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Overcriminalization and the Constitution

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Abstract: *Although the Constitution's great structural principles of federalism and separation of powers are designed to guard against the abuse of governmental power and secure individual liberty, Congress routinely flouts these constitutional safeguards by enacting vague, overly broad, and other improper and unconstitutional criminal laws. Thomas Jefferson warned that "concentrating" or combining the powers of the legislative, executive, and judicial branches of government "in the same hands is precisely the definition of despotic government." Yet overcriminalization invites and effectively requires prosecutors, judges, and even unelected federal bureaucrats to engage in lawmaking to determine the scope and severity of criminal punishment. In order to preserve the rights of innocent Americans, the unbridled and unprincipled growth of federal criminal statutes and regulations must be contained.*

Congress's "tough on crime" rhetoric has almost routinely resulted in the proliferation of vague, overbroad federal offenses that have only theoretical or highly attenuated connections to the federal government's constitutional powers. This proliferation is a central feature of the "overcriminalization" phenomenon. It undermines justice and destroys the lives of individual Americans—consequences that are often directly related to lawmakers' disregard for or circumvention of the language and limitations of the U.S. Constitution.

Overcriminalization in Action

The overcriminalization phenomenon is well illustrated by the federal prosecution of Wisconsin

Talking Points

- Congress criminalizes vast swaths of conduct unrelated to any power or interest that the Constitution grants to the federal government.
- The great structural principles of federalism and separation of powers are designed to guard against the abuse of governmental power and secure individual liberty.
- Congress routinely flouts these constitutional safeguards by enacting vague and otherwise improper and unconstitutional criminal laws.
- The proliferation of federal criminal laws that cover local conduct and overlap with or duplicate existing state laws disrupts the proper balance among state and federal powers.
- Vague and overly broad federal criminal laws invite or practically compel federal prosecutors and courts to engage in lawmaking to determine—and generally extend—the scope of conduct that each offense covers.
- The destructive constitutional implications of overcriminalization are one more reason for Congress to rein in the unprincipled growth of federal criminal statutes and regulations.

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civil servant Georgia Thompson.[1] Thompson was charged with federal "honest services" fraud after she awarded a state contract for travel services to the bidder with the best price and second-best service rating.[2] Thompson and her team of decision makers had no financial interest in the winning company and no conflict of interest, and federal prosecutors made no allegations to the contrary. Instead, the U.S. Attorney's office alleged that the contract award technically violated Wisconsin state procurement rules—an argument that by no means supports the exercise of federal jurisdiction.

Unfortunately for Ms. Thompson, the language of the federal "honest services" fraud statute is an egregious example of overcriminalization.[3] It criminalizes vast swaths of conduct unrelated to any constitutional power or interest. Federal prosecutors thus were able to build their theory of Thompson's guilt on allegations that the contract she granted made her supervisors look good and thus "improved her job security."[4] A jury convicted Ms. Thompson under this preposterous theory, and a federal judge sentenced her to four years in federal prison.

By the time a federal court of appeals reversed the conviction of this hard-working civil servant with a previously unblemished record, Ms. Thompson had lost her job, career, and reputation; had fallen into bankruptcy; and had spent four months in a federal prison. Indeed, until the U.S. Supreme Court held that the language of the "honest services" statute is unconstitutionally vague and imposed a limiting construction on it,[5] prosecutors with the U.S. Department of Justice had used it for 23 years to prosecute thousands of individuals, many of whose conduct had no real connection either to the federal interest or to powers defined by the Constitution.

Lawmakers who are genuinely concerned about preserving America's remarkable freedoms and safeguarding individuals' most basic liberties must take stock of the damage that overcriminalization is doing to the nation's constitutional structure.

Injustices such as those Georgia Thompson suffered are increasingly common in America[6] and, sadly, unsurprising. Express constitutional provisions, as well as the federal–state governmental structure that the Constitution created, are intended to protect liberty.[7] Over the past several decades, however, federal lawmakers have often circumvented or even disregarded these limitations. Lawmakers who are genuinely concerned about preserving America's remarkable freedoms and safeguarding individuals' most basic liberties must take stock of the damage that overcriminalization is doing to the nation's constitutional structure.

Constitutional Powers and Federalism

The unbridled growth of federal criminal law disrupts the basic balance of constitutional govern-

1. United States v. Thompson, 484 F.3d 877 (7th Cir. 2007) (overturning conviction and four-year sentence under the federal "honest services" fraud statute, 18 U.S.C. § 1346).
2. *Id.* at 878–79.
3. The "honest services" fraud statute, 18 U.S.C. § 1346, makes it a federal crime to engage in a "scheme or artifice to deprive another of the intangible right of honest services." *Id.* Violations of this inscrutable prohibition may be punished by up to 20 years in federal prison (or 30 years if the alleged violation "affects" a financial institution). *See id.* §§ 1341, 1343.
4. *See Thompson*, 484 F.3d at 882.
5. Skilling v. United States, 130 S. Ct. 2896, 2907 (2010); *see id.* at 2927–28 (explaining that the Constitution requires a criminal statute to be defined "[1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement" (internal quotation marks omitted)).
6. *See* ONE NATION UNDER ARREST 3–124 (Paul Rosenzweig & Brian W. Walsh eds., 2010) (discussing cases illustrating the injustices caused by overcriminalization).
7. Professor David Currie refers to the constitutional doctrines of federalism and separation of powers as two of the "three great structural principles designed to guard against the possible abuse of governmental power" (the third being checks and balances). DAVID P. CURRIE, THE CONSTITUTION OF THE UNITED STATES 2 (2000).

ment. First and foremost, unprincipled expansion of federal criminal law runs afoul of the fundamental constitutional principle that the federal government is a government of limited and enumerated powers.[8] Likewise, the development of duplicative and overlapping criminal statutes and regulations at the federal level disregards the proper constitutional equilibrium between state and federal powers.

Constitutional Powers

It is a fundamental constitutional tenet that every law enacted by Congress must be based on one or more of the powers specifically enumerated in the Constitution. In *McCulloch v. Maryland*,[9] Chief Justice John Marshall described this limitation on federal authority in the following manner:

> This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent…. [T]hat principle is now universally admitted.[10]

Marshall's statement means that Congress does not have a general federal police power to criminalize conduct.[11] As such, Congress lacks constitutional authority over the vast majority of violent, non-economic activity that, in any event, is routinely governed by state criminal law and state law enforcement.[12] Rather than combating street crime or other purely local matters, federal criminal law should address problems reserved to the national government in the Constitution such as treason, currency counterfeiting, military activities, and specific offenses that require proof of an actual (not theoretical or highly attenuated) nexus with interstate commerce.

Unfortunately, recent congressional approaches to federal criminal law have not abided by such limitations. In most cases, Congress never identifies what legislative power, if any, undergirds its exercise of criminal authority. When Congress does expend the time and effort to cite a constitutional provision to justify criminal-law legislation, it most frequently cites to the Constitution's Commerce Clause (which grants Congress authority to "regulate Commerce… among the several States"[13]) and flatly asserts that the conduct the federal law covers has a constitutionally sufficient nexus to interstate commerce.

Unprincipled expansion of federal criminal law runs afoul of the fundamental constitutional principle that the federal government is a government of limited and enumerated powers.

Congress then leaves it to the courts to decide whether the federal legislature's improper, unjustified exercises of its power to criminalize will be held unconstitutional. The lower federal courts almost uniformly refuse to do so, despite some recent precedents from the Supreme Court reaffirming the limits on federal power to criminalize.[14] Over the past century, Congress and the federal courts have relied on expansive and unsound readings of the Commerce Clause to justify the federal govern-

8. *See, e.g.*, THE FEDERALIST NO. 45, at 241 (James Madison) (George W. Carey & James McClellan eds., 2001) ("The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite."); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 909, at 631 (2d ed. 1851) ("The Constitution was, from its very origin, contemplated to be the frame of a national government, of special and enumerated powers, and not of general and unlimited powers.").
9. 17 U.S. 316 (1819).
10. *Id.* at 405.
11. *See* United States v. Morrison, 529 U.S. 598, 618 (2000).
12. *See id.* at 617–8 ("The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States…. Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.").
13. U.S. CONST. art. I, § 8.
14. *See Morrison*, 529 U.S. 598; *United States v. Lopez*, 514 U.S. 549 (1995).

ment's broadening of the scope of its limited legislative authority to regulate more and more truly local conduct and also to expand the scope of federal criminal law.

Indeed, the number of federal crimes has increased almost exponentially. The sheer size of the federal criminal law is so great that no one has been able to produce an exact count of the thousands of statutory criminal offenses in federal law. The best scholarly estimates are that by 2008 the U.S. Code included at least 4,450 federal crimes[15] and that the Code of Federal Regulations includes tens of thousands of regulations that can be enforced with criminal penalties.[16] Many of these laws were passed by Congress based upon dubious or, at best, attenuated claims of constitutional authority and are beyond Congress's enumerated powers.

Federalism

The current growth of federal criminal law also runs afoul of the fundamental tenets of federalism. Constitutional federalism is no mere theoretical nicety; like all limitations on the power of government, it is a vital safeguard for Americans' essential rights and liberties. The preeminent Framer, James Madison, writing to explain and defend the Constitution in order to persuade Americans to ratify it, called constitutional federalism a "double security… [for] the rights of the people."[17] The proliferation of vague and overbroad federal criminal laws that are unconnected to the federal government's constitutionally defined powers and interests threatens this double security. It circumvents state sovereignty and undermines the authority of state and local law enforcement officials to combat common street crime.

Members of Congress consistently demonstrate a willingness to increase the scope and power of the federal government at the expense of state sovereignty.

Given that the federal government has no general or plenary police power, it is universally accepted that the power to punish crimes belongs primarily to the states. In fact, criminal justice is at the very core of the governmental powers and responsibilities that are predominately left to the states. The criminal justice burden borne by the 50 states dwarfs the burden undertaken by the federal government.[18] In 2003, state and local governments were responsible for 96 percent of those under correctional supervision—that is, in prison or jails, on probation or parole.[19] Similarly, in 2004, just 1 percent of the over 10 million arrests made nationwide were for federal offenses.[20]

Members of Congress consistently demonstrate a willingness to increase the scope and power of the federal government at the expense of state sovereignty. Whether such practices are the result of a desire to appear "tough on crime" or of a collective mentality that societal harms can be solved only through criminalization, the result is the same: a labyrinthine collection of vague and overbroad statutes and regulations that sometimes duplicate and often conflict with state priorities for criminal law and law enforcement.

15. *See* John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE FOUNDATION L. MEMO No. 26, at 1 (June 16, 2008).
16. *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, 216 (1991); *cf.* Clyde Wayne Crews, Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, COMPETITIVE ENTER. INST. 15 (2010) ("Since 1980, the C[ode of Federal Regulations] has grown from 102,195 pages to 157,974. By contrast, in 1960, it had only 22,877 pages.").
17. THE FEDERALIST NO. 51, at 270 (James Madison) (George W. Carey & James McClellan eds., 2001).
18. *See Exploring the National Criminal Justice Commission Act of 2009: Hearing Before the Senate Judiciary Committee Subcommittee on Crime and Drugs*, 111th Cong. (2009) (written statement of Brian W. Walsh, The Heritage Foundation).
19. *Id.*
20. *Id.*

Separation of Powers and Overcriminalization

The unchecked growth of the federal criminal code has led to a dangerous reallocation of power from elected representatives in Congress to unelected bureaucrats. For example, in recent decades, an increasing number of criminal regulations have been created by executive agencies composed of unelected political appointees and career bureaucrats. The purported authority for promulgating these regulations is often broad congressional language delegating authority to administrative agency officials to impose criminal sanctions.[21]

While such "delegation" may be politically expedient, it is also a severe abdication of Congress's authority and leads to the unrestrained and unprincipled use of criminalization as a regulatory mechanism. Although the courts have permitted this sort of delegation in civil matters,[22] it is an especially pernicious trend when Congress's decisions to delegate its authority to unelected bureaucrats in federal agencies involve criminal offenses and penalties that place Americans' most basic freedoms and liberties at stake. A proper understanding of the federal legislature's role would lead Congress to reject these sorts of delegations of its own authority even if the courts do not bind them to do so.

Reallocating the power to define criminal sanctions from elected representatives in Congress to unelected bureaucrats is a severe abdication of Congress's authority and leads to the unrestrained and unprincipled use of criminalization as a regulatory mechanism.

Delegating Power to Federal Prosecutors

Improper delegation is also evident in the manner in which overcriminalization provides federal prosecutors with unfettered control over broad swaths of criminal adjudication and legislative interpretation. The proliferation of vague and overly broad laws has given federal prosecutors the ability to stack criminal charges against defendants in a way that diminishes the likelihood of a criminal trial and increases the probability of either a guilty plea or a jury verdict.

Harvard law professor Bill Stuntz has described charge stacking as the ability "to charge a large number of overlapping crimes for a single course of conduct."[23] The potential for injustice is heightened when each of the crimes is vague and overly broad. However:

> Even if each of these offenses is narrowly defined to cover only serious misconduct, combining crimes enables prosecutors to get convictions in cases where there may be no misconduct at all. When deciding whether to plead guilty, any rational defendant (more to the point, any rational defense lawyer) takes account of the sentence the defendant may receive if he goes to trial and loses.… By stacking enough charges, prosecutors can jack up the threat value of trial and thereby induce a guilty plea, even if the government's case is weak.[24]

In the federal system, where over 95 percent of defendants already plead guilty, overcriminalization thus gives prosecutors vast latitude to secure guilty verdicts. In the interpretive context, the proliferation of vague and overbroad criminal laws has given

21. *See, e.g.*, Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, The Heritage Foundation & National Association of Criminal Defense Lawyers 23–24 (2010) (finding that 14 percent of the non-violent, non-drug criminal provisions that Congress introduced in 2005 and 2006, and 22 percent of those it enacted, "delegated criminal lawmaking authority to unelected regulators").
22. The U.S. Supreme Court has legitimized Congress's decisions to delegate or assign its legislative power to another branch of the federal government so long as there is an "intelligible principle to which the person or body authorized [to exercise the delegated power] is directed to conform." J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928). This approach, the Court has said, is "driven by a practical understanding that in our increasingly complex society…Congress simply cannot do its job absent an ability to delegate power." Mistretta v. United States, 488 U.S. 361, 372–73 (1989).
23. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 594 (2001).
24. *Id.*

federal prosecutors in the U.S. Attorneys' offices and Department of Justice the ability to apply vague, overly broad criminal laws to a vast array of conduct. The prosecutor essentially becomes a lawmaker, providing meaning and context to an otherwise open-ended statute or regulation.[25] Such a situation runs afoul of the proper assignment of federal power under the Constitution.

Delegating Power to the Judiciary

The unprincipled growth of federal criminal law has also led to the inappropriate delegation of legislative authority to the judicial branch. Judges often must take it upon themselves to create meaning from vague, unbounded criminal offenses such as the "honest services" fraud statute. When "interpreting" the large number of imprecise and unclear *mens rea* (criminal-intent) requirements in statutory and regulatory criminal offenses, for example, judges are essentially co-opted into rewriting the laws and "finding" meaning where there is none.

There are judicially created safeguards that federal courts could (and should) apply to grant the benefit of the doubt to a person accused of a vague, ambiguous, or overly broad criminal law. These safeguards include the constitutional void-for-vagueness doctrine that the Supreme Court used to narrow the "honest services" fraud statute as well as the common-law rule of lenity.

Regrettably, overcriminalization often induces the courts to assume instead the responsibilities of the legislature. The Supreme Court pinpointed the hazards arising from this sort of separation-of-powers violation well over a century ago:

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.[26]

The unprincipled growth of federal criminal law has also led to the inappropriate delegation of legislative authority to the judicial branch.

In 1784, Thomas Jefferson warned that "concentrating" or combining the powers of the legislative, executive, and judicial branches of government "in the same hands is precisely the definition of despotic government."[27] James Madison echoed this same conclusion a few years later.[28]

It is undoubtedly convenient and expedient for Congress to create imprecise, hastily drafted criminal laws and allow prosecutors and judges to interpret them as they will.[29] The same can be said about authorizing unelected bureaucrats in federal agencies to make the crucial criminal-law decisions that will affect Americans' most fundamental rights and liberties. However, the fundamental duty for full deliberation over and precise crafting of every criminal law belongs to Congress. When Congress carries out this duty in a haphazard, imprecise manner—or expressly delegates it away to federal agencies—both individual Americans and the nation's system of constitutional government are harmed.

Conclusion

Perhaps the central question that the Framers of the Constitution and Bill of Rights debated—a question to which they gave painstaking consideration—was how best to protect individuals from unfettered

25. James R. Copland, *Regulation by Prosecution: The Problems with Treating Corporations as Criminals*, MANHATTAN INST. CIV. J. REP. NO. 13, at 1, 8 (Dec. 2010) (arguing that prosecutors now have "almost untrammeled power to act as frontline corporate regulators" and "are fashioning ad hoc remedies for what may or may not be crimes, rather than following established rules that clearly state the legal basis for a government's intervention in private affairs").
26. United States v. Reese, 92 U.S. 214, 221 (1875) (Waite, C.J.).
27. Thomas Jefferson, Notes on the State of Virginia, No. 13 (1784).
28. THE FEDERALIST NO. 47, at 249 (James Madison) (George W. Carey & James McClellan eds., 2001) ("The accumulation of all powers, legislative, executive, and judiciary, in the hands, whether of one, a few, or many…may justly be pronounced the very definition of tyranny.").

government power. They were well acquainted with abuses of the criminal law and criminal process and so endeavored to place in America's founding documents significant safeguards against unjust criminal prosecution, conviction, and punishment. In fact, the Framers understood so well the nature of criminal law and the natural tendency of government to abuse it that two centuries later, the most important *procedural* (as opposed to substantive) protections against unjust criminal punishment are derived directly or indirectly from the Constitution itself, notably the Fourth, Fifth, Sixth, and Eighth Amendments.

The wholesale expansion of federal criminal law—in both the number of offenses and the subject matter they cover—has become a major threat to American civil liberties.

Despite these protections, the wholesale expansion of federal criminal law—in both the number of offenses and the subject matter they cover—has become a major threat to American civil liberties. When laws are vague, are overbroad, or lack adequate *mens rea* requirements, the procedural protections of the Bill of Rights are inadequate to protect individual Americans from unjust criminal prosecution and punishment. This inadequacy is evidenced by the terrible toll that overcriminalization has taken on the lives of individuals such as Georgia Thompson,[30] as well as the manner in which the expansion of federal criminal law has eaten away at the wide range of structural constitutional protections put in place by the Framers.

Congress's overcriminalization expands the power of the federal government beyond its constitutional limits and disrupts constitutional federalism's proper balance of power between the federal and state governments. The proliferation of vague, overly broad federal criminal laws results in separation-of-powers violations and encroaches upon the rights of innocent Americans. The destructive constitutional implications of overcriminalization are one more compelling reason for Congress to rein in the unbridled and unprincipled growth of federal criminal statutes and regulations.

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29. Professor Bill Stuntz has provided compelling scholarship showing that, rather than checking each other's interests in the arena of criminal justice, Congress and federal prosecutors now share the same interests, leading to habitual, rampant overcriminalization. Stuntz, *Pathological Politics*, *supra* note 23, at 510. The check that the judiciary provides on the other two branches is insufficient and largely ineffective in slowing the one-way ratchet in the direction of ever more and harsher criminalization:

> [T]he story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes, and growing marginalization of judges, who alone are likely to opt for narrower liability rules rather than broader ones. This dynamic…arises out of the incentives of the various actors in the system. Prosecutors are better off when criminal law is broad than when it is narrow. Legislators are better off when prosecutors are better off. The potential for alliance is strong, and obvious. And given legislative supremacy—meaning legislatures control crime definition—and prosecutorial discretion—meaning prosecutors decide whom to charge, and for what—judges cannot separate these natural allies.

Id.

30. *See also* ONE NATION UNDER ARREST, *supra* note 6, at 3–11, 107–114 (discussing cases of small-business owners Abner Schoenwetter and Krister Evertson, both of whom were convicted and sentenced to federal penitentiaries despite exceedingly scant evidence that their conduct was truly wrongful or that they engaged in it with criminal intent, a historic Anglo–American requirement for criminal punishment).