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Myths and Principles of Federalization

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Myths and Principles of Federalization

by
RORY K. LITTLE*

Table of Contents

Introduction	1029
I. The Federalization Debate	1034
A. Workload Concerns	1038
B. Open Forum Concerns	1047
(1) General Points	1048
(2) One District's Experience	1051
(3) Why Not Try a Master Calendar?	1053
C. Dignity Concerns	1055
D. Federalism Concerns	1061
II. Principles of Federalization	1070
A. A Presumption Against Federalization	1071
B. The Problem with Principles	1071
C. A Principle of Demonstrated State Failure	1077
D. Application of Federalization Principles by the Executive Branch	1081
E. Brief Thoughts on Practice Proposals	1083
Conclusion	1085

Introduction

The debate over which criminal prosecutions, if any, ought to be lodged in federal rather than state courts is an old one, dating back to

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the inception of the union.¹ Like all old stories, the debate has become laden with myths; on some pertinent points the facts have become shrouded and exaggerated. Meanwhile, "federalization of crime"² continues, often in an ad hoc and unprincipled manner; and many federal judges say they have surpassed reasonable workload limits.³ Indeed, despite deep political diversity, federal judges (at least those who have gone public) seem unanimous in their criticisms of and responses to federalization: close the federal courthouse doors and stop federalizing—indeed, defederalize—crime.⁴

1. See, e.g., Charles Warren, *Federal Criminal Laws and the State Courts*, 38 Harv. L. Rev. 545, 548-55 (1925) (describing 1790-1802 "conflict of views" over whether federal courts ought to have more, less, or concurrent jurisdiction over criminal offenses).

2. "Federalization of crime" is a term of art used (generally with a derogatory scowl) to describe congressional legislation that provides for federal jurisdiction over criminal conduct that could also be prosecuted by state or local authorities. This Article will refer to such criminal conduct as "dual jurisdiction crimes," as opposed to conduct that can be prosecuted only in a federal, or only in a state, court. See *infra* text accompanying notes 18-27. Furthermore, this Article will use the term "federalization" to refer to federalization of criminal conduct; federalization of civil causes of action, which may be a problem of far greater proportions (see *infra* notes 41 and 73) is not addressed here.

Although it is a bit of a mongrel, the word "federalization" appears in at least some dictionaries. See, e.g., WEBSTER'S NEW WORLD DICTIONARY 532 (1960) ("federalize: . . . (2) to put under the authority of a federal government"). The earliest use I have found of this word in connection with criminal conduct occurs in 1973. Robert L. Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime*, 15 ARIZ. L. REV. 271, 274 (1973). Federalization is now apparently an accepted term of art.

3. See, e.g., Maryanne Trump Barry, *Don't Make a Federal Case of It*, N.Y. TIMES, Mar. 11, 1994, at A31 (discussing the possible negative consequences of federalizing crime). Judge Barry, chair of the federal Judicial Conference's Criminal Law Committee, was objecting to the then-proposed 1994 federal Crime Bill, which she stated would "swamp the Federal courts." Judge Barry's views appear to be quite representative of federal judges. For example, in a 1992 Federal Judiciary Center survey, 73% of all federal circuit judges and more than 57% of all federal district judges said that the volume of federal criminal cases was a "large" or "grave" problem. Federal Judicial Ctr., *Planning for the Future: Results of a 1992 Federal Judicial Center Survey of United States Judges* 3, 25 (1994) [hereinafter 1992 JUDICIAL SURVEY]. See also FEDERAL JUDICIAL CTR., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 37 (1990) [hereinafter 1990 FED. COURTS STUDY] (noting "the current overload within the federal system"); Hon. Stephen Reinhardt, *Too Few Judges, Too Many Cases: A Plea to Save the Federal Courts*, A.B.A. J., Jan. 1993, at 52 ("Most of us are now working to maximum capacity.").

4. See, e.g., COMMITTEE ON LONG RANGE PLANNING OF THE JUDICIAL CONFERENCE OF THE U.S., PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 22 (1994) [hereinafter 1994 LONG RANGE PLAN] (recommending that "Congress should review existing federal statutes with the goal of eliminating provisions no longer serving an essential federal purpose"). See *infra* note 39 (more fully describing the *Long Range Plan*). These recently expressed concerns are by no means the first, however. In 1977 revered Judge Friendly of the Second Circuit noted that "[c]onsiderably more troubling to me . . . has been what seems a knee-jerk tendency of Congress to seek to remedy any serious abuse by invoking the commerce power as a basis for the expansion of the federal criminal law into areas of scant federal concern." Henry J. Friendly, *Federalism: A Forward*, 86 YALE L.J. 1019,

Yet at the same time, the federal courts handle only a small percentage—less than ten percent—of all criminal prosecutions in this country. The rest are in state courts.⁵ Even on a per-judge basis, state judges handle far more criminal cases than do their federal counterparts.⁶ Thus, as Chief Judge Judith Kaye of the New York Court of Appeals recently noted, in light of this imbalance, simply diverting what are presently federal criminal cases into the state courts is “no solution at all.”⁷

1026-27 (1977). In 1934 Edward Rubin noted “the increasing demand for federal control of crime” in an inaugural-year issue of *Law & Contemporary Problems* devoted entirely to “Extending Federal Powers Over Crime.” Edward Rubin, *A Statistical Study of Federal Criminal Prosecutions*, 1 LAW & CONTEMP. PROBS. 494, 494 (1934). Indeed, 70 years ago in 1925, Professor Charles Warren decried “[t]he present congested condition of the dockets of the Federal Courts and the small prospect of any relief to the heavily burdened Federal Judiciary, so long as Congress continues, every year, to expand the scope of the body of Federal crimes.” Warren, *supra* note 1, at 545. This relatively continuous expression of federalization concerns over this century gives one pause before uncritically accepting the “crisis” cry today, when there are roughly five times as many federal judges—yet only slightly more federal criminal cases—as in Warren’s day. See *infra* text accompanying notes 50-58.

5. In 1992, for example, 47,467 criminal cases were filed in the federal district courts. WILLIAM W SCHWARZER & RUSSELL R. WHEELER, FEDERAL JUDICIAL CTR., ON THE FEDERALIZATION OF THE ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE 31 n.84 (1994) [hereinafter ON FEDERALIZATION]. Yet in 1991, more than 12.4 million criminal cases were filed in state trial courts. BRIAN J. OSTRUM ET AL., NATIONAL CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1991, at 3 (1993). Indeed, state courts reported almost 900,000 felony convictions for 1992. N.Y. TIMES, Jan. 26, 1995, at A6. Thus, even if all 1992 federal criminal filings were felonies (but many were misdemeanors) and all were convictions (they assuredly were not), federal criminal cases still represented less than 6% of the total. Accord Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits of Federal Criminal Jurisdiction*, in this Symposium Issue. (“[T]he states are still handling more than 95% of all violent crime prosecutions.”) This disparity is uncontroversial and encompasses civil cases as well as criminal. As the Federal Courts Study Committee noted in 1990, “90 percent of the nation’s judicial business [civil and criminal] is handled by state rather than federal courts.” 1990 FED. COURTS STUDY, *supra* note 3, at 4. Accord Judith S. Kaye, *Federalism Gone Wild*, N.Y. TIMES, Dec. 13, 1994, at A19 (“The [Long Range] Report laments the 282,000 cases filed in Federal district courts last year. But in that period more than 200,000 cases were filed in the New York City Family Court alone.”)

6. See *infra* text accompanying notes 59-63. Accord Beale, *supra* note 5; see also ON FEDERALIZATION, *supra* note 5, at 23 n.60 (“[O]n average, a state court judge carries a caseload three times as large as that of a federal district judge . . . [and] the state general jurisdiction judiciary handles more than fifty-two times as many civil and criminal cases, with only fifteen times as many judges, as the federal judiciary.”)

7. Kaye, *supra* note 5. Accord Former California Supreme Court Justice Joseph R. Grodin, Testimony Before the Long Range Planning Committee of the United States Judicial Conference 1 (Dec. 1994) (“State court systems are . . . typically burdened in similar fashion.”).

The federalization conundrum is thereby set. Crime shows no sign of significantly diminishing.⁸ Resources are limited and strained. How are we to decide which criminal cases go where, when no one wants them?

This Article will not solve that foundational puzzle. Rather, the Article seeks to sketch and probe the controversy historically, statistically, and theoretically. The attitude is one of skepticism, "the method of suspended judgment,"⁹ rather than an unquestioning acceptance of the idea that we are in the midst of a federal courts "crisis."¹⁰ Surprisingly some of the commonly expressed presuppositions of the federalization debate, stylized here as "myths," are less than firm.

By exposing some of the myths and asking some difficult questions, this Article does not thereby endorse unprincipled or ad hoc federalization of crime. To the contrary, this Article concludes that valid considerations support a presumption against criminal federalization.¹¹ However, this Article also argues that such a presumption must be rebuttable and proposes that such rebuttal be founded on a principle of "demonstrated state failure" to address a category of crime. This federalization principle should be available (contrary to the current critiques) even if such a failure occurs in the area of narcotics, firearms, or other "street crimes" that may not have a firm historical precedent of federal prosecution.¹²

The federal courts legitimately have been called upon to address seemingly local offenses at times of epidemic crime and "state failures" of prosecution. The Prohibition and civil rights eras of federal prosecutions immediately come to mind. Today's legislatures, federal

8. A 1994 FBI Report on Crime states that, while some types of violent crime were down for 1994, there was an overall "increase in all types of crime nationwide." *Former FBI Expert Discusses Crime Report* (CNN television broadcast, Dec. 4, 1994), available in LEXIS, Nexis Library. Moreover, at least some law enforcement experts assert that "the numbers will get worse in the next five years." *Id.*

9. WEBSTER'S NEW INTERNATIONAL DICTIONARY 2353 (2d ed. 1954).

10. *Cf.* 1990 FED. COURTS STUDY, *supra* note 3, at 6 ("[T]he long-expected crisis of the federal courts . . . is at last upon us.").

11. Such a presumption is in accord with the views expressed by Judge Schwarzer and Russell Wheeler at the end of their comprehensive *On Federalization* pamphlet, *supra* note 5, at 47. The route taken by this Article, however, is somewhat different.

12. Professor Judith Resnik has made a similar point about certain civil contexts. See Judith Resnik, Statement Before the Long Range Planning Committee of the United States Judicial Conference 5 (Dec. 1994) ("'State' and 'federal' interests are not pre-existing defined sets of activities but are interactive and interdependent conceptions that vary over time. . . . What today appears to be only of local concern may tomorrow be on the national agenda.").

as well as state, apparently believe that narcotics and weapons offenses have reached similar levels of epidemic state failure proportions and thus demand federal attention. It may be legitimate to suggest the wrong-headedness of the policies underlying such demands and to call for reform of the criminal law.¹³ But simply to close the federal courthouse doors to certain crimes as a jurisdictional matter in the name of a federalization "crisis" that is far from empirically clear is, this Article submits, not principled.¹⁴

What distinguishes valid dual jurisdiction federal crimes from the illegitimate is seldom addressed in criticisms of federalization.¹⁵ Indeed, that fact provides the happy occasion for a Symposium devoted to federalization principles. However, despite the absence of preliminary definition, large aspects of the federalization critique are valid. Recent decisions to "federalize" certain crimes have surely been ad hoc and unprincipled; making intrastate auto theft a federal carjacking crime in 1993 provides a fine example.¹⁶

13. See, e.g., Vaughn Walker, *Comment: Federalizing Organized Crime*, in this Symposium Issue; STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA'S LONGEST WAR: RE-THINKING OUR TRAGIC CRUSADE AGAINST DRUGS* (1993) (calling for decriminalization of currently illegal drugs).

14. The author is well aware of the controversial nature of many of these assertions and would be the first to agree that more empirical work and study needs to be done. Yet some comfort perhaps may be drawn from recent remarks made by U.S. Supreme Court Justice Stephen Breyer, who is reported to have argued in a recent speech against simply "closing the doors to the [federal] courts." He stated that the "[f]ederal judges' desire to reduce their crowded dockets doesn't justify shifting the cases into the state courts . . . because those courts are just as crowded." *Breyer Urges Judges to Remain Generalists*, *MARIN INDEP. J.*, Jan. 28, 1995, at A7.

15. Judge William Schwarzer, who has been Director of the Federal Judicial Center for the past five years, and FJC staff member Russell Wheeler comprehensively survey the arguments for and against federalization in their pamphlet *On Federalization*, *supra* note 5. They nevertheless conclude that such definition may well remain "elusive" and advert to the impossibility of precisely determining "what constitutes an 'important federal interest.'" *Id.* at 42, 45.

16. Anti-Car Theft Act of 1992, Pub. L. No. 102-519, 106 Stat. 3384 (codified at 18 U.S.C. § 2119 (1992)). The legislative history of the carjacking bill indicates that it was introduced after a widely reported violent carjacking committed against a mother and her young child in the Washington D.C. area. See Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, in this Symposium Issue. As President Bush noted upon signing the carjacking law, it was responsive to a "recent wave of these carjackings." President's Statement (Oct. 25, 1995), *reprinted in* 1992 U.S.C.C.A.N. (106 Stat.) 2903. Yet no generalized "principle" for federalizing purely intrastate car thefts, already prosecutable in every state in the Union, was advanced. Indeed, apparently to address concerns that the bill would unnecessarily federalize every simple car theft, a requirement that a firearm must be possessed was included. See 106 Stat. at 3384. No principled distinction exists, however, between gun carjackings and knife carjackings, and Congress eliminated the firearm requirement in 1994. Pub. L. No. 103-322, 108 Stat. 1970 (1994). While national statistics are not yet available on use of this new statute, it seems safe to say

But other parts of the current federalization critique are possibly more myth than reality. This Article addresses three such myths:

1. that federalization of crime is a new phenomenon;
2. that there presently exists an unprecedented federal court workload "crisis" in criminal cases, such that federal judges are so busy trying criminal cases that civil cases cannot be tried;¹⁷
3. that federalization of crime is forever, permanently rending the federal-state balance.

Placing the current federalization debate into the broader historical context of over 200 years of federal criminal legislation helps to debunk these myths.

Finally, this Article addresses the concept of a "principled jurisprudence of federalization" and inquires whether, and what, neutral principles can be stated to guide future decisions to enact and prosecute dual jurisdiction federal crimes. Suggesting that existing formulations are inadequate, this Article sketches a principle of "demonstrated state failure," which explains past accepted federalizations and could be used to evaluate future federalization efforts.

I. The Federalization Debate

The federalization debate centers on criminal conduct that can be prosecuted in state courts as well as in federal courts. Some criminal conduct is only prosecutable in federal courts; federal jurisdiction over such crimes is exclusive. Such exclusively federal crimes include crimes committed on federal territory or outside the borders of the fifty states¹⁸ and criminal acts committed solely against a unique federal interest, such as treason.¹⁹ Providing jurisdiction in the federal

that relatively few carjackings have actually been charged federally, despite their undoubtedly frequent occurrence.

17. See, e.g., 1990 FED. COURTS STUDY, *supra* note 3, at 6 (stating, without citation or specific example, that "the expanded federal effort to reduce drug trafficking has led to a recent surge in federal criminal trials that is preventing federal judges in major metropolitan areas from scheduling civil trials"); Roger J. Miner, *Crime and Punishment in the Federal Courts*, 43 SYRACUSE L. REV. 681, 686 (1992) [hereinafter Miner, *Crime and Punishment*] (stating, without citation, that "[i]n many districts throughout the country, judges are unable to get to their civil calendars because of the huge numbers of criminal cases that they may dispose of").

18. See 18 U.S.C. § 13 (1969 & Supp. 1995) (granting federal jurisdiction over such crimes by assimilating neighboring states' criminal codes); 18 U.S.C. § 3238 (1985) (granting federal jurisdiction over "offenses not committed in any district"). Note that the crimes prosecutable under the Assimilative Crimes Act are all the "local" crimes of the neighboring state; thus, under this provision, federal courts try "local" offenses.

19. 18 U.S.C. § 2381 (1970 & Supp. 1995).

courts for the prosecution of such uniquely federal crimes seems noncontroversial.

But truly unique federal crimes compose a quite narrow band of cases. They pose no controversy precisely because they are so rare, as well as because there is no alternative forum. However, there are other federal crimes that are often described as “unquestionably” federal²⁰ but which, in fact, encompass conduct that is also prosecutable by the states. Once this point is understood, it becomes clear that the huge majority of federal crimes²¹ have always been “dual jurisdiction” crimes rather than exclusively federal.²²

Murder of the President, for example, is obviously prosecutable in state court as murder.²³ Many federal civil rights offenses are already prosecutable in state court, if not as civil rights offenses, then as

20. 1994 LONG RANGE PLAN, *supra* note 4, at 20.

21. It would be convenient to use a phrase here like “the bulk of the federal criminal code,” but this temptation must be avoided because it is inaccurate. There is no single title in the United States Code that contains all federal criminal provisions. See Louis B. Schwartz, *Reform of the Federal Criminal Laws: Issues, Tactics and Prospects*, 1977 DUKE L.J. 171, 184 (“[T]he United States . . . has never . . . had a comprehensive, logically organized and internally consistent penal code.”). The efforts of Professor Schwartz and others to reform and organize federal criminal provisions failed in the 1970s. It is perhaps significant that a major objection to the proposed reform bills was about federalization (although that word was not used): that “matters heretofore considered exclusively local” would expressly have been encompassed by new federal criminal jurisdiction provisions. John G. Miles, *Federal Criminal Code Reform: The Jurisdictional Issue*, 23 Crim. L. Rep. (BNA) No. 11 (Supp.), at 4 (June 14, 1978) (quoting the National Association of Attorneys General).

Thus, federal crimes can today be found in virtually every title of the U.S. Code; major locations include Title 18 (general crimes), Title 21 (controlled substances), and Title 26 (tax provisions). There is consequently no easy way to locate all federal criminal provisions; many are quite obscure. For example, in order to federally prosecute a union payroll-padding scheme in which there were no federal mailings or interstate travel or transmissions, the author once had to prosecute under 42 U.S.C. § 408(g)(2) (now codified at § 408(a)(7)(B) (1991 & Supp. 1994)), the well-known offense of “false representation of a social security number.” See *United States v. Holland*, 880 F.2d 1091, 1093 (9th Cir. 1989).

22. Such a classification error appears, for example, in Second Circuit Judge Roger Miner’s 1987 article, in which he describes “offenses directly affecting the operations of government” as one of four categories of “exclusive” federal criminal jurisdiction. Roger J. Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 HARV. J.L. & PUB. POL’Y 117, 119 (1987) [hereinafter Miner, *Federal Courts*]. While one might argue that criminal conduct that directly affects the federal government should be federalized, such conduct is almost never “exclusively” within federal jurisdiction. Judge Miner is due credit as one of the few federal judges to publicly detail his views about federalization. But careful classification of criminal conduct is essential to the federalization debate, lest one presume one’s conclusions in the initial definition of jurisdictional lines.

23. Compare, e.g., 18 U.S.C. § 1751 (1984 & Supp. 1995) with CAL. PENAL CODE § 187 (Deering 1988).

assaults, batteries, and the like.²⁴ Counterfeiting could be prosecuted as state common law fraud.²⁵ Robbery of a federally insured bank, theft of federal property or by federal employees, defrauding a federal program, bribery of federal officials, even federal tax offenses²⁶—virtually all could be charged under existing state robbery, theft, fraud, bribery or falsehood statutes. Indeed, with many states now enacting “little RICO” statutes, the need for the equivalent federal provision is not self-evident.²⁷

Yet most of these dual jurisdiction federal crimes are not the topic of current federalization critiques. To the contrary, most are accepted as “unquestionably associated with a national government,” and the federal Judicial Conference states that “no one seriously disputes” their federalization.²⁸ But the rationale for labeling these crimes as unquestionably federal is not explained. A shift of such crimes to state courts would significantly lighten the federal load, more so than would the elimination of federal drug cases.²⁹

24. Compare, e.g., 18 U.S.C. §§ 241, 242, 245 (1969 & Supp. 1995) with CAL. PENAL CODE §§ 240-45 (assaults), 422.6 (interference with exercise of civil rights) (Deering 1988 & Supp. 1995).

25. Compare 18 U.S.C. §§ 471-509 (1976 & Supp. 1995) with CAL. PENAL CODE §§ 470-484, 648 (1988 & Supp. 1995). Although the Constitution grants Congress the power to punish counterfeiting, it does not require that such jurisdiction be exclusive. See U.S. CONST. art. I, § 6.

26. 18 U.S.C. §§ 2113, 1001-1027, 1701, 201 (1984 & Supp. 1995); 26 U.S.C. § 7201 (1989).

27. The federal Racketeer-Influenced and Corrupt Organizations statute (RICO) is codified at 18 U.S.C. §§ 1961-1963 (1984 & Supp. 1995). For a list of equivalent state provisions, see Ethan B. Gerber, “A RICO You Can’t Refuse”: *New York’s Organized Crime Control Act*, 53 BROOK. L. REV. 979, 982 & n.14 (1988) (“[A]t least twenty states have passed statutes which are modeled after federal RICO.”). Chief Justice Rehnquist noted this theoretical overlap in 1989 remarks revealingly entitled *Get RICO Cases Out of My Courtroom*, WALL ST. J., May 19, 1989, at A14 (addressing civil RICO cases, while noting that “[o]verlapping criminal remedies do not present much of a problem, because state and federal prosecutors tend to work things out on a sensible basis”). Of course, there may be significant procedural advantages to prosecuting RICO offenses in federal courts. See generally John C. Jeffries, Jr., & John Gleason, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, in this Symposium Issue. This does not, however, undermine the more general point that even such complex federal crimes are actually “dual jurisdiction” and not uniquely federal.

28. 1994 LONG RANGE PLAN, *supra* note 4, at 20, 21.

29. For example, in 1982, fraud, counterfeiting, forgery, and auto theft defendants made up 22% of the federal criminal caseload. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, THE CRIMINAL CASELOAD: THE NATURE OF CHANGE 6 fig. 5 (1995) [hereinafter THE CRIMINAL CASELOAD]. “Drug” defendants constituted only 21%. *Id.* Similarly, in 1993 federal drug prosecutions represented only a quarter of the federal criminal caseload. *Chief Justice’s 1993 Year-End Report Highlights Cost Saving Measures*, THE THIRD BRANCH (Administrative Office of the U.S. Courts), Jan. 1994, at 4.

Nevertheless, the current federalization critique focuses almost entirely on federal narcotics and firearms offenses, but generally without noting why. Chief Justice Rehnquist has claimed that federal courts are in danger of becoming "national narcotics courts," a specter that has been repeatedly echoed by other federal judges.³⁰ When federal judges say that "[t]oo much crime is prosecuted in the federal courts," they concentrate on "drug offense[s]," not penny-ante bank robberies or postal thefts.³¹ The charge is often accompanied by the view that federal judges are being forced to "waste" valuable resources on federal criminal cases that are really "state or local crimes."³² But since the great bulk of federal criminal cases involve other types of dual jurisdiction conduct, it seems fair to question why drug and weapon cases draw the bulk of federal judges' ire.

The current critique of the federalization of crime can be described as encompassing four general types of concerns: (1) workload, (2) open forum, (3) dignity, and (4) federalism concerns. Critics argue that federalization is bad because federal judges are overworked,³³ criminal cases are blocking the federal forum for important federal civil cases,³⁴ federal judges ought not have to handle "ordinary street crimes,"³⁵ and because federalization of dual jurisdiction crimes improperly encroaches on matters that should remain state concerns.³⁶

As detailed below, the first two concerns are not borne out by existing statistical evidence; additional empirical work should be done. The third concern is unanalyzed and unprincipled. Finally, while federalism concerns seem valid at some general level, they pull in oppo-

30. Hon. William H. Rehnquist, Remarks at the United States Sentencing Commission Symposium (June 18, 1993) (transcript available on Reuters). When leaving the bench in December 1993, Judge Kenneth Conboy repeated the concern. Kenneth Conboy, *Trouble in Foley Square*, N.Y. TIMES, Dec. 27, 1993, at A17.

31. E.g., Miner, *Crime and Punishment*, *supra* note 17, at 681, 683. Judge Miner also pokes fun at obscure federal offenses such as reproducing the image of Smokey the Bear or impersonating a 4-H club member. *Id.* at 681. But these crimes are not the serious object of Judge Miner's concern; they are, as he notes, "statutory anachronisms." *Id.* In fact, they are simply never prosecuted and thus are no burden on anyone but the printers of Title 18.

32. See, e.g., Hon. William H. Rehnquist, *Year-End Reports on the Federal Judiciary*, reprinted in THE THIRD BRANCH (Administrative Office of the U.S. Courts), Vols. 23-26, 1991-1994; ON FEDERALIZATION, *supra* note 5, at 37 ("inefficient and wasteful"); 1992 JUDICIAL SURVEY, *supra* note 3, at 7, 29 (FJC asks whether, and the overwhelming majority of federal judges agree that, "federal criminal jurisdiction" should be "more narrowly defined to reduce prosecution of 'ordinary' street crime in federal courts").

33. See *infra* notes 38-40.

34. See *infra* notes 82-84.

35. See *infra* notes 122-124.

36. See *infra* notes 152-156.

site directions when considered in light of our horribly overburdened state criminal justice systems. A constitutional theory of limited federal authority may well support a presumption against federalizing dual jurisdiction criminal conduct. Yet that presumption must be rebuttable; and even a limited federalist theory may require a federal response to criminal conduct that has reached epidemic proportions.³⁷

A. Workload Concerns

The most frequently heard complaint from federal judges is that they are overworked.³⁸ In the most recent judicial expression of federalization concerns, the Long Range Planning Committee of the United States Judicial Conference states that “[h]uge burdens are now being placed on the federal courts.”³⁹ This Committee speaks in terms of “crisis” caused by burgeoning workload and predicts that

37. On this last point, for example, even Judge Miner's ardent anti-federalization piece states that “the national government . . . should have in reserve the power to deal with crime where there has been a complete breakdown of local and state law enforcement.” Miner, *Crime and Punishment*, *supra* note 17, at 687-88. See also 1994 LONG RANGE PLAN, *supra* note 4, at 21-22 (endorsing federal prosecution of local crimes that “[raise] highly sensitive issues in the local community” and citing civil rights prosecutions as exemplary because “local law enforcement had moved reluctantly”).

38. See, e.g., Lauren K. Robel, *Caseloads and Judging: Judicial Adaptations to Caseload*, 1990 B.Y.U. L. REV. 3, 3 (statistical survey of the views of federal judges, summarized as “[f]ederal judges, by their accounts, have too much to do”); 1992 JUDICIAL SURVEY, *supra* note 3, at 25 (more than 80% of federal district judges describe their workload as “a problem”; more than 90% say this is so with regard to criminal cases).

According to Chief Justice Rehnquist, this may be contrasted to the 1950s, when some federal district judges allegedly took their summers off, and some federal appellate judges allegedly viewed their appointments as “semi-retirement.” Hon. William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1, 2.

39. 1994 LONG RANGE PLAN, *supra* note 4, at 7. The Committee on Long Range Planning of the Judicial Conference of the United States is an important and unprecedented effort to anticipate and guide the future of the federal courts in the face of an incredibly “accelerated pace of social change.” *Id.* at 1. It was created in 1990 at the urging of the Ninth Circuit's Chief Judge Clifford Wallace among others and hopes to set a “judiciary wide” agenda for years to come. *Id.* at 131. The Committee has a prestigious membership; it is chaired by Judge Otto R. Skopil, Jr., of the Ninth Circuit and has eight other federal judges as members, as well as a full time staff and a number of consultants and contributors. *Id.* at 131, 139-44.

When presented at the Hastings Symposium, this Article cited to the November 1994 draft of the Proposed Long Range Plan. Since then, a revised draft was received. JUDICIAL CONFERENCE, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS (2d prtg. Mar. 1995). The March 1995 Plan did not significantly alter the substance of the November draft's provisions related to this Article. (Indeed, having received a draft of this Article in the interim, the March 1995 Plan added certain themes responsive to this Article. See *infra* text accompanying notes 152-184 and 198-201 (federalism concerns and sunset provisions)). Thus, citations in this Article remain to the November 1994 Plan.

“core values” of the federal judicial system cannot be preserved without attention to the problem.⁴⁰

Federal workload complaints often focus on criminal cases, which is surprising because civil cases compose the majority of the average federal judge's caseload.⁴¹ Nevertheless, a major concern of the Long Range Planning Committee is that “Congress continues to ‘federalize’ crimes previously prosecuted in the state courts.”⁴² Thus, a primary premise of the Long Range Planning Committee's recommendations is “limited jurisdiction” over crime for federal courts as a “practical necessity.”⁴³ Indeed, one indication of the federal judiciary's preeminent concern about the federal criminal docket is that the Long Range Planning Committee's initial discussion of “judicial federalism” and its first four specific recommendations address criminal cases.⁴⁴ Only after these concerns are expressed is specific attention given by the Committee to the numerically far larger civil side.

But the criminal workload concerns of federal courts are open to question. Federal criminal filings are in fact declining; they have been

40. *Id.* at 9-11, 16 (describing a “nightmarish” future scenario); *accord* 1990 FED. COURTS STUDY, *supra* note 3, at 4 (“the crisis”). Expression of workload concerns can be absolute (that is, “we are simply working too hard”), but may also move to a relative concern, that criminal cases are pushing aside important civil litigation (that is, “we are not working impossibly hard, but criminal cases prevent us from working hard enough on important civil cases”). Such “open forum” concerns are analytically distinct from pure workload and therefore are addressed separately *infra* notes 81-121.

41. For example, in 1994, there were 235,996 civil cases commenced in federal district courts, compared to 45,744 criminal cases. 1994 LONG RANGE PLAN, *supra* note 4, at 11 tbl. 3. This is roughly an 84% to 16%, or 5 to 1, ratio. *See also* WILLIAM P. McLAUGHLAN, FEDERAL COURT CASELOADS 114 (1984) (“[T]he civil portion of the district courts’ docket clearly predominates today and has done so for several decades.”); *Id.* at 113 fig. 5.1 (graphically demonstrating basically flat criminal filings over 40 years, while civil filings steeply incline). McLaughlan's statistical survey of federal court case filings over some forty years is one of the most comprehensive such surveys ever done. Yet, because civil cases predominate hugely over criminal in the federal courts, McLaughlan's book concentrates far more on the details of civil case filings.

42. 1994 LONG RANGE PLAN, *supra* note 4, at 20. Thus, the objection apparently is to enacting new federal crimes. This too is slightly surprising, as it can be argued that rather than the absolute number of federal crimes, it is the “federalization” of criminal procedure that has occurred since 1960 (via the “constitutionalization” of criminal procedure in the Warren Court and subsequent congressional legislation such as the 1970 Speedy Trial Act, more detailed Federal Rules of Criminal Procedure, and the 1987 federal Sentencing Guidelines) that has required increased judicial resources necessarily devoted to criminal cases. While surely significant, these developments are analytically separate from the number of federal criminal statutes enacted and could be addressed by procedural changes rather than complete jurisdictional bars to new federal crimes.

43. 1994 LONG RANGE PLAN, *supra* note 4, at 19, 20.

44. *Id.* at 20-23.

much higher in years past when analyzed on a per-judge basis; and they are simply dwarfed by the criminal case workload of state judges.

Federal criminal case filings have fluctuated over time, but have remained basically steady for sixty years. Thus, comparisons between any two isolated years, without an appreciation of the overall array of filing statistics,⁴⁵ can yield wildly varying conclusions. For example, the 1990 Federal Courts Study noted that criminal filings had increased dramatically from 1980 to 1990; from this a conclusion of workload "crisis" was suggested.⁴⁶ Yet if one chooses 1972 as the baseline comparison year, the number of federal criminal filings is *lower* now as compared to then.⁴⁷ 1980 actually represented the low point of a consistently decreasing criminal case filing trend.⁴⁸ Moreover, even if a federal criminal case crisis was imminent in 1992, it apparently has been averted; federal criminal filings have in fact decreased by at least three percent in each of the past two years.⁴⁹

Indeed, the number of federal criminal cases filed today is far below equivalent filings of sixty years ago, yet today there are seven times as many federal judges. In 1994 there were 45,500 federal criminal cases filed;⁵⁰ in 1932 there were over 86,000.⁵¹ At the same time, the number of federal district judges has increased dramatically, from 401 to 649 since 1970 and from only 163 in 1932.⁵² One measure of workload should be how many criminal cases each individual federal

45. See MCLAUGHLAN, *supra* note 41, at 114 ("[T]he criminal portion [of the federal caseload] shows a striking uniformity over the years [1940-1980].")

46. 1990 FED. COURTS STUDY, *supra* note 3, at 36 (noting a 50% increase since 1980).

47. Chief Justice Rehnquist reports that 45,500 federal criminal cases were filed in 1994. Hon. William H. Rehnquist, *1994 Year-End Report on the Federal Judiciary, reprinted in THE THIRD BRANCH* (Administrative Office of the U.S. Courts), Jan. 1995, at 4. In 1972 the figure was 47,043. ON FEDERALIZATION, *supra* note 5, at 31 n.84. The Long Range Planning Committee notes the lower filing figure, but asserts that the "complexity" of federal criminal cases has "changed dramatically" since then. *Id.*; 1994 LONG RANGE PLAN, *supra* note 4, at 8; *but see infra* text accompanying notes 55-56.

48. ON FEDERALIZATION, *supra* note 5, at 51 fig. 1.

49. Rehnquist, *supra* note 47, at 4 (noting 3% decreases in 1993 and 1994). Also indicative of a long-term trend of relatively decreasing federal criminal caseload, the Long Range Planning Committee notes that while the U.S. population has grown more than 200% since 1904, the number of federal criminal cases filed has increased by only 157%. 1994 LONG RANGE PLAN, *supra* note 4, at 7.

50. See *supra* note 47.

51. Rubin, *supra* note 4, at 497 tbl. 1. The actual number of criminal filings was over 92,000, but the 5,700 cases filed in the District of Columbia in 1932 should be deducted because today such D.C. cases are filed almost exclusively in the local D.C. courts and are consequently not included in that district's reported U.S. District Court filings.

52. 1994 LONG RANGE PLAN, *supra* note 4, at 13 tbl. 6; 60 F.2d v-ix (1932) (listing federal district judges).

judge must handle on average. By this measure, the per-judge workload of federal criminal cases was roughly 534 cases per judge in 1932, 115 in 1972, and only 73 in 1994. This is roughly a sevenfold workload decrease over the past sixty years.⁵³

It is difficult to rationalize away entirely this marked decrease in the federal criminal caseload-per-judge. Although the 1932 statistics included a large number of Prohibition cases, that does not mean that federal judges at that time could ignore those cases.⁵⁴ And while it is true that criminal cases (both state and federal) are more procedurally complex today than in the 1930s,⁵⁵ one may legitimately question whether that increase in complexity overcomes the sevenfold decrease in the per-judge criminal caseload since 1932.⁵⁶ Finally, when one adds to the mix the additional 300-plus federal magistrates who have been authorized since 1976 to perform significant work in criminal cases,⁵⁷ the claim of federal judicial overload caused by criminal cases

53. *Accord* McLAUGHLAN, *supra* note 41, at 125 ("The medians for criminal filings per judge have actually dropped rather sharply.").

54. Indeed, the federal criminal caseload increase in the 1920s and 1930s because of Prohibition cases can be analogized to the current influx of gun, drug, and immigration cases today, in that controversial areas of substantive criminalization have generated an unusual number of federal criminal cases in a single category. *See* Beale, *supra* note 5 (noting statistical jump in narcotics and firearms cases between 1980 and 1992); *see also* Walker, *supra* note 13 (arguing that narcotics offenses should be decriminalized). Similarly, the 1972 federal criminal case filings included a large number of controversial selective service cases. The possibility that narcotics cases might go away in the future does not reduce the impact of those cases on the judiciary today; but the same was true of Prohibition cases in 1932 and Selective Service cases in 1972.

55. 1994 LONG RANGE PLAN, *supra* note 4, at 8 ("Although difficult to quantify, [federal criminal] filings have also increased in complexity."). The plan goes on to assert that the "complexity" of federal criminal cases has changed "dramatically" since 1972. *Id.* But precisely because such an assertion is "difficult to quantify," this latter claim is difficult to evaluate.

56. In addition, the increase in complexity of criminal cases (state as well as federal) is attributable almost entirely to the "federalization" of criminal procedure, a phenomenon that was largely accomplished by 1972. *See generally* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE (Mark Tushnet ed., 1993). Yet since 1972, there has been a 63% decrease in per-judge criminal caseload (roughly 115 per judge in 1972, versus 73 per judge in 1992). Whether there has been an increase in criminal case complexity since 1972 sufficient to offset this workload decrease is at least a debatable question.

57. Professor Judith Resnik deserves credit for calling attention to the significant roles played in today's federal courts by non-Article III judges such as magistrate judges. *See* Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909, 910-12 (1990) (noting that magistrates conducted "134,000 preliminary hearings in felony cases" in 1987). *See also* United States v. Schronce, 727 F.2d 91, 93 (4th Cir. 1984), *cert. denied*, 467 U.S. 1208 (1984) (stating that Federal Magistrates Act of 1968 was "intended to give magistrates a significant role in the federal judicial system" and to "reduce increasingly unmanageable caseloads"). Although more federal criminal cases were filed in 1972 than today, federal magistrates did not have authority to conduct eviden-

appears even more debatable.⁵⁸

Not only is the average federal judge's criminal caseload down over the past sixty years, but the federal criminal caseload-per-judge is far lower than the same figure for state judges. Judge Schwarzer has noted this imbalance: he reports that in 1991 "criminal filings in the state courts were eighty-four times higher than those in federal district courts."⁵⁹ Again, the argument that federal judges simply cannot handle more criminal cases⁶⁰ is at least open to question in light of what state court judges are being asked to accomplish.

Comparing one federal geographic district's federal versus state court criminal filings shows this imbalance dramatically. In 1992 the number of federal criminal filings in the district court for the Northern District of California averaged 34 cases per trial judge, while criminal filings in the superior courts for the counties that compose the Northern District's territory averaged at least 157 per judge.⁶¹ The North-

tiary hearings such as motions to suppress until 1976. See *Nettles v. Wainwright*, 677 F.2d 404, 406-07 (5th Cir. 1982) (en banc).

58. Also, civil filings in the federal courts far outnumber criminal cases, and by any measure, more than 50% of federal court time is spent on civil matters. Thus, it seems fair to inquire (as this Article does *supra* notes 122-151) whether there is something more than pure workload concerns to some critics' preoccupation with criminal cases.

59. ON FEDERALIZATION, *supra* note 5, at 23 n.60. *Accord* Beale, *supra* note 5 (nationally, 75 criminal cases per federal judge versus 417 for state judges—over a 5-1 ratio—in 1992). See also *supra* note 41.

60. For example, in 1989, Professor Beale, as an Associate Reporter to the Federal Courts Study Committee, wrote that "the federal courts will soon be overwhelmed" by criminal cases. Sara Sun Beale, *Federal Criminal Caseload/Scope of Federal Criminal Jurisdiction*, in FEDERAL JUDICIAL CTR., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, PART III (1990) [hereinafter Beale, *Federal Criminal Caseload*]. Also predicted was that "in the very near future [some] districts will be unable to try any civil cases." *Id.* at 5. Albeit this prediction was based solely on anecdotal reports. See *infra* text accompanying notes 85 and 106. Yet three years later in 1992, civil trials still represented more than 50% of all federal trials conducted, THE CRIMINAL CASELOAD, *supra* note 29, at 12, and the author knows of no federal district that is not hearing civil cases today. The gap between dire prediction and reality must be acknowledged and examined.

61. Certain vagaries in the available data make precise calculations difficult; nor are state and federal statistics kept in precisely parallel formats. Thus, when I have had uncertainty in making these calculations, I have attempted to err in favor of overstating the federal workload. The 1993 Annual Report of the California Judicial Council reports that for fiscal year 1991-1992 in the 15 counties that compose the Northern District of California, there were 32,968 criminal filings in the superior courts; there were another 51,000 felony filings in the municipal courts of those counties. 2 JUDICIAL COUNCIL OF CALIFORNIA, 1993 ANNUAL REPORT 64 (1993). All the superior court criminal filings should be felonies, but some portion of them are actually duplicates of cases initially filed in municipal courts. Thus, one cannot simply add up the number of municipal and superior court criminal filings to get total criminal cases; some number represents duplicated cases. On the other hand, some portion (probably a large one) of the municipal court felony filings are finally disposed of there. Thus, using solely the superior court criminal filings surely

ern District of California is in the upper third of the 94 federal districts in terms of filings, trials, and other measures.⁶² The other three federal districts in California (including the Southern District, one of the highest criminal filing districts in the nation) also had significant state-federal imbalances in criminal case filings in 1992.⁶³

Thus, in terms of absolute number of cases as well as per-judge criminal filings, it is simply a myth that federal criminal case filings have skyrocketed. On the other hand, there has been a significant change in the "character" of the federal criminal caseload: the mix of cases has shifted dramatically toward larger numbers of narcotics and weapons offenses.⁶⁴ Since 1972 the percentage of narcotics and weapons offenses in the federal system has more than doubled: drug offenses have increased from eighteen to forty-one percent of the federal criminal filings; gun offenses are up from four to eight per-

undercounts the actual number of state felony cases filed in the state courts within the Northern District of California. But even using just that number, and then dividing by 210 judicial positions available (not necessarily filled) in those counties, yields a per-judge criminal (felony) caseload in the superior courts of 157. Adding the uncounted yet unduplicated municipal court felony cases would obviously increase this number.

Meanwhile, the 1992 Annual Report for the Ninth Circuit shows 682 "criminal filings" in the federal Northern District of California in 1991. 1992 NINTH CIRCUIT ANNUAL REPORT 82. This appears to include misdemeanors as well as felonies. Dividing this number by the number of criminal judicial positions (20 including magistrate judges, who handle all misdemeanors and perform significant work in felony cases, but excluding senior judges) yields a per-judge caseload of 34. See JERROLD M. LADAR, NORTHERN DISTRICT OF CALIFORNIA STATISTICAL SUMMARY: TRIALS, CIVIL CASES, CRIMINAL CASES (FOR THE 12-MONTH PERIOD ENDING JUNE 30, 1994) 2, 8-9 (1994). Adding those senior judges who still handle criminal cases would obviously decrease this workload figure. See *Senior Judges Help District Courts Keep Pace*, THE THIRD BRANCH (Administrative Office of the U.S. Courts), May 1994, at 1. Yet, it is still roughly only one-fifth that of the concurrent state court judges' caseload.

62. See LADAR, *supra* note 61, at 8-9. In 1992 the Northern District of California ranked 26 out of 94 federal districts in terms of number of criminal cases filed (558 cases). ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS 34-36 tbl. D (1993) [hereinafter 1993 WORKLOAD STATISTICS]. For purposes of comparison (see *infra* note 63), the Eastern District of California ranked 16 (742 criminal cases), the Central District ranked 11 (1,116 cases), and the Southern District ranked 9 (1,289 cases). *Id.* See also LADAR, *supra* note 61, at 5 (in 1994, the Northern District of California ranked 33 in trials completed), 7 (ranked in "top ten" for state prisoner cases).

63. Similar calculations, see *supra* note 62, for the other three districts in California yield state judge versus federal judge workload figures of 347 cases to 64 in the Eastern District (Sacramento); 226 to 34 in the Central District (Los Angeles); and 233 to 134 in the Southern District (San Diego, where there is a large abnormality in the number of criminal immigration and marijuana cases filed). See 1993 WORKLOAD STATISTICS, *supra* note 62, at 34-36 tbl. D.

64. THE CRIMINAL CASELOAD, *supra* note 29, at 4-7.

cent.⁶⁵ In addition, increases in the severity of the sentences available upon conviction for gun and drug offenses have been instituted over the past decade.⁶⁶ Many federal judges dislike these higher, often mandatory, penalties.⁶⁷ Anecdotally at least, it is difficult to discuss workload concerns with a federal judge today and not hear some distasteful reference to narcotics and firearms cases.⁶⁸ To be frankly blunt about the Emperors' situation, some federal judges simply do

65. *Id.* at 1, 5-6. It is fair to consider narcotics and weapons offenses together because in reality they are often committed together and charged together. Thus, 18 U.S.C. § 924(c), a frequently charged felon-in-possession offense, provides for severe mandatory minimum penalties for carrying a firearm during and in relation to any drug trafficking crime. *See, e.g., United States v. Taren-Palma*, 997 F.2d 525, 534-35 (9th Cir. 1993) (noting expert testimony that "firearms are often used in drug transactions"); *United States v. Fagan*, 996 F.2d 1009, 1015-16 (9th Cir. 1993) ("because guns are used in many drug transactions firearms are relevant and admissible in drug cases"); ROGER HAINES, 1 NINTH CIRCUIT CRIMINAL LAW REPORT 152 (4th ed. 1990) (separately indexed category for "Drugs and Firearms").

66. For example, 1986 amendments to 21 U.S.C. § 841(b) created new mandatory minimum sentences of 5, 10, 20 years, or life imprisonment for various federal narcotics offenses. Pub. L. No. 99-570, § 1002(2) (codified at 21 U.S.C. § 841 (1986)). Similarly, a 1986 amendment to § 924 increased mandatory imprisonment terms for federal firearms offenses. Pub. L. No. 99-308, § 104(a) (codified at 18 U.S.C. 924 (1986)). The federal Sentencing Guidelines were subsequently drafted to increase the suggested sentencing ranges for most narcotics offenses. *See Irene Nagel, Foreword: Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 931 (1990) ("sentences higher than past practice estimates are also proscribed for those convicted of violent and drug offenses"); Barbara S. Vincent & Paul J. Hofer, *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings*, 7 FED. SENT. REP. 33 (Aug. 1994) (the Guidelines have been set to incorporate the mandatory minimums).

67. Thus, the 1990 *Federal Courts Study* recommended that Congress "repeal mandatory sentence provisions," which it noted were "mainly for drug-related crime." 1990 FED. COURTS STUDY, *supra* note 3, at 133. Judge Miner states that the new federal Sentencing Guidelines ranges "seem most often to be on the high side" and particularly criticized "statutory minimum sentences . . . , especially in the drug area." Miner, *Crime and Punishment*, *supra* note 17, at 692. In 1993 two senior federal judges announced that they would no longer handle criminal drug cases because of their disagreement with the severe penalties mandated by the new Guidelines. Joseph B. Treaster, *Two Judges Decline Drug Cases, Protesting Sentencing Rules*, N.Y. TIMES, Apr. 17, 1993, at A1. Judge Schwarzer was reported at that time to estimate that some fifty federal judges around the nation were similarly "quietly refusing to handle drug cases." Saundra Torrey, *Some Federal Judges Just Say No to Drug Cases*, WASH. POST, May 17, 1993, at F7.

68. By definition, this anecdotal assertion is based on the author's own experiences and conversations. But also, as explained in the text *infra*, the discussions of the federalization issue published by federal judges uniformly focus on the narcotics caseload, without explaining precisely why. This Article suggests that an unspoken substantive distaste for certain types of cases motivates these discussions, as well as (or even rather than) simple workload concerns.

not like their average and increased numbers of gun and drug cases, and oppose federalization for this reason.⁶⁹

Thus, the 1992 Federal Judges Survey expresses distaste for "'ordinary' street crimes" being lodged in federal court, without further defining this concept.⁷⁰ "Ordinary street crimes" may mean gun and drug cases. More pointedly perhaps, the Judicial Conference's proposed *Long Range Plan* (the *Plan*) states that most gun and drug cases are "not . . . enough to involve a federal court's attention," without explaining why this is necessarily so.⁷¹ Similarly, the *Long Range Plan* singles out the recent increase in narcotics case filings without explaining why that development is significant, and it separates drug filing statistics without separating out other types of crimes.⁷² The *Plan's* silence as to why drug cases are singled out leaves a skeptical reader to wonder whether it reflects substantive distaste for drug cases or some other unarticulated concern.⁷³

The preoccupation with guns and drugs is apparent, even if unexplained. For example, in a 1992 article providing valuable detail regarding judicial views on these issues, Judge Miner criticizes recent federal criminal legislation raising the penalties for felons caught in possession of weapons as "federalization of state crime."⁷⁴ He similarly asserts that "[i]f there is one area of criminal prosecution that

69. I am indebted to my Hastings colleague Professor Ash Bhagwat for encouraging me to make explicit this likely controversial assertion about the substantive undercurrent of the current federalization debate.

70. 1992 JUDICIAL SURVEY, *supra* note 3, at 7, 29.

71. 1994 LONG RANGE PLAN, *supra* note 4, at 21 recommendation (b). The plan notes that it would make an exception for exceptionally complex drug or weapon conspiracies. *Id.*

72. 1994 LONG RANGE PLAN, *supra* note 4, at 8, 120.

73. In its recent report entitled *The Criminal Caseload*, the Administrative Office of the U.S. Courts notes that the federal criminal caseload, while "fluctuat[ing] wildly since 1950," has not grown much, while civil filings have increased more than 300%. THE CRIMINAL CASELOAD, *supra* note 29, at 2. This report then asks the same question this Article poses (perhaps more diplomatically): "Why then is the criminal caseload of the district courts the topic of so much attention today?" *Id.* The report goes on to suggest that perhaps the change in the "character" of federal crime filings (toward drug cases) has increased the workload. *Id.* at 4, 8-15. However, that tentative suggestion is at least open to debate. For example, the report notes that the "defendants per case ratio for drug cases" has in fact declined in recent years. *Id.* at 8. So has the average length of criminal jury trials. *Id.* at 14.

74. Miner, *Crime and Punishment*, *supra* note 17, at 685-86. The Armed Career Criminal Act of 1988 dramatically increased penalties for felons possessing firearms in various contexts, to 30-year or life imprisonment terms. Pub. L. No. 100-690, § 6460, 102 Stat. 4373 (codified at 18 U.S.C. §§ 922, 924(c) (1988)); see generally Cynthia R. Cook, *The Armed Career Criminal Act Amendment: A Federal Sentence Enhancement Provision*, 12 GEO. MASON U. L. REV. 99, 104 (1989).

best exemplifies the proposition that too much crime is prosecuted in federal courts, it is the area of drug offense prosecution."⁷⁵ Judge Miner deserves great praise for publicly discussing the thorny issues of federalization, providing detail that is generally absent from most presentations on the topic. However, precisely why guns and drugs are singled out for discussion (as opposed to, for example, small bank robberies or postal thefts) is neither explained nor examined.⁷⁶

While it is suggested above that the federal criminal workload problem is not really as "nightmarish" as some critics make it out to be, it is important to recognize the legitimacy of the concern. Complaints about workload are born of high ideals, not sloth; no one disputes that federal judges today work extremely hard.⁷⁷ They are properly concerned about the quality of justice their workloads permit them to render. Federalization workload concerns are founded on the idea that too many criminal cases can hinder the exercise of careful judgment and threaten a reduction in the quality of justice in the federal system.⁷⁸ Because achieving just results for litigants is an overarching goal of the federal court system (albeit a goal of the states as well), work pressures that obscure this goal are plainly appropriate subjects of critique.

However, the point here is that sheer numbers of criminal cases do not appear to be a primary cause of perceived federal workload pressures. Based on the available empirical information, one may legitimately question whether some other concern actually drives the federalization critique. A substantive bias against drug and gun cases, if one indeed exists, is analytically separate from pure criminal workload. Instead, it suggests an unarticulated, substantive conception of

75. Miner, *Crime and Punishment*, *supra* note 17, at 683.

76. To be fair, this precise question has not been posed prior to this Article and so may have escaped attention as a question needing an answer. Also in fairness, in an earlier article providing a historical account of federalization of crime, Judge Miner noted his more general view that federal mail fraud and other statutes criminalize conduct "which would ordinarily be prosecuted in state courts." Miner, *Federal Courts*, *supra* note 22, at 121-22 (1987). However, this point appears as an aside to the primary historical account; Judge Miner's final focus (and ire) in that article again is reserved for federal drug cases: "local trafficking in controlled substances [has] become grist for the federal prosecutor's mill." *Id.* at 124.

77. See *supra* Part I.A; cf. Rehnquist, *supra* note 38 (describing federal judges' workload in the 1950s).

78. As Professor Beale put it, "the sheer number of drug prosecutions poses a threat to the federal courts' ability to perform their constitutional role." Beale, *Federal Criminal Caseload*, *supra* note 60, at 7.

the type of criminal cases federal courts "should" handle.⁷⁹ This leads to a separate category of federalization concerns, described below as "dignity" concerns.⁸⁰ But first, a variant on the workload theme, described here as "open forum" concerns.

B. Open Forum Concerns

There is no doubt that Congress envisions the federal courts playing a significant role in the enforcement of a large number of national legislative plans. To state but a few examples, environmental protection, antidiscrimination remedies, management-labor relations, and securities regulation have all been lodged with the federal courts.⁸¹ Federal criminal statutes might also be said to reflect some (cohesive or otherwise) congressional design for national enforcement. All of these areas compete for federal judicial resources, and not all the claims available can possibly be tried in federal court.

In light of the variety of federal legislation enacted without express hierarchy, it surely is a valid concern if one class of cases (criminal) pushes out all others, so that the federal forum envisioned by Congress is unavailable as a matter of reality for other categories. Federal judges and commentators claim that this is precisely the effect of federalization of crime on the federal civil docket. Judge Miner of the Second Circuit states that "judges are unable to get to their civil calendars."⁸² The *1990 Federal Courts Study* asserts that "a recent surge in federal criminal trials . . . is preventing federal judges in major metropolitan areas from scheduling civil trials."⁸³ The proposed *1994 Long Range Plan* sounds the same concern, if somewhat muted: "[C]riminal cases have produced significant delays for civil suits in some judicial districts."⁸⁴

79. See, e.g., *id.* at 7 ("The current federal caseload includes many drug prosecutions that could and should be brought by state prosecutions in state courts." (emphasis added)).

80. See *infra* text accompanying notes 122-151.

81. See, e.g., 42 U.S.C. §§ 7401-7626 (1983 & Supp. 1995) (air pollution); 42 U.S.C. §§ 1981-2000(h)-6 (1994) (civil rights); 29 U.S.C. §§ 101-633a (1987) (labor); 15 U.S.C. §§ 77a-78111 (1981) (securities).

82. Miner, *Crime and Punishment*, *supra* note 17, at 686.

83. 1990 FED. COURTS STUDY, *supra* note 3, at 6. This claim apparently was premised in part on Associate Reporter Professor Beale's 1989 report of predictions from federal judges and prosecutors that "in the very near future the[ir] districts will be unable to try any civil cases." Beale, *Federal Criminal Caseload*, *supra* note 60, at 5.

84. 1994 LONG RANGE PLAN, *supra* note 4, at 9. The Committee also notes that "the courts have responded" to the problem. *Id.*

Despite these assertions by federal court observers, no broad empirical data exists to support their claims. Individualistic anecdotal reports are generally the only support offered for the dire predictions of civil trial preclusion.⁸⁵ There is substantial reason to believe that these claims are exaggerated and far from the norm in most federal districts. Before acting to close the federal courts to criminal cases based on open forum concerns, some broader and more scientific statistical work needs to be done.

For example, the most recent Administrative Office report on *The Criminal Caseload* indicates that civil trials still occupy the majority of the trial time of all federal courts.⁸⁶ This balance was roughly the same in 1972, thus belying any claim that a new "crisis" of closed forums is upon us.⁸⁷

(1) *General Points*

Moreover, there is a subtle yet potentially huge bias in this data. In a footnote, the Administrative Office notes that it defines "trial" nonliterally as "any contested proceeding in which evidence is introduced"; thus, all evidentiary "[h]earings on contested motions are reported as trials."⁸⁸ With such a definition, it is not surprising that the Administrative Office's statistics indicate proportionately more criminal than civil "trials."⁸⁹ Criminal cases often have at least one pretrial hearing involving contested evidence because many criminal motions to suppress or to dismiss turn on contested factual issues, which the Federal Rules of Criminal Procedure require to be resolved before trial.⁹⁰ On the other hand, civil cases almost always proceed without

85. See, e.g., Miner, *Crime and Punishment*, *supra* note 17, at 686 ("A judge . . . recently told me . . ."); Beale, *Federal Criminal Caseload*, *supra* note 60, at 5 (citing "reports from judges and prosecutors in districts with heavy drug caseloads").

86. THE CRIMINAL CASELOAD, *supra* note 29, at 12. Not surprisingly, in a report designed to address the criminal caseload, this point is stated in the converse: "By 1992, criminal trials represented more than 47 percent of all trials." *Id.* See also *infra* text accompanying notes 88-92 (discussing the broad and nonliteral definition of "trial" used in developing this statistic and arguing that it is biased to favor reporting of "trials" in criminal rather than civil cases).

87. THE CRIMINAL CASELOAD, *supra* note 29, at 12 ("In 1972 criminal trials made up more than 40 percent of all trials."). In 1992 the figure was 47%. *Id.*

88. *Id.* at 12 n.5. Accord LADAR, *supra* note 61, at 5 n.3.

89. That is, the Administrative Office states that criminal cases make up 15% of all federal cases filed, yet account for more than 47% of all "trials." *Id.* at 13.

90. Federal Rule of Criminal Procedure 12(b) requires that such motions be raised prior to trial, and Rule 12(e) states that such motions "shall be determined before trial" in most cases. FED. R. CRIM. P. 12. Rule 12(e) expressly anticipates that relevant "factual issues" will be resolved when necessary to such pretrial motions. *Id.*

evidentiary hearings because the Federal Rules of Civil Procedure provide for pretrial disposition only by summary judgment, which is by definition a nonevidentiary mechanism.⁹¹ It thus seems undoubtable that criminal cases generally must have more contested evidentiary hearings than do civil cases—but these simply are not “trials” as the term is generally understood. The present statistical comparison of “trials” in the civil and criminal contexts is thus misleading: it compares apples (civil cases that use a nonevidentiary pretrial disposition mechanism) with oranges (criminal cases that use contested pretrial hearings) and then calls only the latter “fruit.” The actual figure for true criminal trials is almost certainly far lower than is currently reported.⁹²

Even if all criminal “trials” reported were actual trials, it remains the fact that more than fifty percent of the federal trial docket is devoted to civil trials.⁹³ This hardly supports the claim that federal judges are not available to try civil cases because criminal cases are overwhelming them. Of course, it can sometimes occur that a particular judge becomes mired in an unusually long trial that precludes almost all other matters.⁹⁴ However, such cases are aberrational⁹⁵ and individual, not district-wide. Moreover, such exclusionary cases can

91. See FED. R. CIV. P. 56(c) (providing for judgment when the pleadings demonstrated “no genuine issue as to any material fact”); see generally William W Schwarzer & Alan Hirsch, *Summary Judgment After Eastman Kodak*, 45 HASTINGS L.J. 1 (1993) (concluding that under appropriate circumstances and used carefully, summary judgment is an affirmative case management tool); William W Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465 (1984) (urging a more principled approach to the use of Rule 56). There is no equivalent to Rule 56 in the federal criminal rules. While it has been suggested that summary judgment principles might profitably be applied in some criminal cases, see James M. Shellow & Susan W. Brenner, *Speaking Motions: Recognition of Summary Judgment in Federal Criminal Procedure*, 107 F.R.D. 139, 139 (1986), that theory has yet to catch on in federal criminal cases.

92. For example, the Northern District of California reports that roughly three-fourths of the nonjury “trials” reported for the district in 1994 were in fact not trials, but evidentiary hearings. LADAR, *supra* note 61, at 5. Because such hearings are generally shorter and less complex than trials, the Administrative Office should consider refining its data collection mechanisms for “trials.”

93. THE CRIMINAL CASELOAD, *supra* note 29, at 12.

94. See, e.g., *United States v. Baker*, 10 F.3d 1374, 1386 (9th Cir. 1993), *cert. denied*, 115 S. Ct. 330 (1994) (over 16-month trial); *Polizzi v. United States*, 926 F.2d 1311, 1313 (2d Cir. 1991) (describing 17-month “Pizza Connection” trial, although noting it to be “an aberration in the federal judicial system”). The *Polizzi* trial was reported to have taken up 265 trial days over 17 months. 926 F.2d at 1313. Thus, it almost certainly did not entirely exclude the trial judge from other matters, since 265 days averages to less than 16 days per month, leaving at least one day a week for other judicial business.

95. *Polizzi*, 926 F.2d at 1313.

also arise in the civil trial context,⁹⁶ as well as in state cases. Therefore, it is a flaw of our legal system in general, not somehow specific to federal criminal legislation.

In fact, it remains true today as a general matter that the federal trial docket remains open to many civil trials; more than 10,000 were conducted in the federal courts in 1992.⁹⁷ Nor has any federal district where the criminal dockets are abnormally large ever suspended all civil trials because of criminal caseload emergencies.⁹⁸

Two other related points deserve brief mention. First, respected federal trial judge Edward Rafeedie has recently written that “[a]lmost all jury trials take from two to three times longer than they should.”⁹⁹ This suggests that, rather than closing the federal courthouse doors, more efficient trial management techniques may provide some solution to the concerns about the availability of federal courts.¹⁰⁰

96. See MCLAUGHLAN, *supra* note 41, at 165 (“[O]ne antitrust case can tie a judge up for years, and it can become nearly the only case the judge can manage during that period.”).

97. THE CRIMINAL CASELOAD, *supra* note 29, at 12 fig. 12. This averages to roughly 100 civil trials annually in each of the 94 federal districts in the country, two per week.

98. While it does not identify the districts, the Administrative Office reports that in three districts (out of 94) in 1992, more than 80% of the trials conducted were criminal (including, of course, nontrial criminal evidentiary hearings, see *supra* text accompanying notes 88-92). THE CRIMINAL CASELOAD, *supra* note 29, at 13. The three districts are almost certainly southern border districts, however, and a single category of criminal conduct clearly predominates in these border districts: immigration offenses. While many districts have criminal immigration caseloads in the single digits, in 1994 California's four district courts had 671 (424 in San Diego alone), Texas's four district courts had 481 (224 in Houston), and Arizona's single district court had 177. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1994 FEDERAL JUDICIAL WORKLOAD STATISTICS tbl. D-3. This total of 1,369 criminal immigration cases represented more than 50% of the 2,596 such cases filed in all the federal courts in 1994. *Id.*; see also MCLAUGHLAN, *supra* note 41, at 121 (noting that the Fifth and Ninth Circuits, where these districts lie, historically have had high criminal filings, presumably largely immigration cases). But of all possibly “dual jurisdiction” federal criminal offenses, immigration offenses seem most clearly “federal” rather than state in character, so that defederalization seems unlikely if not inappropriate. Moreover, it seems clear that the immigration issues in this country today demand solutions far beyond simply deciding whether or not to federalize criminal conduct that is an outgrowth of a far broader social issue.

99. Edward Rafeedie, *Speedier Trials*, LITIG., Fall 1994, at 6.

100. The need for further implementation of management techniques may provide some response to the odd statistical point made in THE CRIMINAL CASELOAD, *supra* note 29, at 9, that while single defendant cases average 178 minutes of court time, multiple defendant criminal cases average 347 minutes per defendant. Gently described by the Administrative Office as a “diseconomy of scale,” this unexplained inefficiency in multi-defendant cases would seem to require strong management attention, not simply acceptance.

Second, contrary to an oft-invoked myth,¹⁰¹ the 1970 Speedy Trial Act simply does not, as a general matter, force delay in civil cases.¹⁰² Because the Speedy Trial Act provides for generous exclusions of time that are often invoked, federal criminal cases are often not tried within the statutory deadline of seventy days; in fact, the average time for disposition of federal criminal cases is more than five months.¹⁰³ This average necessarily includes those criminal cases simple enough to resolve quickly; for cases of any complexity, the Speedy Trial Act itself provides for an exclusion of time that is frequently invoked.¹⁰⁴ Thus, as Professor George Bridges concluded in a 1982 study, "the Act has had no independent effect on the volume or flow of civil litigation in federal courts."¹⁰⁵

(2) *One District's Experience*

Perhaps because more extensive or accurate empirical data about civil versus criminal trials is lacking, "open forum" arguments against federalization are often based on anecdotal evidence.¹⁰⁶ Although unpersuasive on general propositions, such anecdotal evidence may also be cited to prove the contrary point: that federal criminal cases are not barring civil litigants from being heard in federal court. On a recent random morning (Tuesday, January 24, 1995), a visit to the federal courthouse in San Francisco revealed that not one of the nine judges or five magistrate judges was holding a criminal trial that

101. *E.g.*, Beale, *Federal Criminal Caseload*, *supra* note 60, at 4-5 (stating that deadlines imposed by the Speedy Trial Act force criminal trials and criminal pretrial proceedings to take precedence over civil trials); 1990 FED. COURTS STUDY, *supra* note 3, at 36 (claiming that because of the Speedy Trial Act, federal courts "with heavy drug caseloads are virtually unable to try civil cases and others will soon be at that point").

102. The Speedy Trial Act is codified at 18 U.S.C. § 3161 (1988 & Supp. V 1993).

103. MICHAEL V. BORK, *FEDERAL JUDICIAL CASELOAD: A FIVE-YEAR REVIEW, 1989-1993*, at 7 (1994). The Speedy Trial Act provides in relevant part that "the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days" of indictment or first appearance. 18 U.S.C. § 3161(c)(1) (1985 & Supp. 1995). Subsection (h) of § 3161 provides, however, that "[t]he following periods of delay shall be excluded in computing th[is] time," and nine detailed and commonplace periods of delay are then listed.

104. 18 U.S.C. § 3161(h)(8)(B)(ii) provides that a judge deciding whether to grant a continuance may consider whether a case is "so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation . . . within the time limits" of the Act.

105. George S. Bridges, *The Speedy Trial Act of 1974: Effects on Delays in Federal Criminal Litigation*, 73 J. CRIM. L. & CRIMINOLOGY 50, 72 n.68 (1982) (citing other studies as well).

106. *See supra* note 85.

day.¹⁰⁷ Twelve of the fourteen judges' courtrooms were dark; two others were in use for federal civil trials.¹⁰⁸ Moreover, there were nine additional, unassigned courtrooms in this particular federal courthouse that were available and yet dark. Ironically, one federal courtroom was being used for a criminal trial—but it was a state criminal trial in which venue had been transferred from Sacramento to San Francisco.¹⁰⁹

It is virtually certain that the federal judges not in court on January 24th in San Francisco were otherwise engaged with court business. This maybe conceded without distorting the point; that these federal judges were not engaged in a criminal trial and a number of courtrooms were available for civil trials. Indeed, on this particular day in this particular district, the only federal trials occurring were civil.

Of course one swallow does not a summer make,¹¹⁰ and one day's experience cannot be generalized into a broad empirical statement. But this anecdotal experience appears to be accurate for the Northern District of California as a general matter. The 1993-1994 statistical report for that district states that "[t]here is no empirical evidence that the present criminal caseload poses a problem for the civil docket. . . . [C]ivil litigants [receive] a trial forum without undue delay. . . ."¹¹¹

107. On-site survey conducted by Professor Rory Little (Jan. 24, 1995) (notes on file with *Hastings Law Journal*). The San Francisco-based federal judges on that date were Chief Judge Henderson; Judges Conti, Orrick, Weigel, Patel, Lynch, Legge, Walker, and Smith; and Magistrate Judges Langford, Brennan, Brazil, Hamilton and Woodruff. The other trial judges of the Northern District sit in Oakland or San Jose. It is of course possible that these judges were in fact in the middle of a criminal trial but were simply not sitting that day for some reason. However, the published calendar for that week states that only two judges were even scheduled for a criminal trial that day (Judge Patel and Magistrate Judge Hamilton). *THE RECORDER* (S.F.), Jan. 24, 1995, at 15. Moreover, although Judge Patel's posted calendar indicated a scheduled criminal trial, her courtroom was dark. This is not unusual nor is it a point of criticism. In fact, federal litigators are well aware that criminal trials are often continued or resolved on the eve of trial, so that the courtrooms remain dark despite published schedules indicating trial.

108. Courtrooms of Judges Orrick and Smith.

109. *People v. Nguyen*, No. Cr.109842 (Sacramento Super. Ct.), No. 156754 (S.F. Super. Ct.), Judge W.J. Harpham (ret.) presiding. That the federal courthouse was made available for the state trial is an encouraging example of state-federal resource sharing.

110. See ARISTOTLE, *NICOMACHEAN ETHICS* bk. 1, ch. 7, in J. BARTLETT, *FAMILIAR QUOTATIONS* 78 (J. Kaplan ed., 16th ed. 1992).

111. LADAR, *supra* note 61, at 2-3. Other districts, with abnormal criminal filings, have reported to the contrary. See *United States v. Mosquera*, 813 F. Supp. 962, 965 (E.D.N.Y. 1993) (noting that in that district, "criminal filings have increased at a rate far greater than the national average" and reporting that an "advisory group has determined that the criminal docket is the principle cause of unnecessary delay and expense in the civil justice system within the Eastern District").

San Francisco is a major metropolitan area and is in the upper third of federal districts in the country for trials conducted.¹¹² Absent some contrary empirical evidence, it would seem likely that its federal caseload and forum pressures are more typical than aberrational; rather, the three (out of ninety-four) federal districts that are suffering high open forum pressures are likely atypical.¹¹³

(3) *Why Not Try a Master Calendar?*

One substantial bar to conducting more federal trials may be the present federal adherence to an individual judge case management system, as opposed to the "master calendar" assignment system used in many state courts, including California.¹¹⁴ No judge can try more than one case at a time. Under an individual assignment system, if a criminal case is being tried, no other case can be tried by that judge even if the case is ready to go.¹¹⁵ If a case set for trial pleads or settles on the eve of trial, the scheduled trial time usually goes unused and the courtroom stays dark.¹¹⁶

112. LADAR, *supra* note 61, at 5 (district ranks 33 out of 94 federal districts in trials conducted); *see also supra* note 98 (the Northern District of California ranks 16 nationally in total criminal filings).

113. There reportedly were three federal districts in 1994 in which criminal "trials" represented more than 80% of the total trial time. *See supra* note 98. Not coincidentally, immigration problems noticeably skew many governmental functions in these districts besides federal courtroom resources. *Id.*; *see also California Sues U.S. Government over Costs Tied to Illegal Aliens*, N.Y. TIMES, May 1, 1994, at A24; Larry Rohter, *Florida Seeks U.S. Aid for Illegal Immigrants*, N.Y. TIMES, Dec. 31, 1993, at A12; Sam H. Verhovek, *Texas Plans to Sue U.S. over Illegal Alien Costs*, N.Y. TIMES, May 27, 1994, at A10.

114. In an individual case management system, every case is assigned to a particular judge from the day it is filed until the day it is disposed of. In contrast, a master calendar system does not assign cases to any particular judges, but rather uses whatever judge is available to perform whatever functions (for example, arraignment, discovery, motions, settlement, and trial) are needed along the way. *See generally* Richard Enslin, *Should Judges Manage Their Own Caseloads?*, 70 JUDICATURE 200, 200 (1987); Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 257 (1985).

115. There are presently some stalwart federal judges, such as the Honorable James C. Ware in the Northern District of California (San Jose Division), who will try two cases on the same day, running a criminal case from 8 a.m. to 12:30 p.m., and a civil case from 1:30 p.m. to 6 p.m. Such a schedule is obviously exhausting and impossible to manage for very long; it is also hard on support personnel and, perhaps, on jurors. Judge fatigue might well lead to greater trial errors. Most significantly, however, despite such herculean efforts, such a schedule is still limited to the trial of only two cases by that judge, even if five or ten stand ready for trial.

116. Of course, this need not be the case; a single judge can also double or triple schedule trials on her own calendar. This is likely more inconvenient and expensive to the parties (who must prepare whether their case goes to trial or not) than is a master calendar

By contrast, a master calendar assignment system permits trial of a large number of cases simultaneously, limited only by the total number of judges or courtrooms available for trial. In California state courts for example, many cases are often scheduled for the same trial dates. This guarantees that some case is definitely ready on any given date, so that a courtroom does not go unused. If four judges are available, then four cases can be tried. Trials are not tied to the schedule of a single judge.¹¹⁷

The individual judge assignment system is reportedly a relatively recent development in the federal system.¹¹⁸ The use of this system may indicate that other values are viewed as more important than simply trying cases as quickly as possible.¹¹⁹ Yet federal jurisdictions have used master calendar systems in the past, specifically to respond to a perceived caseload crisis.¹²⁰

Undoubtedly it would be advisable to gather more empirical evidence to better evaluate current open forum concerns. For example, data on days actually spent in trial by federal judges is not readily available.¹²¹ As it now stands, however, there is substantial reason to

assignment system, however, since the single judge is the only one available and the number of possible trials is therefore capped at one.

117. As an example, if Judge A is trying a criminal case under a master calendar system while a case before Judge B pleads out, Judge B can immediately be assigned to try one of Judge A's other cases if one is ready to be tried. Of course, even a master calendar system does not end all delays; the number of judges and courtrooms is finite. Thus, California state litigants still face substantial delays in getting their cases to trial. Yet, the master calendar system is the only way California state courts handle the caseload they have, which is significantly greater than that of federal courts. *See supra* text accompanying notes 61-63. Single judge assignment is a luxury that federal courts can afford only because their caseloads are so relatively low.

118. Judge Peckham states that "in 1969, most metropolitan federal district courts changed over from a master calendar system to an individual assignment system." Peckham, *supra* note 114, at 257.

119. Thus, Judges Enslin and Peckham argue that an individual assignment system develops continuity, expertise, and a sense of responsibility for disposition of the assigned cases, all of which may in turn foster more efficient litigation. Enslin, *supra* note 114, at 201; Peckham, *supra* note 114, at 254. Professor Resnik, on the other hand, has raised significant concerns about "managerial judging" in individual assignment systems. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

120. *See* LADAR, *supra* note 61, at 4 n.2 (noting use of a "master calendar" system in the Northern District of California in 1968-1969 to respond to the large influx of selective service cases: "15 criminal cases [ready] for trial . . . each Monday [were] spread among the 7 judges available . . .").

121. For example, the length of federal "trials" reported by the Administrative Office appears to include days during which the trial was still not completed but, for one reason or another, court was not actually in session, thus inflating the figures. *See also supra* text accompanying notes 61-63 (data defines any evidentiary hearing as a "trial").

believe that the "open forum" concerns expressed with regard to federalization of crime are overstated.

C. Dignity Concerns

Some critics of federalization express the view that federal judges should not have to deal with "ordinary" street crimes because such crimes "should not be enough to involve a federal court's attention."¹²² These critics posit, however, that other criminal cases—"cases of clear national import and interest"—properly fall within the scope of federal concern.¹²³ Such views are tied to a conception that federal courts have a "distinctive" role among all courts and that federal courts are "a superlative court system . . . that attracts the most talented lawyers."¹²⁴ Advocates that couch their criticisms of federalization in these terms are in essence concerned with the dignity of federal courts and judges.

There may well be a core to such dignity concerns that captures a real and valid, if difficult to describe, shared value in our conception of federal courts. Many view federal courts, historically and contemporaneously, as special or distinctive. Thus, almost twenty years ago, Professor Burt Neuborne challenged "the myth of parity" between state and federal courts.¹²⁵

This Article does not take issue with the grand aspirations of federal courts (although it should be noted that many state courts share

122. 1992 JUDICIAL SURVEY, *supra* note 3, at 7, 29; 1994 LONG RANGE PLAN, *supra* note 4, at 21 (arguing that in order to merit federal jurisdiction a crime should have "substantial multistate or international aspects"). See also Mordecai Rosenfeld, *The Law and the Yucca Yucca Plant*, N.Y. L.J., June 16, 1989, at 2 (reporting Chief Justice Rehnquist's statements that "garden variety crimes d[o] not belong in federal court").

123. 1994 LONG RANGE PLAN, *supra* note 4, at 19.

124. *Id.* at 6, 19.

125. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). Rather than advance a strong absolute claim (*e.g.*, that federal courts are "better" than state courts for all purposes), Professor Neuborne's thesis was more limited: that federal courts are better than state courts at "enforcing countermajoritarian checks in a sustained, effective manner," and at evaluating "individual[] . . . challenges to collective decisions." *Id.* at 1131. Even when limited to constitutional adjudication, however, the lack-of-parity thesis has been questioned by other scholars. *E.g.*, Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981); Michael E. Solimine & James Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983). Professor Chemerinsky contends that "the debate about parity is unresolvable because . . . there is no empirical answer." Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 236, (1988). This Article does not pretend to settle, nor do its arguments depend upon settlement of, the parity debate.

such a aspirations¹²⁶). However, a concept of federal court dignity can quickly slide into an unanalyzed elitist-sounding position that detracts from a substantive analysis of the difficult questions confronting the federal courts today.

The 1994 draft of the *Long Range Plan* for the federal judiciary occasionally exhibits such unanalyzed excesses.¹²⁷ For example, the *Plan* begins with the assertion (without citation) that federal courts were intended to handle only “small numbers of disputes involving important national interests” and that federal judges are “specially selected for the job of performing . . . difficult counter-majoritarian tasks.”¹²⁸ Yet, not only is the specialness of the procedure not explained,¹²⁹ but how or why this might relate to disqualifying the federal courts from particular types of criminal cases is never explicated.¹³⁰ Throughout the *Long Range Plan*, the federal courts

126. Professor Resnik has noted, for example, that some state courts have responded to issues of race, gender, and ethnicity ahead of the federal courts. Judith Resnik, *Rereading “The Federal Courts”: Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 VAND. L. REV. 1021, 1041 (1994); see also *id.* at 1050 & n.131 (noting “rejuvenational state adjudication and . . . development of constitutional norms”).

127. The 1994 *Long Range Plan* is the most recent and perhaps the most prestigious explication of the anti-federalization position, built upon prior expositions by the 1990 Federal Courts Study Committee, the Federal Judicial Center, and other august bodies. See 1994 LONG RANGE PLAN, *supra* note 4, at 2, 4 n.1 (referencing prior works influencing and supporting the planning process); *supra* note 39 (further describing the *Long Range Plan*). It thus seems fair and useful to focus on the *Long Range Plan* as representative of considered and broadly shared views.

128. 1994 LONG RANGE PLAN, *supra* note 4, at 4. Similarly, the *Plan* states that federal courts “are special purpose courts.” *Id.* Thus, the *Plan* presumes, *ipse dixit*, a “special” status for federal courts even as it fails to explain just what the special purposes are or how they have been identified.

129. The concept of “specialness” here is difficult to understand: judgeships are highly sought after in most jurisdictions, state as well as federal, and each jurisdiction likely considers its selection process special. And it is highly debatable whether the current federal judicial selection process focuses particularly well or “specially” on persons exceptionally able to perform “counter-majoritarian tasks.” See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990) (criticizing the increased incidence of political posturing by judges); STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENT PROCESS* (1994) (criticizing the selection process for Supreme Court Justices). Most attorneys that receive federal judicial nominations have been “mainstream” players and have been deeply involved in, and responsive to, “majoritarian” politics. That some federal judges have been successful in withstanding political pressures after their appointment is true, but is likely attributable to constitutional life tenure protection, rather than to any special selection procedures.

130. See also 1994 LONG RANGE PLAN, *supra* note 4, at 3 (“preeminent legal competence”). The *Long Range Plan* also extols the federal courts as “a superlative court system with superior resources that attracts the most talented lawyers . . .” *Id.* at 6. It is unclear whether this last reference is intended to describe lawyers that become federal judges or those that practice in federal courts; either conception is arguable and unsupported. In

are referred to as “distinctive,” without any development of precisely what the distinctions are or upon what premises they are founded.¹³¹

Such a feeling of distinctive federal court superiority seems to manifest itself quite specifically in the debate over the federalization of crime. Thus, the *Long Range Plan* recommends that criminal conduct with only a “minor” effect on interstate commerce should “not be enough to involve a federal court’s attention.”¹³² Similarly, Judge Miner “object[s] to . . . the use of the federal courts for the prosecution of street-corner sales . . . [and other] small-quantity transactions”;¹³³ and the 1990 Report of the Federal Courts Study Committee bemoans the prosecution of “minor [drug] cases” in federal court.¹³⁴ Indeed, current anti-federalization sources are uniform in this message; an outside reader cannot help but get the impression that some crimes (which ones, other than drugs, are seldom specified) are simply viewed as too trivial and therefore beneath the federal courts’ attention.

The resonations of this claim are disturbing, more so perhaps because they are inexplicit and inferential.¹³⁵ Of course, a great deal of serious crime has little perceivable effect on interstate commerce. Historically it has not been a “significant” impact on interstate commerce that motivates a great deal of specific federal criminal legisla-

contrast, the “superior resources” point is not arguable: the federal courts today have far more dollars per judge—although some view this as part of the national problem—making their resources “superior” to overburdened state systems. See Kaye, *supra* note 5. But surely there are talented and dedicated state judges, and their achievements are perhaps even more admirable given their far more strained resource situation. The point here is not to dispute the assertions, but rather to take issue with their implication: that federal courts or judges are “better” and therefore should not have to handle “trivial” criminal cases. I wish to at least question this claim as a reason for restricting federal criminal jurisdiction. Indeed, if federal courts and judges are in fact “better” than their state counterparts, one might argue that they should handle more criminal cases in a time of national crime and/or judicial resource emergencies.

131. *E.g.*, 1994 LONG RANGE PLAN, *supra* note 4, at 18, 19; see also *id.* at 11 (referencing the “special nature” of the federal court system without precisely explaining it). Some federal court advocates may take the position that if you have to ask, then you can’t understand. This is, however, surely an unsatisfying response to genuine concerns.

132. *Id.* at 21.

133. Miner, *Crime and Punishment*, *supra* note 17, at 683.

134. 1990 FED. COURTS STUDY, *supra* note 3, at 37.

135. This Article is certainly not the first to note this inferential point (although it may be the most blunt). See, *e.g.*, Ann Althouse, *Federalism Untamed*, 47 VAND. L. REV. 1207, 1210 (1994) (arguing that “modest” state court decisions are considered by federal courts to be “unworthy of the attention of the federal judge”); Judith Resnik, *Rereading “The Federal Courts”: Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 VAND. L. REV. 1021, 1052 (1994) (noting that “many judges . . . argue that what is on the federal docket is not worth their time”).

tion or prosecutions.¹³⁶ Indeed, the federal civil rights prosecutions championed today, even by opponents of federalization,¹³⁷ were often state "street crimes" such as assault or murder.¹³⁸ The federal courts were asked to intervene not because the individual cases were non-trivial, but because as a class they threatened a shared national interest or aspiration.¹³⁹

Today, however, it is a different set of "traditionally local" crimes,¹⁴⁰ such as guns on our streets and drugs in our inner cities, that have reached epidemic proportions on a national scale. Local authorities are crying out for federal assistance.¹⁴¹ From what legitimate source may a principle be drawn that such crimes nevertheless remain beneath the attention level of our federal courts?

Indeed, even the *Long Range Plan* is unconsciously schizophrenic on this score. While arguing against federalization of offenses with "minor" impact on interstate commerce, the *Plan* trumpets federal judges as "'keepers of the covenant' and guardians of American constitutionalism" for their heroism in enforcing "the law of the land" in

136. Thus, one of the earliest dual jurisdiction federal crimes, mail fraud, codified at 18 U.S.C. 1341 (1988 & Supp V 1993), requires no effect at all on interstate commerce. Similarly, the post-Civil War civil rights statutes require no interstate effects. See 18 U.S.C. § 241-42 (1988). Indeed, in 1971 the Supreme Court expressly ruled that no interstate commerce effects at all were required for any particular federal loan sharking prosecutions (so long as the "class" of activities had a cumulative effect), so that "trivial" cases could not be precluded from the federal courts. *Perez v. United States*, 402 U.S. 146, 154-57 (1971).

137. *E.g.*, 1994 LONG RANGE PLAN, *supra* note 4, at 5, 22.

138. To take a well-known example, aside from its videotaped prominence and the identity of the assailants, the 1993 Rodney King beating in Los Angeles was little different than hundreds of assaults prosecuted in state courts every day. Disturbing as it is, the fact that the assailants were *local* police officers does not intrinsically suggest special *federal* concern. Similarly, the crime in *Screws v. United States*, 325 U.S. 91 (1945) (sheriffs beat an arrestee to death) while assuredly horrible was simply a homicide, devoid of interstate commerce impact and normally entrusted to the states for prosecution. What made federal prosecution appropriate in *Screws*, however, was a failure of state authorities to effectively deal with the problem; see *infra* text accompanying notes 236-247 (proposing this as an appropriate federalization principle). Indeed, the defendants in *Screws* were the state's local law enforcement authorities. 325 U.S. at 113 (Rutledge, J., concurring in the result).

139. *E.g.*, *Perez*, 402 U.S. at 154 (the "class of activities" enabled federal prosecution) (emphasis omitted); *Screws*, 325 U.S. at 112 (civil rights statutes are "designed to secure individuals their constitutional rights").

140. *Perez*, 402 U.S. at 157 (describing loan sharking subject to federal prosecution).

141. For only a small sample, see, *e.g.*, Valerie Alvord, *Reno Is Told Jails, Prosecutors Needed Here*, SAN DIEGO UNION-TRIB., Oct. 14, 1994, at B1; Julio Barretto, Jr., & Janet E. Quist, *Cities Need Money to Fight Drugs*, J. STATE GOV'T, Apr. 1990, at 50; Paul Chevigny, *Let's Make It a Federal Case: Police Brutality*, NATION, Mar. 23, 1992, at 370; Mitch Gelman & Jill Dutt, *Ready to Cash In; Hoping for More from D.C.*, NEWSDAY, Feb. 7, 1993, at 25.

the South in the 1950s.¹⁴² This Article would certainly join in this praise.¹⁴³ Yet it cannot be gainsaid that much of that heroism was in fact federal “interference” in “local” affairs, involving matters of local violence with minor or no connections to interstate commerce.¹⁴⁴ Despite this fact, and apparently to preserve specially such civil rights prosecutions in the federal courts while otherwise condemning federalization, the *Long Range Plan* suggests a separate principle of federal criminal jurisdiction, vaguely yet clearly designed to capture such cases: “criminal cases raising highly sensitive local issues.”¹⁴⁵

The debate regarding the federalization of civil rights offenses was heated in 1870—and in 1950. Yet critics of federalization today do not question the federalization of this particular class of local offenses.¹⁴⁶ However, the principle set forth in the *Long Range Plan*

142. 1994 LONG RANGE PLAN, *supra* note 4, at 5. Of course, state judges also generally swear an oath to defend the United States Constitution, and many take that oath as seriously as do federal judges. Professor Neuborne’s masterful article, *supra* note 125, is worthy of updating; it may be that the aspirational description of federal courts and judges has increasingly diminishing validity as a “principle of federalization” today.

143. See JACK BASS, *UNLIKELY HEROES* (1981) for an inspirational account of the hero federal judges.

144. Thus, the dissenters in *Screws* began their heated critique of the federalization (without using the term, of course) of the brutal murder of a black man by a Georgia county sheriff by stating the issue as “whether this patently local crime can be made the basis of a federal prosecution.” *Screws v. United States*, 325 U.S. 91, 139 (1945) (Roberts, Frankfurter, & Jackson, JJ., dissenting). In the related civil context, the discriminatory conduct reached by the federal Civil Rights Act of 1964 was presumed to be “of purely local character” in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964) (“Congress may . . . prohibit racial discrimination by motels serving travelers no matter how ‘local’ their operations may appear”).

145. 1994 LONG RANGE PLAN, *supra* note 4, at 21. The comment following this principle expressly references “the height of the civil rights era,” *id.* at 22, and in a veiled reference to the Rodney King case and the attendant riots in Los Angeles, *supra* note 138, states that “[e]ven today, some civil rights actions, because of their potential for explosiveness in the community, may be more effectively handled by the national government.” *Id.* at 22. But the King case was tried (the second time) by the federal district court in the same local Los Angeles community (indeed, *more* local than the Simi Valley community to which the state trial had been transferred). Precisely what was “more effective” about that is unexplained. Nor does this comment address whether *initial* prosecution of that assault case in federal court would have satisfied the *Plan*’s limited federalization principles. If not, why not? If so, why?

146. Neither, of course, does this Article; it takes the more affirmative position, on a principled basis, that such criminal cases are entirely proper in federal court when federal constitutional rights are violated *and* there is a failure of adequate state prosecution. See *infra* text accompanying notes 236-247.

In a creative and wonderfully revivifying article, Professor Akhil Amar has recently argued that there may be a constitutional requirement that civil rights offenses be federalized—although he does not use that term—based on Section 5 of the 14th Amendment. Akhil R. Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95

("highly sensitive issues in the local community"¹⁴⁷) is little more than an ipse dixit. This is apparent simply by way of current example. Today, gun and drug cases would seem to fall within the plain language of "criminal cases raising highly sensitive local issues." Most Americans today report that their fears are higher regarding these local criminal offenses than any other.¹⁴⁸ But the message of the *Long Range Plan* and other current anti-federalizationists seems to be that they do not want these particular "local" crimes in federal courts. Thus, unless the stated principle simply means that civil rights cases are an exception, then the *Plan's* linguistic formulation fails to distinguish (with any clarity or by any principle) the civil rights prosecutions it endorses from its overall anti-federalization position.

The Long Range Planning Committee is surely correct in its general view that no court's resources—state or federal—should be squandered on cases that do not warrant the expenditure of scarce resources.¹⁴⁹ In this sense, as well as in light of their relatively small numbers and high level of achievement, federal courts surely are special resources that ought not be squandered. Thus, substantial components of the *Long Range Plan's* concerns are valid, and the Committee is to be admired for undertaking the daunting task of planning for a future that threatens the quality of justice in all of the court systems in this country.

Yet, having a separate, available forum to handle criminal cases when state or local systems fail may also be vital to "Our Federalism."¹⁵⁰ Federal legislative or enforcement policies based on an expansive concept of the "dignity" of federal courts are unprincipled, founded on unarticulated and disputable premises, and ignore too large a portion of our existing criminal justice system: talented and

COLUM. L. REV. 1, 16-20 (1995). At bottom, this idea seems to be based on a theory of constitutional incorporation of a concept of state failure (*see id.* at 17), the same prudential principle proposed by this Article.

147. 1994 LONG RANGE PLAN, *supra* note 4, at 21.

148. *See* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, in this Symposium Issue (noting current opinion polls).

149. This idea is already recognized in nonprosecution and noncriminal "diversion" policies, designed to shunt criminal violations deemed inconsequential or not serious enough out of the criminal courts. *See, e.g.*, 21 U.S.C. § 844a (1988 & Supp. V 1993) (authorizing purely civil penalties for possession of a "personal use amount" of controlled substances); *infra* note 196 (noting federal nonprosecution policy for single-auto thefts).

150. *Younger v. Harris*, 401 U.S. 37, 43-44 (1971); *see Amar & Marcus, supra* note 146.

struggling state courts. There is an implied elitist and self-protectionist component of this message that seems entirely illegitimate.¹⁵¹

D. Federalism Concerns

A final set of concerns about federalization of crime emerge from the traditional view of the constitutional conception of the union. The federal government, it is said, was created only to address limited and plainly national problems and its courts ought not interfere in state or local affairs without good reason and clear textual support from the Constitution.¹⁵² Alexander Hamilton offered the initial part of this idea with specific regard to crime in Federalist No. 17, as a reason to not think of the proposed federal government as "too powerful."¹⁵³

151. Or as Chief Judge Kaye of the New York State Court of Appeals recently put it, a position that "as long as the whole system is in trouble, why not at least save the Federal courts?" is simply "Federalism Gone Wild." Kaye, *supra* note 5. "A solution that eases the burden on the Federal courts without taking into account the effect on the state court system is no solution at all." *Id.* Other state judges have occasionally expressed similar unhappiness with the federal judiciary's view of state courts. See, e.g., Kentucky Chief Justice Robert F. Stephens, *Commentary on "Planning for the State and Federal Courts": The Additional Problem of Federal Legislation*, 78 VA. L. REV. 1883, 1883 (1992) (noting "a residual attitude problem" among federal judges vis-a-vis their state counterparts).

152. See generally Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954). "[T]he conception of the central government as one of delegated, limited authority" seems settled enough to not require further support. HART AND WECHSLER'S *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 533 (Paul M. Bator et al., 3d ed. 1988). Yet, the literature on "federalism" has grown vast over the past decade; some have suggested that a "rereading" is necessary and that "the reality is that the states have become sub-divisions . . . of the federal government." Resnik, *supra* note 135, at 1049 (1994). The bland account in the text is not intended to endorse any particular side in the inevitable debates regarding conceptions of federalism. See, e.g., Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979, 980 (1993) (discussing "normative federalism"); Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1426-27 (1987) (proposing to "counter the Supreme Court's version of federalism" with a "neo-Federalist" view); Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VAND. L. REV. 1141, 1145 (1988) (proposing "federalist" and "nationalist" models of judicial federalism). The debate is too current and fractured to resolve. See generally Symposium, *Federalism's Future*, 47 VAND. L. REV. 1205 (1994).

But even the traditional account of federalism supports (as this Article contends) a broader conception of federalization than currently is in vogue. A "less federalist" conception might, as well. Professors Rubin and Feely have recently argued that "federalism," apart from simple decentralization of authority, ought to have no significant bearing on determining national policies today. Edward L. Rubin & Malcolm Feely, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994). This conception might support broad federalization of crimes (an effect possibly not intended by the authors) and thus might be generally supportive of themes in this Article; however, it is a theory unexplored by, and unnecessary to, this Article.

153. Hamilton stated that "[t]here is one transcendent advantage belonging to the province of the state governments . . . I mean the ordinary administration of criminal and civil justice." *Id.* at 155. THE FEDERALIST No. 17, at 120 (Clinton Rossiter ed., 1961).

The Tenth Amendment, reserving undelegated powers to the States, seems to embody this idea explicitly.¹⁵⁴ In the context of criminal law, Justice Stewart perhaps said it best in his 1971 dissent in *United States v. Perez*,¹⁵⁵ a case involving a federal prosecution of a local loan shark who operated solely in a small neighborhood in Brooklyn:

[T]he Framers of the Constitution never intended that the National Government might define as a crime and prosecute . . . wholly local activity through the enactment of federal criminal laws. . . . [I]t is not enough to say that loan sharking is a national problem, *for all crime is a national problem*.¹⁵⁶

Significantly, however, Justice Stewart was the lone dissenter in *Perez*, and *Perez* virtually ended the debate about the scope of federal authority to enact criminal laws.¹⁵⁷ Thus, the debate today focuses not on constitutional barriers to federalization, but rather on a search for

154. The Tenth Amendment provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. U.S. CONST. amend. X; *see generally* Gregory v. Ashcroft, 501 U.S. 452, 457-59 (1991) (discussing Tenth Amendment and federalism); Martha A. Field, Garcia v. San Antonio Metropolitan Transit Authority: *The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84, 95 (1985) (noting the Tenth Amendment's limited value as a constitutional basis for states' rights). Cf. Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305, 344 (1987) (explicating theory of the Ninth Amendment as a defense against both state and federal governments). However, the Supreme Court long ago rejected Tenth Amendment arguments as a bar to assertion of federal criminal jurisdiction over dual jurisdiction crimes. *Champion v. Ames (The Lottery Case)*, 188 U.S. 321, 357-58 (1903) (upholding 1895 federal act criminalizing interstate transportation of lottery tickets, while explicitly noting the substantive "evils" of gambling and the states' power to forbid it). *Champion*, while well-settled, was not an easy or self-evident case; it was decided 5-4 and was argued three times to the Supreme Court. *See* 188 U.S. at 321 (noting argument and rearguments).

155. 402 U.S. 146 (1957).

156. *Perez*, 402 U.S. at 157 (1971) (Stewart, J., dissenting) (emphasis added). While perhaps stating it best, however, Justice Stewart was not the first to advance such an idea. *See Ex parte Virginia*, 100 U.S. 339, 354 (1879) (Field, J., dissenting) ("The government created by the Constitution was not designed for the regulation of matters of purely local concern.").

157. *Perez* established the proposition that Congress has constitutional authority to reach discrete "local" criminal episodes that are wholly intrastate, at least when it makes findings that the "class of activities" addressed has significant effects in bulk on interstate commerce. 402 U.S. at 154-57. *Perez* has long been viewed as ending debate as to congressional power to "federalize" local criminal conduct. *See* Stern, *supra* note 2, at 283-85. But the pressures placed on federal courts today by a dramatic increase in firearms and narcotics cases prosecuted under this theory has reinvigorated the old debate. Thus, the scope of Congress's criminal authority under its interstate commerce powers was recently revisited in *United States v. Lopez*, No. 93-1260, 1995 LEXIS 3039 (U.S. Apr. 26, 1995), in which the Court struck down federalization of certain gun possession crimes in schools. Congress's failure to make any commerce findings in enacting the law at issue in *Lopez* apparently leaves open the question whether Congress lacks absolute authority to regulate simple

prudential principles to guide inevitable congressional efforts to federalize crime.

Any federalism concerns must note the fact that federalization of crime is not new.¹⁵⁸ The authors of the Constitution plainly envisioned a body of federal criminal law.¹⁵⁹ The statutes of the First Congress from 1789 to 1790, which created a number of dual jurisdiction federal crimes, were enacted by bodies whose membership was drawn substantially from the Constitution's signers.¹⁶⁰ While the Framers almost certainly foresaw a lesser federal role for the federal courts in criminal law than exists today,¹⁶¹ this is just as certainly true with regard to every area in which the Framers expressed a vision.¹⁶² However, if "federalization" means creating federal jurisdiction over crimes that might also be prosecuted by the States, then it has been going on since the First Congress.

For example, in its first month (July 1789), the First Congress enacted federal criminal statutes encompassing bribery and false statements.¹⁶³ After recessing from September until February 1790, the Congress then enacted federal criminal statutes encompassing, *inter alia*, murder, maiming, theft, fraud, and even receiving stolen property.¹⁶⁴ Of course, these statutes had, as all federal criminal statutes

firearms possession. Compare *id.* at * 56-57 (Kennedy, J., concurring) with *id.* at *65 (Thomas, J., concurring).

158. It is necessary to discourse on this point because a contrary "newness" argument tends to underlie current anti-federalization literature. See, e.g., Stephen Chippendale, Note, *More Harm Than Good: Assessing Federalization of Criminal Law*, 79 MINN. L. REV. 455, 458 (1994).

159. See, e.g., U.S. CONST. art. I, § 8 (counterfeiting and piracy); *id.* § 9 (a form of bribery); *id.* art. III, § 3 (treason). A number of procedural provisions of the Constitution also plainly anticipate federal criminal cases, laws, and trials. E.g., *id.* art. I, §§ 9, 10; *id.* art. II, § 2; *id.* art. III, § 2; *id.* art. IV, § 2.

160. See 1 ANNALS OF CONGRESS 3, 16-17, 100-101 (1834) (listing Constitution signers and the subsequently seated members of Senate and House including, for example, James Madison of Virginia).

161. See, e.g., THE FEDERALIST No. 17, at 118-20 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that the federal government is quite unlikely to be interested in "regulation of the mere domestic police of a state" and that "the ordinary administration of criminal . . . justice" lies within "the province of the state governments").

162. Not to mention significant areas where the Framers could have had no clear vision, e.g., securities regulation (15 U.S.C. §§ 77x, 78ff (1981)), wiretapping (18 U.S.C. § 2518 *et seq.* (1970 & Supp. 1995)). See *New York v. United States*, 112 S. Ct. 2408, 2418 (1992) ("The Federal Government undertakes activities today that would have been unimaginable to the Framers . . .").

163. See Act of July 31, 1789, ch. 5, § 35, 1 Stat. 46.

164. See 1 Act of Mar. 1, 1790, ch. 2, § 2, 1 Stat. 102 (false census returns); Act of Apr. 30, 1790, ch. 9, § 3, 1 Stat. 113 (murder); Act of Apr. 30, 1790, ch. 9, § 5, 1 Stat. 113 (theft); Act of Apr. 30, 1790, ch. 9, § 13, 1 Stat. 115 (maiming); Act of Apr. 30, 1790, ch. 9, § 14, 1

must have for proper federal jurisdiction, a connection to stated federal interests.¹⁶⁵ But that merely masks the fact that these were “state” crimes gone federal, because a number of the First Congress’s criminal statutes applied without regard to geography or exclusive federal control.¹⁶⁶

This federalization pattern can be traced over the next two hundred years. Nonexhaustive highlights include making assaults and other civil rights offenses federal crimes after the Civil War;¹⁶⁷ federalizing financial frauds in 1872;¹⁶⁸ the Mann Act federalizing prostitution offenses in 1910;¹⁶⁹ federalization of dangerous drug offenses starting in 1914;¹⁷⁰ and bank robberies “going federal” in 1934.¹⁷¹

Stat. 115 (forgery, counterfeiting, and uttering); Act of Apr. 30, 1790, ch. 9, § 15, 1 Stat. 115 (more theft and falsification); Act of Apr. 30, 1790, ch. 9, § 16, 1 Stat. 116 (general theft); Act of Apr. 30, 1790, ch. 9, § 17, 1 Stat. 116 (receipt of stolen property); Act of Apr. 30, 1790, ch. 9, § 18, 1 Stat. 116 (perjury).

165. Thus, most (but not all, *see infra* note 166) of the foregoing offenses applied to federal employees, to federal property, or to locations “under the sole and exclusive jurisdiction of the United States.” *E.g.*, Act of July 31, 1789, ch. 5, § 35, 1 Stat. 46; Act of Apr. 30, 1790, ch. 9, § 3, 1 Stat. 113. Similarly, the First Congress generally envisioned federal district court jurisdiction as “exclusive[] of the courts of the several states,” not dual. *See* Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 76. However, this was a policy choice; nothing in theory barred dual jurisdiction over criminal offenses that were, in fact, dual jurisdictional in character. *See* Warren, *supra* note 1, at 545-46.

166. For example, the theft provision found in § 16 of the April 30, 1790 Crime Bill expressly applied to theft committed wherever the subject property might be found. Act of Apr. 30, 1790, ch. 9, § 16, 1 Stat. 113. Similarly, separate federal criminal offenses of accessory before and after the fact were applicable wherever “on the land or at sea” the conduct might occur. Act of Apr. 30, 1790, ch. 9, §§ 10-11, 1 Stat. 114.

The § 5 theft provision of the 1790 Crime Bill provides a fascinating example of 18th-century sentencing philosophy, as well as an interesting sidelight on what might be called the “ripple effect” of criminal legislation: federalizing a state crime in order to deter interference with some *other* federal provision. The 1790 Crime Bill provided that, as part of the penalty for murders committed on federal property, Act of Apr. 30, 1790, ch. 9, § 3, 1 Stat. 113, post-execution dissection of the defendant’s body could be ordered. *Id.* § 4. Presumably, dissection was thought to be an additionally powerful deterrent sanction because of its moral repugnancy. But then, to support this penalty, Congress created a separate offense, theft of an executed body, in order to prevent persons from “rescu[ing]” an executed defendant’s body with impunity. *Id.* § 5. This provision expressly applied wherever the body had been “deposited,” not just to such thefts committed on federal property. *Id.*

167. Act of Apr. 9, 1866, ch. 31, § 2, 14 Stat. 27 and Act of May 31, 1870, ch. 114, §§ 4, 5, 16 Stat. 141 (now codified at 18 U.S.C. §§ 241, 242 (1969 & Supp. 1995)).

168. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323 (mail fraud, now codified at 18 U.S.C. § 1341 (1984 & Supp. 1995)).

169. White Slave Traffic Act, Pub. L. No. 61-277, 36 Stat. 825 (1910) (now codified at 18 U.S.C. §§ 2421-2424 (1970 & Supp. 1995)).

170. Act of Dec. 17, 1914, Pub. L. No. 223, 38 Stat. 785 (Act to tax persons distributing “opium or coca leaves [and] their derivatives”).

171. Federal Bank Robbery Act, Pub. L. No. 73-235, 48 Stat. 783 (1934) (now codified at 18 U.S.C. § 2113 (1984 & Supp. 1995)).

Many today undoubtedly believe that strong and obvious "federal interests" support these federal crimes, and that may in fact be so. The relevant point here is simply that each of these statutes reaches, for the most part, conduct that could be prosecuted locally if federal jurisdiction did not exist. Federalization of crime is simply not a new phenomenon.

Despite the continually expanding body of dual jurisdiction federal criminal laws, federalism concerns have consistently been raised in opposition to new federal crimes from the time of *Screws*¹⁷² through the 1980s.¹⁷³ Interestingly, however, such concerns are seldom voiced today in the political criminal federalization debate. This is certainly not because such concerns are no longer present or perceived; instead it seems likely that a silence about federalism concerns has recently arisen because these concerns are essentially political and pull in directions counter to the political leanings of most participants of the current federalization debate.

For example, many "liberals"¹⁷⁴ today oppose the federalization of crime largely because of the severity of federal criminal Sentencing Guidelines enacted in 1986.¹⁷⁵ Yet these opponents may be loath to make states-rights federalism arguments reminiscent of anti-civil rights and anti-New Deal arguments that were successfully battled decades ago.¹⁷⁶ At the same time, the customary advocates of a federalist states-rights theory tend today to be conservative law-and-order proponents of federalizing criminal statutes.¹⁷⁷ They have little inter-

172. *Screws v. United States*, 325 U.S. 91 (1945).

173. *See, e.g., United States v. Turkette*, 452 U.S. 576, 586 (1981) (noting argument that application of federal RICO statute to present facts "will substantially alter the balance between federal and state enforcement of criminal law").

174. Of course, the limitations of using stereotypical characterizations such as "liberal" and "conservative" must be recognized. Yet the labels are useful, it would seem, in conveying certain broad points. *See, e.g., Fallon, supra* note 152, at 1146 (using "liberal" and "conservative" to discuss uses of models of "judicial federalism"); Field, *supra* note 154, at 117 n.169 (noting other counterintuitive "liberal" versus "conservative" positions).

175. In 1986 Congress enacted the first of increasingly severe "mandatory minimum" sentencing schemes for drugs. Pub. L. No. 99-570, 100 Stat. 3207-2 (codified at 21 U.S.C. § 841(b)(1)(1988)). In 1987 new federal Sentencing Guidelines were promulgated; the Guidelines were viewed as generally increasing the average length of federal sentences. *See Criticizing Sentencing Rules, U.S. Judge Resigns*, N.Y. TIMES, Sept. 30, 1990, at B22. *See also supra* note 67.

176. *See, e.g., the arguments in dissent in Screws v. United States*, 325 U.S. 91, 138-61 (1945); *United States v. Darby*, 312 U.S. 100, 105-08 (1941) (recounting the losing arguments of appellee).

177. For example, conservative U.S. Senator Alphonse D'Amato of New York (R-NY) is generally credited with one of the broadest federalization suggestions ever advanced, a crime bill amendment that would federalize *any* violent crime committed with a firearm.

est in raising federalism concerns that might be used to block federalizing criminal legislation they favor. The result is the surprising silence regarding federalism concerns, at least in the political realms where the federalization debate is being played out.¹⁷⁸

Yet, federalism concerns are far from inconsequential; in fact, they may have the strongest claim to legitimacy in the debate. Despite the fact that the First Congress "federalized" some dual jurisdiction crimes, it seems clear that the vision of the Framers did not include federal criminal courts of general jurisdiction.¹⁷⁹ And while "local" crimes increasingly have been federalized during the past 200 years, the process has been halting and controversial.¹⁸⁰ Without further detailing the substantial work that has been done in this area, it is safe to assert that the constitutional foundations of our government generally contemplate a more restricted role for federal courts than for state courts with regard to criminal cases.¹⁸¹ Thus the federalism concerns that are present (if not currently voiced) in the federalization debate cannot be ignored.

See Taking Back Our Streets Act of 1995, H.R. 3, 104 Cong., 1st Sess. (1995), which is based on § 1213 of S. 1241, 102d Cong., 1st Sess. (1991). The D'Amato Amendment is the repeated rallying point of the federal judiciary's anti-federalization views. See, e.g., *Crime Bill Moves Through House*, THE THIRD BRANCH (Administrative Office of the U.S. Courts), Jan. 1995, at 1 (noting with favor that the D'Amato Amendment is not included in the House Crime Bill).

178. Not directly involved on the political front and sharing common work place concerns, the federal judiciary appears to be a unified and vocal exception despite any political divergence. See 1994 LONG RANGE PLAN, *supra* note 4, at 139-40 (Long Range Planning Committee composed of appointees from both parties); Rehnquist, *1994 Year-End Annual Report*, *supra* note 47, at 1 (presenting federalist-sounding arguments); United States v. Lopez, No. 93-1260, 1995 LEXIS 3039 (U.S. Apr. 26, 1995). Judge Schwarzer and Russell Wheeler's recent compilation of the arguments "on federalization" also surveys concerns similar to those discussed here. ON FEDERALIZATION, *supra* note 5, at 10-17. Yet, perhaps recognizing the sensitivity of such arguments in other contexts, that discussion never uses the term "federalism," nor does it advert to the political use of such arguments in past unrelated debates.

179. See Sara Sun Beale, *Federal Criminal Jurisdiction*, in 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 775-76 (Sanford H. Kadish ed., 1983) [hereinafter Beale, *Federal Criminal Jurisdiction*]; THE FEDERALIST No. 17, *supra* note 153. See also United States v. Dewitt, 76 U.S. 41, 44-45 (1869) (Congress has no general "police regulation" powers).

180. Professor Beale views the history of federalization as somewhat more halting than does this Article. Beale, *Federal Criminal Jurisdiction*, *supra* note 179, at 776. This may or may not be more a descriptive disagreement than a substantive one.

181. Whether, or how much, this original contemplation ought to influence current affairs is a matter of debate which this Article need not settle. See *supra* note 152. For if federalism concerns are due no weight, then even broader federalization of crime than suggested here might be appropriate. For now, this Article gives some, but not overwhelming, weight to originalist federalist concerns.

It seems fair to say that mainstream federalism concerns support some presumption against federalizing criminal conduct that is already prosecutable by the states.¹⁸² In fact, in a very different context, the Supreme Court has previously recognized something similar to a federalism presumption against certain congressional legislation.¹⁸³ Under such an analysis, some good cause (defined by whatever federalization principles are chosen), as well as textual authority in the Constitution, should be demonstrated before the federal government criminalizes matters of local concern.¹⁸⁴

One final federalization myth should be addressed here: despite rhetoric to the contrary, federalization need not be forever. Some federalization critiques argue that making more and more crimes federal continually skews the federal-state balance in one direction and irreparably rends the fabric of our federalism.¹⁸⁵ This concern is countered to some extent by the theory that because Congress is composed of officials elected at state and local levels, any congressional decision to federalize is, in some sense, made by the States' representatives who will protect the States' interests.¹⁸⁶

A more immediate counterpoint, however, is simply to note that federalization need not be, and has not always been, forever. This is true both by reference to prior historical episodes of controversial federalization efforts and by noting the possibility of using legislative "sunset" provisions in federal criminal laws.

182. At the conclusion of their pamphlet, Schwarzer and Wheeler somewhat abruptly assert a similar set of "working presumptions," although their source, and some development of the meaning and application of their presumptions, is not offered. ON FEDERALIZATION, *supra* note 5, at 47.

183. *Gregory v. Ashcroft*, 501 U.S. 452 (1991), held that in order not to tread unnecessarily on the states' inherent authority to regulate their own judiciaries, a presumption against finding that Congress intended to so intrude when it enacted the Age Discrimination Act should operate, rebuttable only with very clear intentional language. *Id.* at 469-70. See Rubin & Feely, *supra* note 152, at 904 (describing *Gregory's* holding as "principles of federalism created a presumption against" legislation).

184. See *infra* text accompanying notes 236-247.

185. Thus, in *United States v. Turkette*, 452 U.S. 576, 586 (1981), the Court noted that "it is urged that [a broad] interpretation of RICO . . . will substantially alter the balance between federal and state enforcement of criminal law." *Accord* ON FEDERALIZATION, *supra* note 5, at 18, 19-21 (describing similar arguments). The Court's response in *Turkette*, of course, was simply to acknowledge that even if this objection were accurate, "Congress was well aware that it was entering a new domain of federal involvement" when it enacted RICO and nothing constitutionally constrained it from so acting. 452 U.S. at 586.

186. See Jesse H. Choper, *The Scope of National Power Vis-a-vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1560-63 (1977); Herbert P. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546 (1954).

The most obvious case of temporary federalization is Prohibition. For over a decade, the federal government was involved in criminally enforcing a constitutional ban on intoxicating liquors.¹⁸⁷ This plunged the federal courts into the most dramatic criminal caseload crisis in history.¹⁸⁸ Eventually, however, the failure of this effort was generally recognized, and federal Prohibition was repealed in 1933.¹⁸⁹ As the American Law Institute concluded in 1934, because of the removal of Prohibition cases, the federal courts "should experience no further difficulty in promptly dispatching their business"¹⁹⁰

A different sort of temporary federalization can occur not by repeal, but by policies of nonprosecution. Such de facto defederalization has occurred, for example, with regard to the Dyer Act, which federalized the crime of auto theft in 1919.¹⁹¹ Enacted expressly to "crush" interstate auto thefts,¹⁹² the Dyer Act resulted in an average of 1,466 federal prosecutions per year from 1922 to 1933.¹⁹³ This statute has not been repealed,¹⁹⁴ and interstate auto theft has not been "crushed." Yet, by 1991, the number of federal auto theft prosecutions had dropped to 205 or less, or little more than two cases per year

187. Enacted in 1919 (effective in 1920), the Eighteenth Amendment to the Constitution provided that "the manufacture, sale, or transportation of intoxicating liquors within . . . The United States . . . is hereby prohibited." U.S. CONST. amend. XVIII, *repealed* by U.S. CONST. amend. XXI. Congress immediately enacted the Volstead Act (National Prohibition Act) criminalizing conduct in violation of the Eighteenth Amendment over President Wilson's veto. See Pub. L. No. 66-66, 41 Stat. 305 (1919); HERBERT ASBURY, *THE GREAT ILLUSION: AN INFORMAL HISTORY OF PROHIBITION* (1950). In 1933 the Twenty-First Amendment was ratified, repealing the Eighteenth Amendment and ending large-scale federalization of prohibition crimes, leaving liquor enforcement to the states. U.S. CONST. amend. XXI.

188. See Beale, *Federal Criminal Jurisdiction*, *supra* note 179, at 778; *supra* text accompanying notes 51-54.

189. U.S. CONST. amend. XXI.

190. AMERICAN LAW INSTITUTE, *A STUDY OF THE FEDERAL COURTS, PART I: CRIMINAL CASES* 3 (1934).

191. Pub. L. No. 66-70, 41 Stat. 324, 325 (1919). Sponsored by Senator Dyer, "The National Motor Vehicle Theft Act" made it a federal crime to "transport[] in interstate . . . commerce a motor vehicle, knowing the same to have been stolen." While this technically refers to an interstate transportation crime rather than purely auto theft, this statute historically was used to prosecute simple auto thefts in which no particularly strong or unique federal interest appeared. See, e.g., *United States v. Maze*, 468 F.2d 529, 536-38 (7th Cir. 1972) (analyzing 11 other federal appellate decisions), *aff'd on other grounds*, 414 U.S. 395 (1974).

192. H.R. REP. NO. 312, 66th Cong., 1st Sess. (1919).

193. See Rubin, *supra* note 4, at 500-01. This figure may also include thefts from interstate carriers under the 1913 Carlin Act. *Id.* at 500 n.15. Even if this is so, however, the result today has been de facto defederalization, as federal Carlin Act prosecutions are also rare.

194. 18 U.S.C. § 2312 (1970 & Supp. 1995).

per federal district.¹⁹⁵ In fact, auto theft is simply not federally prosecuted, absent either multiple thefts (*i.e.*, a “ring”) or some accompanying criminal conduct that is thought to warrant federal attention.¹⁹⁶ Thus, by general agreement and exercise of federal prosecutorial discretion, federalized auto theft is virtually no burden at all on the federal courts—it has been *de facto* repealed.¹⁹⁷

Finally, in addition to the possibility of the repeal of federalized crimes (*de jure* and *de facto*), Congress has authority to attach a “sunset” provision to criminal statutes thought to be particularly controversial. Such a provision might state that the statute will expire (and thus the conduct would no longer be a federal offense) after some experimental period (say five years), unless Congress acts.¹⁹⁸ This is a familiar concept civilly.¹⁹⁹ There is no reason in theory that such provisions could not be used to address the specter of “permanent” federalization. In fact, Congress specifically provided for the “sunset” of one of the new firearms offenses in the 1994 Crime Bill.²⁰⁰

195. Administrative Office of the U.S. Courts, Federal Judicial Workload Statistics 50 (1991).

196. See UNITED STATES ATTORNEYS MANUAL 9-61.112 (directing that “individual thefts” of autos not be prosecuted absent “exceptional circumstances”). This is also based on the author’s personal familiarity with unpublished federal prosecution guidelines for the U.S. Attorney’s Office in the Northern District of California, and a conversation with Eb Luckel, Deputy Chief of the Criminal Division of that office. Interview with Eb Luckel, Deputy Chief of the Criminal Division, Office of the United States Attorney, Northern District of California (Mar. 17, 1995) (auto thefts “are not prosecuted on a single-auto basis”; “we haven’t had a case like that in my memory”) (notes on file with the *Hastings Law Journal*).

197. Cf. BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991) (explaining concept of “amending” the Constitution nonformally, by practice). This is not to say that federal auto theft prosecutions might not be revived again, were some appropriate principle for such revitalization to manifest itself. Indeed, the possibility of such instant refederalization is, some might say, a benefit of nonprosecution defederalization over legislative repeal. The present point, however, is that federalization of auto theft in an earlier time has not, in fact, irreparably shifted the state/federal prosecution balance. See also *supra* note 31 (regarding nonprosecution of such federal crimes as 4-H club impersonation, etc.).

198. See generally Bruce Adams, *Sunset: A Proposal for Accountable Government*, 28 ADMIN. L. REV. 511 (1976) (arguing that sunset provisions would create “an incentive for periodic and comprehensive . . . evaluation” of government programs and agencies); Dan R. Price, *Sunset Legislation in the United States*, 30 BAYLOR L. REV. 401 (1978) (discussing the Sunset Movement).

199. A computer-aided search of the United States Code for the phrase “sunset provision” in the LEXIS, Codes Library, Allcodes file, yields more than 100 federal statutes containing some sort of sunset provision. See, e.g., 5 U.S.C. § 571 (Supp. 1995) (referencing Pub. L. No. 101-552, § 4(b), 104 Stat. 2738); 47 U.S.C. § 548(c)(5) (1994).

200. See Pub. L. No. 103-322, tit. IX, § 110105(2), 108 Stat. 2000 (Sept. 13, 1994) (ten-year sunset for sections 922(v), (w), and Appendix A of Title 18).

However, sunset provisions can also create serious and complex problems.²⁰¹ At the very least, much judicial and legislative energy and resources would be spent keeping track of various deadlines, reenactment, and debates about what conduct falls within or outside of periods of illegality. Moreover, using sunset provisions instead of substantively determining what principles ought to govern federalization simply substitutes a politically expedient gimmick for serious analysis. On balance, this Article does not advocate sunset provisions for criminal laws, but merely notes that they can provide an alternative to entirely foreclosing federal criminal jurisdiction over new, controversial federal crimes.

II. Principles of Federalization

Normative, consequential preferences support federalization limited by a set of principles. Whether or not federal judges are overworked, a lower caseload does provide more time for reflection in criminal as well as civil cases. Opportunity for care ought to be valued in any court system and ought not be unnecessarily constrained. Similarly, having a relatively low number of life-tenured federal judges may be intrinsically valuable.²⁰² Finally, if it is true that the states' criminal justice systems are so overburdened that they fail to deliver a high quality of justice, then we ought not unnecessarily move in the direction of federal equalization. Caseload equality between the state and federal systems, simply for equality's sake, is unprincipled and shortsighted.

For these reasons, a presumption against federalization is appropriate, to preserve some advantage for these intangible yet valuable factors.

201. For example, early 1994 saw controversy surrounding the sunset lapse, and then reenactment, of the federal Independent Prosecutor Act. See James Risen, *Appellate Court Asked to Review Starr Appointment*, L.A. TIMES, Aug. 13, 1994, at A23. See also Mark B. Blicke, *The National Sunset Movement*, 9 SETON HALL LEGIS. J. 209 (1986); Lewis A. Davis, *Review Procedures and Public Accountability in Sunset Legislation: An Analysis and Proposal for Reform*, 33 ADMIN. L. REV. 393 (1981).

202. Compare Reinhardt, *supra* note 3, at 53 (proposing that Congress double the size of the courts of appeals) with Jon O. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187 (1993) (arguing that more than 1,000 federal judges, trial and appellate combined, would negatively affect the quality of federal justice). As Professor Resnik has pointed out, however, once the hundreds of non-Article III judges already acting in the federal system are counted, the 1,000 judge limit has already been exceeded. Resnik, *supra* note 57.

A. A Presumption Against Federalization

Any decision to legislate into federal law a crime already prosecutable by the states ought to be guided by some set of principles; it should not be ad hoc or unthinkingly reactive. A starting point ought to be a rebuttable presumption against federalization: even if criminal federalization is not crushing our federal courts, traditional federalism principles (as well as other concerns) suggest that an initial presumption ought to run against federalizing criminal conduct over which there already exists state criminal jurisdiction.²⁰³

However, any such presumption must be rebuttable because all participants in this debate appear to agree that federalization of crime is appropriate or necessary in some circumstances.²⁰⁴ Thus, the search for principles is an inquiry as to what guidelines are appropriate and useful in deciding when the presumption against federalization should be overcome and new federal crimes enacted.

B. The Problem with Principles

A principled jurisprudence of federalization is thus the goal.²⁰⁵ However, guidelines that are comprehensible, relatively specific, and have some modicum of apolitical acceptance are necessary if the prin-

203. *Accord ON FEDERALIZATION, supra* note 5, at 47. *See supra* text accompanying notes 182-184.

204. *E.g.*, 1994 LONG RANGE PLAN, *supra* note 4, at 19-22; ON FEDERALIZATION, *supra* note 5, at 47. Thus, the 1994 Long Range Plan, which is generally opposed to federalization, states that “[n]o one seriously disputes that conduct directly injurious to or affecting the federal government or its agents” should be federalized. 1994 LONG RANGE PLAN, *supra* note 4, at 21. The Plan also asserts that “federal criminal jurisdiction should also reach . . . environmental concerns, nuclear regulation, and . . . migratory birds,” because these are “interests unquestionably associated with a national government” or are its “inherent interests.” *Id.* Finally, the Plan recommends continued federalization of crimes with “sophisticated” or “substantial multistate . . . aspects,” “serious . . . local government corruption,” and “criminal cases involving highly sensitive local issues.” *Id.*

205. This Article suggests that appropriate principles governing federalization ought to be applicable without regard to the substantive content of the criminal conduct at issue. In an earlier age, this goal might have been described as a search for “neutral principles.” *See* Herbert P. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). A more recent conception might be that of “transsubstantive” procedural rules as developed by the late Professor Robert M. Cover. *See* Robert M. Cover, *For James Wm. Moore*, 84 YALE L.J. 718, 721-22 (1975). Again, this Article purports only to acknowledge, rather than to solve or choose a side in, the “trans-substantivity tangle.” *See* Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 776-79 (1993); *cf. supra* note 152.

ciples are actually to influence policymakers who have the power to act in this area.²⁰⁶

Also, such principles are necessary only for dual jurisdiction criminal conduct. When criminal conduct adversely affects federal interests where a state does not have criminal jurisdiction (*e.g.*, on military reservations, overseas, or on the high seas), then federalization of that criminal conduct may be appropriate even if it would not be were jurisdiction dual.²⁰⁷ This is because no (or at least not as strong an) anti-federalization presumption operates with regard to exclusive jurisdiction criminal conduct. The present question, then, is what principles should govern federalization of dual jurisdiction criminal conduct, which presumptively should remain with the states.

Part of the difficulty in the federalization debate is that there already exists a large body of federal criminal law,²⁰⁸ much of which federalizes dual jurisdiction conduct. Many of these existing federal crimes have their champions who propose principles that will "capture" their favorites while limiting federalization overall. For example, the *Long Range Plan* asserts that "[n]o one seriously disputes" that crimes committed "against the federal government itself or its agents" should be federalized.²⁰⁹

But why should this not be disputed? Why ought the federalization debate not return to first principles and consider the substantive content of federal law as a *tabula rasa*, so to speak? For example, murder is an oft and competently prosecuted state crime.²¹⁰ Why should any murder of the thousands of persons encompassed by 18 U.S.C. section 1114 be federally prosecuted?²¹¹ Or murder of the

206. That is, Congress and the executive branch are the actors who propose, enact, veto or sign, and execute new federal criminal laws. Federalization principles that have been agreed upon only by judges and academics lack practical value unless accepted and understood by legislators, executive branch policymakers, and prosecutors.

207. See *supra* text accompanying notes 18-22 (discussing category of truly "exclusive" federal jurisdiction).

208. See generally NORMAN ABRAMS & SARA SUN BEALE, *FEDERAL CRIMINAL LAW* (2d ed. 1993).

209. 1994 LONG RANGE PLAN, *supra* note 4, at 21; see also *supra* note 204 (noting other descriptions of assertedly appropriate, existing federalization in the *Long Range Plan*).

210. That is, competently prosecuted in general; specific case failures may well give pause. *E.g.*, *Screws v. United States*, 325 U.S. 91 (1945). But to the extent that we believe murder should be federalized because states fail to adequately protect federal interests, the principle being applied is one of state failure. See *infra* text accompanying notes 236-247 (proposing just such a principle).

211. Section 1114 of Title 18 of the United States Code provides for federal prosecution for murders or attempted murders of "any officer or employee . . . or person assisting" or "any civilian . . . employee" of over 30 federal agencies. (1984 & Supp. 1995). No

President, for that matter?²¹² Similarly, the *Long Range Plan* asserts that any crime related to a “regulatory field” which Congress has already preempted “should” be federalized.²¹³ But why? Surely we can formulate principles more principled than “everything already federalized [except guns and drugs] should remain so.”²¹⁴

Part of the problem with federalization, then, is that we like it in discrete instances. Thus, the Long Range Planning Committee trumpets federalization of civil rights offenses.²¹⁵ Similarly, when the 1994 Crime Bill federalized some domestic violence cases in the Violence Against Women Act, critics of expanding federal criminal jurisdiction generally found reason to support that specific legislation.²¹⁶ But “special interests” as a standard provides no principled guidance, any more than does “existing federalized crimes” or “crimes we hate.” How can we separate the “good” federal crimes from the “bad”?

Even ardent opponents of federalization assert that certain criminal conduct, while certainly dual jurisdictional, is so offensive to important federal interests that it must be federalized.²¹⁷ Assassinating the President is one clear (and neutral) example; counterfeiting fed-

principle of federalization is apparent here; victims need not necessarily have been acting in pursuit of their federal duties at the time of the assault, and other federal agencies are not listed. The list of protected federal agents appears to have been created ad hoc over time. See Legislative History note following 18 U.S.C. § 1114 (1992) (showing dozens of amendments since 1951).

212. Indeed, while murder of the federal officials listed in 18 U.S.C. § 1114 has been a federal crime for decades, murder of the President was not made a federal crime until 1965 after President Kennedy was assassinated. See Pub. L. No. 89-141, § 1, 79 Stat. 580 (codified at 18 U.S.C. § 1751 (1988)).

213. 1994 LONG RANGE PLAN, *supra* note 4, at 21.

214. As another example, while arguments for federalizing crimes related to “wildlife preservation” (migratory birds, etc.) may be very strong (likely on a “state failure” theory), they are not even advanced in the *Long Range Plan*’s assertion that they “should” be federalized simply because such crimes already have been. 1994 LONG RANGE PLAN, *supra* note 4, at 21. If the debate were returned to first principles, reasonable minds likely could differ regarding the relative priorities of federal narcotics versus migratory bird criminalization.

215. 1994 LONG RANGE PLAN, *supra* note 4, at 5, 21-22. So too, it must be noted, does the author of this Article.

216. See Eleanor H. Norton, *Federalizing Feminism*, THE RECORDER (S.F.), Aug. 11, 1994, at 8. Again, a version of a “state failure” theory was advanced by Representative Norton. *Id.* (asserting “inadequacy—even collapse—of local law to protect women”). See 18 U.S.C. §§ 2261—2266 (Supp. 1995) (codifying criminal provisions of the Act).

217. This seems to be the tenor of the *Long Range Plan*’s primary recommendation on this point. 1994 LONG RANGE PLAN, *supra* note 4, at 20-21 (Recommendation 1 in the Nov. 1994, Recommendation 2 in the Mar. 1995). This recommendation, however, in fact combines several discrete conceptions, including “conduct injurious to or affecting the federal government”; exclusively federal crimes (“treason”); and “regulatory field[s]” that Congress “has taken over or preempted.” *Id.* (emphasis added). See *supra* note 204.

eral currency may be another. The civil rights offenses (protecting the exercise of federal constitutional rights) are other often-pointed-to examples.²¹⁸ Yet while civil rights offenses are important, their federalization seems based not merely on importance, but on some additional, unarticulated principle different from that which supports federalizing the assassination of the President.

A principle of federalization that merely enshrines "important" federal interests or some similar concept²¹⁹ provides no useful guidance; instead it resonates of "we know it when we see it" (a standard that proved unsatisfying in its original context²²⁰). A principle that proposes to federalize only when there is a "strong" (as opposed to unique) federal interest at stake is not helpful because of its semantic manipulability. Not only is "federal interest" an empty vessel whose substantive content is far from universally agreed upon, but any intensifier—strong, important, direct—simply adds to the potential manipulability. Thus, one person's concept of a "strong federal interest" might well be another person's idea of a "trivial local crime."²²¹

Take the federal civil rights offenses. The idea that there is a strong federal interest in prosecuting assaults motivated by racial animus is well-accepted today.²²² Because we are protecting the free exercise of federal constitutional rights, the federal courts are obviously

218. 18 U.S.C. §§ 241, 242, 245 (1988); see 1994 LONG RANGE PLAN, *supra* note 4, at 21-22.

219. The *Long Range Plan*, at different points, refers to "inherent [federal] interests" and "interests unquestionably associated with a national government." 1994 LONG RANGE PLAN, *supra* note 4, at 20-21. "Unquestionably" is a strong, undefined, and debatable term. For example, listing the protection of migratory birds among the interests encompassed by this principle is surely at least "questionable" when scarce federal judicial resources are at issue. *Id.* at 21. See also ON FEDERALIZATION, *supra* note 5, at 47.

220. See *Jacobellis v. United States*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring); *Paris Adult Theater I v. Slayton*, 413 U.S. 49, 82 (Brennan, J., dissenting) (noting the ad hoc, five-votes *Redrup* procedure for evaluating obscenity cases at the Supreme Court). Justice Stewart's pithy and even pleasing assertion never garnered more than his own vote in the obscenity context.

221. Cf. Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and the Martian Chronicles*, 78 VA. L. REV. 1769, 1831 (1992) (colorfully making a similar point by noting that "one person's Martian may be another person's Venusian").

222. This view, so easily accepted today, was hotly contested when the conduct was first federalized in 1866 and remained so even into the 1950s. See generally *United States v. Price*, 383 U.S. 787, 806 (1966) (noting different view of federal/state division of authority in the 1950s); Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2131 (1993) ("The federalism problem . . . preoccupied the congressional debates over the 1866 . . . Act.").

the appropriate forum.²²³ Yet if it is universally agreed today that there is a strong federal interest in prosecuting assaults motivated by racial animus,²²⁴ cannot a similar argument be applied to narcotics and firearms offenses?

The argument goes something like this: Many governmental officials currently believe that narcotics ruin tens of thousands of lives each year; indeed, the societal costs are staggering. Similarly, governmental officials at every level apparently believe that firearms violence in our communities represents a national crisis.²²⁵ Moreover, vital federal constitutional interests are at stake, starting with the rights enshrined in our Constitution's Preamble: "to insure domestic Tranquility" and "secure the Blessings of Liberty to ourselves and our Posterity."²²⁶ To respond, Congress must federalize these offenses and vigorously pursue federal prosecutions, at least until the national crisis subsides. The powerful engine of federal law enforcement is needed no less than when "local" civil rights crimes threatened our national social fabric.

This argument may not convince you. But if principles of federalization are to provide useful guidance for legislators and the executive branch, then the audience that must be convinced is not judges or legal scholars, but others more (or at least no less) prone to take advantage of rhetorical manipulability. Unless we are to surrender the federalization debate entirely to rhetoric, more specific guiding principles are required.

Another possible set of limiting federalization mechanisms might focus purely on workload objections to federalization and borrow from jurisdictional minimum concepts applied in federal civil stat-

223. This was, of course, not obvious to Justices Frankfurter, Roberts, or Jackson, whose joint dissent in *Screws v. United States*, 325 U.S. 91 (1945), characterized the "brutal" murder of the black victim by white sheriff's deputies as a "patently local crime." *Id.* at 139.

224. See Amar & Marcus, *supra* note 146; 1994 LONG RANGE PLAN, *supra* note 4, at 5, 21-22 (endorsing federalization of civil rights offenses).

225. See, e.g., 140 CONG. REC. S13,121 (daily ed. Sept. 22, 1994) (statement of Sen. Feinstein) ("violence in our communities . . . is simply out of hand," citing reports on guns in schools).

226. U.S. CONST. pmbl.

utes.²²⁷ Indeed, a few scattered federal criminal provisions already embody such quantifiable jurisdictional devices.²²⁸

Thus, if some substantive distaste for "minor" drug and gun crimes in fact underlies the federal judiciary's current federalization concerns,²²⁹ 21 U.S.C. section 841(a) could be amended to federalize only those narcotics offenses involving a significantly large amount or high street value of controlled substances. That is precisely how the penalty structure for federal narcotics offenses currently works: the penalties become more severe as the quantity of controlled substance involved increases.²³⁰ Gun crimes could also be similarly limited: federal criminal jurisdiction might be extended only to offenses involving three or more guns, particularly lethal weapons, or shootings resulting in injury or death.²³¹

But while such mechanisms could immediately address workload concerns,²³² they are also unprincipled in the sense of that term applied here. The only principle operating in such a structure is a protectionist one—to protect federal courts from hearing many presently federalized gun and drug cases—but without a principled distinction

227. I thank my colleague Richard Marcus for suggesting the consideration of such mechanisms from the civil side. For example, civil cases based on diversity of citizenship cannot be filed in federal court unless "the matter in controversy exceeds the sum or value of \$50,000." 28 U.S.C. § 1332 (1993). Similarly, until 1980, the civil "federal question" statute provided federal jurisdiction only when the amount in controversy exceeded \$10,000. 28 U.S.C. § 1331 (1978) (repealed 1980).

228. *E.g.*, 18 U.S.C. § 1957 (1995) (limiting federal prosecution to cases involving "criminally derived property . . . of a value greater than \$10,000").

229. *See supra* text accompanying notes 64-79 and 140-48.

230. The primary federal narcotics statute, 21 U.S.C. § 841(a) (1988), simply criminalizes possession with intent to distribute "a" controlled substance, no matter what the amount. Subsection (b) then sets out a lengthy penalty hierarchy tied to the quantity of drugs at issue. For example, if the offense involves less than 500 grams "of a mixture or substance containing a detectable amount of cocaine," the penalty is from 0 to 20 years; if between 500 grams and 5 kilograms, then the penalty is 5 to 40 years; and if 5 kilograms or more, then 10 years to life. 21 U.S.C. § 841(b) (1988). If limiting the federal criminal caseload is the goal, such quantity concepts could simply be moved into section 841(a).

231. Current federal weapons offenses require merely that the firearm be "use[d] or carrie[d]" (18 U.S.C. § 924(c) (1976 & Supp. 1995)) or "receive[d] or possesse[d]" (26 U.S.C. § 5861 (1989)).

232. Another idea from the civil side that has at least some initial theoretical attraction is some conception of abstention, *see, e.g.*, *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *Younger v. Harris*, 401 U.S. 37 (1971); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), although that doctrine as civilly applied has been criticized and hardly seems transferrable to the criminal context. *See generally* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 *YALE L.J.* 71 (1984); *but see* Rosemary Herbert, *Abstention as a Solution to Successive State and Federal Prosecutions* (Spring 1985) (unpublished student manuscript, on file with author).

from "minor" civil rights assaults, bank robberies, or false statements on federal forms.²³³ If narcotics and weapons crimes truly are nationally widespread in crisis proportions, refusing to address them with federal resources simply for workload reasons arguably violates the notion of a responsive federal government. Nor is simply throwing federal money at the problem, while closing the federal courthouse doors, a principled response if state courts are already handling five times as many criminal cases per judge.²³⁴

The federalization debate ought to turn on an axis more principled than workload: indeed, all sides seem to recognize that regardless of workload, it is sometimes proper for federal court resources to concentrate on national criminal problems (such as civil rights or even narcotics on occasion²³⁵). The challenge is to capture linguistically a comprehensible description of criminal conduct that is appropriately federal, rather than to simply roll up the federal courthouse drawbridges on a workload rationale.

C. A Principle of Demonstrated State Failure

It may be that no language can capture the principles we want to apply, without being so generalized as to be useless as a practical matter. And, of course, no principles will work if subject to unprincipled

233. See 18 U.S.C. § 1001 (1976 & Supp. 1995) (permitting federal prosecution for any false statement made "in any matter within the jurisdiction of any department or agency of the United States"). Consistent with this broad language, this statute has been held to encompass even false statements made to state agencies, if they ultimately might come "within the jurisdiction" of some federal agency. *E.g.*, *United States v. Facchini*, 832 F.2d 1159, 1160 (9th Cir. 1987).

234. See *supra* text accompanying notes 59-63 (discussing state courts' criminal caseload); accord Hon. J. Anthony Kline, *Comment: The Politicalization of Crime*, in this Symposium Issue. Without addressing this imbalance, the *Long Range Plan* recommends "an increase in federal resources allocated to state criminal justice systems" and indeed goes so far as to suggest that Congress "encourag[e] prosecution of federal crimes in state courts." 1994 LONG RANGE PLAN, *supra* note 4, at 22-23. But, as Chief Judge Kaye notes, swamped state courts are likely to be hostile to such proposals. Kaye, *supra* note 5.

235. Thus, the *Long Range Plan* provides that "a massive enterprise, such as a multi-state drug operation," or even a "sophisticated enterprise" within a "single state," would be appropriate federal criminal cases. 1994 LONG RANGE PLAN, *supra* note 4, at 21. The example given for the latter category, however, is "white collar crime," *id.*, rather than sophisticated urban gangs that are presently often prosecuted in federal courts.

application.²³⁶ Yet even a preliminary set of guidelines is better than the current ad hoc approach.²³⁷

“Unique” federal interests is too limited; “intrastate commerce” is too broad; and “strong” federal interests is too manipulable. There is, however, a principle that both explains many past federalizations that we currently accept and might realistically work to limit future federalization: demonstrated state failure. This principle would endorse the federalization of criminal conduct only when there is a demonstrated failure of state and local authorities to deal with the targeted conduct.²³⁸

A concept of demonstrated state failure as a guide to principled federalization immediately raises questions. What counts as failure? Who may, or must, demonstrate the failure? What sort of demonstration is required? Is there judicial review and, if so, of what scrutiny? Such important questions cannot be exhaustively addressed here; only a brief sketch is provided and further development will be necessary.

A principle of demonstrated state failure requires a comparison of state and local versus federal realities (workload, resources, investigative differences, etc.), rather than an absolute assertion that any particular criminal conduct is “appropriately” or “not appropriately” federal.²³⁹ “Failure” is intended to be nonpejorative; it encompasses a simple resource-driven inability to address criminal conduct, as well as

236. That is, perhaps no principles can prevent federal congresspersons (who lack any other immediate forum in which to demonstrate their will—they cannot directly file state legislation) from making carjacking a federal crime in response to a few highly publicized cases. See *supra* note 16. If so, this Article suggests a second-level “check” on the possibility by demanding that federal prosecutors also apply federalization principles before exercising any dual jurisdiction they are given by Congress. See *infra* text accompanying notes 248-254.

237. Thus, despite the academic critique in this Article, the efforts of the Long Range Planning Committee, Judge Schwarzer, and Russell Wheeler to state guiding principles are extremely valuable.

238. Such a concept is far from new; to the contrary, it states a theme that is consistently invoked when a federal response to criminal conduct already prosecutable by the states is demanded. See, e.g., *Curbing Violence at Abortion Clinics*, N.Y. TIMES, Jan. 4, 1995 (editorial following abortion clinic violence, proclaiming that “where local law enforcement fails, the Federal Government must intervene”). Thus, a demonstrated state failure principle can be said to underlie (to list only a few examples) the post-Civil War civil rights offenses, federalization of bank robbery in the 1930s when interstate transportation by car was becoming fast and common, and the 1994 Violence Against Women Act. This Article’s contribution is simply to suggest that this underlying theme be explicitly endorsed as a general and limiting federalization principle.

239. Cf. 1994 LONG RANGE PLAN, *supra* note 4, at 20 (stating that “[i]n principle, criminal activity should be prosecuted in a federal court only in those instances in which state court prosecution is not appropriate”).

intentional refusals to act. Such "failure" might be demonstrated by federal authorities when federal intervention is deemed necessary even over state objection (as in the civil rights prosecutions of the 1960s). Conversely, "failure" could be asserted by state and local authorities in need of aid for federal assistance (as appears to be happening today in some areas with regard to narcotics and firearms offenses).

Thus, state failures in this arena may be of two kinds: those recognized by the states and those disputed by the states. The federal courts have an appropriate role to play in both situations. First, when local authorities can demonstrate that their resources are inadequate to address a serious criminal problem, it is unseemly and even "anti-federalist" for the federal government to turn a blind eye. We may not like gun and drug crimes, but at least in some urban areas today it may be federal resources, the federal forum, and incapacitating federal penalties that stand between a plausible attempt to address these behaviors and total governmental abdication.²⁴⁰

Second, when state or local authorities refuse to address criminal conduct on some systemic level, the call for federal intervention may be even more appropriate.²⁴¹ Civil rights offenses in the South in the 1950s provide the most compelling example. Another example can be found in instances of state and local governmental corruption, in which the criminal conduct at issue may place it beyond the effective reach (or interest) of state authorities.²⁴²

240. This is particularly true today because federal penalties for many crimes are significantly more severe than their state equivalents; this is a dramatic flip-flop from 20 years ago. The deterrent effect (specific incapacitation and perceived general deterrence) of severe federal sentences is, without doubt, the reason local authorities have turned to federal prosecutors with gun and drug cases in recent years. See Scott Wallace, *The Drive to Federalize Is a Road to Ruin*, 8 CRIM. JUST. 8 (1993) (noting "the increasing federal/state punishment gap . . . drawing cases into the federal system," although disputing any deterrent value).

241. Such an intentional failure should be systemic rather than isolated; a single instance of failed or ignored prosecution ought not suffice to generate new federal legislation (although once legislated, the statute might appropriately be invoked even in single, egregious cases like the failed state Rodney King prosecution). Nor should federalization be inevitable on this rationale; a state refusal to address conduct which is criminalized in that state but upon which there is no general agreement (assisted suicide, for example) might well not warrant any federal legislative response.

242. See 1994 LONG RANGE PLAN, *supra* note 4, at 21 (endorsing federalization of "widespread state or local government corruption"). However, a demonstrated state failure should be required even in this context; local prosecutors have not always been ineffective in addressing local governmental corruption, and federal prosecution of local corruption for publicity purposes alone, without inquiry into state failure, would not meet the federalization principle proposed here.

An important component of this principle is the concept of demonstration. A simple assertion of state failure, by either state or federal authorities, should not be sufficient to overcome the presumption against federalization. Such a demonstration might include a showing of the extent of the criminal conduct, the adverse effects it is having on the public interest, and the amount of local resources and effort devoted thus far. Examples of egregious conduct gone unprosecuted, or unsatisfactorily prosecuted, might be provided; but it seems unlikely that a single instance should suffice. The degree and types of proof necessary for a sufficient demonstration are important questions for further development. But Congress would have to be convinced, rationally, that despite the state's efforts (good faith or otherwise) to address the crimes at issue, the results have been inadequate to protect the public interest.

Thus, a requirement of demonstration might, or might not, support some modicum of judicial review. Were it to adopt such a principle, Congress might require that hearings be held or at least that findings be stated and supported. In turn, this might be subject to some "rational basis in the record" review.²⁴³

If honestly applied, a principle of demonstrated state failure could place meaningful limits on future federalization efforts; it also comports with the *Long Range Plan's* call for wholesale review of existing federalized dual jurisdiction crimes.²⁴⁴ It supports some form of open-ended sunset provisions: when a state failure is cured, the principled rationale for federalization disappears.²⁴⁵ Thus, instances of

243. See *United States v. Lopez*, No. 93-1260, 1995 U.S. LEXIS 3039, at *14-15 (U.S. Apr. 26, 1995) (endorsing rational basis review of commerce authority). *Lopez* reaffirms that legislative findings are relevant to judicial review, albeit not dispositive. *Id.* at *24-25.

244. 1994 LONG RANGE PLAN, *supra* note 4, at 22. Of course, the *Long Range Plan* does not invoke any state failure concept to support or describe such a review; rather, it states simply that provisions "no longer serving an essential federal purpose" should be repealed. That unexplicated concept, however, is bound to provoke disagreement in any congressional review; a direction to repeal those existing federal crimes that the states appear to be adequately addressing might result in less dispute and more repeal.

245. The March 1995 Draft Long Range Plan has added an endorsement of sunset provisions. See *supra* note 39; 1995 LONG RANGE PLAN 25. This Article advocates at most only "weak" sunset provisions for federal crimes, providing that federal criminal jurisdiction will end only if Congress (or some other federal body) finds that the need has ended. This differs from a "strong" sunset provision under which termination is automatic on some date even if the need persists. Moreover, sunset repeals may be worse policy overall than simply permitting de facto defederalization by prosecutorial discretion (see *supra* text accompanying note 201), in areas where a future need for federal prosecutions can be envisioned, because it is far harder to enact new legislation than to leave dormant legislation not currently needed. Again, however, pursuit of this tangent requires development beyond the scope of the present Article.

temporary federalization and de facto defederalization²⁴⁶ fit squarely within the proposed principle. Finally, a “demonstrated state failure” principle may also support the sort of nonfederalization response embodied in the 1994 Crime Bill, providing federal seed money to state and local authorities to help address areas of failure without substantive federalization.²⁴⁷

Much remains to be done on the concept of federalization principles. But a principle of demonstrated state failure addresses some federalism concerns, articulates a rationale for many instances of past criminal federalization, and might sensibly and nonsubstantively operate to limit federalization. Some principles that have been proposed mask a protectionist “dignity” conception of the federal courts that is unseemly; others are too vague to be of real assistance. A demonstrated state failure principle surely has flaws and is far from self-defining. But perhaps it better describes a commonality of thought in this area and should be pursued.

D. Application of Federalization Principles by the Executive Branch

Legislative principles of federalization cannot be the end of the effort; federalization principles must reach the executive branch as well. The decision whether to actually prosecute in federal court under statutory authority once granted is made by federal prosecutors, not congresspersons or the judiciary.²⁴⁸ Legislation may give the power to prosecute federally, but the discretion whether to do so lies with the Attorney General and her agents. The principle of “demonstrated state failure”—or any other set of federalization principles that may emerge—therefore ought to be extended to the executive’s decision to prosecute if it is to be fully effective.²⁴⁹

Thus, federal prosecutors should be required to find that applicable federalization principles have been fulfilled before instituting federal prosecutions of dual jurisdiction crimes. Again, only a brief sketch of this idea appears here. But such a requirement undoubtedly could be imposed by direction from the Attorney General to her

246. See *supra* text accompanying notes 187-197 (describing these concepts).

247. See Beale, *supra* note 5.

248. *Wayte v. United States*, 470 U.S. 598, 607-08 (1985); see *United States v. Schwartz*, 857 F.2d 655, 658 (9th Cir. 1988) (“In our system of government, it is the executive branch, not the judicial branch, which holds the right to determine” how to proceed with a federal prosecution); *United States v. Huntley*, 976 F.2d 1287, 1292 (9th Cir. 1992) (reversing dismissal of narcotics prosecution described as “minor” by district court).

249. Accord 1994 LONG RANGE PLAN, *supra* note 4, at 23.

many Department of Justice prosecutors, the ninety-four U.S. Attorneys, and their hundreds of Assistant U.S. Attorneys.²⁵⁰

The need for mandated executive branch application of federalization principles seems apparent. Even if Congress concludes that a state failure to address some crime makes federalization legislation appropriate, the state "failure" upon which Congress's decision is predicated may well not exist in every district, nor may it persist over time.²⁵¹ In order to give teeth to a presumption against federalization, federal prosecutors ought to be required to consider the local situation before choosing to exercise the jurisdictional authority they have been given. The goal is to ensure a principled *exercise* of the congressional decision to federalize; if a state failure principle is operating, it must be part of that exercise.

However, an executive branch federalization review should not be required before every indictment is filed; efficiency concerns as well as respect for prosecutorial discretion counsel a somewhat more generalized application. Thus, relatively broad temporal and geographic determinations (such as "for the next year, we will concentrate on bringing federal civil rights prosecutions in the following states") should suffice. Nor would any right to judicial review of the decision to prosecute for adherence to federalization principles be appropriate. Judicial review of prosecutorial discretion has historically been quite limited,²⁵² and no participants in the current federalization debate suggest a change in this doctrine. Nor should judicial review

250. The *United States Attorneys Manual* (USAM) is an internal Department of Justice publication that collects such guidelines and requirements; the USAM is published in the 12-volume DEPARTMENT OF JUSTICE MANUAL (1994). The Attorney General frequently directs federal prosecutors to make certain inquiries, meet certain standards, and obtain centralized approvals before instituting particular prosecutions. For representative approval requirements, see, e.g., USAM § 9-47.110 (Foreign Corrupt Practice Act prosecutions); § 9-75.001 (obscenity prosecutions); § 9-105.100 (money laundering prosecutions); and § 9-110.101 (RICO). See generally 12 DEPARTMENT OF JUSTICE MANUAL, *supra*, at 1193-2 supp. (table of "prior approval requirements"). Indeed, the USAM already contains "principles of federal prosecution" issued by the Attorney General, which include guidance on how to determine whether a "substantial federal interest" exists in particular prosecutions. USAM, *supra*, §§ 9-27, 9-27.230. USAM provisions are binding on federal prosecutors, although they provide no "rights, substantive or procedural, enforceable by law by any party." USAM, *supra*, § 1-1.100.

251. Cf. 1994 LONG RANGE PLAN, *supra* note 4, at 20 (noting need for federal civil rights prosecutions "in some parts of the country").

252. See *supra* note 248 (Wayte case).

be called for, if the Attorney General and her designees sincerely commit to the federalization principles to be applied.²⁵³

Finally, once federalization principles acceptable to the executive branch are formulated and adopted, the Attorney General should install some ongoing internal review of federal prosecution decisions in order to ensure that prosecutors are adhering to the federalization principles. Nor would individual decisions to prosecute be entirely unreviewable; as is the case with RICO prosecutions or certiorari decisions today, parties might seek internal Department of Justice review with supervisory personnel, invoking federalization principles to oppose prosecutive decisions.²⁵⁴

E. Brief Thoughts on Practice Proposals

Federal courts must continue to pursue efficiency strategies; their overall workload is not likely to decrease significantly no matter what criminal federalization principles are developed.²⁵⁵ For example, United States District Judge Edward Rafeedie in Los Angeles has recently written that many federal court trials are inefficiently administered and consequently “[a]lmost all jury trials take from two to three times longer than they should.”²⁵⁶ He offers a number of ideas on how to improve this situation. In addition, districts that are experiencing extreme criminal trial crunches should consider implementing some form of “master calendar” assignment system.²⁵⁷

Although it is superficially appealing, the responsive mechanism proposed long ago by Charles Warren of vesting concurrent jurisdic-

253. This is not a vain hope; in 1994 Attorney General Reno convened a “Three-Branch Roundtable” to address the issues and divergent views surrounding federalization of crime. See Transcript of Proceedings, *Overlapping and Separate Spheres: A Three-Branch Roundtable on State and Federal Jurisdiction*, U.S. Dep’t of Justice (Mar. 7, 1994) (on file with author). The Roundtable Working Groups have produced Reporters’ drafts addressing many of the issues discussed here, which are reprinted as part of this Symposium Issue.

254. Thus (based on the author’s criminal practice experience both in and out of the Department of Justice), it is not uncommon for Deputy Assistant Attorneys General within the Criminal Division to meet with interested defense counsel prior to approving sensitive federal prosecutions. Similarly, review of tentative certiorari decisions with the Solicitor General are not uncommon. See REBACCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 99 (1992) (noting that “individual citizens and interest groups lobby the Solicitor General and his staff”).

255. See 1994 LONG RANGE PLAN, *supra* note 4, at 9 (noting that “various procedural innovations have been adopted” by federal courts to respond to caseload increases).

256. Rafeedie, *supra* note 99, at 6.

257. See *supra* text accompanying notes 114-121 (discussing master calendar concept).

tion over federal crimes in state criminal courts²⁵⁸ is entirely superfluous and distracts from analysis. It should not be pursued. Such dual prosecutive jurisdiction for federal crimes was actually granted by Congress to the states in the early years of our nation; that fact somewhat undercuts traditional view that such delegation is unconstitutional.²⁵⁹ Although the legislative response to Dean Warren's 1925 article was apparently nil, recent federalization concerns have prompted a rediscovery of his suggestion.²⁶⁰ But putting aside constitutional objections, this solution is unlikely to be welcomed by the host state courts in light of their own huge current criminal caseloads.²⁶¹ Moreover, to avoid constitutional objections, any such state jurisdiction over federal crimes must be voluntary on the states' parts and cannot be made mandatory.²⁶² Yet state courts are already hugely overworked, making new grants of discretionary criminal jurisdiction gratuitous.

Finally, and in any case, the criminal federalization debate by definition addresses only "dual jurisdiction" crimes, over which conduct the state courts already have criminal power. Thus, the Warren concept is completely superfluous; if state courts wish to reach the conduct criminally, they have no need for jurisdiction over duplicative federal statutes. In fact, federal prosecutors often request that local law enforcement authorities pursue their criminal cases in state court.²⁶³ Even if they have a choice of statutes (state or federal), states are unlikely to assume more of this burden today than they already are shouldering.²⁶⁴

258. See Warren, *supra* note 1.

259. *Id.* at 577-83. Despite the fact that Congress granted state courts authority to prosecute federal crimes, in 1842 the Supreme Court stated its view that such delegation to the state courts of federal prosecutive jurisdiction was unconstitutional. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 615 (1842).

260. See Beale, *supra* note 5; 1994 LONG RANGE PLAN, *supra* note 4, at 22.

261. See Kaye, *supra* note 5.

262. Warren unhesitatingly acknowledged this in his 1925 proposal. See Warren, *supra* note 1, at 594, 597-98. *Accord* *New York v. United States*, 112 S. Ct. 2408, 2423 (1992) (Congress "has the power to regulate individuals, not States").

263. If state authorities do prosecute in their own courts, federal prosecutors generally decline any successive prosecution. See USAM, *supra* note 250, § 9-2.142 (stating this declination policy); *Petite v. United States*, 361 U.S. 529, 531 (1960) (noting the policy).

264. In addition, it is primarily higher federal penalties that make federal prosecutions attractive to state authorities; *but cf.* Jeffries and Gleeson, *supra* note 27 (federal procedural advantages may also attract state cases). But serious state constitutional questions would arise, it would seem, if state courts attempted to impose federal penalties that were more severe than the penalties that a state's own legislature has approved for the same conduct. Neither Warren nor the Long Range Plan discusses the penalty implications of their federal-crimes-in-state-court proposals.

Conclusion

Federal judicial resources are surely precious; we must be careful not to dissipate them ad hoc. Yet it is the grandeur and authority of the federal courts that ultimately may be the best rationale for asserting federal criminal jurisdiction to address persistent criminal problems. If the quality of justice is better in the federal courts,²⁶⁵ then problems of crime cannot be ignored federally while state criminal justice systems slowly sink and justice fails. Perhaps there are even constitutional, federalism, or due process limits to the overloading of state criminal courts that would constitutionally require federal courts to step in when state justice fails.²⁶⁶

In any case, the "crisis" of federalization appears to be overstated. Rather than panic and close the federal courthouse doors against new federal crimes categorically, we ought to exercise federal authority in a principled manner, when states are demonstrably unable or unwilling to address criminal behavior that has reached some significant proportions. One goal of the federal Constitution is "a more perfect Union,"²⁶⁷ not a widening separation of the business of state and federal courts. The gulf between state and federal courts today in the criminal arena is apparent. On occasion, the people and the states have a right to demand a principled exercise of federal criminal authority, and may just as rightfully criticize unprincipled limitations as unprincipled extensions.

265. See *supra* note 125 (noting debate regarding whether parity is or is not a myth).

266. Cf. Amar & Marcus, *supra* note 146 (arguing that the Fourteenth Amendment requires federal criminal jurisdiction over civil rights offenses).

267. U.S. CONST. pmbl.

Myths and Principles of Federalization

by
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Table of Contents

Introduction	1029
I. The Federalization Debate	1034
A. Workload Concerns	1038
B. Open Forum Concerns	1047
(1) General Points	1048
(2) One District's Experience	1051
(3) Why Not Try a Master Calendar?	1053
C. Dignity Concerns	1055
D. Federalism Concerns	1061
II. Principles of Federalization	1070
A. A Presumption Against Federalization	1071
B. The Problem with Principles	1071
C. A Principle of Demonstrated State Failure	1077
D. Application of Federalization Principles by the Executive Branch	1081
E. Brief Thoughts on Practice Proposals	1083
Conclusion	1085

Introduction

The debate over which criminal prosecutions, if any, ought to be lodged in federal rather than state courts is an old one, dating back to

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the inception of the union.¹ Like all old stories, the debate has become laden with myths; on some pertinent points the facts have become shrouded and exaggerated. Meanwhile, "federalization of crime"² continues, often in an ad hoc and unprincipled manner; and many federal judges say they have surpassed reasonable workload limits.³ Indeed, despite deep political diversity, federal judges (at least those who have gone public) seem unanimous in their criticisms of and responses to federalization: close the federal courthouse doors and stop federalizing—indeed, defederalize—crime.⁴

1. See, e.g., Charles Warren, *Federal Criminal Laws and the State Courts*, 38 Harv. L. Rev. 545, 548-55 (1925) (describing 1790-1802 "conflict of views" over whether federal courts ought to have more, less, or concurrent jurisdiction over criminal offenses).

2. "Federalization of crime" is a term of art used (generally with a derogatory scowl) to describe congressional legislation that provides for federal jurisdiction over criminal conduct that could also be prosecuted by state or local authorities. This Article will refer to such criminal conduct as "dual jurisdiction crimes," as opposed to conduct that can be prosecuted only in a federal, or only in a state, court. See *infra* text accompanying notes 18-27. Furthermore, this Article will use the term "federalization" to refer to federalization of criminal conduct; federalization of civil causes of action, which may be a problem of far greater proportions (see *infra* notes 41 and 73) is not addressed here.

Although it is a bit of a mongrel, the word "federalization" appears in at least some dictionaries. See, e.g., WEBSTER'S NEW WORLD DICTIONARY 532 (1960) ("federalize: . . . (2) to put under the authority of a federal government"). The earliest use I have found of this word in connection with criminal conduct occurs in 1973. Robert L. Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime*, 15 ARIZ. L. REV. 271, 274 (1973). Federalization is now apparently an accepted term of art.

3. See, e.g., Maryanne Trump Barry, *Don't Make a Federal Case of It*, N.Y. TIMES, Mar. 11, 1994, at A31 (discussing the possible negative consequences of federalizing crime). Judge Barry, chair of the federal Judicial Conference's Criminal Law Committee, was objecting to the then-proposed 1994 federal Crime Bill, which she stated would "swamp the Federal courts." Judge Barry's views appear to be quite representative of federal judges. For example, in a 1992 Federal Judiciary Center survey, 73% of all federal circuit judges and more than 57% of all federal district judges said that the volume of federal criminal cases was a "large" or "grave" problem. Federal Judicial Ctr., *Planning for the Future: Results of a 1992 Federal Judicial Center Survey of United States Judges* 3, 25 (1994) [hereinafter 1992 JUDICIAL SURVEY]. See also FEDERAL JUDICIAL CTR., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 37 (1990) [hereinafter 1990 FED. COURTS STUDY] (noting "the current overload within the federal system"); Hon. Stephen Reinhardt, *Too Few Judges, Too Many Cases: A Plea to Save the Federal Courts*, A.B.A. J., Jan. 1993, at 52 ("Most of us are now working to maximum capacity.").

4. See, e.g., COMMITTEE ON LONG RANGE PLANNING OF THE JUDICIAL CONFERENCE OF THE U.S., PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 22 (1994) [hereinafter 1994 LONG RANGE PLAN] (recommending that "Congress should review existing federal statutes with the goal of eliminating provisions no longer serving an essential federal purpose"). See *infra* note 39 (more fully describing the *Long Range Plan*). These recently expressed concerns are by no means the first, however. In 1977 revered Judge Friendly of the Second Circuit noted that "[c]onsiderably more troubling to me . . . has been what seems a knee-jerk tendency of Congress to seek to remedy any serious abuse by invoking the commerce power as a basis for the expansion of the federal criminal law into areas of scant federal concern." Henry J. Friendly, *Federalism: A Forward*, 86 YALE L.J. 1019,

Yet at the same time, the federal courts handle only a small percentage—less than ten percent—of all criminal prosecutions in this country. The rest are in state courts.⁵ Even on a per-judge basis, state judges handle far more criminal cases than do their federal counterparts.⁶ Thus, as Chief Judge Judith Kaye of the New York Court of Appeals recently noted, in light of this imbalance, simply diverting what are presently federal criminal cases into the state courts is “no solution at all.”⁷

1026-27 (1977). In 1934 Edward Rubin noted “the increasing demand for federal control of crime” in an inaugural-year issue of *Law & Contemporary Problems* devoted entirely to “Extending Federal Powers Over Crime.” Edward Rubin, *A Statistical Study of Federal Criminal Prosecutions*, 1 LAW & CONTEMP. PROBS. 494, 494 (1934). Indeed, 70 years ago in 1925, Professor Charles Warren decried “[t]he present congested condition of the dockets of the Federal Courts and the small prospect of any relief to the heavily burdened Federal Judiciary, so long as Congress continues, every year, to expand the scope of the body of Federal crimes.” Warren, *supra* note 1, at 545. This relatively continuous expression of federalization concerns over this century gives one pause before uncritically accepting the “crisis” cry today, when there are roughly five times as many federal judges—yet only slightly more federal criminal cases—as in Warren’s day. See *infra* text accompanying notes 50-58.

5. In 1992, for example, 47,467 criminal cases were filed in the federal district courts. WILLIAM W SCHWARZER & RUSSELL R. WHEELER, FEDERAL JUDICIAL CTR., ON THE FEDERALIZATION OF THE ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE 31 n.84 (1994) [hereinafter ON FEDERALIZATION]. Yet in 1991, more than 12.4 million criminal cases were filed in state trial courts. BRIAN J. OSTRUM ET AL., NATIONAL CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1991, at 3 (1993). Indeed, state courts reported almost 900,000 felony convictions for 1992. N.Y. TIMES, Jan. 26, 1995, at A6. Thus, even if all 1992 federal criminal filings were felonies (but many were misdemeanors) and all were convictions (they assuredly were not), federal criminal cases still represented less than 6% of the total. Accord Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits of Federal Criminal Jurisdiction*, in this Symposium Issue. (“[T]he states are still handling more than 95% of all violent crime prosecutions.”) This disparity is uncontroversial and encompasses civil cases as well as criminal. As the Federal Courts Study Committee noted in 1990, “90 percent of the nation’s judicial business [civil and criminal] is handled by state rather than federal courts.” 1990 FED. COURTS STUDY, *supra* note 3, at 4. Accord Judith S. Kaye, *Federalism Gone Wild*, N.Y. TIMES, Dec. 13, 1994, at A19 (“The [Long Range] Report laments the 282,000 cases filed in Federal district courts last year. But in that period more than 200,000 cases were filed in the New York City Family Court alone.”)

6. See *infra* text accompanying notes 59-63. Accord Beale, *supra* note 5; see also ON FEDERALIZATION, *supra* note 5, at 23 n.60 (“[O]n average, a state court judge carries a caseload three times as large as that of a federal district judge . . . [and] the state general jurisdiction judiciary handles more than fifty-two times as many civil and criminal cases, with only fifteen times as many judges, as the federal judiciary.”)

7. Kaye, *supra* note 5. Accord Former California Supreme Court Justice Joseph R. Grodin, Testimony Before the Long Range Planning Committee of the United States Judicial Conference 1 (Dec. 1994) (“State court systems are . . . typically burdened in similar fashion.”).

The federalization conundrum is thereby set. Crime shows no sign of significantly diminishing.⁸ Resources are limited and strained. How are we to decide which criminal cases go where, when no one wants them?

This Article will not solve that foundational puzzle. Rather, the Article seeks to sketch and probe the controversy historically, statistically, and theoretically. The attitude is one of skepticism, "the method of suspended judgment,"⁹ rather than an unquestioning acceptance of the idea that we are in the midst of a federal courts "crisis."¹⁰ Surprisingly some of the commonly expressed presuppositions of the federalization debate, stylized here as "myths," are less than firm.

By exposing some of the myths and asking some difficult questions, this Article does not thereby endorse unprincipled or ad hoc federalization of crime. To the contrary, this Article concludes that valid considerations support a presumption against criminal federalization.¹¹ However, this Article also argues that such a presumption must be rebuttable and proposes that such rebuttal be founded on a principle of "demonstrated state failure" to address a category of crime. This federalization principle should be available (contrary to the current critiques) even if such a failure occurs in the area of narcotics, firearms, or other "street crimes" that may not have a firm historical precedent of federal prosecution.¹²

The federal courts legitimately have been called upon to address seemingly local offenses at times of epidemic crime and "state failures" of prosecution. The Prohibition and civil rights eras of federal prosecutions immediately come to mind. Today's legislatures, federal

8. A 1994 FBI Report on Crime states that, while some types of violent crime were down for 1994, there was an overall "increase in all types of crime nationwide." *Former FBI Expert Discusses Crime Report* (CNN television broadcast, Dec. 4, 1994), available in LEXIS, Nexis Library. Moreover, at least some law enforcement experts assert that "the numbers will get worse in the next five years." *Id.*

9. WEBSTER'S NEW INTERNATIONAL DICTIONARY 2353 (2d ed. 1954).

10. Cf. 1990 FED. COURTS STUDY, *supra* note 3, at 6 ("[T]he long-expected crisis of the federal courts . . . is at last upon us.").

11. Such a presumption is in accord with the views expressed by Judge Schwarzer and Russell Wheeler at the end of their comprehensive *On Federalization* pamphlet, *supra* note 5, at 47. The route taken by this Article, however, is somewhat different.

12. Professor Judith Resnik has made a similar point about certain civil contexts. See Judith Resnik, Statement Before the Long Range Planning Committee of the United States Judicial Conference 5 (Dec. 1994) ("'State' and 'federal' interests are not pre-existing defined sets of activities but are interactive and interdependent conceptions that vary over time. . . . What today appears to be only of local concern may tomorrow be on the national agenda.").

as well as state, apparently believe that narcotics and weapons offenses have reached similar levels of epidemic state failure proportions and thus demand federal attention. It may be legitimate to suggest the wrong-headedness of the policies underlying such demands and to call for reform of the criminal law.¹³ But simply to close the federal courthouse doors to certain crimes as a jurisdictional matter in the name of a federalization "crisis" that is far from empirically clear is, this Article submits, not principled.¹⁴

What distinguishes valid dual jurisdiction federal crimes from the illegitimate is seldom addressed in criticisms of federalization.¹⁵ Indeed, that fact provides the happy occasion for a Symposium devoted to federalization principles. However, despite the absence of preliminary definition, large aspects of the federalization critique are valid. Recent decisions to "federalize" certain crimes have surely been ad hoc and unprincipled; making intrastate auto theft a federal carjacking crime in 1993 provides a fine example.¹⁶

13. See, e.g., Vaughn Walker, *Comment: Federalizing Organized Crime*, in this Symposium Issue; STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA'S LONGEST WAR: RE-THINKING OUR TRAGIC CRUSADE AGAINST DRUGS* (1993) (calling for decriminalization of currently illegal drugs).

14. The author is well aware of the controversial nature of many of these assertions and would be the first to agree that more empirical work and study needs to be done. Yet some comfort perhaps may be drawn from recent remarks made by U.S. Supreme Court Justice Stephen Breyer, who is reported to have argued in a recent speech against simply "closing the doors to the [federal] courts." He stated that the "[f]ederal judges' desire to reduce their crowded dockets doesn't justify shifting the cases into the state courts . . . because those courts are just as crowded." *Breyer Urges Judges to Remain Generalists*, *MARIN INDEP. J.*, Jan. 28, 1995, at A7.

15. Judge William Schwarzer, who has been Director of the Federal Judicial Center for the past five years, and FJC staff member Russell Wheeler comprehensively survey the arguments for and against federalization in their pamphlet *On Federalization*, *supra* note 5. They nevertheless conclude that such definition may well remain "elusive" and advert to the impossibility of precisely determining "what constitutes an 'important federal interest.'" *Id.* at 42, 45.

16. Anti-Car Theft Act of 1992, Pub. L. No. 102-519, 106 Stat. 3384 (codified at 18 U.S.C. § 2119 (1992)). The legislative history of the carjacking bill indicates that it was introduced after a widely reported violent carjacking committed against a mother and her young child in the Washington D.C. area. See Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, in this Symposium Issue. As President Bush noted upon signing the carjacking law, it was responsive to a "recent wave of these carjackings." President's Statement (Oct. 25, 1995), *reprinted in* 1992 U.S.C.C.A.N. (106 Stat.) 2903. Yet no generalized "principle" for federalizing purely intrastate car thefts, already prosecutable in every state in the Union, was advanced. Indeed, apparently to address concerns that the bill would unnecessarily federalize every simple car theft, a requirement that a firearm must be possessed was included. See 106 Stat. at 3384. No principled distinction exists, however, between gun carjackings and knife carjackings, and Congress eliminated the firearm requirement in 1994. Pub. L. No. 103-322, 108 Stat. 1970 (1994). While national statistics are not yet available on use of this new statute, it seems safe to say

But other parts of the current federalization critique are possibly more myth than reality. This Article addresses three such myths:

1. that federalization of crime is a new phenomenon;
2. that there presently exists an unprecedented federal court workload "crisis" in criminal cases, such that federal judges are so busy trying criminal cases that civil cases cannot be tried;¹⁷
3. that federalization of crime is forever, permanently rending the federal-state balance.

Placing the current federalization debate into the broader historical context of over 200 years of federal criminal legislation helps to debunk these myths.

Finally, this Article addresses the concept of a "principled jurisprudence of federalization" and inquires whether, and what, neutral principles can be stated to guide future decisions to enact and prosecute dual jurisdiction federal crimes. Suggesting that existing formulations are inadequate, this Article sketches a principle of "demonstrated state failure," which explains past accepted federalizations and could be used to evaluate future federalization efforts.

I. The Federalization Debate

The federalization debate centers on criminal conduct that can be prosecuted in state courts as well as in federal courts. Some criminal conduct is only prosecutable in federal courts; federal jurisdiction over such crimes is exclusive. Such exclusively federal crimes include crimes committed on federal territory or outside the borders of the fifty states¹⁸ and criminal acts committed solely against a unique federal interest, such as treason.¹⁹ Providing jurisdiction in the federal

that relatively few carjackings have actually been charged federally, despite their undoubtedly frequent occurrence.

17. See, e.g., 1990 FED. COURTS STUDY, *supra* note 3, at 6 (stating, without citation or specific example, that "the expanded federal effort to reduce drug trafficking has led to a recent surge in federal criminal trials that is preventing federal judges in major metropolitan areas from scheduling civil trials"); Roger J. Miner, *Crime and Punishment in the Federal Courts*, 43 SYRACUSE L. REV. 681, 686 (1992) [hereinafter Miner, *Crime and Punishment*] (stating, without citation, that "[i]n many districts throughout the country, judges are unable to get to their civil calendars because of the huge numbers of criminal cases that they may dispose of").

18. See 18 U.S.C. § 13 (1969 & Supp. 1995) (granting federal jurisdiction over such crimes by assimilating neighboring states' criminal codes); 18 U.S.C. § 3238 (1985) (granting federal jurisdiction over "offenses not committed in any district"). Note that the crimes prosecutable under the Assimilative Crimes Act are all the "local" crimes of the neighboring state; thus, under this provision, federal courts try "local" offenses.

19. 18 U.S.C. § 2381 (1970 & Supp. 1995).

courts for the prosecution of such uniquely federal crimes seems noncontroversial.

But truly unique federal crimes compose a quite narrow band of cases. They pose no controversy precisely because they are so rare, as well as because there is no alternative forum. However, there are other federal crimes that are often described as “unquestionably” federal²⁰ but which, in fact, encompass conduct that is also prosecutable by the states. Once this point is understood, it becomes clear that the huge majority of federal crimes²¹ have always been “dual jurisdiction” crimes rather than exclusively federal.²²

Murder of the President, for example, is obviously prosecutable in state court as murder.²³ Many federal civil rights offenses are already prosecutable in state court, if not as civil rights offenses, then as

20. 1994 LONG RANGE PLAN, *supra* note 4, at 20.

21. It would be convenient to use a phrase here like “the bulk of the federal criminal code,” but this temptation must be avoided because it is inaccurate. There is no single title in the United States Code that contains all federal criminal provisions. See Louis B. Schwartz, *Reform of the Federal Criminal Laws: Issues, Tactics and Prospects*, 1977 DUKE L.J. 171, 184 (“[T]he United States . . . has never . . . had a comprehensive, logically organized and internally consistent penal code.”). The efforts of Professor Schwartz and others to reform and organize federal criminal provisions failed in the 1970s. It is perhaps significant that a major objection to the proposed reform bills was about federalization (although that word was not used): that “matters heretofore considered exclusively local” would expressly have been encompassed by new federal criminal jurisdiction provisions. John G. Miles, *Federal Criminal Code Reform: The Jurisdictional Issue*, 23 Crim. L. Rep. (BNA) No. 11 (Supp.), at 4 (June 14, 1978) (quoting the National Association of Attorneys General).

Thus, federal crimes can today be found in virtually every title of the U.S. Code; major locations include Title 18 (general crimes), Title 21 (controlled substances), and Title 26 (tax provisions). There is consequently no easy way to locate all federal criminal provisions; many are quite obscure. For example, in order to federally prosecute a union payroll-padding scheme in which there were no federal mailings or interstate travel or transmissions, the author once had to prosecute under 42 U.S.C. § 408(g)(2) (now codified at § 408(a)(7)(B) (1991 & Supp. 1994)), the well-known offense of “false representation of a social security number.” See *United States v. Holland*, 880 F.2d 1091, 1093 (9th Cir. 1989).

22. Such a classification error appears, for example, in Second Circuit Judge Roger Miner’s 1987 article, in which he describes “offenses directly affecting the operations of government” as one of four categories of “exclusive” federal criminal jurisdiction. Roger J. Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 HARV. J.L. & PUB. POL’Y 117, 119 (1987) [hereinafter Miner, *Federal Courts*]. While one might argue that criminal conduct that directly affects the federal government should be federalized, such conduct is almost never “exclusively” within federal jurisdiction. Judge Miner is due credit as one of the few federal judges to publicly detail his views about federalization. But careful classification of criminal conduct is essential to the federalization debate, lest one presume one’s conclusions in the initial definition of jurisdictional lines.

23. Compare, e.g., 18 U.S.C. § 1751 (1984 & Supp. 1995) with CAL. PENAL CODE § 187 (Deering 1988).

assaults, batteries, and the like.²⁴ Counterfeiting could be prosecuted as state common law fraud.²⁵ Robbery of a federally insured bank, theft of federal property or by federal employees, defrauding a federal program, bribery of federal officials, even federal tax offenses²⁶—virtually all could be charged under existing state robbery, theft, fraud, bribery or falsehood statutes. Indeed, with many states now enacting “little RICO” statutes, the need for the equivalent federal provision is not self-evident.²⁷

Yet most of these dual jurisdiction federal crimes are not the topic of current federalization critiques. To the contrary, most are accepted as “unquestionably associated with a national government,” and the federal Judicial Conference states that “no one seriously disputes” their federalization.²⁸ But the rationale for labeling these crimes as unquestionably federal is not explained. A shift of such crimes to state courts would significantly lighten the federal load, more so than would the elimination of federal drug cases.²⁹

24. Compare, e.g., 18 U.S.C. §§ 241, 242, 245 (1969 & Supp. 1995) with CAL. PENAL CODE §§ 240-45 (assaults), 422.6 (interference with exercise of civil rights) (Deering 1988 & Supp. 1995).

25. Compare 18 U.S.C. §§ 471-509 (1976 & Supp. 1995) with CAL. PENAL CODE §§ 470-484, 648 (1988 & Supp. 1995). Although the Constitution grants Congress the power to punish counterfeiting, it does not require that such jurisdiction be exclusive. See U.S. CONST. art. I, § 6.

26. 18 U.S.C. §§ 2113, 1001-1027, 1701, 201 (1984 & Supp. 1995); 26 U.S.C. § 7201 (1989).

27. The federal Racketeer-Influenced and Corrupt Organizations statute (RICO) is codified at 18 U.S.C. §§ 1961-1963 (1984 & Supp. 1995). For a list of equivalent state provisions, see Ethan B. Gerber, “A RICO You Can’t Refuse”: *New York’s Organized Crime Control Act*, 53 BROOK. L. REV. 979, 982 & n.14 (1988) (“[A]t least twenty states have passed statutes which are modeled after federal RICO.”). Chief Justice Rehnquist noted this theoretical overlap in 1989 remarks revealingly entitled *Get RICO Cases Out of My Courtroom*, WALL ST. J., May 19, 1989, at A14 (addressing civil RICO cases, while noting that “[o]verlapping criminal remedies do not present much of a problem, because state and federal prosecutors tend to work things out on a sensible basis”). Of course, there may be significant procedural advantages to prosecuting RICO offenses in federal courts. See generally John C. Jeffries, Jr., & John Gleason, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, in this Symposium Issue. This does not, however, undermine the more general point that even such complex federal crimes are actually “dual jurisdiction” and not uniquely federal.

28. 1994 LONG RANGE PLAN, *supra* note 4, at 20, 21.

29. For example, in 1982, fraud, counterfeiting, forgery, and auto theft defendants made up 22% of the federal criminal caseload. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, THE CRIMINAL CASELOAD: THE NATURE OF CHANGE 6 fig. 5 (1995) [hereinafter THE CRIMINAL CASELOAD]. “Drug” defendants constituted only 21%. *Id.* Similarly, in 1993 federal drug prosecutions represented only a quarter of the federal criminal caseload. *Chief Justice’s 1993 Year-End Report Highlights Cost Saving Measures*, THE THIRD BRANCH (Administrative Office of the U.S. Courts), Jan. 1994, at 4.

Nevertheless, the current federalization critique focuses almost entirely on federal narcotics and firearms offenses, but generally without noting why. Chief Justice Rehnquist has claimed that federal courts are in danger of becoming "national narcotics courts," a specter that has been repeatedly echoed by other federal judges.³⁰ When federal judges say that "[t]oo much crime is prosecuted in the federal courts," they concentrate on "drug offense[s]," not penny-ante bank robberies or postal thefts.³¹ The charge is often accompanied by the view that federal judges are being forced to "waste" valuable resources on federal criminal cases that are really "state or local crimes."³² But since the great bulk of federal criminal cases involve other types of dual jurisdiction conduct, it seems fair to question why drug and weapon cases draw the bulk of federal judges' ire.

The current critique of the federalization of crime can be described as encompassing four general types of concerns: (1) workload, (2) open forum, (3) dignity, and (4) federalism concerns. Critics argue that federalization is bad because federal judges are overworked,³³ criminal cases are blocking the federal forum for important federal civil cases,³⁴ federal judges ought not have to handle "ordinary street crimes,"³⁵ and because federalization of dual jurisdiction crimes improperly encroaches on matters that should remain state concerns.³⁶

As detailed below, the first two concerns are not borne out by existing statistical evidence; additional empirical work should be done. The third concern is unanalyzed and unprincipled. Finally, while federalism concerns seem valid at some general level, they pull in oppo-

30. Hon. William H. Rehnquist, Remarks at the United States Sentencing Commission Symposium (June 18, 1993) (transcript available on Reuters). When leaving the bench in December 1993, Judge Kenneth Conboy repeated the concern. Kenneth Conboy, *Trouble in Foley Square*, N.Y. TIMES, Dec. 27, 1993, at A17.

31. E.g., Miner, *Crime and Punishment*, *supra* note 17, at 681, 683. Judge Miner also pokes fun at obscure federal offenses such as reproducing the image of Smokey the Bear or impersonating a 4-H club member. *Id.* at 681. But these crimes are not the serious object of Judge Miner's concern; they are, as he notes, "statutory anachronisms." *Id.* In fact, they are simply never prosecuted and thus are no burden on anyone but the printers of Title 18.

32. See, e.g., Hon. William H. Rehnquist, *Year-End Reports on the Federal Judiciary*, reprinted in THE THIRD BRANCH (Administrative Office of the U.S. Courts), Vols. 23-26, 1991-1994; ON FEDERALIZATION, *supra* note 5, at 37 ("inefficient and wasteful"); 1992 JUDICIAL SURVEY, *supra* note 3, at 7, 29 (FJC asks whether, and the overwhelming majority of federal judges agree that, "federal criminal jurisdiction" should be "more narrowly defined to reduce prosecution of 'ordinary' street crime in federal courts").

33. See *infra* notes 38-40.

34. See *infra* notes 82-84.

35. See *infra* notes 122-124.

36. See *infra* notes 152-156.

site directions when considered in light of our horribly overburdened state criminal justice systems. A constitutional theory of limited federal authority may well support a presumption against federalizing dual jurisdiction criminal conduct. Yet that presumption must be rebuttable; and even a limited federalist theory may require a federal response to criminal conduct that has reached epidemic proportions.³⁷

A. Workload Concerns

The most frequently heard complaint from federal judges is that they are overworked.³⁸ In the most recent judicial expression of federalization concerns, the Long Range Planning Committee of the United States Judicial Conference states that “[h]uge burdens are now being placed on the federal courts.”³⁹ This Committee speaks in terms of “crisis” caused by burgeoning workload and predicts that

37. On this last point, for example, even Judge Miner's ardent anti-federalization piece states that “the national government . . . should have in reserve the power to deal with crime where there has been a complete breakdown of local and state law enforcement.” Miner, *Crime and Punishment*, *supra* note 17, at 687-88. See also 1994 LONG RANGE PLAN, *supra* note 4, at 21-22 (endorsing federal prosecution of local crimes that “[raise] highly sensitive issues in the local community” and citing civil rights prosecutions as exemplary because “local law enforcement had moved reluctantly”).

38. See, e.g., Lauren K. Robel, *Caseloads and Judging: Judicial Adaptations to Caseload*, 1990 B.Y.U. L. REV. 3, 3 (statistical survey of the views of federal judges, summarized as “[f]ederal judges, by their accounts, have too much to do”); 1992 JUDICIAL SURVEY, *supra* note 3, at 25 (more than 80% of federal district judges describe their workload as “a problem”; more than 90% say this is so with regard to criminal cases).

According to Chief Justice Rehnquist, this may be contrasted to the 1950s, when some federal district judges allegedly took their summers off, and some federal appellate judges allegedly viewed their appointments as “semi-retirement.” Hon. William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1, 2.

39. 1994 LONG RANGE PLAN, *supra* note 4, at 7. The Committee on Long Range Planning of the Judicial Conference of the United States is an important and unprecedented effort to anticipate and guide the future of the federal courts in the face of an incredibly “accelerated pace of social change.” *Id.* at 1. It was created in 1990 at the urging of the Ninth Circuit's Chief Judge Clifford Wallace among others and hopes to set a “judiciary wide” agenda for years to come. *Id.* at 131. The Committee has a prestigious membership; it is chaired by Judge Otto R. Skopil, Jr., of the Ninth Circuit and has eight other federal judges as members, as well as a full time staff and a number of consultants and contributors. *Id.* at 131, 139-44.

When presented at the Hastings Symposium, this Article cited to the November 1994 draft of the Proposed Long Range Plan. Since then, a revised draft was received. JUDICIAL CONFERENCE, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS (2d prtg. Mar. 1995). The March 1995 Plan did not significantly alter the substance of the November draft's provisions related to this Article. (Indeed, having received a draft of this Article in the interim, the March 1995 Plan added certain themes responsive to this Article. See *infra* text accompanying notes 152-184 and 198-201 (federalism concerns and sunset provisions)). Thus, citations in this Article remain to the November 1994 Plan.

“core values” of the federal judicial system cannot be preserved without attention to the problem.⁴⁰

Federal workload complaints often focus on criminal cases, which is surprising because civil cases compose the majority of the average federal judge’s caseload.⁴¹ Nevertheless, a major concern of the Long Range Planning Committee is that “Congress continues to ‘federalize’ crimes previously prosecuted in the state courts.”⁴² Thus, a primary premise of the Long Range Planning Committee’s recommendations is “limited jurisdiction” over crime for federal courts as a “practical necessity.”⁴³ Indeed, one indication of the federal judiciary’s preeminent concern about the federal criminal docket is that the Long Range Planning Committee’s initial discussion of “judicial federalism” and its first four specific recommendations address criminal cases.⁴⁴ Only after these concerns are expressed is specific attention given by the Committee to the numerically far larger civil side.

But the criminal workload concerns of federal courts are open to question. Federal criminal filings are in fact declining; they have been

40. *Id.* at 9-11, 16 (describing a “nightmarish” future scenario); *accord* 1990 FED. COURTS STUDY, *supra* note 3, at 4 (“the crisis”). Expression of workload concerns can be absolute (that is, “we are simply working too hard”), but may also move to a relative concern, that criminal cases are pushing aside important civil litigation (that is, “we are not working impossibly hard, but criminal cases prevent us from working hard enough on important civil cases”). Such “open forum” concerns are analytically distinct from pure workload and therefore are addressed separately *infra* notes 81-121.

41. For example, in 1994, there were 235,996 civil cases commenced in federal district courts, compared to 45,744 criminal cases. 1994 LONG RANGE PLAN, *supra* note 4, at 11 tbl. 3. This is roughly an 84% to 16%, or 5 to 1, ratio. *See also* WILLIAM P. McLAUGHLAN, FEDERAL COURT CASELOADS 114 (1984) (“[T]he civil portion of the district courts’ docket clearly predominates today and has done so for several decades.”); *Id.* at 113 fig. 5.1 (graphically demonstrating basically flat criminal filings over 40 years, while civil filings steeply incline). McLaughlan’s statistical survey of federal court case filings over some forty years is one of the most comprehensive such surveys ever done. Yet, because civil cases predominate hugely over criminal in the federal courts, McLaughlan’s book concentrates far more on the details of civil case filings.

42. 1994 LONG RANGE PLAN, *supra* note 4, at 20. Thus, the objection apparently is to enacting new federal crimes. This too is slightly surprising, as it can be argued that rather than the absolute number of federal crimes, it is the “federalization” of criminal procedure that has occurred since 1960 (via the “constitutionalization” of criminal procedure in the Warren Court and subsequent congressional legislation such as the 1970 Speedy Trial Act, more detailed Federal Rules of Criminal Procedure, and the 1987 federal Sentencing Guidelines) that has required increased judicial resources necessarily devoted to criminal cases. While surely significant, these developments are analytically separate from the number of federal criminal statutes enacted and could be addressed by procedural changes rather than complete jurisdictional bars to new federal crimes.

43. 1994 LONG RANGE PLAN, *supra* note 4, at 19, 20.

44. *Id.* at 20-23.

much higher in years past when analyzed on a per-judge basis; and they are simply dwarfed by the criminal case workload of state judges.

Federal criminal case filings have fluctuated over time, but have remained basically steady for sixty years. Thus, comparisons between any two isolated years, without an appreciation of the overall array of filing statistics,⁴⁵ can yield wildly varying conclusions. For example, the 1990 Federal Courts Study noted that criminal filings had increased dramatically from 1980 to 1990; from this a conclusion of workload "crisis" was suggested.⁴⁶ Yet if one chooses 1972 as the baseline comparison year, the number of federal criminal filings is *lower* now as compared to then.⁴⁷ 1980 actually represented the low point of a consistently decreasing criminal case filing trend.⁴⁸ Moreover, even if a federal criminal case crisis was imminent in 1992, it apparently has been averted; federal criminal filings have in fact decreased by at least three percent in each of the past two years.⁴⁹

Indeed, the number of federal criminal cases filed today is far below equivalent filings of sixty years ago, yet today there are seven times as many federal judges. In 1994 there were 45,500 federal criminal cases filed;⁵⁰ in 1932 there were over 86,000.⁵¹ At the same time, the number of federal district judges has increased dramatically, from 401 to 649 since 1970 and from only 163 in 1932.⁵² One measure of workload should be how many criminal cases each individual federal

45. See MCLAUGHLAN, *supra* note 41, at 114 ("[T]he criminal portion [of the federal caseload] shows a striking uniformity over the years [1940-1980].")

46. 1990 FED. COURTS STUDY, *supra* note 3, at 36 (noting a 50% increase since 1980).

47. Chief Justice Rehnquist reports that 45,500 federal criminal cases were filed in 1994. Hon. William H. Rehnquist, *1994 Year-End Report on the Federal Judiciary, reprinted in THE THIRD BRANCH* (Administrative Office of the U.S. Courts), Jan. 1995, at 4. In 1972 the figure was 47,043. ON FEDERALIZATION, *supra* note 5, at 31 n.84. The Long Range Planning Committee notes the lower filing figure, but asserts that the "complexity" of federal criminal cases has "changed dramatically" since then. *Id.*; 1994 LONG RANGE PLAN, *supra* note 4, at 8; *but see infra* text accompanying notes 55-56.

48. ON FEDERALIZATION, *supra* note 5, at 51 fig. 1.

49. Rehnquist, *supra* note 47, at 4 (noting 3% decreases in 1993 and 1994). Also indicative of a long-term trend of relatively decreasing federal criminal caseload, the Long Range Planning Committee notes that while the U.S. population has grown more than 200% since 1904, the number of federal criminal cases filed has increased by only 157%. 1994 LONG RANGE PLAN, *supra* note 4, at 7.

50. See *supra* note 47.

51. Rubin, *supra* note 4, at 497 tbl. 1. The actual number of criminal filings was over 92,000, but the 5,700 cases filed in the District of Columbia in 1932 should be deducted because today such D.C. cases are filed almost exclusively in the local D.C. courts and are consequently not included in that district's reported U.S. District Court filings.

52. 1994 LONG RANGE PLAN, *supra* note 4, at 13 tbl. 6; 60 F.2d v-ix (1932) (listing federal district judges).

judge must handle on average. By this measure, the per-judge workload of federal criminal cases was roughly 534 cases per judge in 1932, 115 in 1972, and only 73 in 1994. This is roughly a sevenfold workload decrease over the past sixty years.⁵³

It is difficult to rationalize away entirely this marked decrease in the federal criminal caseload-per-judge. Although the 1932 statistics included a large number of Prohibition cases, that does not mean that federal judges at that time could ignore those cases.⁵⁴ And while it is true that criminal cases (both state and federal) are more procedurally complex today than in the 1930s,⁵⁵ one may legitimately question whether that increase in complexity overcomes the sevenfold decrease in the per-judge criminal caseload since 1932.⁵⁶ Finally, when one adds to the mix the additional 300-plus federal magistrates who have been authorized since 1976 to perform significant work in criminal cases,⁵⁷ the claim of federal judicial overload caused by criminal cases

53. *Accord* McLAUGHLAN, *supra* note 41, at 125 ("The medians for criminal filings per judge have actually dropped rather sharply.").

54. Indeed, the federal criminal caseload increase in the 1920s and 1930s because of Prohibition cases can be analogized to the current influx of gun, drug, and immigration cases today, in that controversial areas of substantive criminalization have generated an unusual number of federal criminal cases in a single category. *See* Beale, *supra* note 5 (noting statistical jump in narcotics and firearms cases between 1980 and 1992); *see also* Walker, *supra* note 13 (arguing that narcotics offenses should be decriminalized). Similarly, the 1972 federal criminal case filings included a large number of controversial selective service cases. The possibility that narcotics cases might go away in the future does not reduce the impact of those cases on the judiciary today; but the same was true of Prohibition cases in 1932 and Selective Service cases in 1972.

55. 1994 LONG RANGE PLAN, *supra* note 4, at 8 ("Although difficult to quantify, [federal criminal] filings have also increased in complexity."). The plan goes on to assert that the "complexity" of federal criminal cases has changed "dramatically" since 1972. *Id.* But precisely because such an assertion is "difficult to quantify," this latter claim is difficult to evaluate.

56. In addition, the increase in complexity of criminal cases (state as well as federal) is attributable almost entirely to the "federalization" of criminal procedure, a phenomenon that was largely accomplished by 1972. *See generally* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE (Mark Tushnet ed., 1993). Yet since 1972, there has been a 63% decrease in per-judge criminal caseload (roughly 115 per judge in 1972, versus 73 per judge in 1992). Whether there has been an increase in criminal case complexity since 1972 sufficient to offset this workload decrease is at least a debatable question.

57. Professor Judith Resnik deserves credit for calling attention to the significant roles played in today's federal courts by non-Article III judges such as magistrate judges. *See* Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909, 910-12 (1990) (noting that magistrates conducted "134,000 preliminary hearings in felony cases" in 1987). *See also* United States v. Schronce, 727 F.2d 91, 93 (4th Cir. 1984), *cert. denied*, 467 U.S. 1208 (1984) (stating that Federal Magistrates Act of 1968 was "intended to give magistrates a significant role in the federal judicial system" and to "reduce increasingly unmanageable caseloads"). Although more federal criminal cases were filed in 1972 than today, federal magistrates did not have authority to conduct eviden-

appears even more debatable.⁵⁸

Not only is the average federal judge's criminal caseload down over the past sixty years, but the federal criminal caseload-per-judge is far lower than the same figure for state judges. Judge Schwarzer has noted this imbalance: he reports that in 1991 "criminal filings in the state courts were eighty-four times higher than those in federal district courts."⁵⁹ Again, the argument that federal judges simply cannot handle more criminal cases⁶⁰ is at least open to question in light of what state court judges are being asked to accomplish.

Comparing one federal geographic district's federal versus state court criminal filings shows this imbalance dramatically. In 1992 the number of federal criminal filings in the district court for the Northern District of California averaged 34 cases per trial judge, while criminal filings in the superior courts for the counties that compose the Northern District's territory averaged at least 157 per judge.⁶¹ The North-

tiary hearings such as motions to suppress until 1976. See *Nettles v. Wainwright*, 677 F.2d 404, 406-07 (5th Cir. 1982) (en banc).

58. Also, civil filings in the federal courts far outnumber criminal cases, and by any measure, more than 50% of federal court time is spent on civil matters. Thus, it seems fair to inquire (as this Article does *supra* notes 122-151) whether there is something more than pure workload concerns to some critics' preoccupation with criminal cases.

59. ON FEDERALIZATION, *supra* note 5, at 23 n.60. *Accord* Beale, *supra* note 5 (nationally, 75 criminal cases per federal judge versus 417 for state judges—over a 5-1 ratio—in 1992). See also *supra* note 41.

60. For example, in 1989, Professor Beale, as an Associate Reporter to the Federal Courts Study Committee, wrote that "the federal courts will soon be overwhelmed" by criminal cases. Sara Sun Beale, *Federal Criminal Caseload/Scope of Federal Criminal Jurisdiction*, in FEDERAL JUDICIAL CTR., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, PART III (1990) [hereinafter Beale, *Federal Criminal Caseload*]. Also predicted was that "in the very near future [some] districts will be unable to try any civil cases." *Id.* at 5. Albeit this prediction was based solely on anecdotal reports. See *infra* text accompanying notes 85 and 106. Yet three years later in 1992, civil trials still represented more than 50% of all federal trials conducted, THE CRIMINAL CASELOAD, *supra* note 29, at 12, and the author knows of no federal district that is not hearing civil cases today. The gap between dire prediction and reality must be acknowledged and examined.

61. Certain vagaries in the available data make precise calculations difficult; nor are state and federal statistics kept in precisely parallel formats. Thus, when I have had uncertainty in making these calculations, I have attempted to err in favor of overstating the federal workload. The 1993 Annual Report of the California Judicial Council reports that for fiscal year 1991-1992 in the 15 counties that compose the Northern District of California, there were 32,968 criminal filings in the superior courts; there were another 51,000 felony filings in the municipal courts of those counties. 2 JUDICIAL COUNCIL OF CALIFORNIA, 1993 ANNUAL REPORT 64 (1993). All the superior court criminal filings should be felonies, but some portion of them are actually duplicates of cases initially filed in municipal courts. Thus, one cannot simply add up the number of municipal and superior court criminal filings to get total criminal cases; some number represents duplicated cases. On the other hand, some portion (probably a large one) of the municipal court felony filings are finally disposed of there. Thus, using solely the superior court criminal filings surely

ern District of California is in the upper third of the 94 federal districts in terms of filings, trials, and other measures.⁶² The other three federal districts in California (including the Southern District, one of the highest criminal filing districts in the nation) also had significant state-federal imbalances in criminal case filings in 1992.⁶³

Thus, in terms of absolute number of cases as well as per-judge criminal filings, it is simply a myth that federal criminal case filings have skyrocketed. On the other hand, there has been a significant change in the "character" of the federal criminal caseload: the mix of cases has shifted dramatically toward larger numbers of narcotics and weapons offenses.⁶⁴ Since 1972 the percentage of narcotics and weapons offenses in the federal system has more than doubled: drug offenses have increased from eighteen to forty-one percent of the federal criminal filings; gun offenses are up from four to eight per-

undercounts the actual number of state felony cases filed in the state courts within the Northern District of California. But even using just that number, and then dividing by 210 judicial positions available (not necessarily filled) in those counties, yields a per-judge criminal (felony) caseload in the superior courts of 157. Adding the uncounted yet unduplicated municipal court felony cases would obviously increase this number.

Meanwhile, the 1992 Annual Report for the Ninth Circuit shows 682 "criminal filings" in the federal Northern District of California in 1991. 1992 NINTH CIRCUIT ANNUAL REPORT 82. This appears to include misdemeanors as well as felonies. Dividing this number by the number of criminal judicial positions (20 including magistrate judges, who handle all misdemeanors and perform significant work in felony cases, but excluding senior judges) yields a per-judge caseload of 34. See JERROLD M. LADAR, NORTHERN DISTRICT OF CALIFORNIA STATISTICAL SUMMARY: TRIALS, CIVIL CASES, CRIMINAL CASES (FOR THE 12-MONTH PERIOD ENDING JUNE 30, 1994) 2, 8-9 (1994). Adding those senior judges who still handle criminal cases would obviously decrease this workload figure. See *Senior Judges Help District Courts Keep Pace*, THE THIRD BRANCH (Administrative Office of the U.S. Courts), May 1994, at 1. Yet, it is still roughly only one-fifth that of the concurrent state court judges' caseload.

62. See LADAR, *supra* note 61, at 8-9. In 1992 the Northern District of California ranked 26 out of 94 federal districts in terms of number of criminal cases filed (558 cases). ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS 34-36 tbl. D (1993) [hereinafter 1993 WORKLOAD STATISTICS]. For purposes of comparison (see *infra* note 63), the Eastern District of California ranked 16 (742 criminal cases), the Central District ranked 11 (1,116 cases), and the Southern District ranked 9 (1,289 cases). *Id.* See also LADAR, *supra* note 61, at 5 (in 1994, the Northern District of California ranked 33 in trials completed), 7 (ranked in "top ten" for state prisoner cases).

63. Similar calculations, see *supra* note 62, for the other three districts in California yield state judge versus federal judge workload figures of 347 cases to 64 in the Eastern District (Sacramento); 226 to 34 in the Central District (Los Angeles); and 233 to 134 in the Southern District (San Diego, where there is a large abnormality in the number of criminal immigration and marijuana cases filed). See 1993 WORKLOAD STATISTICS, *supra* note 62, at 34-36 tbl. D.

64. THE CRIMINAL CASELOAD, *supra* note 29, at 4-7.

cent.⁶⁵ In addition, increases in the severity of the sentences available upon conviction for gun and drug offenses have been instituted over the past decade.⁶⁶ Many federal judges dislike these higher, often mandatory, penalties.⁶⁷ Anecdotally at least, it is difficult to discuss workload concerns with a federal judge today and not hear some distasteful reference to narcotics and firearms cases.⁶⁸ To be frankly blunt about the Emperors' situation, some federal judges simply do

65. *Id.* at 1, 5-6. It is fair to consider narcotics and weapons offenses together because in reality they are often committed together and charged together. Thus, 18 U.S.C. § 924(c), a frequently charged felon-in-possession offense, provides for severe mandatory minimum penalties for carrying a firearm during and in relation to any drug trafficking crime. *See, e.g., United States v. Taren-Palma*, 997 F.2d 525, 534-35 (9th Cir. 1993) (noting expert testimony that "firearms are often used in drug transactions"); *United States v. Fagan*, 996 F.2d 1009, 1015-16 (9th Cir. 1993) ("because guns are used in many drug transactions firearms are relevant and admissible in drug cases"); ROGER HAINES, 1 NINTH CIRCUIT CRIMINAL LAW REPORT 152 (4th ed. 1990) (separately indexed category for "Drugs and Firearms").

66. For example, 1986 amendments to 21 U.S.C. § 841(b) created new mandatory minimum sentences of 5, 10, 20 years, or life imprisonment for various federal narcotics offenses. Pub. L. No. 99-570, § 1002(2) (codified at 21 U.S.C. § 841 (1986)). Similarly, a 1986 amendment to § 924 increased mandatory imprisonment terms for federal firearms offenses. Pub. L. No. 99-308, § 104(a) (codified at 18 U.S.C. 924 (1986)). The federal Sentencing Guidelines were subsequently drafted to increase the suggested sentencing ranges for most narcotics offenses. *See Irene Nagel, Foreword: Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 931 (1990) ("sentences higher than past practice estimates are also proscribed for those convicted of violent and drug offenses"); Barbara S. Vincent & Paul J. Hofer, *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings*, 7 FED. SENT. REP. 33 (Aug. 1994) (the Guidelines have been set to incorporate the mandatory minimums).

67. Thus, the 1990 *Federal Courts Study* recommended that Congress "repeal mandatory sentence provisions," which it noted were "mainly for drug-related crime." 1990 FED. COURTS STUDY, *supra* note 3, at 133. Judge Miner states that the new federal Sentencing Guidelines ranges "seem most often to be on the high side" and particularly criticized "statutory minimum sentences . . . , especially in the drug area." Miner, *Crime and Punishment*, *supra* note 17, at 692. In 1993 two senior federal judges announced that they would no longer handle criminal drug cases because of their disagreement with the severe penalties mandated by the new Guidelines. Joseph B. Treaster, *Two Judges Decline Drug Cases, Protesting Sentencing Rules*, N.Y. TIMES, Apr. 17, 1993, at A1. Judge Schwarzer was reported at that time to estimate that some fifty federal judges around the nation were similarly "quietly refusing to handle drug cases." Saundra Torrey, *Some Federal Judges Just Say No to Drug Cases*, WASH. POST, May 17, 1993, at F7.

68. By definition, this anecdotal assertion is based on the author's own experiences and conversations. But also, as explained in the text *infra*, the discussions of the federalization issue published by federal judges uniformly focus on the narcotics caseload, without explaining precisely why. This Article suggests that an unspoken substantive distaste for certain types of cases motivates these discussions, as well as (or even rather than) simple workload concerns.

not like their average and increased numbers of gun and drug cases, and oppose federalization for this reason.⁶⁹

Thus, the 1992 Federal Judges Survey expresses distaste for "'ordinary' street crimes" being lodged in federal court, without further defining this concept.⁷⁰ "Ordinary street crimes" may mean gun and drug cases. More pointedly perhaps, the Judicial Conference's proposed *Long Range Plan* (the *Plan*) states that most gun and drug cases are "not . . . enough to involve a federal court's attention," without explaining why this is necessarily so.⁷¹ Similarly, the *Long Range Plan* singles out the recent increase in narcotics case filings without explaining why that development is significant, and it separates drug filing statistics without separating out other types of crimes.⁷² The *Plan's* silence as to why drug cases are singled out leaves a skeptical reader to wonder whether it reflects substantive distaste for drug cases or some other unarticulated concern.⁷³

The preoccupation with guns and drugs is apparent, even if unexplained. For example, in a 1992 article providing valuable detail regarding judicial views on these issues, Judge Miner criticizes recent federal criminal legislation raising the penalties for felons caught in possession of weapons as "federalization of state crime."⁷⁴ He similarly asserts that "[i]f there is one area of criminal prosecution that

69. I am indebted to my Hastings colleague Professor Ash Bhagwat for encouraging me to make explicit this likely controversial assertion about the substantive undercurrent of the current federalization debate.

70. 1992 JUDICIAL SURVEY, *supra* note 3, at 7, 29.

71. 1994 LONG RANGE PLAN, *supra* note 4, at 21 recommendation (b). The plan notes that it would make an exception for exceptionally complex drug or weapon conspiracies. *Id.*

72. 1994 LONG RANGE PLAN, *supra* note 4, at 8, 120.

73. In its recent report entitled *The Criminal Caseload*, the Administrative Office of the U.S. Courts notes that the federal criminal caseload, while "fluctuat[ing] wildly since 1950," has not grown much, while civil filings have increased more than 300%. THE CRIMINAL CASELOAD, *supra* note 29, at 2. This report then asks the same question this Article poses (perhaps more diplomatically): "Why then is the criminal caseload of the district courts the topic of so much attention today?" *Id.* The report goes on to suggest that perhaps the change in the "character" of federal crime filings (toward drug cases) has increased the workload. *Id.* at 4, 8-15. However, that tentative suggestion is at least open to debate. For example, the report notes that the "defendants per case ratio for drug cases" has in fact declined in recent years. *Id.* at 8. So has the average length of criminal jury trials. *Id.* at 14.

74. Miner, *Crime and Punishment*, *supra* note 17, at 685-86. The Armed Career Criminal Act of 1988 dramatically increased penalties for felons possessing firearms in various contexts, to 30-year or life imprisonment terms. Pub. L. No. 100-690, § 6460, 102 Stat. 4373 (codified at 18 U.S.C. §§ 922, 924(c) (1988)); see generally Cynthia R. Cook, *The Armed Career Criminal Act Amendment: A Federal Sentence Enhancement Provision*, 12 GEO. MASON U. L. REV. 99, 104 (1989).

best exemplifies the proposition that too much crime is prosecuted in federal courts, it is the area of drug offense prosecution."⁷⁵ Judge Miner deserves great praise for publicly discussing the thorny issues of federalization, providing detail that is generally absent from most presentations on the topic. However, precisely why guns and drugs are singled out for discussion (as opposed to, for example, small bank robberies or postal thefts) is neither explained nor examined.⁷⁶

While it is suggested above that the federal criminal workload problem is not really as "nightmarish" as some critics make it out to be, it is important to recognize the legitimacy of the concern. Complaints about workload are born of high ideals, not sloth; no one disputes that federal judges today work extremely hard.⁷⁷ They are properly concerned about the quality of justice their workloads permit them to render. Federalization workload concerns are founded on the idea that too many criminal cases can hinder the exercise of careful judgment and threaten a reduction in the quality of justice in the federal system.⁷⁸ Because achieving just results for litigants is an overarching goal of the federal court system (albeit a goal of the states as well), work pressures that obscure this goal are plainly appropriate subjects of critique.

However, the point here is that sheer numbers of criminal cases do not appear to be a primary cause of perceived federal workload pressures. Based on the available empirical information, one may legitimately question whether some other concern actually drives the federalization critique. A substantive bias against drug and gun cases, if one indeed exists, is analytically separate from pure criminal workload. Instead, it suggests an unarticulated, substantive conception of

75. Miner, *Crime and Punishment*, *supra* note 17, at 683.

76. To be fair, this precise question has not been posed prior to this Article and so may have escaped attention as a question needing an answer. Also in fairness, in an earlier article providing a historical account of federalization of crime, Judge Miner noted his more general view that federal mail fraud and other statutes criminalize conduct "which would ordinarily be prosecuted in state courts." Miner, *Federal Courts*, *supra* note 22, at 121-22 (1987). However, this point appears as an aside to the primary historical account; Judge Miner's final focus (and ire) in that article again is reserved for federal drug cases: "local trafficking in controlled substances [has] become grist for the federal prosecutor's mill." *Id.* at 124.

77. See *supra* Part I.A; cf. Rehnquist, *supra* note 38 (describing federal judges' workload in the 1950s).

78. As Professor Beale put it, "the sheer number of drug prosecutions poses a threat to the federal courts' ability to perform their constitutional role." Beale, *Federal Criminal Caseload*, *supra* note 60, at 7.

the type of criminal cases federal courts "should" handle.⁷⁹ This leads to a separate category of federalization concerns, described below as "dignity" concerns.⁸⁰ But first, a variant on the workload theme, described here as "open forum" concerns.

B. Open Forum Concerns

There is no doubt that Congress envisions the federal courts playing a significant role in the enforcement of a large number of national legislative plans. To state but a few examples, environmental protection, antidiscrimination remedies, management-labor relations, and securities regulation have all been lodged with the federal courts.⁸¹ Federal criminal statutes might also be said to reflect some (cohesive or otherwise) congressional design for national enforcement. All of these areas compete for federal judicial resources, and not all the claims available can possibly be tried in federal court.

In light of the variety of federal legislation enacted without express hierarchy, it surely is a valid concern if one class of cases (criminal) pushes out all others, so that the federal forum envisioned by Congress is unavailable as a matter of reality for other categories. Federal judges and commentators claim that this is precisely the effect of federalization of crime on the federal civil docket. Judge Miner of the Second Circuit states that "judges are unable to get to their civil calendars."⁸² The *1990 Federal Courts Study* asserts that "a recent surge in federal criminal trials . . . is preventing federal judges in major metropolitan areas from scheduling civil trials."⁸³ The proposed *1994 Long Range Plan* sounds the same concern, if somewhat muted: "[C]riminal cases have produced significant delays for civil suits in some judicial districts."⁸⁴

79. See, e.g., *id.* at 7 ("The current federal caseload includes many drug prosecutions that could and should be brought by state prosecutions in state courts." (emphasis added)).

80. See *infra* text accompanying notes 122-151.

81. See, e.g., 42 U.S.C. §§ 7401-7626 (1983 & Supp. 1995) (air pollution); 42 U.S.C. §§ 1981-2000(h)-6 (1994) (civil rights); 29 U.S.C. §§ 101-633a (1987) (labor); 15 U.S.C. §§ 77a-78111 (1981) (securities).

82. Miner, *Crime and Punishment*, *supra* note 17, at 686.

83. 1990 FED. COURTS STUDY, *supra* note 3, at 6. This claim apparently was premised in part on Associate Reporter Professor Beale's 1989 report of predictions from federal judges and prosecutors that "in the very near future the[ir] districts will be unable to try any civil cases." Beale, *Federal Criminal Caseload*, *supra* note 60, at 5.

84. 1994 LONG RANGE PLAN, *supra* note 4, at 9. The Committee also notes that "the courts have responded" to the problem. *Id.*

Despite these assertions by federal court observers, no broad empirical data exists to support their claims. Individualistic anecdotal reports are generally the only support offered for the dire predictions of civil trial preclusion.⁸⁵ There is substantial reason to believe that these claims are exaggerated and far from the norm in most federal districts. Before acting to close the federal courts to criminal cases based on open forum concerns, some broader and more scientific statistical work needs to be done.

For example, the most recent Administrative Office report on *The Criminal Caseload* indicates that civil trials still occupy the majority of the trial time of all federal courts.⁸⁶ This balance was roughly the same in 1972, thus belying any claim that a new "crisis" of closed forums is upon us.⁸⁷

(1) *General Points*

Moreover, there is a subtle yet potentially huge bias in this data. In a footnote, the Administrative Office notes that it defines "trial" nonliterally as "any contested proceeding in which evidence is introduced"; thus, all evidentiary "[h]earings on contested motions are reported as trials."⁸⁸ With such a definition, it is not surprising that the Administrative Office's statistics indicate proportionately more criminal than civil "trials."⁸⁹ Criminal cases often have at least one pretrial hearing involving contested evidence because many criminal motions to suppress or to dismiss turn on contested factual issues, which the Federal Rules of Criminal Procedure require to be resolved before trial.⁹⁰ On the other hand, civil cases almost always proceed without

85. See, e.g., Miner, *Crime and Punishment*, *supra* note 17, at 686 ("A judge . . . recently told me . . ."); Beale, *Federal Criminal Caseload*, *supra* note 60, at 5 (citing "reports from judges and prosecutors in districts with heavy drug caseloads").

86. THE CRIMINAL CASELOAD, *supra* note 29, at 12. Not surprisingly, in a report designed to address the criminal caseload, this point is stated in the converse: "By 1992, criminal trials represented more than 47 percent of all trials." *Id.* See also *infra* text accompanying notes 88-92 (discussing the broad and nonliteral definition of "trial" used in developing this statistic and arguing that it is biased to favor reporting of "trials" in criminal rather than civil cases).

87. THE CRIMINAL CASELOAD, *supra* note 29, at 12 ("In 1972 criminal trials made up more than 40 percent of all trials."). In 1992 the figure was 47%. *Id.*

88. *Id.* at 12 n.5. Accord LADAR, *supra* note 61, at 5 n.3.

89. That is, the Administrative Office states that criminal cases make up 15% of all federal cases filed, yet account for more than 47% of all "trials." *Id.* at 13.

90. Federal Rule of Criminal Procedure 12(b) requires that such motions be raised prior to trial, and Rule 12(e) states that such motions "shall be determined before trial" in most cases. FED. R. CRIM. P. 12. Rule 12(e) expressly anticipates that relevant "factual issues" will be resolved when necessary to such pretrial motions. *Id.*

evidentiary hearings because the Federal Rules of Civil Procedure provide for pretrial disposition only by summary judgment, which is by definition a nonevidentiary mechanism.⁹¹ It thus seems undoubtable that criminal cases generally must have more contested evidentiary hearings than do civil cases—but these simply are not “trials” as the term is generally understood. The present statistical comparison of “trials” in the civil and criminal contexts is thus misleading: it compares apples (civil cases that use a nonevidentiary pretrial disposition mechanism) with oranges (criminal cases that use contested pretrial hearings) and then calls only the latter “fruit.” The actual figure for true criminal trials is almost certainly far lower than is currently reported.⁹²

Even if all criminal “trials” reported were actual trials, it remains the fact that more than fifty percent of the federal trial docket is devoted to civil trials.⁹³ This hardly supports the claim that federal judges are not available to try civil cases because criminal cases are overwhelming them. Of course, it can sometimes occur that a particular judge becomes mired in an unusually long trial that precludes almost all other matters.⁹⁴ However, such cases are aberrational⁹⁵ and individual, not district-wide. Moreover, such exclusionary cases can

91. See FED. R. CIV. P. 56(c) (providing for judgment when the pleadings demonstrated “no genuine issue as to any material fact”); see generally William W Schwarzer & Alan Hirsch, *Summary Judgment After Eastman Kodak*, 45 HASTINGS L.J. 1 (1993) (concluding that under appropriate circumstances and used carefully, summary judgment is an affirmative case management tool); William W Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465 (1984) (urging a more principled approach to the use of Rule 56). There is no equivalent to Rule 56 in the federal criminal rules. While it has been suggested that summary judgment principles might profitably be applied in some criminal cases, see James M. Shellow & Susan W. Brenner, *Speaking Motions: Recognition of Summary Judgment in Federal Criminal Procedure*, 107 F.R.D. 139, 139 (1986), that theory has yet to catch on in federal criminal cases.

92. For example, the Northern District of California reports that roughly three-fourths of the nonjury “trials” reported for the district in 1994 were in fact not trials, but evidentiary hearings. LADAR, *supra* note 61, at 5. Because such hearings are generally shorter and less complex than trials, the Administrative Office should consider refining its data collection mechanisms for “trials.”

93. THE CRIMINAL CASELOAD, *supra* note 29, at 12.

94. See, e.g., *United States v. Baker*, 10 F.3d 1374, 1386 (9th Cir. 1993), *cert. denied*, 115 S. Ct. 330 (1994) (over 16-month trial); *Polizzi v. United States*, 926 F.2d 1311, 1313 (2d Cir. 1991) (describing 17-month “Pizza Connection” trial, although noting it to be “an aberration in the federal judicial system”). The *Polizzi* trial was reported to have taken up 265 trial days over 17 months. 926 F.2d at 1313. Thus, it almost certainly did not entirely exclude the trial judge from other matters, since 265 days averages to less than 16 days per month, leaving at least one day a week for other judicial business.

95. *Polizzi*, 926 F.2d at 1313.

also arise in the civil trial context,⁹⁶ as well as in state cases. Therefore, it is a flaw of our legal system in general, not somehow specific to federal criminal legislation.

In fact, it remains true today as a general matter that the federal trial docket remains open to many civil trials; more than 10,000 were conducted in the federal courts in 1992.⁹⁷ Nor has any federal district where the criminal dockets are abnormally large ever suspended all civil trials because of criminal caseload emergencies.⁹⁸

Two other related points deserve brief mention. First, respected federal trial judge Edward Rafeedie has recently written that “[a]lmost all jury trials take from two to three times longer than they should.”⁹⁹ This suggests that, rather than closing the federal courthouse doors, more efficient trial management techniques may provide some solution to the concerns about the availability of federal courts.¹⁰⁰

96. See MCLAUGHLAN, *supra* note 41, at 165 (“[O]ne antitrust case can tie a judge up for years, and it can become nearly the only case the judge can manage during that period.”).

97. THE CRIMINAL CASELOAD, *supra* note 29, at 12 fig. 12. This averages to roughly 100 civil trials annually in each of the 94 federal districts in the country, two per week.

98. While it does not identify the districts, the Administrative Office reports that in three districts (out of 94) in 1992, more than 80% of the trials conducted were criminal (including, of course, nontrial criminal evidentiary hearings, see *supra* text accompanying notes 88-92). THE CRIMINAL CASELOAD, *supra* note 29, at 13. The three districts are almost certainly southern border districts, however, and a single category of criminal conduct clearly predominates in these border districts: immigration offenses. While many districts have criminal immigration caseloads in the single digits, in 1994 California's four district courts had 671 (424 in San Diego alone), Texas's four district courts had 481 (224 in Houston), and Arizona's single district court had 177. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1994 FEDERAL JUDICIAL WORKLOAD STATISTICS tbl. D-3. This total of 1,369 criminal immigration cases represented more than 50% of the 2,596 such cases filed in all the federal courts in 1994. *Id.*; see also MCLAUGHLAN, *supra* note 41, at 121 (noting that the Fifth and Ninth Circuits, where these districts lie, historically have had high criminal filings, presumably largely immigration cases). But of all possibly “dual jurisdiction” federal criminal offenses, immigration offenses seem most clearly “federal” rather than state in character, so that defederalization seems unlikely if not inappropriate. Moreover, it seems clear that the immigration issues in this country today demand solutions far beyond simply deciding whether or not to federalize criminal conduct that is an outgrowth of a far broader social issue.

99. Edward Rafeedie, *Speedier Trials*, LITIG., Fall 1994, at 6.

100. The need for further implementation of management techniques may provide some response to the odd statistical point made in THE CRIMINAL CASELOAD, *supra* note 29, at 9, that while single defendant cases average 178 minutes of court time, multiple defendant criminal cases average 347 minutes per defendant. Gently described by the Administrative Office as a “diseconomy of scale,” this unexplained inefficiency in multi-defendant cases would seem to require strong management attention, not simply acceptance.

Second, contrary to an oft-invoked myth,¹⁰¹ the 1970 Speedy Trial Act simply does not, as a general matter, force delay in civil cases.¹⁰² Because the Speedy Trial Act provides for generous exclusions of time that are often invoked, federal criminal cases are often not tried within the statutory deadline of seventy days; in fact, the average time for disposition of federal criminal cases is more than five months.¹⁰³ This average necessarily includes those criminal cases simple enough to resolve quickly; for cases of any complexity, the Speedy Trial Act itself provides for an exclusion of time that is frequently invoked.¹⁰⁴ Thus, as Professor George Bridges concluded in a 1982 study, "the Act has had no independent effect on the volume or flow of civil litigation in federal courts."¹⁰⁵

(2) *One District's Experience*

Perhaps because more extensive or accurate empirical data about civil versus criminal trials is lacking, "open forum" arguments against federalization are often based on anecdotal evidence.¹⁰⁶ Although unpersuasive on general propositions, such anecdotal evidence may also be cited to prove the contrary point: that federal criminal cases are not barring civil litigants from being heard in federal court. On a recent random morning (Tuesday, January 24, 1995), a visit to the federal courthouse in San Francisco revealed that not one of the nine judges or five magistrate judges was holding a criminal trial that

101. *E.g.*, Beale, *Federal Criminal Caseload*, *supra* note 60, at 4-5 (stating that deadlines imposed by the Speedy Trial Act force criminal trials and criminal pretrial proceedings to take precedence over civil trials); 1990 FED. COURTS STUDY, *supra* note 3, at 36 (claiming that because of the Speedy Trial Act, federal courts "with heavy drug caseloads are virtually unable to try civil cases and others will soon be at that point").

102. The Speedy Trial Act is codified at 18 U.S.C. § 3161 (1988 & Supp. V 1993).

103. MICHAEL V. BORK, *FEDERAL JUDICIAL CASELOAD: A FIVE-YEAR REVIEW, 1989-1993*, at 7 (1994). The Speedy Trial Act provides in relevant part that "the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days" of indictment or first appearance. 18 U.S.C. § 3161(c)(1) (1985 & Supp. 1995). Subsection (h) of § 3161 provides, however, that "[t]he following periods of delay shall be excluded in computing th[is] time," and nine detailed and commonplace periods of delay are then listed.

104. 18 U.S.C. § 3161(h)(8)(B)(ii) provides that a judge deciding whether to grant a continuance may consider whether a case is "so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation . . . within the time limits" of the Act.

105. George S. Bridges, *The Speedy Trial Act of 1974: Effects on Delays in Federal Criminal Litigation*, 73 J. CRIM. L. & CRIMINOLOGY 50, 72 n.68 (1982) (citing other studies as well).

106. *See supra* note 85.

day.¹⁰⁷ Twelve of the fourteen judges' courtrooms were dark; two others were in use for federal civil trials.¹⁰⁸ Moreover, there were nine additional, unassigned courtrooms in this particular federal courthouse that were available and yet dark. Ironically, one federal courtroom was being used for a criminal trial—but it was a state criminal trial in which venue had been transferred from Sacramento to San Francisco.¹⁰⁹

It is virtually certain that the federal judges not in court on January 24th in San Francisco were otherwise engaged with court business. This maybe conceded without distorting the point; that these federal judges were not engaged in a criminal trial and a number of courtrooms were available for civil trials. Indeed, on this particular day in this particular district, the only federal trials occurring were civil.

Of course one swallow does not a summer make,¹¹⁰ and one day's experience cannot be generalized into a broad empirical statement. But this anecdotal experience appears to be accurate for the Northern District of California as a general matter. The 1993-1994 statistical report for that district states that "[t]here is no empirical evidence that the present criminal caseload poses a problem for the civil docket. . . . [C]ivil litigants [receive] a trial forum without undue delay. . . ."¹¹¹

107. On-site survey conducted by Professor Rory Little (Jan. 24, 1995) (notes on file with *Hastings Law Journal*). The San Francisco-based federal judges on that date were Chief Judge Henderson; Judges Conti, Orrick, Weigel, Patel, Lynch, Legge, Walker, and Smith; and Magistrate Judges Langford, Brennan, Brazil, Hamilton and Woodruff. The other trial judges of the Northern District sit in Oakland or San Jose. It is of course possible that these judges were in fact in the middle of a criminal trial but were simply not sitting that day for some reason. However, the published calendar for that week states that only two judges were even scheduled for a criminal trial that day (Judge Patel and Magistrate Judge Hamilton). *THE RECORDER* (S.F.), Jan. 24, 1995, at 15. Moreover, although Judge Patel's posted calendar indicated a scheduled criminal trial, her courtroom was dark. This is not unusual nor is it a point of criticism. In fact, federal litigators are well aware that criminal trials are often continued or resolved on the eve of trial, so that the courtrooms remain dark despite published schedules indicating trial.

108. Courtrooms of Judges Orrick and Smith.

109. *People v. Nguyen*, No. Cr.109842 (Sacramento Super. Ct.), No. 156754 (S.F. Super. Ct.), Judge W.J. Harpham (ret.) presiding. That the federal courthouse was made available for the state trial is an encouraging example of state-federal resource sharing.

110. See ARISTOTLE, *NICOMACHEAN ETHICS* bk. 1, ch. 7, in J. BARTLETT, *FAMILIAR QUOTATIONS* 78 (J. Kaplan ed., 16th ed. 1992).

111. LADAR, *supra* note 61, at 2-3. Other districts, with abnormal criminal filings, have reported to the contrary. See *United States v. Mosquera*, 813 F. Supp. 962, 965 (E.D.N.Y. 1993) (noting that in that district, "criminal filings have increased at a rate far greater than the national average" and reporting that an "advisory group has determined that the criminal docket is the principle cause of unnecessary delay and expense in the civil justice system within the Eastern District").

San Francisco is a major metropolitan area and is in the upper third of federal districts in the country for trials conducted.¹¹² Absent some contrary empirical evidence, it would seem likely that its federal caseload and forum pressures are more typical than aberrational; rather, the three (out of ninety-four) federal districts that are suffering high open forum pressures are likely atypical.¹¹³

(3) *Why Not Try a Master Calendar?*

One substantial bar to conducting more federal trials may be the present federal adherence to an individual judge case management system, as opposed to the "master calendar" assignment system used in many state courts, including California.¹¹⁴ No judge can try more than one case at a time. Under an individual assignment system, if a criminal case is being tried, no other case can be tried by that judge even if the case is ready to go.¹¹⁵ If a case set for trial pleads or settles on the eve of trial, the scheduled trial time usually goes unused and the courtroom stays dark.¹¹⁶

112. LADAR, *supra* note 61, at 5 (district ranks 33 out of 94 federal districts in trials conducted); *see also supra* note 98 (the Northern District of California ranks 16 nationally in total criminal filings).

113. There reportedly were three federal districts in 1994 in which criminal "trials" represented more than 80% of the total trial time. *See supra* note 98. Not coincidentally, immigration problems noticeably skew many governmental functions in these districts besides federal courtroom resources. *Id.*; *see also California Sues U.S. Government over Costs Tied to Illegal Aliens*, N.Y. TIMES, May 1, 1994, at A24; Larry Rohter, *Florida Seeks U.S. Aid for Illegal Immigrants*, N.Y. TIMES, Dec. 31, 1993, at A12; Sam H. Verhovek, *Texas Plans to Sue U.S. over Illegal Alien Costs*, N.Y. TIMES, May 27, 1994, at A10.

114. In an individual case management system, every case is assigned to a particular judge from the day it is filed until the day it is disposed of. In contrast, a master calendar system does not assign cases to any particular judges, but rather uses whatever judge is available to perform whatever functions (for example, arraignment, discovery, motions, settlement, and trial) are needed along the way. *See generally* Richard Enslin, *Should Judges Manage Their Own Caseloads?*, 70 JUDICATURE 200, 200 (1987); Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 257 (1985).

115. There are presently some stalwart federal judges, such as the Honorable James C. Ware in the Northern District of California (San Jose Division), who will try two cases on the same day, running a criminal case from 8 a.m. to 12:30 p.m., and a civil case from 1:30 p.m. to 6 p.m. Such a schedule is obviously exhausting and impossible to manage for very long; it is also hard on support personnel and, perhaps, on jurors. Judge fatigue might well lead to greater trial errors. Most significantly, however, despite such herculean efforts, such a schedule is still limited to the trial of only two cases by that judge, even if five or ten stand ready for trial.

116. Of course, this need not be the case; a single judge can also double or triple schedule trials on her own calendar. This is likely more inconvenient and expensive to the parties (who must prepare whether their case goes to trial or not) than is a master calendar

By contrast, a master calendar assignment system permits trial of a large number of cases simultaneously, limited only by the total number of judges or courtrooms available for trial. In California state courts for example, many cases are often scheduled for the same trial dates. This guarantees that some case is definitely ready on any given date, so that a courtroom does not go unused. If four judges are available, then four cases can be tried. Trials are not tied to the schedule of a single judge.¹¹⁷

The individual judge assignment system is reportedly a relatively recent development in the federal system.¹¹⁸ The use of this system may indicate that other values are viewed as more important than simply trying cases as quickly as possible.¹¹⁹ Yet federal jurisdictions have used master calendar systems in the past, specifically to respond to a perceived caseload crisis.¹²⁰

Undoubtedly it would be advisable to gather more empirical evidence to better evaluate current open forum concerns. For example, data on days actually spent in trial by federal judges is not readily available.¹²¹ As it now stands, however, there is substantial reason to

assignment system, however, since the single judge is the only one available and the number of possible trials is therefore capped at one.

117. As an example, if Judge A is trying a criminal case under a master calendar system while a case before Judge B pleads out, Judge B can immediately be assigned to try one of Judge A's other cases if one is ready to be tried. Of course, even a master calendar system does not end all delays; the number of judges and courtrooms is finite. Thus, California state litigants still face substantial delays in getting their cases to trial. Yet, the master calendar system is the only way California state courts handle the caseload they have, which is significantly greater than that of federal courts. See *supra* text accompanying notes 61-63. Single judge assignment is a luxury that federal courts can afford only because their caseloads are so relatively low.

118. Judge Peckham states that "in 1969, most metropolitan federal district courts changed over from a master calendar system to an individual assignment system." Peckham, *supra* note 114, at 257.

119. Thus, Judges Enslin and Peckham argue that an individual assignment system develops continuity, expertise, and a sense of responsibility for disposition of the assigned cases, all of which may in turn foster more efficient litigation. Enslin, *supra* note 114, at 201; Peckham, *supra* note 114, at 254. Professor Resnik, on the other hand, has raised significant concerns about "managerial judging" in individual assignment systems. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

120. See LADAR, *supra* note 61, at 4 n.2 (noting use of a "master calendar" system in the Northern District of California in 1968-1969 to respond to the large influx of selective service cases: "15 criminal cases [ready] for trial . . . each Monday [were] spread among the 7 judges available . . .").

121. For example, the length of federal "trials" reported by the Administrative Office appears to include days during which the trial was still not completed but, for one reason or another, court was not actually in session, thus inflating the figures. See also *supra* text accompanying notes 61-63 (data defines any evidentiary hearing as a "trial").

believe that the "open forum" concerns expressed with regard to federalization of crime are overstated.

C. Dignity Concerns

Some critics of federalization express the view that federal judges should not have to deal with "ordinary" street crimes because such crimes "should not be enough to involve a federal court's attention."¹²² These critics posit, however, that other criminal cases—"cases of clear national import and interest"—properly fall within the scope of federal concern.¹²³ Such views are tied to a conception that federal courts have a "distinctive" role among all courts and that federal courts are "a superlative court system . . . that attracts the most talented lawyers."¹²⁴ Advocates that couch their criticisms of federalization in these terms are in essence concerned with the dignity of federal courts and judges.

There may well be a core to such dignity concerns that captures a real and valid, if difficult to describe, shared value in our conception of federal courts. Many view federal courts, historically and contemporaneously, as special or distinctive. Thus, almost twenty years ago, Professor Burt Neuborne challenged "the myth of parity" between state and federal courts.¹²⁵

This Article does not take issue with the grand aspirations of federal courts (although it should be noted that many state courts share

122. 1992 JUDICIAL SURVEY, *supra* note 3, at 7, 29; 1994 LONG RANGE PLAN, *supra* note 4, at 21 (arguing that in order to merit federal jurisdiction a crime should have "substantial multistate or international aspects"). See also Mordecai Rosenfeld, *The Law and the Yucca Yucca Plant*, N.Y. L.J., June 16, 1989, at 2 (reporting Chief Justice Rehnquist's statements that "garden variety crimes d[o] not belong in federal court").

123. 1994 LONG RANGE PLAN, *supra* note 4, at 19.

124. *Id.* at 6, 19.

125. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). Rather than advance a strong absolute claim (*e.g.*, that federal courts are "better" than state courts for all purposes), Professor Neuborne's thesis was more limited: that federal courts are better than state courts at "enforcing countermajoritarian checks in a sustained, effective manner," and at evaluating "individual[] . . . challenges to collective decisions." *Id.* at 1131. Even when limited to constitutional adjudication, however, the lack-of-parity thesis has been questioned by other scholars. *E.g.*, Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981); Michael E. Solimine & James Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983). Professor Chemerinsky contends that "the debate about parity is unresolvable because . . . there is no empirical answer." Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 236, (1988). This Article does not pretend to settle, nor do its arguments depend upon settlement of, the parity debate.

such a aspirations¹²⁶). However, a concept of federal court dignity can quickly slide into an unanalyzed elitist-sounding position that detracts from a substantive analysis of the difficult questions confronting the federal courts today.

The 1994 draft of the *Long Range Plan* for the federal judiciary occasionally exhibits such unanalyzed excesses.¹²⁷ For example, the *Plan* begins with the assertion (without citation) that federal courts were intended to handle only “small numbers of disputes involving important national interests” and that federal judges are “specially selected for the job of performing . . . difficult counter-majoritarian tasks.”¹²⁸ Yet, not only is the specialness of the procedure not explained,¹²⁹ but how or why this might relate to disqualifying the federal courts from particular types of criminal cases is never explicated.¹³⁰ Throughout the *Long Range Plan*, the federal courts

126. Professor Resnik has noted, for example, that some state courts have responded to issues of race, gender, and ethnicity ahead of the federal courts. Judith Resnik, *Rereading “The Federal Courts”: Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 VAND. L. REV. 1021, 1041 (1994); see also *id.* at 1050 & n.131 (noting “rejuvenational state adjudication and . . . development of constitutional norms”).

127. The 1994 *Long Range Plan* is the most recent and perhaps the most prestigious explication of the anti-federalization position, built upon prior expositions by the 1990 Federal Courts Study Committee, the Federal Judicial Center, and other august bodies. See 1994 LONG RANGE PLAN, *supra* note 4, at 2, 4 n.1 (referencing prior works influencing and supporting the planning process); *supra* note 39 (further describing the *Long Range Plan*). It thus seems fair and useful to focus on the *Long Range Plan* as representative of considered and broadly shared views.

128. 1994 LONG RANGE PLAN, *supra* note 4, at 4. Similarly, the *Plan* states that federal courts “are special purpose courts.” *Id.* Thus, the *Plan* presumes, *ipse dixit*, a “special” status for federal courts even as it fails to explain just what the special purposes are or how they have been identified.

129. The concept of “specialness” here is difficult to understand: judgeships are highly sought after in most jurisdictions, state as well as federal, and each jurisdiction likely considers its selection process special. And it is highly debatable whether the current federal judicial selection process focuses particularly well or “specially” on persons exceptionally able to perform “counter-majoritarian tasks.” See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990) (criticizing the increased incidence of political posturing by judges); STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENT PROCESS* (1994) (criticizing the selection process for Supreme Court Justices). Most attorneys that receive federal judicial nominations have been “mainstream” players and have been deeply involved in, and responsive to, “majoritarian” politics. That some federal judges have been successful in withstanding political pressures after their appointment is true, but is likely attributable to constitutional life tenure protection, rather than to any special selection procedures.

130. See also 1994 LONG RANGE PLAN, *supra* note 4, at 3 (“preeminent legal competence”). The *Long Range Plan* also extols the federal courts as “a superlative court system with superior resources that attracts the most talented lawyers . . .” *Id.* at 6. It is unclear whether this last reference is intended to describe lawyers that become federal judges or those that practice in federal courts; either conception is arguable and unsupported. In

are referred to as “distinctive,” without any development of precisely what the distinctions are or upon what premises they are founded.¹³¹

Such a feeling of distinctive federal court superiority seems to manifest itself quite specifically in the debate over the federalization of crime. Thus, the *Long Range Plan* recommends that criminal conduct with only a “minor” effect on interstate commerce should “not be enough to involve a federal court’s attention.”¹³² Similarly, Judge Miner “object[s] to . . . the use of the federal courts for the prosecution of street-corner sales . . . [and other] small-quantity transactions”;¹³³ and the 1990 Report of the Federal Courts Study Committee bemoans the prosecution of “minor [drug] cases” in federal court.¹³⁴ Indeed, current anti-federalization sources are uniform in this message; an outside reader cannot help but get the impression that some crimes (which ones, other than drugs, are seldom specified) are simply viewed as too trivial and therefore beneath the federal courts’ attention.

The resonations of this claim are disturbing, more so perhaps because they are inexplicit and inferential.¹³⁵ Of course, a great deal of serious crime has little perceivable effect on interstate commerce. Historically it has not been a “significant” impact on interstate commerce that motivates a great deal of specific federal criminal legisla-

contrast, the “superior resources” point is not arguable: the federal courts today have far more dollars per judge—although some view this as part of the national problem—making their resources “superior” to overburdened state systems. See Kaye, *supra* note 5. But surely there are talented and dedicated state judges, and their achievements are perhaps even more admirable given their far more strained resource situation. The point here is not to dispute the assertions, but rather to take issue with their implication: that federal courts or judges are “better” and therefore should not have to handle “trivial” criminal cases. I wish to at least question this claim as a reason for restricting federal criminal jurisdiction. Indeed, if federal courts and judges are in fact “better” than their state counterparts, one might argue that they should handle more criminal cases in a time of national crime and/or judicial resource emergencies.

131. *E.g.*, 1994 LONG RANGE PLAN, *supra* note 4, at 18, 19; see also *id.* at 11 (referencing the “special nature” of the federal court system without precisely explaining it). Some federal court advocates may take the position that if you have to ask, then you can’t understand. This is, however, surely an unsatisfying response to genuine concerns.

132. *Id.* at 21.

133. Miner, *Crime and Punishment*, *supra* note 17, at 683.

134. 1990 FED. COURTS STUDY, *supra* note 3, at 37.

135. This Article is certainly not the first to note this inferential point (although it may be the most blunt). See, *e.g.*, Ann Althouse, *Federalism Untamed*, 47 VAND. L. REV. 1207, 1210 (1994) (arguing that “modest” state court decisions are considered by federal courts to be “unworthy of the attention of the federal judge”); Judith Resnik, *Rereading “The Federal Courts”: Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 VAND. L. REV. 1021, 1052 (1994) (noting that “many judges . . . argue that what is on the federal docket is not worth their time”).

tion or prosecutions.¹³⁶ Indeed, the federal civil rights prosecutions championed today, even by opponents of federalization,¹³⁷ were often state "street crimes" such as assault or murder.¹³⁸ The federal courts were asked to intervene not because the individual cases were non-trivial, but because as a class they threatened a shared national interest or aspiration.¹³⁹

Today, however, it is a different set of "traditionally local" crimes,¹⁴⁰ such as guns on our streets and drugs in our inner cities, that have reached epidemic proportions on a national scale. Local authorities are crying out for federal assistance.¹⁴¹ From what legitimate source may a principle be drawn that such crimes nevertheless remain beneath the attention level of our federal courts?

Indeed, even the *Long Range Plan* is unconsciously schizophrenic on this score. While arguing against federalization of offenses with "minor" impact on interstate commerce, the *Plan* trumpets federal judges as "'keepers of the covenant' and guardians of American constitutionalism" for their heroism in enforcing "the law of the land" in

136. Thus, one of the earliest dual jurisdiction federal crimes, mail fraud, codified at 18 U.S.C. 1341 (1988 & Supp V 1993), requires no effect at all on interstate commerce. Similarly, the post-Civil War civil rights statutes require no interstate effects. See 18 U.S.C. § 241-42 (1988). Indeed, in 1971 the Supreme Court expressly ruled that no interstate commerce effects at all were required for any particular federal loan sharking prosecutions (so long as the "class" of activities had a cumulative effect), so that "trivial" cases could not be precluded from the federal courts. *Perez v. United States*, 402 U.S. 146, 154-57 (1971).

137. *E.g.*, 1994 LONG RANGE PLAN, *supra* note 4, at 5, 22.

138. To take a well-known example, aside from its videotaped prominence and the identity of the assailants, the 1993 Rodney King beating in Los Angeles was little different than hundreds of assaults prosecuted in state courts every day. Disturbing as it is, the fact that the assailants were *local* police officers does not intrinsically suggest special *federal* concern. Similarly, the crime in *Screws v. United States*, 325 U.S. 91 (1945) (sheriffs beat an arrestee to death) while assuredly horrible was simply a homicide, devoid of interstate commerce impact and normally entrusted to the states for prosecution. What made federal prosecution appropriate in *Screws*, however, was a failure of state authorities to effectively deal with the problem; see *infra* text accompanying notes 236-247 (proposing this as an appropriate federalization principle). Indeed, the defendants in *Screws* were the state's local law enforcement authorities. 325 U.S. at 113 (Rutledge, J., concurring in the result).

139. *E.g.*, *Perez*, 402 U.S. at 154 (the "class of activities" enabled federal prosecution) (emphasis omitted); *Screws*, 325 U.S. at 112 (civil rights statutes are "designed to secure individuals their constitutional rights").

140. *Perez*, 402 U.S. at 157 (describing loan sharking subject to federal prosecution).

141. For only a small sample, see, *e.g.*, Valerie Alvord, *Reno Is Told Jails, Prosecutors Needed Here*, SAN DIEGO UNION-TRIB., Oct. 14, 1994, at B1; Julio Barretto, Jr., & Janet E. Quist, *Cities Need Money to Fight Drugs*, J. STATE GOV'T, Apr. 1990, at 50; Paul Chevigny, *Let's Make It a Federal Case: Police Brutality*, NATION, Mar. 23, 1992, at 370; Mitch Gelman & Jill Dutt, *Ready to Cash In; Hoping for More from D.C.*, NEWSDAY, Feb. 7, 1993, at 25.

the South in the 1950s.¹⁴² This Article would certainly join in this praise.¹⁴³ Yet it cannot be gainsaid that much of that heroism was in fact federal "interference" in "local" affairs, involving matters of local violence with minor or no connections to interstate commerce.¹⁴⁴ Despite this fact, and apparently to preserve specially such civil rights prosecutions in the federal courts while otherwise condemning federalization, the *Long Range Plan* suggests a separate principle of federal criminal jurisdiction, vaguely yet clearly designed to capture such cases: "criminal cases raising highly sensitive local issues."¹⁴⁵

The debate regarding the federalization of civil rights offenses was heated in 1870—and in 1950. Yet critics of federalization today do not question the federalization of this particular class of local offenses.¹⁴⁶ However, the principle set forth in the *Long Range Plan*

142. 1994 LONG RANGE PLAN, *supra* note 4, at 5. Of course, state judges also generally swear an oath to defend the United States Constitution, and many take that oath as seriously as do federal judges. Professor Neuborne's masterful article, *supra* note 125, is worthy of updating; it may be that the aspirational description of federal courts and judges has increasingly diminishing validity as a "principle of federalization" today.

143. See JACK BASS, *UNLIKELY HEROES* (1981) for an inspirational account of the hero federal judges.

144. Thus, the dissenters in *Screws* began their heated critique of the federalization (without using the term, of course) of the brutal murder of a black man by a Georgia county sheriff by stating the issue as "whether this patently local crime can be made the basis of a federal prosecution." *Screws v. United States*, 325 U.S. 91, 139 (1945) (Roberts, Frankfurter, & Jackson, JJ., dissenting). In the related civil context, the discriminatory conduct reached by the federal Civil Rights Act of 1964 was presumed to be "of purely local character" in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964) ("Congress may . . . prohibit racial discrimination by motels serving travelers no matter how 'local' their operations may appear").

145. 1994 LONG RANGE PLAN, *supra* note 4, at 21. The comment following this principle expressly references "the height of the civil rights era," *id.* at 22, and in a veiled reference to the Rodney King case and the attendant riots in Los Angeles, *supra* note 138, states that "[e]ven today, some civil rights actions, because of their potential for explosiveness in the community, may be more effectively handled by the national government." *Id.* at 22. But the King case was tried (the second time) by the federal district court in the same local Los Angeles community (indeed, *more* local than the Simi Valley community to which the state trial had been transferred). Precisely what was "more effective" about that is unexplained. Nor does this comment address whether *initial* prosecution of that assault case in federal court would have satisfied the *Plan's* limited federalization principles. If not, why not? If so, why?

146. Neither, of course, does this Article; it takes the more affirmative position, on a principled basis, that such criminal cases are entirely proper in federal court when federal constitutional rights are violated *and* there is a failure of adequate state prosecution. See *infra* text accompanying notes 236-247.

In a creative and wonderfully revivifying article, Professor Akhil Amar has recently argued that there may be a constitutional requirement that civil rights offenses be federalized—although he does not use that term—based on Section 5 of the 14th Amendment. Akhil R. Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95

("highly sensitive issues in the local community"¹⁴⁷) is little more than an ipse dixit. This is apparent simply by way of current example. Today, gun and drug cases would seem to fall within the plain language of "criminal cases raising highly sensitive local issues." Most Americans today report that their fears are higher regarding these local criminal offenses than any other.¹⁴⁸ But the message of the *Long Range Plan* and other current anti-federalizationists seems to be that they do not want these particular "local" crimes in federal courts. Thus, unless the stated principle simply means that civil rights cases are an exception, then the *Plan's* linguistic formulation fails to distinguish (with any clarity or by any principle) the civil rights prosecutions it endorses from its overall anti-federalization position.

The Long Range Planning Committee is surely correct in its general view that no court's resources—state or federal—should be squandered on cases that do not warrant the expenditure of scarce resources.¹⁴⁹ In this sense, as well as in light of their relatively small numbers and high level of achievement, federal courts surely are special resources that ought not be squandered. Thus, substantial components of the *Long Range Plan's* concerns are valid, and the Committee is to be admired for undertaking the daunting task of planning for a future that threatens the quality of justice in all of the court systems in this country.

Yet, having a separate, available forum to handle criminal cases when state or local systems fail may also be vital to "Our Federalism."¹⁵⁰ Federal legislative or enforcement policies based on an expansive concept of the "dignity" of federal courts are unprincipled, founded on unarticulated and disputable premises, and ignore too large a portion of our existing criminal justice system: talented and

COLUM. L. REV. 1, 16-20 (1995). At bottom, this idea seems to be based on a theory of constitutional incorporation of a concept of state failure (*see id.* at 17), the same prudential principle proposed by this Article.

147. 1994 LONG RANGE PLAN, *supra* note 4, at 21.

148. *See* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, in this Symposium Issue (noting current opinion polls).

149. This idea is already recognized in nonprosecution and noncriminal "diversion" policies, designed to shunt criminal violations deemed inconsequential or not serious enough out of the criminal courts. *See, e.g.*, 21 U.S.C. § 844a (1988 & Supp. V 1993) (authorizing purely civil penalties for possession of a "personal use amount" of controlled substances); *infra* note 196 (noting federal nonprosecution policy for single-auto thefts).

150. *Younger v. Harris*, 401 U.S. 37, 43-44 (1971); *see Amar & Marcus, supra* note 146.

struggling state courts. There is an implied elitist and self-protectionist component of this message that seems entirely illegitimate.¹⁵¹

D. Federalism Concerns

A final set of concerns about federalization of crime emerge from the traditional view of the constitutional conception of the union. The federal government, it is said, was created only to address limited and plainly national problems and its courts ought not interfere in state or local affairs without good reason and clear textual support from the Constitution.¹⁵² Alexander Hamilton offered the initial part of this idea with specific regard to crime in Federalist No. 17, as a reason to not think of the proposed federal government as "too powerful."¹⁵³

151. Or as Chief Judge Kaye of the New York State Court of Appeals recently put it, a position that "as long as the whole system is in trouble, why not at least save the Federal courts?" is simply "Federalism Gone Wild." Kaye, *supra* note 5. "A solution that eases the burden on the Federal courts without taking into account the effect on the state court system is no solution at all." *Id.* Other state judges have occasionally expressed similar unhappiness with the federal judiciary's view of state courts. See, e.g., Kentucky Chief Justice Robert F. Stephens, *Commentary on "Planning for the State and Federal Courts": The Additional Problem of Federal Legislation*, 78 VA. L. REV. 1883, 1883 (1992) (noting "a residual attitude problem" among federal judges vis-a-vis their state counterparts).

152. See generally Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954). "[T]he conception of the central government as one of delegated, limited authority" seems settled enough to not require further support. HART AND WECHSLER'S *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 533 (Paul M. Bator et al., 3d ed. 1988). Yet, the literature on "federalism" has grown vast over the past decade; some have suggested that a "rereading" is necessary and that "the reality is that the states have become sub-divisions . . . of the federal government." Resnik, *supra* note 135, at 1049 (1994). The bland account in the text is not intended to endorse any particular side in the inevitable debates regarding conceptions of federalism. See, e.g., Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979, 980 (1993) (discussing "normative federalism"); Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1426-27 (1987) (proposing to "counter the Supreme Court's version of federalism" with a "neo-Federalist" view); Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VAND. L. REV. 1141, 1145 (1988) (proposing "federalist" and "nationalist" models of judicial federalism). The debate is too current and fractured to resolve. See generally Symposium, *Federalism's Future*, 47 VAND. L. REV. 1205 (1994).

But even the traditional account of federalism supports (as this Article contends) a broader conception of federalization than currently is in vogue. A "less federalist" conception might, as well. Professors Rubin and Feely have recently argued that "federalism," apart from simple decentralization of authority, ought to have no significant bearing on determining national policies today. Edward L. Rubin & Malcolm Feely, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994). This conception might support broad federalization of crimes (an effect possibly not intended by the authors) and thus might be generally supportive of themes in this Article; however, it is a theory unexplored by, and unnecessary to, this Article.

153. Hamilton stated that "[t]here is one transcendent advantage belonging to the province of the state governments . . . I mean the ordinary administration of criminal and civil justice." *Id.* at 155. THE FEDERALIST No. 17, at 120 (Clinton Rossiter ed., 1961).

The Tenth Amendment, reserving undelegated powers to the States, seems to embody this idea explicitly.¹⁵⁴ In the context of criminal law, Justice Stewart perhaps said it best in his 1971 dissent in *United States v. Perez*,¹⁵⁵ a case involving a federal prosecution of a local loan shark who operated solely in a small neighborhood in Brooklyn:

[T]he Framers of the Constitution never intended that the National Government might define as a crime and prosecute . . . wholly local activity through the enactment of federal criminal laws. . . . [I]t is not enough to say that loan sharking is a national problem, *for all crime is a national problem*.¹⁵⁶

Significantly, however, Justice Stewart was the lone dissenter in *Perez*, and *Perez* virtually ended the debate about the scope of federal authority to enact criminal laws.¹⁵⁷ Thus, the debate today focuses not on constitutional barriers to federalization, but rather on a search for

154. The Tenth Amendment provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. U.S. CONST. amend. X; *see generally* Gregory v. Ashcroft, 501 U.S. 452, 457-59 (1991) (discussing Tenth Amendment and federalism); Martha A. Field, Garcia v. San Antonio Metropolitan Transit Authority: *The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84, 95 (1985) (noting the Tenth Amendment's limited value as a constitutional basis for states' rights). *Cf.* Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305, 344 (1987) (explicating theory of the Ninth Amendment as a defense against both state and federal governments). However, the Supreme Court long ago rejected Tenth Amendment arguments as a bar to assertion of federal criminal jurisdiction over dual jurisdiction crimes. *Champion v. Ames (The Lottery Case)*, 188 U.S. 321, 357-58 (1903) (upholding 1895 federal act criminalizing interstate transportation of lottery tickets, while explicitly noting the substantive "evils" of gambling and the states' power to forbid it). *Champion*, while well-settled, was not an easy or self-evident case; it was decided 5-4 and was argued three times to the Supreme Court. *See* 188 U.S. at 321 (noting argument and rearguments).

155. 402 U.S. 146 (1957).

156. *Perez*, 402 U.S. at 157 (1971) (Stewart, J., dissenting) (emphasis added). While perhaps stating it best, however, Justice Stewart was not the first to advance such an idea. *See Ex parte Virginia*, 100 U.S. 339, 354 (1879) (Field, J., dissenting) ("The government created by the Constitution was not designed for the regulation of matters of purely local concern.").

157. *Perez* established the proposition that Congress has constitutional authority to reach discrete "local" criminal episodes that are wholly intrastate, at least when it makes findings that the "class of activities" addressed has significant effects in bulk on interstate commerce. 402 U.S. at 154-57. *Perez* has long been viewed as ending debate as to congressional power to "federalize" local criminal conduct. *See* Stern, *supra* note 2, at 283-85. But the pressures placed on federal courts today by a dramatic increase in firearms and narcotics cases prosecuted under this theory has reinvigorated the old debate. Thus, the scope of Congress's criminal authority under its interstate commerce powers was recently revisited in *United States v. Lopez*, No. 93-1260, 1995 LEXIS 3039 (U.S. Apr. 26, 1995), in which the Court struck down federalization of certain gun possession crimes in schools. Congress's failure to make any commerce findings in enacting the law at issue in *Lopez* apparently leaves open the question whether Congress lacks absolute authority to regulate simple

prudential principles to guide inevitable congressional efforts to federalize crime.

Any federalism concerns must note the fact that federalization of crime is not new.¹⁵⁸ The authors of the Constitution plainly envisioned a body of federal criminal law.¹⁵⁹ The statutes of the First Congress from 1789 to 1790, which created a number of dual jurisdiction federal crimes, were enacted by bodies whose membership was drawn substantially from the Constitution's signers.¹⁶⁰ While the Framers almost certainly foresaw a lesser federal role for the federal courts in criminal law than exists today,¹⁶¹ this is just as certainly true with regard to every area in which the Framers expressed a vision.¹⁶² However, if "federalization" means creating federal jurisdiction over crimes that might also be prosecuted by the States, then it has been going on since the First Congress.

For example, in its first month (July 1789), the First Congress enacted federal criminal statutes encompassing bribery and false statements.¹⁶³ After recessing from September until February 1790, the Congress then enacted federal criminal statutes encompassing, *inter alia*, murder, maiming, theft, fraud, and even receiving stolen property.¹⁶⁴ Of course, these statutes had, as all federal criminal statutes

firearms possession. Compare *id.* at * 56-57 (Kennedy, J., concurring) with *id.* at *65 (Thomas, J., concurring).

158. It is necessary to discourse on this point because a contrary "newness" argument tends to underlie current anti-federalization literature. See, e.g., Stephen Chippendale, Note, *More Harm Than Good: Assessing Federalization of Criminal Law*, 79 MINN. L. REV. 455, 458 (1994).

159. See, e.g., U.S. CONST. art. I, § 8 (counterfeiting and piracy); *id.* § 9 (a form of bribery); *id.* art. III, § 3 (treason). A number of procedural provisions of the Constitution also plainly anticipate federal criminal cases, laws, and trials. E.g., *id.* art. I, §§ 9, 10; *id.* art. II, § 2; *id.* art. III, § 2; *id.* art. IV, § 2.

160. See 1 ANNALS OF CONGRESS 3, 16-17, 100-101 (1834) (listing Constitution signers and the subsequently seated members of Senate and House including, for example, James Madison of Virginia).

161. See, e.g., THE FEDERALIST No. 17, at 118-20 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that the federal government is quite unlikely to be interested in "regulation of the mere domestic police of a state" and that "the ordinary administration of criminal . . . justice" lies within "the province of the state governments").

162. Not to mention significant areas where the Framers could have had no clear vision, e.g., securities regulation (15 U.S.C. §§ 77x, 78ff (1981)), wiretapping (18 U.S.C. § 2518 *et seq.* (1970 & Supp. 1995)). See *New York v. United States*, 112 S. Ct. 2408, 2418 (1992) ("The Federal Government undertakes activities today that would have been unimaginable to the Framers . . .").

163. See Act of July 31, 1789, ch. 5, § 35, 1 Stat. 46.

164. See 1 Act of Mar. 1, 1790, ch. 2, § 2, 1 Stat. 102 (false census returns); Act of Apr. 30, 1790, ch. 9, § 3, 1 Stat. 113 (murder); Act of Apr. 30, 1790, ch. 9, § 5, 1 Stat. 113 (theft); Act of Apr. 30, 1790, ch. 9, § 13, 1 Stat. 115 (maiming); Act of Apr. 30, 1790, ch. 9, § 14, 1

must have for proper federal jurisdiction, a connection to stated federal interests.¹⁶⁵ But that merely masks the fact that these were “state” crimes gone federal, because a number of the First Congress’s criminal statutes applied without regard to geography or exclusive federal control.¹⁶⁶

This federalization pattern can be traced over the next two hundred years. Nonexhaustive highlights include making assaults and other civil rights offenses federal crimes after the Civil War;¹⁶⁷ federalizing financial frauds in 1872;¹⁶⁸ the Mann Act federalizing prostitution offenses in 1910;¹⁶⁹ federalization of dangerous drug offenses starting in 1914;¹⁷⁰ and bank robberies “going federal” in 1934.¹⁷¹

Stat. 115 (forgery, counterfeiting, and uttering); Act of Apr. 30, 1790, ch. 9, § 15, 1 Stat. 115 (more theft and falsification); Act of Apr. 30, 1790, ch. 9, § 16, 1 Stat. 116 (general theft); Act of Apr. 30, 1790, ch. 9, § 17, 1 Stat. 116 (receipt of stolen property); Act of Apr. 30, 1790, ch. 9, § 18, 1 Stat. 116 (perjury).

165. Thus, most (but not all, *see infra* note 166) of the foregoing offenses applied to federal employees, to federal property, or to locations “under the sole and exclusive jurisdiction of the United States.” *E.g.*, Act of July 31, 1789, ch. 5, § 35, 1 Stat. 46; Act of Apr. 30, 1790, ch. 9, § 3, 1 Stat. 113. Similarly, the First Congress generally envisioned federal district court jurisdiction as “exclusive[] of the courts of the several states,” not dual. *See* Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 76. However, this was a policy choice; nothing in theory barred dual jurisdiction over criminal offenses that were, in fact, dual jurisdictional in character. *See* Warren, *supra* note 1, at 545-46.

166. For example, the theft provision found in § 16 of the April 30, 1790 Crime Bill expressly applied to theft committed wherever the subject property might be found. Act of Apr. 30, 1790, ch. 9, § 16, 1 Stat. 113. Similarly, separate federal criminal offenses of accessory before and after the fact were applicable wherever “on the land or at sea” the conduct might occur. Act of Apr. 30, 1790, ch. 9, §§ 10-11, 1 Stat. 114.

The § 5 theft provision of the 1790 Crime Bill provides a fascinating example of 18th-century sentencing philosophy, as well as an interesting sidelight on what might be called the “ripple effect” of criminal legislation: federalizing a state crime in order to deter interference with some *other* federal provision. The 1790 Crime Bill provided that, as part of the penalty for murders committed on federal property, Act of Apr. 30, 1790, ch. 9, § 3, 1 Stat. 113, post-execution dissection of the defendant’s body could be ordered. *Id.* § 4. Presumably, dissection was thought to be an additionally powerful deterrent sanction because of its moral repugnancy. But then, to support this penalty, Congress created a separate offense, theft of an executed body, in order to prevent persons from “rescu[ing]” an executed defendant’s body with impunity. *Id.* § 5. This provision expressly applied wherever the body had been “deposited,” not just to such thefts committed on federal property. *Id.*

167. Act of Apr. 9, 1866, ch. 31, § 2, 14 Stat. 27 and Act of May 31, 1870, ch. 114, §§ 4, 5, 16 Stat. 141 (now codified at 18 U.S.C. §§ 241, 242 (1969 & Supp. 1995)).

168. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323 (mail fraud, now codified at 18 U.S.C. § 1341 (1984 & Supp. 1995)).

169. White Slave Traffic Act, Pub. L. No. 61-277, 36 Stat. 825 (1910) (now codified at 18 U.S.C. §§ 2421-2424 (1970 & Supp. 1995)).

170. Act of Dec. 17, 1914, Pub. L. No. 223, 38 Stat. 785 (Act to tax persons distributing “opium or coca leaves [and] their derivatives”).

171. Federal Bank Robbery Act, Pub. L. No. 73-235, 48 Stat. 783 (1934) (now codified at 18 U.S.C. § 2113 (1984 & Supp. 1995)).

Many today undoubtedly believe that strong and obvious "federal interests" support these federal crimes, and that may in fact be so. The relevant point here is simply that each of these statutes reaches, for the most part, conduct that could be prosecuted locally if federal jurisdiction did not exist. Federalization of crime is simply not a new phenomenon.

Despite the continually expanding body of dual jurisdiction federal criminal laws, federalism concerns have consistently been raised in opposition to new federal crimes from the time of *Screws*¹⁷² through the 1980s.¹⁷³ Interestingly, however, such concerns are seldom voiced today in the political criminal federalization debate. This is certainly not because such concerns are no longer present or perceived; instead it seems likely that a silence about federalism concerns has recently arisen because these concerns are essentially political and pull in directions counter to the political leanings of most participants of the current federalization debate.

For example, many "liberals"¹⁷⁴ today oppose the federalization of crime largely because of the severity of federal criminal Sentencing Guidelines enacted in 1986.¹⁷⁵ Yet these opponents may be loath to make states-rights federalism arguments reminiscent of anti-civil rights and anti-New Deal arguments that were successfully battled decades ago.¹⁷⁶ At the same time, the customary advocates of a federalist states-rights theory tend today to be conservative law-and-order proponents of federalizing criminal statutes.¹⁷⁷ They have little inter-

172. *Screws v. United States*, 325 U.S. 91 (1945).

173. *See, e.g., United States v. Turkette*, 452 U.S. 576, 586 (1981) (noting argument that application of federal RICO statute to present facts "will substantially alter the balance between federal and state enforcement of criminal law").

174. Of course, the limitations of using stereotypical characterizations such as "liberal" and "conservative" must be recognized. Yet the labels are useful, it would seem, in conveying certain broad points. *See, e.g., Fallon, supra* note 152, at 1146 (using "liberal" and "conservative" to discuss uses of models of "judicial federalism"); Field, *supra* note 154, at 117 n.169 (noting other counterintuitive "liberal" versus "conservative" positions).

175. In 1986 Congress enacted the first of increasingly severe "mandatory minimum" sentencing schemes for drugs. Pub. L. No. 99-570, 100 Stat. 3207-2 (codified at 21 U.S.C. § 841(b)(1)(1988)). In 1987 new federal Sentencing Guidelines were promulgated; the Guidelines were viewed as generally increasing the average length of federal sentences. *See Criticizing Sentencing Rules, U.S. Judge Resigns*, N.Y. TIMES, Sept. 30, 1990, at B22. *See also supra* note 67.

176. *See, e.g., the arguments in dissent in Screws v. United States*, 325 U.S. 91, 138-61 (1945); *United States v. Darby*, 312 U.S. 100, 105-08 (1941) (recounting the losing arguments of appellee).

177. For example, conservative U.S. Senator Alphonse D'Amato of New York (R-NY) is generally credited with one of the broadest federalization suggestions ever advanced, a crime bill amendment that would federalize *any* violent crime committed with a firearm.

est in raising federalism concerns that might be used to block federalizing criminal legislation they favor. The result is the surprising silence regarding federalism concerns, at least in the political realms where the federalization debate is being played out.¹⁷⁸

Yet, federalism concerns are far from inconsequential; in fact, they may have the strongest claim to legitimacy in the debate. Despite the fact that the First Congress "federalized" some dual jurisdiction crimes, it seems clear that the vision of the Framers did not include federal criminal courts of general jurisdiction.¹⁷⁹ And while "local" crimes increasingly have been federalized during the past 200 years, the process has been halting and controversial.¹⁸⁰ Without further detailing the substantial work that has been done in this area, it is safe to assert that the constitutional foundations of our government generally contemplate a more restricted role for federal courts than for state courts with regard to criminal cases.¹⁸¹ Thus the federalism concerns that are present (if not currently voiced) in the federalization debate cannot be ignored.

See Taking Back Our Streets Act of 1995, H.R. 3, 104 Cong., 1st Sess. (1995), which is based on § 1213 of S. 1241, 102d Cong., 1st Sess. (1991). The D'Amato Amendment is the repeated rallying point of the federal judiciary's anti-federalization views. See, e.g., *Crime Bill Moves Through House*, THE THIRD BRANCH (Administrative Office of the U.S. Courts), Jan. 1995, at 1 (noting with favor that the D'Amato Amendment is not included in the House Crime Bill).

178. Not directly involved on the political front and sharing common work place concerns, the federal judiciary appears to be a unified and vocal exception despite any political divergence. See 1994 LONG RANGE PLAN, *supra* note 4, at 139-40 (Long Range Planning Committee composed of appointees from both parties); Rehnquist, *1994 Year-End Annual Report*, *supra* note 47, at 1 (presenting federalist-sounding arguments); United States v. Lopez, No. 93-1260, 1995 LEXIS 3039 (U.S. Apr. 26, 1995). Judge Schwarzer and Russell Wheeler's recent compilation of the arguments "on federalization" also surveys concerns similar to those discussed here. ON FEDERALIZATION, *supra* note 5, at 10-17. Yet, perhaps recognizing the sensitivity of such arguments in other contexts, that discussion never uses the term "federalism," nor does it advert to the political use of such arguments in past unrelated debates.

179. See Sara Sun Beale, *Federal Criminal Jurisdiction*, in 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 775-76 (Sanford H. Kadish ed., 1983) [hereinafter Beale, *Federal Criminal Jurisdiction*]; THE FEDERALIST No. 17, *supra* note 153. See also United States v. Dewitt, 76 U.S. 41, 44-45 (1869) (Congress has no general "police regulation" powers).

180. Professor Beale views the history of federalization as somewhat more halting than does this Article. Beale, *Federal Criminal Jurisdiction*, *supra* note 179, at 776. This may or may not be more a descriptive disagreement than a substantive one.

181. Whether, or how much, this original contemplation ought to influence current affairs is a matter of debate which this Article need not settle. See *supra* note 152. For if federalism concerns are due no weight, then even broader federalization of crime than suggested here might be appropriate. For now, this Article gives some, but not overwhelming, weight to originalist federalist concerns.

It seems fair to say that mainstream federalism concerns support some presumption against federalizing criminal conduct that is already prosecutable by the states.¹⁸² In fact, in a very different context, the Supreme Court has previously recognized something similar to a federalism presumption against certain congressional legislation.¹⁸³ Under such an analysis, some good cause (defined by whatever federalization principles are chosen), as well as textual authority in the Constitution, should be demonstrated before the federal government criminalizes matters of local concern.¹⁸⁴

One final federalization myth should be addressed here: despite rhetoric to the contrary, federalization need not be forever. Some federalization critiques argue that making more and more crimes federal continually skews the federal-state balance in one direction and irreparably rends the fabric of our federalism.¹⁸⁵ This concern is countered to some extent by the theory that because Congress is composed of officials elected at state and local levels, any congressional decision to federalize is, in some sense, made by the States' representatives who will protect the States' interests.¹⁸⁶

A more immediate counterpoint, however, is simply to note that federalization need not be, and has not always been, forever. This is true both by reference to prior historical episodes of controversial federalization efforts and by noting the possibility of using legislative "sunset" provisions in federal criminal laws.

182. At the conclusion of their pamphlet, Schwarzer and Wheeler somewhat abruptly assert a similar set of "working presumptions," although their source, and some development of the meaning and application of their presumptions, is not offered. *ON FEDERALIZATION*, *supra* note 5, at 47.

183. *Gregory v. Ashcroft*, 501 U.S. 452 (1991), held that in order not to tread unnecessarily on the states' inherent authority to regulate their own judiciaries, a presumption against finding that Congress intended to so intrude when it enacted the Age Discrimination Act should operate, rebuttable only with very clear intentional language. *Id.* at 469-70. See Rubin & Feely, *supra* note 152, at 904 (describing *Gregory's* holding as "principles of federalism created a presumption against" legislation).

184. See *infra* text accompanying notes 236-247.

185. Thus, in *United States v. Turkette*, 452 U.S. 576, 586 (1981), the Court noted that "it is urged that [a broad] interpretation of RICO . . . will substantially alter the balance between federal and state enforcement of criminal law." *Accord ON FEDERALIZATION*, *supra* note 5, at 18, 19-21 (describing similar arguments). The Court's response in *Turkette*, of course, was simply to acknowledge that even if this objection were accurate, "Congress was well aware that it was entering a new domain of federal involvement" when it enacted RICO and nothing constitutionally constrained it from so acting. 452 U.S. at 586.

186. See Jesse H. Choper, *The Scope of National Power Vis-a-vis the States: The Dispensability of Judicial Review*, 86 *YALE L.J.* 1552, 1560-63 (1977); Herbert P. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *COLUM. L. REV.* 543, 546 (1954).

The most obvious case of temporary federalization is Prohibition. For over a decade, the federal government was involved in criminally enforcing a constitutional ban on intoxicating liquors.¹⁸⁷ This plunged the federal courts into the most dramatic criminal caseload crisis in history.¹⁸⁸ Eventually, however, the failure of this effort was generally recognized, and federal Prohibition was repealed in 1933.¹⁸⁹ As the American Law Institute concluded in 1934, because of the removal of Prohibition cases, the federal courts "should experience no further difficulty in promptly dispatching their business"¹⁹⁰

A different sort of temporary federalization can occur not by repeal, but by policies of nonprosecution. Such de facto defederalization has occurred, for example, with regard to the Dyer Act, which federalized the crime of auto theft in 1919.¹⁹¹ Enacted expressly to "crush" interstate auto thefts,¹⁹² the Dyer Act resulted in an average of 1,466 federal prosecutions per year from 1922 to 1933.¹⁹³ This statute has not been repealed,¹⁹⁴ and interstate auto theft has not been "crushed." Yet, by 1991, the number of federal auto theft prosecutions had dropped to 205 or less, or little more than two cases per year

187. Enacted in 1919 (effective in 1920), the Eighteenth Amendment to the Constitution provided that "the manufacture, sale, or transportation of intoxicating liquors within . . . The United States . . . is hereby prohibited." U.S. CONST. amend. XVIII, *repealed* by U.S. CONST. amend. XXI. Congress immediately enacted the Volstead Act (National Prohibition Act) criminalizing conduct in violation of the Eighteenth Amendment over President Wilson's veto. See Pub. L. No. 66-66, 41 Stat. 305 (1919); HERBERT ASBURY, *THE GREAT ILLUSION: AN INFORMAL HISTORY OF PROHIBITION* (1950). In 1933 the Twenty-First Amendment was ratified, repealing the Eighteenth Amendment and ending large-scale federalization of prohibition crimes, leaving liquor enforcement to the states. U.S. CONST. amend. XXI.

188. See Beale, *Federal Criminal Jurisdiction*, *supra* note 179, at 778; *supra* text accompanying notes 51-54.

189. U.S. CONST. amend. XXI.

190. AMERICAN LAW INSTITUTE, *A STUDY OF THE FEDERAL COURTS, PART I: CRIMINAL CASES* 3 (1934).

191. Pub. L. No. 66-70, 41 Stat. 324, 325 (1919). Sponsored by Senator Dyer, "The National Motor Vehicle Theft Act" made it a federal crime to "transport[] in interstate . . . commerce a motor vehicle, knowing the same to have been stolen." While this technically refers to an interstate transportation crime rather than purely auto theft, this statute historically was used to prosecute simple auto thefts in which no particularly strong or unique federal interest appeared. See, e.g., *United States v. Maze*, 468 F.2d 529, 536-38 (7th Cir. 1972) (analyzing 11 other federal appellate decisions), *aff'd on other grounds*, 414 U.S. 395 (1974).

192. H.R. REP. NO. 312, 66th Cong., 1st Sess. (1919).

193. See Rubin, *supra* note 4, at 500-01. This figure may also include thefts from interstate carriers under the 1913 Carlin Act. *Id.* at 500 n.15. Even if this is so, however, the result today has been de facto defederalization, as federal Carlin Act prosecutions are also rare.

194. 18 U.S.C. § 2312 (1970 & Supp. 1995).

per federal district.¹⁹⁵ In fact, auto theft is simply not federally prosecuted, absent either multiple thefts (*i.e.*, a “ring”) or some accompanying criminal conduct that is thought to warrant federal attention.¹⁹⁶ Thus, by general agreement and exercise of federal prosecutorial discretion, federalized auto theft is virtually no burden at all on the federal courts—it has been *de facto* repealed.¹⁹⁷

Finally, in addition to the possibility of the repeal of federalized crimes (*de jure* and *de facto*), Congress has authority to attach a “sunset” provision to criminal statutes thought to be particularly controversial. Such a provision might state that the statute will expire (and thus the conduct would no longer be a federal offense) after some experimental period (say five years), unless Congress acts.¹⁹⁸ This is a familiar concept civilly.¹⁹⁹ There is no reason in theory that such provisions could not be used to address the specter of “permanent” federalization. In fact, Congress specifically provided for the “sunset” of one of the new firearms offenses in the 1994 Crime Bill.²⁰⁰

195. Administrative Office of the U.S. Courts, Federal Judicial Workload Statistics 50 (1991).

196. See UNITED STATES ATTORNEYS MANUAL 9-61.112 (directing that “individual thefts” of autos not be prosecuted absent “exceptional circumstances”). This is also based on the author’s personal familiarity with unpublished federal prosecution guidelines for the U.S. Attorney’s Office in the Northern District of California, and a conversation with Eb Luckel, Deputy Chief of the Criminal Division of that office. Interview with Eb Luckel, Deputy Chief of the Criminal Division, Office of the United States Attorney, Northern District of California (Mar. 17, 1995) (auto thefts “are not prosecuted on a single-auto basis”; “we haven’t had a case like that in my memory”) (notes on file with the *Hastings Law Journal*).

197. Cf. BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991) (explaining concept of “amending” the Constitution nonformally, by practice). This is not to say that federal auto theft prosecutions might not be revived again, were some appropriate principle for such revitalization to manifest itself. Indeed, the possibility of such instant refederalization is, some might say, a benefit of nonprosecution defederalization over legislative repeal. The present point, however, is that federalization of auto theft in an earlier time has not, in fact, irreparably shifted the state/federal prosecution balance. See also *supra* note 31 (regarding nonprosecution of such federal crimes as 4-H club impersonation, etc.).

198. See generally Bruce Adams, *Sunset: A Proposal for Accountable Government*, 28 ADMIN. L. REV. 511 (1976) (arguing that sunset provisions would create “an incentive for periodic and comprehensive . . . evaluation” of government programs and agencies); Dan R. Price, *Sunset Legislation in the United States*, 30 BAYLOR L. REV. 401 (1978) (discussing the Sunset Movement).

199. A computer-aided search of the United States Code for the phrase “sunset provision” in the LEXIS, Codes Library, Allcodes file, yields more than 100 federal statutes containing some sort of sunset provision. See, e.g., 5 U.S.C. § 571 (Supp. 1995) (referencing Pub. L. No. 101-552, § 4(b), 104 Stat. 2738); 47 U.S.C. § 548(c)(5) (1994).

200. See Pub. L. No. 103-322, tit. IX, § 110105(2), 108 Stat. 2000 (Sept. 13, 1994) (ten-year sunset for sections 922(v), (w), and Appendix A of Title 18).

However, sunset provisions can also create serious and complex problems.²⁰¹ At the very least, much judicial and legislative energy and resources would be spent keeping track of various deadlines, reenactment, and debates about what conduct falls within or outside of periods of illegality. Moreover, using sunset provisions instead of substantively determining what principles ought to govern federalization simply substitutes a politically expedient gimmick for serious analysis. On balance, this Article does not advocate sunset provisions for criminal laws, but merely notes that they can provide an alternative to entirely foreclosing federal criminal jurisdiction over new, controversial federal crimes.

II. Principles of Federalization

Normative, consequential preferences support federalization limited by a set of principles. Whether or not federal judges are overworked, a lower caseload does provide more time for reflection in criminal as well as civil cases. Opportunity for care ought to be valued in any court system and ought not be unnecessarily constrained. Similarly, having a relatively low number of life-tenured federal judges may be intrinsically valuable.²⁰² Finally, if it is true that the states' criminal justice systems are so overburdened that they fail to deliver a high quality of justice, then we ought not unnecessarily move in the direction of federal equalization. Caseload equality between the state and federal systems, simply for equality's sake, is unprincipled and shortsighted.

For these reasons, a presumption against federalization is appropriate, to preserve some advantage for these intangible yet valuable factors.

201. For example, early 1994 saw controversy surrounding the sunset lapse, and then reenactment, of the federal Independent Prosecutor Act. See James Risen, *Appellate Court Asked to Review Starr Appointment*, L.A. TIMES, Aug. 13, 1994, at A23. See also Mark B. Blicke, *The National Sunset Movement*, 9 SETON HALL LEGIS. J. 209 (1986); Lewis A. Davis, *Review Procedures and Public Accountability in Sunset Legislation: An Analysis and Proposal for Reform*, 33 ADMIN. L. REV. 393 (1981).

202. Compare Reinhardt, *supra* note 3, at 53 (proposing that Congress double the size of the courts of appeals) with Jon O. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187 (1993) (arguing that more than 1,000 federal judges, trial and appellate combined, would negatively affect the quality of federal justice). As Professor Resnik has pointed out, however, once the hundreds of non-Article III judges already acting in the federal system are counted, the 1,000 judge limit has already been exceeded. Resnik, *supra* note 57.

A. A Presumption Against Federalization

Any decision to legislate into federal law a crime already prosecutable by the states ought to be guided by some set of principles; it should not be ad hoc or unthinkingly reactive. A starting point ought to be a rebuttable presumption against federalization: even if criminal federalization is not crushing our federal courts, traditional federalism principles (as well as other concerns) suggest that an initial presumption ought to run against federalizing criminal conduct over which there already exists state criminal jurisdiction.²⁰³

However, any such presumption must be rebuttable because all participants in this debate appear to agree that federalization of crime is appropriate or necessary in some circumstances.²⁰⁴ Thus, the search for principles is an inquiry as to what guidelines are appropriate and useful in deciding when the presumption against federalization should be overcome and new federal crimes enacted.

B. The Problem with Principles

A principled jurisprudence of federalization is thus the goal.²⁰⁵ However, guidelines that are comprehensible, relatively specific, and have some modicum of apolitical acceptance are necessary if the prin-

203. *Accord ON FEDERALIZATION*, *supra* note 5, at 47. *See supra* text accompanying notes 182-184.

204. *E.g.*, 1994 LONG RANGE PLAN, *supra* note 4, at 19-22; ON FEDERALIZATION, *supra* note 5, at 47. Thus, the 1994 Long Range Plan, which is generally opposed to federalization, states that “[n]o one seriously disputes that conduct directly injurious to or affecting the federal government or its agents” should be federalized. 1994 LONG RANGE PLAN, *supra* note 4, at 21. The Plan also asserts that “federal criminal jurisdiction should also reach . . . environmental concerns, nuclear regulation, and . . . migratory birds,” because these are “interests unquestionably associated with a national government” or are its “inherent interests.” *Id.* Finally, the Plan recommends continued federalization of crimes with “sophisticated” or “substantial multistate . . . aspects,” “serious . . . local government corruption,” and “criminal cases involving highly sensitive local issues.” *Id.*

205. This Article suggests that appropriate principles governing federalization ought to be applicable without regard to the substantive content of the criminal conduct at issue. In an earlier age, this goal might have been described as a search for “neutral principles.” *See* Herbert P. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). A more recent conception might be that of “transsubstantive” procedural rules as developed by the late Professor Robert M. Cover. *See* Robert M. Cover, *For James Wm. Moore*, 84 YALE L.J. 718, 721-22 (1975). Again, this Article purports only to acknowledge, rather than to solve or choose a side in, the “trans-substantivity tangle.” *See* Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 776-79 (1993); *cf. supra* note 152.

ciples are actually to influence policymakers who have the power to act in this area.²⁰⁶

Also, such principles are necessary only for dual jurisdiction criminal conduct. When criminal conduct adversely affects federal interests where a state does not have criminal jurisdiction (e.g., on military reservations, overseas, or on the high seas), then federalization of that criminal conduct may be appropriate even if it would not be were jurisdiction dual.²⁰⁷ This is because no (or at least not as strong an) anti-federalization presumption operates with regard to exclusive jurisdiction criminal conduct. The present question, then, is what principles should govern federalization of dual jurisdiction criminal conduct, which presumptively should remain with the states.

Part of the difficulty in the federalization debate is that there already exists a large body of federal criminal law,²⁰⁸ much of which federalizes dual jurisdiction conduct. Many of these existing federal crimes have their champions who propose principles that will "capture" their favorites while limiting federalization overall. For example, the *Long Range Plan* asserts that "[n]o one seriously disputes" that crimes committed "against the federal government itself or its agents" should be federalized.²⁰⁹

But why should this not be disputed? Why ought the federalization debate not return to first principles and consider the substantive content of federal law as a *tabula rasa*, so to speak? For example, murder is an oft and competently prosecuted state crime.²¹⁰ Why should any murder of the thousands of persons encompassed by 18 U.S.C. section 1114 be federally prosecuted?²¹¹ Or murder of the

206. That is, Congress and the executive branch are the actors who propose, enact, veto or sign, and execute new federal criminal laws. Federalization principles that have been agreed upon only by judges and academics lack practical value unless accepted and understood by legislators, executive branch policymakers, and prosecutors.

207. See *supra* text accompanying notes 18-22 (discussing category of truly "exclusive" federal jurisdiction).

208. See generally NORMAN ABRAMS & SARA SUN BEALE, *FEDERAL CRIMINAL LAW* (2d ed. 1993).

209. 1994 LONG RANGE PLAN, *supra* note 4, at 21; see also *supra* note 204 (noting other descriptions of assertedly appropriate, existing federalization in the *Long Range Plan*).

210. That is, competently prosecuted in general; specific case failures may well give pause. E.g., *Screws v. United States*, 325 U.S. 91 (1945). But to the extent that we believe murder should be federalized because states fail to adequately protect federal interests, the principle being applied is one of state failure. See *infra* text accompanying notes 236-247 (proposing just such a principle).

211. Section 1114 of Title 18 of the United States Code provides for federal prosecution for murders or attempted murders of "any officer or employee . . . or person assisting" or "any civilian . . . employee" of over 30 federal agencies. (1984 & Supp. 1995). No

President, for that matter?²¹² Similarly, the *Long Range Plan* asserts that any crime related to a “regulatory field” which Congress has already preempted “should” be federalized.²¹³ But why? Surely we can formulate principles more principled than “everything already federalized [except guns and drugs] should remain so.”²¹⁴

Part of the problem with federalization, then, is that we like it in discrete instances. Thus, the Long Range Planning Committee trumpets federalization of civil rights offenses.²¹⁵ Similarly, when the 1994 Crime Bill federalized some domestic violence cases in the Violence Against Women Act, critics of expanding federal criminal jurisdiction generally found reason to support that specific legislation.²¹⁶ But “special interests” as a standard provides no principled guidance, any more than does “existing federalized crimes” or “crimes we hate.” How can we separate the “good” federal crimes from the “bad”?

Even ardent opponents of federalization assert that certain criminal conduct, while certainly dual jurisdictional, is so offensive to important federal interests that it must be federalized.²¹⁷ Assassinating the President is one clear (and neutral) example; counterfeiting fed-

principle of federalization is apparent here; victims need not necessarily have been acting in pursuit of their federal duties at the time of the assault, and other federal agencies are not listed. The list of protected federal agents appears to have been created ad hoc over time. See Legislative History note following 18 U.S.C. § 1114 (1992) (showing dozens of amendments since 1951).

212. Indeed, while murder of the federal officials listed in 18 U.S.C. § 1114 has been a federal crime for decades, murder of the President was not made a federal crime until 1965 after President Kennedy was assassinated. See Pub. L. No. 89-141, § 1, 79 Stat. 580 (codified at 18 U.S.C. § 1751 (1988)).

213. 1994 LONG RANGE PLAN, *supra* note 4, at 21.

214. As another example, while arguments for federalizing crimes related to “wildlife preservation” (migratory birds, etc.) may be very strong (likely on a “state failure” theory), they are not even advanced in the *Long Range Plan*’s assertion that they “should” be federalized simply because such crimes already have been. 1994 LONG RANGE PLAN, *supra* note 4, at 21. If the debate were returned to first principles, reasonable minds likely could differ regarding the relative priorities of federal narcotics versus migratory bird criminalization.

215. 1994 LONG RANGE PLAN, *supra* note 4, at 5, 21-22. So too, it must be noted, does the author of this Article.

216. See Eleanor H. Norton, *Federalizing Feminism*, THE RECORDER (S.F.), Aug. 11, 1994, at 8. Again, a version of a “state failure” theory was advanced by Representative Norton. *Id.* (asserting “inadequacy—even collapse—of local law to protect women”). See 18 U.S.C. §§ 2261—2266 (Supp. 1995) (codifying criminal provisions of the Act).

217. This seems to be the tenor of the *Long Range Plan*’s primary recommendation on this point. 1994 LONG RANGE PLAN, *supra* note 4, at 20-21 (Recommendation 1 in the Nov. 1994, Recommendation 2 in the Mar. 1995). This recommendation, however, in fact combines several discrete conceptions, including “conduct injurious to or affecting the federal government”; exclusively federal crimes (“treason”); and “regulatory field[s]” that Congress “has taken over or preempted.” *Id.* (emphasis added). See *supra* note 204.

eral currency may be another. The civil rights offenses (protecting the exercise of federal constitutional rights) are other often-pointed-to examples.²¹⁸ Yet while civil rights offenses are important, their federalization seems based not merely on importance, but on some additional, unarticulated principle different from that which supports federalizing the assassination of the President.

A principle of federalization that merely enshrines "important" federal interests or some similar concept²¹⁹ provides no useful guidance; instead it resonates of "we know it when we see it" (a standard that proved unsatisfying in its original context²²⁰). A principle that proposes to federalize only when there is a "strong" (as opposed to unique) federal interest at stake is not helpful because of its semantic manipulability. Not only is "federal interest" an empty vessel whose substantive content is far from universally agreed upon, but any intensifier—strong, important, direct—simply adds to the potential manipulability. Thus, one person's concept of a "strong federal interest" might well be another person's idea of a "trivial local crime."²²¹

Take the federal civil rights offenses. The idea that there is a strong federal interest in prosecuting assaults motivated by racial animus is well-accepted today.²²² Because we are protecting the free exercise of federal constitutional rights, the federal courts are obviously

218. 18 U.S.C. §§ 241, 242, 245 (1988); see 1994 LONG RANGE PLAN, *supra* note 4, at 21-22.

219. The *Long Range Plan*, at different points, refers to "inherent [federal] interests" and "interests unquestionably associated with a national government." 1994 LONG RANGE PLAN, *supra* note 4, at 20-21. "Unquestionably" is a strong, undefined, and debatable term. For example, listing the protection of migratory birds among the interests encompassed by this principle is surely at least "questionable" when scarce federal judicial resources are at issue. *Id.* at 21. See also ON FEDERALIZATION, *supra* note 5, at 47.

220. See *Jacobellis v. United States*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring); *Paris Adult Theater I v. Slayton*, 413 U.S. 49, 82 (Brennan, J., dissenting) (noting the ad hoc, five-votes *Redrup* procedure for evaluating obscenity cases at the Supreme Court). Justice Stewart's pithy and even pleasing assertion never garnered more than his own vote in the obscenity context.

221. Cf. Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and the Martian Chronicles*, 78 VA. L. REV. 1769, 1831 (1992) (colorfully making a similar point by noting that "one person's Martian may be another person's Venusian").

222. This view, so easily accepted today, was hotly contested when the conduct was first federalized in 1866 and remained so even into the 1950s. See generally *United States v. Price*, 383 U.S. 787, 806 (1966) (noting different view of federal/state division of authority in the 1950s); Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2131 (1993) ("The federalism problem . . . preoccupied the congressional debates over the 1866 . . . Act.").

the appropriate forum.²²³ Yet if it is universally agreed today that there is a strong federal interest in prosecuting assaults motivated by racial animus,²²⁴ cannot a similar argument be applied to narcotics and firearms offenses?

The argument goes something like this: Many governmental officials currently believe that narcotics ruin tens of thousands of lives each year; indeed, the societal costs are staggering. Similarly, governmental officials at every level apparently believe that firearms violence in our communities represents a national crisis.²²⁵ Moreover, vital federal constitutional interests are at stake, starting with the rights enshrined in our Constitution's Preamble: "to insure domestic Tranquility" and "secure the Blessings of Liberty to ourselves and our Posterity."²²⁶ To respond, Congress must federalize these offenses and vigorously pursue federal prosecutions, at least until the national crisis subsides. The powerful engine of federal law enforcement is needed no less than when "local" civil rights crimes threatened our national social fabric.

This argument may not convince you. But if principles of federalization are to provide useful guidance for legislators and the executive branch, then the audience that must be convinced is not judges or legal scholars, but others more (or at least no less) prone to take advantage of rhetorical manipulability. Unless we are to surrender the federalization debate entirely to rhetoric, more specific guiding principles are required.

Another possible set of limiting federalization mechanisms might focus purely on workload objections to federalization and borrow from jurisdictional minimum concepts applied in federal civil stat-

223. This was, of course, not obvious to Justices Frankfurter, Roberts, or Jackson, whose joint dissent in *Screws v. United States*, 325 U.S. 91 (1945), characterized the "brutal" murder of the black victim by white sheriff's deputies as a "patently local crime." *Id.* at 139.

224. See Amar & Marcus, *supra* note 146; 1994 LONG RANGE PLAN, *supra* note 4, at 5, 21-22 (endorsing federalization of civil rights offenses).

225. See, e.g., 140 CONG. REC. S13,121 (daily ed. Sept. 22, 1994) (statement of Sen. Feinstein) ("violence in our communities . . . is simply out of hand," citing reports on guns in schools).

226. U.S. CONST. pmbl.

utes.²²⁷ Indeed, a few scattered federal criminal provisions already embody such quantifiable jurisdictional devices.²²⁸

Thus, if some substantive distaste for "minor" drug and gun crimes in fact underlies the federal judiciary's current federalization concerns,²²⁹ 21 U.S.C. section 841(a) could be amended to federalize only those narcotics offenses involving a significantly large amount or high street value of controlled substances. That is precisely how the penalty structure for federal narcotics offenses currently works: the penalties become more severe as the quantity of controlled substance involved increases.²³⁰ Gun crimes could also be similarly limited: federal criminal jurisdiction might be extended only to offenses involving three or more guns, particularly lethal weapons, or shootings resulting in injury or death.²³¹

But while such mechanisms could immediately address workload concerns,²³² they are also unprincipled in the sense of that term applied here. The only principle operating in such a structure is a protectionist one—to protect federal courts from hearing many presently federalized gun and drug cases—but without a principled distinction

227. I thank my colleague Richard Marcus for suggesting the consideration of such mechanisms from the civil side. For example, civil cases based on diversity of citizenship cannot be filed in federal court unless "the matter in controversy exceeds the sum or value of \$50,000." 28 U.S.C. § 1332 (1993). Similarly, until 1980, the civil "federal question" statute provided federal jurisdiction only when the amount in controversy exceeded \$10,000. 28 U.S.C. § 1331 (1978) (repealed 1980).

228. *E.g.*, 18 U.S.C. § 1957 (1995) (limiting federal prosecution to cases involving "criminally derived property . . . of a value greater than \$10,000").

229. *See supra* text accompanying notes 64-79 and 140-48.

230. The primary federal narcotics statute, 21 U.S.C. § 841(a) (1988), simply criminalizes possession with intent to distribute "a" controlled substance, no matter what the amount. Subsection (b) then sets out a lengthy penalty hierarchy tied to the quantity of drugs at issue. For example, if the offense involves less than 500 grams "of a mixture or substance containing a detectable amount of cocaine," the penalty is from 0 to 20 years; if between 500 grams and 5 kilograms, then the penalty is 5 to 40 years; and if 5 kilograms or more, then 10 years to life. 21 U.S.C. § 841(b) (1988). If limiting the federal criminal caseload is the goal, such quantity concepts could simply be moved into section 841(a).

231. Current federal weapons offenses require merely that the firearm be "use[d] or carrie[d]" (18 U.S.C. § 924(c) (1976 & Supp. 1995)) or "receive[d] or possesse[d]" (26 U.S.C. § 5861 (1989)).

232. Another idea from the civil side that has at least some initial theoretical attraction is some conception of abstention, *see, e.g.*, *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *Younger v. Harris*, 401 U.S. 37 (1971); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), although that doctrine as civilly applied has been criticized and hardly seems transferrable to the criminal context. *See generally* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 *YALE L.J.* 71 (1984); *but see* Rosemary Herbert, *Abstention as a Solution to Successive State and Federal Prosecutions* (Spring 1985) (unpublished student manuscript, on file with author).

from "minor" civil rights assaults, bank robberies, or false statements on federal forms.²³³ If narcotics and weapons crimes truly are nationally widespread in crisis proportions, refusing to address them with federal resources simply for workload reasons arguably violates the notion of a responsive federal government. Nor is simply throwing federal money at the problem, while closing the federal courthouse doors, a principled response if state courts are already handling five times as many criminal cases per judge.²³⁴

The federalization debate ought to turn on an axis more principled than workload: indeed, all sides seem to recognize that regardless of workload, it is sometimes proper for federal court resources to concentrate on national criminal problems (such as civil rights or even narcotics on occasion²³⁵). The challenge is to capture linguistically a comprehensible description of criminal conduct that is appropriately federal, rather than to simply roll up the federal courthouse drawbridges on a workload rationale.

C. A Principle of Demonstrated State Failure

It may be that no language can capture the principles we want to apply, without being so generalized as to be useless as a practical matter. And, of course, no principles will work if subject to unprincipled

233. See 18 U.S.C. § 1001 (1976 & Supp. 1995) (permitting federal prosecution for any false statement made "in any matter within the jurisdiction of any department or agency of the United States"). Consistent with this broad language, this statute has been held to encompass even false statements made to state agencies, if they ultimately might come "within the jurisdiction" of some federal agency. *E.g.*, *United States v. Facchini*, 832 F.2d 1159, 1160 (9th Cir. 1987).

234. See *supra* text accompanying notes 59-63 (discussing state courts' criminal caseload); accord Hon. J. Anthony Kline, *Comment: The Politicalization of Crime*, in this Symposium Issue. Without addressing this imbalance, the *Long Range Plan* recommends "an increase in federal resources allocated to state criminal justice systems" and indeed goes so far as to suggest that Congress "encourag[e] prosecution of federal crimes in state courts." 1994 LONG RANGE PLAN, *supra* note 4, at 22-23. But, as Chief Judge Kaye notes, swamped state courts are likely to be hostile to such proposals. Kaye, *supra* note 5.

235. Thus, the *Long Range Plan* provides that "a massive enterprise, such as a multi-state drug operation," or even a "sophisticated enterprise" within a "single state," would be appropriate federal criminal cases. 1994 LONG RANGE PLAN, *supra* note 4, at 21. The example given for the latter category, however, is "white collar crime," *id.*, rather than sophisticated urban gangs that are presently often prosecuted in federal courts.

application.²³⁶ Yet even a preliminary set of guidelines is better than the current ad hoc approach.²³⁷

“Unique” federal interests is too limited; “intrastate commerce” is too broad; and “strong” federal interests is too manipulable. There is, however, a principle that both explains many past federalizations that we currently accept and might realistically work to limit future federalization: demonstrated state failure. This principle would endorse the federalization of criminal conduct only when there is a demonstrated failure of state and local authorities to deal with the targeted conduct.²³⁸

A concept of demonstrated state failure as a guide to principled federalization immediately raises questions. What counts as failure? Who may, or must, demonstrate the failure? What sort of demonstration is required? Is there judicial review and, if so, of what scrutiny? Such important questions cannot be exhaustively addressed here; only a brief sketch is provided and further development will be necessary.

A principle of demonstrated state failure requires a comparison of state and local versus federal realities (workload, resources, investigative differences, etc.), rather than an absolute assertion that any particular criminal conduct is “appropriately” or “not appropriately” federal.²³⁹ “Failure” is intended to be nonpejorative; it encompasses a simple resource-driven inability to address criminal conduct, as well as

236. That is, perhaps no principles can prevent federal congresspersons (who lack any other immediate forum in which to demonstrate their will—they cannot directly file state legislation) from making carjacking a federal crime in response to a few highly publicized cases. See *supra* note 16. If so, this Article suggests a second-level “check” on the possibility by demanding that federal prosecutors also apply federalization principles before exercising any dual jurisdiction they are given by Congress. See *infra* text accompanying notes 248-254.

237. Thus, despite the academic critique in this Article, the efforts of the Long Range Planning Committee, Judge Schwarzer, and Russell Wheeler to state guiding principles are extremely valuable.

238. Such a concept is far from new; to the contrary, it states a theme that is consistently invoked when a federal response to criminal conduct already prosecutable by the states is demanded. See, e.g., *Curbing Violence at Abortion Clinics*, N.Y. TIMES, Jan. 4, 1995 (editorial following abortion clinic violence, proclaiming that “where local law enforcement fails, the Federal Government must intervene”). Thus, a demonstrated state failure principle can be said to underlie (to list only a few examples) the post-Civil War civil rights offenses, federalization of bank robbery in the 1930s when interstate transportation by car was becoming fast and common, and the 1994 Violence Against Women Act. This Article’s contribution is simply to suggest that this underlying theme be explicitly endorsed as a general and limiting federalization principle.

239. Cf. 1994 LONG RANGE PLAN, *supra* note 4, at 20 (stating that “[i]n principle, criminal activity should be prosecuted in a federal court only in those instances in which state court prosecution is not appropriate”).

intentional refusals to act. Such "failure" might be demonstrated by federal authorities when federal intervention is deemed necessary even over state objection (as in the civil rights prosecutions of the 1960s). Conversely, "failure" could be asserted by state and local authorities in need of aid for federal assistance (as appears to be happening today in some areas with regard to narcotics and firearms offenses).

Thus, state failures in this arena may be of two kinds: those recognized by the states and those disputed by the states. The federal courts have an appropriate role to play in both situations. First, when local authorities can demonstrate that their resources are inadequate to address a serious criminal problem, it is unseemly and even "anti-federalist" for the federal government to turn a blind eye. We may not like gun and drug crimes, but at least in some urban areas today it may be federal resources, the federal forum, and incapacitating federal penalties that stand between a plausible attempt to address these behaviors and total governmental abdication.²⁴⁰

Second, when state or local authorities refuse to address criminal conduct on some systemic level, the call for federal intervention may be even more appropriate.²⁴¹ Civil rights offenses in the South in the 1950s provide the most compelling example. Another example can be found in instances of state and local governmental corruption, in which the criminal conduct at issue may place it beyond the effective reach (or interest) of state authorities.²⁴²

240. This is particularly true today because federal penalties for many crimes are significantly more severe than their state equivalents; this is a dramatic flip-flop from 20 years ago. The deterrent effect (specific incapacitation and perceived general deterrence) of severe federal sentences is, without doubt, the reason local authorities have turned to federal prosecutors with gun and drug cases in recent years. See Scott Wallace, *The Drive to Federalize Is a Road to Ruin*, 8 CRIM. JUST. 8 (1993) (noting "the increasing federal/state punishment gap . . . drawing cases into the federal system," although disputing any deterrent value).

241. Such an intentional failure should be systemic rather than isolated; a single instance of failed or ignored prosecution ought not suffice to generate new federal legislation (although once legislated, the statute might appropriately be invoked even in single, egregious cases like the failed state Rodney King prosecution). Nor should federalization be inevitable on this rationale; a state refusal to address conduct which is criminalized in that state but upon which there is no general agreement (assisted suicide, for example) might well not warrant any federal legislative response.

242. See 1994 LONG RANGE PLAN, *supra* note 4, at 21 (endorsing federalization of "widespread state or local government corruption"). However, a demonstrated state failure should be required even in this context; local prosecutors have not always been ineffective in addressing local governmental corruption, and federal prosecution of local corruption for publicity purposes alone, without inquiry into state failure, would not meet the federalization principle proposed here.

An important component of this principle is the concept of demonstration. A simple assertion of state failure, by either state or federal authorities, should not be sufficient to overcome the presumption against federalization. Such a demonstration might include a showing of the extent of the criminal conduct, the adverse effects it is having on the public interest, and the amount of local resources and effort devoted thus far. Examples of egregious conduct gone unprosecuted, or unsatisfactorily prosecuted, might be provided; but it seems unlikely that a single instance should suffice. The degree and types of proof necessary for a sufficient demonstration are important questions for further development. But Congress would have to be convinced, rationally, that despite the state's efforts (good faith or otherwise) to address the crimes at issue, the results have been inadequate to protect the public interest.

Thus, a requirement of demonstration might, or might not, support some modicum of judicial review. Were it to adopt such a principle, Congress might require that hearings be held or at least that findings be stated and supported. In turn, this might be subject to some "rational basis in the record" review.²⁴³

If honestly applied, a principle of demonstrated state failure could place meaningful limits on future federalization efforts; it also comports with the *Long Range Plan's* call for wholesale review of existing federalized dual jurisdiction crimes.²⁴⁴ It supports some form of open-ended sunset provisions: when a state failure is cured, the principled rationale for federalization disappears.²⁴⁵ Thus, instances of

243. See *United States v. Lopez*, No. 93-1260, 1995 U.S. LEXIS 3039, at *14-15 (U.S. Apr. 26, 1995) (endorsing rational basis review of commerce authority). *Lopez* reaffirms that legislative findings are relevant to judicial review, albeit not dispositive. *Id.* at *24-25.

244. 1994 LONG RANGE PLAN, *supra* note 4, at 22. Of course, the *Long Range Plan* does not invoke any state failure concept to support or describe such a review; rather, it states simply that provisions "no longer serving an essential federal purpose" should be repealed. That unexplicated concept, however, is bound to provoke disagreement in any congressional review; a direction to repeal those existing federal crimes that the states appear to be adequately addressing might result in less dispute and more repeal.

245. The March 1995 Draft Long Range Plan has added an endorsement of sunset provisions. See *supra* note 39; 1995 LONG RANGE PLAN 25. This Article advocates at most only "weak" sunset provisions for federal crimes, providing that federal criminal jurisdiction will end only if Congress (or some other federal body) finds that the need has ended. This differs from a "strong" sunset provision under which termination is automatic on some date even if the need persists. Moreover, sunset repeals may be worse policy overall than simply permitting de facto defederalization by prosecutorial discretion (see *supra* text accompanying note 201), in areas where a future need for federal prosecutions can be envisioned, because it is far harder to enact new legislation than to leave dormant legislation not currently needed. Again, however, pursuit of this tangent requires development beyond the scope of the present Article.

temporary federalization and de facto defederalization²⁴⁶ fit squarely within the proposed principle. Finally, a “demonstrated state failure” principle may also support the sort of nonfederalization response embodied in the 1994 Crime Bill, providing federal seed money to state and local authorities to help address areas of failure without substantive federalization.²⁴⁷

Much remains to be done on the concept of federalization principles. But a principle of demonstrated state failure addresses some federalism concerns, articulates a rationale for many instances of past criminal federalization, and might sensibly and nonsubstantively operate to limit federalization. Some principles that have been proposed mask a protectionist “dignity” conception of the federal courts that is unseemly; others are too vague to be of real assistance. A demonstrated state failure principle surely has flaws and is far from self-defining. But perhaps it better describes a commonality of thought in this area and should be pursued.

D. Application of Federalization Principles by the Executive Branch

Legislative principles of federalization cannot be the end of the effort; federalization principles must reach the executive branch as well. The decision whether to actually prosecute in federal court under statutory authority once granted is made by federal prosecutors, not congresspersons or the judiciary.²⁴⁸ Legislation may give the power to prosecute federally, but the discretion whether to do so lies with the Attorney General and her agents. The principle of “demonstrated state failure”—or any other set of federalization principles that may emerge—therefore ought to be extended to the executive’s decision to prosecute if it is to be fully effective.²⁴⁹

Thus, federal prosecutors should be required to find that applicable federalization principles have been fulfilled before instituting federal prosecutions of dual jurisdiction crimes. Again, only a brief sketch of this idea appears here. But such a requirement undoubtedly could be imposed by direction from the Attorney General to her

246. See *supra* text accompanying notes 187-197 (describing these concepts).

247. See Beale, *supra* note 5.

248. *Wayte v. United States*, 470 U.S. 598, 607-08 (1985); see *United States v. Schwartz*, 857 F.2d 655, 658 (9th Cir. 1988) (“In our system of government, it is the executive branch, not the judicial branch, which holds the right to determine” how to proceed with a federal prosecution); *United States v. Huntley*, 976 F.2d 1287, 1292 (9th Cir. 1992) (reversing dismissal of narcotics prosecution described as “minor” by district court).

249. *Accord* 1994 LONG RANGE PLAN, *supra* note 4, at 23.

many Department of Justice prosecutors, the ninety-four U.S. Attorneys, and their hundreds of Assistant U.S. Attorneys.²⁵⁰

The need for mandated executive branch application of federalization principles seems apparent. Even if Congress concludes that a state failure to address some crime makes federalization legislation appropriate, the state "failure" upon which Congress's decision is predicated may well not exist in every district, nor may it persist over time.²⁵¹ In order to give teeth to a presumption against federalization, federal prosecutors ought to be required to consider the local situation before choosing to exercise the jurisdictional authority they have been given. The goal is to ensure a principled *exercise* of the congressional decision to federalize; if a state failure principle is operating, it must be part of that exercise.

However, an executive branch federalization review should not be required before every indictment is filed; efficiency concerns as well as respect for prosecutorial discretion counsel a somewhat more generalized application. Thus, relatively broad temporal and geographic determinations (such as "for the next year, we will concentrate on bringing federal civil rights prosecutions in the following states") should suffice. Nor would any right to judicial review of the decision to prosecute for adherence to federalization principles be appropriate. Judicial review of prosecutorial discretion has historically been quite limited,²⁵² and no participants in the current federalization debate suggest a change in this doctrine. Nor should judicial review

250. The *United States Attorneys Manual* (USAM) is an internal Department of Justice publication that collects such guidelines and requirements; the USAM is published in the 12-volume DEPARTMENT OF JUSTICE MANUAL (1994). The Attorney General frequently directs federal prosecutors to make certain inquiries, meet certain standards, and obtain centralized approvals before instituting particular prosecutions. For representative approval requirements, see, e.g., USAM § 9-47.110 (Foreign Corrupt Practice Act prosecutions); § 9-75.001 (obscenity prosecutions); § 9-105.100 (money laundering prosecutions); and § 9-110.101 (RICO). See generally 12 DEPARTMENT OF JUSTICE MANUAL, *supra*, at 1193-2 supp. (table of "prior approval requirements"). Indeed, the USAM already contains "principles of federal prosecution" issued by the Attorney General, which include guidance on how to determine whether a "substantial federal interest" exists in particular prosecutions. USAM, *supra*, §§ 9-27, 9-27.230. USAM provisions are binding on federal prosecutors, although they provide no "rights, substantive or procedural, enforceable by law by any party." USAM, *supra*, § 1-1.100.

251. Cf. 1994 LONG RANGE PLAN, *supra* note 4, at 20 (noting need for federal civil rights prosecutions "in some parts of the country").

252. See *supra* note 248 (Wayte case).

be called for, if the Attorney General and her designees sincerely commit to the federalization principles to be applied.²⁵³

Finally, once federalization principles acceptable to the executive branch are formulated and adopted, the Attorney General should install some ongoing internal review of federal prosecution decisions in order to ensure that prosecutors are adhering to the federalization principles. Nor would individual decisions to prosecute be entirely unreviewable; as is the case with RICO prosecutions or certiorari decisions today, parties might seek internal Department of Justice review with supervisory personnel, invoking federalization principles to oppose prosecutive decisions.²⁵⁴

E. Brief Thoughts on Practice Proposals

Federal courts must continue to pursue efficiency strategies; their overall workload is not likely to decrease significantly no matter what criminal federalization principles are developed.²⁵⁵ For example, United States District Judge Edward Rafeedie in Los Angeles has recently written that many federal court trials are inefficiently administered and consequently “[a]lmost all jury trials take from two to three times longer than they should.”²⁵⁶ He offers a number of ideas on how to improve this situation. In addition, districts that are experiencing extreme criminal trial crunches should consider implementing some form of “master calendar” assignment system.²⁵⁷

Although it is superficially appealing, the responsive mechanism proposed long ago by Charles Warren of vesting concurrent jurisdic-

253. This is not a vain hope; in 1994 Attorney General Reno convened a “Three-Branch Roundtable” to address the issues and divergent views surrounding federalization of crime. See Transcript of Proceedings, *Overlapping and Separate Spheres: A Three-Branch Roundtable on State and Federal Jurisdiction*, U.S. Dep’t of Justice (Mar. 7, 1994) (on file with author). The Roundtable Working Groups have produced Reporters’ drafts addressing many of the issues discussed here, which are reprinted as part of this Symposium Issue.

254. Thus (based on the author’s criminal practice experience both in and out of the Department of Justice), it is not uncommon for Deputy Assistant Attorneys General within the Criminal Division to meet with interested defense counsel prior to approving sensitive federal prosecutions. Similarly, review of tentative certiorari decisions with the Solicitor General are not uncommon. See REBACCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 99 (1992) (noting that “individual citizens and interest groups lobby the Solicitor General and his staff”).

255. See 1994 LONG RANGE PLAN, *supra* note 4, at 9 (noting that “various procedural innovations have been adopted” by federal courts to respond to caseload increases).

256. Rafeedie, *supra* note 99, at 6.

257. See *supra* text accompanying notes 114-121 (discussing master calendar concept).

tion over federal crimes in state criminal courts²⁵⁸ is entirely superfluous and distracts from analysis. It should not be pursued. Such dual prosecutive jurisdiction for federal crimes was actually granted by Congress to the states in the early years of our nation; that fact somewhat undercuts traditional view that such delegation is unconstitutional.²⁵⁹ Although the legislative response to Dean Warren's 1925 article was apparently nil, recent federalization concerns have prompted a rediscovery of his suggestion.²⁶⁰ But putting aside constitutional objections, this solution is unlikely to be welcomed by the host state courts in light of their own huge current criminal caseloads.²⁶¹ Moreover, to avoid constitutional objections, any such state jurisdiction over federal crimes must be voluntary on the states' parts and cannot be made mandatory.²⁶² Yet state courts are already hugely overworked, making new grants of discretionary criminal jurisdiction gratuitous.

Finally, and in any case, the criminal federalization debate by definition addresses only "dual jurisdiction" crimes, over which conduct the state courts already have criminal power. Thus, the Warren concept is completely superfluous; if state courts wish to reach the conduct criminally, they have no need for jurisdiction over duplicative federal statutes. In fact, federal prosecutors often request that local law enforcement authorities pursue their criminal cases in state court.²⁶³ Even if they have a choice of statutes (state or federal), states are unlikely to assume more of this burden today than they already are shouldering.²⁶⁴

258. See Warren, *supra* note 1.

259. *Id.* at 577-83. Despite the fact that Congress granted state courts authority to prosecute federal crimes, in 1842 the Supreme Court stated its view that such delegation to the state courts of federal prosecutive jurisdiction was unconstitutional. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 615 (1842).

260. See Beale, *supra* note 5; 1994 LONG RANGE PLAN, *supra* note 4, at 22.

261. See Kaye, *supra* note 5.

262. Warren unhesitatingly acknowledged this in his 1925 proposal. See Warren, *supra* note 1, at 594, 597-98. *Accord* *New York v. United States*, 112 S. Ct. 2408, 2423 (1992) (Congress "has the power to regulate individuals, not States").

263. If state authorities do prosecute in their own courts, federal prosecutors generally decline any successive prosecution. See USAM, *supra* note 250, § 9-2.142 (stating this declination policy); *Petite v. United States*, 361 U.S. 529, 531 (1960) (noting the policy).

264. In addition, it is primarily higher federal penalties that make federal prosecutions attractive to state authorities; *but cf.* Jeffries and Gleeson, *supra* note 27 (federal procedural advantages may also attract state cases). But serious state constitutional questions would arise, it would seem, if state courts attempted to impose federal penalties that were more severe than the penalties that a state's own legislature has approved for the same conduct. Neither Warren nor the Long Range Plan discusses the penalty implications of their federal-crimes-in-state-court proposals.

Conclusion

Federal judicial resources are surely precious; we must be careful not to dissipate them ad hoc. Yet it is the grandeur and authority of the federal courts that ultimately may be the best rationale for asserting federal criminal jurisdiction to address persistent criminal problems. If the quality of justice is better in the federal courts,²⁶⁵ then problems of crime cannot be ignored federally while state criminal justice systems slowly sink and justice fails. Perhaps there are even constitutional, federalism, or due process limits to the overloading of state criminal courts that would constitutionally require federal courts to step in when state justice fails.²⁶⁶

In any case, the "crisis" of federalization appears to be overstated. Rather than panic and close the federal courthouse doors against new federal crimes categorically, we ought to exercise federal authority in a principled manner, when states are demonstrably unable or unwilling to address criminal behavior that has reached some significant proportions. One goal of the federal Constitution is "a more perfect Union,"²⁶⁷ not a widening separation of the business of state and federal courts. The gulf between state and federal courts today in the criminal arena is apparent. On occasion, the people and the states have a right to demand a principled exercise of federal criminal authority, and may just as rightfully criticize unprincipled limitations as unprincipled extensions.

265. See *supra* note 125 (noting debate regarding whether parity is or is not a myth).

266. Cf. Amar & Marcus, *supra* note 146 (arguing that the Fourteenth Amendment requires federal criminal jurisdiction over civil rights offenses).

267. U.S. CONST. pmbl.

