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The ratification of the Constitution by Connecticut represented a significant transformation in the nature and role of the respective governments of the American States. As some Federalists noted, the Congress authorized under the Articles of Confederation acted only on the states, while the Congress authorized by the Constitution had the power to regulate the actions of individuals.1 Among the powers to regulate the actions of individuals were some powers to enact laws of a criminal nature.

The states of the American union had in 1788, and still have today, extensive powers to pass criminal laws of their own. In many cases, the powers of the states in the area of criminal law overlap with both the federal powers and with each other. While, to some extent, this overlap was foreseeable and intended,2 the tendency to look to Washington for solutions to every problem has resulted in an ever-increasing overlap.3

The fact that our system of government is designed to allow such overlapping is normally not a significant problem. With the exception of criminal law, state and federal judiciaries have devised numerous mechanisms to substantially reduce any conflicts that might arise from the application of multiple laws in multiple jurisdictions.4 However, such efforts to reduce those problems do not mean the federal government has never overstepped its constitutional limits.5

This form of judicial cooperation simply does not exist on the criminal side of American jurisprudence. While the doctrines exist which could resolve any problems caused by this overlapping,6 courts have chosen to protect their independence. Likewise, the state legislatures have also insisted on their right to determine what behavior is criminal, even when the result is redundancy.

Various problems result from this overlapping, especially when combined with the growth in the size and powers of all governments and a more diverse citizenry. Some of these problems seem on their face to affect only defendants,7 while others clearly affect everyone in the criminal justice system.8 Although the problems are varied, the root causes can be traced to two areas.

The first area is the substantive criminal law, especially at the federal level. In the following pages, this Article will discuss, from a Neo-Federalist perspective, the wide variety of laws found mostly in Title 18 of the United States Code that form our federal criminal law. This Article will suggest that there are both constitutional and pragmatic needs to reexamine what behavior should be punished on a federal level.

The second area is the law regarding criminal procedures. This Article will suggest, from the perspective of Popular Sovereignty, that the current trend to jealously guard jurisdictional prerogatives is not constitutionally required, and may, in some cases, be constitutionally prohibited. While recognizing that there may be problems with establishing procedures for greater cooperation between the federal government and the state governments in the field of criminal prosecution, this Article will tentatively suggest possible solutions to these problems. In addition, this Article will discuss the practical and theoretical impact on the field of criminal procedure of the assumption that the Bill of Rights was designed to protect the rights of the People rather than the rights of individuals.

In both areas, the discussion in this Article will cut against the modern trend. Rather than proposing turning over our criminal justice system to Washington, this Article will argue that the Framers of the Constitution intended a role for both the federal and the local governments. Likewise, while there are times when conflict between state and federal government is necessary and desirable, the two should cooperate in most situations. As an introduction to the discussions outlined above, this Article begins by examining the proper role and jurisdiction of the states and the national government in promulgating and enforcing the criminal law.

I. The Federal Criminal Law: 100 Ton Gorilla or Relief Pitcher

Traditionally, law enforcement has been a province of local government. "Law enforcement" usually referred to such institutions as the city police officer walking his beat, the district attorney's office, state judges, and the state penitentiary though some of these positions and institutions are newer than many realize. Even today, most prisoners and most convicts on probation or parole are governed by the state system.9 Despite this basic fact, the federal prison system is growing;10 many state convicts are simultaneously guilty of federal offenses and vice versa.11 Recent years have seen several proposals which could increase the similarity between federal and state offenses.12

Many fail to perceive a problem with a growing federal presence in the criminal justice system and the duplication between state and federal offenses. At one level, law enforcement is breaking down in all jurisdictions. Several of the states, especially the larger ones, are currently suffering from prison overcrowding. These states are finding themselves under federal injunction to reduce prior populations and, consequently, are releasing dangerous criminals early.13 Simultaneously,
more and more criminal matters are being handled in the federal courts, arguably reducing the resources available for federal civil cases.14 Of course, the simple response to this problem is to funnel more resources into the criminal justice system and to rearrange priorities.

The real problem is that, at a deeper level, federal judges are being asked to handle what they should not be handling. Some people have criticized the federal sentencing guidelines by arguing that local differences justify different sentences in different states

for the same federal crime.15 While in some cases the criticism heaped upon the sentencing guidelines is unfounded,16 it misses the true point: the reason that penalties are not uniform is because there is a lack of national interest in the crime. In some of these cases, there may even lack a constitutionally permissible interest which would authorize the federal government to intervene.

In the pages to follow, this Article will look at the history of federal criminal law.17 This Article will then categorize these laws according to the potential sources of constitutional authority for their enactment. Based on these categories, this Article will suggest that some of these laws should be struck down as unconstitutional under the Tenth Amendment, and that some laws should be repealed for more pragmatic reasons.

A. The Neo-Federalist Interpretation of the Federal Government's Constitutional Authority to Enact Criminal Law

The text of the Constitution has relatively little to say regarding criminal law. A very few subject areas, such as piracy and treason, are explicitly mentioned.18 Arguably, the text impliedly addresses other areas, such as smuggling and tax evasion, through the Necessary and Proper Clause.19 Beyond this, there is no authorization for a general federal criminal law.20 Both an examination of the intent of the Framers,21 and the canons of constitutional and statutory construction22 indicate that, if properly interpreted, the original text of the Constitution does not grant Congress general authority in this area. This view is supported by the early case of *United States v. Hudson & Godwin,*23 where the Supreme Court admitted that, unlike the states, there was no federal criminal common law.24

The narrow vision of federal power implicit in *Hudson & Godwin* comports to the Neo-Federalist conception of the separation of powers. According to that theory, criminal law is largely a state matter. The states existed before the creation of the Union.25 Over the years prior to the Revolution, they gradually built up a body of criminal legislation and common law. In breaking away from the United Kingdom, these states, however, did not fall into a condition of anarchy. Rather, they preserved the criminal common law and criminal legislation that had developed during the colonial period.26

In forming the Union, the states did not abdicate their inherent authority and jurisdiction over criminal matters. In fact, the Tenth Amendment implicitly guaranteed the states that they would retain general jurisdiction over criminal law. The federal government, on the other hand, was given very specific powers over limited areas of the criminal law. Because the Union was created in the context of existing states possessing a wide range of inherent powers, there was no judicial need to assume that the federal government was granted more power than the text of the Constitution would suggest. Under this theory, the common criminal law existed only at the state level: the federal government was granted limited authority to address other problems of national import.

B. The Growth of Federal Criminal Law

The growth of federal criminal law parallels the growth of other federal statutes. At first, Congress exercised its limited power sparingly. The Civil War Amendments added additional powers and, accordingly, additional laws were passed. During the Progressive Era, Congress generated a spurt of new legislation, some of which raised serious constitutional questions. Under President Roosevelt's Administration, the courts upheld New Deal legislation and the activist government, with its extensive powers to regulate the "marketplace,"27 as constitutional. In the post-New Deal Era, Congress legislated extensively in the field of criminal law. The end result of all this federal activity is that, in criminal law even more than in other areas, the states and localities have become nothing more than instruments for the implementation of federal policies.

The first criminal law passed by Congress in 1789 dealt with smuggling. It provided for a $400 fine, forfeiture of the contraband, and publication of the names of the criminals in the local newspaper.28 The same statute authorized customs officers to obtain a warrant to search for contraband which was believed to be stored in warehouses, but apparently allowed warrantless searches of ships.29 Other provisions dealt with fraudulent declarations of the value of goods and bribing a customs officer.30

The first "comprehensive" crime act was adopted in the spring of 1790.31 This act established the punishment for treason32 and created numerous other offenses, including: complicity treason; committing typical "common law" crimes on the high seas or within the "special jurisdiction" of the United States; counterfeiting; and committing acts that interfere with the judicial processes of federal courts.33 The act also established rules governing the procedure of criminal trials and the content of indictments.34

The Second Congress enacted the first legislation covering the extradition of fugitives whether accused criminals or slaves.35 This act provided, in relevant part, that, upon delivery of the indictment to the executive of the state or territory to which a fugitive had fled, that executive had the duty to arrest the fugitive, to inform the executive demanding extradition of that arrest, and to turn the fugitive over to the agent of the demanding executive when that agent arrived.36
The statute also created a federal offense for assisting a fugitive in an attempt to escape from the agent.37

For the most part, the remaining criminal laws passed during the Federalist presidencies were closely connected to the language of the Constitution. These acts created criminal offenses for interfering with the postal service,38 failure to comply with the laws governing the importing of goods and other revenue laws,39 involvement with the military forces of foreign states,40 and improper behavior toward tribes of Native Americans.41 The only constitutionally questionable criminal law passed during this early period was the Alien and Sedition Act.42 Even then, only one section raised serious constitutional questions, which were based on the First Amendment, not the authority to regulate the subject matter.43

Despite the different political philosophies of the Federalists and the Jeffersonians, there was not a significant difference in the type of criminal law passed during the presidency

of Thomas Jefferson. The lion's share of "new" criminal laws consisted of enforcement provisions of legislation regulating trade and imposing taxes.44 In addition, there continued to be a small number of acts concerning the special jurisdiction of the United States, government corruption,45 counterfeiting and other fraud on the government,46 and establishing further procedures for criminal cases.47

Particular note should be paid to the change of laws related to the slave trade during this period. Before 1808, Congress was barred from prohibiting the slave trade; the issue was left to the states.48 The acts passed before 1808 merely enforced the right of the states to choose whether or not to permit slavery.49 One of the last acts passed by the Ninth Congress, in March of 1807, forbade the slave trade as of January 1, 1808, and established appropriate criminal penalties.50

The presidencies of James Madison and James Monroe continued the pattern of their predecessors. The only "unique" acts during this period are those surrounding the War of 1812.51

The Framer's vision of federal criminal law can best be shown by a statute revising the criminal laws of the United States enacted at the end of the presidency of James Monroe the last president of the "framing generation."52 The statute covered three limited areas. First, the statute addressed crimes committed on or against United States property, especially military property.53 Second, it addressed crimes committed on the high seas.54 Third, this act addressed crimes for counterfeiting, governmental corruption, and fraud against the United States.55 Congress enacted other laws that were confined to the tiny area of criminal law in which Congress had acted previously. These statutes followed the typical pattern of this era. Congress limited its authority to enact criminal statutes to areas regarding: 1) enforcement of tax laws and those governing relations with foreign nations and with Native Americans; 2) provisions governing the return of fugitives; 3) laws prohibiting the slave trade; 4) laws establishing "traditional" criminal law in the territories; and 5) laws protecting the postal service and its monopoly.

In short, under even the narrowest interpretation of the Constitution, the criminal laws passed during this period were clearly within the powers of the federal government. To the extent the acts passed in the thirty years following the framing and ratification of the Constitution can be used to interpret the meaning of the Constitution, or the Framers' understanding of the meaning of the Constitution, these acts indicate that the constitution was meant to confer only an extremely limited power over criminal law. The remaining power over criminal law belonged to the states.

By the eve of the Civil War, there had been no significant changes in the scope of federal jurisdiction over criminal law.56 The Civil War Congresses added laws particularly designed to criminalize everyone associated with the Confederacy.57 These statutes could still, however, be justified under the original text of the Constitution. On the other hand, the Civil War Congresses eliminated those statutes dealing with fugitive slaves, thereby narrowing the scope of federal criminal law.58

The Civil War and Reconstruction changed the relationship between the federal government and the states. As noted, before the Civil War, there was an implicit assumption that the states would fairly handle most criminal matters. In the eyes of the Radical Republican majority in Congress after the Civil War, the states especially the former states of the Confederacy could not be trusted to fairly enforce the criminal law when the civil rights of minorities were at stake. Therefore, under the newly created authority of the Thirteenth, Fourteenth, and Fifteenth Amendments, Congress passed laws criminalizing the deprivation of civil rights by individuals or groups.59 After the end of Reconstruction, the Supreme Court considerably restricted these laws under a narrow definition of state action and the scope of power granted to Congress by these three amendments.60

The original codification of federal law, completed in 1873, listed most criminal provisions in Title 70.61 This title contained 128 sections in nine chapters. Six of these chapters defined the core of the major categories of federal offenses: 1) crimes against the existence of the government; 2) crimes arising within the maritime and territorial jurisdiction of the United States; 3) crimes against justice; 4) crimes against the operation of the government (including counterfeiting, fraud, and postal offenses); 5) official misconduct; and 6) crimes against the elective franchise and civil rights.62 Crimes involving the slave trade and against neutrality were in separate titles, with other offenses scattered among the remaining titles.63

The era spanning from the Grant presidency to the Second Cleveland presidency saw the growth of federal criminal law into the field of interstate commerce.64 Early laws during this period focused on animals being shipped between states.65 The next major step was the establishment of the Interstate Commerce Commission to regulate those companies, mostly
railroads, that actually shipped goods between states. Criminal provisions were enacted to enforce those regulatory powers.66 Soon thereafter, Congress passed the first antitrust law criminalizing conspiracy to restrain or monopolize interstate trade.67 This era also saw the exclusion of "immoral" objects from interstate trade without reference to the laws of the states between which the objects were moving.68 The focus of all of these acts remained on the actual transportation of goods and people from one state to another.

Under Theodore Roosevelt, Congress further expanded regulation of interstate and foreign commerce. Several acts amended the authority and duties of the Interstate Commerce Commission, or added new restrictions on "common carriers."69 Other acts sought to eliminate goods from interstate commerce or impose standards on such goods, including food and drugs.70 In addition, "Shanghaiing" became a federal offense.71 This offense was, to some extent, unique, in that the federal jurisdictional element was the *intent* to force the victim to serve on a vessel in interstate commerce.72

One of the last acts of the Roosevelt administration was the adoption of a revision of the criminal code.73 While not containing the entirety of federal criminal law,74 this code does give a relatively accurate picture of the scope of federal criminal law in 1909. It contains 345 sections divided into 15 chapters.75 While the last two chapters contain

general provisions mostly governing procedure and those provisions necessary to the enactment of the code, the first 13 chapters76 and their headings describe those matters subject to regulation by federal criminal law. They were: 1) offenses against the existence of the government (treason and similar crimes); 2) offenses against neutrality; 3) offenses against the elective franchise and civil rights; 4) offenses against the operation of the government (mostly fraud and crimes against federal property); 5) offenses relating to official duties (mostly government corruption); 6) offenses against public justice (mostly crimes like perjury and obstruction of justice); 7) offenses against the currency (various forms of counterfeiting and forgery); 8) offenses against the postal service; 9) offenses against foreign and interstate commerce; 10) the slave trade and peonage (prohibiting various aspects of those practices); 11) offenses within the admiralty and maritime and territorial jurisdiction of the United States; 12) piracy and offenses upon the seas; and 13) offenses in the territories.77

In years between 1909 and the Great Depression, Congress continued the slow expansion of criminal regulation of interstate commerce.78 Several areas that were covered by some of these statutes deserve additional comment. First, the federal government moved very slowly into regulating narcotics. In 1914, Congress passed the Harrison Act, which imposed a tax on certain narcotics.79 Later, Congress added cocaine to the list of drugs that could only be imported for medical and scientific purposes.80 At this point in time, however, there were no federal limits on narcotics, other than taxes, unless the substances moved in interstate or foreign commerce.

Second, Congress attempted to use its powers over interstate commerce to criminalize the use of child labor in the production of goods flowing in interstate commerce.81 This act was held unconstitutional on the theory that it regulated the production of the goods rather than the transportation of the goods between states.82

Third, Congress extended its regulatory powers to govern radio transmissions.83 This authority was limited, however, to transmissions used in interstate commerce and to transmissions which interfered with transmissions within other states.84

Fourth, Congress began to regulate theft in interstate commerce, and the movement of stolen goods in interstate commerce.85 It is amazing to note that, while today this field of federal criminal law seems to be one of the most constitutionally justifiable of all fields, the 1913 act was the first statute dealing with this issue. Congress also criminalized the movement of kidnapping victims across state lines.86

Fifth, for its short life-span, the Eighteenth Amendment gave additional powers to the government. Soon after its ratification, Congress passed the National Prohibition Act to enforce the Amendment.87

Sixth, Congress continued to pass intent crimes and crimes barring the transport of items and people without regard to state laws. In particular, Congress passed the most noted of these criminal statutes, the Mann Act,88 which essentially criminalized the transportation of women across state lines with the *intent* to perform some "immoral" act.89 Aside from

the vagueness of the statute, the act implicitly recognized that some "immoral" activities clearly prohibited by the statute might be legal under state law in some or all of the states in which or through which the transportation occurred.90 As such, there remains a legitimate argument even today that the Mann Act interfered with a matter properly the subject of state legislation.

Finally, this period saw the second complete codification of all of the laws of the United States.91 This codification, which replaced the earlier Revised Statutes, categorized federal law by a roster of titles that is roughly similar to the titles to the current version of the United States Code.92 The 1926 Code's criminal title was similar to the 1909 Criminal Code. It contained the same 13 substantive chapters, but slightly increased in the number of sections to approximately 380.93

The seventy-third Congress, meeting during the first two years of the Franklin D. Roosevelt presidency, began the process that has been described elsewhere as culminating in an unwritten amendment to the Constitution.94 Its impact on federal criminal law was equally revolutionary.

An example of the expansion of federal criminal law during this period can be seen by comparing two acts regulating the sale of securities. The Securities Act of 1933,95 despite its importance, was constitutionally unremarkable. Both of its main criminal provisions, criminalizing the sale of unregistered securities96 and securities fraud,97 only covered acts using the mails or actual interstate transactions. The Securities Exchange Act of 193498 departed from this clear constitutional basis. It extended securities fraud to cover all transactions based on an assumed power to regulate the entire market, regardless of whether actual interstate commerce was involved.99

Other acts were equally revolutionary. One act federalized crimes committed against banks of the federal reserve system.100 Another federalized criminal acts designed to compel the payment of money if those acts "affected" interstate commerce.101

Compared to these acts, other acts important to modern federal criminal law passed by this Congress seem ordinary. This Congress federalized the killing of and interference with the performance of official duties by certain federal officials, mostly law enforcement officers;102 federalized extortion in interstate commerce including interstate communication within that definition;103 criminalized interstate flight;104 and criminalized practically all interstate transportation and commerce in stolen goods.105

During the remainder of Roosevelt's presidency, Congress enacted further federal regulation based on Roosevelt's assertion of broader federal powers. Some legislation asserted jurisdiction over particular subject matters through the language "affecting commerce."106 Other acts merely regulated an entire market without reference to interstate commerce.107

Other statutes ranged from those relying on traditional federal powers to those which made no pretense of having a constitutional basis. Some statutes were still based on a

"pure" interstate commerce justification.108 Others, similar to traditional statutes against fraud on the United States, responded to the new constitutional order which included the growth of the administrative state and criminalized the tampering with witnesses before Congress and administrative agencies.109 Occasionally Congress passed a law with seemingly little or no constitutional basis.110

In 1948, Congress reenacted Title 18 of the United States Code.111 This version of the criminal code transformed the 1926 structure into what is essentially the current statutory scheme.112 The thirteen substantive chapters of the 1926 code were replaced with 59 chapters in the 1948 code.113 The number of sections within these chapters had increased to approximately 500.114

Several features are worthy of note. First, the chapters in the 1948 Code are based on the crime rather than the jurisdictional justification. However, a significant number of the statutes did apply only to acts committed within the "special maritime and territorial jurisdiction of the United States." Second, several sections of this code applied to banks on the basis of their being insured by the FDIC.115 Third, several sections protected objects trains and other vehicles on the basis of their use in interstate commerce.116

Between 1948 and 1967, the growth of federal criminal law continued at its traditional slow pace. Two of the major concerns during this period both connected with "organized crime" were illicit drugs117 and gambling.118 Other concerns during this period were interstate fraud,119 racketeering-type acts of violence,120 and record piracy.121 By enacting these laws, the federal government continued to creep into areas previously controlled exclusively by state criminal laws. However, with the exception of bank crimes, the overlap was still relatively small as of December 31, 1967.

From 1968 through 1970, Congress passed several major acts which form the core of modern federal criminal law. From this moment, the distinction between state matters and federal matters disappeared. This period also signified the beginning of a pattern of legislation dealing with the passions of the moment.

The first major act of this period was the Civil Rights Act of 1968.122 While there were some provisions enforcing civil rights, the major criminal provisions were more concerned with riots and other civil disorders.123 Another act passed during 1968 was the Consumer Credit Protection Act.124 The key criminal provision of this act was aimed at organized crime and covered "extortionate credit transactions" (i.e., loan-sharking).125 A third act, of less importance, dealt with obscene phone calls in interstate commerce.126 The final important act of 1968 was the Omnibus Crime Control and Safe Streets Act of 1968.127 While many sections of this act dealt with procedural matters, there were two significant substantive sections: one covering wiretapping128 and another covering interstate traffic in firearms.129

In 1970, two substantive and one procedural crime bills were enacted. The first substantive bill was the Organized Crime Control Act of 1970.130 In addition to procedural and substantive laws designed to gather evidence, this act: 1) federalized

illegal gambling operations;131 2) further regulated the manufacture of and commerce in explosives;132 and 3) created the Racketeering Influenced and Corrupt Organization (RICO) offense.133 The second substantive bill was the Comprehensive Drug Abuse Prevention and Control Act.134 The criminal provisions of this act modernized the old drug laws.135 Lastly, Congress created a uniform system for allowing a prisoner to dispose of charges in multiple jurisdictions.136

Subsequently, the 1970s proved to be a relatively quiet period. The only noteworthy substantive legislation dealt with child pornography.137

In the first term of the Reagan presidency, the scope of federal criminal law was greatly expanded. Three statutes contained provisions federalizing certain criminal behavior otherwise covered by state laws.138 The most significant criminal act of this period was the Comprehensive Crime Control Act of 1984.139 In addition to significant procedural changes, this bill contained several provisions federalizing areas of criminal law, including violent crimes,140 the destruction of an energy facility,141 and counterfeiting state or corporate securities.142 The bill also dealt with several forms of theft and fraud, such as bank fraud,143 theft of livestock,144 credit card fraud,145 and computer-related fraud.146

Since 1984, despite many proposals, only two provisions have significantly expanded the scope of federal criminal law. The first, part of the Anti-Drug Abuse Act of 1986,147 created a federal crime for using the proceeds of a crime in any transaction to carry on that criminal activity or to hide the ownership of those proceeds.148 The second, part of the Anti-Drug Abuse Act of 1988,149 federalized selling obscene materials that had been in interstate commerce.150

In short, the history of federal criminal law has seen an ever-increasing federal jurisdiction, with a large portion of the increase supposedly being based on the Interstate Commerce Clause.151 The modern trend, at least as far as congressional action is concerned, is proceeding toward a complete merger of federal criminal law and state criminal law.152 This trend implicitly denies that there is or should be a distinction between the state and federal criminal justice systems. The Constitution is based, however, on the assumption that this country is "an indestructible union of indestructible states,"153 and that both the states and the federal government have a proper role to play.154 As such, there is a need to examine, from both a constitutional and a pragmatic point of view, the proper scope of federal legislation.

C. Federal Criminal Law and Federal Powers: Do the Twain Ever Meet

The problem with federal criminal law can be seen by a quick look at the similarity between federal criminal law and state criminal law. When bank robbery is a criminal offense in every state, it becomes extremely difficult to justify making the robbery of a federally-insured bank a federal offense, especially since a large proportion of banks are federally insured.155 One is tempted to raise the question of why did various Congresses feel the need to pass a federal law governing bank robberies. Do the states ignore

robberies when they occur in federally-insured banks? Are state police officers and prosecutors too incompetent to enforce state laws on bank robberies? With many of these statutes, it is clear that any federal interest is incidental to the true problem of crime. In this section, this Article will proceed on the assumption that state governments and state law enforcement officials do care about the problem of crime and the people in their states who are victims of crimes. Based on this assumption, the enactment of federal criminal statutes will be challenged for a constitutional justification.

Any examination of the constitutional basis for the federal criminal code must begin with noting that direct constitutional authority for federal criminal law is limited to a few fields of law,156 to "territorial jurisdiction" over crimes in the District of Columbia and other territories (which is often delegated to the local governments), and to the "special jurisdiction of the United States," namely the high seas and the real property of the United States.157 The remainder of federal criminal law is, for the most part, inherently based on the application of the Necessary and Proper Clause158 to other powers of the federal government. For example, the federal government has the power to levy taxes on income. The argument can easily be made that, in order to effectively guarantee the collection of those taxes, it is necessary and proper that the government criminalize the intentional evasion of those taxes.

Obviously, there is a limit to how far one can stretch the link of necessary and proper laws from the actual power before such a claim becomes clearly pretextual.159 This limit should be strictly enforced in the case of federal criminal law. In plain language, there should be some showing that it is *truly* necessary or useful to the exercise of a federal power before a federal criminal law is considered to be constitutional.160 In the light of this approach to federal powers, this Article will examine some of the traditional jurisdictional justifications for federal criminal law and suggest proper limits within each of them, as well as suggesting other approaches to these issues.161

1. Special Jurisdiction & Other Expressed Authority

There are two categories of offenses for which the constitutional authorization is clearly expressed. The first category is often called the "special jurisdiction of the United States." It includes those offenses committed either on the high seas or other places where only the federal government has legislative authority, such as in a territory. The authority for federal legislation prohibiting these offenses is expressly created by the Constitution.162 Statutes based on this authority to a large extent mirror the typical state criminal code.163 The second category consists of the few crimes specifically mentioned in the Constitution, such as piracy, counterfeiting, and treason.164 Because both categories are clearly delegated to the federal government, these types of statutes are clearly justified and are uncontroversial.

2. Offenses Based On The Interstate Commerce Clause

a. Multi-State Criminal Activity

In a nation of multiple jurisdictions, concern naturally arises about criminal activity that begins in one jurisdiction and continues into another. While this same problem exists to a lesser extent between the various political subdivisions within a state, difficulties are magnified at the interstate and international levels.

The movement of individuals from one state or nation to another causes three basic difficulties in criminal law. First,
it is more difficult to find a criminal, and to find evidence supporting a conviction, when the criminal is no longer in the state where the crime was committed, or if some of the evidence, like stolen goods, has been moved out of the state. Likewise, interstate movement can be used to avoid the enforcement of civil judgement, as in the case of child support payments, for example. Second, even if the evidence or the criminal can be found, the cooperation of another jurisdiction is necessary to return the individual or the evidence to the place of trial. Third, there can be an extensive debate over who has jurisdiction over the criminal act when different parts occur in different states.

The second difficulty has traditionally been the easiest of the problems to solve. Among different nations, extradition treaties have been created to assure that foreign nations will arrest and return a fugitive criminal to the nation where he committed the crime.165 This same problem was faced by the Framers of the Constitution. The original thirteen states were, for all intents and purposes, independent nations before joining together. To insure that criminals would be turned over to the appropriate authorities in the states in which they were wanted, the Constitution expressly provides for the extradition of criminals from one state to another.166 To assist in the implementation of this provision, Congress has authorized both an extradition procedure167 and, to cover those individuals already incarcerated in a state or federal facility for another crime, the Interstate Agreement on Detainers.168

There remains, of course, the problem of retrieving evidence from another jurisdiction, and the problem of finding the criminal once she leaves the original state. The solution to this problem has been to enact various federal statutes punishing interstate flight and the transportation of the proceeds of crime in interstate commerce, with the hope of deterring criminals from removing the evidence or themselves from the state in which the crime was committed.169 Both solutions can be justified under the Necessary and Proper Clause. A legitimate argument can be made that the criminalization of interstate flight assists the implementation of various provisions of Article IV. Likewise, the criminalization of the sale of stolen items in interstate commerce flows naturally from the power of the federal government to exclude contraband from interstate commerce.

On the pragmatic side, each state could criminalize fleeing the state to avoid criminal liability, or exporting stolen goods from the state. Logically, there is no reason for a state to excuse such conduct, as the victims of the underlying criminal acts will, for the most part, be residents and voters of the state in which the original conduct occurred. Equally logical, however, is the argument that the burden that interstate flight puts on the resources of other states and the federal government dictates the need for a uniform, and hence a federal law governing the offense.

The jurisdictional argument is currently the most significant problem. This problem, however, is relatively the same as the equivalent issue in civil cases. A potential solution to this problem will be discussed later in the section on dual sovereignty and the Double Jeopardy Clause.170

b. Items in Interstate Commerce

The regulation of goods moving through interstate commerce is another area traditionally reserved for federal legislation. By a series of logical steps, one can move from the power to regulate commerce to the ability to pass criminal laws to enforce those regulations, including regulations which completely exclude certain products from commerce.171 One of the better examples of such criminal regulation is the federal statutes prohibiting narcotics.172

Our nation's drug laws can be divided into several categories. One relates to the actual movement of the product in interstate commerce (e.g., importing, interstate distribution). Another category contains the remainder of miscellaneous offenses (e.g., manufacture, possession, intrastate distribution). Statutes of the first variety are obviously authorized by the Interstate Commerce Clause. The other offenses have traditionally been justified as mere extensions of the regulatory power conferred by the Interstate Commerce Clause. Although, a better explanation would be that they are based on Congress' expansion of federal authority during the New Deal.173

From a pragmatic perspective, especially under current circumstances, it is clear the drug trade is large enough to be a federal problem. State governments, for the most part, have limited resources with which to protect their borders from illegal interstate commerce.174 Drug dealers in one state may import large quantities of the "pure" drug, refining that drug into smaller adulterated doses, and distribute it to an entire region. For those states which may be low on the distribution chain, the local war on drugs is like fighting a many-headed hydra. If one state manages to make life difficult for those near the top of the distribution chain, the entire operation can be moved to another state. Only the federal government has the ability to follow the "kingpins" from state to state and to try and keep the raw materials out of the country. In addition, the war on drugs places a great strain on local government resources.

Multiple levels of jurisdiction unfortunately make cooperation more difficult. As such, it is logical to divide drug enforcement responsibility between the federal and state governments. The states should handle the miscellaneous but largely local crimes directly or indirectly related to the drug trade.175 The federal government should concentrate on combatting the actual importation, production, and interstate distribution of drugs. Of course, similar arguments can be made for other illegal goods that make their way into interstate commerce.

A third category of drug laws prohibits or penalizes the use of certain items that are considered to be "instrumentali
ties" of the interstate drug trade. These items, such as radio stations, telegraph wires,

telephones, trucks, and other conveyances of communication or goods, can be either the object on which the crime is committed or a mechanism used to commit the crime.176 If the item is the mechanism used to commit the crime, the exercise of federal jurisdiction over the use of the item is often justified on the ground that the states cannot properly prosecute the matter because of the difficulties of concurrent jurisdiction over bits and pieces of the crime.177 Obviously, however, each state has as much of an interest in pursuing the crime as does the federal government.

A different issue arises when the criminal damages or destroys an interstate instrumentality.178 In many cases, both the victim and the perpetrator will be a resident of the state in which the crime occurs. Thus, barring unusual circumstances, the state will have power to punish the offense without too much difficulty; there is no need for federal involvement. Most, if not all, of these acts are prohibited by state law.179 It is difficult to argue, that if the federal government repealed its laws of this type, the states, with absolutely no change in their current laws, could not adequately prosecute criminals who attack truckers or blow up television stations.

In short, several conclusions can be drawn from the foregoing examination of criminal legislation predicated on the Interstate Commerce Clause. First, the federal government is best equipped to deal with interstate flight and trafficking in contraband. Second, federal laws penalizing the damaging or destruction of "instrumentalities" of interstate commerce are of dubious constitutional justification, and such offenses are probably best handled by the states. Offenses involving the use of "instrumentalities" to facilitate illegal interstate commerce are somewhere in between, and both the federal and state governments should play a role in policing these activities.

3. Offenses Based on the Fourteenth Amendment

Most of the offenses based on the Fourteenth Amendment are characterized as civil rights laws. The main statutes governing these offenses punish conspiracies to deprive a citizen of his rights and depriving an individual of her rights under the color of law.180 Each of these statutes serves a different purpose.

It is easier to justify a federal offense for the deprivation of rights while acting under the color of law. Section 242 of title 18 to the United States Code protects individuals against state officials that either actively violate civil rights or passively allow such violations to occur. The statute is designed to protect minorities from popularly elected officials acting on the prejudices of the majority. In such circumstances, it is unrealistic to expect the state to faithfully enforce its laws. Thus, federal legislation in needed.

A problem with Section 242 may exist in that its current language seems to protect only suspect classes.181 This statute could be written to clearly apply to all denials of equal protection and deprivations of rights. Not only would a broader statute serve to protect every group which might be subject to oppression, but it would also lay to rest any objections over a neo-federalist, narrow interpretation of the Interstate Commerce Clause. Any intentional disregard of criminal offenses committed against non-residents would be

criminalized under Congress' enforcement power in Section Five of the Fourteenth Amendment.182

The statute against conspiracies to violate constitutional rights deals with a different but related problem. This section applies to individuals sometimes private citizens who violate the constitutional rights of others. This section varies from Section 242 in two major respects: 1) there is no requirement the victim belong to a suspect class; and 2) there is no requirement of state action. The purpose of the act is to allow the federal government to prosecute those groups or individuals who interfere with the constitutional rights of others, especially where the state is politically unwilling to protect the victims.183

Both of these sections, created pursuant to authorization found in Section Five of the Fourteenth Amendment, serve a "gap-filling" function, which is the proper role of federal criminal law. In most circumstances, state governments will adequately enforce their own laws and protect their own residents. Political realities discourage the vigorous enforcement of laws designed to protect unpopular groups. In some cases, prejudice motivates state officials to actively engage in improper conduct. Whenever that occurs, only a higher level of government, removed from local politics, can intervene to assure that the rule of law is maintained.184

4. Federal Officials and Other Similarly Situated Individuals

Several statutes federalize criminal behavior against federal employees, especially high ranking ones, and foreign officials working in the United States.185 These statutes are implicitly based on the Necessary and Proper Clause.186 At one level, these statutes are merely duplicative of state laws. For example, there is no reason to believe a state would ignore a murder merely because the victim worked for the federal government.

These statutes, however, serve another purpose. A state may provide extra protection to certain government employees and officials. This would be the case where the state believes either that these individuals are more at risk or that offenses against these individuals are more serious than offenses against ordinary citizens.187 Even if these statutes apply equally to crimes against both state and federal officials, the sentences imposed reflect a state-by-state valuation of the moral culpability of such an act or the need for deterrence. As such, these statutes do not necessarily give federal officials and employees (or foreign officials present in this country as guests of the federal government) the protection the federal government believes they deserve. For example, suppose the state of New York believed there should be no difference between the penalty for assassination of an elected official and the penalty for other murders. The result could be that, under state law, the maximum penalty for the assassination of a Senator or the President would have a maximum sentence of life with the possibility of parole.188 The federal government, on the other hand, might believe that the moral culpability of killing such an official and the need for deterrence requires a minimum sentence of life without the possibility of parole.

In short, a state may not accurately weigh the value of, or the danger to, federal officials. In order to encourage government service and to discourage attacks on federal employees, it is necessary and proper for the federal government to establish criminal laws on this subject.189

5. Federal Spending Powers

Federal spending powers190 support two different types of criminal statutes. First, federal criminal law punishes fraud perpetrated against the United States.191 Second, federal law governs criminal activity against recipients of federal funds.192

Like many other categories of criminal legislation discussed earlier, a statute penalizing individuals who attempt to defraud the federal government is easy to justify on both a constitutional and a pragmatic level. The government has a legitimate interest in protecting itself from individuals who are trying to cheat it. Likewise, the federal government is best able to determine the seriousness of the threat presented by a particular scheme to defraud it.

Theoretically, an argument can be made to constitutionally justify protecting recipients of federal funds.193 On a practical level, however, state law already protects these recipients against criminal activity. Realistically, most victims of state crimes are not chosen based upon their status as recipients of federal funds.194 State governments have every incentive to seriously enforce their laws to protect all citizens, even those on the federal doll.

Only one subcategory of recipients of federal funds can raise a legitimate argument for special protection under federal law. Those who are performing work pursuant to a federal contract, and who must turn the completed work over to the sole possession of the federal government, may be subject to politically-motivated terrorism. Those who oppose the work on ideological grounds may seek to sabotage it, and thus may frustrate key federal interests.

6. "Non-traditional" Justifications

An analysis of the above categories would indicate that they simply do not cover many statutes. Some of these statutes fall into areas that closely resemble areas which are clearly constitutional.195 Other statutes simply lack constitutional authorization.196 The remaining statutes fall into two categories: (1) statutes that may be justified under constitutional guarantees of a republican form of government; and (2) statutes that may be justified under "New Deal Economic" powers.197

One of the most underutilized authorities for federal legislation is the guarantee to every state of a republican form of government.198 The efforts of state governments (or any government for that matter) to thoroughly enforce their own laws are hindered for two major reasons. The main reason is simply the lack of resources at all levels of government. Under currently available resources (or at any level of resources that

reasonably could be made available), it is not possible to investigate and solve every crime, much less convict and appropriately sentence every individual.199 Additional criminal laws at the federal level will not alleviate this problem, but would merely shuffle resources from one level to another.

The other major reason a state may fail to enforce its own criminal law is that local law enforcement officers sometimes chose not to enforce certain state laws. In most cases, a decision not to enforce a law will be based on one of three reasons. First, the state may the lack the resources necessary to prosecute every criminal act to the "fullest extent" of the law. Second the local prosecutor's office may determine that certain types of offenses are not "real" crimes.200 Third, the electorate may understand that certain offenses may exist on the book but not in reality.201

There are subtle differences between these three categories. In the first, many people may want the statute enforced, but the state recognizes that enforcement of other statutes commands higher priority. In the second category, people may be indifferent to whether or not the statute is enforced. In the third category, most people may oppose enforcement of the statute, but a substantial number agree with its symbolism. All three categories, however, reflect a working electoral system. Decisions regarding the adoption and enforcement of state criminal laws are largely governed by popular demand.

In a small number of cases, the decision not to prosecute is the result of local corruption. When corruption occurs at a low level, state officials have as much incentive as, if not more than, the federal government to prosecute those involved. State governments may, however, prove inadequate when the corrupt officials occupy higher positions. When high-level officials are "on the take," the people of that state, or of that political subdivision, are no longer being governed by people who represent them, and, as such, are being denied their right to a "republican form of government." Thus, regardless of any other alleged jurisdictional base, federal criminal laws against bribery, conflicts of interest, and other forms of political corruption can be justified under the power of the federal government to guarantee a republican form of government.202

The "New Deal Economic" powers are those powers implicitly created as a result of the constitutional confrontation
between the judiciary and the "political" branches during the 1930s.203 This power over commerce and production provides a justification for federal laws against loan-sharking,204 securities fraud,205 and corruption in labor unions.206 However, in each of these areas, there should be a reconsideration of whether local governments have sufficient resources to handle these problems, and whether multiple jurisdictional problems justify federal action.207

Two final notes are appropriate before leaving this discussion of "New Deal Economic" powers. First, these powers solve the problem associated with the production of illegal items and their intrastate distribution.208 While the traditional Commerce Clause did not reach either production or intrastate commerce, the post-New Deal Commerce Clause, with its focus on production, reaches both. Second, these are limited powers. There is a

time when a product leaves the stream of interstate commerce. Congress does not have the power to regulate mere possession, as the Supreme Court may be beginning to recognize.209

D. A New Federal Criminal Law: From Super Cop to Gap Filler

Up to this point, the discussion has focused on demonstrating that federal criminal law has expanded far beyond its original scope and delegation of authority to Congress. This historical and theoretical discussion leaves two questions unanswered. First, is this expansion really a problem? Second, if so, how can this problem be remedied?

Regardless of the actual scope of federal criminal law, there has been a trend toward nationalizing the discussion of criminal issues. Today, it is not uncommon to hear politicians assert that crime is a national problem.210 Presidential candidates are often asked about their views on the death penalty, as it applies to state crimes.211 The trend represented by these occurrences should at the very least be the subject of a serious national discussion, rather than being taken for granted as a natural part of the political discourse.

Admittedly, there are national aspects to the problem of crime in this country. First, to some extent, an argument can be made that the underlying causes of crime are matters of concern to the national government.212 Second, the nature of urban economics may be such that only the federal government can generate sufficient funding to address both the short-term and long-term causes of the crime problem, as local governments cannot.213

The broader reality, however, is that the particular problems underlying the crime rate are local. To the extent that residents in these areas might find federal criminal law beneficial, the same result could be reached by federal grants to local law enforcement or by changes in state law. The bottom line is that it does not matter which government solves these problems. People just want them solved.

It has often been said that the principles of federalism are designed to allow states to function as laboratories of Democracy.214 Another principle underlying federalism is the recognition that local governments are best able to handle local problems.215 There is always a temptation, especially among those frustrated by the actions (or lack thereof) in state capitals, to turn to Washington for solutions. However, those in the federal government bear the responsibility to recognize that they are not in the best position to solve matters that have traditionally been left to local governments. If the states are not to become mere tools of the federal government, the question must constantly be asked whether federal legislation is appropriate and necessary.

The need arises, then, for a remedy to past excesses, and the discovery of a mechanism to prevent future federal enactments from exceeding its constitutional authority. As with any question of significant public import, there are two alternatives: the judiciary and the political branches.

Until recently, the judiciary did not appear to be a viable option. For more than fifty-five years, the judiciary did not strike down a single statute criminal or otherwise on the ground that the Constitution did not delegate to Congress power to enact the particular statute. Courts routinely struck down statutes on the grounds that it violated the rights of an individual, another branch of the federal government, or of the state governments. Since 1937, the courts, especially the Supreme Court, have been reluctant to set actual boundaries on the expanded congressional powers.

This past term, however, the Supreme Court took a first step toward setting those boundaries. In *United States v. Lopez,* a narrow majority ruled that the Commerce Clause did not authorize the federal government to prohibit the possession of guns within 1,000 feet of a school.216 The majority opinion and two concurring opinions made several crucial points. First, to justify a federal criminal statute under the Commerce Clause, the prohibited activity must be connected to interstate commerce.217 Second, the Commerce Clause does not give the federal government a general police power.218 Third, the majority recognized that the quarrels prior to the New Deal were over the boundary between trade/commerce and production/manufacturing, not the boundary between interstate commerce and intrastate commerce.219

Generally speaking, the reasoning in *Lopez* is similar to the reasoning in this Article, with two exceptions. First, where *Lopez* treats the pre-New Deal arguments as being based on hyper-technical distinctions discarded as unworkable, this Article treats them as did most justices prior to 1936 as distinctions mandated by the Constitution. The distinction between trade and commerce, over which Congress has granted jurisdiction, and production and manufacturing, over which Congress has no say, was deleted by unwritten constitutional amendments effectuated by the New Deal. Second, the majority leaves open the possibility that a federal offense can be created for possession of an item, by adding a jurisdictional
element that requires that the item have moved through interstate commerce.220 However, at some point in time, an item must exit the system of interstate commerce. By the time an item is in the hands of a local criminal, it is likely the item has made the exit, and can no longer be fairly characterized as having an interstate connection. Thus, barring a real jurisdictional element, such as those items within the "special" jurisdiction of the United States, the item in the possession of a local criminal is no longer subject to federal regulation.

Even though *Lopez* indicates that federal courts are to more closely scrutinize the constitutional foundation of federal criminal statutes, the process of putting federal criminal law back in its proper place should not wait on the judiciary. Instead, the political branches should do what is necessary to scale back their usurpation of state power.

Any rational approach to a reduction of federal criminal legislation requires a comprehensive look at the entire federal criminal code. In the late 1960s, a congressional commission was formed to suggest potential reforms of the criminal code.221 Given the vast growth in federal law since that time, another commission should be convened and

authorized to conduct a thorough review of the federal criminal code, and to recommend revisions.222 Each statute should be examined for a constitutional basis,223 and a distinct federal interest protected by the law which is not adequately protected by state laws. Further, no federal legislation dealing with a problem best handled by the states should remain.224

The best starting place for such an examination is with the Criminal Code of 1948. While most of that Code covers subjects appropriately within federal legislation, there are several sections that needlessly duplicate state laws, such as those protecting banks225 and those protecting goods affecting interstate commerce.226 These sections, and any law passed since 1948 on these two subjects, should be repealed.

The major changes since 1948 have involved, for the most part, "multiple jurisdiction" crimes, such as gambling and criminal activities that involve individuals or conduct spread across multiple states.227 Underlying each of these laws is the assumption that, even though the "federal" element of the offense is roughly the same for all, the differences in the "non-federal"
elements require different penalties. Thus, there has been a multitude of statutes enacted to cover a handful of federal interests. These laws should be repealed and replaced with a fewer number of statutes covering respectively: 1) interstate flight to avoid prosecution, testifying,228 or enforcement of a civil judgment;229 2) interstate travel with the intent to violate a state law during the commission of a crime, or during the transportation of a second party with the intent to violate a state law;230 3) the use of interstate commerce to violate or aid in the violation of a state law;231 and 4) the use of interstate commerce to move or dispose of the proceeds or evidence of a criminal activity, including stolen property.232

On the other hand, certain offenses, such as those covered by the current "multiple jurisdiction" statutes, should be made either exclusively federal or left to the states in their entirety. These statutes create the so-called "vice offenses."233 The federal government is authorized to regulate these areas pursuant to its power over all production and commerce. These current statutes, however, needlessly duplicate state statutes. Jurisdiction should be given to either the federal government or the state governments, but not both.

Lastly, state crimes should not be federalized by the spurious addition of a federal element. The federal statute on blackmailing, which criminalizes using information about a federal offense for extortion purposes, is a clear example of overreaching by the federal government.234 These offenses are state crimes that can be adequately handled by the states.

The final step in any reform of federal criminal law must focus on efficient allocation of resources. A restricted role for substantive federal law does not alleviate the larger problems facing society. It will alleviate some of the problems, however. For example, state prison space would be freed if enforcing laws against the manufacture and distribution of controlled substances were entirely a federal concern.235 However, the

main problem will still be the lack of resources. Barring a decision, probably at the federal level, that would increase the discretionary funding available to all levels of law enforcement, there is a dramatic need for statutory provisions enabling more efficient cooperation between the federal and state governments.

II. Forming a More Perfect Union and Establishing Justice: Popular Sovereignty and Criminal Procedure

Modern scholars have charged that the judicial process is isolated from the People.236 Except where the government is a party to a lawsuit, the role of the People in the judicial processes is all but ignored.237 Examining the criminal justice system from the perspective of popular sovereignty alters this traditional misunderstanding of the relationship between the judiciary, the government, and the People. A new understanding can be gained by examining the impact of the concepts of popular sovereignty on such traditional constitutional issues as the exclusionary rule, the jury selection process, and double jeopardy.238

A. The Exclusionary Rule: The Problem of Rogue Agents

At certain stages of English history, the practice of conducting a search, either with a general warrant or without any warrant whatsoever, was legally permissible.239 Likewise, it was normal for a conviction to rely in large part on the con fessions of the accused, sometimes gained only by repeated questioning.240 Prohibitions against such practices in the Constitution reflect the gradual movement of English Law away from these practices.241 Before the development of large police forces, these limitations were scrupulously followed.242 In the twentieth century, police forces have occasionally violated these constitutional principles. Given that these protections against law enforcement abuses exist, and leaving to others the argument over whether these norms should be eliminated, the question for the purpose of this discussion becomes the proper means to enforce these protections.

The method of enforcement, adopted on policy grounds by the Supreme Court, has been the exclusion of the illegally obtained evidence or confession.243 The rule has been justified on the ground that it deters efforts to illegally gain evidence by punishing the government.244 Also, the rule has been said to derive from principles of equity; the government should have "clean hands," and the judiciary should not participate in illegal acts.245

The deterrence theory of the exclusionary rule is the least credible. For the theory to work, those in government, especially the police, would have to be in some way harmed by the exclusion of evidence. While the exclusionary rule may encourage police departments to train police officers in certain procedures and "magic words" that will constitutionalize otherwise unconstitutional searches, no person on the police force, from the local district attorney down to the newest rookie, feels that his or her career will be harmed if evidence is illegally gathered in a specific instance.246 For the deterrence theory to work, the officer walking his beat would have to believe that making a

questionable seizure, or arguably coercing a confession, could result in suspension, a monetary penalty, or the loss of promotion opportunities.247 To the extent these punishments exist, it is by virtue of the rules of the agency employing the officer, not the exclusionary rule. Thus, any deterrent effect the exclusionary rule man engender is negligible.248

The alternative justification emphasizes equitable justice. According to this theory, the exclusionary rule serves as an equitable remedy for the violation of an individual's rights.249 Employing this justification creates several consequences. First, where an illegally-obtained confession has been excluded on equitable principles, and a defendant subsequently perjures herself by contradicting an earlier statement, the concept of "clean hands" requires that she lose the entitlement to have the confession excluded. Under these circumstances, the prosecution should be permitted to use the confession to rebut the accused's perjured testimony.250 Second, an individual is entitled to the exclusion of evidence gathered in a warrantless search only if he owns the property that was searched.251 If the property belonged to somebody else, it was that person's ownership rights that were violated; only the owner is entitled to relief from that injury.252

The equity theory is subject to criticism on the basis that it replaces one injustice with another and, thus, is itself inequitable.253 The exclusionary rule theoretically allows a guilty defendant to escape justice because of police misconduct. The inequity of the rule is amplified in those situations where the defendant lacks clean hands. There should be some alternative form of remedy, such as an action in tort, available to aggrieved parties.

In contrast to these theories, the theory of popular sovereignty provides a different justification for the exclusionary rule. To understand the impact of popular sovereignty on the "rights" of defendants, two elemental concepts are crucial. First, the state's interest in any case is defined not by a particular officeholder or attorney who decides to file the suit. Instead, it is defined by the laws of the state that officer seeks to enforce.254 These officeholders are effectively acting as fiduciaries protecting the interests of the sovereign people, rather than as individuals bringing legal action to enforce an individual right.

Second, officeholders are agents of the People.255 Ordinary principles of agency law teach us that an agent only functions as an agent when acting within the limits of the grant of authority given by the principal.256 When the agent exceeds his authority, he is no longer acting as an agent, but rather is acting on his own behalf.257

In the case of criminal law, the People have allowed various agents, such as legislative branches at all levels of government, to define the interest that government officials are to protect. The People have also conferred extensive discretion upon agents, at both the state and federal level, to choose the statutory and procedural mechanisms necessary to protect those interests. There are several exceptions, however, like the Fourth Amendment, whereby the People have dictated that certain law enforcement methods should be forbidden. Thus, when a police officer violates the Fourth Amendment, he is no longer acting within the bounds of his authority as an appointed agent of the People, but rather as an individual committing a criminal act. When a prosecutor attempts to use improperly

obtained evidence in a case, she likewise is no longer acting as the attorney for the People, but rather is an accessory after the fact to the officer's crime.258

In essential terms, popular sovereignty creates a paradoxical truth. The government can never violate the Constitution, because any action by a government official that is in violation of the Constitution is an individual act perpetrated without authorization. Even if such authority is claimed, the act is still legally invalid. It is not an act of the government, even though the individual may hold an official position. In short, a prosecutor cannot use unconstitutionally obtained evidence in a criminal case, because only the government can prosecute a criminal case, and, if the prosecutor attempts to use such evidence, that prosecutor is acting as an individual and lacks any legal authority to prosecute.259

This general perspective on the exclusionary rule sheds new light on various subissues related to the doctrine. First,
an agency approach to the exclusionary rule will probably not alter the law regarding a warrantless search.260 Although, the language of the Fourth Amendment seems to suggest that all searches should be conducted pursuant to a warrant, an examination of the written instructions to government agents contained in the Fourth Amendment supports two distinct rules. If it is realistically possible to obtain a warrant, no search or seizure shall be made without one. If it is not realistically possible to obtain a warrant, a search may be conducted without a warrant if the law enforcement officer has probable cause.261 A logical application of agency concepts to searches and seizures would require a constant reappraisal of the reasonable possibility of obtaining a warrant. As technology increases, it is now possible to obtain a warrant under circumstances that would have been impossible in the past. While a court would be exceeding its constitutional mandate by dictating one method for obtaining search warrants over another, that same court would be well within its jurisdiction if it excluded evidence obtained from warrantless searches where a warrant could have been issued but for the refusal of local governments to fully utilize reasonably available technology.262

Second, under an agency view of the Fourth Amendment, there is no justification for a "good faith" exception to the exclusionary rule.263 Courts have developed the exception to apply to cases where an officer acted in a good faith belief that a warrant was valid, even if that warrant is later shown to be invalid.264 There are essentially four reasons why a search or seizure may be invalid. As shown below, in none of these categories can a "good faith" exception be rationally created to validate an otherwise unauthorized search or seizure.

The first category, technically invalid warrants, includes those warrants that are supported by probable cause, and adequately describe the place to be searched and the items that or being sought or the person to be arrested, but which contain some other minor or technical error. While one always hears anecdotes about courts throwing out evidence because a comma was missing or a word was spelled incorrectly, to the best of this author's knowledge there has never been a decision by the Supreme Court holding such search warrants to be invalid. The Fourth Amendment does not create a particular

form to be used in warrants, and, thus, there is no reason why a court should actually hold that these types of typographical errors invalidate a warrant. No good faith exception is necessary here.

The next category, legally invalid warrants, are those warrants that contain an error that is sufficiently severe to invalidate it. For example, the warrant may fail to clearly describe with particularity the place to be searched, the items being sought, or the person to be seized.265 This particularity requirement comes from the common law, which disfavored general search warrants.266 While a rule holding such searches improper would result in some evidence being excluded, these errors are clearly preventable. Without a warrant clearly authorizing the search, and unless the search fits into a "warrantless" exception, the officers are not acting as agents of the government; the government may not "ratify" this search after the fact by using the evidence at trial.267

Warrants that are withdrawn or quashed pose a unique problem that primarily affects arrest warrants. Traditionally, search warrants have been executed with close coordination between those officers who have served the warrant and those who execute it. Typically speed has been of the essence in the execution of search warrants. Thus, they are normally executed before anyone could challenge them or have them withdrawn.

Arrest warrants are of a different breed. Like search warrants, police usually attempt to execute arrest warrants quickly, but when the subject of that warrant cannot be found, the warrant is placed on a list of wanteds. This list is sometimes shared with neighboring police agencies, or in more serious cases, with an even wider group of law enforcement agencies. In modern times, these warrants are typically entered onto a computer network. However, the process of removing names from these lists when the warrant expires lags behind.

Recently, in *Arizona v. Evans,* the United States Supreme Court addressed this issue.268 In *Evans,* the local court failed to take steps to remove Evans' arrest warrant from the computer system. Law enforcement officers innocently executed the state warrant. The prosecution defended the search subsequent to arrest based on the good faith exception to the exclusionary rule. The state argued that the admission of illegally-seized evidence at trial was not an independent violation of the Fourth Amendment. Further, it argued the key purpose of the exclusionary rule was the deterrent effect, which would not be served if evidence innocently obtained were excluded. 269 As there was no fault on the part of law enforcement officials, the majority in *Evans* believed that excluding the evidence would have no deterrent effect on law enforcement officials.

Under the theory of popular sovereignty, the reasoning in *Evans* is completely wrong. The prosecutor's attempted admission of illegally-seized evidence at a trial is itself a violation of the Fourth Amendment. Deterrence has little or nothing to do with the exclusionary rule. Rather, the test of whether evidence should be excluded is whether the search was reasonable and whether the goals of the Fourth Amendment were fulfilled. In the *Evans* circumstance, the law enforcement community complied with the Fourth Amendment; they were instructed to conduct an arrest that apparently was valid, which at

one point was actually valid. The judiciary was at fault for failing to notify the law enforcement community that the warrant was no longer valid. In that limited circumstance, especially given the need of law enforcement officials to be able to rely on their good faith compliance with the requirements of the Fourth Amendment, it would be unreasonable for a court to find that the amendment had been violated. If law enforcement agents had been instructed to remove the warrant from the computer system, the fault would have fallen upon the law enforcement community. Under these circumstances, the
Fourth Amendment would be violated by an arrest based on a withdrawn but unretired warrant. The fruits of such an arrest would have to be excluded.

The last category, substantially invalid searches and arrests, are those where the officers erroneously believe there is probable cause supporting their actions. In the case of warrantless actions, it is clear that any evidence gained should be excluded. Under those circumstances, the law enforcement officer is relying on his own authority, hoping a court will later find he acted within the authority properly delegated to him.

The more difficult case is when a warrant is issued without sufficient probable cause. To a limited extent, the law enforcement community has acted within the limits of their authority. The officer serving that warrant does nothing wrong. Reviewing courts should defer to the decision of a neutral magistrate that a warrant should issue. Warrants, however, are typically issued in *ex parte* not adversarial hearings. Thus, defense attorneys may challenge the application for the warrant, when these weaknesses should have been raised by the neutral magistrate. In reality, probable cause is a low threshold; if the case has been properly investigated, the defendant will rarely be successful in arguing there was insufficient cause for the warrant. In those rare cases where probable cause is lacking, it should have been clear to the officer requesting the warrant that she was taking a substantial risk the warrant would be rejected at a later date, and any evidence gathered therefrom would be excluded.

In short, the question with all searches and seizures is whether the act is constitutionally authorized. The warrant must be sufficiently clear and particular. The search or seizure must be supported by probable cause. If the search is not constitutionally authorized according to these standards, no amount of "good faith" can create the authority to conduct the search. Under an agency theory, evidence gained illegally must be excluded regardless of the intentions of the individuals seizing that evidence. At best, good faith is merely a defense to any criminal charges which may be filed against the police officers who conducted the illegal search.

The third area is the Fifth Amendment privilege against self-incrimination, which is violated when an individual is compelled, directly or indirectly to give testimony against herself. This provision of the Fifth Amendment grew out of a common law that was moving away from the use of confessions.270 In treason trials, the historical practice in England had been to confine the accused prior to trial, and to interrogate him until he incriminated himself and others. This practice forced the accused to explain away these confessions and the testimony of other witnesses at trial.271 By the time of the framing,

the use of these pretrial interrogations was considered improper.272 However, in the early part of this century, aided by manuals on the psychology of interrogation, police departments were using techniques for gaining confessions that made medieval England's techniques look subtle.273 In response to these techniques, the Supreme Court moved from first examining the voluntariness of confessions to finally requiring that the intergators give warnings to defendants.274 The one constant, at least until recently, was that improperly obtained confessions were inadmissible, except as rebuttal testimony, and that the admission of these confessions was *per se* reversible error.275

Implicit in the Fifth Amendment, however, is the concept that no person should be convicted on evidence out of their own mouth. Obviously, calling a defendant to the stand and forcing him to testify violates the Fifth Amendment. The real question is whether the Fifth Amendment bars the admission of any confession over the defendant's objection at trial. While such testimony is only indirectly forcing the accused to be a witness against himself, the Fifth's Amendment's language is relatively straightforward. From an agency perspective, an illegally-obtained confession is still an illegal confession, even after the defendant testifies. The state's lack of authority to use that confession is not cured by the defendant's taking the stand. Thus, the state should not be permitted to use an illegal confession, even on rebuttal.

The Constitution's vision of a criminal trial differs tremendously from modern criminal procedure. The technology of criminal investigations has to a large extent kept pace with the changing face of crime. Despite claims to the contrary, it is possible to effectively operate a criminal justice system that does not seek confessions, but does jump through the proper hoops before conducting a search. An agency perspective on criminal procedure would require the exclusionary rule to be applied to all illegally-gained evidence without exception. This is not to suggest that this perspective would not prohibit proper investigations, that would include asking questions of individuals who may know something,276 and conducting searches when those searches are supported by evidence.277

B. Jury Selection: Public Citizens Participating in Judicial Processes

In his ground breaking article, *The Bill of Rights as a Constitution,* Professor Akil Amar noted that the jury is a mechanism by which the People participate in the judicial branch of government.278 This view of the jury as an institution of popular sovereignty should inform the form of permissible challenges in the jury selection process.

1. Challenges for Cause: Should Public Citizens be Punished?

The Supreme Court has declared that all challenges for cause based on juror bias should be considered similar.279 An examination of this statement in light of the principles of popular sovereignty reveals that it is clearly erroneous. Challenges for cause are of three types: technical challenges; those based on personal bias of the prospective juror; and those based on ideological bias. The theory of popular sovereignty demands that each of these categories be analyzed differently.

There are a certain number of statutorily-required prerequisites a potential juror must fulfill in order to qualify for jury service. For example, a typical requirement is that all members of the qualified venire come from the district in which the court sits.280 While in some sense it is fair to say that every jury represents the community from which it is drawn, there is a substantial difficulty in defining that community. Local residency requirements may invalidate a person from serving on a particular jury, but do not utterly prohibit that person from serving on a jury elsewhere.

Other technical requirements actually do exclude people from jury service altogether. Some of these requirements involve the individual's mental capacity or other abilities necessary for comprehension of the evidence.281 Other rules exclude persons employed in certain occupations, such as those who are already involved in the judicial system, or those who serve other functions essential to the community.282 All of these rules are theoretically neutral regarding the outcome of any particular case, and only the rules eliminating certain occupations are questionable from the point of view of popular sovereignty.283

Challenges excluding jurors for personal or ideological bias are brought in order to prevent a distorted outcome in the case. In theory, bias interferes with the accurate performance of one or more jury functions. Under popular sovereignty, a jury serves multiple functions. First, and most obvious, a jury serves as the finder of fact. Second, the jury represents the People. Implicit in this representation is that, as a deliberative body representing the People, the jury is a legislative body equivalent to the regular legislature from which comes the right of jury nullification. Third, serving on a jury educates its members on civic problems, and exposes citizens to the views of fellow members of the community.284

Personal and ideological bias affect these purposes differently. Personal bias consists of favoritism toward a particular individual (a witness, attorney, or party in the case). In theory, a venireperson with a personal bias is more likely to believe or disbelieve some of the evidence presented in the case on the basis of personal proclivities. Personal bias distorts the fact-finding role of the jury. This venireperson, if selected to serve on the jury, may become an additional and uncontradicted witness for one side during jury deliberations.285 Even if this juror does not share his personal knowledge about the involved individuals during deliberations, it is likely the bias will distort that juror's fact-finding.286 Since personal bias has no role to play in helping to fulfill the other functions of the jury, it serves a legitimate purpose to excuse a juror for personal bias upon a sufficient showing that the bias exists and may influence that juror's verdict.

Ideological bias raises a different concern. Jury service is one of the several duties of public citizenship.287 Implicit in the concept of a public citizen is the ideal of total immersion in the political life of society, and concern for the good of that society. A public citizen is alleged to be informed and have a considered opinion on major issues facing society. He has taken, at the very least, a general position on plea bargains, turning state's evidence, the honesty of the police and local prosecutors, the insanity defense, self-defense, racism, sexism, the death penalty, and public corruption, to name a few of

the "political" issues that pervade the judicial system. While some may expect civic virtue to be rare, the political and legal system should encourage this virtue rather than treat it as something to be avoided.

Admittedly, positions on issues such as these may have an impact on the ability of such a juror to accurately find the facts in a case. This is especially true if the ideological bias reflects on the honesty of certain witnesses.288 Just as likely, these positions could influence the law a juror will apply in the case. Popular sovereignty, rather than being concerned about this second aspect, welcomes it. To represent the community and truly deliberate, a jury must have the views of the entire community among its members, or at least a fair sample. A jury in which one member thinks police are "pigs" and another buys tickets to the policemen's ball, is more likely to seriously deliberate over the accuracy of police testimony than a jury composed only of people who vaguely trust the police. Likewise, divergent views on the death penalty or the insanity defense would increase deliberation over those issues when relevant. Automatic exclusion of one side or the other prevents the jury's decision from truly representing the will of the community. In addition, divergent views further the educational function of jury service.

Based on these concerns, exclusion for ideological bias should be the exception rather than the norm. It is legitimate to require jurors to fairly consider both sides of a case. It is not legitimate to require a jury to commit to a particular verdict upon particular facts, especially when the instructions do not require that verdict. Anything beyond these minimal requirements would interfere with the ability of the jury to accurately represent the community in the jury room. The jury is no longer a vehicle for popular participation in the judicial process when a significant portion of the People is subject to challenge for cause because of ideological beliefs.

2. Peremptory Challenges: The End of the World as We Know It

In 1986, the Supreme Court dramatically altered criminal procedure by making it easier, in some circumstances, to quash peremptory challenges.289 Since then, the decisions of the Court have confirmed that the right to a non-discriminatory jury selection process belongs to the venirepersons, not to a particular party.290 These decisions, like the entire perspective of popular sovereignty, recognize that rights that belong to a larger group, paradoxically, may be best enforced by individuals seeking the benefits of those rights.

The recognition of the rights of venirepersons, while currently based on equal protection, can be better understood
under the theory of popular sovereignty. When an attorney peremptorily strikes a juror based either on that juror's declared ideological beliefs or on an attorney's assumptions regarding that juror's beliefs, the strike distorts the representativeness of the jury. Popular sovereignty requires a jury that is a fair sample of the community.291 The right of the People to participate through the jury in the judicial system is necessarily implemented by using a non-discriminatory and rational selection system both in generating the original venire and in reducing that venire to the actual jury. To protect this system from

attempts by one party to manipulate the selection process, it is necessary that the other party have the right to object to improper selections.

At its root, however, the peremptory challenge system is discriminatory, arbitrary, and capricious. Traditionally, a peremptory challenge is one made without need of any justification.292 The implicit justification behind each challenge, and behind the system as a whole, is to eliminate venirepersons who are most likely to believe the other side. Such a process, especially when three or more challenges are given to each side after challenges for cause have already eliminated the most extreme members of the venire, eliminates a large portion of the community. The result of such peremptory challenges is a jury whose views are closest to the median members of the community, rather than a jury which represents the views of the full community. As such, the very concept of peremptory challenges clashes with the underlying principles of popular sovereignty, as applied to the jury system.

An interpretation of the jury clauses based on popular sovereignty requires the abolition of peremptory challenges. Judges from diverse backgrounds are already reaching the same conclusion solely on the basis of current equal protection doctrine.293 Given the variety of groups entitled to some form of protection higher than a rational basis analysis under current law,294 the continued use of peremptory challenges begs for civil rights suits.

Presuming, for the sake of argument, that some form of traditional challenge is necessary to compensate for erroneous refusals to strike for cause, a system of quasi-cause challenges may be constitutional under a theory of popular sovereignty. Such a system would retain a limited number of additional challenges to be used to strike venirepersons who had not been struck for cause. The main change from the status quo in such a system would be a set of legislatively-created reasons resembling current justifications of challenges for cause.295 Where a challenge for cause requires convincing the judge that a venireperson is not qualified, a quasi-cause challenge would merely require the challenges to produce some evidence supporting the suspicion that a venireperson is subject to being struck.296 If properly administered, a quasi-cause system would allow the parties to strike those arguably unqualified jurors for cause, while preserving a highly-diversified jury.

Under the theory of popular sovereignty, the jury is a quintessential assembly of the People.297 To avoid distortion of the community in the composition of the jury, the current procedures must be changed. The jury must represent a fair sample of the community to perform its law-finding and educational functions.

C. Double Jeopardy: Competing Claims of Sovereignty

One of the few remaining exceptions to the protection of the Double Jeopardy Clause is the doctrine of dual sovereignty.298 As this doctrine is implicitly based on a theory of state sovereignty, it conflicts with the theory of popular sovereignty.

The argument for allowing both the state and the federal government to prosecute an individual for practically the same crime is relatively simple. According to the argument, the individual state and the federal government have separate interests that justify these multiple prosecutions.299 The same argument, however, could be made for separate counties within the same state. The distinction made by the courts has been that the relationship between the states and the federal government is qualitatively different from the relationship between the states and its political subdivisions.300 Under the current doctrine, the states are seen as separate sovereigns from each other and the federal government, whereas the counties and cities are merely subdivisions created by the states.301

This theory is historically flawed. While the states may have been sovereign before the framing of the Constitution,302 this sovereignty was surrendered upon ratification of the Constitution.303 Under popular sovereignty, the states are merely subdivisions of the nation, and counties and cities are merely further subdivisions of the political whole.304

An examination of the implications for popular sovereignty of a dual sovereignty exception confirms this position. Under the perspective of popular sovereignty, one of the main reasons for protecting individual defendants is the need to protect the right of the People to organize into political movements.305 Those individuals currently in power could see these movements as personal threats and use the criminal law to harass political opponents.306 These procedural protections hinder the use the criminal law as a political weapon.307 As it is sometimes difficult to distinguish between a political trial and an ordinary trial, the protections extend to all defendants.308

From the point of view of the criminal defendant being harassed for his political positions, it makes no logical difference whether, after being acquitted on state charges, the second trial charges him with the same state offenses or the equivalent federal offenses. Likewise, if the defendant is charged with federal offenses, it makes no difference to the defendant if the first trial at which he was acquitted took place in state court or federal court. Assuming for the sake of argument that the Double Jeopardy Clause originally applied to only federal charges,309 the underlying purpose, to prevent harassment of political opponents, would not be served if, by changing from a state court to a federal court, those in power could bring a subsequent trial. While not always true, it would have been logical for the Framers to expect that, in some areas of the country, state and federal prosecutors would belong to the same political faction. Such a political unity would foster a unity of interest in both the state and the federal government to harass the same people.

Likewise, while perhaps not constitutionally required before the Fourteenth Amendment, many states had adopted, either by state constitution or by reception statute, the equivalent of the Double Jeopardy Clause.310 Thus, before the framing of the Constitution, a second trial for the same offense was prohibited in most states.311 The Constitution requires every state to give full faith and credit to *all* judicial proceedings of other states, implicitly including criminal judgements.312 Given the common law, treating these convictions or acquittals as if they were judgments in the state considering

pressing the equivalent charge would prohibit that state from pressing those charges. Given the unified sovereignty of the entire country, a logical interpretation of the common law would have prohibited a state from trying a case after acquittal on federal charges and vice versa.313

In short, the legal theories in effect in 1800 suggest that no one at least no one who understood the relationship between the states and the national government would have seriously entertained an exception from traditional double jeopardy protection for trials involving different jurisdictions within the United States. Restoring this constitutional protection today might cause procedural problems, but none that are unsolvable.

The essential difficulty in requiring that double jeopardy rules be applied to separate state and federal trials is that no mechanism currently exists for combining state and federal charges. On the civil side, diversity jurisdiction, long-arm statutes, and state courts of general jurisdiction guarantee that all aspects of an occurrence can be litigated in one trial. A decision made in any court with jurisdiction will bind all courts, and failure to raise all claims could result in collateral estoppel or res judicata, preventing any attempt to raise those claims in a second venue. On the criminal side, the equivalent mechanisms do not exist. While not constitutionally required, federal courts have exclusive jurisdiction over federal crimes.314 For the most part, each state's courts have exclusive jurisdiction over state crimes occurring within that state.315 Only U.S. Attorneys have the authority to sign indictments or informations for federal crimes,316 while only state prosecutors and/or grand juries have the authority to initiate state charges.317

While these problems stem from deep-rooted tradition, they are not unsolvable, and a system of cooperation is possible. A model for solving some of the problems is the Uniform Child Custody Jurisdiction Act.318 That act forms the basis for deciding which state court has jurisdiction over child custody disputes. A similar uniform act could establish a procedure for determining in which court it is proper to prosecute crimes occurring in multiple states, or under both state and federal laws. While more factors are involved than in child custody cases, it should be possible to create a scheme of priority.319 Likewise, a mechanism should be implemented that would join all charges, whether state or federal, arising out of one criminal transaction.320

Lastly, and perhaps most difficult, a mechanism would need to be created to determine who would actually conduct the prosecution and which procedural rules would be used. Arguably, there is some legitimacy to a fear that a unified trial procedure could result in protecting some individuals from conviction. A sympathetic or corrupt prosecutor in one jurisdiction may be convinced to rush to an ill-prepared trial, and to an acquittal that would bar further action. However, injunctions to prevent such a trial, the creation of procedural mechanisms that would give other prosecutors the right to participate in the trial, and obstruction of justice charges against such corrupt prosecutors would adequately minimize such abuses.

In short, the procedural mechanisms to allow one unified trial of all criminal charges, which would otherwise violate double jeopardy if tried separately, could be created to

prosecute criminal cases. The current doctrine of dual sovereignty, which prevents the need to consider such mechanisms, is not historically justifiable.321 In addition, given the degree to which different states and the federal government can cooperate when they so desire, dual sovereignty is not logically justifiable. For double jeopardy purposes, the only question should be whether the defendant has already been tried for the behavior underlying the offense. If so, then a second trial is constitutionally prohibited.322

III. Conclusion

The theory of popular sovereignty alters much of the modern understanding of the relationship between the federal government, the state governments, and the People. When applied to criminal procedure, the theory radically alters the theoretical underpinnings of some of the most significant doctrines and rules of modern criminal procedure. While the large majority of these rules retain their validity under popular sovereignty, the application of these rules to particular fact patterns creates different results, and some of the rules become logically unsupportable. Likewise, by emphasizing the limited role of government, popular sovereignty even in the light of neo-federalist history indicates that the federal criminal law has exceeded its appropriate constitutional limits in some cases, and in other cases should be limited for pragmatic reasons. A true rededication to the principles of popular sovereignty and federalism could lead to a more efficient and

productive relationship between federal and state law enforcement efforts.

Assistant Prosecuting Attorney, Lafayette County, Missouri. J.D. Yale 1991. The author would like to thank the people with whom he worked for two years at the Missouri Supreme Court, especially Judge Duane Benton, for numerous discussions during the early stage of drafting about this Article and the ideas contained within it. The author would also like to thank his former professors at Yale for comments and suggestions on the general and specific ideas in this Article. Finally, the author would like to thank the Prosecuting Attorney of Lafayette County, Mr. Page Bellamy, for his friendship and support during the time they both worked with the Public Defender's Office in Sedalia, Missouri, and in their current positions.

1. The Federalist Nos. 15, 16, at 108-18 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

2. *Cf.* The Federalist No. 51, at 323-25 (James Madison).

3. *See, e.g.,* Act of June 24, 1988, Pub. L. No. 100-346, 102 Stat. 644 (codified at 18 U.S.C. § 247 (1994)) (covering desecration of religious property); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1971, 100 Stat. 3207, 3207-59 (codified at 18 U.S.C. §§ 341-43 (1994)) (covering operation of a common carrier while under the influence of drugs or alcohol); Counterfeit Access Device and Computer Fraud and Abuse Act of 1984, Pub. L. No. 98-473, § 2102(a), 98 Stat. 2190 (codified at 18 U.S.C. § 1030 (1994)) (covering computer fraud and related activities); Federal Anti-Tampering Act, Pub. L. No. 98-127, 97 Stat. 831 (1983)(codified at 18 U.S.C. § 1365 (1994)) (covering tampering with consumer products); Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1011(a), 98 Stat. 2141 (codified at 18 U.S.C. § 1366 (1994)) (covering destruction of energy facilities); Money Laundering Control Act of 1986, Pub. L. No. 99-570, § 1352, 100 Stat. 3207-18, 3207-21 (codified at 18 U.S.C. § 1957 (1994)) (covering engaging in a monetary transaction involving criminally-derived property); Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1002(a), 98 Stat. 2137 (codified at 18 U.S.C. § 1959 (1994))(covering violent crimes in aid of racketeering activity).

Each of these new federal crimes, created during a decade when the announced policy of the executive branch was to return responsibility to the states, covers a behavior that either was already covered by state law or could have been covered by state law, if a state legislature desired to criminalize such behavior.

4. While by no means an exhaustive list, some of the major rules and mechanisms that apply to interjurisdictional legal issues are those governing conflict of laws (including preemption), ancillary and pendant jurisdiction, collateral estoppel, and res judicata.

The conflict of laws regime in the various states, imperfect as any attempt at uniformity has been, plus the rules governing federal preemption of state law, allows state and federal courts to try cases in a "convenient" forum, even though the applicable law is not the law of the forum. An example of this would be if a state court in Texas tries a case in which some issues are governed by New York law, others are governed by Delaware law,

and still others are governed by federal law. *See generally* Fleming James**,** Jr. & Geoffrey C. Hazzard, Jr., Civil Procedure §§ 2.36, 2.37 (3d ed. 1985). Likewise, diversity jurisdiction and the applicable rules allow federal courts to try state law claims. *See generally id.* §§ 2.5, 2.35, at 54-56, 117-22. The rules governing pendant and ancillary jurisdiction allow federal courts to unify, if desired by the parties, all claims arising out of a single transaction. *See generally id.* § 2.7, at 61-63. Many state courts have similar rules. In short, presuming a court has jurisdiction to hear a case involving part of a transaction, it is likely all legal issues concerning civil claims about that transaction can be resolved in one court.

The rules governing collateral estoppel and res judicata, when combined with the requirement that states give "full faith and credit" to judgments in other states, U.S. Const**.** art. IV, § 1, allow one court to settle those aspects of a case that might arise in later cases. *See generally* James & Hazzard, *supra,* at 585-652. Thus, in civil cases, regardless of differences between the laws and procedures of the various states and the federal government, any court that has venue or jurisdiction over part of the case can resolve the legal differences and can issue a judgment governing the entirety of the case, with that judgment binding all courts in this country. In a criminal case, however, a case only binds courts in the same jurisdiction and, if the case affects multiple jurisdictions, each part of the case must be tried in those separate jurisdictions rather than combining the case into one court.

5. *Cf.* Terrence M. Messonnier, *A Neo-Federalist Interpretation of the Tenth Amendment,* 25 Akron L. Rev. 213, 245-47 (1991).

6. *See infra* notes 318-22 and accompanying text.

7. *See infra* notes 239-322 and accompanying text.

8. *See infra* notes 13-16 and accompanying text.

9. For example, in 1989, depending upon which statistic is used, states had custody of 11 to 15 individuals for every 1 individual under federal custody. Given that, in both 1980 and 1987, approximately half of those convicted in federal courts were imprisoned, and in 1989, two-thirds were imprisoned, one can extrapolate similar or higher proportions under the jurisdiction of state authorities because, when states are included, the number on probation is 4 times the number in prison. Thus, at least 90% of all criminal cases occur in state courts. *See* U.S. Dep't of Commerce, Economics & Statistics Admin., Bureau of the Census, Statistical Abstract of the U.S. 190-95 (Tbl. Nos. 326, 327, 334, 337 & 338)(1991).

10. As an aside, it is important to note that this fact is directly related to the growing number of crimes and individuals imprisoned at all levels. However, despite holding relatively constant at a range between 20,000 and 25,000 inmates between 1960 and 1982, the number of inmates in federal prisons practically doubled during the 1980s, with over 43,000 prisoners in the federal system as of 1989. *See id.* at 193 (Tbl. No. 334).

11. As anecdotal evidence, I offer my own experience as a law student intern, and as a lawyer working in state criminal law as a public defender and then as an assistant prosecutor. As a law student intern, I participated in a clinical program working with prisoners, mostly at the Federal Correctional Institution at Danbury. Out of the approximately 15-20 prisoners in whose representation I assisted, each was incarcerated for an offense punishable under both state and federal law. Most of these individuals were convicted of selling drugs, or in connection with stolen property, or for some type of fraud.

As a public defender, about one-third of my trials involved drug offenses or bank robbery in a rural area where there were few drug offenses or violent crimes. As a prosecutor, a substantial portion of my office's case load involves drug cases, and we have had several cases involving carjacking, and interstate flight.

Based on this experience, it is clear there is a substantial overlap between state laws and federal laws. Most federal prisoners have committed offenses that could have been prosecuted as state offenses, and a large number of state prisoners perhaps even a majority have committed offenses which could have been prosecuted as federal offenses.

12. For example, between 1983 and 1990, each Congress saw several versions of a major crime package. Each bill included far-reaching provisions that would have toughened federal criminal law. Ultimately, after two years of deadlock, toward the end of the second session, a much narrower statute was enacted that includes only some of the proposals. *See* Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789; Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181; Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207; Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, 98 Stat. 1837, 1976-2199. For further details, see Congressional Quarterly, Almanac 101st Cong., 2d. Sess 1990, at 486-95; Congressional Quarterly, Almanac 100th Cong., 2d. Sess. 1988, at 85-111; Congressional Quarterly, Almanac 99th Cong., 2d. Sess. 1986, at 92-106; Congressional Quarterly, Almanac 98th Cong., 2d. Sess. 1984, at 215-24. Among the highlights of these acts were provisions: 1) adding anabolic steroids to the list of controlled substances, Pub. L. No. 100-690, §§ 1901-07; 2) creating a federal offense for endangering human life while illegally manufacturing a controlled substance, Pub. L. No. 100-690, § 6301, 102 Stat. 4370; 3) creating federal offenses related to child pornography, Pub. L. No. 100-690, §§ 7501-26, 102 Stat. 4485; 4) creating a federal offense for the use of juveniles in drug operations, Pub. L. No. 99-570, § 1102, 100 Stat. 3209-10;
5) creating a federal offense for money laundering, Pub. L. No. 99-570, § 1352, 100 Stat. 3207-18; 6) criminalizing the sale of drug paraphernalia,
Pub. L. No. 99-570, § 1822, 100 Stat. 3207-51; 7) criminalizing the operation of a common carrier under the influence of alcohol or drugs, Pub. L. No. 99-570, § 1971, 100 Stat. 3207-59; 8) criminalizing the sale of drugs near schools, Pub. L. No. 98-473, tit. II, § 503(a); 9) federalizing several "crimes of violence," Pub. L. No. 98-473, tit. II, §§ 1001-05; 10) federalizing destruction of energy facilities, Pub. L. No. 98-473, tit. II, § 1365; 11) federalizing bank fraud, Pub. L. No. 98-473, tit. II, § 1108; 12) federalizing credit card fraud, Pub. L. No. 98-473, tit. II, § 1602; and 13) criminalizing computer

fraud, Pub. L. No. 98-473, tit. II, § 2102. The ultimate question with provisions such as these is not whether such behaviors should be uniformly criminalized, but rather whether the federal government has the authority to pass such statutes, and which level of government should be regulating these types of behaviors. For now, the important point is that all the offenses in these statutes either are or could be covered by state statutes.

13. Andrew Malcolm, *States' Prisons Continue to Bulge, Overwhelming Efforts at Reform,* N.Y. Times, May 20, 1990, at 1; Roberto Suro, *As Inmates Are Freed, Houston Feels Insecure,* N.Y. Times, Oct. 1, 1990, at A16; *cf.* Stephen Labaton, *Glutted Probation System Puts Communities in Peril,* N.Y. Times, June 19, 1990, at A1 (more hard-core offenders receiving probation); Sarah Yall, *Albany Plan Would Ease Prisoner Rise,* N.Y. Times, Mar. 13, 1992, at B1 (New York at 118% of capacity).

14. Linda Greenhouse, *Ease Load on Courts, Rehnquist Urges,* N.Y. Times, Jan. 1, 1992, at A8 (drug cases were 56% of all federal appellate cases); Michael de Courcy Hinds, *Bush Aides Push State Gun Cases into U.S. Courts,* N.Y. Times, May 17, 1991, at A1; *see also* Ralph Blumenthal, *Officials Give Mixed Review to D'Amato Gun-Crime Plan,* N.Y. Times, July 24, 1992, at B3 (discussing impact of proposals for new federal offenses on caseload).

15. Steve Y. Koh, Note, *Reestablishing the Federal Judge's Role in Sentencing,* 101 Yale L.J. 1109, 1130 (1992).

16. For example, the Koh Note compares the appropriateness of similar penalties for an immigration violation in Texas and Massachussets. *Id.* The underlying national policy of controlling the flow of immigration is the same in both districts. The difference between the districts is in the percentage of individuals from various ethnic backgrounds in the two districts, and in the intensity of effort in the two districts to find illegal immigrants. The fact that an illegal immigrant has reached an area where the search is less intense does not lessen the need for nation-wide deterrence of illegal immigration. It should be noted, however, that for other crimes this criticism (that the problem is not as serious in different places) may be appropriate.

17. By necessity, any "short" summary of the history of anything distorts reality. As such, a description of what distortion is conscious may be useful. First, being human, I undoubtedly missed several crucial statutes. Second, for the most part, amendments and further subdivisions of previously existing crimes have been ignored as irrelevant to the history of the expansion of federal criminal law. Third, more emphasis was put on the early criminal law than later criminal law. Similarly, more emphasis was put on an area when federal involvement in that area was new. Fourth, most of the emphasis was put on substantive law rather than procedural law. Finally, this history only extends through the 102d Congress.

18. *See, e.g.,* U.S. Const. art. I, § 8, cl. 10; U.S. Const. art. III, § 3.

19. U.S. Const. art. I, § 8, cl. 18.

20. Of course, one can argue about how small this jurisdiction really is. For a discussion of the limits of using the Necessary and Proper Clause to expand federal jurisdiction, see *infra* notes 158-60 and accompanying text.

21. *Cf.* The Federalist Nos. 42-44 (James Madison).

22. *See generally* 2A, 2B, & 3 Norman J. Singer, Sutherland Statutory Construction (5th ed. 1991). Particularly important to the concept of interpretation of the Constitution is the canon of "*expressio unius est exclusio alterius*." Under this canon, the listing of particular powers granted to the federal government implies that other powers were not given (except to the extent necessary and proper to the implementation of the powers given). *See* 2A Singer, *supra* at 216-17.

23. 11 U.S. (7 Cranch) 32 (1812).

24. *Id.* at 34.

25. Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V,* 55 U. Chi. L. Rev. 1043, 1047-49 (1988)[hereinafter *Philadelphia Revisited*]; Akhil R. Amar, *Of Sovereignty and Federalism,* 96 Yale L.J. 1425, 1446-48 (1987) [hereinafter *Of Sovereignty*]; Messonnier, *supra* note 5, at 225-27.

26. Not only did many, if not all, of the original states enact so-called "reception" statutes, but so did many of the subsequent states. These statutes typically adopted the common law of England as it existed at a particular, often historically significant, point in time, with that point varying from state to state some statutes did not refer to any particular date. *See, e.g.,* Ala. Code § 1-3-1 (1975) (common law of England, but no particular time); Cal. Civ. Code Ann § 22.2 (West 1982) (common law of England, but no particular time); Ga. Code Ann. § 1-1-10(c)(1)(1990)(common law of England May 14, 1776); Md. Const. Declaration of Rights art. B (common law of England July 4, 1776); Mo. Stat. Ann § 1.010 (Vernon 1969) (common law of England 4th year of reign of James I, approximately 1607). Congress has never enacted a reception statute.

27. *See* Bruce A. Ackerman, *Constitutional Politics/Constitutional Law,* 99 Yale L.J. 453, 527-44 (1989) [hereinafter *Constitutional Politics*]; Messonnier, *supra* note 5, at 242-47.

28. Act of July 31, 1789, ch. 5, § 12, 1 Stat. 29, 39.

29. *Id.* § 24, at 43.

30. *Id.* § 22, at 42; § 35, at 46.

31. Act of April 30, 1790, ch. 9, 1 Stat. 112.

32. Treason is the only crime actually created and defined by the text of the Constitution. U.S. Const. art. III, § 3.

33. *See generally* Act of April 30, 1790, ch. 9, 1 Stat. 112.

34. *Id.* §§ 19-20, at 116; §§ 29-32, at 118-19.

35. Act of February 12, 1793, ch. 7, 1 Stat. 302.

36. *Id.* § 1, at 302.

37. *Id.* § 2, at 302. There was an equivalent provision regarding the rescue of slaves. *Id.* § 4, at 305. These provisions differed in that imprisonment was part of the penalty only for helping a criminal fugitive and not for helping a fugitive slave.

38. Act of February 20, 1792, ch. 7, §§ 5, 11, 14, 16, 1 Stat. 232, 234, 235, 236; Act of May 8, 1794, ch. 23, §§ 5, 14, 16, 20, 1 Stat. 354 ,358, 360, 362.

39. Act of August 4, 1790, ch. 35, 1 Stat. 145; Act of March 3, 1791, ch. 15, 1 Stat. 199; Act of December 31, 1792, ch. 1, 1 Stat. 287; Act of July 6, 1797, ch. 11, §§ 12, 13, 14, 17, 1 Stat. 527, 530, 531, 532.

40. Act of June 5, 1794, ch. 50, 1 Stat. 381; Act of June 14, 1797, ch. 1, 1 Stat. 520.

41. Act of July 22, 1790, ch. 33, §§ 3, 4, 5, 1 Stat. 137,138; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of March 3, 1799, ch. 46, 1 Stat. 743; Act of January 14, 1800, ch. 5, 2 Stat. 6.

42. Chs. 58, 66, 74, 1 Stat. 570, 577, 596 (1798).

43. *Id.* Ch. 74, § 2. The remainder of the act deals mostly with conspiracy to overthrow the government, the ability to exclude aliens engaged in treason, and the ability to deport similar aliens.

44. Act of March 30, 1802, ch. 12, 2 Stat. 138; Act of March 3, 1804, ch. 20, § 2, 2 Stat. 262; Act of February 28, 1806, ch. 9, 2 Stat. 351; Act of April 18, 1806, ch. 29, §§ 2, 3, 4, 5, 2 Stat. 379, 380; Act of January 9, 1808, ch. 8, § 3, 2 Stat. 453; Act of January 9, 1809, ch. 5, 2 Stat. 506; Act of March 1, 1809, ch. 24, 2 Stat. 528.

45. Act of February 28, 1803, ch. 9, §§ 7, 8, 2 Stat. 203, 204, 205; Act of April 21, 1806, ch. 48, § 6, 2 Stat. 402, 403.

46. Act of March 2, 1803, ch. 18, 2 Stat. 209; Act of April 21, 1806, ch. 49, 2 Stat. 404; Act of February 24, 1807, ch. 20, 2 Stat. 423.

47. Act of March 26, 1804, ch. 40, § 3, 2 Stat. 290 (establishing a statute of limitations for certain crimes); Act of March 3, 1805, ch. 41, 2 Stat. 339 (seizure of fugitives from foreign ships in United States ports).

48. U.S. Const. art. I, § 9, cl. 1.

49. *See, e.g.,* Act of February 28, 1803, ch. 10, 2 Stat. 205.

50. Act of March 2, 1807, ch. 22, 2 Stat. 426.

51. *See, e.g.,* Act of January 11, 1812, ch. 14, § 17, 2 Stat. 671, 673 (solicitation of desertion); Act of March 3, 1817, ch. 58, 3 Stat. 370 (requiring neutrality in foreign wars by United States citizens); Act of April 20, 1818, ch. 88, 3 Stat. 447 (further requiring neutrality).

52. Act of March 3, 1825, ch. 65, 4 Stat. 115. Perhaps, the citation says as much about the Framers as the content. After 36 years, the statutes of this country barely filled three, one-part volumes of Statutes at Large. Today, each year requires a multi-part volume. Admittedly, there are differences in the complexities facing the federal government between 1820 and 1990, and appropriations bills are much longer; but, it is clear the Framers saw a relatively small role for the federal government compared to the states, which cannot be said for the individuals in Congress and the White House today.

53. *See, e.g., id.* §§ 1, 2, 3.

54. *See, e.g., id.* §§ 4, 6, 7, 8, 9.

55. *See, e.g., id.* §§ 12, 16, 17, 18, 19, 20, 21.

56. Of course, there had been some changes in federal law with the creation of new crimes, the modification of the penalties for old crimes, and some alteration of the rules of procedure. *See, e.g.,* Act of March 3, 1835, ch. 40, 4 Stat. 775 (criminalizing mutiny on the high seas); Act of September 18, 1850, ch. 60, 9 Stat. 462 (altering procedure on the return of fugitive slaves). The subject areas, however, remained the same.

57. *See, e.g.,* Act of July 31, 1861, ch. 23, 12 Stat. 284 (conspiracy to oppose the authority of the United States); Act of August 6, 1861, ch. 60, 12 Stat. 319 (forfeiture of property used in the "insurrection"); Act of July 16, 1862, ch. 190, 12 Stat. 589 (further punishing treason and rebellion); Act of February 25, 1863, ch. 60, 12 Stat. 696 (criminalizing correspondence with officials of the Confederacy); Act of March 3, 1863, ch. 81, 12 Stat. 755 (authorizing suspension of writ of habeas corpus).

58. Act of June 28, 1864, ch. 166, 13 Stat. 200.

59. *See, e.g.,* Act of April 9, 1866, ch. 31, § 2, 14 Stat. 27; Act of May 21, 1866, ch. 86, 14 Stat. 50; Act of May 31, 1870, ch. 114, 16 Stat. 140; Act of April 20, 1871, ch. 22, 17 Stat. 13.

60. *See* United States v. Harris, 106 U.S. 629 (1883); United States v. Cruikshank, 92 U.S. 542 (1875); United States v. Reese, 92 U.S. 214 (1875).

61. Revised Statutes of the U.S. of 1873, at 1037-81.

62. *Id.*

63. *See id.* at 1029-31.

64. As noted earlier, *supra* notes 28-54 and accompanying text, the early Congresses had used the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, to authorize criminal laws enforcing the regulation of commerce with foreign countries and Native Americans.

65. Cruelty to Animal Act, ch. 252, 17 Stat. 584 (1873) (regulating treatment of animals while in interstate commerce); Bureau of Animal Industry Act, ch. 60, §§ 6, 7, 23 Stat. 31, 32 (1884) (prohibiting shipment of diseases livestock in interstate commerce).

66. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887).

67. Antitrust Act of 1890, ch. 647, §§ 1, 2, 26 Stat. 209.

68. Lottery Act of 1895, ch. 191, 28 Stat. 963 (exclusion of lotteries and materials connected with lotteries entirely from interstate trade); Obscenity Act of 1897, ch. 172, 29 Stat. 512 (barring obscene materials from being shipped in interstate trade on "common carriers").

69. Act of June 29, 1906, ch. 3591, 34 Stat. 584 (expanded definition of common carrier to include pipelines); Act of March 4, 1907, ch. 2939, 34 Stat. 1415 (limited working hours of employees of common carriers in interstate commerce); Explosives Transportation Act of 1908, ch. 234, 35 Stat. 554 (barred common carriers from shipping explosives in interstate commerce on the same trip as passengers).

70. Food and Drug Act of 1902, ch. 1357, 32 Stat. 632 (required accurate labeling of state of origin for goods in interstate commerce); Pure Food Act of 1906, ch. 3915, 34 Stat. 768 (prohibited sale of adulterated, misbranded, or dangerous foods or drugs in interstate commerce); Opium Act of 1909, ch. 100, 35 Stat. 614 (barred importing opium or further distribution of imported opium except for medical uses).

71. Act of June 28, 1906, ch. 3583, 34 Stat. 551.

72. *Id.*

73. Criminal Code of 1909, ch. 321, 35 Stat. 1088.

74. As is still true today, some criminal provision were categorized as being part of other codes dealing with the subject of regulation.

75. Criminal Code of 1909.

76. These 13 headings represent the 6 chapters from the criminal law title of the Revised Statutes of 1873, some areas scattered in that code, plus some division of some of the original chapters into new chapters.

77. Criminal Code of 1909.

78. *See, e.g.,* Insecticide Act, ch. 191, 36 Stat. 331 (1910) (regulating adulterated or misbranded insecticides in interstate commerce); Act of May 6, 1910, ch. 208, 36 Stat. 350 (requiring common carriers to file accident reports); Act of July 31, 1912, ch. 263, 37 Stat. 240 (barring films of prize fights from interstate commerce).

79. Ch. 1, 38 Stat. 785.

80. Act of May 26, 1922, ch. 202, 42 Stat. 596 (previously limited to opium).

81. Child Labor Act of 1916, ch. 432, 39 Stat. 675.

82. Hammer v. Dagenhart, 247 U.S. 251 (1918) (5-4 opinion with dissenters noting that regulation only directly regulated interstate commerce). It is worth noting that *none* of the justices directly argued the federal government had the power to directly regulate manufacturing.

83. Radio Communications Act of 1912, ch. 287, 37 Stat. 302.

84. *Id.*

85. Act of February 13, 1913, ch. 50, 37 Stat. 670 (prohibited stealing from trains in interstate commerce or transporting items stolen from such trains across state lines); National Motor Vehicle Theft Act, ch. 89, 41 Stat. 324 (1919) (punishing transportation of stolen cars in interstate or foreign commerce).

86. Lindbergh Act, ch. 271, 47 Stat. 326 (1932).

87. Ch. 85, 41Stat. 305 (1919).

88. Ch. 395, 36 Stat. 825 (1910).

89. *Id.*

90. *Id.*

91. Codification Act, ch. 712, 44-1 Stat. 1 (1926).

92. *Id.*

93. *Id.* at 459-536.

94. Ackerman, *Constitutional Politics, supra* note 27, at 510-15; Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution,* 93 Yale L.J. 1013, 1051-70 (1984) [hereinafter *Storrs Lectures*]; Messonnier, *supra* note 5, at 242 nn.187-88.

95. Ch. 38, 48 Stat. 74.

96. *Id.* § 5, at 77.

97. *Id.* § 17, at 84.

98. Ch. 404, 48 Stat. 881.

99. *Id.* § 9, at 889.

100. Federal Bank Robbery Act, ch. 304, 48 Stat. 783 (1934). Uniquely, at least for 1934, this act included a provision making federal jurisdiction over this crime *non-exclusive*.

101. Federal Anti-racketeering Act, ch. 569, 48 Stat. 979 (1934).

102. Act of May 18, 1934, ch. 299, 48 Stat. 780.

103. Extortion Act (Interstate Commerce), ch. 300, 48 Stat. 781 (1934).

104. Federal Flight Act, ch. 302, 48 Stat. 782 (1934).

105. National Stolen Property Act, ch. 333, 48 Stat. 794 (1934).

106. *See, e.g.,* Fair Labor Standards Act of 1938, ch. 676, §§ 15, 16, 52 Stat. 1060, 1068, 1069 (1938). The "affecting commerce" language was used to reach employees solely engaged in production previously constitutionally prohibited. *See* Hammer v. Dagenhart, 247 U.S. 251 (1918). Under this original version of the Fair Labor Standards Act, federal jurisdiction still required that the goods be shipped in interstate commerce.

107. *See, e.g.,* Emergency Price Control Act of 1942, ch. 26, §§ 4, 205, 56 Stat. 23, 28, 33.

108. Train Wreck Act, ch. 286, 54 Stat. 255 (1940) (prohibited damaging trains used in interstate commerce); Federal Dentures Act, ch. 823, 56 Stat. 1087 (1942) (criminalized using the mail or interstate commerce to violate state laws regulating dentures).

109. Act of January 13, 1940, ch. 1, 54 Stat. 13.

110. *See, e.g.,* Prostitution Prohibition Act of 1941, ch. 287, 55 Stat. 583. This act criminalized acts of prostitution occurring "near" military bases. Obviously, the federal government has the authority to regulate the behavior of military personnel and acts occurring on federal property, such as military bases. This act went further, regulating the acts of civilians who were neither in the territories, on federal property, nor engaged in an activity traditionally subject to federal regulation. Perhaps, the Necessary and Proper Clause could be used to extend the power over federal property to neighboring areas, but such an extension seems to be a little far-fetched.

111. Criminal Code of 1948, ch. 645, 62 Stat. 683.

112. *Compare id.* at 683-84 *with* Title 18 U.S.C. (1994) (labels of parts and labels of chapters within Part I).

113. Criminal Code of 1948, 62 Stat. at 683.

114. *Id.* at 684-813. Of course, some of these sections merely defined terms, but the number of these definitional sections was relatively small.

115. *See, e.g.,* 18 U.S.C. § 656 (1994) (embezzlement by bank official); 18 U.S.C. § 2113 (1994) (bank robbery).

116. *See, e.g.,* 18 U.S.C. § 659 (1994) (theft from vehicle engaged in interstate commerce); 18 U.S.C. § 660 (1994) (embezzlement of funds of common carrier derived from interstate commerce); 18 U.S.C. § 1951 (1994) (interference with interstate commerce by threats or violence); 18 U.S.C. § 1992 (1994) (wrecking trains); 18 U.S.C. § 2117 (1994) (theft from certain vehicles engaged in interstate commerce).

117. Narcotic Control Act of 1956, ch. 629, § 201, 70 Stat. 567, 572 (apparently limited the use of heroin to research purposes); Narcotic Manufacturers Act of 1960, Pub. L. No. 86-429, 74 Stat. 55 (required registration of manufacturers of narcotic drugs); Drug Abuse Control Amendments of 1965, Pub. L. No. 89-74, 79 Stat. 226 (dealt with illicit traffic in depressants and stimulants; required registration of manufacturers of these drugs).

118. Gambling Devices Transportation Act, ch. 1194, 64 Stat. 1134 (1951) (covered shipments of gambling devices in interstate commerce, enforcing state laws on gambling); Gambling Information Act, Pub. L. No. 87-216, 75 Stat. 491 (1961) (covered transmission of wagering information in interstate commerce, enforcing state laws); Act of September 13, 1961, Pub. L. No. 87-218, 75 Stat. 492 (covered transportation of

wagering paraphernalia in interstate commerce); Gambling Devices Act of 1962, Pub. L. No. 87-840, 76 Stat. 1075 (further regulated gambling devices; included registration of manufacturers and repair persons and record-keeping); Act of June 6, 1964, Pub. L. No. 88-316, 78 Stat. 203 (bribery in sports contests).

119. Communications Act Amendments of 1952, ch. 879, § 18, 66 Stat. 711, 722 (wire fraud); Act of July 9, 1956, ch. 519, 70 Stat. 507 (federalizing swindles involving interstate commerce or travel).

120. Civil Rights Act of 1960, Pub. L. No. 86-449, §§ 201-03, 74 Stat. 86, 87. (interstate flight after damaging building or interstate transportation of devices with intent to damage building); Racketeer Travel Act, Pub. L. No. 87-228, 75 Stat. 498 (1961) (covering travel or transportation in aid of racketeering).

121. Act of October 9, 1962, Pub. L. No. 87-773, 76 Stat. 775 (transporting records with counterfeit labels in interstate commerce).

122. Pub. L. No. 90-284, 82 Stat. 73.

123. *Id.* §§ 101-04, 901-1002, 82 Stat. at 73-77, 89-92 (interstate travel with intent to cause riot).

124. Pub. L. No. 90-321, 82 Stat. 146.

125. *Id.* § 202, 82 Stat. at 159-62.

126. Act of May 3, 1968, Pub. L. No. 90-299, 82 Stat. 112.

127. Pub. L. No. 90-351, 82 Stat. 197.

128. *Id.* § 802, 82 Stat. at 212 (criminalized wiretapping without a court order).

129. *Id.* § 902, 82 Stat. at 226.

130. Pub. L. No. 91-452, 84 Stat. 922.

131. *Id.* §§ 802, 803, 84 Stat. at 936, 937 (federalizing obstruction of state laws on gambling and the violation of those laws based on the size of the gambling business).

132. *Id.* § 1102, 84 Stat. at 952.

133. *Id.* § 901, 84 Stat. at 941 (among other things, unilaterally giving the federal government power to prosecute conspiracies to violate state laws as a federal offense).

134. Pub. L. No. 91-513, 84 Stat. 1236.

135. *Id.* §§ 101-411, 84 Stat. at 1242-69.

136. Interstate Agreement on Detainers Act, Pub. L. No. 91-538, 84 Stat. 1397 (1970).

137. Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978) (criminalized child pornography when interstate commerce or travel is involved).

138. False Identification Crime Control Act of 1982, Pub. L. No. 97-398, 96 Stat. 2009 (one provision covered using a fake ID in a way that "affects" interstate commerce); Federal Anti-Tampering Act, Pub. L. No. 98-127, 97 Stat. 831 (1983) (criminalized tampering with a consumer product in a way that "affects" interstate commerce); Controlled Substance Registrant Protection Act of 1984, Pub. L. No. 98-305, 98 Stat. 221 (federalized robbery or burglary of a controlled substance from a registered person).

139. Pub. L. No. 98-473, tit. II, 98 Stat. 1837, 1976. This act was the first extensive criminal statute passed as part of an appropriations bill in the case of this statute, a continuing appropriations bill.

140. *Id.* §§ 1001, 1002, 98 Stat. at 2136 (defining violent crimes, federalizing murder for hire if the mail or interstate commerce is involved, and federalizing violent crimes in aid of racketeering activity including violations of state laws).

141. *Id.* § 1011, 98 Stat. at 2141.

142. *Id.* § 1105, 98 Stat. at 2144.

143. *Id.* § 1108, 98 Stat. at 2147.

144. *Id.* § 1111, 98 Stat. at 2149 (any theft involving the marketing of livestock in interstate commerce).

145. *Id.* § 1602, 98 Stat. at 2183.

146. *Id.* § 2102, 98 Stat. at 2190.

147. Pub. L. No. 99-570, 100 Stat. 3207.

148. *Id.* §§ 1351,1352, 100 Stat. at 3207-18.

149. Pub. L. No. 100-690, 102 Stat. 4181.

150. *Id.* § 7521, 102 Stat. at 4489.

151. U.S. Const. art. I, § 8, cl. 3.

152. RICO is one of the better examples of this merger. Under the provisions of RICO, the fact there are two state offenses *chargeable* brings the defendant's actions under the definitions of "racketeering activity" and "pattern of racketeering activity." *See* 18 U.S.C. § 1961(1)(A)(1994); 18 U.S.C. § 1961(5)(1994). Current judicial interpretation of what constitutes a racketeering enterprise indicates a broad scope of coverage under RICO. *See* Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 488-522 (1985)(no requirement of prior convictions for predicate offenses; enterprise includes any organization for which a pattern of racketeering can be proved); H.J. Inc. v. Northwestern Bell Telephone Co., 109 S. Ct. 2893, 2898-2902 (1989) (pattern requires two or more related predicate offenses demonstrating continuity or threat of continuity). When the language of the offenses constituting racketeering activity and the interpretation of what is a pattern and what is an enterprise are combined, a large portion of continuing conspiracies to violate state laws could be RICO offenses.

Other federal laws closely parallel state laws, with only minor and commonly applicable elements added to make the offense federal; there are proposals for additional federal laws of this type. Essentially, it is becoming extremely difficult to violate state law without violating federal law and vice versa.

153. Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1868).

154. Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1868); The Federalist, *supra* note 2, at 292-93; Amar, *Of Sovereignty, supra* note 25, at 1465-66.

155. A large majority of "thrift" institutions are federally insured. As of 1984, there were fewer than 1,000 commercial bank offices that were not federally-insured less than 2% of all bank offices. Even if each of these offices were the only office of the bank, 1,000 uninsured or state-insured banks would represent less than 7% of all banks. U.S. Dep't of Commerce, *supra* note 9, at 500. As of 1989, only 133 Savings & Loans were not federally-insured approximately 5% of the total of S & L's and other saving banks. *Id.* at 504. Finally, as of 1989, approximately 60% of all credit unions were federally-chartered (and thus federally-insured). *Id.* Using these numbers to develop an estimate, for most of the 1980s, at least 70% of all thrift institutions have been federally-insured, and that percentage has been increasing.

156. *E.g.,* piracy, U.S. Const. art. I, § 8, cl. 10; treason, U.S. Const. art. III, § 3.

157. *See* U.S. Const. art. I, § 8, cl. 10 (jurisdiction over crimes committed on the high seas); U.S. Const. art. I, § 8, cl. 17 (jurisdiction over District of Columbia and real property of the United States); U.S. Const. art. IV, § 3, cl. 2 (jurisdiction over territories and property of United States).

158. U.S. Const. art. I, § 8, cl. 18.

159. *Cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819).

160. For example, it can easily be argued that, in order to exercise the power to regulate interstate commerce, Congress must have the authority to exclude items from interstate commerce which do not comply with congressional regulations. Since reasonable people can disagree over which items should be excluded *e.g.,* marijuana, alcohol, and tobacco over some items there will be a disagreement between the federal government and one or more state government as to whether these items should be excluded from commerce. To enforce its decisions on which items should be excluded from interstate commerce in the face of potential state objections, the federal government needs the ability to criminalize the distribution of those items.

On the other hand, it does not logically follow that the ability to regulate interstate commerce includes the power to protect individuals and items
that may occasionally be involved in interstate commerce. Attempting to criminalize efforts to extort money from, for example, the CEO of a major corporation is better characterized as an attempt to exercise a general power over criminal law. Any claim that such a law flows from the power to regulate interstate commerce (or even the marketplace or workplace in general) is clearly pretextual.

161. In his textbook on federal criminal law, Professor Abrams lists several different approaches to analyzing the authorization for federal criminal law. Norman Abrams, Federal Criminal Law and Its Enforcement 32-62 (1986). While these approaches more accurately reflect the traditional justification given for the largest part of federal criminal law, this Article has shuffled these categories and created others to reflect what is hopefully a better approach, or at least one that is more useful for the purposes of this Article.

162. U.S. Const. art. I, § 8, cl. 10; U.S. Const. art. I, § 8, cl. 17; U.S. Const. art. IV, § 3, cl. 2.

163. *See, e.g.,* 18 U.S.C. § 81 (1994) (arson); 18 U.S.C. § 113 (1994) (assault); 18 U.S.C. § 661 (1994) (theft); 18 U.S.C. § 1111 (1994) (murder); 18 U.S.C. § 1112 (1994) (manslaughter); 18 U.S.C. § 1201(a)(2)(1994) (kidnapping); 18 U.S.C. § 1460 (1994) (possession of obscene material with intent to sell); 18 U.S.C. § 2111 (robbery).

164. U.S. Const. art. I, § 8, cl. 6; U.S. Const. art. I, § 8, cl. 10; U.S. Const. art. III. § 3.

165. For current procedures on extradition and a list of bilateral treaties entered into by the United States, see 18 U.S.C. §§ 3181-95 (1994).

166. U.S. Const. art. IV, § 2, cl. 2.

167. 18 U.S.C. § 3182 (1994).

168. 18 U.S.C. app. at 692 (1994).

169. *See, e.g.,* 18 U.S.C. § 1073 (1994); 18 U.S.C. § 2314 (1994).

170. *Infra* notes 298-322 and accompanying text.

171. First, regulation of commerce can be construed to include regulation not only of the way that commerce is conducted, but also of the actual items which may move in commerce. Second, regulation of all items can be construed to include the power to exclude items which do not comply with regulations. Third, the power to exclude items which do not comply with regulations can be construed to include the power to completely exclude those items that cannot comply with those regulations. Finally, to enforce those prohibitions and to encourage compliance, violations of those regulations can be made a criminal offense.

172. *See* 21 U.S.C. §§ 841-48 (1994).

173. *See* sources cited *supra* note 18; *see also infra* note 27 and accompanying text.

174. While, in the absence of federal preemption, a state clearly could criminalize narcotics without violating the "dormant" commerce clause, there are two major enforcement problems. First, a state cannot regulate manufacturing in another state. Second, for both financial and constitutional reasons, a state simply cannot inspect every item brought into the state to discover if the item contains illegal narcotics.

175. *E.g.,* murders committed as part of drug deals, property crimes committed by addicts to gain money to buy the drugs, other crimes committed by people "under the influence."

176. *See, e.g.,* 18 U.S.C. § 32 (1994) (destruction of aircraft); 18 U.S.C. § 342 (1994) (operation of common carrier under the influence); 18 U.S.C. § 875 (1994) (interstate communication to demand ransom); 18 U.S.C. § 1304 (1994) (broadcasting of lottery information); 18 U.S.C. § 1343 (1994) (wire fraud); 18 U.S.C. § 1362 (destruction of communication facilities); 18 U.S.C. § 1992 (1994) (wrecking trains).

177. A good example of this is wire fraud. 18 U.S.C. § 1343 (1994). By definition, wire fraud requires interstate communication as part of the fraudulent scheme. Thus, at the very least, two states could claim jurisdiction over the crime, with only part of the evidence being in each of these multiple states.

178. *See, e.g.,* 18 U.S.C. § 33 (1994) (destruction of motor vehicle); 18 U.S.C. § 1362 (1994) (destruction of communication facility).

179. For example, many of these incidents will involve arson and/or assault. It is highly unlikely that a state would distinguish between arson committed on a building owned by a nonresident and arson committed on a building owned by a resident. Even if a state tried, such a distinction would violate numerous constitutional provisions. Furthermore, in most cases, the arsonist would be a threat to both residents and nonresidents.

180. 18 U.S.C. § 241 (1994); 18 U.S.C. § 242 (1994).

181. "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both...." 18 U.S.C. § 242 (1994).

182. It is difficult to imagine a state that would refuse to pursue an assault or other common crime merely because the victim was from another state. While nonresidents are sometimes targets of crime because they look lost and confused, most criminals do not inquire into the residence of their victim. Thus, there is an incentive to catch the criminal and convict her regardless of who the victim was.

183. For example, this law could be used to prosecute members of groups dedicated to harassing abortion patients or members of groups dedicated to harassing individuals who peacefully protest abortion clinics. In both cases, it is unclear that state prosecutors or police officers could be charged with depriving either abortion patients or peaceful protestors of their constitutional rights under color of law for refusing to enforce state laws against those individuals doing the harassing, even if such harassment became violent.

184. While the traditional solution to this problem has been the creation of a federal offense, it is possible a procedural solution giving federal officers power to enforce state laws would also work.

185. *See, e.g.,* 18 U.S.C. §§ 111, 112, 115 (1994)(assault against federal officials, foreign officials, and family members of such officials); 18 U.S.C. §§ 871, 878, 879 (1994)(threats against the President, potential successors, former Presidents, Presidential candidates, and foreign officials); 18 U.S.C. §§ 1114, 1116 (1994) (murder of federal personnel and foreign officials).

186. U.S. Const. art. I, § 8, cl. 18.

187. *See, e.g.,* Ala. Code § 13A-5-40 (Supp. 1995) (making murder of certain state and federal officials a capital offense); Cal. Penal Code Ann. § 190.2 (West Supp. 1996)(creates death-eligibility for murder of certain state and federal officials); *cf.* N.Y. Penal Law Ann. § 125.27 (McKinney 1996) (murder of peace officers is murder in the first degree, but no difference in the penalty between murder in the first degree and murder in the second degree, at least prior to 1995).

188. Prior to 1995, the maximum penalty in New York for any offense was life with the possibility of parole. N.Y. Penal Law Ann. § 70.00 (McKinney 1987).

189. Events of the past several years make it clear that government installations are subject to attack by enemies both foreign and domestic. Furthermore, these attacks are

broadcast to a global audience within minutes, making the attackers instant heroes to their fellow travelers. Given the ability of these groups to choose their target and the wide range of explosive devices including atomic devices available for their use, the federal government should not be required to rely on state law for protection.

190. The Constitution gives Congress the power to tax and spend for the common defense and the general welfare. U.S. Const. art. I, § 8, cl. 1.

191. *See, e.g.,* 18 U.S.C. §§ 286-89 (1994)(false claims against United States); 18 U.S.C. § 371 (1994)(conspiracy to defraud United States); 18 U.S.C. § 641 (1994)(embezzlement of United States property); 18 U.S.C. § 1031 (1994) (major fraud against the United States).

192. *See, e.g.,* 18 U.S.C. § 245(b)(1)(B&E) (1994)(act of violence against those participating in any program run by or receiving funds from the United States); 18 U.S.C. §§ 656, 657 (1994) (embezzlement from federally-insured financial institutions); 18 U.S.C. § 1344 (1994)(bank fraud); 18 U.S.C. § 2155 (1994)(destruction of national defense premises).

193. There are two different types of concerns that could justify this protection. First, there is a concern about crimes designed to frustrate the purpose of the federal funding. For example, the federal government provides funding for a wide variety of scientific research. Either because of the purpose of the research or the methods used, some of these research programs face opponents who may be willing to take action to interfere with this research. Depending on the importance of the research, the federal government may feel the need to provide more protection to these projects than state laws on trespassing, destruction of property, arson, or burglary currently give.

Second, there is the concern about the need to spend more federal money to cover losses suffered by the recipients of federal funding. While this argument, at first glance looks legitimate, the need to minimize avoidable federal spending is a slight concern compared to the state interest in preventing crime in the first place.

194. An exception to this general fact may be those criminals who steal items like social security checks. Even with those items, it is more likely the victim is chosen based on his perceived helplessness rather than the source of his funds. Likewise, the researcher subjected to various forms of harassment by opponents of that research is being harassed for performing the research rather than for accepting federal funds.

195. These statutes cover the actual operation of the branches of the federal government, such as government ethics, the integrity of the judicial process, and the integrity of congressional investigations. *See, e.g.,* 18 U.S.C. § 201 (1994)(bribery of government officials and witnesses); 18 U.S.C. § 402 (1994) (criminal contempt); 18 U.S.C. § 1504 (1994)(influencing juror by writing); 18 U.S.C. § 1505 (1994)(obstruction of proceedings before any agency or before a committee of Congress); 18 U.S.C. § 1621 (1994)(perjury).

196. A prime example of this type of legislation would be the White-Slave Traffic (Mann) Act., Ch. 395, 36 Stat. 825 (1910). While fleeing across state lines to prevent capture for criminal activity is an appropriate subject for federal legislation, the original version of the Mann Act did not consider whether the activity was criminal in any of the states in which the offender was traveling. The current statute covering this subject is limited to those sexual activities which are also criminal activities. 18 U.S.C. § 2421 (1994).

197. *See* sources cited *supra* note 27.

198. U.S. Const. art. IV, § 4.

199. To offer anecdotal evidence from my service as a public defender, I had a female client accused of felony stealing. This woman had several prior felony offenses of the same type. Based on her record, the judge felt she deserved a prison sentence. Based on his discussions with the local probation officer, the prosecutor knew this defendant would be paroled shortly after she began serving her sentence. Under these circumstances, the prosecutor felt more control could be exercised over this defendant at a lower cost by placing her on a lengthy term of probation. In the end, the judge sentenced this defendant to a prison sentence, but everyone, including the defendant, knew this sentence was a farce.

200. For example, even though it is technically an offense in most places, no prosecutor is going to file gambling charges against someone for running an office pool. Other prosecutors may, rightly or wrongly, de-emphasize domestic violence. The key point is that these decisions are made based on the political beliefs of the prosecutor, who runs the risk of being thrown out of office if there is substantial opposition to those beliefs among the public at large.

201. An example of this type of decision may be found in states that still retain laws against consensual sodomy. There may be sufficient political pressure to prevent the repeal of these laws, but there is also sufficient political pressure to prevent any attempt to enforce these laws.

202. Currently, the only federal law on the books that clearly applies to corruption by, or efforts to corrupt, state officials is limited to obstruction of state laws in connection with an illegal gambling operation. 18 U.S.C. § 1511 (1994).

203. For a previous discussion of what this author means by the term "New Deal Economic" powers, see Messonnier, *supra* note 5, at 242-47. Upon further consideration, and another look at the disputes of the era leading up to that crisis, the best way to envision the expansion of federal powers during that era would be to imagine that the Commerce Clause had been amended to read: "[The Congress shall have power] to regulate all commerce and production in both goods and services." Beside expanding the commerce power to include production, this amendment would also have eliminated the restrictions limiting Congress to interstate activities. Court decisions since 1937 have, by

use of terms such as "affecting interstate commerce," implemented this unwritten amendment.

204. 18 U.S.C. §§ 891-94 (1994).

205. *See, e.g.,* 15 U.S.C. § 77e (1994); 15 U.S.C. § 77q (1994); 15 U.S.C. § 77x (1994); 15 U.S.C. § 78i (1994); 15 U.S.C. § 78j (1994); 15 U.S.C. § 78ff (1994).

206. *See, e.g.,* 18 U.S.C. § 1961(4) (1994); 18 U.S.C. § 1962 (1994).

207. For example, large-scale stock fraud tends to have a multitude of victims, with almost every state including some victims. Thus, there is a legitimate argument that only the federal government can accurately weigh the damage to society. Likewise, corruption at higher levels of unions that is the national leadership implicitly affects more than one state.

208. *See supra* notes 172-75 and accompanying text.

209. *Cf.* United States v. Lopez, 115 S. Ct. 1624 (1995) (holding that Congress lacked power to regulate possession of handguns within 1,000 feet of a school).

210. Ralph Blumenthal, *supra* note 14; David Johnston, *In Justice Dept. Of the 90's, Focus Shifts from Rights,* N.Y. Times, Mar. 1, 1991, at A1 (discussing growing focus by Department of Justice on criminal law); Clifford Krauss, *Senate Republicans Announce New Campaign for Anticrime Bill,* N.Y. Times, Mar. 4, 1992, at A14; Neil Lewis, *Bush Urges Quick Action on Crime and Other Areas,* N.Y. Times, Mar. 7, 1991, at A5; Charles E. Schumer, *Bush, Not Congress, Is Soft on Crime,* N.Y. Times, Feb. 1, 1992, at 21.

211. *Transcript of the Second Debate Between Bush and Dukakis,* N.Y. Times, Oct. 14, 1988, at A14.

212. *E.g.,* drugs, the existence of a "permanent underclass," young adults raised without any sense of moral responsibility or self-discipline.

213. Urban government faces the ultimate economic problem of multiple claims on scarce resources. City governments are creatures of state statutes and state constitutions, with only those powers to raise funds granted by those state authorities. In many cases, the major urban centers have defined boundaries with no potential to annex additional territories. Inside the territorial boundaries, these city governments face an increasingly mobile tax base. As a result of these factors, local governments have very few options for increasing revenue to better meet the demands placed on them. Simultaneously, these demands are increasing. Urban governments (whether the city government themselves or other political units sharing the same space, such as school districts) face a crumbling infrastructure, unfunded federal mandates to reduce air and water pollution, and an education system desperately in need of modern equipment. In addition, there are the traditional concerns of fire protection, community health programs, garbage collection,

and the like. On top of these problems, the growing rate of crime is just one more crisis that has to take its place in line.

214. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

215. *Cf.* Exec. Order No. 12,612, 3 C.F.R. 252 (1987) (emphasizing desire in legislation and regulation to defer to local authorities when possible).

216. 115 S. Ct. 1624, 1626 (1995).

217. "Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.* at 1630-31. "In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so that far." *Id.* at 1640 (Kennedy, J., concurring).

218. "The Constitution mandates this uncertainty [about the constitutionality of federal law] by withholding from Congress a plenary police power that would authorize enactment of every type of legislation. . . . To uphold the Government's contention [here, we would have] to pile inference upon inference in a manner that would bid fair to convert congressional Commerce Clause authority to a general police power of the sort held only by the States." *Id*. at 1633-34. "[W]e *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." *Id.* at 1642 (Thomas, J., concurring) (emphasis in original).

219. *Id.* at 1627-30, 1635-37 (Kennedy, J., concurring); *id*. at 1643-50 (Thomas, J., concurring).

220. *Id.* at 1633.

221. *See* Norman Abrams, *supra* note 161, at 65-67.

222. The charge given to this committee should make clear that, except for new offenses which would consolidate multiple offenses into one offense precisely tailored to its constitutional justification, it should not propose any new offenses or new areas for federal regulation.

223. *See supra* notes 162-209 and accompanying text; *see also* Messonnier, *supra* note 5, at 241. This review should take a very critical look at claims based on lengthy chains of implied powers.

224. This group of statutes would be those in which the federal interest in, or the federal ability to deal with, the problem so overwhelms the state interests or state ability that it makes sense to leave the problem entirely to the federal government. Some of these areas constitutionally belong to the federal government, such as illegal immigration. Other areas seem more naturally to be federal issues, such as the manufacture and distribution

of drugs though there is some disagreement and some argue, with some justification, that the federal government will not respond to local variations with sufficient urgency, especially in rural areas.

225. *See, e.g.,* 18 U.S.C. § 656 (1994)(theft by bank employee); 18 U.S.C. § 657 (1994)(theft by employees of other credit institutions); 18 U.S.C. § 2113 (1994)(bank robbery).

226. *See, e.g.,* 18 U.S.C. § 659 (1994) (theft of interstate shipments); 18 U.S.C. § 660 (1994) (theft of funds of common carriers); 18 U.S.C. § 1364 (1994) (interference with foreign commerce by violence); 18 U.S.C. § 1951 (1994) (interference with commerce); 18 U.S.C. § 1992 (wrecking trains); 18 U.S.C. § 2117 (1994) (entering locked railway car to commit theft).

227. *See supra* notes 117-50 and accompanying text.

228. Currently covered by 18 U.S.C. §§ 1073-74 (1994).

229. *See, e.g.,* Child Support Recovery Act of 1992, § 2, Pub. L. No. 102-521, 106 Stat. 3403 (codified at 18 U.S.C. § 228(1994)).

230. This would replace, *e.g.,* 18 U.S.C. § 231 (1994) (civil disorder only partially with remainder covered by next proposed statute); 18 U.S.C. § 1201(a)(1) (1994) (transporting victim of kidnapping across state lines); 18 U.S.C. § 1952 (1994) (interstate travel in aid of racketeering only partially with remainder covered by next proposed statute); 18 U.S.C. § 2101 (1994) (riots only partially with remainder covered by next proposed section); 18 U.S.C. §§ 2421-24 (1994) (transportation for illegal sexual activity).

231. This would replace, *e.g.,* 18 U.S.C. § 201 (1994) (bribery of public officials and witnesses); 18 U.S.C. § 836 (1994) (transportation of fireworks into state prohibiting sale or use); 18 U.S.C. § 875 (1994) (use of interstate commerce to demand ransom or extort money); 18 U.S.C. § 1029 (1994) (fraud using access devices); 18 U.S.C. § 1084 (1994) (transmission of wagering information); 18 U.S.C. § 1262 (1994) (transportation of liquor into state prohibiting sale); 18 U.S.C. §§ 1301, 1304 (1994) (transportation of lottery information); 18 U.S.C. § 1343 (1994) (wire fraud); 18 U.S.C. § 1365 (1994) (tampering with consumer product); 18 U.S.C. §§ 1462, 1465, 1466 (1994) (obscenity); 18 U.S.C. § 1953 (1994) (interstate transportation of wagering paraphernalia); 18 U.S.C. § 1958 (19994) (use of interstate commerce to commit murder for hire); 18 U.S.C. § 2101 (1994) (riots).

232. This would replace, *e.g.,* 18 U.S.C. §§ 1956-57 (1994) (money laundering); 18 U.S.C. §§ 2312-17, 2321 (1994) (transportation of various stolen goods).

233. *E.g.,* explosive materials, 21 U.S.C. §§ 841-48 (1994); gambling, 18 U.S.C. § 1955 (1994); and obscenity/pornography, 18 U.S.C. §§ 1460-69, 2251-57 (1994).

234. 18 U.S.C. § 873 (1994).

235. Some of this space would, of course, be taken away by other criminals who would be prosecuted at the state level once the option of federal prosecution was eliminated.

236. To be more precise, scholars have confused the smaller group of individuals who voted in a particular election with the broader group that constitute "We the People." *See, e.g.,* Alexander M. Bickel, The least Dangerous Branch: The Supreme Court At The Bar Of Politics 16-19 (1962). Having ignored this distinction, scholars find an alternative justification for judicial review instead of enforcing the will of the People. *Id.* at 34-72; *see also* John Hart Ely, Democracy and Distrust: A Theory Of Judicial Review (1980). A perhaps unintended side-effect of these theories is a down-playing of the role of the public in actual judicial cases.

237. *Contra* Akhil R. Amar, *The Bill of Rights As a Constitution,* 100 Yale L.J. 1131, 1175-99 (1991)[hereinafter *Bill of Rights*].

238. Before examining the effects of popular sovereignty on these issues, two caveats are in order. First, there are three different aspects of popular sovereignty that interact in the area of criminal law: 1) popular sovereignty as a limit on the powers of government; 2) the existence of procedural protections in the Bill of Rights for the People as a whole; and 3) the role of the People in the government under popular sovereignty. In the discussion of any particular area of criminal procedure, the degree to which each of these three aspects is relevant, and thus which one is emphasized, will change.

Second, in dealing with the text of the Bill of Rights, there are two related "generation gap" problems. The first is the Neo-Federalist problem of later texts that affect the meaning of the Bill of Rights. Dealing with this problem requires a synthesis of these texts. *See* Ackerman, *Constitutional Politics, supra* note 27, at 515-45. The other problem is the changed context between the 1780s and the 1990s. Dealing with this problem requires "translating" these texts into modern concepts. *See* Lawrence Lessig, *Fidelity in Translation,* 71 Tex. L. Rev. 1165 (1993).

To borrow an analogy from Professor Lessig, the problem faced is the equivalent of a motorist trying to get from St. Louis to a small town in New York, slightly west of Albany. The motorist does not have a set of directions to that town, but rather has three sets of directions none of which covers the entire trip. One set gives directions from Kansas City to Boston, but was written before the interstate highway system was built. A second set gives directions from Newark, New Jersey, to the Canadian border with northeastern New York, but uses local names for the roads rather than their "proper" identification *e.g.,* Major Deegan Expressway instead of Interstate 87. The third set gives directions from a small town in Massachussets through the New York town to a town even further west, but uses kilometers and exit number rather than miles and road numbers. If one is able to accurately synthesize and translate these directions, the motorist can use them to complete the journey. If one fails, the motorist will be lost.

Obviously, given the role of normative statements in law, the problem of synthesis and translation is more difficult for legal concepts than for road directions. Thus, there is room for argument with the analysis that follows. Despite these problems, it is this Article's position that a discussion of criminal procedure within the framework of popular sovereignty would lead to a more accurate and faithful analysis of those provisions within the Bill of Rights affecting the criminal justice system.

239. Amar, *Bill of Rights*, *supra* note 237, at 1176-80.

240. John H. Langbein, *The Criminal Trial Before Lawyers,* 45 U. Chi. L. Rev. 263, 280-82 (1978). Likewise, the criminal justice system in the 1600s effectively forced the accused to testify, because the accused was not allowed to have representation. *Id.* at 283.

241. By the time the Bill of Rights was adopted, general warrants were no longer allowed, and defendants were not even allowed to testify in their own behalf at criminal trials at least, not under oath. Amar, *Bill of Rights*, *supra* note 237, at 1175-80; Joel N. Bodansky, *The Abolition of the Party-Witness Disqualification: An Historical Survey,* 70 Ky. L.J. 91, 105-28 (1981-82).

242. There are some logical reasons why a small police force would automatically follow the restrictions contained in the Bill of Rights, and its state equivalents, during the late 1700s and early 1800s. First, these agencies, like small rural agencies even today, lacked the resources for a thorough investigation. Second, the technology which makes searches very useful today did not exist. For example, fingerprinting only dates back to around 1900. David Brown, *Taking the Whorl-View of Humanity,* Wash. Post Wkly. Edition, Aug. 14-20, 1995, at 38. Without even the simplest form of blood testing, fiber analysis, or fingerprinting, random searches would rarely produce useable evidence, except perhaps in smuggling cases. Third, in an era when investigations were the exception instead of the rule, these agencies lacked the public support necessary to immunize officers from potential legal repercussions from an unsuccessful wild goose chase. Under such circumstances, it makes sense to assure that all legal procedures are followed before engaging in a search that may prove futile.

243. Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).

244. *Mapp*, 367 U.S. at 656. *See also* Arizona v. Evans, 115 S. Ct. 1185, 1191 (1995), and cases cited therein.

245. *Mapp*, 367 U.S. at 659-60. This reason has been cited very rarely in recent cases, and is almost never cited in cases finding an exception to the exclusionary rule.

246. A large number of instances might hurt those individuals at the top of the law enforcement community by significantly reducing the number of convictions; but there is no evidence the actual officers on the beat are affected. This Article does not intend to deny that the exclusionary rule encourages officers to follow the constitutional requirements when possible, but rather believes the ethic remains that if the alternatives

are a questionable search and letting a criminal go the officer should conduct a questionable search and leave the legal questions to the attorneys.

247. In the extreme case, an officer might go sufficiently far as to be guilty of violating state or federal civil rights statutes, but, as recent history demonstrates, it is not easy to gain convictions for violating these statutes. In a society that treats many of the constitutional protections afforded to criminal defendants as mere technicalities except when the rights of "innocents" are violated there are no effective penalties to the individual police officer unless those on the top of the system choose to create such penalties and rigorously enforce them. Furthermore, the decision to impose such penalties would have to be based not on the desire to protect the rights of the citizenry, but rather on the desire to avoid the loss of evidence.

248. Some may argue the exclusionary rule does have a deterrent effect because a police officer wants to do her job well, with that job defined as putting criminals behind bars. It is equally likely that an officer who defines his success in his career on this one aspect of the job, rather than doing the entire job well, which would include following constitutional norms is likely to put the blame for these criminals being freed on judges and lawyers rather than himself.

249. This alternative was expressed as "the imperative of judicial integrity" in *Mapp*, 367 U.S. at 659 (quoting Elkins v. United States, 364 U.S. 206, 222 (1960)).

250. United States v. Havens, 446 U.S. 620, 626-28 (1980); Oregon v. Hass, 420 U.S. 714, 722-23 (1975); Harris v. New York, 401 U.S. 222, 226 (1971).

251. United States v. Salvucci, 448 U.S. 83, 91-93 (1980); Rawlings v. Kentucky, 448 U.S. 98, 104-06 (1980); Rakas v. Illinois, 439 U.S. 128, 134 (1978).

252. The cases addressing the exceptions to the exclusionary rule also considered the issue of deterrence. *See, e.g., Salvucci,* 448 U.S. at 94-95; *Havens,* 446 U.S. at 626. The issue of deterrence, however, is inherently murky and subject to charges of both conservative and liberal judicial activism, because of questions regarding how much deterrence is necessary, how effective is the deterrence, and what is the proper balance between Fourth Amendment interests and other significant interests.

253. The United States Supreme Court recognized the existence of this counter argument in *Mapp*. 367 U.S. at 659.

254. *See, e.g.,* State *ex rel*. Missouri Dep't of Natural Resources v. Roper, 824 S.W.2d 901, 904 (Mo. 1992) (discussing source of a state's interests in a case in which state agency sought judicial creation of an exception to general statute).

255. Amar, *Of Sovereignty, supra* note 25, at 1432-38.

256. *See* Restatement (Second) of Agency §§ 33, 35 (1957).

257. *Cf.* Restatement (Second) of Agency §§ 166, 167, 329 (1957). Of course, the principles of agency only apply very roughly to the theory of popular sovereignty, due to the nature of the principal the Sovereign People. Because of the difficulty of action by this principal, it is the exception, rather than the norm, for the People to later ratify an unconstitutional act by one of the government officials acting as an agent of the People. Such ratification, however, has happened previously on rare occasions such as Reconstruction, the New Deal, and perhaps the Louisiana Purchase.

258. Before this statement gets misinterpreted, it should be clarified that in most cases neither the police officer nor the prosecutor is intentionally engaging in an illegal act, but rather under a mistaken belief in the legality of their acts in other words a claim of right to the seized item which in many states is a defense to theft. Thus, in most circumstances, charges are not warranted. The point, however, is that, when acting outside of the authority delegated to them by the People, law enforcement officers are acting in their individual private capacities rather than in their official public capacities.

259. The attempt to introduce such evidence would be an attempt by one agent to "ratify" the improper acts of another agent. Since the Constitution clearly forbids the government from engaging in the underlying constitutional violation, it would be absurd to imply that the Constitution grants one agent the authority to engage in such a ratification.

260. *See, e.g.,* Welsh v. Wisconsin, 466 U.S. 740, 748-54 (1984); United States v. Ross, 456 U.S. 798, 804-25 (1982). While the doctrine stays roughly the same, application of that action does change.

261. Of course, it is debatable whether the framers of the Fourth Amendment had such a strong preference as the case law has developed. *See* Amar, *Bill of Rights*, *supra* note 237, at 1175-80. However, such a rule may be inferable from changes such as incorporation against the states and the growth of police forces. *Cf.* Lessig, *supra* note 238, at 1228-37. These changes undercut the traditional rule more than may first be apparent. When the federal government was effectively prosecuting only tax cases, treason, and piracy, a guarantee of a trial in the local area plus the availability of a state tort gave the criminal defendant subjected to an unreasonable warrantless search two trials in front of an audience potentially more favorable to him than to the federal government. In addition, the minimal enforcement resources discouraged extensive searches. A criminal defendant today is more likely to be searched, effectively has no tort remedy, and is highly likely to be facing a hostile jury. In these circumstances, judicial review before, rather than after, the search is the only check to prevent an officer from abusing her discretion.

262. For example, modern communication technology makes it reasonably possible in some jurisdictions to create a "warrant" that could be used to conduct an on-the-scene search of an automobile. To be blunt, with a couple of minor procedural adjustments, even in the rural county in which the author works as a prosecutor, the technology exists to prepare a search warrant within fifteen to thirty minutes by using fax transmission, phone conferencing, and a basic word processing program. As such, under this approach,

many of the exceptions to the warrant requirement, including the automobile exception, are slowly losing their "emergency" justification. *Cf.* County of Riverside v. McLaughlin, 111 S. Ct. 1661, 1673 n.1 (1991) (Scalia, J., dissenting) (noting the reasonableness of the delay in bringing a prisoner arrested without a warrant before a magistrate is in part a product of technology *i*.e. modern technology allows the prisoner to be brought before a magistrate in a shorter period of time).

263. The United States Supreme Court has recognized two circumstances in which an officer can claim to have acted in good faith: searches based on apparently valid search warrants, United States v. Leon, 468 U.S. 897 (1984); and arrests based on apparently valid arrest warrants, Arizona v. Evans, 115 S. Ct. 1185 (1995).

264. *See* Leon, 468 U.S. at 913-25.

265. For example, if the property being searched was 813 Elmerine Avenue, a search warrant for 813 Elmarine Street would be "technically invalid." However, unless there was an Elmarine Street, an Elmarine Avenue, or an Elmerine Street, or any other similar sounding street in the same city or same county, the search warrant should not be construed as "legally invalid." Everyone reading the warrant would know the property described despite the typographical error. For that same property, however, a warrant for 713 Elmerine Avenue would be "legally invalid." On its face, such a warrant would give permission to search 713 Elmerine, not 813 Elmerine.

266. *See* Amar, *Bill of Rights*, *supra* note 237, at 1175-80. This rule was explicitly included in the text of the Fourth Amendment.

267. On a tangential matter, the same principle would apply to prevent the prosecutor from using items illegally acquired by private parties.

268. 115 S. Ct. 1185 (1995).

269. The Court stated in part: "'The wrong condemned by the [Fourth] Amendment is fully accomplished by the unlawful search or seizure itself' and the use of the fruits of a past unlawful search or seizure 'work[s] no new Fourth Amendment wrong.'" Arizona v. Evans, 115 S. Ct. 1185, 1191 (1995) (citations omitted). "The exclusionary rule operates as a judicially created remedy designed to safeguard against future violations of the Fourth Amendment rights through the rule's general deterrent effect." *Id.* (citations omitted).

270. For a discussion of the factors which led to this development, see John H. Langbein, *Shaping the Eighteenth Century Criminal Trial: A View from the Ryder Sources,* 50 U. Chi. L. Rev. 1, 84-105 (1983).

271. *Cf.* 8 John Henry Wigmore, Evidence in Trials at Common Law § 2250, at 278 (McNaughton rev. ed. 1961).

272. Lessig, *supra* note 238, at 1235-36.

273. In addition to psychological ploys designed to trick defendants into confessions, these techniques included the infamous "third degree" essentially the old English technique of questioning compressed from months into hours. For a discussion of these techniques, see Miranda v. Arizona, 384 U.S. 436, 445-56 (1996).

274. For a discussion of the history of the Supreme Court's interpretations of the Fifth Amendment, see *Miranda,* 384 U.S. at 460-66.

275. *See* Arizona v. Fulminante, 111 S. Ct. 1246, 1252-57, 1263-66 (1991) (holding by 5-4 vote that "harmless error" rule applies to improper confession). To some degree, this decision makes sense under the current regime. If a prosecutor has a strong case and the trial court finds no constitutional violation, it makes very little sense to treat the case differently depending upon the constitutional violation found after the trial.

276. In this light, it is important to always maintain a distinction between custodial interrogation and similar techniques designed to get a suspect to admit his guilt, and questioning of potential witnesses designed to discover clues that may lead to the finding of the criminal party. The problem, of course, is that sometimes a key witness to finding out all of the participants in a crime is one of the suspects. Such a circumstance may require something equivalent to use-immunity, either voluntarily granted by investigating agencies or judicially-imposed.

277. A difficult question from this perspective is the "fruit of the poisonous tree" issue. If a private citizen told the state he had seen objects that looked like those taken in a recent robbery, this evidence could be the basis of a search warrant under current doctrine even if that private citizen had gained the knowledge from breaking and entering into the robber's residence. When a police officer conducts an illegal search, she effectively stops acting as a police officer and becomes a private citizen who is breaking and entering into the robber's house. The best argument for applying the exclusionary rule to the fruit of the poisoned tree is that in gaining the "tree," the police officer is acting as an apparent agent of the People, but in a manner forbidden by them. To allow the admission of the "fruit" would ratify this action, which for reasons previously expressed is also impermissible. Similar reasoning would, perhaps, require the extension of the doctrine to evidence found based on the illegal acts of private citizens.

278. Amar, *Bill of Rights*, *supra* note 237, at 1187-89.

279. Wainwright v. Witt, 469 U.S. 412, 429 (1985).

280. *See, e.g.,* U.S. Const. amend. VI; Ala. Code §§ 12-16-44, 12-16-57, 12-16-59 (1975); Cal Civ. Proc. Ann. §§ 192, 203 (West Supp. 1996); Me. Rev. Stat. Ann. tit. 14, § 1252-A (West Supp. 1995); Mich. Comp. Laws Ann. § 600.1307a (West Supp. 1995); Mo. Rev. Stat. Ann. § 494.425 (Vernon Supp. 1996); N.Y. Jud. Law, Ann. § 510 (McKinney Supp. 1996); Utah Code Ann. § 78-46-7 (Supp. 1995).

281. *E.g.,* age, the ability to read, mental health.

282. *E.g.,* lawyers, medical personnel.

283. Occupational qualifications exclude admittedly competent venirepersons from any jury service, while the others exclude only venirepersons who are believed to be incompetent or merely determine the place of service. Arguably, these occupational exclusions distort the representative nature of the jury and interfere with the educational function of the jury though the educational function is distorted less by the exclusion of lawyers than by the exclusion of other occupations. For a discussion of the educational function of the jury, see Amar, *Bill of Rights*, *supra* note 237, at 1186-87.

284. *Cf. id.* As a side note, while jury service can be educational, grand jury service is even more so. In my county of 30,000 people, we have just reinstituted a grand jury. During the first two months of a six-month term, these grand jurors have returned indictments on one murder case, one sexual offense, and numerous drug cases and thefts. In seeing these cases, these twelve individuals have been exposed to officers from most of the main law enforcement agencies within the county, and have gotten to see a good cross-section of the type of crimes which occur in the county. One can only hope, as the Framers hoped, that these grand jurors will apply this knowledge to their participation in the political life of their towns and this county.

285. It is not difficult to imagine potential conversations in the jury room. For example, one of the jurors may be saying the testimony of one witness was hard to believe; the "biased" juror states he has known that witness for twenty years and that witness X has always impressed the juror
with her honesty. Likewise, a juror could be stating that the victim's injuries from an attack did not seem to be very serious; the "biased" juror states she knows the victim and saw him soon after the attack when it was clear the injuries were very serious.

286. The struggle for the opposing party will be to convince a juror that an impression of a particular person developed over a lengthy period of time is erroneous. Barring dramatic evidence, this task will be difficult to accomplish. It is even more difficult when the knowledge of the victim or the defendant has led the juror to knowledge about extensive facts regarding the merits of the case.

287. For a discussion of the interrelation between private interests and public citizenship underlying the concept of private citizens, see Ackerman, *The Storrs Lectures, supra* note 94, at 1032-43.

288. In many cases, general ideological bias, often based on second-hand experience, will have to cope with the gruesome reality that pervades the typical criminal case. In such circumstances, it is not improbable a juror, who during voir dire thinks there is a firm rule governing the situation, could discover an exception to the rule.

289. Batson v. Kentucky, 476 U.S. 79 (1986).

290. Georgia v. McCollum, 112 S. Ct. 2348, 2353-54 (1992); Edmonson v. Leesville Concrete Co., Inc., 111 S. Ct. 2077, 2081 (1991); Powers v. Ohio, 111 S. Ct. 1364, 1368-70 (1991).

291. *See supra* notes 284-88 and accompanying text.

292. Black's Law Dictionary 1136 (6th ed. 1990).

293. *McCollum,* 112 S. Ct. at 2359-61 (Thomas, J., concurring in the judgment); *Batson,* 476 U.S. at 102-08 (Marshall, J., concurring); State v. Parker, 836 S.W.2d 930, 941 (Mo. 1992) (Benton, J., concurring).

294. Chief among these groups are all races, both genders, and religious faiths. While the *Batson* line of cases has yet to reach the issue of religious beliefs, the Court has reached the issue of gender, finding that such quasi-suspect classifications are protected from discrimination in the exercise of peremptory challenges. J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419 (1994). On the basis of federal civil rights laws, an argument could also be made for age and disability.

Less clear is whether equal protection analysis protects even those groups only entitled to rational basis protection. Recent decisions of the Supreme Court have suggested they would not extend *Batson* to these groups. *See* Purkett v. Elem, 115 S. Ct. 1769 (1995); *J.E.B.,* 114 S. Ct. at 1429. A closer look at most of the categories subject to rational basis analysis occupations or socioeconomic classes would indicate that membership in those groups is not really rationally related to any legitimate interest at trial, with strikes against such groups being based solely on prejudice.

On this last point, at a recent prosecutor's seminar, I had the opportunity to hear a former prosecutor from Harris County, Texas, tell a story about one of his capital cases. According to this prosecutor, one of the venirepersons fit an image which the so-called book on jury selection said the state should strike a young, college-aged male with long hair wearing a T-shirt. Of course, this book is based on assumptions about what that image means in terms of that venirepersons beliefs. Well, this prosecutor on a hunch kept that venireperson on the jury. On the last day of the trial, when the jury was to hear closing arguments in the penalty-phase and then retire to deliberate over whether to impose the death penalty, this juror again wore a T-shirt, but this T-shirt simply said "Death." After the trial, that juror talked to the prosecutor, expressing how shocked he was that he was kept on the jury and thanking the prosecutor for trusting him. According to the prosecutor, that juror is now attending law school. The moral of this prosecutor's story is that how people view the legal system is based on their interaction with the legal system, which for many is limited to jury service and traffic offenses. Any form of discrimination, even for non-suspect classes, has the potential to give a juror a bad impression on the legal system.

295. If these reasons depart too much from acceptable reasons for challenges for cause, they could run into a problem of violating the popular sovereignty requirement that the actual jury reflect the community.

296. For example, a typical quasi-cause challenge would be used to remove a venireperson who said she knew a witness, but not that well, and that she could be objective about his testimony. If the judge believed that venireperson when she said she could be objective, a challenge for cause would fail. The party against whom that witness would be testifying might have doubts about the venireperson's honesty in that answer. A quasi-cause challenge would allow that party to remove that venireperson.

297. Amar, *Bill of Rights*, *supra* note 237, at 1187-91.

298. Heath v. Alabama, 474 U.S. 82, 87-93 (1985); Abbate v. United States, 359 U.S. 187, 189-96 (1959).

299. *Cf. Heath,* 474 U.S. at 93; *Abbate,* 359 U.S. at 195.

300. Waller v. Florida, 397 U.S. 387, 391-95 (1970).

301. *Id.* The separate sovereign argument dates back to early cases involving multiple state and federal proceedings. *See, e.g.*, Moore v. Illinois, 55 U.S. (14 How.) 13, 20 (1852); Houston v. Moore, 18 U.S. (5 Wheat.) 1, 35 (1820) (Johnson, J., concurring).

302. Messonnier, *supra* note 5, at 225-27.

303. *Id.* at 229-30, 233-35.

304. Of course, the states are subdivisions of the nation, which are recognized and extensively protected by the Constitution. However, under the powers delegated to the states by the Constitution, the states are equally free to give such recognition and protection to counties and cities.

305. *Cf.* Amar, *Bill of Rights*, *supra* note 237, at 1183-86.

306. *Cf. id.*

307. *Cf. id.*

308. For example, was the Patty Hearst trial a criminal trial or a political trial? At face level, she was being tried for typical criminal activities. At another level, an argument could be made that the trial was an attempt by the state to crush the Symbonese Liberation Army a political group opposed to the current government. The same question could be raised by a number of trials, including the Manuel Noriega trial, the trial of the World Trade Center bombers, and the trial of the Oklahoma City bombers. As the government cannot be expected to admit that an individual is being charged merely to

stop her political activities, it is legally efficient to extend as the Framers did the protections established for political trials, particularly treason cases, to all criminal trials.

309. Despite *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), there is a legitimate argument that the Double Jeopardy Clause, when combined with the common law, applied to state courts as well.

310. For a discussion of reception statutes, see *supra* note 26.

311. Generally speaking, the common law doctrine of double jeopardy prevented second trials of a person who had previously been convicted or acquitted of the same offense. Grady v. Corbin, 110 S. Ct. 2084, 2098-2100 (1990) [ ] (Scalia, J., dissenting), *overruled by,* United States v. Dixon, 113 S. Ct. 2849 (1993).

312. U.S. Const. art. IV, § 1.

313. In one of the first cases dealing but only tangentially with a double jeopardy problem, Justice Story mentioned that, if a state offense duplicated a federal offense, multiple trials would probably violate the common law. Houston v. Moore, 18 U.S. (5 Wheat) at 72-74 (Story, J.,
dissenting).

314. This requirement originated with the Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78-79. The current requirement is codified at 18 U.S.C. § 3231 (1994).

315. *See, e.g.,* Cal. Penal Code Ann. § 777 (West 1985); Fla. Stat. Ann. § 900.03 (West 1985); Idaho Code § 19-301 (Supp. 1995); Miss. Code Ann. § 99-11-1 (1994); Mo. Rev. Stat. Ann. § 541.020 (Vernon 1987); N.Y. Crim. Proc. Law Ann. § 20.20 (McKinney 1992).

316. Fed. R. Crim. P. 7(c)(1).

317. *See, e.g.,* Cal. Penal Code Ann. § 959 (West 1985); Idaho Code §§ 19-1302, 19-1401 (Supp. 1995, 1987); Miss. Code Ann. § 99-7-9 (1994); Mo. Stat. Ann. §§ 545.040, 545.240 (Vernon 1987); N.Y. Crim. Proc. Law Ann. § 200.50 (McKinney 1993).

318. 9 U.L.A. 123 (1968).

319. Some relevant factors might be where the crime was initiated, which charge carries the heaviest potential penalty, residence of the victim, residence of the criminal, and other similar matters.

320. *See* U.S. Const. amend. V; Miss. Const. art III, § 27; N.Y. Crim Proc. Law Ann. § 195.10 (McKinney 1993). Of course, there are legitimate constitutional arguments from both the traditional approach to the Fourteenth Amendment, and from the theory of

popular sovereignty, that the Fifth Amendment Grand Jury Clause should also apply to the states.

321. At the very least, the burden of providing a historical justification for the doctrine should fall on the proponents of dual sovereignty to present a better common law case than has been presented so far. If there was any basis for the doctrine of dual sovereignty, there should be cases at common law reflecting multiple trials of defendants committing crimes in the border regions between England and Scotland or England and Wales.

322. A discussion of whether double jeopardy prohibits multiple sentences upon conviction for similar state and federal offenses within the same trial is beyond the scope of this Article, as the issue of multiple sentences turns on legislative intent, which would require analysis of each statute. *See* Missouri v. Hunter, 459 U.S. 359, 366-69 (1983).