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I. Introduction

In the early morning hours of Saturday, March 27, 2004, a white male wearing a black knit stocking cap slipped into the bedroom of Audrey Seiler's apartment, threatened her with a knife, and ordered her to follow him to his waiting car.[1] Once outside, he pushed the twenty-year-old college student into a car, forced her to swallow Nyquil capsules, and bound and gagged her with duct tape.[2] For hours, Seiler's abductor drove them around the city of Madison, Wisconsin before finally stopping near a wooded area on the edge of town.[3]

Seiler's friends quickly noticed her absence. By late Saturday afternoon, the local police had launched an investigation into her disappearance. The national media immediately took interest, and for days the nation focused on every detail emerging from this shocking kidnapping in a small college town.[4]

Forensic investigators determined that someone had conducted Internet searches for "Madison parks" and "Madison area wooded areas" on Seiler's laptop shortly before her disappearance.[5] Additionally, detectives discovered surveillance video from a local Target store showing an individual purchasing

1. Criminal Complaint at 10, Wisconsin v. Seiler, No. 04-DA-005353 (Dane County Cir. Ct. Apr. 14, 2004), *available at* http://images.ibsys.com/c3k-structure/images/pdf/seiler_complaint.pdf (last visited Mar. 3, 2008).

2. *Id.* at 10, 12.

3. *Id.* at 10.

4. *See* Josh Mankiewicz, *Racial Profiling in Missing Persons Stories?*, DATELINE NBC, Aug. 5, 2005, http://www.msnbc.msn.com/id/8667821 (last visited Feb. 26, 2008) (noting that, in the four days following Seiler's disappearance, the national morning news programs of ABC, CBS, and NBC collectively devoted almost 100 minutes of airtime to her story) (on file with the Washington and Lee Law Review).

5. Criminal Complaint, *supra* note 1, at 6.

duct tape, rope, a knife, and Nyquil medication.[6] Moreover, as the investigation would later reveal, Seiler's alleged abductor reportedly used a cell phone to call an accomplice, pleading "I did what you asked. You got to let me in now."[7]

Then, on the Wednesday following Seiler's disappearance, a 911 caller reported seeing a young woman fitting Seiler's description sitting in a grassy area near a bike path.[8] Police officers responded to an area just two miles from Seiler's apartment.[9] Upon arrival, they quickly discovered that the lone woman sitting in the grass was indeed the missing college student.[10] Audrey Seiler had been found.[11]

If she had been transported across state lines, the Federal Kidnapping Act[12] (Kidnapping Act) would have been violated.[13] But because Seiler remained in-state—indeed, the entire ordeal took place within Dane County, Wisconsin—her kidnapping amounted to a state law crime.[14] That is, until Congress passed the Adam Walsh Child Protection and Safety Act.[15]

Enacted in late July 2006, this statute contains over one hundred different provisions aimed at protecting children from the harms of violent crime and sexual exploitation.[16] Included in this legislation, however, is a one line amendment to the Kidnapping Act, dramatically expanding the reach of federal jurisdiction to include virtually every type of kidnapping currently regulated

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6. *Id.* at 7.

7. *Id.* at 9.

8. *Id.* at 8.

9. *Id.*

10. *Id.*

11. Or so the story goes. As it turns out, Audrey Seiler faked her own kidnapping. In July 2004, she pled guilty to obstructing a police investigation, was placed on probation, and ordered to pay restitution. *See generally* Criminal Complaint, *supra* note 1 (detailing Seiler's disappearance and subsequent claims). However, the details of Seiler's "kidnapping" are rife with use of the channels and instrumentalities of interstate commerce and provide an ideal framework through which the 2006 changes to the Federal Kidnapping Act can be introduced.

12. *See* Federal Kidnapping Act, 18 U.S.C. § 1201 (2000) (amended 2006) (proscribing abduction in cases where the victim is "transported in interstate or foreign commerce").

13. *See id.* § 1201(a)(1) (prohibiting the transportation of kidnapping victims in interstate commerce).

14. *See* WIS. STAT. ANN. § 940.31(1)(a) (West 2006) (criminalizing the taking of a person from one place to another by threat or the use of force).

15. *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.) (protecting children from online predators and sexual exploitation).

16. *Id.*

under state law.[17] Specifically, the amendment extends federal jurisdiction to kidnapping cases in which an offender makes use of the channels or instrumentalities of interstate commerce.[18]

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.[19] Rather, simply driving a car, picking up a telephone, or even walking down a neighborhood sidewalk satisfies the usage requirement. In Seiler's case, this nexus would have been created when her alleged abductor accessed the Internet, purchased items in a store, transported her in an automobile on local streets, or telephoned his accomplice.

Viewed in this light, it is difficult to imagine a kidnapping scenario in which an offender does not use a channel or instrumentality of interstate commerce in commission or furtherance of the crime. Most, if not all, intrastate kidnappings invariably involve the use of an automobile, a telephone, or some other instrument of interstate commerce in conjunction with the act. Prior to the 2006 amendment, only state authorities could prosecute these otherwise intrastate kidnappings. With the added "offender-use provision" in the 2006 amendment, however, federal authorities now share concurrent jurisdiction with the states over virtually every kidnapping in this country. Indeed, the 2006 amendment is so broad that Congress could use it to extend federal jurisdiction over practically all intrastate criminal activity. While the Kidnapping Act is certainly not the first statute to rely on Congress's authority to regulate the use of the channels and instrumentalities of interstate commerce, it is exceptionally permissive in that the Act allows an offender's actions to create the required nexus with interstate commerce by "any" use.[20]

Consider the effect of this jurisdictional element on an offender who makes use of interstate commerce. For example, a murderer may approach his victim in a dark alley, a burglar may case a neighborhood in her car, or a shoplifter may take a bus to the mall. In each of these examples, the offender has made use of an instrumentality or channel of interstate commerce: the dark alley, the car, or the bus. As a result, Congress has effectively created a new class of offender: Commuter Criminals. Not surprisingly, the broad impact of

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17. *See id.* § 213, 120 Stat. at 616–17 (amending 18 U.S.C. § 1201).

18. *See id.* (providing jurisdiction if the "offender travels in interstate or foreign commerce or uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense").

19. *See* United States v. Lopez, 514 U.S. 549, 558 (1995) (providing that "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").

20. 18 U.S.C. § 1201 (2000).

this jurisdictional element destroys the constitutionally required "distinction between what is truly national and what is truly local."[21]

This Note examines the language and application of this jurisdictional element through the framework of the Kidnapping Act. Part II provides the historical background necessary to explore the constitutionality of federal criminal laws enacted under the Commerce Clause. This Part also identifies the three historical bases through which Congress may enact federal legislation under the Commerce Clause.

Part III traces the history and examines the policy rationales of the Kidnapping Act, from its creation in 1932 through the recent 2006 amendment. Part IV identifies several problems and policy tensions arising from the broad expansion of federal jurisdiction under the 2006 amendment. Specifically, this Note argues that federal jurisdiction over noncommercial, violent criminal conduct not directed at the channels or instrumentalities of commerce should only arise when it is necessary and proper to protect interstate commerce. Because the regulation of intrastate crime in this manner is neither necessary nor proper for carrying out Congress's commerce power, the 2006 amendment remains constitutionally suspect.

II. Federal Regulation Under the Commerce Clause

Congress's authority to regulate criminal activity has expanded dramatically over the past two hundred years.[22] The sheer number of federal criminal laws on the books today reflects this increased authority.[23] Interestingly, most of the growth in federal criminal law has occurred in the past thirty years.[24] In 1998, the American Bar Association estimated that there were well over 3,000 federal criminal laws in existence.[25] A more recent

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21. United States v. Morrison, 529 U.S. 598, 617–18 (2000).

22. *See* Andrew Weis, Note, *Commerce Clause in the Cross-Hairs: The Use of Lopez-Based Motions to Challenge the Constitutionality of Federal Criminal Statutes*, 48 STAN. L. REV. 1431, 1436 (1996) (describing the expanded use of the federal police power).

23. *See id.* at 1436 n.29 (examining the high watermark of federalization that occurred in the late 1960s).

24. *See* TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N, REPORT ON THE FEDERALIZATION OF CRIMINAL LAW 7 (1998), *available at* http://www.overcriminalized.com/papers.cfm (follow "ABA Task Force on Federalization of Criminal Law" hyperlink) (last visited Feb. 26, 2008) [hereinafter ABA REPORT] (noting that "[m]ore than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970") (on file with the Washington and Lee Law Review).

25. *See id.* at 10 n.11 ("While a figure of 'approximately 3,000 federal crimes' is frequently cited, that helpful estimate is now surely outdated by the large number of new federal

estimate measures the number of federal offenses carrying criminal penalties at 4,000.[26]

Congress enjoys discrete authority to enact criminal legislation through its Article I, Section 8 enumerated powers.[27] For example, Congress's postal power enables it to criminalize activities affecting the postal system, such as mail fraud.[28] Likewise, under the Counterfeiting Clause, Congress can "provide for the Punishment of counterfeiting the Securities and current Coin of the United States."[29] Moreover, the Thirteenth, Fourteenth, and Fifteenth Amendments empower Congress to criminalize behavior encroaching on the civil rights of citizens.[30] Congress, however, retains the broadest authority to enact criminal legislation under the Commerce Clause.[31]

The Commerce Clause provides that "[t]he Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[32] Although this clause carries with it enormous legislative power, "the delegates at the Constitutional Convention in Philadelphia unanimously, and without discussion, approved [it]."[33]

Initially, Congress refrained from enacting criminal laws under its commerce power; it limited the exercise of its federal police power to a narrower range of crimes impacting a "direct federal interest."[34] This interest

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crimes enacted in the 16 years . . . intervening since its estimation.").

26. *See* JOHN S. BAKER, JR., FEDERALIST SOC'Y FOR LAW & PUB. POLICY STUDIES, MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION 3 (2004), *available at* http://www.fed-soc.org/doclib/20070404_crimreportfinal.pdf (last visited Feb. 26, 2008) (counting the number of federal criminal statutes in the U.S. Code).

27. *See* Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL'Y 849, 891 (2002) ("Congress can regulate criminal conduct in interstate commerce.").

28. *See* U.S. CONST. art I, § 8, cl. 7 (granting Congress the power to regulate post offices and post roads).

29. U.S. CONST. art I, § 8, cl. 6.

30. *See* U.S. CONST. amend. XIII, § 2 (giving Congress the authority to proscribe slavery); U.S. CONST. amend. XIV, § 5 (enabling Congress to enforce the equal protection and due process rights of citizens against the states); U.S. CONST. amend. XV, § 2 (granting Congress the power to preserve the voting rights of all citizens).

31. *See* Bork & Troy, *supra* note 27, at 891 ("Even though most crime has nothing to do with 'commerce,' today '[f]ew crimes, no matter how local in nature, are beyond the reach of the federal criminal jurisdiction.'" (citations omitted)).

32. U.S. CONST. art. I, § 8, cl. 3.

33. LaMar F. Jost, Case Note, *Constitutional Law—The Commerce Clause in the New Millennium: Enumeration Still Presupposes Something Not Enumerated:* United States v. Morrison, 1 WYO. L. REV. 195, 195 (2001).

34. *See* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1139 (1995) (noting that "[n]arrowly drawn federal

typically arose in settings where the federal government retained exclusive jurisdiction; for example, military installations, federal territories, and the District of Columbia.[35] Because Congress confined these enactments to "crimes committed within a special federal sphere,"[36] legislation addressed only truly national concerns: treason, piracy, perjury in federal court, and forgery of Treasury securities.[37] Notably, there were fewer than twenty federal crimes in force from 1790 through the antebellum period.[38]

Congress's commerce power went largely unexamined until the Supreme Court defined its scope in *Gibbons v. Ogden*.[39] There, Chief Justice Marshall described commerce as "the commercial intercourse between nations, and parts of nations, in all its branches."[40] Recognizing Congress's expansive authority to regulate in this manner, the *Gibbons* Court was careful to note that this power "may very properly be restricted to that commerce which concerns more States than one . . . ."[41] Following this decision, challenges brought under the Commerce Clause focused not on the extent of Congress's authority, but on the limitations of state legislation impacting interstate commerce.[42] For decades following this decision, Congress enjoyed broad power to legislate under the Commerce Clause.[43]

In the mid-to-late 1800s, a rapidly expanding economy provided fertile ground from which the number of federal criminal laws grew.[44] Nonetheless, federal statutes continued to be "narrowly drawn . . . to provide protections in matters of direct federal interest or matters that the states were powerless to address—theft from a federal bank by a bank employee, arson on a federal

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crimes were tailored to provide protections in matters of direct federal interest or matters that the states were powerless to address").

35. *See* Thomas J. Maroney, *Fifty Years of Federalization of Criminal Law: Sounding the Alarm or "Crying Wolf?,"* 50 SYRACUSE L. REV. 1317, 1319 (2000) (tracing the development of federal criminal law).

36. Brickey, *supra* note 34, at 1138.

37. *See id.* (detailing the types of crimes punishable under the Crimes Act of 1790).

38. *See* Maroney, *supra* note 35, at 1319 (observing that, at its inception, federal criminal law consisted of only seventeen offenses).

39. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196–97 (1824) (finding that Congress's authority under the Commerce Clause includes the power to regulate interstate navigation).

40. *Id.* at 189–90.

41. *Id.* at 194.

42. *See* United States v. Lopez, 514 U.S. 549, 553–54 (1995) (noting that in the century following *Gibbons*, the Court's Commerce Clause jurisprudence focused almost exclusively on state legislation discriminating against interstate commerce).

43. *Id.*

44. *See* Brickey, *supra* note 34, at 1141–42 (describing the development of federal regulatory crimes as a byproduct of the growth of interstate travel).

vessel outside of any state's jurisdiction, immigration and customs offenses, tax fraud, and smuggling."[45]

From the economic expansion of the late nineteenth century, a new American society emerged, characterized by an increasingly itinerant population.[46] The rapid migration concomitant with this growth created new problems for the states: Railroad cars transporting diseased livestock through rural areas threatened local economies,[47] and once tight-knit communities became "just the right setting for certain crimes."[48]

Because state regulatory protections failed to shield local economies from what became known as "crimes of mobility,"[49] Congress stepped in with new legislation.[50] No longer could railroads or shipping lines transport diseased livestock.[51] Moreover, Congress enacted sweeping measures, such as the Sherman Antitrust Act[52] and the Interstate Commerce Act,[53] aimed at protecting the national economy.

In the following decades, the Supreme Court endeavored to define the limits of the commerce power,[54] while Congress simultaneously faced the growing reality that criminal activity was no longer restrained within the bounds of state borders. Although state laws could adequately punish intrastate crimes, once a criminal crossed into another state "the jurisdiction where the [crime] occurred was powerless to pursue [the criminal] across state lines."[55] As the country entered the twentieth century, the demand for remedial federal legislation grew and Congress remained "fully poised to radically enlarge the scope and concept of federal criminal jurisdiction."[56]

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45. *Id.* at 1139.

46. *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 193–94 (1994) (describing how economic migration created social and psychological behavioral shifts that reshaped traditional society).

47. *See* Brickey, *supra* note 34, at 1142 (noting that "Congress forbade railroads and boat lines from accepting or transporting diseased livestock").

48. FRIEDMAN, *supra* note 46, at 194.

49. *Id.* at 193.

50. *See* Brickey, *supra* note 34, at 1142 (noting how the failure by the states to protect their interests from out-of-state threats spurred Congress to take action).

51. *Id.*

52. *See* Sherman Antitrust Act, ch. 647, 26 Stat. 209, 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2000)) (regulating monopolies and proscribing restraint of trade).

53. *See* Interstate Commerce Act, ch. 104, 24 Stat. 379, 379 (1887) (codified as amended in scattered sections of 49 U.S.C.) (regulating interstate railroad transportation).

54. *See* United States v. Lopez, 514 U.S. 549, 554 (1995) (describing how these laws "ushered in a new era of federal regulation under the commerce power").

55. Brickey, *supra* note 34, at 1143.

56. *Id.* at 1142.

Crime finally became a national political issue in the 1928 Presidential campaign,[57] and "[b]y the 1930s the federalization of American criminal law was in full swing."[58] Congress increasingly relied on the Commerce Clause to outlaw crimes such as extortion[59] and bank robbery.[60] As one commentator noted, "'[t]wentieth century criminals had wheels and wings'" and were no longer within "the power of states to effectively address."[61]

When the political climate changed decisively during the 1930s following the passage of the New Deal programs, the Court dramatically expanded Congress's Commerce Clause authority.[62] Notably, in a case decided in 1937, *NLRB v. Jones & Laughlin Steel Corp.*,[63] the Court recognized Congress's authority to regulate intrastate activities having a "close and substantial relationship to interstate commerce."[64] Despite this expansion of authority, the Court noted an outer boundary inherent in all Commerce Clause based legislation—a limitation marked by the constitutional demand that there be a "distinction between what is national and what is local."[65] Notwithstanding this limitation, from 1937 through 1995, the Court refused to invalidate any statute as exceeding Congress's limits under the Commerce Clause.[66]

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57. ABA REPORT, *supra* note 24, at 6.

58. Brickey, *supra* note 34, at 1143.

59. *See* Act of May 18, 1934, ch. 300, 48 Stat. 781, 781 (codified as amended at 18 U.S.C. § 875 (2000)) (criminalizing extortion conducted over the telephone, telegraph, or radio).

60. *See* Act of May 18, 1934, ch. 304, 48 Stat. 783, 783 (codified as amended at 18 U.S.C. § 2113 (2000)) (punishing bank robbery).

61. Brickey, *supra* note 34, at 1144 (quoting FRIEDMAN, *supra* note 46, at 226).

62. *See* United States v. Lopez, 514 U.S. 549, 556 (1995) (noting that this period "ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress").

63. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (finding that Congress's Commerce Clause authority includes the power to regulate intrastate activities having a "close and substantial relation to interstate commerce"). In *Jones & Laughlin Steel*, a steelworkers union filed a claim against a local steel mill, charging the company with discrimination against union members in hiring. *Id.* at 22. The NLRB sustained the charge and sought to enforce an order proscribing the discriminatory conduct. *Id.* In response, *Jones & Laughlin Steel* challenged the authority granted to the NLRB under the National Labor Relations Act as an intrusion upon the reserved powers of the state to regulate intrastate affairs. *Id.* at 29. Recognizing an expanded definition of commerce, the Court found that Congress can regulate intrastate activities having an impact on interstate commerce. *Id.* at 37.

64. *Id.* at 37.

65. *Id.*

66. *See* Erwin Chemerinsky, Keynote Address at the Willamette Law Review Symposium: Laboratories of Democracy: Federalism and State Law Independency (Mar. 11, 2005), *in* 41 WILLAMETTE L. REV. 827, 830 (2005) ("From 1937 until April 26, 1995 . . . not a single federal law was declared unconstitutional as exceeding the scope of Congress's commerce power.").

Throughout this history, the Court has come to recognize "three broad categories of activity that Congress may regulate under its commerce power."[67] First, Congress may regulate the use of the channels of interstate commerce.[68] Second, Congress may regulate the instrumentalities of interstate commerce,[69] including "persons or things in interstate commerce, even though the threat may come only from intrastate activities."[70] Third, Congress may regulate any activity having a substantial effect on interstate commerce.[71]

A. Channels of Interstate Commerce

The channels of interstate commerce encompass the mechanisms "through which flow the goods, commodities, and information which constitute commerce between places in different states."[72] These channels include, but are not limited to, streets, highways, airports, railroad tracks, rivers, lakes, telephone lines, and television and radio broadcast facilities.[73]

In the early 1900s, the threat of harm emanating from a migratory society prompted Congress to proscribe the use of the channels of interstate commerce for illicit purposes.[74] For example, in *Hoke v. United States*,[75] the Court

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67. United States v. Lopez, 514 U.S. 549, 558 (1995).

68. *See* United States v. Perez, 402 U.S. 146, 150 (1971) (identifying three categories of activity that Congress may regulate under the Commerce Clause).

69. *See id.* at 150 (describing Congress's authority to regulate the instrumentalities of interstate commerce).

70. *Lopez*, 514 U.S. at 558.

71. *See id.* at 558–59 (describing Congress's authority to regulate under the substantial effects test).

72. United States v. Miles, 122 F.3d 235, 245 (5th Cir. 1997) (DeMoss, J., concurring).

73. *See* Gibbs v. Babbitt, 214 F.3d 483, 490–91 (4th Cir. 2000) (identifying the channels of interstate commerce); *see also Miles*, 122 F.3d at 245 (DeMoss, J., concurring) ("The meaning of the term 'channel of interstate commerce' must refer to the navigable rivers, lakes, and canals of the United States; the interstate railroad track system; the interstate highway system; the interstate pipeline systems; interstate telephone and telegraph lines; air traffic routes; [and] television and radio broadcast frequencies . . . .").

74. *See* Maroney, *supra* note 35, at 1323 (discussing Congress's reliance on the Commerce Clause to enact morals legislation).

75. *See* Hoke v. United States, 227 U.S. 308, 323 (1913) (finding that Congress's motive in enacting a given regulation is immaterial to the consideration of whether the enactment is a valid exercise under the commerce power). In *Hoke*, two defendants, a male and a female, arranged for several women to travel via railroad from Louisiana to Texas in order to engage in prostitution. *Id.* at 317. In doing so, the couple violated the Mann Act and were later charged and convicted. *Id.* On appeal, the defendants challenged the constitutionality of the Mann Act, arguing that Congress's regulation of prostitution as an immoral act exceeds its power under the Commerce Clause. *Id.* at 319. Specifically, the pair argued that the authority to regulate

examined the constitutionality of the regulation of morality under the Mann Act.[76] In *Hoke*, two men were convicted under a law which forbade the transportation of women across state lines for illicit purposes.[77] In this case, the defendants persuaded several young women to travel from Louisiana to Texas for immoral purposes.[78] Although the petitioners argued that the Mann Act was "an attempt to interfere with the police power of the states to regulate the morals of their citizens,"[79] their claim was ultimately rejected. Rather, the Court observed that "there is a domain which the states cannot reach and over which Congress alone has power,"[80] and that "Congress may prohibit . . . transportation between the States, and by that means defeat the motive and evils" of any given activity.[81]

Twentieth century cases demonstrate that Congress's power to regulate these channels "has long been settled."[82] Relying on these early holdings, the Court has continued to uphold federal laws grounded in the use of the channels of commerce for any purpose. In reaching this outcome, the Court has observed that its role is not to judge the motive of any given regulation, just its constitutional basis.[83] Throughout the history of this line of jurisprudence, the Court has consistently made clear that "the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question."[84]

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prostitution and other immoral behavior resides exclusively within the police power of the states. *Id.* Examining Congress's authority under the Commerce Clause, the Court reasoned that Congress may regulate in certain areas where the states have no power. *Id.* at 321. In these areas, such as transportation between the states, the Court found that the commerce power is absolute and may be used in whatever manner Congress sees fit. *Id.* at 323.

76. *See* White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2000)) (proscribing the interstate transportation of women for illegal sexual purposes).

77. *Hoke*, 227 U.S. at 316.

78. *See id.* at 317 (describing the defendants' illegal conduct).

79. *Id.* at 321.

80. *Id.*

81. *Id.* at 322.

82. Caminetti v. United States, 242 U.S. 470, 491 (1917).

83. *See* United States v. Darby, 312 U.S. 100, 115 (1941) ("The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control.").

84. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256 (1964) (quoting *Caminetti*, 242 U.S. at 491).

B. *Instrumentalities of Interstate Commerce*

Like the regulation of the channels of interstate commerce, Congress's authority to regulate the instrumentalities of interstate commerce is also well settled.[85] Instrumentalities are "objects that affect interstate commerce because they are used as a means of transporting goods and people across state lines."[86] These objects include automobiles[87] and aircraft,[88] as well as "persons and things in interstate commerce."[89]

One early case illustrates the extent of Congress's authority over the instrumentalities of interstate commerce. *Southern Railway Co. v. United States*[90] examined whether Congress's authority to regulate instrumentalities encompasses the regulation of intrastate rail cars operating on interstate railroads. The Court found that Congress's authority to regulate interstate commerce properly extends to vehicles, although engaged in purely intrastate commerce, when operating on interstate channels.[91] Specifically, the Court

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85. *See, e.g.*, Shreveport Rate Cases, 234 U.S. 342, 354 (1914) (upholding federal control over intrastate rail carrier fees); S. Ry. Co. v. United States, 222 U.S. 20, 26–27 (1911) (finding that federal safety regulations of interstate rail equipment apply equally to rail cars operating intrastate).

86. United States v. Bishop, 66 F.3d 569, 588 (3d Cir. 1995).

87. *See id.* at 590 ("[W]e can only conclude that motor vehicles are instrumentalities of interstate commerce.").

88. *See* Perez v. United States, 402 U.S. 146, 150 (1971) (citing examples of instruments of commerce).

89. United States v. Lopez, 514 U.S. 549, 558 (1995).

90. *See* S. Ry. Co. v. United States, 222 U.S. 20, 26–27 (1911) (finding that Congress can regulate intrastate instrumentalities when they impact interstate commerce). In *Southern Railway*, a railroad company challenged federal safety standards applicable to all rail cars engaged in interstate commerce, regardless of whether the vehicles operated solely in intrastate commerce. *Id.* at 24. The Court found that Congress promulgated the standards to ensure the safety of railway employees engaged in interstate commerce. *Id.* at 27. Noting that railway employees simultaneously operate both interstate and intrastate equipment, and that an injury or delay caused by the latter could impact the former, the Court concluded that the federal safety regulations were within Congress's authority to regulate the instrumentalities of interstate commerce. *Id.*

91. *See id.* at 26–27 (upholding the regulation in light of the fact that "the absence of appropriate safety appliances from any part of any train is a menace not only to that train, but to others" operating interstate); *see also* Shreveport Rate Cases, 234 U.S. 342, 354 (1914) (upholding federal regulation of intrastate rail transportation charges). In the *Shreveport Rate Cases*, the Court considered whether Congress operated within its commerce power when it authorized the Interstate Commerce Commission (ICC) to regulate railroad cargo rates for intrastate traffic operating on interstate railroads. *Id.* at 345–46. There, several railroad companies demanded higher rates for rail traffic traveling from Shreveport, Louisiana to East Texas than they did for rail traffic traveling the same distance, but originating within the state of Texas. *Id.* at 346. The ICC found that the fee structure discriminated against out of state

observed that rail cars engaged in interstate commerce are interdependent with rail cars engaged in intrastate traffic, for "whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains."[92]

This case highlights the broad scope of congressional authority to regulate instrumentalities of interstate commerce, even in an intrastate context. This power extends to vehicles, for example, "whether or not they are actually traveling in interstate commerce when regulated."[93] There must be limits to this regulation, however, or Congress could "pass federal laws requiring individuals to wear seatbelts (as opposed to requiring that cars be manufactured with seatbelts) or banning motorists from making a right turn at a red light."[94] This Note further explores the outer limit of this power in Part IV.C.2.

C. Substantial Effects Test

Congress also may regulate intrastate activities having a substantial effect on interstate commerce.[95] Under this rationale, courts no longer consider whether a particular statute regulates only intrastate activity.[96] Rather, Congress's plenary power to protect the channels and instrumentalities of commerce necessarily includes the power to regulate all activities having "a close and substantial relation to interstate commerce,"[97] including purely intrastate activities.[98]

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shippers and ordered the railroads to adjust their rates. *Id.* at 347. Several rail companies challenged both Congress's and the ICC's authority to regulate intrastate rail fees. In reviewing these claims, the Court noted that "[t]he fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter." *Id.* at 351. Citing the need to preserve interstate commerce from harmful in-state discrimination, the Court found that Congress acted within its commerce power when it instructed the ICC to regulate intrastate cargo rates having an unreasonable effect on interstate commerce. *Id.* at 359–60.

92. *S. Ry. Co.*, 222 U.S. at 27.

93. United States v. Bishop, 66 F.3d 569, 589 n.32 (3d Cir. 1995).

94. *Id.* at 599 (Becker, J., concurring).

95. *See* United States v. Lopez, 514 U.S. 549, 558–59 (1995) (describing the "three broad categories of activity that Congress may regulate under its commerce power").

96. *See* Diane McGimsey, *The Commerce Clause and Federalism After* Lopez *and* Morrison*: The Case for Closing the Jurisdictional-Element Loophole*, 90 CAL. L. REV. 1675, 1690 (2002) ("As long as the regulated activity had a 'close and substantial relation to interstate commerce,' it did not matter if the statute regulated solely intrastate or local activities.").

97. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937).

98. *See id.* (noting that Congress's commerce power extends over activities which are "intrastate in character").

As this line of reasoning developed, the Court incorporated an aggregation principle that vastly broadened the commerce power.[99] For example, in *Wickard v. Filburn*,[100] the Court considered whether production quotas under the Agricultural Adjustment Act applied to farmers growing wheat for personal consumption.[101] This question required the Court to consider whether Congress could regulate discrete intrastate activity that, when "taken together with that of many others similarly situated," resulted in a substantial impact on interstate commerce.[102] Despite finding that the personal consumption of wheat by an individual farmer had at most a trivial impact on commerce, the Court surmised that the collective consumption of wheat by all farmers had a considerable effect on market prices.[103] Because the resulting impact substantially affected Congress's ability to regulate commodity prices, the Court upheld Congress's authority to legislate in this manner.[104]

The substantial effects test further expanded the breadth of the Commerce Clause to include noncommercial activity "exert[ing] a substantial economic effect on interstate commerce . . . ."[105] With the recognition that Congress can regulate purely intrastate activity through the aggregation principle, the breadth

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99. *See* McGimsey, *supra* note 96, at 1690–91 (observing how "the Court introduced an aggregation principle that greatly expanded Congress's Commerce Clause power").

100. *See* Wickard v. Filburn, 317 U.S. 111, 128–29 (1942) (applying the aggregation principle on intrastate activity having a substantial effect on interstate commerce). Acting under the authority of the Agricultural Adjustment Act of 1938, the Secretary of Agriculture established limits on the production of wheat by individual farmers. *Id.* at 115. These quotas applied to wheat harvested for sale and wheat harvested for personal consumption. *Id.* at 118. Filburn, a local Ohio farmer, harvested a small wheat crop in excess of the government's limits. *Id.* at 114–15. Faced with fines for his overproduction, Filburn challenged the statute on grounds that it violated the Commerce Clause by allowing the federal government to regulate local farming activity having only an indirect impact on interstate commerce. *Id.* at 119. Departing from the analytical framework adopted in prior Commerce Clause cases, the Court instead considered whether the farmer's activity, when aggregated with that of other similarly situated farmers, had a substantial effect on interstate commerce. *Id.* at 125. Noting the collective effect of personal crop consumption on national demand, the Court determined that Filburn's excess wheat production competed with wheat already in commerce. *Id.* at 127–28. Concluding that Filburn's personal consumption of wheat had a substantial effect on interstate commerce, the Court found that the federal regulation authorizing the quotas did not exceed Congress's power under the Commerce Clause. *Id.* at 128–29.

101. *Id.* at 113–14.

102. *Id.* at 128.

103. *See id.* at 128 ("Home-grown wheat in this sense competes with wheat in commerce.").

104. *See id.* at 129 (observing that the practice of growing wheat for personal consumption obstructed the stimulation of trade at increased prices).

105. *Id.* at 125.

of the Commerce Clause significantly expanded.[106] Although the substantial effects doctrine ushered in a period marked by great deference to federal regulation of intrastate conduct,[107] this test ultimately serves as an important limitation on the reach of federal criminal legislation.

In the decades following *Wickard*, a "wholesale expansion" of federal criminal laws began.[108] By the 1960s and 1970s, Congress enacted new federal laws addressing organized crime, drugs, violence, and "other social ills."[109] Because many of these laws focused on purely local conduct,[110] Congress justified these measures in large part under the substantial effects test.[111]

In the 1980s and 1990s, Congress used these rationales to combat violent crime, enacting popular anti-carjacking and firearms related legislation in the process.[112] As it had done for nearly sixty years, the Court granted great deference to congressional legislation passed under the Commerce Clause. From 1937 until 1995, no federal criminal law was held unconstitutional under the Commerce Clause.[113]

III. Federal Kidnapping Act

A. The "Snatch Racket"[114]

Kidnapping has long been a problem in the United States.[115] From the founding of this country until around the late 1800s, lone criminals perpetrated

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106. *See* McGimsey, *supra* note 96, at 1691 (declaring that "[t]he substantial-effects prong set a low bar").

107. *See supra* note 66 and accompanying text (discussing the Court's reticence to invalidate Commerce Clause legislation).

108. Maroney, *supra* note 35, at 1326.

109. ABA REPORT, *supra* note 24, at 7.

110. *See id.* ("[C]oncern with organized crime, drugs, street violence, and other social ills precipitated a particularly significant rise in federal legislation tending to criminalize activity involving more local conduct, conduct previously left to state regulation.").

111. *See* Maroney, *supra* note 35, at 1326 (noting how Congress reached local conduct by declaring that certain activity affected commerce).

112. *See id.* at 1328 (observing how "'public concern with violent crime'" encouraged congressional action (quoting Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 40 (1996))).

113. *Supra* note 66 and accompanying text.

114. Hugh A. Fisher & Matthew F. McGuire, *Kidnapping and the So-Called Lindbergh Law*, 12 N.Y.U. L.Q. REV. 646, 653 (1934) (referring to the crime of kidnapping).

115. *See* Robert C. Finley, *The Lindbergh Law*, 28 GEO. L.J. 908, 908 (1940) (describing kidnapping as a "frequent occurrence throughout our entire national history").

hundreds of kidnappings across the country, although very few demanded ransoms.[116] Because these crimes often took place in rural towns lacking regular communication with other communities, kidnappings received very little attention outside their immediate area.[117]

By 1874, however, the children of well-known industrialists and other prominent citizens became the target of these crimes, and highly publicized ransom-based kidnappings began entering the public consciousness.[118] By the early 1900s, kidnapping became a profitable, albeit illegal, business.[119] Despite an increase in the occurrence of this lucrative crime, many still viewed kidnappings as isolated events, perhaps because the victim rarely moved out of state.[120]

But in late 1931, the kidnapping dynamic changed. Recognizing its lucrative potential, organized crime syndicates entered the fray, creating sophisticated interstate kidnapping operations that targeted wealthy families.[121] Teams of up to twenty criminals facilitated each kidnapping, from the "snatch" to running the ransom money through complex multi-state money laundering operations.[122] The city of St. Louis became a hub for much of this activity, as criminals sought to take advantage of its central location and vast interstate escape routes.[123]

By taking advantage of the ease of interstate travel, organized crime rackets exploited the jurisdictional boundaries of local law enforcement. One commentator observed:

> The fast automobile and the great network of fine roads which followed its development were utilized by the kidnapper; the radio, speedboat, and aeroplane gave his activities the assurance of safety. Law enforcement

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116. *See* Fisher & McGuire, *supra* note 114, at 649 ("In this country there were without doubt hundreds of cases of kidnapping . . . , [but] in most instances, the motive was other than ransom . . . .").

117. *See id.* (describing how many instances of kidnapping received "little or no attention . . . outside of the particular locality or community in which it occurred").

118. *See id.* at 649–51 (describing several high profile kidnappings occurring at the turn of the century).

119. *See id.* at 651 (discussing how "rapid means of transportation . . . opened the eyes of the perpetrators of this oldest means of extorting money to its monetary possibilities").

120. *See id.* at 652 (explaining that high profile kidnappings "were isolated instances, and in very few cases, if in any, was the victim carried into other States").

121. *See* Finley, *supra* note 115, at 909 (noting how the kidnapping problem menaced "the lives and well-being of prominent and wealthy citizens and their families").

122. *See id.* at 909 (describing the inner workings of kidnapping syndicates).

123. *See id.* ("St. Louis became a favored locale for the operations of this species of big time criminal entrepreneur.").

> authorities, lacking coordination, with no uniform system of intercommunication and restricted in authority to activities in their own jurisdiction, found themselves laughed at by criminals bound by no such inhibitions or restrictions, and who did not fail to take advantage of every facility, both legal and scientific, to protect themselves and their illegal methods of livelihood. The procedure was simple—a man would be kidnapped in one State and whisked into another, and still another, his captors knowing full well that police in the jurisdiction where the crime was committed had no authority as far as the State of confinement and concealment was concerned.[124]

Spurred by the growing problem in their state, two Missouri congressmen proposed federal legislation banning the interstate transportation of kidnapped persons.[125] Committees in both the House of Representatives and the Senate considered the legislation and held hearings, but no other action was taken on the issue.[126] That is, until the Lindbergh baby went missing.

B. The Lindbergh Law

On March 1, 1932, an intruder kidnapped the twenty-month-old son of aviation hero Charles Lindbergh from his crib in the second story nursery of their Hopewell, New Jersey home, leaving a $50,000 ransom note in the infant's place.[127] The New Jersey state police immediately began searching the area.[128] Within hours, word of the kidnapping reached the nation's capital.[129] Cognizant that the federal government did not have jurisdiction over the crime, the Attorney General of the United States ordered the FBI to assist the New Jersey State Police with their investigation.[130] The search for the baby boy and

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124. Fisher & McGuire, *supra* note 114, at 653.

125. *See* Finley, *supra* note 115, at 910 (recounting the legislative efforts of Senator Patterson and Representative Cochran).

126. *See id.* (noting that the bills lay dormant in committee until the Lindbergh baby disappeared).

127. *See* FED. BUREAU OF INVESTIGATION, FAMOUS CASES: THE LINDBERGH KIDNAPPING, http://www.fbi.gov/libref/historic/famcases/lindber/lindbernew.htm (last visited Feb. 28, 2008) [hereinafter LINDBERGH KIDNAPPING] (detailing the circumstances surrounding the Lindbergh baby's kidnapping) (on file with the Washington and Lee Law Review).

128. *Id.*

129. *See* Finley, *supra* note 115, at 910 (noting that reports of the kidnapping instantly "shocked the news-conscious world").

130. LINDBERGH KIDNAPPING, *supra* note 127.

his kidnapper captured the nation's attention, as the highest levels of government directed every federal resource toward his safe return.[131]

Within days of the Lindbergh baby's disappearance, Congress turned kidnapping legislation into a national priority.[132] The two bills that sat dormant for months in committee now occupied the attention of the entire Congress.[133] Although the floors of both chambers were filled with debate on the subject, Congress refrained from taking immediate action, in part because "there was apprehension that if the death penalty prevailed [as a statutorily required punishment] it would impose such fear and trepidation upon the criminals in the Lindbergh case that they would effectually conceal themselves or make their escape."[134]

Debate continued in both houses and, despite an overwhelming outpouring of sympathy for the Lindbergh baby, many politicians vehemently opposed the legislation.[135] Proponents of the bill argued that federal action was necessary, while states' rights advocates, headed by the Chairman of the House Judiciary Committee and the Attorney General, worried that this federalization of criminal activity would usurp state laws.[136] Indeed, many in Congress openly questioned whether the proposal "constituted a valid extension of federal jurisdiction under the Commerce Clause."[137]

Ultimately, both houses passed separate versions of the bill, reaching different conclusions on capital punishment and the federal-state balance.[138] With the legislative term nearing its end and both sides wishing to enact some form of kidnapping protection, however, Members of Congress reached a compromise and the President signed the Federal Kidnapping Act into law on June 23, 1932.[139]

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131. *See id.* (observing that President Hoover directed all federal law enforcement agencies to assist the New Jersey police in their investigation).

132. *See* Finley, *supra* note 115, at 910 ("Almost overnight kidnapping legislation became a principal concern of the Congress.").

133. *Id.*

134. 75 CONG. REC. 13,282, 13,288 (1932) (statement of Rep. Montague).

135. *See* Finley, *supra* note 115, at 910 ("[T]hat troublesome old cliche, 'federal usurpation,' called forth much comment.").

136. *Id.*

137. *Id.* at 911.

138. *See id.* at 911–12 (describing the differences between the House and Senate versions of the bill).

139. *See* 75 CONG. REC. 13,282, 13,304 (1932) (statement of Rep. LaGuardia) (urging members of Congress to quickly adopt the bill without amendment). Representative LaGuardia stated:

> We are at the end of the session. We have a great number of bills in conference,

Popularly known as the "Lindbergh Law," this statute alleviated jurisdictional restrictions placed on local law enforcement authorities by extending federal jurisdiction over interstate kidnappings.[140] The statute read:

> [W]hoever shall knowingly transport or cause to be transported . . . in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away by any means whatsoever and held for ransom or reward shall, upon conviction, be punished . . . . *Provided,* [t]hat the term "interstate or foreign commerce" shall include transportation from one State, Territory, or the District of Columbia to another State, Territory, or the District of Columbia, or to a foreign country . . . .[141]

Sadly, this measure proved too late for the Lindberghs' baby boy, who on May 12 was found dead—just over four miles away from his New Jersey home.[142] Indeed, his kidnappers could not have been prosecuted under the Act, for his body apparently never moved in interstate commerce.[143]

Despite initial concerns from Congress and the Justice Department regarding states' rights, the lower federal courts embraced the constitutionality of the Act.[144] Moreover, additional amendments were added almost immediately following its passage. Within two years, Congress rendered the Act inapplicable to cases of parental kidnappings, introduced the death penalty as a punishment option, and created a rebuttable legislative presumption that a kidnapping victim had traveled in interstate or foreign commerce if not found

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> and it is going to do us no good, as I said before, to legislate for the purpose of a headline and send the bill to conference where it will be deadlocked . . . . What we want is a Federal law with teeth in it to meet the situation of interstate kidnaping. Such a bill, as it now stands, is before us, and I urge its approval—without any amendment.

Id. The spelling of "kidnaping" varied until 1994, when Congress standardized the term to "kidnapping." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 330021(2), 108 Stat. 1796, 2150.

140. *See* Act of June 22, 1932, ch. 271, 47 Stat. 326, 326 (codified as amended at 18 U.S.C.A. § 1201 (West 2000 & Supp. 2006)) (criminalizing kidnappings in which the victim travels in interstate commerce).

141. *Id.*

142. LINDBERGH KIDNAPPING, *supra* note 127.

143. 75 CONG. REC. 13,282, 13,288 (1932) (statement of Rep. Montague) ("The Lindbergh case—as far as Federal jurisdiction is concerned, the crime was in no way interstate; it was committed wholly within the State of New Jersey, and no Federal aspects whatever were presented.").

144. *See* Bailey v. United States, 74 F.2d 451, 453 (10th Cir. 1934) ("To prohibit the use of the channels of interstate commerce to facilitate the crime of kidnapping is clearly within the power of Congress.").

within a certain time.[145] Importantly, Congress also expanded the scope of the Act to include nonransom based kidnappings.[146]

In 1972, Congress restructured the text of the Act, providing alternate bases for federal jurisdiction in kidnappings occurring within the special territorial, maritime, and aircraft jurisdiction of the United States, as well as when a foreign official is kidnapped.[147] Despite enduring amendments for seventy-four years, the Act remained consistent in one key respect: Where state law retained jurisdiction over the crime, federal jurisdiction was limited to cases where the victim was transported in interstate or foreign commerce.[148] This important procedural safeguard respecting federalism was eliminated in July 2006.

C. The 2006 Amendment

Just before the summer recess in 2006, Congress passed the Adam Walsh Child Protection and Safety Act, a bill aimed at protecting children from the evils of sexual exploitation, violent crime, pornography, and online predators.[149] The bill enjoyed widespread support in the House and Senate, passing both chambers with a voice vote.[150] President Bush signed the Act into law on July 27, 2006.[151]

Included in that piece of legislation was a one sentence amendment to the Federal Kidnapping Act.[152] Although only a few words were changed, this amendment was not technical; it dramatically increased the scope of federal jurisdiction under the Act.

While the substantive elements of the Act remained the same, Congress changed the jurisdictional element of 18 U.S.C. § 1201(a)(1), from:

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145. *See* Act of May 18, 1934, ch. 301, 48 Stat. 781, 781 (codified as amended at 18 U.S.C.A. § 1201 (West 2000 & Supp. 2006)) (amending the Federal Kidnapping Act).

146. *See id.* (expanding the coverage of the law to include victims "held for ransom or reward or otherwise").

147. *See* Act for the Protection of Foreign Officials and Official Guests of the United States, Pub. L. No. 92-539, 86 Stat. 1070, 1071 (1972) (codified as amended in scattered sections of 18 U.S.C.) (extending federal jurisdiction over crimes against foreign officials).

148. 18 U.S.C. § 1201 (2000).

149. *Supra* note 15 and accompanying text.

150. Rhea Arledge, *Capital Perspective*, PROSECUTOR, Sept.–Oct. 2006, at 42, 42.

151. *See Statement by President George W. Bush upon Signing H.R. 4472*, 2006 U.S.C.C.A.N. S35–38 (detailing President Bush's remarks during the signing ceremony).

152. *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 213, 120 Stat. 587, 616–17 (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.) (expanding kidnapping jurisdiction).

> (1) the person is willfully transported in interstate or foreign commerce, regardless of whether the person was alive when transported across a State boundary *if the person was alive when the transportation began*;[153]

to:

> (1) the person is willfully transported in interstate or foreign commerce, regardless of whether the person was alive when transported across a State boundary, *or the offender travels in interstate or foreign commerce or uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense.*[154]

Thus, § 1201(a)(1) now provides two alternate means of obtaining federal jurisdiction. First, the "victim-use provision" applies if the victim is "willfully transported in interstate or foreign commerce."[155] Alternatively, the "offender-use provision" extends federal jurisdiction in cases where the offender travels in or uses the channels or instrumentalities of interstate commerce.[156] When viewed against the economic rationales supporting existing federal criminal statutes, the constitutional and federalist concerns surrounding the "offender-use provision" become clear.

IV. Examining the Impact of the 2006 Amendment

Prior to 2006, federal jurisdiction in kidnapping cases rested on whether the victim traveled across state lines. This could occur whether or not the kidnapper accompanied the victim.[157] However, the 2006 amendment makes clear that Congress is equally concerned with an offender's use of interstate commerce. Federal jurisdiction now reaches kidnappers who cross state lines. Moreover, kidnappers who remain in-state, but use a channel or instrumentality of interstate commerce in the commission of the kidnapping, are also subject to federal prosecution.[158]

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153. 18 U.S.C. § 1201(a)(1) (2000) (emphasis added).

154. 18 U.S.C.A. § 1201(a)(1) (West 2000 & Supp. 2006) (emphasis added).

155. *Id.*

156. *See id.* (encompassing kidnappings in which "the offender travels in interstate or foreign commerce").

157. *See* 18 U.S.C. § 1201(a)(1) (2000) (amended 2006) (extending federal jurisdiction only to those cases in which "the person is willfully transported in interstate or foreign commerce").

158. *See* 18 U.S.C.A § 1201(a)(1) (West 2000 & Supp. 2006) (extending federal jurisdiction to all kidnappings in which the offender uses the channels or instrumentalities of interstate commerce in committing the crime).

The significance of this change is best understood by examining the nexus between the criminal act and interstate commerce. Although the Kidnapping Act has always regulated interstate abductions, the 2006 amendment now permits federal regulation of wholly intrastate kidnappings.[159] In the intrastate context, the varying rationales supporting federal criminalization of wholly intrastate acts reveal a number of doctrinal tensions. These tensions blur the constitutionally required distinction between federal laws addressing national concerns and state laws addressing local concerns.

To begin, kidnappings can unfold as either interstate or intrastate events. Interstate kidnappings encompass those kidnappings in which the victim, the offender, or both are transported across state lines. Intrastate kidnappings, on the other hand, encompass those remaining abductions in which there is no state line crossing. This type of kidnapping generally arises when both the victim and the offender remain within the same state throughout the kidnapping. It is within this latter category that constitutional and federalism concerns are implicated.

A. Interstate Kidnappings

Congress's commerce power includes the right to regulate activities involving a state-line crossing.[160] This authority stems from Congress's ability to regulate intercourse and traffic between the states.[161] Because this power is plenary, Congress may exercise it in whatever manner it sees fit, within the bounds of the Constitution.[162]

From 1932 through 2006, the Kidnapping Act used this authority to extend federal jurisdiction over a class of kidnappings satisfying the statute's "victim-use provision"—kidnappings in which the victim traveled in interstate commerce.[163] Although Congress remained split on whether to pass the

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159. *Id.*

160. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 573 (1997) ("[T]he transportation of persons across state lines . . . has long been recognized as a form of 'commerce.'"); *see also* Fisher & McGuire, *supra* note 114, at 656 ("It is well settled that [the Commerce Clause] extends not only to the restriction of commerce, but also to the prohibition of the transportation therein of subjects and persons. . . .").

161. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189 (1824) ("Commerce, undoubtedly, is traffic, but it is something more: it is intercourse.").

162. *See* United States v. Darby, 312 U.S. 100, 115 (1941) ("The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control.").

163. 18 U.S.C. § 1201 (2000).

original 1932 Act, the debate centered on the federal usurpation of state power—not on whether Congress possessed the constitutional authority to regulate crime.[164] In particular, Congress concerned itself with organized crime rackets thwarting local authorities by moving money and offenders across state lines.[165] This debate yielded to the recognition that criminals "know the State line spells safety for them, because the power and authority of the State in which the crime is committed ends at the border of the State."[166] Consequently, Congress included the "victim-use provision" in the Act, arguably under the assumption that a victim would not cross into another state unaccompanied by a kidnapper.

The 2006 amendment added an additional jurisdictional hook, an "offender-use provision," which placed a new class of kidnappings under federal jurisdiction.[167] Under the first prong of this provision, federal prosecutors have jurisdiction over kidnappings in which an abductor crosses state lines in carrying out the crime.[168] This would seem to assuage Congress's concern, seventy-four years prior, that a kidnapper might seek to avoid capture by leaving the state.[169]

B. Intrastate Kidnappings

Although the regulation of interstate kidnappings is undoubtedly within Congress's reach, the extension of federal authority into wholly intrastate kidnappings creates a number of tensions. Under the second prong of the

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164. *See* 75 CONG. REC. 13,282, 13,283–84 (1932) (statement of Rep. Michener) (warning that "this must not become a precedent for more legislation giving the Federal Government concurrent authority with the States in enforcing police regulations and laws dealing with matters in which the States are primarily interested, and which can be properly dealt with by State action"); *see also* Finley, *supra* note 115, at 912 (noting that Attorney General Mitchell opposed the enactment of the 1932 kidnapping legislation on grounds that "the moral effect upon the states would be bad, since they would be inclined to relax enforcement activities when the 'Federals' stepped into the picture").

165. *See id.* at 13,283 (statement of Rep. Michener) (noting that "in localities like St. Louis, Mo., and East St. Louis, Ill.—where, in reality there is but one city, with a State line between—legislation of this kind will be very helpful").

166. *Id.* at 13,300 (statement of Rep. Woodruff).

167. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 213, 120 Stat. 587, 615–17 (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.).

168. *See id.* (providing jurisdiction if the "offender travels in interstate or foreign commerce . . . in committing or in furtherance of the commission of the offense").

169. *See* 75 CONG. REC. 13,282, 13,283 (1932) (statement of Rep. Michener) ("[W]here persons commit crime and flee across the State line . . . [t]he pursuing State officer is halted at the State line, and this bill attempts to remedy that condition.").

"offender-use provision," federal jurisdiction reaches cases in which both the offender and the victim remain in state, as long as the offender makes use of an instrumentality or channel of interstate commerce in furtherance of the crime.[170] No longer is federal jurisdiction dependant on a state-line crossing. As a result, only a very narrow class of kidnappings remain outside the federal government's jurisdiction—those kidnappings in which an offender does not use any channel or instrumentality of interstate commerce in the commission of the act.

The language of the 2006 amendment clearly permits the federal government to prosecute wholly intrastate kidnappings. The statute provides that "any" use of the channels or instrumentalities of commerce in furtherance of the kidnapping is sufficient to establish federal jurisdiction.[171] Under the statute's permissive language, even a *de minimis* use of interstate commerce could permit jurisdiction. A grab at state power this broad, however, must find firm footing in the Commerce Clause.

C. Congress's Authority to Regulate Wholly Intrastate Crimes

Congress's authority to regulate wholly intrastate conduct is limited to activities satisfying the substantial effects test or otherwise relating to the channels or instrumentalities of interstate commerce.[172] When regulating criminal conduct, Congress's authority is further circumscribed. The jurisprudence relating to each category of activity exposes these limitations.

1. Defining the Outer Limits of Federal Criminal Law with the Substantial Effects Doctrine

The substantial effects test "was developed . . . to define the extent of Congress' power over purely *intra*state commercial activities that nonetheless have substantial *inter*state effects."[173] Although considered the broadest

170. Adam Walsh Child Protection and Safety Act of 2006 § 213, 120 Stat. at 616–17 (providing jurisdiction if the offender "uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense").

171. *Id.*

172. *See* United States v. Ballinger, 395 F.3d 1218, 1226 (11th Cir. 2005) (reviewing Congress's authority to regulate intrastate criminal activity).

173. United States v. Robertson, 514 U.S. 669, 671 (1995) (per curiam).

category under which Congress can regulate intrastate affairs,[174] this doctrine has come under increasing scrutiny in recent years. Several cases reveal the restricted application of this doctrine in the criminal context.

In *United States v. Lopez*,[175] the Court considered whether the Gun-Free School Zones Act of 1990,[176] which banned the possession of firearms in a school zone, exceeded Congress's power to regulate intrastate activity.[177] Asserting the constitutionality of the statute under the substantial effects doctrine, the Government stressed that "the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population."[178] The Government further bolstered this argument by suggesting that "violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe."[179]

Recognizing that Congress could regulate any criminal act under this broad reasoning, the Court chose to focus on the nature of the proscribed conduct. The Gun-Free School Zones Act simply was not "an essential part of a larger regulation of economic activity" which would justify federal regulation of intrastate activity.[180] The connection between gun possession on school property and interstate commerce is too attenuated to justify federal regulation.[181] The Court observed that if it were to sustain the Government's

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174. *See Ballinger*, 395 F.3d at 1232 (characterizing the substantial effects test as the "broadest *Lopez* category").

175. *See* United States v. Lopez, 514 U.S. 549, 551 (1995) (invalidating a federal gun possession statute on grounds that it exceeded Congress's power to regulate intrastate conduct). In *Lopez*, a high school senior challenged his conviction under the Gun-Free School Zones Act for possessing a loaded handgun on school property. *Id.* The Act banned the possession of firearms on or within 1,000 feet of school property. *Id.* In reviewing the constitutionality of the Act, the Court examined Congress's authority to enact criminal legislation having a substantial effect on interstate commerce. *Id.* at 559. Writing for the majority, Chief Justice Rehnquist observed that the Act did not purport to regulate any economic activity. *Id.* at 561. Further, the Court noted that the Act did not contain a jurisdictional element that would permit a case by case examination of whether firearms possession in a school zone impacted interstate commerce. *Id.* Rejecting the argument that repetition of the proscribed conduct would substantially impact interstate commerce, the Court found that the Act exceeded Congress's power to legislate under the Commerce Clause. *Id.* at 567–68.

176. *See* Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q) (2000) (criminalizing the possession of a firearm in a school zone), *invalidated by* United States v. Lopez, 514 U.S. 549 (1995).

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

178. *Id.* at 563–64 (citing United States v. Evans, 928 F.2d 858, 862 (9th Cir. 1991)).

179. *Id.* at 564.

180. *Id.* at 561.

181. *See id.* at 563–64 (rejecting the Government's "cost of crime" reasoning, which would allow Congress to "regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce").

arguments, it would be "hard pressed to posit any activity by an individual that Congress is without power to regulate."[182]

Five years later, the Court reaffirmed this position in *United States v. Morrison*.[183] In *Morrison*, a rape victim sought to collect civil money penalties against her attackers under the Violence Against Women Act of 1994.[184] That law permitted victims of gender-motivated violence to seek compensatory and punitive damages against their attackers.[185] Finding that "[g]ender-motivated crimes of violence" are not economic activity,[186] the Court concluded that Congress exceeded its commerce power in enacting the legislation.[187] Recognizing that any criminal activity could, in the aggregate, substantially affect interstate commerce, the *Morrison* Court refused to extend the substantial effects doctrine to the regulation of "noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[188] Instead, the Court affirmed that "[t]he regulation and punishment of intrastate violence that is not *directed at* the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States."[189] Since 2000, however, the Court has been careful not to apply the *Lopez* or *Morrison* holdings too broadly.[190]

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182. *Id.* at 564.

183. *See* United States v. Morrison, 529 U.S. 598, 627 (2000) (invalidating a federal statute providing civil remedies for victims of gender-motivated violence). In *Morrison*, Christy Brzonkala, a female student at Virginia Polytechnic Institute, sued two former classmates under the Violence Against Women Act of 1994 for damages stemming from an alleged rape. *Id.* at 604. The Act provided victims of gender-motivated violence compensatory and punitive damages, as well as injunctive and declaratory relief when necessary. *Id.* at 605. Morrison, one of the alleged rapists, successfully challenged the constitutionality of the Act before the Fourth Circuit. *Id.* On review to the Supreme Court, Brzonkala asserted that the Act was a proper exercise of congressional authority regulating activities having a substantial effect on interstate commerce. *Id.* at 609. The Court determined that gender-motivated crimes of violence are not economic in nature and, thus, Congress cannot regulate them under the substantial effects test. *Id.* at 613. The Court further noted the absence of a jurisdictional element in the Act which would tie the regulated activity to interstate commerce. *Id.* As a result, the Court found the Act unconstitutional. *Id.* at 617–18.

184. *See id.* at 604 (describing the circumstances giving rise to the petitioner's claim).

185. *See id.* at 605 (examining the statutory provisions in the Violence Against Women Act).

186. *Id.* at 613.

187. *Id.* at 617.

188. *Id.*

189. *Id.* at 618 (emphasis added).

190. *See* Chemerinsky, *supra* note 66, at 831 (noting how, since *Morrison*, the Supreme Court has "narrowly interpreted federal statutes to avoid Commerce Clause issues"); *see also* Gonzales v. Raich, 545 U.S. 1, 32–33 (2005) (enforcing the Controlled Substances Act against intrastate growers and manufacturers of medicinal marijuana); Rancho Viejo, L.L.C. v. Norton,

Admittedly, the *Morrison* decision does not preclude Congress from regulating criminal conduct that is economic in nature. Carjacking, for example, is an economically motivated crime amenable to regulation under the substantial effects test.[191] Likewise, intrastate loan sharking activities involving threats of violence have been found to have a substantial effect on interstate commerce.[192]

Ransom-based kidnappings are also economic in nature. Yet, despite being the impetus behind the 1932 Act, this type of kidnapping is rare in the United States today.[193] Nevertheless, reasoning that the aggregate amount of ransom money paid to all kidnappers would otherwise be spent lawfully to stimulate interstate commerce, a court could conclude that ransom-based kidnappings, in the aggregate, exert a substantial effect on interstate commerce.[194]

Nonransom-based kidnappings, however, are violent criminal acts which are noneconomic in nature. Categorically, this type of crime is unreachable under the substantial effects doctrine.[195] Congress's only option in regulating this class of intrastate kidnapping, therefore, is under a channels and instrumentalities rationale.

2. The Conflicting Permissiveness of the Channels and Instrumentalities Rationale

The use of the channels and instrumentalities of interstate commerce is not dependant on a state-line crossing. Indeed, the channels and instrumentalities are

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323 F.3d 1062, 1074 (D.C. Cir. 2003) ("[T]he Supreme Court has long held that Congress may act under the Commerce Clause to achieve noneconomic ends through the regulation of commercial activity.").

191. *See* United States v. Bishop, 66 F.3d 569, 581 (3d Cir. 1995) ("When a criminal points a gun at a victim and takes his or her car, the criminal has made an economic gain and the victim has suffered an undeniable and substantial loss. Replicated 15,000 or 20,000 times per year, the economic effects are indeed profound.").

192. *See* Perez v. United States, 402 U.S. 146, 157 (1971) (concluding that loan sharking "in its national setting" substantially impacts interstate commerce).

193. *See* Anthony Cormier, *Experts Say Ransom Attempt a Surprising Twist in Case*, HERALD-TRIBUNE (Sarasota), Feb. 26, 2007, at A1 (quoting retired FBI agent, Dan Vogler, as saying that "[t]ypically, an abduction in the United States is done for revenge, or for something sexual. But ransoms are almost unheard of because you have to arrange to pick up the money—and that's how you get caught").

194. *See, e.g.*, *Gonzales*, 545 U.S. at 19 n.29 (2005) (stating that the question of whether Congress is seeking to regulate a lawful or unlawful market "is of no constitutional import"); Wickard v. Filburn, 317 U.S. 111, 128 (1942) ("The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon.").

195. *See* United States v. Morrison, 529 U.S. 598, 617 (2000) (rejecting the application of the substantial effects doctrine to noneconomic, nonviolent crime).

so ubiquitous that one could hardly leave home without availing oneself of them. Because federal jurisdiction now extends to all kidnappings, except those transpiring exclusively on private property, for a state to retain exclusive jurisdiction over a kidnapping, an abductor must be careful not to make use of any channel or instrumentality in carrying out the offense.[196] However, the broad language of the "offender-use provision" makes this result almost impossible.

Congress structured the 2006 jurisdictional element to extend jurisdiction where an offender uses any channel or instrumentality "of interstate" commerce.[197] The phrase "of interstate" likely reflects Congress's intent to resolve problems in interpreting the scope of a provision encompassing "any use." Older federal criminal statutes often contained ambiguous language extending federal jurisdiction in cases where an offender "uses . . . any facility in interstate or foreign commerce."[198] A number of courts split on whether the term "in interstate" modifies the word "uses" or the term "any facility."[199] Some courts adopted a narrow construction, concluding that the term "in interstate" requires a state-line crossing.[200] Other circuits, however, found the term "in interstate" to modify "any facility" and not "uses," therefore extending federal jurisdiction to all uses of the channels and instrumentalities, including purely intrastate ones.[201] To clarify their intent, Congress amended a number of criminal statutes, replacing the term "in interstate" with "of interstate."[202] As a result, it became clear that Congress intended the jurisdictional element to apply to both interstate and intrastate uses.

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196. For example, a farmer walks across his field and onto a neighbor's adjoining land, kidnaps his neighbor, and later brings her back onto his farm. At no time has the farmer/kidnapper traversed over the channels or instrumentalities of interstate commerce. Though, one might wonder about the outcome if he crossed over a wheat field.

197. 18 U.S.C.A. § 1201(a)(1) (West 2000 & Supp. 2006).

198. *See* United States v. Drury, 396 F.3d 1143, 1144 (11th Cir. 2005) (en banc) (describing the statutory language used in the jurisdictional element of the federal murder-for-hire statute).

199. *See* United States v. Drury, 344 F.3d 1089, 1098 (11th. Cir. 2003) (comparing holdings on the interpretation of the jurisdictional element).

200. *See, e.g.*, United States v. Weathers, 169 F.3d 336, 342–43 (6th Cir. 1999) (finding a sufficient state line crossing occurred because an out-of-state cell phone tower processed the signal generated by defendant's in-state cell phone call).

201. *See generally* United States v. Richeson, 338 F.3d 653 (7th Cir. 2003) (finding that the intrastate use of telephone lines is sufficient to satisfy the federal jurisdictional element); United States v. Marek, 238 F.3d 310 (5th Cir. 2001) (finding that the in-state operation of a cell phone constitutes a use of an instrumentality of interstate commerce).

202. *See, e.g.*, Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638, 3766 (amending the jurisdictional element of the federal murder-for-hire statute, 18 U.S.C. § 1958, to read "facility of" rather than "facility in" interstate or foreign commerce).

In constructing the "offender-use provision" of the Kidnapping Act, Congress chose statutory language with the broadest possible reach. By choosing the term "of interstate" commerce, Congress demonstrated its intent to apply the jurisdictional element to both interstate and intrastate uses.[203] On its face, this is not unconstitutional. Indeed, allowing federal jurisdiction based solely on an offender's use of the channels or instrumentalities is not a new concept.[204] But it is important to examine the manner in which Congress chooses to regulate a particular course of conduct, because the nature of the interstate nexus required under a statute's jurisdictional element often limits that statute's reach.

3. The Limiting Power of a Jurisdictional Element

Whether Congress chooses to regulate conduct under a channels, instrumentalities, or substantial effects rationale, it must include a jurisdictional element.[205] This element serves to limit Congress's reach to only those activities having a sufficient nexus with interstate commerce, thus avoiding potential federalism problems.[206] However, "[t]he mere presence of a jurisdictional element . . . does not in and of itself insulate a statute from

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203. *See Drury*, 396 F.3d at 1144 (noting that federal jurisdiction exists "whenever any 'facility of interstate commerce' is used . . . , regardless of whether the use is *inter* state in nature . . . or purely *intra* state in nature"); *accord Marek*, 238 F.3d at 320 ("[I]t becomes clear that the *facility*, not its use, is what must be 'in interstate or foreign commerce.'").

204. *See, e.g.*, Overstreet v. N. Shore Corp., 318 U.S. 125, 130 (1943) (reasoning that a drawbridge located wholly intrastate on a privately owned toll road is an instrumentality of interstate commerce because it "afford[s] passage to an extensive movement of goods and persons between Florida and other states"); The Daniel Ball, 77 U.S. (10 Wall.) 557, 565 (1870) (finding that a steam ship operating entirely within the state of Michigan is nonetheless engaged in interstate commerce); Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1059 (D.C. Cir. 1997) (Henderson, J., concurring) (stating that a traffic intersection "has an obvious connection with interstate commerce"); United States v. Bishop, 66 F.3d 569, 589, n.32 (3d Cir. 1995) ("[T]he power to regulate instrumentalities of interstate commerce is the power to regulate vehicles used in interstate commerce, i.e. that have traveled, do travel, or will travel in interstate commerce whether or not they are actually traveling in interstate commerce when regulated."); United States v. Hume, 453 F.2d 339, 340 (5th Cir. 1971) (per curiam) (finding that protections offered under a federal aviation statute are not limited to aircraft operating in interstate commerce); United States v. Kammersell, 7 F. Supp. 2d 1196, 1197, 1202 (D. Utah 1998) (finding that an email sent from Riverdale, Utah to Ogden, Utah traveled in interstate commerce because the message passed through an Internet server located in Virginia).

205. *See* United States v. Lopez, 514 U.S. 549, 562 (1995) (noting that a jurisdictional element limits a statute's reach to activity affecting interstate commerce).

206. *Id.*

judicial scrutiny under the Commerce Clause, or render it *per se* constitutional."[207]

In *Lopez*, the Court noted the absence of a jurisdictional element "which might limit [the statute's] reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce."[208] In passing a revised version of the statute in 1996, Congress added a twelve-word jurisdictional element which cured the constitutional defect: "It shall be unlawful for any individual knowingly to possess a firearm *that has moved in or that otherwise affects interstate or foreign commerce* at a place that the individual knows, or has reasonable cause to believe, is a school zone."[209] This change "serves to make the statute an exercise of Congress's power to regulate things in interstate commerce and also of Congress's power to regulate the channels of interstate commerce," in addition to being a regulation under the substantial effects test.[210]

Likewise, the Violence Against Women Act challenged in *Morrison* also lacked an express jurisdictional element.[211] Without this element, the Court found that Congress "elected to cast [the Act's] remedy over a wider, and more purely intrastate, body of violent crime."[212] Without a clear statement assuring "that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision,"[213] courts will not assume that Congress intends to alter the federal-state balance.[214] Instead, the Court requires clear language from Congress indicating its intent to regulate intrastate activity by including a statutory jurisdictional element.[215]

The jurisdictional element of the Kidnapping Act reaches kidnappings having a nexus with the channels or instrumentalities of interstate commerce. In addition, this jurisdictional element encompasses all kidnappings involving a state-line crossing. However, unlike the jurisdictional element in the amended

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207. United States v. Bishop, 66 F.3d 569, 585 (3d Cir. 1995).

208. *Lopez*, 514 U.S. at 562.

209. 18 U.S.C. § 922(q)(2)(A) (2000) (emphasis added).

210. *See* 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, 930 (1997) (stating that the amended Gun-Free School Zones Act "will not have to pass the substantial effects test in order to be within the commerce power").

211. *See* United States v. Morrison, 529 U.S. 598, 613 (noting the absence of a jurisdictional element in the statute).

212. *Id.*

213. United States v. Bass, 404 U.S. 336, 349 (1971).

214. *Id.*

215. *See id.* ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.").

Gun-Free School Zones Act, the Kidnapping Act's jurisdictional element does not permit regulation under the substantial effects test.

D. The Challenge of Regulating Intrastate Kidnapping Under Conflicting Doctrines

With this background, it becomes clear that Congress has endeavored to reach wholly intrastate, nonransom based kidnappings. The problem, however, is that Congress cannot regulate kidnapping this broadly without contravening the first principles of Commerce Clause jurisprudence. The federalist protections embedded in the Constitution and a key policy concern underpinning the original 1932 Kidnapping Act have been pushed aside under the 2006 amendment.

1. First Principles of Commerce Clause Jurisprudence

The Commerce Clause "presupposes something not enumerated," namely, that a particular class of commerce resides exclusively with the States.[216] As the *Gibbons* Court noted, federal regulation should not address concerns "which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government."[217]

Wholly intrastate kidnapping, like many noncommercial crimes, is one of these concerns. An entire kidnapping, from abduction to release, can unfold within the geographical boundaries of a single state. This type of criminal conduct, however, does not impact other states.[218] Nor does intrastate kidnapping interfere with the general powers of the federal government. Outside of a limited federal enclave, Congress possesses no general police power permitting the criminalization of felonies otherwise punishable under state law.[219] The general police power resides exclusively with the states.[220]

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216. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824).

217. *Id.*

218. *See* United States v. Lopez, 514 U.S. 549, 563 (1995) (rejecting the Government's suggestion that violent crime impacts the national economy).

219. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 426 (1821) ("Congress has a right to punish murder in a fort, or other place within its exclusive jurisdiction; but no general right to punish murder committed within any of the States.").

220. *See* United States v. Morrison, 529 U.S. 598, 618 (2000) ("[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.").

Indeed, an essential constitutional protection ensures that all powers not granted to the federal government, nor prohibited to the states, shall be reserved for the states.[221]

It has long been recognized that Congress may regulate commercial activity to achieve noneconomic ends.[222] Likewise, Congress may also regulate noneconomic activity to achieve commercial ends.[223] But does it follow that Congress may regulate a noneconomic activity to further noneconomic goals? Specifically, can Congress criminalize certain types of kidnapping in the name of intrastate crime control? This is not an easy question to answer, as "thus far in our Nation's history" the Court has "upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."[224]

The *Lopez* Court invalidated the Gun-Free School Zones Act on two principle grounds: the regulation "[had] nothing to do with 'commerce' or any sort of economic enterprise," and the statute was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[225] Admittedly, the Court analyzed this statute under the substantial effects doctrine.[226] However, this doctrine represents the "broadest expression of Congress's commerce power."[227]

Because Congress's authority is at its maximum when regulating under the substantial effects test, in essence, this doctrine marks the outer boundary of the

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221. *See* U.S. CONST. amend. X (reserving to the states or to the people all powers not specifically granted to the federal government).

222. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 257 (1964) ("That Congress was legislating against moral wrongs . . . rendered its enactments no less valid."); Champion v. Ames, 188 U.S. 321, 355–57 (1903) (prohibiting the interstate shipment of lottery tickets "for the protection of the public morals"); Rancho Viejo, L.L.C. v. Norton, 323 F.3d 1062, 1074 (D.C. Cir. 2003) ("[T]he Supreme Court has long held that Congress may act under the Commerce Clause to achieve noneconomic ends through the regulation of commercial activity.").

223. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 125 (1942) (recognizing Congress's authority to regulate conduct, "though it may not be regarded as commerce," when such conduct has a substantial effect on interstate commerce).

224. *Morrison*, 529 U.S. at 613.

225. United States v. Lopez, 514 U.S. 549, 561 (1995).

226. *See id.* (stating that the Gun-Free School Zones Act cannot "be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.").

227. United States v. Ballinger, 395 F.3d 1218, 1226 (11th Cir. 2005) (en banc); *see also* Circuit City Stores v. Adams, 532 U.S. 105, 115 (2001) ("The phrase 'affecting commerce' indicates Congress' intent to regulate to the outer limits of its authority under the Commerce Clause.").

commerce power.[228] When a statute is found unconstitutional under this test, it follows that Congress has regulated too expansively over a particular area. As the substantial effects doctrine reaches activity not otherwise sustainable under the other two doctrines, no Commerce Clause legislation should exceed its boundary. It follows, therefore, that every regulation sustainable under the channels or instrumentality doctrine should also satisfy this test. If the regulation of a particular activity is not sustainable under the broadest commerce rationale, then that conduct cannot be regulated under the more restrictive channels or instrumentalities rationales.

This reasoning does not require that Congress's purpose for regulating under a channels or instrumentalities rationale support its sustainability under the substantial effects doctrine. Indeed, Congress's authority to enact a given regulation does not waver in the face of underlying policy goals.[229] The substantial effects check placed on regulations arising under the channels or instrumentalities doctrine serves only to affirm Congress's authority to regulate a particular course of conduct and not affirm its purpose.

Moreover, regulation under the channels or instrumentalities prongs presupposes a sufficient nexus with interstate commerce. For this reason, courts are generally hesitant to question federal regulations enacted under a channels or instrumentalities rationale.[230] It is important to note that the rationales underpinning a statute's jurisdictional element only reflect congressional presumptions of cause and effect.[231] The mere presence of a jurisdictional element in a statute, therefore, does not prove that the regulation contains a sufficient nexus with interstate commerce.[232] Rather, there must be an underlying constitutional justification.

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228. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (noting that Congress's commerce power "may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government").

229. *See* United States v. Darby, 312 U.S. 100, 113 (1941) (explaining that any regulation of commerce is well within Congress's power, regardless of a statute's motive or purpose).

230. *See* Caminetti v. United States, 242 U.S. 470, 491 (1917) ("[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.").

231. *See* Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring) ("[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.").

232. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 273 (1964) (Black, J., concurring) ("[W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question . . . .").

In *Morrison*, the Court recognized that "[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States."[233] Accordingly, the Constitution limits Congress's regulation of intrastate violence to conduct *directed at* the channels or instrumentalities of interstate commerce.[234] For example, when violent criminal conduct is directed at automobiles, such as during a carjacking, then "Congress may criminalize activities affecting their use even though the wrongful conduct . . . occurs wholly intrastate."[235]

The Kidnapping Act's jurisdictional element must be read in this light. By the statute's own language, an offender triggers federal jurisdiction when he "uses . . . any" of the channels or instrumentalities in committing the offense.[236] To be sure, "any use" encompasses every conceivable connection with interstate commerce, from criminal conduct having a direct and substantial effect on commerce to activities with only the most remote and tenuous ties to commerce. Under *Morrison*, however, "any use" is insufficient to justify federal regulation of intrastate crime. Rather, the kidnapper must direct his conduct at the channels or instrumentalities. Conceivably, 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.

The constitutional infirmity in the Kidnapping Act stems from its sweeping jurisdictional language. Under the permissive wording of the statute, federal authorities may prosecute any kidnapping tangentially connected to interstate commerce. This intrusion into each state's traditional police power presses the issue of federalism into focus.

2. Federalism Under the Federal Kidnapping Act

The delineation of power between the federal government and the states grounds the U.S. Constitution in federalist principles. Unmistakably, federalism was a chief concern during the floor debate in the House when Congress took up the original 1932 Act:

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233. United States v. Morrison, 529 U.S. 598, 618 (2000).

234. *Id.*

235. United States v. Bishop, 66 F.3d 569, 590 (3d Cir. 1995).

236. 18 U.S.C.A. § 1201(a)(1) (West 2000 & Supp. 2006).

> Congress should be very careful about enacting additional criminal statutes punishing for crime, when the same result can be obtained through State legislation. Whenever you remove responsibility from the local community to Washington, to that extent you lessen the interest of the local community in the enforcement of the law. Let the States make their own laws wherever possible, and then those same States being responsible for the laws will enforce them. Where we have State statutes and Federal statues dealing with the same subject matter, there is too often the sentiment in the community that Uncle Sam has assumed the responsibility and should carry the burden.[237]

This sentiment echoed five years later in *Jones & Laughlin Steel*, where the Court declared that the "distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system."[238]

This distinction is indispensable in the criminal context as well, where the police power has traditionally resided with the states.[239] Nonetheless, the Kidnapping Act's jurisdictional element has the potential to destroy this distinction. By extending its reach to intrastate kidnappings through its "offender-use provision," the Act leaves virtually no instance of kidnapping to the sole jurisdiction of the States. While interstate kidnappings epitomize national crimes, and intrastate kidnappings typify local concerns, today there is no distinction.

Ironically, throughout the Kidnapping Act's history, Congress deliberately chose not to regulate so extensively. In a 1972 amendment to the Act, Congress specifically acknowledged the core federalism concerns underlying the 1932 debate: "The Congress recognizes that from the beginning of our history as a nation, the police power to investigate, prosecute, and punish common crimes such as murder, kidnapping, and assault has resided in the several States, and that such power should remain with the States."[240]

Other than the plain language of the 2006 amendment, there is no suggestion that Congress intended to tip the balance so far away from federalism. There is no legislative history explaining the amendment. Nor is

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237. 75 CONG. REC. 13,282, 13,283 (1932) (statement of Rep. Michener); *accord* FTC v. Ticor Title Ins. Co., 504 U.S. 621, 636 (1992) ("Federalism serves to assign political responsibility, not to obscure it.").

238. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937).

239. *See* United States v. Morrison, 529 U.S. 598, 619 n.8 ("[T]he principle that 'the Constitution created a Federal Government of limited powers,' while reserving a generalized police power to the States, is deeply ingrained in our constitutional history." (quoting New York v. United States, 505 U.S. 144, 155 (1992))).

240. Act of Oct. 24, 1972, Pub. L. No. 92-539, § 2, 86 Stat. 1070, 1070 (current version at 18 U.S.C. § 1201 (2000)).

there any evidence suggesting an upward trend in kidnappings which could explain Congress's motive:

U.S. District Courts—Disposition of Defendants Charged with Kidnapping

Year	Total # of Defendants	Dismissals	Acquittals	Guilty Pleas	Judge/Jury Convictions
2006[241]	69	10	1	35	23
2005[242]	80	18	1	48	13
2004[243]	97	25	7	45	20
2003[244]	128	21	5	86	16
2002[245]	116	15	1	85	15
2001[246]	146	30	1	102	13

In fact, the number of persons charged under the Kidnapping Act has dropped by almost half over the past five years. If federal courts are not seeing the problem, it is questionable whether one really exists.

The resulting merger of all kidnappings into one national category is troublesome.[247] As one scholar observed, "Federalism depends on limiting the

241. ADMIN. OFFICE OF THE U.S. COURTS, UNITED STATES DISTRICT COURTS TABLE D-4: CRIMINAL DEFENDANTS DISPOSED OF, BY TYPE OF DISPOSITION AND MAJOR OFFENSE (EXCLUDING TRANSFERS), DURING THE 12-MONTH PERIOD ENDING MARCH 31, 2006, *available at* http://www.uscourts.gov/caseload2006/tables/D04Mar06.pdf (last visited Mar. 1, 2008).

242. ADMIN. OFFICE OF THE U.S. COURTS, UNITED STATES DISTRICT COURTS TABLE D-4: CRIMINAL DEFENDANTS DISPOSED OF, BY TYPE OF DISPOSITION AND MAJOR OFFENSE (EXCLUDING TRANSFERS), DURING THE 12-MONTH PERIOD ENDING MARCH 31, 2005, *available at* http://www.uscourts.gov/caseload2005/tables/D04Mar05.pdf (last visited Mar. 1, 2008).

243. ADMIN. OFFICE OF THE U.S. COURTS, UNITED STATES DISTRICT COURTS TABLE D-4: CRIMINAL DEFENDANTS DISPOSED OF, BY TYPE OF DISPOSITION AND MAJOR OFFENSE (EXCLUDING TRANSFERS), DURING THE 12-MONTH PERIOD ENDING MARCH 31, 2004, *available at* http://www.uscourts.gov/caseload2004/tables/D04Mar04.pdf (last visited Mar. 1, 2008).

244. ADMIN. OFFICE OF THE U.S. COURTS, UNITED STATES DISTRICT COURTS TABLE D-4: CRIMINAL DEFENDANTS DISPOSED OF, BY TYPE OF DISPOSITION AND MAJOR OFFENSE (EXCLUDING TRANSFERS), DURING THE 12-MONTH PERIOD ENDING MARCH 31, 2003, *available at* http://www.uscourts.gov/caseload2003/tables/D04Mar03.pdf (last visited Mar. 1, 2008).

245. ADMIN. OFFICE OF THE U.S. COURTS, UNITED STATES DISTRICT COURTS TABLE D-4: CRIMINAL DEFENDANTS DISPOSED OF, BY TYPE OF DISPOSITION AND MAJOR OFFENSE (EXCLUDING TRANSFERS), DURING THE 12-MONTH PERIOD ENDING MARCH 31, 2002, *available at* http://www.uscourts.gov/caseload2002/tables/D04Mar02.pdf (last visited Mar. 1, 2008).

246. ADMIN. OFFICE OF THE U.S. COURTS, UNITED STATES DISTRICT COURTS TABLE D-4: CRIMINAL DEFENDANTS DISPOSED OF, BY TYPE OF DISPOSITION AND MAJOR OFFENSE (EXCLUDING TRANSFERS), DURING THE 12-MONTH PERIOD ENDING MARCH 31, 2001, *available at* http://www.uscourts.gov/caseload2001/tables/D04Mar01.pdf (last visited Mar. 1, 2008).

247. *See* United States v. Lopez, 514 U.S. 549, 577 (1995) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do

use of the commerce power to when there is a true connection to interstate commerce."[248] Absent this true connection, federalism suffers. If Congress wishes to encroach into the area of local law enforcement, it must do so only when necessary and proper to the exercise of its Article I, Section 8 powers.

E. The Offender-Use Provision Is Neither Necessary nor Proper

> The exercise by Congress of power ancillary to an enumerated source of national authority is constitutionally valid, so long as the ancillary power neither conflicts with external limitations—such as those of the Bill of Rights and of federalism—nor renders Congress's powers limitless.[249]

The inherent limitations of the Commerce Clause restrict Congress's ability to regulate intrastate crime. Although, conceivably, every illegal activity has a tangential nexus with interstate commerce, the substantial effects test demarcates a line beyond which Congress cannot reach.[250] It stands to reason that if an activity is beyond the scope of Congress's reach under the substantial effects test, then it is beyond Congress's reach under the channels and instrumentalities prong.

Congress may not regulate noneconomic, violent crime under the substantial effects test. Kidnapping is a violent crime, not an economic activity. To the extent that kidnappers do generate revenue from ransom collections, the receipt of these payments may only have a marginal impact on interstate commerce. Because Congress may not use "a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities"[251] under the substantial effects test, its application in the intrastate kidnapping context may fail under constitutional scrutiny. Accordingly, Congress's attempt to regulate wholly intrastate kidnapping must also fail.

Congress may, however, seek a constitutional alternative to justify its broad reach into the police power of the states. Under the Necessary and

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with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.").

248. McGimsey, *supra* note 96, at 1706.

249. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 798–99 (3d. ed., 2000).

250. *See Lopez*, 514 U.S. at 567 (refusing to "pile inference upon inference in a manner that would . . . convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States").

251. *Id.* at 558.

Proper Clause,[252] Congress may "enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation."[253] When coupled with the Commerce Clause, this provision allows Congress to regulate intrastate activities "that do not themselves substantially affect interstate commerce."[254]

Justice Scalia detailed this approach in his concurring opinion in *Gonzales v. Raich*.[255] Recounting the details of *United States v. Darby*,[256] Justice Scalia described how these constitutional provisions combine to effectively regulate intrastate conduct not otherwise substantially affecting interstate commerce.[257] In *Darby*, the Court considered whether Congress could promulgate rules

252. *See* U.S. CONST. art 1, § 8, cl.18 (including in Congress's enumerated powers the authority to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof").

253. Gonzales v. Raich, 545 U.S. 1, 39 (2005) (Scalia, J., concurring).

254. *Id.* at 35 (Scalia, J., concurring).

255. *See* Gonzales v. Raich, 545 U.S. 1, 32–33 (2005) (upholding the Controlled Substances Act's ban on the intrastate, noncommercial cultivation and possession of marijuana). In *Raich*, two women suffering from various medical conditions cultivated and smoked marijuana in order to relieve chronic pain. *Id.* at 6–7. California's Compassionate Use Act permitted this use under a medical marijuana exception to the state's drug laws. *Id.* Despite this law, the Drug Enforcement Agency arrested both women and charged them with drug possession under the federal Controlled Substances Act. *Id.* at 7. Because California's state law permitted this conduct in contravention of the federal statute, the respondents brought suit challenging the application of federal law in this intrastate context. *Id.* Specifically, the respondents argued that the enforcement of the federal law against intrastate marijuana use and possession violated the Commerce Clause. *Id.* at 15. Reasoning that marijuana is a fungible commodity with an established interstate market, the Court found that local cultivation and consumption of marijuana invariably impacts the drug's national demand. *Id.* at 19. In light of this finding, the Court concluded that Congress could regulate local use under the substantial effects doctrine. *Id.*

256. *See* United States v. Darby, 312 U.S. 100, 123 (1941) (upholding a statute regulating the safety of employees engaged in the manufacture of goods destined for interstate commerce). In *Darby*, the respondent operated a Georgia lumber mill in violation of the Fair Labor Standards Act. *Id.* at 111. The Act prohibited the shipment of lumber in interstate commerce manufactured under substandard labor conditions. *Id.* at 112. Challenging his conviction under the Act, the respondent argued that the law impermissibly regulated intrastate manufacturing under the guise of interstate commerce. *Id.* at 111–12. The Court determined that, although manufacturing alone is not interstate commerce, the shipment of manufactured goods is interstate commercial activity. *Id.* at 113. The Court further explained that any regulation of commerce is well within Congress's power, regardless of a statute's motive or purpose. *Id.* at 115. In reaching this conclusion, the Court overruled a prior decision holding that Congress can only regulate articles in commerce which are inherently dangerous. *Id.* at 116.

257. *See Gonzales*, 545 U.S. at 37–38 (Scalia, J., concurring) (noting that, although "the Necessary and Proper Clause does not give 'Congress . . . the authority to regulate the internal commerce of a State,' . . . it does allow Congress 'to take all measures necessary or appropriate to' the effective regulation of the interstate market" (quoting The Shreveport Rate Cases, 234 U.S. 342, 353 (1914))).

combating substandard labor conditions commonly found in the manufacturing sector.[258] Through the Fair Labor Standards Act,[259] Congress had adopted a policy of "excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards."[260] Congress sought to enforce this policy by requiring local manufacturers to maintain employment records demonstrating compliance with the Act.[261]

Although the policy of excluding goods from interstate commerce emanated from Congress's commerce power, the paperwork requirement placed on local business owners did not enjoy a sufficient nexus with interstate commerce.[262] Instead, the Court looked to the Necessary and Proper Clause and concluded that "[t]he requirement for records even of the intrastate transaction is an appropriate means to the legitimate end."[263] While the Commerce Clause sustained the legitimate end of excluding goods from interstate commerce, the Necessary and Proper Clause sustained the local recordkeeping requirement.[264]

The Necessary and Proper Clause, however, is not without its limitations. As Professor Laurence Tribe has noted, the "power to do what is necessary and proper . . . for 'carrying into execution' another, more specific power is not, and must not be confused with, a power to do whatever might bear some possible relationship to one of the more specific powers."[265] This distinction is evident in the kidnapping context, where Congress's attempt to regulate intrastate kidnappings through the regulation of interstate instrumentalities, while related to the commerce power, is simply too attenuated to find justification under the Necessary and Proper Clause. Importantly, the Tenth Amendment[266] limits Congress's application of the Necessary and Proper Clause to only those powers

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258. *See* United States v. Darby, 312 U.S. 100, 109–10 (1941) (noting that one of the purposes of the Fair Labor Standards Act is "to prevent the use of interstate commerce . . . as the means of spreading . . . substandard labor conditions").

259. *See generally* Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219 (2000)) (regulating wage and hour conditions of factory workers).

260. *Darby*, 312 U.S. at 121.

261. *See id.* at 125 (describing the Fair Labor Standard Act's enforcement mechanism).

262. *See id.* at 122–23 (distinguishing the factual predicate underlying the regulation under the Necessary and Proper Clause).

263. *Id.* at 125.

264. *Id.*

265. TRIBE, *supra* note 249, at 801.

266. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

affirmatively established in the Constitution.[267] The regulation of intrastate crime is simply not an enumerated power and, thus, an attempt to control such activity through the Commerce Clause is neither necessary nor proper under the Constitution.[268]

V. Conclusion

Although Congress enjoys plenary authority to regulate interstate commerce, when regulating wholly intrastate criminal activity, the Constitution requires something more than a tenuous connection with interstate commerce. Yet, the amended Kidnapping Act ignores this constitutional prerequisite. Its jurisdictional element finds a nexus in even the faintest brush with interstate commerce.

Audrey Seiler's kidnapper drove no further on local streets than a commuter does on her daily commute. He spent less time on the Internet than a child would emailing a friend. He spoke no longer on his cell phone than is necessary to make a dinner reservation. Yet each of these acts fulfills the jurisdictional requirement under the amended statute. Its pervasive language allows federal jurisdiction over virtually all intrastate kidnappings.

The consequence of regulating intrastate crime in this manner threatens the federalist balance maintained between the states and the federal government. The statute's language reaches activity so local in character that Congress could use it to criminalize practically any intrastate act. Therefore, federal jurisdiction over noneconomic, violent criminal conduct not directed at the channels or instrumentalities of commerce should only arise when it is necessary and proper to protect interstate commerce. Yet the regulation of intrastate crime is fundamentally a state concern—a concern that Congress cannot justify as necessary or proper without blurring "the distinction between what is truly national and what is truly local."[269]

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267. *See* TRIBE, *supra* note 249, at 802 (arguing that, to find otherwise, would be akin to creating a "blank blueprint . . . in the hands of Congress").

268. *See id.* ("[O]ne cannot be satisfied with a doctrine that tells Congress to take seriously the constitutional boundaries that surround and define its powers—but then adds that, of course, Congress should feel perfectly free to regulate anything that has some possible relationship to money.").

269. United States v. Morrison, 529 U.S. 598, 617–18 (2000).