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KIDNAPPING FEDERALISM: *UNITED STATES v. WILLS* AND THE CONSTITUTIONALITY OF EXTENDING FEDERAL CRIMINAL LAW INTO THE STATES

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On March 1, 1932, Charles and Anne Lindberg's twenty-month-old baby boy was kidnapped out of his nursery while he slept.[1] Known for many years after as the "crime of the century," the kidnapping of the Lindberg baby was, at the time, highly sensationalized.[2] Not only did it involve Lindberg, the man who had flown solo across the Atlantic to become the age's "greatest hero," but the ransom demanded—fifty thousand Depression-era dollars—was considered by most Americans at the time to be a fortune.[3] Newspapers of the day covered the kidnapping with an intensity usually reserved for politics or war, and ordinary people deluged the Lindberg family with thousands of potential leads, expressions of sympathy, and psychic predictions.[4] Even the notorious gangster Al Capone got involved; he promised that if he were released from prison, he and his henchman would deliver both the missing child and the perpetrator.[5]

Despite the level of attention swirling around the missing Lindberg baby, authorities investigating the kidnapping found themselves hampered in their efforts by the nature of kidnapping

* J.D. Northwestern, 2003. Special thanks to Professor Steven Calabresi for putting me on the right track.

[1] HUNTERDON COUNTY DEMOCRAT, THE LINDBERG CASE: THE TRIAL OF THE CENTURY, *available at* http://www.lindberghtrial.com/html/crime.shtml (last visited on February 19, 2003).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

laws.[6] At the time, the only kidnapping laws were *state* laws, and these often—conflicting state laws forced the authorities to conform an otherwise national manhunt to the particular idiosyncrasies of each state into which it extended.[7] To alleviate this confusion and facilitate the pursuit of kidnappers without regard to state lines, Congress quickly passed the Federal Kidnapping Act.[8] Designed exclusively to give federal authorities the power to chase kidnappers when they fled from one jurisdiction to another and from one state to another, the Act created a legal supplement to state kidnapping laws: a nationwide rule of illegality that could govern where a single state's law could not.[9]

Unfortunately, the Act could do little to help the missing Lindberg child. As a trucker discovered on May 12, 1932, the body of the baby had all the while been laying in the woods just a few miles from the Lindberg home, dead as the result of a skull fracture.[10] The Act had been irrelevant; the victim had not been carried across a county line, much less a state line.[11]

Nevertheless, the Act remained, and for the next fifty years it was employed with little controversy, used against those kidnappers that, during the course of the kidnapping, carried their victims across state lines.[12] Over the years, the Act performed the function for which it was designed: to give federal authorities the ability to chase kidnappers across jurisdictional lines and prosecute them under a single, federal criminal statute without becoming tangled in the mire of inconsistent state laws.[13]

Recently, however, in *United States v. Wills*, the Court of Appeals for the Fourth Circuit expanded the Act's traditional scope to reach kidnappings in which the kidnapper does not carry his victim

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[6] *See* United States v. Chatwin, 326 U.S. 455, 463 (1946); H. R. REP. 72-1493, at 1 (1932); 75 CONG. REC. 5,075-76, 13,282-304 (1932).

[7] *See Chatwin*, 326 U.S. at 463; H.R. REP. NO. 72-1493; 75 CONG. REC. 5075-76.

[8] *See Chatwin*, 326 U.S. at 462-63. *See also* Federal Kidnapping Act, 18 U.S.C. § 1201 (1932).

[9] *Chatwin*, 326 U.S. at 462-63.

[10] *See* HUNTERDON COUNTY DEMOCRAT, *supra* note 1.

[11] *Id.*

[12] *See, e.g.*, United States v. Stands, 105 F.3d 1565 (8th Cir. 1997); U.S. v. Hughes, 716 F.2d 234 (4th Cir. 1994); United States v. Toledo, 985 F.2d 1462 (10th Cir. 1993); United States v. Macklin, 671 F.2d 60 (2d Cir. 1982); United States v. Boone, 959 F.2d 1550 (11th Cir. 1979); United States v. McInnis, 601 F.2d 1319 (5th Cir. 1979); United States v. McBryar, 553 F.2d 433 (5th Cir. 1977); United States v. Hoog, 504 F.2d 45 (8th Cir. 1974).

[13] *See Chatwin*, 326 U.S. at 463.

across state lines.[14] In *Wills*, the court held that federal jurisdiction arises under the Act when a kidnapper uses false pretenses to lure his victim into crossing state lines, even if the kidnapper himself does not accompany the victim during that crossing.[15] As the *Wills* court noted, its holding was in direct opposition to *United States v. McInnis*, a twenty-year-old case from the Court of Appeals for the Fifth Circuit that held that federal jurisdiction under the Act can be established *only* when the kidnapper actually accompanies the victim across state lines.[16] The Act, the Fifth Circuit held in *McInnis*, does not "reach the entirely voluntary act of a victim in crossing a state line even though it is induced by deception."[17]

As this article will argue, the circuit split resulting from *Wills* is of some consequence. For if, as *Wills* holds, federal jurisdiction under the Act can attach even when a kidnapping does not cross state lines, then the constitutionality of the Act is brought into question. The Act, like all federal criminal laws, is constitutionally justified by Congress' power to legislate under the Commerce Clause, which grants Congress the power to regulate interstate commerce.[18] If it can be applied to intrastate activities, as the *Wills* decision would have it, under what part of the Constitution could the Act be said to originate?[19] Likewise, if the Act can be used to allow federal authorities to prosecute a kidnapper who does not carry his victim across state lines, important questions of federalism arise: Which entity—the federal government or the state—is charged with policing the protection of citizens? What powers, if any, do the states still retain if the federal government is free to police crimes within their borders?[20] Finally, in the aftermath of *Wills*, how are courts to deal with the Act's declared legislative purpose and heretofore cohesive body of precedent, both of which *Wills* would seem to contradict?[21]

This article proposes that, in its split with existing law set forth by the Fifth Circuit, the Fourth Circuit in *United States v. Wills* misread the Federal Kidnapping Act to reach a conclusion that 1) unconstitutionally enabled federal jurisdiction by allowing a federal

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[14] 234 F. 3d 174 (4th Cir. 2000), *cert. denied*, 531 U.S. 911 (2001).

[15] *Id.* at 178.

[16] *Id. See also McInnis*, 601 F.2d at 1324-27.

[17] *McInnis*, 601 F.2d at 1327.

[18] U.S. CONST. art. I, § 8, cl. 3

[19] *See infra* Part II.A.1.

[20] *See infra* Part II.B.

[21] *See infra* Part III.

criminal law to be utilized against a wholly intrastate crime; 2) violated the tenets of federalism by granting federal authorities power over an area traditionally reserved to the states; and 3) contradicted both precedent and the legislative purpose of the Act by extending the law to a crime—intrastate kidnapping—that it has never been understood to cover.

To make this argument, the first section of this article will provide a brief history of the Act and will detail the contradictory holdings of *McInnis* and *Wills*. The second section will discuss the constitutionality of the *Wills* decision by first reviewing the history of Congress' power under the Commerce Clause to pass federal criminal laws such as the Act. Next, it will examine the curtailment of Congress' commerce power in *United States v. Lopez*[22], and describe the federalist interests of the current Supreme Court. Lastly, the second section of this article will show how a federalist jurisprudence grounded in *Lopez* was successfully employed by the Court in *United States v. Jones*,[23] a case nearly identical to *Wills* that could have implicated many of the same constitutional concerns.

The third section of this article will turn specifically to *Wills*, detailing the manner in which the Fourth Circuit's decision contradicted the legislative purpose of the Act, the internal logic of the federal criminal regime, and the precedent under the Act. The third section will also detail the highly unnatural "natural reading" of the Act employed by the Fourth Circuit to reach such an isolated decision.

Finally, the fourth section of this article will look to the possible future effect of the *Wills* decision, most notably to a similar case likely headed to court as a result of *Wills*' expansion of federal jurisdiction under the Act.

I. THE FEDERAL KIDNAPPING ACT: FROM INCEPTION TO *WILLS*

A. PURPOSEFUL BEGINNINGS

Originally enacted in 1932 as a response to the kidnapping of the Lindberg baby, the Federal Kidnapping Act[24] was designed to assist

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[22] 514 U.S. 549 (1995).

[23] 529 U.S. 848 (2000).

[24] In pertinent part, the statute states: "Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or caries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when –(1) the person is willfully transported in interstate or foreign commerce, regardless of whether the person was alive

state governments in quashing the then "epidemic" of organized kidnapping syndicates.[25] The point of the Act, simply, was to enable federal authorities to chase kidnappers when they fled from one jurisdiction to another.[26] To achieve this end, Congress used "comprehensive language" in the Act to cover "every possible variety of kidnapping followed by interstate transportation," thereby giving federal authorities broad power to "disregard borders" and prosecute interstate kidnappings that individual states' laws could no longer reach.[27]

Though the Act's "comprehensive language" helped produce an early body of caselaw consistent with the proclaimed purpose of the Act,[28] a 1972 amendment to the Act served to confuse some of this consistency.[29] In short, the amendment opened the possibility that the Act no longer required the kidnapper to physically "accompany" the victim across state lines in order for federal jurisdiction to attach.[30] Though the cases that were decided after the amendment continued to further pre-amendment precedent on this point,[31] the question of whether such interstate accompaniment was absolutely necessary under the Act remained unanswered until the Fifth Circuit decided *McInnis*.

B. IMPLICIT UNDERSTANDING MADE EXPLICIT: *UNITED STATES V. MCINNIS*

In *McInnis*, the U.S. Court of Appeals for the Fifth Circuit became the first court to explicitly hold that for jurisdiction to attach under the Federal Kidnapping Act, a kidnapper must physically accompany his victim across state lines.[32] The Fifth Circuit found in

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when transported across a state boundary if the person was alive when the transportation began . . . shall be punished . . ." 18 U.S.C.A. § 1201 (West 2001).

[25] *Chatwin*, 326 U.S. at 463 (citing H. R. REP. NO. 72-1493 (1932)).

[26] *Id.*

[27] *Id.*

[28] *See, e.g., id.* at 462-65; *see also* Edison v. United States, 272 F.2d 684, 687 (10th Cir. 1959) (holding that Act requires that a defendant "cros[s] state line[s] with the kidnapped victim in his custody").

[29] *See infra* note 38.

[30] *Id.*

[31] *See, e.g.*, United States v. McBryar, 553 F.2d 433, 433 (5th Cir. 1977) (requiring accompanied kidnapping to continue until after state lines have been crossed for federal jurisdiction to attach); United States v. Hoog, 504 F. 2d 45, 50-51 (8th Cir. 1974) (holding that Act prohibits the decoying or inveighing of a victim into accompanying the defendant across state lines).

[32] United States v. McInnis, 601 F. 2d 1319, 1326 (5th Cir. 1979).

McInnis that federal jurisdiction did not exist, for though the defendants in that case planned to have their victim travel from Texas to Mexico—where he would be kidnapped and murdered—their plan involved the victim traveling on his own accord.[33] Jurisdiction under the Act, the court held, could not be extended to reach such a situation, to "reach the entirely voluntary act of a victim in crossing a state line even though it is induced by deception."[34]

The *McInnis* court supported its conclusion with reference to the legislative purpose of the Act,[35] to the jurisdictional requirements of other federal criminal statutes predicated on interstate commerce,[36] and to the absence of cases "in which causation has been imputed because the victim transported himself."[37] Additionally, the court noted, though the 1972 amendment to the Act served to "make the thrust of the offense the kidnapping itself rather than the interstate transporting of the kidnapped person,"[38] the legislative history of the amendment—as well as the text of the revised amendment itself—in no way indicated that the jurisdictional element of transportation had been removed or diminished.[39] As a result, the court held, the kidnapping statute could not "be stretched to enable the government to prosecute a defendant merely because what he [does] is vile, or . . . a violation of state law that is likely to go unpunished by state

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[33] *Id.* at 1321.

[34] *Id.* at 1327.

[35] The court acknowledged that the purpose of the Act was "to outlaw interstate kidnapping rather than general transgressions of morality involving the crossing of state lines." *Id.* at 1324 (quoting United States v. Chatwin, 326 U.S. 433, 463 (1946)).

[36] *See, e.g.*, The National Stolen Property Act, ch. 645, 62 Stat. 806 (1948) (codified as amended at 18 U.S.C. § 2314) (under which "no case has been cited in which causation has been imputed because the victim transported himself"); *cited in McInnis*, 601 F.2d at 1326 ("The kidnapping statute thus fits into a common statutory model for federal offenses that premise federal jurisdiction on the offender's unlawful exercise of control over a person or object followed by the interstate transportation of that person or object.").

[37] United States v. McInnis, 601 F.2d 1319, 1326 (5th Cir.).

[38] The text of the statute as originally passed in 1932 created liability for any person who "knowingly transports in interstate or foreign commerce, any person who *has been* unlawfully seized, confined . . . ." Federal Kidnapping Act, Pub. L. No. 72-189, 47 Stat. 326 (1932) (emphasis added). The amended (current) statute creates liability for "whoever unlawfully seizes, confines . . . any person . . . when— (1) the person is willfully transported in interstate or foreign commerce . . . .". 18 U.S.C.A. § 1201 (West 2001). In sum, the previous iteration of the statute explicitly required the "kidnapping" to precede the state line crossing.

[39] *McInnis*, 601 F.2d at 1324-25 (citing S. REP. NO. 92-1105, pt. 2, at 1 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4316.)

authorities."[40]

C. DENYING THE PAST, CREATING THE SPLIT: *UNITED STATES V. WILLS*

Twenty-eight years later, in *Wills*, the Fourth Circuit reached the exact opposite conclusion of *McInnis* by holding that "unaccompanied travel over state lines is sufficient to confer jurisdiction."[41]

In *Wills*, a Virginia resident named Zabiuflah Alam came home to discover Christopher Wills burglarizing his apartment.[42] Wills was arrested and indicted, but before a grand jury could be convened, Wills anonymously lured Alam to the District of Colombia through the guise of a bogus job offer.[43] Though his car was later found in Maryland, Alam was never seen again.[44]

Wills escaped prosecution for the burglary charge, but was later prosecuted under the Federal Kidnapping Act on the theory that he had dispatched Alam to prevent him from testifying in the burglary case.[45] Taped phone conversations between Wills and his brother, an inmate in a Virginia state prison, supported this conclusion; in the conversations, Wills had not only indicated that he was "getting ready to hurt [Alam]," but also later told his brother that "his business was 'tak[en] care of.'"[46]

Despite these statements, the U.S. District Court for the Eastern District of Virginia dismissed the case due to lack of jurisdiction.[47] According to the district court, the Act required that a victim be "willfully transported" by another across state lines for federal jurisdiction to attach.[48] This requirement, the court held, was illuminated not only by *McInnis* and other precedent,[49] but also by the

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[40] *Id.* at 1327.

[41] United States v. Wills, 234 F.3d 174, 178 (4th Cir. 2000).

[42] *Id.* at 175.

[43] *Id.* As part of his lure, Wills obtained a cell phone under a phony name. On a flier that he left outside Alam's apartment, Wills listed the cell's number as that of a fictional company seeking new employees. Alam called this number and arranged a job interview in the District of Columbia. *Id.* at 176.

[44] *Id.* at 176.

[45] United States v. Wills, 2000 WL 311188, at *1 (E.D.Va. Mar. 17, 2000) [hereinafter *Wills I*].

[46] *Wills*, 234 F.3d at 176.

[47] *Wills I*, 2000 WL 311188, at *6.

[48] *Id.* at *4.

[49] *Id.* at *2-*6, (citing United States v. Hughes, 716 F.2d 234, 238 (4th Cir. 1994) (holding that subject matter jurisdiction attaches only with an interstate transporting of a

statute's legislative history.[50] Because Wills did not satisfy this requirement, but "at most . . . caused [Alam] to travel in interstate commerce" of his own accord, the court held that federal jurisdiction could not attach and dismissed the case.[51]

On appeal the Fourth Circuit reversed, convicting Wills on a theory that deception alone, without accompaniment across state lines, was sufficient to establish federal jurisdiction under the Act.[52] According to the court, both *McInnis* and the logic of the lower court were irrelevant in the face of clear congressional intent, intent that could be realized in the plain text of the statute.[53] Because the text of the statute required only that the victim "[be] willfully transported," it therefore did "not require that the defendant accompany, physically transport, or provide for the physical transportation of the victim."[54] To satisfy the jurisdictional element of the Act, then, the court held that it only need ask if the "kidnapper ha[d] interfered with, and exercised control over, [the victim's] actions."[55] In *Wills*, the court found, Alam's freedom to abandon his trip at any time was of little consequence, for the actions taken by Wills to lure him to the District of Colombia "supported a finding that Alam was 'willfully transported' within the meaning of the statute," and therefore federal jurisdiction could sufficiently attach.[56]

D. THE AFTERMATH OF *WILLS*

The circuit split *Wills* creates is significant for a number of

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kidnapped person); United States v. Toledo, 985 F.2d 1462, 1466 (10th Cir. 1993) (holding that Congress' power to prohibit criminal acts is borne out of Commerce Clause); United States v. McInnis, 601 F.2d 1319 (5th Cir. 1979) (holding that Act not violated when victim voluntarily crosses state lines); United States v. Boone, 959 F.2d 1550 (11th Cir. 1992) (holding that jurisdiction attaches despite victim's willingness to accompany kidnapper provided kidnapped maintains "force in reserve")).

[50] United States v. Wills, 2000 WL 311188, *4 (E.D. Va. Mar. 17, 2000) (citing United States v. Chatwin, 326 U.S. 455, 462-63 (1946) (holding that statute does not apply to "situations lacking the involuntariness of seizure and detention which is the very essence of the crime of kidnapping")). *See supra* Part I.A.

[51] *Id.* at *6.

[52] United States v. Wills, 234 F.3d 174, 178 (4th Cir. 2000).

[53] *Id.* The court in *Wills* acknowledged but did not argue with the holding of *McInnis*. Instead the court chose only to "respectfully disagree" with the conclusion reached therein. *Id.*

[54] *Id.* at 176 (stating that after the 1972 amendment to the Act, interstate travel is "merely a basis for federal jurisdiction rather than an integral party of the substantive crime").

[55] *Id.* at 178 (quoting United States v. Hughes, 716 F.2d 234, 239 (4th Cir. 1994)).

[56] *Id.*

reasons, the least of which is the effect it will have on defendants who lure, invite, or otherwise induce their victims to cross state lines before kidnapping them. After *Wills*, previously "intrastate" defendants in the Fourth Circuit must now face "interstate" criminal charges, federal criminal charges that will enable attorneys general to pursue defendants that would otherwise be beyond their reach.[57] Likewise, state kidnapping defendants may now be plucked up by federal prosecutors and forced to stand before a federal criminal court, with its stricter and often more lengthy sentencing requirements,[58] despite not having "transported" or otherwise carried their victim in interstate commerce.[59]

More significantly, the split between *McInnis* and *Wills* and their conflicting views of Congress' legislative power speaks to the scope of the Constitution itself. Under *McInnis*, which holds that Congress intended for jurisdiction under the Act to attach *only* when the kidnapper accompanies his victim across state lines, the Act would seem to be well within Congress' traditional power to legislate under the Commerce Clause.[60] But if, as *Wills* holds, the intent of Congress was to create federal jurisdiction over kidnappings where the kidnapper does *not* himself accompany or otherwise maintain control over the victim while crossing state lines, then not only has Congress' power to legislate under the Commerce Clause been stretched to a new and possibly unconstitutional limit, but, as this comment will explain, the restraints of federalism have been cast aside, as well.[61]

II. THE CONSTITUTIONALITY OF FEDERAL CRIMINAL LAWS

This section will discuss the constitutional implications of the

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[57] *See, e.g., infra* Part V.

[58] RICHARD H. MCLEESE, ILL. INST. FOR CONTINUING LEGAL EDUC., FEDERAL CRIMINAL JURISDICTION § 1.11 (1997) (noting that federal sentencing guidelines and procedural standards create substantial discrepancies between parallel cases tried in state versus federal court).

[59] Thomas J. Maroney, *Fifty Years of Federalization of Criminal Law: Sounding the Alarm or "Crying Wolf?"*, 50 SYRACUSE L. REV. 1317, 1341 (2000) ("[N]ew federal crimes dealing with local conduct place additional (and essentially unreviewable) power in the hands of federal prosecutors, prompting questions about diverse treatment, sentences, and other issues related to the basis for selecting one defendant for federal prosecution while others are prosecuted by the state. In the absence of a distinct federal interest, the decision to prosecute can lack a guiding federal principle."). *See also* TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, AMERICAN BAR ASS'N., REPORT ON THE FEDERALIZATION OF CRIMINAL LAW 33 (1998).

[60] *See infra* Part II.A.

[61] *See infra* Parts II.B.1 and II.B.2.

Wills decision. To do so, it will first cover a brief history of Congress' power to create criminal laws under the Commerce Clause. Next, it will discuss *Lopez*[62] and the current Court's federalist view of the Commerce Clause. Finally, it will examine *Jones*,[63] a most recent case that is both analogous to *Wills* and illustrative of the Court's current procedure for reviewing the constitutionality of a federal criminal law.

A. A HISTORY OF FEDERAL CRIMINAL LAW UNDER THE COMMERCE CLAUSE

Unlike state governments, which have a broad "police power" to criminalize conduct, the federal government has inherent power "to regulate its internal affairs for the protection or promotion of public health, safety, and morals, or—somewhat more vaguely—for the protection or promotion of the public welfare."[64] To act on this inherent power, however, Congress has always been required to locate a constitutional basis for federal jurisdiction under which it *can* act.[65]

Traditionally, these bases for jurisdiction have sprung out of the occurrence of a crime on federal lands or property,[66] the commission of a crime on or by a federal employee,[67] the use of the mails,[68] or the involvement of interstate commerce.[69] The last of these jurisdictional bases, interstate commerce, has been most commonly employed by Congress, and has been further sub-divided into the following three distinct types of jurisdictional foundations: those involving the interstate transportation of the victim,[70] proceeds,[71] or offender;[72]

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[62] 514 U.S. 549 (1995).

[63] 529 U.S. 848 (2000).

[64] WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 128 (2d. ed. 1986).

[65] Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L. J. 979, 980 (1995).

[66] Article I, section 8 of the Constitution gives the federal government jurisdiction "over federal enclaves—those islands of federal owned and controlled lands that are within the state (e.g., military posts, federal courthouses, post offices, and national parks)." MCLEESE, *supra* note 58, at § 1.7.

[67] *See generally* MCLEESE, *supra* note 58, at § 1.8.

[68] *See* 18 U.S.C. § 1715 (1948) (codifying the Post Office Act).

[69] *See* U.S. CONST. art. I, § 8, cl. 3.

[70] *See, e.g.*, 18 U.S.C. § 1201 (West 2001) (criminalizing kidnapping).

[71] *See, e.g.*, 18 U.S.C. § 2314 (1948) (criminalizing interstate transport of stolen goods).

[72] *See, e.g.*, 18 U.S.C. § 2101 (1968) (criminalizing interstate transport of one involved in a riot). *See generally* MCLEESE, *supra* note 58, at § 1.10.

those prohibiting "the use of a medium of interstate commerce in the commission of an offense";[73] and those involving interstate crimes that "affect" commerce.[74] Although this discussion of the Act is concerned with the first foundation—"interstate transport of the victim"—a brief history of all three and how they came to be subdivided will greatly illuminate the issues at hand.

1. Expanding the Commerce Power Before Lopez v. United States

Any history of federal criminal law must begin with the Constitution's Commerce Clause, the clause which delegates to Congress the authority to regulate commerce among the several states.[75] In the seminal case of *Gibbons v. Ogden,*[76] the Supreme Court recognized that the Commerce Clause gave Congress the power to regulate not only commerce, "but also those activities necessary to commerce."[77] Under this rubric, it became clear that to protect "those activities necessary to commerce," Congress had the power to regulate crime.[78]

After the Civil War, Congress began to use its criminal law-making authority under the Commerce Clause, "employ[ing] federal sanctions to protect private individuals from invasion of their rights by other private individuals."[79] Traditionally, the authority to enforce such "police" protection had been a function of state law.[80] But during the Reconstruction, Congress found such authority useful for protecting civil rights when many of the states otherwise refused to do so.[81] Later, Congress similarly used its developing federal police power to fill other gaps in local laws, as with the Interstate

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[73] MCLEESE, *supra* note 58, at §1.10.

[74] *See, e.g.*, 12 U.S.C. § 1951 (1970) (codifying the Hobbes Act, which prohibited robbery or extortion that obstructs, delays, or affects commerce). *See generally* MCLEESE, *supra* note 58, at §1.10.

[75] U.S. CONST. art. I, § 8, cl. 3.

[76] 22 U.S. 1 (1824).

[77] Andrew St. Laurent, *Reconstituting* United States v. Lopez*: Another Look at Federal Criminal Law,* 31 COLUMBIA J. OF LAW AND SOC. PROB. 61 (1997).

[78] *See* Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 40 (1996). *See generally*, Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTING L.J. 1135, 1139 (1995).

[79] Louis B. Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROBS. 64, 65 (1948).

[80] *Id.*

[81] Maroney, *supra* note 59, at 1320-21.

Commerce Commission Act, enacted in 1887, and the Sherman Antitrust Act, enacted in 1890.[82] In each instance, the public support for criminal enforcement enabled Congress to act on its commerce power without contest; nevertheless, Congress' expanding reach under the commerce clause remained "controversial because it extended into areas previously the exclusive province of state law."[83]

In the twentieth century, as Congress began to push the limits of its commerce power with vigor, the number of federal criminal laws began to swell at a rate like never before.[84] For example, in 1910, Congress passed the Mann Act,[85] in 1919 it passed the Dyer Act,[86] in 1932, the Kidnapping Act,[87] and in 1934 the Bank Robbery Act.[88] As it had earlier, Congress designed each of these laws to federalize what was essentially a state law crime that happened to be beyond the reach of state law.[89] In order to successfully enact these criminal laws, though, Congress was forced to adhere to the strict limit that the Court had imposed on its commerce power; for each new law, Congress was allowed only to regulate an activity that "directly" affected interstate commerce.[90]

With the New Deal, President Roosevelt and Congress began to test the Court's standard, enacting laws that stretched previous boundaries of the commerce power to their limits.[91] Famously, in *NLRB v. Jones & Laughlin Steel*,[92] the Court joined the President and Congress by dropping the "direct effects" test for a "close and

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[82] *Id.* at 1322.

[83] *Id.*

[84] *See* Brickey, *supra* note 78, at 1135 (the "federalization of American criminal law is a Twentieth Century phenomenon").

[85] 18 U.S.C. § 2421 (1948) (prohibiting the interstate transport of women for immoral purposes).

[86] 18 U.S.C. § 2312 (1948) (prohibiting the interstate transport of stolen vehicles).

[87] 18 U.S.C. § 1201 (1948).

[88] 18 U.S.C. § 2113 (1948).

[89] *See* Maroney, *supra* note 59, at 1324. These crimes were beyond the reach of state law in the sense that, when a kidnapper, for example, left the state where the crime had been committed, he also left behind the jurisdiction in which he could be prosecuted. Federalization of the crime enabled jurisdiction to cross state lines along with the criminal.

[90] *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[91] Antony Barone Kolenc, Note, *Commerce Clause Challenges after* United States v. Lopez, 50 FLA. L. REV. 867, 873 (1998). When enacting such laws as the 1934 Anti-Racketeering Act and the 1934 Bank Robbery Act, Congress was "fully conscious that it was extending federal law to matters previously left to the states." Maroney, *supra* note 59, at 1325 (quoting Beale, *supra* note 78, at 42).

[92] 301 U.S. 1, 37 (1937).

substantial relation to interstate commerce" test.[93] This newly expanded test enabled Congress to regulate even wholly intrastate activities provided they had at least a "close and substantial relation to interstate commerce."[94] In *Wickard v. Filburn*[95], the Court further loosened the reins by requiring only that the "aggregate effects" of local actions, when taken together, have some effect on interstate commerce.[96] Under this rationale, the Court allowed Congress to regulate farmers growing food exclusively for their own consumption,[97] thereby setting the standard for what would be fifty years of near-total freedom for Congress to legislate under the Commerce Clause.[98] Congress would use this freedom under the Commerce Clause "not only to implement wide-ranging social and economic legislation[,] but also to enact significant criminal provisions, greatly increasing the reach of federal criminal authority."[99] As one author of the late 1990s noted, this increasing "reach of federal criminal authority" would eventually result in a full "40% of the federal criminal provisions enacted since the Civil War" being enacted after 1970.[100]

2. Defining the Limit of the Commerce Power in United States v. Lopez

Congress' near total freedom to federalize under *Wickard* was ultimately curtailed in 1995, however, when the Supreme Court decided *Lopez*.[101] In *Lopez*, the Court again acknowledged that Congress could regulate the channels of interstate commerce, the instrumentalities of interstate commerce, and activities that "substantially affect interstate commerce."[102] Notably, though, the

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[93] *Id.*

[94] *Id.*

[95] 317 U.S. 111, 125-28 (1942).

[96] *Id.*

[97] The Court held that, even though the food was being grown instead of purchased, in the aggregate the production would have some effect on interstate commerce. *Id.* at 125.

[98] Under the *Wickard* rationale, "even legislation enacted primarily to prohibit . . . 'trivial' intrastate activity is sustainable under the Commerce Clause, provided the aggregate effect on interstate commerce is substantial." James M. Maloney, *Shooting for an Omnipotent Congress: The Constitutionality of Federal Regulation of Intrastate Firearms Possession*, 62 FORDHAM L. REV. 1795, 1811 (1994).

[99] St. Laurent, *supra* note 77, at 71.

[100] Maroney, *supra* note 59, at 1327 (quoting TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, AMERICAN BAR ASSOC., *supra* note 59, at 7).

[101] 514 U.S. 549 (1995).

[102] *Id.* at 558-59.

Court went on to find that the legislation in question—the Federal Gun-Free School Zone Act[103]—did not satisfy any of these tests, for the crime it sought to prevent—bringing guns near school—did not involve channels of interstate commerce,[104] did not involve instrumentalities of interstate commerce,[105] and did not substantially affect interstate commerce.[106] The Court therefore struck down the Act and recognized a limit to the commerce power for the first time since its expansion had begun in 1937.[107] To not have done so, the Court reasoned, would have been to "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[108]

The response to *Lopez* was overwhelming. Some praised it as a return to a pre-New Deal balance of power between Congress and the states; others decried it as the worst type of judicial activism.[109] Few, however, could ignore the possible implications of a case that not only redefined the limits of congressional power, but also reanimated the notion that the states—*not* the federal government—were preeminently charged with the protection of their citizens.[110] As the Court continued to pursue this *Lopez* agenda through a string of succeeding cases and continued to test the constitutional limits of Congress' ability to federalize criminal laws, the critical and judicial attention to its "new" view of the Commerce Clause likewise continued to intensify.[111] Despite this attention, consensus about the

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[103] 18 U.S.C. § 922 (regulating the possession of weapons within "gun-free zones" surrounding public schools).

[104] Channels of interstate commerce include highways and airways. United States v. Lopez, 514 U.S. 549, 558-59 (1995).

[105] Instrumentalities of interstate commerce include "persons or things" needed to carry out interstate travel. *Id.*

[106] For gun possession near schools to affect interstate commerce, the court held, there would have to be a "jurisdictional nexus" between gun possession near schools and interstate commerce. *Id. See also* Kathryn Jermann, *Project Exile and the Overfederalization of Crime*, 10 KAN. J.L. PUB. POL'Y 332, 336 (2000).

[107] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937).

[108] *Lopez*, 514 U.S. at 567.

[109] *See generally* Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* U.S. v. Lopez, 94 MICH. L. REV. 752 (1995); Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of* Lopez, *or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 369-70 (2000); Louis J. Virelli and David S. Leibowitz, *Federalism Whether They Want It or Not: The New Commerce Clause Doctrine and The Future of Federal Civil Rights Legislation After* U.S. v. Morrison, 3 U. PA. J. CONST. L. 926 (2001).

[110] *See supra* Part II.A.

[111] *See, e.g.*, Printz v. United States, 521 U.S. 898, 934 (1997) (finding Brady Act's

effects of *Lopez* remained elusive,[112] and big questions continued to loom: How would the Court's new agenda affect the future of federal law, particularly the future of federal criminal law? How could fifty years of federal criminal law be reconciled with the *Lopez* Court's vision of a Constitution that requires a "distinction between what is truly national and what is truly local"?[113]

B. FEDERALIZATION AND FEDERALISM

1. After Lopez: Focusing the Federalism Lens on Criminal Law

These questions were finally best answered by those viewing *Lopez* through the lens of federalism.[114] As an act of federalism, *Lopez* works to curtail congressional criminal authority in an effort to maintain the power reserved for the states by the Tenth Amendment.[115] As *Lopez* explained, because the Tenth Amendment sets forth "a federal government of limited, enumerated powers[,] . . .

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commandeering of state executive officials to violate principles of state sovereignty); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 647 (1999) (holding Patent and Plant Variety Protection Remedy Clarification Act to be beyond Congress's authority under the Fourteenth Amendment); Kimel v. Fla. Bd. Of Regents, 120 S. Ct. 631, 637 (2000) (ruling that states cannot be sued under the Federal Age Discrimination in Employment Act); United States v. Morrison, 529 U.S. 598, 600 (2000) (striking down the civil provision of the Violence Against Women Act as a noneconomic use of the commerce power).

[112] *See supra* note 109.

[113] United States v. Lopez, 514 U.S. 549, 567-68 (1995).

[114] For federalist readings of *Lopez*, *see generally* Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1147 (1995); Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615 (1995); Laura S. Fitzgerald, *Beyond Marbury: Jurisdictional Self-Dealing in* Seminole Tribe, 52 VAND. L. REV. 407 (1999); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180 (1998); Deborah Jones Merritt, *The Third Translation of the Commerce Clause: Congressional Power to Regulate Social Problems*, 66 GEO. WASH. L. REV. 1206 (1998); Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819 (1999); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554 (1995); John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990's*, 32 IND. L. REV. 27 (1998).

[115] U.S. CONST. amend. X. ("The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people"). *See also* Maloney, *supra* note 98, at 1802.

the Commerce Clause is not (or will not become) a grant of unlimited power."[116] Were it to become unlimited, no powers would be reserved to the states and "the Tenth Amendment [would be] without meaning."[117]

In this light, *Lopez* can be seen as an act of the Court to "[limit] federal power in the name of state autonomy,"[118] and protect the states from the congressional drive to "expand the body of federal criminal law and enlarge the role of a national police power."[119] *Lopez* can be seen as a federalist block by the Court against further congressional usurpation of state criminal authority.[120] But then the questions remain: Why in *Lopez* (and its progeny) would the Court choose to focus its attention on federal *criminal* laws? Why would the court target predominately criminal acts for violating the rules of federalism?[121]

Beyond the fact that "criminal law enforcement" is an area in which the "[s]tates historically have been sovereign," the most plausible answer to these questions is the aforementioned rapid federalization of criminal law.[122] As Chief Justice Rehnquist has indicated, the crisis created by case overload in the federal judiciary all but demanded the sort of congressional curtailment afforded by *Lopez*.[123] Moreover, "because there are few interest groups to derail feel-good, do-something federal crime bills, the Court may [have] sense[d] that it alone [was] left to confront Congress" through the

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[116] Maloney, *supra* note 98, at 1802 (citing *Lopez*, 514 U.S. at 549). *See also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 36 (1980).

[117] Maloney, *supra* note 98, at 1802.

[118] Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 130 (*Lopez* "limits an otherwise apparently unlimited grant of governmental power in the name of a framing conception of autonomy").

[119] *See* Brickey, *supra* note 78, at 1136. *See also* Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After* Lopez, 46 CASE W. RES. L. REV. 801, 842-43 (1996) (examining *Lopez* through the lens of federalism).

[120] *See* Brickey, *supra* note 78, at 1136.

[121] *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995) (gun possession law); Printz v. United States, 521 U.S. 898 (1997) (gun control act); United States v. Morrison, 529 U.S. 598 (2000) (Violence Against Women Act).

[122] *Lopez*, 514 U.S. at 564. *See also supra* notes 99-101 and accompanying text.

[123] *See* MCLEESE, *supra* note 58, at § 1.11 (citing NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 1 (2d ed. 1993 & Supp. 1996). *See also* Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1030, 1037 (1995); RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM (1999) (discussing means by which the Federal Courts acquired and can decrease their massive caseload).

"institutional equilibrium" of a federalistic jurisprudence.[124] In effect, the Court was all but forced to focus its newfound federalism on criminal law, if for no other reason than the conflict between the rapid expansion of federal criminal law and the idea that "'[e]xpanding, unreviewed federal power, when no strong case can be made for its existence', is contrary to the historic American wisdom."[125]

Unfortunately for the judiciary, despite *Lopez* and its progeny, the drive to federalize crimes continues.[126] And though *Lopez* has been used to challenge many of these federal criminal laws, "to date, [*Lopez*] has been of assistance to few defendants."[127] In fact, as of the summer of 1998, of the 400 *Lopez* challenges made to federal statutes, only three had been upheld.[128]

One explanation for this weak showing might be the lack of "agreement among the conservative Justices on the theoretical basis

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[124] William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term Foreword: Law As Equilibrium*, 108 HARV. L. REV. 26, 71 (1994). *See also Symposium: Reflection on* United States v. Lopez, 94 MICH. L. REV. 533-831 (1995).

[125] Maroney, *supra* note 59, at 1339 (quoting TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, AMERICAN BAR ASSOC., *supra* note 59, at 27 (1998)). *See also* Stuart Taylors, Jr., *Looking Right at the Justices*, AM. LAWYER, Nov. 1995, at 37, 38 ("*Lopez* might be a useful corrective to the tendency of Congress casually to assume that it can do anything it wants.").

[126] Critics claim that the two interrelated reasons for the feverish federalization of criminal law are politics and the media. That is, because politicians do not wish to appear soft on crime, and know that their records will be publicized during elections, they all strive to pass criminal legislation. *See, e.g.*, Maroney, *supra* note 59, at 1331 (quoting TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, AMERICAN BAR ASSOC., *supra* note 59, at 14-15).

[127] MCLEESE, *supra* note 58, at § 1.10. *See also* Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 923 (2000) ("*Lopez*'s practical effect on existing criminal law has been less than radical. In the years since *Lopez* was decided, few federal criminal statutes have escaped Commerce Clause challenges, but almost all of these challenges have been unsuccessful.").

[128] William Funk, *The* Lopez *Report*, 23 ADMIN. & REG. L. NEWS 1, 14 (1998). The three successful challenges have all been against criminal statutes. *See* United States v. Pappadopoulos, 64 F.3d 522 (9th Cir. 1995) (residential building using natural gas from interstate source did not satisfy jurisdictional requirement under the federal arson statute of being involved in any activity affecting interstate commerce); United States v. Denalli, 73 F.3d 328 (11th Cir. 1996) (home in which work memos were written for international business did not satisfy jurisdictional requirement under the federal arson statute of being involved in any activity involving interstate commerce); United States v. Wilson, 133 F. 3d 251 (4th Cir. 1997) (though doubtful of Congress's power under Commerce Clause to regulate polluted waters in question, court interpreted Clean Water Act to avoid the Constitutional issue). Note, however, that "[o]f the 40-some laws that have been upheld against a *Lopez* challenge, nine have been sustained over a dissent." Funk, *supra*, at 15.

for enhancing state power."[129] After all, if the underlying foundation for the current Court's federalist agenda remains murky, putting the agenda to work can be an impossible task.[130] Alternatively, the unexpected impotency of *Lopez* can be explained by looking at the case as "one item in [a] transformation process," a necessary first step that over time will yield a body of federal criminal law that is bound tight in the cloak of federalism.[131] Given the continued attention to *Lopez*, as well as the Court's persistence in returning to its federalist theme, this second theory would seem to have merit, suggesting that—far from being a dead letter or false start—*Lopez* will only continue to grow in jurisprudential significance.

2. Illuminating the Legacy of Lopez: Jones v. United States

While the significance and historical position of *Lopez* is still being decided, the Court in *Jones v. United States* showed that the holding of *Lopez*—that *Lopez* itself—could be both pragmatically and easily applied.[132] In *Jones*, the Court considered whether the federal arson statute[133]—itself premised on some interstate activity—could be used to reach the intrastate arson of a private residence and, if it could, if its application to the private residence in question would be constitutional.[134]

With *Lopez* in mind, the Court found it appropriate "to avoid the constitutional question that would arise were the Court to read [the arson statute] to render the traditionally local criminal conduct in which [the defendant] engaged a matter for federal enforcement."[135] In other words, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional question arise and by the other of which such questions are avoided, the Court's duty is to adopt the latter."[136] In this case, the Court could either understand the statute to reach traditionally intrastate arson—and thereby refute *Lopez* and the most basic tenets of federalism—or it could, "before

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[129] Byron Dailey, *The Five Faces of Federalism: A State-Power Quintet Without a Theory*, 62 OHIO ST. L.J. 1243, 1244 (2001).

[130] *Id.*

[131] Mark Tushnet, *Living in a Constitutional Moment?:* Lopez *and Constitutional Theory*, 46 CASE W. RES. L. REV. 845, 850 (1996).

[132] 529 U.S. 848 (2000).

[133] 18 U.S.C. § 844(i).

[134] 529 U.S. at 851-52.

[135] *Id.* at 850 (citing United States v. Bass, 404 U.S. 336, 350 (1971)).

[136] *Id.* at 857 (citing United States ex. rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)).

[choosing] the harsher alternative, to require that Congress should have spoken in language that is clear and definite."[137] The *Jones* Court chose the latter, refusing to recognize federal jurisdiction and leaving the matter to Congress to resolve if necessary.[138]

Supported by *Lopez* in spirit, the Court in *Jones* was further supported in letter by *United States v. Bass*.[139] The Court in *Bass*, which sought to resolve ambiguous language under Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, faced a dilemma similar to both *Jones* and *Wills*: how to interpret ambiguous and potentially unconstitutional legislative language granting federal criminal jurisdiction.[140] Like *Jones*, the Court in *Bass* chose to construe the statute narrowly, holding, as cited in *Jones*,[141] that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance" in the prosecution of crimes.[142] For this reason, wrote Justice Stevens in his concurrence to *Jones*, the Court "should interpret narrowly federal criminal laws that overlap with state authority unless Congressional intention to assert its jurisdiction is plain."[143]

As the next section of this article will explain, Justice Stevens' mandate, like the majority decision in *Jones*, is particularly applicable to the situation in *Wills*. As in *Jones*, the *Wills* Court was faced with a statute that had two possible interpretations: one that would raise the serious constitutional issue of allowing federal jurisdiction over an intrastate crime and another that would avoid the constitutional issue and maintain the traditional balance of state and

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[137] *Id.* at 858 (citing United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-22 (1952)).

[138] *Id.*

[139] 404 U.S. 336 (1971).

[140] *Id.* at 338.

[141] United States v. Jones, 529 U.S. 846, 850 (2000).

[142] *Bass*, 404 U.S. at 349.

[143] *Jones*, 529 U.S. at 860 (Stevens, J., concurring). The ABA has echoed a similar caution against over-federalizing criminal law:

> To create a federal crime, a strong federal interest in the matter should be clearly shown, that is, a distinctly federal interest beyond the mere conclusion that the conduct should be made criminal by some appropriate governmental entity. Federal law enforcement for criminal activity that is essentially local in character generally should not be undertaken, at least not without clearly considered Congressional articulation of principles which has so far been absent. The near unanimity of concern and agreement among those who have studied the problem should be a powerful danger signal to the public, to the press, and to legislators.

TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, AMERICAN BAR ASS'N, *supra* note 59.

federal power.[144] Unlike in *Jones*, however, the *Wills* court chose the controversial outcome; it chose to extend federal jurisdiction where Congress had not "convey[ed] its purpose clearly" or made its "intention to assert its jurisdiction . . . plain."[145] Though the *Wills* court felt that Congress had, in fact, conveyed its purpose clearly,[146] the conflicting outcome of *McInnis* showed this not to be the case,[147] and thereby begs the question: if not the 'clear purpose' of Congress, on what grounds did the *Wills* court justify its expansive, contrarian interpretation of the Federal Kidnapping Act?[148]

III. A JUSTIFICATION FOR *WILLS*?

Amazingly, despite the dubious constitutionality of federal criminal laws that regulate wholly intrastate activities,[149] despite the still unsettled position of *Lopez*,[150] and despite the current Court's attempts to reestablish the limits of federalism,[151] the *Wills* court nonetheless chose to extend the Federal Kidnapping Act to cover a kidnapping that *began and ended in one state*.[152] To do so, the court refuted the declared legislative intent of the Act (as well as the general logic of the federal criminal regime in which it sits), refuted precedent, and, in an extremely unnatural "natural reading of the plain text," refuted even the text of the Act itself. In the upcoming sections, the mistakes of the *Wills* court will be examined individually, beginning with the manner by which the *Wills* court refuted the declared legislative purpose behind the Act.

A. *WILLS*: REFUTING THE FEDERAL KIDNAPPING ACT

1. Purpose of the Act Itself

As explained earlier,[153] the original legislative purpose of the Federal Kidnapping Act was to enable federal authorities to chase

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[144] *See* United States v. Wills, 234 F.3d 174, 177 (4th Cir. 2000), *cert. denied*, 533 U.S. 953 (2001); *Jones*, 529 U.S. at 850.

[145] United States v. Bass, 404 U.S. 336, 349 (1971); *Jones*, 529 U.S. at 860.

[146] *Wills*, 234 F.3d at 177.

[147] United States v. McInnis, 601 F.2d 1319, 1321 (5th Cir. 1979).

[148] *Wills*, 234 F.3d at 177.

[149] *See* discussion *supra* Part II.B.1.

[150] *See* discussion *supra* Part II.B.1.

[151] *See* discussion *supra* Part II.B.2.

[152] *See* discussion *supra* Part I.A.

[153] *See* discussion *supra* Part I.A.

kidnappers when they fled from one jurisdiction to another, something that the multitude of individual state statutes had previously made difficult.[154] To achieve this end, Congress used "comprehensive language" that covered "every possible variety of kidnapping followed by interstate transportation," thereby giving federal authorities broad power to disregard borders and prosecute interstate kidnappings that individual states' laws could no longer reach.[155]

At the same time, the precise litany of crimes forbidden by the Act—whoever "unlawfully seize[s], confine[s], inveigle[s], decoy[s], kidnap[s], abduct[s]"—reveals that Congress was also using "comprehensive language" to indicate by omission those criminal acts that the Act did *not* cover, those "unattractive or immoral situations lacking the involuntariness of seizure and detention which is the very essence of the crime of kidnapping."[156] Congress was not creating a catch-all, a general prosecutorial power by which federal authorities could run roughshod over states' police power; there is no indication that "Congress desired or contemplated [that the Act] . . . might be applied to those guilty of immoralities lacking the characteristics of true kidnappings."[157]

Nevertheless, the *Wills* court understood Congress's "comprehensive language" to allow exactly the opposite, to allow Christopher Wills to be convicted for a crime that—with regard to travel in interstate commerce—displayed none of the "characteristics of [a] true kidnappin[g]."[158] In doing so, the *Wills* court admitted that the Act "demanded an inquiry into "whether the kidnapper ha[d] interfered with, and exercised control over, the victim's actions."[159] Likewise, the court acknowledged that "the involuntariness of seizure and detention" was a required element of any kidnapping.[160] But despite these statements and their seeming allegiance to the Act's original intent, the *Wills* court went on to hold that luring Alam across state lines through the guise of a phony job offer was sufficient "control over" him to make his travel "involuntary" and therefore

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[154] *See* United States v. Chatwin, 326 U.S. 455, 463 (1946).

[155] *Id.*

[156] *Id.* at 457, 464.

[157] *Id.*

[158] United States v. Wills, 234 F.3d 174, 175-76 (4th Cir. 2000).

[159] *Id.* at 178 (citing United States v. Hughes, 716 F.2d 234, 239 (4th Cir. 1994)); *see also Chatwin*, 326 U.S. at 464.

[160] *Wills*, 234 F. 3d at 178 (citing United States v. Hughes, 716 F.2d 234, 239 (4th Cir. 1994)); *see also Chatwin*, 326 U.S. at 464.

spring jurisdiction under the Act.[161] That Alam could have "seen through the plan or *could* have decided not to explore the job [offer] ha[d] no significance" under the Act; by enticing Alam to travel, the court held, Wills "willfully caused unaccompanied travel over state lines" and therefore "'willfully transported' Alam within the meaning of the statute."[162]

But how can one "exercise control over" another person who is traveling voluntarily? And how can enticing voluntary travel be said to satisfy the "involuntariness of seizure and detention" that must be part of any kidnapping? On these points the *Wills* court was cryptic; it held only that "Wills' actions in securing the cell phone in Washington, D.C., arranging the interview in Washington, D.C., and placing the [phony job] flier at Alam's home in Virginia support[ed] a finding that Alam was 'willfully transported' within the meaning of the statute."[163]

As for why it would choose to enforce an Act prohibiting "kidnapping[s] followed by interstate transportation" against a defendant who, at most, committed a wholly intrastate kidnapping act *after* enticing his victim to cross state lines voluntarily, the *Wills* court again spoke in vagaries.[164] A 1972 amendment to the Kidnapping Act,[165] the court explained, had reduced interstate transport of the victim from an integral part of the crime to "merely a basis for federal jurisdiction."[166] The effect of this change, it further explained, was to make "the thrust of the offense the kidnapping itself rather than the interstate transportation of the kidnapped person."[167] And because of this new "thrust," the *Wills* court reasoned, it could therefore claim jurisdiction over a kidnapping that

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[161] *Wills*, 234 F.3d at 178-79.

[162] *Id.*

[163] *Id.*

[164] *Id.* at 176.

[165] Instead of the original Act's single basis for federal jurisdiction in the interstate or foreign transport of a kidnappee, the amended Act also grants jurisdiction when the kidnapping occurs within the special maritime and territorial jurisdiction of the U.S., within the special aircraft jurisdiction of the U.S., or when the victim involved is a foreign official, internationally-protected person, or official guest of the U.S. government. 18 U.S.C.A. § 1201 (West 2001).

[166] *Wills*, 234 F.3d at 176 (quoting United States v. Hughes, 716 F.2d 234, 242 (4th Cir. 1994) (Widener, J., concurring)).

[167] *Id.* Legislative history explains that this change was made in the aftermath of the 1972 Munich Olympics "to remedy defects in the traditional interstate transportation jurisdiction as applied to international terrorism or hijacking situations." United States v. Hughes, 716 F.2d 234, 239 (4th Cir. 1994); *see also* S. REP. NO. 92-1105, at 4317 (1972).

involved voluntary interstate travel before the "kidnapping" had even occurred.[168]

Unfortunately, the reasoning of *Wills* will not survive even the language of the amended Act.[169] For though the rewritten Act did shift the "thrust of the offense" in the manner the *Wills* court describes,[170] it did not discount the "interstate transport of the [*already*] kidnapped person" nor excise the jurisdictional requirement of the "interstate transportation of the *victim*."[171] In other words, though the amendment expanded the Act's jurisdictional base, it did nothing to "alter the established requirement that the criminal activity precede the interstate movement."[172]

Perhaps, to extend the logic of *Wills*, it could be concluded that the "criminal activity" that must precede the interstate movement could include the sort of "inveiglement" or "decoy" that Wills used to lure Alam across state lines.[173] Such a conclusion, however, would violate not only the original intent of the Act—to police "every possible variety of kidnapping followed by interstate transportation"—but would also, as we will see in the next section, violate the general legislative logic of the federal criminal regime.[174]

2. The Federal Criminal Legislative Regime

Viewing the Federal Kidnapping Act in the context of the complete federal criminal regime puts the error of the *Wills* decision

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[168] *Wills*, 234 F.3d at 176.

[169] *See supra* note 24.

[170] The amendment does omit language that once explicitly required the kidnapping precede the transport of the victim in interstate travel. *See id.*

[171] *Id.* (emphasis added).

[172] *Hughes*, 716 F.2d at 238; *see also* S. REP. NO. 92-1105 at 4317 (1972) (despite the expanded jurisdiction afforded under the amendment to the Act, "the prime responsibility to investigate, prosecute and punish common law crimes such as murder, kidnapping and assault should remain in the several States.").

[173] Previously, the "decoy" and "inveiglement" mentioned in the Act have been addressed only as means by which a kidnapper convinces a victim to accompany him. *See, e.g.*, United States v. Stands, 105 F.3d 1565, 1576 (8th Cir. 1997) (victim was inveigled into accompanying kidnapper); United States v. Macklin, 671 F.2d 60, 65-66 (2d Cir. 1982).

[174] United States v. Chatwin, 326 U.S. 455, 463 (1946); *see also Hughes*, 716 F.2d at 238 (the policy of the Act is violated when the Act is employed against a defendant "simply because during some relevant time period prior to the kidnapping the eventual offender and his victim crossed a state line." In such a scenario there is "no attempt to escape the jurisdiction in which the offense occurred" and therefore no justification for "departing from the long established framework of federalism" that gives the states responsibility for policing kidnappings.).

in specific relief.[175] For despite the *Wills* court's belief that a victim's voluntary—though fraudulently induced—travel across state lines can invoke jurisdiction under the Act, no other federal criminal Act is likewise understood to afford such a broad concept of federal jurisdiction.[176] Quite simply, "the kidnapping statute thus fits into a common statutory model for federal offenses that premise federal jurisdiction on the offender's unlawful exercise of control over a person or object followed by the interstate transportation of that person or object."[177]

Of course, as the *McInnis* court documents, there are many federal criminal laws under which defendants can be prosecuted for causing interstate transport without actually doing the transporting themselves.[178] And on the surface, this would seem to support *Wills*' finding that because "Wills willfully caused unaccompanied travel over state lines [it was] sufficient to confer jurisdiction."[179] The distinction between the two points of view, however, lies in their understanding of the word "cause." In most judicial decisions rendered under federal criminal law, "causing" unaccompanied travel first involves "some significant and unlawful step" taken towards the commission of a federal crime, a step that "exercise[s] control over a person or object" before then using some other "instrumentality" to

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[175] *See* United States v. McInnis, 601 F.2d 1319, 1325-26 (5th Cir. 1979).

[176] Two partial exceptions are the federal racketeering statute (18 U.S.C. §§ 2312, 2314), which premises jurisdiction on the use of interstate facilities to further certain criminal activities, and the Mann Act (18 U.S.C. §§ 2421 and 2423), which grants federal jurisdiction over a defendant who "knowingly transports" a prostitute across state lines. *See infra* note 177.

[177] *McInnis*, 601 F.2d at 1326; *see also* NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW CRIMINAL CODE 14 (1970).

[178] *See, e.g.*, United States v. Pererira, 347 U.S. 1, 8-9 (1954) (National Stolen Property Act allows jurisdiction when defendant cashes out-of-state check, thereby causing the check to be transported in interstate commerce); United States v. Levine, 457 F.2d 1186, 1188 (10th Cir. 1972) (18 U.S.C. § 1952 jurisdiction attached when prison inmates caused others to ship narcotics in interstate commerce); United States v Leggett, 269 F.2d 35, 37 (7th Cir. 1959) (jurisdiction under 18 U.S.C. § 2312—a prohibition against the interstate shipment of stolen cars—attaches where defendant induced car salesman to drive a stolen car across state lines). In contrast, under the Mann Act, a defendant who "knowingly transports" a prostitute across state lines invokes the federal jurisdiction of the Act, though "knowingly transports" does *not* extend to "causing" the transportation. *See* 18 U.S.C. §§ 2421 and 2423(a) (1998); United States v. Footman, 215 F.3d 145, 148 (1st Cir. 2000). This is because § 3 of the Mann Act explicitly creates a separate jurisdictional basis for interstate transport when a party is induced and therefore caused to cross state lines on her own accord. *See* Graham v. United States, 154 F.2d 325, 326 (D.C. Cir. 1946).

[179] United States v. Wills, 234 F.3d 174, 179, *cert.denied*, 533 U.S. 953 (2001).

complete the transport out of state.[180] This point of view, obviously, informs the policy behind the Federal Kidnapping Act.[181]

For the *Wills* court, though, "cause" had a far different meaning; there, a defendant "causes" unaccompanied travel when he establishes conditions that will entice or facilitate another to move himself across state lines.[182] With *Wills*, there is no prerequisite control to be followed by the use of an instrumentality, nor is there the need for an initial unlawful step; with *Wills*, a simple invitation—fraudulent or not—would be sufficient "cause" and "control" to show that a defendant had transported his victim across state lines.[183]

We should note that, when a victim is made to involuntarily travel alone through the force of the defendant's *threats*, the courts have generally agreed to a *Wills*-like expansion of federal jurisdiction.[184] That is, because "transportation brought about as a result of the defendant's threats [is] in effect accomplished by the defendant," that transportation cannot be deemed voluntary due to the control being utilized by the defendant.[185] Unlike the situation in *Wills*, the threatening defendant does in fact "cause" his victim's unaccompanied travel, in that he takes an immediate unlawful step—the threat—to exercise control over the victim, and then uses an instrumentality—the controlled victim himself—to complete the transport in interstate commerce.[186] And unlike Alam in *Wills*, because the victim under this "threat" theory is not free to turn back, his individual travel can be said to have been "caused" by the acts of the defendant.[187] As a result, while federal criminal law does likely afford for jurisdiction when a victim is forced—by threats—to travel alone, such jurisdiction cannot be extended to the situation in *Wills*. In *Wills* there was no threat that caused Alam to travel, and without

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[180] *McInnis*, 601 F.2d at 1325-26.

[181] *See* discussion *supra* at Part I.A; *see also supra* note 171 and accompanying text..

[182] *Wills*, 234 F.3d at 178.

[183] *Id.*

[184] *See McInnis*, 601 F.2d at 1326 (citing Bearden v. United States, 304 F.2d 532 (5th Cir. 1976)).

[185] *Id. See also* United States. v. Boone, 959 F.2d 1550 (11th Cir. 1992) (voluntarily accompanying a kidnapper across state lines does satisfy interstate transport requirements because kidnapper's "force in reserve" ensures that any attempt to end the journey will immediately spring the kidnapper's unlawful intent). These two variations on the interstate transport requirement are similar in that they both account for a loss of the victim's free will to travel or not; that is, in both cases, should the victim decide to abandon his trip, the kidnapper's force or threat exists as the control that would overcome such a decision.

[186] *McInnis*, 601 F.2d at 1326.

[187] *Id.*

the threat there can be no control.[188] Without control there can be no causation, and without causation there has been no interstate transport.[189]

In sum, by recognizing federal jurisdiction in the absence of "transport" and "cause," *Wills* contradicts not only the policy behind the Kidnapping Act, but also the general logic of the federal criminal regime. The case is, in a word, an anomaly. To further pursue this view and continue the argument against *Wills*, the next section will show how *Wills* is also anomalous within the context of the Kidnapping Act jurisprudence. The final section will examine the text of the Kidnapping Act itself and the means by which the *Wills* court uses the Act to justify its outsider and unconstitutional understanding of federal jurisdiction.

B. *WILLS*: REFUTING THE PRECEDENT

Wills, like most other cases under the Act concerned with "the scope of jurisdiction for kidnappings accomplished through deceit," was focused primarily on whether the victim had been "inveigled" or "decoyed."[190] In line with precedent, *Wills* recognized that kidnappings by inveiglement and decoy were punishable under the Act.[191] Beyond precedent, however, *Wills* then went on to hold that decoy or inveiglement alone, without the kidnapper's control—without his accompaniment[192] or "force in reserve"[193]—could sufficiently cause a victim's interstate travel and therefore invoke the jurisdiction of the Act.[194]

The *Wills* court acknowledged that, because "many, even most, § 1201 kidnapping victims [were] typically accompanied across state lines by their kidnappers," *McInnis* had been the courts' only previous opportunity to *explicitly* consider a victim's voluntary travel

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[188] *Wills*, 234 F.3d at 175-76.

[189] *See supra* notes 177-78 and accompanying text.

[190] *Wills*, 234 F.3d at 177. *See e.g.*, United States v. Hughes, 716 F.2d 234, 239 (4th Cir. 1994); United States v. Stands, 105 F.3d 1565, 1576 (8th Cir. 1990); United States v. Macklin, 671 F.2d 60, 64 (2d Cir. 1982). For clarity's sake, *Hoog* defines "inveigle" as "to lure or lead astray by false representations or promises, or other deceitful means" and "decoy" as "enticement or luring by means of some fraud, trick, or temptation." United States v. Hoog, 504 F.2d 45, 51 (8th Cir. 1994).

[191] *Wills*, 234 F.3d at 176; *see also supra* note 186.

[192] *See McInnis*, 601 F.2d at 1326.

[193] *See* United States. v. Boone, 959 F.2d 1550, 1555-56 (11th Cir. 1992).

[194] *Wills*, 234 F.3d at 178.

across state lines (as a result of decoy or inveiglement).[195] As discussed previously, *Wills* chose to disagree with the decision *McInnis* reached.[196] But *Wills* also chose to ignore the remainder of cases dealing with decoy and inveiglement, finding that their explicit silence on the point of accompaniment equaled an absence of input.[197] In other words, *Wills* found that—because accompaniment or threats had occurred in all other previous cases, and because those cases therefore had no cause to require that accompaniment be "obligatory"—previous caselaw had no bearing on the "question of whether accompaniment is necessary for the Act to apply."[198]

An examination of the case law preceding *Wills* reveals this conclusion to be misguided. To begin with, cases predicating jurisdiction on "decoy" and "inveiglement" under the Act inevitably recognize that control—usually in the form of kidnapper's presence—must either be an apparent or reserved element of deception.[199]

For example, in *United States v. Hughes*, a kidnapper tricked his victim into voluntarily accompanying him across state lines before making his ill will apparent.[200] The court held that, because jurisdiction under the Act required a kidnapping to occur "prior to . . . interstate transportation," "inveiglement" and "decoy" under the Act must also include "inducing a victim by misrepresentation to . . .

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[195] *Id. See also McInnis*, 601 F.2d at 1326.

[196] *See supra* Part I.C.

[197] *Wills*, 234 F.3d at 177-78 ("Contrary to the district court's and [the defendant's] assumption," the fact that in every case but *McInnis* the victim had been accompanied across state lines "does not directly address the legal question of whether accompaniment is necessary to the Act to apply.").

[198] *Id.*

[199] *See, e.g.*, United States v. Macklin, 671 F.2d 60, 64 (2d Cir. 1982) ("The very nature of the crime of kidnapping requires that the kidnapper use some means of force—actual or threatened, physical or mental—in each elemental stage of the crime, so that the victim is taken, held and transported against his or her will"); United States v. Hoog, 504 F.2d 45, 51 (8th Cir. 1994) (though defendant did not himself accompany victim across state lines, his decoy and inveiglement caused the victim to cross state lines in the company of an accomplice); United States. v. Boone, 959 F.2d 1550, 1555 (11th Cir. 1992) (force held in reserve by defendant during otherwise innocent and voluntary state-line crossing satisfies requirements of decoy and inveiglement); Miller v. United States, 138 F.2d 258 (8th Cir. 1943) (kidnapper deceiving his victim to cross state lines with him on the premise that her grandfather was on his deathbed was sufficient force to show inveiglement preceded accompaniment across state lines); and United States. v. Stands, 105 F.3d 1565 (8th Cir. 1997) (victim was inveigled when deceived into joining group that would later kidnap and beat him).

[200] United States v. Hughes, 716 F.2d 234, 236-38 (4th Cir. 1994).

accompany" the kidnapper across state lines.[201] That the victim goes voluntarily is irrelevant; because the kidnapper "has interfered with, and exercised control over" the victim before crossing state lines, the kidnapping has occurred prior to crossing state lines, and therefore jurisdiction is appropriate.[202]

Under *Hughes*, "inveiglement" and "decoy" do not mean 'to induce the victim to travel across state lines on his own accord'; rather, they mean 'to deceive the victim into joining the kidnapper in a trip across state lines.'[203] The former, as *Hughes* illustrates, is an "innocent" state line crossing—perhaps another law has been violated, but a kidnapping (under the Act) has not yet begun.[204] "Inveiglement" and "decoy," in contrast, demand some level of accompaniment or other control during interstate transport.[205] To hold otherwise, the *Hughes* court recognized, would be to assume a "difference on policy grounds between a purely local kidnapping and one preceded by an otherwise innocent state line crossing."[206]

This logic gained support in *United States v. Jackson*.[207] There, the Fifth Circuit held that to establish "inveiglement" or "decoy" under the Act, prosecutors need not "prove that the defendant personally moved the victim in interstate commerce," but that the victim "was transported in interstate commerce," presumably, as in that case, by an accomplice.[208] *Jackson* differs slightly from *Hughes* in that it affords for the work of an accomplice (instead of the defendant himself), but it nevertheless buttresses *Hughes*' view that "inveiglement" and "decoy" involve some level of control—be it by the kidnapper or an accomplice—attending the victim as she crosses state lines.[209] The government must establish that the victim was transported, *Jackson* holds, not that the victim transported himself as a result of another's deception.[210]

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[201] *Id.* at 237, 239.

[202] *Id.* at 239 (noting that such conduct is "sufficient to satisfy the 'involuntariness of seizure and detention' requirement of *Chatwin*").

[203] *Id.* at 237-39.

[204] *Id.*

[205] *Id.*

[206] *Id.* at 239.

[207] 978 F.2d 903 (5th Cir. 1992).

[208] *Id.* at 910. *See also* United States v. Barksdale-Conteras, 972 F.2d 111 (5th Cir. 1992) (defendants convicted under Federal Kidnapping Act after jurisdictional element was satisfied by the victim being transported in interstate commerce by accomplices).

[209] *See infra* Part III.C.

[210] *Jackson*, 978 F.2d at 910.

Again, the idea that "decoy" and "inveigle" require some level of control (during the transport of the victim) was further extended and supported by *United States v Boone*.[211] In *Boone*, the court considered whether a victim deceived into crossing state lines before being murdered was "inveigled" under the Act.[212] To determine if a victim has been "inveigled," the court held, "a fact finder must ascertain whether the alleged kidnapper had the willingness and intent to use physical or psychological force to complete the kidnapping in the event that his deception failed."[213] In other words, a kidnapper need not physically hold his victim as they cross state lines, but he must be capable of exercising some form of control—must retain some "force in reserve"—for jurisdiction to attach.[214] For the *Boone* court, "inveiglement" satisfies this test when the kidnapper "interferes with his victim's actions, exercising control over his victim through the willingness to use forcible action" should the victim try to reverse their travel.[215] For the *Boone* court, "inveiglement" necessarily requires the defendant's "force in reserve," the defendant's accompaniment, when state lines are crossed.[216]

In sum, as the Supreme Court explains in *Chatwin v. United States*: "[t]he act of holding a kidnapped person for a proscribed purpose necessarily implies an unlawful physical or mental restraint for an appreciable period against the person's will and with a willful intent so to confine the victim."[217] Without "an act of unlawful restraint," a kidnapping cannot occur.[218] As a result, to inveigle or decoy a victim across state lines, there must be "restraint," there must be some level of control and there *must be* either accompaniment or a threat.[219]

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[211] 959 F.2d 1550 (11th Cir. 1992).

[212] *Id.* at 1554-55.

[213] *Id.* at 1555.

[214] *Id.* at 1555-56 ("Here, Boone inveigled [his victim] into driving [across state lines] and accompanied him on that journey . . . [a]t all times . . . remain[ing] in a position where he could use force to ensure the kidnapping and transporting of [the victim] to the remote site" where the crime would take place").

[215] *Id.* at 1555 n.5.

[216] *Id.* at 1555-56.

[217] 326 U.S. 455, 460 (1946).

[218] *Id.*

[219] *Id. See also* United States v. Chancey, 715 F.2d 543, 546 (11th Cir. 1983) (if the victim is not being held against her will, there is no kidnapping, and therefore interstate travel does not further the commission of a crime); United States v. De La Rosa, 911 F.2d 985, 990 (5th Cir. 1990) ("[t]o establish a violation of 18 U.S.C. § 1201(a)(1), the

C. *WILLS*: A NATURAL MISREADING OF THE FULL TEXT

With little fanfare, the *Wills* court chose to "respectfully disagree" with this well-established precedent (and ignore the policy behind the Act) in order to decide its case by making a "natural reading of the full text."[220] Before doing so, the court cited the Act itself: "Whoever unlawfully . . . inveigles, [or] decoys . . . and holds for ransom or reward or otherwise any person, . . . when the person is willfully transported in interstate . . . commerce . . . [shall be punished]."[221]

It then came to a simple conclusion: the plain language of the Act does not require that the defendant accompany, physically transport, or provide for the physical transportation of the victim. Rather, the Act only requires that the victim "is willfully transported." If Congress wished to make accompaniment by the defendant over state lines a requirement under the Act, it could easily have written the Act to provide for it.[222] In this way the *Wills* court dismissed nearly seventy years of well-established precedent and policy.[223]

But how surprising that the court should choose to do so by employing such a willfully limited understanding of English syntax. No, as the court concludes, the Act does not explicitly require—as it did in its original 1932 iteration—the defendant to willfully transport the victim across state lines.[224] The Act does, however, demand that the victim "[be] willfully transported." Though the court chose to ignore it, this is a demand made in the passive voice, a means of grammatical construction in which an "object-verb-subject [sentence] sequence" is used if "the object of the sentence is more important than the actor, or if the actor [in the sentence] is obvious."[225] In choosing to employ the passive voice, as Congress did in the Act, an author need "not . . . include [an] actor to have a grammatical

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government must prove . . . that the defendant 1) knowingly and willfully kidnapped the victim; 2) held him for ransom, reward, or other benefit; and 3) transported him in interstate commerce"). *But see* United States v. Toledo, 985 F.2d 1462, 1466-68 (10th Cir. 1993) (though "the interstate aspect of the statute . . . requires that a state line be crossed while the crime is in progress," the court nonetheless reserves judgment on "whether inveigling or decoying the victim across state lines for subsequent abduction violates" the Act).

[220] United States v. Wills, 234 F.3d 174, 178 (4th Cir. 2000).

[221] 18 U.S.C. § 1201(a)(1) (2000).

[222] *Id.*

[223] *See supra* Part III.B.

[224] *See supra* note 24.

[225] HELENE S. SHAPO ET AL., WRITING AND ANALYSIS IN THE LAW 172 (4th ed. 1999).

sentence," though he will "risk obscuring the narrative if [he] end[s] the sentence without identifying the actor."[226] In sum, even when obscured by the passive voice, the actor in a sentence, the person causing the action, *still exists*.[227]

Thus informed, we can see that to say either "an actor willfully transported his victim" or "the victim was willfully transported" is to say the same thing, provided that, in the second example, the actor in the sentence is identified elsewhere. In the Federal Kidnapping Act, the actor in the sentence is identified as "whoever unlawfully inveigles or decoys."[228] Therefore, when the Act later requires that the victim "is willfully transported," the "transporter"—the actor doing the transporting—must still be "whoever unlawfully inveigles or decoys."

Though the *Wills* court chose not to do so, it could have argued that "is willfully transported" refers to a third party, to someone else who willfully transports the victim. Such an argument would fail, however, when we consider that there are only two parties mentioned by the Act: "whoever unlawfully inveigles or decoys" and the "person" being inveigled or decoyed.[229] If the passive voice only subverts but does not eliminate the actor, then the name of the actor must be somewhere in the Act, as well.[230] Can we not assume that Congress attached the substantive elements of the crime to specific actors named within the Act itself?[231]

In the alternative, if we ignore the Act's identification of "whoever unlawfully inveigles or decoys" as the actor in the sentence and allow that "is willfully transported" might be referring to some *other* actor, some "transporter" other than the kidnapper himself[232]—an allowance that would, in fact, alleviate an accompaniment

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[226] *Id.*

[227] *See generally*, JOSEPH M. WILLIAMS, STYLE: TEN LESSONS IN CLARITY & GRACE 64-72 (4th ed. 1994) (explaining the implied role of an actor in the passive construction); TEXAS LAW REVIEW, MANUAL ON USAGE AND STYLE 3-4 (Texas Law Review ed., 8th ed. 1995) (discussing how "the passive form needlessly conceals the identity of the actor").

[228] *See supra* note 24.

[229] *See supra* note 24.

[230] *See supra* note 227 and accompanying text.

[231] Can we not assume that Congress—in its 1972 amendment to the Act, the amendment that created the "is willfully transported" confusion—intended to maintain the Act's original purpose and effect, or would have otherwise explicitly said so?

[232] *See, e.g.*, United States v. Jackson, 978 F.2d 903, 910 (5th Cir. 1992) (co-conspirator, not kidnapper himself, moved victim across state lines); United States v. Hoog, 504 F.2d 45, 51 (8th Cir. 1974) (victim was inveigled by kidnapper who induces accompaniment with an accomplice).

requirement for the kidnapper himself—the holding of *Wills* would nevertheless continue to fail because there would still need to be that other "transporter." In other words, even if the kidnapper need not "transport" the victim under the Act, a grammatically informed reading of the text reveals that someone, some actor, some *other* person must "willfully transport" the victim across state lines for jurisdiction under the Act to attach.[233]

The *Wills* court believed that Wills' actions in deceiving Alam "support[ed] [such a] finding that Alam was 'willfully transported' within the meaning of the statute."[234] But how? There was no act of "transport" on Wills' or anyone else's part, provided that a "natural reading of the full text" continues to understand the word "transport" to mean "to carry from one place to another; convey."[235] No one—other than Alam himself—carried him anywhere; no one conveyed him across state lines.[236] To think otherwise, as the *Wills* court did, would cause the Act to read (in the active voice): "when the victim willfully transports himself in interstate or foreign commerce." Such a reading refutes both legislative intent and reason.[237]

The key to understanding the *Wills* court's contrarian perception of the Act lies in the last sentence of its opinion.[238] There, where one might expect the court to have found that because Wills had willfully transported Alam over state lines—because Wills had *kidnapped* Alam over state lines—it would therefore recognize jurisdiction under the Act; the court instead found that because "Wills [had] willfully *caused* [Alam's] unaccompanied travel over state lines [it was] sufficient to confer jurisdiction" under the Act.[239] In other words, the court admitted that in order to satisfy the jurisdictional requirement of the Act, it was not looking for the active transport of a kidnapping victim across jurisdictional lines, but was instead looking for the cause of a victim's pre-kidnapping state-line crossing.[240] As discussed previously,[241] this construction cannot survive: the Kidnapping Act, like the remainder of our federal criminal

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[233] *See supra* note 24.

[234] United States v. Wills, 234 F.3d 174, 179, *cert. denied*, 533 U.S. 953 (2001).

[235] THE AMERICAN HERITAGE DICTIONARY 1903 (3d ed. 1992).

[236] *Wills*, 234 F.3d at 175-76.

[237] *See supra* Parts I.A. and III.A.1.

[238] *Wills*, 234 F.3d at 179.

[239] *Id.*

[240] *Id.*

[241] *See supra* Part III.A.2.

legislation, "premise[s] federal jurisdiction on the offender's unlawful exercise of control over a person or object followed by the interstate transportation of that person or object."[242] Because pre-kidnapping travel occurs previous to control, it cannot be said to satisfy the jurisdictional requirement.[243]

In sum, the *Wills* court uses its "natural reading of the plain text" to reach a conclusion refuted by the policy behind the Act, by the precedent built thereon, and by even the text of the Act itself. In an advisory brief to the Supreme Court, however, the solicitor general seemed to downplay the error of *Wills,* stating that the nearly novel issue of the case—unaccompanied interstate kidnappings—was so rare as to be unworthy of *certiorari.*[244] The Supreme Court agreed, denying certiorari.[245]

V. CONCLUSION: THE *LENTZ* CASE AND THE FUTURE OF *WILLS*

Although the solicitor general convinced the Supreme Court that unaccompanied interstate kidnappings are rare, because of *Wills* and its drastic expansion of federal criminal jurisdiction under the Act, the "rare" kidnapping occasion has already become a new prosecutorial means for attaching jurisdiction where it would not otherwise exist.[246] In particular, Virginia prosecutors have chosen to revive the case of Doris Lentz, a Virginia resident whose disappearance in 1996 was followed shortly by the discovery of her blood-soaked car.[247] Now, Jay Lentz, her former husband, faces the death penalty, in part because the federal government can claim jurisdiction under *Wills* by arguing that Lentz lured his wife to voluntarily travel unaccompanied across state lines.[248] With *Wills* in effect, voluntary interstate travel is the means by which federal authorities—using federal laws—can prosecute wholly intrastate crimes that are otherwise "nearly impossible" for state law to

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[242] United States v. McInnis, 601 F.2d 1319, 1326 (5th Cir. 1979).; *see also supra* Parts I.A. and III.A.2.

[243] *See supra* Part III.A.2.

[244] Siobhan Roth, *Crossing the Line to Nail Suspects: U.S. Prosecutors Bring Unusual Capital Charges in Two Cases that Left a Trail Across the Region*, 24 LEGAL TIMES, June 25, 2001, at 2.

[245] *Wills*, 533 U.S. 953 (2001).

[246] *See* Roth, *supra* note 244, at 2.

[247] Ron Vample, *Death Penalty Sought Against Man Accused of Killing Wife*, ASSOCIATED PRESS NEWSWIRES, Aug. 31, 2001.

[248] *See* Roth, *supra* note 244, at 2; Vample, *supra* note 247.

reach.[249] With *Wills* in effect, the Federal Kidnapping Act becomes a grant of federal police power to govern kidnappings that begin and end in one state.[250]

In support of this new regime, one of the prosecutors in *Wills* has argued that despite the "criticism of prosecutors [for] overreaching and of Congress for enacting criminal statutes that seem too broad and step on the toes of the states. . . .you need some mechanism to fill in the gaps in the state law."[251] From the prosecutor's point of view, the "gaps" *Wills* filled are more important than the toes stepped on; the kidnappers to be prosecuted outweigh the minor federal intrusion into the states.

As this article has explained, however, the prosecutor's argument cannot stand. First and foremost, his argument fails when we consider that the original legislative purpose of the Act was to prosecute *inter*state kidnappings that individual state laws could not reach.[252] To prosecute *intra*state kidnappings, as both the cited prosecutor and *Wills* itself would have us do, would not constitute filling a "gap" between state laws—the point and effect of the Act in its inception.[253] Instead, to grant federal power over intrastate crimes would be more of an "overlap," a secondary layer of legislation that brings federal authorities into the states as a secondary layer of police enforcement.

Likewise, the prosecutor's argument must fail because, even if the federal government recognizes a "gap" it wants to fill, in doing so it is forbidden to step (even slightly) on the states' toes.[254] As explained earlier, under the Tenth Amendment and the Commerce Clause, Congress' ability to claim federal jurisdiction is founded on the interstate effects of that which it would regulate.[255] Therefore,

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[249] *See* Roth, *supra* note 244, at 3. (One prosecutor admitted that, after *Wills*, he would seek a federal prosecution for any "cases like *Wills*, where on a state level there is a venue question that federally is not a problem").

[250] When reconsidering the prosecution of Lentz, Arlington Commonwealth Attorney Richard Trodden admitted that his office "had a discussion with the U.S. Attorney's Office, and [they] decided that the [federal prosecutors] had a better chance." Roth, *supra* note 245, at 3. After *Wills*, state attorneys general can turn to federal prosecutors to pursue wholly intrastate cases that were coincidentally preceded by the victim's voluntary interstate travel. In other words, after *Wills*, federal prosecutors can be called upon to prosecute intrastate kidnappings that state attorneys general cannot—for whatever reason—successfully pursue.

[251] Roth, *supra* note 245, at 3.

[252] *See supra* Parts I.A. and III.A.I.

[253] *See supra* Part I.A.

[254] *See supra* Parts II.A.2 and II.B.1.

[255] *See supra* Part II.B.1 and III.A.2.

when it acts to legislate, as it did when enacting the Federal Kidnapping Act, Congress must necessarily act *in between* the states themselves; it must necessarily *not* step on the states' toes and fill only those interstate gaps that are outside an individual state's reach.[256]

To read the Federal Kidnapping Act as the prosecutor would, as *Wills* would—to see the Act as a grant of federal authority over intrastate kidnappings preceded by the victim's voluntary interstate travel—would be to do the very thing the Court warned against in *Lopez*: it would be to "covert congressional authority under the Commerce Clause to a general police power of the sort retained by the states."[257] Moreover, and more importantly, to read the Kidnapping Act in this way would render it unconstitutional.[258] For as this article has already explained, Congress has no general police power—it cannot willingly invade the traditional province of the states simply because it seeks to enforce a particular crime to a degree that the states themselves do not.[259] As a result, if the Kidnapping Act does—as *Wills* allows—invade the states in this way, if it does allow federal jurisdiction over intrastate crimes, then it also violates the Tenth Amendment. To violate the Tenth Amendment is more than to simply disrupt the balance of federalism—it is to violate the constitution itself.[260]

Of course, as this article has already explained, the current Supreme Court would not likely find that the Federal Kidnapping Act is, in fact, unconstitutional.[261] Instead, as it did in *Lopez* and *Jones*, the Court would likely read the legislation in question—the Federal Kidnapping Act—in the most constitutionally favorable light.[262] In other words, the Court would not read the Act as a grant federal jurisdiction over a historically state-controlled matter; it would not "choose the harsher alternative" and allow Congress to police intrastate criminal activity.[263] Instead, with an eye to the limits of federalism, the Court would most likely maintain the traditional balance of power and the traditional limits to federal power that have

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[256] *See supra* Part II.B.1.

[257] *See supra* Parts II.A.2 and II.B.1.

[258] *See supra* Part II.B.1.

[259] *See supra* introduction to Parts II and II.A.

[260] *See supra* Part II.B.1.

[261] *See supra* Part II.B.2.

[262] *See supra* Parts II.A.2 and II.B.

[263] *See supra* note 134.

long existed under Kidnapping Act jurisprudence.[264] For as *Jones* illustrates so well, the Court is today unwilling to grant new federal authority on the basis of ambiguous statutory language.[265] Therefore, if Congress—following *Wills*—wants the Kidnapping Act to give federal authorities an intrastate presence that they never-before possessed, and if Congress wants to Act to enable federal authorities to police kidnappings beginning and ending in one state, it will likely have to restate the Act in language that cannot be so easily interpreted to mean otherwise.[266] The Court has shown itself to be a federalist watchdog: it is, at the least, prepared to require continued attempts at federalization to be made explicitly.

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[264] *See supra* Part II.B.2.

[265] 529 U.S. 848 (2000).

[266] *See supra* Part II.B.2.