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Greater and Lesser Powers

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GREATER AND LESSER POWERS

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Abstract:

During much of the twentieth century it was relatively stylish for lawyers, judges and justices to argue that an exercise of power was permissible because "the greater power [to do something else] necessarily includes the lesser power [to do this]." Unfortunately, sloppy and unprincipled uses that merely reflected the intuitions of those who invoked it has largely discredited the argument, although it still makes some relevant appearances.

This paper argues that there is a principled way to apply the argument: by looking to the relative harms caused by each exercise of power. However, any notion of "necessarily includes" needs to be abandoned as there are plenty of reasons to draw distinctions between exercises of power, that have nothing to do with harm - most notably the justification for exercising the power.

Practically speaking, greater and lesser powers will often exist where the exercise of one power is conditioned upon the exercise of another power. The result usually is to force decision-making to extremes: cause a lot of harm, or don't cause any harm at all. While this has the potential virtue of reducing the number of harmful exercises of power, it also creates an obvious perverse incentive to cause more harm. Courts and commentators have almost entirely ignored the key issue of under what circumstances creating this perverse incentive is justified, given alternative means of restricting power.

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I. Introduction

[He] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.

Justice Oliver Wendell Holmes, 1892 ¹

In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling.

Chief Justice William H. Rehnquist, 1986 ²

Separated by almost a century, two of our nation's most prominent jurists relied on similar intuitions to reach conclusions that seem obviously incorrect to most modern lawyers. In each case the Justices used a broad power of the government's (to choose whether to hire policemen; and whether to allow gambling) as a premise. Their conclusion was that since the government possessed that "greater" power, it should also possess what these Justices considered a relatively narrower "lesser" power (to condition hiring on the forfeiture of speech rights; and to prohibit advertising for gambling). During the ninety-four years between their opinions such greater-power-includes-the-lesser-power arguments were commonplace in American jurisprudence. However, since Rehnquist's 1986 deployment of the argument, which was widely criticized and quickly overturned, the argument has not been very fashionable.

Both Holmes and Rehnquist were making little more than tautological claims: claims that were based on intuitions that seemed so axiomatic to those asserting them that it might have seemed both unnecessary and daunting to try to explain the point in more than a sentence or two. Indeed, when asked about his fondness for the argument,

¹ *McAuliffe v. City of New Bedford*, 155 Mass. 216, 220.

² *Posadas de Puerto Rico Associates v. Tourism Co. of PR*, 478 U.S. 328, 345-46.

Rehnquist is reported to have merely responded, “Well, there *is* a certain logic to it.”³ It does indeed have a certain logic to it. But its reach is far more circumscribed than most of its advocates have appreciated.

What Holmes, Rehnquist, and many others have attempted to do by invoking the concept of greater and lesser powers is to reason by analogy. In order to make a workable analogy, though, we need to understand the relevant values on which we are basing our analogy.⁴ Two obvious questions present themselves. First, when are powers “greater” or “lesser” and why should we care? Second, does that categorization tell us all we need to know to decide whether or not to distinguish legally between two exercises of power, or are there other relevant factors?

Powers should be considered greater only if its exercise causes more harm than an exercise of the lesser power would. After all we restrict power in the first place solely because of the harm it can cause. A major limitation of this conception of greater and lesser powers is that it is frequently difficult to determine whether one power is more harmful than another because harms caused by different exercises of power are often qualitatively different.⁵ But even if we can establish genuinely greater and lesser powers that only resolves one relevant issue in the proper analysis. There are ample reasons to allow a more harmful activity (a greater power) and simultaneously disallow a less

³ Lynn A. Baker, *The Missing Pages of the Majority Opinion in Romer v. Evans*, 68 U. COLO. L. REV. 387, 391 (1997) (conversation between the author and the Chief Justice in 1996) (emphasis Professor Baker’s).

⁴ Peter Westen, *On “Confusing Ideas”: Reply*, 91 YALE L.J. 1153, 1163 (1982) (“One can never declare A to be legally similar to B without first formulating the legal rule of treatment by which they are rendered relevantly identical.”).

⁵ See Baker, *supra* note 3, at 391-92 (“The most common critique of greater-includes-the-lesser arguments is that the two types of state action being compared are not a “greater” and a “lesser” variant of the same power but are qualitatively different powers.”). There is no theoretical reason qualitatively different powers cannot be greater and lesser than each other; but the devil is in the details. See *infra* § II.A.

harmful activity (a lesser power). That is, there are values relevant to the legal system other than the harms that flow from exercising power, including: the justification for exercising the power; the procedure by which the power is exercised; the motivation for exercising the power; courts' competency to draw certain distinctions; the benefits of having rules; adherence to a higher authority; and *stare decisis*.

In many of the examples of greater and lesser powers this paper will focus on the lesser power is literally part of the greater power—the greater power consists of the lesser power, plus some other power(s). For example, the power to pass substantive federal law in an area and to confer jurisdiction over those issues on the federal courts is probably greater than the power just to confer jurisdiction over those issues on the federal courts—the harm being to federalism.⁶ In this situation, while we may be allowing the greater power and not the lesser power alone, the reality is that the lesser power is exercisable on the exact same terms as the greater power because it gets exercised whenever the greater power does. So it is somewhat deceptive (although not technically inaccurate) to say that we are allowing the greater power while not allowing the lesser power, when we are really allowing them equally.

There is a remaining problem with this setup. Even if we are not unjustifiably drawing a distinction between greater and lesser powers, we are creating a perverse incentive. Why force a power-wielding entity to cause the additional harm presented by the greater power, rather than just allowing it to exercise the lesser power alone? In the absence of a reason to distinguish the two powers, the answer must be that this restriction will discourage the exercise of the lesser power, and that this is a desirable result. Maybe so. But such a restriction is only justified if there is not a similarly effective alternative

⁶ See *infra* § VI.D.

restriction that does not create a perverse incentive. In other words, if we are going to have a restriction that creates a perverse incentive, it must do a better job than a restriction that does not.

With this issue in mind this paper turns to a variety of real-world examples in which we restrict harmful power by conditioning it on the exercise of additional harmful power, and ask if (and how) such restrictions are justified. Beginning with three examples of situations in which there is a dearth of alternative restrictions, the conclusion is that this type of restriction may well be justified, although we would need to know empirically how often more harm will be caused and how often less harm will be caused. Turning to situations where we have an adjudicative process at our disposal, the conclusion is that deliberately conditioning the exercise of one power on the exercise of a more harmful power often seems more questionable now that there are viable alternative methods to restrict that power. Sometimes, though, this turns out to be a difficult question and the answers are beyond the scope of this paper. But with the proper analytical framework in focus hopefully we can do a better job than the lawmakers that created many of these regimes, often without seeming to acknowledge the issue of alternative restrictions.

Even if every word of this paper is taken as gospel, it does not necessarily point to expansions of power. There are two ways to remedy the potential peculiarity of allowing a greater power but not a lesser power: allow both, or deny both. While most of the examples in this paper assume the soundness of conclusions about the existence of a greater power and then ask if a lesser power should also exist, the exact same logic works in reverse. One might instead accept the soundness of conclusions about the

nonexistence of a lesser power, and then ask if a greater power should also not exist.

This paper is not about more or less power; it is simply about using analogies to draw coherent and justifiable distinctions between powers.

II. Identifying Greater Powers

A. *The Suggested Approach: Comparing Harms*

This paper is about limitations on power. More specifically, it is about relative limitations on power—what we can discern about whether a certain power should be allowed, given what we know about whether a different power is allowed. The argument that greater powers should be understood to include lesser powers posits that in certain circumstances the existence of a “greater” power should be conclusive (or at least strongly suggestive) on the issue of whether another “lesser” power should exist. In section III *infra*, this note addresses the fact that even once greater and lesser powers have been properly identified, that determination should not be conclusive in deciding to permit a lesser power. But first we have to get an idea of what exactly qualifies as a greater or lesser power—how do we know when they exist, and why do we care?

Society restricts power because of the harm (real or perceived) that flows from its exercise. Restricting a type of activity that does not cause any kind of harm would truly be “uncommonly silly.”⁷ So, if the sole justification for restricting power in the first place is to limit the amount of harm caused by its exercise, then when comparing the need for two different restrictions on power we should focus exclusively on the

⁷ *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J. dissenting); *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Thomas, J. dissenting) (quoting *Griswold*).

respective harms caused by them. Thus, discussions of “greater” and “lesser” powers should revolve around the harms that would result from their exercise.⁸

However, some have run astray from the focus on harm that undergirds all restrictions on power and have instead appealed to abstract logic or metaphor. While there is nothing inherently wrong with such appeals,⁹ they can become problematic if we take them too seriously and allow them to distract us from our original goal. A couple of examples. From mathematical group theory: Since adding in smaller increments (a lesser power) allows for more possible resulting numbers than adding in larger increments (a greater power), counter-intuitively the lesser power actually includes the greater power because “the ‘lesser’ power can generate all of the ‘effects’ of the greater power, and more.”¹⁰ From physiology: “If I can lift 100 pounds, it does not logically follow that I can lift fifty pounds. (Perhaps my muscles only respond to big challenges).”¹¹ These examples are illustrative of a mistake many courts have made in a less blatant manner:

⁸ When the Supreme Court rejects the argument, it frequently focuses on the harms caused by the different exercises of power. *See e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 511 (1996) (accepting the validity of the greater powers argument as a general matter, but concluding that “banning speech may sometimes prove far more intrusive than banning conduct”), *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 762-63 (1988) (“The key to the dissent's analysis is its “greater-includes-the-lesser” syllogism. But that syllogism is blind to the radically different constitutional harms inherent in the “greater” and “lesser” restrictions.”).

⁹ After all, the entire concept of greater and lesser powers is itself a metaphor.

¹⁰ Baker, *supra* note 3, at 394. Clever, indeed. But why in the world is adding in as many smaller increments as you want a lesser power than adding in as many larger increments as you want? Surely there are some philosophical explanations, but any explanation of them or their relevancy to solving actual legal problems is entirely absent. The legal examples Professor Baker follows her theory up with bear no relation to the form of her set theory, and are plainly examples of powers that are qualitatively different from each other. *Id.* at 394-97 (including that the power to declare war is greater than the power to quarter soldiers). *See also infra* § III, discussing justifications for the exercise of a power as an important reason for distinguishing its permissibility from that of other exercises of power.

¹¹ John H. Garvey, *The Powers and Duties of Government*, 26 SAN DIEGO L. REV. 209, 215-16 (1989). While Professor Garvey admits this is not a very satisfactory counterexample, in his view that is only because most of the time people who can lift 100 pounds can also lift 50 pounds. A more realistic example might be something like a rocket that can travel very fast, but not very slow... but being more realistic does not make it any more relevant to the task at hand.

relying on intuitive conceptions of what is greater or lesser without tying them back to the clear issue at hand—harm.¹² These theorists and judges are prone to err as they attempt to discern which powers are greater and lesser, without a conception of why we should care about greater and lesser powers in the first place.

* * *

It is easy to say that we should compare the harms caused by different exercises of power, but the actual task of comparison is frequently far more difficult.¹³ Given the choice between facing the death penalty and being tortured, many people might choose torture, but the Eighth Amendment prohibits torture even of people who are eligible for the death penalty.¹⁴ Is the Supreme Court’s interpretation of the Eighth Amendment incorrect? Should we recognize the power to kill to be greater than the power to torture?¹⁵ Not necessarily. There are a number of at least arguably unique harms that accompany torture (pain and suffering,¹⁶ a lack of human dignity,¹⁷ and autonomy¹⁸) that may provide a reasonable basis for disallowing torture while allowing the death penalty.¹⁹

¹² See *supra* § II.B.

¹³ See Douglas Laycock, *Modern American Remedies* 175-176 (4th ed. 2010) (presenting examples of the difficulty in valuing the harm caused by a variety of dignitary torts—best of luck trying to line them up from greater harms to lesser harms).

¹⁴ See, e.g., *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (“ . . . even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.”).

¹⁵ We should according to John Yoo, author of the infamous so-called “Torture Memos” while a member of the George W. Bush Administration’s Department of Justice. Yoo uses as his premise the power to kill people during the course of war, rather than strictly as punishment, but the arguments are similar: “Look, death is worse than torture, but everyone except pacifists thinks there are circumstances in which war is justified. War means killing people. If we are entitled to kill people, we must be entitled to injure them.” *‘Professor Torture’ stands by his famous memo*, Montreal Gazette (Mar. 17, 2007), available at <http://www.canada.com/montrealgazette/news/editorial/story.html?id=5c3b3463-bc14-4c00-879b-2b7b432d1e79&p=3> (interview with Professor Yoo).

¹⁶ *O’Neil v. State of Vermont*, 144 U.S. 323, 339 (1892) (describing “acute pain and suffering” as the hallmark of punishments outlawed by the English Declaration of Rights in the seventeenth century, which subsequently formed part of the basis of our Eighth Amendment). One might note

The point is not to be pro- or anti- Eighth Amendment or torture but rather to suggest that it is an issue too complex for anyone to assert that either power is somehow objectively greater or lesser than the other. The answer lies in how we, as a society, subjectively value the qualitatively different respective harms (or perhaps how the Framers valued them).²⁰ While after we have concluded our subjective inquiry we may be in a position to state that one power is greater than another, it would be deceitful to suggest that there was anything more determinative or scientific about the process.

Unfortunately, judges frequently make such assertions devoid of any apparent underlying analysis, leading one commentator to conclude that “[e]ven the mere phrase ‘the greater

that some methods for carrying out death sentences can be excruciatingly painful. But there is no reason why allowing the death penalty necessarily means we should allow it to be exercised in a way that causes such suffering. Indeed the Court has held that certain methods of execution can violate the Eighth Amendment. *See Gregg v. Georgia*, 428 U.S. 153 (1976) (“In the earliest cases raising Eighth Amendment claims, the Court focused on particular methods of execution to determine whether they were too cruel to pass constitutional muster. The constitutionality of the sentence of death itself was not at issue, and the criterion used to evaluate the mode of execution was its similarity to “torture” and other “barbarous” methods.”). *Cf. Baze v. Rees*, 553 U.S. 35, 1530 (2008) (“This Court has never invalidated a State’s chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment.”). In fact, there is a strong argument to be made that the power to execute in a way akin to torture is greater than the lesser power to carry out an execution via a more painless and/or dignified method. *See infra* § V.A.¹⁷ *Trop*, 356 U.S. at 100 (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”).

¹⁸ Seth F. Kreimer, *Too Close to the Rack and Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 299 (2003) (“Effective torture is intended to induce the subject to abandon her own volition and become the instrument of the torturer by revealing information.”). This harm of torture is probably inapplicable to situations of pure punishment, where only suffering rather than information extraction is the goal.

¹⁹ There are also other potential reasons, unrelated to the harms caused by the death penalty and torture, which might justify distinguishing the two. For example, the death penalty brings with it the benefit of permanent incapacitation, while torture may not. For further analysis of how factors like the benefits from exercising power should interact with categorizing powers as greater or lesser, *see infra* § III.

²⁰ Some eminent scholars have argued that there are correct answers that a perfect judge would come to. *See* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975). However, in the real world—in the absence of a Judge Hercules—lawyers and judges alike are stuck dealing with what is, practically speaking, a subjective calculus.

power includes the lesser' is a dangerous form of legal reasoning because it assumes the very judgment in question."²¹

B. The Classic Formulation, Unconstitutional Conditions, and Equal Protection

While there is no shortage of invocations of greater-power-includes-the-lesser power arguments that are essentially just assertions that a certain type of power is greater because the proponent says it is, the argument's most common (and historically prominent) use is importantly different. It is grounded in a real analytical structure (even if that analytical structure lacks any foundation of its own). The claim is that if an entity possesses the greater power to choose whether or not to (i) provide a certain benefit, or (ii) allow a certain activity; it has the lesser power to provide that benefit, or allow that activity, on whatever terms it wishes.²²

Equivalently, in the case of constitutional rights, if one has no right to do an activity, or receive a benefit, how can one claim a violation of their rights when the activity or benefit is disallowed? This paper began with an argument of this sort by Justice Holmes, addressing the question of whether the government could condition a job on the forfeiture of speech rights. Holmes, answering affirmatively, famously declared: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."²³ That argument pertained to the providing of a governmental benefit; an analytically similar argument pertaining to the allowance of an

²¹ David J. Caputo, *Tobacco Advertising and The First Amendment: A Strange Constitutional Doctrine Indeed* 25 n. 107, available via Legal Electronic Document Archive at <http://leda.law.harvard.edu/leda/data/143/dcaputo.pdf> (unpublished student paper).

²² See e.g., Brooks R. Fudenberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 UCLA L. REV. 371, 375-76 (1995) ("It maintained that if the government has the greater power to deny a benefit completely, or forbid an activity entirely, it could not be unconstitutional to deny that benefit in part.").

²³ *McAuliffe*, 155 Mass. at 220.

activity is the Supreme Court’s more recent statement that “[t]he State’s 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.”²⁴

Here, the greater-includes-the-lesser argument is doing real work: there is a definite relationship between the powers, and those who accept the argument think it makes sense to permit the “lesser” power just because it fits the contours of this discretion/imposing conditions²⁵ relationship. Whatever theoretical justification there may be for the discretion-based argument, it is not rooted in the task that should be at hand—comparing the harm flowing from different exercises of power.²⁶ The Court has (at least sometimes) recognized that this type of argument is “blind to the radically different constitutional harms inherent in the ‘greater’ and ‘lesser’ restrictions.”²⁷ The concern is not that allowing the “lesser” power will work harm to someone’s non-existent right to be a policeman, or non-existent right to sell intoxicating beverages, but that it will work harm to First Amendment rights in both cases.²⁸ The discretion/imposing conditions version of the greater-power-includes-the-lesser-power argument runs entirely

²⁴ *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 717 (1981) (per curiam). The Court had previously “written several opinions implying that nude or partially nude dancing is a form of expressive activity protected by the First Amendment,” *Id.* at 718-719 (Stevens, J. dissenting), and in *Bellanca* continued to assume it should receive some protection. *Id.* at 716.

²⁵ That is, if the state possesses the *discretion* to allow an activity or provide a benefit in the first place, it has the power to *impose conditions* however it desires.

²⁶ *See supra* § II.A.

²⁷ *City of Lakewood*, 486 U.S. at 762-63. Unfortunately, the Court’s rhetoric impugned the “‘greater-includes-the-lesser’ syllogism” as a whole, rather than simply refuting the notion that the powers at issue were in fact in a greater/lesser relationship with one another. Eight years later, in *44 Liquormart*, 517 U.S. 484 at 511, the Court drew just that distinction when it accepted “the proposition that greater powers include lesser ones” but refused to conclude that banning speech was a lesser power than banning conduct.

²⁸ As one commentator put it, harm may be measured “along any number of dimensions.” Carlos M. Vázquez, *The Federal “Claim” in the District Courts: Osborn, Verlinden, and Protective Jurisdiction*, 95 CAL. L. REV. 1731, 1765 (2007).

counter to the wisdom underlying the unconstitutional conditions doctrine: “that government may not do indirectly what it may not do directly.”²⁹

Given that the government provides so much for us that the constitution does not require—education, welfare benefits, commercial licenses, public forums, etc.—this complete rejection of an unconstitutional conditions doctrine would allow the government to functionally eliminate most constitutional rights. Want to go to public school for free? Sign away your right against double jeopardy. Want a business method patent? Agree to fire any of your employees if they engage in speech critical of the government.

In the relatively extreme examples just listed, the conditions imposed as part of the “lesser” power were not particularly related to the core interests that justified the existence of the “greater” power in the first place. Perhaps, one might think, if a germaneness requirement was imposed on conditions—as is required per *South Dakota v. Dole*,³⁰ when the federal government wants to impose conditions on states’ receipt of federal funding—the discretion to allow something might properly be understood as greater than the power to attach conditions. While that approach would certainly reduce the scope of erroneous conclusions that the argument could cause,³¹ it would not eliminate all such errors because the germaneness inquiry is not about the harms caused by the conditions.³² *Dole* is illustrative; the harm to federalism that takes place when

²⁹ Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

³⁰ 483 U.S. 203 (1987) (upholding a law directing the Secretary of Transportation to withhold a percentage of federal highway funds from any state that did not have a minimum drinking age of at least twenty-one years).

³¹ As would essentially any additional limitation on its use.

³² What exactly the germaneness inquiry *is* about is not entirely clear. See Sullivan, *supra* note 29, at 1456-1476. “The cases and commentary . . . say remarkably little about why germaneness should matter.” *Id.* at 1457. But it appears to have something to do with motive, justification,

state legislatures are not truly free to set their own drinking age is the same regardless of whether it was achieved by the threat of withholding ten million dollars in highway funds or ten million dollars in education funds.³³

The concept of greater and lesser powers alone cannot tell us anything categorical about these types of situations, although perhaps some unconstitutional conditions theory can.³⁴ However, solid cases have been made that the search for some grandiose theory of unconstitutional conditions is an exercise in vanity.³⁵

Equal Protection, the First Amendment, and Discrimination

Not only does this version of the greater powers argument, by wholly rejecting any form of an unconstitutional conditions doctrine, allow for the “indirect” destruction of virtually any constitutional right, it also directly denies a fundamental truth contained in some of the most important provisions in the Constitution. The Equal Protection Clauses and the First Amendment make abundantly clear that discrimination between classes of people, activities, or ideas can itself be harmful. The discretion/imposing conditions version of the greater powers argument completely ignores this reality.

This argument would probably view *Plessy v. Ferguson*³⁶ as *overprotective* of the rights of blacks. In *Plessy*, the Court upheld an Equal Protection challenge to a Louisiana law requiring that private railroads have “equal but separate” railcars for whites and

and proper governmental decision-making processes—all of which are related, and reflect other values that should be considered notwithstanding the existence of greater and lesser powers. See *infra* § III.

³³ See Sullivan, *supra* note 29, at 1476 (“[Germaneness theories] fail to explain why *germane* burdens on constitutional rights should be regarded as benign.”) (emphasis original).

³⁴ Of which there are no shortage. See *generally id.*

³⁵ See Cass Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990); Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. L. REV. 989 (1995).

³⁶ 163 U.S. 537 (1896).

coloreds.³⁷ Later in *Brown v. Board*, the Court held that “[s]eparate educational facilities are inherently unequal.”³⁸ But under this formulation of the greater-power-includes-the-lesser-power argument, as long as the government possesses the “greater” power to prohibit a type of business, or not provide public education at all, it would have the “lesser” power to flat out prohibit blacks from any such access and need not even waste its time providing or allowing “separate but equal” accommodations. *Plessy* was one of the worst decisions in Supreme Court history, but surely because it was *underprotective* of the rights of blacks.

But discrimination does not always raise serious questions. For example, it is relatively uncontroversial that the government has fairly broad authority, consistent with the First Amendment, to enact “time, place, and manner” restrictions on speech. If certain types of discrimination cause at most trivial harm, then it may well make sense to conclude that a greater power should include the lesser power to draw those types of distinctions. Perhaps the reigning most influential greater powers argument, from the seminal federal jurisdiction case of *Sheldon v. Sill*,³⁹ illustrates how difficult it can be to identify harmful discrimination. It is literally hornbook law that “the *greater* power to create lower federal courts includes the *lesser* power to control what the courts do,” such that Congress may restrict the lower federal courts from hearing at least certain classes of cases entirely, while allowing others.⁴⁰ Is *that* discrimination harmful? The Court seems to assume that it is not; but if they are right it is certainly not because of any magic in the terms “greater” and “lesser.”

³⁷ *Id.* at 540.

³⁸ *Brown v. Bd. of Ed. of Topeka, Shawnee County, Kan.*, 347 U.S. 483, 495 (1954).

³⁹ *Sheldon v. Sill*, 49 U.S. 441 (1850).

⁴⁰ Laura E. Little, *Examples & Explanations: Federal Courts* 126 (2006) (emphasis original). This is known as “jurisdiction stripping.”

* * *

This version of the greater powers argument allows for more *reductio ad absurdum* arguments than one can reasonably comprehend, and taken to its clear logical conclusion is quite possibly the most noxious jurisprudential idea ever to find favor in the United States Reports. But it is a mistake to conclude that just because the greater powers argument can be (and to an extent has been) greatly misused that it has nothing positive to offer us.

C. Apples to Apples

Thus far, we have seen the greater-includes-the-lesser argument as a bare conclusion masquerading as real analysis,⁴¹ and as a formalistic categorization divorced from any concern about harm.⁴² Accordingly it can cause confusion, rob opinions of analysis, and provide cover for judge's biases.⁴³ But these problems are not always present. The Eighth Amendment is again instructive. In addition to prohibiting torture,⁴⁴ the Eighth Amendment also prohibits excessive punishments.⁴⁵ If a legislature may choose to punish a given act by thirty years imprisonment, could there really be any serious argument that it could not also exercise the lesser power to choose to punish the same act by twenty-five years imprisonment? The harm that the Eighth Amendment is concerned with here—amount of punishment—is clearly lower in the case of twenty-five

⁴¹ See *supra* § II.A.

⁴² See *supra* § II.B.

⁴³ See, e.g. Fudenberg, *supra* note 22, at 378-79 (criticizing the Court for scolding and accepting the argument in the same year, and criticizing individual Justices for blatantly inconsistent statements about it).

⁴⁴ *Wilkerson v. State of Utah*, 99 U.S. 130, 136 (1878) (“it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth] amendment to the Constitution.”).

⁴⁵ *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (“the punishment not be ‘excessive.’”).

years, and so long as there are not other types of harms implicated, we can properly understand the two to be in a greater/lesser relationship.

If however, the issue is whether a *judge* empowered by the legislature to impose a thirty-year sentence for a given crime can impose a twenty-five-year sentence, things are less clear.⁴⁶ It may be that discretion itself is a cognizable harm insofar as it reduces predictability and causes justice to be meted out unequally and/or not to the same degree the legislature had hoped.⁴⁷ While the power to impose a thirty-year sentence is greater than the power to impose a twenty-five-year sentence, the power of a judge to impose a thirty-year sentence is probably not greater than the power to choose to impose a twenty-five-year *or* a thirty-year sentence. However, since legislatures generally act in advance,⁴⁸ with more generality than judges, and are the most direct representative of the people, that discretion is probably not anywhere near as troubling.

There are two takeaways from this punishment example. First, it is possible to have objectively greater and lesser powers when the exercise of the greater power causes all of the harm the lesser power causes, and more.⁴⁹ Second, it is always possible that

⁴⁶ Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1861 n.314 (2008).

⁴⁷ The Court has repeatedly held that discretion itself can be constitutionally problematic, by holding laws unconstitutionally vague. For a particularly colorful example, see *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972) (holding a Jacksonville ordinance “void for vagueness” because it failed to provide adequate notice of what conduct was prohibited, and encouraged “arbitrary and erratic arrests and convictions”). See also *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005) (“... limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike.”).

⁴⁸ Here, they probably must act in advance due to the *ex post facto* clauses. U.S. Const. art. I § 9; U.S. Const. art. I § 10.

⁴⁹ It is in this set of situations that the criticism that “the concept of ‘greater’ and ‘lesser’ powers is too uncertain to be very helpful” is inapposite. Nelson, *supra* note 46, at 1861. Of course, if the only time we can say one power is objectively greater than another is when one is strictly quantitatively greater than the other, the concept, while existent, would be largely unhelpful. But as § V.A. *infra* details, there is a wider group of cases than can be so categorized (in addition to cases like *Florida v. J.L.*, discussed *infra* in § VI.B).

some other type of harm lurks in the background of the exercise of the allegedly lesser power.⁵⁰ In other words, when someone labels powers “greater” and “lesser” we should understand them to be making an analogy, and as with all other analogies, it should be viewed as much as a challenge as a conclusion. The challenge, to skeptics, is to come up with some legally cognizable harm that justifies distinguishing the two.⁵¹

III. Beyond Greater Powers

Recall that we are analyzing analogies about power. Thus far we have been focusing on the harm that flows from the exercise of power. In doing so, we have seen that the greater-power-includes-the-lesser-power argument has been improperly used in many cases to mask harms caused by the “lesser” power. In those cases the analogy failed on the issue of harms, but that will not always be the case. In some situations we will have genuinely greater and lesser powers. However, the properly drawn conclusion that one power is greater and another is lesser means only one thing: that there is no reason to distinguish away the exercise of the lesser power *on the basis of the harm it causes*. As long as we are committed to analogical reasoning in pursuit of the goal of

⁵⁰ Another example of this is Pennsylvania beer law, under which “distributors” are allowed to sell full cases of beer, but generally not lesser quantities of beer, like six- or twelve-packs. 47 P.S. § 1-102. *See also Malt Beverages Distributors Ass’n v. Pennsylvania Liquor Control Bd.*, 601 Pa. 449, 461 n. 13 (2009). Why should the “greater” power to sell a twenty-four pack of beer not include the power to sell a six- or twelve-pack of beer? The answer has to be that the relevant harm the legislature was concerned with was not excessive consumption of beer (if they wanted to make smaller quantities of beer more expensive to purchase in order to discourage their sale, they could simply mandate minimum prices). Rather it appears that this rule is a market division meant to protect the monopoly of “dispensers” which are entitled to sell smaller quantities of beer, but not larger quantities. *Cf. id.* at 464 (refusing to adopt an offered interpretation about what it means to be a “dispenser” out of concern that it would “infring[e] upon the market niche legislatively carved out for the distributor”).

⁵¹ What is and is not a legally cognizable harm is not a function of analogy, but is a value judgment made prior to the analogy. Analogical reasoning has been criticized because the assertion of an analogy can mask underlying assumptions about what are or are not relevant facts or values. *See* Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* 97 (2009); Westen, *supra* note 4.

treating like cases alike,⁵² we still need to know if there are other legally relevant values that a lesser power may implicate. There are many: the justification for exercising the power, the procedure by which the power is exercised, the motivation for exercising the power, courts' competency to draw certain distinctions, the benefits of having rules, adherence to a higher authority, and *stare decisis*.

Justification

The most obvious additional consideration is the need to exercise the power. This is simply the counterbalance to considering the need to restrict exercises of the power that we have been focusing on. Cost-benefit analysis makes the world go round, not just cost analysis. This is why constitutional balancing tests are pervasive; and much of constitutional law consists of figuring out how concerned we are about a certain type of harm, and applying the appropriate level of scrutiny by inquiring into the sufficiency of the government's justification.⁵³

Procedure

The procedure by which the power is exercised is another obvious consideration.⁵⁴ The Third through Seventh Amendments all contain procedural protections against the exercise of power.⁵⁵ By and large, when these provisions are at

⁵² See *Franklin Capital Corp.*, 546 U.S. at 139 (describing the principle that “like cases should be treated alike” as a “basic principle of justice”).

⁵³ What level of scrutiny we apply to a given exercise of power is not necessarily just a function of the harm that its exercise might cause, but also potentially a function of how much we trust the government's motive. As discussed *infra* § III (subsection on motivation), the consideration of motives goes largely to the question of whether we trust the government to properly weigh justification against harm.

⁵⁴ One might be able to conceive of procedural restrictions as changing the nature of the power exercised in the first place. The proper method of analysis, then, would be to compare the relative harm they caused, as discussed *supra*, in § II.A.

⁵⁵ U.S. Const. amend. III (only allowing quartering of soldiers in houses if the manner was first prescribed by law); U.S. Const. amend. IV (implicitly requiring warrants for many searches and seizures and specifying circumstances for their issuance); U.S. Const. amend. V (requiring a

issue there is no question about whether a certain tangible outcome would itself be permissible, but merely whether that outcome was reached in a specified manner. For example, the government has the power to execute people, but only if it successfully jumps through a large number of procedural hoops.

Less obviously, but perhaps more interestingly, we might also have procedural protections that are much less tangible than those laid out in Amendments Three through Seven. For politically accountable bodies the political process itself might be viewed as an important procedural safeguard, perhaps even obviating the need for other kinds of limitations on power. The Court took just that approach in *Garcia v. San Antonio Metropolitan Transit Authority*, reasoning that state sovereign interests “are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.”⁵⁶ While the wisdom of this approach is a topic of academic debate,⁵⁷ supporters and detractors alike might feel more comfortable with the use of such “process-based federalism” the more politically salient the issue at hand is.⁵⁸ And for both accountable and unaccountable entities, the

Grand Jury indictment before proceeding to criminal trials, requiring due process, prohibiting double jeopardy, prohibiting forced self-incrimination); U.S. Const. amend. VI (right to jury trial with lots of accompanying protections); U.S. Const. amend. VII (right to civil trial by jury, and limitation on reviewing jury findings).

⁵⁶ 469 U.S. 528, 551 (1985). However, subsequent decisions by the Court “obviously rejects this view that political safeguards of federalism are adequate. . . . [and the Court did so without even acknowledging] that it was rejecting the Court’s express conclusion in *Garcia*.” Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1777-78 (2006) (referring specifically to *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States* 521 U.S. 898 (1997); and *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).).

⁵⁷ Compare Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349 (2001), with Saikrishna B. Prakash and John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001).

⁵⁸ There is some anecdotal evidence that the Court takes saliency into consideration in deciding what cases to hear, although not necessarily because it trusts saliency as a safeguard. See Frederick Schauer, *Is It Important To Be Important? Evaluating the Supreme Court’s Selection*

severity of an outcome may itself be a protection insofar as it weighs on the conscience of a decision maker.

For a discussion of the circumstances in which less tangible protections might be superior to more traditional methods of restrictions on power, *see infra* § V.C. For a good example of how saliency might aid the political system in enforcing federalism, and for further discussion of the saliency issue, *see infra* § VI.D., discussing the debate over protective jurisdiction.

Motivation

Two otherwise identical actions may be motivated by different purposes. This difference in motivation should and does matter to courts.⁵⁹ While we might generally entrust an entity like a legislature to weigh things like costs and benefits, because we view them as more competent than courts at that task,⁶⁰ giving deference to their decision-making may not seem particularly justified if we have strong evidence that they did not weigh costs and benefits in a permissible way in a given case. A particularly sharp example of willingness (at least theoretically) to disregard the decision of an entity entrusted with wide discretion because of improper motivation is the possibility of a concededly guilty criminal defendant successfully defending his prosecution on the grounds that he was only prosecuted because of his race.⁶¹

Process, 119 YALE L.J. ONLINE 77 (2009), available at <http://yalelawjournal.org/2009/12/09/schauer.html>.

⁵⁹ *See, e.g., Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964) (holding the decision of a school board to close their schools, rather than integrate post-*Brown*, to be unconstitutional on the basis of its motivation).

⁶⁰ *See, e.g., Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (“We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.”).

⁶¹ *See United States v. Armstrong*, 517 U.S. 456 (1996) (discussing so-called “selective prosecution”).

Competency

Although two acts may be similarly harmful to values that a rule or doctrine is concerned with, courts may only realistically be able to prevent one of them. Even where we might be willing to deal with the costs of case-by-case determinations,⁶² there are questions that courts are essentially incapable of answering because they present impossible line-drawing problems. For example, the Dormant Commerce Clause prevents protectionist taxes,⁶³ yet it allows a virtually identical protectionist result to be achieved by discriminatory subsidies.⁶⁴ The reason is that just about every expenditure a state government might make in some way subsidizes businesses in the state,⁶⁵ and it would be an absolute nightmare for courts to try to choose which expenditures were constitutional and which were not. So courts just do not touch the issue at all. This is important for those interested in the greater powers argument to understand; not only because it answers the specific question of why a state can provide a massive protectionist subsidy, but not a small protectionist tax. But also, more generally, it

⁶² See *infra* § III (subsection on rules).

⁶³ See, e.g., *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (invalidating a Hawaii tax on all alcoholic beverages except for certain ones that were only made from a shrub indigenous to Hawaii).

⁶⁴ *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988) (“Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition; discriminatory taxation of out-of-state manufacturers does.”). Cf. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199 n. 15 (1994) (“We have never squarely confronted the constitutionality of subsidies, and we need not do so now.”).

⁶⁵ See *Zobel v. Williams*, 457 U.S. 55, 67-68 (1982) (Brennan, J. concurring) (“A State clearly may undertake to enhance the advantages of industry, economy, and resources that make it a desirable place in which to live. In addition, a State may make residence within its boundaries more attractive by offering direct benefits to its citizens in the form of public services, lower taxes than other States offer, or direct distributions of its munificence. Through these means, one State may attract citizens of other States to join the numbers of its citizenry. That is a healthy form of rivalry . . .”).

illustrates the fact that sometimes the best we can do is offer a solution to part of a problem.⁶⁶

Rules

Even if there are some situations in which we might be able to get better results by making case-by-case inquiries on a matter, there are plenty of reasons to choose a rule instead. Rules provide predictability, are easier to apply, and generate consistency by reducing discretion. These can be serious benefits and the widespread use of bright-line rules instead of standards (or as a part of a standard) in the legal system should therefore be unsurprising. The relatively small benefits of case-by-case adjudication of Congress's motivations, in comparison to these benefits of a simple rule, is probably the most persuasive policy explanation for any lack of Congress's ability to freely confer protective jurisdiction on the lower federal courts even though it could achieve the same end if they created substantive federal law.⁶⁷

Higher Authorities

The legal system is hierarchical. The Constitution, statutes, regulations, court opinions, etc. can all bind courts. As long as the would-be binding authority is valid, it is generally not the prerogative of courts to take a different route just because they disagree with the policy, even if they are objectively correct. Courts should therefore not imply the existence of lesser powers if that possibility is clearly foreclosed by a higher authority. However, as we will see, in some situations the reasoning of the greater-

⁶⁶ As discussed, *infra* notes 70-72 and accompanying text, it is possible to infer from an entity's unwillingness to solve more than part of a problem that there is not much of a problem in the first place. But as the Court's Dormant Commerce Clause jurisprudence illustrates: (i) there may be perfectly good reasons for merely solving part of a serious problem; and (ii) the Court itself has legitimized the approach by its own doctrine.

⁶⁷ See *infra*, § VI.D.

power-includes-the-lesser-power argument is so persuasive that courts forget their place in the legal system. Section 7 of the Federal Arbitration Act, discussed in section VI.C. *infra*, is a particularly clear example.

Stare Decisis

Not only should courts sometimes adhere to decisions of other bodies just because they are the decisions of those bodies, courts should also sometimes adhere to their own prior decisions, even if they could go back in time they would not make the same choice. This is the principle of *stare decisis*.⁶⁸ There are a lot of reasons a court might want to do this, including: (i) to save on costs by not having to decide an issue on the merits again; (ii) to increase predictability; (iii) to constrain judicial discretion; (iv) to treat like-situated parties alike; and (v) to preserve the public's perception of courts.⁶⁹ That a court has previously determined that a greater power does not include a lesser power may be a reason for them to stand by that decision when they otherwise might not. A court might also think that an earlier decision allowing a greater power was erroneous, but respect it as a matter of *stare decisis*—what to do here regarding a lesser power is probably a difficult case-by-case issue, but courts should remember that perverse incentives created by rules are the same regardless of *why* the rules are what they are.

* * *

Pertaining to motive and justification, it is possible that the mere exercise of a lesser power is itself evidence of an impermissible motive or an insufficient justification. Take the example of a city having a policy of strip-searching all female inmates upon

⁶⁸ *Stare decisis et non quieta movere* means “to stand by things decided, and not to disturb settled points.” *Black’s Law Dictionary* 1537 (9th ed. 2009).

⁶⁹ Caleb Nelson, *Statutory Interpretation* 424-45 (2011).

admission to jail, but not all male inmates.⁷⁰ Aside from an Equal Protection challenge there is an issue of the constitutionality of such searches under the Fourth Amendment. Assuming that a court would otherwise be willing to defer to the government's judgment that strip searches upon entry are sufficiently justified absent individualized suspicion,⁷¹ a policy to only search women is powerful evidence that such strip searches are not necessary for things like safety and order. By only seeking to solve part of a "problem," on these facts, one could reasonably infer that there is not really much of a problem at all.⁷²

IV. Practically Unavailable Greater Powers

Some commentators have argued that a problem with the greater powers argument is that in some cases the greater power is not really practically available to be exercised.⁷³ Therefore it does not make sense to premise the exercise of a lesser power (that may feasibly be exercised) on a greater power that may not similarly feasibly be exercised. I understand this to be a procedural point in the sense that the difference that justifies distinguishing the greater power from the lesser power is that the greater power has to jump through certain procedural hoops that the lesser power does not. The more

⁷⁰ See, e.g., *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983). It's not clear that this is actually a lesser power, because we may view the discrimination itself as harmful.

⁷¹ The Supreme Court recently did just that in *Florence v. Board of Chosen Freeholders of County of Burlington*, 566 U.S. ___ (2012).

⁷² The Court has squarely rejected this approach when it is applying rational basis scrutiny. See *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) ("Legislatures may implement their program step by step . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations."). This makes sense since heightened scrutiny cares about the extent of the problem, whereas just about any problem will survive a rational basis test. See also *supra* note 66 (noting that the Court itself sometimes only seeks to solve parts of problems).

⁷³ See, e.g., Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in A Positive State*, 132 U. PA. L. REV. 1293, 1313 (1984). ("Justice Holmes's greater and lesser analogy has a more fundamental failing. Part of the argument's charm is its implicit assertion that the government is not aggrandizing its power. . . . The difficulty with this position is its assumption that the government could have, in fact, wielded the greater power.").

harmful greater power may weigh more heavily on the conscience of the power-wielding entity than a lesser power. And if that entity is accountable to others, either the greater harm and/or saliency of a greater power may increase pressure on the entity not to exercise it.⁷⁴ As some other types of procedures tend to do, we may well expect this fact to limit the exercise of a greater power to only situations of extraordinary justification—a bar which may never be met.

The rebuttal that is generally made to the practically unavailable greater powers argument, at least from a constitutional standpoint, is that it is irrelevant because the fact that a power is theoretically available⁷⁵ speaks to the values embodied in the Constitution.⁷⁶ I understand this to be questioning whether or not a cognizable harm exists at all. If the greater power does not present a cognizable harm, it is hard to imagine how a truly lesser power would. And if the lesser power does not cause any harm we are concerned with, then it should be allowed to be exercised notwithstanding any differences in procedure between the two powers.

So who is right? The answer is both and neither. Both offer explanations of why we might allow a greater power: (i) it simply does not cause any legally cognizable harm; or (ii) it is harmful, but we have restrictions on it to ensure that if it is exercised it is for a sufficient reason. Either explanation on its own would explain the same state of affairs, but without more information, we have no way of determining which inference is correct.

⁷⁴ Cf. Michael Herz, *Justice Byron White and the Argument That the Greater Includes the Lesser*, 1994 B.Y.U. L. Rev. 227, 241 (1994) (“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.”).

⁷⁵ Meaning that a court would allow the power to be exercised, if it came to it.

⁷⁶ See Herz, *supra* note 74, at 242 (“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.”).

The problem is actually even thornier. How we determine what is and is not a constitutionally cognizable harm is not exclusively about harm. For example, the Court has unanimously held that “a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment.”⁷⁷ But the explanation for this cannot be that there are no First Amendment interests at stake, for surely throwing eggs at a Congressman running for President during a campaign speech⁷⁸ effectively communicates an important message. Rather, the explanation for this rule must be that the government’s justification for punishing something that is in fact expressive conduct is always, or almost always, going to outweigh the harms from prohibiting it.⁷⁹

Undoubtedly violence is a very tangible and important problem and preventing it is an important justification that can relatively easily be weighed against the First Amendment harm here.⁸⁰ Further, it is doubtful that anybody questions whether the Supreme Court is in a position to do this weighing effectively. But imagine that on some other issue the Court is not in a good position to evaluate the justification offered by the government. The Court may want to establish rules that force the government to do the weighing itself. It may want to ensure that the government cause additional harm, and be satisfied that if the government is willing to cause all of that additional harm to achieve an end that intrudes on some constitutional value, that there is likely a sufficient enough

⁷⁷ *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993). See also *U.S. v. O’Brien*, 391 U.S. 367 (1968) (“We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”).

⁷⁸ See *United States v. Calderon*, 655 F.2d 1037 (10th Cir. 1981) (applying *O’Brien*).

⁷⁹ A cynic might put forward another possible reason: that the Court does not want to have to do any balancing because the result of the balancing would pretty clearly come out the other way.

⁸⁰ This weighing problem may be far more difficult in other First Amendment contexts like subversive advocacy. At least two things make the problem far easier in the context of violence itself: (1) the immediacy and certainty of the harm, and (2) the availability of other non-violent routes to express ones ideas.

justification such that courts should not second-guess the government's choice. This rationale is probably a motivating factor in the Court's current commercial speech jurisprudence, discussed in section VI.E. *infra*, which leaves what would be protected advertising categorically unprotected if the government is willing to make the advertised product or service illegal. That is to say, we might understand the Court's no-protection rule not as saying such speech has no value because it is illegal, but rather that it does have important First Amendment value to it; but that it is subjugated to other governmental interests because the government went through the political process of making it illegal, signaling the importance of those interests.

V. Using Power to Restrict Power

A. A True Category of Greater Powers

Envision two powers: one can be relatively freely exercised, but the other power can only be exercised if both powers are exercised together. In this setup, we have an exercise of power (the one whose exercise is conditioned on the exercise of the other) that is viewed as potentially harmful, such that the legal system may want to restrict it. But rather than restricting its exercise by requiring a showing of sufficient justification, or that certain explicit procedural requirements be met, we merely require the other perfectly permissible power to also be exercised.

Here, the power to exercise both powers together is going to be greater than either of the powers alone, unless something about the exercise of the powers together negates some of the harm that would be caused by just one of the powers. The plainest example of this is envisioning as separate powers: the power to provide education for whites, and the power to provide education for blacks. The harm of racial discrimination that would

inhere in the exercise of either power alone evaporates if both powers are exercised—and thus we cannot conclude that the power to do both is greater than the power to do just one. A more interesting example is one of the most famous uses of the greater powers argument, in *Commonwealth v. Davis*.⁸¹ In *Davis*, Justice Holmes argued that because the City of Boston had the “greater” power to exclude people from entering Boston Common (and thus also prevent them from speaking on it) it had the lesser power to limit speech there.⁸² A problem with the argument is⁸³ that as soon as you exclude the public from the land, the First Amendment interests in ensuring one’s ability to access the masses largely dries up,⁸⁴ thus making the “lesser” power more harmful to First Amendment interests.⁸⁵

⁸¹ 162 Mass. 510 (1895) (Holmes, J.), *aff’d sub nom. Davis v. Massachusetts*, 167 U.S. 43 (1897). Justice Holmes was probably the argument’s most prominent advocate. See, e.g., Fudenberg, *supra* note 22, at 377.

⁸² *Id.* at 511. (“the 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 step of limiting the public use to certain purposes.”).

⁸³ There is another problem with the argument, although it is not germane to this section of the paper. The city’s only possible motivation to restrict speech in the park is because of the effects of the speech itself (a motivation that should receive careful judicial scrutiny). However if the city is closing down the park entirely, there are other possible motivations—cost, crime, alternative use for the space, etc. A court hesitant to inquire into motivation could defensibly choose to allow the “greater” power, but not the “lesser” power (because we already have a good general sense of the motivation for the “lesser” power).

⁸⁴ In one of its most famous decisions the Court emphasized the need to be able to exercise First Amendment rights in the locations where they could have a meaningful impact, and Justice Fortas colorfully stated that “[f]reedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969). As long as there are other public places to gather, presumably more people will frequent them after the closing of one public place; meaning that the loss of access to the public from closing the Boston Common is less than the loss of access to the public from just prohibiting speech there.

⁸⁵ *Cf. Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002) (Rehnquist, J.) (quoting *Renne v. Geary*, 501 U. S. 312, 349 (1991) (Marshall, J., dissenting)) (“The greater power to dispense with [judicial] elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.”).

We now have a conception of greater and lesser powers that is doing real work rather than just functioning as an ex post label attached to (and perhaps masking) subjective value judgments. Of course what this paper has deemed the “classic formulation” of the greater powers argument—that an entity which possesses the “greater” power of discretion to allow something in the first place, has the “lesser” power to impose any conditions it wants—also does real analytical work, but is hugely divorced from concerns about harm flowing from the exercise of powers and thus allows for a virtually infinite number of *reductio ad absurdum* arguments.⁸⁶ But here the categorization of a power as greater is entirely rooted in concerns about harm. As a basic matter of logic/math, if one power causes some amount of harm, and we add to it another power that does not reduce that harm, we are left with at least the same amount of harm when the powers are exercised together.

B. The Equal Treatment Objection and the Problem of Perverse Incentives

While in a sense the greater power is allowed to be exercised while the lesser power is not, in another sense the lesser power, since it is literally part of the greater power, can be exercised on identical terms to the greater power. That is, there is nothing that has to happen for the lesser power to be exercised that does not also have to happen for the greater power to be exercised. While section III, *supra*, discussed a number of reasons why we might disallow a lesser power while still allowing a greater power, the idea that we needed a reason to justify this state of affairs was based on the premise that we were making it more difficult to exercise the lesser power than to exercise the greater power. But in these situations that is not the case; they are equally difficult to exercise.

⁸⁶ See *supra* § II.B.

As a general matter it cannot be the case that just because we have two powers, one more harmful than the other (i.e., greater and lesser powers), that it is somehow improper for them both to be able to be exercised just as easily. It would be completely inadministrable to have a system that required a power to become incrementally more difficult to exercise, in perfect harmony with the incremental harm the power might cause.⁸⁷ If the legal system does not and cannot insist on perfect harmony between restrictions on power and the harms that flow from power, then one might argue that all I have identified here is that we are treating equally two different exercises of power that there is no legally cognizable reason to treat differently. Undoubtedly, that would be a cause for celebration.⁸⁸

However, just because there might not be a general problem in allowing lesser powers to be exercised on the same terms as greater powers, we should recognize that we may be creating a perverse incentive. If the additional exercise of power that must be undertaken in order for the lesser power to be allowed adds additional harm, then we might be forcing the power-wielding entity to cause more harm than both it and the legal system would prefer. While perverse incentives are commonplace, they should exist only out of necessity. We should never create a perverse incentive if there is another way of accomplishing the same end without one.

If the reason we allow the greater power but not the lesser power alone is not because of any reason identified in section III, *supra*, then why have this distinction?

The answer surely must be that we are merely creating an additional obstacle to the

⁸⁷ Although, if we are restricting power by relying on an entity being held accountable by another group, or by their own conscience, perhaps harm would correlate rather well with difficulty of exercise in many circumstances.

⁸⁸ Not only because our legal rules would be functioning as they should, but because this paper would be ending much sooner.

implementation of the lesser power in the hope that it will be exercised less frequently. But one cannot justify a restriction placed on a harmful exercise of power merely because that restriction reduces the power's exercise (as virtually any restriction would). Our goal in analyzing restrictions on power should be the same as our goal in resolving any other legal issue: find the best possible outcome given all the relevant values of the legal system. That is to say, the proper baseline for comparing the appropriateness of a restriction is not no restriction but the entire set of other possible restrictions.

C. Optimizing Restrictions on Power

There are three dominant paradigms of restrictions on power, and they should structure this analysis: (1) an absolute ban on its exercise; (2) allow its exercise only after certain procedures have been complied with; and (3) requiring a showing of sufficient justification to allow its exercise.⁸⁹ What unique benefits—ones that cannot be replicated through more traditional restrictions on power (which do not tend to create similar perverse incentives)—might there be to conditioning an exercise of power on another exercise of power? Three possibilities are: (i) extraction of additional evidence of justification and/or motive, (ii) increasing the saliency of the exercise of power, and (iii) benefitting from the ease of clear rules.

This setup might be able to extract otherwise potentially undiscoverable evidence. Perhaps an adjudicator will not be in a good position to discern the extent of the justification for exercising the power, and we do not trust the entity exercising the power

⁸⁹ Generally procedural requirements like trials and hearings are merely means to an end to make sure that there are sufficient justifications. Relatedly, as with notice and comment periods in administrative law, their purpose might be to make sure that the decision-maker is merely aware of as much information as possible. Also, there is evidence that people who are adversely affected by a decision feel better about it if they had a chance to be heard during the decisionmaking process. *See, e.g.,* Rebecca Hollander-Blumoff, *Just Negotiation*, 88 WASH. U. L. REV. 381, 386-391 (2010).

to be honest. By forcing the power-wielding entity to commit to other consequences as well, we may be able to more reliably measure how important they truly think the justification is. And so long as that entity is in a better position than an adjudicator to make that determination, we may well get better results. Similarly, if we do not trust the motivation of an entity exercising power, and an adjudicator is not in a good position to evaluate that entity's motivation, we may be comforted if that entity has to take additional action that undercuts a potentially impermissible motivation.

Relatedly, perhaps we are not as concerned with getting an honest assessment from the power-wielding entity but rather we are concerned with getting an accurate assessment from a group that the entity is accountable to. By forcing the entity to do something else that will make its exercise of power more salient, we may be able to increase the likelihood that the group responsible for holding the entity accountable will in fact hold it accountable in a given case.

Even if we have an adjudicator with access to intelligible evidence, we may just want a rule to avoid the expenses and uncertainty that come with individualized determinations that might have to be made every time a power is exercised. Here we do not think that the mandatory exercise of an additional power is strictly better from an evidentiary standpoint than individualized fact-finding, rather we think it is a slightly inferior substitute, but one that comes with significant benefits in other areas.

VI. Evaluating Real-World Distinctions Between Greater and Lesser Powers

The basic framework sketched out in this paper should proceed in up to three steps. First, determining if we do in fact have greater and lesser powers based on the

relative harms caused by the exercises of power.⁹⁰ Second, even if we do have greater and lesser powers, determining if there is a good reason, unrelated to the harms they cause, to distinguish between their exercises.⁹¹ Next, recognizing that in some cases where a greater power literally includes a lesser power—i.e., whenever the greater power is exercised the lesser power is also exercised—although we do not need a reason to distinguish between the exercises of power, that we may be creating a perverse incentive. And if we can achieve the same ends without creating that perverse incentive, we should. The third step is, in those cases, to determine if there is another procedural mechanism that could accomplish a similar goal without the perverse incentive (and if not, if the benefits are worth the cost imposed by the perverse incentive).

As with many other legal and policy questions there often are not clear answers; but we are likely to reach better conclusions if we more fully understand the nature of the problem before us. The examples that follow are rather disparate and the underlying policy questions they present often bear no relationship to each other. The commonality is merely that they each present situations in which an arguably lesser power is not (or might not be) permitted to be exercised while a greater power is. They are meant to illustrate how the analytical framework sketched out in this paper can be applied to a variety of circumstances—what questions should be asked, what the stakes are, and at the end of the day how plausible it is that these regimes are optimal. The first three examples (budget, robbery, and police harassment) are situations where it is more difficult to conceive of other viable restrictions on the lesser power; while the final three examples (arbitration, protective jurisdiction, and commercial speech) are situations where there is

⁹⁰ *See infra*, § II.

⁹¹ *See infra*, § III.

a ready-made adjudicative process which is capable of enforcing a whole variety of other restrictions on the lesser power. The latter group generally presents more of a challenge to those opposing the greater powers argument, because there is fiercer competition for the best possible way to restrict power.

A. The Budget Control Act of 2011 and The Street Robbery

After the infamous debt-ceiling brinksmanship during the summer of 2011, which almost led the federal government to stop making payments on its debt, Congress passed the Budget Control Act of 2011⁹² at virtually the last possible moment. Unable to come to much real agreement about how to regain control over the nation's finances, the Act created the Joint Select Committee on Deficit Reduction and tasked it with the goal of achieving \$1.5 trillion in deficit reduction.⁹³ In an attempt to avoid constitutional problems,⁹⁴ the Committee was merely to make a recommendation to the full Congress,⁹⁵ which then, to avoid more political debate, was to take an up-or-down vote on before Christmas.⁹⁶ The important part, for our purposes, is that the Act contained a trigger that made serious defense and discretionary spending cuts if the process set out in the Act failed to produce the requisite deficit reduction by January of 2012.⁹⁷

The defense cuts were viewed as particularly unpopular among Republicans, and the discretionary spending cuts without new revenue via increased taxation were viewed as particularly unpopular among Democrats. The hope was that the results brought about

⁹² Pub. L. No. 112-25, 125 Stat. 240 (Aug. 2, 2011) (“BCA”), codified at various U.S.C. sections.

⁹³ BCA Title IV.

⁹⁴ See *INS v. Chadha*, 462 U.S. 919 (1983) (requiring exercises of legislative power to go through bicameralism and presentment).

⁹⁵ BCA § 401(a)(3)(A).

⁹⁶ BCA §§ 402(d); 402(b)(4); 402(c)(5).

⁹⁷ BCA § 302.

by the trigger would be viewed as sufficiently harmful by a strong majority of Congress, such that they would be forced to accept any reasonable proposal offered by the Joint Committee. This setup, from a practical standpoint, has much in common with that described, *infra* in § V.A. We have a harmful power (the power to reject the Committee’s proposal) that can only be exercised if Congress also decides it is willing to accept additional harm from the triggered cuts.⁹⁸

* * *

Imagine that while walking down an empty street, someone comes up to you in a threatening manner and asks for your wallet. Although a little scared, you look the would-be robber up and down and think that if it came to fisticuffs you would be comfortable taking your chances. So you refuse to turn over your wallet and hope that your support for the Brady Act is not about to increase dramatically. You have likely just set up a mini-regime in which the greater power (to threaten you with a weapon, or worse, and rob you) does not include the lesser power (to just threaten and rob you).

* * *

Both Congress and the robbery victim are counting on the fact that they can achieve the best possible outcome (having the assailant walk away, and having Congress come to a reasonable bipartisan compromise) significantly more often⁹⁹ if they remove the option for an entity to cause an intermediate harm alone (the lesser power) and only

⁹⁸ I avoid using the terms greater and lesser here, because this is one such situation where the additional harm (unpopular spending cuts) may well undercut some the harm sought to be avoided in the first place (the baseline of a high and growing deficit). But the entire scheme is undoubtedly based on the assumption that the cuts brought about by the trigger are worse (at least politically) than doing nothing—after all, it was supposed to coax Congress into acting after the baseline harm of doing nothing had not been able to force Congressional action.

⁹⁹ What is a sufficient amount will depend on the severity of the respective harms and the risk-preferences of whoever is setting up the regime.

allow that entity to cause a more severe harm (the greater power). By shifting the choice from bad to worse, the regime-maker believes they can influence future behavior in a positive fashion. While certainly people respond to incentives, if the initial tangible harm is being suffered by someone other than the entity making the choice about which harm to impose, we would do well to question whether the decision maker actually faces a dissuasive incentive. If the decision maker does not, chances are an avoidable perverse incentive has been created for no good reason.

Both Congress and the assailant have two reasons they may choose not to exercise a greater power although they would have chosen to exercise a lesser power. First of all, they may be held accountable for choosing to cause more harm—either by angrier constituents or by increased criminal penalties. Secondly, they may feel internal moral pressure not to inflict more harm.¹⁰⁰ It is hard to know the wisdom of either setup, but there are rational arguments for both of them.

But notice in both these situations it is unclear what other more effective mechanisms Congress or the robbery victim might employ to minimize the harm caused. Surely the robbery victim would rather call 9-1-1 if it was a realistic option, and perhaps Democrats and Republicans would like to be able to amicably negotiate a secret debt-deal while avoiding intense pressure from the extremes of their parties. If either of those options were available, we would probably think it insane for either of them to take the “I dare you” approach of trying to restrict harm with even more harm. And even in the

¹⁰⁰ Additionally, the assailant may be unarmed, and thus unable to exercise the greater power at all.

absence of an alternative option (other than doing nothing), we still might question the wisdom of such an approach.¹⁰¹

B. Harassing Your Neighbors with Anonymous Reports to the Police

The Supreme Court's decision in *Florida v. J.L.*¹⁰² could be understood in similar "I dare you" terms. The Court held that a mere "anonymous tip that a person is carrying a gun is, without more, [in]sufficient to justify a police officer's stop and frisk of that person."¹⁰³ The Court explained that a contrary holding would have "enable[d] any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun."¹⁰⁴ However, that explanation is insufficient given the Court's qualification that its holding did not extend to "a report of a person carrying a bomb."¹⁰⁵ Presumably the harassment an innocent person would be subjected to as a result of the police suspecting them of having a bomb would tend to be greater than the harassment they would be subjected to if the police merely suspected them of having a firearm.

Why should we all possess the greater power to harass with false reports of bombs, but not the lesser power to harass with false reports of firearms? As long as some

¹⁰¹ Indeed, the Joint Committee failed to reach a compromise, with stock prices dropping significantly in anticipation of the announced failure. President Barack Obama quickly made it clear that he would veto any attempt by Congress to repeal the automatically triggered cuts—thus continuing to force Congress to choose between the extremes of abject failure (the greater harm) and success ("no" harm), and not allow them to reach some other sort of compromise to avoid the harm of the triggered cuts (the lesser harm). See Catherine Dodge and Kathleen Hunter, *U.S. Supercommittee Fails to Reach Agreement as Across-the-Board Cuts Loom*, Bloomberg News (Nov. 21, 2011), available at <http://www.bloomberg.com/news/2011-11-21/supercommittee-fails-to-reach-agreement-on-1-2-trillion-deficit-reduction.html>.

¹⁰² 529 U.S. 266 (2000).

¹⁰³ *Id.* at 268 (applying *Terry v. Ohio*, 392 U.S. 1 (1968)).

¹⁰⁴ *Id.* at 272.

¹⁰⁵ *Id.* at 273-74.

people are encouraged by the Court's creation of a perverse incentive to report a bomb rather than a firearm,¹⁰⁶ there is only one logically defensible basis for the Court's holding: that some people who would be willing to make a false report of a firearm would *not* be willing to make a similar report of a bomb. That is, they would self-police and decline the dare, either because the false report of a bomb would weigh more heavily on their conscience, or because they fear more in-depth investigation and/or punishment. But even if there are such people, for the Court's holding to be justified it must further be the case that the benefit of fewer total false reports would outweigh the harm caused by an increase in the number of false reports of bombs.

C. Arbitrators' Power to Compel Non-Party Disclosure

Arbitrations are valued in large part because they are thought to be more expeditious than formal litigation.¹⁰⁷ One such gain is limited discovery.¹⁰⁸ Section 7 of the Federal Arbitration Act ("FAA") addresses arbitrators' power to order discovery. It provides that an arbitrator "may summon in writing any person to attend before [them] as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed as material evidence in the case."¹⁰⁹ This language has

¹⁰⁶ It doesn't appear from the Court's decision that it really considered what seems like a relatively obvious perverse incentive. Perhaps this is because the case was principally about the firearm issue, and the comment about bombs in *dicta* was a mere afterthought meant to provide comfort that its decision would not leave the police powerless in what could be a true emergency. So long as would-be harassers similarly view the choice to call in a false report of a bomb as entirely separate from the choice to call in a false report of a firearm, then the Court would be justified in not being concerned about creating a perverse incentive. It is, of course, also the case that there cannot be a perverse incentive if people are not aware of the relevant law—which sets up the somewhat bizarre scenario that the theoretically optimal regime here may be exactly what the Court did, coupled with public ignorance of its decision.

¹⁰⁷ See, e.g., Gabriel Herrmann, *Discovery Policy Under the Federal Arbitration Act*, 88 CORNELL L. REV. 779, 786 (2003).

¹⁰⁸ See, e.g., *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 276 (4th Cir. 1999).

¹⁰⁹ 9 U.S.C. § 7.

given rise to a split among courts over the power of an arbitrator to compel discovery of documents held by non-parties to the arbitration.¹¹⁰

While ordering non-parties to produce documents tends to reduce expediency, ordering non-parties to both produce documents and to attend a hearing is almost certainly even less expedient. Insofar as costly arbitrations are the harm we are concerned with, the latter power seems to clearly be greater.¹¹¹ But while section 7 clearly allows the greater power to order both document production and an appearance, it appears to disallow the lesser power of ordering such production without an appearance. The only justification that appears to have been offered for this state of affairs is that by making what would otherwise be a relatively modest expense (just getting documents) more expensive (by also requiring appearance at a hearing), parties will sometimes just opt for no expense (no documents).¹¹²

But, as introduced in section IV.B. *infra*, a restriction on a harmful exercise of power cannot be justified merely because it is somewhat successful at reducing the harm. We have to ask if it is the best possible way of reducing that harm. And when we have a

¹¹⁰ Generally, arbitrators are deemed to have the authority to order discovery from parties to the arbitration agreement, because arbitration agreements often agree to submit to the rules of an arbitration association. The most prominent such group, the American Arbitration Association, allows for broader discovery than the FAA. *See* AAA Commercial Rule 31(d). However this contractual agreement to discovery can only bind parties to the contract. *See, e.g., Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 406 (3d Cir. 2004).

¹¹¹ We might also be concerned with burdening non-parties, but this harm would also be more severe when a non-party is forced to produce documents *and* attend a hearing.

¹¹² *Hay Group*, 360 F.3d at 409 (Alito, J.) (“we believe that a reasonable argument can be made that a literal reading of Section 7 actually furthers arbitration’s goal of resolving disputes in a timely and cost efficient manner . . . because parties considering obtaining [a subpoena to produce documents at a hearing] will be forced to consider whether the documents are important enough to justify the time, money and effort that . . . will be required [for] an actual appearance before an arbitrator . . . Under a system of pre-hearing document production, by contrast, there is less incentive to limit the scope of discovery and more incentive to engage in fishing expeditions that undermine some of the advantages of the supposedly shorter and cheaper system of arbitration.”) (internal citations and quotations omitted).

perverse incentive, as we do here (to have a hearing when everybody would be satisfied without one), if we can get the same type of reduction in harm without the perverse incentive, we absolutely should. Here there is a very simple way to accomplish that. If the concern is that these documents should only be discoverable when they are likely to be important in light of the associated costs, just have a standard that says that.¹¹³ Not only does the far more modern Revised Uniform Arbitration Act (“RUAA”) take this approach,¹¹⁴ but the Fourth Circuit, allegedly applying § 7 of the FAA, also takes a standards-based approach.¹¹⁵

Some courts have even relied on a “lesser” or “implied” powers theory to allow arbitrators to compel discovery of any documents they want under § 7:

There is little dispute the arbitration panel . . . could require a witness . . . to appear before the panel and bring all of the documents to a hearing . . . however, this scenario seems quite fantastic and practically unreasonable . . . The power of the panel to compel production of documents from third-parties for the purposes of a hearing implicitly authorizes the lesser power to compel such documents for arbitration prior to a hearing.
Meadows Indem. Co. Ltd. v. Nutmeg Ins. Co., 157 F.R.D. 42, 44-45 (M.D. Tenn. 1994).

This reasoning has persuaded both the Sixth and Eighth Circuits.¹¹⁶ Of course, what the

¹¹³ While rules usually have at least some benefit over standards, it is not clear that there are any here. Section 7 says “may” respecting the arbitrators power, so we already essentially have a standard here, even if a vacuous one.

¹¹⁴ RUAA § 17(c) (2000) (“An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair expeditious, and cost effective.”).

¹¹⁵ *COMSAT Corp.*, 190 F.3d at 276 (“ . . . a party might, under unusual circumstances, petition the district court to compel pre-arbitration discovery upon a showing of special need or hardship.”).

¹¹⁶ *Am. Fed’n of Television & Radio Artists, AFL-CIO v. WJBK-TV (New World Communications of Detroit, Inc.)*, 164 F.3d 1004, 1009-10 (6th Cir. 1999); *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 870-71 (8th Cir. 2000). It is possible to read this language as only saying that if you are going to have a hearing *at which the non-party is present*, you can order the documents to be delivered prior to the hearing so that they can be reviewed in advance. However, the facts of the cases and the understandings by subsequent courts suggest that the non-party never needs to be present at a hearing.

court identifies as “fantastic and practically unreasonable” is precisely the greater burden upon which the statute conditions the lesser power, as a means to control it. Despite some hopelessly weak arguments to the contrary, the statute is unambiguous on this point,¹¹⁷ as the Second and Third Circuits have held—although both suggested that the statutory scheme could be largely sidestepped by ordering non-party attendance at a hearing, and then waiving the requirement of attendance after the documents had been produced.¹¹⁸

Section 7 of the FAA provides an example of a relatively simple scheme in which a lesser power is only allowed to be exercised if additional harm is also inflicted. It is a silly policy because a straightforward standard is superior, as it avoids creating a perverse incentive. Every court of appeals addressing this unambiguous statutory scheme refused to vindicate the logic behind it. The Fourth Circuit carved out a standards-based exception, the Sixth and Eighth Circuits obliterated the scheme by holding the lesser power could impliedly be exercised alone, and the Second and Third Circuits provided a road map for parties to avoid actually having a non-party attend a hearing, thereby eliminating the deterrent of higher cost. This example suggests two things: (i) federal judges are skeptical that this is generally a wise way to restrict power when there are

¹¹⁷ Some commentators have argued that the language “before them” does not necessarily mean in the physical presence of an arbitrator, but rather could connote a concept like jurisdiction. See Lowell Pearson, *The Case for Non-Party Discovery Under the Federal Arbitration Act*, DISP. RESOL. J., August-October 2004, at 46, 49. But “attend before them” and “bring with him” surely refers to physical presence.

¹¹⁸ *Hay Group*, 360 F.3d at 413 (Chertoff, J. concurring) (“Under section 7 of the Federal Arbitration Act, arbitrators have the power to compel a third-party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings. This gives the arbitration panel the effective ability to require delivery of documents from a third-party in advance, notwithstanding the limitations of section 7 of the FAA. In many instances, of course, the inconvenience of making such a personal appearance may well prompt the witness to deliver the documents and waive presence.”); *Life Receivables Trust v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210, 218 (2d Cir. 2008).

alternatives available; and (ii) judges sometimes forget what their job is. As mentioned in section III, *infra*, one reason a greater power should not include a lesser power is if an entity that has binding authority has said that it does not. In this case Congress has chosen an unwise policy, but unless it is unconstitutional it is the job of courts to uphold that policy.¹¹⁹ No means no.

D. Protective Jurisdiction

The federal judicial power extends to, *inter alia*, “all cases . . . arising under . . . the laws of the United States.”¹²⁰ Thus if Congress passes valid substantive law it can without question also choose to confer jurisdiction on the federal courts to hear disputes involving that law. When this happens the federal government aggrandizes both its legislative and judicial power at the expense of the states’. But suppose that a deferential Congress has no desire to pass substantive law. Rather it merely wants to provide a federal forum in an area where it could have written substantive law, in order to *protect*¹²¹

¹¹⁹ Some commentators have argued that this scheme is absurd, such that Congress could not have possibly intended it. Herrmann, *supra* note 107, at 798-800; Pearson, *supra* note 117, at 52. The Third Circuit properly explicitly rejected that argument. *Hay Group*, 360 F.3d at 409; see note 99, *supra*. We would need a lot more judges if it was suddenly the judiciary’s responsibility to invalidate every policy that aimed at a legitimate end just because there was a demonstrably better way to accomplish it. Further, as we will see, there are judicially crafted schemes that take the same form.

¹²⁰ U.S. Const. art. III, § 2.

¹²¹ “Protective jurisdiction” is the conferring of federal jurisdiction over a state-law claim, in the absence of a potential question of federal substantive law or diversity, with the goal of providing the protection the federal courts to some class of litigants. See, e.g., Carole E. Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. Rev. 542 (1983); Gil Seinfeld, *Article I, Article III, and the Limits of Enumeration*, 108 MICH. L. REV. 1389, 1443 (2010). The debate over the proprietary of protective jurisdiction extends well beyond the greater-includes-the-lesser argument focused on here, and includes a variety of other theories about when and why protective jurisdiction may be appropriate. See, e.g., Paul J. Mishkin, *The Federal “Question” in the District Courts*, 53 COLUM. L. REV. 157, 192-93, 196 (1953) (there is permissible protective jurisdiction for all cases in an area when there is an “articulated and active federal policy regulating [the] field.”); Seinfeld, *supra*, at 1426 (“I think it makes sense to regard congressional authority to set the subject matter jurisdiction of the federal courts as near plenary.”); Scott A. Rosenberg, *The Theory of Protective Jurisdiction*, 57 N.Y.U. L. Rev. 933,

litigants from adjudication in state court. Should the greater power (to pass substantive law and confer jurisdiction) include the lesser power (to merely confer jurisdiction)?

Before diving into that question, we need to be careful that we are actually dealing with greater and lesser powers. It appears that we are because the power to pass substantive law literally includes the power to confer jurisdiction—both of which take power from the states. Therefore, we will have greater and lesser powers unless exercising those two powers in tandem reduces the harm caused by conferring jurisdiction.¹²² So the relevant question is whether the harm to federalism that exists when federal courts hear cases is reduced when the underlying substantive law becomes federal law rather than state law.

Generally state courts are the ultimate authority on what state law is, such that even the United States Supreme Court almost always defers to their interpretations.¹²³ But federal courts routinely interpret and apply state law (and are bound by state court interpretations of their own law) when hearing diversity cases,¹²⁴ and when exercising supplemental jurisdiction over claims transactionally related to federal questions.¹²⁵ That

948-950 (discussed *infra* note 132, and accompanying text). Although the Supreme Court has discussed protective jurisdiction on numerous occasions, no majority opinion has ever ruled for or against it; and on at least a couple of occasions the Court has construed statutes to avoid having to address the issue. *Mesa v. California*, 489 U.S. 121, 137 (1989) (“We have, in the past, not found the need to adopt a theory of “protective jurisdiction” to support Art. III “arising under” jurisdiction, and we do not see any need for doing so here because we do not recognize any federal interests that are not protected by limiting removal to situations in which a federal defense is alleged.”); *Textile Workers Union of America v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957).

¹²² See *supra* § V.A.

¹²³ See, e.g., *Bush v. Gore*, 531 U.S. 98, 112 (2000) (“In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law. That practice reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns.”). But in some exceptional cases, the vindication of a federal right may require the Supreme Court to review a state court decision on state law. *Id.* at 112-13; *State of Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938).

¹²⁴ See *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

¹²⁵ See *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966).

federal courts often apply state law does not tell us that there is no constitutionally cognizable harm implicated,¹²⁶ but the diversity example does tell us that any such harm is probably not debilitating and was intended by the Framers to be subordinated to at least some protective justifications.¹²⁷

It is probably relatively safe to conclude that the power to create federal substantive law and confer jurisdiction is greater than the power merely to confer federal jurisdiction over state law claims. This is not the result of some kind of logical proof since federal courts hearing state law claims (as opposed to hearing the same type of claims, but claims now governed by federal law)¹²⁸ might cause some added degree of harm to federalism and state autonomy. However, any such harm is probably outweighed by the increased intrusion on state legislatures' power to pass substantive law.¹²⁹

¹²⁶ For example, surely when Congress exercises permissible Article I power, damage is done to federalism interests, but we tolerate it because we have deemed the justification to outweigh the harm to federalism. *See also supra* § IV (pointing out that the Court sometimes justifiably fashions rules that categorically allow constitutional values to be infringed upon if they are satisfied there is likely to be a sufficient justification in such cases).

¹²⁷ Although, perhaps the harm is much more severe if the federal jurisdiction is exclusive, because state courts will never get a chance to interpret their own law. *See, Rosenberg, supra* note 121, at 960 (overdramatizing this point by asserting that the process of state law evolution in state courts is “frozen when state rules are enforced by federal courts,” which is not true so long as state courts retain concurrent jurisdiction). It is worth nothing that federal courts deciding issues of state law that a state court would never be in a position to decide is not completely anomalous. For instance, 28 U.S.C. § 1738 requires all courts in the country (including federal courts) to give the same preclusive effect to state court decisions that the courts of that state would give them. The Court has held that this inquiry is still the proper one even in circumstances where a state court would never be able to answer this question, because the question could only properly arise in federal court. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985) (remanding and ordering lower federal courts to decide whether Illinois courts would preclude claims that were in the exclusive jurisdiction of the federal courts, on the basis of claim-splitting because a related claim had been brought in Illinois state court).

¹²⁸ Keep in mind that we are ignoring the harm that comes from just shifting the workload from state court to federal court, because that harm will happen in both situations—the focus should only be on the unique harm (if any) from federal rather than state courts interpreting state law.

¹²⁹ Seinfeld, *supra* note 121, at 1438 (“[We should assume] that the threat posed to state autonomy by the enactment of substantive federal law (and the concomitant displacement of state law) is greater than that posed by the establishment of federal jurisdiction over state-law

Assuming we do in fact have greater and lesser powers here, there are still at least three primary objections to premising protective jurisdiction on a greater-includes-the-lesser rationale: (i) the justification for exercising jurisdiction that is present when there is federal substantive law is not present (or less present) when state law provides the rules of decision; (ii) federalizing substantive law is more salient than just expanding federal jurisdiction, and this saliency is necessary to allow process-based federalism to work properly; and (iii) the text of the Constitution simply forecloses the possibility.

Justification

There are many justifications for why Congress might want federal courts to hear certain types of claims. While some of these undoubtedly only exist when the rule of decision is provided by federal law (uniform construction of federal law, development of a court with special expertise in an area of federal law, and development of federal common law in certain areas), others exist regardless of whose law governs (use of certain federal procedures, uniformity of procedure, and avoidance of bias in state courts).¹³⁰ In the words of one commentator, the former are “substance-based” justifications, and the latter “forum-based” justifications.¹³¹ The Constitution plainly contemplates both, and in the case of diversity it permits federal jurisdiction to be premised solely on forum-based justifications. But, the critical question is: when else, if ever, is a forum-based justification alone enough?

It has been suggested that if we are going to allow protective jurisdiction at all, we should solely evaluate the substantially of the forum-based interests, and ignore whether

claims.”). *See also* Vázquez, *supra* note 28 (“Conferring federal jurisdiction by displacing state law is more intrusive from a federalism perspective than conferring federal jurisdiction without displacing state law.”).

¹³⁰ Rosenberg, *supra* note 121, at 948-50.

¹³¹ *Id.*

Congress could legislate substantively in the area because in the absence of substantive legislation there are only forum-based interests.¹³² While not an unreasonable theory, it is not, on its face, fully responsive to the greater-includes-the-lesser argument. The potential relevance of whether Congress could substantively legislate is that Congress *can* legislate substantively when motivated entirely by forum-based justifications.¹³³ A more complete explanation is that theoretically Congress should not be able to do this, but that it is not worth policing and an acceptable over-inclusive aspect of the “arising under the laws of the United States” jurisdictional rule.

Perhaps rather than being concerned that Congress is pursuing an impermissible justification, we do not have a theoretical objection to such a justification but are merely concerned with its sufficiency. In other words, it is perfectly fine that Congress is motivated by forum-based interests when it creates federal substantive law and attaches federal jurisdiction, but we want to make sure those forum-based interests are substantial. However, since what makes a forum-based justification a forum-based justification is that it exists independently of whether there is state or federal substantive law, it is not clear what passing substantive law says about Congress’s forum-based justifications other than that they are willing to accept whatever consequences might accompany more substantive federal law—primarily a shift in the federal-state balance of power. This might provide some dissuasive effect,¹³⁴ but when restricting harm with more harm the important

¹³² *Id.* at 960-61.

¹³³ Granted, we might expect that once they legislate substantively, they might have some interest in substance-based justifications for jurisdiction; but they might not. Indeed, the very fact that Congress might attempt to provide protective jurisdiction suggests that they do not care much about substance-based justifications in such an instance.

¹³⁴ Although maybe not a ton because Congress is not in the best position to be concerned about expanding its *own* power.

question is not if it is at all effective, but whether there is a comparable way to restrict the harm without creating a perverse incentive.¹³⁵

Saliency

Perhaps you are a believer in the political safeguards of federalism, and think that the political process itself has the potential to impose restrictions on expansive federal power, such that courts need not engage in particularly difficult line-drawing.¹³⁶

However, courts may still have a role to play in ensuring that issues they punt to the political system are sufficiently salient such that process-based federalism actually has a realistic shot at working. Clear-statement rules that caution against preempting state law are often justified on those grounds.¹³⁷ Although the more harmful an act, the more salient it is likely to be, the saliency rationale is independent from the harm-based rationale just discussed because it is merely concerned about the extent of the understanding of the law. For example, one could imagine a law that is more salient although less harmful,¹³⁸ and one could also imagine people who do not care about the additional harm, but the additional harm ends up informing them about the initial harm.

¹³⁵ See *supra* § V.B-C.

¹³⁶ See *supra* § III (subsection on procedure).

¹³⁷ Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 302 (2000) (“clear-statement rules . . . [are presented] as a way to improve the legislative process—a way to create the conditions necessary for the political safeguards of federalism to work.”).

¹³⁸ *The Patient Protection and Affordable Care Act*, Pub. L. No. 114-148, 124 Stat. 119 (Mar. 23, 2010) (“PPACA”), appears to be such an example. Its individual mandate provisions require that if individuals over a certain income do not purchase qualifying health insurance, they will be assessed a fine collectible by the IRS. Congress could have constitutionally approached the issue of uninsured Americans in the same way it approached Medicare and Social Security Disability, by forcefully taking citizen’s money through taxation, and then spending it through a government run health insurance program. But instead, in enacting PPACA it took a less intrusive approach, which has managed to engender massive outcry precisely because the individual mandate is so much more salient. See also Prepared Statement of Walter Dellinger, Senate Judiciary Hearing on The Constitutionality of the Affordable Care Act (Feb. 2, 2011), available at <http://www.judiciary.senate.gov/pdf/11-02-02%20Dellinger%20Testimony.pdf>. The Court properly upheld the individual mandate by reference to Congress’s broad taxing power in

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Aside from these policy-type reasons to not allow the lesser power of just conferring jurisdiction on the federal courts, if the list of permissible uses of the federal judicial power is exhaustive¹³⁹ that should probably end the question of whether a use that is not on the list is permissible. Perhaps the greater powers argument should inform the decision of whether or not the list is exhaustive, but it should not override a conclusion of exhaustiveness.¹⁴⁰

E. Banning Non-Misleading Commercial Advertisements

“The government may ban . . . commercial speech related to illegal activity.”¹⁴¹ Such speech “is not protected by the First Amendment.”¹⁴² However, if the speech concerns lawful activity (and is also not misleading) the speech all of a sudden receives a lot of First Amendment protection. Ostensibly, the government must show that it has a substantial interest in regulating the speech, that the regulation directly advances that interest, and that the restriction is narrowly tailored.¹⁴³ While this sounds like intermediate scrutiny, the Supreme Court very recently suggested that it need not bother classifying speech as commercial or not because the same outcome would result “whether a special commercial speech inquiry or a stricter form of judicial scrutiny applied.”¹⁴⁴ So it appears that the Court may now think that commercial speech related to lawful activity is essentially per se protected against content-based restrictions by the First Amendment

National Federation of Independent Business v. Sebelius, 567 U.S. __ (2012).

¹³⁹ And it unquestionably is according to the Court. See *Seinfeld*, *supra* note 121.

¹⁴⁰ See *supra* § III (subsection on higher authorities).

¹⁴¹ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563-64 (1980) (citing *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 388 (1973)).

¹⁴² *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002).

¹⁴³ *Id.* (citing the infamous *Central Hudson*, 447 U.S. at 566, test, and applying it with some teeth).

¹⁴⁴ *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667 (2011).

as long as it is not misleading, and commercial speech related to illegal activity is per se unprotected by the First Amendment.

That is an awful lot of weight to place on whether or not a commercial activity is legal or not, particularly since states possess extraordinarily wide latitude to ban commercial activities,¹⁴⁵ only subject to the restriction that they cannot interfere with specific constitutional rights—surely a state could not freely ban contraceptives,¹⁴⁶ guns,¹⁴⁷ newspapers,¹⁴⁸ abortions,¹⁴⁹ etc. Along with that wide latitude to ban commercial activity comes apparently equally wide latitude to ban related commercial speech. So why should the power to ban commercial activity and related speech not include the power to merely ban the speech alone?

The Wrong “Greater” Power

In *Posadas v. Tourism Company of Puerto Rico*, a similar greater-power-includes-the-lesser-power rationale carried the day, and the Court upheld Puerto Rico’s limitation on gambling advertisements.¹⁵⁰ Chief Justice Rehnquist distinguished the facts of that case from two prior cases in which the Court had held that states could not ban advertisements for contraceptives¹⁵¹ or abortion clinics.¹⁵² He reasoned that:

¹⁴⁵ See Martin H. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 Vand. L. Rev. 1433, 1441 (1990) (“The government’s power to prohibit commercial activity is, for all practical purposes, plenary.”). See also *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938) (“regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”).

¹⁴⁶ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁴⁷ U.S. Const. amend. II.

¹⁴⁸ U.S. Const. amend. I.

¹⁴⁹ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁵⁰ *Posadas*, 478 U.S. at 345-46.

¹⁵¹ *Carey v. Population Services International*, 431 U. S. 678 (1977).

¹⁵² *Bigelow v. Virginia*, 421 U. S. 809 (1975).

In *Carey* and *Bigelow*, the underlying conduct that was the subject of the advertising restrictions was constitutionally protected and could not have been prohibited by the State. Here, on the other hand, the Puerto Rico Legislature surely could have prohibited casino gambling by the residents of Puerto Rico altogether. In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling, and *Carey* and *Bigelow* are hence inapposite. *Posadas v. Tourism Company of Puerto Rico*, 478 U.S. 328, 345-46 (1986). This reasoning received intense condemnation both by commentators¹⁵³ and by the Court in subsequent years, because it articulates that the mere power to ban a product is greater than the power to ban advertising for that product.¹⁵⁴

By and large this criticism is justified, at least by reference to First Amendment doctrine more broadly. We protect the right to disseminate videos of illegal animal cruelty,¹⁵⁵ the right to advocate illegal violence so long as it is not an “incitement to imminent lawless action,”¹⁵⁶ and the right to disseminate information that was illegally obtained by a third-party.¹⁵⁷ Thus it is clear that we do not always allow the legality of conduct to dictate the legality of related speech. However, that is precisely what the Court has done in the commercial speech context—the ability to restrict advertising turns

¹⁵³ Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at "The Greater Includes the Lesser"*, 55 Vand. L. Rev. 693, 703 (2002) (describing “the greater/lesser reasoning in *Posadas* [as] so widely, even fervently, condemned”). For an overwhelming list of scholarly authority against it, see *id.* at 697 n. 22.

¹⁵⁴ 44 *Liquormart*, 517 U.S. 484 at 511 (only 4 Justices signed on to this portion of Justice Stevens’ majority opinion) (“Contrary to the assumption made in *Posadas*, we think it quite clear that banning speech may sometimes prove far more intrusive than banning conduct. . . . we reject the assumption that words are less vital to freedom than actions, or that logic somehow proves that the power to prohibit an activity is necessarily “greater” than the power to suppress speech about it.”). No other Justice disputed this, and in spite of the massively fractured voting, Justice Stevens stated that “[a]s the *entire* Court apparently now agrees, the statements in the *Posadas* opinion on which Rhode Island relies are no longer persuasive.” *Id.* at 513 (emphasis added). See also *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 n.2 (1995) (opinion of Thomas, J. joined by 7 others) (Noting that the greater powers reasoning in *Posadas* was mentioned only after determining that the speech restriction passed the *Central Hudson* test, and in the instant case refusing to carve out an exception from the *Central Hudson* test based on its reasoning).

¹⁵⁵ *United States v. Stevens*, 130 S. Ct. 1577 (2010).

¹⁵⁶ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹⁵⁷ *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

almost exclusively on its legality. If we add that fact to the premise of Rehnquist's greater powers argument, the response that banning conduct does not mean you can ban speech is no longer relevant, because we already know that the speech can be banned if the conduct can be banned—the only question is, can it be banned without also banning the conduct.

* * *

There is an argument to be made that power to both ban an activity and related speech is not greater than the power to ban just the speech. Once an activity becomes illegal presumably it will take place less often. Since a primary reason for protecting commercial speech in the first place is that it allows dissemination of information about what is available,¹⁵⁸ once the availability of the referent of the information decreases, perhaps so should the First Amendment protection.¹⁵⁹ Of course some illegal commercial activities are rather widespread—gambling, illicit drug sales, prostitution, sales of counterfeit goods, etc.—and most illegal commercial activities probably at least occasionally take place. So even if you think that First Amendment protection of commercial activities should be based, at least in part, on the availability of the activity, that is not much of a defense to the rigidity of the current commercial speech doctrine—

¹⁵⁸ *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (“So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.”).

¹⁵⁹ This argument is similar to the argument I made earlier against Holmes' conclusion in *Commonwealth v. Davis* that the power to exclude people from Boston Common was greater than the power to restrict speech there. My response was that the very availability of Boston Common gave rise to most of the relevant First Amendment interests, and thus that removing speech rights was more harmful if Boston Common was still open to the public. See *supra* § V.A.

although perhaps we take the bitterness of an over- and under-inclusive rule with the sweetness of simplicity.

Assuming that we do have greater and lesser powers here we might nonetheless think that the state is more justified in restricting speech related to illegal activities than to lawful activities. After all, illegality is a pretty good proxy for dangerousness. And if we think courts will struggle to determine the extent of the government's justification for restricting speech in any given case, and we do not trust the legislature to be honest about the extent of their perception of their justification, we may be better off relying on the evidence we can get from seeing if they have decided to make an activity illegal.¹⁶⁰ Banning activities is likely to cause additional harm and is likely to be more salient, and the fact that legislators are willing to overcome that is some evidence of the justification for limiting the activity.¹⁶¹ And relatedly, perhaps as we have seen before, if only part of a solution to a problem is being implemented, that may be some evidence of the lack of severity of the problem.

F. Additional Food for Thought

These examples of distinctions between what are probably genuinely greater and lesser powers are not isolated examples of a rare phenomenon in our legal system. Similar doctrinal puzzles are presented in a variety of other important contexts, yet the expounders of these doctrines rarely seem to acknowledge that they have fashioned partial solutions to problems that create obvious perverse incentives. While such results are clearly undesirable, they may nonetheless be the best option in some cases. The

¹⁶⁰ See *supra*, § V.C.

¹⁶¹ Although, we should be extraordinarily hesitant about protecting First Amendment rights by leaving them to the political process. The bill of rights is inherently anti-democratic, and just because it might make sense to trust the political process on some issues of federalism does not mean such an approach is appropriate elsewhere.

reader is invited to use the framework and examples that has thus far been laid out, and see if they are persuaded that conditioning the exercise of a lesser power on the exercise of a greater power is the best way to address a further sampling of these problems.

Procedural Due Process Protection

The government by choosing not to voluntarily confer much protection on its own employees can largely avoid the Due Process Clause entirely.¹⁶² However once it decides to confer some protection on its employees, it runs the risk of giving its employees a property right such that the Due Process Clause is triggered.¹⁶³ Once the Due Process Clause is triggered, governmental employees are entitled to even more protection.¹⁶⁴ The government therefore has the seemingly greater power to grant essentially no protection, but does not have the seemingly lesser power to grant some protection (like for-cause removal only, with notice), because once they go that far the Due Process Clause kicks in and also requires things like an explanation of the evidence and an opportunity for the employee to present his or her side of the story.¹⁶⁵

Again, as we have repeatedly seen, an actor is foreclosed from choosing an intermediate option and is forced to one of two relative extremes. Before the law was as clearly settled, Justice Rehnquist writing for a plurality of the Court took the opposite approach and insisted that the substantive and procedural protections offered by the state should be taken as a whole, such that an employee “must take the bitter [of the limited procedural protections] with the sweet [of more than necessary substantive

¹⁶² *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).

¹⁶³ *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

protections].”¹⁶⁶ The Court subsequently had no problem rejecting this approach with a logical and clear doctrinal answer.¹⁶⁷ However, it offered no real analytical explanation of why the state should be denied the ability to offer the middle-ground of protection Rehnquist had previously approved of.

Things Moving in Interstate Commerce

Under the Commerce Clause Congress has broad discretion to ban goods moving in interstate commerce,¹⁶⁸ and with the help of the Necessary and Proper Clause it can ban those same items even if they have not moved in interstate commerce.¹⁶⁹ Yet this power to essentially enact a nationwide ban on goods does not include the seemingly lesser power to ban goods less completely—like in the vicinity of schools.¹⁷⁰

Standard of Review for Constitutional Errors in Criminal Trials

There is no federal constitutional right to a state court appeal from a criminal conviction.¹⁷¹ Yet, states that choose to voluntarily allow such appeals (which would be all of them) are bound by the Supreme Court’s holding in *Chapman v. California* that “before a federal constitutional error can be held harmless, the court must be able to

¹⁶⁶ *Arnett v. Kennedy*, 416 US 134, 154 (1974). It is entirely unsurprising that Rehnquist was the author of this opinion. He was a strong proponent of the greater powers argument, and twelve years after *Arnett* he penned the most famous modern invocation of the argument as part of his majority opinion in *Posadas*, discussed in § VI.E *supra*.

¹⁶⁷ 470 U.S. 532 (1985).

¹⁶⁸ *Champion v. Ames*, 188 U.S. 321 (1903). Presumably this authority is subject to the same independent constitutional constraints that states would be subject to in banning products or services. See *supra*, § VI.E.

¹⁶⁹ *Wickard v. Filburn*, 317 U.S. 111 (1942); *Gonzales v. Raich*, 545 U.S. 1 (2005).

¹⁷⁰ *United States v. Lopez*, 514 U.S. 549 (1995). In *Lopez*, the items that Congress was attempting to ban in the vicinity of schools were guns. Quite clearly the Second Amendment would prohibit a flat-out ban on guns throughout the country, so the greater power was not available on these facts. However, there is no reason to think the Commerce Clause reasoning the Court used would not apply to goods that could be prohibited nationally (such as marijuana).

¹⁷¹ *McKane v. Durston*, 153 U.S. 684 (1894).

declare a belief that it was harmless beyond a reasonable doubt.”¹⁷² Why should the “greater power to dispense with an appeal not carry with it the lesser power to remedy only those constitutional errors than an appellate court finds, for example, have probably affected the outcome?”¹⁷³

Abstinence-Only Sex Education

Teenagers are faced with three basic choices about sex: (i) do not have it; (ii) have it with protection; and (iii) have it without protection. Let us assume that we can agree the best option is generally for teenagers to abstain entirely. One of the primary effects of abstinence-only sex education is surely to reduce the number of teenagers having sex with protection. The result is a push to the extremes: not having sex at all, or having unprotected sex. Whether or not this is a wise policy will depend largely on (i) the percentage of teenagers that as a result instead choose to have no sex (and correspondingly what percentage decide instead to have unprotected sex), (ii) how much we value no sex over safe sex, versus how much we disvalue unprotected sex compared to safe sex; and (iii) what our alternative choices are. The first is an entirely empirical question, the second is a question of values (although probably one that should be significantly informed by empirics, like STD statistics), and the third is a test of our ingenuity.

There has been a good deal of literature and research acknowledging and trying to answer these questions by a wide variety of groups. Many of these groups have shown that they understand the basic stakes that should structure the debate. Their actual conclusions do not concern us here. What should concern us is that often judges,

¹⁷² *Chapman v. California*, 386 U.S. 18, 24 (1967).

¹⁷³ Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 12 (1994).

legislators, and legal commentators seem to fail to recognize that they are faced with a structurally similar dilemma. They therefore seem to too quickly approve of legal regimes that eliminate or reduce opportunities to cause an intermediate harm—that is, regimes which are not friendly to the exercise of lesser powers alone.

VII. Conclusion

The argument that greater powers should be understood to include lesser powers is based on powerful intuitions about values and coherence, and avoiding perverse incentives. Unfortunately it has been inconsistently deployed, often as a shortcut to avoid actual analysis. Even having unpacked the argument we have seen that it frequently raises more questions than it answers. Those questions cannot be easily dismissed. They not only go to the heart of how we structure our affairs to achieve the best possible outcomes, but also to the heart of what we think the best outcomes are in the first place.

The most common flaw in greater powers arguments is that the powers are not clearly in a greater/lesser relationship. Many have categorically dismissed the argument because of the rampant misapplication of those labels. The sole focus must be on the harm caused by the respective powers—restrictions on power are designed to check harms, and as soon as we lose that focus we are liable to leave important harms unchecked.

Once we get past the issues of greater and lesser powers, we need to recognize that the only thing we have done is take account of the harms caused by the exercises of power. But in restricting that power the legal system cares about a lot more than the just harm a power will cause. Any one of those other values—the justification for exercising the power, the procedure by which the power is exercised, the motivation for exercising

the power, courts' competency to draw certain distinctions, the benefits of having rules, adherence to a higher authority, and *stare decisis*—might provide a sound reason to allow a greater power but disallow a lesser power.

Against that backdrop we need to recognize that there is a particular category of greater and lesser powers that implicates special issues: when a lesser power is literally part of a greater power. Here the reason the greater power is greater than the lesser power because it causes all of the harm the lesser power does, and then some of its own.¹⁷⁴ Importantly, the lesser power can be exercised on the exact same terms as the greater power since the exercise of the greater power is also the exercise of the lesser power. So if the entire premise of the greater powers argument is that it is (at least sometimes) wrong to make it harder to exercise a lesser power than a greater power, there simply is no problem here. There is, however, an additional concern that is particularly acute here—perverse incentives. We are forcing a power-wielding entity that wants to exercise a lesser power to cause more harm than it may be in anybody's interest for them to cause. Why would we want to do this?

Perverse incentives are a pervasive problem, and often a problem that cannot be solved without sacrifice. So, depending on the context it may be wise to subordinate concerns over perverse incentives to other relevant values. But if we can eliminate perverse incentives without meaningful sacrifice, we should. One reason why we might want to allow greater powers that literally include lesser powers, but not allow the lesser power alone, is because the extra harm caused by the greater power may dissuade an entity from exercising it. That is, the power-wielding entity might self-police and choose

¹⁷⁴ Just because one power is a component of another power does not necessarily make the component power lesser. It is possible that by exercising the powers in tandem, the harm caused by the component power is diminished. *See supra* § V.A.

not to exercise the greater power because it cares about the harm it would cause. It might care about the extra harm in and of itself, or if the entity is accountable to others it might care that its constituency cares about the added harm.

The critical question in using harm to restrict harm is whether it provides any advantage over other available restrictions. It could be superior to a balancing test if (i) the power-wielding entity is in a better position than a would-be adjudicator to determine the extent of the justification; and if (ii) we do not trust the power-wielding entity to be honest about how important its justification for restricting power is. Even if it gets us results inferior to those case-by-case balancing would, it might still be justified based on the simplicity and certainty provided by a bright-line rule. However, at the end of the day, these benefits (if any) over alternative options must be significant enough to outweigh the harm caused by the perverse incentive. Often the ultimate resolution of which approach is better will turn on unknowable empirics. But we are better off using our intuitions to guess about empirics than to ignore the issue entirely.

In the absence of viable alternative restrictions on power, conditioning the exercise of power on the exercise of more power may well be a good idea. Congress and the President took this approach in the Budget Control Act of 2011 to seek to prevent themselves from allowing the national debt to spiral out of control when they were unable to figure out any other method. A lone robbery victim might take a similar approach to dissuade a robber from stealing his or her stuff. But in most situations in which we have greater and lesser powers, we have disputes that will be settled by an adjudicatory body, and the only question is how. In these situations it is much harder to claim that this

approach is wise, and very few courts have truly defended such an approach on the basis of a logically defensible rationale.

There is no better way to conclude this paper than to recognize that the greater-power-includes-the-lesser-power argument is probably often most useful to us when it is not being offered as a conclusion. From the determination of the existence of greater and lesser powers in the first place, to consideration of other values that might justify a distinction between the powers, to inquiring into alternative restrictions on power—the entire analytical structure of this note is based on (de)constructing an analogy. There is no way to prove that an analogy is sound, and new rationales for distinguishing situations are always a possibility. Therefore, we should understand all analogies, including the greater-power-includes-the-lesser-power argument as a challenge—a challenge to give us a reason why we should not follow its intuitive and logical appeal. If and when we are persuaded by the greater powers argument, and it is presented as a conclusion, all we should understand that to mean is that the analogy has not been satisfactorily rejected, not that it necessarily cannot be.