CONSTITUTIONALIZING THE FEDERAL CRIMINAL LAW DEBATE: MORRISON, JONES, AND THE ABA

George D. Brown*

As the number of federal criminal laws has increased over the past decade, so, too, has the intensity with which scholars debate the role of federal law generally. However, in their debate, the scholars focus largely on matters of legislative policy. They essentially ask the question, “How far should Congress go when creating new federal law?” Professor George Brown seeks to answer a different question.

In this article, Professor Brown addresses the constitutional questions regarding federal criminal law. In essence, he attempts to answer not how far Congress should go, but, instead, how far it actually can go when formulating new federal law. Following the Lopez decision, it seemed that constitutional issues would become more prevalent in the federal criminal law debate. Although some scholars continue to treat the matter as one of legislative choice, Professor Brown argues that the recent decisions in Morrison and Jones require scholars to address the constitutional issues. He then offers a revised look at the debate—one that includes both legislative and constitutional issues.

The opportunity to limit the excessive federalization of local crimes rests entirely with Congress. It is conceivable that at some point the Supreme Court might adopt a more narrow construction of the Commerce Clause that would inhibit Congress’s authority to federalize local crimes. . . .1


Research support for this article was provided by a Boston College University Research Incentive Grant.

I. INTRODUCTION

It is hardly surprising that many observers question the scope of federal criminal law. Consider United States v. Pascucci,2 a case about which Judge Sentelle might say “I am not making this up.”3 Pascucci was a federal extortion prosecution arising out of the defendants’ entrapment of an errant husband into a sexual encounter, followed by a demand for payment or revelation to his wife and employer.4 Gieck, the victim, was a traveling representative of Ford Motor Company.5 In order to sustain federal jurisdiction, the government had to show that Gieck’s infidelity had an effect on interstate commerce.6 Part of its successful argument, supported by Gieck’s testimony, was that he “would have difficulty performing his job because of the stress inherent in being an extortion victim, thus causing an effect on interstate commerce.”7 If federal power exists in Gieck’s case, it is hard to see where federal power over extortion stops.8 Even self-employed persons will suffer stress, thus reducing their ability to contribute to commerce.

It is primarily this expansionist character of federal criminal law that has led to what Professors Abrams and Beale call the “great debate on the nature of the federal role.”9 The debate has been going on for some time, but it intensified during the 1990s as Congress created new federal crimes to the point that there are now over 3000 on the books.10 What is striking about the great debate is that throughout much of its history, the commentators have treated the issues as matters of legislative policy only.11 The ultimate question was presented as one of how far Congress should go, not one of how far it could go in a constitutionally prescribed federal system. Yet many participants invoked the values of federalism and the role of the states in the area as reasons to limit federal

---

2. 943 F.2d 1032 (9th Cir. 1991).
4. Pascucci, 943 F.2d at 1033.
5. Id.
6. Id. at 1035.
7. Id. at 1040 (Ferguson, J., dissenting).
8. See id. at 1041. There was clearly a federal interest present in the Pascucci prosecution. The perpetrators were associated with the U.S. Marshal’s Service. However, the rationale for sustaining jurisdiction contains no such limit. Any U.S. Attorney who wishes to make extortion a priority is free to do so under the de minimis effect theory expressed there. Pascucci is apparently still good law. See United States v. Atcheson, 94 F.3d 1237, 1243 (9th Cir. 1996).
10. REPORT, supra note 1, at 9–10 n.11. For an excellent pre-1990s discussion, see John S. Baker, Jr., Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper, 16 RUTGERS L.J. 495 (1985).
11. Professors Abrams and Beale make the point in the previous, pre-Lopez, edition of their casebook, NORMAN ABRAMS & SARAH SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 48 (2d ed. 1995) (“Under prevailing interpretations, the courts have not imposed significant constitutional restrictions on the scope of the federal criminal laws.”).
criminal law, even while it was generally assumed that there were no enforceable limits. Then came Lopez.

One would have expected Lopez to have a radical effect on the great debate. The Court struck down a federal criminal statute—the Gun-Free School Zones Act—on constitutional grounds. The five-member majority found judicially enforceable limits on the commerce power, the lack of which had been a central tenet of the debate. Moreover, the decision rested heavily on notions of the states’ predominant role in criminal law and the lack of a national police power. These, too, had been important themes. Lopez has certainly played a role in further intensifying the debate, but it is a surprisingly tentative one. Although it seems unlikely that those participating in the great debate would simply ignore a major Supreme Court decision, the notion persists that issues of federal criminal law are matters of policy rather than constitutional limits.

There are several reasons for the uncertain role of Lopez in the federal criminal law debate. Some participants may simply reject the decision or view it as likely to be short-lived, resting on untenable rationales. Others may view it as extremely limited, a blip on the constitutional screen, of little generative force. The lower courts have almost universally upheld federal criminal statutes against a staggering array of Lopez-based challenges. Lopez itself treated several existing criminal laws based on the Commerce Clause as clearly valid. Moreover, the Court seemed especially favorable toward federal statues with a jurisdictional element: a requirement that the facts of a particular case demonstrate a nexus with interstate commerce. Statutes of this type have always been an important component of the federal criminal arsenal, and are likely to become more so.

Whatever the reason, important players in the debate continue to present it as a matter of policy rather than of constitutional limits, or at

---

16. Id. at 567.
17. E.g., id. at 564, 566.
18. See Daniel C. Richman, The Changing Boundaries Between Federal and Local Law Enforcement (forthcoming) (manuscript at 2, on file with the author) (describing “a critical debate that, for better or worse, is now more a matter of public policy than constitutionality”).
21. Id. at 561–62. Jurisdictional element statutes are different from those that regulate an entire class of activities, e.g., possession of a gun in a “school zone,” without reference to whether the particular possession had any connection or nexus to interstate commerce.
least to display considerable ambivalence on the subject. A key example of the latter approach is the influential report of the Criminal Justice Section of the American Bar Association: *The Federalization of Criminal Law (Report).*22 The *Report* covers all facets of the debate, but rests its highly negative appraisal of federalization primarily on the values of the federal system and the role of the states in the criminal law.23 Having a major Supreme Court decision in hand that buttresses that approach would seem to be a significant plus. However, *Lopez* plays little more than a footnote role, essentially treated as a “recent decision” that sheds some light on the matter.24 The Task Force response to any such criticism would be that it “did not attempt to identify the limits of the powers of the national government under the Commerce Clause to criminalize conduct which is already, or which could be, prosecuted by states.”25 Instead, its analysis of the problem is followed by a series of recommendations to Congress.26 In my view, the whole endeavor, helpful and thorough though it is, is weakened by presenting the debate as taking place on a sort of constitutional carte blanche with federalism values somehow present, but in aspirational form only.

Whatever merit this position may have had in 1998, the year of the *Report*, it is considerably harder to uphold after the Supreme Court’s 1999 term and the decisions in *United States v. Morrison*27 and *Jones v. United States*.28 *Morrison* involved a civil statute, the federal private civil remedy authorized by the 1994 Violence Against Women Act.29 However, that statute’s remedy was contingent upon “a crime of violence motivated by gender,”30 and the Court’s Commerce Clause analysis concerns essentially the limits of Congress’s authority to enact criminal law.31 The majority opinion is a ringing reaffirmation of *Lopez* and its federalistic

23. See id. at 24–56.
24. See id. at 3. This page of the *Report* neither refers to *Lopez* by name nor cites it. Instead, the report informs the reader that the unnamed decision is “noted in the *Report* at p. 25.” Id. at 3 n.1. The text of page 25 does not refer to *Lopez* by name, but quotes a portion of a sentence referring to the lack of a national police power. Id. at 25. *Lopez* is then cited in the corresponding footnote. Id. at n.41. The unquoted portion of the sentence makes the more contentious point that judicial intervention is necessary to insure that Congress respects the limits on its power. See *United States v. Lopez*, 514 U.S. 549, 566 (1995). *Lopez* is cited in a later footnote as “dealing with the constitutionality of the federal Gun Free School Zones Act under the affecting commerce power.” *Report, supra* note 1, at 32 n.55. These three references appear to constitute the extent of *Lopez*’s cameo role in the *Report*. Federalism is an important background value, but the notion that the Supreme Court might be ready and willing to enforce it has to be inferred.
26. See id. at 51–56.
30. Id. § 13981(c).
31. See *Morrison*, 529 U.S. at 608–15. The Court also dealt with, and rejected, arguments in favor of the Act based on the Fourteenth Amendment. Id. at 619–27.
analysis of the issue. At the same time, the four Lopez dissenters were equally strong in reaffirming their rejection of that analysis. A week later, however, the unanimous decision in Jones suggested that the Morrison-Lopez split had never occurred. At issue in Jones was the construction of the jurisdictional element in the federal arson statute. Justice Ginsburg, a Morrison-Lopez dissenter, wrote the Court’s opinion. She treated Lopez as the guiding precedent, invoked the need to preserve the federal-state balance, and warned against an expansive interpretation of the statute that would leave congressional power virtually without limits. Neither Justice Breyer nor Justice Souter, the principal Morrison-Lopez dissenters, saw any reason to say a word.

I am not suggesting that opponents of Lopez should give up the fight, but the Morrison-Jones-Lopez trilogy makes it clear that the Court’s emphasis on limiting federal authority to enact criminal law must play a central role in the great debate. It is hard to believe, for example, that a revised version of the Report would not place greater emphasis on constitutional issues as constitutional issues. The existence of federalism-based, judicially enforceable limits on national power is the obvious one. Lurking beneath the surface, as the Report suggests, are other important constitutional values. Particularly significant are those involving the civil liberties of defendants potentially subject to two criminal justice systems. Putting judicially enforceable federalism at the center of the debate reinforces the Report’s recognition of a view harking back to Madison that strong state governments and limits on national power protect individual liberties. The whole debate poses a series of dilemmas for proponents of national power and institutions. They are not accustomed to seeing the federal courts cast as villains vis-à-vis state courts. For them, Congress has always been the legislative institution that protects individuals, yet federal criminal statutes can have the opposite effect. Some participants in the debate may be uncomfortable siding with Justices Scalia and Thomas on a “state’s rights” issue.

Whether one likes it or not, the Court has forcefully entered the debate, and its rulings must be part of that debate. For that matter, the Court itself is not finished. Even assuming the current majority holds,

32. E.g., id. at 609 (“[I]t [Lopez] provides the proper framework for conducting the required analysis of § 13981.”).
33. See id. at 628 (Souter, J., dissenting); id. at 655 (Breyer, J., dissenting). Justices Ginsburg and Stevens joined in both dissents.
34. See 18 U.S.C. § 844 (i).
36. Id. at 858.
37. Id. at 857 (“Were we to adopt the Government’s expansive interpretation of § 844(i), hardly a building in the land would fall outside the federal statute’s domain.”).
38. See REPORT, supra note 1, at 27–29 (discussing effects on defendants of “disparate” consequences resulting from two systems of overlapping criminal laws).
39. See id. at 26–27. In THE FEDERALIST No. 51, Madison contended that, as a result of the existence of two separate governments, “a double security arises to the rights of the people.”
Morrison does not represent the last word on how far Lopez extends. In Jones the Court was able, through construction, to avoid difficult questions of how constitutional analysis applies to statutes with jurisdictional elements. The language of Morrison, Lopez, and Jones, as well as the lower court practice exemplified in Pascucci, points toward a broad approach that upholds federal jurisdiction. However, the spirit of the Court’s recent decisions cuts the other way.

In this article, I attempt to assess how the federal criminal law debate would look with substantial constitutional analysis added to the mix. Part I is a detailed examination of the ABA Task Force Report. I evaluate the Report as it stands, and present an argument on how constitutional analysis would strengthen it. Part II analyzes Morrison and Jones. I treat the former as an extension of Lopez and the debate it engendered. Jones is presented as a tentative foray into the complex area of jurisdictional elements. Part III focuses on jurisdictional element statutes in greater detail, using the affecting commerce approach of the Hobbs Act as a test case. This analysis suggests that harmonizing Lopez with such statutes will not be an easy task. Perhaps Pascucci should not survive, but the line is hard to draw. The federal courts may end up taking a lot of jurisdictional element cases that, under the spirit of Lopez, belong in the state courts. My overall conclusion is that the Court’s contributions should be welcomed, not ignored, and that in the long run they will serve to enrich the great debate.

II. THE GREAT DEBATE AND THE ABA

A. The Debate—An Overview

The debate over the proper range of federal criminal law exists primarily in academic writings. Federal judicial opinions have also weighed in on the subject, especially since Lopez. Federalism concerns are sometimes expressed in congressional deliberations, usually to be swept aside. Within the overall debate there is a surprising degree of agreement, although Lopez may have pushed the poles further apart. There is no support for the proposition that Congress’s power is limited to the specific authorization of a federal penal law contained in the Constitution, such as that to “define and punish Privacies and Felonies com-

43. See ABrams & BEALE, supra note 9, at 64 (contending that the range of disagreement has risen in recent years).
mitted on the high Seas, and Offenses against the Law of Nations."

There is certainly acceptance of Chief Justice Marshall’s argument in *McCulloch v. Maryland* that the grant of a power, coupled with the Necessary and Proper Clause, includes the ability to impose appropriate penal sanctions to further the exercise of that power. It is often stated that where “indisputable” or “direct” federal interests are at stake, federal criminal law is also necessary and proper. Classic examples are crimes “occur[ing] on federal property or where federal moneys are affected or federal personnel are injured or killed.”

The issue becomes problematic when the federal government creates a federal crime to cover offenses traditionally reserved as matters for state criminal justice systems. Well-known examples include fraud, robbery, extortion, prostitution, arson, and carjacking. Professors Abrams and Beale state that “it is hard to think of a crime under state law that cannot be prosecuted federally.” Once one moves beyond direct federal interests to what I shall henceforth refer to as the overlapping crimes, it is hard to state specific principles to guide the inquiry.

There are, however, a number of recurring arguments invoked to justify creation of these federal crimes. One such argument is that federal investigative and prosecution resources may be superior to those of the states. This superiority could play a particularly important role in cases of interstate crime and/or the work of large-scale criminal organizations. A related approach is what Professor Little calls the principle of “demonstrated state failure.” This argument suggests that, apart from resource constraints, states may be hampered in their ability to prosecute such matters as political corruption. The argument is not a race-to-the-bottom theory that some states will attract crime unless the higher level steps in with uniform regulation. Nor is it a preference for the federal

44. U.S. CONST. art. I, § 8, cl. 10.
45. 17 U.S. (4 Wheat.) 316 (1819).
46. See id. at 417 (explaining that the power to establish federal courts includes the power to punish perjury in those courts).
47. See ABRAMS & BEALE, supra note 9, at 65.
48. Id. at 417.
50. ABRAMS & BEALE, supra note 9, at 64.
51. The concept of overlap arises frequently in the federal criminal law debate. E.g., Harry Litman & Mark Greeberg, *Dual Prosecutions: A Model for Concurrent Federal Jurisdiction*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 72, 84 (1996), quoted in ABRAMS & BEALE, supra note 9, at 65 (“[T]he federal government’s ability to respond to national problems depends on a significant overlap between federal and criminal state jurisdiction.”).
judicial forum of the sort advocated in private litigation involving assertion of federal rights. Rather, it is that structural considerations favor federal enforcement at least some of the time. Indeed, it is possible to take these contentions further and present crime fighting as an integral part of the national government’s role, an activity in which it should be more engaged. Attacking street crime, for example, can be seen as advancing “its historic and inspiring role of promoting equality of opportunity along income and racial lines.”

Even those who take the profederal position this far recognize that the states can do the job some of the time. Indeed, the advocates of federalization do not want to eliminate the state role. We are not dealing with an area in which national power means federal supremacy, or pre-emption. This does, however, create a serious problem of legislative design that goes beyond mere drafting. Simply put, the overlapping crimes will overlap. Federal law parallels state law in order to catch the crimes that require federal prosecution. Thus proponents of a strong federal role envisage a criminal justice system with many federal penal laws overlapping those of the states to create the necessarily wide range of potential federal power. At the same time, they do not expect these federal laws to be used in every case. National power in this world of concurrent criminal jurisdiction is presented as supplementary to that of the states, who would continue to handle the bulk of the prosecutions. Federal law would simply not be needed in most cases. The laws would be on the books, however, potentially available in every case.

This overbreadth leads proponents of a strong national presence to seek filtering devices that identify the cases where federal intervention is needed. The most obvious candidates are the individual U.S. Attorneys. In this model, federalism concerns would become part of prosecutorial discretion. Any further need for limits could be addressed in the relevant statute itself, or in administrative directives, by requiring a finding that the state is unable or unwilling to prosecute a particular matter. Alternatively, the courts might play a role in screening out the cases that do not need federal intervention, perhaps through interpretation of jurisdictional elements. The vision is one of

---

55. Id. at 324.
56. See Gorelick & Litman, supra note 52, at 976 (arguing against federalization if the national government cannot achieve more than the states).
57. See Stacy & Dayton, supra note 54, at 283 (stressing importance of concurrent state and national authority).
58. E.g., Gorelick & Litman, supra note 52, at 976 (contending that, “only a tiny fraction of the conduct falling under such statutes will be prosecuted federally”).
59. E.g., id. at 976 (emphasizing role of prosecutorial discretion in protecting federalism interests); Moohr, supra note 53, at 1138–41 (discussing prosecutorial discretion model).
60. See Abrams & Beale, supra note 9, at 73–76 (discussing statutory techniques of targeting).
61. See generally id. at 76–103 (discussing targeting through judicial interpretation).
cooperative federalism, reinforced by the fact that law enforcement authorities from different jurisdictions often do cooperate, as well as the view that a certain amount of tension is inherent in the criminal justice system.\textsuperscript{62}

It is possible to advocate intermediate solutions such as more federal funding of state and local authorities.\textsuperscript{63} However, in the rest of this section I will emphasize the arguments against the broad concurrent system. At this point, I will summarize them briefly, because they are a major theme of the \textit{ABA Task Force Report} discussed in the remainder of this section. Professors Abrams and Beale state that this position can be labeled, in a somewhat oversimplified fashion, as that of the “antifederalizers.”\textsuperscript{64} It is certainly true that federalism values play a major role in the analysis of those who oppose a broad national role. These include such tenets as the historical role of the states in criminal matters, the lack of a national police power or a national police force, and the perception of criminal law and punishment as resting upon moral judgments that may differ among states.\textsuperscript{65} A second theme in the antifederalizers’ critique is the drain on federal resources, particularly those of the federal courts.\textsuperscript{66} This theme suggests that a potentially large volume of run-of-the-mill criminal cases diverts these courts from their unique mission of adjudicating important national issues. Finally, as noted, critics present federal criminal prosecution, especially its sentencing component, as dispensing a particularly harsh form of justice, perhaps inappropriate for routine state cases.\textsuperscript{67} The latter point dovetails with a third strain of the critique: the contention that being subject to a dual system of criminal law is harmful to the civil liberties of defendants.\textsuperscript{68} For example, selective prosecution by federal authorities, perhaps in cahoots with state officials, may occur when both levels want to “get” a particular defendant and punish him as severely as possible. Indeed, as I develop in discussing the \textit{Report}, the civil liberties critique is one of the strongest arguments against the system of overlapping criminal laws. As for the overall debate, one might view it as in

\begin{itemize}
\item \textsuperscript{62} See Richman, \textit{supra} note 18, at 27–29 (discussing relationships between federal and state authorities).
\item \textsuperscript{63} E.g., \textit{REPORT}, \textit{supra} note 1, at 54–55.
\item \textsuperscript{64} ABRAMS & BEALE, \textit{supra} note 9, at 65.
\item \textsuperscript{65} E.g., Grant S. Nelson & Robert J. Pushaw, Jr., \textit{Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues}, 85 \textit{IOWA L. REV.} 1, 118 (1999).
\item \textsuperscript{66} E.g., \textit{REPORT}, \textit{supra} note 1, at 35–42. The Report states that “[t]he federal courts should play the distinctive and complementary role envisioned for them in the Constitution’s federal scheme, and not simply duplicate the functions of the state courts.” \textit{Id.} at 37.
\item \textsuperscript{67} E.g., Jones v. United States, 529 U.S. 848, 859 (2000) (Stevens, J., concurring) (noting that defendant “received a sentence of 35 years in prison when the maximum penalty for the comparable state offense was only 10 years”).
\item \textsuperscript{68} See \textit{REPORT}, \textit{supra} note 1, at 27–29. For example, the Report notes that “in plea negotiations, local prosecutors can use possible federal prosecution, with its likely harsher punishments, as a threat.” \textit{Id.} at 34 (footnote omitted).
\end{itemize}
considerable flux, with new perspectives emerging as the terrain shifts. My own sense is that the critics are gaining ground. In this respect, the ABA Task Force Report is particularly significant. It is the product of a strong group of experts, working under the aegis of a prestigious organization. It reflects considerable research. The Report is not ambiguous about the great debate. It is a strong endorsement of the antifederalizer position.

B. The Report: “The Adverse Consequences of Inappropriate Federalization”

The Report can be described as having four distinct components. I will outline and analyze each one, noting that this approach to the Report should not imply that the components are in exact sequential order.

1. A Description of the Present Extent of Federal Criminal Law

The Report accepts as a baseline the existence of over three thousand federal crimes. If anything, the Task Force felt that “the present number of federal crimes is unquestionably larger.” The Report traces the historical development of these laws, noting the major periods of growth in the twentieth century. It describes, for example, the concern in the 1960s and 1970s with “organized crime, drugs, street violence, and other social ills.” Of particular concern to the authors is the “explosive” growth of federal penal statutes in the last three decades. The research underlining the Report leads the Task Force to conclude that “[m]ore than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970.” The Task Force notes the difficulty of reaching an exact number of federal crimes, as well as the fact that many penal provisions do not create what I have referred to as the overlapping crimes. Nonetheless, the Task Force views the latter phenomenon as particularly significant. Indeed, it “gives rise to the concerns addressed in this Report.”

The Task Force also concludes that the federalization trend is growing. For example, in the 105th Congress, one thousand bills dealing with criminal statutes had been introduced by the end of July 1998. The Task Force notes that it is necessary to go beyond legislative activity and to take account of increases in federal investigative and prosecution per-

---

69 See id. at 9–10 n.11.
70 Id.
71 Id. at 7.
72 Id.
73 Id. (emphasis in original) (footnote omitted). The Report concludes that “much, though not all, of this surge has occurred in the last two decades.” Id. at 7 n.9.
74 Id. at 9–10 n.11.
75 Id. at 11.
76 Id.
Federal courts will be hearing new and additional classes of cases, and the federal prison system will see the result as well. The analysis of the Task Force measures the expanding federal role through justice system expenditures, concluding that between 1982 and 1993 these expenditures “increased at twice the rate of comparable state and local expenditures.”

The Report devotes considerable attention to the reasons behind the continuing and increasing federalization with its attendant consequences throughout the system. A recurring theme is the lack of any underlying principle that would drive the choice to create overlapping offenses. Indeed, it is this trend that the Task Force concludes is the major source of problems within the federal criminal justice system. It is presented as a “patchwork response to newsworthy events, rather than as part of a cohesive code developed in response to an identifiable federal need.” Anticrime legislation is popular. However, the mere presence of new federal laws on the books may create “the illusion of greater crime control,” rather than improve the operation of the criminal justice system.

What is striking about the descriptive portion of the Report is the extent to which it is explicitly based on a critical appraisal of the federalization trend. What bothers the Task Force is not so much the “astonishing” growth in the scope of federal criminal law but its overlapping with existing state jurisdiction without any “principled basis” for occupying this territory. In particular, the Task Force appears to agree with critics who view such legislation as based on political considerations, rather than any demonstration of incapacity on the part of state or local government. Thus, even in the descriptive portion of the Report, it is clear that the authors are intent on validating a critique of the present system of federal criminal law, beyond merely describing it. I find the description, especially the statistical and graphic supporting material, extremely helpful. The Report is likely to play a major role in future discussions of federal criminal law, even for those who do not accept its premises. However, the assumptions behind it probably play a greater role in the Report than does the descriptive portion.

77. Id. at 13–14.
78. See id. at 39–40.
79. Id. at 14.
80. Id. at 14–15.
81. Id. at 15 (quoting POLICE EXECUTIVE RESEARCH FORUM, POSITION ON FEDERALISM, transmitted to the Task Force, December 1997).
82. Id. at 10.
83. Id. at 5.
84. See id. at 15–16.
2. Normative Federalism Principles and Critiques

A second distinct component of the document is its normative exposition of the American federal system in the context of criminal justice initiatives. As I have noted, the Report is highly critical of Congress for enacting so many overlapping statutes without a principled basis, that is, without some sort of guidepost as to what is truly federal and what belongs to the states. The Report is highly critical of Congress for enacting so many overlapping statutes without a principled basis, that is, without some sort of guidepost as to what is truly federal and what belongs to the states. Of course, the search for such directive principles is at the heart of much of the “great debate” discussed earlier in this article. The Report is squarely based on assumptions about American federalism, both as a matter of constitutional allocation of power and as a matter of tradition and governmental policy. It is not always easy to ascertain the extent to which the Report views this inquiry as controlled, at least in part, by judicially enforceable principles of federalism. The quote at the beginning of this article suggests that the matter is entirely one of congressional discretion. This apparent emphasis on tradition and self-imposed limits on Congress can be found elsewhere in the Report. It is consistent with what is often referred to as Professor Wechsler’s view of the political safeguards of federalism, which relies on Congress to protect the interests of states rather than on judicially enforceable norms. Indeed, the Report emphasizes that the Task Force “did not attempt to identify the limits of the power of the national government under the Commerce Clause to criminalize conduct which is already, or which could be, prosecuted by states.”

On the other hand, the Report states unequivocally that “[c]ongressional power to make conduct a federal crime is constitutionally limited.” Lopez receives an apparently favorable, although indirect, mention at the beginning. Approximately two pages are devoted to “The Constitutional Framework.” The Report does cite Lopez, as well as Printz v. United States, to support notions of dual sovereignty, enumerated national powers, and a concomitant limitation on federal criminal law.

The Report, however, goes beyond issues of constitutional federalism, whether as a matter of judicially enforceable limits or political tradition, to analyze several detrimental effects on the federal system that

---

85. E.g., id. at 5, 13-15. The Report states that “[a]new crimes are often enacted in patchwork response to newsworthy events, rather than as part of a cohesive code developed in response to an identifiable federal need.” Id. at 14–15.
86. See id. at 2–3.
88. REPORT, supra note 1, at 3.
89. Id. at 45.
90. For a discussion of the Report’s treatment of Lopez, see supra note 24.
91. REPORT, supra note 1, at 24–26.
93. See REPORT, supra note 1, at 24–29.
flow from the growth of the overlapping federal offenses. For example, the long-standing notion of lack of a national police power in general, and a national police force in particular, is jeopardized whenever Congress “bestows new federal investigative power on federal agencies, broadening their power to intrude into individual lives.”94 The Report also finds important negative consequences on the functioning of the federal system, a “disruption of the delicate balance”95 that is the essence of American federalism. Undermining the primary role of state courts in dealing with crime “can lead to a notable diminution of the stature of the state courts in the perception of citizens.”96 The Report also finds a blurring of responsibility for essentially local matters that can harm principles of accountability of different jurisdictions to the citizens.97 Although the authors do not cite Printz for the importance of accountability in federalism, that principle lay at the heart of the Printz decision98 as well as its predecessor, New York v. United States.99

What is striking about the normative components of the Report, and the document as a whole, is the extent to which they follow the “new federalism” vision of the current Supreme Court as found in cases like Printz and Lopez. This is all the more surprising, given the Report’s sparse reliance on Lopez. After all, Lopez struck down a federal criminal statute, in language that emphasized the limits of national authority and the traditional, primary role of the states in matters of criminal law.100 The notions of separate spheres as a key element of the federal system can be found in the opinions of Chief Justice Rehnquist and Justice Kennedy.101 Whatever its constitutional dimensions are, or might be, the normative components of the Report are in accord with the views of the current Court majority. This, in itself, is an important boost for the new federalism, given the prestige of the American Bar Association. What may be of even greater significance, however, is the component of the Report that attempts to demonstrate the harm that excessive federalization imposes on the criminal justice system as well as other important institutions.

3. Criminal Justice and Other Systemic Consequences

This aspect of the Report contends, in part, that the relatively small amount of federal prosecutions, considered against the total number of

---

94. Id. at 27.
95. Id. at 26.
96. Id.
97. Id. at 42–43.
101. E.g., id. at 567–68 (invoking the “distinction between what is truly national and what is truly local”). The Report states that “it is vital to remember that the American criminal justice system was set up to operate within distinct spheres of government.” REPORT, supra note 1, at 24.
prosecutions in the United States, means that the federal effort actually has a minimal effect on crime control itself.\textsuperscript{102} The Task Force maintains that this is the case even in the drug area. Their statistics for 1997 show that drug trafficking offenses constituted twenty-eight percent of all federal filings, but that these cases represented less than two percent of all drug prosecutions in the country.\textsuperscript{103} A number of the newer federal criminal statutes are hardly used at all.\textsuperscript{104} This might lead one to the conclusion that whatever objections there are to the overlapping offenses in theory, they cannot have a serious practical effect of any sort.

However, the Task Force concludes that there are a range of negative effects, resulting in part from the potential for federal action. For example, there is a significant “potential for competition to detect and prosecute crime.”\textsuperscript{105} The presence of the statutes may create little more than the illusion of crime control, but the Task Force identifies direct negative impacts on those who come in contact with the criminal justice system. One example is the potential for more citizens to be investigated by federal authorities in a country that rejects a national police force.\textsuperscript{106} Particularly troubling to the authors are the negative consequences for defendants and potential defendants. There is obviously a real danger of being whipsawed between the two jurisdictions.\textsuperscript{107}

This objection is more than theoretical. A good real-life example is Project Exile, a joint undertaking of the cities of Richmond and Norfolk, Virginia and the U.S. Attorney for the Eastern District of Virginia.\textsuperscript{108} Whenever possible, local offenders who have committed firearm-related offenses are dropped from the state system and prosecuted in federal court.\textsuperscript{109} The result may be substantially more severe penalties.\textsuperscript{110} It is also the case that the consequences of Project Exile fall heavily upon members of the minority communities in those two cities.\textsuperscript{111} However, former President Clinton has praised the program, and a major nation-

\textsuperscript{102} See \textit{Report}, \textit{supra} note 1, at 53 (“The new waves of federal statutes often stand only as symbolic book prohibitions with few actual prosecutions.”).

\textsuperscript{103} \textit{Id.} at 20.

\textsuperscript{104} \textit{Id.}

\textsuperscript{105} \textit{Id.} at 40. The \textit{Report} notes that prosecutors at both levels may be potential candidates for higher office. \textit{Id.}

\textsuperscript{106} See \textit{id.} at 13.

\textsuperscript{107} See \textit{id.} at 27–29; Moohr, \textit{supra} note 53, at 1128–29 n.6 (noting issues of defendants’ rights).


\textsuperscript{109} \textit{Id.}

\textsuperscript{110} \textit{Id.} at 308–09 (discussing punishment issues raised by the program).

\textsuperscript{111} The defendants in \textit{Jones}, in arguing the unconstitutionality of Project Exile, relied primarily on individual rights contentions. \textit{Id.} at 309–12. They also raised issues of federalism. \textit{Id.} at 313–14. Although the district court expressed sympathy for the defendants’ contentions, it upheld the program. \textit{See id.} at 312. The court seemed particularly sympathetic to federalism arguments stating that “Project Exile represents a substantial federal incursion into a sovereign state’s area of authority and responsibility.” \textit{Id.} at 316.
wide expansion seems likely.112 Thus the Task Force seems on solid
ground in pointing to serious civil liberties problems resulting from the
overlapping offenses, a theme that is found in the great debate.113

The fact of overlapping inevitably strengthens the role of federal
prosecutors. The Report points to increased power at the federal prose-
cutorial level.114 It portrays federal prosecutors as less accountable than
their state counterparts, and in a position to use a wide range of investi-
gative and prosecutorial tools without effective review.115 This broad
federal prosecutorial power is inherent in the overlapping system; in-
deed, it is an essential component of a structure with a wide range of po-
tential federal action. Yet,

[given the parallel systems of state and federal prosecution that can
cover essentially the same conduct, new federal crimes dealing with
local conduct place additional (and essentially unreviewable) power
in the hands of federal prosecutors, prompting questions about di-
verse treatment, sentences, and other issues related to the basis for
selecting one defendant for federal prosecution while others are
prosecuted by the state.116

The Report is particularly concerned with the drain on federal re-
sources. A small example is that of the federal prison system, which has
been experiencing a higher rate of inmate increase than state systems.117
A far more complex “resource” issue is the impact of federalization on
the federal courts. At the operational level, a large volume of prosecu-
tions under the overlapping statutes may crowd out “traditional federal
criminal law prosecutions and many . . . increasingly complicated federal
civil suits. All of these cases compete for scarce court attention.”118 It is,
of course, possible to view this as essentially a resource problem. How-
ever, the Task Force, like other commentators on the federal court sys-
tem, such as Judge Richard Posner,119 sees the growing number of crim-
nal cases as a threat to the unique role of the federal courts. The
criticism can extend beyond the overlapping offenses to most criminal
cases, but at least eliminating the former would make it easier for the
federal courts to “play the distinctive and complementary role envi-
sioned for them in the Constitution’s federal scheme.”120

In my view, this is one of the principal strengths of the overall posi-
tion that the Task Force advocates. Article III Courts are not meant to

112. See Dominic Perella, Virginia Crime-Fighting Plan Assailed as Racist, BOSTON GLOBE, May
113. E.g., Greg Holban, After the Federalization Binge: A Civil Liberties Hangover, 31 HARV.
114. REPORT, supra note 1, at 32–35.
115. Id. at 32–33.
116. Id. at 33.
117. See id. at 39–40.
118. Id. at 35.
120. REPORT, supra note 1, at 37.
be courts of general jurisdiction, but to resolve the delineated set of matters that the Constitution envisions for them. Extensive prosecutions of the overlapping offenses blur any unique role, as well as undermine the status of the state courts as the only courts of general jurisdiction. In this sense, it can be argued that a vigorous federalism in the criminal law area protects both state and national institutions. One might take the argument a step further and argue that handling what ought to be essentially state prosecutions casts the federal courts somewhat in the role of villains. Project Exile is one example. It is also part of the general phenomenon of harsher federal sentences due to the Sentencing Guidelines. In some instances, the state courts may offer greater procedural protections to criminal defendants than do the federal courts. The American judicial system recognizes the role of state courts through a large number of civil and criminal doctrines to confine federal courts and preserve many cases for state adjudication.

The widespread presence of the overlapping offenses stands these doctrines on their head in the criminal context, because the case itself becomes federal. Indeed, this whole component of the Report is strong support for the proposition that federalism makes sense, particularly in its protection of individual rights. Federalism is the primary bulwark against programs like Project Exile, with its detrimental consequences for civil liberties and civil rights. Proponents of federalism have long contended that it protects rights. The Report acknowledges this fact, but does not make it quite the centerpiece of analysis that one finds in, for example, Justice Kennedy's Lopez opinion. The Report makes recommendations to Congress, but could go much further in pointing out how the Court’s current federalism doctrines support them.

4. Recommendations

The Report contains five recommendations, all directed to Congress. This approach reflects the Task Force’s view that “[t]he opportunity to limit the excessive federalization of local crime rests entirely with Congress.” I will give each of the recommendations in order, and comment on them both individually and collectively.

The first is Recognizing How Best to Fight Crime Within the Federal System. The Task Force presents this recommendation as imposing an obligation on federal legislators to recognize that failure to endorse new federal penal statutes is not necessarily a sign of being "soft on crime."
It calls for recognition of “the risks inherent in excessive federalization of criminal law.”126 The second recommendation is closely related: Focused Consideration of the True Federal Interests in Crime Control and the Risks of Federalization of Local Crime.127 This recommendation would move Congress away from “piecemeal debates”128 about crime towards a larger perspective guided by the findings and principles set forth in the Report. Once again, the authors stress that new federal statutes bring negative effects on federal and state interests, but may be little more than symbolic efforts in the fight against crime. Both recommendations seem essentially precatory in terms of having an actual effect on congressional debates. They amount to little more than a plea that Congress do a better job of recognizing the competing interests that are at stake when new federal criminal statutes are proposed.

The third recommendation is the creation of Institutional Mechanisms to Foster Restraint on Further Federalization.129 This is an attempt to add teeth to the first two recommendations through new elements of the legislative process, although the Report stops short of any form of judicially enforceable, “process-based” review. One suggestion is the preparation of an “impact statement” that would assess federal-state costs as well as the benefits to fighting crime of any new legislation.130 The Task Force contends that such an “impartial, technical staff analysis” could prove to be “particularly useful in light of the reasons that account for most of the legislation at issue in this Report.”131 A second, similar proposal is the consideration of institutionalizing policy analysis perhaps through a “joint Congressional committee on federalism.”132 As an alternative, the Task Force suggests staff analysis from the existing standing committees. Recommendations of this sort are hardly new. Even if adopted, it is doubtful that they would play much of a role in stemming the federalization tide. Impacts on the federal system and on the prevention of crime are extremely hard to quantify. A joint committee on federalism is not likely, if created, to have a serious impact on the legislative process. The cause of the proliferation of overlapping statutes, as the Task Force recognizes, is their political appeal. As between some abstract recommendation about the effects of a get-tough-on-crime bill on federalism, and its appeal to the electorate, it is not hard to predict how most legislators will vote.

126. Id.
127. Id. at 52–53.
128. Id. at 52.
129. Id. at 53–54.
130. Id. at 53 (comparing its proposal with the sorts of preenactment review provided by the Congressional Budget Office and the Congressional Research Service).
131. Id.
132. Id. at 53–54.
The same objection can be lodged against the Report’s fourth recommendation: **Sunset Provisions**. The Task Force has in mind a relatively short provision, perhaps no more than five years. Use of a sunset mechanism would allow future evaluation of the effectiveness of a criminal statute, as well as other considerations, such as whether states have improved their capacity to deal with the matter. Sunset provisions are not new. The most dramatic recent example is the demise of the independent counsel statute. It is important to note, however, that the independent counsel had been a controversial mechanism from the beginning, and had barely survived a previous renewal. The main reason why federal overlapping criminal statutes get enacted is that they are not controversial at the congressional level in the sense that a large number of legislators oppose them on the merits. The key arguments against them are based largely on federalism and its attendant values. In order to bring about change at the national legislative level, it is necessary to inject these values into the debate in a manner that ensures their consideration. It is far from clear that any of the first four recommendations could accomplish this.

The fifth recommendation, **Responding to Public Safety Concerns with Federal Support for State and Local Crime Control Efforts**, can certainly make a difference from the state point of view, but finesses the issue in terms of substantive legislation. There is certainly political support for helping local criminal justice systems, especially the police, as the 1994 crime prevention legislation demonstrated. At the same time, funds may not always be available. Moreover, national legislators are liable to regard the provision of funds as a supplement to federal criminal statutes rather than an alternative to their enactment.

In sum, there are serious questions about how much difference the recommendations of the Task Force would make in solving the problems that it identifies. I think that the Task Force is right in focusing on the federalism dimensions of the issue. The premise of all the recommendations, however, appears to be that “the ultimate safeguard for maintaining this valued constitutional system must be the principled recognition by Congress of the long-range damage to real crime control and to the

---

133. *Id.* at 54.
134. *Id.*
137. *See Moohr, supra* note 53, at 1130 (noting the lack of strong constituency against federal criminal enactments).
138. *Report, supra* note 1, at 54–55 (arguing that direct federal funding of state law enforcement efforts may be the most direct method of dealing with inadequate state resources and issues of redistribution).
nation’s structure caused by inappropriate federalization.” Much of the Report leads one to question whether Congress will perform this task, at least without a sense of binding constraints. Moreover, when it comes to “ultimate safeguards” of the constitutional system, Marbury v. Madison is strong support for the view that judicial interpretations of constitutional norms must be considered. This would seem particularly appropriate at a time when the Supreme Court is infusing new content, as well as enforceability, into the very values the Task Force highlights as fundamental to its view of criminal law. The question then arises as to what the Court’s vision of constitutional federalism would add to the Report, and why it is relegated to a seemingly minor role.

5. The Supreme Court’s New Federalism—The Missing Link?

The Report is at its strongest in presenting a normative, federalism-based critique of the overlapping offenses. Indeed, this may be true, in general, of critical participants in the federal criminal law debate. This observation derives additional force if one views federalism as a vehicle for advancing the individual rights concerns expressed in the Report, as well as in the overall debate. The question thus arises as to why the Supreme Court’s new federalism plays such a relatively small role in the normative portions of the Report and why the Report at times explicitly presents the issue as a matter of congressional choice only.

Lopez certainly strengthens the Report’s analysis. It does receive passing mentions, but they hardly do justice to the decision’s potentially revolutionary effect on federal criminal law—the very result the Task Force advocates. In striking down the Gun-Free School Zones Act, the opinions by Chief Justice Rehnquist and Justice Kennedy emphasized the primary role of the states in law enforcement. Like the Report, the Court was advocating “a distinction between what is truly national and what is truly local.” If Congress is its principal audience, the Report should make clear the constitutional constraints under which the national legislature operates. It is often argued that federal officials in all three branches should and do consider the constitutionality of their acts. There are current indications that this has occurred during the debate over hate crimes. Why not encourage the phenomenon?

The Report is certainly right in addressing its recommendations to Congress. It is the source of the overfederalization problem; in a sense,
Congress is the problem. There are two main causes of the current positive attitude toward overlapping legislation. The first is in an institutional culture of belief that Congress acts without constitutional limits in terms of its power to create crimes.147 At times, the Report seems to reinforce this belief. The second cause is the popularity of anticrime legislation. The Report acknowledges this point repeatedly, as well as the corollary point that legislators do not wish to appear “soft” on the issue.148 One might view this aspect of the legislative culture as a validation of some version of public choice theory that depicts representatives as “single-minded seekers of reelection.”149 Although much of the debate over public choice and its validity occurs in the context of assessing the role of interest groups, the intuitive point obviously holds when there are few, if any, powerful interest groups on either side of the issue. Given the need to rein in Congress, it is something of a mystery that the Report did not enlist the prominent and obvious ally that the Court’s new federalism constitutes. One would expect to find it front and center, rather than rarely cited and sometimes obliquely referenced.

The authors no doubt had their reasons. They apparently did not view constitutional analysis as part of their task, even though the values and implications of federalism are the dominant theme of the Report. Nonetheless, several more plausible reasons suggest themselves. The first reflects the fact that “[t]he members of the Task Force were selected with the explicit goal of including persons with diverse political and philosophical backgrounds.”150 Some of those individuals who normally favor a strong role for the national government may have been reluctant to associate themselves with decisions such as Lopez, which are often identified as calls for “states rights.” Who wants to get on the bad side of the New York Times?151 Some may have objected to the methodology that the Court used in Lopez, for example, explicit notions of spheres of authority for each level of government, or judicially enforceable norms of federalism. The latter possibility, plus the Report’s emphasis on convincing Congress to change its ways suggests that many members of the Task Force espouse the Wechsler thesis concerning Congress as the primary guardian of federalism. Alternatively, some of those who were willing to sign on to the sharp critique of the present system of overlapping offenses may have felt that constitutional limits would be a crude and inap-

147. In the previous edition of their casebook, Professors Abrams and Beale state that “under prevailing interpretations, the courts have not imposed significant constitutional restrictions on the scope of the federal criminal laws.” Abrams & Beale, supra note 11, at 48.
148. See Report, supra note 1, at 52.
150. Report, supra note 1, at 1.
151. The New York Times has been extremely critical of recent federalism decisions such as Lopez. Editorial, The High Court Loses Restraint, N.Y. Times, Apr. 29, 1995, at 22. (“To strip Congress of the power to function is a throwback to the misguided rulings of earlier times.”).
propriate method of targeting the best role for each level of government.\textsuperscript{152}

In my view, the lack of a more direct invocation of the new federalism represents something of an inconsistency, and deprives the \textit{Report} of an element that would add to its persuasive effect. Given the Court’s recent decisions in \textit{United States v. Morrison}\textsuperscript{153} and \textit{Jones v. United States},\textsuperscript{154} it is extremely likely that if the \textit{Report} were rewritten, constitutional analysis would play a much larger role. \textit{Morrison} reaffirmed the doctrinal basis of \textit{Lopez}. \textit{Jones} represents an initial attempt to bring this analysis to bear on the issue of jurisdictional elements. The latter question will play a major role in future judicial and legislative decisions about the scope of federal criminal law.

III. The 2000 Cases—\textit{Morrison} and \textit{Jones}

A. Morrison

After the Court’s 1999 term, it is hard to depict \textit{Lopez} as a limited decision, a blip on the constitutional radar screen. Two significant cases decided in 2000 present a reaffirmation of \textit{Lopez}, although \textit{United States v. Morrison}\textsuperscript{155} produced only a partial clarification of the reach of the prior decision. At the same time, \textit{Morrison}, coupled with \textit{Jones v. United States}\textsuperscript{156} left the status of jurisdictional elements unclear, even as the Court was taking a strong stand on the use of the “substantially affecting commerce” approach to a statute regulating a class of activities. The Court did not take the fundamental step urged by Justice Thomas\textsuperscript{157} and Professors Nelson and Pushaw\textsuperscript{158} of defining interstate commerce and limiting Congress’s authority under that clause essentially to the defined matters. Nonetheless, \textit{Morrison} comes pretty close to establishing the sort of limits that this approach favors.

\textit{Morrison} grew out of an ugly sexual encounter on a state college campus. The victim sued the alleged perpetrators under the Violence Against Women Act of 1994.\textsuperscript{159} She utilized the civil remedy that was provided in addition to a criminal provision. This remedy is closely tied to the criminal law, an aspect of the statute that makes \textit{Morrison} such an important case in the area of federal criminal law. It declares that “[a]ll persons within the United States shall have the right to be free from

\textsuperscript{152} See Abrams & Beale, supra note 9, at 73 (suggesting that a constitutional approach is undesirable as a method of targeting).
\textsuperscript{153} 529 U.S. 598 (2000).
\textsuperscript{154} 529 U.S. 848 (2000).
\textsuperscript{155} 529 U.S. 598 (2000).
\textsuperscript{156} 529 U.S. 848 (2000).
\textsuperscript{158} See Nelson & Pushaw, supra note 65, at 9.
\textsuperscript{159} 42 U.S.C. § 13981 (1994).
crimes of violence motivated by gender.” 160 It then establishes liability on the part of any person “who commits a crime of violence motivated by gender,” 161 thus depriving another person of the previously declared right. The Supreme Court, as well as the Fourth Circuit, treated the issue as a matter of the reach of the Commerce Clause under the third category of permissible legislative activities identified by *Lopez*: intrastate activity with a substantial effect on interstate commerce. 162 Although there are also issues of Congress’s Fourteenth Amendment authority in the case, they are not treated here.

The five-member majority in the Supreme Court did not see a need to extensively refight the *Lopez* battle. Instead, it essentially repeated many of the same themes, including the need to reconcile the notion of a government of limited powers with the admittedly “modern, expansive interpretation of the Commerce Clause” 163 that has prevailed since the New Deal. In *Lopez*’s focus on the “substantially affects” category there was a degree of ambiguity as to whether the regulated activity had to be either economic or commercial. On this matter, at least, *Morrison* represents a substantial clarification. According to the majority, “a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case.” 164 The majority not only repeats the references to economic or commercial activity but stresses that such a limitation can serve as a proxy for keeping the national government out of “entire areas of traditional state concern.” 165

Chief Justice Rehnquist’s majority opinion also noted the lack of a jurisdictional element, a factor that had played a role in the *Lopez* analysis. 166 Unlike *Lopez*, there were extensive legislative findings in support of the Violence Against Women Act. The Court clarified another possible ambiguity of *Lopez* by stating that it would review legislative findings and that the judicial branch must retain the final say on whether Congress has exceeded its authority. 167 On this point, the *Morrison* majority echoes *Lopez* and Justice Kennedy’s *Lopez* concurrence by invoking *Marbury v. Madison*. 168 In the case of the Violence Against Women Act, the majority concluded that the relationship between gender-motivated violence and commerce was similar to that between gun-free school zones and commerce: accepting the notion of a connection would have no stopping point and would potentially permit Congress to regulate all violent crime and, indeed, other areas of traditional state concern. 169

160. *Id.* § 13981(b).
161. *Id.* § 13981(c).
164. *Id.* at 610.
165. *Id.* at 611 (quoting *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring)).
166. *Id.* at 611–13.
167. *Id.* at 614–15.
168. See *Lopez*, 514 U.S. at 575–79 (Kennedy, J., concurring).
169. *Morrison*, 529 U.S. at 615–16.
Court did accept some notion of protecting interstate commerce against violence directed at it, but was willing to go no further.

There remains a degree of ambiguity in the Morrison holding on the need for the regulated activity to be “economic.” The Court rejected “the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce,” but declined to “adopt a categorical rule against aggregating the effects of any noneconomic activity.” The protective approach may be one possible exception to a categorical rule; jurisdictional elements, as developed below, may be another. All in all, however, Morrison stands as a reaffirmation of Lopez and a clarification of the third category. Beyond this clarification, and the Court’s demonstrated willingness to review and disagree with congressional findings, there is little new in Morrison, except, perhaps, for a heightened role for Marbury v. Madison in legitimizing the judiciary’s role in Commerce Clause review. Chief Justice Rehnquist relies primarily on Lopez’s overriding rationales: the lack of a national police power; the need to preserve “traditional areas of state concern”; criminal law as an example of such an area; the need to avoid arguments in favor of national power that have no stopping point; and, above all, the need to preserve a “distinction between national and local authority.” In a sense, however, the fact that Morrison does not break much new ground is part of what makes it significant. The majority treats Lopez as the guiding precedent, and renews its effort to establish a continuity between Lopez and previous decisions in the field.

The first of the two dissents, that of Justice Souter, does show a strong desire to relitigate Lopez, both in general and in its application to the Violence Against Women Act. In the context of that statute he takes the majority to task on the issue of rational basis review when there are congressional findings, notably, a “voluminous” legislative record. Justice Souter views the judiciary’s role as essentially over once it ascertains the “sufficiency” of the record before Congress. However, his critique goes well beyond the scope of rational basis review. He repeatedly

---

170. The Court stated that “[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.” Id. at 618.
171. Id. at 617. The Court repeated the Lopez principle that “the Constitution requires a distinction between what is truly national and what is truly local.” Id. at 617–18.
172. Id. at 613.
173. Id. at 615.
174. See id. at 607–09 (treating Lopez as the decision that “most recently canvassed and clarified our case law”).
175. See id. at 628 (Souter, J., dissenting).
176. Id. at 634–35.
177. Id. at 634.
suggests that *Lopez* was wrongly decided, and elaborates on what he sees as several fundamental flaws both in *Lopez* and *Morrison*. One of his main arguments is that the Court’s insistence on finding that the activity that Congress seeks to criminalize not only affects commerce but that it is commercial in nature represents a return to a “categorical” approach to the Commerce Clause that the later New Deal cases had rejected. He criticizes the older, categorical cases as an attempt to perpetuate the concept of laissez-faire economics into the twentieth century. In a similar vein, he criticizes what he views as the new categorical approach as aimed at “serving a conception of federalism.” This approach rests on notions of traditional state concern that previous cases had rejected, as well as on an untenable attempt at “reviving traditional state spheres of action as a consideration in commerce clause analysis.” Justice Souter views “the federalism of some earlier time” as an ideal that categorical concepts of commerce cannot protect from the realities of the twentieth century any more than they could protect laissez-faire economics. For him, the answers to questions of federalism are to be found in the political process. His substantial reliance on the majority opinion in *Garcia v. San Antonio Metropolitan Transit Authority*—with its direct endorsement of the Wechsler thesis—is in direct opposition to Justice Kennedy’s *Lopez* concurrence, which presents judicial review as an essential mechanism to uphold the lines of authority that constitutional federalism establishes.

The battle, thus, is joined, or more precisely rejoined. *Garcia*, like *Morrison* and *Lopez*, was a five-to-four decision. In tones that resemble those of the federalistic dissenters in *Garcia*, Justice Souter thinks that history and time are on his side. He will apparently stick to his position until it prevails. He thinks that *Morrison* and *Lopez* are weak decisions, and that they will fall from their own lack of weight and the necessity of national legislative action, whatever the role of the states might once have been. In my view, the gulf between the dissent and the majority is one that cannot be bridged through some lesser form of judicial review that attempts to have things both ways by preserving state and national power, congressional authority and judicial enforcement of constitutional

178. *E.g.*, *id.* at 637, 640, 643. The majority stated that “Justice Souter’s dissent does not reconcile its analysis with our holding in *Lopez* because it apparently would cast that decision aside.” *Id.* at 611 n.4.
179. *See id.* at 642–43. According to Justice Souter “adherence to these formalistically contrived confines of commerce power in large measure provoked the judicial crisis of 1937.” *Id.* at 642.
180. *Id.* at 644.
181. *Id.*
182. *Id.*
183. *Id.* at 647.
185. *See id.* at 565 n.9.
186. *See United States v. Lopez*, 514 U.S. 549, 575–79 (1995) (rejecting the notion that the political branches can be relied on to preserve federalism boundaries).
norms. This is not to say that the effort will not be made. The majority’s refusal to adopt a “categorical view that noneconomic activity can never be aggregated”\textsuperscript{188} may be one example. As Justice Souter points out, there is a tentativeness to the Court’s opinions in \textit{Morrison} and \textit{Lopez} that may leave the law in a state of considerable uncertainty, relegating judges to “ad hoc review.”\textsuperscript{189} Alternative approaches may be possible. Professor Vicki Jackson, in a major article on the Court’s new federalism, has suggested a focus on the congressional process leading up to a statute that affects state authority and the extent to which state interests were considered.\textsuperscript{190} This approach, while thought-provoking, raises obvious questions, including whether it is not a more serious incursion on the legislative domain than the Court’s current approach and how a reviewing court decides when the states’ interests have been sufficiently considered.\textsuperscript{191} Who speaks for the states? How much should one credit the testimony of state officials with substantial responsibility for their judicial systems that these systems cannot handle private litigation such as the civil suit at issue in \textit{Morrison}?\textsuperscript{192}

Justice Breyer’s short dissent views such procedural approaches, including that of Professor Jackson, as worth serious consideration.\textsuperscript{193} What is striking about his opinion is its degree of sympathy with the twin goals of protecting federalism and devising a judicial role that will do so while respecting the powers of Congress.\textsuperscript{194} In the end, however, he appears to conclude that the goals are irreconcilable. He clearly favors Congress, rather than the courts, as the primary guardian of the boundaries and interests of federalism, although he is at least willing to discuss procedural limits on the legislature, as opposed to the substantive limits that the \textit{Morrison} and \textit{Lopez} majorities imposed.\textsuperscript{195}

What is most striking about Justice Breyer’s opinion is his discussion of the basic parameters of the federal system and the question of whether any boundaries exist. In \textit{Lopez}, he never really answered the

\begin{itemize}
\item \textsuperscript{188} United States v. Morrison, 529 U.S. 598, 613 (2000).
\item \textsuperscript{189} Id. at 654–55 (Souter, J., dissenting). Justice Souter predicted that the courts would not be able to sustain such a position of uncertainty, both for institutional reasons and because the realities of national integration do not permit it. Id. at 655.
\item \textsuperscript{191} See also Nelson & Pushaw, supra note 65, at 99–100 (criticizing Jackson’s approach as insufficient to permit meaningful judicial review). They state that “Professor Jackson’s attempt to balance the need for judicial clarity and consistency against the importance of maintaining the workability and stability of our federal system of government ends up preserving the status quo: Congress effectively has carte blanche under the Commerce Clause.” Id. at 99 n.473.
\item \textsuperscript{192} See United States v. Morrison, 529 U.S. 598, 661–62 (2000) (Breyer, J., dissenting) (noting support of National Association of Attorneys General for Violence Against Women legislation, but also noting opposition of Conference of Chief Justices); see also id. at 653 (Souter, J., dissenting) (noting position of state attorneys general).
\item \textsuperscript{193} Id. at 663 (Breyer, J., dissenting) (citing numerous academic articles suggesting that “the thoroughness of legislative procedures” may be relevant).
\item \textsuperscript{194} See id. at 655–61 (Breyer, J., dissenting).
\item \textsuperscript{195} See id. at 663–64 (Breyer, J., dissenting).
\end{itemize}
majority’s criticism that his defense of national power in that case left no stopping point.\textsuperscript{196} In \textit{Morrison}, he takes the bull by the horns and states essentially that there is no stopping point. Americans live in a unified, interdependent country in which all problems can be seen as national. “We live in a Nation knit together by two centuries of scientific, technological, commercial, and environmental change.”\textsuperscript{197} Commerce Clause jurisprudence must reflect this fabric, rather than attempt to undo it, because “virtually every kind of activity, no matter how local, genuinely can affect commerce, or its conditions, outside the State—at least when considered in the aggregate.”\textsuperscript{198} Alternatively, Congress could largely get around the \textit{Morrison} holding through jurisdictional elements that require a connection to commerce in individual cases.\textsuperscript{199} That is not, however, the essential point. What is fundamental is that in a unitary nation—even one built on a federalist tradition—every activity is now potentially the domain of the national legislature. Judicial constructs cannot capture, much less enforce, elusive, indeed nonexistent, boundaries.\textsuperscript{200} It follows that whether the national legislature should deal with a matter is a question for that body, not the courts. Once again, the Wechsler thesis has triumphed.

What should one make of \textit{Morrison} in the context of this article? The most important point is the reaffirmation of \textit{Lopez}, even if by a one-vote majority. It will be even harder to downplay the \textit{Morrison-Lopez} discussion of federal-state spheres as a judicially enforceable constitutional matter in future discussions of federal criminal law. At the same time, Justice Breyer’s arguments sound a lot like those of some participants in the great debate, as well as portions of the \textit{Task Force Report}. Of course, the majority opinion sounds like portions of the \textit{Report} as well. Apart from similarities that I have already mentioned, such as the lack of a national police power, the \textit{Morrison-Lopez} majority tackles head-on the principal foundation of the growth of federal criminal law: the elasticity of the Commerce Clause. One can sympathize with members of the Task Force who may at the time have felt that the matter was still, in a sense, in contention in the Supreme Court. However, many issues of constitutional limits are the subjects of ongoing judicial division. The question after \textit{Morrison} and \textit{Lopez} is whether the current majority line will hold, or whether those cases will suffer the fate of \textit{National

\textsuperscript{196} In \textit{Lopez} the majority stated that “[a]lthough Justice Breyer argues that acceptance of the Government’s rationales would not authorize a general federal police power, he is unable to identify any activity that the States may regulate but Congress may not.” United States v. Lopez, 514 U.S. 549, 564 (1995).

\textsuperscript{197} \textit{Morrison}, 529 U.S. at 660 (Breyer, J., dissenting).

\textsuperscript{198} \textit{Id.}

\textsuperscript{199} \textit{See id. at 659.}

\textsuperscript{200} \textit{See id.} According to Justice Breyer, it is “close to impossible for courts to develop meaningful subject-matter categories that would exclude some kinds of local activities from ordinary Commerce Clause ‘aggregation’ rules without, at the same time, depriving Congress of the power to regulate activities that have a genuine and important effect upon interstate commerce.” \textit{Id.}
League of Cities v. Usery.  

A single vote could make a difference. Certainly Justices Breyer and Souter will not change their positions. They are right that the economic-noneconomic line is hard to draw; the Court appears to admit that exceptions may be necessary. The dissenters appear to favor no line between national and state authority. They end up, like the Report, calling on Congress to judge the appropriateness of its exercise of power, and express confidence in its ability to strike the right balance. At least in the area of federal criminal law, however, the Task Force Report is powerful evidence that this has not happened.

B. Jones and Jurisdictional Elements—The Next Frontier?

What next? Let us assume that the Morrison-Lopez line holds, an assumption that derives some plausibility from the unanimous opinion in Jones v. United States. The case concerns primarily the construction of jurisdictional elements, a point developed in this subsection. However, it is also striking because of the repeated references by Justice Ginsburg to Lopez as not only a valid precedent but also as a major guide in the interpretation of federal criminal statutes. Even if the federalistic majority on the Court continues to prevail, it will hardly mean the end of legislative pushes for federal criminal law or the end of the great debate. Jones may represent both a setback for statutes regulating an entire class of activity and a positive sign for those with jurisdictional elements.

On the legislative front, a perception might develop that class of activity statutes are subject to particular scrutiny if they regulate an entire area of noneconomic crime. However, as Justice Breyer stated in Morrison, it is possible for Congress to attempt an end run around Morrison-Lopez through the use of jurisdictional elements. As he noted, many instances of a large class of activities could, in theory, be reached by requiring some minimal nexus to commerce in individual cases. Congress has long based a substantial number of federal criminal statutes on jurisdictional elements. Some of its most recent criminal enactments utilize this technique. The current debate over hate crimes legislation involves a proposed statute that does so in part. Jones appeared to raise basic constitutional questions about the interaction between Lopez and jurisdictional elements. The Court in Jones was able to sidestep the issue through statutory construction. Yet there is language that suggests that a differently drafted jurisdictional element would have produced a differ-

---

203. 529 U.S. 848 (2000).
204. See Jones, 529 U.S. at 857–58.
205. Morrison, 529 U.S. at 659 (Breyer, J., dissenting).
206. Id.
ent result. Beyond *Jones*, there stand of course the opinions in *Morrison* and *Lopez*. Both of them show a strong receptivity towards statutes containing a jurisdictional element, a point that reinforces Justice Breyer’s contention that Congress is likely to use this approach more frequently.

*Jones* involved arson of a residence caused by a molotov cocktail, which led to severe damage to the home in question.\(^{208}\) The defendant was convicted in federal court under a statute that reads in part:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce [shall be punished]. . . .\(^{209}\)

The Supreme Court reversed the conviction, largely on grounds of statutory construction.\(^{210}\) Justice Ginsburg’s opinion placed great emphasis on the words “used in.”\(^{211}\) She viewed this as a qualifying term that requires an active connection between the property and commerce. Her opinion swept aside arguments by the government that the property was “used” in the requisite manner because it served as security for an out-of-state lender, was the basis of an insurance policy from an out-of-state insurer, and received natural gas from beyond the state.\(^{212}\) The opinion relies heavily on canons of statutory construction. For example, Justice Ginsburg invoked the rule of lenity for cases in which more than one reading might be possible.\(^{213}\) She also stressed the need for a narrow construction when the alternative would change the federal-state balance in matters of criminal law.\(^{214}\) For purposes of this article, however, the most significant portion of her opinion is the strong reliance on the judicial tradition of avoiding one of two possible constructions if it would lead to “grave and doubtful constitutional questions.”\(^{215}\)

The constitutional doubts that apparently motivated the Court to emphasize this analysis come squarely from *Lopez*. This portion of the opinion is worth quoting in full: “Given the concerns brought to the fore in *Lopez*, it is appropriate to avoid the constitutional question that would arise were we to read [the arson statute] to render the ‘traditionally local criminal conduct’ in which petitioner Jones engaged ‘a matter for federal enforcement.’”\(^{216}\)

Beyond its apparently central role as a precedent, one must note the presence and effect of key *Lopez* themes in *Jones*. Not only does the

---

\(^{208}\) *Jones*, 529 U.S. at 851.


\(^{210}\) *Jones*, 529 U.S. at 854–58.

\(^{211}\) Id. at 854–56.

\(^{212}\) See id. at 856.

\(^{213}\) See id. at 858.

\(^{214}\) See id.

\(^{215}\) Id. at 857 (citation omitted).

\(^{216}\) Id. at 858 (quoting United States v. Bass, 404 U.S. 336, 350 (1971)).
Court express its concern for the federal-state balance in matters of
criminal law, it cites directly the emphasis of the *Lopez* Court on avoid-
ing federal intrusion into an area “of traditional state concern.”217 An-
other theme from *Lopez* echoed in *Jones* is the Court’s observation that
accepting the government’s argument would render virtually every build-
ing in the country subject to the federal arson statute.218 *Jones* clearly re-
fects the *Lopez* Court’s desire to avoid logic that would uphold federal
statutes without a stopping point.

Of course, the Court was able to construe the arson statute nar-
rowly due to the presence of the word “used.”219 The opinion should not
necessarily be read as casting doubt on the ability of Congress to draft
and utilize jurisdictional elements in a broad manner. The Court sug-
gested that a different interpretation would have resulted if Congress had
utilized only the term “affecting . . . commerce.”220 That drafting tech-
nique would represent statutory breadth and would “signal Congress’ in-
tent to invoke its full authority under the Commerce Clause.”221 In other
words, a broadly drafted jurisdictional element such as those envisioned
by Justice Breyer could not be construed away and would seem neces-
narily to raise constitutional questions concerning the application of *Lopez*
to statutes drafted in this fashion. It is perhaps noteworthy that the
briefs in *Jones* devoted considerable attention to how one would satisfy a
broad jurisdictional element and what the constitutional bearing of *Lo-
pez* on such cases would be.222 Indeed, the grant of certiorari appeared to
highlight the potential constitutional questions.223 *Jones* may have left
them open, but the Supreme Court has addressed the issue, beginning
with broad language in *Lopez* and *Morrison*, as well as Justice Breyer’s
dissent in the latter case. Moreover, the issue has received extensive
treatment in the lower courts.

*Lopez* is a good starting place to demonstrate the current Court’s
apparent hospitable attitude towards jurisdictional elements. That case
involved a class of activity statute: criminalization of any possession of
fire arms in a school zone as defined. In analyzing what was wrong with
that statute as an exercise of the commerce power, the Court noted that
it “contains no jurisdictional element which would insure through case-
by-case inquiry, that the firearm possession in question affects interstate
commerce.”224 The opinion went on to discuss *United States v. Bass*,225 in
which the Court had earlier read a jurisdictional element into an am-

---

217. *Id.* at 857.
218. *Id.* (“Were we to adopt the Government’s expansive interpretation of § 844(i), hardly a
building in the land would fall outside the federal statute’s domain.”).
219. *Id.* at 852–57.
220. *Id.* at 853–55.
221. *Id.* at 854.
biguous statute. The point of *Bass*, for the *Lopez* Court, was its insistence on utilizing the technique of demonstrating an individualized connection with interstate commerce, as opposed to the Gun-Free School Zones Act, in which many instances of possession would have no such connection unless they were treated in the aggregate.\(^{226}\) Thus, one can see that the *Lopez* Court fastened on the jurisdictional element approach as a means of demonstrating the constitutional weakness of class of activity statutes. The majority seemed to be saying that with the former approach we at least know that there is some demonstrable connection to commerce and hence to Congress’s source of constitutional authority.

The distinction also played an important role in *Morrison*. One of the Court’s reasons for striking down the Violence Against Women Act was that it “contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress’ power to regulate interstate commerce.”\(^{227}\) The majority made clear its problem with class of activity statutes that cast a wider net and thus will reach conduct that a statute with a jurisdictional element would not. Justice Breyer seized on the majority’s affirmation of the validity of this approach. He contended that Congress could simply redraft the statute to forbid violence against women if there were a nexus to interstate commerce such as travel in it or the use of items that have moved in it.\(^{228}\) This segment of his dissent succeeds in identifying the weak point in the majority’s apparent endorsement of jurisdictional element statutes. The endorsement suggests that almost anything goes as long as Congress uses this technique, but it does so in the context of opinions the clear goal of which is to limit congressional power.

A superficial reading of *Lopez* and *Morrison*, particularly the former, might suggest that the mere presence of a jurisdictional element is enough to validate a statute. *Morrison*, however, suggests limits to validity by stating that such an element “may”\(^{229}\) establish the existence of power and that it would “lend support”\(^{230}\) to the argument of a sufficient connection with interstate commerce. Even with this qualification, however, there is still a potential inconsistency within the majority’s sharp distinction between the two types of statutes. Each can deal with non-economic activity that has some sort of connection with, or effect on, interstate commerce. The thrust of *Morrison* and *Lopez* is that statutes that cover many instances of such activity are beyond Congress’s authority under the Commerce Clause. Why should statutes that cover a much smaller number of instances, with a resultant smaller effect on the area

\(^{226}\) *Lopez*, 514 U.S. at 562 (“Unlike the statute in *Bass*, § 922(q) has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.”).


\(^{228}\) *Id.* at 659 (Breyer, J., dissenting).

\(^{229}\) *Id.* at 612–13.

\(^{230}\) *Id.* at 613.
that Congress seeks to regulate be more constitutional? As noted, it appeared that the Court might address this broad issue in *Jones*, but it was able to sidestep it through construction. The lower courts, however, have had a wide range of experience with jurisdictional element statutes after *Lopez*. Those that rely on some form of movement within interstate commerce have encountered little difficulty, perhaps not a surprising result given *Lopez*’s first category. Recently, however, a considerable degree of difference has arisen within the lower courts over how to treat jurisdictional elements that require some sort of “effect” on commerce. In the next section, I will examine this problem, both in general, and in the context of one of the most frequently litigated areas: the reach of federal jurisdiction under the Hobbs Act.

IV. JURISDICTIONAL ELEMENTS—THE NEXT CHALLENGE FOR THE COURT?

A. Jurisdictional Elements—The Concept and the Problems

Congress, in utilizing the commerce power has a choice between statutes that cover an entire class of activities, e.g., loan-sharking, or only activities with a specified link to interstate commerce. This link is an element of the crime, and must be proved by the prosecution as part of its case. The drafting of statutes with jurisdictional elements is a practice that Congress has frequently utilized, as Justice Breyer pointed out in his *Lopez* dissent. For example, 18 U.S.C. § 2315 provides for punishment of “[w]hoever receives, possesses, conceals, stores, barter[s], sells, or disposes of any goods . . . of the value of $5,000 or more . . . which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken.” The Travel Act punishes any person who “travels in interstate or foreign commerce or uses . . . any facility in interstate or foreign commerce, [including the mail] with intent to [commit certain crimes].” The Hobbs Act punishes any person who

in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section.

The question arises why Congress would use this approach rather than drafting statutes broadly through the class of activity technique. Justice Breyer has suggested that Congress ought to have the choice of

234. Id. § 1952.
235. Id. § 1951.
dealing with a matter either “instance by instance” or “problem by problem.” Congress might have several reasons for choosing to proceed on a more narrow basis. It may wish to limit the reach of a particular federal statute to the more important cases that call for federal intervention. Alternatively, it may be in some doubt as to its constitutional authority to deal with the problem on a broad, classwide scale. Such doubts would certainly make more sense after *Morrison* and *Lopez*. At the same time, the national legislature may see the use of a jurisdictional element as a simple way of getting around whatever limits those cases impose. Justice Breyer made that point in *Morrison*. Professors Stacy and Dayton have recently stated that “a nexus with interstate commerce can be shown in every case.” I develop below the argument that matters are not quite so simple, but it is clear that the temptation to use jurisdictional elements is growing.

This drafting technique raises several important conceptual questions. The first is the extent to which such statutes are really different from those regulating a class of activity. After all, the court must determine in each case that the defendant’s conduct fell within the parameters of the statute, whether the question involves his possession of a gun in a school zone or the possibility that a piece of stolen property has traveled in interstate commerce. Each type of statute regulates a class, in the sense of a group of individuals possessing an identifiable characteristic that other individuals do not have. The most helpful answer may be that in class-of-activity statutes the inquiry as to the defendant’s conduct does not involve issues of congressional power. On the other hand, in considering whether a defendant has satisfied a jurisdictional element, the court is potentially drawn into questions of the limits of congressional authority. Another important question is whether jurisdictional element statutes are simply outside of the analytical framework established in *Lopez* and reaffirmed in *Morrison*. It is possible to view those cases as dealing only with class-of-activity statutes of the type then before the Court. On the other hand, the three categories of congressional authority set forth in *Lopez* are broad enough to permit an inquiry into the validity of a jurisdictional element statute within that particular overall framework.

In analyzing the constitutional problems posed by jurisdictional elements, I find it helpful to distinguish between those that I refer to as “nexus” elements, and “effects” elements. An example of the former would be the punishment of possession of, or interference with an object that had traveled in interstate commerce. The nexus is the fact of having been in interstate commerce. An example of the latter type is a statute that requires proof of an effect on interstate commerce from the defendant’s proscribed conduct. Most of the language about the ease with

---

which jurisdictional elements are satisfied is more readily applicable to elements of the first type than those of the second. When Professors Stacy and Dayton state that “a nexus with interstate commerce can be shown in every case,” it is clear that they are referring to “something that has traveled in interstate commerce.”

It is certainly true that goods and people move across state lines, and that if such movement is treated as a nexus, it is potentially easy to satisfy in almost “every case.” A hospitable approach to nexus jurisdictional elements can also be found in Supreme Court precedent going back to United States v. Bass. There the Court required a firearm possession statute to contain a need to show that the firearm had been “in” interstate commerce. Discussion of Bass played a major role in Lopez. The majority treated the Bass Court as having interpreted a potentially ambiguous possession statute in a way that would “limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.”

It is also important to note that Lopez summarized existing Commerce Clause precedent as establishing the famous three categories of permissible regulation. The first is that of “the use of the channels of interstate commerce.” Focusing on that category, it is easy to see that the fact of a person or thing having traveled in commerce can bring to bear Congress’s power to regulate the channels. Indeed, the problem with nexus statutes is that they are so easy to satisfy that the spirit of Lopez can be totally circumvented. Professors Stacy and Dayton quote Professor Robert Nagel to the effect that, “the much-heralded jurisdictional tie is itself subject to the logic of Lopez—that is, the asserted tie to commerce would potentially allow national regulation of every imaginable activity.”

As recently as Morrison, the federalist majority seemed to indicate approval of nexus elements involving travel in interstate commerce.

However, it is odd to construct a rationale for virtually unlimited national power out of Lopez—a case that was intended to, and did, impose limits in the name of federalism. If Congress were to move towards a broad use of nexus elements, the Court would have to take a second look. There is language in Morrison suggesting that jurisdictional elements “might” limit the reach of statutes to those with a connection to

239. Stacy & Dayton, supra note 54, at 297.
243. Id. at 562.
244. Id. at 558.
commerce, and that they “may” establish that a particular statute is in furtherance of the commerce power. Professors Nelson and Pushaw contend that it is necessary to confront the basic realities of transportation in a highly mobile society and then to ask whether the transportation was itself a commercial act, or simply the movement of an individual for personal purposes. They analyze the Lottery case, as correctly decided, not under a channels theory, but through the route of viewing the sale of the ticket as commercial and the interstate transportation of tickets as having an impact on commerce among the states. They reject, however, a broad reading of Champion to the effect that “Congress has plenary Commerce Clause power over all interstate transportation—whether of property or people, and whether for commercial purposes or not.” Thus in analyzing the Mann Act cases, they suggest a sharp distinction between interstate transportation of a woman for a commercial purpose and similar transportation for a personal one. It is not clear whether the Court is ready to rethink its broad endorsement of nexus elements. Certainly, the lower courts have been quick to find nexus elements satisfied whenever the channels rationale may be invoked.

The problems posed by statutes that require an “effect” on commerce are more complex. After all, Morrison and Lopez involved the question of the effect on commerce of a class of activities and such important issues as whether the effect had to be substantial and the activity had to be either economic or commercial. If one assumes that effects element statutes are to be analyzed within the Lopez framework, they appear to fall squarely within the third category: “[T]he power to regulate those activities having a substantial relation to interstate commerce.” A significant problem posed by a jurisdictional element statute that requires an effect on commerce is how to handle the criminalization of noneconomic activity that may, in individual cases, have some effect on interstate commerce, but not a substantial one. This problem can be broken down into several sets of issues. The first is whether noneconomic activity is out of bounds. Morrison appeared to leave this question slightly open. Moreover, the notion of protecting

247. Id. at 612.
249. 188 U.S. 321 (1903).
251. Id. at 120.
252. Id. at 127–29.
253. See United States v. Lankford, 196 F.3d 563, 571–72 (5th Cir. 1999). Indeed, courts have upheld possession statutes without a requirement of transportation in order to regulate the channels of interstate commerce. See Nat’l Ass’n of Home Builders v. Babbitt, 130 F.3d 1041, 1048–49 (D.C. Cir. 1997).
255. See United States v. Morrison, 529 U.S. 598, 613 (2000) (declining to “adopt a categorical rule against aggregating the effects of any noneconomic activity”).
interstate commerce from “intrastate violence that is . . . directed at the instrumentalites, channels, or goods” involved in it appears to extend to noneconomic activity. A second issue is that of the quantifiable effect on interstate commerce. This is a complex question. On the one hand, the use of an effects element suggests a congressional desire to screen out small cases that do not justify the intervention of federal authority. On the other hand, there is the serious question of how frequently an individual noneconomic criminal act could possibly have an effect on interstate commerce that rises to the level of “substantial.” It is one thing for an entire class of activities such as loan-sharking to meet this standard; it is quite another matter for an isolated act to meet it. This brings up a third issue raised by effects elements: Is it conceptually possible to aggregate the effects of individual instances so that an evaluation of the statute may look at its impact on commerce across a range of applications? There is a clear appeal to doing so, given the difficulty of meeting the substantiality test. On the other hand, utilization of any such technique would seem to obliterate the distinction between jurisdictional element statutes and those regulating classes of activity. Aggregating conduct to reach the desired threshold would turn the former type of statute into the latter.

The above discussion suggests that generalizations about jurisdictional-elements statutes need to draw a distinction between the types of statutes I have outlined here. Those who predict smooth sailing for nexus element statutes may well be correct. Effects-element statutes are another matter, both in theory and in practice. Indeed, it is these statutes that have caused the greatest amount of confusion and uncertainty in the lower courts. In the next subsection of this article, I will examine the most hotly contended area: jurisdictional elements under the Hobbs Act.

C. The Hobbs Act: The Current Battleground

The Hobbs Act provides, in part, as follows:

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section [shall be punished].

The Act is not a pure effects element statute because of the alternative references to obstructing or delaying commerce. Such an exercise of congressional power fits under what Professors Nelson and Pushaw have
referred to as the “protective principle,” a concept apparently endorsed by the Supreme Court in *Morrison*. Moreover, it is consistent with *Lopez*-based approaches to keeping clear the channels of interstate commerce under the first category, and, perhaps, protecting “persons or things in interstate commerce” under the second category. The history of the Hobbs Act reflects precisely these concerns. According to Judge DeMoss, “[t]he legislative history of the Hobbs Act is replete with evidence that Congress passed the statute to combat highway robberies by labor union members which, at the rate of more than 1000 per day, were having a considerable impact on interstate commerce.”

What has been happening in the lower courts, with astonishing frequency, is a focus on the effects portion of the statute. It may well be that the government has decided to limit “obstructing” and “delaying” to cases that are more clearly linked to the transportation of goods in commerce, such as those that prompted the legislation. At the same time, the government is clearly intent on reaffirming prior cases that gave a liberal interpretation of the constitutionality of effects applications of the Act, while defendants are equally insistent on contending that *Lopez* has precluded such an approach. For purposes of discussion, let us assume cases with some resemblance to *Pascucci*: extortion or robbery of an individual, or robbery of an intrastate business. These are the sorts of cases that are posing problems in the lower courts, and to which the language about obstructing or delaying has not been applied.

There are, initially, two textual aspects of the statute that appear to argue in favor of a broad application in such cases. The Supreme Court has repeatedly stated that the use of words such as “‘affecting . . . commerce’ . . . signals Congress’ intent to invoke its full authority under the Commerce Clause.” A second matter is the point that the drafting contains the phrase “in any way or degree,” also indicating an intent to reach as far as Congress can. This draftsmanship, however, cannot mean that Congress can go beyond its powers under the Commerce Clause. Thus the courts must approach Hobbs Act effects cases with the assumption that Congress wants to go as far as possible, but that limits still apply. I will briefly outline and critique five alternative approaches that can be found in current Hobbs Act litigation. Again, one should assume

---

259. Nelson & Pushaw, *supra* note 65, at 147–49. Professors Nelson and Pushaw would require some specificity as to the persons or entities protected against crimes or torts. Without a limitation, they are concerned that “the protective principle would become a tool for exercising general police power.” *Id.* at 149.
262. United States v. Lopez, 179 F.3d 230, 244 (5th Cir. 1999) (DeMoss, J., specially dissenting).
263. ABRAMS & BEALE, *supra* note 9, at 216–17.
that the defendant’s conduct is criminal, but not economic or commercial in the sense of being part of a consensual transaction. 265

The first approach is simply that a “de minimis” impact on commerce is all that is necessary. Pascucci, a pre-Lopez case, is an example of such an approach, as are numerous cases involving low level crimes. 266 Although many courts have rejected Lopez-based attacks on the de minimis approach, it is clearly at variance with the spirit of that case. Moreover, it also seems at variance with the notion that one of the potential advantages of jurisdictional elements is that they can serve as a means of identifying the cases where federal intervention is necessary. Part of the rationale for maintaining the de minimis approach appears to be substantial reliance on the following quote from the Supreme Court’s decision in Maryland v. Wirtz: “Where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.” 267 The Court seemingly aimed the quote at class of activity statutes more than at those requiring a particularized inquiry into the existence of federal power, whatever the statute at issue may have been. 268 The question arises whether one may legitimately apply class of activity analysis to an individualized form of draftsmanship such as an effects element. It would seem that an individual case has to stand or fall on its own merits. Assuming the third category of Lopez is applicable, it is hard to reconcile de minimis with a notion of a substantial effect on interstate commerce.

The last observation leads to a second approach that has been advocated by a number of lower court judges, notably Judge DeMoss. 269 This approach requires that the defendant’s conduct, by itself, have a substantial effect on interstate commerce. This has the obvious advantage of tying the jurisdictional element inquiry directly to the third category of congressional power identified in Lopez. At the same time, it presents two problems. First, as noted above, it may be virtually impossible for a single action to have a substantial effect on interstate commerce, at least if effect is used as it was in reference to the entire domestic wheat market in the Lopez Court’s analysis of Wickard v. Filburn. 270 Second, use of a substantial-effects test will inevitably lead to a large volume of litigation over what level of activity satisfies the test. For example, the govern-

265. E.g., Hickman, 179 F.3d at 238 (Higginbotham, J., dissenting) (“[R]obbery is everywhere the unlawful decision by a single party to deprive another involuntarily of his property.”); Nelson & Pushaw, supra note 65, at 156.

266. See ABRAMS & BEALE, supra note 9, at 241 (citing cases involving small amounts).


268. The statute at issue in Wirtz applied to the wages and hours of employees of an “enterprise” engaged in commerce.” Id. at 186. Thus, in theory, it is a jurisdictional element statute, because there might be employees not so engaged. Statutes applicable to subjects “in commerce” illustrate the difficulty in drawing a sharp distinction between class of activity statutes and those utilizing jurisdictional elements.

269. Hickman, 179 F.3d at 243–44 (DeMoss, J., specially dissenting).

270. 317 U.S. 111 (1942).
ment in Jones argued that the substantial-effects test, while it would require “judicial line-drawing that would likely produce arbitrary outcomes,” was clearly met when property damage from arson triggered an out-of-state insurer’s obligation to pay more than $75,000. Indeed, the government contended that substantially smaller amounts would suffice. Under a somewhat analogous statute, the Tenth Circuit has held that $6,000 is sufficient to satisfy a substantiality test.

Perhaps motivated by the problems of the first two approaches, some lower courts have adopted a third approach, holding that the defendant’s conduct can be aggregated with instances of similar conduct to achieve the constitutionally required threshold, always assuming that we are dealing with Lopez’s third category. Aggregation has an obvious appeal, in that it permits the Hobbs Act to have the same broad reach that it had prior to Lopez while paying lip service to that case’s concept of limits. However, the approach seems directly contrary to the use of the jurisdictional element in the first place, although the objection is not quite the same as that to the de minimis test. The problem with aggregation is that it turns an individualized approach into what is essentially a class of activities analysis that treats the statute as if it had been enacted on a generalized basis. Courts no longer assess the defendant’s action, but rather the potential action of a class of similarly situated defendants. Particularly if one views Morrison and Lopez as not allowing legislation to reach such classes in the case of noneconomic activity, it is hard to see how those cases point towards constitutionality in cases of individual noneconomic conduct that is somehow transformed into that of a class.

A fourth approach is found in United States v. Harrington. That case involved the robbery of a restaurant that sent its receipts from the District of Columbia to a Maryland bank for deposit. In addition, this money would then have been used by the restaurant’s parent company to make interstate purchases. The Court of Appeals for the D.C. Circuit insisted that “statutory jurisdictional elements must be taken seriously.” It advocated an approach that, quoting Lopez, required an “explicit connection with or effect on interstate commerce.” Although there is a strong suggestion of the application of a protective principle,

272. See id. Indeed, the government contended that “there is no clear reason why the result should be different, however, if the damage were only $7,500 or $750.” Id.
275. 108 F.3d 1460 (D.C. Cir. 1997).
276. Id. at 1466.
277. Id.
278. Id. at 1467.
279. Id. (quoting United States v. Lopez, 514 U.S. 549, 562 (1995)).
the court seemed primarily concerned with formulating a test that requires some effect, but not a substantial one. The opinion perhaps stands for the proposition that proximity is satisfied by a "concrete" effect. This seems like a slightly stricter de minimis test, subject to the same objections. Moreover, the Harrington approach is somewhat hard to apply with precision and obviously will lead to what Justice Breyer called "random" results.

A final approach is that of requiring a de minimis effect in the individual case and overall aggregation that achieves the desired level. This has been the approach of the Seventh Circuit, summarized as "collective effect plus proof of a slight connection between the particular [crime] and interstate commerce." It is hard to see how combining two unsatisfactory analyses leads to anything any better.

Recently, the Court of Appeals for the Fifth Circuit divided evenly in United States v. Hickman, a Hobbs Act prosecution for a series of local robberies. The dissenting opinion in Hickman has attracted attention as potentially breaking new ground in Hobbs Act Analysis. The dissenters accepted federal prosecution of local robberies if they, individually, had a substantial effect on interstate commerce. Judge Higginbotham’s opinion devotes most of its analysis to whether individual robberies can be aggregated to the point that a court can find a substantial effect on interstate commerce. The dissenters focused on when courts could aggregate isolated activities such as robberies. For them, the key is whether courts can view the individual activities as interconnected—"aggregation demands connection." They viewed robberies as "causally independent of one another. That is, if the effect on interstate commerce directly attributable to one instance of an activity does not depend in substantial part on how many other instances of the activity occur, there is an insufficient connection . . . ."

I have already argued that the use of aggregation may be inconsistent with jurisdictional element statutes that use an effects approach. The Hickman dissenters add an additional inquiry: if aggregation is possible, what can be aggregated? Their analysis may have implications beyond the Hobbs Act. At least in the context of that statute, the dissent-

---

280. Id. at 1465–66 (distinguishing the court’s approach requiring an “explicit” and “concrete” effect from the substantial effects test).
281. Id. at 1467.
284. 179 F.3d 230 (5th Cir. 1999).
285. ABRAMS & BEALE, supra note 9, at 218 (“[T]he dissenting judges make the most serious effort to date to define limits that would apply to the prosecutions under the Hobbs Act (and to other legislation that has been justified under the aggregation principle).”).
286. Hickman, 179 F.3d at 231.
287. Id. at 232–38.
288. Id. at 232.
289. Id. at 233.
ers’ approach would rule out federal prosecutions for most robberies. Those that affect the flow of goods can be justified under the protective principle, and they would probably fit the language of delaying or obstructing. Otherwise a robbery, or even a series of robberies, would have to have a substantial effect on interstate commerce. I have already noted the problem courts find in satisfying this standard. Applying the Hickman dissent’s theory of aggregation would create further problems. The dissenters require a degree of connection beyond the fact that deterrence of one crime may deter others. Apparently the key is the economic nature of the activity, a criterion that stems from Lopez. Extortion might be a little harder to characterize than robbery. In the political context, some extortions look like consensual transactions. Professors Stacy and Dayton have warned against introducing “superficial and formalistic factors” in Commerce Clause analysis. The dissenters themselves were aware of the pitfalls of “abstract” analysis.

The Hickman dissent is an important contribution. What would happen to the Hobbs Act if it were widely followed? Some extortions and robberies, even if deemed noneconomic, might be found to have a substantial effect on interstate commerce. Some would be reachable under the protective principle as examples of delaying or obstructing. The basis in Lopez’s categories one and two would seem to avoid the aggregation issue. Some extortions, and perhaps even some robberies, might be deemed sufficiently economic that they could be aggregated. Would it then be possible to aggregate all extortions, for example, or only economic ones? And what about the basic point that aggregation seems at odds with the individualized approach of jurisdictional elements?

Concerns like this can only increase the appeal of straightforward solutions. At least with de minimis, you know where you stand. At the other end of the spectrum, Professors Nelson and Pushaw essentially view the Hobbs Act as unconstitutional. Strictly applying a substantial-effects test on an individualized basis may have a rough justice appeal of some workability and some fidelity to Lopez, at least in the sense of keeping out small cases. At this point it may be less important to offer a definitive answer than to recognize the need for Supreme Court attention to the jurisdictional element issue. The Court was able to sidestep it in Jones. However, considerable fleshing out of the issue seems the next logical step in the Court’s application of the Morrison-Lopez line of

290. Id. at 237 (“[O]ne might argue that each incident of robbery hardens society and makes it more likely that other robberies will occur.”).
291. Stacy & Dayton, supra note 54, at 297.
292. See Hickman, 179 F.3d at 243 (DeMoss, J., specially dissenting).
293. See Nelson & Pushaw, supra note 65, at 9–10. It should be noted that Professors Nelson and Pushaw reject categories one and two even though they espouse a protective theory. Nelson & Pushaw, supra note 65, at 10.
294. Id. at 155–56.
analysis to federal criminal law. Certainly, left unaddressed, jurisdictional elements have the potential to undermine those cases entirely.

V. CONCLUSION

Federal criminal law is here to stay. So is the debate it generates. The controversy arises not out of crimes involving clearly federal interests, such as theft of federal property, but out of statutes creating federal crimes duplicating offenses that the states already investigate and prosecute. The American criminal justice system has evolved into one of largely concurrent jurisdiction. This development creates the potential for federal prosecutors to step in whenever they conclude national interests require it. Defenders of national authority see this as a positive sign, especially in situations where states might be somehow unable to act.

However, there are serious negative consequences. There is certainly an erosion of state authority. There is a drain on federal resources, particularly those of the federal courts. Perhaps most seriously, the presence of concurrent criminal justice systems covering the same behavior creates serious problems of civil rights and civil liberties. The African American defendants in Project Exile, for example, probably face more serious federal sentences than they would have faced in the state system that arrested them. Some federal offenses carry the death penalty. It is not hard to imagine those on the victim’s side arguing for federal prosecution, especially in a state that has abolished the death penalty.

The debate has been going on for some time. What is new is the injection of a strong constitutional element. This development began with Lopez, and the notion that there are judicially enforceable limits to federal incursions into the domain of state criminal law. Morrison substantially reenforces this concept. The next step for the Court is to figure out how to apply the limits found in these cases to statutes containing jurisdictional elements requiring a nexus to interstate commerce. This will not be an easy task. The principal challenge will be choosing between simple formulas that attempt to delineate when there is enough connection to commerce to justify involving federal power, and more complicated approaches that target the issue through a high degree of abstraction.

A quite different challenge is that facing the other participants in the debate: how to deal with the Court’s forceful entry into it. The view that the whole question is one of legislative policy only seems hard to maintain after Morrison and Lopez. Yet it retains considerable appeal as


296. In Rhode Island, a state with no death penalty, a brutal homicide during a carjacking led to calls for federal prosecution so that the death penalty might be available. Cindy Rodriguez, Death Penalty in Carjacking-Slayings Rare Despite Outrage over R.I. Case, BOSTON GLOBE, June 27, 2000, at B1.
the *ABA Task Force Report* shows. My sense of the matter is that the Court’s new federalism is here to stay. If the “great debate” were to recognize that fact and build on it, the whole subject would be enriched.