Georgia State University Law Review

Volume 14
Issue 4 *July 1998*

Article 3

7-1-1998

# Putting the Federal Judiciary Back on the Constitutional Track

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# PUTTING THE FEDERAL JUDICIARY BACK ON THE CONSTITUTIONAL TRACK

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## INTRODUCTION

In *The Federalist Papers*, Alexander Hamilton referred to the federal judiciary as the "least dangerous" branch of government.[1] Today, however, great public concern exists about what many citizens see as the unchecked expansion of power exercised by the courts and the usurpation of policymaking authority by unelected judges. Some have even described this phenomenon as a looming constitutional crisis. The *Weekly Standard* for December 16, 1996, describes as a crisis the "brazen interference of the judicial branch of government in the decision-making authority of the American electorate."[2]

Paul Craig Roberts, writing in the January 9, 1997, *Washington Times*, states that the "federal judiciary, especially the Supreme Court, has removed the most important moral and political decisions from the democratic process. In place of persuasion and the expression of the people's will, the judiciary dictates."[3]

The intensity of public feeling is exhibited in the introduction to a symposium on "The End of Democracy? The Judicial Usurpation of Politics," in the November 1996 issue of *First Things*.[4] There, the author states that

> the government of the United States of America no longer governs by the consent of the governed. With respect to the American people, the judiciary has in effect declared that the most important questions about how we ought to order our life together are outside the purview of "things of their

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1. THE FEDERALIST No. 78, at 396 (Alexander Hamilton) (Max Beloff ed., 2d ed. 1987).

2. *It's Time to Take on the Judges,* WEEKLY STANDARD, Dec. 16, 1996, at 9.

3. Paul Craig Roberts, *Commentary: How to Create a Crisis Out of Whole Cloth*, WASH. TIMES, Jan. 9, 1997, at A14.

4. *The End of Democracy? The Judicial Usurpation of Politics*, FIRST THINGS, Nov. 1996, at 18.

> knowledge." . . . [J]udges . . . simply claim, and exercise, the power to decide. The citizens of this democratic republic are deemed to lack the competence for self government.[5]

One reason for the heightened public concern has been the increasing tendency of the courts to use their power to decide cases as a means of nullifying laws passed by legislatures, and even the people themselves through ballot initiatives, wherein judges impose their own policy preferences on an unwilling society. Moreover, the kinds of laws and policies typically at issue in many of these cases go not to minor matters, but to fundamental issues which affect the moral and religious basis of our society, and which the courts seem determined to govern without popular consent.

In many cases, the Supreme Court and other federal judicial bodies not only have exceeded their constitutional limits, but have challenged the principle of federalism that should protect the balance of power between the national government and the governments of the states. The Congressional Research Service has surveyed Supreme Court decisions and noted that the Court has overturned more than 260 state and local laws during the past twenty years.[6] Other federal courts likewise have nullified the actions of state legislators. In the past few years, some of the most egregious federal judicial decisions have involved initiatives passed by the people themselves.[7] In some cases, this raw exercise of judicial power has been accompanied by scant legal precedent, jurisprudential reasoning, or constitutional foundation.

When judges exceed their constitutional prerogative to interpret law and instead read their personal views and prejudices into the Constitution, the least democratic branch of government becomes the most powerful. America's Founding Fathers created a democratic republic in which elected

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5. *Id.*

6. *See Judicial Activism: Defining the Problem and Its Impact: Hearing Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary* 105th Cong. (June 11, 1997) (statement of The Honorable Edwin Meese III, Ronald Reagan Distinguished Fellow in Public Policy at the Heritage Foundation and former Attorney General of the United States) [hereinafter *Meese Senate Subcommittee Statement*) (available in WESTLAW, 1997 WL 11233616).

7. *See, e.g.,* Romer v. Evans, 517 U.S. 620 (1996) (Amendment 2 to the Colorado Constitution adopted in a statewide referendum overturned on equal protection grounds).

representatives were to decide the important issues of the day. In their view, the role of the judiciary, although crucial, was to interpret and clarify the law—not to make law. The Framers recognized the necessity of judicial restraint and the dangers of judicial activism. James Madison wrote in *The Federalist Papers* that to combine judicial power with executive and legislative authority was the "very definition of tyranny,"[8] and Thomas Jefferson believed that allowing only the unelected judiciary to interpret the Constitution would lead to judicial supremacy. "[T]o consider the judges as the ultimate arbiters of all constitutional questions [is] a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy," said Jefferson.[9]

Unfortunately, the federal judiciary has sometimes strayed far beyond its proper functions, in many ways validating Jefferson's warnings about judicial power. In no other democracy in the world do unelected judges decide as many vital political issues as they do in the United States. The federal government will never return to its proper role in American society until the federal judiciary returns to its proper role in American government.

Supreme Court decisions based on the Constitution cannot be reversed or altered, except by a constitutional amendment. Such decisions are virtually immune from presidential vetoes or congressional legislation. Abraham Lincoln warned of this in his First Inaugural Address when he said:

> [T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.[10]

When the most important social and moral issues are removed from the democratic process, citizens lose the political experience and moral education that come from resolving difficult issues and

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8. THE FEDERALIST No. 47, at 246 (James Madison) (Max Beloff ed., 2d ed. 1987).

9. Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820) *in* 15 THE WRITINGS OF THOMAS JEFFERSON 276, 277 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904).

10. Abraham Lincoln, *First Inaugural Address* (Mar. 4, 1861) *in* INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES: FROM GEORGE WASHINGTON 1789 TO GEORGE BUSH 1989 (U.S. G.P.O. 1989).

reaching a social consensus. President Ronald Reagan explained how judicial activism is incompatible with popular government:

> The Founding Fathers were clear on this issue. For them, the question involved in judicial restraint was not—as it is not—will we have liberal or conservative courts? They knew that the courts, like the Constitution itself, must not be liberal or conservative. The question was and is, will we have government by the people?[11]

## I. COURTS AND POLICY

It is not only the lack of constitutional authority that makes judicial activism a serious problem. Courts are not designed to make broad public policy. Necessarily, courts' decisions are bounded by the facts of particular cases. Likewise, courts do not have the opportunity to review a broad array of witnesses' testimony concerning the possible ramifications of their decisions. Thus, when federal judges exceed their proper interpretive role, the result is not only infidelity to the Constitution, but very often extremely poor public policy.

Numerous cases illustrate the consequences of judicial activism and the harm it has caused our society. Activist court decisions have undermined nearly every aspect of public policy. Among the most serious examples follow:

### *A. Allowing Racial Preferences and Quotas*

In *United Steelworkers of America v. Weber*,[12] the Supreme Court held for the first time that the Civil Rights Act of 1964[13] permits private employers to establish racial preferences and quotas in employment,[14] despite the clear language of the statute, "[i]t shall be an unlawful employment practice for any employer . . . to discriminate against any individual because of his race, color, religion, sex, or national origin."[15] Had the Court decided *Weber* differently, racial preferences would not exist in the private sector today. The *Weber* decision is a classic example

11. Ronald Reagan, Remarks at the Swearing-In Ceremony for William H. Rhenquist as Chief Justice & Antonin Scalia as Associate Justice of the Supreme Court of the United States (1986), *in* 2 PUBLIC PAPERS 1268, 1270 (1989).
12. 443 U.S. 193 (1979).
13. Pub. L. No. 88-352, 78 Stat. 241.
14. *See Weber*, 443 U.S. at 208-09.
15. *Id.* at 200 n.3 (quoting 42 U.S.C. § 2000e-2(d) (1970)).

of how unelected government regulators and federal judges have diverted our civil rights laws from a color-blind ideal to a complex and unfair system of racial and ethnic preferences and quotas that perpetuate bias and discrimination.

### *B. Creating a "Right" to Public Welfare Assistance*

In *Goldberg v. Kelly*,[16] the Supreme Court sanctioned the idea that welfare entitlements are a form of "property" under the Fourteenth Amendment. The Court's conclusion: Before a government can terminate benefits on the grounds that the recipient is not eligible, the recipient is entitled to an extensive and costly appeals process akin to a trial. Thanks to the Supreme Court, welfare recipients now have a "right" to receive benefits fraudulently throughout lengthy legal proceedings, and do not have to reimburse the government if their ineligibility is confirmed. The decision has tied up thousands of welfare workers in judicial hearings and has deprived the truly needy of benefits.[17] By 1974, for example, New York City alone needed a staff of 3000 to conduct *Goldberg* hearings.[18]

### *C. Hampering Criminal Prosecution*

In *Mapp v. Ohio*,[19] the Supreme Court began a revolution in criminal procedure by requiring state courts to exclude from criminal cases any evidence found during an "unreasonable" search or seizure. In so holding, the Court overruled a previous case, *Wolf v. Colorado*,[20] which had allowed each state to devise its own methods for deterring unreasonable searches and seizures. The Supreme Court in effect acted like a legislature rather than a judicial body. As a dissenting justice noted, the *Mapp* decision unjustifiably infringes upon the states' sovereign judicial systems and forces them to adopt a uniform, federal procedural remedy ill-suited to serve states with "their own peculiar problems in criminal law enforcement."[21]

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16. 397 U.S. 254 (1970).
17. *See* Edwin Meese III & Rhett DeHart, *Reigning in the Federal Judiciary,* 80 JUDICATURE 178, 179 (1997).
18. *See id.*
19. 367 U.S. 643 (1961).
20. 338 U.S. 25 (1949).
21. *Mapp*, 367 U.S. at 681 (Harlan, J., dissenting).

In fact, neither the Fourth Amendment nor any other provision of the Constitution mentions the exclusion of evidence. Similarly, the legislative history of the Constitution does not indicate that the Framers intended to require such exclusion.[22] In contrast to the Supreme Court's approach, the government ought to explore other means of deterring police misconduct without acquitting criminals, such as permitting civil lawsuits against reckless government officials and enforcing internal police sanctions against offending officers with fines and demotions.

Since *Mapp v. Ohio*, the exclusionary rule has had a devastating impact on law enforcement in the United States. One recent study estimated that 150,000 criminal cases, including 30,000 cases of violence, are dropped or dismissed every year because the exclusionary rule excluded valid, probative evidence needed for prosecution.[23]

### *D. Lowering Hiring Standards for the U.S. Workforce*

In *Griggs v. Duke Power Co.*,[24] a plaintiff challenged a company's requirement that job applicants possess a high school diploma and pass a general aptitude test as a condition of employment. The plaintiff argued that because the diploma and test requirements disqualified a disproportionate number of minorities, those requirements were unlawful under the Civil Rights Act of 1964[25] unless shown to be related to the job in question.

The Supreme Court ruled that, under the Act, employment requirements that disproportionately exclude minorities must be shown to be related to job performance, and it rejected the employer's argument that the diploma and testing requirements were implemented to improve the overall quality of its workforce.[26] Moreover, the Court held that "Congress has placed on the employer the burden of showing that any given

22. *See* Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases*, 83 COLUM. L. REV. 1365, 1371 (1983).

23. *See Meese Senate Subcommittee Statement, supra* note 6.

24. 401 U.S. 424 (1971).

25. Pub. L. No. 88-352, 78 Stat. 241.

26. *See Griggs*, 401 U.S. at 431.

requirement must have a manifest relationship to the employment in question."[27]

In fact, the Act explicitly authorizes an employer to use aptitude tests like the one challenged in *Griggs*. This insidious court decision has lowered the quality of the U.S. workforce by making it difficult for employers to require high school diplomas and other neutral job requirements. The *Griggs* decision also forced employers to adopt racial quotas in order to avoid the expense of defending hiring practices that happen to produce disparate outcomes for different ethnic groups.

### *E. "Discovering" a Right to Abortion*

In *Roe v. Wade*,[28] the Supreme Court considered the constitutionality of a Texas statute that prohibited abortion except to save the life of the mother. Although the Court acknowledged that the Constitution does not explicitly mention a right of privacy,[29] it held that the Constitution protects rights "implicit in the concept of ordered liberty."[30] In striking down the Texas statute under the Due Process Clause of the Fourteenth Amendment, the Court ruled that the "right of personal privacy includes the abortion decision."[31] The Court then went on, in a blatantly legislative fashion, to proclaim a precise framework limiting the ability of states to regulate abortion procedures.[32]

A dissenting opinion in *Roe* pointed out that, in order to justify its ruling, the majority had to somehow "find" within the Fourteenth Amendment a right that was unknown to the drafters of the Amendment.[33] When the Fourteenth Amendment was adopted in 1868, there were at least thirty-six state or territorial laws limiting abortion,[34] and the passage of the Amendment raised no questions at the time about the validity of those laws. "The only conclusion possible from this history," wrote the dissenting justice, "is that the drafters did not intend to have the

27. *Id.* at 432.
28. 410 U.S. 113 (1973).
29. *See id.* at 152.
30. *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).
31. *Id.* at 154.
32. *See id.* at 164-66.
33. *Id.* at 174 (Rehnquist, J., dissenting).
34. *See id.* at 174-75 & n.1 (Rehnquist, J., dissenting).

Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter."[35]

One of the most pernicious aspects of the *Roe* decision is that it removed one of the most profound social and moral issues from the democratic process without any constitutional authority. For the first two centuries of America's existence, the abortion issue had been decided by state legislatures, with substantially less violence and conflict than has attended the issue since the *Roe* decision.

### *F. Overturning State Referenda*

In *Romer v. Evans*,[36] the Supreme Court actually negated a direct vote of the people. This case concerned an amendment to the Colorado constitution enacted in 1992 by a statewide referendum. "Amendment 2" prohibited the state or any political subdivisions therein from adopting any policy that grants homosexuals "any minority status, quota preference, protected status or claim of discrimination."[37] The Court ruled that the amendment was unconstitutional because it did not bear a "rational relationship" to a legitimate government purpose and thus violated the Equal Protection Clause of the Fourteenth Amendment.[38]

The State of Colorado contended that this amendment protected freedom of association, particularly for landlords and employers who have religious objections to homosexuality, and that it only prohibited preferential treatment for homosexuals. But the Court rejected these arguments and offered its own interpretation of what motivated the citizens of Colorado, claiming that "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[39]

The dissenting opinion argued that Amendment 2 denies equal treatment only in the sense that homosexuals may not obtain "preferential treatment without amending the state

35. *Id.* at 176 (Rehnquist, J., dissenting).
36. 517 U.S. 620 (1996).
37. *Id.* at 624 (quoting COLO. CONST. art. II, § 30b (invalidated 1996)).
38. *See id.* at 635.
39. *Id.* at 634.

constitution."[40] Noting that, under *Bowers v. Hardwick*,[41] states are permitted to outlaw homosexual sodomy, the dissent reasoned that if it is constitutionally permissible for a state to criminalize homosexual conduct, it is surely constitutionally permissible for a state to deny special favor and protection to homosexuals.[42] The Court's decision, the dissent charged, "is an act, not of judicial judgment, but of political will."[43]

It is difficult not to regard the *Romer* decision as the pinnacle of judicial arrogance: six appointed justices struck down a law passed by fifty-four percent of a state's voters in a direct election, the most democratic of all procedures. In one of the most egregious usurpations of power in constitutional history, the Supreme Court not only desecrated the principle of self-government, but appointed itself the moral arbiter of the nation's values.

## II. COURTS AND THE CONSTITUTION

It is important to recognize that the legislative and executive branches have co-equal power with the judicial branch in regard to the Constitution. The executive has a sworn duty to uphold and protect the Constitution. Congress has the power to apply the Constitution to unfolding generations through its ability to enact statutory law. The judiciary's power is limited to interpreting the Constitution.

The Founding Fathers wisely provided three separate branches under the Constitution because they anticipated the possibility that each of the branches might go wrong from time to time and that, when that happened, the other two branches—individually or together—could use their powers to get the offending branch back on the constitutional track.

There are a number of cases throughout our more than two centuries of history in which actions of the Supreme Court have been modified or corrected by the Congress or by the President:[44]

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40. *Id.* at 638 (Scalia, J., dissenting).
41. 478 U.S. 186 (1986).
42. *See Romer*, 517 U.S. at 641 (Scalia, J., dissenting).
43. *Id.* at 653 (Scalia, J., dissenting).
44. For background material on the following three examples, as well as summaries of similar historical incidents, see GERALD GUNTHER, CONSTITUTIONAL LAW 21-28 (12th ed. 1991) and Michael Stokes Paulsen, *The Most Dangerous Branch: Executive*

- When the Supreme Court, in *Dred Scott v. Sandford*[45] in 1857, ruled that the Missouri Compromise was unconstitutional, claiming that Congress had no power to ban chattel slavery in U.S. territories, Abraham Lincoln called on Congress to pass a new statute to extend the ban on slavery to all the territories, and Congress passed such a law in 1862, long before the Thirteenth Amendment.[46]
- In the landmark case of *Marbury v. Madison*,[47] which established the Supreme Court's claim to judicial review of federal acts, President Jefferson simply disregarded Chief Justice Marshall's opinion for the Court that the President was constitutionally required to give Mr. Marbury his commission.
- The constitutionality of the Second Bank of the United States was affirmed by the Supreme Court in the 1819 case of *McCulloch v. Maryland*;[48] nevertheless, President Andrew Jackson disputed the Court's decision, withdrew the federal treasury from that institution, deposited it in state banks instead, and vetoed Congress's bill renewing its charter.

## III. THE COURTS AND CONGRESS

In recent years, the passage by Congress of the Religious Freedom Restoration Act of 1993[49] and the Prison Litigation Reform Act of 1995[50] are direct examples of Congress's changing policies and practices that had resulted from judicial decisions.

As the late constitutional scholar Alexander Bickel pointed out, the Founding Fathers intended to set up the Constitution as a kind of colloquy among the three branches of the federal government and with the self-governing citizens of the United States, rather than to make one branch final and "infallible."[51]

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*Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

45. 60 U.S. (19 How.) 393 (1857).

46. *See* Paul Finkelman, *The* Dred Scott *Case, Slavery and the Politics of Law*, 20 HAMLINE L. REV. 1, 40 (1996).

47. 5 U.S. (1 Cranch) 137 (1803).

48. 17 U.S. (4 Wheat.) 316 (1819).

49. Pub. L. No. 103-141, 107 Stat. 1488.

50. Pub. L. No. 104-134, 110 Stat. 1321-66.

51. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986).

Thus, Congress has the authority to participate in that colloquy within its lawmaking function, as well as to initiate amendments to the Constitution to provide an opportunity for the people to change Supreme Court decisions, which is the ultimate check on a Court that has gone out of control.

In carrying out its role of upholding the Constitution, Congress has a number of strategies it can use to confine the judiciary to its proper constitutional role.

The Senate should use its confirmation authority to block the appointment of activist federal judges. The Senate Judiciary Committee, by holding hearings on every judicial nomination, provides an excellent opportunity to discern a judicial candidate's understanding of a constitutionally limited judiciary. The confirmation hearings also provide a public opportunity for judicial watchdog organizations to testify in support of or against a particular nominee. In addition to the hearing, the careful review of the nominee's background, experience, writings and other information, along with the testimony of judges and other attorneys who have had ample opportunities to view a candidate's work, can provide a check on potentially activist judges. Likewise, the full Senate should vote individually on each judicial nominee. There is no more important duty for the Senate than ensuring the qualification and constitutional commitment of judges who are, in essence, appointed for life.

Congress should exercise its power to limit the jurisdiction of the federal courts. Congress has great control over the jurisdiction of the lower federal courts. Article III, Section 1 of the Constitution provides that the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." It is well-established that, because Congress has total discretion over whether to create the lower federal courts, it also has great discretion over the jurisdiction of those courts it chooses to create.[52] In fact, Congress has withdrawn jurisdiction in the past from the lower federal courts when it became dissatisfied with their performance or concluded that state courts

52. *See* Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850).

were the better forum for certain types of cases.[53] The Supreme Court has repeatedly upheld Congress's power to do so.[54]

Congress also has some authority to limit the jurisdiction of the Supreme Court and to regulate its activities. Article III of the Constitution states that the Supreme Court "shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Although we recognize that the scope of Congress's power to regulate and restrict the Supreme Court's jurisdiction over particular types of cases is under debate, there is a constitutional basis for this authority.

In the only case that directly addressed this issue, the Supreme Court upheld Congress's power to restrict the Court's appellate jurisdiction. In *Ex Parte McCardle*,[55] the Court unanimously upheld Congress's power to limit its jurisdiction, stating:

> We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.
>
> What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause.[56]

Although some respected constitutional scholars argue that Congress cannot restrict the Supreme Court's jurisdiction to the extent that it intrudes upon the Court's "core functions,"[57] there is no question that Congress has more authority under the Constitution to act than it has recently exercised.

The 104th Congress displayed an encouraging willingness to assert its authority over the jurisdiction of the lower federal courts. For example, the Prison Litigation Reform Act of 1995[58] reduced the discretion of the federal courts to micromanage state prisons and to force the early release of prisoners. The Act also makes it more difficult for prisoners to file frivolous lawsuits. (An

53. *See* Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030 (1982).
54. *See id.*
55. 74 U.S. (7 Wall.) 506 (1868).
56. *Id.* at 514.
57. *See* GUNTHER, *supra* note 44, at 43-44.
58. Pub. L. No. 104-134, 110 Stat. 1321-66.

incredible 63,550 prisoner lawsuits were filed in federal court in 1995 alone.[59]) Congress also passed the Antiterrorism and Effective Death Penalty Act of 1996.[60] This Act limits the power of the federal courts to entertain endless habeas corpus appeals filed by prisoners on death row, significantly expediting the death penalty process.[61]

Congress can limit the ability of courts to engage in judicial activism by restraining the legislative federalization of crime and the expansion of litigation in federal court. Whenever Congress enacts a new federal criminal statute or a statute creating a cause of action in federal court, it enlarges the power and authority of the federal courts and provides more opportunities for judicial activism. At the same time, the federalization of crimes that traditionally have concerned state and local governments upsets the balance between the national government and the states. The following steps can help reduce the federalization of the law and once again restore balance to the federal-state relationship.

### *A. Recodify the U.S. Code*

In the present federal criminal code, important offenses like treason are commingled with insignificant offenses like the unauthorized interstate transport of water hyacinths. The Federal Courts Study Committee found that the current federal code is "hard to find, hard to understand, redundant, and conflicting."[62] Ideally, Congress would start with a blank slate, recodifying only those offenses that truly belong under federal jurisdiction. Due to the highly political nature of crime, such an undertaking might require the creation of an independent commission modeled after the recent commission for closing unneeded military bases.

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59. *See* 142 CONG. REC. S10576-02 (daily ed. Sept. 16, 1996) (statement of Sen. Abraham); *see also* Editorial, *Inmates' Suits No Joke*, BOSTON HERALD, Jan. 11, 1997, at 12.

60. Pub. L. No. 104-132, 110 Stat. 1214.

61. *See id.*

62. Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary From the Federalization of State Crime*, 42 U. KAN. L. REV. 503, 527 & n.115 (1995) (quoting Report of the Federal Courts Study Committee 106 (1990)).

### *B. Require a "Federalism Assessment" for Legislation*

This idea would require that all federal legislation offer a justification for a national solution to the issue in question, acknowledge any efforts the states have taken to address the problem, explain the legislation's effect on state experimentation, and cite Congress's constitutional authority to enact the proposed legislation.

### *C. Create a Federalism Subcommittee within the Judiciary Committees of the House and Senate*

First proposed by President Reagan's Working Group on Federalism,[63] federalism subcommittees would attempt to ensure compliance with federalism principles in all proposed legislation.

## CONCLUSION

This analysis has addressed the public concern about judicial activism, the assault upon the Constitution that it entails, the practical detriments that result from judicial legislation, and the ways in which Congress can curtail improper judicial usurpation of the policymaking function. The latter suggestions have been modest in their scope, but could mark a good-faith effort by the legislative branch of our federal government to restore the constitutional protections for individual liberty and self-government that were designed so carefully to protect and empower the American people.

63. *See* Exec. Order No. 12,303, 46 Fed. Reg. 21,341 (1981).