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Electronic Impulses, Digital Signals, and Federal Jurisdiction: Congress's Commerce Clause Power in the Twenty-First Century

I. INTRODUCTION

[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.[1]

Suppose that a Manhattan mafia boss contacts a hit man located in the Bronx and asks him to kill a police informant. Suppose further that the hit man commits the murder at the informant's apartment in Queens. Should the federal government care that the mafia boss contacted the hit man using a cellular telephone rather than a hand-delivered letter? Should it matter that the cellular signal was transmitted by a cellular tower located in Newark, New Jersey rather than Nyack, New York? Should the federal government care that the mafia boss pays the hit man by wiring money through Western Union rather than by handing him a bag full of cash? Finally, should it matter that the Western Union transmission was routed through a service center in Nashua, New Hampshire rather than Nanuet, New York?[2]

Common sense suggests that the answers to these questions should be an unequivocal "no." Nonetheless, the Supreme Court's

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

2. These scenarios were derived from hypothetical fact patterns conceived hy the late Judge Henry J. Friendly. Judge Friendly used these hypothetical fact patterns to demonstrate that commerce-based jurisdiction often hinges on arbitrary and seemingly inconsequential factual distinctions. *See* Thomas M. Mengler, *The Sad Refrain on Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. KAN. L. REV. 503, 514 n.63 (1995) (citing HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 59 (1973)).

Commerce Clause[3] jurisprudence dictates that these trivial factual distinctions are critical in determining whether federal criminal jurisdiction is proper. Thus, it is not surprising that these exact questions proved to be outcome-determinative in two recent cases, *United States v. Marek*[4] and *United States v. Weathers*.[5]

This Note utilizes *Marek* and *Weathers* to illustrate one significant limitation of the Supreme Court's Commerce Clause jurisprudence. Namely, current Supreme Court jurisprudence permits Congress to regulate purely local, garden-variety crimes that have taken on interstate characteristics merely because a defendant utilizes a cellular phone, paging device, Internet message, Western Union transmission, or other interstate communication device in furtherance of the crime.[6] These interstate communication devices, which have been deemed "channels" or "instrumentalities" of interstate commerce by the federal courts,[7] provide the basis for federal jurisdiction.

A brief discussion of *Marek* and *Weathers* demonstrates the nature of the problem. In both *Weathers* and *Marek*, the defendants had been convicted of violating the federal murder-for-hire statute, 18 U.S.C. § 1958.[8] Section 1958 imposes criminal sanctions on anyone who "uses or causes another to use . . . any facility in interstate or foreign commerce."[9] The defendants in both cases challenged their convictions on constitutional grounds alleging, inter alia, that the government failed to satisfy § 1958's commerce-based jurisdictional requirement.[10]

In *Marek*, the Fifth Circuit held that the defendant's use of Western Union in furtherance of a murder-for-hire scheme satisfied the jurisdictional requirements of § 1958, even though the wire

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3. The Commerce Clause provides that Congress shall have the power "[t]o regulate commerce with foreign nations, and among the several states, and with Indian tribes." U.S. CONST. art. 1, § 8, cl. 3.

4. 238 F.3d 310 (5th Cir. 2001), *cert. denied*, 435 U.S. 813 (2001).

5. 169 F.3d 336 (6th Cir. 1999), *cert. denied*, 528 U.S. 838 (1999).

6. For purposes of this Note, the term "interstate communication device" refers to telephones, facsimile machines, computers, paging devices, Western Union, and other similar devices.

7. *See, e.g.*, *Marek*, 238 F.3d at 317 (concluding that when Congress enacted 18 U.S.C. § 1958, it was regulating and protecting the instrumentalities of interstate commerce); *Weathers*, 169 F.3d at 342 (concluding implicitly that when Congress enacted § 1958, it was regulating the channels of interstate commerce).

8. *Marek*, 238 F.3d at 313-14; *Weathers*, 169 F.3d at 337.

9. 18 U.S.C. § 1958(a) (2000). The statute also requires that the murder be committed as consideration for pecuniary value.

10. *Marek*, 238 F.3d at 313-14; *Weathers*, 169 F.3d at 337. Section 1958's jurisdictional element requires that the defendant "[travel] in interstate or foreign commerce, or [cause] another [including the intended victim] to use the mail or any facility in interstate or foreign commerce." § 1958(a).

transfer was initiated and terminated in the State of Texas.[11] The court paid little attention to the potentially momentous constitutional questions implicated in the case, choosing instead to focus on matters of statutory construction.[12] The court ultimately concluded that federal jurisdiction under § 1958 was supplied by the nature of the facility used, rather than by separate proof of actual interstate contact.[13] Having concluded that Western Union was "a quintessential facility in interstate commerce," the court upheld Marek's conviction even though the prosecution offered no proof that the Western Union transmission ever crossed the Texas state line.[14] In dicta, the court suggested that § 1958's jurisdictional element, which included all "means of transportation and communication,"[15] would be satisfied by the intrastate use of a telephone, automobile, airplane, or automated teller machine ("ATM").[16]

The court in *Marek*, however, split from the Sixth Circuit's interpretation of § 1958 in *Weathers*. In *Weathers*, the court had held that the defendant's use of a cellular telephone in furtherance of a murder-for-hire scheme satisfied the jurisdictional requirements of § 1958, despite the fact that both parties to the telephone call were located within the State of Kentucky.[17] The court reached this conclusion merely because completion of the call required that an electronic search signal be sent to cellular communications equipment in both Kentucky and Indiana.[18] Resolving the case largely as a matter of statutory construction, the Sixth Circuit held that the jurisdictional requirement of § 1958 requires that the defendant use a facility of interstate commerce in a manner that involves an actual interstate contact.[19] Thus, it would not be sufficient that the defendant used a facility that was merely capable of making interstate contact.[20] The court upheld Weathers's conviction, however, because

11. 238 F.3d at 312-13, 320.

12. This does not imply, however, that the *Marek* court *should have* engaged in a thorough constitutional analysis. Part V.A of this Note explains that many federal criminal statutes, including § 1958, are virtually exempt from constitutional review under the Supreme Court's Commerce Clause jurisprudence. Part V.C of this Note ultimately recommends that the Supreme Court modify its Commerce Clause jurisprudence so that § 1958 and similar federal statutes are subject to constitutional review.

13. *Marek*, 238 F.3d at 317, 320.

14. *Id.* at 313, 320.

15. Section 1958's definition section indicates that "facility of interstate commerce" includes "means of transportation and communication." § 1958(b).

16. *Marek*, 238 F.3d at 318-19 nn.35-37.

17. United States v. Weathers, 169 F.3d 336, 337 (6th Cir. 1999).

18. *Id.* at 341-42.

19. *Id.* at 340-42.

20. *Id.* at 341-42.

his cellular phone caused an actual, albeit tenuous and incidental, interstate contact.[21]

At first glance, the split of authority created by *Marek* and *Weathers* appears to he an isolated problem of statutory construction.[22] Beyond the statutory construction issue, however, there is a much larger constitutional issue looming in the background that threatens to usher in a new era of federalization under the Commerce Clause. The reasoning from *Marek* suggests that federal criminal jurisdiction is proper as long as the defendant uses a "means of communication" that could hypothetically cause an interstate contact.[23] Following *Marek* to its logical conclusion, the federal government would have the power to investigate and prosecute any murder-for-hire scheme that is facilitated by Western Union, a cellular telephone, a paging device, or an Internet transmission, regardless of whether any human being or electronic signal ever crosses state lines.[24]

The holding in *Weathers*, while somewhat less troublesome than the holding in *Marek*, suggests that federal authorities would have jurisdiction over all of the same crimes, as long as the prosecution can prove an actual interstate contact, no matter how tenuous and incidental.[25] This additional requirement would create little difficulty for the prosecution, however, since even a simple telephone call now requires a "complex system of microwave radios, fiber optics, satellites, and cables" that "typically bears no relation to state boundaries."[26] Thus, by requiring proof of actual interstate

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21. *Id.* at 342.

22. Scholars have already written extensively on the split of authority created by *Weathers* and *Marek*. *See, e.g.*, Christopher Lieb Nybo, *Dialing M for Murder: Assessing the Interstate Commerce Requirement for Federal Murder for Hire*, 2001 U. CHI. L. FORUM 579 (2001); Jason Weathers, *The National Significance of a Local Killing: When Does "Interstate" Mean Intrastate Under the Federal Murder for Hire Statute, 18 U.S.C. § 1958?*, 24 W. NEW ENG. L. REV. 97 (2002).

23. 18 U.S.C. § 1958(b).

24. The *Marek* court did not explicitly discuss cellular phones, pagers, or the Internet. Nonetheless, it suggests that § 1958's jurisdictional element is satisfied if the defendant uses any "means of transportation or communication" that is capable of causing an interstate contact. 238 F.3d at 318-19. It is evident that cellular phones, pagers, and Internet transmissions constitute "means of communication" that are capable of causing electronic signals to travel across state borders.

25. See *Weathers*, 169 F.3d at 342 (explaining that it would focus on "evidence regarding the technical aspects of the operation of Weathers's cellular telephone" to determine whether it caused an actual out-of-state contact).

26. United States v. Stevens, 842 F. Supp. 96, 98 (S.D.N.Y. 1994) (citing Goldberg v. Sweet, 488 U.S. 252, 255 (1989)); *see also* United States v. Paredes, 950 F. Supp. 584, 589 n.8 (S.D.N.Y. 1996) (explaining that an intrastate E-mail may necessarily involve an interstate contact because of the structure of the Internet) (citing G. BURGESS ALLISON, THE LAWYER'S GUIDE TO THE INTERNET 31-32 (1995)).

commerce, the *Weathers* decision does not alleviate the grave constitutional concerns implicated in *Marek*. Under these cases, Congress's power to regulate crime increases exponentially with each new development in communication technology.[27]

Part II of this Note will examine the ongoing debate regarding the federalization of the criminal law. This Note ultimately concludes that the federalization of purely local, garden-variety crimes contravenes the text of the Constitution and threatens to disrupt the delicate balance between federal and state law enforcement. In addition, this Note argues that the federal government should dedicate its scarce resources to complex crime schemes that transcend state and national borders.

In Part III, this Note offers a detailed analysis of the *Weathers* and *Marek* opinions. These cases are used to demonstrate that Congress is often permitted to regulate purely local, garden-variety crimes that have taken on interstate characteristics merely because the defendant utilizes an electronic communication device that causes tenuous, ephemeral interstate contacts. More importantly, the decisions in *Marek* and *Weathers* demonstrate that many federal

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27. These grave constitutional concerns are also implicated in cases involving various other federal criminal statutes, including the wire fraud statute, 18 U.S.C. § 1343 (2000). *See, e.g.*, United States v. Brumley, 116 F.3d 728 (5th Cir. 1997) (affirming wire fraud conviction where defendant fraudulently induced victims to send money via Western Union from one location in Texas to another location in Texas, but where the government offered proof that the wire transmission was routed through a Western Union processing center outside of Texas); United States v. Davila, 592 F.2d 1261 (5th Cir. 1979) (same); United States v. Bryant, 766 F.2d 370 (8th Cir. 1985) (affirming wire fraud conviction where defendant sent Western Union transmission from one location in Missouri to another location in Missouri, but where wire transfer was processed by Western Union facility located in Virginia); *see also* United States v. Kammersell, 7 F. Supp. 2d 1196 (D. Utah 1998) (upholding conviction under 18 U.S.C. § 875(c) (2000), which prohibits persons from sending threatening messages in interstate commerce, where defendant sent threatening E-mail to victim located in the same state, but where the message was routed through an America Online processing facility in Virginia). In the interest of brevity, I do not discuss these cases in the body of this Note. Nonetheless, these cases pose the same threat of overfederalization as those arising under § 1958. Thus, the two reformulated Commerce Clause standards proposed in Part V of this Note would apply to, and change the outcome of, various cases arising under the wire fraud statute as well.

Finally, it is necessary to note that the federal courts have unanimously agreed that *intra*state communications may form the basis for federal criminal jurisdiction under the mail fraud statute, 18 U.S.C. § 1341. *See, e.g.*, United States v. Elliott, 89 F.3d 1360 (8th Cir. 1996), *cert. denied*, 519 U.S. 1118 (1997) (holding that the jurisdictional element of the mail fraud statute was satisfied where the defendant, an attorney, used the U.S. mail to deliver fraudulent invoices to clients located within the same state); United States v. Cady, 567 F.2d 771 (8th Cir. 1977), *cert. denied*, 435 U.S. 944 (1978) (holding that fraudulent medical bills delivered to insurance companies via U.S. mail constituted wire fraud, even though mailings were intrastate and purely local). These cases are irrelevant to this Note, however, because the mail fraud statute is based on Congress's postal power, U.S. CONST. art. I, § 8, cl. 7. This Note focuses exclusively on federal jurisdiction under Congress's commerce power, U.S. CONST. art. I, § 8, cl. 3.

criminal statutes, including the murder-for-hire statute, are virtually exempt from meaningful constitutional review under the Supreme Court's existing Commerce Clause jurisprudence.

Part IV provides an overview of the Supreme Court's modern Commerce Clause jurisprudence, with special emphasis on the three-category analytical framework delineated in *United States v. Lopez* and *United States v. Morrison*. In Part V, this Note demonstrates that the three-category framework permits Congress to convert its commerce power into a plenary police power of the sort retained by the states. Indeed, Part V demonstrates that federal criminal statutes are exempt from meaningful constitutional review, as long as (i) the statutes contain an express jurisdictional element or (ii) the statutes are deemed to be regulation of the channels or instrumentalities of interstate commerce.

Finally, in Part VI, I propose two reformulated Commerce Clause standards that are designed to prevent further federalization of criminal law. I ultimately conclude that the Supreme Court should add a fourth category to the *Lopez/Morrison* framework. That category would encompass cases such as *Marek* and *Weathers*, where the jurisdictional element of a federal criminal statute allegedly is satisfied by the defendant's use of an interstate communication facility. Under my proposed standard, Congress would be permitted to regulate such crime schemes only when the parties to the communication are located in different states.

II. THE FEDERALIZATION OF STATE CRIME: CONSTITUTIONAL CONCERNS AND PRACTICAL IMPLICATIONS

For many years, members of the legal community have debated whether federalization of state crime is desirable or, more importantly, constitutionally permissible. Although the debate continues, one point has become clear: The vast majority of federal judges and academics agree that Congress has used its commerce power to "overfederalize" criminal law.[28] Federal judges and

28. In a recent article, Tom Stacy and Kim Dayton argued that crime has not been overfederalized but cataloged an extensive list of federal judges and academics who have voiced opposition to the federalization process. *See* Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J. L. & PUB. POL'Y 247, 247 n.1 (2000). More importantly, perhaps, they located only one published article that supported the federalization trend. Interestingly, that article was published by two federal prosecutors. *Id.* (citing Harry Litman & Mark D. Greenberg, *Dual Prosecutions: A Model for Concurrent Jurisdiction*, 543 ANNALS AM. ACAD. POL. & SCI. 72 (1996)).

Among the judges who have voiced opposition to the federalization trend are Chief Justice William H. Rehnquist and Justices Sandra Day O'Connor and Antonin Scalia. *See* Stephen

academics are particularly hostile to recent congressional efforts to vest the national government with concurrent jurisdiction over violent street crimes, which have traditionally been within the exclusive authority of state law enforcement officials.[29]

The critics of the federalization trend note that the United States Code now contains more than three thousand federal crimes,[30] including domestic violence,[31] prostitution,[32] kidnapping,[33] and murder.[34] The United States Code also includes a number of trivial offenses, such as bringing false teeth into a state without the approval of a local dentist[35] and reproducing the image of "Smokey the Bear"

Chippendale, Note, *More Harm Than Good: Assessing Federalization of Criminal Law*, 79 MINN. L. REV. 455, 466 (1994). In addition, the "Federal Judicial Center's 1992 Survey of Federal Judges showed that 91.5% of active district court judges and 89% of the current active circuit judges expressed strong or moderate support for narrowing of criminal jurisdiction to reduce prosecution of ordinary street crime in federal court." Stacy & Dayton, *supra*, at 247 n.2 (internal quotations omitted) (citing William W. Schwarzer & Russell R. Wheeler, *On the Federalization of the Administration of Civil and Criminal Justice*, 23 STETSON L. REV. 651, 652 n.3 (1994)).

The list of academics who have criticized the federalization trend is also extensive. Professors Dayton and Stacy cited twelve articles supporting this view. *See, e.g.*, Gerald G. Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789 (1996); Phillip B. Heymann & Mark H. Moore, *The Federal Role in Dealing with Violent Street Crime: Principles, Questions, and Cautions*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 103 (1996); Sara Sun Beale, *Too Many and yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979 (1995); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995); Sanford Kadish, Comment, *The Folly of Federalization*, 46 HASTINGS L.J. 1247 (1995); William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719 (1995); Mengler, *supra* note 2; Chippendale, *supra*.

29. Stacy & Dayton, *supra* note 28, at 248. Although federal law now proscribes many garden-variety crimes, state and local authorities still prosecute ninety-five percent of violent street crimes. *See* Mengler, *supra* note 2, at 516 (citing OFFICE OF THE ATT'Y GEN., COMBATING VIOLENT CRIME: 24 RECOMMENDATIONS TO STRENGTHEN CRIMINAL JUSTICE 4 (July 1992)).

30. Beale, *supra* note 28, at 980 n.10 (explaining that this figure was taken from Miner's 1992 article and that, since that time, Congress has enacted statutes defining many new criminal offenses) (citing Roger J. Miner, *Crime and Punishment in the Federal Courts*, 43 SYRACUSE L. REV. 681, 681 (1992)).

31. Federal law provides criminal penalties for any "person who travels in interstate or foreign commerce . . . with the intent to kill, injure, harass, or intimidate a spouse or intimate partner." 18 U.S.C. § 2261 (2000). If the federal government is unable to prove the requisite nexus with interstate commerce, the states retain exclusive jurisdiction.

32. Federal law proscribes "knowingly transport[ing] any individual in interstate or foreign commerce . . . with intent that such individual engage in prostitution, or in any sexual activity." 18 U.S.C. § 2421 (2000). If the federal government is unable to prove the requisite nexus with interstate commerce, the states retain exclusive jurisdiction.

33. Federal law provides criminal penalties for any person who "unlawfully seizes . . . kidnaps, abducts, or carries away and holds for ransom or reward . . . any person." 18 U.S.C. § 1201 (2000). To exercise jurisdiction, the federal government must prove a requisite nexus with interstate or foreign commerce, controlled airspace, or the high seas. § 1201.

34. 18 U.S.C. § 1958 (2000).

35. Mengler, *supra* note 2, at 527 n.117 (citing 18 U.S.C. § 1821 (1988)).

without permission.[36] According to many commentators, the explanation for the recent "explosion" of federal criminal law is relatively straightforward: Members of Congress understand that "getting tough on crime . . . is simply good politics."[37]

The text of the Constitution, on the other hand, suggests that the federal government should have a very limited role in the realm of criminal law.[38] In fact, the Constitution "expressly grants Congress the authority to punish only four types of criminal conduct."[39] Moreover, the Constitution provides that "[t]he powers not delegated to the United States by the Constitution . . . are reserved to the States."[40]

It is necessary to note, however, that proponents of the federalization trend also find support in the text of the Constitution. Indeed, the Constitution grants Congress authority to "make all laws which shall be necessary and proper for carrying into [e]xecution" its enumerated powers.[41] One of Congress's enumerated powers is to "regulate . . . commerce among the several States."[42] The proponents of federalization argue that many local activities, including crime, have a dramatic impact on the national economy.[43] Thus, they believe

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36. *Id.* at 527 n.116 (citing § 711). The federal government provides criminal penalties because Smokey's image is owned by the United States Forest Service.

37. Ashdown, *supra* note 28, at 802-03; *see also* Mengler, *supra* note 2, at 504 (explaining that Congress's decision to criminalize conduct already within the purview of state law reflects the fact that "we live at a time when legislators, state as well as federal, are zealous in their efforts to he tough on crime, or at least to create the appearance of toughness"); William H. Rehnquist, *Seen in A Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1, 7 (1993) (observing that "hardly a congressional session goes by without an attempt to add new [criminal] sections"); Chippendale, *supra* note 28, at 467 n.63 (" 'Every two years, right before an election, Congress seems to pass a crime bill.' ") (citing *Is Crime Killing America?*, U.S. NEWS & WORLD REP., Mar. 15, 1994, at 3).

38. *See* Mengler, *supra* note 2, at 508 ("There is no suggestion in the Constitution or in the Framers' debates that the federal government was to have a significant role in prosecuting crimes affecting the local community.").

39. *See* Chippendale, *supra* note 28, at 456 n.10 (explaining that "the Constitution authorizes Congress to punish counterfeiting, U.S. CONST. art. 1, § 8, cl. 6, piracy on the high seas, U.S. CONST. art. I, § 8, cl. 10, crimes committed on federal property, U.S. CONST. art. I, § 8, cl. 17, and treason, U.S. CONST. art. III, § 3"); *see also* Mengler, *supra* note 2, at 508 ("By expressly enumerating only a few circumstances in which Congress may enact criminal statutes, the United States Constitution itself reflects tbe perspective that the burden of criminal law enforcement should largely reside with tbe states.").

40. U.S. CONST. amend. X.

41. *Id.* art. 1, § 8, cl. 18.

42. *Id.* art I, § 8, cl. 3.

43. *See* Stacy & Dayton, *supra* note 28, at 249 (explaining that, according to a recent study, crime costs the nation approximately $500 billion per year) (citing TED R. MILLER ET AL., VICTIM COSTS AND CONSEQUENCES: A NEW LOOK (1996)).

that Congress should be permitted to enact criminal statutes designed to protect our nation's highly interdependent economy.

Since the text of the Constitution is not conclusive, critics of the federalization process often resort to tradition, arguing that that overfederalization offends American traditions of federalism.[44] These critics believe that the constitutionally mandated division of authority between the federal and state governments reflects the Framers' belief that "[d]ifferent laws, opinions, and beliefs exist in different states"[45] and that "the national government could not possibly account for such a multiplicity of local interests."[46] Further, they believe that the Framers adopted the Tenth Amendment to reserve to each state the power to "address its unique 'local' concerns and objectives."[47] Indeed, the critics of federalization argue that "no one can seriously contend that the Framers envisioned that the federal government would be as involved as it currently is in the prosecution and adjudication of criminal behavior in the United States."[48]

Proponents of the federalization trend contend that reliance on "tradition" is not justified. Professors Stacy and Dayton have argued that the difficulties of "defining, identifying, and using tradition make relying upon it standardless."[49] Moreover, they cite "counter-

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44. *See* United States v. Lopez, 514 U.S. 549, 561 n.3 (1995) ("Under our federal system, the '[s]tates possess primary authority for defining and enforcing the criminal law.' ") (quoting Brecht v. Abrahamson, 507 U.S. 619, 635 (1993)); Beale, *supra* note 28, at 994-95 (explaining that "the values promoted by federalism, which have great force in the context of criminal enforcement, are threatened by the seemingly inexorable expansion of federal criminal law" and suggesting that "[p]erhaps the most obvious aspect of the division of power is that the United States has no single police force").

45. Grant S. Nelson & Robert J. Pushaw, *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 27 n.107 (1999) (citing PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 288 (Lee) (Paul Ford ed., 1888)).

46. *Id.* (citing MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 357 (Madison) (1911)).

47. *Id.* at 26.

48. Mengler, *supra* note 2, at 508; *see also* Nelson & Pushaw, *supra* note 45, at 113 ("[T]he Founders understood [that] only state officials can respond directly to local concerns on subjects that reflect social, moral, and cultural views, such as crime and family law."). The writings of James Madison tend to confirm these scholarly observations. Madison eloquently explained that "[t]he powers delegated to the federal government are few and defined. Those which are to remain in the states are numerous and indefinite . . . . The powers reserved to the states will extend to all objects which . . . concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clint Rossiter ed., 1961).

49. Stacy & Dayton, *supra* note 28, at 272. One other scholar noted similar concerns, explaining that "traditions are multifaceted and rich, permitting a range of normative claims to be couched in historical practices but varying significantly." *Id.* at 273 (citing Judith Resnik, *History, Jurisdiction, and the Federal Courts: Changing Contexts, Selective Memories, and Limited Imagination*, 98 W. VA. L. REV. 171, 217-18 (1995)).

traditions" that may in fact support the federalization of certain crimes. They note, for example, that federal regulation of firearms dates back to 1934.[50] In a similar vein, many scholars have criticized efforts to interpret the Constitution in light of the Framers' intent.[51] It could hardly be argued, for example, that the Framers envisioned a national economy, homogenous states, and mass interstate transportation when they drafted the Commerce Clause.

Notwithstanding these competing constitutional and historical considerations, practical considerations tip the scale in favor of very limited federal criminal jurisdiction. In recent years, the federal judiciary has been flooded with an unmanageable criminal docket. Between 1980 and 1992, the number of criminal cases filed in the federal courts increased by seventy percent, and the number of defendants prosecuted rose seventy-eight percent.[52] More importantly, criminal cases now consume half of the federal judiciary's total time.[53] The avalanche of criminal filings not only disrupts the operation of the federal courts but also robs civil litigants of necessary judicial resources.[54] The Speedy Trial Act, which requires dismissal of criminal charges if they are not tried within seventy days, forces the federal judiciary to give priority to their criminal docket.[55] Consequently, federal judges are forced to put civil cases on the back

50. *Id.* at 273.

51. For scholarly criticism of originalist interpretations of the Constitution, see, e.g., DANIEL FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS (2002); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Rebecca Brown, *Tradition and Insight*, 103 YALE L.J. 177 (1993).

52. Beale, *supra* note 28, at 984. Professors Stacy and Dayton have argued that these "statistics provide no support whatsoever for the claim that the national government's crime fighting role has grown, much less that the growth has been rapid and unrestrained." Stacy & Dayton, *supra* note 28, at 260. They explain, for example, that felony filings in state courts increased by sixty-four percent from 1984 to 1994, while federal felony filings increased by only thirty-two percent during the same period. *Id.* at 253. These statistics assume, of course, that "federalization" has not occurred unless the felony filings in federal courts grow at the same rate as the felony filings in state courts. This is a highly questionable assumption in light of the fact that most crimes involve purely local conduct. Professors Stacy and Dayton also attempt to undermine the significance of the federalization trend by explaining that the federal prison population constituted only 7.8% of the total population of prisoners in the United States in 1994, down from an average of 11.7% in the 1940s. *Id.* at 258. These statistics assume that federalization has not occurred unless the federal prison population grows at the same rate as the state prison population. For the reasons previously stated, this is also a highly questionable assumption.

53. In some districts, such as the Southern District of Florida, the criminal docket constitutes eighty-four percent of the federal judiciary's caseload. *See* Beale, *supra* note 28, at 985 n.22.

54. *See id.* at 984-88 (explaining that federal courts dedicate a vast amount of time and attention to criminal trials, thereby depriving civil litigants of adequate judicial resources).

55. *Id.* at 987-88 (describing the effect of the Speedy Trial Act, 18 U.S.C. § 3162 (1985)).

burner until pending criminal matters have been resolved. In the end, many civil litigants are deprived of "the just, speedy, and inexpensive determination" envisioned by the Federal Rules of Civil Procedure.[56]

Most important, perhaps, is that the scarce resources of the federal government have been dedicated to simple street crimes, rather than complex crimes that transcend state and national boundaries. Federal prosecutors, as well as their counterparts in the federal judiciary, spend a significant amount of time dealing with drug offenses, firearm offenses, arson cases, carjacking cases, and other local crimes.[57] Often, these offenses have only a tenuous nexus with interstate commerce and an even less pronounced effect on the national economy.

It would be more efficient to allocate federal resources to complex, multistate crimes that truly implicate national concerns. The terrorism provisions of the Patriot Act[58] and the corporate fraud provisions of the Sarbanes-Oxley Act[59] are examples. It is beyond question that terrorism and large-scale corporate fraud schemes have a dramatic impact on the national economy. In addition, terrorism has a significant impact on national security. These crimes are extremely complex because they often involve a unique "interplay of business, financial, and governmental institutions."[60] Moreover, they often transcend state boundaries in significant and tangible ways. Thus, only the federal government has the expertise, resources, and multijurisdictional authority to fight these crimes. Congress would therefore be well advised to reallocate the federal judiciary's scarce resources from local, garden-variety street crimes to sophisticated white-collar crimes and terrorism issues that transcend state and national borders.

III. COMMERCE CLAUSE JURISPRUDENCE BASED ON ELECTRONIC IMPULSES: JUDICIAL INTERPRETATIONS OF THE FEDERAL MURDER-FOR-HIRE STATUTE

The following section contains a detailed analysis of the *Marek* and *Weathers* opinions. These cases are used to demonstrate two

56. Chippendale, *supra* note 28, at 471 (quoting FED. R. CIV. P. 1).

57. *See, e.g.*, Beale, *supra* note 28, at 984 (Between 1980 and 1992, "the number of drug cases filed in the federal courts roughly quadrupled, from 3,130 cases (6,678 defendants) to 12,833 cases (25,033 defendants). Firearm prosecutions also quadrupled, from 931 prosecutions in 1980 to 3,917 in 1992.").

58. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

59. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-24, 116 Stat. 745 (2001).

60. Mengler, *supra* note 2, at 518.

deficiencies of the Supreme Court's Commerce Clause jurisprudence. First, many federal criminal statutes, including the murder-for-hire statute, are exempt from meaningful constitutional review because they contain an express jurisdictional element. The *Marek* and *Weathers* decisions demonstrate that express jurisdictional elements do little to ensure that the criminal conduct has an adequate nexus with interstate commerce. Second, federal criminal statutes are exempt from constitutional review, even when they are applied to local offenses, as long as they are deemed to be regulations of the channels or instrumentalities of interstate commerce.

A. United States v. Weathers: *Ephemeral and Vaporous Interstate Contacts are Sufficient*

In *United States v. Weathers*, the defendant arranged for the murder of a state law enforcement officer who was scheduled to testify against him in an upcoming criminal trial.[61] To facilitate the murder scheme, Weathers used his cellular telephone to contact a man, whom he believed to be a drug dealer and who was willing to commit the murder in return for cash and drugs.[62] In fact, the drug dealer was an undercover law enforcement agent who was investigating Weathers's criminal activity.[63] During these telephone conversations, Weathers arranged clandestine meetings with the law enforcement agent so that they could discuss the details of the murder plan, arrange the delivery of the murder weapon, and complete various drug deals.[64] During all of their telephone conversations, both Weathers and the undercover law enforcement agent were located in the State of Kentucky.[65]

During the trial, the government called an expert witness to testify as to the manner in which Weathers's cellular phone operated.[66] The expert witness, who was employed by Weathers' cellular service provider, had specialized training in the technical functioning of the local cellular network.[67] The expert testified that the completion of the intrastate cellular phone call required that an

61. 169 F.3d 336, 338 (6th Cir. 1999).
62. *Id.*
63. *Id.*
64. *Id.* at 338, 343.
65. *Id.* at 337.
66. *Id.* at 339.
67. *Id.*

interstate paging signal be sent to communications equipment in both Kentucky and Indiana.[68]

Based on the extensive evidence presented at trial, the jury returned a guilty verdict.[69] Weathers appealed his conviction to the Sixth Circuit, alleging, inter alia, that the government failed to satisfy the commerce-based jurisdictional element of the murder-for-hire-statute.[70] He claimed that "even if the evidence demonstrated the use of a facility in interstate commerce, that use was 'so ephemeral' and 'so vaporous' as to be virtually non-existent.' "[71]

The court of appeals never questioned whether the murder-for-hire statute, as applied to the facts of the case, was constitutional. Rather, it resolved the case largely as a matter of statutory construction.[72] The court began its analysis by explaining that § 1958(a) and § 1958(b)(2) contained textual discrepancies that made it difficult to interpret the statute's jurisdictional requirements.[73] Section 1958(a), the substantive section of the statute, prohibits a person from using a "facility *in* interstate or foreign commerce" in furtherance of a murder-for-hire scheme.[74] The problem is that § 1958(b)(2), the definitional section of the statute, does not define the phrase "facility *in* interstate commerce."[75] Rather, it provides a definition of the phrase "facility *of* interstate commerce."[76] In effect, the definitional section of the statute does not define the jurisdictional phrase.[77]

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68. The *Weathers* opinion offers a highly detailed description of the technical operation of the defendant's cellular phone. *See id.*

69. *Id.* at 337.

70. *Id.*

71. *Id.* at 339.

72. In Part V.A, I offer a detailed analysis to explain the reasons that the *Marek* court resolved the case using statutory construction, rather than by analyzing the constitutionality of § 1958. At this point, it is sufficient to state that many federal criminal statutes are exempt from constitutional review under the Supreme Court's current Commerce Clause jurisprudence. This limitation ultimately supports the conclusion that the Supreme Court should reformulate its Commerce Clause jurisprudence. *See infra* Part V.C.

73. *Weathers*, 169 F.3d at 340.

74. 18 U.S.C. § 1958(a) (2000) (emphasis added). "Whoever travels in or causes another [including the intended victim] to travel in interstate or foreign commerce, or uses or causes another [including the intended victim] to use the mail or any *facility in interstate or foreign commerce*, with intent that a murder be committed . . . shall be fined under this title or imprisoned for not more than ten years, or both." § 1958(a) (emphasis added).

75. *See* § 1958(b)(2) (emphasis added).

76. § 1958(b)(2) (emphasis added). "As used in this section . . . *'facility of interstate commerce'* includes means of transportation or communication." § 1958(b)(2) (emphasis added).

77. *Weathers*, 169 F.3d at 340.

The court emphasized that the "the distinction between 'in' and 'of' interstate commerce . . . is critical."[78] It explained that a statute that "speaks in terms of an instrumentality in interstate commerce . . . is intended to apply to interstate activities only."[79] A statute that speaks in terms of "facilities of interstate commerce," on the other hand, extends to intrastate activities involving an interstate commerce facility.[80] In effect, one of the phrases "stresses how the facility is used under the particular facts, and the other stresses whether the facility itself is a facility of interstate commerce."[81] Thus, it was unclear whether § 1958 required actual interstate use of a facility under the particular facts of the case or, alternatively, whether it required only that the defendant use a facility that typically is involved in interstate commerce.[82]

The court ultimately resolved the textual discrepancies in the murder-for-hire statute by concluding that "the key prohibition creating the criminal offense is found in subsection (a)[,] and . . . it controls over the provision in subsection (b)."[83] Since subsection (a) included the phrase "facility in interstate commerce," rather than "facility of interstate commerce," the court held that jurisdiction would be proper only if the defendant's use of his cellular phone actually involved an interstate contact.[84] It was irrelevant that the cellular network itself was interstate, in the sense that it was composed of a nationwide network of equipment, or that it was capable of facilitating interstate calls.[85]

The court explained that the undisputed evidence demonstrated that "without [interstate search signals] . . . the transmission of a telephone call to or from Weathers's cellular telephone would not have been possible."[86] Thus, Weathers's use of his

78. *Id.* at 341.

79. *Id.* (citing United States v. Barry, 888 F.2d 1092, 1095 (6th Cir. 1989)).

80. *Id.*

81. *Id.* at 340.

82. *Id.*

83. *Id.* at 342.

84. *Id.* The Court noted that it was proper to "focus on the technical aspects of the operation of Weathers's cellular phone, and the legal consequences flow[ing] therefrom." *Id.* at 342. The Court noted that this approach was consistent with the approach taken in *Fed. Power Comm'n v. Fla. Power & Light Co.*, 404 U.S. 453 (1972), and emphasized that "the legal conclusions may depend upon the evaluation of technical facts." *Id.* In that case, the Supreme Court's finding that the Federal Power Commission had jurisdiction hinged on its determination that energy from the Florida State Power Commission was "transferred into a 'bus,' the point of connection between several regional utilities . . . before it was sent to various out-of-state destinations." *Id.* at 342 (citing *Fla. Power & Light Co.*, 404 U.S. at 463).

85. *See id.* at 342.

86. *Id.*

cellular phone involved an actual use of facilities in interstate commerce. Accordingly, the Sixth Circuit affirmed the conviction.[87]

B. United States v. Marek *and* United States v. Cisneros: *Just Look at the Nature of the Facility, No Need to Search for Ephemeral or Vaporous Contact*

Less than a year after the Sixth Circuit's decision in *Weathers*, the Fifth Circuit was asked to resolve the same issue: whether the jurisdictional element of § 1958 required that a facility actually be used in an interstate manner, or whether it required only that the facility was itself a facility of interstate commerce. In two cases, *United States v. Marek*[88] and *United States v. Cisneros*,[89] panels of the Fifth Circuit Court of Appeals reached contradictory conclusions with respect to that issue.[90] Subsequently, the Fifth Circuit voted to rehear these cases en banc to reconcile the discrepancy and to establish a consistent position with respect to the jurisdictional requirements of § 1958.[91]

1. *United States v. Cisneros* (Take One)

In *United States v. Cisneros*, the defendant asked her trusted fortune-teller if she could find someone to murder her daughter's former boyfriend.[92] After engaging in numerous international telephone calls between the United States and Mexico, the fortune-teller located and employed two hit men.[93] The two men traveled from Mexico and killed the intended victim in Texas.[94] The defendant was subsequently convicted under § 1958 for using a facility in interstate commerce in the commission of murder-for-hire.[95] Cisneros appealed her conviction alleging, inter alia, that the government had failed to provide sufficient evidence that she used a "facility in interstate or foreign commerce."[96]

In resolving the jurisdictional issue, the Fifth Circuit recognized the difficulties caused by the textual discrepancies between

87. *Id.* at 344.
88. 198 F.3d 532 (5th Cir. 1999), *reh'g granted*, 206 F.3d. 449 (5th Cir. 2000).
89. 203 F.3d 333 (5th Cir. 2000), *vacating* 194 F.3d 626 (5th Cir. 1999).
90. United States v. Marek, 238 F.3d 310, 313 (5th Cir. 2001).
91. *Id.*
92. 203 F.3d at 337-38.
93. *Id.*
94. *Id.* at 338.
95. *Id.* at 339.
96. *Id.*

§§ 1958(a) and 1958(b).[97] The panel noted that the phrase "facility in interstate commerce," as included in § 1958(a), would require proof that the facility employed in the instant case was actually used in the process of interstate or foreign commerce.[98] Conversely, the phrase "facility of interstate commerce," as used in § 1958(b), would not require proof of actual interstate use since that wording encompasses even intrastate use of facilities through which interstate commerce is typically accomplished.[99]

It was not necessary for the *Cisneros* court to decide which jurisdictional phrase governed the case, however, because the result in the case would have been the same under either textual construction.[100] Cisneros's fortune-teller not only used a facility through which international commerce typically was accomplished—a "facility *of* interstate commerce"—but also used that facility in a manner that actually affected the process of international commerce—a "facility *in* interstate commerce."[101] The court suggested in dicta, however, that the jurisdictional element of § 1958 should be interpreted narrowly so as to require that a facility actually be used in an interstate manner.[102] According to this interpretation, like the court's interpretation in *Weathers*, intrastate use of a facility would not suffice even if that facility were typically used in interstate commerce.

2. *United States v. Marek* (Take Two)

In *United States v. Marek*, the defendant attempted to hire a hit man to murder her boyfriend's mistress.[103] The defendant, Betty Louise Marek, was arrested after she used Western Union to transfer

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97. *Id.* at 340.

98. *Id.* The court used dictionary definitions to highlight the important differences between the phrase "facility in interstate commerce" and "facility of interstate commerce." *Id.* The court explained that the word "of" means "belonging or connected to," while "in" means "during the act or process of." *Id.* (citing WEBSTER'S II NEW COLLEGE DICTIONARY 557, 559 (1995)).

99. *Id.*

100. United States v. Marek, 238 F.3d 310, 314 (5th Cir. 2001); *see also* United States v. Marek, 198 F.3d 532, 535-36 (5th Cir. 1999) (disregarding as dicta the *Cisneros* court's conclusion that § 1958's jurisdictional requirement should be read narrowly to require that an interstate commerce facility actually be used in an interstate manner).

101. *See Marek*, 238 F.3d at 314 (explaining that "[i]n *Cisneros* the subject telephone calls were unquestionably international so the use of the telephone facility was international ("foreign"), as is the telephone facility itself.").

102. *See Cisneros*, 203 F.3d at 342. The *Cisneros* court explained that the "legislative history plainly suggests that we should eschew the broader reading of the statute. Using the definition in [§ 1958] (b) to interpret 'facility in interstate commerce' would extend the reach of the federal murder-for-hire statute to new realms of traditionally-exclusive state jurisdiction." *Id.*

103. 198 F.3d at 533.

$500 to the putative hit man who, unbeknownst to Marek, was actually an undercover police officer.[104] The wire transfer was initiated in Houston, Texas and received in Harlingen, Texas.[105]

Despite the fact that the wire transfer was entirely intrastate, Marek was indicted under § 1958 for using a facility in interstate commerce in the commission of murder-for-hire.[106] Marek pled guilty to the offense, and the district court sentenced her accordingly.[107] Marek later appealed the conviction on the grounds that the prosecution failed to prove that she used a "facility in interstate commerce" in the commission of the murder-for-hire scheme.[108]

On appeal, the Fifth Circuit explained that the issue was "whether the use of Western Union's facilities by one party to transfer funds to another party in the same state qualifies as the use of a 'facility in interstate commerce' as required by § 1958(a)."[109] The court conceded that this issue had been addressed in *Cisneros* but concluded that "any such discussion in *Cisneros* was *dicta* and is not binding on this court's discussion . . . ."[110]

After analyzing the text of the statute and its legislative history, and after applying rules of statutory construction, the Fifth Circuit concluded that "a facility in interstate commerce" was synonymous with the phrase "interstate commerce facility."[111] Accordingly, the court held that jurisdiction was proper if the defendant utilized a facility that was ordinarily engaged in interstate commerce, even if the facility was used entirely intrastate on the particular occasion in question.[112] Applying that rule to the instant case, the Fifth Circuit held that "regardless of the place of origin and place of completion, the use of Western Union, quintessentially a facility *in* interstate commerce and *of* interstate commerce as well, satisfies the jurisdictional requirements of § 1958."[113] This holding, which was based on the nature of the facility rather than the manner

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 534.

110. *Id.* The discussion in *Cisneros* was dicta because "[t]hat case involved the international use of a facility in foreign commerce. It was thus unnecessary for the *Cisneros* court to determine whether an *intrastate* use of a common carrier . . . that is itself a 'facility in interstate commerce' was jurisdictionally sufficient." *Id.*

111. *Id.* at 535.

112. *Id.*

113. *Id.* (emphasis in original).

in which it was actually used, was in direct conflict with the Fifth Circuit's dicta in *Cisneros*.

3. *United States v. Marek* (Take Three): Resolving the Split Within the Fifth Circuit

Just one year after the Fifth Circuit decided *Marek* and *Cisneros*, it voted to rehear both cases en banc in order to reconcile the discrepancies regarding § 1958's jurisdictional requirements.[114] The court noted from the outset that the *Cisneros* case did not present any complex or novel issues of law, since it involved actual interstate use of a facility that was ordinarily involved in interstate commerce.[115] Therefore, in *Cisneros*, it was unnecessary for the court to decide whether intrastate use of an interstate facility satisfied § 1958's jurisdictional requirements.[116] *Marek*, on the other hand, raised a difficult jurisdictional issue, requiring the court to determine whether the jurisdictional element of § 1958 required that "both (1) the facility and (2) the defendant's use of the facility be in interstate or foreign commerce."[117]

In resolving the issue, the Fifth Circuit first analyzed the plain language of the statute.[118] The court explained that "the key question of statutory construction . . . is whether . . . under § 1958, the phrase 'in interstate or foreign commerce' modifies [the word] 'use' or modifies [the word] 'facility.' "[119] The court ultimately concluded that the phrase "in interstate or foreign commerce" is "an adjective phrase that modifies 'facility,' the noun that immediately precedes it—*not* an adverbial phrase that modifies the syntactically more remote verb, '[to] use.' "[120] According to that interpretation, jurisdiction under § 1958 is based on the nature of the facility involved, rather than on its actual use under the particular facts of the case.

The court next turned to § 1958's statutory context to determine whether its jurisdictional requirements would be satisfied by intrastate use of an interstate commerce facility. The court explained that "when . . . [Congress] adopted § 1958, . . . [it] was acting within the second of three broad categories identified by the

114. United States v. Marek, 238 F.3d 310, 313 (5th Cir. 2001).
115. *See id.* at 314.
116. *Id.*
117. *Id.* at 315.
118. *Id.* at 315-16.
119. *Id.* at 316.
120. *Id.*

Supreme Court in *United States v. Lopez*."[121] The second *Lopez* category empowered Congress "to regulate and protect the instrumentalities of interstate commerce, or person or things in interstate commerce, *even though the threat may come only from intrastate activities*."[122] The court then concluded that "[w]hen Congress regulates and protects under the second *Lopez* category . . . federal jurisdiction is supplied by the nature of the instrumentality or facility used, not by separate proof of interstate movement."[123]

The court also addressed the discrepancy between the wording in § 1958(a), which uses the phrase "facility in interstate commerce," and the wording in § 1958(b)(2), which uses the phrase "facility of interstate commerce."[124] The court explained, "[W]e find the inconsistency between § 1958(a) and (b)(2) to be more apparent than real, and that use of slightly different phraseology in the clarification section . . . was not intended by Congress to limit the scope of the statute."[125] The court buttressed its assertion by examining the statute's legislative history.[126] In the Senate report, the court found numerous instances in which the phrases "of interstate commerce" and "in interstate commerce" were used interchangeably.[127] Furthermore, the Senate Judiciary Committee Report made it clear that "the gist of the offense is travel . . . or the use of the facilities of interstate commerce . . . ."[128] Finally, the court noted that the title of

121. *Id.* at 317. This determination was critical to the outcome of the case. In Part V.A, I explain that statutes falling within the second *Lopez* category are virtually exempt from constitutional scrutiny under the Supreme Court's existing Commerce Clause jurisprudence. This helps to explain why the *Marek* court did not address the grave constitutional implications of the case, choosing instead to focus on matters of statutory construction. This limitation ultimately leads to the conclusion that the Supreme Court should reformulate its Commerce Clause jurisprudence. *See infra* Part IV.C.

122. *Marek*, 238 F.3d at 317 (quoting United States v. Lopez, 514 U.S. 549, 558 (1995)).

123. *Id.* The court also explained that the *intra*state use of various other interstate commerce facilities has been deemed sufficient to create federal criminal jurisdiction. *Id.* at 318. The court cited *United States v. Weathers*, for example, for the proposition that "telephones, even when used intrastate, constitute instrumentalities of interstate commerce." *Id.* at 319 n.35 (citing United States v. Weathers, 169 F.3d 336, 341 (6th Cir. 1999)). In addition, the court cited *United States v. Baker*, where the Eighth Circuit held that the jurisdictional element of the Travel Act was satisfied when an extortion victim withdrew cash from his local bank account using another local bank's automated teller machine. *Id.* at 319 (citing United States v. Baker, 82 F.3d 273, 276 (8th Cir. 1996)). The court explained that "[t]hough [the victim's] withdrawal triggered an entirely *intra*state electronic transfer . . . the jury found that [the defendant] caused [the victim] to use a facility in interstate commerce." *Id.* (internal citations omitted).

124. *Id.* at 320.

125. *Id.*

126. *Id.* at 321.

127. *Id.*

128. *Id.* (citing S. REP. NO. 98-225, at 306 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3185).

the statute "Use of Interstate Commerce Facilities in the Commission of Murder-for-Hire," made it clear that federal jurisdiction is based on the nature of the instrumentality used, not on separate proof of interstate movement.[129]

Ultimately, the court concluded that "when a facility employed to advance murder-for-hire is in interstate . . . commerce generally, the jurisdictional element of § 1958 is satisfied even though the particular use of the facility on the specific occasion in question is only *intra*state."[130] Consequently, the court concluded that "both (1) Marek's intrastate use of Western Union—a quintessential facility *in* interstate commerce—to transfer funds within Texas and (2) Cisneros's international phone calls, [were] sufficient to satisfy the jurisdictional element of section 1958."[131]

IV. THE THREE-RING CIRCUS: CATEGORIES OF ACTIVITY THAT CONGRESS MAY REGULATE USING THE COMMERCE CLAUSE

The courts in *Marek* and *Weathers* applied the murder-for-hire statute to local crimes that, at best, had a very tenuous link to interstate commerce. Neither court questioned whether the murder-for-hire statute, as applied to predominantly intrastate crime, exceeded Congress's commerce power. To understand why the courts in *Marek* and *Weathers* eschewed a meaningful constitutional review in favor of statutory construction, it is necessary to understand the dynamics of the Supreme Court's three-category Commerce Clause framework.

In two recent decisions, *United States v. Lopez*[132] and *United States v. Morrison*,[133] the Supreme Court identified and explained three broad categories of activity that Congress may regulate using the Commerce Clause.[134] Specifically, the Court found that Congress may regulate (i) "the use of the channels of interstate commerce,"[135] (ii) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities,"[136] and (iii) those activities "substantially

129. *Id.* (citing 18 U.S.C. § 1958 (2000)).

130. *Id.* at 320.

131. *Id.* (emphasis in original).

132. 514 U.S. 549, 558-59 (1995).

133. 529 U.S. 598, 608-09 (2000).

134. These three categories were originally delineated in the 1971 Supreme Court decision of *Perez v. United States*, 402 U.S. 146, 150 (1971). The *Lopez* and *Morrison* decisions, however, represent the Court's most recent discussion of this three-category framework.

135. *Morrison*, 529 U.S. at 609; *Lopez*, 514 U.S. at 558.

136. *Id.*

affecting commerce."[137] The Supreme Court did not explain what it meant when it said that Congress could regulate the channels or instrumentalities of interstate commerce. Similarly, the Court did not explain what activities substantially affect commerce. Instead, it cited a number of prior cases that fit within each of the three categories.

In this Part, I offer a brief summary of the cases that the Supreme Court cited to illustrate the three-category framework. This background helps to explain why *Marek* and *Weathers* were resolved largely as a matter of statutory construction with little attention to underlying constitutional issues.

A. Ring One: Regulation of the Use of the Channels of Interstate Commerce

In *Lopez*, the Court cited *United States v. Darby*[138] and *Heart of Atlanta Motel, Inc. v. United States*[139] to illustrate Congress's power to regulate "the use of the channels of interstate commerce."[140] In *Darby*, the Court upheld the constitutionality of the Fair Labor Standards Act prohibiting, inter alia, the shipment in interstate commerce of goods produced in violation of the Act's minimum wage and maximum hour requirements.[141] The Court recognized that Congress's true intention might have been to regulate the conditions of intrastate manufacturing.[142] Nonetheless, the Court held that Congress, "following its own conception of public policy, . . . is free to exclude from commerce articles whose uses [are] . . . injurious to the public health, morals or welfare."[143] In *Heart of Atlanta Motel*, the Court analyzed the constitutionality of Title II of the Civil Rights of Act of 1964, prohibiting discrimination in hotels, motels, restaurants, and other places of public accommodation.[144] The Court examined the statute's legislative history, which demonstrated that African-Americans were often unable locate overnight accommodations.[145] Congress found that the unavailability of overnight accommodations discouraged a large portion of the country's African-American

137. *Morrison*, 529 U.S. at 609; *Lopez*, 514 U.S. at 558-59.

138. 312 U.S. 100 (1941).

139. 379 U.S. 241 (1964).

140. *See Lopez*, 514 U.S. at 558 (citing *Darby*, 312 U.S. at 114, and *Heart of Atlanta Motel*, 379 U.S. at 256, as examples of Congress's ability to regulate tbe "channels of interstate commerce").

141. *See* 312 U.S. at 100.

142. *Id.* at 113-15.

143. *Id.* at 114.

144. 379 U.S. at 247.

145. *Id.* at 252-53.

community from engaging in interstate travel.[146] The Court upheld the regulations based in part on a recognition that "the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question."[147]

B. Ring Two: Regulation of the Instrumentalities of Interstate Commerce, or Persons or Things in Interstate Commerce

To illustrate Congress's ability to regulate "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities,"[148] *Lopez* cited the *Shreveport Rate Cases*.[149] In that case, numerous railroad companies challenged the constitutionality of an order of the Interstate Commerce Commission ("ICC") that prohibited the railroads from charging higher rates for interstate shipments between Texas and Louisiana than they charged for shipments within the State of Texas.[150] The railroads argued that the Commerce Clause did not permit the ICC to control intrastate shipping rates, even "to the extent necessary to prevent injurious discrimination against interstate traffic."[151] The Court rejected this argument, emphasizing that Congress had the authority to protect commerce by requiring that "the agencies of interstate commerce . . . not be used in such manner as to cripple, retard or destroy it."[152] The Court ultimately held that Congress's power to regulate commerce "extend[s] to these interstate carriers as instruments of interstate commerce [and] necessarily embraces the right to control their

146. *Id.* at 253.

147. *Id.* at 256 (quoting Caminetti v. United States, 424 U.S. 470, 491 (1917)); *see also* Perez v. United States, 402 U.S. 146, 150 (1971) (explaining that Congress's power to regulate the use of the channels of interstate commerce is illustrated by 18 U.S.C. §§ 2312-15 (2000), which prohibit the interstate shipment of stolen goods, and § 1201, which prohibits the interstate shipment of persons who have been kidnapped); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-5, at 828 n.10 (3d ed. 2000) (explaining that Congress's power to regulate the use of the channels of commerce has also been recognized in *Hoke v. United States*, 227 U.S. 308 (1913), and *Champion v. Ames*, 188 U.S. 321 (1903), in which the Supreme Court upheld congressional bans on the interstate shipment of prostitutes and lottery tickets, respectively)).

148. United States v. Morrision, 529 U.S. 598, 609 (2000); United States v. Lopez, 514 U.S. 549, 558 (1995).

149. *Lopez*, 514 U.S. at 558. The *Shreveport Rate Cases* is the popular name for *Houston, East & West Texas Ry. Co. v. United States*, 234 U.S. 342 (1914).

150. *Houston, E. & W. Tex. Ry. Co.*, 234 U.S. at 346-49.

151. *Id.* at 350.

152. *Id.* at 351.

operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate."[153]

In addition to the *Shreveport Rate Cases*, the *Lopez* Court cited two federal statutes to further elucidate Congress's ability to regulate the "instrumentalities of interstate commerce . . . or persons or things in commerce."[154] The first statute, 18 U.S.C. § 32, regulates the destruction of aircraft employed in interstate, overseas, or foreign air commerce.[155] This statute, like the ICC order discussed in the *Shreveport Rate Cases*, constitutes a regulation of the "instrumentalities of interstate commerce."[156] The second statute cited in *Lopez*, 18 U.S.C. § 659, regulates thefts from interstate shipments.[157] This statute represents a regulation of a "person or thing in commerce."[158]

C. Ring Three: Regulation of Activities That Substantially Affect Commerce

The final category of activity that Congress may regulate is "activit[y] that substantially affect[s] interstate commerce."[159] To illustrate this category, the *Lopez* Court cited *Wickard v. Filburn*.[160] In *Wickard*, a farmer challenged the constitutionality of the Agricultural Adjustment Act, which permitted the Secretary of Agriculture to set a national acreage allotment for the production of wheat.[161] Under this scheme, the Secretary of Agriculture indirectly controlled the amount of wheat that could be produced on each individual farm in the country.[162] The statute limited not only the amount of wheat that each farm could sell in interstate commerce, but also controlled the amount of wheat that was raised for home consumption.[163] The Act was designed to "control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce."[164]

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153. *Id.*
154. *Lopez*, 514 U.S. at 558.
155. *Id.*
156. *Id.*
157. *Id.* at 559.
158. *Id.*
159. *Id.*
160. *Id.* (citing Wickard v. Filburn, 317 U.S. 111 (1942)).
161. *Wickard*, 317 U.S. at 113, 115.
162. *Id.* at 115.
163. *Id.* at 118-119.
164. *Id.* at 115.

The petitioner, a farmer who had been fined for excess wheat production, argued that this regulation was unconstitutional because it regulated the "production and consumption of wheat."[165] He asserted that these activities were beyond Congress's commerce power because they were "local in character" and their effects upon interstate commerce were at most "indirect."[166] These distinctions were not dispositive, however, because the Court held that "even if appellee's activity [is] local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce."[167]

The Court also explained that "home-grown wheat . . . constitutes the most variable factor in the disappearance of the wheat crop,"[168] and that it "supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market."[169] Therefore, the Court concluded that "[i]t can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions."[170]

Finally, the Court explained that Congress could regulate the amount of wheat that the petitioner produced for home consumption, even if it could not prove that the petitioner's individual contribution to the wheat supply substantially affected interstate commerce.[171] The Court held that though "appellee's own contribution to the demand for wheat may be trivial by itself, [this] is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."[172] Thus, the Court recognized that Congress could regulate "not only acts which taken alone would have substantial effects on interstate commerce, but also acts which might reasonably be deemed nationally significant in their aggregate economic effect."[173]

Professor Laurence Tribe has observed that the "substantial effects test" and "aggregation principle" delineated in *Wickard* and its progeny represented an "enormous increase" in Congress's commerce power.[174] He explained that "the interconnectedness of our society and

165. *Id.* at 119.
166. *Id.*
167. *Id.* at 125.
168. *Id.* at 127.
169. *Id.* at 128.
170. *Id.* at 128.
171. *Id.* at 127-28.
172. *Id.*
173. *See* TRIBE, *supra* note 147, § 5-4, at 813 (describing the holding of *Wickard*).
174. *Id.* § 5-4, at 814.

the fact that every act has 'economic consequences combine to suggest that, with respect to almost any activity, one could make a strong argument that its repetition all over the country *will* substantially affect commerce.' "[175]

Congress's ability to regulate commerce under these two tests was increased even further in the 1940s, when the Supreme Court began "deferring to Congress's findings regarding the effect that a regulated activity in fact had on interstate commerce."[176] These doctrinal trends, taken together, meant that the Court would uphold any federal statute, as long as Congress had a rational basis for believing that the regulated activity, in the aggregate, had a "substantial effect" on commerce.[177] Striking down a congressional attempt to invoke the commerce power became a "de facto impossibility."[178]

In the 1995 case of *United States v. Lopez*,[179] the Supreme Court recognized the need to place "judicially cognizable limits to the increasingly amorphous and seemingly unbounded 'substantial effects' test."[180] The statute at issue in *Lopez*, the Gun Free School Zones Act,

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175. *Id.* § 5-4, at 823 (" 'In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence . . . .' ") (citing United States v. Lopez, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring). It is important to note that until 1971, the Supreme Court did not apply the "substantial effect" test or the "aggregation principle" in the context of criminal cases. *See* Chippendale, *supra* note 39, at 460. Instead, the Court required all offenses prosecuted under the Commerce Clause statutes to have an interstate nexus. *Id.* Then, in the landmark case of *Perez v. United States*, 402 U.S. 146 (1971), "the Court upheld a conviction under a federal loan shark statute without any showing of a specific interstate nexus because Congress determined that extortionate credit transactions in the aggregate affect interstate commerce." *Id.* at 460-61. From that point forward, the Court would uphold a federal criminal statute as long as Congress had a rational basis to helieve that the regulated conduct, in the aggregate, had a substantial effect on interstate commerce. *Id.* at 461.

176. *See* TRIBE, *supra* note 147, § 5-4, at 814.

177. *See id.* § 5-4, at 814-15 (observing that "Congress, seizing the opportunity created by the Court's 'substantial effect' and 'cumulative effect' principles and by its deference to congressional findings, relied in part on these doctrines as its constitutional justification for all sorts of legislation, including civil rights legislation, certain criminal statutes, and food and drug laws").

178. *See id.* § 5-4, at 816.

> Where Congress had provided findings linking the challenged regulation of an activity to its power to regulate interstate commerce, the Court would defer to these findings unless they had no "rational basis"; if no findings accompanied the legislation, the Court demonstrated that it would nevertheless uphold the regulation if it could on its own imagine the articulation of some rational basis for locating the legislative act within the commerce power . . . and such a rational basis would exist whenever the requisite effect on interstate commerce could be thought to result from the aggregation of all instances of an activity . . . . While all of these precepts were operating at full tilt, striking down a congressional attempt to invoke the commerce power . . . was a *de facto* impossibility.

Id.

179. 514 U.S. 549 (1995).

180. TRIBE, *supra* note 147, § 5-4, at 818.

made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[181] The Court noted at the outset of its analysis that the Gun Free School Zones Act fell within the third broad category of Commerce Clause regulations, because it could not fairly be characterized as a regulation of the "channels or instrumentalities" of interstate commerce.[182]

The Court then clarified, and slightly modified, the rule regarding regulations in the third category: "Where economic activity substantially affects commerce, legislation regulating that activity will be sustained."[183] In doing so, the Court made it clear that Congress may not regulate an activity that merely "affects" or has a "trivial impact" on commerce; rather, Congress must demonstrate a "substantial effect" on commerce.[184] More importantly, the Court delineated a dichotomy[185] that limited the application of the substantial effects test and the aggregation principle.[186] The Court restricted these tests by stating that individual instances of a regulated intrastate activity could not be aggregated to find a substantial effect on interstate commerce unless that activity could be classified as "commercial" or "economic."[187]

Applying this modified constitutional standard, the Court explained that the Gun Free School Zones Act was "a criminal statute that by its terms has nothing to do with commerce or any sort of economic enterprise."[188] Consequently, the Court concluded that the statute could not be upheld "under our cases upholding regulations of activities that arise out of or are connected with a commercial

181. 514 U.S. at 551 (1995) (citing the Gun Free School Zones Act of 1990, 18 U.S.C. § 922 (2000)).

182. *Id.* at 559.

183. *Id.* at 560.

184. *Id.* at 559.

185. *See* TRIBE, *supra* note 147, § 5-4, at 822 (concluding that the *Lopez* Court settled on a "comprehensible and . . . defensible dichotomy between regulating, for whatever purpose, activity that is in any sense economic or commercial in nature, and regulating activity that plainly is not").

186. *See id.* § 5-4, at 819 (recognizing that *Lopez* "reaffirmed [the Court's] decisions upholding federal laws regulating such intrastate activities as coal mining, loan sharking, running a restaurant, running a hotel, and producing wheat for home consumption" but explaining that the decision's "key move" was its post hoc "characterization of these prior cases as involving 'intrastate *economic* activity,' " even though those decisions did not originally rely on the commercial nature of the activity being regulated).

187. *Lopez*, 514 U.S. at 559-61.

188. *Id.* at 561.

transaction, which viewed in the aggregate, substantially affects interstate commerce."[189]

The *Lopez* Court also noted two other features of the Gun Free School Zones Act that required its invalidation. First, it contained no jurisdictional nexus that "would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."[190] Second, the Court noted that "neither the statute, nor its legislative history contain express congressional findings regarding the effecte upon interstate commerce of gun possession in a school zone."[191] Thus, the Court invalidated the Gun Free School Zones Act on the ground that Congress exceeded the scope of its commerce power.

The next step in the Court's efforts to curb the sweeping "substantial effects" test took place in *United States v. Morrison*.[192] The statute at issue in *Morrison*, the Violence Against Women Act ("VAWA"), provided that "persons within the United States shall have the right to be free from crimes of violence motivated by gender."[193] To enforce this right, the VAWA provided that "a person . . . who commits a crime of violence . . . and thus deprives another of the [aforementioned right] . . . shall be liable to the party injured" in a civil suit.[194]

The Court began its analysis by explaining that the VAWA fell within the third category of Commerce Clause regulation because it "focus[ed] on gender-motivated violence wherever it occurs (rather than violence directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce)."[195] The Court then observed that "since *Lopez* most recently canvassed and clarified our case law governing this third category of Commerce

189. *Id.*

190. *Id.*

191. *Id.* at 562. Although the statute's legislative history did not demonstrate that gun possession in school zones had a substantial effect on interstate commerce, the government prosecutors advanced numerous arguments at trial that supported this proposition. *Id.* at 563-64. Namely, the prosecution argued that "the possession of handguns near schools may lead to violent crime and that violent crime can be expected to affect the functioning of the economy in two ways." *Id.* at 563. First, "the costs of violent crime are substantial, and through the mechanism of insurance, those costs are spread through the population." *Id.* at 563-64. Second, "violent crime reduces the willingness of people to travel to areas within the country that are perceived to be unsafe." *Id.* at 564. The Court concluded, however, that if these arguments were accepted it would be "difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where states have historically been sovereign." *Id.* at 564.

192. 529 U.S. 598 (2000).

193. 42 U.S.C. § 13981(b) (2000).

194. § 13981(c).

195. *Morrison*, 529 U.S. at 609.

Clause regulation, it provides the proper framework for conducting the required analysis of [VAWA]."[196]

The Court observed two similarities between the VAWA and the Gun Free School Zones Act that required the VAWA's invalidation.[197] First, "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[198] The Court noted that "while we need not adopt a categorical rule against aggregating the effects of any noneconomic activity . . . thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."[199] Second, the Court observed that the VAWA "contains no jurisdictional element,"[200] even though "*Lopez* [made it] clear that such a jurisdictional element would lend support to the argument that [the VAWA] is sufficiently tied to interstate commerce."[201] Instead, "Congress elected to cast [VAWA's] remedy over a wider, and more purely intrastate, body of violent crime."[202]

The VAWA did, however, have one saving grace. Unlike the Gun Free School Zones Act at issue in *Lopez*, the VAWA's legislative history contained extensive findings regarding the effects of gender-motivated violence on interstate commerce.[203] The House and Senate Reports were replete with evidence that gender-motivated violence affected interstate commerce by "deterring potential victims from traveling interstate, from engaging in employment in interstate business," and by "diminishing national productivity, increasing medical and other costs, and decreasing the supply of and demand for interstate products."[204]

The Court summarily rejected these congressional findings, however, because they "rely so heavily on a method of reasoning that we have already rejected [in *Lopez*] as unworkable if we are to maintain the Constitution's enumeration of powers."[205] The Court stated that Congress's highly attenuated "but-for" causal chain would allow it to regulate "any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment,

196. *Id.*
197. *Id.* at 610-13.
198. *Id.* at 613.
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.* at 614.
204. *Id.* at 615 (citing H.R. CONF. REP. NO. 103-711, at 385 (1994); S. REP. NO. 103-138, at 54 (1993)).
205. *Id.*

production, transit, or consumption."[206] Finally, the Court concluded that it was for the judiciary, and not the legislature, to determine whether an activity's effect on interstate commerce was substantial enough to warrant congressional regulation under the Commerce Clause.[207] Thus, the *Morrison* holding reversed the Court's tradition of unquestioning deference to congressional findings.[208]

V. TAMING THE THREE-RING CIRCUS

Unlike the Gun Free School Zones Act and the Violence Against Women Act, the murder-for-hire statute contains an express jurisdictional element.[209] The purpose of this jurisdictional element is to ensure that the "trier of fact . . . find[s] some sort of connection or link to interstate commerce as a precondition of [the] statute's applicability to the case at hand."[210] On its face, therefore, § 1958 seems to pose no threat to the delicate balance between state and federal criminal jurisdiction.

Nonetheless, statutes that contain an express jurisdictional element may threaten constitutional concepts of federalism when applied to purely local conduct. Section 1958, as applied to the facts of *Marek* and *Weathers*, is a perfect example. As explained earlier, *Marek* suggests that federal jurisdiction under § 1958 is proper so long as the defendant uses Western Union, a cellular phone, a paging device, an automobile, an airplane, a telephone, or the Internet in furtherance of the murder-for-hire scheme.[211] *Weathers*, while somewhat less

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206. *Id.*

207. *Id.* at 614 (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 273 (1964) (Black, J., concurring)).

208. *See* RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 4.2, at 36 (3d ed. Supp. 2002) (noting that five Justices, beginning in the early 1990s and the early twenty-first century, "took the position that the Court would not defer to Congress concerning the question of whether a single-state noncommercial activity had a substantial effect on interstate commerce").

209. *See* 18 U.S.C. § 1958(a) (2000). Neither the Gun Free School Zones Act, 18 U.S.C. § 922 (2000), nor the Violence Against Women Act, 42 U.S.C. § 13981 (2000), contained an express jurisdictional element. Rather, these statutes attempted to regulate a wider and more purely intrastate body of activity. Section 1958(a), on the other hand, does contain an express jurisdictional element.

210. TRIBE, *supra* note 147, § 5-5, at 829.

211. United States v. Marek, 238 F.3d 310, 318-19 (5th Cir. 2001). The *Marek* decision concluded, without discussion, that Western Union was a "quintessential facility of interstate commerce." *Id.* at 320. Section 1958(b) indicates that "facility of interstate commerce" includes "all means of transportation and communication." Presumably, the court concluded that Western Union fit within this definition because it is capable of transmitting money across state borders. It therefore seems reasonable to conclude that the *Marek* court would include cellular phones, pagers, and Internet communications within the same definition.

troublesome than *Marek*, suggests that § 1958 should apply in all the same circumstances provided that the prosecution can prove that the defendant's use of an electronic communication device caused even a tenuous, incidental interstate contact.[212] If this same logic were extended to other federal criminal statutes, it is difficult to perceive any limitations on the federal government's power.

In essence, *Marek* and *Weathers* have interpreted § 1958's jurisdictional element in a manner that emasculates it of any real substance or meaning. In that regard, § 1958 engenders grave constitutional concerns, similar to the Gun Free School Zones Act and the Violence Against Women Act. Thus, it seems that § 1958 should be subject to the careful constitutional review advocated by the Supreme Court in *Lopez* and *Morrison*. The following sections will demonstrate, however, that *Lopez* and *Morrison* fail to impose any judicially cognizable limits on many types of commerce-based federal statutes, including § 1958.

A. Two Rings of the Three-Ring Circus Remain Untamed: No Limits on Congress's Power to Regulate the Channels and Instrumentalities of Interstate Commerce

In *Lopez* and *Morrison*, the Supreme Court suggested that it was unwilling to "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the states."[213] The Court recognized that the substantial effects test and the aggregation principle, coupled with the Court's tradition of deference to congressional findings, vested Congress with a license to regulate virtually all spheres of private conduct.[214] Accordingly, the Court attempted to formulate judicially cognizable limits on Congress's commerce power. These limits, the Court explained, would prevent Congress from regulating noncommercial activities that did not have a concrete effect on interstate commerce.[215]

The decisions in *Weathers* and *Marek* demonstrate, however, that the judicially cognizable limits recognized in *Lopez* and *Morrison* are inadequate to prevent Congress's growing commerce power from eroding state police power. In *Weathers* and *Marek*, the courts of

212. *See supra* notes 17-21 and accompanying text.

213. United States v. Lopez, 514 U.S. 549, 567 (1995).

214. See *supra* Part IV.C.

215. See *Lopez*, 514 U.S. at 567 (explaining that the Gun Free School Zones Act was unconstitutional because "the possession of a gun in a local school zone is in no sense an economic activity . . . and there is no requirement that [the] possession of the firearm have any concrete tie to interstate commerce").

appeals had little trouble concluding that Congress had the constitutional authority to regulate local street crime that had traditionally been the subject of state criminal law. In neither case did the court ask whether the regulated activity, murder-for-hire schemes, could be considered commercial or economic. In neither case did the courts ask whether the regulated activity, through repetition elsewhere, could have a substantial effect on interstate commerce. In neither case did the court find it necessary to consult the statute's legislative history to determine whether murder-for-hire schemes had a significant connection to the national economy. Instead, both cases were resolved largely as a matter of statutory interpretation. The courts did not ask whether Congress had constitutional authority to regulate local murder-for-hire schemes. Rather, they asked whether Congress intended for the murder-for-hire-statute to apply to the facts of this case.

This analysis does not imply, however, that the *Marek* and *Weathers* courts failed to employ the proper constitutional standards when analyzing § 1958. Rather, these cases illustrate two significant limitations on the holdings in *Lopez* and *Morrison*. First, *Lopez* and *Morrison* left untouched Congress's ability to regulate the channels of interstate commerce, the instrumentalities of interstate commerce, or persons or things in interstate commerce.[216] Indeed, the holdings in *Lopez* and *Morrison* only limited Congress's ability to regulate activities that substantially affect commerce. In other words, the Supreme Court placed limits on the third *Lopez* category, but did not place any limits on the first two categories. As explained in Part III.D, the primary constitutional restraint formulated by *Lopez* and *Morrison* was to limit the substantial effects test and the aggregation principle. Shortly after *Lopez* was decided, the Court made it clear that these constitutional restraints do not affect Congress's authority to regulate the channels and instrumentalities of commerce, that is, regulations falling within the first two categories of *Lopez*.[217]

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216. *See* ROTUNDA & NOWAK, *supra* note 208, § 4.2, at 41 (explaining that, after *Lopez* and *Morrison*, the Court will continue to uphold federal laws that regulate the channels of interstate commerce or that regulate activities, persons, products, or transactions that cross state or national borders); TRIBE, *supra* note 147, § 5-5, at 825-33 (explaining that the *Lopez* decision left "untouched" Congress's ability to regulate the "channels" and "instrumentalities" of interstate commerce; of persons and objects participating in interstate commerce; and of activities jurisdictionally "connected" to interstate commerce).

217. *See* ROTUNDA & NOWAK, *supra* note 208, § 4.2, at 36 (using the Supreme Court case of *Reno v. Condon*, 528 U.S. 141 (2000), to explain that it is unnecessary to consider whether a regulated activity substantially affects commerce when the regulation falls within the first or second *Lopez* category); George D. Brown, *Constitutionalizing the Federal Criminal Law Debate: Morrison, Jones, and the ABA*, 2001 U. ILL. L. REV. 983, 1016-17 (2001) (explaining that, even

The Court subsequently confirmed the limited nature of *Lopez* and *Morrison*, holding in *United States v. Robertson* that the substantial effects test and the aggregation principle applied only when Congress attempted to regulate intrastate activity that allegedly had a substantial effect on commerce.[218] In other words, the substantial effects test and aggregation principle apply only when Congress is attempting to regulate within the third category.[219] Professor Tribe has suggested that the substantial effects test is not relevant outside the third category because, "the first two categories, *by definition*, substantially affect [commerce]—because they are components of—interstate commerce."[220]

The second limitation of *Lopez* and *Morrison* is that they seem to leave "untouched . . . federal statutes that contain a jurisdictional element expressly requiring the trier of fact to find some sort of connection or link to interstate commerce as a precondition of a given statute's applicability to the case at hand."[221] The *Lopez* decision seems to suggest that such statutes, by their very terms, would only apply in cases where the defendant had utilized a facility or instrumentality of interstate commerce or engaged in activity that "substantially affected commerce."[222] In other words, the Court concluded that jurisdictional elements serve as independent judicial checks and ensure that the statute applies only when the regulated activity falls into one of three preexisting *Lopez* categories.

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after *Lopez* and *Morrison*, Congress's power to regulate the channels and instrumentalities of interstate commerce appears to extend to noneconomic activity).

218. *See* TRIBE, *supra* note 147, § 5-5, at 826-27 (citing United States v. Robertson, 514 U.S. 669, 671 (1995)).

219. *See id.*

220. *Id.* § 5-5, at 827.

221. *Id.* § 5-5, at 829. In both *Lopez* and *Morrison*, the Court relied on numerous factors in deciding to invalidate the Gun Free School Zones Act and the Violence Against Women Act, respectively. *See supra* Part IV.C. Among the factors considered was that each statute lacked a jurisdictional element that would ensure that the regulated activity was sufficiently connected to interstate commerce. United States v. Morrison, 529 U.S. 598, 613 (2000); United States v. Lopez, 514 U.S. 549, 561 (1995). The Court further implied that, if such an element had been present in the relevant statutes, both *Lopez* and *Morrison* might have been decided differently. *See Morrison*, 529 U.S. at 613 (stating that "*Lopez* makes clear that such a jurisdictional element would lend support to the argument that [the regulated activity] is sufficiently tied to commerce"). *But see* ROTUNDA & NOWAK, *supra* note 208, at 43 ("[The *Morrison* opinion] noted that the Act contained no 'jurisdictional element,' but . . . also stated that such a statement would not have been enough in itself to save the statute.").

222. *See* TRIBE, *supra* note 147, § 5-5, at 829-30 n.19 (explaining that *Lopez* seems to treat statutes containing a jurisdictional element "as falling within the third category . . . inasmuch as the Court says it will treat the jurisdictional hook as itself satisfying the requirement of substantial effect").

Justice Breyer's dissent in *Morrison* criticized the majority's apparent endorsement of statutes with a jurisdictional element.[223] For example, Breyer explained that Congress might be encouraged to insert a jurisdictional element into statutes whose constitutional validity was questionable.[224] He keenly observed that the addition of a jurisdictional element would do little, if anything, to address the Court's federalism concerns since "most everyday products or their component parts cross interstate boundaries."[225] Nonetheless, this small textual change would presumably remove the statute from the Court's heightened constitutional scrutiny.[226]

The limitations of the *Lopez* holding help to explain why *Marek* and *Weathers* were resolved largely as matters of statutory interpretation. First, both courts were distinctly aware that the text of § 1958 contained an express jurisdictional element.[227] Second,

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223. *See* Brown, *supra* note 217, at 1012 (citing *Morrison*, 529 U.S. at 659 (Breyer, J., dissenting)).

224. *Morrison*, 529 U.S. at 659.

225. *Id.*; *see also* Glenn H. Reynolds, *Lower Courts Reading of* Lopez, *or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 388 n.100 (explaining that "[a] hard and fast rule that the presence of a jurisdictional element [guarantees constitutionality] ignores the fact that . . . the jurisdictional hook may be so attenuated as to fail to guarantee that the activity regulated has a substantial effect on interstate commerce").

226. Although the Court demonstrated a "strong receptivity towards statutes containing a jurisdictional element" in *Lopez* and *Morrison*, the Justices might be changing their attitude. *See* Brown, *supra* note 217, at 1010. In a unanimous decision, the Court implied that "the concerns brought to the fore in *Lopez*" may also be present in cases involving the application of federal statutes with jurisdictional elements. *Id.* (citing Jones v. United States, 529 U.S. 848, 858 (2000)).

In *Jones*, the defendant set fire to a private dwelling using a Molotov cocktail. *Jones*, 529 U.S. at 851. He was convicted under the federal arson statute, 18 U.S.C. § 844(i) (2000), which makes it a federal crime to damage or destroy "by means of fire or an explosive, any . . . property used in interstate or foreign commerce or in any activity affecting interstate of foreign commerce." *Id.* at 850. The prosecution argued that the jurisdictional element was satisfied because the residence was "used" to secure a mortgage from an out-of-state lender and also because it received its natural gas from a source outside Indiana. *Id.* at 854. The Court resolved the case as a matter of statutory construction, holding that these "passive, passing, [and] past connection[s] to commerce" were not enough, because the jurisdictional element "is most sensibly read to mean active employment for a commercial purpose . . . ." *Id.* at 855-56.

The Court took the opinion one step further, however, by addressing the underlying constitutional concerns. *Id.* at 857-58. It explained that, "[g]iven the concerns brought to the fore in *Lopez*, it is appropriate to avoid the constitutional question that would arise were we to read [the statute] to render [Jones'] 'traditionally local criminal conduct' . . . 'a matter for federal enforcement.' " *Id.* at 858. The Court cited *Lopez* for the proposition that it would avoid any statutory construction that would raise "grave and doubtful constitutional questions" by allowing Congress to regulate areas of "traditional state concern." *Id.* at 857-58. This portion of the opinion suggests that the heightened constitutional standard of *Lopez* and *Morrison* may be brought to bear on statutes containing express jurisdictional elements.

227. United States v. Marek, 238 F.3d 310, 315-16 (5th Cir. 2001); United States v. Weathers, 169 F.3d 336, 339-40 (6th Cir. 1999).

Weathers and *Marek* concluded that § 1958 fell within the first and second *Lopez* categories, respectively.[228] Either one of these factors, by itself, would have been sufficient to remove § 1958 from the heightened constitutional standard of *Lopez* and *Morrison*.[229]

In that light, it is not surprising that the courts in *Marek* and *Weathers* found § 1958 to be constitutional, even as applied to purely local criminal conduct. After all, the Supreme Court had invalidated only two federal statutes in six decades. Neither of those statutes contained a jurisdictional hook, nor did they fall within one of the first two *Lopez* categories. It is evident that the Supreme Court's three-category framework has numerous loopholes that permit further expansion of Congress's power under the Commerce Clause.

B. Two Rings of the Three-Ring Circus Remain Largely Undefined: No Guidance Regarding the Scope of the Three Rings

The *Marek* and *Weathers* decisions illustrate one additional deficiency of the *Lopez* and *Morrison* holdings: the Supreme Court has failed to adequately define the phrases "channels of interstate commerce" and "instrumentality of interstate commerce." It is not entirely clear whether these categories are subject to limitations or whether they merely serve as default categories for all federal statutes that cannot neatly be classified as regulations of intrastate activities that substantially affect commerce. As demonstrated in Part IV.A, this classification has important constitutional implications. Statutes falling within the first two categories are not subject to the heightened constitutional review of *Lopez* and *Morrison* and are therefore likely to receive rubber-stamp judicial approval under the highly deferential rational basis test.

The Supreme Court has never promulgated a concrete definition for the phrase "channels of commerce." As explained in Part III.A, the Court attempted to illustrate the meaning of this phrase by citing *United States v. Darby*[230] and *Heart of Atlanta Motel, Inc. v. United States*.[231] In *Darby*, the Court affirmed Congress's power to prohibit the shipment of goods that had been produced in violation of

228. *Marek*, 238 F.3d at 317 (explaining that "[w]hen it adopted § 1958, Congress was acting within the second of three broad categories identified . . . in *United States v. Lopez*," i.e., the power to regulate the instrumentalities of interstate commerce); *Weathers*, 169 F.3d at 342 (concluding that the phrase "facility in interstate commerce" was the controlling wording of § 1958 and it "is best interpreted as Congress's attempt to regulate the use of the channel of interstate commerce," i.e., the first *Lopez* category).

229. *See supra* Part IV.A.

230. 312 U.S. 100 (1941).

231. 379 U.S. 241 (1964).

minimum wage and maximum hour laws.[232] By giving Congress the power to prohibit the physical shipment of goods, the holding in *Darby* suggested that the phrase "channels of interstate commerce" includes the United States Postal Service, railways, highways, and other similar routes of interstate transportation and shipment.[233] These conduits of transportation comport with the common sense understanding of channels of commerce.

The Court left room for the expansion of the scope of the phrase "channels of interstate commerce," however, when it cited *Heart of Atlanta*.[234] The reference to *Heart of Atlanta* suggests that the phrase "channels of interstate commerce" permits Congress to regulate stationary facilities such as hotels, restaurants, gas stations, automobile repair facilities, rest stops, camping grounds, and parking lots. The decision in *Heart of Atlanta* thus suggests that the phrase "channels of interstate commerce" includes items that are only incidentally related to the actual "river of commerce."[235]

By failing to provide a concrete definition for channels of interstate commerce, the Supreme Court gave lower courts wide latitude to interpret the phrase broadly. It is not surprising, therefore, that the *Weathers* court indirectly concluded that a cellular telephone is a "channel of interstate commerce."[236] Nonetheless, common sense suggests that a cellular phone is hardly synonymous with railways, highways, hotels, or any other components of the river of commerce.

Not only did the Court fail to clearly define the phrase "channel of interstate commerce," it also failed to provide a concrete definition of the phrase "instrumentality of interstate commerce." Rather than formulating a clear definition, the Supreme Court attempted to illustrate the meaning of the phrase "instrumentality of interstate commerce" by citing three cases: the *Shreveport Rate Cases*,[237]

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232. *See* discussion *infra* Part III.

233. Professor Tribe has colorfully described these transportation facilities as the "rivers of commerce." *See* TRIBE, *supra* note 147, § 5-5, at 827.

234. See United States v. Lopez, 514 U.S. 549, 558 (1995) (citing *Heart of Atlanta*, 379 U.S. at 256).

235. The companion case to *Heart of Atlanta*, *Katzenbach v. McClung* (*"Ollie's Barbecue"*), which was not cited by the *Lopez* court, hinted at an even more expansive interpretation, since the restaurant in that case had apparently never served any interstate travelers. *See* Katzenbach v. McClung, 379 U.S. 294, 304 (1964).

236. The *Weathers* court concluded that a cellular phone, which necessarily emits interstate electronic signals, constitutes a "facility in interstate commerce." *United States v. Weathers*, 169 F.3d 336, 342 (6th Cir. 1999). It then concluded that the phrase "facility in interstate commerce" is best interpreted as Congress's attempt to regulate the "use of the channels of interstate commerce." *Id.* at 342. Thus, it indirectly concluded that a cellular phone is a channel of interstate commerce.

237. Houston, E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342 (1914).

Southern Railroad Co. v. United States,[238] and *United States v. Perez*.[239] The Court in the *Shreveport Rate Cases* and *Southern Railroad* held that Congress was permitted to regulate railroads that provide interstate shipping services.[240] In *Perez*, the Court explained that Congress could regulate the destruction of aircraft employed in interstate, overseas, or foreign air commerce.[241] These cases, taken together, suggest that the phrase "instrumentality of interstate commerce" should include commercial vehicles that facilitate the interstate shipment and transportation of goods and people through the channels of commerce.[242] But the Court's failure to be more precise retained the possibility that the lower courts would adopt a more expansive view.

The lower courts have taken full advantage of this opportunity. Consequently, the phrase "instrumentality of interstate commerce" has evolved in the lower federal courts and now includes automobiles,[243] cellular telephones,[244] the United States Postal Service,[245] conventional telephones,[246] and automated teller machines.[247] Common sense suggests that these items are not analogous to railroads, airplanes, or other commercial vehicles that facilitate interstate shipment and transportation through the channels of commerce.

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238. 222 U.S. 20 (1911).

239. 402 U.S. 146 (1971).

240. *See supra* Part III.A for a discussion of these cases.

241. 402 U.S. at 150.

242. It seems that at least one federal judge offers support for this definition of the "instrumentalities of interstate commerce." *See* Reynolds, *supra* note 225, at 384 n.79 ("Category Two, in the opinion of Judge Higginbotham, 'encompassed only vehicles that move or could move in interstate commerce and people or goods traveling in interstate commerce.' ") (citing United States v. Hickman, 179 F.3d 230, 231 (5th Cir. 1999) (en banc) (Higginbotham, J., dissenting)).

243. *See* United States v. Marek, 238 F.3d 310, 319 (2001) (explaining that automobiles have been considered "facilities of interstate commerce," i.e., instrumentalities of interstate commerce) (citing United States v. Bishop, 66 F.3d 569, 589 (3d Cir. 1995)).

244. *See* United States v. Weathers, 169 F.3d 336, 341 (6th Cir. 1999) (explaining that cellular phones, even when used intrastate, have been held to be instrumentalities of interstate commerce) (citing United States v. Clayton, 108 F.3d 1114, 1117 (9th Cir. 1997)).

245. *Marek*, 238 F.3d at 317 (explaining that the Fifth Circuit has concluded that the United States Postal Service is a "facility in interstate commerce," i.e., an "instrumentality of interstate commerce") (citing United States v. Heacock, 31 F.3d 249, 255 (5th Cir. 1994)).

246. *See, e.g.*, *Weathers*, 169 F.3d at 341; United States v. Graham, 856 F.2d 756, 760-61 (6th Cir. 1988); Aquionics Acceptance Corp. v. Kollar, 503 F.2d 1225, 1228 (6th Cir. 1974); FTC v. Shaffner, 626 F.2d 32, 37 (7th Cir. 1980) (all holding that telephones, even when used intrastate, are instrumentalities of interstate commerce).

247. *Marek*, 238 F.3d at 319 (citing United States v. Baker, 82 F.3d 273, 276 (8th Cir. 1996) (explaining that the court in *Baker* held that an interstate network of automated teller machines constituted a "facility in interstate commerce," or rather, "an instrumentality of interstate commerce")).

By slowly expanding the scope of the phrases "channels of interstate commerce" and "instrumentalities of interstate commerce," the federal courts have created a loophole that allows Congress to further federalize criminal law. Theoretically, Congress could regulate most garden-variety street crimes by drafting statutes that apply only if the putative defendant used a cellular phone, paging device, ATM machine, or Internet transmission in furtherance of the crime. Congress could then allege that these statutes were designed to protect the instrumentalities of interstate commerce from immoral uses. In effect, this technique would allow Congress to regulate noneconomic, intrastate criminal activity that has no demonstrated effect on interstate commerce. These statutes might be upheld because they would be exempt from the Court's heightened constitutional standard applied in *Lopez* and *Morrison*.

C. The Solution: Is It Better to Combine Lopez*'s Three Rings or to Add a Fourth?*

Part IV.A and IV.B of this Note illustrate two deficiencies of the Supreme Court's current Commerce Clause jurisprudence. First, federal statutes are exempt from constitutional review if they contain an express jurisdictional element.[248] Second, commerce-based statutes will be exempt from heightened constitutional review if they are deemed regulations of the instrumentalities or channels of interstate commerce.[249] Thus, the Court has created an incentive for Congress to exploit these loopholes to ensure that its commerce-based statutes receive rubber-stamp constitutional approval.

In light of these limitations, it is evident that despite the intentions of the *Lopez* Court, the Supreme Court's current Commerce Clause jurisprudence cannot prevent Congress from converting its commerce power into "a general police power of the sort retained by the states."[250] This section of the Note proposes two new Commerce Clause standards that are designed to achieve the federalist objectives of *Lopez* more effectively than did *Lopez* itself.

248. *See supra* Part IV.A.

249. *See supra* Part IV.A.

250. United States v. Lopez, 514 U.S. 549, 567 (1995).

1. Extending the Reach of *Lopez* and *Morrison* by Eliminating the Three-Category Framework

One way to close the loopholes in the Court's current Commerce Clause jurisprudence is to eliminate the three-category framework and extend the heightened standard of review formulated in *Lopez* and *Morrison* to all commerce-based statutes.[251] Under this uniform standard, Congress would be permitted to regulate economic[252] activities that, in the aggregate,[253] have a substantial effect on interstate commerce. In addition, Congress could regulate

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251. Professors Nelson and Pushaw have formulated a revised Commerce Clause standard that (i) eliminates *Lopez*'s three-category framework and (ii) adopts a uniform constitutional standard for all commerce-based statutes. *See* Nelson & Pushaw, *supra* note 45, at 107-63. While there are a number of similarities between the Nelson/Pushaw standard and my proposed standard, there are also a number of important differences. *See infra* notes 252-54. Generally speaking, the Nelson/Pushaw standard represents a more drastic departure from the Court's existing Commerce Clause jurisprudence than my proposed standard. *See supra* notes 250-52.

252. The new constitutional standard formulated by Professors Pushaw and Nelson would permit Congress to (1) "regulate 'commerce' (2) that implicates more than one state." Nelson & Pushaw, *supra* note 45, at 107. The professors intentionally eschew the term "economics" in favor of the term "commerce." In their view, the term "commerce" includes only "the voluntary exchange of goods or property or services and all accompanying market-oriented activities, enterprises, relationships, and interests"; while the term "economics" covers virtually all human endeavors and interactions, including areas such as crime and religion." *Id.* at 107-09. I believe that Nelson and Pushaw have misconstrued the judicial understanding of the term "economic." The Supreme Court has made it abundantly clear that they do not construe the word "economic" to include criminal activity. *See* United States v. Morrison, 529 U.S. 598, 613 (2000) (explaining that "[g]ender-motivated crimes [proscribed by the Violence Against Women Act] are not, in any sense of the phrase, *economic* activity") (emphasis added); *Lopez*, 514 U.S. at 561 (explaining that the Gun-Free School Zones Act "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of *economic* enterprise") (emphasis added). Because I believe that Pushaw and Nelson's concerns are misguided, my proposed standard retains the "economic/noneconomic" distinction applied in *Lopez* and *Morrison*.

253. Nelson and Pushaw's standard seems to abandon the requirement that a regulated activity have a "*substantial* effect on interstate commerce." Nelson & Pushaw, *supra* note 45, at 107. Accordingly, their standard also abandons the "aggregation principle" formulated in *Wickard* and its progeny. Instead, they require only that the regulated activity "[implicate] commerce in more than one state." *Id.* They admit that "our second hurdle is usually easy to clear because almost all interstate commerce has interstate effects." *Id.* at 159. In fact, after Nelson and Pushaw apply their proposed constitutional standard to a number of hypothetical fact patterns, they concede that "[o]ur analysis thus far has not identified a single federal statute that fails to meet our second requirement." *Id.* at 158. They suggest, however, that the second prong of their test would prevent Congress from regulating "local, ad hoc commercial transactions" such as lemonade stands and garage sales. *Id.* at 158-59. I believe that the second prong of the Nelson/Pushaw standard has no real bite. It would not prohibit Congress from regulating local activity that causes tenuous or incidental interstate contacts. Consequently, I chose to retain the Supreme Court's current requirement that the regulated activity "substantially affect" interstate commerce. Since I retained the requirement, I also retained the "aggregation principle," which permits Congress to aggregate individual violations to prove that a regulated activity has a "substantial effect" on commerce.

noneconomic activities,[254] but only if it could prove that individual instances of the regulated activity have a substantial effect on interstate commerce.

It is important to note three important differences between this proposed constitutional standard and the Court's existing three-category framework. First, Congress would always be required to demonstrate that the regulated activity has a substantial effect on interstate commerce. Under the Court's existing jurisprudence, Congress is not required to prove that the regulated activity substantially affects commerce if it is regulating a "channel" or "instrumentality" of commerce.[255] Second, a federal statute would be subject to the heightened standard of constitutional review even if it contained an express jurisdictional element. Under the Court's existing jurisprudence, these statutes arguably escape the Court's heightened constitutional review.[256] Third, this proposed standard would prohibit Congress from using the aggregation principle when attempting to regulate noneconomic activity. This standard differs from the Court's existing jurisprudence, which limits the aggregation principle to the third *Lopez* category under which Congress may regulate an activity that substantially affects commerce.[257]

A simple example illustrates the differences between this proposed standard and the Court's existing three-category framework. Suppose, for example, that a man travels from his Manhattan apartment to his girlfriend's apartment in Newark, New Jersey intending to assault her. Suppose further that he is indicted under the federal domestic violence statute, 18 U.S.C. § 2261, which imposes criminal sanctions on anyone "who travels in interstate or foreign commerce . . . with intent to kill, injure, harass, or intimidate a spouse or intimate partner, and who, in the course of or as a result of such travel, commits or attempts to commit a crime of violence."[258]

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254. Nelson and Pushaw's proposed constitutional standard does not usually permit Congress to regulate noncommercial activities, even if Congress could demonstrate that those activities substantially affect commerce. Under their standard, noneconomic crimes and torts can be regulated only when they interfere with or threaten commerce itself. *Id.* at 107.

255. *See supra* Part IV.A.

256. *See supra* Part IV.A.

257. *See supra* Part IV.A.

258. Professors Nelson and Pushaw applied their proposed constitutional standard to a number of existing federal statutes to demonstrate its effect on Congress's existing commerce-based legislation. Nelson & Pushaw, *supra* note 45, at 147-59. The examples are also used to demonstrate the simplicity and effectiveness of their standard. I follow a similar approach throughout Part IV.C.1 of this Note. I am indebted to Professors Nelson and Pushaw for their guidance in this regard.

Under the existing three-category framework, federal courts would resolve the case largely as a matter of statutory interpretation. The sole question for the courts would be whether Congress intended § 2261 to proscribe the conduct in the instant case. The Court would pay scant attention, however, to the underlying constitutionality of the statute. The statute would be exempt from the Court's heightened standard of constitutional review for two reasons.[259] First, the statute probably would fall within the first *Lopez* category, because it represents an attempt by Congress to protect the channels of interstate commerce from immoral uses. Second, the statute contains an express jurisdictional element that, at least theoretically, requires the trier of fact to find a nexus with interstate commerce.

Therefore, the prosecution would not be required to show that the proscribed conduct has a substantial effect on interstate commerce, whether individually or in the aggregate. In addition, the courts would review the constitutionality of the statute under the highly deferential rational basis standard of review. Under that standard, it is very unlikely that the court would dismiss the indictment for lack of subject-matter jurisdiction, even though the defendant committed a purely local crime. Thus, the federal government would be permitted to usurp the state's traditional authority for criminal law enforcement.

Under my proposed standard, however, the result would be different. First, the prosecution would be required to prove that the proscribed conduct has a substantial effect on interstate commerce. This burden would be particularly difficult to satisfy, as the prosecution would be prohibited from using the aggregation principle. The aggregation principle would be unavailable because § 2261 is a criminal statute that "by [its] terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[260] Consequently, the prosecution would be required to prove that the defendant's individual instance of intrastate violence had a substantial effect on interstate commerce. It seems unlikely that the prosecution could meet this burden, and the courts would therefore dismiss the defendant's indictment for lack of subject matter jurisdiction.

This example illustrates one of the desirable features of this Note's proposed constitutional standard. It would prohibit Congress from regulating a number of street crimes, such as carjacking, arson,

259. *See supra* Part III.A for a discussion of the type of statutes exempt from the heightened constitutional standard applied in *Lopez* and *Morrison*.

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

murder, possession of handguns, and possession of narcotics for personal use.[261] None of these criminal offenses can be fairly characterized as regulations of an economic activity, and, consequently, Congress would be required to prove that individual instances of these crimes substantially affect interstate commerce. It seems highly unlikely that Congress could meet this burden. Accordingly, federal regulation of these crimes would be deemed unconstitutional under the new standard.

This new standard is also desirable because it would still permit Congress to regulate complex white-collar crimes that involve "an interplay of business, financial, and government institutions,"[262] sophisticated multistate criminal enterprises, and drug trafficking. This feature of the test is beneficial because federal jurisdiction is necessary and proper when state law enforcement officials are unable to effectively and efficiently investigate and prosecute complex crimes.[263]

A simple example illustrates this point. Imagine that the CEO of a publicly traded company, acting on the basis of nonpublic information, sells shares of the company's stock. He thereby gains an unfair advantage over other stock market participants. Under the new standard, the federal government would be permitted to prosecute insider trading, as well as other forms of securities fraud, under Rule 10b-5 of the Securities Exchange Act. These fraudulent schemes are economic in nature because, by their very terms, they must be employed "in connection with the purchase or sale of securities."[264] In addition, Congress would have little difficulty proving that securities fraud, in the aggregate, has a substantial effect on the national economy. Therefore, Rule 10b-5 would be deemed constitutional under the new standard.

Congress would also be permitted to regulate certain types of organized crime enterprises under the Racketeer Influenced and

261. *See supra* note 258. Professors Nelson and Pushaw apply their proposed constitutional standard to many of the crimes mentioned here. *See* Nelson & Pushaw, *supra* note 45, at 119-58.

262. *See* Mengler, *supra* note 2, at 517-18 (describing the complex nature of white-collar crime).

263. *See* Ashdown, *supra* note 28, at 799-801 (explaining numerous situations in which federal law enforcement is required and ultimately concluding that "there appear to be two situations where congressional exercise of federal criminal jurisdiction is clearly warranted—cases where the states, although capable, are unwilling to engage the macbinery of their own domestic criminal law or when local law enforcement is incapable of handling a problem national in scope. Civil rights protection and political corruption might be examples of the former, while protection of national markets and organized crime represent activities in the latter category").

264. Securities Exchange Act of 1934 § 10b-5, codified at 15 U.S.C. § 78dd n.5 (2000).

Corrupt Organizations Act of 1970 ("RICO").[265] RICO prohibits "using or investing income from a 'pattern of racketeering activity' to acquire an interest in an enterprise."[266] Under RICO, the term "racketeering" includes a "great variety of serious criminal conduct, including murder, kidnapping, arson, robbery, bribery, extortion, and drug dealing."[267] Although the crimes included within RICO's definition of racketeering are normally considered noneconomic, they take on economic characteristics when the proceeds of these crimes are used to "acquire an interest in an enterprise."[268] Thus, Congress would be able to regulate racketeering activities that are used to fund corrupt organizations as long as it could prove that, in the aggregate, these crimes have a substantial effect on commerce. Once again, Congress should have little difficulty satisfying this standard.

Finally, Congress would be able to regulate intrastate drug trafficking as well as the possession and/or manufacture of narcotics with intent to distribute.[269] These crimes are economic because they presuppose that narcotics will be distributed in return for money, goods, or services. Congress could presumably demonstrate that even intrastate narcotics offenses, taken in the aggregate, have a substantial effect on interstate commerce. Therefore, Congress would also be permitted to regulate these crimes under the new standard.

One problematic aspect of the new standard, however, is that Congress still would be permitted to regulate some garden-variety street crimes, including murder-for-hire and prostitution. Both of these crimes are economic in nature because they involve an exchange of money for a service. Therefore, Congress would be permitted to regulate prostitution and murder-for-hire as long as it could prove that, in the aggregate, these crimes have a substantial effect on interstate commerce. It is possible, therefore, that the outcomes of *Marek* and *Weathers* would be the same under the new constitutional standard.

Although the *Marek* and *Weathers* decisions may remain undisturbed, the new standard would still prevent further federalization of criminal law. As explained in Part I, *Marek* and *Weathers* are not troublesome merely because they permit Congress to

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265. 18 U.S.C. §§ 1961-1968 (2000); *see also* Nelson & Pushaw, *supra* note 45, at 151-52 (applying their proposed constitutional standard to the RICO statute).

266. *See* Nelson & Pushaw, *supra* note 45, at 151.

267. WAYNE R. LAFAVE, CRIMINAL LAW § 6.5(d)(3) (3d ed. 2000).

268. *See* Nelson & Pushaw, *supra* note 45, at 151-52.

269. *See supra* note 252. Professors Nelson and Pushaw apply their proposed constitutional standard to various federal regulations of controlled substances. *See* Nelson & Pushaw, *supra* note 45, at 136-38.

regulate murder-for-hire schemes. Rather, *Marek* and *Weathers* are troublesome because, if their reasoning is extended to its logical conclusion, Congress would have the authority to regulate any garden-variety crime facilitated by Western Union, a telephone, an automobile, an airplane, a paging device, or the Internet.

Under the new standard, however, this expansion would not be possible. Even when a crime is facilitated by an instrumentality or channel of interstate commerce, such as Western Union or a cellular telephone, the new standard would require Congress to prove that the regulated crime substantially affects interstate commerce. If the regulated crime is noneconomic, as is the case with many garden-variety crimes, then Congress would be unable to use the aggregation principle to satisfy this requirement. Therefore, the new standard would prohibit courts from further federalizing criminal law by extending the logic used in *Marek* and *Weathers* to noneconomic crimes.

2. Adding a Fourth Category of Activity to the *Lopez* / *Morrison* Framework

Rather than eliminating the three-category framework delineated in *Lopez* and *Morrison*, the Supreme Court couldadd a fourth category to the existing framework. The fourth category would be used to analyze congressional regulations of interstate communication devices in cases like *Marek* and *Weathers*.[270] The fourth category would apply in a variety of cases, including *Marek* and *Weathers*, where the jurisdictional element of a federal criminal statute is allegedly satisfied by the defendant's intrastate use of a communication device that causes only a tenuous and incidental interstate contact.

Under this standard, Congress would be permitted to regulate interstate communication devices only if the parties to the communication were located in different states. Under this standard, the electronic signal path would be completely irrelevant. This approach was initially developed by Judge Shira A. Scheindlin in *United States v. Paredes*.[271] In *Paredes*, Judge Scheindlin explained that federal criminal jurisdiction would be virtually unlimited if an "electronic signal path" was sufficient to generate federal jurisdiction. She aptly noted that:

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270. *See supra* note 6 (providing a definition of the phrase "interstate communication device").

271. 950 F. Supp. 584 (S.D.N.Y. 1996).

> Intrastate communications have taken on an interstate quality because of the means by which beepers, cellular phones, email and telephones function. It is very likely that in the near future all electronic forms of communication will be transmitted across state lines regardless of the location of the communicating parties. As the original role of federal criminal jurisdiction was intended to be limited in nature, it is troubling to permit technological innovation to significantly expand its scope without a specific expression of Congressional intent.[272]

Based on this observation, Judge Scheindlin concluded that federal jurisdiction should be based on the location of the communicating parties, rather than on the electronic signal path.[273]

The effect of this new standard can be illustrated by applying it to the facts of *Marek* and *Weathers*.[274] In both cases, the defendants used an electronic device to facilitate communication with a hit man located within the same state.[275] In *Weathers*, the prosecution also demonstrated that the defendant's electronic communications device emitted an electronic signal that caused a brief, incidental out-of-state contact.[276]

The facts of *Marek* and *Weathers* fail to satisfy the requirement of the proposed fourth *Lopez* category. That category dictates that Congress is prohibited from regulating the use of an interstate communication facility if the communicating parties are located within the borders of the same state. Therefore, under the proposed fourth *Lopez* category, *Marek* and *Weathers* would have been dismissed for lack of subject-matter jurisdiction.

The foregoing example illustrates two primary advantages of adding a fourth category to the *Lopez* framework. First, the new standard would prevent Congress from regulating local street crimes that have "taken on an interstate quality because of the means by which beepers, cellular phones, email and telephones function."[277] Second, the standard is extremely simple. Federal courts would merely need to inquire whether the communicating parties were

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272. *Id.* at 589. The court in *Weathers* also discussed the threat that technological innovation poses to the delicate balance between federal and state authorities. *United States v.* Weathers, 169 F.3d 336, 343 (6th Cir. 1999). It explained that ambiguous statutes "will pose even thornier questions as communications that appear to be carried on *intra*state are increasingly transmitted by satellite and other obviously interstate facilities." *Id.*

273. Judge Scheindlin thought that this standard was appropriate unless, of course, Congress expressed a clear intent to regulate murder-for-hire based on the electronic signal path. *See Paredes*, 950 F. Supp. at 589-90. Unlike Judge Scheindlin, I believe this standard should apply even if Congress does express an unambiguous intent to regulate murder based upon tenuous interstate commerce.

274. See supra Sections II.A & II.B for an extensive discussion of *Weathers* and *Marek*, respectively.

275. *See supra* Sections II.A & II.B.

276. *Weathers*, 169 F.3d at 339, 342.

277. *Paredes*, 950 F. Supp. at 589.

located in different states at the time of the communication. If so, federal jurisdiction would be proper. If not, prosecutorial authority would be delegated to state law enforcement officials who would presumably be quite capable of investigating and prosecuting the local criminal scheme.

This new standard is, however, subject to one important limitation. Specifically, the standard only applies when Congress attempts to regulate the use of an interstate communication facility. Consequently, it would not limit Congress's ability to regulate a variety of other local crime schemes. Consider, for example, the Manhattan businessman who solicits a prostitute on the streets of New York. If the man consummated the crime in a Manhattan hotel room, the state authorities would have the exclusive power to regulate his conduct. If, however, the businessman sought cheaper hotel rates across the Hudson River, the federal authorities would have jurisdiction.[278] Indeed, federal law provides criminal sanctions for those who "knowingly transport any individual in interstate or foreign commerce . . . with intent that such individual engage in prostitution, or in any sexual activity."[279] The fourth *Lopez* category would not prevent the federal authorities from prosecuting this local crime scheme. In this instance, the defendant never used an interstate communication facility in furtherance of the crime. Therefore, the proposed fourth *Lopez* category would be inapplicable.

3. The Optimal Solution

In the preceding sections, I have proposed two Commerce Clause standards that are designed to prevent Congress from converting its commerce power into a plenary police power of the sort retained by the states. Ultimately, the optimal solution is for the Supreme Court to supplement its existing Commerce Clause framework with a fourth category, which would be narrowly tailored to address the primary issue raised in this Note. Namely, it would prevent Congress from further federalizing criminal law in the wake of technological innovation. Indeed, the four-category framework would prevent Congress from regulating local crime schemes that have taken on interstate characteristics merely because the defendant uses an electronic communication device in furtherance of the crime.

The other proposed standard, which involves eliminating the three-category framework and creating a uniform Commerce Clause

278. This hypothetical fact pattern was conceived by the late Judge Henry J. Friendly. *See supra* note 2.

279. 18 U.S.C. § 2421 (2000).

test, is not narrowly tailored and would apply to a much broader group of cases. Indeed, the new standard would apply in *all* cases where federal jurisdiction is based on Congress's commerce power. In that regard, the uniform Commerce Clause standard would represent a more drastic departure from the Supreme Court's existing Commerce Clause framework. The federal courts may have difficulty implementing this new standard, because a great deal of the Supreme Court's Commerce Clause jurisprudence would not have continuing validity under the new standard.

The four-category Commerce Clause framework is also preferable because of its simplicity. Under the new test, federal jurisdiction is proper only if the communicating parties are located in different states at the time of the communication. This simple fact question presumably could be resolved by the jury. Thus, the four-category framework would probably yield consistent, predictable results in the federal courts. Moreover, federal prosecutors would be discouraged from initiating a criminal prosecution unless they had convincing proof that the defendant engaged in an interstate communication. This prosecutorial reluctance would prevent the courts from spending time on criminal cases that are likely to be dismissed for lack of subject-matter jurisdiction.

The uniform Commerce Clause standard is not nearly as simple as the four-category framework. Under the uniform Commerce Clause standard, federal courts would be required to determine whether the regulated criminal activity is economic or noneconomic in nature. This determination is not always simple, since many garden-variety crimes, including arson and carjacking, might be motivated by the prospect of pecuniary gain. Second, the federal courts would be required to determine whether the regulated activity, alone or in the aggregate, has a substantial effect on interstate commerce. This determination requires significant judicial discretion, because, in the past, the courts have been unable to develop the necessary objective. Thus, the new standard is not likely to lead to uniform interpretation in the federal courts.

Due to these practical considerations, the Supreme Court should adopt the four-category Commerce Clause framework instead of eliminating the three-category framework and adopting a uniform standard. This four-category framework is much simpler and is likely to produce more consistent results in the federal courts.

VI. CONCLUSION

In two recent cases, *Lopez* and *Morrison*, the Supreme Court warned that the Commerce Clause "must be considered in light of our dual system of government and may not be extended so as to . . . effectually obliterate the distinction between what is federal and what is local and create a completely centralized government."[280] In addition, the Court emphasized that it was unwilling to "convert congressional authority under the Commerce Clause into a [plenary] police power of the sort retained by the states."[281] The Court attempted to preserve these federalist ideals by formulating a heightened standard of constitutional review for certain commerce-based federal statutes.

More specifically, the Court placed two judicially cognizable limits on Congress's ability to regulate *intra*state activities that affect commerce, i.e., regulations falling within the third *Lopez/Morrison* category.[282] First, the Court held that Congress would not be permitted to regulate within the third category unless it could demonstrate that an intrastate activity had a substantial effect on interstate commerce.[283] Second, the Court held that Congress would not be permitted to use the aggregation principle to prove a substantial effect on interstate commerce unless the regulated activity was deemed economic.[284]

This Note demonstrates, however, that these limits are not sufficient to achieve the Court's federalist objectives. The Court's current Commerce Clause jurisprudence contains two significant loopholes that permit further federal encroachment on the state police power. First, the constitutional standards announced in *Lopez* and *Morrison* do not restrict Congress's ability to regulate the channels or instrumentalities of interstate commerce—the first two categories of the *Lopez/Morrison* framework. Rather, those cases only limit Congress's ability to regulate activities that affect commerce—the third category in the *Lopez/Morrison* framework. Second, the decisions in *Lopez* and *Morrison* seem to leave untouched federal statutes that contain an express jurisdictional element. The statutes in *Lopez* and

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280. United States v. Morrison, 529 U.S. 598, 607 (2000) (quoting NLRB v. Jones & Loughlin Steel, 301 U.S. 1, 37 (1937)); United States v. Lopez, 514 U.S. 549, 556-57 (1995) (quoting *NLRB*, 301 U.S. at 37).

281. *Morrison*, 529 U.S. at 618-19; *Lopez*, 514 U.S. at 567.

282. See supra Sections III.A-C for a detailed discussion of the three-category framework developed in *Lopez* and *Morrison*.

283. *Lopez*, 514 U.S. at 559-60.

284. *Id.*

Morrison may have been subject to heightened constitutional scrutiny only because they lacked such a jurisdictional element.[285]

Two recent court of appeals cases, *Marek* and *Weathers*, illustrate the grave and questionable consequences of the loopholes in the Supreme Court's Commerce Clause jurisprudence. In both cases, the courts were asked to interpret the jurisdictional requirements of § 1958. That statute had two important characteristics: (i) it contained an express jurisdictional element, and (ii) it represented a congressional regulation of the channels or instrumentalities of interstate commerce. For both of these reasons, the statute was exempt from the judicially cognizable limitations announced in *Lopez*. The cases were decided largely as a matter of statutory interpretation, with little attention given to the underlying constitutional consequences.[286]

Due to the lack of meaningful constitutional review, the *Marek* and *Weathers* courts reached troubling conclusions. In *Marek*, the court implicitly concluded that the federal government should have the power to investigate and prosecute all crimes that are facilitated by an automobile, an airplane, a cellular telephone, a paging device, or the Internet.[287] Under the interpretation in *Marek*, the prosecution was not required to prove that the use of these facilities caused an actual interstate contact.[288] The *Weathers* opinion, while somewhat less troublesome than *Marek*, implicitly suggested that the federal government should have jurisdiction over all of the same crimes, as long as the prosecution can prove that the defendant's use of a "facility of interstate commerce" causes even a tenuous and incidental interstate contact.[289]

In essence, the *Marek* and *Weathers* threaten to convert congressional authority under the Commerce Clause into a plenary police power, even though the Court in *Lopez* and *Morrison* expressly warned against such an expansion of power. This conclusion does not suggest, however, that the courts in *Marek* and *Weathers* failed to apply the proper legal analysis. Rather, it suggests that the Supreme Court should reformulate the constitutional standards announced in *Lopez* and *Morrison* if it truly intends to limit Congress's commerce power.

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285. Indeed, Congress's response to *Lopez* was to reenact the Gun Free School Zones Act with an additional requirement that the gun had moved in interstate commerce. 18 U.S.C. § 922 (2000).

286. See *supra* Part III for a detailed discussion of *Marek* and *Weathers*.

287. *See supra* notes 22-24 and accompanying text.

288. *See supra* notes 22-24 and accompanying text.

289. *See supra* notes 25-27 and accompanying text.

This Note has identified and explained two reformulated constitutional standards that are designed to achieve the Court's federalist objectives. Under the first standard, the Court would eliminate the three-category framework and extend the "substantial effects" requirement to all commerce-based statutes. Under this proposed standard, Congress would be permitted to regulate economic activities that, in the aggregate, have a substantial effect on interstate commerce. In addition, Congress could regulate noneconomic activities, but only if it could prove that individual instances of the regulated activity have a substantial effect on interstate commerce. This standard would prevent Congress from regulating most crimes which, by their very nature, are noneconomic. This standard preserves the states' traditional responsibility for defining and enforcing criminal law.

Under the second proposed standard, the Supreme Court would retain the existing three-category framework and add a fourth category to govern congressional regulation of the use of interstate communication facilities. Congress would be permitted to regulate within the fourth category only if an interstate communication facility is used to facilitate contact between persons located in different states. This standard would prevent the federal courts from asserting jurisdiction in cases in which a purely local crime "ha[s] taken on ... interstate qualit[ies] because of the means by which beepers, cellular phones, email, and telephones function."[290] Thus, this standard ensures that the states will retain primary responsibility for the administration of criminal justice.

Ultimately, the Supreme Court should adopt the proposed four-category Commerce Clause framework, rather than eliminating the three-category framework and adopting a uniform Commerce Clause standard. The four-category framework is preferable for two primary reasons. First, it represents a less drastic departure from the Supreme Court's existing Commerce Clause jurisprudence. Indeed, the fourth category would only apply in a limited number of cases where federal jurisdiction is allegedly based on the defendant's use of an electronic communication device in furtherance of the crime. The uniform standard, on the other hand, would apply in all cases in which federal jurisdiction is based on Congress's commerce power. Due to the breadth of the uniform standard, courts would experience difficulty in implementing the new standard and are likely to produce inconsistent results given the lack of relevant case law. Second, the four-category framework is extremely simple and will produce consistent results in

290. United States v. Paredes, 950 F. Supp. 584, 589 (S.D.N.Y. 1996).

the federal courts. The uniform standard, on the other hand, requires the federal courts to make complex legal determinations that involve a great degree of judicial discretion. Thus, the uniform standard is unlikely to produce consistent results in the short term.

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