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Misguided Federalism

Peter J. Henning

I. INTRODUCTION

Federalism has moved to the forefront of constitutional analysis in recent years as a narrow majority of the Supreme Court has begun to rein in congressional assertions of authority to legislate in areas viewed as beyond the constitutional grant of power to the federal government. One means of curtailing congressional authority is by enforcing limits on the Commerce Clause, perhaps the broadest of Congress’s regulatory powers. In United States v. Lopez, the Court sent a “constitutional wake-up call” making clear that it would no longer acquiesce in every congressional enactment purportedly adopted as an exercise of the commerce power when it invalidated the Gun-Free School Zones Act. This marked the first time since 1936 that the Court overturned a statute because it exceeded Congress’s authority to regulate interstate commerce. Lopez reiterated that the Commerce Clause provides only a limited grant of legislative power—despite the broad language used in opinions such as Wickard v. Filburn—that reflects the fundamental constitutional principle of federalism: the Constitution “withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation.”

Five years after Lopez, in United States v. Morrison, the Court applied its Commerce Clause analysis in striking down a provision of the Violence Against

* Professor of Law, Wayne State University Law School. Copyright © 2003 Peter J. Henning. The author appreciates the assistance provided by the Wayne State University Law School Works-in-Progress Program, and especially the suggestions of Bob Sedler, Kingsley Browne, Erica Eisinger, Jon Weinberg, John Rothchild, Mike McIntyre, Dave Moran, Vince Wellman, and John Dolan.


5. 317 U.S. 111, 120 (1942) (applying aggregate effect on commerce test in upholding regulation of noncommercial, intrastate farming of wheat).


Women Act ("VAWA") that created a federal civil damages action for gender-motivated violence. The Court rejected the extensive congressional findings concerning the economic impact of such misconduct as the constitutional basis for the legislation, asserting that the judiciary has an independent duty to enforce the limits on congressional power under the federalist structure of the Constitution. The Court held that federalism constrains the federal government's authority to reach certain areas already subject to state control because "[t]he Constitution requires a distinction between what is truly national and what is truly local."10

The Court’s recent reliance on federalism as an independent limitation on congressional power to legislate in areas that infringe on state sovereignty has a significant impact on the application of federal criminal laws to misconduct traditionally viewed as a matter of local concern. Federal statutes reach a wide

8. See id. at 628-31 & 629-31 nn.3-8 (Souter, J., dissenting) (distinguishing the case from Lopez based on "the mountain of data assembled by Congress, here showing the effects of violence against women on interstate commerce").

9. Id. at 616 n.7 ("No doubt the political branches have a role in interpreting and applying the Constitution, but ever since Marbury this Court has remained the ultimate expositor of the constitutional text."). The majority rejected Justice Souter's argument in a dissenting opinion that the political process was the only constitutional restraint on congressional enactments under the commerce power. The Court stated:

[Justice Souter's] assertion that, from Gibbons on, public opinion has been the only restraint on the congressional exercise of the commerce power is true only insofar as it contends that political accountability is and has been the only limit on Congress' exercise of the commerce power within that power's outer bounds. As the language surrounding that relied upon by Justice SOUTER makes clear, Gibbons did not remove from this Court the authority to define that boundary.

Id.

variety of crimes—such as car-jacking, murder-for-hire schemes, the use of violence to block access to abortion clinics, and even armed robberies of individuals—that are virtually identical to offenses normally subject to prosecution by state authorities. Because there are no federal common law crimes, the federal government’s ability to punish misconduct is limited by the requirement that Congress regulate under one of its enumerated powers in enacting criminal legislation. The Morrison Court expressed concern that the extension of federal authority through VAWA to rape, a common law felony prosecuted in every state, went beyond Congress’s legislative power because “we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.”

As Morrison exemplifies, the Court’s reinvigoration of federalism as a limit on congressional authority affects the application of federal criminal statutes. Even before Lopez, academic commentary and the federal judiciary questioned

11. 18 U.S.C. § 2119 (2000) (“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 . . . .”).


13. 18 U.S.C. § 248 (2000) (Freedom of Access to Clinic Entrances Act) (“Whoever by force or threat of force or by physical obstruction, intentionally injures, intimidates, or interferes with . . . any person because that person is or has been . . . obtaining or providing reproductive health services . . . .”).

14. 18 U.S.C. § 1951(a) (2000) (Hobbs Act) (“Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery . . . .”; see United States v. Peterson, 236 F.3d 848, 857 (7th Cir. 2001) (overturning conviction under the Hobbs Act for robbery of local drug dealer for failure to establish commerce element).

15. See United States v. Hudson & Goodwin, 11 U.S. 32, 34 (1812) (“The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.”); Ben Rosenberg, The Growth of Federal Criminal Common Law, 29 AM. J. CRIM. L. 193, 194 (2002) (“That all federal criminal law derives from statutes is a cornerstone of the federal criminal jurisprudence.”). Mr. Rosenberg argues that by adopting open-ended statutes, Congress effectively permits federal courts to create a type of common law for federal offenses, although the foundation remains statutory rather than the pure common law development of criminal offenses. Id.


17. See Sara Sun Beale, The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors, 51 DUKE L.J. 1641, 1646 (2002) (“Lopez and Morrison provide a [constitutional] doctrine with which the Supreme Court can prune back federal criminal jurisdiction, particularly in cases involving conduct the Court deems non-economic.”).
the policy of extending federal jurisdiction to a host of crimes that were—and remain—traditionally within the purview of state and local prosecutors and courts. The Supreme Court, in Lopez and Morrison, added a constitutional dimension to this critique by raising a significant question regarding Congress’s authority to adopt provisions extending federal authority to criminal misconduct historically prosecuted by the states.

Although defendants have been largely unsuccessful in challenging the constitutionality of statutes on Commerce Clause grounds since Lopez, some lower courts have accepted constitutional challenges to the particular application of federal statutes to ostensibly local crimes as violative of federalism principles. In United States v. McCoy, the Ninth Circuit held that a provision of the child

18. See, e.g., JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 24 (1995) ("[C]riminal activity should be prosecuted in a federal court only in those instances in which state court prosecution is not appropriate or where federal interests are paramount."); Kathleen F. Brickey, Criminal Mischief: The Federalization of American Criminal Law, 46 HASTINGS L.J. 1135, 1172 (1995) ("Federal duplication of state criminal law unduly burdens the federal justice system, which is ill-equipped to supplant local law enforcement."); William J. Stuntz, The Pathological Politics of Criminal Law, 100 MICH. L. REV. 505, 517 (2001) ("Federal criminal law probably covers more conduct—and a good deal more innocuous conduct—than any state criminal code."). But see Susan R. Klein, Independent-Norm Federalism in Criminal Law, 90 CAL. L. REV. 1541, 1555 (2002) ("[T]he threat of federal encroachment on state criminal-justice systems is small. Not only will the total percentage of federal criminal-law actions per state criminal-law filings remain small, but most of these federal prosecutions will continue to be filed in the same few areas—immigration violations, interstate and international drug offenses, and complex white-collar offenses.").

19. In an article written shortly after the Court’s decision in Lopez, I predicted that “the effect of Lopez on federal criminal law is likely to be minimal” because Congress was not apt to make the mistake of passing a statute that did not contain a commerce element. Peter J. Henning, Foreword: Statutory Interpretation and the Federalization of Criminal Law, 86 J. CRIM. L. & CRIMINOLOGY 1167, 1169 (1996). The civil damages provision of VAWA did not contain such an element of proof, although the criminal provisions require proof of interstate movement. While Lopez, standing alone, was not likely to have much effect on federal criminal law, Morrison’s advancement of federalism as a possible separate limitation on congressional power to adopt regulations, including criminal laws, can have a much greater effect than the more limited Commerce Clause analysis in Lopez. I am not sure if I stand corrected, but my prediction was not particularly prescient, as demonstrated by this Article.


pornography statute was "unconstitutional as applied to simple interstate possession of a visual depiction," even though the government had introduced sufficient proof of all the elements of the offense, including the interstate commerce element contained in the statute. 22 Similarly, in United States v. Garcia, 23 a district court dismissed a prosecution under the Violent Crime in Aid of Racketeering 24 statute because the provision was unconstitutional as applied to a murder that did not involve any obvious interstate nexus. In United States v. Hickman 25 and United States v. McFarland, 26 the Fifth Circuit, sitting en banc, twice divided evenly on the issue of the constitutionality of a prosecution under the Hobbs Act that involved a series of "purely local" armed robberies. In Hickman, the dissenting judges argued that Lopez and Morrison required reversal of the convictions because "[t]he ad hoc and random use of the Hobbs Act to prosecute local robberies masks the dramatic reach of federal power." 27 The Supreme Court's assertion in Morrison regarding the constitutional "distinction between what is truly national and what is truly local" 28 has provided added impetus for defendants to dispute the federal government's authority to enforce laws when the offense involves conduct that historically was not subject to federal prosecution. 29

Invoking federalism as an independent principle to limit the federal government's authority to prosecute crimes that state and local authorities

22. Id. at *1 (emphasis added). The statute, 18 U.S.C. Section 2252(a)(4)(B), prohibits possession of a visual depiction of a minor "engaging in sexually explicit conduct" if it "was produced using materials which have been mailed or so shipped or transported" in interstate commerce. The government introduced evidence that the camera and film used to take the picture were shipped in interstate commerce. Id. at *2.


25. 179 F.3d 230 (5th Cir. 1999).

26. 311 F.3d 376 (5th Cir. 2002).

27. Hickman, 179 F.3d at 243 (Higginbotham, J., dissenting). In McFarland, the dissenting judges, in an opinion by Circuit Judge Garwood, asserted that "[t]he evidence does not reflect any particular, concrete effect on interstate commerce that in fact actually resulted from any of the four robberies." McFarland, 311 F.3d at 393 (Garwood, J., dissenting).


29. See United States v. Ballinger, 312 F.3d 1264, 1276 (11th Cir. 2002) (The Court overturned the convictions because "[w]hile Ballinger’s crimes are heinous, they are state crimes. To allow the government to prosecute him for these arsons would be to obliterate the distinction between national and local authority that undergirds our federal system of government."); cf. United States v. Watts, 256 F.3d 630, 631 (7th Cir. 2001) (The defendant "pleaded guilty to both counts, but reserved the right to pursue on appeal a line of argument popular with criminal defendants these days: whether Congress exceeded its Commerce Clause power by enacting the federal armed bank robbery statute.").
ordinarily handle certainly has a superficial appeal.³⁰ *Lopez* and *Morrison* both refer to a seemingly inviolable realm of state authority that appears to include state and local control—perhaps to the exclusion of the federal government—over the prosecution of "local" crimes. The Court's federalism analysis gives the impression of separate spheres of authority over the criminal law that relegates Congress to legislating only in those areas that are obviously "national" in scope.³¹ The notion of mutually exclusive spheres hinted at in *Lopez* and *Morrison*—at least with respect to criminal statutes—overstates the role of federalism in demarcating the authority of the national and state governments.³²

The Founders certainly envisioned that federal crimes could encompass conduct also subject to state prosecution. For example, the Constitution explicitly provides for federal prosecution for treason, but does not exclude state prosecutions for the same conduct.³³ The Double Jeopardy Clause reflects the

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³⁰ See Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 6 (1996) ("Federal defendants charged with acts of local political corruption often contend that such prosecutions offend federalism and related Tenth Amendment principles.").

³¹ See, e.g., Richard H. Fallon, Jr., The "Conservative" Paths of the Rehnquist Court's Federalism Decisions, 69 U. CHI. L. REV. 429, 431 (2002) ("By limiting Congress's regulatory capacity, decisions such as United States v. Lopez preserve spheres in which state and local governments are the exclusive lawmakers.") (footnote omitted).

³² See Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 87-88 (2001) ("Certainly the graveyard of failed distinctions that these efforts left behind—'commerce' versus 'police' regulation, 'inherently national' versus 'inherently local' matters, 'manufacturing' or 'mining' versus 'commerce,' 'direct' versus 'indirect' effects—does not speak well for the judicial ability to develop doctrinal limits on national power that are at once meaningful and workable.") (footnotes omitted); Roderick M. Hills, Jr., The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't, 96 MICH. L. REV. 813, 938 (1998) ("[T]he Court has relied . . . on palpably untrue statements that the federal and state governments operate in separate, independent, and mutually exclusive spheres."); Kurland, supra note 30, at 61 ("[T]he substantive federal criminal law was potentially very broad in scope. It necessarily would overlap with state criminal jurisdiction to varying, and significant, degrees. This much was accepted. So much for a notion of a rigid dual federalism and the demarcation of exclusive spheres of jurisdiction in the criminal law context."); Lawrence Lessig, Translating Federalism: United States v. Lopez, 1995 SUP. CT. REV. 125, 206 ("There is no [such] thing out there called 'tradition' that lower courts can look to to sort out just what objects of regulation should be federal and which local. And because there is nothing out there to guide the courts, courts will be guided to different conclusions."); Ernest A. Young, State Sovereign Immunity and the Future of Federalism, 1999 SUP. CT. REV. 1, 27 (Enclaves of exclusive state authority "are exceptionally difficult to sustain because they frequently overlap with areas in which federal authority is unquestioned.").

³³ U.S. CONST. art. III, § 3, cl. 1 ("Treason against the United States, shall consist
possibility of federal and state prosecution for the "same offence." The Constitution also provides exclusive federal control over the laws of the Federal District and the territories. The First Congress adopted criminal laws to implement the enumerated powers provided by the Constitution. It enacted statutes to reach misconduct affecting the interests of the federal government that did not come within any specific constitutional grant of legislative power. Thus, while the states obviously retain authority to prosecute crimes under their general police power, the federal government has concurrent authority to protect federal interests that is not limited to a small realm of misconduct over which such authority is explicitly authorized by the Constitution.

It is a misguided view of federalism that the federal government somehow invades the sovereignty of the states by pursuing criminal prosecutions for certain types of conduct already subject to prosecution by state and local authorities. The source of that misunderstanding is the Supreme Court's broad language in Lopez and Morrison asserting that matters traditionally viewed as "local"—including the prosecution of violent crimes normally brought in state and local courts—are reserved in some way from regulation by the national government. Under this approach, federalism becomes not just an aspect of constitutional analysis, but also a new type of defense in federal prosecutions.

Some lower courts, encouraged by off-handed references in Supreme Court opinions about the limiting effect of federalism on congressional authority to reach certain types of crimes, have taken that cue to reject the federal

only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."); see Kurland, supra note 36, at 44 ("[B]y the rejection of the proposal [at the Constitutional Convention] that would have provided the United States with the 'sole' power over treason, the states retained the power to define and punish treasonous activities themselves."); Brandon L. Bigelow, Note, The Commerce Clause and Criminal Law, 41 B.C. L. Rev. 913, 932 (2000) ("The states and federal government thus shared the power to prosecute treason.").

34. U.S. Const. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.").

35. U.S. Const. art. I, § 8, cl. 17 ("Authority over all Places purchased" or ceded).

36. U.S. Const. art. I, § 8, cl. 6 (counterfeiting); U.S. Const. art I, § 8, cl. 10 (offenses).

37. See David P. Currie, The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791, 61 U. Chi. L. Rev. 775, 833 (1994) ("Clearly the First Congress did not view the list of topics of federal criminal law as implicitly negating authority to create other offenses when that was necessary and proper to the exercise of some other explicit federal power."); Kurland, supra note 36, at 59 ("Congress understood early on that it possessed a broad constitutional federal criminal law authority. It relied on the Necessary and Proper Clause, and other inherent attributes of sovereignty and self-protection to determine the necessary means for protecting important interests that were appropriately within the domain of the federal government.").
government’s power to pursue a particular case even when the statute itself is a proper exercise of Congress’s power to regulate. This application of federalism creates a new form of judicial supervisory authority to invoke a vague constitutional limitation—one not mentioned explicitly in the Constitution—to limit the national government’s power to pursue criminal prosecutions. The effect of an exercise of such a supervisory authority, under the rubric of deciding an as-applied constitutional challenge to the prosecution, is that it allows the court to dismiss the charge without regard to the defendant’s guilt. The basis for the dismissal is that the prosecution exceeds what, in the judge’s view, is the type of crime the federal government should prosecute under an otherwise valid statute.

This approach, however, misconstrues the role of federalism in apportioning power between different layers of government. Federalism is not an additional limitation on federal prosecutors that prohibits particular prosecutions for violations of statutes because of a perceived invasion of the states’ sovereignty.

38. See, e.g., United States v. McCoy, No. 01-50495, 2003 WL 1343642, at *14 (9th Cir. Mar. 20, 2003) (“Nothing in current Commerce Clause jurisprudence, as proclaimed by the Supreme Court, provides support for the application of Section 2252(a)(4)(B) to McCoy and others similarly situated whose non-commercial, non-economic possession of a prohibited photograph is entirely intrastate in nature.”); United States v. McFarland, 311 F.3d 376, 409 (5th Cir. 2002) (Garwood, J., dissenting) (dissenting from affirmance by an equally-divided court of convictions for violations of the Hobbs Act involving robberies of local stores because “the instant robberies fall within Lopez category three, and for that reason they are within the Commerce Clause power only if they ‘substantially’ affect interstate commerce. Individually considered, it is clear that none of them do.”); United States v. Corp, 236 F.3d 325, 332 (6th Cir. 2001) (reversing conviction for possession of child pornography, but not declaring law unconstitutional, because “[the defendant’s] activity was not of a type demonstrated substantially to be connected or related to interstate commerce on the facts of this case”); United States v. Hickman, 179 F.3d 230, 231 (5th Cir. 1999) (en banc) (Higginbotham, J., dissenting) (dissenting from affirmance by an equally-divided court of convictions for violations of the Hobbs Act involving robberies of local outlets of national restaurant chains because “the Hobbs Act prosecutions exceeded Congress’s authority”); United States v. Rayborn, 138 F. Supp. 2d 1029, 1031 (W.D. Tenn. 2001) (dismissing indictment for arson of a church because application of the statute to this case “would be an unconstitutional extension of Congress’s commerce power”); United States v. Garcia, 68 F. Supp. 2d 802, 811 (E.D. Mich. 1999) (dismissing indictment under VCAR statute because “[a] stronger and more substantial connection or impact on interstate commerce is required”); United States v. McCormack, 31 F. Supp. 2d 176, 189 (D. Mass. 1998) (dismissing indictment for bribery of a police officer because the conduct was “not related to a legitimate national problem” because it is not directed towards protecting the integrity of federal funds”).

39. See, e.g., McCoy, 2003 WL 1343642, at *15 (“If punishment for the conduct in which McCoy engaged is desirable and lawful, it is the state that must seek to attain that result, not the federal government. The statute is unconstitutional as applied.”).
In *Lopez* and *Morrison*, the Court relied on federalism as a rationale for holding that Congress exceeded its authority under the Commerce Clause in enacting statutes that dealt with criminal conduct falling within the traditional purview of the states. It was unclear whether federalism added anything to the Court’s analysis of congressional authority to regulate commerce, and it appeared to serve largely as a policy justification for declaring the statutes unconstitutional rather than as an independent principle limiting Congress’s legislative authority.\(^{40}\)

Even if federalism constrains the legislative power from reaching beyond the limitations of the Commerce Clause, it does not equally restrict the Executive Branch in pursuing criminal charges when federal prosecutors apply an otherwise valid law to criminal conduct traditionally within the ambit of state and local authority. If federalism limits more than just congressional authority to enact criminal statutes, then a defendant can raise a constitutional challenge in any federal criminal prosecution and seek dismissal of the charge because the prosecution allegedly violated federalism principles. The issue, then, is whether federalism’s structural protections of state authority limit the power of the Executive Branch to apply the law in a particular case.

Part II of this Article discusses the Supreme Court’s reinvigoration of federalism as a limit on congressional power to adopt legislation that disrupts the balance between federal and state interests. While the Court in *Lopez* and *Morrison* sought a principled articulation of federalism as a limit on congressional power to regulate, its language conveyed an impression that there are certain types of crimes that can be designated as “local” and, therefore, reserved exclusively to the states. Part III analyzes the development of the federal criminal law, and how the Supreme Court has rejected federalism challenges to criminal statutes that were duplicative of existing state and local crimes, supporting the position that congressional authority is not limited by the police power of the states to punish similar forms of misconduct. Part IV reviews the status of constitutional challenges to prosecutions on federalism grounds, and discusses how the usual view of constitutional adjudication as primarily involving “as-applied” challenges is inappropriate when the issue involves the power of Congress to adopt a statute and the limits on its power under the principle of federalism. This Article then considers cases in the lower courts that have taken the Court’s recent federalism analysis as a signal that the judiciary must police federal prosecutors by examining whether a particular case involves a “national” interest in the prosecution or whether it is merely a “local”

\(^{40}\) Cf. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903, 928 (1994) ("[N]o Supreme Court decision has ever rested on [the Tenth Amendment’s] language, and even federalism’s most enthusiastic proponents, such as Justice O’Connor, cast their arguments for federalism in functional, or policy terms.")
crime that is somehow barred by the Constitution from any federal involvement. I argue that federalism does not provide a basis for courts to exercise a "'chancellor's foot' veto" to bar a prosecution on federalism grounds when the statute is a valid exercise of one of Congress's enumerated powers.

II. THE FEDERALISM REVIVAL

Federalism is a concept that defies easy description, and the Supreme Court is closely divided on how much it limits congressional authority to enact legislation. Federalism is neither a specific grant of power to the states nor a denial of any particular authority to the federal government. It is a structural device viewed as one of the fundamental protections embedded in the Constitution, although "[f]ederalism ... is not a rule from which judgments can follow inexorably, without the imposition of contested value choices."42

41. See United States v. Russell, 411 U.S. 423, 435 (1973) ("[T]he defense of entrapment ... was not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve."). The Delaware Supreme Court summarized the problem with an equity jurisprudence based solely on the Chancellor's view of what is and is not permissible:

We are mindful of the elasticity inherent in equity jurisprudence and the traditional desirability in certain equity cases of measuring conduct by the "conscience of the court" and disapproving conduct which offends or shocks that conscience. Yet one must be wary of equity jurisprudence which takes on a random or ad hoc quality.

Equity is a roughish [sic] thing. For Law we have to measure, know what to trust to; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the standard for the measure we call a 'foot' a Chancellor's foot; what an uncertain measure this would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing in the Chancellor's conscience.


42. Susan Bandes, Erie and the History of the One True Federalism, 110 YALE L. J. 829, 875 (2001) (reviewing EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA (2000)); see Jackson, supra note 1, at 2215 ([D]efining the 'it' of federalism restraints remains acutely difficult. Although the Constitution does provide some quite explicit constitutional protections for the interests of the states, standards limiting national legislation in substantive matters claimed to be 'reserved' to the states do not emerge clearly from the naked text of Congress's enumerated powers."); Young, State Sovereign Immunity, supra note 32, at 34 ("Federalism doctrine is an incompletely theorized, common law sort of creature, and
Federalism is an issue of congressional power to enact regulations that operate on the states directly in their role as sovereigns, and not one of whether the federal government can exercise its power over individuals. Since the Court's decisions in Lopez and Morrison, however, some lower courts have asserted their authority to dismiss federal prosecutions because the particular application of the statute exceeded the limits of congressional power which federalism imposed, even if the statute itself was a valid exercise of legislative authority. For example, in United States v. McCormack, a federal district court dismissed corruption charges because the violation was not related to a "legitimate national problem" that permitted the prosecution of an essentially local crime. In United States v. Rayborn, another federal district court dismissed arson charges because the prosecution "would be an unconstitutional extension of Congress's commerce power." These decisions relied on the Court's assertion that federalism places an external limit on the power of Congress to regulate certain types of conduct, and that if the crime appears to be something that is "truly local," then the court can step in to block the prosecution by the federal government without regard to the constitutionality of the statute.

Unlike the federalism decisions that consider the scope of congressional power, lower courts that dismiss charges without invalidating the underlying statute apply federalism as a type of ad hoc limit on the authority of federal prosecutors to charge crimes that come within the literal terms of the statute. The issue is not that the government cannot prove the crime, but whether federal prosecutors can pursue the charge, or instead it should come within the exclusive authority of the states. Of course, a federal court cannot direct a state to exercise its sovereign authority to pursue an individual prosecution, so the only remedy available is dismissal of the federal charges. Under this view, federalism is a general limit on federal authority to prosecute crimes, a limit that will not be immediately apparent without a judicial declaration that the conduct falls outside the interests of the national government. This application is not consistent with the Supreme Court's approach to federalism because it misconstrues how federalism operates as a limit on congressional authority to enact regulations under the Constitution, but does not limit the Executive's power to enforce otherwise valid laws.

for this reason it is unrealistic to expect that doctrine to be perfectly coherent or strategic.

45. Id. at 1032.
A. Federalism as an Anti-Commandeering Rule

Law review authors note that federalism has, in the past decade, become a “hot” topic, odd as that may sound. Federalism never really left the scene of constitutional debate, despite the effort of a narrow majority of the Court to consign it to a type of judicial oblivion in Garcia v. San Antonio Metropolitan Transit Authority. In Garcia, a narrow majority of the Court overruled the nine-year-old precedent of National League of Cities v. Usery that accepted judicial authority under federalism to overturn legislation regulating the states directly. In Garcia, the majority opinion asserted, “[W]e have no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause.” Garcia advanced the proposition that states’ interests “are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.” In dissent, then-Justice Rehnquist accurately predicted that Garcia’s hands-off approach would not last long.

The Court began its revival of federalism as a type of constitutional rule of statutory construction in Gregory v. Ashcroft. The Court’s 5-4 decision in that case held that the federal Age Discrimination in Employment Act (“ADEA”) did not prevent a state from enforcing a mandatory retirement provision for state court judges. The Court discussed federalism’s role as an independent limit on congressional authority to regulate the states. Justice O’Connor’s majority opinion began by noting that “[a]s every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government.” This dual sovereignty did not necessarily prohibit federal action,

46. See Frank B. Cross & Emerson H. Tiller, The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence, 73 S. CAL. L. REV. 741, 741 (2000) (“Federalism is ‘hot.’”); Fallon, Jr., supra note 31, at 430 (“Law reviews echo with discussion of whether the court has yet achieved, or is likely to effect, a federalism ‘revolution.’”).
47. 469 U.S. 528 (1985).
50. Id. at 551.
51. Id. at 580 (Rehnquist, J., dissenting) (“I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.”); see also id. at 589 (O’Connor, J., dissenting) (“I share Justice REHNQUIST’S belief that this Court will in time again assume its constitutional responsibility.”).
52. 501 U.S. 452 (1991); see Rubin & Feeley, supra note 40, at 903 (“A mere six years after its brave declaration that it had sworn off federalism for good [in Garcia], the Supreme Court suffered a relapse [in Gregory v. Ashcroft].”).
because "Congress may legislate in areas traditionally regulated by the States," but any interference with the states in exercising their sovereignty may impermissibly alter the balance between federal and state authority. To determine whether the statute impermissibly overrode the states' authority, the Court imposed a "plain statement rule" requiring that Congress make its intent to regulate the states "unmistakably clear in the language of the statute." The Court held that the ADEA did not contain the requisite plain statement and, therefore, did not protect the Missouri judges from the state's mandatory retirement provision.

In *Gregory*, the Court couched its holding in terms of *Garcia*'s approach to federalism, asserting that its rule avoided "a potential constitutional problem" by requiring that courts be "absolutely certain that Congress intended" to override the states. The Court did not proscribe judicial review of legislation on federalism grounds, however, as *Garcia* appeared to do, a point that portended the future conflict regarding the role of federalism as an independent limit on congressional authority.

In *New York v. United States*, the Court—again in a 5-4 decision—took its first step toward reasserting federalism as a wide-ranging limit on congressional authority to legislate by invalidating a provision of the Low-Level Radioactive Waste Policy Act because the Act impermissibly "commandeered" the state legislatures. The Act's "take title" provision required states to enact legislation to provide for the siting and financing of waste disposal facilities. The Court began its federalism analysis with a very different approach from that used in *Garcia* by emphasizing the importance of the judicial role in determining the line between federal and state power, noting that this process "has given rise to many of the Court's most difficult and celebrated cases." The Constitution reflects the limitations of the federal system in two ways: first, the federal government has only those powers enumerated in the Constitution; second, the Tenth Amendment reserves to the states those powers not transferred to the national government. For the purpose of analyzing the validity of a statute, the Court then stated that "in a case . . . involving the division of authority between federal and state governments, the two inquiries are mirror images of each other." Declaring that the Tenth Amendment is "essentially a tautology," the Court stated that the federalism principle involved "understanding and applying

54. Id. at 460.
55. Id. (quoting *Astatecadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).
59. U.S. CONST. amend. X ("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.")
the framework set forth in the Constitution" that was separate from the analysis of the scope of any particular constitutional provision.60

The approach to federalism signaled in New York was that of a limitation on congressional authority that is not rooted in the text of the Constitution so much as it is in the Court’s perception of the proper interaction between state and federal authority. Federalism means that the line between the states and the national government would be one largely subject to judicial exposition, with no predictable guideposts or constitutional language to denote the scope of the doctrine. The Court invalidated the “take title” provision in New York because Congress does not have the power to commandeer the states to do the federal government’s bidding.61 Although the law came within congressional authority under the Commerce Clause, the Court held that “the provision [was] inconsistent with the federal structure of our Government established by the Constitution.”62

Both Gregory v. Ashcroft and New York involved congressional action that operated on the states directly. In New York, the Court noted that “[i]n providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.” The federal system incorporates dual sovereignty to protect the states as states from federal interference, as exemplified by Printz v. United States.63

In Printz, the Court invalidated the Brady Handgun Violence Protection Act’s requirement that state and local officials undertake background checks on prospective handgun purchasers because such a requirement violated the anti-commandeering principle of New York.64 In analyzing the limits on congressional authority to act directly on the states, the Court emphasized the “residual state sovereignty” protected by federalism, and that “[t]his separation of the two spheres is one of the Constitution’s structural protections of liberty.”65 The principle of federalism meant that it was “an essential attribute of the States’ retained sovereignty that they remain independent and autonomous within their proper sphere of authority.”66

60. New York, 505 U.S. at 156-57.
61. Id. at 177. The Court was concerned that political accountability would be diminished if Congress could require the states to regulate in a specified manner because “where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.” Id. at 169.
62. Id. at 177.
64. Id. at 933.
65. Id. at 921.
66. Id. at 928.
The Court's analysis in New York and Printz signaled the possibility that federalism reserved particular areas for state regulation, placing those areas beyond the authority of the national government. The statutes were unconstitutional because federalism cordoned off the states from direct federal authority, not because Congress did not have the authority to enact the legislation on the subject under one of its enumerated powers. Federalism, therefore, operated as a separate restraint on the power of the national government, at least when the government sought to regulate the states as political entities, to compel states to implement the policy dictates of the federal government.

The Court made that point clear in Reno v. Condon,67 when it upheld the Driver's Privacy Protection Act that restricted the states from disclosing driver's license information. Although the statute directly regulated the states, the Court found that the statute was a valid exercise under the Commerce Clause and "[did] not require the States in their sovereign capacity to regulate their own citizens."68 The Court made it plain that Garcia was effectively dead when it described the role of federalism as an added constraint on the power of Congress to enact legislation: "In New York and Printz, we held federal statutes invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment."69

B. United States v. Lopez: Federalism and Criminal Statutes

While the Court relied on federalism to invalidate statutes regulating the states as states in New York and Printz, the criminal law operates directly only on individuals and business associations—not states—and so would appear to fall outside any significant federalism concerns. In United States v. Lopez, however, the Court referenced federalism to support its analysis of the limit of Congress's power to regulate under the Commerce Clause. Unlike the anti-commandeering cases, in which federalism provided an external limit on congressional authority, the role of federalism in interpreting criminal statutes adopted pursuant to the commerce power was much less clear.

The statute at issue in Lopez was the Gun-Free School Zones Act, which made it a federal crime "for any individual knowingly to possess a firearm . . . at a place that the individual knows, or has reasonable cause to believe, is a school zone."70 Unlike many other federal statutes, including other parts of the federal firearms provisions, the Gun-Free School Zones Act did not require proof

68. Id. at 151.
69. Id. at 149.
of an interstate commerce element.\textsuperscript{71} Chief Justice Rehnquist’s opinion for the Court began by analyzing congressional authority to regulate “three broad categories of activity” under the Commerce Clause: “channels of interstate commerce”; “instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities”; and “those activities having a substantial relation to interstate commerce.”\textsuperscript{72} The third category, which governed the statute at issue, required “an analysis of whether the regulated activity ‘substantially affects’ interstate commerce.”\textsuperscript{73} The Court concluded that possession of guns was not “an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.”\textsuperscript{74}

As a matter of constitutional analysis, the \textit{Lopez} opinion did not break new ground beyond the fact that the Court invalidated a federal statute for exceeding the commerce power for the first time in approximately sixty years. The Chief Justice’s majority opinion contained an oblique reference to federalism in a footnote that described the role of the states as the “primary authority for defining and enforcing the criminal law,” and stated that “[w]hen Congress criminalizes conduct already denounced as criminal by the States, it effects a ‘change in the sensitive relation between federal and state criminal jurisdiction.’”\textsuperscript{75} The majority opinion’s brief reference to federalism was irrelevant to its holding except to buttress the point that the Gun-Free School Zones Act reached conduct already within the purview of the states and so perhaps it was also an unwise extension of federal jurisdiction.

Unlike the majority opinion, Justice Kennedy’s concurring opinion, joined by Justice O’Connor, clearly relied on federalism as a basis for the Commerce Clause analysis. Justice Kennedy argued that the statute was beyond the authority of Congress because it upset the balance between the federal government and the states.\textsuperscript{76} He relied on federalism as an aspect of the

\textsuperscript{71} See, e.g., 18 U.S.C. § 922(i) (2000) (“It shall be unlawful for any person to transport or ship in interstate or foreign commerce, any stolen firearm or stolen ammunition, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.”).


\textsuperscript{73} \textit{Id.} at 559.

\textsuperscript{74} \textit{Id.} at 567.

\textsuperscript{75} \textit{Id.} at 561 n.3 (quoting Brecht v. Abrahamson, 507 U.S. 619, 635 (1993) and United States v. Enmons, 410 U.S. 396, 411-12 (1973)). The footnote then quoted from President Bush’s statement when he signed the legislation containing the Gun-Free School Zones Act that the law “inappropriately overrides legitimate State firearms laws with a new and unnecessary Federal law.” \textit{Id.} (quoting Statement of President George Bush on Signing the Crime Control Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1944, 1945 (Nov. 29, 1990) (internal quotation marks omitted)).

\textsuperscript{76} \textit{Id.} at 580 (Kennedy, J., concurring) (“If Congress attempts that extension, then
Commerce Clause analysis, stating that "[w]ere the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory."\textsuperscript{77} His concurrence emphasized the Court's "particular duty to ensure that the federal-state balance is not destroyed."\textsuperscript{78}

Chief Justice Rehnquist's majority opinion may have used federalism as a short-handed way to acknowledge the outer limits of the Commerce Clause to distinguish congressional authority to regulate from a state's general police power, however slight that distinction may be in practice.\textsuperscript{79} That approach is different from \textit{New York} and \textit{Printz}, which made it clear that federalism was an independent constraint on congressional authority to regulate. The states retain their sovereignty under the Tenth Amendment, and the federal government cannot usurp that sovereignty without violating the principle of federalism when Congress seeks to regulate the states as states.

Does federalism play the same role for criminal statutes by reserving to the states the authority to define and punish certain types of crime, such as gun possession near a school? The majority opinion in \textit{Lopez} implied that, regardless of the Commerce Clause issue, the statute at issue might be such a significant alteration of the federal-state balance that it could violate federalism. Justice Kennedy's concurrence directly assailed the Gun-Free School Zones Act as an "intrusion on state sovereignty" that, while not as severe as that in \textit{New York} and \textit{Printz}, "is nonetheless significant."\textsuperscript{80} For Justice Kennedy, at least, federalism was a separate limitation on the power of Congress to enact criminal legislation when such litigation encompasses conduct already punished by the states.

\begin{itemize}
\item at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern.
\end{itemize}

\textsuperscript{77} \textit{Id.} at 577 (Kennedy, J., concurring).

\textsuperscript{78} \textit{Id.} at 581 (Kennedy, J., concurring).

\textsuperscript{79} \textit{See id.} at 566 ("But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender 'legal uncertainty'.").

\textsuperscript{80} \textit{Id.} at 583 (Kennedy, J., concurring). Justice Thomas made a similar point in his concurrence, asserting that the Court's seminal Commerce Clause decision in \textit{Gibbons v. Ogden} "merely was making the well understood point that the Constitution commits matters of 'national' concern to Congress and leaves 'local' matters to the States." \textit{Id.} at 596 (Thomas, J., concurring).
C. United States v. Morrison: Federalism and Violent Crime

Chief Justice Rehnquist's majority opinion in *Morrison* took the Court a step closer to the position that federalism provides an independent constraint on the authority of Congress to regulate certain subjects. The plaintiff in *Morrison* sued three students, who were members of the university's football team, for raping her, and also sued the school for failing to handle her complaint about the rape properly. She brought her damages claim under 42 U.S.C. Section 13981, which provided that any "person . . . who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages." 81 Despite the extensive congressional findings regarding the impact of gender-motivated violence on interstate commerce, the Court held that the conduct regulated by Congress—violence against women—was not economic in nature and, therefore, fell outside the Commerce Clause. 82 The Court relied explicitly on federalism to invalidate the civil damages provision of VAWA, although it remained unclear what the relationship was between federalism and the Commerce Clause analysis.

On the commerce issue, *Morrison*’s analysis was little more than a reiteration of *Lopez*. The Court rejected what it perceived as an attempt by Congress to manufacture federal authority that would permit regulation of virtually any subject through an expansive depiction of the effects of traditional crimes on interstate commerce. It reaffirmed the refusal in *Lopez* to sanction a limitless grant of legislative authority to Congress under the Commerce Clause on the theory that the aggregation of any type of conduct could eventually affect interstate commerce. The Chief Justice’s opinion went further, however, by offering a broader description of the federalism implications of VAWA.

The Court’s discussion of federalism was not linked explicitly to the Commerce Clause analysis, and it appeared to be more in the nature of a cautionary warning to Congress not to extend federal power too far, lest the Court be required to rein in the legislature further. *Morrison*’s federalism analysis began with the premise that “if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have

81. 42 U.S.C. § 13981(c) (2000). Subsection (b) of the statute provided that “[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender.” Id. § 12981(b).

82. United States v. Morrison, 529 U.S. 598, 613 (2000) (“Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity . . . . [O]ur cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.”).
lesser economic impacts than the larger class of which it is a part.\textsuperscript{83} Taken to its logical extreme, the Court noted, such an interpretation of the commerce power would permit regulation of "family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant."\textsuperscript{84} Federalism prevents that result by operating as a further restraint on congressional authority, a restraint which goes beyond the Court’s limitation of criminal statutes enacted under the Commerce Clause to conduct involving economic activities.\textsuperscript{85}

The federalism principles incorporated in the constitutional design apparently operate as a separate limitation beyond the Commerce Clause because "[t]he Constitution requires a distinction between what is truly national and what is truly local."\textsuperscript{86} Following the path to what he perceived was the logical conclusion of this federal-state dichotomy, the Chief Justice’s opinion stated that "[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States."\textsuperscript{87} In describing the distinction between the national government and the states, the Court stated, "[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."\textsuperscript{88}

\textsuperscript{83} Id. at 615.
\textsuperscript{84} Id. at 615-16.
\textsuperscript{85} The majority’s language adopted a faintly derogatory tone for family law and domestic violence, implying that these areas are unworthy of federal legislation and instead are only of local—and hence minor—governmental interest. See Beale, supra note 17, at 1654 ("[A]lthough the volume of cases that could fall within the civil provisions of VAWA was limited, the subject matter was a form of extremely common criminal activity associated with the low-status family courts or criminal courts."); Deborah M. Weissman, Gender-Based Violence as Judicial Anomaly: Between "The Truly National and the Truly Local," 42 B.C. L. Rev. 1081, 1104-05 (2001) ("Having reduced gender-based violence to 'any conduct,' or even any criminal conduct, the Court then discursively linked it with family law issues traditionally set aside for state regulation and jurisdiction.... Through this rhetorical practice of connecting the adjudication of family law issues with gender-motivated crimes of violence, the Court prohibited the transformation of these issues to a national civil rights concern.") (footnotes omitted).
\textsuperscript{86} Morrison, 529 U.S. at 617-18.
\textsuperscript{87} Id. at 618.
\textsuperscript{88} Id.
D. The Notion of Separate Spheres of Authority

*Morrison*'s conclusion that federalism creates separate spheres of authority, thereby reserving to the states punishment for "local" crimes, misconstrued the distinction that federalism creates between state and federal authority. The Court did not explain why the authority of the states to punish local crimes—violent and otherwise—entailed a limitation on the federal government's power to regulate similar conduct if it came within one of the enumerated powers. VAWA has a criminal provision that the Court recognized as falling within the commerce power because an element of the crime required proof of interstate travel, satisfying one of the first two *Lopez* categories to permit federal regulation. 89 The states' police power has never been viewed as a direct limitation on the authority of another sovereign to punish crimes within its jurisdiction. The authority of the states to exercise their powers is protected by federalism, but that does not directly affect whether the federal government can use its own authority to accomplish the same result.

The *Morrison* Court appeared to assume that because federalism involves a separation between the two levels of government, there must be distinct crimes, such as domestic violence, that Congress cannot regulate. 90 That conclusion, however, is not supported by the premise because it assumed that the existence of separate sovereigns meant that only one could regulate in certain areas. While federalism may limit the national government's authority to regulate the states directly—the essential holding of *Printz* and *New York*—it does not lead to the conclusion that federalism deprives Congress of the authority to regulate any particular subject. 91 This approach is similar to the federalism constraint

89. See id. at 613 n.5 ("The Courts of Appeals have uniformly upheld this criminal sanction as an appropriate exercise of Congress' Commerce Clause authority.").

90. Joshua A. Klein, Note, Commerce Clause Questions After Morrison: Some Observations on the New Formalism and the New Realism, 55 STAN. L. REV. 571, 577 (2002) ("The *Lopez*/*Morrison* Court seems to have some inchoate sense of a particular limit that is appropriate—one that preserves the 'federal and state balance.'").

91. For example, it is a violation of federal law for a felon to possess a weapon that had traveled in interstate commerce at one time. 18 U.S.C. § 922(g) (2000). The Court upheld the constitutionality of that provision in *Scarborough v. United States*, 431 U.S. 563 (1977), rejecting the defendant's argument that after *Bass* the mere possession of a weapon, without proving that it traveled in interstate commerce while the defendant possessed it while a convicted felon, was beyond the scope of the Commerce Clause. *Id.* at 577. The Court expressed no discomfort with the conclusion that "Congress sought to reach possessions broadly, with little concern for when the nexus with commerce occurred." *Id.* *Lopez* did not appear to disturb the holding in *Scarborough*, and the federal government can still reach a variety of situations involving the possession of a weapon. While the Court's language in *Morrison* implied that certain crimes are beyond federal authority, in fact there are no particular crimes that, standing alone, only the states may prosecute.
recognized in New York and Printz that prevented Congress from directing the states as states to exercise their sovereign authority in a particular manner. This view of federalism, at least with regard to congressional authority to enact criminal laws, led Chief Justice Rehnquist to assert that if regulation was beyond the Commerce Clause, it must be because federalism reserved the subject matter to the states. Further, the view of federalism expressed in Morrison implied that the Constitution reserved certain subjects, particularly violent crime, to the states in much the same way that it granted specified powers exclusively to the federal government.92

The constitutional grant of power to the federal government to regulate commerce does not give the federal government exclusive authority over any particular subject that may have some relation to commerce. The term "commerce" is inclusive, first described by Chief Justice Marshall in Gibbons v. Ogden93 as "traffic, but it is something more: it is intercourse." Commerce does not have any independent content except that the subject regulated must come within "the commercial intercourse between nations, and parts of nations."94 The Commerce Clause involves both a grant of legislative authority to Congress and, by negative implication, a prohibition on the states from enacting regulations that interfere with interstate commerce. It is the dormant Commerce Clause, which limits the authority of the states to regulate by discriminating in favor of local businesses, that raises the issue of state power over matters of "local" concern.95

In Cooley v. Board of Wardens,96 the Court asserted judicial authority under the Commerce Clause to invalidate state and local regulations if the subject matter required uniform national legislation, regardless of whether Congress had in fact occupied the field by adopting legislation.97 If the regulation dealt with

92. See Allan Ides, Economic Activity as a Proxy for Federalism: Intuition and Reason in United States v. Morrison, 18 CONST. COMMENT. 563, 580 (2001) ("The basic intuition behind Morrison is that the civil remedy created by VAWA transgressed the undefined distinction between what is truly local and what is truly national.").
93. 22 U.S. (9 Wheat.) 1 (1824).
94. Id. at 189.
95. Id. at 189-90.
96. In Gibbons v. Ogden, the Court considered whether the Commerce Clause permits any state regulation of matters involving interstate commerce, but did not need to decide the issue. Id. at 200 ("In discussing the question, whether this power is still in the States, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power.").
97. 53 U.S. (12 How.) 299 (1851).
98. Id. at 319 ("Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."). The application of the
a matter of local interest, then the states retained the authority to exercise their police powers to enact regulations. 99 Thus, for many years, dormant Commerce Clause analysis depended on the distinction between what was a national concern and what subjects permitted the states to continue regulation because of the local nature of the issue.

Morrison’s reference to the distinction between subjects that are “truly national” and “truly local” harkens back to the early Commerce Clause jurisprudence of Gibbons and Cooley, but it used those notions in a completely different context. The Court in those early Commerce Clause cases sought to determine the extent of the states’ authority to enact regulations that affected interstate commerce, and Chief Justice Marshall advanced the position that they might not have retained any authority. 100 The issue was not whether Congress could legislate on a subject, but the extent of the police power retained by the states when Congress had not legislated on the subject. The recognition of the dormant Commerce Clause in Cooley was a compromise that preserved broad federal authority and the police power of the states to maintain regulations in a number of areas where they had traditionally operated.101 Ultimately, Cooley’s
dormant Commerce Clause has been subject to severe criticism, but it remains a fixture of constitutional jurisprudence. See Patrick C. McGinley, Trashing the Constitution: Judicial Activism, the Dormant Commerce Clause, and the Federalism Mantra, 71 OR. L. REV. 409, 410 (1992) (“The fact is that in the 114 years since the doctrine of the negative Commerce Clause was formally adopted by the Court, and in the 50 years prior to that in which it was alluded to in various dicta of the Court, our applications of the doctrine have, not to put too fine a point on the matter, made no sense.”).

99. Cooley, 53 U.S. (12 How.) at 319 (“Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.”).

100. See Gibbons, 22 U.S. (9 Wheat.) at 209 (“It has been contended by the counsel for the appellant, that, as the word ‘to regulate’ implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated. There is great force in this argument, and the Court is not satisfied that it has been refuted.”).

101. See Robert A. Sedler, The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure, 31 WAYNE L. REV. 885, 923 (1985) (“The Court’s holding in Cooley was obviously a compromise between the view that the commerce power was an exclusive federal power so as to preclude all state regulation or taxation affecting interstate commerce and the view that the commerce clause imposed no restriction at all on the reserved general
reliance on dividing subjects into national and local areas broke down and the Court instead adopted a balancing approach that looks to the effect of state regulations on interstate commerce and whether the laws at issue are a form of economic protectionism.  

*Morrison* took the notion of the division between national and local subjects that was once important in Commerce Clause jurisprudence—and revived briefly in *Hammer v. Dagenhart* to limit federal authority over manufacturing and mining—and appeared to enshrine it as one aspect of the core meaning of federalism. The Court's reference to family law and violent crimes as areas of peculiar local concern, subject to the states' police power, was not in the context of its analysis of the commerce power but rather an assertion that the Constitution somehow preserves core areas for exclusive state control. It is interesting to note that neither the dormant Commerce Clause, the source for the purported distinction between subjects of national and local interest, nor the principle of federalism is found in the words of the Constitution. Yet, according to *Morrison*, federalism acted as a type of independent constraint on congressional authority to adopt legislation on the subject of rape, wholly apart from the limits of the Commerce Clause, as an independent means to preserve certain subjects for exclusive state regulation.  


104. Congressional authority to regulate commerce does not necessarily displace state regulation of the subject matter, at least insofar as the state regulation does not interfere with interstate commerce. The states have long had power over health and safety issues, for example. While Congress has the exclusive right to regulate interstate and foreign commerce, which prevents the states from adopting their own regulations even if Congress has not chosen to legislate, the Commerce Clause does not affect the authority of the states to regulate the subject matter of that commercial intercourse within their own borders when the burden on commerce is only incidental. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").  

Professor Sedler asserts that, after *Cooley*, the Supreme Court viewed the national-local distinction as limiting the federal government's power to regulate on a topic which was deemed local under the dormant Commerce Clause. *See Sedler, supra* note 101, at
The assertion in *Morrison*—and to a lesser extent in *Lopez*—that federalism required that the states have exclusive authority over some types of criminal conduct is flawed because the Court’s premise is unsupportable. While federalism creates competing levels of government by preserving the sovereignty of the states, it does not mean the states must have exclusive control over certain types of crime regardless of whether Congress has the constitutional authority to regulate under the Commerce Clause or any other power.105 The Constitution’s denial of a general police power to the federal government did not establish that the regulation of certain subjects, such as family law or crimes of violence, was reserved exclusively to the states. Instead, the authority granted to the federal government to regulate commerce permits Congress to adopt legislation that reaches even those areas already within the police power of the states.

The Constitution did not create exclusive spheres of state authority that independently proscribed congressional authority to adopt criminal laws. Although federalism may operate as an independent constraint on congressional authority to regulate the states, *New York* and *Printz* did not hold that regulation of low-level radioactive waste and the purchase of firearms was reserved exclusively to the states. The anti-commandeering rule applied in those cases because the means Congress chose—requiring state authorities to implement the national government’s policy decisions—was an impermissible invasion of the sovereignty of the states. It was not the subject matter but the method of implementation that violated the federalism principle.

Unlike the statutes invalidated in *New York* and *Printz*, criminal laws neither commandeered the states to do the federal government’s bidding nor displace state criminal laws. Therefore, while the Constitution may limit Congress from pursuing its goals by certain means because of federalism, it does not do so by reserving selected subjects and placing them outside any federal assertion of authority. And yet, that seemed to be Chief Justice Rehnquist’s point in *Morrison* when he described “family law and other areas of traditional state regulation” as subjects beyond congressional authority, regardless of whether the legislation bore a sufficient nexus to the commerce power.

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924 n.147 ("If the activity being regulated was held not to constitute ‘commerce’ within the meaning of the commerce clause, the commerce clause, in its negative aspect, could not be relied on to challenge state regulation of that activity. This also meant, however, that the activity could not be regulated by Congress in the affirmative exercise of the commerce power."). At least with regard to criminal statutes, the Court in *Champion v. Ames* (The Lottery Case), 188 U.S. 321 (1903), upheld a federal prohibition on the interstate transportation of lottery tickets enacted pursuant to the Commerce Clause even though the states had the authority to regulate lotteries under their police powers. See infra text accompanying notes 137-40.

105. See Klein, *supra* note 18, at 1553 ("Where federal criminal laws regulate conduct already regulated by the states, such federal legislation does not displace the state criminal justice system, but rather supplements it with concurrent jurisdiction.").
Morrison's seeming claim that certain subjects are beyond the authority of the national government because they are "local" in nature has significant implications for federal criminal law. If a statute reaches one of those reserved local subjects, then it may be unconstitutional regardless of any inquiry into congressional authority to adopt the law under one of the powers enumerated in the Constitution. Perhaps the statute itself is a permissible exercise of congressional authority, but its application in a particular case may reach into local affairs in a way that offends federalism as Chief Justice Rhenquist viewed it in Morrison. The effect of this view of federalism creates uncertainty in a wide variety of federal prosecutions, and is at odds with the development of the federal criminal law.

In the next section, this Article reviews the Supreme Court's analysis of federal criminal law, and how it has historically accepted that federal provisions operate in many areas already subject to state regulation. The fact that both the federal and state governments can enforce criminal laws covering similar conduct has not been troubling in a constitutional sense. If federalism does reserve certain criminal misconduct to exclusive state regulation because of its peculiarly "local" nature, then that would signal a major change in the scope of federal criminal law. I argue that the dichotomous view expressed in Lopez and Morrison represents a shift based on a misguided understanding of how federalism operates as a limit on congressional authority but does not restrain the authority of the executive branch to enforce the laws.

III. THE DEVELOPMENT OF FEDERAL CRIMINAL LAW

The Court's discussion of federalism in Lopez and especially Morrison was misleading when it described the relationship between the states and the national government as one involving exclusive areas of control. The Constitution permits both levels of government to operate concurrently in many areas, including the punishment of misconduct. Criminal statutes adopted by the First Congress show that the Framers did not confine federal law to those crimes enumerated in the Constitution, and the statutes reached much conduct already prohibited by the states.

Federalism requires that there be a national interest in the type of conduct regulated by the criminal provision, but there was no sense that Congress could not legislate pursuant to one of its enumerated powers because a particular subject was already prosecuted by the states. Prior to Lopez and Morrison, the

106. See Ides, supra note 92, at 579 ("[T]he problem [in Lopez and Morrison] was that Congress was attempting to regulate matters that in the Court's view were traditionally and perhaps exclusively left to the states. All this talk about economic or commercial activity (or any of the other doctrinal elements mentioned in these two opinions) was simply a proxy for this much more significant theme.").
Court's approach to interpreting the scope of federal criminal statutes accepted that Congress could designate conduct as subject to federal prosecution pursuant to one of its enumerated powers without violating the sovereignty of the states or traversing the limitations of federalism. Although the states retain primary authority for defining and punishing criminal conduct through the police power, their sovereignty would not be undermined by federal criminal statutes so long as there is a sufficient national interest identified by Congress and a constitutional authority, such as the Commerce Clause, to adopt the provision. The Court did not conclude, however, that the Constitution reserved the criminal law to the states and denied it to the national government.

A. The First Federal Crimes

The Constitution provides explicit congressional authority to punish counterfeiting federal coins and securities, piracy and felons committed on the high seas, and treason. In addition, Congress has the power of "exclusive Legislation" over the federal district, which necessarily would include providing a criminal code.

One of the first statutes enacted by Congress set the rate for duties on imports and included a prohibition on "any officer of the customs [who] shall, directly or indirectly, take or receive any bribe, reward or recompense for conniving, or shall connive at a false entry of any ship or vessel, or of any goods, wares or merchandise." There was a clear national interest in punishing bribery related to customs duties—collectors of customs were among the first presidential appointments after ratification of the Constitution and import duties were the principal source of federal revenue—but the constitutional source of

107. U.S. CONST. art. I, § 8, cl. 6 ("To provide for the Punishment of counterfeiting the Securities and current Coin of the United States.").

108. U.S. CONST. art. I, § 8, cl. 10 ("To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.").

109. U.S. CONST. art. III, § 3, cl. 2 ("The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.").

110. U.S. CONST. art. I, § 8, cl. 17. Congress also has authority to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," U.S. CONST. art. IV, § 3, cl. 2, and to "make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I, § 8, cl. 14. These provisions give Congress the authority to enact criminal laws related to crimes committed on federal land and by members of the military.

111. Act of July 31, 1789, § 35, 1 Stat. 46 (1789). Congress adopted the provision approximately two months before it adopted the Judiciary Act of 1789, 1 Stat. 73, that created the federal courts in which violators of the provision would be prosecuted.

112. See Laurence F. Schmeckebier, The Customs Service: Its History,
this provision was not entirely clear. The collection of customs duties relates to congressional authority to regulate foreign commerce, and Congress has the authority to "lay and collect [t]axes," so the criminal provision may be an incident to those powers. The bribery provision was not, however, an exercise of one of the enumerated powers in the Constitution explicitly authorizing the adoption of a federal criminal law, and the crime was certainly one that also came within the authority of the states to prosecute. This first federal criminal law did not supplant the law of the states, but it provided a means to reach misconduct that was of paramount concern to the federal government.

The next year, the First Congress adopted a broad set of laws that addressed a number of crimes for which there was also no explicit constitutional authority. Among the federal offenses created was theft of court records, bribery of federal judges, perjury, and obstruction of court officers. These provisions protected the federal judicial process from corruption, and were an adjunct to the congressional power in Article III to create the lower federal courts. There was no enumerated power to adopt statutes that reached these offenses, most of which were already subject to state prosecution. Professor Currie has noted, "Clearly the First Congress did not view the list of topics of federal criminal law as implicitly negating authority to create other offenses when that was necessary and proper to the exercise of some other explicit federal power."
In addition to the creation of federal crimes beyond those the authority for which was enumerated in the Constitution, the First Congress also addressed the issue of where a federal prosecution could be brought. The Judiciary Act of 1789 provided for exclusive federal court jurisdiction of federal crimes, but because of the hardship created on litigants and jurors forced to travel great distances to the few federal courts, Congress later adopted a number of criminal provisions that permitted the state courts to adjudicate cases for violation of federal criminal laws. Federal criminal law did not eliminate or constrain the police power of the states, but provided an added protection for the federal government to vindicate its own interests. In Martin v. Hunter's Lessee, Justice Story asserted in dictum that "[n]o part of the criminal jurisdiction of the United States can consistently with the Constitution, be delegated to state tribunals," a position he reiterated a few years later in Houston v. Moore. The opposition to state court jurisdiction over federal offenses expressed by Justice Story was not that Congress had somehow usurped state authority in adopting criminal laws, but rather, that those laws were an important attribute of the sovereignty of the national government and their enforcement should not be delegated to the states. Both levels of government could exercise their power to proscribe criminal acts, each operating independently of the other.

The issue of whether the Commerce Clause provided authority to adopt a criminal provision reaching conduct already subject to state prosecution came before the Supreme Court in 1838 in United States v. Coombs. The government charged the defendant with stealing items from a ship that had run aground, and he challenged the federal court's admiralty jurisdiction because the

at 11-12 ("[T]he historical record demonstrates that the Framers provided for relatively broad federal criminal authority, not limited to the few express grants of federal criminal authority specified in the Constitution.").

117. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 76-77 (1789) (District court jurisdiction was "exclusively of the Courts of the several States . . . that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas.").

118. See Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 70 (1923) (During the twenty years after passage of the Judiciary Act of 1789, Congress passed "many statutes vesting in the State Courts such jurisdiction over Federal questions both in civil and criminal cases."); Kurland, supra note 30, at 62 ("Congress recognized the extreme burdens on the citizenry if even minor federal offenses were required to be tried in distant federal courts, which, at the time, were few.").


120. Id. at 337.

121. 18 U.S. (1 Wheat.) 1, 69 (1820) ("In a government formed like ours, where there is a division of sovereignty . . . it would seem a peculiarly safe and salutary rule, that each government should be left to enforce its own penal laws in its own tribunals.").

122. 37 U.S. (1 Pet.) 72 (1838).
ship was above the high water mark on the beach and, therefore, not on the high seas.\textsuperscript{123} Although the Court agreed that the ship was not within the admiralty jurisdiction, it held that the provision was a proper exercise of the commerce power to reach conduct on land. According to the Court, congressional authority "extends to such acts, done on land, which interfere with, obstruct, or prevent the due exercise of the power to regulate commerce."\textsuperscript{124} The Court then rejected the proposition that, because the defendant's crime—thief—came within the criminal law of the states, it could not be the subject of a separate federal prosecution: "[I]t could scarcely be deemed prudent or satisfactory wholly to rely upon state legislatures or state laws, for the protection of rights and interests specially confided by the constitution to the authority of congress."

Coombs accepted congressional authority under the Commerce Clause to enact criminal laws that reached conduct already subject to state prosecution. The Court's holding rested on the principle that the national government's interest could be vindicated through a federal criminal statute even though state laws already authorized punishment for the exact same conduct. Federal and state authority coexisted, and the Court did not express any concern that the federal enactment somehow displaced the authority of the states or invaded their sovereignty.

In addition to the Commerce Clause, Congress in 1792 exercised its authority under the Postal Clause\textsuperscript{125} to adopt criminal statutes, reaching a variety of offenses involving the use and delivery of the mail, that also constituted state crimes, such as theft.\textsuperscript{126} Congressional authority over the postal system is exclusive, although there is no express grant of power to adopt criminal laws. The criminal provisions adopted by Congress under the postal power did not create exclusive federal jurisdiction over crimes involving the postal system, nor did the law preempt the states from prosecuting common law offenses, such as larceny, that involved the mails. Like the criminal laws adopted by the First Congress, the postal legislation did not supplant the police power of the states

\textsuperscript{123} The provision under which the defendant was charged made it a criminal offense for:

\textquote{[A]ny person . . . [to] plunder, steal, or destroy, any money, goods, merchandise, or other effects, from or belonging to any ship or vessel, or boat, or raft, which shall be in distress, or which shall be wrecked, lost, stranded, or cast away, upon the sea, or upon any reef, shoal, bank, or rocks, of the sea, or in any other place within the admiralty and maritime jurisdiction of the United States.}

Act of 1825, ch. 65, § 9, 4 Stat. 116 (1825).

\textsuperscript{124} Coombs, 37 U.S. (1 Pet.) at 78.

\textsuperscript{125} U.S. CONST. art. I, § 8, cl. 7 ("To establish Post Offices and post Roads.").

\textsuperscript{126} Act of Feb. 20, 1792, ch. 7, § 17, 1 Stat. 237 (1792).
but provided an additional protection beyond what the states could—or would—furnish to protect important federal interests.\textsuperscript{127}

B. The Court Confronts an Expanding Federal Criminal Law

The Postal and Commerce Clauses were the primary sources of congressional authority to enact broader criminal laws to combat abuses in the developing national economy during the post-Civil War era. In 1868, Congress adopted a statute to outlaw use of the mails for lotteries, and a short time later enacted the first version of the Mail Fraud statute that prohibited the use of the mails for “any scheme or artifice to defraud.”\textsuperscript{128} Representative Farnsworth, sponsor of the Mail Fraud statute, stated that the law would “prevent the fraud which are mostly gotten up in the large cities . . . by thieves, forgers, and rascallions generally.”\textsuperscript{129} The statute clearly reached a crime—larceny by trick\textsuperscript{130}—already prosecuted under the common law of every state, although the federal statute went much further by encompassing any scheme to defraud and not just completed conduct.

The Supreme Court upheld the constitutionality of the criminal prohibition on the use of the mails for transporting lottery tickets in \textit{Ex parte Jackson},\textsuperscript{131} holding that the postal power gave Congress the authority “to refuse its facilities for the distribution of matter deemed injurious to the public morals.”\textsuperscript{132} The harm from the conduct was not to the postal system itself, nor to the federal government, which suffered no direct or pecuniary loss. Nevertheless, the Court

\textsuperscript{127} See Kurland, supra note 30, at 58 (The postal crimes provisions “also criminalized conduct that was very likely proscribed by state criminal law as well, but which Congress nevertheless had determined affected a federal interest of sufficient importance to be made the subject of federal criminal law. This development further established the principle of overlapping criminal jurisdiction between the states and the federal government in areas outside of the express grants of federal criminal law authority.”).


\textsuperscript{130} The common law offense of larceny required proof of a “trespassory taking and carrying away of the personal property of another with the intent to permanently deprive the possessor of the property.” JOSHUA DRESSLER, \textit{UNDERSTANDING CRIMINAL LAW} § 32.02[A], at 546 (3d ed. 2001). The use of fraud, rather than a physical taking, to obtain possession of property was first recognized as a form of larceny in \textit{Pear’s Case}. King v. Pear, 1 Leach 212, 168 Eng. Rep. 208 (1779).

\textsuperscript{131} 96 U.S. 727 (1877).

\textsuperscript{132} \textit{Id.} at 736.
held that Congress possessed the power to enact legislation designed to protect individuals from criminal conduct involving use of the facilities of the federal government. While not an exercise of a general police power, Jackson signaled a broad view of federal authority to enact criminal laws covering conduct already subject to state prosecution, in the name of protecting the public from harm through the use of a facility entrusted to the federal government.\textsuperscript{133} The Court confirmed this expansive understanding of congressional power in Ex parte Rapier,\textsuperscript{134} stating that "[i]t is not necessary that Congress should have the power to deal with crime or immorality within the states in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality."\textsuperscript{135}

Similar to the Mail Fraud statute, Congress expanded the Lottery Act in 1895 to prohibit any transfer of lottery tickets in interstate commerce in addition to barring the use of the mails for that purpose.\textsuperscript{136} In Champion v. Ames (Lottery Case),\textsuperscript{137} the Court took the same broad approach to congressional power to enact criminal laws under the Commerce Clause that it took in Jackson and Rapier with the Postal Clause. The Court upheld the provision on the ground that Congress may regulate interstate commerce by prohibiting any transfer among the states of an item Congress deemed harmful, regardless of whether a state permitted the operation of a lottery within its borders.\textsuperscript{138} In reaching that conclusion, the Champion Court rejected the argument that the statute violated the Tenth Amendment because it regulated an activity already subject to state control under the police power. The Court stated:

In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those states—perhaps all of them—which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits.\textsuperscript{139}

\textsuperscript{133} See Henning, supra note 129, at 443 ("Thus, at least in the Supreme Court’s view in 1878, the constitutionality of the expansion of federal jurisdiction over what had been state crimes was tied directly to Congress’s power to regulate the post office.").

\textsuperscript{134} 143 U.S. 110 (1892).

\textsuperscript{135} Id. at 134.

\textsuperscript{136} Act of March 2, 1895, ch. 191, § 1, 28 Stat. 963 (1895).

\textsuperscript{137} 188 U.S. 321 (1903).

\textsuperscript{138} Id. at 326.

\textsuperscript{139} Id. at 327 (emphasis added). In Hipolite Egg Co. v. United States, 220 U.S. 45 (1911), the Court upheld the seizure of adulterated food under the Food and Drug Act because there was no violation of state sovereignty arising from the seizure: "The question here is whether articles which are outlaws of commerce may be seized wherever found; and it certainly will not be contended that they are outside of the jurisdiction of the national government when they are within the borders of a state." Id. at 58.
Chief Justice Fuller dissented, arguing that the provision was an exercise of a general police power that the Constitution reserved to the states, and, therefore, the states had “exclusive” authority to adopt measures to eliminate lotteries, not the federal government.\footnote{Champion, 188 U.S. at 330 (Fuller, C.J., dissenting). The Chief Justice stated: The power of the state to impose restraints and burdens on persons and property in conservation and promotion of the public health, good order, and prosperity is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive, and the suppression of lotteries as a harmful business falls within this power, commonly called, of police. \textit{Id.} (citing Douglas v. Commonwealth of Kentucky, 168 U.S. 488 (1897)). This was the first assertion of the position that federal criminal legislation invaded the reserved powers of the states and, therefore, might be beyond the authority of Congress to adopt, regardless of whether Congress might have authority in the area. \textit{See also} Robert H. Bork & Daniel E. Troy, \textit{Locating the Boundaries: The Scope of Congress’s Power to Regulate Commerce}, 25 HARV. J.L. \\& PUB. POL’Y 849, 880 (2002) (“[T]his permissive attitude toward using an enumerated power to infringe on the police power, an area reserved to the States, seems inconsistent with the Constitution’s structure.”).}

\footnote{227 U.S. 308 (1913).}

\footnote{\textit{Id.} at 321.}

\footnote{\textit{Id.} at 322.}

\footnote{\textit{Id.} at 323. In \textit{United States v. Barnew}, 239 U.S. 74 (1915), the Court rejected a challenge to a criminal statute making it an offense to engage in a fraudulent scheme by pretending to be a federal official, which the defendant argued was beyond the power of Congress to adopt because it “encroaches upon the functions of the several states to protect their own citizens and residents from fraud.” \textit{Id.} at 77. The Court held that the

In \textit{Hoke v. United States},\footnote{Id. at 322.} the Court rejected for a second time the argument that a federal criminal provision exceeded the scope of congressional authority to regulate conduct already subject to state criminal laws. It upheld the constitutionality of the Mann Act, which prohibited the interstate transportation of females for immoral purposes. It found no merit to the argument that the law was “a subterfuge and an attempt to interfere with the police power of the states to regulate the morals of their citizens, and . . . that it is in consequence an invasion of the reserved powers of the states.”\footnote{\textit{Id.} at 323.} Although the states and the national government have “different spheres of jurisdiction,” the authority of each is exercised “whether independently or concurrently, to promote the general welfare, material and moral.”\footnote{\textit{Id.} at 323.} The federal criminal law did not displace the states from their historic role, but provided important support to reach misconduct already subject to state prosecution, so that the Commerce Clause gave Congress the authority to “adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations.”\footnote{\textit{Id.} at 323.}
The Court’s Commerce Clause jurisprudence took an abrupt, although short-lived, turn toward substantially limiting the scope of congressional authority under the Commerce Clause in *Hammer v. Dagenhart.* The Court struck down the Child Labor Act because the statute did not reach interstate transportation but, rather, “the production of articles, intended for interstate commerce, [which] is a matter of local regulation.” The majority opinion expressed concern that if it upheld the law, “all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the states.” The Court noted the substantial constitutional problem with such broad federal authority: “The maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the nation by the federal Constitution.” *Hammer v. Dagenhart* concluded with the apocalyptic warning that:

[If Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed.]

The Court viewed the Child Labor Act as invading the sovereignty of the states because the prohibition worked by the federal provision effectively precluded state regulation over “matters purely local.” The emphasis on the statute was:

[W]ell within the authority of Congress. In order that the vast and complicated operations of the government of the United States shall be carried on successfully and with a minimum of friction and obstruction, it is important—or, at least, Congress reasonably might so consider it—not only that the authority of the governmental officers and employees be respected in particular cases, but that a spirit of respect and good will for the government and its officers shall generally prevail.

*Id.* at 78.

146. *Id.* at 272.
147. *Id.* (emphasis added).
148. *Id.* at 275.
149. *Id.* at 276.
150. The Court’s holding conflicted with its treatment of other federal criminal laws that approached the federal statute as almost a cooperative federal-state effort to a problem and not an attempt by the federal government to preclude the state from
need to preserve local control indicated that a regulation coming within congressional authority over commerce would not be constitutional if it reached an area already subject to the police power of the states. Much as Morrison proclaimed almost eighty years later, the majority in Hammer asserted that there was a core area subject to exclusive state regulation—the "purely local" subject of child labor in factories and mines in a state—that Congress could not reach under an exercise of even its broadest power, the Commerce Clause. Hammer took a narrow approach to the commerce power, informed by a view of federalism that required a separation between national and state authority into exclusive spheres, at least for certain subjects.\footnote{151}

regulating the same conduct. Justice Holmes dissented in Hammer, arguing that "[t]he Act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like." Id. at 281 (Holmes, J., dissenting). The analysis in Hammer was unclear because, while it did not explicitly overturn any prior decisions, the Court appeared to signal a significant change in the scope of congressional authority to adopt criminal regulations under the Commerce Clause. The Court acknowledged that Congress could regulate interstate transportation of manufactured items, noting that the statutes in Hoke and Champion were constitutionally permissible because they regulated commerce and not just a local activity. The Child Labor Act was somehow different because the law reached manufactured items and not the transport of them, although the Court could only assert its conclusion that manufacturing was not commerce without explaining how that distinction made any difference. See David P. Currie, The Constitution in the Supreme Court: 1910-1921, 1985 DUKE L.J. 1111, 1122-23 ("As an original matter, a respectable argument could have been made that the commerce power should be construed, in light of its purpose, only to authorize measures that removed obstructions to commerce. The difficulty was that this position had been rejected both in [Champion] and Hoke, neither of which the Hammer Court purported to question.").

151. The Court extended its analysis of the separation between federal and state authority in invalidating the Child Labor Tax Act in Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922). The Act sought the same result as the Child Labor Act by imposing a significant tax on goods manufactured by companies using child labor. The Court found that Hammer’s analysis controlled, holding that, “here the so-called tax is a penalty to coerce people of a state to act as Congress wishes them to act in respect of a matter completely the business of the state government under the federal Constitution.” Id. at 39. It is interesting to note that Justice Day, the author of Hammer v. Dagenhart, also wrote the Court’s opinion the following year in United States v. Doremus, 249 U.S. 86 (1919), that rejected the defendant’s federalism argument that the Harrison Narcotic Drug Act invaded the police power of the states. Congress enacted the law under the tax power, not the Commerce Clause, and the Court stated “[n]or is it sufficient to invalidate the taxing authority given to the Congress by the Constitution that the same business may be regulated by the police power of the state.” Id. at 93-94. Although unsympathetic to the federalism argument in Doremus, the Court took the opposite approach three years later in Bailey, finding that the Child Labor Tax Act invaded the authority of the states to regulate under the police power. Bailey rather feebly attempted to distinguish Doremus on the ground that the child labor tax was designed to achieve a result “plainly
Hammer's position that "purely local matters" fell outside the Commerce Clause was good law for less than twenty years, and the Court rejected explicitly its narrow view of the commerce power in United States v. Darby.\(^1\) The Court held, "It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states."\(^2\) Darby moved the constitutional focus for congressional enactments, especially criminal provisions, away from the subject matter of the law—i.e., whether the conduct was a "purely local matter"—so that the existence of state regulation was irrelevant to the authority of Congress to enact the statute. Hammer was an aberration in the Court's approach to federal criminal statutes,\(^3\) and Darby restored the position that Congress may regulate through the criminal law if the provision comes within one of the Constitution's enumerated powers, rejecting the notion that the police power of a state may insulate certain subjects from congressional legislative authority. The subject of congressional regulation must still be one of national interest, so that federal law did not displace the states but provided an additional means of protecting the people so long as Congress saw fit to exercise its authority.

C. Statutory Interpretation and Limits on Federal Criminal Law: Perez and Bass

Beginning in the New Deal era and continuing to today, Congress has expanded the federal criminal law so that it now encompasses most types of criminal conduct already subject to state and local prosecution. This expansion was especially noticeable for crimes involving violence, as the national government responded to political pressure to crack down on crime.\(^4\) The new

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1. See Currie, supra note 150, at 1122 (The Court in Hammer "executed a sharp about-face" from its prior precedents.).

2. See 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, 980-81

3. Bailey, 259 U.S. at 43, but that was also true in Doremus, which sought, through a tax, to outlaw the manufacture of opium. Doremus repeated the Court's position that "[i]f the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it." Doremus, 249 U.S. at 93. Bailey ignored precedent to prevent Congress from using the tax power to do an end-run around Hammer, a result that had little to do with constitutional principles.

4. Doremus, 249 U.S. at 93. The Court overruled Hammer v. Dagenhart because that decision "was a departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted." Id. at 116-17.
federal statutes usually replicated crimes prosecuted by the states, although many included an element of the offense involving proof of a federal interest, such as interstate commerce or use of the mails. In the rush to expand the number of crimes subject to federal prosecution, Congress often adopted provisions with little thought about whether the national interest was served by the legislation. Moreover, the statutes were not always drafted with precision, so that different laws overlapped and crimes were poorly defined, leaving it to the federal courts to engage in the painstaking process of statutory interpretation to explain the scope of the federal criminal provisions.

Although the Supreme Court in Darby rejected the "purely local" analysis of Hammer, the process of statutory interpretation still required the Court to consider whether Congress had the constitutional authority to adopt a particular provision. In United States v. Perez, the Court upheld the Consumer Credit Protection Act as a proper exercise of congressional power under the Commerce Clause that permitted federal prosecution for extortionate credit activities, i.e., loan-sharking. The crime involved the use of violence or threats to extract payments, an area subject to prosecution under state law, and the Court found that Congress could legislate on the same topic because "it was the class of activities regulated that was the measure" of the commerce power and not whether the criminal conduct itself involved any interstate movement. Perez established the outer limit of congressional authority to legislate under the Commerce Clause, requiring only that there be a connection in the aggregate between the activity subject to the criminal prohibition and interstate commerce.

(1995) ("[T]here are now more than 3,000 federal crimes. By the mid-1990s, the accumulation of new statutes had reversed the pattern that held for the first century of the nation: the bulk of the federal criminal code now treats conduct that is also subject to regulation under the states' general police powers.") (footnote omitted).

156. See, e.g., United States v. Batchelder, 442 U.S. 114, 123-24 (1979) (The Court noted the "partial redundancy" of two provisions involving felons possessing firearms, one of which permitted a five-year sentence, the other only a two-year sentence, and held that "when an act violates more than one criminal statute, the Government may prosecute [sic] under either so long as it does not discriminate against any class of defendants.").


158. The Act provides in part: "Whoever makes any extortionate extension of credit, or conspires to do so, shall be fined under this title or imprisoned not more than 20 years, or both." 18 U.S.C. § 892(a) (2000). It defines an "extortionate extension of credit" as "any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person." 18 U.S.C. § 891(6) (2000).

159. Perez, 402 U.S. at 153.

160. Id. at 154 ("Where the class of activities is regulated and that class is within
In the process of interpreting criminal statutes, the issue arose whether the constitutional authority for enacting the provision must also be proven as an element of the offense. All crimes require the government to prove specified conduct (actus reus) and the applicable mental state (mens rea) as defined by the statute. If Congress enacted a criminal law based on its commerce power, one question was whether proof of an effect on interstate commerce was an element of the crime and not just an issue of constitutional authority. The loan-sharking statute reviewed in Perez did not require any proof of an effect on interstate commerce.

In United States v. Bass, 161 the Court reviewed a statute making it a crime for any felon "who receives, possesses, or transports in commerce or affecting commerce . . . any firearm." 162 The government argued that the commerce element of the statute only modified "transports" and did not require proof that the defendant possessed a firearm "in commerce" for a conviction. The Court held that the government must "show the requisite nexus with interstate commerce" for any conviction under the statute, which it asserted was "the more plausible construction" of the provision. 163

As a matter of statutory interpretation, the Court was no doubt correct regarding the necessity to prove the commerce element for a possession charge. Near the end of its opinion, however, Bass referred to "a second principle supporting today's result: unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." 164 It was not clear how this notion of a "federal-state balance" entered into the statutory analysis of the firearm statute, and the Court did not refer explicitly to either federalism or the Tenth Amendment as the basis for its assertion. The Court implied that a different interpretation of the commerce element would present a significant constitutional problem because "[a]bsent proof of some interstate commerce nexus in each case, Section 1202(a) dramatically intrudes upon traditional state criminal jurisdiction." 165

Bass did not explain the nature of this intrusion, and made no reference to earlier precedents acknowledging that congressional authority to protect morality

the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class.'") (quoting Maryland v. Wirtz, 392 U.S. 183, 193 (1968)).
163. Bass, 404 U.S. at 340. The Court stated that it did not need to consider Perez: In light of our disposition of the case, we do not reach the question whether, upon appropriate findings, Congress can constitutionally punish the 'mere possession' of firearms; thus, we need not consider the relevance, in that connection, of our recent decision in Perez v. United States.
164. Id. at 349.
165. Id. at 350.
through criminal laws did not invade the police power. The Court’s cursory discussion of the federal-state balance did not appear to be the application of an independent constitutional principle limiting the power of Congress to adopt criminal laws, but more as a rationale for its decision to read the statute narrowly to require proof of the interstate commerce element for all three acts that would constitute a violation. Yet, Bass took an idea first raised in Hammer—that a federal criminal statute that reached “purely local” conduct would fall outside the scope of the Commerce Clause—and offered it as a principle of statutory interpretation to limit the scope of federal criminal laws.  

Perez and Bass present an interesting contrast. Perez endorsed a broad reading of congressional authority to adopt criminal laws under the Commerce Clause—one without an interstate commerce element—while Bass cautioned that statutes must incorporate a federal interest in the prosecution or they may somehow exceed the authority of Congress to adopt the provision. Although the loan-sharking statute did not require proof of how the conduct affected interstate commerce, credit transactions clearly involve economic activity so there was no need to require proof of a commerce element for the offense. Bass also did not need to address whether there was a constitutional requirement that the federal interest be an element of every prosecution because the commerce element was part of the firearm statute. The Court’s task in Bass was limited to interpreting the scope of that element, and its reference to the potential effect of the provision on the federal-state balance supported its statutory interpretation for a provision almost completely lacking evidence of congressional intent. Reading Bass to impose a constitutional limitation that federal criminal laws cannot reach certain types of conduct because they are already subject to state prosecution—regardless of congressional authority to adopt the provision—means that the Court would have effectively restored an aspect of

166. The “plain statement rule” asserted in Bass does not operate to limit congressional authority to adopt a statute. Instead, it is a rule of statutory construction that imposes a requirement on Congress to make it clear that the scope of the statute is to alter the balance between the authority of the federal government and the states. See Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 787 (2000) (“[T]he ordinary rule of statutory construction’ that ‘if Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.’”) (quoting Will v. Mich. Dept. of State Police, 491 U.S. 58, 65 (1989)). The criminal statute at issue in Bass did not change the balance between the federal government and the states because the states retained the authority to prosecute crimes to the same extent as before the adoption of the federal statute. Moreover, a federal prosecution would have no effect on a prior or subsequent state prosecution under the Double Jeopardy Clause, so there is no way in which the states were displaced or affected by the federal law.
Hammer it rejected in Darby, that the federal criminal law should not intrude upon certain areas that are of "purely local" concern.\textsuperscript{167}

The issue of constitutional limitations on congressional authority to adopt criminal laws, and the relation between the national and state governments in the prosecution of crimes, was largely dormant for two decades after Perez and Bass. The broad endorsement of congressional authority under the Commerce Clause in Perez gave the impression that few, if any, areas were beyond the reach of federal legislation, at least until the Court took a more restrictive view of what constitutes commerce in Lopez.

D. Making Sense Out of Federalism Limits on Criminal Statutes

Neither Bass nor the Court’s more recent decisions in Lopez and Morrison addressed how to avoid interference with state authority outside of the limitations on Congress’s enumerated powers. Bass noted that a broader interpretation of a criminal statute that permitted prosecution without reference to the effect on commerce might have presented constitutional problems, but that was dictum to support the Court’s exercise in statutory interpretation. Lopez and Morrison raised concerns about the validity of federal criminal statutes that reached conduct traditionally subject to prosecution by the states, but that was not the principle basis for those decisions, which were largely concerned with determining the proper scope of the Commerce Clause.

The reference in Morrison to the "distinction between what is truly national and what is truly local" harkened back to the Court’s early dormant Commerce Clause jurisprudence and the "dual sovereignty" approach of Hammer v. Dagenhart regarding "matters purely local." The concept of federalism as

\textsuperscript{167} In Jones v. United States, 529 U.S. 848 (2000), decided shortly after Morrison, the Court relied on Bass as a basis for its interpretation of the federal arson statute, 18 U.S.C. § 844(i) (2000), that required the government to prove that the property be involved in commerce at the time of the burning. The statute reached arson of any building "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce," and the government argued that the private residence affected interstate commerce because, \textit{inter alia}, it was used to obtain a mortgage from an out-of-state lender and received natural gas from another state. The Court stated "[t]o read § 844(i) as encompassing the arson of an owner-occupied private home would effect such a change [on the federal-state balance], for arson is a paradigmatic common-law state crime." \textit{Id.} at 858. The Court did not explain how the broader reading of the federal crime would "significantly change[ ] the federal-state balance" merely by reaching a common law offense subject to state prosecution. \textit{Id.} Much as it did in Bass, the Court relied on the federalism concern to read the interstate commerce element of the offense narrowly to require proof that the crime directly affected interstate commerce. \textit{See} United States v. Ballinger, 312 F.3d 1264 (11th Cir. 2002) (applying the Court’s analysis in Jones to hold that 18 U.S.C. Section 247, prohibiting arson of religious property, should be construed narrowly to require a substantial effect on interstate commerce).
creating distinct spheres of federal and state authority meant that the Constitution might impose an external constraint on congressional authority to adopt statutes that reach areas subject to the exclusive control of the states. The problem with that understanding is that the Court has never provided a coherent analysis, outside of the anti-commandeering cases, of how federalism can be an independent limit on the authority of Congress to enact criminal laws.

Criminal statutes permit the executive branch to prosecute defendants, and there is no conscription of any state officer to promote or enforce the federal law.\textsuperscript{168} Indeed, the opposite was the case in \textit{Lopez} and \textit{Morrison}, the problem being that the federal statute operated in an area in which the states traditionally prosecuted offenses but where in fact the federal government chose, for whatever reason, to pursue criminal charges.\textsuperscript{169} \textit{Morrison}’s reference to conduct that is “truly local” and the maintenance of the federal-state balance in adopting criminal laws is misleading because it ignored the Court’s longstanding approach, reaffirmed in \textit{Darby} when it overruled \textit{Hammer}. Under that approach, the validity of federal criminal laws does not depend on the subject matter of the prohibition because they do not displace the police power of the states or affect the states’ ability to enforce criminal laws.\textsuperscript{170}

The Court’s decisions in \textit{Lopez} and \textit{Morrison} failed to make clear how federalism restrains the authority of the national government to enforce federal criminal laws, except as a principle of statutory construction or a guide to the limits of the enumerated powers. Unfortunately, reference to what is “truly national” and “truly local” indicated that a case might involve an “as-applied” constitutional violation of federalism if the prosecution involves conduct that is truly local, thereby invading the sovereignty of the states. Thus, \textit{Lopez} and \textit{Morrison} created the impression that the Constitution fashioned distinct spheres of authority that the national government may not traverse in a particular prosecution, regardless of whether a particular law itself was a proper exercise of congressional authority.

\textsuperscript{168} See United States v. Jones, 231 F.3d 508, 515 (9th Cir. 2000) (rejecting defendant’s constitutional challenge under \textit{Printz} to a provision of the federal firearms law because “[t]he statute at issue here is a federal criminal statute to be implemented by federal authorities; it does not attempt to force the states or state officers to enact or enforce any federal regulation”).

\textsuperscript{169} See Klein, supra note 18, at 1556 (discussing the author’s conversation with the Assistant United States Attorney assigned to the \textit{Lopez} prosecution who stated that his office took the case from state prosecutors because of political pressure for a federal prosecution).

\textsuperscript{170} See Klein, supra note 18, at 1550 (“The Court accomplishes little when it intervenes to protect the states from duplicative federal legislation.”); Massey, supra note 103, at 475 (“There is simply no indication that the Court is poised to undermine \textit{Champion v. Ames} or any other chestnuts of this genre.”) (footnote omitted).
As a result, some lower courts have misread the Supreme Court's references to federalism in *Lopez* and *Morrison* and appear to believe that they authorize a type of judicial supervisory authority for federal courts to police prosecutors if the court believes the subject of the prosecution does not include a sufficient national interest. This conception of federalism operates not only as a limitation on Congress, but also as a new basis for a "chancellor's foot veto" to be exercised by the lower courts to block federal prosecutions, a power that is far beyond the meaning of federalism.

IV. MISGUIDED FEDERALISM AS A LIMITATION ON INDIVIDUAL PROSECUTIONS

Many federal statutes require proof of an element that reflects the constitutional basis for the offense. For example, the Hobbs Act prohibits robbery or extortion that "in any way or degree obstructs, delays, or affects commerce,"171 and courts interpret the provision to rely on the fullest extent of congressional power under the Commerce Clause.172 The Mail Fraud statute requires proof that, for the purpose of executing a fraudulent scheme, the defendant "places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service,"173 an exercise of congressional authority under the Postal Clause.174 Other provisions, however, such as the prohibition on illegal gambling, do not require proof of any element that relates to the constitutional power under which Congress enacted the statute.175

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172. See United States v. Green, 350 U.S. 415, 420-21 (1956) ("It is also stated in the opinion below that to interpret the Act as covering the activity charged would 'extend the jurisdiction of the Court, and the power of Congress beyond their Constitutional limits.' The same language is in the order. Since in our view the legislation is directed at the protection of interstate commerce against injury from extortion, the court's holding is clearly wrong. We said in the Local 807 case that racketeering affecting interstate commerce was within federal legislative control.") (citation omitted).


174. A violation of the Mail Fraud statute may also involve the use of "any private or commercial interstate carrier," which is based on the Commerce Clause and not the Postal Clause. See Henning, supra note 129, at 469 (discussing the constitutional basis in the Commerce Clause of the interstate carrier amendment to the Mail Fraud statute). The Wire Fraud statute, which covers the same types of fraudulent conduct as the Mail Fraud statute, is also an exercise of the commerce power, requiring proof of a transmission by "wire, radio or television communication in interstate or foreign commerce." 18 U.S.C. § 1343 (2000).

175. 18 U.S.C. § 1955(a) (2000). The gambling offense is defined as follows: "Whoever conducts, finances, manages, supervises, directs, or owns all or part of an
In *Lopez*, the Supreme Court noted that the presence of a "jurisdictional element . . . would ensure, through case-by-case inquiry, that the firearms possession in question affects interstate commerce."\(^{176}\) The jurisdictional element is not constitutionally required, but it provides some measure of comfort that the particular prosecution embodies the interests of the national government.\(^{177}\) Statutes that require proof of a federal jurisdictional element permit courts to police prosecutions by determining whether the federal government introduced sufficient proof of that element of the offense. It is not uncommon, for example, that the government fails to establish beyond a reasonable doubt the requisite effect on interstate commerce or the mailing element, and a court will reverse a conviction on the ground of insufficient evidence of that jurisdictional element of the offense.\(^{178}\) The problem in that illegal gambling business shall be fined under this title or imprisoned not more than five years, or both." Id. Courts have rejected constitutional challenges to the provision based on *Lopez* and *Morrison* because the statutes are directed at commercial activity. See United States v. Riddle, 249 F.3d 529, 539 (6th Cir. 2001).


177. See, e.g., Jones v. United States, 529 U.S. 848, 858 (2000) (holding that federal arson statute did not reach arson of every building that has any effect on interstate commerce to avoid "the constitutional question that would arise were we to read § 844(i) to render the 'traditionally local criminal conduct' in which petitioner Jones engaged 'a matter for federal enforcement'") (quoting United States v. Bass, 404 U.S. 336, 350 (1971)); United States v. McLemore, 28 F.3d 1160, 1164-65 (11th Cir. 1994) (dismissing indictment under 18 U.S.C. Section 924(h) prohibiting the knowing transfer of a firearm to be used in a crime of violence because the law did not include violations of state laws only and Congress did not meet the requirements of the plain statement rule showing that it intended to alter the federal-state balance); accord United States v. Acosta, 124 F. Supp. 2d 631 (E.D. Wisc. 2000).

178. See, e.g., Jones, 529 U.S. at 859 (building involved in arson was a private residence and did not meet the requirement that property be used in interstate commerce); Stirone v. United States, 361 U.S. 212, 218-19 (1960) (proof of Hobbs Act commerce element at trial differed impermissibly from what was charged in the indictment, so government failed to prove element of the offense charged and the conviction was reversed); United States v. Odom, 252 F.3d 1289, 1297 (11th Cir. 2001) (reversing arson conviction involving burning of a church because the government failed to prove that the building was used for commercial activity); United States v. Hannigan, 27 F.3d 890, 895 (3rd Cir. 1994) (reversing mail fraud conviction because there was insufficient evidence that mails were used when witness did not have personal knowledge of routine business practices of company that allegedly mailed the matter).
instance is not a constitutional one, but the more rudimentary issue of meeting the government's high burden of proof in a criminal case.\footnote{Henning: Henning: Misguided Federalism}

The Supreme Court's invocation of federalism in \textit{Lopez} and \textit{Morrison} as a potential limit on the national government's authority raises the question whether courts can prohibit federal prosecutions even if the government provided sufficient proof of a jurisdictional element or a jurisdictional element is not explicitly required. If federalism can be applied as an independent constitutional constraint to prohibit individual federal prosecutions of conduct involving matters that are "truly local," regardless of whether the statute has a jurisdictional element, then the Court has effectively created a constitutional requirement that the government prove in every case that the charges involve subjects of national importance or the prosecution cannot proceed in federal court. This approach misreads the meaning of federalism because that principle does not empower courts to rewrite statutes or condition the enforcement of federal criminal laws on a judge's particular perception of what cases are in the interest of the federal government to prosecute.

\textbf{A. Facial and As-Applied Constitutional Challenges}

When a defendant challenges the constitutionality of a statute, the traditional view is that a court generally should consider only the validity of the statute as applied in the particular case. In \textit{United States v. Salerno},\footnote{See, e.g., United States v. Peterson, 236 F.3d 848, 855 (7th Cir. 2001) (reversing Hobbs Act conviction arising from theft of marijuana because the government's proof of the effect on interstate commerce was "too attenuated to establish that [the victim] ran an interstate business. To render a guilty verdict, the jury must hear sufficient evidence to avoid resorting to excessively strained inferences or guesswork.").} the Supreme Court stated, "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."\footnote{Id. at 745.} A facial challenge seeking to have the law declared unconstitutional without regard to its particular application to the claimant's circumstances, therefore, is viewed with suspicion, at least if one accepts at face value \textit{Salerno}'s blanket assertion.

The only type of facial challenge explicitly recognized by the Court involves a claim of overbreadth—that a statute impermissibly infringes on the First Amendment right of free speech.\footnote{Id. ("The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since}
party to claim that a statute is facially unconstitutional because it reaches speech otherwise protected by the First Amendment, even if the party's own speech might not be protected.\textsuperscript{183} The Court is misleading, however, when it asserts that overbreadth is the only exception to the general requirement that all other constitutional challenges must be considered only as applied to the litigant. Scholars point to many instances outside of the overbreadth doctrine in which the Court has held a statute unconstitutional on its face.

Professor Monaghan discussed another type of facial challenge, the "valid rule" claim, that "a litigant always had the right to be judged in accordance with a constitutionally valid rule of law. Put differently, a litigant could make a facial challenge to the constitutional sufficiency of the rule actually applied to him, irrespective of the privileged character of his own activity."\textsuperscript{184} Professor Monaghan's insight was that any as-applied challenge presumed that the rule being applied was within the power of the legislature to adopt the provision, and that if the legislature could not have adopted the law, then the Constitution prohibits any application of the statute to any person subject to government regulation.\textsuperscript{185} Although scholars disagree about the basic nature of constitutional claims—whether as-applied and facial claims are really separate categories or different ways of viewing the litigant's claim of constitutional infirmity\textsuperscript{186}—they

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we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment.'

\textsuperscript{183} See Richard H. Fallon, Jr., \textit{Making Sense of Overbreadth}, 100 \textit{Yale L.J.} 853, 863 (1991) ("When speech or expressive activity forms a significant part of a law's target, the law is subject to facial challenge and invalidation if: (i) it is 'substantially overbroad'—that is, if its illegitimate applications are too numerous 'judged in relation to the statute's plainly legitimate sweep,' and (ii) no constitutionally adequate narrowing construction suggests itself." (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)) (footnote omitted); Note, \textit{The First Amendment Overbreadth Doctrine}, 83 \textit{Harv. L. Rev.} 844, 845 (1970) ("The newer and more aggressive method of reviewing overbroad laws on their face involves scrutiny to determine whether a statute is too sweeping in coverage—and if so, invalid on its face. Such review proceeds without regard to the constitutional status of a particular complainant's conduct.") (footnote omitted).


\textsuperscript{185} See \textit{id.} at 8 ("Thus, in addition to a claim of privilege, a litigant has always been permitted to make another, equally 'conventional' challenge: He can insist that his conduct be judged in accordance with a rule that is constitutionally valid. . . . In sharp contrast to a fact-dependent privilege claim, a challenge to the content of the rule applied independent of the specific facts of the litigant's predicament.").

\textsuperscript{186} See Matthew D. Adler, \textit{Rights, Rules, and the Structure of Constitutional Adjudication: A Response to Professor Fallon}, 113 \textit{Harv. L. Rev.} 1371, 1387 (2000) ("At best, there is a distinction between 'facial' and 'as-applied' challenges that comes in at the remedial stage, but this is more aptly phrased as a distinction between facial invalidation (where the court completely repeals an invalid rule) and partial invalidation (where the court amends, rather than repeals, an invalid rule."); Matthew D. Adler,
are unanimous that every party subject to government regulation can assert a right to be judged by a law that is a valid exercise of the government's authority to enact and enforce the provision.\footnote{187}

The Constitution, therefore, prohibits application of a rule that is not a valid exercise of the government's authority. Thus, the valid rule claim is not that the Constitution explicitly protects a litigant's conduct, but that the regulation the government seeks to enforce is beyond its authority. The statute would be unconstitutional on its face because it cannot be applied in any permissible manner, regardless of whether the litigant's conduct would have violated the provision. Unlike an overbreadth claim, which rests on the proposition that some, but not all, applications of the statute will impinge on free speech rights, the valid rule challenge posits that the provision cannot be applied in any situation because the legislature did not have the authority to adopt the provision in the first place.\footnote{188}

The valid rule requirement is inherent in the legal structure created by the Constitution, although it is not identifiable in the constitutional text. The rule is not the subject of separate judicial analysis, as Professor Fallon noted: "[I]t is hard to identify direct judicial affirmations of the valid rule requirement, though a doctrinal home could easily be found in the Due Process Clause: due process

\textit{Rights Against Rules: The Moral Structure of American Constitutional Law}, 97 Mich. L. Rev. 1, 12 (1998) ("The essential function of constitutional courts is to assess rules against these kinds of moral tests, and to repeal or amend those rules that are moral failures.")); \textit{Facial Challenges to State and Federal Statutes}, 46 Stan. L. Rev. 235, 294 (1994) ("The distinction between as-applied and facial challenges may confuse more than it illuminates. In some sense, any constitutional challenge to a statute is both as-applied and facial.") (footnote omitted); \textit{As-Applied and Facial Challenges and Third-Party Standing}, 113 Harv. L. Rev. 1321, 1324 (2000) ("[I]t is more misleading than informative to suggest that 'facial challenges' constitute a distinct category of constitutional litigation. Rather, facial challenges and invalidations are best conceptualized as incidents or outgrowths of as-applied litigation.").

\footnote{187} See Fallon, Jr., supra note 186, at 1327 ("In a nutshell, everyone has a personal right, independent of third-party standing, to challenge the enforcement of a constitutionally invalid statute against her.").

\footnote{188} See Fallon, Jr., supra note 186, at 1332 ("If the statute under which a defendant is convicted is invalid—for example, because it prohibits 'fighting words' on too narrow and discriminatory a basis—the defendant's conviction must be reversed for the sole and simple reason that there is no constitutionally valid rule of law under which the defendant could be sanctioned (even though there is no general right to utter fighting words."); \textit{Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement}, 48 Am. U. L. Rev. 359, 408 (1998) ("Because valid rule facial challenges take place at the level of statutory rules and constitutional requirements and predicate the claim of facial invalidity on an inherent constitutional defect invalidating all conceivable applications, they are largely unaffected by matters of statutory severability, whether presumptive or actual.").
forbids sanctions unless a defendant had fair notice of a valid rule of law.” 189
This understanding of the scope of enforceable laws can be traced to the seminal
decision in Marbury v. Madison, 190 when the Court held that “a law repugnant
to the constitution is void.” 191 The Court reiterated that view recently in Aiden
v. Maine, 192 an Eleventh Amendment case, when it stated that the Supremacy
Clause only permits federal law to displace state law when the federal provision
“is a valid exercise of the national power.” 193 In Printz, the Court described
the provision at issue as an “ultra vires congressional action,” and, therefore,
“merely [an] ac[t] of ursurpation’ which ‘deserve[s] to be treated as such.” 194
Unless the legislature validly enacted a rule, the Court treats the law as a nullity,
subject to no further consideration, much less enforcement.

Lopez and Morrison are quintessential examples of the Court declaring the
statutes facially unconstitutional, and, therefore, inapplicable to the defendants’
conduct, because they failed the valid rule requirement. 195 The defendants did
not assert that the statutes violated their personal constitutional rights, such as the
right to trial by jury, or that their conduct was somehow privileged from
prosecution. Far from it, the defendant in Lopez clearly violated the Gun-Free
School Zones Act and the procedural posture of Morrison required the Court to
accept the plaintiff’s allegations of rape as true. The Court found the statutes
unconstitutional because Congress did not have the power under the Commerce
Clause to enact regulations for what the Court determined were noncommercial

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189. Fallon, Jr., supra note 186, at 1333.
190. 5 U.S. (1 Cranch) 137 (1803).
191. Id. at 180; see Dorf, supra note 186, at 247 (“Under this view, now canonized
in American law, the very meaning of an enforceable constitution is that an
unconstitutional law may not be enforced.”).
193. Id. at 731.
Federalist No. 33 (Alexander Hamilton)).
195. Recent scholarship discussing the valid rule requirement largely ignores the
federalism decisions of the past decade. In those cases, the Court did not engage in any
form of as-applied constitutional analysis to determine whether the particular prosecution
or civil claim violated a right of the defendants, or whether the statute violated the
sovereignty of a state in a particular circumstance. The underlying facts of the cases are
almost completely irrelevant to the ultimate decision invalidating the provisions, and in
the anti-commandeering cases there was no issue of fact, only whether Congress could
regulate the states in the manner chosen. In Lopez and Morrison, both of which involved
factual questions, the Court’s focus was on congressional authority to reach the category
of conduct that was the subject of the provisions: possession of a weapon and rape. It
is not clear why the scholarship in this area has not used the federalism and Commerce
Clause decisions as a vehicle to demonstrate the importance of the valid rule requirement
when the Court clearly decided facial challenges without regard to whether the provision
was unconstitutional as applied.
activities—i.e., the statutes were not valid rules—so the provisions could not be the basis to sanction the defendants, regardless of the impropriety of their conduct.

The Commerce Clause, like the other enumerated powers, incorporates a structural requirement that Congress act pursuant to a constitutional grant of authority. Similarly, federalism protects the sovereignty of the states by limiting the federal government’s regulatory authority to areas permitted by the Constitution. Federalism protects the liberty of all by constraining the power of the national government to act in only those areas that the Constitution recognizes through the enumerated powers. In that sense, everyone shares the constitutional right to challenge an act of Congress or administrative regulation that is “ultra vires” and, therefore, beyond the scope of the federal government’s power.196 Along the lines that Professor Adler suggests, the enumerated powers provided in the Constitution permit a challenge alleging that the federal government fails to regulate a particular subject or to do so in a particular manner, but the grant of authority does not protect any particular conduct from permissible congressional regulation.197

If challenges to congressional authority to enact a statute in reality seek the facial invalidation of the provision, because every litigant has the right to be sanctioned only under a valid rule, can there also be an as-applied challenge on the same ground? In other words, if federalism limits congressional authority to enact regulations on particular subjects, then can that same constitutional limitation be applied on a case-by-case basis to determine whether the application of a regulation to specific conduct comports with the limitations imposed by the Constitution? The answer would appear to be yes, simply because as-applied challenges are the favored method for alleging a constitutional violation, as described by Salerno. Yet, as-applied challenges involve the assertion of an individual’s right to be free from government regulation of certain activities, such as protected expression or religious exercise,

196. See, e.g., United States v. Sabri, 183 F. Supp. 2d 1145, 1158 (D. Minn. 2002), rev’d, No. 02-1561, 2003 WL 1792130 (8th Cir. Apr. 7, 2003) (dismissing indictment upon finding that 18 U.S.C. Section 666, a federal anti-bribery statute, was facially unconstitutional because Congress did not have the power to adopt the statute under the Spending Clause); Dorf, supra note 186, at 248-49 (“The Constitution does not create, in so many words, an individual right to be judged only by a constitutional law. But the Constitution certainly forbids a court from enforcing an unconstitutional law. Courts, which will not enforce unconstitutional laws, will treat litigants exactly as though they have a right to be judged only by constitutional rules of law. In practice, therefore, every litigant does have such a right.”).

197. See Adler, supra note 186, at 3 (“A constitutional right protects the right-holder from a particular rule (a rule with the wrong predicate or history); it does not protect a particular action of hers from all the rules under which the action falls.”) (footnote omitted).
or a claim that the government's actions did not comport with a specific constitutional protection afforded to individuals, such as the right to trial by jury or Miranda warnings. Unlike the valid rule requirement, which focuses solely on whether the regulation meets the requirements for a constitutionally proper enactment, as-applied challenges are an assertion of a right held by the individual, on the assumption that the statute applied is a valid rule.

While the Court describes federalism as a mechanism to protect liberty, it is not a right held by individuals in the same way that the Bill of Rights provides certain specific guarantees that individuals can assert. Some lower federal courts, however, read Lopez and Morrison as giving the judiciary a mandate to review individual prosecutions to ensure that there is no violation of what Morrison called the constitutional "distinction between what is truly national and what is truly local." The Supreme Court described federalism as a means to ensure liberty, which is the type of language associated with individual constitutional rights, and in Salerno the Court asserted that constitutional challenges are limited to as-applied claims unless First Amendment rights are implicated. The logic seems inexorable, therefore, that federalism must be available for an as-applied claim if it is designed to protect the liberty of individuals from the improper assertion of authority of the federal government.

With no Supreme Court analysis about how federalism should be applied, lower courts have asserted their authority to enforce the permissible line on a case-by-case basis, engaging in a type of ad hoc review of individual prosecutions to ensure that the proceeding involves a matter that is "truly national." That approach reflects a significant misunderstanding of the type of constitutional challenge asserted in Lopez and Morrison when, despite references to federalism, the Supreme Court only interpreted the scope of the Commerce Clause to determine that the statutes were not valid rules, but did not create a new form of federalism analysis for individual prosecutions.

B. Can There Be As-Applied Federalism?

In United States v. McCormack, a federal district court dismissed an indictment involving the payment of a $4,000 bribe to a local police officer to prevent an investigation of the defendant's illegal activities. The government

198. See Dorf, supra note 186, at 269 ("[T]he Ninth and Tenth Amendments do not expressly recognize any rights at all.").

199. See, e.g., United States v. Nutall, 180 F.3d 182, 190 (5th Cir. 1999) (DeMoss, J., specially concurring) ("Under the Supreme Court's decision in United States v. Lopez, the federal courts are charged with the task of drawing a line between criminal conduct which is 'truly local' and criminal conduct which is 'truly national' in effect.") (citation omitted).

charged the defendant under Section 666, a statutory provision that prohibits bribery of state and local officials employed by programs that receive more than $10,000 of federal funds in a twelve-month period. An additional element of the offense requires proof that the value of the payment exceeded $5,000.\textsuperscript{201} The district court expressed serious doubts about whether the payments to the officer met the statutory requirement of a bribe valued over $5,000, and whether there was a sufficient connection between the misconduct and the federal funds received by the local government. The district court could have dismissed the indictment on either statutory ground. It decided, however, to reach the perceived federalism issue arising from the prosecution of a local official for a violation already covered by state criminal law. The district court relied on Lopez and New York to hold that “whatever other application of Section 666 may be constitutional, this one is not.”\textsuperscript{202}

\begin{quote}
(a) Whoever, if the circumstance described in subsection (b) of this section exists—

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that—

(i) is valued at $5,000 or more, and
(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

202. McCormack, 31 F. Supp. 2d at 187. It was unclear why the district court eschewed the statutory grounds in dismissing the indictment. The scope of Section 666 troubled the court, but rather than rely on Bass to read the statute narrowly, the court never cited that decision or provided any definitive statutory interpretation of the
The district court in *McCormack* was troubled by the application of a federal law to what the court viewed as a matter of petty corruption, noting at one point that under a broad interpretation of the statute, "[T]he law could make it a federal crime to offer $20 to a local traffic cop in order to avoid a $50 ticket." The district court did not analyze the constitutionality of Section 666 as a valid rule, presuming that it was a proper exercise of congressional authority under the Spending Power. The constitutional violation, therefore, occurred when the federal prosecutors filed a case involving local corruption that was unrelated to the federal government's interests.

The Sixth Circuit accepted a similar as-applied federalism challenge to a prosecution for violation of a federal child pornography statute in *United States v. Corp.* The statute required proof that the visual depiction "was produced using materials which have been mailed or so shipped or transported" in interstate commerce. To meet this element, the government established that the photographic paper used for the depictions came from Germany. The Sixth Circuit dismissed the indictment, holding that while the statute was proper under the Commerce Clause, the prosecution did not show that the defendant's activity "would substantially affect interstate commerce." Although the government met its burden of proof to establish all the elements of the crime—including the commerce element—the circuit court overturned the conviction because "Corp

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provision to avoid the constitutional problem. As the Supreme Court emphasized in *Bass*, the concern with the federal-state balance was to avoid a constitutional issue, not to highlight it as a step toward dismissing a charge on constitutional grounds.

203. *Id.* at 183.

204. *Id.* at 186. The district court did not consider whether the authority for enacting Section 666 required a different constitutional analysis from *Lopez's* Commerce Clause analysis. While federalism informs the scope of the commerce power, it does not have the same limiting effect on the federal government's authority to spend and adopt legislation related to that exercise of power. *See South Dakota v. Dole*, 483 U.S. 203 (1990).

205. *McCormack*, 31 F. Supp. 2d at 189 ("Clearly the conduct at issue here—bribing a local police officer to prevent further investigation and/or prosecution for state crimes—is not 'related to a legitimate national problem' because it is not directed towards protecting the integrity of federal funds given to the Malden police department or even to the programs those funds were intended to support."). Federalism challenges are not limited to criminal prosecutions, and can be raised in civil regulatory actions. *See, e.g., United States v. Olin*, 927 F. Supp. 1502, 1533 (S.D. Ala. 1996) ("EPA's attempt in this case to apply CERCLA liability against the defendant would exceed the power of Congress under the Commerce Clause."); *rev'd*, 107 F.3d 1506, 1510 (11th Cir. 1997) (CERCLA "remains valid as applied in this case because it regulates a class of activities that substantially affects interstate commerce.").

206. 236 F.3d 325 (6th Cir. 2001).


208. *Corp*, 236 F.3d at 333.
was not the typical offender feared by Congress that [sic] would become addicted to pornography and perpetuate the industry via interstate connections."

Like McCormack, the Sixth Circuit was troubled by the application of a federal criminal law in an area at the outer limits of congressional authority involving conduct that had only a slight impact on interstate commerce. The Corp court imposed a new requirement for a federal prosecution, based on its view of the requirements of federalism, that permitted it to dismiss the charge because the defendant’s “activity was not of a type demonstrated substantially to be connected or related to interstate commerce.” The court’s ad hoc review meant that federal judges were making the ultimate decision whether the prosecution merited the exercise of federal authority, a decision usually left to the executive branch to determine how to vindicate the interests of the national government. The Sixth Circuit did not reverse the conviction because the statute was an invalid rule under the Commerce Clause, but on the assertion of its authority to protect the principle of federalism by declaring that the federal prosecutors went beyond what the appellate judges perceived was the boundary between federal and state authority.

Relying on Corp, the Ninth Circuit, in United States v. McCoy, declared that all prosecutions involving intrastate possession of child pornography that did not involve any commercial exchange or offer of sale were unconstitutional as applied. The defendant possessed a single picture that violated the statute, and the government introduced sufficient evidence to meet the explicit commerce element of the provision. Purporting to apply Morrison, the Ninth Circuit found that “[t]he kind of demonstrable and substantial relationship required between intrastate activity and interstate commerce is utterly lacking here.” Without that evidence, the court held that “simple interstate possession is not, by itself, either commercial or economic in nature,” and, therefore, “as applied to McCoy and others similarly situated, § 2252(a)(4)(B) cannot be upheld as a valid exercise of the Commerce Clause power.” The court did not explain why Morrison permitted it to impose this additional element, which appeared to require the government to introduce proof of the impact of the defendant’s activity in the particular instance to establish the propriety of the exercise of the commerce power before it could uphold the prosecution. Circuit Judge Trott dissented on

209. *Id.* The statute did not require proof of any “substantial” effect on interstate commerce, and it is unclear where the Sixth Circuit found the authority to rewrite a duly enacted federal law.

210. *Id.*

211. No. 01-50495, 2003 WL 1343642 (9th Cir. Mar. 20, 2003).

212. *Id.* at **14-15. The court rejected the analogy to Wickard v. Filburn, 317 U.S. 111 (1942), because “McCoy’s photograph is much farther removed from interstate activity than Filburn’s wheat.” *Id.* at *7.
the ground that his "colleagues may have exceeded what the law permits. They have rendered an opinion on the validity of the statute 'as applied,' but I do not believe they have that option."213 In McCoy, the court took it upon itself to rewrite the statute to comport with its view of what specific types of conduct Congress should have outlawed under its commerce power.214

The Eleventh Circuit used similarly misleading language in construing the applicability of a federal religious property arson statute in United States v. Ballinger.215 The court found that the evidence of the effect on interstate commerce was insufficient to sustain a conviction under the commerce element of the statute. Yet, the court phrased its conclusion in terms of finding that the statute was unconstitutional as applied, and the opinion concluded by noting that application of the statute to the defendant's conduct would be "to obliterate the distinction between national and local authority that undergirds our federal system of government."216 If there was insufficient evidence of an element of the offense, then reference to a constitutional ground for invalidating the conviction was wholly unnecessary.

A district court made a similar misstatement of the analysis in United States v. Rayborn,217 when it dismissed an indictment for arson of a church under the same statute because application of the statute in the case "would be an unconstitutional extension of Congress's commerce power."218 The court's decision had nothing to do with the scope of congressional power under the Commerce Clause, and instead rested on the finding that the government did not have sufficient proof to establish the commerce element of the offense, which requires proof that the building was used in an activity affecting interstate commerce. The insufficiency of the government's proof means that a conviction cannot be entered under the Due Process Clause, which requires proof of each

213. *Id.* at *23 (Trott, J., dissenting). Circuit Judge Trott argued that the majority effectively declared the statute unconstitutional because "[t]he upshot of condemning the statute 'as applied' is either (1) tantamount to condemning the statute, *hic sepultus*, on its face as overbroad, or (2) construing the statute as the Supreme Court did in *Jones* as not covering intrastate non-commercial possession." *Id.*

214. The *McCoy* majority asserted that "[i]f punishment for the conduct in which McCoy engaged is desirable and lawful, it is the state that must seek to attain that result, not the federal government." *Id.* at *15. The court did not declare the statute unconstitutional because of the possible violation of federalism, as the Supreme Court did in *Lopez* and *Morrison*, but rather asserted "[t]he statute is unconstitutional as applied." *Id.* The Ninth Circuit never explained why it did not declare the statute unconstitutional on its face, perhaps wishing to avoid having to draw the line between permissible and impermissible applications of the commerce power.

215. 312 F.3d 1264 (11th Cir. 2002).
216. *Id.* at 1276.
218. *Id.* at 1031.
element beyond a reasonable doubt, but that insufficiency is irrelevant to whether the statute is a valid exercise of congressional authority.

In United States v. Garcia, the district court confused statutory interpretation with the scope of federalism in dismissing a charge under the Violent Crimes in Aid of Racketeering Activity ("VCAR") statute largely because the murder at issue was "still, in the end, a street crime committed by a thug as part of a local turf war in southwest Detroit." The VCAR charge—which permitted the federal prosecutors to seek the death penalty—required proof of a violent act for the purpose of gaining admission to or maintaining a position in a criminal enterprise. The only commerce element in the indictment related to federal jurisdiction over the criminal enterprise under RICO in a separate count; VCAR did not require the government to prove a separate effect on commerce from the violent act. The district court found that the absence of a separate commerce element for VCAR pushed "too far against the strictures of Lopez," but did not declare the statute itself unconstitutional. Instead, the district court held that the indictment did not allege sufficient jurisdictional facts "to withstand an as-applied challenge to" VCAR.

The absence of a jurisdictional element might have provided a basis for declaring VCAR facially unconstitutional as an invalid rule under Lopez. The district court, however, relied only on the insufficiency of the facts alleged in the indictment showing a federal interest in the underlying crime to find the prosecution—but not the statute—unconstitutional because the government failed to establish the federal interest in a local crime of violence. The district court misread Lopez as establishing a separate pleading requirement beyond what a particular statute may require, a type of additional constitutional element for

220. Id. at 811.
Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished.
222. Garcia, 68 F. Supp. 2d at 812. Three circuit courts have rejected constitutional challenges to VCAR on federalism grounds, finding that the connection between the enterprise and interstate commerce, and not the act of violence itself, was sufficient. See United States v. Riddle, 249 F.3d 529, 538 (6th Cir. 2001); United States v. Mapp, 170 F.3d 328, 336 (2nd Cir. 1999); United States v. Gray, 137 F.3d 765, 773 (4th Cir. 1998).
a charge that reaches ostensibly local conduct. Rather than determine whether VCAR was a valid rule under the Commerce Clause, the district court asserted that there was a constitutional violation in this particular instance because the government’s proof did not reach the level at which the court could declare that the prosecution involved an issue that was “truly national” and not just something “truly local.” The elements of the crime, and the sufficiency of the government’s proof, do not grant a court the authority to determine whether a particular prosecution appears to involve conduct that is insufficiently national to warrant federal involvement.

C. Federalism and the Constitutional Remedy

The courts that rely on federalism as the basis for declaring an individual prosecution unconstitutional never discuss the source of that authority—beyond quotations from Lopez and Morrison regarding the distinction between national and local interests—or how these federalism limits on the executive branch should be ascertained. The courts refer to the “local” nature of the conduct, relying on the perception that these types of violations are among those usually

224. Id.

225. A substantial group of judges on the Fifth Circuit have asserted—quite vehemently—that particular prosecutions violated the Constitution because they involved purely local crimes brought in the federal courts. In United States v. McFarland, 311 F.3d 376 (5th Cir. 2002) (per curiam), a case in which the convictions were affirmed by an equally-divided court sitting en banc, the dissenting judges asserted that Hobbs Act convictions for robbing local stores were “crimes prototypical of those that historically have been within the reserved police power of the states, contrary to the principle that the Commerce Clause is limited to matters that are truly national rather than truly local.” Id. at 409-10 (Garwood, J., dissenting). In United States v. Hickman, 179 F.3d 230 (5th Cir. 1999) (en banc), another affirmance by an equally-divided en banc Fifth Circuit court, the dissenting judges stated “[w]e believe that the Hobbs Act prosecutions exceeded Congress’s authority” because they involved “purely local robberies.” Id. at 231 (Higginbotham, J., dissenting). Circuit Judge Jolly, in dissent, argued that the child pornography statute was unconstitutional as applied in a prosecution involving “the simple local possession of self-generated child pornography in which there is no suggestion of commercial activity.” United States v. Kallestad, 236 F.3d 225, 231 (5th Cir. 2000) (Jolly, J., dissenting). Circuit Judge DeMoss, dissenting in another Hobbs Act prosecution involving robberies, asserted that “[s]ooner or later the Supreme Court must either back down from the principles enunciated in Lopez or rule that the Hobbs Act cannot be constitutionally applied to local robberies.” United States v. Nutall, 180 F.3d 182, 190 (5th Cir. 1999) (DeMoss, J., dissenting). Dissenting judges in the Eleventh Circuit raised a similar claim about the broad application of the Hobbs Act after Lopez, arguing that “[t]he majority’s holding will result in the federalization of any crime involving extortion to acquire money.” United States v. Kaplan, 171 F.3d 1351, 1358 (11th Cir. 1999) (en banc) (Birch, J., dissenting).
prosecuted by state and local authorities. The authority of the states to prosecute the same offense, however, is not relevant to the constitutional analysis of the authority of Congress to adopt the statutes in the first place because federal crimes do not displace any state offenses. Except for those areas in which the federal government has exclusive jurisdiction, it would be surprising if the federal crimes were not similar to state laws because both the national government and the states operate against the same common law traditions.

More than the invocation of the national-local distinction as some type of meaningful basis for the decision, lower federal court reliance on federalism as the basis for declaring a particular prosecution unconstitutional ignores the balance of constitutional authority between Congress and the federal judiciary. In the context of criminal laws, federalism restricts congressional authority to adopt statutes outside an express grant of authority. *Lopez* and *Morrison* did not invoke federalism as an independent limit on congressional power, as the Supreme Court did in *New York* and *Printz* in applying the anti-commandeering rule. Instead, the Court used federalism to explain the limits of the Commerce Clause to reach its conclusion that the statutes at issue were facially unconstitutional because they did not regulate commercial activity.226

The flaw in the as-applied analysis of federalism claims is that federalism neither protects specific types of conduct from regulation by the federal government, nor does it afford individual litigants with any right limiting how the government can proceed in applying an otherwise valid regulation.227 The Commerce Clause—or the other enumerated powers—does not provide individuals with any rights beyond the requirement of a valid rule adopted pursuant to a legitimate exercise of constitutional authority. Federalism is a means to protect the sovereignty of the states, so while a particular enactment may be invalid as beyond the scope of the federal government’s power, it does not permit a defendant to assert a right to prevent application of an otherwise valid statute to that defendant. While a state may challenge a federal statute because it invades its sovereignty—the type of claim asserted successfully in *New York* and *Printz*—individuals are only indirectly protected by federalism through its preservation of the sovereignty of the states. While an individual can assert that a regulation is facially invalid because the enactment violates the limitations imposed by federalism, there is no individual right to have the

226. *See* Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1479 (2001) ("[T]he federal courts must play backup to Congress, to ensure that any unconstitutional legislation that emerges from the political process . . . will not survive.").

227. *See* Klein, *supra* note 18, at 1552 ("This Court-imposed decentralization federalism not only fails to protect the states qua states, but also fails to protect individual liberties.").
government prove that a particular prosecution comes within the interests of the national government.

The Supreme Court has never viewed federalism as giving lower courts ad hoc authority to declare unconstitutional particular instances in which the executive branch applied the law to cases involving crimes with a strong local interest. In Hoke v. United States, the Court rejected the defendants' challenge to the constitutionality of the Mann Act by noting that the issue was one of congressional authority and not the local nature of the conduct: "If the statute be a valid exercise of [the commerce] power, how it may affect persons or states is not material to be considered. It is the supreme law of the land, and persons and states are subject to it." Justice Holmes made the same point in his dissenting opinion in Hammer v. Dagenhart, stating that "if an act is within the power specifically conferred upon Congress, it seems to me that it is not made any less constitutional because of the indirect effects that it may have, however obvious it may be that it will have those effects, and that we are not at liberty upon such grounds to hold it void." The Court has consistently viewed the appropriate remedy when Congress violates the limitations on its power imposed by federalism to be declaring the statute void due to the constitutional infirmity, not that the statute as-applied violated the rights of an individual but otherwise remains enforceable in more acceptable circumstances.

230. In Gregory v. Ashcroft, the Court used federalism to support its narrow interpretation of the federal statute to avoid any constitutional problems, much as it did in Bass. In New York and Printz, the Court invalidated the provisions at issue as violating the constitutional protection of the state afforded by federalism, and those laws only reached the states and did not seek to regulate the conduct of individuals. In College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999), an Eleventh Amendment case, the Court appeared to invalidate the Trademark Remedy Clarification Act because Congress did not have the authority to abrogate a state's sovereign immunity under the Fourteenth Amendment. Id. at 675. The Court did not consider whether the Act might be a permissible exercise of congressional authority in other situations, a more traditional approach to an as-applied claim of unconstitutionality. Some lower courts reject as-applied challenges and only review whether the criminal statute is a proper exercise of congressional authority. See United States v. Faasse, 265 F.3d 475, 479 (6th Cir. 2001) (en banc) (upholding the constitutionality of the Child Support Recovery Act); United States v. Lewko, 269 F.3d 64, 69 (1st Cir. 2001) (upholding the constitutionality of the Child Support Recovery Act and noting that "[t]he defendant's invocation of the uniquely local concerns of family law are inapposite"); United States v. Santiago, 238 F.3d 213, 217 (2d Cir. 2001) (per curiam) (upholding the constitutionality of the federal firearm felon-in-possession statute); United States v. Grassie, 237 F.3d 1199, 1211 (10th Cir. 2001) (upholding the constitutionality of the church arson statute); United States v. Angle, 234 F.3d 326, 338 (7th Cir. 2000) (upholding the constitutionality of the child pornography statute); United States v.
Courts that consider as-applied challenges miss the point that federalism only affects whether the statute, and not the particular prosecution, is a valid exercise of congressional authority, so the analysis need not proceed to a consideration of whether the facts involved in the prosecution involve a national or local interest. The only issue left after analyzing whether Congress had the authority to enact the statute was whether the government introduced sufficient proof of all the elements of the crime, which may include an element of the offense reflecting federal jurisdiction based on the constitutional authority of Congress, such as an effect on interstate commerce or interstate transportation. Even when a court conducts the proper inquiry into congressional authority to adopt the provision, it can still fall into the trap of construing the challenge as raising the constitutional issue only as applied in the particular prosecution. The Court’s recent federalism decisions—ranging from New York and Printz to Lopez and Morrison—uniformly apply the same remedy when Congress exceeds the scope of its authority by declaring the statute facially unconstitutional. Federalism has never been a means by which the courts can police individual prosecutions because it is a principle that informs the relationship between the federal government, primarily the Congress, and the states. It is by necessity a vague limitation, subject to the particular circumstances in which Congress acts. It is completely unsuitable as a tool for courts to police federal prosecutors as a means to determine the line between what is “truly national” and “truly local.”

Lower courts that rely on federalism as granting them the authority to reject a particular prosecution because it is beyond the power of the federal

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Napier, 233 F.3d 394, 399-402 (6th Cir. 2000) (upholding the constitutionality of the federal statute prohibiting possession of a firearm by a person subject to a domestic violence court order).

231. See United States v. Morris, 247 F.3d 1080, 1087 (10th Cir. 2001) ("[W]e reject Morris’s contention that the Hobbs Act was unconstitutionally applied to him.").

232. See, e.g., United States v. Edgar, 304 F.3d 1320, 1329 (11th Cir. 2002) (rejecting the defendant’s facial challenge to the constitutionality of Section 666 as beyond congressional power under the Spending Clause, and then rejecting the defendant’s “as-applied” challenge to the indictment); United States v. Shaffner, 258 F.3d 675, 683 (7th Cir. 2001) (upholding constitutionality of federal statute on sexual exploitation of a minor as a proper exercise of the Commerce Clause authority, and then concluding that “prosecution under § 2251(a) in this case is a permissible exercise of Congress’ authority under the Commerce Clause") (emphasis added).

233. Cf: Klein, supra note 90, at 598 ("An ad hoc method of ‘I Know It When I See It’ jurisprudence risks turning federalism into a vehicle for judicial preference enforcement, calling to mind Justice Holmes’s criticism of the Lochner-era substantive due process cases that improperly ‘read[ ] into [the Constitution] conceptions of public policy that the particular Court may happen to entertain.’") (quoting Tyson & Brother-United Theatre Ticket Offices, Inc. v. Banton, 273 U.S. 418, 434 (1927) (Holmes, J., dissenting)) (footnote omitted).
government, regardless of the whether the statute is a valid rule, essentially exercise a new type of supervisory authority over the decisions of federal prosecutors. It is true that the Supreme Court has recognized a limited judicial authority to supervise the conduct of litigation for "establishing and maintaining civilized standards of procedure and evidence." Federal courts have, for instance, relied on their supervisory power to dismiss indictments because of perceived misconduct by investigators and prosecutors acting through the grand jury, even though the misconduct did not violate any constitutional protection afforded to defendants. In recent years, however, the Supreme Court has substantially curtailed the authority of lower federal courts to impose rules under the inherent supervisory power for conduct involving the grand jury, restricting the authority of federal courts to dismiss indictments when there is no violation of the rights of a defendant. Similarly, the Court has been cautious about recognizing a broad due process right to police federal prosecutors for what a court may term "outrageous government conduct." There is no real distinction between reviewing prosecutorial practices under the supervisory power or due process analysis, and the Court has rejected improper interference with the decisions of federal prosecutors about whether and how to prosecute a case.

The application of federalism to prohibit a particular prosecution of an offense—despite the constitutionality of the statute—because a federal court deems the conduct to fall within the category of a "truly local" crime has the hallmark of a standardless judicial authority to assess the propriety of the

234. See United States v. Robinson, 119 F.3d 1205, 1217 (5th Cir. 1997) ("[W]e recognize that there is a danger in the courts transforming a general axiom of federalism into a rule of decision to determine the outcome of particular cases. A jurisprudence of undefined 'outer limits' surely would repose too much discretion in the courts.").

235. See United States v. Williams, 504 U.S. 36, 50 (1992) ("[A]ny power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings. It certainly would not permit judicial reshaping of the grand jury institution, substantially altering the traditional relationships between the prosecutor, constituting court, and the grand jury itself.") (citation omitted); Peter J. Henning, Prosecutorial Misconduct in Grand Jury Investigations, 51 S.C. L. REV. 1, 23 (1999) ("Williams sounded the death knell for supervisory judicial review of prosecutorial actions before the grand jury.")

236. See United States v. Payner, 447 U.S. 727, 737 n.9 (1980) (Even if the search was "so outrageous as to offend fundamental 'canons of decency and fairness,'" the fact remains that "[t]he limitations of the Due Process Clause . . . come into play only when the Government activity in question violates some protected right of the defendant.") (quoting Rochin v. California, 342 U.S. 165, 169 (1952), and Hampton v. United States, 425 U.S. 484, 490 (1975)) (citations omitted).

237. See Henning, supra note 235, at 37 ("Due process and supervisory power are two sides of the same prosecutorial misconduct coin.").
decision to prosecute. In United States v. Russell, then-Justice Rehnquist warned that the defense of entrapment "was not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve." As-applied federalism provides a new type of chancellor's foot veto because the principle applied to individual cases is so vague as to defy definition, depending almost entirely on how the lower court perceives the relationship between the crime and the national interest. Moreover, such an application of federalism undermines congressional authority to define the national interest through the enactment of criminal laws.

If Congress has the authority to adopt a statute, then the Constitution delegates to the Executive the responsibility to implement that law, consistent with the constitutional requirements that it be enforced justly and not in violation of the rights of any individual. A judicial declaration that a particular prosecution violates the tenets of federalism, despite congressional power to adopt the statute allegedly violated, permits the judicial branch to interfere with the power of the executive without any of the constitutional safeguards embodied in the separation of powers. Congress cannot cure any defect in the statute because it is a wholly proper exercise of its constitutional authority, yet the courts can prohibit enforcement because a particular instance appears to violate the court's concepts of federalism.

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239. Courts mistakenly use language that equates the analysis of whether the government has established a violation of a statute with the constitutional issue of whether Congress has the authority to adopt the provision. For example, in United States v. Lynch, 282 F.3d 1049 (9th Cir. 2002), the Ninth Circuit considered a challenge to a conviction under the Hobbs Act that involved the robbery and murder of an individual. The circuit court stated that "[w]e therefore must decide whether the Commerce Clause permits the federal government to exercise jurisdiction over Lynch." Id. at 1052. The constitutional issue does not involve jurisdiction but whether Congress can adopt the provision pursuant to its enumerated powers, in this case the Commerce Clause. Lynch found that the government had not introduced sufficient evidence that the robbery of a single person and subsequent use of the victim's ATM card in another state to meet the jurisdictional element of an effect on interstate commerce required for a conviction under the Hobbs Act. Id. at 1055. That conclusion was not a decision on the constitutional issue—regardless of the Ninth Circuit's initial assertion—but a determination of the sufficiency of the government's proof of the elements of the crime. Although often styled as a constitutional claim under Lopez and Morrison, courts engage in the more common appellate function of reviewing the sufficiency of the evidence when they consider the effect on commerce of the defendant's conduct to determine whether the government met the due process requirement of proof beyond a reasonable doubt. The Commerce Clause analysis has nothing to do with that determination, much less the federalism principle regarding the proper roles of the federal and state governments.
240. The plain statement rule of Bass reflects the position that federalism applies only to the validity of the congressional enactment and not the particular prosecution.
Enforcing federalism as an ad hoc limitation on particular prosecutions that involve "truly local" crimes means that defendants have a new type of constitutional defense to a federal charge when the charge involves conduct also subject to state prosecution. A federalism claim to block a prosecution, such as that successfully asserted in McCormack, Corp, McCoy, and Garcia, does not involve an alleged violation of the defendant's constitutional rights, or that the statute cannot be enforced because Congress lacked the authority to adopt it. Instead, the claim is that, regardless of the government's proof, the prosecution is not a proper exercise of the national government's authority. It is a very odd defense to assert that the federal government cannot convict a defendant for violating a statute because the national government's interest is insufficient to permit enforcement of an otherwise valid law. Federalism protects the states directly, not individuals, from the misuse of authority by the federal government, so it is hard to understand how it can furnish to an individual a defense to criminal charges for violating a statute that Congress has the authority to enact.

The decisions in Lopez and Morrison to invalidate the statutory provisions at issue signaled the proper role of federalism as a principle that supports taking a limited approach to the scope of congressional authority to exercise one of its enumerated powers. The national interest must be reflected in the statute, and the role of the courts is to ensure that Congress adhered to the constitutional limitations on the authority of the national government. It is an unfortunate misreading of what the Supreme Court did to invoke federalism as a grant of independent authority to the federal courts to police the decisions of the Executive to pursue a particular prosecution under an otherwise valid criminal statute.

See Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159, 174 (2001) ("We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference."). The Court reads the statute narrowly to avoid reaching the constitutional issue, so that, by implication, if Congress is sufficiently clear about its intention to expand federal authority, then the provision is presumably constitutional if Congress in fact has the authority. A particular application of the statute permits the Court to review its constitutionality, but not the decision to pursue the case.