

FEDERALISM AND CONSTITUTIONAL CRIMINAL LAW

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I. INTRODUCTION

Over the past fifty years, the Supreme Court has created an expansive and nearly comprehensive body of constitutional criminal procedure. These are the familiar rules about police investigation and fair trials. At the same time, though, the Court has repeatedly resisted doing the same for substantive criminal law and sentencing. It has generally avoided limiting what can be a crime, how it must be defined, and how much it can be punished. As William Stuntz concluded, while “policing and the trial process” have been “aggressively” regulated, “substantive criminal law” has been essentially left “to the politicians.”¹ It takes an entire law school course to read just the highlights of the search and seizure cases; with respect to what can be a crime and how it must be defined, though, “constitutional law places few limits . . . save for crimes that involve speech, consensual sex, or reproduction.”² Cases limiting substantive criminal law are so few that they are all individually famous—think *Lawrence v. Texas*³ or *Griswold v. Connecticut*.⁴ What is the reason for this imbalance? This is a question that has long vexed scholars, and one that is worthy of renewed attention.

Past attempts to understand the case law have yielded more frustration than insight. Precisely because they are so small in number, and seemingly so random, scholars have mostly labored in vain to synthesize a theory of the Court’s constitutional limits on substantive criminal law. In this Article, I propose a new approach. If the default

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1. William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 782 (2006).

2. *Id.* at 790 (footnotes omitted); see U.S. CONST. amend. IV.

3. 539 U.S. 558 (2003).

4. 381 U.S. 479 (1965).

presumption is that criminal law will *not* be constitutionalized, then the best way to piece together a theory of the Court's behavior is to look at the cases where it *rejects* constitutional claims. When we do this, the randomness that has frustrated commentators disappears, and is replaced by a remarkable consistency. One rationale is routinely invoked from the 1950s onward—at least once per decade—it is federalism. This is significant, and indicates that there is an enduring and important justification for judicial restraint here. Unearthing this line of reasoning is the first contribution of this Article.

Surprisingly, though, neither the Court nor the academy have fully examined the strength of federalism in this context. This is likely because the criminal law is most closely associated with the “police power,” which has always been understood to be the province of the states. The second goal of this Article, then, is to undertake that missing assessment. Overall, I conclude that the argument is weaker than the Court seems to believe, and is certainly not worthy of its status as a near-truism. While the Court invokes federalism uniformly to reject constitutional limitations on substantive criminal law, this Article argues that this is conceptually imprecise. To understand whether the federalism argument does the work it is supposed to do, we must first understand more clearly what is meant by “federalism,” and the type of constitutional rule that it is used to resist. As we will see, the soundness the argument is dependent on the context in which it is deployed, but the Court has ignored this complexity.

This Article presents its assessment of federalism in two parts. First, it offers an internal critique of the Court's own federalism-based reasoning in constitutional criminal cases. Next, it engages in a hypothetical discussion of how yet unused federalism theories would apply in the same context. The overarching goal is to provide a framework for analysis, adding nuance to the Court's invocation of federalism while marking its strengths or weaknesses along the way.

We will begin with the internal critique—the assessment of the Court's reasoning as made explicit in the case law. Here, the Court's discussion of federalism can be broken down into two variants: “Experimentation Federalism” and “Morality Federalism.” Experimentation Federalism is the argument that states ought to be able to experiment when addressing the problem of crime, and that their closeness to the problem will give them an edge.⁵ Morality Federalism is the argument that, because criminal law ought to reflect the morality of the community that creates it and is governed by it, lawmaking

5. See *infra* Part IV.A.

jurisdictions will better reflect this morality if they are geographically smaller.⁶ Both types of federalism-based arguments are employed by the Court when it refuses to create constitutional criminal law, but they are analytically distinct.

Beyond this, the Court's cases reject more than just one type of limitation on state criminal law—instead, federalism defeats the creation of three categories of constitutional rule: (1) offense definition rules (the way a crime can be defined);⁷ (2) rights granting or conduct protection rules (what can be a crime);⁸ and (3) sentence proportionality rules (how much a crime can be punished).⁹ An example of an offense definition rule that the Court has refused to impose is the requirement that a crime have a mens rea element; an example of a rejected conduct protection rule is the right to assisted-suicide; an example of a rejected proportionality rule is that life-imprisonment for “three strikes” is cruel and unusual punishment.

The federalism argument is at its weakest when applied to the first category—offense definition rules. This is because offense definition rules are trans-substantive, and therefore do little to inhibit state policy choices in dealing with the problem of crime. The most important feature of the state “laboratory” is the ability to make substantive determinations of what is and is not criminalized so as to reduce socially harmful conduct. Offense definition rules that apply to all the various categories of conduct (trans-substantively) only minimally work against the concerns of Experimentation Federalism; they do not cordon off any category from criminalization, and therefore put little restriction on the “laboratory.” For example, if there were a constitutional requirement that all crimes required that the act be committed voluntarily, this says nothing about what the substantive content of that act must be. Morality Federalism is similarly a weak argument, although less weak, when applied to offense definition rules—not because of the logic of the argument, but because the vast majority of offense definition rules will not implicate moral viewpoints that will be geographically concentrated. It is highly unlikely, for example, that ethical stances on the requirement of a voluntary act would be clustered in a state jurisdiction. To the extent that this would be controversial at all, disagreement will be geographically diffuse. Ironically, while the federalism argument is weakest when applied to offense definition rules, it is in these cases where it appears most often.

6. *See infra* Part IV.B.

7. *See infra* Part V.B.

8. *See infra* Part V.C.

9. *See infra* Part V.D.

Federalism is a stronger argument when applied to the second category of constitutional rules—conduct protection, or rights-granting rules—but its application to this context is unappealing for an outside reason. Federalism here accords deference to states in their restriction of individual liberty and punishment of its exercise. This is bad on its own, but it can also result in the use of criminal law to oppress minorities. This is most apparent with Morality Federalism. If this kind of federalism is used to prevent the court from protecting conduct from criminalization, it allows local morality to resist the promulgation of rights that are recognized by the broader national community. While we might value local moral viewpoints in many areas of law, criminal law seems to be an unappealing vehicle for these views. An example of this is the now-rejected majoritarian reasoning of *Bowers v. Hardwick*.¹⁰ Moreover, this same observation makes Experimentation Federalism problematic, as the experimentation that would be prevented by a rights-granting rule is, again, experimentation with the restriction of liberty. Beyond this, conduct protection rules seem to transcend experimentation concerns entirely. Experimentation Federalism is predicated on tinkering with different methods to reach *shared* goals; conduct protection rules alter the goals themselves. For example, *Griswold* placed the issue of contraception use entirely beyond the reach of state punishment.¹¹ This obviated any need to “experiment” with how to more effectively deter the conduct through criminal law.

It is in the third category of constitutional rules, sentencing proportionality rules, that the federalism argument is at its apex. Given the complexity of assessing appropriate punishments, Experimentation Federalism works well here. There is no one right way, and a varied approach across different jurisdictions will hopefully yield advances in the science of penology. These are all good arguments in theory, but they are undermined by the reality of state practice, which often makes punishments the product of political reactions to sensational, publicized crimes. Laws aiming to protect young children illustrate this well. For states to fully participate in the experimentation that federalism anticipates, they need to increase their usage of social science and criminological data, basing their punishments on facts and not emotions. Otherwise, states weaken their federalism claim, and strengthen the argument that judicial intervention is needed. Morality Federalism is similarly valid, and perhaps at its strongest, when applied to sentencing decisions. It is true that certain states may face a more serious problem

10. 478 U.S. 186, 190-91, 196 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

11. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

with certain conduct than others do, and will therefore want to deter it with greater punishment. Moreover, other states may view conduct as more worthy of retribution based on their citizens' moral viewpoints. However, the same concerns regarding discriminatory liberty-restriction noted above are also salient here—sentencing regimes also invite the oppression of minorities—mandatory life-in-prison “recidivist” statutes are a good example.

After completing the internal critique of the Court's reasoning just sketched out, we will turn to the assessment of other federalism theories that would potentially defeat constitutional criminal law claims—theories yet unused by the Court in this specific context.¹² Drawing on the canonical framework of the values of federalism presented in *Gregory v. Ashcroft*,¹³ the discussion will be supplemented with four new theories: “Liberty Federalism,” “Participation Federalism,” “Mobility Federalism,” and “Inherent Sovereignty Federalism.”¹⁴ As we will see, while some of these theories are likely unused in constitutional criminal cases because they are wholly inapplicable, others would support the current climate of judicial restraint.¹⁵ This Article addresses them in turn.

Liberty Federalism is the theory that federalism is worthwhile because a system of dual sovereignty is expected to prevent each sovereign from infringing on individual liberty.¹⁶ This variant of federalism, though, does little work in justifying the absence of constitutional criminal law—such a body of rules would only work to increase freedom by limiting crime definition and sentencing. It is hard to imagine, for example, how a rule *against* mandatory “three strikes” laws would be a setback to liberty.

Participation Federalism aligns the values of federalism with the values of democracy, and holds that smaller jurisdictions further enable democratic involvement.¹⁷ This type of federalism is a valid argument against judicially created rules about offenses, as such rules present the familiar problem of the “countermajoritarian difficulty,” and thwart expressions of political will. Still, we note in response that “participation” for politically weak out-groups will not be protected without judicial help (so-called “representation reinforcement”), and that criminal defendants fit many of the typical features of such groups. For

12. See *infra* Part VI.B.

13. 501 U.S. 452 (1991), *rev'd*, 134 S. Ct. 2077 (2014).

14. See *infra* Part VI.B.

15. See *infra* Part VI.B.

16. See *infra* Part VI.B.1.

17. See *infra* Part VI.B.2.

example, sex offenders are the easiest of political punching bags, and judicial intervention may therefore be more warranted in this area.

Mobility Federalism is the theory that the existence of the states allows citizens to “vot[e] with their feet” and that this creates healthy jurisdictional competition.¹⁸ Like Participation Federalism, a mobility-based theory is conceptually valid when used against constitutional criminal rules: a national rule would eliminate the market for competition in the area that it covers. Still, the Court may have refrained from using such an argument in a criminal case because the assumption of completely free mobility—a fiction tolerated in other regulatory areas—is intolerable when talking about punishment. Such a theory countenances punishment based solely on economic disparities—the ability to be mobile. One could imagine a state becoming more socially conservative due to demographic changes, thus leaving those unable to leave vulnerable to moralistic criminalization.

Last to consider is Inherent Sovereignty Federalism—the argument that state sovereignty is intrinsically valuable, and that the states’ historic residual powers were only partially altered by the Constitution.¹⁹ Because such a theory presumes originalism as an interpretive method, it would foreclose the creation of most unenumerated rights applicable to criminal law. However, we note that one originalist theory—the “presumption of liberty”—would justify such rules as being grounded in the Ninth Amendment and the Privileges and Immunities Clause.²⁰ For example, the common law’s requirement of a voluntary act might be seen as a right “retained” by the people even after ratification.

By the end of this Article, we will have completed a comprehensive critique and assessment of the different theories of federalism as applied to constitutional criminal law.²¹ What the Court understands to be a uniformly applicable and uncontestable truism is, as we will see, far more problematic. Having undermined the invocation of federalism in this context, we will have come a small way toward understanding the question that motivated the inquiry: why so much criminal procedure and so little substantive criminal law? We will know, at least, that the Court’s own primary explanation cannot simply be taken at face value.

18. See *infra* Part VI.B.3.

19. See *infra* Part VI.B.4.

20. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 259-61 (2004); see U.S. CONST. art. IV, § 2, cl. 1; *id.* amend. IX.

21. See *infra* Parts II–VI.

Part II addresses the scholarship regarding substantive criminal law and the Constitution, concluding that this area of law is undeveloped.²² Part III undertakes a survey of every case in which a state criminal law is challenged as unconstitutional, and in which the Court rejected that claim by invoking federalism.²³ Part IV discusses the two primary variations of federalism used in these cases, as well as four theories drawn from cases in different contexts.²⁴ Part V addresses the different types of constitutional rules that are rejected in the cases discussed in Part II (or might be rejected in future cases): offense-definition rules, conduct-protection rules, and sentencing proportionality rules.²⁵ Part VI analyzes the application of the federalism argument variants to the three constitutional rule-types, noting the strengths and weaknesses of the argument in each context. Part VI begins with the internal assessment of the Court's reasoning, and addresses the two primary federalism theories used in the case law.²⁶ Part VI then turns to an assessment of the potential application of yet unused theories.²⁷

II. LITERATURE REVIEW: THE GENERAL ABSENCE OF SUBSTANTIVE CONSTITUTIONAL CRIMINAL LAW

We begin with a descriptive claim: when viewed against the body of constitutional criminal procedure, there is very little constitutional criminal law. By “substance” I mean the definition of what a criminal offense is and how much it can be punished, and “procedure” the way that offense must be investigated and proven.²⁸ While entire law school courses are devoted to criminal procedure, constitutional limits on criminal law form but a small part of the reading material for that subject.²⁹ Scholars have not failed to notice this reality. In 1958, Henry M. Hart, Jr., excoriated the Supreme Court for its failure to articulate a

22. *See infra* Part II.

23. *See infra* Part III.

24. *See infra* Part IV.

25. *See infra* Part V.

26. *See infra* Part VI.A.

27. *See infra* Part VI.B.

28. George Fletcher describes this as the distinction between “guilt in principle” (substantive rules) and “guilty in fact” (procedural rules). GEORGE P. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 7 (1998).

29. *See, e.g.*, SANFORD A. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 440-41, 566-80 (10th ed. 2017).

coherent requirement of mens rea.³⁰ But this failure was just the first of many.

Writing in 1979, John Jeffries and Paul B. Stephan concluded, “At least in terms of judicial exposition, the existence of constitutional constraints on the substantive criminal law is largely *terra incognita*.”³¹ This was in sharp contrast with the area of criminal procedure:

The Supreme Court has devoted considerable attention to issues of procedural justice and, to a lesser extent, to the sufficiency and reliability of the evidence on which conviction is based. Yet even as the Supreme Court was fashioning an entire body of federal constitutional law on criminal procedure, it remained reluctant to restrict legislative authority over the substantive definition of crime. With few, though important, exceptions, the Court’s opinions in the field of substantive criminal law have been confined to the construction of federal statutes, and the states have remained largely free to define the penal law as they see fit. . . . There exists today, as there has for many years, a decided imbalance in the development of constitutional doctrine. The result is an elaborate body of law governing procedural rights and a dearth of constitutional authority on the minimal conditions of substantive justice.³²

This was written after decades of the Warren Court’s activity in the area of criminal procedure, but it still holds true today.

Where the Court *has* involved itself in substantive criminal law is in random areas marked out for specific protection—“special constitutional protections for certain kinds of activity,” notably the First Amendment and “privacy.”³³ Because this case law lacks comprehensive scope, Jeffries and Stephan wrote, “These incidental limits imposed on the criminal law . . . do not . . . contribute much to the notion of minimal constitutional standards applicable to crime definition generally.”³⁴ A

30. See Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 431-36 (1958) (“From beginning to end, there is scarcely a single opinion by any member of the Court which confronts the question in a fashion which deserves intellectual respect.”); see also Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 519 (2004) (“On the topic of constitutional criminal law, Hart’s essay . . . is best read as a provocation, or perhaps a manifesto, rather than as a coherent account. At its core is an insight about the relationship between constitutional criminal law and constitutional criminal procedure that Hart characteristically formulates as a rhetorical question: ‘What sense does it make to insist upon procedural safeguards in criminal prosecutions if anything whatever can be made a crime in the first place?’” (footnote omitted) (quoting Hart, *supra*, at 431)).

31. John Calvin Jeffries, Jr., & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1366 (1979).

32. *Id.* at 1366-67 (footnotes omitted).

33. *Id.* at 1367 n.123; see U.S. CONST. amend. I.

34. Jeffries & Stephan, *supra* note 31, at 1367.

good example is “overbreadth” doctrine: while it showed initial potential to be applicable to criminal law universally, the Court then explicitly limited it to the First Amendment context.³⁵

Jeffries and Stephan offered two hypotheses to explain this “historic imbalance.” The first was the “decline and disgrace of substantive due process,”³⁶ which left “the Court and the bar without any familiar doctrinal basis for prescribing the minimal content of the law of crimes.”³⁷ The second was “the traditional conception of the law of crimes as essentially static and unchanging, determined more by Anglo-Saxon inheritance than by any fresh perception of public policy, and quite unlikely to be subject to radical legislative innovation.”³⁸ Substantive limits were the province of the common law, not the Constitution.

By the end of the century, other scholars would note the lack of progress in creating a constitutional criminal law. Surveying the case law in 1996, William Stuntz concluded that the “[c]riminal law, like the vast spheres of civil regulation, is basically a nonconstitutional field; disputes about the definition of crimes rarely intersect with disputes about constitutional law.”³⁹ Again, there were random exceptions—such as vagueness doctrine, free speech, and the right to “privacy.”⁴⁰ What was lacking was a general “substantive due process aimed specifically at criminal law.”⁴¹ In 2001, Stuntz wrote that the creation of a constitutional criminal law, according to the conventional view, “seems absurd.”⁴²

Stuntz was more interested in the problems that resulted from this state of affairs,⁴³ than he was in explaining its cause, but he did offer

35. Compare *Schall v. Martin*, 467 U.S. 253, 268-69 n.18 (1984) (“[O]utside the limited First Amendment context, a criminal statute may not be attacked as overbroad.”), with *Aptheker v. Sec’y of State*, 378 U.S. 500, 517 (1964) (applying the overbreadth doctrine to the right to travel).

36. Jeffries & Stephan, *supra* note 31, at 1367.

37. *Id.*

38. *Id.* at 1367-68.

39. William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 6 (1996).

40. *Id.* “[C]onstitutional law places few limits on crime definition, save for crimes that involve speech, consensual sex, or reproduction. (The large majority of crimes involve none of those things.)” Stuntz, *supra* note 1, at 790 (footnotes omitted).

41. Stuntz, *supra* note 39, at 6-7.

42. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 588 (2001).

43. Stuntz, *supra* note 1, at 802-03. Put succinctly, Stuntz theorized that a constitutionalization of procedure without a constitutionalization of substance created a perverse political incentive for the legislatures to over-criminalize and create draconian sentencing laws.

The constitutional proceduralism of the 1960s and after helped to *create* the harsh justice of the 1970s and after. . . . Political incentives are the mechanism. Constitutional law

some hypotheses. He posited that the success of constitutional criminal procedure—and the concomitant failure of substance—may be because there was little state law to displace in the area of procedure.⁴⁴ He also assessed more conventional explanations, including the general sense that the determination of proportionality—whether “particular offenses are serious enough to justify the penalty attached to them”—is too “formless,” and is “policy with a thin legal veneer.”⁴⁵ Critics, he wrote, might also view such a task as too akin to the creation of “common-law crime[s]”—something “old but abandoned (so we all assume).”⁴⁶

In 1998, Louis Bilionis also wrote about the absence of constitutional criminal law, but from a less critical point of view.⁴⁷ In making his sympathetic argument, though, Bilionis agreed with our descriptive point: the Court has basically stayed out of substantive criminal law.⁴⁸ Moreover, the burden of proof cases proved to be similar

creates a series of political taxes and subsidies, making some kinds of legislation and law enforcement more expensive and others cheaper. Since the 1960s, the Supreme Court has regulated policing and trial procedure aggressively, while leaving substantive criminal law and (until the past few years) noncapital sentencing to the politicians. Consequently, legislators find it easy to expand criminal codes and raise sentences but harder to regulate policing and the trial process. . . . [C]onstitutional law has made legislation in constitutionally *unregulated* areas politically cheap.

Id. at 781-82, 792 (footnotes omitted).

44. Stuntz, *supra* note 42, at 588 n.292 (“It would be a very different enterprise to constitutionalize criminal law, where huge and elaborate bodies of nonconstitutional law already exist.”).

45. Stuntz, *supra* note 39, at 30-31 (footnote omitted). He reiterates this point in his second article:

Those opinions will not seem terribly lawlike. If the Supreme Court’s proportionality cases teach anything, they teach the impossibility of applying something that looks and feels like legal analysis to the question whether a given crime deserves a given sentence. . . . The distinction can only be drawn by courts making open-ended, ungrounded value judgments: this behavior merits punishment; that behavior doesn’t, for no better reason than because I think so (and because I think and hope most of the local population will agree). It sounds like the antithesis of the rule of law.

Stuntz, *supra* note 42, at 593 (footnote omitted).

46. Stuntz, *supra* note 39, at 38.

47. See Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1277, 1299-1318 (1998). Bilionis argued that the Court deliberately refrained from entering the area of constitutional criminal law so as to leave it to democratic process, and that the seemingly random points of intervention were not random at all—but instead examples of “process reinforcement.” *Id.* at 1302, 1318-23.

48.

To [scholars’] dismay, the Supreme Court has—with two exceptions—seemingly resisted the notion. The two exceptions are familiar. First came the 1957 case of *Lambert v. California*, in which the Court came as close as it ever has to constitutionalizing a mens rea requirement as fundamental to the just imposition of a criminal sanction. *Lambert* was followed in 1962 by *Robinson v. California*, in which the Court came as close as it ever has to constitutionalizing criminal law’s other Latin half, the element of actus reus. . . . Yet what followed from *Lambert* and *Robinson*, the received wisdom holds, is a

non-starters.⁴⁹ As Billionis summarized, “All in all, four decades have passed since Henry Hart lamented the Supreme Court’s failure to forge a relationship between the Constitution and substantive criminal law, and not much seems to have changed.”⁵⁰

Markus Dubber, too, assessed the body of scholarship and case law in this area:

It has become a commonplace that there are no meaningful constitutional constraints on substantive criminal law. While *procedural* criminal law is thoroughly constitutionalized, so much so that criminal procedure has become synonymous with *constitutional* criminal procedure, the law of crime and punishment has remained virtually untouched by constitutional scrutiny.⁵¹

Instead, the Court’s chosen points of entry into criminal law seem random, and incoherent. Discussion is dominated by consideration of the right at issue, not the fact that it was subverted by a state criminal offense: “Occasionally the Court has taken up issues of constitutional criminal law, without recognizing them as such. (Much, perhaps most, of the Court’s constitutional criminal law jurisprudence is accidental, as the abortion and euthanasia cases illustrate.)”⁵²

Attempts to synthesize a theory of constitutional criminal law from these haphazard interventions are therefore a fool’s errand. Dubber wrote that “[r]educing constitutional criminal law to a search for oracular signs from the U.S. Supreme Court makes little sense.”⁵³ Because the Court has been “notoriously fickle” in this area, and because the “case and controversy” requirement often results in narrow rules, we

story of unfulfilled potential, the unexciting tale of an exciting substantive constitutional criminal law that never came to be. The curse that Justice Frankfurter cast upon the majority in his dissent in *Lambert* appears to have stuck, for the case indeed ‘turn[ed] out to be an isolated deviation from the strong current of precedents—a derelict on the waters of the law.’ *Robinson*, meanwhile, was consigned to a fate only slightly less forlorn, relegated to the outermost fringe of the criminal law by the narrow reading placed upon it six years later by the Court in *Powell v. Texas*.

Id. at 1269-70 (quoting *Lambert v. California*, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting)).

49.

Nor has a substantive constitutional criminal law sprung, as some have hoped, from robust interpretations of the presumption of innocence and the requirement that guilt be established by proof beyond a reasonable doubt. The Court stiffened its back toward such interpretations in *Patterson v. New York*, and its posture has shown no real signs of relaxation since.

Id. at 1270-71 (footnotes omitted).

50. *Id.* at 1271 (footnote omitted).

51. Dubber, *supra* note 30, at 509-10 (footnote omitted).

52. *Id.* at 521 (footnote omitted).

53. *Id.* at 528.

ought not attempt to “squeeze sense out of the Supreme Court’s ill-considered efforts on substantive criminal law over the decades.”⁵⁴ “Commentators by and large have waited for the Court to set the agenda,” Dubber wrote, and “[t]hey are waiting still.”⁵⁵

Like other commentators, Dubber offers potential explanations for this “fickle” intervention. The Court, he believes, has bought into two forms of “fetishism”: process and federalism.⁵⁶ The Court thinks that “a good (or constitutional) procedure can save any state action, no matter how bad (or unconstitutional),”⁵⁷ and that “criminal lawmaking is taken to be one, perhaps *the*, manifestation of the power of governance most closely associated with the states, the *police power*, which is also widely recognized as the power of governance least susceptible to definition, never mind limitation.”⁵⁸ These are related: “Federalism and process fetishism go hand-in-hand because federal constitutional oversight of a state’s procedural application of its criminal laws is thought to be less intrusive than oversight of the making of the laws in the first place.”⁵⁹

Like Stuntz, Bilionis, and Dubber, other commentators have addressed the central question in passing—in the course of discussing the mens rea “requirement”⁶⁰ or the burden of proof cases.⁶¹ All agree

54. *Id.* at 528-29 (footnote omitted). Dubber notes that there is a lack of scholarly literature on the topic and posits the following reason:

Perhaps one reason for this absence is the Court’s habit to reverse itself in short order on issues of constitutional criminal law, as in *Robinson and Powell* (actus reus), *Mullaney* and *Patterson* (burden of proof), and in *Rummel*, *Hutto*, *Solem*, *Harmelin*, and now *Ewing* (proportionality). Other opinions were not reversed, but instead left adrift “as a derelict on the waters of the law.” Perhaps if the Court had not sent its watchers reeling almost as soon as they had begun to make another cautious foray into one corner of constitutional criminal law, someone might have begun the task of assembling the bits and pieces of doctrine into a whole. Instead, these partial academic projects of construction were condemned to irrelevance, and abandoned, as soon as the Supreme Court changed course, again.

Id. at 521-22 (footnotes omitted) (quoting *Lambert*, 355 U.S. at 232 (Frankfurter, J., dissenting)).

55. *Id.* at 521.

56. *Id.* at 510 n.2.

57. *Id.* at 519.

58. *Id.* at 510 (footnote omitted).

59. *Id.* at 510 n.2.

60. See, e.g., Gary V. Dubin, *Mens Rea Reconsidered: a Plea for A Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322, 367-69 (1966); Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 882 (1999).

61. See, e.g., Ronald Jay Allen, *Mullaney v. Wilbur*, *The Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 TEX. L. REV. 269, 285-86 (1977); Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 CALIF. L. REV. 1665, 1689-1703 (1987); Jeffries & Stephan, *supra* note 31, at 1328-44; Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 462-74, 487-88 (1989).

with the basic point—there is very little meaningful constitutional regulation of criminal law. Surveying the past decades from the standpoint of 1997, Ronald Allen wrote, “Virtually every . . . foray of the Court into the constitutional aspects of the substantive criminal law . . . [is] typified by early cases that seem to have lurking in them grand pronouncements that would curtail state control over the criminal law” and “[i]n each case, those grand pronouncements were ground down to virtual insignificance in subsequent cases.”⁶² In 1999, Alan Michaels concluded, “The Supreme Court has been extremely reluctant to develop substantive due process rules governing what may be considered constitutionally proper objects of punishment. The Court has repeatedly and emphatically stated that deciding what is criminal is the right of the legislatures, particularly the state legislatures, in the first instance.”⁶³

III. A FOCUS ON CASES UPHOLDING STATE CRIMINAL LAWS

Having surveyed prominent commentators’ estimations of the absence of case law (and their tentative explanations for it), it is now worth undertaking a new reading with fresh eyes. While these commentators lamented the lack of coherence in the Court’s approach to substantive criminal law, this vision likely resulted from a focus on cases where the Court *did* intervene to promulgate a rule. Thus, it seems random that privacy and vagueness are constitutionalized, whereas mens rea is not.⁶⁴ We will do the opposite, and focus on the cases where the Court does *not* intervene—where the Court refuses to find that a state criminal law is unconstitutional.⁶⁵ After all, if the status quo is the lack of constitutional regulation, then the theory to be found is one of inaction or restraint.

As we will see, in cases where the Court refuses to invalidate a state criminal law, there is a rationale that appears with consistency: federalism. This is not to say that it is the only rationale, or the most

62. Ronald J. Allen, *Foreword: Montana v. Egelhoff—Reflections on the Limits of Legislative Imagination and Judicial Authority*, 87 J. CRIM. L. & CRIMINOLOGY 633, 648-49 (1997).

63. Michaels, *supra* note 60, at 882 (footnotes omitted).

64. Moreover, when viewed together the burden of proof cases have been described as unintelligible. See Dubber, *supra* note 30, at 522-30 (first citing Ronald J. Allen, *The Restoration of In re Winship: A Comment on Burdens of Persuasion in Criminal Cases After Patterson v. New York*, 76 MICH. L. REV. 30, 36-43, 45-53 (1977); and then citing Claire Finkelstein, *Positivism and the Notion of an Offense*, 88 CALIF. L. REV. 335, 343-49 (2000)) (discussing attempts to create theory of the burden of proof cases).

65. See *infra* Part III.

important.⁶⁶ With notable exceptions,⁶⁷ though, federalism appears in the vast majority of these cases.⁶⁸

In what follows, we will trace out the development of this “federalism rationale,” and will see that it makes an appearance at least once every decade from the 1950s onward.⁶⁹

A. Leland v. Oregon

We begin, in 1952, with the case of *Leland v. Oregon*.⁷⁰ In *Leland*, the defendant challenged a state statute that required the insanity defense to be proven beyond a reasonable doubt by the defense.⁷¹ The Court held that this law did not violate the Due Process Clause.⁷²

The Court in *Leland* began its analysis by noting that the Oregon law “adopted the prevailing doctrine of the time,” which was the familiar *M’Naghten*’s rule.⁷³ However, at the time the case was decided, Oregon was the last remaining jurisdiction to require that the defense be proved beyond a reasonable doubt.⁷⁴ Twenty other states at the time made the burden a preponderance of the evidence, and the federal government had made the burden “clear[.]” proof.⁷⁵ Interestingly, the *Leland* Court quoted

66. Nor is it to say that proffered rationales necessarily explain a decision. They may be nothing more than rhetorical makeweights. Nevertheless, even rhetoric is worthy of critical analysis when it is enshrined in fundamental law. For an example of a scholar who has taken note of the federalism rhetoric, but seen it as masking a deeper concern see Youngjae Lee, *Federalism and the Eighth Amendment*, 98 IOWA L. REV. BULL. 69, 71-73 (2013) (noting that the Court’s refusal to implement proportionality rules is due to uncertainty about theories of punishment, despite federalism language in opinions).

67. One area where I have not found evidence of federalism-based arguments is the First Amendment. Cases upholding criminal statutes as non-violative of this constitutional provision instead treat “the state” as a monolithic concept, without attention to the fact that there are indeed many different states. *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296, 308-11 (1940) (“When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious.”). This may be a feature of the strict scrutiny test, which looks to an abstracted governmental interest.

68. Of the cases outside the First Amendment that uphold a state criminal law and do not invoke federalism, I only found one. *See Rogers v. Tennessee*, 532 U.S. 451, 453, 461-62 (2001) (holding that retroactive judicial abolition of a “year and a day rule” for murder causation did not violate the Due Process Clause). In *Rogers*, the Court was more concerned with retroactivity and with the nature of common law adjudication. *See id.* at 461-62.

69. *See infra* Part III.

70. 343 U.S. 790 (1952).

71. *Id.* at 793.

72. *Id.* at 799-801; *see* U.S. CONST. amend. XIV, § 1.

73. *Leland*, 343 U.S. at 796 (quoting *M’Naghten’s Case* (1843) 8 Eng. Rep. 718, 719 (H.L.)).

74. *Id.* at 797-98.

75. *Id.* The federal standard was announced in 1895. *See Davis v. United States*, 160 U.S. 469, 483-93 (1895).

the case establishing the federal rule—*Davis v. United States*⁷⁶—which stated, “[I]t is desirable that there be uniformity of rule in the administration of the criminal law in governments whose constitutions equally recognize the fundamental principles that are deemed essential for the protection of life and liberty.”⁷⁷ However, *Leland* was quick to distinguish that observation as irrelevant to the case at bar: “The decision obviously establishes no constitutional doctrine, but only the rule to be followed in federal courts. As such, the rule is not in question here.”⁷⁸ Apparently, uniformity was only desirable *within* a jurisdiction.

Across the states, though, there was no similar demand. Contrasting the preponderance jurisdictions with the single beyond a reasonable doubt jurisdiction—Oregon—the Court wrote, “[W]e see no practical difference of such magnitude as to be significant in determining the constitutional question we face here.”⁷⁹ In fact, the popularity of a given practice was not determinative with respect to the Due Process claim:

The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”⁸⁰

Popularity is relevant, but it will not carry the day.

The reason for this begins, on its face, as a product of judicial restraint. Quoting Justice Frankfurter in an older case, the Court stated, “The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment.”⁸¹

Judicial restraint concerns then dovetail, though, into those of federalism. After warning of the “idiosyncrasies of . . . personal judgment” by Justices, the Court stated, “We are therefore reluctant to interfere with Oregon’s determination of its policy . . . since we cannot say that policy violates generally accepted concepts of basic standards of justice.”⁸² It is not just that individual judge’s predilections ought not be enshrined into law, but also that those predilections, if given legal effect,

76. 160 U.S. 469 (1895).

77. *Leland*, 343 U.S. at 797 (quoting *Davis*, 160 U.S. at 488).

78. *Id.*

79. *Id.* at 798.

80. *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), *overruled by* *Malloy v. Hogan*, 378 U.S. 1 (1964)).

81. *Id.* at 799 (quoting *Malinski v. New York*, 324 U.S. 401, 417 (1945)).

82. *Id.*

would thwart the “determination of [a State’s] policy.”⁸³ Thus, the issue of insanity was not merely a scientific issue, but a question “of basic policy as to the extent to which that knowledge should determine criminal responsibility.”⁸⁴ The word “policy” is a telltale sign that the Court was committing the issue to the State’s discretion—policy is a political choice.⁸⁵

Even Justice Frankfurter’s dissent, while disagreeing with its implication, seemed compelled to invoke federalism. “Especially is deference due to the policy of a State when it deals with local crime, its repression and punishment,” he wrote.⁸⁶ Still, “[t]here is a gulf, however narrow, between deference to local legislation and complete disregard of the duty of judicial review.”⁸⁷

Thus, in *Leland*, the stage is already set for decades of recurring use of the federalism rationale. *Leland* contrasts fundamental justice with the inherently discretionary concept of “policy,” and tethers the “policy” decision to the individual state-jurisdiction.⁸⁸

B. Ferguson v. Skrupa

Next to consider is the 1963 case of *Ferguson v. Skrupa*.⁸⁹ In *Ferguson*, Kansas had made it a misdemeanor offense for any person to engage “in the business of debt adjusting” except as an incident to “the lawful practice of law in this state.”⁹⁰ “Debt adjusting” meant what we might today call a credit relief or consolidation.⁹¹ A three-judge district court held that this law violated the Due Process Clause, relying on *Lochner*-esque reasoning.⁹²

83. *See id.*

84. *Id.* at 801 (footnote omitted).

85. “In sum, within any single State in our representative democracy, voters may exercise their political will to direct state policy” *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 42 (1994).

86. *Leland*, 343 U.S. at 807 (Frankfurter, J., dissenting).

87. *Id.*

88. *Id.* at 798-99 (majority opinion).

89. 372 U.S. 726 (1963).

90. *Id.* at 726-27 (quoting KAN. STAT. ANN. § 21-2464 (1961, repealed 1969)).

91. *Id.* at 727 (quoting KAN. STAT. ANN. § 21-2464).

The statute defines “debt adjusting” as “the making of a contract, express, or implied with a particular debtor whereby the debtor agrees to pay a certain amount of money periodically to the person engaged in the debt adjusting business who shall for a consideration distribute the same among certain specified creditors in accordance with a plan agreed upon.”

Id. (quoting KAN. STAT. ANN. § 21-2464).

92. *Id.* at 727-28; *see Lochner v. New York*, 198 U.S. 45 (1905).

The Court, unsurprisingly, reversed.⁹³ The rationale began with one of judicial restraint and concomitant deference to the legislature in economic regulation.⁹⁴ Like in *Leland*, though, this then bled into an invocation of federalism through the language of state policy discretion: “It is now settled that States ‘have power to legislate against what are found to be injurious practices in their internal commercial and business affairs’”⁹⁵ Thus, “the Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting.”⁹⁶

C. Powell v. Texas

The next—and perhaps most comprehensive—representation of the federalism argument appears in a 1968 case *Powell v. Texas*.⁹⁷ *Powell* is well known to students of criminal law as the case that limited the rule of *Robinson v. California*,⁹⁸ (against status crimes), and it therefore holds an important place in the narrative of “unfulfilled potential.”⁹⁹

Powell involved a challenge to a Texas offense which read as follows: “Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars.”¹⁰⁰ The defendant argued that the Eighth Amendment prohibited punishment for this conduct, given the rule against status crimes announced in *Robinson*.¹⁰¹ The Court upheld the law, and named two primary rationales: “Traditional common-law concepts of personal accountability and essential considerations of federalism”¹⁰²

These rationales are really fused, though: the Court thought that criminal law should be guided by the common law, and that the common law is state law. “We cannot,” wrote the Court, “cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds.”¹⁰³ And, these tools are useful

93. *Skrupa*, 372 U.S. at 731-33.

94. *Id.* at 730.

95. *Id.* (quoting *Lincoln Fed. Lab. Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536 (1949)).

96. *Id.* at 731.

97. 392 U.S. 514 (1968).

98. 370 U.S. 660 (1962).

99. *Powell*, 392 U.S. at 532 (citing *Robinson*, 370 U.S. 660).

100. *Id.* at 517 (quoting TEX. PENAL CODE ANN. art. 477 (West 1913)).

101. *Id.* at 531-32; see U.S. CONST. amend VIII.

102. *Powell*, 392 U.S. at 535.

103. *Id.* at 535-36 (citing Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932)).

because of the “constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man.”¹⁰⁴ Incrementalism is necessary, as the criminal law’s deeper moral implications make its development a complex undertaking, and this development must take place locally: “This process of adjustment has always been thought to be the province of the States.”¹⁰⁵ The states are responsible for criminal law, then, both because diversity in jurisdiction allows for different evolutions of a complicated area of law, and also because the “nature of man” seems to be so bound up with moral considerations that it is appropriately assessed by the government which is closer to its citizens.

The Court made explicit its vision of diverse approaches to different criminal law questions in an analogy made to the insanity defense. Citing the D.C. Circuit’s changing insanity rule, the Court wrote that “[t]he experimentation of one jurisdiction in that field alone indicates the magnitude of the problem.”¹⁰⁶ Imposition of a uniform principle across the states impedes innovation and diversity of development: “[F]ormulating a constitutional rule would reduce, if not eliminate, that fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold.”¹⁰⁷

The Court also professed anxiety over the prospect of developing a robust body of substantive criminal law: “[I]t is difficult to see any limiting principle that would serve to prevent this Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country.”¹⁰⁸ Note the concern with diversity of jurisdictions, and the important final clause—a preoccupation with geographic differences.

The federalism rationale thus looms large in *Powell*. It is perhaps even more salient, though, in the concurrence by Justice Black, joined by Justice Harlan.¹⁰⁹ He begins by noting that such constitutional regulation of criminal law would be “a revolutionary doctrine of constitutional law that would . . . tightly restrict state power to deal with a wide variety of

104. *Id.* at 536.

105. *Id.*

106. *Id.* (citing *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), *overruled by United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972)).

107. *Id.* at 536-37.

108. *Id.* at 533.

109. *Id.* at 544-45 (Black, J., concurring).

other harmful conduct.”¹¹⁰ States need to deal with problems like crime, and the Court would only get in the way.¹¹¹ Moreover, states solve the problem of crime *better* than does a central government. Justice Black wrote that “[p]erceptive students of history at an early date learned that one country controlling another could do a more successful job if it permitted the latter to keep in force the laws and rules of conduct which it had adopted for itself.”¹¹²

Part of this seems to be geographic for Justice Black. In an extended passage, he discusses how the colonies on the east coast eventually “crept cautiously westward.”¹¹³ “During all this period,” he wrote, “the Nation remembered that it could be more tranquil and orderly if it functioned on the principle that the local communities should control their own peculiarly local affairs under their own local rules.”¹¹⁴ Again, the peculiarity of a locality seems to be its climate and terrain:

We are asked to tell the most-distant Islands of Hawaii that they cannot apply their local rules so as to protect a drunken man on their beaches and the local communities of Alaska that they are without power to follow their own course in deciding what is the best way to take care of a drunken man on their frozen soil.¹¹⁵

Federalism is important, for Justice Black, because a drunk on the beach is less of a problem than a drunk in a snow bank. The Court, Justice Black warned, ought not to act “as a board of Platonic Guardians to establish rigid, binding rules upon every small community in this large Nation.”¹¹⁶ Note the concern for distance and the size of the locality, made even more explicit in the next line: “It is always time to say that this Nation is too large, too complex and composed of too great a diversity of peoples for any one of us to have the wisdom to establish the rules by which local Americans must govern their local affairs.”¹¹⁷

Here, we see a deeper justification for federalism that itself results from disparate geography—“diversity of peoples,” which Justice Black likely meant as culture. In concluding, Justice Black wrote that this diversity meant that “experience in making local laws by local

110. *Id.* at 537.

111. MARKUS DIRK DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* 190 (2005).

112. *Powell*, 392 U.S. at 547 (Black, J., concurring).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

people themselves is by far the safest guide for a nation like ours to follow,” and this was especially so in criminal law—the law most concerned with “age-old questions of . . . ethical foundations and practical effectiveness.”¹¹⁸

D. *Patterson v. New York*

The next major presentation of the federalism argument comes in 1976, in *Patterson v. New York*.¹¹⁹ *Patterson*, like *Powell*, is another leading representation of the “unfulfilled potential” narrative—it narrowed the holding of a prior case, *Mullaney*, and upheld a New York law placing the burden of proof for establishing a defense of extreme emotional disturbance on the defendant.¹²⁰

In *Patterson*, the analysis of the offense immediately begins with an invocation of federalism: “It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.”¹²¹ Accordingly, a state’s “decision” in criminal law will not be invalidated unless it violates fundamental norms—notice the language of discretion and policy.¹²² This is reinforced later in the opinion, where the Court notes that the rule makes prosecution easier, and this is framed as New York’s “choice.” “If the State nevertheless chooses to recognize a factor that mitigates the degree of criminality or punishment,” the Court wrote, “we think the State may assure itself that the fact has been established with reasonably certainty.”¹²³ In a footnote, “choice” and “decision” become “policy,” and policy choices are up for disagreement:

The drafters of the Model Penal Code would, as a matter of policy, place the burden of proving the nonexistence of most affirmative defenses . . . on the prosecution once the defendant has come forward with some evidence that the defense is present. The drafters recognize the need for flexibility, however, and would, in “some exceptional situations,” place the burden of persuasion on the accused.¹²⁴

118. *Id.* at 548.

119. 432 U.S. 197 (1977).

120. *Id.* at 201. The defense had the effect of reducing a second-degree murder conviction to that of manslaughter. *Id.* at 199 n.3.

121. *Id.* at 201 (citations omitted) (citing *Irvine v. California*, 347 U.S. 128, 134 (1954) (plurality opinion)).

122. *Id.* at 201-02.

123. *Id.* at 209.

124. *Id.* at 209 n.11.

A state must be free to exercise its “judgment” with respect to how “cumbersome,” “expensive,” or “inaccurate” a given rule would be.¹²⁵ Thus, the Court also cited *Leland* and noted that the Oregon insanity rule, although singular amongst the various jurisdictions, did not violate the Due Process Clause.¹²⁶ Flexibility and diversity—even if it results in outliers—does not make the outlier invalid.

In concluding, the Court’s preoccupation with federalism becomes less subtle: “We thus decline to adopt [the proposed rule] as a constitutional imperative, operative countrywide”¹²⁷ The reason why “countrywide” rules are disfavored is set out in the important, and much-quoted sentence: “Traditionally,” the Court wrote, “due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society’s interests against those of the accused have been left to the legislative branch.”¹²⁸ This sounds more like separation of powers than federalism, but it is both. This deference is to a specific level of legislature: the states. *Patterson* sets out the primary theory of Due Process regulation of the criminal law—that it is minimal, delineating only the very outer bounds of acceptability—and it justifies this abdication of responsibility using federalism.

Like in *Leland*, Justice Powell’s dissent in *Patterson* agrees on this basic principle, it disagrees only in the principle’s application:

The Court beats its retreat from *Winship* apparently because of a concern that otherwise the federal judiciary will intrude too far into substantive choices concerning the content of a State’s criminal law. The concern is legitimate, but misplaced. *Winship* and *Mullaney* are no more than what they purport to be: decisions addressing the procedural requirements that States must meet to comply with due process. They are not outposts for policing the substantive boundaries of the criminal law.¹²⁹

Again, even the dissenters agreed that the federal courts ought not “intrude” into a state’s criminal law and rejected the task of “policing the boundaries” of substantive criminal law.¹³⁰ By the time of *Powell*, then, the federalism rationale for Supreme Court deference in this area had become an axiom that was no longer up for debate.

125. *Id.* at 209.

126. *Id.* at 204.

127. *Id.* at 210.

128. *Id.*

129. *Id.* at 227-28 (Powell, J., dissenting) (citations omitted).

130. *Id.*

E. Rummel v. Estelle

Federalism was also featured prominently in the 1980 Eighth Amendment case *Rummel v. Estelle*.¹³¹ In *Rummel*, the defendant was sentenced to life in prison under Texas's recidivist statute, which stipulated that "[w]hoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary."¹³² Rummel's three crimes were fraudulent use of a credit card for more than \$50, a check forgery of \$28.36, and obtaining \$120.75 under false pretenses.¹³³ He argued that a life sentence was disproportionate for his offenses under the Eighth Amendment and the Court rejected the claim.¹³⁴ In making his challenge, the defendant compared recidivist statutes amongst the states, noting the particular severity of the Texas regime.¹³⁵

The Court dismissed this line of argument by appealing to federalism. Quoting Justice Holmes's *Lochner* dissent, the Court stated that "our Constitution 'is made for people of fundamentally differing views'" and it compared various peculiar laws amongst states—such as Arizona's crime against the theft of a horned animal, and California's crime against theft of avocados.¹³⁶ The Court noted that "[i]n one State theft of \$100 will earn the offender a fine or a short term in jail; in another State it could earn him a sentence of 10 years' imprisonment."¹³⁷ These seemingly absurd juxtapositions, though, served only to prove the Court's point: states can do what they want. "Absent a constitutionally imposed uniformity inimical to traditional notions of federalism," the Court wrote, "some State will always bear the distinction of treating particular offenders more severely than any other State."¹³⁸ This is justified mostly because of imperfect knowledge as "[p]enologists themselves have been unable to agree whether sentences should be light or heavy, discretionary or determinate."¹³⁹ Without a complete understanding, states are best left to experimentation—"uncertainty reinforces our conviction that any 'nationwide trend' toward [certain]

131. 445 U.S. 263 (1980).

132. *Rummel*, 445 U.S. at 264 (quoting TEX. PENAL CODE § 12.42 (West 1973)).

133. *Id.* at 265-66.

134. *Id.* at 267.

135. *Id.* at 279-81.

136. *Id.* at 281-82 (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905)).

137. *Id.* at 282 (footnotes omitted).

138. *Id.* (footnote omitted).

139. *Id.* at 283 (footnotes omitted).

sentences must find its source and its sustaining force in the legislatures, not in the federal courts.”¹⁴⁰

F. *McMillan v. Pennsylvania*

The next case to consider, *McMillan v. Pennsylvania*,¹⁴¹ was decided in 1986.¹⁴² *McMillan* involved a challenge to Pennsylvania’s Mandatory Minimum Sentencing Act,¹⁴³ which required a minimum sentence of five years imprisonment if the defendant “visibly possessed a firearm” during the commission of an offense.¹⁴⁴ This fact need only have been established by a preponderance of the evidence.¹⁴⁵ The petitioner argued that, under the law of *In re Winship*¹⁴⁶ and *Mullaney*, “if a State wants to punish visible possession of a firearm it must undertake the burden of proving that fact beyond a reasonable doubt.”¹⁴⁷ In other words, the factor was required to be listed as an offense element.

In rejecting this claim, the Court invoked *Patterson*, and emphasized that “*Patterson* rests on a premise . . . that preventing and dealing with crime is much more the business of the States than it is of the Federal Government.”¹⁴⁸ Like in *Patterson*, the Court also discussed the burden of proof issue as a “choice” for the states:

While visible possession might well have been included as an element of the enumerated offenses, Pennsylvania chose not to redefine those offenses in order to so include it, and *Patterson* teaches that we should hesitate to conclude that due process bars the State from

140. *Id.* at 283-84. Some scholars argue that *Rummel* has been overtaken by later cases, but they admit that the case is still cited. See Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 730 n.246 (2005) (“The continuing significance of *Rummel* today is unclear. *Solem*, decided three years later, is impossible to square with *Rummel*. Neither is *Rummel* consistent with the current position of the Supreme Court, which is that there is a narrow principle of proportionality under the Eighth Amendment that has been valid since *Weems* and controls both noncapital and capital cases. Although the case continues to be cited by the Court as good law, much of the rationale of the opinion remains deeply at odds with the cases decided since then.”).

141. 477 U.S. 79 (1986), *aff’d sub nom.* Commonwealth v. McMillan, 567 A.2d 1043 (Pa. 1990).

142. See *id.* While this is ostensibly a sentencing case, it is discussed along with the guilt-stage cases because the petitioners’ argument was that the sentencing factor necessarily should have been treated as a liability element. *Id.* at 87-90.

143. 42 PA. CONS. STAT. § 9712 (1974), *declared unconstitutional by* Commonwealth v. Valentine, 101 A.3d 801 (Pa. 2014).

144. *McMillan*, 477 U.S. at 80-81 (citing 42 PA. CONS. STAT. § 9712(a)).

145. 42 PA. CONS. STAT. § 9712(b).

146. 397 U.S. 358, 361-62 (1970).

147. *McMillan*, 477 U.S. at 84.

148. *Id.* at 85 (citation omitted).

pursuing its chosen course in the area of defining crimes and prescribing penalties.¹⁴⁹

Once we are in the realm of “choice,” state laws are immunized from constitutional invalidation.¹⁵⁰ After observing that many states have included weapon possession as offense elements, the Court wrote, “[T]he fact that the States have formulated different statutory schemes to punish armed felons is merely a reflection of our federal system,” which demands “[t]olerance for a spectrum of state procedures dealing with a common problem of law enforcement.”¹⁵¹ While the *Patterson* Court observed that disparity amongst rules would not invalidate outliers, in *McMillan* this disparity is almost lauded.¹⁵²

G. *Martin v. Ohio*

The next year, in 1987, the Court decided *Martin v. Ohio*,¹⁵³ in which the petitioner challenged the Ohio statute placing the burden of establishing self-defense on the defendant.¹⁵⁴ The Court upheld the law.¹⁵⁵

In coming to this conclusion, the opinion frequently invoked federalism.¹⁵⁶ It cited *Patterson*, saying, “We there emphasized the preeminent role of the States in preventing and dealing with crime and the reluctance of the Court to disturb a State’s decision with respect to the definition of criminal conduct and the procedures by which the criminal laws are to be enforced in the courts.”¹⁵⁷ *Martin* actually strengthens the claim of *Patterson*: criminal law was called “the business of the States”¹⁵⁸ in the earlier case, but later the States are called “preeminent.”¹⁵⁹ It is not just that states “do” criminal law, but that they “do it better.”

149. *Id.* at 86.

150. See DUBBER, *supra* note 111, at 180-81. The language of state “choice” is also used later in the opinion: “That Pennsylvania’s particular approach has been adopted in few other States does not render Pennsylvania’s choice unconstitutional.” *McMillan*, 477 U.S. at 90.

151. *McMillan*, 477 U.S. at 90 (quoting *Spencer v. Texas*, 385 U.S. 554, 566 (1967)).

152. *Patterson v. New York*, 432 U.S. 197, 210-11 (1977). Interestingly, the dissent in *McMillan* was authored by Justice Marshall—the same justice who wrote *Patterson*. See *McMillan*, 477 U.S. at 93 (Marshall, J., dissenting). Justice Marshall wrote that the issue in the case “is a question that must be decided by this Court and cannot be abdicated to the States.” *Id.*

153. 480 U.S. 228 (1987).

154. *Id.* at 230.

155. *Id.* at 236.

156. See *id.* at 232, 236.

157. *Id.* at 232 (citing *Patterson*, 432 U.S. at 201-02).

158. *Patterson*, 432 U.S. at 201.

159. *Martin*, 480 U.S. at 232.

Martin is also another example of a case where the dissent sheds light on the larger terms of debate—and here—it is federalism. Justice Powell, like prior dissenters, was forced to accept the basic premise: “I agree, of course, that States must have substantial leeway in defining their criminal laws and administering their criminal justice systems.”¹⁶⁰ Moreover, he focused repeatedly on the issue of state deference, and described the majority’s ruling as being motivated by “its willingness to defer to the State’s legislative definitions of crimes and defenses.”¹⁶¹ Justice Powell’s dissent, given its focus on the limits of federalism, gives us a window into the importance of that rationale for the majority.

H. *Harmelin v. Michigan*

The 1991 case *Harmelin v. Michigan*,¹⁶² is another important presentation of the federalism argument—like *Rummel*, in the context of sentencing.¹⁶³ The petitioner in *Harmelin* was sentenced to life incarceration without parole for the possession of less than 700 grams of cocaine, and he argued that this sentence was unconstitutionally disproportionate.¹⁶⁴

The plurality opinion relied on the federalism rationale invoked by *Rummel*. After quoting that case, the plurality elaborated further:

Diversity not only in policy, but in the means of implementing policy, is the very *raison d’être* of our federal system. Though the different needs and concerns of other States may induce them to treat simple possession of 672 grams of cocaine as a relatively minor offense nothing in the Constitution requires Michigan to follow suit. The Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions.¹⁶⁵

States ought to be able to punish the same conduct differently because each jurisdiction may have “different needs and concerns,” and also because thoughts on punishment can change, thus making uniform national rules undesirable.

Justice Kennedy’s controlling concurrence also emphasized federalism. “[M]arked divergences both in underlying theories of

160. *Id.* at 241 (Powell, J., dissenting).

161. *Id.* at 240–41, 243–44.

162. 501 U.S. 957 (1991).

163. *Id.* at 990; *id.* at 999–1000 (Kennedy, J., concurring).

164. *Id.* at 961 (majority opinion).

165. *Id.* at 990 (citations omitted).

sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure,” he wrote.¹⁶⁶ Here, disparity is not a byproduct, but a desirable result. Quoting another case, Justice Kennedy asserted, “Our federal system recognizes the independent power of a State to articulate societal norms through criminal law.”¹⁶⁷ This morality-laden aspect of federalism is especially relevant in sentencing law:

State sentencing schemes may embody different penological assumptions, making interstate comparison of sentences a difficult and imperfect enterprise. And even assuming identical philosophies, differing attitudes and perceptions of local conditions may yield different, yet rational, conclusions regarding the appropriate length of prison terms for particular crimes. Thus, the circumstance that a State has the most severe punishment for a particular crime does not by itself render the punishment grossly disproportionate.¹⁶⁸

Different jurisdictions are allowed, and expected, to have different views about the punitive upshots for the same conduct, both because of differing views of the purposes of punishment and because of differing applications of the same purpose to local conditions.

I. *Medina v. California*

Moving forward to 1992, we turn to *Medina v. California*.¹⁶⁹ In *Medina*, the petitioner challenged a California law placing the burden to prove mental competency to stand trial on the defendant.¹⁷⁰ Rejecting the contention that the *Mathews v. Eldridge*¹⁷¹ test applied to criminal proceedings, the Court instead applied *Patterson* and quoted the familiar line: “It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government . . . and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.”¹⁷²

Medina adds some new considerations, though, which the Court believed were “suggest[ed]” by *Patterson*. “[B]ecause the States have considerable expertise in matters of criminal procedure and the criminal

166. *Id.* at 999 (Kennedy, J., concurring).

167. *Id.* (quoting *McCleskey v. Zant*, 499 U.S. 467, 491 (1991)).

168. *Id.* at 999-1000 (citations omitted) (citing *Rummel v. Estelle*, 445 U.S. 263, 281 (1991)).

169. 505 U.S. 437 (1992).

170. *Id.* at 442.

171. 424 U.S. 319 (1976).

172. *Medina*, 505 U.S. at 445 (citations omitted) (quoting *Patterson v. New York*, 432 U.S. 197, 201 (1977)).

process is grounded in centuries of common-law tradition,” the Court wrote, “it is appropriate to exercise substantial deference to legislative judgments in this area.”¹⁷³ This is an echo of the “common-law-federalism” amalgam discussed earlier in *Powell*, in which experimentation and the localism of mores worked to justify deference to states.¹⁷⁴ Here, it is the “expertise” of the states that is highlighted—expertise undoubtedly gained because of the “centuries” of development that formed the common law. *Medina* notes that this practice of deference means that the “less intrusive” test is the appropriate test for due process in criminal law—not that of *Mathews*.¹⁷⁵

J. Montana v. Egelhoff

In 1996 the Court decided *Montana v. Egelhoff*,¹⁷⁶ a case in which the following state law was challenged: “[Voluntary intoxication] may not be taken into consideration in determining the existence of a mental state that is an element of [the criminal] offense.”¹⁷⁷ *Egelhoff* is complicated, and produced only a plurality opinion with a controlling concurrence by Justice Ginsburg. Both opinions contain federalism-based themes.

Following an extended analysis of the common law’s position on voluntary intoxication, the plurality chose to end its opinion with a flourish discussing federalism. First, the opinion quoted the important line from *Powell* regarding the debate about the “nature of man” as “the province of the states.”¹⁷⁸ Next, the language of state “choice” was invoked: “The people of Montana have decided to resurrect the rule of an earlier era, disallowing consideration of voluntary intoxication when a defendant’s state of mind is at issue. Nothing in the Due Process Clause prevents them from doing so”¹⁷⁹ Here we see a more explicit connection drawn between “state policy” federalism and the concept of democratic legitimacy—it is “the people” of the state who chose, and this democratic wellspring is framed as in opposition to the Constitution. Expansive interpretations of the Due Process Clause would “prevent[]” the “people” from making their “deci[sion].”¹⁸⁰

173. *Id.* at 445-46. Here, the Court is not talking about criminal “procedure” in the Fourth Amendment sense.

174. *See Powell v. Texas*, 392 U.S. 514, 535-37 (1968).

175. *Medina*, 505 U.S. at 445-46.

176. 518 U.S. 37 (1996).

177. *Id.* at 39-40 (quoting MONT. CODE ANN. § 45-2-203 (1973)).

178. *Id.* at 56 (quoting *Powell*, 392 U.S. at 536).

179. *Id.*

180. *Id.*

Justice Ginsburg's concurrence, too, contains lineaments of the federalism rationale. She noted that "States enjoy wide latitude in defining the elements of criminal offenses," and cited *Martin*.¹⁸¹ She then wrote that this was especially the case when determining "the extent to which moral culpability should be a prerequisite to conviction of a crime."¹⁸² Moreover, she cited to a Pennsylvania case in which that court referenced *Powell*'s "nature of man" quotation.¹⁸³

K. Washington v. Glucksberg

The next case to consider was decided in 1997, *Washington v. Glucksberg*,¹⁸⁴ and addressed a Washington State assisted suicide offense.¹⁸⁵ The Court held that the crime did not violate the Due Process Clause, relying mostly on the long history of suicide bans in American law.¹⁸⁶

After turning from its historical discussion, though, the Court invoked federalism themes. The Court noted that "[p]ublic concern and democratic action are . . . sharply focused" on end-of-life issues, and that therefore "the States are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues."¹⁸⁷ While not stating it explicitly, the opinion lauded the state-level experimentation anticipated by *Powell*.

Justice Souter's concurrence was more direct. In comparing legislative competencies with those of the judiciary, he wrote that

[l]egislatures, on the other hand, have superior opportunities to obtain the facts necessary for a judgment about the present controversy. Not only do they have more flexible mechanisms for factfinding than the Judiciary, but their mechanisms include the power to experiment, moving forward and pulling back as facts emerge within their own jurisdictions. There is, indeed, good reason to suppose that in the absence of a judgment for respondents here, just such experimentation will be attempted in some of the States.¹⁸⁸

181. *Id.* at 58 (Ginsburg, J., concurring) (citing *Martin v. Ohio*, 480 U.S. 228, 232 (1987)).

182. *Id.* (quoting *Powell*, 392 U.S. at 545).

183. *Id.* at 59 (first quoting *Powell*, 392 U.S. at 536; and then citing *Commonwealth v. Rumsey*, 454 A.2d 1121, 1122 (1983)). Note, however, that deference to the "State" here ironically did not translate into deference to a State high court.

184. 521 U.S. 702 (1997).

185. *Id.* at 705-06.

186. *Id.* at 706-07, 710-19.

187. *Id.* at 716, 719.

188. *Id.* at 788 (Souter, J., concurring).

Like in *Leland*, this was not just a separation of powers observation, but also one of federalism. The experimentation will take place among “jurisdictions”—plural—and it was happening in “some of the States.”¹⁸⁹

L. *Ewing v. California*

In 2003, the Court decided the most recent case that refused to strike down a sentencing scheme on Eighth Amendment grounds: *Ewing v. California*.¹⁹⁰ *Ewing* involved a proportionality challenge to California’s “three strikes” law—a recidivist statute designed to “protect[] the public safety by providing lengthy prison terms for habitual felons.”¹⁹¹

The plurality opinion approved Justice Kennedy’s concurrence in *Harmelin*, including his observations about the “beneficial, result[s] of the federal structure.”¹⁹² However, the plurality also added new thoughts:

Throughout the States, legislatures enacting three strikes laws made a deliberate policy choice that individuals who have repeatedly engaged in serious or violent criminal behavior . . . must be isolated from society in order to protect the public safety. Though three strikes laws may be relatively new, our tradition of deferring to state legislatures in making and implementing such important policy decisions is longstanding. . . . Our traditional deference to legislative policy choices finds a corollary in the principle that the Constitution “does not mandate adoption of any one penological theory.” . . . A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation. . . . Some or all of these justifications may play a role in a State’s sentencing scheme. Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.¹⁹³

Here, again, we see the rhetoric of state “policy” and “choice” invoked, and its resultant implication—deference to state legislatures.

189. *Id.*

190. 538 U.S. 11 (2003) (plurality opinion).

191. *Id.* at 14-15.

192. *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring); see *Ewing*, 538 U.S. at 24-25 (citing *Harmelin*, 501 U.S. at 998-99 (Kennedy, J., concurring)).

193. *Ewing*, 538 U.S. at 24-25 (citations omitted).

M. Clark v. Arizona

In 2006 the Court decided the last case we must consider: *Clark v. Arizona*.¹⁹⁴ The law at issue in *Clark* eliminated “cognitive incapacity” as a type of insanity excuse—when an actor is “unable to understand what he is doing.”¹⁹⁵ It also restricted the consideration of insanity evidence to the question of the defense, eliminating its bearing on mens rea elements.

The majority opinion, by Justice Souter, is very long and extensively reasoned, and the federalism rationale makes notable appearances. In discussing the formulation of the insanity rule—the first aspect of the challenge noted above—the Court noted, “[T]he insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice.”¹⁹⁶ This is especially true in the case of insanity, where medical science and legal defenses are “subject to flux and disagreement.”¹⁹⁷ When there is “fodder for reasonable debate . . . due process imposes no single canonical formulation.”¹⁹⁸ Here the Court reiterated the familiar language of state “choice,” and echoed the experimentation rationale which was first fully discussed in *Powell*—nearly forty years prior.¹⁹⁹

In discussing the state court’s restriction of insanity evidence to the defense elements, these themes of choice and experimentation reoccur. The Court stated that Arizona had “authority to define” the defense “by choosing an insanity definition.”²⁰⁰ Later, the Court wrote that “[i]t bears repeating that not every State will find it worthwhile to make the judgment Arizona has made, and the choices the States do make about dealing with the risks posed by mental-disease and capacity evidence will reflect their varying assessments . . . as expressed in choices of insanity rules.”²⁰¹ Experimentation requires choice, and this will result in disparity across jurisdictions.

N. Summary

Beginning in 1952 with *Leland* and ending in 2006 with *Clark*, we have walked through the story of federalism as an argument against

194. 548 U.S. 735 (2006), *aff’d sub nom.* Clark v. Arnold, 769 F.3d 711 (9th Cir. 2014).

195. *Id.* at 742.

196. *Id.* at 752.

197. *Id.*

198. *Id.* at 753.

199. *Id.* at 752; *see* Powell v. Texas, 392 U.S. 514, 536-37 (1968).

200. *Clark*, 548 U.S. at 771.

201. *Id.* at 778 (footnote omitted).

constitutional limits on criminal law. What we found was a consistent invocation of various themes such as the importance of state policy choices, experimentation amongst jurisdictions, state expertise and preeminence in criminal law, and diversity in societal norms. While federalism was not the only force in play when the Court refused to invalidate the laws discussed above, it was an important and enduring one.²⁰²

IV. THE CONCEPT OF FEDERALISM AND ITS JUSTIFICATIONS

The task ahead is to assess whether federalism deserves the status it has obtained in the criminal law context. However, to answer this question we first need a more precise understanding of what is meant by federalism, and why it is or is not beneficial in criminal cases.

Edward L. Rubin and Malcolm Feeley write that federalism is a “broad political or legal term[]” and “can mean many different things.”²⁰³ Because of this, it is important to say what “federalism” we are speaking about—what is the “federalism” discussed in the above cases? The federalism we are concerned with is federal judicial deference to state institutions—both legislatures and courts—in the area of criminal law, taking its form as a narrow interpretation of certain constitutional provisions. But while federalism is this practice, it is also an *argument* that justifies the practice. Thus, it makes sense to speak of the Court as deferring to states “because of federalism” just as much as it is to say that that deference is itself “federalism.” We are concerned with both the practice and the argument.

The reasons why this is thought to be a beneficial practice or system have often been referred to as federalism’s “values.”²⁰⁴ Often, these are assumed away and not thoroughly examined. As Barry Friedman observes, “[E]ven familiar arguments for federalism are

202. For a very broad outline of the typical arguments used to resist “substantive due process” regulation of law, see Justice Harlan’s concurrence in *Griswold*, where federalism is but one of a number of reasons:

Judicial self-restraint will not, I suggest, be brought about in the ‘due process’ area by the historically unfounded incorporation formula long advanced by my Brother BLACK, and now in part espoused by my Brother STEWART. It will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.

Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring).

203. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 910 (1994); see Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 504 & n.32 (1995).

204. See, e.g., Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 404-05 (1997).

remarkably poorly developed in the literature. Instead, we tend to utter these reasons as slogans, without thinking through them or testing them.”²⁰⁵ Erwin Chemerinsky lodges this critique at the Court as well:

[O]f all the areas of constitutional law, discussions about federalism are the ones where the underlying values are least discussed and are the most disconnected from the legal doctrines. . . . [W]here in federalism cases is there any careful exploration of why state autonomy matters and how it is undermined by specific federal actions?²⁰⁶

While there is no exhaustive or authoritative list of the justifications for federalism, Heather Gerken writes that there is a “healthy pluralism.”²⁰⁷ The Supreme Court has repeatedly mentioned six major values. The canonical listing comes from the 1991 case *Gregory v. Ashcroft*,²⁰⁸ which stated the following:

This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Perhaps the principal benefit of the federalist system is a check on abuses of government power.²⁰⁹

Twenty years later, in *Bond v. United States*, the Court re-affirmed *Gregory*’s catalogue, but made explicit an additional value—the

205. *Id.* Heather Gerken believes that this may be because the central debates about federalism are the implementation of the values. “Federalism theory has long exhibited a healthy pluralism with regard to the ends federalism promotes. . . . The Supreme Court reels off these arguments as easily as scholars do. The divide in federalism debates centers on the means necessary to achieve those ends.” Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1552-53 (2012) (footnote omitted) [hereinafter Gerken, *Our Federalism(s)*]; see Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1891 (2013) [hereinafter Gerken, *New Nationalism*] (“Supporters of conventional federalism have a ready list of reasons why states matter. Federalism promotes choice, fosters competition, facilitates participation, enables experimentation, and wards off a national Leviathan.”).

206. Chemerinsky, *supra* note 203, at 501-02.

207. Gerken, *Our Federalism(s)*, *supra* note 205, at 1552.

208. 501 U.S. 452 (1991).

209. *Id.* at 458 (citations omitted). Interestingly, the Court also cites to two law review articles for the same proposition, first citing Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1491-1511 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS’ DESIGN* (1987)); and then citing Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3-10 (1988). The arguments contained in these articles flesh out the statements in the opinion, but do not seem to add anything new to them.

“integrity, dignity, and residual sovereignty of the States . . . [as] an end in itself, to ensure that States function as political entities in their own right.”²¹⁰ These, then, are the generally accepted values of federalism, listed in rough order of importance²¹¹: (1) maximization of individual liberty through checks on government power (the “principal benefit”); (2) experimentation and innovation across jurisdictions; (3) responsiveness to geographic diversity; (4) democratic participation, (5) competition for citizens; and (6) inherent sovereignty.²¹²

Before assessing the validity of these values as reasons for judicial restraint in the area of constitutional criminal law, more should be said about each. However, as the cases in the previous section reveal, only two of these values are regularly used by the Court in the criminal context: societal diversity and jurisdictional experimentation. Since these are the expressed justifications for resisting a constitutional criminal law, they will be addressed first, and more fully.

A. Experimentation-Based Federalism

As we saw in the line of criminal cases above, the first and most common justification of federalism is efficiency through experimentation. The efficiency of federalism in turn seems to have two sub-parts: (1) it is more efficient to allow different jurisdictions to experiment with different approaches than to impose a uniform rule; and (2) localities better understand their own problems, and therefore can tailor legal solutions more effectively.

The genesis of Experimentation Federalism, at least from reading string citations, is *New State Ice Co. v. Liebmann*.²¹³ This case involved a *Lochner*-era, substantive due process invalidation of an Oklahoma

210. 564 U.S. 211, 221 (2011), *rev'd*, 134 S. Ct. 2077 (2014); *see* *Wyeth v. Levine*, 555 U.S. 555, 584 (2009).

211. The order of importance is based on statements made by the Court, or on how frequently each is used.

212. Note that academic literature generally agrees with this formulation. *See* Gerken, *Our Federalism(s)*, *supra* note 205, at 1552-53 n.6 (first citing *Gregory*, 501 U.S. at 458-59; then citing DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 75-106 (1995); then citing Akhil Reed Amar, *Five Views of Federalism: “Converse-1983” in Context*, 47 *VAND. L. REV.* 1229 (1994); then citing Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 *DUKE L.J.* 75, 136-39 (2001); then citing Steven G. Calabresi, “*A Government of Limited and Enumerated Powers*”: *In Defense of United States v. Lopez*, 94 *MICH. L. REV.* 752, 774-79 (1995); then citing Merritt, *supra* note 209, at 3-10; then citing Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 *TEX. L. REV.* 1, 53-63 (2004); and then citing Michael W. McConnell, *supra* note 209, at 1493-1511).

213. 285 U.S. 262 (1932).

statute criminalizing ice manufacture without a license.²¹⁴ What is remembered, though, is this passage from Justice Brandeis's dissent:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.²¹⁵

This passage would be cited by countless other opinions invoking Experimentation Federalism (“Experimentation Federalism (1)”), and the language of state “experimentation” made its way into many of the criminal cases discussed earlier. This was most explicitly referenced in *Powell*: “[F]ormulating a constitutional rule would reduce, if not eliminate, that fruitful experimentation, and freeze [it] into a rigid constitutional mold.”²¹⁶ This was also apparent in *Rummel*, where the Court noted that “[p]enologists themselves have been unable to agree” on appropriate punishments, and that in this context of “uncertainty,” it was the place of the “legislatures” to continue experimentation.²¹⁷

Sympathetic commentators write that federalism “promote[s] the efficiency of government administration.”²¹⁸ Speaking more dispassionately, Susan Klein summarizes Experimentation Federalism as follows: “The first version of federalism seeks to preserve local control of the criminal-justice system and to foster diversity and experimentation that might improve efficiency in areas where there is nationwide agreement as to general goals, though perhaps not as to the best means for achieving those goals.”²¹⁹ Klein’s formulation adds an important nuance—this federalism is normally invoked only with respect to policy *means* (not ends), and only when the policy ends are somewhat agreed upon by all. As Barry Friedman writes, “Countless state and local governments, remote from one another but facing similar problems, develop numerous twists on solving them.”²²⁰

214. *Id.* at 271-72, 278-80.

215. *Id.* at 311 (Brandeis, J., dissenting).

216. *Powell v. Texas*, 392 U.S. 514, 536-37 (1968).

217. *Rummel v. Estelle*, 445 U.S. 263, 283-84 (1980).

218. Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1614 (1977) (noting that the purpose of federalism is “to promote the efficiency of government administration”).

219. Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CALIF. L. REV. 1541, 1541-42 (2002) (footnotes omitted).

220. Friedman, *supra* note 204, at 399-400 (footnote omitted).

The second type of Experimentation-based Federalism (“Experimentation Federalism (2)”) is a recognition of the superiority of local knowledge. This was implied by *Medina* when the Court spoke about the “considerable expertise” of States in criminal law issues, and by *Martin* when the role of the States was described as “preeminent.”²²¹ As Geoffrey Moulton, Jr. writes, “The great insight of federalism is that different levels of government have different competencies, and that wisely allocating responsibilities to those different levels of government can work significant benefits in terms of . . . governmental efficiency.”²²²

In sum, Experimentation Federalism is the argument that localized legal decision making is beneficial because (1) it allows for inter-jurisdictional experimentation with respect to the means of achieving shared goals; and (2) it places authority in the jurisdiction that has superior knowledge—by virtue of its size.²²³ Decentralized experimentation is seen as more “efficient” than the imposition of a uniform national rule, which would need to be repeatedly updated by Congress or the Supreme Court to fix its weaknesses. Experimentation Federalism presupposes that legal rules will not “get it right” the first time, and will inevitably need revision. The argument also assumes that there is a range of rules to solve a given problem—that there is not only one “right way,” and that the states will effectively “compare notes” with each other.²²⁴ Moreover, it is assumed that smaller governments

221. *Medina v. California*, 505 U.S. 437, 445-46 (1992); *Martin v. Ohio*, 480 U.S. 228, 232 (1987).

222. H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 852 (1999). Trust in state expertise is also present in Justice White’s dissent in *Robinson v. California*, which outlawed status crimes: “I fail to see why the Court deems it more appropriate to write into the Constitution its own abstract notions of how best to handle the narcotics problem, for it obviously cannot match either the States or Congress in expert understanding.” 370 U.S. 660, 689 (1962) (White, J., dissenting). Given that the States are placed alongside Congress, though, Justice White may have meant more that *legislatures* had expertise courts did not.

223. Friedman adds nuance to this argument, but this does not seem to be based on arguments made in cases, certainly not criminal cases:

There are essentially two common, related theories of federalism based upon efficiency.

The first theory, “decentralization,” makes the point that when power is diffused, different governments can adopt a mix of policies that meet the preferences of different citizens, thus maximizing the way in which government as a whole satisfies individual preferences. The second theory, “competition,” argues that citizens will vote with their feet by moving to jurisdictions that maximize their individual preferences.

Friedman, *supra* note 204, at 386-87 (footnotes omitted).

224. Recent scholarship informed by public choice theory argues that there may be a downside to “comparing notes,” in that political actors may learn bad lessons from each other about how to manipulate interest groups, institutions, and the electorate. Michael A. Livermore, *The Perils of Experimentation*, 126 YALE L.J. 636, 636 (2017) (“[L]earning can also occur along a political

know the peculiarities of their own problems better than a distant bureaucracy. They are more responsive to knowledge-inputs from the local citizenry, and are also run by officials who live in the given locality.

B. *Morality-Based Federalism*

The second major justification for deference to states that the Court has used in the context of criminal law is societal diversity: smaller, more local jurisdictions will be “more sensitive to the diverse needs of a heterogeneous society.”²²⁵ One scholar describes this as the ability to create the “type of social and political climate [citizens] prefer.”²²⁶ For our purposes—discussing, as we are, the imposition of state punishment—the relevant “diversity” here is *moral* diversity. It is differing views about what is and what is not worthy of punishment. This version of federalism holds that law-making should reflect a community’s moral consensus, and that therefore the more tightly a legal jurisdiction can map onto a moral community, the better.²²⁷ This rationale appears less often, and less forcefully, than does Experimentation Federalism. But Morality Federalism is still important.

It takes center stage in the oft-quoted line from *Powell*: federalism in criminal law is valuable because of the “constantly shifting adjustment of the tension between the evolving aims of the criminal law and [the] changing religious, moral, philosophical, and medical views of the nature of man.”²²⁸ Surely more is meant here than efficiency—this is about contestable moral propositions that are not resolvable with policy-based arguments.²²⁹ Justice Black’s concurrence in *Powell* hints at this as well when he speaks of “diversity of peoples,” meaning diversity of cultures.²³⁰ This is especially implicated by criminal law, which is

dimension as information about ideological preferences, campaign techniques, and electoral incentives is revealed. Both types of information can be put to use in the policy arena by a host of individual and institutional actors that have a wide range of motives, from a public-spirited concern for the general welfare to a desire to maximize personal financial returns. . . . [D]ecentralization can lead to the overproduction of socially harmful information.”)

225. *Bond v. United States*, 564 U.S. 211, 221 (2011) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

226. Merritt, *supra* note 209, at 8.

227. *See Powell v. Texas*, 392 U.S. 514, 535-36 (1968).

228. *Id.* at 536.

229. As John Rawls observed, “[A] basic feature of democracy is the fact of reasonable pluralism—the fact that a plurality of conflicting reasonable comprehensive doctrines, religious, philosophical, and moral, is the normal result of its culture of free institutions.” John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 766 (1997).

230. *Powell*, 392 U.S. at 547-48 (Black, J., concurring). Justice Black also invoked these themes when he was on the dissenting side in *In re Winship* stating:

concerned with “age-old questions” of the law’s “ethical foundations and practical effectiveness.”²³¹ Justice Kennedy’s concurrence in *Harmelin* is also replete with this theme, and recognizes “the independent power of a State to articulate societal norms through criminal law.”²³²

Klein describes this value-laden variant of federalism as “foster[ing] a community’s expression of morality.”²³³ Friedman, too, describes one of the “values” of federalism to be “cultural diversity”: “[T]here is some substance to this idea of diversity, substance that cannot be taken into account through national legislation.”²³⁴ Importantly, this expression of local morality can be both rights-enabling and rights-restricting.²³⁵ Friedman gives the examples of drinking ages, speed limits, and gun usage.²³⁶ Firearm possession is an excellent example of the dual nature of Morality Federalism: some states aggressively punish possession of certain types of firearms, while other states actively protect the conduct through legislation.²³⁷

Putting together rights-enabling and rights-restricting scenarios, we can synthesize a more generally applicable description of Morality Federalism: the moral views of a jurisdiction ought to be instantiated in that jurisdiction’s criminal law because (1) the people in that community hold those moral beliefs; and (2) it is these people who will be required to live under whatever law they enact. It is *within* the jurisdiction that criminal law is created and where it applies. Therefore, if law should reflect moral viewpoints, law is most appropriately made at the smallest jurisdictional level. As Billionis argues, “[C]riminal law is most responsive to the people who require its protection and who must live under its force when it is fashioned and maintained at the state level,”

It can be, and has been, argued that when this Court strikes down a legislative act because it offends the idea of “fundamental fairness,” it furthers the basic thrust of our Bill of Rights by protecting individual freedom. But that argument ignores the effect of such decisions on perhaps the most fundamental individual liberty of our people—the right of each man to participate in the self-government of his society.

397 U.S. 358, 384-85 (1970) (Black, J., dissenting). For Justice Black, it is the liberty to participate and legislate that mattered—the “liberty of government,” which allowed the “States . . . to be left free to govern themselves in accordance with their own views of fairness and decency.” *Id.* at 385.

231. *Powell*, 392 U.S. at 548 (Black, J., concurring).

232. *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring) (citation omitted).

233. Klein, *supra* note 219, at 1542.

234. Friedman, *supra* note 204, at 401-02.

235. Klein seems to take into account only rights-enabling localism, but this misses half the picture. See Klein, *supra* note 219, at 1579-83.

236. Friedman, *supra* note 204, at 402.

237. See, e.g., N.Y. PENAL LAW § 265.00 (McKinney 1965); TEX. PENAL CODE ANN. § 46.02 (West 2011).

and moreover, “[f]ederalism invites a decentralized disposition of issues that, if addressed at a national level, would spark peculiar divisiveness because of their myriad local implications.”²³⁸

Morality Federalism, like Experimentation Federalism, is built on various assumptions—two of which are somewhat controversial. First, of course, is that it is true or valid that criminal law should reflect morality. This implicates a classic debate in legal theory.²³⁹ The argument also assumes a descriptive claim that moral viewpoints will very often be concentrated *geographically* and along jurisdictional boundaries. While this may seem intuitively true, this is hotly debated by scholars.²⁴⁰ The issues surrounding these two assumptions will be addressed later.²⁴¹

C. Liberty-Based Federalism

Having finished the discussion of the two primary values of federalism invoked by the Supreme Court in constitutional criminal cases, we now turn to federalism’s values more generally. Because these are not explicitly used by the Court in the earlier cases, though, they will be addressed in less depth.

We begin with a value that is generally called federalism’s “principal benefit” by the Court: the preservation of individual liberty through the creation of dual sovereigns that check each other.²⁴² “[A] healthy balance of power between the States and the Federal Government,” wrote the Court in *Gregory*, “will reduce the risk of tyranny and abuse from either front.”²⁴³ The Court then quoted Alexander Hamilton’s observation that “[p]ower [is] almost always the rival of power,” and that “[i]f [the people’s] rights are invaded by either [government], they can make use of the other as the instrument of

238. Bilionis, *supra* note 47, at 1303-04; *see also* Roderick M. Hills, Jr., *Federalism as Westphalian Liberalism*, 75 *FORDHAM L. REV.* 769, 770 (2006) (describing federalism as means of devolving contentious moral decisions to local level so as to “defus[e] deep disagreements”).

239. *See* Jeffrie G. Murphy, *Legal Moralism and Liberalism*, 37 *ARIZ. L. REV.* 73, 75 (1995) (discussing so-called “Hart-Devlin Debate”).

240. *Compare* Guido Calabresi & Eric S. Fish, *Federalism and Moral Disagreement*, 101 *MINN. L. REV.* 1, 18 (2016) (“Who can doubt the deep geographic divide, in America, of moral attitudes with respect to guns, abortion, capital punishment, gay marriage, religious fundamentalism, assisted suicide, and more.”), *and* Daniel J. Elazar, *Foreword: The Moral Compass of State Constitutionalism*, 30 *RUTGERS L.J.* 849, 861 (1999) (calling states “distinct societies”), *with* JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS, A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* (2005) (noting lack of distinctive identities due to “the ease and frequency of mobility; [and] the dominance of mass media and mass marketing of national scope”).

241. *See infra* Part VI.A.2.a, A.3.b.

242. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

243. *Id.*

redress.”²⁴⁴ Liberty Federalism, then, is the argument that creating competing vehicles of political will empowers the citizenry in controlling those institutions, and prevents one from becoming preeminent and overweening.²⁴⁵

One aspect of this deserves emphasis: it is primarily the liberty of the *individual citizens* that is sought to be maximized, not the liberty of the State *qua* institution. As the Court wrote in *New York v. United States*,²⁴⁶ “The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.”²⁴⁷

Liberty Federalism presumes that states and the federal government will act in tension, and not in concert, when it comes to personal freedoms. There is evidence of this happening—say, with state legalization of marijuana possession or, before *Obergefell*, allowing gay marriage.²⁴⁸ However, there are also examples of cooperative restrictions on liberty—for example, the Federal Defense of Marriage Act (“DOMA”),²⁴⁹ which empowered states to refuse to recognize other states’ gay marriages.²⁵⁰ Liberty Federalism is most problematic, and perhaps entirely inapplicable in the context of the criminalization power. It is not obvious that, by creating two different entities with the ability to proscribe individual conduct, personal freedom is increased. Part VI further discusses this.²⁵¹

244. *Id.* at 458-59 (citing THE FEDERALIST NO. 28 (Alexander Hamilton)).

245. *See* *Bond v. United States*, 564 U.S. 211, 221-22 (2011), *rev’d*, 134 S. Ct. 2077 (2014).

246. 505 U.S. 144 (1992).

247. *Id.* at 181.

248. *See* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596-97 (2015) (discussing prior same-sex legalizations).

249. Pub. L. No. 104-99, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7, and 28 U.S.C. § 1738C (2012)), *invalidated by* *United States v. Windsor*, 133 S. Ct. 2675 (2013). In 2013, the Supreme Court held that DOMA was unconstitutional. *Windsor*, 133 S. Ct. at 2694-96.

250. *Obergefell*, 135 S. Ct. at 2597 (discussing DOMA). Moreover, it is not obvious that smaller jurisdictions will be more protective of individual liberty. *See* Erwin Chemerinsky, *Does Federalism Advance Liberty?*, 47 WAYNE L. REV. 911, 927 (2001) (“The argument then must be that a government that is more responsive to the people will be one that better protects liberty. But this premise is highly questionable; it assumes that popular sentiment is likely to be rights progressive rather than rights regressive. To the extent that voters at the state and local level prefer rights regressive legislation—or more likely a rule that abuses a particular minority group—greater responsiveness increases the dangers of government tyranny.”).

251. *See infra* Part VI.B.1.

D. Democratic Participation-Based Federalism

Another value of federalism is that, because it creates smaller government, “it increases opportunity for citizen involvement in democratic processes.”²⁵² Deborah Merritt helpfully sketches out why such involvement is desirable: “[I]t trains citizens in the techniques of democracy, fosters accountability among elected representatives, and enhances voter confidence in the democratic process.”²⁵³ Similarly, Michael McConnell notes that the founders saw federalism as enhancing an essential “public spiritedness,” since “participation in deliberation over the public good” was more accessible in states than in a remote central government.²⁵⁴ What we can call “Participation Federalism,” then, is the argument that for multiple reasons it is beneficial for citizens in a democracy to be engaged in political processes, and that this is facilitated by smaller units of lawmaking.

Participation Federalism makes the values of federalism synonymous with the values of democracy.²⁵⁵ Because of this, participation is one of the most coherent reasons for supporting the system of dual sovereignty. If the features of a democracy are esteemed in this country—primarily, citizen involvement in self-government—then an institutional structure that helps advance those features ought also to be esteemed. In the context of criminal law, Participation Federalism tracks closely with the concerns of morality federalism, but adds a process-based riff: local morality should determine what conduct is and is not punished in a locality, but the smaller the locality, the better the opportunities for citizens to make their moral viewpoints known. The same level of citizen participation and impact is more implausible in the federal context.

E. Mobile Citizenry-Based Federalism

A fifth value of federalism that is mentioned by the Court and commentators, although not in the criminal context, is the notion that federalism enables “voting with one’s feet.”²⁵⁶ The Court wrote in its

252. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

253. Merritt, *supra* note 209, at 7-8 (footnotes omitted).

254. McConnell, *supra* note 209, at 1510; *see also* Roderick M. Hills, Jr., *The Individual Right to Federalism in the Rehnquist Court*, 74 GEO. WASH. L. REV. 888, 889 (2006) (arguing that “federalism itself is an individual right because it provides an accessible mechanism by which laypeople can influence the scope of their rights”).

255. For more on the values of democratic theory see STEPHEN MACEDO, *LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* (Oxford University 1990).

256. Friedman, *supra* note 204, at 387; *see* *Bond v. United States*, 564 U.S. 211, 221-22

canonical discussion of federalism that the existence of sub-national governmental units “makes government ‘more responsive by putting the States in competition for a mobile citizenry.’”²⁵⁷ The Court cited to McConnell,²⁵⁸ who connected this value back to liberty stating that the “[o]ppressive measures at the state level are easier to avoid.”²⁵⁹ However, the Court’s invocation of mobility seems more nuanced—mobility leads to competition, and in turn more “responsive” government. Different legal jurisdictions are conceptualized as different products in a larger market for law and government, with citizens as the freely-choosing consumers. Presumably, as in a normal market, competition between the “suppliers”—states—will drive down the “prices” and makes the “products” better.²⁶⁰ This theory finds its intellectual genesis in the well-known work of political economist Charles Tiebout.²⁶¹

Mobility Federalism in the context of criminal law is an attractive theory. Citizens wishing to leave a state with objectionable criminal laws can escape their application by re-locating; citizens wishing to live in a place where certain conduct is punished, for whatever reason, can do the same. In the aggregate, this movement is expected to serve as a consensus signal to the state governments more generally, pointing them to the better decisions in criminal lawmaking. A contemporary example of exodus from an undesirable legal regime can be seen in the move away from jurisdictions that criminalize marijuana possession and use into those that have legalized it.²⁶² Conversely, mobility due to the

(2011), *rev'd*, 134 S. Ct. 2077 (2014); *Gregory*, 501 U.S. at 458.

257. *Bond*, 564 U.S. at 221 (quoting *Gregory*, 501 U.S. at 458).

258. *Gregory*, 501 U.S. at 458 (citing McConnell, *supra* note 209).

259. McConnell, *supra* note 209, at 1503.

260. Ronald McKinnon & Thomas Nechyba, *Competition in Federal Systems: The Role of Political and Financial Constraints*, in *THE NEW FEDERALISM: CAN THE STATES BE TRUSTED?* 3, 11-12 (John A. Ferejohn & Barry R. Weingast eds., 1997) (“In the same way as different types of individuals choose different shopping centers that provide varying mixes of products and services, under decentralization these individuals will choose (by deciding where to live) different types of communities that provide varying mixes of public services.”).

261. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 419-20 (1956). In 1956, Tiebout hypothesized that although the provision of public goods by governments was traditionally thought to work outside normal economic principles, in a system with different geographic jurisdictions and porous borders, citizen mobility enabled the functioning of a market: “Moving or failing to move replaces the usual market test of willingness to buy a good and reveals the consumer-voter’s demand for public goods.” *Id.* at 420.

262. *See Marijuana Refugees: Looking for a New Homes in Pot-Legal States*, NBC NEWS (Feb. 5, 2014, 3:42 PM), <http://www.nbcnews.com/business/consumer/marijuana-refugees-looking-new-homes-pot-legal-states-n22781>. According to one news site, in 2015, the Colorado Health Department reported that eighty percent of all new citizens reported moving to Colorado because of marijuana legalization. *See According to a New Survey, 4 out of Every 5 People Move to Colorado for Marijuana*, DENVER CITY PAGE, <http://www.imfromdenver.com/according-to-a-new-survey-4->

attractiveness of criminalization is likely illustrated by citizens seeking out places that are more “tough on crime” to feel safer.²⁶³

Mobility Federalism is predicated on a number of assumptions, though, most important being (1) the ability of citizens to actually move;²⁶⁴ and (2) that states are incentivized to compete for larger populations, and will shape their policies accordingly.²⁶⁵ The theory would be of little value if only the rich could escape the onerous criminal regime, or if the state criminalized without regard for citizen movement.

F. *Inherent Sovereignty-Based Federalism*

Last to consider is the “value” of federalism least mentioned by the Court—perhaps because it seems to be less of a normative justification than a descriptive explanation: the residual sovereignty of the states. This is the theory that the historic fact of state sovereignty, altered only by the ratification of the Constitution, but largely preserved by the Tenth Amendment, is itself a “reason” for federalism. Sovereignty Federalism eschews the search for the system’s benefits, though, and instead treats federalism as intrinsically worthwhile.²⁶⁶

While earlier cases suggested that the value of federalism was instrumental to individual liberty,²⁶⁷ in *Bond* the Court made clear that while federalism was not “just an end in itself,” it was also valuable for its own sake: “The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States. The federal

out-of-every-5-people-move-to-colorado-for-marijuana (last visited Feb. 15, 2018).

263. For Doron Teichman’s theory, see *infra* notes 391-95 and accompanying text. He posits that, given the “goal of encouraging crime migration,” states may respond by “gradually harshen[ing] their criminal justice system” so as to “rais[e] the price of committing a crime within it.” Doron Teichman, *The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition*, 103 MICH. L. REV. 1831, 1834 (2005).

264. Tiebout, *supra* note 261, at 419. Tiebout calls it an “assumption” that “[c]onsumer-voters are fully mobile and will move to that community where their preference patterns . . . are best satisfied.” *Id.*

265. H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 MINN. L. REV. 73, 130-32 (1997) (“Unlike a unitary national government, which reduces choice and is relatively unaffected by competition, state governments have an incentive to implement policies that not only maximize utility for a majority of voters already in the state but also serve to attract additional taxpayers.” (footnote omitted)).

266. *Bond v. United States*, 564 U.S. 211, 221-22 (2011), *rev’d*, 134 S. Ct. 2077 (2014).

267. *New York v. United States*, 505 U.S. 144, 181 (1992) (citation omitted). This was only recently made explicit by the Supreme Court. Earlier, in *New York v. United States*, the Court emphasized the ultimate aim of preserving liberty: “State sovereignty is not just an end in itself: ‘Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.’” *Id.* (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting), *abrogated in part by Martinez v. Ryan*, 566 U.S. 1 (2012)).

balance is, in part, an end in itself, to ensure that States function as political entities in their own right.”²⁶⁸

Understanding federalism to be intrinsically valuable is problematic, as it provides no deeper principles to resort to in hard cases. It seems shallow and incomplete to say that an institutional structure is an “end in itself,”²⁶⁹ or, as Michael Dorf describes it, “that state sovereignty is one of the cold hard facts of life.”²⁷⁰ Read charitably, this might be understood as a historically based social contract theory: the states were sovereign entities before 1789, and the Constitution is contract whereby the states willingly gave up some of their power. This would explain the emphasis on “residual” powers being “preserve[d]”—even after the ratification.²⁷¹ As Dorf writes, this view understands “the parties to the contract were sovereign States and therefore honoring the contract means protecting state sovereignty.”²⁷²

Thought to be at the core of such residual power is the “police power”—a power which existed pre-ratification, and is thus called “historic.”²⁷³ In turn, the core of the police power has been described as “[t]he promotion of safety of persons and property.”²⁷⁴ Power to protect people and things, though, further implies the power to prohibit and punish conduct.²⁷⁵ Therefore, criminalization is viewed as one of the primary aspects of state sovereignty.²⁷⁶ Sovereignty Federalism results in

268. *Bond*, 564 U.S. at 221 (quoting *New York*, 505 U.S. at 181).

269. *New York*, 505 U.S. at 181.

270. Michael C. Dorf, *Instrumental and Non-Instrumental Federalism*, 28 RUTGERS L.J. 825, 829 (1997).

271. It also comports with other language in the earlier *New York* case, where the Court quoted *The Federalist* No. 39: “States are not mere political subdivisions of the United States. . . . The Constitution instead ‘leaves to the several States a residuary and inviolable sovereignty,’ . . . reserved explicitly to the States by the Tenth Amendment.” *New York*, 505 U.S. at 188 (quoting THE FEDERALIST NO. 39 (James Madison)).

272. Dorf, *supra* note 270, at 830. Dorf sees two problems with this theory of federalism. First, that “we have no good reason to believe that a legal document’s legitimacy rests entirely, or even principally, on adherence to some original understanding,” and second, that “the terms of the social compact were significantly altered in the wake of the Civil War.” *Id.* at 830-31 (footnote omitted).

273. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

274. *Kelley v. Johnson*, 425 U.S. 238, 247 (1976). “The States have broad authority to enact legislation for the public good—what we have often called a ‘police power.’” *Bond v. United States*, 134 S. Ct. 2077, 2086 (2014) (citing *United States v. Lopez*, 514 U.S. 549, 567 (1995)).

275. See *Lopez*, 514 U.S. at 609 (Souter, J., dissenting) (“The Court observes that the Gun-Free School Zones Act operates in two areas traditionally subject to legislation by the States, education and enforcement of criminal law.”); *Engle v. Isaac*, 456 U.S. 107, 128 (1982) (“The States possess primary authority for defining and enforcing the criminal law.”); see also *Gonzales v. Raich*, 545 U.S. 1, 42-43 (2005) (O’Connor, J., dissenting) (“The States’ core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens.” (first citing *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993); and then citing *Whalen v. Roe*, 429 U.S. 589, 603 n.30 (1977))).

276. The real historical story is more complicated. Dubber has exhaustively chronicled the

a narrow view of the federal government's power to criminalize, and assumes that most crime can and should be dealt with at the state level. For example, when the Court reached the merits in *Bond*, it emphasized that a federal crime prohibiting possession of "chemical weapons" ought not be applied to cases of local assault using chemicals because to do so would "intrude upon the police power of the States."²⁷⁷

V. THE CONCEPT OF CONSTITUTIONAL CRIMINAL LAW

Having now looked more closely at federalism and its values, it is important to understand more precisely what federalism argues against: Supreme Court regulation of state criminal law. What would a constitutional criminal law look like if it were to be created? Remarkably, this issue is undertheorized in both case law and commentary. In what follows, this Article discusses both the general nature of these types of rules, as limitations on legislative power, and three prominent instantiations: offense definition rules, conduct protection rules, and sentencing proportionality rules.²⁷⁸

A. *The Law of Criminal Law: Rules About Rules*

When analyzing the concept of constitutional criminal law, it is most important to understand the implication of the first word: *constitutional*. This means that we are concerned with the proper scope and content of the "law of criminal law," not of the "criminal law" itself. Constitutional criminal law does not contain rules regarding conduct in society—it contains rules about these rules. In analytic jurisprudential terms, this law would be composed of "secondary rules"²⁷⁹ like H.L.A. Hart's "rule of recognition," which, as Scott Shapiro summarizes, "sets out the criteria of legal validity."²⁸⁰ Moreover, the norms of constitutional criminal law—these secondary rules—are not directed at citizens obeying the law, but instead at the officials who make it.²⁸¹ Importantly, the rules imposed on these officials take the form of

evolution of the meaning of "police," which in ancient times meant patriarchal household management, and later—in America—non-justiciability. DUBBER, *supra* note 111, at 190-203.

277. *Bond*, 134 S. Ct. at 2092.

278. See *infra* Part V.

279. SCOTT J. SHAPIRO, LEGALITY 80, 86-88 (2011); see H.L.A. HART, THE CONCEPT OF LAW 81 (Paul Craig ed., 3d ed. 2012) ("[R]ules of the first type impose duties; rules of the second type confer powers . . . [and] provide for . . . the creation or variation of duties . . .").

280. SHAPIRO, *supra* note 279, at 85.

281. *Id.* at 84-85.

“disabilities”—in Hohfeldian terms²⁸²—*limitations* on power, and not grants of power.²⁸³ Hart describes this in *The Concept of Law*:

A constitution which effectively restricts the legislative powers of the supreme legislature in the system does not do so by imposing . . . duties on the legislature not to attempt to legislate in certain ways; instead it provides that any such purported legislation shall be void. It imposes not legal duties but legal disabilities. “Limits” here implies . . . the absence of legal power.²⁸⁴

Constitutional criminal law, then, is a body of secondary rules that place disabilities on legislatures in the creation of criminal offenses. Put more plainly, it limits the power of punishment.

These types of rules could take many forms, though—some perhaps yet to be imagined. In order to ground ourselves in reality, we will look only at the most common types of constitutional rules that the Court has imposed or refused to impose in the area of criminal law.

B. Offense Definition Rules

One form of constitutional rule about criminal law is a rule about the manner in which offenses can be defined. While the word “crime” appears multiple times in the Constitution, it has never been interpreted by the Court.²⁸⁵ An offense definition rule would form part of such an interpretation.

While offense definition rules remain—with few exceptions—non-constitutional in status, they are well known to nearly everyone who thinks about criminal law. As Jeffries and Stephan write, “[C]riminal law doctrine’ refers not to the traditional definitions of specific offenses but rather to the conceptual structure of crime definition. This structure has been distilled from the common law tradition by generations of scholars and judges.”²⁸⁶ All this has been referred to by George Fletcher

282. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 55, 58 (1913); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 986 (1982).

283. Hohfeld, *supra* note 282, at 30. Thus, the Court was correct in one respect when it concluded that “a constitutional doctrine of criminal responsibility” would be “limitation by fiat.” *Powell v. Texas*, 392 U.S. 514, 534 (1968).

284. HART, *supra* note 279, at 69; SHAPIRO, *supra* note 279, at 89-90 (discussing legal “auto-limitation”).

285. See, e.g., U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .”); *Powell*, 392 U.S. at 535-37.

286. FLETCHER, *supra* note 28, at 4 (“[T]here is already much greater unity among diverse systems of criminal justice than we commonly realize.”); Jeffries & Stephan, *supra* note 31, at 1370.

as the “grammar of the criminal law. . . . [T]he deep structure, both the syntax and the semantics, of defining and punishing crime.”²⁸⁷

The most well-known parts of this conceptual structure are the formal requirements of a voluntary act—actus reus—and a blameworthy mental state—mens rea.²⁸⁸ Requiring that an offense include a voluntary act ensures that punishment will be limited to conduct, and not mere thoughts, circumstances, conditions, or statuses.²⁸⁹ Whereas the requirement of a culpable mental state limits punishment to conduct of which the actor is subjectively aware.²⁹⁰ This dichotomy is present at least as far back as Blackstone, who wrote that “to make a complete crime, cognizable by human laws, there must be both a will and an act.”²⁹¹ Highlighting the traditional importance of actus reus and mens rea, Robinson writes, “The distinction between these two concepts represents one of the most basic organizing distinctions in criminal law today.”²⁹²

Also notable is the legality principle and its sub-parts. The legality principle, put simply, is that “[p]unishment requires a crime, defined by law.”²⁹³ Its more famous, and ancient, formulation is *nulla poene sine lege*. However, in order to flesh out this principle, it is usefully divided into at least five sub-parts: legislativity,²⁹⁴ prospectivity,²⁹⁵ publicity,²⁹⁶

287. GEORGE P. FLETCHER, 1 *THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL* 8 (2007). Paul H. Robinson, too, calls this constellation of rules “the structure of criminal law.” See GUYORA BINDER, *THE OXFORD INTRODUCTIONS TO U.S. LAW: CRIMINAL LAW* 98 (Dennis Patterson ed., 2016) (“[T]he concept of a criminal offense . . . has implications for [its] form.”). See generally *THE STRUCTURE AND LIMITS OF CRIMINAL LAW* (Paul H. Robinson ed., 2014).

288. Jeffries & Stephan, *supra* note 31, at 1370-72, 1376-79 (discussing proportionality as an additional fundamental constraint).

289. Statuses include the identity, characteristics, or dispositions of the offender. *Id.* at 1370 (noting that liability cannot be premised on “personal characteristic or status”).

290. “Offense elements are of two kinds: (1) objective elements defining the required conduct, and any required antecedent or concurrent circumstances or results; (2) subjective elements, defining the offender’s beliefs, desires, or mental states at the time of his or her conduct.” BINDER, *supra* note 287, at 95. Admittedly, these concepts are easy to confuse. As Fletcher observes, “The requirement of action blurs into the requirement of voluntary action and in turn into the element of *mens rea* or culpability.” FLETCHER, *supra* note 287, at 287.

291. 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *21 (1769).

292. Paul H. Robinson & Joshua Samuel Barton, *Introduction* to *THE STRUCTURE AND LIMITS OF CRIMINAL LAW*, *supra* note 287, at xii.

293. BINDER, *supra* note 287, at 100.

294. Offenses must be created only by legislatures. See *United States v. Hudson & Goodwin*, 11 U.S. 32, 34 (1812) (holding that there are no common law federal crimes).

295. Offenses must only punish conduct committed after the crimes are promulgated. See U.S. CONST. art. I, § 9, cl. 3; *id.* § 10, cl. 1.

296. Offenses must be published and not secret. See *Lambert v. California*, 355 U.S. 225, 228 (1957) (stating the notice requirement).

specificity,²⁹⁷ and regularity (generality).²⁹⁸ All these requirements are designed to preserve individual liberty against arbitrary government power. Thus, Fletcher calls this “negative legality,” which is the shield against “an aggressive state that will invariably seek to impose its will on its subjects.”²⁹⁹ Note that the legality principle, unlike most other offense rules, is largely protected by constitutional provisions and by Supreme Court case law.³⁰⁰

The conceptual structure of an offense contains much more than *mens rea*, *actus reus*, and legality, though. Sometimes culpable choices are made not to act, and we call these “omissions.” Criminal law generally demands that offenses punishing omissions do so only in the presence of a duty to act.³⁰¹ As the Model Penal Code stipulates, “Liability for the commission of an offense may not be based on an omission . . . unless . . . a duty to perform the omitted act is otherwise imposed by law.”³⁰²

Moreover, many offenses take a form which is different from that of direct perpetration; liability is extended anticipatorily to non-consummated offenses, and participatorily to actors other than the direct perpetrator.³⁰³ Thus, criminal law recognizes attempt, solicitation, and conspiracy, but also recognizes a “merger” rule that prevents double-liability for both the anticipatory offense and a completed offense—say, for attempt and for the completed offense.³⁰⁴ Moreover, while jurisdictions diverge, some recognize a limit to attempt liability when an attempt is impossible or abandoned.³⁰⁵ With respect to participatory

297. Offenses must clearly state the conduct they prohibit. *See* *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983) (stating the vagueness doctrine).

298. Offenses must not target individuals or groups by name. *See* BINDER, *supra* note 287, at 100 (discussing the legality principle and defining regularity). “Regularity” is guaranteed by the bill of attainder provisions. *See* U.S. CONST. art. I, § 9, cl. 3; *id.* § 10, cl. 1.

299. FLETCHER, *supra* note 28, at 207.

300. *See, e.g., Kolender*, 461 U.S. at 357-58 (discussing the vagueness doctrine as effectuating notice, and non-arbitrary enforcement requirements); *see also* U.S. CONST. art. I, § 9, cl. 3; *id.* § 10, cl. 1.

301. BINDER, *supra* note 287, at 118-19.

302. MODEL PENAL CODE § 2.01(3)(b) (AM. LAW INST. 2016); *see* FLETCHER, *supra* note 28, at 47-48 (noting that the imposition of these duties “raises serious problems” of legality given that they are usually judicially generated).

303. *See* BINDER, *supra* note 287, at 288-328.

304. *Id.* at 230-33, 288-313. This is not frequently extended to conspiracy, however. *Id.* at 308-09.

305. *Id.* at 298-303. American courts normally only exempt from liability legally impossible attempts—when an actor mistakenly believes that his conduct is an offense. *Id.* at 299-301. These can be distinguished from factually impossible attempts. *See* FLETCHER, *supra* note 28, at 176-77 (“What people mean when they talk about impossible attempts is that some specific factual barrier prevents consummation of the offense: the gun is unloaded, the pocket is empty, the powder is just powder.”).

liability, criminal law has also recognized complicity as an offense form, but requires that aiding and abetting happen before completion of the principal's offense, and that the accomplice possess some minimal mental state with respect to the principal's ultimate aims.³⁰⁶

Once the offense elements are met, the concept of criminal law continues to impose structure to the analysis in the form of defenses. These are rules about liability that, unlike offenses, "exculpate" a defendant.³⁰⁷ First, sometimes the elements of an offense are satisfied yet the defendant did not act wrongfully—defenses of this type are called justifications.³⁰⁸ Second, the elements of an offense may be satisfied and the conduct wrongful, yet we have deemed that punishment is inappropriate based on qualities of the specific defendant—these are excuses.³⁰⁹ Recognition of these two defense-types is essential to limiting punishment to cases where it serves its purposes. As Guyora Binder writes, "[A] justification applies normative principles of criminalization directly to the criminal's act . . . [and] [a]n excuse applies normative principles of punishment directly to the criminal."³¹⁰

Finally, and easy to overlook, is the more modern concept of element analysis—the requirement that crimes "provid[e] a precise statement of all separate elements of an offense definition."³¹¹ We could imagine a crime that consisted of mashed together words creating some nebulous zone of prohibited conduct, but that would be unacceptable. Criminal law instead demands precision and clarity by organizing itself with elements, and delineating between subjective elements, the culpability elements, and objective elements, such as the conduct, circumstance, and result elements.³¹² These distinctions "provide fair notice of the scope of the prohibition, eliminate the need for judicial construction that may expand or reduce that scope, and delineate the scope so as to limit the arbitrary administration and application of

306. BINDER, *supra* note 287, at 316, 320-21.

307. FLETCHER, *supra* note 28, at 93.

308. BINDER, *supra* note 287, at 336.

309. *Id.* at 335-36.

310. *Id.* at 334. Kimberly Kessler Ferzan and Larry Alexander note that "[t]here is considerable controversy over how best to understand justifications and excuses." LARRY ALEXANDER ET AL., CRIME AND CULPABILITY 89 (2009). They also summarize the generally accepted view that "justifications are thought to focus on the wrongfulness of the *act*, excuses center on the blameworthiness of the *actor*." *Id.* For more on the difficulty in conceptualizing this distinction see Kent Greenawalt, *Distinguishing Justifications from Excuses*, 49 LAW & CONTEMP. PROBS. 89, 91-92 (1986); and Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 648-49 (1984), reprinted in THE STRUCTURE AND LIMITS OF CRIMINAL LAW, *supra* note 287, at 68-69.

311. Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 704 (1983).

312. *Id.* 706-09.

criminal laws.”³¹³ While offense elements themselves have constitutional status,³¹⁴ element analysis does not.

All of the above rules form the conceptual structure of criminal law, and impose a rational order for the definition and interpretation of offenses. For our purposes, it is important to note that these rules are almost entirely trans-substantive: they apply to all types of crimes.³¹⁵ However central, though, these rules are almost entirely absent from constitutional law.³¹⁶

C. Rights-Granting (Conduct Protection) Rules

The second category of rules the Supreme Court could impose on state criminal law is simpler to conceptualize, and is addressed more rarely: conduct protection, or rights-granting, rules. These will be prohibitions on prohibitions—the Court telling state legislatures what conduct they cannot punish.³¹⁷ For the citizen, though, these rules function as “immunities”³¹⁸ in that they immunize conduct from the reach of criminal law. The Court creates such “immunities” when it recognizes “rights” or “liberties.”

The best examples of this in criminal law are the privacy cases—often thought of as the substantive due process cases—culminating in *Lawrence v. Texas*.³¹⁹ However, cases like these are so few that they are all well-known to students and teachers of criminal law.³²⁰ While

313. *Id.* 703-04 (footnotes omitted).

314. *See In re Winship*, 397 U.S. 358, 361-62 (1970).

315. The only exceptions that come to mind would be any justifications or excuses that have limited factual applications. For example, the justification of self-defense applies only to offenses involving violence against other persons. Note that I do not include various conceptions of a criminal offense that are borrowed from non-Anglo-American systems. For example, in German criminal law, all offenses must protect one, and only one, recognized legal interest. *See FLETCHER*, *supra* note 28, at 105 (“Most . . . norms of the criminal law are designed to protect specific legal interests—what the Germans call *Rechtsgüter*.”). This type of requirement would not be trans-substantive, and would be more akin to the conduct protection rules discussed next. *See infra* Part V.C.

316. As mentioned earlier, legality is a notable exception. Note too that the Supreme Court has extensive case law on some of these issues, such as conspiracy liability and mens rea, but these cases are limited to an interpretation of federal statutes. *See, e.g., Morissette v. United States*, 342 U.S. 246, 260-73 (1952) (discussing federal statute on mens rea); *Kotteakos v. United States*, 328 U.S. 750, 769-77 (1946) (discussing federal conspiracy statute).

317. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 564-79 (2003).

318. *See Hohfeld, supra* note 282, at 55-56; Singer, *supra* note 282, at 986.

319. 539 U.S. 558; *see Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997) (discussing line of substantive due process cases in criminal law).

320. *See, e.g., McDonald v. City of Chicago*, 561 U.S. 742, 759-61 (2010); *Lawrence*, 539 U.S. at 564-69, 573-78; *Glucksberg*, 521 U.S. at 720-21; *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844, 846-53 (1992); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 271-84 (1990); *Bowers v. Hardwick*, 478 U.S. 186, 190-96 (1986), *overruled by Lawrence*, 539 U.S. 558;

Lawrence represented a momentous development, we have not seen new extensions of its rationale in criminal cases. There have been no new conduct protection rules flowing from the right to privacy—at least not in criminal cases.³²¹

The other major category of rights-granting rules involves a far more developed jurisprudence: that of the First Amendment. There are many cases protecting speech, expressive conduct, and religious exercise. For example, the Court has invalidated, either facially or as applied, criminal laws that punish wearing clothing with curse words on it,³²² burning the American flag,³²³ and ritually sacrificing animals.³²⁴ One cluster of cases in the First Amendment criminal context is worthy of special mention—the so-called overbreadth cases.³²⁵ According to the doctrine of overbreadth, a law can be challenged as facially unconstitutional even when its application to the defendant who is challenging it would be constitutional when viewed in isolation.³²⁶ An example of an overbroad offense is one that prohibits showing a drive-in movie containing nudity—overbroad because “nudity” contains innocuous images such as “a baby’s buttocks.”³²⁷

Moore v. City of E. Cleveland, 431 U.S. 494, 500-06 (1977); Roe v. Wade, 410 U.S. 113, 152-54 (1973), *overruled in part by Planned Parenthood of Se. Pa.*, 505 U.S. 833; Eisenstadt v. Baird, 405 U.S. 438, 440-41, 453-55 (1972); Loving v. Virginia, 388 U.S. 1, 8-9, 12 (1967); Griswold v. Connecticut, 381 U.S. 479, 483-86 (1965); Poe v. Ullman, 367 U.S. 497, 500 (1961); Meyer v. Nebraska, 262 U.S. 390, 397-401 (1923).

321. The recent case extending the fundamental right of marriage to homosexual couples, *Obergefell*, was an expansion of the substantive due process jurisprudence, but was not a criminal case. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015). Still, *Obergefell* would presumptively invalidate any state attempts to criminalize gay marriage, and therefore may be seen in some sense as a conduct-protection rule. *Id.* at 2600-05, 2607-08 (“But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there.”).

322. *Cohen v. California*, 403 U.S. 15, 16, 22-26 (1971) (noting that the defendant was arrested and convicted for wearing a jacket with “Fuck the Draft” written on it in a courthouse lobby).

323. *Texas v. Johnson*, 491 U.S. 397, 399-400, 410-20 (1989).

324. *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 524-28, 531-32 (1993).

325. Earlier overbreadth cases were not limited to the First Amendment. See, e.g., *Aptheker v. Sec’y of State*, 378 U.S. 500, 515-17 (1964) (suggesting that the statute was overbroad because it infringed on the right to travel).

326. *Sabri v. United States*, 541 U.S. 600, 609-10 (2004) (“[O]verbreadth challenges call for relaxing familiar requirements of standing, to allow a determination that the law would be unconstitutionally applied to different parties and different circumstances from those at hand.” (citing *City of Chicago v. Morales*, 527 U.S. 41, 55-56, 55 n.22 (1999))). While overbreadth is technically limited to First Amendment claims, Richard Fallon argues persuasively that the use of facial challenges is not. See Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 926-42, 941 tbl.1 (2011); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 365-71, 377-81 (1998).

327. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975).

It is important to note that, unlike the offense definition rules discussed earlier, conduct-protection rules are substance-specific—the technical term would be *cis-substantive*. That is, they are limited in application to certain categories of primary conduct. The privacy and First Amendment cases illustrate this feature well. Perhaps because of their specificity, the cases addressing constitutional claims of this kind are far rarer than those addressing offense definition rules, and consequently, federalism is employed more rarely to beat them back.

D. Proportionality Rules

The final category of constitutional rules to discuss is that of sentencing proportionality rules. These rules are premised on the Eighth Amendment's Cruel and Unusual Punishment Clause,³²⁸ which the Court has interpreted to require "that punishment for crime should be graduated and proportioned to offense."³²⁹ Youngjae Lee distills these rules into four categories,³³⁰ only one of which is of concern to the present discussion: "[C]onstitutionally permitted types of

328. U.S. CONST. amend. VIII. This Clause of the Amendment has been incorporated against the states, but the Excessive Fines Clause has not. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 259-60, 266-68 (1989) (discussing the historical application of the Excessive Fines Clause to fines "imposed by, and payable to, the government[]") and holding that the Clause does not apply to awards of punitive damages among private parties).

329. *Weems v. United States*, 217 U.S. 349, 365-67 (1910). For an in depth explanation of the reasons why proportionality is desirable, consider the following:

The fundamental legal protection that people be punished no more than they deserve is thus a requirement that flows neither from the laws of morality nor from some general principle that people ought to receive only what they deserve. Rather, it is one of many conditions that attach to the government's exclusive control of the power to criminalize and punish, and only by respecting such constraints can the State maintain the legitimacy of its exclusive control.

Youngjae Lee, *Why Proportionality Matters*, 160 U. PA. L. REV. 1835, 1838 (2012); see Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 266 (2005) ("[P]roportionality is better understood as an external limitation on the state's power to incarcerate or execute individuals, and this limitation applies whether the state is punishing to exact retribution, to deter, to incapacitate, or (as is most often the case) to pursue some amalgam of ill-defined and possibly conflicting purposes.").

330.

The first category prohibits certain types of punishments, such as burning at the stake, crucifixion, drawing and quartering, and torture. In the second are constitutionally permitted types of punishments that are nevertheless unconstitutional because they are disproportionate to the crimes for which they are imposed. The third category includes so-called "super due process for death" or "death is different" cases, which allow sentences of death only after procedures mandated and approved over time by the Supreme Court. Finally, in the fourth category are punishments that satisfy the requirements of type, proportionality, and procedure, but are nevertheless unconstitutional because of how they are administered.

Lee, *supra* note 140, at 678-79 (footnotes omitted).

punishments that are nevertheless unconstitutional because they are disproportionate to the crimes for which they are imposed.”³³¹ Outside of the unique death penalty context, this is basically an assessment of the proportionality of periods of incarceration. For example, a proportionality rule of this type might look like this: it is unconstitutional to sentence an offender to life imprisonment without parole for writing a bad check.³³²

Importantly, these rules only modify the *amount* of punishment—not whether something can be punished in the first place.³³³ In this way, they are fundamentally different from offense definition and conduct-protection rules. However, proportionality rules are similar to conduct-protection rules in that they seem to be substance-specific, and apply to single classes of conduct, and not across all crimes generally. In fleshing out the meaning of proportionality by creating a proportionality rule, one must necessarily delineate a specific category of conduct and compare it to a specific category of punishment. The cases discussed earlier show that federalism is consistently invoked to reject these rule-types, although the cases that address proportionality claims are less prevalent than are those addressing offense definition claims.

VI. THE FEDERALISM RATIONALE ASSESSED

We now have a more precise understanding of the different theories of federalism, and of the different types of constitutional rules that could be imposed in the context of substantive criminal law. In what follows, I assess what each variant of federalism means for each type of constitutional rule—that is, whether the theory is a good or a bad reason for creating rules of such a type.³³⁴

First, we will engage in a sustained examination of the versions of federalism that the Supreme Court itself used to resist imposing limits on substantive criminal law.³³⁵ As our discussion of the line of cases above should make clear, two theories are invoked consistently: Experimentation Federalism and Morality Federalism. We will address each type of constitutional rule—offense definition, conduct protection, and sentencing proportionality—and assess the impact of these theories

331. *Id.* at 678 (footnote omitted).

332. *Solem v. Helm*, 463 U.S. 277, 288-89, 295-300, 303 (1983).

333. *Robinson v. California*, 370 U.S. 660, 666-68 (1962). The prohibition on status crimes announced in *Robinson*, while premised on the Eighth Amendment, was more accurately described as a conduct protection rule. *Id.*

334. *See infra* Part VI.

335. *See infra* Part VI.A.

for each rule-type.³³⁶ The goal of this effort is to understand whether the Court's own stated reasoning for judicial restraint in substantive criminal law has merit. As we will see in Subpart VI.A, the strength of the federalism rationale depends both on the variant of the argument that is being employed, and on the target of its application—the rule type it is used to resist.³³⁷

Next, we will address those theories of federalism that the Court has not itself invoked in the same context.³³⁸ These theories come from unrelated federalism cases, and from scholars, but for whatever reason the Court has avoided employing these arguments in constitutional criminal cases.³³⁹ Because these theories are external to the case law, this analysis will be less extensive. Moreover, since the features of these theories apply uniformly to all three types of constitutional rules, the discussion will not be broken down on that basis. As we will see, some of these federalism theories would strongly support the Court's restraint, whereas others are entirely inapposite.³⁴⁰

A. *The Internal Critique: Assessing the Court's Reasoning*

We begin with the internal assessment of the reasoning in the Court's case law. We will address each rule type in turn, and see whether the different variants of federalism that the Court has invoked can justify restraint.

1. Offense Definition Rules

We turn first to offense definition rules, the rule-type most prevalent in the line of cases discussed earlier. Ironically, although these rules are the most common targets of the federalism argument, I suggest that it is here that the argument is at its weakest application.³⁴¹ Being trans-substantive, offense definition rules do little to inhibit state policy experimentation, thus weakening the Experimentation Federalism argument. Moreover, any moral disagreement that these rules might provoke is very unlikely to cluster itself geographically, thus weakening the Morality Federalism argument.

336. See *infra* Part VI.A.

337. See *infra* Part VI.A.

338. See *infra* Part VI.B.

339. See *infra* Part VI.B.

340. See *infra* Part VI.B.

341. See *infra* Part VI.A.1.

a. Experimentation Federalism

Since offense definition rules are trans-substantive, they will only minimally inhibit state experimentation, and therefore Experimentation Federalism is an insufficient reason to reject these types of rules. That an omission offense requires the existence of a duty does not dictate to a state what the duty must be; that attempts must be limited by a merger rule does not tell a state what attempts can and cannot be punished. The list could go on. The point is this: the really important part of policy “experimentation” takes place at the conduct-selection phase of criminalization, and not at this secondary stage of structuring the offense definition. State policy choices should be respected, but a constitutional criminal law of the first kind of rules does very little to undermine them.

Take, for example, the societal problem of drug-driven violence. There are many ways to combat and prevent this type of violence, and different jurisdictions might experiment to find that one is more effective than another. Use of drugs could be criminalized, thus inhibiting the “demand” side of the drug market, and therefore reducing the concomitant violence. However, “manufacture” of drugs could also be criminalized, thus shutting down the “supply” of drugs and any resultant need for violence. Is this type of experimentation inhibited by trans-substantive offense definition rules? Not really. Requiring a minimum mental state to protect against innocent cases of possession does little to thwart state policy; requiring that these offenses be written with clear elements susceptible to element analysis is similarly a low hurdle.

Consider the seminal *Powell* case. The Texas legislature wrote the following offense: “Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars.”³⁴² Presumably, the societal problem the state attempted to address with this crime was disorderly conduct in public caused by intoxication. However, in writing the offense the way it did, the state arguably (1) criminalized an act that could be non-voluntary; and (2) created a strict liability crime.³⁴³ Were the Court to find that one of the above two features made the crime unconstitutional, this would only minimally impact the state’s ability to address public drunken disorder. An act element could be included in the clause “be found,” and a mental element added before that. This would

342. *Powell v. Texas*, 392 U.S. 514, 517 (1968) (quoting TEX. PENAL CODE ANN. art. 477 (West 1913)).

343. Also, it was arguably overbroad in that it criminalized being drunk in someone else’s house. This attack, however, would be seeking in effect a conduct-immunization rule, which we are not addressing here.

have the beneficial effect of screening out many innocent offenders, while more precisely targeting the societal harm intended to be mitigated by the legislature.

McMillan is another example: there, the Court rejected a claim that Pennsylvania needed to make possession of a firearm an offense element if it wanted to punish a defendant more severely.³⁴⁴ The choice of making a given fact an element or a sentencing factor, while important to the litigants in assessing the required burdens of proof, is of little moment to the state when making policy choices about crime. Were Pennsylvania required to list gun possession as an element, this would add important procedural protections for the defendant, but would create no straightjacket on legislators trying to experiment with different laws. It would mean that they would simply have to add the element to the statute, and prosecutors would need to prove it beyond a reasonable doubt. The state would still be left with all the tools it could need or want to address the problem of gun violence.

Finally, we could think back to the burden of proof cases: *Leland* (insanity), *Patterson* (emotional distress), *Martin* (self-defense), and *Medina* (competency). In each of these cases, a state placed the burden of proving the various claims on the defendant, and in each case the Court upheld these laws by adverting to Experimentation Federalism. Imagine if the holdings were the opposite, and the prosecution had to disprove these circumstances as if their non-occurrence were an element. Would this hinder state policy experimentation with respect to addressing crime? It might require increased law enforcement and prosecutorial resources, but it would not limit the manner in which criminal law responds to or shapes conduct. Still, for the defendant this choice is often very consequential—the defendant, having little resources, pitted in litigation against a sovereign entity. For a moderate increase in individual rights, the state suffers little in terms of the range of its abilities to address anti-social conduct.

Overall, offense definition rules present very little impediment to the creative construction of State policies to “deal” with crime. Experimentation Federalism is an insufficient argument to prevent their adoption.

b. Morality Federalism

Morality Federalism is similarly a weak argument against the creation of constitutional offense-definition rules, although less weak

344. *McMillan v. Pennsylvania*, 477 U.S. 79, 85-86, 90 (1986).

than Experimentation Federalism. It is conceivable that a local moral viewpoint regarding offense definitions would be stifled by a Court imposed rule, but the possibility becomes remote when considering an external observation: moral disagreements about offense definition rules, to the extent that they are ever controversial,³⁴⁵ are not likely to manifest themselves in geographic concentrations. Take the example of mens rea: We are unlikely to see the pro- and anti-strict liability camps cluster themselves geographically. However, unless there is some meaningful concentration of moral viewpoints within the boundaries of a legal jurisdiction, Morality Federalism makes no sense. As Malcolm Feeley and Edward Rubin argue, even if America is viewed as made up of “heterogeneous and potentially fractious” communities, these “need not be geographically distinct and frequently will not be.”³⁴⁶ Summarizing the consensus view, Jessica Bulman-Pozen concludes that “most recent federalism scholarship has rejected the notion of state identity altogether, at least for the majority of states.”³⁴⁷ Red-and-blue election night maps are deceptive; the real divide is between cities and rural areas, and even this divide may be exaggerated.³⁴⁸

345. The vast majority of these rules have uncontroversial moral content, making the value of a local morality viewpoint less important. Most people agree that no one should be punished for an involuntary act, or for conduct that was legally justified.

346. MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* 18 (2008). This is a standard critique of federalism more generally. See Lawrence M. Friedman, *Book Reviews*, 43 *LAW & SOC’Y REV.* 437, 437 (2009) (reviewing FEELEY & RUBIN, *supra*) (“Federalism may be necessary, and healthy, when a country is sharply divided, and when the components are geographically concentrated and have separate political and cultural identities. . . . Federalism made sense in the United States when there were slave states and free states, and cultural and political identities ran very deep along this fault line. There were good arguments, then, for a federal system in the first half of the nineteenth century. But not now. The split between North Dakota and South Dakota is not the sort of division that justifies federalism.”).

347. Jessica Bulman-Pozen, *Partisan Federalism*, 127 *HARV. L. REV.* 1077, 1110 (2014) (“Although the United States is not a homogenous polity, American heterogeneity does not closely track state borders. Today, individuals from Montana to Mississippi to Maine can eat at the same restaurant chains, shop at the same stores, read the same publications, and listen to the same music. . . . To the extent the states reflect cultural differences, regional rather than state distinctiveness is likely to be what matters. And urban/rural cleavages may generate both intrastate division and interstate unity. Moreover, many of our major metropolitan areas cross state lines.”).

348. FEELEY & RUBIN, *supra* note 346, at 117 (“The familiar political map of the United States during the last several elections—showing red, Republican states through the center of the country and blue, Democratic states concentrated in the Northeast and West Coast—depicts a misleading regionalization of the vote. Looking at a county-by-county map of these elections, it becomes apparent that virtually every state displays the same political pattern; the rural areas voted Republican, and the urban areas voted Democratic. Divisions of this sort, which depend on class or status or living conditions, rather than on regions, indicate a political culture that is national in character.”); Matthew S. Levendusky & Jeremy C. Pope, *Red States vs. Blue States: Going Beyond the Mean*, 75 *PUB. OPINION Q.* 227 (2011) (arguing that division between Red and Blue states is exaggerated, and demonstrating “a great deal of commonality between red and blue states, with much more common ground than division between the two groups”).

If this is a weakness of federalism more generally, then it is especially true in the context of criminal offense definition rules. Consider the example of *Egelhoff*. Recall that in that case the Court refused to require that Montana allow voluntary intoxication to be considered for the purposes of determining mens rea.³⁴⁹ This would be a trans-substantive rule, and could conceivably provoke widespread moral disagreement. Still, would such disagreement break down along geographic lines? Would the defenders of drunken indiscretions all happen to live together? This seems highly implausible, and the same is generally true for other potentially controversial offense-form rules (i.e., strict liability, the necessity defense, the scope of self-defense, etc.).

Consider also the example of *Clark*, where the Court refrained from invalidating an Arizona law that eliminated half of the *M’Naghten* insanity test.³⁵⁰ Deciding not to exculpate conduct that is the result of an inability to “understand what [someone] is doing” is an important policy choice that implicates deep ethical considerations.³⁵¹ One might imagine sharp disagreement on this question. However, would any such disagreement be reflected in geographic concentrations? Like with the prior example, this seems improbable.

The same can also be said of the burden of proof cases just discussed: *Leland* (insanity), *Patterson* (emotional distress), *Martin* (self-defense), and *Medina* (competency). Allocations of proof burdens are important to lawyers and litigants, but they do not seem to be morally divisive, and if they are, such division would probably not show up in geographic pockets. Again, it might be that recognition of a defense would provoke such a phenomenon, but not the choice of where to place the burden.

Morality Federalism does not seem completely unjustified with respect to offense-definition rules, but the nature of the ethical issues implicated by these rules—and the way that this disagreement will manifest itself, if ever—significantly weakens the force of the argument.

2. Conduct Protection Rules

We now turn to the second, and rarest, category of criminal law rule-making from the Supreme Court: substance-specific immunization of conduct from criminalization. These are the prohibitions on *what* may be punished by state legislatures, and directly specify conduct—indeed, often classes of conduct—that is beyond the reach of the criminal law.

349. *Montana v. Egelhoff*, 518 U.S. 37, 49-56 (1996).

350. *Clark v. Arizona*, 548 U.S. 735, 742, 749-56 (2006), *aff’d sub nom.* *Clark v. Arnold*, 769 F.3d 711 (9th Cir. 2014).

351. *Id.* at 747, 749.

Once a rule of this type is promulgated, there is no manner in which a state can touch the behavior through the creation of an offense. In their substance-specific character, they are the opposites of the trans-substantive offense-definition rules. As we will see, though, while the federalism argument is much stronger when applied to these types of rules, it is still problematic.

a. Morality Federalism

For these rules, we will consider Morality Federalism first, as here the problem is most apparent—if local moral viewpoints are used to justify the non-imposition of conduct protection rules, this accords deference to states in their restriction of individual liberty, and punishment of its exercise. This is unappealing in a modern liberal state.

Here, of course, the Morality Federalism argument is theoretically quite strong: certain moral communities will believe that particular conduct is worthy of criminalization, whereas others may not, and Supreme Court protection of certain conduct trumps local moral consensus. If it is indeed true that criminal law reflects “religious, moral, [and] philosophical” views regarding the “nature of man,”³⁵² and if it is expected that these views will be at least somewhat divergent across certain jurisdictions, and geographically concentrated, then Morality Federalism is a strong reason not to impose nationwide, substance-specific conduct protection rules. Gambling is a crime in Utah, but casinos proliferate next door, in Las Vegas, Nevada.³⁵³ Whether or not we agree that this is an important difference in the two states’ views of the “nature of man,” it is still a difference. Morality Federalism asks that this difference be respected, and in this sense it is coherent.

Still, while we should concede that Morality Federalism is theoretically sound when applied to these types of rules, it is nevertheless a problematic application when viewed against the background principles of a liberal state.³⁵⁴ This is because in the unique context of the criminal law, the local morality seeking expression will manifest itself as prohibitions backed by punishments. This can be contrast with other areas of law, where a robust deference to local jurisdictions’ moral viewpoints might result in increased liberty—

352. *Powell v. Texas*, 392 U.S. 514, 536 (1968).

353. See NEV. REV. STAT. § 463.15997 (2015); NEV. REV. STAT. § 463.160 (1955); UTAH CODE ANN. § 76-10-1102 (LexisNexis 1953).

354. A full discussion of what a modern “liberal state” is would take us far afield. For such a discussion, see STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM 78-130 (1990). For our purposes, we need emphasize only one aspect of it, the commitment to the maximization of personal autonomy.

examples of this include the development of state laws extending civil rights legislation to cover sexual orientation.³⁵⁵ Or those that grant explicit “open carry” permission to handgun owners.³⁵⁶ For example, Heather Gerken has highlighted the potential for a “Progressive Federalism” that protects individual and minority rights.³⁵⁷

This is not true of criminal law, and that is the problem. In a modern liberal state with a commitment to the maximization of personal liberty, instantiations of morality in law that take the form of punitive prohibitions are worthy of less deference than are those that manifest themselves in other ways. As Binder writes, “[P]unishment deprives offenders of freedoms deemed fundamental in liberal society,” and therefore “[a] state claiming to be founded on liberal principles must . . . justify and limit its power of punishment.”³⁵⁸ Overall, the criminal law seems to be too harsh a tool to be used as a vehicle for local morality.

The problematic application of the argument here is exemplified by the now-abandoned reasoning in *Bowers v. Hardwick*, which was in part propped up by Morality Federalism: “The law . . . is constantly based on notions of morality [Respondent] insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.”³⁵⁹ This was, of course, repudiated later in *Lawrence v. Texas*, when the Court explicitly adopted Justice Stevens’s analysis in his *Bowers* dissent: “Our prior cases make . . . abundantly clear [that] the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice”³⁶⁰

The examples of *Lawrence* and *Bowers* bring out an even more sinister potential for Morality Federalism than merely the restriction of liberties simpliciter—the calculated oppression of minority groups by the majority. *Washington v. Glucksberg* might be seen as another

355. See, e.g., D.C. CODE § 2-1401.01 (1977).

356. See, e.g., TEX. PENAL CODE ANN. § 46.02 (West 1973).

357. Heather K. Gerken, *A New Progressive Federalism*, DEMOCRACY, Spring 2012, at 37, 38-46. See generally Heather K. Gerken, *Distinguished Scholar in Residence Lecture: A User’s Guide to Progressive Federalism*, 45 HOFSTRA L. REV. 1087 (2017).

358. BINDER, *supra* note 287, at 57.

359. 478 U.S. 186, 196 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003). Morality Federalism also formed a basis of Justice Scalia’s dissent in *Lawrence*, when he wrote that “[t]he Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are ‘immoral and unacceptable,’ the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity.” *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting) (citation omitted) (quoting *Bowers*, 478 U.S. at 196).

360. *Lawrence*, 539 U.S. at 576-78 (Stevens, J., dissenting) (quoting *Bowers*, 478 U.S. at 216).

example.³⁶¹ The terminally ill are a small number of people who are politically powerless—indeed, physically powerless. According to deference to local morality in criminalization decisions allows for majoritarian ethical views to ride roughshod over minorities—whatever their composition. Professor William Stuntz is blunter: “If . . . criminal suspects are disproportionately poor and nonwhite and so will not get lawmakers’ protection, one might reasonably expect lawmakers to be tempted to criminalize things poor and nonwhite people do.”³⁶²

Morality Federalism makes sense when used to counteract the imposition of nationwide conduct protection rules. Still, this is problematic in a modern liberal state, as it accords deference to morality that seeks to express itself as punishment of others—and often of minorities.

b. Experimentation Federalism

This same observation also makes Experimentation Federalism problematic when used to resist conduct protection rules, as the experimentation that such a rule would prevent is, again, experimentation with the punitive restriction of liberty.³⁶³ Moreover, an additional consideration makes the experimentation argument less salient here: conduct protection rules are usually so broad that they transcend experimentation concerns entirely. They do not say that a state may not approach a societal problem a certain way—instead, they say that a certain class of conduct is not a societal problem that needs to be addressed through the criminal law *at all*.

This observation comes from an assessment of past cases. Since 1900, the criminal cases that addressed a conduct protection claim are limited in number.³⁶⁴ When the Court did act to immunize conduct in these cases, what the opinions shared was an expansive view of the protected behavior. As *Lawrence* stated,

361. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

362. Stuntz, *supra* note 39, at 21.

363. Erwin Chemerinsky, *Does Federalism Advance Liberty?*, 47 WAYNE L. REV. 911, 928 (2001) (“[T]he application of constitutional rights to the states limits their ability to experiment with and provide less safeguards of individual liberties.”). States may also learn bad lessons when viewing the experiments of their counterparts. Michael A. Livermore, *The Perils of Experimentation*, 126 YALE L.J. 636, 665 (2017) (“[A]lthough criminal justice reform has picked up steam in recent years, for decades crime policy was driven by prior political lessons learned in a variety of otherwise different jurisdictions that a ‘soft on crime’ label was to be avoided at all costs, leading to policies that almost certainly do not maximize well-being.”).

364. See *supra* notes 326-28 and accompanying text.

To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct³⁶⁵

Conduct protection rules, then, seem outside of the parameters of Experimentation Federalism. Recall Susan Klein's critical clarification: Experimentation Federalism is predicated on *shared goals* (when "federal and state actors share the same basic moral framework"), with the efficiency coming from the experimentation amongst *means*.³⁶⁶ A debate about whether something should be punished by the state is a different, and deeper, question than how best to create a licensing scheme for ice-cutters (*New State Ice*).

This confusion between ends and means—and the mistaken application of Experimentation Federalism in this area—is illustrated by the case of *Glucksberg*, discussed earlier. The Court lauded the fact that multiple states "are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues,"³⁶⁷ and Justice Souter emphasized the states' superior "factfinding" power (including "the power to experiment").³⁶⁸ This kind of sanitized language of scientific experimentation and fact-finding distracts from the central moral issue: whether suicide, and assisting it, should be punished. *Glucksberg*'s fault is not so much that it invoked federalism, but that it invoked the wrong kind—Experimentation Federalism instead of Morality Federalism.

The same problem is also represented by Justice Black's concurrence in *Powell*. There, Justice Black noted the importance of allowing "the most-distant Islands of Hawaii [to] apply their local rules so as to protect a drunken man on their beaches," and of allowing "the local communities of Alaska . . . to follow their own course in deciding what is the best way to take care of a drunken man on their frozen soil."³⁶⁹ Again, the issue was the punishment of a potentially non-voluntary addiction and its byproduct—not the need to scientifically adjust for different geographies or climates. "Experimentation" masks over the deeper issues, and seems out of place in discussions of these conduct-protection rules.

365. *Lawrence*, 539 U.S. at 567.

366. Klein, *supra* note 219, at 1547-48.

367. *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997).

368. *Id.* at 788 (Souter, J., concurring).

369. *Powell v. Texas*, 392 U.S. 514, 547 (1968) (Black, J., concurring).

Experimentation Federalism, then, will not normally be implicated by constitutional conduct protection rules. These rules cover broad swaths of conduct, and place them outside the bounds of criminal law experimentation entirely.

3. Proportionality Rules

We now turn to the final type of constitutional criminal law rule: sentencing proportionality rules. These are the rules that set limits to how much a state can punish certain conduct.³⁷⁰ Recall that these rules are closer to conduct protection rules than they are to offense definition rules, as they are substance-specific. In engaging in the proportionality assessment between offense and punishment, it is necessary to define a certain crime or class of crimes.

Whether or not it is true that the failure to promulgate proportionality rules has been “driven by concerns of federalism,”³⁷¹ the argument should not be invoked at all unless it makes sense. As we will see, the federalism argument is at its strongest when applied to proportionality rules. Still, certain features of state practice suggest that in order for the argument to work as it is expected, there must be some changes made in the way that states define their punishments. Moreover, concerns about discrimination, noted above, also loom over the sentencing enterprise, making deference risky.³⁷²

a. Experimentation Federalism

Experimentation Federalism works well as an argument against nationwide proportionality rules—at least with respect to punishment justified by deterrence or incapacitation—punishment based on retributivism will be discussed later.³⁷³ There is no universally agreed-upon approach to effective punishment, and therefore this lack of clarity invites a diversity of experimental approaches so as to find the best. As the Court said in *Rummel*, “Penologists themselves have been unable to agree whether sentences should be light or heavy, discretionary or

370. Youngjae Lee argues that federalism is not the primary reason behind the Court’s reluctance to promulgate proportionality rules. *See Lee, supra* note 66, at 71-73 (“What is driving the Court’s jurisprudence, rather, is the Court’s reluctance to take a side on debates over competing theories of punishment.”). He may be right, but the task of this Article is to assess this argument on its own terms.

371. Michael J. Zydney Mannheimer, *Cruel and Unusual Federal Punishments*, 98 IOWA L. REV. 69, 80-85, 130 (2012). *But see Lee, supra* note 66, at 71.

372. *See supra* Part VI.A.2.a.

373. *See infra* Part VI.A.3.b.

determinate,” giving the enterprise an air of “uncertainty.”³⁷⁴ Moreover, it is legislatures—not the Court—that have the fact-finding competence to undertake such a task. They can set up sentencing commissions, take into account social-science data, and observe trends over time. As Michael O’Hear writes, “Experience suggests that reasonable minds can, and do, differ substantially about sentencing policy.”³⁷⁵ All this weighs heavily against the imposition of nationwide rules.

However, it should be added that in order for Experimentation Federalism to work as it is supposed to in theory, there must be changes in state sentencing practice. Experimentation is premised on the rational adjustment of policy decisions based on objective inputs—otherwise a state is not functioning as a “laboratory.” As Bierschbach and Bibas write, “Feedback loops do little good unless sentencers offer reasoned explanations for what they are doing and why, and others actually take note.”³⁷⁶ Unfortunately, this is not how most sentencing laws have come to be. For example, Michael Tonry wrote in 2008 that while “there is little credible evidence that changes in sanctions affect crime rates,” nevertheless, three-strikes and mandatory minimum laws proliferate.³⁷⁷ What, then, is motivating the decision-making?

Often, the answer is an emotional, fear-driven response to a sensational crime. Jonathan Simon described this as “unifying framework of ‘fearing crime,’”³⁷⁸ and Tonry described it as “paranoia.”³⁷⁹ Legislatures faced with such a phenomenon react predictably: they “act out,” as David Garland called it, “abandon[ing] reasoned, instrumental action and retreat[ing] into an *expressive* mode . . . concerned not so much with controlling crime as with expressing the anger and outrage that crime provokes.”³⁸⁰ Stuntz called these “popular symbolic stands,” which legislators often know to be

374. *Rummel v. Estelle*, 445 U.S. 263, 283 (1980).

375. Michael M. O’Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 755 (2002); see Richard A. Bierschbach & Stephanos Bibas, *What’s Wrong With Sentencing Equality?*, 102 VA. L. REV. 1447, 1451 (2016) (critiquing simplistic demands for “equality” as “standins for more fundamental—and more complicated—debates about *who* decides sentencing issues, *how* they do so, and *what purposes* their decisions should serve”).

376. Bierschbach & Bibas, *supra* note 375, at 1491.

377. Michael Tonry, *Learning from the Limitations of Deterrence Research*, in 37 CRIME AND JUSTICE: A REVIEW OF RESEARCH 279, 279, 285 (Michael Tonry ed., 2008). Tonry did caution that more work needed to be done in the social-scientific field, however. *Id.* at 301-02.

378. JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 77 (2007).

379. MICHAEL TONRY, PUNISHING RACE: A CONTINUING AMERICAN DILEMMA 128-33 (2011).

380. DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 110 (2001).

ineffective.³⁸¹ Of course, fear moves the dial in only one direction—*increased* severity of penalties.

The proportionality cases discussed earlier are good examples of this problem. The three-strikes law at issue in *Ewing* followed the predictable formula: the California ballot initiative was propelled into the spotlight by the murder of young Polly Klaas by a repeat-offender, Richard Allen Davis.³⁸² Similarly, the draconian sentence imposed in *Harmelin* for drug possession was mandated by a 1978 Michigan law—a law drafted in the midst of a national hysteria initiated by President Nixon’s 1971 declaration of a “war on drugs.”³⁸³

Irrational decision-making is one potential pitfall of giving states free reign over sentencing decision, but one scholar has also theorized that *rational* decision-making might lead to a “race to the bottom” between the states.³⁸⁴ Doron Teichman has argued that “the decentralized structure of the American criminal justice system creates a dynamic process in which local communities have an incentive to increasingly harshen that system’s standards.”³⁸⁵ Given the “goal of encouraging crime migration,” States may respond by “gradually harshen[ing] their criminal justice system” so as to “rais[e] the price of committing a crime within.”³⁸⁶ As the states compete to each be harsher than their neighbors, the overall trend will be toward harshness.³⁸⁷

381. Stuntz, *supra* note 41, at 531. “Prosecutors sometimes succumb to their own incentives or professional tunnel vision. Judicial elections can foster a tough-on-crime approach based on a sensationalist case. ‘Community’ views might be badly fractured or, worse, reflect privileged over disadvantaged voices.” Bierschbach & Bibas, *supra* note 375, at 1491 (footnote omitted).

382. *Ewing v. California*, 538 U.S. 11, 14-15 (2003) (“Polly Klaas’ murder galvanized support for the three strikes initiative.”). “Prior to news of Polly’s death, [the sponsor] had collected only about 20,000 signatures. Within days of the reports of her murder, Three Strikes had gathered 50,000 signatures and was well on its way to becoming the fastest qualifying voter initiative in California history.” Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 412 (1997) (footnotes omitted).

383. See *Harmelin v. Michigan*, 501 U.S. 957, 961, 994-96 (1991). For more on the Michigan law see *People v. Bullock*, 485 N.W.2d 866, 868, 875-77 (Mich. 1992); Anne Yantus, *Sentence Creep: Increasing Penalties in Michigan and the Need for Sentencing Reform*, 47 U. MICH. J. L. REFORM 645, 648-50 (2014). For an extended discussion of the “war on drugs,” including its antecedents and results see Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227 *passim* (2015) (“The impact on public opinion regarding drugs was quick. In 1957, only 5.6 percent of the U.S. population viewed crime-related problems, like drug use, as the most important problem facing the nation. By 1971, 37.9 percent of the population viewed crime as the most important problem facing the nation. The media similarly connected drugs and violence by claiming that marijuana and ‘knives, chains, and handguns’ were commonplace in American schools. Even though these laws were adopted across the nation, they were not effective at eliminating drug use or sales; rather, they were used primarily as a means for politicians to appear ‘tough on crime.’” (footnotes omitted)).

384. Teichman, *supra* note 263, at 1858-64.

385. *Id.* at 1832.

386. *Id.* at 1834.

387. *Id.* at 1834, 1837-39 (“In other words, while some commentators have argued that we are

Overall, then, while Experimentation Federalism is theoretically valid when used to resist nationwide proportionality-rules, if the argument is to work as expected there must be significant changes in the way states determine sentences. Ad hoc emotional reactions must be replaced by careful development informed by social science. Otherwise, states weaken their federalism claim, and strengthen the argument that judicial intervention is needed to prevent excess and disproportionality. Second, the possibility of a jurisdictional “arms race” with respect to sentencing also suggests the potential need for federal constitutional rules policing the outer limits of acceptable practices.³⁸⁸

b. Morality Federalism

Local Morality-based Federalism is similarly valid, and perhaps at its strongest application, when used to resist nationwide sentencing proportionality rules. Moral viewpoints about the seriousness of a given offense are directly tied to the correspondent judgment about the need to more greatly deter, incapacitate, or mete out retribution for that offense. Moreover, these viewpoints about crime severity are likely to be geographically concentrated. For example, southwestern border states may view the problem of drug trafficking to be more serious than do citizens of states in New England or the Pacific Northwest. States that are known to be more friendly to gun-rights may choose to punish unauthorized possession less severely than states that are hostile to guns. As Chief Justice Burger wrote in his dissent in *Solem v. Helm*,³⁸⁹ “Stealing a horse in Texas may have different consequences and warrant different punishment than stealing a horse in Rhode Island or Washington, D.C.”³⁹⁰ O’Hear echoes this, noting that “[s]entencing policy involves a variety of value judgments . . . [and] survey data indicates that views regarding sentencing policy follow ‘strong and consistent’ regional patterns, with residents of New England demonstrating the greatest tendency to be lenient and residents of central southern states displaying the least leniency.”³⁹¹ “[W]hen it comes to

witnessing an arms race between law enforcement agencies and criminals, what we might actually be witnessing is an arms race between local communities attempting to drive crime to their neighbors.” (footnote omitted).

388. *See id.* at 1866-71.

389. 463 U.S. 277 (1983).

390. *Id.* at 309 (Burger, C.J., dissenting). Interestingly, he also invoked the language of policy: “[T]he severity of punishment to be accorded different crimes was peculiarly a matter of legislative policy.” *Id.* at 310.

391. O’Hear, *supra* note 375, at 755-56 (footnote omitted). Richard Bierschbach and Stephanos Bibas agree: “Disaggregating sentencing through such actors furthers many of the federalism values that scholars have touted outside the sentencing context. . . . One might even

sentencing,” write Bierschbach and Bibas, “the notion of disaggregated decision making and some degree of normative variation at the local level is practically baked into our constitutional framework.”³⁹²

Morality Federalism, then, is a good reason not to impose nationwide proportionality rules. However, as with deference in the area of conduct protection rules, deferring to local moral viewpoints about crime severity does come with some danger. If there are problems when states look to local morality when deciding what is a crime, then there are similar concerns when that morality is used to decide how bad the crime is—and how much punishment it deserves. Sentencing disparities, like criminalization, can be used by majorities to ostracize and oppress minorities. The federal disparity between the punishment for possession of crack and powder cocaine is well known, and has been criticized as reflecting racial bias.³⁹³ This disparity is present in the sentencing schemes of many states as well.³⁹⁴

The Supreme Court cases invoking federalism in sentencing are good examples of this problem. Two of them, *Rummel* and *Ewing*, both involved mandatory sentencing schemes imposed by recidivist statutes.³⁹⁵ After an extensive study of these types of laws, Markus Dubber concluded that they were “arational” in that they made no attempt to “advance the legitimate goals of state punishment,” and instead sought only to function as “symbolic” statements.³⁹⁶ He noted that many of the recidivist statutes began as voter initiatives—the most democratic wellspring of local morality—which are often discriminatory in intent and effect: “[I]nitiatives are problematic because they place an ostracized minority at the mercy of an electorate unfettered by whatever limited constraints public official debate continues to place on representatives of the state. . . . The millions of state members convicted of crimes constitute the paradigmatic powerless minority.”³⁹⁷

argue that [these] arguments . . . should have special purchase at sentencing, with its lack of easy policy answers, difficult moral tradeoffs, and inextricable connection to community norms.” Bierschbach & Bibas, *supra* note 375, at 1488-89.

392. Bierschbach & Bibas, *supra* note 375, at 1490-91.

393. Tonry, *supra* note 377, at 79.

394. NICOLE D. PORTER & VALERIE WRIGHT, SENTENCING PROJECT, CRACKED JUSTICE 3 (2011), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Cracked-Justice.pdf> (listing thirteen states with crack-powder disparities).

395. *Ewing v. California*, 538 U.S. 11, 14-16 (2003); *Rummel v. Estelle*, 445 U.S. 263, 264-65 (1980).

396. Markus Dirk Dubber, *Recidivist Statutes as Arational Punishment*, 43 BUFF. L. REV. 689, 689, 714-24 (1995).

397. *Id.* at 703.

Again, local morality can have a more sinister side that will manifest itself in sentencing laws.³⁹⁸ As Bierschbach and Bibas warn, “‘Community’ views might . . . reflect privileged over disadvantaged voices.”³⁹⁹ While Morality Federalism is a good reason to defer to states in sentencing, this deference should be tempered with the same caution noted with respect to criminalization more generally.

*B. Assessing the Potential Application of Theories
Unused by the Court*

Having completed an assessment of the two federalism theories invoked by the Supreme Court in constitutional criminal cases, we now turn to a briefer discussion of other federalism values noted by the Court in different contexts. As we will see, some of these values are probably omitted by the Court because they are inapplicable to criminal law, while others, though unused, would actually bolster the Court’s arguments for restraint.⁴⁰⁰ As mentioned earlier, because these theories are not explicitly invoked in case law, they will be treated in less depth.

1. Liberty Federalism

We begin with what the Court called the “principal benefit” of federalism, albeit not in a constitutional criminal case; dual sovereignty as a check on an oppressive government, for the purpose of protecting individual liberty.⁴⁰¹ “[A] healthy balance of power between the States and the Federal Government,” wrote the Court, “will reduce the risk of tyranny and abuse from either front.”⁴⁰² Does this justification for federalism counsel restraint or activism when interpreting the constitutional limits on substantive criminal law?

To ask the question is to answer it: if the ultimate aim of Liberty Federalism is *individual* liberty, then limiting the power to punish individual conduct only enhances this. As the Court wrote in *New York*, dual sovereignty is not preserved “for the benefit of the States or state governments as abstract political entities,” but instead “for the protection

398. Youngjae Lee takes note of this concern, and proposes a compromise: enforce proportionality through process rules. See Youngjae Lee, *Judicial Regulation of Excessive Punishments Through the Eighth Amendment*, 18 FED. SENT’G REP. 234, 236 (2006) (“Legislators are constitutional actors with an independent duty to observe and uphold the Constitution. One way for the Court to protect Eighth Amendment values while deferring to legislators’ substantive decisions is to examine the legislative process to determine whether proper deliberation has taken place, given the constitutional values at stake.”).

399. Bierschbach & Bibas, *supra* 375, at 1491.

400. See *infra* Part VI.B.

401. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

402. *Id.*

of individuals.”⁴⁰³ If it is the individual that we care about, and specifically that individual’s liberty, then Liberty Federalism should not stand in the way of recognizing offense definition rules, conduct protection rules, and proportionality rules. These rules function as limitations directed at the government, and the limitation imposed is on the power to punish individuals for their conduct. These limitations, therefore, enhance the liberty of the individual at the expense of the power of the state. Therefore, Liberty Federalism cannot serve as a valid argument against such rules.⁴⁰⁴ This may explain why the Court never invokes this so-called “principal benefit” of federalism in its cases addressing constitutional criminal law.

Imagine if the Court imposed a ban on mandatory life in prison for “three-strikes”—think *Ewing*—or perhaps set a minimum mental state for criminal punishment. Such limits on state power would only enhance personal freedom.

2. Participation Federalism

Next, we turn to another theory of federalism that the Court has at times invoked: greater democratic participation through smaller governing institutions. Federalism, the Court wrote, “[I]ncreases opportunity for citizen involvement in democratic processes.”⁴⁰⁵ As we said earlier, the values of Participation Federalism are really synonymous with the values of democracy, which are in turn seen as intrinsically worthwhile.⁴⁰⁶

Once this is recognized, the conflict with judicially imposed constitutional limitations on criminal law becomes clear. While such rules do not technically affect the power of citizens to participate democratically—they can still vote, and the legislature still meets—they functionally limit participation by placing certain legislative solutions outside the realm of possibility. Citizens are empowered to participate in democratic processes, but the result of these processes must fit within a judicially-created parameter. We might say that participation only “counts” if it has at least the possibility of being effective, and that constitutional criminal rules affect this possibility.

403. *New York v. United States*, 505 U.S. 144, 181 (1992).

404. Perhaps, though, it could be said that constitutional rules of this nature would upset the “rivalry” between the two sovereigns that Madison anticipated, thus resulting in a net decrease in liberty. It is hard to imagine how this could happen. Constitutional rules limiting substantive criminal law will limit both sovereigns in parallel; it is not that one would be made stronger or weaker than the other.

405. *Gregory*, 501 U.S. at 458.

406. *See supra* Part IV.D.

The tension between democratic participation in governance and constitutional rules forces us to confront the foundational problem in constitutional law: the “countermajoritarian difficulty.”⁴⁰⁷ As Barry Friedman writes, “The problem is this: to the extent that democracy entails responsiveness to popular will, how to explain a branch of government whose members are unaccountable to the people, yet have the power to overturn popular decisions?”⁴⁰⁸ To the extent that judicial review more generally is undemocratic, then, so too are any judicially created limits on criminal law. Since Participation Federalism is ultimately grounded in the intrinsic value of democracy, this theory is a valid argument against constitutional limits on criminalization.

However, if the central problem here is the countermajoritarian difficulty, then attempted “solutions” to that larger problem are also answers in this context. In fact, one is particularly applicable to criminal law: representation reinforcement. Stuntz has persuasively applied the logic of this theory to criminal defendants,⁴⁰⁹ and his observations are worthy of repeating. “A lot of constitutional theory has been shaped by the idea, made famous by *Carolene Products* footnote four, that constitutional law should aim to protect groups that find it hard or impossible to protect themselves through the political process. If ever such a group existed,” Stuntz writes, “the universe of criminal suspects

407. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, *passim* (1998). “The ‘countermajoritarian difficulty’ has been the central obsession of modern constitutional scholarship.” *Id.* at 334 (footnote omitted).

408. *Id.* at 335 (footnote omitted).

409. Stuntz, *supra* note 39, at 19-24. Bilionis believes that the Court’s few forays into substantive criminal law can be explained as examples of appropriate representation reinforcement, with its general policy of restraint justified because the democratic “process” works well most of the time. *See* Bilionis, *supra* note 47, 1272-77, 1293-94, 1318-23. If we agree with Stuntz, though, then judicial intervention should be the *norm* in criminal cases. Bilionis’s approval of process-protection is correct, but too limited in application. Bilionis and Stuntz disagree on how much constitutionalization is needed because they disagree about the extent of the democratic system’s dysfunction in criminal law. Bilionis argues that Stuntz “takes [democratic] process less seriously than [the Court],” and criticizes theories that aspire to a more comprehensive constitutional criminal law as “exalt[ing] the fear of process failure in extreme cases over the day-to-day need for legislative flexibility.” *Id.* at 1298 n.119. Note, though, that Bilionis accepts that judicial intervention is warranted in “extreme” cases. *Id.* One wonders whether he believes if *Ewing* falls into such a category. Stuntz’s response again emphasizes the perverse incentives skewing legislative deliberation:

My response to [Bilionis’s] argument is not to deny its premise. Rather, I seek to show that legislators’ political incentives are to criminalize too much—with “too much” defined by the preferences of the very constituents whose wishes legislators are supposed to represent. Once one understands those incentives, one may conclude that courts are more likely than legislatures to capture social value judgments accurately.

Stuntz, *supra* note 42, at 527 n.96.

is it.”⁴¹⁰ He notes that this was a key motivation behind the Warren Court’s constitutionalizing of criminal procedure, and that its reasoning also extends to substantive criminal law:

[I]f criminal suspects are indeed an “out group” of the sort that needs special constitutional protection, the protection should not stop with procedure. After all, substantive criminal law defines *who suspects are*. If legislatures (and prosecutors and police officers) can’t be trusted to define how suspects are to be treated because suspects are too easily ignored by the rest of us, presumably they can’t be trusted to decide who is a suspect to begin with. If the reason for constitutionalizing criminal procedure is that criminal suspects are disproportionately poor and nonwhite and so will not get lawmakers’ protection, one might reasonably expect lawmakers to be tempted to criminalize things poor and nonwhite people do.⁴¹¹

If the strength of Participation Federalism is its foundation in democratic values, then theories of constitutional adjudication that ultimately aim to further these values present a potential answer to the “countermajoritarian difficulty.” One such theory—representation reinforcement—might fruitfully be seen as justifying limits on criminal law.

This is well illustrated by the class of those most vilified members of our society: sex offenders. Largely because of these offenders’ lack of political power, legislatures have been free to run amok, creating draconian registration and community notification regimes.⁴¹² I have previously argued that the legislative rhetoric leading up to the passage of these laws shows a breakdown of reasoned deliberation.⁴¹³ Such a group seems to call out for “representation reinforcement,” and constitutional criminal law would fill such a gap.

410. Stuntz, *supra* note 39, at 20 (footnote omitted).

411. *Id.* at 21; *see* Stuntz, *supra* note 1, at 818 (“How can constitutional law and politics work together to produce a more just criminal justice system? How can ‘representation reinforcement’ become a reality rather than a slogan? . . . With regard to content, John Hart Ely had it about right: constitutional law adds the most value when it advances interests that the political process will not advance on its own.”).

412. Bret R. Hobson, Note, *Banishing Acts: How Far May States Go to Keep Convicted Sex Offenders Away from Children?*, 40 GA. L. REV. 961, 989-90 (2006) (calling sex offenders “reviled, politically powerless group present[ing] . . . an expedient target for politicians”).

413. *See* Brenner M. Fissell, *Abstract Risk and the Politics of the Criminal Law*, 51 AM. CRIM. L. REV. 657, 682-83 (2014) (“Legislative debate primarily focused on sensationalistic recounting of anecdotal evidence, appealing both to sympathy for the victims . . . and to a dehumanization of the offenders.” (footnote omitted) (citing Daniel M. Filler, *Making the Case for Megan’s Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315, 331, 339 (2001))).

3. Mobility Federalism

The next theory of federalism to consider, also unused by the Court in criminal cases, is Mobility Federalism—the view that the existence of multiple states “makes government ‘more responsive by putting the States in competition for a mobile citizenry.’”⁴¹⁴ Does a constitutional criminal law prevent people from “voting with their feet” with respect to certain issues, thereby making states less reactive to citizen preferences?

Here, again, the pro-federalism camp has a very coherent argument. Recall that Mobility Federalism depends on the states acting as many suppliers of different products, creating a market-like environment in which citizens can exercise choice. When the Court promulgates a nationwide offense definition rule, conduct protection rule, or sentencing proportionality rule, though, such a rule destroys the market for the given governmental rule-“product.” Constitutional criminal rules are limitations on state power; they take away the state’s ability to “produce” a given legal regime. When the Court ruled that capital punishment could only be imposed for first-degree murder,⁴¹⁵ it eliminated the availability of harsher punitive regimes and any correspondent market for them. All this vitiates the value of Mobility Federalism.

Again, though, perhaps there is something unique about criminal law that may explain why the Court has not resorted to an invocation of Mobility Federalism here—despite its analytic coherence.⁴¹⁶ One possibility is that the core premise of this theory—the free ability of citizens to move across state lines—is a fiction that seems intolerable to indulge in when it is used to justify geographically disparate regimes of criminal punishment.

Mobility Federalism accepts that it is not totally true that citizens are freely mobile, but believes that this ability to move can *in general* create a beneficial market for citizens in many regulatory areas.⁴¹⁷ The

414. *Bond v. United States*, 564 U.S. 211, 221 (2011) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)), *rev’d*, 134 S. Ct. 2077 (2014).

415. *Kennedy v. Louisiana*, 554 U.S. 407, *passim* (2008), *rev’d sub nom.* 624 Fed. App’x 886 (5th Cir. 2015).

416. I have been unable to find scholarly commentary on the use of this theory in criminal law, other than an article authored by Doron Teichman. *See* Teichman, *supra* note 263, at 1836-49, 1858-63. Teichman posits that the theory will operate in a perverse manner in this context. I find this telling; it seems scholars and judges are embarrassed to invoke Tiebout when speaking about criminalization and punishment. I suggest that the argument sketched above might explain this intuition.

417. *See* Tiebout, *supra* note 261, at 419, 423. Tiebout himself accepted that his “assumption” of “fully mobile” citizens who “will move to that community where their preference patterns . . . are best satisfied” was an “extreme model.” *Id.* (acknowledging, for example, that “[c]onsumer-voters do not have perfect knowledge and set preferences, nor are they perfectly mobile”).

theory relies on a rough prediction that is admittedly wrong in many cases.⁴¹⁸ As Richard Briffault wrote, “Interjurisdictional movement is not cost-free. It is constrained by a variety of economic and social factors that tend to affect poorer people more than affluent ones. First, there are the out-of-pocket costs of relocation Second, most people can only reside where they have access to work.”⁴¹⁹

This means that when Mobility Federalism is applied to realistic conditions, it inherently favors maximizing the “preference patterns” of the rich.⁴²⁰

While in many different areas of policy we might begrudgingly permit the use of an ideal theory that is economically discriminatory in the real world—e.g., taxes, zoning laws, and environmental regulations⁴²¹—if there is one area where we should draw the line, it is criminal punishment. Criminal law is unlike other forms of regulation because “it burdens interests not implicated when other modes of social control are employed”⁴²²—especially the power to direct the condemnation of a community on an individual—and create a resultant stigma.⁴²³ Mobility Federalism in the real world thus contemplates the likelihood that there will be disparities in condemnatory punishment solely based on economic capacity to move.

One could take the example of the imposition of strict new gun laws in New York State.⁴²⁴ These laws disproportionately target rural,

418. See Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23, 33-35 (1983) (noting that while the pure assumption of mobility is “unrealistic,” the competitive market may nevertheless result in “a powerful tendency toward optimal legislation”).

419. Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 420 (1990) (footnote omitted).

420. Tiebout, *supra* note 261, at 418-19, 422 (using the term “preference patterns”).

421. George G. Triantis, *Foreword: The Allocation of Government Authority*, 83 VA. L. REV. 1275, 1276-79, 1281-82 (1997).

422. Douglas Husak, *The Criminal Law as Last Resort*, 24 OXFORD J. LEGAL STUD. 207, 234 (2004); see Nils Jareborg, *Criminalization as Last Resort (Ultima Ratio)*, 2 OHIO ST. J. CRIM. L. 521, 524-27, 532-34 (2005).

423. Hart, *supra* note 30, at 405 (“[Criminal conduct] is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.”); see John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 193, 223-28 (1991) (“[T]he factor that most distinguishes the criminal law is its operation as a system of moral education and socialization.”).

424. See N.Y. PENAL LAW § 265.00 (McKinney 1965) (expanding the definition of “assault weapon”); Thomas Kaplan, *Sweeping Limits on Guns Become Law in New York*, N.Y. TIMES (Jan. 15, 2013), <http://www.nytimes.com/2013/01/16/nyregion/tougher-gun-law-in-new-york.html>. The New York Secure Ammunition and Firearms Enforcement Act of 2013 was passed four weeks after the Newtown Massacre, and implemented the federally-repealed definition of an assault weapon on the state level. Jon Campbell, *A Year After SAFE Act, Is New York Safer?*, USA TODAY (Jan. 12, 2014, 10:22 AM), <https://www.usatoday.com/story/news/nation/2014/01/12/new-york-safe->

less wealthy citizens more likely to possess and use such guns—usually in upstate New York. While upper-class gun owners are able to move to more lax states to preserve their cherished lifestyle, most will be stuck.⁴²⁵

4. Inherent Sovereignty Federalism

The final theory of federalism to consider is the non-instrumental or intrinsic theory of Sovereignty Federalism—that the preservation of the “integrity, dignity, and residual sovereignty of the States . . . is, in part, an end in itself, to ensure that States function as political entities in their own right.”⁴²⁶ Michael Dorf writes that under this view, “state sovereignty is one of the cold hard facts of life,” and its positive or negative effects are irrelevant.⁴²⁷ As we said when introducing this concept, it is best understood as a historically situated social contract claim, with the “police power” over criminal law recognized as a traditional aspect of state sovereignty.⁴²⁸ What is the upshot of Sovereignty Federalism for a constitutional criminal law?

Given the historical and contractual character of this theory, Sovereignty Federalism would impose a requirement of originalism in interpretation.⁴²⁹ This would then foreclose almost all constitutional limits on substantive criminal law that might spring from un-enumerated rights. Only those limits expressly imposed by constitutional text would be legitimate, as only in these areas would the states have validly ceded authority from their general police power: no bills of attainders or ex post facto crimes, no corruption of blood, etc.

It is worth noting, though, that one originalist theory would actually support such limits. Randy E. Barnett has written that while constitutional text should be interpreted according to its original meaning, “where the original meaning is incomplete or vague, the text must be ‘construed,’ as opposed to ‘interpreted,’ in a way that enhances its legitimacy without contradicting the meaning that does exist.”⁴³⁰ In engaging in such construction, he concludes, one should apply a “[p]resumption of [l]iberty” that favors individual rights.⁴³¹ Importantly,

act/4430741; see S. B. 2230 (N.Y. 2013).

425. See Jeff Winkler, *Gun-Toting Carpetbaggers*, NEW REPUBLIC (Apr. 12, 2013), <https://newrepublic.com/article/112889/new-yorkers-moving-texas-because-gun-control>.

426. *Bond v. United States*, 564 U.S. 211, 221 (2011), *rev'd*, 134 S. Ct. 2077 (2014).

427. Dorf, *supra* note 270, at 829.

428. See *id.* at 830 (“On this view, the parties to the contract were sovereign States and therefore honoring the contract means protecting state sovereignty.”).

429. *Id.* at 830-31 (connecting the historical argument with originalist method).

430. BARNETT, *supra* note 20, at 4.

431. *Id.* at 259-61.

the “police power”—being unwritten in the Constitution—must also be constructed with such a presumption.⁴³²

Barnett’s theory provides the intellectual scaffolding upon which Sovereignty Federalism might admit of *limitations* on state criminal law, because limitations on punishment increase liberty.⁴³³ This theory might hold that, say, the common law requirement of a voluntary act was a right “retained by the people” to limit criminalization.⁴³⁴

VII. CONCLUSION

Federalism is an argument that is invoked consistently when the Supreme Court rationalizes its refusal to create a constitutional criminal law. Yet this argument has remained unexamined by scholars—perhaps because it has become so axiomatic. A closer look at federalism as applied in this area reveals a more complicated picture than that presented by the Court’s opinions. It shows that federalism is composed of different variants, and that the constitutional rules it is used to resist also breaks down into three sub-categories. Once these concepts are disambiguated, it becomes apparent that federalism is a stronger argument against the creation of certain rules than it is against others, and that in some applications it is very weak. This is true both of the theories of federalism that the Court has explicitly invoked, as well as those that it has yet failed to use. Ironically, the most common application of the argument—against offense definition rules—seems to be the weakest. Moreover, what the Court has called the “principal benefit” of federalism, liberty preservation, seems to be a justification for, and not against, constitutional limits on criminal law. What has been treated as an unassailable justification for judicial restraint, then, turns out to have a far more limited application.

432. *Id.* at 322-34.

433. *See id.* at 262-65. This could be grounded in the Ninth Amendment, which preserves other “unenumerated rights . . . retained by the people” (individuals), or the Privileges and Immunities Clause. *See id.* at 254-55 (internal quotations omitted) (quoting U.S. CONST. amend. IX).

434. *See* U.S. CONST. amend. IX.