Con Law:

Separation of Powers, Federalism, and 14th Amendment

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-KJW

Constitutional Interpretation

*"**Indeterminacy**' means multiple plausible interpretations. The indeterminacy of the Constitution is the whole point of this course."* –TBN

Sources of Constitutional Interpretation

Primary

- History/Original Intent
  - Federalist Papers, Minutes from Constitutional Convention, History Generally (Soft v. Hard –*McCulloch*)
- Text of the Constitution
  - Normal Textual Interpretation
- Structure of the Constitution
  - SoP, Federalism, gov't of limited powers, and other pre-commitments.
- Values in the Constitution
  - "We must never forget that it is a constitution we are expounding"
  - Limited, divided Gov't, enumerated powers, result of compromise

Secondary

- Precedent
  - Seems to get more weight over time

Judicial Role of Interpretation (See Judicial Review)

The process of interpretation, under the shadow of indeterminacy, will necessarily be colored by the Justice, his background, his era, and the evolving culture of the country (and his take on that evolution).

Problems with Judicial Review:

- Anti-majoritarian: Judicial Review allows courts to keep the People from deciding
- Temporal Difficulty (Dead Hand Problem): Judicial Review permits 1787 Constitution to overrule will of current majority

Responses to the Problems:

- Not anti-majoritarian, judges just interpret the Constitution, the People's supreme law.
  - It is a fiction that the Constitution is will of the People; it was ratified by exclusive group
- Legislature itself is not quite democratic, not directly representative and are captured by special interests
  - Small groups can organize better than large group (this helps interest groups)
- Anti-majoritarian virtue, judges are best interpreters in an imperfect system, sometime we need to protect against majorities
- **NB**: Judges can limit itself through doctrinal conventions. The tiered (scrutiny) system is just an attempt by the Court to bind and limit itself.

Constitutional Structure

"This government is acknowledged by all to be one of enumerated powers."

Four Major Functions of the Constitution

1. Establish Nat'l Gov't (Replace Arts of Confed.)
2. Divide Power (SoP)
3. Allocate Powers between State and Nat'l Gov't's (Federalism)
4. Limit Gov't Power (Individual Rights: BoR, Reconstruction Amends)

Popular Sovereignty – "We the People . . ."

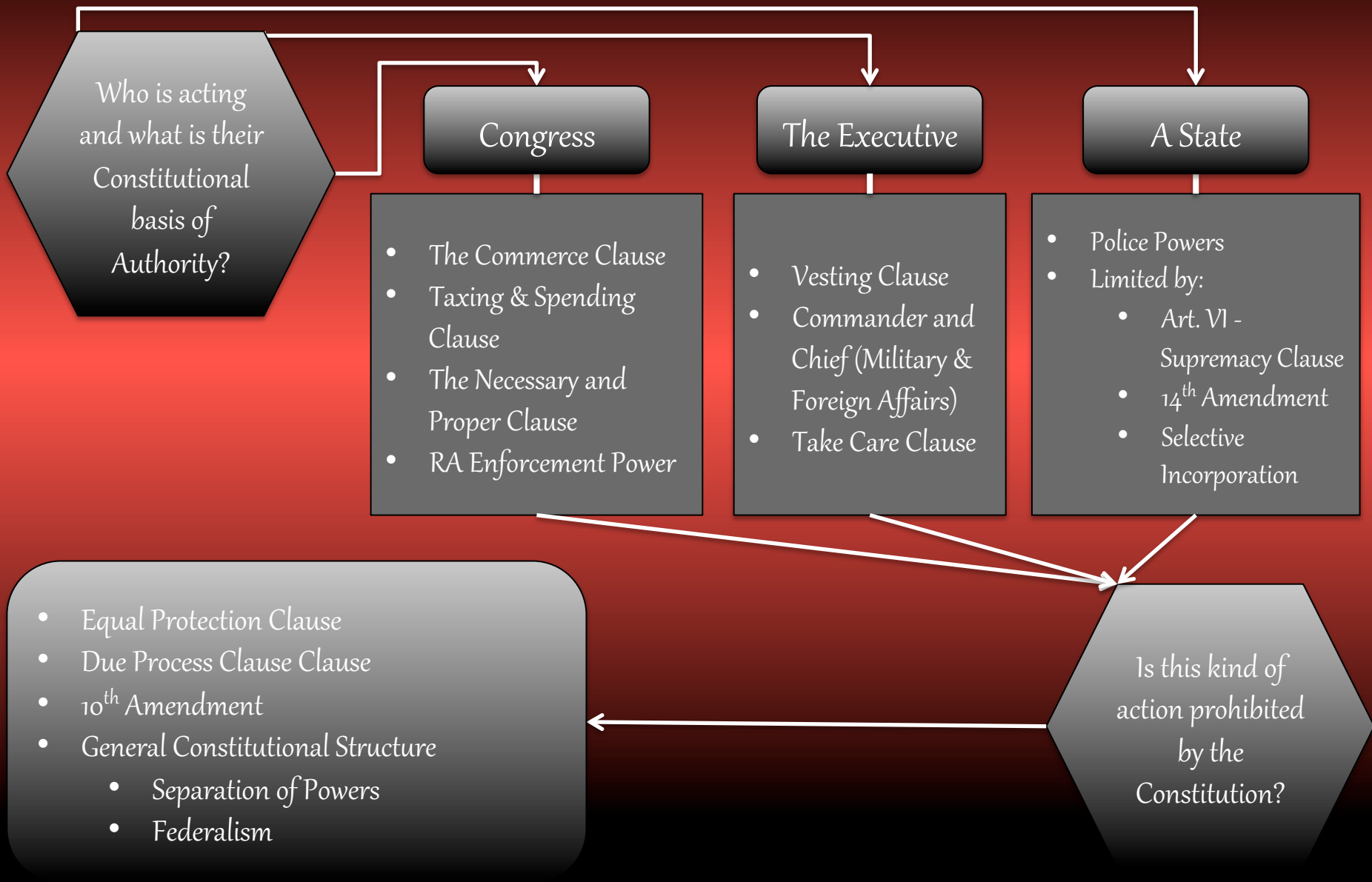
Madison: Greatest concern in a democracy was control by factions (self-interest). He wanted a large, non-parochial gov't with limited and divided powers (and he got it – See Fed. 10)

Jefferson: Greatest concern was despotic gov't. He wanted small scale, participatory democracy granting local gov't and "a little rebellion now and then."

The U.S. Constitution:

Art. I: Legislative Branch; (see Express and Implied Powers)
Art. II: Executive Branch; (see Executive Powers)
Art. III: Judicial Branch; (see Judicial Review)
Art. V: Amendment Process
Art. VI: Supremacy Clause
1st Amend: Speech, Religion
2d Amend: Bear arms
3d Amend: Quartering of Soldiers
4th Amend: Search and Seizures
5th Amend: Due Process (SDP, EP via Rev. Incorp.), Takings
6th Amend: Speedy Trial, Impartial Jury
7th Amend: Civil Jury
8th Amend: Cruel and Unusual Punishment
9th Amend: Unremunerated Rights (See SDP)
10th Amend: Reserved Powers (to States)
13-15th Amends: Reconst. Amends (Abolished Slavery, Citizenship, DP, P&I, EP, Race/Vote)
19th and 26th Amend: Suffrage (Sex and Age Respectively)

Master Flow-Chart



Judicial Review

"It is emphatically the province and duty of the judicial department **to say what the law is**."

Introduction:

Judicial Review is the power of the judiciary to review actions of the Gov't for constitutionality. It is the means of ensuring enforcement of the limitations imposed by the people, through the Constitution on the Gov't. It establishes the Judge as the authoritative interpreter of the Constitution. As such, the cases that follow establish the Federal Judiciary's constitutional supremacy over the fed legislature, the State Courts, and, finally, over all other gov't actors.

Cases:

- *Marbury v. Madison*: Review of Fed Legislation
- *Martin v. Hunter's Lessee*: Judicial Exclusivity
- *Cooper v. Aaron*: Question of Judicial Supremacy

Marbury v. Madison:

Chief Justice Marshall established Judicial Review of federal legislation, creating a powerful constitutional role for the judiciary. This made the judiciary a ***co-equal branch of gov't***. As the authoritative interpreter, the judge is bound to interpret the Constitution as laid out in slide 2.

Martin v. Hunter's Lessee:

SCOTUS reviewed VA SCt's interpretation of a fed law. VA Ct claims not bound by the Court b/c States are co-equal sovereigns w/ the Fed gov't. Story, J. held that Art. III gives the Court power over all cases arising under the Const./laws of the US and that the Supremacy Clause binds all state judges. In Essence, He rejected co-equal sovereignty and established Federal Judicial Exclusivity.

Cooper v. Aaron:

Case was about ordering integration. Laid to rest the question of departmentalism; established Judicial Supremacy in interpretation of the Constitution: "[Marbury] declared . . . the federal judiciary is supreme in exposition of the . . . Constitution."

Political Question:

Where Federal Court has jurisdiction and could rule on constitutional question, but will not; matter left to political process. Judicially-Created Doctrine—pragmatic and discretionary; controversial; seldom used today.

Baker v. Carr (1962) Established Test:

- Textual commitment of issue to coordinate branch of Gov't
- Lack of judicially manageable standards for resolving issue
- Impossibility of resolving w/o initial policy determinations or w/o expression of disrespect for coordinate branch

Powers of Congress: Implied Powers

"[T]he question respecting the extent of the powers actually granted is perpetually arising . . . ."

Introduction:

McCulloch established that, though the Constitution established a gov't of limited powers, that gov't is supreme in its sphere. The Necessary and Proper Clause is an example of implied powers. *McCulloch* noted the N&P gave Congress the "ample means" to execute its enumerated powers. *Sebelius* reminded us that those ample means do not include creating the "necessary predicate" for the exercise of an enumerated power, but rather, must be incidental to it.

Cases:

- *McCulloch v. Maryland*: N&P as an Implied Power
- *NFIB v. Sebelius*: Incidental to Enumerated Power

McCulloch v. Maryland:

Maryland was attempting to tax the Bank of the US. The case concerned whether a state could tax the bank, and thus the federal government (no) and was the bank constitutional (yes). Marshall, C.J. Famously noted that the N&P clause was placed in the Art. I, Sec. 8 powers, thus augmenting the enumerated powers, not limiting them. He also made clear that necessary, here, meant something more like convenient, or a means to an end, than essential. This has remained with the N&P jurisprudence.

NFIB v. Sebelius:

In the Healthcare Case, Roberts, C.J. found that the N&P clause could not be used to uphold the law because there was no CC jurisdiction, so to speak. The N&P powers assist Congress in the exercise of its enumerated powers where they already apply but it cannot be used to create jurisdiction.

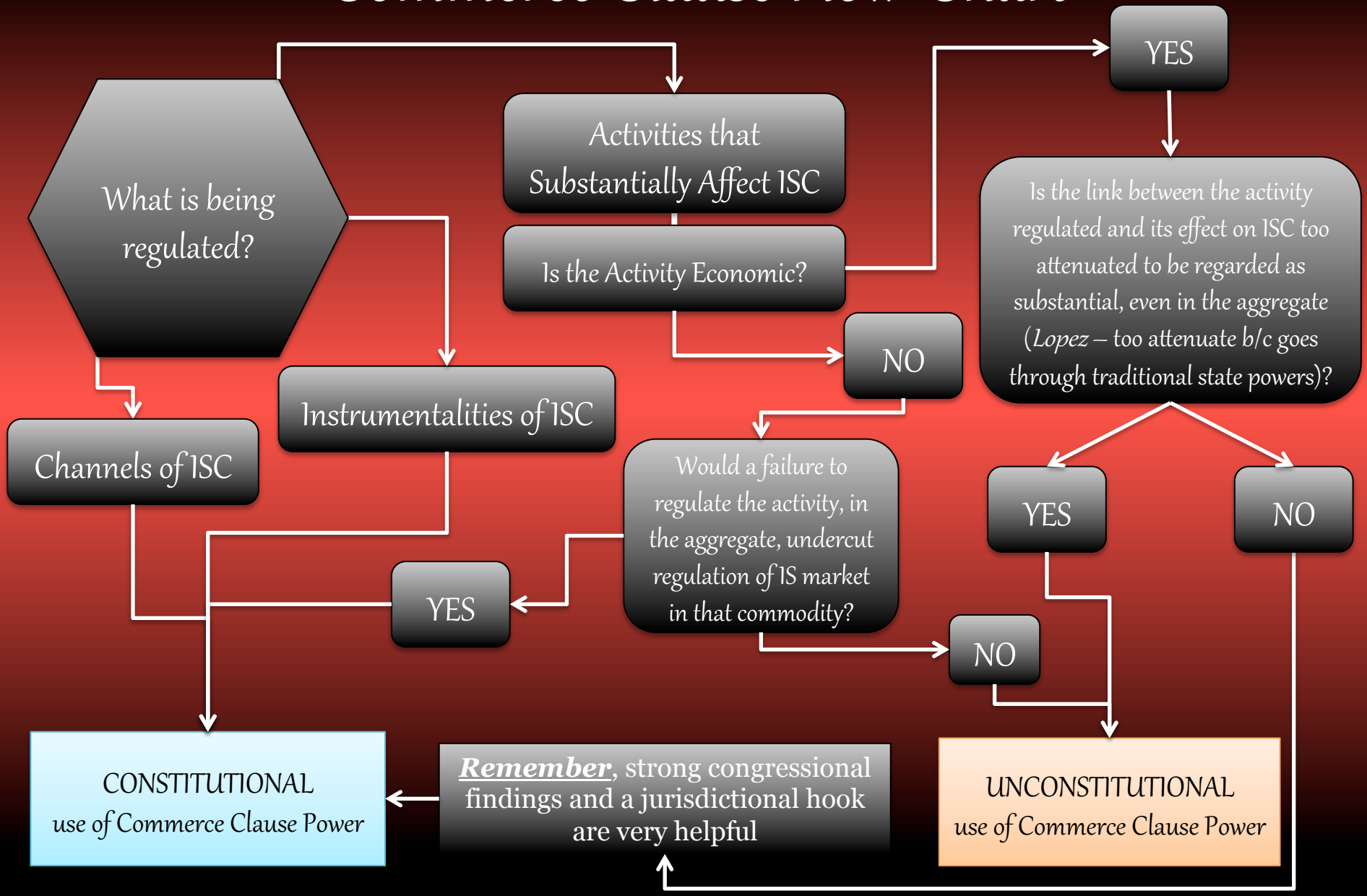
Conclusion – The Standard:

Absent a (1) pretext or (2) an express constitutional prohibition, *McCulloch* established the standard of review for Congressional Action:

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional."

With this standard, Congress has not only broad powers but much space in which to exercise them.

Commerce Clause Flow-Chart



Powers of Congress: Express Powers

The Commerce Clause

Introduction:

The CC initially empowered Congress to regulate only navigation/transportation between two or more states and was defined by federalism concerns. After the New Deal, even production could be regulated via the CC. *Lopez* held that Congress can regulate (1) channels of ISC, (2) instrumentalities of ISC, and anything that has (3) a substantial effect on ISC.

Cases:

- Early Commerce Power
  - *Gibbons v. Ogden:* Defined BROAD Commerce Power
- Pre-New Deal (Laughlin and Darby (after 1936) transition out)
  - *Carter v. Carter Coal:* Mining (production) not w/in CC
  - *Jones & Laughlin Steel:* Saves SCOTUS (corp size matters)
  - *US v. Darby:* End of motive analysis, FLSA reg-ing ISC
- Post-New Deal
  - *Wickard v. Filburn:* Intros aggregation principle
- Commerce Power and Civil Rights
  - *Heart of Atlanta Motel v. US:* Uses CC to enforce Civ Rights
  - *Katzenbach v. McClung:* More attenuate case, still upheld
- Modern (limited?) Commerce Power
  - *US v. Lopez:* Economic v. non-economic distinction
  - *US v. Morrison:* Applies *Lopez* despite more better findings
  - *Gonzalez v. Raich:* Can reg intrastate if part fed reg scheme
  - *NFIB v. Sebelius:* Must reg ACTIVITY, can't create it

Gibbons v. Ogden:

Court held that Commerce includes navigation/transportation, "Among" means two or more states, and "regulate" grants plenary powers. Congress can not regulate State inspection of articles that are or will move in ISC. RBR
Motive analysis starts: *Hammer v. Dagenhart*; ends: *Darby*. *Carter Coal* is a federalism case; production can be regulated b/c no direct effect on ISC (unlike trade). There is concern that such regulation would relagate states to "geographic subdivisions of a nat'l domain. 1936: Jurisprudential switch.

Wickard v. Filburn:

Expansion of CC powers. Substantial effects test & aggregation principle introduced. No statute stricken until *Lopez*.

Heart of Atlanta Motel v. US:

Civil rights failed under 14th but upheld here under CC. Blacks inability to travel (green book) substantially effect ISC.

US v. Lopez:

Regulated activity (possession of firearm) substantially affects ISC if economic in nature and not too attenuated (link can be undermined if goes through traditional state power (education)). Congressional findings & jurisdictional hook help. (mentions potential for *Raich*)

US v. Morrison:

Domestic violence not economic and Court can (and does) disregard (better) congressional findings (makes good on Ollie BBQ threat).

Gonzalez v. Raich:

Can reg purely intraSt non-commercial activity if Cong. concludes failure to reg that activity could, in the aggregate, undercut reg of the IS market in that commodity. Reasserts aggregation principles.

Powers of Congress: Express Powers

The Taxing and Spending Power

Introduction:
Taxing and Spending are pretty intertwined. Once the motive analysis went away, Congress obtained broad power to condition spending (essentially cooperative federalism) and tax as a regulatory matter because "[e]very tax is in some sense regulatory" (*Steward*). *Sebelius* set (or at least gives some idea of), perhaps, the outer limit on the spending power. Test: Does tax/spending at issue have incidental regulatory effect (**upheld**) or is it coercive/penalty (**stricken**)

Cases:

- *US v. Butler:* Can't use tax/spend to get around CC
- *Steward Machine v. Davis:* End of Motive Analysis
- *South Dakota v. Dole:* Conditional highway funding
- *NFIB v. Sebelius:* Penalty can be tax, new spending doctrine

US v. Butler:
Taxing/Spending (T&S) power is limited by "for the general welfare" is not restricted to raising funds for enumerated powers only. But AAA is stricken because you can't use T&S to get around CC power and is thus coercion.

Steward Machine v. Davis:
Cardozo gets rid of motive analysis (*Butler*, *Bailey v. Drexel Furniture* – child labor case). All tax is at least a little regulatory. Tax incentive is const'l, when it turns from incentive to coercion is a question of degree, one of fact. NB: this is 1937 (magic year is 1936).

South Dakota v. Dole:
Highway funds conditioned on drinking age is (turns on facts) not too attenuated and the amount in question (5% of fund) is "mild encouragement" not coercion. Conditions on spending are not coercive if conditions:

- Serve national welfare purpose;
- Are unambiguous;
- Relate to fed interest in fed programs (RBR);
- Do not violate external const'l provisions; ***and***
- Do not violate 10th Amend (this IS the question of test)

NFIB v. Sebelius:
Even though indiv. Mandate calls itself a penalty it can be a tax b/c (1) not exceedingly heavy burden, (2) no scienter req, & (3) collected by IRS (*Drexel Furniture*). The Medicaid expansion is coercive b/c the change was too dramatic for the States to have had unambiguous notice (such a big change that this is essentially a different program so a loss of old funds for new conditions is coercive).

Powers of Congress: Express Powers

Enforcement Power under the Reconstruction Amends (14/5)

Introduction:
14/5 enforcement power is a true SoPs dispute. The RAs give Congress power to enforce their provisions via legislation and initially the Court allowed Congress to pass laws to protect those rights. The Court later reigned in such action, the substantive content of the Constitution is for the Court to determine, the Court speaks and Congress follows (Congruence and Proportionality Test). Key to this whole section: What the Court thinks of Congress' power matters most.

Cases:

- *Katzenbach v. Morgan*: One-way ratchet theory
- *City of Boerne v. Flores*: Give effect to Enforce; C&P
- *United States v. Morrison*: State-action doctrine
- *Nevada v. Hibbs*: Prophylactic law upheld

Congruity and Proportionality Test:
Congruence:

- Legislation Must Be Consistent with Substantive Meaning Declared by Court

Proportionality:

- Legislation Must Not overcorrect or over-enforce right

Katzenbach v. Morgan:
Statute banning English literacy tests (after 6th grade) are upheld under 14/5. One-way ratchet theory says that states can expand but not reduce rights.

City of Boerne v. Flores:
RFRA stricken (req'd gen applicable laws burdening religion have a compelling interst (SS)). Congress may ENFORCE but not expand on substantive rights. C&P Test controls, Congress can't pass prophylactic laws; the Court speaks and Congress follows.

US v. Morrison:
VAWA stricken b/c it regulated private parties and RAs only apply to state actors (but note, not stricken for prophylaxis)

Nevada v. Hibbs:
Law granting leave to all parents is upheld under 14/5. The underlying problem that Congress sought to cure was public action based on improper stereotypes (gender based). **TBN**: favorable results for women achieved when arguments framed in terms of men.

TBN: I gave you *Morrison* and *Hibbs* to indicate that *Boerne* does NOT stand for the proposition that Congress cannot use 14/5 in a prophylactic way; it can if Court endorses it.

Executive Power

Domestic and Foreign Affairs

Introduction:
The Constitution created a powerful executive: Commander & Chief of Army and Navy, pardons, treaties, nominate judges, other offices. But does he have inherent (implied) power? POTUS has nearly broad powers in foreign affairs but SoP places much greater restrictions on his power in domestic affairs.

Cases:

- Domestic Affairs
  - *Youngstown Steel*: Three Zones of Operation
  - *US v. Nixon*: Balancing Pres'l Prerogatives
- Foreign Affairs
  - *US v. Curtiss-Wright*: Plenary in foreign affairs
  - *Hamdi v. Rumsfeld*: Citizen enemy combatant

Youngstown Steel:
Jackson's (Functionalist) Concurrence puts the president's actions in three zones:
Zone 1: President Acts with express or implied authority of Congress – POTUS at height of powers. Courts give widest latitude; if action held unconst'l it is b/c fed gov't as whole lacks such power.

Zone 2: Twilight Zone of Concurrent Power and Congressional Silence – Such silence may enable, if not invite executive action. "[A]ny actual test is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."

Zone 3: President acts against expressed or implied will of Congress – Power at lowest ebb, President's powers minus Congress'. Courts can uphold such action only by disabling Congress; cautious judicial review.

US v. Nixon:
Interest in confidentiality doesn't trump special prosecutor's need for recording b/c not based in nat'l security, defense, diplomacy, other Pres'l Prerogatives.

US v. Curtiss-Wright: (DICTA)
Power in foreign affairs vested initially in fed gov't Pres, as sole organ of in int'l relations has plenary power.

Hamdi v. Rumsfeld:
Power in foreign affairs is different for citizens (i.e., it is domestic power) but Court frowns at *Curtiss-Wright* anyway. Finds that Pres had power under AUMF in Zone 1. **TBN**: Jackson zones are theoretically interesting but functionally unhelpful b/c Court can find a way to pres into whatever one it wants (Souter in Dissent says zone 3). For Habeas Info see slides.

Limits on Federal Power

The 10th Amendment and State Powers

Introduction:

The 10th Amend can be viewed as (1) simply reaffirming the idea that the fed gov't is one of limited powers or (2) as distinct limitation, reserving certain powers to the States. Before 1941, the latter was the dominant view but *Darby* (1941) advocated the former saying that the 10th Amend "states but a truism." Since then, the 10th had been taken less seriously until the Rehnquist Court (resurgence). Now varies from Justice to Justice.

Cases:

- *Nat'l League of Cities v. Usery*: FLSA does not apply to areas of traditional gov't function
- *Garcia v. San Antonio MTA*: Overturns *Nat'l League* as unworkable – less respect for 10th
- *Printz v. US*: No Commandeering of State officials

Nat'l League of Cities v. Usery:

Rehnquist held that FLSA (overtime and minimum wage) did not apply to State and local public employees because it is an area of traditional gov't function. Const doesn't grant the fed gov't power over state public employees so reserved to states under 10th Amend.

Garcia v. San Antonio MTA:

Overturns *Nat'l League* because the test of "traditional gov't function" produced results all over the place. Holds that protection of state interests should be preserved via the political process (dissent claims this is a return to *Darby*).

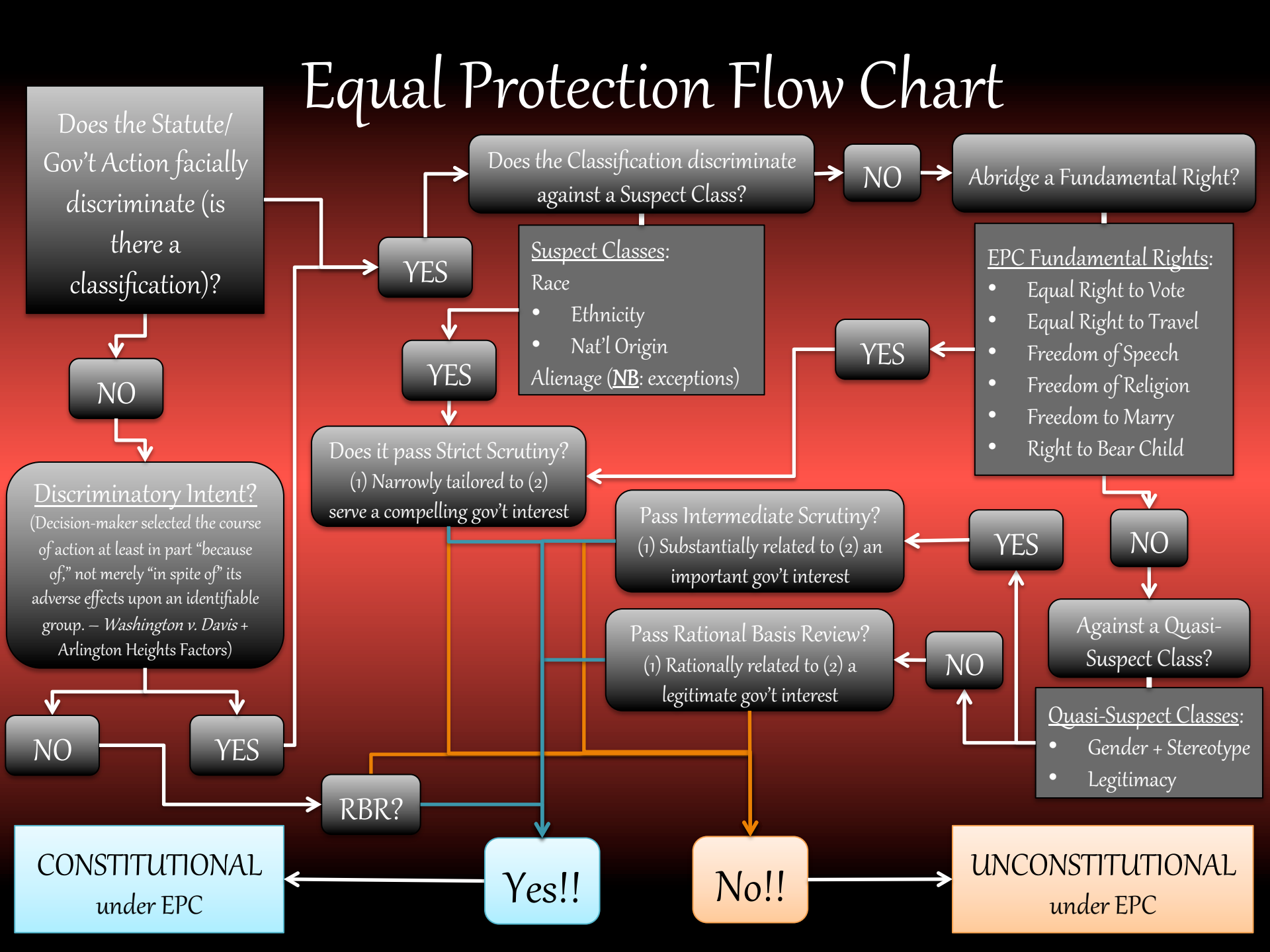
Printz v. US:

Holds that the fed gov't cannot commandeer state law enforcement to enforce fed law. Doesn't reinstate *Nat'l League* or overturn *Garcia*. Leaves open question: Is litigation or political process best way to protect state interests? **TBN**: Fed gov't has massive tool kit, find ways around *Printz*. Conditional spending best way (cooperative federalism), just incentivize cooperation.

State Powers:

Pre-reconstruction amendments and incorporation, the only constraints on state power were politics, Art. VI, and the scope of ***State Police Powers***. Police Powers essentially allows states to regulate anything concerning health, public welfare, or morals (morals less so these days because it too often runs into personal rights). State gov'ts were not constrained by Const b/c they are especially responsive to voters.

Equal Protection Flow Chart



Individual Rights: Limits on Gov't Power

The Reconstruction Amendments

Introduction:
The Reconstruction Amendments (13, 14, and 15) were passed to end slavery, limit state power and to overturn *Dred Scott*. They were successful, to varying degrees, in achieving all of these goals. There was a period in which the Court limited their scope and power but a robust EP jurisprudence was developed.

Cases:

- Pre-Reconstruction Amendments
  - *Dred Scott v. Sandford:* No Black Citizenship
- Retreat from Reconstruction
  - *Slaughterhouse:* Early death of P&I Clause
  - *Strauder v. West Virginia:* Intent-based Analysis
  - *Civil Rights:* Established State Action Doctrine
  - *Plessy v. Ferguson:* Separate but Equal

Dred Scott:
Black slave is carried to free states and master dies, claims he is free. Taney held that anyone with Afr-Amer heritage cannot be a citizen b/c they" have no rights a white man is bound to respect." Didn't have to reach whether Scott was free b/c w/o citizenship he lacked standing but did so anyway, declaring Constitution is pro-slavery. Finds substantive property right in 5th amendment.

Slaughterhouse Cases:
Case about state power to grant monopoly of slaughterhouse services. The Court limited (killed) P&I Clause to just those guaranteed to citizens of the Nation not the states: right to travel to national capital; to seek redress from nat'l govt; to use seaports/navigable waters; to have access to federal courts; Great Writ. Biggest problem: this makes I&P redundant. Dissent: This is about Common Law P&I/incorporation of BoR.

Strauder v. West Virginia:
Courts will review laws under EPC using intent-based (anti-classification) analysis (see *Washington v. Davis*). Facial classifications, not effects (anti-subordination), are best way to know the State's intent.

Civil Rights Cases: (Special Favorites of the Law Case)
Held that Recon Amends could not support civil rights act b/c it only permits fed gov't to reg state action (State Action Doctrine) not private action. Two exceptions: Public Function (If a private entity performs a task traditionally, exclusively performed by the gov't, Constitution applies.) and Entanglement (If the gov't affirmatively authorizes, facilitates, or encourages unconstitutional conduct, Constitution applies e.g. gov't subsidies, gov't licensing/regs, judiciary, law enforcement). *Jones v. Meyer*: Permits Cong to identify/remove badges of slavery. (race model dead)

Plessy v. Ferguson:
Separate but equal, no stigma for separate train cars. Dissent: Our Const is color-blind (**TBN**: Suspect understanding of Harlan, he says other racist stuff in Op. – See Chinese)

Individual Rights: Limits on Gov't Power

The Equal Protection Clause and Reverse Incorporation

Introduction:
Cases turn on the Standards of Review in EP analysis. Strict Scrutiny is often considered "strict in theory, fatal in fact" and RBR is traditionally the opposite.

Cases:

- Rational Basis Review
  - *Railway Express v. NY*: Advertising Vehicles
  - *Williamson v. Lee Optical*: Won't strike down state laws b/c unwise (find a rationale!)
- Strict Scrutiny
  - *Carolene Products*: Footnote 4 – Basis for SS
  - *Korematsu v. US*: First SS case, upheld order
  - *Loving v. Virginia*: Miscegenation and EPC
- School Desegregation
  - *Brown v. Board* (C or S?): Separate not Equal
  - *Bolling v. Sharp*: Reverse incorp: EPC to 5th, DC Deseg
  - *Green v. Cty School Bd*(S): Ct intervention; *Green* Factors
  - *Swann v. Mecklenburg* (S): One race schools suspect (de jure presumed), districts responsible to remedy racial iso
  - *Keyes v. Denver*: Area-wide presump (meaningful areas)
  - *Milliken v. Bradley* (C): Retreat from Keys/Swann; Local dist lines sacred; attention to achievement (Sep but Eq?)

Carolene Products: (How to create a suspect class)
Econ leg is presumptively Const'l, not so for leg re: personal liberties. FN 4: Presumption of Constitutionality declines for leg that (1) burdens Discrete (physically and socially separate; easy to identify) & Insular (difficult to form coalitions) minorities and (2) if there is a political process defect.

Korematsu v. US:
Military order facially discriminates against Japanese-Americans. Court applies "most rigid scrutiny" but finds that military necessity is sufficiently compelling b/c of the difficulty in ascertaining loyalty (essentially applies RBR). Jackson in Dissent: Decision more dangerous than order – "loaded gun."

Loving v. Virginia:
Statute facially discriminates. SS applied again but this time law is stricken b/c no compelling state interest is advanced (racial integrity not compelling, protects only white "integrity"). Ct rejects equal application theory.

Brown v. Board:
Overturns *Plessy*: Stigma in separate facilities, political process defect, and intangibles in education. Anti-Classification or Anti-Subordination (equal treatment)?

Other Cases:
Green Factors: Student ratio; faculty ratio; facilities; transportation; extracurricular activities. De Jure: Intentional segregation by state actor. De Facto: Mostly results from "private forces." Retreat from anti-sub, focus on achievement.

Individual Rights: Limits on Gov't Power

The Equal Protection Clause and Reverse Incorporation Cont.

Introduction:
Anti-sub vs. Anti-class continues. Unitary status means a lot in these cases. *Bakke* upholds AA but strikes quotas.

Cases:

- Discriminatory Purpose vs. Intent
  - *Washington v. Davis*: "Because of" vs. "In Spite of"
  - *Arlington Heights*: Discriminatory Purpose Factors
- Race-Based Affirmative Action
  - *Grutter v. Bollinger* (S?): Compelling interest: diversity
  - *Gratz v. Bollinger* (C): Stuck numerical points for race
  - *Fisher v. Texas*: Dials back deference to universities
  - *Schuette* (C): Michigan State Const Amendment
- Recent Doctrine on Race and EP
  - PICS: Primary and Secondary School Integration
  - *Ricci v. DeStefano* (C): Desperate impact no enough
  - *Texas Dept.* (S): Needs causation for Disparate impact

Washington v. Davis:
If there is no facial discrimination, SS applies only if (1) there are discriminatory effects (standing harm) and (2) the π can show that there was discriminatory intent. Test: Discriminatory intent if the decision-maker selected the course of action at least in part "because of," not merely "in spite of" its adverse effects upon an identifiable group.

Grutter v. Bollinger:
Compelling interest in "diversity". Can consider race as part of holistic, non-numerical, individual review process (narrow tailoring) (***Sunset*** suggested at 25 yrs)

Gratz v. Bollinger:
Admissions policy giving set number of points for race doesn't constitutes individualistic review, not narrowly tailored.

Fisher v. Texas:
Race-conscious plan ONLY IF Court finds no workable race-neutral alt would get edu'l benefits of div (Crit Mass).

Schuette v. Coalition to Defend Affirmative-Action:
Upheld Michigan Const Amend that outlaws affirmative action. Okay b/c not removing baseline rights just bonuses.

PICS v. Seattle School District:
Plurality: No CI in diversity for Primary/Secondary schools, only remedial, but if Unitary then no more. Kennedy says yes CI for div in P/S schools but not as applied (5 votes in future)

Ricci v. DeStefano:
Violation of Title VII to disregard results of race-blind merit exam (for promotion) in anticipation of civil rights litigation (Title VII may be in conflict w/ 14th)

Texas Dept. of Housing v. Inclusive Communities:
Disparate impact not Const'l mandated but statutorily cognizable under FHA (but Kennedy sets standard very high)

Individual Rights: Limits on Gov't Power

Misc. on Affirmative Action and Suspect Classes

Narrow Tailoring Considerations (AA only?):

1. Individualized consideration
2. Availability of race-neutral alternatives
3. Minimizing undue harm to other races
4. Limit in duration

Arlington Heights Factors: *Not an Exhaustive List

- Extreme Statistical Proof (generally, effect alone does not prove purpose) – *Yick Wo*?
- Deviation from Procedure (whether events leading up to decision suspicious)
- Decision inconsistent with Typical Priorities (typical substantive considerations)
- Legislative or Administrative History (statements of decision-makers and past practice; timing of policy; context of policy)

SS Arguments for "Benign" Racial Classification:

- For:
    - Importance of colorblindness
    - Stigma against beneficiaries
    - Importance of individual decisions
- Against:
    - Majority deprives itself
    - Necessary to use race as remedy
    - Necessary to achieve other goals, such as diversity

TBN: Best Arguments for SS are not Constitutional or historical or precedential but policy arguments

Carolene Products: Creating a Suspect Class

Discrete and Insular Minorities

- Discrete: Physically and socially separate; easy to identify
- Insular: Difficult to form coalitions
- Other Factors:
    - Political powerlessness/exclusion
    - Immutable characteristics (reaffirmed in *Obergefell*?)
    - History of purposeful discrimination
- **Overall**: Groups Subjects to Stereotypes & Stigma

Problems with the Discrete and Insular Concept

1. What about the Quality of political participation?
2. Static
3. Exclusion plus characteristic that are non-immutable but stigmatized?
4. Majorities with characteristics of "minorities"

Why isn't Sex-Orientation a Suspect Class?

- Discrimination – Moral Judgment
- Political Powerlessness – Political Losers/Discrete
- Immutable Characteristic – "Lifestyle Choice"

This will not be the same for transgender classifications, those are about gender and get to the heart of stereotypes (unless req bio difference as in the bathroom cases).

Individual Rights: Limits on Gov't Power

The Equal Protection Clause and Reverse Incorporation Cont.

TBN: The fact that there is In.Scrutiny just means Ct doesn't know what to do w/ gender (even more true of Sexual-Orientation, no SoR)

Cases:

- Gender-Based Classifications
  - *Reed v. Reed*: First (EPC) to strike gender-classification
  - *Frontiero v. Richardson*: Split on SoR (Brennan compares women to slaves, wants SS)
  - *Craig v. Boren*: Drinking case – Intermediate Scrutiny
  - *US v. Virginia (C)*: VMI – Adversative Model Case
  - *Nguyen v. INS*: Gender-class upheld under IS
- Gender-Based Affirmative Action
  - *Califano v. Goldfarb*: Female favorable benefit stricken
  - *Califano v. Webster*: Remedial SSI benefit upheld
- Other Suspect/Potentially Suspect Classifications
  - *Sugarman v. Dougall*: Alienage (Undivided loyalty)
  - *Griffin v. Illinois*: Wealth (Trial transcript given to poor)
  - *San Antonio v. Rodriguez*: Wealth (Education not FR)
  - *Plyler v. Doe*: Wealth & Alienage (Children, Pub Schools)
  - *Kadrnas v. Dickinson Public Schools*: Wealth
  - *City of Cleburne v. Cleburne Living Center*: Mental Disability/ "Retardation"(Irrational Prejudice)
  - *US Depart. Of Ag. v. Moreno*: Unconventional Households (Bare desire to hurt unpopular group is a illegitimate and irrational purpose – RBR + Bite)

Gender-Based Classification:

Test: Is classification based on actual bio differences or stereotypes and gender roles? *US v. VA*, *Reed*, *Frontiero*, *Craig*, all based on Stereotypes and so were stricken but *Nguyen v. INS*, *Geduldig* (preg disability insur exclusion) all based on bio differences so were upheld. First IS case helps men (*Craig*).

Gender-Based Affirmative Action:

Remedial (redress longstanding disparate treatment of women) justification works for gender too but was used in *Webster* but not in *Goldfarb* (Survivor benefits and SSI respectively).

Other Classifications:

Alienage: (Graham v. Richardson)

General Rule: State Alienage-based classification law subject to SS. (*Graham v. Richardson* – SS for Alienage b/c D&I minority)
Illegal Alien Exception – *Plyler v. Doe* (RBR): Illegal Aliens not protected suspect class b/c here illegally
Vital Gov't Function Ex: RBR for voting, political office, jury service)
Federal Interest Exception: Naturalization is fed power, fed gets RBR (*Matthews v. Diaz*).
Remember there is interplay between race, nat'l origin and alienage.

Wealth: (Non-Suspect)

Edwards v. California: Facial discrimination against poor unconst'l.
Rodriguez: Cognizable wealth discrim only in cases of absolute deprivation and complete inability to pay. Marshall sliding scale.

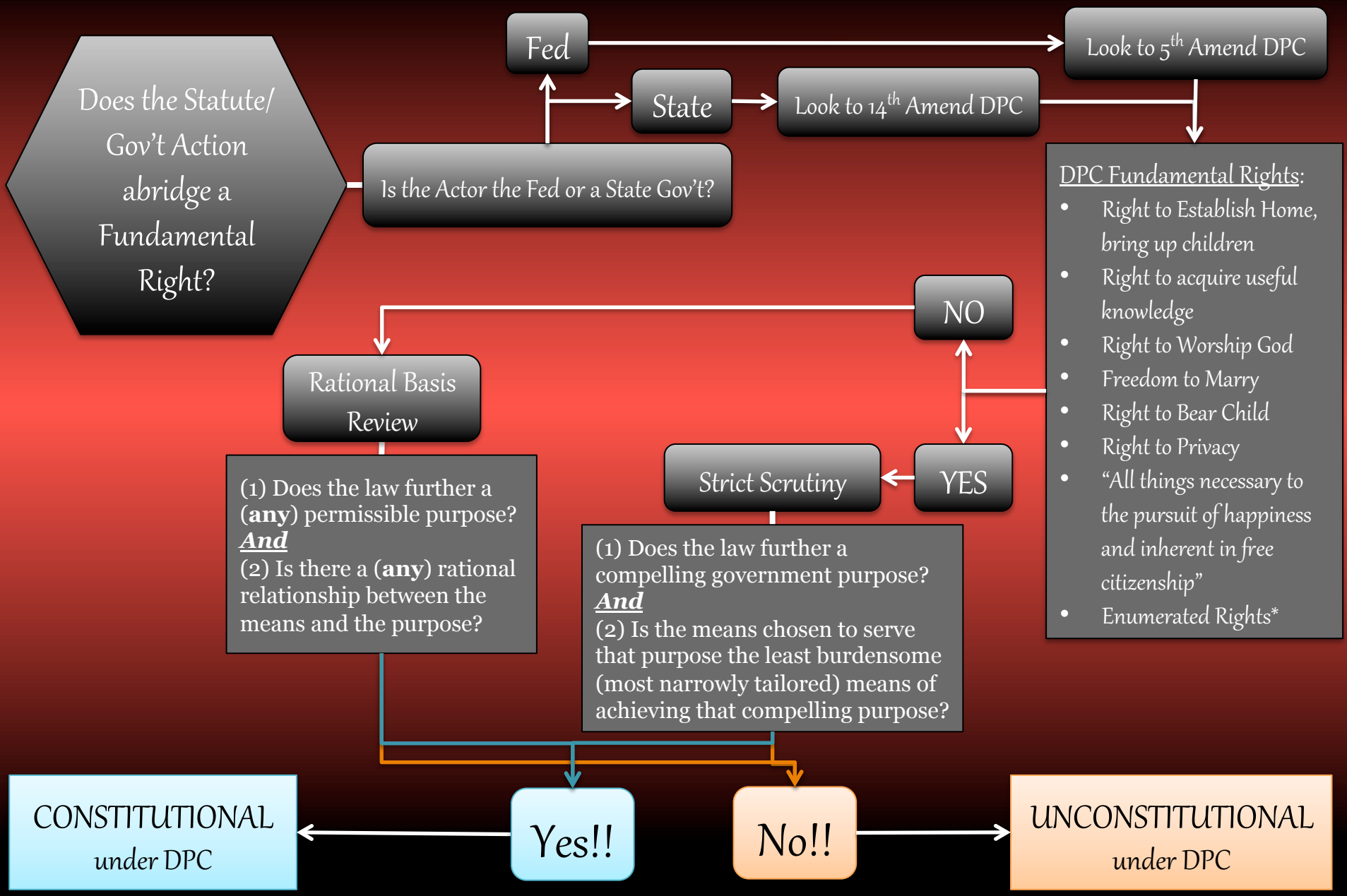
Mental Disability: (Non-Suspect)

Cleburne: Irrational prejudice of mentally disabled in zoning.
Rational Relation Review (sliding scale?)

Unconventional Households: (Non-Suspect)

Moreno: Denies food stamps to unrelated members (targets hippies)

Substantive Due Process Flow Chart



Individual Rights: Limits on Gov't Power

Substantive Due Process and Incorporation

Introduction:

Incorporation happened over the course of many years but *Palko* was the turning point. Justice Black wanted total incorporation of BoR against the state but Selective Incorporation was the accepted method. First 8 BoR incorporated except: civil jury trials (7th), grand jury indictment (5th) or quartering of soldiers (3d). SDP uses same test as incorporation to find DPC meaning of liberty: "Whether [X Right] is fundamental to our scheme of ordered liberty, whether it is deeply rooted in this Nation's history and tradition." (McDonald)

Cases:

- Incorporation
  - *Twining v. New Jersey*:
  - *Palko v. CT*: Turning point, selective not total
  - *Adamson v. CA*:
  - *Duncan v. LA*:
  - *McDonald v. Chicago*: 2d Amendment
- *Lochner v. New York*: Right to Contract
  - *West Coast Hotel v. Parrish*: Death of *Lochner*
- Family Autonomy (Privacy and Contraception)
  - *Meyer v. Nebraska*: Sets out list of FRs (last slide)
  - *Pierce v. Society of Sisters*: Family Privacy
  - *Griswold v. CT*: Gen Right to privacy (Contraception)

Lochner v. NY:

One of the most hated cases in Con Law. Court relied on Field's *Slaughterhouse* dissent to hold that 14th Amend protects a substantive liberty right to contract. There are three reasons to take issue with this case: (1) No right to K, (2) SDP itself is unconstitutional, and (3) Ct shouldn't make policy decisions. West Coast Hotel overturns the FR in *Lochner* but not the case (The Constitution does not speak of liberty of Contract) and *Williams v. Lee Optical* disavowed the whole Econ SDP endeavor (The day is gone when the Court uses DPC to strike down state laws regulating business and industrial conditions).

Meyer v. Nebraska and Pierce v. Society of Sisters:

Meyers lays out the "Corpus of Family Rights" (last slide) and together these cases establish a right to family privacy.

Griswold v. CT:

Court stuck down law banning contraception as infringing on a right of privacy (SS). Majority held out a penumbra approach to the right to privacy, other more narrow rights indicate that there is a broader right to privacy. Others argued that the right rested in the 9th amendment, others that SDP stands on its own, and the view that the 14th amendment as a whole protects this right. In any case, it seemed to be relegated to married couples but *Eisenstadt* extended it to unmarried couples (freedom from gov't intrusion in intimate matters; right to left alone) and *Carey* struck down a law that prohibited any but a licensed pharmacist from distributing contraception as infringing FR of privacy.

Expansive Right!

Individual Rights: Limits on Gov't Power

SDP – Reproductive Autonomy (Abortion)

Introduction:

The Abortion cases are a large expansion on the Privacy right cases. They don't follow intuitively but they are based in that doctrine. *Roe* sets forth a trimester system for weighing compelling state interests and the autonomy rights of the mother. Pre-viability, the balance weighs in the Mother's favor, post-viability it weighs in the State's favor. *Casey* discards the trimester system and installs the undue burden test. *Gonzales v. Carhart* upholds a ban on partial birth abortions and not unduly burdening the mother's right to an abortion.

Cases:

- *Roe v. Wade*: Trimester System
- PP *v.* Casey: Undue Burden Test - Does the law have the purpose or effect of placing a "substantial obstacle" in the path of a woman seeking an abortion before the fetus attains viability? **TBN**: Propaganda-permissive case!
- *Gonzales v. Carhart*: Ban on partial-birth abortion

Roe v. Wade:

The right to privacy encompasses a woman's unrestricted right to terminate a pregnancy during 1st trimester.

1st Trimester: State has no compelling interest, cannot criminalize abortion

2d Trimester: Compelling interest in maternal health; states may regulate abortions if reasonably related to woman's health (subject to SS)

3d Trimester: Compelling interest in maternal health, potential human life; state may prohibit (and regulate) abortions if there are exceptions for woman's life/health (subject to SS)

Planned Parenthood v. Casey:

The Court made it clear that it would like to overturn *Roe* but feels bound by *Stare Decisis*. It reaffirms that states may not prohibit abortions pre-viability but it dispenses with the trimester framework and SS. After viability states may prohibit abortion and may regulate throughout pregnancy if the regulations do not "unduly burden" the Mother's right (Court finds spousal notification req an undue burden b/c lacks domestic violence exception).

Gonzales v. Carhart:

Court upheld fed law banning partial-birth abortions even though it struck down a similar NE law in *Stenberg*. Contrary to the reqs in *Casey* and *Stenberg* the law did not have an exception for mother's health (only life). Kennedy cited the dignity of life, law didn't impact a woman's right to choose and there was a "less shocking" alternative available.

Individual Rights: Limits on Gov't Power

SDP – Sexual Autonomy (Sexual Orientation)

Equal Protection of Due Process?

Introduction:

Sexual-Orientation is a relatively new area for the Court and b/c of that it is one that has a lot of open questions. What is the standard of review? Are these cases EP or DP? Is this really about Sex discrimination? Kennedy has written nearly all of the opinions which has created law bereft of any coherent standard, which is that much more difficult to assail. In the end, gays and lesbians (but not transgender people) end up winning quite a bit (mostly on dignity/ intimacy grounds). Important Questions: Can morality be a permissible gov't purpose or a legitimate gov't interest, i.e. can it satisfy RBR? **TBN**: Sex-Orien gets RBR + Bite, it is a special case.

Cases:

- *Bowers v. Hardwick*: Sodomy Law Upheld
- *Lawrence v. Texas*: Sodomy Law Stuck Down
- *Romer v. Evans*: Anti-discrimination leg repeal struck down
- *US v. Windsor*: DOMA Struck Down; Federalism
- *Obergefell v. Hodges*: Gay-marriage bans stricken

Bowers v. Hardwick (1986):

Court held that privacy did not protect consensual sodomy, even in private (this law was a general ban on sodomy). Inconsistent w/ *Eisenstadt*, right to be left alone? Dissent: If that right [privacy] means anything, it [is that], before Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is immoral.

Lawrence v. Texas (2003):

Court struck down a homosexual sodomy law. It never commits to a FR, doesn't law down a SoR (so RBR?). **TBN**: I would point to *Eisenstadt*, privacy implicates the right to be be free from gov't intrusion in intimate matters. O'Connor, J., concurred on EPC grounds (this seems right to me).

Romer v. Evans (1996):

Colorado passes amendment 2 to repel and prevent local laws that protect homosexuals from discrimination. Court applies RBR (not SS even though Kennedy cites *Plessy*) and strikes the amendment as having no legitimate state interest in the classification (motivated by animus).

US v. Windsor (2013):

Court held that marriage is a state issue but decided the case on EP aspect of 5th Amend's DPC (liberty) b/c homosexuals were deprived of equal liberty here.

Obergefell v. Hodges (2015):

FR to marriage reaffirmed (*Windsor* held that *Loving* stood for that proposition) but extends it to SSM. State bans on SSM violated the DPC of 14th. Marriage ranks as fundamental b/c of tradition and history and SSM ranks as fundamental b/ c marriage is traditionally in flux. Bans also violate EPC of 14th, which works synergistically w/ DPC (not clear what this means). No SoR articulated (would fail under any standard?). Dissent: Not the judicial role, for the states and legislatures.

FR and Gov't Interests

Equal Protection:

RBR:
Railway Express – traffic safety, econ reg; N/A
Williamson v. Lee Optical – med reg, public safety; N/A
Frontiero – Administrative Convenience; N/A
Plyler v. Doe – N/A; N/A (but children get to go to school)
San Antonio v. Rodriquez: Threshold question, poverty is a protected class only if absolute deprivation and complete inability to pay; self-determination in education; N/A
Geduldig v. Aiello – economics (no req to spend money on pregnant woman); N/A

RBR + Bite:
Cleburne – Not flood plain and not junior HS abusers (if allowing buildings); N/A
Moreno – Not bare desire to harm unpopular group (hippies); N/A
TBN: Sexual Orientation Cases

Intermediate Scrutiny:
Craig v. Boren – traffic safety but not sig related; N/A
VMI – Not adversative model, post hoc rationales don't count; N/A (IS up a notch? "exceedingly persuasive justification")
Nguyen v. INS – confirmation of ***bio*** relationship, opp to develop meaningful realationship; N/A
Goldfarb – N/A; N/A
Webster – remedial rationale; N/A

Strict Scrutiny:
Korematsu – Security, couldn't identify in timely manner bad dudes; N/A
Loving – not racial integrity; marriage
Bakke – not remedial for quotas but maybe diversity
Grutter – diversity
Gratz – diversity (but not narrowly tailored)
Schuette – democracy (process), not preferential treatment; N/A
PICS – not diversity (p/s education), not remedial unless past badness; N/A
Sugarman – loyalty of gov't employees (but not civic jobs); N/A
Griffin v. Illinois – ??; a transcript during crim appeal
Skinner – not punishment; bear/beget a child
Harper – not raise revenue via vote or improve voting; vote

Due Process:

RBR:
Bowers – morality; N/A
Romer – not morality (animus?); N/A

Strict Scrutiny:
Griswold – not morality/reduction of extramarital sex; Privacy
Eisenstadt – Same; Same but extended to non-marrieds (to be left alone)
Carey – Same; Same
Roe – Same but maternal health/life, potential human life; Same (bodily integrity see *Eisenstadt*) Remember this case when considering how to balance to compelling interests and fundamental rights!