in hypertechnical, formalistic terms.
    - *Washington Legal Foundation* (1998) (p519): a 5–4 majority says that this is property.

- *Legal Foundation of Washington* (2003) (p182s): a 5–4 majority says that the property has no value, and so no compensation is due.
    - (Note that the Court assumes that the public use requirement is satisfied, itc. (¶0p184s).)
- N.b. that there's currently a case before the court that concerns whether a rent control law is a taking.
    - Isn't rent control like speed limits?, Macdonald asks.

"Just compensation"

- The basic rule is that you measure the compensation by the *owner's* loss (not the taker's gain) (¶1p526).

"Public use"

- *Midkiff* (1984) (p523)
    - N.b. also *Kelo* (pending before the Court): how is *Kelo* any different from the standard, road-building type takings?
    - N.b. *Berman* (1954) (¶5p524 in text)
        - (Is *Berman* on all fours with *Kelo*?)
    - The rule itc.: rational basis, only, is required. So, the Court is giving the lowest level of scrutiny to "public use" questions.
        - (This is effectively, of course, just separation of powers.)
- So, ultimately, with "public use," we're just trying to determine: WHO DECIDES??

Wednesday, February 23

Equal protection

- History
    - Note how there was *nothing* in the constitution about equal protection *until the Civil War*!!!! There weren't even any *pretenses* about white male dominancy!!
    - Then, the second constitutional "moment" begins—the Civil War until 1937.
    - But, even so, it wasn't until 1954, for blacks, and maybe not even *still*, for women, that there's been any force behind the text of the Equal Protection clause.
        - So, Macdonald asks, are we really concerned with equality??
    - *Brown* (1954) (p527x): was this judicial activism? Well, at the time, it was definitely *activism*.
        - (Note that Rehnquist, then a clerk for Jackson, wrote a memo to Jackson arguing for a *Plessy* analysis (!).)

Bolling (1954) (p527x): reverse incorporation—am14 applies to the *federal* government, through the am5 Due Process clause.

- Analytical framework for Equal Protection (from Chemerinksy):
    1. Classification
        - Consider, e.g., the hypo at ¶0p529 where there's law that requires all police officers to be at least 5'10" tall and 150 lbs.
            - Ask—should this law be analyzed based on its real world impact (exclusion of women), or it's legislative intent??
                - The current Equal Protection jurisprudence *ignores* the result and impact. It focuses, instead, on intent (of the legistlators). See *Feeney* (1979) (p596) and *Davis* (1976) (n5p529).
                - But, of course, the legislative intent is always going to be lawyered.
                    - (However, n.b. a kind of "res ipsa loquitur" phenomenon, where an impact can be *so* egregious that it indicates an unpermitted intent.)
    2. Level of scrutiny
        - Which depends (in part, at least) on the classification.
            - (But then the level of scrutiny leads directly to the result, often (!!!).)

Friday, February 25

- Macdonald's intent/impact hypo matrix:

    Requirements for being:

an attorney:	pass the bar	vs.	be male
a driver:	be 16 y.o. and pass a test	vs.	be white
on welfare:	have less than $20K in gross income	vs.	don't be a bastard

    What differences are there in these requirements?
        - Mutability
        - Rational relation of ends and means

- Note, again, how:
    - The classification...
    - determines the level of scrutiny...
    - determines the result!!!

    So, does the classification really determine the result, like this? I.e., it this whole

Equal Protection jurisprudence simpler than the Court makes it look?

Rational basis review

- The question at base here is: how much deference should the Court give to the legislature?
    - (Judicial activism—keep in mind that very, very few laws are ever "actively" reviewed by the judiciary. Way less than 1%, says Macdonald.)
- Will rational basis review ever result in a finding of unconstitutionality? Well, it's rare, but it happens—see *Cleburne* and *Romer*, e.g. (¶2p534).
    - But, in those cases waas the Court *really* using rational basis review, or was it secretly (tacitly) using some higher level of review? (And, if so, why would the Court disguise its level of review??)
- The process of analysis:
    1. Legitimate purpose
        - *Romer* (1996) (p535)
            - What's the end here, according to the state? The preservation of the property owners' rights (e.g., to discriminate).
                - (Note the *Fritz* problem here—do we look at the "actual" or the invented purpose?)
                - (Or, for that matter, don't we, "the people," have a right to be irrational??)
            - Note the "special rights" argument made by the dissenters (¶6p536).
                - (Macdonald calls this a "redneck" argument.)
            - The Court actually says that the true end of the law was only *animus* (!).
                - (Macdonald says that anyone who was in Colorado at the time would know that this assessment was accurate.)

Tuesday, March 1

- [*Romer*:] But, how often is there anything *other* than animus at work with a discriminatory law? I.e., are all, or nearly all, purposes just pretexts, when there's a discriminatory impact??
- N.b., too, how the Court here says that the discrimination in *Romer* is a "*literal*" (!!!) violation of the Equal Protection clause (¶5p237).
    - *Cf. Moreno* (¶3p551), about hippies. That case kind of foreshadows the animus rationale here.
- How will this "animus" rationale play out in review of the marriage amendments? (Or, will the Court avoid

touching those amendments, like it did with the pledge case??)
        - Scalia's dissent:
            - (Macdonald says that Scalia's dissents are much, much more injudicious than his opinions for the Court.)
            - Macdonald also characterizes this dissent as a "legal zero"; especially since it's based on *Bowers* (1986), which has been overruled since *Romer*.
    - "Conceivable" purposes
        - *Fritz* (1980) (p540)
            - Here, Congress created a pretty convoluted system of classification—but gave no real rationale for that system.
            - Itc. is a paradigm example of judicial restraint (in the form of deference to the legislature).
                - But—what's *really* being deferred to, here? See Brennan's dissent: the Court is deferring to a collective bargaining agreement that's been codified by our "pristine" and "virginal" (Macdonald's terms) legislative process.

2. Under- and over-inclusiveness
    - N.b. that perfect fits are pretty much impossible.

Wednesday, March 2

- *Railway Express* (1949) (p544)
    - What's the state *purpose* here? To prevent visual distractions to drivers.
    - What's the *means*? No advertisements allowed on your vehicle unless they're for your company.
        - So, this is grossly underinclusive—especially in Manhattan.
    - The Court suggests a "one step at a time" rationale—the state shouldn't be forced to develop comprehensive statutory schemes all at once. That is, this is not "all or nothing."
- *Beazer* (1979) (p546)
    - Methadone discrimination: this is a classic example of overinclusiveness, because the law covers *all* users.
        - Note that there's a little uninclusiveness here, too—the law does not cover alcoholics, e.g.
    - (State purpose? Safety.)
    - What's worse—under- or over-??
        - In either case, rational basis review is very tolerant of both.
    - N.b. Jackson's argument at ¶6p545: if the law goes there, it

needs to go there *equally*.
- *Moreno* (1973) (p551)
  - Both under- and over-, here. So egregiously, in fact, that the Court says it's irrational.
- *Cleburne* (1985) (p553)

Race classifications

- What about the Declaration of Independence? That was 1776, and it took us to 1954?!!
  - Is our early history just blatant hypocrisy?
    - If so, can we analogize this to the concept of original sin?
    - The practical argument is that this was a necessary compromise (with the southern states).

Dred Scott (1856) (p558)
- This is the poster boy (Macdonald says) for this early-period hypocrisy. This is pretty much considered the *worst* Court decision ever. (And may argue that this decision helped in large part to precipitate the war.)
- The holding (¶2p560): to have standing in a federal court sitting in diversity, you much be a "citizen"; and Dred Scott is not a citizen. So, the courts have no jurisdiction.
  - But—the Court goes on to make more rulings (are these dicta?):
    1. If the Court could rule here, it would say Scott's freedom amounted to a taking (!!!!!).
    2. The Court strikes down the Missouri Compromise.

Friday, March 4

- What about "original intent," considering itc.?
  - Is "original intent" a good idea? Here, we see it leading to "unmitigated evil." Doe "original intent" mean the U.S. should forever think like the slaveowning framers?!!
- The northern states: they weren't pristine either, n.b.
  - E.g., separate but equal; which was upheld in *Plessy*, and was not overturned until *Brown* (1954 (!!!)).
- Does our race history still matter?
  - (How much) have we improved?
    - 33% of all black children today are born into poverty.
    - All black age groups have higher mortality rates than whites.

    Things like this didn't just happen—they are "badges" of slavery (says Macdonald).

Are we "condemned to repeat" our racial history?

Strict scrutiny

1. History
2. Politicial powerlessness
    - E.g., *Carolene Products*.
    - The Court will step in as a sort of "proxy" for the under-empowered group.
3. Immutable traits

Given these ideas, is strict scrutiny enough? Should we just have per se illegality in these cases? (But, then, what would happen to affirmative action? Well, it would be outlawed. (N.b., *Grutter*.))

- Two kinds of racial classifications:
    1. Facial
    2. Neutral ("hidden")

Tuesday, March 8

Facial racial classifications

- *Korematsu* (1944) (p564)
    - N.b. *Strauder* (p564x): the Court had language to overrule facial racial classifications going back to 1879!!!
    - Did the Court here fail its essential role of upholding the Constitution in times of crisis? Or is this necessary deference to the military during war?
        - Were there good reasons to single out Japanese-Americans? Well, apparently there were credible sightings of Japanese threats on the west coast.
    - Note how Black (!) wrote the majority opinion. And other liberal justices concurred with it (But see Murphy's dissent.)
        - Compare Jackson's dissent.
    - Today? Are the courts wrong in not going along with the executive's insistence that "terrorists" be denied due process?

Racial classifications burdening both whites and minorities

- *Loving* (1967) (p569)
    - Is disciminatory impact required? Or is a disciminatory purpose enough?

- N.b. *Palmer* (1971) (p594), which seems to say that purpose is irrelevant if there's no impact. (But is that consistent with *Loving*?)
- Would a *better* rationale for itc. be that this law is simply violative of the *fundamental right* of marriage?
  - And, just generally, which is better thinking in these kinds of cases—fundamental rights or equal protection??
- *Palmore* (1984) (p571)
  - What analysis for the same-race adoption preference after itc.?

Wednesday, March 9

Facial racial classifications (again)

- Taxonomy:
  1. Disadvantage minorities
  2. Affect both whites *and* minorities
  3. **Require separation**
- Classifications that require separation
  - History
    - Reconstruction (see ¶2p572)
    - *Plessy* (1896) (p573)
      - What's the rationale here? That am14 Equal Protection couldn't have been aimed at *social* discrimination—only political discrimination.
      - N.b. Harlan's dissent.
    - The Civil Rights movement
      - The legal strategy: initially, the focus wasn't on "separate," but on "equal": trying to force the states to make separate facilities equal (see pp575-76).
        - By 1953, there was a majority on the Court that was willilng to go for the "equal" solution (¶1p577).
      - Then, the death of Vinson and the subsequent ascendance of Warren (¶2p577).

Brown (1954) (p577)

- Rationale: itc. was based on the social sciences.
  - This is still bothersome to some:
    - Should we be using the social sciences to make caselaw??
    - Modern studies: many of them disagree with the authorities that the Court relied on itc.

- After itc., the Court used itc. to strike down segregation in a variety of contexts (see ¶3p580).

Tuesday, March 22

Facially neutral racial classifications

- Discriminatory impact
  - *Davis* (1976) (p581)
    - What if this had been a *physical fitness* test? Wouldn't it have then resulted in the hiring of mostly blacks??!!
  - N.b., powder vs. crack cocaine: the penalties for crack can be up to 100 times harsher than the penalties for powder.
  - *McCleskey* (1987) (p584): about death penalty disparaties.
  - The Court has held in all of these cases that discriminatory impact is *not* enough. You have to demonstrate discriminatory purpose as well.
    - (Federal statutes, though, can make impact enough.)
    - Why not?? Why shouldn't impact be enough?
      - See pp589-90.
      - Arguments that impact should not be enough:
        - The purpose of the Equal Protection clause is to prevent discriminatory governmental *motives*.
        - A slippery slope argument: if impact is enough, then way too many laws would be vulnerable.
          - Macdonald thinks this argument is "we can't go *too* far in eliminating discrimination!" But look at the statistics in *Cooper*—hardly much has changed one decade after *Brown*.
      - Arguments that impact should be enough:
        - A lot of racism is subconcious—so there's never going to be a smoking "intent" gun.
        - Laurence Tribe's argument: that Equal Protection is not meant to end impure thoughts, but "to guarantee a full measure of human dignity for all" (¶1p590).
  - If impact is not enough, alone, is *purpose* enough by itself? I.e., do you have to show both impact *and* purpose?
    - *Palmer* (1971) (p594)
      - Macdonald thinks itc. is fucking "insane."

Wednesday, March 23

- Proving discriminatory purpose
  - Cf. other areas of law that address intent:
    - Tort: foreseeability
    - Criminal law: which requires a *desire* to bring about the circumstances (mens rea).

    Which of these is better in the Equal Protection context? (Well, what are we trying to do??)
  - *Feeney* (1979) (p596)
    - Itc. sets out a full smoking gun requirement.
      - Macdonald asks: isn't itc. complete license for legislatures to enact laws in (blatant) spite of *knowing* those laws will hurt minorities?
  - *Arlington Heights* (1977) (p597)
    - The Court lays out three possibilities:
      1. *Yick Wo* / *Gomillion* test: a "res ipsa loquitur" type of test.
      2. Historical background test: another "res ipsa" type of test.
         - N.b. the James Meredith case—an example of this "historical background."
      3. Legislative / administrative history

      Are *any* of these realistic ways of proving discrimination??
    - Still though, *even if* you can show the purpose, *all you get is a burden shift*!!! (n80p599).
  - Peremptory challenges cases
    - N.b. there's an unresolved issue in this area—whether *Batson* applies to peremptories based on religion (why wouldn't it??, Macdonald asks).
    - Three-step analysis here:
      1. Prima facie case
      2. Burden shift
      3. Analysis

- Remedies in the school segregation cases
  - *Brown II* (1955) (p602)
    - The Court here says that in constructing remedies the courts should be guided by equitable principles.

Friday, March 25

- [*Brown II*:] why do these remedies slowly?, Macdonald asks. Why not do them *right away—tomorrow*??
- The reality today: ¶0p606.
  - Did the courts chicken out? Or do these statistics simply indicate the limits of the law?
- *Swann* (1971) (p606)

Affirmative action

- Chemerinsky says that nothing in constitutional law is more controversial than this (¶5p615).
  - Is he right?? Macdonald suggests that there are very few today that are even *interested* in affirmative action—basically only universities are.
- Level of scrutiny?
  - It's the same as old-style racial classifications.
  - Arguments:
    - For strict scrutiny:
      1. Color-blindness
      2. Stigma of affirmative action (tokenism)
      3. The law should look at *individual* merit, rather than group merit.
    - For intermediate scrutiny:
      1. Give these groups a leg up, at last
      2. To get anything done in this area, we've got to use a lower level of scrutiny
      3. Value of "diversity"
- *Bakke* (1978) (p616)
  - N.b. that there's no majority here on the appropriate level of scrutiny.
    - But—
      - A 5-4 majority says *no quotas*.
      - Another 5-4 majority says race *can* be a *factor*.

Tuesday, March 29

- History of the affirmative action debate
  - *Bakke* (1978) (p616)
  - *Fullilove* (1980) (p624x): the "end" of remedying past wrongs is okay.
  - *Wygant* (1986) (p624x)
    - The "means" of bustin a seniority system is *not* okay.
    - Also, as far as "ends," remedying a *general* societal problem isn't enough.
    - The Court rejects the "role model" justification for affirmative action

itc.
    - *Paradise* (1987) (p624x): the only case where a court actually came in an *created* an affirmative action program (in all other cases, the programs were created by other branches of government).
    - *Croson* (1989) (p625)
        - Court applies strict scrutiny to state/local affirmative action programs.
        - N.b. the dissents itc. by a liberal minority that is now *gone*.
            - Note especially the idea in the dissents that it is *wishful thinking* that a color-blind approach can work.
    - *Metro Broadcasting* (1990) (p633x)
        - The facts here are like *Croson*, except that the program was set up by *Congress*—the majority says that congressional AA programs are entitled to more deference.
    - *Adarand* (1995) (p633)
        - The Court overrules *Metro Broadcasting*—congress gets no special deference when it comes to AA. Everyone gets the same strict scrutiny.
- AA in higher education
    - *Grutter* (2003) (p189p)
        - (Involving a law school.)
        - The Court accepts "diversity" as a compelling state interest.

Wednesday, March 30

    - *Grutter* and *Gratz*
        - *Grutter*, in the law school context, where race was a "plus factor," was an okay AA program.
        - *Gratz*, in the undergrad context, where race got you an automatic 20 points, was unconstitutional as an AA program.
- What about outside the higher education context, now?
    - Is "diversity" a compelling state interest?
        - Well, we know, from *Croson*, that it's apparently *not* when it comes to contracting and employment set-aside programs.
    - What about AA programs for women?....

Gender classifications

- Note the statistics on p641.
- Is there any legal rationale for this kind of ongoing discrimination?
    - Childbearing??
    - ??
- [Lots of broad and general discussion about gender discrimination. Very little constitutional law.]

Friday, April 1

[Missed class—*Law Review* symposium in Boise.]

Monday, April 4

Craig (1976) (p647)

- We've got three levels of scrutiny, of course, but it's not very clear what's supposed to happen under intermediate scrutiny:
  - "Substantially related" standard
  - Burden of proof?

  Rehnquist, dissenting, says that these standards are too "diaphonous" (Macdonald agrees, but with nothing else in this dissent).

  So, what we have here, Macdonald thinks, is a compromise. Even so, intermediate scrutiny does make the jurisprudence more flexible.

Virginia (1996) (p650)

- N.b. Scalia's dissent—a solo dissent of *over 37 pages*—where he seems to be arguing for tradition for the sake of tradition (is that his only argument?, Macdonald asks).
- The bottom line itc. is that there can be no male-only education, even in the military school context.
  - What about the possible value of same-gender education? Well, those arguments are losing out to the arguments against it.
- Note that in this dissent Scalia says that the majority opinion "drastically revises" the sex-based classifications standards—what *does* itc. do?
  - Note how the Court reviews that *actual purposes* of the law here (!!).
  - What bothers Scalia is the "exceedingly persuasive justification" language (which doesen't actually originate in this case; it comes from *Hogan* (1982) (p660)) and the "skeptical scrutiny" idea.
    - Does this mean strict scrutiny? Or is this something new altogether? In whatever case, under this standard can anyone predict future decisions?

- How to prove gender discrimination
  - Well, we have the same structure, at least, that we had with racial discrimination analysis:
    - Facially discriminatory laws
    - Facially neutral laws
  - *Geduldig* (1974) (p655): one of the "stupidest" decisions ever, Macdonald says.

Tuesday, April 5

- Why intermediate scrutiny for gender, while strict scrutiny for race? Are there any legal or normative justifications for this? And, if there are, do they stem from descriptive (i.e., the descriptive differences between men and women) justifications?

Orr (1979) (p658)
- This case is about alimony.
- N.b. stereotypes versus *real* differences.

Hogan (1982) (p660): about males in nursing school.

Michael M. (1981) (p663)
- A 5-4 decision, about statutory rape law. (Macdonald asks, should we even have statutory rape laws?)
- How could we draft a *better* law? Because, Macdonald says, statutory rape is both gender- and age-discriminatory.

Wednesday, April 6

- Affirmative action for women
  - *Michael M.* (1981) (p663): [lots of class discussion about policy matters wrt. statutory rape laws]
  - *Rostker* (1981) (p666)
    - Here, a stereotype-based classification is upheld.
    - Arguably, though, this isn't an Equal Protection case at all—rather, it's a separation of powers case.

- Remedies for past discrimination
  - *Califano* (1977) (p669)
  - *Nguyen* (2001) (p226p)
    - What idea supposedly justifies the different treatment here? Well, that we can be certain about maternity, but not so much about paternity. (But what about DNA, nowadays?!!!)
    - N.b. ¶1p231p: the difference between men and women wrt. the birth process is a *real* one, the Court says.

Alienage classifications

- Note that we've got two distinct groups here: legal aliens and illegal aliens.
- N.b. am14 EqP Clause itself: where it says "persons," not "citizens."

Thursday, April 7

[Missed class—ABA committee meeting]

Tuesday, April 12

Fundamental rights

Griswold (1965) (p730)

- Social contract theory, that Macdonald has—that certain rights are just never given over to the government in the first place.
  - N.b. the am9.
- N.b. ¶5p732: Goldberg, concurring in *Griswold*, says that if we give these rights over to the states to do whatever they want with, then what's to say that the states couldn't, say, require abortion? How would a pro-lifer respond, Macdonald asks.

[Abortion: policy discussion, mainly about (1) when life begins and (2) who decides.]

Wednesday, April 13

[More class discussion about abortion policy.]

Friday, April 15

- Privacy
  - *Griswold* (1965) (p730)
    - Harlan II, concurring (p733), and White, concurring (p733): they focus on "liberty" from the text.
      - Does this approach allow for too much judicial "activism"? Does it make "liberty" mean "license"?
        - Well, maybe it might look that way, but how many fundmental rights have been recognized since *Griswold*? Is it just abortion and that's all?
    - The dissents: do they want a "Trojan police" (¶4p731)? If so, what authority would the federal or state/local governments have to actually field a "Trojan police" force?

- Marriage
  - *Loving* (1967) (p701): [again]

- *Zablocki* (1978) (p702)
    - Here, we have an attempted legal restraint on marriage—a man had to prove that he had no children from a previous marriage with child support problems.
    - The Court says that the right to marry is fundamental to "*all*" individuals (¶2p703).
        - What does this say, then, about gay marriage?
- What about the marriage "tax penalty"? Is this an "infringement" (see Chemerinsky's second question in the fundamental rights analysis) on a fundamental right?
- What about HIV teests required for a marriage license?
    - Is there a compelling governement interest?
    - If so, is this a narrowly tailored enough means? In the modern world?

- Custody of your own children
    - *Michael H.* (1989) (p709)
        - N.b. Brennan, dissenting, who lays out the rule of itc. fairly clearly, at ¶1p715.
        - Scalia's "most specific level" approach: fn23p712—Scalia doesn't want to "expand" the fundamental right to marriage.

Tuesday, April 19

- The right to keep the family together
    - *Moore* (1977) (p715)
        - "Who decides" who we can live with?
            - *Belle Terre*: upholding what were plainly and simply anti-hippy laws (Macdonald says).

- The right of parents to control their children's upbringing
    - *Meyer* (1923) (p719) and *Pierce* (1925) (p720)
    - What about immunizations and transfusions, wrt. parents who object to them for their children?
    - Grandparent's rights?
        - *Troxel* (2000) (p722)
            - Does itc. say that parents' rights trump grandparents' rights, always? Or is it just that this statute was too broad? (See ¶4p723).

Wednesday, April 20

Eisenstadt (1972) (p736)

- *Griswold* told us that the privacy right extends to married couples. Itc. extends, then, access to contraception to everyone.
    - Otherwise, wouldn't there be an Equal Protection problem? And possibly a substantive due process problem, too?
- This case is also important as a logical precursor to the *Roe* and *Casey* decisions.
    - (Or is it really? That is, is this case just an outlier?)

- [Policy discussions: the spectrum between contraception and infanticide]
    - In 1973, we have five possible directions the Court could go in:
        1. Life begins at conception
        2. Leave it all to the states
        3. Equal Protection
        4. *Roe*
        5. 100% private, moral choice

Roe (1973) (p739)
- N.b. *Roe*'s trimester scheme (p744), which is now obsolete after *Casey*.

Casey (1992) (p747)
- What does itc. do? It establishes an "undue burden" test.
    - What difference does this make?
        - Is "undue burden" too vague? Too vague to stay put over time?
        - Most commentators see itc. as a nod to the pro-life camp. N.b. Blackmun's dissent (p754).
- N.b. that the opinion for the Court here is jointly penned—this is very rare.
- Itc. leaves a bunch of questions open: again—is the "undue burden" test analytically coherent? Or does it just end up being a pick and choose kind of thing?

Friday, April 22

- *Casey*'s undue burden test
    - A waiting period is okay, the Court says.
    - But spousal notification is not.

  Again—is this test too fuzzy?
    - And aren't all these things *intended* to interfere with women getting abortions, anyhow?, Macdonald asks.

- N.b., no "putative father" rights (p775).

- Partial-birth abortion

- *Stenberg* (2000) (p759)
    - O'Connor, concurring, sets out what a valid partial-birth abortion band statute would look like. Why haven't the red states passed such a thing, then? Could it be that the pro-life politicians want to sustain the illusion of struggle, to maximize the success of their fundraising and organizing??

- Government funding for abortion
    - See p773. Macdonald likes Brennan's dissent in *Maher*, at p733.

- The right to die
    - *Cruzan* (1990) (p785)
        - This is the living will case.
        - The end result itc. is that there *is* a right to refuse medical treatment.
            - But, at bottom, this is just an evidence case—the Court holds that a "clear and convincing" evidence requirement is permissible (¶1p790).

Tuesday, April 26

- Where might the Court go next—what's the next fundamental right to be recognized?

- The right to die (again)
    - The state of the law: at least for compos mentis adults, there's a right to refuse medical treatment.
        - (Is this just an expression of the common law tradition of bodily rights?)
    - But, what if you've got an adult who is *not* compos mentis?
        - Then, the state can have an evidence rule (see, generally, living wills and *Cruzan*).
        - But what should the default rule be? Appoing a guardian ad litem?? Or what??
    - Assisted suicide
        - *Vacco* (1997) (p797)
            - Here, the Equal Protection argument is advanced, and the Court rejects it, saying that the person wanting assistance in suicide is not similarly situated to the terminal patient who wants to plug pulled.
        - *Glucksberg* (1997) (p792)
            - Here, in this companion case to *Vacco*, the fundamental rights argument is advanced, and the Court rejects it, too.
                - So, do we just leave this one to the states? *Cf.* medicinal pot, gay marriage.

Wednesday, April 27

- Sexual orientation rights
  - *Bowers* (1986) (p799)
    - N.b. Powell, concurring. Later, in his memoirs, Powell said that he had was wrong (noting that he had met some gay people). And he was the fifth vote in this 5-4 decision.
  - *Lawrence* (2003) (p235p)
    - Expressly overrules *Bowers*.
    - There is no legitimate state interest here, the Court says.
      - *Cf. Romer*.
      - So, you don't even have to worry about level or scrutiny, because without a legitimate state interest out there, you can't even survive rational basis review.

Friday, April 29

- Right to control over information
  - N.b. government versus private data banks: it's *all* just information—so can you really draw a meaningful distinction between these two??
  - There's not much law in this area yet—but what there is doesn't show much support for rights here (see ¶0p809).
  - *Whalen* (1977) (p806)
    - Here, there's a built-in statutory protection (a penalty) against disclosure.
    - What if the Court had focused on the collection of the names in the first place (rather than the risk of disclosure)?
      - What privacy interest do you have in your legal drug use?
      - What about the criminal procedure, am4 angle?
    - What about other databases?
      - DNA
      - HIV
      - sexual orientation
      - religion
      - movie rentals
      - websites visited
      - etc.

Other topics

- Here's some topics we didn't cover:
  - Other fundamental rights
    - Travel

    - Vote
    - Court access
    - Education
- Procedural due process
    - The test:
        1. Was there a deprivation?
        2. What process is due?
            * See *Mathews* (p888): employing a three-factor analysis.