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THE UNDERFEDERALIZATION OF CRIME

Tom Stacy and Kim Dayton†

INTRODUCTION

According to federal judges and academics, crime has been overfederalized.¹ The national government's crime fighting role has ex-

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¹ This position has been endorsed by official organs of the federal judiciary, the Chief Justice, and individual federal judges. See Judicial Conference of the United States, Long Range Plan for the Federal Courts 21-28 (1995) [hereinafter LONG RANGE PLAN]; REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 4-10, 35-38 (1990) [hereinafter FEDERAL COURTS STUDY]; William H. Rehnquist, *1991 Year-End Report of the Federal Judiciary, in THE THIRD BRANCH 1, 3* (Administrative Office of the U.S. Courts, Jan. 1992); Sam J. Ervin, III, *The Federalization of State Crimes: Some Observations and Reflections*, 98 W. VA. L. REV. 761 (1996); Letter from Ninth Circuit Court of Appeals Judge Clifford J. Wallace to Chief Justice William Rehnquist, Attorney General Janet Reno, then-Senate Judiciary Chair Joseph Biden, and then-House Judiciary Chair Jack Brooks (Mar. 29, 1993), reprinted in Marshall, *infra*, at 738 (Appendix A) [hereinafter Wallace letter]; Robert E. Cowen, *Federalization of State Law Questions: Upheaval Ahead*, 47 RUTGERS L. REV. 1371 (1995); Roger J. Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 HARV. J.L. & PUB. POL'Y 117 (1987). See also William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 Wis. L. REV. 1, 6 (describing the views of federal judges); William W. Schwarzer & Russell R. Wheeler, *On the Federalization of the Administration of Civil and Criminal Justice*, 23 STETSON L. REV. 651, 652 n.3 (1994).

This position has also been embraced in some fashion by every scholar who has addressed the matter. See Gerald G. Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789 (1996); Abraham Abramovsky, *Interstate Domestic Violence and Murder: Are They the Same?*, N.Y.L. J., July 12, 1996, at 3; Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979 (1995); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995); Stephen Chippendale, *More Harm Than Good: Assessing Federalization of Criminal Law*, 79 MINN. L. REV. 455 (1994); Philip B. Heymann & Mark H. More, *The Federal Role in Dealing with Violent Street Crime: Principles, Questions, and Cautions*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 103 (1996); Sanford Kadish, Comment: *The Folly of Overfederalization*, 46 HASTINGS L.J. 1247 (1995); William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719 (1995); Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. KAN. L. REV. 503 (1995); John B. Oakley, *The Myth of Cost-Free Jurisdictional Reallocation*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 52, 59 (1996); Franklin E. Zimring & Gordon Hawkins, *Toward a Principled Basis for Federal Criminal Legislation*, 54 ANNALS AM. ACAD. POL. & SOC. SCI. 15 (1996). Professor Little has argued that, as it is typically presented, the overfederalization thesis rests

panded so greatly, the legal elites maintain, that it offends both constitutional federalism and prudence. Federal judges and academics are particularly hostile to recent efforts to vest the national government with concurrent jurisdiction over violent street crime, which has always fit within garden variety state offenses.² In reasoning and result, the Supreme Court's decision in *United States v. Lopez*³ lends these prevailing and virtually unchallenged perceptions the currency of constitutional law. Emboldened by *Lopez* and the judicial and academic consensus it reflects, some lower courts have begun invalidating recently enacted federal offenses.⁴

on a number of unsupported myths. Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029 (1995). But in the end he effectively embraces the thesis, endorsing a strong presumption against concurrent federal criminal jurisdiction. *Id.* at 1070-1081.

The only published dissent from the overfederalization thesis has come from two federal prosecutors. See generally Harry Litman & Mark D. Greenberg, *Dual Prosecutions: A Model for Concurrent Federal Jurisdiction*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 72 (1996).

² See, e.g., Rehnquist, *Seen in a Glass Darkly*, *supra* note 1, at 6 ("Most federal judges have serious concerns about the numbers and types of crimes now being funneled into the federal courts. They question the appropriateness of handling 'street crimes' formerly handled in the state systems."); Schwarzer & Wheeler, *supra* note 1, at 652 n.3 ("[T]he Federal Judicial Center's 1992 survey of federal judges show[ed] that 91.5% of the active district judges and 89% of the current active circuit judges expressed strong or moderate support for 'narrowing of federal criminal jurisdiction to reduce prosecution of 'ordinary' street crime in federal court.'"); Brickey, *supra* note 1, at 1167-72; Heymann & Moore, *supra* note 1, at 105 ("In our view, these principles [of federalism] continue to counsel a sharply limited role for the federal government in responding to street crime."); Kadish, *supra* note 1, at 1249; Oakley, *supra* note 1, at 59.

³ *United States v. Lopez*, 115 S. Ct. 1624 (1995).

⁴ *United States v. Denalli*, 73 F.3d 328 (11th Cir. 1996), (federal arson statute), *modified*, 90 F.3d 444 (11th Cir. 1996); *United States v. Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995) (same statute); *United States v. Woodruff*, No. CR-93-0438, 1996 U.S. Dist. LEXIS 12358 (N.D. Cal. Aug. 22, 1996) (Hobbs Act); *Hoffman v. Hunt*, 923 F.Supp. 791 (W.D.N.C. 1996) (Freedom of Access to Clinic Entrances Act); *United States v. Paredes*, 950 F. Supp. 584, 588-89 (S.D.N.Y. 1996) (invalidating application of federal murder-for-hire statute); *United States v. Mallory*, 884 F. Supp. 496 (S.D. Fla. 1995) (carjacking); *United States v. Wilson*, 880 F. Supp. 621 (E.D. Wis. 1995) (Freedom of Access to Clinic Entrances Act), *rev'd*, 73 F.3d 675 (7th Cir. 1995); *United States v. Parker*, 911 F.Supp. 830 (E.D. Pa. 1995) (Child Support Recovery Act), *rev'd*, 1997 U.S. App. LEXIS 4033 (3d Cir. 1997); *United States v. Bailey*, 902 F. Supp. 727 (W.D. Tex. 1995) (same statute); *United States v. Mussari*, 894 F. Supp. 1360 (D. Ariz. 1995), *reconsideration denied*, 912 F. Supp. 1248 (D. Ariz. 1995) (same statute), *rev'd*, 95 F.3d 787 (9th Cir. 1996). Many lower courts, particularly federal appellate courts, have rejected *Lopez* based constitutional challenges to federal criminal statutes. Many of these decisions, however, have prompted vigorous dissents. See *United States v. Bishop*, 66 F.3d 569, 590 (3d Cir. 1995) (Becker, J., dissenting) (carjacking); *Brzonkala v. Virginia Polytechnic and State Univ.*, No. 95-1358, 1996 U.S. Dist. LEXIS 10766 (W.D. Va., July 26, 1996) (civil cause of action under Violence against Women Act); *United States v. Wall*, 92 F.3d 1444, 1454 (6th Cir. 1996) (Boggs, J., dissenting) (arguing that federal gambling statute is unconstitutional); *United States v. McHenry*, 97 F.3d 125, 129 (6th Cir. 1996) (Batchelder, J., dissenting) (arguing that carjacking statute is unconstitutional); *United States v. Beuckelaeve*, 91 F.3d 781, 787 (6th Cir. 1996) (Suhreinrich, J., dissenting) (possession of machine guns); *United States v. Wilson*, 73 F.3d 675, 689 (7th Cir. 1995) (Coffey, J., dissent-

In light of its sharp divergence from public opinion, conventional legal wisdom should have, but so far has not, aroused skepticism and puzzlement. Unlike constitutional civil liberties, principles of federalism do not protect unpopular minorities by constraining the general public. Instead, they empower the general public — sometimes on the state level and sometimes on the national level.⁵ Yet this general public clearly supports a strong national crime fighting role. According to the opinion polls,⁶ the proclamations of political leaders,⁷ and legislative enactments,⁸ the public overwhelmingly views crime — especially violent street crime — as a top-priority problem and wants the national government engaged in efforts to stop it. On its face, at least, this view seems quite sensible. According to a recently published study that is the most comprehensive of its kind, crime costs the nation approximately \$500 billion per year.⁹ It seems only logical, then, to conclude that crime constitutes a very serious national problem and that the addition of national legal, investigative, prosecutorial, judicial, and prison resources can help address it.

This article contends that judicial and academic complaints about the overfederalization of crime largely have matters backwards. The im-

ing) (Freedom of Access to Clinic Entrances Act); *United States v. Kirk*, 70 F.3d 791, 795-798 (5th Cir. 1995) (Jones, J., dissenting) (statute addressing possession of machine guns).

⁵ See Tom Stacy, *Whose Interests Does Federalism Protect?*, ___ U. Kan. L. Rev. ___ (1997) (forthcoming); *infra* notes 129-31, 253-59, and accompanying text. See also James F. Blumstein, *Federalism and Civil Rights: Complementary and Competing Paradigms*, 47 VAND. L. REV. 1251, 1260 (1994) (“[T]he rights conferred through federalism are typically group-based [W]ithin the decentralized unit, the commitment to majoritarianism remains intact.”).

⁶ Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 2 n.2 (1996) (citing opinion polls for the proposition that “crime ranks as the most serious issue facing Americans”). See also Brickey, *supra* note 1, at 1135 (“In January 1994 more than forty percent of Americans surveyed identified crime as the nation’s most pressing problem.”).

⁷ Lawrence Friedman observes that President Bush, in his 1992 State of the Union address, “declared in ringing terms that ‘we must do something about crime,’ especially ‘violent street crime.’” LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 276 (1993). Friedman traces presidential proclamations about the need to fight crime back to President Hoover, who highlighted crime in his 1929 inaugural address and created the Wickersham Commission to study it. *Id.* at 273. According to Friedman, “[c]rime popped out again as a major national issue after World War II, and nobody was able to put the jinni back in the bottle after that.” *Id.* at 274.

⁸ See *infra* notes 11-17, 19-20, and accompanying text.

⁹ TED R. MILLER ET AL., *VICTIM COSTS AND CONSEQUENCES: A NEW LOOK* (1996) (report presented to the National Institute of Justice, the research and development agency of the United States Department of Justice). Although the report estimates that the annual cost of crime in the United States is at least \$450 billion, “[t]he study excludes the cost of running the nation’s prisons, jails and parole and probation systems, which would add \$40 billion, bringing the total annual cost of crime to almost \$500 billion, according to other Justice Department statistics.” Fox Butterfield, *Survey Finds That Crimes Cost \$450 Billion a Year*, N.Y. TIMES, Apr. 22, 1996, at A8.

age of a runaway national government increasingly taking away the enforcement of the criminal law from the States is essentially false. The available evidence indicates that the national government's share in the enforcement of criminal law has been actually *diminishing* for more than the last half century. The national government does have concurrent authority over a greater range of criminal activity now, including much violent street crime. But, contrary to *Lopez* and the conventional wisdom it embraces, this expanded authority does not transgress constitutional principles of federalism. In fact, constitutional and policy considerations affirmatively support the opposite conclusion that the national government may (and probably should) exercise more authority, especially with respect to the street crime that plagues poor urban areas. It seems that crime, especially street crime, has been *underfederalized*.

Part I challenges the impression that the nation's role in enforcing criminal law is growing. While the number of federal offenses has grown, the national government's role in actually enforcing criminal law reveals a fairly steady decline since the 1930s. Given the increasing interdependence of the nation's economy in that same period, this decline strongly suggests that the criminal enforcement system has been underfederalized.

In Parts II and III, we examine what constitutional federalism has to say about the national government's role in combating crime. We argue that, contrary to the holding of *Lopez* and the broad reading some lower courts have given it,¹⁰ the Constitution should not be read to invalidate the recent federal legislation which expands the national government's authority over gang-related violence,¹¹ violence in the schools,¹² domestic violence,¹³ carjackings,¹⁴ racially motivated church-burnings,¹⁵ willful failure to pay child support,¹⁶ and the treatment of convicted sex offenders after their release from prison.¹⁷ On the contrary, the values standing behind constitutional federalism would support an even greater

¹⁰ See generally *supra* note 4 (listing cases in which courts have given *Lopez* a broad reading).

¹¹ 18 U.S.C. § 36 (1995). See *infra* Part III.D.1.

¹² The Gun-Free School Zone Act of 1990, 18 U.S.C. § 922(q) (1990). See *infra* Part III.D.1.

¹³ The Violence Against Women Act of 1994, 18 U.S.C. § 2262 (1994). See *infra* Part III.D.3.

¹⁴ The Anti-Car Theft Act, 18 U.S.C. § 2119 (1994). See *infra* Part III.D.1.

¹⁵ The Church Arson Prevention Act of 1996, Pub. L. No. 104-155, 110 Stat. 1392 (1996). See *infra* Part III.D.3.

¹⁶ The Child Support Recovery Act of 1992, 18 U.S.C. § 228 (1992). See *infra* Part III.D.4.

¹⁷ Megan's Law, which was signed into law in the spring of 1996, requires that states, as a condition of receiving federal funds, implement a system of notifying communities that a convicted sex offender intends to locate there after his release from prison. Pub. L. No. 104-145, 110 Stat. 1345 (1996). See *infra* Part III.D.2.

national role in crime fighting. This is particularly true respecting street crime in poor urban areas, which judges and scholars disdain as beyond the national government's proper province.

Part IV considers the principal policy argument pressed by those who subscribe to the overfederalization position. This argument, which addresses the burdens criminal cases impose on federal courts, rests on a use of statistics so selective that it borders on the disingenuous. In fact, the burden on federal judges is now considerably less than in prior decades and, in any event, state judges face far greater burdens. Policy considerations and constitutional values alike suggest that the criminal law has been underfederalized.

I. THE NATIONAL GOVERNMENT'S DIMINISHING SHARE

The overfederalization thesis trades upon an image of a national government whose role in the enforcement of criminal law has grown and is growing dramatically. Writing on behalf of the Attorney General's Round table on the Federalization of Crime, for instance, Duke Law Professor Sara Sun Beale has recently proclaimed: "By virtually every measure, the federal government is playing an increasingly important role in the enforcement of criminal law."¹⁸ The image of a constantly growing national role has been created and maintained by ritualistic incantation of a few selected statistics. Devotees of the overfederalization position commonly observe (often with a note of exasperation) that there are now over 3,000 federal criminal offenses¹⁹ and that Congress has created new offenses at an accelerating pace.²⁰ They also never fail to mention that the number of federal criminal cases filed

As Megan's law indicates, Congress has not limited its expanding involvement to the enactment of additional federal offenses. Congress also has used its spending power to induce states to change their sentencing practices for state law crimes. For example, the 1994 Crime Bill conditioned grants for construction of state prisons on a state's enacting "truth in sentencing" laws that require convicted defendants to serve at least 85% of their sentences. The grants are also conditioned on a state's sentencing a higher percentage of violent offenders to prison and increasing the average prison term for violent offenders. Brickey, *supra* note 1, at 1173 n.200.

¹⁸ Sara Sun Beale, *Reporter's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law*, 46 HASTINGS L.J. 1277 (1995). See also Ashdown, *supra* note 1, at 793, 802.

¹⁹ See, e.g., Ashdown, *supra* note 1, at 802; Kathleen F. Brickey, *The Commerce Clause and Federalized Crime: A Tale of Two Thieves*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 21, 28 (1996); Roger J. Miner, *Crime and Punishment in the Federal Courts*, 43 SYRACUSE L. REV. 681 (1992).

²⁰ See, e.g., Rehnquist, *Seen in a Glass Darkly*, *supra* note 1, at 7 ("[H]ardly a congressional session goes by without an attempt to add new sections to the federal criminal code."). See also Beale, *supra* note 1, at 979; Brickey, *supra* note 1, at 1145; Marshall, *supra* note 1, at 722-23. For the history of the expanding number of federal offenses, see *infra* note 100. For a listing of recently created federal criminal offenses, see Beale, *supra* note 1, at 979-80; John C. Jeffries & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal*

has increased by more than 70 percent since 1980.²¹ These facts cohere with and reinforce the common perception that, since the New Deal era, the national government has played a greatly expanded role in all facets of American life. The notion of a greatly expanded and expanding national role in the enforcement of criminal law thus seems quite plausible. Indeed, no one has seriously questioned it.²²

This depiction of the national government's role, however, is not just misleading; it is essentially false. True, Congress has given the national government concurrent authority over an increasingly wide range of criminal activity, including much street crime.²³ But a considerable body of statistical evidence reveals that the national government's exercise of its concurrent authority has been so selective that its share of overall enforcement has actually declined for more than the last half century. The actual pattern of national crime fighting efforts, then, raises the real possibility that crime has been *underfederalized*.

A. CASE FILINGS

The number of criminal cases that are filed per year furnishes one rough measure of the comparative shares of the national and state governments' efforts in combating crime. Case filings, while far from a perfect indicator, do provide a useful gauge of the level of investigative,

Prosecution, 46 HASTINGS L.J. 1095, 1097 (1995); Marshall, *supra* note 1, at 746-54 (Appendix B) (listing new federal offenses created by the 1994 Crime Bill).

²¹ See, e.g., FEDERAL COURTS STUDY, *supra* note 1, at 36 (noting a "more than 50%" increase between 1980 and 1989); Wallace letter, *supra* note 1 (noting a nearly 60% increase between 1981 and 1991); Ashdown, *supra* note 1, at 803; Beale, *supra* note 1, at 984; Cowen, *supra* note 1, at 1375; Kadish, *supra* note 1, at 1250; Mengler, *supra* note 1, at 505.

²² In discussing the history of the national criminal justice system, proponents of the overfederalization thesis concentrate almost entirely on the offenses over which the national government has jurisdiction. See, e.g., Sara Sun Beale, *Federal Criminal Jurisdiction*, in 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 775-79 (1983); Brickey, *supra* note 1, at 1137-45. See also *infra* note 100. They routinely discuss the burden that federal criminal filings, particularly drug prosecutions, impose on the federal courts. See *infra* Part IV.A. They also occasionally mention that state courts face even greater burdens. Other than these statements, however, the proponents have paid scant attention to the degree to which the national government actually has used its expanding concurrent criminal jurisdiction.

Only Professors Zimring and Hawkins have even attempted to gauge the overall state and national roles in the actual exercise of crime fighting authority. Zimring & Hawkins, *supra* note 1, at 16-17. Reciting 1986 statistics concerning the percentage of prisoners, jail inmates, and police officers accounted for by the national and state systems, they report that "the national government is still a less than 10 percent partner in the administration of criminal justice." *Id.* at 16. Zimring and Hawkins, however, did not look at the evidence concerning changes in the overall federal and state roles over time. They nonetheless make the unsupported (and, it turns out, erroneous) assertion that "the role of the federal government has expanded since the New Deal . . ." *Id.*

²³ In addition to the recently enacted federal crimes mentioned in the text accompanying notes 11-17, the national government now has concurrent jurisdiction over, *inter alia*, auto-theft, bank robbery, and drug crimes.

prosecutorial, and judicial resources that government expends in addressing crime.

Although judges and scholars have relied on recent increases in federal filings as evidence of overfederalization, their use of statistics has been misleading.²⁴ In 1980, which judges and scholars use as the base year for measuring the recent increase, the number of federal criminal filings was at an historic low, lower than in any year since 1917.²⁵ Beyond this, a recent increase in federal filings does not and cannot, by itself, establish an expanding national *share*. To gauge changes in national and state crime fighting shares, one must try to compare federal filings with state filings and compare trends over a longer period of time.

The data that permit a direct comparison of federal and state criminal case filings, although available only for 1984 and subsequent years,²⁶ show a striking decline in the national share. While federal felony filings increased by about 32% from 1984-94, felony filings in state courts increased by 64% for that period.²⁷ The share of the felony caseload borne by the federal courts declined from 2.15% to 1.78%.²⁸ The trend is

²⁴ See *supra* note 21 and accompanying text.

²⁵ Unless otherwise indicated, figures concerning federal filings are drawn from the following sources: For the years since 1940, the annual report published by the Administrative Office of the United States Courts; for the years 1934-39, the Annual Report of the Attorney General; and for the years before 1933, Edward Rubin, *A Statistical Study of Federal Criminal Prosecutions*, 1 LAW & CONTEMP. PROBS. 494, 497 (1934).

²⁶ Since 1975, the National Center for State Courts has been engaged in an institutional effort to collect and publish caseload information for all state courts. Its published data regarding overall state criminal filings from 1975-81, however, are incomplete, and the Center itself regards these data as unreliable. No published data are available for 1982-83. Since 1984, the NCSC has reported filings information for the courts of general jurisdiction of forty two states and the Commonwealth of Puerto Rico.

Unless otherwise indicated, the state statistics discussed in this section are drawn from the Center's reports and databases for the years 1984-94, NATIONAL CENTER FOR STATE COURTS, CASELOAD HIGHLIGHTS: EXAMINING THE WORK OF STATE COURTS, NATIONAL STATE COURT CASELOAD TRENDS, 1984-1994 (1996), and from its electronic database on felony filings in state courts [hereinafter 1984-94 DATABASE]. See Attachment to E-mail Message from Neil LaPointe to Kim Dayton, Aug. 8, 1996 (containing database) (on file with the authors).

Any references to state court filings thus understate the total filings in state courts because, following the Center's data, they exclude nine States and refer only to state courts of general jurisdiction.

²⁷ In 1984, some 23,000 felony cases were filed in the federal district courts, compared with 1.06 million in state courts. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR 1991. In 1994, the number of federal felony filings had increased to just under 31,000 cases, while felony filings in the States had increased to over 1.7 million. ADMINISTRATIVE OFFICE OF THE UNITED STATES, ANNUAL REPORT OF THE DIRECTOR 1994.

²⁸ At least in recent years, felony filings have composed a slightly higher percentage of all filings in federal courts than in state courts. In 1994, for example, felony filings composed 67% of federal criminal case filings, compared to 59% in state courts of general jurisdiction.

Instead of comparing felony filings, one can compare all criminal filings. In terms of raw numbers, there were in 1984 about 37,000 criminal case filings in federal courts; in the state courts of general jurisdiction for which figures are available, some 10 million. By 1994, the

slightly more pronounced if one compares the rates of growth in filings rather than the absolute numbers of filings. According to a comparative study by National Center for State Courts, the growth rate in felony filings in state courts was 70% — more than twice the growth rate in federal felony filings (33%).²⁹ In the ten years since 1984, which encompass much of the time period on which judges and academics rely to establish overfederalization,³⁰ the data on criminal filings unequivocally show a declining national share.

In fact, by excluding juvenile filings, these data understate how much the national share has decreased. Juvenile crime rates, arrests, and filings — particularly respecting violent crimes — are significantly on the rise. Data compiled by the National Center for State Courts show that, between 1984 and 1994, juvenile adjudications in the state courts increased from 1.2 to 1.9 million (59%).³¹ Both the impact and burden of this dramatic rise in the juvenile crime rate falls almost exclusively on the state courts.³²

total number of federal criminal filings stood at about 45,500 cases, while the total number of state criminal filings had risen to nearly 13.5 million. These raw numbers reflect, respectively, a 27% increase in total federal criminal filings and a 35% increase in state criminal filings. The growth rate in total criminal filings in state courts was 36% from 1984-94, compared to a growth rate of 28% in the federal courts.

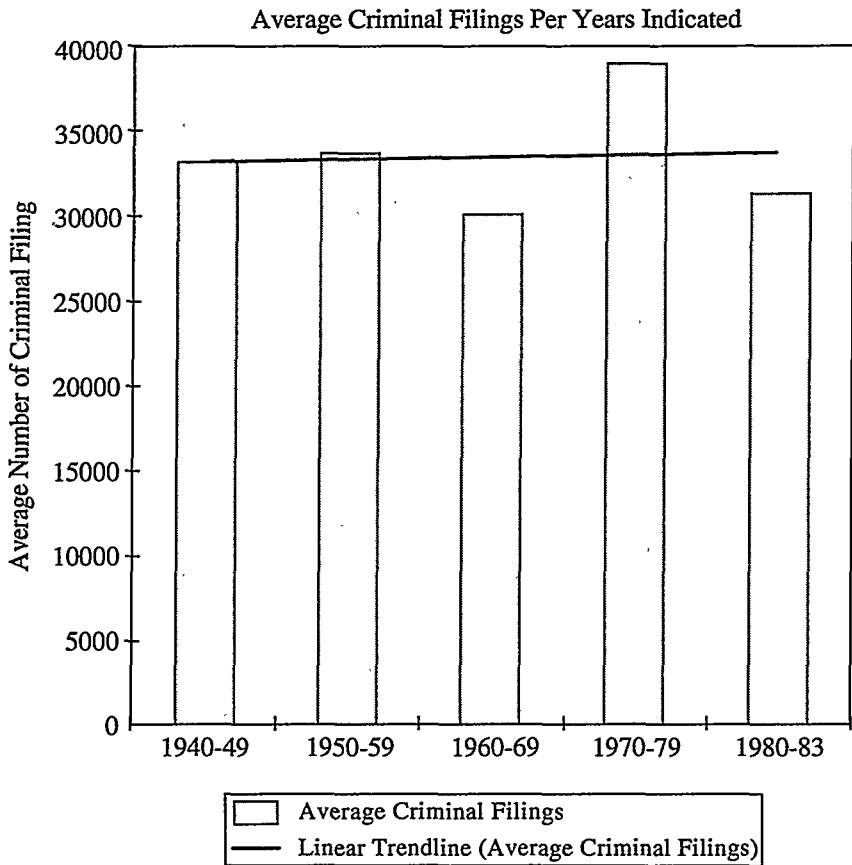
In terms of the overall number of criminal prosecutions initiated in the United States, the national share is minimal: between 1984 and 1994, the national component of all criminal prosecutions represented an average of only .35% of all criminal filings (felonies and misdemeanors), declining from .36% of all cases in 1984 to .34% in 1994. The states' share of total criminal prosecutions, of course, increased concomitantly over that same period — a percentage increase that translates to more than 3.5 million more criminal cases prosecuted in state courts in 1994 than in 1984.

²⁹ BRIAN J. OSTRAM & NEAL B. KAUDER, ANNUAL REPORT, EXAMINING THE WORK OF STATE COURTS, 1994 22 (National Center for State Courts, 1996).

³⁰ See *supra* note 21 and accompanying text.

³¹ OSTROM & KAUDER, *supra* note 29, at 46. According to the National Criminal Justice Reference Service, while the rate of juvenile crime remained fairly constant between 1973 and 1988, between 1988 and 1992 the arrest rate for juvenile violent crime increased more than fifty percent. NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE, JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT (1995). See also U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, COMBATING VIOLENCE AND DELINQUENCY: THE NATIONAL JUVENILE JUSTICE ACTION PLAN 19 (1996) [hereinafter COMBATING VIOLENCE] (“Between 1983 and 1992, juvenile arrest rates for Violent Crime Index offenses increased nearly 60 percent, while adult rates increased by 47 percent.”).

³² We have been unable to locate statistics that would reveal whether the federal share of juvenile prosecutions has been increasing or decreasing. For purposes of the point made in the text, however, it does not matter, because whether increasing or decreasing, the national share of juvenile prosecutions is far lower than the national share of adult prosecutions. “Federal prosecutions of juveniles, whether as delinquents or as criminal offenders, account for less than 1 percent of all *Federal* prosecutions.” COMBATING VIOLENCE, *supra* note 31, at 26 (emphasis added). See also John Ashcroft, *Clinton Lets Juveniles Guilty of Federal Gun Crimes Off the Hook*, Congressional Press Release (Fed. Doc. Clr. H. July 8, 1996) (“[S]ince taking office, the Clinton Administration has prosecuted only 233 juveniles for federal crime, that is fewer than two prosecutions per state in a three year period.”). As juvenile prosecutions

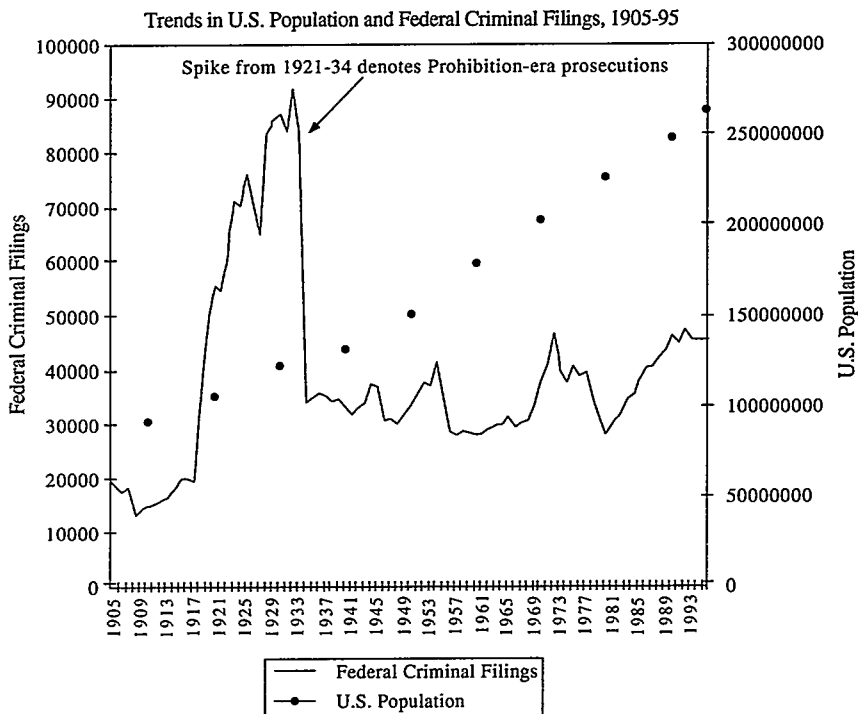


Although one cannot directly compare the federal and state filings for the years before 1984, other measures indicate that the 1984-94 trend is not an aberration, but a part of a larger historical pattern. One such measure is federal criminal filings relative to population. Although there have been considerable variations in the average number of criminal filings for each decade since the turn of the century, a linear trend line for these averages (see chart above) shows only a minimal increase in the average between the 1940s and 1983.

Meanwhile, the nation's population increased dramatically. Between 1900 and 1995, for instance, the population of the United States increased by nearly 350%: about 76 million to more than 263 million.³³ Over that same period, however, the total number of federal criminal prosecutions (felony and misdemeanor) rose from about 17,000 cases to

comprise a larger proportion of criminal prosecutions, then, the national share of all criminal prosecutions shrinks.

³³ U.S. DEPT. COMMERCE, BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1995 6 (1995).



somewhat less than 46,000 — less than 275%.³⁴ From 1940 to 1980, the population increased by 79%³⁵ while federal criminal filings increased by only 15%.³⁶ As depicted in the chart above, the annual number of federal criminal prosecutions has not kept pace with the rate of general population increases, as one might have expected it would. In per capita terms, the national government's crime fighting role has declined quite significantly since the turn of the century.

Available data from individual states³⁷ tend to confirm the expectation that state criminal prosecutions have kept better pace with population increases, indicating that the national share has declined. In Kansas, for example, there were a total of 3,494 criminal dispositions in the district courts in 1927 (both felonies and misdemeanors); in 1984, there were 24,623 in 1984: an increase of more than 600%.³⁸ Federal criminal filings, in contrast, declined by more than 44% between 1927 and

³⁴ See *supra* note 25.

³⁵ U.S. DEPT. COMMERCE, *supra* note 33, at 6.

³⁶ See *supra* note 25.

³⁷ Sources of information concerning state criminal caseloads prior to 1984 are less extensive than federal criminal justice statistics, and there is no compilation that totals the data available for individual States. Nonetheless, some historical data are available for the courts systems of some States.

³⁸ See KANSAS SUPREME COURT, OFFICE OF JUDICIAL ADMINISTRATION, ANNUAL REPORT OF THE COURTS OF KANSAS, 1983-84 FISCAL YEAR 1 (1984) (reporting 1984 criminal disposi-

1984.³⁹ From 1938 to 1984, felony case dispositions in New York's Supreme and County Courts rose over 300%;⁴⁰ criminal dispositions in the federal courts, on the other hand, rose a mere 11.5%. In Texas, criminal filings in the state district courts rose from 19,933 cases in 1950 to 108,796 cases in 1984⁴¹ — an increase of more than 500%. During that same 1950 to 1984 time period, federal criminal filings increased by only 6%.⁴²

More recent data likewise indicate that the growth in state criminal filings has consistently outstripped the growth of federal criminal filings.⁴³ In North Carolina, for example, total criminal filings increased from 39,138 cases in 1971 to 68,067 in 1984: an increase of nearly 74% in just thirteen years.⁴⁴ In the federal courts, by comparison, criminal filings declined 11%.⁴⁵ From 1975 to 1984, the total number of reported criminal filings in the Michigan Circuit Courts rose from 27,576 to 41,990 cases (+52%), while reported criminal filings in Tennessee were up almost 36%. Federal filings over that ten-year period declined 12.5%.⁴⁶

Even if we assume some inconsistency and error in the data collection methods the state courts used before 1984 and even if we recognize

tions statistics); REPORT OF THE JUDICIAL COUNCIL OF KANSAS 153 (1927) (reporting 1927 criminal dispositions statistics).

³⁹ See *supra* note 25, 1985 REPORT OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 170 (table 38: 35,911 criminal filings in 1984, excluding transfers); Rubin, *supra* note 25, at 497 (64,614 criminal filings). If Prohibition cases are excluded from the 1927 federal filings, federal filings increased, but only by 50%.

⁴⁰ See FIFTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF THE STATE OF NEW YORK, LEGISLATIVE DOCUMENT NO. 23 (1939) (tables 24,25: reporting 1938 criminal caseload statistics for Supreme and County Courts); SIXTH AND SEVENTH ANNUAL REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS 13 (1984) (reporting 1984 criminal caseload statistics for Supreme and County Courts).

⁴¹ COURT STATISTICS PROJECT STAFF, STATE JUSTICE INSTITUTE, STATE COURT CASELOAD STATISTICS, 1984 83 (National Center for State Courts 1984) (criminal filings in district courts); TWENTY-THIRD ANNUAL REPORT OF THE TEXAS CIVIL JUDICIAL COUNCIL TO THE GOVERNOR AND SUPREME COURT 50 (1951) (reporting 1950 district court criminal case filings statistics).

⁴² 1951 ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 101 (36,322 filings); 1985 ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES 170.

⁴³ Except as noted, the state court criminal filings figures discussed in this paragraph are derived from data reported in, respectively, NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT, 1975 42 (197) (table 23) [hereinafter STATE COURT ANN. STATS. 1975]; NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS, 1994 158-62 (1995) (table 10) [hereinafter STATE COURT ANN. STATS. 1994].

⁴⁴ See NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1988 83 (1986) (table 11); *North Carolina Superior Court Statistics 1971-95* <http://www.tomh_isd.aoc.state.nc.us/futures2.htm> (1971 filings).

⁴⁵ See *supra* text accompanying note 25; 1975 ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES 250 (1975) (41,291 filings).

⁴⁶ *Id.* (41,108 filings).

that there are wide variations in the rates of per-capita criminal filings among the states, these state criminal filings statistics indicate that the federal share of law enforcement activities has been shrinking for at least the last half century. A direct comparison of federal and state filings shows that the national share fell between 1984 and 1994. Prior to 1984, federal filings, when compared with both population trends and filings for individual States, also indicate a declining national share.

B. PRISONERS

The numbers of inmates in state and federal prisons furnish yet another measure of the state and national crime fighting shares. Like the measure of case filings, these numbers indicate that the national share has declined over the last half century, not expanded.⁴⁷

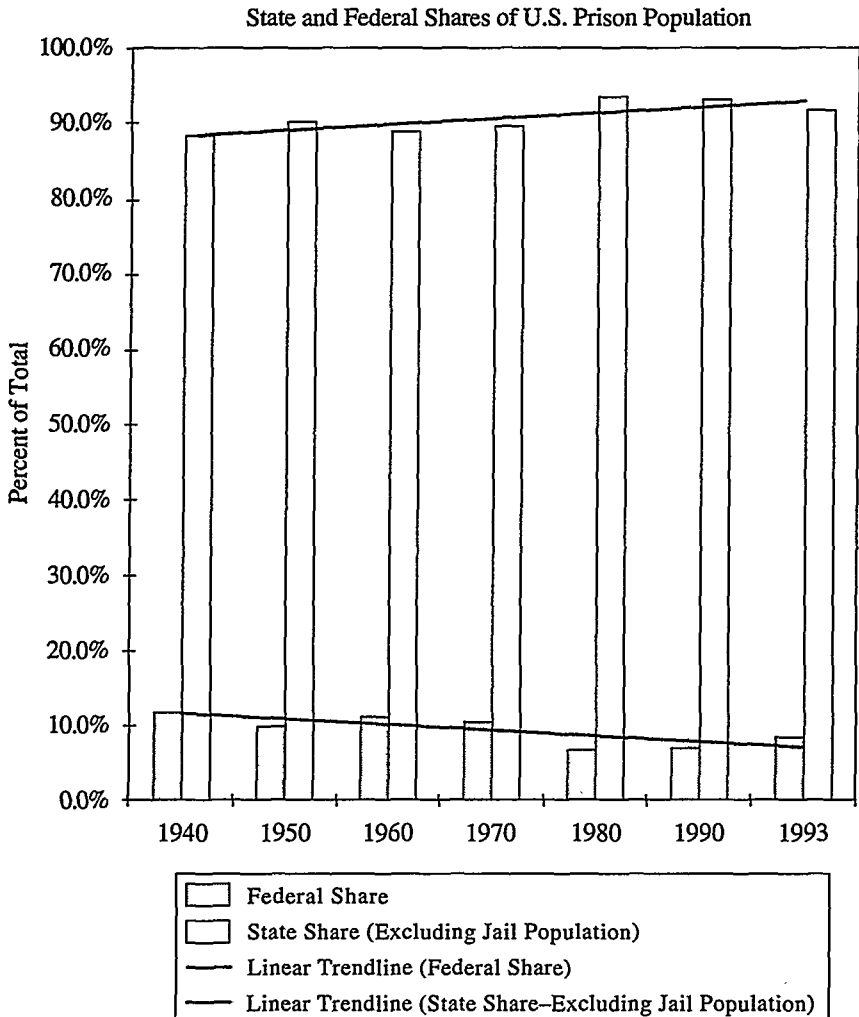
Near the beginning of this century, the federal prison population constituted only about 2.8% of the total population of prisoners in the United States. The percentage of the nation's prisoners under federal jurisdiction swelled during the Prohibition era (the 1920s and early 1930s) and never fell back to pre-Prohibition levels. In 1940, well after Prohibition and before the United State's entrance into World War II, the federal share of the prison population stood at 11.6%.⁴⁸ But since that time the percentage of prisoners in federal institutions has declined each decade. In the 1940s, an average of 11.7% of the nation's prisoners were housed in federal prisons. In the 1950s and 1960s, the average remained relatively constant at the lower levels of 10.6% and 10.3%, respectively. The decade's average percentage fell somewhat in the 1970s to 9.9% and then quite precipitously to 6.6% in the 1980s. By the 1980s, then, the percentage of the nation's prisoners in federal rather than state prison had fallen to nearly half of its 1940s level.

Since 1990, the national share of the prison population has increased from 6.4% in 1990 to 7.8% in 1994.⁴⁹ Yet, as the diminishing national share of criminal filings indicates, this increase almost surely

⁴⁷ Our discussion of statistics regarding federal and state prison populations is derived from a number of sources, including: U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850-1984 (1996) [hereinafter HISTORICAL CORRECTIONS STATISTICS]; U.S. DEPT. OF COMMERCE, ECONOMICS AND STATISTICAL ADMINISTRATION, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES (1995); and materials compiled by the National Center for State Courts. These prisoner statistics do not include individuals housed in local jails, which comprise about one-third of all state incarcerations. See generally, U.S. DEPT OF JUSTICE, NATION'S JAILS HOLD RECORD 442, 490; *Inmates* (Press Release, Apr. 30, 1995) <[www:http://www.ncjrs.org/txtfiles/jails.txt](http://www.ncjrs.org/txtfiles/jails.txt)>.

⁴⁸ The federal share of prisoners reached its zenith in 1945, when 12.7% of the nation's prisoner population was housed in federal penal institutions. See HISTORICAL CORRECTIONS STATISTICS, *supra* note 47, at 29 (percentages derived from table 3-2).

⁴⁹ BUREAU OF JUSTICE STATISTICS, PRISONERS IN 1994 (Aug. 1995).



reflects the harsher sentences of the federal sentencing guidelines.⁵⁰ Further, even with the increase of this decade, the national share of the prison population is presently lower than it was in any decade since the 1920s, with the exception of the 1980s, when the national share was at its lowest since before Prohibition.⁵¹

⁵⁰ *Id.* at 12 (linking changes in federal prison populations to the sentencing guidelines, which increased the average length of sentences and increased the number of offenders who receive a sentence of incarceration rather than probation).

⁵¹ Critics of the federal government's current crime fighting role sometimes mention a fourth measure of the respective roles of the federal and state governments: expenditures required to support their respective criminal justice systems. Critics frequently cite figures showing recent dramatic increases in total federal expenditures as evidence of overfederalization. Professor Beale, for example, noted in 1995 that "in actual dollars, federal expenditures increased from 1971-1990 by 668 percent, more than the combined increase of 597 percent for

C. IMPLICATIONS

The various statistical measures discussed above undermine a central empirical premise of the overfederalization position. The statistics furnish no support whatsoever for the claim that the national government's crime fighting role has grown, much less that the growth has been rapid and unrestrained. Taken together, these measures in fact compellingly demonstrate the opposite conclusion that the national government's crime fighting share has been declining for over sixty years.

This decline strongly suggests that crime has been underfederalized, not overfederalized. Two paths lead to this conclusion. First, an analogy can be drawn between civil and criminal regulation. Especially since the New Deal in the 1930s, the national government has played an increasingly important role in the civil regulation of the nation's businesses. It is generally thought that, with the increasing integration of the United States economy, resulting from developments in transportation, communications, and production, an expanded regulatory national role is appropriate.⁵² An expanded national role would also seem appropriate for the enforcement of criminal laws, especially given crime's high costs to the national economy⁵³ and the high priority the public attaches to the problem.⁵⁴

all state and local governments." Beale, *supra* note 18, at 1292, 1295 (citing U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JUSTICE EXPENDITURE AND EMPLOYMENT 1990 4 (1992)).

To the extent that expenditure data are relevant measures of the respective roles of the federal, state, and local governments, the picture they paint is considerably more complex than these commentators would appear to recognize. Most important is the fact that the lion's share of the "1971-90" increase in expenditures started to occur in 1987, during the period when the national share of federal criminal filings declined. The past decade's dramatic increase in federal criminal justice expenditures is considerably disproportionate to the total number of criminal and felony criminal filings in each year of that same period, which actually decreased slightly over the 1971-92 time frame. Interestingly, the increase in federal expenditures since 1987 coincides with the new federal sentencing regime ushered in by the Federal Sentencing Guidelines, which carry demanding procedural costs and higher sentences.

⁵² See, e.g., *United States v. Lopez*, 115 S. Ct. 1624, 1628 (1995) (modern doctrine that expands Congress's commerce powers recognizes "the great changes that had occurred in the way business was carried on in this country"); *id.* at 1637 (Kennedy, J., concurring) (arguing against "reverting to an understanding of commerce that would serve only an 18th-century economy, dependent upon production and trading practices that had changed but little over the preceding centuries"); *id.* at 1662 (Breyer, J., dissenting) ("[A] holding that the particular statute before us falls within the commerce power would not expand the scope of that Clause. Rather, it simply would apply preexisting law to changing economic circumstances."); *New York v. United States*, 505 U.S. 144, 157 (1992) ("[T]he powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role" to activities that would have been "unimaginable to the Framers.").

⁵³ See generally *supra* note 9; *infra* notes 89-90, 178-79, and accompanying text.

⁵⁴ See *supra* notes 6-8 and accompanying text.

Second, the ever increasing sophistication and integration of the United States economy since the 1930s has strengthened the justifications for national crime fighting. More criminal activity crosses state boundaries now.⁵⁵ Specialized law enforcement technologies and expertise have a wider application.⁵⁶ One State's enforcement efforts have a greater impact in other States.⁵⁷ The redistributive rationale for national authority carries greater weight because business and capital are more mobile.⁵⁸

Both the civil analogy and the justifications for national crime fighting thus suggest that an expanded national share would be permissible as a matter of constitutional law and desirable as a matter of social policy. That the national government's share actually has declined tends to indicate an underfederalization of crime. The following sections subject this hypothesis to critical scrutiny as a matter of law and policy.

II. THE CONSTITUTION: TEXT AND TRADITION

According to conventional legal wisdom, the national government's current role in crime fighting violates constitutional principles of federalism. Part I partly defused this criticism by showing that the national share of law enforcement actually diminished over the last sixty years. This demonstration, however, still does not quell the objection that Congress has given the national government concurrent jurisdiction over too many kinds of offenses. Prompted partly by constitutional concerns, proponents of the overfederalization thesis would like to sharply curtail the scope of the national government's criminal jurisdiction, especially over street crime.⁵⁹

⁵⁵ See *infra* Part III.B.2.

⁵⁶ *Id.*

⁵⁷ See *infra* Part III.B.4.a.

⁵⁸ See *infra* Part III.B.4.b.

⁵⁹ At the heart of the overfederalization thesis is the contention that the national government now has jurisdiction over too much crime, especially street crime. Litman & Greenberg, *supra* note 1, at 73-74. Judges and scholars have offered different standards for defining the parameters of national criminal jurisdiction. See *United States v. Lopez*, 115 S. Ct. 1624, 1631-32, 1631 n.3 (1995) (identifying factors such as whether the proscribed activity is commercial in nature; whether the statute requires a jurisdictional nexus between the particular case and interstate commerce; whether Congress made findings concerning the impact of the proscribed activity on interstate commerce; and whether the activity lies within a traditional domain of state regulation); LONG RANGE PLAN, *supra* note 1, at 24-25 (listing five types of offenses over which the national government properly has jurisdiction); Little, *supra* note 1, at 1077-81 (advocating a demonstrated state failure principle); Mengler, *supra* note 1, at 526 (listing four of the same categories); Zimring & Hawkins, *supra* note 1, at 22-24 (listing four justifications for national involvement). But the Judges and scholars agree that the national government should not have jurisdiction over ordinary street crime, such as small scale gun and drug offenses, gang violence, carjacking, and domestic violence. See, e.g., Ashdown, *supra* note 1, at 801; Brickey, *supra* note 1, at 1148, 1159-65, 1167-68; Kadish, *supra* note 1, at 1251; Mengler, *supra* note 1, at 527; Mordecai Rosenfeld, *The Law and the Yucca Yucca*

Lopez dramatically enlarges the importance of the constitutional doubts over the existing scope of national criminal jurisdiction.⁶⁰ Before *Lopez*, any such doubts could be dismissed as academic; apparently settled constitutional doctrine gave Congress virtually unlimited regulatory power in relation to the states.⁶¹ Yet in striking down the federal Gun-Free School Zones Act,⁶² *Lopez* invigorates and endorses constitutional

Plant, N.Y.L. J. 2 (June 16, 1989) (reporting Chief Justice Rehnquist's statement that "garden variety crimes d[o] not belong in federal court"); Zimring & Hawkins, *supra* note 1, at 24-25. See also *supra* note 2 and accompanying text.

⁶⁰ Until *Lopez*, judicial and scholarly critics of the federalization of crime addressed their arguments exclusively to Congress. See, e.g., Brickey, *supra* note 1, at 1170-71 (noting that "the courts' liberal approach to commerce clause jurisdiction . . . gives the government 'carte blanche for federal invasion of the traditional realm of the states.'"). Yet in explaining the increased national involvement in terms of the political incentives facing national politicians, see Ashdown, *supra* note 1, at 795, 806-07; Marshall, *supra* note 1, at 723-24, their logic ineluctably suggested that Congress would be unreceptive and their arguments for limiting national authority entirely futile. *Lopez* and the Court's "new federalism" decisions, however, raise the strong possibility that the overfederalization thesis may succeed in the Supreme Court even as it fails in Congress.

⁶¹ Prior to *Lopez*, *Perez v. United States*, 402 U.S. 146 (1971), was the leading decision concerning Congress's authority to create federal crimes. At issue in *Perez* was a federal statute that made loansharking a crime. Although the statute did not require a case-by-case showing that the particular loansharking transaction had any effect on interstate commerce, the Court held that Congress had validly enacted the statute pursuant to its powers under the Commerce Clause.

The Court's holding was based on an application of the doctrinal rules that then had been controlling since the demise of the *Lochner* Court in the 1930s. Under those rules, Congress has authority to regulate any class of intrastate activity it rationally believes might exert a substantial and harmful effect on interstate commerce if left unregulated. See, e.g., *Hodel v. Indiana*, 452 U.S. 314, 324 (1981); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964); *Wickard v. Filburn*, 317 U.S. 111, 125 (1942); JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 4-9, at 162 (5th ed. 1995). Citing congressional findings, the *Perez* Court reasoned that Congress had rationally concluded that the class of intrastate loansharking activities, taken as a whole, had a substantial and adverse effect on interstate commerce. 402 U.S. at 155-57.

In light of the interdependence of the modern United States economy, the same can be said about any class of criminal activity Congress might choose to regulate. See NOWAK & ROTUNDA, *supra* § 4-10(c), at 167 (under modern doctrine, "[c]ongress could make almost any local activity a federal crime"). See also *infra* notes 9, 89-94, 178-79, and accompanying text.

As *Perez* illustrates and as scholars have unanimously observed, modern pre-*Lopez* Commerce Clause doctrine accorded Congress essentially all encompassing regulatory authority, including *carte blanche* to expand the national government's role in the enforcement of criminal law. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-8, at 316 (2d ed. 1988) ("Contemporary commerce clause doctrine grants Congress such broad power that judicial review of the affirmative authorization for congressional action is largely a formality."); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 554 (1995) ("[W]e have a collection of doctrinal rules that, if we take them seriously, allow Congress to do anything it wants under the commerce power."); Deborah J. Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1565 (1994). Judges and scholars writing before *Lopez* were thus quick to concede the constitutionality of national crime control efforts as a matter of positive law. Kadish, *supra* note 1, at 1248; Mengler, *supra* note 1, at 507.

⁶² 18 U.S.C. § 922(q) (1990).

worries about the national government's concurrent jurisdiction over crime. A lively debate is now brewing in the law journals and lower courts over how broadly the Court will and should read *Lopez*.⁶³ By contributing to this ongoing debate, an assessment of the overfederalization thesis's constitutional claims can now have doctrinal as well as academic significance.

In the next two Parts, we argue that the constitutional objections to the current national crime fighting role are quite misplaced. This Part begins with the threshold question of the source(s) from which the Constitution's meaning can be discerned. We maintain that the Justices in *Lopez*, as well as other proponents of the overfederalization thesis, are wrong to think that they can glean the national government's constitutional role from Constitutional text or societal tradition. The text embraces principles that the modern world has now brought into conflict and the uses of tradition are inherently unprincipled and illegitimate.

A. TEXT AND HISTORY

In modern times, the Constitution's text does not prescribe the permissible scope of the national government's role in fighting crime. The text embraces two fundamental principles. Article I and the Tenth

⁶³ See Part III. D. (discussing the proper outcome of the split of authority over the constitutionality of numerous recently enacted offenses).

The *Lopez* Court sent conflicting signals concerning the intended breadth of its decision. In striking down the Gun-Free School Zones Act, aspects of the Court's opinion stress case-specific features suggesting that the decision has a very limited import. See Deborah J. Merritt, *Commerce!*, 94 MICH. L. REV. 674 (1995). The Court emphasized that Congress had made no findings specifically addressing the impact of the regulated activity on the national economy, 115 S. Ct. at 1631-32, 1632 n.4.; the Act contained no jurisdictional element that required the prosecution to establish a nexus between each case and interstate commerce, 115 S. Ct. at 1631; the possession of guns has a "noncommercial" nature, 115 S. Ct. 1630-31, 1633; and the Act involved *both* education and the criminal law, each of which traditionally has been the subject of state law, 115 S. Ct. at 1631 n.3, 1632-33. See also 115 S. Ct. 1634, 1640, 1641 (Kennedy, J., concurring).

Other aspects of the Justices' opinions, however, point toward a broad import. The Court stressed that the Constitution envisions limits on the regulatory powers of the national government, 115 S. Ct. at 1626, 1628-29, 1632, 1634, and that criminal law, by tradition, has been left to the States, 115 S. Ct. at 1631 n.3, 1632. This emphasis and the Court's reliance on tradition in a number of other constitutional contexts suggest that the Court might define the principle of limited national power in light of tradition. If this is what *Lopez* signals, the decision could have dramatic consequences. Given the role of federal criminal law at the time of the founding and for nearly one hundred years thereafter, see *infra* note 100 and accompanying text, federal criminal jurisdiction might be limited in the name of tradition to activity that either involves the federal government itself or deprives freed slaves and their sympathizers of their civil rights. Alternatively, *Lopez* might be read in light of the Court's reasoning that a decision to uphold the Gun-Free School Zones Act effectively would remove all limits on national power. 115 S. Ct. at 1632-33, 1634. As many lower courts have found, this same logic can be seen to encompass many other federal offenses of recent vintage. See *supra* note 4.

Amendment envision limits on national regulatory authority, while the Commerce Clause contemplates congressional authority to address national economic problems. While fully compatible at this nation's founding, these two principles now conflict. The Constitution's text and history do not resolve this conflict, which simply did not exist in the founders' world.

1. *Express Enumeration and Implied Authority*

An analysis of the text must begin with the four criminal offenses the Constitution explicitly mentions. Article I gives Congress the power to "define and punish Piracies and Felonies committed on the high Seas,"⁶⁴ to "define and punish . . . offenses against the Law of Nations,"⁶⁵ and to "provide for the Punishment of counterfeiting the . . . current Coin of the United States."⁶⁶ Article III itself defines the offense of treason against the United States⁶⁷ and gives Congress the power "to declare the Punishment of Treason . . ."⁶⁸

In addition to according Congress express authority over these offenses, the Constitution seems to give Congress implied authority to create other criminal offenses. It accords Congress other, more general powers,⁶⁹ such as the power to regulate interstate commerce,⁷⁰ and it also grants Congress the overarching power to "make all Laws which shall be necessary and proper for carrying into Execution" these powers.⁷¹ These provisions, it seems, give Congress implied authority to enact criminal laws as a necessary and proper means of effectuating its enumerated powers, including the power to regulate interstate commerce.

Perhaps one could argue that, by mentioning only four criminal offenses, the Constitution excludes the creation of other crimes as a necessary and proper means of carrying out Congress's other enumerated powers. As a textual matter, this argument has some plausibility. Article I, for instance, gives Congress authority to "coin Money,"⁷² and one would think that, under the Necessary and Proper Clause, a power to criminalize counterfeiting would be clearly implied. But instead of leaving this power to implication under the Necessary and Proper Clause, Article I accords Congress power to "provide for the Punishment of

⁶⁴ U.S. CONST. art. I, § 8, cl. 10.

⁶⁵ *Id.*

⁶⁶ U.S. CONST. art. I, § 8, cl. 6.

⁶⁷ U.S. CONST. art. III, § 3, cl. 1.

⁶⁸ U.S. CONST. art. III, § 3, cl. 2.

⁶⁹ *See generally* U.S. CONST. art. I, § 8.

⁷⁰ U.S. CONST. art. I, § 8, cl. 3.

⁷¹ U.S. CONST. art. I, § 8, cl. 18.

⁷² U.S. CONST. art. I, § 8, cl. 5.

counterfeiting . . . current Coin of the United States"⁷³ That the drafters felt a need to specify the power to criminalize counterfeiting, it might be argued, indicates their understanding that Congress lacks the power to create federal crimes absent express textual authority to do so.

Although this reading of the text is not unreasonable, it does not reflect the founders' true understanding. In 1790, the First Congress enacted a Crimes Act which created several federal crimes not mentioned in the Constitution, including perjury in federal court and murder on land controlled by the federal government.⁷⁴ The authority to create such crimes, if it exists, must be implied as necessary and proper to the execution of Congress's enumerated powers, such as its powers respecting federal courts⁷⁵ and federal property.⁷⁶ Yet no member of the First Congress (which included many of those who participated in the Constitution's drafting and ratification) questioned Congress's authority to criminalize perjury in federal courts or murder on federal property.⁷⁷

The Crimes Act of 1790 is thus compelling evidence that the founders did not intend the national role in criminal law to be limited to crimes expressly mentioned in the Constitution. Commentators⁷⁸ and Supreme Court Justices⁷⁹ accordingly have consistently and universally recognized that Congressional authority to create criminal offenses extends beyond these expressly mentioned offenses.

2. *The Tenth Amendment and the Commerce Clause*

Proponents of the overfederalization thesis therefore must (and do) look beyond textually specified crimes for limits on national crime fighting. The *Lopez* Court, for instance, relied upon the principle of limited

⁷³ U.S. CONST. art. I, § 8, cl. 6.

⁷⁴ FRIEDMAN, *supra* note 7, at 71.

⁷⁵ See U.S. CONST. art. I, § 8, cl. 9; see also U.S. CONST. art. III.

⁷⁶ U.S. CONST. art. I, § 8, cl. 17; see also U.S. CONST. art. IV, § 3, cl. 2.

⁷⁷ See Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 56 (1996) ("At the outset, the First Congress recognized that federal criminal law authority was not limited to the few explicit constitutional grants of authority to define punishments.").

⁷⁸ According to the maxim *expressio unius est exclusio alterius*, expressing one thing is excluding another. BLACK'S LAW DICTIONARY 581 (6th ed. 1990). Proponents of the overfederalization thesis, however, do not invoke this maxim to claim that the Constitution should be read to deny Congress all authority to enact criminal offenses not specifically mentioned in the Constitution. They maintain only that the Constitution's text evidences an original understanding that the national government would play an extremely limited role in the enforcement of criminal law. Brickey, *supra* note 1, at 1137-38; Mengler, *supra* note 1, at 508; Miner, *supra* note 1, at 118.

⁷⁹ The view that Congress has implied authority to create unspecified criminal offenses is an implicit premise of *Lopez* and can be traced all the way back to *United States v. Coombs*, 37 U.S. 72, 76-78 (1838).

national power, which is evident in the text and structure of Article I⁸⁰ and is even more explicit in the Tenth Amendment.⁸¹

There is, however, a fundamental and unavoidable problem with relying on the Tenth Amendment to limit national crime fighting. In the circumstances of a fully integrated and modern national economy, imposing such limits denies Congress the full authority the Commerce Clause contemplates. Simply put, the demise of the radically localized world of the late eighteenth century and the rise of the modern national economy has brought the principle of a limited national regulatory authority into conflict with the Commerce Clause.

In view of its text and history, the Commerce Clause gives Congress authority to address significant impediments to an effective interstate economy by giving Congress the power to "regulate Commerce . . . among the several States . . ." ⁸² Even if one defines, as the Court has done throughout its history, "commerce among the States" to refer to goods as they cross state lines, Congress's authority cannot, has not, and should not be limited to such activity. The evident purpose of the Commerce Clause and several other powers specified in Article I is to facilitate a vibrant interstate economy.⁸³ That purpose, coupled with the

⁸⁰ The very first sentence of Article I states: "All legislative Powers *herein granted* shall be vested in a Congress of the United States . . ." U.S. CONST. art. I, § 1 (emphasis added). The Article proceeds to enumerate certain subjects on which Congress has power to legislate. See generally U.S. CONST. art. I, § 8. Together with Article I's opening statement, the enumeration of such powers can only mean that Congress's constitutional legislative authority is not all-encompassing and instead is limited to the granted powers.

⁸¹ The Tenth Amendment declares: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

The principle of limited national power is further confirmed by the history of the Constitution's drafting and ratification. See, e.g., THE FEDERALIST No. 10, at 313 (James E. Cooke ed., 1987) (Madison) ("[T]he powers delegated by the proposed Constitution to the federal government are few and defined."). The principle has been recognized consistently by the Supreme Court. *Lopez*, 115 S. Ct. at 1628-29 (collecting cases).

⁸² U.S. CONST. art. I, § 8, cl. 3.

⁸³ This aim can be seen in the overall structure and text of Article I. Article I grants Congress authority, *inter alia*, to establish uniform bankruptcy laws, create a national currency, establish post offices and roads, and grant patents and copyrights. These provisions are best understood as overlapping powers that share with the Commerce Clause the goal of facilitating the maintenance and development of a robust national economy. See THE FEDERALIST No. 41, at 269 (James E. Cook ed., 1987) (Madison) (describing all of the powers mentioned above belonging to a category of powers designed to "provide for the harmony and proper intercourse among States").

The aim is also evident in the genesis of the Commerce Clause. Under the Articles of Confederation, States were free to and apparently did enact protectionist measures that inhibited trade among the States. The delegates to the Constitutional Convention unanimously agreed that this was contrary to the common interest and that Congress should have authority to regulate interstate commerce. They evidently thought that an effective interstate economy is in the common interest and that, due to the parochial perspective of individual States, States cannot be relied upon to further that end. See *Lopez*, 115 S. Ct. at 1637 (Kennedy, J., concur-

Necessary and Proper Clause, gives Congress authority to address intrastate activity that hinders the flow of goods across state lines. Any lesser degree of authority would be inadequate to fulfill this goal of a well-functioning national economy. Indeed, the modern doctrine that has developed since the demise of the *Lochner* Court embraces just this understanding of the Commerce Clause.

In the modern world, the Commerce Clause grants Congress the power to reach essentially all intrastate activity.⁸⁴ In late eighteenth century America, when the Constitution became law, "the vast majority of colonists lived on small farms where they produced most of the food, clothing, firewood, and other goods themselves."⁸⁵ As Justice O'Connor has observed, "In an era when interstate commerce represented a tiny fraction of economic activity and most goods and services were produced and consumed close to home, the interstate commerce power left a broad range of activities beyond the reach of Congress."⁸⁶ But, as Justice O'Connor also observed: "In the decades since ratification of the Consti-

ring) ("[W]e have a single market and a unified purpose to build a stable national economy."); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 581 (1985) (O'Connor, J., dissenting) ("[T]he Framers of our Constitution intended Congress to have sufficient power to address national problems."); William N. Eskridge, Jr. & John Ferejohn, *The Elastic Commerce Clause: A Political Theory of Federalism*, 47 VAND. L. REV. 1355, 1369 (1994) ("In light of the nation's experience under the Articles of Confederation, there was a consensus after adoption of the Constitution that the federal government should be able to exercise national authority to facilitate a national market."); Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615, 641 n.138 (1995) ("Madison thought it was clear that the encouragement of manufacture was one of the purposes of the Commerce Clause.").

⁸⁴ Under modern doctrine, Congress has authority to regulate any intrastate activity it rationally believes might have a significant adverse effect on the interstate economy. See *supra* note 61. Commentators agree that, under this doctrine, Congress essentially has all-encompassing authority. *Id.* Until *Lopez*, which qualifies modern doctrine, every case that faithfully followed this doctrine rejected arguments that Congress had exceeded its Commerce Clause authority in regulating private intrastate activity. *Lopez* marked the first time in nearly sixty years that the Court had invalidated federal regulation of private actors as beyond Congress's commerce powers. NOWAK & ROTUNDA, *supra* note 61 § 4-9, at 162.

⁸⁵ DANIEL E. DIAMON & JOHN. D. GUILFOIL, UNITED STATES ECONOMIC HISTORY 145 (1973) ("Self-sufficient, family-operated farms characterized United States agriculture as late as the early nineteenth century."); BARRY S. POULSON, ECONOMIC HISTORY OF THE UNITED STATES 69 (1981). See also HERMAN E. KROOSS, AMERICAN ECONOMIC DEVELOPMENT 37 (1974) ("[A]t the end of the Colonial Period, 90 out of every 100 Americans worked on farms, or in the forest, or as fishermen; manufacturing and construction absorbed another five; and trade and services were practically nonexistent.").

⁸⁶ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 583 (1985) (O'Connor, J., dissenting). See also DIAMON & GUILFOIL, *supra* note 85, at 144:

In the absence of navigable water routes, the packhorse was the dominant means of overland transportation in the interior region of the United States in the eighteenth century. Due to the high cost and time consuming nature of packhorse transportation, the only commodities which could be shipped were those with high value and low perishability. The chief commodities fulfilling such requirements were fur and, to a lesser degree, whiskey and guns.

tution, interstate economic activity has greatly expanded. Industrialization, coupled with advances in transportation and communications, *has created a national economy in which virtually every activity occurring within the borders of a State plays a part.*⁸⁷ No longer is there an area of purely local activity which is not in some way inextricably intertwined with the national economy.⁸⁸ In today's world, every problem has a national economic dimension and thus falls within the authority the Commerce Clause gives Congress.

Therefore, fidelity to the Commerce Clause now requires that Congress have authority to regulate crime — even ordinary street crime. According to the most recent and authoritative estimate, crime costs the nation approximately \$500 billion per year.⁸⁹ Even if these costs are categorized according to particular crimes or types of crimes, they remain quite substantial.⁹⁰

⁸⁷ *Garcia*, 469 U.S. at 583 (emphasis added).

⁸⁸ See, e.g., Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1497 (1994) (“[B]etween the Civil War and World War I the economies of the separate states became functionally integrated.”); Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643, 647 (1996) (“[I]t is logically possible — even as a practical matter highly likely — that such everyday matters as the quality of family (or public schooling) do affect productivity.”). Even “conservative” scholars who advocate judicially enforceable lines between state and national authority recognize that, in today's world, essentially all aspects of one State's economic life are inextricably intertwined with the economic lives of its sister States. See DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 5 (1995); Stephen G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 783 (1995); Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 555, 567 (1994).

⁸⁹ See *supra* note 9. According to the previous best estimate, which was the product of the President's Commission on Law Enforcement and Administration of Justice, “in 1965 the total costs of crime and the criminal justice system . . . equaled about 3 percent of the gross national product.” Philip J. Cook, *Costs of Crime*, in 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 373, 373 (S. A. Kadish ed., 1983).

⁹⁰ See *United States v. Bishop*, 66 F.3d 569, 580 (3d Cir. 1995) (reporting congressional findings on the extent and significance of auto theft); MILLER ET AL., *supra* note 9, at 17, 24 (breaking down annual costs according to particular crimes); CHARLES E. SILBERMAN, *CRIMINAL VIOLENCE, CRIMINAL JUSTICE* 42 (1978) (placing economic losses associated with shoplifting and employee theft at over nine billion dollars in 1974); U.S. DEPT. OF JUSTICE, *COMBATING VIOLENT CRIME: 24 RECOMMENDATIONS TO STRENGTHEN CRIMINAL JUSTICE* 14 (1992) [hereinafter *COMBATING VIOLENT CRIME*]. See also Beale, *supra* note 1, at 1007 (“It would be naive to deny that there is a federal interest — and, indeed, a significant effect on commerce — as a result of violent street crime.”).

One might object that Congress should be denied regulatory authority on the grounds that a particular offense does not have a significant impact on the national economy as a whole. Such a limiting principle, however, has obviously unacceptable implications. A single state's tariff on a particular kind of out-of-state good would have an even less significant impact on the national economy. Yet, as everyone would acknowledge, authority to preempt such a tariff is within the core of Congress's Commerce Clause authority. Indeed, even when Congress has not legislated, the Court has held that such state tariffs violate the Commerce Clause because of their adverse impact on the national economy. See, e.g., *West Lynn Creamery v. Healy*, 114 S. Ct. 2205, 2211 (1994) (“[T]ariffs against the products of other States are so patently

Lopez illustrates this point. In his dissent, Justice Breyer cited more than one hundred and fifty academic and governmental sources to support his conclusion that the presence of guns in and near schools, the subject over which Congress had given the national government concurrent authority, has a significant adverse impact on interstate commerce.⁹¹ The majority's rebuttal to Breyer was ineffective, even lacking in conviction. Although the Court complained that Justice Breyer's analysis had "pile[d] inference upon inference,"⁹² it tellingly did not attempt to dispute any of these inferences.⁹³ As Professor Robert Nagel observed, "the Court's analysis effectively concedes that regulation of guns near schools would have a substantial effect on commerce."⁹⁴

Instead of denying the national economic consequences of the activity Congress had criminalized, the majority reiterated the principle of limited national economic power. The Court repeatedly stressed that if the adverse economic effects Justice Breyer identified constitute a sufficient basis for congressional regulation, then Congress's commerce power has no meaningful limits.⁹⁵ The Court's point is quite correct: Given the pervasive interdependence of the modern American economy, Congress's Commerce Clause power to address significant national economic problems is now essentially all-encompassing.⁹⁶ Justice Breyer unsurprisingly lacked an effective rejoinder to the Court's charge that he

unconstitutional that our cases reveal not a single attempt by any State to enact one."); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

⁹¹ 115 S. Ct. 1624, at 1665-71 (1995). Justice Breyer maintained that these sources support the conclusions that 1) the problem of guns in and around schools is widespread and adversely affects the quality of education; 2) the quality of education significantly influences interstate and foreign commerce; and 3) gun-related violence on or near school premises has a significant adverse impact on interstate and foreign commerce. *Id.* at 1659-61.

⁹² *Id.* at 1634.

⁹³ See Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 563 (1995) (that standard Commerce Clause doctrine "justif[ies] the Gun-Free School Zones Act seems undeniable"). The Court could not have meant to suggest seriously that the chain of economic causation Justice Breyer traced out is untrue *because* it piles inference upon inference. Due to the interdependence and almost overwhelming complexity of the national economy, any effort to isolate the effect of one causal factor will necessarily pile inference upon inference. Indeed, widely accepted and sophisticated techniques of social and economic analysis, such as multi variate regression analysis, are premised on the notion that such complicated causal chains do exist.

⁹⁴ See Nagel, *supra* note 88, at 647.

⁹⁵ 115 S. Ct. at 1628-29, 1632, 1633. See also Merritt, *supra* note 63, at 686-90; H. Jefferson Powell, *Enumerated Means and Unlimited Ends*, 94 MICH. L. REV. 651, 654-58 (1995). Almost a quarter century earlier, Justice Stewart, dissenting in *Perez v. United States*, made essentially the same point respecting modern Commerce Clause doctrine. 402 U.S. at 157-58.

⁹⁶ See *supra* note 61.

was "unable to identify any activity that the States may regulate but Congress may not."⁹⁷

As *Lopez* nicely illustrates, both the Constitution's text and history embrace principles that the modern world has thrown into conflict.⁹⁸ In its half-hearted and unconvincing denial of consequences to the national economy, the Court's opinion reveals that loyalty to the Tenth Amendment principle of limited national power compromises Congress's Commerce Clause authority to address national economic problems. In its inability to identify any limits on Congress's Commerce Clause authority, Justice Breyer's dissenting opinion reveals that complete loyalty to the Commerce Clause compromises the Tenth Amendment's principle of limited national power. It sacrifices candor and constitutional principle to pretend, as the majority did, that imposing limits on national crime fighting does not compromise Congress's Commerce Clause authority. But it also sacrifices candor and constitutional principle to pretend, as the dissent did, that upholding Congress's full Commerce Clause authority preserves the Tenth Amendment's principle of limits on national power.

Both the proponents of the overfederalization thesis and the Justices, then, are wrong to rely upon the Constitution's text and history when imposing limits on national crime fighting. Of course, it is also wrong to rely upon text and history to deny that such limits exist. The text embraces both the principles of limited national power and of national power to address significant impediments to an effective interstate economy.⁹⁹ Neither text nor history resolves the modern conflict be-

⁹⁷ 115 S. Ct. at 1632. However, instead of responding directly and persuasively to the majority's challenge to identify limits on Congress's Commerce Clause authority, the dissent sought to turn the tables. It accused the majority of inconsistency with the unbroken lines of cases over the last sixty years that recognize Congress's Commerce Clause authority to address national economic problems. *Id.* at 1662-64.

⁹⁸ In her dissenting opinion in *Garcia*, Justice O'Connor recognized the conflict and explained its genesis. 469 U.S. at 581. In subsequent cases and in *Lopez*, however, Justice O'Connor and the other Justices have pretended that the conflict does not exist. In *New York v. United States*, for instance, Justice O'Connor, writing for the Court, declared: "Our task. . . consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution." 112 S. Ct. 2408, 2418 (1992). Yet, as Justice O'Connor herself acknowledged in *Garcia*, it is not possible to follow the principles laid down at the founding because those principles conflict in the modern world.

Like the Justices, scholars tend to ignore or evade the conflict. *See, e.g.*, MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 50-51 (1995); TRIBE, *supra* note 61 § 5-7, at 313. For exceptions, see Jack M. Balkin, *Constitutional Interpretation and the Problem of History*, 63 N.Y.U. L. REV. 911, 922 (1988); Nagel, *supra* note 88, at 649-55.

⁹⁹ *See* Nagel, *supra* note 88, at 649 ("[O]ur Constitution only authorizes certain enumerated powers for the national government, but also authorizes some enumerated powers that are broad enough to allow congressional control over any aspect of human affairs."); Jesse H. Choper, *Did Last Term Reveal "A Revolutionary States' Right Movement Within the Supreme Court"?*, 46 CASE W. RES. L. REV. 663, 669 (1996).

tween the two, for in the founders' localized world, the conflict did not exist.

B. TRADITION

In part, both the proponents of the overfederalization thesis and the *Lopez* majority appeal to societal tradition as a reason to limit national involvement in crime fighting. Before *Lopez*, scholars pointed to the relatively few federal criminal offenses during this nation's first century.¹⁰⁰ Striking down the Gun Free School Zones Act, the *Lopez* Court likewise invoked societal tradition, twice emphasizing that "[s]tates have historically been sovereign" in the enforcement of the criminal law.¹⁰¹

In fact, the very effort to impose constitutional limits leads naturally, if not necessarily, to a reliance upon tradition. Although the Tenth

¹⁰⁰ Brickey, *supra* note 1, at 1138-41; Mengler, *supra* note 1, at 508-10; Miner, *supra* note 1, at 119-23.

Until the Civil War, federal criminal law was limited to the crimes specifically mentioned in the Constitution and a narrow list of additional crimes. These additional crimes involved conduct that was not within the jurisdiction of any State and was directed against and harmful to the national government itself. Two of these crimes were perjury in federal court and bribery of a federal judge. See FRIEDMAN, *supra* note 7, at 71, 261-62; Beale, *supra* note 1, at 775-76.

[F]or example, the Crimes Act of 1790 punished murder and other crimes committed in a fort or other place controlled by the federal government, crimes committed outside the jurisdiction of any state, forgery of United States certificates and other public securities, perjury in federal court, treason, piracy, and committing acts of violence against an ambassador.

Brickey, *supra* note 1, at 1138.

It was not until after the Civil War that Congress first began to invoke, in very limited fashion, the Commerce Clause as authority to criminalize private conduct not directed against the national government itself and within the states' traditional police powers. Civil rights concerns prompted the Reconstruction Congress to enact statutes that gave the national government concurrent jurisdiction over some criminal conduct that was traditionally subject to state law. Brickey, *supra* note 1, at 1139-40. Section five of the Fourteenth Amendment was intended to resolve all doubts concerning the constitutionality of such civil rights legislation. In the years after the enactment of such civil rights inspired crimes, Congress criminalized some conduct involving the use of the instrumentalities of interstate commerce, such as railroads. "For example, the interstate transportation of explosives and of cattle with contagious diseases was made criminal." Beale, *supra* note 1, at 777.

Significant reliance on Congress's commerce power to federalize criminal conduct that was traditionally governed only by state law did not begin until the late nineteenth and early twentieth century. For example, in 1890, Congress enacted the Sherman Act, which criminalizes monopolization, attempts to monopolize, and agreements to restrain trade which affect interstate commerce; in 1910, it enacted the Mann Act, which prohibits transportation of women across state lines for purposes of prostitution; and in 1919, it enacted the National Motor Vehicle Act of 1919, which prohibits interstate transportation of stolen vehicles. See Beale, *supra* note 1, at 777; Brickey, *supra* note 1, at 1142; Mengler, *supra* note 1, at 510-12. See also FRIEDMAN, *supra* note 7, at 262, 262-67 (The level of national involvement "changed dramatically in the twentieth century").

For general discussions of the history of federal offenses, see FRIEDMAN, *supra* note 7, at 71-73, 261-76; Beale, *supra* note 22, at 775-79.

¹⁰¹ 115 S. Ct. at 1631, 1632 n.3.

Amendment embraces the principle of limited national power, it makes no effort to delineate those limits. It says merely that “[t]he powers not delegated by the United States by the Constitution . . . are reserved to the States”¹⁰² According to this text, then, the scope of the limits on national authority depends not on a standard the Tenth Amendment specifies, but rather a construction of the powers the Constitution delegates to the national government.¹⁰³ In the words of the well-known aphorism, “The amendment states but a truism that all is retained which has not been surrendered.”¹⁰⁴ In light of the pervasive interdependence of the modern economy, however, the Court is now unable to rely on the proper and natural ambit of the Commerce Clause as a basis for establishing limits on national authority.¹⁰⁵ In this way, modern conflict between the Tenth Amendment and the Commerce Clause pushes the Court away from the Constitution’s text and towards tradition.

In this section, we identify a number of reasons why tradition is not a sound basis for imposing constitutional limits on national anti-crime measures. The previous section has already identified one reason: Imposing such limits compromises Congress’s authority to address significant national economic problems — authority that the Commerce Clause actually grants Congress. But two other sets of reasons also counsel against relying upon tradition. One set focuses on the inherently unprincipled nature of using tradition. The other set implies that, even if it were principled, using tradition lacks legitimacy.

First, the difficulties of defining, identifying, and using tradition make relying upon it standardless. Tradition is notoriously difficult to define. How long must a practice exist for it to qualify as a tradition? For instance, in the early part of this century Congress enacted the Dyer Act,¹⁰⁶ which prohibits the interstate transportation of stolen motor vehicles. Has that Act been in place long enough to qualify as a tradition?

Another question concerns the sources from which tradition may be inferred. Although the Dyer Act has been in place for more than three-quarters of a century, it has been the source of relatively few federal

¹⁰² U.S. CONST. amend. X. The full text: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

¹⁰³ See Jean Yarbrough, *Federalism and Rights in the American Founding*, in *FEDERALISM AND RIGHTS* 57, 64 (E. Katz & G. A. Tarr eds., 1996) (“The Constitution enumerates only those powers which the national government may exercise and says nothing about those powers which rightly belong to the states.”).

¹⁰⁴ The aphorism derives from *United States v. Darby*, 312 U.S. 100, 124 (1941). See also *New York v. United States*, 112 S. Ct. 2408, 2412 (1992) (restating the aphorism with approval).

¹⁰⁵ See *supra* notes 61, 82-97, and accompanying text.

¹⁰⁶ 18 U.S.C. §§ 2311-13 (1919) (prohibiting the interstate transportation of stolen motor vehicles).

prosecutions over the last two decades.¹⁰⁷ What, then, is the relationship between the formal law and informal enforcement practices? May the recent practice of not enforcing the Dyer Act furnish the basis for inferring a tradition of exclusive state authority over auto theft? And if enforcement practices do not themselves constitute tradition, may they nonetheless prevent the law's unenforced terms from establishing a tradition?¹⁰⁸

Still another problem concerns the generality at which a tradition may be defined and used. For instance, may one identify the reasons behind a practice and then use these reasons to define the tradition? Does the Dyer Act furnish a basis for inferring a tradition of national involvement in fighting criminal activity that constitutes a significant threat to the nation's economy? Or only when there is a threat to the nation's transportation system? Or must a tradition of national involvement be defined as narrowly as possible so that the Dyer Act establishes a tradition of national involvement in fighting the transport of motor vehicles across state lines, but not a broader tradition of fighting autotheft generally?

In addition to the difficulty of defining tradition, there is the pervasive problem of arguable counter-traditions. As a leading scholar of the federal courts has aptly observed, "there are a series of traditions about the allocation of authority between state and federal courts. These traditions are multifaceted and rich, permitting a range of normative claims to be couched in historical practices but varying significantly."¹⁰⁹

In *Lopez*, for example, the Court, while pointing to a broadly defined tradition of state sovereignty respecting the general enforcement of criminal laws,¹¹⁰ arbitrarily ignored several other traditions of arguable greater pertinence. The Gun-Free School Zones Act can be linked to national involvement in the regulation of firearms, a practice which traces back to 1934.¹¹¹ Because the problem of gun violence in schools

¹⁰⁷ Schwarzer & Wheeler, *supra* note 1, at 695.

¹⁰⁸ Thus, one might say that the Dyer Act, during the years in which it was vigorously enforced, established a tradition of national involvement in combating auto-theft; that the subsequent nonenforcement of the Act negated the existence of this prior tradition; that this non-enforcement does not itself rise to the level of a tradition; and, therefore, that there is now no tradition at all answering whether States have exclusive authority over auto-theft.

The complexity of the above analysis, coupled with the absence of any persuasive reason for undertaking it, highlights the absurdity of relying upon tradition.

¹⁰⁹ Judith Resnik, *History, Jurisdiction, and the Federal Courts: Changing Contexts, Selective Memories, and Limited Imagination*, 98 W. VA. L. REV. 171, 217-18 (1995). For an extended and illuminating discussion of the problems associated with tradition-based claims about the proper spheres of federal and state jurisdiction, see *id.* at 217-240.

¹¹⁰ 115 S. Ct. at 1631, 1632 n.3.

¹¹¹ For a recitation of the history of national firearms legislation, see *United States v. Lopez*, 2 F.3d 1342, 1348-60 (5th Cir. 1993), *aff'd*, 115 S. Ct. 1624 (1995).

is particularly acute in poor urban areas,¹¹² the Act also can be viewed as part of longstanding efforts by the national government to assist states with various problems of poverty, efforts which began with the New Deal in the 1930s and extended beyond the Great Society programs of the 1960s.¹¹³ Given the disproportionate impact of violence in schools on African Americans,¹¹⁴ the Act also can be seen as part of the national government's traditional role in promoting racial equality. Like the Gun-Free School Zones Act, the other federal offenses that vex judges and scholars can be linked to traditions of national authority.¹¹⁵

What is the proper response to the existence of conflicting traditions such as these? One possible response would be to deny their existence. On the facts of *Lopez*, for instance, one might object that the traditions we identified in the preceding paragraph are defined too generally.¹¹⁶ Yet the tradition on which the Court relied, state sovereignty over the criminal law, was defined with extreme generality. While characterizing the tradition of national gun control with arbitrary narrowness and thereby dismissing its relevance,¹¹⁷ the Court characterized the tradition

¹¹² See *infra* note 212.

¹¹³ See *infra* notes 185, 261, and accompanying text.

¹¹⁴ See *infra* note 215.

¹¹⁵ The federal carjacking statute, 18 U.S.C. § 2119, can be linked to the tradition of national authority over auto-theft, which was commenced by enactment of the Dyer Act in 1919, see *supra* notes 106-08 and accompanying text. The carjacking statute can also be seen to spring from the more general tradition of national involvement with the nation's transportation system, which arguably can be traced back to federal support for canals in the early 1800s.

The Child Support Recovery Act, 18 U.S.C. § 228, which makes it a federal crime for a parent in one state willfully to fail paying support owed for a child who resides in another state, can be traced to a tradition of national authority over lawbreakers who cross state lines. See *infra* note 241.

The Brady Handgun Violence Prevention Act, 18 U.S.C. § 922(s), can be seen to flow from the tradition of national firearms regulation, see *infra* note 117 and accompanying text.

The Violence Against Woman Act, 18 U.S.C. §2262, can be linked to the national government's roles in promoting equality of disadvantaged groups, which can be traced back to the Fourteenth Amendment, see *infra* Part III.B.3, and the nation's role in helping States address the problems of poverty, which extends back to the New Deal, see *infra* note 261.

For a discussion of the relationship between these offenses and federalism's underlying values, see *infra* Part III.D.

¹¹⁶ See *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) ("We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."). But see 491 U.S. at 132 (O'Connor & Kennedy, Js., concurring in all but this aspect of Justice Scalia's majority opinion); 491 U.S. at 136, 137-41 (Brennan, J., dissenting) (disagreeing with this aspect of Justice Scalia's majority opinion).

¹¹⁷ The *Lopez* Court quoted approvingly from the Fifth Circuit's opinion below, which described the Gun-Free School Zones Act as "a sharp break with the longstanding pattern of federal firearms legislation." 115 S. Ct. at 1632. The Fifth Circuit saw the Act as a break from the pattern of federal firearms legislation because it "abjures any express nexus to interstate commerce or other federal element nor any express or implied Congressional finding about mere possession of ordinary firearms absent such a nexus." *Lopez*, 2 F.3d at 1358.

It is quite arbitrary to define the "tradition" of national gun control in terms of such specific congressional findings or jurisdictional nexus. Inserting a jurisdictional clause that

on which it relied in arbitrarily broad terms when it spoke of state sovereignty in the entire domain of criminal law. As the facts of *Lopez* illustrate, any effort to deny categorically that conflicting traditions exist seems implausible, if not disingenuous. Because the "propensity to hold contradictory ideas simultaneously is one of the most significant qualities of the American political mind at all stages of national history,"¹¹⁸ competing traditions can very frequently be identified at different levels of generality.¹¹⁹

As a consequence of these various difficulties, the use of tradition is inherently manipulable and unprincipled. As many prominent scholars and some Justices have recognized, a tradition-bound approach necessarily "imports values surreptitiously — claiming, all the while, only to be discovering values that are, as it were, out there in societal traditions . . ." ¹²⁰ Because "tradition can be invoked in support of almost any cause,"¹²¹ it can and will be used to constitutionalize conclusions whose real basis is disguised and unanalyzed.

Second, even if a principled methodology were developed for doing so, reliance upon tradition would remain objectionable. For one thing, it is self defeating to give tradition the force of constitutional law. In ordinary life, tradition carries significant, but not decisive, normative force. In the law of negligence, for example, adhering to industry custom is evidence of reasonableness, but it is not dispositive.¹²² The prospect of a departure from tradition may warrant hesitation and reconsideration, but few people follow tradition blindly for its own sake. At the heart of the pragmatic spirit that pervades American history is a willingness to depart from tradition when there is good reason to do so. Ironically, giving tradition binding effect violates the longstanding American tradition of according tradition presumptive but not conclusive weight.

requires a case-by-case showing that the gun(s) in question has moved in interstate commerce would be devoid of any real meaning. Virtually all firearms are manufactured out-of-state or contain component parts that are manufactured out-of-state. Congressional findings of a link to interstate commerce are likewise a matter of form rather than substance. Congress can always make such findings. See *infra* notes 201-05 and accompanying text.

¹¹⁸ ROBERT MCCLOSKEY, *THE AMERICAN SUPREME COURT* 13 (1960).

¹¹⁹ See KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* 165 (1988); Jack M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 *CARDOZO L. REV.* 1613, 1617-18, 1624 (1990).

¹²⁰ LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* 106 (1991). See also *Michael H.*, 491 U.S. at 137-38 (Brennan, J., dissenting); *Moore v. City of East Cleveland*, 431 U.S. 494, 541, 549 (1977) (White, J., dissenting); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 60-63 (1980); Balkin, *supra* note 98, at 1617-18, 1624; Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 *U. CHI. L. REV.* 1161, 1171-74 (1988).

¹²¹ ELY, *supra* note 120, at 60.

¹²² WILLIAM L. PROSSER, *THE LAW OF TORTS* § 33, at 167-68 (4th ed. 1971).

In addition, according to tradition the status of constitutional law lacks legitimacy. This practice does not have the legitimacy of positive law, for it is nowhere codified in the Constitution and, unlike the Constitution's text, it was never adopted by supermajorities of the electorate. Nor does the practice have the legitimacy of a justified normative principle.¹²³

Finally, even a principled reliance upon tradition would prevent desirable and legitimate adaptation to historical change. Ordinary practice and morality do not accord tradition decisive force partly because traditions become tired and outlive their usefulness. The same is true in the context of constitutional federalism. Many commentators think that, with the rise and increasing integration of the national economy, it has been desirable and legitimate for Congress's regulatory power to expand. As a result of changes over history, the activity that is properly denominated "commerce among the States" has expanded in both absolute and relative terms. Yet if the Court had consistently policed the relationship between this nation and its States for adherence to tradition, then this legitimate expansion of national power could not have occurred.

A jurisprudence of tradition can allow desirable adaptation to historical change only by undermining itself. Adaptation to historical change becomes possible only if the courts do not consistently enforce tradition and selectively countenance changes that dissolve old traditions. However, a jurisprudence that depends on selective nonadherence for its viability and acceptability is fundamentally incoherent. Adaptation could be permitted by defining traditions according to their underlying reasons, whose applicability changes with history. Thus, the national government's very limited role in crime-fighting before the Civil War might be characterized in terms of the absence back then of a significant connection between crime and the national economy and in terms of the absence of any need for national involvement. If, however, traditions should be characterized according to their underlying reasons, then the focus ultimately should be on only those reasons, not on the traditions.

Tradition thus constitutes a very poor basis for limitations on national crime-fighting. Due to the malleability of defining tradition and the necessity of departing from it to adapt to changing circumstances, the use of tradition is inherently unprincipled. The practice lacks warrant in the Constitution's text and itself defies the enduring American tradition of pragmatic experimentalism. If constitutional limits on national crime-fighting are justifiable, surely more can be said for them than a dubious appeal to tradition.

¹²³ As the American tradition of according traditions only presumptive weight would indicate, tradition is normatively justified only when it is supported (or at least not undermined by) good reasons.

III. THE CONSTITUTION: FEDERALISM'S UNDERLYING VALUES

The only principled answer to the Constitution's stance on national crime-fighting comes from federalism's underlying values. One cannot rely on the text for answers. Modern economic transformations have precipitated a conflict between the Tenth Amendment and the Commerce Clause. But one can look behind this conflict to the values the textual prescriptions are intended to enshrine.¹²⁴ In contrast with changing traditions, these values have explicit textual mooring and derive a much greater degree of legitimacy from the text. Constitutional conclusions based upon these values also derive legitimacy from reason. Whereas an approach that selectively identifies tradition disguises the reasoning underlying the conclusions,¹²⁵ relying upon federalism's values exposes and structures that reasoning. In addition, an approach that appeals to federalism's values seeks to justify conclusions based upon reasons, not blind obedience to tradition.

In this Part, we argue that, although federalism's values have illuminating and important implications, those implications are actually the reverse of the ones that devotees of the overfederalization thesis see. In general, federalism's underlying rationales decisively support rather than undermine a concurrent national crime-fighting role. In fact, the case for national crime-fighting is strongest where the Justices and scholars believe it is the weakest: violent street crime that plagues poor urban areas.

This conclusion has extremely important implications. In the months since *Lopez* was handed down, some lower courts have invalidated recently enacted federal criminal statutes that target firearms, domestic violence, willful failure to pay child support, and carjacking. Instead of relying upon the formalistic categories that *Lopez* announces, as these courts have done, courts should resolve the modern conflict between the Tenth Amendment and the Commerce Clause in accordance with federalism's underlying values.¹²⁶ It follows, we show, that the constitutionality of all of the new federal offenses mentioned above should be upheld.¹²⁷

A. RATIONALES FOR STATE AUTHORITY

Why is it a good thing for states to have exclusive authority? One answer might be that such authority is an essential attribute of state sov-

¹²⁴ For general discussions of federalism's normative values, see, for example, *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991); SHAPIRO, *supra* note 88; Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987) (book review).

¹²⁵ See *supra* Part II.B.

¹²⁶ See *infra* notes 201-05 and accompanying text.

¹²⁷ See *infra* Part III.D.

ereignty. This answer, however, is unsatisfactory. It is unclear which, if any, attributes genuinely constitute sovereignty¹²⁸ and, in any event, such attributes now conflict with Congress's Commerce Clause authority. In addition, as the Supreme Court declared in *New York v. United States*,¹²⁹ "The Constitution does not protect the sovereignty of the States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States."¹³⁰ State sovereignty instead is meant to benefit the People(s): the electoral majorities to whom state governments must be accountable under the Republican Guarantee Clause.¹³¹

The Justices and scholars have thus sought to identify the ways exclusive state authority can promote the interests of the People(s) whom federalism is meant to serve. Exclusive state authority, it is widely thought, generally promotes values such as diversity, experimentation, accountability, and liberty.¹³² According to the conventional wisdom among judges and academics, federalizing crime undermines these values.¹³³ This view, we believe, greatly exaggerates the degree to which these values militate against a concurrent national crime-fighting role. Further, it completely overlooks the extent to which these values actually favor such a role.

1. Diversity

When views about the wisdom of a particular policy differ from region to region and state to state, more voters can be satisfied by leaving the choice to the states.¹³⁴ Proponents of the overfederalization thesis maintain that this interest in diversity strongly favors state authority over

¹²⁸ See generally Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341.

¹²⁹ 112 S. Ct. 2408 (1992).

¹³⁰ *Id.* at 2431-32.

¹³¹ See *infra* notes 253-59 and accompanying text.

¹³² For useful general discussions of the various rationales for state authority, see Gregory v. Ashcroft, 111 S. Ct. 2395, 2399 (1991); SHAPIRO, *supra* note 88, at 75-94. See generally McConnell, *supra* note 124.

¹³³ See, e.g., Beale, *supra* note 1, at 994-95; Kadish, *supra* note 1, at 1247, 1249, 1251; Marshall, *supra* note 1, at 720; Mengler, *supra* note 1, at 516-17; Miner, *supra* note 1, at 127. Those commentators who wrote before *Lopez* did not appeal to these values to demonstrate the unconstitutionality of efforts to federalize crime. Given the apparently settled constitutional doctrine according Congress unlimited power, see *supra* note 61 and accompanying text, these commentators instead sought to show that the trend of federalizing crime is unwise as a matter of policy. But after *Lopez*, the appeal to federalism's values may take on its more natural form as a constitutional argument.

¹³⁴ See, e.g., Gregory, 111 S. Ct. at 2399; McConnell, *supra* note 124, at 1493.

criminal law because "criminal law [is] an expression of local mores and concerns"¹³⁵ which can vary from region to region and state to state.¹³⁶

With respect to the overwhelming bulk of matters now within federal criminal jurisdiction, however, interest in diversity carries very little weight. Diversity would constitute a good reason for leaving the criminalization of gambling or abortion exclusively to the States. Views over the propriety of criminalizing these matters differ, sometimes quite sharply, from State to State. Public opinion, however, does not differ from State to State or region to region respecting the criminalization of autotheft, narcotics, carjacking, or violent street crime in general. By and large, the national government's crime-fighting efforts, particularly those addressed to violent street crime, target criminal activity that the public uniformly and strongly opposes. In such a context, state authority is not needed to accommodate diverse beliefs about whether the activity should be criminal.

Because views sometimes differ from state to state about appropriate punishment, the interest in diversity does have some limited application, even when virtually everyone agrees that the activity should be criminalized. The death penalty is a favorite example.¹³⁷ When Congress makes that penalty available for a crime over which the States have concurrent jurisdiction, federal prosecutors and juries can "override the decisions of fourteen states and the District of Columbia to ban capital punishment."¹³⁸

Even respecting the death penalty, however, the value of diversity is very limited. First, that punishment is not available for the vast bulk of federal offenses. For instance, the death penalty was not available under the Gun-Free School Zones Act which was struck down by *Lopez*.¹³⁹ Even where it is available, the death penalty is sought and imposed in very few cases.¹⁴⁰ In addition, even where the national government has concurrent jurisdiction, the overwhelming bulk of criminal offenses continues to be prosecuted in state court under state law.¹⁴¹ These various limiting factors help explain why the presence of the death penalty in

¹³⁵ Brickey, *supra* note 1, at 1138.

¹³⁶ *Id.* at 1138-39: "Louisiana was free to legalize lotteries while Utah chose to outlaw them. Nevada could boost its economy by permitting prostitution and casino gambling while New Hampshire could ban them." See also Beale, *supra* note 1, at 995; Neil H. Cogan, *The Rules of Everyday Life*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 97, 101-02 (1996); Mengler, *supra* note 1, at 516.

¹³⁷ See, e.g., Cogan, *supra* note 136, at 101; Brickey, *supra* note 1, at 1166-67.

¹³⁸ Brickey, *supra* note 1, at 1166-67.

¹³⁹ 18 U.S.C. § 924(a)(4) (1990) (providing for fine and/or imprisonment of not more than 5 years).

¹⁴⁰ There have been no federal executions since 1963.

¹⁴¹ See *supra* Part I.A.

federal law has never been treated as sufficient for denying the national government a concurrent role in enforcing the criminal law.¹⁴²

2. *Experimentation*

On the surface, it seems reasonable to argue that there is great value in permitting States to experiment with ways of combating crime that everyone would like to see eradicated.¹⁴³ In his *Lopez* concurrence, for instance, Justice Kennedy made such an argument. After identifying a variety of measures for addressing the problem of guns in the schools, he opined that “[t]he statute now before us forecloses [s]tates from experimenting and exercising their own judgment” respecting those measures.¹⁴⁴ Other critics likewise maintain that federalizing crime tends to subvert the value of experimentation by establishing a uniform national regulatory scheme.¹⁴⁵ Despite its appealingly pragmatic ring, however, experimentation has been much overblown as a reason for favoring exclusive state authority over crime. In fact, it is best seen as favoring a concurrent national role.

By invoking experimentation as a reason to favor exclusive state authority, Justice Kennedy and other proponents of the overfederalization thesis have failed to appreciate the crucial difference between exclusive and concurrent authority. If the national government were seeking to exercise exclusive jurisdiction, then federal criminal offenses such as the Gun-Free School Zone Act would indeed preempt state experimentation. Enacting federal offenses would substitute a single national regulatory scheme for the diverse schemes of the separate states. In expanding national crime fighting efforts, however, Congress has given the national government concurrent, not exclusive, jurisdiction. Although the use and distribution of narcotics and the interstate transport of stolen vehicles are federal crimes, the national government has no monopoly over drug and auto-theft prosecutions. Indeed, the states continue to handle the bulk of such prosecutions.¹⁴⁶ So the choice presented by national crime fighting is not between exclusive state and exclusive national authority, as the

¹⁴² To the limited extent it is implicated, the value of promoting diversity through exclusive state jurisdiction must be balanced against the values furthered by giving the national government a concurrent role.

¹⁴³ Although the founders apparently never advanced the idea, case law and commentary on federalism is laced with approving references to the States as “laboratories of experimentation.” The standard citation is to Justice Brandeis’s dissenting opinion in *New State Ice Co. v. Liebman*, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting). See, e.g., REDISH, *supra* note 98, at 25; SHAPIRO, *supra* note 88, at 85-88.

¹⁴⁴ 115 S. Ct. at 1641.

¹⁴⁵ See, e.g., Beale, *supra* note 1, at 994; Mengler, *supra* note 1, at 517.

¹⁴⁶ See FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SEARCH FOR RATIONAL DRUG CONTROL* 161 (1992) (reporting that “about 30 percent of those in prison for drug offenses during 1986 were in federal prisons”).

proponents of the overfederalization too often imply. Rather, it is between exclusive state authority and overlapping state and national authority.

A concurrent national role leaves the states free, so far as their own law is concerned, to experiment with the other methods of eradicating activity also proscribed by federal law. The Gun-Free School Zones Act, for instance, did not preclude the states from trying any of the alternative regulatory measures Justice Kennedy identified in his concurrence. A federal law that gives the national government a concurrent role preempts the states only from trying to legitimize the conduct in question. Of course, states do not wish to experiment with this alternative, especially with respect to street crime.

A concurrent national role not only permits state experimentation respecting crime control methods, but also advances rather than subverts the underlying goal of experimentation. The public regards crime, particularly violent street crime, as a serious problem and wants it stopped.¹⁴⁷ In this context, the goal of experimentation is stopping or minimizing crime. Joint state and national efforts can be expected to go further toward accomplishing this goal than state efforts alone.¹⁴⁸

3. *Liberty*

Several commentators contend that national crime fighting endangers liberty.¹⁴⁹ The heady question of whether state or national authority better promotes liberty is quite complex and permits no definitive answer for all contexts.¹⁵⁰ In this context, however, a concurrent national role would seem to enhance rather than threaten liberty.

Federal prosecution neither infringes unjustifiably on the liberty of criminal defendants nor threatens to undermine the liberty of defendants in a procedural sense. Such defendants will have the fair procedures required by the Due Process Clause of the Fifth Amendment and the other,

¹⁴⁷ See *supra* notes 6-8 and accompanying text.

¹⁴⁸ Of course, overlapping state and national regulatory schemes carry costs that might support a prudent judgment to give either the States or the national government exclusive authority. But whether joint state and national authority produces benefits that outweigh its costs seems a decision peculiarly within the province of voters. It would be inappropriate for the Court to decide as a matter of constitutional law that, despite its greater effectiveness, concurrent state and national authority cannot be employed because of its greater costs.

¹⁴⁹ Beale, *supra* note 1, at 995 ("The concentration of power in an integrated national police force might pose a greater threat to individual liberty."); Calabresi, *supra* note 88, at 803; Heymann & Moore, *supra* note 1, at 108 ("The fear of a single national police, such as many democracies have, has always been deep in the United States."). But see Mengler, *supra* note 1, at 517 ("[T]he specter of a national police force has haunted few (except perhaps the paranoid) since the sixties.").

¹⁵⁰ See Tom Stacy, *Does Federalism Promote Liberty?*, 5 KAN. J.L. & PUB. POL'Y 15 (1996).

more specific procedural guarantees specified in the Fifth and Sixth Amendments. Moreover, federal prosecution does not threaten to deprive defendants of liberty in a substantive sense. Whether state or federal, the criminal law generally infringes on the liberty of defendants justifiably. The infringements of trial and punishment are triggered by the defendant's unjustified invasion into the liberty of others.¹⁵¹

Further, a concurrent national role would seem to promote overall liberty by bettering the enforcement of the criminal law. By inflicting injury to persons and property, crime diminishes the opportunities and effective liberty of its actual victims. By forcing potential victims to take costly and opportunity-sacrificing precautions to avoid becoming victims, crime also diminishes the effective liberty of potential victims.¹⁵² As compared with leaving enforcement exclusively to the States, a supplemental national role can be expected to improve enforcement due to the increased resources made available and the greater size and coordination of national law enforcement agencies. To the extent that it does so, a supplemental national crime fighting role increases overall liberty by preventing would-be criminals from invading the liberty of many other people. The liberty-enhancing effect of the criminal law coupled with the contribution of a concurrent national role would seem especially important in the context of street crime, which, by taking life and invading bodily integrity, constitutes a particularly grave infringement upon liberty.

Perhaps there is some legitimate cause for concern that national crime fighting will threaten liberty by swelling the ranks of national law enforcement agencies.¹⁵³ Such centralized agencies might pose a greater danger of oppression than the smaller, more numerous, and less coordinated state and local police departments. This speculative danger, however, hardly justifies a constitutional rule of exclusive state jurisdiction, which would preclude the electorate from balancing that danger against the possible liberty-enhancing effects of a concurrent national role.

¹⁵¹ See generally JEFFRIE G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW* (discussed in chapter three).

¹⁵² See Cook, *supra* note 89, at 373:

Crime reduces our standard of living. The prices of consumer goods are inflated by shoplifting, employee theft, embezzlement, antitrust violations, and extortion of legitimate businesses by organized crime. The fear of household burglary and street crime motivates us to make large expenditures on self-protection and insurance. Our tax bills reflect the pervasive crimes of income-tax evasion and government program fraud, as well as the necessity of supporting public law enforcement efforts.

¹⁵³ See *supra* note 149.

4. *Participation*

According to those who claim that the criminal law already has been overfederalized, exclusive state authority promotes the democratic virtues of participation and accountability.¹⁵⁴ It does so by vesting authority with state and local prosecutors over whom the public has greater control and influence.¹⁵⁵ Yet, as with the values of experimentation and liberty, a concurrent national role would seem to promote rather than impinge upon democratic participation and accountability.

As with experimentation, the arguments made by proponents of the overfederalization thesis fail to appreciate the distinction between exclusive and concurrent authority. It may well be true that exclusive state authority over crime promotes participation and accountability better than exclusive national authority. The crucial issue, however, is whether exclusive state authority promotes these values better than *concurrent* state and national authority.

Compared with exclusive state authority, supplemental national authority seems to expand rather than contract opportunities for participation and accountability. When the national government has concurrent authority, the electorate can still hold state and local officials responsible for inadequate efforts to curb crime. Although the national government now has concurrent jurisdiction over much criminal activity, state and local governments still account for over 90% of all enforcement efforts.¹⁵⁶ Concurrent national authority has not prevented crime from becoming an issue on subnational levels. State and local officials continue to be held accountable for a failure to respond to the electorate's concerns.¹⁵⁷ In fact, because it enables national officials to be held responsi-

¹⁵⁴ For discussions of this point with respect to federalism generally, see, for example, *Gregory v. Ashcroft*, 501 U.S. 452, 457-58 (1991); REDISH, *supra* note 98, at 25; McConnell, *supra* note 124, at 1509-10.

¹⁵⁵ Heymann & Moore, *supra* note 1, at 104; Beale, *supra* note 1, at 994-95; Mengler, *supra* note 1, at 517.

¹⁵⁶ Zimring & Hawkins, *supra* note 1, at 16.

¹⁵⁷ Some Justices and scholars have expressed a concern that concurrent authority blurs the lines of political accountability. See, e.g., Lopez, 115 S. Ct. at 1638-39 (Kennedy & O'Connor, JJ., concurring); Evan H. Caminker, *State Sovereignty and Subordinate: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001 (1995). Voters, the Justices presumably fear, will be confused about which level of government is accountable for failing to act in an area of concurrent authority.

As an empirical matter, such confusion hardly seems so widespread or significant that it merits judicial intervention. Because the Court has long held that Congress and the States have concurrent authority over interstate commerce, such confusion has had ample time to fester and manifest itself. Yet neither the Justices nor commentators have cited any empirical evidence that it is a serious problem. Indeed, leading political science texts on American democracy nowhere mention the supposed problem. See, e.g., ROBERT A. DAHL, *DEMOCRACY IN THE UNITED STATES* (4th ed. 1981).

Beyond its lack of empirical support, the voter confusion argument suffers from two other problems. The heart of the voter confusion argument is that concurrent authority breeds con-

ble as well, concurrent national authority can be seen to expand opportunities for participation and accountability.¹⁵⁸

In addition, a concurrent national role in criminal law enforcement seems to promote the overriding goal that, in this context, underlies the values of participation and accountability. In some contexts, the electorate presumably values both accountability and participation in and of themselves. Even when they do not like the outcome of the political process, people regard participation or the opportunity to participate as

fusion and that an effective federal democracy requires clearly defined zones of exclusive state and national authority. The argument thus carries the radical implication that the Court should overturn the longstanding and now uncontroversial principle that Congress and the States have concurrent authority over interstate commerce.

In addition, although the voter confusion argument asserts that concurrent authority frustrates accountability, concurrent authority in one important way actually promotes accountability. As Madison emphasized and our nation's history teaches, voters can hold officials accountable by shifting power vertically to and from the state and national levels. See *infra* notes 260-61 and accompanying text. Exclusive zones of authority, however, preclude the voters from holding officials accountable in this way.

The concern that concurrent state and national authority might confuse voters and blur lines of accountability is worth further investigation. But so far the case has not been made that this concern justifies a constitutional bar against concurrent authority in general or in the crime fighting context.

¹⁵⁸ One might object that this argument is flawed because it assumes that national involvement increases the overall resources available for law enforcement. The question, one might maintain, is not whether participation and accountability are enhanced by devoting national resources in addition to state resources. Rather, the question is whether, at any given level of resource expenditure, participation and accountability are maximized by exclusive state deployment of those resources. Because state and local prosecutorial decisions are closer to the people, this objection would conclude, exclusive state deployment maximizes participation and accountability.

While certainly plausible on its face, this objection overlooks the problems of collective action that impel states not to devote sufficient resources to enforcement efforts. See *infra* Part III.B.4. As a result of these collective problems, the choice is not whether to devote a given level of resources to exclusive state deployment or joint national and state deployment. Rather, it is whether to deploy national resources in addition to state resources. See Zimring & Hawkins, *supra* note 1, at 26 (noting the tendency of federal involvement to supplement rather than supplant state involvement). The additional deployment of national resources can expand opportunities for participation and accountability.

Still, one might object that the additional national resources could be channeled into state systems in the form of federal funding rather than being used to support national police, prosecutors, courts, and prisons. While this objection is true, it is not at all clear that, as compared with national enforcement efforts, such federal funding of state systems would enhance participation and accountability. One way the electorate holds both state and federal officials accountable is shifting power to and from state, local, and national levels of government according to the perceived responsiveness and effectiveness of each level. See *infra* notes 260-61 and accompanying text. A constitutional rule that requires any additional national resources to be used to fund state systems and that prohibits national enforcement efforts would prevent the operation of this important political check. In addition, national enforcement efforts produce a number of efficiencies that national funding of state systems cannot produce. See *infra* notes 195-99 and accompanying text. Compared with exclusive state efforts, concurrent national enforcement can improve the overall efficiency of law enforcement efforts and thereby promote the overriding goal behind participation and accountability: controlling crime.

something that is good in itself. One suspects that this premise is less true in the context of the criminal law. In that context, the electorate values participation not so much as an end-in-itself, but as a means to its overriding end of controlling crime. The electoral accountability of prosecutors and legislators gives the electorate a tool it can use to ensure that these officials respond vigorously to the problem of crime. Of course, there are other available tools, including that of giving the national government concurrent authority to combat crime. As compared with vesting exclusive authority with the States, the cooperative efforts of the state and national governments might better control crime and thus better promote the goal of participation and accountability.

B. RATIONALES FOR NATIONAL AUTHORITY

National authority can sometimes promote uniformity, efficiency, and liberty.¹⁵⁹ It also can help avoid a tendency toward under regulation that results from the relatively parochial perspectives of the separate States. Proponents of the overfederalization thesis have failed to appreciate the degree to which these various rationales, especially the tendency toward under regulation, favor supplemental national efforts to control crime. While the States' inclination to under-regulate has been recognized as a rationale for national authority in the contexts of environmental, labor, and corporate law, these implications have not been explored fully in the context of criminal law.

1. *Uniformity*

No one argues that there is a general need for a nationally uniform criminal code. The interstate mobility of offenders and goods, however, can create a need for nationally uniform regulation in particular areas.¹⁶⁰

Gun control is a good example. Given the interstate mobility of people and guns, one state's stringent gun control measure can be substantially undermined if bordering states choose not to enact such a measure. If gun control measures are to be their most effective, a nationally uniform rule is required.

¹⁵⁹ See generally SHAPIRO, *supra* note 88, at 34-57.

¹⁶⁰ For discussions about national authority and the need for uniformity in other contexts, see *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88-89 (1987); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 583-84 (1986); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1851) (holding that Congress possesses exclusive authority to regulate interstate commerce in contexts where a need for uniformity exists); SHAPIRO, *supra* note 88, at 133; Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 781 (1994).

2. Efficiency

Compared with state enforcement alone, concurrent state and national enforcement can produce a number of efficiencies.¹⁶¹

First, as proponents of the overfederalization thesis have themselves observed, a national system can be more efficient when a need exists for interstate coordination.¹⁶² The conventional wisdom is thus willing to cede the national government authority to investigate a multi state drug ring, for example.¹⁶³ A unified national system of criminal justice can more easily produce the interstate coordination necessary to such an investigation.

Second, many proponents of the overfederalization thesis also acknowledge that a national system of enforcement facilitates the development and more efficient use of highly specialized resources.¹⁶⁴ Of course, the states could conceivably each have prisons for escape artists, witness protection programs, DNA and computer specialists, and the like. Yet separately developing and using such specialized resources and expertise sometimes would involve unnecessary and costly duplication.¹⁶⁵

Third, the existence of both state and national enforcement systems facilitates a more cost-effective deployment of criminal punishment. Sentences under the federal sentencing guidelines tend to be harsher than those meted out in state systems.¹⁶⁶ This differential allows prosecutors

¹⁶¹ See SHAPIRO, *supra* note 88, at 133 n.74 (“[A]dministration at the national level may eliminate wasteful overlap and inefficiency.”); Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 919 (1985).

¹⁶² See, e.g., LONG RANGE PLAN, *supra* note 1, at 24; Zimring & Hawkins, *supra* note 1, at 23; Heymann & Moore, *supra* note 1, at 105; Mengler, *supra* note 1, at 520. See also *Federal and State Law Enforcement: Hearing Before the Crime Subcomm. of the House Judiciary Comm.*, 104th Cong. (1996) [hereinafter *Law Enforcement Hearings*], reprinted in FEDERAL NEWS SERVICE (May 23, 1996) (testimony of Jane Brady, Attorney General, Delaware); *id.* (testimony of John R. Justice, Solicitor, Chester County, South Carolina); *id.* (testimony of Jack O’Malley, District Attorney, Cook County, Illinois).

¹⁶³ See, e.g., LONG RANGE PLAN, *supra* note 1, at 24.

¹⁶⁴ See, e.g., *id.* at 25; Heymann & Moore, *supra* note 1, at 105, 109; *Law Enforcement Hearings*, *supra* note 162 (testimony of Jane Brady, Attorney General, Delaware).

¹⁶⁵ In some cases, the national government can and does develop these resources, then makes them available to the states. But, in at least some cases, developing and deploying such resources can be easier and more efficient in the context of a comprehensive national enforcement effort that extends from the investigation to the prosecution or even the punishment of the crime. See Jamie S. Gorelick & Harry Litman, *Prosecutorial Discretion and the Federalization Debate*, 46 HASTINGS L.J. 967, 973 (1995).

¹⁶⁶ See, e.g., Beale, *supra* note 1, at 998 (“The sentences available in a federal prosecution are generally higher than those available in state court — often ten or even twenty times higher.”); Kevin R. Reitz, *The Federal Role in Sentencing Law and Policy*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 116, 118 (1996). The disparity between federal and state sentences has led Professor Beale to criticize concurrent state and national jurisdiction because it results in the unequal treatment of similarly situated offenders. Beale, *supra* note 1, at 996-1004.

to channel the high expense of lengthy prison terms selectively to those cases in which it will produce the greatest expected benefit.¹⁶⁷ For example, harsh sentences can produce relatively large benefits when the case's public notoriety increases general deterrence or when the case involves an incorrigible and dangerous recidivist who needs lengthy incapacitation. Alternatively, the threat of lengthy incarceration may be used to induce an offender to cooperate.¹⁶⁸ Federal and state sentencing disparities thus can be exploited wisely by federal and state prosecutors to improve the overall effectiveness of crime-fighting.

Fourth, concurrent state and national enforcement schemes facilitate a useful exchange of ideas and methods.¹⁶⁹ As a result of federal diversity of citizenship jurisdiction, the judicial system as a whole benefits from the dialogue between federal and state courts about the content of state civil law. State and federal courts similarly can borrow and learn from each other about the proper interpretation of criminal statutes and concepts. The mutually beneficial exchange made possible by dual enforcement extends beyond the judicial system to policing and punishment systems. National enforcement in a particular area, for instance, permits the national government to offer training to state police personnel in that area.

3. *Equal Liberty*

Virtually everyone agrees that the national government has a crucial role to play in protecting the liberties of minorities, particularly racial minorities. In his famous Federalist No. 10, Madison maintained that because factions on the state and local level would lose their majority status in the larger national polity, the national government would better protect minorities from majoritarian oppression.¹⁷⁰ In modern times, the focus has been less on Madison's generic factions and more on racial minorities. The Reconstruction Amendments, accompanying legislation, and the civil rights legislation of the 1960s were all prompted by the inability or unwillingness of states to protect African-Americans from oppression. There is now a broad consensus, one to which the propo-

Among other things, this criticism overlooks a very important efficiency that flows from the different sentencing schemes.

¹⁶⁷ Professors Heymann and Moore note "Local prosecutors now . . . ask federal law enforcement to try street criminals who are regarded as unusually dangerous or elusive." Heymann & Moore, *supra* note 1, at 110.

¹⁶⁸ See Jeffries & Gleeson, *supra* note 20, at 1117-25.

¹⁶⁹ See Mengler, *supra* note 1, at 519-20 (identifying "cross-pollination" as a positive value of cooperative federalism).

¹⁷⁰ THE FEDERALIST No. 10, *supra* note 81, at 56-65. See also FEDERALIST No. 51, at 351-53 (James Madison) (James E. Cook ed., 1987) (restating the argument). For critical discussions of Madison's argument, see SHAPIRO, *supra* note 88, at 79-81; McConnell, *supra* note 124, at 1503; Rapaczynski, *supra* note 128, at 409; Stewart, *supra* note 161, at 921.

nents of the overfederalization thesis are party, that the national government has a legitimate and important role to play in protecting the liberties of racial minorities.¹⁷¹

Although they affirm the national government's role in promoting racial equality, judges and academics so far have not considered the relationship between this role and supplemental national authority to combat street crime. Violent street crime is disproportionately concentrated in African American neighborhoods. In 1993, for instance, African-Americans were victimized by violent crime at a 38% greater rate than the rate of white Americans.¹⁷² Prompted by the reality of statistics such as these, Professor Randall Kennedy has written: "[T]he principal problem facing African-Americans in the context of criminal justice today is not over-enforcement but *under-enforcement* of the laws."¹⁷³ The national government's accepted role in promoting racial equality obviously can justify a national response to racially motivated crimes. Perhaps less obviously, it also furnishes significant support for supplemental national efforts to combat the violent street crime that disproportionately afflicts African-American communities.

4. *The States' Tendency to Under-regulate*

The literature on federalism notes a tendency on the part of the states to under regulate. This tendency has two basic sources: one flows from the inclination of each state to overlook the out-of-state benefits of its regulatory efforts and the other from competition among states for mobile capital, business, and taxpayers. Although these problems are well-recognized in the contexts of environmental, labor, and corporate law,¹⁷⁴ their implications for criminal law have been almost entirely ignored.¹⁷⁵ This fact is unfortunate, for these problems do exist in the con-

¹⁷¹ See, e.g., LONG RANGE PLAN, *supra* note 1, at 25; Mengler, *supra* note 1, at 526; Little, *supra* note 1, at 1059 (noting that critics of federalization do not question the federalization of civil rights offenses).

¹⁷² BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1993 13 (1996). African-Americans experienced violent crime at a rate of 71.7 per thousand, while the rate among white Americans was 51.7 per thousand.

¹⁷³ Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1259 (1994) (emphasis in original).

¹⁷⁴ See, e.g., SHAPIRO, *supra* note 88, at 39-44; Caminker, *supra* note 157, at 1011-12; Calabresi, *supra* note 88, at 781-82; McConnell, *supra* note 124, at 1495.

¹⁷⁵ Although the leading discussions of the federalization of crime recite values of federalism that are thought to favor exclusive state authority, they do not mention the problems of spillover benefits and race-to-the-bottom effects, and how these problems might lead to suboptimal state enforcement. See generally LONG RANGE PLAN, *supra* note 1; Beale, *supra* note 1; Mengler, *supra* note 1; Brickley, *supra* note 1; Zimring & Hawkins, *supra* note 1.

A number of different standards have been proposed for delineating the proper boundaries for national enforcement efforts. See generally *supra* note 59 and *infra* note 190. None of these various standards expressly recognizes as a permissible basis for national criminal juris-

text of criminal justice and strongly suggest that states tend to devote insufficient resources to combating crime, especially street crime in poorer areas.

a. Spillover Benefits

Ideally, government would undertake the expense of additional enforcement efforts until the point where marginal cost equals marginal benefit. Although a wide array of factors can impede realizing this ideal, a federalism-based impediment is important here.

The impediment arises when, *inter alia*, a state's regulatory efforts produce windfall benefits in other states. Due to such spillover benefits — "positive externalities," in the lexicon of economists¹⁷⁶ — the cost-benefit ratio the regulating state faces is at odds with the ratio of aggregate benefits and costs. Because the regulating state will enjoy only some of the benefits of its increased regulatory effort while incurring all of the costs, it will tend to under regulate.¹⁷⁷

This is precisely the situation states face with respect to the benefits and costs of investigating, prosecuting, and punishing crime. In today's highly mobile and pervasively integrated society, a State's enforcement efforts inevitably produce spillover benefits in other States. While it does itself reap all of the benefits, the regulating state must bear the entire cost.

External benefits created by enforcing the criminal laws can be easily identified. Incarcerating an offender in Wisconsin can benefit Illinois by incapacitating a recidivist who would have committed crimes in Illinois. Similarly, the apprehension, prosecution, and incarceration in Kansas of a drug courier traveling to St. Louis, Missouri would benefit Kansas to some extent. But, while Kansas would underwrite the entire cost, Missouri would reap the greatest benefit. A particular state's law enforcement efforts also produce less direct, but equally real and significant, external economic benefits.¹⁷⁸ For instance, if successful, a state's efforts to reduce domestic violence and other violent crime improve the

diction the inadequacy of state resources that result from spillover benefits and race-to-the-bottom effects. In fact, proponents of the overfederalization thesis have criticized broadly formulated standards of national jurisdiction precisely because these standards would permit "the scope of federal jurisdiction [to be based] on the need for federal resources." Beale, *supra* note 1, at 1006. See also LONG RANGE PLAN, *supra* note 1, at 26; Mengler, *supra* note 1, at 523, 534.

¹⁷⁶ SHAPIRO, *supra* note 88, at 44 n.109; LeBoeuf, *supra* note 88, at 567-68.

¹⁷⁷ SHAPIRO, *supra* note 88, at 42; LeBoeuf, *supra* note 88, at 567 ("Activities that generate positive externalities will be undertaken in suboptimal amounts.").

¹⁷⁸ See MILLER ET AL., *supra* note 9 (identifying crime's main economic consequences and attempting to quantify their value); Cook, *supra* note 89, at 373 (identifying some of the crime's economic consequences).

productivity of workers who produce nationally marketed products, thereby benefiting consumers and shareholders in other States.¹⁷⁹

In deciding which level of law enforcement to undertake, a state will be inclined to ignore such out-of-state benefits. Although a state will bear and consider the entire cost of a given level of law enforcement, it will tend not to consider the full benefits that level produces. The theory of federalism thus predicts that each state will incline toward a suboptimal level of law enforcement.¹⁸⁰ Supplemental national authority is needed.

b. The Race to the Bottom

To maximize their tax base and create jobs, states compete to attract and retain businesses and affluent citizens. While such competition sometimes has desirable consequences, it can also trigger a so-called "race-to-the-bottom"¹⁸¹ phenomenon in which state and local governments forego desirable regulation and taxation.¹⁸²

At first blush, one would think that the race-to-the-bottom effect would be unlikely to affect crime-fighting efforts.¹⁸³ Skimping on the enforcement of criminal laws and exacerbating crime seems to subvert the goal of retaining and attracting mobile business, capital, and taxpayers. The incentives that precipitate the race-to-the-bottom effect in other

¹⁷⁹ See MILLER ET AL., *supra* note 9, at 9 (estimating productivity losses that result from various crimes); *Violence Against Women: Victims of the System: Hearing on S.15 Before the Comm. on the Judiciary*, 102d Cong. 242 (1991) (statement of the National Federation of Business and Professional Women) ("On a national level, domestic violence has been estimated to cost employers between three to five billion dollars annually due to absenteeism in the workplace.").

¹⁸⁰ The level each state will tend to choose is suboptimal from a national perspective, which considers aggregate benefits and costs rather than just in-state benefits and costs. That level also may well be suboptimal from the long-run perspective of most, if not all, states themselves. Considering each state's decisions in isolation, a state may be better off if it chooses the level of law enforcement whose marginal in-state cost is equal to the marginal in-state benefit. But in the long haul most, if not all, states might be better off if all states would agree to undertake that level of enforcement that is justified by aggregate rather than in-state benefits and costs. States might try to agree that each will consider aggregate benefits and costs rather than just in-state benefits. But such agreements are quite unlikely in view of the transaction costs of their negotiation and enforcement, the hurdles imposed by the Constitution's Interstate Compact Clause, U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State . . ."), and free rider problems. See SHAPIRO, *supra* note 88, at 39.

¹⁸¹ The phrase was first used in William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 705 (1974).

¹⁸² See, e.g., *United States v. Darby*, 312 U.S. 100, 122 (1941); SHAPIRO, *supra* note 88, at 42-43; DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 76-77 (1991).

¹⁸³ See Merritt, *supra* note 63, at 707 (States can be expected to compete with one another for students and thus, to ensure safe schools, have an incentive to enact and enforce laws prohibiting guns in schools).

contexts, one would think, would compel states to devote sufficient resources to enforcing criminal laws.

This analysis, while superficially persuasive, overlooks two important factors. First, much crime, especially violent street crime, is disproportionately concentrated in poor urban areas. According to the most recent statistics, for instance, "[p]ersons from households with annual incomes below \$7,500 were over twice as likely as those from households with incomes of \$75,000 or more to be violent crime victims" and "had significantly higher rates of rape/sexual assault and aggravated assault compared to persons in all other income groups"¹⁸⁴ Second, the race-to-the-bottom effect is particularly likely to prevent states from addressing such poverty-related problems. Due to the concentration of street crime in poor urban areas, efforts to control it necessitate a redistribution of resources. While the costs of such efforts are largely borne by affluent citizens and businesses through taxation, the benefits are disproportionately centered in poorer communities. As a result of the pressures of the race-to-the-bottom, "[i]t is generally accepted by economists that redistributive policies cannot be successfully carried out locally."¹⁸⁵ The race-to-the-bottom theory, then, predicts that while states will take ample

¹⁸⁴ BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1993 7 (1996). The same batch of statistics which pertain to 1993 showed that "persons from households with low incomes experienced higher violent crime victimization rates than persons from wealthier households." *Id.* In addition, "[r]esidents of cities had the highest violent crime victimization rates" and "[f]or each specific category of property crimes except burglary, urban households had the highest victimization rates." *Id.* at 52. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIME VICTIMIZATION IN CITY, SUBURBAN, AND RURAL AREAS I (1992) (stating that the average annual rate of violent victimization among city residents was 92% higher than among rural residents). As Robert McGuire, then Police Commissioner of the city of New York, wrote, "The cruelest aspect of urban crime is its devastating and disproportionate impact upon the poor and minority citizens who are the most vulnerable, emotionally and economically, to the social and personal disruptions of endemic criminal behavior." Robert J. McGuire, *Crime Control in New York: Two Strategies*, 73 J. CRIM. L. & CRIMINOLOGY 985, 991-92 (1982). See also VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994, H.R. REP. NO. 103-324 (1994), reprinted in 1994 U.S.C.C.A.N. 1803, 1804 ("The impact [of violent crime] is particularly harsh in poorer communities, many of which are literally being destroyed by violence, while fear of crime deters many neighbors and businesses from participating in the rebuilding of their communities.").

¹⁸⁵ LeBoeuf, *supra* note 88, at 579. See also SHAPIRO, *supra* note 88, at 134:

[E]ven with respect to a state that is willing to implement some redistribution within its borders — shifting assets from the wealthier residents to the poorer — I suspect that the more ambitious such a program, the more likely it is (given the right to exit) to drive both affluent residents and investment capital to other states.

See also ALICE M. RIVLIN, REVIVING THE AMERICAN DREAM: THE ECONOMY, THE STATES, AND THE FEDERAL GOVERNMENT 122 (1992); McConnell, *supra* note 124, at 1500 ("[I]t can be shown that the level of redistribution in a decentralized system is likely to be lower even if there is virtually unanimous agreement among the citizens that higher levels would be desirable."); Stewart, *supra* note 161, at 919 ("The mobility of capital and of persons may also deter state and local governments from providing adequate welfare and social services for the needy.").

measures to minimize the incidence of crime in affluent neighborhoods, they will skimp on such measures in poorer neighborhoods.

Actual practice tends to confirm this hypothesis. The widespread complaints that poor urban areas are chronically under policed,¹⁸⁶ that the dockets of state courts are overburdened,¹⁸⁷ that state prisons are under funded and overcrowded,¹⁸⁸ and that urban areas now receive substantial federal funding for their criminal justice systems¹⁸⁹ can be seen as evidence of the predictable effects of the race-to-the-bottom. Theory and practice, then, both indicate that, left to their own devices, states devote insufficient resources to combating crime in poor communities.

C. THE OVERFEDERALIZATION THESIS REVISITED

Proponents of the overfederalization thesis thus have the import of federalism's values backwards. Instead of favoring exclusive state authority, as the overfederalism thesis asserts, those values in most contexts overwhelmingly favor a supplemental national role in fighting crime.

Diversity, experimentation, accountability, and liberty may favor exclusive state authority in other contexts. But in the context of crime-fighting, their cumulative import favors a concurrent national role. Because the public's views on most crime, especially violent street crime, vary little from state to state, the value of diversity furnishes no strong support for exclusive state authority. As for experimentation, concurrent state and national authority in most settings does not preclude States from adopting their own crime-fighting methods. In addition, concurrent national authority can be seen to better promote the values of liberty, participation, and experimentation. It expands participation by vesting both national and subnational officials with responsibility for addressing the crime problem and by enabling the electorate to hold all such offi-

¹⁸⁶ See, e.g., Kennedy, *supra* note 173, at 1259; *Safety and Security in Public Housing: Field Hearing Before the Subcomm. on Housing and Community Development* of the House Comm. on Banking, Finance, and Urban Affairs, 103d Cong. 113 (1994) (testimony of Henry Cisneros, U. S. Secretary of Housing and Urban Development) (noting that gang members control public housing buildings in Chicago); *id.* at 128 (testimony of Vincent Lane, Chairman, Chicago Housing Authority) (same observation). See also CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* 151 (1993):

An especially powerful argument can be made that the criminal law, as currently administered, does indeed deny equal protection of the laws to both blacks and women. It does so because blacks do not have the same protection as whites against criminal violence, and women do not have the same protection as men.

¹⁸⁷ See *infra* notes 283-85 and accompanying text.

¹⁸⁸ See GOVERNOR'S TASK FORCE ON ALTERNATIVE SANCTIONS TO INCARCERATION, FINAL REPORT 5 (1992) (prepared for Governor of Maryland) ("Today over forty (40) states are under Federal court orders to reduce prison overcrowding."); COMBATING VIOLENT CRIME, *supra* note 90, at 15 ("[M]ore than 120,000 prison beds were needed across the Nation at the close of 1990.").

¹⁸⁹ See *infra* notes 197, 307.

cially accountable. By helping to curb crime with the addition of resources and expertise, a concurrent national role can promote liberty and the overriding objective of experimentation and participation.

The case for permitting national involvement becomes quite compelling when one considers the accepted rationales for national authority. A concurrent national role in combating crime can produce efficiencies, promote equality, and redress the tendency of states to deploy an insufficient level of enforcement resources.

Lopez and the academic and judicial consensus it reflects are thus wrong in seeking to restrict the national government's jurisdiction to a relatively narrow list of distinctively federal offenses.¹⁹⁰ Various rationales for supplemental national authority support expansive national ju-

¹⁹⁰ At the extreme, some proponents of the overfederalization thesis seem to advocate dividing state and national authority over crime into separate, mutually exclusive spheres. See LONG RANGE PLAN, *supra* note 1, at 24-28; Litman & Greenberg, *supra* note 1, at 74 (reading the LONG RANGE PLAN to embrace a "fixed-spheres" view of state and national jurisdiction). Other proponents would settle for overlapping state and national authority but still would confine concurrent national enforcement efforts to a relatively narrow ambit.

The national government, the proponents argue, should exercise authority over criminal activity only in the presence of a strong, clearly defined national interest for doing so. See, e.g., LONG RANGE PLAN, *supra* note 1, at 24-25; Marshall, *supra* note 1, at 733-36; Miner, *supra* note 1, at 126 ("[F]ederal prosecution should be limited to misconduct affecting clearly defined national interests."). The proponents reject arguments that such an interest may be based on the inadequate funding of state criminal justice systems, Beale, *supra* note 1, at 1006; Mengler, *supra* note 1, at 522-23, the significant impact that the criminal activity exerts on the national economy, Beale, *supra* note 1, at 1007; Kadish, *supra* note 1, at 1249 ("[T]he fact that deplorable conduct is widespread in the United States, and in that sense constitutes a national problem, hardly warrants making that conduct a federal crime."), or the symbolic importance of a national effort that affirms cherished values, Marshall, *supra* note 1, at 721, 734-36. Such bases for national intervention are said to be too all-encompassing. Beale, *supra* note 1, at 982; Marshall, *supra* note 1, at 734-36.

According to the proponents of the overfederalization thesis, national involvement must be justified on the basis of a much more limited set of reasons. The proponents commonly acknowledge that exercising national authority may be necessary and appropriate to address criminal activity that crosses state borders, such as a multistage or international drug ring. See, e.g., LONG RANGE PLAN, *supra* note 1, at 24; Beale, *supra* note 1, at 1007; Mengler, *supra* note 1, at 526; Miner, *supra* note 1, at 126. For example, the conventional legal wisdom would at least cede the national government concurrent jurisdiction over large-scale distribution of narcotics. See LONG RANGE PLAN, *supra* note 1, at 24; FEDERAL COURTS STUDY, *supra* note 1, at 15, 35-38; Miner, *supra* note 1, at 126. Judges and scholars also typically concede that, because of a local unwillingness to prosecute, a national role may be needed to address crimes involving civil rights violations or widespread local corruption. See, e.g., LONG RANGE PLAN, at 25; Mengler, *supra* note 1, at 526. More controversially, some proponents go further and accept a national role respecting crimes of an especially sophisticated nature — such as complex fraud or money laundering offenses — that require specialized law enforcement expertise. LONG RANGE PLAN, *supra* note 1, at 25; Mengler, *supra* note 1, at 526. *But see* Beale, *supra* note 1, at 1006-07 (criticizing this proposal). Ordinary street crime, proponents all agree, clearly fails to satisfy any of these criteria for national intervention. See *supra* note 2.

Proponents of the overfederalization thesis are right to assert that national criminal jurisdiction should not exist unless there is a need for a national role. But they have taken an arbitrarily restricted view of when there is such a need.

risdiction. Consider first the efficiency rationale. A need for interstate coordination, specialized resources, a harsher regime of punishment, or a dialogue between state and national officials can exist with virtually any type of offense, including street crimes. Highly trained experts and prosecutors may enhance the successful prosecution of a thief who has committed this "local" offense through the use of sophisticated computer techniques. Interstate coordination may be required when investigating a murderer who has crossed state lines or belongs to a multistage ring. National jurisdiction over multistage narcotics operations may be aided significantly by authority to prosecute "local" possession offenses.¹⁹¹ As two experienced federal prosecutors have recently written, "Congress cannot in advance carve out federal jurisdiction over just those cases in which federal jurisdiction is needed."¹⁹² Rather than supplying a sound basis for limiting national enforcement efforts to a discreet list of offenses, concerns about efficiency support selective national involvement in enforcing a broad array of offenses, including street crimes.

Another main rationale for national authority, which arises from the tendency of states to underinvest in enforcement, likewise transcends offense categories. When deciding the level of their enforcement activities, states are inclined to ignore the out-of-state benefits of enforcing offenses of all descriptions. In addition, the pressures of race-to-the-bottom effects impel States to skimp in enforcing even garden-variety state offenses in poorer neighborhoods. Contrary to the conventional wisdom, then, federalism's values support concurrent national jurisdiction over a broad array of offenses, not just a select few.

In fact, the justification for supplemental national authority is strongest respecting violent street crime, a category which federal judges and academics insist upon treating as outside the province of the national government. The interest in diversity has exceedingly little weight with regard to street crime, which the general public tends to view as the most threatening kind of crime. In addition, because such crime disproportionately afflicts African-Americans, fighting it is one way the national government can fulfill its role of promoting racial equality. Finally, States are especially inclined to underinvest in enforcing the street crime concentrated in poor urban neighborhoods. The problem, of course, is not that state and local governments do nothing. As theory and experience both teach, the problem instead is that state and local efforts

¹⁹¹ In some cases, authority over possession offenses may be needed "to 'log-roll' smaller players . . . to produce a case against the main participants." Mengler, *supra* note 1, at 529. Authority to prosecute possession might also be needed to prosecute a supplier for a lesser offense due to difficulties of proof and/or to offer attractive plea bargains to major participants. *Id.*

¹⁹² Litman & Greenberg, *supra* note 1, at 82.

fall short of the optimum.¹⁹³ The conventional judicial and academic wisdom, which views street crime as within the exclusive province of the States, overlooks these strong justifications for supplemental national enforcement efforts.¹⁹⁴

Many proponents of the overfederalization thesis do affirm a generalized need for supplemental national funding of state criminal justice systems, especially for state courts.¹⁹⁵ But they do not recognize the degree to which federalism's values support national enforcement efforts as well. With the exception of diversity, which has a very limited weight in this context,¹⁹⁶ federalism's values do not favor funding over enforcement. Further, a variety of efficiency-related considerations support concurrent national enforcement efforts.

First, national enforcement efforts may be a more efficient way of tying national intervention to the reasons that justify it. The national government, it is true, can provide funding to supplement the resources States devote to, *inter alia*, combating street crime in poor areas. But the political pressures that gave rise to the need for national intervention in the first place raise the strong possibility that an unconditional grant of funds will not be used in a way that removes the need.¹⁹⁷ The national government can require that the funding be used for a particular purpose, of course. Yet such conditional appropriations and the monitoring necessary to secure compliance with them may well be more intrusive on state prerogatives than supplemental national enforcement efforts.¹⁹⁸ In addition, national enforcement may be more efficient because it better ensures that supplemental resources are used for their intended purposes while avoiding the costs of monitoring state-by-state compliance.

¹⁹³ See *supra* Part III.B.4.

¹⁹⁴ See *supra* note 175.

¹⁹⁵ LONG RANGE PLAN, *supra* note 1, at 26; Mengler, *supra* note 1, at 522-23, 534.

¹⁹⁶ See *supra* Part III.A.1.

¹⁹⁷ In 1968, Congress created the Law Enforcement Assistance Administration, which, over the next thirteen years, received about \$7.5 billion that was disbursed to the states as block grants. See Robert F. Diegelman, *Federal Financial Assistance for Crime Control: Lessons of the LEAA Experience*, 73 J. CRIM. L. & CRIMINOLOGY 994, 996-1000 (1982). Unfortunately, "too often agencies dissipated the funds by scattering them widely or by applying them to unwise, frivolous, or routine expenditures, with the result that their potential impact was sharply diluted." *Id.* at 1001. See also *Local Government Law Enforcement Block Grants Act of 1995*, H.R. REP. No. 104-24, 104th Cong. 147 (1995) [hereinafter *Block Grants*] (discussing opposing views):

Funds under the LEAA program were thrown away on airplanes that were used for the private purposes of State officials, Army combat tanks, limousines, radio equipment that didn't work and computers that were left to rot in warehouses, employment of politicians' friends and relatives, and foolish "consulting" fees.

As a result of the LEAA's perceived failure, the program was discontinued during the Reagan Administration. Heymann & Moore, *supra* note 1, at 106-07.

¹⁹⁸ See *infra* Part III. D.2.

Second, absent national enforcement efforts, a national role cannot produce most of the efficiencies mentioned in the preceding section. Without federal offenses and a federal system of punishment, offenders cannot be channeled to and from more and less severe systems of punishment according to the needs of the particular case. The absence of national enforcement efforts in a particular area of offenses also inhibits a mutually beneficial exchange of ideas and methods between state and federal judges, prosecutors, and police. Improved interstate coordination of law enforcement resources likewise necessitates national enforcement efforts. Supplemental funding of state systems simply cannot yield these efficiencies.

Federalism's underlying values, then, furnish little reason for resisting and strong reasons for favoring national enforcement efforts. Of course, the degree to which national enforcement efforts will make potential efficiencies actual, as well as the ideal mix of national funding and enforcement, are unclear and subject to debate. But federalism's values do not categorically favor funding over enforcement and cannot justify a constitutional prohibition of national enforcement efforts in any area, particularly the area of street crime.¹⁹⁹

D. THE CONSTITUTIONALITY OF PARTICULAR FEDERAL LAWS

Lopez and proponents of the overfederalization thesis call into question the constitutionality of a series of newly enacted federal offenses. Relying upon *Lopez* and the consensus about overfederalization it embodies, some lower courts have struck down a number of these offenses.²⁰⁰

The lower courts have applied the doctrinal lines that *Lopez* draws, focusing on whether the prosecution must show a nexus to interstate commerce in each case, whether Congress made explicit findings, and

¹⁹⁹ Republicans and Democrats in Congress disagree over the wisdom of appropriating funds to the states for particular uses. The proposed Local Government Law Enforcement Block Grants Act of 1995, which passed in the House, seeks to amend the Violent Crime Control and Law Enforcement Act of 1994 to convert federal funds made available for hiring additional police officers into block grants "for reducing crime and improving public safety." *Block Grants*, *supra* note 197, at 8. According to Republicans on the House Judiciary Committee, the block grants enables "localities to respond to their own unique crime problems with their own solutions." *Id.* Many of the Democrats on the Committee, however, believe that such block grants "eliminate any standards to which local officials will be held" and "will result at the end of five years in billions of dollars being thrown down a rat-hole, with no evidence of what they were used for and whether any results were obtained." *Id.* at 147. As yet another alternative, Congress could channel the funds into federal law enforcement.

We do not believe that the Constitution dictates the outcome of this choice among loosely conditioned block grants, appropriations for particular uses, and federal enforcement. The choice is instead political.

²⁰⁰ See generally *supra* note 4.

whether the offense regulates “commercial” activity.²⁰¹ We cannot begin to fathom why such superficial and formalistic factors should determine the outcome of the modern conflict between the Commerce Clause and the Tenth Amendment. The first two factors — whether the statute requires a case-by-case jurisdictional nexus with interstate commerce and whether Congress made findings to this effect — are devoid of meaningful content. A nexus with interstate commerce can be shown in every case²⁰² and Congress always can make the requisite findings.²⁰³ As for the distinction between commercial and noncommercial activity, the distinction might well lack any principled definition.²⁰⁴ But even if this distinction does have real meaning, it overlooks Congress’s authority under the Necessary and Proper Clause to reach “noncommercial” activity that substantially impedes interstate commerce.²⁰⁵

²⁰¹ See, e.g., *United States v. Coleman*, 78 F.3d 154 (5th Cir. 1996); *United States v. Bell*, 70 F.3d 495 (7th Cir. 1995); *United States v. Sage*, 906 F. Supp. 84 (D. Conn. 1995).

²⁰² As Professor Nagel has observed:

[A]ny conceivable object of regulation will necessarily involve *something* that has traveled in interstate commerce. Everyone knows that schools, police departments, and families all purchase goods that have been part of commerce. Therefore, the much-heralded jurisdictional tie is itself subject to the logic of *Lopez* — that is, the asserted tie to commerce would potentially allow national regulation of every imaginable activity.

Nagel, *supra* note 88, at 648. Thus, Congress can always insert a jurisdictional element that does nothing to narrow a statute’s breadth. For example, if the Gun-Free School Zones Act had required a showing that the gun or its component parts had moved across state lines, it still would have covered all guns possessed in or near schools. Legislation along this line has already been introduced. Proposed Legislation: “The Gun-Free School Zones Amendments Act of 1995,” H.R. Doc. No. 72, 104th Cong. (1995); Gun-Free School Zones Act of 1995, S. 890, 104th Cong. (1995).

²⁰³ In today’s economy, Congress can always find that the class of regulated activity has a substantial and adverse impact on the national economy. See *supra* notes 61, 84-94, and accompanying text. In *Lopez*, for instance, Justice Breyer’s dissent made this requisite showing, which the Court did not seriously contest. See *supra* notes 91-94 and accompanying text. See also Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of United States v. Lopez*, 46 CASE W. RES. L. REV. 757, 774 (1996) (“Not only did Justice Breyer do Congress’ work, he did it well.”). In fact, Congress already had amended the version of the Gun-Free School Zones Act at issue in *Lopez* to include findings about the impact of gun possession in and near schools on interstate commerce. 18 U.S.C. § 922(q)(1) (1994). See also *Lopez*, 115 S. Ct. at 1632 n.4 (noting that “[t]he Government does not rely upon these subsequent findings as a substitute for the absence of findings in the first instance”).

²⁰⁴ For a nice discussion of the various problems, see *Lopez*, 115 S. Ct. at 1659-64 (Breyer, J., dissenting). The majority itself observed that “depending on the level of generality, any activity can be looked upon as commercial.” *Id.* at 1633. See also Nagel, *supra* note 88, at 648.

²⁰⁵ See *supra* notes 82-90 and accompanying text. See also Nagel, *supra* note 88, at 647 (“[I]t is logically possible — even as a practical matter highly likely — that such everyday matters as the quality of family life (or public schooling) do affect productivity.”).

A distinction between “commercial” and “noncommercial” activities also finds no support in federalism’s values. There is no necessary correlation between the net import of federalism’s various rationales, on the one hand, and the “commercial” nature of the activity, on the other.

Courts can resolve the conflict between the Tenth Amendment and the Commerce Clause in a way that is both more rational and more faithful to the Constitution by focusing instead on the relationship between a particular federal offense and federalism's underlying values. If this Part's analysis is so far correct, it should be possible to see recently enacted federal offenses as fully consistent with federalism's underlying values. This is, in fact, the case.

1. *The Gun-Free School Zones Act, Carjacking, Gang-Related Violence, and Violent Street Crime Generally*

In *Lopez*, the Court struck down the federal Gun-Free School Zones Act,²⁰⁶ which criminalized possession of guns in and around schools. Contrary to the Supreme Court's decision and much of the scholarly reaction to it,²⁰⁷ the values of federalism amply justify concurrent national efforts to combat this problem and other forms of street crime as well.

The requirement of exclusive state authority which *Lopez* imposes cannot be derived from the values of diversity, experimentation, participation, and liberty. As for diversity, public opinion does not vary from State to State about whether guns should be permitted in and around schools. The intensity and homogeneity of the public sentiment is indicated by the 43 state laws that target this very problem.²⁰⁸ The federal statute did not preclude states from experimenting with other ways of

Education furnishes a good example. Although *Lopez* seems to place education in the category of noncommercial activity, 115 S. Ct. at 1632, 1633, federalism's values furnish strong support for some national role. First, the interstate mobility of students and graduates produces a need for uniformity. In law and medicine, for instance, measures of educational achievement, educational standards, and tests for admission are substantially uniform nationwide. Second, the redistributive rationale for national authority has some application. The problems of positive externalities and the race-to-the-bottom suggest that States will not devote sufficient resources to education, especially respecting the poor. See SHAPIRO, *supra* note 88, at 42 ("[T]he Nation's total commitment to education, if left wholly to the states as individual polities, may well be suboptimal."). The large inequities in school financing that exist in many States, *see, e.g.*, Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989), tend to confirm this hypothesis. To the extent that an optimal level of investment in education and equal educational opportunity are important to a productive national economy, some national involvement may be necessary. A formalistic doctrinal rule that would treat education as non-commercial would ignore these rationales for national authority.

²⁰⁶ 18 U.S.C. § 922(q) (1990).

²⁰⁷ Much of the scholarly writing about *Lopez* makes the strong (and, in our view, untenable) claim that federalism's underlying values furnish considerable support for exclusive state authority and essentially no support for a concurrent national role. See Friedman, *supra* note 203, at 767 n.58; Regan, *supra* note 93, at 569; Merritt, *supra* note 63, at 707; Calabresi, *supra* note 88, at 802-03.

²⁰⁸ Brief for National Conference of State Legislatures *et al.*, United States v. Lopez, 115 S. Ct. 1624 (1995) (appendix). See also 115 S. Ct. at 1641 (Kennedy, J., concurring) ("[O]ver 40 States already have criminal laws outlawing the possession of firearms on or near school grounds.").

addressing the problem with their own laws.²⁰⁹ By making both federal and state officials responsible for the problem, concurrent national involvement would seem to promote participation and accountability.²¹⁰ By expanding the resources available to address the problem and improving enforcement, a concurrent national role would also seem to promote liberty and the goals underlying experimentation and accountability.²¹¹ If anything, the values typically associated with state authority tend to favor, not undercut, concurrent national jurisdiction.

In addition, several of the values typically associated with national authority combine to provide strong support for a concurrent national role. Good reasons exist for doubting the adequacy of state law enforcement. The problem of guns and gun-related violence in the schools is most acute in poor urban areas.²¹² Race to the bottom pressures and past experience indicate that states will not undertake the redistribution of resources needed for sufficient enforcement.²¹³ In addition, any given state will be inclined to ignore the intangible but real benefits that enforcement efforts produce in other states.²¹⁴

Other rationales for national authority are also implicated. Given that gun-related violence has a disproportionate impact on schools in African-American communities,²¹⁵ the Gun-Free School Zones Act can be seen to flow, in part, from the national government's accepted role of promoting racial equality. Considerations of efficiency also support a concurrent national role. In particular cases, interstate coordination or the harsher penalties of the federal sentencing guidelines may be needed. All told, federalism's values favor concurrent national enforcement by a lopsided margin.

A similar analysis applies with respect to street crime generally, including recently enacted statutes that give the national government concurrent enforcement jurisdiction over carjacking²¹⁶ and some forms of

²⁰⁹ See *supra* Part III.A.2.

²¹⁰ See *supra* Part III.A.4.

²¹¹ See *supra* Part III.A.3.

²¹² UNITED STATES DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SCHOOL CRIME: A NATIONAL VICTIMIZATION SURVEY 1 (1991). See *supra* note 184 and accompanying text (noting that the poor experience more violent crime). See also U.S. DEPT. OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT 55 (1995) [hereinafter JUVENILE OFFENDERS] (noting that "[t]wenty-five percent of students in central cities reported gangs in their schools, compared with 8% in non-metropolitan areas" and that "the students who reported gangs in their schools were also more likely than other students to be the victims of crime").

²¹³ See *supra* Part III.B.4.b.

²¹⁴ For a discussion of those benefits, see 115 S. Ct. at 1673 (Breyer, J., dissenting). See also *supra* notes 178-79 and accompanying text.

²¹⁵ In 1991, "[b]lack juveniles had a violent victimization rate 20% higher than that of white juveniles." JUVENILE OFFENDERS, *supra* note 212, at 22. "Twenty-three percent of violent juvenile victimizations occurred in school or on school property in 1991." *Id.*

²¹⁶ 18 U.S.C. § 2119.

gang-related violence.²¹⁷ We therefore disagree with those federal judges who have declared the carjacking statute unconstitutional²¹⁸ and with those scholars who condemn the statute as unwise, if not unconstitutional.²¹⁹

2. *Megan's Law*

Megan's law, enacted this past legislative session, requires that states establish systems for notifying communities that a convicted sex offender intends to locate there upon release from prison.²²⁰ Because states must observe the requirement as a condition of receiving federal funds, the law involves a conditional exercise of Congress's spending power. In the end, we believe that Megan's law strikes a defensible balance among federalism's underlying values. The question, however, is a closer one because conditional spending is more dangerous to federalism's values than concurrent national enforcement efforts.

We begin by noting a perversity in the current legal thinking about conditional exercises of the spending power. Under present doctrine, a law that requires states to comply with conditions attached to federal funds is looked upon more indulgently than a law authorizing concurrent national enforcement efforts.²²¹ From the perspective of federalism's

Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall [be guilty of a crime].

²¹⁷ 18 U.S.C. § 36 (drive-by shootings).

²¹⁸ *United States v. McHenry*, 97 F.3d 125, 129 (6th Cir. 1996) (Batchelder, J., dissenting); *United States v. Bishop*, 66 F.3d 569, 590 (3d Cir. 1995) (Becker, J., dissenting); *United States v. Mallory*, 884 F. Supp. 496 (S.D. Fla. 1995). The great majority of courts, including every appellate court that has addressed the issue, has upheld the constitutionality of the carjacking provision. *See, e.g.*, *United States v. Hicks*, 103 F.3d 837 (9th Cir. 1996); *United States v. McHenry*, *supra*; *United States v. Coleman*, 78 F.3d 154, 160 (5th Cir. 1996) (citing appellate decisions); *United States v. Lowe*, 924 F. Supp. 318 (1996).

²¹⁹ Zimring & Hawkins, *supra* note 1, at 24-25; Brickey, *supra* note 1, at 1162 n.154.

²²⁰ Pub. L. No. 104-145, 110 Stat. 1345. The law was enacted "in response to public outcry following the brutal rape and murder of a seven-year-old girl, Megan Kanka. Megan, her parents, and the community did not know that the murderer, who lived across the street from the Kankas, was a twice-convicted sex offender." *Artway v. Attorney General of State of New Jersey*, 81 F.3d 1235, 1243 (3rd Cir. 1996) (discussing the New Jersey version of the statute).

²²¹ In *United States v. Butler*, the Supreme Court held that Congress's power to spend is limited only by the requirement that the spending be in the general welfare and is broader than Congress's power to regulate, which is limited by Congress's enumerated powers. 297 U.S. 1 (1936). The Court has given Congress very broad authority to attach conditions to funds it makes available to the states. *See South Dakota v. Dole*, 483 U.S. 203 (1987); TRIBE, *supra* note 61 § 5-10, at 321-23 (1988).

In reviving federalism-based limits on national power, the Rehnquist Court has also treated Congress's spending power as broader than its power to regulate under the commerce clause. In *New York v. United States*, for instance, the Court held that, while Congress had exceeded its regulatory power in enacting the take title provisions of the Low-Level Radioac-

values, however, conditional federal spending is much harder to justify than concurrent federal enforcement.

As compared with conditional spending, concurrent national enforcement efforts better preserve the values of diversity, experimentation, and participation. Federal law applies only in the relatively small percentage of cases in which the national government actually exercises its concurrent authority. States remain free to handle their own enforcement efforts as they see fit, according to their own law. To the extent that public opinion varies and state laws differ accordingly, such diversity can be given considerable effect. Because states continue to enforce their own laws respecting the problem, concurrent national enforcement efforts also permit substantial state experimentation. In addition, state officials can be held accountable for the content and enforcement of state laws.

In contrast, conditions imposed through the spending power induce states to conform to nationally uniform rules. While concurrent national enforcement efforts permit the bulk of cases to be handled under varying state laws, a condition attached to federal spending applies in all cases. For this reason, conditional exercises of the spending power such as Megan's law should satisfy a higher, not lower, burden.

Megan's law probably can surmount such a burden. Rather than applying only in a small percentage of cases in which the national government chooses to exercise enforcement authority, Megan's law envisions a nationally uniform rule. It therefore would be problematic if opinions about the problem at hand were diversely distributed among the states. However, "[a]t least 46 states have enacted laws requiring convicted sex offenders to register with law enforcement authorities" and "[m]any of these statutes also provide for public notification of the presence of registered sex offenders in local communities."²²² The apparent uniformity of public sentiment indicates that the interest in diversity has no strong application here.

In addition, the problem of externalities supplies a persuasive justification for national authority. Given the interstate mobility of released sex offenders, any state's notification requirement can impose very significant costs on other states. To avoid one state's notification requirement, an offender can relocate in a state that does not have such a requirement. Indeed, a state might enact a notification requirement partly because it tends to shift the problems associated with released sex

tive Waste Policy Amendments Act of 1985, it could achieve the same regulatory goal through a conditional exercise of its spending power. 505 U.S. 144, 186-88 (1992).

²²² Doe v. Pataka, 919 F. Supp. 691, 694 (S.D.N.Y. 1996).

offenders elsewhere.²²³ Given that one state's decision imposes significant negative externalities on other states, national authority makes sense.

3. *Church-Burning and Domestic Violence*

In response to the recent rash of church-burnings, Congress enacted the Church Arson Prevention Act of 1996, which expands the national government's jurisdiction over racially motivated church-burnings.²²⁴ A number of the rationales for national authority support this statute. The most obvious and important is the national government's longstanding and accepted role in promoting racial equality. This role, which finds constitutional recognition in the Thirteenth and Fourteenth Amendments, justifies supplemental national enforcement efforts respecting racially motivated crimes, including church-burnings.²²⁵ The efficiency rationale for concurrent national enforcement also may have some application. A few observers have speculated that the recent church-burnings may involve a concerted conspiracy involving organizations that are dedicated to promoting interracial antagonism. Should this speculation prove true, the national government's greater efficiency in addressing problems that require interstate cooperation would support a supplemental national role as well.

The rationales commonly advanced in support of exclusive state authority do not militate against concurrent national enforcement efforts here. It is true that public opinion about racial equality has been and perhaps still is diversely distributed along geographic lines. The Fourteenth Amendment, however, makes it illegitimate for governments to effectuate these preferences against racial equality. In addition, concur-

²²³ One might surmise that each state would seek to avoid such externalities by enacting its own notification requirement and that States would eventually achieve the same result as Megan's law: a nationally uniform notification requirement. This prospect, however, does not argue persuasively against national authority. Given the widespread support for a notification requirement, there is little reason to desire that states to do it alone. In addition, promulgating a national notification requirement would be easier than the halting and time-consuming process of state-by-state adoption. It would also avoid the externality problem of sex offenders moving to states that do not have notification requirements. If the matter is left to the states, some states will experience such external costs until all states adopt the notification requirements.

²²⁴ Pub. L. No. 104-155, 110 Stat. 1392 (1996). For an explanation of the changes the Act makes in the law, see CHURCH ARSON PREVENTION ACT OF 1996, H.R. REP. NO. 104-621 (1996).

²²⁵ We think that federal jurisdiction over race-hate crimes may be grounded on Congress's Commerce Clause authority. Such jurisdiction also may be grounded on Congress's authority under Section Five of the Fourteenth Amendment, depending on whether that section enables Congress to regulate the behavior of private rather than governmental actors, *see* United States v. Guest, 383 U.S. 745, 762, 774-86 (1966), and under Section Two of the Thirteenth Amendment.

rent national enforcement permits substantial state experimentation and promotes participation and liberty.²²⁶

Similar considerations apply with respect to the Violence Against Women Act of 1994, a favorite target of those who subscribe to the overfederalization thesis.²²⁷ The Act gives the national government concurrent authority over domestic abusers who cross state lines with the intent to commit abuse or violate a protective order.²²⁸ As in the case of the Church Arson Prevention Act, the national government's role in promoting equality can be seen to favor a supplemental national role.²²⁹ For example, ample evidence exists that crimes of domestic violence against women are underenforced at the state and local levels.²³⁰ Furthermore, such crimes disproportionately affect the poor.²³¹ This fact reinforces the need for a supplemental national role.

As with other offenses, the national government's greater efficiency in investigating and prosecuting interstate crimes sometimes comes into play, particularly since the Act requires interstate movement as a prerequisite to jurisdiction.²³² We therefore disagree with the widespread judicial and scholarly criticism of the Violence Against Women Act as well as with a recent district court decision that invalidated the Act's civil

²²⁶ See *supra* Part III.A.2-4.

²²⁷ See, e.g., Beale, *supra* note 1, at 995; William H. Rehnquist, *Welcoming Remarks: National Conference on State-Judicial Relationships*, 78 VA. L. REV. 1657, 1660 (1992); William H. Rehnquist, *Chief Justice's 1991 Year-End Report on the Federal Judiciary*, in THE THIRD BRANCH 1, 3 (Jan. 1992) ("The broad definition of criminal conduct . . . could involve the federal courts in a whole host of domestic relations disputes."); William H. Rehnquist, *Judicial Conference Opposes Expanded Role for Federal Courts*, in THE THIRD BRANCH 1, 3 (Oct. 1991) (reporting that the U.S. Judicial Conference voted to oppose the criminal provisions in the Violence Against Women Act); Brickey, *supra* note 1, at 1167-69 (characterizing the Act as "an overt attempt to substitute the judgment of Congress for those of state legislatures and courts on a matter peculiarly within the domain of the states"); Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1110 n.191 (1994) (noting that, although the Judicial Conference voted in 1993 to take no position on the Act, it reiterated its concerns about federalization).

²²⁸ 18 U.S.C. §§ 2261-62 (1994).

²²⁹ See Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1882-83 (1995).

²³⁰ See VIOLENCE AGAINST WOMEN ACT OF 1993, S. REP. NO. 103-138, at 27-28, 41-42 (1993).

²³¹ BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1993 39 (1996). In 1993, people whose annual household income was less than \$7,500 were victims of violent crimes at the hands of relatives at a rate of 12 per thousand. The rate declined as household income increased. People whose annual household income was \$75,000 or more experienced such crimes at a rate of 2.3 per thousand — approximately 20% of the rate experienced in the poorest families. *Id.*

²³² See Abramovsky, *supra* note 1, at 4 ("The drafters of the interstate domestic violence statute had legitimate concerns; namely, that evidence might be difficult to obtain in domestic violence cases involving offenses committed in more than one state.").

cause of action with reasoning that applies equally to the Act's criminal provisions.²³³

4. *Child Support*

Federalism's values also furnish strong support for the Child Support Recovery Act of 1992,²³⁴ which criminalizes a willful failure "to pay a past due support obligation with respect to a child who resides in another State"²³⁵ First, the problem of externalities²³⁶ justifies a concurrent national role. When the child and the noncustodial parent who owes support are located in different states, as the Act requires, that parent's state will incur much, if not all, of the cost of enforcement while the benefits will accrue in another state. The theory of federalism predicts that the efforts of noncustodial the parent's state to collect from the parent will be suboptimal. Consistent with this prediction, "the statistics suggest the chances for successful avoidance of [child support] obligations [increase] significantly when there is a state boundary between the child and the non-custodial parent."²³⁷

Second, the Act finds strong support in the national government's greater efficiency in investigating and prosecuting interstate crimes. The national government possesses jurisdiction only when the child and parent reside in different States, therefore providing the case with an interstate dimension.²³⁸ Third, none of the rationales for exclusive authority apply in this context.²³⁹ The strong public support for holding deadbeat

²³³ *Brzonkala v. Virginia Polytechnic and State Univ.*, 1996 U.S. Dist. LEXIS 10766 (July 26, 1996) (addressing the constitutionality of civil cause of action created by the Act). *But see Doe v. Doe*, 1996 U.S. Dist. LEXIS 8601 (June 19, 1996) (upholding civil cause of action created by Act).

The Act's criminal provisions have been so far used in only a handful of cases. *See generally Abramovsky, supra* note 1. So far, there are no published opinions addressing their constitutionality.

²³⁴ 18 U.S.C. § 228.

²³⁵ 18 U.S.C. § 228(a) (1992). The general problem of unpaid child support is of enormous significance. "[O]f the \$48 billion in child support payments owed nationally according to court judgments, a total of \$35 billion has never been collected." *United States v. Sage*, 906 F. Supp. 84, 90 (D. Conn. 1995).

²³⁶ *See supra* Part III.B.4.a.

²³⁷ *Sage*, 906 F. Supp. at 90. *See also* CHILD SUPPORT RECOVERY ACT OF 1992, H.R. REP. NO. 102-771, at 5 (1992) [hereinafter CHILD SUPPORT RECOVERY ACT].

²³⁸ *See Gorelick & Litman, supra* note 165, at 974 ("[A] relatively small number of egregious offenders . . . intentionally exploit states' jurisdictional limitations to elude their child support responsibilities."); Renee M. Landers, *Federalization of State Law: Enhancing Opportunities for Three-Branch and Federal-State Cooperation*, 46 HASTINGS L.J. 811, 819 (1995) (national government has a "superior . . . capacity to locate and track parents and to identify employers of non-paying parents").

²³⁹ According to the House Report accompanying the Act, "at least 42 states have made willful failure to pay child support a crime . . ." CHILD SUPPORT RECOVERY ACT, *supra* note 237, at 5-6. Furthermore, the Act does not displace differing state rules concerning the setting and modification of support awards. It is a means of enforcing, not supplanting, such rules.

dads responsible does not vary significantly from state to state. Thus, interest in diversity has no real application.

Unfortunately, basing their decisions on a broad reading of the formalistic factors *Lopez* identifies as relevant, several district courts have invalidated the Act.²⁴⁰ From the standpoint of federalism's values, however, this result is not only wrong, but indefensible.²⁴¹

5. *The Brady Law and Gun Control*

In 1993, the President signed the Brady Handgun Violence Prevention Act into law.²⁴² The Brady Act uses the criminal law to regulate the sale of handguns. To improve the efficacy of the Gun Control Act of 1968, which prohibits the transfer of firearms to people such as felons and fugitives from justice, the Brady Act mandates a five day waiting period for purchase of handguns. During that period, it requires a local

See 18 U.S.C. § 228(d)(1) (1992). As Professor Dailey has observed, "[b]ecause the federal law induces the states to take responsibility for child support standards and enforcement, it can be viewed as reinforcing rather than undermining state authority." *See* Dailey, *supra* note 229, at 1885. The interest in diversity thus has no real application here.

²⁴⁰ *United States v. Parker*, 911 F. Supp. 830 (E.D. Pa. 1995), *rev'd*, 1997 U.S. App. LEXIS 4033 (3d Cir. 1997); *United States v. Bailey*, 902 F. Supp. 727 (W.D. Tex. 1995); *United States v. Mussari*, 894 F. Supp. 1360 (D. Ariz), *reconsideration denied*, 912 F. Supp. 1248 (1995), *rev'd*, 95 F.3d 787 (9th Cir. 1996). *See also* Rebecca A. Wistner, Comment, *Abusing the Power to Regulate: The Child Support Recovery Act of 1992*, 46 CASE W. RES. L. REV. 935 (1996) (arguing that, although constitutional under *Lopez*, the Act represents an abuse of federal power as a matter of policy).

Other district courts have upheld the Act's constitutionality. *See United States v. Ganasposki*, 1996 U.S. Dist. LEXIS 9353 (M.D. Pa. July 1, 1996) (citing cases). As of this writing, every federal appellate court that has addressed the issue has upheld the Act's constitutionality. *See, e.g., United States v. Bongiorno*, 106 F.3d 1027 (1st Cir. 1997); *United States v. Hampshire*, 95 F.3d 999 (10th Cir. 1996); *United States v. Mussari*, 95 F.3d 787 (9th Cir. 1996); *United States v. Parker*, 1997 U.S. App. LEXIS 4033 (3d Cir. 1997); *United States v. Sage*, 92 F.3d 101, 107 (2d Cir. 1996).

²⁴¹ One might try to defend the conclusion on the ground that the Act usurps the traditional role of States over matters of family law. The *Lopez* Court, for instance, mentioned family law along with education and criminal law enforcement as areas that, by tradition, are local in nature. 115 S. Ct. at 1632, 1633. *See Bailey*, 902 F. Supp. at 729 (reasoning that the domestic relations exception to federal diversity jurisdiction indicates the Child Support Recovery Act's unconstitutionality).

Such a use of tradition, however, would be quite arbitrary. There is a competing tradition of national authority over lawbreakers whose illegal action crosses state lines. *See, e.g.,* 18 U.S.C. §§ 2312, 2313 (transportation, sale of stolen motor vehicles that have crossed state lines); 18 U.S.C. § 1201 (transporting a kidnaping victim across state lines). Deadbeat dads who willfully defy orders to support children located in other States fit within this tradition of national authority. As in other contexts, conflicting traditions exist and reliance upon tradition is unprincipled and result-oriented. *See supra* Part II.B.

²⁴² The legislation's formal title is the Brady Handgun Violence Prevention Act of 1993 and is codified at 18 U.S.C. § 922 (1993).

law enforcement officer²⁴³ to make a reasonable effort to check the prospective purchaser's background. Lower courts are divided over whether the local officer's duties violate the limits that, under *New York v. United States*,²⁴⁴ the Tenth Amendment imposes on Congress's authority to require the participation of state officials in federal regulatory programs.²⁴⁵ The Supreme Court has agreed to resolve this controversy in its coming 1996 term.²⁴⁶

In addition, lower courts have begun to address more general constitutional challenges to other federal firearm offenses.²⁴⁷ In contrast with most other crime-fighting contexts, diversity does furnish significant support for exclusive state regulatory authority over the purchase of firearms. Public opinion does not differ significantly from state to state over the wisdom of notifying communities about the presence of released sex offenders or of eliminating gang violence, carjacking, and the presence of guns in schools. But public opinion does differ over the wisdom of regulating the purchase of firearms with stringent regulation, finding significantly greater support in New York than in Texas, for example.

The rationale of experimentation also furnishes more support for exclusive state authority over the purchase of firearms than it does in most other crime-fighting contexts. Concurrent national jurisdiction over a particular criminal activity, such as carjacking or guns in schools, leaves states free to experiment with other means of preventing and punishing the activity and precludes states only from making the activity legal. In the contexts previously discussed, states do not wish to experiment by legitimizing the activity. In contrast, some states do wish to make the immediate and unregulated purchase of firearms legal. The Brady law, however, precludes state experimentation with this alternative.

Still, while some of federalism's values favor exclusive state authority over firearm purchases, an interest in regulatory uniformity furnishes impressive support for national intervention. When one or more states decide to regulate such purchases, a contrary decision by nearby states has the external effect of substantially undermining the regulation. Instead of complying with one state's regulatory requirements, sellers and/

²⁴³ The Act requires that the background check be conducted by the local Chief Law Enforcement Officer, 18 U.S.C. § 922(s)(1)(A)(I)(III)-(IV) (1993), who may be the local chief of police, sheriff, or his equivalent or designee, 18 U.S.C. § 922(s)(8) (1993).

²⁴⁴ 505 U.S. 144 (1992).

²⁴⁵ See, e.g., *Koog v. United States*, 79 F.3d 452 (5th Cir. 1996) (holding portion of the Act unconstitutional). But see *Frank v. United States*, 78 F.3d 815 (2d Cir. 1996) (upholding constitutionality of Act); *Mack v. United States*, 66 F.3d 1025 (9th Cir. 1995), cert. granted, 116 S. Ct. 2521 (1996) (same holding).

²⁴⁶ *Printz v. United States*, 116 S. Ct. 2521 (1996).

²⁴⁷ See *infra* note 252.

or purchasers can simply travel to other states that do not have such requirements. Indeed, the ease of circumventing the gun control laws of any particular state or locality provides a potent and often successful argument against adopting such laws. The ability of one group of states to undermine the regulatory preferences of another group of states furnishes a strong justification for vesting the national government with decision-making authority. If gun regulation is to be the most effective, it must be done on the national level.

Federalism's values stand in conflict not only respecting the regulation of firearm purchases, but also respecting a narrower issue: the constitutionality of the local sheriff's role in enforcing the Brady Act. Because the Act does not provide funding for the required background checks, it consumes resources that state and local governments may wish to use for other purposes.²⁴⁸ To the extent it forces such a rearrangement of fiscal priorities, the Act undermines the values promoted by state and local authority, such as diversity. Congress's ability to make states shoulder the cost of complying with the background check requirement also can be seen to have given Congress an undue incentive to enact the requirement. On the other hand, the value of efficiency favors using local officials, which avoids "a costly, intrusive, and substantially duplicative [national] administrative bureaucracy"²⁴⁹ The use of local officials to enforce national laws can even promote diversity by "enhanc[ing] the prospect that ministerial enforcement decisions will reflect local conditions and concerns"²⁵⁰ In addition, because "the total implementation cost is relatively low . . . [an] unfunded mandate [is] reasonable, since federal reimbursement would itself entail potentially substantial transaction costs which represent deadweight social losses."²⁵¹

In contrast with other contexts, then, federalism's values give rise to weighty arguments both for and against the Brady Act and perhaps some other national gun control measures as well.²⁵² In this light, the constitu-

²⁴⁸ See *FERC v. Mississippi*, 456 U.S. 742, 787 (1982) (O'Connor, J., concurring in the judgment and dissenting in part); Caminker, *supra* note 157, at 1079-80; H. Jefferson Powell, *The Oldest Question in Constitutional Law*, 79 VA. L. REV. 633, 685-87 (1993).

²⁴⁹ Caminker, *supra* note 157, at 1014.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 1084.

²⁵² Federalism's values stand in conflict only when public preferences about the activity in question differ significantly from state to state. Where public preferences do not so differ, the interest in diversity is not implicated and federalism's values unequivocally support concurrent national authority.

In contrast with the Brady Act, which regulates the general sale of firearms, public preferences probably are not diversely distributed respecting the activities most federal firearms offenses regulate. For instance, we seriously doubt that public preferences differ significantly from state to state over whether convicted felons should be allowed to possess a firearm, 18 U.S.C. § 922(g) (1993); whether gun dealers should be allowed to sell firearms to known drug

tionality of such gun control measures depends on the net import of federalism's conflicting values and on who has authority to determine the appropriate balance: the Justices or the electorate.

E. JUDICIAL DEFERENCE

In most contexts, including that of street crime, federalism's values decisively favor concurrent national enforcement efforts. While little that is plausible can be said in favor of exclusive state authority, efficiency concerns and the tendency of states to deploy insufficient enforcement resources argue strongly for a concurrent national role. This fact alone demonstrates the unsoundness of the result in *Lopez* and the general constitutional claims of the overfederalization thesis. Yet *Lopez* and the overfederalization thesis become even more untenable when one considers the deference that the Court properly owes to the national political process over matters of federalism. That deference, in fact, implies the constitutionality of even the Brady Act, which, from the perspective of federalism's underlying rationales, is a much closer case.

Three primary considerations justify giving Congress wide latitude to determine the net import of federalism's underlying values. The first, and perhaps the most important, is that federalism works by empowering political majorities, who are well represented in the national political process and who are better able than the federal judiciary to identify their own interests. In contrast with constitutional civil liberties, which seek to protect political and religious dissidents from electoral majorities, federalism empowers such majorities, sometimes at the state and national level.²⁵³ Although the Justices and scholars frequently speak as though federalism protects the interests of state governments,²⁵⁴ it would be a

addicts, 18 U.S.C. § 922(d) (1993); whether people should be allowed to possess or sell firearms whose serial number has been erased, 18 U.S.C. § 922(k) (1993); and whether people should be allowed to possess machine guns, 18 U.S.C. § 922(o) (1993). From the standpoint of federalism's values, then, courts have reached the correct result in upholding the constitutionality of these provisions. See, e.g., *United States v. Chesney*, 86 F.3d 564 (6th Cir. 1996) (18 U.S.C. § 922(g)(1) (1993)); *United States v. Hernandez*, 85 F.3d 1023, 1031 (2d Cir. 1996) (18 U.S.C. § 922(k) (1993)); *United States v. Kirk*, 70 F.3d 791 (5th Cir. 1995) (18 U.S.C. § 922(o) (1993)). But see *United States v. Kirk*, 70 F.3d at 798 (Jones, J., dissenting) (arguing that prohibiting possession of machine guns is unconstitutional).

Public preferences possibly do differ significantly from state to state over the wisdom banning assault weapons. 18 U.S.C. § 922(w) (1993). Still, polls indicate that nationwide, the support for the ban is quite high. See WALL ST. J., June 9, 1995, at A1 (reporting Wall St. Journal/NBC poll finding that public favors assault weapon ban by 78% to 18%).

²⁵³ See Blumstein, *supra* note 5, at 1260.

²⁵⁴ In debating whether the Court should defer to the national political process on matters of federalism, for instance, the Justices and commentators have focused on the adequacy with which state governments are represented in the national political process. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551 (1985) (majority opinion); *id.* at 565-66 (Powell, J., dissenting); JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PRO-

fundamental mistake to see federalism as protecting the interests of governmental entities.²⁵⁵ In our constitutional system, it is the people, and not the state or national governments, who have ultimate sovereignty.²⁵⁶ Indeed, the central aim of the Republican Guarantee Clause²⁵⁷ is to require that each state government remain accountable to electoral majorities.²⁵⁸ Because the electoral majorities whom federalism empowers are well-represented in the national political process,²⁵⁹ the outcome of that process would seem to constitute a reliable indication of the interests of those majorities. Judicial review in the name of federalism does not properly respect the competence of those majorities to determine their own interests.

A second reason also supports deferring to the national political process: Judicial intervention frustrates one of the political checks through which the electorate furthers its view of good government and, with it, federalism's underlying values. In Federalist No. 46, Madison emphasized that the electorate can avoid and discourage oppressive and inefficient government by shifting authority back and forth between the national and state governments.²⁶⁰ Such vertical power-shifting requires

CESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 171-259 (1980); Merritt, *supra* note 61, at 1566-70.

²⁵⁵ See *New York v. United States*, 505 U.S. 144, 181 (1992) ("The Constitution does not protect the sovereignty of the States for the benefit of the States or state governments as abstract political entities, or even for the benefit of public officials governing the States.").

²⁵⁶ See, e.g., U.S. CONST. preamble. ("We the People of the United States . . . do ordain and establish this Constitution . . ."); THE FEDERALIST No. 22, at 145-46 (Alexander Hamilton) (James E. Cooke ed., 1987); THE FEDERALIST No. 37, at 234 (James Madison) (James E. Cooke ed., 1987); *New York v. United States*, 505 U.S. at 181.

²⁵⁷ "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them from Invasion; and, on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. CONST. art. IV, § 4.

²⁵⁸ Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 23 (1988) (suggesting that a republican government "is one in which the people control their rulers" and citing, *inter alia*, the Federalist Papers).

²⁵⁹ Electoral majorities at the state level, or subdivisions of such state majorities, elect each of the 435 members of the House of Representatives. Electoral majorities at the state level are represented equally in the Senate. In combination, state majorities elect the President through the popular vote and through the electoral college.

²⁶⁰ Madison began by stressing that ultimate sovereignty rests with the people and that the legitimacy of both state governments and the national government springs from this source. THE FEDERALIST No. 10, *supra* note 81, at 315 (James Madison). He then declared that if the people come to favor the national government over state governments, they "ought not surely to be precluded from giving most of their confidence where they may discover it most due . . ." *Id.* at 317. He thought it highly likely that the People would remain partial to state government "because it is only within a certain sphere that the federal power can, in the nature of things, be advantageously administered." *Id.* Nonetheless, Madison thought that the people ought to be free to follow their judgment regarding the "proofs of a better administration . . ." *Id.*

For a discussion of Madison's argument, see SAMUEL H. BEER, *TO MAKE A NATION* 302-03 (1993).

concurrent state and national authority for its operation. Judicially-enforced zones of exclusive state authority, however, preclude the operation of this political check, which Madison thought central to liberty and efficiency and which has had considerable practical significance throughout the nation's history.²⁶¹

A third reason for giving Congress wide latitude is that balancing federalism's values involves judgments that are best left to the political process. The net import of federalism's sometimes conflicting values, the proper mix of state and national authority, and the proper balance between federal funding and enforcement efforts cannot be assessed by abstract, *a priori* speculations. The answers depend largely on contestable judgments of policy and prediction which then must be re-evaluated in light of experience.²⁶² The evolving and revisable nature of such judgments is ill-suited to judicially-enforced constitutional rules, which inhibit the required flexibility.²⁶³ Especially because the purpose of such judgments is to further the interests of the electoral majorities, these judgments are better left to the trial and error of the political process.

In light of these three reasons, the Court can justify invalidating national crime-fighting efforts only when federalism's underlying values plainly favor exclusive state authority. So far, the concurrent national crime-fighting efforts do not fall into this category. Even when federalism's values point sharply in different directions, as they do respecting

²⁶¹ The New Deal, President Johnson's Great Society, and the 1994 congressional elections all furnish important historical examples of power-shifting to and from the national and state governments. The shifting of power from the national government to the states was a prominent theme of the 1994 congressional elections that resulted in a Republican Congress. Marshall, *supra* note 1, at 721. Proponents of such a power shift seek to revise, if not reverse, the last sea change in nation-state relations — the enactment of President Johnson's Great Society programs in the 1960s. The welfare, Medicaid, and Medicare programs of the Great Society transferred much responsibility for the health and welfare of the poor and elderly to the national government because of the perceived unresponsiveness of the States. See RIVLIN, *supra* note 185, at 92.

²⁶² See SHAPIRO, *supra* note 88, at 119 (“[U]nfortunately, clear answers, even if ascertainable in light of present conditions, are not immutable but rather are necessarily contingent on time and place. What may seem most appropriate today may seem foolishly out of tune with tomorrow's needs.”).

²⁶³ The balancing of federalism's values in any given context necessitates empirical judgments about, *inter alia*, the degree to which concurrent national efforts will produce efficiencies and the strength of the pressures of the race-to-the-bottom. In the Court's dormant Commerce Clause jurisprudence, the Justices have explicitly affirmed that the decision of such debatable empirical questions should be left to the political process. Justice Brennan, who is perhaps the most “liberal” modern Justice, and Justice Scalia, who was one of the most “conservative,” agreed on this point. See *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 679 (1981) (Brennan and Marshall, Js., concurring) (one of the most basic dormant Commerce Clause principles is that “[t]he courts are not empowered to second-guess the empirical judgments of lawmakers”); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 95 (1987) (Scalia, J., concurring) (“[I] do not know what qualifies us” to determine “how effective the present statute is in achieving one or the other objective . . .”).

some national gun control measures, Congress, not the Court, should have the ultimate authority to determine their net import.

F. OVERVIEW

The Court has very little justification, especially in the context of street crime, for invoking constitutional federalism to invalidate concurrent national efforts to enforce the criminal laws. Neither the Constitutional nor societal tradition can furnish a defensible basis for the judicial imposition of federalism-based limits on national crime-fighting. The Constitution embraces principles that now conflict with each other, and using tradition is inherently unprincipled and illegitimate. In contrast, the values behind federalism do furnish a sound basis on which to determine the Constitution's allocation of state and national authority. Yet, contrary to the conventional wisdom among judges and scholars, those values overwhelmingly support concurrent national efforts to combat crime, particularly street crime. Even when federalism's values support good arguments both for and against a concurrent national role — as they do in the case of the Brady Act — those arguments are properly resolved by voters in the national political process, not by the Court.

IV. POLICY

To say that something is constitutionally permissible is not to say that it is prudent. In this part, we accordingly address the overfederalization thesis from a policy perspective. We begin by deconstructing two of the principal policy arguments of the overfederalization thesis. We conclude by offering a positive vision of the national government's proper role in combating crime. Policy considerations, we argue, suggest that crime has been underfederalized, not overfederalized. The national government should play a greater role in actual enforcement efforts than it now does, especially respecting the violent street crime that ravages poor urban areas.

A. THE BURDEN ON FEDERAL COURTS

Perhaps the principal policy argument against the federalization of crime-fighting points to the alleged burdens that criminal caseloads impose on the federal courts.²⁶⁴ The result of these burdens, proponents of the overfederalization thesis claim, is inefficiency and, very probably,

²⁶⁴ Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39 (1996); Oakley, *supra* note 1, at 59-62. Complaints about the burden enforcing federal criminal law imposes on the federal courts are hardly new. In 1925, for instance, Charles Warren decried "[the present congested condition of the dockets of the Federal Courts and the small prospect of relief to the heavily burdened Federal Judiciary, so long as Congress continue[d], every year, to expand the scope of the

disaster. Recent increases in criminal filings coupled with the time pressures of the Speedy Trial Act²⁶⁵ are said to delay civil cases, especially in districts with the heaviest drug offense dockets such as the Southern District of Florida.²⁶⁶ The consequence, some proponents of the overfederalization thesis warn, is nothing short of “the threat of the breakdown of our federal civil justice system”²⁶⁷ Others are less apocalyptic. They maintain that federal criminal cases, especially the ones involving routine street crime, detract from the federal courts’ specialized role of handling complex litigation²⁶⁸ and deciding civil cases that involve nationally important issues of federal constitutional and statutory law.²⁶⁹ As appealing as they might be, these arguments rest on incomplete and highly skewed presentations of the available empirical data.²⁷⁰

body of Federal crimes” Charles Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545 (1925).

²⁶⁵ 18 U.S.C. § 3162(a) (1985). The Act requires dismissal of charges that are not brought to trial within 70 days of filing. This period may be tolled for a variety of reasons.

²⁶⁶ LONG RANGE PLAN, *supra* note 1, at 11; FEDERAL COURTS STUDY, *supra* note 1, at 36; Beale, *supra* note 1, at 985, 987-88; Kadish, *supra* note 1, at 1250-51; Mengler, *supra* note 1, at 506 n.23.

²⁶⁷ Kadish, *supra* note 1, at 1251. *See also* Brickey, *supra* note 1, at 1154 (describing civil justice as “a casualty of the war on drugs”); FEDERAL COURTS STUDY, *supra* note 1, at 36. These various concerns even prompted Professor Beale to argue that continued federalization of crime is not only unwise as a policy matter, but also threatens to impair the federal courts’ core constitutional functions. Beale, *supra* note 1, at 988-93.

²⁶⁸ Mengler, *supra* note 1, at 521.

²⁶⁹ Kadish, *supra* note 1, at 1251 (quoting Chief Justice Rehnquist’s statement that we must “decide whether we want the federal courts to spend the majority of their time hearing general criminal cases or whether we want the federal courts to occupy their traditional role as a forum for civil disputes on nationally important issues such as commerce, constitutional questions, civil rights and civil liberties”).

²⁷⁰ Although one might respond to the alleged burden of deciding federal criminal cases by increasing the number of federal judges, proponents of the overfederalization thesis maintain that this solution would be unacceptable. *See, e.g.*, FEDERAL COURTS STUDY, *supra* note 1, at 7; Oakley, *supra* note 1, at 61 (“While the dilution of workload through the addition of judges is always incrementally attractive, in the long run it will cause the present system to collapse.”); Beale, *supra* note 1, at 991-93; Wallace letter, *supra* note 1, at 741-42. According to the Federal Courts Study Committee, for instance, an expansion in the number of federal judges might well diminish the quality of the federal courts. Such an expansion, the Committee warns, would reduce the quality of federal judges by overloading the process surrounding appointments and confirmations. *See, e.g.*, FEDERAL COURTS STUDY, *supra* note 1, at 7. *See also* Beale, *supra* note 1, at 991-93. *But see* Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 BYU L. REV. 67, 69-70 (“[The appointments process plays only a small role in maintaining quality.”); FEDERAL COURTS STUDY, *supra* note 1, at 38 (dissenting statement of Dennis and Moorhead) (“The Federal Courts Study Committee should be recommending more federal judgeships to create a greater capacity in our federal judiciary to meet its responsibilities and leave the choice of forum to prosecutors.”). Judges and academics have also warned that a larger federal judiciary would make the uniform interpretation of federal law more difficult. *See, e.g.*, FEDERAL COURTS STUDY, *supra* note 1, at 7-8; Mengler, *supra* note 1, at 522-23; Beale, *supra* note 1, at 991-92.

Consider the oft-repeated statistic that “federal criminal filings have increased 70% since 1980.”²⁷¹ Because total federal criminal filings were lower in that year than in any other year since 1917,²⁷² using 1980 as a starting point is misleading. Moreover, the absolute number of criminal filings is an exceedingly poor measure of the burden on federal courts. One also must take into account the greatly expanded size of the federal judiciary,²⁷³ whose growth has far exceeded that of the general population.

As measured by trends in criminal filings per judgeship,²⁷⁴ the burden of criminal filings on the federal courts has declined quite dramatically. In 1905, for instance, there were 295 federal criminal cases filed per judgeship. By 1925, during the height of Prohibition, the per judgeship criminal caseload averaged 544 cases. In 1945, the average criminal caseload per judgeship was still 207 cases; twenty years later, in 1965, the federal judiciary was responsible for some 115 criminal filings per judgeship. In 1980, when federal criminal filings were at a sixty-plus year low, the per-judgeship filings figure was 56 cases. After 1980, the per-judgeship criminal case filings figure began to drift upward throughout the 1980s to 69 cases in 1985 and 81 in 1990 before dropping to 71 in 1995. Expressed in terms of numbers of filings, the burden of criminal cases on individual federal judges has declined fairly steadily since the turn of the century. In the 1980s and so far in the 1990s, that burden has been less than in any decade since (at least) the turn of the century and, as Figure 4 (below) shows, is less than half the level of the 1940s.²⁷⁵

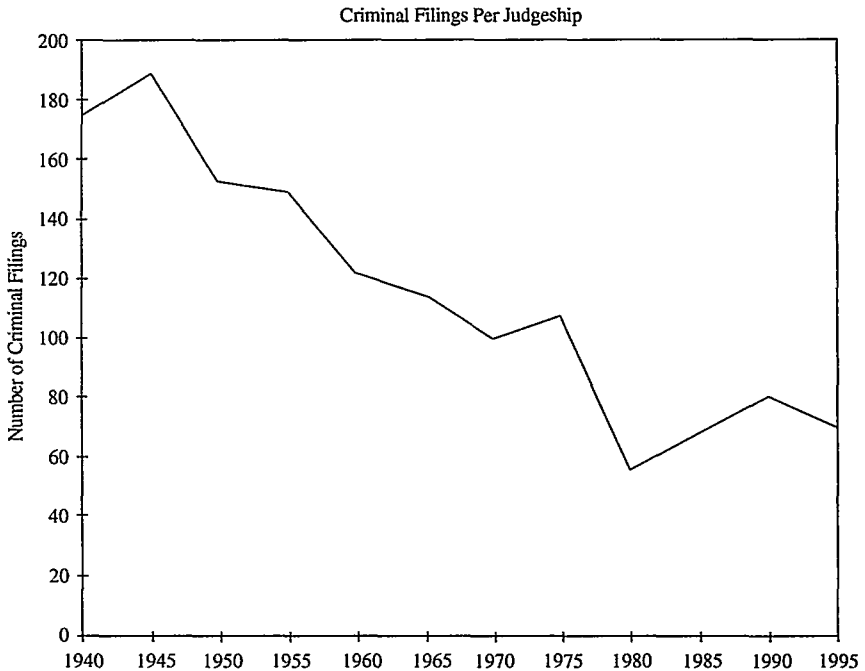
²⁷¹ See *supra* note 21.

²⁷² See *supra* note 25.

²⁷³ From 1975 to 1995, the number of federal judges rose from 399 to 649. In addition, although the total number of magistrate judges increased only slightly, the allocation of full-time magistrate judges rose from 143 in 1975 to 416 in 1995. LONG RANGE PLAN, *supra* note 1, at 11.

²⁷⁴ Except as noted, the term “judgeship” as used in this section refers to the number of judgeships authorized by Congress in a given year. Judgeship figures from 1940-1995 include the judges of territorial district courts. Neither active-status senior district judges nor federal magistrate judges are counted in the Administrative Office’s calculations of per judgeship caseloads, even though both categories of judges are responsible for the disposition of large numbers of criminal cases. In this respect, the critics’ claims concerning judicial workloads would appear to be even more exaggerated.

²⁷⁵ The overall trend remains the same if one focuses only on felony filings, which compose about two thirds of the criminal caseload. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 1995 REPORT OF THE DIRECTOR 341-59 (no date of publication) [hereinafter JUDICIAL BUSINESS 1995] (detailing magistrate activities in federal fiscal year 1995). Between 1978 and 1995, the number of felony filings in the federal district courts increased by about 31.5%. Judicial capacity, as measured by the number of authorized district judgeships, increased in that interval from 399 judgeships to 649 — or by 63%. The result: a decline in the per-judgeship felony caseload from 62 cases in 1978 to 50 cases in 1995. While it may be true that the number of felony defendants prosecuted was slightly higher in 1995 than it was in 1978, the total number of per-judgeship felony defendants prosecuted actually declined from 87 in 1978 to 80 in 1995.



Of course, an increase in complexity of federal criminal cases might compensate somewhat for the striking historical decrease in the numbers of filings per judge. Claims of increased complexity, however, are at least exaggerated and quite probably wrong. Professor Beale, for example, has noted that the number of defendants prosecuted per case — one measure of case complexity — has risen in recent years.²⁷⁶ Yet in 1945, the number of defendants-per-case-filing was 1.6, and the fifty year *average* has been about 1.3. In this context, 1995's figure of 1.4 defendants prosecuted per case filing is hardly a deviation from historical norms,

It would be misleading to focus only on felony filings when comparing the burden of criminal cases on federal judges in the 1980s and subsequent years with the years prior to 1979. Until 1971, when the federal magistrates system was created, Pub. L. No. 90-578, 82 Stat. 1107 (1968) (codified as amended at 28 U.S.C. §§ 604, 631-639 and 18 U.S.C. §§ 3060, 3401-02 (1992)), Article III judges were responsible for *all* misdemeanor and felony criminal dispositions and most collateral matters associated with the criminal docket, save a handful of selected matters that could be addressed by United States Commissioners. Until 1979, the role of the magistrate was severely limited. *See generally* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, A CONSTITUTIONAL ANALYSIS OF MAGISTRATE JUDGE AUTHORITY (June 1993). Since that time, however, federal magistrates have assumed a significant share of the duties once handled by the district judges. Federal magistrates were responsible, in 1995, for the disposition of more than 46,000 matters deriving from the federal courts' criminal caseload, including most pretrial matters associated with felony prosecutions and the final disposition of virtually all petty offenses and misdemeanors.

²⁷⁶ Beale, *supra* note 264, at 45.

and its departure from the historical mean is not statistically significant.²⁷⁷

The available data also belie the contention that criminal trials impose a larger burden on federal courts now than in the past. The Long Range Planning Committee of the Judicial Conference, for example, complained recently that “[i]n 1994, criminal filings were only 13 percent of all filings, but 42 percent of all trials [sic].”²⁷⁸ This complaint, however, overlooks the more important fact that the number of criminal trials²⁷⁹ per judgeship has declined. In 1995, each federal judge, on average, conducted only seven criminal trials.²⁸⁰ This is the lowest number of almost any time in the last half-century and is roughly only one-third of the twenty criminal trials conducted per federal judgeship in 1945. That “the average length of a criminal jury trial has increased”²⁸¹ matters little given the fact that each federal judge, on average, tries so many fewer criminal cases now.

Trends in the number of criminal filings, trials, and defendants prosecuted per judgeship compellingly indicate that the burden criminal cases impose on individual federal judges is far less now than in prior decades. The number of criminal filings per judgeship has shown a striking and steady pattern of decline since the turn of the century. The complexity of each case, as measured by the number of defendants per case, has remained relatively constant over the last half century. In fact, the declining number of criminal trials per judge tends to indicate that, on average, each criminal case is less complex and less burdensome.²⁸²

²⁷⁷ The means discussed in this paragraph were obtained by averaging defendant- and trial-related statistics from the administrative office of the United States Courts Annual Report.

²⁷⁸ LONG RANGE PLAN, *supra* note 1, at 12.

²⁷⁹ In about 1970, the Administrative Office (AO) changed the definition of “trial” for the purposes of reporting the “total number of criminal trials” in table C-7 of its Annual Reports. In the AO’s reports since that time, the “total criminal trials” figure has included, *inter alia*, suppression hearings handled by district judges, other contested pre-trial motions, and sentencing hearings. In this article, however, references to “criminal trials” and “criminal trials per judgeship” contemplate “a proceeding commenced for the purpose of obtaining . . . a verdict in a criminal case” — that is, a trial on the merits. *See, e.g.*, JUDICIAL BUSINESS 1995, *supra* note 275, at 361 (table T-1: showing federal court trial statistics for trials on the merits).

²⁸⁰ JUDICIAL BUSINESS 1995, *supra* note 275, at 361.

²⁸¹ LONG RANGE PLAN, *supra* note 1, at 12.

²⁸² Another strand of the “complexity” argument focuses on the case mix — that is, the kinds of criminal cases that are filed today as compared with the past. For example, Professor Beale has written:

The makeup of the federal criminal caseload has changed significantly, requiring more judicial resources. The federal caseload in the early 1970s included a substantial number of relatively straightforward offenses that could typically be disposed of quickly, such as auto theft, forgery, counterfeiting, and selective service offenses. These offenses accounted for roughly one quarter of all federal defendants charged in 1972, but only 4 percent in 1992. During the same period, the percentage of defendants charged with drug offenses grew from 18 to 41 percent.

Far from justifying a shift of criminal cases from federal to state courts, the available data point the other way, suggesting that the federal criminal caseload could stand to be increased.

Criminal cases impose a much heavier burden on state judges than on federal judges. According to the National Center for State Courts, the average criminal caseload for state judges in courts of general jurisdiction in 1990 was an extraordinary 406 criminal cases per judge, a caseload that was five times higher than the federal judiciary's in the same year.²⁸³ In 1994, the per-judge caseload in the state courts had *increased* to 417 criminal cases, while the federal per-judgeship caseload had dropped to 74.²⁸⁴ As the Center has noted, "[w]ith only 14 times as many judges as the federal judiciary, the state general jurisdiction judiciary handles 90 times as many criminal cases"²⁸⁵ Considering the far lighter and declining criminal caseloads of federal judges, the daunting caseloads already managed by state judges strongly suggest that federal courts are not doing their fair share and that crime has been underfederalized, not overfederalized.

Beale, *supra* note 264, at 48. At least three observations might be made about this statement. First, Beale cites no authority for the proposition that "auto theft, forgery, counterfeiting, and selective service offenses" are "relatively straightforward" and can "be disposed of quickly." Second, the fact that the case mix has changed over time is not, in and of itself, evidence of increased burdens, but only an indication of shifting law enforcement priorities fueled by the demands of the public and the incidence of particular kinds of crime. Finally, to the extent that Beale is claiming, as she clearly intends to, that federal criminal cases are more complex than in the past, this fact would appear to fit precisely within the new federalists' position that the federal courts' criminal jurisdiction should be reserved for only the most complex and "significant" cases—such as major drug conspiracy cases: It is hardly a criticism that the federal courts are "wasting their time" with minutiae.

Finally, Professor Beale and others have focused a substantial portion of their burdens' related criticisms of the current national criminal justice role on the procedural requirements and consequences of the Federal Sentencing Guidelines. *See, e.g., id.* at 48-50. Although the demands that the Guidelines have ostensibly made on federal judicial resources may be a reason to modify or eliminate the Guidelines, arguments of this variety have nothing whatever to do with the claim that criminal justice has been overfederalized.

²⁸³ OSTROM & KAUDER, *supra* note 29, at 21.

²⁸⁴ *Id.*

²⁸⁵ *Id.* *See also* J. Anthony Kline, *Comment: The Politicization of Crime*, 46 HASTINGS L.J. 1087, 1088 (1995) (footnotes omitted):

The adverse impact of the extraordinary growth in the criminal caseloads of state trial judges is that such judges lack the resources available to federal trial judges. The federal judicial budget for the present year is about \$2.9 billion, or roughly \$4 million per federal judge. The California judiciary is about twice as large as the federal judiciary, but its present annual budget, approximately \$774 million, is less than one-fourth the federal budget and amounts to less than \$1 million per superior court judge.

B. THE POLITICS OF CRIME

Judicial and academic hostility to recent federal crime legislation partly flows from the sense that such legislation is the product of political posturing and expediency.²⁸⁶ It is common knowledge that national politicians can reap significant political gains by enacting popular but largely symbolic anti-crime measures. By doing so, they are able to achieve the support of the voting public while antagonizing only criminals, who have essentially no political clout, and perhaps also federal judges, who are few in number.²⁸⁷ Adherents of the overfederalization thesis warn that the result of such tactics is the continual and undue expansion of national criminal jurisdiction. To counteract the political incentives facing national politicians, they suggest that states should have exclusive authority over crime as a matter of policy and, perhaps, also as a matter of constitutional law.

Although we largely accept this analysis of the underlying political dynamic, the conclusion that it favors state over national authority does not follow. State legislators face precisely the same incentives as federal legislators. By embracing tough anti-crime symbolism, they, too, can reap large political benefits at low political cost. Not surprisingly, many of the federal statutes that judges and academics find objectionable, such as the Gun-Free School Zones Act that *Lopez* invalidated, essentially track laws widely adopted by the states.²⁸⁸ We share concern that anti-crime measures too often reflect political grandstanding rather than a careful and realistic balancing of costs and benefits. This problem, however, afflicts all levels of government, not just the national government; it is a question of democratic government, not federalism. The political incentives that proponents of the overfederalization thesis have spotlighted argue in favor of giving expert commissions and/or courts a greater authority over the content of state and federal anti-crime legislation. However, neither as a matter of policy nor constitutional law do political incentives justify vesting legislative jurisdiction exclusively with the states rather than with both the states and the national government.

The conclusions drawn by proponents of the overfederalization thesis are overbroad in an additional sense. In a democracy, the fact that legislation is designed to curry favor with voters does not imply that it is

²⁸⁶ See, e.g., Rehnquist, *Seen in a Glass Darkly*, *supra* note 1, at 7; Brickey, *supra* note 1, at 1165; Marshall, *supra* note 1, at 722-25; Kadish, *supra* note 1, at 1248-49; Mengler, *supra* note 1, at 529; Heymann & Moore, *supra* note 1, at 111-12.

²⁸⁷ Mengler, *supra* note 1, at 529-30.

²⁸⁸ See *supra* note 208 (43 states had adopted laws similar to Gun-Free School Zones Act). See also *supra* note 222 and accompanying text (46 States have laws identical or similar to Megan's law); *supra* note 239 (at least 42 states have criminalized willful failure to pay child support).

wrongheaded or unconstitutional. As a result of the widespread public concern over crime and support for efforts to combat it, national politicians do have strong incentives to expand the national criminal jurisdiction. That, however, does not supply a reason for concluding that the expansion is a bad thing. In fact, in a democracy, legislative responsiveness to widely shared views strongly supports the opposite conclusion.

C. A POSITIVE VISION

As a matter of policy, what is the best mix of state and national jurisdiction over crime? We believe the answer should reflect federalism's underlying values. Those values not only have constitutional stature, but also embrace important policy considerations such as responsiveness and efficiency. It would be foolish, of course, to suppose that federalism's values yield a uniquely correct level of national intervention or dictate the ideal balance between national funding and enforcement efforts. Nonetheless, they do support the general conclusions that the national government's criminal jurisdiction should be wide-ranging, that the various rationales for national intervention should be incorporated into investigative and prosecutorial guidelines, but should not be judicially enforceable, and that the national share of enforcement efforts should be increased, particularly with respect to violent street crime in poor urban neighborhoods.

1. *The Scope of National Criminal Jurisdiction*

Given that the various rationales for national authority transcend offenses,²⁸⁹ *Lopez*, lower courts, and the proponents of the overfederalization thesis err in seeking to limit national jurisdiction to fewer offenses. Nonetheless, concluding that national criminal jurisdiction should encompass a broad array of offenses leaves open the possibility that this jurisdiction should be limited in other ways.

As an alternative to limiting national jurisdiction to a relatively short list of offenses, the scope of national jurisdiction might be tied to the various rationales for national intervention. Under this approach, federal investigators and prosecutors could pursue a case within any category of offenses, but only by showing a need for national intervention. The various rationales for national intervention could be codified into statutes, and courts could make case-by-case jurisdictional determinations based upon them.

This approach for limiting the national criminal jurisdiction is far more attractive than the approach proposed by the proponents of the overfederalization thesis. It is undoubtedly true that having federal offi-

²⁸⁹ See *supra* notes 190-94 and accompanying text.

cials consider the various rationales for national intervention would improve the exercise of national jurisdiction. The Department of Justice should incorporate these rationales into its internal guidelines and require that federal law enforcement agencies and federal prosecutors consider them when they decide when and how to supplement state enforcement efforts.²⁹⁰

For a variety of reasons, however, it would be unwise to give courts authority to police adherence to these rationales. First, forcing federal investigators and prosecutors to demonstrate the presence of these rationales to a judge would unduly restrict the exercise of concurrent national authority. For example, one of the rationales for national intervention, which is based on the states' tendency to ignore the out-of-state benefits of their enforcement efforts, does not lend itself to case-by-case showings because this rationale predicts that states will choose a suboptimal level of enforcement across-the-board.²⁹¹ Second, case-by-case showings of a need for national intervention raise issues of workability and judicial competence. How would courts give content to and enforce the redistributive rationale for national intervention? How would courts judge the relative efficiency of state and national enforcement? Third, limiting national jurisdiction to the demonstrated presence of particular factors would lead to costly litigation over issues of jurisdiction.

While precipitating these costs, the determinations of jurisdiction discussed above are not necessary to advance important countervailing values. As we have seen, the typical rationales for exclusive state jurisdiction have little application to crime-fighting and, on balance, actually provide general support for concurrent national authority.²⁹² In addition, state courts and judges confront far greater caseloads than do federal courts and judges.²⁹³

These various considerations undercut the proposal to require a demonstrated need for national intervention in each case. Instead, they suggest that national jurisdiction should be defined broadly, leaving the wise use of such jurisdiction in individual cases to federal police and

²⁹⁰ See Harry Litman & Mark D. Greenberg, *Reporters' Draft for the Working Group on Federal-State Cooperation*, 46 HASTINGS L.J. 1319 (1995). Courts have held that the Justice Department's internal guidelines do not create judicially enforceable rights. See *United States v. Paternostro*, 966 F.2d 907, 912 (5th Cir. 1992); *United States v. Pungitore*, 910 F.2d 1084, 1120 (3d Cir. 1990).

²⁹¹ As for efficiency, the exercise of national authority might be more efficient even in the absence of any efficiency consideration that might be specified in a statute. In the course of investigating a multistage drug ring, for example, federal law enforcement agents might stumble upon an unrelated murder. Even though there is no need for interstate coordination, specialized resources, or harsher punishment, the murder might be more efficiently investigated and prosecuted at the federal level.

²⁹² See *infra* Part III.A.

²⁹³ See *supra* notes 283-85 and accompanying text.

prosecutors. Although the rationales for national support should be incorporated into internal investigative and prosecutorial guidelines, they should not be converted into judicially enforceable rules.

2. *The Exercise of National Jurisdiction*

Concurrent jurisdiction in a particular area does not mean that the national government should always or routinely exercise its jurisdiction. The national government, in fact, has been very selective about exercising its concurrent jurisdiction.²⁹⁴ As Congress has expanded the list of activities over which the national system has concurrent authority, the national share of enforcement activity has actually diminished (and accounts for less than 10% of all such activity).²⁹⁵

Policy considerations suggest some conclusions regarding the appropriate exercise of national criminal jurisdiction. Some of these conclusions largely confirm the wisdom of existing practices; others require important changes.

Perhaps the most obvious conclusion is that, within the area of concurrent jurisdiction, national enforcement efforts should be substantially guided by efficiency considerations. National enforcement efforts are thus warranted where a need exists for interstate coordination, specialized resources, or the harsher penalties associated with the federal sentencing guidelines. To a significant degree, existing patterns of national enforcement probably conform with this conclusion.²⁹⁶

A second conclusion also supports existing practices: national criminal jurisdiction is appropriately used to respond to crime that the public regards especially serious. National criminal jurisdiction has always been sensitive to changing public preoccupations. While auto theft prosecutions accounted for a significant percentage of federal filings in the 1960s, drug prosecutions have accounted for an increasing share of federal filings over the last fifteen years.²⁹⁷ In the early 1930s, Congress

²⁹⁴ Zimring & Hawkins, *supra* note 1, at 16 ("The virtually unlimited power of the national government both to enter the field and to exclude other levels of government is exercised with extraordinary restraint under current conditions of American justice."); Jeffries & Gleeson, *supra* note 20, at 1098-1101.

²⁹⁵ See *supra* Part I; Zimring & Hawkins, *supra* note 1, at 16.

²⁹⁶ In a recent article, for example, two federal prosecutors report that the Department of Justice's prosecutorial criteria respecting the Child Support Recovery Act "are designed to target the few cases that states are unable to handle because of interstate barriers" and that "[the Department filed charges under the . . . Act against 28 persons" in 1994. Gorelick & Litman, *supra* note 165, at 975. See also *id.* at 976 (noting that the "Department's prosecutorial policy emphasizes . . . allocation of criminal justice resources according to the comparative advantage of the federal, state and local governments") (emphasis in original); Litman & Greenberg, *supra* note 1, at 1325-26 (discussing the joint state-federal Triggerlock program and the Anti-Violence Initiative).

²⁹⁷ See Schwarzer & Wheeler, *supra* note 1, at 695.

responded to widespread public concern over the kidnaping of Charles Lindbergh's baby by making kidnaping a federal offense in certain circumstances.²⁹⁸ In the 1990s, Congress similarly responded to a few horrific and widely publicized accounts of carjacking by making the crime a federal offense.²⁹⁹ As these exchanges illustrate, national law enforcement efforts reflect and respond to changing public perceptions.

The conventional legal wisdom is sharply critical of the use of national criminal jurisdiction to accommodate what it characterizes as fickle political fashion. Proponents of the overfederalization thesis maintain that the national government has become over-involved in drug offenses.³⁰⁰ They also object to creating federal offenses simply because the public believes that they address important problems, such as carjacking or violence against women.³⁰¹

One can easily criticize the merits of the public's crime-fighting priorities. For instance, some scholars have made impressive arguments that these priorities rely too heavily on incarceration.³⁰² Overcriminalization, however, is not overfederalization. Federalism emphasizes the proper distribution of jurisdiction at all levels between the national and state criminal justice systems, not the proper overall level of resources devoted to particular uses of this jurisdiction. Even if the public decided to decriminalize drug use or shift resources from punishment to prevention, questions of federalism would arise and remain almost entirely independent of the merit of these policy shifts. The public's current crime-fighting priorities might be misplaced, but no policy relating to federalism condemns the supplemental use of national power for their implementation.

Indeed, from the standpoint of federalism, national enforcement efforts *should* be guided partly by the priority the public attaches to particular kinds of crime, such as street crime and domestic violence. Drugs, domestic violence, and carjacking each carry significant national economic consequences. While there are no strong arguments for exclusive state authority over these matters, considerable justification exists for a

²⁹⁸ FRIEDMAN, *supra* note 7, at 266.

²⁹⁹ See *supra* notes 216, 218-19, and accompanying text. For a discussion of impetus for the federal carjacking statute, see Brickey, *supra* note 1, at 1162 n.154; Zimring & Hawkins, *supra* note 1, at 20; ANTI CAR THEFT ACT OF 1992, H.R. REP. NO. 102-851, pt. 2, at 14-15 (1992).

³⁰⁰ See, e.g., Kadish, *supra* note 1, at 1251; Miner, *supra* note 19, at 683. See also *supra* note 190.

³⁰¹ See, e.g., Marshall, *supra* note 1, at 734-37; Kadish, *supra* note 1, at 1249; Zimring & Hawkins, *supra* note 1, at 20-21.

³⁰² For examples arguing, *inter alia*, that recent public priorities have resulted in the overuse of incarceration, see FRANKLIN E. ZIMRING & GORD HAWKINS, INCAPACITATION (1995); MICHAEL TONRY, MALIGN NEGLECT — RACE, CRIME, AND PUNISHMENT IN AMERICA (1995).

concurrent national role. As we have seen, the tendency of states to overlook the out-of-state benefits of law enforcement suggests that individual states will choose a suboptimal level of enforcement across-the-board.³⁰³ Given the limitations on, and alternative uses of, national resources, the national government obviously will not and cannot become equally involved in all areas. Decisions must be made about where to concentrate supplemental national enforcement. In a democracy, it is desirable for these decisions to be made, in part, in accordance with which types of crime the public regards as particularly serious and threatening.

Federalism-based policies lead to a third conclusion, which, unlike the first two, would require a rethinking and reformulation of current practices: the violent street crime that afflicts poor neighborhoods should be one of the primary targets of supplemental national funding and enforcement. We can now draw together the three separate lines of inquiry, each of which lead to this conclusion. To begin, the public regards street crime as particularly threatening and, as we have seen, public priorities appropriately influence the allocation of national enforcement resources. In addition, the national government's accepted role in promoting racial equality can help sustain a national focus on street crime, which disproportionately besets African-American communities. Finally, the redistributive rationale for national authority also applies. It is widely recognized in other contexts that states have great difficulty in adopting redistributive measures and that, where redistribution is desirable, a need for national intervention exists.³⁰⁴ It is widely overlooked, however, that eradicating street crime in poor neighborhoods entails just such a redistribution and that, consequently, a special need for supplemental national involvement exists.

In addition to standing conventional legal wisdom on its head,³⁰⁵ the conclusion that the national government has an important role to play in combating street crime in poor neighborhoods would require some changes at the level of enforcement practices. Some national enforcement efforts are consistent with this role. The Department of Justice, for example, has formed joint state, local, and federal law enforcement task forces to combat, *inter alia*, gang-related crimes.³⁰⁶ Such cooperative

³⁰³ See *supra* Part III.B.4.a.

³⁰⁴ See *supra* note 185 and accompanying text.

³⁰⁵ It is true that many proponents of the overfederalization thesis affirm a national role in combating the drug problem, which tends to be especially severe in poor areas. But they see this national role as flowing solely from the national government's greater efficiency in investigating interstate conspiracies or handling especially complex cases. See *supra* note 190. The conventional legal wisdom sees no justification for national intervention that extends beyond interjurisdictional drug rings to violent street crime. See *id.* and accompanying text. Indeed, it views street crime as paradigmatically inappropriate for national intervention. See *supra* notes 2, 59, 190, and accompanying text.

³⁰⁶ See Gorelick & Litman, *supra* note 165, at 970, 977.

combinations of local and national officials can serve as a model for increased national efforts to fight street crime in poor areas. Other national efforts, however, are not consistent with a supplemental national role that accords some priority to fighting this crime. The 1994 Crime Control Act, for instance, provides funds for hiring additional police officers, but contains no preference for poor neighborhoods.³⁰⁷ There is no articulated national policy, at either the legislative or law enforcement levels, of giving some priority to combating crime in poor neighborhoods. Federalism considerations suggest the need for such an articulation and for a concomitant redirection of enforcement efforts based upon this priority.

Federalism-based policies also suggest a fourth and final conclusion: The national government should increase its share of enforcement activities. This conclusion flows from two sources. One is the evidence that the relative national role in enforcing the criminal law has been diminishing since the 1930s.³⁰⁸ As a result of technological changes and the increased interdependence of American life during that period, more crime crosses state borders, specialized law enforcement technology and expertise have wider application, enforcement produces more spillover benefits in other states, and the pressures of the race-to-the-bottom are intensified. In short, the need for national intervention now extends to a greater share of criminal activity. Federalism-based considerations suggest that the national role should increase, not decrease.

The far heavier criminal caseloads faced by state courts and judges³⁰⁹ also indicate a need for a greater national role. The more burdened state criminal justice systems tend to confirm the hypothesis, suggested by the theory of federalism, that States alone will not devote adequate resources to enforcement. These burdens also strongly indicate the need for increased national enforcement and funding. The national government is currently not doing its fair share in addressing a problem that afflicts both individual communities and the nation as whole.

CONCLUSION

On the levels of empirical fact, constitutional law, and social policy, the current legal thought on and off the Supreme Court has matters ex-

³⁰⁷ The Act requires that 50% of the grant funds be allocated to local governments having populations of 150,000 people or less. 42 U.S.C. § 3793(11)(B) (1994). See *VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994*, H.R. REP. NO. 103-324 (1994), reprinted in 1994 U.S.C.C.A.N. 1813 (additional views of Charles E. Schumer, D-N.Y.) (objecting to channeling 60% of the funds to local governments having populations of 100,000 or less because "it would deny the larger cities, which have the most severe crime problems and in which police departments are stretched thinnest, from access to most of the grant money").

³⁰⁸ See *supra* Part I.

³⁰⁹ See *supra* notes 283-85 and accompanying text.

actly backwards. The empirical evidence shows that since the 1930s, the national share in the exercise of crime-fighting authority has been decreasing, not increasing. As for the Constitution, it establishes no presumption in favor of exclusive state authority over crime control. The constitutional values of federalism, which are the only sources from which the Constitution's meaning now can be gleaned, decisively support a concurrent national role in enforcing a broad array of offenses. In addition, policy considerations do not lead to the conclusion that the national government's crime-fighting role should be pared down. They instead suggest the need to increase the national share of enforcement. This conclusion is especially true with respect to violent street crime in poor neighborhoods, which is precisely the kind of crime that the Justices and other legal elites most strongly believe should be left to the states.

Whether due to disagreement with the merits of existing crime-fighting priorities, unstated concerns over civil liberties, or undue sensitivity to the parochial interests of the federal judiciary, the conventional legal wisdom overlooks the lofty appeal of the concurrent national role we have outlined. Crime-fighting efforts, in general, have the unequivocal support of the public nationwide. Due to this nationwide consensus and the concomitant popular support for joint state and federal efforts, crime is one arena in which cooperative federalism can work best. Crime limits the opportunities of both its actual and potential victims, particularly in the poor urban areas where we have argued national support should be concentrated. Federalism-based considerations suggest that the national government should increase its share of enforcement efforts in a way that advances its historic and inspiring role of promoting equality of opportunity along income and racial lines.