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## The Commerce Clause and Criminal Law

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# THE COMMERCE CLAUSE AND CRIMINAL LAW

**Abstract:** The ongoing expansion of federal criminal law undermines the historical decentralization of criminal law in this country by usurping state authority in that area. While some protection of federalism is necessitated by the Supreme Court's commerce power jurisprudence, the economic/non-economic distinction enunciated in *United States v. Lopez* is an unworkable return to past efforts to find internal limits to the Commerce Clause. Instead, a return to the test of *National League of Cities v. Usery*—viewing the Tenth Amendment as an external limit on the scope of Congress's Commerce Clause authority—is the best means of protecting the authority of the states to make and enforce criminal law.

## INTRODUCTION

It has been five years since the United States Supreme Court announced in *United States v. Lopez* that an outer limit to Congress's Commerce Clause power to enact criminal law exists, and that the Court would police that limit.<sup>1</sup> Though not in the context of a criminal prosecution, a majority of the Supreme Court recently reaffirmed their commitment to policing that limit in *United States v. Morrison*, stating that “[t]he Constitution requires a distinction between what is truly national and what is truly local.”<sup>2</sup>

In his dissent in *Morrison*, Justice Souter rejected the Court's reasoning in both that case and *Lopez*, stating that “today's ebb of the commerce power rests on error.”<sup>3</sup> The lower courts appear to agree with Justice Souter; in the five years since the Supreme Court announced its decision in *Lopez*, lower courts have deferred to Congress in holding federal criminal statutes and their application to local crime constitutional in almost every instance.<sup>4</sup> In the face of contin-

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<sup>1</sup> See *id.* at 556–57, 561.

<sup>2</sup> *United States v. Morrison*, 120 S. Ct. 1740, 1754 (2000).

<sup>3</sup> *Id.* at 1773 (Souter, J., dissenting).

<sup>4</sup> Between 1995 and 1999, 618 cases cited *Lopez* with regard to the validity of federal criminal legislation (result of Westlaw KeyCite search of cases citing *Lopez* headnote related to federalism); see also William Funk, *The Lopez Report*, 23 ADMIN. & REG. L. NEWS 1, 14 (1998) (as of the summer of 1998, of the 400 *Lopez* challenges made to federal statutes, only three had been upheld).

ued judicial deference to Congressional assertions of Commerce Clause authority, commentators have been emboldened to proclaim that federal courts are not likely to invalidate many federal laws under *Lopez*, nor is the Supreme Court likely to expand its scope.<sup>5</sup>

At least one Circuit Court of Appeals has reached an impasse on the issue.<sup>6</sup> After meeting *en banc*, the Fifth Circuit split evenly, eight to eight, as to whether the federal government could use the Hobbs Act to reach a group of local thugs who robbed franchises of national corporations in their area including Subway Sandwiches, Church's Chicken, AutoZone Auto Parts, Dairy Queen and Hardee's.<sup>7</sup> Although the split served to uphold the conviction, the dissent in that case exposed the doctrinal differences that continue to perplex courts across the country.<sup>8</sup> Bound by that *en banc* ruling, less than a week later the Fifth Circuit upheld the Hobbs Act conviction of a man who robbed a local Ace Hardware store, part of a national chain.<sup>9</sup> In a special concurrence, however, one judge on the panel observed that "[s]ooner or later the Supreme Court must either back down from the principles enunciated in *Lopez* or rule that the Hobbs Act cannot be constitutionally applied to local robberies."<sup>10</sup>

If *Lopez* and *Morrison* do stand for meaningful limits on Congress's Commerce Clause power, the Supreme Court must definitively locate those limits to guide lower courts in their analysis of federal statutes and their application.<sup>11</sup> This Note will argue that some protection of federalism is necessitated by the Supreme Court's commerce power jurisprudence, which has gradually expanded the Commerce Clause from a limited, enumerated power to one of breathtaking sweep.<sup>12</sup> The economic/non-economic distinction enunciated in *Lo-*

<sup>5</sup> See, e.g., H. Geoffrey Moulton, *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 924 (1999) ("While the framers did envision judicial review of federalism issues, the mechanism of such review was keeping Congress to its enumerated powers, which, as a result of technological changes beyond the framers' imagination, have appropriately expanded to something close to a general police power."); Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 728-29 (1995) ("The Supreme Court sprinkled its 1994 Term with repeated clues that the Court does not intend further dramatic cuts in Congress's Commerce Clause power.");

<sup>6</sup> See *United States v. Hickman*, 179 F.3d 230, 231 (5th Cir. 1999) (Higginbotham, J., dissenting).

<sup>7</sup> See *id.* (Higginbotham, J., dissenting).

<sup>8</sup> See *id.* (Higginbotham, J., dissenting).

<sup>9</sup> See *United States v. Nutall*, 180 F.3d 182, 186-87 (5th Cir. 1999).

<sup>10</sup> *Id.* at 190 (DeMoss, J., specially concurring).

<sup>11</sup> Cf. George D. Brown, *Should Federalism Shield Corruption? Mail Fraud, State Law and Post-Lopez Analysis*, 82 CORNELL L. REV. 225, 259-60 (1997).

<sup>12</sup> See *infra* notes 16-76 and accompanying text.

pez and Morrison, however, is an unworkable return to past efforts to find internal limits to the Commerce Clause.<sup>13</sup> With the erosion of structural safeguards that preserve the values of federalism, a return to the test first enunciated in 1976 in *National League of Cities v. Usery*—viewing the Tenth Amendment as an external limit on the scope of Congress's Commerce Clause authority—is the best means of protecting the states' traditional police power.<sup>14</sup> In addition to recognizing the historical primacy of the states in enforcing criminal law, this return would bolster the power of the people in their states to hold state and federal law enforcement officials accountable by imposing a requirement that the state acquiesce in federal criminal prosecutions within their jurisdiction in subject areas traditionally policed by the states.<sup>15</sup>

### I. COMMERCE CLAUSE JURISPRUDENCE: FROM *GIBBONS V. OGDEN* TO *UNITED STATES V. LOPEZ*

The Constitution empowers Congress “[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”<sup>16</sup> Indeed, when the Founders convened at the Constitutional Convention in the spring of 1787, they met expressly “to take into consideration the trade and commerce of the United States.”<sup>17</sup> The Articles of Confederation, which loosely bound the former English colonies, had proven ineffectual, and the need for a coordinated, national commercial policy was clear.<sup>18</sup> Madison addressed the scope of Congress's power to regulate commerce between the states only briefly in *The Federalist*, arguing that the power was necessary to give effect to Congressional authority to regulate commerce with foreign nations.<sup>19</sup> He concluded unremarkably that “[t]he regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained.”<sup>20</sup>

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<sup>13</sup> See *infra* notes 37–49, 68–73 and accompanying text.

<sup>14</sup> See 426 U.S. 833, 842 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); see also *infra* notes 77–132 and accompanying text.

<sup>15</sup> See *infra* notes 133–236 and accompanying text.

<sup>16</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>17</sup> CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA 9 (1966) (citing the 1786 report of the Annapolis Commission to the Continental Congress).

<sup>18</sup> See *id.* at 9–11.

<sup>19</sup> See THE FEDERALIST No. 42, at 213–14 (James Madison) (Garry Wills ed., 1982).

<sup>20</sup> *Id.* at 236.

### A. *The Dormant Commerce Clause as a Limit on State Power*

In *Gibbons v. Ogden*, in 1824, the Supreme Court took up the question of the reach of the Commerce Clause.<sup>21</sup> In that case, the holder of a license from the State of New York to operate steam vessels sought to enjoin a competing steam ship operator who ran a similar service between New Jersey and New York.<sup>22</sup> The New York license granted the holder exclusive rights to navigate the waters of the state, while the competing steam ship operator had received a federal license under a Congressional act regulating the coasting trade and fisheries.<sup>23</sup>

Describing Congress's commerce power with "a breadth never yet exceeded,"<sup>24</sup> Chief Justice Marshall observed that:

This power [i.e., the Commerce Clause], like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitation, other than are prescribed in the constitution . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce . . . is vested in Congress as absolutely as it would be in a single government.<sup>25</sup>

In a complex federal system, Chief Justice Marshall observed, contests for power must inevitably arise.<sup>26</sup> The Constitution is not silent on this issue, however, providing that "[t]his constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land."<sup>27</sup> Chief Justice Marshall concluded that, despite the lack of any explicit overriding Congressional legislation, the very grant to Congress of the authority to pass such legislation rendered the New York license invalid.<sup>28</sup>

The reach of this "Dormant Commerce Clause," though broad, was not without limits, according to Chief Justice Marshall: "The enumeration [of the commerce power] presupposes something not enumerated; and that something . . . must be the exclusively internal

<sup>21</sup> 22 U.S. (9 Wheat.) 1 (1824).

<sup>22</sup> See *id.* at 1-2.

<sup>23</sup> See *id.*

<sup>24</sup> *Wickard v. Filburn*, 317 U.S. 111, 120 (1942).

<sup>25</sup> *Gibbons*, 22 U.S. at 196-97.

<sup>26</sup> See *id.* at 204-05.

<sup>27</sup> U.S. CONST. art. VI.

<sup>28</sup> See *Gibbons*, 22 U.S. at 210.

commerce of a State."<sup>29</sup> The reach of the federal power to regulate commerce, Chief Justice Marshall warned, is largely a political question, in that "[t]he wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances . . . the sole restraints on which they have relied, to secure them from its abuse."<sup>30</sup>

The modern formulation of the Dormant Commerce Clause is exemplified by cases such as *Pike v. Bruce Church*, in which the Supreme Court considered the reach of an Arizona statute that prohibited a company from shipping uncrated cantaloupes across the state line to a nearby packing facility in California.<sup>31</sup> In that case, in 1970, the Court applied a balancing test that weighed the legitimate local public interest protected by the Arizona statute against the burden the statute imposed on interstate commerce.<sup>32</sup> The Court acknowledged the state's interest in maintaining its reputation for high-quality produce, and held the statute a constitutional regulation of intrastate commerce as applied to Arizona growers who packaged their produce in-state.<sup>33</sup> Nevertheless, the Court held that as applied to a company that maintained its own packing facility in California, a mere thirty-one miles away from the farm in Arizona, the statute unconstitutionally interfered with interstate commerce.<sup>34</sup> Because the company did not identify its cantaloupes as Arizona produce, the Court found only slight state interest in forcing the company to comply with Arizona regulations.<sup>35</sup> That interest proved insufficient when weighed against the requirement that the company spend \$200,000 to move at least part of its packing operations from California to Arizona.<sup>36</sup>

### B. *The Commerce Clause as a Limit on Federal Power*

For nearly a century after the Court decided *Gibbons*, the Supreme Court rarely considered the extent of Congress's Commerce

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<sup>29</sup> See *id.* at 194–95.

<sup>30</sup> *Id.*

<sup>31</sup> See 397 U.S. 137, 139 (1970).

<sup>32</sup> See *id.* at 142.

<sup>33</sup> See *id.* at 143.

<sup>34</sup> See *id.* at 139, 144–45.

<sup>35</sup> See *id.* at 144.

<sup>36</sup> See *Pike*, 397 U.S. at 145.

Clause authority.<sup>37</sup> As Congress enacted increasingly comprehensive regulatory schemes in the latter part of the nineteenth century and early twentieth century, however, the Court was drawn into the struggle between states and the federal government over this issue.<sup>38</sup> The Court frequently invalidated these measures as exceeding Congress's authority to regulate under the Commerce Clause.<sup>39</sup> In so doing, the Court relied upon a confused jurisprudence that at first focused on the distinction between "production" or "manufacture" and "commerce,"<sup>40</sup> and later focused on the "direct" or "indirect" effects a particular activity had on interstate commerce.<sup>41</sup> This state of confusion continued as the nation sank deeper into economic depression during the early 1930s, and the Court drew increasing fire as it invalidated Congress's New Deal economic legislation.<sup>42</sup>

Angered by the Court's intransigence, President Franklin D. Roosevelt plotted to pack the Court with six new members, justices who would be sympathetic to New Deal reforms.<sup>43</sup> Though President Roosevelt proved unsuccessful, the Court nevertheless obliged him with the famous "switch in time that saved nine."<sup>44</sup> In *NLRB v. Jones & Laughlin Steel*, in 1937, the Court sustained federal labor laws that regulated manufacturing facilities.<sup>45</sup> Rejecting its previous inquiry

<sup>37</sup> See *United States v. Lopez*, 514 U.S. 549, 553-52 (citations omitted) (noting limited inquiry by Court into extent of commerce power); see also *id.* at 568-69 (Kennedy, J., concurring) (same).

<sup>38</sup> See *id.* at 554 (citing, e.g., Interstate Commerce Act, 24 Stat. 379 (1887); Sherman Anti-Trust Act, 26 Stat. 209, as amended, 15 U.S.C. § 1 et seq.).

<sup>39</sup> See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 308-09 (1936) (striking down federal regulation of coal industry); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546, 550 (1935) (striking down federal regulation of poultry industry); *Hammer v. Dagenhart*, 247 U.S. 251, 272 (1918) (striking down federal regulation of child labor). *But see, e.g., Caminetti v. United States*, 242 U.S. 470, 491, 496 (1917) (upholding federal prohibition on transportation of women in interstate commerce for purposes of debauchery); *Champion v. Ames*, 188 U.S. 321, 352-53, 354 (1903) (upholding federal prohibition on interstate sale of lottery tickets); *Kidd v. Pearson*, 128 U.S. 1, 20-22 (1888) (upholding state regulation of liquor manufactured for later sale in interstate commerce).

<sup>40</sup> See, e.g., *Dagenhart*, 247 U.S. at 272 (stating that production of articles using child labor is a matter of local, rather than national, regulation); *Kidd*, 128 U.S. at 20 (noting distinction between manufactures and commerce).

<sup>41</sup> See, e.g., *Carter*, 298 U.S. at 308-09 (stating that effects of labor strikes on interstate commerce are indirect); *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 546 (observing that "there is a necessary and well-established distinction between direct and indirect effects.").

<sup>42</sup> See, e.g., *Carter*, 298 U.S. at 309; *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 550. See generally C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937-1947*, at 7-9 (1963).

<sup>43</sup> See generally PRITCHETT, *supra* note 42, at 7-9.

<sup>44</sup> See *id.*

<sup>45</sup> See 301 U.S. 1, 49 (1937).

into the direct and indirect effects of a regulated activity, the Court observed that the distinction between interstate commerce, which Congress might legitimately regulate, and intrastate commerce, which Congress could not reach, "is necessarily one of degree."<sup>46</sup> The Court added that despite the distinction in past cases between manufacture and commerce, a stoppage of steel production because of labor strife would have a serious impact on interstate commerce.<sup>47</sup> The Court deferred to Congress's judgment, concluding that "interstate commerce itself is a practical conception. . . . [I]nterferences with that commerce must be appraised by a judgment that does not ignore actual experience."<sup>48</sup> That case was followed by other decisions equally deferential to Congressional judgment as to whether an activity's interstate effect was sufficient to merit federal regulation.<sup>49</sup>

That deference continued for more than fifty years, and the Commerce Clause came to be viewed as a national power with almost no limit.<sup>50</sup> In *United States v. Lopez*, in 1995, however, the Supreme Court announced that an outer limit to Congress's Commerce Clause power exists, and that the Court would police that limit.<sup>51</sup> In that case, the Court struck down the conviction of a boy who brought a handgun to school, holding that the Gun Free School Zones Act of 1990 exceeded Congress's power to legislate under the Commerce Clause.<sup>52</sup> The Court identified three broad categories that Congress may regulate under its commerce power: (1) the use of channels of interstate commerce; (2) the instrumentalities of interstate commerce, as well as persons or things in interstate commerce; and (3) activities which have a substantial relation to interstate commerce.<sup>53</sup> Finding that possession of a gun in a school zone did not fall within either of the first two categories, the Court considered whether Con-

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<sup>46</sup> See *id.* at 37.

<sup>47</sup> See *id.* at 41.

<sup>48</sup> *Id.* at 41-42.

<sup>49</sup> See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942) (deferring to Congressional determination that wheat consumption would, in the aggregate, have a substantial effect on interstate commerce); *United States v. Darby*, 312 U.S. 100, 109, 116-17 (1941) (deferring to Congressional determination that goods produced through substandard labor conditions should be barred from interstate commerce).

<sup>50</sup> See e.g., *Merritt*, *supra* note 5, at 674. *But see* *National League of Cities v. Usery*, 426 U.S. 833, 842 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (imposing external limit on Commerce Clause through Tenth Amendment); see also *infra* notes 83-132 and accompanying text.

<sup>51</sup> See 514 U.S. at 556-57, 561.

<sup>52</sup> See *id.* at 552.

<sup>53</sup> See *id.* at 558-59.



gress could legitimately regulate gun possession as an activity which had a substantial relation to interstate commerce.<sup>54</sup>

As to that third category, the Court acknowledged that the case law was unclear as to whether an activity must "affect" or "substantially affect" commerce in order to be within Congress's reach under the Commerce Clause.<sup>55</sup> The Court concluded that the proper test requires that the regulated activity "substantially affect" commerce.<sup>56</sup> Reviewing past cases, the Court further held that "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."<sup>57</sup> The Court cited examples including efforts to regulate intrastate extortionate credit transactions, as well as actions under the Civil Rights Act of 1964 that relied upon restaurants utilizing substantial interstate supplies, or inns and hotels catering to interstate guests, as permissible targets of legislation because of their economic nature.<sup>58</sup>

By contrast, the Court continued, the Gun-Free School Zones Act was a criminal statute which had nothing to do with commerce, or any sort of economic enterprise.<sup>59</sup> Although the Court observed that the "[s]tates possess primary authority for defining and enforcing the criminal law," it did not invalidate the Gun-Free School Zones Act on those grounds.<sup>60</sup> Instead, the traditional nature of criminal law as an area of state responsibility served to indicate the non-economic nature of gun possession.<sup>61</sup> The Gun-Free School Zones Act therefore could not be sustained under Congress's power to regulate economic activities that substantially affect interstate commerce.<sup>62</sup>

In his *Lopez* concurrence, Justice Kennedy, joined by Justice O'Connor, emphasized the intrusion of federal criminal law into an area of traditional state control.<sup>63</sup> A vital component of federalism, Justice Kennedy stated, is accountability; citizens must have some means of knowing which of the two governments, state or federal, to hold accountable for the failure to perform a certain function.<sup>64</sup>

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<sup>54</sup> See *id.* at 559.

<sup>55</sup> See *id.*

<sup>56</sup> See *Lopez*, 514 U.S. at 559.

<sup>57</sup> See *id.* at 560.

<sup>58</sup> See *id.* at 559 (citations omitted).

<sup>59</sup> See *id.* at 561.

<sup>60</sup> *Id.* at 561 n.3 (citation and internal quotation marks omitted).

<sup>61</sup> See *Lopez*, 514 U.S. at 561.

<sup>62</sup> See *id.* at 561.

<sup>63</sup> See *id.* at 580 (Kennedy, J., concurring).

<sup>64</sup> See *id.* at 576-77 (Kennedy, J., concurring).

When the federal government invades an area of traditional state concern, like the police power, the boundaries between state and federal spheres blur.<sup>65</sup> In the absence of a truly enumerated and well-defined commerce power, and in the face of the political convenience in ignoring the limits of federal law-making authority, Justice Kennedy argued that the Court could not abstain altogether from the federalism debate.<sup>66</sup> Moreover, he warned, broad assertions of federal criminal jurisdiction prevent the states from acting as "laboratories for experimentation" in devising new approaches to deterring crime.<sup>67</sup>

Justice Souter warned in his *Lopez* dissent that the Court's distinction between economic and non-economic activity represented a return to "the old pitfalls" of the arbitrary distinctions between "direct and "indirect" effects on commerce.<sup>68</sup> In a separate dissent, Justice Breyer added that he believed that Congress might rationally conclude that guns in classrooms did indeed substantially affect commerce.<sup>69</sup> Guns interfere with the ability of teachers to educate students, significantly reducing the quality of education.<sup>70</sup> Students represent the future workforce of America, and their diminished learning results in decreased productivity for industry.<sup>71</sup> Thus, Justice Breyer argued, Congress might rationally conclude that guns in American classrooms have a substantial effect on interstate commerce.<sup>72</sup> To demonstrate the rational nature of such a conclusion, Justice Breyer appended a lengthy compilation of sources.<sup>73</sup>

In the wake of *Lopez*, lower courts have been reticent to circumscribe Congress's authority to enact criminal law under the Commerce Clause.<sup>74</sup> For example, lower courts have rejected *Lopez* challenges to Hobbs Act prosecutions for robbery in almost every instance, relying either upon the express jurisdictional element con

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<sup>65</sup> See *id.* at 577 (Kennedy, J., concurring).

<sup>66</sup> See *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring).

<sup>67</sup> *Id.* at 581 (Kennedy, J., concurring).

<sup>68</sup> See *id.* at 606, 608 (Souter, J., dissenting).

<sup>69</sup> See *id.* at 618-21, 625-26 (Breyer, J., dissenting).

<sup>70</sup> See *id.* at 619 (Breyer, J., dissenting).

<sup>71</sup> See *Lopez*, 514 U.S. at 620-21 (Breyer, J., dissenting).

<sup>72</sup> *Id.* at 625-26 (Breyer, J., dissenting).

<sup>73</sup> See *id.* at 631-644 (Breyer, J., dissenting).

<sup>74</sup> See, e.g., Funk, *supra* note 4, at 14 (as of the summer of 1998, of the 400 *Lopez* challenges to federal statutes made, only three had been upheld).

tained in the Act,<sup>75</sup> or upon Congressional intent to regulate criminal activity which has a substantial effect on commerce.<sup>76</sup>

## II. THE TENTH AMENDMENT AND HISTORY: COLONIAL, STATE AND FEDERAL CRIMINAL PROSECUTIONS

Juxtaposed against this expansive view of the Commerce Clause is the Supreme Court's Tenth Amendment jurisprudence, which has traveled an admittedly "unsteady path."<sup>77</sup> The Tenth Amendment reserves all power not granted to the federal government to the "States respectively, or to the people."<sup>78</sup> The Court has in the past found external constraints on Congress's Commerce Clause authority through reference to the Tenth Amendment and traditional powers reserved to the states.<sup>79</sup> A review of the Court's recent Tenth Amendment jurisprudence, as well as the historical roots of both state and federal criminal law, is helpful in defining the roles of each.<sup>80</sup>

### A. *The Tenth Amendment as an External Limit on Congress's Commerce Clause Authority*

In *National League of Cities v. Usery*, in 1976, the Supreme Court attempted to define the external limit that the Tenth Amendment imposes upon federal Commerce Clause authority.<sup>81</sup> In that case, 1974 amendments to the Fair Labor Standards Act ("FLSA")—originally enacted by Congress under the Commerce Clause almost thirty years earlier—had extended the minimum wage and maximum hours provisions of that Act to almost all city and state employees.<sup>82</sup> Cities and states protested, arguing that although Congress possesses broad power to regulate under the Commerce Clause, the Tenth Amend-

<sup>75</sup> See, e.g., *United States v. Farrish*, 122 F.3d 146, 148-49 (2d Cir. 1997); *United States v. Harrington*, 108 F.3d 1460, 1466 (D.C. Cir. 1997); *United States v. Castleberry*, 116 F.3d 1384, 1387 (11th Cir. 1997); *United States v. Atcheson*, 94 F.3d 1237, 1242 (9th Cir. 1996); *United States v. Sillio*, 57 F.3d 553, 558 n.2 (7th Cir. 1995); see also Michael McGrail, Note, *The Hobbs Act After Lopez*, 41 B.C. L. REV. 949 (2000) (reviewing appellate court holdings in Hobbs Act prosecutions and suggesting alternate method of analysis).

<sup>76</sup> See, e.g., *United States v. Robinson*, 119 F.3d 1205, 1215 (5th Cir. 1997); *United States v. Bolton*, 68 F.3d 396, 399 (10th Cir. 1995); see also McGrail, *supra* note 75, at 949.

<sup>77</sup> *New York v. United States*, 505 U.S. 144, 160 (1992).

<sup>78</sup> U.S. CONST. amend. X.

<sup>79</sup> See, e.g., *National League of Cities v. Usery*, 426 U.S. 833, 842 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

<sup>80</sup> See *infra* notes 81-184 and accompanying text.

<sup>81</sup> See 426 U.S. at 845-46.

<sup>82</sup> See *id.* at 836.

ment protection of state sovereignty acts as an external limit to that power.<sup>83</sup> A majority of the Court agreed, observing that “[t]his Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers . . . to regulate commerce.”<sup>84</sup> The Court noted that despite language in a leading Commerce Clause case that dismissed the Tenth Amendment as a mere “truism,” the Tenth Amendment declares that Congress may not exercise its power in a manner which impairs the states’ integrity or their ability to function effectively in a federal system.<sup>85</sup> The Court added that although Congress may otherwise possess the legislative authority to do so, it may not invade certain attributes fundamental to the sovereignty of state governments and essential to their functioning.<sup>86</sup>

One attribute of state sovereignty, the Court continued, is the power to determine the wages and hours of those employed to carry out government functions, such as police and fire protection.<sup>87</sup> In addition to cost increases imposed upon states, the Court expressed concern that FLSA would also interfere with state employment policy decisions, such as hiring people with little training or students on their summer breaks.<sup>88</sup> The Court noted that this “interfere[nce] with traditional aspects of state sovereignty” became even more glaring when FLSA’s overtime provisions were considered, forcing the states to increase hiring or wages regardless of the states’ own employment policy decisions.<sup>89</sup> The Court concluded that by regulating the “States Qua States,”<sup>90</sup> FLSA unconstitutionally eroded the ability of the states to continue a separate and independent existence.<sup>91</sup>

Five years later, in *Hodel v. Virginia Surface Mining and Reclamation Association*, the Court developed a three part test based upon the holding of *National League of Cities*.<sup>92</sup> In that case, an association of coal producers challenged federal regulations governing mining practices in part because the regulations invaded traditional state author-

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<sup>83</sup> See *id.* at 841.

<sup>84</sup> See *id.* at 842.

<sup>85</sup> See *id.* (citing *Fry v. United States*, 421 U.S. 542, 547 (1975) (citing *United States v. Darby*, 312 U.S. 100, 124 (1941))).

<sup>86</sup> See *New York v. United States*, 426 U.S. at 845–46 (citation omitted).

<sup>87</sup> See *id.* at 845.

<sup>88</sup> See *id.* at 846–48.

<sup>89</sup> See *id.* at 849–50.

<sup>90</sup> *Id.* at 847.

<sup>91</sup> See *New York v. United States*, 426 U.S. at 855.

<sup>92</sup> 452 U.S. 264, 287–88 (1981).

ity to regulate land use.<sup>93</sup> The Court stated that a successful Tenth Amendment challenge must show (1) that the challenged statute regulates the "States as States," (2) the federal regulation addresses matters that are indisputably attributes of state sovereignty, and (3) state compliance with the regulation would directly impair their ability to structure integral operations in areas of traditional governmental functions.<sup>94</sup> The Court held that because the federal mining regulations governed only private individuals, rather than states, the Tenth Amendment challenge failed.<sup>95</sup>

In *EEOC v. Wyoming*, in 1983, the Supreme Court further refined its analysis of the external constraints the Tenth Amendment imposed upon the Commerce Clause.<sup>96</sup> In that case, a game warden forced to retire by the Wyoming Game and Fish Department fought his involuntary retirement, seeking enforcement of Congress's 1974 amendment to the Age Discrimination in Employment Act ("ADEA") that extended the provisions of that law to state employees.<sup>97</sup> Although the Court acknowledged the management of state parks as a traditional state function, it nevertheless upheld the application of the ADEA to protect the game warden as a valid exercise of Congress's Commerce Clause authority.<sup>98</sup> The Court reasoned that the degree of federal intrusion in that instance was not sufficient to rise to an impermissible interference with state sovereignty, and that there was no showing of the potential impact on the ability of a state to structure its operations.<sup>99</sup> Even if the federal intrusion had been of a greater degree, the Court noted that the federal interest in protecting older workers, when weighed against state sovereignty, might still justify state submission to federal regulation.<sup>100</sup>

*National League of Cities* and its progeny survived for less than ten years.<sup>101</sup> In 1985, in *Garcia v. San Antonio Metropolitan Transit Authority*, the Supreme Court reconsidered the 1974 amendments to FLSA.<sup>102</sup> In

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<sup>93</sup> See *id.* at 284-85.

<sup>94</sup> See *id.* at 287-88.

<sup>95</sup> See *id.* at 293. The Court also observed that under the Commerce Clause, Congress could have displaced state regulation of surface coal mining altogether. "We fail to see why [a regulation] should become constitutionally suspect simply because Congress chose to allow the States a regulatory role." *Id.* at 290.

<sup>96</sup> See 460 U.S. 226, 239 (1983).

<sup>97</sup> See *id.* at 233.

<sup>98</sup> See *id.* at 239.

<sup>99</sup> See *id.*

<sup>100</sup> See *id.* at 237 (citation omitted); see also *id.* at 243 n.17.

<sup>101</sup> See *Garcia*, 469 U.S. at 531.

<sup>102</sup> See *id.* at 530.

that case, a federal district court had concluded that owning and operating a municipal mass-transit system was a traditional governmental function, thus placing the transit authority's employees beyond the reach of 1974 amendments to FLSA.<sup>103</sup> Observing that the "traditional governmental function" test had proven not only unworkable, but also inconsistent with established principles of federalism, the Court overruled *National League of Cities*.<sup>104</sup>

The Court noted that, since its decision in *National League of Cities*, it had made little headway in defining the scope of the state governmental functions to be protected.<sup>105</sup> The Court added that, once the "traditional governmental function" test was rejected, no alternative test appeared workable.<sup>106</sup> The Court refused to look at the historical authority of states in particular areas, because such a standard would not allow courts to accommodate state expansion into non-traditional areas such as education.<sup>107</sup> The Court also rejected any non-historical standard, such as "uniquely" governmental functions, finding that such standards would be as unmanageable as the standard in *National League of Cities*.<sup>108</sup>

The Court concluded that judicial determinations of state immunity from federal regulation were inconsistent with the constitutional design.<sup>109</sup> The principal protections afforded states were political, and lay in the structure of the federal government itself.<sup>110</sup> As proof of the effectiveness of these structural safeguards, the Court pointed to the success states had enjoyed in recent years in drawing funding from the federal government, with federal grants increasing from \$7 billion to \$96 billion between 1958 and 1983.<sup>111</sup> Acknowledging that structural changes had occurred since the drafting of the Constitution—particularly the direct election of senators through the Seventeenth Amendment—the Court explained that "we are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result."<sup>112</sup>

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<sup>103</sup> See *id.*

<sup>104</sup> See *id.* at 531.

<sup>105</sup> See *id.* at 539.

<sup>106</sup> See *Garcia*, 469 U.S. at 543.

<sup>107</sup> See *id.* at 543–44.

<sup>108</sup> See *id.* at 545.

<sup>109</sup> See *id.* at 546–47.

<sup>110</sup> See *id.* at 552 (citations omitted).

<sup>111</sup> See *Garcia*, 469 U.S. at 552, 552 n.12 (citations omitted).

<sup>112</sup> See *id.* at 554.

In dissent, Justice Rehnquist summed up the fundamental disagreement between members of the Court about the nature of federalism and the Tenth Amendment: "I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court."<sup>113</sup> Justice O'Connor echoed his view: "I share Justice Rehnquist's belief that this Court will in time again assume its constitutional responsibility."<sup>114</sup>

In *New York v. United States*, in 1992, the federalist wing of the Supreme Court moved toward assuming that "constitutional responsibility," addressing the proper division of authority between the federal and state governments.<sup>115</sup> In that case, the Court considered whether Congress possessed the authority to enact certain provisions of the Low-Level Radioactive Waste Policy Act, which, among other measures, forced states to take title to radioactive waste if they failed to provide for the disposal of that waste.<sup>116</sup> Upholding the other provisions of the Act, the Court struck down the take-title provision as unconstitutional in light of the Tenth Amendment and state sovereignty.<sup>117</sup>

According to the Court, the division between federal and state authority is sharply defined by Article I of the Constitution and the Tenth Amendment: "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress."<sup>118</sup> Thus, the Tenth Amendment directs the Court to determine whether an incident of state sovereignty is protected by a limit on Article I power.<sup>119</sup>

Despite reference to the Tenth Amendment, the Court distinguished this case from *Garcia* and other Tenth Amendment cases.<sup>120</sup> Unlike *Garcia*, which considered the authority of Congress to subject states to generally applicable laws, *New York v. United States* concerned the circumstances under which Congress could use a state to imple-

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<sup>113</sup> See *id.* at 580 (Rehnquist, J., dissenting).

<sup>114</sup> See *id.* at 589 (O'Connor, J., dissenting).

<sup>115</sup> See 505 U.S. at 149.

<sup>116</sup> See *id.* at 150-54.

<sup>117</sup> See *id.* at 157, 187-88.

<sup>118</sup> See *id.* at 156.

<sup>119</sup> See *id.* at 157.

<sup>120</sup> See *New York v. United States*, 505 U.S. at 160-61.

ment federal regulations.<sup>121</sup> Looking to the history of the Constitutional Convention, the Court noted that an early draft of the New Jersey Plan suggested that state officials ought to execute federal laws and policies.<sup>122</sup> Ultimately, however, the Convention chose a national government that derived its power from the people, and governed them directly, as well.<sup>123</sup> Under this constitutional design, the federal government may not compel the states to regulate their people in a certain manner.<sup>124</sup>

The Court noted that Congress may still induce states to regulate in a certain manner, either through economic rewards under the spending power, or by regulating directly under an Article I power so as to pre-empt state authority in that area.<sup>125</sup> Either of these methods preserves the accountability of both federal and state governments to their electorate.<sup>126</sup> For example, state officials can accept or reject federal funding, according to the desires of the people in that state.<sup>127</sup> Likewise, federal officials can be elected or rejected on the basis of the national policies they endorse.<sup>128</sup> Accountability is diminished, however, when the federal government "commandeers" state officials and coerces them into enforcing federal policies.<sup>129</sup> State officials may thus be forced to bear the consequences of an unpopular federal regulatory program, while federal officials remain insulated from the angry electorate within the states.<sup>130</sup> The Court added that even if a state "consents" to subject itself to a federal plan, the plan is still void.<sup>131</sup> Congress cannot expand its constitutional authority at the expense of others.<sup>132</sup>

#### B. *Criminal Law Enforcement as an Attribute of State Sovereignty: Historical Roots of State and Federal Police Power*

Assuming that a majority of today's Court might be amenable to a Tenth Amendment argument that the state police powers in the area

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<sup>121</sup> *See id.*

<sup>122</sup> *See id.* at 164.

<sup>123</sup> *See New York v. United States*, 505 U.S. at 165.

<sup>124</sup> *See id.* at 166.

<sup>125</sup> *See id.* at 167.

<sup>126</sup> *See id.* at 168.

<sup>127</sup> *See id.*

<sup>128</sup> *See New York v. United States*, 505 U.S. at 168.

<sup>129</sup> *See id.* at 169.

<sup>130</sup> *See id.*

<sup>131</sup> *See New York v. United States*, 505 U.S. at 182.

<sup>132</sup> *See id.*



of criminal law are a "traditional" component of sovereignty, it is helpful to consider the origin of both state and federal criminal law.<sup>133</sup> Some excellent records of early criminal prosecutions have been compiled, particularly in Massachusetts and Virginia, two of the most influential original colonies.<sup>134</sup> A study of these records demonstrates what the Founders may have understood to lie within the proper purview of the states.<sup>135</sup>

Colonial criminal law derived from a mix of provincial statutes and common law, influenced by the physical and social environment of the New World as well as the ideological views of the colonists.<sup>136</sup> In a 1767 charge to a grand jury, for example, Chief Justice Hutchinson of the Massachusetts Superior Court of Judicature observed that "[i]n this Country we have always been happy in a good Set of Laws. The principal Crown-Law of this Province is grounded on our provincial Laws; where these fail, the Common Law of England is the Rule."<sup>137</sup> Similarly, the Virginia General Court heard trials on statutory and common law felonies such as arson, burglary, robbery, counterfeiting, murder, rape and treason.<sup>138</sup> Though there were other crimes that fell within the jurisdiction of the Virginia General Court, little evidence exists that they were ever enforced.<sup>139</sup>

Colonists particularly feared arson because of the destruction fire could wreak to homes and people.<sup>140</sup> In 1730, the Virginia Assembly passed into law a bill providing that any person convicted of maliciously, unlawfully, and willingly engaging in arson would be found a felon without benefit of clergy.<sup>141</sup> Destruction of property—whatever

<sup>133</sup> *Id.* at 580 (O'Connor, J., dissenting); see also Brown, *supra* note 11, at 259-60; cf. *id.* at 156-57; Garcia, 469 U.S. at 579-80 (Rehnquist, J., dissenting).

<sup>134</sup> See generally JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1772 (Josiah Quincy, Jr. ed., 1865); HUGH F. RANKIN, TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA (1965).

<sup>135</sup> See *infra* notes 136-184 and accompanying text.

<sup>136</sup> See LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 22-23 (1993).

<sup>137</sup> See QUINCY, *supra* note 134, at 235.

<sup>138</sup> See RANKIN, *supra* note 134, at 126-226.

<sup>139</sup> See *id.* at 126.

<sup>140</sup> See *id.*

<sup>141</sup> See *id.* at 126-27. "Benefit of clergy" originated in feudal England as a privilege extended to clergy accused of committing a felony. See DANIEL R. COQUILLETTE, THE ANGLO-AMERICAN LEGAL HERITAGE 440 (1999). Over time, the privilege was extended to anyone who could read Psalm 51:1—known as the "neck verse" because it kept one's neck out of the noose. See *id.* By 1705, even the reading was abolished, and benefit of clergy had be-

the means—weighed heavily in the minds of the colonists. In Massachusetts, Chief Justice Hutchinson, whose home was destroyed by a mob protesting the imposition of the Stamp Act in 1765, appeared in court the morning after the riot—wearing clothes borrowed from friends—to warn the colonists that “this is not the Way to proceed—the Laws of our Country are open to punish those who have offended.”<sup>142</sup>

Thefts of all types plagued the colonists in both Massachusetts and Virginia, particularly in the 1760s, around the time England began sending larger numbers of convicts to the New World.<sup>143</sup> Chief Justice Hutchinson admonished a Massachusetts grand jury in 1766 that “[t]here has been of late, a great Number of Thefts and Robberies committed in the Day-time in many of the neighbouring Towns,” and urged the grand jury to be alert for similar crimes in Boston.<sup>144</sup> The Virginia laws against theft and the severity of their punishment—which ranged from as little as a few lashes to conviction and punishment as a felon—reflected a similar interest in protecting citizens in their property.<sup>145</sup>

The presence of multiple currencies in colonial Virginia made enforcing laws against counterfeiting difficult.<sup>146</sup> As a formal matter, counterfeiting was a crime against the King, and those found guilty of this high treason were to be sentenced to a horrible death.<sup>147</sup> Though at least one colonist was tried, convicted and executed for this crime, the colonists did not share the traditional English taste for gore, and dispensed with the formalities in preference of a simple hanging.<sup>148</sup> Massachusetts had a similar prohibition against counterfeiting the

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come a one-time opportunity to escape the death penalty for those who had been convicted of a felony and sentenced to death. *See id.*

<sup>142</sup> See QUINCY, *supra* note 139, at 172–73.

<sup>143</sup> See RANKIN, *supra* note 134, at 158.

<sup>144</sup> See QUINCY, *supra* note 134, at 223.

<sup>145</sup> See RANKIN, *supra* note 134, at 159, 161.

<sup>146</sup> *See id.* at 177–78.

<sup>147</sup> *See id.* at 177. In 1736, the punishment for high treason was described:

The Offender shall be drawn upon a Hurdle, backward, with his Head downward, from the Prison to the Gallows, and there hang'd, then cut down alive, his Privy Members cut off, and his Entrails cut out, his Body quartered, and his Head and Quarters hang'd up: All his Lands, Goods and Chattels, are forfeited, and his Blood corrupted. But in Counterfeiting &c. of Current Coin, there is no Corruption of Blood. . . .

*Id.* at 177–78 n.76 (citation omitted).

<sup>148</sup> *See id.* at 187.

King's coin, although the provincial law made it a lesser crime than treason against the King.<sup>149</sup>

Both the Massachusetts and Virginia courts heard trials for murder and rape.<sup>150</sup> Chief Justice Hutchinson instructed one grand jury: "Homicide . . . is another Offence which you are to take Notice of, and this . . . may be done, either by shooting, striking, poisoning, or any other Way, however secret, by which the Life of a Man is destroyed."<sup>151</sup> With little exception, the punishment for these crimes was death.<sup>152</sup>

As the colonists began to speak rebellious words more openly in the late 1760s, the colonial courts struggled to keep a lid on open rebellion—largely through stern warnings about the consequences of treason.<sup>153</sup> Treason encompassed any rebellion, sedition or speaking against the King or government.<sup>154</sup> Chief Justice Hutchinson warned those critics of the colonial government and the Crown published in local newspapers that he would "not pronounce those Authors guilty of High Treason; but I will venture to say, they come as near it as possible, and not come within it."<sup>155</sup> Even after the Revolution, the delegates to the Constitutional Convention—perhaps concerned for the integrity of their newly formed state governments—refused to cede all authority to prosecute treason to the federal government.<sup>156</sup>

After the drafting and ratification of the Constitution, the new state governments continued to make and enforce criminal laws.<sup>157</sup>

<sup>149</sup> See QUINCY, *supra* note 134, at 221.

<sup>150</sup> See *id.* at 176 (recounting a 1765 charge to the Grand Jury in which Chief Justice Hutchinson instructed "You are to inspect all Felonies . . . All Offences that more immediately respect the Morals of the People you are to enquire of; such as . . . Profaneness, Lewdness, and those Crimes which a chaste Ear cannot bear the Recital of"); *id.* at 221 (murder); RANKIN, *supra* note 134, at 220 (rape); *id.* at 204 (murder).

<sup>151</sup> See QUINCY, *supra* note 134, at 222.

<sup>152</sup> See RANKIN, *supra* note 134, at 204, 219.

<sup>153</sup> See QUINCY, *supra* note 134, at 245–46, 260.

<sup>154</sup> See RANKIN, *supra* note 134, at 223.

<sup>155</sup> QUINCY, *supra* note 134, at 263.

<sup>156</sup> See Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 43–44 (1996).

<sup>157</sup> The unremarkable nature of this statement, and the continuity of criminal law enforcement in the transition from colonial to state government, is demonstrated by a Massachusetts law entitled "An ACT providing for the Payment of Costs in criminal Prosecutions, and for preventing unnecessary Costs therein" enacted in 1791. See ASAHEL STEARNS & LEMUEL SHAW, *THE GENERAL LAWS OF MASSACHUSETT'S FROM THE ADOPTION OF THE CONSTITUTION TO FEBRUARY, 1822*, at 403 (Theron Metcalf ed., 1823). That Act found colonial statutory provisions for the payment of costs in criminal prosecutions insufficient—though still valid—and established a new program to pay for criminal law enforcement. See *id.* at 403–06.

Indeed, there was an unbroken passage of power and legitimacy from colonial to state governments; for example, despite the colonial origin of law reports compiled by Josiah Quincy, Jr. in the Superior Court of Judicature for Massachusetts Bay between 1761 and 1772, the Massachusetts Supreme Judicial Court routinely cited to those reports long after achieving independence, and continued to cite Quincy's *Reports* as late as 1959.<sup>158</sup>

Although the states have enjoyed a pre-eminent position in defining criminal law and punishment since the original thirteen colonies were chartered some 350 years ago, the Constitution created some police power in the federal government at its inception.<sup>159</sup> Federal criminal law issues received only modest consideration during the Constitutional Convention, however.<sup>160</sup> Debate on the substantive issues of criminal law revolved almost exclusively around four main topics: (1) piracy, (2) crimes against the law of nations, (3) treason and (4) counterfeiting.<sup>161</sup> While there was broad agreement that these issues required national governmental action and thus deserved mention in the Constitution, there was also great reluctance to cede criminal law enforcement powers to the new federal government or to have prosecutions for those crimes tried in federal court.<sup>162</sup>

There was little opposition to the general principle that piracy was an appropriate subject for the new federal government.<sup>163</sup> The Convention thus agreed, after some discussion, to delegate the authority to define and punish piracy and felonies on the high seas exclusively to Congress.<sup>164</sup> Moreover, pursuant to Congress's power to make laws regarding the coining of money, the Convention agreed that Congress should also have the power to punish counterfeiting.<sup>165</sup> To some extent, this power was necessary because the Constitution rejected the common law conception of treason—of which counterfeiting was a part—in favor of a more restrictive definition.<sup>166</sup>

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<sup>158</sup> See Daniel R. Coquillette, *First Flower—the Earliest American Law Reports and the Extraordinary Josiah Quincy Jr. (1744–1775)*, 30 SUFFOLK U. L. REV. 1, 10 (1996) (citations omitted).

<sup>159</sup> See Kurland, *supra* note 156, at 46.

<sup>160</sup> See *id.* at 25.

<sup>161</sup> See *id.* at 25–26.

<sup>162</sup> See *id.* at 28.

<sup>163</sup> See *id.* at 33.

<sup>164</sup> See Kurland, *supra* note 156, at 38.

<sup>165</sup> See *id.* at 39–40.

<sup>166</sup> See *id.* at 41.

In fact, considerable debate surrounded provisions for prosecution of treason during the Constitutional Convention, largely because some representatives insisted that the states should retain the power to define and prosecute treason independent of the federal power to do so.<sup>167</sup> In spite of concerns expressed by Madison that the separate powers of the state and federal governments to prosecute treason would result in multiple prosecutions, the notion that a sovereign inherently possesses the power to punish treason as a form of self-protection proved too enduring to be overcome at the Convention.<sup>168</sup> The states and federal government thus shared the power to prosecute treason.<sup>169</sup>

Bribery appears in the Constitution in the context of impeachment, from which some infer a power in Congress to enact federal criminal legislation.<sup>170</sup> Because the common law conception limited bribery prosecutions to public officials, the Convention felt no need to define the term further, and Congress did not hesitate to make statutory provisions defining bribery and prescribing the punishment for a number of public officials guilty of misconduct.<sup>171</sup>

Thus, piracy, counterfeiting, treason, and perhaps bribery of public officials were within the legitimate domain of the federal criminal law ordained in the Constitution.<sup>172</sup> Congress extended its reach somewhat more, however, under the Necessary and Proper Clause in conjunction with its enumerated powers almost as soon as it met in 1789.<sup>173</sup> In 1792, Congress used the Postal Clause to criminalize various postal crimes, such as robbing and stealing mail.<sup>174</sup> This early instance of concurrent jurisdiction has been taken as evidence that the spheres of state and federal sovereignty blurred and overlapped even at the outset of the Republic.<sup>175</sup>

In *Cohens v. Virginia*, in 1821, the Supreme Court described the relationship between the federal and state governments in the domain of criminal law.<sup>176</sup> In that case, a man convicted in a Virginia state court for selling lottery tickets in violation of a Virginia statute

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<sup>167</sup> See *id.* at 42-44.

<sup>168</sup> See *id.* at 43-44.

<sup>169</sup> See Kurland, *supra* note 156, at 43-44.

<sup>170</sup> See *id.* at 48.

<sup>171</sup> See *id.* at 48, 53.

<sup>172</sup> See *id.* at 46.

<sup>173</sup> See *id.* at 58.

<sup>174</sup> See Kurland, *supra* note 156, at 58.

<sup>175</sup> See *id.* at 62.

<sup>176</sup> See 19 U.S. (6 Wheat.) 264 (1821).

argued that his conviction could not stand because Congress had authorized the government of the District of Columbia to sell those lottery tickets.<sup>177</sup> He argued that the Congressional act invalidated any Virginia criminal provisions against lottery ticket sales.<sup>178</sup> The Court observed that Congress possesses the authority to punish murder in a federal facility—and even the concealment of that crime outside the facility—but no general right to punish murder committed within any of the States.<sup>179</sup> Moreover, the Court stated that “[i]t is clear, that Congress cannot punish felonies generally.”<sup>180</sup>

The Court added, however, that the Constitution delegated to the Congress enumerated powers, and with that all of the authority necessary to carry out those enumerated powers.<sup>181</sup> Thus Congress could pass legislation to punish certain felonies, where those felonies threatened an enumerated power.<sup>182</sup> Nevertheless, the Court counseled against presuming that Congress would lightly invade state prerogatives with respect to the criminal law.<sup>183</sup> Holding that Congress had expressed no clear intent to allow the sale of lottery tickets past the borders of the District of Columbia, the Court upheld the conviction as a valid exercise of Virginia criminal law.<sup>184</sup>

### III. THE FORGOTTEN ROLE OF THE SENATE: VOICE OF THE STATES

Although, as Chief Justice Marshall observed in *Gibbons*, the question of the reach of congressional commerce power is primarily political,<sup>185</sup> substantial changes have occurred in our national government in the past 100 years that undermine the protection afforded state sovereignty.<sup>186</sup> The shift from a Senate elected by state legislatures to one elected directly by the people—a change effected by the ratification in 1913 of the Seventeenth Amendment to the Constitution—was apparently directed at the undesirable control of state legis-

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<sup>177</sup> See *id.* at 375.

<sup>178</sup> See *id.* at 375, 376.

<sup>179</sup> *Id.* at 426.

<sup>180</sup> *Id.* at 428.

<sup>181</sup> See *Cohens*, 19 U.S. at 429 (“Congress is not a local legislature. . . . The American people thought it a necessary power. . . . Being so conferred, it carries with it all those incidental powers which are necessary to its complete and effectual execution.”).

<sup>182</sup> See *id.* at 426.

<sup>183</sup> See *id.* at 443.

<sup>184</sup> See *id.* at 448.

<sup>185</sup> See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824).

<sup>186</sup> See U.S. CONST. amend. XVII.

latures by party bosses, and did not contemplate the radical impact this change would have upon federalism.<sup>187</sup>

The Founders originally provided in the Constitution that the Senate was to be elected by the state legislatures.<sup>188</sup> As Madison explained in *The Federalist*:

the appointment of senators by the state legislatures. . . . is recommended by the double advantage of favouring a select appointment, and of giving to the state governments such an agency in the formation of the federal government, as must secure the authority of the former; and may form a convenient link between the two systems.<sup>189</sup>

Madison noted that the equal vote for each state in the Senate recognized the equal share each state had in preserving their residual sovereignty "to guard by every possible expedient against an improper consolidation of the states into one simple republic."<sup>190</sup> Thus, for the first 120 years of the Republic, senators represented their state governments, not the people in their states.<sup>191</sup>

When Progressive senators proposed an amendment to the Constitution providing for the direct election of senators in May 1908, they cited the support of twenty-seven state legislatures, and urged senators from those states to aid in passing the amendment.<sup>192</sup> The resolution died in committee after being referred to the Committee on Privileges and Elections.<sup>193</sup> Undeterred, Progressive senators again introduced a resolution calling for the direct election of senators with the next Congress.<sup>194</sup> On May 31, 1910, they came to the floor of the Senate armed with the resolutions and laws of thirty-seven states—"over three-fourths of the States of the Union."<sup>195</sup> Progressives recited a litany of progressive reforms that had been defeated in the Senate, and attributed those defeats to the corruption of the party machinery.<sup>196</sup> Supporters of the amendment believed that direct election

<sup>187</sup> See C.H. HOEBEKE, *THE ROAD TO MASS DEMOCRACY* 17-19 (1995).

<sup>188</sup> See U.S. CONST. art. I, § 3.

<sup>189</sup> *THE FEDERALIST* No. 62, at 313 (James Madison) (Garry Wills ed., 1982).

<sup>190</sup> See *id.* at 314.

<sup>191</sup> Compare U.S. CONST. art. I, § 3, with U.S. CONST. amend. XVII.

<sup>192</sup> See 60 CONG. REC. 6803-04 (1908).

<sup>193</sup> See 60 CONG. REC. 6809 (1908); 61 CONG. REC. 7112 (1910).

<sup>194</sup> See 61 CONG. REC. 7112 (1910).

<sup>195</sup> 61 CONG. REC. 7113 (1910).

<sup>196</sup> See 61 CONG. REC. 7122-24 (1910). According to one senator:

would serve as a panacea for all of the ills induced by "the machine."<sup>197</sup>

Although that resolution also failed to muster the necessary two-thirds support in the last week of the 61st Congress, proponents of the resolution knew that they would have an adequate number of votes to pass the resolution in the next Congress.<sup>198</sup> That is precisely what happened; exhausted and overwhelmed, opponents to the measure relented after a desultory debate in the Senate.<sup>199</sup> The measure was reported out of a joint House-Senate committee as the Seventeenth Amendment on May 13, 1912, and submitted to the state legislatures for ratification.<sup>200</sup> The state legislatures ratified the amendment in less than a year with remarkably little debate, despite profound constitutional consequences to state representation in the federal government.<sup>201</sup>

#### IV. COOPERATIVE AND ADVERSARIAL MODELS OF CONCURRENT STATE-FEDERAL CRIMINAL JURISDICTION

Although it is difficult to establish a causal link, it can definitively be said that federal criminal law has expanded dramatically since the ratification of the Seventeenth Amendment.<sup>202</sup> According to the American Bar Association Task Force on Federalization of Criminal Law ("Task Force"), just 8% of all federal criminal provisions enacted since the Civil War were adopted prior to 1909, four years before the ratification of the Seventeenth Amendment.<sup>203</sup> After 1909, federal criminal statutes steadily increased in frequency.<sup>204</sup> More than 40% of the federal criminal provisions enacted since the Civil War have been

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It is not true . . . that purity in politics is an iridescent dream. It can be made a reality . . . by the overthrow of the imperfect mechanism of party government which has evolved the bad system of machine-rule government. The remedy for the evils from which our national, state and municipal governments have suffered is to restore the rule of the people.

*Id.* at 7123.

<sup>197</sup> See *id.* at 7123 ("The people have no sinister purposes. The people will not sell out."); see also 61 CONG. REC. 2494-95 (1911); *id.* at 2251, 2257-58.

<sup>198</sup> See HOEBEKE, *supra* note 187, at 182.

<sup>199</sup> See *id.* at 182-83.

<sup>200</sup> See *id.* at 189.

<sup>201</sup> See *id.* at 189-90.

<sup>202</sup> See James A. Strazzella, *The Federalization of Criminal Law*, 1998 A.B.A. TASK FORCE ON FEDERALIZATION OF CRIM. L. CRIM. JUST. SEC. 9 chart 2.

<sup>203</sup> See *id.*

<sup>204</sup> See *id.*



enacted since 1970,<sup>205</sup> many of these touching on traditional state police power areas such as arson, murder, rape and theft.<sup>206</sup> Congress continues to expand the reach of federal criminal law, an expansion which the Task Force recently warned could undermine the historical decentralization of the criminal law which has served our nation so well.<sup>207</sup> The Task Force has identified almost 10,000 criminal and punitive civil sanctions which are spread throughout the United States Code.<sup>208</sup> These criminal and punitive civil sanctions are so pervasive, however, that no comprehensive list of every federal criminal sanction is possible to compile.<sup>209</sup>

Although they operate independently, state and federal law enforcement officials differ more in the manner in which they are selected than in the crime control issues they face.<sup>210</sup> The President of the United States appoints a United State Attorney to each judicial district with the advice and consent of the Senate; subject to removal by the President, U.S. Attorneys serve a term of four years.<sup>211</sup> Depending upon the size of a state, there can be from one to four U.S. Attorneys appointed.<sup>212</sup> By contrast, forty-one state attorneys general are directly elected by the people within that state.<sup>213</sup> The remaining at-

<sup>205</sup> See *id.* at 7.

<sup>206</sup> See *id.* at app. C.

<sup>207</sup> See Strazzella, *supra* note 202, at 43.

<sup>208</sup> See *id.* at 10; see also *id.* at 10 n.11 (observing that although a number of "approximately 3000 federal crimes" is frequently cited, that number is already 16 years old).

<sup>209</sup> See *id.* at 10.

<sup>210</sup> See 28 U.S.C. § 547 (1994) (providing that U.S. Attorney shall prosecute all offenses against United States); see also Elizabeth Glazer, *Thinking Strategically: How Federal Prosecutors Can Reduce Violent Crime*, 26 FORDHAM URB. L.J. 573, 581 (1999) (stating that federal prosecutors have "begun systematically to stake out territory traditionally dominated by district attorneys.").

<sup>211</sup> See 28 U.S.C. § 541 (a)-(c) (1994).

<sup>212</sup> See, e.g., 28 U.S.C. § 101 (1994) (designating Massachusetts as one judicial district); 28 U.S.C. § 84 (1994) (dividing California into four judicial districts).

<sup>213</sup> Compare 28 U.S.C. § 541 (a)-(c) (1994), with ALA. CONST. art. V, § 114; ARIZ. CONST. art. V, § 1; ARK. CONST. art. VI, §§ 1, 3; CAL. CONST. art. V, § 11; COLO. CONST. art. IV, §§ 1, 3; CONN. GEN. STAT. ANN. § 3-124 (West 1988); DEL. CONST. art. III, § 21; FLA. CONST. art. IV, §§ 4, 5; GA. CONST. art. V, § 3, ¶ 1; IDAHO CONST. art. IV, § 1; ILL. CONST. art. V, §§ 1, 2; IND. CODE ANN. § 4-6-1-2 (Michie 1996); IOWA CONST. art. V, § 12; KAN. CONST. art. 1, § 1; KY. CONST. § 91; LA. CONST. art. IV, § 3; MD. CONST. art. V, § 1; MASS. CONST. amend. XVII; MICH. CONST. art. V, § 1.V(21); MINN. CONST. art. V, § 1; MISS. CONST. art. VI, § 173; MO. CONST. art. IV, § 17; MONT. CONST. art. VI, § 2; NEB. CONST. art. IV, § 1; NEV. CONST. art. 5, § 19 N.M. CONST. art. V, § 1; N.Y. CONST. art. V, § 1; N.C. CONST. art. III, § 7; N.D. CONST. art. V, § 2; OHIO CONST. art. III, § 1; OKLA. CONST. art. 6, § 4; OR. REV. STAT. §§ 180.010-.020 (1989); R.I. CONST. art. IV, § 1; S.C. CONST. art. VI, § 7; S.D. CONST. art. IV, § 7; TEX. CONST. art. 4, § 1, 2; UTAH CONST. art. VII, § 1; VT. STAT. ANN. tit. 3, § 151 (1995); VA. CONST. art. V, § 15; WASH. CONST. art. III, § 1; WIS. CONST. art. VI, § 1.

torneys general are appointed by the governor or some other elected state official or officials.<sup>214</sup>

Cooperative crime-fighting efforts between these local and federal officials can result in significant reductions in local crime.<sup>215</sup> Federal prosecutors, armed with the resources of the federal government and the stiff penalties under the U.S. Sentencing Guidelines, can have a tremendous impact on local crime.<sup>216</sup> For example, in February 1997, President Clinton lauded federal, state and local officials in Boston for their coordinated effort in combating juvenile crime, particularly gang violence.<sup>217</sup> Known as the "Boston Plan," the joint effort emphasizes intervention, prevention and enforcement.<sup>218</sup> The intervention and prevention elements utilize a variety of community-based programs, funded by both the state and federal governments, to provide young people with alternative after-school and summer activities, encouraging them to pursue professional careers rather than crime as a vocation.<sup>219</sup>

The threat of federal prosecution is particularly potent in the area of enforcement.<sup>220</sup> After the Youth Violence Strike Force (YVSF)—a division of the Boston Police Department—identifies juvenile violence hot spots within the city, it sends representatives to meet with both community members and gang members to warn that these neighborhoods will receive intensive police attention unless the violence stops.<sup>221</sup> Together with the Suffolk County District Attorney and U.S. Attorney for the District of Massachusetts, city officials target the most dangerous offenders for federal prosecution, in order to take

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<sup>214</sup> Six of the remaining attorneys general are appointed by the governor, often with some form of advice and consent from the state legislature. See ALASKA STAT. § 44.23.010-020; HAW. REV. STAT. ANN. § 28-1 to 7 (Michie 1999); N.H. CONST. art. 46; N.J. CONST. art. 5, § 4, ¶ 3; PA. CONST. art. 4, § 8; WYO. STAT. ANN. § 9-1-601 (Michie 1999). One attorney general is elected by state senators and representatives. See ME. CONST. art. 9, § 11. The Tennessee Supreme Court appoints that state's attorney general, see TENN. CONST. art. VI, § 5, but the judges of that court are elected, see *id.* at art. VI, § 3.

<sup>215</sup> See, e.g., Brian Privor, *Dush 'Til Dawn: Children's Rights and the Effectiveness of Juvenile Curfew Ordinances*, 79 B.U. L. REV. 415, 475 (1999).

<sup>216</sup> See Glazer, *supra* note 210, at 574.

<sup>217</sup> See Ann Scales, *Clinton Offers Crime Plan, Cites Boston Effort in Push for \$500M in Youth Programs*, BOSTON GLOBE, Feb. 20, 1997, at A1.

<sup>218</sup> See Privor, *supra* note 215, at 476.

<sup>219</sup> See *id.* at 478-81. A complete review of the prevention and intervention programs are beyond the scope of this Note; nevertheless, their importance to the success of the Boston Plan cannot and should not be underestimated.

<sup>220</sup> See *id.* at 477.

<sup>221</sup> See *id.* at 476-77.

advantage of greater federal resources and the stiffer penalties meted out under the U.S. Sentencing Guidelines.<sup>222</sup>

These measures have significantly reduced youth violence in Boston.<sup>223</sup> From the plan's initiation in 1995 to 1997, homicides committed in Boston by people under twenty-four years old dropped from forty to fifteen.<sup>224</sup> Between 1995 and 1998, only four firearms homicides of youths under the age of sixteen occurred in the city, with one eighteen month period from July 1995 through the end of 1996 during which no juveniles were killed by gunfire.<sup>225</sup> When Brooklyn officials confronted an increase in youth violence in 1999, they turned to the Boston Plan as their model.<sup>226</sup> A key component of that plan, worked out by federal and local law-enforcement officials, included federal criminal prosecutions of the worst offenders.<sup>227</sup>

On the other hand, the failure of federal and local law-enforcement officials to coordinate their efforts can result in significant waste of scarce resources, and awaken state-federal jealousies and animosities.<sup>228</sup> For example, in *United States v. Miles*, two men who committed a string of armed robberies of McDonald's restaurants, a Taco Bueno restaurant and a Colter's Barbecue and Grill in and around Gainesville, Texas were convicted of, among other charges, four counts of interference with interstate commerce by robbery under the Hobbs Act.<sup>229</sup> One month after the last of these robberies, a Cooke County grand jury indicted the two for aggravated robbery in connection with the robbery of one of the McDonald's

<sup>222</sup> See *id.* at 477; see also Glazer, *supra* note 210, at 574-75.

<sup>223</sup> See Privor, *supra* note 215, at 475; Fred Kaplan, *Brooklyn Adopts 'Boston Plan' on Slayings*, BOSTON GLOBE, Oct. 14, 1999, at A14.

<sup>224</sup> See Kaplan, *supra* note 223, at A14.

<sup>225</sup> See Privor, *supra* note 215, at 475; see also Kaplan, *supra* note 223, at A14.

<sup>226</sup> See Kaplan, *supra* note 223, at A14.

<sup>227</sup> See *id.* Brooklyn District Attorney Charles Hynes said:

We'll tell [gang members] they're going to knock off violence in the neighborhood. The options are: If you help us, we'll help you find employment. If you don't help us, we'll target every one of you . . . [and] there will be no plea bargaining. We'll ask for jail, the highest sentence, the highest bail, and the U.S. Attorney will take over cases where federal punishment would be more severe.

*Id.*

<sup>228</sup> Cf., e.g., *United States v. Miles*, 122 F.3d 235, 250-51 (5th Cir. 1997) (DeMoss, J., specially concurring).

<sup>229</sup> See *id.* at 236.

restaurants.<sup>230</sup> Nevertheless, three months later the U.S. Attorney for the Northern District of Texas filed an eleven count indictment, which included the McDonald's robbery and several others.<sup>231</sup>

While the Fifth Circuit upheld the Hobbs Act convictions in *Miles* with a *per curiam* decision, one judge noted in a special concurrence that "[t]he prosecution of local crimes is generally considered to be a state function."<sup>232</sup> The judge noted that no federal law enforcement agency had been involved in the initial investigation into these robberies, or the identification or apprehension of the suspects.<sup>233</sup> Detectives from the local police department had done all of the legwork in the case, including gathering victim statements, taking fingerprints at the crime scenes and interviewing the suspects.<sup>234</sup> "All indications pointed toward a speedy and successful prosecution . . . under Texas law, and Texas statutes provide for the enhancement of sentences for repeat offenders and career criminals".<sup>235</sup> The judge observed that he was bound by Fifth Circuit precedent to uphold the conviction, but added that he believed that the federal prosecution of a local crime—particularly in light of the degree of state police work involved in preparing the prosecution—was an unconstitutional usurpation of state police powers.<sup>236</sup>

#### V. RESTORING THE BALANCE: A PRINCIPLED APPROACH TO FEDERALISM

The special concurrence in *Miles* points to the true problem with federal criminal law today.<sup>237</sup> The Supreme Court's deferential Commerce Clause jurisprudence has allowed Congress to expand a limited, enumerated power to something more akin to a general police power.<sup>238</sup> The "economic/non-economic" distinction in *Morrison* and *Lopez* attempts to address this issue, yet it represents another attempt to find an internal limit on the commerce power by describing the

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<sup>230</sup> See *Texas Briefly: Gainesville: Two Men Indicted in McDonald's Robbery*, FT. WORTH STAR-TELEGRAM, Jan. 29, 1992, at 15.

<sup>231</sup> See *Miles*, 122 F.3d at 237-38.

<sup>232</sup> *Id.* at 250 (DeMoss, J., specially concurring).

<sup>233</sup> See *id.* (DeMoss, J., specially concurring).

<sup>234</sup> See *id.* (DeMoss, J., specially concurring).

<sup>235</sup> *Id.* at 250-51 (DeMoss, J., specially concurring).

<sup>236</sup> See *Miles*, 122 F.3d at 251 (DeMoss, J., specially concurring).

<sup>237</sup> See *id.* (DeMoss, J., specially concurring).

<sup>238</sup> See, e.g., Moulton, *supra* note 5, at 924; Merritt, *supra* note 5, at 728-29.

Commerce Clause itself.<sup>239</sup> This has proven unsustainable, as past efforts to limit the power of Congress by distinguishing "manufacture" from "commerce," or "direct" and "indirect" effects on interstate commerce have proven.<sup>240</sup> As "the switch in time that saved nine" demonstrates, these are arbitrary definitions that derive their power from the votes of a majority of the Supreme Court, rather than a principled approach to federalism.<sup>241</sup> As Justice Breyer copiously documented in his *Lopez* dissent, Congress might have rationally concluded that guns affect education, and education affects commerce.<sup>242</sup> It is precisely because of this rational conclusion that internal limits on the Commerce Clause are inadequate to protect traditional state sovereignty in crime control.<sup>243</sup>

Although he joined the majority opinion in *Lopez*, Justice Kennedy, joined by Justice O'Connor, observed the difficulty in drawing a line between economic and non-economic activities.<sup>244</sup> Justice Kennedy expressed concern that the Gun-Free School Zones Act extended into criminal law, an area of traditional state control, as evidenced by the fact that possession of a gun on school grounds was already criminalized by most states.<sup>245</sup> "If Congress attempts that extension, then at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern."<sup>246</sup> That inquiry should be guided by a return to the test of *National League of Cities*, which balanced federal intrusion into state sovereignty against the national interest in federal regulation.<sup>247</sup>

In *Garcia*, the dissent signaled that one day the Court would resurrect the Tenth Amendment as a bulwark against federal intrusion into state sovereignty.<sup>248</sup> There are three compelling reasons that the

<sup>239</sup> See, e.g., *United States v. Morrison*, 120 S. Ct. 1740, 1768 (2000) (Souter, J., dissenting); *United States v. Lopez*, 514 U.S. 549, 607-08 (1995) (Souter, J., dissenting).

<sup>240</sup> See *Morrison*, 120 S. Ct. at 1768 (Souter, J., dissenting); *Lopez*, 514 U.S. at 607-08 (Souter, J., dissenting).

<sup>241</sup> See *supra* notes 37-49, 68-73 and accompanying text.

<sup>242</sup> See *Lopez*, 514 U.S. at 619-21, 631-44 (Breyer, J., dissenting).

<sup>243</sup> Cf. *id.*, 514 U.S. at 573 (Kennedy, J., concurring); *Miles*, 122 F.3d at 250 (DeMoss, J., specially concurring).

<sup>244</sup> See *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring) ("In a sense any conduct in this interdependent world has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far.").

<sup>245</sup> See *id.* at 581 (Kennedy, J., concurring) (observing that over 40 states already have criminal laws outlawing the possession of firearms on or near school grounds).

<sup>246</sup> See *id.* at 580.

<sup>247</sup> See *supra* notes 77-132 and accompanying text.

<sup>248</sup> See 469 U.S. 528, 580 (1985) (Rehnquist, J., dissenting); *id.* at 589 (O'Connor, J., dissenting).

Court should address federal usurpation of state prerogatives in criminal law—a bedrock attribute of state sovereignty—through the Tenth Amendment.<sup>249</sup> First, a return to consideration of the external limit imposed on Congress's Commerce Clause power by the Tenth Amendment would bring consistency to the Court's overall Commerce Clause jurisprudence.<sup>250</sup> Second, despite *Garcia's* conclusory dismissal, history can be a guide in determining a state's sovereign interests, particularly in the area of criminal law.<sup>251</sup> Third, state prosecutors are uniformly more accountable to the people in their states than their federal counterparts, and thus institutionally are the more appropriate final decision-making authority in criminal matters.<sup>252</sup>

Since *Gibbons v. Ogden*, the Dormant Commerce Clause has proven successful in protecting federal authority in the area of interstate commerce, while allowing states to regulate intrastate commerce to the fullest possible extent.<sup>253</sup> In *Pike*, the Court determined the outer limits of state power to regulate intrastate commerce by balancing a state regulation's interference with interstate commerce against the state interest.<sup>254</sup> This test at once protects Congress's exclusive authority over interstate commerce, while preserving maximum flexibility for states in addressing local issues.<sup>255</sup> Those same interests are at work when Congress exercises its Commerce Clause authority over interstate commerce to reach areas of traditional state control, like criminal law.<sup>256</sup> By imposing the inverse rule of *Pike* in such cases—i.e. weighing a federal criminal statute's interference with traditional state sovereignty against the national interest to be protected—the Court could bring symmetry to its fractured Commerce Clause jurisprudence.<sup>257</sup> Before being overruled in *Garcia*, this is precisely the balancing test the Court employed in cases where it considered whether the Tenth Amendment presented an external limit to

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<sup>249</sup> See *infra* notes 253–313 and accompanying text.

<sup>250</sup> See *infra* notes 253–259 and accompanying text; see also Thomas W. Merrill, *Toward a Principled Interpretation of the Commerce Clause*, 22 HARV. J.L. & PUB. POL'Y 31, 41, 42 (1998) (citing *Pike* and suggesting that same presumptions that inform Dormant Commerce Clause jurisprudence should inform determination of affirmative scope of Commerce Clause).

<sup>251</sup> See *infra* notes 260–273 and accompanying text.

<sup>252</sup> See *infra* notes 274–313 and accompanying text.

<sup>253</sup> See *supra* notes 21–229 and accompanying text.

<sup>254</sup> See *Pike*, 397 U.S. at 142.

<sup>255</sup> See *id.* at 143.

<sup>256</sup> See Merrill, *supra* note 250, at 41, 42.

<sup>257</sup> Cf. *id.* at 42.

Congress's Commerce Clause authority, as in *EEOC v. Wyoming*.<sup>258</sup> By returning to this balancing test, the Court would bring a logical consistency to its Dormant Commerce Clause and Commerce Clause jurisprudence, protecting state sovereignty while also preserving maximum flexibility for Congress to address issues of national importance.<sup>259</sup>

In determining whether a federal criminal statute interferes with state sovereignty, history can and should be a guide in determining a state's sovereign interests, particularly in the area of criminal law.<sup>260</sup> In *Garcia*, the Court refused to adopt a historical approach to determine whether a particular state function was an "essential function" of state government, because such a standard would not allow courts to accommodate state expansion into non-traditional areas such as education.<sup>261</sup> Instead, the Court held that states must rely upon the political structure embodied in the Constitution for protection from federal encroachment.<sup>262</sup> In effect, the Court stated that because it cannot discover and protect from improper federal intrusion all areas of state sovereignty through the historical record, it will protect none.<sup>263</sup>

While history may not be useful in determining the states' sovereign interests in every case, the long tradition of colonial and state criminal jurisdiction should not be ignored when weighing the state sovereign interest in criminal law.<sup>264</sup> Early in its own history, the Supreme Court indicated that there are limits to Congressional authority to make criminal law.<sup>265</sup> In *Cohens*, the Court stated that Congress could not make a law to punish felonies generally.<sup>266</sup> This would seem to imply that the early Supreme Court understood the states to be the primary maker and enforcer of criminal law.<sup>267</sup> Historically, the states

<sup>258</sup> See 460 U.S. 226, 239, 242 n.17 (1983).

<sup>259</sup> Compare *Pike*, 397 U.S. at 142 (balancing state interest protected by state law against interference with interstate commerce to determine whether statute violates Dormant Commerce Clause), with *EEOC v. Wyoming*, 460 U.S. at 239, 242 n.17 (balancing federal interest protected by federal law against interference with state sovereignty to determine whether statute violates Tenth Amendment); see also Merrill, *supra* note 250, at 42.

<sup>260</sup> Cf. *New York v. United States*, 505 U.S. 144, 164-65 (1992) (referring to the history of the Constitutional Convention to establish intent of Founders with respect to relationship between states and national government).

<sup>261</sup> See *Garcia*, 469 U.S. at 543-44.

<sup>262</sup> See *id.* at 552 (citations omitted).

<sup>263</sup> See *id.* (citations omitted).

<sup>264</sup> See *supra* notes 133-184 and accompanying text.

<sup>265</sup> See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 428 (1824).

<sup>266</sup> See *id.*

<sup>267</sup> See *id.*

and their precursor colonial governments have exercised that authority to punish felonies such as arson, murder, rape, and theft.<sup>268</sup> The states clearly surrendered some traditional authority under the Constitution—as with counterfeiting—but the Tenth Amendment guarantee that “the powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people” seems empty if the only protection of the states’ residual authority lies in the political process.<sup>269</sup>

Although the history of federal criminal jurisdiction is helpful in defining the Founders’ and early Congressional understanding of what the scope of federal criminal law might be, taken alone, it provides little insight into what powers would have been understood to remain exclusively within the domain of the states after the ratification of the Constitution and the Bill of Rights.<sup>270</sup> Perhaps the history of federal criminal jurisdiction, taken in conjunction with an understanding of what colonial and early state governments understood about their authority, best serves to identify core competencies for federal prosecutors—including matters of piracy, counterfeiting, treason and bribery.<sup>271</sup> These core competencies are the historical antecedents of the modern federal criminal law, and should have relevance in defining the proper scope of federal criminal jurisdiction.<sup>272</sup> Nevertheless, these core competencies should not be used to completely obliterate the divide between crimes that are properly within the jurisdiction of the federal government, and those that are within the jurisdiction of the states.<sup>273</sup>

Congressional intrusion into areas of traditional state concern might be less objectionable if states retained a voice in federal deci-

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<sup>268</sup> See *supra* notes 133–184 and accompanying text.

<sup>269</sup> See *supra* notes 133–184 and accompanying text. But see Aviam Soifer, *Truisms That Never Will Be True: The Tenth Amendment and the Spending Power*, 57 U. COLO. L. REV. 793, 810–11, 811 n.74 (1986) (“The ‘wholly popular’ government was free to alter the balance, if the people so wished, even if at the expense of state sovereignty.”). While I agree in the main with Prof. Soifer that the people are free to allocate power between their respective sovereigns, I believe that an allocation that effectively displaces one of the two sovereigns should not be undertaken lightly, and is probably best accomplished by the people through the amendment process.

<sup>270</sup> See *supra* notes 133–184 and accompanying text.

<sup>271</sup> See *supra* notes 133–184 and accompanying text; see also Philip B. Heymann & Mark H. Moore, *The Federal Role in Dealing with Violent Street Crime: Principles, Questions, and Cautions*, ANNALS OF THE AMERICAN ACADEMY, Jan. 1996, at 115.

<sup>272</sup> Cf. Geraldine Szott Moore, *The Federal Interest in Criminal Law*, 47 SYRACUSE L. REV. 1127, 1138 (1997); Heymann & Moore, *supra* note 271, at 115.

<sup>273</sup> See *supra* notes 133–184 and accompanying text.



sion-making.<sup>274</sup> Since the ratification of the Seventeenth Amendment, however, states have not had a voice in the Senate—rather, the people in their states have exercised that role.<sup>275</sup> Admittedly, the state legislatures of all but three states agreed to this radical change in the constitutional structure of the federal government;<sup>276</sup> but given the scant discussion of federalism and the overwhelming concern with political machines in the debates leading to the Seventeenth Amendment, it is an open question whether the states or the people intended such a result.<sup>277</sup> In *The Federalist*, Madison observed that the indirect election of senators and their longer, six-year term would provide a “cool and deliberate” body that would serve to slow the legislative process.<sup>278</sup> Arguably, the Seventeenth Amendment eliminated this cool and deliberative body, and denied the states any chance of directly participating in the decisions to dramatically increase the scope of federal criminal law in the twentieth century.<sup>279</sup>

Since 1909, a scant four years before the Seventeenth Amendment was ratified, approximately 92% of all federal criminal statutes have been enacted—many of those since 1970, and many touching on traditional state areas such as murder, rape, robbery, burglary and forgery.<sup>280</sup> Although the dramatic increase in federal criminal provisions in the last ninety years cannot be attributed solely to the loss of a Senate elected by state legislatures, these criminal provisions significantly limit the ability of the states to act as “laboratories for experimentation” in devising new methods to deter crime by instituting a uniform national standard.<sup>281</sup> The states should have some sort of input into the regulation of criminal conduct, a traditional subject of the state police power.<sup>282</sup>

Given the history of state primacy in the areas of arson, murder, rape and theft, there should be a rebuttable presumption that federal prosecution of these crimes infringes on state sovereignty.<sup>283</sup> This should not end the inquiry, however. The most important feature of both the modern Dormant Commerce Clause cases and the decision

<sup>274</sup> See *supra* notes 185–201 and accompanying text.

<sup>275</sup> See *supra* notes 185–201 and accompanying text.

<sup>276</sup> See HOEBEKE, *supra* note 187, at 189.

<sup>277</sup> See *supra* notes 185–201 and accompanying text.

<sup>278</sup> THE FEDERALIST No. 63, at 320 (James Madison) (Garry Wills ed., 1982).

<sup>279</sup> See *supra* notes 185–236 and accompanying text.

<sup>280</sup> See *supra* notes 202–209 and accompanying text.

<sup>281</sup> See *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring).

<sup>282</sup> *Cf. id.*

<sup>283</sup> See *supra* notes 260–273 and accompanying text.

in *National League of Cities* is that they struck down state or federal statutes as applied, rather than facially, thus allowing the continued, if limited, enforcement of those statutes.<sup>284</sup> Although the *National League of Cities* test might be criticized because it consistently yielded decisions favorable to federal power, perhaps that is simply because federal power is indeed expansive—but not unlimited.<sup>285</sup>

A return to the *National League of Cities* test would give courts the flexibility to weigh competing values in deciding whether a particular criminal prosecution violates state sovereignty.<sup>286</sup> This is a far less restrictive inquiry than the *Lopez* test, which categorically strikes down federal criminal statutes.<sup>287</sup> In *Pike*, for example, the Court held that the Arizona Department of Agriculture could continue to vindicate its legitimate interests and require in-state cantaloupe growers to ship their produce in prescribed containers, even if the Department of Agriculture could not reach a border corporation that grew its cantaloupes in Arizona but shipped them from Southern California.<sup>288</sup> In *Lopez*, however, the Court implicitly held that there could be no national interest in curbing gun possession in public schools by striking down the Gun-Free School Zones Act on a facial challenge.<sup>289</sup>

In weighing those competing values, federal prosecutors should be able to overcome the presumption against federal criminal prosecutions in areas of traditional state control if the state acquiesces in the federal prosecution. The benefits of concurrent state and federal criminal jurisdiction are undeniable.<sup>290</sup> Cooperative law enforcement strategies have resulted in significant reductions in crime in local areas.<sup>291</sup> As the Boston Plan demonstrates, federal criminal prosecution can be a powerful weapon in the hands of state prosecutors when state and federal officials work together.<sup>292</sup> It is only where state and federal law enforcement officials collide that concerns about waste of scarce resources and usurpation of the state's criminal law enforcement role arise.<sup>293</sup> Federal law enforcement officials possess far greater resources than their state counterparts, and as in *Miles*, can

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<sup>284</sup> See *Pike*, 397 U.S. at 143; *Wyoming v. EEOC*, 460 U.S. at 239.

<sup>285</sup> See, e.g., *Wyoming v. EEOC*, 460 U.S. at 239; *Hodel*, 452 U.S. at 293.

<sup>286</sup> See *supra* notes 77–132 and accompanying text.

<sup>287</sup> Compare *Pike*, 397 U.S. at 143, 146, with *Lopez*, 514 U.S. at 552.

<sup>288</sup> See 397 U.S. at 143, 146.

<sup>289</sup> See *Lopez*, 514 U.S. at 552.

<sup>290</sup> See *supra* notes 215–227 and accompanying text.

<sup>291</sup> See *supra* notes 215–227 and accompanying text.

<sup>292</sup> See *supra* notes 215–227 and accompanying text.

<sup>293</sup> See, e.g., *United States v. Miles*, 122 F.3d 235, 250 (DeMoss, J., specially concurring).

better afford the costs of interagency rivalry.<sup>294</sup> It is in those cases that federal criminal jurisdiction most clearly intrudes upon state sovereignty.<sup>295</sup>

Although the Court rejected in *New York v. United States* the notion that a state could "consent" to federal intrusion into state sovereignty, that case was not about the Tenth Amendment as an external limit to the Commerce Clause.<sup>296</sup> Instead, that case addressed the ability of Congress to use a state's resources to implement a federal regulation.<sup>297</sup> By contrast, no state resources are used in a federal criminal prosecution; the defendant is indicted by a federal grand jury, and prosecuted by a federal prosecutor in a federal court. Admittedly, state acquiescence in federal criminal prosecutions might present some of the same federalism issues that state consent did in *New York v. United States*.<sup>298</sup> Arguably, the Constitution describes a precise line of demarcation between state and federal power, and a breach of that line would narrow state authority.<sup>299</sup> Under the *National League of Cities* test—particularly if state acquiescence was taken into account—one Hobbs Act prosecution for robbery might go forward, while a second for a similar criminal act would not, because state officials preferred to prosecute the case themselves.<sup>300</sup> Consent in this instance does not narrow state criminal jurisdiction, however, because the state retains the authority to indict and prosecute other criminals who violate state law.<sup>301</sup> Rigid lines of demarcation between state and federal power fail to acknowledge the difficulty inherent to defining the limits of Congress's Commerce Clause authority; as Justice Rehnquist warned in *Lopez*, "[t]hese are not precise formulations, and in the nature of things they cannot be."<sup>302</sup>

Though imprecise, a return to the test of *National League of Cities* would reinforce one of the most important values embodied in the Constitution: accountability of public officials to the local electorate.<sup>303</sup> Because they are elected, or appointed by officials elected *solely*

<sup>294</sup> *Cf. id.*

<sup>295</sup> *Cf. id.*

<sup>296</sup> See 505 U.S. at 160, 182.

<sup>297</sup> See *id.* at 160.

<sup>298</sup> *Cf. id.* at 182.

<sup>299</sup> See *id.* at 182.

<sup>300</sup> See *id.*

<sup>301</sup> *Cf. New York v. United States*, 505 U.S. at 182.

<sup>302</sup> *Lopez*, 514 U.S. at 567.

<sup>303</sup> See *Lopez*, 514 U.S. at 576-77 (Kennedy, J., concurring); *New York v. United States*, 505 U.S. at 168.

by the people within the jurisdiction, state attorneys general are far more accountable to the people in their states.<sup>304</sup> By contrast, federal prosecutors are far less accountable for their acts.<sup>305</sup> If the electorate within a state seeks to hold a federal prosecutor accountable for an unpopular law enforcement decision within a jurisdiction, their only recourse is to demand that the President remove the U.S. Attorney, or vote against the President of the United States in the next election.<sup>306</sup> In either event, their ability to influence a federal criminal prosecutor is entirely controlled by an official beholden not only to them, but to the citizens of forty-nine other states for his or her position.<sup>307</sup>

A return to *National League of Cities* and adoption of state acquiescence as a rebuttal to the presumption against federal criminal prosecutions would provide that accountability. It is helpful to consider the contrast between the Boston Plan and *Miles* in this regard.<sup>308</sup> In a federal prosecution of a defendant identified by the YVSF through the Boston Plan and charged with a Hobbs Act robbery, the Massachusetts Attorney General might file a short brief with the federal district court signaling that state's acquiescence in the prosecution.<sup>309</sup> The federal district court would find that, in that case, federal prosecution did not unduly interfere with state sovereignty and allow the trial to go forward.<sup>310</sup> If the people of Massachusetts do not like the targeting of youths for federal prosecution, they need look no further than their Attorney General to hold an official ultimately accountable.<sup>311</sup> In the *Miles* case, on the other hand, the Texas Attorney General, in consultation with the Cooke County District Attorney, might refuse to acquiesce in the federal prosecution of the Hobbs Act robbery charge, because the state has already invested resources into the investigation of the crime.<sup>312</sup> The federal district court would then weigh the sovereignty interest of the state—presumed to be high—against the national interest in the prosecution of two thugs who stole a few hundred dollars from local restaurants—arguably quite low.<sup>313</sup>

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<sup>304</sup> See *supra* notes 215–236 and accompanying text.

<sup>305</sup> See *supra* notes 215–236 and accompanying text.

<sup>306</sup> See 28 U.S.C. § 541 (c) (1994).

<sup>307</sup> See *id.*

<sup>308</sup> Compare *Privor*, *supra* note 215, at 476–77, with *Miles*, 122 F.3d at 250 (DeMoss, J., specially concurring).

<sup>309</sup> See *supra* notes 77–132 and accompanying text.

<sup>310</sup> See *supra* notes 77–132 and accompanying text.

<sup>311</sup> See *supra* notes 77–132 and accompanying text.

<sup>312</sup> See *Miles*, 122 F.3d at 250 (DeMoss, J. specially concurring).

<sup>313</sup> See *supra* notes 77–132 and accompanying text.

## CONCLUSION

The Dormant Commerce Clause protects federal power over interstate commerce from interference by state regulation of intrastate commerce.<sup>314</sup> The Court confronts similar issues when it addresses federal criminal statutes which regulate areas of traditional state control, like arson, murder, rape and theft.<sup>315</sup> Rather than invalidate federal criminal statutes as facially unconstitutional, perhaps the Court should square the external limit the Tenth Amendment imposes upon Congress's Commerce Clause authority with the limit the Dormant Commerce Clause imposes upon the states.<sup>316</sup> A balancing test that weighed the interference of a federal criminal statute with an area of traditional state control against the national benefit to be derived would protect state sovereignty while providing states and the national government maximum flexibility in dealing with crime control problems.<sup>317</sup> Such an arrangement also would allow the people in their states to check the excesses of unelected federal prosecutors through their state law enforcement officials, and hold those law enforcement officials accountable for policy decisions made within the state.<sup>318</sup>

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<sup>314</sup> See *supra* notes 16-76 and accompanying text.

<sup>315</sup> See *supra* notes 77-236 and accompanying text.

<sup>316</sup> See *supra* notes 237-313 and accompanying text.

<sup>317</sup> See *supra* notes 237-313 and accompanying text.

<sup>318</sup> See *supra* notes 237-313 and accompanying text.