

**Whose Jurisdiction is it Anyway: How the Hobbs Act Allows the  
Federal Government to Over-Criminalize Citizens from Marginalized Communities**

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**Abstract**

There is a direct and substantial correlation between Congress' Commerce Power, the Hobbs Act, and the Federal Government's ability to prosecute crimes that substantially impact interstate commerce. This comment seeks to explore this correlation and expose the unconstitutionality of the Hobbs Act in its current state. Part I provides a brief introduction of how the Hobbs Act over criminalizes marginalized communities. Part II reviews the historical context of The Hobbs Act, the scope of Congress's Commerce Power and, how the Hobbs Act has been applied today. Part III analyzes data and demographic statistics of robbery and extortion crimes, and Part IV concludes this comment.

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## I. Introduction

For many years, the Hobbs Act has allowed the Federal Government to extend its jurisdictional hand across states lines in order to prosecute private states citizens for certain offenses that impact interstate commerce. Crimes such as extortion, robbery or attempted robbery, are all offenses where the Hobbs Act jurisdictional component applied if they were committed in a way that aggravates component that substantially effects interstate commerce. These components can include marijuana, livestock, or housing. Additionally, if a citizen is convicted of a robbery or extortion under the Hobbs Act, he may be subject to harsher sentencing guidelines and over-criminalization that is not necessarily consistent with the offense committed because a Hobbs Act offense carries a twenty-year sentence, and the United States Sentencing Commission sets further punishments for those who use a firearm in connection with a crime of violence to an additional 20 years.<sup>1</sup>

Offenses such as murder, burglary, arson, and theft, are all traditionally violations of state law,<sup>2</sup> and are historically committed by citizens from marginalized communities. Communities that are marginalized include individuals who have traditionally been excluded from participation in communities as well as those who still experience significant hurdles to civic engagement. Those who are marginalized due to racial, economic, immigrant, or sexual orientation issues are also included.

By allowing states to prosecute certain crimes, the Constitution provides a blanket of protection over the doctrine of dual sovereignty.<sup>3</sup> The State government has a separate and

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<sup>1</sup> 18 U.S.C.A § 924(c)(3)(A).

<sup>2</sup> Ave Mince-Didier, State Crimes vs. Federal Crimes [www.criminaldefenselawyer.com](http://www.criminaldefenselawyer.com) (2022), <https://www.criminaldefenselawyer.com/resources/state-crimes-vs-federal-crimes.htm> (last visited Nov 21, 2022).

<sup>3</sup> According to the dual sovereignty doctrine, when an offense influences two jurisdictions, distinct sovereignties, such as separate states, are permitted to pursue the same case in criminal court.

apparent interest in prosecuting a defendant in order to uphold the laws of that state and to impose its own sentencing guidelines when crimes are committed within the state.

However, this comment suggests that businesses, corporations, or gangs, who engage in organized or high collar criminal activity, such as racketeering or extortion, should still be subject to the jurisdiction of the Hobbs Act due to the fact that they have committed the specific crimes that the Hobbs Act seeks to deter. In many circumstances extortion, racketeering and, organized crimes usually occur from members of these entities that come may come from economically privileged communities. These entities may also have access to priceless resources including, competent legal counsel, a more concrete legal consciousness. Racketeering crimes committed by these entities tend to exceed a monetary value that impact commerce and outweighs a state's interest in prosecuting an entity that should be evaluated by the federal court's and given more regulation under the Hobbs Act opposed to petty crimes by private citizens.

## **II. Historical Context**

In order for one to understand why the Hobbs Act can be seen as a jurisdictional overreach, we must first review the history of Congress' Commerce Power in addition to the Supreme Court's interpretation of the Commerce Power throughout history. We must also review the historical context of why Hobbs Act was enacted and how the Federal Court's began to apply the Hobbs Act with the Commerce Power after its passage. Reviewing these issues will allow one to understand how although an activity has been declared as a component of interstate commerce, certain offenses are now subject to an unintentional regulation by Congress due to the lack of specific language in within the statute.

**a. The History and Scope of Congress' Commerce Power**

According to Article I, Section 8 of the United States Constitution, Congress has the power or authority to make or establish laws that are necessary and proper the executing of certain powers.<sup>4</sup> The Framers articulated these powers specifically granted to Congress under the Necessary and Proper Clause, more commonly known as the enumerated powers. Within these powers is Congress' Commerce power and the Taxing and Spending Power. The Commerce Power can be defined as the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.<sup>5</sup>

In American history there have been four major eras of interpretation of the Commerce Power by the Supreme Court. Within these eras of interpretation there were two main inquiries at the heart of any litigation stemming from the Commerce Power. The first question was whether or not Congress could act and if Congress did have the power to act, the second inquiry was whether or not the 10<sup>th</sup> Amendment serves as limitation of the action. The 10<sup>th</sup> Amendment specifically states, 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.<sup>6</sup>

Generally, Congress can act only when the Constitution specifically allows the action and states can act at any time unless the constitution forbids the action.

In the first era of interpretation, stemming from early American history throughout the early 1890s, the Supreme Court heard the earliest case encompassing an issue with the Commerce Power. In *Gibbons v. Ogden*.<sup>7</sup> the Supreme Court heard a case wherein Gibbons, the defendant, was sued by Ogden, the plaintiff, for violating a monopoly that was given to him. The Supreme

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<sup>4</sup> U.S. Constitution, Art. I §8, cl. 3.

<sup>5</sup> *Id.*

<sup>6</sup> USCS Const. Amend. 10.

<sup>7</sup> *Gibbons v Ogden*, 22 U.S. 1(1824).

Court ruled that under the Commerce Clause, Congress had the power to regulate any aspect of commerce that crossed state lines, including modes of transportation. The court also found that the 10<sup>th</sup> Amendment was not a limitation to this power and that the regulation preempted conflicting regulation by the states.<sup>8</sup> Although the Supreme Court gave Congress' Commerce Power a broad interpretation, this period did not require much regulation, so the Commerce Power was rarely used.

The second era of interpretation, lasting from 1890 to 1937, was more commonly known as Lochner era, was named after a period of heightened judicial scrutiny.<sup>9</sup> During this era, the Supreme Court broadly interpreted due process rights in order to strike down economic regulations of working conditions, wages or hours, in favor of laissez-faire economic policy.<sup>10</sup> The case that inspired the name of this era was *Lochner v. New York*. In *Lochner* the court declared a New York law that prohibited working more than 60 hours per week and 10 hours per day in a bakery unconstitutional because it infringed on the contracting rights of the employer and employee. The Lochner period came to an end after President Roosevelt vowed to “load” the Supreme Court with fresh appointees because he was tired of the court striking down New Deal measures.<sup>11</sup> During this era, the Commerce Clause was narrowly defined by the court and the 10<sup>th</sup> Amendment was used as a limitation.

The court applied their interpretation in cases landmark cases from this era including the case of *Hammer v. Dagenhart*.<sup>12</sup> In *Hammer*, The Keating-Owen Child Labor Act made it illegal to ship products made with child labor over state lines. Roland Dagenhart, Reuben's father, had

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<sup>8</sup> Alex McBride, *Gibbons v. Ogden (1824)*, 2005.

<sup>9</sup> Thomas Vance, *Section I(A): The Commerce Clause*, (2022).

<sup>10</sup> *Lochner era* (no date) *Legal Information Institute*. Legal Information Institute. Available at: [https://www.law.cornell.edu/wex/lochner\\_era](https://www.law.cornell.edu/wex/lochner_era) (Accessed: November 13, 2022).

<sup>11</sup> *Id.*

<sup>12</sup> See *Id.* at Section I(B).

filed a lawsuit to protect his right to allow his son, then fourteen.<sup>13</sup> The court at this time limited Congress' authority and held that a prohibition on the interstate transportation of goods produced by child labor was outside of the scope of the Commerce Clause. The court reasoned that such a prohibition could be classified as a limit on commercial intercourse between parts of nations because it limited what could enter one state and exit another.<sup>14</sup> Instead of making a decision under Marshall's definition of commerce, the Court focused on the effects of the prohibition. The Court reasoned that because the prohibition would subject intrastate production to Federal control, the prohibition was unconstitutional.<sup>15</sup> During this era, the court's began to heavily rely on the concept of dual federalism.<sup>16</sup> The Supreme Court began to apply three general rules during this time period. First, the meaning of commerce was defined as leaving the zone of power to the states.<sup>17</sup> Second, among the states was defined as allowing Congress to regulate only when there was a substantial effect on interstate commerce.<sup>18</sup> And third, the court held that the 10<sup>th</sup> Amendment reserved a zone of activities to the states and federal laws within the scope of their Commerce Power were unconstitutional if they invaded that zone.<sup>19</sup>

Within this same era of interpretation, the court also heard the case of *United States v. Darby*<sup>20</sup> where the court unanimously overruled *Hammer* and showed how much the court's change their approach as history changes. In *Darby*, The Fair Labor Standards Act, which Congress passed, regulated a number of areas of employment, including minimum wages, weekly

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<sup>13</sup> *Hammer v. Dagenhart*, Oyez, <https://www.oyez.org/cases/1900-1940/247us251> (last visited Nov 06, 2022).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> The view that the Federal and State Governments were separate sovereigns, that each had separate zones of authority, and that it was the judicial role to protect the states by interpreting and enforcing the Constitution to protect the zone of activities reserved to the states.

<sup>17</sup> Erwin Chemerinsky, *Constitutional Law*, 161, (Rachel Barkow, Richard Epstein, Ronald Gilson, James Krier, Tracey Meares, Richard Nuemann Jr., Robert Sitkoff, David Slansky, eds, 6<sup>th</sup> ed (2020).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *United States v. Darby*, 312 U.S. 100 (1940).

work limits, and child labor.<sup>21</sup> Darby, a maker of timber, was detained for breaking the Fair Labor Standards Act when he exported lumber out of the country.<sup>22</sup> The federal district court dropped his charges after determining that Fair Labor Standards Act was unconstitutional.<sup>23</sup> The district court justified their decision holding that the possible impact of the Fair Labor Standards Act on intrastate activity violates the Commerce Clause.<sup>24</sup> At issue in *Darby* was whether or not the Fair Labor Standards Act was a legitimate exercise of Congress' Commerce Power. On appeal, the Supreme Court used a substantial effect test and upheld that the Fair Labor Standards Act which set national minimum wage and maximum hour laws by putting a prohibition on the interstate shipment of goods made in violation of Federal law.

The third era of interpretation of the commerce clause was from approximately 1937-1990. Within this era the Supreme Court defined the Commerce Power as extending to those activities intrastate, so which effect intrastate commerce<sup>25</sup> and refused to apply the 10<sup>th</sup> Amendment as a limitation. Following the Great Depression era, the definition of commerce expanded as landmark cases such as *Wickard v. Filburn*<sup>26</sup> came before the court. In the case of *Wickard*, after a farmer grew wheat in excess of a designated allotment the Supreme Court upheld a Congressional attempt to regulate the prices on wheat growth. After *Wickard*, the commerce clause ushered in an era that created agencies, commission's, and boards to oversee United States commercial life.<sup>27</sup> Writing for the majority opinion of the court, Chief Justice Jackson articulated that the "...the Commerce Power is not confined to regulation of commerce among the states...

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<sup>21</sup> United States v. Darby, Oyez, <https://www.oyez.org/cases/1940-1955/312us100>.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Wickard v. Filburn*, 317 U.S. 111, 124, (1942).

<sup>26</sup> *Wickard v. Filburn*, 317 U.S. 111, (1942).

<sup>27</sup> Larry Downes, Harvard Business Review: *The Commerce Clause Wakes Up* (2005).

the power may be exercised to the utmost extent and acknowledges that no limitations other than are prescribed in the Constitution.<sup>28</sup>

The fourth era of interpretation of Congress' Commerce Power began in 1990 and is still applicable to Commerce Power cases today. After the New Deal and the passing of Civil Rights legislation, members of the Supreme Court were anxious to change the scope of this Congressional power.<sup>29</sup> During this era the court heard another landmark case of *United States v. Lopez*<sup>30</sup> and again narrowed the scope of the Commerce Power and revived the 10<sup>th</sup> Amendment as an independent, judicially enforceable limit on federal actions. *Lopez* was a case where the Supreme Court ruled on the constitutionality of the Gun-Free School Zone Act; the court held that the act was beyond the scope of the Commerce Power and the court laid out three categories of interstate commerce regulation. First, Congress has the authority to regulate channels of interstate commerce.<sup>31</sup> Channels of interstate commerce can be defined as be highways, bridges, and railroad tracks. Second, Congress has the authority to regulate instrumentalities, persons or things on interstate commerce.<sup>32</sup> Instrumentalities can be defined as buses, trucks, airplanes, boats, and goods. Third, Congress has the authority to regulate intrastate activities that substantially effect interstate commerce. The third component might be of the utmost importance due to the fact that determinations made using this component, do not require an obvious connection. Under this element, the court has provided that when determining whether an activity has a substantial effect on commerce, the first inquiry to be made is if the activity is economic or noneconomic. Non-economic activities are not usually subject to regulation of Congress, without

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<sup>28</sup> *Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>29</sup> Thomas Vance, *Section I(D): Lopez the Commerce Clause*, (2022).

<sup>30</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

a jurisdictional element conferred by Congress or Congressional findings that justify the regulation. However, economic activities require the court to conduct a separate analysis of whether the activity is economic in nature or a part of a larger regulation. The court in *Lopez* also articulated an attenuation requirement and ruled that the link between school zones and interstate commerce was too attenuated to be seen as a legitimate exercise of Congress' Commerce Power.

As we have matriculated through American history, the Supreme Court has been known to sway its interpretations of law based on certain factors such as, the belief of the justices on the bench or the political climate of the country at the time. The Supreme Court's interpretation of the Commerce Clause, during this era, gives the Hobbs Act just the right amount of leniency needed to convey the proper jurisdiction required upon Federal agents to prosecute crimes traditionally left to the jurisdiction of state courts.

Today's interpretation of the Commerce Power in *Lopez* mirrors to language of the Hobbs Act and is the type of ambiguity the gives Hobbs Act such a wide jurisdictional reach. The court's interpretation allows Congress to develop legislation that regulates activities solely based on a substantial effect argument. Although, the test of this element under *Lopez* can also be seen as providing a more stable way to determine when an activity substantially effects interstate commerce. Congress actively uses *Lopez* as a host to keep the Hobbs Act alive without having to impose a monetary value on the activity to prove an actual effect on commerce. This is primarily due to an objective inquiry, under the Commerce Power, of whether or not Congress would have concluded the activity is substantial effecting which, in many instances, will more likely favor the Federal Government over the states.

**b. The Hobbs Act**

Originally, Congress enacted the Anti-Racketeering Act<sup>33</sup> as a way to deter and penalize extortion and racketeering and to protect trade and commerce from interference by, threats, violence, coercion and activities of organized crimes.<sup>34</sup> In addition to prohibiting robbery and extortion, the Anti-Racketeering Act contained a wage clause.<sup>35</sup> Under the wage clause, racketeering was known as the use of force to coerce the payment of funds by an employee from an employer.<sup>36</sup> The wage clause was an attempt to keep legitimate wage demands by labor unions that weren't accompanied by violent coercion out of the reach of the criminal laws, but the Court went further than Congress intended. The Anti-Racketeering Act remained unchanged until 1946 when Congress passed the Hobbs Act as an amendment. Like many other pieces of Congressional Legislation, the Hobbs Act began as a direct response from Congress after the Supreme Court's opinion in the case of *United States v. Local 807 of Int'l Bhd. of Teamsters*.<sup>37</sup> In *Local 807*, members of a New York City truck drivers' union were being prosecuted for violating the Anti-Racketeering Act by using threats of violence in order to obtain payments from a trucking company in return for that companies trucks to be granted permission to enter the city.<sup>38</sup> The Anti-racketeering Act prohibited:

Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce:

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<sup>33</sup> 18 U.S.C § 420(a) (1946); reenacted without consequential change, 18 U.S.C § 1951 (Supp. 1952).

<sup>34</sup> 31 Am. JUR. 2d *Extortion, Blackmail, Threats* § 18 (1967).

<sup>35</sup> 131 Cong. Rec. 774. (Statements by Mr. Grassey).

<sup>36</sup> *Id.*

<sup>37</sup> *United States v. Local 807 of Int'l Bhd. of Teamsters, etc.*, 315 U.S. 521 (1942) (establishes the Supreme Court's opinion that led to the Hobbs Act amendment).

<sup>38</sup> Barry L. Johnson, Hobbs Anti-Racketeering Act (1946).

(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bonafide employer to a bonafide employee, or

(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right ...<sup>39</sup>

In *Local 807*, the Supreme Court held that the union activities were not illegal under the Anti-Racketeering Act because the act exempted wage payments to employees from coverage by that law.<sup>40</sup> In issuing this opinion, the court established a legal gap within the Anti-Racketeering Act. Members of Congress filed various proposals to close that loophole soon after the *Teamsters Local 807* ruling.<sup>41</sup> One of the bills introduced by Representative Samuel F. Hobbs was enacted in 1946. According to one Congressman, the Hobbs bill was "made necessary by the amazing decision of the Supreme Court."<sup>42</sup>

The Hobbs Acts' main function was to place behavior that was exempt within the union into the reach of Federal prosecutors. Now, under the Hobbs Acts it is a Federal crime to commit, attempt to commit, or conspire, to commit a robbery or extortion with a component of interstate commerce. The language of the Hobbs Act also provides federal court's with competent jurisdiction to hear cases or proceedings where either a robbery or extortion has taken place within one of the three categories of regulation under Congress' Commerce Power.<sup>43</sup>

Focusing on §1951(a) and §1951(b)(1), the Hobbs act lays out specific punishment for crimes that interfere with interstate commerce by use of threats or violence by specifically stating:

... whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion

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<sup>39</sup> Pub. L. No. 376, 48 Stat. 979.

<sup>40</sup> Barry L. Johnson, Hobbs Anti-Racketeering Act (1946).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> 18 U.S.C.A § 1951.

or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.<sup>44</sup>

**c. Modern Day Hobbs**

In modern society, there has been a frequent argument that the conviction of a Hobbs Act offense for robberies traditionally prosecuted at the state level, is an overextension of the federal court's jurisdiction because it allows a resident of a state who committed petty thief to be prosecuted in federal court with a possible sentence of up to 20 years.<sup>45</sup> Recently, the United States Supreme Court ruled on the case of *United States v Taylor*. At issue in *Taylor* was whether or not attempted Hobbs Act robbery qualify as a “crime of violence” under 18 U. S. C. § 924(c)(3)(A).<sup>46</sup> This code specifically states:

(3) For purposes of this subsection the term “crime of violence” means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another ...<sup>47</sup>

The court's answer to this question is of grave significance because a person convicted of attempted Hobbs Act robbery alone normally faces up to 20 years in prison. But if that offense qualifies as a “crime of violence” under § 924(c)(3)(A), the same individual may face a second felony conviction and years or decades of further imprisonment.<sup>48</sup>

In *Taylor*, the plaintiff and a co-conspirator attempted to rob a local drug dealer that ended up being shot during the transaction.<sup>49</sup> Subsequently, the government charged Taylor on seven

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<sup>44</sup> *Id.*

<sup>45</sup> Garrett Epps *Writ of Fido*: The Supreme Court looks at how robbing a drug dealer can trip the Hobbs Act Commerce Provision and bring a petty thief a lot of Federal trouble.

<sup>46</sup> *United States v. Taylor*, 142 S. Ct. 2015 (2022).

<sup>47</sup> 18 U.S.C.S. § 924 (LexisNexis, Lexis Advance through Public Law 117-214, approved October 19, 2022)

<sup>48</sup> *Id.*

<sup>49</sup> *United States v. Taylor*, Oyez, <https://www.oyez.org/cases/2021/20-1459> (last visited Nov 15, 2022).

different counts including conspiracy, committing a Hobbs Act Robbery, and use of a firearm in furtherance of a crime of violence.<sup>50</sup> In addition the indictment alleged two predicate crimes:<sup>51</sup> (1) conspiracy to commit a Hobbs Act Robbery, and (2) attempted Hobbs Act Robbery. Ultimately, Taylor pled guilty to conspiracy to commit a Hobbs Act Robbery and the use of firearm in furtherance of a crime violence and in return, the Government agreed to drop the remaining charges.<sup>52</sup> Taylor ended up being convicted of the conspiracy charge and using a firearm in furtherance of a crime of violence.<sup>53</sup> He then filed a writ of habeus corpus<sup>54</sup> asking the court to vacate and remand his conviction.

The United States Court of Appeals for the Fourth Circuit vacated the conviction on the grounds that the elements of a Hobbs Act robbery do not require the attempted use or threatened use of physical violence the offense does not qualify as a crime of violence.<sup>55</sup> Justice Gorsuch, writing the majority opinion, stated that in order to convict a defendant of attempted Hobbs Act robbery, the prosecution must prove that the defendant intended to complete the offense and that the defendant completed a “substantial step” toward that end. Neither element requires proof that the defendant used, attempted to use, or threatened to use force (even though, in many cases, force is present).<sup>56</sup> Justice Gorsuch also stated that the legislation itself must require that a crime of violence be found in order to charge the suspect with a Hobbs Act robbery. Prior to *Taylor*, the Federal Court's had the power or authority to make their own decision about when a Hobbs Act

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<sup>50</sup> *Id.*

<sup>51</sup> A predicate crime is an offense which is component of another crime.

<sup>52</sup> *Id.*

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

<sup>54</sup> Fundamental right in the United States Constitution that protects against unlawful and indefinite imprisonment. This allows a detainee to appear before a court and make inquiries about his or her detention.

<sup>55</sup> *Id.*

<sup>56</sup> *United States v. Taylor, Oyez*, <https://www.oyez.org/cases/2021/20-1459> (last visited Nov 15, 2022).

robbery constitutes a rise to a crime of violence. Although many people may think that robbery is facially violent in nature, the courts have articulated a different standard.

Looking through a historical lens, it might make sense as to why the Anti-Racketeering Act was originally passed and how it might seem like a sound solution do deter unionized criminals from effecting interstate commerce. However, society has shifted into an era where racketeering is no longer a common crime and the federal courts have begun to interpret the Hobbs Act to be applicable to smaller crimes as long as an interstate commerce component could be attached. It is the very act of not providing specific language, when amending the Anti-Racketeering Act, that allows a petty robbery to become a federal offense and contributes to the Federal Government infringement on dual federalism.

#### **d. Contradicting Opinions**

The following cases of *United States v. Lopez*, *United States v. Morrison*, and *Gonzales v. Raich*, all serve as a demonstration on how the Supreme Court Justices interpretation of the Commerce Power have been contradictory in its application and how this confusion among the court may lead to a jurisdictional encroachment by the Federal Government.

##### **a. *United States v. Lopez***

In *Lopez*, the defendant was a high school student who brought a concealed weapon to his high school in San Antonio, Texas.<sup>57</sup> The Gun Free School Zones Act, established by Congress prior to Lopez's choice to carry the gun to school, made it illegal for anyone to knowingly possess a handgun in a place that the individual knows, or has reasonable cause to believe is a school zone under federal law.<sup>58</sup> He was subsequently accused of possessing a firearm on school property in

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<sup>57</sup> *United States v. Lopez*, Oyez, <https://www.oyez.org/cases/1994/93-1260> (last visited Nov 17, 2022).

<sup>58</sup> *United States v. Lopez*, 514 U.S. 549 (1995): Case brief summary - quimbee, <https://www.quimbee.com/cases/united-states-v-lopez> (last visited Nov 20, 2022).

accordance with Texas law.<sup>59</sup> The Federal Government argued that Congress had the authority to establish the Gun Free School Zone Act under its Commerce Power. To add to their argument, the government contended that the law was related to interstate commerce someone bringing a gun to school could lead to violence and in return might deter others from traveling into areas where the violence occurred.<sup>60</sup>

In hearing this case, the Supreme Court was tasked with evaluating whether or not Congress may establish law that forbade the ownership of a firearm in a school zone using its Commerce Power. Ultimately the court decided that Congress did not have the authority to establish the Gun Free School Zone Act. Justice Rehnquist, delivering the opinion of the court, stated that The Commerce Clause grants Congress considerable legislative power, but this power does not permit Congress to regulate the carrying of handguns, especially when doing so has no discernible impact on the nation's commerce. The channels of interstate commerce, the instrumentalities of, or people or objects in, interstate commerce, and acts that significantly effect or significantly relate to interstate commerce are the only three broad categories of activities that Congress may regulate.<sup>61</sup> Focusing on the third category, activities that substantially effect interstate commerce. The court stated that the mere possession of firearms (as opposed to their purchase or sale) within a school zone has no discernible impact on commerce, positive or negative.<sup>62</sup>

As in any other case, the court relied heavily on their own interpretations of how an activity may substantially affect interstate commerce. There is a relevant argument to be made

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<sup>59</sup> *United States v. Lopez*, Oyez, <https://www.oyez.org/cases/1994/93-1260> (last visited Nov 17, 2022).

<sup>60</sup> *United States v. Lopez* (1995), Bill of Rights Institute, <https://billofrightsinstitute.org/e-lessons/united-states-v-lopez-1995> (last visited Nov 20, 2022).

<sup>61</sup> *United States v. Lopez*, 514 U.S. 549 (1995): Case brief summary - quimbee, <https://www.quimbee.com/cases/united-states-v-lopez> (last visited Nov 06, 2022).

<sup>62</sup> *Id.*

that the court did not find that the guns in school zones impact interstate commerce because the court was not willing to make the necessary inferences required in the objective test in the analysis of determining whether an activity is economic. If the objective test would have been applied, it is likely the congress would have concluded that having firearm in a school zone is economic in nature and substantially effects interstate commerce which was the basis of the passage of the Gun Free School Zone Act.

Justice Breyer authored a dissenting opinion supporting this argument highlighting three important key points that further the argument that the Supreme Court's interpretation of the Commerce Clause and ambiguous language in the Hobbs Act leads to an overreach of power by the federal government. First, the authority of Congress to control interstate commerce includes the authority to control local activities as far as they have a significant impact on interstate commerce.<sup>63</sup> Second, when deciding whether a conduct impacts interstate commerce, the Court must take into account not only the impact of one specific incident but the overall impact of all comparable occurrences.<sup>64</sup> And Third, according to the Constitution, the judge must assess Congress's conclusion that a regulation relates to its mandate to advance and safeguard interstate commerce with the utmost deference.<sup>65</sup>

**b. *United States v. Morrison***

According to the *United States v. Morrison* ruling by the Supreme Court, Congress lacked the authority to adopt Section 13981 of the Violence Against Women Act under the Commerce Clause or the 14th Amendment of the United States Constitution. In *Morrison*, a federal civil remedy for victims of gender-based abuse was included in the 1994 Violence Against Women

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<sup>63</sup> *United States v. Lopez*, 514 U.S. 549, 115 (1995) (Breyer, J., dissenting).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

Act, even if the victims did not file a criminal complaint.<sup>66</sup> Antonio Morrison, the defendant was accused of assaulting and raping Virginia Tech University student Christy Brzonkala that same year.<sup>67</sup> As a result, Morrison was temporarily expelled from school, but a grand jury in the state was unable to convict him due to a lack of evidence.<sup>68</sup>

At issue in *Morrison* was whether or not given that it is not an economic activity, Congress lacked the ability to prohibit violence against women under the Commerce Clause.

The court ruled that the criminal, non-economic nature of the conduct was a crucial factor in *Lopez*.<sup>69</sup> A non-economic activity is gender-based violence. There is no evidence from legislative history or other research that gender-based violence has an impact on interstate trade. Any connection between the two is diminished.<sup>70</sup> However, Justice Breyer issued a dissenting opinion that is consistent with the dissenting opinion in *Lopez*. Justice Breyer states:

The majority's opinion is flawed in that it does nothing to help create a workable standard for Commerce Clause jurisprudence. Firstly, the distinction between economic and non-economic activity is very difficult to define. The majority does nothing to clarify this distinction. Secondly, the majority disregards principles of federalism in overruling Congress's determination, supported by legislative history, that violence against women has a substantial impact on interstate commerce. Finally, the majority's holding fails to set a standard for determining the constitutional limits of Congress's regulatory activity.<sup>71</sup>

### c. *Gonzales v. Raich*

*Gonzales v. Raich*<sup>72</sup> is another example wherein the Federal Court's used either Congressional legislation or case law precedent in order to reach the conclusion that an item

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<sup>66</sup> *United States v. Morrison*, Oyez, <https://www.oyez.org/cases/1999/99-5> (last visited Nov 06, 2022).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740 (2000).

<sup>70</sup> *Id.*

<sup>71</sup> *United States v. Morrison*, 529 U.S. 598, 120 (2000) (Breyer, J., dissenting).

<sup>72</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005).

(marijuana), traditionally regulated by states, was subject to the regulation under the Commerce Power. This is a result of the test developed in *Lopez*, that allows the regulation of activities that substantial economic effect interstate commerce.<sup>73</sup> In *Gonzales* respondents who were suffering from medical condition sought the use of medical marijuana pursuant to the Compassionate Use Act, a law in California that allowed residents with certain medical conditions to use medical marijuana with approval from a licensed physician.<sup>74</sup> At the same time, Congress passed the Comprehensive Drug Prevention Act<sup>75</sup> and the Controlled Substance Act which prevented the purchase and possession of illegal drug in the United States.<sup>76</sup> Subsequently, county officials conducted an investigation that concluded the use of one of the respondents uses was lawful.<sup>77</sup> However the Federal agents still seized and destroyed her marijuana plants.<sup>78</sup> After Raich sued the Attorney General at the time seeking injunctive and declaratory relief, the Court of Appeals ruled that the C.S.A. was an invalid exercise of Congress' Commerce Power and Gonzales appealed to the Supreme Court of the United States.<sup>79</sup>

In this case the Supreme Court was tasked with deciding whether or not the Controlled Substance Act exceeded Congress' power under the commerce clause as applied to the claim that marijuana has a substantial effect has on interstate commerce.<sup>80</sup> The court held that the commerce clause did give Congress the authority to regulate marijuana as a component of interstate commerce.<sup>81</sup> Justice Stevens wrote for the majority stating that the court's precedent had established that the Commerce Power gave Congress the authority to regulate activities that

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<sup>73</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>74</sup> Compassionate Use Act Cal. Health & Safety Code § 11362.5.

<sup>75</sup> Comprehensive Drug Abuse Prevention and Control Act, 21 USCS §§ 801 (1970).

<sup>76</sup> Controlled Substance Act, 12 U.S.C.S § 812 (1970).

<sup>77</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Gonzales v. Raich*, Oyez, <https://www.oyez.org/cases/2004/03-1454> (last visited Oct 14, 2022).

substantial effect interstate commerce.<sup>82</sup> The majority opinion also stated that Congress does have the authority to ban marijuana because there was an existing market for marijuana at the time.<sup>83</sup> In addition, the court struck down plaintiff's argument that this case was similar to *Lopez* and *United States v. Morrison*,<sup>84</sup> due to those cases not containing components of interstate commerce.

This comment disagrees with the majority opinion of the court and sides with the dissenting opinion of Justice O'Connor who was joined by the Chief Justice at the time along with Justice Thomas who agrees but dissents to Part III. In order to truly appreciate the dissenting opinion in its applicability to the argument that the substantial effect factor in *Lopez* allows for Congressional overreach, we must review each part of the part of Justice O'Connor's three points of discussion.

O'Connor begins the dissent by articulating that the court has traditionally enforced Congress' Commerce Clause to protect state sovereignty from Federal encroachment and to maintain the distribution of power within the government.<sup>85</sup> She then furthers her argument by mentioning one of federalism's chief virtues is that it promotes innovation by the states, if it chooses, to act as a playground for social and economic experiments without worry of governmental infringement.<sup>86</sup> The dissent also mentions that the states' core police powers have always included authority to define criminal law and protect the health, safety, and welfare of

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<sup>82</sup> *Id.*

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

<sup>84</sup> *United States v. Morrison*, 529 U.S. 598 (2000) (Supreme Court case that decided the constitutionality of an act that regulated violence against women; the act was not constitutional because it was not an economic activity).

<sup>85</sup> *Gonzales v. Raich*, 545 U.S. 1, (2005) (O'Connor, S., dissenting) (quoting *United States v. Lopez*, 514 U.S. 549 (1995)); (*NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37, 81 L. Ed 893, 57 S. Ct 615(1937)).

<sup>86</sup> *Gonzales v. Raich*, 545 U.S. 1, (2005) (O'Connor, S., dissenting) (quoting *New States Ice Co v. Liebmann*, 285 U.S. 262, 311, 76, L. Ed. 747, 52 S. Ct. 371(1932) (Brandeis, J., dissenting)).

their citizens.<sup>87</sup> In addition, California, like other states, has already come to its own decision about the decision of whether marijuana should be available to relieve and as a result, then court hearing this issue, without any proof that marijuana has a substantial effect on interstate commerce.<sup>88</sup>

The court's previous holdings in *Lopez* and *Morrison* lay out standards in which there are alleged activities that have substantial effect on interstate commerce.<sup>89</sup> In these cases the court turned to four considerations as to why the alleged activities were not components on interstate commerce. First, the court recognized that in substantial effects cases the court traditionally upholds Federal regulation of that activity. However, neither activity alleged in *Lopez* or *Morrison* had anything to do with commerce or any sort of economic enterprise.<sup>90</sup> Second, the court noted that the alleged statutes contained no express jurisdictional requirements<sup>91</sup> establishing its connection to interstate commerce. Third, although not required, there was no legislative findings<sup>92</sup> about the activities impact on interstate commerce. Finally, the Governments argument in these cases are rejected because the conduct could not be seen to have an adverse effect<sup>93</sup> on the economy.

Emphasizing the third consideration articulated in *Lopez* and *Morrison*, O'Connor mentions that the decision rendered by the court in *Gonzales*, allows Congress to regulate intrastate activity without check, as long as there is some implication, that the conduct is essential

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<sup>87</sup> *Gonzales v. Raich*, 545 U.S. 1, (2005) (O'Connor, S., dissenting) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993); (*Whalen v. Roe*, 429 U.S. 589, 603, n. 30, 51 L. Ed. 2d 64, 97 S. Ct. 869)).

<sup>88</sup> *Gonzales v. Raich*, 545 U.S. 1, (2005) (O'Connor, S., dissenting).

<sup>89</sup> *Id.*

<sup>90</sup> *United States v. Lopez*, 514 U.S., at 561.

<sup>91</sup> The court also noted that the conduct alleged is 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. *United States v. Lopez*, 514 U.S. 549

<sup>92</sup> *Gonzales v. Raich*, 545 U.S. 1, (2005) (O'Connor, S., dissenting).

<sup>93</sup> *Id.*

or necessary to the regulation of interstate commerce.<sup>94</sup> In this case, the marijuana was never bought or sold, crossed state lines and had no demonstrable effect on the national marijuana market. In this case Congress failed to demonstrate how the regulation of medical marijuana would substantially affect interstate commerce, thus the conduct of Congress is a violation of the 10<sup>th</sup> Amendment.<sup>95</sup>

In *Lopez*, The Supreme Court's set forth factors as to what Congress may regulate pursuant to the Commerce Clause. The substantial effect factor laid out in *Lopez* is dangerously ambiguous and allows the Federal Government to regulate nearly anything if they can even remotely attach it to interstate commerce. In *Lopez and Morrison* both arguments made by the government in support of the federal regulation were rejected due to the lack of linkage from the alleged conduct to a substantial effect on interstate commerce. In *Gonzales*, Justice O'Connor articulated how the government's argument should have been rejected on the same basis of *Lopez* and *Morrison*. This contention is primarily based on the fact that the only argument that could be made for satisfying the substantial effect factor, is the fact that there is already an established marijuana market, which does not give automatic rise to regulation under the Commerce Power. Although *Lopez* is the Supreme Court's controlling case when determining what Congress can regulate pursuant to its Commerce Power, it has led to many jurisdictional issues as mentioned in O'Connor's dissenting opinion in *Gonzales*.

Now that we have brief historical foundation of the Commerce Power, the Scope of the Commerce Power and the Hobbs, we must now analyze data and statistics to better understand how the Hobbs Act has led to the prosecution of marginalized communities in federal court for

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

offenses not intended to be subject to the jurisdiction of Hobbs due to lack of educational and legal resources.

### **III. Data and Statistics**

Robbery and non-violent crimes that fall under the umbrella of extortion are currently subject to the jurisdiction of the Hobbs Act. As a result, marginalized communities have taken a bigger hit in regard to overcriminalization under the Hobbs Act even though high collar crimes, which are types of crimes Congress was seeking to regulate, are of higher monetary value. These statistics alone shall serve as an illustration of how the Hobbs Act is being used as a mechanism to prosecute crimes that were not intended by the legislative purpose of the act.

#### **a. Robbery**

As mentioned before, a vast majority of robberies that occur on the state level are committed by citizens from either low income or marginalized communities more than members of any other demographic community. Essentially, a robbery is illegal crime, and is subject to punishment to which this comment does not contest. However, this comment does side with the argument that not all robberies should be prosecuted at the federal level.

There are several issues with allowing a robbery to be prosecuted in federal court. Most of the robberies on a state or local level are committed by citizens from low-income communities, and the Hobbs Act gives the court's free reign to prosecute robberies by citizens of lower socioeconomic classes for robberies that are not substantially impactful in nature. Whether the crime is committed for resources or for leisure, there is a lack of intent due to a legal consciousness, a lack of access adequate representation, if the defendant cannot obtain his own counsel for federal matters, and a lack monetary significance stemming from the crime. Under the language in the Hobbs Act, and robbery is defined as:

... the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.<sup>96</sup>

In 2019, the United States saw an influx of violent crimes including robberies. According to data provided by the FBI's Uniform Crime Reporting program, African Americans made up 13% of the US population.<sup>97</sup> Similarly, Hispanics made up 18% of the US population.<sup>98</sup> In regard to robberies, African Americans made up approximately 50% of those who were taken into custody for robbery, aggravated assault, and other attacks.<sup>99</sup> Some of the more serious crimes also included higher levels of robbery, and aggravated assault were among the of serious non-fatal violent crimes for which African Americans made up 36% of the arrestees.<sup>100</sup> Additionally, 22% of arrest made for robberies were Hispanic, which leaves the remaining 44% of arrest for violent crimes to Caucasians.<sup>101</sup>

In reviewing these statistics, nearly 50% of the arrest made for violent crimes including robbery consisted of African Americans and Hispanics. This means that out of the arrest made in 2019, around half were subject to the Hobbs Act if a prosecutor or investigator could find an impact on interstate commerce. Although Caucasians made up an additional 44% themselves, with African Americans only carrying 13% of the population, there is an argument that can be

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<sup>96</sup> 18 U.S.C § 1951.

<sup>97</sup> Federal Bureau of Investigation Crime Data Explorer, <https://crime-data-explorer.app.cloud.gov/pages/home> (last visited Nov 21, 2022).

<sup>98</sup> *Id.*

<sup>99</sup> Matt Clarke, U.S. DOJ Statistics on Race and Ethnicity of Violent Crime Perpetrators, Prison Legal News, <https://www.prisonlegalnews.org/news/2021/jun/1/us-doj-statistics-race-and-ethnicity-violent-crime-perpetrators/> (last visited Nov 1, 2022).

<sup>100</sup> Federal Bureau of Investigation Crime Data Explorer, <https://crime-data-explorer.app.cloud.gov/pages/home> (last visited Nov 21, 2022).

<sup>101</sup> *Id.*

made that African Americans and Hispanics are being arrested for robbery at a higher rate than other races. This can cause overcriminalization because these defendants who come from these communities do not typically have backgrounds in education or in the law. Although ignorance of the law is not an excuse, federal court courts should ensure the administration of justice by ensuring private citizens are being prosecuted under the Hobbs Act for good cause.

**b. Racketeering and Extortion Like Crimes**

Extortion is known as the practice of obtaining illegally obtained money or property by using threats of violence. Bribery and extortion, both crimes involving meddling with and by public officials, were originally each other's counterparts. However, the definitions of extortion and, to a lesser extent, bribery have been broadened to include conduct taken by private individuals. In 2019 Caucasian males carried 66% of the arrest for forgery or counterfeiting, 64% of arrest for fraud and, 59% of embezzlement arrest.<sup>102</sup> In contrast African Americans accounted for 30% of forgery and counterfeiting crimes, 32% of fraud arrest, and 37 of embezzlement arrests.

**IV. Conclusion**

With the Hobbs Act at their disposal, the Federal Government has the authority and has exercised the ability to over-criminalize citizens from disproportionate communities for federal offenses at a higher rate than those who have committed organized or high collar crimes. Citizens from these communities have been historically known to be of the lower economic class and as a result, may not be able to afford genuinely adequate legal representation for federal matters. In today's society it is easy for an offense to begin as a state crime that later becomes a federal crime.

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<sup>102</sup>*Id.*

This occurs when the crime subsequently meets the requirements of a federal offense, with or without the knowledge of the defendant. This can also be as result of a lack of legal consciousness. After a federal requirement attaches, they will automatically transition from a state level offense to a federal offense.

Although, racketeering is not as big a threat as it was during the original passage of the Ant-Racketeering Act the dangerously ambiguous language in the amendment allows robberies (crimes of violence) committed by citizens who are unaware of the impact they are making on interstate commerce, to be subject to a power of the federal court's with the possibility of receiving a 20-year sentence for petty theft. Prior to the Supreme Court's holding in *United States v. Taylor*, federal prosecutors had the ability to try a defendant for an attempted or completed Hobbs Act robbery, carrying stringent sentencing guidelines, although no element of the legislation required proof that defendant used, attempted to use, or threatened to use force. This means that, if persuasive enough in his argument, all a federal prosecutor needed to prevail, was a showing of a substantial step from the crime committed by the defendant to a substantial impact on interstate commerce.

Due to the ambiguous language of the Hobbs Act and the impact it has had on disproportionate communities, this comment purposes that the language of the Hobbs Act should be amended once again to require the use, attempted use, or threatened use of force for a Hobbs Act Robbery so that citizens who commit non-violent crimes will not be under the jurisdiction of Hobbs. Furthermore, the federal courts should a impose a balancing test of the facts when determining whether the federal courts have the proper jurisdiction to hear the case.

This balancing test should weigh an open and apparent impact on interstate commerce, against the states interest in prosecuting the defendant. Within the balancing test, the effect on

interstate commerce must substantially outweigh the states interest in order for the defendant to fall under the reach of the Hobbs Act. When implementing the balancing test, the court's should evaluate the open and apparentness requirement as being so apparent that a reasonable person would have or should have known that the crime he was committing had a substantial effect on interstate commerce. This can be inferred from the nature of the crime itself or a monetary value that can be placed on the crime in order to associate a substantial impact on the market. For instance, if a defendant stole \$200 from his place of employment and is being prosecuted under the Hobbs Act, the court's should look at the either the nature of the crime or the monetary amount that was taken and make an objective inquiry as to whether or not a reasonable person, at the time the offense is being committed, would have known they were impacting interstate commerce at the time.

If the Federal Court's cannot conclude that the nature, or monetary value of the robbery or extortion was so open and apparent that a reasonable person, would have or should have known about his violation, the federal courts should dismiss the case make the proper arrangements to offer the case to state prosecutors in the interest of justice. As an addition to amending the Hobbs Act to require the use of force, the language of the legislation should also mirror the balancing test in requiring that that the nature or monetary value of the robbery or extortion be so open and apparent that it substantially outweighs the state interest in prosecuting the defendant.