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Essay

*151 DON'T MAKE A FEDERAL CASE OUT OF IT: THE CONSTITUTION AND THE NATIONALIZATION OF CRIME

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If, in the American manner of political discourse, you were inclined to put the genius of our system of government on a bumper sticker, you would probably choose the phrase "limited government." If you were of an historical mind--and could spell--you might use the phrase "popular sovereignty." [FN1] The expansion of national crimes and federal jurisdiction has eroded this principle. It is all too easy to make a federal case out of very local conduct.

The philosophical genius of our system is that the government is limited. To limit governmental power, we have established a constitution. The text of the Constitution is almost entirely structural and procedural. The few values it establishes, like liberty and deliberation, are implicit. Its articles assign and restrict authority. It specifies procedures that the government must employ. In the frenzy to adapt governmental power to our policy preferences, limited government in principle and limited grants in our constitutional structure in practice have been lost.

Friedreich Nietzsche observed that "Democratic contrivances are quarantine measures against that ancient plague, the lust for power: as ***152** such, they are very necessary and very boring." [FN2] Among these contrivances are the various techniques of republicanism. You may recall these examples from high school civics: separation of powers, which simply splits the authority allocated to one level of government into three branches with principal responsibility for executive, legislative, and judicial operations assigned among them; [FN3] bicameralism, with legislative authority exercised through parallel majorities in two bodies; [FN4] and rotation in office, with the presidential term-limit and short terms for House members. [FN5]

A central contrivance is federalism. While the separation of powers divides total governmental authority at one level into functional specialties, the federal principle holds that it should additionally be divided among levels and regions. The federal practice is one nation, fifty states, and over eighty-six thousand local governments. [FN6] That is one unit of government for every 3300 people--man, woman, and child.

Federalism had a practical basis. Union without obliteration of the constituent units and sub-units was a political necessity. This necessity arose from both the tradition of the colonists and the power of the existing states. [FN7] Our tradition of local self-government has been long and strong. For instance, the Benjamin Harrison who signed the Declaration of Independence for Virginia was the fifth generation of his family to be elected to the Virginia House of Burgesses. [FN8]

Federalism has several bases in principle. One is responsiveness. The accountability of personnel and programs was thought to be easier in smaller polities. [FN9] Power can be adapted to local conditions, and the smaller populace can react faster and with greater precision. Also, responsiveness is a partial surrogate for legitimacy. Another basis is experimentation. A variety of localities can test a great range of innovations and programs with a presumed ease of repeal in case they fail, while centralized government languishes in the legacies of failed but unchangeable policies.

***153** The most important federal principle is limitation. The assignment of authority to different levels takes from the pool of power potentially available for the national government and balkanizes it into jealous possession by the states and localities.

A division requires specific allocations; therefore, assignments are made within the system. Some are prohibitions on the states: states are, for instance, constitutionally incapable of imposing customs duties. [FN10] Some are prohibitions on the nation: the nation is, for instance, constitutionally incapable of imposing immigration laws that vary by state. [FN11] Some restrictions are topical. Congress is permitted to legislate on a very short list of subjects for its policy decisions: the nation, for instance, furnishes monetary standards. [FN12]

After the federal responsibilities are identified, then there is a reservation. The states retain the general authority. [FN13] Their policy authority is only circumscribed by the grants to the nation [FN14] and, of course, by the prohibitions on the states. [FN15]

The expanding use of criminal law by the national government exemplifies a trend that conflicts with the careful arrangement of power in the Constitution. The Constitution allocates criminal authority. No general criminal power is expressed for the national government. While there are numerous instances of the text's imposing procedural restrictions on the use of criminal power, only five clauses suggest some grant of that power to the nation. One is treason. [FN16] It is the only defined crime, but it is a limiting definition designed to keep Congress from adopting an expansive concept like "constructive treason." [FN17] Counterfeiting is mentioned. [FN18] Piracy and the law of nations are mentioned. [FN19] Military crimes are ***154** mentioned. [FN20] These four different items exhaust the catalog of specific criminal authority for the national government.

The express reference to counterfeiting and military offenses is parallel to the grant of substantive power in the fields of currency [FN21] and armed forces; [FN22] however, implied authority exists for the nation to establish crimes that are directly related to an express power. [FN23] Tax evasion is an obvious example. One of the earliest federal crimes was smuggling because in the early years virtually all revenue came from customs duties. [FN24]

The man in the street once objected to something's being blown out of proportion by saying, "**Don't make a federal case** out of **it**." Looking at the current mode of federal criminal law, we understand why that expression has fallen from fashion.

We have examples of bad draftsmanship and concept. It is impossible to be precise, but there are approximately 187 federal criminal fraud statutes. One of these, mail fraud, [FN25] is a source of endless possible jurisdiction. Every common deceit is a federal case if the mail was used however indirectly and incidentally. [FN26] If the proceeds of a fraudulent deal are deposited by mail to the schemer's bank, federal jurisdiction attaches by the casual fact that he chose mail over the drive-through deposit. [FN27] The same is true with the telephone: once a crook picks up a telephone federal prosecutors are vested with jurisdiction. [FN28]

Senator D'Amato's brother was recently acquitted of mail fraud. [FN29] The charge was that he had mailed bills to his giant corporate client describing lobbying as legal services, even though the corporation knew what he was doing for it and the details accompanying the bill correctly identified the nature of the service. [FN30]

***155** Insider trading and racketeer-influenced and corrupt organizations crimes are offenses with undefinable elements and mammoth breadth. [FN31] Additionally, statute books have other examples of plain excess. It was a federal crime in the sale of your car to lie about the odometer reading. [FN32] It is a federal crime to fail to label reused mattress stuffing. [FN33] And my personal favorite: it is a federal crime for someone claiming allegiance to America to practice folk medicine in China. [FN34]

The 1994 crime bill [FN35] had among its 355 pages these gems: One section adopted the Drug Free Truck Stops and Safe Rest Areas Act. [FN36] Another section increased the punishment for counterfeiting the Congressional Medal of Honor, a crime oppressing every neighborhood. [FN37] Another section redefined livestock expressly to include llamas. [FN38] Yet another section enacted nothing, but expressed the Congress's opinion that the states should include consideration of the parties' drunk driving records in child custody decisions. [FN39]

The basis of the expansion is the Commerce Clause. The Constitution says that Congress has the power to regulate commerce "among the several States." [FN40] This is an important clause because it is the major means of our having established an economic union for free trade within the country. [FN41] But it has been misused.

We have had four phases of judicial rationalization of the expansion of the national power. First came necessity. Late in the last century, Congress outlawed interstate traffic in lottery tickets. [FN42] In 1903, the Supreme Court addressed the challenge to the law's constitutionality. [FN43] A Texan had sent by express a packet of Paraguayan lottery tickets to a ***156** Californian. [FN44] The jurisdictional basis of the statute was that interstate commerce was affected. [FN45]

John Marshall Harlan, one of our five greatest Justices, lapsed when he said, "[T]he common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. . . . [C]ommerce shall not be polluted." [FN46] Since the states have tried and failed to eliminate this evil, he continued, "We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end." [FN47] He argues from necessity only. His argument is: If the end is good--whatever that means--Congress must have the means necessary; it must have somehow gotten the power to meet its policy needs at the moment.

In the same era, we had pretext. Congress adopted the Mann Act, making it illegal to transport women in interstate commerce for immoral purposes. [FN48] To uphold this obviously essential law, the Supreme Court relied on the analogy that bringing young girls to the city for debauchery is parallel to shipping contagious cattle in interstate commerce. [FN49]

Another pretext is that federal insurance of bank deposits was used as the basis to make bank robbery a federal crime. [FN50] This spasm of Congressional activity was a response to the newly automotive bank robbers in the 1920s. In the last decade, one-third of Texas banks failed, [FN51] and there wasn't a gun in sight. After the bankers had followed government rules in their reckless expansion, the government decided to blame the bankers, endlessly prosecuting officers criminally for bad judgment, wasting judicial resources, destroying lives in a cruel, ugly gesture.

***157** The next group of misuses are, to be charitable, simply misguided. These are the civil rights pretexts. In the 1930s, California adopted its Okie law making it illegal to bring a poor person into the state. [FN52] The Supreme Court saw no implication about the privileges of citizens as people to travel within their country, a logically coherent and textually sound basis for an attack on the law's constitutionality. Rather, it said that California was merely interfering with the national power over interstate commerce. [FN53] Similarly, in passing the public accommodations section of the 1964 Civil Rights Act, Congress relied on its power over interstate commerce, not on its power under the amendment that abolished slavery. [FN54]

The last phase is abandonment. After seventy years of supine accommodation to these transparent extra-constitutional power shifts, the judges quit trying. The turning point was the crime of loan sharking [FN55] as a national problem. In 1971, the Court said, "Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce." [FN56]

Justice Potter Stewart, dissenting, correctly said that "Congress surely has the power to . . . regulate those intrastate activities that have a demonstrably substantial effect on interstate commerce." [FN57] The connection with commerce is reduced to a ritual finding by Congress, not an observable, physical reality--not even a secondary effect--but only a finding-- an extra sentence in the paperwork. Ipse dixit. It affects interstate commerce if Congress says it does; Congress tells us when the Constitution counts.

Only recently has the Court taken a modest step to slow the expansion of federal power based on the power over interstate commerce. A statute was held to be beyond Congress's authority when it made possession of a ***158** firearm in a school zone into a federal crime. [FN58] One timid case does not make a trend much less a counterrevolution.

The text of the Constitution confides power over piracy to the national government; [FN59] therefore, ordinary criminal attacks on domestic interstate commerce must have been left to the states. The national government had to exercise jurisdiction on the high seas and under the law of nations because, after the union, the states were powerless to act except domestically. From the text, it appears that crimes against interstate commerce were to be part of that residual power with the states. After all, even in 1789 by state authority robbing stage coaches was illegal everywhere. The Founders did not need to expand national authority to include the power to punish the pirates of the highway, canal, and railroad--only the high seas.

Clearly, the effect of the nationalization of crime is not a reduction in crime. It has, however, trivialized the national power. This trivialization is not like the elitism of Justice Scalia who says federal courts should be reserved for big cases. [FN60] Traffic offenses in a national forest are still national, and federal judges are not too valuable to try seamen's wage cases. [FN61]

The trivialization is the confused, diffused application of what was to have been a limited power and of what is a limited resource. One effect of the dual responsibility between the states and the nation for all crime is ***159** that it confuses accountability, defeating that purpose of the division; and dual responsibility confuses the borders between state and national power, defeating those limits.

The nationalization dilutes resources, whether prosecutorial, enforcement, or judicial. Because the Hobbs Act makes the interstate transportation of stolen vehicles a federal crime, [FN62] five bulldozer thieves will be prosecuted like this: All five in one state action; then, two in one federal action; and three in another federal action. [FN63]

It jeopardizes liberty. There is a strong individual liberty component to restricting the scope of national police. Think about ten thousand new officers spread among three thousand counties versus a concentration under the Bureau of Alcohol, Tobacco and Firearms, the people who brought you the siege of Waco.

It is a fraud on the public. The federal system cannot deliver on a promise to reduce crime through enforcement. California and Texas each prosecutes four or five times as many felonies as the whole federal system. [FN64] Federal courts handle 1.5% of the nation's felony prosecutions. [FN65] The judicial budget is .18% of the federal budget and three-quarters of our work is not criminal. [FN66] The same proposition is true for the "not criminal"; we do only three percent of all civil work so that the quality of justice in America is almost wholly dependent on the quality of the state judiciaries. [FN67]

Criminalization erodes the federal court's ability to work on its civil cases. In our civil cases, while it would not make much of a television miniseries, the work of the federal courts ranges from shipwrecks, corporate takeovers, race discrimination, and biological patents, to ***160** international trade and agency arbitrariness. Any aspect of that civil work is more significant to the community than one more convict.

Every criminal burden reduces our response to these private disputes; and they, especially if left unresolved, affect long-term growth and opportunity far more than all of the routine marijuana cases. To use an appropriately violent metaphor, we are shooting ourselves in the foot.

Excessive and trivial applications weaken all law, state and national, through nonenforcement and, worse, selective enforcement. Damage is done to the fabric of all law by its hypocritical use in the moral offenses, like gambling. For awhile in Texas, only the charities could gamble legally. [FN68] In that logic, maybe it would have been sound public policy to have given the churches a monopoly on prostitution as well as gambling. Indeed, gambling is so appalling an evil, [FN69] as Justice Harlan said, that only thirty-seven states have socialist lotteries. [FN70] Three-quarters of the states think gambling is so morally reprehensible that they are allowed to do it themselves. To the

young, this sort of example is a powerful teacher.

We are funding scum. All prohibitions generate black markets and protection as Prohibition itself did and as the drug war is now doing. This creates a huge underground economy, infecting legitimate business.

We are creating an army of police. [FN71] Many have mercifully forgotten the Anglo-American history of controversy over having a standing army. Simply put, it was feared that an army organized and existing within the country would be too tempting a source of power for the government for it not to use it for domestic purposes, like ***161** repression. [FN72] James Madison would fear an army of police as well as an army of Hessians.

Madison would certainly want no unified police, state or national. Nearly everybody in the federal government is armed. Among law enforcement agencies, a quick look reveals that we have the Coast Guard, Secret Service, Marshal, Immigration and Naturalization, FBI, IRS, Customs, Park Rangers, Border Patrol, ATF, and Drug Enforcement Administration. Even Environmental Protection Agency officers carry guns. [FN73] We should limit the police forces, but we should not limit them by unifying them.

We have also created an army of convicts and worse of ex-convicts, whose chances of successful assimilation into the community productively are remote. The number of people in Texas prisons has doubled in the last decade, and the number of people in federal prisons has tripled in the last decade. [FN74]

The most forceful, unchecked power in America is prosecutorial discretion. [FN75] When a prosecutor seeks your indictment, you can be ruined even if you are both innocent and never indicted. This discretion is essential, but it must be limited by more than grand juries. We need to limit the range and number of laws a prosecutor has to use.

When Rudolph Giuliani was United States Attorney for Southern New York, he would pick a day of the week at random and on that day, every drug case brought was prosecuted in federal court. [FN76] On the other six days, those cases all went to state courts. [FN77] This illustrates how arbitrary the discretion can be as well as how merged the state and federal jurisdiction has become.

***162** We probably ought not to have a central prosecutor. The Texas Constitution grants no prosecutorial power to a statewide officer; the state wisely allows only local district attorneys to present cases to the grand juries. [FN78]

Prosecutorial discretion remains dangerous. As independent counsel of the Iran-Contra investigation, Lawrence Walsh spent eight years and forty-seven million dollars destroying careers in a spree that looked more like political vengeance than public justice. [FN79] At best, he became a self-justifying bureaucratic bully.

The excessive use of criminal laws trashes the Constitution. As the nation has grown tired of the crime problem, the courts have grown tired of enforcing the constitutional niceties that differentiate just societies from merely efficient ones.

As a moral and cultural force, criminal law follows; it does not lead. While it is important in its enforcement phase, it can only minimize marginal citizens and separate incorrigibles. It is horribly misused when it is applied to politics.

The country should not criminalize policy differences or criminalize different policies. Whatever one may have thought about the relation between America and the Contras, it belonged in the realm of voting booths, not grand juries. Whatever one may have thought of the relation between America and Noriega, it belonged to politics, not to criminal law. What kind of nation conducts its foreign policy through a Miami grand jury?

Our focus should be on accountability. We should let national efforts attend to national matters, we should let Washington demonstrate its competence by accomplishment. The federal government owns and operates the Amtrak railroad. [FN80] I would think we would be more ready to believe that the feds could clear school yards of drugs if they had first cleared their own Amtrak engines of drugs. [FN81]

***163** We must focus on constitutional structure; look first to principle, not policy. Good policies do not necessarily

belong in Washington. Remember, every enactment is an allocation of power, not just a program preference.

In a country of 270 million people, [FN82] every troublesome aspect of our society can be multiplied by local instance into a national problem; but the founders allowed for a plurality of local initiatives to address some classes of problems, keeping that power dispersed. They--for us--confided other, more limited responsibilities to the central government.

Prevention is the only successful law enforcement technique. Arrest, trial, and prison are weak replies. Although there are no bureaucratic statistics for prevention and there are no budgetary increases based on prevention, we could do a lot for law and order if we would get the officers out of topless joints, gay bars, and undercover deals, put them in uniform, and set them patrolling the city, preferably on foot.

There are no short-term solutions. Education and economic opportunity take years, but they do work. Community strength and moderate regimes are sources of strength. We face nothing novel. About two thousand years ago, Lao Tzu said, "In an Empire with many prohibitions, People are often poor . . . When laws are abundantly promulgated . . ., There are many thieves and brigands." [FN83]

Constitutional preservation must be our first priority. Maintaining constitutional order exceeds the importance of maintaining law and order. Excesses for law and order are counterproductive to law and order. These excesses harm the whole world of social policy. Excesses risk the constitutional mechanism that has got us thus far so well.

Whether it is the nationalization of crime or the criminalization of the nation, it wastes money, concentrates power, confuses responsibility, evades limits, and erodes rights.

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[FN1]. James Madison described popular sovereignty, "the ultimate authority, wherever the derivative may be found, resides in the people alone ...." The Federalist No. 46, at 330 (James Madison) (Clinton Rossiter ed., 1961).
Chief Justice Jay described it: "[A]t the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects ... and have none to govern but themselves; the citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty." Chisolm v. Georgia, 2 U.S. (2 Dall.) 419, 471-72 (1793) (Jay, C.J.).
The term fell into disuse after it was associated with the proponents of local-option slavery like Senator Stephen A. Douglas. Hans Sperber & Travis Trittschuh, American Political Terms: An Historical Dictionary 331 (1962).

[FN2]. The Viking Book of Aphorisms 310 (W.H. Auden & L. Kronenberger eds., 1962).

[FN3]. U.S. Const. arts. I-III.

[FN4]. U.S. Const. art. I, § 1.

[FN5]. U.S. Const. art. I, § 2 (House), amend. XXII, § 1 (President).

[FN6]. U.S. Dep't of Commerce, Statistical Abstract of the United States 297 (1995).

[FN7]. See Ralph Ketcham, Framed for Posterity: The Enduring Philosophy of the Constitution 61-62 (1993); Irving Brandt, James Madison: Father of the Constitution 1787-1800, at 12 (1950).

[FN8]. Garry Wills, Inventing America: Jefferson's Declaration of Independence at xvii (1978).

[FN9]. For a general discussion, see The Federalist No. 9 (Alexander Hamilton), No. 10 (James Madison).

[FN10]. U.S. Const. art. I, § 10, cl. 2.

[FN11]. U.S. Const. art. I, § 8, cl. 4.

[FN12]. U.S. Const. art. I, § 8, cl. 5.

[FN13]. See U.S. Const. amend. X.

[FN14]. See U.S. Const. art. I, § 8.

[FN15]. See U.S. Const. art. I, § 10.

[FN16]. See U.S. Const. art. III, § 3, cl. 2.

[FN17]. The Framers rejected the law of constructive treason, limiting it so that "[t]reason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." U.S. Const. art. III, § 3, cl. 1.
The early English law of constructive treason subjected individuals to conviction and execution for "compass[ing] or imagin[ing]" the death of the king among other acts. Statute of Treasons, 25 Edw. 3 (1351). Some suggest that this omission would bar the federal government from making dissident speech a crime. See William T. Mayton, Seditious Libel and the Lost Guarantee of a Freedom of Expression, 84 Colum. L. Rev. 91, 115 (1984).

[FN18]. See U.S. Const. art. I, § 8, cl. 6.

[FN19]. See U.S. Const. art. I, § 8, cl. 10.

[FN20]. See U.S. Const. art. I, § 8, cl. 14, 16.

[FN21]. See U.S. Const. art. I, § 8, cl. 5.

[FN22]. See U.S. Const. art. I, § 8, cl. 12-13, 15.

[FN23]. See U.S. Const. art. I, § 8, cl. 18.

[FN24]. In fact, the first federal police agency was formed in 1789 when the Revenue Cutter Service was established to prevent smuggling. See Norman Abrams & Sara Sun Beale, Federal Criminal Law and its Enforcement 5 (2d ed. 1993).

[FN25]. See 18 U.S.C. § § 1341-46 (1994).

[FN26]. See id.

[FN27]. See id.

[FN28]. See § 1343 (fraud by wire, radio, or television).

[FN29]. See United States v. D'Amato, 39 F.3d 1249 (2d Cir. 1994).

[FN30]. See Richard W. Painter, Rule of If This Is Mail Fraud, Then Most Lawyers Are Guilty, Wall St. J., May 4, 1994, at A15 (criticizing the conviction of Armand D'Amato, a lawyer, for mail fraud based on misleading bills sent by him to his corporate client at request of a corporate officer); D'Amato, 39 F.3d at 1257-60 ("[M]ail fraud cannot be charged against a corporate agent who in good faith believes that his ... (otherwise legal) misleading or inaccurate conduct is in the corporation's best interests.").

[FN31]. See 18 U.S.C. § § 1961-68 (1994).

[FN32]. See 15 U.S.C. § 1981-91 (1994) (repealed 1994).

[FN33]. See 15 U.S.C. § 70b(h) (1994).

[FN34]. See 21 U.S.C. § 201 (1994).

[FN35]. Violent Crime Control and Law Enforcement Act, Pub. L. No. 103- 322, 108 Stat. 1796 (1994) (codified in scattered sections of 18 U.S.C.).

[FN36]. § 180201, 108 Stat. at 2046.

[FN37]. § 320109, 108 Stat. at 2113.

[FN38]. § 320912, 108 Stat. at 2128.

[FN39]. See § 300001, 108 Stat. at 2099.

[FN40]. U.S. Const. art I, § 8, cl. 3.

[FN41]. See Lynn N. Hughes, Balancing Is Not the Answer: Reconciling the Nation's Commerce Power with the States' Residual Power 7-8 (1992) (unpublished LL.M. thesis, University of Virginia) (on file with author and the University of Virginia Law Library).

[FN42]. See An Act for the Suppression of Lottery Traffic Through National and Interstate Commerce and the Postal Service, Subject to Jurisdiction and Laws of the United States, 28 Stat. 963, U.S. Comp. Stat. 1901 at 3178 (1895).

[FN43]. See Champion v. Ames, 188 U.S. 321 (1903) ("The Lottery Case").

[FN44]. Id. at 323-24.

[FN45]. Id. at 344.

[FN46]. Id. at 356.

[FN47]. Id. at 357-58.

[FN48]. See 18 U.S.C. § 2421 (1949) (amended 1986) (substituting in the 1986 amendment "individual" for "woman or girl" and deleting the language on "immoral purpose," adding criminal "sexual activity").

[FN49]. See Hoke v. United States, 227 U.S. 308, 322 (1913) ("[I]f the facility of interstate transportation can be taken away from ... the contagion of diseased cattle ... the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women ....").

[FN50]. See Federal Bank Robbery Act, 18 U.S.C. § 2113(f) (1994) (originally enacted in 1934); S. 2841, 73d Cong. (1934).

[FN51]. See Texas Almanac 1998-1999, at 553 (1998) (reporting there were 1466 banks in Texas in 1980); George E. French, A Letter From the Editor, FDIC Banking Rev., Winter 1990, at preface (noting that 423 banks failed from 1980- 1989).

[FN52]. See 1937 Cal. Stat. 464 (repealed 1965).

[FN53]. See Edwards v. California, 314 U.S. 160, 173 (1941) (striking the law because the Constitution prohibits "attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the

transportation of persons and property across its borders").

[FN54]. See Civil Rights Act of 1964, 42 U.S.C. § 2000a(b)(1) (1994) (declaring that "any inn, hotel, motel, or other establishment which provides lodging to transient guests" affects commerce per se); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (holding that public accommodations provisions of the Civil Rights Act of 1964 are valid under the Commerce Clause).

[FN55]. See 18 U.S.C. § 891-96 (1994).

[FN56]. Perez v. United States, 402 U.S. 146, 154 (1971).

[FN57]. Id. at 157.

[FN58]. United States v. Lopez, 514 U.S. 549 (1995) (holding that the Gun-Free School Zones Act, making it a federal offense for any individual knowingly to possess a firearm at a place he has reasonable cause to believe is a school zone, exceeded Congress's Commerce Clause authority, because possession of gun in local school zone was not an activity that substantially affected interstate commerce).

[FN59]. See U.S. Const. Art. I, § 8, cl. 10.

[FN60]. See generally Justice Antonin Scalia, Remarks at the National Conference of Bar Presidents (Feb. 15, 1987) (transcript on file with the author). "[F] ederal courts, as I knew them then [1960], were forums for the 'big case'--major commercial litigation ...." Id. at 3. They had "a docket that was at least substantially exotic." Id. If you wonder what he meant by "big," he said that cases now "often involve matters that are, in monetary terms ..., insignificant." Id. (emphasis added). Among those he considers beneath concern are what he euphemistically calls "[i]mproper activity by municipal law enforcement officers ... or by federal officers under the Constitution ...." Id. "[W]hen I had the unrealistic ambition of being a federal judge, back in 1960, I did not want to dispose of predominantly routine cases ...." Id. at 7.

[FN61]. Those icons of American justice who rode the circuit were not above the routine cases that make up the bulk of unglamourous federal court work. See, e.g., The Abby, 1 F. Cas. 26 (C.C.D. Mass. 1818) (No. 14) (Story, J.) (analyzing jurisdictional issues in a routine ship seizure); Field v. Columbet, 9 F. Cas. 12 (N.D. Cal. 1864) (No. 4764) (Field, J.) (regarding an action to try title of land); Ex Parte Giddings, 10 F. Cas. 336 (C.C.D. Mass. 1814) (No. 5404) (Story, J.) (determining the rights of a seaman disabled before he boarded his ship to the prizes taken by the cruise).

[FN62]. See 18 U.S.C. § 1951 (1994).

[FN63]. See id.

[FN64]. California's general jurisdiction state court felony caseload in 1992 was 164,583 cases; Texas's was 153,853. State Justice Institute, State Court Caseload Statistics: Annual Report 1992, at 154, 156 (1992) [hereinafter State Court Report]. The entire criminal felony docket of all the federal district courts was only 33,391 in 1993. The Administrative Office of the United States, Statistics Division, Federal Court Management Statistics 167 (1993) [hereinafter Federal Court Report].

[FN65]. The total felony caseload for all state trial courts in 1992 was 2,099,878. See State Court Report, supra note 64, at 154-56.

[FN66]. The federal budget was $1494 billion in 1994, and the judicial budget was $2.7 billion of that. See Cong. Quarterly, Almanac: 103 Congress, 1st Session 538, 564 (1994). The total number of criminal cases commenced in federal district courts in 1993 was 45,229. Statistical Tables for the Twelve Month Period Ended December 31, 1993, tbl.D-2 (1994). The total civil cases for the same year was 229,850. See Federal Court Report, supra note 64, at 167.

[FN67]. See Brian J. Ostrom, Changing Caseloads: The View From the State Courts, 16 St. Ct. J., Spring 1992, at 11 (stating that 18.4 million civil cases were filed in state trial courts in 1990).

[FN68]. The Texas Constitution prohibited lotteries from 1845 until 1980 when it was amended to permit lotteries by a "church, synagogue, religious society, volunteer fire department, nonprofit veterans organization, fraternal organization, or nonprofit organization supporting medical research or treatment programs." Tex. Const. art. 3, § 47. But see Tex. Const. of 1845, art. 7, § 17 (prohibiting lotteries). The state itself became a gambling entrepreneur when it started its own lottery in 1992. See State Lottery Act, Tex. Gov't Code Ann. § 466.001-.004 (West Supp. 1997-98) (effective Aug. 30, 1993). Texas has now authorized pari-mutuel betting on dog and horse races. See Texas Racing Act, Tex. Rev. Civ. Stat. Ann. art. 179e (West Supp. 1998) (effective Dec. 4, 1986).

[FN69]. See Champion v. Ames, 188 U.S. 321, 357-58 (1903).

[FN70]. Interview with the Texas Comptroller's Office, Austin, Tex. (1997); see < http://www.yahoo.com/Business_and_Economy/Products_and_Services/Get_Rich_ Quick_/Lotteries/Regional/U_S__States/>.

[FN71]. There are 68,825 full-time federal officers authorized to carry guns and make arrests in the United States. Bureau of Justice Statistics, Federal Law Enforcement Officers, 1993, at 4 (Dec. 1994). On the state and local level, there are 1,248,277 people working in law enforcement. See Statistical Abstract of the United States, supra note 6, at 210.

[FN72]. See The Federalist No. 25, at 212 (Alexander Hamilton), No. 46 at 334 (James Madison) (Clinton Rossiter ed., 1961). Alexander Hamilton and James Madison addressed popular fear of standing armies in the Federalist Papers. For a general discussion, see The Federalist Nos. 24-29 (Alexander Hamilton), No. 46 (James Madison).

[FN73]. 21 C.F.R. § 64.2(p) (1997).

[FN74]. The number of inmates in Texas prisons went from 29,892 in 1980 to 60,467 in 1992. See Statistical Abstract of the United States, supra note 6, at 218. The number of inmates in all federal prisons grew from 20,611 in 1980 to 50,403 in 1990. See id. at 217. Perhaps even more startlingly, that number grew by another 50%, to 74,399, by 1993. See id.

[FN75]. "The prosecutor has more control over life, liberty, and reputation than any other person in America." Justice Robert Jackson, The Federal Prosecutor, 31 J. Crim. L. & Criminology 3 (1940).

[FN76]. Alexander Stille, A Dynamic Prosecutor Captures the Headlines, Nat'l L.J., June 17, 1985, at 48.

[FN77]. Giuliani initiated "federal day," one day chosen at random each week in which all street-level drug dealers apprehended by local authorities would be prosecuted in federal court. Id. Giuliani stated that "[t]he idea was to create a Russian-roulette effect." Id.

[FN78]. See Tex. Code Crim. P. Ann. arts. 2.01, 20.03 (West 1977).

[FN79]. See Jan Crawford Greenberg, Independent Counsels: Is the Cost Too High? New Legislation Would Cut Power and Make Them More Accountable, Chi. Trib., May 6, 1996, at 6.

[FN80]. See 49 U.S.C. § 24101 (1994).

[FN81]. See, e.g., News Across the Nation, San Diego Union Trib., Jan. 7, 1989, at A2 (describing a derailment which injured 25 people in Pennsylvania as the fault of Amtrak and a control-tower operator who used drugs); Switchman on Duty During Amtrak Crash Fails Test for Drugs, Wall St. J., Feb. 24, 1988, at 8 (stating that the Amtrak switch operator tested positive for drugs in crash that injured 19); Norman D. Atkins, New York Amtrak Wreck Train Signal Operator Had Drug Traces in Blood, Wash. Post, July 27, 1984, at A2 (stating that urinalysis showed cocaine use of signal operator).

Between 1987 and 1993, 147 railroad employees involved in accidents tested positive for drugs or alcohol--including two Conrail, also a national railroad, employees responsible for a collision with an Amtrak train in which 16 persons died. See Linda Chavez, 'Sensitivity' Wins; You Lose, USA Today, July 27, 1994, at 13A. As a result of the collision, Congress amended the safety laws through the Rail Safety Improvement Act of 1988 to give the Federal Railroad Administration direct jurisdiction over railroad employees in safety-sensitive positions. See 45 U.S.C. § 441(a) (1993) (repealed 1994).

[FN82]. U.S. Dep't of Commerce, Statistical Abstract of the United States 1997, at 33 tbl.33 (1997).

[FN83]. Lao Tzu, The Tao Te Ching: A New Translation with Commentary 189 (Ellen M. Chen trans., Paragon House 1989) (ante 1800 B.C.).

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