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Independent-Norm Federalism in Criminal Law

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Introduction

Does anyone desire constitutionally required, Court-imposed federalism in the field of criminal law? While many conservatives would respond affirmatively as quickly as liberals could decline, I suggest in this essay that a deeper exploration of the issue may reveal that their actual preferences are just the opposite. The federalism conservatives say they want, which consists of striking down meaningless federal criminal statutes that duplicate similar pre-existing state prohibitions, accomplishes nothing, while the federalism they may receive if the Court continues on its current path and enforces the doctrine neutrally² (admittedly two questionable assumptions), will probably allow behavior they find morally reprehensible. On the other hand liberals, long in favor of intense federal judicial protection of individual liberties enshrined in the Bill of Rights but a deferential approach to judicial review under the Commerce Clause, may be surprised to find that federalism can enhance individual autonomy and lifestyle preference well beyond what the federal constitution mandates. The answer to whether liberals or conservatives should champion federalism in the criminal law ultimately depends on what we mean by "federalism," whether it can be effectively and neutrally enforced, and what kinds of state regulations we anticipate being protected by such enforcement.

Though yet to be acknowledged, I contend that there are two distinct forms of federalism; the "decentralization" or "50-labs" version, and what I call "independent-norm" federalism, and the difficult issues we face are presented only by the latter. The first version seeks to preserve local control of the criminal justice system and to foster diversity and experimentation that might improve efficiency,³ in areas where there is nationwide agreement as to general goals,⁴ though perhaps not as to the means best used to achieve those goals. Decentralization federalism, the focus of the vast majority of scholarship and United States Supreme Court decisions, concerns issues such as whether the federal judiciary should permit concurrent federal and state jurisdiction over the same criminal conduct,⁵ whether the federal executive branch should nonetheless refrain from exercising its authority to initiate charges in some categories of cases,⁶ and under what conditions the federal legislative branch should participate in⁷

² Admittedly two questionable assumptions.

³ *New State Ice Co. v. Leibman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

⁴ This includes prohibiting firearms in our schools, punishing those who assault women, and criminalizing arson.

⁵ The three most recent examples are *United States v. Lopez*, 514 U.S. 549, 551 (1995) (invalidating the federal Gun-Free School Zones Act, codified at 18 U.S.C. section 922, as violative of the Commerce Clause); *United States v. Morrison*, 529 U.S. 598, 601 (2000) (invalidating the civil remedy section of the Violence Against Women Act, codified as 42 U.S.C. section 13981, as violative of the Commerce Clause); *Jones v. United States*, 529 U.S. 848, 850 (2000) (interpreting federal arson statute, codified at 18 U.S.C. section 844(i), as excluding the destruction of a private residence, to avoid doubtful constitutionally question of whether alternative interpretation would have violated the Commerce Clause).

and distribute grants to⁸ innovative state law enforcement efforts.

The second form of federalism fosters community expression of morality by protecting individuals from federal prosecution for generally victimless behavior that local and state governments have determined is blameless, where there is no nationwide consensus (but rather strongly held diametrically opposed views) on the morality of the behavior. The state's norm is independent of the federal norm. The issue in independent-norm federalism, an issue largely ignored by the Court⁹ and

⁶ For example, despite the constitutionality of successive federal and state prosecutions for the same offense under the dual sovereignty doctrine, a federal prosecution will not be initiated after a state prosecution for substantially the same conduct absent "compelling interests of federal law enforcement." *Thompson v. United States*, 444 U.S. 248, 248 (1980); United States Attorneys Manual Chapter 9-2.031 (1997) (detailing current version of the Petite policy, and requiring approval by the Assistant Attorney General). Additionally, federal prosecutors regularly decline to institute federal criminal charges altogether in favor of a state forum. United States Attorneys Manual Chapter 9-27.240, Initiating and Declining Charges - Prosecution in Another Jurisdiction (1997) (outlining general principles to assist federal prosecutors in determining whether to decline a case in favor of a state prosecution).

⁷ See, e.g., Daniel C. Richman, "Project Exile" and the Allocation of Federal Law Enforcement Authority, 43 ARIZ. L. REV. 369, 373 (2001) (detailing devolution of federal criminal enforcement power from Main Justice in Washington, D.C. to the 94 U.S. Attorney's Offices, who cooperate with state and local authorities in areas covered by concurrent federal/state criminal jurisdiction); Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Dep't of Justice, *Promising Strategies to Reduce Gun Violence*, 31 (1999) (lauding innovative joint federal/state programs in eight cities to reduce gun violence, which left most of the social programs and criminal prosecutions to the state actors).

⁸ See, e.g., The Paul Coverdell National Forensic Sciences Improvement Act of 2000, Public Law No: 106-561 (106th Congress, 2000) (provides grants to improve the quality, timeliness, and credibility of forensic science services for criminal justice purposes); The Violent Offender DNA Identification Act of 1999, S.903 (would require FBI to develop a voluntary plan to assist State and local forensic laboratories in performing DNA analyses on samples collected from convicted offenders); The Public Safety Partnership and Community Policing Act, PC105-302 (1997) (codified at 42 U.S.C. section 3796dd); Project Exile: The Safe Streets and Neighborhoods Act of 2001, S. 619 (would provide grants to law enforcement agencies, prosecutors, courts, and probation officers of state conditioned on their enacting mandatory minimum sentences for using firearm in any violent crime or serious drug trafficking offense).

⁹ Though the Court has acknowledged the liberty enhancing feature of federalism, it refers to maintaining sufficiently strong States that can defend against federal tyranny, it does not directly refer to preventing the national government from enacting morals legislation that disagrees with a minority state norm. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991) ("In the tension between federal and state power lies the promise of liberty"); *Printz v. United States*, 521 U.S. 898, 921 (1997) (noting that the separation of the federal and state sphere "is one of the Constitution's structural protections of

commentators,¹⁰ is whether the grant of power to Congress in the Commerce Clause, as limited by the rights of the states expressed in the Tenth Amendment, allows the federal government to criminalize or otherwise impede the state statute or state constitutional provision permitting the conduct.

In Part I of this article, I will explore the differences between the two forms of federalism outlined above and argue that the former is adequately protected in the criminal law area by ordinary political processes, legal doctrines, and institutional arrangements, without Court intervention. My original contribution to the plethora of scholarship making this point in the civil arena¹¹ will be to demonstrate that it holds especially true for criminal law, because ordinary preemption doctrine is inapplicable, few private causes of action are available, and the federal law enforcement apparatus is small relative to the states. Thus most, if not all, of the community-based variations in enforcing criminal proscriptions described by my colleagues in this Symposium are not threatened by federal action to the contrary, and need no Court protection. Where the Court does insist on "protecting" states from criminal legislation that essentially duplicates and assists these states, it may waste time and institutional capital, but effects no real change. Most such federal criminal statutes are primarily symbolic "feel good" enactments, that generally can be reenacted in a constitutional manner, or be instituted instead by conditional or outright grants of manpower and resources to the states. Moreover, those individuals who violated the stricken federal criminal statutes can be prosecuted on the state level.

This is clearly not the case for independent-norm federalism. One way to view the concept is as the flip side of our Bill of Rights jurisprudence, where federal courts protect citizens from state infringement of their constitutionally-guaranteed liberties. Where Congress enacts legislation to criminalize behavior specifically protected by the state government, the Court is called upon to prevent the national government from infringing upon state created liberty interests.¹² This category of legislation

liberty").

¹⁰ *But see* Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 401-03 (1997) (arguing that, in addition to allowing states to serve as laboratories, federalism can protect cultural and local liberty, and diffuse power to protect liberty); Lynn A. Baker and Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. ____ (2001) (suggesting that federalism, in fostering state-by-state diversity, will promote liberal as well as conservative conception of the social good, and distinguishing "horizontal" from "vertical" federalism).

¹¹ A small sampling of the federalism scholarship making this point is included in nn. 21-25, *infra*. This is not to suggest that there is anything like agreement in the academic community on this proposition. A sampling of federalism scholarship disputing this point is included in nn. 26-27, *infra*.

¹² *Cf. Paul v. Davis*, 424 U.S. 693, 700-01 (1976) (federal civil rights action based upon violation of procedural due process requires that government official deprive an individual of a liberty or property right previously "recognized and protected by state law"). When I say "liberty" in this context, I refer to behavior and transactions that competent adult parties engage in voluntarily, I do not refer to those liberties protected by the Bill of Rights, substantive due process, or any other constitutional clause.

criminalizes activity the states wish to permit, and thus directly conflicts with, rather than supplements, state norms. Where only a few states are outliers, they will probably not succeed in the national political process in protecting their citizens from majority will. Unlike instances of concurrent jurisdiction, federal prosecutions in these cases will have a significant and real chilling effect on the behavior, well beyond the small number of cases that can actually be brought. For states wishing to pursue minority independent norms, it is the Court or bust.

In Part II, I admit and explore my own agnostic position regarding whether such independence in norm is desirable. It seems to me that fracturing the country in this manner has at least as many disadvantages as benefits. While doing so would protect minority lifestyles and allow individuals to maximize their conception of their welfare, a glance through history and to surrounding countries suggests that our nation may not remain cohesive if divided on basic moral issues. Moreover, a stringent Court-imposed federalism test can also be used to prevent progressive federal legislation that is insufficiently connected to commerce or otherwise authorized under Congress' constitutional powers.¹³

However, assuming an affirmative answer to the question of desirability, I argue that this independent-norm federalism can be fostered only by a bright-line test policed by the judicial branch. Process federalism, perhaps sufficient to protect the decentralization variety,¹⁴ will not assist with independent norms. Alternative tests suggested by scholars are insufficiently objective.¹⁵ Further, I suggest that a new approach may be unwarranted, as recent Commerce Clause decisions, as well as decisions striking down legislation enacted pursuant to section 5 of the Fourteenth Amendment, are already leading us in this direction.¹⁶ A strict requirement that the prohibited behavior cross state lines, or that it have a direct economic spillover effect on neighboring states, may accomplish the goal in a manner least subject to the very real danger posed by the ideologically driven agendas of some of the Justices.¹⁷

¹³ See *infra* nn. 123-126.

¹⁴ See n. 208 *infra*.

¹⁵ See *infra* nn. 191 - 200, and accompanying text.

¹⁶ The recent Commerce Clause cases push us in this direction by adding the requirement that the effect on commerce be substantial, that the effect of the regulation must be relatively direct, and that the activity regulated must be a commercial one. See the discussion of *United States v. Lopez* and *United States v. Morrison* in Part IIB, *infra*.

Recent Section 5 cases shift us toward the Commerce Clause as the primary enumerated power under which the Federal government can enact legislation, by limiting Congressional action pursuant to section 5 of the Fourteenth Amendment to regulation of state rather than private conduct, and by requiring that the remedy for the actual constitutional violation be proportional to the scope of the violation. See discussion of *City of Boerne v. Flores* and *Alabama v. Garret* in Part II.B, *infra*.

¹⁷ See, e.g., Frank B. Cross and Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741, 762

Finally, in Part III, I review how some recent controversies will be affected by the Court's future federalism jurisprudence where independence of norms is at issue. I will focus here on the issues surrounding same-sex marriages,¹⁸ the so-called "right-to-die" of those suffering a terminal illness,¹⁹ and state endorsement of medicinal marijuana.²⁰ Despite conservative intolerance of these liberties, and the federal government's attempt to control state law in each of these cases, a neutrally-enforced, Court-driven federalism doctrine could well result in some measure of protection of these state-created rights from federal criminalization. State sanctioned activity in these areas will have minimal direct economic impact on neighboring states, and the behavior can be engaged in without crossing a state boundary. The purpose of federal proscriptions against such conduct will likely be protection of morality rather than regulation of the national or local economy. If "our federalism" does indeed protect such conduct, the current conservative federal administration is due for some surprising interactions with the Court.

I. Federalism and Politics

One primary controversy reflected in the scholarship and in the recent series of 5-4 U.S. Supreme Court decisions concerns the issue of whether the political process sufficiently protects state power from federal usurpation absent Court intervention. The argument that it does, originating with Professor Wechsler in 1954,²¹ advanced by Dean Choper in 1980,²² and adopted briefly by the Court

(2000) (identifying ideology as the dominant determinant of the Court's federalism decisions); *Bush v. Gore*, 531 U.S. 98, 103 (2000) (five conservative Justices held that the equal protection clause prohibits the state of Florida from recounting votes pursuant to state law).

¹⁸ In response to *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), a decision by the Hawaii Supreme Court finding that a statute that provided that only opposite-sex couples could marry violated the state's Equal Protection clause, Congress passed the Defense Of Marriage Act, codified at 28 U.S.C. section 1738C, which provides that no state is required to accord Full Faith and Credit to a same sex marriage valid in the state performed.

¹⁹ Despite the Death with Dignity Act passed by the Oregon voters, Attorney General Ashcroft has instructed DEA agents to revoke the drug licenses of physicians in Oregon who help patients commit suicide. Dispensing of Controlled Substances to Assist Suicide, Attorney General Order No. 2534-2002, 21 CFR P. 1306.04, 66 Fed. Reg. 56608 (Nov. 6, 2001).

²⁰ Since the Supreme Court's ruling in *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 486 (2001) that there is no common-law medical necessity defense to federal criminal prosecution of drug users, Ashcroft's Justice Department has begun raiding medical marijuana clubs in California. *U.S. Cracks Down on Medical Marijuana in California*, NY TIMES, October 31, 2001, A12.

²¹ Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Governance*, 54 COLUM. L. REV. 543 (1954) (arguing that structural features of the constitution, such as equal state representation in the Senate and the role of

in 1985,²³ states that the formal constitutional structure of American politics, along with informal political institutions such as our major political parties,²⁴ offer states such considerable protections from federal legislative overreaching that judicial review is unnecessary. The arguments in opposition suggest that the failure of political safeguards coupled with the constitutional mandate of a federal government of enumerated powers require active judicial policing of federal legislation to protect the states.²⁵ Legislators, though elected from each state, may too quickly become members of the federal

the states in selecting the President through the electoral college, justify Court inattention to federalism).

²² JESSE CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980) (urging that the Court should conserve its political capital for individual rights cases and treat issues of federalism as nonjusticiable, and emphasizing practical political restraints on national power, such as congressional delegations' bipartisan pursuit of state interests, the President's political need to maintain relationship with Congress, the fact that most federal elected officials began as state officeholders, and mechanisms such as bicameralism, the committee system, the Presidential veto, and the filibuster that allow minorities to block legislation). See also Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1324-25 (2001) (suggesting that a strict approach to the separations of powers and Supremacy Clause doctrines will safeguard the states).

²³ *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 531 (1985) (holding that the concept of "traditional governmental function" was incoherent, and reversing *National League of Cities v. Usery*, 426 U.S. 833 (1976)). As Professor Yoo has noted, the Court has since tacitly overruled *Garcia*. John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1334-57 (1997).

²⁴ Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 276 (2000); Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1527 (1994) (arguing that political parties protect state authority by "linking the fortunes of officeholders at state and federal levels, fostering a mutual dependency that protects state institutions by inducing federal lawmakers to take account of (at least some) desires of state officials").

²⁵ Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1450 (1995) (arguing that the "best" reading of the Supreme Court's federalism jurisprudence is that the judiciary has re-asserted itself as a monitor to remind Congress to operate within its constitutional limits); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1460 (2001) (political process as exclusive protection of federalism is inconsistent with the Constitution's text, structure and original understanding); Marci A. Hamilton, *Why Federalism Must be Enforced: A Response to Professor Kramer*, 46 VILL. L. REV. 1069, 1071 (2001) (arguing that Larry Kramer's theory fails both as a matter of constitutional history and on empirical grounds); Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995) (hailing *Lopez* as a "revolutionary and long overdue" revival of the concept that the federal government possesses limited and enumerated powers).

government seeking to grab more power from the states.²⁶ A resolution, or even a full debate, of this argument as applied to the criminal law field is hobbled by two failures: first, a failure to separately analyze federal criminal statutes depending upon whether they duplicate or oppose state norms; and second, a failure to note important distinctions between institutions and legal doctrines in the civil justice area from those in the criminal justice system. I will decouple decentralization from independent-norm federalism in Section A, and federalism in the civil arena from federalism in the criminal law in Section B, below.

A. Decentralization Federalism in Criminal Law

One prevalent view of federalism focuses on the twin goals of preserving local control in fields traditionally left to state government, and developing better laws and procedures through experimentation in the 50 states.²⁷ If such decentralization is the goal of federalism in criminal law, then this goal is naturally achieved through existing legal doctrines and institutions, without judicial review of federal criminal legislation, at least in those instances where federal and state actors share the same basic moral framework. Scholars and the Court first fail to recognize the distinction between instances where the state and federal government agree on the behavior to be proscribed (resulting in concurrent jurisdiction over the same criminal conduct), and instances where the governments disagree (resulting in federal jurisdiction criminalizing behavior protected by state norms). Despite the spate of recent Court case and scholarship "protecting" states from these federal criminal statutes, states need no Court protection where criminal jurisdiction over agreed-upon misconduct is concurrent, because they either don't intend to experiment in a way radically different from the method employed by the federal government, or they can happily experiment in a manner consistent with federal legislation. Where all state and federal officials agree as to the impropriety of the underlying conduct, state officials' failure to prevent such federal legislation is not due to lack of political ability, but rather is because they don't care

²⁶ John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 *IND. L. REV.* 27, 39 (1998); William W. Van Alstyne, *The Second Death of Federalism*, 83 *MICH. L. REV.* 1709, 1712 (1985). As aptly pointed out by Frank Cross, however, the Article III judges deciding federalism disputes "are, like legislators, typically members of the federal government with the same human concerns for power, prestige, and glory as congressmen." Frank B. Cross, *Realism About Federalism*, 74 *N.Y.U. L. REV.* 1304, 1315 (1999).

²⁷ See, e.g., Jesse Choper, *The Scope of National Power Vis-A-Vis the States: The Dispensibility of Judicial Review*, 86 *YALE L. J.* 1552, 1614 (1977) (federalism is "to promote the efficiency of government administration"); Michael Dorf and Charles F. Sabel, *A Constitution of Democratic Experimentalist*, 98 *COLUM. L. REV.* 267 (1998) (suggesting that decentralization advances the goal of federalism: an "experimentalist collaboration between the states and the federal government"); H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 *MINN. L. REV.* 849, 852 (1999) ("The great insight of federalism is that different levels of government have different competencies, and that wisely allocating responsibilities to those different levels of government can work significant benefits in terms of both citizen satisfaction and governmental efficiency.").

(or as we say in Texas, they have no dog in that fight). Some examples will illustrate both that the majority of statutes and cases concern concurrent jurisdiction and not independent norms, and that the States were either seeking federal assistance or indifferent to it.

Every criminal case reviewed by the Court for consistency with the Commerce Clause, with the significant exception of those few criminal enforcements of the New Deal legislation,²⁸ involved instances of concurrent jurisdiction where the states were in favor of the federal law in question. For example, in a series of cases from 1903 to 1925, the Court sustained criminal laws prohibiting the interstate transportation of lottery tickets,²⁹ women for immoral purposes,³⁰ and stolen vehicles.³¹ These activities were already prohibited by the states.³² Likewise, in a series of cases from the 1950s to the 1970s that sustained criminalizing the movement of items across state lines, such as possession of a firearm that had moved in commerce by a convicted felon³³ and travelling in aid of the commission of a state crime,³⁴ and

²⁸ Federal criminal enforcement of the New Deal legislation was in opposition to state norms, and was stricken by the Court before the switch in time that saved nine. *See, e.g., United States v. Darby*, 312 U.S. 100 (1941) (finding that a federal prohibition of interstate lumber shipments produced in states that violated wage and hour standards established by the Fair Labor Act of 1938, was an unconstitutional violation of congressional power under the commerce clause); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1941) (sustaining federal law controlling price of milk for sale). However, those cases do not fit into my category of independent state norms that will or should be protected by the Court's new commerce clause jurisprudence. Those cases involved quintessentially commercial activity. *See* Part II, B, *infra*;

²⁹ Lottery Case (*Champion v. Ames*), 188 U.S. 321, 354 (1903) (upholding the constitutionality of the Federal Anti-Lottery Act of 1895, as within Congress' plenary power to regulate interstate commerce).

³⁰ *Caminetti v. United States*, 242 U.S. 470, 492 (1917) (upholding the Mann Act by finding that Congress possessed the authority to keep the channels of interstate commerce free from immoral and injurious use).

³¹ *Brooks v. United States*, 267 U.S. 432, 436 (1925) (holding that the National Motor Vehicle Theft Act of 1919 was a constitutional exercise of Congress' power to punish the use of such commerce as an agency to promote immorality).

³² *See, e.g.* Robert E. Cushman, *The National Police Powers Under the Commerce Clause of the Constitution*, 3 MINN. L. REV. 289, 383-92 (1919) (noting that in 1895 Congress responded to national disapproval of lotteries by prohibiting the movement of lottery tickets by mail or via interstate commerce.)

³³ *United States v. Bass*, 404 U.S. 336, 337-38 (1971) (holding that the Omnibus Crime Control and Safe Streets Act of 1968 required the Government to demonstrate the nexus between the possession of a firearm and interstate commerce).

³⁴ *Rewis v. United States*, 401 U.S. 808, 812 (1971) (reversing Travel Act conviction where

that sustained the regulation of intrastate economic activity that substantially effecting commerce, such as loan-sharking,³⁵ extortion and robbery,³⁶ and gambling,³⁷ all of the states had already enacted similar prohibitions.³⁸ None of these were instances of independent state norms that state officials were unable to protect from federal encroachment.

The more recent cases tell the same story. Despite the lack of any protest from any state, the Court in *United States v. Lopez* struck as violative of the Commerce Clause 18 U.S.C. § 922(q), which prohibited knowing possession of a firearm in a school zone. As Justice Kennedy noted in his concurrence, 40 states had already enacted criminal laws outlawing the possession of firearms on or near school grounds.³⁹ The majority responded by asserting that "when Congress criminalizes conduct already denounced as criminal by the states, it effects a 'change in the sensitive relations between federal

there was no evidence that the defendant "had employed interstate facilities to conduct his numbers operation; moreover he could not readily identify which customers had crossed state lines."); *Perrin v. United States*, 444 U.S. 37 (1979) (upholding travel Act conviction based upon commercial bribery under New York law, where "the requisite interstate nexus is present" by way of "phone calls from Louisiana to Richmond, Tex., by Willis and Levy, and the subsequent shipment of materials by the Richmond firm to Louisiana by Continental Bus").

³⁵ *Perez v. United States*, 402 U.S. 146m 154-55 (1971) (upholding the Consumer Credit Protection Act as a constitutional exercise of Congress' power under the Commerce Clause because extortionate credit transactions support national organized crime and allows the underworld to obtain control of legitimate business, thus affecting interstate and foreign commerce).

³⁶ *United States v. Green*, 350 U.S. 415, 420-421 (1956) (upholding Hobbs Act as appropriate exercise of Congressional power); *Stirone v. United States*, 361 U.S. 212 (1960) (same).

³⁷ *United States v. Five Gambling Devices*, 346 U.S. 441, 451-52 (1953) (affirming the dismissal of indictments under the Act of January 2, 1951, which prohibited the interstate shipment of gambling devices, because the Government failed to allege that the gambling devices had at any time been transported or affected interstate commerce).

³⁸ For a sample of states that outlawed extortion during this time, see N.Y. PENAL LAW §155.05 (1965); CONN. GEN. STAT. §53(a)-119(5) (1969); CAL. PENAL CODE § 518 (West 1872); N.J. STAT. ANN. §2C: 20-2 (West 1978); D.C. CODE ANN. §22-2307 (1968); TEX. PENAL CODE ANN. §31.02 (Vernon 1973); and FLA. STAT. ch. 71-136, §1021 (1971). For a sample of states that criminalized gambling during this time, see N.Y. PENAL LAW §222.05 (1965); GA. CODE ANN. §26-2702 (Harrison 1933); CONN. GEN. STAT. §73-455 (1973); CAL. PENAL CODE §330 (West 1872); N.J. STAT. ANN. § 2C: 37-1 (West 1978); D.C. CODE ANN. § 22-1501 (1901); DEL. CODE ANN. tit.11, § 1401 (1953); TEX. PENAL CODE ANN. §47.02 (Vernon 1973); and FLA. STAT. ch. 71-136, §1059 (1971). For a sample of states that outlawed loan sharking during this time, see 1971 CONN. GEN. STAT. 239, §1 (1971) and N.J. STAT. ANN. §2C: 21-19 (West 1978).

³⁹ *United States v. Lopez*, 115 S.Ct. 1624, 1641 (1995).

and state criminal jurisdiction."⁴⁰ The only example the majority gave of such a change was to quote the government's brief that "section 922(q) displaces state policy choices in that its prohibitions apply even in states that have chosen not to outlaw the conduct in question."⁴¹ However, a failure at the state level to separately criminalize gun possessions near schools cannot rationally be equated with approval of such conduct, or even with a desire by those states to prevent federal prosecutions. Before leaping to the conclusion of state approval of student's bringing guns to school, the Court would have to examine whether the conduct was prohibited by a more general criminal proscription, a school rule, or a civil or regulatory bar. Had a state enacted a provision affirmatively exempting such gun possession from criminal proscription or other sanctions (or been willing to state for the Court on the record that it desired that students bring guns to class), we would have a clear independent-norm problem warranting Court attention.⁴²

The same unnecessary Court protection of the States from duplicative federal criminalization occurred in the two most recent federalism cases. As Justice Souter noted in his dissent in *United States v. Morrison*, 36 states and the Commonwealth of Puerto Rico filed *amicus* briefs in support of the rape victim utilizing the civil section of the Violence Against Women Act, and the majority position means that "the states will be forced to enjoy the new federalism whether they want it or not."⁴³ Similarly, in *Jones v. United States*,⁴⁴ where the Court rejected the Department of Justice's construction of the federal arson statute as applying to private residences, virtually every state criminalizes exactly that conduct.⁴⁵

The Court accomplishes little when it intervenes to protect the states from duplicative federal legislation they desire. As I demonstrate in Part IB, the existence of concurrent jurisdiction does not prevent or even impinge upon local experimentation as to the means to accomplish shared crime prevention goals. Additionally, in cases of federal-state consensus, Congress can easily circumvent this unnecessary federal protection by utilizing conditional federal spending. A seven-member majority in *South Dakota v. Dole* allowed Congress to condition the receipt of federal highway funds to states raising their drinking age to 21 years old.⁴⁶ Congress is empowered to condition such federal funds so

⁴⁰ *United States v. Lopez*, 115 S.Ct. at 1631.

⁴¹ *United States v. Lopez*, 115 S.Ct. at 1631, n. 3 (citing brief for United States 29, n. 18).

⁴² See Part IIA *infra*.

⁴³ *United States v. Morrison*, 529 U.S. 598, 651 (2000) (Souter, J., dissenting). One state did oppose the federal statute, but that state also already outlawed the conduct in question.

⁴⁴ 529 U.S. 848, 850-51 (2000).

⁴⁵ See, e.g., IND. CODE. § 35-43-1-1, 35-50-2-5 (1993).

⁴⁶ 483 U.S. 203, 206 (1987) (affirming that the conditioning of federal highway funds on state law drinking age minimums is a permissible exercise of congressional spending power).

long as they are "directly related" to the purpose of the congressional program, do not induce the state to engage in unconstitutional acts, and are not coercive.⁴⁷ As my colleague Lynn Baker has so astutely pointed out, "the Court offered Congress a seemingly easy end run around any restrictions the Constitution might impose on its ability to regulate the states."⁴⁸ Untold millions of federal dollars go to state law enforcement each year.⁴⁹ Even under Justice O'Connor's narrower spending power test,⁵⁰ requiring that the condition effectuate the purposes of Congress' grant, there is little doubt, in most cases, as to the constitutionality of such largesse.⁵¹

Where the states and the federal government share the same view on the norm underlying the criminal prohibition subject to concurrent jurisdiction, though they may disagree as to the details, the punishment, or the means best suited to implement the norm, the states should be relatively easy to bribe. On the other hand, where a state has a strongly felt independent norm, it may choose to forgo federal money rather than capitulate.⁵² Moreover, where the independent norm is a non-economic one,

⁴⁷ *Dole*, 483 U.S. at 209-11.

⁴⁸ Lynn Baker, *Conditional Federal Spending after Lopez*, 95 COLUM. L. REV. 1911, 1914 (1995).

⁴⁹ For example, according to the most recent Department of Justice report on the Office of Justice Programs, the Department of Justice appropriated \$3,569 million dollars in fiscal year 2000 to assist tribal and state law enforcement efforts, \$104 million for drug courts and substance abuse programs at the state level, and \$786 million for state crime prevention programs. U.S. Department of Justice Fiscal 2000 Performance Report - Fiscal Year 2002 Performance Plan, pp. 7, 37, and 50.

⁵⁰ *Dole*, 483 U.S. at 216 (O'Connor, J., dissenting).

⁵¹ This is no doubt true today, but the Court has shown little regard lately for federalism precedent. Conservatives are presently pushing these cases, and the Supreme Court of Washington recently struck down a Spending Clause statute. *See, e.g.*, Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 Geo. Law J. 461 (2002); *Guillen v. Pierce County*, 31 P.3d 628, 650-51 (Wash. 2001) (holding that 28 U.S.C. section 409, which makes traffic and accident materials nondiscoverable in state and local court, violates the Spending Clause).

⁵² *See* Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113, 1140 n. 98 (1997) (noting case of Virginia's and new Hampshire's partial refusal of conditional federal education funding under the Goals 2000 program). *But see* the fate of Louisiana's 18 year old drinking age. In 1984, Congress passed the National Minimum Drinking Age Act (NMDAA) in the hopes of establishing a uniform drinking age and eliminating the ability of young persons to drive across state lines in search of more lenient jurisdictions. *See* 23 USCS §158 (providing that ten percent of apportioned highway funds will be withheld from states in which "the purchase or public possession in such a state of any alcoholic beverage by a person who isles than twenty-one years of age is lawful."). Congress' incentive was to

the state may have an easier time establishing that the federally funded program is unrelated to the condition.⁵³

An alternative method for circumventing any Court-imposed limits on decentralization federalism, that will be effective in the vast majority of cases, is for Congress to simply rewrite the stricken statute by adding the jurisdictional hook of interstate movement. This is precisely what Congress did in the wake of the *Lopez* Court's decision to strike down the Gun Free School Zone Act, by amending 18 U.S.C. § 922(q) to require that the individual possessed "a firearm that has moved in or that otherwise effects interstate or foreign commerce."⁵⁴ Congress was smart enough to add this jurisdictional hook in advance to the criminal section of the Violence Against Women Act.⁵⁵ The majority in *Morrison*, while striking down the civil provision without the jurisdictional hook, noted approvingly that the Courts of Appeals had uniformly upheld this criminal provision as fitting squarely within the "channels" category.⁵⁶ Though Congress cannot circumvent all Commerce Clause review via a jurisdictional hook, it will be much easier to do so with economically motivated criminal legislation, where travel across state boundaries is more likely, and much harder to do so with morals legislation, where travel is less likely. This is precisely why, as I will argue below, Court protection is sensible only in the latter instance.

condition federal highway funds on each state's compliance with the NMDAA. At the time, Louisiana was a minority position state with a minimum drinking age of 18. In response to the NMDAA, Louisiana first passed meaningless legislation that established the drinking age at twenty-one, but provided no penalties for vendors who sold alcohol to minors. Act No. 33, 1987 LA. ACTS. 2746. After considerable federal pressure and facing the prospect of deteriorating highways, Louisiana acquiesced and closed the loophole in 1995, by criminalizing the sale of alcohol to minors. Act No. 639, 1995 LA. ACTS 1674. The legislation was upheld under the Louisiana Constitution's Equal Protection Clause by the Louisiana Supreme Court. *See Manuel v. Louisiana*, 677 So. 2d 116 (La. 1996).

⁵³ *See, e.g., United States v. McCormack*, 31 F. Supp. 2d 176, 188 (D. Mass. 1998) (application of 18 U.S.C. section 666, federal program bribery, to local corruption unconnected to the federally funded program, violated *Dole's* requirement of a connection between the federal interest and the federal regulation); *United States v. Sabri*, No. 01-246, 70 BNA Crim. Law Rptr. 1486 (D. Minn. 2002) (same).

⁵⁴ H.R. 3610, codified in 922(q)(2)(a) (West 2001). Though the statute now permits the prosecutor to prove either interstate movement or an effect on commerce, I argue in Section II B, *infra*, that it is only proof of interstate movement will save the statute from the additional requirements, that the regulated activity substantially affect commerce, be a commercial activity, and that such effect not be overly attenuated.

⁵⁵ 18 U.S.C. § 2261(a)(1) makes it a crime to travel across a state line to injure or harass an intimate partner or do so in the course of or as a result of such travel.

⁵⁶ *Morrison*, 529 U.S. 598, 612, n.5.

This Court-imposed decentralization federalism not only fails to protect the states *qua* states, but it also fails to protect individual liberties. By definition, in cases of concurrent federal and state criminal jurisdiction, the state can prosecute the person who violated the norm if the federal statute is stricken on Commerce Clause grounds.⁵⁷ Though a state can choose not to prosecute an individual at the state level, if it was in favor of similar federal legislation then state prosecution seems likely. Thus using judicial review to supplement the political process in protecting states *qua* states and in protecting states as guarantors of individual liberties is generally a waste of time.

B. The Civil-Criminal Federalism Distinction: Institutions and Doctrines

In addition to their failure to distinguish decentralization from independent norm federalism, scholars and the Court have failed to recognize features peculiar to criminal law that impact federalism principles. There are two aspects particular to the criminal law field that further militate against Court intervention in instances of current jurisdiction. First, federal criminal statutes do not preempt state law in the field, and second, federal criminal statutes cannot be enforced by private causes of action. These two factors, combined with institutional considerations, protect the decentralization goal of federalism without assistance from the Court.

I will begin with preemption. Where constitutionally-enacted federal and state criminal laws do not directly and clearly conflict, and hence there is no supremacy clause issue, ordinary preemption doctrine as it is commonly understood in civil law will not operate to displace the state laws. This is quite unlike what we have recently come to expect in civil cases, where the Court regularly uses preemption to displace entire bodies of state regulations and state created private causes of action. For example, in *Buckman Co. v. Plaintiff Legal Committee*,⁵⁸ the Court dismissed state law fraud claims against a manufacturer's regulatory consultant as impliedly preempted by the federal Food, Drug, and Cosmetic Act. Additional recent instances where the Court struck state regulation of business via the preemption doctrine abound, in cases where states attempt to permit suits for business torts, ensure safe business practices, and require safe products and services.⁵⁹ The Court's new found commitment to

⁵⁷ For example, Mr. Lopez had already been arrested and charged under Texas law with firearm possession on school premises before the United States Attorney's Office decided to prosecute. *See Lopez*, 514 U.S. at 551 (describing original charge under Texas Penal Code Ann. § 46.03(a)(1) (Supp. 1994)).

⁵⁸ 531 U.S. 341, 344 (2001).

⁵⁹ *See, e.g., Ingersoll-Rand, Co. v. McClendon*, 498 U.S. 133, 138-39 (1990) (finding that the Employee Retirement Income Security Act of 1974 preempted state common law claims for unlawful discharge related to pension plans); *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) (holding that the preemption prescription of the Airline Deregulation Act barred state regulation of air carriers); *Morales v. Trans World Airlines*, 504 U.S. 374, 391 (1992) (ruling that the ADA preempted suits against air carriers under state general consumer protection laws); *United States v. Locke*, 529 U.S. 89, 94 (2000) (finding that Washington state's regulation of oil

federalism apparently does not extend to protecting consumers from big business, even where the state government desires this protection.⁶⁰ Thus, in the civil arena, without Court imposed Commerce Clause restrictions on federal legislation, such legislation might preempt entire fields from state regulation.

On the other hand, where federal criminal laws regulate conduct already regulated by the states, federal legislation does not displace the state criminal justice system, but supplements it with concurrent jurisdiction. Though there was a single Supreme Court case in 1956 holding that a non-regulatory federal criminal statute preempted state criminal legislation,⁶¹ the Court has not stricken a state criminal statute on preemption grounds for nearly half a century.⁶² Conventional wisdom tells us that "in the

vessel navigation and safety was preempted by a comprehensive federal regulatory scheme); *Geier v. Honda Motor Co.*, 529 U.S. 861, 865 (2000) (holding that the petitioners' suit under state tort law conflicted with Federal Motor Vehicle Safety Standard 208 and was preempted because the state claims would be an obstacle to the regulatory scheme); *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000) (striking down a Massachusetts state law prohibiting state contracts with the Burmese government because it was an obstacle to Congress' objectives under the federal Foreign Operations, Export Financing, and Related Programs Appropriations Act); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553 (2001) (ruling that Massachusetts advertising regulations targeting cigarettes were preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA)); *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) (holding that the 1996 Telecommunications Act divested the states of their regulatory authority over local telephone markets in favor of central rule-making by the FCC).

⁶⁰ For a gentle critique of the Court's preemption doctrine on federalism grounds, see Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILLANOVA L. REV. 1349, 1377-84 (2001). For a scathing review, see Frank B. Cross and Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741, 753 - 754 (2000) (finding "selective invocation" of federalism in the preemption decisions).

⁶¹ *Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956) (holding that the federal Smith Act, prohibiting knowing advocacy of the overthrow of the U.S. government by force or violence, preempted the Pennsylvania sedition act, which prohibited the same conduct, noting that the federal government had specifically urged local authorities not to intervene). In two earlier cases *Fox v. Ohio*, 5 How. 410 (1847) and *Gilbert v. Minnesota*, 254 U.S. 325 (1920) the Court found that state statutes did not impinge on the federal offense of counterfeiting, or on the raising of armies for the national defense, respectively.

⁶² In *Jones v. United States*, 529 U.S. 848 (2000), Justice Stevens argued that the "presumption against federal pre-emption of state law" dictated interpreting the federal statute to apply only to arsons of businesses, as otherwise the federal criminal statute, which authorizes a sentence of 35 years, would displace the state "policy choice" to punish home arson with a 10 year maximum. *Id.* at 859 (Steven, J., with Thomas, J., concurring). The implication here is that a clear statement by Congress that 18 U.S.C. section 844 applies to arsons of private residences would mean that the federal arson statute would pre-

criminal context there is a clear understanding that Congress ordinarily intends to supplement state law, rather than to regulate comprehensively and occupy the field,⁶³ and lower courts have routinely rejected claims regarding the preemptive effects of federal criminal statutes.⁶⁴ A refusal to apply preemption doctrine to criminal law allows the vast majority of criminal cases to continue to be brought in the state systems, without the necessity of Court intervention via the Commerce Clause and regardless of the passage of federal legislation.

An even more significant limit on federal encroachment of state criminal law enforcement authority is the exceedingly few private causes of action to enforce the criminal law.⁶⁵ When Congress passes a civil statute, such as the provision struck down in *Morrison*, neither the federal nor state governments have any control over the number actions brought pursuant to the statute, or over the quality of such actions. On the other hand, only an Assistant U.S. Attorney or a trial attorney with the Department of Justice can bring an action to enforce a criminal provision of the federal code. This fact severely limits the impact of federal criminal statutes on state criminal justice regimes. The federal government cannot increase its percentage of the total criminal law caseload without a politically intolerable increase in the federal income tax. Only five to ten percent of criminal felony cases brought each year are filed in federal court, and this figure has remained constant since 1930.⁶⁶ Though there is great controversy regarding the propriety of the "federalization" of criminal law, commentators surprisingly agree that resource allocation means the federal government will continue to be a minor player in criminal law enforcement; the practical debate is whether the broad discretion this

empt the Indiana state statute. This is passing strange, given that every federal criminal statute displaces state policy choices unless the federal and state statutes are identical in punishment and procedure, yet the Court has not held that any of these federal criminal statutes pre-empt state criminal statutes.

⁶³ BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT at 681.

⁶⁴ See, e.g., *Pic-A-State PA, Inc. v. Commonwealth*, 42 F.3d 175, 176 (3rd Cir. 1994) (holding that state statute criminalizing the sale within one state of another state's lottery ticket was not precluded by 18 U.S.C. § 1301, which criminalizes conducting a business that sells another state's lottery); *United States v. Ruthstein*, 414 F.2d 1079, 1083 (7th Cir. 1969) (finding that Congress has not preempted the states "from proscribing the transmission of gambling information").

⁶⁵ These include civil RICO claims, codified at 18 U.S.C. § 1962; and *qui tam* actions to enforce fraud against the government, codified at 31 U.S.C. § 3730(b)(1).

⁶⁶ NORM ABRAMS AND SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 13 (3d ed. 2000) (in 1998 there were almost one million felony filings in the 50 states versus about 35,000 in federal district court); see also Thomas G. Stacy and Kimberley A. Dayton, *The Underfederalization of Crime*, 6 CORNELL J. L. & SOC. POL. 247, 249-250 (1997) ("The image of a runaway national government increasingly taking away the enforcement of the criminal law from the States is essentially false, the available evidence indicates that the national government's share in the enforcement of criminal law has been actually diminishing for more than the last half century.").

federalization gives to prosecutors is better limited by the Court, Congress, or the Department of Justice.⁶⁷

This severe resource limitation,⁶⁸ coupled with the fact that individuals bringing a private cause of action are monetarily rewarded, whereas the federal government is monetarily penalized⁶⁹ by bringing federal criminal actions and paying for incarceration, means that the 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.⁷⁰ Absent the unlikely possibility of decriminalization of drugs, the small percentage

⁶⁷ Those arguing in favor of limits by the Department include Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1081-82 (1995); Dan Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 486-87 (1996) (suggesting that the Court defer to the Department of Justice interpretation of federal criminal statute); Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 899 (2000) (suggesting that Department of Justice guidelines on federal prosecutions adequately controls prosecutorial discretion).

Those advocating Court or Congressional limitations on prosecutorial discretion include Franklin E. Zimring and Gordon Hawkins, *Towards a Principle Basis for Federal Criminal Legislation*, 543 ANNALS 15, 16-17 (1996); and Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1136 (1995).

⁶⁸ As of 1999 there were fewer than 12,000 FBI special agents, 4,500 DEA agents, 9,000 U.S. Custom's Service agents, 2,000 ATF agents, and 500 Assistant U.S. Attorneys in the 94 U.S. Attorney Offices located throughout the country, compared to the close to 700,000 police officers and 30,000 state and local prosecutors nationwide. ABRAMS AND BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT (3d West 2000) at 6-13.

⁶⁹ A significant exception to this is criminal forfeiture brought in the money laundering, drug, and RICO areas. 18 U.S.C. § 1963 (21 U.S.C. § 853); 18 U.S.C. § 982. For criticisms of these provisions, see Susan R. Klein, *Civil In Rem Forfeiture and Double Jeopardy*, 82 Iowa Law Rev. 183 (1996). Some of the worst excesses have been curbed by the passage of the Civil Asset Forfeiture Reform Act of 2000, P.L. 106-185, 114 Stat. 202 (2000).

⁷⁰ These categories account for almost 80% of the criminal caseload. See U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics, available at <http://www.ussc.gov/linktojp.htm> (in 1998, slightly over forty percent of federal offenders were convicted of drug-related offenses, almost 20% were for white-collar offenses, and almost 16% were immigration offenses).

The federal government's latest war on "fill-in-the-blank" will certainly change, as the

left over for discretionary use will move around to make symbolic strikes with no real effect.⁷¹

Consider *Lopez* once again. There was no good reason for the U.S. Attorney's Office to initiate the case, as the defendant had already been indicted at the state level, and this was not a statute to which any U.S. Attorney's Office would ordinarily devote any resources. Although the U.S. Attorney initially refused to take the case, there was a push from the Department of Justice to prosecute at least some cases under the statute, and therefore a press conference was held with the U.S. Attorney and Senator Gramm announcing the "get tough" policy on guns in schools. In the view of Richard Durbin, the Assistant U.S. Attorney in the case, this move was solely political; society would have been better off with a felony conviction in state court than a misdemeanor conviction in federal court.⁷² Mr. Durbin further informed me that his office hasn't prosecuted another school zone case since *Lopez*, and doesn't intend to. His reticence is not related to the risk of a new Commerce Clause challenge under the revised statute, but is because these cases are simply not worth the time and money spent on them.⁷³

For these reasons, there have been only a handful of reported cases under this statute pre and post-*Lopez* nationwide.⁷⁴

Department declared a war on organized crime in the early 1950s, a war on white collar crime in the mid-1970s, a war on official corruption in the late-1970s, a war on drugs which began in earnest in the 1980s, a war against violent crime in the 1990s, and, of course, our current war on international terrorism. *See generally* Nancy E. Marian, *A History of Federal Crime Control Initiatives, 1960 - 1993* (1994).

⁷¹ *See, e.g.*, Am. Bar Ass'n, Criminal Justice Section, Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law* 51, 53 (1998) (noting that the "new wave of federal statutes often stand only as symbolic book prohibitions with few actual prosecutions"); 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 at 981 (1995) ("When Congress has chosen to legislate by adding new federal crimes, it has neither preempted state law as a formal matter nor provided sufficient resources to supplant state enforcement as a practical matter.").

⁷² The federal crime was a misdemeanor for a first offense, whereas the corresponding state crime was a felony.

⁷³ Telephone interview with Richard Durbin, Assistant U.S. Attorney for the Western District of Texas, on August 5, 2001, notes on file with author.

⁷⁴ I could find only 8 reported cases: *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Walker*, 59 F.3d 1196 (11th Cir. 1995); *United States v. Edwards*, 55 F.3d 428 (9th Cir. 1995); *United States v. Knowles*, 29 F.3d 947 (5th Cir. 1994); *United States v. Daniels*, 874 F.Supp 1255 (N.D. Ala. 1994); *United States v. Morrow*, 834 F.Supp 364 (N.D. Ala. 1993); *United States v. Ornelas*, 841 F.Supp 1087 (D. Colo. 1994); *United States v. Holland*, 841 F.Supp 143 (E.D. Pa. 1993).

As a result of these peculiar attributes of criminal law -- that federal criminal statutes do not preempt state ones, that there are few private federal criminal causes of action, and that the federal law enforcement apparatus is small relative to the states -- the so-called "federalization" of criminal law has not stopped the local experimentation that is the hallmark of decentralization federalism. Because 90-95% of felony offenders are prosecuted in state rather than federal criminal justice systems, local experimentation as the method of achieving shared federal and state law enforcement goals has flourished. The fact that occasionally in a while a felon is diverted from the state to the federal system has little if any impact on these state experiments -there are plenty of data points left for determining whether the particular state method is effective.⁷⁵ Current examples of state experiments run the gamut from boot camps,⁷⁶ drug courts,⁷⁷ shaming devices,⁷⁸ community policing,⁷⁹ and civil commitment for sexually violent predators.⁸⁰

The assertion by Justice Kennedy in his concurrence in *Lopez* that "the statute now before us forecloses the States from experimenting and exercising their own judgment in the area"⁸¹ not only lacks empirical foundation but is false. He claims the Gun Free School Zone Act will eliminate better alternatives such as "inducements to inform on violators where the information leads to arrest or

⁷⁵ This is obviously true for most federal statutes which replicate state crimes - the chance of being pulled into federal rather than state court is like a bolt of lightning striking. Even when the federal prosecutions are substantial, as in the controlled substance area, there are still plenty of defendants left over for state experiments.

⁷⁶ Shay Bilchik, *Program Report: Juvenile Justice Reform Initiatives In the States, 1994-95*, Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice (1997), available at www.ojjdp.ncjrs.org/pubs/reform (detailing rise between 1983 and 1995 of adult boot camps in over thirty states and juvenile boot camps in ten states).

⁷⁷ In 1997, the U.S. General Accounting Office found that there were 162 drug courts operating in thirty-eight states, the District of Columbia and Puerto Rico. *Drug Courts: Overview of Growth, Characteristics, and Results*, Report to the Senate Committee on the Judiciary and the House Committee on the Judiciary, U.S. General Accounting Office GAO/GGD-97-106 (1997).

⁷⁸ See Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 734-35 (1998) (discussing cases).

⁷⁹ See, e.g., Symposium, *Declining Crime Rates: Insiders' Views of the New York City Story*, 88 J. CRIM. L. & CRIMINOLOGY 1217, 1218-19 (1998).

⁸⁰ Nancy J. King and Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1491 (2001) (providing list of states enacting civil commitment of sexual offender statutes in the wake of *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997), where the Court upheld the civil commitment of sexual predators against Ex Post Facto and double jeopardy challenges).

⁸¹ *United States v. Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

confiscation of the guns,. . .programs to encourage the voluntary surrender of guns with some provision for amnesty,. . .penalties imposed on parent or guardians for failure to supervise the child,. . .laws providing for suspension or expulsion for gun-toting students,. . .or programs for expulsion with assignment to special facilities."⁸² In fact, all of those programs are in force in various states -- as his own footnotes revealed.⁸³ Because the vast majority of violators will be prosecuted in state courts, social scientists can continue to do the empirical studies necessary to determine which of these many means of achieving gun free schools is most effective. Policy makers on the federal level and in other states will naturally gravitate toward those methods.

A final institutional reason that decentralization federalism does not need Court protection to protect experimentation is that federal authority already tends to devolve downward from Main Justice in Washington, D.C., to the 94 local U.S. Attorney's Office throughout the country, to state and local task forces. The structure of the federal law enforcement apparatus encourages such devolution. Though there is a perception by the public that the U.S. Attorneys and their Assistants work for the Attorney General, this is not actually the case. U.S. Attorneys, like the Attorney General, are appointed by the President, and, depending on their personal relationship with the President, may wield more authority than the Attorney General herself.⁸⁴ Moreover, these U.S. Attorneys are by custom selected by senators from their home state. Thus, they are politically beholden to the state senator, rather than to the President, and their ties are to that state as well as the beltway.⁸⁵ Though technically there are certain cases that U.S. Attorney Offices may not initiate absent main Justice approval, that rule is honored "most often in the breach."⁸⁶

⁸² *Id.* at 582.

⁸³ *Id.* at 582 (listing state statutes).

⁸⁴ That was certainly the case for Attorney General Reno, President Clinton's third choice for the post. It was well known in the Department (I was a member at the time) that she did not have the President's ear.

⁸⁵ JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 116 (1978) (noting that a U.S. Attorney's ties to the senators and local political figures who submitted his name for appointment give him a sense of independence from Washington).

⁸⁶ The quote comes from former Justice Department official Charles F.C. Ruff in *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 55 GEO. L.J. 1171 at 1207-08 (1997). See also Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 57 UNIV. CHI. L. REV. 246, 250, n. 16 (1980) (discussing the range of responses by U.S. Attorney's Offices to requirements by main Justice of consultation before proceeding). My own experience working some money laundering and narcotics cases on detail in 1993 to the U.S. Attorney's Office in San Diego was there was a general disdain for taking "orders" from officials at main Justice who had less experience than the line attorneys and less familiarity with local customs and requirements.

Many commentators, politicians and scholars have noted the decentralization of federal law enforcement authority.⁸⁷ Examples, such as the federal government's law enforcement response to illegal gun use and ownership, abound. The Eastern District of Virginia's U.S. Attorney's Office and the Norfolk, Virginia's District Attorney's Office responded with Operation Exile, which has been touted equally by the Democratic and Republican administrations.⁸⁸ This project, which funnels only certain gun arrests made by state and local authorities into federal court, and is combined with a community outreach and education initiative and a media campaign, is effective because cooperation and intelligence are provided by local authorities.⁸⁹ While this response may work well in Virginia, the U.S. Attorney in Boston prefers "Operation Cease Fire," which uses probation and gang unit officers to target youth gangs, order maintenance tactics to suppress flair-ups, intensive inspections of federal firearm licensees, and provides at-risk youths with social services, job training, and conflict resolution training.⁹⁰ The U.S. Attorney in the Southern District of New York, on the other hand, prefers "Federal Day," where one day per month violators of concurrent federal/state criminal proscriptions are shunted

⁸⁷ See, e.g., Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 at 497 (1996) (lamenting decentralization and "the incentives that individual U.S. Attorney's had to bend the law to serve purely local interests"); JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEM, 204 at 209, 210 (1978) (noting that the fact of decentralization allows branch offices to bring cases against high level political figures that potential political pressure would prevent main Justice from bringing).

⁸⁸ Former Democratic Attorney General Janet Reno praised the program during her congressional testimony. Hearing Before the Committee on the Judiciary United States Senate Concerning Justice Department Oversight (May 5, 1999), available at <<http://www.usdoj.gov/archive/ag/testimony/1999/agjudic050599.htm>>; R.H. Melton, *Bush Favors Va.-Style Gun Control; Candidate Has National Hopes for Program Penalizing Felons*, WASHINGTON POST, June 23, 1999, at A8 (former Governor George W. Bush calling for the implementation of Project Exile nationwide).

⁸⁹ See generally, Daniel C. Richman, *"Project Exile" and the Allocation of Federal Law Enforcement Authority*, 43 ARIZ. L. REV. 369 (2001) (detailing Project Exile as one example of "a new stage in the devolution of federal enforcement power"); Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, in BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS, 2 CRIM. JUSTICE 2000, 94 (National Institute of Justice, NCJ 182408, July 2000) (noting that main Justice understands that the necessary cooperation of state and local officials with its anti-violence initiatives could be achieved only through arrangements that U.S. Attorneys negotiate district by district).

⁹⁰ The "Boston Strategy" is outlined in the Justice Department's "Promising Strategies to Reduce Gun Violence," Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice (1999) (also profiling joint federal/state programs to reduce gun violence in seven other cities).

to federal rather than state court.⁹¹ The U.S. Attorney in Maryland and her state counterparts developed "Project DISARM,"⁹² and so forth.⁹³ Thus, where norms are shared, not only does the federal government seem content and perhaps even eager to refrain from interfering with the 50 labs conducting crime control experimentation on the state level, but to that number we can add another 94 loci of experimentation reflected in the different approaches adopted in the various U.S. Attorney's Offices.

On a more abstract level, my argument for deferential review of federal criminal statutes that duplicate state norms is a variant of process-based federalism. The administrative state contains certain safeguards that protect decentralization federalism,⁹⁴ but do not protect independent-norm federalism.

⁹¹ Steven Labaton, *New Tactic in the War on Drugs Tilts Scales of Justice Off Balance*, NEW YORK TIMES, December 29, 1989, A18.

⁹² *Promising Strategies to Reduce Gun Violence* at 142 (describing the strategy by U.S. Attorney Lynne A. Battaglia that declined to charge every drug offender eligible for federal prosecution, but instead was based on a collaborative federal/state case referral and screening process).

⁹³ Professor Richman's insight is that Congress has in fact specifically organized the federal enforcement bureaucracy in a manner that promotes decentralization out of concern for presidential power. See Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 U.C.L.A. L. REV. 757 (1999) (arguing that Congress curbs the federalization of criminal law not through legislative specificity in its substantive lawmaking, but rather through structural and procedural mechanisms of control such as control over appointments, requirement of hearings, controls over agency budgets and agency structure, and limitations on investigations).

⁹⁴ Though there may be little negative effect on states *qua* states from this federalization, there are two significant negative effects on individual liberties; the potential for an individual to suffer successive federal and state prosecutions for the same criminal conduct, *Bartkus v. Illinois*, 358 U.S. 121, 138 (1959), and the availability of differing procedures and penalties in state and federal prosecutions for the same crimes, *United States v. Armstrong*, 517 U.S. 456, 479 (1996) (Stevens, J., dissenting) (noting that a guilty verdict for defendant in federal court provided a mandatory life term, whereas in state court his sentence could have been as short as six years). Much scholarship bemoans the federalization of criminal law precisely for these reasons, my own work included. See, e.g., Susan R. Klein, *Double Jeopardy's Demise*, 88 CAL. L. REV. 1001, 1002 (2000); Steve D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 646 (1997)

Some of the successive state and federal prosecutions are prevented by the Department of Justice's Petite Policy, *supra* n. 6. The number of such successive prosecution are only, by the most generous count, in the low 100s. Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159, 1208, n. 245 (1995) (finding over 100 cases since 1975). Likewise, the Department has attempted to curb forum shopping by encouraging federal prosecutors to decline bringing federal charges altogether in favor of a state forum in

The fact that the Department of Justice has few resources relative to states, that it and other federal law enforcement agencies are organized in the field along state lines, and that the Court does not preempt state legislation in the criminal law field all lead to less need for Court diligence in cases of concurrent jurisdiction. These are long-standing institutional features that are highly unlikely to change.

C. *Independent-Norm Federalism in Criminal Law*

The institutions, legal doctrines, and political processes which protect the states from federal encroachment where moral values are shared are ineffective in protecting what I have called independent-norm federalism in the criminal law. When the state's norm is independent of the federal norm, the outlier state will rarely obtain the allies necessary to win protection from contrary federal legislation in the political process.⁹⁵ The lack of federal preemption and private causes of action will likewise fail to protect citizens in outlier states from federal prosecution where the federal norm differs. One older and one more recent example, concerning issues of sexuality, and one controlled substance example where the state minority was substantial, will demonstrate this point.

The first example demonstrating this lack of protection is the federal response to Mormon polygamy in the late 19th century. In a series of statutes culminating in 1887, Congress criminalized polygamous marriages in Utah through prohibitions against bigamy and co-habitation.⁹⁶ The purpose of these federal criminal statutes, as evidenced by the legislative history and Supreme Court interpretation, was to eradicate the independent-norm practiced in Utah.⁹⁷ Though Congress enacted these statutes

appropriate circumstances. *See supra* n. 6. While I do not mean to minimize these problems, it does seem to me that banning all concurrent jurisdiction in the criminal law area is an overbroad reaction, and that federalism doctrine is not the right tool for the job. A more targeted response would be to renunciate the dual sovereignty doctrine and to provide a more lenient selective prosecution claim.

⁹⁵ Baker, 95 Colum. L. Rev. 1911, *supra* n. __ (outlining difficulties faced by outlier states in the political process).

⁹⁶ Congress passed the Morrill Act criminalizing bigamy as a felony in 1862. The Morrill Act, Ch. 125, § 1, 12 Stat. 501 (1862) (codified at Rev. Stat. § 5352); Congress passed the Pollen Act in 1874 facilitating polygamy convictions by transferring cases from the Mormon controlled probate courts to the non-Mormon federal system, the Pollen Act, Ch. 469, Pt. X, 13 Stat. 253 (1874); and finally Congress the Edmunds Act criminalizing bigamy, polygamy, or unlawful co-habitation in 1882, the Edmunds Act, Ch. 47, Pt. X, 22 Stat. 30 (1882) (codified at 48 U.S.C. § 1461) (repealed 1983); the Edmunds Tucker Act of 1887, the Edmunds Tucker Act, Ch. 397, 24 Stat. 635 (1887) (codified at 28 U.S.C. §§ 633, 660) (repealed 1978).

⁹⁷ For a full discussion of the history of Mormon polygamy, see Mary K. Campbell, *Mr. Peay's Horses: A Federal Response to Mormon Polygamy, 1854-1887*, 13 YALE J. L. & FEMINISM 29

pursuant to the explicit text of the Property Clause of the Constitution and not the Commerce Clause,⁹⁸ and therefore one could argue that the outcome might have been different had Utah been a state at the time this war against polygamy had begun, historical evidence undermines such an argument. These federal criminal statutes passed by huge margins,⁹⁹ despite the fact that they not only criminalized polygamy but impinged upon First, Fifth, Fourth and Sixth Amendment rights of the Mormons.¹⁰⁰ The perceived immorality of the practice would have quite overshadowed any desire of other states to take up Utah's cause in the interest of state's rights.

More recently, in 1996 Congress enacted the Defense of Marriage Act (DOMA) defining marriage for federal purposes as exclusively heterosexual and authorizing individual states to refuse to

(2001). *See also* 47 Cong. Record 13, 1156 (remarks of Senator Sherman of Ohio) (suggesting criminal prohibition was "the only remedy for this evil."); *id.* at 1158 (remarks of Senator Garland) (noting that "desperate cases need desperate remedies"); *Reynolds v. United States*, 98 U.S. 145, 166 (1878) (upholding the Morrill Act against a Free Exercise Clause challenge in part because "polygamy leads to the patriarchal principle, and . . . applied to large communities, fetters the people in a stationary despotism, while that principle cannot long exist in connection with monogamy."); *Cannon v. United States*, 116 U.S. 55, 72 (1885) (upholding co-habitation conviction under the Edmunds Act despite lack of evidence of living or sleeping together as the statute seeks not to punish sex with multiple women but rather "to prevent a man from flaunting in the face of the world the ostentation and opportunities of a bigamist household.. .").

⁹⁸ United States Constitution, Art. IV, sec. 3, clause 2.

⁹⁹ *See, e.g.*, Cong. Globe, 36 Cong., 1st Sess. 1520 (1860) (representative discussing the Morrill Bill stated "every member from every section of the Union is ready to assert the odious criminality of polygamy. It is encouraging, it is refreshing, to know that there is at least one subject on which there is no sectionalism. . ."); EDWARD BROWN FIRMAGE AND RICHARD COLLIN MANGRUM, *ZION IN THE COURTS, A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, 1830-1900*, 166 (1988) noting that after passing the Senate, the Edmunds Act cleared the House 199 to 42, with 51 not voting).

¹⁰⁰ For example, the Morrill Act revoked the statute incorporating the Mormon Church, prohibited any religious organization from holding real estate worth in excess of \$50,000 and required that all future holding above the statutory amount escheat to the federal government, the Edmunds Act created a five man commission to oversee elections in Utah, disallowed current or past polygamists the vote, and allowed prosecutors to strike a potential juror for cause if he had been practicing polygamy or if he refused to answer a question about his marital status, or who simply believe it was right for a man to have more than one wife. The forfeiture of existing property was upheld in *Late Corp. v. United States*, 136 U.S. 1 (1890); the denial of the vote based on a test oath that excluded any believing Mormon was upheld in *Davis v. Benson* (USSC 1890). These cases held such despite that fact that at the time, congressional actions concerning citizens in the territory were restricted by the Bill of Rights.

give full faith and credit to same-sex marriages performed in other states.¹⁰¹ As one commentator has noted, the debates over DOMA mirrored the morality play of the debates over the anti-polygamy statutes,¹⁰² including a debate over whether bi-sexuals could have legal harems, and whether a state could prohibit marriage to children, or even limit marriage to human beings.¹⁰³ One southern congressman asked: "[i]f a person had an insatiable desire to marry more than one wife, . . . what argument did gay activists have to deny him a legal polygamist marriage?"¹⁰⁴ Like the anti-polygamy criminal statutes, DOMA passed both Houses by huge margins,¹⁰⁵ despite questions as to its constitutionality under the Equal Protection and Full Faith and Credit Clauses.¹⁰⁶ The few outlier states that might have opposed such legislation, such as Hawaii and Vermont, didn't stand a chance.

A final example of the failure of the political process to protect independent minority norms is the inability of a large minority of states (currently tallied at nine) to convince their colleagues in Congress to either reschedule marijuana from a Schedule I to a Schedule II or III substance, or to allow an exemption for medicinal use by the seriously ill. In 1986, the Drug Enforcement Administration, in response to a push from the National Organization for the Reform of Marijuana Laws, held two years of formal hearings on the possible rescheduling of marijuana. Although the administrative law judge ruled that marijuana did have a "currently accepted medical use"¹⁰⁷ and recommended moving it from

¹⁰¹ Public Law 104-199, § 2(a), 1996, 110 Stat. 2419, presently codified at 28 U.S.C. § 1738C.

¹⁰² David L. Chambers, *Polygamy and Same Sex Marriage*, 26 HOFSTRA L. REV. 53 (1997).

¹⁰³ Defense of Marriage Act: Hearing on Sen. 1740 Before the Senate Committee on Judiciary, 1996 WL 387295 (July 11, 1996) (statement of Representative Steven Largent of Oklahoma) (DOMA 142 Cong. Rec. 87443 (daily edition July 11, 1996)).

¹⁰⁴ Andrew Sullivan, *Three's a Crowd*, NEW REPUBLIC, June 17, 1996, at 10 (quoting question asked of him by Congressman Bob Engles of South Carolina during hearings).

¹⁰⁵ 142 Cong. Rec. H. 7505-06 (daily edition July 12, 1996) (the Bill passed the House by a vote of 342 to 67); 142 Cong. Rec. S. 10129 (ed. Sept. 10, 1996) (the Bill passed the Senate by a vote of 85 to 14).

¹⁰⁶ See, e.g., Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1 (1997) (arguing that the Defense of Marriage Act violate the Equal Protection Clause because it was enacted with an invidious motive and impermissibly discriminates); Julie L.B. Johnson, Comment, *The Meaning of "General Laws": The Extent of Congress' Power Under the Full Faith and Credit Clause and the Constitutionality of the Defense of Marriage Act*, 145 U. PA. L. REV. 1611, 1613-15 (1997) (arguing that Congress has no authority under the Full Faith and Credit Clause to enact DOMA).

¹⁰⁷ *Alliance for Cannabis Therapeutic v. DEA*, 930 F.2d 936, 938 (D.C. Cir. 1991). The Court upheld the DEA's rejection of the judge's ruling in 15 F.3d 1131, 1137 (D.C. Cir. 1994).

Schedule I to Schedule II, the administrator of the DEA rejected his findings.¹⁰⁸ In June of 1991, the FDA eliminated its Individual Use Investigation New Drug Program, which gave a small number of patients marijuana on a limited basis.¹⁰⁹ In 1998, Congress passed the "Sense of the Congress" Resolution, entitled "Not Legalizing Marijuana For Medicinal Use,"¹¹⁰ which declared that "Congress continues to support the existing Federal legal process for determining the safety and efficacy of drugs and opposes efforts to circumvent this process by legalizing marijuana." Finally, in 2001, the DEA again denied a petition to transfer marijuana from Schedule I control.¹¹¹ Until either a majority of states see the value in medicinal marijuana or we modify our present hysteria over the use of controlled substances, the outlier states will never succeed in protecting their norm.

The failure to distinguish independent-norm federalism from decentralization federalism has led some scholars who are in favor of Court protection of federalism to suggest a single stringent standard of judicial review for all cases, criminal and civil and independent-norm and concurrent jurisdiction alike. For example, Professor Yoo suggests there is a "false dichotomy" between the protection of individual rights and the protection of states' rights,¹¹² and Professors Baker and Young suggest that federalism should be categorized with "individual rights that receive vigorous protection" of judicial review.¹¹³ While I would not go so far as Professor Choper in arguing that the political process is the exclusive safeguard for federalism, it seems to me that rational basis review is sufficient for decentralization federalism. The Court ought to reserve its current, more stringent, "rational basis plus" inquiry for independent-norm federalism, just as it reserves heightened scrutiny under the Equal Protection Clause for discrete and insular minorities.¹¹⁴

Professor Yoo's analogy between a state's representation in Congress and an individual's representation in the national government through her elected official, and suggestion that both categories receive similar judicial review, is misguided as a matter of common sense, history, and constitutional text. Common sense tells us that states have similar interests in preventing federal

¹⁰⁸ A history of the states' failure to get marijuana rescheduled can be found in 1999 ANN. SURV. AM. L. 471, 479-483 (1999); LESTER GRINSPOON, M.D. AND JAMES D. BACKALOW, MARIJUANA: THE FORBIDDEN MEDICINE (1993).

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¹¹⁰ 112 Stat. 2681-760-2681-761.

¹¹¹ Statement of Laura M. Nagel, Deputy Assistant Administrator Office of Diversion Control Drug Enforcement Administration before the House Committee on Government Reform, 2001 WL 2006520, 3/21/01 Cong. Testimony.

¹¹² Yoo, 79 TEX. L. REV. at 1476.

¹¹³ Young and Baker, 51 DUKE L.J. at 107.

¹¹⁴ *United States v. Caroline Products Co.*, 304 U.S. 144, 152 n.4 (1938).

encroachment, and there is ordinarily no reason for some states to gang up against others. Our tragic history has shown this to be anything but true where certain individuals are concerned, particularly our treatment of African Americans, women, homosexuals, and those accused of criminal offenses. Finally, the language in the first eight amendments of the Bill of Rights offers specific and detailed civil and criminal protection to individuals, whereas the text of the Tenth Amendment offers no protection to states or individuals beyond what happens to be left after Congress asserts its enumerated powers.¹¹⁵

Professors Choper and Rubin would claim that my attempt to apply heightened scrutiny to state minority norms is likewise misguided, since a state being sanctioned for choosing to pursue a minority norm is unlike an individual being sanctioned for an immutable characteristic. I disagree. A state could become the federalist counterpart to an African-American in Equal Protection doctrine by vigorously pursuing minority norms, and in this posture it warrants judicial protection, particularly if one believes that one of the values underlying federalism is the protection of liberty-enhancing state practices from federal interference. At the very least, the Court should apply this same rational-basis-plus test it is using to strike federal statutes that duplicate state norms to strike federal statutes that contradict state norms.

Not only does the political process fail to protect independent-norm federalism in the criminal law, but the particular institutions and doctrines in criminal law, such as limited federal resources for criminal prosecutions, lack of preemption doctrine, and the absence of a private cause of action, will also not protect state experimentation with different norms the way they protect state experimentation with different means. When there is concurrent jurisdiction, the criminal knows that if he is caught there is a good chance of prosecution at some level. Because most cases are brought on the state level, state programs to achieve prevention of such behavior by different means than the federal program have an opportunity to flourish. Assuming that most people choose to obey the law whether they agree with it or not, where a state chooses to pursue an independent moral norm, and makes that choice clear to its citizens, by either enacting legislation to protect the norm or enshrining the norm in its state constitution, some citizens will engage in this behavior. If this same behavior, however, is criminalized federally, the behavior will be chilled.¹¹⁶ Even though federal resources for criminal prosecutions are small, and a federal prosecutor must choose to bring the case, the mere threat of a federal prosecution will stop all but the most hardy from engaging in the behavior, notwithstanding that it is legal on the state level.¹¹⁷

¹¹⁵ See U.S. Const., Amendment X (reserving "powers not delegated to the United States" to the States and the people).

¹¹⁶ See, e.g., *Symposium*, The Legal Construction of Norms: The Limits of Behavior Theories of Law and Social Norms, 86 Va.L.Rev. 1603 (2000); Ernest Van Den Haag, The Criminal Law as a Threat System, 73 J. Crim.L. & Criminology 796 (1982).

¹¹⁷ This threat of federal criminal prosecution will successfully prevent experimentation with an independent-norm despite the possibility of jury nullification. The specter of nullification is no doubt why main Justice brought the cannabis case in San Francisco as a civil injunctive action, tried to a judge, rather than as a criminal prosecution tried to a jury. However, the possibility of nullification will fail to

II. Court Protected Minority Norms

If I have failed to convince the reader that the political process protects decentralization federalism, this does not detract from my second point; the political process fails to protect independent-norm federalism. If we wish to protect such federalism, it requires a judicially imposed solution. I will begin by discussing the advantages and drawbacks of such judicial protection. Next, I will offer my version of current Section 5 and Commerce Clause jurisprudence. While I am not necessarily a cheerleader for present law, the Court's new limits may protect minority norms in a way previously impossible, and a better test seems unlikely.

A. The Identification and Desirability of Independent-Norm Federalism

The first criticism of providing a doctrine to protect independent-norm federalism is that the attempt to categorize federal criminal statutes into decentralization federalism and independent-norm federalism is an exercise in futility; it is impossible to draw such distinctions. One response would be to admit the truth of this criticism and apply more stringent judicial review to all federal statutes that encroach upon states' prerogatives in criminal law. Aside from the waste in judicial capital, there is no lasting harm to this, as appropriate federal legislation can simply be redrafted to comport with the stricter Commerce Clause test or could be transformed into a conditional spending program. Moreover, there would still be value in the distinction for purposes of describing cases and alerting legislators and judges to the potential impact on state-created liberties where the federal statute contravenes state norms. However, the criticism goes too far; while there will certainly be cases at the margin where the distinction will be hard to draw, in most of the cases it will not be. Generally, criminal laws are passed for a single reason - prevention of behavior identified as "bad." Preventing the behavior is properly labeled the end, and the method of preventing it the means. Where the ends are shared among federal and state officials, federal statutes in the area are decentralization federalism statutes; where the ends are not shared federal statutes impinge on independent state norms.

However, some means to an end may be considered so immoral on their own that inflicting those means upon an uncooperative state may be impinging upon that state's moral norms as much as any substantive criminal law would. For example, suppose Massachusetts considers the death penalty not only morally wrong but unconstitutional pursuant to its state constitution.¹¹⁸ Is a federal statute

protect independent-norm federalism for the same reason it is failing to protect the medical marijuana program in California; the federal government can bypass the jury via requests for injunctions, and most individuals will not put themselves through the ordeal of a criminal trial despite the potentially favorable outcome some year or two in the future, given the time, expense, stigma, and psychological toll involved in being a criminal defendant.

¹¹⁸ *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116, 124-30 (Mass. 1984) (striking certain key procedural provisions of the Massachusetts death penalty statute on the grounds that they impermissibly burden a constitutional right and violate article 12 of the Declaration of Rights of the Massachusetts Constitution).

permitting the death penalty for drug kingpins who foreseeably cause death¹¹⁹ an allowable means to reach the shared end of ridding our country of illicit drugs, or is it an independent norm? Since resolving such a debate seems nearly impossible, and since the number of such cases appears small, my solution would be to characterize a regulation according its characterization by the particular state. In other words, if a particular state found what might be characterized as a means to be sufficiently important to enact state legislation protecting or prohibiting such means, the federal court should likewise treat it as a moral norm and categorize any federal incursions as independent-norm federalism. The Court could give standing to object to a federal statute as violative of a state norm only to the state itself rather than a criminal defendant, and the problem resolves itself.¹²⁰ This is, in essence, what has occurred in two of examples I discuss in Part III, as the state of Oregon objected to (and sued) the federal government to protect its right-to-die statute, and a number of District Attorney's in California have threatened to open up their own marijuana dispensaries.¹²¹ The Court would apply stricter scrutiny only if the state supports the defendant's objection to the federal statute.

A second criticism of my categorization is that it assumes that protecting independent-norm federalism is desirable. One of the arguments against this proposition is that historically federalism has frequently been no friend of a liberal society. For example, the southern states championed federalism as a method of maintaining apartheid following the Civil War,¹²² and states used federalism to deny women the right to vote until and even after the passage of the Nineteenth Amendment.¹²³ More recent is the well documented association of federalism with the Court's assault on the New Deal.¹²⁴ Given this

¹¹⁹ 21 U.S.C. § 848.

¹²⁰ This also resolves the problem of a state changing its "mind" regarding a norm it formerly shared with the federal government. The state attorney can attack a federal criminal prohibition at any time. This procedure does not harm the defendant, as it is only where her state protects the norm that she will benefit from attacking the federal prohibition, as she will then be safe from state prosecution as well.

¹²¹ See *infra* n. ____.

¹²² See, e.g., Edward L. Rubin, *Puppy Federalism and the Blessings of America*, 574 ANNALS 37, 47 (2001) (chastising scholars for forgetting the southern states' treatment of blacks after the Civil War, and noting that "we can enjoy the idea of federalism because we have forgotten the great problems associate with its actuality"); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987) ("victims of government-sponsored lawlessness have come to dread the ford 'federalism.'"); Frank C. Cross, *Realism about Federalism*, 74 N.Y.U. L. REV. 1304, 1306 (1999) ("federalism's role in American history as a stalking horse for racism is infamous.").

¹²³ Riva B. Seigel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. ____ (2002) (detailing the use of federalism in the late nineteenth century to oppose suffrage culminating in the challenge, in *Leser v. Garnet*, 258 U.S. 130 (1922), to the constitutionality of the Nineteenth Amendment securing the vote for our fairer sex).

¹²⁴ Erwin Chemerinsky, *Rehabilitating Federalism*, 92 MICH. L. REV. 1333, 1333-34 (1994)

history, it is not unreasonable to believe in the continued use of federalism to prevent progressive federal legislation, or to protect morally unattractive state practices.¹²⁵

I do not discount this danger. Still, the worst state excesses would probably be stricken by the Constitution outside of Commerce Clause legislation. Certainly in the period following the New Deal the Court became much more protective of individual liberties enshrined in the Bill of Rights,¹²⁶ though it is gradually becoming less protective again. Even where purely private conduct was at issue, such as the private discrimination outlawed in the Civil Rights Act,¹²⁷ where the conduct involves bars on travel or engaging in commerce it could still be effectively regulated federally under a stringent Commerce Clause test.

On the other hand, there are liberal advantages to allowing minority norms to flourish. The potential for the state rather than the federal government to be the protector of individual rights in the criminal procedure area was famously noted by Justice William J. Brennan, Jr. in 1977.¹²⁸ This potential has since been realized as the Burger and Rehnquist Courts chipped away at the Warren Court revolution. Many state supreme courts continue to provide the protection originally granted by the Warren Court pursuant to state constitutions.¹²⁹ Other advantages include fostering democracy by

(noting that federalism was invoked in the effort to frustrate New Deal reforms such as child labor and minimum wage legislation).

¹²⁵ Or, as Professor Rubin suggested to me, what is to prevent independent-norm federalism from being used to protect state "prisons runs as slave plantations." E-mail between author and Edward Rubin, 11-29-2001, on file with author.

¹²⁶ See the gradual incorporation of most of the Bill of Rights into the 14th Amendment, and the Warren Court revolution. LAFAYETTE, ISRAEL & KING, CRIMINAL PROCEDURE, 2d ed., sections 2.1 - 2.6 (West 1999).

¹²⁷ *Heart of Atlanta*, 379 U.S. 241 (1964).

¹²⁸ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1997) (urging state courts not to regard the incorporation of the Bill of Rights into the Fourteenth Amendment as the ceiling for individual rights and liberties but rather as the floor; and suggesting that state constitutions may grant liberties that extent "beyond those required by the Supreme Court's interpretation of federal law.")

¹²⁹ Examples of this are legion. See, e.g., WRIGHT, KING, & KLEIN, FEDERAL PRACTICE AND PROCEDURE, CRIMINAL 3D, Secs. 52, n. 46, (West 2002 pocket part) (listing cases from states that interpret their state version of the Fourteenth Amendment to provide more privacy protection than the federal counterpart); Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 97 (2000) (recommending that states continue to undertake independent analysis of their state constitutions, in order to protect individual rights and liberties more extensively than the U.S. Supreme Court, and suggesting this has the advantages of

allowing minority ideology the opportunity to become the majority position before larger political systems terminate it,¹³⁰ permitting business and individuals to vote their regulatory and lifestyle preferences with their feet,¹³¹ and preventing the strife that could lead to secession.¹³²

The protection of independent state norms will most likely favor liberals today, so long as conservatives retain control of the federal government and liberals retain control in at least some states. Thus, today federalism may protect "liberal" causes such as the right to die, the medical use of marijuana, and same-sex marriage.¹³³ Likewise, in the period before the Civil War the federal government was controlled by slave holders who enforced the Fugitive Slave Acts of 1793 and 1850 and repealed the anti-slavery limits in the Missouri Compromise, and it was some northern states who resisted the Fugitive Slave Law, passed Person Liberty Laws, and generally agitated to limit slavery.¹³⁴

fostering dialogue among different organs of the federal and state government).

¹³⁰ Nicholas S. Zeppos, *The Dynamics of Democracy: Travel, Premature Predation, and the Components of Political Identity*, 50 VAND. L. REV. 445, 447 (1997) (suggesting that the decision in *Romer v. Evans*, 116 S.Ct. 1620 (1996), striking a state constitutional amendment that prevented local governments from protecting the rights of its gay citizens, can best be explained under a theory of democracy that prevents larger political systems from killing off a potentially competitive minority ideology).

¹³¹ See, e.g., Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward the Public Choice Explanation of Federalism*, 76 VA. L. REV. 265 (1990); Richard A. Epstein, *Exit Rights Under Federalism*, 55 L. & CONTEMP. PROBS. 147 (Winter 1992); Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same Sex Marriage*, 68 S. CAL. L. REV. 745, 747 (1995) (suggesting that states may compete to become the first to recognize same sex marriages, with the prize of over 4 billion dollars in revenue likely to flow to the first state).

¹³² See, e.g., Clayton P. Gillette, *The Exercise of Trumps by Decentralized Governments*, 83 VA. L. REV. 1347 (1997); Michael C. Dorf and Charles S. Sabel, *A Constitution of Democratic Experimentalist*, 98 COLUM. L. REV. 267 (1998); Symposium, *A Government of Limited and Enumerated Powers: In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 765 (1995) (suggesting that the United States and Switzerland are federalism success stories because both have a large number of subunits which "provide plenty of opportunities for social minority groups to dominate particular federal sub-entities *without* encouraging secession").

¹³³ See Part III, *infra*.

¹³⁴ See generally Paul Finkelman, *Teaching Slavery in American Constitutional Law*, 34 Akron L. Rev. 261 (2000) (detailing the unsuccessful attempts by northern states to assist slaves and freed blacks in the face of Congressional and Court opposition); Robert J. Kaczorowki, *The Tragic Irony of American Federalism: National Sovereignty Versus State Sovereignty in Slavery and in Freedom*, 45

However, there is nothing inherent about the current political lineup. An outlier state on the right, such as Florida, may choose to prohibit homosexuals from adopting children,¹³⁵ and, assuming a conservative Court finds no constitutional bar to such law, a future liberal Congress may be prohibited by the Court from legislating otherwise under either section 5 or the commerce clause. Whose ox federalism goes may simply depend upon who controls Congress, the Courts, and each state. I cannot in this short essay resolve the debate about whether independent-norm federalism is a desirable goal. I note here only that Professor Rubin is mostly correct in calling our country essentially homogenous; any serious disagreement between the state and the federal government regarding what conduct should be made criminal will, therefore, remain mercifully small.

B. *Current Commerce Clause and Section 5 Jurisprudence*

Regardless of whether Court protection of independent-norms is wise, current Supreme Court jurisprudence is pushing us, perhaps inadvertently, in this direction. The 1997 term marked a departure from prior precedent in Congressional authority to legislate in furtherance of the substantive guarantees of the Fourteenth Amendment. Presently, if Congress wants to regulate private conduct implicating civil rights,¹³⁶ it has to use the Commerce Clause or some other enumerated power, not Section 5 of the Fourteenth Amendment. Legislation under Section 5 must remedy a constitutional violation engaged in by the state, not by private actors, and the remedy must be congruent and proportional to the judicially defined injury to be prevented or harm to be remedied.¹³⁷ However, where the legislature does not directly enforce a provision of the Constitution or Bill of Rights and therefore cannot use Section 5, it

Kan. L. Rev. 1015 (1997) (suggesting that federalism is not one of the "first principles" of the Founders, as Congress used the Fugitive Slave Acts to reduce state sovereignty and curb state police powers); Paul Brest and Sanford Levinson, *Process of Constitutional Decisionmaking: Cases and Materials* 157-160 (4th ed. 2000).

¹³⁵ Fla. Stat. section 63.042 (2001).

¹³⁶ For instance, by providing a cause of action to the elderly discriminated against in employment, 29 U.S.C. §§ 621-634 (1994) or by providing a cause of action for persons assaulted because of gender, 42 U.S.C. § 13981 (1998).

¹³⁷ *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997) (holding that the Religious Freedom Restoration Act was unconstitutional because Congress was not attempting to remedy a violation of the Fourteenth Amendment); *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 374 (2001) (holding that Congress had no authority under the Fourteenth Amendment to apply the American with Disabilities Act to the states). Scholars faulting the Court's section five interpretation include Samuel Estreicher and Margaret H. Lemos, *The Section 5 Mystique, Morrison, and the Future of Federal Antidiscrimination Law*, 2000 SUP. CT. REV. 109; Lawrence G. Sager, *A Letter to the Supreme Court Regarding the Missing Argument in Brzonkala v. Morrison*, 75 N.Y.U. L. REV. 150 (2000).

may nonetheless regulate pursuant to the commerce clause if the activity in question is clearly economic or has an economic or physical spillover effect onto another state.¹³⁸ The single reason to cheer the Court's narrowing of Section 5 and its shunting of those cases to Commerce Clause analysis is that such a requirement might curb federal legislation which seeks to impinge upon independent state norms which advance civil rights. For example, federal legislation criminalizing same-sex marriage cannot be upheld under section 5, as it does not remedy a constitutional violation, and likewise, as I will demonstrate in Part III, it cannot be upheld under the Commerce Clause as it does not regulate an economic transaction.

The change in Commerce Clause analysis has been just as radical as the change in section 5 jurisprudence. From the late 1930s, the Court has allowed Congress to regulate purely intrastate activities "affecting commerce," rather than limiting regulation to commerce involving more than one state.¹³⁹ This third category of permissible Commerce Clause regulation¹⁴⁰ permitted regulation of an entire "class of activities" without proof that the particular intrastate activity against which a sanction was laid had an effect on commerce."¹⁴¹ Because of the breadth of this third test, not a single federal statute was invalidated on Commerce Clause grounds post-New Deal until the federalism revolution began in 1995. The Court's new limits on federal power all concern the third test for determining whether a federal statute is validly enacted under the Commerce Clause; that it affect interstate commerce. The first limit is that the effect on commerce from the regulated behavior be substantial.¹⁴² Second, the

¹³⁸ *Kimel v. Florida Board of Regents*, 529 U.S. 62 (2000) (holding that Congress had the authority to enact the Age Discrimination in Employment Act of 1967 ("ADEA") under the Commerce Clause but not under Section 5 of the Fourteenth Amendment because the ADEA imposed substantive requirements disproportionate to any unconstitutional conduct targeted by the Act); *United States v. Morrison*, 529 U.S. 598, 602 (2000) (finding that Congress lacked authority under both Section 5 of the Fourteenth Amendment and the Commerce Clause to enact a civil cause of action provision of VAWA).

¹³⁹ Thus *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding regulation of wheat grown on a farm solely for home consumption because, though never marketed interstate, it supplied the need of the grower which otherwise would have been satisfied by his purchase in the open market) won out over *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat 1 (1824). See Justice Douglas' opinion in *Perez v. United States*, 402 U.S. 146, 151-55 (1971) for a nice description of the return to the substantial effects test during the new Deal.

¹⁴⁰ In addition to (1) the channels of interstate or foreign commerce, and (2) the instrumentalities of interstate commerce or persons or things in commerce.

¹⁴¹ *Perez*, *supra* n. 132, 402 U.S. at 152.

¹⁴² *Lopez*, 514 U.S. at 560 ("the proper test requires an analysis of whether the regulated activity 'substantially effects' interstate commerce."); *Morrison*, 529 U.S. at 610.

activity regulated (probably) must be economic in nature.¹⁴³ Third, the link between the regulated activity and commerce and its effect on interstate commerce cannot be attenuated.¹⁴⁴

As with the Court's narrowing of Congressional power under section 5 of the Fourteenth Amendment, the reason to cheer these limits is their potential to enhance independent-norm federalism, and allow states to create more (but never less) protection of individual rights than that mandated by the federal constitution. The cumulative effect of these new limits may be to allow a state to experiment with different non-economic norms. This is because first, the limits on the third category will force much legislation back into an analysis under the first two categories of the Commerce Clause - regulating the channels of interstate commerce and protecting the instrumentalities of interstate commerce. Those non-subjective categories require either physical trespass onto a neighboring state, or interference with transportation routes. Second, to be upheld, the few cases remaining in the third category must at the very least produce economic externalities on neighboring states. Limiting Congress to regulation of commercial activity, and perhaps non-commercial activity that has a direct and substantial economic effect in a neighboring state, will allow states to protect minority non-economic norms so long as there are few economic or physical externalities beyond their borders.¹⁴⁵

If one is going to impose a federalism doctrine policed by the judiciary, the Court's current test, at least as I interpret it, is basically sound, and quite an improvement over prior attempts. Though the question of whether or not an effect is "substantial" leaves a lot of wiggle room, it also clearly raises the bar to finding Commerce Clause authorization. Moreover, it seems no more subjective than the attempt to differentiate between a "legitimate" state purpose and an "important" one.¹⁴⁶ The requirement that the activity be "commercial" in nature is arguably more legitimate and sensible than previous distinctions prior to the New Deal. It is legitimate because it is grounded in the text of the constitution - after all we

¹⁴³ *United States v. Lopez*, 514 U.S. at 561 ("Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise"); *Morrison*, 529 at 612 ("While we need not adopt a categorical rule against aggregating the effects of any non-economic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate only when that activity is economic in nature.")

¹⁴⁴ *Lopez*, at 570. (to uphold the government's "cost of crime" or "national productivity" arguments "we would have to pile inference upon inference in the manner that be fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the states."); *Morrison*, 529 U.S. at 615 ("The reasoning the petitioners advance seeks to follow the but-for causal chains in the initial occurrence of violent crime. . .to every attenuated effect upon interstate commerce. If accepted petitioners' reasoning would allow Congress to regulate any crime.").

¹⁴⁵ This presumes that the test for the third category is sufficiently objective that the Court must apply it to protect disfavored as well as favored state norms.

¹⁴⁶ *Craig v. Boren*, 429 U.S. 190, 197 (1976) (requiring that laws classify on the basis of gender "must serve important governmental objectives" rather than simply legitimate ones).

are construing the *commerce* clause. The old distinctions between manufacturing,¹⁴⁷ mining,¹⁴⁸ and union activities,¹⁴⁹ which were not commerce, and distribution, which was commerce, had no grounding in the text, no relation to regulating a national economy, and in fact severely limited the ability of Congress to regulate the national economy.¹⁵⁰

On the other hand, the new limit requiring a commercial transaction is very broad, and would plainly allow all New Deal legislation to stand. It is also somewhat less subjective - somebody makes, keeps, or loses money or some other form of property, or they don't. In the criminal law area, prohibiting Congress from regulating non-commercial activity is more likely to protect private behavior, where the impetus for the prohibition is morality rather than economic regulation. Thus crimes involving money such as the Extortionate Credit Act,¹⁵¹ robbery under the Hobbs Act,¹⁵² racketeering under RICO,¹⁵³ and a host of others¹⁵⁴ will continue to be upheld using the substantial effects test even when

¹⁴⁷ *United States v. E.C. Knight Co.*, 156 U.S. 1, 12-16 (1895) (distinguishing "commerce" from "manufacture").

¹⁴⁸ *Oliver Iron Co. v. Lord*, 262 U.S. 172, 178 (1923) ("mining is not interstate commerce, but like manufacturing is a local business . . .").

¹⁴⁹ *NLRB v. Jones Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Carter v. Carter Coal Co.*, 298 U.S. 238, 303 (1936) (holding that regulation of unfair labor practices in mining regulated "production" not "commerce").

¹⁵⁰ *See, e.g., Morrison*, 529 U.S. at 610 (Congress may "regulate in the commercial sphere on the assumption that we have single market and unified purpose to build a stable national economy.").

¹⁵¹ *Perez v. United States*, 402 U.S. 146 (1971). The Extortionate Extension of Credit Act is codified at 18 U.S.C. § 893.

¹⁵² *United States v. Culbert*, 435 U.S. 371, 372 (1978); *United States v. Green*, 350 U.S. 415, 420-21 (1956) (upholding Congress' power to enact the Hobbs Act, which prohibits extortion and robbery that "in any way or degree. . . effects commerce.") The Hobbs Act is codified at 18 U.S.C. § 1951.

¹⁵³ Criminal RICO, codified at 18 U.S.C. § 1962(a), like the Hobbs Act, has two potential jurisdictional hooks. The enterprise must either affect commerce, or be engaged in commerce. The latter hook was blessed by the Supreme Court in *United States v. Robertson*, 514 U.S. 659, 670-671 (1995) (per curiam) (upholding criminal RICO prosecution against a Commerce Clause challenge because the mining business itself was engaged in interstate commerce and used the channels of interstate commerce by bringing in workers from out of state and investing money in one state for equipment that was transported to another state).

¹⁵⁴ *See, e.g.,* 21 U.S.C. § 841 (prohibiting the distribution of controlled substances; 21 U.S.C. § 848 (prohibiting a continuing criminal enterprise what derives substantial income from drug sales); 18

purely intrastate, whereas purely intrastate crimes of passion, such as murder, rape, assault, or throwing a molotov cocktail in the home of your cousin,¹⁵⁵ would most likely not be. Finally, the attenuation limit is subject to the charge of a return to the failed direct versus indirect test employed by the New Deal Supreme Court.¹⁵⁶ While this charge of subjectivity has merit, the attenuation test is no more subjective than the proximate cause analysis courts and juries apply daily in civil and criminal cases.¹⁵⁷

Most of the scholarly criticism of the Court's new limits on the third category of cases concern the commercial-noncommercial distinction. For example, Professor Regan chides the Court for providing "no justification for distinguishing between commercial behavior that affects interstate commerce and noncommercial behavior that does the same."¹⁵⁸ He then gives us examples under which Congress's power to regulate noncommercial local behavior under the Commerce Clause should be obvious. "Surely Congress can regulate private sport hunting of migratory birds or drunk driving on interstate highways or backyard incinerators if they are found to emit some airborne toxic chemical that is deposited hundreds of miles from the site of incineration."¹⁵⁹ While the drunk driving example can

U.S.C. § 1956 and 1957 (prohibiting the laundering of money derived from unlawful activity); 18 U.S.C. § 248 (prohibiting blockading a healthcare business); 7 U.S.C. § 2024 (food stamp fraud); 18 U.S.C. § 1033 (crimes by or affecting persons engaged in the business of insurance); 18 U.S.C. § 2113 (prohibiting larceny and robbery of federally insured bank).

¹⁵⁵ *Jones v. United States*, 529 U.S. 848 (2000); *Morrison*, 529 U.S. at 615 ("if Congress may regulate gender-motivated violence, it would be able to regulate murder. . .").

¹⁵⁶ A.L.A. Schechter, *Poultry Corp. v. United States*, 295 U.S. 496 (1935), *rejected in N.L.R.B., Jones and Laughlin Steel*, 301 U.S. 1 (1937).

¹⁵⁷ *See, e.g., Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 267-68 (1992) (importing proximate cause analysis onto civil RICO claim); Model Penal Code, § 2.03 (1985) (requiring causal relationship between conduct and result); Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 679 (1995) ("the majority's use of 'substantial effect' is more akin to the notion of proximate cause in tort law." The *Lopez* majority meant that the relationship between the regulated activity and interstate commerce must be strong enough or close enough to justify federal intervention just as the concept of proximate cause means that a defendant's negligence must be closely enough related to the plaintiff's injury to justify forcing the defendant to bear the costs of the injury.") Although Professor Merritt ascribes the proximate cause analysis to the addition of the word "substantial" rather than the addition of the requirement that there be a direct effect, I think we ultimately arrive at the same destination.

¹⁵⁸ Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 566 (1995) (offering a functional theory of the Commerce Clause that would focus on practical justifications for the exercise of federal power).

¹⁵⁹ Regan, 94 MICH. L. REV. at 564, *supra* n. 181.

easily be regulated under the channels or instrumentalities tests,¹⁶⁰ the other examples give us pause. One way out for the remaining two examples is to say that national consumer safety and environmental regulation are regulations of commerce, and including purely intrastate activity is an essential part of the larger regulatory scheme.¹⁶¹ One could also try to fit these examples into one of the other two categories of Commerce Clause analysis by noting that birds and pollution physically cross state lines. The Court should be unwilling to allow one state to economically injure another state, negatively affecting the national economy. Thus, where there is economic spillover from one state to another, even where the activity causing the spillover is not commercial, regulation under the "affecting commerce" test is appropriate.¹⁶² The citizens of Georgia should not have to pay to clean up pollution created by the citizens of Florida; Colorado should not lose the natural treasure of its parks (not to mention the admission fees) because the citizens of Georgia killed the wildlife. Such an economic spillover test would certainly solve the migratory bird problem, and I believe this is where the Court is heading, despite the five-four decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, that held, as a matter of statutory construction, the Clean Water Act did not permit the regulation of intrastate waters used by migratory birds.¹⁶³

¹⁶⁰ In this section I discuss only the affecting commerce test. In notes ___ through ___ and accompanying text, below, I will discuss the other two justifications; regulation of the instrumentalities of commerce and regulation of the channels of commerce. Interstate highways are part of the national infrastructure of interstate travel, and drunk drivers also threaten other goods and persons traveling in interstate commerce.

¹⁶¹ see n. ___, *infra*.

¹⁶² Perhaps this is why Justice Rehnquist refused to "adopt a categorical rule against aggregating the effects of any non-economic activity." *Morrison*, 529 U.S. at 613.

¹⁶³ 531 U.S. 159, 162 (2001). The majority found that there was no congressional acquiescence in this administrative interpretation of the statute, and that the argument that intrastate water not adjacent to open waters is covered by the act raised "significant constitutional questions." *Id.* at 175. The constitutional questions concerned (1) whether the activity regulated that, in the aggregate must substantially effect interstate commerce, is water areas used by migratory birds or commercial landfills, and (2) whether such regulation would "result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 174. Were Congress to amend the statute to comport with the agency interpretation, then the dissenters' argument that the activity regulates commerce under the Court's present test is quite strong. The purpose of the Clean Water Act is not land use regulation to protect the navigability of water, but is instead environmental regulation to protect our natural resources, an acceptable exercise of federal power. *Id.* at 191 (Stevens, J., dissenting) (citing *Hoddell v. Virginia Surface Mining and Reclamation Assoc., Inc.*, 452 U.S. 264 (1981)). The requirement that the activity regulated be a commercial one is met since the discharge of the fill material is undertaken for economic reasons, and the class of activity affects commerce by hurting migratory birds, which in addition to their intrinsic value generate millions or perhaps billions of dollars through commercial activities such as birdwatching and hunting. *Id.* at 195. This is a paradigmatic economic spillover problem; the landfill benefits the state doing the filling, but imposes much of its costs on surrounding

Professor Lessig criticizes a different aspect of the commercial-noncommercial distinction. He argues first that the rule is indeterminate because an activity can be defined narrowly such that it is not commercial or defined broadly such that it is.¹⁶⁴ For example, the Civil Rights Act of 1964 is illegitimate if the activity is defined as "discriminating" rather than as preventing the use of hotels and restaurants during travel, and the federal arson statute is illegitimate if the arson is done for vengeance rather than for insurance fraud.¹⁶⁵ He also claims that even if we could define the activity being regulated, there is no objective method for determining whether the particular activity is commercial or not; what really draws the line "is simply the old line drawn and undermined in *National Legal Cities*, namely the line focussing on objects of traditional state concern."¹⁶⁶

These criticisms are valid, but overstated. We have a general sense that, in addition to the transportation routes themselves, commerce means making money, a sense shared by the Court.¹⁶⁷ The activity defined in the Civil Rights Acts is not simply discriminating, as all forms of discrimination are not prohibited. Rather, it is discriminating in the use of those hotels and restaurants that are necessary for interstate travel. Likewise, the arson statute interpreted narrowly in *Jones* criminalizes the activity of burning a non-residential structure, the motive for such burning is irrelevant to the crime.¹⁶⁸ Finally,

states. See Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2343 (1996). Moreover, the fact that birds themselves cross state lines provides a sufficient jurisdictional nexus for federal regulation. However, if I am wrong, and the application of the Clean Water Act to purely intrastate bodies of water is prohibited under the Commerce Clause, then surely all three of the state norms I discuss in Part III of this article are also off limits for federal regulation. Otherwise, the Court is engaging in expressly political decision making which cannot stand the test of time.

¹⁶⁴ Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUPREME CT. REV. 125 (1995) (examining *Lopez* as an exercise in "interpretive fidelity"). Likewise, Professor Moulton argues that "gun possession ought reasonably to be understood as commercial activity" because guns are both articles of commerce and instruments used to further or impede commercial aims. H. Geoffrey Moulton, Jr., *The Quixotic Search for Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 888 (1999). His mistake is that neither of these nexuses to commerce (travel in commerce or use of the gun in commerce) were part of the criminal offense.

¹⁶⁵ Lessig at 204.

¹⁶⁶ Lessig at 205, 206.

¹⁶⁷ *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249 (199, 2524) (RICO enterprise need not have an underlying economic motive, defined as desire to make money).

¹⁶⁸ In *Jones* the Court limited the statute to the burning of a business rather than a private residence. *Supra* n. 5. The *mens rea* element for the federal arson statute is simply the intent to burn.

though Professor Lessig is correct that the Court states that "depending on the level of generality any activity can be looked upon as commercial,"¹⁶⁹ he neglects to say that the majority here is criticizing Justice Breyer's dissenting definition of "commercial." While it is true that what is not commercial will generally fall into categories of traditional state concern¹⁷⁰ such as family law and education, the breakdown won't be precise; defining marriage might be reserved for the state but selling one's child or pimping one's husband could be prohibited federally.

While the scholarship and the recent Supreme Court Commerce Clause cases primarily focus on the third test, regulating intrastate activities that affect commerce, the Court's clear affirmation of the other two categories of Commerce Clause authority is of at least equal significance. These categories are first, regulating the use of channels of interstate or foreign commerce where Congress finds they are being misused, and second, the protection of the instrumentalities of interstate commerce, or persons or things in commerce, from intrastate threats.¹⁷¹ By refusing to extend any of the limits placed on the third category to the first two, the Court can stay out of decentralization federalism and protect independent-norm federalism through a relatively nonsubjective physical and economic spillover test. The majority of criminal statutes in number, if not in percentage used,¹⁷² involve transportation of persons or things in interstate commerce, and thus fit neatly under one of these two categories.¹⁷³

One could make a plausible argument for the constitutionality of a statute criminalizing the arson of a private residence for the purpose of collecting insurance proceeds, provided one could show either that the insurance company was headquartered in a different state, or that the cumulative affect on such fraud on the insurance industry was substantial.

¹⁶⁹ Lessig at 205, quoting *Lopez*, 115 S.Ct. at 1633.

¹⁷⁰ *Lopez*, 115 S.Ct. at 1633 (Kennedy, J., concurring).

¹⁷¹ *Morrison*, 529 at 612 (opining favorably on the criminal provision of the Violence Against Women Act, which requires that the crime against the intimate partner be committed during interstate travel or by spouses who cross state lines to continue the abuse); *Lopez*, 514 at 559 (noting the authority of Congress to "keep the channels of interstate commerce free from immoral and injurious uses" and Congress' authority "to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.").

¹⁷² Forty percent of federal criminal convictions are brought pursuant to controlled substance statutes, which is justified under the class of activities affecting commerce rationale. It would be difficult to argue that drug distribution is anything but a commercial transaction involving a national market. *But see*, notes ___ through ___, section IIIA *infra* (suggesting different result for drug possession, where state regulation prevents the interstate distribution of the drug).

¹⁷³ Examples include transporting lottery tickets and obscene literature from one state to another, 18 U.S.C. § 1302, transporting a female across state lines for the purpose of prostitution or other immoral purpose, 18 U.S.C. § 2421, transporting stolen motor vehicles, 18 U.S.C. §§ 2311-2313,

Though commentators and jurists alike poke fun at this movement across state lines as the dividing line between what is truly national and what is truly local,¹⁷⁴ it serves two very useful purposes. First, it allows the federal government to regulate wherever the conduct at issue directly and physically impinges upon a neighboring state. It is one thing to allow a minority norm to exist confined to the single locality that desires it, it is another thing to say the national polity has no authority to prevent the unwanted norm from spreading into states opposed to it. Second, this test is grounded in the text of the Constitution, which permits regulation of commerce "among the several States."¹⁷⁵ Finally, the test is an objective one. The behavior, person, or item, either moves from one state to another or it does not. A conservative and liberal jurist cannot disagree.

Thus, purely intrastate crimes of a commercial nature¹⁷⁶ should be upheld under the substantial

transporting a kidnapped person, 18 U.S.C. §§ 1201-1202, stealing shipments from an interstate or foreign carrier, 18 U.S.C. § 659, interstate communications of extortions or threats, 18 U.S.C. § 875, traveling in interstate commerce with the intent to commit any extortion, bribery or arson under state law, 18 U.S.C. § 1952, possession by a felon of a firearm that has been transported in interstate commerce, 18 U.S.C. § 922h, alien smuggling, 8 U.S.C. § 1324, interstate stalking and domestic violence, 18 U.S.C. §§ 2261-2262, acts of terrorism transcending national boundaries, 18 U.S.C. § 2332, transporting stolen goods, securities, or money, 18 U.S.C. § § 2314-2315, fraud executed through interstate wire transmissions, 18 U.S.C. § 1343, importing controlled substances, 21 U.S.C. § 952, use of interstate commerce facilities in the commission of murder-for-hire, 18 U.S.C. § 1958, shipping diseased livestock, 18 U.S.C. § 42, and crossing a state line to avoid prosecution, 18 U.S.C. § 1073.

¹⁷⁴ As Judge Henry Friendly put it, "why should the federal government care if a Manhattan businessman takes his mistress to sleep with him in Greenwich, Connecticut although it would not if the love nest were in Port Chester, New York?"). HENRY FRIENDLY, *FEDERAL JURISDICTION, A GENERAL VIEW*, 58 (1973); Grant S. Nelson and Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 4-5 (1999) (suggesting that the limits in *Lopez* should be applied to the first two categories of cases as well, and that physically crossing a state boundary is inadequate justification for federal regulation); Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After Lopez*, 47 CASE W. R. L. REV. 801, 814 and 815 (1995) (suggesting that if Congress were to correct the jurisdictional flaw in the Gun Free School Zone Act by requiring that the guns "have been shipped, transported or received in interstate commerce. . .the underlying social concern would be precisely the same as before - the adverse impact of violent crime on the educational process").

¹⁷⁵ U.S. Cn., Art. I, Sec 8, clause 5.

¹⁷⁶ See *supra* fn 143-145. But see *United States v. Hickman*, 179 F.3d 230, 231 (5th Cir. 1999) (upholding a Hobbs Act conviction by an equally divided en banc Court) (dissenters argued that the robbery of a local sandwich shop cannot be prosecuted under the Hobbs Act after *Lopez* first,

effects test. Any crime involving movement across state lines, whether commercial or not, will also be upheld under one of the first two Commerce Clause tests. This potentially leaves a very narrow opportunity for states to protect noneconomic minority norms from federal encroachment.

One potential wrinkle in my claim that modern Commerce Clause jurisprudence requires a physical entry or economic spillover effect into another state is the Court's lament in *Lopez* and *Morrison* of the lack of an express jurisdictional element requiring that the particular conduct which is the subject of the criminal charge affect interstate commerce.¹⁷⁷ One might argue that all Congress need do to circumvent the Court's new limits on the effects test is to add as an element of the criminal offense that it affects commerce.¹⁷⁸

This wrinkle is presently being ironed out by lower courts interpreting the Hobbs Act, which requires that the robbery or extortion "affect commerce."¹⁷⁹ Some lower courts are holding, for example, that a 1960 Supreme Court case requiring only a *de minimis* affect on commerce¹⁸⁰ survives *Lopez*, and are affirming all Hobbs act convictions without regard to whether the behavior regulated is commercial, or whether the class-wide effect of the behavior on commerce is substantial.¹⁸¹ Other courts are requiring that the individual robbery before them have a substantial effect on commerce.¹⁸²

because robbery is not an economic activity, and second, because the effects on commerce of individual acts of robbery are causally independent and therefore cannot be aggregated to produce a substantial effect). It seems to me the claim that a monetary transaction is not economic because involuntary is quite a stretch, and the requirement of causal dependency is made up of whole cloth.

¹⁷⁷ See *Morrison*, 529 U.S. at 613 ("Section 13981 contains no jurisdictional element establishing that the federal cause of action is pursuant of Congress' power to regulate interstate commerce. . . *Lopez* makes clear that such a jurisdictional element would lend support to the argument that section 13981 is sufficiently tied to interstate commerce. . ."); *Lopez*, 514 U.S. at 551 (Section 922q contains no jurisdictional element that would ensure, through case by case inquiry, that the firearm possession in question effects interstate commerce.").

¹⁷⁸ This is suggested by George D. Brown. George D. Brown, *Constitutionalizing the Federal Criminal Law Debate: Morrison, Jones and the ABA*, 2001 U. ILL. LAW REV. 983, 985 (2001).

¹⁷⁹ 18 U.S.C. § 1951(a) (1994). One can also violate the statute by obstructing or delaying commerce, but the constitutional authority to prevent that is clear.

¹⁸⁰ *Stirone v. United States*, 361 U.S. 212, 215 (1960) (affecting commerce "in any way or degree" sufficient for Hobbs Act violation).

¹⁸¹ See, e.g., *United States v. Stillo*, 57 F.3d 553, 558 (7th Cir.), *cert denied* 116 S.Ct. 383, (1995); *United States v. Kaplan*, 171 F.3d 1351, 1355 (11th Cir. 1999).

¹⁸² *United States v. Harrington*, 108 F.3d 1460, 1467 (D.C. Cir. 1997) (requiring that the effect on commerce of the particular robbery be "concrete").

Finally, the third and, in my opinion, correct approach requires that the class of activity in the aggregate directly and substantially affect commerce, but that the individual case need only have a *de minimis* effect.¹⁸³

Clearly the Court intended, by placing such stringent requirements on the effects test in *Lopez* and *Morrison*, to police the limits of Congress' Commerce Clause authority, regardless of whether Congress makes a finding in the Congressional Record that the class of activity affects commerce,¹⁸⁴ or places the same "affecting commerce" language in a statute for the jury to make that finding in the particular case before them. Thus, for the Hobbs Act to survive, first the Court must determine that the class of intrastate activity regulated, here robbery, substantially affects commerce, that the effect of robbery on the economy is not too attenuated, and that the activity regulated is commercial. After that finding, due to the existence of the jurisdictional hook, in each particular case the jury also has to find that the particular robbery charged has a *de minimis* effect on commerce. Therefore, even though the national class of all robberies substantially affects interstate commerce, in a particular criminal prosecution an individual may be acquitted because he robbed a homeowner, and his robbery did not affect interstate commerce.¹⁸⁵ Surely the Court could not have intended to say in *Morrison* that Congress has no authority to regulate a state activity unless the Court concurs that the activity is a commercial one that, as a class, directly and substantially affects interstate commerce, yet Congress can regulate an essentially intrastate noncommercial activity that does not substantially effect commerce where the jury finds a *de minimis* impact in an individual case.¹⁸⁶

Instead, what the *Lopez* Court meant when it suggested a jurisdictional element was a requirement that the gun itself was transported in interstate commerce, thus moving the case to the

¹⁸³ See, e.g., *United States v. Jones*, 178 F.3d 479, 481 (7th Cir. 1999) (upholding arson conviction against Commerce Clause challenge by considering the "collective effect plus proof of a slight connection between the particular [crime] and interstate commerce."); *rev'd, Jones v. United States*, 529 U.S. 848, 850-51 (2000) (finding that Congress did not intend for arson statute to cover private residence).

¹⁸⁴ *Morrison*, 529 U.S. at 615 (discounting congressional findings).

¹⁸⁵ See, e.g., *United States v. Collins*, 40 F.3d 95, 99-100 (5th Cir. 1994) (rejecting application of the Hobbs Act to robbery of a homeowner's cash, jewelry, clothes, and car, and relying on *Lopez*), *cert. denied*, 115 S.Ct. 1986 (1995). This is in contrast to courts' upholding Hobbs Act prosecutions where the defendant extorted or robbed a business that made purchases or sales across state lines. See, e.g., *Stirone v. United States*, 361 U.S. 212 (1960); *United States v. Davis*, 30 F.3d 613, 614 (5th Cir. 1994).

¹⁸⁶ See, e.g., *Hickman*, 179 F.3d at 240 ("a jurisdictional element by itself cannot save a statute that exceeds congressional authority. The jurisdictional element must in some way be meaningful, and the Supreme Court has specified a condition for meaningfulness in its substantial effects test.").

channel of commerce category.¹⁸⁷ Alternatively the Court might have meant a jurisdictional requirement limiting convictions to possession of guns intended to be used in the drug trade, a type of activity that as a class would substantially affect commerce.¹⁸⁸ If the jurisdictional hook is to supplant a finding of substantial effect for the class by Congress and the Court, it cannot be sufficient for every individual case to have a *de minimis* impact that does not add up in the aggregate to a direct and substantial effect. Likewise, when the *Morrison* Court mentioned the lack of a jurisdictional element supporting the civil cause of action under the Violence Against Women Act, it cited the criminal cause of action under that statute, requiring that a partner cross state lines to commit or facilitate the abuse. This again shifts the analysis to the channels of commerce test. If as a class aggregate instances of violence against women do not sufficiently and directly affect commerce to allow such regulation under the Commerce Clause, it is difficult to argue that particular acts of violence, where there is no crossing of state lines and a mere *de minimis* effect on commerce, are validly regulated under the Commerce Clause.

C. A Better Test?

My interpretation of the Court's present test is that it permits federal regulation under the Commerce Clause wherever there is an economic spillover from the regulated behavior on another state (the substantial effects test) and whenever the state fails to physically contain the activity within its own borders (the channels and instrumentalities tests). It is irrelevant whether the purpose of the regulation is to beneficially enhance commerce and to protect these transportation routes or whether the purpose is strictly to prohibit immoral behavior. However, the latter purpose, when decoupled from interstate movement or direct economic spillover effects, will be insufficient to override contrary state views of moral behavior. I am not going so far as to claim that my restatement of the current commerce clause test is the law, but rather I am claiming that my view is consistent with everything the Court has said and is a sensible elaboration of where the Court seems to be headed. Moreover, despite the inconsistencies and nuances yet to be ironed out, I believe this test, as least as I interpret it, may be the best the Court can do, if we define "best" as a test that permits decentralization, protects minority norms, is less subjective than plausible alternatives, and is relatively stable. An examination of other proposals supports this conclusion.

One such proposal, hinted at by the Court in *Lopez* and *Morrison*, would develop categories of national versus local activities.¹⁸⁹ I believe a move to delineate specific categories would be a mistake.

¹⁸⁷ This explains the Court's citation to a number of cases and statutes imposing such an interstate transportation requirement. *United States v. Lopez*, 514 U.S. at 561 and 562, citing to *United States v. Bass*, and *United States v. Five Gambling Devices*).

¹⁸⁸ *United States v. Kirk*, 104 F.3d 997 (6th Cir. 1997) (affirming conviction under 18 U.S.C. § 922(o), prohibiting possession of a machinegun required after 1986, by an equally divided en banc court, as machine guns have a substantial effect on commerce by facilitating the drug trade.

¹⁸⁹ *United States v. Lopez*, 514 U.S. 549, 564 (1995) (criticizing the government's national productivity theory as it would allow regulation of family law, criminal-law enforcement, and education where "States historically have been sovereign"); *United States v. Morrison*, 120 S.Ct. at 1749, 1754

The Court would put not only family law and education but also criminal law on the non-federal side of the line. This would be unfortunate, as much crime cannot be successfully controlled by the states.¹⁹⁰ On the other hand, under the substantial effects test, family law and education will stay, for the most part, off-limits, while crimes involving money and property will be fair game. Moreover, under the present channels and instrumentalities tests, family law, criminal law, and other traditionally local concerns remain off limits unless they involve movement across state lines.

This alternative also assumes such categorization is even possible. As Justice Souter reminded us in his dissent in *Morrison*, the "effort to carve out inviolable state spheres" has already been tried and rejected as incoherent.¹⁹¹ Professor Resnik suggested that an attempt to identify the "truly national" from the "truly local" by reference back to the founding is doomed, for the federal had yet to be made.¹⁹² Such categories are politically based judgments about which government should regulate such

(warning that the commerce clause test must not be allowed to "obliterate the distinction what is national and what is local" and that the test suggested by the government would allow Congress to regulate any type of violent crime as well as family law as "we can think of no better example of the police powers which the Founders denied the National Government and reposed in the States that the suppression of violent crimes and vindication of the victims".)

¹⁹⁰ For example, there is almost universal agreement that certain misconduct, such as crimes committed by transnational and national organizations and crimes that interfere with the core functions of the federal government should be the subject of federal criminal law. *See, e.g.*, James A. Strazzella, *The Federalization of Criminal Law*, 1998 A.B.A. Crim. Just. Sec. 56.

¹⁹¹ *Morrison*, 529 U.S. at 645 (Souter, J., dissenting) (noting that the Court made this attempt in *National League of Cities v. Usery*, 426 U.S. 833 (1976) (striking down part of the 1974 Fair Labor Standards Act as an unconstitutional intrusion onto the states' ability to regulate internal governmental functions), but overruled it nine years later in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 529 (1985) (overruling *National League of Cities* and upholding the application of minimum-wage provisions of the Fair Labor Standards Act to the San Antonio transit authority).

Justice Souter leveled the same criticism in discussing the Court's distinction between commercial and noncommercial activities. It seems to me that the commercial/non-commercial distinction is not analogous to the failed pre-New Deal distinctions between mining, production, manufacturing, union membership and commerce. Those distinctions, having no basis in the text of the Constitution or in logic, were, as Justice Souter rightly pointed out, no more than the Court's attempt to enshrine laissez-faire economics into the Constitution. The commercial/noncommercial distinction, on the other hand, flows directly from the constitutional text (to regulate "commerce"), is exceedingly broad, and is designed to police the outer limits of the Commerce Clause powers with some judicial review.

¹⁹² Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 620 (2001) (criticizing categorical federalism as a political claim and as an unworkable legal principle). Professor Resnik also noted that as a descriptive matter categorical federalism is incorrect,

activities rather than an interpretation of whether the particular federal statute regulates commerce. Though some scholars argue otherwise,¹⁹³ I believe the Court has learned its lesson and will not attempt to revive "dual federalism."¹⁹⁴

This criticism of categories or dual federalism as overly subjective also applies to many of the alternative tests recently offered by scholars championing judicially enforced federalism. For example, Professor Chemerinsky has suggested a functional analysis of federalism that pragmatically assigns responsibility to state and federal governments.¹⁹⁵ Professor Merritt has alternatively argued for protecting state autonomy through the use of the Guarantee Clause,¹⁹⁶ and for protecting federalism through a Court imposed "fuzzy" multifactor test, with the full array of factors yet to be discovered.¹⁹⁷

since family life and criminal law have long been subject to federal statutory and constitutional lawmaking. *Id.* at 644-53. Lessig, *supra* note ____, at 206 ("there is no such thing out there called 'tradition' that lower courts can look 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 conclusion. As these differences percolate, and thrust themselves on the Court to resolve, the results cannot but help but seem, as they were before *Garcia*, inconsistent.")

¹⁹³ See, e.g., Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2183 (1998) (suggesting that *Lopez* assumed "that the Constitution must be read to reserve areas for only the states to regulate"); H. Geoffrey Moulton, Jr., *The Quixotic Search for Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 868 (1999) (suggesting that in the commandeering cases the Court returned to dual federalism); Peter M. Shane, *Federalism's "Old Deal": What's Right and Wrong with Conservative Judicial Activism*, 45 VILLANOVA L. REV. 201, 215 (2000) (suggesting that *Lopez* embraced dual federalism).

¹⁹⁴ See, e.g., Edward F. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 17 (1950) (detailing the death of dual federalism in 1937); Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 156-63, 177-85 (2001) (arguing that the federalist revival has not revived dual federalism, though the Court has yet to learn the same lesson in foreign affairs).

¹⁹⁵ Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 533-40 (1995).

¹⁹⁶ Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1583-84 (1994); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 29-36 (1988).

¹⁹⁷ Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 693-712, 742-50 (1995) (analogizing the Commerce Clause Test to fuzzy logic, and suggesting that the Court look to factors such as whether the activity is commercial, whether there is a jurisdictional element, whether there are explicit congressional findings, whether the activity is in an area traditionally regulated by the states, whether the activity is linked to private property, whether the activity is one over which national regulation is necessary, whether the activity is a crime, and whether the activity is linked to the

Finally, Professor Regan suggests the Court consider whether there is a special justification for federal power such as whether there is a "general interest of the union" or where "states are separately incompetent" to regulate the activity.¹⁹⁸

While these functional tests are just the opposite of the sort of formalism represented by dual federalism, the subjectivity and indeterminacy of such proposals is clear.¹⁹⁹ For example, under Merritt's first proposal, how is a court to determine which and how many limitations on state autonomy are sufficient to constitute a denial of republican government? Which particular combination of factors recognized by Professor Merritt in her second proposal, or of factors yet to be discovered by the Justices, will be sufficient to strike any particular piece of legislation? Likewise Professor Regan's "general interest of the union" justification for federal regulation pursuant to the Commerce Clause is devoid of any objective descriptions.²⁰⁰ More important that the fact that such subjective and therefore indeterminate tests fail to provide guidance to the lower courts, they impermissibly allow the Justices to "deploy their discretion in pursuit of personal ideological objectives rather than abstract ideals of

workplace, among others).

¹⁹⁸ Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 555 (1995). Professor Althous made a similar proposal, suggesting that the Court should focus on whether federal regulation passed under the Commerce Clause addresses a "national market or other system of organization that causes harm at a national level." Ann Althous, *Enforcing Federalism after United States v. Lopez*, 38 ARIZ. L. REV. 793, 817 (1996) (examining *Lopez* and arguing against a formalistic approach to the Commerce Clause and in favor of a pragmatic approach to the roles of the federal and state governments).

¹⁹⁹ Lynn Baker and Ernie Young have defended these federalism tests as no more subjective than individual rights cases, where the Court imposes strict judicial review. 51 DUKE L.J. 75, 85 - 106, *supra* n. _____. They cite to the indeterminacy of the substantive due process test, without noting that, for this very reason, the Court has abandoned free floating due process in the criminal procedure area in favor of protecting those guarantees through more objective tests gleaned from the specific provisions of the Bill of Rights. See Susan R. Klein, *Miranda's Exceptions in a Post-Dickerson World*, 92 J. CRIM. LAW & CRIMINOLOGY 567 (2001). Baker & Young cite extensively to a concurring opinion in *Glucksberg*, where the Court *rejected* a substantive due process "right to due;" the Court has likewise refused to extend subjective substantive due process beyond "matters relating to marriage, family, procreation, and the right to bodily integrity." *Albright v. Oliver*, 510 U.S. 266 (1994).

²⁰⁰ As Professor Moulton so aptly criticizes, "its approach recognizes that federalism's central question is one of institutional choice, of deciding which level of government is best suited to solve particular problems (or to decide whether something is a problem at all). . . .The difficulty with searching judicial review of legislative decisions allocating government responsibility is such decisions are often enormously complex and quite contestable, at both the empirical and normative levels." 83 MINN. L. REV. at 915.

federalism.²⁰¹ The danger of adopting a subjective rule was well stated by Professor Lessig. Where the rule is perceived as political, "the Court could not credibly constrain Congress without undermining its own institutional authority."²⁰²

There are two final proposals I would like to mention and reject. The first, mentioned by Justice Kennedy in his concurrence in *Lopez*, would ask whether, in enacting the federal legislation, Congress had a commercial purpose.²⁰³ As Justice Souter noted in his dissent in *Morrison*, this is a close cousin to the intent-bases analysis rejected in *Heart of Atlanta*, which asked whether the intent of Congress was to regulate commerce or to regulate morals.²⁰⁴ Such an inquiry fails for two reasons. First, nothing about the text of the Commerce Clause suggests that the regulation must be for the purpose of increasing the flow of commerce, enhancing efficiency, or maximizing money, rather than protecting interstate commerce from immoral uses. All laws are passed at least in part to further a particular moral stance,²⁰⁵ and criminal laws are passed in whole to condemn immoral behavior.²⁰⁶ In addition to forcing

²⁰¹ Frank Cross, *Realism about Federalism*, 74 N.Y.U. L. REV. at 1329 (suggesting that conservative Justices invoke federalism to turn down habeas petitions but ignore it when striking down state redistricting or affirmative action plans); Frank B. Cross and Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. Cal. Law Rev. 741, 757-62 (2000) (examining every Supreme Court decision between 1985 and 1997 and finding that conservative outcomes were favored over liberal outcomes when federalism doctrines were applied); William N. Eskridge, Jr. and John Ferejohn, *The Alaska Commerce Clause: A Political Theory of American Federalism*, 47 VAND. L. REV. 1355, 1396 (1994) (reviewing 28 major federalism cases and finding high association between ideology and outcome); Sue Davis, *Rehnquist and State Courts: Federalism Revisited*, 45 W. POL. Q. 773, 777-81 (1992) (analyzing every non-unanimous civil liberties decision and finding Justices influenced most by the ideological posture of the case); Harold J. Spaeth, *Judicial Power as a Variable Motivating Supreme Court Behavior*, 6 MIDWEST J. POL. SCI. 54 (1962) (analyzing Warren Court decisions and finding that federalism was less important in determining the outcome of the case than ideology or activism).

²⁰² Lessig, *Translating Federalism*, 1995 SUP. CT. REV. at 193.

²⁰³ *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring); see also *United States v. Hickman*, Hobbs Act conviction upheld by equally divided en banc court, 179 F.3d 230, 242 (5th Cir. 1999) (Higgenbotham, J., dissenting) ("...we do no more today than insist that Congress identify a non-pretexual, rational basis ...").

²⁰⁴ *United States Morrison*, 529 U.S. 598, 643 (Souter, J., dissenting). See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964) (stating that a congressional intent to legislate against a moral wrong will not render an otherwise valid exercise of the commerce power unconstitutional).

²⁰⁵ Even economic regulations express our preference for capitalism, and redistributive programs our interest in compassion.

the federal government out of criminal law entirely, and reversing numerous Supreme Court cases,²⁰⁷ a motive test is not feasible. Even if it were possible to determine the "intent" of a multimember body, Congress would become adept at mouthing the right words and hiding its true motive, and any Court attempt to pierce the pretext would be entirely speculative.²⁰⁸

Finally, a body of literature has suggested the Court adopt "process federalism" rather than substantive federalism. What these process-based federalism schemes share is that they focus on the process by which Congress enacted the legislation and ask whether there is a sufficient written congressional record supporting the economic effect of the activity regulated.²⁰⁹ These are perfectly plausible methods for beefing up the rational basis the Court should use to review statutes falling into the decentralization federalism category. Such a test, however, will provide insufficient protection for

²⁰⁶ This of course is what distinguishes criminal from civil law. *See, e.g.,* Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679, 685-86 (1999) (outlining the modern American paradigm of criminal law - a legislative purpose to punish a person for committing a morally culpable act that injures society); Carol S. Steiker, *Forward, Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEORGETOWN L.J. 775, 797-806 (1997) (suggesting that a sanction must be labeled criminal rather than civil if its purpose is to punish immoral behavior).

²⁰⁷ *See, e.g.,* *Champion v. Ames*, 188 U.S. 321, 363-64 (1903) (upholding legislation banning the transportation of lottery tickets); *Scarborough* (banning transportation of guns for felons).

²⁰⁸ *See, e.g.,* King & Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1540-1542 (2001) (rejecting legislative purpose as one of the factors the Court should use to police legislative evasion of the elements rule set out in *Apprendi v. New Jersey*, and collecting literature and caselaw reviling purpose analysis as "indeterminate, illogical, and futile"). *But see*, Mitchell Berman, *Coercion without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 23-7, 83-4 (2001) (recommending motive test).

²⁰⁹ *See, e.g.,* Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of United States v. Lopez*, 46 CASE W. RES. L. REV. 757, 765-71 (1996) (suggesting that Congress must establish a record justifying national legislation to withstand Court scrutiny); Vicki C. Jackson, *Federalism and Uses and Limits of Law: Printz and Principle*, 111 HARV. L. REV. 2181, 2234-46 (1998) (proposing a "process-based 'clear evidence/clear statement'" test, under which Congress must produce a record, consisting of legislative hearings and floor debate, as to why the exercise of authority was appropriate); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 831 (1996) (suggesting that the Court should review the congressional record to determine whether Congress took into account federalism concerns and justified federal legislation, analogizing his test to the "hard look" doctrine of judicial review of administrative decisions); Lawrence Lessig, *Translating Federalism* 1995 SUP. CT. REV. at 207-213 (suggesting that the Court require procedures such as a clear statement of economic effect, a review of any self-imposed limits Congress built into the statute, and whether the legislation allows states to opt out).

minority norms, which will certainly be defeated in the process. A similar criticism can be levied against my newer version of process federalism, which relies on the structure of the federal criminal law enforcement apparatus to foster federalism. As demonstrated above, this is effective only where norms are shared. If we wish to protect minority norms confined to a single state, some measure of heightened scrutiny is required.²¹⁰ The Court's present Commerce Clause jurisprudence is probably as close as we can come.

III. Independent-Norm Examples

The Court's new limitations on federal authority under the Commerce Clause should provide a narrow range of protection for independent norms in the criminal law, and almost no protection for concurrent federal-state criminal jurisdiction. Wherever the conduct to be regulated, whether economic or purely moral, physically crosses a state line it can be regulated pursuant to the channels or instrumentalities tests, and will be reviewed only for whether it has a rational basis. Where the conduct is wholly intrastate but commercial, it can be regulated pursuant to the substantial effects test, though with slightly more stringent review. It is only where the conduct is wholly intrastate, noneconomic in nature, and will have little or no economic spillover effect on neighboring states, that there is any hope for Court protection. Very few areas of conduct fit into this narrow category. Regulation of certain sexual, religious, educational, and medical practices may be circumscribed, at least where federal and state regulation is not already prohibited by the First Amendment or by substantive due process' privacy penumbra.

A look at three issues presently percolating through our courts and political systems will be instructive on the issue of whether the Court's current Commerce Clause jurisprudence will protect any independent norms, as I suggest it should, or whether politics will triumph over neutral application of the law, as is entirely possible. I will discuss the regulation of sodomy and the state regulation of gay marriages and two medical regulations, the use of life-ending drugs by the terminally ill and the use of medical marijuana. I believe that these three examples fit into the small class of policy disputes where the disagreement is primarily moral rather than economic or commercial, and where the effects of an outlier policy in an outlier state can be substantially confined to that state. When you have that combination, that is an attractive case for federalism. Because the disagreement is moral, the case for diversity is very strong, and concomitantly the case for commerce clause regulation is very weak. Though admittedly my version of the Court's current commerce clause test has to strain a bit to fit these three examples, these are the kinds of cases that warrant judicial protection.

A. Same Sex Marriages

²¹⁰ Justice Stevens in his dissent in *Lopez* correctly noted that the Court is abandoning the rational basis test for regulation justified under the substantial effects prong of Commerce Clause analysis. *United States v. Lopez* 514 U.S. at 608 (Stevens, J., dissenting) ("there is today, however, a backward glance at both the old pitfalls, as the Court treats deference under the rationality rule as subject to gradation according to the commercial or noncommercial nature of the immediate subject of the challenged regulation.")

Homosexuals are presently free from the risk of federal criminal prosecution for sodomy, regardless of whether they are married, only if they remain in or travel to those states where sodomy is legal. The Mann Act originally barred the transportation in interstate or foreign commerce of any woman or girl with the intent that she engage in prostitution or for any other immoral purpose.²¹¹ This rather vague federal prohibition of interstate movement for the purpose of "immoral" conduct was upheld in a series of Supreme Court cases.²¹² Nevertheless, the statute was amended in 1986 to change "immoral purpose" to "any sexual activity for which any person can be charged with a criminal offense," and the gender-specific language was removed.²¹³ It thus appears that, in light of *Bowers v. Hardwick*²¹⁴ and the many states, such as my home state of Texas, that still criminalize sodomy,²¹⁵ same-sex couples validly married in Hawaii cannot safely vacation in Texas, so long as their intent to engage in sex is "one of the dominant purposes" of their trip.²¹⁶ Though there is some small chance the Court would protect sodomy between homosexual couples validly married in their home state,²¹⁷ and

²¹¹ See Rep. Sec'y Commerce and Labor (1908) 18; Senate Document No. 196 51st Cong. 2nd Sess. (1909); 45 Cong. Rec. 813, 1036-37 (1910).

²¹² See *Hoke v. United States*, 227 U.S. 308, 323 (1913) (upholding constitutionality of the Mann Act against Commerce Clause and right to travel challenges); *Caminetti v. United States*, 242 U.S. 470, 496 (1917) (upholding conviction for transportation of a woman from California to Nevada for purpose of consensual sex, rejecting challenge that the statute was intended to criminalize only commercial vice). Note, *Interstate Immorality: The Mann Act and the Supreme Court*, 56 YALE L.J. 718, 725-30 (1947) (criticizing Supreme Court interpretation of "immoral purpose" language of Mann Act as vague and contrary to the rule of lenity).

²¹³ See 18 U.S.C. § 2421 (West 2001) (amended in 1986 by Public Law 99-628, § 5(a)(1), (b)(2), Nov. 7, 1986 100 Stat. 3511).

²¹⁴ 478 U.S. 186, 194-96 (1986) (holding that due process does not prevent the criminalization of consensual sodomy by gay partners).

²¹⁵ Diana Hassel, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 TEXAS L. REV. 813, 821, n. 46 (noting the 16 states that currently criminalize sodomy and that 4 or those limit the ban to persons of the same sex); Tex. Penal Code Ann. § 21.06 (Vernon 1994).

²¹⁶ See, e.g., *Mortensen v. United States*, 322 U.S. 369, 374 (1944) (interpreting the Mann Act to require that the defendant's intent that girl engage in prostitution "must be found to exist before the conclusion of the interstate journey and must be the dominant motive of such interstate movement"); *United States v. Snow*, 507 F.2d 22, 23-24 (7th Cir. 1974) (holding that the Mann Act only requires that a defendant's intent to have females engage in immoral conduct be one of the dominant purposes of a trip across state lines, not the dominant purpose); *United States v. Miller*, 148 F.3d 207, 212 (2d Cir. 1998) (same).

²¹⁷ This seems to me quite unlikely. Even if the Court were willing to recognize the homosexual

there is little chance the United States Attorney's Office would actually prosecute such a case,²¹⁸ there remains some small risk of prosecution.²¹⁹ This slight risk of federal prosecution, coupled with the attendant social consequences of engaging in even unenforced criminal behavior,²²⁰ is sufficient to chill the local norm.

Neutral application of current commerce clause jurisprudence should eliminate any risk of state or federal prosecution, and protect the minority norm, so long as the individual remains in her home state (and it protects the norm.) Though homosexual sodomy is not protected from state or federal criminalization by the privacy penumbra that shelters procreation and pregnancy termination decisions,²²¹ Congress has no authority to regulate purely intrastate sexual behavior of a noncommercial nature.²²² Thus, while current commerce clause jurisprudence allows the currently worded Mann Act to stand, it should prevent Congress from adopting a "mega-DOMA" prohibiting individuals states from

marriage in the state in which it was performed, it still might allow a federal prosecution under the Mann Act in a state where such marriage was not recognized under DOMA, *supra* n. 25, and where sodomy is a crime.

²¹⁸ U.S. Attorney's Manual § 9-79.100 (1997) (providing that unless minors are the victims, prosecution should be limited to "persons engaged in commercial prostitution activities.")

²¹⁹ *See, e.g., Cleveland v. United States*, 329 U.S. 14, 18-20 (1946) (rejecting freedom of religion challenge to Mann Act conviction of Mormon husbands for transportation of their plural wives across state lines, and finding polygamy was "immoral" within the meaning of the Act); *Garner v. State*, 41 S.W.3d 349 (Tx. Ct. App. 2001) (upholding the convictions of two men for consensual sodomy in violation of Texas Penal Code § 21.06).

²²⁰ *See, e.g., Ryan Goodman, Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and the Social Panoptics*, 89 CAL. L. REV. 643 (2001) (examining social effects of underenforced sodomy laws in South Africa); *Diana Hassel, The Use of Criminal Sodomy Laws in Civil Litigation*, 79 TEX. L. REV. 813 (2001) (detailing use of underenforced sodomy laws to disadvantage gay people in family law, public employment, and immigration).

²²¹ *Bowers v. Hardwick*, *supra* n. ____.

²²² Perhaps one could argue that sodomy can be federally prohibited so long as the statute requires movement across state lines by either party, at any time, for any reason. This in essence imprisons homosexuals forever to their home states. I would hope that this would be an unconstitutional status crime, or would violate right to travel. Admittedly, such a holding would cast some doubt on the objectiveness of the bright-line test permitting federal regulation whenever there is interstate movement. However, a limit on federal regulation that excludes persons, unless those persons were moving in furtherance of the crime, would still be manageable.

recognizing same-sex marriages, and should likewise prevent Congress from enacting a federal ban on sodomy similar to the Mann Act but without the requirement of interstate movement.

B. Physician Assisted Suicide

Can the federal government prevent terminally ill Oregonians from ending their lives? Here is another area to which the Due Process Clause of the Fourteenth Amendment does not speak - it neither mandates nor prohibits assisted suicide.²²³ Oregon voters have twice approved an assisted suicide statute, permitting doctors to prescribe lethal medications to terminally ill Oregonian adults.²²⁴ Republican Attorney General John Ashcroft, reversing a 1998 administrative decision by former Democratic Attorney General Janet Reno,²²⁵ determined that "prescribing ... controlled substances to assist suicide violates the Controlled Substances Act" and asked the DEA to revoke the drug licenses of doctors who prescribe life-ending medication pursuant to the Oregon Act.²²⁶ General Ashcroft's actions were first temporarily stayed and then permanently enjoined by a conservative Republican federal judge appointed by President Bush's father.²²⁷ Though the opinion was rendered purely as a matter of statutory interpretation,²²⁸ the indignation and constitutional challenge rang clear. "On November 6, 2001, with no advance warning to Oregon representatives, Attorney General Ashcroft ... fired the first shot in the battle between the state of Oregon and the federal government over which

²²³ See *Vacco v. Quill*, 117 S.Ct. 2293 (1997) and *Washington v. Glucksberg*, 117 S.Ct. 2258 (1997), both holding that state bans on assisted suicide do not violate the fourteenth amendment.

²²⁴ Oregon's Death With Dignity Act, Or. Rev. Stat. §§ 127.800 - 127.880 (2001) approved by the voters in 1994 and 1997. The Act requires that two doctors certify that the patient has less than six months to live, has voluntarily chosen to die, and is competent to make health-related decisions.

²²⁵ Letter from the Honorable Janet Reno, Attorney General of the United States. to chairman Henry J. Hyde, House Comm. on the Judiciary, (June 5, 1998), available at <http://www.usdoj.gov/opa/pr/1998/June/259ag.htm.html>.

²²⁶ Dispensing of Controlled Substances to Assist Suicide, 21 CFR Pt. 1306.04, Attorney General Order No. 2534-2001, 66 Fed. Reg. 56608 (Nov. 6, 2001).

²²⁷ *State v. Oregon v. John Ashcroft*, Temporary Restraining Order, Case No. CV01 - 1647 (D. Or. 2001), permanent injunction imposed in 2002 WL 562198 (D. Or. 2002). U.S. District Judge Robert E. Jones was appointed by former president Bush in 1990.

²²⁸ *State of Oregon v. Ashcroft*, 2002 WL 562198, p. 7 (D. Or. 2002) (holding that when Congress enacted the federal Controlled Substances Act and implementing regulations, which permits the DEA to revoke the registration of physicians and pharmacists who prescribe a controlled substance other than for "a legitimate medical purpose," it intended that each state, not the Attorney General, determine what medical practices are "legitimate").

government has the ultimate authority to decide what constitutes the legitimate practice of medicine... the citizens of Oregon, through their democratic initiative process, have chosen to resolve the moral, legal, and ethical debate on physician-assisted suicide for themselves by voting --not once, but twice -- in favor of the Oregon Act."²²⁹

While the constitutional question is a close one, either criminal prosecution or civil penalties against Oregon doctors probably should not survive Commerce Clause scrutiny. The Solicitor General's Office would argue that being paid by a patient to write a prescription is a commercial activity, and in the aggregate this purely intrastate activity substantially effects interstate commerce. However, one would be hard pressed to define this effect as substantial, given that the Act has been used by only about 70 terminally ill people since 1997.²³⁰ Doctors and state officials could make their case more attractive by writing their prescription for free, or even providing the drug from a state-run dispensary.

A better way for the federal government to justify either Attorney General Ashcroft's action or any new federal legislation criminalizing the writing of such prescription²³¹ is to claim that regulating prescriptions for lethal doses of barbiturates is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."²³² The constitutionality of the regulation of a few prescriptions written in Oregon will depend on how the Court defines the term "essential." Certainly the regulation of prescription drugs nationwide will be upheld either because the drugs themselves travel through commerce or because the sale of

²²⁹ *Id.* at p. 1 - 2. Judge Jones noted that officials from Oregon specifically asked Attorney General Ashcroft, in writing, to consult them if former General Reno's interpretation of the Controlled Substances Act were to be reexamined. Though General Ashcroft's office assured Oregon representatives that no change was anticipated, and that the Department of Justice would consult with them if the situation changed, "the Attorney General of the United States completely ignored his earlier promise to the Oregon Attorney General to ascertain Oregon's views." *Id.* at p. 4.

²³⁰ There is some dispute as to the number. See *State v. Ashcroft*, 2002 WL 562198, p. 3 (D. Or. 2001) ("Since 1997, the Oregon Act has been utilized by approximately 70 terminally ill Oregonians."); Carol M. Ostrom, *Mom's Assisted Suicide Places a Face on Debate*, HOUS. CHRON., Mar. 3, 2002, at A49 (counting 91 persons since 1997).

²³¹ "Between 1998 and 2000, two separate federal legislative attempts to preempt the Oregon act failed to pass." *Id.* at 4, n.6.

²³² *United States v. Lopez*, 514 U.S. at 561; see also *Hodell v. Indiana*, 452 U.S. 314, 329 n. 17 (1981) (provision not valid in itself may be upheld if it is "an integral part of [a] regulatory program"); Adrian Vermuele, *Does Commerce Clause Review Have Perverse Effects?*, 46 Villanova L. Rev. 1325, 1329-40 (2001) (arguing that current Commerce Clause doctrine will have the perverse effect of increasing centralization because Congress will enact broad and comprehensive regulatory schemes to ensure that regulation of intrastate behavior will be deemed constitutional).

drugs is a commercial activity substantially affecting interstate commerce. Time will tell whether the regulation of those 70 prescriptions are an essential part of the federal governments scheme to regulate drug sales nationwide, or whether the Court will see fit to unbundle a particular drug in a particular state from the comprehensive scheme. A neutral application of the law points to the latter result.

Should the Court side with General Ashcroft, officials in Oregon could nonetheless escape federal regulation by authorizing the use of less powerful drugs not regulated by the DEA, or by authorizing less pleasant methods such as gunshot or asphyxiation. If the Court neutrally and strictly enforces its new Commerce Clause jurisprudence, it ought to put medical care on the non-commercial side of the line, along with education and family law, and subject the regulation to more stringent review. The effect on commerce of these few prescriptions should be deemed nonessential to the regulatory scheme, and the effect on commerce of these few prescriptions too attenuated to justify federal intervention.²³³

C. Medicinal Marijuana

In the final and most difficult example, I will consider whether the federal government can defeat the Compassionate Use Acts enacted in nine states.²³⁴ The Court specifically declined to address this issue in *United States v. Oakland Cannabis Buyers Cooperative*,²³⁵ where it upheld a civil injunction against a marijuana cooperative, and rejected the argument that the injunction had to be modified to recognize a common law medical necessity defense. Though rightly holding that the defense of legal

²³³ The government might argue, as it did in *Lopez*, that the effect on commerce is not simply the few dollars spent on the doctor visit and the pill, but includes additional effects such as lost wages and funeral expenses. This was rejected as too attenuated in *Lopez*, however, and is even more of a stretch in this case. Moreover, given the cost of care to the terminally ill and the fact that most of them are probably no longer able to work, there may be a net economic gain from an early death.

²³⁴ See, Compassionate Use Act of 1996 (Calif. Health & Safety Code 11362.5) (West Supp. 2000); Arizona Rev. State. Ann. 13-3412.01 (West 1997); Alaska Stat. Ann. § 11.71.090, 17.37.010-17.37.080 (2000); Nevada Secretary of State, Ballot Question 9-1998 General Election (supporting amendment to state constitution allowing medicinal use of marijuana) <<http://sos.state.nv.us/nvelection/1998general/questions/29.html>>, Nevada Constitution Article 4, § 38; Oregon Medical Marijuana Act (allowing citizens "suffering from debilitating medical conditions" to use "small amounts"); Ore. Rev. Stat. 475.300-475.346 (1999); Measure No. 692 (allowing "qualified patients" to use marijuana), Washington Rev. Code Ann. 69.51A.005-900-69.51A.902 (1997) and Supp. 2000-2001 (West Supp. 2001); Colorado Amendment 20, Colorado Constitution Art. XVIII, § 14 (allowing medical use of marijuana and creating a state-run confidential registry); Maine Revenue Statute Ann. Title 22, § 2383-B(5) (2000); Legalization of Marijuana for Medical Treatment Initiative of 1998, (approved by District of Columbia voters); Hawaii Revenue Statutes §§ 329-121 - 329-128 (Supp. 2000).

²³⁵ 532 U.S. 483 (2001).

necessity can never succeed where a legislature itself has determined that it should not, the Court noted that it would not "consider the underlying constitutional issues," including whether the federal drug statutes "exceed Congress' Commerce Clause powers."²³⁶ The three concurring Justices, led by that champion of federalism Justice Stevens, noted that the majority's holding that there is no necessity defense applies only to distribution cases.²³⁷ Justice Stevens believes that we ought to show "respect for the sovereign States that comprise our Federal Union"²³⁸ by allowing a necessity defense to federal prosecutions where the individual merely cultivated and possessed marijuana based upon his physicians recommendations.

I will here posit the most attractive case for the state of California; cultivation of marijuana by the patients themselves, after receiving a letter from their doctor verifying that they have one of the listed diseases and that no other course of treatment was effective, and after receiving the seeds directly from city officials.²³⁹ This scenario is not farfetched.²⁴⁰

In resolving the Commerce Clause issue, the Court would have to ask whether this purely intrastate behavior, in the aggregate, substantially affected commerce. It seems to me the answer might well be "no," depending upon how the Court defines the class of activity being regulated and whether it

²³⁶ *Id.* at 7 (holding that because there is no statutory ambiguity, the canon of constitutional avoidance has no application).

²³⁷ *Id.* at 10 (Stevens, J., joined by Souter and Ginsburg, concurring). The concurrence criticizes the majority for a broader holding that the defense of necessity is unavailable to anyone under the Controlled Substance Act.

²³⁸ *Id.* at 10.

²³⁹ I note that if the state were to limit Proposition 215 in this manner, patients and the government officials would be subject to at most a federal misdemeanor offense for their first conviction. *See* 21 U.S.C. § 844; 21 U.S.C. § 841b4.

²⁴⁰ Proposition 215 authorizes only the possession and cultivation of marijuana, and only after approval by a physician. Compassionate Use Act of 1996, Cal. Health & Safety Code 11362.5(d) (West Supp. 2000). The District Attorney of San Francisco, in an amicus brief filed at the lower court level, indicated that San Francisco may authorize city health officials "to operate marijuana distribution centers for seriously ill patients." Brief for the District Attorney of San Francisco as amicus curiae at 11, *Cannabis Cultivators*, F.Supp.2d 1086 (N.D. Calif. 1998). The City of San Jose presently licenses dispensaries to control the strength and number of marijuana plants and to set maximum client purchases per week. Dan Baum, *California Separate Peace*, Rolling Stone Mag., Oct. 30, 1997 at 43; Elaine Shannon, *Too High in California?*, Time, Dec. 9, 1997 at 84. The Oakland Police Department licenses a single cooperative and requires patients to carry identification cards. Michael Pollan, *Living with Medical Marijuana*, New York Times Magazine, July 20, 1997 at 2-23.

believes users of medicinal marijuana are otherwise law abiding. If the class of activity being regulated is the entire illegal marijuana market or even the entire illicit drug market, then of course in the aggregate the transactions have a substantial effect, or would be an essential part of the larger regulatory scheme. However, one would argue the class is the purely in-state legal medical marijuana growers/users, and that there is no national market for this class of activity. Likewise, the regulatory scheme concerns only the national market for illegal marijuana, not the local market for the distinguishable medicinal marijuana.²⁴¹ If a seriously ill patient in California is denied legal medical marijuana by contrary federal law, he will simply suffer rather than attempt to obtain illegal marijuana on the black market. This distinguishes the *Wickard* case, because if Mr. Wickard was barred from home growing wheat he would certainly have purchased it on the legal national market. This argument would also be contingent on convincing the Court that those states allowing medicinal marijuana regulate it stringently enough to prevent it from finding its way onto the national black market.²⁴² Finally the outcome would also depend on whether the Court views medicinal marijuana as part of the clearly commercial national war on drugs or as part of the traditionally state regulated realm of medical care.

Conclusion

The distinction between "decentralization" federalism and "independent-norm" federalism in the criminal law is a useful one, regardless of whether the purpose of the distinction is purely descriptive, or whether it might be used to build doctrine. As a descriptive matter, it identifies those federal criminal statutes that contradict an independent state norm and therefore are most likely to impinge upon the states as protectors of individual liberties. It also relieves those scholars, legislators, and judges concerned with states as laboratories for achieving shared norms from concern regarding federal criminal statutes that merely replicate state norms. Unique attributes of criminal law, such as the minor role played by the federal government, the lack of private causes of action, and the failure of federal law to preempt state law, lead to a robust level of experimentation in those cases regardless of Court intervention. As a prescriptive matter, assuming the desirability of independent norms, the distinction might be used as a basis for applying heightened judicial scrutiny to one category of cases, and as an argument in favor of constructing an objective test focusing on physical and economic spillover into a neighboring state.

I have suggested that the Court is already moving toward an objective economic/physical spillover test under the Commerce Clause for all federal statutes, criminal and civil, regardless of whether these statutes implicate decentralization federalism or independent-norm federalism. In the criminal law area, those statutes which provide concurrent federal jurisdiction over misconduct already

²⁴¹ This distinction between the legal and illegal drug markets was made by Lauryn P. Gouldin in *Cannabis, Compassionate Use and the Commerce Clause: Why Developments in California May Limit the Constitutional Reach of the Federal Drug Laws*, 1999 *Ann. Surv. Am. L.* 471, 518-19 (1999).

²⁴² Perhaps, in our day of genetic engineering, we could develop a legal local strain of marijuana that is different in appearance than illegal marijuana, in order to monitor whether it is escaping local control.

illegal pursuant to state law do no real harm to either the decentralization or liberty-enhancing values of federalism. While a judicial finding of unconstitutionality here wastes time and energy, it likewise does little harm, as the prohibition can be re-enacted with a jurisdictional hook, can be achieved through the Spending Clause, or can be enforced at the state level. Where the federal statute restricts state-created liberties, however, it harms the decentralization and liberty enhancing values of federalism, and a judicial finding of unconstitutionality under the Commerce Clause has real bite in protecting these values. It is these very few cases that warrant judicial and scholarly attention. One might legitimately be leery of constructing doctrinal distinctions based upon institutional features and doctrines that distinguish criminal from civil law, when such distinctions are not grounded in the text or history of the Constitution. However, one cannot legitimately argue in favor of protecting federalism where the federal statute harms business interest, but not where it harms homosexuals. Though my examples in Part III all concerned liberal issues, a neutrally applied federalism test should, of course, protect moral and political minorities both left and right who cluster in communities and control a state's policy, on an issue that is not subject to a guarantee of rights secured by the U.S. Constitution. To remain viable, the Court's new federalism must at least appear to be neutrally applied.