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The Internet and the Hobbs Act: What's the Connection?

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THE INTERNET AND THE HOBBS ACT: WHAT'S THE CONNECTION?

Abstract: The Hobbs Act provides a federal alternative to traditional state robbery charges by criminalizing any robbery that affects interstate commerce. Courts have interpreted the Hobbs Act's commerce element broadly, by requiring the government to demonstrate that a robbery had a de minimis effect on interstate commerce. With this standard, robberies of businesses generally satisfy the statute's commerce element, but robberies of individuals often do not. This difference between a state and a federal robbery charge is significant, because the Hobbs Act generally carries substantially harsher penal sentences. This Note examines when the use of the internet in the robbery of an individual should satisfy the Hobbs Act's commerce element. With the internet's prominent role in society, the answer to this issue could impact whether countless robberies can be charged as federal crimes. This Note, therefore, contends that courts should adopt a functional test to determine, on a case-by-case basis, whether internet use in a robbery satisfies the Hobbs Act's commerce element. Adoption of this test would align with Commerce Clause case law and Hobbs Act case law. Furthermore, it would promote federalism and safeguard the traditional role of federal courts.

INTRODUCTION

Suppose that someone mugs you on the street, gets in a car, and then uses Google Maps on a phone to assist in their escape.[1] Does the mugger's use of the internet through Google Maps affect interstate commerce?[2]

In this hypothetical, the matter of whether use of the internet affects interstate commerce is critical for determining whether this mugging could be charged as a federal crime under the Hobbs Act, rather than only as a state

[1] *See* Oral Argument at 18:00, United States v. Luong, 965 F.3d 973 (9th Cir. 2020) (No. 16-10213), https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000012526 [https://perma.cc/6CZG-9E4B] (recounting a hypothetical presented by a judge at oral argument). U.S. Court of Appeals for the Ninth Circuit Judge Jay Bybee asked a prosecutor during oral argument whether the use of Google Maps would constitute an effect on interstate commerce. *Id.* The prosecutor responded that it would affect commerce. *Id.*

[2] *See id.* The hypothetical posed did not reflect the facts of the case. *See* Appellant's Opening Brief at 4, *Luong*, 965 F.3d 973 (No. 16-10213), 2016 WL 4943650, at *4 (describing how the defendant utilized the website Craigslist for assistance in committing an armed robbery). In the real case, the defendant advertised a car on a Craigslist webpage. *Id.* When a potential buyer met with the defendant to purchase the car, the defendant robbed him at gunpoint. *Id.* The Ninth Circuit in 2020 upheld the conviction and affirmed the holding that the defendant's use of Craigslist to conduct a robbery affected interstate commerce. *Luong*, 965 F.3d at 983–84.

crime.[3] Although Congress originally enacted the Hobbs Act to address highway robberies in the 1940s, courts have interpreted the statute to apply to any robbery that affects interstate commerce.[4] This interpretation renders the Hobbs Act applicable to robberies of businesses and corporations, but rarely to robberies of individuals.[5] The Hobbs Act, consequently, would not traditionally apply in the aforementioned mugging hypothetical.[6] If, however, the use of the internet automatically fulfills the interstate commerce requirement, it would elevate many robberies of individuals to federal crimes.[7]

Prosecuting a robbery as a federal crime, rather than as a state crime, can have significant sentencing consequences.[8] When the government successfully prosecutes a Hobbs Act armed robbery, the defendant becomes subject to the

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[3] *See* 18 U.S.C. § 1951 (requiring a robbery or extortion to affect interstate commerce "in any way or degree"). To convict a defendant under the Hobbs Act, the government must prove both that a robbery or extortion occurred, and that such action affected interstate commerce. *See* United States v. Robinson, 119 F.3d 1205, 1212 (5th Cir. 1997) (explaining the two elements of a Hobbs Act prosecution). The government bears the burden of demonstrating that a robbery or extortion affected interstate commerce because Congress used its constitutional power under the Commerce Clause in enacting the Hobbs Act. Michael McGrail, Note, *The Hobbs Act After* Lopez, 41 B.C. L. REV. 949, 951 (2000); *see* U.S. CONST. art. l, § 8, cl. 3 (affording Congress the power to regulate commerce between states).

[4] *See* United States v. Culbert, 435 U.S. 371, 380 (1978) (ruling that any conduct that satisfies the Hobbs Act's statutory language constitutes a Hobbs Act offense, regardless of whether the crime could also be charged as a state crime); *see also* United States v. Miles, 122 F.3d 235, 244 (5th Cir. 1997) (DeMoss, J., specially concurring) (discussing the legislative history and historical context of the Hobbs Act, and also noting that Congress enacted it to address labor unions that would rob and extort truck drivers on interstate highways).

[5] *See* United States v. Perrotta, 313 F.3d 33, 36 (2d Cir. 2002) (finding that the extortion of an individual does not generally have an effect on interstate commerce, even in the aggregate); United States v. Collins, 40 F.3d 95, 100–01 (5th Cir. 1994) (stating the concern that any robbery or extortion could become a federal robbery if businesses and individuals are treated identically under the Hobbs Act). Robberies of individuals can still fall under the jurisdiction of the Hobbs Act, but only when the government demonstrates that the particular robbery affected interstate commerce. *See Perrotta*, 313 F.3d at 37–38 (examining how robberies of individuals can fall under the Hobbs Act when the victim "directly participated in interstate commerce," such as when a defendant targets a victim due to the victim's role as an employee at a business that engages in interstate commerce).

[6] *See* United States v. Wang, 222 F.3d 234, 239 (6th Cir. 2000) (ruling that stealing from an individual does not per se affect interstate commerce, even if the individual was walking to or from a store or a restaurant). In the U.S. Court of Appeals for the Sixth Circuit's 2000 decision *United States v. Wang*, the defendants followed the owners of a restaurant back to their home, where they robbed them of the cash that they made that day. *Id.* at 236. The court reasoned that a small amount of cash stolen from private individuals in their home does not constitute an effect on interstate commerce. *Id.* at 239.

[7] *See* United States v. Horne, 474 F.3d 1004, 1006 (7th Cir. 2007) (ruling that the use of eBay to lure a victim into being robbed constituted an effect on interstate commerce, establishing Hobbs Act jurisdiction); *see also Collins*, 40 F.3d at 100 (expressing the concern that, without distinguishing between individuals and businesses, any robbery could constitute a federal crime).

[8] *See* United States v. Hebert, 131 F.3d 514, 526 n.2 (5th Cir. 1997) (DeMoss, J., dissenting in part) (providing a list of long federal prison sentences associated with robberies of less than $20,000 that the government could have charged at the state level).

sentencing requirements of the Hobbs Act and 18 U.S.C. § 924(c).[9] For instance, in 2001 in the U.S. Court of Appeals for the Fifth Circuit case *United States v. McFarland*, the defendant robbed four shops at gunpoint for approximately two thousand dollars.[10] He received over ninety-seven years in prison without the possibility of parole, effectively a life sentence.[11] Had the defendant been convicted under Texas law, a state court could have sentenced him to as little as five years in prison.[12]

Prosecutors at the federal level often seek mandatory heightened sentences under the Hobbs Act; federalizing all robberies that involve internet use could, therefore, significantly expand the caseload of the federal courts by bringing these cases within federal courts' jurisdictions.[13] In the U.S. judicial framework, federal courts are tasked with overseeing a small number of cases

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[9] *See id.* at 526 (stating that defendants in Hobbs Act cases receive "humungous sentences" for armed robberies due to the sentencing requirements of 18 U.S.C. § 924(c)). Title 18 U.S.C. § 924(c) adds a consecutive minimum sentence that varies based on how a firearm is used in a robbery, as well as if it is the defendant's first conviction under the statute. 18 U.S.C. § 924(c). Courts, including the U.S. Courts of Appeals for the Second, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits, generally find that a Hobbs Act armed robbery is a "crime of violence" under 18 U.S.C. § 924(c) because it involves the use of "physical force" to steal property from a person or business. *See* United States v. Gathercole, 795 F. App'x 985, 986 (8th Cir. 2020) (per curiam) (finding that a Hobbs Act robbery constitutes a "crime of violence" under 18 U.S.C. § 924(c)(3)(A)); United States v. Hill, 890 F.3d 51, 53 (2d Cir. 2018) (same); United States v. Gooch, 850 F.3d 285, 292 (6th Cir. 2017) (same); United States v. Rivera, 847 F.3d 847, 848–49 (7th Cir. 2017) (same); United States v. Moreno, 665 F. App'x 678, 681 (10th Cir. 2016) (same); United States v. Howard, 650 F. App'x 466, 468 (9th Cir. 2016) (same); *see also* 18 U.S.C. § 924(c)(3)(A) (defining a "crime of violence" as one that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another").

[10] 264 F.3d 557, 557–58 (5th Cir. 2001), *aff'd by an equally divided court*, 311 F.3d 376 (5th Cir. 2002) (en banc). The defendant in *United States v. McFarland*, a 2001 case before the U.S. Court of Appeals for the Fifth Circuit, robbed four stores using a .25 caliber pistol. *Id.* A grand jury indicted him on one charge of committing a Hobbs Act robbery and on four counts of using a firearm during the performance of a felony. *Id.* at 558.

[11] *Id.* As the court explained in *McFarland*, it sentenced the defendant to 210 months in prison under the Hobbs Act, 60 months for one of the gun charges, and 300 months for each of the remaining three gun charges. *Id.* This results in a sentence of 1,170 months in prison. *Id.*

[12] *Id.* The relevant statute in Texas in *McFarland* granted judges the discretion to sentence defendants convicted of first-degree crimes to between five and ninety-nine years in prison. TEX. PENAL CODE § 12.32 (2019). The court further noted that, even if the defendant received the highest possible sentence under state law of ninety-nine years, he still would have been available for parole after thirty years. *McFarland*, 264 F.3d at 558.

[13] *See* United States v. Hickman, 179 F.3d 230, 243 (5th Cir. 1999) (en banc) (Higginbotham, J., dissenting) (discussing how the expansion of the Hobbs Act into traditional state crimes affects the abilities of the federal courts to focus on matters that have defined their "vital historical role"); *see also* Andrew Perrin & Madhu Kumar, *About Three-in-Ten U.S. Adults Say They Are Almost Constantly Online*, PEW RSCH. CTR. (July 25, 2019), https://www.pewresearch.org/fact-tank/2019/07/25/americans-going-online-almost-constantly/ [https://perma.cc/MBM3-GUGJ] (finding that 81% of Americans use the internet on a daily basis, with 28% of Americans using it "almost constantly").

that tend to pose questions of national importance.[14] This has generally relegated the brunt of the criminal caseload to state courts, particularly for assault, robbery, and extortion.[15] This delegation of cases provides federal courts, as well as federal prosecutors, with the time and resources to focus on more complex cases and issues.[16] The potential expansion of the Hobbs Act, therefore, could result in the diversion of federal judicial and prosecutorial resources to robberies that could be handled by the state courts.[17]

Along with triggering a potential increase in the federal caseload, a broader interpretation of the Hobbs Act raises federalism concerns.[18] If courts deem any use of the internet in the commission of a robbery to constitute an effect on interstate commerce, the Hobbs Act could apply to robberies of individuals, federalizing what have traditionally been state level crimes.[19] This

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[14] *See* William W. Schwarzer & Russell R. Wheeler, *On the Federalization of the Administration of Civil and Criminal Justice*, 23 STETSON L. REV. 651, 677 (1994) (explaining that the federal court system is not crafted to handle a large caseload because it was designed to handle only certain types of cases). Some scholars emphasize that federal courts are meant to provide a forum for conflicts of nationwide importance. *Id.* at 682.

[15] *See Hickman*, 179 F.3d at 243 (Higginbotham, J., dissenting) (describing robbery, extortion, murder, and assault as crimes normally within the state courts' realms). The dissenting opinion further noted that state courts handle "an overwhelming percentage" of the country's litigation. *Id.*

[16] *See* Schwarzer & Wheeler, *supra* note 14, at 684 (describing it as "inefficient and wasteful" for federal courts to use their limited resources on traditional state criminal cases). Some scholars reason that federal prosecutors should use their resources on the prosecution of traditional federal crimes, such as tax evasion and white-collar crimes, rather than on crimes that the state courts can handle. *Id.*

[17] *See Hickman*, 179 F.3d at 242–43 (Higginbotham, J., dissenting) (explaining that federal courts cannot properly function if they must oversee criminal cases normally handled by the state courts); Schwarzer & Wheeler, *supra* note 14, at 684 (acknowledging the practical limitations in forcing federal courts to handle traditional state crimes). There were 319,356 robberies in the United States in 2017, which significantly exceeds the 81,553 criminal cases filed in U.S. district courts in 2018. *See* FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2017: ROBBERY (2018), https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/robbery.pdf [https://perma.cc/2JDK-HUWA] (stating the number of robberies in the United States in 2017); *Federal Judicial Caseload Statistics 2018*, U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018 [https://perma.cc/5VTY-HYMY] (stating the number of criminal fillings in U.S. district courts in 2018).

[18] *See* Schwarzer & Wheeler, *supra* note 14, at 667–68 (describing how expansions in federal jurisdiction harm supposedly autonomous state functions); *see also* United States v. Morrison, 529 U.S. 598, 617–18 (2000) (emphasizing the importance of differentiating between federal and local powers with regard to criminal laws).

[19] *See* United States v. Lynch, 282 F.3d 1049, 1054 (9th Cir. 2002) (stating that no circuit court "has rejected the distinction between" robberies of persons and businesses under the Hobbs Act), *overruled on other grounds by* 437 F.3d 902 (9th Cir. 2006) (en banc); *see also* United States v. Wang, 222 F.3d 234, 239 (6th Cir. 2000) (ruling that the robbery of an individual does not always satisfy the interstate commerce clement of the Hobbs Act because, unlike with businesses, the aggregation principle does not apply). The Ninth Circuit in 2002 in *United States v. Lynch* noted its concern that the federalizing of robberies of individuals would destroy any difference between what constitutes a federal offense and what constitutes a state one. 282 F.3d at 1054. Notably, the Supreme Court in the 1979 decision *United States v. Culbert* ruled that there is no constitutional issue with the Hobbs Act applying to cases that can also be prosecuted under state law. 435 U.S. 371, 379–80 (1979).

jurisdictional shift could undercut criminal justice policy as formulated by state legislatures, as well as disregard the experience of local judges who have long considered what the punishments should be for such an offense.[20]

This Note contends that the use of the internet should not categorically constitute an effect on interstate commerce under the Hobbs Act.[21] Rather, courts should adopt a functional test to determine whether the use of the internet satisfies the Hobbs Act's commerce element with a case-by-case inquiry.[22] To support Hobbs Act charges, this test would require robberies involving commercial websites, such as eBay and Craigslist, to always fulfill the Act's commerce element.[23] When robberies involve non-retail websites, courts should evaluate on a case-by-case basis whether the use of the internet was commercial in nature—for instance, the use of Google Maps in the mugging hypothetical would not satisfy the commerce element because it was not a commercial use.[24] This construction of the Hobbs Act acknowledges the internet's role as a mechanism of interstate commerce, but also ensures that internet use does not automatically provide grounds for federal jurisdiction.[25]

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[20] *See* Schwarzer & Wheeler, *supra* note 14, at 668 (explaining the theory that, by allowing federal criminal law to overlap with state criminal law, Congress can "override" the choices made by state officials about how to handle and punish those that commit a crime). Scholars note that the higher mandatory sentences for federal crimes can undermine state policies that have been made with regard to the respective crimes. *Id.*

[21] *See* 18 U.S.C. § 1951(a) (prohibiting robberies and extortions that affect commerce "in any way or degree"); *see also* United States v. Luong, 965 F.3d 973, 983–84 (9th Cir. 2020) (suggesting that internet use during a local robbery would not always satisfy the Hobbs Act's commerce element).

[22] *See Wang*, 222 F.3d at 239–40 (outlining why robberies of individuals do not generally affect interstate commerce, but also stating that the court will nevertheless determine if there is a "nexus" between the robbery of the individual and interstate commerce). The functional view of the *Wang* court for examining the interstate element of the Hobbs Act for robberies of individuals can apply to the internet as well. *See id.* (stating that there could be "[o]ther avenues of proof" for proving that the robbery of an individual satisfied the commerce element of the Hobbs Act).

[23] *See* United States v. Horne, 474 F.3d 1004, 1005 (7th Cir. 2007) (stating that the defendant used eBay to commit the robbery). The Seventh Circuit in 2007 in *United States v. Horne* found that the use of eBay affected interstate commerce because the "buy and sell offers" made through the website created "interstate transactions." *Id.* at 1006. Similarly, in the 2017 Sixth Circuit decision *United States v. Person*, the defendant advertised automobiles on Craigslist, and would rob the buyers when they came to pick up the car. 714 F. App'x 547, 548 (6th Cir. 2017). The court in *Person* ruled that the government satisfied the commerce element of the Hobbs Act because the defendant's crimes involved the internet. *Id.* at 551.

[24] *Compare* Oral Argument, *supra* note 1, at 18:00 (describing Circuit Judge Bybee's hypothetical of whether a mugger using Google Maps to escape the crime scene would satisfy the commerce element of the Hobbs Act), *with Horne*, 474 F.3d at 1005 (explaining how the defendant used the commerce website of eBay to facilitate his robberies).

[25] *See* Oral Argument, *supra* note 1, at 18:00 (questioning whether the use of the internet could, standing alone, establish federal jurisdiction over a robbery); *see also* United States v. Sutcliffe, 505 F.3d 944, 952 (9th Cir. 2007) (deeming the internet to be "intimately related to interstate commerce"). Several circuit courts of appeals, including the Third, Sixth, Eighth, Ninth, and Eleventh Circuits, have found the internet to be a channel and instrumentality of interstate commerce. *Sutcliffe*, 505 F.3d at 953; United States v. Trotter, 478 F.3d 918, 921 (8th Cir. 2007) (per curiam); United States v.

Part I of this Note examines the legal landscape surrounding the commerce element of the Hobbs Act, and how courts have viewed the use of the internet in Hobbs Act prosecutions.[26] Part II discusses the arguments for and against a categorical rule that internet use should always satisfy the Hobbs Act's commerce element, as well as the underlying policy considerations.[27] Part III proposes that courts adopt a functional test for determining whether internet use in a particular case satisfies the Hobbs Act's commerce clement.[28]

I. Unpacking the Hobbs Act, the Commerce Clause, and Robberies Involving the Internet

This Part illustrates the governing doctrines and case law that are necessary for determining when the internet can establish federal jurisdiction under the Hobbs Act.[29] Section A of Part I introduces the Hobbs Act and its commerce element.[30] Section B examines the progression of Commerce Clause case law.[31] Sections C and D describe the differing interpretations of the Hobbs Act's commerce element in relation to the Commerce Clause case law.[32] Section E examines the Supreme Court's latest Hobbs Act jurisprudence and how it diverts from prior Hobbs Act case law.[33] Section F analyzes the few instances in which courts have interpreted the role of the internet in Hobbs Act prosecutions.[34]

A. The Hobbs Act and Its Interstate Commerce Requirement

The Hobbs Act has vastly expanded since its enactment in 1946.[35] Congress first passed the Hobbs Act to address the specific problem of highway robbery.[36] In the early twentieth century, labor unions in cities along the East

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MacEwan, 445 F.3d 237, 245 (3d Cir. 2006); United States v. Chambers, 441 F.3d 438, 450 (6th Cir. 2006); United States v. Hornaday, 392 F.3d 1306, 1311 (11th Cir. 2004).

[26] *See infra* notes 29–172 and accompanying text.

[27] *See infra* notes 173–239 and accompanying text.

[28] *See infra* notes 240–263 and accompanying text.

[29] *See infra* notes 35–172 and accompanying text.

[30] *See infra* notes 35–46 and accompanying text.

[31] *See infra* notes 47–98 and accompanying text.

[32] *See infra* notes 99–147 and accompanying text.

[33] *See infra* notes 148–154 and accompanying text.

[34] *See infra* notes 155–172 and accompanying text.

[35] *See* United States v. Miles, 122 F.3d 235, 244 (5th Cir. 1997) (DeMoss, J., specially concurring) (noting that Congress passed the Hobbs Act to address highway robberies, but also identifying that the Act now applies to many local robberies that do not occur on highways); *see also* Alexander M. Parker, Note, *Stretching RICO to the Limit and Beyond*, 45 Duke L.J. 819, 822, 826 (1996) (stating that "almost any act of extortion" can be a federal crime under the Hobbs Act and that Congress did not intend for the Hobbs Act to reach so broadly).

[36] *Miles*, 122 F.3d at 244 (DeMoss, J., specially concurring). The congressional hearings for the Hobbs Act focused on "extortion" and "paying of tribute" on interstate highways. *Id.*; *see* 18 U.S.C.

Coast would obstruct trucks and require them to pay a fee in order to enter the city.[37] Despite Congress's purported objective to address these specific union-related crimes, the language of the Hobbs Act omitted any reference to highways or highway robberies.[38] The statute instead prohibited acts of "robbery or extortion" that interfered with articles of commerce "in any way or degree."[39]

Interpreting this language, the United States Supreme Court ruled in 1960, in *Stirone v. United States*, that the Hobbs Act was an expression of Congress's full constitutional power under the Commerce Clause to prohibit robberies that disrupt interstate commerce.[40] In 1978, the Supreme Court further expanded the reach of the Act in *United States v. Culbert*, when it ruled that the Hobbs Act applied to any robberies that fit within the realm of the statute's language, including robberies that would also fall within the purview of state law.[41] The federal government could, therefore, prosecute any robbery under the Hobbs Act, so long as it affected interstate commerce.[42]

The government must prove two elements in every Hobbs Act prosecution.[43] First, it must prove that an individual either attempted or completed an act

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§ 1951(a) (addressing the interference of "any article or commodity in commerce" that "affects" interstate commerce).

[37] *Miles*, 122 F.3d at 244 (DeMoss, J., specially concurring). These inbound trucks were often carrying vegetables and other produce from other states. *Id.* Unions would force the truck drivers to either pay the equivalent of a day's salary for a union truck driver, or hire a union member to drive the shipment into the city. *Id.*

[38] *See* 18 U.S.C. § 1951(a) ("Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do.").

[39] *Id.* There is no evidence as to why Congress included the phrase "in any way or degree," nor as to what meaning Congress intended those words to carry. *Miles*, 122 F.3d at 244 (DeMoss, J., specially concurring). The Hobbs Act defines robbery as the "unlawful taking or obtaining of personal property from the person or in the presence of another, against his will." 18 U.S.C. § 1951(b)(1). It further defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force." *Id.* § 1951(b)(2).

[40] 361 U.S. 212, 215 (1960). The Supreme Court's 1960 opinion *Stirone v. United States* involved a powerful labor union official convicted under the Hobbs Act for extorting the owner of a concrete business. *Id.* at 213. The defendant threatened to interfere with the concrete business's contract to build a steel mill, unless the concrete business owner paid him off. *Id.* at 213–14.

[41] 435 U.S. 371, 379–80 (1978) (stating that Congress hoped to address the states' ineffectiveness in prosecuting robberies and extortions by allowing the federal government to prosecute these actions).

[42] *See id.* (ruling that Congress passed the Hobbs Act to address any robberies or extortions that meet the statute's language); *see also* United States v. Peterson, 236 F.3d 848, 851 (7th Cir. 2001) (explaining that a Hobbs Act robbery mandates that "two elements be proven: robbery and an effect on interstate commerce"), *abrogated on other grounds by* Taylor v. United States, 136 S. Ct. 2074 (2016). "Interstate commerce" generally concerns all of the aspects of "commercial intercourse between different states." *Interstate Commerce*, BLACK'S LAW DICTIONARY (6th ed. 1990).

[43] United States v. Robinson, 119 F.3d 1205, 1212 (5th Cir. 1997); *see* 18 U.S.C. § 1951(a) (prohibiting robbery, extortion, or attempted robbery or extortion that "obstructs" interstate commerce). In *United States v. Robinson*, the government charged the defendant under the Hobbs Act for robbing the owners and employees of check-cashing businesses immediately after they made check withdrawals.

of robbery.[44] Second, the government must prove a disruption of interstate commerce.[45] In evaluating what can and should satisfy the commerce element in a Hobbs Act prosecution, it is first necessary to examine how the Supreme Court expanded, and later restricted, Congress's power to regulate through the Commerce Clause.[46]

B. The Commerce Clause and Its Ever-Developing Case Law

The Commerce Clause of the U.S. Constitution states that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[47] The Commerce Clause is the only enumerated power that Congress possesses to regulate businesses and markets.[48] After the Articles of Confederation failed to give the national government power over trade, the Constitutional Convention designed the Commerce Clause to afford the federal government power over commerce between the states.[49] As the United States economy expanded over the next two centuries, courts in turn expanded the Commerce Clause to afford Congress greater regulatory power by expanding what constitutes "commerce."[50]

1. The Commerce Clause and Its Early Interpretations

In 1824 in *Gibbons v. Ogden*, the Supreme Court defined commerce as "intercourse," and ruled that Congress could regulate commerce that affects

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119 F.3d at 1208. The defendant would rob business owners and employees as they made check withdrawals from a bank drive-through, or would rob them when they returned to the business premises from the bank. *Id.* In total, the defendant stole approximately seventy thousand dollars from three different businesses. *Id.* at 1209.

[44] *Robinson*, 119 F.3d at 1212.

[45] *Id.*

[46] *See id.* at 1209–10 (examining the Commerce Clause case law to determine the proper standard for applying the commerce element in a Hobbs Act prosecution). In making its determination, the U.S. Court of Appeals for the Fifth Circuit examined Commerce Clause case law that spanned from the 1940s to the 2000s. *Id.* at 1209–10, 1214–15.

[47] U.S. CONST. art. l, § 8, cl. 3.

[48] *See* Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335, 1340 (1934) (stating that the Commerce Clause provides the only source of power that Congress has to govern "trade").

[49] *Id.* at 1337–38. In fact, the Founders called the Constitutional Convention in large part due to the failure of the Articles of Confederation to afford the national government the power to oversee interstate commerce. *Id.* at 1337.

[50] *See* U.S. Dep't of Treasury v. Fabe, 508 U.S. 491, 499 (1993) ("The emergence of an interconnected and interdependent national economy, however, prompted a more expansive jurisprudential image of interstate commerce."); *see also* United States v. Lopez, 514 U.S. 549, 585–90 (1995) (Thomas, J., concurring) (explaining the Constitution's Founders' original interpretation of "commerce," and suggesting that the case law has taken too expansive a view of what "commerce" is).

more than one state.[51] *Gibbons*, however, did not specify what constitutes interstate activity that Congress can regulate.[52] The Supreme Court first addressed this question in *Champion v. Ames* in 1903, and found that Congress has "plenary" power under the Commerce Clause to regulate the transportation of goods across state lines.[53] In the decades following *Champion*, the Court hesitated to expand the scope of federal regulation under the Commerce Clause.[54] For example, in 1918 in *Hammer v. Dagenhart*, the Supreme Court struck down a federal law that prohibited the interstate shipment of goods produced by factories that employed child labor.[55] The Court reasoned that Congress could not use the Commerce Clause as a pretext to regulate employment conditions within states, even if the statute regulated the interstate transportation of goods.[56] The Court further clarified that the production of goods did not constitute commerce, regardless of whether those items later crossed state boundaries.[57] Although the Court narrowly interpreted the Commerce Clause in these early cases, its rulings in the coming decades greatly expanded Congress's Commerce Clause Power and ultimately laid the groundwork for the expansion of the Hobbs Act.[58]

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[51] 22 U.S. (9 Wheat.) 1, 189, 194 (1824). Notably, the Supreme Court in the 1824 case *Gibbons v. Ogden* ruled that Congress's power under the Commerce Clause is "complete in itself, [and] may be exercised to its utmost extent." *Id.* at 196.

[52] *See id.* at 194–95 (explaining that internal commerce of the state falls under state power and all other commerce falls under federal authority, but not clarifying which commerce is internal to a state).

[53] 188 U.S. 321, 362–63 (1903). In addressing a statute that prohibited the transportation of lottery tickets between states, the Supreme Court established that Congress could prohibit articles of commerce from traveling across state boundaries. *Id.*

[54] *See* Carter v. Carter Coal Co., 298 U.S. 238, 303–04 (1936) (stating that Congress could not promulgate labor regulations for coal miners under the Commerce Clause because such laws are related to the production, not transportation, of goods); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 548, 550 (1935) (finding that the hours and pay of employees could not be regulated because they did not directly affect interstate commerce); Hammer v. Dagenhart, 247 U.S. 251, 271–72 (1918) (ruling that Congress could not prohibit the transportation of goods produced by child labor under its commerce power because such restrictions could only be regulated locally), *overruled by* United States v. Darby, 312 U.S. 100 (1941).

[55] 247 U.S. at 276–77.

[56] *Id.* at 271–72. The Court stated that regulating interstate movement of goods is acceptable when the interstate movement itself is "harmful." *Id.* at 271. At the same time, the Court prohibited Congress from regulating interstate movement of goods solely because the production of the goods within a state is "harmful." *Id.* at 272.

[57] *Id.* at 272.

[58] *See, e.g.*, United States v. Robinson, 119 F.3d 1205, 1214–15 (5th Cir. 1997) (applying a de minimis standard to the interstate commerce clement of Hobbs Act prosecutions, which is based on the aggregation principle established by the Supreme Court in 1942); *see also* Wickard v. Filburn, 317 U.S. 111, 127–28 (1942) (ruling that a seemingly minimal action could constitute an effect on interstate commerce when that action, considered in the aggregate, affects interstate commerce).

2. The Expansion of the Commerce Clause Power in the New Deal and Civil Rights Eras

At the height of the Great Depression, the Supreme Court adopted a more expansive view of the Commerce Clause.[59] In 1937, in *NLRB v. Jones & Laughlin Steel Corp.*, the Court ruled that activities with a "close and substantial relation to interstate commerce" fall under the realm of the Commerce Clause, even if those actions appear to be intrastate when viewed in isolation.[60] In analyzing a federal law that protected the right to unionize, the Court in *Jones & Laughlin Steel* focused on the effect of unionized labor on interstate commerce, and dismissed the fact that the employees in question participated in product manufacturing.[61] In 1941, as American involvement in World War II loomed, the Supreme Court further expanded the Commerce Clause's power in *United States v. Darby*, ruling that Congress possessed the power to regulate the transportation of manufactured items.[62]

The Supreme Court, in its 1942 *Wickard v. Filburn* decision, elaborated on what constituted a "close and substantial relation to interstate commerce."[63] The case involved a farmer fined by the federal government for producing wheat on his farm in excess of federal regulations.[64] He subsequently challenged the regulation on the basis that the Commerce Clause could not extend

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[59] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (finding that activities could affect commerce so long as they have a "close and substantial relation to interstate commerce"). The 1937 Supreme Court case *NLRB v. Jones & Laughlin Steel* involved a dispute over whether the National Labor Relations Board could require a private steel company to rehire its striking workers under the Wagner Act. *Id.* at 22. The Court explicitly recognized the far-reaching, negative effects that such a strike would have on the nation's economy. *Id.* at 41 ("It is obvious that [the effect on interstate commerce] would be immediate and might be catastrophic.").

[60] *Id.* at 37. The Court used the example of carriers that transport items both intrastate and interstate. *Id.* at 37–38. Congress can regulate these carriers, the Court reasoned, because such regulation is necessary to protect interstate traffic and ensure efficiency. *Id.*

[61] *Compare* Carter v. Carter Coal Co., 298 U.S. 238, 303 (1936) (ruling that Congress could not regulate employment conditions for coal miners because it involved the production, not transportation, of goods), *with Jones & Laughlin Steel*, 301 U.S. at 40 (stating that the unionized labor's participation in the production of the items was not decisive).

[62] 312 U.S. 100, 113 (1941). The ruling overturned the Court's 1918 *Hammer v. Dagenhart* decision by stating that Congress could use the Commerce Clause as pretext to regulate goods that it finds harmful. *Id.* at 114, 116–17 ("[Congress] is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use."); *see* Hammer v. Dagenhart, 247 U.S. 251, 271–72 (1918) (ruling that Congress could not use interstate commerce as pretext to regulate the production of goods), *overruled by Darby*, 312 U.S. 100.

[63] *See* 317 U.S. at 125 (stating that, even if an activity occurs intrastate, Congress can regulate it if it has a "substantial economic effect on interstate commerce"); *see also Jones & Laughlin Steel*, 301 U.S. at 37 (explaining that activities that appear entirely local can be regulated by Congress if they have a "close and substantial relation to interstate commerce").

[64] *Wickard*, 317 U.S. at 114–15. The farmer produced wheat on his farm to either sell or feed to his livestock. *Id.* at 114.

to the intrastate growth and consumption of wheat.[65] The Court upheld the federal regulations because, even if the farmer's contribution to interstate commerce was minimal, the contribution of farmers in the aggregate had a substantial effect on interstate commerce.[66] The ruling established the aggregation doctrine, which maintains that Congress can regulate intrastate activities that, when taken in the aggregate, substantially affect commerce.[67]

Two decades following *Wickard*, Congress used its Commerce Clause power to pass the Civil Rights Act of 1964.[68] That same year, in *Heart of Atlanta Motel, Inc. v. United States*, the Supreme Court upheld Congress's use of its Commerce Clause power to pass the Civil Rights Act, on the grounds that discrimination against African Americans obstructs interstate commerce.[69] Specifically, the ruling held that Congress could regulate local activities, such as racial discrimination in motels, when those activities have a substantial impact on interstate commerce.[70]

Similarly, in a second 1964 Civil Rights Act Supreme Court case *Katzenbach v. McClung*, the Court ruled that Congress could regulate discrimination in a local restaurant because the restaurant purchased a portion of its meat from outside of the state.[71] The Court justified its ruling by using the aggregation

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[65] *Id.* at 119.

[66] *Id.* at 127–28. The Court noted that the objective of the regulation at issue in *Wickard v. Filburn* was to drive up the price of wheat. *Id.* at 128. Congress, therefore, could regulate the production of wheat because it would substantially affect the interstate market demand for wheat. *Id.* at 128–29.

[67] *See id.* at 127–29 (finding that the Commerce Clause empowers Congress to regulate an intrastate activity when that activity, in the aggregate, affects interstate commerce); *see also* United States v. Robinson, 119 F.3d 1205, 1214–15 (5th Cir. 1997) (applying the aggregation principle to uphold the de minimis standard for establishing Hobbs Act jurisdiction).

[68] *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 249 (1964) (stating that Congress passed the Civil Rights Act of 1964 through its power to regulate commerce); *see also* Civil Rights Act of 1964, 42 U.S.C. § 2000a (ensuring "equal access" in certain public forums by prohibiting discrimination based on race).

[69] 379 U.S. at 257, 261. The Court relied on congressional testimony that racial discrimination forced many African Americans to travel farther distances in order to receive accommodations. *Id.* at 252–53.

[70] *Id.* at 258. The motel at issue in the 1964 Supreme Court case *Heart of Atlanta Motel, Inc. v. United States* refused to allow African Americans to inhabit the motel. *Id.* at 243. Notably, the motel had 216 rooms, was located near several interstate highways, advertised nationally, and 75% of its customers were from other states. *Id.* The Court, therefore, found that the policies of the motel affected interstate travelers by refusing to serve them on the basis of race. *Id.* at 258, 261.

[71] 379 U.S. 294, 304 (1964). The restaurant in question annually purchased approximately $70,000 of food that originated from other states. *Id.* at 298. There was, however, no evidence that any of the restaurant's customers were from outside of the state. *Id.* Unlike its emphasis on interstate travelers in *Heart of Atlanta Motel*, the Court in 1964 in *Katzenbach v. McClung* looked to congressional testimony that discrimination in restaurants had a substantial impact on interstate commerce in the aggregate. *Id.* at 299. *Compare Heart of Atlanta Motel*, 379 U.S. at 258 (finding that commerce was affected because interstate travelers could not reside at the motel at issue), *with McClung*, 379 U.S. at 299 (emphasizing that racial discrimination in restaurants was an economic issue with far-reaching implications).

principle established in *Wickard*, and reasoned that restaurants on the whole sold less food because of racial discrimination.[72] But unlike prior Commerce Clause rulings, the majority opinion in *McClung* emphasized Congress's power under the Necessary and Proper Clause to enact any laws related to the regulation of interstate commerce.[73] The Supreme Court, ultimately, extended this principle even further in 1969, in *Daniel v. Paul*, wherein the Court found that a local snack bar in Arkansas affected interstate commerce because the ingredients in its bread came from other states.[74] This era of Commerce Clause jurisprudence created crucial precedents for assessing the interstate commerce element of a Hobbs Act prosecution.[75]

3. Scaling Back the Commerce Clause Power: The *Lopez* Era

The legal landscape of Commerce Clause jurisprudence shifted in 1995 with the Supreme Court's holding in *United States v. Lopez*.[76] The Court in *Lopez* struck down a federal law that prohibited an individual from knowingly possessing a firearm in a school zone.[77] Chief Justice William H. Rehnquist's

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[72] *McClung*, 379 U.S. at 300–01. The aggregation principle in *Wickard* established that Congress could regulate intrastate activities with seemingly minimal effect on interstate commerce when those activities have a substantial impact in the aggregate. *See* 317 U.S. 111, 127–28 (1942) (finding that one farmer's growing and consuming of wheat may have a "trivial" effect in isolation, but many farmers doing the same would have a substantial effect on interstate commerce).

[73] *McClung*, 379 U.S. at 301–02 (stating that Congress could pass any legislation that is "necessary and proper" for regulating interstate commerce); *see also* U.S. CONST. art. l, § 8, cl. 18 (granting Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers").

[74] *See* 395 U.S. 298, 305 (1969) (ruling that the Civil Rights Act of 1964 applied to a snack bar in Arkansas because "three of the four food items sold contain[ed] ingredients originating from outside of the State"). The snack bar at issue in the Supreme Court's 1969 decision *Daniel v. Paul* served four items on its menu: hamburgers and hot dogs with buns, soda, and milk. *Id.* The Court found that the food sold by the snack bar affected interstate commerce because the ingredients in the buns were from outside of the state, and that some of the ingredients in the soda were "probably" from outside of the state. *Id.*

[75] *See* United States v. Robinson, 119 F.3d 1205, 1214–15 (5th Cir. 1997) (relying on the aggregation principle established in *Wickard* to rule that a de minimis standard is appropriate in Hobbs Act prosecutions). The Fifth Circuit in *Robinson* voiced its concerns that moving away from the aggregation principle in *Wickard* "would be call[ing] into question" the rulings regarding civil rights legislation that relied on the expanded Commerce Clause power. *Id.* at 1214; *see McClung*, 379 U.S. at 300–01 (using the aggregation principle established in *Wickard* to find that Congress could regulate racial discrimination in restaurants, even if instances of discrimination in that particular restaurant did not have a substantial effect on interstate commerce).

[76] *See* 514 U.S. 549, 551 (1995) (holding that Congress did not have the power under the Commerce Clause to regulate the possession of firearms in schools); *see also* John Schreiner, *The Irony of the Ninth Circuit's Expanded (Ab)Use of the Commerce Clause*, 33 W. STATE U. L. REV. 13, 17 (2005) (stating that the Supreme Court's 1995 decision in *United States v. Lopez* "has become a high-water mark in Commerce Clause case law").

[77] 514 U.S. at 551; *see* Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A) (prohibiting a person from knowingly possessing a firearm in a school zone).

majority opinion reasoned that the act of possessing a firearm in a school zone did not substantially affect interstate commerce.[78] Unlike the wheat in *Wickard* or the restaurant in *McClung*, the handling of a firearm in a school zone was not economic, and could not, even through aggregation, have a substantial impact on interstate commerce.[79]

The Court in *Lopez* emphasized the importance of federalism and state power, and minimized in this context Congress's power under the Necessary and Proper Clause.[80] In arguing that possession of a firearm in a school zone substantially affects commerce, the government in *Lopez* claimed that violent crime has significant costs that reach the whole population through insurance premiums.[81] The Court rejected this argument on the basis that such reasoning could give Congress the power to prohibit crimes under the Commerce Clause that were historically within the realm of the states.[82] The government further argued that possession of a firearm in a school zone threatened the nation's learning environments, leading to a less educated citizenry that would consequently be less economically productive.[83] The Court reiterated that such logic would afford Congress infinite power over a matter normally left to state and local governments—the regulation of public schools.[84]

The *Lopez* ruling ultimately recognized three groups of activities that Congress can regulate under the Commerce Clause.[85] The first two categories, channels of interstate commerce and instrumentalities of interstate commerce,

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[78] *Lopez*, 514 U.S. at 567 (stating that, even in the aggregate, possession of a firearm in a school zone does not have a substantial impact on interstate commerce).

[79] *Id.*; *see McClung*, 379 U.S. at 304 (finding that a restaurant buying meat from other states could, in the aggregate, create a substantial impact on interstate commerce); Wickard v. Filburn, 317 U.S. 111, 128–29 (1942) (holding that Congress could regulate the amount of wheat that a farmer grows and consumes on his own farm due to the substantial effect that it has on interstate commerce in the aggregate).

[80] *Compare Lopez*, 514 U.S. at 552 (explaining the Constitution's enumeration of powers and the Framers' intentions regarding state powers), *with McClung*, 379 U.S. at 301–02 (beginning its analysis of Congress's power under the Commerce Clause by stating that the Constitution grants Congress the ability to enact "all Laws which shall be necessary and proper" to regulate interstate commerce (quoting U.S. CONST. art. I, § 8)).

[81] *Lopez*, 514 U.S. at 563–64.

[82] *Id.* at 564. The Court in *Lopez* emphasized the significance of state powers throughout the opinion. *Id.* at 552. The Court specifically quoted *The Federalist Papers*: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *Id.* (quoting THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961)).

[83] *Id.* at 564.

[84] *Id.* at 565. Chief Justice Rehnquist authored the opinion for the Court and explained that if the Court accepted the government's reasoning, then Congress would be able to create a "federal curriculum" because the lessons presented in classrooms have an "effect on classroom learning." *Id.*

[85] *Id.* at 558.

involve inherently interstate activities that Congress can always regulate.[86] The last group constitutes activities that have a "substantial relation to interstate commerce."[87] The Court acknowledged that this third group could include intrastate activities, but only if such activities are economic in nature and substantially affect interstate commerce.[88]

In examining the third category of activities established in *Lopez*, in 2000 the Supreme Court, in *United States v. Morrison*, struck down a federal criminal statute that prohibited gender-motivated violence.[89] The Court held that Congress could not use its Commerce Clause power to prohibit noneconomic, violent crimes on the grounds that such activity affects interstate conduct in the aggregate.[90] Similar to the ruling in *Lopez*, the opinion in *Morrison* emphasized the preservation of state and local power.[91] The Court emphasized its *Lopez* reasoning that if the Commerce Clause permits the punishment of any crime that has an aggregate effect on commerce, then Congress would possess the power to regulate almost all crimes.[92]

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[86] *Id.* Congress can regulate the abuse of channels of interstate commerce, such as the transportation of stolen items or kidnapping. Perez v. United States, 402 U.S. 146, 150 (1971). Secondly, Congress can govern instrumentalities, such as by prohibiting robbery of shipped goods. *Id.*

[87] *Lopez*, 514 U.S. at 558–59.

[88] *Id.* at 559–60. The Court, in demonstrating examples of intrastate activities that were economic and substantially affected interstate commerce, cites the restaurant in *McClung*, the motel in *Heart of Atlanta Motel*, and the wheat in *Wickard*. *Id.*; *see* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964) (stating that Congress has power under the Commerce Clause to regulate motels that serve interstate travelers); Katzenbach v. McClung, 379 U.S. 294, 300–01 (1964) (finding that Congress could regulate a local restaurant because racial discrimination in restaurants affects interstate commerce); Wickard v. Filburn, 317 U.S. 111, 128–29 (1942) (ruling that Congress could regulate the amount of wheat produced on a farm); *see also* Mark D. Rosen, *Marijuana, State Extraterritoriality, and Congress*, 58 B.C. L. REV. 1013, 1020 (2017) (stating that Congress can regulate only economic activities under the third *Lopez* group).

[89] 529 U.S. 598, 619 (2000) (finding that Congress did not have the power under the Commerce Clause to enact such a statute); *see* Violence Against Women Act, 42 U.S.C. § 13981 (1994) (prohibiting gender-motivated crimes against women). Congress made findings that gender-motivated crimes substantially affect interstate commerce: one million women seek medical assistance from injuries caused by their male partners each year, violent crimes against women cost the country around $3 billion per year, and the United States spends between $5 billion and $10 billion annually on the criminal, social, and medical costs associated with domestic violence. *Morrison*, 529 U.S. at 632 (Souter, J., dissenting). Although the Supreme Court acknowledged the effect that gender-motivated violence has on the national economy, it struck down the law to preserve state power over criminal law. *Id.* at 615–18 (majority opinion).

[90] *Morrison*, 529 U.S. at 617. The ruling explicitly declined to adopt a categorical rule that noneconomic conduct could not be considered in the aggregate. *Id.* at 613.

[91] *See id.* at 617–18 (citing *Lopez*, 514 U.S. at 568) ("The Constitution requires a distinction between what is truly national and what is truly local.").

[92] *Id.* at 615. The Court worried that permitting such an expansion of the Commerce Clause would allow Congress to prohibit murder, as well as any other violent crime. *Id.* It further noted that punishing violent crime is a quintessential state power. *Id.* at 618.

Finally, in a recent twist, the Court departed from the trend of judicially restricting the Commerce Clause's reach.[93] In 2005, in *Gonzalez v. Raich*, the Supreme Court upheld a federal drug regulation on the basis that the intrastate production and selling of controlled substances is part of a larger market that substantially impacts interstate commerce.[94] Unlike the rulings in *Lopez* and *Morrison*, the Court in *Raich* followed *McClung*'s precedent of emphasizing Congress's power under the Necessary and Proper Clause.[95]

In his concurring opinion, Justice Antonin Scalia reasoned that Congress possesses the power to regulate noneconomic intrastate activities when the policies are part of a broader plan of interstate regulation.[96] Justice Scalia further explained that Congress could regulate noneconomic local activities under the Commerce Clause when the absence of regulation would "undercut" Congress's regulation of interstate commerce.[97] Although the Court reverted to its pre-*Lopez* jurisprudence in *Raich*, the rulings in *Lopez* and *Morrison* raised questions concerning what constitutes a substantial effect on interstate commerce in a Hobbs Act case and how courts should consider the balance of federal and state power when interpreting the Hobbs Act.[98]

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[93] *See* Gonzalez v. Raich, 545 U.S. 1, 9 (2005) (ruling that Congress possessed the power under the Commerce Clause to regulate controlled substances, even when they were produced and consumed in the same state).

[94] *Id.* at 25–26.

[95] *Id.* at 5; *see* Katzenbach v. McClung, 379 U.S. 294, 301–02 (1964) (outlining Congress's power under the Necessary and Proper Clause). *Compare Lopez*, 514 U.S. at 552 (beginning its Commerce Clause analysis by emphasizing the federal government's enumerated powers in contrast with the powers of states), *with Raich*, 545 U.S. at 5 (starting the opinion with a description of Congress's power under the Commerce Clause and Necessary and Proper Clause).

[96] *Raich*, 545 U.S. at 37 (Scalia, J., concurring) ("Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.").

[97] *Id.* at 38. Justice Scalia specifically states in his concurrence that prior Supreme Court Commerce Clause rulings do not categorically prohibit the regulation of noneconomic intrastate actions. *Id.* at 38–39. He further clarified that such actions do not fall under the third *Lopez* category of substantially burdening interstate commerce. *Id.* at 38; *see Lopez*, 514 U.S. at 558–59 (stating that Congress can regulate activities that substantially relate to interstate commerce).

[98] *See Lopez*, 514 U.S. at 559 (stating that the test for congressional regulations is whether an "activity 'substantially affects' interstate commerce"); *see also* United States v. Morrison, 529 U.S. 598, 617 (2000) (finding that Congress could not rely on the aggregation principle to regulate violent crimes that are noneconomic in nature). The opinions in *Lopez* and *United States v. Morrison* emphasized the importance of restricting the federal government to its enumerated powers in order to preserve state power. *See Morrison*, 529 U.S. at 617–18 (stating that the Court needs to distinguish between the "truly national" and the "truly local"); *Lopez*, 514 U.S. at 552 (describing the federal government's powers as "few and defined," and that all other governing powers remain with the states).

C. The Relationship Between the Hobbs Act and the Commerce Clause in Local Robberies[99]

In applying the interstate commerce requirement of the Hobbs Act, circuit courts of appeals have relied primarily on the Supreme Court's larger framework for interpreting the Commerce Clause.[100] Despite the narrowing of the Commerce Clause power in *Morrison* and *Lopez*, circuit courts have repeatedly held that a showing of a de minimis effect on interstate commerce is sufficient to satisfy the commerce element of a Hobbs Act prosecution.[101] Accordingly, robberies under the Hobbs Act do not necessarily need to have a substantial effect on interstate commerce, even when they occur entirely intrastate.[102]

In upholding local robbery prosecutions under the *Lopez* formulation, courts have adopted two approaches.[103] Some circuits, including the U.S. Court of Appeals for the D.C. Circuit and the U.S. Court of Appeals for the Ninth Circuit, have simply ruled that the substantial effect test established in *Lopez* does not apply to Hobbs Act robberies.[104] Other circuits, such as the U.S. Court of Appeals for the Fifth Circuit and the U.S. Court of Appeals for the Tenth Circuit, have held that robbery or extortion fall under the third *Lopez* category requiring a substantial relation to interstate commerce.[105] These courts, however, do not

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[99] This Note defines "local robberies" as those robberies that do not take place on an interstate highway nor directly obstruct the movement of goods between states. "Local robberies" are intrastate robberies that fall under the third *Lopez* category of having a "substantial relation to interstate commerce." *See Lopez*, 514 U.S. at 558–59 (describing Congress's power to regulate activities that "substantially affect interstate commerce").

[100] *See, e.g.*, United States v. Robinson, 119 F.3d 1205, 1214–15 (5th Cir. 1997) (determining a standard for courts to evaluate the interstate commerce element of the Hobbs Act through application of the New Deal Era Commerce Clause case law to the Court's ruling in *Lopez*).

[101] *See* United States v. Smith, 182 F.3d 452, 456 (6th Cir. 1999) (stating that every circuit court that has ruled on the issue has applied a de minimis standard to the interstate commerce element of a Hobbs Act prosecution). The de minimis effect test requires only that the action in question had a small or "minimal" effect on interstate commerce. *See, e.g.*, United States v. Harding, 563 F.2d 299, 302 (6th Cir. 1977) (describing the de minimis standard as requiring "no more than a minimal effect on interstate commerce").

[102] *See, e.g.*, United States v. Clausen, 328 F.3d 708, 711 (3d Cir. 2003) (explaining that courts need to apply a de minimis standard to Hobbs Act robberies, which the prosecution can satisfy through the aggregation principle).

[103] *See* Kelly D. Miller, *The Hobbs Act, the Interstate Commerce Clause, and* United States v. McFarland*: The Irrational Aggregation of Independent Local Robberies to Sustain Federal Convictions*, 76 TUL. L. REV. 1761, 1766–67 (2002) (explaining that courts have used two methods in applying the Hobbs Act to local robberies); *see also Lopez*, 514 U.S. at 558–59 (listing the three groups of activities that Congress can regulate under the Commerce Clause).

[104] Miller, *supra* note 103, at 1766–67; *see* United States v. Harrington, 108 F.3d 1460, 1467 (D.C. Cir. 1997) (stating that courts do not need to find a "substantial" effect in a Hobbs Act prosecution); United States v. Atcheson, 94 F.3d 1237, 1242–43 (9th Cir. 1996) (same).

[105] *See Clausen*, 328 F.3d at 711 (explaining that some courts have placed Hobbs Act robberies in the third category of *Lopez*); *Robinson*, 119 F.3d at 1212 (applying Hobbs Act robberies under the third category of *Lopez*, and stating that they can be satisfied through the aggregation principle); Unit-

require a showing that the *specific* robbery substantially affected interstate commerce.[106] They instead apply the aggregation principle established in *Wickard* to find that robbery has a substantial effect on interstate commerce in the aggregate.[107] Either interpretation empowers the government to prosecute robberies of any business under the Hobbs Act.[108] Nonetheless, courts hesitate to apply this aggregate reasoning when the victim of the robbery is an individual, in effect limiting Hobbs Act prosecutions to the robberies of businesses.[109]

Although *Lopez* marked a significant shift in the Supreme Court's Commerce Clause jurisprudence, *Lopez* did not impact circuit courts' approach to analyzing the interstate commerce element of Hobbs Act prosecutions.[110] The circuit courts distinguish the Hobbs Act from the Gun-Free School Zone Act in *Lopez*, insofar as the acts of robbery and extortion in the aggregate substantially affect interstate commerce.[111] They reason that robbery has an "obvious" inter-

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ed States v. Bolton, 68 F.3d 396, 399 (10th Cir. 1995) (same); *see also Lopez*, 514 U.S. at 558–59 (describing congressional power to regulate activities that substantially impact interstate commerce).

[106] *See Clausen*, 328 F.3d at 711 (stating that the Hobbs Act requires only a de minimis standard). The U.S. Courts of Appeals for the Fifth, Sixth, Seventh, and Tenth Circuits apply this same reasoning. *See Smith*, 182 F.3d at 456 (requiring a de minimis, rather than a substantial, effect on interstate commerce in each case); *Robinson*, 119 F.3d at 1212 (same); *Bolton*, 68 F.3d at 399 (same); United States v. Stillo, 57 F.3d 553, 558 n.2 (7th Cir. 1995) (same).

[107] Miller, *supra* note 103, at 1768; *see* Wickard v. Filburn, 317 U.S. 111, 127–29 (1942) (stating that Congress could regulate local activities when those activities have a "substantial effect" on interstate commerce in the aggregate).

[108] *See Clausen*, 328 F.3d at 710–11 (explaining how both methods applied by courts require a de minimis standard that robberies of businesses always satisfy); *see also Robinson*, 119 F.3d at 1215 (explaining that the robberies of retail stores, taken in the aggregate across the country, would certainly have a substantial impact on interstate commerce). The aggregation principle is applied to robberies of businesses both because those businesses buy and sell goods from other states, and also because robberies of businesses in the aggregate would have a substantial effect on interstate commerce. *See, e.g.*, *Robinson*, 119 F.3d at 1215 (explaining how the aggregation principle can be applied to businesses that import supplies from other states and also how robberies of retail stores across the country would substantially affect interstate commerce).

[109] *See* United States v. Perrotta, 313 F.3d 33, 36 (2d Cir. 2002) (differentiating the robbery or extortion of an individual from the robbery or extortion of a business to satisfy the commerce element); United States v. Lynch, 282 F.3d 1049, 1054 (9th Cir. 2002) (same), *overruled on other grounds by* 437 F.3d 902 (9th Cir. 2006) (en banc); United States v. Collins, 40 F.3d 95, 100 (5th Cir. 1994) (distinguishing individuals and businesses with regard to the commerce element to ensure that not every robbery or extortion could be charged federally). Courts have reasoned that robberies of individuals often do not exhibit the direct effect on interstate commerce that robberies of businesses do. *See, e.g.*, *Collins*, 40 F.3d at 100–01 ("[I]t is manifest that Congress may not regulate conduct that, standing alone, does not directly affect interstate commerce or have a direct effect on a business engaged in interstate commerce.").

[110] *See Clausen*, 328 F.3d at 710 (stating that, even after *Lopez*, circuit courts continued to hold that individual crimes under the Hobbs Act did not need to substantially affect commerce).

[111] *See, e.g.*, *Robinson*, 119 F.3d at 1215 (reasoning that the "cumulative result" of robberies and extortions under the Hobbs Act has a substantial impact on interstate commerce). The court distinguished the Hobbs Act from the Gun-Free School Zone Act at issue in *Lopez* by stating that, unlike robbery, the act of possessing a gun in a school does not have an aggregate effect on interstate commerce. *Id.*

state effect because it involves taking money or items from businesses involved in interstate trade.[112] These courts further identify that, unlike the Hobbs Act, the federal law in *Lopez* did not contain an express jurisdictional element requiring an effect on interstate commerce.[113] Specifically, the Supreme Court in *Lopez* took issue with the Gun-Free School Zones Act for not including a jurisdictional element because that eliminated any need to examine on a case-by-case basis whether possessing a firearm in a specific instance affected interstate commerce.[114]

Following *Morrison*'s ruling that Congress could not regulate noneconomic criminal activity based on its aggregate effect, circuit courts still maintained the de minimis standard.[115] These courts held that *Morrison* did not affect their prior interpretations of the Hobbs Act because the law at issue in *Morrison* was similar to the law in *Lopez*.[116] The courts found that, unlike the law in *Morrison* that addressed violence against women, or the law in *Lopez* that prohibited possession of guns in school zones, the Hobbs Act fundamentally regulates economic activity and thus appropriately demands application of the aggregation principle.[117] The U.S. Circuit Court of Appeals for the Seventh Circuit in *United States v. Peterson* additionally identified that the law in *Morrison* criminalized all gender-motivated violence, irrespective of such conduct's effect on interstate com-

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[112] *See, e.g.*, *id.* at 1212–13 (stating that a robbery takes the funds that a business would have otherwise used to make interstate purchases and sales).

[113] *Id.* at 1211; *see* 18 U.S.C. § 922(q)(1)(A) (1990) (including no express jurisdictional element). An express jurisdictional element in a Commerce Clause statute explicitly mandates an effect on interstate commerce for each act or crime. Miller, *supra* note 103, at 1767. The Hobbs Act contains an express jurisdictional element for interstate commerce with the requirement that the robbery or extortion affect commerce "in any way or degree." 18 U.S.C. § 1951(a) (2018). Conversely, the statute at issue in *Lopez* did not explicitly require that the possession of a gun in a school zone affect interstate commerce. *See* 18 U.S.C. § 922(q)(1)(A) (1990) (creating a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone"); *see also* United States v. Lopez, 514 U.S. 549, 562 (1995) (finding that the language of the statute did not require that a certain set of firearm possessions affect interstate commerce).

[114] 514 U.S. at 561–62. A jurisdictional element requires a case-by-case analysis because it mandates an effect on interstate commerce as one of the elements of the crime. *Id.*; *see* 18 U.S.C. § 1951(a) (2018) (requiring the robbery or extortion to interfere with commerce).

[115] *See, e.g.*, United States v. Peterson, 236 F.3d 848, 852 (7th Cir. 2001) (ruling that *Morrison* did not affect the constitutionality of the de minimis standard in Hobbs Act prosecutions), *abrogated on other grounds by* Taylor v. United States, 136 S. Ct. 2074 (2016); United States v. Malone, 222 F.3d 1286, 1295 (10th Cir. 2000) (same).

[116] Miller, *supra* note 103, at 1769–70 (explaining how the Tenth Circuit found that *Morrison* did not affect its prior Hobbs Act decisions because *Morrison* relied heavily on *Lopez*). *Compare* 18 U.S.C. § 922(q)(1)(A) (1990) (outlawing the possession of a gun in a school zone), *and* 42 U.S.C. § 13981 (1994) (prohibiting gender-motivated violence), *with* 18 U.S.C. § 1951 (2018) (forbidding robbery or extortion that "affects" interstate commerce "in any way or degree").

[117] *See, e.g.*, *Malone*, 222 F.3d at 1295 (reasoning that the laws in *Lopez* and *Morrison* were similar in that they both addressed "non-economic criminal conduct").

merce.[118] The Hobbs Act, meanwhile, prohibited only criminal activities with a "proven effect" on interstate commerce.[119]

Courts upholding the de minimis standard have generally overlooked *Lopez*'s emphasis on preserving powers generally left to the states.[120] In *United States v. Robinson*, the Fifth Circuit noted *Lopez*'s concerns for enumerated powers and conservation of traditional state powers, but still deferred to Congress's ability to regulate commerce under the Necessary and Proper Clause.[121] The Fifth Circuit in *Robinson* further shared its concern that interpreting *Lopez*'s third category to require a substantial effect on interstate commerce in each individual case could jeopardize the Supreme Court's holdings on civil rights legislation.[122] Courts have additionally justified federal regulation of traditional state crimes on the grounds that Congress is not regulating robbery, but is instead regulating the ensuing "depletion of assets" as an economic issue.[123]

D. Dissenting Views of the Hobbs Act's Interstate Commerce Element

Although every circuit court has upheld the use of the de minimis standard in local Hobbs Act prosecutions, dissenting and concurring opinions highlight some judicial disagreement to such rulings.[124] Notably, a dissenting opinion to a Fifth Circuit en banc decision in *United States v. Hickman* argued that the prosecution could not satisfy the substantial effect test by aggregating separate, local

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[118] 236 F.3d at 852 (differentiating the law at issue in *Morrison* from the Hobbs Act on the basis that the Hobbs Act regulates criminal acts that have an economic effect).

[119] *Id.*; *see* 18 U.S.C. § 1951 (requiring that a robbery affect interstate commerce "in any way or degree").

[120] *See Peterson*, 236 F.3d at 852 (maintaining the de minimis standard on the grounds that the aggregation principle still exists following *Lopez* and *Morrison*); United States v. Bolton, 68 F.3d 396, 398–99 (10th Cir. 1995) (upholding the de minimis standard in Hobbs Act prosecutions, and analyzing *Lopez* without any mention of enumerated powers or preservation of state powers).

[121] United States v. Robinson, 119 F.3d 1205, 1209 (5th Cir. 1997). The Firth Circuit in *Robinson* limited *Lopez* to "remind[ing] us that from time to time, the judiciary must intercede to assure that Congress does not . . . dramatically alter the balance of federalism." *Id.* The opinion subsequently stated that it was "well aware" of the arguments regarding the federalization of crimes traditionally prosecuted by the states, but did not address the issue. *Id.*

[122] *Id.* at 1214; *see* Katzenbach v. McClung, 379 U.S. 294, 300–01 (1964) (ruling that, even if the restaurant's racial discrimination in the present case did not have a substantial impact on commerce, discrimination at restaurants in the aggregate did have such an effect). The court clarified that the *Lopez* ruling did not support such a proposition, because the Court in *Lopez* explicitly stated that it did not want to alter "well-established Commerce Clause precedents." *Robinson*, 119 F.3d at 1214 (quoting United States v. Knutson, 113 F.3d 27, 29 (5th Cir. 1997) (citing United States v. Lopez, 514 U.S. 549, 567–69 (1995))).

[123] *See, e.g.*, *Peterson*, 236 F.3d at 852 (clarifying that Congress did not regulate the act of robbery itself, but instead targeted the economic effect that robberies have on interstate commerce in the aggregate). The Seventh Circuit's opinion in *United States v. Peterson* noted that the Hobbs Act did not make all robberies a federal offense, but only those with an effect on interstate commerce. *Id.*

[124] *See* Miller, *supra* note 103, at 1768 (stating that judicial support for upholding the de minimis standard in local robberies is "hardly unanimous").

robberies.[125] Like the majority in *Lopez*, the *Hickman* dissent worried that permitting the aggregation of robberies under the Hobbs Act would allow Congress to regulate other traditional state crimes by using the aggregation rationale.[126]

Fifth Circuit Judge Patrick Higginbotham's *Hickman* dissent advocated for the adoption of a rule that would prohibit the aggregation of noneconomic activities.[127] Judge Higginbotham examined why cases that found a substantial effect on interstate commerce through aggregation generally involved economic enterprises, such as the wheat market in *Wickard*, the restaurant in *McClung*, or the motel in *Heart of Atlanta Motel*.[128] He reasoned that, unlike the activities in those cases, robbery and extortion under the Hobbs Act are not economic.[129] Particularly troubling for Judge Higginbotham was the fact that the Hobbs Act did not target a specific, larger market.[130] He explained that individual robberies, untethered from a specific market, would have to relate to one another in some way to make aggregation appropriate.[131] From this interpretation, Judge Higginbotham could not rationalize how such robberies are sufficiently related to, or dependent on, one another to justify regulation under Congress's Commerce Power.[132]

Fifth Circuit Judge Harold DeMoss Jr. issued a separate *Hickman* dissent and has consistently criticized using a de minimis standard to extend the Hobbs

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[125] 179 F.3d 230, 231 (5th Cir. 1999) (en banc) (Higginbotham, J., dissenting). The Fifth Circuit in *United States v. Hickman* was an equally divided en banc panel. *Id.* at 231 (majority opinion). The court issued a two-sentence majority opinion that simply affirmed the convictions on the basis of the en banc panel being equally divided. *Id.*

[126] *Id.* at 232 (Higginbotham, J., dissenting). The dissent explained that, in the aggregate, large reductions of almost any crime would have a substantial effect on interstate commerce. *Id.* Notably, the Fifth Circuit issued the *Hickman* decision prior to the Supreme Court's ruling in *Morrison*, which adopted a similar rationale. *See* United States v. Morrison, 529 U.S. 598, 617 (2000) (ruling that Congress could not solely rely on the aggregation principle to regulate noneconomic, criminal conduct); *see also Hickman*, 179 F.3d at 231 (ruling one year prior to *Morrison*, which the Court decided in 2000).

[127] 179 F.3d. at 235 (Higginbotham, J., dissenting).

[128] *Id.*; *see* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 257–58 (1964) (ruling that Congress could regulate motels because proprietors' discrimination had a substantial effect on interstate commerce in the aggregate); Katzenbach v. McClung, 379 U.S. 294, 304–05 (1964) (finding that discrimination in restaurants affected interstate commerce in the aggregate); Wickard v. Filburn, 317 U.S. 111, 128–29 (1942) (finding that Congress could regulate the amount of wheat grown on a farm because the production and consumption of wheat on local farms has, in the aggregate, an effect on interstate commerce).

[129] *Hickman*, 179 F.3d at 237 (Higginbotham, J., dissenting). The dissent disagreed with the notion that robberies or the effects of robberies are "economic." *Id.* at 237–38. The dissenting opinion stated that there must be a line between economic and noneconomic activity because otherwise any activity that involves a transfer could be considered as "economic." *Id.* at 237.

[130] *See id.* at 236 ("Without identification of a market or specific property that Congress wishes to protect, it is difficult at best to assess whether Congress had a rational basis for reaching acts that are insubstantial when viewed alone.").

[131] *Id.* at 237.

[132] *Id.*

Act to traditional state crimes.[133] In his dissent in *Hickman*, as well as in other decisions, Judge DeMoss repeatedly asserted that the government in a Hobbs Act prosecution of a local robbery should have to prove that the individual robbery substantially affected interstate commerce.[134] He reasoned that Congress did not intend for the Hobbs Act to apply to intrastate robberies, insofar as it passed the Hobbs Act to address highway robberies committed by labor unions in the 1930s and 1940s.[135] The government in a Hobbs Act prosecution, therefore, could not rely on the aggregate effect of local robberies on interstate commerce to obtain a conviction because Congress never intended to regulate that market.[136]

Judge DeMoss further supported his views by applying the Supreme Court's ruling in *Lopez* to local robberies under the Hobbs Act.[137] Contrary to the circuit court rulings upholding the de minimis standard, Judge DeMoss emphasized *Lopez*'s focus on enumerated powers and the role of state power in a federal system.[138] With this focus on restricting federal power, he reasoned that courts must strictly adhere to the third *Lopez* category's "substantial effect" standard, which results in the de minimis standard being unconstitutional.[139] He

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[133] *See id.* at 243 (DeMoss, J., specially dissenting) (arguing that an individual robbery or extortion under the Hobbs Act must have a substantial effect on interstate commerce); United States v. Miles, 122 F.3d 235, 248 (5th Cir. 1997) (DeMoss, J., specially concurring) (same); *see also* United States v. Hebert, 131 F.3d 514, 530 (5th Cir. 1997) (DeMoss, J., dissenting in part) (dissenting on the application of the Hobbs Act to a local robbery in which the government did not prove that the individual act of robbery substantially affected interstate commerce).

[134] *Accord Miles*, 122 F.3d at 248 (DeMoss, J., specially concurring) (stating that the Hobbs Act should apply only to robberies that substantially affect interstate commerce). Judge DeMoss took the position that the Hobbs Act should apply to robberies in only three instances: robberies involving a channel of interstate commerce, robberies involving a person or item in interstate commerce, and robberies involving individual robberies that substantially affect interstate commerce. *Id.* at 251.

[135] *Hebert*, 131 F.3d at 527 (DeMoss, J., dissenting in part). Judge DeMoss made the distinction that Congress intended to target the robbery of goods in the movement of interstate commerce, and not the robbery of goods that arrived at a retail stores. *Id.*; *see Hickman*, 179 F.3d at 244 (DeMoss, J., specially dissenting) ("[N]othing in the legislative history of the Hobbs Act indicates that Congress was concerned with local robberies of retail establishments.").

[136] *See Hickman*, 179 F.3d at 244 (DeMoss, J., specially dissenting) (stating that there exists "no rational basis" for the notion that Congress intended to address local robberies in the aggregate).

[137] *See id.* at 243 (stating that *Lopez* is the "constitutional touchstone" that should control the outcome of Hobbs Act cases).

[138] *See Miles*, 122 F.3d at 241 (DeMoss, J., specially concurring) (beginning his analysis by speaking of *Lopez*'s emphasis on enumerated powers and a balance between the national and state governments). Judge DeMoss specifically noted that the Court in *Lopez* stated that the federal government does not have a "general police power" to regulate intrastate activities. *Id.* at 242 (citing United States v. Lopez, 514 U.S. 549, 566 (1995)).

[139] *Id.* at 248. Judge DeMoss discussed the Fifth Circuit's ruling in *United States v. Corona*, in which the court found that a federal arson statute required a showing of a substantial impact on interstate commerce in each individual case to obtain a conviction. *Id.*; *see* United States v. Corona, 108 F.3d 565, 570 (5th Cir. 1997) (requiring that the government prove that an individual instance of arson substantially affects interstate commerce). The ruling in *Corona* required a showing of a substantial effect to ensure that not every act of arson could become a federal crime. 108 F.3d at 570. Judge De-

further concluded that, as a practical matter, the de minimis standard makes *any* robbery of *any* retail establishment a federal offense.[140] Such a result directly conflicts with the Supreme Court's interpretation of the Commerce Clause in *Lopez*—that Congress does not have a general police power over intrastate activities.[141]

Judge DeMoss's *Hickman* dissent, as well as his concurring and dissenting opinions in other Hobbs Act cases, also examined the practical implications of permitting federal criminal law to apply to traditionally local crimes.[142] Judge DeMoss described how prosecutors opportunistically charge local crimes under federal statutes, rather than under state statutes, to access federal mandatory sentencing requirements.[143] For instance, in *United States v. Herbert*, a 1997 Fifth Circuit case, the defendant received a sentence "amounting to life" for an armed robbery conviction, despite it being his first conviction and having stolen less than one thousand dollars.[144] In a broader critique, Judge Higginbotham's dissenting opinion in *Hickman* noted that the Founders designed the federal courts with limited jurisdiction to ensure that they could

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Moss, therefore, concluded that courts must apply *Lopez* to the Hobbs Act in the same way that the Fifth Circuit applied *Lopez* to the arson statute in *Corona*. *Miles*, 122 F.3d at 248 (DeMoss, J., specially concurring).

[140] *Miles*, 122 F.3d at 250 (DeMoss, J., specially concurring).

[141] *Id.* Judge DeMoss reasoned that giving Congress the power to regulate intrastate robberies through the Commerce Clause would grant Congress a "general police power" and contradict "our dual system of government." *Id.* (quoting *Lopez*, 514 U.S. at 557).

[142] *See Hickman*, 179 F.3d at 242–43 (Higginbotham, J., dissenting) (examining the concerns around expanding the reach of federal criminal jurisdiction); United States v. Hebert, 131 F.3d 514, 526–27 (5th Cir. 1997) (DeMoss, J., dissenting in part) (explaining how federal prosecutors can turn state robberies into federal offenses to impose harsher sentences).

[143] *Hebert*, 131 F.3d at 526–27 (DeMoss, J., dissenting in part). Judge DeMoss explained how prosecutors charge armed robberies as federal crimes under the Hobbs Act in order to access the "draconian" sentencing requirements imposed under the companion firearm counts. *Id.* The federal statute, 18 U.S.C. § 924(c), creates minimum sentencing guidelines for "crimes of violence" that involve the use of a firearm. 18 U.S.C. § 924(c)(1)(A). For instance, the statute requires a minimum sentence of seven years for "branching" a firearm during a violent crime. *Id.* § 924(c)(1)(A)(ii). It also mandates a minimum sentence of twenty-five years if the defendant had been previously convicted under the statute. *Id.* § 924(c)(1)(C)(i). Judge DeMoss included a list of cases where defendants convicted of armed robbery under the Hobbs Act received what amounted to lifetime sentences because of the heightened sentencing requirements imposed by 18 U.S.C. § 924(c). *Hebert*, 131 F.3d at 526 n.2 (DeMoss, J., dissenting in part).

[144] 131 F.3d at 526–27 (DeMoss, J., dissenting in part). The defendant received approximately 142 years in federal prison based on Hobbs Act convictions and under companion counts for using a firearm. *Id.* at 525 & n.1 (stating that the defendant received a sentence of 215 years, in which two-thirds of that time stemmed from his convictions under the Hobbs Act and 18 U.S.C. § 924(c), and the remaining time came from his convictions under the relevant bank robbery statutes and their companion gun counts). Without the use of a firearm, the defendant would have received approximately ten years under the Hobbs Act. *See id.* at 520 (majority opinion) (stating that the defendant received 121 months for the Hobbs Act convictions). Judge DeMoss took particular issue with the fact that nobody had been injured, no shots had been fired, and that it was the defendant's first conviction. *Id.* at 526–27 (DeMoss, J., dissenting in part).

operate effectively within a federalist system of government.[145] Judge Higginbotham contended, therefore, that federal courts could not properly focus on the cases traditionally falling under their jurisdiction if they must oversee the criminal cases that are generally tried in state courts.[146] Although the opinions by Judges Higginbotham and DeMoss are not controlling on the de minimis standard issue, they express many of the policy concerns that follow from a holding that internet use during a robbery automatically extends the reach of the Hobbs Act to traditionally state level robberies.[147]

E. The Supreme Court's Latest Hobbs Act Ruling: Taylor v. United States

In 2016, in *Taylor v. United States*, the Supreme Court applied the Hobbs Act to home invasions of marijuana dealers, evaluating contextual factors that had not been addressed in circuit court Hobbs Act cases involving local business robberies.[148] Although a home invasion would generally not satisfy the Hobbs Act's commerce element, the Court in *Taylor* ruled that the Hobbs Act applied to the home invasion because the defendant attempted to steal marijuana, a federally-regulated drug.[149] The government, therefore, did not need to prove any other effect on interstate commerce.[150]

The Court reasoned that, because *Raich* established that Congress could regulate the marijuana market under its Commerce Clause power, Congress could also regulate the robberies of marijuana through the Hobbs Act.[151] The Court focused on whether what was being stolen was a part of an interstate mar-

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[145] *Hickman*, 179 F.3d at 242–43 (Higginbotham, J., dissenting).

[146] *Id.* Judge Higginbotham's dissenting opinion noted that state courts have historically dealt with the "overwhelming percentage" of criminal litigation. *Id.* at 243. Consequently, if federal courts had to try the traditional state crimes of robbery, murder, and extortion, then they would be unable to "play their vital historical role." *Id.*

[147] *See id.* (analyzing how the expansion of criminal cases in the federal courts will harm the federal courts' ability to deal with their traditional cases); *Hebert*, 131 F.3d at 526–27 (DeMoss, J., dissenting in part) (indicating the issue of allowing prosecutors to charge traditional states crimes as federal crimes in order to receive heightened sentencing requirements).

[148] *Compare* Taylor v. United States, 136 S. Ct. 2074, 2078 (2016) (detailing the defendant's participation in several home invasions), *with* United States v. Baylor, 517 F.3d 899, 900 (6th Cir. 2008) (involving a defendant convicted of robbing a pizza chain restaurant), *and Hebert*, 131 F.3d at 520 (involving a defendant convicted of robbing a bank), *and* United States v. Miles, 122 F.3d 235, 236 (5th Cir. 1997) (discussing a defendant that robbed a McDonald's), *and* United States v. Robinson, 119 F.3d 1205, 1208–09 (5th Cir. 1997) (addressing a case where a defendant was convicted for robbing liquor stores and other retail establishments).

[149] 136 S. Ct. at 2077–78.

[150] *See id.* at 2081 (ruling that the government does not need to prove an effect on interstate commerce in a Hobbs Act prosecution when the defendant targets a drug dealer).

[151] *Id.* at 2080; *see* Gonzalez v. Raich, 545 U.S. 1, 17, 22 (2005) (ruling that marijuana is in a "class of activities" that Congress can regulate). The Court supported its reasoning by explaining that someone who robs marijuana is affecting an interstate market that Congress has authority to regulate. *Taylor*, 136 S. Ct. at 2080.

ket that Congress could regulate, not on whether the robbery itself affected interstate commerce.[152] Notably, the Court explicitly stated that it was not expanding the power of the Commerce Clause.[153] Even though the Court attempted to limit its holding to robberies of drug dealers, it remains unclear whether such reasoning could apply to other markets that Congress has power to regulate.[154]

F. The Use of the Internet in Hobbs Act Prosecutions

The use of the internet during a robbery presents the latest challenge for courts in interpreting how far the Hobbs Act extends under the power of the Commerce Clause.[155] As a system of connected computers and servers, the internet provides an unparalleled means of communication.[156] Unlike other forms of communication, the internet offers countless methods to communicate in real time, including email, text messaging, picture messaging, social media, and auction websites.[157] The internet is distinguishable from newspapers, television, or magazines, because it requires active use on behalf of the user.[158] Along with requiring active participation, the internet is unique in that discernable borders or consistent travel paths do not constrain it.[159] Lastly, the internet's rapid world-

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[152] Michael Munoz, Comment, Taylor v. United States*: In Federal Criminal Law, "Commerce Becomes Everything*," 15 GEO. J.L. & PUB. POL'Y 475, 478 (2017) (describing how the Supreme Court's 2016 decision in *Taylor v. United States* did not analyze the crime committed, but instead ruled that "the regulation of marijuana is the ultimate factor"); *see Taylor*, 136 S. Ct. at 2080 (reasoning that if Congress can regulate the intrastate market for drugs under the Commerce Clause, then it can also regulate the theft of those drugs).

[153] *Taylor*, 136 S. Ct. at 2081–82 (reassuring that *Taylor*'s ruling does not increase the Commerce Clause power established in *Raich*, and emphasizing that the holding only applies to robberies that intentionally target drug dealers). The Court explicitly stated that it was not rendering the Hobbs Act's commerce element "superfluous." *Id.*

[154] *See* Munoz, *supra* note 152, at 480 (explaining why the Court's broad view of the Commerce Clause under the Hobbs Act could have significant "future consequences"); *see also* United States v. Luong, 965 F.3d 973, 983 (9th Cir. 2020) (ruling that the Supreme Court's reasoning in *Taylor* applies to robberies involving commercial websites because Congress has the authority to regulate online transactions).

[155] *See* United States v. Person, 714 F. App'x 547, 551 (6th Cir. 2017) (addressing whether the use of Craigslist could satisfy the Hobbs Act's interstate commerce element); United States v. Horne, 474 F.3d 1004, 1006 (7th Cir. 2007) (deciding whether the use of eBay for committing a robbery satisfies the Hobbs Act's interstate commerce element).

[156] *See* H. Joseph Hameline & William Miles, *The Dormant Commerce Clause Meets the Internet*, 41 BOS. BAR J. 8, 8 (1997) (stating that the internet "operates like no other existing method of communication"); *see also* Reno v. ACLU, 521 U.S. 844, 849 (1997) (describing the internet as "an international network of interconnected computers").

[157] *See Reno*, 521 U.S. at 851 (describing the various means of communication over the internet); Hameline & Miles, *supra* note 156, at 8 (stating how the internet is different from other means of communication).

[158] Hameline & Miles, *supra* note 156, at 8.

[159] *See id.* (explaining that the internet has no borders and that internet transactions never travel the same path). One scholar uses the example of two purchases made by a resident of Los Angeles

wide growth and ever-evolving applications make it even more difficult to definitively categorize.[160] These complexities present courts with unique circumstances in each case and with facts that do not always fit within the traditional interstate commerce case law.[161]

Although there have been federal cases involving the use of the internet in Hobbs Act prosecutions, no circuit court has directly ruled on whether any use of the internet, standing alone, satisfies the interstate commerce element of the Hobbs Act.[162] A 2007 opinion authored by Seventh Circuit Judge Richard Posner, *United States v. Horne*, found that the government satisfied the interstate element of the Hobbs Act because the defendant used eBay.[163] The defendant in *Horne* used false advertisements to sell cars on eBay, and would rob buyers at gunpoint when they came to pick up their purchase.[164] Judge Posner specified that the "buy" and "sell" offers made through eBay's website constituted interstate commerce because these offers could be made by buyers worldwide.[165] In 2017, upon almost identical facts to those in *Horne*, the Sixth Circuit in *Person* similarly found that the use of the website Craigslist satisfied the Hobbs Act's

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from a Boston company's website: the first purchase traveled through eight states and five computers, but the second purchase went through six states and nine computers. *Id.*

[160] *See* Michelle Evans, *5 Stats You Need to Know About the Digital Consumer in 2019*, FORBES (Dec. 17, 2018), https://www.forbes.com/sites/michelleevans1/2018/12/17/5-stats-you-need-to-know-about-the-digital-consumer-in-2019/#6c85c0d636bd [https://perma.cc/EY4y-SDCZ] (stating that around four billion people will use the internet in 2019, which is over half of the world's population); *see also Reno*, 521 U.S. at 850 (stating that forty million people used the internet in 1996).

[161] *See* Hameline & Miles, *supra* note 156, at 8 ("Courts have encountered great difficulty in placing the Internet into an existing legal context—is it like television, print media, telephone or a highway?").

[162] *See* United States v. Luong, 965 F.3d 973, 983–84 (9th Cir. 2020) (finding that the use of Craigslist advertisements in furtherance of a robbery satisfied the interstate commerce element of the Hobbs Act); United States v. Person, 714 F. App'x 547, 551 (6th Cir. 2017) (same); United States v. Horne, 474 F.3d 1004, 1006 (7th Cir. 2007) (ruling that the use of eBay to facilitate a robbery satisfied the Hobbs Act's commerce element). Notably, the U.S. Court of Appeals for the Ninth Circuit in *United States v. Luong* explicitly stated that its holding did not address all uses of the internet in connection with a robbery, but rather ruled solely on transactions "facilitated by electronic marketplaces." 965 F.3d at 983–84 (stating that "[w]e do not need to reach this question [as to whether all internet use affects commerce], however, because the evidence was sufficient to show that Luong clearly affected interstate commerce by robbing his victim as part of a commercial transaction facilitated by a website").

[163] 474 F.3d at 1006. eBay is an auction website that allows users to make "buy" and "sell" offers for products advertised on the website. *Id.* The defendant in the Seventh Circuit's 2007 *United States v. Horne* case used eBay to advertise vintage automobiles. *Id.* at 1005. The defendant would commit a robbery when the victims arrived to pick up the car that they bought from the defendant through eBay. *Id.*

[164] *Id.* at 1005. The defendant's only robbery with a "successful" result involved his stealing a GPS system from a victim's vehicle. *Id.* The court sentenced the defendant to approximately sixteen years in prison. *Id.* at 1005–06.

[165] *Id.* at 1006. Judge Posner, in calling eBay an "avenue of interstate commerce," compared eBay to a highway. *Id.* He further clarified that, because the use of eBay constituted interstate commerce, the government did not need to prove that any victims came from outside of the state, or that any money was transferred between states. *Id.* Rather, it was sufficient that the defendant disrupted "interstate transactions" by making fraudulent offers on eBay. *Id.*

commerce element because Craigslist is a marketplace on the Internet, which is a channel of commerce that Congress can regulate.[166] Neither opinion, however, addressed whether the use of the internet in every instance would satisfy the Hobbs Act's commerce element.[167]

Unlike in *Horne* and *Person*, the Ninth Circuit in 2020, in *United States v. Luong*, ruled that the defendant affected interstate commerce by posting an advertisement to Craigslist, despite the fact that the internet forum in question focused solely on transactions in the defendant's local area.[168] With a similar scheme to those of the defendants in the previous cases, the defendant in *Luong* advertised a car online and then robbed the buyer at gunpoint when they met to complete the transaction.[169] In an opinion authored by Judge William E. Smith, the Ninth Circuit followed the Supreme Court's reasoning in *Taylor*, and found that the Hobbs Act applies to intrastate online transactions because Congress possesses the power to regulate such transactions in the aggregate.[170] Notably, the opinion indicated that the court was not determining whether internet use always establishes federal jurisdiction, and instead specifically limited its ruling

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[166] 714 F. App'x at 548, 551. *Compare id.* at 548 (describing how the defendant used Craigslist to advertise cars to buyers, whom he would rob after they arrived to pick up the car), *with Horne*, 474 F.3d at 1005 (detailing how the defendant would market fake cars on eBay to lure purchasers into being robbed). Craigslist provides users with the opportunity to advertise goods to other users through the use of its website. *Person*, 714 F. App'x at 549. The Sixth Circuit in *United States v. Chambers* ruled that the internet is a channel of interstate commerce. 441 F.3d 438, 450 (6th Cir. 2006) (finding that the defendant used "channels of interstate commerce" when seeking sexual images over the internet). Although the court in *Chambers* did not explicitly state that the internet was a channel of interstate commerce, it ruled that the defendant used a channel of commerce when sending pictures on the internet. *Id.*; *see Person*, 714 F. App'x at 551 (citing *Chambers* in support of the contention that the internet is a channel of commerce).

[167] *See Person*, 714 F. App'x at 551 ("The government proved the commerce element in this case by showing that Person's crimes involved the internet, which is a channel of interstate commerce."); *Horne*, 474 F.3d at 1005–06 (ruling in a manner that did not specify whether the court's holding was limited to the facts of the case). The facts of *Person* demonstrated that the defendant relied mainly on the internet to induce his victims. 714 F. App'x at 548. It is not clear whether a lesser use of the internet in the furtherance of a robbery would still satisfy the standard. *See id.* at 551.

[168] *See* United States v. Luong, 965 F.3d 973, 979, 982–83 (9th Cir. 2020) (finding that the defendant's use of a local forum on Craigslist to commit a robbery satisfied the Hobbs Act's commerce element). The Craigslist forum described itself as a "local service" because it only provided transaction opportunities within the San Francisco Bay Area. *Id.* at 979.

[169] *Id.*

[170] *Id.* at 982–83; *see* Taylor v. United States, 136 S. Ct. 2074, 2081 (2016) (holding that the Hobbs Act applied to local robberies of marijuana because Congress possessed the power to regulate the interstate market for illegal drugs). Although the Ninth Circuit recognized that the ruling in *Taylor* was limited to drug robberies, the court applied the *Taylor* rationale to a Hobbs Act robbery case involving commercial websites. *Luong*, 965 F.3d at 982–83. The court reasoned that, because Congress has the power to regulate online transactions, it can also regulate robberies that utilize those transactions. *Id.* The court ultimately concluded that the Hobbs Act always applies to robberies in which the defendant "used a commercial website to advertise a commercial transaction in order to facilitate a robbery." *Id.* at 983.

to robberies that utilize commercial websites.[171] The following Part addresses the question that the circuit courts in *Horne*, *Person*, and *Luong* did not explicitly answer—should courts apply a categorical rule or a case-by-case analysis to determine whether internet use establishes Hobbs Act jurisdiction?[172]

II. Categorical Rule or Functional Test for Internet Use Establishing Hobbs Act Jurisdiction

Courts have interpreted the Commerce Clause broadly under the Hobbs Act, particularly when businesses are the victims of the robberies.[173] The case law, however, does not thoroughly address the impact of internet use on establishing federal criminal jurisdiction under the Hobbs Act's commerce element.[174] With the ubiquity of the internet in modern society, the solution to this issue will determine whether many small-scale robberies targeting individuals could become federal crimes.[175] This potential expansion of federal jurisdiction could significantly impact defendant sentencing, state autonomy in criminal

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[171] *Luong*, 965 F.3d at 983–84 (stating that its ruling "does not mean *every* local robbery is a Hobbs Act robbery simply because the robber touched his smart phone to check the weather or plan a get-away route"). Although the court limited its ruling to robberies involving commercial websites, it is not clear how far its reasoning could be extended to include other internet uses that facilitate a robbery. *See id.*

[172] *See id.* at 983–84 (declining to rule on whether internet use always establishes Hobbs Act jurisdiction); *Person*, 714 F. App'x at 551 (ruling that the use of Craigslist satisfied the Hobbs Act's commerce element); *Horne*, 474 F.3d at 1006 (finding that the use of eBay affected interstate commerce, without ruling on whether other uses of the internet affect commerce).

[173] *See, e.g.*, United States v. Robinson, 119 F.3d 1205, 1212–13 (5th Cir. 1997) (ruling that the commerce element of the Hobbs Act is satisfied by showing a "slight effect" on interstate commerce, as well as that robberies of businesses generally have an effect on interstate commerce in the aggregate). Like other circuit courts, the U.S. Court of Appeals for the Fifth Circuit in *United States v. Robinson* found that a robbery that "depletes the assets" of a business satisfies the commerce element because it harms the business's ability to buy products from other states. *Id.* at 1212.

[174] *See* United States v. Person, 714 F. App'x 547, 551 (6th Cir. 2017) (ruling that the use of Craigslist to commit a robbery constituted a disruption of interstate commerce because the internet is a channel and an instrumentality of interstate commerce); United States v. Horne, 474 F.3d 1004, 1006 (7th Cir. 2007) (finding that the use of eBay satisfied the commerce element of the Hobbs Act because the defendant's offers to sell cars created "interstate transactions"). Neither the U.S. Court of Appeals for the Sixth Circuit in *United States v. Person*, nor the U.S. Court of Appeals for the Seventh Circuit in *United States v. Horne* explicitly ruled on whether the use of the internet in any circumstance involving a robbery would suffice to satisfy the Hobbs Act's commerce requirement. *See Person*, 714 F. App'x at 551; *Horne*, 474 F.3d at 1006.

[175] *See* United States v. Wang, 222 F.3d 234, 239 (6th Cir. 2000) (ruling that, unlike with robberies of businesses, robberies of individuals generally cannot satisfy the commerce element of the Hobbs Act through the aggregation principle, and that instead the government needs to prove an effect on interstate commerce in each case). The Sixth Circuit in 2000 in *United States v. Wang* surmised that the "overwhelming majority" of Hobbs Act cases would address the robberies of companies and businesses involved in interstate commerce, rather than the robberies of individuals. *Id.* at 240.

justice matters, and the jurisdictional balance between state and federal courts.[176]

This Part details the arguments for and against courts adopting a categorical rule that internet use satisfies the Hobbs Act's commerce element.[177] Section A introduces two legal theories justifying a categorical rule, one of which relies on the internet being an instrumentality of commerce, and another that is based on the Supreme Court's ruling in *Taylor v. United States*.[178] Section B describes how a categorical rule promotes judicial efficiency and bolsters Congress's ability to regulate national issues.[179] Section C considers an alternative functional rule that requires courts to determine the nature of internet use in each case.[180] Section D examines how a functional rule supports state autonomy and preserves the traditional role of federal courts.[181]

A. Legal Theories Justifying a Categorical Rule

1. Internet Use Always Satisfies the Hobbs Act's Commerce Element as a Channel and Instrumentality of Interstate Commerce

Because the internet is a platform for economic transactions, the instrumentality theory relies on the interstate commerce framework introduced by the Supreme Court in *United States v. Lopez*.[182] The *Lopez* framework recognizes certain "categories of activity" that Congress can govern under the Commerce Clause.[183] Specifically, Congress can always regulate activities involving channels and instrumentalities of interstate commerce, even if the reg-

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[176] *See* United States v. McFarland, 264 F.3d 557, 558 (5th Cir. 2001) (discussing how charging the defendant under the Hobbs Act, instead of state law, resulted in a much harsher sentence due to the mandatory minimum sentence requirement at the federal level), *aff'd by an equally divided court*, 311 F.3d 376 (5th Cir. 2002) (en banc). *See generally* Schwarzer & Wheeler, *supra* note 14, at 655 (examining the effects and consequences of expanded federal jurisdiction in criminal and civil law).

[177] *See infra* notes 173–239 and accompanying text.

[178] *See infra* notes 182–205 and accompanying text.

[179] *See infra* notes 206–213 and accompanying text.

[180] *See infra* notes 214–231 and accompanying text.

[181] *See infra* notes 232–239 and accompanying text.

[182] *See* 514 U.S. 549, 558–59 (1995) (describing the three categories as: (1) "channels of interstate commerce," (2) "instrumentalities of interstate commerce," and (3) "activities having a substantial relation to interstate commerce"); *see also* United States v. MacEwan, 445 F.3d 237, 245 (3d Cir. 2006) (ruling that the internet is a channel and instrumentality of interstate commerce); United States v. Hornaday, 392 F.3d 1306, 1311 (11th Cir. 2004) (same). Channels of interstate commerce often involve the structures that facilitate the movement or transportation of goods, such as roads, highways, and waterways. Nathaniel H. Clark, Comment, *Tangled in a Web: The Difficulty of Regulating Intrastate Internet Transmissions Under the Interstate Commerce Clause*, 40 MCGEORGE L. REV. 947, 954 (2009). Instrumentalities of interstate commerce generally include means of transporting goods, such as automobiles, boats, and airplanes. *Id.* at 958.

[183] *Lopez*, 514 U.S. at 558–59 (listing the three "categories of activity" that Congress can regulate through its Commerce Clause power).

ulated activity occurs entirely intrastate.[184] Any use of the internet during a robbery, therefore, satisfies the Hobbs Act's commerce element because the internet is an instrumentality of interstate commerce that Congress can regulate.[185]

The instrumentality theory arises from courts' reasoning in child pornography cases involving the internet.[186] In 2006, the U.S. Court of Appeals for the Third Circuit in *United States v. MacEwan* ruled that downloading an illicit image from the internet automatically satisfied the statute's commerce element because the internet is both a channel and an instrumentality of interstate commerce.[187] The court reasoned that any use of the internet establishes federal jurisdiction, insofar as the internet "is inexorably intertwined with interstate commerce."[188] Notably, in 2017, the U.S. Court of Appeals for the Sixth Circuit in *United States v. Person* seemingly adopted this instrumentality rationale, and found that the defendant's use of Craigslist to commit a robbery satisfied the Hobbs Act's commerce element.[189]

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[184] *Id.* An example of an intrastate activity that Congress can regulate under the first two *United States v. Lopez* categories is when a person purchases a television from a retailer store. Jonathan R. Gray, Comment, United States v. Schaefer *and* United States v. Sturm*: Why the Federal Government Should Regulate All Internet Use as Interstate Commerce*, 90 DENV. U. L. REV. 691, 701–02 (2012). Although this purchase occurred entirely intrastate, a truck (an instrumentality) driving on a highway (a channel) likely transported the television. *Id.*

[185] *See* United States v. Person, 714 F. App'x 547, 551 (6th Cir. 2017) (ruling that the government satisfied the Hobbs Act's commerce element by demonstrating that the defendant's crime used the internet, which is an instrumentality of interstate commerce); Brief for the United States as Appellee at 19, United States v. Luong, 965 F.3d 973 (9th Cir. 2020) (No. 16-10213), 2017 WL 238932, at *19 (arguing that the defendant's use of the internet satisfied the Hobbs Act commerce element because he "availed himself" of an instrumentality and channel of interstate commerce); *see also Lopez*, 514 U.S. at 558 (stating that Congress can regulate instrumentalities of interstate commerce, regardless of whether the activity occurs entirely intrastate).

[186] *See MacEwan*, 445 F.3d at 245 (finding irrelevant whether the use of the internet in the particular case caused any transmissions across state lines, and instead deciding that the use of the internet automatically satisfied the statute's commerce element); *Hornaday*, 392 F.3d at 1311 (ruling that Congress has the power to regulate illicit communications with minors over the internet because it is a channel and an instrumentality of commerce).

[187] 445 F.3d at 245. The court explained that the statute in the U.S. Court of Appeals for the Third Circuit's 2006 case *United States v. MacEwan* prohibited people from knowingly receiving child pornography "that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer." *Id.* at 243 (quoting 18 U.S.C. § 2252A(a)(2)(B) (2006)).

[188] *Id.* at 245.

[189] *See* 714 F. App'x at 551 (stating that the prosecution satisfied the commerce element because "Person's crimes involved the Internet, which is a channel of interstate commerce"). In stating that the internet satisfied the commerce element because it is a channel of interstate commerce, the court in *Person* cited a Sixth Circuit child pornography case. *Id.*; *see* United States v. Chambers, 441 F.3d 438, 450 (6th Cir. 2006) (upholding a child pornography conviction because the defendant used the internet, as a channel of commerce, to receive illicit images).

Nevertheless, the commerce language of the Hobbs Act differs from that of the child pornography statute.[190] Unlike the Hobbs Act requirement that there be an actual effect on interstate commerce, the statute at issue in *MacEwan* prohibited the knowing reception of child pornography that was "transported" in interstate commerce.[191] The child pornography statute prohibited certain conduct *in* a channel of commerce, rather than requiring that conduct to *affect* interstate commerce.[192] Accordingly, the courts in the child pornography cases focused on how Congress could regulate activities involving the instrumentalities of commerce, without determining whether the use of the internet itself affected commerce.[193]

2. Internet Use Categorically Satisfies the Commerce Element Because It Is a Market That Congress Possesses the Power to Regulate

Unlike the instrumentality theory that focuses on Congress's power to regulate instrumentalities of commerce, the *Taylor* theory proposes a categorical rule based on the Supreme Court's decision in *Taylor* in 2016.[194] In *Taylor*, the Court ruled that robberies or attempted robberies of marijuana always satisfy the Hobbs Act's commerce element because Congress has the power to regulate the national and local marijuana markets.[195] The Court stated that Con-

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[190] *Compare* 18 U.S.C. § 1951 (2018) (prohibiting robberies and extortions that "in any way or degree" affect interstate commerce), *with* 18 U.S.C. § 2252A(a)(2)(B) (2006) (criminalizing the knowing reception of child pornography that has traveled in interstate commerce "by any means, including by computer"). Notably, the child pornography statute's language explicitly includes computers when describing its commerce element. 18 U.S.C. § 2252A(a)(2)(B) (2006).

[191] *MacEwan*, 445 F.3d at 239 n.1 (stating that the statute prohibits child pornography "that has been mailed, or shipped or transported" in interstate commerce (quoting 18 U.S.C. § 2252A(a)(2)(B) (2006)).

[192] *Compare* 18 U.S.C. § 1951 (2018) (applying to an act of robbery or extortion that "obstructs, delays, or affects commerce"), *with* 18 U.S.C. § 2252A(a)(2)(B) (2006) (addressing child pornography received through a computer). Since the ruling in *MacEwan*, Congress added language to the statute, in which the use of child pornography can qualify under the statute when it affects interstate commerce. *Compare MacEwan*, 445 F.3d at 239 n.1 (stating the language of the statute as "child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means" (quoting 18 U.S.C. § 2252A(a)(2)(B) (2006))), *with* 18 U.S.C. § 2252A(a)(2)(B) (2018) (requiring that child pornography "has been mailed, or has been shipped or transported in *or affecting* interstate or foreign commerce by any means" (emphasis added)).

[193] *See, e.g.*, *MacEwan*, 445 F.3d at 245 (ruling that downloading illicit images from the internet always satisfies the statute's commerce element because the internet is an instrumentality of interstate commerce).

[194] *See* 136 S. Ct. 2074, 2081 (2016) (holding that the government can satisfy the Hobbs Act's commerce element by proving that the defendant knowingly robbed or attempted to rob drugs or earnings from the sale of illegal drugs). The defendant in the 2016 Supreme Court case *Taylor v. United States* committed two home invasions of drug dealers' residences, but stole only $40, a couple of cell phones, some jewelry, and one marijuana cigarette. *Id.* at 2078.

[195] *Id.* at 2081; *see* Gonzales v. Raich, 545 U.S. 1, 17, 22 (2005) (ruling that Congress can regulate intrastate activities, such as drug possession and dealing, upon a determination that local instances of a practice pose a threat to the national market). The 2005 Supreme Court opinion *Gonzales v. Raich*

gress could regulate the intrastate marijuana market because the possession and sale of controlled substances composed a "class of activities" that substantially affects commerce in the aggregate.[196] The Court reasoned that because Congress has authority over the intrastate marijuana market, it also must have the power to regulate intrastate marijuana robberies.[197]

The *Taylor* theory contends that the rationale that all drug robberies satisfy the Hobbs Act's commerce element should also apply to extend the Hobbs Act to cases that involve the internet.[198] Like with the marijuana market, Congress unquestionably possesses the power to regulate the internet under the Commerce Clause.[199] Because Congress can govern the internet, the theory goes, Congress can also criminalize robberies that involve any use of the internet.[200] The fact that the use of the internet, like the use of marijuana, is a "class of activity" with an enormous effect on interstate commerce in the aggregate further supports the *Taylor* theory.[201]

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involved California residents that were charged federally for growing and smoking their own marijuana, which they did entirely intrastate. 545 U.S. at 7. The two California residents challenged whether Congress possessed power under the Commerce Clause to prosecute them for marijuana that was grown and ingested entirely within the state of California. *Id.* at 9.

[196] *Taylor*, 136 S. Ct. at 2080; *see Raich*, 545 U.S. at 17–18 (stating that Congress can regulate local activities that do not have a substantial impact on interstate commerce when the inability to regulate those intrastate activities would "undercut the regulation of the interstate market"); *see also* Wickard v. Filburn, 317 U.S. 111, 128–29 (1942) (ruling that Congress can regulate conduct that appears menial and intrastate when that conduct, taken in the aggregate across the country, has a substantial effect on interstate commerce).

[197] *Taylor*, 136 S. Ct. at 2080. In making this determination, the *Taylor* Court insisted that the ruling did not expand the Commerce Clause power of Congress, but rather "graft[ed]" the ruling in *Raich* into the Hobbs Act's commerce element. *Id.*

[198] *See* Oral Argument, *supra* note 1, at 22:00 (introducing the argument that *Taylor*'s holding on marijuana robberies can apply to internet use because Congress possesses the ability to regulate the internet); *see also Taylor*, 136 S. Ct. at 2080 (ruling that, because Congress can regulate the intrastate possession and selling of narcotics, it can also regulate intrastate robberies involving those narcotics). During the oral argument for the U.S. Court of Appeals for the Ninth Circuit's 2020 decision *United States v. Luong*, Judge William E. Smith raised the potential theory that the reasoning of *Taylor* can apply to internet use, which the prosecutor supported. Oral Argument, *supra* note 1, at 22:00.

[199] *See* United States v. Sutcliffe, 505 F.3d 944, 953 (9th Cir. 2007) (ruling that Congress "clearly" possesses the authority to regulate the internet because it is an instrumentality of interstate commerce); United States v. MacEwan, 445 F.3d 237, 245 (3d Cir. 2006) (same); United States v. Hornaday, 392 F.3d 1306, 1311 (11th Cir. 2004) (same); *see also* United States v. Lopez, 514 U.S. 549, 558 (1995) (stating that Congress has power under the Commerce Clause to regulate "instrumentalities of interstate commerce").

[200] *See, e.g.*, *Sutcliffe*, 505 F.3d at 953 (stating that Congress can regulate the internet under the Commerce Clause). This is the same rationale that the Supreme Court applied in *Taylor* when it ruled that, because Congress could regulate the intrastate drug market, it could also regulate robberies of narcotics that occur entirely intrastate. *See Taylor*, 136 S. Ct. at 2080 (finding it "a simple matter of logic" that if Congress can regulate the intrastate drug market, then it can also regulate robberies involving those drugs).

[201] *See Raich*, 545 U.S. at 17–18 (stating that Congress can regulate intrastate activities when those activities have a substantial impact on interstate commerce in the aggregate). As of 2015, the internet constituted 6% of the United States economy, and generated over $900 billion in revenue.

There are uncertainties surrounding this theory because the Court in *Taylor* explicitly noted that the ruling applied only to robberies involving drug dealers.[202] It is therefore unclear whether *Taylor*'s reasoning regarding the marijuana market could apply to the general use of the internet.[203] The application of *Taylor* to the internet is further limited because, unlike the inherent criminality of marijuana possession and distribution under federal law, Congress does not prohibit or criminalize the use of the internet by itself.[204] In a Hobbs Act case involving the internet, the government is instead criminalizing robberies wherein the internet may have been used to facilitate or assist with committing the crime itself.[205]

B. Supporting a Categorical Rule: The Policies of Efficiency and Necessity

The argument in support of a categorical rule that internet use always establishes Hobbs Act jurisdiction offers policy justifications of judicial efficiency and congressional necessity.[206] As with any bright-line standard, a categorical rule is efficient because it creates predictable outcomes as to jurisdictional questions, which in turn encourages plea negotiations.[207] With expedited pro-

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Tom Risen, *Study: The U.S. Internet Is Worth $966 Billion*, U.S. NEWS & WORLD REP., https://www.usnews.com/news/blogs/data-mine/2015/12/11/the-internet-is-6-percent-of-the-us-economy-study-says [https//perma.cc/X6NK-UJMA] (Jan. 22, 2016).

[202] *See* 136 S. Ct. at 2082 ("Our holding today is limited to cases in which the defendant targets drug dealers for the purpose of stealing drugs or drug proceeds."). The opinion further stated that the ruling did not address robberies involving other individuals or companies. *Id.*

[203] *See id.* at 2080 (reasoning that Congress can regulate local robberies of narcotics because it has full power to regulate the intrastate possession and consumption of drugs). The Court in *Taylor* did not foreclose the future application of this logic to other circumstances, but did limit the holding to the robberies of drug dealers. *Id.* at 2082. Notably, the Ninth Circuit in *Luong* applied the Supreme Court's reasoning in *Taylor* to find that the Hobbs Act regulates local robberies that involve commercial websites. 965 F.3d 973, 982–83 (9th Cir. 2020). The ruling, however, did not address all potential uses of the internet, but was instead limited to robberies wherein "a commercial website [was used] to advertise a commercial transaction in order to facilitate a robbery." *Id.* at 983.

[204] *See* Oral Argument, *supra* note 1, at 25:15 (raising the distinction that Congress criminalized the marijuana in *Taylor*, whereas Congress did not prohibit the use of Craigslist in the present case); *see also* 21 U.S.C. § 841 (criminalizing the improper possession or distribution of specified substances, including marijuana).

[205] *See* United States v. Person, 714 F. App'x 547, 551 (6th Cir. 2017) (finding that the defendant violated the Hobbs Act by advertising cars on Craigslist and then robbing the potential buyers when they came to view the car); United States v. Horne, 474 F.3d 1004, 1006 (7th Cir. 2007) (convicting the defendant for robbery under the Hobbs Act because he used eBay, a website, to trap his victims who he robbed at gunpoint).

[206] *See* United States v. Robinson, 119 F.3d 1205, 1209 (5th Cir. 1997) (crediting Congress's Commerce Clause power for America's profound economic growth over the past centuries); Gray, *supra* note 184, at 710 (stating that a clear rule for Congress's power under the Commerce Clause assists courts by making cases more predictable).

[207] *See* Gray, *supra* note 184, at 710–11 (examining how a clear mandate from Congress under the Commerce Clause power makes prosecutions more straightforward); *see also* Andrew McLetchie, Note, *The Case for Bright-Line Rules in Fourth Amendment Jurisprudence: Adopting the Tenth Cir-*

ceedings, such a rule would permit federal courts to allocate more of their time and resources to the complex and significant cases that the Founders designed them to oversee.[208]

The main policy rationale of a categorical rule is, however, that Congress needs the unfettered ability to regulate any crimes that involve the internet.[209] The internet is fundamentally an interstate and worldwide system, meaning that states alone cannot meaningfully regulate it.[210] Congress, therefore, is left with the regulatory burden.[211] Proponents of a categorical rule would contend that the Commerce Clause case law supports Congress's ability to address national issues through its commerce power, which has historically justified the enactment of civil rights legislation, the criminalization of controlled substances, and the guarantee of a right to unionize.[212] Ultimately, even if this rule impedes state control over sentencing policies, its supporters would deem it necessary to prioritize federal internet regulation over the preservation of certain state powers.[213]

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cuit's Bright-Line Test for Determining the Voluntariness of Consent, 30 HOFSTRA L. REV. 225, 228 (2001) (explaining that the benefit of bright-line rules is their clear guidance for prosecutors and judges and their ability to minimize the number of appeals). Some argue that courts should rule that internet use always satisfies the statute at issue in *MacEwan*, which prohibited the transportation of illicit images of minors in interstate commerce. Gray, *supra* note 184, at 710; *see* 18 U.S.C. § 2252A(a)(2)(B) (2006) (forbidding the knowing reception of child pornography in interstate commerce).

[208] *See* United States v. Hickman, 179 F.3d 230, 243 (5th Cir. 1999) (en banc) (Higginbotham, J., dissenting) (explaining that federal courts cannot properly focus on their traditional cases if they must act as "major criminal courts"); Schwarzer & Wheeler, *supra* note 14, at 682 (describing federal courts as tasked with addressing issues of "national interest").

[209] *See* Schwarzer & Wheeler, *supra* note 14, at 670–72 (explaining the argument that Congress requires the power to address the needs of the public, especially with regard to crime).

[210] *See* Gray, *supra* note 184, at 706 (describing the internet as "inherently interstate in nature," which means that Congress can regulate it under the Commerce Clause); *see also* Stern, *supra* note 48, at 1335 (stating that the Constitutional Convention ratified the Commerce Clause to give the federal government control over issues that the states could not appropriately address themselves). One scholar asserts that the Founders called the Constitutional Convention because they primarily wanted to give the federal government power over commerce, as the states could not handle the task individually. Stern, *supra* note 48, at 1337–38.

[211] *See* Gray, *supra* note 184, at 706 (reasoning that Congress can regulate the internet to the "fullest extent of its Commerce Clause powers" because the internet is a channel and an instrumentality of commerce, and because it has a substantial effect on interstate commerce).

[212] *See* Gonzalez v. Raich, 545 U.S. 1, 9 (2005) (upholding Congress's use of the Commerce Clause power to pass legislation that criminalized the possession and selling of controlled substances); Katzenbach v. McClung, 379 U.S. 294, 304–05 (1964) (ruling that Congress properly used its Commerce Clause power in enacting the Civil Rights Act of 1964 to target racial discrimination in restaurants); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) (finding that the Wagner Act's guaranteeing of a right to unionize was within Congress's commerce power).

[213] *See* Schwarzer & Wheeler, *supra* note 14, at 667 (asserting that state concerns and policies cannot take priority over issues of national interest, particularly because the Founders created a national government under the Constitution to allow national concerns to supersede state interests). In short, the argument is federalism concerns cannot impede the federal government's ability to address national issues. *Id.*

C. Functional Method: A Case-by-Case Inquiry as to Whether Use of the Internet Satisfies the Hobbs Act's Commerce Element

Unlike the categorical arguments, the functional theory requires a case-by-case inquiry to determine whether internet use in a robbery affected interstate commerce.[214] This inquiry distinguishes types of internet use in the same manner that courts differentiate between robberies of individuals and robberies of businesses.[215] Robberies of businesses generally satisfy the Hobbs Act's commerce element because they affect commerce in the aggregate, but robberies of individuals satisfy the element when there is merely a "realistic possibility" of affecting commerce.[216] In this model, commerce websites, such as eBay and Craigslist, would be viewed in the same manner as businesses, whereas all other types of internet use would be held to the same standard as robberies of individuals.[217]

The functional theory treats commerce websites as if they are traditional retail establishments, wherein any robbery involving them satisfies the Hobbs Act's commerce element.[218] This theory places the use of retail websites within the third *Lopez* category of activities that Congress can regulate under the Commerce Clause because the activities involve conduct that has a "substantial relation to interstate commerce."[219] In determining whether Hobbs Act

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[214] *See* United States v. Diaz, 248 F.3d 1065, 1087 (11th Cir. 2001) (stating that an examination of the case facts is necessary to determine whether interstate commerce was affected by the robbery of an individual).

[215] *Compare* United States v. Robinson, 119 F.3d 1205, 1213–14 (5th Cir. 1997) (stating that robberies of businesses satisfy the Hobbs Act's commerce element because they impede companies from spending on items from other states), *with* United States v. Wang, 222 F.3d 234, 238 (6th Cir. 2000) (identifying that robberies of individuals require a higher burden of proof for the commerce element because the connection to interstate commerce for individuals is generally "more attenuated").

[216] *See Diaz*, 248 F.3d at 1084 (explaining that robberies of businesses generally fall under the reach of the Hobbs Act); *Wang*, 222 F.3d at 238–39 (stating that the government in a Hobbs Act case possesses the burden of proving that robberies of individuals "ha[ve] a 'realistic possibility' of affecting interstate commerce").

[217] *See, e.g.*, *Robinson*, 119 F.3d at 1212–13 (explaining that robberies of businesses generally satisfy the Hobbs Act's commerce element). "Commerce websites" describes websites that function as online stores or markets, and generally receive commission on items sold through the platform. *See* United States v. Person, 714 F. App'x 547, 549 (6th Cir. 2017) (describing Craigslist as a website that offers users the opportunity to advertise goods for sale on the internet); United States v. Horne, 474 F.3d 1004, 1006 (7th Cir. 2007) (stating that eBay is an auction website that connects interstate and international users); Brief for the United States as Appellee, *supra* note 185, at 15 (describing Craigslist as an "online marketplace" that over sixty million Americans use each year, on which there are approximately eighty million posts each month).

[218] *See, e.g.*, *Robinson*, 119 F.3d at 1212–13 (describing the depletion of assets theory that makes robberies of businesses substantially impact interstate commerce in the aggregate); *see also Diaz*, 248 F.3d at 1084 (stating that the "Hobbs Act usually is applied to robberies of businesses").

[219] *See* United States v. Lopez, 514 U.S. 549, 558–59 (1995) (stating that Congress can regulate conduct that substantially affects interstate commerce under the Commerce Clause). Notably, commerce websites can also fall under the first two *Lopez* categories involving Congress's ability to regu-

robberies have a substantial relation to interstate commerce, courts apply a de minimis standard that requires only a slight effect on interstate commerce.[220] In applying this standard, courts generally rule that robberies of businesses satisfy the commerce element because business robberies, in the aggregate, affect commerce.[221] This reasoning would also apply to any robberies involving commerce websites.[222]

Although retail websites cannot be robbed in the same manner as a physical store, robberies can still be committed by using their services.[223] For instance, the defendant in the U.S. Court of Appeals for the Seventh Circuit's 2007 case *United States v. Horne* made fake offers on eBay to sell his car in order to attract interested buyers to a location where he would rob them at

late channels and instrumentalities of interstate commerce. *See id.* at 558 (describing the first two *Lopez* categories of channels and instrumentalities of interstate commerce). With the internet categorized as a channel of interstate commerce, Congress can regulate the buying and selling of goods on retail websites because the internet is acting as a channel. *See* Gray, *supra* note 184, at 702 (explaining how purchasing or selling items online qualifies the internet as a channel of interstate commerce, insofar as it offers the means for obtaining interstate goods). The Seventh Circuit in *Horne* adopted this view when it ruled that eBay is an "avenue of commerce" and compared it to a highway. 474 F.3d at 1006. This reasoning, which essentially places retail websites under the third *Lopez* category, would categorically satisfy the Hobbs Act's commerce element. *Compare id.* (finding that using eBay satisfied the commerce element because it is an instrumentality and a channel), *with Robinson*, 119 F.3d at 1212–13 (placing robberies under the third *Lopez* category and finding that robberies of businesses always satisfy the Hobbs Act).

[220] *See* United States v. Smith, 182 F.3d 452, 456 (6th Cir. 1999) (upholding the de minimis standard in Hobbs Act prosecutions); *Robinson*, 119 F.3d at 1212 (same); United States v. Atcheson, 94 F.3d 1237, 1241 (9th Cir. 1996) (same); United States v. Bolton, 68 F.3d 396, 399 (10th Cir. 1995) (same).

[221] *See Diaz*, 248 F.3d at 1084 (stating that Hobbs Act robberies usually involve robberies of businesses, rather than individuals); *Wang*, 222 F.3d at 240 (predicting that most Hobbs Act prosecutions will involve robberies of businesses, rather than robberies of individuals). Courts often reason that these robberies affect interstate commerce because businesses are involved in commerce, and when they are robbed, their ability to spend on interstate goods and services is weakened. *See Robinson*, 119 F.3d at 1212–13 (explaining that a robbery of a business satisfies the Hobbs Act's commerce element because it harms the business's ability to purchase items and services from outside of the state); *Bolton*, 68 F.3d at 399 (finding that the defendant's robberies of several businesses affected interstate commerce because they "depleted the assets of businesses engaged in interstate commerce").

[222] *See* United States v. Luong, 965 F.3d 973, 983 (9th Cir. 2020) (finding that the Hobbs Act applied to robberies wherein the defendant "used a commercial website" to "facilitate" the crime); *Horne*, 474 F.3d at 1006 (finding that the robbery of a person lured by another through eBay obstructed interstate transactions conducted on the website). This theory relies on the notion that, like when a person robs a store of cash, when a person robs commerce websites of their commissions on products that would otherwise be sold, such a robbery limits the websites' ability to purchase items in interstate commerce. *See, e.g.*, *Robinson*, 119 F.3d at 1212–13 (explaining the "depletion of assets" theory).

[223] *See* United States v. Person, 714 F. App'x 547, 548 (6th Cir. 2017) (involving a defendant that used Craigslist advertisements to set up meetings to rob people); *Horne*, 474 F.3d at 1005–06 (upholding the conviction of a defendant who used eBay as a means to meet with buyers who he would ambush at gunpoint).

gunpoint.[224] The Seventh Circuit found that the defendant's conduct affected interstate commerce, insofar as his actions obstructed transactions on eBay.[225] Similar to the robberies of conventional stores, robberies through a retail website affect interstate commerce in the aggregate because they deprive the website of income and deter people throughout the country from using and paying for the website's services.[226]

Similar to the standard for robberies of individuals, the functional theory would require that any use of the internet not involving a retail website have a de minimis effect on interstate commerce.[227] This standard would require courts to conduct a case-by-case inquiry to determine if the use of the internet affected interstate commerce.[228] Courts would likely find that noncommercial internet use, such as Google Maps, does not satisfy this standard, because there is no apparent effect on interstate commerce.[229] The functional theory would, however, apply the Hobbs Act when defendants advertise items and services on social media websites and other messaging platforms, which do not take commissions on sales made between their users.[230] For instance, if the defendant in *Horne* adver-

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[224] 474 F.3d at 1005.

[225] *Id.* at 1006. In hinting toward the aggregation theory, the court noted that most eBay transactions are either international or interstate, meaning that defendant's actions likely affected potential interstate transactions. *Id.*

[226] *See, e.g.*, *Robinson*, 119 F.3d at 1212 (stating that robberies of businesses inhibit the businesses' ability to purchase items or services, which affects interstate commerce in the aggregate). The Supreme Court in 1964 applied this same reasoning in *Katzenbach v. McClung*, in which it found that racial discrimination in restaurants had an aggregate effect on interstate commerce because it deterred African Americans from frequenting restaurants. *See* 379 U.S. 294, 300–01, 304–05 (1964) (upholding Congress's finding that discrimination against African Americans in restaurants obstructed interstate commerce).

[227] *See, e.g.*, United States v. Diaz, 248 F.3d 1065, 1084 (11th Cir. 2001) (explaining that the government needs to prove that the specific robbery of an individual had a "minimal impact" on interstate commerce). The U.S. Court of Appeals for the Eleventh Circuit in 2001 in *United States v. Diaz* explained three instances when robberies of individuals satisfy the Hobbs Act's commerce element: (1) the robbery lessens the assets of a person "directly" involved in interstate commerce, (2) the robbery results in the victim "deplet[ing] the assets" of a business involved in interstate commerce, and (3) the number of people or money involved in the robbery is so "large" that it affects interstate commerce. *Id.* at 1084–85.

[228] *See id.* at 1087 (stating that the court needed to examine the specific robberies and extortions of individuals to determine whether they affected interstate commerce); United States v. Wang, 222 F.3d 234, 240 (6th Cir. 2000) (reversing the defendant's Hobbs Act conviction on the basis that the individual robbery committed by the defendant did not affect interstate commerce).

[229] *See Diaz*, 248 F.3d at 1084–85 (stating that robberies of individuals satisfy the Hobbs Act only in circumstances that significantly involve either businesses or individuals involved in interstate markets); *see also* Oral Argument, *supra* note 1, at 18:00 (posing the hypothetical as to whether the use of Google Maps to escape from a robbery constitutes an effect on interstate commerce under the Hobbs Act). Notably, the Ninth Circuit in *Luong* clarified that its ruling would not apply the Hobbs Act to every local robbery wherein the perpetrator "touched his smart phone to . . . plan a get-away route." 965 F.3d 973, 983–84 (9th Cir. 2020).

[230] *Compare* Noll v. eBay, Inc., 282 F.R.D. 462, 463 (N.D. Cal. 2012) (describing eBay as an online marketplace that charges users for advertising items on the website), *with In re* CTLI, LLC,

tised his car through a Facebook status post, his robbery would still affect interstate commerce insofar as he used the internet to rob the victim of the money that he would have otherwise spent on a car in interstate commerce.[231]

D. Supporting a Case-by-Case Inquiry: The Policies of Federalism and Limited Federal Criminal Law

The policy arguments in favor of a functional method are that it supports both state autonomy and the traditional role of federal courts.[232] Unlike a categorical rule regarding internet use, a functional rule on this issue may deter prosecutors from forum shopping in federal court, especially in cases where it is not clear whether the use of the internet affected interstate commerce.[233] By deterring prosecutors from forum shopping to receive heightened sentences, the functional method would promote state sentencing policies that local lawmakers crafted to address the interests and beliefs of their community.[234] Proponents of such a rule would contend that this aligns with the Founders' belief that the crafting of criminal law policies belongs to the states.[235]

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528 B.R. 359, 365 (Bankr. S.D. Tex. 2015) (describing Facebook as allowing its 1.39 billion monthly users to post status updates that appear on the individual's Facebook page without charge).

[231] *See* United States v. Horne, 474 F.3d 1004, 1005 (7th Cir. 2007) (involving a defendant who posted an automobile on eBay to facilitate a robbery). This rationale is based on prior courts finding that the Hobbs Act applies when someone robs individuals "directly engaged in interstate commerce" of the assets that they would have otherwise used in interstate commerce. *See Diaz*, 248 F.3d at 1085 (stating that the Hobbs Act can apply to individuals when "the crime depletes the assets of an individual who is directly engaged in interstate commerce").

[232] *See* United States v. Hickman, 179 F.3d 230, 242–43 (5th Cir. 1999) (en banc) (Higginbotham, J., dissenting) (describing the jurisdictional boundaries between state and federal courts as "integral to our federalism"); Schwarzer & Wheeler, *supra* note 14, at 664–65 (describing the negative consequences that could arise if federal courts expand their jurisdiction into the state realm).

[233] *See* United States v. Hebert, 131 F.3d 514, 526–27 (5th Cir. 1997) (DeMoss, J., dissenting in part) (criticizing the harsh sentences that defendants receive under the Hobbs Act for robberies that would normally be prosecuted at the state level). Specifically, armed robberies receive significantly harsher sentences at the federal level than at the state level because there are mandatory minimum sentences for violent crimes involving the use of weapons at the federal level. *Id.*; *see* 18 U.S.C. § 924(c) (requiring certain minimum sentences when a firearm is possessed or used in the commission of a violent crime). The Fifth Circuit's 2001 case *United States v. McFarland* demonstrates the difference between state and federal sentencing laws for armed robbery; in that case, the defendant received approximately one hundred years in prison at the federal level, but could have been eligible for as little as five years at the state level. 264 F.3d 557, 558 (5th Cir. 2001), *aff'd by an equally divided court*, 311 F.3d 376 (5th Cir. 2002) (en banc).

[234] *See* Schwarzer & Wheeler, *supra* note 14, at 668 (reasoning that federal criminal laws with harsher sentences than their state law counterparts undermine the policy decisions made by the state legislatures). Some scholars observe that criminal penalties adopted by states often "reflect the states' diverse values and priorities." *Id.* at 666.

[235] *See id.* at 659–60 (explaining that the Founders intended for states to oversee criminal laws and their enforcement). Scholars have argued that the Constitution, by listing only a few federal crimes, reflects the wish of the Founders to have state courts act as the main criminal courts. *Id.*

Along with promoting the policymaking role of states, the functional method would assist in preserving the limited role of federal courts.[236] The Founders designed the federal courts to try a small volume of time-consuming cases that concern national issues.[237] By not federalizing every robbery that involves internet use, the functional method would help ensure that federal courts do not become major criminal tribunals.[238] Federal courts could consequently utilize more of their resources to address the complex national cases that they are meant to oversee.[239]

III. Courts Should Adopt a Functional Test to Govern Whether Internet Use Satisfies the Hobbs Act's Commerce Element

Courts should adopt the functional theory's case-by-case approach to determine whether internet use in a robbery satisfies the Hobbs Act's commerce element.[240] The Commerce Clause case law, the Hobbs Act case law, and potential federalism policy implications all support such a theory.[241] Moreover, this method ensures that courts act as a check against Congress using the internet as a vehicle to federalize other types of crimes.[242]

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[236] *See Hickman*, 179 F.3d at 242–43 (Higginbotham, J., dissenting) (stating that the Framers of the Constitution created federal courts with "limited jurisdiction" to ensure the federalist system of the United States government); Schwarzer & Wheeler, *supra* note 14, at 677 (explaining that the role of federal courts is to attend to a small amount of cases that are of national importance).

[237] *See* Schwarzer & Wheeler, *supra* note 14, at 663, 664–65, 677 (explaining why the Founders thought that federal courts were best suited to handle such significant cases). The Framers created federal courts to provide a highly competent forum to handle complex and important cases. *Id.* at 677, 682.

[238] *See Hickman*, 179 F.3d at 243 (Higginbotham, J., dissenting) (reasoning that courts cannot appropriately work if they must oversee the traditional state crimes of robbery, extortion, and assault). Judge Higginbotham's dissenting opinion in the Fifth Circuit's 1999 en banc case *United States v. Hickman* expressed fears that, without judicially imposed limitations, the Commerce Clause could run unchecked in its expansion of federal criminal jurisdiction. *Id.*

[239] *See* Schwarzer & Wheeler, *supra* note 14, at 684 (describing why it is "inefficient and wasteful" for federal courts to try cases that the state courts could handle). In his scholarship, Judge William W. Schwarzer expresses concern that, in allocating their resources to cases involving state crimes, federal courts could not properly address more pressing federal issues. *Id.*

[240] *See* 18 U.S.C. § 1951 (stating that robberies and extortions fall under the act when they affect interstate commerce "in any way or degree"); *see also* United States v. Diaz, 248 F.3d 1065, 1087 (11th Cir. 2001) (conducting an inquiry into the specific facts of the case to determine whether the robbery of an individual affected interstate commerce).

[241] *See* United States v. Lopez, 514 U.S. 549, 552 (1995) (indicating that states and the federal government must have a "healthy balance of power" between them); Schwarzer & Wheeler, *supra* note 14, at 666 (expressing the need for states to maintain autonomy because they enact policies that are demonstrative of the local communities that they represent); *see also* United States v. Robinson, 119 F.3d 1205, 1215 (5th Cir. 1997) (ruling that the government can satisfy the Hobbs Act's commerce element by demonstrating how robberies, in the aggregate, affect interstate commerce).

[242] *See* United States v. Hickman, 179 F.3d 230, 243 (5th Cir. 1999) (en banc) (Higginbotham, J., dissenting) (explaining that the expansion of federal criminal jurisdiction occurred because courts have not checked Congress's power under the Commerce Clause).

The functional method supports the deterrence of forum shopping, the preservation of state autonomy, and the maintenance of limited jurisdiction for the federal courts.[243] Without a categorical rule that internet use grants prosecutors' federal jurisdiction in robberies, prosecutors will hesitate to automatically charge such cases in federal court in pursuit of heightened sentences.[244] This promotes state autonomy by ensuring that state sentencing policies are not undercut by heightened federal sentencing guidelines.[245] In fact, a categorical rule would undermine the residents of each state who voted for state attorneys general and judges based on their sentencing policies.[246] This is not a theoretical concern—expanding the Hobbs Act would frustrate the criminal justice reform efforts of voters across the country who recently elected progressive state prosecutors for their commitments to addressing mass incarceration and overcriminalization.[247] Additionally, ensuring that federal prosecutors cannot automatically bring charges for robberies based on internet use in federal court will prevent federal court caseloads from significantly increasing, thus enabling the courts to concentrate on cases of national significance, as the Framers intended.[248]

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[243] *See* Schwarzer & Wheeler, *supra* note 14, at 668, 677 (describing how criminal sentences with heightened mandatory minimums harm state autonomy by overshadowing state criminal sentencing laws, and also observing that the Framers intended federal courts to handle only a small number of cases).

[244] *See* Gray, *supra* note 184, at 710–11 (explaining why clear legal guidance helps add "predictability in the outcomes of cases," as well as how it makes prosecutions more "effective"); *see also* United States v. McFarland, 264 F.3d 557, 558 (5th Cir. 2001) (acknowledging that the defendant would have received a significantly lighter sentence had he been charged under state law rather than the Hobbs Act), *aff'd by an equally divided court*, 311 F.3d 376 (5th Cir. 2002) (en banc); United States v. Hebert, 131 F.3d 514, 526–27 (5th Cir. 1997) (DeMoss, J., dissenting in part) (outlining that federal prosecutors charge armed robberies under the Hobbs Act to access heightened sentences not otherwise available under state law).

[245] *See* Schwarzer & Wheeler, *supra* note 14, at 668 (identifying that federal prosecutors, by charging traditional state crimes under federal sentencing guidelines, effectively "nullify" state sentencing laws).

[246] *See id.* (stating that the practice of forum shopping by federal prosecutors is harmful to the nation's federalist system because it significantly weakens state sentencing policies that local politicians and judges enacted in accordance with the beliefs of their communities).

[247] *See* Mark Berman, *These Prosecutors Won Office Vowing to Fight the System. Now, the System Is Fighting Back.*, WASH. POST (Nov. 9, 2019), https://www.washingtonpost.com/national/these-prosecutors-won-office-vowing-to-fight-the-system-now-the-system-is-fighting-back/2019/11/05/20d863f6-afc1-11e9-a0c9-6d2d7818f3da_story.html [https://perma.cc/JG7R-NE5J] (stating that voters recently elected over two dozen progressive prosecutors across the country); *see also* Candace Smith, Jake Lefferman & Allie Yang, *Progressive Prosecutors Aim to Change the Criminal Justice System from the Inside*, ABC NEWS (Oct. 1, 2020), https://abcnews.go.com/US/progressive-prosecutors-aim-change-criminal-justice-system-inside/story?id=73371317 [https://perma.cc/BY2A-SXXE] (explaining that progressive prosecutors advocate for "ending mass incarceration" and promoting rehabilitative methods of punishment).

[248] *See* United States v. Hickman, 179 F.3d 230, 242–43 (5th Cir. 1999) (en banc) (Higginbotham, J., dissenting) (explaining that the Framers gave the federal courts "limited jurisdiction," which is critical to the country's system of federalism); Schwarzer & Wheeler, *supra* note 14, at 682

By maintaining that Congress cannot federalize every robbery involving internet use, the functional method embodies the Supreme Court's insistence in *United States v. Lopez* and *United States v. Morrison* that Congress not infringe upon traditional state powers.[249] It also does not disrupt the Commerce Clause principles established in the New Deal Era, because it would still apply the aggregation principle to commerce websites to invoke Hobbs Act charges.[250] More importantly, by preserving the aggregation principle, the functional method does not threaten the Commerce Clause precedents that the Supreme Court relied on to uphold the Civil Rights Act of 1964.[251] Along with abiding by Commerce Clause precedents, the functional method aligns with the Hobbs Act case law, insofar as it distinguishes between robberies on the basis of whether the robbery depleted the assets of a commercial enterprise.[252]

To be sure, the functional theory is not without its flaws when compared with the categorical rules.[253] The categorical rules are more efficient because

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(describing how federal courts "provide a tribunal of undoubted integrity and competence for the adjudication of disputes imbued with a federal, that is, a national, interest"). Judge Schwarzer explains that the Constitution's Framers wanted state courts to largely focus on crime, and that they made this clear by including only a few federal crimes in the Constitution. Schwarzer & Wheeler, *supra* note 14, at 659–60; *see Hickman*, 179 F.3d at 243 (Higginbotham, J., dissenting) (acknowledging that federal courts are not meant to serve as large criminal courts).

[249] *See* United States v. Morrison, 529 U.S. 598, 617–18 (2000) (explaining that Congress could not regulate gender-motivated, violent crimes because such crimes have historically fallen under the jurisdiction of the states); United States v. Lopez, 514 U.S. 549, 564 (1995) (worrying that if the Court upheld the federal statute criminalizing the possession of firearms in schools, then it would necessarily grant Congress the ability to regulate any type of crime). The Court in 1995 in *United States v. Lopez* concluded its opinion by stating that there must be a difference between "national" and "local" activities. 514 U.S. at 567–68.

[250] *See* Katzenbach v. McClung, 379 U.S. 294, 300–01 (1964) (finding that Congress could regulate racial discrimination in restaurants under the Commerce Clause because racial discrimination in restaurants across the country affected interstate commerce); Wickard v. Filburn, 317 U.S. 111, 127–29 (1942) (describing how Congress could regulate activities that appear entirely local when those activities, in the aggregate, substantially affect interstate commerce).

[251] *See* United States v. Robinson, 119 F.3d 1205, 1214 (5th Cir. 1997) (expressing the concern that requiring a showing of a substantial effect on interstate commerce in each Hobbs Act case would be "call[ing] into question" the Supreme Court's 1964 ruling in *Katzenbach v. McClung*, which used the aggregation principle to uphold the Civil Rights Act of 1964); *see also* Civil Rights Act of 1964, 42 U.S.C. § 2000a (disallowing discrimination in restaurants, motels, and other businesses on the basis of race).

[252] *See* United States v. Diaz, 248 F.3d 1065, 1084–85 (11th Cir. 2001) (stating that, although robberies of businesses generally satisfy the Hobbs Act's commerce element, robberies of individuals do so in only certain circumstances); United States v. Wang, 222 F.3d 234, 239–40 (6th Cir. 2000) (explaining that, due to the lesser burden for the government to prove robberies of businesses under the Hobbs Act, the "overwhelming majority" of Hobbs Act cases will involve robberies of businesses). The U.S. Court of Appeals for the Eleventh Circuit in 2001 in *United States v. Diaz* explained the certain instances in which robberies of individuals satisfy the Hobbs Act's commerce element. 248 F.3d at 1084–85.

[253] *See* McLetchie, *supra* note 207, at 228 (explaining that courts sometimes favor categorical rules because they provide clear guidance).

courts need to decide only whether the defendant used the internet rather than applying a case-by-case inquiry.[254] This makes rulings more predictable, discouraging litigation on the issue.[255] Moreover, the functional method will result in more appeals, because parties will hope that an appeals court will reach a different conclusion in applying the case-by-case analysis.[256] Nonetheless, even though the categorical rules are more efficient, courts should adopt the functional method because it leads to just outcomes by discouraging prosecutors from forum shopping in pursuit of harsher sentences and allowing defendants the opportunity to show why internet use should not trigger the Hobbs Act in their particular cases.[257] With the United States already facing the issue of mass incarceration, the deterrence of forum shopping for longer penal sentences trumps the efficiency value of a categorical rule.[258]

The most notable drawback of the categorical rules is that they offer Congress the ability to federalize most crimes.[259] Due to the internet's overwhelming prominence in today's world, Congress could federalize countless crimes by simply enacting criminal statutes with a commerce element identical to that of the Hobbs Act.[260] The internet would thereby offer Congress unbridled

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[254] *See id.* (stating that judges, prosecutors, and defense attorneys could all benefit from bright-line rules that are "easy to follow"). The U.S. Court of Appeals for the Sixth Circuit's 2017 opinion in *United States v. Person* demonstrated how easily a categorical rule could be applied to internet use when it ruled on the issue in three sentences. *See* 714 F. App'x 547, 551 (6th Cir. 2017) (holding that the defendant's use of Craigslist to conduct a robbery satisfied the Hobbs Act's commerce element because he utilized the internet).

[255] *See* Gray, *supra* note 184, at 710 (arguing that providing a clear rule on an issue creates "predictability" as to how the law will be applied, which is beneficial for everyone involved). Although previous scholarship examined the benefits of a clear rule in the context of a child pornography statute, these same principles can apply to the categorical rules discussed in this Note. *Id.*

[256] *See* McLetchie, *supra* note 207, at 228 (explaining that categorical rules "reduce the number of appeals").

[257] *See* United States v. Hebert, 131 F.3d 514, 526–27 (5th Cir. 1997) (DeMoss, J., dissenting in part) (detailing how federal prosecutors can charge traditional state robberies in federal court to access heightened sentences); *see also* Schwarzer & Wheeler, *supra* note 14, at 668 (examining how the federalization of crimes traditionally handled by the states can undercut state laws on sentencing).

[258] *See* Drew Kann, *5 Facts Behind America's High Incarceration Rate*, CNN (Apr. 21, 2019), https://www.cnn.com/2018/06/28/us/mass-incarceration-five-key-facts/index.html [https://perma.cc/WE6U-K659] (stating that the United States possesses the world's largest incarceration rate and has 2.2 million imprisoned citizens); *see also Hebert*, 131 F.3d at 526 n.2 (DeMoss, J., dissenting in part) (describing ten Hobbs Act armed robbery convictions that resulted in at least twenty-year prison sentences).

[259] *See* United States v. Hickman, 179 F.3d 230, 243 (5th Cir. 1999) (en banc) (Higginbotham, J., dissenting) (explaining that the continued expansion of the Commerce Clause could grant the government the ability to federalize all robberies). This was one of the Supreme Court's main concerns when it struck down the Violence Against Women Act in 2000 in *United States v. Morrison*. *See* 529 U.S. 598, 615, 617 (2000) (rejecting the government's argument in favor of the Act on the basis that Congress cannot use the aggregation principle to establish federal jurisdiction over every violent crime).

[260] *See* 18 U.S.C. § 1951(a) (establishing a commerce element with the phrase "whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in

power to expand federal criminal jurisdiction under the Commerce Clause.[261] Such a result directly conflicts with the Supreme Court's emphasis in *Lopez* and *Morrison* that Congress cannot regulate all crimes through the Commerce Clause.[262] Ultimately, a categorical approach would functionally eliminate the state and federal distinction in robbery prosecutions, and would significantly expand the caseload of the federal courts.[263]

Conclusion

Although federal courts interpret the Hobbs Act's commerce element broadly, it is currently unclear when internet use establishes jurisdiction under the Hobbs Act. With the internet's dominant role in modern society, the decision on this issue could result in the federalizing of countless robberies, particularly robberies of individuals. This topic is notable because robberies charged at the federal level under the Hobbs Act rather than in state court can carry significantly greater prison sentences. Courts, therefore, should adopt a functional test, wherein they conduct a case-by-case inquiry to determine whether internet use in a particular robbery satisfies the Hobbs Act's commerce element. The Commerce Clause and the Hobbs Act case law support a functional test, and such a test promotes the preservation of state power and the traditional role of the federal courts.

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commerce"); *see also* Herb Scribner, *Here's How Often People Use the Internet Weekly*, USA Today (Jan. 29, 2018), https://www.usatoday.com/story/life/features/2018/01/29/heres-how-often-people-are-using-the-internet-each-week/109888188/ [https://perma.cc/7LHW-VAR3] (detailing that 79% of Americans own a smartphone with access to the internet, and that Americans, on average, use the internet for approximately seventeen hours per week).

[261] *See* Oral Argument, *supra* note 1, at 19:20 (questioning whether a categorical rule that internet use establishes Hobbs Act jurisdiction could federalize almost any robbery).

[262] *See Morrison*, 529 U.S. at 618 (stating that the Founders specifically rejected the idea that the federal government could have full control over local violent crimes); United States v. Lopez, 514 U.S. 549, 567–68 (1995) (emphasizing that the crime at issue was entirely local in nature and Congress therefore did not have the Commerce Clause power to regulate it). The Supreme Court in *Lopez* highlighted the importance of federal powers not intruding on state powers, and further noted that state powers are vast and significant. 514 U.S. at 552.

[263] *See* Schwarzer & Wheeler, *supra* note 14, at 668, 677, 682 (describing why the federal and state distinction is necessary for upholding state criminal sentencing policies, as well as explaining that federal courts were intended to have a smaller caseload to focus on time-consuming and complex cases of significant importance to the nation); *see also Morrison*, 529 U.S. at 617–18 ("The Constitution requires a distinction between what is truly national and what is truly local.").