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INSURING DOMESTIC TRANQUILITY: *LOPEZ*, FEDERALIZATION OF CRIME, AND THE FORGOTTEN ROLE OF THE DOMESTIC VIOLENCE CLAUSE

Jay S. Bybee*

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I. Introduction

In his opinion for the Court in *United States v. Lopez*,¹ Chief Justice Rehnquist warned that under the government's expansive theory of the Commerce Clause, "it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement . . . where States historically have been sovereign."² Concerned that Congress might assume a "general police power,"³ the Court held that the Gun-Free School Zones Act⁴ was beyond Congress's authority under the Commerce Clause.⁵ Scholars and commentators question how far *Lopez* extends,⁶ and it remains to be seen whether *Lopez* has any real power to restrain Congress's creation of a broad, duplicative criminal code.⁷

1 514 U.S. 549 (1995).

2 *Id.* at 564.

3 *Id.* at 567.

4 Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844 (1990) (codified as amended at 18 U.S.C. § 922(q) (1994)).

5 See *Lopez*, 514 U.S. at 567-68.

6 *Lopez* has occasioned an enormous amount of legal commentary. Two good symposia include Symposium, *Reflections on United States v. Lopez*, 94 MICH. L. REV. 533 (1995) and Symposium, *The New Federalism After United States v. Lopez*, 46 CASE W. RES. L. REV. 635 (1996).

7 See, e.g., 18 U.S.C. § 33 (Supp. I 1995) (car bombs and bombs in parking structures); *id.* § 36 (1994) (drive-by shootings); *id.* § 43 ("animal enterprise terrorism" against, inter alia, a zoo, aquarium, circus, or rodeo); Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, § 645(b), 110 Stat. 3009, 3009-709 (1996) (to be codified at 18 U.S.C. § 116) (female genital mutilation); 18 U.S.C. § 228 (failure to pay child support); Church Arson Prevention Act of 1996, Pub. L. No. 104-155, 110 Stat. 1392 (to be codified at 18 U.S.C. § 247); 18 U.S.C. § 248 (freedom of access to abortion clinics); *id.* § 521 ("criminal street gangs"); *id.* § 844(i) (arson); *id.* § 1028 (fraud in connection with identification documents); *id.* § 1030 (fraud in connection with computers); *id.* § 1992 (Supp. I 1995) (wrecking trains); *id.* § 2119 (1994) (carjacking); *id.* § 2261 (interstate domestic violence); see also Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 979-81 & nn.2-9 (1995) (describing the rapid expansion of federal criminal law in the 1980s and 1990s); Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After Lopez*, 46 CASE W. RES. L. REV. 801, 812-17 (1996) [hereinafter Brickey, *Life After Lopez*] (suggesting a number of ways Congress can correct the Gun-Free School Zones Act to survive constitutional challenge);

Lopez promises, at best, to be a limited restraint on Congress's power to federalize crime because it applies only to Congress's authority under the Commerce Clause. Although this clause traditionally has been the most effective basis for Congress's creation of criminal laws, it is not the sole basis on which Congress can rely.⁸ Moreover, the Tenth Amendment offers little hope of explaining why matters such as criminal law that, as the Court said, have been "historically" within the states' sovereignty,⁹ are constitutionally within their sovereignty. The Tenth Amendment reassures us that whatever has not been delegated to the United States has been reserved to the states or the people, but (of itself) it cannot tell us what has been delegated or reserved.¹⁰ Clear constitutional confirmation of the historic sovereignty of the states in the area of criminal law enforcement can come only from an express reservation of state authority over crime or (what is functionally the same) an express disabling of the United States.

Lost in the discussions of the federalization of crime is the one clause in the Constitution that actually links Congress, the states, and the problem of local crime: the Domestic Violence Clause. This clause represents precisely

Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1166-69 (1995) (counseling congressional restraint with respect to new federal criminal legislation); Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 2-7 (1996) (noting that it is unclear what impact *Lopez* will have on federal criminal law and the Commerce Clause); Gregory W. O'Reilly & Robert Drizin, *United States v. Lopez: Reinvigorating the Federal Balance by Maintaining the States' Role as the "Immediate and Visible Guardians" of Security*, 22 J. LEGIS. 1, 8-12 (1996) (discussing the effects of "federal encroachment" on federalism, federal court caseloads, and potential defendants); Franklin E. Zimring & Gordon Hawkins, *Toward a Principled Basis for Federal Criminal Legislation*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 15, 22-26 (1996) (proposing a framework of principles for federal intervention into criminal law).

Some commentators do not believe that federal criminal jurisdiction has extended too far. See, e.g., G. Robert Blakey, *Federal Criminal Law: The Need, Not for Revised Constitutional Theory or New Congressional Statutes, But the Exercise of Responsible Prosecutive Discretion*, 46 HASTINGS L.J. 1175, 1216 (1995) (arguing that "[a]bstract questions of legal theory or governmental organizations have little to do with what our people want from our systems of criminal justice"); Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247, 249-50 (1997) (stating that "[t]he image of a runaway national government increasingly taking away the enforcement of the criminal law from the States is essentially false").

⁸ Congress might, for example, rely on its power over bankruptcies, see U.S. CONST. art. I, § 8, cl. 4; 18 U.S.C. §§ 151-155 (defining crimes in connection with bankruptcy); coining, weights and measures, and counterfeiting, see U.S. CONST. art. I, § 8, cls. 5-6; 18 U.S.C. §§ 331, 471-509 (defining crimes of counterfeiting of U.S. and foreign coins, securities, obligations, and official papers); post roads, see U.S. CONST. art. I, § 8, cl. 7; 18 U.S.C. §§ 1341-1342, 1691-1738 (defining crimes in connection with the mails); naturalization, see U.S. CONST. art. I, § 8, cl. 4; 18 U.S.C. §§ 1421-1429 (defining crimes in connection with immigration and naturalization); slavery, see U.S. CONST. amend. XIII, § 2; 18 U.S.C. §§ 1581-1588 (defining crimes in connection with slave trade); piracy, see U.S. CONST. art. I, § 8, cl. 10; 18 U.S.C. §§ 1651-1661 (defining crimes in connection with piracy); and U.S. territories and property, see U.S. CONST. art. IV, § 3, cl. 2; 18 U.S.C. §§ 1851-1864 (defining crimes in connection with public lands). See also *Marchetti v. United States*, 390 U.S. 39, 61 (1968) (upholding a revenue provision regulating intrastate illegal gambling under Congress's taxing power); *United States v. Hallmark*, 911 F.2d 399, 401 (10th Cir. 1990) ("Congress may, in any case, regulate or prohibit wagering activities pursuant to its enumerated powers; to do so by means of a tax would not violate the Constitution.").

⁹ See *Lopez*, 514 U.S. at 564.

¹⁰ See U.S. CONST. amend. X.

the Constitution's express commitment of general criminal law enforcement to the states. Article IV, Section 4 provides:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.¹¹

Long ignored by courts, the Domestic Violence Clause recognizes the primacy of the states in addressing domestic violence within their borders. It imposes on the federal government a duty to protect states against domestic violence, but only when states request assistance. The Domestic Violence Clause plays the role of a Tenth Amendment for crime. It is a reaffirmation of the enumerated powers doctrine¹² and a promise of federal noninterference that prohibits not only the uninvited use of federal forces to combat crime, but also forbids federal legislation that displaces the states' obligation to protect their citizens by suppressing domestic violence. As St. George Tucker opined in one of the earliest commentaries on the Constitution:

[E]very pretext for intermeddling with the domestic concerns of any state, under colour of protecting it against domestic violence is taken away, by that part of the provision which renders an application from the legislative, or executive authority of the state endangered, necessary to be made to the federal government, before it's [sic] interference can be at all proper.¹³

The Supreme Court's decision in *Lopez* demonstrates how far our thinking about the power of the federal government to address domestic violence has traveled from the thinking of St. George Tucker.¹⁴ This Article documents an important, but overlooked portion of that journey. Part I begins with a discussion of the structure of state powers under the Constitution and discusses the Supreme Court's current view of the powers of the United States to define and punish crime. Part II then considers *Lopez* in greater detail and explains why the Tenth Amendment does not offer a satisfactory justification for exclusive state control over crime.

¹¹ *Id.* art. IV, § 4.

¹² The enumerated powers doctrine provides that Congress's power is limited to those powers expressly conferred by the Constitution. See *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 395 (1805) (Marshall, C.J.) ("[U]nder a constitution conferring specific powers, the power contended for must be granted, or it cannot be exercised."); William Van Alstyne, *Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L.J. 769, 770-71.

¹³ 1 ST. GEORGE TUCKER, *BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA* app. at 367 (photo. reprint 1996) (1803).

¹⁴ Compare *Lopez*, 514 U.S. at 567 ("Admittedly, some of our prior cases have taken long steps down [the] road" towards recognizing a general police power under the Commerce Clause), with 1 TUCKER, *supra* note 13, app. at 367 (stating that the Domestic Violence Clause takes away all power from Congress to intermeddle in a state's domestic affairs in the name of protecting the state from domestic violence).

Part III reviews the adoption of the Domestic Violence Clause and the Framers' diverse views regarding the power of the United States. This part considers the early interpretation of federal power through congressional criminal legislation, judicial enforcement, and executive intervention to suppress domestic violence in the states. Part IV examines the role of the Domestic Violence Clause in the debates over the Fourteenth Amendment and its enforcement and, in particular, the Civil Rights Act of 1871. These debates, as significant to the Fourteenth Amendment as the earlier debates and legislation were to the original Constitution, demonstrated nearly polar views of Congress's power to define national crimes. The Domestic Violence Clause figured prominently in these debates.

Part V concludes with a discussion of the role of the Domestic Violence Clause in delegating authority between the federal government and the states. In particular, this part considers the clause's implications on *Lopez* and future cases dealing with the scope of federal criminal authority.

This Article concludes that the Domestic Violence Clause has two functions: one procedural and the other substantive. First, it provides a mechanism by which a state can request federal assistance to suppress domestic violence. This function represents the literal meaning of the clause. But the Domestic Violence Clause has long had a more subtle meaning. It also serves as a reassurance that the states have the primary duty to provide domestic tranquility, while the United States retains the obligation to insure it. The clause thus provides a guarantee to the states that the federal government will not interfere with a state's administration over crime; a promise of noninterference that extends not only to the use of federal troops, but also to federal legislation that threatens to displace or co-opt the states' responsibility against domestic violence.¹⁵

The Domestic Violence Clause has important implications for the federalization of crime. Although the clause does not supply a rule forbidding federal criminal legislation and thus demarcating a line between federal and state criminal jurisdiction, it creates a presumption demanding that Congress justify an overlap of federal and state action against crime. At the least, the Domestic Violence Clause provides independent reinforcement for the step the Court took in *Lopez* to rein in congressional attempts to federalize crime and may even justify closer scrutiny of such legislation.

II. *The Problem of Exclusive State Powers*

A. *Defining Congress's Powers/Discovering State Powers: The Enigma of the Half-Empty Glass*

The "more perfect union" created by the Constitution did not assign or divide power between the states and the national government in the same way that it divided power among the three great departments of the national

¹⁵ See, e.g., Brady Handgun Violence Prevention Act, 18 U.S.C. § 922(s) (1994) (requiring local law enforcement officials to conduct background checks on handgun purchasers). The Court recently held the "Brady Act" unconstitutional because it compelled state officers to execute federal law, in violation of the "dual sovereignty" principle. See *Printz v. United States*, 117 S. Ct. 2365, 2384 (1997).

government. In drafting the Constitution, the Framers confronted two separate problems of divided government: First, a horizontal division of power among three branches collectively exercising the singular power of the United States; and, second, a vertical demarcation of authority between distinct sovereigns exercising different powers.

Separation of powers described three entities exercising a single power; federalism described two sets of sovereigns exercising two separate powers. These differences required distinct approaches. In the first three articles of the Constitution, the Framers took pains to set out the powers (the horizontal division) that would belong to each of the three departments of the new national government. Each of these articles begins with an affirmative allocation of power.¹⁶ Separation of powers questions begin from the premise that the national government, as a whole, possesses the power at issue; the question is to which department the power has been granted. Federalism questions begin from the quite different premise that states have the general power of a sovereign, and the national government is of limited powers; the question is whether there is any power in the national government at all and, if so, whether that power is exclusive or concurrent.

The Framers began with the proposition that the people already had granted all authority inherent in government to an existing set of sovereigns—the states—and that the states exercised that authority consistent with the charters agreed upon between the people and the several states.¹⁷ In the Constitution, the states ceded a portion of their authority (“[a]ll legislative Powers herein granted”)¹⁸ to a new national sovereign. The Constitution granted power to the national government and reserved power to the states, but it did not grant power to the states.¹⁹ The task for the Framers, accordingly, was to describe those powers actually granted to the national government, powers that might be exercised either exclusively, or concurrently with the states.

In *Federalist No. 32*, Alexander Hamilton described the mechanisms employed in the Constitution for distinguishing exclusive and concurrent pow-

¹⁶ See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States.”); *id.* art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.”); *id.* art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish.”). There are, of course, significant differences between the vesting clauses. See Martin H. Redish & Elizabeth J. Cisar, “*If Angels Were To Govern*”: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 479-80 (1991). See generally Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992) (discussing the structural relationships between the branches of the federal government).

¹⁷ See Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism and the Sirens’ Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 501-04 (1997) (discussing the roles of the people and the states in the formation of the Constitution).

¹⁸ U.S. CONST. art. I, § 1; see *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) (“[E]xcept as restrained and limited by [the Constitution, the states] possess and exercise the authority of independent States.”).

¹⁹ See Thomas B. McAfee, *The Federal System as Bill of Rights: Original Understandings, Modern Misreadings*, 42 VILL. L. REV. (forthcoming 1998) (manuscript at 6, on file with author).

ers.²⁰ He offered two principal means for identifying exclusive powers in the United States: First, where the Constitution expressly granted exclusive power to the United States; second, where it granted power to the United States and then prohibited the exercise of such power by the states.²¹ He illustrated the first case with the District of Columbia Clause: Congress may “exercise *exclusive* Legislation in all Cases whatsoever, over such District.”²² The second was easily illustrated by the coinage clauses.²³ Article I, Section 8, granted Congress power to “coin Money,”²⁴ a power that, in the absence of any other provision, could be exercised concurrently by the states as well. But Article I, Section 10, provided that “[n]o State shall . . . coin Money,”²⁵ making Congress’s power to coin money exclusive; the decision to coin or not to coin money belonged to Congress alone.²⁶

Although it did not grant powers to the states, the Constitution ensured exclusive powers in the states. This process was more complicated than granting Congress exclusive powers. Unlike Congress, the states did not need to plead the source of their powers affirmatively; they were assumed to exercise general police powers.²⁷ When state powers were concerned, the inquiries were whether the exercise of power was consistent with the state’s constitution and within the general police power of any sovereign (ordinarily not an inquiry for the Court), and whether the matter was granted exclusively to Congress or otherwise prohibited to the states.²⁸ Ordinarily, the absence of an expressly defined power in the United States would leave the states with the ability to exercise that power if it was consistent with a state’s constitution.²⁹

20 THE FEDERALIST No. 32, at 200 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

21 See *id.*

22 U.S. CONST. art. I, § 8, cl. 17 (emphasis added); see *Shoemaker v. United States*, 147 U.S. 282, 298-300 (1893); THE FEDERALIST No. 32, at 200 (Alexander Hamilton).

23 See THE FEDERALIST No. 32, at 200 (Alexander Hamilton).

24 U.S. CONST. art. I, § 8, cl. 5.

25 *Id.* § 10, cl. 1.

26 Hamilton also argued that the United States has exclusive power when “a similar authority in the States would be absolutely and totally *contradictory and repugnant*.” THE FEDERALIST No. 32, at 200 (Alexander Hamilton). He pointed to Congress’s power to establish a “uniform Rule of Naturalization,” U.S. CONST. art. I, § 8, cl. 4, as one which must be exclusive “because if each State had power to prescribe a *DISTINCT RULE* there could be no *UNIFORM RULE*.” THE FEDERALIST No. 32, at 201 (Alexander Hamilton).

27 See *Martin v. Hunter’s Lessee*, 14 U.S. (9 Wheat.) 304, 325 (1816).

28 See THE FEDERALIST No. 32, at 200 (Alexander Hamilton).

29 The Tenth Amendment affirms this relationship. Whatever powers are “not delegated to the United States by th[e] Constitution,” and not “prohibited by [the Constitution] to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X. The last phrase, reserving power to the States and the people, is a recognition of the relationship between the states and their own citizens as codified in pre-existing state constitutions. The Tenth Amendment does not calcify the relationship between a state and its citizens, but simply recognizes that whatever power is not granted to Congress has been reserved to the states and the people, and the states and the people may reallocate that power between them as they see fit. See DAVID E. ENGBAHL, *CONSTITUTIONAL FEDERALISM IN A NUTSHELL* 8-9 (2d ed. 1987); see also McAfee, *supra* note 19 (manuscript at 28) (explaining that the Tenth Amendment, as adopted, underscores “that it is the people who grant and reserve powers, to both federal and state governments”).

The states have exclusive power in three cases: (1) When the Constitution expressly recognizes power in the states; (2) when the power is expressly forbidden to Congress (and not forbidden to the states); and (3) when the power is not granted to Congress (and not forbidden to the states). The first case is the least likely because the states are sovereigns with general powers. One area in which the Constitution may actually have granted an express power to the states is in the regulation of "intoxicating liquors."³⁰ "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system."³¹ The second case is illustrated by the First Amendment, which prohibits Congress from establishing religion, interfering with religious free exercise, and abridging freedom of speech, press, and petition.³² The First Amendment—at least prior to the Fourteenth Amendment—disabled Congress alone, thus guaranteeing exclusive state control over speech, press, and religion, and protecting state religious establishments.³³

Determining the third case—exclusive power in the states through the absence of power in Congress—is a far more vexing task. In the first two cases our task was to find either a constitutional provision conferring power on the states or a clause denying power to Congress, but our task in the third case is to prove a negative: that, with respect to a particular subject, the Constitution does not confer any such power on Congress, nor deny it to the states. Because of the structure of our Constitution, we must approach the question of exclusive state powers with some caution. The Court's experi-

³⁰ "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2.

³¹ *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980); see *South Dakota v. Dole*, 483 U.S. 203, 205 (1987); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 356 (1987) (O'Connor, J., dissenting) ("[T]he Twenty-first Amendment was intended to return absolute control of the liquor trade to the States, and . . . the Federal Government could not use its Commerce Clause powers to interfere in any manner with the States' exercise of the power conferred by the Amendment."); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984) ("[Section] 2 reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the [Twenty-first] Amendment, would clearly be invalid under the Commerce Clause."). *But cf.* Laurence Tribe, *How to Violate the Constitution Without Really Trying: Lessons from the Repeal of Prohibition to the Balanced Budget Amendment*, 12 CONST. COMMENTARY 217, 218-20 (1995) (arguing that the Twenty-first Amendment was intended to empower the states, but in fact prohibits directly the conduct that it meant to authorize states to prohibit).

³² See U.S. CONST. amend. I.

³³ See *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 397-98 (1866) (Miller, J., dissenting); see also *Permoli v. Municipality No. 1*, 44 U.S. (3 How.) 589, 609 (1845) ("The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws . . ."); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1272-75 (1992) (explaining the federalism-based theory of the First Amendment; noting that the theory has not been accepted by federal courts); Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1555-66, 1571-76 (1995) (discussing the text and history of the First Amendment and explaining why it applied only to Congress).

ence with this problem has not been a pleasant one.³⁴ In *New York v. United States*,³⁵ the Court observed that the division of authority between the federal government and the states could be determined in two ways: by asking whether the Constitution delegated such power to Congress, or by asking whether the matter was reserved to the states by the Tenth Amendment.³⁶ The Court then stated:

[T]he two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.³⁷

Because the enumerated powers doctrine applies only to the federal government, the Court's "mirror images" analogy does not work. It is not true that if a power is delegated to Congress, the states "disclaim[] any reservation of that power."³⁸ The statement is true only if the power one is concerned with is an *exclusive* power; the Constitution is replete with powers granted to Congress that are exercised concurrently with the states. Similarly, reserved powers also may be concurrent powers, so that a power might be reserved to the states through the Tenth Amendment and still have been conferred upon Congress.³⁹ Only if a power has been reserved exclusively to the states can one say that the Constitution does not confer such power on Congress.

Determining the powers exclusively reserved to the states is not as facile as the Court makes it sound. In *New York*, the Court compounded its "mirror images" theme:

[J]ust as a cup may be half empty or half full, it makes no difference whether one views the question at issue . . . as one of ascertaining the limits of the power delegated to the Federal Government under

³⁴ See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985) (stating that, with rare exception, "the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace"); *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976) ("[T]here are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."), *overruled by Garcia*, 469 U.S. at 557.

³⁵ 505 U.S. 144 (1992).

³⁶ See *id.* at 155-56; see, e.g., *Garcia*, 469 U.S. at 547-48.

³⁷ *New York*, 505 U.S. at 156.

³⁸ *Id.*

³⁹ Taxing and spending is an easy one. As Hamilton explained: "There is plainly no expression in the granting clause which makes [the taxing] power *exclusive* in the Union. There is no independent clause or sentence which prohibits the States from exercising it." *THE FEDERALIST* No. 32, at 201 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). He concluded that the taxing power (other than on imports and exports) was "manifestly a concurrent and coequal authority in the United States and in individual States." *Id.*; see also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 199 (1824) ("The power of taxation is indispensable to [the states'] existence, and is a power which . . . is capable of residing in, and being exercised by, different authorities at the same time.").

the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment.⁴⁰

Again, the Court employed a flawed analogy. The Court admitted that “the Tenth Amendment ‘states but a truism that all is retained which has not been surrendered,’”⁴¹ but did not believe it. Knowing that the top half of a cup is empty tells us nothing about the contents of the bottom half of the cup (just as knowing that the bottom half of a cup contains milk tells us nothing about the top half of the cup). Knowing that Congress has power over a particular matter tells us nothing about the power of the states over that matter unless we know whether Congress’s power is exclusive. Conversely, knowing that the states have power over a matter does not mean that Congress may not concurrently exercise such a power. The Constitution simply does not treat the question of congressional and state powers symmetrically. One employs different mechanisms for locating the boundaries of congressional or state authority, respectively.

This discussion is altogether relevant to an important question for those who remain concerned with constitutional federalism: Are there any matters which yet belong uniquely to the states? If there are, one cannot prove them by virtue of the Tenth Amendment,⁴² but only by showing that the Constitution confers no such power on Congress, that the Constitution expressly con-

⁴⁰ 505 U.S. at 159.

⁴¹ *Id.* at 156 (quoting *United States v. Darby*, 312 U.S. 100, 124 (1941)). The enumerated powers doctrine generally has failed. See Van Alstyne, *supra* note 12, 773 n.15.

The doctrine of enumerated powers, standing alone, is ideologically indifferent to federalism interests; the tenth amendment is not. . . . The tenth amendment is a significant counter referent against which the fairness of interpreting enumerated powers may be measured. Its dismissal as a “truism” . . . [in *Darby*] was more hubris than insight, a reflection of judicial values in the age of the national state.

Id.

⁴² The Tenth Amendment has no substantive content. See *Coog v. United States*, 79 F.3d 452, 455 (5th Cir. 1996) (“[T]he Tenth Amendment does not independently provide a substantive limitation on the powers of the United States.”), *cert. denied*, 117 S. Ct. 2507 (1997). Rather, the Amendment is best viewed as a rule of construction, to prevent the inference that Congress had power over all matters not specifically excepted in the new Bill of Rights. See David N. Mayer, *Justice Clarence Thomas and the Supreme Court’s Rediscovery of the Tenth Amendment*, 25 *CAP. U. L. REV.* 339, 352 (1996). Professor Mayer wrote:

[T]he Tenth Amendment was prompted, first, by Antifederalist fears about the imperfect enumeration of powers in the Constitution—particularly the vagueness of the “necessary and proper” clause—and, second, by the Federalist argument that the addition of a bill of rights to the Constitution would be “dangerous” because it would jeopardize the enumerated powers scheme of Article I. The Amendment was intended to provide a rule of construction against additional federal powers being inferred from the *absence* of limitations, or rights provisions

Id.

Professor Merritt has argued that the Republican Guarantee Clause offers stronger support for federalism than the Tenth Amendment. Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 *COLUM. L. REV.* 1, 2 & n.8 (1988). In her view, states cannot enjoy republican governments when expansive congressional legislation interferes severely with state autonomy. See *id.* This Article demonstrates that the Domestic Violence Clause provides even greater textual support for state autonomy to govern a particular area—criminal law enforcement.

fers the power on the states, or that the Constitution disables Congress. The question is not purely academic, but instead is of current concern to a Court determined to retrench or at least hold the line against expansion of federal powers.⁴³

The Court's concern is manifest in its recent decision in *United States v. Lopez*,⁴⁴ in which the Court struck down a provision of the Gun-Free School Zones Act of 1990 that prohibited "any individual knowingly to possess a firearm at a place that [he] knows . . . is a school zone."⁴⁵ The Court found that Congress may regulate three classes of activity under the Commerce Clause: the use of the channels of interstate commerce; instrumentalities of interstate commerce, such as vehicles or railroads used to facilitate interstate commerce, as well as persons and things in interstate commerce; and those activities that substantially affect interstate commerce.⁴⁶

The United States did not argue that firearm possession was a channel or an instrumentality of interstate commerce. Rather, the government claimed that Congress properly regulated gun possession within a school zone as an activity that substantially affects interstate commerce because firearm possession may result in violent crime in schools, which affects the national economy in a number of ways.⁴⁷ Violent crime in schools imposes insurance costs, reduces our willingness to travel to certain areas of the country, and threatens the educational process.⁴⁸ Reflecting on the government's argument, the Court observed that

under the Government's . . . reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents . . . , it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.⁴⁹

The Court's syllogism—if we accept the Solicitor General's position, then Congress can regulate family law, criminal law enforcement, and education—takes the form of a *reductio ad absurdum* argument. An unstated, but necessary, premise in the Court's reasoning is that family law, criminal law enforcement, and education are not within Congress's powers. Therefore, if one accepts the Solicitor General's position, two contradictory premises are

⁴³ See, e.g., *United States v. Lopez*, 514 U.S. 549, 564 (1995); see also U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 841 (1995) (Kennedy, J., concurring) ("[T]he Federal Government must be held within the boundaries of its own power when it intrudes upon matters reserved to the States."). But see Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 728-29, 733-35 (suggesting that, after *Lopez*, "the Court does not intend further dramatic cuts in Congress's Commerce Clause power").

⁴⁴ 514 U.S. 549 (1995).

⁴⁵ 18 U.S.C. § 922(q)(2)(A) (1994) (originally codified at 18 U.S.C. § 922(q)(1)(A) (Supp. V 1993)). This provision was subsequently amended to add congressional findings. See *Lopez*, 514 U.S. at 563 n.4.

⁴⁶ See *Lopez*, 514 U.S. at 558-59.

⁴⁷ See *id.* at 563.

⁴⁸ See *id.* at 563-64.

⁴⁹ *Id.* at 564.

created: Congress can regulate family law (by virtue of the Commerce Clause), and Congress cannot regulate family law (because of “_____”). But how does the Court fill in the blank to explain why Congress cannot regulate family law?

The *New York* Court might have answered with a “mirror image” argument: To paraphrase the Court, one might say that family law, criminal law enforcement, and education are not within Congress’s powers, or one could say that family law, criminal law enforcement, and education are within the states’ sovereignty.⁵⁰ But how can we prove that the latter is true? Simply because the states “historically” have governed a particular subject matter does not necessarily mean that the states “exclusively” govern that subject matter. The Court has offered us an empty concern, a specter that the Court itself has no tools for capturing.

B. Congress and “Historical” State Subject Matter

The *Lopez* court identified three areas of the law traditionally dominated by state law: family law, education, and criminal law enforcement. One should also add real property to these categories. How exclusive are the states’ historical powers in these four areas? As one might have guessed, not very exclusive.

I. Domestic Relations

The area of domestic relations “has long been regarded as a virtually exclusive province of the States.”⁵¹ “The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.”⁵² Even “[o]n the rare occasion when state family law has come into conflict with a federal statute,” the Court has limited preemption to those cases in which Congress “‘positively required by direct enactment’ that state law be pre-empted.”⁵³

Until recently, there were few occasions for federal interference with state domestic relations law. Beginning in 1884, amendments to the Constitution were proposed to give Congress the formal power to enact uniform domestic relations laws.⁵⁴ All were ultimately rejected.⁵⁵ More recently—

⁵⁰ See *New York v. United States*, 505 U.S. 144, 156-57 (1992).

⁵¹ *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).

⁵² *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)); see *Ankenbrandt v. Richards*, 504 U.S. 689, 697-701 (1992) (reaffirming a “domestic relations” exception to the exercise of federal diversity jurisdiction; holding that the exception exists by virtue of statute, not Article III); *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 384 (1930) (“[D]omestic relations of husband and wife . . . [are] matters reserved to the States.”); *Andrews v. Andrews*, 188 U.S. 14, 32 (1903) (“[T]he Constitution of the United States confers no power whatever upon the government of the United States to regulate marriage in the States or its dissolution.”).

⁵³ *Hisquierdo*, 439 U.S. at 581 (quoting *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904)).

⁵⁴ See *Sherrer v. Sherrer*, 334 U.S. 343, 364 n.13 (1948) (Frankfurter, J., dissenting); HERMAN AMES, *THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY*, H.R. DOC. NO. 54-353, pt. 2, at 190 (1896). See generally H.R. REP. NO. 52-1290 (1892).

⁵⁵ See *Sherrer*, 334 U.S. at 364 n.13.

and despite Justice Holmes's warning that "[c]ommerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce"⁵⁶—federal legislation in the domestic relations area has expanded greatly.⁵⁷ The Court's rhetoric has been loud, but when Congress has acted in an area traditionally—and some thought, exclusively—belonging to the states, the enumerated powers doctrine has done little to restrain Congress's activity.⁵⁸

2. Property and Inheritance

Understanding the relationship between the states and the federal government with respect to the transfer and use of real property has become increasingly complicated. Property law, which regulates the ownership and transfer of real and personal property, has remained, quite naturally, under the control of the states. In general, the Supreme Court has thought that the "devolution of property . . . is an area normally left to the States,"⁵⁹ as a "part of the residue of sovereignty retained by the states, a residue insured by the Tenth Amendment."⁶⁰ Indeed, as early as *Swift v. Tyson*,⁶¹ the Court's example of "state laws strictly local" were "rights and titles to things having a

⁵⁶ Northern Sec. Co. v. United States, 193 U.S. 197, 402 (1904) (Holmes, J., dissenting).

⁵⁷ See, e.g., Child Support Recovery Act of 1992, 18 U.S.C. § 228 (1994); Parental Kidnaping Prevention Act of 1980, 28 U.S.C. § 1738A; Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (1994 & Supp. I 1995); 42 U.S.C. §§ 300z to 300z-10 (1994); Adoption Assistance and Child Welfare Act of 1980, *id.* §§ 620-628, 670-679a; Child Abuse Prevention and Treatment Act, *id.* §§ 5101-5107, 5116a-5116i, 5118-5118e; Child Abuse Prevention and Treatment and Adoption Reform Act of 1978, *id.* §§ 5111-5115; Family Violence Prevention and Services Act, *id.* §§ 10401-10418; Victims of Child Abuse Act of 1990, *id.* §§ 13001-13055; see also *Ankenbrandt v. Richards*, 504 U.S. 689, 715 (1992) (Blackmun, J., concurring in the judgment) (noting "the expansion in recent years of federal law in the domestic relations area").

⁵⁸ See, e.g., *Cleveland v. United States*, 329 U.S. 114, 119 (1946) (upholding the conviction of polygamists under a statute prohibiting the transportation of women across state lines for "immoral purposes," and stating that "[t]he fact that the regulation of marriage is a state matter does not, of course, make the Mann Act an unconstitutional interference by Congress with the police powers of the states").

More recently, federal courts have upheld the Child Support Recovery Act of 1992, 18 U.S.C. § 228, although several district courts initially held the Act unconstitutional under *Lopez*. See, e.g., *United States v. Bailey*, 115 F.3d 1222, 1233 (5th Cir. 1997), *rev'g* 902 F. Supp. 727 (W.D. Tex. 1996); *United States v. Johnson*, 114 F.3d 476, 480 (4th Cir. 1997); *United States v. Parker*, 108 F.3d 28, 30 (3d Cir. 1997), *rev'g* 911 F. Supp. 830 (E.D. Pa. 1995); *United States v. Bongiorno*, 106 F.3d 1027, 1040 (1st Cir. 1997); *United States v. Hampshire*, 95 F.3d 999, 1004 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 753 (1997); *United States v. Mussari*, 95 F.3d 787, 791 (9th Cir. 1996), *rev'g* 894 F. Supp. 1360, 1368 (D. Ariz. 1995), *cert. denied*, 117 S. Ct. 1567 (1997); *United States v. Sage*, 92 F.3d 101, 108 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 784 (1997).

⁵⁹ *United States v. Oregon*, 366 U.S. 643, 649 (1961) (upholding the escheatment of estate of a veteran without heirs, who died in a veterans hospital); see John Marshall, *A Friend of the Constitution*, reprinted in JOHN MARSHALL'S DEFENSE OF McCULLOCH V. MARYLAND 173 (Gerald Gunther ed., 1969) ("Congress certainly may not, under the pretext . . . of guaranteeing to each state a republican form of government, alter the law of descents . . .").

⁶⁰ *United States v. Burnison*, 339 U.S. 87, 91-92 (1950); see also *Oregon*, 366 U.S. at 654 (Douglas, J., dissenting) (stating that "[t]here is nothing more deeply imbedded in the Tenth Amendment, as I read history, than the disposition of the estates of deceased people").

⁶¹ 41 U.S. (16 Pet.) 1, 18 (1842), *overruled on other grounds*, *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character.”⁶²

On the other hand, Congress possesses some direct power over property. For example, Congress has express control over property in the District of Columbia and U.S. territories.⁶³ The United States also owns property outside the District of Columbia and the territories, and exercises control as an owner.⁶⁴ Additionally, a federal claim to property may trigger an obligation to pay compensation under the Takings Clause.⁶⁵ Less directly, the United States successfully has asserted control of land use under the Treaty Power,⁶⁶ enacted rent controls and survivorship rules for military life insurance under its war powers,⁶⁷ and prohibited discrimination in housing through the Thirteenth Amendment.⁶⁸ Through its commerce power, Congress has regulated land use through numerous environmental statutes⁶⁹ and, more recently, required that buildings accommodate the disabled.⁷⁰

⁶² *Id.* at 18.

⁶³ See U.S. CONST. art. I, § 8, cl. 17; *id.* art. IV, § 3, cl. 2; see also *Block v. Hirsh*, 256 U.S. 135, 158 (1921) (involving rent control in the District of Columbia); *Gibbons v. District of Columbia*, 116 U.S. 404, 407 (1886) (involving property taxes in the District of Columbia); *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840) (explaining that “territory” in the Property Clause means “land”); *Sere v. Pitot*, 10 U.S. (6 Cranch) 332, 337 (1810) (holding that Congress has the power to govern and legislate for the Orleans territory, acquired through the Louisiana Purchase).

⁶⁴ See 28 U.S.C. § 2410(a) (1994) (authorizing quiet title actions against the United States when the United States claims a lien).

⁶⁵ See U.S. CONST. amend. V; *United States v. Causby*, 328 U.S. 256, 261-67 (1946) (holding that the use of airspace may render the property below uninhabitable and thus compensable under the Fifth Amendment).

Congress may also have the power to “to create a separate ‘Federal law’ as to what constitutes real property for Federal condemnation.” *United States v. Certain Property Located in the Borough of Manhattan*, 306 F.2d 439, 444 (2d Cir. 1962) (citing *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943)); see, e.g., Private Property Rights Restoration Act, S. 145, 104th Cong. (1995) (requiring compensation to landowners whose property value is significantly reduced by federal government action).

⁶⁶ See U.S. CONST. art. II, § 2, cl. 2; *Missouri v. Holland*, 252 U.S. 416, 435 (1920) (upholding the Migratory Bird Treaty Act against a Tenth Amendment challenge).

⁶⁷ See U.S. CONST. art. I, § 8, cls. 11-16; *id.* art. II, § 2, cl. 1; *Wissner v. Wissner*, 338 U.S. 655, 658, 661 (1950) (upholding the National Service Life Insurance Act of 1940); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 142, 144 (1948) (upholding the Housing and Rent Act of 1947 under Congress’s war power, but recognizing that a broad interpretation of war power might “not only swallow up all other powers of Congress but largely obliterate the Ninth and the Tenth Amendments as well”).

⁶⁸ See U.S. CONST. amend. XIII, § 2; *United States v. City of Parma*, 661 F.2d 562, 573 (6th Cir. 1981); *Williams v. Matthews Co.*, 499 F.2d 819, 825 (8th Cir. 1974); *United States v. Hunter*, 459 F.2d 205, 214 (4th Cir. 1972).

⁶⁹ See, e.g., Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464; Wood Residue Utilization Act of 1980, *id.* §§ 1681-1687; Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328; Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (“CERCLA”). Compare *United States v. NL Indus.*, 936 F. Supp. 545, 563 (S.D. Ill. 1996) (upholding CERCLA under the Commerce Clause), with *United States v. Olin Corp.*, 927 F. Supp. 1502, 1503 (S.D. Ala. 1996) (holding that, on the facts of the case, CERCLA violated the Commerce Clause), *rev’d*, 107 F.3d 1506, 1511 (11th Cir. 1997).

⁷⁰ See Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213. Congress re-

One area of property regulation that has remained largely with the states is the transfer of property through inter vivos or testamentary disposition.⁷¹ The Court has long observed that “regulating the manner and term upon which property real or personal within its dominion may be transmitted by last will and testament, or by inheritance” is “nothing more than an exercise of the power which every state and sovereignty possesses”⁷² Yet even here, the Court has affirmed Congress’s control over the property of veterans who died intestate in a Veterans’ Administration Hospital, by virtue of Congress’s power to raise armies and maintain navies and conduct war.⁷³

Although states still have substantial control over zoning regulations, property transfers, and testamentary dispositions, there seems to be little question that all of these matters affect commerce and might be brought within Congress’s Commerce Clause powers. Property and inheritance, as an area of state dominion, seems to rest on congressional sufferance rather than any particular constitutional doctrine.

3. Education

In *Brown v. Board of Education*,⁷⁴ the Court observed that “education is perhaps the most important function of state and local governments.”⁷⁵ This statement echoes earlier recognition of the intimate relationship among the state, families, and schools.⁷⁶ To say that states have historically taken the lead in the field of education is not equivalent, however, to stating that they possess exclusive power over education. If Congress and the President’s recent efforts in this area are any indication, there is much evidence to the contrary.⁷⁷

cited both the Commerce Clause and Section 5 of the Fourteenth Amendment as the sources of power by which it could legislate the Act. *See id.* § 12101(b)(4).

⁷¹ *See* *United States v. Burnison*, 339 U.S. 87, 91-92 (1950); *Clark v. Allen*, 331 U.S. 503, 517 (1947); *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942).

⁷² *Mager v. Grima*, 49 U.S. (8 How.) 490, 493 (1850).

⁷³ *See* *United States v. Oregon*, 366 U.S. 643, 648-49 (1961); *see also* U.S. CONST. art. I, § 8, cls. 11-16.

⁷⁴ 347 U.S. 483 (1954)

⁷⁵ *Id.* at 493.

⁷⁶ *See, e.g.,* *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (“There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.”); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

⁷⁷ *See, e.g.,* Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 128 (1994) (codified, in part, as amended at 20 U.S.C. §§ 5801-6084 (1994 & Supp. I 1995)); Remarks at the Presidential Scholars Awards Presentation Ceremony, in PUB. PAPERS 912, 914-15 (June 21, 1995) (discussing education legislation); Joint Statement by the President and the Governors on a Process for Measuring and Reporting on Progress Toward the National Education Goals, in PUB. PAPERS 1078 (July 31, 1990) (establishing a National Education Goals Panel); *see also* *United States v. Lopez*, 514 U.S. 549, 631-36 (1995) (Breyer, J., dissenting) (listing congressional hearings and materials related to education).

C. Dual Remedies, Dual Sovereignties, and Federal Criminal Law

Even though the *Lopez* Court identified “criminal law enforcement” as a matter historically belonging to the states,⁷⁸ Part II.B did not discuss crimes or law enforcement because criminal law presents a problem quite distinct from other historical state subject matter. The Court’s inclusion of criminal law with family law and education was a mistake in categorization. Crime is improperly added to the preceding list, not because it does not belong to the states, but because “crimes” are not a subject matter in the same way that “property,” “inheritance,” and “domestic relations” are said to be subjects within the law. Rather, criminal sanctions have long been recognized as a particular kind of *remedy* within the law.⁷⁹ Just as we contrast criminal procedure with civil procedure, we ordinarily contrast criminal sanctions with civil sanctions.⁸⁰ Crimes are sanctioned, even in the absence of any actual damage, because they are viewed as wrongs against the public interest. Civil sanctions, on the other hand, typically are applied when some actual harm to an individual has occurred. In other words, criminal law provides a public remedy, while torts provide a private remedy.⁸¹ Furthermore, the remedies for harm to property often differ from the remedies for harm to the family. For years, the remedy for beating one’s spouse was divorce, not jail.⁸² Only recently has spouse abuse come to have both a public and a private remedy.⁸³

These differences reveal that it is difficult to say that the defining and punishing of crimes is a matter historically belonging to the states. If it is so, it is because the underlying subject matter to which we have applied public sanction was a matter belonging to the states. This hypothesis, however, does not address the issue of federal power over crimes any more than stating that domestic relations, property, and education belong to the states.

Does Congress have a general power over crime?⁸⁴ Or, stated differently, does Congress have the power to make criminal sanctions a remedy for the violation of federal law? The answer appears obvious in light of the innumerable federal criminal laws that Congress has enacted.⁸⁵ The answer may be obvious, but the rationale is not. In the ordinary case, a sovereign has the

⁷⁸ See *Lopez*, 514 U.S. at 564.

⁷⁹ See Stuart P. Green, *Why It’s a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. (forthcoming Jan. 1998) (manuscript at 9-10, on file with author); David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 83 (1996) (“What is remarkable about the actions that formed our categories of crime and tort is that they were choices. Crime and tort were different ways for a victim to pursue justice for the same wrongful act.”); cf. Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1803-13 (1992) (describing the elements of the law of sanctions, that is crimes and torts, as including the definition of the wrong, a purpose, a procedure, and a remedy).

⁸⁰ See Mann, *supra* note 79, at 1803-04.

⁸¹ See *id.* at 1806-07.

⁸² See Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2130-34 (1996).

⁸³ See *id.* at 2170-71.

⁸⁴ See *United States v. Salerno*, 481 U.S. 739, 754 (1987) (Marshall, J., dissenting) (“The Constitution does not contain an explicit delegation to the Federal Government of the power to define and administer the general criminal law.”).

⁸⁵ See examples cited *supra* note 7.

right to punish violations of its own laws. But the United States, as a federal system, is not the ordinary case because when we are physically present in the United States, we are subject simultaneously to the jurisdiction of two sovereigns. "Where a person owes a duty to two sovereigns, he is amenable to both for its performance; and either may call him to account."⁸⁶

Even in the exercise of its sovereign prerogative to punish, the enumerated powers constrain Congress. The Constitution expressly grants to Congress the power to punish in three cases: counterfeiting securities and coin of the United States, piracies and felonies committed on the high seas, and treason.⁸⁷ Under the doctrine of *expressio unius est exclusio alterius*,⁸⁸ one reasonably might argue that, by granting Congress the power to punish these matters, the Framers intended to establish the whole of Congress's power to define crimes. As Chief Justice Marshall asked in *McCulloch v. Maryland*: "[W]hence arises the power to punish, in cases not prescribed by the constitution?"⁸⁹ He answered: "[T]he power of punishment appertains to sovereignty, and may be exercised, whenever the sovereign has a right to act, as incidental to his constitutional powers."⁹⁰ From early on, however, Congress not only punished the three crimes enumerated in the Constitution, but also crimes related to its other substantive powers as a remedy "necessary and proper" to the exercise of these powers.⁹¹ For example, it exercised the power to punish crimes physically committed in locations where it had plenary authority: the military,⁹² the District of Columbia,⁹³ and U.S. property and territories.⁹⁴ Congress exercised this authority in these jurisdictions even when the subject matter of the crime was one that fell within an area historically regulated by the states, such as marriage.⁹⁵

Does Congress possess the power to punish crimes that are not defined in the Constitution and are not physically committed in locations subject to exclusive federal control? Congress, in fact, has defined and punished crimes in other areas over which it has power,⁹⁶ notably, commerce among the

⁸⁶ *Ex parte Siebold*, 100 U.S. 371, 389 (1879); *see also* *Moore v. Illinois*, 55 (14 How.) 13, 20 (1852) ("Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns.[sic] and liable to punishment for an infraction of the laws of either.")

⁸⁷ *See* U.S. CONST. art. I, § 8, cl. 6 (counterfeiting); *id.* art. I, § 8, cl. 10 (piracies); *id.* art. III, § 3, cl. 2 (treason).

⁸⁸ "Expression of one thing is the exclusion of another."

⁸⁹ 17 U.S. (4 Wheat.) 316, 416 (1819).

⁹⁰ *Id.* at 418.

⁹¹ U.S. CONST. art. I, § 8, cl. 18.

⁹² *See, e.g.*, 10 U.S.C. § 934 (1994) (providing generally for a court-martial to punish, among other things, all "crimes and offenses not capital" by members of the military).

⁹³ *See, e.g.*, An Act to Create a Metropolitan Police District of the District of Columbia, and to Establish a Police Therefor, ch. 62, 12 Stat. 320 (1861); An Act for the Punishment of Crimes in the District of Columbia, ch. 37, 4 Stat. 448 (1831).

⁹⁴ *See, e.g.*, An Act to Authorize Protection to be Given to Citizens of the United States Who May Discover Deposites of Guano, ch. 164, § 6, 11 Stat. 119, 120 (1856); An Act for the Punishment of Certain Crimes Against the United States, ch. 9, 1 Stat. 112 (1790).

⁹⁵ *See, e.g.*, 48 U.S.C. § 1561 (prohibiting bigamy and polygamy in the Virgin Islands); *see also* *Reynolds v. United States*, 98 U.S. 145, 168 (1878) (affirming a conviction in the Utah Territory under the federal bigamy statute).

⁹⁶ *See* FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES

states.⁹⁷ Thus, even though Congress has no express power to address questions of morality, such as lotteries, prostitution, or even sodomy, the Court has acquiesced to the exercise of such power when it was nominally attached to something dealing with interstate commerce.⁹⁸ Congress's ability to enact criminal laws involving interstate commerce has resulted in a substantial overlap between state and federal criminal laws.⁹⁹

The steady expansion of Congress's power under the Commerce Clause has given rise to the question whether there is any area that Congress cannot reach through federal criminal laws? Commentators have long assumed that "there is no serious restriction on what Congress may or may not choose to criminalize, aside from such considerations of self-restraint as Congress itself may be inclined, politically, to observe."¹⁰⁰ In *Lopez*, the Court indicated that there were still some limits on the scope of federal power over commerce.¹⁰¹ But even if the Court ultimately fails to establish real limits on Congress's Commerce Clause power, one would be remiss to conclude that Congress has plenary power to punish crime. One must not only ask if there is a basis for congressional action, but also whether the Constitution disables Congress. Although Congress can properly make it a crime to steal mail, it cannot make it a crime to steal mail from Presbyterians, or even make it a crime to steal mail from everyone except Presbyterians. In doing so, Congress would violate the First Amendment (and likely the Equal Protection

80-85 (Philadelphia, James Kay, Kun. and Brother 1852) (describing federal criminal laws). Brief histories of the federalization of crime may be found in John S. Baker, Jr., *Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper?*, 16 RUTGERS L.J. 495, 499-531 (1985); Sara Sun Beale, *Reporter's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law*, 46 HASTINGS L.J. 1277, 1278-82 (1995); Andrew Weis, Note, *Commerce Clause in the Cross-Hairs: The Use of Lopez-Based Motions to Challenge the Constitutionality of Federal Criminal Statutes*, 48 STAN. L. REV. 1431, 1436-38 (1996).

⁹⁷ See Baker, *supra* note 96, at 518-31. But see Trade-Mark Cases, 100 U.S. 82, 96-97, 99 (1879) (striking a trademark counterfeiting provision on the grounds that the State impermissibly embraced all commerce, not just intrastate commerce); *United States v. DeWitt*, 76 U.S. (9 Wall.) 41, 44-45 (1869) (striking a federal criminal statute prohibiting the sale of certain oils on grounds that Congress lacked power under the Commerce Clause).

⁹⁸ Essentially, many of the crimes enacted under the Commerce Clause fall within Congress's reach simply when persons engaging in otherwise intrastate conduct cross a state line. See, e.g., *Perez v. United States*, 402 U.S. 146, 150-57 (1971) (loansharking); *United States v. Five Gambling Devices*, 346 U.S. 441 (1953) (upholding a statute providing for the seizure and forfeiture of gambling devices, but affirming the dismissal of indictments that failed to allege that the devices in question had travelled in or affected interstate commerce); *Caminetti v. United States*, 242 U.S. 470, 491 (1917) (upholding the White Slave Traffic Act of 1910, which prohibited the transportation of women for immoral purposes); *Champion v. Ames*, 188 U.S. 321, 363-64 (1903) (The Lottery Case) (prohibiting the transportation of lottery tickets across state lines); see also *Cleveland v. United States*, 329 U.S. 14, 19 (1946) (upholding the Mann Act, which outlaws the transportation across state lines of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose").

⁹⁹ See Paul D. Carrington, *Federal Use of State Institutions in the Administration of Criminal Justice*, 49 SMU L. REV. 557, 558 (1996) ("[M]ost federal criminal law is now redundant to State systems of criminal justice.").

¹⁰⁰ William Van Alstyne, *Dual Sovereignty, Federalism, and National Criminal Law: Modernist Constitutional Doctrine and the Nonrole of the Supreme Court*, 26 AM. CRIM. L. REV. 1740, 1750 (1989); see Baker, *supra* note 96, at 501.

¹⁰¹ See *United States v. Lopez*, 514 U.S. 549, 564-65 (1995).

Clause). These provisions are external constraints on otherwise legitimate exercises of congressional power.

There are two methods that might disable Congress from exercising general criminal power.¹⁰² First, Congress might be implicitly disabled because the states have been empowered expressly to deal with the subject matter. Second, the Constitution might expressly disable Congress. The remainder of this Article is devoted to the question whether the Domestic Violence Clause is a disability on Congress, prohibiting it from interfering—either directly through the use of U.S. law enforcement officials, or indirectly through the establishment of federal criminal laws—in the domestic affairs of the states.

III. *The Domestic Violence Clause and the Scope of Federal Power Over Crime*

In 1786, British traders refused credit to or payment in goods from cash-strapped Boston merchants, who in turn demanded that Western Massachusetts subsistence farmers pay their debts in hard currency.¹⁰³ Unable to meet these demands or to obtain legislative relief, the cash-poor farmers faced debtors' courts and prison.¹⁰⁴ Outraged citizens convened at town meetings to protest the debtor proceedings and to demand the abolition of the state senate and courts.¹⁰⁵ The meetings turned into armed mobs that were led by Revolutionary War veterans, including Daniel Shays, who vented their frustrations by closing the courts.¹⁰⁶ Massachusetts Governor James Bowdoin dispatched the state militia to protect the courts, but the militia's numbers proved inadequate.¹⁰⁷ Congress, justifiably worried that rebellion might erupt in other states,¹⁰⁸ called for additional federal troops from surrounding states.¹⁰⁹ Its request largely went ignored.¹¹⁰ In the meantime, rumors abounded that the protesters had sought assistance from the British in Can-

¹⁰² See text accompanying *supra* notes 30-33.

¹⁰³ See David Szatmary, *Shays' Rebellion in Springfield*, in SHAYS' REBELLION: SELECTED ESSAYS 1, 3-7 (Martin Kaufman ed., 1987) [hereinafter Szatmary, *Rebellion in Springfield*]; see also ROBERT J. TAYLOR, *WESTERN MASSACHUSETTS IN THE REVOLUTION* 128-36 (1954). Shays' Rebellion was both a class and a rural/urban struggle. The urban merchant classes were better suited to paying taxes in cash than their poor, landed compatriots. See TAYLOR, *supra*, at 133; Szatmary, *Rebellion in Springfield*, *supra*, at 5-6. On the class nature of the rebellion, see Millard Hansen, *The Significance of Shays' Rebellion*, 39 S. ATLANTIC. Q. 305, 306-08 (1940).

¹⁰⁴ See Szatmary, *Rebellion in Springfield*, *supra* note 103, at 5-6.

¹⁰⁵ See TAYLOR, *supra* note 103, at 136-41.

¹⁰⁶ See *id.* at 143-49, 154, 156-57; Szatmary, *Rebellion in Springfield*, *supra* note 103, at 7-10.

¹⁰⁷ See TAYLOR, *supra* note 103, at 150, 158; see also MARION L. STARKEY, *A LITTLE REBELLION* 91 (1955).

¹⁰⁸ See DAVID P. SZATMARY, *SHAYS' REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION* 123-26 (1980) (referring to violent or near violent protests in Maryland, New Jersey, Pennsylvania, South Carolina, and Virginia).

¹⁰⁹ See ROBERT A. FEER, 268-85 (Frank Freidel & Ernest May eds., 1988); SZATMARY, *supra* note 108, at 82.

¹¹⁰ See FEER, *supra* note 109, at 274, 278, 280; SZATMARY, *supra* note 108, at 84-85.

ada and that Great Britain hoped to use this opportunity to reinstate the monarchy in the states.¹¹¹

By February 1787, however, Massachusetts had reestablished order, the rebels had dispersed, and Shays' Rebellion was over.¹¹² But concerns about how the confederation would survive while one or more of its states were weakened by insurrection lingered.¹¹³ Three months later, the Constitutional Convention opened in Philadelphia.

Shays' Rebellion supplied both a reason and an excuse for creating new powers in the union.¹¹⁴ For James Madison, Shays' Rebellion was "'distressing beyond measure to the zealous friends of the Revolution'" and it supplied "'new proofs of the necessity of such a vigor in the general government as will be able to restore health to any diseased part of the Federal body.'"¹¹⁵ From the opening gavel of the Constitutional Convention in May 1787, concerns raised by Shays' Rebellion were not far from the delegates' minds. Virginia's Governor, Edmund Randolph, opened the Convention with a discussion of the elements of a proper government, the defects of the Confederation, and the Virginia Plan.¹¹⁶ Governor Randolph listed some of the attributes of a federal government: "The character of such a government ought to secure, first, against foreign invasion; secondly against dissensions between members of the Union, or seditions in particular states . . ." ¹¹⁷ He then discussed the defects of the present arrangement: "First, that the Confederation produced no security against foreign invasion; . . . Secondly, that the federal government could not check the quarrel between states, nor a rebellion in any, not having constitutional power, nor means, to interpose according to the exigency."¹¹⁸ Governor Randolph was not alone in his concerns. Shays' Rebellion was cited repeatedly at the Constitutional Convention¹¹⁹ and the state ratifying conventions,¹²⁰ as well as in *The Federalist*

111 See SZATMARY, *supra* note 108, at 74-75, 108-09, 118; TAYLOR, *supra* note 103, at 149-50.

112 See TAYLOR, *supra* note 103, at 162-63.

113 See SZATMARY, *supra* note 108, at 127-30; TAYLOR, *supra* note 103, at 168.

114 See SZATMARY, *supra* note 108, at 120-123; GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 412 (1969).

[T]he late rebellion in Massachusetts [sic] has given more alarm than I think it should have done. [sic] calculate that one rebellion in 13 states in the course of 11 years, is but one for each state in a century & a half. [sic] no country should be so long without one. [sic] nor will any degree of power in the hands of government prevent insurrections.

Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 8 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 249, 252 (John P. Kaminski & Gaspare J. Saladino eds., 1988).

115 SZATMARY, *supra* note 108, at 128 (quoting letter from James Madison to George Mater (Jan. 7, 1787), in 9 *JAMES MADISON, THE PAPERS OF JAMES MADISON* 231 (Robert Rutland ed., 1962)); see also Hansen, *supra* note 103, at 311-13.

116 See 4 *THE DEBATES IN THE SEVERAL STATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 126 (photo. reprint 1941) (Jonathan Elliot ed., 1836) [hereinafter *ELLIOT'S DEBATES*] (statement of Edmund Randolph).

117 4 *id.* (statement of Edmund Randolph).

118 4 *id.* at 127 (statement of Edmund Randolph).

119 See Andrew R. Willing, *Protection By Law Enforcement: The Emerging Constitutional*

*Papers*¹²¹ and other contemporaneous discussions.¹²² The Framers reasoned that Massachusetts had been unable to deal with the incident, that the rebellion threatened peaceful government, and that the situation demanded the assistance of a general militia to aid state governments as necessary.¹²³

These concerns found expression in two provisions: the Preamble, which provides that the Constitution was established, in part, to “insure domestic Tranquility,”¹²⁴ and in Article IV, Section 4.¹²⁵ The latter appeared to fulfill the Preamble’s promise and the Framers’ concerns that Shays’ Rebellion not be reenacted. Article IV, Section 4 consists of three clauses: the Republican Guarantee Clause, the Invasion Clause, and the Domestic Violence Clause. Article IV, Section 4 provides:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.¹²⁶

From its inception, the language of the Domestic Violence Clause and the familiar history surrounding its adoption created confusion as to whether the clause granted authority to the new national government or whether it constituted a guarantee to the states of federal noninterference in domestic matters. For many in that era, the concern was not that the United States would physically intervene to suppress domestic violence without state permission, but that Congress would simply adopt its own criminal code, thereby authorizing the United States to intervene at will in support of its own laws.¹²⁷ This Part explores the various views of the Framers on this controversial issue.

A. *The Preamble and The Articles of Confederation*

Essential to any claim of legitimate sovereignty is the sovereign’s ability to protect its people. If the king cannot insure the safety of his people, there is no reason that they should recognize him as king; if he cannot protect them, his reign is not likely to last. People obeyed their king because he offered them security against their enemies and promised to maintain the

Right, 35 *RUTGERS L. REV.* 1, 42 & n.245 (1982) (listing 21 references to Shays’ Rebellion in the records of the federal convention).

¹²⁰ See Robert Feer, *Shays’s Rebellion and the Constitution: A Study in Causation*, 42 *NEW ENG. Q.* 388, 404 n.32 (1969) (listing six references in state conventions).

¹²¹ See *THE FEDERALIST* Nos. 6, at 31, 21, at 131, 25, at 162, 28, at 177, 74, at 502 (Alexander Hamilton), No. 43, at 293 (James Madison) (Jacob E. Cooke ed., 1961).

¹²² See Willing, *supra* note 119, at 40-42.

¹²³ See *THE FEDERALIST* Nos. 21, at 131, 25, at 162 (Alexander Hamilton).

¹²⁴ U.S. CONST. preamble.

¹²⁵ See Willing, *supra* note 119, at 44-45 & n. 251; see also U.S. CONST. art. IV, § 4.

¹²⁶ U.S. CONST. art. IV, § 4.

¹²⁷ See *infra* Part III.B.

public peace.¹²⁸ “One of the first duties of government,” the Court said in *Marbury v. Madison*, is to “afford . . . protection.”¹²⁹

From the outset, the Framers recognized the reciprocity in the union they were proposing. The Confederation had only nominally promised mutual aid, and the newly independent Americans discovered, through Shays’ Rebellion, that the Confederation only nominally provided it. Consequently, the Confederation failed to earn the respect of the people, as demonstrated by the continuation of the Massachusetts uprising after the Confederation government took action.¹³⁰ In the Constitution, the Framers thought that a real promise of securing the borders would command real fealty from the people. At the same time, the Framers, with the unpleasantness of Shays’ Rebellion fresh in their minds, saw an opportunity to strengthen the national government to deal with internal disorders as well.¹³¹ Protection of citizens within the states was more complicated, however, than the offer of protection against foreign enemies. Although foreign enemies could be repelled by a single sovereign, a new national government could only hope to supplement, but not displace, state governments in their dealings with civil disorders.

These broad purposes are reflected, quite subtly, in the Preamble and are illustrated by contrasting the phrases “*provide* for the common defence,” “*promote* the general welfare,” and “*insure* domestic tranquility.”¹³² The duty of the United States with respect to the common defense was quite clear. Under the Constitution, the United States expressly acquired the war powers,¹³³ and the states expressly relinquished the right to “engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”¹³⁴ The United States would, by assuming the war powers of the states, take on the responsibility of providing for the common defense, as promised by the Preamble.

128 See Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 513-20, 536-37 (1991); Willing, *supra* note 119, at 22-38.

129 5 U.S. (1 Cranch) 137, 163 (1803); see *United States v. Cruikshank*, 92 U.S. 542, 550-51 (1875); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 76 (1872). The fundamental privileges belonging to citizens of the United States, that are to be ensured by the sovereign, begin with “protection by the Government,” according to Justice Washington. *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230); see John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1435-36 (1992).

130 See SZATMARY, *supra* note 108, at 84-85. The Shaysites were able to continue closing courts following the passage of anti-Shaysite legislation and a call for federal troops, because the Confederation lacked the monetary resources to raise sufficient troops and thereby enforce the new laws. See *id.*

131 See *id.* at 120 (“The crisis atmosphere . . . strengthened the resolve of the nationalists and shocked some reluctant localists into an acceptance of a stronger national government . . .”); WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 33 (1972) (“Since independence, . . . the interests of the government and the people were identical, so there could be no valid reason for extralegal violence.”); WOOD, *supra* note 114, at 412 (“[M]any social conservatives [saw Shays’] rebellion as encouraging the move for constitutional reform. It was both a confirmation of their worst fears . . . and a vindication of their desires for stronger government . . .”).

132 U.S. CONST. preamble (emphasis added).

133 See *id.* art. I, § 8, cls. 11-16; *id.* art. II, § 2, cl. 1.

134 *Id.* art. I, § 10, cl. 3.

The national government's responsibility for the "general welfare" was also enumerated, but not as easily described as its power over defense. The Constitution granted Congress a series of different powers, guardianship of which would assist in the promotion of the general welfare. For example, Congress was granted the power to tax and spend for the general welfare,¹³⁵ a power peculiarly well suited for *promoting* the general welfare, though stopping short of *providing* for it. This distinction reveals that, in the Framers' minds, providing for the general welfare was neither the province nor within the capacity of any government. To the extent that a government might promote it, the United States would share that power with the states.

On the other hand, the Constitution did not grant Congress an exclusive power (as it had over war) or general enumerated powers (as it had for spending for the general welfare) to provide for domestic tranquility. The United States assumed the duty of "protect[ing] [the states] against Invasion"¹³⁶ and obligated itself to protect the states against domestic violence "on Application of the Legislature, or of the Executive (when the Legislature cannot be convened)."¹³⁷ Congress did not assume primary responsibility for quelling domestic violence. Rather its responsibility was secondary: The United States was to *insure* domestic tranquility when the states, in their own judgment, proved incapable.¹³⁸ The Framers did not intend to unify all the sovereign powers of the states. They moved from a confederacy to a dual system of government, a system they thought would create "a more perfect union,"¹³⁹ not a "perfect union."¹⁴⁰ Although the Framers gave Congress enumerated powers for the common defense and general welfare,¹⁴¹ they granted it only limited power to insure domestic tranquility.¹⁴²

By contrast, the Articles of Confederation (the "Articles") had made no provision for federal control or assistance in such situations. The Articles created the "firm league of friendship" that pledged "common defence, the security of their liberties, and their mutual and general welfare; binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever."¹⁴³ But despite this general pledge, the Articles had neither provisions for punishing crime nor a mechanism for actually aid-

¹³⁵ See *id.* § 8, cl. 1.

¹³⁶ *Id.* art. IV, § 4.

¹³⁷ *Id.*

¹³⁸ See Heyman, *supra* note 128, at 525 ("The states . . . were to retain their role as 'the immediate and visible guardian[s] of life and property' . . ." (quoting THE FEDERALIST No. 17, at 80 (Alexander Hamilton) (Jacob E. Cooke ed., 1961))); see also DAVID HUTCHISON, THE FOUNDATIONS OF THE CONSTITUTION 13 (1975) (suggesting that the Framers drafted the phrase "insure domestic tranquility" in response to an incident in Philadelphia in 1783 and to Shays' Rebellion).

¹³⁹ U.S. CONST. preamble.

¹⁴⁰ See Martin Diamond, *The Federalist on Federalism: "Neither a National Nor a Federal Constitution, But a Composition of Both,"* 86 YALE L.J. 1273, 1280 (1977); see also THE FEDERALIST No. 39, at 257 (James Madison); Van Alstyne, *supra* note 12, at 773.

¹⁴¹ See U.S. CONST. art. I, § 8, cl. 1.

¹⁴² See 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 501-02 (1953).

¹⁴³ ARTICLES OF CONFEDERATION AND PERPETUAL UNION art. III.

ing states whose security was threatened from within.¹⁴⁴ Incident to its war powers under the Articles, Congress had the power to “establish[] rules for deciding, in all cases, what captures on land or water shall be legal, and in what manner prizes, taken by land or naval forces in the service of the United States, shall be divided or appropriated[,]”¹⁴⁵ but it had no authority to define crimes or marshal troops to the aid of the states.¹⁴⁶ As with our Constitution, the Articles forbid the states to engage in war without the consent of Congress, except in case of actual invasion, invasion by Indians, or “infest[ation] by pirates.”¹⁴⁷ The Articles gave Congress the power to appoint courts for the “trial of piracies and felonies committed on the high seas,”¹⁴⁸ and provided for extradition between states of persons charged with or guilty of “treason, felony, or other high misdemeanor in any State.”¹⁴⁹

To address internal commotions, such as Shays’ Rebellion, the Framers laced together three related powers: the power to define crimes, creation of a central military authority, and the use of federal authority to suppress domestic violence. The Constitutional Convention of 1787 resulted in the clear authority of the United States to create an army and navy and to assemble a militia, the power to use the forces of the United States to suppress domestic violence, when requested by appropriate state authorities, and the somewhat blurred authority to define crimes.¹⁵⁰

B. Three Views at the Founding of Federal Criminal Authority

I. Express Authority and Enumerated Crimes

As previously noted, the Constitution expressly grants to Congress the power to punish in three cases:¹⁵¹ counterfeiting securities and coin of the

¹⁴⁴ See 4 ELLIOT’S DEBATES, *supra* note 116, at 127 (discussing the defects of the Articles, including “that the federal government could not check the quarrel between states, nor a rebellion in any, not having constitutional power, nor means, to interpose according to the exigency”); HUTCHISON, *supra* note 138, at 12-13; *supra* notes 119-123 and accompanying text.

¹⁴⁵ ARTICLES OF CONFEDERATION AND PERPETUAL UNION art. IX, cl. 1.

¹⁴⁶ Hamilton noted that the Confederation had a “total want of a SANCTION to its laws.” THE FEDERALIST No. 21, at 129 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

¹⁴⁷ ARTICLES OF CONFEDERATION AND PERPETUAL UNION art. VI, cl. 5.

¹⁴⁸ *Id.* art. IX, cl. 1.

¹⁴⁹ *Id.* art. IV, cl. 2.

¹⁵⁰ U.S. CONST. art. I, § 8, cls. 6, 10 (conferring power to punish counterfeiting, piracy, and felonies on the high seas); *id.* cls. 12-16 (conferring power over army and navy and authorizing use of militia); *id.* art. III, § 3, cl. 2 (conferring power to punish treason); *id.* art. IV, § 4 (Domestic Violence Clause).

¹⁵¹ Ratification of the Thirteenth Amendment may have given Congress power to punish those who engage in slavery. Section 1 declares that “[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction,” while Section 2 gives Congress “power to enforce this article by appropriate legislation.” *Id.* amend. XIII; see CONG. GLOBE, 42d Cong., 1st Sess. app. at 85 (1871) (statement of Rep. Bingham) (suggesting that the United States had the power to punish individuals who enslaved others).

United States,¹⁵² piracies and felonies committed on the high seas,¹⁵³ and treason.¹⁵⁴ The United States has a powerful interest in each of these areas.

The Counterfeiting Clause added significant power to the United States government. Under the Articles, Congress had “the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States[.]”¹⁵⁵ but it possessed no power to punish counterfeiting. The omission was evident because the Congress, operating under the Articles, requested that the states address the counterfeiting problem.¹⁵⁶ This request, however, failed to produce consistent and uniform enforcement.¹⁵⁷ The Framers addressed this deficiency through three different clauses in the Constitution. As with the Articles, Congress was given authority to “coin Money [and] regulate the Value thereof.”¹⁵⁸ In contrast to the Articles, the states were expressly forbidden to “coin Money.”¹⁵⁹ Finally, as noted above, Congress was given authority to “provide for the Punishment of counterfeiting the Securities and current Coin of the United States.”¹⁶⁰ This combination of power and disability gave Congress exclusive authority over coinage and counterfeiting.¹⁶¹

The debates on the Counterfeiting Clause are short, but indicate that the power granted to Congress still had limits. Gouverneur Morris, a delegate to the convention from Pennsylvania, thought the counterfeiting authority should be extended “so as to provide for the punishment of counterfeiting in general. Bills of exchange for example might be forged in one State and carried into another[.]”¹⁶² Another delegate suggested that it “might be politic to provide by national authority for the punishment” of counterfeit foreign securities.¹⁶³ The delegates did not adopt either of these suggestions.¹⁶⁴

The Piracies Clause provides an interesting contrast to the coin and counterfeiting provisions. Whereas the Counterfeiting Clause gave Congress

152 See U.S. CONST. art. I, § 8, cl. 6 (“The Congress shall have Power . . . [t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States;”).

153 See *id.* cl. 10 (“The Congress shall have Power . . . [t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;”).

154 See *id.* art. III, § 3, cl. 2 (“The Congress shall have Power to declare the Punishment of Treason . . .”). Although the Treason Clause is found in Article III, rather than Article I, it uses language identical to that used to enumerate the powers of Congress in Section 8 of Article I (“The Congress shall have Power . . .”). Two other crimes—bribery and slavery—are specifically mentioned in the Constitution. See *id.* art. II, § 4 (defining bribery as an impeachable offense); *id.* amend. XIII (prohibiting slavery).

155 ARTICLES OF CONFEDERATION AND PERPETUAL UNION art. IX, cl. 4.

156 See Kurland, *supra* note 7, at 24, 39 n.125.

157 See *id.* at 24.

158 U.S. CONST. art. I, § 8, cl. 5.

159 *Id.* § 10, cl. 1.

160 *Id.* § 8, cl. 6.

161 See THE FEDERALIST No. 42, at 285 (James Madison) (Jacob E. Cooke ed., 1961).

162 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 315 (Max Farrand ed., rev. ed. 1937) [hereinafter FARRAND].

163 *Id.* (failing to identify the source of the proposition).

164 St. George Tucker concluded that the Counterfeiting Clause gave Congress no power over forgery, nor “the power of punishing offences of this nature, generally, but such only as are enumerated: all others not enumerated being reserved to the jurisdiction of the states, respectively.” 1 TUCKER, *supra* note 13, app. at 414-15.

the power to “provide for the Punishment of counterfeiting,” the Piracies Clause granted Congress the authority to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”¹⁶⁵ The terms “define and punish” in the latter clause suggest that Congress had greater responsibility to define precisely what constituted piracy and offences against the law of nations, a duty perhaps not as pressing with respect to counterfeiting coins and securities.¹⁶⁶ Congress did not, however, acquire an exclusive complementary power over admiralty, as it had with respect to coinage. Congress acquired power to “provide and maintain a Navy” and to “[r]egulat[e] . . . naval Forces,”¹⁶⁷ and the Constitution prohibited the states from maintaining “[s]hips of War in time of Peace.”¹⁶⁸ This combination of power in Congress and disability in the states gave Congress exclusive control of the navy, but not necessarily exclusive control over admiralty.¹⁶⁹

The more controversial question for the Framers was whether these clauses gave Congress exclusive power over piracies. During the debates over the Piracies Clause, Colonel George Mason, a delegate from Virginia, “doubted . . . the propriety of taking the power in all these cases wholly from the States.”¹⁷⁰ James Madison argued that the clause should give exclusive power to Congress.

If the laws of the States were to prevail on this subject, the citizens of different States would be subject to different punishments for the same offence at sea—There would be neither uniformity nor stability in the law—The proper remedy for all these difficulties was to vest the power proposed by the term “define” in the Natl. legislature.¹⁷¹

165 U.S. CONST. art. I, § 8, cl. 10.

166 In an early commentary, Thomas Sergeant observed:

Piracy is well defined by the law of nations as robbery on the sea. The term, felonies, however, in relation to offences on the high seas, is necessarily somewhat indeterminate, since the term is not used in the criminal jurisdiction of the admiralty, in the technical sense of the common law. Offences against the law of nations cannot, with any accuracy, be said to be completely ascertained and defined in any public code, recognised by the common consent of nations. In respect to these, there is a peculiar fitness in giving the power to define, as well as to punish.

THOMAS SERGEANT, *CONSTITUTIONAL LAW* 333 (Philadelphia, P.H. Nicklin & T. Johnson 2d ed. 1830).

167 U.S. CONST. art. I, § 8, cls. 13-14.

168 *Id.* § 10, cl. 3.

169 By statute, federal district courts have exclusive original jurisdiction of “[a]ny civil case of admiralty or maritime jurisdiction.” 28 U.S.C. § 1333(1) (1994); *see* U.S. CONST. art. III, § 2 (“The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction.”); *see also* *United States v. Bevens*, 16 U.S. (3 Wheat.) 336, 389 (1818) (concluding that a murder committed by a marine on a warship docked in Boston harbor was not on the “high seas” and thus the federal court lacked jurisdiction).

170 2 FARRAND, *supra* note 162, at 315.

171 *Id.* at 316.

Although the Constitution does not state that Congress's power over these matters is exclusive,¹⁷² the states generally have respected counterfeit laws and piracies and felonies on the high seas as the domain of Congress.

The Treason Clause is the only crime defined in the Constitution.¹⁷³ By defining treason, the Constitution would seem to have assumed the exclusive right to do so. In the Pennsylvania ratification debates, James Wilson, representing the city of Philadelphia, made clear that, in his view, even Congress could not define treason. In his words, this clause is "the first instance in which it has not been left to the legislature to extend the crime and punishment of treason so far as they thought proper. . . . [T]here can be no treason against the United States, except such as is defined in this Constitution."¹⁷⁴ Nothing in the Treason Clause, however, forbids the states from prosecuting someone for treason, and the Extradition Clause contemplated that persons might be charged "in [a] State with Treason, Felony, or other Crime."¹⁷⁵ The Extradition Clause does not make clear, however, whether states may punish treason against the state only, and, if so, whether the state must use the definition found in Article III.

Although a strong case could be made that each of these crimes lay exclusively within the power of the United States, the more difficult question was whether these crimes constituted the total criminal domain of the United States. The Framers said little at the convention on this subject; either they did not question the matter, they considered the answer obvious, or they simply did not wish to resolve the question. In any event, any original understanding at the convention was not made express, as the ratifying debates demonstrate. The question arose in the Virginia ratification debates, when delegates Patrick Henry and George Nicholas argued the mechanics of the proposed Constitution and the government's power over crime. Given to hyperbole, Patrick Henry warned that

Congress, from their general powers, may fully go into business of human legislation. They may legislate, in criminal cases, from treason to the lowest offence—petty larceny. They may define crimes and prescribe punishments. In the definition of crimes, I trust they will be directed by what wise representatives ought to be governed by.¹⁷⁶

George Nicholas responded that the enumerated powers doctrine barred Congress from defining crimes not enumerated:

[Mr. Henry] says that, by this Constitution, [Congress has] power to make laws to define crimes and prescribe punishments; . . . Treason against the United States is defined in the Constitution, and the forfeiture limited to the life of the person attainted. Congress have

¹⁷² See THE FEDERALIST No. 42, at 280-81 (James Madison) (Jacob E. Cooke ed., 1961).

¹⁷³ See U.S. CONST. art. III, § 3, cl. 1 ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.").

¹⁷⁴ 2 ELLIOT'S DEBATES, *supra* note 116, at 469 (statement of James Wilson); see 2 *id.* at 487 (statement of James Wilson) ("Congress can neither define nor try the crime [of treason].").

¹⁷⁵ U.S. CONST. art. IV, § 2, cl. 2.

¹⁷⁶ 3 ELLIOT'S DEBATES, *supra* note 116, at 447 (statement of Patrick Henry).

power to define and punish piracies and felonies committed on the high seas, and offences against the laws of nations; *but they cannot define or prescribe the punishment of any other crime whatever, without violating the Constitution.* . . . [William Grayson] says that the power of legislation includes every thing. A general power of legislation does. But this is a special power of legislation. Therefore, it does not contain that plenitude of power which he imagines. They cannot legislate in any case but those particularly enumerated.¹⁷⁷

Nicholas's argument was straightforward, and it was an argument that would be repeated during the Alien and Sedition Debates, as well as the Fourteenth Amendment enforcement debates.¹⁷⁸

The argument that the enumerated crimes were the sum of Congress's powers in the area of criminal law turned on a characterization of criminal power as a unique governmental authority, one not necessarily belonging to a national government. As St. George Tucker commented in 1803, "[Congress is] not entrusted with a general power over [the subject of crimes and misdemeanors], but a few offences are selected from the great mass of crimes All felonies and offences committed upon land, in all cases not expressly enumerated, being reserved to the states respectively."¹⁷⁹ Tucker's argument would have been absurd if applied to a national government that was also the sole or principal government. The Framers were cautious, however, over the prospects of a central army and its use in the "internal police" of the United States.¹⁸⁰ Moreover, the Framers had little reason—with the exception of their brief experience with counterfeiting, concerns over uniform laws of the seas, and Shays' Rebellion—to demand national control over other crimes.

2. "Necessary and Proper" Criminal Sanctions

A month after the Constitutional Convention finished its draft, Colonel George Mason, who refused to sign the Constitution, wrote George Washington to explain his objections to it. In this letter, Mason suggested that the Necessary and Proper Clause (or Sweeping Clause) might permit Congress to "constitute new crimes."¹⁸¹ If Mason thought that result to be an avoidable evil, he had reason to be concerned. A second view of Congress's power over crime admitted the exclusivity of the three crimes enumerated in the

¹⁷⁷ *Id.* at 451 (statement of George Nicholas) (emphasis added).

¹⁷⁸ See *infra* notes 288-289 and accompanying text; *infra* notes 385-388 and accompanying text.

¹⁷⁹ 1 TUCKER, *supra* note 13, app. at 269; see 1 *id.* app. at 414-415.

¹⁸⁰ Cf. *Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention; And to Several Essential and Necessary Alterations in It. In a Number of Letters from the Federal Farmer to the Republican* (1788) [hereinafter *Letters from the Federal Farmer*], reprinted in 2 THE COMPLETE ANTI-FEDERALIST 233-34 (Herbert J. Storing ed., 1981) (arguing that Congress cannot "carry all the powers proposed to be lodged in it into effect, without calling to its aid a military force," which would affect the "internal police" of the states).

¹⁸¹ Letter from George Mason to George Washington (Oct. 7, 1787), in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 331 (photo. reprint 1968) (Paul Leicester Ford ed., 1888) [hereinafter PAMPHLETS ON THE CONSTITUTION].

Constitution, but denied that these were the sum total of Congress's power to define crimes.

The two bases for this argument were the various property clauses and the Sweeping Clause. The District of Columbia Clause, the Territory Clause, and, perhaps, the Militia Clauses¹⁸² were distinct from Congress's other enumerated powers. In the Commerce, Copyright, and Piracy Clauses, for example, Congress acquired power over particular subject matter.¹⁸³ By contrast, in the District of Columbia Clause, Congress acquired power over the District and "all Places purchased . . . for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."¹⁸⁴ Similarly, the Territory Clause granted Congress the power to make "all needful Rules and Regulations"¹⁸⁵ for U.S. territory and property. These clauses permitted Congress to regulate these areas without resort to the Sweeping Clause.¹⁸⁶

So far, Congress could be said to have power over the three enumerated crimes (counterfeiting, piracy, and treason) and power to define crimes within enumerated areas (the District of Columbia, forts and magazines, and territories). But what of Congress's other enumerated powers, those not expressly linked to crime? Might Congress punish theft or misuse of the mails pursuant to its power "to establish post-Offices and post-roads"?¹⁸⁷ Did it have the power to punish fraud in the payment of taxes and other revenues? What of Congress's enormous power to "regulate Commerce . . . among the several States"?¹⁸⁸ And what of Congress's potentially fearsome power under the Sweeping Clause "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers"?¹⁸⁹

Colonel Mason was not the only figure concerned with the scope of Congress's power to enact criminal laws. James Iredell, a prominent North Carolina Federalist and future Supreme Court justice, thought Congress had some power to define crimes not enumerated:

182 I say "perhaps" with respect to the Militia Clauses because there was some question of Congress's power to punish offenses by members of the militia. Richard Henry Lee argued that Congress's power to organize the militia did not include "the infliction of punishments. The militia will be subject to the common regulations of war when in actual service; but not in time of peace." 3 ELLIOT'S DEBATES, *supra* note 116, at 407.

183 See U.S. CONST. art. I, § 8, cls. 3, 8, 10.

184 *Id.* cl. 17.

185 *Id.* art. IV, § 3, cl. 2.

186 See David E. Engdahl, *State and Federal Power over Federal Property*, 18 ARIZ. L. REV. 283, 288-90 (1976); Gary Lawson, *Who Legislates?*, 1995 PUB. INTEREST L. REV. 147, 155 (book review).

187 *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 417 (1819); see also *In re Rapier*, 143 U.S. 110, 134 (1892) ("It is not necessary that Congress should have the power to deal with crime or immorality within the States in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality"; upholding postal restrictions on lotteries); *Ex parte Jackson*, 96 U.S. 727, 732-37 (1877) (noting that Congress's post-office power has traditionally been construed to authorize "all measures necessary to secure [the mail's] safe and speedy transit, and the prompt delivery of its contents"). Note that under the Articles of Confederation, Congress had the power to "establish[] [or] regulat[e] post-offices from one State to another, throughout all the United States." ARTICLES OF CONFEDERATION AND PERPETUAL UNION art. IX, cl. 4.

188 U.S. CONST. art. I, § 8, cl. 3.

189 *Id.* cl. 18.

These are offences [counterfeiting, piracy, and treason] immediately affecting the security, the honor or the interest of the United States at large, and of course must come within the sphere of the Legislative authority which is intrusted [sic] with their protection. Beyond these authorities, Congress can exercise no other power of this kind, except in the enactment of penalties to enforce their acts of legislation in the cases where express authority is delegated to them, and if they could not enforce such acts by the enacting of penalties those powers would be altogether useless, since a legislative regulation without some sanction would be an absurd thing indeed.¹⁹⁰

The Anti-Federalist essayist “Brutus” had significant concerns that Congress’s power to define crimes was nearly boundless. Discussing the Preamble, he observed that it “has in view every object which is embraced by any government. The preservation of internal peace—the due administration of justice—and to provide for the defence of the community, seems to include all the objects of government.”¹⁹¹ Referring to the phrase “insure domestic tranquility,” Brutus interpreted it as

comprehend[ing] a provision against all private breaches of the peace, as well as against all public commotions or general insurrections; and to attain the object of this clause fully, the government must exercise the power of passing laws on these subjects, as well as of appointing magistrates with authority to execute them. . . . [I]f the spirit of this system is to be known from its declared end and design in the preamble, its spirit is to subvert and abolish all the powers of the state government, and to embrace every object to which any government extends.

. . . Any person, who will peruse the 8th section with attention, in which most of the powers are enumerated, will perceive that they either expressly or by implication extend to almost every thing about which any legislative power can be employed. But if this equitable mode of construction is applied to this part of the constitution; nothing can stand before it.

. . . [The Vesting Clause in Article I will] authorise the Congress to do any thing which in their judgment will tend to provide for the general welfare, and this amounts to the same thing as general and unlimited powers of legislation in all cases.¹⁹²

If James Iredell and Brutus agreed that Congress would have some additional authority to define crimes, they disagreed over the wisdom of Congress doing so. But others believed that the threat of Congress creating additional

¹⁹⁰ James Iredell, *Answers to Mr. Mason's Objections to the New Constitution*, reprinted in PAMPHLETS ON THE CONSTITUTION, *supra* note 181, at 333, 359.

¹⁹¹ *Essays of Brutus (XII)* (Feb. 7, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 180, at 422, 424.

¹⁹² *Id.* at 425; see also SERGEANT, *supra* note 166, at 351 (“[T]he express grant [of power to punish] does not prevent the exercise of the punishing power in any other cases, where it may be a necessary and proper sanction to enforce [Congress’s] decrees.”).

crimes under the Sweeping Clause was unfounded. "An Impartial Citizen" of Virginia answered Colonel Mason's argument directly:

It is also objected by Mr. Mason, that under [the Federalists'] own construction of the general clause, at the end of the enumerated powers, the Congress may grant monopolies in trade, constitute new crimes, inflict unusual punishments, and in short, do whatever they please. Nothing can be more groundless and ridiculous than this. . . . [T]he laws which Congress can make, for carrying into execution the conceded powers, must not only be *necessary*, but *proper*—So that if those powers cannot be executed without the aid of a law, granting commercial monopolies, inflicting unusual punishments, creating new crimes, or commanding any unconstitutional act; yet, as such a law would be manifestly *not proper*, it would not be warranted by this clause, without absolutely departing from the usual acceptation of words.¹⁹³

If one assumes that the Sweeping Clause comprehends the possibility of criminal sanctions as a means of regulating matters within Congress's enumerated powers, what limitations are there on Congress's power to define crime? The Sweeping Clause itself suggests a limitation: the crime must be not only "necessary," but also "proper" to executing the narrow scope of Congress's enumerated powers.¹⁹⁴ Thus, the Sweeping Clause both grants and limits Congress's power:¹⁹⁵

To carry a law or power into execution in its most basic sense means to provide enforcement machinery, prescribe penalties, authorize the hiring of employees, appropriate funds, and so forth to effectuate that law or power. It does *not* mean to regulate unenumerated

¹⁹³ *An Impartial Citizen V, On the Federal Constitution* (Feb. 28, 1788), reprinted in, 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 114, at 431. Pelatiah Webster also addressed Brutus's concerns:

[T]he Constitution does not suffer the federal powers to controul [sic] in the least, or so much as to interfere in the internal policy, jurisdiction, or municipal rights of any particular State: except where great and manifest national purposes and interests make that controul [sic] necessary. It appears very evident to me, that the Constitution gives an establishment, support, and protection to the internal and separate police of each State, under the superintendency of the federal powers, which it could not possibly enjoy in an independent state. . . .

There can be no doubt that each State will receive from the union great support and protection against the invasions and inroads of foreign enemies, as well as against riots and insurrections of their own citizens; and of consequence, the course of their internal administration will be secured by this means against any interruption or embarrassment from either of these causes.

Pelatiah Webster, *The Weakness of Brutus Exposed* (Nov. 4, 1787), reprinted in PAMPHLETS ON THE CONSTITUTION, *supra* note 181, at 119, 128.

¹⁹⁴ See Printz v. United States, 117 S. Ct. 2365, 2378-79 (1997); Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 271-72 (1993). But see McAfee, *supra* note 19 (manuscript at 33-36, on file with author) (questioning Lawson and Granger's conclusion that the word "proper" in the Sweeping Clause places a substantial limit on Congress's power to legislate under this clause).

¹⁹⁵ See Lawson & Granger, *supra* note 194, at 274-75.

subject areas to make the exercise of enumerated powers more efficient.¹⁹⁶

This view is consistent with the tenor of the debate between those Federalists and Anti-Federalists who thought the Constitution granted Congress the power to define crimes in those matters for which Congress was given some power, even if that power did not expressly include the definition of crimes. Both sides in the debate should have been assured at least that the Constitution limited Congress's authority to define crimes. Congress's exclusive power to define crime was limited to the three enumerated crimes; its plenary power to define crimes was limited; and with respect to the remainder of the government's enumerated powers, it was limited to those acts for which criminal sanctions were "necessary and proper."¹⁹⁷

3. *The Domestic Violence Clause as a Reservation of State Criminal Authority*

The third view of crime expressed at the convention and during the ratification debates began from a different premise. Rather than focusing on the powers granted to Congress, this view embraced an idea much like the Tenth Amendment: the states reserved their authority over the general matter of crime, except that which was specifically granted to Congress. The concept of reservation was important because the Framers were about to give the new national government authority to assist in the suppression of domestic violence. Governor Randolph's Eleventh Resolution proposed "that a Republican Government & the territory of each State, . . . ought to be guaranteed by the United States to each State,"¹⁹⁸ which would "preserve the particular States against seditions within themselves or combinations against each

¹⁹⁶ *Id.* at 331.

¹⁹⁷ See ASA KINNE, QUESTIONS AND ANSWERS ON THE LAWS OF THE UNITED STATES, RELATIVE TO CRIMINAL OFFENCES AND THEIR PUNISHMENT 16 (New York, S.W. Benedict 1842) ("Congress ha[s] power to inflict punishment in cases not specified by the constitution, such power being implied as necessary and proper to the sanction of the laws, and the exercise of the delegated powers.").

¹⁹⁸ 1 FARRAND, *supra* note 162, at 22. At the Virginia ratification convention, Randolph elaborated on this theme:

When Massachusetts was distressed by the late insurrection, Congress could not relieve her. Who headed that insurrection? Recollect the facility with which it was raised, and the very little ability of the ringleader, and you cannot but deplore the extreme debility of our merely nominal government. We are too despicable to be regarded by foreign nations. The defects of the Confederation consisted principally in the want of power: . . . Congress, sir, ought to be fully vested with power to support the Union, protect the interests of the United States, maintain their commerce, and defend them from external invasions and insult, and internal insurrections; to maintain justice, and promote harmony and public tranquility among the states. A government not vested with these powers will ever be found unable to make us happy or respectable.

3 ELLIOT'S DEBATES, *supra* note 116, at 82 (statement of Governor Edmund Randolph). For a general history of the drafting of the Domestic Violence Clause, see WIECEK, *supra* note 131, at 51-63; Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 516-20 (1962); Clarence C. Ferguson, *The Inherent Justiciability of the Constitutional Guaranty Against Domestic Violence*, 13 RUTGERS L. REV. 407 (1959).

other.”¹⁹⁹ Charles Pinckney, a delegate from South Carolina, also offered a draft plan, which proposed that “[o]n the application of the legislature of a state, the United States shall protect it against domestic insurrection.”²⁰⁰

As the proposals began working their way through the convention, James Madison moved to amend Randolph’s Eleventh Resolution to “[t]he republican constitutions and the existing laws of each state, to be guaranteed by the United States.”²⁰¹ James Wilson offered that the object of the Madison amendment was “to secure the States agst. dangerous commotions, insurrections and rebellions,” to which Colonel Mason added that “[i]f the Genl Govt. should have no right to suppress rebellions agst. particular States, it will be in a bad situation indeed.”²⁰²

James Madison proposed a substitute provision that emphasized the difference between external and internal threats: “the Constitutional authority of the States shall be guaranteed to them respectively agst. domestic as well as foreign violence.”²⁰³ Luther Martin of Maryland, stridently Anti-Federalist, thought the states should be left to “suppress Rebellions themselves,”²⁰⁴ although his colleague Daniel Carrol thought the proposition so essential that “[e]very State ought to wish for it.”²⁰⁵ Harkening back to Congress’s inability to aid Massachusetts during Shays’ Rebellion, he added that “[i]t has been doubted whether it is a *casus federis* at present. And no room ought to be left for such a doubt hereafter.”²⁰⁶ John Rutledge, a delegate from South Carolina, thought the proposal was unnecessary because “[n]o doubt could be entertained but that Congs. had the authority if they had the means to cooperate with any State in subduing a rebellion.”²⁰⁷ James Wilson disagreed and urged that they guarantee protection against foreign and domestic violence.²⁰⁸ The Committee of Detail proposed language much closer to the current form of Article IV, Section 4, guaranteeing to each state a republican form of government and protecting states against foreign invasion and, upon the application of the state legislature, against domestic violence.²⁰⁹

The Committee of Detail had included an additional provision to the Domestic Violence Clause that appeared to be drawn from Pinckney’s proposal.²¹⁰ It provided that Congress’s power to subdue rebellion be conditioned on the application of the state legislature. The delegates divided over

199 1 FARRAND, *supra* note 162, at 25.

200 5 ELLIOT’S DEBATES, *supra* note 116, at 132 (statement of Charles Pinckney).

201 1 FARRAND, *supra* note 162, at 206.

202 2 *id.* at 47. There is some evidence that the Framers were also concerned with slave insurrections. See 3 ELLIOT’S DEBATES, *supra* note 116, at 423 (statement of Patrick Henry); 3 *id.* at 427 (statement of George Nicholas); 1 TUCKER, *supra* note 13, app. at 367; CIVIS: TO THE CITIZENS OF SOUTH CAROLINA, *reprinted in* 16 DOCUMENTARY HISTORY OF RATIFICATION, *supra* note 114, at 25.

203 2 FARRAND, *supra* note 162, at 47-48 (statement of James Madison).

204 2 *id.* at 48 (statement of Luther Martin).

205 2 *id.* (statement of Daniel Carrol).

206 2 *id.* (statement of Daniel Carrol).

207 2 *id.* (statement of John Rutledge).

208 See 2 *id.* at 48-49 (statement of James Wilson).

209 See 2 *id.* at 159.

210 See *supra* note 200 and accompanying text.

whether to strike out the condition. Gouverneur Morris objected that the condition put Congress in a strange position: "We first form a strong man to protect us, and at the same time wish to tie his hands behind him, The legislature may surely be trusted with such a power to preserve the public tranquillity."²¹¹ Delegates Oliver Ellsworth of Connecticut and Elbridge Gerry of Massachusetts opposed deleting the condition because, as Gerry pointed out, the "[s]tates will be the best Judges in such cases" and, referring to Shays' Rebellion, suggested that "[m]ore blood would have been spilt in Massts in the late insurrection, if the Genl. authority had intermeddled."²¹²

By the end of August of 1787, the delegates completed their edits of the clause by deleting, as redundant, the word "foreign" from the phrase "foreign invasion."²¹³ Delaware's John Dickinson, repeating earlier objections, made one last attempt to delete the requirement that a request come from the legislature. It was, he said, "of essential importance to the tranquillity of the U.S. that they should in all cases suppress domestic violence."²¹⁴ The delegates refused to drop the condition, but agreed to permit state executives to request assistance when state legislatures could not meet.²¹⁵ At the last minute, the delegates refused to substitute the term "insurrections" for "domestic violence," a proposal that would have coupled the terms "invasion" and "insurrection" in the Domestic Violence Clause just as they are in the Militia Clause.²¹⁶

In the press, the Domestic Violence Clause proved extremely controversial, providing occasion for discussion of a federal role in suppressing domestic violence.²¹⁷ It also evoked distinct views of its function in the Constitution. The Anti-Federalists strenuously objected to the militia powers granted to the new government²¹⁸ and the possibility that the militia would be used to interfere in the internal affairs of the states:

The powers lodged in the general government, if exercised by it, must intimately effect [sic] the internal police of the states, as well as external concerns; and there is no reason to expect the numerous state governments, and their connections, will be very friendly to

211 2 FARRAND, *supra* note 162, at 317 (statement of Gouverneur Morris). The notes of the Committee of Detail demonstrate that the condition put power in the hands of the states: "The guarantee is 1. to prevent the establishment of any government, not republican[;] 2. against external invasion[; and] 3. to protect each state against internal commotion[.] 4. But this guarantee shall not operate in the last Case without an application from the legislature of a state." 2 *id.*

212 2 *id.* at 317 (statement of Elbridge Gerry).

213 See 2 *id.* at 466.

214 2 *id.* at 466-67 (statement of John Dickinson).

215 See 2 *id.* at 467.

216 See 2 *id.*; cf. U.S. CONST. art. I, § 8, cl. 15.

217 See, e.g., THE FEDERALIST No. 28, at 178 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); *Essays of Brutus (VII)* (Jan. 3, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 180, at 400, 400-01; *Essays of Brutus (X)* (Jan. 24, 1788), reprinted in, 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 180, at 413, 416-17.

218 See, e.g., Luther Martin, *Information to the General Assembly of the State of Maryland*, in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 180, at 27, 58-59.

the execution of federal laws in those internal affairs, which hitherto have been under their own immediate management.²¹⁹

Brutus, referring to the Militia, Piracy, and Domestic Violence Clauses, recommended that the general government concern itself with external problems and those matters when the states were incapable of action on their own.²²⁰ Ordinary police matters, however, including the punishment of crime, such as murder and theft, belonged to the states:

[T]he *protection and defence* of the community is not intended to be entrusted *solely* into the hands of the general government . . . It is true this system commits to the general government the protection and defence of the community against foreign force and invasion, against piracies and felonies on the high seas, and against insurrections among ourselves. They are also authorised to provide for the administration of justice in certain matters of a general concern, and in some that I think are not so. But it ought to be left to the state governments to provide for the protection and defence of the citizen against the hand of private violence, and the wrongs done or attempted by individuals to each other—Protection and defence against the murderer, the robber, the thief, the cheat, and the unjust person, is to be derived from the respective state governments.²²¹

He further emphasized the division of authority between the federal government and state governments:

The just way of reasoning therefore on this subject is this, the general government is to provide for the protection and defence of the community against foreign attacks, &c., they therefore ought to have authority sufficient to effect this, so far as is consistent with the providing for our internal protection and defence. The state governments are entrusted with the care of administering [sic] justice among its citizens, and the management of other internal concerns, they ought therefore to retain power adequate to the end. The preservation of internal peace and good order, and the due administration of law and justice, ought to be the first care of every government.²²²

During the ratification debates, Massachusetts delegate Reverend Samuel Stillman, referring to the Republican Guarantee and Domestic Violence Clauses, observed:

Congress solemnly engage themselves to protect [the states] from every kind of violence, whether of faction at home or enemies abroad. This is an admirable security of the people at large, as well as of the several governments of the states; consequently the gen-

²¹⁹ *Letters from the Federal Farmer*, *supra* note 180, at 233.

²²⁰ *See Essays of Brutus (VII)*, *supra* note 217, at 400-01.

²²¹ *Id.*

²²² *Id.* at 401.

eral government cannot swallow up the local governments, as some gentlemen have suggested.²²³

Stillman's logic appeared to have misplaced a premise. The concern that states not be "swallow[ed] up" was not answered by Stillman's reassurance that Congress would protect the states from "faction at home." Rather, the concern was fully satisfied by the condition that the states request the assistance of the national government, and that the national government otherwise had no power.

Much of the discussion at the Virginia ratifying convention concerned the relationship between the Militia Clause (which authorized Congress to provide for militia to execute federal law, suppress insurrection, and repel invasions) and the Domestic Violence Clause (which guaranteed states protection against invasion and, upon request, domestic violence). James Madison discussed the general purpose for the Militia Clause:

I conceive [it] to be an additional security to our liberty, without diminishing the power of the states in any considerable degree. It appears to me so highly expedient that I should imagine it would have found advocates even in the warmest friends of the present system. The authority of training the militia, and appointing the officers, is reserved to the states. Congress ought to have the power to establish a uniform discipline throughout the states, and to provide for the execution of the laws, suppress insurrections, and repel invasions: these are the only cases wherein they can interfere with the militia; . . . without such a power to suppress insurrections, our liberties might be destroyed by domestic faction, and domestic tyranny be established.²²⁴

George Nicholas, responding to Patrick Henry's complaint that the government might abuse its general control of the militia,²²⁵ noted that

[t]here is a great difference between having the power in three cases, and in all cases. [Congress] cannot call [the militia] forth for any other purpose than to execute the laws, suppress insurrections, and repel invasions. And can any thing be more demonstrably obvious, than that the laws ought to be enforced if resisted, and insurrections quelled, and foreign invasions repelled?²²⁶

The discussion then turned to the national government's possible use of the militia to quell civil insurrection. Mr. Clay²²⁷ worried that the clause would permit the national government to intervene on the merest pretext of violence in a state. He considered that "the word *insurrection* included every opposition to the laws; and if so, it would be sufficient to call [the militia] forth to suppress insurrections, without mentioning that they were to execute

²²³ 2 ELLIOT'S DEBATES, *supra* note 116, at 168 (statement of Rev. Samuel Stillman).

²²⁴ 2 *id.* at 90 (statement of James Madison).

²²⁵ See 3 *id.* at 384-88 (statement of Patrick Henry).

²²⁶ 3 *id.* at 392 (statement of George Nicholas).

²²⁷ Elliot refers to the speaker only as Mr. Clay. The Virginia ratifying convention was attended, however, by two Mr. Clays: Charles Clay and Green Clay. Thus, the speaker remains unknown.

the laws of the Union.”²²⁸ James Madison’s response may not have satisfied Clay: “There are cases in which the execution of the laws may require the operation of militia, which cannot be said to be an invasion or insurrection. There may be a resistance to the laws which cannot be termed an insurrection.”²²⁹ He elaborated: “[A] riot did not come within the legal definition of an insurrection. There might be riots, to oppose the execution of the laws, which the civil power might not be sufficient to quell.”²³⁰

James Madison’s reference to riots elicited objections from Patrick Henry:

Under the order of Congress, they shall suppress insurrections. Under the order of Congress, they shall be called to execute the laws. . . . [James Madison] said that the militia should be called forth to quell riots. . . . It is a long-established principle of the common law of England, that civil force is sufficient to quell riots. To what length may it not be carried? . . . They may make the militia travel, and act under a colonel, or perhaps under a constable.²³¹

James Madison, seeking to reassure Henry, responded that

[t]here is a great deal of difference between calling forth the militia, when a combination is formed to prevent the execution of the laws, and the sheriff or constable carrying with him a body of militia to execute them in the first instance; which is a construction not warranted by the clause.²³²

When Patrick Henry and others read Article IV, Section 4 to give Congress exclusive control of the militia,²³³ James Madison denied such exclusive use of the militia and explained that states could use the militia to suppress insurrections and quell riots and then call on the federal government to aid them if necessary.²³⁴ In response to Patrick Henry’s insistence that the Militia and Domestic Violence Clauses, together with the clause forbidding the states from engaging in war, demonstrated Congress’s exclusive control of the militia,²³⁵ James Madison further explained that the Domestic Violence Clause was consistent with state control and simply gave states access to a national military force. Clarifying his earlier explanation,²³⁶ he now drew a distinction between invasion and “domestic insurrections”:

²²⁸ 3 *id.* at 407 (statement of Mr. Clay).

²²⁹ 3 *id.* at 408 (statement of James Madison).

²³⁰ 3 *id.* at 410 (statement of James Madison).

²³¹ 3 *id.* at 411-12 (statement of Patrick Henry).

²³² 3 *id.* at 415 (statement of James Madison).

²³³ See 3 *id.* at 416-17, 422 (statement of Patrick Henry); 3 *id.* at 417-18 (statement of William Grayson).

²³⁴ See 3 *id.* at 416 (statement of James Madison); see also 3 *id.* at 417 (statement of Frances Corbin) (suggesting that states could use their own militia and could call on Congress for the militia of other states); 3 *id.* at 419 (statement of John Marshall) (arguing that despite Congress’s grant of power to use and control the militia, the Constitution did not disable the states’ power over the militia).

²³⁵ See 3 *id.* at 423 (statement of Patrick Henry).

²³⁶ See *supra* notes 229-230 and accompanying text.

The word *invasion* [in the Domestic Violence Clause], after power had been given in the [Militia Clause] to repel invasions, may be thought tautologous, but it has a different meaning from the other. [The Domestic Violence Clause] speaks of a particular state. It means that it shall be protected from invasion by other states. A republican government is to be guaranteed [sic] to each state, and they are to be protected from invasion from other states, as well as from foreign powers; and, on application by the legislature or executive, as the case may be, the militia of the other states are to be called to suppress domestic insurrections. Does this bar the states from calling forth their own militia? No; but it gives them a supplementary security to suppress insurrections and domestic violence.²³⁷

Edmund Pendleton, President of the Virginia ratifying convention, supported James Madison's interpretation by offering his view that the Domestic Violence Clause vested both a power (in the national government) and an immunity (in the states):

All the restraint here contained is, that Congress may, at their pleasure, on application of the state legislature, or (in vacation) of the executive, protect each of the states against domestic violence. This is a restraint on the general government not to interpose. The state is in full possession of the power of using its own militia to protect itself against domestic violence; and the power in the general government cannot be exercised, or interposed, without the application of the state itself.²³⁸

The earliest commentators on the Constitution also viewed the Domestic Violence Clause as a restricted grant of power to Congress. William Rawle, a contemporary of the Framers and author of a popular treatise on the Constitution, thought it the duty of a proper state government to apply to the federal government for aid when

its own powers are insufficient to suppress the commotion [sic] At the same time it is properly provided, in order that such interference may not wantonly or arbitrarily take place, that it shall only be on the request of the state authorities: otherwise the self-government of the state might be encroached upon at the pleasure of the Union.²³⁹

Explaining the limitation on Congress, Rawle commented that "there has been the utmost care to avoid encroachments on the internal powers of the different states, whenever the general good did not imperiously require it."²⁴⁰

²³⁷ 3 ELLIOT'S DEBATES, *supra* note 116, at 425 (statement of James Madison).

²³⁸ 3 *id.* at 441 (statement of Edmund Pendleton).

²³⁹ WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 292 (Philadelphia, H.C. Carey & I. Len 1825).

²⁴⁰ *Id.*

Although Rawle emphasized the procedural aspects of the clause as a shield to the states, St. George Tucker was emphatic that the Domestic Violence Clause reserved authority to the states.

[E]very pretext for intermeddling with the domestic concerns of any state, under colour of protecting it against domestic violence is taken away, by that part of the provision which renders an application from the legislative, or executive authority of the state endangered, necessary to be made to the federal government, before it's [sic] interference can be at all proper.²⁴¹

Both Thomas Cooley and Joseph Story, commenting on the Constitution, expressly followed Tucker's formulation.²⁴²

In these early discussions, the Framers and commentators approached the Domestic Violence Clause somewhat differently. Madison and others considered "domestic violence" as the internal analog to invasion, and they equated the term with a direct challenge to a state's authority.²⁴³ This interpretation was consistent with the Domestic Violence Clause's location in Article IV, juxtaposed with the Republican Guarantee Clause and the Invasion Clause.²⁴⁴ Federalists agreed that the Domestic Violence Clause referred to crime, but was limited to a specific kind of crime: crime against government qua government. The Domestic Violence Clause secured state governments against insurrection, which meant violent threats to the state's government as the government.²⁴⁵

By contrast, for Anti-Federalists and others (including the early commentators St. George Tucker, William Rawle, Joseph Story, and Thomas Cooley), "domestic violence" referred not only to insurrection, but also to other crimes as well.²⁴⁶ Under this broader view the term covered not only direct threats to the government's authority, but actions that indirectly threatened the government by challenging its ability to protect its citizens.²⁴⁷ Although those subscribing to the narrow view of "domestic violence" found support in the Domestic Violence Clause's proximity to the Republican Guarantee and Invasion Clauses, the broader view of the Domestic Violence

241 1 TUCKER, *supra* note 13, app. at 367.

242 See THOMAS M. COOLEY, *GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 198 (Boston, Little, Brown and Co. 1880) (citing Tucker); 1 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1825, at 633 (Boston, Little, Brown and Co. 3d ed. 1858) (citing Tucker); see also *The Guarantee of Order and Republican Government in the States*, 2 INT'L REV. 57, 65-68, 82-83, 86 (1875). The author of the latter, unsigned article was evidently Thomas Cooley. See Note, *The Guarantee of Order and Republican Government in the States*, 2 CENT. L.J. 18 (1875).

243 See, e.g., *supra* notes 203, 224, 229-230, 237 and accompanying text.

244 See U.S. CONST. art. IV, § 4.

245 See 1 GEORGE TICKNOR CURTIS, *CONSTITUTIONAL HISTORY OF THE UNITED STATES FROM THEIR DECLARATION OF INDEPENDENCE TO THE CLOSE OF THEIR CIVIL WAR* 613 (New York, Harper & Brothers 1897); G. Edward White, *Reading the Guarantee Clause*, 65 U. COLO. L. REV. 787, 798 (1994).

246 See, e.g., *supra* notes 181, 191-192, 219, 221-222, 241 and accompanying text.

247 See Willing, *supra* note 119, at 23 n.143 (referring to the early origins of "government as protector of the populace against domestic violence").

Clause was consistent with the plain text of the clause and the Framers' refusal to substitute the term "insurrections" for "domestic violence."²⁴⁸

The difference between the two views was of lesser moment, at the time, than one might expect because everyone agreed that the United States could intervene only when invited by the state. The difference is significant today, however, when determining whether there exists a dormant Domestic Violence Clause: an area of either insurrection or ordinary crime into which the United States may not (as St. George Tucker stated) "intermeddl[e]" without state consent.²⁴⁹

C. *Post-Ratification History of Federal Criminal Authority and the Domestic Violence Clause*

Once the states ratified the Constitution, the task of interpreting it fell largely to the earliest Congresses. Their views of their own powers are an interesting contrast to the views of the Framers and those delegates responsible for ratifying the Constitution. Moreover, congressional interpretations of the Constitution were substantial precursors to the judgments of the courts.²⁵⁰ There is, of course, a danger in trusting Congress to decide the limits of its own powers. The first Congresses were remarkably aware, however, of the Constitution and conscientiously debated its meaning in a way that would be quite foreign to modern legislators.

1. *Congress, Crime, and Domestic Violence*

a. *The Crime Act of 1790*

In April 1790, Congress enacted its first "Act for the Punishment of certain Crimes against the United States."²⁵¹ The Act of April 30, 1790 ("Act of 1790") focused on the three crimes enumerated in the Constitution and defined punishable crimes committed on federal property. The Act of 1790 punished treason,²⁵² piracy and other crimes (such as robbery or murder) on the high seas or against the law of nations,²⁵³ and counterfeiting.²⁵⁴ It also defined crimes—murder, manslaughter, larceny—in places "under the sole and exclusive jurisdiction of the United States."²⁵⁵ If the first Congress had stopped there, it would strongly have suggested that Congress regarded the limits of its own power to be circumscribed by the enumerated crimes and its

²⁴⁸ See *supra* text accompanying note 216.

²⁴⁹ See *supra* text accompanying note 241.

²⁵⁰ See David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. CHI. L. REV. 775, 775-76 (1994) ("Before 1800 nearly all of our constitutional law was made by Congress or the President, and so was much of it thereafter.")

²⁵¹ Act of Apr. 30, 1790, ch. 9, 1 Stat. 112 (codified as amended at 18 U.S.C. §§ 3005, 3281-3283, 3290, 3432 (1994)) [hereinafter *Crime Act of 1790*]; see DWIGHT F. HENDERSON, CONGRESS, COURTS, AND CRIMINALS: THE DEVELOPMENT OF FEDERAL CRIMINAL LAW, 1801-1829, at 7-9 (1985).

²⁵² See *Crime Act of 1790*, §§ 2, 29, 1 Stat. at 112, 118-19.

²⁵³ See *id.* §§ 8-13, 16, 25-28, 1 Stat. at 113-15, 116, 117-18.

²⁵⁴ See *id.* § 14, 1 Stat. at 115.

²⁵⁵ *Id.* §§ 3, 7, 16, 1 Stat. at 113, 116.

control of U.S. property.²⁵⁶ The first Congress did not stop there, however, but further defined the related crimes of misprision of (federal) felonies, misprision of treason, and receiving goods stolen in contravention of U.S. law.²⁵⁷ These crimes were related to offenses that Congress clearly had the power to punish, but were not the offenses themselves. Congress also provided for punishing the theft or falsification of court records, perjury, bribery of judges, obstruction of process, and receiving persons convicted.²⁵⁸ All of these matters were related—"necessary and proper"—to important functions of the new government, but not specified in the Constitution. Finally, Congress included procedural rules, including a three-year statute of limitations on most of the crimes defined and the method of capital punishment.²⁵⁹

The *Annals of Congress* contains little recorded debate concerning the Act of 1790. The only debates that were sufficiently controversial to merit inclusion in the *Annals* were brief discussions of a venue provision,²⁶⁰ punishment for passing counterfeit securities (as opposed to the actual counterfeiting),²⁶¹ and a Senate proposal that the bodies of executed murderers "shall be delivered to a surgeon for dissection."²⁶² The *Annals of Congress* provides little discussion, if any, of the members' views of the limits of Congress's power. Rather, it demonstrates only the collective view that Congress may not only punish the enumerated crimes and provide for the punishment of crime within U.S. territories and property, but also that Congress may punish related crimes. At the very least, the sparse debate recorded in the *Annals of Congress*, the absence of other recorded debate, and the Act of 1790 itself suggest that Congress did not take seriously the position, held by some Framers, that Congress had limited power to define crime.²⁶³

b. *The Militia Act of 1792*

In 1792, Congress enacted the first of two bills for execution of the Militia Clauses and the Domestic Violence Clause.²⁶⁴ Although Article I granted Congress the power to "provide for calling forth the Militia to execute the

²⁵⁶ See *United States v. Lopez*, 514 U.S. 548, 596-97 & n.6 (Thomas, J., concurring).

²⁵⁷ See Crime Act of 1790, §§ 2, 6, 17, 1 Stat. at 112, 113, 116; Kurland, *supra* note 7, at 53, 56-57.

²⁵⁸ See Crime Act of 1790, §§ 15, 18-23, 1 Stat. at 115, 116-17.

²⁵⁹ See *id.* §§ 31-33, 1 Stat. at 119.

²⁶⁰ See 1 ANNALS OF CONG. 833-34 (Gales & Senton eds. 1834) (August 30, 1789); see also Crime Act of 1790, §§ 4-5, 1 Stat. at 113. Because the early debates are found in two different reports, each with its own pagination, for Volume 1 of the *Annals* I will indicate the exact date.

²⁶¹ See 1 ANNALS OF CONG. 1521 (Apr. 7, 1791); see also Crime Act of 1790, § 14, 1 Stat. at 115. During the debates over the establishment of the Bank of the United States, James Madison, who opposed the bank's creation as exceeding Congress's enumerated powers, pointed out that although "Congress have power 'to regulate the value of money;' yet it is expressly added, not left to be implied, that counterfeiters may be punished." 2 ANNALS OF CONG. 1899 (1791).

²⁶² See 1 ANNALS OF CONG. at 940-41 (Jan. 28, 1790), 1519-20 (Apr. 5, 1790); see also Crime Act of 1790, § 4, 1 Stat. at 113.

²⁶³ See Currie, *supra* note 250, at 833; Kurland, *supra* note 7, at 53, 74-75.

²⁶⁴ See An Act to Provide for Calling Forth the Militia to Execute the Laws of the Union, Suppress Insurrections; and Repel Invasions, ch. 28, 1 Stat. 264 (1792). The Act was repealed in 1795 and reenacted with a provision requiring the President to judge the need for and strength of

Laws of the Union, suppress Insurrections and repel Invasions,”²⁶⁵ Article IV authorized the United States to protect the states “against Invasion; and . . . against domestic Violence.”²⁶⁶ The Act of May 2, 1792 (the “Militia Act”) delegated Congress’s authority over the militia to the President and assigned to the President the United States’ duty to protect the states. Section 1 of the Militia Act provided:

That whenever the United States shall be invaded, or be in imminent danger of invasion . . . it shall be lawful for the President of the United States, to call forth . . . the militia . . . to repel such invasion . . . ; and in case of an insurrection in any state, against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such state, or of the executive (when the legislature cannot be convened) to call forth . . . the militia . . . to suppress such insurrection.²⁶⁷

This provision united in the President the powers granted in the Militia and Domestic Violence Clauses and largely tracked the language of the Constitution (with the exception of using the term “insurrection” instead of “domestic violence”).

Section 2 of the Militia Act, which authorized the militia to execute the laws of the United States, would shortly prove more controversial. This section provided, in part:

That whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals . . . the same being notified to the President of the United States, by an associate justice or the district judge, it shall be lawful for the President . . . to call forth the militia of such state to suppress such combinations, and to cause the laws to be duly executed.²⁶⁸

a federal response. See *infra* note 270. Compare *id.* § 2, with Act of Feb. 28, 1795, ch. 36, § 2, 1 Stat. 424 (codified as amended at 10 U.S.C. § 331 (1994)).

²⁶⁵ U.S. CONST. art. I, § 8, cl. 15.

²⁶⁶ *Id.* art. IV, § 4.

²⁶⁷ Act of May 2, 1792, ch. 28, § 1, 1 Stat. 264, 264. The current codification provides: Whenever there is an insurrections [sic] in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.
10 U.S.C. § 331 (1994).

²⁶⁸ Act of May 2, 1792, § 2, 1 Stat. at 264. The current codification provides: Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.
10 U.S.C. § 332.

This provision went far beyond the language of the Constitution. It vested serious decisions about the strength of domestic resistance to the enforcement of U.S. law in the President²⁶⁹ and the judiciary.²⁷⁰ In contrast to section 1 of the Militia Act and the Domestic Violence Clause, section 2 of the Militia Act and the Militia Clause appeared to authorize federal suppression of any resistance to federal law without any act or consent by the states. Representative William Vans Murray of Maryland hoped “[t]he bill . . . would attempt to mark with precision the objects the Constitution looked towards, under the words ‘execute the laws of the Union, and suppress insurrections.’”²⁷¹ Furthermore, he suggested an important distinction: “What was the occasion to warrant force of that species, was the first object: Who was to judge of its existence, was another.”²⁷² He worried that the bill lacked “defined objects and situations” for which the militia would be called forth.²⁷³ To Representative Murray, the Militia Act’s broad grant of power was problematic because the new government “was a Government of definition, and not of trust and discretion.”²⁷⁴ Other representatives voiced concerns that the bill “suppose[d] that the General Government only possesses the power to suppress insurrections.”²⁷⁵ In reality, “the States individually certainly possess this power; they can suppress insurrections, and will do it; their interest is involved in supporting the laws, and they are fully competent to do it.”²⁷⁶ These issues quickly came to light during the Whiskey Rebellion in Western Pennsylvania two years later.²⁷⁷

c. *The Sedition Act of 1798*

The liberties Congress took with the Constitution in the early crime and militia bills were trivial when compared with its actions under the Act of July 14, 1798 (the “Sedition Act”). This Act made criminal the “writing, printing, uttering or publishing of any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame.”²⁷⁸ Through the Sedition Act, Congress codified, in part, the common law rule of seditious libel, altering it, however, to provide that truth

²⁶⁹ See 2 ANNALS OF CONG. 554 (1792) (statement of Rep. Murray) (objecting to the Militia bill’s vesting the power to call forth the militia “to the discretion of one man”); 2 *id.* at 553 (statement of Rep. Mercer) (opposing section 2 of the Militia bill).

²⁷⁰ The Act of 1792 expired in 1794. A new bill was passed in 1795 with one significant change. Section 2’s provision requiring certification from an associate justice or district judge was omitted. The need to intervene was left entirely to the President’s judgment. See Act of Feb. 28, 1795, ch. 36, § 2, 1 Stat. 424, 424 (codified as amended at 10 U.S.C. § 331); see also Prize Cases, 67 U.S. (2 Black) 635, 641-42 (1862) (“[The President’s] powers in cases of insurrection or invasion were clear and undoubted. He had the army, the navy, and the militia of the States . . . confided to his command, *sub modo*.”).

²⁷¹ 2 ANNALS OF CONG. 554 (statement of Rep. Murray).

²⁷² 2 *id.* (statement of Rep. Murray).

²⁷³ 2 *id.* at 555 (statement of Rep. Murray).

²⁷⁴ 2 *id.* (statement of Rep. Murray); see 2 *id.* at 574 (statement of Rep. Livermore).

²⁷⁵ 2 *id.* at 574 (statement of Rep. Baldwin).

²⁷⁶ 2 *id.* (statement of Rep. Baldwin).

²⁷⁷ See *infra* text accompanying notes 312-324.

²⁷⁸ Act of July 14, 1798, ch. 74, § 2, 1 Stat. 596, 596.

constituted a defense.²⁷⁹ Because seditious libel is a lesser offense closely related to treason, and because treason is expressly defined by the Constitution, one might have expected that no other definition, including lesser offenses, would have been proper.²⁸⁰

The debates over the constitutionality of the Sedition Act centered on two questions. First, did Congress have an affirmative grant of power to enact such a provision? Second, assuming it did, had the First Amendment disabled Congress from enacting such provisions? This section focuses on the first of these arguments.²⁸¹

The Federalists, seeking a legal basis for silencing criticism of President John Adams, made several arguments in favor of the Sedition Act. First, they argued that Congress had power to suppress insurrection and repel invasions, and “[t]he alien and sedition acts . . . form . . . an essential part in these precautionary and protective measures, adopted for our security.”²⁸² Alluding to the Militia and Domestic Violence Clauses, as well as the Militia Act, Massachusetts Representative Harrison Otis argued:

Unlawful combinations to oppose the measures of Government, to intimidate its officers, and to excite insurrections, are acts which tend directly to the destruction of the Constitution, and there could be no doubt that the guardians of that Constitution are bound to provide against them. And if . . . these were acts of a criminal nature, it follows that all means calculated to produce these effects, whether by speaking, writing, or printing, were also criminal.²⁸³

These arguments lacked textual support, however, because Congress’s only enumerated power to suppress insurrections and repel invasions was the power to martial the militia. Furthermore, the power of the United States against invasion and domestic violence is intended to protect the states, not the national government.

More to the point, the Federalists asserted that the Sweeping Clause empowered Congress to punish seditious libel. “[C]an the powers of a Government be carried into execution, if sedition for opposing its laws, and libels against its officers, itself, and its proceedings, are to pass unpunished?”²⁸⁴ A committee report, drafted in response to petitions requesting a repeal of the alien and sedition laws, reasoned that:

[A] law to punish false, scandalous, and malicious writings against the Government, with intent to stir up sedition, is a law necessary

²⁷⁹ See 2 CROSSKEY, *supra* note 142, at 767; 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 235 (Maeva Marcus ed., 1990) [hereinafter DOCUMENTARY HISTORY OF THE SUPREME COURT].

²⁸⁰ Congress has, nevertheless, approved legislation that criminalizes lesser offenses of treason. See, e.g., An Act for the Punishment of Certain Crimes Therein Specified, ch. 1, 1 Stat. 613 (1799) (criminalizing correspondence with a foreign government with the intent to influence that government in matters involving the United States).

²⁸¹ I have discussed previously the Sedition Act debates in the context of the First Amendment in Bybee, *supra* note 33, at 1567-71.

²⁸² 5 ANNALS OF CONG. 2991 (1799) (committee report).

²⁸³ 5 *id.* at 2146 (1798) (statement of Rep. Otis).

²⁸⁴ 5 *id.* at 2167 (statement of Rep. Harper).

for carrying into effect the power vested by the Constitution in the Government of the United States . . . ; because the direct tendency of such writings is to obstruct the acts of the Government by exciting opposition to them, to endanger its existence by rendering it odious and contemptible in the eyes of the people, and to produce seditious combinations against the laws, the power to punish which has never been questioned²⁸⁵

The Federalists further defended the distance the Sedition Act had traveled from the Constitution by reciting various sections of the Act of 1790, as evidence that “Congress has passed many laws for which no express provision can be found in the Constitution, and the constitutionality of which has never been questioned.”²⁸⁶ Finally, the Federalists claimed that the federal government could not hope for punishment of sedition by the states and, therefore, Congress simply was codifying a common law crime that the federal courts must have power to punish.²⁸⁷

Republicans answered that, the First Amendment aside, Congress had no power to enact such legislation. Virginia Representative John Nicholas claimed “it was not within the powers of the House to act upon this subject.”²⁸⁸ He had “looked in vain amongst the enumerated powers given to Congress in the Constitution, for an authority to pass a law like the present.”²⁸⁹ James Madison, in defense of the Virginia Resolutions,²⁹⁰ argued that Congress’s power to suppress insurrections could not support the Sedi-

²⁸⁵ 5 *id.* at 2988 (1799) (committee report).

²⁸⁶ 5 *id.* As Representative Otis stated:

[O]ther crimes had been made penal at an early period of the Government, by express statute, to which no exception had been taken. For example, stealing public records, perjury, obstructing the officers of justice, bribery in a Judge, and even a contract to give a bribe, . . . were all punishable, and why? Not because they are described in the Constitution, but because they are crimes against the United States—because laws against them are necessary to carry other laws into effect

5 *id.* at 2147 (1798) (statement of Rep. Otis). Otis also pointed to language in the Judiciary Act of 1789, that “sav[ed] to suitors in all cases the right of a common law remedy, where the common law was competent to give it.” Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73, 77; see 5 ANNALS OF CONG. 2147 (statement of Rep. Otis). Otis assumed that this competency derived from the Constitution and could not “perceive how this competency applied to civil and not to criminal cases.” 5 *id.* (statement of Rep. Otis).

²⁸⁷ See 5 ANNALS OF CONG. 2989 (1799) (committee report); 5 *id.* at 2147 (1798) (statement of Rep. Otis) (“[T]he National Government is invested with a power to protect itself against outrages of this kind, or it must be indebted to and dependent on an individual [sic] state for its protection, which is absurd.”); 5 *id.* at 2141 (statement of Rep. Harper).

²⁸⁸ 5 *id.* 2139 (statement of Rep. Nicholas).

²⁸⁹ 5 *id.* (statement of Rep. Nicholas).

²⁹⁰ The Virginia Resolutions of 1798 were drafted by James Madison and adopted by the General Assembly of Virginia to denounce the Alien and Sedition Acts as unconstitutional, as well as to reaffirm the rights of states as reserved through the Tenth Amendment. See James Madison, Virginia Resolutions of 1798, reprinted in 4 ELLIOT’S DEBATES, *supra* note 116, at 528, 528-29. Similarly, Thomas Jefferson drafted the Kentucky Resolutions to oppose the Acts. See Thomas Jefferson, Kentucky Resolutions of 1798 and 1799, reprinted in 4 ELLIOT’S DEBATES, *supra* note 116, at 540, 540-45. The Virginia Resolutions were transmitted to the executive of each state, who were asked to communicate the resolutions to each legislature, so that “the other states, in confidence that they [would] concur with [Virginia] in declaring, as it [did] hereby declare, that the [Alien and Sedition Acts] [were] unconstitutional.” Madison, *supra*, at 529. A

tion Act “with the least plausibility.”²⁹¹ Further, North Carolina Representative Nathaniel Macon quoted from James Iredell’s remarks during the North Carolina ratifying debates to show that Congress has “no power to define any other crime whatever,”²⁹² beyond those enumerated in the Constitution. The Kentucky Resolutions, authored by Thomas Jefferson, made this argument more forcefully:

Resolved, That the Constitution of the United States having delegated to Congress a power to punish treason, counterfeiting the securities and current coin of the united States, piracies and felonies committed on the high seas, and offences against the laws of nations, and no other crimes whatever; and it being true, as a general principle, and one of the amendments to the Constitution having also declared “that 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,”—therefore, also, the [Sedition Act and the Bank Fraud Act] (and all other their acts which assume to create, define, or punish crimes other than those enumerated in the Constitution,) are altogether void, and of no force; and that the power to create, define, and punish, such other crimes is reserved, and of right appertains, solely and exclusively, to the respective states, each within its own territory.²⁹³

The Republicans also denied that authority might be found in the Sweeping Clause. Representative Albert Gallatin of Pennsylvania, one of the most vocal critics of the sedition laws, asserted that the Constitution gave to Congress no specific power to punish seditious libel, and Congress could only claim it from a “more general authority.”²⁹⁴ If “Congress had the power, generally, to provide for the punishment of any offenses against Government. . . . such a power, . . . would embrace the punishment of any . . . act, which, though not criminal in itself, might be obnoxious to the persons who happened to have Government in their hands.”²⁹⁵ But, he said, the Constitution specified the offenses Congress could punish. He then proceeded to list piracy and felonies on the high seas, counterfeiting, treason, offenses within U.S. territories and property, and

offences against the laws or exercise of the Constitutional authority of any department—which offences Congress had a right to define and punish, by virtue of the clause of the Constitution which em-

number of states issued resolutions disapproving the Virginia and Kentucky Resolutions. See 4 ELLIOT’S DEBATES, *supra* note 116, at 532-39.

²⁹¹ James Madison, Report on the Virginia Resolutions, *reprinted in* 4 ELLIOT’S DEBATES, *supra* note 116, at 546, 568.

²⁹² 5 ANNALS OF CONG. 2151 (statement of Rep. Macon). The passage from which Macon quoted is found in 4 ELLIOT’S DEBATES, *supra* note 116, at 219.

²⁹³ Jefferson, *supra* note 290, at 540.

²⁹⁴ 5 ANNALS OF CONG. 2158 (statement of Rep. Gallatin).

²⁹⁵ 5 *id.* (statement of Rep. Gallatin); see 5 *id.* at 3002 (1799) (statement of Rep. Gallatin); Madison, *supra* note 291, at 568 (reiterating that the federal government is “possessed of particular and definite powers only, not of general and indefinite powers vested in ordinary governments”).

powered them to pass all laws necessary and proper for carrying into execution any power vested by the Constitution in them.²⁹⁶

He defended Congress's previous crime acts, including provisions punishing theft of the mails and tax evasion, as evidence that it had "heretofore strictly adhered to the specification of the Constitution."²⁹⁷ The Sweeping Clause, he argued, required a basis in some other enumerated power of Congress or the United States.²⁹⁸ The Federalists' argument, on the other hand, would give Congress a "general guardianship over the morals of the people."²⁹⁹

The Republicans also asserted that there was no warrant for a claim to common law authority to punish seditious speech. Representative Gallatin stated that the Federalists had confounded two very distinct ideas—the principles of the common law, and the jurisdiction over cases arising under it. "That those principles were recognised in the cases where the courts had jurisdiction, was not denied; but such a recognition could by no means extend the jurisdiction beyond the specific cases defined by the Constitution."³⁰⁰ Thus, in Gallatin's view,

[t]he question was not whether the Courts of the United States had, without this law, the power to punish libels, but whether, supposing they had not the power, Congress had that of giving them this jurisdiction—whether Congress were vested by the Constitution with the authority of passing this bill?³⁰¹

²⁹⁶ 5 ANNALS OF CONG. 2158 (1798) (statement of Rep. Gallatin).

²⁹⁷ 5 *id.* at 2159 (statement of Rep. Gallatin).

²⁹⁸ See 5 *id.*

²⁹⁹ 5 *id.* at 3005 (1799) (statement of Rep. Gallatin). In a harbinger of the arguments made in *Lopez*, Representative Gallatin continued:

[N]othing can have a greater tendency to insure obedience to law, and nothing can be more likely to check every propensity to resistance to Government, than virtuous and wise education; therefore Congress must have power to subject all the youth of the United States to a certain system of education. It would be very easy to connect every sort of authority used by any Government with the well-being of the General Government, . . . although the consequence must be the prostration of the State Governments.

5 *id.* (statement of Rep. Gallatin).

Madison's Report on the Virginia Resolutions expressed a similar thought: "Congress have power to suppress insurrections; yet it would not be allowed to follow, that they might employ all the means tending to prevent them; of which a system of moral instruction for the ignorant . . . might be regarded as among the most efficacious." Madison, *supra* note 291, at 558; *cf.* *United States v. Lopez*, 514 U.S. 549, 622-23 (Breyer, J., dissenting). Discussing the links between crime, education, and commerce, Justice Breyer questioned:

Why then is it not equally obvious, in light of those links, that a widespread, serious, and substantial physical threat to teaching and learning *also* substantially threatens the commerce to which that teaching and learning is inextricably tied? . . . [G]uns in the hands of six percent of inner-city high school students and gun-related violence throughout a city's schools must threaten the trade and commerce that those schools support.

Id. (Breyer, J., dissenting).

³⁰⁰ 5 ANNALS OF CONG. 2157 (1798) (statement of Rep. Gallatin); see also Madison, *supra* note 291, at 561-64 (rejecting the proposition that Congress can simply codify the common law).

³⁰¹ 5 ANNALS OF CONG. 2157-58 (statement of Rep. Gallatin).

Moreover, state sedition laws did not justify Congress's actions.³⁰²

Sedition posed an interesting and unique dilemma for government. In its most extreme form—overt actions against the government—it constituted treason. In a lesser form—but constituting action nonetheless—it could be punished as a crime. But in either form, it was a unique kind of crime because the victim was the institution of government itself. Although any crime challenges the ability of the government to protect its citizens and to maintain the peace, sedition strikes at the fundamental ability of the government to protect itself, to maintain its physical legitimacy, and to leave itself in a position to protect its citizens.

The federal government's power to punish sedition presented a special issue of its broader power to punish unenumerated crimes. This issue, as framed by the Sedition Act debates, was profound because it went to the heart of the government's legitimacy, and it was broad because Congress relied exclusively on the Sweeping Clause for its authority. In these debates, it is sometimes difficult to separate arguments of political expediency from more detached thoughts about the Constitution. For example, as the Federalists pointed out, no one in Congress contested the power of Congress to punish seditious *acts*, even though the Republicans' arguments about the lack of an enumerated power authorizing punishment of seditious *libel* applied with equal force to the section of the bill punishing actions.³⁰³

But even if the Federalists and Republicans agreed on the government's power to punish seditious acts, the arguments served as a warning that congressionally defined crimes not intended to protect the government itself must have a clear basis in the text of the Constitution. The Republicans' arguments revealed a deep suspicion that the enumerated powers principle was proving to be a sieve and that the Sweeping Clause might justify nearly all criminal legislation. Although some Republicans continued to maintain that Congress could only punish the enumerated crimes, most Republicans—and almost certainly the Federalists—would have conceded that Congress could make certain conduct criminal such as was necessary and proper to the enforcement of laws plainly within Congress's power. In the end, “a crisis which seems to us to have been concerned with freedom seemed to the statesmen of 1798 to be a crisis in federalism.”³⁰⁴

d. Other Provisions

The initial impetus to enact laws protecting the interests of the United States demonstrated that Congress did not believe that its authority was confined to the enumerated crimes and crimes committed on federally owned property. Congress obviously thought that the Sweeping Clause authorized

302 See 5 *id.* at 2142 (statement of Rep. Nicholas).

303 See 5 *id.* 2988 (1799) (committee report).

304 Mark DeWolfe Howe, Book Review, 66 HARV. L. REV. 189, 190 (1952) (reviewing JOHN C. MILLER, *CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS* (1951)); see *Dennis v. United States*, 341 U.S. 494, 522 n.4 (1951) (Frankfurter, J., concurring) (quoting an 1804 letter from Thomas Jefferson to Abigail Adams: “While we deny that Congress have a right to controul [sic] the freedom of the press, we have ever asserted the right of the states, and their exclusive right, to do so.”).

further criminal legislation. Prior to the Civil War, Congress enacted a number of criminal statutes protecting federal interests. These crimes included forgery against the United States or involving U.S. debt or securities, bribery, fraud against the United States, interference with the mail, and embezzlement.³⁰⁵ These crimes appear to arise out of enumerated powers granted to Congress.³⁰⁶ To the extent punishment of these crimes infringed state jurisdiction over crime, the incursion was modest.³⁰⁷

Following the Civil War, Congress enacted its first laws intended to protect individuals, rather than the government itself.³⁰⁸ These laws included the Act of March 3, 1865 which, among other things, prohibited the passing of obscene materials through the mail.³⁰⁹ Despite the fact that the mails were exclusively within federal control, the passage of these laws represented a substantial step towards the federalization of crime.³¹⁰ Regulatory crimes, drawing on Congress's commerce power, followed shortly thereafter.³¹¹

2. *The Executive and Domestic Violence*

The first real test of the United States' new powers against insurrection and domestic violence came in 1794, shortly after passage of the Militia Act. In early 1791, Congress enacted an excise tax on whiskey.³¹² The whiskey tax

³⁰⁵ See, e.g., Act of Dec. 23, 1857, ch. 1, §§ 12-13, 11 Stat. 257, 259 (punishing forgery or counterfeiting of treasury notes and fraudulent use of engraving plates); Act of Feb. 26, 1853, ch. 81, 10 Stat. 170 (criminalizing various frauds upon the Treasury of the United States); Act of Aug. 31, 1852, ch. 113, § 4, 10 Stat. 121, 140 (punishing the theft of mailbags and other property belonging to the Post-Office Department); Act of Aug. 6, 1846, ch. 90, § 16, 9 Stat. 59, 63 (criminalizing embezzlement of public moneys). These laws are described in WHARTON, *supra* note 96, at 80-85. See also Sara Sun Beale, *Federal Criminal Jurisdiction*, in 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 775-76 (Sanford H. Kadish ed., 1983); Martin Conboy, *Federal Criminal Law, in 1 LAW: A CENTURY OF PROGRESS, 1835-1935*, at 295, 308-10 (Alison Reppy ed., 1937).

³⁰⁶ See, e.g., U.S. CONST. art. I, § 8, cl. 7 (mail); *id.* cl. 2 (U.S. debt); *id.* cl. 6 (counterfeiting securities); *id.* art. II, § 4 (removal of officers of the United States for bribery).

³⁰⁷ See 1 CONG. DEB. 167 (1825) (statement of Rep. Webster) ("The crimes most mischievous were crimes against the property of the Government."); *id.* at 154-55 (statement of Rep. Webster). But see *id.* at 154, 335-36 (statements of Rep. Wickliffe) (criticizing a bill comprising various federal crimes because "it extends the jurisdiction of the United States to offences committed within the territories of the several States"). Indeed, the Act of March 3, 1825, ch. 65, 4 Stat. 115, contained an assimilated crimes provision, adopting state criminal laws in federal areas within a state where there was no applicable federal law. Rather than adopt a separate federal criminal code that covered all possible offenses in these areas, Congress instead chose to rely on state laws for many of the offenses that could be committed.

³⁰⁸ See Baker, *supra* note 96, at 513-14; Beale, *supra* note 305, at 776; Conboy, *supra* note 305, at 311-24. For discussion of the civil rights acts, see *infra* Part IV.

³⁰⁹ See An Act Relating to the Postal Laws, ch. 89, § 16, 13 Stat. 504, 507 (1865).

³¹⁰ See Baker, *supra* note 96, at 514; see also An Act to Amend Certain Sections of the Revised Statutes Relating to Lotteries, and for Other Purposes, ch. 908, 26 Stat. 465 (1890); An Act to Revise, Consolidate, and Amend the Statutes Relating to the Post-Office Department, ch. 335, § 301, 17 Stat. 283, 322 (1872).

³¹¹ See, e.g., An Act for the Suppression of Lottery Traffic Through National and Interstate Commerce and the Postal Service Subject to the Jurisdiction and Laws of the United States, ch. 191, 28 Stat. 963 (1895); An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1-4 (1994)) (Sherman Antitrust Act); Act to Regulate Commerce, ch. 104, 24 Stat. 379 (1887).

³¹² See An Act Repealing, After the Last Day of June Next, the Duties Heretofore Laid

was part of Treasury Secretary Alexander Hamilton's fiscal plan, under which the United States would assume state debts, and the tax would cover the budget shortfall.³¹³ To the farmers of Western Pennsylvania, the tax was odious, and as many as 7,000 of them organized against its collection.³¹⁴ Comparisons with Shays' Rebellion were inevitable.³¹⁵

After an attack on a federal tax collector, President Washington met with Pennsylvania Governor Thomas Mifflin in August 1794 and found that state officials were reluctant to meet the organized rebellion with the state's militia.³¹⁶ Governor Mifflin thought that the judiciary should be employed to punish the rioters before deploying a military force.³¹⁷ Soon after Associate Justice James Wilson certified that U.S. laws were being opposed and that the resistance was beyond the judiciary's power (a certification required by the Militia Act), Washington determined to assemble a militia and send it to Western Pennsylvania.³¹⁸ The United States marshalled a militia of nearly 13,000 men from Pennsylvania, New Jersey, Virginia, and Maryland and, as with Shays' Rebellion, the resistance dispersed quickly.³¹⁹

The episode would seem to have vindicated Washington's use of the Militia Clause and the Militia Act.³²⁰ But the precedent came at some cost to clarity in state-federal relations. After President Washington announced his intentions to send a militia, Governor Mifflin and Secretary of State Edmund Randolph exchanged correspondence over the propriety of President Washington's proposed acts. Governor Mifflin protested that "the military power of the Government ought not to be employed until its judiciary authority, after a fair experiment, has proved incompetent to enforce obedience or to punish infractions of the law."³²¹ Referring to the Domestic Violence Clause, Governor Mifflin advised that although the riots were connected with federal revenue laws, the acts were indistinguishable from other acts of organized violence:

Had the riot been unconnected with the system of federal policy, the vindication of our laws would be left to the ordinary course of justice; and only in the last resort, at the requisition, and as an auxil-

upon Distilled Spirits Imported from Abroad, and Laying Others in Their Stead; and also upon Spirits Distilled Within the United States, and for Appropriating the Same, ch. 15, §§ 14-15, 1 Stat. 199, 202-03 (1791).

313 See H.M. BRACKENRIDGE, *HISTORY OF THE WESTERN INSURRECTION IN WESTERN PENNSYLVANIA* 17-18 (Pittsburgh, W.S. Haven 1859); THOMAS P. SLAUGHTER, *THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION* 95-97 (1986).

314 See BENNETT MILTON RICH, *The Presidents and Civil Disorder* 7 (1941).

315 See *id.* at 2; SLAUGHTER, *supra* note 313, at 103.

316 See RICH, *supra* note 314, at 8.

317 See LELAND D. BALDWIN, *WHISKEY REBELS: THE STORY OF A FRONTIER UPRISING* 184-85 (1939); RICH, *supra* note 314, at 8; SLAUGHTER, *supra* note 313, at 192-93, 196; Richard A. Ifft, *Treason in the Early Republic: The Federal Courts, Popular Protest, and Federalism During the Whiskey Insurrection*, in *THE WHISKEY REBELLION: PAST AND PRESENT PERSPECTIVES* 165, 170 (Steven R. Boyd ed., 1985).

318 See RICH, *supra* note 314, at 8-9.

319 See *id.* at 8-10, 16.

320 See *id.* at 19-20 (offering effusive praise for Washington's actions during the Whiskey Rebellion).

321 4 ANNALS OF CONG. app. at 2827 (1796) (letter from Governor Mifflin).

ary of the civil authority, would the military force of the State be called forth.³²²

Governor Mifflin's point was a fair one: What was to prevent the United States from declaring the law enforcement efforts of a state inadequate and thus a threat to federal laws, requiring displacement of the state's law enforcement role? In response, Secretary Randolph conflated the Republican Guarantee and Domestic Violence Clauses, suggesting that military force is sometimes necessary if the citizens of the United States expect to "support their own authority . . . against disorderly and violent combinations" and to "preserve the character of Republican Government, by evincing that it has adequate resources for maintaining the public order."³²³ The latter statement could not have been reassuring to state officials who were concerned that any public disturbance might be viewed as a threat to republican government and provide the occasion for federal intervention. From a state's perspective, there could be no threat as great to its republican form of government as federal intervention.³²⁴

Executive practice in the period between the Whiskey Rebellion and passage of the Fourteenth Amendment was more guarded than President Washington's initial foray may have suggested. Following President John Adams's use of the militia to suppress Fries' Insurrection of 1799, an incident similar to the Whiskey Rebellion,³²⁵ there were relatively few occasions requiring the use of federal troops prior to the Civil War,³²⁶ and most of the interventions involved opposition to federal law.³²⁷ Presidents were very cautious about intervening in state domestic affairs when no violation of federal law was involved. In fact, on several occasions, the President declined to respond to requests for assistance on the grounds that the state had not

³²² See 4 *id.* app. at 2827-28 (letter from Governor Mifflin).

³²³ 4 *id.* app. at 2832. Professor Wiecek says that the Guarantee Clause was not cited as authority by Washington or Congress for his efforts "to put down the Rebellion since the domestic violence clause provided authority enough." WIECEK, *supra* note 131, at 78. But the Domestic Violence Clause clearly was not the source of the government's claim to authority. Because the Rebellion involved the enforcement of a federal excise on domestic whiskey, it was the Militia Clause, not the Domestic Violence Clause, that provided the textual basis for the President's use of force under section 2 of the Militia Act of 1792. See Ferguson, *supra* note 198, at 414 & n.40 (noting that President Washington authorized the use of troops to stop the obstruction of federal law).

³²⁴ See BALDWIN, *supra* note 317, at 184 ("[Pennsylvania] state officials were silent, probably each reminded of the prophecy that the federal government would swallow up the states and interpreting [Washington's] proposal as a step in that direction.").

³²⁵ See RICH, *supra* note 314, at 21 n.1, 22-24.

³²⁶ These incidents are catalogued in OFFICE OF THE JUDGE ADVOCATE GEN., FEDERAL AID IN DOMESTIC DISTURBANCES, 1903-1922, S. DOC. NO. 67-263 (1922) (supplementing FREDERICK T. WILSON, U.S. ARMY, FEDERAL AID IN DOMESTIC DISTURBANCES, 1787-1903, S. DOC. NO. 57-209 (1903)). See generally RICH, *supra* note 314.

³²⁷ See S. DOC. NO. 67-263, at 45.

demonstrated the insufficiency of its own resources³²⁸ or that an improper official had made the request.³²⁹

During this period, Attorney General Caleb Cushing advised that “domestic violence” encompassed more than insurrection or riot, but extended to “robbery, burglary, arson, rape, and murder.”³³⁰ This view of “domestic violence” was a two-edged sword. It expanded the circumstances in which the federal government could intervene when requested by the appropriate state officials, yet simultaneously suggested that it typically was not appropriate for the United States to address such ordinary crimes in the absence of a state request. If, in cases of insurrection against a state, the federal government could only act upon invitation, *a fortiori*, there was no authority for intervention in lesser matters of “domestic violence.” Furthermore, the Attorney General affirmed that “each State of the Union has the right to protect itself against domestic violence, and to invoke to that end the friendly cooperation, or at least the neutrality, of the United States.”³³¹

3. *The Courts and the Federalization of Crime*

Early judicial opinions offer relatively little discussion of congressional authority to punish crime. The judiciary widely assumed that Congress possessed “necessary and proper” authority to punish acts against the United States.³³² In dicta in *McCulloch v. Maryland*,³³³ Chief Justice Marshall inferred from Congress’s power “[t]o establish Post Offices and post Roads”³³⁴ the right of the United States “to punish those who steal letters from the

³²⁸ See *id.* at 54-56 (Dorr Rebellion in Rhode Island); *id.* at 75-76 (San Francisco riots); *id.* at 174 (labor disturbances in Missouri and Illinois); *The Guarantee of Order and Republican Government in the States*, *supra* note 242, at 86 (elections in Mississippi). The Dorr Rebellion is discussed in text accompanying *infra* notes 364-378.

³²⁹ See S. Doc. No. 67-263, at 56 (request from a governor denied without evidence that the legislature could not convene); *id.* at 76-77 (same); *id.* at 145 (request from Little Rock mayor denied); see also *id.* at 99, 173-74, 311 (examples of the President denying assistance because the state legislature had not made the request); *Insurrection in a State*, 8 Op. Att’y Gen. 8, 13 (1856) (request from a governor denied without evidence that the legislature could not convene).

The Department of Justice has specified three prerequisites for the President to send troops: (1) “That a situation of serious domestic violence exists within the state”; (2) “That such violence cannot be brought under control by the law-enforcement resources available to the Governor, including local and State police forces and the National Guard”; and (3) “That the proper request is received from the Legislature or, when the Legislature is not in session, the Governor.” U.S. DEP’T OF JUSTICE, *THE USE OF MILITARY FORCE UNDER FEDERAL LAW TO DEAL WITH CIVIL DISORDERS AND DOMESTIC VIOLENCE* 3-4 (1980) [hereinafter *THE USE OF MILITARY FORCE UNDER FEDERAL LAW*].

³³⁰ *Yazoo City Post Office Case*, 8 Op. Att’y Gen. 489, 494 (1857).

³³¹ *Id.* at 497.

³³² See, e.g., James Iredell’s Charge to the Grand Jury of the Circuit Court for the District of New York (April 6, 1795), in 3 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 279, at 22; James Iredell’s Charge to the Grand Jury of the Circuit Court for the District of Pennsylvania (April 11, 1799), in 3 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 279, at 341-44.

³³³ 17 U.S. (4 Wheat.) 316 (1819).

³³⁴ U.S. CONST. art. I, § 8, cl. 7.

post-office, or rob the mail.”³³⁵ In his view, “the power of punishment appertains to sovereignty, and may be exercised, whenever the sovereign has a right to act, as incidental to his constitutional powers.”³³⁶

The judiciary gave a great deal more attention, however, to the question of its own powers over crime. Just as Congress and the Executive had struggled with the reach of their new powers, the judiciary grappled with the bounds of its jurisdiction to punish crimes. On the one hand, its jurisdiction seemed to be circumscribed by Congress’s criminal authority.³³⁷ The courts’ immediate concern, however, was not with the breadth of Congress’s enumerated power over crime, but with its own powers to try cases based on common law crimes.³³⁸ A “common law jurisdiction to punish was a doctrine to be feared. Its potential reach threatened the liberties of citizens and the polity of each and every state.”³³⁹ Jurisdiction over common law crimes would have expanded dramatically the power of the United States to define and punish crime. Had the courts possessed common law jurisdiction over crime, the Executive’s power to prosecute such crimes would have expanded commensurately. Moreover, it would probably have expanded Congress’s power as well, because Congress has power over federal jurisdiction and has the power to make laws “necessary and proper for carrying into execution . . . all other Powers . . . vested in the Government of the United States.”³⁴⁰

The debate over common law crimes was relatively short-lived. In May 1806, the *Connecticut Courant* reprinted an article charging that the President and Congress had given \$2,000,000 to Napoleon as inducement to make a treaty with Spain.³⁴¹ The United States indicted publishers Hudson and Goodwin for common law criminal libel against President Thomas Jefferson and Congress.³⁴² The Court’s spare opinion in *United States v. Hudson & Goodwin*³⁴³ held that the courts did not possess jurisdiction over such

³³⁵ *McCulloch*, 17 U.S. (4 Wheat.) at 417. Alluding to the Crime Act of 1790, Marshall added that “the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court” was “conducive to the due administration of justice” though “not indispensably necessary.” *Id.*

³³⁶ *Id.* at 418.

³³⁷ See Kathryn Preyer, *Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic*, 4 *LAW & HIST. REV.* 223, 226-28 (1986).

³³⁸ See JOHN M. GOODENOW, *HISTORICAL SKETCHES OF THE PRINCIPLES AND MAXIMS OF AMERICAN JURISPRUDENCE, IN CONTRAST WITH THE DOCTRINES OF THE ENGLISH COMMON LAW ON THE SUBJECT OF CRIMES AND PUNISHMENTS* 283-314 (Roy M. Mersky & J. Myron Jacobstein eds., photo. reprint 1972) (1819).

³³⁹ Preyer, *supra* note 337, at 263.

³⁴⁰ U.S. CONST. art. I, § 8, cl. 18.

³⁴¹ See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 32 (1812); 2 *CROSSKEY*, *supra* note 142, at 771-72; Gary D. Rowe, Note, *The Sound of Silence: United States v. Hudson & Goodwin, the Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 *YALE L.J.* 919, 924 (1992).

³⁴² See 2 *CROSSKEY*, *supra* note 142, at 772. Ironically, the Jeffersonians, who had vociferously protested the Sedition Act as beyond Congress’s enumerated powers and a violation of the First Amendment, employed a common law variation on the Act’s theme against its Federalist supporters.

³⁴³ 11 U.S. (7 Cranch) 32 (1812).

crimes.³⁴⁴ The Court declined to state whether such jurisdiction could be conferred by Congress; it was sufficient that Congress had not.³⁴⁵ The Court acknowledged that the federal government might possess “certain implied powers,” but with respect to defining crimes, “[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.”³⁴⁶ Moreover, whatever implied powers inhered in the courts,³⁴⁷ power to adjudicate common law crimes did not.³⁴⁸

Hudson & Goodwin provided substantial support for state control of crime. Just as the Sedition Act debates concerned state control of speech, press, and religion, *Hudson & Goodwin* preserved, at least for a time, the states’ power to define crimes.³⁴⁹ If the Supreme Court had upheld a federal court common law jurisdiction over crime, Congress’s ability to define such crimes might have followed as well.³⁵⁰ Had the United States then possessed common law criminal authority, almost any crime could have been viewed as an act against the government (as the debates over the Civil Rights Act of 1871 demonstrated).³⁵¹ If such authority were construed broadly, the national government could have used the Militia Clause to intervene at will to punish crimes, reducing the Domestic Violence Clause to a nullity. *Hudson & Goodwin* confirmed that Congress held, in the first instance, whatever au-

³⁴⁴ See *id.* at 34.

³⁴⁵ See *id.* at 33; see also Madison, *supra* note 291, at 564 (discussing Article III, Section 2; concluding that the judiciary’s power over “cases in law and equity” excludes jurisdiction over criminal cases).

³⁴⁶ *Hudson & Goodwin*, 11 U.S. (7 Cranch) at 34. The Court’s reference to Congress “declar[ing] the Court that shall have jurisdiction” referred to the practice of authorizing prosecution of federal crimes in state courts. See Kurland, *supra* note 7, at 61-62. It was not a foregone conclusion that federal crimes, once defined, would be prosecuted in federal court.

³⁴⁷ The Court referred to the courts’ inherent powers to “fine for contempt—imprison for contumacy—[and] enforce the observance of order.” *Hudson & Goodwin*, 11 U.S. (7 Cranch) at 34; see also *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-46 (1991) (discussing the basis for, and examples of, courts’ inherent power).

³⁴⁸ See *Hudson & Goodwin*, 11 U.S. (7 Cranch) at 34.

³⁴⁹ Had *Hudson & Goodwin* concerned common law crimes in places under the exclusive jurisdiction of the United States, the case may have only represented a judgment concerning the division between Congress and the judiciary. Cf. 2 CROSSKEY, *supra* note 142, at 782 (quoting complaints that, following *Hudson & Goodwin*, crimes not defined by statute could not be punished, even when committed in places under the exclusive jurisdiction of the United States); see also *United States v. Reese*, 92 U.S. 214, 216 (1876) (“If Congress has not declared an act done within a State to be a crime against the United States, the Courts have no power to treat it as such.”).

³⁵⁰ See Rowe, *supra* note 341, at 928, 931-35 (discussing Justice Story’s efforts to have Congress authorize federal courts to adjudicate common law crimes).

³⁵¹ See *infra* Part IV.B.2. In a subsequent case involving prosecution for piracy, Justice Story, riding circuit, held that federal courts may punish common law or nonstatutory piracy. Story included as “crimes and offences against the United States . . . all offences against the sovereignty, the public rights, the public justice, the public peace, the public trade and the public police of the United States.” *United States v. Coolidge*, 25 F. Cas. 619, 620 (C.C.D. Mass. 1813) (No. 14,857). The Supreme Court reversed. See *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816).

thority the United States possessed to define crimes.³⁵² The Court deferred to another day the limitations, if any, on Congress's authority.

The early Court had few opportunities to opine about the extent of Congress's criminal authority. Two years after the Court's dicta on the power of Congress to define crimes based on the Sweeping Clause,³⁵³ the Court offered more dicta, which now suggested that Congress's authority over crime was quite limited. In *Cohens v. Virginia*,³⁵⁴ Virginia prosecuted the Cohens for selling lottery tickets, which was prohibited in Virginia.³⁵⁵ The Cohens argued in defense that the tickets were issued by a District of Columbia corporation organized under a congressional statute authorizing it to conduct a lottery.³⁵⁶

The Court upheld its jurisdiction over the Cohens' appeal from the Virginia courts.³⁵⁷ Virginia had argued that when Congress legislated for the district, its powers were no greater than "a local legislature."³⁵⁸ The Court disagreed that Congress's power was so limited, but in the course of its discussion, admitted that Congress had "no general right to punish murder committed within any of the States" and that "Congress cannot punish felonies generally."³⁵⁹ On the merits, the Court held that Congress had not authorized the sale of tickets outside the District of Columbia and affirmed the convictions.³⁶⁰

Cohens provided a fascinating twist on *Hudson & Goodwin*. Although the *Hudson & Goodwin* Court gave up its ability to exercise jurisdiction over substantive common law crimes, it reserved Congress's power to define common law crimes.³⁶¹ In *Cohens*, the Court (at least in dicta) rejected any claim that Congress might have had to define crime within the states,³⁶² but it asserted the Court's jurisdiction to hear appeals from state common law

352 See *Liparota v. United States*, 471 U.S. 419, 424 (1985) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute."); cf. Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 73 (1923) (suggesting that the legislative history of the Judiciary Act shows that "Congress did not intend to limit criminal jurisdiction to crimes specifically defined by it").

353 See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 418 (1819).

354 19 U.S. (6 Wheat.) 264 (1821).

355 See *id.* at 375.

356 See *id.* at 375, 423.

357 *Cohens* raised the question whether the Supreme Court could hear a constitutional challenge to a criminal conviction under state law. The question of Supreme Court appellate jurisdiction over constitutional challenges to *civil* matters in state courts had been resolved previously in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 351 (1816). For background on *Cohens*, see W. RAY LUCE, *COHENS V. VIRGINIA* (1821); THE SUPREME COURT AND STATE RIGHTS, A REEVALUATION OF INFLUENCES AND IMPACTS 1-24 (1990); G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835*, at 504-10 (abr. ed. 1991).

358 *Cohens*, 19 U.S. (6 Wheat.) at 427; see *id.* at 292-93 (argument of Philip Barbour on behalf of Virginia) (arguing that the D.C. lottery corporation was not created under a law of the United States and thus the appeal was not within the Court's jurisdiction).

359 *Id.* at 426, 428.

360 See *id.* at 447.

361 See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 33-34 (1812).

362 See *Cohens*, 19 U.S. (6 Wheat.) at 426-28.

cases.³⁶³ Following *Hudson & Goodwin* and *Cohens*, it appeared that the federal judiciary had disclaimed any authority to adjudicate common law crimes and that Congress lacked any general power to punish felonies within the states.

The Supreme Court was presented with the opportunity to shed light on the Domestic Violence Clause's role in federalism in *Luther v. Borden*.³⁶⁴ In 1842, a group of citizens in Rhode Island sought to replace the original Charter of Charles II, issued in 1663, with a new constitution.³⁶⁵ Thomas Dorr was elected governor at the first election under the putative constitution, and his election set him in opposition to Governor Samuel King, who had been elected previously under the Charter.³⁶⁶ Governor King repeatedly requested federal assistance to quell what he considered an insurrection, yet his requests were denied on the ground that the disturbances were not beyond Rhode Island's capacity and that the legislature (not the Governor) had to request assistance.³⁶⁷ The Dorr Rebellion ended with the Charter government still in place and without federal intervention.³⁶⁸

The suit by Martin Luther, a Dorr sympathizer, alleged that Luther Borden unlawfully entered Luther's home during the Dorr Rebellion.³⁶⁹ Borden claimed that he had entered lawfully on the authority of martial law declared by the Charter government.³⁷⁰ According to the Court, if the Charter government was legitimate, Borden had lawfully entered Luther's home; but, if the Dorr government was legitimate, Borden had trespassed.³⁷¹ For purposes of the Guarantee Clause, the Supreme Court held that the power to determine which government was legitimate did not belong to the courts, but to Congress. The Court concluded that the same reasoning applied to the determination of when to intervene under the Domestic Violence Clause.³⁷² Referring to the Militia Act, the Court found that Congress had delegated the power of the United States in "cases of domestic violence" to the President.³⁷³ "If there is an armed conflict, . . . it is a case of domestic violence,

³⁶³ See *id.* at 415.

³⁶⁴ 48 U.S. (7 How.) 1 (1849). The Domestic Violence Clause had been invoked earlier by counsel in *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449, app. at lxviii (1841) (argument of Groves's counsel Mr. Walker). Walker argued that state powers include

a power to guard the state, "against domestic violence," which not only was reserved to the state, but to the state exclusively, unless upon its "application" for aid to the government of the United States. . . . In the state then alone resides the power to pass all laws, designed to protect its people against domestic violence.

Id. The Court, however, did not mention the Domestic Violence Clause in its opinion.

³⁶⁵ See *Luther*, 48 U.S. (7 How.) at 35-36.

³⁶⁶ See OFFICE OF THE JUDGE ADVOCATE GEN., FEDERAL AID IN DOMESTIC DISTURBANCES, 1903-1922, S. DOC. NO. 67-263, at 54-55 (1922) (supplementing FREDERICK T. WILSON, U.S. ARMY, FEDERAL AID IN DOMESTIC DISTURBANCES, 1787-1903, S. DOC. NO. 57-209 (1903)); see also *Luther*, 48 U.S. (7 How.) at 9, 37 (plaintiff's pleadings to the Circuit Court).

³⁶⁷ See S. DOC. NO. 67-263, at 54-56.

³⁶⁸ See *id.* at 57.

³⁶⁹ See *Luther*, 48 U.S. (7 How.) at 34.

³⁷⁰ See *id.*

³⁷¹ See *id.* at 38-39.

³⁷² See *id.* at 42-43.

³⁷³ *Id.* at 43.

and one of the parties must be in insurrection against the lawful government. And the President must, of necessity, decide which is the government"³⁷⁴

Luther v. Borden was the Court's first—and, effectively, its last—pronouncement on the Domestic Violence Clause. Ironically, the Court avoided stating what the Domestic Violence Clause meant or might mean in another context. For the Court, it was sufficient that the power to decide the procedural question of whether the precondition for the exercise of federal authority in state domestic affairs had been met was committed by statute to the President.³⁷⁵ The Court treated the Domestic Violence Clause as a procedural requirement for which there was no statutory role for the Court.³⁷⁶ In the context of *Luther*, the Court properly identified its role, but *Luther* was read later for the broader proposition that the Republican Guarantee Clause—and with it the Domestic Violence Clause—raised questions for the political branches *exclusively*.³⁷⁷

[I]f the question of what was the rightful government within the indentment of § 4 of Article IV was a judicial one, the duty to afford protection from invasion and to suppress domestic violence would be also judicial, since those duties were inseparably related to the determination of whether there was a rightful government.³⁷⁸

Luther implied that the Court had nothing to say about the Domestic Violence Clause.

³⁷⁴ *Id.*; see Letter from President John Tyler to Governor Samuel King (Apr. 11, 1842), in ELISHA R. POTTER, CONSIDERATIONS ON THE QUESTIONS OF THE ADOPTION OF A CONSTITUTION, AND EXTENSION OF SUFFRAGE IN RHODE ISLAND 52, 54 (Boston, Thomas H. Webb & Co. 1842) (reprinting correspondence of President Tyler declining to respond to Governor King's request to intervene in the Dorr Rebellion, but acknowledging his responsibility to recognize the proper government); see also *The Guarantee of Order and Republican Government in the States*, *supra* note 242, at 65 (explaining that the President could only intervene against "unlawful violence" and that to respond to a demand from a particular side would have been to recognize that government as lawful).

³⁷⁵ See *Luther*, 48 U.S. (7 How.) at 43.

³⁷⁶ See *id.* ("[Congress] might, if they had deemed it most advisable to do so, have placed it in the power of a Court to decide when the contingency had happened which required the federal government to interfere. But Congress thought otherwise, and no doubt wisely").

³⁷⁷ See *Coleman v. Miller*, 307 U.S. 433, 455 (1939); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 141-50 (1912); *Taylor v. Beckham*, 178 U.S. 548, 578-79 (1900); *cf. Monarch Ins. Co. v. District of Columbia*, 353 F. Supp. 1249, 1254-55 (D.D.C. 1973) (denying claims against the United States based on the Domestic Violence Clause for the failure to prevent 1968 riots because "the decision to use troops or the militia (National Guard) in quelling a civil disorder is exclusively within the province of the President"), *aff'd mem.*, 497 F.2d 684 (D.C. Cir. 1974); *Consolidated Coal & Coke Co. v. Beale*, 282 F. 934, 936 (S.D. Ohio 1922) (declining to issue a certificate that an insurrection exists because that determination belongs to the President). In the context of immigration policy and implementation, several courts recently have held that claims arising out of the Invasion and Guarantee Clauses are nonjusticiable. See *Texas v. United States*, 106 F.3d 661, 666-67 (5th Cir. 1997); *California v. United States*, 104 F.3d 1086, 1090-91 (9th Cir. 1997); *New Jersey v. United States*, 91 F.3d 463, 468-70 (3d Cir. 1996); *Padavan v. United States*, 82 F.3d 23, 28-29 (2d Cir. 1996); *Chiles v. United States*, 69 F.3d 1094, 1097 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 1674 (1996).

³⁷⁸ *Pacific States*, 223 U.S. at 148.

IV. *The Domestic Violence Clause and the Fourteenth Amendment*

The Fourteenth Amendment worked real change in state-federal relationships. This section reviews the development of federal criminal law in light of the passage of the Fourteenth Amendment. As this section demonstrates, the Framers of the Fourteenth Amendment were well aware that the Amendment would alter the authority of the United States over domestic violence. They were not of one mind, however, as to how the Fourteenth Amendment would alter it and could not have predicted the course the Court would chart.

A. *Adoption of the Fourteenth Amendment*

In early 1866, shortly after ratification of the Thirteenth Amendment, Congress began work on three important pieces of reconstruction legislation: the Freedmen's Bureau Bill,³⁷⁹ the Civil Rights Act of 1866 (the "Civil Rights Act"),³⁸⁰ and the Fourteenth Amendment. Congress took up the Freedmen's Bureau Bill first. Two sections of that bill are of interest here. Section 7 directed the President to provide military protection and military jurisdiction over cases involving persons denied civil rights on the basis of race, color, or previous condition of servitude.³⁸¹ Section 8 made it a misdemeanor to deprive persons of their rights, as provided in section 7.³⁸² The Bill passed Congress but was vetoed by President Andrew Johnson, who questioned its constitutionality,³⁸³ and the veto was sustained in late February 1866.

Congress then took up a proposal to amend the Constitution. Republican Congressman John Bingham of Ohio proposed:

Article . The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.³⁸⁴

Despite Bingham's assurance that the proposed amendment did not "take away from any State any right that belongs to it,"³⁸⁵ he candidly admitted that under his proposal Congress would have the power to make laws equal.³⁸⁶ Senator William Stewart of Nevada argued that the only way to make the laws equal was to "afford the same protection in all the States," which would require Congress "to legislate fully upon all subjects affecting life, liberty, and property, and in this way secure uniformity and equal protec-

³⁷⁹ S. 60, 39th Cong. (1866).

³⁸⁰ Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1982, 1987-1992 (1994)).

³⁸¹ See S. 60 § 7; HORACE EDGAR FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 13-14 (1965).

³⁸² See S. 60 § 8; FLACK, *supra* note 381, at 13-14.

³⁸³ See CONG. GLOBE, 39th Cong., 1st Sess. 915-17 (1866) (President Johnson's veto statement).

³⁸⁴ *Id.* at 1034 (statement of Rep. Bingham).

³⁸⁵ *Id.* at 1088 (statement of Rep. Bingham)

³⁸⁶ See *id.* at 1093-94 (statements of Reps. Hale and Bingham).

tion to all persons in the several States.”³⁸⁷ Some members of Congress believed that Bingham’s proposal gave Congress the power to prescribe uniform criminal codes, which they regarded as an “utter departure” from the original constitutional scheme.³⁸⁸ It was soon apparent that there was formidable opposition to Bingham’s proposed amendment, and the amendment was tabled while Congress considered the Civil Rights bill.³⁸⁹

The Civil Rights Act contained provisions similar to sections 7 and 8 of the Freedmen’s Bureau bill. Section 1 granted all citizens “the same right . . . as is enjoyed by white citizens” to make contracts, sue, inherit, own property, as well as the right “to full and equal benefit of all laws and proceedings for the security of person and property.”³⁹⁰ Section 1 further provided that all citizens shall be subject to like punishment, pains, and penalties.³⁹¹ Section 2 of the Civil Rights Act made it a misdemeanor for a person, under color of law, to deprive an inhabitant of any State or Territory of civil rights secured by section 1 by reason of color, race, or previous condition of servitude.³⁹² Congress enacted the bill in March 1866, only to have President Andrew Johnson veto it, in part, because the bill would preempt state criminal law.³⁹³ He feared that in the “vast domain of criminal jurisprudence, provided by each State for the protection of its own citizens, and for the punishment of all persons who violate its criminal laws, Federal law,

³⁸⁷ *Id.* at 1082 (statement of Sen. Stewart); *see also id.* at 1263 (statement of Rep. Broomall) (suggesting the Government already had the power “to protect its citizens within as well as without its jurisdiction”).

³⁸⁸ *See id.* at 1063 (statement of Rep. Hale); *see also id.* at 1095 (statement of Rep. Hotchkiss) (“I understand the amendment as now proposed . . . authorize[s] Congress to establish uniform laws throughout the United States upon the subject named, the protection of life, liberty, and property.”); *id.* at 1087 (statement of Rep. Davis) (stating that the proposed amendment was “a grant for original legislation by Congress. . . . [I]t is itself the judge of the measure of equal protection”). Senator Stewart remarked:

Congress shall have power by law to make all the laws in all the States affecting the protection of either life, liberty, or property, precisely similar; . . . Congress must examine and modify all these laws, so that they shall afford the same protection in all the States that they do in any. The only way this could be accomplished, would be for Congress to legislature fully upon all subjects affecting life, liberty, and property, and in this way secure uniformity and equal protection to all persons in the several States. When this was done, there would not be much left for the State Legislatures.

Id. at 1082 (statement of Sen. Stewart).

³⁸⁹ *See id.* at 1095 (postponing discussion on the amendment for about a month and a half); *see also* FLACK, *supra* note 381, at 59.

³⁹⁰ Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. §§ 1982, 1987-1992 (1994)).

³⁹¹ *Id.*

³⁹² *See id.* § 2. Section 2 reached only acts under color of law. Representative Wilson explained that, by this limitation, the drafters were attempting to avoid creation of “a general criminal code for the States.” CONG. GLOBE, 39th Cong., 1st Sess. 1120 (1866) (statement of Rep. Wilson); *see* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 422-26 & n.33 (1968).

³⁹³ *See* CONG. GLOBE, 39th Cong., 1st Sess. 1679-81 (1866) (President Johnson’s veto statement).

wherever it can be made to apply, displaces State law."³⁹⁴ This time, however, Congress overrode the President's veto.³⁹⁵

Members of Congress, as well as the President, had lingering doubts about the constitutionality of the Civil Rights Act.³⁹⁶ In response to these concerns, Congress renewed its efforts to propose an amendment to the Constitution that would make the Civil Rights Act constitutional.³⁹⁷ In May 1866, Thaddeus Stevens, the Republican leader in the House, introduced a redrafted proposal very similar to our present Fourteenth Amendment.³⁹⁸ The Amendment passed Congress in June 1866 and was ratified in July 1868.³⁹⁹

B. *Congress, the Domestic Violence Clause, and the Civil Rights Enforcement Debates*

The challenge of enacting enabling legislation under the Fourteenth Amendment fell to subsequent Congresses, which struggled with the Amendment's meaning.⁴⁰⁰ In 1871, Congress began consideration of the so-called Ku Klux Klan Act, or the Civil Rights Act of 1871.⁴⁰¹ Enacted pursuant to section 5 of the Fourteenth Amendment, the Ku Klux Klan Act provided a civil remedy in tort for anyone deprived of "any rights, privileges, or immunities secured by the Constitution of the United States" by a person acting under the color of law.⁴⁰² The Ku Klux Klan Act also made it a criminal offense for two or more persons to conspire to deprive "any person or any class of persons of the equal protection of the laws."⁴⁰³ The Act further authorized the President to employ the militia to suppress any "insurrection,

³⁹⁴ *Id.* at 1680.

³⁹⁵ See Act of Apr. 9, 1866, 14 Stat. at 29-30.

³⁹⁶ See WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 104 (1988).

³⁹⁷ See *id.* From the beginning of the Thirty-ninth Congress, some members of Congress felt the need for an amendment to place the rights secured by the Freedmen's Bureau bill and the Civil Rights Act "beyond the power of shifting congressional majorities." JACOBUS TEN-BROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* 184 (1951).

³⁹⁸ See FLACK, *supra* note 381, at 65-66, 116. For a detailed account of the drafting of the Fourteenth Amendment, see generally *id.* at 55-139.

³⁹⁹ See 15 Stat. app. at 708-11 (1868). Throughout the drafting and ratification process, the most extensive debates in Congress were the debates over Bingham's proposed amendment in February 1866.

⁴⁰⁰ Following the Fourteenth Amendment's ratification, Congress enacted various enforcement acts that contained criminal sanctions, in addition to the Civil Rights Act of 1871, discussed *infra*. The Act of May 31, 1870, ch. 114, 16 Stat. 140 (codified as amended at 42 U.S.C. §§ 1971, 1981, 1987-1991 (1994)), made it a misdemeanor to interfere with the right to vote. The Act of Mar. 1, 1875, ch. 114, 18 Stat. 335, made it a misdemeanor to deny equal enjoyment of public accommodations. The latter Act was held unconstitutional in the *Civil Rights Cases*, 109 U.S. 3, 25 (1883).

⁴⁰¹ Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C.A. § 1983 (West Supp. 1997)). Congress had voted to adjourn in March 1871 when it received a message from President Ulysses Grant, requesting legislation to protect life, liberty, and property. Five days later, Representative Shellabarger reported a bill to enforce the Fourteenth Amendment. See FLACK, *supra* note 381, at 226-27.

⁴⁰² Act of Apr. 20, 1871 § 1.

⁴⁰³ *Id.* § 2 (codified as amended at 42 U.S.C. § 1985(3)).

domestic violence, unlawful combinations, or conspiracies" hindering the execution of the laws, when state officials are unable or unwilling to protect the state's citizens.⁴⁰⁴ It thus extended dramatically the President's authority under the Militia Act, which had been enacted pursuant to Article IV, Section 4.⁴⁰⁵

The Ku Klux Klan Act tested the limits of Congress's power under the Fourteenth Amendment. Unlike the Act of May 31, 1870, there was no requirement that a conspiracy have any connection with or approval by state officials, aside from the simple failure to prevent it.⁴⁰⁶ Rather, as in the Freedmen's Bureau bill and the Civil Rights Act, Congress intended to punish individuals, not states or state officials.⁴⁰⁷ But unlike those prior bills, which claimed power from the Thirteenth Amendment,⁴⁰⁸ the Ku Klux Klan Act's references to equal protection tied it securely to the Fourteenth Amendment.⁴⁰⁹ Front and center in the extensive debates were questions about Congress's power to punish crime and the role of the Domestic Violence Clause.

The opponents of the Ku Klux Klan Act made three general arguments against Congress's power to enact such legislation. They first made the familiar argument that Congress had limited authority to pass criminal legislation, a claim that received little response from the Act's proponents. Second, they argued that Congress had not acquired new power to punish crime under the Fourteenth Amendment, a claim that was carefully contested by Radical Republicans and questioned even by cautious opponents of the bill. Finally,

⁴⁰⁴ *Id.* § 3. The current codification provides:

The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—

- (1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or
- (2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.

10 U.S.C. § 333 (1994); see Ferguson, *supra* note 198, at 414-19 (discussing the constitutionality of section 333).

⁴⁰⁵ Compare 10 U.S.C. § 331 (corresponds to the Act of May 2, 1792, ch. 28, 1 Stat. 264) (requiring a state request for federal assistance with domestic violence), with 10 U.S.C. § 333 (authorizing intervention without a state's request). See Comment, *Federal Intervention in the States for the Suppression of Domestic Violence: Constitutionality, Statutory Power, and Policy*, 1966 DUKE L.J. 415, 418 n.16 [hereinafter *Federal Intervention in the States*] (indicating that the Ku Klux Klan Act was independent of Article IV, Section 4).

⁴⁰⁶ See Act of Apr. 20, 1871 § 3.

⁴⁰⁷ See *Federal Intervention in the States*, *supra* note 405, at 428.

⁴⁰⁸ See FLACK, *supra* note 381, at 19-27.

⁴⁰⁹ See *Federal Intervention in the States*, *supra* note 405, at 419-20; see also *District of Columbia v. Carter*, 409 U.S. 418, 423 (1973) ("Unlike the 1866 [Civil Rights] Act, which was passed as a means to enforce the Thirteenth Amendment, the primary purpose of the 1871 Act was 'to enforce the Provisions of the Fourteenth Amendment.'" (quoting full title of the Act of April 20, 1871)).

the Act's opponents argued that the Domestic Violence Clause reserved the states' rights over crime and that it had not been repealed by the Fourteenth Amendment. The Act's supporters responded that the Domestic Violence Clause either was not encroached or, more boldly, actually supported Congress's power. This section examines each of these arguments in context.

1. *Enumerated Crimes and Necessary and Proper Crimes*

The first person to speak after the Ku Klux Klan Bill was introduced was Democratic Representative Michael Kerr of Indiana. Representative Kerr argued that the bill constituted a "shabby evasion of an express limitation upon the power of Congress."⁴¹⁰ He quoted Chief Justice Marshall's opinion in *Cohens v. Virginia*⁴¹¹ to support the proposition that Congress's "criminal jurisdiction is rigidly confined to the punishment of crimes committed within places subject to its exclusive jurisdiction . . . and to crimes against the revenue, or other clearly granted powers of general control and regulation."⁴¹² Representative John B. Storm of Pennsylvania put the question in a more sophisticated light. He first asked whether the Fourteenth Amendment denied to the states the right to punish crimes.⁴¹³ Concluding that it did not, he argued that the Piracy Clause and the principle of *expressio unius est exclusio alterius* demonstrated that Congress could not deprive the states of the right to punish crimes other than piracies and felonies committed on the high seas.⁴¹⁴ He then referred to the District of Columbia Clause and the Act of 1790 as evidence that the first Congress viewed its own authority as limited; a view which, he said, was confirmed by *Cohens*.⁴¹⁵

Echoing Representatives Kerr and Storm, Representative Charles W. Willard of Vermont referred to the Counterfeiting and Treason Clauses as evidence of the states' reserved powers.

Certain specified crimes . . . the General Government has jurisdiction of and can punish; but it can no more punish offenses against life and property . . . than it can regulate the distribution of the property of estates, the enforcement of civil contracts, the matters of taxation, or the proceedings in courts, in the States.⁴¹⁶

Representative James G. Blair of Missouri added that although Congress could punish what he referred to as "incidental" crimes—those "[o]ffenses arising from the violation of the specific powers granted," such as the power to establish post roads—Congress did not receive a constitutional grant to punish "substantive crime," such as murder or larceny.⁴¹⁷ Representative

⁴¹⁰ CONG. GLOBE, 42d Cong., 1st Sess. app. at 50 (1871) (statement of Rep. Kerr).

⁴¹¹ 19 U.S. (6 Wheat.) 264, 428 (1821) ("It is clear, that Congress cannot punish felonies generally . . ."); see *supra* text accompanying notes 354-360.

⁴¹² CONG. GLOBE, 42d Cong., 1st Sess. app. at 50 (1871) (statement of Rep. Kerr).

⁴¹³ See *id.* app. at 86 (statement of Rep. Storm).

⁴¹⁴ See *id.* app. at 86-87 (statement of Rep. Storm).

⁴¹⁵ See *id.* app. at 87 (statement of Rep. Storm).

⁴¹⁶ *Id.* app. at 187 (statement of Rep. Willard).

⁴¹⁷ *Id.* app. at 207 (statement of Rep. J. Blair).

Horatio C. Burchard of Illinois worried that if Congress could punish conspiracy to commit a crime, it could punish the underlying offense as well.⁴¹⁸

The supporters of the Ku Klux Klan Act offered little rebuttal to these claims. They likely believed that it was too late to argue that Congress did not have the power to punish crimes other than those enumerated, and that the Ku Klux Klan Act was an "incidental" crime as Representative James Blair had defined it. As the bill's sponsor, Representative Samuel Shellabarger of Ohio pointed out, the question was not one of Congress's exclusive control of crime, but of its concurrent power under the dual sovereignty doctrine.⁴¹⁹

Surprisingly, few supporters of the legislation referred to Congress's prior criminal legislation, including the recent Civil Rights Acts of 1866 and 1870, both of which contained criminal provisions.⁴²⁰ If Congress really was limited to punishing only enumerated crimes, or even crimes "incidental" to its express powers, the prior acts should have been unconstitutional. Undoubtedly, there were important distinctions to be made between the earlier acts and the 1871 proposal, but neither side seemed willing to articulate a comprehensive theory of Congress's criminal authority.

2. Criminal Authority Under the Fourteenth Amendment

However limited Congress's power to define and punish crimes had been under the original Constitution, the opponents of the Ku Klux Klan Act had to show that Congress had not acquired any new criminal authority through the Fourteenth Amendment.⁴²¹ The Act's proponents could find two textual bases for arguing that Congress had new congressional power over crime. First, the Equal Protection Clause was nominally about "protection of the laws."⁴²² This clause at least guaranteed equality in the administration of state laws. Although it may not have constituted a license to courts to ensure that the laws were equal, it at least assured that "protection of the laws" was administered fairly.⁴²³ Second, the Privileges and Immunities

⁴¹⁸ See *id.* app. at 313 (statement of Rep. Burchard). If Congress indeed had such a power, he added, "a revolution in the whole theory of our Government has been effected unknown to the people." *Id.* (statement of Rep. Burchard).

⁴¹⁹ See *id.* app. at 70 (statement of Rep. Shellabarger) ("[T]he [Fourteenth] amendment have brought within the benign protection of the Constitution . . . these 'fundamental' rights of American citizenship, and Congress can protect them and so can the States so far as they are identical.").

⁴²⁰ *But see id.* app. at 153 (statement of Rep. Garfield) (referring to the Civil Rights Acts of 1866 and 1870); *id.* at 506 (statement of Sen. Pratt) (same).

⁴²¹ Representatives Bingham and Shellabarger asserted that the Ku Klux Klan Act's constitutionality rested on the Fourteenth Amendment's grant of power to enforce its provisions. See *id.* app. at 83 (statement of Rep. Bingham); *id.* app. at 69 (statement of Rep. Shellabarger). Shellabarger loosely quoted *Jones v. Van Zandt*, 46 U.S. (5 How.) 215, 230 (1847) for the proposition that Congress may "'enforc[e] by legislation every constitutional provision' [sic] . . . Congress is bound to execute, by legislation, . . . even those provisions not specially named as to be so enforced." CONG. GLOBE, 42d Cong., 1st Sess. app. at 69 (1871) (statement of Rep. Shellabarger).

⁴²² U.S. CONST. amend. XIV, § 1.

⁴²³ See Harrison, *supra* note 129, at 1433-37, 1447-51 (arguing that the "equal protection of the laws" is different from the protection of "equal laws"; "the Equal Protection Clause is mainly

Clause forbids the states from abridging the “privileges or immunities of citizens,”⁴²⁴ which, following Justice Washington’s opinion in *Corfield v. Coryell*, included “[p]rotection by the Government.”⁴²⁵

Opponents of the Ku Klux Klan Act responded with two arguments. First, they claimed that because Section 1 of the Fourteenth Amendment was a negative provision akin to the state disabilities found in Article I, Section 10 (“No state shall”), it was judicially, but not legislatively, enforceable; thus, Congress had acquired no additional power to define and punish crime.⁴²⁶ In making this assertion, they did not ignore Section 5,⁴²⁷ but rather they argued that Section 1 was a congressionally unenforceable prohibition.

[B]y a negative provision States are prohibited from making and enforcing laws which shall abridge the privileges and immunities of citizens of the United States. . . . [N]egative provisions confer no power to enact positive laws. There is simply a denial of power to States, and not a conferring of power on Congress to pass laws.⁴²⁸

Representative William S. Holman of Indiana added to the argument:

[I]t seems impossible that [the Equal Protection Clause] should be tortured into an affirmative power in Congress to legislate on that subject. Where power is conferred on Congress by the Constitution it is done in express terms, or as a necessary incident to a power of legislation expressly conferred; but here there is no power conferred, but simply a denial of power.

. . . [I]f any State does violate . . . these provisions [in section 1] . . . [t]he Federal courts [will] . . . declare[] the statute null and void.⁴²⁹

On this ground, the opponents had made an important point.⁴³⁰ Although the Equal Protection Clause undoubtedly was about protection, and southern states had shown an appalling lack of respect for the rights of their new citizens, the structure of Section 1 of the Fourteenth Amendment was decidedly—indeed, deliberately—that of Article I, Section 10.⁴³¹ The

about protection, even though it is about equality too”); Heyman, *supra* note 128, at 563-66; *see also* CONG. GLOBE, 39th Cong., 1st Sess. 1063-64 (1866) (colloquy between Reps. Stevens and Hale) (illustrating the two sides of congressional debate on the meaning of the Equal Protection Clause).

⁴²⁴ U.S. CONST. amend. XIV, § 1.

⁴²⁵ 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230).

⁴²⁶ On the comparison between Section 1 of the Fourteenth Amendment and Article I, Section 10, *see* CONG. GLOBE, 42d Cong., 1st Sess. app. at 260 (1871) (statement of Rep. Holman); *id.* app. at 221 (statement of Sen. Thurman).

⁴²⁷ *See id.* app. at 160 (statement of Rep. Golladay) (arguing that Section 5 “applies to the other sections of the [Fourteenth] Amendment and not to the first section”).

⁴²⁸ *Id.*

⁴²⁹ *Id.* app. at 259 (statement of Rep. Holman); *see id.* app. at 242 (statement of Sen. Bayard) (stating that there is no “affirmative grant of power” in Section 1); *id.* at 572 (statement of Sen. Stockton) (disparaging the claim that “because no State can, Congress may; or, in other words, the denial of power to a State confers it on Congress”).

⁴³⁰ *See* Bybee, *supra* note 33, at 1592-96 (discussing these arguments in the context of congressional power to enact legislation respecting the First Amendment).

⁴³¹ Representative Bingham stated that he “imitate[d] the framers of the original Constitu-

later sections were self-executing and complete without congressional enactment.⁴³² Moreover, the argument did not overlook Section 5, but limited its application to those sections of the Fourteenth Amendment that clearly contemplated congressional action, Sections 2 and 3.⁴³³

Representative Shellabarger responded to these arguments by pointing out that the Fugitive Slave Clause⁴³⁴ was also a negative clause, granting no express power to Congress.⁴³⁵ Nevertheless, Congress had legislated the Fugitive Slave Act⁴³⁶ in 1793 and prescribed criminal violations in 1850.⁴³⁷ Moreover, the Supreme Court had upheld the 1793 Act in *Prigg v. Pennsylvania*.⁴³⁸ He concluded that the Court's decision confirmed that "upon that mere negation upon the power of the States it was the right of Congress to enforce its provisions by affirmative law, both civil and criminal, in its remedies."⁴³⁹ Building upon the theme of Congress's duty to protect its citizens, Representative Bingham added that the Reconstruction Amendments "vest in Congress a power to protect the rights of citizens against States, and individuals in States, never before granted."⁴⁴⁰

A second, more moderate, approach to opposing the Ku Klux Klan Act was taken by Ohio Republican James Garfield and other Congressmen. Garfield suggested that Section 1 of the Fourteenth Amendment could be enforced through Section 5 and, therefore, might justify congressional action, including criminal sanctions.⁴⁴¹ What troubled Garfield, however, was that the Fourteenth Amendment seemed to limit Congress's enforcement of Sec-

tion" in his use of the phrase "[N]o State shall." CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (1871) (statement of Rep. Bingham).

⁴³² Representative Shellabarger countered this argument by distinguishing the legal relationship between the states and the national government from the relationship between states and the people. *See id.* app. at 69-70 (statement of Rep. Shellabarger). Although the former are "prohibitions upon the political powers of the States" and are "of such nature that they can be, and even have been, when the occasion arose, enforced by the courts," the latter, including the Privileges and Immunities Clause of Article IV, Section 2, are enforceable by Congress. *Id.* app. at 69 (statement of Rep. Shellabarger). Likewise, because the provisions of Section 1 of the Fourteenth Amendment were intended to protect personal rights from invasion by the states, he argued that they were enforceable by Congress through affirmative legislation. *See id.* (statement of Rep. Shellabarger); *infra* text accompanying notes 434-439.

⁴³³ *See* CONG. GLOBE, 42d Cong., 1st Sess. app. at 259 (1871) (statement of Rep. Holman).

⁴³⁴ U.S. CONST. art. IV, § 2, cl. 3, *amended* by U.S. CONST. amend. XIII. This clause provides that

[n]o Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Id.

⁴³⁵ *See* CONG. GLOBE, 42d Cong., 1st Sess. app. at 70 (1871) (statement of Rep. Shellabarger).

⁴³⁶ Act of Feb. 12, 1793, ch. 7, 1 Stat. 302.

⁴³⁷ *See* Act of Sept. 18, 1850, ch. 60, § 7, 9 Stat. 462, 464; *see also* CONG. GLOBE, 42d Cong., 1st Sess. app. at 70 (1871) (statement of Rep. Shellabarger).

⁴³⁸ 41 U.S. (16 Pet.) 539, 622 (1842); *see* CONG. GLOBE, 42d Cong., 1st Sess. app. at 70 (1871) (statement of Rep. Shellabarger).

⁴³⁹ CONG. GLOBE, 42d Cong., 1st Sess. app. at 70 (1871) (statement of Rep. Shellabarger).

⁴⁴⁰ *Id.* app. at 83 (statement of Rep. Bingham).

⁴⁴¹ *See id.* app. at 153 (statement of Rep. Garfield).

tion 1 to circumstances when the “laws of the State are unequal” or there is “a systematic maladministration of [the laws], or a neglect or refusal to enforce their provisions.”⁴⁴² If this state of affairs was “clearly made out,” Garfield believed that the Fourteenth Amendment authorized congressional response.⁴⁴³ The problem was that the Ku Klux Klan Act “propose[d] to punish citizens of the United States for violating State laws. . . . [W]hen we provide by congressional enactment to punish a mere violation of a State law, we pass the line of constitutional authority.”⁴⁴⁴ Garfield argued that Congress was simply assuming that violations of state criminal laws, without more, constituted a denial of equal protection of the laws.⁴⁴⁵ Were that the case, Congress’s authority would be nearly unlimited, as long as crimes were committed in the states.⁴⁴⁶ In essence, Garfield and his colleagues regarded this view as improperly imputing the acts of a state’s citizens on the state itself. As Illinois Representative John F. Farnsworth remarked, the bill “assumes that an unlawful act of some of its citizens is the act of the State.”⁴⁴⁷

For Representatives Garfield, Farnsworth, and others, the proposed bill fell well within power that Representatives Bingham and Shellabarger had once advocated for Congress⁴⁴⁸—but not within what Congress and the states had actually agreed to in the Fourteenth Amendment. Representative Garfield recognized that the power Congress claimed in 1871 was an exercise of Representative Bingham’s failed constitutional amendment, a charge Representative Bingham did not deny.⁴⁴⁹ Representative Bingham’s “proposed amendment,” said Representative Garfield, “was a plain, unambiguous proposition to empower Congress to legislate directly upon the citizens of all the States in regard to their rights of life, liberty, and property.”⁴⁵⁰ The Fourteenth Amendment instead “exerts its force directly upon the States The other, the rejected proposition, would have brought the power of Congress to bear directly upon the citizens.”⁴⁵¹

442 *Id.* (statement of Rep. Garfield); *see also id.* at 506 (statement of Sen. Pratt) (“So long as the States do their duty in affording protection, there is no pretext for intervention by Congress.”); *id.* at 501-02 (statement of Sen. Frelinghuysen) (“I hold it to be always constitutional to prevent the Government and the administration of its laws from being destroyed or seriously impaired.”).

443 *See id.* app. at 153 (statement of Rep. Garfield).

444 *Id.* app. at 154 (statement of Rep. Garfield).

445 *See id.* (statement of Rep. Garfield).

446 *See id.*

447 *Id.* app. at 116 (statement of Rep. Farnsworth).

448 *See supra* notes 434-440 and accompanying text.

449 As Representative Bingham stated:

[The Fourteenth Amendment] is full and complete. The gentlemen says that amendment differs from the amendment reported by me in February [1866]; differs from the provision introduced and written by me, now in the fourteenth article of amendments. It differs in this: that it is, as it now stands in the Constitution, more comprehensive than as it was first proposed and reported in February, 1866. It embraces all and more than did the February proposition.

CONG. GLOBE, 42d Cong., 1st Sess. app. at 83 (1871) (statement of Rep. Bingham).

450 *Id.* app. at 151 (statement of Rep. Garfield).

451 *Id.*; *see id.* app. at 115-16 (statement of Rep. Farnsworth); *see also* EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869, at 92 (1990) (explaining that the original proposal was defeated primarily because it was too broad); Alexander M. Bickel, *The*

Representative Garfield's position was eminently reasonable. He did not deny that Congress had acquired new authority in the Fourteenth Amendment, including authority to prescribe and address crime. The authority Congress acquired was not plenary, however, but limited to crimes committed by state officials who, while acting under color of state law, had failed to respect citizens' rights to privileges or immunities, equal protection, and due process.⁴⁵² The Fourteenth Amendment did not extend Congress's power to punish domestic crime committed by citizens, even if the crime might be motivated by race, color, or previous condition of servitude.⁴⁵³ Rather, it granted Congress the power to address state refusals to protect its citizens equally.⁴⁵⁴

3. *The Domestic Violence Clause as a Reserved Power*

Finally, both sides looked to the Domestic Violence Clause to support their positions. The proponents of the Ku Klux Klan Act argued that the United States derived power from the Domestic Violence Clause. Indiana Senator Daniel D. Pratt reasoned that the Guarantee Clause and the Domestic Violence Clause implied power in the United States.⁴⁵⁵ In Michigan Representative Austin Blair's opinion, the requirement of a state request for federal assistance was a "mere[] technical difficulty."⁴⁵⁶

[Article IV, Section 4] is mandatory: "The United States shall protect each of them against domestic violence on application." But, now a case arises in which the domestic violence exists, and large numbers of the people who suffer apply to Congress for its suppression; but the State authorities, in plain violation of their duty, will not make the application. May not the Government, under this section, waive the application and move at once to the performance of its duty in this respect?⁴⁵⁷

According to Representative Blair, drawing support from the Militia Act and President Washington's actions in the Whiskey Rebellion, a state request is not a condition precedent to federal action to suppress domestic violence pursuant to Article IV, Section 4:

The Constitution forbids nothing in this section. It lays a duty upon the United States in a certain event, but it does not prohibit the performance of that duty in case the event does not occur. The Constitution is open to reasonable construction upon that subject, and the construction ought to be such as to promote the manifest

Original Understanding and the Segregation Decision, 69 HARV. L. REV. 1, 60 n.115 (1955) (reviewing the Bingham—Garfield debate over Congress's power to legislate under the Fourteenth Amendment).

⁴⁵² See CONG. GLOBE, 42d Cong., 1st Sess. app. at 151 (1871) (statement of Rep. Garfield).

⁴⁵³ See *id.* app. at 154 (statement of Rep. Garfield).

⁴⁵⁴ See *id.* app. at 153 (statement of Rep. Garfield).

⁴⁵⁵ See *id.* at 504 (statement of Sen. Pratt) ("It cannot be that the United States, charged with guarantying to every State a republican form of government and protecting it against domestic violence, shall not possess the power adequate to fulfill its trust.").

⁴⁵⁶ *Id.* app. at 72 (statement of Rep. A. Blair).

⁴⁵⁷ *Id.* (statement of Rep. A. Blair).

object of the provision, which was to protect the people of the States against domestic violence.⁴⁵⁸

To Representative Blair, the Domestic Violence Clause constituted a continuing obligation on the part of the United States and required no authorizing request from a state. Rather, a state could compel the United States to aid the state when the United States had not come to the state's assistance on its own volition.⁴⁵⁹ Representative Blair's argument was a bootstrap. Crime became evidence of a state's inability (or inattention to the need) to call for assistance under Article IV, Section 4. The failure to call for federal assistance denied protection of the laws to the state's citizens. Therefore, the argument went, Congress could intervene without a state request by virtue of the Fourteenth Amendment.

Other members of Congress thought that the Fourteenth Amendment eliminated outright the Domestic Violence Clause's requirement that a state request assistance before the United States intervened. Although New Jersey Senator Frederick Frelinghuysen denied that it was "expedient for the General Government to assume a general municipal jurisdiction over crimes in the States,"⁴⁶⁰ he thought, nevertheless, that the Fourteenth Amendment and the Ku Klux Klan Act granted new powers to the President:

When the President, in the exercise of his official judgment, is satisfied that, by reason of combinations, insurrections, or domestic violence in any State, the State fails to give protection to the citizen of the United States in his privileges and immunities, it should be the President's duty to suppress such domestic violence or combination by the use of the military force or other means

. . . [I]f you give the President of the United States authority to employ the military force and other means, such as police or constabulary force, to suppress domestic violence . . . there will not be much disorder in [the South].⁴⁶¹

He concluded that the federal government can

act[], nationally, in its supervision over the peace and order of the States. This would be giving the President the same power that the fourth article of the Constitution gives him, only it is to be exercised at his discretion instead of at the discretion and request of a Governor of a State.⁴⁶²

⁴⁵⁸ *Id.* app. at 72-73 (statement of Rep. A. Blair); *see id.* app. at 79 (statement of Rep. Perry) (suggesting that the language regarding a state request means "that when applied to in that way [the United States] shall assist. It does not expressly forbid assistance when not applied for in that way"); *see also id.* at 604 (statement of Sen. Pool) ("When any State denies the protection of the laws to persons within its jurisdiction, it is competent for the Government of the United States to intervene and to afford to its citizens that protection.").

⁴⁵⁹ *See id.* app. at 79 (statement of Rep. Perry); *id.* app. at 72-73 (statement of Rep. A. Blair).

⁴⁶⁰ *Id.* at 501 (statement of Sen. Frelinghuysen).

⁴⁶¹ *Id.* at 501-02 (statement of Sen. Frelinghuysen).

⁴⁶² *Id.* at 502 (statement of Sen. Frelinghuysen). Vermont Senator George Edmunds reinforced this view of the President-as-Governor. Under the Ku Klux Klan Act, the President and the military "act . . . just as police officers . . . [They are in] precisely the position that a body of

Although Senator Frelinghuysen did not think the Domestic Violence Clause constrained the United States' ability to suppress domestic violence in the states, he seemed to believe that the Ku Klux Klan Act did not work a serious deprivation of state control over crime. He did not explain, however, what limits, if any, were placed on Congress.

The United States interferes only to guaranty rights and protection when the State fails, and acts in its national character, and not municipally. It does not interfere with the State government, excepting to strengthen and sustain it. The United States neither makes nor executes a criminal code. The framework of our Government, reserving municipal government to the States and national jurisdiction to the General Government, is not disturbed.⁴⁶³

Representative Shellabarger and others appeared to agree that the United States could suppress domestic violence if a state denied equal protection.⁴⁶⁴

Opponents of the Ku Klux Klan Act made two essential arguments. They first warned that the Ku Klux Klan Act plainly violated the Domestic Violence Clause, which they characterized as a reservation of state authority over crime. According to Representative George W. Morgan of Ohio, "so jealous is the Constitution of the rights and liberties of the people, that it does not allow the President to interfere, even on the application of the Governor of a State, except when the Legislature cannot be convened."⁴⁶⁵ Citing the maxim *expressio unius est exclusio alterius*, New Jersey Senator John P. Stockton argued that Article IV, Section 4 provided "a full, ample, and complete remedy" to domestic violence and "absolutely forbid[s] any other interference by other means or under other circumstances."⁴⁶⁶ Other Congressmen agreed that the Domestic Violence Clause left complete power

police would occupy in seeing a riot in the streets of a city . . ." *Id.* at 567-68 (statement of Sen. Edmunds).

⁴⁶³ *Id.* at 502 (statement of Sen. Frelinghuysen).

⁴⁶⁴ *See, e.g., id.* app. at 71 (statement of Rep. Shellabarger).

Two things are provided—equal laws and protection for all; and whenever a State denies that protection Congress may by law enforce protection. The amendment does not say that in such case the laws of Congress must be made so that the protection cannot be furnished to the people until it is invited by the Legislature or Executive of the very State which is denying it.

Id. (statement of Rep. Shellabarger); *see Federal Intervention in the States, supra* note 405, at 426-27.

⁴⁶⁵ CONG. GLOBE, 42d Cong., 1st Sess. 331 (1871) (statement of Rep. Morgan).

⁴⁶⁶ *Id.* at 574 (statement of Sen. Stockton). During the course of the Senate debates, Senator Lyman Trumbull objected to a proposal that would give the President power to intervene "in all cases where domestic violence in any State shall obstruct the impartial course of justice." *Id.* at 580 (statement of Sen. Trumbull). He reminded the Senate that the Act of 1792 had authorized the President to act only when the judiciary required assistance. The proposed language of this bill went too far in his view. According to Trumbull, the United States could intervene when a conspiracy obstructed constitutional rights, "but as the bill is altered, it provides for giving this assistance to put down domestic violence in any locality in a State whenever the impartial administration of justice is interfered with." *Id.* at 581 (statement of Sen. Trumbull). Senator Trumbull referred incorrectly to the Act of 1795, which eliminated the 1792 Act's requirement of judicial certification. *See supra* note 270.

over the question of domestic violence to the states.⁴⁶⁷ Some quoted Justice Story's *Commentaries* for the proposition (belonging to St. George Tucker) that "every pretext for intermeddling with the domestic concerns of any State, under color of protecting it against domestic violence, is taken away"⁴⁶⁸ by the Domestic Violence Clause.

The Ku Klux Klan Act's opponents also argued that the Fourteenth Amendment had not altered the relationship between the federal government and the states vis-à-vis the Domestic Violence Clause. In their opinion, the clause "is not repealed or modified by the fourteenth amendment."⁴⁶⁹ Moreover, they argued that the Fourteenth Amendment *could not* have repealed the Domestic Violence Clause. Representative James Blair drew an analogy between the Domestic Violence Clause and "specific jurisdiction," which he asserted was "fatal to the position assumed by the advocates of the bill, that general jurisdiction over life, liberty, property, and the rights, privileges, and immunities of the citizen is conferred upon Congress[.] Is it not fatal to any jurisdiction other than that specifically named . . . ?"⁴⁷⁰ For Representative Blair, the Fourteenth Amendment, as a broad prohibition, could not have repealed, sub silentio, a reservation of power as specific as the Domestic Violence Clause.⁴⁷¹

Congress, eventually enacted the Ku Klux Klan Act.⁴⁷² Section 333 of Title 10 now provides that the President

shall take such measures as he considers necessary to suppress, in a State, . . . domestic violence . . . [when it] . . . so hinders the execution of the laws of that State . . . and the constituted authorities of

⁴⁶⁷ See, e.g., *id.* app. at 221 (statement of Sen. Thurman); *id.* app. at 207 (statement of Rep. J. Blair); *id.* app. at 160 (statement of Rep. Golladay); *id.* app. at 117 (statement of Sen. F. Blair); *id.* app. at 49 (statement of Rep. Kerr).

⁴⁶⁸ *Id.* app. at 49 (statement of Rep. Kerr) (quoting 1 STORY, *supra* note 242, at 633); see *id.* app. at 117 (statement of Sen. F. Blair).

⁴⁶⁹ *Id.* app. at 49 (statement of Rep. Kerr); see *id.* app. at 117 (statement of Sen. F. Blair); cf. EEOC v. Wyoming, 460 U.S. 226, 259 (1983) (Burger, C.J., dissenting) ("The Tenth Amendment was not, after all, repealed when the Fourteenth Amendment was ratified The question then becomes whether the Fourteenth Amendment operates to transfer from the states to the Federal Government the essentially local governmental function of deciding who will protect citizens from lawbreakers.").

⁴⁷⁰ CONG. GLOBE, 42d Cong., 1st Sess. app. at 207 (1871) (statement of Rep. J. Blair).

⁴⁷¹ I have not located further discussions of the Domestic Violence Clause in Congress. In recent years, at least those years that can be researched through computer, the Domestic Violence Clause rarely has been invoked, and when it has, it has been asserted as a source of congressional authority. See, e.g., 133 CONG. REC. 32,959-61 (1987) (statement of Rep. Conyers) (arguing, in support of the Fraud Amendments Act of 1987, that Article IV, Section 4 grants Congress "the power to act to protect state and local governments, not only from foreign intrigue or domestic violence, but also corruption"); see also Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367, 445 (1989) ("After its experience with the Reconstruction Acts, Congress has rarely exercised its power under the guarantee clause to pass legislation or to otherwise justify congressional action.").

⁴⁷² See Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C.A. § 1983 (West Supp. 1997)).

that State are unable, fail, or refuse to protect [a right, privilege, immunity, or protection named in the Constitution].⁴⁷³

C. *The Executive and Domestic Violence After the Adoption of the Fourteenth Amendment*

Following the divergent and divisive congressional debates over the relationship between the Domestic Violence Clause and the Fourteenth Amendment, the Executive Branch has taken a remarkably passive view of its powers. The President has been careful to distinguish between responses to opposition of federal law (for which the Militia Clause supplies the constitutional authority)⁴⁷⁴ and formal state requests (for which the Domestic Violence Clause supplies the authority).⁴⁷⁵ Even as the Executive has provided assistance, it has affirmed the primary role of the states as guarantors of the physical safety of the people. The Office of Legal Counsel stated in 1981 that “[t]he statutory and constitutional scheme of our government leaves the protection of life and property and the maintenance of public order largely to state and local governments. Only when civil disorder grows beyond a state’s ability to control or threatens federal rights does the federal government generally intervene.”⁴⁷⁶

Even during the period of civil unrest following *Brown v. Board of Education*,⁴⁷⁷ when federal troops were used to enforce federal court decrees issued under the Fourteenth Amendment,⁴⁷⁸ the Executive expressed its

⁴⁷³ 10 U.S.C. § 333 (1994).

⁴⁷⁴ See, e.g., Proclamation No. 6023, 3 C.F.R. 113 (1990) (regarding domestic disturbances in the Virgin Islands that obstructed execution of federal laws); Exec. Order No. 12,690, 3 C.F.R. 236 (same); Proclamation No. 5748, 3 C.F.R. 178 (1988) (regarding disturbances at a federal penitentiary in Atlanta that made impractical the enforcement of certain federal laws); Exec. Order No. 12,616, 3 C.F.R. 260 (same). But see EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1957*, at 133-36 (4th rev. ed. 1957) (arguing that the use of federal troops to quash labor disputes blurred the line between federal and state control of the domestic peace).

⁴⁷⁵ See Proclamation No. 6427, 3 C.F.R. 44 (1992) (regarding the Los Angeles riots); John Lancaster & Barton Gellman, *4,000 Federal Troops Concentrate in Staging Area for L.A. Deployment*, WASH. POST, May 2, 1992, at A17 (referring to the request from California Governor Wilson and Los Angeles Mayor Bradley for federal assistance); see also Governorship of Arkansas—Case of Baxter and Brooks, 14 Op. Att’y Gen. 391, 391 (1874) (application by the legislature, as well as two persons, each claiming to be governor, to prevent domestic violence following a contested election for governor).

⁴⁷⁶ Use of Potatoes to Block the Maine-Canada Border, 5 Op. Off. Legal Counsel 422, 423 (1981).

The present posture of criminal law in the United States is consistent with that intended by the Founding Fathers: the States retain jurisdiction over crimes committed within the State which are local in nature; the Federal Government has jurisdiction over certain crimes that involve interstate commerce, taxes, assaults on Federal and foreign officials, and the like.

1972 ATT’Y GEN. ANN. REP. 26; see *id.* at 313 (“The Constitution . . . provide[s] for Federal assistance to States to help them to ‘suppress Insurrections’ and to insure ‘against domestic Violence.’”).

⁴⁷⁷ 347 U.S. 483 (1954).

⁴⁷⁸ See President’s Power to Use Federal Troops to Suppress Resistance to Enforcement of Federal Court Orders—Little Rock, Arkansas, 41 Op. Att’y Gen. 313, 329 (1957) (invoking the authority of 10 U.S.C. §§ 332-333); Andrew D. Herz, *Gun Crazy: Constitutional False Conscious-*

reluctance to assume responsibility except when necessary. For example, during the integration of Little Rock's schools, the U.S. Attorney General reaffirmed that:

Whenever interference and obstruction to enforcement of law exists, and domestic violence is interposed to frustrate the judicial process, it is the primary and mandatory duty of the authorities of the State to suppress the violence and to remove any obstruction to the orderly enforcement of law. This same duty fully exists where the domestic violence is interposed in opposition to the enforcement of Federal law rather than to the local law of the State.⁴⁷⁹

Although the Executive has been reluctant to intervene physically in specific instances, the President has not expressed the same reluctance to enforce the general criminal legislation of the United States, even when that legislation may displace the "primary and mandatory duty" of the states.⁴⁸⁰

D. *The Courts and the Federalization of Crime After the Adoption of the Fourteenth Amendment*

The federal judiciary showed an even more unreceptive disposition than the Executive towards the expansion of federal control over crime. After passage of the Fourteenth Amendment, the Supreme Court had an opportunity to reconsider the extent of federal authority in light of that amendment.⁴⁸¹ The initial signals were favorable to those who favored centralized authority. In *Ex parte Siebold*,⁴⁸² a case brought under the Civil Rights Act of 1870,⁴⁸³ the Court declared that the United States may

by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.

This power to enforce its laws . . . does not derogate from the power of the State⁴⁸⁴

ness and Dereliction of Dialogic Responsibility, 75 B.U. L. REV. 57, 70 n.46 (1995) (discussing presidential enforcement of court decrees in Alabama, Arkansas, and Mississippi pursuant to 10 U.S.C. §§ 331-333); see also *Federal Intervention in the States*, *supra* note 405, at 418 n.16 (noting Governor Wallace's objections to the use of U.S. troops in Alabama during the civil rights era because the state legislature had not requested federal assistance).

⁴⁷⁹ 41 Op. Att'y Gen. at 322-23.

⁴⁸⁰ The United States has sought to enforce new federal legislation, even when the legislation touches matters traditionally within the states' purview. See, e.g., *United States v. McHenry*, 97 F.3d 125 (6th Cir. 1996) (enforcing the federal carjacking statute, 18 U.S.C. § 2119 (1994)); *United States v. Bishop*, 66 F.3d 569 (3d Cir.), *cert. denied*, 116 S. Ct. 681 (1995) (same). For examples of federal legislation in the domestic relations area, see *supra* note 57.

⁴⁸¹ See Bonfield, *supra* note 198, at 557 ("[A]s the Court discarded the guarantee clause as judicially unenforceable [sic], it adopted and expanded the fourteenth amendment as a vehicle for achieving many of the same ends.").

⁴⁸² 100 U.S. 371 (1879).

⁴⁸³ Act of May 31, 1870, ch. 114, 16 Stat. 140 (codified as amended at 42 U.S.C. §§ 1971, 1981, 1987-1991 (1994)).

⁴⁸⁴ *Siebold*, 100 U.S. at 395; see also *In re Debs*, 158 U.S. 564, 582 (1895) ("The entire

This statement might simply have been a tautological declaration that the United States would exercise such power as it possessed, but to the Congress that recently had enacted various civil rights enforcement acts, it must have been inspiring.

Whatever hope the Republican Congresses had for the recognition of a broad criminal authority was dashed, however, in the early civil rights enforcement cases.⁴⁸⁵ The Supreme Court did not deny that the Fourteenth Amendment gave Congress some new authority to punish crime, but it maintained that the amendment had not given Congress expansive powers over crime. In *United States v. Cruikshank*,⁴⁸⁶ the United States charged the defendants with violating section 6 of the Civil Rights Act of 1870,⁴⁸⁷ by “banding” and conspiring to injure a citizen with the intent of hindering the exercise of constitutional rights.⁴⁸⁸ In particular, the defendants were charged with, among other violations, conspiring to deprive citizens of their lives and liberty without due process of law. This allegation, the Court said, amounted to a charge of “conspiracy to falsely imprison or murder” and was “no more . . . within the power of the United States . . . than it would be to punish for false imprisonment or murder itself.”⁴⁸⁹

Cruikshank was followed by *United States v. Harris*,⁴⁹⁰ in which the Court struck down the criminal conspiracy section of the Ku Klux Klan Act.⁴⁹¹ The Ku Klux Klan Act punished conspiracies to deprive persons of their privileges or immunities or their rights to equal protection and due course of justice.⁴⁹² The statute did not apply only to the acts of a state or state officials, but to the acts of private persons “no matter how well the State may have performed its duty.”⁴⁹³

First, the Court affirmed that the Fourteenth Amendment reached only state actions and thus found the Act’s criminal conspiracy provisions unconstitutional.⁴⁹⁴ The Court then concluded that the Thirteenth Amendment did not justify the law.⁴⁹⁵ It reasoned that if Congress could punish conspiracy to do an unlawful act, it could punish the underlying criminal act as well, and “[t]he only way . . . in which one private person can deprive another of the equal protection of the laws is by commission of some offense against the laws which protect the rights of persons, as by theft, burglary, arson, libel,

strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights intrusted by the constitution to its care.”).

⁴⁸⁵ See Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1336-39 (1952).

⁴⁸⁶ 92 U.S. 542 (1875).

⁴⁸⁷ Act of May 30, 1870 § 6.

⁴⁸⁸ See *Cruikshank*, 92 U.S. at 548-49.

⁴⁸⁹ *Id.* at 553-54.

⁴⁹⁰ 106 U.S. 629 (1882).

⁴⁹¹ Act of Apr. 20, 1871, ch. 22, § 2, 17 Stat. 13 (originally codified at Rev. Stat. § 5519); see *Harris*, 106 U.S. at 644.

⁴⁹² See Act of Apr. 20, 1871 § 2.

⁴⁹³ *Harris*, 106 U.S. at 639.

⁴⁹⁴ See *id.* at 638-39 (citing *Cruikshank*, 92 U.S. at 554).

⁴⁹⁵ See *id.* at 639.

assault, or murder."⁴⁹⁶ If the Court upheld the criminal provisions of the Ku Klux Klan Act, it would "accord to Congress the power to punish every crime by which the right of any person to life, property, or reputation is invaded."⁴⁹⁷ Moreover, approval of the Act's criminal sanctions under the Thirteenth Amendment would "invest Congress with power over the whole catalogue of crimes," a result that was "clearly unsound."⁴⁹⁸ The Court subsequently has given much broader construction to the civil rights enforcement provisions that impose civil rather than criminal sanctions,⁴⁹⁹ and even to those provisions that enforce criminal sanctions against state officials or private persons who obtain cooperation from state officials.⁵⁰⁰

Finally, in the *Civil Rights Cases*,⁵⁰¹ the Court struck down the Civil Rights Act of 1875, which made it a misdemeanor to discriminate in public accommodations on the basis of race, color, or previous condition of servitude.⁵⁰² Holding that the Fourteenth Amendment reached only state action, the Court warned that without a state action requirement, Congress could not "enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property."⁵⁰³

The Court had turned back Congress's aggressive use of the Fourteenth Amendment. As the Court closed out the nineteenth century, however, it expressly affirmed that Congress's power over crime was not limited to the enumerated crimes:

Although the Constitution contains no grant, general or specific, to Congress of the power to provide for the punishment of crimes, except piracies and felonies on the high seas, offences against the law of nations, treason, and counterfeiting the securities and current coin of the United States, no one doubts the power of Congress to

⁴⁹⁶ *Id.* at 643.

⁴⁹⁷ *Id.*

⁴⁹⁸ *Id.* The Court also cited with approval part of Justice Bradley's opinion as Circuit Justice in *Cruikshank*:

[The Fourteenth Amendment] is a guaranty of protection against the acts of the state government itself. It is a guaranty against the exertion of arbitrary and tyrannical power on the part of the government and legislature of the state, not a guaranty against the commission of individual offenses; and the power of congress, whether implied or expressed, to legislate for the enforcement of such a guaranty, does not extend to the passage of laws for the suppression of ordinary crime within the states. This would be to clothe congress with power to pass laws for the general preservation of social order in every state.

United States v. Cruikshank, 25 F. Cas. 707, 710 (C.C.D. La. 1874) (No. 14,897), *aff'd*, 92 U.S. 542 (1876); *see Harris*, 106 U.S. at 638.

⁴⁹⁹ *See, e.g., Griffin v. Beckenridge*, 403 U.S. 88, 97 (1971); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968); *see also John Valery White, Vindicating Rights in a Federal System: Rediscovering 42 U.S.C. § 1985(3)'s Equality Right*, 69 TEMP. L. REV. 145, 153-57 (1996) (discussing the evolution of the Court's interpretation of 42 U.S.C. § 1985(3) (1994), which provides the civil remedy originally enacted as section 2 of the Ku Klux Klan Act).

⁵⁰⁰ *See, e.g., United States v. Guest*, 383 U.S. 745, 755-57 (1966); *Screws v. United States*, 325 U.S. 91, 108 (1945).

⁵⁰¹ 109 U.S. 3 (1883).

⁵⁰² *See id.* at 9-10, 26.

⁵⁰³ *Id.* at 14; *see also id.* at 11 (stating that the Fourteenth Amendment "does not authorize Congress to create a code of municipal law").

provide for the punishment of all crimes and offences against the United States, whether committed within one of the States of the Union, or within territory over which Congress has plenary and exclusive jurisdiction.⁵⁰⁴

In the various civil rights enforcement cases, the Court confirmed that the Fourteenth Amendment only modestly expanded Congress's criminal authority; any future expansions of federal criminal law would have to rely on the growth of existing congressional authority that took place soon after, through the Commerce Clause.⁵⁰⁵

V. *The Future of the Domestic Violence Clause*

Congress's debates and enactments, the President's deployment of troops, and the Supreme Court's opinions demonstrate a wide spectrum of views on the power of the United States under the Domestic Violence Clause. It is at least clear that the clause was of great importance to the Framers, that it remained important to the early Congresses, and that it reacquired significance in the civil rights enforcement debates.⁵⁰⁶ The Domestic Violence Clause has been regarded variously as a purely procedural requirement, as evidence of federal power, as a clause repealed sub silentio by the Fourteenth Amendment, and as evidence of state insulation from federal authority. This section explores the legitimacy of the explanations of the Domestic Violence Clause's role in federalism and congressional authority.

A. *The Domestic Violence Clause as a Procedural Requirement*

At its most basic level, the Domestic Violence Clause provides a procedure by which a state can request assistance from the federal government. This reading of the clause is a natural reading of the text and satisfies the concerns of the Framers that a state (such as Massachusetts during Shays' Rebellion) has a means of obligating the United States to come to its aid.⁵⁰⁷

The elements of the Domestic Violence Clause's procedural effect are significant. First, the Domestic Violence Clause recognizes the right of state governments to request assistance and, within state governments, the pre-

⁵⁰⁴ *Logan v. United States*, 144 U.S. 263, 283 (1892); see also *In re Rapier*, 143 U.S. 110, 134 (1892) ("It is not necessary that Congress should have the power to deal with crime or immorality within the States in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality.").

⁵⁰⁵ The Commerce Clause, as has been well documented, has been the principal source of Congress's broad criminal power. See *supra* notes 96-98 and accompanying text.

For a time, Section 2 of the Eighteenth Amendment also served as a basis for federal criminal authority over "intoxicating liquors." U.S. CONST. amend. XVIII, § 2 ("The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."), repealed by U.S. CONST. amend. XXI. For a discussion of the role the Prohibition Amendment played in the development of federal criminal law, see generally KENNETH M. MURCHISON, *FEDERAL CRIMINAL LAW DOCTRINES: THE FORGOTTEN INFLUENCE OF NATIONAL PROHIBITION* (1994).

⁵⁰⁶ Since *Luther v. Borden*, it has not played a significant role in court decisions. See *supra* notes 375-378 and accompanying text.

⁵⁰⁷ See *supra* notes 136-138 and accompanying text.

ferred position of state legislatures over governors. For those states threatened with federal military intervention, the clause provides a bright-line process for inviting a federal presence. The state legislature's power to request federal troops is the closest thing the Constitution allows to a state declaration of war; it is the state's means to combat violence beyond its resources.

Second, the Domestic Violence Clause conscientiously distinguishes between state legislatures and state governors, but it conspicuously fails to assign within the national government responsibility for responding to a state's request for assistance. The power is granted to "[t]he United States."⁵⁰⁸ Although Congress has assigned to the President the responsibility of responding to state requests, there is no textual reason (as the Court itself acknowledged in *Luther v. Borden*)⁵⁰⁹ that the judiciary could not assume some responsibility for its enforcement. The power to respond to domestic violence naturally devolved to the political and war-making branches. Since *Luther*, the Court has disclaimed any statutory responsibility for the process of responding to the states.

Following the passage of the Militia Act, presidents have most frequently and quite naturally viewed the Domestic Violence Clause as a procedural requirement.⁵¹⁰ From the President's perspective, the power he possesses under the Domestic Violence Clause and the early militia acts is simply an extension of his authority as commander in chief.⁵¹¹ This statement should not suggest that the President bears only a ministerial duty. Because the Constitution distinguishes between invasion (of the United States or a state), insurrection (against the United States), and domestic violence (against a state), the President must discern between domestic violence in the states (for which he needs a request before intervening), and insurrection against the United States or invasion of a state or the United States (for which he needs no further authorization).⁵¹²

As previously discussed, presidents have been cautious in the exercise of their authority against domestic violence.⁵¹³ They have distinguished between domestic violence at federal facilities and in federal territories and domestic violence in the states, and have been careful to ensure that state requests for assistance have come from the legislature. Furthermore, when a governor has assumed the responsibility for making the request, presidents have exercised their own judgment as to whether the Constitution has been satisfied because the legislature was unable to convene.⁵¹⁴

⁵⁰⁸ U.S. CONST. art. IV, § 4.

⁵⁰⁹ See 48 U.S. (7 How.) 1, 43 (1849).

It rested with Congress . . . to determine upon the means proper . . . to fulfil [the guarantee of the Domestic Violence Clause]. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened which required the federal government to interfere.

Id.

⁵¹⁰ See, e.g., THE USE OF MILITARY FORCE UNDER FEDERAL LAW, *supra* note 329, at 3-4.

⁵¹¹ See U.S. CONST. art. II, § 2, cl. 1.

⁵¹² See *id.* art. IV, § 4; 10 U.S.C. §§ 331-333 (1994).

⁵¹³ See *supra* Part III.C.2 and Part IV.C.

⁵¹⁴ See, e.g., JUDGE ADVOCATE GEN., FEDERAL AID IN DOMESTIC DISTURBANCES, 1903-

B. *The Domestic Violence Clause as a Substantive Provision*

If the Domestic Violence Clause only fulfilled the procedural role described in the preceding section, it would satisfy the intentions of many of the Framers and would serve a useful, if limited, function. But the Domestic Violence Clause has long had a secondary meaning, one that the Supreme Court has never had the opportunity to recognize and one only infrequently acknowledged by the Executive. To many of the Framers, early constitutional commentators, and drafters of the Fourteenth Amendment, the Domestic Violence Clause never was simply a process for requesting federal assistance, but was a substantive provision as well.

1. *The Domestic Violence Clause as a Grant of Federal Power*

With lingering concerns over Shays' Rebellion, some of the Framers regarded the Domestic Violence Clause as a grant of power to the federal government to address extraordinary incidents of violence.⁵¹⁵ They emphasized the Domestic Violence Clause as a grant of power, a recognition that no government incapable of offering protection to its citizens was worthy of the devotion of those citizens.⁵¹⁶ Nearly a century later, Radical Republicans, deeply disturbed by racially motivated mobs, riots, and other violence in the South, again viewed the Domestic Violence Clause as a grant of national power, albeit a flawed grant.⁵¹⁷ To some of them, the Domestic Violence Clause is itself plenary authorization to suppress domestic violence. They conceived of the Domestic Violence Clause as a continuing obligation on the part of the United States, which it might choose to fulfill at its own discretion.⁵¹⁸ The phrase "on Application of the Legislature" provides a means for states to compel the United States to intervene when the United States had not already done so.⁵¹⁹ Under this construction, the United States insures domestic tranquility even when, in the view of the governor or the state legislature, no assistance is necessary.

To other drafters of the Fourteenth Amendment, the Domestic Violence Clause did not go so far. In their view, the Domestic Violence Clause requires a state to consent to federal intervention, a constitutional flaw that the Equal Protection Clause remedied.⁵²⁰ Under this view, the Fourteenth Amendment superseded the Domestic Violence Clause and authorized federal intervention whenever required to protect U.S. citizens. Still others believed the Fourteenth Amendment simply added to, but did not supersede, the powers of the United States under the Domestic Violence Clause.⁵²¹ Rather they thought that the two provisions were linked through a mirror-

1922, S. DOC. NO. 67-263 (1922) (supplementing FREDERICK T. WILSON, U.S. ARMY, FEDERAL AID IN DOMESTIC DISTURBANCES, 1787-1903, S. DOC. NO. 57-209 (1903)). .

⁵¹⁵ See *supra* notes 123-125 and accompanying text.

⁵¹⁶ See *supra* notes 128-131, 198 and accompanying text.

⁵¹⁷ See *supra* notes 455-459 and accompanying text.

⁵¹⁸ See CONG. GLOBE, 42d Cong., 1st Sess. app. at 79 (1871) (statement of Rep. Perry); *id.* app. at 72-73 (statement of Rep. A. Blair).

⁵¹⁹ See *id.* app. at 72-73, 79.

⁵²⁰ See *supra* notes 459-462 and accompanying text.

⁵²¹ See *supra* notes 460-462 and accompanying text.

image symmetry: the Domestic Violence Clause protects state governments from groups of their citizens; the Fourteenth Amendment protects groups of citizens from their state governments.

In one sense, the Domestic Violence Clause clearly empowers the United States to respond to domestic violence. No other constitutionally granted power authorizes the United States to suppress domestic violence. The Militia Clause only authorizes enforcement of federal law and protection from insurrection or invasion of the United States.⁵²²

Treating the Domestic Violence Clause purely as a power, however, is troublesome. The clause surely authorizes federal intervention to suppress domestic violence, but the aggressive interpretations outlined above would moot the Invasion Clause and vastly expand the Militia Clause. An expansive reading also is less consistent with the context in which the Domestic Violence Clause was drafted. There was little sense among the Framers that the United States required a general power to address violence in the states.⁵²³ Although the memory of Shays' Rebellion was a powerful reminder of the vulnerability of the states and the need for union, the Framers were acutely aware of the states' role as the first response to crime and violence.⁵²⁴ A broad reading of the clause-as-power offers such huge potential for federal intervention into state domestic affairs that it is inconceivable that such an aggressive Federalist view would have prevailed.

It also is doubtful that the Fourteenth Amendment is a sufficient vehicle for the repeal, sub silentio, of the Domestic Violence Clause. The Fourteenth Amendment plainly is about protection (as are numerous other provisions of the Constitution), but by its terms, it is about a special case of protection—*equal* protection.⁵²⁵ The Fourteenth Amendment might justify federal remedies against a state that systematically fails to offer the protection of its laws to an individual or group.⁵²⁶ It might justify criminal penalties against offending state officials.⁵²⁷ But it is too great a leap to suggest that domestic violence is, without more, evidence of a state's failure to protect its citizens and sufficient justification for federal intervention. Such an approach, as the Supreme Court recognized in the early civil rights cases, would make the national government the peacekeeper of first resort.⁵²⁸

A group among the Radical Republicans would have been happy to see the federal government assume responsibility for national enforcement of criminal law. Because they counted among their numbers the drafters and spokesmen for the Fourteenth Amendment and the enforcement acts, the Radical Republicans' views carry some weight. Their votes alone were not

⁵²² See U.S. CONST. art. I, § 8, cl. 15; *supra* note 224.

⁵²³ Rather, the Framers primarily seemed concerned with preventing organized insurrection. See *supra* notes 198-200 and accompanying text. The Anti-Federalists envisioned an even more limited role for the federal government. See, e.g., *supra* note 204.

⁵²⁴ See, e.g., Heyman, *supra* note 128, at 525 (describing in general terms the division of responsibility for crime between the federal and state governments).

⁵²⁵ See U.S. CONST. amend. XIV. For a discussion of the Amendment's framers' debates, see *supra* notes 384-388 and accompanying text.

⁵²⁶ See, e.g., *supra* notes 401-404 and accompanying text.

⁵²⁷ See *supra* notes 391-395 and accompanying text.

⁵²⁸ See *supra* notes 501-503 and accompanying text.

sufficient, however, to carry the Amendment and the enforcement acts, and more moderate Republicans and Democrats explained why the Fourteenth Amendment, as written, did not go so far.⁵²⁹ The precise line between Congress's power to provide remedies for state violations of equal protection of the laws and the general power of states as the primary agent for defining and punishing crime may not always be clear (and is beyond my present purposes),⁵³⁰ but drive-by shootings, "animal enterprise terrorism" against a zoo, aquarium, circus, or rodeo, and carjackings⁵³¹ do not fall on Congress's side of the line.

2. *The Domestic Violence Clause as a Reservation of State Authority*

The Domestic Violence Clause was also viewed as a disability on the federal government and a reservation of state authority, a kind of Tenth Amendment for crime. Through the Militia Clause, the Framers authorized to Congress the use of the militia to execute the laws of the United States, repel invasions, and suppress insurrections. The Domestic Violence Clause, on the other hand, was seen as a bill of rights for the states, ensuring that the United States would not abuse its authority over the militia to displace state power over domestic disturbances. The Domestic Violence Clause dispelled any thought that the United States had a general authority to address crime.

This view of the Domestic Violence Clause confirms the enumerated power doctrine. Domestic violence is by its nature local; it refers to the internal affairs of a state. Although a state might believe itself overwhelmed by insurrection, riots, or even more ordinary crime, the decision whether assistance is needed, like decisions about defining and punishing crime itself, belongs to the state. Such a reading of the clause is confirmed by the requirement that state legislatures, rather than the state executive, make the request, which gives the states an additional measure of security by avoiding a precipitous request by the governor.⁵³²

It is not a contradiction to suggest that the Domestic Violence Clause is both a power and a disability. More precisely, the Domestic Violence Clause is a conditional grant of power and a disability. In form, the clause is similar to the disabilities imposed upon the states in Article I, Section 10. Consider, for example, the Compacts Clause:⁵³³ the states are forbidden to enter into compacts with other states, except where Congress specifically authorizes it. The Compacts Clause is a conditional disability.

⁵²⁹ See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. app. at 260 (1871) (statement of Rep. Holman); *supra* notes 428-433 and accompanying text.

⁵³⁰ See OFFICE OF THE JUDGE ADVOCATE GEN., FEDERAL AID IN DOMESTIC DISTURBANCES, 1903-1922, S. DOC. NO. 67-263 (1922) (supplementing FREDERICK T. WILSON, U.S. ARMY, FEDERAL AID IN DOMESTIC DISTURBANCES, 1787-1903, S. DOC. NO. 57-209 (1903)); *Federal Intervention in the States*, *supra* note 405, at 460-62.

⁵³¹ See 18 U.S.C. §§ 36, 43, 2119 (1994).

⁵³² See, e.g., 2 FARRAND, *supra* note 162, at 317 (rejecting a motion to strike "on application of the legislature," but also agreeing that the request should not simply come from the legislature or executive).

⁵³³ U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power . . .").

Because of the structure of the Constitution, a conditional power in Congress and a conditional disability in the states are roughly symmetrical. Congress may exercise only those powers specifically granted it; the states are denied only such powers expressly or implicitly denied them. The states expressly are denied the power to enter into interstate compacts, subject to a condition permitting them to do so. Likewise, the United States is denied the power to intervene in state domestic violence, subject to a condition permitting it to do so. The result under both clauses is the same, as the states may not enter into interstate compacts, nor may the United States intervene to suppress a state's domestic violence, except as each is invited by the other.

This interpretation of the Domestic Violence Clause does not disparage the effect of the Fourteenth Amendment. If a state denies to its citizens the equal protection of the state's criminal laws, for example, Congress has power to enforce the Equal Protection Clause through, among other things, criminal sanctions against state officials.⁵³⁴ But the Fourteenth Amendment did not repeal the Domestic Violence Clause, nor did it (as revealed by its text and history) displace the states as the level of government entrusted with providing for domestic tranquility.⁵³⁵

C. *The Domestic Violence Clause and the Federalization of Crime after Lopez*

What implications does this analysis have for the Domestic Violence Clause and state-federal relations? There are two consequences: the clause supplies both a rule and presumption. First, the Domestic Violence Clause provides, at a minimum, a rule regarding the process by which the United States may physically intervene to protect states from domestic (as opposed to external) threats. At one time, the Domestic Violence Clause also might have reinforced the enumerated powers doctrine, providing a rule that Congress had no power over crime except the three enumerated crimes and, perhaps, crimes committed in federal territory. Thus, it would have given the states exclusive power over all other crime. This narrow view would not diminish Congress's power over commerce, but it would limit Congress's power to define crimes based on the Commerce Clause.⁵³⁶ Although this is a plausible reading of the Domestic Violence Clause, in light of the practices of the earliest Congresses and the Supreme Court's reading of the Necessary and

⁵³⁴ See, e.g., *Federal Intervention in the States*, *supra* note 405, at 438-39 (discussing Congress's ability to "punish the culpable failure of the state official to do his duty"); *supra* note 500 and accompanying text.

⁵³⁵ See *supra* text accompanying notes 525-528.

⁵³⁶ See Van Alstyne, *supra* note 100, at 1747. Throughout this analysis, I assume that there are no independent grounds for federal intervention such as enforcing federal law, protecting the state against invasion, or displacing the state's law enforcement functions because the state is violating the Equal Protection Clause.

Ultimately, the Domestic Violence Clause largely may be symbolic, more a punctuation mark emphasizing the importance of federalism principles that are woven throughout the enumerated powers doctrine. Nevertheless, the importance of such a function should not be overlooked. The Tenth Amendment bears such a burden. See Van Alstyne, *supra* note 12, at 773 n.15. *Lopez* may also serve such a purpose. See Brickey, *Life After Lopez*, *supra* note 7, at 839 ("[T]he real significance of *Lopez* may be its symbolic value.").

Proper Clause, it is too late in the day to maintain it. The procedural function of the Domestic Violence Clause, however, is well established and respected today.⁵³⁷

Second, and most important, this analysis suggests that the Domestic Violence Clause provides a presumption against federal preemption, co-option, and even duplication of state efforts to control domestic violence. This secondary meaning of the Clause suggests that if the United States undertakes to address domestic violence on the basis of its own independent authority, it must demonstrate clear constitutional support for its actions. The Domestic Violence Clause does not deprive the federal government of criminal jurisdiction that properly belongs to it, nor does it suggest that the division of criminal jurisdiction between federal and state governments is unique and exclusive. Rather, it emphasizes the different spheres in which the federal government and the state governments operate and the fact that encroachment by the federal government into domestic violence undermines the states in their first duty: protection of their citizens.

As its origins in Shays' Rebellion demonstrate, the Domestic Violence Clause relates, in the first instance, to insurrections: those actions that (although falling short of overt revolution) threaten the legitimacy of the government itself.⁵³⁸ Violent acts against the government are regarded as more serious than violent acts against individuals because the former threaten our common ability to maintain our supporting institutions.⁵³⁹ Hence, the promise of federal support to suppress domestic violence was significant because it ensured that state governments could rely on the resources of other states, brought together by the United States, to guarantee the physical integrity of the state as a governmental institution and to secure the people in the state as a political body.

When Congress seeks to punish ordinary crime, however, it suggests that Congress can, a fortiori, intervene to preserve the institution of a state unable to control domestic violence even in the absence of a request by the state legislature. But that implication is contrary to the accepted understanding of the clause. When Congress invokes the Commerce Clause, for example, in a way that affects a state's power over ordinary crime within the state, Congress eviscerates the Domestic Violence Clause. Congress threatens to assume, on its own authority, all responsibility for domestic violence, nullifying the clause entirely.

The Domestic Violence Clause supplies an independent justification for demanding that Congress demonstrate that it has not displaced the criminal authority of the states when it legislates against crime in the states. In this respect, the Domestic Violence Clause provides a better explanation for the state as the primary authority against crime than does the Court's flawed Tenth Amendment analysis in *Lopez*.⁵⁴⁰ Furthermore, the Domestic Vi-

⁵³⁷ See *supra* Part V.A.

⁵³⁸ See, e.g., WIECEK, *supra* note 131, at 33; *supra* note 123 and accompanying text.

⁵³⁹ See *supra* notes 117-123 and accompanying text.

⁵⁴⁰ For similar reasons, the Domestic Violence Clause also supports the Court's recent decision in *Printz v. United States*, 117 S. Ct. 2365 (1997), in which it held unconstitutional the Brady Handgun Violence Protection Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993). Relying on gen-

lence Clause supports the Court's insistence in *Lopez* that activities that Congress makes criminal under the Commerce Clause must "substantially affect" commerce.⁵⁴¹ After *Lopez*, Congress bears the burden of demonstrating that legislation enacted under the Commerce Clause *substantially*, and not incidentally, affects commerce.⁵⁴²

Indeed, the Domestic Violence Clause may demand an even more scrupulous review of federal criminal legislation than would *Lopez*. Although *Lopez* applies to all legislation under the Commerce Clause, whether criminal or civil, it has no application to noncommerce legislation.⁵⁴³ The Domestic Violence Clause, on the other hand, is an external constraint on federal criminal law enforcement, whether Congress derives its authority from the Commerce Clause or some other provision. Thus, the "substantially affects" standard may not translate effectively should the Court be called upon to review federal criminal legislation that claims provenance from other constitutional provisions. This analysis of the Domestic Violence Clause does not prevent Congress from passing laws that define and punish crime, nor does it prevent Congress from passing laws that overlap with state domestic violence provisions (and in their enforcement even displace state enforcement). But the Domestic Violence Clause requires that if Congress undertakes to define and punish crime, it must have some firm constitutionally enumerated basis for doing so.

Finally, implicit in this analysis is the idea that it is appropriate for the judiciary to sit in judgment of congressional legislation. Whatever the merits of judicial review in other contexts, the Domestic Violence Clause imposes a duty on the "United States," and not on Congress alone.⁵⁴⁴ The Court may have few tools for judging the legitimacy of competing governments (as in *Luther*), but it surely is able to distinguish between legislation legitimately serving an end within the express powers of the United States and the creation of a general, federal criminal code.

VI. Conclusion

The Domestic Violence Clause demands that one respect the notion of a dual criminal system. It is a powerful reminder of the primacy of the states as the caretakers of the public peace and the lesser role of the United States as the insurer of that peace when the state admits that the matter is beyond its resources. Although the Court in *Lopez* took a step towards refocusing our

eral principles of federalism, the Court concluded that "[t]he power of the Federal Government would be augmented immeasurably if it were to impress into service—and at no cost to itself—the police officers of the 50 states." *Printz*, 117 S. Ct. at 2378.

If, as I have argued, the Domestic Violence Clause prevents the federal government from displacing indirectly the states' law enforcement responsibilities through a duplicative federal criminal code, *a fortiori*, the federal government cannot displace the states directly by conscripting into service state law enforcement officials.

⁵⁴¹ See *United States v. Lopez*, 514 U.S. 549, 559 (1995).

⁵⁴² See *id.*

⁵⁴³ See *id.* at 552 (indicating that the issue before the Court was limited to Congress's power under the Commerce Clause).

⁵⁴⁴ See U.S. CONST. art. IV, § 4.

attention on federalism, the courts should either confess the end of the enumerated powers doctrine and finish the charade or put some teeth back into the doctrine. The Domestic Violence Clause provides one means for ensuring that the states provide for domestic tranquility, without interfering with the United States' duty to insure it.