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THE HOBBS ACT THROUGH THE *RIVERA-RIVERA* LOOKING GLASS: A MERE INTRUSION UPON BASIC FUNDAMENTAL FEDERALISM PRINCIPLES?

PATRICK GOODWIN*

I. INTRODUCTION

“The Powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”¹

By and large, the United States federal government has abided by this fundamental principle that James Madison delivered during the Constitution’s ratification process.² However, pursuant to its Commerce Clause power,³ Congress’s ability to regulate activities that may affect interstate commerce has grown substantially.⁴

Congress has passed several laws making it a federal offense to engage in conduct that interferes with interstate commerce,⁵

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1. JAMES MADISON, NO. 45: THE ALLEGED DANGER FROM THE POWERS OF THE UNION TO THE STATE GOVERNMENTS CONSIDERED (1788), *reprinted in THE FEDERALIST PAPERS*, 285-290, at 289 (Clinton Rossiter ed., Penguin Group 1961).

2. James Madison’s Address to New York Citizens (The Federalist No. 45), <http://www.constitution.org/fed/federa45.htm> (last visited Mar. 19, 2011).

3. *See* U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power to regulate commerce with foreign Nations, among the States, and with the Indian Tribes).

4. *See* United States Dep’t of the Treasury v. Fabe, 508 U.S. 491, 499 (1993) (explaining that the evolution of an interdependent and interconnected national economy has created the need for a more expansive jurisprudential view of what interstate commerce entails); *see also* United States v. Culbert, 435 U.S. 371, 373, 379 (1978) (noting that Congress anticipated that the Hobbs Act legislation would authorize them to use full constitutional power to punish interferences with interstate commerce because states had been ineffective in prosecuting robberies and extortions that had affected interstate commerce in the past).

5. Interstate commerce has been narrowed in recent years to only encompass regulation of channels, instrumentalities, and activities that have a substantial relation upon business that occurs between the states. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* § 3.3.5, 265-66 (3d ed. 2006). Additionally, intrastate activities that “so affect intrastate commerce” in the aggregate also fit into Congress’s commerce powers. Wickard

usurping police powers traditionally reserved for the states.⁶ One such law is the Hobbs Act, which allows Congress to punish interference with interstate commerce when the crimes are robbery, extortion, or involve physical violence.⁷

In response, the courts have determined that if an activity reasonably affects interstate commerce,⁸ either on its own or through aggregation, Congress has the power to punish those offenders under federal law.⁹ In the case of *United States v. Rivera-Rivera*,¹⁰ the First Circuit held that the robbery of a local Puerto Rican store could be aggregated with other potential robberies, and thus, charged and convicted the robbers under the Hobbs Act. This Comment will discuss why the court's decision to apply the *de minimis* interference test on interstate commerce was wrong¹¹ and why the court should have applied the substantial

v. Filburn, 317 U.S. 111, 124 (1942).

6. See *United States v. Hickman*, 179 F.3d 230, 238 (5th Cir. 1999) (Higginbotham, J., dissenting) (stating that control over crime regulation has traditionally fallen under the states' broad police powers); see also *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (explaining that the constitutionally mandated balancing of powers between the states and federal government was adopted by the Framers to ensure that the citizenry's fundamental liberties were fully protected).

7. Interference with Commerce by Threats or Violence (Hobbs) Act 18 U.S.C. § 1951(a) (West 2000). Section 1951 provides that:

Whoever in any way or degree obstructs, delays, or affects 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 fined under this title or imprisoned not more than twenty years, or both.

Id.

When Congress passed the Hobbs Act, it was principally concerned with overturning the United States Supreme Court case of *United States v. Local 807 International Brotherhood of Teamsters*, in which the Court determined that the Anti-Racketeering Act of 1934 was inapplicable to extort labor activities. Jaime Zimmerman, Notes, *Rob Once, Serve Twice?: Punishment Under Both the Federal Bank Robbery Act and the Hobbs Act Violates the Double Jeopardy Clause*, 9 NEV. L.J. 407, 425 (2009). During debate, Representative Hancock reasoned that the bill was necessary because of the "amazing decision of the Supreme Court" in the *Local 807* case, which he believed nullified the Anti-Racketeering Act of 1934. 91 CONG. REC. 11, 900 (1945) (statement of Rep. Hancock).

8. The Hobbs Act defines commerce as "all commerce between any point in a State . . . and any point outside thereof; [and] all commerce between points within the same State through any place outside such State." 18 U.S.C. § 1951(b)(3); *United States v. Lynch*, 437 F.3d 902, 908 (9th Cir. 2006).

9. See *Stirone v. United States*, 361 U.S. 212, 218 (1960) (stating that the charge that interstate commerce is affected is crucial because the federal government's jurisdiction for the crime rests solely on the interference with interstate commerce).

10. 555 F.3d 277 (1st Cir. 2009), *petition for cert. denied*, *Sanchez-Rosado v. United States*, 130 U.S. 344 (2009).

11. See *id.* at 286, 293 (holding that the two robbers were guilty of a Hobbs

effects test, which would have resulted in no Hobbs Act conviction, as suggested by the *Rivera-Rivera* dissent.¹²

Part II will explore both the substantial effects test¹³ and the *de minimis* test,¹⁴ each of which are used by the courts under the Commerce Clause when determining whether an action affects interstate commerce. After analyzing the different interstate commerce tests, this Comment will focus on the interstate commerce tests' relation to the Hobbs Act. This part will end with an analysis of the Hobbs Act violation in the *Rivera-Rivera* case. Part III will further analyze the *Rivera-Rivera* decision and discuss why the court should have applied the substantial effects test instead of the *de minimis* test. Finally, Part IV will propose changing the appropriate interstate commerce test in Hobbs Act violation cases to the substantial effects test.

II. BACKGROUND

A. *The Commerce Clause and the Tests Used to Determine an Activity's Effect on Interstate Commerce*

Article I, Section 8, Clause 3 grants Congress the power to regulate commerce.¹⁵ At the time the Constitution was ratified, "commerce" was seen as consisting of selling, buying, bartering, and the necessary transportation used to effectuate these purposes.¹⁶ Throughout the history of Commerce Clause regulation, much deference has been given to Congress's broad

Act violation because of a *de minimis* interference with interstate commerce).

12. See *id.* at 295 (Lipez, J., dissenting) (concluding that the court's nexus to interstate commerce was insufficient when even wrongly applying a *de minimis* standard of interference).

13. See *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (laying out three broad categories of activity that Congress may regulate pursuant to its Commerce Clause power, including: (1) regulating the use of the interstate commerce channels; (2) regulating and protecting the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) regulating those activities that have a substantial relation to interstate commerce, such as those activities that substantially affect interstate commerce).

14. See *Rivera-Rivera* 555 F.3d at 288-89 (applying a *de minimis* standard under an aggregation principle that many local robberies in the aggregate will have a negative effect on interstate commerce, thus this particular robbery has a "*de minimis*" effect on interstate commerce and is thus punishable).

15. U.S. CONST. art. I, § 8, cl. 3.

16. See *Lopez*, 514 U.S. at 585, 596-97 (Thomas, J., concurring) (explaining what the Framers had intended by allowing Congress to regulate the commerce of the country, specifically pointing out that the idea of "commerce" was not intended to give Congress a broad exercise of police power over the country, and noting that the police powers was meant to be reserved to the states); see also SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 361 (4th ed. 1773) (defining commerce as "intercourse; exchange of one thing for another; interchange of anything; trade; traffick").

ability to regulate activities that have an effect on interstate commerce.¹⁷ Activities directly affecting interstate commerce have been held to be within the scope of Congress's power to regulate, as have intrastate activities¹⁸ that are economic¹⁹ in nature.²⁰

The courts have essentially implemented two very different standards to be used when determining if Congress has the power to act under the Commerce Clause.

17. David C. Mangan, Note, *Gonzales v. Raich: The "States as Laboratories" Principle of Federalism Supports Prolonging California's Experiment*, 51 ST. LOUIS U. L.J. 521, 540 (2007); see *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 537, 548 (1985) (stating that the scope of Congress' Commerce Power authority is not limited by definitions of state sovereignty, and Congress can properly regulate intrastate economic endeavors pursuant to its broad Commerce Clause powers); *Hodel v. Va. Surface Mining and Reclamation Ass'n., Inc.*, 452 U.S. 264, 276 (1981) (explaining that the Court must defer to a congressional finding that a regulated activity affects interstate commerce so long as a rational basis exists for such a finding); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964) (noting that Congress is not confined to regulating commerce among the states, but rather has the power to make regulations so long as appropriate means exist to attain a legitimate end, regardless of whether the activity is purely local in nature); *United States v. Darby*, 312 U.S. 100, 114 (1941) (holding that Congress's commerce power is not diminished by the exercise or non-exercise of state power); see also *Gibbons v. Ogden*, 22 U.S. 1, 1824 WL 2697 at *3 (1824) (holding that the power of Congress over interstate commerce may be exercised to its fullest extent and acknowledges no limitations other than those enumerated in the Constitution).

18. Intrastate activities are those which do not have an effect on interstate commerce since the totality of the activity is completed within the state. Generally, unless the activity is economic in nature, Congress is not able to regulate intrastate activities. Lino A. Graglia, Essay, Lopez, Morrison, and Raich: *Federalism in the Rehnquist Court*, 31 HARV. J.L. & PUB. POL'Y 761, 776 (2008); see Noelle Formosa, Notes, *Ganging Up on RICO: Narrowing Gonzales v. Raich to Preserve the Significance of the Jurisdictional Elements as a Constitutional Limitation in the Racketeer Influenced and Corrupt Organizations Act*, 82 S. CAL. L. REV. 135, 143 (2008) (stating that the intrastate activities must substantially affect interstate commerce when aggregated with other similar activities for the activity to be within Congress's reach).

19. "Economics" refers to the "production, distribution, and consumption of commodities." *Gonzales v. Raich*, 545 U.S. 1, 25-26 (2005) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)).

20. Scott Schwartz, Note, *The Hapless Ecosystem: A Federalist Argument in Favor of an Ecosystem Approach to the Endangered Species Act*, 95 VA. L. REV. 1325, 1336 (2009) (citing *United States v. Morrison*, 529 U.S. 598, 613 (2000)); see also *United States v. Morales-de Jesus*, 372 F.3d 6, 18 (1st Cir. 2004) (proclaiming that Congress's power to criminalize conduct under its commerce power depends on the economic nature of the class of conduct as defined by statute).

1. *The Lopez Standard of Substantial Effects*

The case of *United States v. Lopez*²¹ came before the Supreme Court because a high school student was arrested for carrying a concealed handgun onto school property in violation of the Gun-Free School Zones Act of 1990.²² The alleged theory was that guns physically moved in interstate commerce, and thus, Congress could aggregate the movement of all guns in order to act pursuant to its Commerce Clause powers in this particular instance.²³ However, the Court held that the proper test to be used was the “substantial effects” test in order to determine an activity’s effect on interstate commerce.²⁴ The Court laid out three broad categories for which Congress may regulate under its Commerce Clause power, including the: (1) channels, (2) instrumentalities, and (3) activities that have a substantial relation to interstate commerce, such as those activities that substantially affect interstate commerce.²⁵ The majority of the litigated Commerce Clause cases fall into the third category. This category is comprised of intrastate activities that have traditionally been aggregated²⁶ in order to prove their effect on interstate commerce.²⁷ These intrastate activities must be of an economic

21. 514 U.S. 549.

22. 18 U.S.C. § 922(q)(1)(A)-(B) (2006) provides that crime involving drugs and guns is a nationwide problem which is exacerbated at the local level by the interstate movement of drugs, guns, and gangs.

23. *Lopez*, 514 U.S. at 551-52 (alleging that Congress was executing a well-defined constitutional commerce power to regulate activities that affect interstate commerce by passing this legislation allowing Congress to punish those offenders that brought guns into school grounds because the business of all schools affect interstate commerce).

24. *Id.* at 559. When Congress intrudes upon a traditionally local concern, the level of scrutiny must be heightened and the stricter substantial effects test must be applied so as to preserve fundamental federalism principles. Mangan, *supra* note 17, at 526.

25. *Lopez*, 514 U.S. at 558-59 (pointing out the history of interstate commerce, through the *Wickard* lens, has given Congress a substantial amount of power to legislate in areas affecting commerce because of the Court’s powerlessness to enforce the limitations on Congress’ commerce power because all activities in one way or another effect commerce in at least a minute way).

26. To aggregate something is to combine things into a single group or total. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966). The aggregation principle is based on the idea that an inferential chain can establish an impact on interstate commerce. Kenton J. Skarin, Article, *Not All Violence is Commerce: Non-economic, Violent Criminal Activity, RICO, and Limitations on Congress Under the Post Raich Commerce Clause*, 13 TEX. REV. L. & POL. 187, 208 (2009).

27. See *Wickard*, 317 U.S. at 124 (explaining that Congress’s commerce power appropriately extends to intrastate activities which so affect interstate commerce in the aggregate that if it were not held to be within its power to regulate, Congress would be obstructed from properly carrying out its enumerated constitutional powers). This aggregation principle is based on the

endeavor to satisfy the requisite Commerce Clause nexus.²⁸

2. Morrison and the Substantial Effects Test

The Supreme Court in *United States v. Morrison*²⁹ used a similar analysis of the substantial effects test as the Court in *Lopez*.³⁰ In *Morrison*, a former Virginia Tech student brought suit under the Violence Against Women Act of 1994³¹ against students who had allegedly raped her.³² Once again, the theory was that Congress could act under its Commerce Clause powers in order to curb gender-inspired violence because this type of violence occurs nationwide, across all state lines.³³ Like in *Lopez*, the Court held that Congress did not have the ability to regulate non-economic conduct pursuant to its broad-reaching Commerce Clause powers.³⁴ Such regulation and punishment of intrastate activities that are not directed at the channels, instrumentalities, or goods moving in interstate commerce has historically fallen to the states.³⁵ Thus, because gender violence is non-economic in nature,

notion that several similar activities can impact commerce through a proximate, inferential chain. Skarin, *supra* note 26, at 208 (citing *United States v. Nascimento*, 491 F.3d 25, 52-53 (1st Cir. 2007) (Boudin, C.J., concurring)).

28. *Lopez*, 514 U.S. at 559. The interstate commerce nexus required in the Hobbs Act is satisfied “by proof of a probable or potential impact” upon interstate commerce. *Lynch*, 437 F.3d at 909 (quoting *United States v. Huynh*, 60 F.3d 1386, 1389 (9th Cir. 1995)). This simple nexus to interstate commerce for robberies provides the federal government with a basic jurisdictional element used to link local robberies by a single defendant to that of a federal offense. Margaret H. Lemos, Article, *The Commerce Power and Criminal Punishment: Presumption of Constitutionality or Presumption of Innocence?*, 84 TEX. L. REV. 1203, 1205-06 (2006). This jurisdictional element is constitutionally mandated. See *United States v. Cruz-Rivera*, 357 F.3d 10, 14 (2004) (reasoning that, hypothetically, few would doubt that there is an insufficient connection to interstate commerce if the underlying robbery results in the shutting down of an interstate business).

29. 529 U.S. 598 (2000).

30. *Morrison*, 529 U.S. at 613 (stating that the Supreme Court has historically “upheld Commerce Clause regulation of intrastate activities only where the activity is economic in nature.”). The Court determined that the aggregation principle should not be applied if these activities are non-economic in nature. *Id.*

31. Violence Against Women Act of 1994, U.S.C. § 13981 (2006) (invalidated). The Act was created so that all persons within the United States would be free from gender motivated crimes. *Morrison*, 529 U.S. at 605; 42 U.S.C. § 13981(b).

32. *Morrison*, 529 U.S. at 602, 604.

33. *Id.* at 609.

34. *Id.* at 617.

35. See *id.* at 617-18 (rejecting the argument that Congress can regulate and punish non-economic, violent, criminal activities based solely on that activities aggregate effect on interstate commerce, since such power is traditionally kept within the province of the states); see also *Cohens v. Virginia*, 19 U.S. 264, *426 (1821) (holding that Congress clearly cannot

the Court determined that Congress had no power to act.

3. *Gonzales and the De Minimis Effect*

However, the overwhelming majority of appellate courts continue to use a *de minimis* standard to determine a crime's interstate commerce effect,³⁶ requiring only a minimal interference with commerce to uphold congressional regulation.³⁷ These appellate court holdings were further strengthened when the Supreme Court decided *Gonzales v. Raich*,³⁸ reaffirming the use of the aggregation principle of combining certain criminal conduct in order to show a substantial interference with interstate commerce.³⁹ Under this test, Congress can act if it has a rational basis for concluding that various acts, when aggregated together, have a substantial effect on interstate commerce.⁴⁰

B. *The Hobbs Act and Its Role in Commerce Clause Regulation*

The Hobbs Act was enacted in 1948 to ensure the criminalization of highway robbery and to protect trade and

punish felonies generally because this would be an invasion on states' rights).

36. See Craig M. Bradley, *Federalism and the Federal Criminal Law*, 55 HASTINGS L.J. 573, 575 (2004) (declaring the long held view of the federal appellate courts that a mere *de minimis* interference on commerce would be sufficient to prove the element of interstate commerce for certain federal crimes).

37. See, e.g., *United States v. Re*, 401 F.3d 828, 834-35 (7th Cir. 2004) (holding that a *de minimis*, or slight effect, on interstate commerce is sufficient to satisfy the requirement that the crime affected interstate commerce); *United States v. Turner*, 272 F.3d 380, 386 (6th Cir. 2002) (holding that where the criminal victimization of a business establishment occurs, the *de minimis* standard remains applicable); *United States v. Mills*, 204 F.3d 669, 671 (6th Cir. 2000) (remarking that the Sixth Circuit held that the *de minimis* rule survives the holding in *Lopez*); *United States v. Wang*, 222 F.3d 234, 237 (6th Cir. 2000) (holding that the courts require the government only to demonstrate a *de minimis* effect on interstate commerce to support a criminal conviction).

38. 545 U.S. 1.

39. *Id.* at 18-19 (explaining that the growing of marijuana and the growing of wheat, like in *Wickard*, are strikingly similar, and thus Congress had a rational basis for concluding that leaving marijuana growing outside of the federal scope for control via congressional commerce power would negatively affect price and market conditions). Thus, the Court was able to determine that a rational basis existed for concluding that Congress could properly regulate the local growth of marijuana under its Commerce Clause authority. *Id.* at 22.

40. *Id.*; See also *Hickman*, 179 F.3d at 232 (explaining that if a group of acts in the aggregate would have a substantial effect on interstate commerce, Congress may regulate those acts individually under its Commerce Clause power). Some commentators have noted that the Court's decision in *Raich* severely hampered the upstart federalism movement that had started a decade previously with the decisions in *Lopez* and *Morrison*. Craig M. Bradley, *Whatever Happened to Federalism?*, 41 TRIAL 52, 52 (Aug. 2005).

commerce⁴¹ from interference by violence, threats, coercion, and intimidation.⁴² The Hobbs Act allows Congress to use its full constitutional power to punish interference with interstate commerce where the crime involves extortion, robbery, or physical violence.⁴³

Of particular concern in this Comment is the Hobbs Act's determination that the federal government can punish those who rob business establishments and persons involved with interstate commerce.⁴⁴ The Hobbs Act's interstate commerce element in robbery cases has often been proven by showing that the crime depleted business assets that were engaged in interstate commerce or by showing that the business was forced to close at least temporarily.⁴⁵ Significantly, the Courts in both *Lopez* and *Morrison* held that Congress could not regulate non-economic, criminal conduct based solely on that conduct's aggregate effect on interstate commerce.⁴⁶

41. 18 U.S.C. § 874 (2006). Section 874, the "Anti-Kickback Act" provides that:

Whoever, by force, intimidation, or threat of procuring dismissal from employment, or by any manner whatsoever induces any person employed in the construction, prosecution, completion or repair of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, to give up any part of the compensation to which he is entitled under his contract of employment, shall be fined under this title or imprisoned not more than five years, or both.

42. See *United States v. Miles*, 122 F.3d 235, 243-45 (5th Cir. 1997) (DeMoss, J., specially concurring) (explaining that although the Hobbs Act has generally been given a very broad interpretation, the legislative history shows that Congress was mainly concerned with criminalizing highway robbery as well as a tool for the federal government to fight back against the growing organized crime activities). In fact, the legislative history contains significant evidence that Congress passed the Hobbs Act to combat highway robberies by union members that were having a considerable impact on interstate commerce with a daily occurrence rate of over 1,000. *Id.*

43. *Stirone*, 361 U.S. at 215. Additionally, such interference is outlawed in any way or degree. *Id.* By enacting the Hobbs Act, Congress deemed robbery to be an activity that may have substantial detrimental effects on interstate commerce if repeated over and over again. See generally, H.R. REP. NO. 79-238, (1945), reprinted in 1946 U.S.C.C.A.N. 1360, 1370.

44. See *Capozzi*, 486 F.3d at 726 (determining that the government can establish the required effect on interstate commerce by proving that the defendant's actions have minimally depleted the business' assets that is engaged in interstate commerce); see also *United States v. Diaz*, 248 F.3d 1065, 1087-91 (11th Cir. 2001) (finding sufficient evidence that the defendants affected interstate commerce to support a Hobbs Act conviction where the defendants robbed and extorted individuals engaged in interstate commerce).

45. *Rivera-Rivera*, 555 F.3d at 294 (Lipez, J., dissenting); *Turner*, 272 F.3d at 387.

46. See *Morrison*, 529 U.S. at 618 (holding that the regulation and punishment of violence, not directed at the channels, instrumentalities, or goods involved in interstate commerce is purely a local power); see also *Lopez*,

Additionally, a mandatory, minimum prison sentence of twenty-five years is required for repeat offenders that use a firearm during the course of a violent federal felony under the Hobbs Act.⁴⁷ Despite being a federal criminal minimum sentencing statute, § 924(c) of the Gun Control Act of 1968 has been held to be within the scope of the Commerce Clause because it both regulates activities that arise out of commercial transactions, and it contains a jurisdictional element which ensures an interstate commerce analysis.⁴⁸

C. *The Application of a De Minimis Standard in United States v. Rivera-Rivera to Prove an Interstate Commerce Nexus*

In the *Rivera-Rivera* case, the First Circuit Court of Appeals affirmed the decision of the district court, finding that two men who had engaged in a robbery of the Muñiz Gallery, a lottery ticket business in Caguas, Puerto Rico, were guilty of a Hobbs Act violation.⁴⁹ The appellate court determined that it only needed to find a *de minimis* interference with commerce in order to sustain the Hobbs Act conviction.⁵⁰

514 U.S. at 583 (O'Connor, J., concurring) (stating that the regulation of activities beyond the scope of commerce in the ordinary and usual sense of the word is prohibited).

47. See 18 U.S.C. § 924(c)(1)(C)(i) (2006). Section 924(c)(1)(C)(i) provides, “[i]n the case of a second or subsequent conviction under this subsection, the person shall be sentenced to a term of imprisonment of not less than 25 years.” This statute in its entirety gives the mandatory minimum sentences for federal criminal cases. Specifically, § 924(c), is known as the Gun Control Act of 1968. Nicole Lybrand Westin, Case Survey, *United States Supreme Court Holds that Only a Temporal Link is Required Between the Carrying of Explosives and the Making of a False Statement to a Customs Agent to Support a Conviction for a False Statement*, 31 U. ARK. LITTLE ROCK L. REV. 694, 695 (2009).

48. *United States v. Staples*, 85 F.3d 461, 463 (9th Cir. 1996); *United States v. Harris*, 108 F.3d 1107 (9th Cir. 1997). *But see Lopez*, 514 U.S. at 561 (stating that § 922(q), a criminal statute, was not within the scope of the commerce clause).

49. See *Rivera-Rivera*, 555 F.3d at 280, 289 (finding that both defendants had engaged in a robbery of a lottery ticket business in Caguas, and that this robbery affected interstate commerce).

50. See *id.* at 286 (finding it to be well established that a *de minimis* interference with interstate commerce is sufficient in order to sustain a conviction under a Hobbs Act violation); see *United States v. Cruz-Arroyo*, 461 F.3d 69, 75 (1st Cir. 2007) (finding that a *de minimis* interference with commerce is sufficient to sustain a Hobbs Act conviction for robbery); *Capozzi*, 347 F.3d at 335 (holding that “to prove a Hobbs Act violation, the government must show only that the . . . conduct created a realistic probability of a *de minimis* effect on interstate commerce.”) (quoting *United States v. Butt*, 955 F.2d 77, 80 n.2 (1st Cir. 1992)). *But see Wang*, 222 F.3d at 240 (agreeing that a mere *de minimis* effect on interstate commerce is sufficient to support a Hobbs Act conviction, but refusing to apply the *de minimis* standard in that particular case because the robbery victim was robbed inside of a private

To support its conclusion of a *de minimis* interference, the court noted that the Puerto Rican lottery ticket business was engaged in interstate commerce because the business's lottery machines had been manufactured in Rhode Island, and the business occasionally served tourists.⁵¹ The court reasoned that past lottery machine purchases from interstate vendors was sufficient proof of interstate commerce.⁵² Furthermore, the court reasoned that any indirect link that can be established to interstate commerce will be sufficient to overcome the minimal *de minimis* interference requirement.⁵³

The majority's opinion was met with a strong dissent in the case.⁵⁴ While acknowledging that the interstate commerce component of the Hobbs Act violation is a critical factor in this case, the dissent argued that the evidence did not meet even the "modest requirement" of proving a *de minimis* effect on interstate commerce.⁵⁵ Of particular concern to the dissent was the inability of the business owner to prove that his business had presently been engaging in interstate commerce or was planning on engaging in future interstate purchases upon which the robbery

residence, despite the fact that the victim was a business owner and the money stolen from the business owner-victim was from business funds).

51. See *Rivera-Rivera*, 555 F.3d at 287-88 (finding that, pursuant to a stipulation made at trial, the lottery ticket machines were manufactured in Rhode Island and from there were shipped to Puerto Rico for installation, also finding that, pursuant to the same stipulation, tourists occasionally bought tickets from the business). When a business is robbed, the government may demonstrate that the robbery affected interstate commerce by first proving that the business robbed was engaged in interstate commerce. *Id.* at 286. Thus, by finding that the machines were manufactured in Rhode Island and then shipped to Puerto Rico, and further finding that the business occasionally had tourists as customers, the court deemed the business to have been engaged in interstate commerce. *Id.* at 287.

52. See *id.* at 288 (explaining that past interstate commerce purchases were sufficient to allow a jury to infer that the business would be making similar purchases in the future. *But see id.* at 295 (Lipez, J., dissenting) (arguing that there was no indication in the record that interstate purchases had been made since the lottery machines were brought to Puerto Rico from Rhode Island initially, and arguing that there was no indication that the lottery business had any plans of acquiring new machines at any point in the foreseeable future). Thus, if the record lacks proof of future interstate purchasing by the business, the robbery could not have had any impact on the business' interstate commerce. *Id.* at 295 (Lipez, J., dissenting).

53. See *id.* at 289 (finding that indirect links establishing interstate commerce are sufficient and also finding the lottery ticket machines were not the only nexus available to establish an interstate commerce link because United States mainland tourists still occasionally visit the business).

54. *Id.* at 293 (Lipez, J., dissenting).

55. *Id.* at 294 (Lipez, J., dissenting) (stating that establishing a federal interest in crimes typically of concern to states is a critical component of the Hobbs Act, and the government failed to meet their burden in this case).

could have had an impact.⁵⁶ Because the Hobbs Act requires proof that the robbery impeded interstate business dealings, and because the business owner in this matter was unable to prove that the robbery affected future interstate purchases, the dissent determined that there was an insufficient nexus to interstate commerce.⁵⁷

With the *Rivera-Rivera* case decided in the prism of *Gonzales*, there remains dispute about which test future courts should use when determining whether an activity affects interstate commerce. With several appellate courts in recent years following the Court's lead in *Gonzales* and pursuing a *de minimis* requirement test, ideals of federalism have begun to erode, eliminating a substantial impediment to Congress's ability to usurp state police powers.⁵⁸

III. ANALYSIS

A. *The Intrusion Masked as "De Minimis" Interference*

The Hobbs Act is designed to punish criminal offenders who have committed violations affecting interstate commerce.⁵⁹ In this way, the Hobbs Act is not targeting any type of economic activity specifically.⁶⁰ However, the Hobbs Act does punish violent criminal offenders. Punishing violent criminals that are not affecting any type of economic activity specifically would seem to contrast significantly with the Court in *Morrison's* rejection of the argument that Congress could regulate non-economic, violent

56. See *id.* at 295 (Lipez, J., dissenting) (noting that the business owner was unable to prove that he regularly engaged in interstate commerce or that the robbery impacted any plans for future interstate business).

57. See *id.* (Lipez, J., dissenting) (stating that the possible purchase of replacement equipment at an undefined point in the future is insufficient to establish the Hobbs Act requirement for an interstate commerce nexus).

58. See Ilya Somin, *A False Dawn for Federalism: Clear Statement Rules After Gonzales v. Raich*, 2006 CATO SUP. CT. REV. 113, 113 (2005-2006) (explaining that the decision in *Gonzales* "severely undermined" the hope that the Supreme Court may change direction after the *Lopez* and *Morrison* decisions and pursue placing meaningful constitutional limitations on Congress' powers); see Mangan, *supra* note 17, at 541 (arguing that allowing Congress to exert too broad of authority pursuant to its Commerce Clause powers would affect the integrity of the federalism system).

59. See Zimmerman, *supra* note 7, at 423 (stating that the Hobbs Act requires proof that the robbery offense affected interstate commerce).

60. See Hickman, 179 F.3d at 231 (Higginbotham, J., dissenting) (stating that the Hobbs Act is not a tool used to "target any class of product, process, or market, or indeed even commercial victims"); see also Randy E. Barnett, *Foreword: Limiting Raich*, 9 LEWIS & CLARK L. REV. 743, 749 (2005) (observing that most violent crimes may not count as "production, distribution, or consumption of commodities" as had been the case of previous interstate commerce cases).

criminal conduct based solely on some perceived aggregate effect that such criminal conduct could have on interstate commerce.⁶¹

Robbery undoubtedly is a violent crime.⁶² And, with questions remaining about whether robbery is an economic crime,⁶³ it is confounding that proof of an effect upon interstate commerce need only require a *de minimis* showing of interference instead of the stricter substantial effects standard. Requiring a mere *de minimis* interference standard allows Congress considerable authority in the realm of police power, expanding on Congress's limited and enumerated constitutional powers.⁶⁴ Congress has never been granted such a national police power and allowing Congress to act pursuant to some perceived minimal underlying effect on interstate commerce would open the floodgates to a national police power.⁶⁵ Such a national police power would be a direct violation of traditional federalism principles that our Constitution was founded upon.⁶⁶ As the majority feared in *Lopez*, allowing

61. *Morrison*, 529 U.S. at 617.

62. Press Release, The Federal Bureau of Investigation, FBI Releases Preliminary Annual Crime Statistics for 2009 (May 24, 2010), <http://www.fbi.gov/news/pressrel/press-releases/fbi-releases-preliminary-annual-crime-statistics-for-2009/>. The Federal Bureau of Investigations (FBI) has labeled robbery as a violent crime in their crime index reports. *Id.*

63. See Thane Rehn, Note, *RICO and the Commerce Clause: A Reconsideration of the Scope of Federal Criminal Law*, 108 COLUM. L. REV. 1991, 2031 (2008) (advocating that robbery is not an economic crime because, although it may be committed for economic gain, it involves neither the production nor voluntary exchange of goods or services); see also Hickman, 179 F.3d at 237-38 (Higginbotham, J., dissenting) (stating that robbery, as criminal conduct, is outside the scope of economic activity).

64. See *United States v. Collins*, 40 F.3d 95, 101 (5th Cir. 1995) (declaring that the federal government has limited and enumerated powers, with police powers generally reserved to the states).

65. See *Hickman*, 179 F.3d at 238 (Higginbotham, J., dissenting) (concluding that, along with the regulation of firearm control, control over robbery crimes have traditionally been held by the states pursuant to their control over law enforcement); see also *Wang*, 222 F.3d at 240 (confirming that upholding federal jurisdiction over a robbery violation under the Hobbs Act essentially acknowledges a general federal police power). Because there is ambiguity over the economic status of robbery crimes, and because robbery is a traditional target of these states' law enforcement personnel, robbery should be considered a non-economic crime that should not be aggregated in order to find an effect on interstate commerce. *Id.*

66. See Clarence Thomas, Associate Justice, Supreme Court of the United States, Dwight D. Opperman Lecture, *Why Federalism Matters* (Sept. 24, 1999), in 48 DRAKE L. REV. 231, 233 (2000) (describing the Constitution as one that:

aims to provide enough power to government to insure that the rights of the people would be secure from both foreign invasion and domestic unrest; but a Constitution that also aims to prevent government from becoming the destroyer of rights, by granting the government only specified, enumerated powers It remains a just, legitimate government only so long as it stays within the bounds established by its

Congress to enact any type of legislation it wished under the guise of interstate commerce would give Congress the very plenary police power that has not been authorized in the Constitution.⁶⁷

In relying on a *de minimis* interference standard with commerce, courts implicitly rely on the aggregation principle, in that similar robberies like this one would substantially affect interstate commerce, giving Congress the power to regulate under its commerce power.⁶⁸ However, given that these cases concern robbery,⁶⁹ this would appear to be another departure from the *Morrison* decision, where the Court held that non-economic, violent conduct could not be aggregated in order to show an effect on interstate commerce.⁷⁰ By allowing this aggregation, Congress is merely usurping traditional state police power functions, attaining powers not expressly granted to them by the Constitution.⁷¹

B. *The Intrusion's Effect in the Rivera-Rivera Decision*

Rivera-Rivera exemplifies how appellate courts have handled the interstate commerce aspects of Hobbs Act violations in the wake of *Lopez*, *Morrison*, and *Gonzales*. The *Rivera-Rivera* decision established that it need only find a *de minimis* interference with commerce in order to sustain that aspect of the

charter, our Constitution).

67. *Lopez*, 514 U.S. at 566; see also Thomas, *supra* note 66, at 235 (noting that federalism provides a check on the national government in a way that the separation of powers alone could not do).

68. See generally, *Rivera-Rivera*, 555 F.3d at 297 (Lipez, J., dissenting) (explaining that the majority applied a *de minimis* test because, unlike the statutes in question in *Lopez* and *Morrison*, the Hobbs Act includes a jurisdictional element to ensure that robberies are viewed, on a case-by-case analysis, as affecting interstate commerce). However, by giving Congress the power to cherry pick the robbery cases in which it wishes to pursue a Hobbs Act violation, Congress is given the power to ignore fundamental principles of federalism, blurring the distinction between traditional local police powers and Congress' ability to act under the Hobbs Act. See Stephen R. McAllister, Essay, *Is There a Judicially Enforceable Limit to Congressional Power Under the Commerce Clause?*, 44 U. KAN. L. REV. 217, 232 (1996) (arguing that if Congress is allowed to decide which situations it wishes to intervene and override state autonomy, such as by exercising a general national police power, the delineation between federal and state authority becomes blurred).

69. The FBI places robbery in the violent crime classification. See *supra* note 60 and accompanying text.

70. See *Morrison*, 529 U.S. at 617 (rejecting the argument that Congress has the ability, pursuant to its commerce power, to regulate non-economic, violent criminal conduct based solely on that violent criminal conduct's aggregate effect on interstate commerce).

71. See Thomas, *supra* note 66, at 236 (arguing that federalism creates independent sovereigns with their own government, plenary control over its citizenry, and the ability to administer in areas such as criminal punishment with substantial policy-making freedoms).

Hobbs Act violation.⁷² To prove that the robbery affected interstate commerce, the court determined that the lottery ticket business engaged in interstate commerce through out-of-state product purchases, serving out-of-state customers, the depletion of the business's assets, and temporary closure that the robbery caused.⁷³

1. *The Argument That the Lottery Ticket Business Engaged in Interstate Commerce by Purchasing Products from Out-of-State*

The court in *Rivera-Rivera* relied on the fact that some of the Muñiz Gallery's lottery ticket machines were manufactured in Rhode Island before being shipped to Puerto Rico for installation.⁷⁴ The court's theory was that the lottery ticket business benefitted from this interstate transaction, and thus, must have engaged in interstate commerce.⁷⁵ With evidence of past interstate commerce purchases by the Muñiz Gallery stipulated to, the majority reasoned that a jury could infer that the robbery prevented the business from potentially making future interstate commerce purchases.⁷⁶ Because these potential future interstate commerce purchases would have been affected by the robbery, the court reasoned that a *de minimis* interference on interstate commerce was established.⁷⁷

However, there were several aspects that the court in *Rivera-Rivera* overlooked regarding the court's past purchases theory. First and foremost, the court paid little attention to the fact that the lottery ticket and gaming machines were not even purchased directly from the Rhode Island manufacturer by the Muñiz Gallery.⁷⁸ The Muñiz Gallery actually leased the gaming machines

72. See *Rivera-Rivera*, 555 F.3d at 286 (determining it to be well-established that the court need only find a *de minimis* interference with commerce to sustain a Hobbs Act conviction).

73. *Id.*

74. See *id.* at 287 (determining that the stipulated testimony of Muñiz, declaring his business used lottery ticket terminals that were manufactured in Rhode Island, was sufficient for the government to prove that the business had purchased goods from out of state).

75. See *id.* (declaring that the government's introduction of evidence, via the stipulated testimony of Muñiz, that the lottery ticket machines were purchased from Rhode Island was sufficient evidence to determine that the local lottery ticket business was engaged in interstate commerce).

76. See *id.* at 288 (determining that a jury could reasonably infer from the past purchases that the Muñiz Gallery was engaged in regular interstate commerce purchases since all of the machine parts were brought in from Rhode Island).

77. *Id.* at 289.

78. See *id.* at 295 n.19 (Lipez, J., dissenting) (noting that the evidence suggested that Muñiz obtained the machines from the Puerto Rican Department of the Treasury, and this governmental entity was responsible for purchasing the machines from the Rhode Island manufacturer).

from the Commonwealth of Puerto Rico's Department of the Treasury, which brought the machines to Puerto Rico from Rhode Island.⁷⁹ Such a leasing arrangement is at best an attenuated⁸⁰ stretch by a court to find an interstate commerce nexus,⁸¹ especially when the nexus attempting to be created arises out of an aggregation of a violent, non-economic activity, something that the Court in *Morrison* expressly prohibited.⁸²

Additionally, the argument that past interstate commerce purchases can suffice to show an effect on interstate commerce is in direct violation of the Hobbs Act language itself.⁸³ The Hobbs Act requires that the robbery offense must have potentially impeded the business's interstate dealings.⁸⁴ However, the Muñiz Gallery was not presently engaged in interstate commerce, and the Gallery had no foreseeable plans of engaging in interstate commerce via future purchases at the time of the robbery.⁸⁵ Unlike when an establishment engages in interstate commerce on a regular basis, an interstate commerce effect cannot be presumed here merely because a robbery occurred.⁸⁶

In this case, the robbery did not have any effect on the business's interstate commerce transactions.⁸⁷ Virtually every business today uses some item that was purchased from a company in a different state.⁸⁸ However, because the court used

79. *Id.*

80. A mere possibility of future substantial effects on interstate commerce is much too attenuated in order to be a constitutional exercise of congressional power. *GDF Realty Investments, LTD v. Norton*, 326 F.3d 622, 638 (6th Cir. 2003).

81. A nexus is a means of causal connection used to link a series or a group. Nexus definition, MERRIAM WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/Nexus>.

82. *Morrison*, 529 U.S. at 617. Such an indirect link has been allowed to establish the requisite interstate commerce nexus because the crime of robbery causes a depletion of the business' assets indirectly engaged in interstate commerce, thereby potentially affecting interstate commerce. See *United States v. Elias*, 285 F.3d 183, 189 (2d Cir. 2002) (holding that a robbery of a local business may be said to affect interstate commerce because the robbery impairs the business' ability to acquire goods originating from out-of-state locations).

83. See *Rivera-Rivera*, 555 F.3d at 295 (Lipez, J., dissenting) (finding that the Hobbs Act requires proof that the particular robbery in question potentially prevented the business from pursuing its interstate dealings).

84. See *Capozzi*, 347 F.3d at 336 (explaining that the Hobbs Act requires that the robbery in question affects interstate commerce based on a case-by-case, fact-specific analysis).

85. *Rivera-Rivera*, 555 F.3d at 295 (Lipez, J., dissenting).

86. *Id.* at 296.

87. *Id.* (determining that the mere possibility of a future effect on interstate commerce 18 U.S.C. § 874, one that may not occur for several years, is not sufficient proof of an effect on interstate transactions).

88. See *id.* at 298 (Lipez, J., dissenting) (stating that virtually every business has some item that was purchased from out-of-state, be it something

the *de minimis* standard to prove interference on interstate commerce, the court aggregated similar robberies together with the *Rivera-Rivera* robbery to show an effect on interstate commerce.⁸⁹ To a logical extreme, aggregating such robberies under the Hobbs Act would seem to embrace the concept that Congress can punish virtually all local robberies.⁹⁰

2. *The Argument That the Muñiz Gallery Served Out-of-State Tourists, Thus Satisfying an Interstate Commerce Nexus*

The court in *Rivera-Rivera* noted that even if the Muñiz Gallery's past interstate commerce purchases were insufficient to establish an interstate commerce nexus, the fact that the Gallery occasionally served tourists from the United States mainland was also sufficient to establish the effect the robbery had on interstate commerce.⁹¹ The owner of the Gallery, Muniz, stated under stipulated testimony that tourists knew the Gallery had lottery ticket and gaming machines and occasionally visited to purchase such tickets.⁹²

This argument, similar to the argument that the gaming device purchases from the Rhode Island manufacturer, fails to establish an effect on interstate commerce. The effect on interstate commerce from a handful of tourists being prevented from entering the Muñiz Gallery for a day because of a robbery appears to be minimalistic at best.⁹³ The lottery ticket business was not

paramount to the company's function or merely a rug or painting).

89. *Id.* at 289; see *Hickman*, 179 F.3d at 232 (Higginbotham, J., dissenting) (noting that the Supreme Court has recognized an aggregation principle since the *Wickard* decision, concluding that interstate commerce can be substantially affected if a myriad of similar instances occur together). However, this aggregation has not been allowed to extend to aggregation of violent criminal conduct. See *id.* at 235 (noting that a rule stating that violent, non-economic criminal conduct cannot be aggregated to show a substantial effect on interstate commerce would be consistent with Supreme Court precedent); see also *Lopez*, 514 U.S. at 559 (explaining that, in order to be aggregated, the conduct must be economic in nature).

90. *Rivera-Rivera*, 555 F.3d at 298 (Lipez, J., dissenting) (noting that the majority's line of reasoning essentially places all local robberies under the power of the federal government to punish under the Hobbs Act because the nexus between the robbery and interstate commerce has become too attenuated). However, the Hobbs Act robbery provisions were intended to be utilized only in instances involving organized crime or other gang-related activity; by punishing offenders of traditional local robbery, the Hobbs Act is being interpreted too broadly than it was intended to be. U.S. ATTORNEY'S MANUAL, §9-131.040 (Apr. 1999).

91. *Rivera-Rivera*, 555 F.3d at 288.

92. *Id.* at 287, n.10 (testifying that when tourists come from the mainland United States, some of them purchase lottery tickets from the Muñiz Gallery and others play in the gaming room).

93. *Id.* at 297 (Lipez, J., dissenting) (noting that there was no evidence that the sale of lottery tickets to involved engaging in interstate commerce, nor

advertising in out-of-state markets, and the tickets were locally produced merchandise.⁹⁴ The court determined that despite this mountain of evidence, a *de minimis* interference with commerce was satisfied by evidence that tourists were occasional customers of the lottery ticket business. In this way, the court expanded the definition of what it means to be engaged in interstate commerce, allowing Congress to punish more offenders than it normally could because of a lack of a federal police power.⁹⁵ Extending this argument to the furthest reaches of logic, one who robs a Chicago street vendor serving food to tourists made with cheese products from Milwaukee could be held in violation of the Hobbs Act.⁹⁶

3. *The Argument That the Rivera-Rivera Robbery Depleted the Assets of the Muñiz Gallery*

The *Rivera-Rivera* decision found that the robbery at issue depleted the assets of the Muñiz Gallery, thereby affecting its ability to conduct interstate business.⁹⁷ The lottery business was indeed robbed of nearly \$9,000, depleting its ability to conduct interstate business as usual and creating the possibility that the

evidence of a realistic probability that interstate commerce was affected by this particular robbery).

94. *Id.* (explaining that the purchaser does not become an actor in interstate commerce merely by being from out-of-state when the sale is of a locally produced product). *But see* *United States v. Rodriguez*, 218 F.3d 1243, 1245 (11th Cir. 2000) (concluding that the robbery at issue constituted a Hobbs Act violation because there was evidence that the motels, at some point, had registered guests from out-of-state, sufficient to establish a connection to interstate commerce); *see also* *United States v. Pearson*, 508 F.2d 595, 597 (5th Cir. 1975) (concluding that a hotel was engaged in interstate commerce because the hotel had guest registration cards of people from out-of-state, thereby sufficiently establishing that the robbery affected interstate commerce).

95. *See Rivera-Rivera*, 555 F.3d at 297 (Lipez, J., dissenting) (arguing that the court's interpretation that tourists making purchases at the business is sufficient to establish an interstate commerce nexus is an expansion of Congress's Commerce Clause powers from the *Lopez* and *Morrison* holdings, reaching into areas of traditional local concerns); *see also Lopez*, 514 U.S. at 577 (Kennedy, J., concurring) (fearing that if the federal government was allowed to take over regulation of a traditionally local concern that had little to do with the regulation of commercial activities would blur the lines between state and federal authority).

96. *See Hickman*, 179 F.3d at 231 (Higginbotham, J., dissenting) (determining that, in a similar situation, taking a child's lemonade may potentially be allowed to aggregate in a Hobbs Act violation to sustain a Hobbs Act conviction); *see also McAllister*, *supra* note 68, at 232 (noting that this blurring of federal and state authority lines may result in ineffective government).

97. *Rivera-Rivera*, 555 F.3d at 288 (relying on the testimony of Muñiz, who testified via stipulation that the Muñiz Gallery's shutdown of operations on the day of the robbery is sufficient to establish that the depletion of assets inhibited the possible purchases in interstate transactions).

Muñiz Gallery would be prevented from engaging in interstate transactions because of the robbery.⁹⁸ Once again, the court relied on the premise that a *de minimis* interference is shown through this analysis by relying on the aggregation principle that other similar robberies, aggregated together, would have an effect on interstate commerce.⁹⁹

However, this argument presumes that the depleted assets would have been used to continue regular interstate purchases.¹⁰⁰ As the record indicates, the business did not have any plans to make more interstate purchases in the foreseeable future.¹⁰¹ Because it was not realistically probable that the depleted assets would be used in interstate transactions, sustaining a conviction for a violent, non-economic crime through mere speculation is once again an attenuated interstate commerce nexus.¹⁰²

4. *The Argument That the Robbery Caused a Temporary Closure of the Muñiz Gallery, Thereby Affecting Interstate Commerce*

Finally, the *Rivera-Rivera* court pointed out that the robbery resulted in a temporary closure of the business for one day.¹⁰³ The business was thus unable to bring in interstate money from out-of-state tourists that may have entered the Gallery on that day.¹⁰⁴ This speculative loss was sufficient because the court needed to find only a *de minimis* interference with interstate commerce to sustain the Hobbs Act conviction.

98. *Id.* at 286, 294.

99. *Id.* at 286, n.8. *But see Hickman*, 179 F.3d at 231, n.1 (Higginbotham, J., dissenting) (concluding that the proof of a substantial effect on interstate commerce should not be allowed to be achieved by aggregating diverse and separate instances of intrastate activities where this is not a rational basis for concluding that there is a sufficient connection between the activities).

100. *See Rivera-Rivera*, 555 F.3d at 295 (Lipez, J., dissenting) (noting that, under a *de minimis* standard for interference, the \$9,000 loss would be sufficient to establish a Hobbs Act violation). The lack of proof that there was anticipated interstate commerce purchases at the time of the robbery shows that the robbery did not affect the business's ability to conduct interstate business by this depletion of assets. *Id.*

101. *Id.*

102. *See id.* (noting that the business's loss of \$9,000 cannot be reasonably presumed to affect an interstate transaction that may not occur for several years).

103. *Id.* at 286.

104. *Id.* (laying out the idea that the temporary closure resulted in the potential loss of business from potential tourists). *But see id.* at 297 (Lipez, J., dissenting) (pointing out that the mere sale of a locally produced product to a purchaser buying locally does not transform the transaction into an interstate transaction merely because the purchaser is from out-of-state).

C. *Putting It All Together: The De Minimis Standard's Effect on the Rivera-Rivera Decision*

Because the court in *Rivera-Rivera* needed to find only a *de minimis* interference, indirect and attenuated connections to interstate commerce sufficed for the majority to conclude that the robberies affected interstate commerce.¹⁰⁵ This *de minimis* standard allowed the court to loosely apply interstate commerce connections which only further blurred the lines between federal and state crimes, effectively eliminating federalism protections.¹⁰⁶ Essentially, the court has determined a *de minimis* interference with interstate commerce occurs when machines are indirectly obtained from an out-of-state manufacturer and when a purchaser from out-of-state purchases locally produced merchandise.¹⁰⁷ This line of reasoning should no longer apply, as courts should instead apply the substantial effects test as laid out in *Lopez* to future Hobbs Act cases.

IV. PROPOSAL

The Hobbs Act should be amended to require proof of a substantial effect on interstate commerce in all Hobbs Act convictions. Such an amendment to the Hobbs Act would curb Congress's Commerce Clause powers to more properly fit under the Court's jurisprudence in *Morrison*. While the Court in *Gonzales* may have altered the perception of Congress's powers under the Commerce Clause after *Lopez* and *Morrison*, it did nothing to alter the Court in *Morrison's* determination that Congress could not act pursuant to its Commerce Clause powers

105. *Id.* at 298 (Lipez, J., dissenting) (noting that the majority's determination that a *de minimis* interference with interstate commerce has been proven by indirect nexuses).

106. *See id.* (stating that the *de minimis* standard cannot be applied so loosely or else the interstate commerce element of a Hobbs Act violation will no longer serve to distinguish between federal and state crimes, effectively giving Congress complete control over all local robbery crimes). This approach followed by the Courts of Appeal after the *Gonzales* decision has fundamentally altered the federalism protections that the *Morrison* court had articulated in its decision, requiring a proof of a substantial effect on interstate commerce before Congress would have the power to regulate in the area. *See* Jonathan H. Adler, Symposium Article, *Is Morrison Dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751, 751 (2005) (noting that Supreme Court "hollowed out" the core contemporary federalism principles in Commerce Clause jurisprudence with its decision in *Gonzales*).

107. *See Rivera-Rivera*, 555 F.3d at 298 (Lipez, J., dissenting) (concluding that the majority has determined that speculative, future replacement of items previously purchased in interstate commerce suffices to establish an interstate commerce nexus, effectively making all local robberies punishable under the Hobbs Act); *see also Lopez*, 514 U.S. at 567 (explaining that the Court refuses to pile inference upon inference so as to convert congressional commerce authority to a general police power retained by the States).

when the activity in question is non-economic and violent.¹⁰⁸ Because Hobbs Act robbery cases are non-economic and violent in nature, Congress should not be allowed to use its Commerce Clause powers to legislate.¹⁰⁹

Federal jurisdiction in Hobbs Act violation cases still depends upon an initial inquiry into the commercial nature of the entity that was robbed.¹¹⁰ Because the federal government's authority to act in Hobbs Act violation cases rests solely on the finding of an interference with interstate commerce, it is imperative that some interference with commerce be identified.¹¹¹ The *Gonzales* decision allowed the Appellate Courts to fully embrace the *de minimis* test.¹¹²

However, the *de minimis* test has been too liberally construed, allowing aggregation of fundamentally non-economic activities, such as robbery, under the Hobbs Act.¹¹³ The aggregation principle used in Hobbs Act cases has made finding a substantial effect on interstate commerce a very easy task for the government. With its burden significantly reduced, the government is able to pursue more crimes that have a causal correlation with interstate commerce.

The lax burden of merely needing to find a *de minimis* interference with interstate commerce has created a system of justice that allows for attenuated connections with interstate commerce to suffice for an interference with commerce.¹¹⁴

108. See Brian Nisbet, Comment, *What Can RICO Not Do?: RICO and the Non-Economic Intrastate Enterprise That Perpetrates only Non-Economic Racketeering Activity*, 99 J. CRIM. L. & CRIMINOLOGY 509, 510 (2009) (noting that Congress, after *Gonzales v. Raich*, could regulate non-economic intrastate activity if the activity was done in furtherance of a larger and valid regulatory scheme, but noting the silence with regards to any mention of overturning the *Morrison* determination that Congress could not regulate violent criminal activity under its commerce power).

109. See George D. Brown, Article, *Counterrevolution?—National Criminal Law After Raich*, 66 OHIO ST. L.J. 947, 999 (2005) (advocating that robbery is neither an economic nor a commercial activity).

110. Brown, *supra* note 109, at 999. However, courts continue to avoid adopting a categorical rule against regulating noncommercial, intrastate activities. Instead, courts continue to rely on the different factors outlined in *Morrison*, *Gonzales*, and *Lopez*. Adler, *supra* note 106, at 760.

111. See *Stirone*, 361 U.S. at 218 (declaring the charge that interstate commerce is affected is a crucial element of the Hobbs Act test because the federal government's jurisdiction to act rests solely on that interference).

112. See generally *United States v. Bailey*, 227 F.3d 792 (7th Cir. 2000) (declaring that the overwhelming authority of case law supports the notion that a mere minimal effect on interstate commerce, rather than a substantial effect, is necessary).

113. *Hickman*, 179 F.3d at 231 (Higginbotham, J., dissenting).

114. See *Norton*, 326 F.3d at 630, 638 (declaring that substantial effects on interstate commerce have begun to be found in more hypothetical, attenuated interstate commerce cases because of the aggregation principle).

However, allowing such indirect nexuses to establish this element of the Hobbs Act is giving Congress more power to act in an area traditionally reserved for state police enforcement.¹¹⁵

Thus, the use of the substantial effects test is necessary because it would prevent attenuated connections to interstate commerce from being used to satisfy the interstate commerce element of a Hobbs Act conviction.¹¹⁶ Additionally, use of the substantial effects test would provide a safeguard for fundamental federalism principles by ensuring that the states retain their traditionally held police powers.¹¹⁷

A. *Use of the Substantial Effects Test Would Require the Government to Prove a Direct Connection with Interstate Commerce in Hobbs Act Cases*

Rivera-Rivera is the perfect example of why courts should strongly consider using the substantial effects test in Hobbs Act cases as opposed to the *de minimis* test. In relying on the Muñiz Gallery's indirect, attenuated connection to interstate commerce, the *Rivera-Rivera* decision showed just how far appellate courts have been willing to go to find that a mere *de minimis* interference with interstate commerce is sufficient to sustain a Hobbs Act conviction. The Court found it insignificant that the Muñiz Gallery had not purchased their lottery ticket machines directly in interstate commerce. Similarly, the Court deemed it irrelevant that the Muñiz Gallery had no plans to make future purchases in interstate commerce. The Court found that the interstate commerce nexus had been satisfied because the lottery ticket machines were indirectly obtained from the Puerto Rican Treasury Department in interstate commerce. Thus, the *Rivera-Rivera* decision essentially determined that the robbery of a local business, with no present or future intentions of engaging in business interstate, substantially affected interstate commerce.¹¹⁸

With the ability to aggregate this minor robbery of a local lottery ticket business with other similar robberies under the *de minimis* standard, the government has been given incredible

115. John Panneton, Article, *Federalizing Fires: The Evolving Response to Arson Related Crimes*, 23 AM. CRIM. L. REV. 151, 161 (1985).

116. Some appellate courts have held that, "the possibility of future substantial effects . . . on interstate commerce . . . is simply too hypothetical and attenuated . . . to pass constitutional muster." *Norton*, 326 F.3d at 638.

117. *Lopez*, 514 U.S. at 566-67; *Morrison*, 529 U.S. at 618; *Collins*, 40 F.3d at 101; *Cohens*, 19 U.S. at 426.

118. *Rivera-Rivera*, 555 F.3d at 289. Pursuant to the three broad categories that the Court in *Lopez* laid out as to when Congress may act under its Commerce Clause powers, the *Rivera-Rivera* decision relied upon Congress's power to regulate those activities that substantially affect interstate commerce. See *Lopez*, 514 U.S. at 558-59 (listing the three types of areas that Congress may act pursuant to its Commerce Clause power).

leeway by the court in *Rivera-Rivera* to prove a substantial interference with interstate commerce. The government in *Rivera-Rivera* did not even have to prove a direct connection to interstate commerce.¹¹⁹ As the Court noted in *Morrison*, “[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.”¹²⁰ With such an indirect, attenuated connection to commerce deemed satisfactory by the *de minimis* test, there seems to be no end in sight to the government’s ability to prosecute any robbery as a Hobbs Act violation.

Inevitably, something from every store or market has at one time or another moved in interstate commerce. Even street vendors often have products in their carts that have been produced in other states.¹²¹ Following the *Rivera-Rivera* precedent in Hobbs Act cases, any robbery could be indirectly linked to an aspect of interstate commerce that would allow the government a near universal police power in robbery cases. Allowing this past movement in interstate commerce to suffice as interstate commerce under the *de minimis* test, especially when it is unconnected to the underlying robbery, is in direct violation of the *Lopez* holding.¹²²

There can be little doubt that the *Rivera-Rivera* robbery, by itself, did not have a substantial effect on interstate commerce. The only real connection to interstate commerce that was directly impacted by the robbery was the occasional tourist that was prevented from purchasing a ticket. Under the substantial effects test, requiring that the robbery have a substantial effect on interstate commerce to satisfy the Hobbs Act element of interstate commerce, this robbery would not have been found to be a Hobbs Act violation because there was not direct substantial interference with interstate commerce.

B. The Substantial Effects Test Provides the Best Safeguard to Basic Federalism Principles

The Supreme Court’s denial of certiorari in the *Rivera-Rivera* case is a failure of the Court to protect federalism principles and further proof that the Hobbs Act must be amended to contain substantial effect language. An amended Hobbs Act would prohibit

119. *Rivera-Rivera*, 555 F.3d at 289.

120. *Morrison*, 529 U.S. at 618.

121. See *Hickman*, 179 F.3d at 231 (Higginbotham, J., dissenting) (quipping that if courts continue to require only needing to find a *de minimis* interference with interstate commerce in robbery cases, then the taking of a child’s lemonade from her lemonade stand would also potentially be included as a Hobbs Act violation as well).

122. Bradley, *supra* note 36, at 578.

Congress from future overextensions into areas of traditional state concerns.¹²³ A *de minimis* standard, through its aggregation effect, inherently gives Congress the ability to legislate in a criminal law area that has been traditionally reserved to the states.¹²⁴ Such a usurpation of traditional state powers could never have been intended by the Framers because the Framers intentionally did not give the federal government a federal police power.¹²⁵ Federalism works in this way to ensure that a healthy balance of power is shared between the states and the federal government, thereby reducing the possibility of abuse by either one.¹²⁶

Use of the substantial effects test is much more conducive to upholding and protecting the federalism principles embodied in the Constitution. Use of this test, instead of the *de minimis* test used in *Rivera-Rivera*, would ensure that Congress could continue to punish robberies that substantially effect interstate commerce on their own. However, Congress would be prevented from punishing more local robberies that do not directly have a substantial interference with interstate commerce.¹²⁷ This would allow the states' full use of their traditional police powers in order to crackdown on regular robberies, without concern about whether their jurisdiction is proper in the situation. Thus, the substantial effects test would provide the states with the ability to check the federal government's broad power under the Commerce Clause,

123. See *Collins*, 40 F.3d at 101 (stating that the Hobbs Act clearly was only intended to reach certain activities having an effect on interstate commerce, and that the States are in the most suitable position to enforce general criminal laws); *United States v. Bass*, 404 U.S. 336, 349 (1971) (stating that, unless Congress conveys its purpose clearly, congressional acts will not be deemed to significantly change the federalism balance between the national and state governments); see also Mangan, *supra* note 17, at 541 (arguing that allowing Congress's authority to reach too broadly would affect the integrity of the federalism system). *But see* *United States v. Farmer*, 73 F.3d 836, 843 (8th Cir. 1996) (declaring that the court has little doubt that Congress has the power to protect businesses from violence that is connected to an interstate chain).

124. See Thomas, *supra* note 66, at 235-236 (stating that, under basic fundamental principles, states still retain jurisdiction over the great majority of policymaking that affects the daily lives of its citizens). *Contra* *United States v. Bailey* 990 F.2d 119, 126 (4th Cir. 1993) (holding that the Tenth Amendment does not bar the federal government from enforcing its laws, even when state laws exist addressing the same criminal act).

125. See *Lopez*, 514 U.S. at 596-97 (Thomas, J., dissenting) (declaring that the Supreme Court has always rejected reading the Commerce Clause in a light that would grant Congress the ability to exercise a federal police power).

126. See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (stating that a healthy balance of power-sharing between the states and the federal government is critical in reducing the risk of tyranny and abuses of authority by either side).

127. See *Lopez*, 514 U.S. at 557 (noting that, in using this substantial effects test, simply because Congress concludes that a particular activity has a substantial effect on interstate commerce does not necessarily make it so).

ensuring that the states retain control over the police powers.¹²⁸

V. CONCLUSION

The substantial effects test is much more suited for use in Hobbs Act robbery cases than the *de minimis* standard. The substantial effects test ensures the proximity of the nexus between the business and its interstate commerce dealings that the robbery supposedly affected. This proximity ensures that the robbery actually substantially affected interstate commerce—true to the black letter of the *Lopez* ruling.¹²⁹

Furthermore, the substantial effects test is better suited for protecting federalism principles. This test creates a higher burden for the federal government to prove how a robbery substantially affected interstate commerce. By requiring a substantial interference with commerce, great deference is given to the states' general police powers, but it allows the federal government to bring charges against those who have substantially affected interstate commerce with their individual robbery. Thus, federalism principles are protected and the government is free to pursue a more select group of Hobbs Act offenders.

128. See Thomas, *supra* note 66, at 236 (stating that the framers believed that this struggle between national and state power would ensure that the states would have an interest in monitoring the activities of the federal government to guarantee that the federal government was operating within its enumerated authorities).

129. See *Lopez*, 555 F.3d at 558-59 (declaring that if there is not interference with an instrumentality or channel of interstate commerce, it must be proven that the activity said to be affected had a substantial relation to interstate commerce).