Justice Byron White and the Argument that the Greater Includes the Lesser

Michael Herz
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The proposition that the greater includes the lesser is tremendously attractive to lawyers and judges. It satisfies the desire for logic, proof, and coherence. It sounds right.

It is also a trap. That does not mean that it is always false. Were that so, it would not be much of a trap. It is a trap because it is only sometimes true.

In this Article, I will consider Justice Byron White's use of the greater-includes-the-lesser argument. I have two goals. The first is to learn something more about White; the second is to learn something more about legal argument. I suggest that White is fond of the greater-includes-the-lesser argument,¹ which represents a style of logical reasoning that is typical of his opinions but is often overlooked by commentators. While the argument holds great appeal for White, he has for the most part successfully avoided its traps.

Part I begins with some general observations on Justice White's jurisprudence, agreeing with the usual portrait of White as a pragmatic functionalist, but suggesting that that portrait is incomplete. White is a keenly analytic thinker who is interested not only in how things work in practice but also in

* Professor of Law, Benjamin N. Cardozo School of Law; law clerk to Justice White, 1983 and 1984 Terms. My thanks to Susan Bandes, Eva Hanks, John McGinnis, and Kevin Worthen for comments on an earlier draft, to Larry Crocker and Abner Greene for helpful conversations, and to Eric Rethy (Cardozo '93) and Michael Jaffe (Cardozo '94) for very useful research.

1. Early drafts of this Article fluctuated hopelessly between the present and past tense when discussing Justice White's opinions. His retirement from the Supreme Court suggested that the past tense was correct, but using it did not come naturally and I frequently lapsed into the more reassuring present tense. I then came to the happy realization that because Justice White continues his judicial activity, sitting by designation on the Courts of Appeals, see, e.g., 114 S. Ct. No. 8, at cliii (1994) (designating Justice White to sit on the Tenth Circuit from March 14 through March 18, 1994), use of the present tense remains correct except when specifically referring to his Supreme Court tenure.
how they hold together in theory. Part II discusses the contours and limitations of the logical proposition that the greater includes the lesser. Part III then applies that discussion to White opinions that invoke the greater-includes-the-lesser argument.

I. INTRODUCTORY NOTES ON WHITE’S JURISPRUDENCE

A. Legal Functionalism

Most accounts of Byron White’s jurisprudence emphasize White’s pragmatic functionalism. For example, Alan Ides’ insightful recent essay portrays White as the inheritor of the legal realism preached at the Yale Law School when he was a student there, eschewing formalist distinctions and blinded doctrinalism in favor of a pragmatic, functionalist consideration of real-world circumstances.

In a similar vein, Lance Liebman writes of White:

His job, as he saw it, was to decide cases: to read the briefs, to question the lawyers rigorously, to find the flaws in general statements about the law, and to see, as far as humanly possible, the consequences of each decision and its supporting rationale. Thus his powerful intelligence was largely focused on predicting, skeptically, the consequences of conclusion and reason—the consequences for other applications of a rule, and the real-world consequences of a Supreme Court decision.


3. Lance Liebman, A Tribute to Justice Byron R. White, 107 HARV. L. REV. 13, 14 (1993); see also Kate Stith, Byron R. White, Last of the New Deal Liberals, 103 YALE L.J. 19, 19 (1993) (noting that “[t]o the distress of those who would have preferred greater elaboration of a philosophical vision, he approached the judicial task in a lawyerly and pragmatic fashion”).
7. 111 S. Ct. 2298, 2312 (1991) (White, J., dissenting); see id. at 2312-13 (“Today the Court strikes down yet another innovative and otherwise lawful governmental experiment in the name of separation of powers.”).
and, of course, *INS v. Chadha*—are the most celebrated examples of White's functionalism. This approach is "realist" both in the jurisprudential sense and in the sense that it pays serious attention to the real world. In a phrase of Justice Jackson's that White quoted more than once, the goal was to achieve not abstract purity or theoretical elegance but a "workable government."  


9. See *Ideas*, *supra* note 2, at 421-29; Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Footloose Inconsistency?*, 72 CORNELL L. REV. 488 (1987). Indeed, here is where one finds arguably its single starkest expression. In *Bowsher v. Synar* the majority concluded that the Comptroller General was subservient to Congress because he could be removed by an act of Congress. 478 U.S. at 727-28. For White, the removal power was a "triviality" of "minimal practical significance" that had "lain dormant" for six decades. *Id.* at 759, 765, 771 (White, J., dissenting). Indeed, "[t]he practical result of the removal provision is not to render the Comptroller unduly dependent upon or subservient to Congress, but to render him one of the most independent officers in the entire federal establishment." *Id.* at 773 (White, J., dissenting). "Realistic consideration of the nature of the Comptroller General's relation to Congress thus reveals that the threat to separation of powers conjured up by the majority is wholly chimerical." *Id.* at 774 (White, J., dissenting). In utter contrast, Chief Justice Burger wrote for the majority that whether in practice the Comptroller General was a pawn of Congress was simply irrelevant: "In constitutional terms, the removal powers over the Comptroller General's office dictate that he will be subservient to Congress." *Id.* at 730.

White's approach in these cases was replicated in his opinions in "vertical separation of powers" (i.e. federalism) cases. There he also emphasized the need for flexibility to enable government to handle real and changing problems and deference to better-informed branches, focusing on overall structure and displaying impatience with the Court's attachment to purely formal requirements at the expense of their underlying rationales. One of the purest and most explicit examples of this approach came during his second-to-last Term in White's partial dissent in *New York v. United States*, 112 S. Ct. 2408 (1992). The Low-Level Radioactive Waste Act required states to take title to such waste if they failed to ensure adequate disposal opportunities. In an opinion by Justice O'Connor, the Court struck down the take-title provision as an unconstitutional "commandeering" of the organs of state government by the feds. Taking the majority to task for its "formalistically rigid obeisance to 'federalism,'" *Id.* at 2446 (White, J., concurring in part and dissenting in part), White emphasized that "action, rather than rhetoric, is needed to solve" what had become "a crisis of national proportions," and it thus "would be far more sensible to defer to a coordinate branch of government in its decision to devise a solution to a national problem of this kind," *Id.* at 2444 & n.3 (White, J., concurring in part and dissenting in part). The upshot of the Court's opinion, he argued, would be at best to force Congress to jump through additional hoops to achieve the same result and might well be less rather than more state decision-making and autonomy. *Id.* at 2446 (White, J., concurring in part and dissenting in part).

10. The quote is from *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring), and was invoked by White in his dissents in *Bowsher*, 478 U.S. at 760 (White, J., dissenting), and *Chadha*, 462 U.S. at 978 (White, J., dissenting).
“White's function- and fact-oriented approach to jurisprudence,” as Ides shows, is hardly limited to the separation of powers cases. To Ides' catalogue, I would add one category and four examples. The category is White's preference for as-applied rather than facial constitutional challenges. An as-applied challenge (a) is narrower than a facial challenge and (b) rests on hard facts about the real world rather than judicial hypothesizing about possible applications.

My four examples concern four superficially unrelated cases that can be lumped together because each forced the Court explicitly to describe the role of judges. In Chisom v. Roemer, Justice White joined the Court's opinion, written by Justice Stevens, holding that the Voting Rights Act applies to elections for judges, notwithstanding the statute's application only to elections for "representatives." In Gregory v. Ashcroft, he wrote separately, joined only by Justice Stevens, concluding that judges are "on the policymaking level" and therefore not within the protection of the Age Discrimination in Employment Act. In Payne v. Tennessee, White joined the Court's opinion, written by Chief Justice Rehnquist, overruling two recent decisions and permitting the introduction of victim-impact evidence in capital trials. White had dissented in the first decision, then made a fifth vote to stand by that decision in the second, before returning to his original substantive position in

11. Ides, supra note 2, at 437; see also Pierce O'Donnell, Common Sense and the Constitution: Justice White and the Egalitarian Ideal, 58 U. COLO. L. REV. 433, 434 (1987) (describing White's judicial approach as "fundamentally pragmatic, rather than ideological, principled but nondoctrinaire").

12. My assertion that White had such a preference is based on impression more than research. For one example, however, see Renne v. Geary, 111 S. Ct. 2331 (1991). The majority dismissed without reaching the merits; Justices White and Marshall wrote separately, addressing the merits. Viewing the case as a facial challenge, Marshall would have struck the statute down, id. at 2350 (Marshall, J., dissenting); viewing it as an as-applied challenge White would have upheld the statute, id. at 2342 (White, J., dissenting).

13. I have thus lumped them together. See Michael Herz, Choosing Between Normative and Descriptive Versions of the Judicial Role, 75 MARQUETTE L. REV. 725 (1992), on which the following discussion draws.

Payne. Finally, in *James B. Beam Distilling Co. v. Georgia*, White was in a group of three Justices who concluded that because the Court had applied the new rule announced in a prior decision, *Bacchus Imports, Ltd. v. Dias*, to the parties in *Bacchus*, fairness required that the rule be applied retroactively across the board. Three Justices would have applied the *Bacchus* rule prospectively, and three (the unusual cluster of Marshall, Blackmun, and Scalia) contended that judicial decisions must always be retroactive.

Justice White's votes in these cases are ideologically inconsistent. For example, he voted for the civil rights plaintiffs in *Chisom* but against them in *Gregory*—unlike, say, Justices Blackmun and Marshall, who voted for the plaintiffs in both. He voted against the criminal defendant, but also against the big corporation, unlike most of the other Justices, who voted either against the criminal defendant and for the corporation or vice versa. He read one ambiguous federal statute to apply to state governments and one not to, unlike Chief Justice Rehnquist and Justices Kennedy and Scalia, who read both to leave the states alone. Ideology, however, is always the wrong criterion for evaluating or understanding White's opinions. Viewed as the application of a single methodology and view of the judiciary, these four votes are wholly and uniquely consistent.

Each of these cases required a choice between an idealized, normative version of the judicial role and a realistic, descriptive version. The one portrays courts as modest dispute resolvers, faithfully applying legal rules made by others; the other deems judges active lawmakers. Alone among the Justices, White opted for the descriptive version in each of these cases—he always chose reality over theory. He was one of only two Justices who was willing to come right out and say that

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21. In contrast, for example, Chief Justice Rehnquist endorsed an essentially legislative role for the Court in *Payne* and *Jim Beam*, unfazed by overruling prior decisions or ruling prospectively, but then joined Justice O'Connor's tentative majority opinion in *Gregory* (holding only that judges were not clearly not on the policymaking level) and in *Chisom* refused to accept that judges could be "representatives." Justices Marshall and Blackmun painted an extraordinarily conservative picture of judges as wholly deferential to the policymakers in other branches, as absolutely bound by precedent, and as constitutionally obliged to rule retroactively, only to hold that these diffident dispute-resolvers were "representatives" under the Voting Rights Act. And so on.
judges are policymakers; he joined the majority that endorsed the “representatives” label; he saw no constitutional imperative of retroactive decisionmaking; and he joined a majority that gave short shrift to the principles of stare decisis. In short, he consistently went along with an image of the judiciary that is a good deal closer to the model of a legislature—representative policymakers who decide matters prospectively and without regard for prior decisions—than the “official version” would have it.22 This version is, of course, that of the realists.23

22. Not surprisingly, Justice Scalia, the current Court’s leading formalist, was almost as consistent in adhering to the opposite version of the judicial role. For him, judges are wholly unlike legislators: they are not representatives, may not make policy, and must decide retroactively. Scalia’s vote in Payne (the one case in this group where he and White joined the same opinion) is the aberration on this account, although it is a minor one given the conflicting signals of the usual normative version of the judicial role: adhere to precedent, but also defer to ultimate binding legal standards, such as those set out in the Constitution.

23. In light of Justice White’s uniquely consistent approach in these cases, I cannot resist offering a few words at this point on the question of White’s consistency, or lack thereof. It is striking to what extent the standard perception is that White was quite inconsistent, both on the macro level (the usual charge being that he grew ever more conservative over the years and would have been a sore disappointment to the President who appointed him) and on the micro level (it often being observed that he was “unpredictable”). All former clerks have had the “isn’t he getting more conservative” conversation a million times. And it is a standard observation that, in Chief Justice Rehnquist’s words, “his judicial work defies easy categorization” and “no ‘Byron R. White School of Jurisprudence’ remains behind.” William H. Rehnquist, A Tribute to Justice Byron R. White, 33 WASHBURN L.J. 5, 5, 6 (1993).

To me (and, I think, to most former clerks, see, e.g., Rex E. Lee, A Case for ‘Whizzer White’s’ Greatness, NAT’L L.J., May 31, 1993, at 17) all this is quite mystifying. First of all, except in the area of affirmative action, see Charles Fried, A Tribute to Justice Byron R. White, 107 HARV. L. REV. 20, 20 (1993) (noting that White joined opinions in affirmative action cases that were “clearly, even provocatively, inconsistent”); Lance Liebman, Justice White and Affirmative Action, 58 U. COLO. L. REV. 471 (1987) (describing shifts in White’s views on affirmative action), White did not shift noticeably to the right over the years. In the area of criminal procedure, where the Court was most visibly conservative over White’s last decade on it, he merely stayed to the right, where he had begun (dissenting, for example, in Miranda v. Arizona, 384 U.S. 436, 526 (1966) (White, J., dissenting), and Escobedo v. Illinois, 378 U.S. 478, 495 (1964) (White, J., dissenting)) and where the Court came to join him. Indeed, when the Court lurched even further to the right than he had been, he refused to go with it. See, e.g., Arizona v. Fulminante, 499 U.S. 279, 288-95 (1991) (plurality opinion of White, J., joined by Marshall, Blackmun, and Stevens, JJ.) (dissenting from application of harmless-error rule to introduction of coerced confessions). In the substantive due process area, he was skeptical from the start (dissenting in Moore v. City of East Cleveland, 431 U.S. 494, 541 (1977) (White, J., dissenting), and every abortion decision beginning with Roe v. Wade, 410 U.S. 113, 221 (1973) (White, J., dissenting)) but not openly hostile (going along in Griswold v. Connecticut, 381 U.S. 479, 502 (1965) (White, J., concurring in the judgment), and consistently arguing for parental liberty interests).
This is not to say that White was endorsing a wide-ranging judicial activism. He was not, and he did not display such tendencies himself. On the other hand, for all the talk about his deference to the democratic process, he is not shy about interfering with it. And he always has frankly acknowledged the broad scope of the judicial power to do so, even when he thought it was being unwisely exercised. What mattered to him in these cases, then, was how judges functioned in the real world, what they “did in fact.”

The same description applies to his First Amendment opinions from the start. On the other hand (again, excepting affirmative action) he was consistently in the liberal camp in equal protection cases, and Voting Rights Act plaintiffs had no greater friend on the Court.

Not only are these positions consistent over time, they are easily squared one with another. As others have described, the dominant themes are deference to democratically accountable and/or expert decisionmakers, an effort to ensure that democratic processes work effectively, scrutiny to ensure that other governmental players are doing their jobs correctly, and a pragmatic flexibility.

Oddly, he was perhaps most inconsistent in his approach to consistency. That is, more than most Justices he would accept rulings from which he had dissented as binding precedent. Here and there, however, he never gave in. He was a consistent dissenter in cases involving separation of powers, abortion, and the religion clauses. I am not sure what determined when White accepted precedent he deemed wrongly decided and when he held fast to his dissenting view. My tentative speculation is that he was more likely to perpetuate a dissenting position when he was isolated. This seems perverse, but may reflect his strong sense of institutional obligation. A Justice is freer to chart his own course when the Court does not need him to chart its course. On White’s sense of institutional obligation, see, e.g., Fried, supra, at 23 (noting White’s “willingness to go along to ‘make a Court’—a subordination of personal punctilio to the goal of making the Court’s work useful to, not to say usable by, the lower courts and the profession”); Monroe E. Price, White: A Justice of Studied Unpredictability, NAT’L L.J., Feb. 18, 1980, at 24, 25 (stating that White “believes deeply in performing proficiently his assignment as a judge on a court that can perform what is expected of it”).

24. See Liebman, supra note 3, at 15-16 (noting examples of White’s willingness to intrude on legislative choice); see also infra note 41.

25. His dissent in Miranda provides the classic example:

[The Court is making] new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution. This is what the Court . . . must do and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers.


26. Less strikingly, these decisions reflect a second oft-noted aspect of White’s jurisprudence: deference to and confidence in democratic decisionmaking. Chisolm is one of many cases in which White voted for a strong reading of the Voting Rights Act; Payne one of many in which he took a narrow reading of constitutional limitations on the political branches; Jim Beam one of many in which he endorsed onerous judicial remedies once a statutory or constitutional violation had been found. There is no shortage of examples. On this aspect of White’s opinions, see Ides,
B. Logical Formalism

I wholly agree, then, with the usual account of Justice White’s jurisprudence, as far as it goes. I also feel, however, that it is incomplete. It leaves out Justice White’s extraordinary abilities as an abstract thinker. In his final opinion as a Supreme Court Justice, a partial concurrence and partial dissent in *United States v. Dixon*, White criticized the majority’s approach as having “consequences [that are] at once illogical and harmful.” This phrase captures the second aspect of White’s judicial method: he sought to avoid not just harmful outcomes but also illogical ones.

Notwithstanding White’s disdain for ungrounded theorizing, and legal functionalist though he may have been, he was in many ways a logical formalist. His pragmatism may have led to or at least is part of the first; his analytic abilities and interest in argument led to or at least are part of the second.

While perhaps he is “as far as you can get from [being] flamboyant, dramatic or even eloquent,” Byron White is, to use a phrase he often applies to others, “smart as hell.” This is a recurrent and unsurprising theme of the recollections of former clerks. For example, Bill Nelson notes Justice White’s “extraordinary analytical ability” and states that “[i]n my experience as his law clerk, I found that Justice White could identify the weaknesses and gaps in any theoretical argument.”

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supra note 2, at 456-58.
28. Id. at 2877 (White, J., concurring in the judgment in part and dissenting in part).
29. In addition to the sources cited above, see supra notes 2-3 and accompanying text, consider this typical expression of such exasperation: “Surely, even at the extreme level of abstraction at which the Court operates in its opinion, the majority can recognize a difference between the scope and dangers of [laws that had been struck down in prior cases], and Lakewood’s more focused regulation.” *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 787 (1988) (White, J., dissenting); see also *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 521 (1981) (plurality opinion of White, J.) (stating that the dissent’s “position makes little sense even abstractly”).
The Justice has an "analytic bent of mind" and admires and possesses the debater's facility with argument.

Others who have tussled with him share this impression. Former Solicitor General Charles Fried writes:

It is not possible to have seen Justice White in the courtroom, to have argued before him, without getting a sense of a strong intelligence. He knew the case. He had worked out its intricacies—he obviously loves a puzzle. He delighted in asking just the question that displayed a weakness the advocate was trying to skate over, or perhaps had not even noticed. "Skewer" is the word that comes to mind.

It would be odd if this analytical skill and inclination did not in some way surface in his jurisprudence. I think it does. Consider one example by way of introduction. Justice White shows a particular thoughtfulness about means/ends tests, often focusing on whether a particular rule or statute served its stated purposes. In a number of the Warren Court individual

statement travels fully clothed into his consciousness with all of the trappings of nuance, comparison, structure, and context that, for most of us, require articulated analysis and, even more importantly, time." David M. Ebel, A Tribute to Justice Byron R. White, 107 HARV. L. REV. 8, 11 (1993).

32. Stith, supra note 3, at 19.

33. As Lance Liebman wrote more than two decades ago, "White is a brilliant lawyer, quick and imaginative at seeing and making arguments." Lance Liebman, Swing Man on the Supreme Court, N.Y. TIMES, Oct. 8, 1972, § 6 (Magazine), at 16, 17. It has always been my impression that a disproportionate number of his law clerks were on the debate team at some point. One former clerk recalls:

The Justice was the consummate debater. No one could ever accuse him of political correctness in his thinking. I marvelled at his nimble mind, command of history, and willingness to push the outside of the envelope to test his acolytes' glib assumptions. I have never met anyone who could so cogently and economically marshal the facts and law.

Our debates were nothing if not intense. Arguing with the Justice was like taking the bar examination in a hurricane. The man who graduated first in his high school, college, and law school classes used all of his awesome intellectual powers to make his points.


34. Fried, supra note 23, at 22. Fried's predecessor Erwin Griswold ascribes White's "appearance of brusqueness" to the fact that "his mind is so clear and quick." Erwin N. Griswold, Reflections on Justice White, 58 U. COLO. L. REV. 339, 346 (1987); see also Stuart Taylor Jr., Justice Byron White: The Consistent Curmudgeon, LEGAL TIMES, Mar. 22, 1993, at 1, 30 ("White's personal crustiness is that of a man of enormous intelligence—a Rhodes Scholar who was at the top of his Yale Law School class and who arguably boasts as much sheer intellectual horsepower as anyone on the Court—who seemingly cannot be bothered to spend much effort seeking to persuade others to his point of view.").
liberties cases, for example, Justice White went along with the result, but focused on means and ends, without joining in any sweeping statements about the Constitution. Thus, in *Griswold v. Connecticut* White voted with the majority. While acknowledging an unenumerated privacy right as part of a substantive due process liberty interest, his opinion was directed primarily to whether the ban on the use of contraceptives by married couples would in fact further the stated goal:

I wholly fail to see how the ban on the use of contraceptives by married couples in any way reinforces the State's ban on illicit sexual relationships. . . .

. . . Perhaps the theory is that the flat ban on use prevents married people from possessing contraceptives and without the ready availability of such devices for use in the marital relationship, there will be no or less temptation to use them in extramarital ones. This reasoning rests on the premise that married people will comply with the ban in regard to their marital relationship, notwithstanding total nonenforcement in this context and apparent nonenforceability, but will not comply with criminal statutes prohibiting extramarital affairs and the anti-use statute in respect to illicit sexual relationships, a premise whose validity has not been demonstrated and whose intrinsic validity is not very evident.36

This is not just a "let's look at the real world, folks" opinion. It is carefully reasoned, somewhat abstract, and logically complex. White's concern is whether the state's *argument* holds together on its face.

Close examination of the means and ends can be seen in his opinion in *United States v. Leon*,37 which established a "good faith exception" to the exclusionary rule under which evidence obtained in good faith by a police officer reasonably relying on an invalid warrant is admissible. White, never enthusiastic about the exclusionary rule, had advocated such an exception for some time before a majority joined him in *Leon*.38 The reasoning in *Leon* rests not on empirical investi-

35. 381 U.S. 479 (1965).
36. *Id.* at 505-07 (White, J., concurring in the judgment).
gation but on a theory about the purpose of the exclusionary rule and the circumstances in which that purpose will be served by excluding illegally obtained evidence. For White, the critical point was that “[p]enalizing the officer for the magistrate’s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.”

The same attention to the means/ends connection is seen in White’s willingness, probably somewhat greater than that of most Justices, to strike down laws under rational basis scrutiny, and in his well-known opinion in the air-bags case.

In all these examples, I would suggest, something more than “functionalism” or “legal realism” is at work. White is neither a policy wonk in robes, nor an Earl Warren, nor a Louis Brandeis (the brief-writer or the Justice). He is an exceptionally intelligent and keenly analytic thinker who seeks logical coherence in legal argument and in judicial opinions. His jurisprudence is shaped as much by that latter commitment as it is


40. Liebman, supra note 3, at 15 & n.8.


These cases might be seen as counter-examples to White’s oft-noted confidence in the democratic process and deference to legislative judgments. See, e.g., Rhesa H. Barksdale, A Tribute to Justice Byron R. White, 107 HARV. L. REV. 3, 6 (1993) (“His opinions reflect his unwavering confidence and faith in our majoritarian, democratic system. He understands the limited role of the courts, especially the federal courts, in that system, feeling confident that the affairs of our nation are best managed by its people and their elected representatives.”); Stith, supra note 3, at 24-25 (noting examples of “White’s clear sense of the primacy of democratic institutions”). Yet an important consequence of striking a law down as irrational under the Equal Protection Clause (rather than applying heightened scrutiny or discovering a fundamental right) is that it leaves the legislature free to do almost exactly the same thing again in the future. While striking down a law may be meddlesome, if you are going to strike it down the least meddlesome way of doing so is by using the rational basis standard under the Equal Protection Clause.

by pragmatism and concern for how things work in practice. The attention to the connection between means and ends reflects three characteristics of his jurisprudence: (1) the pragmatic, consequentialist functionalism, which is so often noted; (2) the inclination to rule narrowly and with regard to the specific case before him, which is also often noted; and (3) the rigorous, abstract, intellectually precise concern for logical coherence. It is this last element that is often overlooked.

The remainder of this Article addresses a particular manifestation of this tendency, what one might call an intellectual rather than a legal formalism. That is White's use, or, as the case may be, rejection, of the purely logical proposition that the greater includes the lesser.

II. THE GREATER INCLUDES THE LESSER

The central argument that Congress can restrict the jurisdiction of the lower federal courts—for example, by denying them jurisdiction in cases concerning school prayer or abortion—is that the Constitution leaves it up to Congress whether there shall be such courts at all. This argument, which has been around for a long time, is an archetypal example of the argument that the greater includes the lesser. The claim is that the greater power—not to create the courts in the first place, or, presumably, to eliminate them altogether, thus stripping them of all jurisdiction—includes the lesser power of stripping them of some jurisdiction.

43. I take Dennis Hutchinson to be adverting to the same twin aspects of Justice White's approach when he notes that two "hallmarks" of White opinions are that "practical interests defeat hypothetical risks, and doctrinal structure is logically applied." Dennis J. Hutchinson, The Man Who Once Was Whizzer White, 103 YALE L.J. 43, 53 (1993).

44. Article III provides for "one supreme Court, and ... such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.


46. The Supreme Court has largely avoided this imbroglio. However, Justice White laid out a close cousin of this argument in Palmore v. United States, 411 U.S. 389 (1973). There a criminal defendant, convicted in the District of Columbia Superior Court in a trial presided over by a D.C. judge without life tenure, argued that criminal prosecutions under the D.C. criminal code were federal questions that could be heard only by Article III judges. The Court held that even though the D.C. criminal code was a federal law, prosecutions thereunder did not have to take place in federal court. Part of the rationale was that Congress did not have to create inferior courts or invest them with the entire jurisdiction authorized by Article III. If it did not, it might still adopt criminal statutes, violations of which...
The greater-includes-the-lesser argument is particularly associated with Justice Holmes. In one of its purest expressions, Holmes wrote that "[e]ven in the law the whole generally includes its parts. If the State may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way." Note the opening "even in the law"—the life of the law may well have been experience rather than logic, but perhaps not by much. Logic still counts. Indeed, perhaps nowhere did Holmes more refute his most famous aphorism than in his frequent reliance on the argument that the greater includes the lesser.

would then be prosecuted in the state courts with non-tenured judges. Such an outcome would be indistinguishable from what happened here. Id. at 401-02.


In Western Union, the Court struck down a Kansas statute that conditioned the State's permission for a foreign corporation to do business in the State on the corporation's willingness to pay a discriminatory tax based on the corporation's entire capital stock rather than just its in-state assets. See also Pullman Co. v. Kansas ex rel. Coleman, 216 U.S. 56 (1910). The greater/lesser principle had been more successfully invoked in earlier foreign corporations cases. See, e.g., Doyle v. Continental Ins. Co., 94 U.S. 535, 542 (1876) (holding that State could withdraw business license because corporation had invoked federal court's diversity jurisdiction; "[i]f the State has the power to cancel the license . . . [i]t has the power to determine for what causes and in what manner the revocation shall be made"). Western Union is a prominent early application of the unconstitutional conditions doctrine, which rejects the greater/lesser principle.

49. A few other examples are worth citing. In the well-known case of Commonwealth v. Davis, 39 N.E. 113 (Mass. 1895), aff'd, 167 U.S. 43 (1897), Holmes upheld a conviction for speaking on the Boston Common without a permit. "[T]he legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the less [sic] step of limiting the public use to certain purposes." Id. at 113; see also Ferry v. Ramsey, 277 U.S. 88, 94-95 (1928) (Holmes, J.); Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 602 (1926) (Holmes, J., dissenting); McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 518 (Mass. 1892) (Holmes, J.). In Myers v. United States, 272 U.S. 52 (1926), in which the Court struck down congressional limits on the President's authority to remove a postmaster, Holmes' dissent centered on the fact that Congress could eliminate the position of postmaster altogether:
Holmes is hardly the only Justice to have embraced this reasoning. Among contemporary Justices, Chief Justice Rehnquist seems to be its most enthusiastic endorser, but he is far from alone.51

We have to deal with an office that owes its existence to Congress and that Congress may abolish tomorrow. Its duration and the pay attached to it while it lasts depend on Congress alone. . . . With such power over its own creation, I have no more trouble in believing that Congress has power to prescribe a term of life for it free from any interference than I have in accepting the undoubted power of Congress to decree its end.

Id. at 177.

Even Holmes, however, drew the line somewhere. When the Court upheld the Postmaster General's revocation of second-class mailing privileges for a pro-German newspaper, Holmes dissented: "The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues." United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting).

50. Bogle, supra note 47, at 199 n.21. A brief catalogue: (1) Given the state's greater power to ban gambling altogether, it necessarily has the lesser authority to forbid advertising of legal gambling. Posadas de P.R. Assoc's. v. Tourism Co., 478 U.S. 328, 345-46 (1986) (Rehnquist, J.). (2) Given that the state need not offer a person employment at all and could hire only at-will employees, it has the lesser authority to limit the permissible bases for termination but rely on sketchy procedures to determine if such a basis exists. Arnett v. Kennedy, 416 U.S. 134, 153-54 (1974) (plurality opinion of Rehnquist, J.) (stating that employees "must take the bitter with the sweet" in accepting for-cause employment with limited due process protections). (3) If a plaintiff who rejects a settlement offer and then wins a smaller amount after a trial must pay the defendant's post-settlement-offer costs, then one who rejects the offer and loses altogether must pay those costs. Delta Air Lines, Inc. v. August, 450 U.S. 346, 368 (1981) (Rehnquist, J., dissenting) (criticizing the Court for "[t]otally ignoring the common-sense maxim that the greater includes the lesser"); see also United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 177 (1980) ("Because Congress could have eliminated windfall benefits for all classes of employees, it is not constitutionally impermissible for Congress to have drawn lines between groups of employees for the purpose of phasing out those benefits."). The United States Law Week records the following recent exchange between the Chief Justice and the attorney defending a city ordinance that forbids virtually all signs:

Why would a rule of one sign per house violate our precedents? Chief Justice Rehnquist asked.

The government would be imposing a choice on residents as to which issue they may speak on, Cherrick responded.

It's better to speak on one issue than none, isn't it? Should you prohibit debate entirely instead? Rehnquist asked.


51. See, e.g., Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 433 (1989) (Stevens, J., concurring in the judgment) (reasoning that because Tribe had power to exclude non-members from the reservation altogether it necessarily had the power to regulate their use of the land through
Despite its prevalence and appeal, the argument that the greater includes the lesser must be used cautiously. Carelessly invoked, it can cover up significant problems.

First, the argument obviously is only valid if in fact the greater power exists. Otherwise the major premise disappears and the argument fails by its own terms. The danger of a false assertion of such a power is not imaginary. After all, the argument rests on a claim about a hypothetical case not before the court. It carries with it all the risks of deciding without briefs, arguments, or a concrete set of facts. Put differently, the argument is one form of proceeding by hypothetical, a style of legal reasoning that has largely fallen out of favor.\textsuperscript{52} Furthermore, the supposed greater power may be more theoretical than real. Seth Kreimer has objected to the Holmesian analysis on the ground that it too often relies on an asserted greater power that would never actually be exercised in the real world. In these circumstances, the government is in every meaningful way aggrandizing its power; the supposedly greater power is actually the lesser, since it is in reality unavailable.\textsuperscript{53}

I am not certain the practical unavailability of the greater option is as significant as Kreimer contends. It is more a political than a legal argument. In certain circumstances, those challenging a particular exercise of government authority will happily call the government’s bluff, willing to run the (mini-
mal) risk that the government will exercise its theoretical power to make them even worse off than by the exercise of the lesser power. This is rather like the prosecutor who chooses not to have the jury instructed as to a lesser included offense, predicting that it is unlikely to convict on the offense charged and not wanting to give it any other option than acquittal. Just as the mere fact that the attorney is willing to run the risk does not mean that the jury cannot convict of the offense charged, so it is not clear why the unlikelihood that the government would exercise its greater power means it is unable to exercise the lesser. Even if the greater power has disappeared for all practical purposes, why did it take the lesser with it? If the question is whether the Constitution constrains certain activity (the lesser), the fact that non-constitutional considerations constrain other, greater measures is beside the point.54

The second obvious error in relying on the greater-includes-the-lesser argument occurs when one proposition is not in fact "the lesser" of the other. In set-theoretic terms, the greater includes the lesser if all A's are also B's, in which case A is a subset of B. But if in fact not all A's are B's, then A is simply not a subset of B, and "greater" and "lesser" misdescribes their relationship. Such a difficulty might arise in the legal setting in determining, for example, whether something is a lesser included offense. If in fact not every element of the one must be shown to prove the other, then it is not.55

54. As John Garvey writes:

The problem with [the argument that the "greater" option is not in practice available] is that it confuses "ought" with "can." . . . Think about the ultra vires doctrine . . . . The charter of X Corporation permits it to boycott Y Corporation, but X's board of directors would never agree to such a proposal. The board would agree to buy from Y only at a lower price. Is this proposal ultra vires? Probably not. If boycotts are OK, less drastic measures probably are too. It is a question of what the charter allows. The board's approval has no bearing on that question.


I also note that this argument has not been made, to my knowledge, in the debate over congressional limitations on federal jurisdiction, where it would most obviously apply. After all, Congress simply is not going to eliminate the lower federal courts—in practical terms, it cannot do so. But no one has argued that this in and of itself precludes limiting their jurisdiction. Instead, the argument is over the courts' essential role in the constitutional plan, or the fact that elimination of the courts would amount to denial of the substantive rights that the courts now stand ready to vindicate. These are arguments that the greater power does not exist even on paper, albeit for some of the same reasons that it does not exist in practice.

55. See, e.g., Schmuck v. United States, 489 U.S. 705, 716 (1989); In re Niel-
The third trap of this argument—another way in which the lesser is not in fact a subset of the greater—is what logicians call the fallacy of composition, or its flip-side, the fallacy of division.\textsuperscript{56} The fallacies arise because a set-theoretic approach is not always valid. In set theory, components or elements of the set do not interact; they are unaffected by being grouped together. In the real world this is not necessarily the case. For example, sodium chloride is a harmless substance (table salt). But that does not mean that either sodium or chlorine is harmless; because of their interaction the components do not necessarily share the characteristics of the whole, and vice versa.\textsuperscript{57}

In the legal setting, the fallacies of composition and division tend to take a slightly different form than in abstract logic. The character of components may not change through interaction, but the basic point remains that the parts do not necessarily share the characteristics of the whole. In particular, the greater may not include the lesser because exercise of the “lesser” power implicates constitutional considerations not present in the exercise of the “greater” power. In law, this tends to be true in one of two separate ways. The first involves situations we tend to think of as equal protections problems, the second involves “unconstitutional conditions.”

As to the first, in many settings adopting a lesser rather than a greater measure will raise equality concerns. Consider the frequent judicial statements, echoing the greater-includes-the-lesser proposition, that the Equal Protection Clause is not violated by underinclusive regulation because the legislature can proceed one step at a time.\textsuperscript{58} This is a significant overstatement. For example, to further its legitimate interests in reducing traffic congestion, automobile accidents, and air pollu-

\textsuperscript{sen, 131 U.S. 176 (1889).}
\textsuperscript{56. See Stephen Toulmin ET AL., AN INTRODUCTION TO REASONING 171-73 (2d ed. 1984).}
\textsuperscript{57. Id. The conclusion about the harmlessness of sodium and chlorine is an example of the fallacy of division. The fallacy of composition here would be the conclusion that sodium chloride is harmful because sodium and chlorine are. Another example of the latter fallacy would be the conclusion that because each individual can decide how she will act, the human race can decide how it will act, for example by selecting a rate of population growth or choosing between war and peace. J.L. Mackie, Fallacies, in 3 THE ENCYCLOPEDIA OF PHILOSOPHY 169, 173 (Paul Edwards ed., reprint ed. 1972).}
\textsuperscript{58. See, e.g., Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949) (“It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.”).}
tion, the legislature could forbid anyone to own an automobile. That does not mean, however, that it could forbid women and not men to own automobiles, notwithstanding the fact that doing so would be a step toward these same permissible goals. This "one step" toward the solution violates an independent constitutional principle of equal treatment.59 This is not the case if the state attacks the worst aspects of the problem first, as indeed it does by criminalizing drunk driving and outlawing especially dirty cars through the adoption of emissions standards.

The second type of problem is more complicated. Under the doctrine of "unconstitutional conditions," already "venerable" a generation ago,60 the state may not (at least it may not without a compelling interest) condition a benefit—welfare, research funds, employment—on the recipient's not exercising a constitutional right.61 Not all applications of the greater-includes-the-lesser argument involve unconstitutional conditions, and not all arguably unconstitutional conditions trigger the greater-includes-the-lesser argument. Nonetheless, if the greater includes the lesser, then there should be no doctrine of unconstitutional conditions. As we have seen,62 this was Justice Holmes' view. To quote his most famous non-liberal First Amendment comment: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."63 In other words, since New Bedford had no obligation to hire McAuliffe at all (alternatively, he had no right

59. Many other examples of this general equality principle are possible: a state need not use grand juries, Gerstein v. Pugh, 420 U.S. 103, 120 (1975), but if it does it cannot select the jurors in a racially discriminatory manner, Rose v. Mitchell, 443 U.S. 545, 555-56 (1979); a state need not (at least in theory) provide appellate review of judicial decisions, but if it does so it cannot deny appellate review to certain types of litigants, Colten v. Kentucky, 407 U.S. 104, 125 (1972) (Marshall, J., dissenting); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956); a state need not elect government officials, but if it does, it is severely limited in how it can restrict the franchise, Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

60. See John D. French, Comment, Unconstitutional Conditions: An Analysis, 50 GEO. L.J. 234, 234 (1961) (referring to "the venerable doctrine of unconstitutional conditions").


62. See supra notes 47-49 and accompanying text.

63. McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892); see also cases cited supra note 49.
to city employment), then surely it could offer him the job conditioned on his agreeing not to talk politics. The arrangement only puts McAuliffe in a better position than he had been in, and the State has not compelled him to forgo his constitutional rights. The Holmes position has fallen out of favor, however. As long as one concedes that some conditions are unconstitutional, and there is unanimous agreement as to that, though huge disagreement as to why and which ones, then the greater does not always include the lesser.

My goal is not to elaborate a theory of unconstitutional conditions; we are adequately supplied with those already. More narrowly, we can discuss why the simple assertion of the principle that the greater includes the lesser is not a satisfactory response to the argument that a condition is unconstitutional. The basic reason is that there is a qualitative difference that is ignored by the quantitative perspective of the greater-includes-the-lesser. The logical defect was explained in Thomas Reed Powell's 1916 article, The Right to Work for the State. Rejecting the Holmesian position regarding regulation of foreign corporations, Powell explained that the power to exclude out-of-state corporations from doing business in the state at all


It may be that there is no such thing as an unconstitutional conditions doctrine as such. Cass Sunstein asked in the title of one article whether there was. Cass R. Sunstein, Is There an Unconstitutional Conditions Doctrine?, 26 SAN DIEGO L. REV. 337 (1989). He entitled his next article Why the Unconstitutional Conditions Doctrine Is an Anachronism, see Sunstein, supra note 47, implicitly answering the question raised by the first. In the second article, Sunstein accepts the existence of such a doctrine, but only to argue that it should be abandoned. In fact there is nothing to abandon but a label. The unconstitutional conditions doctrine does not exist as such, any more than there is a "doctrine of unconstitutional congressional arrogation of power" or a "doctrine of unconstitutional fines." In some circumstances, certain conditions are unconstitutional. As Sunstein states, "[a] welfare program limited to Democrats is unconstitutional because of the first amendment; points about voluntary participation and the 'greater power' are simply a diversion. Courts do not need an unconstitutional conditions doctrine in order to make the necessary response." Id. at 606 (footnote omitted); see also Westen, supra note 47, at 986.

does not "include" the power to allow such corporations to do business subject to whatever condition the state chooses to impose. Powell illustrated the fallacy syllogistically:

**Major Premise.** There is a class of corporations "A" (foreign corporations doing intra-state commerce) over which the state has the power of absolute exclusion.

**Minor Premise.** The X corporation is an "A" corporation.

**Conclusion.** Therefore the X corporation is one upon which the state has power to impose any burden whatsoever.\(^\text{66}\)

The logical defect here, explains Powell, is the "fallacy of four terms": the predicate in the major premise is different from the predicate in the conclusion. Moreover, the relation between the two is not that of a whole and its parts; not every member of the class of "imposing any burden whatsoever" is a member of the class of "absolutely excluding."\(^\text{67}\)

Though he does not distinguish them, Powell is identifying two sorts of defects of the greater-includes-the-lesser argument. One is that the actions identified as the "parts" are not in fact all within the whole. The second is that while the challenged action may indeed be a "part" of a permissible "whole," an independent constitutional prohibition may apply to the part and not the whole. For example, Powell observes that just because the state might impose the death penalty for treason does not mean it can impose a lesser but cruel and unusual punishment such as torture.\(^\text{68}\) Here the point is that there is a qualitative

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\(^{66}\) Id. at 110.

\(^{67}\) Id. at 111.

\(^{68}\) Id. at 108 n.22, 111 n.31. This example is more complex than Powell indicates, and nicely illustrates the qualitative/quantitative distinction. On the one hand, one could argue that Powell's premise is mistaken: torture is not "less" than capital punishment. We know that precisely because the relevant standard—the Eighth Amendment—is itself essentially quantitative, proscribing the extreme punishments. On this view, if indeed torture violates the Eighth Amendment and the death penalty does not, that means that execution is lesser and torture greater according to the relevant yardstick and Powell's argument is wrong. On the other hand, one could say that the Eighth Amendment, with its concern with what is "cruel and unusual," is concerned with the character of punishment, not its amount. Certain bizarre punishments would be forbidden even if everyone agreed they were milder than other permissible punishments, in which case Powell's argument works quite well.

Powell's real point, incidentally, is not about a constraint such as the Eighth Amendment at all; it is about equality. His broader argument is that the fact that a state might forgo public works projects and not hire anyone—that is, there is no right to state employment as such—does not mean that the Equal Protection
difference between the "greater" and the "lesser" that, whatever their quantitative relation, means that only the latter implicates a constitutional protection. 69

Let us restate these points about equal protection and unconstitutional conditions in the language of the greater-includes-the-lesser argument. Even where the greater power undeniably exists and the lesser is undeniably a subset or part thereof, there are three ways in which the "lesser" may in fact be the "greater."

First, and most important, the consequences of the "lesser" step may in fact exceed those of the greater or trigger constitutional concerns absent in the case of the exercise of the greater power. For example, allowing men to drive but not women looks "lesser" in that it denies cars to some rather than all, but it becomes greater when we also consider the harms it imposes other than denying cars. A stigmatic and practical harm to women occurs not from being denied cars per se, but from being denied cars when men are allowed to have them. This may make the total harm greater than would result from an across-the-board ban. Similarly, to borrow one of Seth Kreimer's examples, consider the difference between a municipality's decision to maintain whites-only swimming pools and its decision to have no swimming pools at all. While the latter superficially looks like the exercise of a "greater" power, its negative consequences are in fact "lesser." The harm to blacks from being selectively excluded would be greater than the benefit to whites of being able to swim. 70 This is most obviously an equal pro-

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69. Although the examples in this Article will primarily involve questions of constitutional authority, that reflects the Supreme Court's docket more than an inherent characteristic of the argument. For example, consider the problem of the good samaritan. The greater-includes-the-lesser argument would be that if you cannot be held liable for refusing to go to someone's aid at all, you cannot be held liable for going to the person's aid and botching the job. The greater indifference would include the lesser. Yet the common-law rule is the opposite. The usual justification is that by going to someone's assistance, the samaritan may discourage others from doing so and induce reliance by the victim; therefore it becomes more important that the samaritan assist properly than that he assist at all. Put in terms of the greater including the lesser: there is a qualitative difference between the "greater" and the "lesser," since only the latter affirmatively denies the victim assistance she might otherwise receive. Similarly, the common law imposes liability if the defendant, though under no obligation to act, acts negligently and leaves the plaintiff in a worse situation. Here the greater/lesser argument does not apply because inaction would have been "lesser."

70. Kreimer, supra note 53, at 1312-13; see also Palmer v. Thompson, 403
tection point—indeed, it is a cost/benefit justification for the Equal Protection Clause. But a case such as Sherbert v. Verner,71 involving the Free Exercise Clause, could be analyzed in the same way.72 Similarly, making content-based distinctions as to what speech to allow may have more serious consequences by skewing the market, than would an exercise of the “greater” power of an across-the-board ban, which eliminates more speech but does so neutrally.

The second way in which the “lesser” may be “greater” or at least different turns on the nature of the two. Because it is unacceptably dangerous to drive either very fast or very slow, superhighways have both a minimum and maximum speed limit. Knowing that the speed limit is 55, one might argue that because the greater includes the lesser it must be permissible to drive 30. This is false. Concerns inapplicable to the greater conduct forbid the “lesser.” By the same token, it would be a similar, and similarly invalid, greater/lesser argument to say that since 40 is fast enough, 80 must be as well. The point is that a separate set of concerns renders the greater and the lesser apples and oranges, even though they look like big apples and little apples. In many cases an independent constitutional prohibition, such as the Free Exercise clause in Sherbert, will prohibit the exercise of a "lesser" power.

The third way in which the argument breaks down turns on the government’s justifications for its actions. Even where the act truly is lesser in its effect on the individual, we must still inquire whether the state’s interests are as strong as those supporting exercise of the greater power. For example, it can be argued that if Congress can legislate substantively in a particular area, then it may take the milder step of simply providing a federal forum for state-created rights in that area. In Textile Workers Union of America v. Lincoln Mills,73 Justice Frankfurter rejected this reasoning. “Surely the truly technical restrictions of Article III are not met or respected by a beguiling phrase that the greater power here must necessarily include

U.S. 217 (1971) (upholding city’s decision to close rather than integrate its swimming pools). Palmer is discussed at infra notes 138-139 and accompanying text.
71. 374 U.S. 398 (1963) (striking down state law denying unemployment benefits to Sherbert, who had been fired for refusing to work on her Sabbath, because she had unjustifiably failed to accept suitable work).
72. See Westen, supra note 47, at 1012.
73. 353 U.S. 448 (1957).
the lesser." Frankfurter did not elaborate as to why the greater-includes-the-lesser argument does not work here. At least part of the explanation should be that the federal interest in providing a forum is far greater in the case of a federal claim than in the case of a state claim. Thus, in terms of the intrusion on state authority, to open the federal courts to state claims is "less" than supplanting state law altogether, but if the federal interest justifying that step is proportionately even smaller then the first might be unconstitutional even though the second is not.

III. JUSTICE WHITE'S USE OF THE ARGUMENT THAT THE GREATER INCLUDES THE LESSER

While I have not attempted any comprehensive survey, it is my impression that Justice White is attracted to the argument that the greater includes the lesser. The argument appears in some of his best-known and strongest opinions. For example, it is at the center of his dissent in Chadha:

If Congress may delegate lawmaking power to independent and Executive agencies, it is most difficult to understand Art. I as prohibiting Congress from also reserving a check on legislative power for itself. Absent the veto, the agencies receiving delegations of legislative or quasi-legislative power

74. Id. at 474 (Frankfurter, J., dissenting).
76. Peter Westen offers a different example of the same reasoning. In Bagley v. Harvey, 718 F.2d 921, 924 (9th Cir. 1983), the Ninth Circuit held that a state may condition a prisoner's parole on his agreeing not to travel to his home town. Since the state could simply keep him in prison, thus denying him any freedom of movement at all, it surely had the lesser power to let him out of prison but not allow him to go to one place. Westen points out, however, that the question here is whether the state's interests outweigh the prisoner's constitutional right to travel. The mere fact that the state could wholly infringe that right while the prisoner was in custody cannot be dispositive, for the state no longer has the same strong justification for close confinement once the parolee is out of prison. Westen, supra note 47, at 994-95.

Westen's criticism does not demonstrate that the court's result was wrong in this case. The state may well have powerful reasons for keeping the parolee away from his home town; one could imagine that doing so was a principal aim of his imprisonment. Westen does show, however, that the court erred in simply relying on the greater-includes-the-lesser argument without more. This example also implies, incidentally, that there is no such thing as an unconstitutional conditions doctrine. The constitutional analysis is the normal balancing of individual right versus state interest that obtains whether or not the case is said to involve an unconstitutional condition.
may issue regulations having the force of law without bicameral approval and without the President's signature. It is thus not apparent why the reservation of a veto over the exercise of that legislative power must be subject to a more exacting test. 77

It is the basis for his concurrence in R.A.V. v. City of St. Paul, 78 disagreeing with the majority's conclusion that St. Paul could not outlaw only some fighting words:

It is inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil, but that the government may not treat a subset of that category differently without violating the First Amendment; the content of the subset is by definition worthless and undeserving of constitutional protection. 79

And it pops up briefly and innocuously in many opinions along the way: "If there is no First Amendment privilege to refuse to answer the relevant and material questions asked during a good-faith grand jury investigation, then it is a fortiori true that there is no privilege to refuse to appear before such a grand jury . . . . 80

There is no foolproof way of finding all the opinions in which Justice White relied on the argument that the greater includes the lesser, and deciding whether the argument has been invoked can be something of a judgment call. I know of about two-dozen such opinions; no doubt there are more.

On the other hand, Justice White is not wedded to this formulation. He has ignored it in some circumstances when it might have been available, and rejected it when others have invoked it. The most prominent example is his rejection of Justice Rehnquist's "bitter with the sweet" argument in procedural due process cases. The Rehnquist position is that because the state is free not to establish a substantive entitlement (for example, a for-cause standard for dismissing state employees) in the first place, it must also be free to create the entitlement but limit it by defining the procedures for its deprivation. 81

78. 112 S. Ct. 2538, 2550 (1992) (White, J., concurring in the judgment).
79. Id. at 2553 (White, J., concurring in the judgment) (citation omitted).
Justice White consistently refused to endorse this classic greater-includes-the-lesser formulation, and then authored the opinion for the Court that decisively rejected it. 82

This Part analyzes a sampling of opinions in which White used or abjured the greater-includes-the-lesser argument. I should say at the outset that the focus on the use of this argument is misleading. None of the opinions I discuss rest solely on the greater-includes-the-lesser argument. My purpose is not to analyze or even give a full account of these particular opinions, but to examine Justice White's use of a particular argument. In any given case that argument may be only a small piece of his entire reasoning.

A. Lesser Included Offenses

In at least one setting black-letter law holds that the greater includes the lesser: lesser included offenses in criminal law. For example, under the Double Jeopardy Clause a conviction for a lesser included offense bars later prosecution for the greater offense and vice versa. 83 Determining whether an offense is jeopardy-barred involves a straightforward, set-theoretic determination of whether the quantitative relationship holds. The danger of a qualitative shift in the nature of the elements is absent. Thus, the validity of the greater-includes-the-lesser argument hinges on whether the asserted set-theoretical relationship holds. Justice White's opinions in this setting are careful and precise.

For example, in Illinois v. Vitale 84 the defendant had caused a fatal automobile accident. Writing for the Court, Justice White found no double jeopardy violation when the State of Illinois first prosecuted Vitale for failure to reduce speed, and then, on the basis of the same accident, for involuntary manslaughter. Because manslaughter did not necessarily entail proof of failure to reduce speed, the mere possibility that the state would seek to rely on the elements of the lesser offense did not bar prosecution for the greater offense. The same sort of rationale underlies White's opinion in Morris v. Mathews. 85 There the state appellate court, finding that the defendant had been convicted of a jeopardy-barred offense, reduced the convic-

84. 447 U.S. 410 (1980).
tion to one for a lesser included offense that was not jeopardy-barred. The Supreme Court affirmed, reasoning that the jury necessarily had found that the defendant's conduct satisfied all the elements of the lesser included offense.

In *Biles v. Watkins*, as in *Morris v. Mathews*, a state appellate court had reduced a conviction to one for a supposedly lesser included offense. The defendant had been convicted of felony capital murder, the underlying felony being kidnapping. The Mississippi Supreme Court had found insufficient proof of the kidnapping; the felony murder conviction therefore could not stand, and the court instead imposed a conviction of simple murder on the ground that it was a lesser included offense that did not rest on the commission of a separate felony. The Supreme Court denied certiorari. Dissenting from the denial, Justice White pointed out that felony capital murder may be committed "without any design to effect death," whereas simple murder requires "a deliberate design to effect . . . death." The supposedly "lesser included" offense thus required proof of an element not necessary for conviction of the greater offense and therefore could not be imposed by the reviewing court.

The same firm, logical analysis is present in White's dissent in the 5-4 decision in *Schad v. Arizona*. Schad was convicted of first-degree murder. The prosecution proceeded on both premeditated- and felony-murder theories (Schad had stolen the victim's car). The judge refused Schad's request for an instruction on robbery as a lesser included offense, but did instruct on second-degree murder. The jury convicted of first-degree murder without specifying, or being asked to specify, whether it had convicted on the premeditated- or felony-murder theory. In an opinion by Justice Souter, the majority held that the refusal to instruct on robbery was not unconstitutional. A defendant is entitled to a lesser included offense instruction in a capital case because of the possibility that a jury, convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime, might, without such an instruction, go ahead and convict of the capital offense

86. 441 U.S. 953 (1979) (denial of certiorari).
87. Id. at 953 (White, J., dissenting from denial of certiorari) (quoting MISS. CODE § 97-3-19(2)(e) (1972)).
88. Id. (quoting MISS. CODE § 97-3-19(1)(a) (1972)).
if the only alternative was acquittal. The requirement of an instruction on a third option besides acquittal or conviction of a capital offense was satisfied here by the possibility of conviction on second-degree murder; the jury was not faced with an all-or-nothing choice.

White's dissent rested on two propositions. First, robbery is a lesser included offense of felony murder/robbery. The State contended that felony murder has no lesser included offenses. White pointed out, irrefutably, that "in the case of a compound crime such as felony murder, in which one crime must be proven in order to prove the other, the underlying crime must, as a matter of law, be a lesser included offense of the greater." Second, second-degree murder is not a lesser included offense of felony murder; therefore the charge on that offense was only a third option beside acquittal or conviction of premeditated murder. In short, the second-degree murder charge did not provide the constitutionally required third option besides conviction of felony murder and acquittal.

Schad shows Justice White pursuing a logically rigorous analysis, focusing on the set-theoretical relationship of the elements of other crimes. It is the majority that takes the more "functional," good-enough-for-government-work approach.

One final case bears mention. The question in United States v. Dixon was whether a conviction for criminal contempt barred a subsequent prosecution for the criminal offense that was the basis of the contempt conviction. One of the defendants had been subject to a civil protection order forbidding him to assault his estranged wife; after doing just that he was tried for criminal contempt for violating the order, then on charges of assault and assault with intent to kill. The majority

91. Schad, 111 S. Ct. at 2512.
92. Id.
93. Justice Souter's response to White was that a jury would not be so "irrational" as to convict of capital murder rather than second-degree murder if it was unconvincing that the defendant had committed either first- or second-degree murder but was convinced he had committed robbery and so did not wish to let him off the hook entirely. There is something to this point as a purely descriptive matter. But if the evidence truly was insufficient to show that the defendant had deliberately killed the victim, while still indicating some violence and a theft, the charge closest to what the evidence established would be felony murder. (It is still true that this assumes that the jury is willing to ignore its reasonable doubt instructions so far as to convict for felony murder, but not ignore its instructions on the elements of offenses so far as to convict for second-degree murder.)
94. 113 S. Ct. 2849 (1993).
held that the prosecution for simple assault was jeopardy-barred, since assault had to be proved to establish violation of the protective order, but that prosecution for assault with intent to kill was not. White pointed out that simple assault was a lesser included offense of assault with intent to kill. Given the jury's opportunity to convict of any lesser included offense, and the likelihood that it would receive an instruction on the lesser included offense even if it was not charged, the majority's position amounted to a rule that "while the government cannot, under the Constitution, bring charges of simple assault, it apparently can . . . secure a conviction for simple assault, so long as it prosecutes Foster for assault with intent to kill. As I see it, Foster will have been put in jeopardy twice for simple assault."\(^{95}\)

In each of these cases, Justice White carefully and correctly applied a quantitative, greater-includes-the-lesser analysis, determining whether in fact the necessary overlap of the two offenses existed.\(^{96}\)

### B. First Amendment Cases

The most complex and interesting cases in which Justice White has relied on the argument that the greater includes the lesser have arisen under the First Amendment. Here White has repeatedly argued, usually in dissent, that a particular law is constitutional because it interferes with speech less than would a broader prohibition that is concededly constitutional.

The most recent and prominent of these cases is *R.A.V. v. City of St. Paul.*\(^{97}\) This was a challenge to a city ordinance making it a crime to

place[] on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resent-

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95. *Id.* at 2878 (White, J., concurring in the judgment in part and dissenting in part).

96. *See also* Jeffers v. United States, 432 U.S. 137, 158 (1977) (White, J., concurring in the judgment in part and dissenting in part); *cf.* Harmelin v. Michigan, 111 S. Ct. 2680, 2717 (1991) (White, J., dissenting) (noting oddity of punishing possession of narcotics as severely as possession with intent to distribute, since the first is a lesser included offense of the latter).

ment in others on the basis of race, color, creed, religion or gender.98

As interpreted by the Minnesota Supreme Court, the ordinance reached only speech that qualified as "fighting words" under Supreme Court cases holding that such speech is unprotected by the First Amendment.99 Justice Scalia's opinion for the majority struck down the ordinance on the ground that it was a content-based regulation of speech. Scalia relied on the extensive caselaw establishing that, if we know nothing else about the First Amendment, we know that it prohibits the government from allowing some speech and forbidding other speech solely because of agreement or disagreement with its content or viewpoint.

Justice White's opinion concurring in the judgment100 took a completely different tack, resting first and foremost on the greater-includes-the-lesser argument. Under the Court's longstanding categorical approach to First Amendment cases, the ordinance prohibited unprotected speech. The fact that it did not apply to all unprotected speech did not make it invalid; the fact that St. Paul could forbid all fighting words (the greater power) established that it could forbid some fighting words (the lesser power).

To borrow a phrase, [the majority's] ... "simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence as well." It is inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil, but that the government may not treat a subset of that category differently without violating the First Amendment; the content of the subset is by definition worthless and undeserving of constitutional protection.101

100. The opinion was a concurrence in the judgment because Justice White also considered the statute unconstitutional. While completely rejecting the majority's approach, White concluded that the statute was overbroad, reaching some protected speech notwithstanding the narrowing interpretation of the state supreme court. R.A.V., 112 S. Ct. at 2558-59 (White, J., concurring in the judgment).
101. Id. at 2553 (White, J., concurring in the judgment) (citations omitted) (quoting id. at 2543 (majority opinion of Scalia, J.)).
The dispute between White and Scalia in *R.A.V.* concerns when, if ever, content-based underinclusion is of constitutional concern. This question arises when "government may ban all speech in a category, but instead bans only some, defined by content." 102 Elena Kagan has convincingly shown that this problem recurs in and unifies four types of First Amendment cases that are not generally lumped together: (1) government prohibitions on only some speech within an unprotected category, as in *R.A.V. ;* (2) the selective financial support for only some speech, as in *Rust v. Sullivan;* 103 (3) the selective application of time, place, and manner restrictions; and (4) the selective limitation of speech in non-public fora. 104 In each of these settings the government has the "greater" power of enacting a broad prohibition. It could decline to fund any speech on issues of reproductive health, and it could outlaw all fighting words, or all raucous noises, or all speech in a non-public forum. The problem arises when it takes the "lesser" step of funding some speech, of forbidding some fighting words but not all, of allowing some raucous or distracting speech, or of opening up the non-public forum to some speakers but not others.

Justice White, perhaps alone among recent or current members of the Court, does indeed treat all these cases as involving the same situation. 105 For White these are not First


105. Professor Kagan writes that "the arguments in *Rust* and *R.A.V.* mirror each other. Between the two cases, the Court switched sides: the dissent in *Rust* became the *R.A.V.* majority, the majority in *Rust* became a concurrence in *R.A.V.* So too did most of the individual Justices trade positions . . . ." Kagan, *supra* note 102, at 38. Most, but not all—White did not trade positions, accepting the content-based underinclusion in both cases (and many others).

I would add that this is hardly the only place where criticisms of the Court or individual Justices for inconsistency do not apply to White. The perceived inconsistency of his results, see *supra* note 23, is in many cases the result of the actual consistency of his method. Accordingly, the common scholarly criticism of a (result-
Amendment cases, they are equal protection cases. More precisely, the First Amendment argument is answered by the greater-includes-the-lesser response; the question that remains is one of equality, not freedom of speech. I will consider each in turn.

1. Selective regulation within an unprotected category

The central case here is R.A.V. However, White's R.A.V. approach was anticipated by his opinion for the Court in New York v. Ferber, which upheld a state prohibition on child pornography. White distinguished child pornography from other non-obscene sexual materials on the ground that the state had a compelling interest in protecting minors who participated in the production of these materials (a rationale that White realized applied only to photographs and films, not written descriptions). Because of the harm to minors, child pornography fell into a new unprotected category. White then made quick work of the defendant's underinclusion argument: because child pornography was unprotected speech was such an argument was by definition unavailable. Under the greater-includes-the-lesser approach, underinclusion objections automatically fail. None of the concurring opinions took issue with this reasoning although it is, of course, exactly White's argument in R.A.V.

From a straight set-theoretic perspective, this approach is sound. To stick with the R.A.V. problem, the regulated fighting words are a subset of the (unprotected) category of all fighting words and therefore must themselves be unprotected. The key objection to the analysis, and the one Scalia dwells on, is that there is an independent constitutional prohibition on the exercise of the lesser power here. Yet given the Court's categorical

oriented) shift in methodology will often not apply. As an illustration, in addition to this set of cases and those discussed supra notes 13-21, see also David H. Taylor, The Forum Selection Clause: A Tale of Two Concepts, 66 TEMPLE L. REV. 785, 831-32 n.266 (1993) (noting that all the Justices who had participated in a 1972 case and were still on the Court for a similar 1987 case "saw fit to take a different approach to the issue without sufficient explanation as to why their previous opinion was not controlling, in need of reversal, or distinguishable. Only Justice White's position [reflected in a separate concurrence in the first case] has some logical consistency.")


108. Id. at 765-66 & n.18.
approach to the First Amendment it is hard to say that that Amendment is such an independent prohibition. (At the very least, it is hard to see why content-based distinctions between unprotected speech merit strict scrutiny.) By definition the regulation applies to (and exempts some) speech that is of so little value as to merit no First Amendment protection at all. The equality-based concern that always arises here is addressed by Justice White under the rubric of the Equal Protection Clause, and he concludes that the legislature could reasonably have decided that the speech it forbade was especially problematic.

Interestingly, Justice White did not bring up what may be the strongest greater-includes-the-lesser argument in response to the majority. Scalia argues that if the state is going to proscribe fighting words, it must proscribe all of them; it cannot pick and choose. Yet if that is the case, why is the line drawn at fighting words, the specific category of unprotected speech relevant under the Court's cases? Why isn't the statute still fatally underinclusive because it does not outlaw all unprotected speech? Under Scalia's rationale, it should be unconstitutional to prohibit all fighting words but not, say, the dissemination of information vital to national security; that would be content-based discrimination, and the fact that fighting words are constitutionally unprotected would make no difference given the decision to prefer other unprotected speech to fighting words. Thus Scalia implicitly assumes that the greater does include the lesser: the state can forbid some but not all unprotected speech. He never explains why the magic categories are those on the standard list of unprotected speech.

Still, White's greater-includes-the-lesser logic is not completely dispositive. White is in general hardly super-sensitive to First Amendment values and could be accused of shortchanging those values here, notwithstanding the protection that should

109. Two responses are possible. First, perhaps St. Paul does forbid all unprotected speech except fighting words that are not hate speech. Even if it does, however, one cannot learn it from the majority opinion. Second, some sort of secondary-effects argument may be available here; the legislature could reasonably conclude that the harms flowing from fighting words are more severe than those flowing from, say, revealing classified information, not because it likes the message of classified information better. Yet it's not clear why that argument is not equally applicable to the St. Paul ordinance. Cf. Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993) (upholding state law that enhances criminal penalties when victim is selected because of race).
be afforded by the company he kept—Justices Marshall, Blackmun, and Stevens. White does not fully address concerns about government manipulation of the free speech marketplace. Even when the government is preferring some unprotected speech to other unprotected speech, the fact of government preference must give us pause.

As a thought experiment, suppose the ordinance had forbidden all fighting words except those that "arouse anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender." Under Justice Scalia's analysis, nothing changes; this is still a content-based distinction within an unprotected category and so unconstitutional. Is it also the same case under White's approach? The hypothetical tests our intuitive comfort with the result of White's approach in R.A.V. itself. As a First Amendment matter, such a law must be constitutional for White. The forbidden speech is unprotected; underinclusion is therefore irrelevant. However, I do not believe he would vote to uphold it. Rather, he would strike it down on equal protection grounds. The objection to this approach would be that evaluating such a law under the Equal Protection Clause instead of the First Amendment lowers the level of scrutiny. A statute as perverse as this hypothetical one would not survive, but many others would.

The "equal protection component" of the First Amendment might be strong enough to require more searching scrutiny of unequal regulation even of unprotected speech. Professor Kagan concludes that content-based underinclusion should not trigger strict scrutiny but that viewpoint-based underinclusion (either direct or in effect) should.110 Her argument is powerful. Whether it is ultimately right or not need not be resolved here. But it does suggest that the shortcoming of White's opinion is that it gives short shrift to the possible harms of content- or viewpoint-based regulation of unprotected speech.

2. Selective funding of speech

This type of case resembles those involving selective regulation of unprotected speech in that here again the speaker has no right to the subsidy, just as the speaker has no right to engage in unprotected speech, but the objection lies in the selective exercise of the state's undoubted power (to forbid

unprotected speech, to refuse to subsidize). During his Supreme Court tenure, White was rather silent in these cases. He generally joined opinions of other Justices that were consistent with his position in R.A.V., rejecting challenges to selective subsidies or conditions on subsidies. For example, he joined Justice Rehnquist’s majority opinion in Rust v. Sullivan, upholding a federal prohibition on the use of federal funds for abortion counseling. Likewise, he joined Rehnquist’s dissent in FCC v. League of Women Voters, which argued that the government could forbid radio stations receiving public funds from endorsing political candidates or editorializing. For Rehnquist this was a viewpoint-neutral limitation on how government funds will be spent.

White’s votes in these cases may be overdetermined. They can be explained as reflections of his narrow understanding of First Amendment rights. But they also are consistent with his general confidence in the greater-includes-the-lesser proposition and his consistent application of it in First Amendment cases.

3. Time, place, and manner restrictions

City of Lakewood v. Plain Dealer Publishing Co. involved a municipal ordinance under which the Mayor had discretionary authority to grant permits for newsracks on public property. Using Kagan’s categories, this is a case involving the selective application of time, place, and manner restrictions. In an opinion by Justice Brennan, a 4-3 majority invalidated the ordinance as a prior restraint that gave the authorities unbridled discretion to engage in content-based discrimination against protected expression. So characterized, the case was easy. Justice White rejected the characterization, however. For him, this was not constitutionally protected expression; the city could ban all newsracks. Therefore, as in R.A.V., in which the city could ban all fighting words, the possibility of govern-


112. Rehnquist himself has not shown the same consistency between the different settings in which the content-based underinclusion problem arises, having joined Justice Scalia’s opinion in R.A.V.


114. Id. at 772.
ment-drawn distinctions within the unprotected category was not threatening.\textsuperscript{115}

Justice Brennan expressly rebuked Justice White for relying on the “discredited” greater-includes-the-lesser argument.\textsuperscript{116} Justice White denied that he was using such an analysis at all.\textsuperscript{117} The denial is odd; it seems inescapable that Justice White was using this argument. What he was not doing, however, is using it in its “discredited,” Holmesian form. Not every exercise of the lesser power would be automatically valid. White acknowledged, for example, that the City could not grant newsracks only to Republicans. Because this was a facial challenge, however, it was unnecessary and inappropriate to anticipate mayoral abuse of that sort. White’s position was exactly that repeated in \textit{R.A.V.} (and, for that matter, in \textit{Rust}): allowing some speech and rejecting other speech is not \textit{per se} impermissible under the First Amendment if none of the speech is protected.\textsuperscript{118}

Justice White’s statement that the city could not grant newsrack licenses only to papers owned by a particular political

\textsuperscript{115} Id. at 784 (White, J., dissenting).
\textsuperscript{116} Id. at 762-69.
\textsuperscript{117} Id. at 785-86 (White, J., dissenting).
\textsuperscript{118} White’s major premise—that the city could forbid newsracks altogether—is not necessarily correct. \textit{See} Philadelphia Newspapers, Inc. v. Borough Council, 381 F. Supp. 228 (E.D. Pa. 1974) (striking down ban on newsracks); Sandra L. Cobden, \textit{Note, Passive Communication in Public Fora: The Case for First Amendment Protection of Newsracks}, 12 \textit{CARDOZO L. REV.} 191 (1990) (arguing that a complete ban on newsracks in a public forum would be unconstitutional). If it is mistaken then the argument collapses.

For another example of White’s reliance on the greater-includes-the-lesser argument in the public forum setting, see Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (White, J.) (reasoning that because the Parks Service was under no obligation to allow a 24-hour vigil of protest on the Mall in Washington, D.C., it necessarily had the power to allow the vigil but refuse to allow participants to sleep in their tents).

A slight variation on \textit{Lakewood} surfaced during White’s last Term on the Court. In \textit{City of Cincinnati v. Discovery Network, Inc.}, 113 S. Ct. 1505 (1993), the Court struck down an ordinance that allowed newspapers to use newsracks but forbade “commercial handbills” to do so. The Court saw this as a content-based regulation that drew a distinction having nothing to do with the (concededly legitimate) aesthetic and safety concerns that underlay the ordinance. Justice White did not write an opinion but joined Chief Justice Rehnquist’s dissent. \textit{Id.} at 1521. Rehnquist argued that the Court had often upheld underinclusive regulations of commercial speech and justified the commercial/noncommercial distinction of the ordinance on the ground that the former enjoyed greater First Amendment protection. Echoing Justice White’s \textit{Lakewood} dissent, he noted that the city could order the removal of all newsracks and described himself as at a loss to understand why the ordinance was unconstitutional because it did not limit \textit{more} speech.
party is notable. On the surface it conflicts with the strong version of the greater/lesser argument that he made in R.A.V. Two explanations for this arguable inconsistency are possible. First, it might be that for Justice White the greater-includes-the-lesser argument disposed of any First Amendment objections, but racial or political distinctions would have been unconstitutional under the Equal Protection Clause. Alternatively, White's position may be that equality requirements of the First Amendment are stronger when speech is not in an unprotected category, such as fighting words. This is consistent with his emphasis in R.A.V. on the complete lack of value of the proscribed speech and the basic doctrinal proposition, with which he does not quarrel, that a regulation can be upheld with a reasonable time, place, and manner limitation only if content-neutral.

This second explanation, although never clearly articulated by Justice White, seems to me descriptively the most accurate and analytically the soundest. It reconciles White's dissent in Lakewood with his plurality opinion in Metromedia, Inc. v. City of San Diego,120 which to a large extent presaged the disagreements between the Justices in Lakewood. A city ordinance outlawed all outdoor advertising signs, with the exception of (a) on-site signs identifying the resident or advertising goods made on the premises and (b) a fairly narrow list of twelve types of signs, such as time and temperature signs and for-sale signs. 

With White writing for a four-Justice plurality, the Court struck down the ordinance as to non-commercial messages but upheld it as to commercial messages. The city could apply its ban to commercial signs, given the reduced protection enjoyed by commercial speech. As applied to non-commercial speech, however, the ordinance came to grief in two respects, both growing out of the exceptions to the general ban. First, the exception for on-site signs designating the name of the owner or resident of the premises or advertising goods manufactured at the premises, amounted to a broad exception for commercial speech without an equivalent exception for non-commercial

119. Some of White's language supports this reading: selling newspapers through newsracks "does not involve the exercise of First Amendment protected freedoms," but racial or political distinctions "would be clearly violative of the First Amendment (or some other provision of the Constitution)." City of Lakewood, 486 U.S. at 786 (emphasis added).

speech. This privileging of commercial speech was constitutionally backward. In effect the ordinance treated the less protected category better than speech in the more protected category. Second, the twelve specific exceptions violated the general requirement of content-neutrality. Because the distinctions were content-based, the law could not be upheld as a reasonable time, place, and manner regulation.121

How would the greater-includes-the-lesser argument have operated here? We need not wonder, for Justice Stevens employed just that argument in his dissent. He objected that the plurality "concludes that the ordinance is an unconstitutional abridgment of speech because it does not abridge enough speech."122 Disagreeing with Justice Brennan, Stevens argued that a total ban on billboards would be constitutional because ample alternative channels of communication would remain available and the restriction would not in its intent or effect be especially burdensome for a particular subject or message. Because a total ban would be acceptable, a ban with some exceptions must also be acceptable, since its burden on communication is less serious than would be that of a total ban and the exceptions are not keyed to a particular subject or message.123

4. Non-public fora

White has taken the same approach to speech in a non-public forum. Thus, in Perry Education Ass'n v. Perry Local Educators' Ass'n,124 Justice White wrote the opinion for the Court upholding a school district's limitation of its interschool mail system to messages from the teachers' certified bargaining

121. Id. at 516-17 (plurality opinion of White, J.). Justice Brennan, joined by Justice Blackmun, concurred in the judgment. He portrayed the law as a total ban and voted to strike it down because the asserted state interests in traffic safety and aesthetics were inadequate to outweigh this across-the-board ban on a particular medium of communication. Id. at 527-40 (Brennan, J., concurring in the judgment).

122. Id. at 540 (Stevens, J., dissenting in part); see also supra note 50 (describing oral argument in LaDue v. Gillee, No. 92-1856).

123. Metromedia, Inc., 453 U.S. at 542 (Stevens, J., dissenting in part). Stevens's position here is quite close to Professor Kagan's; content-based underinclusion is acceptable, viewpoint-based underinclusion receives strict scrutiny. Oddly, Stevens did not take this approach in R.A.V., writing an opinion for himself only that focused on the relative harms flowing from the prohibited and permissible speech.

representative and denying it to a rival union. Because the mail system was not a public forum, reasonable "distinctions in access on the basis of subject matter and speaker identity" that would be "impermissible in a public forum" were "inherent and inescapable" and "wholly consistent with the District's legitimate interest in 'preserv[ing] the property . . . for the use to which it is lawfully dedicated.'"\textsuperscript{125}

5. \textit{Content-based regulation of protected speech}

This should be the easy First Amendment category. The most basic tenet of First Amendment doctrine is that the government cannot choose which speech to permit and which to forbid on the basis of content.\textsuperscript{126} This principle will often be inconsistent with the greater-includes-the-lesser argument. An across-the-board ban might well be acceptable, but a content-based selective prohibition will not. White characterized \textit{Metromedia} as such a case. It is an uncomplicated instance of where the greater-includes-the-lesser argument fails because a separate constitutional prohibition forbids the exercise of the lesser power but not the greater.\textsuperscript{127}

The Court is not always careful in avoiding the greater/lesser argument in light of the prohibition on content-based regulation. For example, in \textit{New York State Liquor Authority v. Bellanca},\textsuperscript{128} it upheld a state law forbidding topless dancing where liquor is served. Were topless dancing unprotected activity, the case would be easy; even if not within the police power (which it surely is) or a violation of the dormant Commerce Clause (which it almost certainly is not), the regulation is within the power granted to the states by the Twenty-First Amendment. The problem is that topless dancing is protected activity. The per curiam opinion simply ignored that fact, rea-

\textsuperscript{125} Id. at 49, 50-51 (quoting United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 130 (1981)).


\textsuperscript{127} See also Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2473 (1991) (White, J., dissenting) (arguing that prohibition of public nudity was unconstitutional as applied to nude dancing because it drew "a line between expressive conduct which is regulated and nonexpressive conduct of the same type which is not regulated" and so triggered strict scrutiny); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 593 (1983) (White, J., concurring in part and dissenting in part) (arguing that a use tax on paper and ink products was invalid because it applied only to a few newspapers).

\textsuperscript{128} 452 U.S. 714 (1981) (per curiam).
soning that the “power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs.” Yet the Twenty-First Amendment cannot automatically authorize a state to allow some expressive activity where alcohol is sold (plays, the opera, comedians, music) and not others. Only Justice Stevens dissented, but he was surely correct in arguing that the Twenty-First Amendment does not trump the First. After all, the Twenty-First would not sustain a law that allowed the sale of liquor to whites but not blacks. The balance of interests may be different here, but the need to consider the First Amendment is no less than the need to consider the Fourteenth in that case. Here is one instance where White joined (or conceivably wrote) an opinion with a clear abuse of the greater-includes-the-lesser argument.

C. “Content-Based Underinclusion”
Outside the First Amendment

The same principle behind the First Amendment opinions can be seen in other White opinions in which he makes the greater-includes-the-lesser argument and rejects any equality-based responses. For example, in New York v. United States, the majority distinguished cases rejecting similar Tenth Amendment/federalism challenges to federal statutes on the ground that in those cases Congress had regulated both the states and private entities identically. The law at issue in New York applied only to the states. White rejected the distinction as not “logically sound,” arguing:

[The Court makes no effort to explain why this purported distinction should affect the analysis of Congress’ power under general principles of federalism and the Tenth Amendment. The distinction, facilely thrown out, is not based on any defensible theory. . . . An incursion on state sovereignty hardly seems more constitutionally acceptable if the federal statute that “commands” specific action also applies to private parties. The alleged diminution in state authority over its

129. Id. at 717.
130. Id. at 718-19 (Stevens, J., dissenting).
133. New York, 112 S. Ct. at 2441 (White, J., concurring in part and dissenting in part).
own affairs is not any less because the federal mandate restricts the activities of private parties.\textsuperscript{134}

White's rhetoric here is not exactly that of the greater and the lesser, for he does not present it as an instance in which the challenged action is "lesser" than the permissible one. Instead he states that the two are the same. Nonetheless, the point is the same as in the First Amendment cases. The substantive intrusion, whether on First or Tenth Amendment rights, is identical regardless of how or whether it affects others. If it violates state sovereignty to force the state to take title to low-level radioactive waste, then it violates state sovereignty; whether the regulation applies to others is simply irrelevant. The underinclusion—here, regulating only states rather than states and private entities alike—is constitutionally irrelevant.

In most circumstances this approach leaves equality concerns unaddressed. However, given the peculiarity of a state asserting equal protection rights and the solid reasons for applying the take-title obligation only to states, those are very far removed here.

Without getting buried in the merits of this case, we might still note where White might have been mistaken. As in the First Amendment cases, the argument would be that he failed to acknowledge a normatively relevant aspect of underinclusion. Suspicion is generally appropriate if the outcome of the political process is to concentrate burdens on one major loser. If legislation must apply equally to states and private interests alike, then that is some protection against such ganging up. Moreover, by ensuring that the states have some political allies, it would guarantee that the theory that states can protect themselves through the political process\textsuperscript{135} actually holds up in practice.

The same sort of criticism can be made of White's use of the greater-includes-the-lesser argument in Chadha, where that argument is used in a more straightforward way. The relevant passage is quoted above.\textsuperscript{136} White's point is that if Congress can hand its legislative responsibilities over to the Attorney General entirely, it must be able to hand them over almost

\textsuperscript{134} Id.
\textsuperscript{135} See Garcia, 469 U.S. at 550-54.
\textsuperscript{136} See supra text accompanying note 77.
entirely, retaining some role for itself through the legislative veto. Yet a basic argument against congressional delegation is that policy decisions should be made in a visible manner by accountable officials. Delegations dilute accountability. If this is our concern, then White’s implicit response is that it can only increase accountability to have the legislative veto; a little congressional involvement is better than none. The problem is that accountability may be even further diluted by the legislative veto. It is always harder to pin down responsibility when its exercise is shared and invisible.  

Again, this Article is not going to take on the vitality of the Tenth Amendment or the constitutionality of the legislative veto. My only point is that without more the greater/lesser argument is usually incomplete. As discussed in Part II, it is subject to misuse often enough that its use generally requires some explanation of why it is appropriate. In *New York v. United States* and *INS v. Chadha* there are at least plausible arguments that the “lesser” power may actually be the “greater” in that it creates even more of the problems associated with the “greater” than does the exercise of that power itself.

### D. Moving from the Lesser to the Greater

A peculiar wrinkle on this style of argument is provided by *Palmer v. Thompson*, in which the Court, over Justice White’s dissent, upheld the decision of Jackson, Mississippi to close all its public swimming pools in the face of a judicial order to desegregate them. The situation might be seen as a classic greater-includes-the-lesser problem. Suppose Jackson segregates its pools. It argues that since it is not required to provide pools at all, it must be permitted to provide pools but on certain conditions, or only to certain people. Invoked to support racial classifications, that argument would be unanimously rejected; indeed, this case only arose because courts had found Jackson’s segregated pools unconstitutional. It is a stark example of the central fallacy of the greater-includes-the-

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137. One of the stronger aspects of Chief Justice Burger’s opinion was his account of how the veto operated in practice. INS v. Chadha, 462 U.S. 919, 923-28 (1983). Although this was totally irrelevant to his stated theory of the case, and although he relied in a somewhat obfuscatory fashion on its use in cases other than Chadha’s, Burger’s account is responsive to White. Indeed, it is the *functionalist* response to the most *formalist* aspect of White’s opinion.

lesser argument; quantitative change may also involve a qualitative change.

The fact that the greater does not include the lesser here seems to suggest that the majority was correct in Palmer. The Court properly did not assume a correspondence of the whole and the parts, realizing that just because the lesser was invalid did not mean that the greater was as well. The error would have been one of composition rather than division, but the principle is the same.

Was Justice White incorrect, then, in linking the lesser and the greater in Palmer, in failing to recognize that they were different? I think not. The heart of his dissent was a focus on "evidence of invidious purpose or motive"139 and the fact that closing all pools involved precisely the same stigmatizing message about black inferiority present in the decision to segregate pools. In short, in these circumstances, the greater did include the lesser; "composition" was not a fallacy.

Another example of the same form of reasoning is Justice White's dissent in Ingraham v. Wright.140 There the Court rejected Fourteenth and Eighth Amendment challenges to corporal punishment of schoolchildren. It held that the Eighth Amendment simply does not apply to school discipline; by "punishment" the Amendment refers only to criminal sanctions.141 Justice White disagreed. If, he reasoned, there are some punishments that are so barbaric that they may not be imposed for the commission of crimes—those acts that society designates as the most thoroughly reprehensible a person can commit—then similar punishments may not be imposed on persons for less culpable acts, such as breaches of school rules. If it is unconstitutional to cut off someone's ear for committing murder, it must be unconstitutional to cut off a child's ear for being late to class.142

Like the Palmer v. Thompson dissent, this is a greater-includes-the-lesser argument, but not in the normal direction. Prohibition of the lesser necessarily implies prohibition of the

139. Id. at 241 (White, J., dissenting).
141. Id. at 668-71. As to the due process claim, the Court held that while students had a liberty interest in being free from corporal punishment, after-the-fact state tort remedies provided all the process that was due. Id. at 672-74, 676-80.
142. Id. at 684 (White, J., dissenting).
greater; if the government cannot do X, then it cannot do 2X.

The primary objection to White's reasoning would be the usual one: that the shift from greater to lesser (or, as here, from lesser to greater) is not simply quantitative but qualitative. That is one way of describing the majority's claim that what happens in schools does not count as "punishment." To illustrate, suppose we accept *Ingraham* and reverse the argument. Say the state sought to impose corporal punishment for theft. It might argue, citing *Ingraham*, that if the state can impose such punishment on school pupils it surely can impose it on criminals, where the justification is greater and the harm slighter. Among the objections to this argument would be the standard one that the greater does not include the lesser here because a particular constitutional prohibition—the Eighth Amendment—applies to the lesser (because it is *criminal* punishment) and not the greater. For present purposes, we need not resolve the dispute over the meaning of "punishment" in the Eighth Amendment. I would make only two points. First, White's use of the greater-includes-the-lesser argument (or, more precisely, the argument that the lesser is included within the greater) is wholly appropriate here given his premises. Second, that argument is at least relevant, though not disposi-
tive, to the question of the scope of "punishment," because it helps achieve an overall legal regime of principle and coherence.

A second objection to White's reliance on the greater/lesser idea is also possible. Precisely because of the deep societal approbation of, say, murder as compared to its view of, say, tardiness for class, a prohibition of cruel and unusual punishments is less necessary in the school discipline setting than in the criminal justice setting. It is not at all clear, however, that (setting aside vigilante justice) the state does in fact have a greater tendency to go overboard in punishing criminals than in punishing schoolchildren.

143. Another example in a White opinion is *Branzburg v. Hayes*, 408 U.S. 665 (1972), in which the Court held that reporters could be required to appear before a grand jury.
E. White Opinions Rejecting Greater/Lesser Arguments

Justice White's last opinion for the Court was in *United States v. Edge Broadcasting Co.*,144 upholding a statute prohibiting the broadcast of any lottery advertisement by a radio station located in a state without a state-run lottery. The Solicitor General argued that because Congress and the states had the power to outlaw lotteries altogether, they necessarily had the lesser power to forbid the advertising of lotteries.145 Without explanation, Justice White declined to address that issue, proceeding instead with a straightforward application of the commercial speech decisions. The opinion is a farewell reminder that (as we saw in *Metromedia*) White was by no means fixated on the greater-includes-the-lesser argument.146 This section looks at some of the other situations in which he has rejected this approach.

1. The greater power does not exist

The first requirement of any greater-includes-the-lesser argument is, of course, that the major premise is correct, i.e.

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144. 113 S. Ct. 2696 (1993).
146. In my view the government's argument in *Edge* was flatly wrong and the Court appropriately refused to go down that path. In the speech cases discussed in Part III.B, supra, the greater power was always a power to *curtail* speech. Here the asserted greater power is a general regulatory authority over (constitutionally unprotected) conduct. The concern over the sort of qualitative shift that undoes the greater/lesser argument should thus be far greater.

In this situation a constitutional prohibition applies to the exercise of the supposedly lesser power that does not apply to the exercise of the greater. As one judge with impeccable conservative credentials has written about the *Posadas* dictum on which the government relied: "[I]t is not clear that the power to regulate a specific economic activity necessarily comprises the power to regulate speech about that activity. After all, the Constitution does not forbid legislation abridging the freedom of gambling; it does forbid legislation abridging the freedom of speech." Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 649 n.74 (1990).

The point is clearest if one posits a law that forbids public discussion or "abstract advocacy" of gambling or lotteries. No one would make the greater-includes-the-lesser argument as to such a law. The appropriateness of that argument is no greater when the forbidden speech is advertising. Even though under the commercial speech cases one might plausibly uphold the prohibition of advertising and not of abstract advocacy, the usual First Amendment analysis is still required. Indeed, this application of the greater-includes-the-lesser approach would in effect eliminate constitutional protection of commercial speech.
that the greater authority does indeed exist. This is the simplest and most direct basis on which to reject any particular application of the argument. Justice White himself is open to that criticism in the *Lakewood* case, although the substantive issue is one far beyond my interests here. In at least one case, White rejected a greater-includes-the-lesser argument on this basis. In *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation* the question was whether an Indian tribe could impose its zoning regulations on non-Tribe members who owned land within the reservation. There was no opinion for the Court. In one opinion, Justice Stevens relied on the treaty between the United States and the Tribe to argue that the Tribe had the authority wholly to exclude outsiders from the reservation, and therefore necessarily possessed the authority to allow them into the reservation but regulate their use of land therein. Justice White seemed sympathetic to Stevens's greater-includes-the-lesser approach, but he rejected the premise. Notwithstanding the treaty, the Tribe lacked power to exclude from lands that, pursuant to federal statute, had been sold in fee to non-members of the Tribe. The greater-includes-the-lesser argument collapsed because the greater power simply did not exist.

Seth Kreimer has argued that the greater-includes-the-lesser argument should be unavailable whenever the government would never in fact exercise a purely theoretical greater authority. In essence, this argument is that (de facto rather than de jure) the supposed greater authority does not exist. As discussed above, this may not be such a telling criticism of the argument. But in any event I am unaware of Justice White ever relying on a purely theoretical greater power. To the contrary, in *Chadha*, for example, he argued that if Congress can hand over legislative decisionmaking in its entirety to an agency it must be able to hand it over almost completely, retaining a veto. Standardless delegations are of course a fact of life in the administrative state, and the "greater power"

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147. *See supra* note 118 and accompanying text.
149. *Id.* at 433 (Stevens, J., concurring in the judgment).
150. *Id.* at 423-27 (opinion of White, J.).
152. *See supra* notes 53-54 and accompanying text.
to which White referred was the power that the majority was endorsing, indeed requiring.

White’s reliance on real rather than theoretical greater powers is not surprising. As discussed in Part I, all of White’s jurisprudence rests there.154 The logical approach I am discussing in this Article is not divorced from the functionalism on which others have focused; the two are not just consistent, they are interconnected, and each operates in the service of the other.155

2. The public forum

The public forum doctrine, which limits government’s authority to control the use of its own property, is itself a rejection of the greater-includes-the-lesser argument. After all, one could argue that because the government need not create parks, sidewalks, post-offices and so on in the first place it must therefore have the lesser authority to create them but limit their use. So Justice Holmes (of the Massachusetts Supreme Judicial Court) argued in Davis.156 The legal conclusion that certain property is a public forum is the logical conclusion that the greater does not include the lesser. But why doesn’t it? In the terms of Part II, two things seem to be at work. First, if the greater-includes-the-lesser argument is defective when there is no realistic possibility that the government will exercise its theoretical greater power, the public forum cases are an excellent example. The government is not going to eliminate parks and sidewalks altogether. Second, the state’s justification for its exercise of the lesser power is weaker than that for its exercise of the greater power.157 The reasons for not having streets and parks—related to expense, resource

154. See supra notes 2-12 and accompanying text.
155. Cf. Allan Ides, Letter to the Editors, NEW REPUBLIC, May 10, 1993, at 4, 4 (noting that Justice White sought “not to promote particular ideologies, but to decide cases in a pragmatic way that permits the political branches to shoulder primary responsibility for governing our society” and that the goal of an opinion was “to decide the case in an intellectually and analytically sound manner”) (emphasis added).
156. “[T]he legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the less [sic] step of limiting the public use to certain purposes.” Commonwealth v. Davis, 39 N.E. 113, 113 (Mass. 1895), aff’d, 167 U.S. 43 (1897).
157. See supra notes 73-76 and accompanying text.
allocation, and opportunity costs—are not applicable to denying their use for First Amendment activity once they exist.

By accepting the public forum doctrine at all then (which concededly is hardly a radical move) White properly rejects a strong version of the greater-includes-the-lesser idea. Still, while by no means contending that there was no such thing as a public forum, and not writing many opinions in this area, White consistently voted with whichever set of Justices took the narrower view of the scope of the public forum doctrine. This is of course consistent with his relatively narrow understanding of First Amendment rights; it is also consistent with the greater-includes-the-lesser idea. One wonders whether his relatively unsympathetic view of public forum arguments might not stem at least in part from the fact that the whole idea of the public forum is inconsistent with the argument that the greater includes the lesser.

3. Equality

In *McLaughlin v. Florida*, Justice White wrote the opinion for the Court striking down Florida's prohibition on interracial fornication. Separate statutory provisions forbade (1) adultery, (2) unmarried cohabitation or "open and gross lewdness and lascivious behavior," and (3) fornication. In addition, another provision made it a crime for "any white person and negro, or mulatto" to "live in adultery or fornication with each other" and for any such couple to "habitually live in and occupy in the nighttime the same room." The appellants were found guilty of violating this last section. A unani-

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158. In addition to *Perry*, his best-known opinion for the Court in a public-forum case is *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), which also rejected a First Amendment challenge.


161. *Id.* at 185 n.1.

162. *Id.*
nous Court reversed the conviction under the Equal Protection Clause. This predecessor to Loving v. Virginia is barely a footnote in the history of the Court's cases concerning racial discrimination. However, it is a stark (and easy) illustration of equality concerns overriding the greater-includes-the-lesser argument. The Court did not even hesitate with regard to the state's power to forbid adultery and fornication generally. But the Court did not conclude that because the state can forbid all such behavior (as indeed it had), it must be able to forbid some. That argument does not work:

This is not . . . a case where the class defined in the law is that from which "the evil mainly is to be feared," or where the "[e]vils in the same field may be of different dimensions and proportions, requiring different remedies," or even one where the State has done as much as it can as fast as it can. That a general evil will be partially corrected may at times, and without more, serve to justify the limited application of a criminal law; but legislative discretion to employ the piece-meal approach stops short of permitting a State to narrow statutory coverage to focus on a racial group. Such classifications bear a far heavier burden of justification.

Three points can be made about this passage. First, it is stylistically typical of Justice White: restrained, deadpan, not especially memorable, but clear, firm, and useful. Second, it is methodologically typical, reflecting a heavy reliance on precedent and care not to go further than necessary. Third, and most relevant to present purposes, it avoids the one-step-at-a-time trap. The greater-includes-the-lesser argument only works if the resulting selective treatment can be justified. Here it obviously cannot; especially seen from 1994 the point is not a subtle one. But the awareness of equality concerns in the greater-includes-the-lesser setting is constant in White's opinions.  

164. McLaughlin, 379 U.S. at 194 (citations omitted).
165. In both style and method, Justice Stewart's more stirring and condemning concurrence is a strong contrast. Id. at 198 (Stewart, J., concurring).
4. Substance and procedure

The most prominent example of Justice White rejecting the greater-includes-the-lesser argument is in the procedural due process setting. The Due Process Clause applies only when there is a deprivation of "life, liberty or property."167 Life and, to some extent, liberty have meanings independent of the requirements of positive law, but the definition of "property" is wholly a matter of positive law. Thus, the antecedent requirement triggering due process is left entirely up to the state: it can choose to create a property right in a particular interest or not. If the state has the power to create or not to create property in the first place, it would seem also to have the lesser power to define the procedures for the deprivation of those property interests it does create. In the much-quoted phrase of Chief Justice Rehnquist, it can force the property owner to "take the bitter with the sweet."168

The government employment cases illustrate the argument. The government can create a property interest in employment by limiting the permissible bases for termination. But it need not do so; should the state choose to hire at-will employees, nothing in the Constitution would forbid it, and then the Due Process Clause would not apply to termination, since no property interest would be at stake.169 If the government can make an employee terminable at will, then logically it should be able to place the employee in a better position by adopting a for-cause standard for termination though specifying procedures for termination that fall short of "due process." Commentators have generally seen this logic as irrefutable.170

Indeed, this is logic that Justice White and others have accepted in other settings. The procedural due process problem has a counterpart in the criminal area. Here too the Constitu-

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170. See, e.g., JEREMY RABKIN, JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY 135 (1989) (stating that "the logical implication" of leaving the definition of property to the state is that the state is likewise free to determine the level of due process protection); Karen H. Flax, Liberty, Property, and the Burger Court: The Entitlement Doctrine in Transition, 60 Tul. L. REV. 889, 918-19 (1986) ("[S]trictly speaking, the entitlement doctrine does entail Rehnquist's 'bitter with the sweet' theory.").
tion imposes procedural limitations through the Due Process Clause but leaves it to the state to define the substantive predicates for the deprivation of life, liberty, or property. For example, the state has the authority to define the elements of the crime of murder; the Due Process Clause then imposes the procedural obligation to prove each element beyond a reasonable doubt. However, the state can accept that burden by defining something (for example, sanity) as an element of the crime, or avoid it by defining the same element (now insanity) as an affirmative defense and so requiring that the defendant prove it. As long as the Constitution is silent as to the elements of the crime or the need for a particular affirmative defense, which it generally is, then the state can allocate burdens of proof as it sees fit. Indeed, a greater-includes-the-lesser argument supports this conclusion: the state need not create a particular affirmative defense in the first place, it therefore has the lesser power to create the defense but place the burden of proving it on the defendant.

This argument has been stated most squarely by Chief Justice Rehnquist, but can also be found in Justice White's opinions, particularly Patterson v. New York. In Patterson a defendant who had been convicted of murder challenged the state's requirement that he had to prove by a preponderance of the evidence "extreme emotional disturbance" in order to reduce the crime to manslaughter. He argued that under In re Winship the state had to prove the absence of extreme emotional disturbance beyond a reasonable doubt. Justice White reasoned that the state was under no constitutional obligation to expand the old common law defense of heat-of-passion in the way it had; that it had done so only because it could place the burden of persuasion on the defendant; and that the state was not faced with the all-or-nothing choice of either recognizing no such defense or having to disprove its existence. The great-

172. See Lockett v. Ohio, 438 U.S. 586, 633 (1978) (Rehnquist, J., concurring in part and dissenting in part). The defendant in Lockett had argued that in order to impose the death sentence the state had to consider all possible mitigating factors and to prove their absence beyond a reasonable doubt. Then-Justice Rehnquist made quick work of the latter argument: "Because I continue to believe that the Constitution is not offended by the State's refusal to consider mitigating factors at all, there can be no infirmity in shifting the burden of persuasion to the defendant when it chooses to consider them." Id.
174. Id. at 206-10.
er-includes-the-lesser argument is more implicit than explicit; but lurking beneath the surface is the idea that the fact that the state did not have to create the defense in the first place means that it can create it but adopt a procedural rule that in effect renders the defense less helpful to or protective of the defendant.\textsuperscript{175}

The bitter-with-the-sweet theory is not obviously different. Nonetheless, Justice White has consistently rejected Chief Justice Rehnquist’s argument,\textsuperscript{176} and authored the opinion for the Court in the decision that finally flatly rejected it, \textit{Cleveland Board of Education v. Loudermill.}\textsuperscript{177}

The easy way out of the “positivist trap”\textsuperscript{178} revealed by the bitter-with-the-sweet argument would be to hold that the greater power in fact does not exist. This might be done in three ways. First, if the entitlements doctrine were rejected, then the states would not be free to define “property” for purposes of the Due Process Clause. Indeed, there is a sort of a greater-includes-the-lesser argument against the entitlements doctrine: if the Constitution removes the “lesser” power of determining procedures for deprivation from the state, then surely it must also remove the greater power of defining the substantive scope of the entitlement. However, while the entitlements doctrine has received a quite hostile scholarly reception,\textsuperscript{179} neither the Court as a whole nor Justice White in particular has shown any sign of being ready to abandon it.

Second, the greater power does not exist if the Constitution or natural law imposes affirmative obligations on the state to create or respect certain property rights. Some scholars make

\textsuperscript{175} Justice Blackmun has described the \textit{Patterson} rationale in exactly these terms: “[S]ince the State constitutionally could decline to recognize the defense \textit{at all}, it could take the lesser step of placing the burden of proof \textit{upon} the defendant.” \textit{Walton v. Arizona}, 497 U.S. 639, 681 (1990) (Blackmun, J., dissenting); see also \textit{McKoy v. North Carolina}, 494 U.S. 433, 444 (1990) (White, J., concurring) (joining Court in setting aside requirement that jury be unanimous in finding mitigating circumstances, but writing separately to note that state can place burden of persuasion as to mitigating circumstances on the defendant).


\textsuperscript{177} 470 U.S. 532 (1985).


\textsuperscript{179} For one of many examples, see the discussion and citations in Cynthia R. Farina, \textit{Conceiving Due Process}, 3 \textit{Yale J.L. \\& Feminism} 189 (1991).
such an argument, and in some of the takings cases under the Fifth Amendment the Court seems hesitant to yield the state an unfettered power to define property. However, the Court has been wholly reluctant to discover affirmative rights in the Constitution in general\textsuperscript{180} or to adopt a substantive due process regime in which individuals would have affirmative rights to property, "new" or old.\textsuperscript{181}

Third, the greater power might be said to exist in theory only. Even if this objection to the greater-includes-the-lesser argument is valid, however, it does not apply in all the procedural due process cases. While it is quite certain, for example, that the federal and state governments could not in practice eliminate "welfare" across the board, they can and do make significant adjustments to the relevant programs.

Accepting the existence of the greater power to define substantively protected interests, then, why doesn't the State have the lesser power to define the procedures by which it deprives those interests it deigns to create? \textit{Loudermill} gives only a partial explanation:

\begin{quote}
[The Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty.]\textsuperscript{182}
\end{quote}

Several ideas seem to be at work here. One is purely practical. This passage comes close to a concession that the Court has backed itself into a corner with the entitlements doctrine. To avoid writing the Due Process Clause out of the Constitution insofar as it protects property the Court had to reject the bitter-with-the-sweet idea. The Constitution inescapably anticipates some limits on the procedures by which the state deprives property; if no process was "due" then the Clause is meaningless.


Furthermore, reconsider the criminal procedure cases discussed above. The Rehnquist position in a case like *Lockett* is that because the state need not provide for consideration of mitigating circumstances at all, it is free to place the burden of persuasion on the defendant. Note that he does not generalize the point. Applying the bitter-with-the-sweet doctrine to criminal cases would mean that because the state is free to define the elements of a crime it is free to determine the procedures by which those elements are established. Even Rehnquist does not believe that, and very thick books about constitutional criminal procedure show that the Court does not. The state's freedom to establish the substantive grounds for depriving life or liberty does not include the lesser power to determine the procedures for doing so.

The criminal setting may be distinguishable from procedural due process settings such as welfare benefits or government employment. Life and liberty, unlike property, have a constitutional meaning separate from state positive law; positive law only defines when they will be lost. In the property setting positive law does double duty: it simultaneously defines what is property and establishes the substantive basis for the deprivation. This distinction does not defeat the criminal law analogy, however. For one thing, the requirements of constitutional criminal procedure apply even where the sanction is only a criminal fine, which deprives the defendant of something (money) that is only property because positive law says it is. Moreover, the power to define the elements of a crime, even though distinct from the power to determine what constitutes the protected interest that will be deprived as a consequence of committing the crime, is nonetheless a "greater" power than the authority to determine procedures. Therefore, the bitter-with-the-sweet argument should still apply.

Finally, the insistence in *Loudermill* that substance and procedure are distinct recalls the example in Part II about maximum and minimum speed limits on the superhighway. Although they are enormously interconnected and the rules of one always have consequences for the other, substance and procedure are distinct. To invoke the vocabulary of this Article, there are important qualitative differences between the "greater" and "lesser" powers here. Regardless of the state's au-

183. See supra p. 22.
authority to define the scope of substantive entitlement, process serves important and distinct functions—both in ensuring accuracy and in serving more amorphous "process values"—that would be lost in the easy calculation that the greater includes the lesser.

IV. CONCLUSION

The argument that the greater includes the lesser is often valid, but slippery and dangerous. If its underlying assumptions—that the greater power really does exist, that the lesser power is really included within it, and that there is no qualitative difference between the two—are unexamined, the argument is easily misused. Whenever the argument is invoked, those assumptions must be investigated.

A few reservations and a few conclusions with regard to Justice White. First, I have not necessarily shown that Justice White had a particular fondness for this argument. Maybe what I have shown is only that he sat on the Court for thirty-one years. That's a long time, during which a Justice is likely to trot out any particular argument more than once. Again, I have not done any thorough research into the relative frequency with which different Justices invoke this argument, which is a standard lawyer's and judge's move. I can only say that I come away from this examination convinced that the greater-includes-the-lesser is an important idea for Byron White.

Second, I have not necessarily shown that this argument affected the way White decided cases. It may only have affected the way he wrote opinions. As always the overlap of the stated argument and the underlying bases of the decision is uncertain. In my view, Justice White generally follows where the argument leads. He may think there is something wrong with the argument if it leads him to the wrong place, and therefore rethink it, but argument and logical consistency are important to him. But if you think ideology explains decisions and opinions are always ex post rationalizations, I have said nothing to convince you otherwise.

Third, as I said at the outset, the foregoing account is misleadingly incomplete. It is not by any means a full picture of White's jurisprudential method. I offer it as only a part of the picture, and a small part at that, but a neglected one.

What, then, does this tell us about Byron White's jurisprudence? I would stress three things. First, it reminds us of his analytic, logically rigorous approach to legal argument. For all
the focus on White's real-world pragmatism and desire for facts, it is equally important to White to think things through to ensure a logical coherence. Indeed, the strongest criticism of his opinions in the cases I have discussed is that they are not functionalist enough. By invoking this logical approach, White avoids considering hard questions about how things operate in practice: does selective limitation of unprotected speech in practice skew the free speech marketplace, even though it is "less than" a broader but more neutral restriction? Does the legislative veto in practice decrease accountability, even though it is "less than" a broader delegation from elected to unelected officials? And so on.

Second, these cases show that White was much more sensitive to equality arguments than to arguments about absolute limits on government power. Where he ignores a possible greater-includes-the-lesser argument it is usually because he is sensitive to the equality issues. When he accepts the argument, it is with a recognition that there may be equality objections. 184

Finally, Justice White's treatment of the proposition that the greater includes the lesser shows care and precision in his thinking, a nonideological approach to deciding cases, and a striking consistency of his method. In these characteristics, it is a wholly typical example of his work.

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184. The same dynamic can be found in White's consistent rejection of First Amendment challenges to campaign finance laws. On the one hand, White was unsympathetic to the First Amendment argument, on the other, he stressed the need for equal opportunity for participation in the democratic process.