

COMMENTS

LAW AND LIMITS: HOW CATEGORIES CONSTRUCT CONSTITUTIONAL MEANING

*Anthony Edward Falcone**

INTRODUCTION

The purpose of this article is to explore a certain method of judicial reasoning and its implications regarding the practice of judicial review. Taking the Court's police power, Commerce Clause, and modern substantive due process jurisprudence as examples, I argue that the Court uses prototypes to restrict the scope of constitutional categories in order to implement perceived constitutional values. I further argue that this prototype-based reasoning is best seen as implementing the Constitution out of concern about legislative pretext and the need to create limits on governmental power, rather than as specifying the exact content of the Constitution.

In the three areas mentioned, the Court has asked questions such as whether an activity is sufficiently harmful¹ or affected with the public interest to allow regulation,² whether an activity is economic,³ or whether a constitutional right to privacy is broad enough to protect an activity.⁴ Using insights into human categorization, I argue that

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¹ See, e.g., *Lochner v. New York*, 198 U.S. 45, 64 (1905) ("It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employés (all being men, *sui juris*), in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employés.").

² See, e.g., *Munn v. Illinois*, 94 U.S. 113, 133 (1876) (concluding that a state law limiting rates charged by grain warehouses is valid since grain storage is clothed with the public interest).

³ See, e.g., *United States v. Morrison*, 529 U.S. 598, 610, 613 (2000) (explaining that the non-economic, criminal nature of possession of a firearm was central to the holding in *Lopez* and applying the *Lopez* test to invalidate a provision of the Violence Against Women Act); *United States v. Lopez*, 514 U.S. 549, 561 (1995) (holding that a federal statute criminalizing possession of a firearm within a school zone did not regulate economic activity and therefore exceeded Congress' power under the Commerce Clause).

⁴ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (invalidating a regulation forbidding the use of contraceptives as applied to married persons because the marital relationship is within a zone of privacy created by various constitutional guarantees).

the scope of constitutional limitations in these areas involves a choice between hewing to a category's most prototypical examples or acknowledging the graded nature of the category and ceding its control to the legislature. For example, whether an activity is commercial can be decided by a court according to its notion of commercial activity in order to maintain the constitutional value of a limited federal government or the choice can be ceded to a legislature to be made according to its view of what actually affects commerce.⁵

Besides having positive value in explaining the Court's reasoning, the analysis that follows supports the view that the Court's rulings in the police power, Commerce Clause, and modern substantive due process contexts do not specify the exact content of the Constitution but instead provide rules of decision for courts.⁶ If the form of judicial decisions in these areas follows from how the Court uses categories *a priori* to create bounds on legislative power, then the decisions have as much to do with categorical reasoning as with the content of the Constitution. While this is not an endorsement of popular constitutionalism or departmentalism, it undermines a view opposed to these philosophies: that the Court simply applies the law and that judicial constitutional interpretation is "law" whereas non-judicial interpretation is not.

At the outset, it is important to note what I do *not* argue. I do not argue that any newly-discovered secrets of the human brain dictate the outcome of any cases. Nor do I attack specific areas of jurisprudence, for example, by condemning the *Lochner* Court as illegitimate while praising the *Carolene Products* paradigm as enlightened. In fact, my point is the opposite: that the Court, whether liberal or conservative, purposefully constructs constitutional categories to protect perceived constitutional values.

Part I will explain relevant insights into human categorization from linguistics and other sciences. Part II will show how these insights can explain three main areas of the Supreme Court's modern jurisprudence: the Commerce Clause cases, the police power cases,

⁵ See *infra* Part II.B.

⁶ For recent work examining the distinction between the Constitution's meaning and its judicial enforcement, see RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001) (surveying different constitutional theories in light of their status as tools for implementing the Constitution); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004) (describing how a distinction between the Constitution's content and its judicial enforcement is useful in explaining various areas of the Court's jurisprudence); and Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005) (arguing against the conclusion that the Court's decisions in key areas specify the content of the Constitution). For an influential discussion of the distinction, see Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (arguing that there are areas where the Supreme Court has refused to enforce a provision to its full conceptual boundaries due to institutional concerns).

and the *Griswold* line of substantive due process cases. Part III will conclude with an examination of the normative implications of this account.

I. COGNITIVE LINGUISTICS AND LEGAL CATEGORIES

Before turning to the case law, it would be helpful to begin with an explanation of what I mean by “prototype-based” or “categorical” reasoning. As I will explain more fully in this section, a prototype is a “best” example of a category.⁷ I use categorical reasoning to refer to the way people categorize, or group, things and concepts.

Drawing on the literature about human categorization, I hope to establish in this section three basic points about categorical reasoning that will aid later discussion: categories are graded, purposeful, and not fully declarative.⁸ The classical view was that categories were defined by necessary and sufficient conditions, with all members of a category sharing common properties and belonging equally to the category.⁹ In the mid-twentieth century, insights from fields and sub-fields as diverse as anthropology,¹⁰ psychology,¹¹ philosophy,¹² and mathematics¹³ began to collapse the classical notion of categories.¹⁴

⁷ See GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* 7 (1987). For this discussion, I draw heavily on Lakoff's work because it is thorough and accessible.

⁸ While this account differs in its main emphases, readers interested in cognitive science and its application to law should refer to Steven L. Winter's 2001 book, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND*, and to a *Brooklyn Law Review* symposium on Winter's book, Symposium, *Cognitive Legal Studies: Categorization and Imagination in the Mind of the Law*, 67 BROOK. L. REV. 941 (2002). A summary of the literature on categorization and law can be found in Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103 (2004).

⁹ GEORGE LAKOFF & MARK JOHNSON, *PHILOSOPHY IN THE FLESH: THE EMBODIED MIND AND ITS CHALLENGE TO WESTERN THOUGHT* 9 (1999) (describing this classical view).

¹⁰ See, e.g., BRENT BERLIN & PAUL KAY, *BASIC COLOR TERMS: THEIR UNIVERSALITY AND EVOLUTION* 7–10 (1969) (detailing research showing that different societies use the same basic color categories, like red and blue, regardless of whether each society's language has words for each of the basic colors).

¹¹ See, e.g., *COGNITION AND CATEGORIZATION* (Eleanor Rosch & Barbara B. Lloyd eds., 1978) (surveying scholarship on the nature of human category formation); see also *infra* Part I.

¹² For example, the philosopher Ludwig Wittgenstein argued that categories have family resemblances, with members being similar along a variety of dimensions but not necessarily sharing all of the same common properties. See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 31–32 (G.E.M. Anscombe trans., 1953).

¹³ See, e.g., L.A. Zadeh, *Fuzzy Sets*, 8 INFO. AND CONTROL 338 (1965) (postulating fuzzy set theory to explain categories such that members can belong to a category to some degree). Turning the tables, George Lakoff and Rafael Nuñez have used insights from cognitive science to explain mathematics. See GEORGE LAKOFF & RAFAEL E. NUÑEZ, *WHERE MATHEMATICS COMES FROM: HOW THE EMBODIED MIND BRINGS MATHEMATICS INTO BEING* (2000).

¹⁴ See LAKOFF, *supra* note 7, at 11–57 for a description of these advances and their implications.

A. Categories are Graded

Categories are graded; that is, they are not defined by necessary and sufficient conditions but have members that fit the categories well and others that fit less well.

A famous legal example is explored in H.L.A. Hart's discussion of a law banning vehicles from a park.¹⁵ It is clear that such a law would ban automobiles but unclear whether it also bans bicycles, airplanes, or roller-skates.¹⁶ Hart noted that legal rules often are indeterminate; they have an "open texture," with some applications more clearly covered by a rule than others.¹⁷

To take a non-legal example, a famous series of experiments by the psychologist Eleanor Rosch illustrates the mental reality of graded categories marked by prototype effects.¹⁸ Rosch found that subjects identified robins (but not penguins) as prototypical birds and desk chairs (but not rocking chairs) as prototypical chairs. Rosch used measures that included direct ratings of a member's fit in a category, the response time for identifying whether a statement like "a penguin is a bird" is true, and what examples subjects would give if asked to list members of a category.¹⁹ Central or prototypical members, like robins, often possessed the main attributes of the group.²⁰ They also had stronger ratings for fit, elicited shorter response times, and were more often included in lists of category members.²¹ Rosch's insight was that people seem to have graded internal representations of categories:²² members of categories are more or less central. Un-

¹⁵ See H.L.A. HART, THE CONCEPT OF LAW 123-25 (1961).

¹⁶ See *id.* Arguably, Hart and cognitive scientists share Wittgenstein's influence. See LAKOFF, *supra* note 7, at 16-18 (describing the influence of Wittgenstein's notion of the concept of a game on the evolution of modern thinking on categories); Frederick Schauer, (*Re*)taking Hart, 119 HARV. L. REV. 852, 861 n.26 (2006) (reviewing NICOLA LACEY, A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM (2004)) (noting that Hart's account of the open texture of law in *The Concept of Law* relied heavily on the work of F.M. Waismann, one of Wittgenstein's disciples).

¹⁷ HART, *supra* note 15, at 124.

¹⁸ For a summary of Rosch's work on categories, see LAKOFF, *supra* note 7, at 39-55. The term "prototype effects" refers to the fact that some members are considered "more representative of [a] category than other[s]." *Id.* at 41. In her later work, Professor Rosch concluded that the prototype effects described in her experiments related to mental representations but that there is not a one-to-one correspondence between the two. *Id.* at 43.

¹⁹ *Id.* at 41-42. There were other interesting findings in this area: for example, subjects believed that a disease was more likely to spread from robins to ducks than from ducks to robins, leading to the conclusion that new information about a representative category member is more likely to be generalized to nonrepresentative members than vice versa. *Id.* at 42.

²⁰ *Id.*

²¹ *Id.* at 41.

²² The underlying mental representations that produce prototype effects have various names, including frames, schemas, and scripts. Lakoff uses the term "idealized cognitive models." LAKOFF, *supra* note 7, at 68.

der this account, central or prototypical members of a category are often the standard by which other members are judged, and they are most strongly associated with the category.

B. Categories are Purposive

Categories are often constructed with a specific purpose in mind. Whether one's use of categories is "right" depends upon one's goals.

For example, there is really no such thing as a fish, biologically speaking.²³ This may be counterintuitive or even pointless with respect to our daily lives: a thing is a fish because the category label serves our purposes by helping to distinguish its taste and appearance. However, based on evolutionary links, some so-called fish, like lungfish, are actually much more closely related to land-dwelling creatures like reptiles, mammals, and birds than to other fish.²⁴ In one important respect, genetic make-up, lungfish are not fish at all. At the very least, there is no unitary concept of fish. Neither the genetic categorization nor the folk understanding is right or wrong in any absolute sense but each may be more or less useful to the evolutionary biologist, the fisherman, or the restaurant patron. Categories and their underlying representations are not right or wrong but more or less apt in relation to one's goals.

In fact, people often construct categories in an ad hoc manner, based on their purpose at a particular time. Categories like "what to do for entertainment on a weekend" are constructed (just as legal categories are), but they nonetheless exhibit prototype effects.²⁵ This kind of category is ad hoc and is understood in relation to an individual's goals.

Categories are also determined by our purposes in the broader sense of the term. For example, Douglas Medin and Gregory Murphy argue that human categorization is underdetermined by similarity: categories are instead determined by individuals' theories about the world.²⁶

²³ *Id.* at 119 (citing STEPHEN JAY GOULD, HEN'S TEETH AND HORSE'S TOES 363-64 (1983)).

²⁴ *Id.* (citing GOULD, *supra* note 23, at 363-64).

²⁵ See generally Lawrence W. Barsalou, *Ad Hoc Categories*, 11 *MEMORY & COGNITION* 211 (1983) (studying the similarities and differences between ad hoc categories, which, like "weekend entertainment," are categories that are consciously constructed for a purpose, and common categories, such as "fruit" and "dogs."). Barsalou concludes that, despite their differences, both ad hoc, purposive categories and common categories demonstrate prototype effects. *Id.* at 216.

²⁶ See Gregory L. Murphy & Douglas L. Medin, *The Role of Theories in Conceptual Coherence*, 92 *PSYCHOL. REV.* 289, 313 (1985) (concluding that categories are coherent to the extent that they match individuals' background knowledge or theories about the world). As an illustrative example, Murphy and Medin note that in the Book of Leviticus, the Bible lists unclean animals, whose status as unclean is determined not by similarity to other clean or unclean animals but by

C. Categories are not Fully Declarative

While goal-related, categories are not fully declarative. By this I mean two related things: first, that we often categorize automatically and unconsciously and, second, that we do not necessarily have an explicit theory to explain our categorizations. For example, we can understand that penguins are not the best example of a bird or judge when someone is telling a lie²⁷ more or less automatically. Moreover, we do so without necessarily possessing an accurate and explicit theory of what constitutes a bird or a lie.

The fact that categories are not fully declarative means that they can impart more meaning in a narrative or legal argument than is immediately apparent. To borrow a phrase from Anthony Amsterdam and Jerome Bruner, one's categories are "rarely innocent":²⁸ they can make something seem a real and natural phenomenon, rather than an artificial construction of the world.²⁹ Amsterdam and Bruner examine the concept of dual fatherhood in *Michael H. v. Gerald D.*,³⁰ a case that involved a biological father³¹ seeking to establish paternity and thus visitation rights to his child. Justice Scalia, writing for the plurality, stated that "California law, like nature itself, makes no provision for dual fatherhood."³² Amsterdam and Bruner describe Justice Scalia's concept of the natural family as the "conceptual and narrative engine" for the case.³³ The "natural" family allowed Justice Scalia to frame the plaintiff as an aggressor on the familial relationship who is not entitled to a due process visitation right because historical tradition protects the unitary and traditional family as opposed to a non-traditional, biological one.³⁴ In fact, Lakoff argues that there is no unitary model of parenthood; there are several

whether each animal fits with its habitat, structure, and form of movement; the ostrich is thus unclean because it has feathers but cannot fly. *Id.* at 312–13.

²⁷ See LAKOFF, *supra* note 7, at 71 (detailing three conditions for a lie: a false belief, an intention to deceive, and actual factual falsity). When test subjects are asked to define a lie, they point to factual falsity, but when subjects are asked to judge whether a hypothetical example satisfies the conditions for being a lie, factual falsity is the least important condition. *Id.* at 71–73.

²⁸ ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 35 (2000).

²⁹ *Id.* at 44.

³⁰ 491 U.S. 110 (1989).

³¹ Blood tests showed that the plaintiff, Michael H., had a 98.07% probability of paternity. *Id.* at 114. The child was the product of an adulterous relationship between Michael H. and the child's mother. Despite plaintiff's biological relation to the child, defendant Gerald D. was listed on the birth certificate as the father because he was married to the mother at the time of conception and birth.

³² *Id.* at 118.

³³ AMSTERDAM & BRUNER, *supra* note 28, at 81.

³⁴ See *id.* at 103.

dominant submodels.³⁵ The unexamined use of categories as if they are natural and inevitable can give judicial opinions a sense of logical entailment that makes it seem as if the Court is simply reading the law.³⁶ In sum, categories and their underlying representations appear to be graded and marked by prototype effects, which are driven by the purposes and beliefs of their users and are not fully declarative.

II. ON MINDING LIMITS

The Court's police power, Commerce Clause, and modern substantive due process jurisprudence all demonstrate the features described above: the categories the Court employs are graded, purposeful, and not fully declarative.³⁷ They make good examples

³⁵ For example, while there is a prototypical concept of a mother, there are also many submodels for which we have labels, including the stepmother, the adoptive mother, the natural mother, the unwed mother, the foster mother, the surrogate mother, and the genetic mother. LAKOFF, *supra* note 7, at 83. While Amsterdam and Bruner do not mention Lakoff's discussion of submodels for parenthood, it adds a nice touch to their point.

³⁶ Cass Sunstein cites LAKOFF, *supra* note 7, in relation to the idea that the *Lochner* era entrenched the common law as a neutral base-line. See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 504 & n.386 (1987) (citing Lakoff for the proposition that "normative commitments are built into [our] language"); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 903 & n.148 (1987) (citing Lakoff for the proposition that *Lochner*-like "premises are built into our language"). I suspect Professor Sunstein means that legal categories are socially constructed but at the same time often seem natural.

³⁷ Legal interest in categories on recent insights into categorization is focused elsewhere. Scholars seem to focus on a single area of law or a specific case. See, e.g., Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747 (2001) (drawing on categorization research to argue against a disparate impact standard because bias is largely unconscious); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (arguing the same); Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 146-49 (2002) (using Professor Winter's interpretation of the cognitive science literature to examine the concept of property in takings doctrine). Reasoning by analogy has attracted some attention. See, e.g., Dan Hunter, *Reason is Too Large: Analogy and Precedent in Law*, 50 EMORY L.J. 1197 (2001) (attempting to use cognitive science to explain analogical reasoning in law), but Professor Lakoff's work on metaphor seems to be the area that lawyers most discuss. See, e.g., Adam Arms, *Metaphor, Women and Law*, 10 HASTINGS WOMEN'S L.J. 257, 271-72 (1999) (drawing on Professors Lakoff and Johnson's insights into metaphor to describe how the "bundle of sticks" and "grasped thing" metaphors for property can harm women's interests by helping to deny them the results of intangible assets owned by their ex-husbands, such as the monetary rewards of advanced professional degrees that their husbands earned while married); Linda L. Berger, *What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ASS'N LEGAL WRITING DIRECTORS 169 (2004) (describing how lawyers can use cognitive science's understanding of metaphor to improve their legal arguments); Gary Minda, *The Law and Metaphor of Boycott*, 41 BUFF. L. REV. 807, 815-16 (1993) (describing how seemingly inconsistent decisions about boycotts follow from differing conceptions of boycotts themselves). Lakoff's hypothesis regarding metaphors is that many of our higher-order concepts derive their content from experiences in the physical domain. Thus, we understand arguments as conflicts and speak of them in terms of defending oneself, demolishing the enemy, having weak points, etc. See GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE*

because they are second nature to a reader with legal training and they help define the scope of governmental power.

Scholars have engaged in a lively debate about the proper way to interpret certain provisions of the Constitution. Should constitutional interpretation be based on the original historical understanding,³⁸ the moral principles a provision embodies,³⁹ the structure of the Constitution,⁴⁰ the nature of the federal government,⁴¹ or an aspirational content that invites each successive generation to fill in the content of provisions?⁴² Are there general principles that the Constitution embodies, such as a concern with processes for protecting liberty rather than with specific substantive protections⁴³ or a ban on favoring one group over another?⁴⁴ My account of categorization complicates these questions. I argue that the Court concerns itself with protecting perceived constitutional values via its categorizations rather than with directly implementing constitutional provisions or inquiring into questions of text or moral principle.⁴⁵

LIVE BY 4 (1980). Sometimes with collaborators, Lakoff has applied such analyses to western philosophy, see LAKOFF & JOHNSON, *supra* note 9, mathematics, see LAKOFF & NUÑEZ, *supra* note 13, and political beliefs, see GEORGE LAKOFF, *MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK* (2002).

³⁸ See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System*, in *A MATTER OF INTERPRETATION* 3, 38 (Amy Gutmann ed., 1997) (arguing that constitutional interpreters should seek "the original meaning of the text").

³⁹ See, e.g., RONALD DWORKIN, *FREEDOM'S LAW* 2 (1996) ("The moral reading proposes that we all—judges, lawyers, citizens—interpret and apply these abstract [rights-granting] clauses on the understanding that they invoke moral principles about political decency and justice."); Michael S. Moore, *Do We Have an Unwritten Constitution?*, 63 S. CAL. L. REV. 107, 135 (1989) (arguing for a moral realist interpretation under the theory that the founders used "brief and general language" to refer to values whose nature would guide constitutional interpretation).

⁴⁰ See, e.g., Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (arguing that constitutional interpreters should read contested constitutional words and phrases in light of similar words and phrases found elsewhere in the document).

⁴¹ See, e.g., CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 29 (1969) (arguing for "a wider use of inference from relation and [national] structure in the intellectual processes of constitutional law").

⁴² See, e.g., Laurence H. Tribe, *Comment*, in *A MATTER OF INTERPRETATION*, *supra* note 38, at 65, 70 (arguing that the Framers "launched [the Constitution] upon a historic voyage of interpretation in which succeeding generations . . . would elaborate what the text means in ways all but certain not to remain static.").

⁴³ See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* 88–101 (1980) (arguing that the Constitution is dedicated to concerns of process and structure, as opposed to protecting specific substantive values).

⁴⁴ See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1710–14 (1984) (arguing that a key constitutional value is a ban on preferencing one group over another for a non-public purpose).

⁴⁵ Fallon similarly takes extant theories of constitutional interpretation as his foil to argue that the Court implements the Constitution, but he does so by emphasizing the need for the Court to employ its practical judgment in implementing the Constitution. See FALLON, *supra* note 6, at 4 (arguing that "the Justices frequently must function as practical lawyers and, in that

Specifically, the insights that legal categories are graded, defined by the purposes of their users, and not fully declarative explain the reasoning behind the Court's often conclusory language in its police power, Commerce Clause, and modern substantive due process jurisprudence: the Court chooses to limit a category to its most prototypical meaning or to recognize the full reach of a category, which to some extent really is intuitive. At the same time, its notion of limits is driven by a desire to maintain other norms like individual liberty, such that it cannot admit the full possible meaning of some legal categories.

Consider this statement from Chief Justice Charles Evans Hughes, in a case challenging the New Deal Court's expansive notion of the commerce power:

Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as "interstate commerce," "due process," "equal protection." In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion.⁴⁶

Chief Justice Hughes suggests that categories are graded—not defined by formulas but open to change by actors over time. He also seems to suggest that this process is not defined solely by the legal categories themselves but involves the balancing of other grants and limitations. As seen in the Commerce Clause⁴⁷ and police power⁴⁸ contexts, the Court will often limit regulatory power to certain categories and their prototypical examples to set an effective limit on government.

Steven Winter suggests that courts employ legal categories so as to make them realistic to their readers, often by arguing that new cases are logically connected to existing precedent.⁴⁹ The reasoning appears legitimate precisely because it responds to some of its readers' conceptions.⁵⁰

Categorical reasoning was a marked practice of nineteenth-century legal thinkers, a practice characterized as an effort to identify

role, must craft doctrines and tests that reflect judgments of constitutional meaning but are not perfectly determined by it.").

⁴⁶ Santa Cruz Fruit Packing Co. v. NLRB, 303 U.S. 453, 467 (1938).

⁴⁷ See *infra* Part II.A for a discussion of the Court's police power jurisprudence.

⁴⁸ See *infra* Part II.B for a discussion of the Court's Commerce Clause jurisprudence.

⁴⁹ WINTER, *supra* note 8, at 325–27.

⁵⁰ *Id.*

abstract principles that reflect objective truth.⁵¹ This is perhaps the common understanding of much of the Court's pre-New Deal economic rights and Commerce Clause jurisprudence.⁵² However, as the following discussion should make clear, in the somewhat disparate areas of the Court's police power, Commerce Clause and substantive due process jurisprudence, categorical reasoning lives, though perhaps stripped of the authority bestowed by a belief in the objective truth of categories.⁵³

In the description that follows of the Court's police power jurisprudence, as well as in my descriptions of the Court's Commerce Clause and modern substantive due process cases, I do not cover the full complexity of the Court's motivations and the diversity within each era's doctrines. This omission is intentional, as this article's purpose is to explore broad trends in constitutional reasoning rather than detailed doctrinal permutations.

A. *From Lochner to Midkiff*

The *Lochner* Court attempted to limit exercises of the police power to certain prototypical uses, an effort at least partially motivated by a desire to maintain substantive limits and by a fear of legislatures acting for pretextual reasons.⁵⁴ The Court's shift away from these prototypical examples in the 1930s was marked by a lessened suspicion of legislative pretexts and a willingness to allow legislatures to exercise their power according to the full possible scope of the concept.

During the era named after *Lochner v. New York*,⁵⁵ the Court struck down legislation on the ground that it improperly interfered with the right to liberty and property protected by the Fourteenth Amendment.⁵⁶ The Court restricted the police power using a variety of cate-

⁵¹ See, e.g., WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937*, at 5-6 (1998) (calling belief in the possibility of attaining objective truth a "luxury" no longer enjoyed today).

⁵² See *id.* at 152-59.

⁵³ Recognizing that legal categories do not reflect objective truth is not necessarily an unqualified good: Wiecek suggests that, despite the flaws in classical legal thinking, it at least offered a comprehensive explanation of the law and the work of judges, providing a legitimacy that the modern Court lacks. *Id.* at 251.

⁵⁴ It is true that there is no police power provision in the Constitution and perhaps also true that the *Lochner* Court was most concerned with the value of personal liberty (not the police power as such). These two points are worth noting, but they do not change my analysis.

⁵⁵ 198 U.S. 45 (1905).

⁵⁶ See U.S. CONST. amend. XIV, § 1 (stating that no state may "deprive any person of life, liberty, or property, without due process of law"). Although this presents one view of *Lochner* era jurisprudence, in recent years there have been a variety of arguments over *Lochner*'s import and intellectual roots. See, e.g., HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993) (arguing that *Lochner*-era jurisprudence was actually dictated by a concern over legislation that unfairly singled out individuals

gories, including the class of activities sufficiently dangerous to justify regulation, emergency situations that necessitated regulation, and activities affected by the public interest.⁵⁷ The Court devised these categories as limits and allowed regulation of only their prototypical members so as to prevent state power from being unbounded.⁵⁸ For example, the maximum hour legislation in *Lochner* could not be justified by reference to danger to the employees, either as employees or as members of the general public, or by a need to regulate the cleanliness of the shop. The danger to the employees could not be a justification because then no trade or occupation would escape the police power,⁵⁹ nor could the law be upheld under the reasoning that any law that makes one segment of the population healthier contributes to general public health because then any law regulating a private business might be valid.⁶⁰ Finally, improving the cleanliness of the shop could not be a justification because, if it were, the state would become a *pater familias*, regulating the conduct of all individuals.⁶¹ The connection between the legislation and the legitimate use of the police power was simply too “shadowy and thin”; the law could not be upheld if the right of grown men to contract was to have meaning.⁶²

At first, the Court’s language seems to offer conclusions, not reasoning. The *Lochner* Court admits the possibility of gradience⁶³ but instead chooses to rely on the “common” understanding of what is

for special treatment); Sunstein, *Lochner’s Legacy*, *supra* note 36, at 874 (arguing that *Lochner* entrenched the Court’s notion of neutrality as a constitutional requirement); David Bernstein, *Lochner-Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L. J. 1, 11–13 (2003) (arguing against Professor Gillman’s and Professor Sunstein’s theses).

⁵⁷ See, e.g., *Tyson & Brother-United Theatre Ticket Offices v. Banton*, 273 U.S. 418, 442 (1927) (holding that a state law limiting resale prices for tickets unconstitutionally interferes with property rights); *Munn v. Illinois*, 94 U.S. 113, 133 (1876) (concluding that a state law limiting rates charged by grain warehouses is valid because grain storage is clothed with the public interest).

⁵⁸ See *Lochner*, 198 U.S. at 56 (“It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint.”).

⁵⁹ *Id.* at 60.

⁶⁰ *Id.*

⁶¹ *Id.* at 62.

⁶² *Id.*

⁶³ *Id.* at 59 (“In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others.”).

dangerous.⁶⁴ While it seems conclusory, such reasoning is sensible if categories are somewhat intuitive: the activity is not dangerous enough to warrant interference by the legislature, as determined by the Court's own use of the concept. This kind of categorical reasoning is also within the Court's competence for *a priori* reasoning, as opposed to making the validity of a statute turn on factual determinations. Thus, the Court can limit regulation of dangerous activities to prototypical examples of such activities, for example, mining,⁶⁵ without a need for explicit fact-finding regarding the danger created by such activities.⁶⁶

The existence of only a shadowy and thin connection between the maximum hour legislation and a legitimate purpose implies that it is not a central case of the exercise of the police power. To protect its notion of liberty, the Court seems willing to accept only central cases. If the state's power really could reach any object, then private liberty could be routinely trampled upon, violating the notion of limited government.⁶⁷

The New Deal Court began to undermine the restriction to prototypical examples of these categories by favorable comparison to a central case. For example, in *Home Building & Loan Ass'n v. Blaisdell*, the Court upheld a Minnesota regulation allowing the postponement of mortgage payments by identifying similarities between the facts of *Blaisdell* and the facts of other cases in which the suspension of contracts during times of physical disasters was allowed.⁶⁸ The Court reasoned that if the power to temporarily suspend contracts exists for physical disasters, then it should also exist for urgent public emergencies caused by economic disasters.⁶⁹ Justice Sutherland's dissent warned against eroding constitutional protections, contrasting the potentially trivial effects of upholding one particular piece of legislation with the "far more serious and dangerous inroads upon the limitations of the Constitution which are almost certain to ensue as a

⁶⁴ See *id.* ("To the common understanding the trade of a baker has never been regarded as an unhealthy one.").

⁶⁵ See *Holden v. Hardy*, 169 U.S. 366 (1898) (rejecting a due process challenge to a state law regulating aspects of mine safety, including permissible work-day length).

⁶⁶ That said, in other cases, the Court was more willing to accept explicit fact-finding. See, e.g., *Baltimore & Ohio R.R. v. Interstate Commerce Comm'n.*, 221 U.S. 612 (1911) (upholding hour restrictions on railroad workers because of the danger of railroad malfunctions due to errors by exhausted workers); *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding maximum hours legislation for women due to their frail physical structure and the fact that such regulations affect the well-being of women's offspring).

⁶⁷ This is a conclusion, not reasoning: there are some limits on what the government will do because of the felt duty of individual legislators to comply with the Constitution and the political accountability created by regular elections.

⁶⁸ 290 U.S. 398, 439-40 (1934).

⁶⁹ See *id.*

consequence naturally following any step beyond the boundaries fixed by that instrument.”⁷⁰

The Constitution as a judicially enforced limit on certain exercises of power was certainly gone because the Court, bolstered by its new Roosevelt appointees, abandoned a substantive vision for enforcing the liberty of contract and acknowledged the graded nature of its categories for policing that boundary. For example, in *Nebbia v. New York*,⁷¹ the Court seemed to expand the doctrine of a business affected with a public interest by precisely this method: the Court stated that there was “no closed class or category of businesses affected with a public interest,” as the category was instead open to interpretation.⁷² The Court no longer seemed interested in enforcing its distinctions, and this acknowledgment of the graded nature of categories was part of the rationale for abandoning them. By *United States v. Carolene Products*,⁷³ the Court’s expanded vision of the police power led it to uphold legislation that could be classified as the patent preferencing of a special interest without a corresponding public benefit.⁷⁴

A broad description of the scope of the police power⁷⁵ occurred in *Berman v. Parker*⁷⁶ and *Hawaii Housing Authority v. Midkiff*,⁷⁷ both cases under the Takings Clause where the Court equated the state’s power

⁷⁰ *Id.* at 448 (Sutherland, J., dissenting).

⁷¹ 291 U.S. 502 (1934).

⁷² *Id.* at 536.

⁷³ 304 U.S. 144, 154 (1938) (holding that a Congressional Act banning the interstate shipment of filled milk—skimmed milk compounded with fat or oil other than milk fat—did not violate the Fifth Amendment).

⁷⁴ See Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397, 398 (describing the legislation at issue in *Carolene Products* as “an utterly unprincipled example of special interest legislation”).

⁷⁵ I omit discussion of *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), the Court’s most recent takings case, because the majority did not purport to interpret the police power: they reinterpreted the Takings Clause as requiring a public use. See *id.* at 2663 (“The disposition of this case therefore turns on the question whether the City’s development plan serves a ‘public purpose.’”); *id.* at 2675 (O’Connor, J., dissenting) (describing the discussion of the police power in *Berman* and *Midkiff* as “errant”). But cf. KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM* (forthcoming 2006) (manuscript at 135–36, on file with the *University of Pennsylvania Journal of Constitutional Law*) (arguing that *Kelo*’s public use requirement is really grounded in the Due Process Clause). I also omit limitations created prior to *Kelo*: at least one federal court and several states’ highest courts have blocked the condemnation of private property for use by other private parties. See, e.g., 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001) (blocking the condemnation of a 99 Cents store to make room for the expansion of a neighboring Costco store because the condemnation involved “the naked transfer of property from one private party to another”); Sw. Ill. Dev. Auth. v. Nat’l City Envtl., L.L.C., 768 N.E.2d 1, 11 (Ill. 2002) (blocking condemnation of a metal recycling center so that a racetrack could expand its parking lot because the condemnation violated both the state and federal constitutions).

⁷⁶ 348 U.S. 26 (1954).

⁷⁷ 467 U.S. 229 (1984).

of eminent domain with the police power. *Berman* addressed the constitutionality of a statute that allowed the condemnation of property for redevelopment even if the property itself was not blighted, and *Midkiff* addressed the constitutionality of a condemnation scheme designed to break up a Hawaiian land oligopoly by transferring land from the owner oligopolies to their tenants. The proscription against taking the property of one individual and granting it to another has been announced and repeated in Supreme Court decisions since almost the nation's founding. For example, in the 1798 case of *Calder v. Bull*, the Court stated that "a law that takes property from A. and gives it to B." is invalid because it is "against all reason and justice, for a people to entrust a legislature with SUCH powers."⁷⁸ Almost a century later, in *Missouri Pacific Railroad v. Nebraska*, the Court stated that the taking of private property from one person for another's private use is not due process of law.⁷⁹ In *Loan Ass'n v. Topeka*, the Court stated that there are "reservations of individual rights" implied in the social contract such that no court could order that the "homestead now owned by A. should no longer be his, but should henceforth be the property of B."⁸⁰ Further, the Court held that using public bonds to help a private company establish bridges was not a valid exercise of the police power, for "[t]o lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law."⁸¹ A government-forced transfer of property from one party to another cuts against the purpose of government.

Rather than enforcing a limit, the Court in both *Berman* and *Midkiff* emphasized two related ideas: the broad conceptual scope of the police power and the responsibility of the courts to defer to legislative determinations on such matters. The Court in *Berman* gave this definition of the police power:

An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the tradi-

⁷⁸ 3 U.S. (3 Dall.) 386, 388 (1798).

⁷⁹ 164 U.S. 403, 417 (1896).

⁸⁰ 87 U.S. (20 Wall.) 655, 663 (1874) (citations omitted).

⁸¹ *Id.* at 664.

tional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it.⁸²

The passage suggests that the police power is marked by prototypical examples, such as the protection of public health or safety. It also recognizes the full, unbounded nature of the category. The police power resists definition precisely because it is graded: it is not defined by necessary conditions and is not bounded by a single definition but has a whole range of members, some less central than others. The Court's accompanying deference to the legislature suggests that it recognizes the category of the police power as dependent on the purposes of government and cedes the power to construct that category to the legislature. The necessity of the acquisition of property in *Berman* depends not on a judge's categories—it depends on the demands of the public interest, as largely defined by the legislature. *Berman* seemed to recognize that the category of the police power is purposive in the sense that its definition lies with the branch charged with determining the ends of the government. Despite its prototypes, the category is graded such that limiting the power of the government to regulating only the most prototypical examples would unnecessarily limit the legislature's power.

Midkiff relied on the rule in *Berman* and came to a similar conclusion. After repeating *Berman*'s rule, the Court concluded that once the purpose of eliminating an oligopoly was found, the legislation was not a naked transfer of wealth from one individual to another but instead a classic use of the police power to eliminate oligopoly.⁸³ Under *Berman* and *Midkiff*, judicial enforcement of limits is minimal and the possibility of pretext exists: the Court's broad concept of the police power allows legislatures to act for illegitimate purposes, unchecked by the judiciary.⁸⁴

In sum, to protect its notion of liberty, the *Lochner* Court limited the police power to certain prototypical exercises by employing a host of categories, including whether something is sufficiently dangerous or affected with a public interest, even if its distinctions would not stand up to a close factual analysis. Later, the New Deal Court interpreted the scope of the police power to be as broad as the concept would allow, including less prototypical examples that very well could have been transfers of wealth to private parties. In addition, rather than employing a category that would prevent the police power from

⁸² *Berman v. Parker*, 348 U.S. 26, 32 (1954). The passage up to the ellipsis was also quoted in *Midkiff*, 467 U.S. at 239.

⁸³ See *Midkiff*, 467 U.S. at 241–42.

⁸⁴ See *Kelo v. City of New London*, 125 S. Ct. 2655, 2675 (2005) (O'Connor, J., dissenting) ("The trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing," such that it is difficult to ascertain an illegitimate governmental purpose).

being used as a pretext, the modern Court allows the legislature's purpose to define the proper use of the police power.

*B. The Commerce Clause: Or There and Back Again*⁸⁵

In the Court's twentieth century Commerce Clause jurisprudence, we see the same shift from categories created to limit the use of the commerce power to prototypical activities to a broad, legislatively-determined agenda. We then see a partial return to a more prototype-based understanding of what is economic.

The Constitution specifies that Congress has the power to "regulate Commerce with foreign Nations, and among the several States."⁸⁶ Under this grant, the pre-New Deal Court upheld legislation where the regulated goods traveled in interstate travel and were harmful in themselves but struck down legislation where the goods were harmless;⁸⁷ upheld regulation of commerce, but not manufacture;⁸⁸ upheld regulation of activities that had a direct but not an indirect effect on interstate commerce;⁸⁹ and upheld regulation of goods still in the flow of commerce but not regulation at their destination.⁹⁰ The reasoning in support of these distinctions was again categorical and somewhat conclusory. For example, in *Carter v. Carter Coal*,⁹¹ the Court held that a coal tax was not valid under the Commerce Clause. While the manufacture of coal may have a tremendous impact on the country, the Court took the word "direct" to mean the "absence of an efficient intervening agency or condition."⁹² Under this theory, it did not matter whether the impact on interstate commerce was great but only how the effect occurred.⁹³ Congress could regulate a single lottery ticket moving in interstate commerce but not the source of production of tons of coal moving through the country. In limiting the

⁸⁵ The subtitle comes from J.R.R. Tolkien's *THE HOBBIT: OR THERE AND BACK AGAIN* (1936).

⁸⁶ U.S. CONST. art. I, § 8, cl. 3.

⁸⁷ See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (invalidating ban on products of child labor from entering interstate commerce because the goods are harmless in themselves); *Champion v. Ames (The Lottery Case)*, 188 U.S. 321 (1903) (upholding federal ban on lottery tickets in interstate commerce).

⁸⁸ See, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (refusing to apply the Sherman Antitrust Act to a trust that manufactured ninety-five percent of the United States' sugar because the actual manufacture was intrastate).

⁸⁹ See, e.g., *Carter v. Carter Coal*, 298 U.S. 238 (1936) (holding that labor conditions in the coal industry have only an indirect effect on interstate commerce).

⁹⁰ See, e.g., *Swift & Co. v. United States*, 196 U.S. 375 (1905) (upholding regulation of cattle stockyards because they are not a final destination).

⁹¹ 298 U.S. 238 (1936).

⁹² *Id.* at 307-08.

⁹³ *Id.* at 308 ("[T]hat question is not—What is the *extent* of the local activity or condition, or the *extent* of the effect produced upon interstate commerce? but—What is the *relation* between the activity or condition and the effect?").

power to regulate to direct effects, the Court hewed closely to an *a priori* category and its prototype rather than allowing a fact-specific inquiry. As the Court argued in *A.L.A. Schechter Poultry Corp. v. United States*, a broad definition of the power to regulate commerce would mean no limit to federal power, creating “for all practical purposes . . . a completely centralized government.”⁹⁴

With *NLRB v. Jones & Laughlin Steel*⁹⁵ and *Wickard v. Filburn*,⁹⁶ the Court collapsed its earlier distinctions. In *Wickard*, perhaps the broadest expansion of the Commerce Power, the Court rejected the mechanical application of prior tests like the direct/indirect effects distinction. In finding that Congress could regulate the production of wheat for home consumption, the Court stated that the “mechanical application of legal formulas [is] no longer feasible.”⁹⁷ The Court reasoned that while the local nature of an activity can help determine whether Congress intended to regulate it, ultimately even the trivial production of home-grown wheat can influence the national economy.⁹⁸ The Court in *Wickard* chose not to employ its categorical analysis: instead, it allowed a largely fact-based analysis. This fact-based analysis acknowledged the full conceptual range of what commerce may mean and largely ceded its control to Congress, despite the possibility that Congress might abuse that power by acting for a purpose other than commercial regulation. In *Jones & Laughlin Steel*, in upholding a collective bargaining law the Court again emphasized an unwillingness to apply a form of categorical reasoning: the Court found the possibility of debilitating labor strife to be closely related to interstate commerce⁹⁹ and warned against “shut[ting] our eyes to the plainest facts of our national life and [dealing] with the question of direct and indirect effects in an intellectual vacuum.”¹⁰⁰ As in the later *Wickard* case, the Court seemed to criticize the categorical approach for its avoidance of economic reality in favor of its concepts: the categorical approach seemed unable to accept factual findings or alternative characterizations from the legislature. Thus, the Court notes that “interstate commerce itself is a practical conception,”¹⁰¹ that its jurisprudence should not “ignore actual experience,”¹⁰² and that any judgment is “one of degree.”¹⁰³ Rather than being defined *a*

⁹⁴ 295 U.S. 495, 548 (1935).

⁹⁵ 301 U.S. 1 (1937).

⁹⁶ 317 U.S. 111 (1942).

⁹⁷ *Id.* at 124.

⁹⁸ *Id.* at 127–28.

⁹⁹ 301 U.S. at 41.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 41–42.

¹⁰² *Id.* at 42.

¹⁰³ *Id.* at 37.

priori, the power granted by the Commerce Clause is defined by practical exigencies, involving questions of degree rather than principle.

Despite their lack of judicial protection, concerns regarding the scope of government power were at least (and perhaps at most) noted by the New Deal Court. For example, in *Jones & Laughlin Steel*, the Court noted that the scope of the Commerce Power must "not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local."¹⁰⁴ This distinction may be important for a variety of reasons. For example, perhaps a far-reaching power under the Commerce Clause was never envisioned by the founders, even if its text suggests such a broad scope;¹⁰⁵ the Constitution created a dual system of government accountability that requires that the federal government not unduly interfere with the legitimate activities of the states;¹⁰⁶ and the federal system protects essential liberties so long as there is a proper balance between the power of the state and local governments.¹⁰⁷

In the modern cases, perhaps influenced by the belief that the federal system must be judicially protected, the question of whether an activity is truly economic seems to carry the day.¹⁰⁸ In *United States v. Lopez*, the Court ruled that a regulation forbidding the knowing possession of a firearm within 1,000 feet of a school exceeded the Commerce Power.¹⁰⁹ *Lopez* noted that Congress could regulate the channels of interstate commerce, persons or things in interstate commerce even if they have only an intrastate effect, and activities that substantially affect interstate commerce.¹¹⁰ Addressing the third category, the Court emphasized the fact that the law in question did not have anything to do with commerce or any sort of economic ac-

¹⁰⁴ *Id.*

¹⁰⁵ Lawrence Lessig, *Translating Federalism*: *United States v. Lopez*, 1995 SUP. CT. REV. 125, 129–31 (noting the argument that the restriction of the Commerce Power in *Lopez* was necessary to maintaining the limits on federal power envisioned by the founders).

¹⁰⁶ *Cf. Younger v. Harris*, 401 U.S. 37, 44 (1971) (describing the notion of proper respect for state governments, "a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that that the National Government will fare best if the States . . . are left free to perform their separate functions in their separate ways.").

¹⁰⁷ *Gregory v. Aschcroft*, 501 U.S. 452, 459 (1991) ("In the tension between federal and state power lies the promise of liberty.").

¹⁰⁸ I say "seems to" because the Court is open to the criticism that it does not employ its test consistently. See Roosevelt, *supra* note 6, at 1699 (arguing that in *Pierce County v. Guillen*, 537 U.S. 129 (2003), the Court allowed regulation of non-commercial activity since the Court did not believe that Congress was acting for pretextual ends).

¹⁰⁹ 514 U.S. 549 (1995).

¹¹⁰ *Id.* at 558–59.

tivity.¹¹¹ The Court reasoned that because the regulation did not concern a commercial activity, cases upholding regulations of activities that are connected with a commercial transaction which viewed in the aggregate substantially affects interstate commerce were inapposite.¹¹² Like the Court's judgment in *Lochner* about the health effects of baking,¹¹³ the judgment that the regulation at issue had nothing to do with commerce seems entirely conclusory. Perhaps the presence of guns in schools has just as much effect on learning and therefore on commerce as any activity legitimately regulated.¹¹⁴ However, the Court rejected this argument, because otherwise, any activity could be classified as economic: there would be no limit on federal power, even in areas traditionally left to the states.¹¹⁵

The Court's rationale stems from a truncation of the allowable concept of what is economic, in favor of what is truly or more prototypically economic. This restriction is considered necessary to maintaining a limited national government in a federal system. Certainly, in one respect, this rule seems wrong: it should not matter whether the Commerce Clause affects areas traditionally left to the states, for example, as the scope of the Commerce Clause is plenary.¹¹⁶ However, if we view the Court as limiting the commerce power in the belief that this limitation is necessary for maintaining the federal system, a different picture emerges. The Court must ignore the economic impacts of guns in schools and restrict the scope of the Commerce Clause to prototypical commercial activities so that the judicial limit it imposes is not lost.

In *United States v. Morrison*,¹¹⁷ the Court ruled that the Commerce Clause did not give Congress the power to enact the civil remedy provision of the Violence Against Women Act. The *Morrison* Court suggested that the non-economic and traditionally local nature of the statute was crucial in *Lopez* and in *Morrison* itself.¹¹⁸ In examining findings regarding the economic impacts motivating the provision, the Court stated that "Congress' findings are substantially weakened

¹¹¹ *Id.* at 561.

¹¹² *Id.*

¹¹³ See *supra* Part II.A.

¹¹⁴ See, e.g., *Lopez*, 514 U.S. at 602 (Stevens, J., dissenting) (noting that "[t]he welfare of our future 'Commerce . . . ' is vitally dependent on the character of the education of our children.") (citation omitted); *id.* at 620–25 (Breyer, J., dissenting) (discussing empirical evidence supporting a conclusion that guns near schools have a substantial effect on interstate commerce).

¹¹⁵ See *id.* at 565.

¹¹⁶ See *id.* at 609 (Souter, J., dissenting) ("The suggestion is either that a connection between commerce and these subjects is remote, or that the commerce power is simply weaker when it touches subjects on which the States have historically been the primary legislators. Neither suggestion is tenable.").

¹¹⁷ 529 U.S. 598 (2000).

¹¹⁸ *Id.* at 610.

by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers."¹¹⁹ The method of reasoning is a factual examination of the actual effects of an activity on commerce, and the method is unworkable because it conflicts with the Court's categorically-implemented limitations.

The modern Commerce Clause jurisprudence exhibits the same formalism as *Lochner*: the restriction of governmental power to prototypical activities through a process of categorical reasoning that denies empirical evidence of similarity or actual effect in order to maintain a constitutional norm.¹²⁰ Concern about pretext operates here as well: it is very likely that Congress did not pass the anti-gun legislation in *Lopez* or the protections for women in *Morrison* because of concern about the economy.¹²¹

In the police power and Commerce Clause areas, the legal standard follows from a particular method of thought that is categorically based on prototypes, rather than constitutional text alone.¹²² While positively satisfying, this suggests also that the Court's reasoning does not necessarily mirror any intended meaning to the Constitution. This idea will be explored in the next section in the area of modern substantive due process and renewed in the last section on the theoretical implications of this analysis.

C. Categorization and Substantive Due Process

Substantive due process has proven historically persistent¹²³ and a matter of continuing contention with regard to its premise.¹²⁴ While

¹¹⁹ *Id.*

¹²⁰ See *supra* Part II.A.

¹²¹ Frank Goodman, *Preface, The Supreme Court's Federalism, Real or Imagined?*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 9, 17–18 (2001) (suggesting that *Lopez* and *Morrison* place activities outside Congress's power for reasons other than their effect on interstate commerce).

¹²² The Necessary and Proper Clause may complicate this analysis. See *Gonzales v. Raich*, 125 S. Ct. 2195, 2218 (2005) (Scalia, J., concurring) ("Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.").

¹²³ Cf. James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMM. 315, 318 (1999) (noting that as early as the antebellum era, some judges understood due process as having substantive content); *Washington v. Glucksberg*, 521 U.S. 702, 757–64 (1997) (Souter, J., concurring) (tracing the persistent notion of due process rights from the natural rights tradition, through the *Lochner* era, to the modern day).

¹²⁴ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting) (criticizing as inconsistent the majority's decision to invalidate an anti-sodomy statute without announcing a fundamental right to homosexual sodomy); ROBERT H. BORK, *THE TEMPTING OF AMERICA* 115 (1990) (criticizing *Roe* because "the opinion seems to regard the constitutional grounding of the right to privacy as a technicality that really does not matter, and indeed it does not, since the right does not come out of the Constitution but is forced into it."); John Hart Ely, *The Wages*

this description does not intend to compare the varying approaches to substantive due process,¹²⁵ it does show that the same kind of categorical reasoning seen in the Commerce Clause and police power areas takes place here.

In its early privacy rights decisions, the Court employed a form of categorical reasoning based on making specific constitutional provisions stand for general concepts and simply stating that an asserted right fell within that category. For example, in *Griswold v. Connecticut*, the Court invalidated a regulation forbidding the use of contraceptives to prevent conception as applied to married individuals because the marital relationship was within a zone of privacy created by various constitutional guarantees.¹²⁶ The Court explained that its First Amendment cases protected various peripheral rights necessary to make the right meaningful, including a right to read, teach, and associate freely, while other constitutional guarantees like the Fourth and Fourteenth Amendments created a zone of privacy.¹²⁷ The Court then concluded that the marital relationship falls "within the zone of privacy created by several fundamental constitutional guarantees."¹²⁸ Here the Court constructed a general category from the specific provisions. The Court's statement of breadth was unsupported by explicit reasoning; that said, the Court may rightly assume that readers can accept that things seem to belong to categories without explicit argument.

In *Roe v. Wade*, the Court again listed constitutional protections before deciding that, whether based on the Ninth Amendment or the Fourteenth, the right of privacy is "broad enough" to encompass a woman's decision whether or not to terminate her pregnancy.¹²⁹ The Court understood the categories of the Constitution as graded and encompassing a broad range of rights.¹³⁰ Justice Blackmun's dissent

of *Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (criticizing the *Lochner*-esque use of substantive due process in *Roe v. Wade*).

¹²⁵ See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 762 (1997) (Souter, J., concurring) (suggesting an incremental approach that balances individual interests against that of the state); *Michael H. v. Gerald D.*, 491 U.S. 110, 125–26 (1989) (describing the asserted liberty interest as narrowly as possible when determining whether an asserted interest is protected by the Due Process Clause); *Bowers v. Hardwick*, 478 U.S. 186, 203–04 (1986) (Blackmun, J., dissenting) (suggesting two lines of privacy rights, one in regard to decisions that form a central part of one's life and another based on the primacy of the home); *Moore v. City of East Cleveland*, 431 U.S. 494, 503–04 (1977) (identifying rights protected by substantive due process by looking to traditions that are deeply rooted in the nation's history).

¹²⁶ *Griswold v. Connecticut*, 381 U.S. at 485–86.

¹²⁷ *Id.* at 482–83.

¹²⁸ *Id.* at 485.

¹²⁹ 410 U.S. 113, 153 (1973).

¹³⁰ Todd Brower suggests something similar in "A Stranger to Its Laws": *Homosexuality, Schemas, and the Lessons and Limits of Reasoning by Analogy*, 38 SANTA CLARA L. REV. 65 (1997). Brower

in *Bowers v. Hardwick* illustrates this point: it attempts to create a decisional and locational privacy right, based on case-law and various constitutional amendments, that is broad enough to encompass a right to homosexual sodomy.¹³¹ The Court's seemingly conclusory reasoning involves the same methods employed in earlier eras—the purposeful use of categories to enforce substantive values and not-fully-declarative categorical resemblances.

In *Lawrence v. Texas*, the Court did not identify a fundamental right to homosexual sodomy, but it did hold that the state could not “demean [the petitioners’] existence” by criminalizing their private sexual conduct.¹³² Some commentators have suggested that the Court in *Lawrence* was reluctant to announce any new fundamental right.¹³³ Even absent *Griswold*’s explicitly categorical reasoning, *Lawrence* is equally conclusory in its statement of rights and equally motivated by policy concerns, namely, the desire to protect certain areas from state interference, especially where exercise of liberty is important to an individual and works little ostensible harm on the state.¹³⁴

The modern substantive due process jurisprudence sometimes differs from the police power and Commerce Clause jurisprudence in that it more explicitly acknowledges the policy aspects of its decisions. The Court sometimes takes into account the permissible purposes of government and balances individual liberty against the demands of organized society,¹³⁵ as opposed to ceding the task entirely to the legislature¹³⁶ or creating a category for *a priori* reasoning.¹³⁷ For example, as contended in the amicus brief of prominent philosophers in *Washington v. Glucksberg*,¹³⁸ the Court’s emphasis on protection of the power to make important life decisions and order one’s conception of existence does seem to extend *a fortiori* to one of the most impor-

suggests that the Court is really comparing claimed fundamental rights to prototypical fundamental rights. *Id.* at 76.

¹³¹ See *Bowers*, 478 U.S. at 203–07 (Blackmun, J., dissenting).

¹³² 539 U.S. 558, 578 (2003) (“The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”).

¹³³ See, e.g., Lawrence Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1906 (2004) (making such an argument).

¹³⁴ See *Lawrence*, 539 U.S. at 578 (the Due Process Clause guarantees “a realm of personal liberty which the government may not enter”) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992)).

¹³⁵ *Casey*, 505 U.S. at 850 (quoting Justice Harlan’s statement that due process “represent[s] the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.”) (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

¹³⁶ See *supra* notes 82–84 and accompanying text (describing this tendency with regard to the Court’s modern police power jurisprudence).

¹³⁷ See *supra* notes 57–66 and accompanying text (describing this tendency with regard to the Court’s *Lochner*-era jurisprudence).

¹³⁸ 521 U.S. 702 (1997).

tant decisions a person can make—the circumstances under which one leaves this life.¹³⁹ However, the practical realities and dangers of protecting such a right seem to militate against protection,¹⁴⁰ even if it is squarely within the superordinate category.

That said, for at least two reasons; the fact that modern substantive due process cases contain explicit policy balancing whereas the Commerce Clause and police power cases do not is a distinction without a difference. First, as already noted, the *Griswold* line is often just as conclusory as the Court's holdings in the police power and Commerce Clause contexts.¹⁴¹ Second, the Court's Commerce Clause and police power cases sometimes do involve policy balancing that is at odds with what their categorical test would otherwise seem to mandate.¹⁴² To the extent that modern substantive due process involves an explicit balancing of personal and governmental interests, this is perhaps the abandonment of a trope, not necessarily a marked change in practice.

In sum, the categorical perspective suggests that rather than being an unprincipled usurpation or extratextual interpretation, the modern substantive due process cases involve just another form of categorical reasoning, employed in an effort to protect perceived (and contested) constitutional values.

III. ON SAYING WHAT THE LAW IS

The graded, purpose-driven, not-fully-declarative nature of our categories can descriptively explain the Court's jurisprudence in the police power, Commerce Clause, and modern substantive due process areas. Rather than being conclusory statements, the early Commerce Clause and police power cases seem to turn on prototypical allowable uses, created to judicially maintain substantive constitutional values. These are sometimes replaced by a notion of the category as graded and partially determined by the purposes of government and by an accompanying license to allow legislatures to define these purposes.

¹³⁹ Amicus Brief in Support of Respondents Submitted by Ronald Dworkin et. al., *Washington v. Glucksberg*, 1996 WL 708956, at *3–4.

¹⁴⁰ See *Glucksberg*, 521 U.S. at 782 (Souter, J., concurring) (finding the state's asserted interest in protecting patients from involuntary euthanasia dispositive).

¹⁴¹ This is not to suggest that substantive due process jurisprudence does not suffer this same flaw. See, e.g., Tribe, *supra* note 133, at 1904 (noting that the intimate decision involved in *Lawrence* involved a fleeting sexual encounter).

¹⁴² See, e.g., *supra* note 66.

A. *Categories as Enforcing Normative Limits*

For the past century, judges in these areas have been defining the law in ways that match a judicial method of looking at the world: using categories and resemblances rather than factual determinations to see whether a right should be upheld or a regulation struck down. The Constitution, as judicially enforced, does not specify an outcome in these areas. Rather the Constitution at most specifies broad categories whose less prototypical examples may be treated differently depending on the Court's view of the need to protect other constitutional values from interference, for example, individual liberties in the police power jurisprudence, dual federalism in the Commerce Clause jurisprudence, or personal privacy in the *Griswold* line.

This paper suggests no best way to go about solving the tension between the broad powers of modern government and the perceived need for constitutional limits. However, a good starting point is the Court's concerns—the need to enforce limits due to the danger of legislatures acting under an illegitimate pretext or exceeding the constitutional bounds of their authority. This is consistent with the notion that the Court should step in only where Congress cannot be trusted to protect basic constitutional values,¹⁴³ be it a base-line of individual rights, federalism, or private decisional autonomy. Given the Court's reasoning in the areas discussed, structuralism, originalism, intentionalism, and so on seem rather shallow or at least just a first step: perhaps the Constitution's structure provides some guidance as to *what* values must be enforced, but these are broad, normative values that have been implemented via judicially-created categorical limits.

Using these categorical limits, the Court's decisions are weakest where they should be strongest. They do not adequately justify the nature and source of the values at stake, as in the modern Commerce Clause and the *Griswold* line, beyond an *ipse dixit* about limits or the breadth of protection. If the greatest justification for restricting a category is fear of pretext or a desire to create a substantive limit, as it appears to be, then this analysis should carry most of the conceptual weight; proclamations regarding category membership should not be relied on.¹⁴⁴ These proclamations perhaps enhance the perception that the Court lays down the law according to constitutional principles, as opposed to implementing somewhat vague constitutional policies. However, assuming reason and reasons are the measure of

¹⁴³ Cf. ELY, *supra* note 43, at 183 (“[C]onstitutional law appropriately exists for those situations where representative government cannot be trusted, not those where we know it can.”).

¹⁴⁴ Roosevelt, for example, lists various considerations the Court could consider in deciding what decision rule to adopt, including enforcement costs. Roosevelt, *supra* note 6, at 1658–67.

judicial opinions, the Court's legitimacy is at most a secondary consideration.

There is an equalizing force to this analysis. If scholars and judges engage in attacks about similarity to canonical cases (being canonical for good or bad reasons), *Lochner*, *Lopez*, and *Roe* are all equally open to attack. That they feature similarly categorical, seemingly conclusory reasoning is a charge against all of these cases, rather than just one of them.

B. Categories as a Judicial Implementation

Areas like the modern Commerce Clause cases suggest that the category is a judicial creation based on what the Court sees as prototypical, as opposed to a fact about the Constitution itself, just as areas like the modern police power seem relatively unbounded from the judicial perspective compared to their possible content. This is compatible with the view that the Court fashions rules of decision, rather than simply specifying constitutional content.¹⁴⁵

Ultimately, conceptualizing constitutional law as an *a priori*, categorical interpretative process unveils a broad horizon of constitutional meaning.¹⁴⁶ The judicially enforced constitutional limit is not defined by the Constitution but by the Court's categories. As suggested by the legislatively-designed purposes in the police power, Commerce Clause, and modern substantive due process cases, this conception is not necessarily a single correct one but one that is adapted to the means and ends of its users—courts enforcing the law.

This complicates the debate over the role of non-judicial actors in the construction of constitutional meaning. Commentators have urged a stronger role for non-judicial actors in the construction of constitutional meaning.¹⁴⁷ The Court is not necessarily the primary arbiter of constitutional meaning: the public,¹⁴⁸ Congress,¹⁴⁹ or the President¹⁵⁰ should perhaps play a more robust role.

¹⁴⁵ See Sager, *supra* note 6, *passim* (arguing that there are areas where the Supreme Court has refused to enforce a provision to its full conceptual boundaries due to institutional concerns); Berman, *supra* note 6, *passim* (surveying the utility of this distinction in other areas). See generally FALLON, *supra* note 6 (surveying different methods of constitutional theory in light of their potential to implement its content).

¹⁴⁶ See Roosevelt, *supra* note 6, at 1718 (noting the interpretative room left by the fact that the Court's decisions do not specify the exact content of the Constitution). Cf. Berman, *supra* note 6, at 16 (suggesting that while citizens preparing for litigation should abide by the Court's decisions, the meaning of the Constitution could have a greater operative role to play in constitutional discourse).

¹⁴⁷ See generally MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4 (2001).

¹⁴⁸ See, e.g., TUSHNET, *supra* note 147.

An objection to taking the Constitution outside the courts is that certain kinds of extra-judicial constitutional interpretation don't mesh with our notion of the Constitution as ordinary law.¹⁵¹ But what the Court decides isn't always exactly law either, in the sense in which we often employ the term. The Court is acting to enforce general limits on government in an *a priori*, categorical fashion to create some kind of substantive limits, not specifying any "true" content to the Constitution by comparing a statute to the Constitution as if it were laying the documents side-by-side. Moreover, in the areas described, the Court's results are not determinate in an ordinary law kind of way or indeterminate, per Hart's sense of open texture—the Court constructs limits based on concerns about pretext. It does not divine the purpose of a particular provision in the way a court would interpret an open-textured statute¹⁵² but bases its decisions on broader, largely unexplored concerns about pretext and limits. In fact, these unsubstantiated concerns about pretext and limits seem just as ethereal or willowy as Tushnet's vision of populist constitutional law and its thin Constitution, which guarantees not specific textual rights but broad fundamentals like equality, freedom of expression, and liberty.¹⁵³

There may nonetheless be reasons to treat the Court's resolution of issues as binding law—for example, that such treatment provides a necessary settlement function that Congress cannot provide¹⁵⁴ or that our governmental system compels Congress to respect judicially-enforced limits designed with Congress in mind. However, it would be an error to view the Court's resolution of constitutional issues, at

¹⁴⁹ See, e.g., Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997) (arguing that Congress should have a more robust power of constitutional interpretation with respect to the Fourteenth Amendment).

¹⁵⁰ See, e.g., Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 220 (1994) ("Perhaps most important of all, the President has, as a logical incident of his textually specified powers, the ancillary power of judgment: the formidable power to interpret the laws he is charged with executing and (sometimes) that he has had a role in making.").

¹⁵¹ TUSHNET, *supra* note 147, at x ("The most problematic term here is *law*. How can constitutional decisions made away from the courts, particularly by ordinary citizens, be law?").

¹⁵² Hart notes that an individual interpreting an open-textured statute looks to the purposes of the statute and criteria of relevance and closeness of resemblance. See HART, *supra* note 15, at 124.

¹⁵³ See TUSHNET, *supra* note 147, at 11 (contrasting the thick, judicially constructed Constitution with the thin, populist one).

¹⁵⁴ See Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMM. 455, 477–78 (2000) (arguing that the Court is institutionally superior to the political branches at settling constitutional questions); Larry Alexander & Frederick Schauer, *On Extra-judicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371 (1997) (describing the value possessed by settled rules independent of their content). But see LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 234–35 (2004) (arguing that the Court does not necessarily settle constitutional issues any better than Congress would).

least in the areas described, as resolving the meaning of the Constitution itself.¹⁵⁵

CONCLUSION

The Court's seemingly conclusory categorical reasoning in its police power, Commerce Clause, and modern substantive due process areas does not specify the exact content of the Constitution but the realities of its judicial enforcement. The Court may choose to acknowledge that a legal category is graded and cede the power of government entirely to the legislature, as occurred in the modern police power and post-New Deal Commerce Clause areas. It may instead hew to a specific conception of a category, so as to judicially protect a constitutional value from infringement by the legislature, especially where it is likely that the legislature acts for pretextual reasons. As seen in the modern substantive due process cases, the Court can also create broad categories that may subsume purported rights.

The nature of how we reason about categories can deepen our understanding of these lines of jurisprudence. The Court will invent or use existing categories such as whether an activity is dangerous or commercial and adhere to its categories even if the facts might allow that baking¹⁵⁶ may be dangerous like mining¹⁵⁷ or that guns near schools¹⁵⁸ have a greater effect on interstate commerce than home-grown wheat¹⁵⁹ out of a concern for creating substantive limits. The categories are necessarily graded, with the Court's method of enforcing the scope of the categories varying according to its concerns about substantive limits. These categories are purposive: they are tools for creating these limits. Finally, these categories are not fully declarative; the Court's reasoning may still be sensible without declarative explanation.

¹⁵⁵ This is somewhat contrary to the Court's understanding of its job. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (stating that if Congress determined the substance of the Fourteenth Amendment, then "what Congress would be enforcing would no longer be, in any meaningful sense, the 'provisions of [the Fourteenth Amendment]'" (alteration in original); *United States v. Butler*, 297 U.S. 1, 62-63 (1936) ("When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the government has only one duty, to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question.").

¹⁵⁶ *See Lochner v. New York*, 198 U.S. 45 (1905) (invalidating maximum hour legislation for bakers, partially because baking is not a dangerous enough activity).

¹⁵⁷ *See Holden v. Hardy*, 169 U.S. 366 (1898) (upholding a similar regulation for miners).

¹⁵⁸ *See United States v. Lopez*, 514 U.S. 549 (1995) (holding that federal statute criminalizing possession of a firearm within a school zone did not regulate economic activity).

¹⁵⁹ *See Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that the power to regulate interstate commerce extends to limiting production of home-grown wheat).

Pretending that courts are specifying the content of the Constitution and debating about how they should discover it seems silly in these areas. The Court in these areas does not specify the content of the Constitution so much as use concepts restricted to their most central meanings to create limits on governmental power, as it did in the recent Commerce Clause and early twentieth-century police power areas; conversely, it can also expand categories to create limits, as it did in *Griswold* and *Roe*. This reinforces the notion that the Court does not fully enforce the content of the Constitution and situates the Court's holdings as resulting from its institutional position and a certain form of *a priori* reasoning rather than the meaning of the Constitution standing alone.