

THE INCREASING FEDERALIZATION OF CRIME

Susan A. Ehrlich*

I. INTRODUCTION

Over the past decade, an outburst of federal legislative proposals has transformed traditional state and local criminal offenses into federal crimes as well. A few examples: Within a week of the 1999 massacre of high-school students in Littleton, Colorado, President Bill Clinton proposed making it a federal felony for adults to either recklessly or knowingly allow children to possess weapons later used to injure or kill a person.¹ When a Maryland woman was murdered in a publicized car-jacking in 1992, within weeks, the United States Congress made car-jacking a federal crime,² although the perpetrator was convicted of the state crimes of robbery and murder. Similar action was taken in 1994 in response to other publicized crimes, a drive-by shooting³ and murder by an escaped prisoner.⁴

In Congress' 105th Term, hundreds of bills were introduced having to do with federal criminal statutes, many of which pertained to juvenile justice, including one unsuccessful measure that would require that 14- and 15-year-olds be tried as adults if accused of offenses constituting what Congress defines as serious violent crimes or drug offenses. In an analogous context, using its Commerce Clause⁵ power, Congress passed the National Minimum Drinking Age Amendment of 1984, conditioning a state's receipt of certain federal highway funds on whether the state legislature had raised the age of drinking alcoholic beverages to 21.⁶ It since has rewarded states with additional appropriations for those including in its definition of an impaired

* A.B., Wellesley College; J.D., Arizona State University. The author is a judge on the Arizona Court of Appeals and a former Assistant United States Attorney. She served as a member of the Task Force on Federalization of Criminal Law of the American Bar Association. While the views expressed are those only of the author and only in her personal capacity, she wishes to express her appreciation to the following individuals for their contributions of time and thoughtful comments: Jim Hair, Pam Eaton, Mark Genrich, Ray Gesteland, Larry Hammond, Jim Mancuso, Ralph Rossum, Jennifer Simmon and Jim Strazzella.

1. H.R. 3987, 106th Cong. § 5 (2000) (amending 18 U.S.C. § 922) (1994).
2. 18 U.S.C. § 2119.
3. *Id.* § 36.
4. *Id.* § 1120.
5. U. S. CONST. art. I, § 8 ("The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.").
6. 23 U.S.C. § 158 (1994).

driver a person whose blood-alcohol level is 0.08% or greater,⁷ and it has threatened to reduce the amount of federal highway funds appropriated to a state if the state does not, an idea the Arizona legislature already has considered and rejected.⁸ And, effective October 1, 2000, it has reduced the federal highway money given to a state if the state does not ban its motorists from having open containers of alcohol in their vehicles and impose tougher penalties on those convicted multiple times for driving while impaired.⁹ As a consequence of these and other measures, it is estimated that there are now more than 3600 federal crimes, including not only car-jacking but street-gang crimes and stalking, as well as drive-by shooting and a myriad of gun-related offenses.¹⁰ It is also estimated that, of the federal criminal statutes enacted since the Civil War, approximately 40 percent have been passed since 1970, and this does not include the thousands of federal regulations that include sanctions.¹¹

Without doubt, criminal conduct ought to be prosecuted, but, while this increasing federalization of crime might bring votes to politicians at election time,¹² the rush to make federal every social affront is at the expense of our constitutional division of governmental authority and of the justice system itself. This article addresses some of these concerns with regard to the diminution of the strength that is the United States' federal system of government, the impact on the abilities of local and state governments to respond to the needs of their constituents and to develop policies and

7. *Id.* § 163.

8. In Arizona, as in 33 other states, the blood-alcohol-content threshold is 0.10%. ARIZ. REV. STAT. ANN. § 28-1381 (West 1998). Fifteen states have adopted 0.08%, and two allow law-enforcement officers to decide.

9. 23 U.S.C. §§ 154, 164 (2000). Arizona is not one of the states losing its appropriation because of existing state laws. ARIZ. REV. STAT. ANN. §§ 4-244, 28-1387 (West 1999).

10. James A. Strazzella, *The Federalization of Criminal Law*, TASK FORCE OF FED. OF CRIM. LAW REP. A.B.A. CRIM JUST. SEC. at 7-10, app. C (1998) [hereinafter TASK FORCE REPORT]. In contrast, Attorney General Grant Woods estimated that, in Arizona, there were 261 felony statutes and 596 misdemeanor statutes, plus 128 statutes comprising felonies and misdemeanors for a total of 985 statutes making criminal some aspect of human behavior. Letter from Grant Woods, Office of Arizona Attorney General, to Susan A. Ehrlich, Judge, Arizona Court of Appeals (Mar. 5 1998) (on file with author).

11. TASK FORCE REPORT, *supra* note 10, at 9-10 (finding, for example, perjury in connection with assorted government-required forms).

12. A pervasive sense of fear for personal safety has been noted by Johnson and Broder in HAYNES JOHNSON & DAVID S. BRODER, *THE SYSTEM: THE AMERICAN WAY OF POLITICS AT THE BREAKING POINT* 604-08 (1996). See also BILL BRADLEY, *TIME PRESENT, TIME PAST* 100 (1996).

The pressures of electoral politics often crowd out work for structural reform. Politicians consumed by re-election rarely take the time to master a subject, and their legislative activity often mirrors what their polls say their constituents want. A small amendment on a crime bill serves a senator's campaign more than it serves the criminal-justice system. It's easier to understand a single change than a reform of the entire system.

Id.

programs, the consequent lessening of regard individuals have for their local and state governmental bodies, including the judicial branch, the increasing concentration of power in the federal government and the resulting adverse effect on its law-enforcement and judicial systems, with the concomitant loss of faith by individuals in government at all levels.

II. SOME HISTORY

When the United States Constitution was ratified, Congress had the explicit power to make criminal only treason, offenses committed on federal property, counterfeiting, offenses against the “Law of Nations,” piracy and “Felonies committed on the high Seas.”¹³ What James Wilson said during Pennsylvania’s convention debates on the adoption of the Constitution indicates the rationale of the drafters:

Whatsoever object of government is confined in its operation and effects within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends in its operation and effects beyond the bounds of a particular state, should be considered as belonging to the government of the United States.¹⁴

The first Congress added other conduct of a limited yet federal nature, such as the obstruction of justice in the federal courts.¹⁵ By then, a division among competing political groups, a division still characteristic of any discussion of the interplay between the state and national governments, was becoming fixed: The Federalists tended towards a greater role for the federal government in reliance on the expansive language of the Preamble to the Constitution and Article 1, section 8, both of which proclaim that the purpose of the Constitution is to “provide for the common Defense and general Welfare.” For the Republicans, later re-named Democrats, state sovereignty was paramount to such a degree that they believed that each state should be

13. U.S. CONST. art. I, § 8; *see also* THE FEDERALIST NO. 10, at 47 (James Madison) (George W. Carey & James McClellan eds., 1990) (“The Federal Constitution forms a happy combination . . . the great and aggregate interests being referred to the national, the local and particular to the State legislatures.”); THE FEDERALIST NO. 45, at 238 (James Madison) (George W. Carey & James McClellan eds., 1990) (“The federal powers ‘will be exercised principally on external objects, as war, peace, negotiations and foreign commerce . . . The powers reserved to the several States will extend to all the objects which concern the . . . internal order of the State.’”).

14. Raoul Berger, *A Lawyer Lectures a Judge*, 18 HARV. J.L. & PUB. POL’Y 851, 858 n.54 (1995) (quoting 2 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 399 (2d ed. 1836)).

15. 18 U.S.C. § 1501 (1994); *see also* Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 645 n.1 (1997).

permitted to retain the maximum authority to address matters within its concern.

As an illustration of the developing competition among ideologies relating to the nature of and tension between the national government and the states, James Madison, on June 8, 1789, proposed an amendment to the Constitution providing that “[n]o state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.”¹⁶ In response, Thomas Tudor Tucker from South Carolina argued that, far from being an amendment to the United States Constitution, Madison’s proposal effectively altered only the states’ constitutions.¹⁷ He moved to strike Madison’s proposal: “[I]t will be much better . . . to leave the state governments to themselves, and not to interfere with them more than we already do, and that is thought by many to be rather too much.”¹⁸ In defense, Madison maintained that, “if there was any reason to restrain the government of the United States from infringing on these essential rights, it was equally necessary that they should be secured against the state governments.”¹⁹ With that, Madison’s motion passed as a House Resolution and Articles of Amendment and was transmitted to the Senate.²⁰ There, however, his proposal failed,²¹ with at least one senator later noting his legislative body’s “disgust” at interfering with the sovereign interests of the states.²²

The Judiciary Act of 1789 similarly reflected Congressional deference to the states. It provided in section 34, called the “Rules of Decision Act,” that “the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.”²³ But it also asserted in section 25 its understanding that the Constitution gave the United States Supreme Court the power to review final decisions of the highest state court in which a decision “could be had,”²⁴ the significance of which would become evident within the first quarter of the next century.

16. CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD OF THE FIRST FEDERAL CONGRESS 13 (Helen E. Veit et al. eds., 1991).

17. *Id.* at 188.

18. *Id.*

19. *Id.*

20. *Id.* at 37-41.

21. *Id.* at 41.

22. *Id.* at 300 n.13 (citing a letter by William Grayson to Patrick Henry, Sept. 29, 1789). Of course, Madison became the “Father of the Bill of Rights.” Robert A. Goldwin, FROM PARCHMENT TO POWER (1997).

23. 1 Stat. 73, sec. 34 (1789); *see also* *Swift v. Tyson*, 41 U.S. 1 (1842), *overruled by* *Erie RR Co. v. Tompkins*, 304 U.S. 64 (1938).

24. *Id.* § 25; *see generally* *Cohens v. Virginia*, 19 U.S. 264 (1821); *Martin v. Hunter’s Lessee*, 14 U.S. 304 (1816).

By the presidency of James Madison, Congress was prepared to spend money on “internal improvements” such as canals and roads to promote commerce, but Madison vetoed the bill, believing that the power to regulate commerce among the several states did not extend that far.²⁵ Nonetheless, a willingness to involve the national government was growing as the United States was becoming more commercialized. Americans had favored the expansion of their territory through the Louisiana Purchase, the constitutionality of which was questionable according to the legal analysis of the time which favored only such federal powers as were specifically enumerated in the Constitution;²⁶ now they wanted roads and canals to expedite commerce.

Into this flux strode the United States Supreme Court guided by Chief Justice John Marshall. In 1805, the Chief Justice wrote for the Court in *United States v. Fisher*²⁷ that, in the context of the Necessary and Proper Clause of the Constitution,²⁸ if a Congressional decision of where to draw the line between the powers of the federal government and those of the states “interfere with the right of the state sovereignties,” it is but “the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of congress extends;” any objection is one “to the constitution itself.”²⁹ In 1819, Marshall authored the Court’s unanimous opinion in *McCulloch v. Maryland*³⁰ definitively establishing the supremacy of federal over state law.³¹

25. President James Madison, Veto Message (Mar. 3, 1817).

Having considered the bill this day presented to me entitled “An act to set apart and pledge certain funds for internal improvements,” and which sets apart and pledges funds “for constructing roads and canals, and improving the navigation of water courses, in order to facilitate, promote, and give security to internal commerce among the several States, and to render more easy and less expensive the means and provisions for the common defense,” I am constrained by the insuperable difficulty I feel in reconciling the bill [with] the Constitution of the United States to return it with that objection to the House of Representatives, in which it originated.

Id., available at <http://www.up.net/~willie/TBY/JMA/VETROADS.HTML>.

26. DUMAS MALONE, JEFFERSON THE PRESIDENT: FIRST TERM, 1801-1805, at 311-32 (1970); JAMES MACGREGOR BURNS, THE VINEYARD OF LIBERTY 172-78 (1982); *see also* August 12, 1803, letter of Thomas Jefferson to John C. Breckinridge, THOMAS JEFFERSON: WRITINGS 1136 (Library of America 1984); September 7, 1803, letter of Thomas Jefferson to Wilson Cary Nicholas. *Id.* at 1139.

27. 6 U.S. (2 Cranch) 358 (1805). “The question in this case is, whether the United States, as holders of a protested bill of exchange, which has been negotiated in the ordinary course of trade, are entitled to be preferred to the general creditors, where the debtor becomes bankrupt?” *Id.* at 385.

28. U.S. CONST. art. I, § 8 (“The Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

29. 6 U.S. (2 Cranch) at 397.

30. 17 U.S. (4 Wheat.) 316 (1819).

31. *Id.* at 406.

In 1810, the Court decided *Fletcher v. Peck*,³² and, in 1819, *Dartmouth College v. Woodward*,³³ both of which held that a state is obliged as is any other party to honor its contracts.³⁴ With this certainty, the number of businesses rose exponentially, as did the opportunities for expanded commerce. Five years later, the strength of the Commerce Clause was made manifest in *Gibbons v. Ogden*,³⁵ in which case the Court made clear that it is for Congress, not the states, to regulate interstate commerce: “This [commerce] power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”³⁶

The trend was such that, by December 6, 1825, in his annual message, President John Quincy Adams opined that it was the federal government that bore responsibility for the general welfare of the populace.³⁷

Nevertheless, until the Civil War, there were only a few federal crimes, and those still restricted largely to offenses against the United States, its officers and property, and its enclaves of jurisdiction, and there was virtually no overlap between federal and state offenses. Federal criminal law was directed to those acts injurious to the national government itself,³⁸ and the states retained their integrity in this regard. As Joseph Story wrote of the national and state governments:

Each, by the theory of our government, is essential to the existence and due preservation of the powers and obligations of the other. The destruction of either would be equally calamitous since it would involve the ruin of that beautiful fabric of balanced government

32. 10 U.S. (6 Cranch) 87 (1810)(When a law in practical terms constitutes a contract, a repeal of the law does not act to repudiate the contract, and the state remains obligated according to its terms.).

33. 17 U.S. (4 Wheat.) 518, 651-52 (1819) (The charter awarded by Great Britain to the trustees of Dartmouth College comprises a contract within the meaning of the United States Constitution such that the State of New Hampshire may not pass a law impairing or abrogating that contract.).

34. *Fletcher*, 10 U.S. at 136-38; *Dartmouth*, 17 U.S. at 651-52.

35. 22 U.S. (9 Wheat.) 1 (1824).

36. *Id.* at 196.

37. PAUL C. NAGEL, JOHN QUINCY ADAMS: A PUBLIC LIFE, A PRIVATE LIFE 301-03 (1997).

38. Indeed, in contemplating whether to issue a proclamation emancipating the slaves, President Abraham Lincoln did not believe that he could do so as a matter of federal law regardless of the justice of the provocation for such an order. As he wrote to one of his closest friends and political advisors, “Congress has no power over slavery in the states and so much of it as remains after the war is over . . . must be left to the exclusive control of the states where it may exist.” DAVID HERBERT DONALD, LINCOLN 365 (1995) (quoting 1 THE DIARY OF ORVILLE HICKMAN BROWNING, 555 (T. C. Pease & J. G. Randall eds., 1927)).

which has been reared with so much care and wisdom and in which the people have reposed their confidence as the truest safeguard.³⁹

However, the Civil War decisively transformed the political geography of the nation. For the first time since its independence from Great Britain, the union was greater than the sum of the individual states, and the federal government became the point of convergence of power. As Shelby Foote has said, emotionally as well as grammatically, “the United States” became singular rather than plural.⁴⁰ A confederacy of independent states in any sense had ended. The result of this second revolution was that the federal government greatly expanded, partly because of the necessity of the war, partly because of Reconstruction and partly because of the Republican takeover, which brought to power persons who believed in the possibilities of an advantageous commercial relationship between business and government, such as the underwriting of railroads and the protection from tariffs for manufacturing interests.⁴¹

With the consolidation of the national government came a demand for a greater expansion of the federal criminal law. Federal offenses for the most part still were limited to those necessary to prevent interference with the federal government itself or to those situations in which its jurisdiction was exclusive, e.g., the federal territories and the District of Columbia. They did not extend to crimes against individuals, which remained the business of the state and local jurisdictions.⁴² Whereas before the Civil War, federal statutes customarily provided for concurrent state jurisdiction over federal crimes as a means of keeping federal power in check, in 1874, Congress proclaimed that its courts possessed exclusive jurisdiction over federal offenses.⁴³ By then, the scope of federal jurisdiction had expanded, again largely due to the growth in commerce, itself the result of the boom in interstate transportation and the growth of the western regions.

The United States Supreme Court generally approved the new legislation, deciding that Congress was entitled to use the power granted to it by the Commerce Clause to aid the states. In *Champion v. Ames*,⁴⁴ the Court upheld the use of that clause as support for a Congressional ban on the interstate

39. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 416 (1833).

40. The phrase “the United States is” supplanted the phrase “the United States are.” GEOFFREY C. WARD, THE CIVIL WAR: AN ILLUSTRATED HISTORY 273 (1990) (interviewing Shelby Foote).

41. H. W. BRANDS, T. R.: THE LAST ROMANTIC 227-28 (1997).

42. Sara Sun Beale, *Reporter’s Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law*, 46 HASTINGS L.J. 1277, 1278 (1995).

43. 18 U.S.C. § 3231 (1994).

44. 188 U.S. 321 (1903)

transportation of lottery tickets.⁴⁵ A decade later, in *Hoke v. United States*,⁴⁶ it stated in upholding the Mann Act, prohibiting the transportation in interstate commerce of a girl or woman for an immoral purpose: “Congress is given power ‘to regulate commerce with foreign nations and among the several States.’ The power is direct; there is no word of limitation in it, and its broad and universal scope has been so often declared as to make repetition unnecessary.”⁴⁷

It also became logical for Congress to punish misconduct involving interstate facilities, such as the railroads. The Sherman Antitrust Act⁴⁸ and the law creating the Interstate Commerce Commission (“ICC”)⁴⁹ were passed in the 1880s. With the creation of the ICC there now existed a regulatory agency—the first of many—with a host of civil and criminal penalties to impose on miscreants.⁵⁰

By then, Congress had also passed legislation concerning another interstate activity, the United States Postal Service.⁵¹ This arose largely as a matter having to do with growing national concerns over gambling in the form of lottery circulars and obscene publications,⁵² not unlike the concerns of contemporary Americans.

In President Theodore Roosevelt’s message to Congress on December 6, 1904, this former New York state legislator and governor declared that the states were not sufficiently able to address the needs of expanding industry. “It has proved exceedingly difficult, and in many cases impossible, to get unanimity of wise action among the various States on these subjects The National Government alone can deal adequately with these great corporations.”⁵³

Prohibition and the Depression spawned an increasing number of new federal offenses, including, for the first time, crimes of violence against private

45. *Id.* at 363-64. Given the broad discretion entrusted Congress by the Constitution in matters of interstate commerce and of general welfare, it was within Congress’ power to prohibit such interstate commerce as Congress deemed “injurious to the public morals,” such as the interstate transportation of lottery tickets by an express company. *Id.* at 356-57.

46. 227 U.S. 308 (1913)

47. *Id.* at 320. Despite the appellants’ insistence that they enjoyed a right to travel without any inquiry regarding their motivation, given the broad power granted Congress by the Commerce Clause, it is entitled to prohibit those interstate-commerce activities deemed harmful to the general welfare. *Id.* at 310, 322-23 (citation omitted).

48. 15 U.S.C. §§ 1-7 (1994) (originally enacted in 1890).

49. 49 U.S.C. §§ 1-22 (1994) (originally enacted in 1887).

50. The ICC was abolished in 1995. 49 U.S.C. § 701 (Supp. I 1995).

51. 18 U.S.C. §§ 1693, 1695, 1700 (1994). In addition to the power of the Commerce Clause, there is the related power to create and regulate a postal system. U.S. CONST. art. I, § 8 (“Congress shall have power . . . to establish Post Offices and Post Roads . . .”).

52. See *Champion v. Ames*, 188 U.S. 321, 323 (1903), although the indictment made no reference to the use of the mails but alleged only interstate commerce.

53. BRANDS, *supra* note 37, at 143 (quoting WORKS 17:250-310).

individuals and businesses, as well as the first federal firearms legislation.⁵⁴ By then, too, the authority of the Commerce Clause was recognized in time for the social and economic legislation of the New Deal.⁵⁵ United States Supreme Court Justice Louis Brandeis could say only in dissent now that “[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”⁵⁶

In the 1960s and 1970s, Congress began to utilize the commerce power to authorize federal criminal penalties for interstate travel used to facilitate narcotics and drug traffic and other behavior associated with organized crime. The Travel Act was the first “compound offense,” a federal law that includes violations of existing state offenses as elements of a new federal offense.⁵⁷ In its wake was the Racketeer Influenced and Corrupt Organizations (“RICO”) Act which, like the Travel Act, has principal elements that are satisfied by proof of a violation of state law.⁵⁸ Additionally, its provisions addressing

54. See, e.g., Federal Firearms Act of 1938, ch. 850, 52 Stat. 1250 (1938); National Firearms Act of 1934, ch. 757, 48 Stat. 1236 (1934).

55. See *NRLB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937) (stating that Congress has the authority to enact “all appropriate legislation” for the “protection or advancement” of interstate commerce).

56. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (“In this circumstance [of students carrying guns on school premises], the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.” (citing *Liebmann*, 285 U.S. at 311)); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Id.; *Federal Energy Reg. Comm’n v. Mississippi*, 456 U.S. 742, 788 (1982) (O’Connor, J., dissenting) (“Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas.”) (citing *Liebmann*, 285 U.S. at 311); “In addition to promoting experimentation, federalism enhances the opportunity of all citizens to participate in representative government Finally, our federal system provides a salutary check on governmental power.” *Id.* at 789-90; see also *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (“[State] [l]egislative bodies have broad scope to experiment with economic problems . . .”).

57. 18 U.S.C. § 1952 (1994).

58. *Id.* at § 1961. Specifically, in its “Definitions,” the statute states:

(1) ‘racketeering activity’ means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year

(2) ‘State’ means any State of the United States, . . . any political subdivision, or any department, agency or instrumentality thereof

extortionate credit transactions or “loan-sharking” are radical for making criminal a category of activity based upon Congress’ finding that the class of activity affects interstate commerce; no proof is required that the conduct involved in a single prosecution has an effect on commerce.⁵⁹ Similar is a 1970 federal drug-control statute.⁶⁰ When the United States Supreme Court declared the loan-sharking law constitutional in 1971 in *Perez v. United States*,⁶¹ it limited judicial review to a determination whether the barred class of activity was within the ambit of federal power; if it was, there would be no review of individual instances within the class.⁶²

However, in *United States v. Lopez*,⁶³ the Court commented that “criminal law enforcement” is an area in which the “States historically have been sovereign.”⁶⁴ It thus may have started slowing the seeming transformation of the power to regulate interstate commerce into an overarching power to regulate for the general welfare. Two years later, in *Printz v. United States*,⁶⁵ it struck the provision of the “Brady Bill” requiring local law-enforcement officials to assist the administration of a federal firearms statute, holding that, if Congress wants to exercise its regulatory power, it must act directly and not “commandeer” the services of state officials for its work absent the consent of the state.⁶⁶ In the Court’s last term, it held in *Jones v. United States*⁶⁷ that a person accused of violating the statute that made arson a federal crime could not be convicted, even though he had thrown a Molotov cocktail into a home, because the act concerned a building not being used in interstate commerce in any active sense.⁶⁸ The Court observed that arson is “traditionally local criminal conduct,”⁶⁹ indeed “a paradigmatic common-law state crime.”⁷⁰

Then, in deciding *United States v. Morrison*,⁷¹ involving a single act of campus violence, the Court noted “the concern that we expressed in *Lopez* that

59. *Id.* at § 1962.

60. 21 U.S.C. § 801 (1994). To make clear the interstate-commerce aspect of illegally trafficking in controlled substances, section 801 states: “(5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.” The statute then defines “felony” as “any Federal or State offense classified by applicable Federal or State law as a felony.” 18 U.S.C. § 802(13) (1994).

61. 402 U.S. 146 (1971).

62. *Id.* at 154.

63. 514 U.S. 549 (1995).

64. *Id.* at 564.

65. 521 U.S. 898 (1997).

66. *Id.* at 914.

67. 68 U.S.L.W. 4422 (U.S. May 23, 2000).

68. *Id.*

69. *Id.* at 4424 (citing *United States v. Bass*, 404 U.S. 336, 350 (1971)).

70. *Id.* at 4425.

71. 68 U.S.L.W. 4351 (U.S. May 16, 2000) (citing *United States v. Lopez*, 514 U.S. 549, 564 (1995)).

Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority,"⁷² adding that, "even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds."⁷³ It returned to a case from the era of President Franklin Roosevelt, for the proposition that, in the 1937 case,

the Court warned that the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'⁷⁴

Specifically addressing the issue of violence, it underscored:

The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce

. . . .

. . . We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. In recognizing this fact we preserve one of the few principles that has been consistent since the [Commerce] Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.⁷⁵

In the infancy of this country, the Articles of Confederation failed because its authors—and the states they represented—were wary of a unifying

72. *Id.* at 4356.

73. *Id.* at 4354 (citing *Lopez*, 514 U.S. at 557).

74. *Id.* at 4353 (citing *Lopez*, 514 U.S. at 556-57 (quoting *Jones & Laughlin Steel*, 301 U.S. at 37)).

75. *Id.* at 4357-58 (citations and footnote omitted).

sovereign.⁷⁶ While federalism now is accepted as the primary theoretical gift of the authors of the Constitution,⁷⁷ slightly more than 200 years after the passage of the Constitution in 1789, there is little in the way of conduct generally deemed by Americans to be abhorrent that is not the subject of a federal offense. The pattern of the first half of our country's political chronicle, at least in its approach to the issue of crime, has been reversed in a fundamental way, and many federal offenses now include those within the states' police powers. The questions then are as follow: Is there harm in this approach? If so, what are the criteria for its proper limitation?

III. THE FEDERALIZATION OF CRIME

Harkening back to the debate among the authors of The Federalist Papers, the United States Supreme Court said in 1991 that,

Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front In the tension between federal and state power lies the promise of liberty.⁷⁸

Certainly this "promise of liberty" deeply implicates the criminal-justice system.⁷⁹ It thus is the deliberate design of federalism and a primary

76. Indeed, Article II provided that "[e]ach state retains its sovereignty, freedom and independence . . . [except as] expressly delegated to the United States." Articles of Confederation, DOCUMENTS OF AMERICAN HISTORY 111 (Henry Steele Commager ed., 1963). Presently the European Community and, within it, the European Union are addressing the same issues.

77. See generally Fred Friendly, *Federalism: A Forward*, 86 YALE L.J. 1019 (1977).

78. Gregory v. Ashcroft, 501 U.S. 452, 458-59 (1991); see also *Printz v. United States*, 521 U.S. 898, 918-19 (1997) ("Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.'" (citing THE FEDERALIST No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961))); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.

Id.; *New York v. United States*, 505 U.S. 144, 181 (1992) ("[T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting))).

79. The criminal law is not only "the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict [it] governs the strongest

constitutional principle that the general police power rests with the states and not the national government.⁸⁰

Unwise federalization disrupts this constitutional balance, thereby undermining the strength as well as many of the values achieved by the federal system: the closeness of government bodies to their constituents, the preservation of the ability of local and state governments to experiment in social policy, and the states as the checks and balances of the national power. The corollary is that, without any evidence to conclude that the local and state governments are unwilling to or incapable of exercising their responsibilities, the incursion of the national government subverts the authority of and the regard for the local and state governments, making it increasingly difficult for those governments to effectively and imaginatively respond to the needs of their constituents. A political culture that comes to regard the federal government as its guardian relegates the local and state governments to secondary status. The premise—articulated or not—is that these lesser governments are not capable of handling important matters. Public confidence and commitment are diminished. Ultimately, federalization obscures the boundaries of political responsibility and accountability, undermines the confidence constituents have in their officials, and erodes the authority of the local and state institutions.

The implications for the courts are clear. State and local courts handle as much as 95 percent of all criminal prosecutions,⁸¹ yet, if they are viewed as being of little consequence to the maintenance of justice compared to the federal judicial system, the faith of the populace in that branch of government charged with safeguarding its rights deteriorates. The protection of the courts' abilities and resources as a priority then is lessened with a continuing erosion of trust.

The growing number of federal crimes also floods the federal courts with cases that can be well-handled by the state courts to the detriment of cases for which the federal system was designed and is suited. In this context, there is the irony that the historic reason for having a distinct system of federal courts no longer justifies its existence.

Arbitrary parallel systems of federal and state prosecutions for fundamentally the same conduct also have developed, each prosecution

force that we permit official agencies to bring to bear on individuals.” Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952).

80. See *Jones v. United States*, 68 U.S.L.W. 4422, 4423 (U.S. May 23, 2000) (discussing arson as “traditionally local criminal conduct” (citing *United States v. Bass*, 404 U.S. 336, 350 (1971))); *United States v. Lopez*, 514 U.S. 549, 566 (1995) (stating that the Constitution withholds “from Congress a plenary police power that would authorize enactment of every type of legislation”); *Patterson v. New York*, 432 U.S. 197, 201 (1977) (“preventing and dealing with crime is much more the business of the States than it is of the Federal Government”).

81. Beale, *supra* note 38, at 1294.

implicating distinct procedures and disparate consequences for essentially similar behavior with several unfortunate results: First, there is the impact upon individual liberty given that the Double Jeopardy Clause⁸² does not preclude separate prosecutions and diverse sentences imposed by state and federal courts based upon the same acts because the state and national governments constitute separate sovereigns.⁸³ Second, the stability of governing legal precedent is affected. Third, it permits unseemly investigative and prosecutorial confusion and delay inconsistent with our notions of due process. Fourth, it necessitates costly duplicative systems to administer the ancillary programs of treatment, probation, prisons and parole.

As well, there is an attendant adverse implication for local and state law-enforcement agencies. The increasing number of federal crimes and administrative and regulatory sanctions has spawned an expanding investigative power of all of the federal agencies and not just the Department of Justice, including the Federal Bureau of Investigation and the Drug Enforcement Administration, or the Department of the Treasury, including the Bureau of Alcohol, Tobacco and Firearms and the Internal Revenue Service. This proliferation in turn permits an increased intrusiveness from distant federal officials, further diminishing the state and local agencies and concentrating the police power at the national level in a manner contrary to the explicit directives of the Constitution.

The increased federal authority additionally means that there is confusion about the law-enforcement agencies' respective roles and responsibilities. It also necessitates that federal agencies compete with local and state agencies for limited resources. The competition inescapably leads to changes in the allocation of resources, in turn affecting the balance between the federal and state and local abilities to respond to crime. This competition for resources at each level of government is unprofitable in every sense, but it has a particularly negative effect on community-policing efforts, which are programs that singularly benefit from the direct infusion of imagination and funding.

Federalization customarily is executed in one of two ways: (1) The national government assumes the responsibility of providing or seeming to provide a remedy for a problem or problems it identifies, or (2) it uses its greater financial resources to compel or coerce local and state governments to adopt certain policies and take particular actions by conditioning funding to those governments upon their adoption of or compliance with federally-favored policies and standards. At best, the result is a costly federal proposal

82. U.S. CONST. amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb").

83. *State v. Poland*, 645 P.2d 784, 791 (Ariz. 1982); *Bartkus v. Illinois*, 359 U.S. 121, 134-37 (1959).

that compromises or duplicates more effective local and state programs. At worst, it creates federal competition that has a deleterious impact on the local and state programs. There also is the more insidious, corrosive impact on the local, state, and, indeed, federal governments and institutions themselves, their authority and constituent perception. Given further the certain inability of the federal response to be sufficiently satisfactory in meeting the expectations it creates in the diminution of crime, ultimately the populace becomes disaffected and disengaged if not disdainful of the entire political process and government itself.

The promise of the tension of opposites inherent in a federal government—and the health of the body politic itself—is the alliance of robust local and state governments with and within a strong federal union and the allocation of authority therein. A decentralized system not only allows a criminal justice policy to be tailored to local interests and needs, it increases political accountability and, therefore, respect for the system. Indeed, permitting a variety of strategies at the local and state levels achieves a greater degree of public participation and provides comparative experiences with different approaches to the same or similar problem. Thus, federal involvement should be guided by the postulate that the government most close to its constituency will better reflect those judgments about what are appropriate responses to those behaviors its constituents deem offensive than those governments “which are larger and more remote.”⁸⁴ The corollary is that, absent a demonstrated legitimate federal interest, those decisions should be left undisturbed as a matter of accountability and efficiency.⁸⁵

84. See Philip B. Heymann & Mark H. Moore, *The Federal Role in Dealing with Violent Street Crime: Principles, Questions, and Cautions*, in 543 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE: THE FEDERAL ROLE IN CRIMINAL LAW 104-05 (James A. Strazzella ed., 1996) [hereinafter ANNALS].

85. The Chief Justice of the United States, William H. Rehnquist, certainly is the most prominent jurist to sound this alarm. As he wrote in *The 1998 Year-End Report of the Federal Judiciary*:

The trend to federalize crimes that traditionally have been handled in state courts . . . threatens to change entirely the nature of our federal system. The pressure in Congress to appear responsive to every highly publicized societal ill or sensational crime needs to be balanced with an inquiry into whether states are doing an adequate job in these particular areas and, ultimately, whether we want most of our legal relationships decided at the national rather than local level. Federal courts were not created to adjudicate local crimes, no matter how sensational or heinous the crimes may be. State courts do, can, and should handle such problems. While there certainly are areas in criminal law in which the federal government must act, the vast majority of localized criminal cases should be decided in state courts which are equipped for such matters.

William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary*; see also William H. Rehnquist, *Remarks at the 75th Annual Meeting*, American Law Institute (1998), pp. 17-19; *The 1999 Year-End Report on the Federal Judiciary*, p. 2.

In this regard, we have to define and debate the questions posed by the increasing federalization of crime. There must be governing principles in a principled government. Given that the national government by definition of the Constitution possesses essential but limited functions, there needs to be with every federal offense an identification of the strong national interest that requires a federal prohibition.

No one doubts that a disruption of the core functions of the national government should be the subject of a federal crime. These include an offense against its entity, such as treason; the enforcement of its powers as a sovereign, including international affairs; the protection of its property and agents; when there is a federal relationship to the site of the offense such as on a military installation or other federal enclave; the uniform interpretation and application of the federal law, and the resolution of interstate disputes.⁸⁶

The latter, however, calls into question Congress' increasingly frequent use of the Commerce Clause when a distinction needs to be made between truly interstate activity implicating national interests versus tangential and readily contrived interstate involvement. The example of the federal crime of car-jacking again is useful because the car-jacking itself need not involve an interstate connection such as the robbery of a driver in interstate travel or an interstate escape. The statute applies to motor vehicles that have "been transported, shipped, or received in interstate or foreign commerce."⁸⁷ This pertains then to cars manufactured in Michigan or imported through California but long since registered and driven in another state. Congress usurped the offense because it is serious and publicized, not because of any true implication for interstate commerce.

Some commentators maintain that the federalization of crime is appropriate when the "national government has a strong substantive interest in the suppression of particular behavior" or at least a greater interest than the local or state governments are assumed to have.⁸⁸ Related is the proposal of federal intervention if the conduct might "overwhelm" the local or state authorities, or if those authorities are thought to be unwilling to acknowledge or confront a problem perceived to exist by the national authorities.⁸⁹ However, implicit in these ideas is the postulate both untrue and insulting to local and state governments that the national government, without demonstration or proof, is necessarily superior in perception and willingness to respond. If the rationale

86. See John B. Oakley, *The Myth of Cost-Free Jurisdictional Reallocation*, in ANNALS, *supra* note 73, at 55-57; see also Beale, *supra* note 38, at 1296-97 (discussing separate proposals of Professor Kathleen Sullivan and Judge Stanley Marcus).

87. 18 U.S.C. § 2119 (1994).

88. Franklin E. Zimring & Gordon Hawkins, *Toward a Principled Basis for Federal Criminal Legislation*, in ANNALS, *supra* note 73, at 22-23.

89. See *id.*; see also Beale, *supra* note 38, at 1296-97 (discussing ideas of Sullivan and Marcus); Oakley, *supra* note 75, at 56-57.

to make an offense a federal crime is only that the public is alarmed, there is none: Federal jurisdiction can be invoked regardless of whether there is any independent national interest. A political culture stressing the federalization of what is important is going to make federal any number of crimes; the justification of “importance” is only an invitation to the increased federalization of crime. Those who criticize the ability of local and state governments to act preach a self-fulfilling prophecy. Instead, we must reinforce our federal system by recognizing and utilizing the strengths of our local and state governments to reflect our pluralism and thereby sustain the vigor of our federal government.