

**THE KIDS ARE ONLINE:  
THE INTERNET, THE COMMERCE CLAUSE, AND THE AMENDED  
FEDERAL KIDNAPPING ACT**

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*Should kidnapping be a federal crime where use of the Internet or other telecommunications facilities is central to the crime's execution, but the physical act itself takes place within the borders of a single state? Through the case study of the harrowing kidnapping and murder of twelve-year-old Brooke Bennett, this article examines a uniquely twenty-first century legal question about federalism, technology and criminal law.*

*In 2006, Congress amended the Federal Kidnapping Act, 18 U.S.C. § 1201(a)(1), expanding federal jurisdiction to reach kidnappings in which the channels or facilities of interstate commerce were used to commit the crime, even when the physical kidnapping occurred within the borders of a single state. The amendment was contained in a provision of the Adam Walsh Child Protection and Safety Act of 2006, and was expressly intended to permit federal jurisdiction over intrastate kidnappings that resulted from Internet child predation. The constitutionality of the amended § 1201(a)(1) is now being challenged on Commerce Clause grounds in several federal district courts.*

*This article defends the statute, and, more broadly, attempts to rebut the aggressive doctrinal attack on federal prosecution of violent crime waged since United States v. Lopez, particularly as it relates to "jurisdictional-elements" statutes, i.e., those statutes that premise federal authority on use of the channels or facilities of interstate commerce. Jurisdictional-elements statutes are the next frontier in Commerce Clause jurisprudence. This article offers a new model of federal prosecution of intrastate violent crime in Lopez Second Category cases that relies on a meaningful application of the "nexus requirement" contained in § 1201(a)(1) and similar statutes, thus rebutting modern federalist critiques that argue the federal government is overreaching when it brings such cases.*

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## INTRODUCTION

Brooke Bennett was a twelve-year-old girl growing up in a small Vermont town.<sup>1</sup> She had a crush on a local boy, and like any young girl, she loved to talk about him with her confidant, a cousin her own age. Brooke was unaware that this cousin—a girl identified in court documents as “J[uvvenile]-1”<sup>2</sup>—had a terrible secret. For years, since the time she was eight years old, J1 had been sexually abused by her stepfather, a registered sex offender named Michael Jacques. Jacques used the Internet and cell phone text messaging to create an elaborate and terrifying alternate reality, convincing J1 that she had been targeted by a bogus criminal syndicate called the “Breckenridge Program” that would kill her if she refused to submit to his will. At first, Breckenridge’s demands took the form of sexual intercourse with her “trainer,” Jacques. But when Jacques decided he wanted Brooke, too, he began an elaborate, Internet and text-message based campaign to convince J1 that she must lure Brooke into three-way sex or “Breckenridge” would punish her. Perhaps realizing that Brooke would never agree, Jacques’s plan metastasized, and he decided to kidnap and rape Brooke, then kill her. In May and June of 2008, Jacques sent J1 literally hundreds of email and text messages, both from himself and from fictional “Breckenridge” members, convincing J1 that Brooke had to be “terminated” because she was planning to go to the police and accuse Jacques of rape.<sup>3</sup> Using the knowledge of Brooke’s innocent crush against her, Jacques concocted phony text messages that appeared to be from the local boy, inviting her to a pool party at J1’s house (which was also Jacques’s house). He forwarded the messages to J1, who forwarded them to Brooke, pretending the boy was too shy to invite Brooke directly. Brooke fell for it. On June 25, 2008, she went to Jacques’s house, expecting to find her crush, but Jacques was waiting for her instead. He drugged her and sexually abused her for many hours, then strangled her and buried her body in a shallow grave. To throw the police off his trail, Jacques hacked Brooke’s MySpace page and posted a message suggesting she had run away.

Kidnapping, rape and murder are age-old crimes. But in its use of emails, texting and social media, the murder of Brooke Bennett is

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1 The following account is based on the Statement of Facts in the Memorandum of the United States in Opposition to Defendant’s Motion to Dismiss Count 1 of the Indictment, *United States v. Jacques*, No. 2:08-CR-117 (D. Vt. Feb. 26, 2010) [hereinafter, “Jacques Memo”]. The case is still pending, and the jury has not yet made a final determination of the truth of these allegations.

2 *See, e.g., id.* at 2.

3 *Id.*

thoroughly modern, and presents a uniquely twenty-first century legal question about federalism and the criminal law. The physical conduct relating to Brooke's kidnapping and murder took place entirely within the borders of the state of Vermont. Yet, many other critical aspects of the crime—without which it could not have succeeded—unfolded in cyberspace. Jacques's use of these technologies in committing the crime allowed federal prosecutors to charge him with kidnapping resulting in death under a recent 2006 amendment to the Federal Kidnapping Act, 18 U.S.C. § 1201(a)(1), passed as part of the Adam Walsh Child Protection and Safety Act of 2006.<sup>4</sup> That amendment expanded federal jurisdiction to reach kidnappings in which the channels or facilities of interstate commerce were used to commit the crime, even when the physical kidnapping occurred within the borders of a single state.<sup>5</sup> Indeed, the defense's first substantive motion in *United States v. Jacques* was a Commerce Clause-based challenge to the constitutionality of this amendment to the Federal Kidnapping Act.<sup>6</sup> This Article defends the amended Federal Kidnapping Act against such a challenge, and more broadly, attempts to rebut the aggressive doctrinal attack on federal prosecution of violent crime waged since *United States v. Lopez*,<sup>7</sup> particularly as it relates to

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4 See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.). The Act contained a variety of new provisions and amendments to existing federal laws intended specifically to address on-line sexual predation of children.

5 Prior to this amendment, Jacques could not have been charged federally because the victim did not travel across a state border. Instead, he would have been charged with kidnapping under Vermont law, and would not be facing the death penalty, which is not sanctioned in Vermont. Several commentators have addressed the constitutional and federalism issues arising from application of the federal death penalty in states that do not permit capital punishment. See, e.g., Miguel A. Lopez, Recent Developments, *Federalism by Jury in United States v. Fell*, 33 HARV. J.L. & PUB. POL'Y 375, 377 (2010) (addressing Sixth Amendment concerns relating to a federal judge's dismissal of a juror who expressed opposition to capital punishment in a Vermont-based case); Michael J. Zydney Mannheimer, *When the Federal Death Penalty is "Cruel and Unusual,"* 74 U. CIN. L. REV. 819, 821 (2006) (arguing that "the Eighth Amendment proscription of 'cruel and unusual punishments' prohibits the federal government from imposing a sentence of death in any State that does not itself impose that punishment"); Sean M. Morton, Comment, *Death Isn't Welcome Here: Evaluating the Federal Death Penalty in the Context of a State Constitutional Objection to Capital Punishment*, 64 ALB. L. REV. 1435, 1463 (2001) (arguing that the Eighth Amendment definition of "cruel and unusual punishments" should be judged according to prevailing "community standards" in the states where the death penalty would be imposed).

6 See Defendant's Motion to Dismiss Count 1 of the Indictment, *United States v. Jacques*, No. 2:08-CR-117 (D. Vt. Jan. 8, 2010). As will be discussed in detail below, the district court upheld the statute against a constitutional challenge and denied this motion.

7 514 U.S. 549 (1995).

“jurisdictional-element”<sup>8</sup> statutes—those statutes that premise federal authority on use of the channels or facilities of commerce.

Part I of this Article will describe the debate surrounding jurisdictional-elements provisions like the amended Federal Kidnapping Act and will argue against the modern federalist attack on such statutes. Jurisdictional-elements statutes clearly fall into the Second Category of cases declared by *United States v. Lopez* to be properly within Congress’s Commerce Clause authority. Yet modern federalists attack them anyway, and indeed oppose virtually all federal prosecution of intrastate violent crime, on purely ideological grounds that make no sense as a matter of doctrine or practice. Part II will focus on the jurisdictional-elements provision of the amended Federal Kidnapping Act,<sup>9</sup> with special reference to the case study of *United States v. Jacques*, to demonstrate that the statute both meets doctrinal requirements for constitutionality under the Commerce Clause and implicates a legitimate federal interest. Part III will offer a model of federal prosecution of intrastate violent crime in Lopez Second Category cases that relies on a meaningful application of the “nexus requirement” already contained in § 1201(a)(1)’s jurisdictional-elements provision, and other similar statutes, and therefore disproves accusations of federal overreaching.

#### I. LOPEZ SECOND CATEGORY JURISDICTIONAL-ELEMENTS PROVISIONS UNDER THE GUN

The Commerce Clause-based critique of the statute under which Jacques is charged—the 2006 Adam Walsh Act amendment to the Federal Kidnapping Act, codified at 18 U.S.C. § 1201(a)(1)—arises in the broader context of doctrinal and policy challenges to federal criminal jurisdiction since *United States v. Lopez*, which themselves must be understood against the backdrop of conservative attacks on federal power generally. Modern federalists have sought aggressively to dismantle federal power and have been using the Commerce Clause as their primary weapon since the Rehnquist Court decided *Lopez*. This Article draws a line at jurisdictional-elements statutes such as the amended Federal Kidnapping Act and argues that, as a

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<sup>8</sup> Jurisdictional-element or -elements statutes are those federal criminal statutes that “add[] to the criminal activity a specific link to interstate commerce. This link is an element of the crime, and the prosecution must prove it as part of its case.” George D. Brown, *Counterrevolution?—National Criminal Law After Raich*, 66 OHIO ST. L.J. 947, 998 (2005).

<sup>9</sup> 18 U.S.C. § 1201(a)(1) (2006).

matter of both doctrine and practice, modern federalist attacks on the statute are overblown and misleading.

As will be established below, § 1201(a)(1) is a Lopez Second Category statute, meaning that Congress's power to reach the kidnappings in question is premised on use of the facilities of interstate commerce. This section will begin by addressing the policy context in which the modern federalist critique of federal criminal statutes has arisen, and will argue that it is an overheated environment in which a purposely alarmist view of expansive federal power has come to predominate. This section will then examine the Supreme Court's modern Commerce Clause cases—*Lopez*, *Morrison*, and *Raich*—and demonstrate that they are limited to Lopez Third Category statutes that fail to include a jurisdictional element narrowly tailoring the regulation of crime to Congress's legitimate authority under the Commerce Clause. This section will conclude by explaining that the extension of the modern federalist critique to Second Category statutes such as the amended Federal Kidnapping Act is warranted neither by doctrinal Commerce Clause concerns nor by the facts of existing federal prosecutions, but rather arises out of an ideological opposition to federal power.

#### A. Policy Context: *The ABA Report*

Starting in the late 1980s, with Chief Justice Rehnquist as a leading voice, modern federalist judges and scholars began an aggressive campaign against federal regulation generally, focusing on what they viewed as encroachment by the federal government into traditionally state functions. Federal enforcement of criminal law emerged as a significant front in this war. Modern federalists asserted that the role of the federal government in prosecuting crime had expanded beyond what they viewed as the Framers' intent that crime be handled by local authorities.<sup>10</sup> This "overfederalization" argument asserts that the Framers, by failing to create a federal police power, demonstrated an intent to leave the enforcement of criminal laws to the states.

This theory has been countered on a number of grounds. Some commentators have argued that it lacks support in the text of the Constitution and instead arises from a "misunderstanding" rooted in:

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<sup>10</sup> Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247, 247 n.1 (1997) (listing early articles and speeches arguing that crime has been overfederalized).

the Supreme Court's broad language in *Lopez* and *Morrison* asserting that matters traditionally viewed as "local"—including the prosecution of violent crimes normally brought in state and local courts—are reserved in some way from regulation by the national government . . . . This application of federalism creates a new form of judicial supervisory authority to invoke a vague constitutional limitation—one not mentioned explicitly in the *Constitution*—to limit the national government's power to pursue criminal prosecutions.<sup>11</sup>

Others have argued that the "separate spheres" view is simply another manifestation of the originalist interpretation of the Constitution. As such, it is outdated and long superseded by the modern, interpretive approach, which acknowledges the impact of social, economic, and technological changes on the law in general, and criminal enforcement in particular.<sup>12</sup> This Article does not attempt to resolve what the Framers intended the division of responsibility to be between the state and federal governments regarding criminal enforcement. Instead, it argues that the modern federalists' overriding goal of limiting the power of the federal government has taken on a life of its own in this area, resulting in an ideologically driven opposition to any and all federal criminal enforcement. This opposition now extends even to categories of statutes that the Supreme Court has previously held to be legitimate exercises of federal power and that serve a manifest and legitimate federal interest. The amended Federal Kidnapping Act is such a statute.

In 1998, the American Bar Association Criminal Justice Section issued a report entitled, "The Federalization of Criminal Law" (hereinafter, "the ABA Report"),<sup>13</sup> that became a rallying cry for modern federalists. The ABA Report's impact was so significant that it is now widely accepted that criminal law is "overfederalized," despite obvious flaws in the reasoning of the ABA Report and a patently alarmist message. The ABA Report created the conditions in which modern federalists have been able to expand their critique beyond the parameters set by the Court's modern Commerce Clause jurisprudence to encompass an attack on all federal prosecution of violent crime.

The ABA Report surveyed criminal law in the latter part of the twentieth century and painted a frightening picture of an out-of-

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11 Peter J. Henning, *Misguided Federalism*, 68 MO. L. REV. 389, 395–96 (2003) (emphasis added).

12 See Thomas J. Maroney, *Fifty Years of the Federalization of Criminal Law: Sounding the Alarm or "Crying Wolf?"* 50 SYRACUSE L. REV. 1317, 1349 (2000) ("The writer submits that the Task Force view of the constitutional allocation of legislative power regarding criminal law enforcement is of a system frozen in amber.").

13 JAMES A. STRAZZELLA, TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW 2 (1998).

control federal government usurping the criminal enforcement function that federalists believe properly rests with the states. In support of this position, the ABA Report focused on data relating to the *absolute number* of federal crimes, asserting “that the evidence demonstrated a recent dramatic increase in the number and variety of federal crimes . . . [that] significantly overlaps crimes traditionally prosecuted by the states.”<sup>14</sup> The ABA Report recounted and thus forever popularized the oft-repeated figure that there were over 3000 federal crimes on the books,<sup>15</sup> and noted with alarm that “[m]ore than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970.”<sup>16</sup>

However, this critique failed to consider in any detail what these post-1970 crimes were, what reasons were given for their enactment, or how the percentage increase in federal crimes compared to the increase in state criminal statutes or prosecutions in a similar time period. No serious effort was made to analyze whether the newly enacted statutes were necessary, whether they served a legitimate federal interest, or whether they addressed conduct that the states lacked resources or jurisdiction to reach. In place of any detailed analysis of the federal criminal statutes enacted, the Task Force simply asserted that, “a major reason for the federalization trend—even when federal prosecution of these crimes may not be necessary or effective—is that federal crime legislation is politically popular.”<sup>17</sup> The support for this proposition was that “more than one source” had stated this view to the Task Force.<sup>18</sup>

The ABA Report’s concern that local criminal jurisdiction had been usurped by the federal government has been effectively rebutted with statistical evidence that focuses not on the raw number of crimes added to the federal criminal code in recent decades but rather on the relative proportion of state versus federal prosecutions during a similar time period. Describing the picture of exploding federal enforcement as “essentially false,” Professors Stacy and Dayton have argued that, “a considerable body of statistical evidence reveals that the national government’s . . . share of overall enforcement has actually declined for more than the last half century.”<sup>19</sup>

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14 *Id.*

15 *Id.* at 9–10 n.11.

16 *Id.* at 7.

17 *Id.* at 15.

18 *Id.* at 2.

19 Stacy & Dayton, *supra* note 10, at 252.



This factual rebuttal of the ABA Report's position on overfederalization is borne out by a telling statistic contained within the ABA Report itself. The ABA Report reviews the frequency of prosecution of selected federal crimes that overlap state jurisdiction, and finds: "The key point is that federal prosecutions comprise less than 5% of all the prosecutions in the nation. The other 95% are state and local prosecutions."<sup>20</sup> The fact that less than five percent of criminal prosecutions are federal would logically seem to undermine the ABA Report's hypothesis of an out-of-control federal government usurping state enforcement functions. Yet, surprisingly, the ABA Report draws the opposite conclusion from this fact, asserting that the increase in the raw number of federal crimes, when combined with the fact that the proportion of federal prosecutions remains low, represents "symbolic book prohibitions with few actual prosecutions."<sup>21</sup> In other words, the Report attempts to discount the tiny incidence of federal prosecutions as yet more evidence of unjustified increase in federal crimes.

The Report fails to consider any alternative explanation for the fact that the raw number of federal crimes has risen while the federal share of prosecutions has remained so small. A much more logical explanation advanced by a number of commentators is that federal authorities exercise appropriate self-limitation, and restrict prosecution under statutes creating concurrent federal/state jurisdiction to cases where a legitimate federal interest is present. For example, Litman and Greenberg detail the United States Department of Justice's "Petite Policy," which "severely restricts" the exercise of federal jurisdiction to "exceptional cases in which important federal interests outweigh the considerations generally militating against federal involvement in areas regulated by the states."<sup>22</sup> Other commentators have described the exercise of federal prosecutorial discretion as proper where federal resources are necessary to enforcement because of the group or interstate nature of the criminal conduct.<sup>23</sup> An appropriate self-limitation argument certainly makes more sense than the ABA Report's that Congress has rushed in to create so many unneeded criminal statutes that they sit on the books unprosecuted.

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<sup>20</sup> ABA Report, *supra* note 13, at 19.

<sup>21</sup> *Id.* at 53.

<sup>22</sup> Harry Litman & Mark D. Greenberg, *Dual Prosecutions*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 72, 73 (1996).

<sup>23</sup> See John C. Jeffries, Jr., & Hon. John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1101-02 (1995) (discussing how the interstate nature of "organized crime" warrants federal prosecution).

This Article offers a third explanation for the federal government's continuing tiny share of prosecutions, one that dovetails neatly with the doctrinal discussion regarding the *Lopez* categories set forth below. As will be fully explained, *Lopez* First and Second Category jurisdictional-elements statutes are intrinsically self-limiting. By requiring proof of use of the channels or instrumentalities of commerce in commission of the crime, First and Second Category statutes create a "nexus" requirement<sup>24</sup> that restricts federal enforcement to those limited factual scenarios that implicate this legitimate federal interest. Thus, the exercise of discretion by prosecutors to limit federal prosecution to cases involving a federal interest is not even necessary. Properly drawn statutes do this all by themselves, thus refuting not only the doctrinal preoccupations of the modern federalist critique but its policy and practical arguments as well.

In sum, the ideological and policy environment in which the modern federalist doctrinal critique has taken root is a purposely alarmist one. The ABA Task Force Report has succeeded in painting a picture of exploding federal jurisdiction that legitimates significant restrictions on federal criminal prosecutions in the name of states' rights. Yet the ABA Report itself has acknowledged that the federal share of prosecutions remains tiny, essentially admitting that its alarm over multiplying federal power is unwarranted. A better explanation for the fact that such a small percentage of criminal prosecutions are federal is that *Lopez* First and Second Category statutes are narrowly tailored and not the monstrous incursion into state authority that modern federalists fear.

*B. Doctrinal Context: Modern Commerce Clause Cases Are All Lopez Third Category*

This section will establish that the Supreme Court's triumvirate of modern Commerce Clause cases clearly carve out "jurisdictional-elements" statutes like the amended Federal Kidnapping Act as appropriate exercises of Congress's Commerce Clause power. *Lopez*, *Morrison*, and *Raich* were concerned only with *Lopez* Third Category statutes, where federal jurisdiction is premised not on use of channels

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<sup>24</sup> Federal courts typically use the term "nexus" to describe the relationship that must exist between proscribed conduct and interstate commerce in order for a statute to be a valid exercise of federal power. See, e.g., *United States v. Bass*, 404 U.S. 336, 347 (1971) (invalidating a firearms charge for the government's failure to prove "requisite nexus" to interstate commerce); *United States v. Ballinger*, 395 F.3d 1218, 1228 n.5 (11th Cir. 2005) (upholding statute because it "contains an *explicit* requirement of an appropriate nexus with interstate commerce").

or facilities of commerce, but on the more amorphous, vague, and thus more easily abused assertion that the regulated conduct “substantially affects interstate commerce.”<sup>25</sup> Thus, the extension of the modern federalist critique to First and Second Category statutes that clearly limit jurisdiction to an appropriate federal interest does not make sense—or rather, it makes sense only as an exercise of the ideological breed of federalism reflected in the ABA Report.

*United States v. Lopez* involved a challenge to the constitutionality of the Gun-Free School Zones Act of 1990, which prohibited possession of a firearm in “a place that an individual knows, or has reasonable cause to believe, is a school zone.”<sup>26</sup> The respondent, a twelfth-grader at Edison High School in San Antonio, Texas, was prosecuted and convicted federally under the Act for carrying a loaded, concealed .38 caliber handgun to school.<sup>27</sup> He moved to dismiss the indictment “on the grounds that § 922(q)(1)(a) is unconstitutional as it is beyond the power of Congress to legislate control over our public schools.”<sup>28</sup> In denying the respondent’s motion, the district court relied on then-existing precedent counseling a broad interpretation of Congress’s authority under the Commerce Clause, holding that “the business of elementary, middle, and high schools affects interstate commerce.”<sup>29</sup> The Fifth Circuit reversed on the grounds that Congress had failed to make sufficient findings in enacting the Gun Free School Zones Act to demonstrate that it was an appropriate exercise of Commerce Clause jurisdiction.<sup>30</sup> The Supreme Court, in an opinion by Chief Justice Rehnquist, affirmed the Fifth Circuit, striking down a federal criminal statute as in excess of congressional authority under the Commerce Clause for the first time since 1935,<sup>31</sup> and in the process, creating the doctrinal foundation for a broad-based attack on federal enforcement of criminal laws that has been underway ever since.

*Lopez* was ambitious in scope. Chief Justice Rehnquist’s opinion did far more than strike down a single statute; it “synthesized more than a century of Commerce Clause activity into a definitive descrip-

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25 *United States v. Lopez*, 514 U.S. 549, 560 (1995).

26 18 U.S.C. § 922(q)(1)(a) (Supp. V 1988).

27 *Lopez*, 514 U.S. at 551.

28 *Id.* (internal quotation marks omitted).

29 *Id.* at 552 (internal quotation marks omitted).

30 *Id.*

31 *See* *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935) (finding that Section 3 of the National Industrial Recovery Act exceeded the power of Congress to regulate interstate commerce and invaded the province of the states).

tion of the commerce power,”<sup>32</sup> redefining Commerce Clause jurisdiction in the process. *Lopez* began “with first principles,” starting with the proposition that the federal government is limited by the Constitution to acting within its enumerated powers, of which the commerce power is one.<sup>33</sup> While the commerce power is plenary—in other words, a power that “may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution”<sup>34</sup>—the Constitution indeed prescribes limits, and those limits are the ones “inherent in the very language of the Commerce Clause.”<sup>35</sup>

The Supreme Court had been engaged in working out these limits and the boundaries of Congress’s Commerce Clause authority from the early days of the Republic. From the beginnings of Commerce Clause jurisprudence, the Court sanctioned congressional power to legislate in a manner that reached inside states so long as the conduct being regulated was “intermingled” with interstate commerce.<sup>36</sup> In *Gibbons v. Ogden*, justifying its decision to strike down a New York state law that had granted a monopoly over ferry boat operations between New York and New Jersey because it burdened commerce among states, the Court explained, “[c]ommerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior.”<sup>37</sup>

As *Lopez* recounted, during the twentieth century, the Court, in “recognition of the great changes that had occurred in the way business was carried on in this country,” steadily expanded Congress’s Commerce Clause authority to reach intrastate activity as a corollary of the necessary expansion in interstate commerce regulations.<sup>38</sup> While earlier cases had limited Congress’s reach to that intrastate activity that “affected interstate commerce *directly*,”<sup>39</sup> the distinction between direct and indirect effects on commerce maintained in earlier cases was ultimately abandoned in *Wickard v. Fillburn* as unmanageable and inappropriate.<sup>40</sup> *Wickard* upheld federal regulation of the in-

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32 United States v. Ballinger, 395 F.3d 1218, 1225 (11th Cir. 2005).

33 *Lopez*, 514 U.S. at 552.

34 *Id.* at 553 (quoting *Gibbons v. Ogden*, 20 U.S. (9 Wheat.) 1, 196 (1824)).

35 *Id.*

36 *Gibbons*, 20 U.S. (9 Wheat.) at 194.

37 *Id.*

38 *Lopez*, 514 U.S. at 556.

39 *Id.* at 555 (emphasis added) (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546 (1935)).

40 See 317 U.S. 111, 120 (1942) (“[Q]uestions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature

trastate production and consumption of wheat for home use on the theory that, when aggregated with other instances of home wheat production, an individual instance of home production did exert a “substantial economic effect on interstate commerce.”<sup>41</sup> As Chief Justice Rehnquist explained in *Lopez*, *Wickard* “explicitly reject[ed] earlier distinctions between direct and indirect effects on interstate commerce,”<sup>42</sup> and allowed Congress to regulate any conduct that “[e]ven if . . . local and though it may not [itself] be regarded as commerce . . . exerts a substantial economic effect on interstate commerce.”<sup>43</sup>

### C. Lopez’s “Three Categories” Analysis

While acknowledging this element of longstanding Commerce Clause jurisprudence, the *Lopez* Court nevertheless took a stand against wider application of *Wickard*’s aggregation approach, choosing instead to focus on the fact that the language of the Commerce Clause itself requires Congress to refrain from legislating in matters that concerned only “the exclusively internal commerce of a State.”<sup>44</sup> In an effort to clarify what categories of conduct might be regulated without violating this precept, Chief Justice Rehnquist culled from prior Commerce Clause cases “three broad categories of activity that Congress may regulate under its commerce power.”<sup>45</sup> These three *Lopez* “categories,” which have had tremendous influence on subsequent Commerce Clause jurisprudence, were summarized as follows:

First, Congress may regulate the use of the channels of interstate commerce . . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities . . . . Finally, Congress’s commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce . . . .<sup>46</sup>

The Court then proceeded to analyze the Gun Free Schools Act, whose constitutionality was at issue in *Lopez*, finding that it did not implicate *Lopez*’s First or Second Categories because it did not regu-

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such as ‘production’ and ‘indirect’ and foreclose consideration of the actual effects of the activity in question upon interstate commerce.”).

41 *Id.* at 125.

42 *Lopez*, 514 U.S. at 556.

43 *Id.* (quoting *Wickard*, 317 U.S. at 125).

44 *Id.* at 553 (quoting *Gibbons v. Ogden*, 20 U.S. (9 Wheat.) 1, 194–95 (1824)).

45 *Id.* at 558.

46 *Id.* at 558–59.

late either the channels or the instrumentalities of commerce.<sup>47</sup> Indeed, it is critical to note that *Lopez* did not address the constitutionality of any statute enacted under Categories One or Two.

Finally, the Court then considered whether § 922(q) could be sustained under *Lopez*'s Third Category, as a regulation that, even if it regulated intrastate activity, "substantially affected interstate commerce."<sup>48</sup> In determining that § 922(q) could not be so sustained, the Court relied on the fact that "Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise."<sup>49</sup>

Despite a vigorous dissent by Justice Souter arguing that the "economic/non-economic" distinction was meaningless and impossible to apply in the modern economy,<sup>50</sup> the distinction was central to the majority's decision. Yet in relying on the non-economic nature of the gun possession at issue to strike down § 922(q), the majority was careful to distinguish another statute regulating similar conduct that passed constitutional muster decades earlier by virtue of containing a jurisdictional-elements provision limiting the reach of federal authority. The majority contrasted § 922(q) with 18 U.S.C. § 1202(a), an early version of the federal felon-in-possession statute upheld in *United States v. Bass*.<sup>51</sup> Section 1202(a), like the statute at issue in *Lopez*, regulated the mere possession of firearms if certain other criteria were met—in the case of *Bass*, that the possessor had previously been convicted of a felony rather than that he possessed the firearm in a school zone.<sup>52</sup> This context was not the relevant factor in the view of the *Lopez* majority, however; rather the distinction hinged on language in § 1202(a) restricting its application to those felons who "re-

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47 *Id.* at 559.

48 *Id.*

49 *Id.* at 561 (emphasis added).

50 *See id.* at 608 (Souter, J., dissenting) (arguing that the *Lopez* majority's reliance on this "distinction between what is patently commercial and what is not" was a regrettable "backward glance" to the "untenable jurisprudence from which the Court extricated itself almost 60 years ago" when, in *Wickard v. Fillburn*, it abandoned what Justice Souter believed was an equally meaningless distinction between regulations having a direct versus indirect effect on Commerce). Given the "hopeless porosity" of the line between the commercial and non-commercial, Justice Souter advocated a different sort of constitutional restraint: applying rational basis analysis to determine whether a particular statute had been enacted in excess of the commerce power, thus requiring the Court to defer to Congress's greater "political accountability." *Id.* at 604.

51 404 U.S. 336 (1971). The federal felon-in-possession statute is currently codified at 18 U.S.C. § 922(g) (1988).

52 *See Bass*, 404 U.S. at 337–38 ("The evidence showed that respondent, who had previously been convicted of a felony in New York State, possessed on separate occasions a pistol and then a shotgun.").

ceiv[e], posses[s] or transpor[t] in commerce or affecting commerce . . . any firearm.”<sup>53</sup> The Court noted with approval that *Bass* had interpreted this language “to require an additional nexus to interstate commerce.”<sup>54</sup> The inclusion of such a nexus requirement “limit[ed] [1202(a)’s] . . . reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.”<sup>55</sup>

Indeed, had the Gun Free School Zones Act contained such a provision, the outcome of *Lopez* might have been different. The Court at the outset of the opinion focused on both factors equally, stating, “[t]he Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce.”<sup>56</sup> Thus, *Lopez* accords the absence of a jurisdictional-elements provision equal weight with the non-economic nature of the regulated conduct in its decision to strike down § 922(q).

Nevertheless, this economic/non-economic distinction forms the primary legacy of *Lopez* and has come to dominate the modern federalist approach to Commerce Clause jurisprudence with a force perhaps not envisioned by the majority that originated it. *Lopez*’s distinction between purely criminal, non-economic regulations on the one hand, and criminal regulations that “substantially affect commerce” on the other, clearly arose in the context of and referred to *Lopez* Third Category statutes only. Subsequent Supreme Court reliance on this economic/non-economic distinction has remained limited to *Lopez* Third Category cases. Yet, as will be described in greater detail below, modern federalists have increasingly relied upon this distinction to attack *Lopez* First and Second Category statutes as well.

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<sup>53</sup> *Id.* at 337 (citations omitted).

<sup>54</sup> *Lopez*, 514 U.S. at 562.

<sup>55</sup> *Id.* It should be noted that § 1202(a)’s jurisdictional-elements provision is not of the same type as that contained in the amended Federal Kidnapping Act, coincidentally codified at 18 U.S.C. § 1201(a)(1). The nexus requirement in § 1202(a) requires an inquiry into whether the particular firearms possession occurred in commerce or affected commerce, a distinctly *Lopez* Third Category concept. The amended Federal Kidnapping Act’s jurisdictional-elements provision, however, requires a different sort of nexus—that between the kidnapping and the instrumentalities of commerce, referencing *Lopez*’s Second Category. Professor Brown has referred to those jurisdictional-elements provisions requiring a nexus to the channels (*Lopez* First Category) or instrumentalities (*Lopez* Second Category) of commerce as “nexus’ elements,” and those provisions—like the one at issue in *Bass*—that regulate conduct in or affecting commerce as “‘effects’ elements.” See George D. Brown, *Constitutionalizing the Federal Criminal Law Debate*: Morrison, Jones, and the ABA, 2001 U. ILL. L. REV. 983, 1014 (2001).

<sup>56</sup> *Lopez*, 514 U.S. at 551.

D. *Morrison: Another New Federalist Victory in Another Lopez Third Category Case*

The Court reaffirmed and cemented this distinction between the economic and the non-economic when, five years later in *United States v. Morrison*,<sup>57</sup> it struck down a quasi-criminal statute on the grounds that the regulated conduct fell outside the scope of Congress's Commerce Clause power. The statute at issue in *Morrison* was not a criminal enforcement statute per se, but rather a provision of the Violence Against Women Act, codified at 42 U.S.C. § 13981, that provided a civil damages remedy to rape victims. Nevertheless, the Court determined that the statute's underlying purpose was the redress of violent crime, thus implicating the economic/non-economic distinction first propounded in *Lopez*.<sup>58</sup>

Writing once again for the majority, Chief Justice Rehnquist noted that the statute's proponents did not claim that it fell under either of the first two *Lopez* categories; instead, they advocated sustaining § 13981 under the Third Category, "as a regulation of activity that substantially affects interstate commerce."<sup>59</sup> Therefore, the method of analysis developed in *Lopez* for Third Category statutes was determined to provide the "proper framework" for the Court's decision,<sup>60</sup> and that meant applying the economic/non-economic distinction. "[T]he noneconomic, criminal nature of the conduct at issue was central to our decision," to strike down the Gun Free School Zones Act in *Lopez*, the Court noted.<sup>61</sup> "[I]n those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce"—i.e., in Third Category cases—"the activity in question has been some sort of economic endeavor."<sup>62</sup> The fact that Congress had made express findings when enacting § 13981 that gender-based violence substantially affected commerce by virtue of its significant impact on victims and their families was "not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation."<sup>63</sup> Indeed, these congressional findings

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57 529 U.S. 598 (2000).

58 *See id.* at 625 ("But even if that distinction were valid, we do not believe it would save § 13981's civil remedy. For the remedy is simply not 'corrective in its character, adapted to counteract and redress the operation of such prohibited [s]tate laws or proceedings of [s]tate officers.'" (citation omitted) (internal quotation marks omitted)).

59 *Id.* at 609.

60 *Id.*

61 *Id.* at 610.

62 *Id.* at 611.

63 *Id.* at 614.



seemed only to alarm the Court, since “they rely so heavily on a method of reasoning that we have already rejected as unworkable”—that of aggregating the economic impact of violent crime on its victims and finding that the cumulative effect on Commerce added up to being “substantial.”<sup>64</sup> In a passage that has become a rallying cry for modern federalists, the Court declared:

We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.<sup>65</sup>

Following this logic, the Court proceeded to strike down § 13981 on the theory that “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”<sup>66</sup> Since the regulated activity was intrastate and non-economic, it followed that the statute had exceeded Congress’s power under the Commerce Clause, and the Court therefore struck it down.

It is critical to remember that, like *Lopez*, *Morrison* analyzed a Third Category statute. And just as the *Lopez* Court had distinguished jurisdictional-elements statutes by contrasting the Gun Free School Zones Act with the felon-in-possession statute upheld in *Bass*, the *Morrison* majority distinguished *Lopez* First and Second Category jurisdictional-elements statutes in its analysis of § 13981, making clear that its alarm over federal usurpation of state functions did not extend to them. *Morrison* noted that § 13981 was not one of those First or Second Category statutes that contain “a jurisdictional element [that] may establish that the enactment is in pursuance of Congress’ regulation of interstate commerce.”<sup>67</sup> On the contrary, the presence of “such a jurisdictional element would lend support to the argument that § 13981 is sufficiently tied to interstate commerce.”<sup>68</sup> This is because *Lopez* First and Second Category statutes are premised on Congress’s power to regulate the channels and instrumentalities of commerce. Regulation of channels and instrumentalities suffices in itself to provide the basis for Commerce Clause jurisdiction; therefore, there is no need to engage in a separate analysis of the commercial or economic nature of the regulated activity.

Despite the fact that *Morrison* clearly distinguished First and Second Category statutes, its passages expressing concern with the

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64 *Id.* at 615.

65 *Id.* at 617–18.

66 *Id.* at 613.

67 *Id.* at 612.

68 *Id.* at 613 (emphasis added).

aggregation theory would, in subsequent years, be appropriated by those opposing such statutes. At its most extreme, this view would come to hold that *all* violent intrastate crime should be viewed as beyond Congress's Commerce Power to regulate.

*E. Gonzales v. Raich: The Outer Boundary of Lopez Third Category Analysis*

Another five years would pass before the Court again considered the constitutionality of a federal criminal statute under the Commerce Clause. When it did, it would be in another Lopez Third Category case. In *Gonzales v. Raich*, the Court, in an opinion by Justice Stevens, addressed the conflict between the federal Controlled Substances Act ("CSA"), which criminalized the manufacture and distribution of marijuana, and California's Compassionate Use Act, which legalized the drug for medical use.<sup>69</sup> The specific question addressed by the Court was whether Congress's Commerce Clause power, as amplified by its power under the Necessary and Proper Clause,<sup>70</sup> was broad enough to permit prohibition of a type of intrastate cultivation of marijuana that was specifically allowed under state law.<sup>71</sup> Despite the fact that respondents had cultivated marijuana only locally and for medical use in a manner permitted by California law, federal authorities had confiscated and destroyed their marijuana plants.<sup>72</sup> Respondents failed at the district court level, but the Ninth Circuit reversed, entering a preliminary injunction holding the CSA unconstitutional as applied to them because the marijuana they cultivated had remained within the state of California and never entered the stream of commerce.<sup>73</sup>

The facts of *Raich* seemingly called out for the Court to reaffirm the federalist principles of *Lopez* and *Morrison*. Where *Lopez* and *Morrison* involved federal statutes criminalizing intrastate conduct simultaneously criminalized by the states, the statute at issue in *Raich* went further, criminalizing intrastate conduct *allowed* by the state of California. The CSA did not merely overlap state authority on a matter of criminal justice; it contravened it. The Ninth Circuit had focused on exactly these federalism concerns in enjoining the federal government from enforcing the CSA against respondents. As the *Raich*

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<sup>69</sup> 545 U.S. 1 (2005).

<sup>70</sup> A full discussion of the function of the Necessary and Proper Clause as an "expander" to Congress's Commerce Clause authority is beyond the scope of this Article.

<sup>71</sup> *Raich*, 545 U.S. at 5.

<sup>72</sup> *Id.* at 7.

<sup>73</sup> *Id.* at 8.

Court noted, the Ninth Circuit “placed heavy reliance on . . . [the] decisions in *United States v. Lopez* . . . and *United States v. Morrison* . . . to hold that this separate class of purely local activities was beyond the reach of federal power.”<sup>74</sup>

But the Court did not agree. Relying once again on the economic/non-economic distinction developed in *Lopez* for Third Category “substantially affects commerce” cases, the majority found that, “[u]nlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic.”<sup>75</sup> The CSA’s statutory scheme was “at the opposite end of the regulatory spectrum” from those struck down in *Lopez* and *Morrison*, which the Court believed did not pertain to economic activity.<sup>76</sup> Reaching back to *Wickard v. Filburn* for authority, the Court found that the CSA regulated “purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce . . . . When Congress decides that the ‘total incidence’ of a practice poses a threat to a national market, it may regulate the entire class.”<sup>77</sup> Marijuana was a commodity akin to the homegrown wheat at issue in *Wickard* and thus was properly subject to the comprehensive regulatory scheme Congress set up for this commodity.<sup>78</sup> The Court determined that whether homegrown, home-consumed marijuana, when viewed in the aggregate, substantially affected interstate commerce was a determination best left to Congress, subject only to rational basis review by the Court.<sup>79</sup> The Court therefore reversed the Ninth Circuit’s grant of the preliminary injunction, upholding the CSA and affirming that, even in *Lopez* Third Category cases, Congress has the power to criminalize wholly intrastate conduct.

*Lopez* and *Morrison* had been greeted by commentators as a sea change in Commerce Clause jurisprudence, ushering in a new era in which congressional authority would be closely scrutinized and limited by a Court hewing to federalist principles.<sup>80</sup> Now *Raich* ap-

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74 *Id.* at 9.

75 *Id.* at 25.

76 *Id.* at 24.

77 *Id.* at 17 (citations omitted).

78 *See id.* at 19.

79 *Id.* at 22.

80 *See, e.g.*, Harry Litman & Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes*, 47 CASE W. RES. L. REV. 921, 921–22 (1997) (“[*Lopez*] appeared to undermine long held assumptions about the commerce power, along with the validity of a wide range of criminal, social and environmental statutes . . . . Some commentators . . . offered the even more dramatic assessment that the decision signaled a turning point in the Court’s basic approach to federalism.”).

peared to have “called a halt to the New Federalism.”<sup>81</sup> Indeed, it was viewed by some commentators as its death knell. “*Raich* largely eviscerates the modest steps toward limiting congressional Commerce Clause authority that the Court took in *United States v. Lopez* and *Morrison v. United States*,” one wrote.<sup>82</sup> *Lopez* and *Morrison* had failed to define “economic activity,” leaving it to the *Raich* Court to adopt a “sweeping” definition of the term capable of reaching “[a]lmost any human activity.”<sup>83</sup>

It remains to be seen whether the Court has truly stepped back from the new federalist approach which *Lopez* and *Morrison* apply in Third Category cases. Perhaps *Raich* is simply an example of the “hopeless porosity”<sup>84</sup> Justice Souter identified in the supposedly airtight distinction between economic and non-economic conduct. *Raich* should still alarm proponents of modern federalism in that it demonstrates the Court’s willingness to allow federal regulation of wholly intrastate conduct in some *Lopez* Third Category cases. Certainly its invocation of the rational basis test—entirely absent from *Lopez* and *Morrison*—provides fresh hope to proponents of federal criminal enforcement.

In any event, *Raich* carries forward much of the language from *Lopez* and *Morrison* that assesses the validity of *Lopez* Third Category statutes solely by reference to whether or not the conduct they regulate is properly characterized as “economic” activity. In doing so, it continues another critical aspect of modern Commerce Clause jurisprudence—that this determination is required only for *Lopez* Third Category cases, whereas First and Second Category cases are set aside as distinct and do not raise the same federalism concerns.<sup>85</sup> It is this aspect of *Raich* that matters for purposes of addressing the validity of First and Second Category jurisdictional-elements statutes, such as the amended Federal Kidnapping Act.

#### F. Modern Federalism and “Jurisdictional-Elements” Statutes

Indisputably, modern Commerce Clause jurisprudence deals only with *Lopez* Third Category “substantially affects commerce” statutes. In the years since *Lopez*, the Court has never had occasion to address

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<sup>81</sup> Brown, *Counterrevolution*, *supra* note 8, at 948.

<sup>82</sup> Ilya Somin, *Gonzales v. Raich: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL’Y 507, 508 (2006).

<sup>83</sup> *Id.* at 514.

<sup>84</sup> *Unites States v. Lopez*, 514 U.S. 549, 608 (1995) (Souter, J., dissenting).

<sup>85</sup> *See* *Gonzales v. Raich*, 545 U.S. 1, 16–17 (2005) (discussing the evolution of Commerce Clause jurisprudence).

directly the constitutionality of any First or Second Category statute. Nevertheless, as described above, clear language throughout the *Lopez* line of cases distinguishes First and Second Category statutes and makes clear they are not implicated in the economic/non-economic distinction created to resolve Third Category cases. Justice Scalia put it best in his concurrence in *Raich*: “The first two categories are self-evident, since they are the ingredients of interstate commerce itself.”<sup>86</sup>

Federalist scholars acknowledge that the holdings of *Lopez* and its progeny concern only Third Category statutes.<sup>87</sup> Indeed, they can hardly deny it. Yet they do not accept this limitation. Instead, scholars and criminal defense lawyers alike have sought to extend *Lopez*'s principles to First and Second Category cases, arguing that *Lopez* should be construed to place any and all intrastate, violent, non-economic crime beyond the power of Congress to regulate regardless of its impact on the facilities or channels of commerce. As just demonstrated, this proposition not only lacks foundation in modern Commerce Clause jurisprudence; it flies in the face of it. The explanation for criminal defendants seeking to extend the modern federalist critique to First and Second Category statutes is obvious. They have a personal stake in striking down the federal statutes under which they are charged in order to secure release. The interest of federalist scholars obviously differs. It can be understood by reference to the alarmism of ideological federalism described above in the section on the ABA Report. More specifically, modern federalists have expressed this alarmism through hypothetical factual scenarios that posit what can be called “endless” or “infinite” federal jurisdiction.

Ironically, Justice Breyer's dissent in *United States v. Morrison* first gave these concerns their shape and urgency. In contending that the majority's economic/non-economic distinction was unworkable, Justice Breyer noted that the growth of transportation and other technological advances meant that Congress could reach most intrastate conduct simply by crafting a statute that rooted jurisdiction in a state-border crossing.<sup>88</sup> “[I]n a world where most everyday products or their component parts cross interstate boundaries, Congress will fre-

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<sup>86</sup> *Id.* at 34 (Scalia, J., concurring).

<sup>87</sup> See Diane McGimsey, *The Commerce Clause and Federalism After Lopez and Morrison: The Case for Closing the Jurisdictional-Elements Loophole*, 90 CALIF. L. REV. 1675, 1679 (2002) (“A primary reason why *Lopez* and *Morrison* did not spur a revolution is that they limited congressional power with respect to only one of three categories of activity that courts have allowed Congress to regulate . . . activities that ‘substantially affect interstate commerce . . .’” (citations omitted)).

<sup>88</sup> Such a statute would clearly fall under *Lopez* First Category.

quently find it possible to redraft a statute using language that ties the regulation to the interstate movement of some relevant object, thereby regulating local criminal activity . . . .”<sup>89</sup> In raising this possibility, Justice Breyer was commenting on the meaninglessness of the economic/non-economic distinction, arguing that such murkiness called out for a rational-basis standard of review that would have Congress, rather than the Court, draw these difficult lines. But modern federalist scholars viewed his observation as both a realistic threat and an invitation to extend their critique to First and Second Category statutes, which they promptly did.

Since then, modern federalists have argued that Congress must be prevented from using jurisdictional-elements provisions in bad faith, as a ruse to avoid scrutiny under *Lopez*.<sup>90</sup> “Jurisdictional elements present serious problems and can easily permit an end run around the Court’s efforts to cabin national power. They are likely to be the next battleground in federal criminal law.”<sup>91</sup> Jurisdictional-elements statutes have been called the “Last Frontier” for federalism in the modern era,<sup>92</sup> with particular concern reserved for the First Category state-border crossing jurisdictional element initially identified by Justice Breyer.

In crafting their argument, modern federalists began raising the alarming specter of infinite federal jurisdiction, imagining hypothetical statutes in which there is no end point for federal incursion into the state domain. “The potential problem for conservatives is that virtually everything or every person moves in interstate commerce at some point, and that nexus elements<sup>93</sup> could lead to open-ended congressional power.”<sup>94</sup> When Congress includes a state border crossing jurisdictional element in a statute, it “leads courts to be lenient,” potentially allowing the exercise of federal power in criminal cases without “meaningful limits.”<sup>95</sup> Modern federalists imagine that Congress will flagrantly misuse such jurisdictional-elements provisions—

89 United States v. Morrison, 529 U.S. 598, 659 (2000) (Breyer, J., dissenting).

90 For example, Professor Brown wrote, “[A]s Justice Breyer stated in *Morrison*, it is possible for Congress to attempt an end run around Morrison-Lopez through the use of jurisdictional elements,” noting with alarm “the current Court’s apparent hospitable attitude toward jurisdictional elements.” Brown, *supra* note 55, at 1009, 1011 (emphasis added).

91 Brown, *supra* note 8, at 951.

92 *Id.* at 997.

93 Professor Brown refers to these Third Category jurisdictional-element provisions as “‘effects’ elements,” as opposed to jurisdictional-elements statutes that arise under Categories One or Two, which he refers to as “‘nexus’ elements. See *supra* note 55.

94 Brown, *supra* note 8, at 999.

95 McGimsey, *supra* note 87, at 1680.

for example, federalizing state crimes by criminalizing intrastate conduct where the perpetrator wore clothing that had crossed state lines.<sup>96</sup>

The only way to solve this infinite jurisdiction problem, they argue, is to strike down statutes regulating intrastate criminal conduct through use of a First or Second Category jurisdictional-elements as beyond Congress's Commerce Clause authority, *unless* the regulated conduct separately satisfies the economic/non-economic test imposed in the *Lopez* line of cases. Professor McGimsey writes:

[T]he Court [should] limit Congress's use of the jurisdictional element by imposing a 'purpose-nexus' requirement. A purpose-nexus requirement would require the jurisdictional element to conform both to the purposes of the statute and the purposes underlying the Commerce Clause power itself.<sup>97</sup>

In other words, even *Lopez* First and Second Category cases, where federal authority is exercised in order to regulate the channels or instrumentalities of commerce, should be subjected to a vestigial Third Category "substantially affects commerce" analysis. As will be discussed below, this argument has expressly been leveled at the 2006 amendment to the Federal Kidnapping Act, despite its inarguable status as a *Lopez* Second Category statute.<sup>98</sup>

As will be established in the next two sections, this solution is unnecessary because the posited problem does not exist either as a matter of doctrine or in practice. This is simply another ideologically driven instance of modern federalist alarmism that disappears upon close examination. Use of a channel, facility or instrumentality of interstate commerce *does* provide a meaningful nexus to interstate commerce, so long as courts properly supervise built-in proof requirements. As a practical matter, prosecutions under the amended Federal Kidnapping Act, and by extension under other *Lopez* First and Second Category "jurisdictional elements" statutes, require courts to vet the relationship of each individual prosecution to interstate commerce. The language of such statutes creates a nexus re-

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96 See Litman & Greenberg, *supra* note 80, at 948 (citing Sarah Sun Beale, Address at the Case Western Reserve Law Review Symposium: The New Federalism after *United States v. Lopez* (Nov. 10, 1995)). Litman and Greenberg describe this sort of infinite jurisdiction hypothetical as "less an analytical attack on the act than an expression of queasiness about the prospect of an unlimited commerce power." *Id.* at 949.

97 McGimsey, *supra* note 87, at 1681.

98 See Colin V. Ram, Note, *Regulating Intrastate Crime: How the Federal Kidnapping Act Blurs the Distinction Between What Is Truly National and What Is Truly Local*, 65 WASH. & LEE L. REV. 767, 797-800 (2008) (criticizing the "sweeping jurisdictional language" and "permissive wording" of the 2006 amendment to the Federal Kidnapping Act).

quirement that in each instance obligates the prosecution to allege facts pertaining to interstate commerce in the indictment and prove them beyond a reasonable doubt at trial. As will be described below, this nexus requirement fully addresses doctrinal concerns raised by the modern triumvirate of Commerce Clause cases, and furthermore, simply by requiring lower courts to pay attention to statutory proof requirements, disproves the modern federalists' "infinite jurisdiction" hypotheticals. If the modern federalists' fears of infinite jurisdiction were warranted, there would indeed be a proliferation of federal kidnapping prosecutions rooted in meaningless and attenuated uses of the instrumentalities of commerce. Instead, federal kidnapping prosecutions are few and far between, and—like *United States v. Jacques*—represent completely valid exercises of jurisdiction rooted in legitimate federal interests.

## II. THE AMENDED FEDERAL KIDNAPPING ACT'S JURISDICTIONAL-ELEMENTS PROVISION

### A. *Legislative History Shows That § 1201(a)(1) Is a Proper Exercise of Commerce Clause Jurisdiction.*

Examining the legislative history of the recent amendment to the Federal Kidnapping Act's jurisdictional-elements provision effectively rebuts the modern federalist critique of the amendment and other similar Lopez First Category statutes. Congress acted within its authority under the Commerce Clause when it amended § 1201(a)(1) because it acted to preserve and protect an important facility of interstate commerce.

In 2006, Congress passed the Adam Walsh Act, which it described as “[a]n Act to protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography, [and] to promote Internet safety.”<sup>99</sup> The Adam Walsh Act is an extensive piece of federal criminal legislation containing scores of provisions that have been codified throughout various titles of the United States Code. Some of its provisions have wrought enormous change. For example, Title I of the Adam Walsh Act established SORNA, the Sex Offender Registration and Notification Act, which set up an entire scheme for federal registration of sex offenders who move between states.<sup>100</sup> Title III

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<sup>99</sup> Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587, 587 (codified at 42 U.S.C. §§ 16901-16917 (2006)) (emphasis added).

<sup>100</sup> 120 Stat. at 590-611. SORNA has been written about extensively and has been the subject of scholarly challenges, including those arising under the Commerce Clause. *See, e.g.*,



established the federal framework for civil commitment of sexually dangerous persons.<sup>101</sup> It is Title II, however, entitled, “Criminal Law Enhancements Needed to Protect Children from Sexual Attacks and Other Violent Crimes,” that is relevant to this Article.<sup>102</sup> Title II contains numerous provisions amending existing federal crimes to address gaps and enhance penalties, all in the interest of protecting children, but with a determined and specific focus on Internet safety.

Title II, § 213, entitled “Kidnapping Jurisdiction,” amended 18 U.S.C. § 1201(a)(1) to create the expanded federal jurisdiction at issue here. Specifically, Title II, § 213 of the Adam Walsh Act amended the Federal Kidnapping Act, 18 U.S.C. § 1201(a)(1), as follows:

Section 1201 of title 18, United States Code, is amended—(1) in subsection (a)(1), by striking “if the person was alive when the transportation began” and inserting “, or the offender travels in interstate . . . commerce or uses the mail or any means, facility, or instrumentality of interstate . . . commerce in committing or in furtherance of the commission of the offense . . . .”<sup>103</sup>

This amendment made several changes to previously existing federal jurisdiction in kidnapping cases. Most significant for purposes of this Article, it created federal jurisdiction over kidnappings in which the perpetrator uses facilities or instrumentalities of interstate commerce in committing or in furtherance of the crime. The statute prior to the amendment contained no such Lopez Second Category jurisdictional-elements provision, but rather limited federal jurisdiction to the traditional Lopez First Category “channels of commerce” cases—in other words, cases in which the victim crossed a state border.<sup>104</sup>

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Corey Rayburn Yung, *One of These Laws Is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 HARV. J. ON LEGIS. 369, 407–24 (2009) (criticizing SORNA for allowing “persons who have ever traveled in interstate commerce . . . [to] be subject to federal criminal prosecution for crimes having no interstate component” and for punishing “persons who crossed state lines and who committed a crime wholly unrelated to such travel”).

<sup>101</sup> 120 Stat. at 617–22 (codified at 42 U.S.C. § 16971 and 18 U.S.C. §§ 4241 *et seq.* (2006)). The AWA’s main civil commitment provision, 18 U.S.C. § 4248, was recently upheld by the Supreme Court against a Tenth Amendment-based challenge as a proper exercise of Congress’s power under the Necessary and Proper Clause in that it was rationally related to the pursuit of a number of legitimate federal objectives. *See* *United States v. Comstock*, 130 S. Ct. 1949 (2010) (upholding the Adam Walsh Child Protection and Safety Act as constitutional under the Necessary and Proper Clause).

<sup>102</sup> 120 Stat. at 611–17.

<sup>103</sup> 120 Stat. at 616 (codified at 18 U.S.C. § 1201(a)(1) (2006)). A separate amendment made by Section 213 to 18 U.S.C. § 1201(a)(2) is not at issue in this Article.

<sup>104</sup> It is worth noting that the requirement of a state border-crossing, which has long been a feature of federal kidnapping jurisdiction, is a Lopez First Category construct, and thus a parallel construct to the use of interstate commerce facilities at issue in the amended

The amendment made changes to the state-border crossing requirement as well, expanding it in two respects. First, it allowed for jurisdiction where the government proved travel by *either* the perpetrator or the victim, replacing the prior provision, which had required a border crossing by the victim. Second, it eliminated the requirement that the victim be alive at the time the transport began. These alterations to the Lopez First Category border crossing requirement are not the focus of this Article. Rather, it is the Lopez Second Category “instrumentalities of commerce” aspect of the amendment that is especially controversial, because it allows for federal jurisdiction in cases like *United States v. Jacques*, where the physical acts constituting the crime took place entirely within the borders of one state.

Congress’s expressed concern with Internet safety is central to analyzing the federalism issues presented by § 1201(a)(1)’s amended jurisdictional-elements provision. This concern not only motivated congressional action, but also serves as the basis of Commerce Clause jurisdiction. The Adam Walsh Act, and by extension the changes it made to the Federal Kidnapping Act, arose out of a legitimate federal interest: the need to keep the important economic tool of the Internet safe for use, rather than having it subverted by sexual predators who take advantage of its anonymity to lure child victims. Congress’s power to enact regulations directed at protecting instrumentalities of commerce is plenary, as will be established below, and for good reason. These instrumentalities, as Justice Scalia said in his *Raich* concurrence, “are the ingredients of interstate commerce itself,”<sup>105</sup> and therefore statutes that premise jurisdiction on their use do not pose the same federalism concerns as Lopez Third Category statutes.

Further factual context is useful in understanding the congressional intent underlying the amendment to § 1201(a)(1)’s jurisdictional-elements provision. Children are by far the most sought-after victims for sexual predators. During the five-year period from 1991 to 1996, 67% of all victims of sexual assaults reported to law enforcement agencies in the United States were under the age of seventeen.<sup>106</sup> Twice as many victims of sexual assault were under the age of six (14% of all victims) as were over the age of thirty-four (7%).<sup>107</sup>

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Federal Kidnapping Act. From the perspective of modern Supreme Court Commerce Clause jurisprudence, First and Second Category statutes are equivalent.

<sup>105</sup> *Gonzales v. Raich*, 545 U.S. 1, 34 (2005) (Scalia, J. concurring).

<sup>106</sup> HOWARD N. SNYDER, U.S. DEP’T OF JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 2 (2000).

<sup>107</sup> *Id.*

Fourteen-year-olds were the single most likely age group to be victims of sexual assaults.<sup>108</sup>

Just as children are disproportionately victimized by sex crimes, they also disproportionately use the Internet and cell phones, including social media and text messaging, to communicate. Rates of child Internet usage have skyrocketed in recent years, driven by the availability of new, smaller, more mobile technological platforms. As one study noted, “[t]he transformation of the cell phone into a media content delivery platform, and the widespread adoption of the iPod and other MP3 devices, have facilitated an explosion in media consumption among American youth.”<sup>109</sup> Eight- to eighteen-year-olds spend an average of 7.5 hours per day, seven days per week, consuming media content and communicating using such platforms.<sup>110</sup> Statistics bear out a tremendous increase in youth access to mobile Internet and communications platforms over a recent five-year period. Between 2004 and 2009, the percentage of eight- to eighteen-year-olds who owned an iPod or other MP3 device accelerated dramatically, rising from 18% to 76%, while the percentage who owned a cell phone went from 39% to 66%.<sup>111</sup>

Youth access to mobile Internet and text messaging creates unprecedented opportunities for sexual predators to communicate with minors without parental supervision. Unsurprisingly, attempts to sexually victimize youth using online platforms have shown dramatic increases as well. Between 2000 and 2006, a period that does not fully reflect the most recent increases in youth ownership of mobile communications devices, arrests for attempts to sexually solicit minors online nearly quintupled, from 644 in 2000 to 3100 in 2006, while arrests for crimes involving actual sexual solicitation of youth online rose 21%.<sup>112</sup> A 2006 study (again, prior to the explosion in mobile device ownership) estimated that one in seven, or 13%, of youth internet users were sexually solicited online.<sup>113</sup> Only 5% of these incidents were reported to law enforcement, and in 56% of cases, the vic-

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108 *Id.*

109 VICTORIA J. RIDEOUT, ULLA G. FOEHR & DONALD F. ROBERTS, KAISER FAMILY FOUND., GENERATION M2: MEDIA IN THE LIVES OF 8- TO 18-YEAR-OLDS 3 (2010), available at [www.kff.org/entmedia/upload/8010.pdf](http://www.kff.org/entmedia/upload/8010.pdf).

110 *Id.* at 1.

111 *Id.* at 3.

112 JANIS WOLAK, DAVID FINKELHOR & KIMBERLY MITCHELL, CRIMES AGAINST CHILDREN RESEARCH CENTER, TRENDS IN ARRESTS OF ONLINE PREDATORS 2 (2009).

113 JANIS WOLAK, KIMBERLY MITCHELL & DAVID FINKELHOR, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, ONLINE VICTIMIZATION OF YOUTH: FIVE YEARS LATER 1 (2006).

tim told nobody at all—not law enforcement, parents or friends.<sup>114</sup> Technological trends clearly shaped the nature of victimization. For example, in 2006, 27% of online sexual solicitation of youth included requests to transmit sexually explicit photographs to the perpetrator, a trend that had not been investigated in earlier studies because the technology for digital photographic transmission did not yet exist.<sup>115</sup>

This factual context explains why Congress chose to address use of the Internet to commit sex crimes against children. They were deeply concerned with the prospect of sexual predators hijacking an important tool of commerce and rendering it unsafe for use by children. This focus on the safety of Internet use was explicit in the floor debate on the Adam Walsh Act. The legislative history of the Adam Walsh Act contains no direct reference to Congress's intent in expanding kidnapping jurisdiction, but specific discussion is hardly necessary given the extensive focus on Internet safety found throughout the legislative history. For example, during floor debate on July 20, 2006, one week before its final passage, then-Senator Joseph Biden made the following statement regarding a different portion of the Adam Walsh Act:

Advances in technology are a great thing, but many times there is a dark side. The Internet, for example, puts the knowledge of the world at a child's fingertips, but it can also be and is abused by sexual predators causing kids harm. To steal a phrase from my son, who is a federal prosecutor, he told me: Dad, it used to be you could lock your door or hold your child's hand at the mall and keep them out of harm's way. But today, in my son's words, with a click of a mouse, a predator can enter your child's bedroom in a locked home and begin the pernicious road to violating that child. That is why this legislation adds the "use of the Internet to facilitate or commit a crime against a minor" as an offense . . . .<sup>116</sup>

Numerous other passages throughout legislative history of the Adam Walsh Act express similar concerns regarding safe use of the Internet. Senator Allen: "[C]hild predators have increased their ability to inflict harm on our children by exploiting new communications technologies, including the Internet . . . . The Adam Walsh Act . . . sets out several provisions that will dramatically increase Internet safety . . . ."<sup>117</sup> Senator Sensenbrenner: "[T]he Internet is a remarkable tool which has revolutionized the way we live . . . . The problem is, though, there is a dark underbelly to the Internet . . . ."<sup>118</sup> Senator

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114 *Id.* at 20.

115 *Id.* at 23.

116 152 CONG. REC. 15,327 (2006).

117 *Id.* at 15,331.

118 *Id.* at 15,332.

Frist: “The Internet has become the anonymous gateway for child predators to make contact with children, to win their confidence, and to victimize them.”<sup>119</sup> Concededly, these passages do not directly refer to Title II, § 213 of the AWA, the provision expanding federal kidnapping jurisdiction to include cases in which the perpetrator used an interstate commerce facility in commission of the crime. Yet they make Congress’s purpose in enacting that amendment crystal clear. Congress was concerned about abuse of the Internet for child predation. Members of Congress expressed this concern throughout floor debate on the Adam Walsh Act, underscoring their concern not only with safeguarding children, but with preserving safe usage of the Internet, an important tool of commerce.

This legislative history of the Adam Walsh Act, and by extension the amendment to § 1201, underlines its constitutional legitimacy. Extending federal kidnapping jurisdiction to cover certain wholly intrastate kidnappings, such as that of Brooke Bennett described in the case study below, does not exceed Congress’s authority under the Commerce Clause, because Congress was acting to protect an important instrumentality of commerce.

*B. Because the Internet and Telecommunications Facilities Are Facilities of Interstate Commerce, § 1201(a)(1) Is a Proper Exercise of Commerce Clause Jurisdiction*

Congress has the power to regulate facilities or instrumentalities of interstate commerce under the Commerce Clause, and this power includes the power to regulate wholly intrastate acts committed through use of such facilities.

There can be no dispute that the Internet is a facility or instrumentality of interstate commerce as that term is used in the Court’s modern Commerce Clause jurisprudence. While the Supreme Court has not had occasion to rule on this question, numerous lower federal courts have done so, and no federal court has addressed the question and held that it is not. One notable early opinion is *American Library Ass’n v. Pataki*,<sup>120</sup> which engaged in a long and thoughtful analysis of the interstate and economic nature of the Internet before concluding that it was indeed an instrumentality of interstate commerce:

The Internet is wholly insensitive to geographic distinctions. In almost every case, users of the Internet neither know nor care about the physical

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119 *Id.* at 15,344.

120 969 F. Supp. 160 (S.D.N.Y. 1997).

location of the Internet resources they access . . . . Moreover, no aspect of the Internet can feasibly be closed off to users from another state. An internet user who posts a Web page cannot prevent New Yorkers or Oklahomans or Iowans from accessing that page . . . . Commercial use of the Internet, moreover, is a growing phenomenon . . . . In addition, many of those users who are communicating for private, noncommercial purposes are nonetheless participants in interstate commerce by virtue of their Internet consumption. Many users obtain access to the Internet by means of an on-line service provider . . . which charges a fee for its services . . . . The inescapable conclusion is that the Internet represents an instrument of interstate commerce, albeit an innovative one; the novelty of the technology should not obscure the fact that regulation of the Internet impels traditional Commerce Clause considerations.<sup>121</sup>

Numerous federal courts have since followed suit, holding that the Internet is a facility or instrumentality of interstate commerce.<sup>122</sup>

The fact that the Internet is a facility of interstate commerce, combined with the fact that Congress acted with the purpose of promoting Internet safety when it amended § 1201(a)(1) to expand federal kidnapping jurisdiction, rebuts any lingering doctrinal federalism concerns. It has long been established that Congress's Commerce Clause authority is "plenary" and includes the power to reach purely intrastate conduct that harms or burdens commerce.<sup>123</sup>

<sup>121</sup> *Id.* at 170–73.

<sup>122</sup> *See, e.g.*, *United States v. Penton*, 380 Fed. Appx. 818, 820 (11th Cir. 2010) (holding that "[i]t is well-settled that the internet is an instrumentality of interstate commerce"); *United States v. Faris*, 583 F.3d 756, 759 (11th Cir. 2009) (concluding that the Internet is an instrumentality of interstate commerce, and can be regulated by Congress even when communication remains intrastate); *United States v. Sutcliffe*, 505 F.3d 944, 952–53 (9th Cir. 2007) (agreeing with the Eighth Circuit's conclusion that the interstate nature of the Internet, regardless of how and where it is used, makes it an instrumentality and channel of interstate commerce); *United States v. Trotter*, 478 F.3d 918, 921 (8th Cir. 2007) (concluding that the Internet is an instrumentality and channel of interstate commerce because it is part of an "international network of interconnected computers" (quoting *Reno v. ACLU*, 521 U.S. 844, 849 (1997))); *United States v. Lane*, No. 06–11886, 2006 WL 2711939, at \*2 (11th Cir. Sept. 22, 2006) (holding that Congress has the power to regulate immoral uses of the Internet, even if those uses had "primarily intrastate impact" (quoting *United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004))); *United States v. Walters*, 182 Fed. App'x 944, 945 (11th Cir. 2006) (finding the Internet to be an instrumentality of interstate commerce that can be regulated by Congress); *United States v. Tykarsky*, 446 F.3d 458, 470 (3d Cir. 2006) (citing *United States v. MacEwan*, 445 F.3d 237, 246 (3d Cir. 2006) (holding that the Internet is both an instrumentality and channel of interstate commerce)); *MacEwan*, 445 F.3d at 245 (concluding that intrastate use of the Internet amounts to an "instrumentality and channel of interstate commerce" because the Internet is "a system that is inexorably intertwined with interstate commerce"); *Hornaday*, 392 F.3d at 1311 (finding that the Internet is an instrumentality of interstate commerce that can be regulated by Congress, regardless of whether the use is intrastate in nature).

<sup>123</sup> *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36–37 (1937) (stating that the commerce power "is plenary" and may reach intrastate activities that affect commerce);

The *Lopez* Court adapted this principle for use in its Second Category cases, clearly stating that Congress has the authority “to regulate and protect the instrumentalities of interstate commerce . . . *even though the threat may come only from intrastate activities.*”<sup>124</sup> That proposition was established in *Lopez*, and has been repeated in the Court’s pronouncements on the Commerce Clause ever since.<sup>125</sup> It has been repeatedly cited, and more importantly, *applied*, in the lower federal courts to uphold federal criminal statutes that reach intrastate conduct where the perpetrator used the facilities or channels of commerce to commit the crime.

For example, in *United States v. Ballinger*, the Eleventh Circuit upheld the federal conviction of a defendant who had repeatedly crossed state lines during a church-arson spree.<sup>126</sup> The defendant had mounted a Commerce Clause-based challenge to his conviction, asserting that, since each individual arson took place within the borders of a single state, no single arson could be described as having occurred in or affected interstate commerce as required by the federal statutes he was charged under.<sup>127</sup> The Court relied on *United States v. Lopez*<sup>128</sup> to hold that:

Plainly, congressional power to regulate the channels and instrumentalities of commerce includes the power to prohibit their use for harmful purposes, even if the targeted harm itself occurs outside the flow of commerce and is purely local in nature . . . . Congress has repeatedly used this power to reach criminal conduct in which the illegal acts ultimately occur intrastate, when the perpetrator uses the channels or instrumentalities of interstate commerce to facilitate their commission.<sup>129</sup>

Other cases have expressly applied this doctrine to *Lopez* Second Category cases involving use of telecommunications facilities in commission of intrastate crimes. In the starkest and yet the most common example of this principle, courts have held that use of the

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*see also* *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964) (holding that the commerce power includes authority to regulate intrastate activities that have “a substantial and harmful effect” on commerce).

<sup>124</sup> *United States v. Lopez*, 514 U.S. 549, 558 (1995) (emphasis added) (citing *Shreveport Rate Cases*, 234 U.S. 342 (1914)).

<sup>125</sup> *See, e.g.*, *Pierce County v. Guillen*, 537 U.S. 129, 147 (2003) (upholding a federal statute prohibiting the discovery of reports or surveys undertaken to promote highway safety as a proper exercise of Commerce Clause jurisdiction); *United States v. Morrison*, 529 U.S. 598, 609 (2000) (applying the *Lopez* framework in whether a federal statute providing a federal civil remedy for victims of gender-motivated violence was proper exercise of the Commerce Clause).

<sup>126</sup> 395 F.3d 1218, 1243 (11th Cir. 2005).

<sup>127</sup> *Id.* at 1230–31.

<sup>128</sup> *Lopez*, 514 U.S. at 558–59.

<sup>129</sup> *Ballinger*, 395 F.3d at 1226.

telephone or other telecommunications facilities is sufficient to establish federal jurisdiction under Second Category statutes even if the telephone call placed or other usage does not itself cross state lines. In other words, it is the *use* of the facility per se that forms the basis of jurisdiction, not the interstate travel of the signal.

In murder-for-hire cases, where jurisdiction is premised on the use of “any facility of interstate . . . commerce, with intent that a murder be committed,”<sup>130</sup> several circuits have held that the call or use need not be interstate. In *United States v. Marek*, the Fifth Circuit upheld the defendant’s conviction of murder-for-hire in violation of 18 U.S.C. § 1958<sup>131</sup> based on the fact that payment for the murder contract was made using a wire transfer that did not cross a state border.<sup>132</sup> The Court found that “[w]hen Congress regulates and protects under the second *Lopez* Category . . . federal jurisdiction is supplied by the nature of the instrumentality or facility used, not by separate proof of interstate movement.”<sup>133</sup> On this ground, numerous courts have held that federal jurisdiction will lie under 18 U.S.C. § 1958 so long as a telephone call was made in furtherance of the murder-for-hire plot, whether or not the call also traveled interstate.<sup>134</sup>

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<sup>130</sup> 18 U.S.C. § 1958 (2006).

<sup>131</sup> 18 U.S.C. § 1958 is entitled “Use of interstate commerce facilities in the commission of murder-for-hire,” and criminalizes the use of “any facility of interstate . . . commerce, with [the] intent that a murder be committed.”

<sup>132</sup> 238 F.3d 310, 323 (5th Cir. 2001) (en banc).

<sup>133</sup> *Id.* at 317.

<sup>134</sup> *See, e.g.,* *United States v. Nowak*, 370 Fed. App’x 39, 44–45 (11th Cir. 2010) (holding intrastate calls made within an interstate telephone system may be regulated by Congress because the telephone system is a facility of interstate commerce under 18 U.S.C. § 1958); *United States v. Means*, 297 Fed. App’x 755, 759 (10th Cir. 2008) (concluding that 18 U.S.C. § 1958 “only requires use of an interstate commerce facility, not interstate use of such facility,” meaning Congress may regulate purely intrastate telephone calls because they are part of a larger interstate network); *United States v. Nader*, 542 F.3d 713, 722 (9th Cir. 2008) (adopting prior circuit’s holdings regarding the murder-for-hire statute to conclude that “intrastate telephone calls made with intent to further unlawful activity can violate the Travel Act because the telephone is a facility in interstate commerce”); *United States v. Fisher*, 494 F.3d 5, 10 (1st Cir. 2007) (deciding not to address the question of whether a showing of intrastate usage of a requisite facility, such as a telephone, suffices as a facility of interstate commerce that may be regulated by Congress); *United States v. Giordano*, 442 F.3d 30, 39 (2d Cir. 2006) (concluding that “intrastate use of the telephone constituted use of a facility of interstate commerce within the meaning of [18 U.S.C. § 1958]” because “the national telephone network is a ‘facility of interstate commerce’ for purposes of the federal murder-for-hire statute” (internal citations omitted)); *United States v. Perez*, 414 F.3d 302, 304–05 (2d Cir. 2005) (holding that the language “‘facility of interstate commerce’ and ‘facility in interstate commerce’ are to be used *interchangeably*,” and wholly intrastate communication can satisfy as a facility if it was part of a larger interstate communication system); *United States v. Richeson*, 338 F.3d 653, 661



Other courts have reached this conclusion with respect to 18 U.S.C. § 2422(b), a statute criminalizing use of interstate commerce facilities to entice a minor to engage in sexual activity. In *United States v. Faris*,<sup>135</sup> for example, the defendant raised a Commerce Clause-based challenge to his conviction on the grounds that, while the telephone calls he made to arrange sexual liaisons with two minors were routed through Virginia, he had personally never left the state of Florida.<sup>136</sup> The court noted that Congress's Commerce Clause authority "includes prohibiting the use of commercial instrumentalities for harmful purposes even if the targeted harm 'occurs outside the flow of commerce' and 'is purely local.'"<sup>137</sup> It also noted that the telephone calls he made had been routed interstate, but did not find that fact necessary to establishing federal jurisdiction: "Even if none of Faris' communications were routed over state lines, the internet and telephone he used . . . were still 'instrumentalities of interstate commerce.'"<sup>138</sup> Similarly, in *United States v. Tykarsky*, the court denied a motion for a new trial in another § 2422(b) case based on a claim of error in the following instruction to the jury: "The first element . . . is that the defendant used a facility or means of interstate commerce. A computer connected to the Internet through a telephone line is such a facility whether or not the communication itself went across state lines."<sup>139</sup>

In so holding, the *Tykarsky* court relied on a rapidly growing body of law stemming from the holding in *Lopez*, echoed in *Morrison*, that Congress's authority to regulate the facilities or instrumentalities of interstate commerce reaches intrastate conduct.<sup>140</sup>

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(7th Cir. 2003) (holding that a showing that the defendant used an interstate commerce facility in an intrastate fashion is sufficient under 18 U.S.C. § 1958 to satisfy commerce clause requirements); *United States v. Weathers*, 169 F.3d 336, 342 (6th Cir. 1999) (noting that intrastate use of the telephone network is a "facility of interstate commerce" within the meaning of 18 U.S.C. § 1958(a)).

135 583 F.3d 756 (11th Cir. 2009).

136 *Id.* at 758.

137 *Id.* at 758–59 (quoting *United States v. Ballinger*, 395 F.3d 1218, 1226 (11th Cir. 2005)).

138 *Faris*, 583 F.3d at 759 (quoting *United States v. Lopez*, 514 U.S. 549, 558 (1995)).

139 *United States v. Tykarsky*, No. CRIM.A. 03-400, 2004 WL 1813206, at \*2 (E.D. Pa. July 20, 2004).

140 *Id.* (citing *United States v. Gil*, 297 F.3d 93, 99–100 (2d Cir. 2002); *United States v. Baker*, 82 F.3d 273, 275–76 (8th Cir. 1996); *United States v. Giordano*, 260 F. Supp. 2d 477, 482 (D. Conn. 2002)); *see also* *United States v. Gilbert*, 181 F.3d 152, 159 (1st Cir. 1999) (holding that the use of the telephone to make a bomb threat was sufficient to sustain federal jurisdiction even absent evidence of an interstate call).

C. *Federal Courts Addressing the Amended § 1201(a)(1) Have Upheld it Against Commerce Clause Challenges.*

Finally, several federal district courts have addressed facial challenges to the constitutionality of the amended § 1201(a)(1) directly as of the writing of this Article, including the court in the *Jacques* case. All have upheld the amended jurisdictional-elements provision against challenges asserting lack of Commerce Clause jurisdiction, and instead have held that the amended § 1201(a)(1) is a proper exercise of the commerce power under *Lopez*'s Second Category.<sup>141</sup> This section will focus on the facial challenges to the amended statute and the resulting rulings on its place in *Lopez* Second Category jurisprudence. Subsequently, Section III below will discuss the treatment in these same opinions of as-applied challenges to specific prosecutions under the amended § 1201(a)(1), which demonstrates how the *Lopez* Second Category federal nexus requirement operates to limit federal prosecution to those cases in which a legitimate federal interest is present, and thus refutes the modern federalist "infinite jurisdiction" critique.

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<sup>141</sup> It should be noted that two additional unreported federal district court opinions have analyzed § 1201(a)(1) since the 2006 amendment, but have addressed issues other than its constitutionality under the Commerce Clause. In *United States v. Camejo de la Flor*, No. 8:10-cr-188-T-30MAP, 2010 WL 3324851 (M.D. Fla. Aug. 23, 2010), the defendant, a Cuban national living in Mexico, was charged with kidnapping and conspiracy to kidnap under 18 U.S.C. § 1201(a)(1), 1201(a)(2) and 1201(c), as part of an alien smuggling scheme whereby he agreed to smuggle a Cuban national to Tampa, Florida. *Id.* at \*1. The defendant allegedly refused to release the victim as agreed and instead made telephone calls to the victim's family in Tampa demanding ransom. *Id.* The defendant moved to dismiss the indictment on grounds that he had never entered the United States, and that the indictment constituted an extraterritorial application of the Federal Kidnapping Act unauthorized by law. *Id.* The district court rejected the challenge, finding that the telephone calls placed to Tampa to demand ransom were sufficient to create jurisdiction. *Id.* at \*2. The constitutionality of the amended § 1201(a)(1) was not at issue. *Id.* In *Vincent v. Smith*, No. 05 Civ. 7852 (DAB)(KNF), 2010 WL 23324 (S.D.N.Y. Jan. 5, 2010), the district court adopted the magistrate judge's Report & Recommendation concerning a federal habeas corpus petition filed by the petitioner, who argued that his New York state kidnapping conviction must be overturned because it was preempted by the Federal Kidnapping Act. *Id.* at \*1. The court rejected the petition, finding that the Federal Kidnapping Act created concurrent jurisdiction and did not preempt state law. *Id.* at \*2.

1. *District Court Rulings on Facial Challenges Prior to United States v. Jacques.*

*United States v. Ochoa*<sup>142</sup> was the first unreported federal district court opinion deciding a Commerce Clause-based facial challenge to the amended Federal Kidnapping Act. In that case, defendant Sarah Ochoa, using a false name, sent emails over the Internet and used a pay phone and cell phone to arrange for the victim, a realtor, to show her properties.<sup>143</sup> While in the basement of one of the properties, Ochoa pulled a semi-automatic handgun on the victim, sat on her chest, put the gun in the victim's mouth and demanded \$500,000.<sup>144</sup> Ochoa then demanded that the victim drive her to her bank and withdraw the entire balance of her account, which the victim did.<sup>145</sup> Ochoa was charged under the amended Federal Kidnapping Act, with federal jurisdiction premised on the use of the Internet and telephones to lure the victim to the site of the kidnapping.<sup>146</sup>

Ochoa challenged the constitutionality of § 1201(a)(1), arguing that basing federal jurisdiction on mere use of the Internet and telephones when the physical crime had occurred entirely within the state of New Mexico exceeded Congress's authority under the Commerce Clause.<sup>147</sup> The district court rejected this argument, relying on many of the principles discussed above.<sup>148</sup> The court wrote:

As applied to these facts, the Federal Kidnapping Act falls squarely within Congress's power to regulate under the Commerce Clause . . . Congress has plenary authority to regulate the instrumentalities of interstate commerce. Both telephones and the internet are instrumentalities of interstate commerce. Therefore, Congress has plenary authority to regulate these devices and can forbid their use to facilitate kidnapping—even when the kidnapping itself takes place entirely within the borders of one state.<sup>149</sup>

*Ochoa* was cited by the district court in *United States v. Augustin*,<sup>150</sup> which reached the same result, upholding the Federal Kidnapping

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142 No. 8-CR-1980 WJ, 2009 WL 3878520 (D.N.M. Nov. 12, 2009). The portion of the opinion relating to the defense's challenge to the application of the statute as applied to Ochoa is discussed below in Section III.

143 *Id.* at \*1.

144 *Id.*

145 *Id.*

146 *Id.* at \*1–2.

147 *Id.* at \*2.

148 *Id.*

149 *Id.* at \*3.

150 No 1:09-CR-187, 2010 WL 2639966 (E.D. Tenn. June 28, 2010). As with the *Ochoa* decision, the discussion of *Augustin* in this section will focus on the court's ruling regarding the facial challenge to the amended statute. Section III below will discuss the *Augustin*

Act against a Commerce Clause-based challenge.<sup>151</sup> In *Augustin*, the defendants moved to dismiss the indictments against them, arguing that § 1201(a)(1) was unconstitutional because it exceeded Congress's Commerce Clause authority, and that it was unconstitutional as applied to the facts of their cases.<sup>152</sup> The government alleged that the defendants kidnapped the victim at gunpoint after he had cheated them in a drug deal and demanded money or drugs.<sup>153</sup> The defendants took the victim's cell phone, then forced him to use it repeatedly to make arrangements for the delivery of money.<sup>154</sup> The district court first addressed the constitutionality of the statute generally, and held as follows:

Since the 2006 amendment, no federal court of appeals court has addressed the constitutionality of the federal kidnapping statute. One district court in New Mexico upheld the statute . . . . The Court agrees with the well-reasoned analysis stated in the *Ochoa* opinion. Because the statute contains the express jurisdictional element requiring use of instrumentalities of commerce to commit or in furtherance of the kidnapping, the statute is constitutional under the second category of *Lopez*.<sup>155</sup>

The defendants' challenge to the constitutionality of the statute as applied to the facts of their case will be considered below in the section on the nexus requirement.

In amending § 1201(a)(1) to allow federal jurisdiction over intrastate kidnappings based on the use of the Internet or other telecommunications facilities, Congress acted with the intent to regulate the Internet and render it safe for use by children. Case law establishes that the Internet is a facility of interstate commerce. Federal appeals courts have uniformly relied on the Supreme Court's modern Commerce Clause cases to hold that use of the Internet or other telecommunications facilities is sufficient in itself to establish federal jurisdiction over intrastate crime, whether or not the signal traveled interstate. The two federal district courts to consider this matter to date have relied on all of these principles to find that the amended § 1201(a)(1) is a constitutional exercise of Congress's plenary power under the Commerce Clause to regulate the facilities and instrumentalities of interstate commerce. In short, the modern federalist critique as applied to the amended Federal Kidnapping Act, and other

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court's consideration of the statute as applied to the facts of the particular prosecution with specific reference to the federal nexus requirement.

151 *Id.* at \*1.

152 *Id.*

153 *Id.*

154 *Id.*

155 *Id.* at \*3.

similar Lopez Second Category cases, has been firmly rejected by federal courts as a matter of doctrine.

2. *The Facial Challenge to § 1201(a)(1) in United States v. Jacques*

Turning to our Vermont case study, Michael Jacques, the defendant accused of kidnapping, raping and strangling twelve-year-old Brooke Bennett, moved to dismiss the Federal Kidnapping Act charge against him, arguing—as had the *Augustin* and *Ochoa* defendants—that the 2006 Adam Walsh Act amendment to § 1201(a)(1) was unconstitutional on its face because it exceeded Congress’s power to legislate under the Commerce Clause.<sup>156</sup> The personal stakes for Jacques were high: striking down the statute as unconstitutional would result in dismissal of the federal charge and re-filing under Vermont state law, in which case death would not be an available penalty.<sup>157</sup> On May 4, 2011, the district court denied Jacques’s motion.<sup>158</sup>

In addressing Jacques’s facial challenge to the constitutionality of the statute, the district court adopted the reasoning of the *Ochoa* and *Augustin* opinions, stating, “[t]his Court agrees with the approach taken by the *Augustin* and *Ochoa* courts, and considers that § 1201(a)(1) is an example of Congress exerting its power to regulate the use of the instrumentalities of interstate commerce under Lopez’s Second Category.”<sup>159</sup> Jacques had argued that, in any case where the federal government sought to prosecute conduct also criminalized under state law, Lopez Second Category analysis should not apply.<sup>160</sup> Rather, courts should be required to analyze the constitutionality of the statute using “four considerations” taken from *Lopez* and *Morrison*, which by definition included a vestigial Third Category analysis.<sup>161</sup> “In effect,” the court wrote, “Jacques would invalidate any federal statute that proscribes an activity that is also proscribed by a state’s criminal laws unless the activity substantially affects interstate commerce.”<sup>162</sup>

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156 Defendant’s Motion to Dismiss Count 1 of the Indictment at 1–3, *United States v. Jacques*, No. 2:08-CR-117, 2011 WL 1706765 (D. Vt. Jan. 8, 2010). The defendant also raised an as-applied challenge, the disposition of which is discussed below. See *infra* notes 227–31 and accompanying text.

157 *Id.* at 3.

158 *United States v. Jacques*, No. 2:08-CR-117, 2011 WL 1706765, at \*1 (D. Vt. May 4, 2011).

159 *Id.* at \*10.

160 *Id.* at \*7.

161 *Id.*

162 *Id.*

The district court roundly rejected this argument, finding it “fo-reclosed” by controlling Second Circuit authority.<sup>163</sup> The district court cited the Second Circuit’s opinion in *United States v. Giordano*<sup>164</sup> for the proposition that, while Congress’s authority to legislate under the Commerce Clause is not unlimited, statutes that contain jurisdictional elements premising federal authority on use of the facilities of interstate commerce do not require a separate showing of substantial effect on commerce in order to pass constitutional muster.<sup>165</sup> The court then reviewed case law upholding other federal statutes that criminalize conduct also proscribed by the states, but root federal jurisdiction in use of interstate commerce facilities: 18 U.S.C. § 2425 (enticement of a minor using the telephone or other facilities of interstate commerce) and 18 U.S.C. § 1958 (murder for hire using the mails or any facility of interstate commerce).<sup>166</sup> Finding this authority dispositive with respect to the facial challenge to the amended § 1201(a)(1), the *Jacques* court held that:

[Section] 1201(a) is an unremarkable and facially valid exercise of Congress’s long-established power to regulate the channels and instrumentalities of interstate commerce under the Commerce Clause, regardless of whether the underlying conduct is also amenable to proscription under a state’s police power . . . . As the 11th Circuit stated: “Plainly congressional power to regulate the channels and instrumentalities of commerce includes the power to prohibit their use for harmful purposes, even if the targeted harm itself occurs outside the flow of commerce and is purely local in nature.”<sup>167</sup>

Thus, as did the courts in *Augustin* and *Ochoa*, the *Jacques* court firmly rejected the idea that a Lopez Second Category statute must separately be found to regulate conduct that substantially affects commerce in order to be constitutional. Second Category jurisdictional elements provide sufficient basis in and of themselves to establish the constitutionality of federal statutes.

### III. A PROPOSAL FOR THE EXERCISE OF CONCURRENT JURISDICTION THAT REBUTS THE MYTH OF “INFINITE FEDERAL JURISDICTION”

While doctrinal arguments leveled by modern federalists against Lopez Second Category statutes such as the amended § 1201(a)(1) are thus demonstrably without merit according to federal courts, the

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<sup>163</sup> *Id.*

<sup>164</sup> 442 F.3d 30 (2d Cir. 2006), *cert. denied*, 549 U.S. 1213 (2007).

<sup>165</sup> *See Jacques*, 2011 WL 1706765, at \*7.

<sup>166</sup> *Id.* at \*8–9.

<sup>167</sup> *Id.* at \*11, (quoting *United States v. Ballinger*, 395 F.3d 1218, 1226 (11th Cir. 2005)).

practical arguments raised appear at first blush to be more troubling. Modern federalists acknowledge that the Supreme Court has carved out First and Second Category jurisdictional-elements provisions as permissible exercises of Congress's Commerce authority, but they argue that this carve-out is wrongheaded and certain to lead to disastrous *practical* consequences. Specifically, they raise the specter of what can be termed "infinite federal jurisdiction," in which the federal government asserts jurisdiction over a greater and greater number of intrastate violent crimes based on increasingly minimal uses of interstate commerce facilities. This section will demonstrate that—like the general fear of exploding federal jurisdiction contained in the ABA Report<sup>168</sup>—this fear is exaggerated, indeed, unfounded, because of the self-limiting nexus requirement built into the amended § 1201(a)(1) and other similar Lopez First and Second Category statutes. It will also put forth a proposal for meaningful application of the nexus requirement by federal district courts that will resolve any lingering "infinite jurisdiction" concerns.

A. *The Infinite Jurisdiction Critique Applied to § 1201(a)(1)*

The "infinite jurisdiction" critique has been expressly lodged against the amended Federal Kidnapping Act. In a note entitled "Regulating Intrastate Crime: How the Federal Kidnapping Act Blurs the Distinction Between What Is Truly National and What Is Truly Local,"<sup>169</sup> Colin V. Ram argues that:

[T]he amendment extends federal jurisdiction to kidnapping cases in which an offender makes use of the channels or instrumentalities of interstate commerce. Under the current interpretation of Congress's commerce power, there is no minimum threshold of interaction necessary to create the required nexus with interstate commerce. Rather, simply driving a car, picking up a telephone, or even walking down a neighborhood sidewalk satisfies the usage requirement . . . [I]t is difficult to imagine a kidnapping scenario in which an offender does not use a channel or instrumentality of commerce in commission or furtherance of the crime.<sup>170</sup>

To buttress the alarming picture of infinite jurisdiction that he paints, Ram does not cite to an actual instance of a federal prosecution based on some minimal or attenuated usage of an interstate commerce facility. Rather, he relies on a Wisconsin state kidnapping case which he argues *could potentially be federalized* given the broadened

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168 See *supra* notes 10–24 and accompanying text.

169 Ram, *supra* note 98.

170 *Id.* at 770.

jurisdictional reach of the Federal Kidnapping Act after the amendment.<sup>171</sup> In the case he recounts, a young woman named Audrey Seiler was initially believed to have been kidnapped; police determined that her computer had been used to search for local “wooded areas” where she could be brought by the kidnapper.<sup>172</sup> Ram argues that this Internet usage, combined with other uses of the channels of interstate commerce in the case, could have provided the basis for federal jurisdiction under the amended § 1201(a)(1).<sup>173</sup> The case was never prosecuted federally, however; nor was it prosecuted by the state of Wisconsin, since Seiler was found to have faked her kidnapping.<sup>174</sup>

Ram argues that the only way to combat the supposed problem of infinite federal jurisdiction is to limit federal kidnapping prosecutions under the amendment to instances in which the intrastate violence is *directed at* the channels or instrumentalities of commerce themselves.<sup>175</sup> “Conceivably,” he writes, “this may occur if the kidnapper *targets* a bus stop or rail station. Absent this factual prerequisite, however, only state authorities may proscribe intrastate kidnappings.”<sup>176</sup> Ram’s proposal—which appears to be based on an extremely narrow reading of dicta in *United States v. Morrison*<sup>177</sup>—flies in the face of the extensive federal court jurisprudence discussed above, which allows the exercise of federal jurisdiction over intrastate conduct based on use of the channels or facilities of commerce. Setting aside the doctrinal problems with Ram’s argument, however, it fails as a practical matter. The “infinite federal jurisdiction” concern is demonstrably unwarranted given the self-limiting nexus requirement built into the amended § 1201(a)(1). This nexus requirement ensures that federal authorities can only exercise their discretion to prosecute where a meaningful federal nexus is shown.

Given that Seiler was never prosecuted federally, this example does little to convince a reader that the specter of infinite federal jurisdiction under the amended Federal Kidnapping Act is real. Nevertheless, this hypothetical concern remains central to the modern federalist critique of all jurisdictional-elements statutes and therefore must be addressed with respect to the amended § 1201(a)(1). The answer, as will be detailed below, is that the statutory language requir-

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171 *Id.* at 768–70.

172 *Id.* at 768 (citations omitted).

173 *Id.* at 770.

174 *Id.* at 769 n.11.

175 *Id.* at 800.

176 *Id.* (emphasis added).

177 *Id.* at 800 n.233.



ing that the usage of the interstate commerce facility be “in furtherance” of the crime charged is in itself a meaningful limitation and not nearly so unconstrained as modern federalists posit. Legal scholars are in the business of dreaming up farfetched hypotheticals; courts are not. Using the language of a statute to posit the most extreme possible applications is no substitute for analyzing how courts apply and interpret the statute in practice. In practice, as will be shown, § 1201(a)(1) has been applied to intrastate kidnapping only where the usage of the interstate commerce facility is central to the crime. Thus, the modern federalist attack on § 1201(a)(1) is untenable once the limitation provided by the “in furtherance” language is examined.

*B. Concurrent Jurisdiction and a Meaningful Federal Nexus Requirement  
Render “Infinite Jurisdiction” a Merely Imaginary Threat*

The threat of infinite federal jurisdiction under the Federal Kidnapping Act—and by extension, under other Lopez First and Second Category jurisdictional-elements statutes—is simply not real, for two reasons. First, the amended § 1201(a)(1) does not remove jurisdiction over intrastate kidnappings from state authorities and vest it in federal prosecutors; rather it creates concurrent jurisdiction that may be exercised by federal prosecutors only when certain limited factual circumstances are present. Second, these limited factual circumstances form a federal nexus requirement whereby the nexus to interstate commerce becomes an element of the crime to be proved beyond a reasonable doubt in each federal trial. Any lingering concerns regarding the infinite jurisdiction critique can be resolved by meaningful enforcement of this federal nexus requirement, rather than by more drastic or farfetched remedies, such as limiting use of § 1201(a)(1) to direct attacks on interstate commerce facilities, as Ram suggests, or by striking down the statute entirely. A further review of the three district court opinions upholding the amended § 1201(a)(1) against as-applied challenges will conclusively demonstrate that the statute contains a self-enforcing federal nexus requirement that is already being meaningfully applied by courts. This Article proposes amplifying the already-significant nexus requirement by adding a mandatory “more than a mere incidental use” analysis—as done by the district court *United States v. Augustin*—in order to resolve any lingering infinite jurisdiction concerns.

### 1. Concurrent Jurisdiction

It is beyond dispute that, both before and after it was amended by the Adam Walsh Act, the Federal Kidnapping Act established concurrent rather than exclusive jurisdiction over kidnapping cases, and did nothing to preempt state jurisdiction.<sup>178</sup> The original purpose of the Federal Kidnapping Act was “to supplement state-kidnapping laws and authorize the use of federal resources to apprehend and prosecute otherwise fugitive kidnapers, not to strip the States of their authority to do so.”<sup>179</sup> This remains true today: the miniscule number of cases decided by federal courts under § 1201(a)(1) in the more than four years since the amendment is testimony to the fact that the federal statute is rarely invoked.<sup>180</sup> The facts of the cases, as discussed above and further below, establish that the nexus to a federal interest in each case is meaningful and strong.

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<sup>178</sup> See *Vincent v. Smith*, No. 05 Civ. 7852(DAB)(KNF), 2010 WL 23324, at \*6 (S.D.N.Y. Jan. 5, 2010) (stating that the existence of the Federal Kidnapping Act does not mean that the regulation of interstate kidnapping is solely the responsibility of the federal government).

<sup>179</sup> *Id.*

<sup>180</sup> Statistics on the number of cases prosecuted under § 1201(a) since the adoption of the amendment in 2006 are simply not available. The United States Department of Justice Bureau of Justice Statistics reports federal criminal prosecutions by broad category of crime rather than by statute of prosecution. Thus, while statistics are now available for two fiscal years since adoption of the amendment (specifically, 2007 and 2008), the “kidnapping” cases reported include all cases initiated in federal courts during those periods that might be characterized as involving kidnapping, broadly defined, no matter what crime is charged. See, e.g., U.S. DEP’T OF JUSTICE BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS, 2008–STATISTICAL TABLES tbl. 4.1 (2010) (reporting commencement of 139 “kidnapping” cases); U.S. DEP’T OF JUSTICE BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS, 2007–STATISTICAL TABLES, tbl. 4.1 (2010) (reporting commencement of 125 “kidnapping” cases). Reference to the “Kidnapping” category in the index of the Federal Criminal Code and Rules demonstrates the overbreadth—and thus uselessness for our purposes—of this category. At a minimum, in addition to kidnappings charged under § 1201(a), the category includes hostage-taking in connection with bank robbery in violation of 18 U.S.C. § 2113; a number of federal crimes with child or minor victims, including sexual exploitation of children involving a state-border crossing in violation of 18 U.S.C. § 2251; offenses committed on Indian lands and reservations under 18 U.S.C. § 1153; conspiracy to kidnap in a foreign country in violation of 18 U.S.C. § 956; hostage-taking in violation of 18 U.S.C. § 1203; international parental kidnapping in violation of § 1204; involuntary servitude in violation of 18 U.S.C. § 1583; certain civil rights violations under 18 U.S.C. §§ 241, et seq.; and human trafficking in violation of 18 U.S.C. §§ 1589 et seq. This category is therefore simply not useful in ascertaining the number of cases charged under § 1201(a). The *Ochoa* and *Augustin* cases, discussed in detail above, are the only reported opinions prior to the *Jacques* opinion to address the constitutionality of using § 1201(a) to prosecute intrastate kidnappings where an interstate commerce facility was used to commit the crime. See *supra* notes 142–55. Searches of online sources reveal only a handful of pending cases under § 1201(a), all of which other than the *Jacques* case rely on the traditional state-border crossing to provide jurisdiction.

Indeed, concurrent jurisdiction is the rule rather than the exception for all federal statutes that reach intrastate violent crime. Modern federalists have consistently failed to recognize the concurrent nature of federal jurisdiction, and thus have failed to acknowledge that the federal government is not taking over prosecution of these crimes, but rather carefully limiting jurisdiction to those cases involving a federal interest. As one commentator explains:

There is a fundamental flaw in the federalism criticisms of . . . recent federal criminal legislation in traditionally state areas . . . . [R]ecent legislation in traditionally state areas [does] not supplant state criminal legislation . . . [but] merely creates concurrent federal jurisdiction, making federal prosecutions possible in select areas . . . . [I]n practice, federal prosecutions occur in only a tiny fraction of the cases . . . .<sup>181</sup>

This is an important point, even if modern federalists might reply by saying it is not concurrent federal jurisdiction they object to, but rather *any* federal jurisdiction. This response, were they to make it, would simply restate their argument and ignore the doctrinal basis established above for federal jurisdiction over intrastate kidnapping in those limited cases where use of interstate commerce facilities is central to the crime.

As a matter of doctrine, use of an interstate commerce facility defines a federal interest as surely as does the state-border crossing traditionally at the heart of federal kidnapping jurisdiction, which federalists have yet to object to. As a matter of policy, similar factors militate in favor of federal prosecution of those limited cases, such as the *Jacques* case as argued for federal prosecution under the traditional state-border crossing model. The resources required to prosecute crimes heavily reliant on Internet or telephone usage—i.e., electronic surveillance tools—are commonly controlled by federal rather than state law enforcement agencies. More generally, policing of interstate commerce facilities such as the Internet and other telecommunications facilities is only feasible if undertaken by federal authorities rather than by state governments potentially subjecting users to the dangers of inconsistent regulation.<sup>182</sup> Thus, in all significant respects, federal prosecution premised on use of interstate commerce facilities accords with traditional federal kidnapping jurisdiction. Its

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<sup>181</sup> Litman & Greenberg, *supra* note 80, at 963.

<sup>182</sup> Indeed, the Second Circuit enjoined enforcement of a Vermont statute prohibiting online dissemination of sexually explicit materials to minors on the grounds that state regulation of the Internet violates the Dormant Commerce Clause. *See Am. Booksellers Found. v. Dean*, 342 F.3d 96, 104 (2d Cir. 2003) (“Thus, at the same time that the internet’s geographic reach increases Vermont’s interest in regulating out-of-state conduct, it makes state regulation impracticable.”).

concurrent nature means that where kidnappings do not implicate this federal interest, they will be left to the state's concurrent authority to prosecute.

## 2. Federal Nexus Requirement

Federal prosecutions represent only a "tiny fraction" of cases in which concurrent jurisdiction exists for a simple reason. Modern federalists are wrong: the statutes have been written to contain meaningful practical limits. In the article containing the above-quoted passage, Litman and Greenberg specifically addressed the legislative change made to the Gun Free School Zones Act by Congress after the Supreme Court had struck the statute down in *Lopez*.<sup>183</sup> Congress amended the statute to require a specific showing that the handgun possessed within the school zone had moved in interstate commerce.<sup>184</sup> The authors argue that the revised Gun Free School Zones Act meaningfully "demarcate[s] a constitutional line" because it limits the exercise of federal jurisdiction to cases in which the state border crossing is a cause of the harm—possession of a gun in a school zone—addressed by Congress in the statute.<sup>185</sup> In other words, there is a built-in nexus or causation requirement limiting federal jurisdiction to a small number of cases presenting a legitimate federal interest.

Federal courts have long interpreted the jurisdictional-elements language in federal criminal statutes to create a separate proof requirement that becomes an element of the charged crime. Beginning with *United States v. Bass*, the Supreme Court found that the presence of such a proof requirement could cure arguments that a statute exceeded Commerce Clause jurisdiction. In *Bass*, the Court rejected a Commerce Clause challenge to a previous version of the federal felon-in-possession statute, finding the statute constitutional so long as it was read to require proof of a nexus to interstate commerce as an element of the charged crime.<sup>186</sup> "[T]he nexus with interstate commerce . . . must be shown in individual cases," the Court wrote.<sup>187</sup> "And consistent with our regard for the sensitive relation between federal and state criminal jurisdiction, our reading preserves as

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183 See Litman & Greenberg, *supra* note 80, at 924.

184 See *id.*

185 *Id.* at 926.

186 See *United States v. Bass*, 404 U.S. 336, 347 (1971) (setting aside a conviction because the Government did not meet the required proof of a nexus to interstate commerce).

187 *Id.* at 350.

an element of all the offenses a requirement suited to federal criminal jurisdiction alone.”<sup>188</sup> The *Lopez* majority specifically contrasted the Gun Free School Zones Act with the felon-in-possession statute at issue in *Bass*, finding the *lack* of such a nexus in the Gun Free School Zones Act rendered that statute beyond Congress’s power under the Commerce Clause.<sup>189</sup> Federal courts have repeatedly upheld federal criminal statutes against Commerce Clause challenges where specific jurisdictional-elements language creates a proof requirement demanding a showing that the regulated conduct bore a nexus to interstate commerce.<sup>190</sup> Failure to prove up the required federal nexus does not render the entire statute unconstitutional, but rather amounts to lack of proof beyond a reasonable doubt, and leads to a judgment of acquittal on federal charges.<sup>191</sup>

*C. Section 1201(a)(1)’s Federal Nexus Requirement in Action*

Like other *Lopez* First and Second Category jurisdictional-elements statutes, the amended § 1201(a)(1) contains a working federal nexus requirement that has the practical effect of limiting federal prosecutions of intrastate kidnappings to cases in which there is a demonstrable federal interest. This nexus requirement can be observed in action each time courts consider “as-applied” challenges to the amended Federal Kidnapping Act. By raising an “as-applied” challenge, a defendant argues that the facts underlying his prosecution are constitutionally insufficient to support prosecution by federal authorities. Such a challenge triggers a requirement that the trial court vet the strength of the federal interest in the prosecution by determining whether the facts as alleged in the indictment establish a sufficient nexus between the defendant’s conduct and interstate commerce. Where the federal interest is deemed too attenuated, the case must be dismissed in favor of the concurrent state jurisdiction. Defendants’ ability to raise these as-applied challenges, combined with courts’ serious and meaningful consideration of them, render

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188 *Id.* at 351.

189 *See* United States v. Lopez, 514 U.S. 549, 561 (1995) (“[Section] 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.”).

190 *See* United States v. Trupin, 117 F.3d 678, 685 n.3 (2d Cir. 1997) (providing examples of various cases demonstrating that possession can constitute interstate commerce).

191 *See* United States v. Keller, No. 2:09-cr-20303, 2010 WL 55508, at \*8 (E.D. Mich. Jan. 6, 2010) (claiming that a lack of federal jurisdiction in § 1958 case is better understood as one of insufficiency of evidence that a federal crime was committed).

the “infinite federal jurisdiction” myth just that—a trope with no basis in the reality of our criminal justice system.

*1. The Federal Nexus Requirement in Augustin and Ochoa*

The opinion in *United States v. Augustin*,<sup>192</sup> in particular, stands as a model of clarity worthy of emulation by other district courts in ensuring meaningful enforcement of the federal nexus requirement.

In order to understand *Augustin*'s application of the federal nexus requirement, we must begin where the *Augustin* court did: with the opinion in *Ochoa*,<sup>193</sup> which preceded *Augustin* by seven months and was the first federal district court opinion to consider the constitutionality of the amended Federal Kidnapping Act under the Commerce Clause.<sup>194</sup> After finding the amended § 1201(a)(1) facially valid as a matter of Commerce Clause doctrine as described above,<sup>195</sup> the *Ochoa* court addressed what it termed “cursory allegations” by the defendant that the statute was “overly vague and contain[ed] ‘no meaningful limiting language,’” so that “it is virtually impossible to imagine a kidnapping scenario, however localized, that would *not* trigger federal jurisdiction.”<sup>196</sup> This argument by the defendant, Sarah Ochoa, is immediately recognizable as a variant of the “infinite federal jurisdiction” critique raised by Ram and other modern federalists. The *Ochoa* court rejected the infinite jurisdiction argument in the following passage:

[T]he Act contains sufficient limiting language. It only criminalizes kidnappings when the offender uses an instrumentality of interstate commerce “in committing or in furtherance of the commission of the offense.” Mere use of a cell phone, for example, is not sufficient; the offender must use the cell phone to *further* the kidnapping.<sup>197</sup>

This passage clearly limits federal jurisdiction over intrastate kidnapping to cases in which a federal nexus is established through a usage of the interstate commerce facility that “further[s] the kidnapping.” The court does not discuss the definition of “further” in any detail. However, a review of the facts of *Ochoa*<sup>198</sup> shows direct usage of inter-

192 No. 1:09-CR-187, 2010 WL 2639966, at \*1 (E.D. Tenn. June 28, 2010).

193 *United States v. Ochoa*, No. 8-CR-1980 WJ, 2009 WL 3878520, at \*1 (D.N.M. Nov. 12, 2009).

194 *See Augustin*, 2010 WL 2639966, at \*3 (explaining that before 2006, the Federal Kidnapping Act only prohibited kidnappings when the victim was physically transported across state lines).

195 *See supra* notes 142–49 and accompanying text.

196 *Ochoa*, 2009 WL 3878520, at \*4.

197 *Id.* (emphasis added).

198 *See supra* notes 143–45 and accompanying text.

state commerce facilities to commit the crime. (The government had proved at trial that Sarah Ochoa used the Internet and telephones to arrange the meeting at which she kidnapped the realtor.)<sup>199</sup> The combination of the language used by the court, and the facts of the case establishing direct usage to further the kidnapping, obviously suggests that an attenuated usage would not satisfy the statute's federal nexus requirement. On the contrary, *Ochoa* contains just the sort of criminal usage of interstate commerce facilities that—according to the legislative history of the Adam Walsh Act described above—Congress properly set out to police when it amended § 1201(a)(1).<sup>200</sup>

The opinion in *United States v. Augustin* expands somewhat on *Ochoa's* requirement of direct usage of the interstate commerce facility to further the kidnapping, employing language that, if followed by other courts applying the amended § 1201(a)(1), would lay to rest any concern with overly expansive federal kidnapping jurisdiction. In *Augustin*, the court addressed the constitutionality of the statute in the context of a motion to dismiss the indictment,<sup>201</sup> and was appropriately sensitive to the fact that the averments in the indictment were, at that point, simply allegations. This awareness led the court to discuss the federal nexus requirement in greater detail, with particular focus on its role as an element of the crime to be proved in order for the defendant to be convicted.<sup>202</sup> The court declined to dismiss the indictment prior to trial on an as-applied challenge, writing that “[t]he jurisdictional requirement of 18 U.S.C. § 1201(a)(1) is a substantive element of the offense . . . . The Court accordingly reserves for the jury the determination of whether the use of instrumentalities satisfies the statute.”<sup>203</sup>

However, in addressing what *sort* of use of instrumentalities would satisfy the statute, the *Augustin* court performed the functional equivalent of an as-applied review, amplifying upon *Ochoa's* usage of the “further the kidnapping” language in the process. After quoting *Ochoa* to reject the defendants’ argument that the amended § 1201(a)(1) allows proof of nexus based on improperly attenuated usage of interstate commerce facilities, the *Augustin* opinion added this observation:

The plain language of the [sic] 18 U.S.C. § 1201(a)(1), requires *more than* an “*incidental*” use of a telephone to satisfy the jurisdictional element. Ra-

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199 See *Ochoa*, 2009 WL 3878520, at \*1.

200 See *supra* note 99 and accompanying text.

201 *Augustin*, 2010 WL 2639966, at \*1.

202 *Id.* at \*5.

203 *Id.*

ther, the . . . instrumentality must have been used “in committing or in furtherance of the commission of the offense” . . . This in the Court’s opinion requires *more than a mere* “incidental” use.<sup>204</sup>

This language from *Augustin* is salutary. As already discussed, § 1201(a)(1), like other Lopez First and Second Category jurisdictional-elements statutes, creates a federal nexus requirement that must be proved as an element of the crime. *Augustin* and *Ochoa* hold that the § 1201(a)(1) federal nexus requirement demands proof that a facility of interstate commerce was used to further the kidnapping. Adding the *Augustin* court’s specification that the usage in furtherance be “more than merely incidental” would resolve any concern with improperly expansive federal jurisdiction.

## 2. Application of Federal Nexus Requirement by the Jacques Court.

In considering the as-applied challenge contained in the defendant’s motion to dismiss, the court in *United States v. Jacques* performed the functional equivalent of a federal nexus requirement analysis, although it did not employ that terminology. The effect was the same, however: the court carefully examined the relationship between the kidnapping and the alleged use of the interstate commerce facility (in this case the Internet) to ensure that the usage was not attenuated from the crime. The defendant’s “as-applied” challenge thus triggered a factual review by the *Jacques* court that fulfilled the promise of § 1201(a)(1)’s jurisdictional-elements provision, rendering it self-limiting in nature.

Before reviewing the portion of the *Jacques* court’s opinion addressing the as-applied challenge, this Article will provide a more detailed recitation of the facts of the *Jacques* case than was included in the court’s opinion. The purpose of this review is simply to demonstrate that judicial opinions assessing the factual nexus between the alleged crime and the use of the interstate commerce facility are by nature schematic, and often fail to convey the full range and power of “nexus” facts ultimately presented to a jury. This is certainly true in the case of *United States v. Jacques*.

In its Memorandum in Opposition to Defendant’s Motion to Dismiss Count 1 of the Indictment, the government summarized the proof it planned to offer at trial. While the allegations showed that the physical acts constituting the crime took place within the borders of the state of Vermont, the government describes the kidnapping as the culmination of months of careful planning and manipulation, *vir-*

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204 *Id.* at \*4 (citations omitted) (emphasis added).



*tually all of which* occurred online or through text messaging. Documents filed in the case—in which Jacques is charged under the amended Federal Kidnapping Act, 18 U.S.C. § 1201(a)(1)—demonstrate that Jacques employed the Internet and text messaging intensively and extensively over a lengthy period of time to plan, commit and cover up the crime.<sup>205</sup> Given the manner in which the Internet and text messaging was used to plan, coerce and direct a critically important accomplice, to lure Brooke to the phony “party” where she was drugged, raped and killed, and to tamper with evidence in order to divert police attention away from Jacques, it is clear that the crime was inseparable from and could not have succeeded without the Internet and cell phone text messaging. The greater part of this crime took place in cyberspace; only its culmination happened in Vermont.

Jacques had been sexually abusing another young girl, identified in court documents as J1, for years; Jacques had used the Internet and cell phone text messages to convince J1 that she had been targeted by a criminal organization called the “Breckenridge Program” that would kill her or her family members if she did not submit to sexual intercourse with her “trainer,” Jacques.<sup>206</sup> In the weeks leading up to the kidnapping and murder of Brooke, Jacques used email and text messages to direct J1 to assist in luring Brooke to her death. Court documents detail hundreds of email and text messages sent by Jacques to J1 during May and June 2008, using a variety of email addresses and purporting to come from various fictitious members of Breckenridge.<sup>207</sup> J1 was originally told that she had been selected for “summer training,” which would require her to acquire Brooke for three-way sex with Jacques and J1.<sup>208</sup> However, at some point, Jacques decided to kill Brooke. During the second half of May 2008, he sent numerous emails and text messages, again purportedly from Breckenridge members, convincing J1 that Brooke had to be killed because she was threatening to go to the police and accuse Jacques of rape, and instructing J1 to assist in committing the crime.<sup>209</sup>

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<sup>205</sup> See Jacques Memo, *supra* note 1, at 4-7.

<sup>206</sup> Jacques Memo, *supra* note 1, at 4.

<sup>207</sup> *Id.* at 4-11.

<sup>208</sup> *Id.* at 6.

<sup>209</sup> *Id.* at 5. A letter written on June 6, purporting to be from Breckenridge to J1, recovered from Jacques’s laptop, stated:

[W]e have recently come to an agreement with Charles, Eric and Jacques regarding what will be done. To put it bluntly, Miss Bennett will cease to exist . . . You will not be required to participate in the actual termination, but you will participate in the events leading up to it. We expect your full and enthusiastic participation.

In the week leading up to the kidnapping and murder, Jacques and J1 continued to exchange voluminous, detailed emails and text messages planning Brooke's abduction.<sup>210</sup> J1 was instructed to lure Brooke to Jacques's house (which, as the documents make obvious, was also J1's house), using the ruse that J1 was hosting a pool party there which would be attended by a local boy Brooke liked.<sup>211</sup> Jacques created numerous phony text messages that appeared to be from this boy, and forwarded them to J1, who forwarded them to Brooke.<sup>212</sup> The text messages spoke of this boy's interest in Brooke and his desire to see her at the pool party. Brooke's texted replies demonstrated that she believed the phony text messages to be authentic and was eager to attend the party: "OMG!," court documents quote Brooke as texting back to J1, "He really sent those 2 u? That is awesome."<sup>213</sup> Brooke then texts J1, "I will talk to my mom!" to get permission to attend the pool party and to sleep over at Jacques's house the night before.<sup>214</sup>

Meanwhile, Jacques continued to instruct J1 through numerous, detailed text messages regarding the logistics of the abduction and its planned cover-up. After being repeatedly pressured by phony text messages from fictional Breckenridge members, on June 20, J1 texted Jacques that she would "help out . . . with the tie down."<sup>215</sup> Jacques, posing as a Breckenridge member, repeatedly commanded J1 to obtain a semen sample in a handkerchief from a local boy that Jacques later planted near Brooke's body to divert suspicion.<sup>216</sup> Via text message, J1 agreed to obtain the semen sample, informed Jacques when she had completed the task, and made arrangements to deliver the handkerchief containing the specimen to Jacques.<sup>217</sup>

It is impossible to overstate the role played by text messaging in the actual execution of the crime. Jacques and J1 were in constant contact via text message from the time Brooke arrived at the Jacques residence at approximately 8:00 PM on June 24 (the night before her murder), throughout the commission and completion of the crime

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*Id.* at 8.

210 *See id.* at 8–11.

211 *Id.* at 8–9.

212 *Id.* at 10–11.

213 *Id.* at 11.

214 *Id.*

215 *Id.* (alteration in original).

216 *Id.* at 11, 18.

217 *Id.* at 11–12.

on June 25.<sup>218</sup> These text messages covered everything from moment-by-moment bulletins regarding the timing of Brooke's arrival, to the logistics of the planned cover-up, to discussions of whether Brooke was asleep or awake, to statements by J1 concerning how scared she was, followed by directives from Jacques to calm down and carry out the plan as directed.<sup>219</sup>

Finally, on the morning of June 25, Jacques was alone in the house with the two girls and ready to carry out his plan. Jacques and J1 texted back and forth, unbeknownst to Brooke, and arranged for J1 to tell Brooke that Jacques wanted to show her a "magic trick."<sup>220</sup> Jacques came downstairs from his bedroom to where the two girls were and got Brooke, leading her back upstairs.<sup>221</sup> Shortly thereafter, Jacques came down again and instructed J1 to leave the house, telling her that the taser was not working.<sup>222</sup> Even as Jacques raped and murdered Brooke upstairs, J1 continued to send text messages to fictional Breckenridge members keeping them apprised of unfolding events and telling them it was time to come get the body.<sup>223</sup>

Like the kidnapping and murder itself, Jacques's attempts to cover it up were directly accomplished through use of the Internet. Initially, Jacques had planned to use Brooke's cell phone after her murder to send text messages to J1 making it look like she was still alive and had run off with a local boy.<sup>224</sup> Jacques and J1 exchanged a long series of panicked text messages after Brooke's arrival at the Jacques's residence on June 24, when it became clear that Brooke had left her cell phone at home.<sup>225</sup> Through repeated texts, Jacques and J1 developed an alternative plan: J1 would obtain Brooke's MySpace password, which Jacques would use to access her account and plant a decoy story about Brooke running away with the boy.<sup>226</sup> That night,

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218 The Memorandum does not expressly discuss where Jacques, J1 and Brooke were within the house, or whether at times Jacques's wife was also present. It is clear from the context, however, that J1 was with Brooke, but that Jacques was elsewhere in the house (or perhaps at times not in the house at all) during the many hours that these text messages were being exchanged. *Id.* at 12-18.

219 *Id.* at 12-15.

220 *Id.* at 16.

221 *Id.*

222 *Id.*

223 In one such message, J1 wrote, "The tazor [sic] didn't work and I'm leaving . . . Now get here now now now." *Id.*

224 *Id.* at 12.

225 *Id.* at 12-13.

226 *Id.* at 13.

before he killed her, Jacques accessed Brooke's MySpace account and posted a phony entry that made it look like she would be meeting this boy the next morning.<sup>227</sup> The next day, after Brooke was murdered and buried and her mother had come to Jacques's house looking for her, Jacques and his wife checked Brooke's MySpace page and "discovered" the post.<sup>228</sup> Jacques was subsequently arrested and charged federally under 18 U.S.C. § 1201(a)(1). Count One of the indictment read in relevant part:

On or about and between June 20–25, 2008, in the District of Vermont, JACQUES unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted and carried away Brooke Bennett, and held her for his own benefit and purpose, *and used means, facilities and instrumentalities of interstate commerce, namely, cell phone text messages, internet email messages, and an internet MySpace posting, in committing or in furtherance of the commission of the offense*, which resulted in the death of Brooke Bennett. (18 U.S.C. § 1201(a)(1)).<sup>229</sup>

It was this count that Jacques moved to dismiss.

After denying Jacques's facial challenge to the constitutionality of the amended § 1201(a)(1),<sup>230</sup> the district court considered the as-applied challenge, performing the equivalent of a federal nexus analysis. The defendant had asserted that "any use of cell phone text messages was too attenuated from the kidnapping to support a conviction."<sup>231</sup> Though the defense admitted that interstate commerce facilities were used to lure Brooke to Jacques's house prior to her rape and murder, Jacques argued that luring her was not the same as kidnapping her; the luring and the kidnapping must be viewed as two separate, unrelated events.<sup>232</sup> The court rejected this hair-splitting. Examining the definition of kidnapping under § 1201(a)(1), the court found that proof that the defendant "inveigled or decoyed" the victim was placed on an equal footing with proof that he "kidnapped, abducted, or carried [her] away" in the statutory language.<sup>233</sup> Jacques's luring of Brooke could not be separated from the

<sup>227</sup> The entry read in part:

I do want to see you in the morning so please meet me . . . u know where. I think I have a good plan to sneak around this. My mom will kill me but then I'm going 2 Texas and she will get over it . . . . OMG if only people knew me 4 real! See you there!

*Id.* at 14 (alterations in original).

<sup>228</sup> *Id.* at 17–18.

<sup>229</sup> *Id.* at 19 (emphasis added).

<sup>230</sup> *See supra* notes 156–67 and accompanying text.

<sup>231</sup> United States v. Jacques, No. 2:08-CR-117, 2011 WL 1706765 at \*11 (D. Vt. May 4, 2011).

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

kidnapping itself, but was part and parcel of the crime. The court wrote:

A kidnapping that begins with an inveiglement and evolves into a confinement by force is one offense, not two, and begins with the inveiglement, not the confinement by force . . . . [T]he government's evidence could permit a jury to conclude that the layers of deception enabled Jacques to entice Miss Bennett to come to his house . . . all in order to keep her within his control and for his own illicit purposes.<sup>234</sup>

Thus, the use of the interstate commerce facilities was in no way attenuated. The court concluded:

Because, at a minimum, cell phone text messaging was allegedly used to convince Brooke Bennett that she was assisting in the preparations for a pool party . . . there is probable cause to believe that an instrumentality of interstate commerce was used to commit or to facilitate the commission of a kidnapping. The application of § 1201(a) to Jacques's conduct as alleged in Count 1 of the indictment is constitutional.<sup>235</sup>

The court's opinion in *Jacques* is thus a perfect example of a Lopez Second Category jurisdictional-elements provision working as it is supposed to. Because a defendant has the opportunity to move to dismiss the charge in an "as-applied" challenge—as Jacques did here—no decision by a federal prosecutor to exercise concurrent jurisdiction in a kidnapping case can hope to escape scrutiny. Courts will be required to examine the government's factual allegations even prior to trial to determine whether the use of interstate commerce facilities is too attenuated from the crime itself to support federal conviction. If the allegations are sufficient, the court will allow the charge to proceed to trial, where the defendant will have another opportunity to argue attenuation to the jury. As discussed below, properly formulated jury instructions will make crystal clear that the government must prove federal nexus beyond a reasonable doubt in order to support conviction. The prospect of a defendant using his cell phone to order a pizza on the way to commit a crime thus subjecting himself to unwarranted federal prosecution is an alarmist specter with no basis in reality.

### 3. *A Proposal for Ensuring Proper Federal Nexus Review Through Jury Instructions*

In order to lay to rest the infinite jurisdiction specter permanently, this Article proposes that the *Augustin* "more than a mere incident-

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<sup>234</sup> *Id.* at \*12.

<sup>235</sup> *Id.*

tal use” language discussed above<sup>236</sup> be adopted by federal district courts and studied by federal prosecutors seeking to understand the proper limits to federal jurisdiction under the case. This could easily be implemented by federal district courts through jury instructions. Courts formulating jury instructions in Lopez Second Category jurisdictional elements statutes already instruct juries that the government must prove use of the interstate commerce facility beyond a reasonable doubt.<sup>237</sup> Courts should now specify, when instructing on the usage element under § 1201(a)(1), that the defendant must have used the interstate commerce facility to further the kidnapping, and that this usage must be “*more than . . . mere[ly] incidental.*”<sup>238</sup>

Such a requirement would forever banish farfetched infinite jurisdiction hypotheticals. If the defendant got hungry in the middle of a kidnapping and called Domino’s to order a pizza, or if he used the Internet to check the weather, the usage would not meet the “more than merely incidental” requirement and would therefore be insufficient to support the exercise of federal jurisdiction. Defendants in such cases would be unlikely to be charged federally, because prosecutors would realize they lacked the requisite proof on a required element of the crime. (Indeed, there is simply no evidence that federal authorities currently bring kidnapping charges based on such attenuated usages.) If they were charged, however, defendants would likely prevail on as-applied challenges to their indictment, or be acquitted by juries. But where the defendant used the anonymity of emails and text messages to lure the defendant into a trap—as Sarah Ochoa did, and as Michael Jacques did with Brooke Bennett—or made telephone calls to arrange for payment of ransom as occurred in the *Augustin* case, then the usage of interstate commerce facilities would be deemed more than merely incidental. In those cases, defendants would properly be subject to federal prosecution.

#### CONCLUSION

Congress’s plenary authority under the Commerce Clause to regulate the facilities of interstate commerce and prevent their use for harmful purposes, even where the harmful use arises solely within the

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<sup>236</sup> See *supra* note 204 and accompanying text.

<sup>237</sup> See, e.g., *United States v. Gibson*, No. 06 CR 70, 2007 WL 1385382, at \*3 (N.D. Ill. May 4, 2007) (upholding jury instruction in murder-for-hire case requiring proof beyond a reasonable doubt “that the defendant knowingly used or caused another to use a facility of interstate commerce” in committing the crime).

<sup>238</sup> *United States v. Augustin*, No. 1:09-CR-187, 2010 WL 2639966, at \*4 (E.D.Tenn. June 28, 2010) (emphasis added).

boundaries of a single state, has long been established. The triumvirate of modern Commerce Clause cases—*Lopez*, *Morrison*, and *Raich*—only cement this principle. The modern federalist critique lodged against the amended Federal Kidnapping Act, and by extension against other Lopez First and Second Category jurisdictional-elements statutes, is unavailing as a matter of doctrine. Its persuasive power has come instead from hyperbolic scenarios of “infinite federal jurisdiction” that are factual in nature and divorced from current Commerce Clause jurisprudence. While this Article maintains that the threat of infinitely expansive federal jurisdiction urged by modern federalists is overblown, a practical and moderate change to the application of the amended Federal Kidnapping Act that would lay to rest such federalism concerns once and for all. By requiring that the already applicable federal nexus requirement of § 1201(a)(1) be implemented through jury instructions requiring “more than a merely incidental use” of interstate commerce facilities, federal jurisdiction over that appropriately limited number of intrastate kidnappings would be unassailable.