

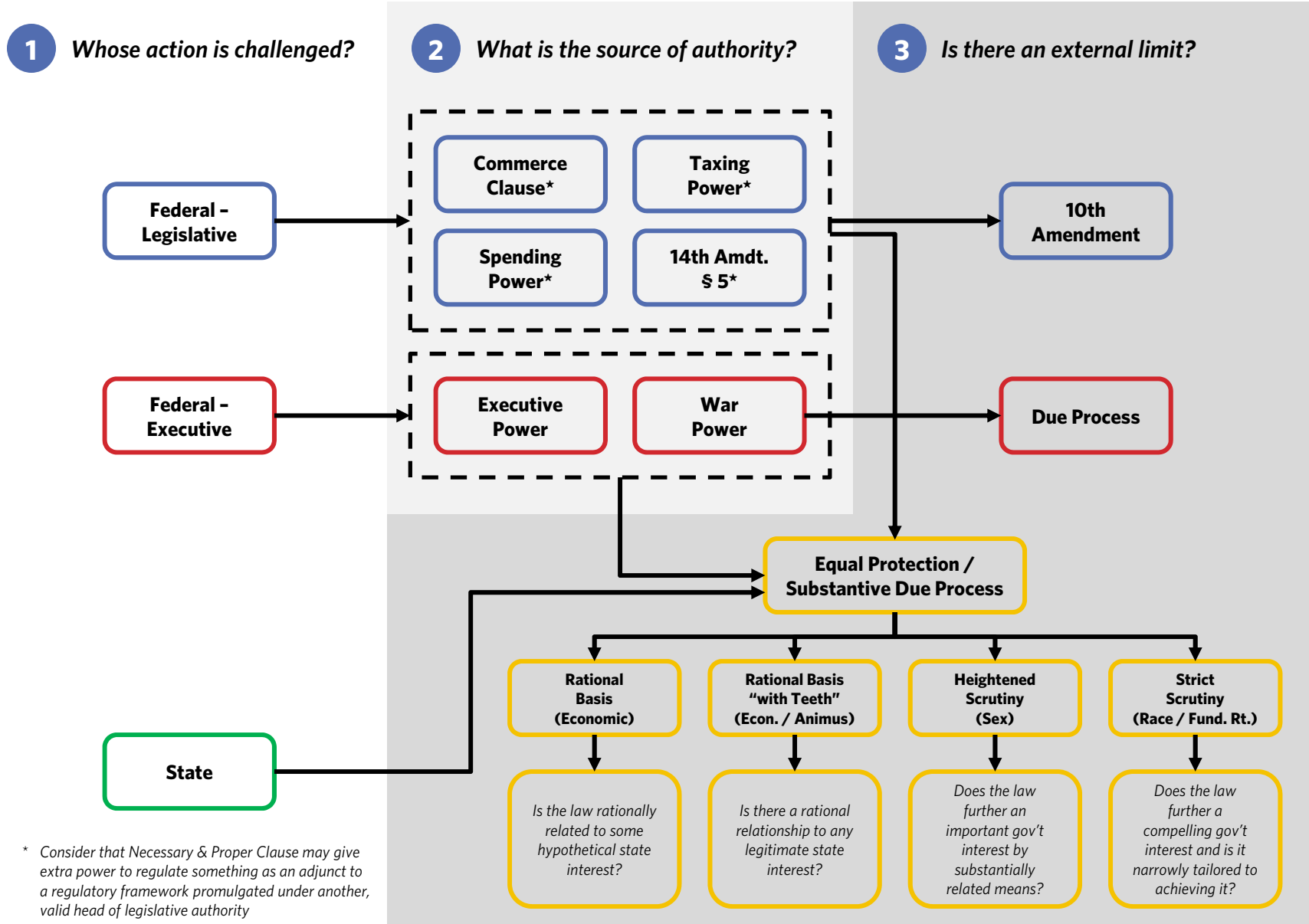
Constitutional Law

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Answering a Constitutional Law Question



Cases & Topics (1)

Case	Topic(s)	Case	Topic(s)
<i>Marbury v. Madison</i> (1803) (p. 108)	Jud. Review, Const. Interp.	<i>Boumediene v. Bush</i> (2008) (p. S198)	Executive Power, Due Process
<i>McCulloch v. Maryland</i> (1819) (pp. 38, 67)	Leg. Power, Federalism	<i>The Slaughterhouse Cases</i> (1873) (p. 320)	P&I, Equal Protection
<i>Gibbons v. Ogden</i> (1824) (p. 168)	Federalism	<i>Williamson v. Lee Optical</i> (1955) (p. 520)	Rational-Basis Review
<i>Mayor of the City of New York v. Miln</i> (1837) (p. 191)	Federalism	<i>Railway Express Agency v. New York</i> (1949) (p. 522)	Rational-Basis Review
<i>Cooley v. Board of Wardens</i> (1851) (p. 204)	Federalism	<i>U.S. Dept. of Agriculture v. Moreno</i> (1973) (H/O)	Rational-Basis w/ Teeth
<i>Champion v. Ames</i> (1903) (p. 437)	Commerce Clause	<i>Lyng v. International Union, UAW</i> (1988) (p. 1596)	Rational-Basis Review
<i>Hammer v. Dagenhart</i> (1918) (p. 441)	Commerce Clause	<i>Strauder v. West Virginia</i> (1880) (p. 351)	Segregation
<i>NLRB v. Jones & Laughlin Steel</i> (1937) (p. 549)	Commerce Clause	<i>Plessy v. Ferguson</i> (1896) (p. 359)	Segregation
<i>United States v. Darby</i> (1941) (p. 551)	Commerce Clause	<i>Sweatt v. Painter</i> (1950) (p. 897)	Segregation
<i>Wickard v. Filburn</i> (1942) (p. 553)	Commerce Clause	<i>McLaurin v. Oklahoma State Regents</i> (1950) (p. 897)	Segregation
<i>Heart of Atlanta Motel v. United States</i> (1964) (p. 560)	Commerce Clause	<i>Brown v. Board of Education (Brown I)</i> (1954) (p. 898)	Segregation
<i>Katzenbach v. McClung</i> (1964) (p. 560)	Commerce Clause	<i>Bolling v. Sharpe</i> (1954) (p. 913)	Segregation
<i>United States v. Lopez</i> (1995) (p. 601)	Commerce Clause	<i>Brown v. Board of Education (Brown II)</i> (1955) (p. 928)	Segregation
<i>United States v. Morrison</i> (2000) (p. 623)	Commerce Clause, § 5 Power	<i>Green v. New Kent Cty. School Board</i> (1968) (p. 932)	Segregation
<i>Gonzales v. Raich</i> (2005) (p. 624)	Commerce Clause	<i>Swann v. Charlotte-Mecklenburg Board of Ed.</i> (1971) (p. 935)	Segregation
<i>United States v. Comstock</i> (2010) (p. S95)	Commerce Clause	<i>Milliken v. Bradley</i> (1975) (p. 941)	Segregation
<i>NFIB v. Sebelius</i> (2012) (p. S99)	Comm. Cl., Tax, Spend. Power	<i>Parents Involved v. Seattle School Dist. No. 1</i> (2007) (p. S267)	Segregation
<i>South Dakota v. Dole</i> (1987) (p. 627)	Spending Power	<i>Korematsu v. United States</i> (1944) (p. 966)	Strict Scrutiny
<i>Katzenbach v. Morgan</i> (1966) (p. 576)	§ 5 Power	<i>Loving v. Virginia</i> (1967) (p. 959)	Strict Scrutiny
<i>City of Boerne v. Flores</i> (1997) (p. 629)	§ 5 Power	<i>Hernandez v. Texas</i> (1954) (p. 1010)	Strict Scrutiny
<i>Coleman v. Court of Appeals of Maryland</i> (2012) (p. S173)	§ 5 Power	<i>Yick Wo v. Hopkins</i> (1886) (p. 1021)	Strict Scrutiny
<i>Garcia v. San Antonio Metro. Transit Auth.</i> (1985) (p. 653)	10th Amdt. Constraints	<i>Gomillion v. Lightfoot</i> (1960) (p. 1023)	Strict Scrutiny
<i>Gregory v. Ashcroft</i> (1991) (p. 665)	10th Amdt. Constraints	<i>Washington v. Davis</i> (1976) (p. 1026)	Strict Scrutiny
<i>New York v. United States</i> (1992) (p. 674)	10th Amdt., Commandeering	<i>Arlington Heights v. Metro. Housing Devel.</i> (1977) (p. 1039)	Strict Scrutiny
<i>Printz v. United States</i> (1997) (p. 693)	10th Amdt., Commandeering	<i>Regents of the Univ. of California v. Bakke</i> (1978) (p. 1072)	Affirmative Action
<i>Youngstown Sheet & Tube v. Sawyer</i> (1952) (p. 823)	Executive Power	<i>Gratz v. Bollinger</i> (2003) (p. 1142)	Affirmative Action
<i>Dames & Moore v. Regan</i> (1981) (p. 839)	Executive Power	<i>Grutter v. Bollinger</i> (2003) (p. 1120)	Affirmative Action
<i>Hamdi v. Rumsfeld</i> (2004) (p. 841)	Executive Power, Due Process	<i>Fisher v. University of Texas</i> (5th Cir. 2011) (H/O)	Affirmative Action

Cases & Topics (2)

Case	Topic(s)	Case	Topic(s)
<i>Reed v. Reed</i> (1971) (p. 1182)	Sex Discrimination	<i>Lochner v. New York</i> (1905) (p. 417)	Substantive Due Process
<i>Frontiero v. Richardson</i> (1973) (p. 1188)	Sex Discrimination	<i>Home Building & Loan Ass'n v. Blaisdell</i> (1934) (p. 501)	Substantive Due Process
<i>Craig v. Boren</i> (1976) (p. 1214)	Sex Discrimination	<i>West Coast Hotel Co. v. Parrish</i> (1937) (p. 511)	Substantive Due Process
<i>United States v. Virginia (The VMI Case)</i> (1996) (p. 1229)	Sex Discrimination	<i>United States v. Carolene Products</i> (1938) (p. 513)	Substantive Due Process
<i>Personnel Admin. of Mass. v. Feeney</i> (1979) (p. 1262)	Sex Discrimination	<i>Griswold v. Connecticut</i> (1965) (p. 1342)	SDP, Contraception, Privacy
<i>Geduldig v. Aiello</i> (1974) (p. 1276)	Sex Discrimination	<i>Eisenstadt v. Baird</i> (1972) (p. 1353)	SDP, Contraception, Privacy
<i>Tuan Anh Nguyen v. INS</i> (2001) (p. 1296)	Sex Discrimination	<i>Michael H. v. Gerald D.</i> (1989) (p. 1371)	SDP, Family, Privacy
<i>Nevada Dept. of Human Res. v. Hibbs</i> (2003) (p. 1304)	Sex Discrimination, § 5 Power	<i>Roe v. Wade</i> (1973) (p. 1388)	SDP, Abortion
<i>Reed v. Reed</i> (1971) (p. 1182)	Sex Discrimination	<i>Planned Parenthood of S.E. Pa. v. Casey</i> (1992) (p. 1424)	SDP, Abortion
<i>Romer v. Evans</i> (1996) (p. 1505)	Sexual Orientation Discrim.	<i>Gonzales v. Carhart</i> (2007) (p. S319)	SDP, Abortion
<i>Windsor v. United States</i> (2d Cir. 2012) (H/O)	Sexual Orientation Discrim.	<i>Bowers v. Hardwick</i> (1986) (p. 1466)	SDP, Sex. Orient., Privacy
<i>Perry v. Brown</i> (9th Cir. 2012) (H/O)	Sexual Orientation Discrim.	<i>Lawrence v. Texas</i> (2003) (p. 1482)	SDP, Sex. Orient., Privacy

Who Decides Constitutional Questions?

Judicial Branch

- The Supreme Court gets the last word on matters of constitutional interpretation
- Lower federal and state courts also decide constitutional questions
- The federal courts determine the “outer bounds” of constitutionality – that is, the maximally permissible conduct allowable under the Constitution
- Judicial review presents several issues:
 - “Countermajoritarian difficulty”
 - Institutional competence
- But federal courts are limited by the “Case or Controversy” requirement to the types of cases they can hear; must be live and capable of judicial resolution, considering:
 - Standing
 - Ripeness
 - Mootness
 - Political Question
- Courts also police separation-of-powers issues – formal vs. functional approaches

Executive Branch

- The President and executive departments make independent determinations of the constitutionality of legislation and actions
- The President may veto any law he views as unconstitutional
- The President may issue a signing statement interpreting legislation passed in a way he deems to not violate the Constitution
- The President may request opinions from the Attorney General on constitutional questions (OLC)
- The President may decline to execute a statute he deems to be unconstitutional
- While he exercises independent discretion, the President’s interpretation must be narrower than the Court’s (i.e., not violate the Constitution as determined by the Court)

Legislative Branch

- All legislators swear to uphold the Constitution and the legislation that Congress passes is presumptively constitutional
- Congress determines the jurisdiction of the federal courts and can decide what matters may be decided by such courts
 - Jurisdiction stripping
 - With certain limits as enumerated in the Constitution
- Congress is often the best place for difficult (policy) questions to get resolved
 - Better fact-finding capabilities
 - More representative of the public will

Judicial Power

Power of Judicial Review

- The Constitution doesn't say anywhere that the Supreme Court has the power to strike down laws as being unconstitutional
- **Marbury v. Madison (1803)**
 - Marbury was seeking his commission from Madison
 - Resolved the question of judicial review; "it is emphatically the province and duty of the judicial department to say what the law is"
 - Went out of its way to needlessly strike down the law, establish the power of judicial review and do it in a way that would give the President what he wanted, averting a constitutional crisis
- The Supreme Court has the ability to review the judgments of state courts and the constitutionality of state legislation (*Martin v. Hunter's Lessee*)
- The Supreme Court also has appellate jurisdiction over state criminal cases (*Cohens v. Virginia*)

"Case or Controversy" Requirement

- Limits the ability of a federal court to hear cases; there must be a live case or controversy
- **Standing:** is the plaintiff the proper party to bring the matter to the court for adjudication?
 - Injury: has been injured or imminently will be injured
 - Must generally be personally suffered; no third-party claims or generalized grievances (generally)
 - Causation: must be traceable to the defendant's actions
 - Redressability: court must be able to remedy the injury

"Case or Controversy" Requirement (Continued)

- **Ripeness:** may the court hear a challenge to a law before it has been enforced?
 - Look at the hardship to be suffered without pre-enforcement review and fitness of the issues in the record before the court
- **Mootness:** have events after the filing of the lawsuit ended the plaintiff's injury?
 - Unless: there is a wrong capable of repetition but evading review; voluntary cessation; class-action suits where at least one member has an ongoing injury
- **Political Question:** is the matter a political question not resolvable by the courts? Six factors
 - Jurisdictional: (1) constitutional commitment of the issue to a political department
 - Doctrinal: (2) lack of judicially discoverable and manageable standards for resolving it; (3) impossibility of deciding without an initial policy determination unsuitable for judicial discretion
 - Prudential: (4) impossibility of undertaking independent resolution without expressing lack of respect for the political branches; (5) existence of an unusual need for unquestioning adherence to a political decision already made; (6) potential embarrassment from answers by various branches on the same question
 - Fail: challenges to (1) the republican form of government clause; (2) the President's conduct of foreign policy; (3) the impeachment and removal process; (4) partisan gerrymandering

The Dog Days of Federalism

General Principles

- The federal government is one of limited and enumerated powers
 - Congress generally draws its powers from Article 1, Section 8, which lists a number of them
- The states have the “police power” – the power left over, to regulate health, welfare, family issues, etc.
- Key sources of congressional power
 - Taxing Clause
 - Spending Clause
 - Commerce Clause
 - 14th Amdt. Section 5 (didn’t come until later)
 - Necessary & Proper Clause
- Key sources of executive power
 - Vesting Clause
 - War Power
- Key limiting principles on federal government
 - 10th Amdt. – powers not vested in the federal government remain with the states (unless forbidden by the Constitution) or the people
 - 11th Amdt. – can’t sue states in federal courts
- Key limiting principles on state governments
 - Commerce Clause / Dormant Commerce Clause – regulation of certain spheres of activity vested solely in the federal government, whether it uses it or not, unless it delegates that power to the state government
- Early cases sought to define the roles of the two sets of governments

Early Cases

- ***McCulloch v. Maryland (1819)***
 - Congress has the power to create a national bank (pursuant to N&P Clause) and states can’t tax it, because that would give them effective supremacy and allow a tax on the whole country without representation
- ***Gibbons v. Ogden (1824)***
 - Federal boat license trumps state license; established that there are separate spheres for the federal and state governments and overlapping areas (e.g., taxing)
- ***Mayor of the City of New York v. Miln (1837)***
 - Found that the city could have reporting and bonding requirements for ship passengers pursuant to the police power (regulating poor people) even though it may also impact commerce (change to Taney Court)
- ***Cooley v. Board of Wardens (1851)***
 - State law regulating boat pilots upheld because it didn’t conflict with federal law (not pre-empted) and local knowledge is a good thing in that area

Necessary & Proper Clause

- Not an independent source of authority; used to effect the purposes of other enumerated powers; perhaps possible to use as an adjunct to other powers

1 *Is the end within the scope of the Constitution?*

2 *Are the means appropriate / plainly adapted?*

3 *Are the means prohibited by the Constitution?*

Ups & Downs of Commerce Clause Power



Early Cases

- Court maybe willing to uphold use of Commerce Clause for morals legislation
- But cautious about use of Commerce Clause as a pretext for stepping on states' police power

Champion v. Ames (1903)

- OK to prohibit sending lottery tickets across state lines

Hammer v. Dagenhart (1918)

- Can't regulate child labor via the Commerce Clause as a pretext for exercising states' police power

NLRB v. Jones & Laughlin (1937)

- Upheld NLRA for interstate companies that affect interstate commerce directly & immediately

United States v. Darby (1941)

- Overruled *Dagenhart*; pretext is fine if it would be impractical to separate interstate & intrastate activities

Wickard v. Filburn (1942)

- Growing wheat for personal consumption affects interstate commerce; aggregate effects

Heart of Atl. v. United States (1964)

- Anti-discrimination law for motels OK under Commerce Clause even if really passed for moral reasons; end of pretextual analysis

Katzenbach v. McClung (1964)

- Anti-discrimination law on restaurant OK even if it just impedes commerce or changes it without reducing it

New Deal & Civil Rights

- Court initially tried to cabin expansions of Commerce Clause into categories (direct / indirect, etc.)
- But eventually gave up and allowed virtually limitless regulation under the Commerce Clause

United States v. Lopez (1995)

- Gun-Free School Zones Act; first time law struck down under Commerce Clause since New Deal

United States v. Morrison (2000)

- Struck down VAWA as both non-economic (non-commercial) and not interstate in nature

Gonzales v. Raich (2005)

- Reaffirmed *Wickard* with respect to federal prohibition on marijuana, even when state legalized

Rehnquist Court

- New distinctions in doctrine emerging, some harkening back to the "dog days"
- Newfound respect for federalism and caution about encroachment on state police power by the federal government

Roberts Court

- No clear overall change in amount of Commerce Clause power
- But even more distinctions emerging

United States v. Comstock (2010)

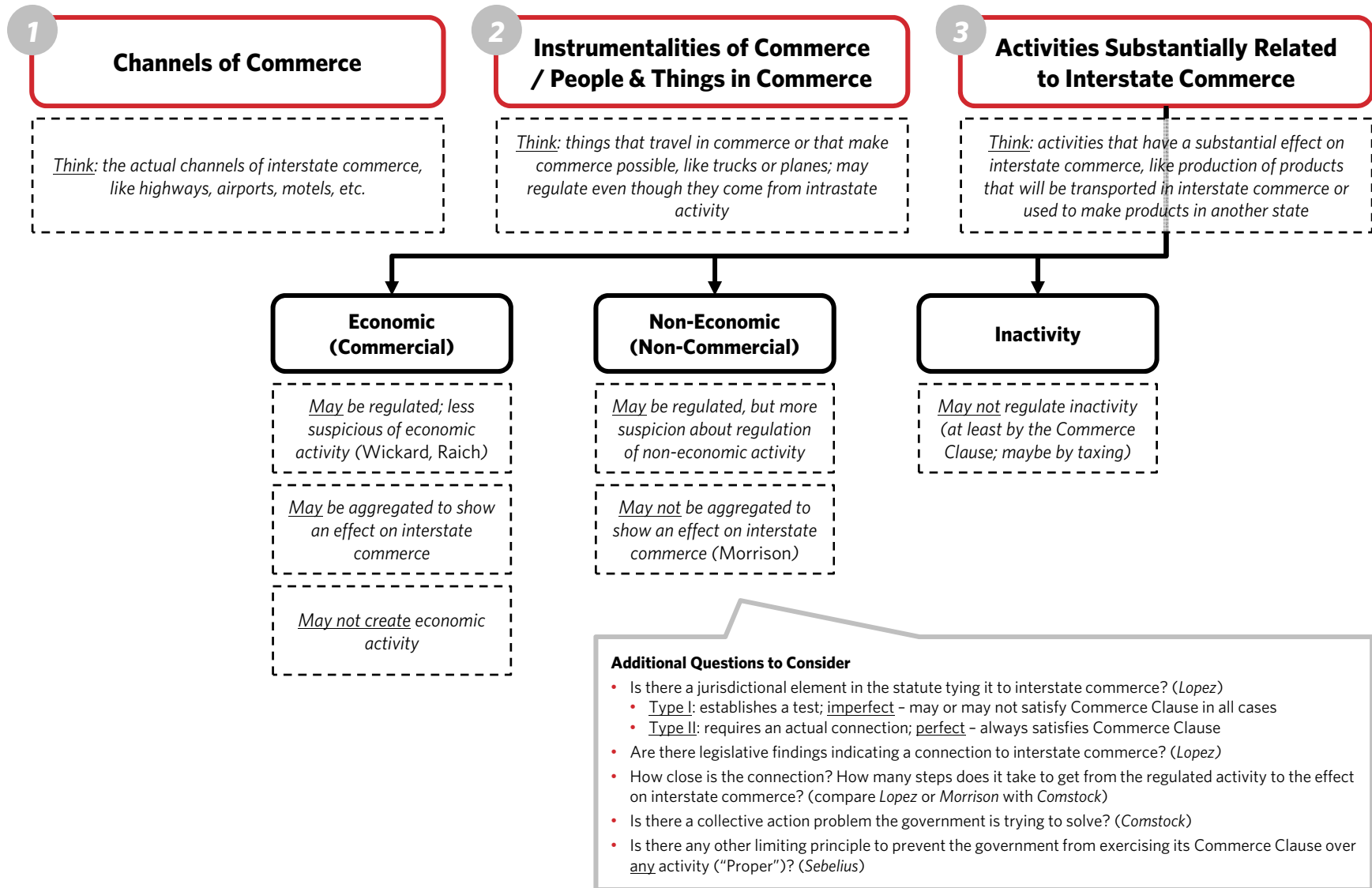
- OK to civilly commit former federal prisoners to correct problem created by federal law; also accommodates state interests

NFIB v. Sebelius (2012)

- Forcing one to buy health care is not a regulation of commerce; it's a creation of commerce

Commerce Clause: State of the Doctrine

There Are Three Things Congress Can Regulate Under the Commerce Clause . . . (Lopez)



Commerce Clause: Important Cases

Cases

- **United States v. Lopez (1995)**
 - First case struck down as violating the Commerce Clause since the New Deal
 - Federal law prohibited possession of guns in school zones; tenuous connection to interstate commerce
 - OK to regulate intrastate activity affecting interstate commerce; but this was a criminal statute that didn't deal with interstate commerce
 - No legislative findings - not necessarily required but helpful where a connection is not apparent - and no jurisdictional element
 - "Costs of crime" reasoning could result in federal government regulating nearly all criminal activity
 - Must leave police power to the states
 - Generally defer to Congress but still a role for courts to play in policing the outer boundaries of uses of the Commerce Clause (Kennedy)
 - Dissents: commerce power is plenary; distinguishing between commercial and non-commercial is hard; there is a connection between education and commerce
- **United States v. Morrison (2000)**
 - VAWA gave victims of gender-motivated violence a federal cause of action
 - But neither particularly commercial nor interstate; may not find Commerce Clause power based on the aggregate effect of such non-economic activity
 - No jurisdictional element, though there were some legislative findings; could lead to federalization of all criminal law
- **Gonzales v. Raich (2005)**
 - Court upheld federal prohibition on medical marijuana in California; called this an economic activity (fungible commodity) that could lead to interstate spillover; reaffirmed *Lopez* but held this close to *Wickard*
 - Scalia: consider N&P Clause as it applies to the whole of Congress's powers instead of each in isolation
 - O'Connor: but this would suggest that the more Congress does, the more it can do
- **United States v. Comstock (2010)**
 - Law allowed civil commitment of former federal prisoners if no state wanted them; needed to solve collection action problem that it created
 - Upheld as necessary and proper extension of the Commerce Clause, even though it was a long chain
- **NFIB v. Sebelius (2012)**
 - Individual mandate in Affordable Care Act
 - First argument: Commerce Clause
 - But Court found this would allow Congress to regulate inactivity instead of activity (not buying insurance) because, in aggregate, it could affect commerce; would give government much greater power over the people
 - Regulating activity in advance not allowed, even if everybody is likely to engage in it
 - Second argument: Necessary & Proper Clause
 - Other insurance provisions are valid and individual mandate necessary to make them effective; this "piling on" was OK in *Comstock* - Congress doing more because Congress is doing more
 - Maybe "necessary" but not "proper" - taking away state power; no limiting principle

Taxing Power

General Principles

- Congress has a broad power to tax, which is also shared with the states
- Taxing power followed similar arc to that of the Commerce Clause – Court initially struck down taxes but eventually acquiesced and allowed for a broader construction of the power
- Several requirements
 - Must raise revenue, but not much
 - Must be for the general welfare, not local
 - But courts aren't in a good position to determine this – basically a political question
 - Must not be so large as to constitute a penalty or criminal sanction
 - Can't command via the Taxing Power what Congress couldn't otherwise do via the Commerce Clause or other head of legislative authority
 - Must not violate any other provision of the Constitution
- Tax vs. penalty
 - How large is it?
 - Is there a scienter requirement?
 - Does it label the payer an offender?
 - Who administers it?

NFIB v. Sebelius (2012)

- Even if the individual mandate isn't a valid exercise of the Commerce Clause, is the "penalty" for violating it a valid exercise of the Taxing Power?
- Even though labeled a "penalty," look at substance over form; in particular, try to construe the statute to not be struck down as unconstitutional
 - Doesn't apply to those who don't pay federal income taxes
 - Found in the Internal Revenue Code
 - Size of "penalty" likely far less than the cost of purchasing insurance
 - No scienter requirement
 - Collected solely by the IRS, which isn't allowed to criminally prosecute those who don't pay it
 - Not branding those who don't pay "criminals"
 - Thus, for all intents and purposes, a tax
- But, if it's a tax, the Court can't review the constitutionality of it yet because of the Tax Anti-Injunction Act
 - But, even though it's a tax for the Taxing Power, it's a penalty; Congress likely intended to override the Tax Anti-Injunction Act for this particular exaction
- Generally OK to tax inactivity, even though the government can't create activity – capitation taxes
- Chief Justice Roberts's *Marbury* moment – going out of his way to unnecessarily make new Commerce Clause doctrine while leading to the outcome that would avoid a constitutional crisis

Spending Power

General Principles

- Congress has a broad power to spend money as it sees fit, and may attach conditions to the funds it allocates to grants
- The conditions can require the recipient of the funds to do things Congress couldn't ordinarily compel; but this can't go too far
 - Must be in pursuit of the general welfare
 - Deferential to Congress
 - Must be unambiguous
 - Recipient must be able to accept the funds fully aware of what it's getting itself into
 - Must be related to the federal interest in the national project or program
 - Must not be an independent constitutional bar on the conditional grant of funds
 - Must not turn pressure into compulsion
 - Similar to Taxing Power - no penalty

Cases

- ***South Dakota v. Dole (1987)***
 - Congress conditioned 5% of state highway funding on changing minimum drinking age to 21
 - Congress might not be able to regulate the drinking age directly because of the 21st Amendment
 - (1) Condition advanced general welfare (preventing drunk driving); (2) conditions clearly stated; (3) drunk-driving fatalities happen on highways; (4) gets state to do something it's allowed to do without violating individual constitutional rights; (5) only 5% of funds

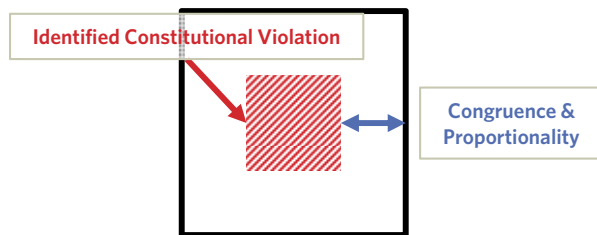
Cases (Continued)

- ***NFIB v. Sebelius (2012)***
 - Affordable Care Act required states to expand Medicaid coverage; it funded 90%+ of the changes but if states didn't adopt the changes, they would lose all Medicaid funding
 - Principal objection: coercion
 - Medicaid constitutes ~20% of state budgets
 - Federal government funds 50-80% of Medicaid
 - Threatening to take away ~10% of budget is a "gun to the head"; Court is OK with conditions on spending as long as they're voluntary but this went beyond that
 - True even though the Medicaid statutes provide that Congress can change the terms of the program at any time - states lacked fair notice of such a drastic change
 - Much bigger than any prior change
 - Past record of changes showed that such amendments would be smaller
 - Suggested that the conditions on acceptance were ambiguous - retroactively imposing new conditions
 - Political constraints would prevent the federal government from completely repealing or federalizing the program
 - Implicit federalism / 10th Amendment concerns - conscripting state legislatures to enact federal regulations
 - Consideration: preserving political accountability; if the government does something the people don't like, the people should know whom to hold accountable - the federal government or the state government

Section 5 Power

General Principles

- Congress may legislate to enforce the provisions of the 14th Amdt. – only regarding state action
- Two views of this power:
 - Nationalist: Congress may enforce its own interpretation of the 14th Amdt., but not dilute rights recognized by the Court (*Morgan*)
 - Federalist: Congress may only enforce the 14th Amdt. as interpreted by the Court (*City of Boerne*)
- Court has adopted the federalist viewpoint – Congress may only legislate to prevent or remedy violations of rights recognized by the Court
- Must be “congruence and proportionality” between the injury to be prevented and the means adopted
 - Must determine the “metes and bounds” of the right, relying on judicial doctrine (how the Court treats it)
 - Must identify, in the legislative history, a pattern of state action that violates the constitutional right
 - Must have reason to believe many of the state actions affected would likely be unconstitutional; consider tailoring geographically or temporally (sunset clause)
 - Must consider appropriateness in light of harm – more leeway when heightened scrutiny implicated



Permissible Congressional Action

Cases

- ***Katzenbach v. Morgan (1966)***
 - Didn't ask whether New York voting law violated the EPC, but rather whether Congress was able to legislatively overturn the law under § 5
 - Found that Congress could legislate prophylactically to pre-empt state action that threatened 14th Amdt. violations even if not necessarily unconstitutional
- ***City of Boerne v. Flores (1997)***
 - RFRA prescribed strict scrutiny for laws imposing burdens on religious practices, overriding precedent that said such laws were subject to lesser scrutiny
 - Court said Congress can overprotect a right, but not change the meaning of a right; required congruence and proportionality between the injury and the remedy
- ***United States v. Morrison (2000)***
 - Government tried to defend VAWA under § 5, saying states didn't prioritize domestic violence, violating the EPC; too attenuated; did not give a cause of action against states, but against private individuals
- ***Coleman v. Court of Appeals of Maryland (2012)***
 - Court rejected the holding of *Hibbs* for the “self-care” provisions of the FMLA, finding it was concerned with economic, not sex, discrimination
 - Less deference given to the action since only rational basis, not heightened scrutiny
 - Four justices would have overruled *Geduldig* and made pregnancy discrimination a form of sex discrimination; since the self-care provisions mostly affect pregnant women, this would be a valid § 5 enactment

10th Amendment Constraints

General Principles

- The 10th Amendment reserves rights – other than those enumerated in the Constitution as belonging to the federal government – as belonging to the states, or the people, unless prohibited by the Constitution
- Attempts to preserve federalist system
- Generally two constraints arising from the 10th Amdt.
 - Encroaching on traditional state prerogatives
 - Mostly left to be resolved by the political process, but courts will try to construe statutes in order to avoid a federalism problem (rule of statutory construction)
 - Commandeering of state officials
 - Generally cannot force state legislatures and executives to carry out Congress's wishes – but may be able to induce them via, for example, the Spending Power
 - Commandeering of state judiciaries is less problematic and, in some ways, mandated by the Constitution – state courts required to recognize the Constitution as the supreme law of the land

Cases

- ***Garcia v. San Antonio Metro. Transit Auth. (1985)***
 - Found *National League of Cities*, which rejected application of FLSA to states to protect “traditional” state functions from federal encroachment, unsound in principle and unworkable in practice
 - State sovereign interests protected by political process
 - No reason to privilege “traditional” functions over newer, important state functions
 - Hard to tell what functions are “traditional” or integral – would lead to inconsistent results
 - Many federalism questions are political, not justiciable

Cases (Continued)

- ***Gregory v. Ashcroft (1991)***
 - Court decided that ADEA would not be construed to overturn state's mandatory retirement age for judges absent a clear statement from Congress that it intended to do so when an alternate construction of the statute was plausible (constitutional avoidance)
- ***New York v. United States (1992)***
 - Congress, wanting to deal with nuclear waste, created a scheme for states to regulate such waste, allowing interstate compacts and providing certain incentives
 - Surcharge / tax / spending incentive was a permissible use of the Commerce Clause
 - Rate-increase provision also fine; ultimately burdened private actors and gave authority to discriminate against interstate commerce – OK use of Commerce Clause
 - “Take title” provision problematic – gave state choice between regulating and taking the nuclear waste when Congress could not force states to do either
 - Congress can't force states to legislate
 - Congress can regulate directly or pre-empt, may direct state judges under the Supremacy Clause and courts may direct state officials to comply with federal law
- ***Printz v. United States (1997)***
 - Federal law told state attorneys general to do background checks on gun buyers
 - But state executives not answerable to the federal government
 - Congress paying legislation and then trying to get the states to pay the bill – not OK
 - No commandeering of state legislatures or executives
 - But judges are OK to commandeer
 - Would undermine political accountability

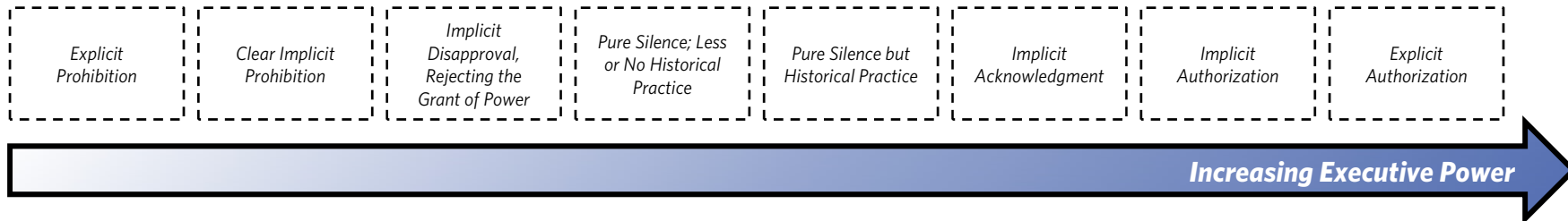
Executive Power

Sources of Executive Power

- The President has certain explicit powers, given directly by the Constitution (e.g., Commander-in-Chief Clause)
- The Vesting Clause is likely a source of some implicit, unenumerated powers – compare “the executive power” vested in the President with “all legislative powers herein granted” vested in Congress
 - More power for foreign affairs vs. domestic affairs
- Congress gives the President and other officers certain other powers
- The President may do things for a long period of time; if Congress doesn’t object it may be deemed to have acquiesced, putting a gloss on the President’s powers

Cases

- **Youngstown Sheet & Tube v. Sawyer (1952)**
 - President seized steel mills to avoid a labor strike; concerned about shortages during the Korean War
 - Court said President didn’t have the inherent power and Congress considered giving it to him, but didn’t
 - Justice Jackson provided the classifications (below) and Justice Frankfurter gave the “gloss” concept
- **Dames & Moore v. Regan (1981)**
 - President Carter issued an executive order releasing liens on certain Iranian funds in exchange for hostages; a company sued Iranian entities but court vacated the attachment on their property because of the order
 - Court affirmed; no statutory authorization but implicit approval via congressional acquiescence



Youngstown 3 - Lowest Ebb

- Lowest authority when acting contrary to Congress’s express or implied will
 - In order for the action to be upheld, the power must not be able to be restrained by Congress – must be derived from the Constitution directly

Youngstown 2 - “Zone of Twilight”

- Some authority when acting despite congressional silence
 - Must figure out whether Congress has spoken; if it hasn’t, maybe Congress thinks the President has the power
 - Consider “contemporary imponderables”
 - Consider gloss of congressional considerations and historical practices

Youngstown 1 - Max Power

- Maximum authority when acting with express or implied authorization by Congress
 - Maximum deference when political branches are united
 - Acting with the whole power of the government, but may still not be OK (e.g., by violating individual rights)

War Power: In General

General Principles

- War power split between the President, who is the Commander-in-Chief, and Congress, which has the power to declare war, apportion funds, etc.
- To what extent can Congress regulate how the President engages in military action without stepping on the President's commander-in-chief power?
- When may the President use the military absent congressional authorization?
 - For domestic-law purposes, Congress declares war anytime it explicitly authorizes the use of military force
 - Most agree that, at a minimum, the President doesn't need an authorization of force to repel an attack
 - May be able to protect U.S. persons or property abroad
- Courts almost never get involved in disputes about the war power – Constitution used as part of the debate between the President and Congress

OLC Opinion (2011)

- President unilaterally engaged the military in Libya
 - History of unilateral engagements evidences a shared understanding about the scope of the President's power – congressional acquiescence
 - Shared understandings may be particularly important when courts have a limited role
 - But legislators' views are all over the map – how can one determine that Congress has acquiesced?
- When deciding whether President can act unilaterally, consider (1) the importance of the national interest (probably not limited); and (2) whether the "nature, scope and duration" of the action make it a "war"

War Powers Resolution

- Passed after the Vietnam War to make it harder for the President to involve troops in international conflict
- Instead of requiring Congress to de-fund the action, changes the default rule, requiring the President to withdraw without approval
 - Must get approval within 60 days
 - Could be *Youngstown 3*; express prohibition on President's use of force after the 60 days
 - Could also be *Youngstown 1*; express authorization unless the President crosses the 60-day boundary
 - Assumes President will sometimes act unilaterally
- How do you correct violations of the WPR? Not really justiciable – courts usually don't get involved

Koh Testimony (2011)

- Claims there's a "shared understanding" of "hostilities" under the WPR that may limit when congressional approval is required; not hostilities if
 - Nature of mission is limited
 - Supporting NATO-led civilian-protection mission
 - Exposure of armed forces is limited
 - No significant armed confrontations; few U.S. casualties
 - Risk of escalation is limited
 - Low likelihood of escalating to a conflict involving lots of troops, casualties, combat and broader geographic scope
 - Military means are limited
 - Limited air strikes, no ground involvement and support mostly with intelligence and refueling

War Power: Due Process Limitations on the War Power

Hamdi v. Rumsfeld (2004)

- Citizen, captured in Afghanistan, held in U.S. – no question that he was entitled to habeas relief
- Government has the right to detain persons in Hamdi’s narrow category (citizen combatants in Afghanistan)
 - Non-Detention Act requires an act of Congress to detain citizens and the AUMF meets that (impliedly)
 - If President can kill under the AUMF, surely he can detain
- If this were *Youngstown 3* (Souter), Court would have had to figure out whether the President could inherently detain people (but Court avoids that issue)
- How long would that detention authority last?
 - Maybe when the hostilities end or when there’s no longer a purpose in holding him
 - Implied statutory authorization could unravel over time, requiring a more explicit authorization from Congress
- Process required to show that Hamdi was properly detained, but doesn’t require a full, court-like hearing
 - Balance Hamdi’s interests and the burdens on the government (*Mathews v. Eldridge*)

- Not squarely addressed in any case, but under the logic of *Boumediene*, surely habeas relief would be afforded

Held in U.S.
Held Outside U.S.

	Citizen	Non-Citizen
Held in U.S.		
Held Outside U.S.		

Key Take-Aways

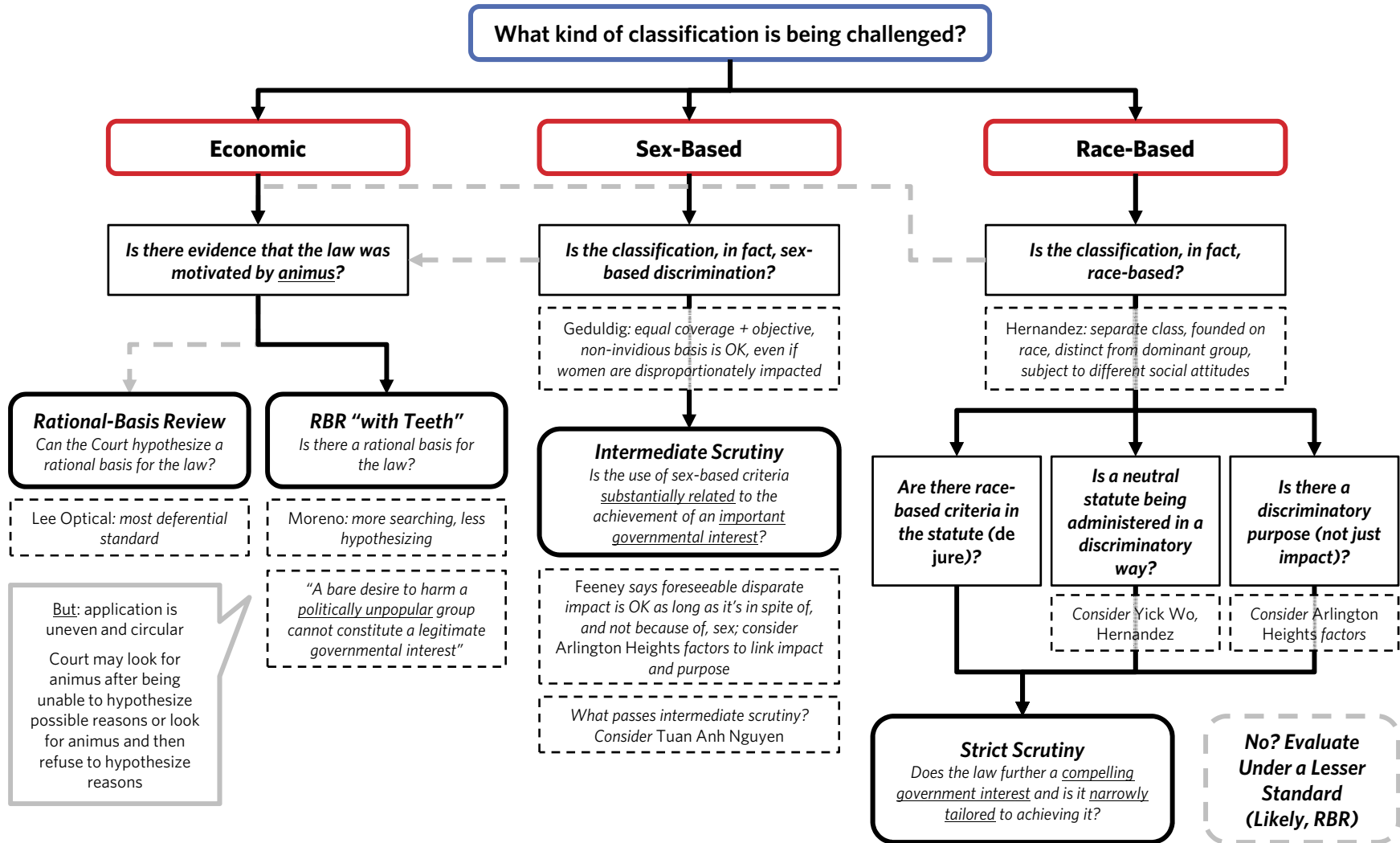
- Court necessarily sees its own role as limited
- But there is still a role for the Court even in times of war
- Court wants to incentivize the political branches to work together and will give joint action deference as long as they’re not working to eliminate a role for the Court

- Court in *INS v. St. Cyr* (2001) said it believed there was a constitutional right (vs. statutory right) to habeas corpus as it existed at the time the Constitution was ratified (but unclear what shape this takes)
- Accumulated understanding of cases suggests that U.S. citizens detained by the executive authority outside the U.S. still have the right to habeas corpus

Boumediene v. Bush (2008)

- Non-citizen captured in Afghanistan and held at Guantanamo Bay; Congress, as a response to *Rasul* and *Hamdan*, stripped federal courts of jurisdiction to hear habeas cases for non-citizens at Guantanamo Bay and substituted a watered-down version (like what was suggested in *Hamdi*)
- Sort of a *Youngstown 1* case – Congress trying to make it easier for the President to detain
- Finds that three factors are relevant in determining whether the Suspension Clause reaches a person: (1) the citizenship and status of the detainee and the adequacy of the process through which that status was made; (2) the nature of the sites where apprehension and then detention took place; (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ
 - In this case, the processes were flimsy, Guantanamo is under the U.S.’s *de jure* control and the practical difficulties were few because the base was secure and close to the U.S.
 - *Maqaleh* came out the opposite way for detainees held at Bagram Air Force Base in Afghanistan
- If the military had used more rigorous processes, then the Court might have given more deference
- *Boumediene* gives courts some shapeless review over the process, likely displacing *Hamdi* in that regard

Equal Protection Clause Analysis



- Key Themes**
- Permissible and impermissible types of discrimination
 - Formal equality vs. anti-subordination
 - More protection afforded when a group is unable to seek redress via the normal political process

- Characteristics of Groups Getting Heightened Scrutiny**
- Singled out because of political or moral disapproval (Moreno, Romer)
 - History of discrimination; distinguishing characteristic; lack of relationship between distinguishing characteristic and ability to contribute to society; lack of political power (2d. Cir. Windsor)

Equal Protection: Economic Regulation & Rational-Basis Review

General Principles

- When it comes to most economic regulation, the Court will give significant deference to Congress, owing to its superior fact-finding ability and the Court's own lack of institutional competence
- In most cases, it will only look for a rational basis for the law, hypothesizing if need be
 - Congressional findings can be helpful, but not required
 - Law doesn't necessarily have to solve the problem it addresses or do it in the best way possible; Congress can act piece-meal
- If there is reason for the Court to believe the law is aimed at harming a politically disfavored group that isn't covered by heightened scrutiny, it might still be more searching in its review
 - "With teeth" - no hypothesizing and will look to see whether the purported reason is actually rational
 - Evidence of animus may make the Court skeptical of the purported legislative purpose
- Cost-saving usually legitimate for RBR but not RBRWT

Cases

- **The Slaughterhouse Cases (1873)**
 - Louisiana forced all butchers to work out of a slaughterhouse owned by one corporation
 - Court construed Privileges & Immunities Clause to apply only to P&I of citizens of the U.S., not of states, draining all real meaning; also found Equal Protection to only apply to newly freed slaves

Cases (Continued)

- **Williamson v. Lee Optical (1955)**
 - Oklahoma law gave optometrists certain prescription rights while withholding them from opticians
 - Court set forth rational-basis test; protecting eye health was rational, even if this wasn't the best way of doing it
 - Most concerned about invidious discrimination
- **Railway Express Agency v. New York (1949)**
 - NYC disallowed third-party advertising on trucks; could have been to regulate traffic; kind of a dumb rule and a dumb way of implementing it, but rational basis!
- **U.S. Dept. of Agriculture v. Moreno (1973)**
 - Amendment to food-stamp program made it harder for groups of unmarried people to qualify; legislative history indicated it was aimed at hippies
 - Court said the amendment wasn't related to the purpose of the program and ineffective for purported purpose (combating fraud); searching for an actual, rational purpose because of evidence of animus
- **Lyng v. International Union, UAW (1988)**
 - Amendment to food-stamp program got rid of food stamps for striking workers
 - Government argued it would cost less, give priority to other groups and maintain political neutrality
 - Court went back to rational-basis review; no animus here, perhaps because workers weren't disfavored
 - "Rough justice" is fine, as long as there's a rational basis
 - Cost-cutting is probably also OK, as long as a group isn't singled out for cuts; don't want to allow it as a permissible reason, because the government could always use it as a rationale for program changes

Equal Protection: Segregation Cases (1)

Key Themes

- Evolution of equal protection: going from protecting the historically disfavored race to formal equality by race to broadening to other groups
 - Tension between conception of equal protection as promoting formal equality vs. anti-subordination
- Agreed that equal protection only applies to state action - no ability to regulate social or private segregation via the 14th Amendment
- Use of race-based criteria permissible when correcting a prior proven constitutional violation, but probably not OK for states to use race-based criteria to correct social segregation or prevent re-segregation
 - Is it somehow more permissible to use “race-conscious” criteria without making any decisions based on an individual’s race?

Cases

- ***Strauder v. West Virginia (1880)***
 - Strauder, on trial for murder, sought to overturn a state law prohibiting blacks from serving on juries
 - No guarantee he would have gotten a black juror, but kind of an expressive harm and a lack of opportunity to fight community stereotypes
 - Court found this unconstitutional, but limited application of the 14th Amdt. to race only
 - Introduced formal equality and anti-subordination themes at the same time

Cases (Continued)

- ***Plessy v. Ferguson (1896)***
 - Sought to overturn a state law requiring segregation of train cars by race
 - Court thought that 14th Amdt. only sought to protect civil / political rights, not social ones; skipped over the possibility that state-mandated segregation helped to perpetuate discrimination
 - Introduced the separate but equal doctrine
 - Justice Harlan (dissenting) introduced formal equality, said any racial classification is suspect but thought whites would come out ahead in any event
- ***Sweatt v. Painter (1950)***
 - Court found that Texas law school established just for blacks did not meet the separate but equal standard
 - Tangible factors: funding, faculty, etc.
 - Intangible factors: prestige, reputation, brand, etc.
 - Court previously said separate schools were OK - but this called into question whether a separate law school could ever be equal (particularly on intangibles)
 - The state could’ve closed its public white law schools
- ***McLaurin v. Oklahoma State Regents (1950)***
 - Black student was admitted to Oklahoma university but forced to be segregated within it; closer to a direct challenge to separate but equal, but not quite
 - Court found that such segregation was not OK; school couldn’t force students in different races to mix but had to make them legally equal
 - Students should have the ability to gain acceptance based on their own merits

Equal Protection: Segregation Cases (2)

Cases (Continued)

- ***Brown v. Board of Education (Brown I) (1954)***
 - Stipulated that schools were separate and equal in material respects in order to directly challenge *Plessy*
 - Court thought that the 14th Amdt. didn't clearly speak to segregation in public schools; although schools were segregated at the time, education not as pervasive then
 - No constitutional right to an education, but changed circumstances shine a brighter light on the problem
 - Maybe the extent of the future problem didn't occur to the ratifiers or maybe it did and they intended for it to be interpreted differently in different circumstances
 - Short-term vs. long-term (Bickel) – segregation OK in the short term, maybe not OK as people change their minds
 - Segregation imposes a stigma – separation serves to subjugate one race – clear that blacks wanted to go to white schools and not vice versa
- ***Bolling v. Sharpe (1954)***
 - Similar challenge to D.C. schools; found an “Equal Protection Component” in the 5th Amdt. to avoid a constitutional embarrassment – reverse incorporation
- ***Brown v. Board of Education (Brown II) (1955)***
 - Considering the remedies, Court gave district courts supervision over cases and told them to proceed with all deliberate speed; this was slow – parents had to sue to force districts to desegregate
- ***Green v. New Kent County School Board (1968)***
 - Court recognized that merely removing the law requiring segregation was not enough; required affirmative steps to be taken to eliminate discrimination – but only for schools that had adjudged constitutional violations
- ***Swann v. Charlotte-Mecklenburg Board of Ed. (1971)***
 - Gave courts broad remedial power to correct segregation; OK to set racial goals, have single-race schools (if holistically desegregated), order school assignments based on race and do busing
- ***Milliken v. Bradley (1975)***
 - Required the scope of the remedy to align with the extent of the constitutional violation; interdistrict busing might have been OK if boundaries were drawn to create segregation, if other districts were segregated or if there was a spillover effect; not proven here
- ***Parents Involved v. Seattle School Dist. No. 1 (2007)***
 - Two school districts wanted to take affirmative steps to avoid re-segregation, arguing for diversity in schools
 - But in prior cases, the remediation of past *de jure* discrimination was the compelling government interest; Seattle's schools were not unconstitutionally segregated and Louisville's desegregated
 - Racial imbalance by itself isn't unconstitutional
 - In addition, means not narrowly tailored
 - Race was effectively the deciding factor and crude – only two categories of race (white and non-white)
 - “The way to stop discriminating on the basis of race is to stop discriminating on the basis of race”
 - Advancing formal equality
 - Justice Kennedy (concurring) thought using “race-conscious” measures might be OK, but operating on individuals based just on their race was not OK
 - Classifying on the basis of race is an expressive harm
 - Difficult to discern between good and bad discrimination

Equal Protection: Strict Scrutiny (1)

General Principles

- Government classifications on the basis of race are subject to the most searching form of scrutiny
 - Compelling government interest + narrow tailoring
- What is a race? Four ways to think about it – status, formal, historical, cultural
 - There are often statutory definitions (*Plessy*)
 - A separate class, founded on racial terms, that is distinct from the historically dominant racial group, and subject to different social attitudes (*Hernandez*)
 - But language alone isn't sufficient (*Hernandez v. N.Y.*)
 - If a group is treated as distinct in one part of the country but not another, maybe the test changes
 - Doesn't necessarily matter whether it was a group that was thought to be disfavored when the 14th Amendment was passed
- What constitutes a compelling government interest?
 - Pressing national security / emergency needs
 - Remediation of prior *de jure* race-based discrimination
 - But can't try to prevent social segregation
 - Diversity in higher education
 - Almost nothing else
- What constitutes narrow tailoring?
 - Must be the least restrictive means available for achieving the state interest
 - More discretion given to school administrators to administer affirmative-action programs – Court lacks institutional competence

Actions Leading to Strict Scrutiny

- *De facto* and *de jure* discrimination in legislative, executive and judicial action will be subjected to strict scrutiny
 - Race-based statutory criteria (*Loving*)
 - Implementing facially neutral statute in a discriminatory manner (*Yick Wo, Hernandez*)
 - Legislating for a race-based reason (*Gomillion*)
- Disparate impact along racial lines does not violate the Constitution unless a discriminatory purpose is shown, but discrimination needn't be the only purpose; look at the *Arlington Heights* factors
 - Impact of official action, including whether a pattern emerges unexplainable on any basis other than race
 - The historical background for the decision, particularly if it reveals actions taken for invidious purpose
 - The specific sequent of events leading up to the challenged decision
 - Departures from the normal procedural sequence
 - Substantive departures where the normal considerations would favor the contrary outcome
 - The legislative or administrative history, contemporary statements, etc.
 - Once a partial race-based motive is shown, burden shifts to prove the same decision would have been reached absent such a motive

Equal Protection: Strict Scrutiny (2)

Cases

- ***Korematsu v. United States (1944)***
 - First articulation of strict scrutiny
 - Sought to overturn internment of those of Japanese ancestry during the war; no question that a national emergency was a compelling government interest
 - No real tailoring, but Court didn't find that problematic
 - Justice Jackson very concerned about the Court endorsing this move - the internment was only likely to last as long as the emergency, but the constitutionality could be invoked later (a "loaded weapon")
- ***Loving v. Virginia (1967)***
 - Virginia statute forbade marriages between whites and non-whites; court decided a law that turns on a racial classification is unconstitutional even though it applied equally to both races (whites could only marry whites and non-whites could only marry non-whites)
 - EPC requires considering whether any classification is arbitrary and invidious discrimination; if race-based, then strict scrutiny
 - No compelling interest - intended to promote white supremacy; did not forbid, for example, blacks and Asians from marrying
- ***Hernandez v. Texas (1954)***
 - Administration of facially neutral jury-selection statute resulted in no people of Mexican descent on juries for 25 years; the result bespeaks discrimination
 - Dealt with a group that isn't a recognized "racial" group per se - petitioner must show that it's a race- / origin-based group that society treats as a separate class, typically subject to differing social attitudes
- ***Yick Wo v. Hopkins (1886)***
 - Administration of neutral law granting laundry permits to white owners but not Chinese ones unconstitutional
- ***Gomillion v. Lightfoot (1960)***
 - Unconstitutional to redraw the boundaries of a city in order to exclude black voters
- ***Washington v. Davis (1976)***
 - Applicants to D.C. police department sought to overturn testing requirement because of disparate impact on blacks
 - While disparate impact can shift the burden of proof or evidence discriminatory purpose, such a purpose itself must be present to be unconstitutional; not here
 - Treated differently under Title VII
- ***Arlington Heights v. Metro. Housing Devel. (1967)***
 - Developer sought a judicial review of the city's unwillingness to rezone land for multi-family development
 - Re-articulated that discriminatory impact insufficient
 - But, showing that intent to discriminate was a motivating factor, even if not the only factor, would shift the burden to the other party to disprove the discriminatory purpose / show that the same result would have been reached absent such a purpose
 - Must show racial motivation not a "but for" cause of the decision
 - Gave the six factors for courts to use to infer a discriminatory purpose (see prior page)

Equal Protection: Strict Scrutiny & Affirmative Action

Key Take-Aways

- Diversity – at least in education – can be a compelling government interest; there’s pedagogical value that accretes to all students
 - But underrepresentation and remediation of past wrongs are not permissible
- Schools have a lot of leeway in crafting affirmative-action programs, but may not use set-asides / quotas
 - Should consider race as part of “diversity” along with other factors

Cases

- **Regents of the Univ. of California v. Bakke (1978)**
 - UC set 16 slots aside for minorities in its med. school
 - Confirmed strict scrutiny as the right test – even though it was “reverse discrimination” – formal equality
 - Court rejected state’s arguments that racial underrepresentation in medicine and remediation were permissible goals, but accepted diversity
 - Quota not a narrowly tailored means – what’s the relationship?
 - Each applicant must be able to demonstrate his own contributions to diversity / other qualifications
- **Gratz v. Bollinger (2003)**
 - U-M gave 20 extra points in its undergraduate admissions to anybody in certain racial groups; Court found this to be decisive for minority applicants with little room for individualized review – too much discrimination of the non-minority applicants
 - Consider: relative importance of the points, other factors, use of race to achieve equality vs. to prevent it

- **Grutter v. Bollinger (2003)**
 - U-M Law School gave applicants a “holistic review” with race one factor among many
 - Court affirmed that diversity is a permissible goal and the law school could attempt to get a “critical mass”
 - What’s a critical mass? Enough to break down stereotypes, avoid marginalization, prevent single students from representing “the minority viewpoint”
 - Wanted to prepare students for a diverse world, etc.
 - Found the review less troubling since it considered all relevant qualifications and, thus, race was less likely to be the deciding factor for most people
 - Deference – presumed university acted in good faith; free to balance diversity and quality
 - Even though admissions tracked statistics, didn’t use them to make individual decisions
- **Fisher v. University of Texas (5th Cir. 2011)**
 - Texas tried a number of race-motivated but facially neutral ways of admitting students; settled on its Top 10% Plan plus an individual review, giving points for a holistic review of the file
 - No points specifically for race, but that was one factor among many that could be considered
 - Is the *Grutter*-like review program permissible on top of the Top 10% Plan?
 - If critical mass achieved, is this racial balancing?
 - University can be aware of racial demographics even if it cannot set quotas
 - If the state gets most of the way there, does that make the individualized review more suspect?
 - Penalizing state for “killing a gnat with a sledgehammer”?

Equal Protection: Gender Discrimination & Heightened Scrutiny (1)

General Principles

- Around the 1970s, the Court began giving sex-based discrimination a more heightened level of scrutiny
 - Concerned about arbitrariness or decision-making based on stereotypes – perpetuates stereotypes and historically based sex inequality
 - Expressive harm
 - Formal equality notion, but less stringent than strict scrutiny because of legitimate differences between men and women
- Must first decide if the classification is sex-based
 - Usually obvious, but certain properties may not be enough (e.g., pregnancy-based discrimination is OK)
- Must show a discriminatory purpose, not just impact
 - Similar to strict scrutiny in this regard, although Court seems less willing to infer purpose from effect
 - No articulated factors, but can look to the *Arlington Heights* factors for guidance
- If shown, must prove that the discrimination was substantially related to an important government interest – less strict than strict scrutiny
 - Must look at actual reason, not hypothetical one
- May be able to find heightened scrutiny for other groups by analogizing to sex (see *Frontiero*, *Windsor*)
 - Immutable characteristic which usually bears no relationship to ability to contribute to society
 - History of discrimination / stereotyping intended to subordinate the group
 - Lack of political power – less able to seek redress in the political process

Cases

- ***Reed v. Reed* (1971)**
 - State law preferred male executors over female ones (tie-breaker); Court found it an arbitrary preference, likely rooted in some stereotypical notion of suitability, in violation of the 14th Amdt. even though the Court used only rational-basis review (maybe “with teeth”)
- ***Frontiero v. Richardson* (1973)**
 - Federal law gave benefits to married couples; a man didn’t have to prove that he provided less than half of his spouse’s support (presumed) but a woman did
 - Court began to use a higher level of scrutiny
 - Discussed the history of discrimination against women, the resulting oppression of women and pervasive stereotypes in the law
 - Recognized the more recent trend toward statutory equal protection for women
 - Suggested sex is an immutable characteristic that bears no relationship to ability to contribute to society
 - Legal burdens should bear some relationship to individual responsibility
 - Law prescribed disparate treatment for men and women who were similarly situated;
 - Government said its interest was to save money or promote administrative convenience
 - But this wasn’t good enough to survive (similar to RBRWT or strict scrutiny, cost savings aren’t enough)
- ***Craig v. Boren* (1976)**
 - Women could buy “near beer” at 18 vs. 21 for men
 - Warned about sex-based action on outdated sex roles; articulated heightened-scrutiny standard, which the state’s justifications couldn’t meet

Equal Protection: Gender Discrimination & Heightened Scrutiny (2)

Cases (Continued)

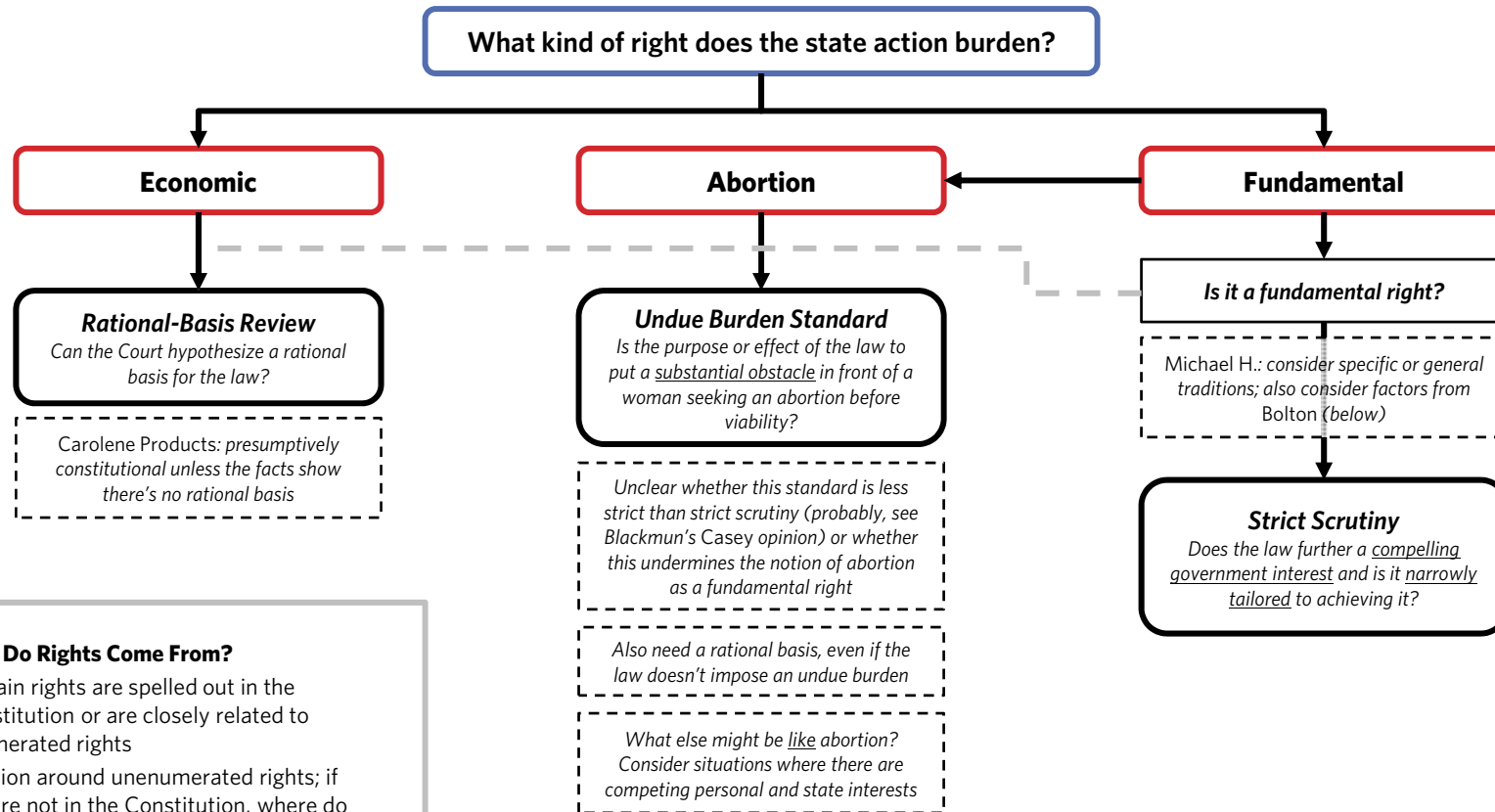
- **United States v. Virginia (The VMI Case) (1997)**
 - VMI didn't admit women; courts told Virginia it could set-up a female-only school, but it established a watered-down version
 - Tried to expand heightened scrutiny to "extremely persuasive justification" but hasn't stuck
 - State's interests were in diversity of education and difficulty in adapting curriculum to women
 - While single-sex schooling might be OK, not offering high-quality, single-sex schools to women; equality!
 - Not required to change standards, only to allow women to try to get in on their own merits, if they want to
 - Might be an exception if admissions criteria were a guise to keep women out
 - Can't use overbroad generalizations - women may not be able to get in or want to, but they shouldn't be prevented without a good reason
 - Some differences between sexes can be recognized, can't use differences between sexes to perpetuate sex-based inequality or stereotypes
- **Personnel Admin. of Mass. v. Feeney (1979)**
 - State law gave hiring preference to veterans; Feeney sued because it disproportionately favored men
 - Clarified that, like in strict scrutiny, must find a discriminatory purpose, not just a foreseeable impact
 - In this case, legislature clearly wanted to favor veterans, but this hurt a lot of men too, so not a clear preference of men over women - not a pretextual reason
 - Dissent wanted to shift the burden to disprove purpose and thought the means could have been tailored
- **Geduldig v. Aiello (1974)**
 - State insurance scheme didn't cover pregnancy; Court found this pregnancy-based discrimination, subject to rational-basis review, not sex-based discrimination
 - An objective and non-invidious basis that disparately impacts women
 - Scheme covered the same conditions for both sexes
- **Tuan Anh Nguyen v. INS (2001)**
 - Federal law put stricter requirements for citizenship on children born to American men out-of-country
 - Admitted sex-based discrimination, but permissible
 - Government's interests: evidentiary, encouraging parent-child relationship
 - Much easier for men to plant their seed around the world; women must be physically present at birth
 - But based on stereotype that men are more likely to be deadbeat than women
 - Those with relationship wouldn't be burdened
 - "Substantially related" - means don't need to achieve ultimate objective in every instance
 - Concerned about calling every biological difference a stereotype - would obscure the meaning of the EPC
- **Nevada Dept. of Human Res. v. Hibbs (2003)**
 - Used Section 5; forced state employers to give maternity and paternity leave; if employees of either sex could take such leave, it would reduce employers' incentives to discriminate against women in hiring, etc.
 - Found this to be OK; targeted sex-role stereotyping that occurred at the work-life intersection, which was responsible for much sex-based discrimination; allowable under congruence and proportionality

Equal Protection: Sexual Orientation

Cases

- **Romer v. Evans (1996)**
 - Colorado amended its constitution to invalidate laws that protect people based on sexual orientation – no “benefit” due to sexual orientation
 - Unconstitutional in two ways
 - Imposed a broad disability on a single group
 - Restricting gays’ ability to participate in the political process and/or advocate for itself; must either amend the constitution or pass a law of general applicability, no matter what the harm
 - The law imposes different burdens on groups based on their acts (e.g., felons) but not based on immutable characteristics
 - No rational relationship to any state interest – inexplicable by anything but animus – rational basis “with teeth”
- **Windsor v. United States (2d Cir. 2012)**
 - Trying to strike down DOMA section 3 based on taxes
 - Court articulated factors leading to heightened scrutiny
 - History of discrimination – criminalization of homosexual conduct
 - Relation to ability – homosexuality not related to ability to contribute to society
 - Distinguishing characteristic – gays trying to marry
 - Political power – less power despite achievements
 - Government’s arguments don’t stand up to scrutiny
 - (1) Uniform definition of marriage for federal law (but traditional state role); (2) protecting the fisc (not OK for heightened scrutiny); (3) preserving traditional definition (maybe tradition isn’t enough); (4) encouraging responsible procreation (but Windsor already married)
- **Perry v. Brown (9th Cir. 2012)**
 - Prop. 8 changed the state constitution to get rid of gay marriage
 - Court used a narrow analysis – withdrawing the label was unconstitutional
 - Routinely recognized that must have a legitimate interest in taking away a right from one group but not another – and animus doesn’t count (*Moreno, Romer*) – rational basis “with teeth”
 - Constitution isn’t a “one-way ratchet” – doesn’t require that the state only ever increase its rights; it just needs a good reason
 - State’s arguments
 - Wants to incentivize responsible procreation
 - But straight couples irresponsibly procreate, not gay ones; many couples can marry without being able to procreate
 - Tradition
 - If there were a reason to prefer the traditional basis – trying an experiment that doesn’t work – then maybe this would be an acceptable reason
 - But gays got married and this sounds like a reason for animus; can’t hide behind tradition
 - Could create a perverse incentive for states
 - The more material benefits a state provides to gay couples, the more likely it is that it’s withholding the remainder because of animus
 - Would penalize progressive states for providing all material benefits (domestic partnerships) but not the “marriage” label
 - But states that believe that gay marriage is worse might be able to forge better arguments against it

Substantive Due Process Analysis



Where Do Rights Come From?

- Certain rights are spelled out in the Constitution or are closely related to enumerated rights
- Tension around unenumerated rights; if they're not in the Constitution, where do they come from?
 - Privileges & Immunities Clause - should be a source, but isn't
 - "Zones of privacy" or "penumbras" around existing rights - maybe, but not really thought of this way anymore
 - 9th Amdt. - not a direct source, but maybe a directive to read more broadly into the content of the other Amendments?
 - 5th & 14th Amdts. - inherent in the concept of "liberty"

What Rights Are Fundamental? (Douglas in *Doe v. Bolton*)

- Autonomous control over the development of one's intellect, interests, tastes and personality (absolute 1st Amdt. Rights)
- Freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception and the education and upbringing of children (fundamental but subject to police power if there's a compelling state interest)
- Freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll or loaf (subject to regulation for a compelling state interest)

Substantive Due Process: Early Cases

Cases

- ***Lochner v. New York (1905)***
 - City passed a law restricting bakery employees to 60 hours of work per week
 - Court hostile toward progressive legislation at the time
 - Used the 14th Amdt., on the basis that one's services are a form of property and a state can't violate such freedom
 - State would need to put significant interests on the table; Court didn't find the power to regulate labor relations or public health sufficiently weighty
- ***Home Building & Loan Ass'n v. Blaisdell (1934)***
 - State imposed an emergency moratorium on mortgage foreclosures
 - Although it found no "emergency power" in the Constitution, the Court found that states are able to restrict contract rights (rational-basis review)
 - The emergency gave the state a good reason to act
 - Basically the beginning of the end for *Lochner*
- ***West Coast Hotel v. Parrish (1937)***
 - Challenge to minimum-wage legislation for women
 - "Liberty . . . requires the protection of law against the evils which menace the health, safety, morals and welfare of the people"
 - "Regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process"
 - Found that there was an interest in protecting women workers from unscrupulous and overreaching employers
- ***United States v. Carolene Products (1938)***
 - Statute prohibited the interstate shipment of milk that had been mixed with a non-milk fat or oil to resemble milk or cream
 - Tried to raise a 5th Amdt. objection, but unavailing; Congress had good reason to legislate this way and wasn't required to fix all aspects of the problem or treat all products equally - it was fine to just legislate against milk products without prohibiting margarine, etc.
 - "The existence of facts supporting the legislative judgment is to be presumed . . . unless in light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators"
 - **Footnote 4:** presumption of constitutionality may have a narrower scope when legislation appears to be within a specific prohibition of the Constitution
 - Suggested that legislation restricting political processes that ordinarily bring about repeal of undesirable legislation may be subjected to more scrutiny
 - Suggested also there might be more scrutiny when prejudice against "discrete and insular minorities" might restrict the political processes that would be used to protect those minorities

Substantive Due Process: Modern

Cases

- ***Griswold v. Connecticut (1965)***

- 14th Amdt. challenge to state law criminalizing use of contraceptives (for married couples)
 - Not a revival of *Lochner* (reading own policy preferences into the Constitution) because it dealt with a law affecting an intimate relationship, not an economic problem (might be different if regarded manufacture or sale of contraceptives)
- Court found that rights have “penumbras” that create “zones of privacy” around them that the government cannot violate
 - Certain relationships (marital, familial) fall within these zones of privacy
- Goldberg (concurring) – 9th Amdt. suggests the “liberty” protected by the 5th and 14th Amdts. is not restricted to those in the first eight Amendments
 - Look to history and collective conscience to determine which rights are fundamental
 - What about judicial restraints?
- Harlan (concurring) – due process is a bulwark against arbitrary legislation; “liberty” is a freedom from all substantial arbitrary impositions and purposeless restraints and certain interests require particularly careful scrutiny

- ***Eisenstadt v. Baird (1972)***

- State law prohibited use / distribution of contraceptives to unmarried people
 - Bootstrapping – state had no rational basis to distinguish between married and unmarried people (EPC)
 - Expanded *Griswold* – right to privacy an individual right “to be free from unwarranted government intrusion” into certain fundamental interests – not part of association

- ***Michael H. v. Gerald D. (1989)***

- Michael sired Victoria with Carole while she was married to Gerald; Gerald was listed as Victoria’s father on her birth certificate; Carole briefly moved in with Michael and he formed a relationship with his daughter; but Carole went back to Gerald
 - Michael claimed that he had a constitutionally protected liberty interest in his relationship with Victoria
- Court (Scalia) concerned about restraining judges from inventing new rights – restricts such rights to those that are (1) fundamental and (2) traditionally protected
 - Traditionally protected could just mean it’s a right that typically hasn’t been legislated on, not one that’s been afforded special protection; idea is to keep future generations from casting aside traditional values
- Couches the issue in whether the relationship between Michael and Victoria had been treated as a protected family unit under historical societal practices
 - Found no such historical basis
- Scalia wanted to look to the most specific historical practice applicable and generalize if needed, but this didn’t command a plurality of the Court
- Brennan (dissenting) – disputed the use of the most specific tradition, preferring to find a level of generality at which norms become clearer – parenthood
 - Also, what’s the point of having the Court protect only those rights that are already substantially protected by the states?
 - Didn’t believe the Constitution constrained families to such narrow terms

Substantive Due Process: Abortion

Cases

- **Roe v. Wade (1973)**
 - Challenged Texas criminal abortion statute
 - Court found that there wasn't a history of criminalizing abortions - emerging mostly in past 100 years
 - Court relied primarily on a right to privacy embedded in the 14th Amdt. - signal for strict scrutiny
 - Also invoked a right to bodily integrity
 - Woman's interests
 - Bodily integrity - not being forced by the state to bear children against her wishes
 - Ability to choose whether to take on the expectations and obligations of parenthood
 - State interests
 - Protecting health of the woman
 - Protecting prenatal life
 - Found no absolute abortion right; woman's interests must give way as the pregnancy progresses
 - More dangerous to terminate later on and more likely the fetus could survive and become a person with rights
 - Adopted a sort of balancing test
 - First trimester: up to woman and doctor alone
 - Second trimester: state can regulate in ways reasonably related to maternal health
 - After viability (third trimester): state can ban except when necessary to preserve mother's life or health
- **Planned Parenthood of S.E. Pa. v. Casey (1992)**
 - Challenged Pa. statute that put various restrictions on abortions - informed consent, providing info 24 hours before, spousal notification, parental consent
 - Stated principles about when to overturn decisions
 - Has the rule become unworkable?
 - Have substantial reliance interests built up?
 - Have other legal developments made the rule obsolete?
 - Have facts changed to discredit the rule?
 - Time limits described in *Roe* might have changed (due to science) but reasoning still good
 - Still OK for state to proscribe abortions after viability (reasonable possibility of maintaining life outside womb)
 - But rejected trimester framework in favor of undue burden standard - if purpose or effect is to put a substantial obstacle in front of a woman seeking an abortion before viability
 - Undue: spousal notification; Blackmun suggested strict scrutiny would've invalidated all such restrictions
- **Gonzales v. Carhart (2007)**
 - Federal statute banned intact D&E abortions except to save the life (not health) of the mother
 - Purpose: not to create an obstacle, but to respect the dignity of human life and protect women from regret
 - Effect: lack of a health exception didn't matter because it wasn't clear that the method was ever necessary to protect the mother's health
 - Congress could act in the fact of uncertainty, but one could bring an as-applied challenge
 - But is there a rational basis? The number of abortions won't change, but prohibition will alter a doctor's options in treating patients (chipping away at the right)

Substantive Due Process: Sexual Orientation & Privacy

Cases

- ***Bowers v. Hardwick* (1986)**
 - Challenge to Georgia statute that criminalized sodomy
 - Court narrowly treated the asserted right as the “fundamental right to commit homosexual sodomy”
 - Distinguished prior cases, which had to do with marriage, family, procreation and child-rearing
 - Also distinguished prior cases that dealt with what one can watch or read in his own home – 1st Amdt.
 - Other victimless crimes (drug use, etc.) are just as illegal if committed at home
 - Found this to be not a fundamental right
 - Those are ones “implicit in the concept of ordered liberty” or “deeply rooted in this Nation’s history and tradition”
 - Instead, sodomy has been long criminalized
 - Also found the moral judgment of the state to be a rational basis for legislating
 - Blackmun (dissenting) disputed the level of specificity with which the Court described the asserted right
 - Whether to engage in certain types of private consensual sexual activity – statute was sex-neutral
 - Would have rooted this in the “decisional” and “spatial” aspects of the right to privacy
 - Decisional: right to make certain decisions central to one’s life – intimate associations
 - Spatial: special protection at home – the right to conduct intimate relationships in the intimacy of one’s home
 - Stevens (dissenting) thought that the law couldn’t be enforced because it intruded into marital bedrooms and the state’s application only against gays couldn’t be sustained because the moral judgment embodied in it was against sodomy, not gays
- ***Lawrence v. Texas* (2003)**
 - Similar to *Bowers*, except the Texas statute only applied to homosexual conduct
 - Overturned *Bowers* on SDP grounds (*Casey* factors)
 - Court intimated that the *Bowers* court too narrowly conceived the liberty interest at stake
 - Statute sought to control private sexual conduct; courts should be skeptical unless the statute prevents an injury or abuse of an institution
 - Sexual liberty as part of forming a deeper bond
 - No substantial reliance interests; in fact, *Bowers* created uncertainty because of the other doctrine established
 - Questioned the historical predicates in *Bowers*
 - Subsequent cases (*Romer*, *Casey*) undermined the legal basis for *Bowers*
 - Articulated the liberty interest as being able to engage in private sexual conduct free of the threat of criminal sanction by the state
 - Court didn’t say this is a fundamental right or appear to use strict scrutiny; it found no rational basis for the law
 - Court also suggested that the Constitution can evolve with changing public attitudes
 - “Times can blind . . . and later generations can see that laws once thought necessary and proper . . . only serve to oppress”
 - Scalia (dissenting) found it difficult to discern between this law and other “morals legislation”
 - Court didn’t find it a fundamental right, so if the morals basis didn’t pass RBR, no such legislation could
 - Thought this should have been a job for the political process