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Dual Sovereignty, Federalism and National Criminal Law: Modernist Constitutional Doctrine and the Nonrole of the Supreme Court

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PRESENTATION BY PROFESSOR WILLIAM VAN ALSTYNE*

Dual Sovereignty, Federalism and National Criminal Law: Modernist
Constitutional Doctrine and the Nonrole of the Supreme Court

A. Introduction

Near the end of the famous Watergate Hearings before Senator Sam Ervin's Senate Subcommittee more than a decade ago, the wagging-eyebrowed Chairman from North Carolina summed up his conclusion following one more witness's revelation of deceit and misinformation that had characterized the complex events and coverup of Watergate. "Oh, what a tangled web we weave, when first we practice to deceive," the Chairman opined. Senator Ervin's point was at once telling as well as entertaining. Watching the proceedings on network television, one had the impression that the whole nation at once nodded along. We were all part of that memorable event. In a single, fondly remembered quotation, the Senator had pretty well cut through to the truth.

From Watergate to this solemn panel on federalism and national criminal law might seem to be a very far stretch. To the contrary, I think it is not. There is a suitable parallel here. We, too, are now entangled in what our own constitutional tergiversations have wrought. There has been a consensus of sorts to let go of *constitutional* federalism, that is, of substantive federalism shaped by the Constitution itself. In its place, we have accepted what for want of a more felicitous phrase one might suitably describe as *political* federalism, or federalism to such extent as national politics solely decide.

Under political (or political sufferance) federalism, it is for Congress to decide to what extent it desires to make national law, whether civil or criminal, and that is that. Congress determines what in *its* view warrants national, uniform control. Insofar as national consensus (represented by Congress itself) decides that certain things ought to be criminalized and prosecuted, then, that decides the matter, and so they are made national crimes. To the extent that Congress is content to leave the field to the patchwork of state criminal law, Congress may, on just that basis, leave matters alone. But to the extent it is discontent to do so, *regardless* of the subject, it is free to proscribe a given practice, acting as a national state. Only what it will suffer the states to treat as each might think appropriate, with no overlay of national criminal law, will Congress leave alone. There is nothing necessarily amiss in this arrangement. Indeed, an excellent case can be made, and has been, that it is just about

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right. Insofar as national consensus (represented by Congress itself) decides that certain things *ought* to be criminalized and prosecuted, whether separately, additionally, or wholly apart from the willingness of each state to do so, irrespective of the subject, many will agree that the Constitution ought not stand in its way.

Political sufferance federalism, as distinct from constitutional federalism, measures the propriety of national criminal law solely by political checks directly and indirectly operating on Congress. It does *not*, on the other hand, contemplate *any* significant role for the *judiciary*. Rather, the judiciary is expected to defer to the outcome already reached in Congress. The judiciary must of course still interpret the acts Congress adopts, but it is not expected to do much beyond that conventional task.¹ Specifically, in a system of political (or political-sufferance) federalism, it is not for the judiciary to gainsay such power to enact national criminal law as Congress determines to be appropriate, just because Congress criminalizes something for which others are unable to find any implied or expressly enumerated power constitutionally given to Congress thus to use.

Political federalism, as distinct from constitutional federalism, is thus sufferance federalism, that is, federalism superintended by Congress and unsuperintended by the courts. Essentially, two centuries after the framing and ratification of the Constitution, this is the system we have. To be sure, there was never an explicit amendment enacting political sufferance federalism in lieu of constitutional federalism in the United States. Rather, the process of judicial appointment, acquiescence, interpretation, and deference rationalization, has brought it effectively to pass. Nevertheless, since it has in fact come to pass, my comment will be quite brief.

The following review of political sufferance federalism is divided into three short parts and is meant to show what has become of constitutional federalism with reference to national and state substantive criminal law, from the expectation of 1789 to the current time. It examines three models arguably applicable to the division of legislative power between Congress and the States according to the Constitution. It suggests that there are some constitutional losses, as well as what others regard as great national gains. There is also some sense of a tangled web in the manner in which the Supreme Court, as well as Congress, has behaved.

B. Touching Base with the Obvious Place to Begin A Review of Federalism and National Substantive Criminal Law

As we all presumably know quite well, there is no federal *common* law of crimes as such, as there is in certain states. Rather, as the Supreme Court

1. For two strong examples of narrow statutory interpretation, each illustrating the mitigative possibilities of strict criminal law statutory construction, see *Yates v. United States*, 354 U.S. 298 (1957); *Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

held early on in *United States v. Hudson*,² the Constitution vests in the national government a limited enumeration of affirmative powers pursuant to which Congress must act by statute insofar as one is to be held answerable to alleged violations of national criminal law. Under the Constitution, for the greater part of our history, the determination of what shall be considered criminally sanctionable conduct has been a primary function of state, rather than of national law. To state the matter somewhat differently, the plan of federalism is generally this: whether certain conduct shall be deemed criminal or not criminal is, as a general proposition, to be determined state by state.

On the other hand, the national government must act pursuant to such powers as the Constitution grants it, and there is no *general* power in Congress to say what shall be a crime.³ As Chief Justice Marshall wrote in *United States v. Fisher*,⁴ "[u]nder a constitution conferring specific powers, the power contended for must be granted, or it cannot be exercised."⁵ Justice Brewer reaffirmed this principle in *Kansas v. Colorado*,⁶ where he wrote that "the proposition that there are legislative powers . . . not expressed in the grant of powers [to Congress], is in direct conflict with the doctrine that this is a government of enumerated powers."⁷ Hamilton specifically addressed the allocation of responsibility to the courts as well as the Congress to respect and apply the doctrine of enumerated powers and the tenth amendment when he wrote:

[i]f it be said that the legislative body themselves are the constitutional judges of their own powers and that the construction they put on them is conclusive upon the other departments it may be answered, that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution. . . . It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the

2. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 33 (1812). In *Hudson*, the Court stated that "[t]he only question which this case presents is, whether the Circuit Courts of the United States can exercise a common law jurisdiction in criminal cases." *Id.* at 33-34. Unanimously answering no, it reasoned that "[t]he powers of the general Government are made up of concessions from the several states—whatever is not expressly given to the former, the latter expressly reserve. . . . The legislative authority of the Union must first make an act a crime pursuant to some power or powers expressly given it." *Id.* For the equivalent proposition with respect to national civil law, see *Erie R. Co. v. Tompkins*, 304 U.S. 64, 75-79 (1938). For a review of the general field, see Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883 (1986).

3. For a review of Supreme Court usages of implied powers, see 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION *Implied Powers* 962 (1986).

4. 6 U.S. (2 Cranch) 358, 395 (1805).

5. *Id.*

6. 206 U.S. 46 (1907).

7. *Id.* This reflects the tenth amendment to the Constitution which states that "powers not delegated to the United States, nor prohibited to it by the states, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

legislature in order, among other things, to keep the latter within the limits assigned to their authority.⁸

The lack of federal authority to develop a federal criminal common law is still with us today. A useful example may illustrate this basic point, furnished in the state-by-state differences respecting criminal sodomy, with respect to which there is, even now, no national law. In a number of states, sodomy is a crime as it was a crime in nearly every state as recently as 1960, but now is no longer. Rather, in just about half the states, consensual acts of sexual choice (including sodomy) have been decriminalized, as the Supreme Court noted in *Bowers v. Hardwick*⁹ two terms ago.

In some states, moreover, state law has gone well beyond mere decriminalization. In this latter group of states, of which California is an example, the civil rights law of the state may treat sodomy virtually as a *protected* personal choice; the state law may forbid discrimination against those who engage in it. In essence, the "law" of sodomy in the United States is not one thing but any one of three different things. What it is depends upon where one resides or where one finds oneself when one acts. While this may seem startling to some, it is entirely as strong, natural federalists would quite expect.

A more interesting example of federalism and criminal law, perhaps because it may seem more startling, is the willful killing of another without legal privilege or legal excuse, or murder. While all states, of course, disallow murder in some manner, it is still true that its definition, its separation by degree, the scope of legal privilege, the recognition of legal excuse, etc., differ in highly material ways, as do the penalties. In fact, at the margin, which is by no means trivial, what is "murder" in one state is not murder but, rather, a form of excusable homicide in a different state where, for example, the calculus of fault—the scope of excusing "insanity" or "diminished mental capacity"—reflected in the state's law, is not the same as in the state next door. Of course, there is no general national crime of murder as such. Nor consistent with federalism, could Congress presume to enact a national general anti-homicide or national general anti-sodomy criminal statute *simpliciter*. The reason? It is as obvious as it is rudimentary: the Constitution nowhere authorizes it to do so.

One may wish to doubt this, perhaps especially as to homicide, about which one may care more than one cares about sodomy or something else. Still, doubt it as one will, the burden will remain exactly to show pursuant to what grant of power might Congress act? Other than in reference to the District of Columbia (a federal enclave expressly subject to plenary congressional legislative jurisdiction), or the possessions and territories of the United States, wherein does the Constitution confer any plenary, national, legislative jurisdic-

8. THE FEDERALIST No. 78, at 438-39 (A. Hamilton) (I. Kramnick ed. 1987); see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (applying *The Federalist No. 78*). For a review of Supreme Court usages of implied powers, see *Implied Powers*, *supra* note 3, at 962.

9. 478 U.S. 196 (1986) (data respecting the pattern of state laws are presented in the Supreme Court's review of this case).

tion to say what shall generally be deemed to be a criminal offense and what not? So, startling or not, there is really no more to grasp onto here in regard to "homicide" as such than, say, "sodomy," or still something else. This, then, or so it seems to me, is the obvious right place to begin our brief review. Diversity and disagreement among fifty differently minded states regarding the criminality of what one does in each state is the general constitutional rule; superimposition of national criminality by Congress is not.

C. Express Powers in Congress to Specify Certain Offenses And Provide for Their Punishment: A Strict Constructionist View

The obligatory, albeit important, reminder of basic federalism doctrine having just been finished, it is nonetheless true that the Constitution is *not* silent in respect to certain powers that it does take care to vest in Congress to criminalize certain acts. Indeed, several specific, express clauses vest in Congress a power to punish certain acts or omissions as crimes against the United States. As to these few areas, there is no doubt Congress is empowered to act, quite apart from whether it tends to cross over the coverage (or non-coverage) that may arise as an incident of ordinary state criminal law.

For example, there are two such explicit clauses provided in article I, section 8, that list certain things Congress may describe and punish as crimes. The first provides that "Congress shall have power . . . to provide *for the punishment* of counterfeiting the Securities and current Coin of the United States."¹⁰ Another, in the same article and the same section, provides that "Congress shall also have power . . . to *define and punish* Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."¹¹ Also, there are a few other provisions expressly providing for congressional criminal law power elsewhere in the Constitution, that is, other than in article I, section 8. For example, article III, section 3, provides that "Congress shall have the *Power to declare the Punishment of Treason*,"¹² even while limiting the definition (as well as the penalties) Congress is authorized to enact.

Apart from these few clauses, however, the Constitution provides no other explicit substantive power in Congress to define what shall be criminal or to provide for "punishments." Accordingly, it is quite arguable (indeed, a strict constructionist would be encouraged so to argue) that the few clauses already adverted to are themselves conclusive of what Congress may do in respect to national substantive criminal law. In other areas of constitutional law, just to illustrate the potential force of this argument, the Supreme Court has given explicit constitutional provisions just such an *exclusive* effect. It has done so, moreover, on the seemingly logical ground of *expressio unius, exclusio alterius est*. The *expressio unius* principle means that insofar as the Constitution addresses a given subject in a particular and explicit way (here, the subject of

10. U.S. CONST. art. I, § 8, cl. 6.

11. U.S. CONST. art. I, § 8, cl. 10.

12. U.S. CONST. art. III, § 3, cl. 1.

express powers in Congress to *punish* certain things as crimes against the United States), the clauses that do so are meant to be both empowering *and exclusive* as well. And insofar as they are the latter, they are obviously not merely precautionary, or merely illustrative, of what Congress may do. Rather, they specify the sole areas in which Congress may make criminal—as distinct from civil—law.

It is interesting to note that the Supreme Court applied this *expressio unius* approach in *Marbury v. Madison*.¹³ There, the Court held that insofar as the Constitution affirmatively identified certain kinds of cases that would lie within the original jurisdiction of the Supreme Court, the same clause implied that no other kinds of cases could be brought within that jurisdiction even if Congress desired that they should, and even though there was no separate or additional express constitutional provision limiting Congress from adding to the original jurisdiction of the Court other kinds of cases, including other cases clearly within the judicial power of the United States.¹⁴ Rather, the conclusion—that other kinds of cases could not be added to the Court's original jurisdiction—was regarded as impliedly forbidden by the specific affirmative provision directed to the Court's original jurisdiction as such.

If an equivalent "strict construction" ("*expressio unius*") analysis were applied to our subject, it would yield a similarly *strict* limit on the power of Congress to legislate on crime: to provide such criminal sanctions as Congress may decide to be appropriate in respect to each subject thus specified (for example, counterfeiting national currency, offenses on the high seas, treason) *but not otherwise*. An interesting sort of argument, is it not?

This strict constructionist approach would, for federalists, be much more conducive to federalism than what we have. For while it would not deny to Congress the power to be effective in respect to other enumerated powers with which Congress is clearly entrusted, it would limit Congress in all such instances short of treating noncompliance as a *crime*, rather than simply as a *civil* wrong to be *civilly* prevented (for example, enjoined), or *civilly* redressed (for example, by money damages). In brief, it would generally disallow regulation by criminalization, reserving the criminal law consequences of most transactions and most personal activities in the United States as an ordinary incident of state law alone.

An example, again, would be this: to "punish" the counterfeiting of national currency, national criminal statutes could obviously be enacted, because

13. 5 U.S. (1 Cranch) 137 (1803).

14. Indeed, to the contrary, a separate clause in the same article III of the Constitution provided for the appellate jurisdiction of the Court—and then provided that appellate jurisdiction was subject to such exception as Congress might choose to make. U.S. CONST. art. III, § 2, cl. 2. Consistent with the empowering clause, Congress might logically be deemed to have power to make an exception of certain cases otherwise reaching the Court only on appeal by providing that they might commence in that Court instead. The whole clause would have made eminently good sense, therefore, by interpreting article III to guarantee that certain cases could commence in the Supreme Court. However, unless Congress decided to so provide, all other cases within the judicial power could be heard there only on appeal. The Court, however, unanimously held against any such claim.

it is explicitly provided for in article I, section 8. For acts of "robbery," "theft," or "embezzlement," on the other hand, whether generally or from a bank (and whether or not the particular bank were federally insured), any purely *criminal* prosecution that might be brought would arise solely as an unexceptional incident of some ordinary applicable state criminal law, insofar as it could arise at all. This approach—which may seem strange to some but perhaps ought not to seem strange to strict constructionists—would limit Congress to civil (noncriminal) forms of regulation of matters in respect to which it is given no express power to provide for punishment in the Constitution. It would at the same time gain a very great deal that might be of interest to strong civil libertarians. It would also give much more significance than modern doctrine provides to the clause in the fifth amendment in our Bill of Rights which provides that no person "shall be subject for the same offence to be twice put in jeopardy."¹⁵

Defining what is the "same" offense has frequently been a problem. Where the United States is granted a separate sovereign substantive criminal law jurisdiction of its own (for example, to punish the counterfeiting of its currency), under principles of dual sovereignty it is conceded that multiple federal and state prosecutions are not foreclosed though the accused is twice placed in jeopardy on what may be a single disputed event. So, in the case just supposed, there may first be a state prosecution for the state law felony of "larceny by trick," where the offense was the attempt by the accused to secure something of value from another by using counterfeit currency (the "trick" was the knowing use of that very currency), and then, regardless of its outcome, a virtually identical, overlapping federal "counterfeiting" prosecution as well. In this instance, the same wrongdoing (passing counterfeit currency) is twice alleged, tried, and possibly punished, in two prosecutions, against the same person, in successive prosecutions. But there is no barrier to this possibility despite what the fifth amendment says. Even if in the first trial an acquittal was voted because the jury concluded the accused was not involved at all, still that acquittal, on that dispositive fact as found by the jury in favor of the accused, has no preclusive effect on the second jury's decision on precisely the same issue.

It is the principle of dual sovereignty that is used to explain the permissibility of the practice of successive state and federal (national) prosecutions in such cases. The interest of the United States—to protect its currency from debasement—is independent of, and not the same as the state's interest—to protect persons from a species of criminal fraud. Thus, the one interest is not subsumed by the other; the interest of the United States is not redundant to that of the state, nor can it be treated as submerged in the determination of the state's trial jury as to what the accused did, or did not, do. The entitlement of two successive criminal prosecutions, first by the federal government and again by the state (or first by the state and again by the United States), is not deemed to be foreclosed by the protection the fifth amendment pro-

15. U.S. CONST. amend. V.

vides. The accused can take no conclusive comfort in having been found "not guilty," by a jury of his or her peers, as his or her first reading of the fifth amendment might lead one so to suppose. He or she may at once be placed in jeopardy under the alternative law, by the alternative "sovereign," so far as the fifth (or the fourteenth) amendment is concerned.¹⁶

Under the "strict construction" view of federalism we are currently reviewing, however, this is not terribly distressing, or at least is not a distress that can *often* arise. The reason is that the subjects for which Congress may provide separate punishment of its own *are strictly limited* to those subjects with respect to which Congress is provided an *explicit* penal power, exactly as we have seen.

On the other hand, note that any more generous a view of congressional power to impose national *criminal* law necessarily also increases the field of "dual sovereignty" overlap between state and federal criminal law. Correspondingly, the opportunities for abuse and harassment also pile up, for example, of treating the first "sovereign's" prosecution as a dry run from which to learn what next time to do, contrary to the spirit of the fifth amendment guarantee. The strict construction view of congressional power to define and punish crime minimized this risk. In that respect, it is commendable additionally from a fifth amendment point of view.

In brief, while the view of substantive criminal law power in Congress we have been examining would doubtless handicap Congress in some measure from its *own* point of view, it would also have the following benefits:

1. It would reflect a principle of strict construction respecting the Constitution generally, and also constrain Congress from legislating crimes short of its general tendency to deploy national criminal law;
2. It would to the same extent re-establish the importance of each state's *own* primary responsibility for criminal law (when Congress may superimpose some penal rule of its own, it may hardly matter what a state may or may not do);
3. It would give real weight and more meaning to the fifth amendment; "autrefois acquit" and "autrefois convict" would generally be dispositive verdicts, and not merely the sound of a criminal law gong, sounding the end of "round one."
4. It would *not*, on the other hand, significantly cut back on the law making power of Congress generally; the thesis is one addressed solely to congressional power to make national *criminal* law, and Congress might still provide *civil* regulation across a wider subject matter frontier, pursuant to such enumerated powers as *it is so authorized to act*.

But having now looked at this plausible model (one, incidentally, never adopted by the Supreme Court), let us examine a very different view.

16. *E.g.*, *Bartkus v. Illinois*, 359 U.S. 121 (1959).

*D. Powers in Congress to Specify Such Crimes As It Thinks Appropriate:
Modernist Doctrine and the Nonrole of the Supreme Court*

Despite the elegance and strong federalism (and civil liberties) appeal of this first view, that is, of highly limited congressional power to make a national criminal law, it is not the prevailing view. Rather, there is at least one major additional source of power pursuant to which Congress may act in presuming to provide penal sanctions other than the particular clauses that expressly so provide. Correspondingly, the field of double jeopardy prosecutions that accused persons may face pursuant to dual sovereignty entitlements of distinctive state and national interests is also larger.

The additional source Congress may draw on is, simply, the "additional source" of any other enumerated power also granted to Congress, plus the necessary and proper clause in article I, section 8. In short, the power to prescribe federal crimes is not limited to the short list of subjects with respect to which the power to "punish" is expressly vested in Congress. It extends to anything within any other enumerated power, though the clause enumerating the power relied upon by Congress may itself say nothing of a power to punish or to make something a national crime.

By far the most familiar example of such a clause is the clause vesting in Congress the power "to regulate commerce, with foreign nations, and among the several states, and with the Indian tribes."¹⁷ This clause, together with the necessary and proper clause, is and has been the springboard most often used by Congress to criminalize acts as it likes. It is also why, in the main, the particular subject of this panel, federalism and the limits or lack of limits on national criminal law, is not a very important one, as a technical matter, despite many other reasons why one might be interested in the subject as a matter of policy, efficiency, double jeopardy, or good sense.

The result of the conventional wisdom—that Congress is not confined to providing penal sanctions only on subjects the Constitution expressly authorizes it to treat in this way but may provide penal sanctions whenever they are an appropriate means of carrying *any* of its enumerated powers into effect—is that the interplay of state and federal (national) substantive criminal law is principally a function of politics and policy, nothing more. Constitutionally, Congress need not (but it may and sometimes does) make criminals of persons who use the postal service to mail things: it does not matter whether what they send offends neither the criminal law of the state from which they make the mailing, nor the criminal law of the receiving state, nor, indeed, any of the states in between. Congress need not (but may and sometimes also does) similarly criminalize the use of any private commercial medium, whether between the states or wholly within a state. It does so pursuant to both the commerce clause and the necessary and proper clause. Even more, Congress may criminalize transactions without requiring evidence that the transaction, the participants, or, indeed, any of the items or proceeds of the transaction,

17. U.S. CONST. art. I, § 8, cl. 3.

have any interstate connection, direct or indirect. Indeed, Congress has done so lately. In fact, on the face of the act of Congress, there may be nothing whatever to distinguish it from a purely ordinary state criminal law. Yet, even this last sort of national substantive criminal law is now deemed to be within Congress's power. Specifically in the last mentioned case, even as ultimately tested in the Supreme Court, only one Justice held that it was not.¹⁸

Moreover, because of behavior now commonplace in federalism cases in the Supreme Court,¹⁹ the capacity of Congress to criminalize as it likes does not stop with the sort of example I have just now recalled. What may safely now be bluntly claimed virtually as a national "police power" (as distinct from a commerce power) is not confined to commerce among the states. It is not confined to "commerce," as such, at all. Rather, it extends to command even the terms of purely local public works. If a small town undertakes to provide a public park entirely from local taxes, for instance, it may not now do so unless it can meet congressionally-dictated standards of what it must pay its own employees to plant the grass or supervise the playground. It must do so, even though what it does has nothing whatever to do with interfering with, much less attempting to influence, regulate, or participate in commerce among the states. Nor will it affect the outcome that the local park project may be in part a good faith community means to provide a measure of local work for unemployed people in the immediate community. Congress may nonetheless pass legislation, and has done so, to compel the community to forgo its project entirely if it is unable or unwilling to pay such wages as Congress will require it to pay, without federal assistance. On what constitutional basis? Pursuant to what enumerated power? Pursuant to the power to "regulate . . . the several states," that is, the clause in article I, section 8, in whose wholly self-determined congressional uses the Supreme Court has acquiesced.²⁰

18. *Perez v. United States*, 402 U.S. 146, 158 (1971) (act of Congress indistinguishable from any commonplace state extortion statute not requiring proof of any interstate element or any interstate effect, either direct or indirect, either in isolation or in combination with all identically treated transactions, sustained). In *Perez*, however, Justice Stewart disagreed with the Court, stating, "I cannot escape the conclusion that this statute was beyond the power of Congress to enact." *Id.* at 157 (Stewart, J., dissenting).

19. See, e.g., *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). Justice Rehnquist, in his concurring opinion, wrote that:

[i]t is illuminating for purposes of reflection, if not for argument, to note that one of the greatest 'fictions' of our federal system is that the Congress exercises only those powers delegated to it, while the remainder are reserved to the States or to the people. *The manner in which this Court has construed the Commerce Clause amply illustrates the extent of this fiction.*

Id. at 307 (emphasis added).

20. See *Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528, 547 (1985) (application of minimum wage and overtime requirements of FLSA to local agency sustained) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976)); see also *Nine for the Seesaw*, THE ECONOMIST, Mar. 2, 1985, at 212 ("the Supreme Court seems to have declared that judicial enforcement of the constitutional position on federalism is at an end"). The ellipse in the text quotation of the

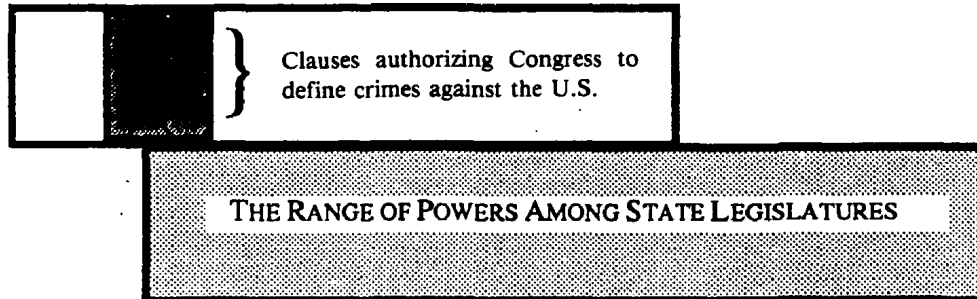
Because of the modern *non*role of the Supreme Court in leaving to Congress the prerogative of determining the proper scope of its own principal powers as enumerated in article I and elsewhere in the Constitution, there is no serious restriction on what Congress may or may not choose to criminalize, aside from such considerations of self-restraint as Congress itself may be inclined, politically, to observe. To be sure, there remains the different kinds of limits provided by parts of the Bill of Rights, such as the first amendment's protection of freedom of speech. These, however, are merely the same sort of limits elsewhere also addressed to the states through the fourteenth amendment: none of these frame any federalism limits at all. The net consequence is, therefore, that virtually anything a state legislature might make a criminal offense, whether or not it has seen fit to do so, Congress may make into a *national* crime. Again, under the dual sovereignty principle of the fifth amendment, the national government is entitled to bring its own prosecution, so long as it is nominally independent of what the state may have done, without regard to the way in which the state proceeding may have concluded in respect to essentially the same subject and (for all practical purposes) the same crime. This is, in short, the federalism we now have.

E. Sorting Out the Tangled Web of Federalism and National Criminal Law

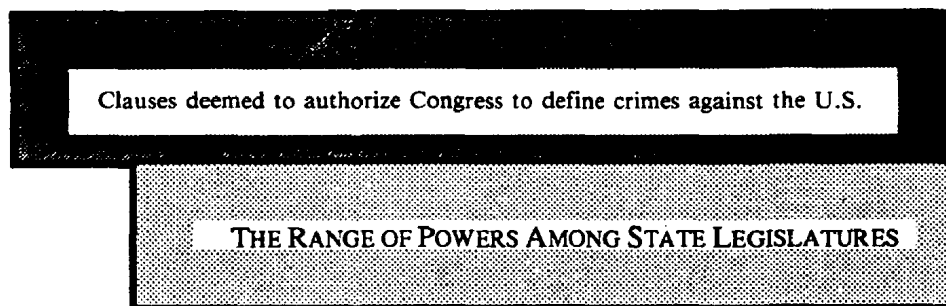
We have now looked briefly at two alternative views respecting the power of Congress to enact national criminal law. The differences between them are indeed extreme. The first is that which I have called *conservative* or *strict-constructionist*. The second is not so easily described, but *modernist*, or *political-sufferance federalism*, will probably do. Respectively, they are very different. Graphically, they look like this:

commerce clause, omitting the part of the clause, "commerce among," is deliberate and meant for emphasis, as a majority of the Court now treats the clause as though it lacked these limiting words.

THE RANGE OF LEGISLATIVE POWERS IN CONGRESS



THE RANGE OF LEGISLATIVE POWERS IN CONGRESS



With respect to each, one may note that they do not differ in one respect: there is a zone of competence in the criminal law constitutionally granted to Congress that the states are not constitutionally competent to deal with.²¹ They share this narrow wedge of criminal law jurisdiction constitutionally reserved to the nation as a whole to assert. However, in the first model the zone of potential national (domestic) criminal law is narrowly constrained: insofar as certain clauses expressly empower Congress to specify certain offenses and punishments, these offenses are at once both empowering and limiting, or exclusive. In the second model, the authority of Congress to enact criminal laws is unconstrained by federalism; Congress may enact nationwide criminal law virtually as freely as it may in the federal conclave of the District of Columbia itself.

The second model does not yet *verbally* disregard the doctrine of enumerated powers. Rather, it reports its nonapplication in actual practice, consistent with the newer nonrole of the Supreme Court. In practice, this role is that of interpretative acquiescence and validation of claims of congressional authority, an authority now subject to serious judicial (as distinct from political) check

21. For example, defining and punishing piracy on the high seas is properly understood to be a power vested in the United States alone.

only via the Bill of Rights.²² The modernist view of legal history in the United States having thus been written principally since 1936, and moved on, we are near the end of this very brief review of federalism in the comparison of respective national and state substantive criminal law. Still, before leaving the subject in this rather arthritic condition, a passing word or two may be appropriate, to venture some professional comment of my own.

As to the first model, though I may wish to leave with this audience the implicit suggestion that the model does in fact reflect the correct, that is, originally established, clear constitutional division apportioning substantive criminal law legislative jurisdiction between Congress and the states, I actually do not believe it does. Rather, despite its attractive federalist appeal and, despite even its "*Marbury*-like" (*expressio unius*) way of distinguishing a limited criminal lawmaking set of powers in Congress from a broader civil lawmaking set of powers in Congress, I think it is false. Rather, I do not doubt that the few express clauses specifically addressed to certain criminal lawmaking powers of Congress were precautionary, rather than exclusive. The model is elegant and neat (and in some ways I might wish it were correct), but it is nonetheless almost certainly incorrect. It would take some falsification of constitutional history to make it "correct," if that is so.

Insofar as the commerce clause does and was meant to authorize Congress to break down barriers to trade in our national and international commerce, and to assure conditions of freer trade as the framers of the Constitution meant for Congress to do, I do not think it unconstitutional for Congress to provide criminal sanctions (and not merely civil sanctions) as part of our national antitrust laws. I believe this insofar as Congress believes these sanctions to be necessary and proper for their deterrent value against state or private efforts to interfere with trade for their own ends. This is so, by way of further example, in respect to the enabling clauses of the three civil war amendments, that is, the enforcement clauses provided respectively in the thirteenth, fourteenth, and fifteenth amendments. These are, after all, provisions equal in their own right to the enumerated powers in article I. This is so also elsewhere in respect to the vested powers of Congress, such as the power to impose certain kinds of taxes and make willful evasion or nonpayment a criminal offense. Whether one sees the power to do the latter as within the power to levy such taxes, or, instead, as an incident of the necessary and proper clause, it comes to the same point in the end.

Having allowed this much, however, does *not at all* mean that one therefore accepts the second model: that model is also false, at least as false as the first, though false in a wholly different way. Its falseness lies not in its claim that Congress may adopt criminal law (and not merely civil law) measures appropriate to the subjects actually committed to congressional determination by the Constitution. Rather, it is false in the manner in which modernist doctrine has operated to efface the basic boundaries of constrained federalism in the

22. And, albeit to a much lesser extent, to some continuing judicial willingness to enforce the doctrine of separated powers.

United States. It is that effacement of the basic boundaries that is the sham in our constitutional law, nothing more but also nothing less. Given *that* falsification, given the Supreme Court's nonrole (or, rather, given its active role of passive validation of anything Congress presumes to do), we do now have a tangled web of exaggerated, highly overreaching, and frequently duplicative, national criminal law. The tangled web, itself, moreover, has two intertwined strands.

The first strand in this tangled web is that which we have already at least twice noted, namely, that Congress is no longer obligated to act within any merely reasonable or any merely moderate view of its expressly enumerated powers. Instead, the Supreme Court has accepted so self-serving and self-aggrandizing a congressional view respecting the scope of enumerated power that none has any coherent limit worthy of discussion, much less litigation. As we have already noted, for example, the "power to regulate commerce among the states" is read as though it said the power is one "to regulate," period, whether or not it is commerce, whether or not it is among the states, etc. It is read to say that "Congress shall also have power to regulate what each state does though the state is not engaging in commerce but is merely attempting to provide local services on such terms as it believes it can afford." The falsification of the clause is so complete that there seems little chance it can now be recalled. And so the same may be observed in respect to other clauses, without now taking time to run the exercise through.

There is a second strand to this tangled web, and it deserves a separate critical comment of its own. It is that the majority of the Court does not apply any serious federalism review to acts of Congress even when it is confronted with a virtually transparent fraud. This may seem to be a restatement of the first point, but actually it is not, and I shall provide at least one case to try to show.

To take up this second point specifically, suppose Congress levied a "tax" on all wagering transactions in the United States. In such a case, however, suppose also it was quite clear that Congress would itself be disappointed were the "tax" actually to generate any revenue, as distinct from discouraging the continued occurrence of wagering. In *United States v. Kahriger*,²³ a Supreme Court majority upheld just such an act of Congress, including its enforcement by criminal sanctions against all those compelled to report, to disclose, and to pay. The majority proceeded to dispose of the case essentially by declaring that a tax is a tax is a tax, that is, that it does not matter *why* the tax was enacted, or *what* it was meant to do.

Surprisingly, however, Justice Frankfurter, though himself a Roosevelt appointee to the Supreme Court, strongly dissented in the case. Moreover, he did so on pure federalism grounds. His point was so well and so usefully expressed that it is well worth quoting. This is what Frankfurter had to say:

[W]hen oblique use is made of the taxing power as to matters which substantively are not within the powers delegated to Con-

23. 345 U.S. 22 (1953).

gress, the Court cannot shut its eyes to what is obviously, because designedly, an attempt to control conduct which the Constitution left to the responsibility of the States, merely because Congress wrapped the legislation in the verbal cellophane of a revenue measure.²⁴

Justice Frankfurter's point is crucial. Indeed, it is fundamental to any useful and correct model of federalism review in the Supreme Court. Disregard it, as the Court has and is still now inclined to do, and the distinction between the enumerated powers vested in Congress, and the police powers reserved to the states, is totally lost.

An act though on its face nominally *within* an enumerated power, for example, a national excise tax on wagering transactions, Frankfurter says, ought *not* be sustained if it is clear that it is but "an attempt to control conduct the Constitution left to the responsibility of the States," albeit an attempt "wrapped . . . in the verbal cellophane of a revenue measure," as this attempt clearly was.²⁵ The acceptability of gambling, Frankfurter reminds us, was not given to Congress to determine at all. If such wagering is not now a crime in a given state, Congress cannot thus subvert that policy on the one hand, by enacting a tax that not merely renders such wagering more expensive (as must happen with any tax) but, rather, is meant effectively to wipe it out. Even if such wagering *were* a crime in a given state, moreover, Congress cannot make it so simply because it also disapproves of gambling just as the state does, for its coincidence of disapproval does not enlarge its power in any way. In any case, the act of Congress is void because it is unauthorized by anything confided to Congress in the Constitution of the United States.

In one respect especially, the Frankfurter dissent is as important as it is keen. Indeed, one may say admiringly of that rare, dissenting opinion that it implicitly yields a thoughtful, even a brilliant, recognition and use of the fifth amendment, as well as of the tenth amendment and of general federalism principles as well. It provides one final reprise on this subject. This is the insight Frankfurter provides.

The principle of dual sovereignty, pursuant to which overlapping state and federal prosecutions may sometimes proceed despite the fifth amendment ban on double jeopardy, has no standing if there is no federal interest separate from that which a state might hold in the event or conduct Congress's criminal statute seeks to punish. Only if Congress has a good faith interest in generating revenue, distinct from adding its own ("me too") desire to stamp out wagering, does the act of Congress comply with the fifth amendment's dual sovereignty reiteration of the federalism principles we have reviewed. In brief, what makes it a failure under federalism principles also makes it a sham under the fifth amendment.

If then—in Frankfurter's view—on the one hand the state in which the wagering takes place finds no reason to forbid it, Congress may not attempt to

24. *Id.* at 37.

25. *Id.* at 38.

gainsay the state's choice (to permit wagering) by wrapping its (unauthorized) criminal law prohibition in the "verbal cellophane" of a "revenue measure." Yet, Congress might otherwise, of course, have imposed even a steep excise tax on such wagers, if it wished, incidental to raising funds to meet such expenditures that Congress is constitutionally authorized to make. Equally, on the other hand, even if the state does criminalize wagering, the duplicative act of Congress gains no purchase of its own merely because that is so. Indeed, precisely to the extent that the congressional interest is not distinguishable from the state's, that is, precisely to the extent it has *no* revenue-generating purpose (but purely and wholly a "police power" purpose), it fails to meet the separate sovereignty (that is, separate interest) premise of the fifth amendment's prohibition against a person being placed twice in jeopardy for merely the *same* offense.

What this comes down to in the end is a moderate, third model of federalism and of national criminal law. It is a view that respects the doctrine of enumerated powers, the tenth amendment, the principle of dual sovereignty, and the fifth amendment. In a word, it is the Constitution applied by conscientious judges. It consists, at the first step, of a fair rather than a tortured understanding of each power vested in Congress, an understanding commensurate with conceding to Congress an ample discretion to manage the important responsibilities actually meant to have been committed to Congress. It consists, at the second step, of an equivalent sense of judicial resolve, even as was admirably reflected in Frankfurter's dissent in *Kahriger*,²⁶ to be no party to any constitutional sham. The correct model, figuratively speaking, admitting one may fail to carry it more impressively than I have managed to do so in these few, contestable, words, looks neither like the first nor the second model we previously pictured. Rather, it looks or should look more like this:

THE RANGE OF LEGISLATIVE POWERS IN CONGRESS

Clauses deemed to authorize Congress to define crimes against the U.S.

THE RANGE OF POWERS AMONG STATE LEGISLATURES

This is not now, however, the operative model. Rather, the modernist one is. The Supreme Court and Congress have, together, torn the web of constitu-

26. *Id.* at 37.

tional federalism. The moving hand of politics writes its own constitutional law. It makes up its own, much different sort of web. In the vision of federalism that now controls the general field, as the Federalist Society should already know, the Constitution is largely not enforced.

F. Touching Base With the Obvious Still Again, Albeit in a Different Way

The Constitution of the United States, it is trite to say, will bear almost any "interpretation," given suitable will. The fact of this depressing truth²⁷ is illustrated yet again in the example we have just reviewed on federalism and national criminal law. We have, for instance, looked merely at three models. The three models we reviewed differ significantly in their descriptions of what is and is not given to Congress. Yet each can be fitted to the Constitution without altering any words in the Constitution itself. Granting that this is so, however, what is it that ought to move one to adopt one rather than either of the other formulations as constitutionally correct? Let me try what might seem to be a surprisingly naive sort of answer that begins from a somewhat different place. That is, it is an answer that actually tries not to "interpret" the Constitution at all.

I think it is significant that the more naive locution of "applying the Constitution," as the way one might describe the chief task of the Supreme Court in constitutional law, has all but given way to the headier locution of "interpreting the Constitution." The two words themselves, however, are not really fungible in any useful sense. The two tasks they describe are not just variances on a common theme, nor is one a more sophisticated and more realistic restatement of the other. Rather, each of these descriptions aspires to quite a different thing. Indeed, they report wholly different orientations to one's work. Each imagines a different role for the Supreme Court of the United States.

The locution of "interpreting" the Constitution, now so commonplace in describing the supposed chief task of the Supreme Court, is flauntingly invitational. It frankly does suggest a different task than the task of faithfully "applying" the Constitution of the United States. Its invitation is of a sort that permits one to "interpret" naked emperors as actually wearing well turned out clothes, if one likes. It is the same usage that enables one to "interpret" a badger as though it were a mink (if a mink is what we need then, what the hell, here's one!). The privilege to interpret (as distinct from the obligation to apply) is papal; it vests authority to transfigure and to transform. It invites one, as it were, to come on board with one's *own* "interpretation" of *some-one else's* work and, in the process, willfully displace that work along the way. The gloss proposed by the interpreter commands as much (it is so much "better" it is entitled to command). In a large way, the interpretation suppresses that which it purports to interpret; it becomes the interpreter's own

27. It is a depressing truth (rather than an exhilarating truth as some believe) insofar as pliability of constitutional law is the antithesis of reliability of constitutional law.

decal, glued over the original. The original becomes increasingly obscure. The decal becomes the law. When done in this way, by "interpreting," it is thought to be perfectly all right to prefer one's decal to the document.

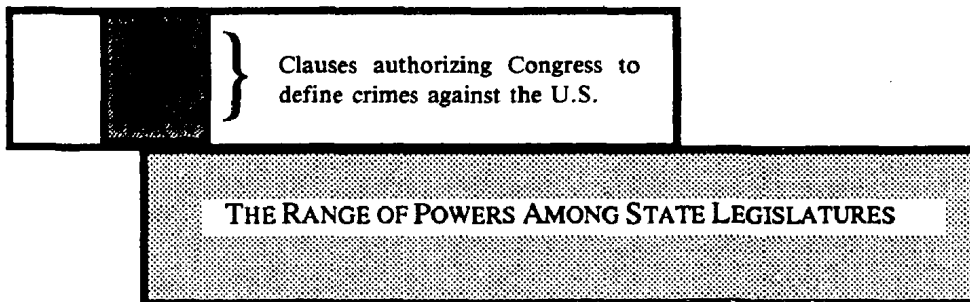
The task of "applying" is, aspirationally, an *altogether* different task. One does not aspire to interpret but, rather, to understand. One does not seek to do art but to act without art, to be faithful to this Constitution as best one knows how. Of course, it presupposes a given and one may, on that account, find that the task presupposes far too much to be simply done. But, simple or hard, it is what one seeks to do, as distinct from "interpreting" the original away. The fact remains as before: what one means to do actually counts. It produces very different sorts of results. In the case of federalism, we have more or less "interpreted" the boundaries constraining Congress away. And having done that, where will we turn next?

APPENDIX

THREE PERSPECTIVES OF NATIONAL AND STATE CRIMINAL LAW:
FEDERALISM AND THE CONSTITUTION OF THE UNITED STATES

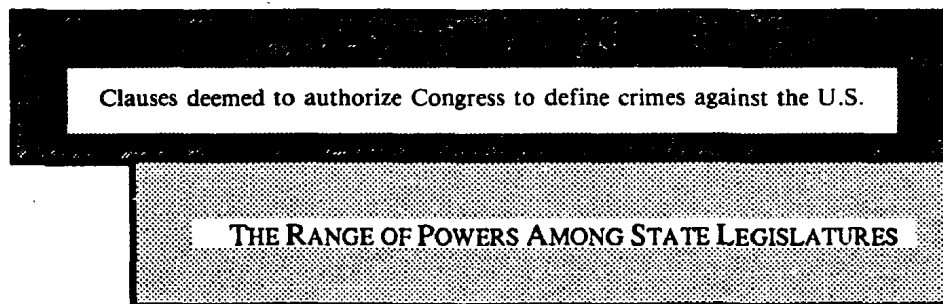
I. STRICT CONSTRUCTION

THE RANGE OF LEGISLATIVE POWERS IN CONGRESS



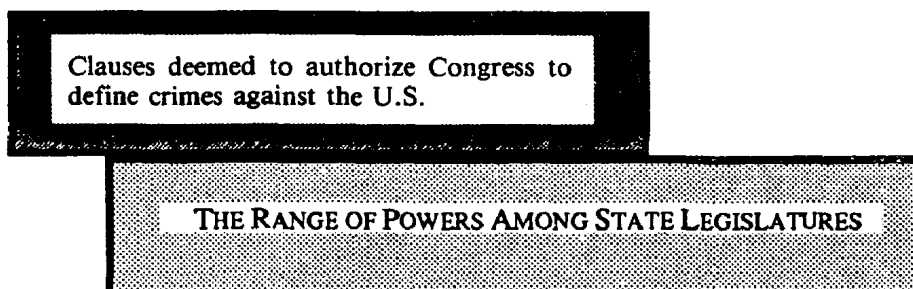
II. MODERNIST DOCTRINE

THE RANGE OF LEGISLATIVE POWERS IN CONGRESS



III. THE CONSTITUTION OF THE UNITED STATES

THE RANGE OF LEGISLATIVE POWERS IN CONGRESS



1. *Transformative "Interpretations" of the Commerce Clause Accepted by the Supreme Court*

Congress shall have the power to regulate commerce among the several states.

The word "regulate" is interpreted to be inclusive of the power to prohibit. That is, the power to regulate is the power to prescribe the governing rule; an act prohibiting certain kinds of commerce is itself an example of regulating. So the clause is construed to say:

Congress shall have the power to *prohibit* commerce among the several states.

The power to regulate commerce among the states is interpreted to include the power to reach those things pertinent to itself, which is bearing on commerce among the several states; the larger power is deemed to include a lesser one, to control both the thing itself and such things as may affect it in some way. So the clause is construed to say:

Congress shall have the power to *regulate and prohibit* whatever may affect commerce among the several states, though it is *not* commerce among the states.

Since what each state may do may in some manner affect commerce among the several states, the clause is also construed to say:

Congress shall have power to regulate the states, whether they are engaged in commerce or not.

Thus, by the force of modernist doctrine and de facto Supreme Court abrogation of judicial review, the clause now reads approximately in the following way:

Congress shall have the power to regulate and prohibit what it deems suitable to regulate or prohibit, subject only to such limitations as other provisions in this Constitution may provide.