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Stephen Chippendale

Federalization\(^1\) of criminal law under the Commerce Clause\(^2\) has contributed to an explosive growth in federal law enforcement.\(^3\) The federal criminal code currently includes

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2. The Commerce Clause provides that “Congress shall have Power... To regulate Commerce... among the Several States.” U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause was adopted to give the federal government power to prevent state tariff barriers. David S. Bogen, The Hunting of the Shark: An Inquiry into the Limits of Congressional Power Under The Commerce Clause, 8 WAKE FOREST L. REV. 187, 192 (1972).

The contours of the Clause have evolved through judicial interpretation. In Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194 (1824), Chief Justice John Marshall broadly defined “commerce among the States” as “commerce which concerns more States than one.” From 1887 to 1937, however, the Court rejected the expansive view suggested in Gibbons in favor of a narrower view of the commerce power. See, e.g., Hammer v. Dagenhart, 247 U.S. 251, 276-77 (1918) (holding that the commerce power does not authorize the prohibition of interstate transit of goods produced by child labor). The Court acceded to political pressure in 1937 and reversed its narrow interpretation of the commerce power in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41-43 (1937). For a detailed account of the Court during this doctrinal transformation, see EDWARD S. CORWIN, CONSTITUTIONAL REVOLUTION, LTD. 39-79 (1941).

Congressional power under the Commerce Clause has become virtually limitless since the New Deal. See infra note 28 and accompanying text (discussing the current broad scope of the commerce power).

3. See James M. Maloney, Note, Shooting for an Omnipotent Congress: The Constitutionality of Federal Regulation of Intrastate Firearms Possession, 62 FORDHAM L. REV. 1795, 1796 (1994) (noting that “the Commerce Clause has become, in recent years, the foundation for an expanding federal criminal jurisdiction over intrastate activities”) (footnote omitted).
more than 3,000 offenses\textsuperscript{4} and "hardly a congressional session goes by without an attempt to add new sections."\textsuperscript{5} These additions caused federal criminal case filings to increase nearly seventy percent between 1980 and 1990.\textsuperscript{6} Criminal cases now consume half of the federal judiciary's total time,\textsuperscript{7} and criminal trials account for eighty percent of the caseload in some districts.\textsuperscript{8}

To appreciate this accelerating growth of federal law enforcement it is necessary to recall how limited the federal government's role in controlling crime has historically been under American federalism.\textsuperscript{9} The Constitution expressly grants Congress the authority to punish only four types of criminal conduct.\textsuperscript{10} Similarly, the federal court system reflects the Framers'}
desire to protect state authority over criminal prosecution. Consequently, states have traditionally been responsible for defining and punishing criminal offenses.

This Note explores the proliferation of federal statutes targeting intrastate crime. Part I discusses the growth of federal criminal law and the emerging backlash to that growth. Part II analyzes the federalization trend and concludes that federalization unsettles the proper jurisdictional balance between

James Madison expected the federal government to have a restricted role in law enforcement:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.


12. Chief Justice Marshall coined the term "police power" to designate the broad legislative powers of the states in our federal system. See Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 443 (1827); Ruth L. Roettinger, The Supreme Court and State Police Power: A Study in Federalism 10 (1957). Police power has been defined as the authority of states to "adopt such laws and regulations as tend to prevent the commission of fraud and crime, and secure generally the comfort, safety, morals, health, and prosperity of its citizens by preserving the public order." Black's Law Dictionary 1156 (6th ed. 1990). For a discussion of the personal and property interests protected by the police power, see generally Roscoe Pound, A Survey of Social Interests, 57 Harv. L. Rev. 1 (1934).

Decentralized law enforcement originated in colonial America when moral rules were enforced through informal means of social control such as "mocking criticism." Lawrence M. Friedman, Notes Toward a History of American Justice, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER 13, 14-16 (Lawrence M. Friedman & Harry N. Scheiber eds., 1988). See generally Lawrence M. Friedman, CRIME AND PUNISHMENT IN AMERICAN HISTORY (1993) (discussing the development of American law enforcement).
the state and federal court systems. Part III surveys possible approaches to halting unchecked federalization of criminal law. This Note concludes by recommending that Congress create a commission to curb this disturbing trend.

I. FEDERAL CRIMINAL LAW

A. EARLY FEDERAL CRIMINAL LAW

For constitutional and political reasons, the federal government possessed extremely limited criminal authority prior to the Civil War. The 1872 recodification of the Postal Act was the first statute to extend federal authority beyond protecting the operations of the national government. The Supreme Court, however, resisted further expansion of federal criminal law throughout the nineteenth century.

B. THE COMMERCE CLAUSE: FROM WICKARD TO PEREZ

Congress's recent propensity for federalizing local crime originated in the Supreme Court's commerce-power decisions of the early 1940s. Because the Court's attitude toward economic...
regulation shifted during this period,\textsuperscript{20} the Commerce Clause became a primary basis for congressional authority in the area of criminal law.\textsuperscript{21}

The New Deal decision that most influenced the future of federal criminal law was \textit{Wickard v. Filburn}.\textsuperscript{22} In upholding a statute regulating wheat produced for personal consumption,\textsuperscript{23} the \textit{Wickard} Court articulated the principle that controls commerce-power analysis to the present day: Congress has the power to regulate acts that in the aggregate affect interstate commerce.\textsuperscript{24} The “affecting commerce” rationale\textsuperscript{25} has been the constitutional justification for expansive civil rights\textsuperscript{26} and envi-

\begin{footnotesize}
\begin{enumerate}
\item \textit{United States v. Wrightwood Dairy Co.}, 315 U.S. 110, 121 (1942) (holding that the commerce power permits federal regulation of intrastate milk sales that affect interstate commerce), and \textit{United States v. Darby}, 312 U.S. 100, 115 (1941) (holding that congressional motive is irrelevant to a statute’s constitutionality under the Commerce Clause).
\item The New Deal decision that most influenced the future of federal criminal law was \textit{Wickard v. Filburn}.\textsuperscript{22} In upholding a statute regulating wheat produced for personal consumption,\textsuperscript{23} the \textit{Wickard} Court articulated the principle that controls commerce-power analysis to the present day: Congress has the power to regulate acts that in the aggregate affect interstate commerce.\textsuperscript{24} The “affecting commerce” rationale\textsuperscript{25} has been the constitutional justification for expansive civil rights\textsuperscript{26} and envi-
\item For almost a century prior to the New Deal the Supreme Court had limited federal regulation by distinguishing between local and national commerce. See supra note 2 (discussing judicial interpretation of the Commerce Clause). See generally Edward S. Corwin, \textit{The Passing of Dual Federalism}, 38 Va. L. Rev. 1 (1950) (analyzing the Court’s distinction between types of commerce). The Court, however, shifted its position under political pressure from President Franklin D. Roosevelt’s “Court-packing” plan. \textit{Gerald Gunther, Cases and Materials on Constitutional Law} 150-52 (10th ed. 1980).
\item \textit{Wickard}, 317 U.S. at 111 (1942).
\item In \textit{Wickard} an Ohio farmer challenged New Deal legislation that controlled fluctuations in wheat prices by limiting the amount each farmer could introduce to the market. \textit{Id.} at 115. The Agricultural Adjustment Act of 1933 penalized any farmer whose production exceeded a certain quota. \textit{Id.} at 113-16. The Court rejected Filburn’s theory that his production had no direct effect on the market because he consumed the majority of the wheat produced on his farm. \textit{Id.} at 127-29. For a detailed account of \textit{Wickard}, see Robert L. Stern, \textit{The Commerce Clause and the National Economy, 1933-1946: Part Two}, 59 Harv. L. Rev. 883, 901-09 (1946).
\item The Supreme Court has said that the term “affecting commerce” represents “the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause.” NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224, 226 (1963) (per curiam).
\item The civil rights cases of the 1960s refined the principle that intrastate activities can be regarded as having an effect on interstate commerce and thus subjected to federal regulation. See, e.g., \textit{Katzenbach v. McClung}, 379 U.S. 294, 303-05 (1964) (accepting Congress’s determination that racial discrimination
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\end{footnotesize}
Environmenal legislation. Under this test congressional power under the Commerce Clause has emerged as virtually unlimited.

Until 1971, the Court restrained the application of the "affecting commerce" doctrine in criminal cases by requiring all offenses prosecuted under commerce-based statutes to have a nexus to interstate commerce. In *Perez v. United

by restaurants adversely affects interstate commerce); *Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261-62 (1964) (upholding application of the Civil Rights Act because Congress rationally determined that discrimination by public inns discouraged interstate travel). See generally *Nowak & Rotunda, supra note 24, at 163-65 (discussing the importance of the commerce power as a weapon against racial discrimination).

27. In *Hodel v. Indiana, 452 U.S. 314 (1980), the Supreme Court upheld a federal statute establishing special requirements for coal mining operations conducted on farmland. Justice Thurgood Marshall's majority opinion held that protection of farmland falls within the commerce power because of congressional concern about losses in agricultural productivity attributable to mining. *Id. at 324-26.


The commerce power's breadth is demonstrated by the fact that since the New Deal, only one commerce-based statute has been held unconstitutional by the Supreme Court, and the Court later reversed that holding. See *National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). Nevertheless, the Court maintains that the Commerce Clause limits congressional power to regulate intrastate activity. See, e.g., *Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 310 (1981) (Rehnquist, J., concurring) ("It would be a mistake to conclude that Congress' power to regulate pursuant to the Commerce Clause is unlimited."); *Maryland v. Wirtz, 392 U.S. 183, 198 (1968) ("This Court has examined and will continue to examine federal statutes to determine whether there is a rational basis for regarding them as regulations of commerce among the States.").

29. E.g., *Lottery Case, 188 U.S. 321, 346 (1903) holding Congressional power under the Commerce Clause does not reach commerce "which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States"). Historically, the Supreme Court permitted commerce-based statutes targeting criminal conduct in connection with movement across a state line. See, e.g., *Hoke v. United States, 227 U.S. 308, 320-23 (1913) (upholding the Mann Act's prohibition of the interstate transportation of women for prostitution); *Lottery Case, 188 U.S. at 354 (upholding a federal statute prohibiting interstate transportation of lottery tickets); see also *Norman Abrams, *Federal Criminal Law and Its Enforcement 32-36 (1986) (discussing federal jurisdiction over transportation in interstate commerce). The Court continued to rely on the direct use of the "interstate channels" rationale articulated in *Lottery
States, however, the Court upheld a conviction under a federal loan-shark statute without any showing of a specific interstate nexus because Congress determined that extortionate credit transactions in the aggregate affect interstate commerce. Consequently, courts now review federal criminal statutes under the same lenient test used to analyze the validity of other Commerce Clause legislation.

C. Federalization Explosion

Over the last two decades Congress has transformed federal law enforcement by enacting a determinate sentencing scheme, mandatory sentencing statutes, and criminal stat-

Case and Hoke in the post–New Deal era. See, e.g., United States v. Five Gambling Devices, 346 U.S. 441, 446 (1953) (holding a federal indictment defective because the government failed to allege that the defendant purchased the devices in interstate commerce).


31. Id. at 154. The convicted loan shark had used threats to collect money owed him by a local butcher. Id. at 148. Although the Court acknowledged that these threats did not by themselves impact interstate commerce, the eight-member majority concluded that Congress reasonably found loan sharking affects interstate commerce because its proceeds can be used to finance interstate crime. Id. at 154.

The Perez Court relied on Wickard v. Filburn, 317 U.S. 111 (1942), Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), Katzenbach v. McClung, 379 U.S. 294 (1964), and other cases on which the “affecting commerce” rationale is built. 402 U.S. at 150-54; see also supra notes 24-28 and accompanying text (discussing the “affecting commerce” rationale). Only Justice Potter Stewart dissented from Perez:

[I]t is not enough to say that loan sharking is a national problem, for all crime is a national problem. It is not enough to say that some loan sharking has interstate characteristics, for any crime may have an interstate setting. And the circumstance that loan sharking has an adverse impact on interstate commerce is not a distinguishing attribute, for interstate business suffers from almost all criminal activity, be it shoplifting or violence in the streets.

402 U.S. at 157-58 (Stewart, J., dissenting).

The Perez Court’s conclusion that the Commerce Clause does not require any specific connection between the criminal transaction and interstate commerce has aroused substantial debate. Compare Patricia A. Hair, Note, National Police Power Justified by Economic Impact of Organized Crime, 46 Tul. L. Rev. 829, 835-36 (1972) (arguing the outcome of Perez is necessary to combat organized crime) with Robert L. Stern, The Commerce Clause Revisited—The Federalization of Intrastate Crime, 15 Ariz. L. Rev. 271, 276-85 (1973) (arguing Perez extends the “affecting commerce” rationale too far).

32. See Nowak & Rotunda, supra note 24, at 165.

utes that essentially duplicate state codes. Although these developments are interrelated, the expansion of the federal


The congressionally created United States Sentencing Commission now determines federal sentencing policy through the promulgation of binding guidelines. 28 U.S.C. §§ 991(b), 994(a)(1)-(2) (1988). Federal judges must follow the guidelines when sentencing convicted criminals if there is no justification for departing from the prescribed sentence. 18 U.S.C. § 3553(b) (1988).

The success of these reforms has been debated extensively. Compare Theresa W. Karle & Thomas Sager, Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis, 40 EMORY L.J. 393, 444 (1991) (contending the guidelines "generally are meeting their goal of reducing" sentencing disparity) with Daniel J. Freed, Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentences, 101 YALE L.J. 1681, 1718-27 (1992) (contending the guidelines are too rigid to achieve their goals).


The major mandatory sentence laws have been enacted by Congress during election years in response to constituent concerns. Gary T. Lowenthal, Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform, 81 CAL. L. REV. 61, 64 n.9 (1993).

Determinate sentencing and mandatory sentencing statutes are not always easily reconciled. The sentencing guidelines are intended to provide consistent punishment for similar crimes and direct judges to a whole complex of factors. See U.S. SENTENCING COMM’N, supra, at 16; supra note 33 and accompanying text (discussing guidelines). In contrast, mandatory sentencing emphasizes the presence of a single aggravating factor, which may result in discriminatory enforcement against African-Americans. See Lowenthal, supra, at 65-66, 122.


36. See infra notes 144-147 and accompanying text (discussing how strict federal sentences draw cases into the federal system).
criminal code is the most significant because it blurs the traditional division of prosecutorial authority between state and federal governments. Freed by Perez from the fetters of the Commerce Clause, Congress has increasingly federalized criminal offenses that were historically regarded as within the domain of the states.

Until the early 1970s federalism concerns made Congress hesitant to enact commerce-based criminal statutes that targeted local activities. As a result, earlier federal criminal statutes tended to target organized crime because its interstate nature made state prosecution difficult. In contrast, post-Perez...
rez legislation has extended federal criminal jurisdiction to include such local offenses as arson. One recent proposal would have made virtually any murder with a firearm a federal offense. The 1994 crime bill continued the trend, creating many new federal offenses.

The recently enacted carjacking statute exemplifies the increasing federalization of criminal law. Invoking the Commerce Clause as its constitutional justification, Congress made armed automobile theft a federal offense less than one month after the carjacking death of a Maryland resident made national organized crime. Id. at 811; Bradley, supra, at 235-42. Robert F. Kennedy observed in 1960 that "[i]f we do not on a national scale attack organized criminals with weapons and techniques as effective as their own, they will destroy us." ROBERT F. KENNEDY, THE ENEMY WITHIN 265 (1960).

The growth of federal power under the Commerce Clause in the area of organized crime remains controversial. Compare Bradley, supra, at 285 (arguing that the threat posed by organized crime does not justify expanding federal power) with John L. McClellan, The Organized Crime Act (S. 30) or Its Critics: Which Threatens Civil Liberties?, 46 NOTRE DAME LAW. 55, 199-200 (1970) (arguing that more federal legislation is required to combat organized crime).


> Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate commerce or foreign commerce from the person or presence of another by force or violence or by intimidation, or attempts to do so, shall—

(1) be fined under this title or imprisoned not more than 15 years or both . . . .


46. Legislative history shows that Congress included the transportation prerequisite to insure that the statute would pass constitutional muster under the Commerce Clause. United States v. Eskridge, 818 F. Supp. 259, 260-62 (E.D. Wis. 1993).
Congress then amended the statute to expand its scope with little consideration for its effect on the crime rate, and even though many states had enacted carjacking legislation of their own.

D. A Backlash? Resistance to Federalization

There are signs that steps are being taken to reassess the scope of the commerce power. The Reagan Administration, for example, published a report attacking Perez. More recently, a coalition of thirty national criminal justice organizations released a policy statement calling for a halt to the growing trend

47. Pamela Basu died in 1992 after trying to rescue her two-year-old daughter from two carjackers. See Ted Gup, A Savage Story, Time, Sept. 21, 1992, at 55, 55. Ms. Basu became tangled in the seat belt outside her car and was dragged for almost two miles until she fell away from the car. Id.


49. There is no evidence that the federal carjacking statute has prevented an increase in the number of carjackings. U.S. Anti-Carjacking Law Gets Little Use, SACRAMENTO BEE, Jan. 18, 1994, at A6; see also infra notes 75-83 and accompanying text (discussing the failure of federal statutes to reduce the crime rate).

50. For example, Florida, Indiana, and Mississippi make it a felony to take a motor vehicle from another person's possession by force or violence. FLA. STAT. ch. 812.133 (1994); IND. CODE ANN. § 35-42-5-2 (Burns 1994); MISS. CODE ANN. § 97-3-117 (1994).

51. Some commentators have begun to argue for a more restrictive reading of the Commerce Clause. Professor Richard Epstein, for example, observes that there is a "powerful tension" between the post-New Deal legacy and the original understanding of the commerce power. Richard Epstein, The Proper Scope of the Commerce Power, 73 VA. L. Rev. 1387, 1454-55 (1987). He argues that the Commerce Clause "is far narrower in scope than modern courts have held." Id. at 1455.

52. DOMESTIC POLICY COUNCIL, THE STATUS OF FEDERALISM IN AMERICA: A REPORT OF THE WORKING GROUP ON FEDERALISM (1986) [hereinafter FEDERALISM REPORT]. The Federalism Report contends that over the last 200 years the states have transformed into "administrative appendages for the national government, their independent political power usurped by . . . constitutional evolution and political and economic change." Id. at 58. The report attacks criminal legislation based on the expansive interpretation of the commerce power in Perez. Id. at 27; see supra notes 30-31 and accompanying text (discussing the Supreme Court's reasoning in Perez).

Most significantly, in the 1993 case *United States v. Lopez* the Fifth Circuit held one part of the Gun-Free School Zones Act of 1990 unconstitutional and criticized Congress for exercising the commerce power without making a finding of an activity's impact on commerce. *Lopez* is evidence of the increased willingness of some federal courts to invalidate new commerce-based criminal legislation.

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54. See William H. Rehnquist, Welcoming Remarks: National Conference on State-Federal Judicial Relationships, 78 VA. L. REV. 1657, 1660 (1992) ("Although legislative efforts are necessary in some areas, simple congressional self-restraint is called for in others, specifically, the federalization of crimes . . .").


56. See Naftali Bendavid, How Much More Can Courts, Prisons Take?: It's Tempting to Federalize Crimes, But Opponents are Gathering Momentum, LAW TIMES, June 7, 1993, at 1, 22.

57. See FBI Director Sees Danger of Overload, L.A. TIMES, Dec. 9, 1993, at 32.


60. *Lopez*, 2 F.3d at 1367-68.

61. Id. at 1359 (observing "the noticeable absence of any attempt by Congress to link the Gun-Free School Zones Act to commerce").

62. See, e.g., United States v. Cortner, 834 F. Supp. 242, 245 (M.D. Tenn. 1993) (holding that the commerce power does not permit Congress to regulate carjackings), rev'd sub nom. United States v. Osteen, 30 F.3d 135 (6th Cir. 1994) (table); see also Constance Johnson, Law and Disorder, U.S. News & WORLD REP., Mar. 28, 1994, at 35, 36 (noting that "federal judges have begun throwing out prosecutions under several of the criminal laws recently passed by Congress"); infra notes 124-130 and accompanying text (discussing why federal courts are hostile to new criminal statutes).
II. THE IMPACT OF FEDERALIZATION ON CRIME AND THE COURTS

Expanding federal authority into traditionally local areas of law enforcement holds tremendous political appeal for Congress.\(^6\) These political considerations, however, are outweighed by the negative implications of federalizing criminal law. In the name of protecting interstate commerce, Congress is raising law enforcement costs without lowering the crime rate, and is diminishing the effectiveness of the federal courts.

A. A FAILED CRIME CONTROL STRATEGY

Federalization advocates assert that federal prosecution of intrastate crime helps overwhelmed local authorities.\(^6\)\(^4\) This argument is not compelling because there is no evidence that increasing the federal role in law enforcement lowers the crime rate.\(^6\)\(^5\) Three factors explain this failure: inconsistent enforcement of federal criminal statutes, dilution of law enforcement resources, and stifling of innovative anti-crime approaches.

1. No Strict Enforcement

Congress embraced deterrence as the primary purpose of the criminal justice system when it created the United States Sentencing Commission.\(^6\)\(^6\) Unfortunately, the proliferation of federal criminal statutes sabotages this goal. The deterrent effect of criminal statutes depends on their consistent application.\(^6\)\(^7\) The number of federal investigators and prosecutors, 

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\(^6\) See, e.g., Bendavid, supra note 56, at 1 (describing Congress's "eagerness to respond to headlines" by creating new federal offenses); Is Crime Killing America?, U.S. News & World Rep. Debate Series, Mar. 15, 1994, at 3, 3 ("'Every two years, right before an election, Congress seems to pass a crime bill.'") (statement of Steven V. Roberts); Moore, supra note 4, at 1140 ("Most Members of Congress love voting for these [crime] bills. Nobody wants to be tagged as soft on crime.").

\(^6\) See Masci, supra note 38, at G1. Some advocates, for example, compare current federal criminal legislation to regulations enacted by Congress at the turn of this century to combat the social problems of child labor and sweatshops. Id.

\(^6\)\(^5\) Id. According to the Office of Management and Budget, the national crime rate dropped slightly during the 1980s, but there is no evidence that the increasing federal role in law enforcement was the cause. See id.; see also Barrett, supra note 6, at A10 (discussing the ineffectiveness of federal "war" on drugs).


\(^6\) See CHARLES W. THOMAS & DONNA M. BISHOP, CRIMINAL LAW: UNDERSTANDING BASIC PRINCIPLES 80 (1987); see also LAFAVE & SCOTT, supra note 21,
however, has failed to keep pace with the expanding criminal code. As a result, criminal statutes are applied inconsistently and federal prosecutors are prevented from handling new cases. Some commentators estimate that prosecutors pursue at most ten percent of federal crimes.

Furthermore, because federal prosecution practices vary nationwide, these crimes are not uniformly prosecuted. For instance, the likelihood that a carjacking case will be heard in federal court depends greatly on where the crime occurred. The underenforcement of federal criminal statutes is particularly acute in densely populated areas.

2. Two Systems Not Better Than One

Historically, federal criminal law targeted interstate criminal activities while states were responsible for local crime.

at 25 (noting that certainty of punishment may be more important to general deterrence than severity of sanction).

68. The Federal Bureau of Investigation, for example, used only 13 agents in 1993 to investigate 290 carjackings. See Johnson, supra note 62, at 36; see also Unloading After Leaving, Recorder, Feb. 24, 1994, at 9 (quoting former Deputy Attorney General Philip Heyman's concerns about the shortage of federal investigators and prosecutors).

69. See James Vorenberg, Decent Restraint of Prosecutorial Power, 94 Harv. L. Rev. 1521, 1525 (1981) (observing that "prosecutors increasingly have been forced to allocate resources by deciding whether to charge").

70. See Laura Frank & Sam V. Meddis, U.S. Attorneys Don't Treat Laws the Same, USA Today, June 22, 1994, at 1A. The number of cases referred to United States Attorneys, for example, has increased 39% in the last 14 years while the number of cases acted on increased only 21%. Id.

71. See Laura Frank & Sam V. Meddis, Avalanche of Federal Laws Burying the System, USA Today, June 22, 1994, at 7A.

72. Id. (comparing acceptance of "almost any" carjacking case in the U.S. Attorney's office in Tyler, Texas, with "relatively few" carjacking cases in Fort Worth, Texas).

73. Id.; see also Johnson, supra note 62, at 36 (noting that fewer than 300 people have been prosecuted since the federal carjacking statute's passage). Studies also indicate that the likelihood of prosecution depends on the characteristics of the potential defendant. See Note, Race and the Criminal Process, 101 Harv. L. Rev. 1472, 1520 (1988). Prosecutors are more likely to pursue cases involving minority defendants. Id.

74. See Frank & Meddis, supra note 70, at 1A. In 1992, for example, there were fewer than 10 federal prosecutors for every one million people in the country's six most urban areas. See Managing the Federal Government: A Decade of Decline: A Majority Staff Report to the Committee on Government Operations, H. 402-1, 102d Cong., 2d Sess. 217 (1992). In contrast, Charleston, West Virginia, a rural community, had 20 federal prosecutors for every one million residents. Id.

75. See supra notes 9-12 and accompanying text (discussing the traditional law enforcement roles of the federal government and the states).
The federalization trend, however, blurs this division of authority and makes law enforcement less efficient. Federal and local prosecutors, for example, now vie over whether state or federal courts will first hear criminal charges. In addition, the increased federal role encourages some state and local governments to rely on federal prosecution and shift their resources away from law enforcement.

Perhaps most importantly, federalization dilutes the resources of federal law enforcement agencies. Interstate criminal activity, the earlier focus of federal law enforcement, is now often ignored as federal prosecutors devote their time and resources to local crimes. "Operation Triggerlock," for example, directed federal prosecutors to enforce various firearm violations in federal courts. As a result, federal prosecutors are prevented from focusing on complex white-collar offenses.

3. One Size Does Not Fit All

Finally, expanding the federal criminal code fails to reduce the crime rate because Congress is unable to tailor its approach to local circumstances. The national uniformity federal legislation provides is generally neither necessary nor beneficial in the area of criminal law.

77. See, e.g., Richard J. Meislin, Prosecutors Vie Over Trial Dates in Scandal Case, N.Y. TIMES, June 12, 1986, at B2 (describing the lack of cooperation between the United States Attorney in Manhattan and the Manhattan District Attorney in municipal corruption trial).
78. See Masci, supra note 38, at G1.
79. Frank & Meddis, supra note 71, at 7A (noting that as the number of crimes deemed "federal" increases, the number of resources dedicated to complex offenses such as tax and environmental crimes dwindles).
80. See supra note 41 (discussing federal organized crime legislation).
81. See Weisberg, supra note 76, at 2, 10.
84. Uniformity is less important in criminal law than commercial law, for example, because there is no need for a comprehensive code to facilitate interstate transactions. See LaFAVE & SCOTT, supra note 21, at 4.
85. Pub. L. No. 101-647, 104 Stat. 4844 (codified at 18 U.S.C. §§ 921(a), 922(q), 924(a)); see also supra notes 58-61 and accompanying text (discussing the Lopez court's holding that the statute is unconstitutional).
is an example of a federal criminal statute inappropriate for many areas of the country. Firearm restrictions necessary in New York, for example, may not be appropriate in Montana. Indeed, diverse approaches to law enforcement are a hallmark of decentralized crime control.

Governors and state court chief justices properly criticize the loss of self-government caused by federalization of criminal law. Tailoring criminal law to local circumstances maximizes agreement on law enforcement policies. Moreover, state and local prosecutors and judges are more closely attuned to local standards of fairness than are their federal counterparts.


87. See Miner, supra note 17, at 127; see also Harmelin v. Michigan, 111 S. Ct. 2680, 2699 (1991) (noting that policy diversity is “the very raison d’etre of our federal system”).

88. George Embrey, Governors Want More Help, Fewer Restraints from Washington, Columbus Dispatch, July 17, 1994, at 3B (discussing governors’ concerns that federalization hampers state law enforcement).


90. See Miner, supra note 17, at 127 (contending that the citizenry has been “conditioned” to turn to federal law enforcement “as the first line of defense against anti-social conduct”).


A caseload crisis confronts the federal civil justice system. A growing case backlog is forcing potential litigants to suffer substantial delays. In 1989, for example, the median disposition of federal civil cases was a year and a half. Federal civil cases routinely take over two and a half years to reach trial. After observing this disturbing trend from the bench, Judge Irving Kaufman noted:

In its third century, the federal court system has entered a period of crisis. Faced with ever-burgeoning caseloads and essentially static resources, the nation's courts fall further and further behind the promise of the Federal Rules of Civil Procedure: "the just, speedy, and inexpensive determination of every action."

Congress's recent penchant for federalizing intrastate crime is the principal cause of this crisis in the civil justice system. As Justice O'Connor observed, federalization has had a "sea change" effect on the federal judiciary. For a number of reasons, the growing criminal docket is turning federal courts into police courts.


97. Id. at 2.

98. Id. at 1 (quoting Fed. R. Civ. P. 1).


101. Rehnquist, supra note 5, at 7 ("Continuation of the current trend toward large-scale federalization of the criminal law has the enormous potential of changing the character of the federal judiciary.").
1. Criminal Case Filings

Criminal filings traditionally did not constitute a major jurisdictional area of the federal courts. Federal courts instead reserved their time for the civil cases that shaped the nation's commercial development. The federal criminal docket, however, has increased by seventy percent since 1980 while the number of judges has remained relatively static. As a result, 73.6 new criminal cases are filed annually for each authorized judgeship as opposed to the 54.2 new cases filed annually fourteen years ago. Authorization for a large number of federal judges to handle the increasing criminal caseload is unlikely in the near future.

2. The Speedy Trial Act

The Speedy Trial Act, enacted to enforce the Sixth Amendment, operates in conjunction with the growing crimi-
nal docket to divert judicial resources from civil cases. The Act requires federal courts either to try or to dismiss contested criminal cases within seventy days. Moreover, the Act orders that courts not grant continuances for criminal cases because of civil congestion. The Act thus entitles the criminal docket to priority over civil cases. Consequently, state crimes currently heard in federal courts take precedence over traditional civil litigation.

3. The Federal Sentencing Guidelines

The Federal Sentencing Guidelines exacerbate federalization's effects on the judiciary. In an attempt to eliminate disparity, the guidelines have made the sentencing process "more complicated and time-consuming than ever." Sentencing hearings now consume more judicial time. In addition, the sentencing guidelines facilitate routine appeal and may lead to more appeals than was previously the case. Finally, because the guidelines effectively robbed prosecutors of their abil-


113. See Edward D. Cavanagh, Unclogging the Judicial Pipeline, CONN. L. TRIB., Jan. 17, 1994, at 25, 25; see also supra note 33 (discussing the sentencing guidelines promulgated by the United States Sentencing Commission).


116. Id.

117. See, e.g., United States v. Ruiz-Garcia, 886 F.2d 474, 477 (1st Cir. 1989) ("[W]e anticipate that appeals from sentencing decisions will become much more commonplace."); Albert W. Alschuler, The Failure of Sentencing Guidelines: A Plea for Less Aggregation, 58 U. CHI. L. REV. 901, 906 (1991) (noting that sentencing review before the guidelines was "almost nonexistent").
ity to plea-bargain, more federal prosecutions now go to trial and thereby drain even more resources.

III. HALTING UNCHECKED FEDERALIZATION: A SURVEY OF OPTIONS

The proliferation of federal criminal statutes serves law enforcement poorly and, if left unchanged, will damage the federal courts. Various solutions are possible. All of the approaches strive to limit federal involvement in criminal enforcement to matters of true national concern. As Chief Justice Earl Warren observed, “It is essential that we achieve a proper jurisdictional balance between the Federal and State court systems, assigning to each system those cases most appropriate in the light of the basic principles of federalism.”

The separation of powers makes each branch of the federal government responsible for law enforcement. Consequently, each branch has the power to restore the balance described by Chief Justice Warren. The federal courts can limit the authority of Congress to enact criminal legislation under the Commerce Clause. Federal prosecutors can refuse to prosecute local crimes. Both of these approaches, however, have serious drawbacks. The best solution is for Congress to exercise restraint in enacting criminal legislation. Because congressional restraint is unlikely, the most attractive and politically realistic approach is for Congress to create a commission to evaluate commerce-based criminal statutes.

A. THE COURTS

As one district court noted, the expansion of federal criminal law is possible “only because we in the judicial branch are willing to interpret the Commerce Clause of the Constitution so


119. Approximately 85% of criminal convictions result from guilty pleas. Jeffrey Standen, Plea Bargaining in the Shadow of the Guidelines, 81 Cal. L. Rev. 1471, 1475 n.12 (1993). A recent five percent decrease in guilty pleas has caused a 33% increase in federal trials. See Raven, supra note 91, at 12. In the year ending June 30, 1990, for example, criminal trials constituted 44% of all completed federal trials. See McLaughlin & Crupi, supra note 95, at S-5.

120. Rehnquist, supra note 54, at 1657 (quoting Earl Warren, Address by the Chief Justice of the United States, 26 A.L.I. Proc. 27, 33 (1959)).
broadly." If the trend toward federalization continues, however, the Commerce Clause may again become an obstacle to federal legislation. A substantial segment of the federal judiciary may decide that congressional authority extends too far into local matters.

There are philosophical and pragmatic reasons why the federal judiciary may be willing to narrow the commerce power. First, the Reagan Administration, which published a report attacking Perez v. United States for undermining federalism, appointed an extremely high percentage of the current Article III judiciary, including three Supreme Court justices. Almost all Reagan appointees share the former president's policy preferences in this area. Second, some federal judges are concerned about the high number of criminal cases funneled into the federal courts. As one court stated:

122. See supra note 29 and accompanying text (discussing the earlier requirement that the government demonstrate a nexus between the crime and interstate commerce).
123. The United States Judicial Conference, the federal judiciary's policy-making organization, for example, has expressed its concerns about federalization and has endorsed "limited federal jurisdiction." Grene, supra note 106, at 3.
124. 402 U.S. 146 (1971); see supra note 31 and accompanying text (discussing the Perez Court's reasoning).
125. See supra note 52 and accompanying text.
126. By 1989 Reagan appointees constituted 47% of all federal judges. Sheldon Goldman, Reagan's Judicial Legacy: Completing the Puzzle and Summing Up, 72 JUDICATURE 318, 318-19 (1989). Goldman believes that "Ronald Reagan will be seen as having had the greatest influence on the shape of the American judiciary and law since Franklin Roosevelt." Id. at 330.
129. See, e.g., United States v. Cortner, 834 F. Supp. 242, 244 (M.D. Tenn. 1993) (observing that "[a]t every meeting of federal judges that I attend there is the complaint that the Congress is broadening federal jurisdiction to the point where we are unable to do our jobs"), rev'd sub nom. United States v. Osteen, 30 F.3d 135 (6th Cir. 1994) (table).
This court suspects that Congress expects courts invariably to presume that Congress intends to hang any and all new federal legislation which purports to control activity within the several states on the so-called Commerce Clause . . . . After all, has not everyone been conditioned to believe that there is nothing which moves or has ever moved which does not support an invocation of the Commerce Clause . . . .

The Supreme Court has never held that the commerce power is unlimited and has thus kept open the possibility that the courts could reevaluate its application. Even a minor reevaluation could yield fundamental changes in federal authority. If the courts in criminal cases, for example, were to require prosecutors to prove the crime had an actual effect on interstate commerce, federal prosecutions of local crime would be curtailed.

Judicial resolution of federalization, however, has serious detriments. Perez v. United States, the landmark Supreme Court decision expanding criminal jurisdiction under the commerce power, is firmly rooted in the "affecting commerce" rationale. A move away from Perez, therefore, could erode the doctrine and thereby weaken important civil rights and environmental precedents. Moreover, a reevaluation would undercut established criminal case law and possibly lead federal courts to reach inconsistent conclusions about the constitutionality of criminal statutes. Such inconsistency would confuse the criminal law landscape.

Most importantly, as the Supreme Court observed, interstate commerce "is not a technical legal conception, but a practical one." Consequently, as federal courts have recognized, Congress has a superior institutional capacity for determining the effect of an activity on interstate commerce. Modern jurisprudence, therefore, treats the establishment of a nexus be-

131. See supra note 28 (discussing how the Supreme Court maintains that Congress does not have unlimited power to regulate intrastate activity).
132. See Kurland, supra note 128, at 411.
133. 402 U.S. 146 (1971); see supra note 31 (discussing the Perez Court's reasoning).
134. See supra notes 23-25 and accompanying text.
135. See supra notes 26-27 and accompanying text.
137. See, e.g., United States v. Lopez, 2 F.3d 1342 (5th Cir.) (observing that committee reports provide Congress with important information), reh'g denied, 9 F.3d 105 (5th Cir. 1993), cert. granted, 114 S. Ct. 1536 (1994).
tween activities and interstate commerce as a question of fact best left to the legislature.\textsuperscript{138}

B. THE EXECUTIVE BRANCH

The effects of federalization could be mitigated through the discretion of federal prosecutors. United States attorneys are granted the power to "prosecute . . . all offenses"\textsuperscript{139} in their district, but are not obligated to do so.\textsuperscript{140} The decision to institute criminal charges is the prosecutor's alone to make\textsuperscript{141} and is nearly immune from judicial review.\textsuperscript{142}

This solution would require that federal prosecutors make a pre-arraignment determination that the alleged offense actually impacted interstate commerce. This approach would thus be a de facto return to pre-Perez federal law enforcement: a nexus with interstate commerce would be required before a local crime would be heard in federal court.\textsuperscript{143}

Unstructured prosecutorial discretion is unlikely to alleviate the problems of federalization. Criminal cases "tend to flow toward the jurisdiction with tougher penalties."\textsuperscript{144} The strict sentencing guidelines\textsuperscript{145} and harsh mandatory sentences\textsuperscript{146} en-

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\item 138. See Saul M. Pilchen, Politics v. The Cloister: Deciding When the Supreme Court Should Refer to Congressional Factfinding Under the Post-Civil War Amendments, 59 Notre Dame L. Rev. 337, 382-85 (1984). This judicial deference to congressional findings regarding impacts on interstate commerce contrasts sharply with the de novo judicial determination in early commerce-power cases. Id. at 380-81.
\item 141. A federal prosecutor, for example, does not have to initiate prosecution even if sufficient evidence exists to support a conviction. See Jane W. Ellis, Prosecutorial Discretion to Charge in Cases of Spousal Assault: A Dialogue, 75 J. Crim. L. & Criminology 56, 60 (1984).
\item 142. See, e.g., Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967) ("Few subjects are less adapted to judicial review than . . . discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought.").
\item 143. See supra notes 40-41 and accompanying text (discussing federal criminal law prior to Perez v. United States).
\item 144. H. Scott Wallace, The Drive to Federalize is a Road to Ruin, Crim. Just., Fall 1993, at 8, 52 (quoting Rep. Hughes).
\item 145. See supra note 33 and accompanying text (discussing the Federal Sentencing Guidelines).
\item 146. See supra note 34 and accompanying text (discussing federal mandatory sentencing statutes).
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acted by Congress over the past two decades thus draw cases into the federal system. Two factors explain this phenomenon:

First, law enforcement officials file cases in federal court which they previously would have filed in state court because they believe that the defendants will serve more time in prison under the guidelines than they would under state law. Second, law enforcement officials file cases in federal court that they previously would not have filed in either state or federal court, because under pre-guidelines law, they did not believe the results of the prosecution would be worth the effort.\(^{147}\)

To help combat this phenomenon, the Department of Justice could adopt internal guidelines governing the prosecution of intrastate crime.\(^{148}\) Federal prosecutors, for example, could be required to obtain the Assistant Attorney General’s approval before initiating prosecution.\(^{149}\) These guidelines, however, would not be enforceable by the courts and could be modified by the Justice Department at any time.\(^{151}\) Consequently, prosecutorial discretion does not offer a lasting solution to the problem of federalization.


149. Such a solution would be similar to the current guidelines requiring approval of the Assistant Attorney General before indicting attorneys for laundering their clients’ fees. See D. Randall Johnson, *The Criminally Derived Property Statute: Constitutional and Interpretive Issues Raised by 18 U.S.C. § 1957*, 34 WM. & MARY L. REV. 1591, 1597 (1993); see also Kurland, *supra* note 128, at 390 n.74 (describing the requirement that federal prosecutors receive permission before initiating RICO prosecutions).


C. CONGRESS

The third option for halting federalization is for Congress to exercise restraint and legislate only when federal action is genuinely necessary.\textsuperscript{152} It is Congress's responsibility to limit federal jurisdiction\textsuperscript{153} and thereby maintain the allocation of authority envisioned by the Framers.\textsuperscript{154} Moreover, as Chief Justice Marshall noted, the commerce power is ultimately restrained only by Congress's discretion.\textsuperscript{155}

Historically, Congress proceeded cautiously in enacting criminal statutes that target local activities.\textsuperscript{156} The carjacking statute provides Congress an opportunity to reestablish a policy of restraint. The statute, by making almost any theft of an automobile a federal offense,\textsuperscript{157} intrudes on a traditionally local area of law enforcement without lowering the crime rate.\textsuperscript{158} Congress should therefore limit its scope to criminal activity with an actual nexus to interstate commerce. The amended statute, for example, could target theft of an automobile when combined with the movement of the stolen car or its parts across state lines.\textsuperscript{159}

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    \item 152. See, e.g., United States v. Brown, 959 F.2d 63, 68 (6th Cir. 1992) (observing that curtailing federalization "must come from Congress rather than the courts").
    \item 153. The Constitution provides for "such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. Congress also has authority over the Supreme Court's appellate jurisdiction. U.S. Const. art. III, § 2. Congress thus has a great deal of control over the federal judiciary. See Michael Wells, Congress's Paramount Role in Setting the Scope of Federal Jurisdiction, 85 NW. U. L. REV. 465, 465 (1991). See generally Mayer, supra note 11, at 5-10 (discussing the allocation of federal judicial power).
    \item 154. See supra notes 9-12 and accompanying text (discussing the traditional role of states in the area of criminal law).
    \item 155. Chief Justice Marshall observed:
        The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are... the sole restraints on which they have relied, to secure them from... abuse [of the commerce power]. They are the restraints on which the people must often rely solely, in all representative governments.
    \item 156. See supra note 40 and accompanying text (discussing the traditional reluctance of Congress to enact criminal legislation).
    \item 157. See supra notes 45-50 and accompanying text (discussing the carjacking statute).
    \item 158. See supra note 49.
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Unfortunately, such an amendment is improbable because Congress has an "underdeveloped capacity for self-restraint."\textsuperscript{160} To be sure, the need for Congress to regain its historical caution regarding criminal law is recognized by many members.\textsuperscript{161} With little political mileage to be gained, however, Congress is unlikely to tackle the politically risky task of limiting the criminal code. Indeed, the reverse situation is more probable: Congress will continue to enact new criminal statutes to appease constituents.\textsuperscript{162} As the Framers feared, the broader national interest is in danger of being subjugated by the political considerations of individual legislators.\textsuperscript{163}

D. A PROPOSED COMMISSION

This Note proposes that Congress appoint a commission to address the politically charged issue of revising the criminal code. Such a commission would not be without precedent and, although not a panacea, would be likely to revise the code fairly while avoiding a purely politically-driven outcome.

1. The Proposed Commission

The proposed commission takes as its model the 1988 commission used to decide which military bases should be closed.\textsuperscript{164} In that situation, Congress, unable to overcome political gridlock, authorized a twelve-member commission of military experts appointed by the Secretary of Defense to recommend


\textsuperscript{161.} Senator Joseph Biden, for example, acknowledged in a recent speech that "too many small cases . . . are brought in federal courts, rather than the state courts that are equally competent to hear them." Bendavid, supra note 56, at 1; see also Members of Congress Fault Trend to Federalize Crimes, THIRD BRANCH (Administrative Office of the U.S. Courts, Wash., D.C.), June 1993, at 1, 1 (describing the concerns of Rep. Brooks and Sen. Metzenbaum).

\textsuperscript{162.} See, e.g., Naftali Bendavid, Will Federalizing Domestic Violence Really Help Women?, Recorder, June 21, 1994, at 1, 12-13 (discussing the politics of the Violence Against Women Act); see also supra note 63 and accompanying text (discussing the political appeal of expanding the criminal code).


which bases should be closed in light of various criteria.\textsuperscript{165} Importantly, the Base Closure and Realignment Act provided for silent congressional approval of the commission's recommendations and limited Congress to voting on the entire list of bases to be closed.\textsuperscript{166}

Similarly, the proposed commission would study the federal criminal code and recommend which statutes targeting intra-state crime are excessive. The charter would provide at least four criteria for the commission to consider: 1) the historical role of the federal government in controlling crime, 2) the police power of states, 3) the mission of the federal court system, and 4) the deterrence value of particular statutes.\textsuperscript{167} The proposed commission would consist of former members of Congress, retired federal law enforcement officials, and scholars appointed by the Attorney General. The commission's recommendations would take effect unless Congress passed a joint resolution rejecting the package proposal.

2. Advantages of Commissions

Government by commission is an increasingly common mechanism used by Congress to take advantage of expert analysis while avoiding legislative stalemate. Commissions similar to the proposed one, for example, have successfully addressed such divisive policy issues as the closure of military bases and the reform of the social security system.\textsuperscript{168} Additionally, the United States Sentencing Commission has been praised by some com-

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\item[167] These factors are suggested by the above analysis. See supra part II (discussing the harms of federalization).
\end{footnotes}
mentators for removing politics from the sentencing process.\textsuperscript{169} Federal courts have held that these commissions are not an excessive delegation of legislative authority.\textsuperscript{170} Consequently, scholars predict legislative commissions will continue to play an important role in policy decisionmaking.\textsuperscript{171}

Federalization resembles policy issues successfully addressed by previous commissions, indicating that the proposed commission would succeed in its mission. The Greenspan Commission, for example, was formed in the early 1980s to address a social security system on the verge of bankruptcy.\textsuperscript{172} Federalization, by draining federal judicial resources, also requires Congress to undertake meaningful reform. Such comprehensive reform is well suited for commissions because of their ability to deliberate in an orderly manner.\textsuperscript{173}

The creation of a commission, however, does not guarantee a halt to federalization of criminal law. Not all commissions have succeeded in their missions.\textsuperscript{174} Moreover, the politics of federalization differ from those of base-closings. Only a few legislators felt pressure to oppose the base-closing commission's recommendations.\textsuperscript{175} In contrast, federal criminal law is a much broader issue. Nonetheless, federalization is disrupting law enforcement and damaging the federal courts. The proposed commission might not succeed, but the possibility of restoring

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\item \textsuperscript{169} See, e.g., Karle & Sager, supra note 33, at 420 (praising the Commission for reducing sentencing disparity). Unlike the Sentencing Commission, which is a standing body, see supra note 33, the commission proposed in this Note would make a single recommendation.
\item \textsuperscript{170} E.g., National Federation of Federal Employees v. United States, 905 F.2d 400, 405 (D.C. Cir. 1990).
\item \textsuperscript{171} See, e.g., Mark Seidenfeld, A Civic Republican Justification for the Bureaucratic State, 105 HARV. L. REV. 1511, 1542 (1992) ("I believe that the success achieved by the Defense Base Closure and Realignment Commission was not an anomaly.").
\item \textsuperscript{172} See supra note 168 and accompanying text (discussing the social-security commission).
\item \textsuperscript{174} The Quadrennial Pay Commission, for example, failed to resolve the politically delicate issue of salary increases for Congress and the federal judiciary. See Hanlon, supra note 168, at 342-43.
\item \textsuperscript{175} Id. at 344.
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the traditional federal/state criminal law dichotomy and protecting the federal courts makes it worth the effort.

CONCLUSION

American federalism provides for the vast majority of crimes to be regulated by state and local governments. Congress, however, has enacted numerous statutes in recent years creating new federal offenses based on expansive interpretations of the commerce power. By creating the commission proposed in this Note, Congress can send the strong message that it intends to restore the proper balance between state and federal law enforcement.