Hook, Line, and Stinker: How the Jurisdictional "Hook" for Hobbs is Unconstitutionally Broad, Leads to Overcriminalization, and Absurd Results

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ABSTRACT: The Hobbs Act, passed by Congress in 1946, makes it a federal crime to obstruct, delay, or affect commerce through robbery or extortion. "Commerce" is the federal jurisdictional hook that elevates robbery to a federal crime. The commerce hook grants jurisdiction for all robberies that Congress's Commerce Clause power reaches. This Note argues that federal Hobbs Act robbery prosecutions for individual, localized robbery eviscerates meaningful dual federalism distinctions and has led to confusion among lower courts and patchwork definitions for what it means to "affect commerce" for these cases. This Note proposes three solutions—at least one for each coordinate branch of government—to solve the problem. For the judicial branch, the Supreme Court should declare the Hobbs Act unconstitutional because it grants Congress a police power to reach purely local robbery that should be left to state prosecution and that "commerce" should be interpreted consistently with its meaning at the time of the Hobbs Act's passage. For the legislative branch, Congress should amend the Hobbs Act to only allow federal prosecution of robberies that "substantially and directly" affect commerce. The Note concludes that the judicial and legislative solutions for Hobbs are unlikely, so pragmatically, the executive branch should adopt prospective enforcement policies that make clear Hobbs charges should not be brought for de minimis, localized robbery. Each of these solutions would aid in restoring the appropriate balance between federal and state criminal robbery law thus, keeping federal resources trained on the most pressing national concerns.

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I. INTRODUCTION

The Hobbs Act ("Hobbs") was passed in 1946 as an amendment to the Anti-Racketeering Act of 1934.[1] Hobbs was important to the successful prosecution of mostly intrastate disruptions to transporting goods in interstate commerce.[2] Traditionally, the criminalization and prosecution of

1. 18 U.S.C. § 1951 (2012).

2. *Prosecution Under the Hobbs Act and the Expansion of Federal Criminal Jurisdiction*, 66 J. CRIM. L. & CRIMINOLOGY 306, 310 (1975) [hereinafter *Prosecution Under Hobbs*].

local robbery was a local or state concern.[3] With the passage of Hobbs, the federal government imposed itself on traditionally state-based prosecution of local robberies.[4] Hobbs's jurisdictional hook is linked to whatever Congress has the power to regulate through its Commerce Clause power.[5]

This Note argues that because the Hobbs Act's jurisdiction is tied to Congress's expansive Commerce Clause power, Hobbs has frustrated dual federalism by obliterating meaningful distinctions between state and federal robbery. At the heart of this inquiry is the question of when the federal government should show up in a person's life and when matters should properly remain a local concern. Part II reviews the history of Hobbs—its legislative history as well as how the Supreme Court has expanded the authority of Congress to pass laws pursuant Commerce Clause authority. Part III highlights the irregularities and misapplications of Hobbs jurisdiction in five different circuits. Additionally, Part III discusses a circuit split on substantially similar facts where the Second Circuit plainly disagrees with the Fifth Circuit's definition of Hobbs jurisdiction for local, individualized robbery cases. Part IV proposes solutions for each coordinate branch of government to solve Hobbs's jurisdictional problem for local, individualized robbery. For the judiciary, this Note suggests that courts should not allow Hobbs jurisdiction for individual, localized robberies that do not have a direct and substantial effect on commerce, and "commerce" should be interpreted consistent with its meaning at the time that Hobbs was passed. For the legislative branch, this Note suggests a change to the statute's language that would limit Hobbs jurisdiction for robberies that directly and substantially affect commerce. Ultimately, the Note concludes the most pragmatic and workable solution is for the executive branch to modify its enforcement and charging guidelines to prohibit federal prosecution for localized, individual robbery.

II. A REVIEW OF HOBBS

To understand Hobbs's nearly limitless jurisdiction, it is important to review its history. Section II.A considers the history of the Hobbs Act—why it was passed and the legislative goals of its adoption, Section II.B analyzes the scope of Congress's Commerce Clause power, and Section II.C scrutinizes how the Supreme Court has interpreted the Hobbs Act's commerce jurisdictional hook only three times since its passage.

3. Taylor v. United States, 136 S. Ct. 2074, 2082–83 (2016) (Thomas, J., dissenting).
4. *Id.*
5. 18 U.S.C. § 1951(b)(3).

A. HOBBS ACT HISTORY

At the turn of the twentieth century, organized crime was becoming a significant national problem.[6] In the early 1930s, Congress began examining the issue.[7] Congressional focus and intense public pressure in curbing gang and mob-related crime resulted in Congress passing the 1934 Anti-Racketeering Act ("the Act").[8] Given that most racketeering and gang activity was happening at the local level, the predominant view was that the crime should be addressed locally.[9] However, due to political headwinds, the view that continuing to prosecute these crimes locally did not win out.[10] The Act "claimed federal jurisdiction when the crime is 'in connection with or in relation to any act in any way or degree affecting' interstate or foreign commerce."[11] A historical point that will become a more important part of our story later—the Act's passage coincides with the period just *before* the Supreme Court started radically expanding Congress's authority to regulate through the Commerce Clause.[12]

Contemporary observers recognized that Congress needed to expand its reach if it was going to get at these mostly localized crimes.[13]

The Supreme Court's 1942 decision in *United States v. Local 807* was the catalyst for congressional action and passing Hobbs.[14] In *Local 807*, the Supreme Court reversed the conviction of a union whose members used force to overtake trucking routes as a means for getting better wages.[15] Hobbs was passed to criminalize the "*direct* obstruction of [] interstate movement."[16] Hobbs is codified as 18 U.S.C. § 1951:

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6. *See generally* Craig M. Bradley, *Anti-Racketeering Legislation in America*, 54 AM. J. COMP. L. 671 (2006) (reviewing the history of anti-racketeering legislation in America).

7. *Id.* at 675–78.

8. *Id.*

9. *Id.*

10. *Id.* at 677–78 ("In the summer and fall of 1933, a subcommittee of the Commerce Committee held hearings around the country on the subject of organized crime. . . . [T]he overwhelming sentiment of the witnesses, federal and state officials alike, was that crime should be dealt with by state, not federal authorities. However, because deferring to the states meant that Congress would have nothing to show for the hearing, it is hardly surprising that despite the opinion of the witnesses, thirteen major bills were introduced in January of 1934." (citation omitted)).

11. *Id.* at 678 (citing Act of May 18, 1934, 48 Stat. 979).

12. *See infra* notes 22–40 and accompanying text.

13. *Prosecution Under Hobbs*, *supra* note 2, at 310 ("The Court in *Local 807* did not uphold the conviction [of the labor union disrupting trucks in interstate travel] despite the serious danger involved in such activity. . . . The controversy stemming from the Court's substantial limitation of the Anti-Racketeering Act eventually induced Congress to pass the Hobbs Act so as to reach the activities condoned in *Local 807*.").

14. *Id.*

15. United States v. Local 807 of Int'l Bhd. of Teamsters, 315 U.S. 521, 526 (1942).

16. *Prosecution Under Hobbs*, *supra* note 2, at 310 (emphasis added) ("[The] emphasis upon the interstate commerce aspect of the Hobbs Act and its apparent requirement of directness and

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspired 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.[17]

The statute defines only three terms: "robbery," "extortion," and "commerce."[18] Hobbs's legislative grant is breathtakingly large and cleverly tied to the expansion of whatever authority Congress has under the Commerce Clause.[19]

Since Hobbs was an amendment to the Act, it is useful to recall the contemporaneous advocacy and legislative history of the Act's passage. As previously mentioned, advocates recognized that most of the United States's organized crime was occurring at the local level, and it was necessary for local law enforcement action to stop the wrongdoing.[20] At the hearings for the Act, Assistant Attorney General Keenan prophetically shared:

> If this broad definition were accepted, any attempt to eradicate such evils [the Act prevents] would undoubtedly lead us [federal law enforcement] into every branch of business that is conducted in the

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substantiality lends support to the limitation of both the jurisdictional scope and substantive aspect of the Hobbs Act.").

17. 18 U.S.C. § 1951(a) (2012).

18. *Id.* § 1951(b)(1)–(3) ("As used in this section—(1) The term 'robbery' means 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. (2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. (3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and *all other commerce over which the United States has jurisdiction.*" (emphasis added)).

19. The statute's definition of "commerce" is codified at § 1951(b)(3).

> The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

Id.

20. *See supra* notes 6–10.

> country today. . . . Basically the problem of law enforcement is and should be the task of each single local community.[21]

Today, it is a rare case that the federal government cannot reach de minimis, local robberies. This is a waste of federal resources and needlessly tramples on local law enforcement's jurisdiction.

B. SCOPE OF THE FEDERAL COMMERCE POWER

It is similarly useful to situate the understanding of Congress's commerce authority with the prevailing Supreme Court interpretations at the time of Hobbs's passage. Hobbs's jurisdiction is inextricably linked to Congress's power to regulate pursuant to its Commerce Clause authority. Untangling the scope of the federal commerce power is no easy task. While a full review of the Supreme Court's interpretation of the Commerce Clause is a worthy endeavor, the scope of this Note necessarily restricts the forthcoming discussion to those areas of Commerce Clause history that are most relevant to the discussion of Hobbs.[22]

The United States's federal system is one of limited, enumerated powers.[23] Article I stipulates that "[t]he Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."[24] Pursuant to one of these delegated powers, Congress can enact legislation "[t]o regulate Commerce with foreign Nations, and among the several States."[25]

Historically, the Constitution's grant of enumerated economic powers to Congress was a direct response to the economic failures of the Articles of

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21. *Prosecution Under Hobbs*, *supra* note 2, at 312 n.51 (quoting *Investigation of the Matter of So Called "Rackets" With a View to Their Suppression: Hearings Before the Senate Comm. on Commerce*, 73rd Cong. 1–6 (1933–34)).

22. For a more comprehensive review of the expansive scope of Congress's Commerce Clause authority, see the inimitable work of Richard Epstein—noted legal scholar and Laurence A. Tisch Professor of Law at NYU School of Law. Professor Epstein provides a more comprehensive overview of the nearly limitless scope and substantial problems associated with Congress's expansive Commerce Clause power. *See* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1388 (1987) (explaining that "[t]he commerce power is not a comprehensive grant of federal power. It does not convert the Constitution from a system of government with enumerated federal powers into one in which the only subject matter limitations placed on Congress are those which it chooses to impose upon itself. Nor does the 'necessary and proper' clause work to change this basic design; although it seeks to ensure that the federal power may be exercised upon its appropriate targets, it is not designed to run roughshod over the entire scheme of enumerated powers that precedes it in the Constitution."). *See generally* Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167 (1996) (suggesting that *United States v. Lopez* may stem the tide in the Supreme Court's 70-year story of nearly unfettered expansion of Congress's Commerce Clause authority).

23. *See* U.S. CONST. amend. X.

24. *Id.* art. 1, § 8.

25. *Id.* art. 1, § 8, cl. 3.

Confederation.[26] In order for the newly established America to coordinate its economic strength, it was critical to nationalize the economy.[27] Importantly, however, the meaning of "commerce" to the Framers and to the early Supreme Court, "does not comprise the sum of all productive activities in which individuals may engage."[28]

One of the most relevant expansions of Congress's commerce authority came from *Wickard v. Filburn*.[29] The Supreme Court found that entirely local wheat production and consumption had an effect on a national wheat quote regulatory scheme, so Congress was within its scope of Commerce Clause authority.[30] In embracing a more expansive commerce power, the *Wickard* opinion, importantly, had two restraining features. One, the enforcement at issue in *Wickard* was still tied to another permissive exercise of Congress's Commerce Clause power—i.e., the national economic interest in regulating wheat.[31] Second, the Court made clear that the regulated activity must "exert[] a substantial economic effect on interstate commerce."[32] This was the state of play at the time of Hobbs's passages. However, it is worthwhile to briefly review the Court's post-*Wickard* Commerce Clause cases to appreciate how Hobbs has turned into a plenary federal robbery.

For the rest of the twentieth century, the Supreme Court's treatment of the Commerce Clause was mostly one of expansion and deference to Congress.[33] During this period, Congress's power to regulate pursuant to its Commerce Clause authority dramatically expanded.[34] The Supreme Court did not strike down a congressional regulation rooted in Congress's commerce power until 1995.[35] In *United States v. Lopez*, the Court struck down

26. *See generally* Jack Rakove, *The Legacy of the Articles of Confederation*, 12 PUBLIUS 45 (1982) (explaining that a fundamental flaw of the Articles of Confederation was that Congress could not compel the states to participate in providing for a national system of government).

27. *Id.* at 60–63.

28. Epstein, *The Proper Scope of the Federal Commerce Power*, *supra* note 22, at 1389.

29. Wickard v. Filburn, 317 U.S. 111, 124–25 (1942).

30. *Id.* at 119–20. *See generally* Epstein, *The Proper Scope of the Federal Commerce Power*, *supra* note 22, at 1408–10 (explaining the radical expansion of Congress's Commerce Clause authority).

31. *Wickard*, 317 U.S. at 125–29.

32. *Id.* at 125.

33. *See generally* Hous., E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342 (1914) (holding that Congress had the power to regulate intrastate commerce); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding Congress's power to regulate labor relations); United States v. Darby, 312 U.S. 100 (1941) (upholding Congress's passage of the Fair Labor Standards Act of 1938); Katzenbach v. McClung, 379 U.S. 294 (1964) (finding that Congress could prohibit racial discrimination at restaurants who serve interstate travelers pursuant to Congress's commerce authority); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (finding that Congress could regulate hotel accommodations through its commerce power because hotels serve persons in interstate commerce); Perez v. United States, 402 U.S. 146 (1971) (holding that Congress can regulate loansharking because of its effect on interstate commerce).

34. *See* cases cited, *supra* note 33.

35. United States v. Lopez, 514 U.S. 549, 558–59 (1995).

Congress's Gun-Free School Zones Act.[36] In striking down the Gun-Free School Zones Act, Chief Justice Rehnquist recognized that "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, *substantially affect* any sort of interstate commerce."[37] The Chief Justice recognized that determining the precise boundaries of Congress's commerce authority is "not [a] precise formulation[]."[38] However, he also recognized that Congress should be properly limited on the basis of its Article I charge: "The Constitution mandates . . . uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation."[39] In establishing that outer limit, Chief Justice Rehnquist recognized that when an activity becomes so attenuated from commerce, it is beyond Congress's power.[40]

The American Constitutional system presupposes that powers not expressly delegated in the Constitution are reserved for the states.[41] Rejecting the Government's argument in *Lopez*, the Court articulated an important principle:

> [U]nder the Government's . . . reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents . . . it is difficult to perceive any limitation on federal power, even in areas such as *criminal law enforcement* or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.[42]

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36. *Id.* at 551. The Gun-Free School Zones Act made it illegal to carry a gun in a school zone. *Id.* at 551, 563–68.

37. *Id.* at 567 (emphasis added).

38. *Id.*

39. *Id.* at 566.

40. *Id.* at 567–68 (holding, "To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do." (citations omitted)).

41. 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.").

42. *Lopez*, 514 U.S. at 564 (emphasis added).

Five years after *Lopez*, in *United States v. Morrison*, the Supreme Court again pulled back on Congress's Commerce Clause authority.[43] Like *Lopez*, the issue in *Morrison* had to do with regulating pursuant to how activities, taken in the aggregate, effect commerce.[44]

Critically, the Court, again, held Congress does not have a plenary police power—maintaining "[t]he Constitution requires a distinction between what is truly national and what is truly local."[45] Five years after *Morrison*, the Court revisited Congress's Commerce Clause authority in *Gonzales v. Raich* and found that Congress has the "power to regulate purely local activities that are part of an economic 'class of activities' that have a *substantial* effect on interstate commerce."[46]

C. SUPREME COURT'S INTERPRETATION OF "COMMERCE" FROM HOBBS ACT

The Supreme Court has only given meaning to "commerce" from Hobbs on three occasions.[47] In *Stirone v. United States*, a contractor who supplied concrete from a Pennsylvania plant for the construction of a steel-processing plant in Pennsylvania was charged with violating the Hobbs Act.[48] While the concrete was produced and supplied for intrastate work in Pennsylvania, the Supreme Court found that by the nature of the business, the contractor "caused supplies and materials (sand) to move in interstate commerce between various points in the United States."[49] In interpreting the Hobbs Act, the Court held the "Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence."[50] The Court then spun a hypothetical that if the contractor's business had "been hindered or destroyed, interstate movements of sand to him would have slackened or stopped."[51]

This, the Court expounded, is precisely the type of activity that the Hobbs Act was passed to stop.[52] While the situation from *Stirone* can find useful analogy in the problems expressed by the union disruptions of interstate traffic from *Local 807*, the Court was reaching. If Congress wanted to reach

43. *See* United States v. Morrison, 529 U.S. 598, 617 (2000) ("[R]eject[ing] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce.").

44. *Id.* at 609.

45. *Id.* at 617–18 (citing *Lopez*, 514 U.S. at 568).

46. Gonzales v. Raich, 545 U.S. 1, 17 (2005) (emphasis added).

47. Taylor v. United States, 136 S. Ct. 2074, 2079–80 (2016); United States v. Culbert, 435 U.S. 371, 377–79 (1978); Stirone v. United States, 361 U.S. 212, 215–16 (1960).

48. *Stirone*, 361 U.S. at 213.

49. *Id.*

50. *Id.* at 215.

51. *Id.*

52. *Id.*

this situation, it could have passed a law that outlawed this type of behavior; however, it responded by creating an overbroad statute—Hobbs.[53]

In *United States v. Culbert*, a defendant was convicted of attempting to rob a federally-insured bank.[54] The question in *Culbert* was "whether the Government not only had to establish that respondent violated the express terms of the Act, but also had to prove that his conduct constituted 'racketeering.'"[55] The Court rejected the respondent's argument that the Hobbs Act must be read in the context of its whole statutory scheme.[56] Curiously, this is precisely the type of statutory analysis the Court undertakes while interpreting statutes.[57]

In a charitable review of legislative debate, the Court acknowledged "there is no question that Congress intended to define as a federal crime conduct that it knew was punishable under state law."[58] Without addressing that federalism concern, the Court then circuitously held that because Congress knew it was going to regulate activities that were primarily regulated at the state level, it must have thought the Federal Government would do a better job.[59] This notion is particularly hard to square with contemporaneous cases that were particularly sensitive to not upsetting dual federalism's boundaries.[60]

Taylor v. United States is the most recent Supreme Court case to interpret the commerce element of Hobbs.[61] Taylor was a gang member who broke into multiple drug dealers's homes and robbed them of drugs and money.[62] Both the trial and appellate courts ruled that Taylor could not admit "evidence [showing] that the drug dealers he targeted dealt only in locally-grown marijuana."[63] The Court recognized that "the Hobbs Act is unmistakably broad."[64] Justice Alito continued "[i]t reaches any obstruction, delay, or other

53. *See generally* cases cited, *supra* note 33 (tracing the history of the Court's Commerce Clause analysis).

54. United States v. Culbert, 435 U.S. 371, 371 (1978).

55. *Id.* at 372.

56. *Id.* at 374–79.

57. *See* Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307–08 (1961) (reasoning that in order for the Supreme Court to give meaning to a provision of the tax code, it must consider the whole regulatory scheme).

58. *Culbert*, 435 U.S. at 379.

59. *Id.* at 380.

60. United States v. Bass, 404 U.S. 336, 348–49 (1971) (holding, "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States"). The Court further refined "we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Id.* at 349.

61. Taylor v. United States, 136 S. Ct. 2074, 2079–80 (2016).

62. *Id.* at 2076 ("Taylor was indicted under the Hobbs Act on two counts of affecting commerce or attempting to do so through robbery for his participation in two home invasions targeting marijuana dealers.").

63. *Id.*

64. *Id.* at 2079.

effect on commerce, even if small, and the Act's definition of commerce encompasses 'all . . . commerce over which the United States has jurisdiction.'"[65] The Court declined to clarify which activities satisfy the "commerce" jurisdictional hook under Hobbs:

> The case now before us requires no more than that we graft our holding in [*Gonzales v.*] *Raich* onto the commerce element of the Hobbs Act . . . . It therefore follows as a simple matter of logic that a robber who affects or attempts to affect even the intrastate sale of marijuana grown within the State affects or attempts to affect commerce over which the United States has jurisdiction.[66]

This reasoning is a bit strained given the plain language of Hobbs, which says "all other commerce over which the United States has jurisdiction."[67]

The Court did not even need to reach this confounding logic, if *Raich* reaches that conclusion under a Commerce Clause analysis. Moreover, it strains logic to understand these highly-localized activities as meeting the "direct relation" standard from *Raich*. In his dissent, Justice Thomas recognized this concern that allowing Hobbs jurisdiction for these types of robberies would usurp state's prerogatives in prosecuting purely local crime and eviscerate dual federalism.[68] He notes that the Constitution only gives Congress the authority over four specific crimes: (1) "counterfeiting securities and coin of the United States," (2) "piracies and felonies committed on the high seas," (3) "offenses against the law of nations," and (4) treason.[69] Citing Chief Justice Thurgood Marshall, Justice Thomas notes, "it is 'clea[r] that Congress cannot punish felonies generally.'"[70]

Perhaps most notably, the Supreme Court leaves us hanging on what exactly *Taylor* means in the larger discussion around "commerce" and the Hobbs Act.[71] Justice Alito closes the Court's opinion, noting "[o]ur holding today is limited to cases in which the defendant targets drug dealers for the purpose of stealing drugs or drug proceeds. We do not resolve what the Government must prove to establish Hobbs Act robbery where some other type of business or victim is targeted."[72] The limited holding in *Taylor* and the Supreme Court's lack of specificity about the type of individual crimes that meet Hobbs's commerce element has given rise to conflicts among the Circuit Courts of Appeals, which has led to irregularities and overcriminalization.[73]

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65. *Id.* (citing 18 U.S.C. § 1951(b)(3) (2012)).
66. *Id.* at 2080.
67. 18 U.S.C. § 1951(b)(3) (2012).
68. *Taylor*, 136 S. Ct. at 2082–83 (Thomas, J., dissenting).
69. *Id.* at 2083 (citations omitted).
70. *Id.* (quoting Cohens v. Virginia, 19 U.S. 264, 428 (1821)).
71. *Id.* at 2082–83.
72. *Id.* at 2082.
73. *See infra* Part III.

III. IRREGULARITIES AND MISAPPLICATIONS

According to recent Department of Justice statistics, Hobbs convictions have increased more than any other crime—an almost 48 percent increase—over the last five years.[74] Considering the severity of the penalties involved with federal criminal penalties compared to state prosecutions and limited federal resources, it is imperative the Supreme Court establish a clear standard for what it means to "affect commerce" under Hobbs. The problems with Hobbs jurisprudence are essentially three-fold: (1) there is a lack of uniformity among the Circuit Courts of Appeals on what test satisfies the "affect commerce" element of Hobbs,[75] which leads to federal robbery convictions in some circuits but not others, (2) a direct Circuit Court of Appeals conflict—on substantially similar facts—about what constitutes "affecting commerce,"[76] and (3) it transforms robbery—quintessentially a state crime—into a federal police power, which contributes to overcriminalization.[77]

Section III.A reviews the conflicting Circuit Court of Appeals definitions for what satisfies the "affect commerce" portion of Hobbs, Section III.B highlights the direct circuit split between the Second and Fifth Circuits on a Hobbs jurisdictional issue for a purely local robbery, and Section III.C explores how Hobbs's broad interpretation and application to crimes it was not originally passed to reach has led to overcriminalization.

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74. *Convictions for December 2018*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Feb. 13, 2019), https://trac.syr.edu/tracreports/bulletins/overall/monthlydec18/gui [https://perma.cc/JBY5-XVBU].

75. *See generally* United States v. Lynch, 437 F.3d 902 (9th Cir. 2006) (holding that while persuaded by the *Collins* Court, there should also be finding of direct effect on interstate commerce to satisfy Hobbs); United States v. Wilkerson, 361 F.3d 717 (2d Cir. 2004) (finding a connection to commerce when $350 was stolen that *could* have been used to purchase goods that traveled in interstate commerce); United States v. Carcione, 272 F.3d 1297 (11th Cir. 2001) (finding that the government can sustain a Hobbs Act conviction with only a de minimis connection to interstate commerce); United States v. Quigley, 53 F.3d 909 (8th Cir. 1995) (affirming a lower court decision that robbing potential patrons of a store was too attenuated a connection for affecting commerce); United States v. Collins, 40 F.3d 95 (5th Cir. 1994) (holding that the theft of personal items like a car and cell phone, which are used to conduct business, are too attenuated a connection to affect interstate commerce).

76. United States v. Burton, 425 F.3d 1008, 1110–12 (5th Cir. 2005) (finding that forcing a victim to withdraw money from an ATM was not sufficient to sustain a Hobbs conviction); *see also* United States v. Rose, 891 F.3d 82, 86–88 (2d Cir. 2018) (declining to follow *Burton* on essentially the same facts).

77. *See supra* note 36 and accompanying text (suggesting a definition for overcriminalization and suggesting several steps that can be taken to pull back the number of federal crimes that can be prosecuted). *See generally* Stephen F. Smith, *A Judicial Cure for the Disease of Overcriminalization*, 135 HERITAGE FOUND. LEGAL MEMORANDUM, Aug. 2014, at 1 (arguing that poorly defined criminal laws lead to overcriminalization and that criminal statutes should be interpreted narrowly).

A. CONFLICTING CIRCUIT INTERPRETATIONS FOR "AFFECT COMMERCE"

Since the Supreme Court has only addressed the commerce element of Hobbs three times,[78] the Circuit Courts of Appeals are adrift in their applications of Hobbs's jurisdictional hook. This Section proceeds by reviewing conflicting jurisdictional tests that have cropped up from the Second, Fifth, Eighth, Ninth, and Eleventh Circuits.

1. Second Circuit

The Second Circuit, as illustrated by *United States v. Wilkerson*, has the most expansive definition of "affect commerce" for individual robberies sufficient to get Hobbs jurisdiction.[79] In 1997, two brothers were held up as they were moving appliances into a basement—an assailant approached them and demanded money.[80] When the pair refused, the assailant shot one of the brothers and stole $350–$400 in cash.[81] The trial court found the attacker guilty for killing one of the brothers and also convicted him of Hobbs robbery for stealing the money.[82]

In upholding the trial court's Hobbs conviction, the Second Circuit began by stating the importance of the jurisdictional element of any crime.[83] The court seems to be sensitive to the idea that there must be some boundary between state and federal robbery crimes—"[t]his 'jurisdictional nexus transforms the quintessential state crimes of robbery and extortion into federal crimes.'"[84] However, the court fails to give any meaningful threshold principle for what transforms local robbery into federal robbery, which is reached by Hobbs.[85] While acknowledging that the requisite connection to commerce was "exceedingly thin," the *Wilkerson* court nonetheless upheld the Hobbs conviction on a speculative basis that the stolen money *could* have been used to purchase goods that traveled in interstate commerce.[86]

Curiously, the cases the court uses to justify sustaining a Hobbs conviction are not readily analogous to the attenuated connection to commerce from *Wilkerson*. The court first discusses *United States v. Elias*, a case where a defendant was convicted of robbing a neighborhood grocery store of "$1400 [sic] in cash, along with cigarettes, subway MetroCards, telephone calling

78. *See supra* note 47.

79. *See Wilkerson*, 361 F.3d. at 732 (recognizing that finding a Hobbs violation on such attenuated facts might support Hobbs jurisdiction over every robbery).

80. *Id.* at 720.

81. *Id.*

82. *Id.*

83. *Id.* at 726 ("Indeed, '[t]here is nothing more crucial, yet so strikingly obvious, as the need to prove the jurisdictional element of a crime.'" (quoting United States v. Leslie, 103 F.3d 1093, 1103 (2d Cir.1997))).

84. *Id.* (quoting United States v. Perrotta, 313 F.3d 33, 37 (2d Cir. 2002)).

85. *Id.*

86. *Id.* at 727, 730–32.

cards, and food stamps."[87] There, the Second Circuit upheld a Hobbs conviction because the robber stole items from a business that was engaged in interstate commerce by serving as a marketplace for goods that travel in interstate commerce.[88]

Elias stands for the proposition that if a person disrupts a retailer who is engaged in interstate commerce, he or she could be guilty of a Hobbs violation. However, the facts of *Wilkerson* are even one more layer removed —the plaintiffs merely could have used the funds to purchase goods in interstate commerce. Which begs the question, then, is every robbery where some amount of money is taken—which *could* have been used to buy goods —sufficient to get Hobbs jurisdiction?

The *Wilkerson* court then discusses *United States v. Fabian*, in which the Second Circuit upheld a Hobbs conviction from a robbery where the defendant thought the victims were loan sharks—in reality they were retired taxi drivers.[89] The *Fabian* court said the important point was "[the defendant] *believed* he was robbing a loan shark . . . not whether the crimes *actually* involved a loan shark."[90] In a subsequent opinion, the Second Circuit overturned a Hobbs conviction because the connection to commerce was too attenuated.[91] In *United States v. Perrotta*, the court was unpersuaded by the government's argument "that the victim work[ing] for a company engaged in interstate commerce" was enough to satisfy Hobbs jurisdiction.[92] In further refining that point, the *Wilkerson* court cites *United States v. Lynch*, which in its own estimation stands for the proposition that "the taking of small sums of money from an individual has its primary and direct impact *only* on that individual and *not* on the national economy."[93]

This is curious—if not incoherent—with the *Wilkerson* court's holding that robbing an individual of $350–$400 that hypothetically could have been spent on items, which hypothetically traveled in interstate commerce, was sufficient for Hobbs jurisdiction. The cases the *Wilkerson* court used for its analysis can reasonably stand for the proposition that robbing a business engaged in interstate commerce fits squarely within the type of federal robbery Hobbs jurisdiction reached. However, it does not then follow that small-time, individual robberies—like the ones at issue in *Wilkerson*—should similarly be reached through Hobbs.

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87. *Id.* at 727 (citing United States v. Elias, 285 F.3d 183, 186 (2d Cir. 2002)).

88. *Id.*

89. United States v. Fabian, 312 F.3d 550, 553–55 (2d Cir. 2002), *abrogated by* United States v. Parkes, 497 F.3d 220 (2007).

90. *Id.* at 555 (emphasis added).

91. United States v. Perrotta, 313 F.3d 33, 36 (2d Cir. 2002).

92. *Id.*

93. *Wilkerson*, 361 F.3d at 728 n.6 (emphasis added) (quoting United States v. Lynch, 282 F.3d 1049, 1053 (9th Cir. 2002) (*Lynch I*)).

2. Fifth Circuit

The Fifth Circuit takes a decidedly different view of how crimes reach the threshold of affecting commerce for Hobbs jurisdiction. In 1991, a defendant—Benny Collins—robbed a Dallas-based Denny's while also robbing the home of a businessman.[94] In robbing the man's home, the defendant took "cash, jewelry, clothes, and [the man's] Mercedes-Benz with its cellular telephone."[95] The trial court convicted Collins of Hobbs robbery, among other charges.[96] He was sentenced to 250 months based on his Hobbs conviction.[97] On appeal, Collins challenged whether the items he took were sufficient to justify that he "affected commerce."[98]

The government had advanced a "'depletion-of-assets' theory"—that one could prove sufficient impact on commerce by showing that the stolen items were ones that a person would use to conduct interstate commerce.[99] The Fifth Circuit rejected the government's argument—"[a]lthough the government need only show that the robbery of Winn had a *de minimis* effect on interstate commerce to secure federal jurisdiction under section 1951(a), both of these propositions are too attenuated to satisfy the interstate commerce requirement."[100] The court found that "[b]oth direct and indirect effects on interstate commerce may violate [Hobbs]."[101] However, the depletion-of-assets theory fails because the "theory relies on a minimal adverse effect upon interstate commerce."[102] For the Fifth Circuit, Hobbs can reach individual robberies in only three ways:

> (1) the acts deplete the assets of an individual who is directly and customarily engaged in interstate commerce; (2) if the acts cause or create the likelihood that the individual will deplete the assets of an entity engaged in interstate commerce; or (3) if the number of individuals victimized or the sum at stake is so large that there will be some "cumulative effect on interstate commerce."[103]

The Fifth Circuit found that the government failed to establish a sufficient connection to interstate commerce because it was unable to show "an actual or potential direct effect on a business caused by the robbery of an individual."[104] The court underscored the difficulty of individual crimes being

94. United States v. Collins, 40 F.3d 95, 97 (5th Cir. 1994).
95. *Id.* at 98.
96. *Id.*
97. *Id.*
98. *Id.* at 99.
99. *Id.* at 99–100.
100. *Id.* at 99.
101. *Id.*
102. *Id.*
103. *Id.* at 100.
104. *Id.*

sufficient for Hobbs jurisdiction—"[i]t is suggested that the robbery might have affected the performance of [the victim's] employment duties. This linkage . . . is much too indirect to present a sufficient nexus with interstate commerce to justify federal jurisdiction."[105] The court goes on to say that if individual robberies, like the ones Collins committed, are reached by Hobbs, then Hobbs "would be ubiquitous, and any robbery, in our closely-interwoven economy, arguably would affect interstate commerce."[106]

In recognizing a limit to robberies that are reached by Hobbs jurisdiction, the Fifth Circuit is mindful of the boundaries of local and federal robbery. The court argues "it is clear that the Hobbs Act was intended to reach only certain activities that hamper interstate business, reflecting the long-recognized principle that the states are best positioned and equipped to enforce the general criminal laws."[107] This tact is decidedly different than the one taken by the Second Circuit. Under the Second Circuit's analysis of these facts, it is reasonable to conclude it would have sustained Collins's Hobbs conviction. This tension between the Second and Fifth Circuits is only the beginning of the patchwork manner in which circuits evaluate Hobbs jurisdiction.

3. Ninth Circuit

The Ninth Circuit has been through several iterations of its rule for Hobbs jurisdiction.[108] John Lynch appealed his 20-year sentence on a Hobbs conviction on the basis that his robberies were not sufficient to establish Hobbs jurisdiction.[109] Lynch lured his victim to Montana from Las Vegas because he knew his victim had just received a workers's compensation settlement.[110] After coercing the victim to come to Montana, Lynch shot and killed the victim, took his wallet, debit card, and the victim's truck.[111] Before fleeing Montana, Lynch used the victim's debit card to withdraw funds at a Montana ATM from the victim's Las Vegas-based credit union.[112] Lynch then traveled from Montana back to Las Vegas, through Wyoming and into Utah, while using the victim's debit card at various points along the way.[113] The court found that "[e]ach of these withdrawals required electronic contact from the

105. *Id.*

106. *Id.*

107. *Id.* at 101.

108. *See generally* United States v. Lynch, 367 F.3d 1148, 1154 (9th Cir. 2004) (refining the *Collins* test to one that "is utilized where the defendant's conduct had no *direct* effect upon interstate commerce, but only an *indirect* effect"); *Lynch I*, 282 F.3d 1049 (9th Cir. 2002) (adopting the *Collins* test from the Fifth Circuit); United States v. Lynch, 207 F. Supp. 2d 1133 (D. Mont. 2002) (interpreting the facts of *Lynch I* under the *Collins* test).

109. United States v. Lynch, 437 F.3d 902, 905 (9th Cir. 2006).

110. *Id.* at 906.

111. *Id.*

112. *Id.*

113. *Id.*

place of withdrawals in Montana, Utah, and Nevada with computer servers in Nevada and Kansas through the use of interstate telephone lines."[114]

In evaluating whether the foregoing facts were sufficient to establish Hobbs jurisdiction, the Ninth Circuit distinguished between conduct "that ha[d] direct and indirect effects on interstate commerce."[115] In refining the *Collins* test it adopted from *Lynch I*, the court noted that the test "is utilized where the defendant's conduct had no *direct* effect upon interstate commerce, but only an *indirect* effect."[116] The Ninth Circuit found that while individual robberies might have an indirect effect on commerce, the fact in-and-of-itself that it is an individual robbery does not preclude Hobbs jurisdiction.[117] Ultimately, the court held that it does not need to reach the *Collins* analysis for indirect effect on interstate commerce.[118] The court concluded that Lynch's actions were sufficient to find a *direct* effect on commerce because Lynch (1) used the victim's debit card in three states, and (2) that "[t]he use of the debit card required the use of interstate communications from the source of the use, to Las Vegas, to Kansas, back to Las Vegas, and back to the place of withdrawal."[119]

On the facts of *Lynch I*, the Ninth Circuit's tension with the Second and Fifth Circuit is less obvious. Yet, on closer scrutiny the Ninth Circuit seems to want to have the Second Circuit's cake while eating the Fifth's cake too. The Ninth Circuit expressly adopts the Fifth Circuit's *Collins* analysis, which calls for a narrow set of circumstances when individual, intrastate robberies qualify for Hobbs jurisdiction.[120] However, the court also favorably cites a previous Ninth Circuit holding, which it says stands for the proposition that "[t]he government need not show that a defendant's acts actually affected interstate commerce."[121] That analysis closely tracks the Second Circuit's idea that robbing someone of even a small amount of money that could be used to buy goods in commerce is sufficient for Hobbs jurisdiction.[122]

4. Eighth Circuit

The Eighth Circuit's test of Hobbs jurisdiction is functionally closer to the Fifth Circuit's test. As a representative case, a trial court acquitted two

114. *Id.*

115. *Id.* at 905–07.

116. *Id.* at 907.

117. *See id.* at 907–10 (holding that the *Collins* analysis is persuasive and applicable in some cases of individual, intrastate crimes but that because Hobbs is so broad, there are similar intrastate, individual robberies that can be reached through Hobbs jurisdiction).

118. *Id.* at 911.

119. *Id.* at 910–11. The court also references (on the cited pages) several other facts that established a direct effect on commerce; they are omitted from this discussion because they are less relevant to the circuit conflict.

120. *Id.* at 907–08, 911.

121. *Id.* at 909 (citing United States v. Huynh, 60 F.3d 1386, 1389–90 (9th Cir. 1995)).

122. *See supra* Section III.A.1.

assailants, John Quigley and Johnny Jones, of violating the Hobbs Act for robbing two Nebraska victims.[123] The victims were Native Americans who lived in a small Nebraska town, and had been drinking on the night of the robbery.[124]

After running out of liquor, they were in search for more.[125] They did not have enough money to purchase liquor at their town's liquor store; however, the two "had a special arrangement with a liquor store owner in a nearby Nebraska town."[126] The owner of that liquor store "regularly cashed [the victim's] social security and pension checks and held some" cash back as an improvised tab to pay for future alcohol.[127] On the night of the robbery, the victims called the neighboring town's liquor store owner and arranged for alcohol delivery from that store.[128] However, they grew tired of waiting and decided "to find a ride to pick up the [alcohol] themselves."[129]

As the victims were walking around their town looking for a ride, Quigley and Jones spotted them and asked if they needed a ride.[130] The victims explained their predicament and Quigley and Jones agreed to drive the pair to the neighboring town to pick up the alcohol the victims ordered.[131] En route, Quigley and Jones pulled over and demanded money from the victims.[132] The victims gave them everything they "had: eighty cents and a near-empty pouch of chewing tobacco."[133] Quigley and Jones then beat the victims and left them on the side of the road.[134]

The Eighth Circuit began its opinion skeptical of the government's Hobbs charge: "This case presents a very unusual attempted application of [Hobbs]. In the *overwhelming majority* of cases involving the statute, the victim is a business engaged in interstate commerce."[135]

The court continued by noting that when robberies involve individuals, the connection to commerce is too attenuated.[136] The government, in *Quigley*,

123. United States v. Quigley, 53 F.3d 909, 909–10 (8th Cir. 1995).
124. *Id.*
125. *Id.*
126. *Id.* at 910.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* (emphasis added) (citation omitted).
136. *Id.* The court favorably cites the Fifth Circuit's *Collins* test too. *See id.* at 910–11 ("Quigley and Jones did not rob the liquor store, but instead robbed individuals who patronized the store. Actions normally have a lesser effect on interstate commerce when directed at individuals rather than businesses. Criminal acts directed towards individuals rather than businesses may violate [Hobbs] only if (1) the acts deplete the assets of an individual who is directly and customarily

advanced a speculation theory argument[137] substantially similar to the one the Second Circuit accepted.[138] Here, the government alleged that Quigley and Jones, by preventing the victims from reaching their destination—where they would have purchased alcohol, which traveled in interstate commerce—disrupted commerce sufficient for Hobbs jurisdiction.[139] In reviewing the sufficient Commerce Clause authority for Hobbs jurisdiction, the Eighth Circuit endorsed the Fifth Circuit's narrowing reading while rejecting the more expansive readings from the Second and Ninth Circuits. "The commerce power is not unbridled, however. Because of federalism, Congress only has power to regulate conduct that 'exerts a substantial economic effect on interstate commerce.'"[140] The *Quigley* court continued that there may be some instances where the "probability of affecting commerce is sufficient"—however, those cases are rare and must be grounded in near certainty.[141]

Reasoning through the Fifth Circuit's *Collins* factors, the Eighth Circuit concluded that although Quigley and Jones's actions were reprehensible, they were not sufficient for the government to sustain a Hobbs violation.[142] In noting that Quigley and Jones's actions were unacceptable, the court also pointed out that just because the government cannot prove a Hobbs violation does not mean the attackers escape any liability: "Quigley and Jones did not escape punishment for their attacks . . . [they] were convicted of third-degree assault in Nebraska state court and served time in jail."[143] *Quigley* stands for the proposition that the Eighth Circuit recognizes a boundary between federal and state robberies, and that it is not willing to go as far as the Second or Ninth Circuits in finding attenuated commerce connections sufficient for Hobbs jurisdiction. The court's concluding thought—that the assailants did not escape all consequences—provides useful context for this Note's later discussion of over-federalization of crime under Hobbs.[144]

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engaged in interstate commerce, (2) the number of individuals victimized or the sum at stake is so large that there will be some cumulative effect on interstate commerce, or (3) the acts cause or are likely to cause the individual victim to deplete the assets of an entity engaged in interstate commerce." (citations omitted)).

137. "Speculation theory" refers to factual situations where the court accepts that Hobbs jurisdiction is reached when a de minimis amount of money is stolen, which could have been used to buy goods in interstate commerce. *See generally* United States v. Wilkerson, 361 F.3d 717 (2d Cir. 2004) (concluding that jurors could have inferred funds would be used to purchase items from out of state).

138. *See supra* notes 79–93 and accompanying text.

139. *Quigley*, 53 F.3d at 911.

140. *Id.* at 910 (quoting Wickard v. Filburn, 317 U.S. 111, 125 (1942)).

141. *Id.* ("Although a probability of affecting commerce is sufficient in some cases, like extortion cases involving the depletion-of-assets theory, the probability must be realistic rather than merely speculative.").

142. *Id.* at 910–11.

143. *Id.* at 911.

144. *See infra* Section III.C.

5. Eleventh Circuit

The Eleventh Circuit's Hobbs test can be most readily characterized as narrower than the Second Circuit, less demanding than the Fifth Circuit, and perhaps most on point with the Eighth and Ninth Circuits.[145] In *United States v. Carcione*, a Florida defendant was convicted of a Hobbs violation for the home robbery and murder of a wealthy woman.[146] For the Hobbs violations, the defendant was sentenced to 40 years in prison.[147]

The Chicago-based appellant, Carcione, was contacted to rob the victim.[148] Carcione agreed to rob the victim, flew from Chicago and stole the victim's "purse, her wallet and its contents, and her jewelry, including a seven and one-half carat diamond ring, a strand of pearls, a diamond and platinum tennis bracelet, and a sapphire tennis bracelet."[149] After the robbery, Carcione escaped, with the stolen property, first to Georgia and then back to Chicago.[150] The diamond ring was sold and the proceeds were split amongst multiple people who participated in and supported the robbery, including Carcione.[151]

In reviewing much of the foregoing history of Hobbs jurisdiction, the Eleventh Circuit "stress[ed] that under this Circuit's binding precedent, a conviction for Hobbs Act robbery may be sustained if there is proof that the defendant's conduct had even a minimal effect on interstate commerce."[152] The court elaborated in a footnote, here, that "[a] substantive violation of the Hobbs Act requires an actual, de minimis affect [sic] on commerce."[153]

The court then reviewed Carcione's travel and communications in connection with the plot to rob the victim and concluded that both were sufficient to establish a necessary connection to commerce for the government to prove Hobbs jurisdiction.[154] The *Carcione* holding seems more

145. Note that the Ninth Circuit tacitly endorsed the Eleventh Circuit's view in *Carcione*. *See* United States v. Lynch, 437 F.3d 902, 910 (9th Cir. 2002) (favorably considering the Eleventh Circuit's analysis of the test for what is "sufficient to establish a *direct* effect on interstate commerce").

146. United States v. Carcione, 272 F.3d 1297, 1298–99 (11th Cir. 2001).

147. *Id.* (adding together the two Hobbs Act violations).

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 1300.

153. *Id.* at 1300–01 n.5 (citing United States v. Farrell, 877 F.2d 870, 875 (11th Cir. 1989)).

154. *Id.* at 1301–02. In reviewing the effect of Carcione's travel on interstate commerce the court stated that, "[i]n anticipation of the robbery, [Carcione] flew from Illinois to Florida to meet up with [other co-conspirators]. Then, after the robbery was completed, [Carcione] drove to Georgia . . . [and] proceeded to drive . . . back to Illinois. This travel clearly demonstrates an effect on interstate commerce." *Id.* at 1301. In reviewing the effect of Carcione's stealing the victim's jewelry, the court found, "interstate commerce was affected when [Carcione] took the jewelry he robbed from [the victim] across state lines to Illinois, where [a co-conspirator] was waiting to inspect and then purchase the diamond ring." *Id.* at 1301–02.

consistent with the animating principles of Hobbs jurisdiction—with obvious parallels to the Ninth Circuit's reasoning in *Lynch*—in that the federal government has an interest in robbery schemes that are carried out over state lines. However, the *Carcione* court's opinion further underscores the tension between the Second, Fifth, Eighth, Ninth and Eleventh circuits over which types of activities are reached by Hobbs. And further, the opinion highlights the substantially different tests and factors each circuit applies in reviewing whether the government has sustained its burden to prove an effect on commerce for Hobbs jurisdiction.

B. CIRCUIT CONFLICT ON SUBSTANTIALLY SIMILAR FACTS

Given the previous circuit split review, it is not terribly surprising a circuit conflict crops up between the Second and Fifth Circuits. As reviewed in Sections III.A.1 and III.A.2, the Fifth and Second Circuits take a decidedly different view on what types of intrastate crimes are reached by Hobbs jurisdiction. Two cases—*United States v. Burton* from the Fifth Circuit and *United States v. Rose* from the Second Circuit—illustrate this tension and underscore the problem with Hobbs. Due to the conflict between the two circuits, effectively the same conduct is a federal crime in the Second Circuit while simultaneously not being a federal crime in the Fifth Circuit.[155] This Section reviews the similar facts and conflicting judicial reasoning of *Burton* and *Rose* in order to underscore why it is critical that the Supreme Court, Congress, or policy makers revisit and resolve the current problems with Hobbs.

1. ATM Robbery is Insufficient to Establish Hobbs Jurisdiction: *United States v. Burton*

As previously discussed, the Fifth Circuit takes the narrowest view of Hobbs jurisdiction.[156] The conflict in *Burton* arose from a robbery where Donald Burton approached a victim as she was leaving the post office and demanded money.[157] After telling him that she did not have much money on her person, Burton took the victim and drove her to a local bank.[158] Then, "Burton backed the car into the drive-through ATM in such a way that [the victim]—in the passenger seat—was able to access the ATM. [The victim] withdrew $150 and gave it to Burton."[159]

155. *See generally* United States v. Rose, 891 F.3d 82 (2d Cir. 2018) (holding that defendant's robbery sufficiently established Hobbs jurisdiction and was a federal crime); United States v. Burton, 425 F.3d 1008 (5th Cir. 2005) (holding that defendant's bank robbery was not a federal crime).

156. *See supra* Section III.A.2 (explaining the Fifth Circuit's approach to determining Hobbs jurisdiction).

157. *Burton*, 425 F.3d at 1009.

158. *Id.*

159. *Id.*

The government pursued a Hobbs conviction on the basis that the money was in "the 'care, custody, control, management or possession' of a bank."[160] The inference the government drew is that Burton was attempting to get the bank's money, and he did not care that the money belonged to the victim at all.[161] In effect, Burton was just using the victim as an instrumentality to get at the bank's assets.[162] However, the court rejected this argument, finding that "[t]here is no evidence that the $150 'belong[ed] to' or was in the 'care, custody, control, management or possession' of [the bank]. [The victim] withdrew her money from her account and gave the money to Burton in her car."[163] For the Fifth Circuit, the source of the funds (a bank) or the instrumentality that was used to withdraw the money (an ATM, which presumably had communications across state lines) was immaterial to the robbery jurisdiction under Hobbs.[164] The court seemed troubled by the idea that the government could sweep this type of robbery—effectively no different than if the defendant had the $150 in her purse in the first place—into a federal crime.[165]

Therefore, the court foreclosed the government from convicting Burton of a Hobbs violation because the robbery did not meet Hobbs's jurisdictional element.[166]

2. ATM Robbery is Sufficient to Establish Hobbs Jurisdiction: *United States v. Rose*

Contrary to the Fifth Circuit's restrictive application of Hobbs jurisdiction, the Second Circuit has the broadest definition of what is sufficient to satisfy the jurisdictional element of Hobbs.[167] In *Rose*, the Second Circuit directly called out and refused to follow the Fifth Circuit's position in *Burton*.[168] In *Rose*, the defendant appealed a trial court Hobbs conviction.[169] The defendants, Rose and a co-conspirator, Arberry, robbed a victim in Manhattan.[170]

The victim was approached by Rose, who asked for directions to a church, and then "Arberry placed a hard object against the victim's back and told him

160. *Id.* at 1011.

161. *Id.* at 1010–11.

162. *Id.*

163. *Id.* at 1012 (first alteration in original).

164. *See id.* at 1011–12.

165. *See id.* at 1010–12 (noting that the though the money was in the victim's possession for only a very short time, this interval still removed the money from the control of the bank during the commission of the crime).

166. *See id.*

167. *See supra* Section III.A.2.

168. United States v. Rose, 891 F.3d 82, 87 (2d Cir. 2018).

169. *Id.* at 84–85.

170. *Id.* at 84.

that he was being robbed."[171] While Rose was sitting on a bench, Arberry took the victim to a "Citibank, where the victim used an ATM to withdraw $900 from his account. Arberry and the victim returned to the bench, where the victim gave Rose the $900."[172] Rose and Arberry then let the victim go.[173]

In evaluating whether the government had established Hobbs jurisdiction, the *Rose* court relied on its previous decision in *Wilkerson*.[174] Rose argued that his robbery was of an individual so that it lacked the requisite connection to Hobbs to establish a federal crime.[175]

Further, Rose alleged "[t]he money belonged to the victim, not Citibank, and thus no assets of a firm engaged in interstate commerce were depleted. Similarly, Rose argue[d] that he was not targeting a firm's assets, but the individual victim's."[176] Interestingly, "Rose concede[d] that he committed a state-law crime," his dispute was that he did not commit federal Hobbs robbery.[177]

The Second Circuit rejected Rose's argument.[178] Further, the court expressly declined to follow the Fifth Circuit's reasoning from *Burton*:

> We decline to follow *Burton* to the extent that it concluded that a forced ATM withdrawal, by itself, cannot support Hobbs Act jurisdiction. The mere fact that the bank did not have "custody" over the funds at the precise moment that the robber stole the victim's money (the key question for bank robbery, under the *Burton* framing) does not mean that the crime lacked a *de minimis* effect on interstate commerce (the key question for Hobbs Act robbery).[179]

This express circuit split is reason enough for the Supreme Court to clarify the appropriate standard for Hobbs robbery for localized robbery.

The direct conflict of the Second and Fifth Circuits, on meaningfully similar facts, is representative of a larger problem—the Circuit Courts of Appeals are largely adrift on how to evaluate Hobbs's jurisdictional hook. The Second Circuit's opinion is largely consistent with the view that Hobbs effectively is an all-purpose federal robbery statute that grants the federal government the authority to prosecute even local petty robbery. The Fifth Circuit, for its part, clings to the notion that Congress was not given a plenary police power to federalize all forms of robbery, and stakes its limiting

171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 86; *see also supra* Section III.A.1.
175. *Rose*, 891 F.3d at 86.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* at 87.

principle on individual, intrastate crimes that do not, in a strict view, have any substantial effect on commerce.

C. OVER-FEDERALIZATION OF CRIME UNDER HOBBS

The United States federal government is one of limited, enumerated powers.[180] Surely then, Congress does not have the unfettered authority to criminalize any robbery. However, given the foregoing review, in most of the country, Congress has been given the authority to do just that. The Supreme Court, recently, has indicated its desire to preserve dual federalism:

> In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. The States have broad authority to enact legislation for the public good —what we have often called a "police power." The Federal Government, by contrast, has no such authority and "can exercise only the powers granted to it" . . . . For nearly two centuries it has been "clear" that, lacking a police power, "Congress cannot punish felonies generally."[181]

As a matter of close scrutiny, then, it is hard to imagine that the Supreme Court would find the type of crime reached by Hobbs in the Second Circuit's holdings in *Wilkerson* and in *Rose*.

When considering "over-federalization" of crime through Hobbs, it is useful to understand the mood around Hobbs's passing.[182] Justice Felix Frankfurter, a member of the Supreme Court when Hobbs was passed, wrote about the importance of preserving a vital separation of federal and state functions.[183] Justice Frankfurter described how the Supreme Court, at the time, would approach interpreting statutes that could upset the balance of federal-state power:

> The task [of interpreting statutes] is one of accommodation as between assertions of new federal authority and historic functions of the individual states. Federal legislation of this character cannot therefore be construed without regard to the implications of our dual system of government. . . . The history of congressional legislation regulating not only interstate commerce as such but also activities intertwined with it, justify the generalization that, when the Federal Government takes over such local radiations in the vast

180. *See generally* U.S. CONST. art. I (describing the federal government's enumerated powers).

181. Bond v. United States, 572 U.S. 844, 854 (2014) (citation omitted) (first quoting United States v. Lopez, 514 U.S. 549, 567 (1995); then quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819); and then quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 428 (1821)).

182. *See supra* Section II.B.

183. *See generally* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947) (discussing how statutory interpretation must be read consistent with the principles of dual federalism).

> network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.[184]

Justice Frankfurter's comments strongly suggest that at least one Supreme Court Justice during the passage of Hobbs thought it was critically important for Congress to be explicit in any legislation that would disrupt the federal-state balance of power. Hobbs was drafted broadly, and although Congress cleverly tied Hobbs's jurisdiction to further expansions of Congress's commerce power, Congress could not have predicted the radical expansion of Commerce Clause authority that would happen over the next 70 years. More to the point, the Hobbs architects could not have known that the statute would be used as a tool for the federal government to federalize petty, one-off local robbery. Hobbs's constitutional bona-fides—for the reasons given by Justice Frankfurter at the time and the concepts of dual federalism that have endured for 200 years—should be evaluated through the commerce lens that existed at the time of Hobbs's passing.[185]

It is problematic for our system of limited, delegated powers for Congress to usurp state's rights without (1) a proper constitutional basis, and (2) without an express, textually-communicated intent to do so.

IV. THE SEARCH FOR A LIMITING PRINCIPLE

The problem with Hobbs is a search for a limiting principle. For the foregoing reasons, courts are helplessly adrift in how to apply Hobbs's jurisdictional commerce element for local, individualized robbery. As a result, circuit courts routinely obliterate the important distinction between federal and state crime. Judge Patrick Higginbotham, dissenting in an equally divided *en banc* Fifth Circuit opinion, eloquently elaborated on this issue: "We are left adrift by a statute [Hobbs] whose reach is at best no more fixed than a property line set at the latest low tide mark of an ocean tributary."[186] This Note posits solutions for each of the three coordinate branches of government. The first Section will discuss two judicial branch solutions: (1) the Supreme Court should prohibit the federal government bringing Hobbs charges for local robberies of individuals that involved misdemeanor amounts of money, because it unconstitutionally grants Congress a police power, and (2) that the "commerce" jurisdictional hook for Hobbs robberies that are localized and individual should be interpreted consistently with the meaning of "commerce" at the time Hobbs was passed. The second Section proposes a

184. *Id.* at 539–40.

185. *See infra* Section IV.A.

186. United States v. McFarland, 311 F.3d 376, 410 (5th Cir. 2002) (en banc) (Higginbotham, J., dissenting).

modest modification to the statutory text of Hobbs that would appropriately cabin its statutory reach to crimes that substantially affect commerce. The third Section proposes—pragmatically—that the most realistic solution to maintain the proper boundaries between federal and state robbery rests with the executive branch charging and enforcing guidelines and that Department of Justice policies should prohibit federal prosecutors from bringing Hobbs charges for localized, individual robbery.

A. JUDICIAL BRANCH: PREVENTING HOBBS'S APPLICABILITY TO INDIVIDUALIZED, LOCAL ROBBERY

In its most recent consideration of Hobbs, the Supreme Court punted.[187] In upholding a Hobbs conviction for the robbery of a small-time, local drug dealer, the Court held "[t]here is no question that the Government in a Hobbs Act prosecution must prove beyond a reasonable doubt that the defendant engaged in conduct that satisfies the Act's commerce element."[188] If, as the *Taylor* Court states, the government must prove the jurisdictional commerce hook for Hobbs beyond a reasonable doubt,[189] then the Supreme Court should overrule the circuit courts that advance a speculation theory because of the conflict between circuit courts for the jurisdictional hook of Hobbs.[190]

Allowing courts to speculate how stealing a sum of money might, hypothetically, be used in future interstate commerce transactions leads to absurd results and patchwork tests that cannot, by definition, meet a reasonable doubt threshold. It does not withstand reason that if one of the Second Circuit's roughly 24.5 million citizens steals $500, they have committed a federal robbery crime, whereas one of the Fifth Circuit's roughly 32 million citizens would not have.

Adopting the Second Circuit's interpretation of commerce that satisfies Hobbs jurisdiction is unworkable and unconstitutionally converts Hobbs into an all-purpose federal robbery statute. In our constitutional system of limited, delegated powers, that outcome obliterates dual federalism and effectively grants Congress a police power for getting at local, relatively small-time robbery. The Second Circuit's reasoning is flawed because it constructs an artificial distinction without a meaning. In *Rose*, the court accepts the government's assertion that the perpetrator was really stealing bank assets, not merely the victim's money.[191] For the Second Circuit, the *source* of the money is sufficient to satisfy Hobbs jurisdiction.[192] This reasoning creates all

187. *See generally* Taylor v. United States, 136 S. Ct. 2074 (2016) (failing to resolve the circuit split).

188. *Id.* at 2080.

189. *Id.*

190. *See supra* Section III.A.

191. United States v. Rose, 891 F.3d 82, 87 (2d Cir. 2018).

192. *Id.*

sorts of line drawing problems. What if the victim had withdrawn the money from the ATM 30 minutes prior to the robbery, or an hour, or how about a day before? That money would have still come from a bank ATM, but can there really be a straight-faced argument that the would-be robber was after the bank's assets? Taking the same $500 example from before—it is absurd that a robber should be guilty of a federal crime for stealing $500 if they rob it from someone who is taking the money out of an ATM whereas they would only be guilty of a state crime for robbing someone who just happened to have $500 in their wallet as they were walking down the street. Moreover, federal resources should not be trained on these petty street crimes that are best handled by local law enforcement. Beyond the dual federalism point, there are a number of constraints on coordinated federal resources and those resources should be trained on the most pressing national concerns. If the Court adopts the Second Circuit's reasoning from *Rose*, there is essentially no robbery the government could not prosecute through Hobbs.

Because of the patchwork application of Hobbs's jurisdictional element, courts have effectively created a system where prosecutors are free to define what federal robbery means, instead of what the law says. By continuing to allow the speculation theory to influence circuits, absurd results will continue and prosecutors's unreviewable discretion will continue to provide the most reliable definition for federal robbery.[193] The law for what constitutes federal robbery should be applied consistently across jurisdictions and to its citizens —the Supreme Court needs to reign in Hobbs's jurisdictional hook so that it only reaches crimes that have *substantial* and *direct* effect on commerce. To that end, the Supreme Court should take the opportunity to resolve the conflict of the lower courts in favor of finding that Congress does not have a police power, and that local, intrastate crimes in the mold of crimes in *Wilkerson*, *Rose*, and *Burton* are not crimes that Congress can constitutionally reach through its limited, delegated powers.

Furthermore, this Note submits that the best reading of Hobbs is one that gives meaning to what the text meant at the time the statute was passed.[194] Hobbs is a distinctively short statute.[195] As previously discussed, Hobbs was originally passed to reach substantial intrastate crime that affected the national economy.[196]

The fact that Congress included a jurisdictional hook to the statutory language indicates that Congress did not intend for Hobbs to be an omnipresent robbery statute.[197] Further, it is at a minimum dubious to suggest

193. *See* United States v. Nixon, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.").

194. *See* 18 U.S.C. § 1951 (2012); *see also supra* Section II.B (explaining the scope of the federal commerce power).

195. 18 U.S.C. § 1951.

196. *See supra* Section II.A (mentioning the history of the Hobbs Act).

197. *See* 18 U.S.C. § 1951(a).

that Congress, in 1946, had any indication that Congress's Commerce Clause authority would be as large as it is today. Even with *Wickard* on the table, the 1940s Commerce Clause jurisprudence still required "actual effects" on commerce[198]—not the speculative, aggregate commerce authority interpretation that currently reigns supreme.[199] Hobbs provides a definition of "commerce" in the statute:

> The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.[200]

The last phrase in the statute is the most controversial and has proved to be the most substantial part of Hobbs's dramatic jurisdictional reach. Recalling the previous commerce discussion and Hobbs's history, Congress's Commerce Clause authority was more limited when Hobbs was codified in 1946 than it is now.[201] With the new composition of the Supreme Court, now might be the time that the Court revisits a more originalist interpretation of commerce. Giving the statute and specifically "commerce" its meaning that it had when it was passed would go a long way in preserving those meaningful and necessary distinctions.

B. LEGISLATIVE BRANCH: MODIFYING HOBBS'S STATUTORY TEXT

Should the constitutional basis be unpersuasive, the Hobbs problem could be resolved through legislation. Congress should revisit and revise the statutory text of § 1951(a)[202] by striking the words "in any way or degree" and adding the word "substantial" before "affects commerce." Additionally, Congress should add "directly" before "affects commerce." These modifications, although slight, would go a long way to recognizing the general lines that the majority of circuits have drawn for Hobbs jurisdiction. It would reflect a priority that localized, individual robberies are not the purview of federal government enforcement and keep Hobbs prosecution trained on robbers who are truly disrupting commerce—the type of crime that Hobbs was passed to prevent. The suggested language of the statute would fix that problem:

198. Wickard v. Filburn, 317 U.S. 111, 120 (1942).
199. *See supra* note 22 and accompanying text.
200. 18 U.S.C. § 1951(b)(3).
201. *See supra* Part II.
202. *See supra* notes 17–18 and accompanying text.

> Whoever *substantially* obstructs, delays, or *directly* affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspired 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.

These modifications would restore Hobbs to its original purpose—to allow the federal government to prosecute local commercial disruptions that have a direct and substantial effect on the economy.

C. EXECUTIVE BRANCH: PROHIBIT HOBBS CHARGES FOR INDIVIDUAL, LOCALIZED ROBBERY

Due to political challenges in getting legislation passed through Congress and the chance of getting the "right" case to the Supreme Court to address circuit split issue, the executive branch is likely poised to provide the best solution. Current Department of Justice ("DOJ") Charging Guidelines indicate the robbery charges should "be utilized, as a general rule, only in instances involving organized crime, gang activity, or wide-ranging schemes."[203] The guidelines go on to recognize that even "a de minimis effect on commerce is sufficient in a Hobbs Act prosecution."[204] The guidelines note—but do not prohibit—bringing Hobbs charges in situations where the person robbed was an individual, not a business.[205]

In a 2017 United States Attorneys's Bulletin, two senior DOJ attorneys circulated a memo explaining then-Attorney General Jeff Sessions's memo affirming DOJ's commitment to prosecuting crime through Hobbs.[206] This document reiterated the previously mentioned guidance on Hobbs robbery, however it cautioned federal prosecutors "to be sure to check [their] circuit-specific law regarding . . . [individual] robberies as to what is required to satisfy the 'effect on interstate commerce' element."[207] In order to preserve the traditional boundaries of federal and state roles in prosecuting robbery, the charging should make clear that U.S. Attorneys and other prosecutors should focus on Hobbs robberies of businesses engaged in interstate commerce. Further, it should clarify that individuals should only be prosecuted for Hobbs robbery if their robbery directly and substantially effected commerce to a similar degree and effect as a robbery against a

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203. U.S. DEP'T OF JUSTICE, JUSTICE MANUAL 9-131.040 (2011), *available at* https://www.justice.gov/jm/jm-9-131000-hobbs-act-18-usc-1951#9-131.040 [https://perma.cc/3SFM-MS4Q] (proscribing the policy for applying the Hobbs Act, 18 U.S.C. § 1951).

204. *Id.*

205. *See id.*

206. Christopher Graveline & Bonnie S. Greenberg, *Hobbs Act Robbery*, 65 U.S. ATT'YS BULL. 17 (June 2017).

207. *Id.* at 18 (citing United States v. Wang, 222 F.3d 234, 239 (6th Cir. 2000)).

business or if their individual robbery was a part of a larger scheme to disrupt commerce.

V. CONCLUSION

Due to its expansive drafting and lack of clarity from the Supreme Court, Hobbs has been transformed into a multi-purpose federal robbery statute that obliterates any meaningful distinction between state and federal robbery. As a result, the circuits are adrift in their application of the Hobbs's jurisdictional hook such that a citizen can be reached by federal robbery prosecution for robbing an individual in one area of the country but not in another. The proper prosecution forum for these individual, localized robberies is the state in which they happen. Local law enforcement is better equipped to understand the nature of the types of individual crimes that occur in their locales, and it would focus the federal government's constrained resources on issues that are better suited for the federal government—like organized crime. This Note proposes solutions for each branch of government to remedy the circuit conflicts and restore important boundaries of dual federalism for individual, local robbery. In order to preserve consistency of the law and to ensure that federal resources are being most appropriately directed toward important national concerns, it is time for all three branches of government to look critically at how to solve the problems with Hobbs.