Equal Protection Held Hostage: Ransoming the Constitutionality of the Hostage Taking Act

Victor C. Romero

Follow this and additional works at: http://elibrary.law.psu.edu/fac_works

Part of the Civil Rights and Discrimination Commons, Fourteenth Amendment Commons, and the Immigration Law Commons

Recommended Citation
EQUAL PROTECTION HELD HOSTAGE:
RANSOMING THE CONSTITUTIONALITY
OF THE HOSTAGE TAKING ACT

Victor C. Romero

I. INTRODUCTION

In the early 1980s, international and domestic public sentiment against terrorist acts ran high following the 1975 OPEC hostage-taking incident, the Entebbe airport hijacking in 1976, and perhaps most notorious of all, the Iranian Hostage Crisis of 1979. In response, many members of the global community became signatories to the 1979 International Convention Against the Taking of Hostages (Hostage Taking Convention or HTC). The United States signed on to that agreement, and in 1984, Congress passed enabling legislation entitled the Hostage Taking Act (HTA or the Act) as part of a crime control initiative aimed at deterring future terrorist acts. Because Congress was most concerned with conforming to the Hostage Taking Convention and addressing international terrorism, the HTA does not apply in domestic non-governmental hostage-taking cases unless either the hostage-taker or the hostage is a noncitizen.

* Assistant Professor of Law, The Dickinson School of Law; B.A. 1987, Swarthmore; J.D. 1992, University of Southern California.

I would like to thank Bob Ackerman, Gil Carrasco, Jack Chin, Harvey Feldman, Ted Janger, Michael Mogill, and Eric Muller for their insightful comments on earlier drafts of this Article; Andrea Myers for her excellent research assistance; Dean Peter Glenn for providing the resources and financial support for this Article; and most importantly, my wife, Corie, and my family in the Philippines for their tremendous love and faith.

1 For a brief description of these events, see JOSEPH J. LAMBERT, TERRORISM AND HOSTAGES IN INTERNATIONAL LAW—A COMMENTARY ON THE HOSTAGES CONVENTION 1979, at 2-3 (1990).


4 See infra Parts III, IV. This Article uses the term "noncitizen" in place of "alien," and "undocumented immigrant" in place of "illegal alien." While the term "alien" is one of art that has a specific legal meaning under 8 U.S.C. § 1101(a)(3), I agree with Professor Gerald Neuman that referring to noncitizens as aliens "calls attention to their 'otherness,' and even associates them with nonhuman invaders from outer space." Gerald L. Neuman, ALIENS AS OUTLAWS: GOVERNMENT SERVICES, PROPOSITION 187, AND THE STRUCTURE OF EQUAL PROTECTION DOCTRINE, 42 UCLA L. REV. 1425, 1428 (1995). I also prefer the term "undocumented immigrant" over "illegal alien" for two reasons:
Until 1988, the only reported case applying the HTA involved the prosecution of a Lebanese citizen accused of hijacking a Jordanian airliner with U.S. citizens aboard;\(^5\) this incident fit the prototypical international terrorist model to which the HTA was originally intended to apply. However, since that initial case, the federal government has found creative ways to invoke the HTA in domestic hostage-taking situations that bear little resemblance to international terrorism and are more akin to garden-variety state-law kidnapping. To date, the Act has been invoked in domestic hostage-taking situations in cases ranging from undocumented immigrant smuggling,\(^6\) to alleged underlying drug conspiracies,\(^7\) to individual kidnapping cases;\(^8\) the common factual link among these actions is that, in each, either the hostage or the hostage-taker was a noncitizen.\(^9\)

When the HTA has been challenged under an equal protection analysis,\(^10\) the federal courts have uniformly held the Act's alienage classification to be a valid exercise of Congress's plenary power over the conduct of foreign relations and to be rationally related to achieving Congress's goals of complying with the Hostage Taking Convention and deterring international terrorism.\(^11\) In response, this Article contends that, following the Supreme Court's lead in \textit{Adarand Constructors, Inc. v. Peña}\(^12\) and \textit{City of Cleburne v. Cleburne Living Center, Inc.},\(^13\) the continuing maltreatment of noncitizens in this coun-

---


\(^{6}\) See infra subpart IV.A.

\(^{7}\) See infra subpart IV.C.

\(^{8}\) See infra subparts IV.B, IV.D.

\(^{9}\) Indeed, the plain terms of the Act make it inapplicable to situations in which the hostage-taker and hostage are both United States citizens, except in situations in which the hostage-taker attempts to coerce the United States government. See infra text accompanying note 82.

\(^{10}\) This Article is limited to discussing the HTA under an equal protection analysis; some courts have discussed the constitutionality of the HTA in other contexts. See, e.g., United States v. Chen De Yan, 905 F. Supp. 160, 163-65 (S.D.N.Y. 1995) (examining the constitutionality of the Act under the Commerce Clause and the Necessary and Proper Clause, as well as under an equal protection analysis).

\(^{11}\) See infra Part IV.


\(^{13}\) 473 U.S. 432 (1985). See infra subpart V.A.
try requires that federal alienage classifications be reviewed with the same strict, or at least heightened rational basis, scrutiny applied to state legislation. By subjecting the HTA's alienage classification to more stringent review, courts will likely find that the federal government's proffered rationales of treaty compliance and terrorist deterrence do not satisfy the guarantees of equal protection when invoked in what are otherwise state-law kidnappings. Specifically, noncitizens' equal protection rights are violated when the HTA is applied to purely local kidnappings that bear no relation to Congress's foreign policy goals; leaving such prosecutions unchecked may lead to a two-tier system in which citizen defendants are prosecuted in state court while noncitizens face generally stiffer penalties in federal court on the same facts—facts that should create purely local, not national, interest.

As a check on the government's charging power under the Act, this Article suggests the following equal protection safeguard: In domestic non-governmental hostage-taking situations, the HTA should not apply solely on the basis of the hostage-taker's or hostage's alienage absent some other legitimate nexus to foreign relations. Such a requirement will have two salutary effects. First, an international nexus arrangement would act as a check on alienage discrimination; without such a requirement, noncitizens may find themselves haled into federal court in far greater numbers than their citizen counterparts. Such vigilance is especially important because alienage often serves as a proxy for race and the maximum penalty underlying an HTA offense—a sentence of life imprisonment—functions as a powerful bargaining chip for the federal government against those who are among society's most powerless. Second, absent this nexus, the

---

14 18 U.S.C. § 1203(a) (1994) (requiring imprisonment "for any term of years or for life."). Under the federal sentencing guidelines, "kidnapping, abduction, or unlawful restraint" is punishable at a base offense level of 24; specific offense characteristics that enhance the sentence include whether a demand upon the government was made, whether the victim sustained permanent or life-threatening bodily injury, whether a dangerous weapon was used, and so on. U.S. SENTENCING GUIDELINES MANUAL § 2A4.1 (1996). In contrast, state penalties vary greatly, ranging anywhere from a minimum of parole to a maximum sentence of death. However, only Nevada's and Washington's statutes carry a maximum death sentence; most of the other state statutes carry maxima from a specific term of years to life imprisonment. Thus, a kidnapping involving a noncitizen defendant in the state of Delaware would be punishable by a maximum of 20 years under applicable state law, but by a maximum of life imprisonment under the HTA. DEL CODE ANN. tit. 11, § 783a (1995) (kidnapping in the first degree is a Class B felony which, under DEL CODE ANN. tit. 11, § 4205 (1995), carries a minimum sentence of 2 years and a maximum of 20 years). See also infra Appendix A, which lists additional state kidnapping statutes.

15 The international nexus test serves as a check on prosecutorial discretion; my concern is that absent such a check, future HTA cases may have a disparate impact upon noncitizens. This test is designed to obviate the need for the defense of selective prosecution in future cases. For commentary and cases on the selective prosecution doctrine, see, e.g., Tobin J. Romero, Project: Twenty-Fourth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1993-1994, 83 GEO. L.J. 839, 839-50 (1995) (discussing recent federal appeals court
Act will displace\textsuperscript{16} state kidnapping laws in purely intrastate cases in which the only distinguishing fact is the nationality of the hostage-taker or hostage. Consequently, this nexus test will ensure that ordinary kidnapping cases will be prosecuted by the states, thereby relieving some of the burden on the federal courts and preserving comity between the federal and state systems.

Part II of this Article describes the 1979 Hostage Taking Convention and sets forth some of its provisions in an effort to better understand the impetus for the HTA. Part III examines the legislative history of the HTA and briefly describes the \textit{Yunis} case as the prototypical hostage-taking action that the HTA was designed to address. Part IV reviews the constitutionality of the HTA under equal protection guarantees as interpreted by the most recent court decisions. Part V suggests an alternative to the courts’ ready willingness to find a rational basis for federal enforcement of the HTA—one in which the courts, under the lens of a more heightened scrutiny, require the federal government to demonstrate how the hostage-taking act at issue bears some rational relationship to foreign relations.

II. THE 1979 INTERNATIONAL CONVENTION AGAINST THE TAKING OF HOSTAGES

The Hostage Taking Convention is one of six conventions and two protocols enacted to combat international terrorism.\textsuperscript{17} While the other international instruments contain prohibitions against certain


specific acts of hostage-taking committed during armed conflicts, only the Hostage Taking Convention contains a general prohibition against international hostage-taking.\textsuperscript{18}

In September 1976, in the wake of the infamous "Raid on Entebbe," the former Federal Republic of Germany proposed that the 31st Session of the United Nations General Assembly include on its agenda the topic of drafting an international convention against the taking of hostages.\textsuperscript{19} A drafting committee was formed, and during its life span, two other hostage-takings and rescue operations took place: the 1977 hijacking of a Lufthansa aircraft and holding of hostages at Mogadishu, Somalia, which precipitated a rescue operation by commandos from the former Federal Republic of Germany; and the 1978 hijacking of an Egyptian aircraft and holding of hostages at Larnaca, Cyprus, which resulted in a raid by Egyptian commandos.\textsuperscript{20} Moreover, the American hostages in Iran were seized only one month before the General Assembly's consensus adoption of the Hostage Taking Convention.\textsuperscript{21} One astute commentator declared: "It would appear that the revulsion of the world community at these acts of hostage-taking, coupled with the realization by small and developing States that they are vulnerable to rescue operations, helped lead to the success of the drafting process."\textsuperscript{22} After a series of separate votes on various individual articles, the Hostage Taking Convention came into force on June 4, 1983, thirty days after deposit of the twenty-second ratification.\textsuperscript{23} The United Nations adopted the Hostage Taking Convention by consensus in December 1979, and as of January 1, 1995, seventy-five nations had become parties to it.\textsuperscript{24}

Four articles of the Hostage Taking Convention shed the most light on the HTA, the United States' enabling legislation: Article 1 (which defines the offense of hostage-taking); Article 2 (which requires that each member state make the offenses set forth in Article 1 punishable); Article 5 (which requires that member states establish jurisdiction over hostage-taking offenses); and Article 13 (which limits the Hostage Taking Convention to international acts of hostage-taking).

\textsuperscript{18} Id. at 5.
\textsuperscript{19} Id. at 57.
\textsuperscript{20} Id. at 65.
\textsuperscript{21} Id.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
A. Article 1: Definitions

Article 1 provides that:

1. Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offense of taking of hostages ("hostage-taking") within the meaning of this Convention.

2. Any person who:
   (a) attempts to commit an act of hostage-taking, or
   (b) participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking
likewise commits an offence for the purposes of this Convention.25

Under the Hostage Taking Convention, the offense of "hostage-taking" requires that the offender seize or detain a hostage and threaten to kill, injure, or continue the hostage's detention with the purpose of compelling a third party to behave in a certain way. Interestingly, this definition expresses no concern for either the motives of the hostage-taker—be they pecuniary or political—or the identity of the hostage.26 While the Hostage Taking Convention was still in committee, several states attempted to restrict the definition of the hostage-taker to include members of totalitarian and oppressive regimes, but to exclude from prosecution political freedom fighters combatting unjust colonial rule.27 No compromise was reached on this language, and the broadest "any person" terminology prevailed. Conversely, other states moved to exclude members of an oppressive regime from the defini-

25 HTC, supra note 2, art. 1.
26 Moreover, the Hostage Taking Convention does not draw distinctions as to the nationalities of either the hostage-taker or the hostage. Interestingly, even though it was primarily drafted to combat hostage-taking by international terrorists, the Convention itself does not define the term "terrorism" because of the political nature of the term. Some commentators define terrorism as including all concerted acts of violence against a targeted group for the purpose of achieving a political end, while others would distinguish the motive behind the political act. As one writer has stated, "one man's terrorist is another man's freedom fighter." Elizabeth R.P. Bowen, Note, Jurisdiction Over Terrorists Who Take Hostages: Efforts to Stop Terror-Violence Against United States Citizens, 2 Am. U. Int'l L. & Pol'y 153, 159 (1987) (contrasting Menachem Begin, Freedom Fighters and Terrorists, in International Terrorism: Challenge and Response 39-46 (B. Netanyahu ed., 1979)). For a discussion of definitions of terrorism in both international and domestic legal instruments, see Douglas Kash, Abductions of Terrorists in International Airspace and on the High Seas, 8 Fla. J. Int'l L. 65, 66-73 (1993).
27 For example, Libya suggested the following language to modify the Federal Republic of Germany's "any person" terminology: "the term 'taking of hostages' is the seizure or detention, not only of a person or persons, but also of masses under colonial, racist or foreign domination, in a way that threatens him or them with death, or severe injury or deprives them of fundamental freedoms." U.N. Doc. A/AC.188/L.9 (1979), as cited in Lambert, supra note 1, at 62 & n.220.
tion of "hostage" under the Hostage Taking Convention; once again, the more restrictive language failed to persuade. In addition, the drafting history of this article makes clear that individual, and not state, liability is targeted by the Hostage Taking Convention; moreover, any individual acting at a state's behest is not immune from liability.

Article 1 also requires that the hostage-taker act with the intent to compel compliance by a third party. Although the representative from the United Kingdom suggested that the language was too restrictive in that it would not take into account situations in which the hostage-taker did not desire to compel the act of a third party or where the element of compulsion was ambiguous, the Hostage Taking Convention members took no concrete steps to address this issue. An "intent to compel" is, therefore, a necessary element of the offense. Nonetheless, the hostage-taker need not convey any explicit (oral or written) demands to the third party as long as the offender's motive is to compel the party's compliance with any unspoken demands. Finally, the hostage-taker must compel a specific third party to do or not do something; the drafting legislation confirms that Article 1's list of possible third parties was meant to be exhaustive.

B. Article 2: Penalties

Article 2 mandates that "[e]ach State Party . . . make the offences set forth in article 1 punishable by appropriate penalties which take into account the grave nature of those offences." While Article 1 does not impose any obligations upon the signatory states, Article 2 specifically requires that each state fix penalties appropriate for each of the offenses outlined in the first article. However, Article 2 says nothing regarding the actual imposition of specific penalties by the member states; the provision requires only that the penalties take into account the "grave" nature of the offenses. Moreover, if a state al-

28 Lesotho, Tanzania, Algeria, Egypt, Guinea, Libya, and Nigeria proposed that the "taking of hostages" not include those "carried out in the process of national liberation against colonial rule, racist and foreign regimes, by liberation movements recognized by the United Nations for regional organizations." U.N. Doc. A/AC.188/L.5 (1979), as cited in Lambert, supra note 1, at 62 & n.222.
29 Lambert, supra note 1, at 79-80.
30 Id. at 84-85.
31 Id. at 85.
32 Lambert notes that without an explicit oral or written demand, a hostage-taker's intent is more difficult to prove. Id.
33 Id. at 85-87. In addition, the Hostage Taking Convention specifically lists "attempt" and "participation" as Article 1 offenses. Id. at 89-92.
34 HTC, supra note 2, art. 2.
35 Lambert, supra note 1, at 93.
36 Id. at 93, 102-03.
ready has laws in place that provide penalties for these hostage-taking offenses, it need not enact new legislation.\textsuperscript{37} Thus, the Hostage Taking Convention's enforcement rests entirely upon municipal legal systems rather than on any overarching international law framework.\textsuperscript{38} In response, member nations have either relied on existing domestic legislation or drafted specific laws punishing Article 1 acts; one survey of maximum penalties adopted by various member states revealed a range from a fourteen-year prison sentence to death.\textsuperscript{39} The United States' enabling legislation, the HTA, specifies a sentence from a term of years to life.\textsuperscript{40}

\textbf{C. Article 5: Jurisdiction}

Article 5 obligates member states to establish jurisdiction over the hostage-taking offenses enumerated in Article 1.\textsuperscript{41} An article establishing signatory state jurisdiction is a necessary feature of international conventions because member states seek to ensure that the maximum number of international criminals are brought to justice; when more states establish jurisdiction over international offenses,

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{37} Id. at 101. This policy has prompted two responses from member states: one, to enact specific enabling legislation (as the U.S. did via the HTA); and two, to rely on existing law that already punishes similar acts such as kidnapping. \textit{Id.}
\item \textsuperscript{38} Id. at 93. Lambert identifies two reasons that underlie this deference to municipal legal enforcement of the Hostage Taking Convention: first, the extent of individual liability under international law for criminal offenses is unclear; and second, no judicial or enforcement mechanisms with the exception of those in individual states' legal frameworks exist to address international offenses. \textit{Id.} at 94.
\item \textsuperscript{39} Id. at 105 ("The most severe penalty—death—can be imposed by the Philippines, while the least severe maximum penalty—14 years—is provided for under the law of New Zealand."). While such a disparity in sentences might support the move toward a more uniform sentencing policy, Lambert notes that most countries reject such an approach. \textit{Id.} at 102-03 & n.39 (describing similar subcommittee discussions during the drafting of the Hague Convention).
\item \textsuperscript{40} 18 U.S.C. § 1203(a) (1994). For the sentencing guidelines provision, see \textit{supra} note 14.
\item \textsuperscript{41} Article 5 provides:
\begin{enumerate}
\item Each State Party shall take such measures as may be necessary to establish its jurisdiction over any of the offenses set forth in article 1 which are committed:
\begin{enumerate}
\item (a) in its territory or on board a ship or aircraft registered in that State;
\item (b) by any of its nationals or, if that State considers it appropriate, by those stateless persons who have their habitual residence in its territory;
\item (c) in order to compel that State to do or abstain from doing any act; or
\item (d) with respect to a hostage who is a national of that State, if that State considers it appropriate.
\end{enumerate}
\item Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offenses set forth in article 1 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States mentioned in paragraph 1 of this article.
\item This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.
\end{enumerate}
\end{enumerate}

HTC, \textit{supra} note 2, art. 5.
\end{footnotesize}
more criminals are prosecuted. As with the penalties provisions of Article 2, Article 5 does not require that a state enact new legislation if its current laws sufficiently extend jurisdiction over the Article 1 offenses. Because this Article deals specifically with domestic hostage-taking acts, this subpart need not describe the nuances of Article 5 jurisdiction and the principles underlying such concepts as extradition and extraterritorial hostage-taking acts. It is sufficient to note that the thrust of Article 5 is to ensure that the member states establish laws that will maximize their opportunity for prosecuting international hostage-takers as a means of deterring international terrorism.

**D. Article 13: Limitations**

Article 13 limits the HTC to international acts of hostage-taking:
This Convention shall not apply where the offence is committed within a single State, the hostage and the alleged offender are nationals of that State and the alleged offender is found in the territory of that State.

Thus, the HTC will not apply where the following four conditions are present: (1) the offense is committed within a single signatory nation; (2) the hostage is a citizen of that nation; (3) the hostage-taker is a citizen of that nation; and (4) the hostage-taker is subsequently found in the territory of that nation. Simply put, the Hostage Taking Convention does not apply to purely internal state matters; the idea behind Article 13 is that purely domestic concerns should best be left to the individual member states.

In sum, the historical backdrop and text of the Hostage Taking Convention reveal a document intended to address the urgent problem of international hostage-taking while leaving to the member states much discretion over the actual implementation of the treaty, from defining "terrorism," to establishing jurisdiction, to imposing penalties. Despite this deference accorded the member states, the Hostage Taking Convention emphasizes through Article 13 that its scope is predominantly international and that any clearly internal hostage-taking acts would be the province of the member nations themselves.

42 "Because such crimes present a threat to the entire international order, it is imperative that offenders are prosecuted, and the greater the number of States which have jurisdiction over the offenses, the greater the possibility that this will happen." Lambert, supra note 1, at 135.

43 Id. at 142.

44 For an excellent discussion of these issues, see id. at 134-65.

45 HTC, supra note 2, art. 13.

46 Lambert, supra note 1, at 299.

47 "The only problem of interpretation which arises with respect to this Article is whether it excludes from the scope of the Convention acts of hostage-taking which are otherwise internal in nature, but where the target of demands is either a foreign State or a third party located in a foreign State." Id.
In turn, the next Part discusses the United States's enabling legislation, the HTA, the legislative history behind it, and its professed purposes.

III. The Hostage Taking Act

A. Legislative History

The HTA was the United States's response to the Hostage Taking Convention; specifically, the HTA was enacted to implement the Convention. Dr. Joseph Lambert surmises that the United States enacted the HTA for three reasons: first, the existing federal kidnapping statute did not adequately cover the conduct described in Article 1 of the HTC as required by Article 2; second, section 1201 of the federal kidnapping statute may not have had the jurisdictional reach required by Article 5 of the HTC; and third, even if the jurisdictional prerequisites were met, the U.S. was required to enact enabling legislation because the HTC is not a self-executing treaty. Professor Phillip Heymann and Ian Gershengorn suggest three very similar purposes behind the HTA: "(1) to implement the international Convention on the Taking of Hostages... [;] (2) to protect U.S. interests by filling a gap in federal law; and (3) to send a message to the international community." The legislative history and executive pronouncements at the time reveal that the commentators are correct in their assessment that the

---

48 The Joint Explanatory Statement of the Committee of the Conference states that the Crime Bill under which the HTA was passed [i]mplements the International Convention Against the Taking of Hostages. It supplements the Federal kidnapping statute to cover certain acts of hostage taking, prohibits hostage taking intended to compel a third person or a government to take or refrain from acting, and expands Federal jurisdiction over certain hostage taking offenses. The provision also implements the International Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation. It expands the protections of current law to cover more persons, to prohibit more acts that threaten aviation safety, and to expand Federal jurisdiction over certain offenses.


49 18 U.S.C. § 1201(a) (1994). The federal kidnapping statute provides in pertinent part: (a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when — (1) the person is willfully transported in interstate or foreign commerce... shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.

Id. § 1201(a)(1) (emphasis added). Thus, in most circumstances, the federal kidnapping statute would not apply to international hostage-taking situations that occurred completely within one state.

50 Dr. Lambert's comment specifically addresses the issue of the United States' extraterritorial jurisdiction over international hostage-taking acts; again, this issue is beyond the scope of this Article. For thoughtful commentary on international jurisdictional implications of the Act, see infra note 59 and authorities cited therein.

51 LAMBERT, supra note 1, at 102 & n.38.

52 Heymann & Gershengorn, supra note 5, at 5.
HTA was aimed at deterring international terrorism while simultaneously ensuring that the statute did not usurp the states' power to prosecute kidnapping crimes under their own laws. In 1984, the Reagan Administration pushed the HTA through Congress as part of the Comprehensive Crime Control Act of 1984. During the requisite congressional hearings on Senate Bill 2624, precursor to the HTA, then-Deputy Assistant Attorney General Victoria Toensing stated that while it provided for broad jurisdiction over the hostage-taking offense, the bill did not intend to displace existing state kidnapping law: "Although the bill is not limited to hostage-taking by terrorists, in keeping with the purpose of the international Convention, we do not intend to assume jurisdiction where there is no compelling federal interest." The Justice Department echoed this sentiment in its responses to the inquiries of Senator Patrick Leahy regarding the bill. Indeed, Senator Leahy put the federalism concern squarely before the Justice Department:

Question #8 — While I appreciate the need to honor international obligations, and this of course includes conventions and treaties, this legislation is another example of a bill that extends federal jurisdiction in an area that has been traditionally the domain of local law enforcement authorities. This approach has been seen in such bills as the Career Criminal Act and has not fared well with a number of us in the Senate with actual law enforcement experience at the state level.

Answer: As reflected by the answers to the previous questions, the Department of Justice is very sensitive to issues of federalism in the area of law enforcement. Proposed subsection 1201(g) and the entire body of material submitted by the Administration in support of S. 2624 clearly demonstrate the continuing vitality of the state's primary responsibility for handling hostage taking situations. S. 2624, while being sought because of our international obligations, supplements state law. It does not supplant it. We are confident that this message will be understood and will be well received by the nation's law enforcement community.

In addition, President Reagan urged Congress to pass the bill to "demonstrate to other governments and international forums that the United States is serious about its efforts to deal with international ter-

55 The following statements evince the executive branch's desire to maintain the division of responsibility between state and federal prosecuting arms: "we normally would expect state and local governments in the United States to be able to deal with most hostage-taking situations when a demand is made upon them . . . ."; "we expect state and local law enforcement authorities to handle most internal situations . . . ."; and "[u]nder S. 2624, there is an expansion of concurrent federal jurisdiction to what has traditionally been and what ought to remain primarily a local law enforcement responsibility." Legislative Initiatives Hearings, 98th Cong., 2d Sess. (1984) (responses of the U.S. Department of Justice to Written Questions of Senator Leahy).
torism." However, the President also realized the importance of not having the federal government encroach upon state jurisdiction:

[T]he new provision on hostage-taking is not intended to usurp the authority of state and local law enforcement authorities. It is expected that most kidnappings and hostage-takings will continue to be handled by those authorities and that the federal government will not necessarily intervene in situations that local authorities can handle.

Thus, at the time the bill was adopted, the Justice Department and the President were in accord that while it was passed as enabling legislation to address the international concerns raised by the HTC, Senate Bill 2624 would supplement, but not supplant, existing state kidnapping law. The federal government understood that most hostage-taking situations would be the province of state, not federal, law.

B. Early Case Law Applying The HTA: United States v. Yunis

With these concerns voiced and apparently addressed, the bill passed into law, becoming the HTA. The first important federal case to invoke the HTA was *United States v. Yunis,* in which foreign nationals hijacked an airliner carrying several American citizens. On appeal following the defendants' convictions, the Court of Appeals for the D.C. Circuit had little trouble finding that the federal district court had jurisdiction over this case. *Yunis* involved the prototypical international hostage-taking case—foreign nationals hijacking an airliner carrying American citizens; this was not a state kidnapping case, nor would any one state presumably be interested in prosecuting the defendants here. This was a crime against citizens of the United States, and the federal courts are the proper fora for vindicating U.S. nationals' rights.

---

60 924 F.2d at 1090-93.
61 In addition, the federal courts are also the proper fora for extraterritorial kidnappings where the hostage-taker is eventually found in the United States. See, e.g., United States v.
More recently, however, the federal courts have provided fora for HTA prosecutions in reported cases that look less like international terrorism and more like garden-variety state-law kidnapping. This phenomenon has prompted defendants to challenge their convictions on equal protection grounds. Specifically, they contend that the HTA’s alienage classification requiring that either the hostage-taker or the hostage be a noncitizen violates equal protection guarantees. As discussed in the next Part, all the courts that have addressed this issue have agreed that the HTA passes constitutional muster.

IV. CURRENT EQUAL PROTECTION CHALLENGES TO THE HOSTAGE TAKING ACT

As of this writing, only four cases have discussed whether the HTA violates equal protection, and only one of them comes from an appellate court: United States v. Lopez-Flores,$^{62}$ the only circuit court case; United States v. Yang Jin Song,$^{63}$ United States v. Pacheco,$^{64}$ and United States v. Chen De Yian.$^{65}$ All issuing their opinions between August and December of 1995, the courts in these cases uniformly held that the HTA did not violate equal protection.

A. United States v. Lopez-Flores

In United States v. Lopez-Flores,$^{66}$ the Ninth Circuit affirmed the trial court’s convictions of defendants Jose Lopez-Flores, Jose Eduardo Hernandez, Jose Perez-Garcia, and Jaime Ortiz-Mejia—all foreign nationals—for hostage taking in violation of the Hostage Taking Act.$^{67}$ In June 1992, an agent of these defendants and Amilcar Santos, a Mexican citizen, agreed that Santos would be smuggled illegally into the United States in exchange for Santos’s promised payment of about $250.$^{68}$ Santos understood that the smugglers would take him to his wife’s residence in the United States, where she would pay the fee upon his delivery.$^{69}$ However, after crossing the border at Tijuana, the smugglers did not take Santos to his wife’s residence; in-

---

$^{62}$ 63 F.3d 1468 (9th Cir. 1995).
$^{66}$ 63 F.3d 1468 (9th Cir. 1995).
$^{67}$ Id. at 1470 (citing 18 U.S.C. § 1203 (1984)). The panel also affirmed these defendants’ convictions for violation of 18 U.S.C. § 924(c) for their use of firearms in a crime of violence. Id.
$^{68}$ Id.
$^{69}$ Id.
stead, they took him to a "drop house" in Los Angeles, California, where he was locked in a room with approximately twenty other smuggled persons. In addition, the smugglers increased the smuggling fee from $250 to approximately $400.

Serving as captors and guards, the smugglers fed Santos once a day and permitted him to leave the room only to use the bathroom. The smugglers beat Santos and threatened him at gunpoint; Santos was told that the smugglers had attempted to contact his wife and that he would not be released until his wife or friends paid the smugglers' increased fee. In a dramatic turn of events, Santos escaped on June 5, 1992; he led police officers to the drop house, and the defendants were subsequently arrested, charged, and convicted.

On appeal, the defendants first contended that the HTA, "which, inter alia, criminalizes conduct that involves either a non-national perpetrator or non-national victim, violates the Equal Protection Clause by impermissibly classifying offenders and victims on the basis of alienage." As a second point, the defendants argued that the HTA does not apply to a case involving undocumented immigrant smuggling.

Without hearing oral argument, the Ninth Circuit panel concluded that the HTA "is constitutional as an exercise of Congress'[s] plenary powers over aliens and foreign relations." In addition, the court adopted the reasoning of the Fifth Circuit in United States v. Carrion-Caliz to hold that the HTA may be applied to undocumented immigrant smuggling. Both of these rulings merit further scrutiny.

1. Whether the HTA is Constitutional Under Equal Protection.—The Hostage Taking Act provides in relevant part:

70 Id.
71 Id.
72 Id.
73 Id.
74 Id. at 1470-71 (detailing Santos's escape through a window and his subsequent pursuit at gunpoint by the defendants).
75 Id. at 1471.
76 Id. at 1470.
77 Id.
78 Id.
80 Lopez-Flores, 63 F.3d at 1470.
81 In an unpublished disposition decided in 1994, the Ninth Circuit had the opportunity to rule on the facial constitutionality of the HTA in United States v. Ortiz-Marquez, No. 91-50112, 1994 U.S. App. LEXIS 19179, at *10-*11 (9th Cir. July 16, 1994). In yet another smuggling case, the Ortiz-Marquez court held that it need not reach the equal protection issue because even if the defendants had been U.S. nationals, the victim was a noncitizen, and therefore the Act as applied to this case passed constitutional muster. Id.
(a) [W]hoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or governmental organization to do or abstain from any act ... shall be punished by imprisonment by any term of years or for life.

....

(b)(2) It is not an offense under this section if the conduct required for the offense occurred inside the United States, each alleged offender and each person seized or detained are nationals of the United States, and each alleged offender is found in the United States, unless the governmental organization sought to be compelled is the Government of the United States.82

As the *Lopez-Flores* court noted:

If either the alleged offender or the victim is a non-national, the Hostage Taking Act applies; however, if both the alleged offender and the victim(s) are nationals of the United States (and the offense occurred in the United States and each alleged offender is found in the United States) then the Act is inapplicable, unless the alleged offender sought to compel the government of the United States to do or abstain from any act.83

Based on the preceding HTA sections, the *Lopez-Flores* defendants argued that the Act was facially invalid under an equal protection analysis because the statute applies only when at least one noncitizen is involved.84

The court began its analysis by invoking the Due Process Clause of the Fifth Amendment, which it noted "incorporates the Fourteenth Amendment's right to equal protection."85 In the court's view, equal protection analysis involves taking two steps: first, the defendants must show that "the statute, either on its face or in the manner of its enforcement, results in members of a certain group being treated differently from other persons based on membership in that group."86 The court concluded that the defendants had established this because noncitizens are treated differently under the statute than citizens.87


83 *Lopez-Flores*, 63 F.3d at 1471-72.

84 The court rejected the government's contention that the defendants had no standing to make this claim, accepting instead the defendants' contention that because they challenged the statute on its face, they had standing to proceed. *Id.* at 1472 (citing *McCleskey v. Kemp*, 481 U.S. 279, 291-92 n.8 (1987)).

85 *Id.* at 1472 (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954)).


87 *Id.* Congress must have contemplated four possible defendant-victim citizenship scenarios when it passed the HTA: (1) noncitizen defendant-noncitizen victim; (2) noncitizen defendant-citizen victim; (3) citizen defendant-noncitizen victim; and (4) citizen defendant-citizen victim. Assuming that noncitizens and citizens are equally likely to engage in hostage-taking, the HTA allows the noncitizen defendant to be prosecuted in twice as many scenarios as the citizen. Thus, the HTA would apply to both scenarios involving noncitizen defendants (scenarios 1 and 2), but only one scenario involving the citizen defendant (scenario 3, but not 4).
Second, once differential treatment is established, the court must “analyze under the appropriate level of scrutiny whether the distinction made between the groups is justified.”

As to the second prong, the court rejected the defendants’ contention that strict scrutiny should apply to the alienage classification. The court distinguished the cases cited by the defendants applying the strict scrutiny test on the ground that these were cases in which state, and not federal, laws adopted alienage classifications. Noting that the HTA was a federal law, the court stated that “[f]ederal laws that classify on the basis of alienage . . . receive less searching judicial review than do state laws that classify on that basis.”

Specifically, the court distinguished the federal government’s interests in noncitizens from those of the states, citing immigration and foreign relations as “paramount federal concerns.” While conceding that most of the cited federal laws subjected to rational basis scrutiny involved immigration—an area over which Congress wields plenary power—the court noted that the HTA “was prompted by considerations that are also uniquely federal.” Quoting the Alaska district court’s opinion in United States v. Tsuda Maru, the court remarked that the very nature of conducting foreign policy requires Congress and the executive to distinguish citizens from noncitizens; therefore, applying equal protection to limit these branches’ authority would undermine their ability to effectively conduct this country’s foreign relations.

The court also reviewed the historical purposes behind the HTA and found that the Act was designed to effectuate specific important foreign policy goals. Then-President Ronald Reagan promoted the HTA’s predecessor bill as part of a legislative package drafted in response to “a record number of terrorist attacks on American soil.” Reagan noted that the bill would “send a strong and vigorous message to friend and foe alike that the United States will not tolerate terrorist activity against its citizens within its borders.” The court observed

---

88 Id. (citing Plyler v. Doe, 457 U.S. 202, 217-18 (1982)).
89 Id. at 1473 (citing Bernal v. Fainter, 467 U.S. 216, 219 (1984); Graham v. Richardson, 403 U.S. 365 (1971); Hernandez v. Texas, 347 U.S. 475 (1954)).
90 Id. at 1473.
91 Id. (citing Nyquist v. Mauclet, 432 U.S. 1, 7 n.8 (1977); Mathews v. Diaz, 426 U.S. 67, 84-85 (1976); Mow Sun Wong v. Campbell, 626 F.2d 739, 744 n.10 (9th Cir. 1980), cert. denied, 450 U.S. 959 (1981)).
92 Id.
93 479 F. Supp. 519, 522-23 (D. Alaska 1979) (upholding provisions of the Fishing Conservation and Management Act of 1976, which distinguished between citizens and noncitizens, as essential to the conduct of foreign relations).
94 Lopez-Flores, 63 F.3d at 1474-75.
95 Id. at 1472.
96 Id. (quoting President’s Message, supra note 58) (internal quotation marks omitted).
that subsection (b)(2) of the HTA, which exempts most purely domestic hostage situations from coverage, “virtually mirrors Article 13 of the Hostage Taking Convention, which makes the Convention inapplicable to hostage takings lacking an international aspect.”97

The court concluded that the HTA served two legitimate foreign policy interests: the need to deter “in-country terrorist attacks” and “the desire to meet the United States' obligations under international treaties.”98 Because such concerns are uniquely federal and are reasonably promoted through the challenged legislation, the court determined that the HTA is constitutional on its face.

2. Whether the HTA May Be Applied to Undocumented Immigrant Smuggling.99—Next, the Lopez-Flores court rejected the appellants' contentions that 18 U.S.C. § 1203 does not apply to undocumented immigrant smuggling because the HTA was never intended to apply to such cases and the crimes of harboring and transporting undocumented immigrants are already adequately addressed in Title 8 of the U.S. Code.100 Instead of squarely addressing these issues, the court focused on whether the HTA “sets forth elements that clearly encompass the conduct at issue in this case.”101 Following the Fifth Circuit's decision in United States v. Carrion-Caliz,102 an-

97 Id. at 1472-73. “Article 13 provides that '[t]his Convention shall not apply where the offense is committed within a single state, the hostage and the alleged offender are nationals of that State and the alleged offender is found in the territory of that State.' Hostage Taking Convention, art. XIII, T.I.A.S. No. 11081.” Id. at 1473 n.2.

98 Id. at 1473.

99 There have been other reported undocumented immigrant smuggling cases in which the defendants were charged under the HTA, but the statute was not challenged on equal protection grounds. See, e.g., United States v. Peral-Cota, 988 F.2d 125 (9th Cir. 1993) (unpublished disposition); United States v. Chun Yen Chiu, 857 F. Supp. 353, 362 (D.N.J. 1993) (granting defendants' motions to suppress evidence). In one other opinion, the statute was challenged as an unconstitutional incursion upon Colorado's right to punish offenses committed within that state; that case was dismissed as procedurally defective and without merit. See United States v. Rutherford, 931 F.2d 64 (10th Cir. 1991) (unpublished disposition).

100 Lopez-Flores, 63 F.3d at 1475.

101 Id.

102 944 F.2d 220 (5th Cir. 1991), cert. denied, 503 U.S. 965 (1992). In United States v. Carrion-Caliz, defendant Ramiro Carrion-Caliz appealed from his conviction on three counts of violating the HTA on the ground that the government failed to produce sufficient evidence to convict him. In early 1990, Carrion agreed to transport Luisa Amanda Cuaremsa and three members of her family across the Texas-Mexico border so that the Cuaresmas could visit a relative in Miami, Florida. On March 18, 1990, Carrion and another individual, Santos, assisted the four family members across the Rio Grande River into the United States. Once there, the family members were secreted away and Carrion telephoned the Miami relative demanding more money for the members' release. Instead of paying the money, the relative traveled to Texas and contacted the local authorities. Under the supervision of U.S. officials, the relative arranged to deliver the ransom money to Carrion. When Carrion showed up to collect the money, he was arrested. At trial, Carrion was convicted on three counts of violating the HTA; he appealed to the Fifth Circuit, claiming that the government failed to produce sufficient evidence to convict him.
other smuggling case, the court reasoned that by the plain terms of the statute, undocumented immigrant smuggling could be covered. While the court acknowledged that undocumented immigrant smuggling was not expressly considered in the HTA's legislative history, testimony during hearings recognized that Senate Bill 2624 would cover more than terrorist acts, but only if there was a compelling federal interest at stake. Curiously, without any further explication, the court summarily concluded that the federal interests in this case were "very great." The court closed by stating that it joined the Fifth Circuit "in concluding that the Hostage Taking Act can be applied to [undocumented immigrant] smugglers whose conduct involves holding [undocumented immigrants] for ransom."

Thus, the Ninth Circuit believed the HTA to be facially constitutional because the Act's alienage classification is rationally related to Congress's foreign policy goals of deterring international terrorist threats within this country and America's obligation to abide by the Hostage Taking Convention. In addition, the panel found that the plain terms of the HTA apply to undocumented immigrant smuggling, even though such cases were not specifically contemplated by Congress when it passed the Act.

While this expansion of the HTA's reach to include undocumented immigrant smuggling may arguably be constitutionally acceptable, neither the Ninth nor Fifth Circuit anticipated two issues that indicated the beginning of a slide down a slippery slope: First, would

---

103 Lopez-Flores, 63 F.3d at 1476.
104 Id. (quoting Legislative Initiatives Hearings, 98th Cong., 2d Sess. 48-49 (1984) (statement of Victoria Toensing, Deputy Assistant Attorney General)).
105 Id.
106 Id.
the goals of deterring international terrorism and complying with the HTC have justified an "as applied" equal protection challenge had the Lopez-Flores defendants (or Carrion defendants, for that matter) been able to show that they were prosecuted based solely on their alienage and not for any legitimate foreign policy concerns? And second, would the court have looked to deterring international terrorism to justify the Act's facial constitutionality if the kidnapping had occurred entirely in the United States and had not involved a U.S.-Mexico border crossing? These disparate impact and comity concerns loom larger in the cases below in which the factual connection to foreign policy becomes even more tenuous than in the undocumented immigrant smuggling context.

B. United States v. Yang Jin Song

Unlike the undocumented immigrant smuggling cases, United States v. Yang Jin Song involved the alleged abduction at gunpoint of a Chinese national for the purpose of extorting a ransom of $30,000 from his relatives in mainland China.107 The defendants moved to dismiss the HTA count as violative of equal protection "because it impermissibly classifies victims and offenders on the basis of alienage."108

Citing Lopez-Flores, the Yang court held that, on its face, the Act did not violate equal protection guarantees. After noting that because the Act was properly promulgated under Congress's plenary powers over foreign policy, the court concluded that it need only find a rational basis to uphold the alienage classification at issue.109 The government proffered two bases, and the court reviewed both.

First, the court considered whether the need to comply with the HTC provided a rational basis for the alienage classification; specifically, Article 13 of the HTC contains an alienage classification, and the HTA's text simply tracks this language. Unlike the Ninth Circuit's ready acceptance of this basis in Lopez-Flores, the district court noted that simple compliance with a treaty would not, in and of itself, pass constitutional muster.110 Nonetheless, the court concluded that Congress's need to account for comity concerns along with treaty compli-

---

108 Id. at *3.
109 Id. at *7-*9.
110 The court noted that although courts generally defer to the political branches of government with respect to foreign policy issues, enabling legislation containing an impermissible classification would not survive rational basis scrutiny simply because an international treaty required it. Id. at *10 (citing Boos v. Barry, 485 U.S. 312, 324 (1988); Reid v. Covert, 354 U.S. 1, 16 (1957)).
ance made the alienage classification acceptable under the "rational basis" test.  

Second, the government asserted that Congress has a legitimate interest in combatting international terrorism. Again, while Lopez-Flores accepted this proffer as a reasonable basis for the HTA, the district court expressed its concern that while the Act may withstand a facial challenge, the Act must be applied constitutionally as well:

There are acts of kidnapping that would technically fit under the Hostage Taking Act but which do not have the slightest connection with international terrorism. This Act would cover even an intrafamilial kidnapping if the perpetrator or the victim happened never to have applied for citizenship, even if the parties involved had lived in this country for many years, had no connection with any foreign country, and there was no even arguably international aspect to the kidnapping itself.

Although Congress's interest in combatting international terrorism is clearly a legitimate government purpose, care must be taken to ensure that this legitimate purpose is not used as a springboard to discriminate against aliens merely on the basis of alienage.1

While it concluded that the relationship of the alienage classification to the goal of deterring international terrorism is not so attenuated as to render the distinction arbitrary or irrational,1 the court expressed concern that the classification be used for that exact purpose and not for the purpose of discriminating against noncitizens.1

Interestingly, the court did not proceed with an "as applied" analysis, perhaps because it believed that under its theory of the case, there was an unquestioned international involvement because the defendants sought to coerce ransom money from the victim's relatives in mainland China.1

In Yang, the district court expressed concern about the slippery slope problem. While it agreed with the Lopez-Flores court that the Act is facially constitutional, Yang cautioned the federal government to be careful not to selectively target noncitizens for prosecution, which could lead to violations of the equal protection guarantees as applied. However, in the court's mind, Yang did not present the district court with the proper facts to make the case for a discriminatory prosecution, given the defendants' professed motive of extorting money from a resident of mainland China.1

---

111 Id. at *10-*13. "The need to comply with the Treaty while not at the same time violating the Tenth Amendment does, in this case, constitute a legitimate governmental purpose for the use of the classification. Moreover, the use of the alienage classification in the Act does rationally further this purpose." Id. at *12-*13.

112 Id. at *14-*15.

113 Id. at *13-*14 (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985)).

114 Id. at *12-*13.

115 Id. at *1.
C. United States v. Pacheco

*United States v. Pacheco* involved a fact scenario more akin to state-law kidnapping than either the undocumented immigrant smuggling cases or *Yang*; in addition, *Pacheco* is the first case to consider whether the HTA was constitutional *as applied* to the defendants. Co-defendants Arturo Pacheco and Mario Alonso Quintero were charged with conspiracy to take a hostage and hostage-taking under the HTA.\footnote{902 F. Supp. 469, 470 (S.D.N.Y. 1995).} The government alleged that on or about February 2, 1995, Drug Enforcement Agency operatives arrested Lauren Brito and charged him with selling 250 grams of heroin to a confidential informant.\footnote{Id.} An unnamed individual subsequently contacted Brito and told him that he owed $16,000 for the heroin the government seized.\footnote{Id.} On March 21, 1995, four men abducted Carlos DeLeone, Brito’s brother-in-law, in Manhattan and took him to an apartment in Jackson Heights, New York, where Pacheco and Quintero were present.\footnote{Id.} Brito was again contacted and told that DeLeone would be harmed if Brito did not pay the $16,000 owed the abductors.\footnote{Id.} Over the next two days, Brito paid Quintero $2,000 and Pacheco $5,000, and Brito turned over the title to his wife’s vehicle, all in exchange for the safe release of DeLeone.\footnote{Id.} Notably, neither Quintero nor DeLeone was a United States citizen at the time of the charged incident.\footnote{Id.}

Defendants moved to dismiss the indictment on the ground that the charges lodged were unconstitutional. Specifically, they alleged that the HTA violates the equal protection component of the Fifth Amendment because “it irrationally singles out aliens for prosecution” and that the conduct charged in this case was outside the scope of the Act.\footnote{Id.}

The district court found the Act to be constitutional on its face and as applied to the facts of this case. With respect to the facial challenge, the court held that while the HTA criminalized certain conduct of noncitizens, this legislative act was well within Congress’s plenary power over foreign relations and would therefore be subject to minimal scrutiny.\footnote{Id.} Citing the Ninth Circuit’s decision in *Lopez-Flores*,\footnote{Id. at 472 (citing *Lopez-Flores*, 63 F.3d at 1473).} the court concluded that a rational basis existed for Congressional enactment of the HTA:
Congress has made a determination that, in dealing with the problem of international terrorism, aliens who engage in kidnapping or hostage-taking ought to be prosecuted in federal court under a federal statute. I cannot say that that determination is irrational. Indeed, I find that the different treatment accorded aliens under the Act is rationally related to the Act's purpose of complying with this nation's foreign policy obligations under the Hostage Taking Convention and Congress's general responsibility in making foreign policy decisions. Thus, the court relied on the same two reasons announced by Lopez-Flores and Yang for upholding that Act against the facial challenge: compliance with the HTC and the deterrence of international terrorism.

The court then considered whether the HTA passed constitutional muster as applied to the facts of this case. Defendants contended that "the indictment should [have been] dismissed because the Act may only be applied to politically motivated abductions that have some international nexus, and that it should not be applied to what they suggest is a garden variety kidnapping." The court rejected this analysis for three reasons. First, the defendants' conduct falls within the plain words of the statute, regardless of Congress's primary concern in passing the Act. Second, Congress did not limit the scope of the Act to hostage taking in furtherance of international terrorist activity; thus, Congress "necessarily determined that any crime involving aliens is sufficiently 'international' in nature to fall within the auspices of its power to legislate in the areas of foreign relations and immigration." And third, applying the Act to this situation further general goals of deterrence and Congress's specific aim of controlling terrorism and hostage-taking: "[When courts apply] the Act strictly, non-United States nationals will be put on notice that they will be prosecuted in federal court if they cross our borders and engage in acts of kidnapping. Thus, application of the Act in this case is rationally related to the Act's purpose of deterring non-United States nationals from engaging in criminal conduct within the United States."

Addressing dicta in the Fifth Circuit's Carrion opinion as to whether an international aspect was required by the Act, the dis-

\[126\] Id.
\[127\] Id.
\[128\] Id. at 472-73 (citing H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 248-49 (1989); United States v. Bufalino, 576 F.2d 446, 452 (2d Cir.), cert. denied, 439 U.S. 928 (1978)). Although the court did not cite these decisions, this rationale was essentially the same approach taken by the Fifth Circuit in Carrion and the Ninth Circuit in Lopez-Flores in deciding whether the Act applied to undocumented immigrant smuggling. See supra subpart IV.A.
\[129\] Id. at 473.
\[130\] Id.
\[131\] The Fifth Circuit language was as follows:
strict court stated that its opinion did not conflict with the Fifth Circuit's. The court found that, taken in context, the *Carrion* court sought to distinguish the HTA from the federal kidnapping statute by describing the former as having been enacted to fulfill America's international obligations attendant to its status as an HTC signatory state. In addition, the *Carrion* court's interpretation of the statute was held not to be inconsistent with the court's own view. Specifically, the *Pacheco* court equated the *Carrion* court's reference to an "international aspect" as meaning simply that, under the terms of the Act, either the hostage-taker or the hostage had to be a noncitizen.

While the *Pacheco* court's "as applied" analysis has some surface appeal, it appears too convenient and contrived; it does not address the difficult issue raised by the *Yang* court. How does the *Pacheco* court respond to the charge that the federal government may be specifically targeting noncitizens for prosecution in a hostage-taking situation where none of the players appears to have any international connection aside from claiming foreign citizenship? Fundamentally, the *Pacheco* court's response would be that the foreign citizenship of the defendants is enough to provide a rational basis for the Act's application. In essence, this formulation merges Congress's foreign relations power with its power over immigration; while the powers are related and may sometimes overlap, they need not necessarily overlap. Unfortunately, the *Pacheco* test does not solve the problem of prosecutorial abuse; rather, it makes prosecutorial abuse a non-issue.

---

Because it deals with international acts of kidnapping or hostage taking, the Hostage Taking Act applies only to acts of the United States government. If the act of kidnapping or hostage taking at issue does not involve the United States government, and has no international aspect, then the Hostage Taking Act does not apply. *Carrion*, 944 F.2d at 224.

132 *Pacheco*, 902 F. Supp. at 473. This interpretation is consistent with the district court's reading of *Carrion* in United States v. Lin, 881 F. Supp. 34, 36 (D.D.C. 1995) (noting that language in *Carrion* was dictum and that if the offender or the detainee was a noncitizen or the detainee was recovered outside the U.S., then the case would have an "international aspect").

133 "In other words, the 'international aspect' that the court referred to is simply the fact that either a defendant or the victim is not a United States citizen." *Pacheco*, 902 F. Supp. at 473.

134 Indeed, in their hornbook on constitutional law, Professors John Nowak and Ronald Rotunda indicate that while Congress's powers over foreign relations and immigration overlap, these powers are not coextensive. Aside from the fact that Congress's immigration power derives specifically from Article I, Section 8, Clause 4 of the Constitution, Nowak and Rotunda suggest that this same power emanates from Congress's foreign relations power. U.S. CONST., art. I, § 8, cl. 4; JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 6.3, at 203 (4th ed. 1991) ("This broad 'foreign affairs power' has been used as a basis for a wide variety of congressional legislation. Alien immigration and registration laws were promulgated on the strength of the 'foreign affairs power.'"). For example, a noncitizen who commits a felony will likely be the concern of the immigration authorities under the immigration code, but the felonious act may not necessarily implicate foreign relations. Conversely, Congress may pass foreign affairs legislation that may distinguish between citizen and noncitizen, but such legislation may not necessarily affect United States immigration policy. See, e.g., United States v. *Tsuda Maru*, 479 F. Supp. 519 (D. Alaska 1979).
by equating a defendant's alienage with an international connection. Taken to its extreme, \textit{Pacheco} implies that all noncitizen defendants in hostage-taking cases are international terrorists who must be deterred through federal prosecution under the HTA. Under the facts of \textit{Pacheco}, this is an unfair implication to make. There is no evidence from the district court's opinion that either defendants Pacheco, a U.S. national, or Quintero, a noncitizen, had any international terrorist ties.\footnote{\textsuperscript{135} Any inferences regarding the international nature of the alleged drug trafficking would be pure speculation at this point. \textit{See Pacheco}, 902 F. Supp. at 469 (discussing facts of drug bust).} Thus, the \textit{Yang} court's concern about prosecutorial abuse remains unaddressed despite the \textit{Pacheco} court's attempt at an "as applied" equal protection analysis. In addition, it is unclear that by invoking the HTA and by prosecuting the \textit{Pacheco} defendants in federal court, the federal government sends a strong anti-international terrorist message; more likely, the government gains the practical leverage of a maximum life imprisonment as a bargaining chip in negotiations with the \textit{Pacheco} defendants.

\section*{D. United States v. Chen De Yian}

\textit{Chen} presents another example in which a federal court found jurisdiction in what would otherwise be a garden-variety kidnapping case on its facts. The government alleged that from early 1991 to about April 24, 1992 defendants Chen De Yian, Wang Kun Lue, and others conspired to take Chan Fung Chung hostage to compel Chung's relatives to pay ransom for Chung's release.\footnote{\textsuperscript{136} \textit{Chen I}, No. 94 Cr. 719 (DLC), 1995 U.S. Dist. LEXIS 8560, at *2-*3 (S.D.N.Y. June 21, 1995).} To further this conspiracy, Wang and a co-conspirator met in New York City in May 1991 to plan the abduction; on or about April 24, 1992, the defendants seized Chung and attempted to place him in a vehicle driven by the co-conspirator.\footnote{\textsuperscript{137} \textit{Id.} These defendants were also charged with several other counts arising out of a conspiracy to commit a murder-for-hire during the period from 1990 through June 1991. \textit{Id.} at *2.}

Defendants moved to dismiss the HTA conspiracy charge on, among others, the ground that its alienage classification violates the equal protection component of the Fifth Amendment's Due Process Clause.\footnote{\textsuperscript{138} \textit{Chen II}, 905 F. Supp. 160, 162 (S.D.N.Y. 1995). In addition, the defendants contended that the HTA was not essential to the implementation of the HTC, and therefore, Congress's passing of this legislation under the Necessary and Proper Clause was invalid. Further, the defendants challenged the statute as violating the concept of federalism, presumably under the Tenth Amendment. \textit{Id.} at 163. An examination of these arguments is beyond the scope of this Article. \textit{But see supra} note 16 (referring to commentary on preemption and federalism concerns).} Citing the Ninth Circuit's \textit{Lopez-Flores} decision,\footnote{\textsuperscript{139} The court also noted the \textit{Carrion} court's ruling that the HTA applied to noncitizen smuggling cases. \textit{Id.} at 165 n.15 (citing \textit{Lopez-Flores}, 63 F.3d at 1468; \textit{Carrion-Caliz}, 944 F.2d at 220).} the dis-
strict court noted that while the HTA facially discriminates on the basis of alienage, the Act survives the applicable minimum scrutiny. "[T]he alienage classification does not violate equal protection, because it reasonably furthers the legitimate—if not compelling—foreign policy interest behind the Hostage Taking Act: 'to attack the pressing and urgent problem of international terrorism.'"

Unlike the Pacheco court, the Chen court did not go beyond the defendants' facial challenge to consider whether the HTA passes constitutional scrutiny when applied to the facts of the case. Interestingly, one of the defendants, Chen, pled guilty to a New York state charge arising from this event prior to the federal indictment. If the state had already secured a conviction against Chen in a prior proceeding, why was it necessary to proceed against him in federal court? If the federal government wanted to ensure that the HTA did not displace state kidnapping laws, it would not have filed an HTA claim on these facts. Predictably, Chen challenged the federal proceeding on double jeopardy grounds; the court simply stated that it was "unable to rule on this issue, beyond noting that as a general rule a conviction in state court does not preclude a subsequent indictment and trial in federal court." This response is suspect especially when the Department of Justice states that it intends not to displace existing state law in such cases.

Thus, Chen fails to persuade on two fronts. First, it does not address the Yang prosecutorial abuse concern by dealing with the difficult issue of how this case passes constitutional muster as applied. But second, and more importantly, Chen provides a factual scenario in which the federal government chose to prosecute even after a state-law conviction for the same act. As mentioned above, the Justice Department, the Attorney General's office, and President Reagan all professed before Congress that the Act would not be invoked when the states could readily enforce their own kidnapping laws. Yet, this case appears to present a situation in which comity concerns did not preclude the federal government from seeking prosecution under the HTA.

140 Id. at 168 (citing President's Message, supra note 58, at 1).
141 Chen I, No. 94 Cr. 719 (DLC), 1995 U.S. Dist. LEXIS 8560, at *4 n.3.
142 Id. (citing Abbate v. United States, 359 U.S. 187, 195 (1959)); see also Brooks et al., supra note 4, at 617 (discussing the permissibility of consecutive state and federal prosecutions of the same defendant in the context of the trial of the Los Angeles Police Department officers accused of beating motorist Rodney King).
143 See supra subpart III.A.
V. THE ALTERNATE VIEW: REQUIRING A Nexus TO FOREIGN RELATIONS

All four cases discussed in the prior section appear to raise more questions than they answer. While the courts in these cases agree that the HTA's alienage classification survives challenges to its facial constitutionality on the ground that it is rationally related to achieving the two foreign policy goals of complying with the United States' Hostage Taking Convention obligations and deterring international terrorism, these rationales weaken when applied to fact scenarios that more closely resemble garden-variety state-law kidnapping.

This Part contends that all four courts failed to properly assess the importance of protecting noncitizens from possible prosecutorial abuse through the application of the HTA to circumstances that appear more closely akin to local kidnapping. Specifically, the courts should have applied a more stringent standard of scrutiny when reviewing the HTA's alienage classification either under the Supreme Court's strict scrutiny test in *Adarand Constructors, Inc. v. Peña* 144 or at the very least, under the heightened rational basis test applied in *City of Cleburne v. Cleburne Living Center, Inc.* 145 To ensure protection of noncitizens under either level of scrutiny, this Part advocates that courts require the federal government to demonstrate that the facts underlying an HTA charge bear a rational relationship to international relations.

A. The Standard of Review: A Higher Standard of Scrutiny

The courts in *Lopez-Flores, Yang, Pacheco,* and *Chen* all correctly set forth the current equal protection doctrine applied in reviewing federal laws that create alienage classifications. In *Mathews v. Diaz,* 146 the Supreme Court held that a rational basis test applied to its review of an equal protection challenge, brought under the Fifth Amendment's Due Process Clause, to a federal statute that placed additional burdens on noncitizens for them to be eligible for supplemental Medicare benefits. Citing Congress's inherent powers over immigration and foreign relations, the Court concluded that it must not second-guess the efforts of the legislature or the executive to effectively handle such political questions:

Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary. This very case illustrates the need

146 426 U.S. 67, 82-84 (1976).
for flexibility in policy choices rather than the rigidity often characteris-
tic of constitutional adjudication.\footnote{147} Curiously, the Mathews court did not address the issue of why the equal protection component of the Fifth Amendment’s Due Process Clause would provide less protection than the Fourteenth Amendment’s Equal Protection Clause when the Supreme Court had, on at least two occasions, ruled that the scope of protection under both amendments was the same.\footnote{148} Indeed, in striking a state statute depriving noncitizens of welfare benefits, the Court in Graham v. Richardson\footnote{149} specifically stated that “classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.”\footnote{150} Yet, in Mathews, the Court distinguished Graham on the grounds that Graham involved a state, and not a federal, statute.\footnote{151} In the Mathews Court’s view, a noncitizen’s rights to equal protection of the laws depended more on who made the laws rather than on the effect the laws had on the individual.

However, the Court’s 1995 decision in Adarand Constructors, Inc. v. Peña\footnote{152} may signal a shift in emphasis from deference to the federal government to the greater protection of individual rights: the Adarand Court ruled that the same standard of scrutiny applies to

\footnote{147}{Id. at 81.}
\footnote{148}{See, e.g., Gilbert Paul Carrasco, Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection, 74 B.U. L. Rev. 591, 603 & n.52 (1994) (arguing that the Mathews court failed to articulate a viable reason for why state and federal laws would be subject to different levels of scrutiny); Michael J. Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 Colum. L. Rev. 1023, 1062 (1979) (arguing that a classification cannot be suspect when the states employ it, yet not suspect when invoked by the federal government); David F. Levi, Note, The Equal Treatment of Aliens: Preemption or Equal Protection?, 31 Stan. L. Rev. 1069, 1089 (1979) (same).}

Professor Linda Bosniak suggests that this apparent schism in the Court’s treatment of alienage classifications stems from the inherent tension between the need to develop a coherent immigration policy and the desire to treat similarly situated individuals equally under the law:

Scholars describe the law of alien status as structured by a fundamental doctrinal division between immigration law’s “inside” and its “outside.” “Inside” immigration law aliens are said to be subject to substantially unconstrained government power by way of the “plenary power doctrine.” “Outside” immigration law, in contrast, alien status is characterized as largely insulated from such unconstrained power; instead, the treatment of aliens is said to be governed by the norms of equal personhood. \ldots [W]hile the conventional distinction between immigration law’s inside and outside is an understandable response to the structure of the doctrine, it tends to obscure the complex and contested nature of the status of aliens on the so-called “outside,” and it tends to obscure the fact that the “inside” and “outside” are often not pregiven doctrinal locations but disputed zones whose exact parameters are extremely controversial.


\footnote{149}{403 U.S. 365 (1971).}
\footnote{150}{Id. at 372.}
\footnote{151}{“The equal protection analysis \ldots involves significantly different considerations because it concerns the relationship between aliens and the States rather than between aliens and the Federal Government.” Mathews, 426 U.S. at 84-85.}
\footnote{152}{115 S. Ct. 2097 (1995).}
federal as well as state laws that create race-based classifications. In *Adarand*, the Supreme Court remanded for further review a race-based federal program designed to provide government contracts to disadvantaged businesses; specifically, the Court held that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.\footnote{Id. at 2113.}

Noting that state legislation is strictly scrutinized under the Equal Protection Clause of the Fourteenth Amendment, the Court reaffirmed its earlier decisions—the very ones *Mathews* ignored—holding that equal protection claims under the Due Process Clause of the Fifth Amendment are treated the same as those brought under the Fourteenth Amendment.\footnote{Id. at 2108 (citing Weinberger v. Wiesenfield, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."); United States v. Paradise, 480 U.S. 149, 166 n.16 (1987) (Brennan, J., concurring) ("[T]he reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth."); Buckley v. Valeo, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."). Earlier in its opinion, the Court set forth the difference between the language from which equal protection is derived in the Fifth Amendment versus the Fourteenth: *Adarand* lends support to the idea that strict scrutiny should apply to alienage classifications as it applies to racial classifications. First, if the Court truly believed, as it stated in *Graham*, that alienage classifications—like those based on race and nationality—are inher-}

\textit{Adarand} lends support to the idea that strict scrutiny should apply to alienage classifications as it applies to racial classifications. First, if the Court truly believed, as it stated in *Graham*, that alienage classifications—like those based on race and nationality—are inher-
ently suspect, then there is no sound reason to draw a distinction between the race-based classification in *Adarand* and the HTA's alienage classification. More importantly, the distinction between race and alienage has become precariously blurred because of a wave of existing and proposed state and federal anti-immigration laws, that while on their face appear racially neutral, have arguably come to the fore in response to a perceived mass influx of non-white immigrants.158 Perhaps the most famous of these state laws is Proposition 187, which was approved by California's electorate on November 8, 1994.159 This initiative restricts undocumented immigrants' access to several state benefits including public school education and state-

---

158 By 1990, sixteen states had enacted "English-only" laws, which at least one commentator has argued are likely prompted by the increasing number of nonwhite immigrants from Asia and Latin America. Michele Arington, Note, *English-Only Laws and Direct Legislation: The Battle in the States over Language Minority Rights*, 7 J.L. & Pol. 325, 325-27 (1991). Others see "English-only" laws as beneficial both for maximizing opportunities for the new immigrant as well as unifying a country divided by an over-emphasis on multiculturalism and diversity. Joan Beck, *Soothing Words: Committing to a Common Language Will Strengthen America*, Chi. Trib., Sept. 10, 1995, at 19. Interestingly, Arizona's "English-only" law has recently been slated for review by the Supreme Court; unfortunately, the Court is unlikely to reach the merits of the law, but will likely restrict its review to whether the private sponsors of the bill have standing to assert the law's validity after it was struck down by a federal court in 1990. Linda Greenhouse, *Justices to Review Effort to Make English the Official Language*, N.Y. Times, Mar. 26, 1996, at A14. For further scholarly treatment of "English-only" laws, see, e.g., B. PIATT, ¿ONLY ENGLISH?: LAW AND LANGUAGE POLICY IN THE UNITED STATES (1990); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 Minn. L. Rev. 269, 356 (1992) (arguing that "official English laws" violate equal protection); Juan F. Perea, *English-Only Rules and the Right to Speak One's Primary Language in the Workplace*, 23 U. Mich. J.L. Ref. 265, 268 (1990) (arguing that speaking one's non-English "primary language" in the workplace should be protected under Title VII). Several proposed state laws include restrictions on driver's licenses and foster care for children. See Jerry Gillam, *DMV, INS to Check New License Applicants*, L.A. Times, June 22, 1994, at A3 (driver's licenses); Charisse L. Grant, *HRS to Issue Guidelines for Undocumented Immigrant Children*, Miami Herald, Apr. 27, 1994, at 3B (foster care). At the federal level, Lamar Smith has advocated the adoption of a national law patterned after Proposition 187. Ronald Bronstein et al., *From Tax Cuts to School Prayer: A Primer on the Leading Issues*, L.A. Times, Jan. 1, 1995, at A26. While Congress has yet to pass such a rule, the House of Representatives recently approved a bill that would allow states to pass laws denying public education to undocumented immigrant children. Eric Schmitt, *House Approves Ending Schooling of Illegal Aliens*, N.Y. Times, Mar. 21, 1996, at D25. Not surprisingly, the impetus for such legislation stems from the fact that immigrants are often wrongly accused as the source of societal ills such as unemployment and income inequality. See, e.g., Richard A. Boswell, *Restrictions on Non-Citizens' Access to Public Benefits: Flawed Premise, Unnecessary Response*, 42 UCLA L. Rev. 1475, 1476 (1995) ("The recent debates and political initiatives relating to immigrant access to public benefits are part of a recurrent historical pattern in which increased attention has been focused on immigrants during periods of perceived economic downturn."); Robert Wright, *Who's Really to Blame?*, Time, Nov. 6, 1995, at 32-33 ("Job-stealing aliens and job-exporting CEOs are easy targets, but growing income inequality has deeper roots.").
funded medical care. Professor Gerald Neuman notes that "Proposition 187 owed some of its attractiveness to animosity towards Latino immigration, and not merely to a generalized concern about control of the borders. Illegal migration was repeatedly characterized by proponents as a reconquest of California by Mexico." Indeed, Professor Kevin Johnson states that despite the media-driven image of the "illegal alien" as a young, unskilled Mexican male, Mexicans comprised only thirty-nine percent of all undocumented immigrants in the United States in 1992. This dangerous intersection between race and alienage cautions greater, not lesser, scrutiny of alienage classifications.

Second, the Court cannot continue to draw a convincing distinction between Congressional power in foreign policy, on the one hand, and its power aimed to alleviate racial discrimination, on the other, on the ground that the former is an inherently federal power while the latter is not. In fact, the text of the federal Constitution appears to support the opposite view. The power to pass laws against racial discrimination appears explicitly in Section 5 of the Fourteenth Amendment, while the foreign policy power has had to be implied into the Constitution's text. Indeed, the Adarand Court admitted that some

---


162 Kevin R. Johnson, Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class, 42 UCLA L. REV. 1509, 1545-46 (1995) ("The stereotypical 'illegal alien,' the term that replaced 'wetback,' is a Mexican who has snuck into the United States in the dark of night. The image in the minds of many is that of a poor, brown, unskilled, young male. . . . Despite the stereotype, only about thirty-nine percent (1.3 million) of the total [number of undocumented immigrants in 1992] were from Mexico.").

163 Politicians have also capitalized on this growing xenophobia in their public appearances: California Governor Pete Wilson voiced his support for Proposition 187 by stating that "[w]e cannot educate every child from here to Tierra del Fuego." Daniel M. Weintraub & Bill Stall, Wilson Would Expel Illegal Immigrants from Schools, L.A. TIMES, Sept. 16, 1994, at A1. Even more stridently, 1996 Republican presidential candidate Pat Buchanan had this to say about race and immigration in 1991: "If we had to take a million immigrants in, say, Zulus, next year, or Englishmen, and put them in Virginia, what group would be easier to assimilate?" Richard Lacayo, The Case Against Buchanan, TIME, Mar. 4, 1996, at 26. Indeed, Buchanan has also described the issue of undocumented immigration at the U.S.-Mexico border as an "invasion": "That's what's taking place when one, two, three million people walk across our borders every year." Steven A. Holmes, Candidates Criticized for Sound-Bite Approach to Problem of Illegal Aliens, N.Y. TIMES, Mar. 7, 1996, at B10. However, Jessica Vaughan, assistant director for the Center for Immigration Studies in Washington, describes Buchanan's estimates as sheer "baloney" and states that the actual number is closer to 400,000. Id.

164 In Perez v. Brownell, the Court directly addressed the issue of the source of Congress's foreign relations power:
of its current members disagree as to the degree of deference to be accorded Congress when it legislates to end racial discrimination under its express power pursuant to Section 5 of the Fourteenth Amendment. Yet, the Court's members appear to agree that the federal courts should defer to Congress's powers over foreign policy even though this is not explicitly stated in the Constitution.

Finally, even assuming that deference should be accorded Congress in the areas of immigration and foreign policy, the federal courts in Lopez-Flores, Pacheco, and Chen failed to recognize that these powers, while interrelated, do not necessarily arise in every non-governmental domestic kidnapping situation. As Judge Wood suggested in Yang, a green-card holder who has lived in the United States for many years and has cut off ties with her home country will likely not create a foreign policy situation should she engage in a purely domestic kidnapping; however, her noncitizen status will necessarily implicate the federal government's immigration power over her.

Alternatively, if the courts decline to review the HTA's alienage classification through the lens of strict scrutiny, the Supreme Court's decision in City of Cleburne v. Cleburne Living Center, Inc. provides support at least for applying a heightened rational basis test to the HTA's alienage classification. In Cleburne, the Court ruled that the requirement that a proposed group home for the mentally retarded obtain a special use permit from the petitioner city violated the
equal protection rights of the mentally retarded respondents. Although the Court held that mental retardation was not a quasi-suspect class and therefore it would review the permit requirement using a rational basis test, the Court held that the city's professed reasons for requiring the permit stemmed solely from stereotypical beliefs about the mentally retarded:

The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded, including those who occupy the Featherston facility and who would live under the closely supervised and highly regulated conditions expressly provided for by state and federal law.

The case for a stricter rational basis test when reviewing the application of the HTA to local kidnappings is even more compelling. First, unlike its pronouncements regarding mental retardation in Cleburne, the Court has held in Graham that alienage is suspect. This distinction suggests that greater protection should be accorded noncitizens. And second, the blanket application of the HTA to garden-variety state-law kidnappings makes the problem of prejudice against the

168 Id. at 435.
169 Id. at 450; accord Schneider v. Rusk, 377 U.S. 163, 168 (1964) ("[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" (citing Bolling, 347 U.S. at 499)).

Justice Stevens eloquently captured the thrust of the Cleburne Court's equal protection analysis in his concurrence:

The rational-basis test, properly understood, adequately explains why a law that deprives a person of the right to vote because his skin has a different pigmentation than that of other voters violates the Equal Protection Clause. It would be utterly irrational to limit the franchise on the basis of height or weight; it is equally invalid to limit it on the basis of skin color. None of these attributes has any bearing at all on the citizen's willingness or ability to exercise that civil right.

473 U.S. at 452-53 (Stevens, J., concurring). In his partial dissent, Justice Marshall agreed that the rights of the mentally retarded should be protected, but argued that the majority's analysis was really a form of heightened scrutiny, and that the ordinance would have survived the application of the traditional deferential rational basis test. Id. at 456 (Marshall, J., dissenting in part); see also Gayle Lynn Pettinga, Note, Rational Basis with Bite: Intermediate Scrutiny by Any Other Name, 62 IND. L.J. 779 (1987).

Aside from its decision in Cleburne, the Supreme Court has rarely utilized the rational basis test to strike down local legislation of a social or economic nature. See Hooper v. Bernalillo County Assessor, 472 U.S. 612, 621-22 (1985); Zobel v. Williams, 457 U.S. 55, 65 (1982); United States Dept of Agric. v. Moreno, 413 U.S. 528, 534-36 (1973). Indeed, Professor Laurence Tribe places little stock in this so-called "rational basis with bite" test: "This sporadic move away from near-absolute deference to legislative judgment seems to be a judicial response to statutes creating distinctions among classes of residents based on factors the Court evidently regards as in some sense 'suspect' but appears unwilling to label as such." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-3, at 1445 (2d ed. 1988).

170 Graham, 403 U.S. at 372 ("[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."); see also Plyler, 457 U.S. at 230 ("If the State is to deny a discrete group of innocent [undocumented] children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest.").
class of noncitizens even more difficult to ferret out than in Cleburne because the HTA specifically allows the government to prosecute noncitizen hostage-takers. Thus, it is unclear in a local kidnapping situation whether the federal government seeks to prosecute a noncitizen defendant because it has a legitimate interest in deterring international terrorism or because it has decided to target the noncitizen defendant by haling her into federal court to face a possible maximum life sentence. The intersection of race and alienage suggests that courts proceed cautiously, for equal protection will not tolerate a system in which all citizen kidnappers are tried in state court while all noncitizen kidnappers are subject to federal court prosecution on facts devoid of any true connection to international affairs.

Should they adopt either Adarand's strict scrutiny approach or Cleburne's heightened rational basis test, the federal courts will likely find the HTA unconstitutional both facially and as applied. Under a facial strict scrutiny test, a court will probably find that while the twin goals of treaty compliance and international terrorism deterrence constitute compelling federal interests, the text of the Act is not narrowly tailored to achieve these goals because the Act's plain terms apply to purely local kidnappings based solely on the noncitizenship of either the defendant or the victim, regardless of whether the facts of the case bear any rational relationship to foreign relations. "As applied," the HTA also fails strict scrutiny because neither treaty compliance nor international terrorism deterrence is a compelling federal interest when invoked in the context of a garden-variety state-law kidnapping case. Similarly, the Cleburne standard suggests that the government's two reasons may be mere proxies for negative stereotypes against noncitizens when presented to support federal prosecutions in purely local kidnapping situations.

B. The Theory: Requiring a Nexus to Foreign Relations

As an answer to the equal protection concerns stemming from the prosecutorial abuse question posed by the Yang court and the comity concerns raised by the Chen facts, this subpart argues that the federal government should first prove that a case bears a nexus to foreign relations for the HTA to be invoked in non-governmental domestic hostage-taking cases. This test would require the government to plead and prove that the facts of the case bear some rational relationship to the United States' foreign policy concerns beyond the foreign citizenship of either the hostage-taker or the victim.

This requirement achieves several desirable results. First, a foreign relations nexus gives credence to the HTA's professed goal of deterring international terrorism. In proving a nexus, the government satisfies equal protection guarantees even under strict scrutiny by eliminating the Yang court's concern that the HTA may be used to
justify the discriminatory prosecution of noncitizens. As a practical matter, this requirement ensures that the federal government will not be able to arbitrarily invoke the HTA's maximum life sentence provision in garden-variety kidnapping cases in which the defendant happens to be a noncitizen. As mentioned in the previous section, this is a particularly valid concern given the recent rise in anti-immigrant sentiment.  

And second, requiring a rational relationship to foreign relations will ensure that the federal authorities are able to justify encroaching upon what would otherwise appear to be a state problem. Such an approach comports with classic notions of comity between federal and state governments. 172 Had the Chen court required proof of an international nexus, then it would have been able to adequately address Chen's double jeopardy concern by supporting federal jurisdiction with a legitimate foreign policy reason instead of vaguely stating that a state conviction does not preclude subsequent federal prosecution. 173 Furthermore, this nexus requirement should have the salutary effect of reducing the number of HTA prosecutions that find their way into federal court, thereby lessening the burden on already overburdened federal court dockets.

C. The Result: Applying the Theory to Lopez-Flores, Yang, Pacheco, and Chen

A theory is only as good as its applicability; therefore, this section examines how the international nexus test would play out in the four cases discussed above. On their facts, Lopez-Flores and Yang satisfy the international nexus requirement, while Pacheco and Chen do not. Lopez-Flores (as well as Carrion) involved fact situations that had rational connections to foreign relations: Lopez-Flores involved smuggling undocumented immigrants across the U.S.-Mexico border, while Yang involved the coercion of a resident of mainland China. However, Pacheco and Chen are quite problematic. Neither case involved

---

171 See supra notes 158-63 and accompanying text.
172 "In general, the principle of 'comity' is that the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another state or jurisdiction, not as a matter of obligation, but out of deference and mutual respect." Brown v. Babbitt Ford, Inc., 571 P.2d 689, 695 (Ariz. Ct. App. 1977). More recently, the concept of "comity" has been invoked beyond state and federal government relations to Native American and state government relations, and international relations. See, e.g., Barbara Ann Atwood, Fighting over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity, 36 UCLA L. REV. 1051, 1088 (1989) (arguing that through the comity doctrine or statutory interpretation, "voluntary recognition by state courts of the competence and preferred role of tribal courts in reservation-based child custody disputes would eliminate" existing jurisdictional quarrels between the two); Joel R. Paul, Comity in International Law, 32 HARV. INT'L L.J. 1, 4-6 (1991) (arguing for a broader notion of comity in resolving international policy conflicts among sovereign states).
173 See Chen I, No. 94 Cr. 719 (DLC), 1995 U.S. Dist. LEXIS 8560, at *3 n.3.
any specific facts that evince a connection to international relations aside from the foreign nationalities of the players; indeed, defendant Chen was prosecuted in state court on the same kidnapping incident that gave rise to the HTA claim.

This seemingly easy test could become more difficult to apply as the factual scenarios vary from case to case. However, the international nexus test does not purport to provide a panacea for all hypothetical situations; rather, the test aims to shift the focus of the debate away from alienage classifications and toward an analysis of whether the federal government's prosecution of the hostage-taker in any given case serves a valid foreign policy goal.

One criticism of the proposed test may be that focusing on the international nature of a given hostage-taking case deviates from the legitimate goal of fulfilling the United States' obligation as a signatory state to the HTC. Because the HTC's Article 13 requires that a domestic offense involve either a noncitizen hostage-taker or hostage to trigger the Hostage Taking Convention's application, the international nexus test arguably deviates from Article 13 and its language. However, Article 13 was adopted to ensure that the Hostage Taking Convention addressed international affairs and not purely internal matters; the international nexus test satisfies Article 13's concern by requiring that a foreign policy link be the primary basis of jurisdiction rather than determining the alienage of the defendant and victim. As discussed earlier, alienage distinctions may be a dangerous proxy for race-based discrimination and a poor indicator of a true nexus to foreign relations.

A second critique may be that the HTA actually benefits noncitizens as much as it harms them because noncitizen victims will find their kidnapping cases in federal court more often than citizen victims. However, the potential benefit to the noncitizen victim falls far short of the potential harm to the noncitizen defendant; it is the defendant, not the victim, who has to face a possible life sentence under the HTA.

Finally, one may argue that any efficiencies gained by remanding more actions to state court may be canceled out by the extra requirement that the federal government prove an international nexus in each case. Nonetheless, the international nexus requirement remains a strong check against a federal government that might otherwise neglect disparate impact, prosecutorial abuse, and comity concerns. In addition, even if empirical evidence bears out greater costs than bene-

174 See supra subpart II.D.
175 See supra subpart V.A.
fits because of this requirement, constitutional concerns should never be subordinated to issues of judicial expediency.\textsuperscript{176}

VI. CONCLUSION

Last year, Congress sought the passage of two important pieces of legislation relevant to foreign relations and immigration, respectively: an anti-terrorism bill and an immigration bill.\textsuperscript{177} Implicitly, these two bills reflect Congress’s understanding that anti-terrorism and immigration are two distinct concepts that need to be addressed separately.\textsuperscript{178} Unfortunately, the decisions in \textit{Lopez-Flores}, \textit{Yang}, \textit{Pacheco}, and \textit{Chen} suggest that the federal government may be losing sight of this

\textsuperscript{176} See, e.g., \textit{Bounds v. Smith}, 430 U.S. 817, 825 (1977) ("[T]he cost of protecting a constitutional right cannot justify its total denial.").


One commentator has suggested that the anti-terrorism bill would place too much power in the hands of the federal government and would wreak havoc on our legal and constitutional traditions. For example, "[t]he bill would . . . give far-reaching power to the Secretary of State. He could designate any organization abroad as ‘terrorist’ and thereby make it a crime for Americans to support its activities even if they are wholly legal and even charitable." Anthony Lewis, \textit{How Terrorism Wins}, \textit{N.Y. Times}, Mar. 11, 1996, at A17.

In an interesting insight into the intersection of race and immigration, another commentator has argued that the proposed bill limiting legal immigration may not address the larger problem of how immigrants displace low-skilled African-American workers in the inner cities. Specifically, he suggests that "[a]lleviating the economic distress of low-skilled blacks requires attacking two problems: the unwillingness of employers to hire them and the lack of meaningful training. Putting roadblocks in the paths of immigrants simply won’t do the trick." Roger Waldinger, \textit{The Jobs Immigrants Take}, \textit{N.Y. Times}, Mar. 11, 1996, at A17.

\textsuperscript{178} Of course, there are some situations in which anti-terrorism and immigration overlap. For example, early last year, the House of Representatives voted to strike a provision of the anti-terrorism bill that made it easier to deport undocumented immigrants suspected of terrorism. Stephen Labaton, \textit{House Kills Sweeping Provisions in Counterterrorism Legislation}, \textit{N.Y. Times}, Mar. 14, 1996, at A1; see also \textit{Federal Document Clearinghouse, Senate Judiciary Committee Begins Hearings on Anti-Terrorism Bill}, 1995 WL 14248276 (Apr. 28, 1995) (discussing New Hampshire Senator Bob Smith’s proposal to expedite the deportation of noncitizen terrorists).
difference when it seeks to prosecute noncitizens under the HTA in what appear to be garden-variety state-law kidnappings. Such prosecutions run afoul of equal protection guarantees when viewed through the lenses of *Adarand* and *Cleburne* because the proffered reasons of treaty compliance and international terrorism deterrence ring hollow in cases involving crimes of purely local concern. The international nexus test advocated here restores and maintains the distinction between anti-terrorism and immigration by requiring the federal government to prove that its prosecutions of apparently local kidnappings involving noncitizen defendants truly raise foreign policy concerns and promote Congress's legitimate goal of deterring international terrorism.
## State Kidnapping Statutes

<table>
<thead>
<tr>
<th>STATUTE</th>
<th>PENALTY</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>ALA. Code § 13A-6-43 (1994)</strong></td>
<td>Kidnapping in the first degree is a Class A felony which, under <strong>ALA. Code § 13A-5-6 (1994)</strong>, carries a sentence of life imprisonment for not more than 99 years or less than 10 years.</td>
</tr>
<tr>
<td><strong>ALA. Code § 13A-6-44 (1994)</strong></td>
<td>Kidnapping in the second degree is a Class B felony which, under <strong>ALA. Code § 13A-5-6 (1994)</strong>, carries a sentence of imprisonment for not more than 20 years or less than 2 years.</td>
</tr>
<tr>
<td><strong>ALASKA Stat. § 11.41.300 (1989)</strong></td>
<td>Kidnapping is an unclassified felony, which under <strong>ALASKA Stat. § 12.55.125(b) (1995)</strong>, carries a sentence of imprisonment for at least five years but not more than 99 years.</td>
</tr>
<tr>
<td><strong>ARK. Code Ann. § 5-11-102 (Michie 1993)</strong></td>
<td>Kidnapping is a Class Y felony which, under <strong>ARK. Code Ann. § 5-4-401 (Michie 1993)</strong>, carries a sentence of imprisonment for not less than 10 years and not more than 40 years, or life.</td>
</tr>
<tr>
<td><strong>CAL. Penal Code § 207 (Deering Supp. 1996)</strong></td>
<td>The sentence for kidnapping, under <strong>CAL. Penal Code § 208 (Deering Supp. 1996)</strong>, is a minimum of 3 years imprisonment and a maximum of 8 years imprisonment.</td>
</tr>
<tr>
<td><strong>COLO. Rev. Stat. § 18-3-301 (1986)</strong></td>
<td>Kidnapping in the first degree may be a Class 1 or Class 2 felony. It is a Class 1 felony if the person kidnapped suffered bodily injury and a Class 2 felony if the person kidnapped was liberated unharmed. The sentence for a Class 1 felony, under <strong>COLO. Rev. Stat. § 18-1-105 (Supp. 1995)</strong>, is a minimum of life imprisonment and a maximum of death. Under the same statute, the sentence for a Class 2 felony is a minimum of 8 years imprisonment and a maximum of 24 years imprisonment.</td>
</tr>
<tr>
<td><strong>COLO. Rev. Stat. § 18-3-302 (1986)</strong></td>
<td>Kidnapping in the second degree is a Class 3 felony which, under <strong>COLO. Rev. Stat. § 18-1-105 (Supp. 1995)</strong>, carries a sentence of a minimum of 4 years imprisonment and a maximum of 12 years imprisonment.</td>
</tr>
<tr>
<td><strong>DEL. Code Ann. tit. 11, § 783 (1995)</strong></td>
<td>Kidnapping in the second degree is a Class C felony which, under <strong>DEL. Code Ann. tit. 11, § 4205 (1995)</strong>, carries a sentence of imprisonment for up to 10 years.</td>
</tr>
<tr>
<td><strong>FLA. Stat. Ann. § 787.01 (West 1992)</strong></td>
<td>Kidnapping is a felony in the first degree, punishable for a term of years not exceeding life.</td>
</tr>
<tr>
<td><strong>GA. Code Ann. § 16-5-40 (1995)</strong></td>
<td>The sentence for kidnapping is imprisonment for not less than 10 and not more than 20 years.</td>
</tr>
<tr>
<td><strong>HAW. Rev. Stat. § 707-721 (1993)</strong></td>
<td>Unlawful imprisonment in the first degree is a Class C felony which, under <strong>HAW. Rev. Stat. § 706-660 (1993)</strong>, carries a sentence of a maximum of 5 years imprisonment and a minimum to be determined by the Hawaii paroling authority.</td>
</tr>
<tr>
<td>STATUTE</td>
<td>PENALTY</td>
</tr>
<tr>
<td>---------</td>
<td>---------</td>
</tr>
<tr>
<td>IDAHO Code § 18-4502 (1987)</td>
<td>First degree kidnapping carries a sentence of death (but not if the person is liberated or unharmed) or life imprisonment under IDAHO Code § 18-4504 (1987).</td>
</tr>
<tr>
<td>ILL. ANN. Stat. ch. 720 para. 5/10-1 (Smith-Hurd 1993)</td>
<td>Kidnapping is a Class 2 felony which, under ILL. ANN. Stat. ch. 730 para. 5/5-8-1 (Smith-Hurd Supp. 1995), carries a sentence of imprisonment of not less than 3 years and not more than 7 years.</td>
</tr>
<tr>
<td>IND. Code § 35-42-3-2 (1994)</td>
<td>Kidnapping is a Class A felony which, under IND. Code AN. § 35-50-2-4 (Burns Supp. 1995), carries a fixed term sentence of 30 years of imprisonment, with not more than 20 years added for aggravating circumstances or not more than 10 years subtracted for mitigating circumstances.</td>
</tr>
<tr>
<td>IOWA Code Ann. § 710.3 (West 1993)</td>
<td>Kidnapping in the second degree is a Class B felony which, under IOWA Code Ann. § 902.9 (West 1994), carries a sentence of imprisonment for not more than 25 years.</td>
</tr>
<tr>
<td>IOWA Code Ann. § 710.4 (West 1993)</td>
<td>Kidnapping in the third degree is a Class C felony which, under IOWA Code Ann. § 902.9 (West 1994), carries a sentence of imprisonment for not more than 10 years.</td>
</tr>
<tr>
<td>KY. Rev. Stat. Ann. § 509.040 (Baldwin 1995)</td>
<td>Kidnapping can be either a Class A felony, Class B felony, or capital offense. Under KY. Rev. Stat. Ann. § 532.060 (Baldwin 1995), the sentence for a Class A felony is imprisonment for not less than 20 years and not more than life, and the sentence for a Class B felony is imprisonment for not less than 10 years and not more than 20 years.</td>
</tr>
<tr>
<td>LA. Rev. Stat. Ann. § 14:45 (West 1986)</td>
<td>Simple kidnapping carries with it a sentence of a fine of not more than $5000, imprisonment with or without hard labor for not more than 5 years, or both.</td>
</tr>
<tr>
<td>ME. Rev. Stat. Ann. tit. 17-A, § 301 (West 1983)</td>
<td>Kidnapping is a Class A crime. A defense, which reduces the crime to Class B, is if the defendant voluntarily released the victim alive and not suffering from serious bodily injury in a safe place prior to trial. Under ME. Rev. Stat. Ann. tit. 17-A, § 1252 (West Supp. 1995), the sentence for a Class A felony is imprisonment for a definite period not to exceed 40 years, while the sentence for a Class B felony is imprisonment for a definite period not to exceed 10 years.</td>
</tr>
<tr>
<td>STATUTE</td>
<td>PENALTY</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>-----------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Md. Ann. Code of 1957 art. 27, § 337 (1992)</td>
<td>Kidnapping is a felony which carries a sentence of imprisonment for not more than 30 years.</td>
</tr>
<tr>
<td>Mass. Gen. Laws Ann. ch. 265, § 26 (West 1990)</td>
<td>Kidnapping carries a sentence of imprisonment for not more than 10 years or a fine of $1000 and imprisonment for not more than 2 years. If the kidnapping is committed with the intent to extort money or any other valuable thing, it carries a sentence of imprisonment for life or any term of years.</td>
</tr>
<tr>
<td>Minn. Stat. Ann. § 609.25 (West 1987)</td>
<td>Under Minn. Stat. Ann. § 809.25 (West Supp. 1996), if the kidnapping victim is found in a safe place, the sentence is imprisonment for not more than 20 years. If the victim is not released in a safe place or if the victim suffers great bodily harm during the course of the kidnapping or if the person kidnapped is under 16, the sentence is imprisonment for not more than 40 years.</td>
</tr>
<tr>
<td>Miss. Code Ann. § 97-3-53 (1994)</td>
<td>Kidnapping carries a sentence of life imprisonment, and if the jury cannot agree on life, the court shall fix a sentence of imprisonment for not less than 1 year nor more than 30 years.</td>
</tr>
<tr>
<td>Mo. Ann. Stat. § 565.110 (Vernon 1979)</td>
<td>Kidnapping is classified as either a Class A felony or Class B felony, depending on the circumstances. Under Mo. Ann. Stat. § 558.011 (Vernon 1979), the sentence for a Class A felony is imprisonment for not less than 10 years nor more than 30 years, while the sentence for a Class B felony is imprisonment for not less than 5 years nor more than 15 years.</td>
</tr>
<tr>
<td>Mont. Code Ann. § 45-5-302 (1995)</td>
<td>Kidnapping carries a sentence of imprisonment for not less than 2 years and not more than 10 years.</td>
</tr>
<tr>
<td>Nev. Rev. Stat. § 28-313 (1989)</td>
<td>Kidnapping is either a Class IA felony or Class II felony, depending on the circumstances. Under Nev. Rev. Stat. § 28-105 (1989), the sentence for a Class IA felony is life imprisonment, while the sentence for a Class II felony is imprisonment for a maximum of 50 years and a minimum of 1 year.</td>
</tr>
<tr>
<td>Nev. Rev. Stat. Ann. § 200.310 (Michie Supp. 1995)</td>
<td>Kidnapping may be classified in the first degree, which is a Class A felony, or in the second degree, which is a Class B felony. Under Nev. Rev. Stat. Ann. § 193.130 (Michie Supp. 1995), the sentence for a Class A felony is death or life imprisonment without possibility of parole; the sentence for a Class B felony is a minimum of 1 year imprisonment or a maximum of 20 years imprisonment.</td>
</tr>
<tr>
<td>N.M. Stat. Ann. § 30-4-1 (Michie Supp. 1995)</td>
<td>Kidnapping may be classified as either a first degree or a second degree felony, depending on the circumstances. Under N.M. Stat. Ann. § 31-18-15 (Michie 1994), the basic sentence for a first degree felony is 18 years imprisonment; the basic sentence for a second degree felony is 9 years imprisonment.</td>
</tr>
<tr>
<td>STATUTE</td>
<td>PENALTY</td>
</tr>
<tr>
<td>----------------------------------</td>
<td>-------------------------------------------------------------------------</td>
</tr>
<tr>
<td>N.Y. PENAL LAW § 135.25 (McKinney 1987)</td>
<td>Kidnapping in the first degree is a Class A-I felony which, under N.Y. PENAL LAW § 70.00 (McKinney 1987 &amp; Supp. 1996), carries a sentence of a maximum of 25 years imprisonment and a minimum of 15 years imprisonment.</td>
</tr>
<tr>
<td>N.Y. PENAL LAW § 135.20 (McKinney 1987)</td>
<td>Kidnapping in the second degree is a Class B felony which, under N.Y. PENAL LAW § 70.00 (McKinney 1987), carries a maximum sentence of 25 years imprisonment.</td>
</tr>
<tr>
<td>N.C. GEN. STAT. § 14-39 (1994)</td>
<td>Kidnapping may be classified as either a Class C or Class E felony. Under N.C. GEN. STAT. § 15A-1340.17 (1988), a Class C felony carries a sentence of a maximum of 17 years, 6 months imprisonment, and a minimum of 3 years, 8 months imprisonment; a Class E felony carries a sentence of a maximum of 4 years, 11 months imprisonment, and a minimum of 1 year, 3 months imprisonment.</td>
</tr>
<tr>
<td>N.D. CENT. CODE § 12.1-18-01 (1985)</td>
<td>Kidnapping is a Class A felony unless the actor voluntarily releases the victim alive and in a safe place prior to trial, in which case it is a Class B felony. Under N.D. CENT. CODE § 12.1-32-01 (Supp. 1995), the sentence for a Class A felony is a maximum of 20 years imprisonment; the sentence for a Class B felony is a maximum of 10 years imprisonment.</td>
</tr>
<tr>
<td>OHIO REV. CODE ANN. § 2905.01 (Baldwin 1996)</td>
<td>Kidnapping is a felony of the first degree. If the offender releases the victim unharmed in a safe place, the kidnapping is a felony of the second degree. Under OHIO REV. CODE ANN. § 2929.11 (Baldwin 1994), the sentence for a felony of the first degree is a minimum of 4 years imprisonment with a maximum of 25 years imprisonment. Under the same section, the sentence for a felony of the second degree is a minimum of 3 years imprisonment with a maximum of 15 years imprisonment.</td>
</tr>
<tr>
<td>OKLA. STAT. ANN. tit. 21, § 741 (West 1983)</td>
<td>Kidnapping is punishable by imprisonment not exceeding 10 years.</td>
</tr>
<tr>
<td>OR. REV. STAT. § 163.235 (1993)</td>
<td>Kidnapping in the first degree is a Class A felony which, under OR. REV. STAT. § 161.605 (1993), carries a sentence of a maximum of 20 years imprisonment.</td>
</tr>
<tr>
<td>OR. REV. STAT. § 163.225 (1993)</td>
<td>Kidnapping in the second degree is a Class B felony which, under OR. REV. STAT. § 163.605 (1993), carries a sentence of a maximum of 10 years imprisonment.</td>
</tr>
<tr>
<td>R.I. GEN. LAWS § 11-26-1 (1994)</td>
<td>Kidnapping is a felony punishable by a sentence of a maximum of 20 years imprisonment.</td>
</tr>
<tr>
<td>S.C. CODE ANN. § 16-3-910 (Law. Co-op. Supp. 1995)</td>
<td>Kidnapping is a felony punishable by imprisonment for not more than 30 years.</td>
</tr>
<tr>
<td>S.D. CODIFIED LAWS ANN. § 22-19-1 (Supp. 1995)</td>
<td>Kidnapping is a Class 1 felony except if the defendant has inflicted gross permanent injury on the victim, in which case it is a Class A felony. Under S.D. CODIFIED LAWS ANN. § 22-6-1 (1988), the sentence for a Class A felony is death or life imprisonment; the sentence for a Class 1 felony is life imprisonment.</td>
</tr>
<tr>
<td>TENN. CODE ANN. § 39-13-303 (1991)</td>
<td>Kidnapping is a Class C felony which, under TENN. CODE ANN. § 40-35-111 (1990), carries a sentence of imprisonment for not less than 3 years nor more than 15 years.</td>
</tr>
</tbody>
</table>
Kidnapping is a felony of the third degree which, under TEx. PENAL CODE ANN. § 12.34 (West 1994), carries a sentence of imprisonment for not more than 10 years nor less than 2 years.

Kidnapping is a felony of the second degree which, under UTAH CODE ANN. § 76-3-203 (Supp. 1995), carries a sentence of imprisonment for not less than 1 year nor more than 15 years.

Kidnapping carries a maximum sentence of life imprisonment or a fine of not more than $50,000, or both.

"Abduction and kidnapping" is a Class 5 felony which, under VA. CODE ANN. § 18.2-10 (Michie Supp. 1995), carries a sentence of imprisonment for not less than 1 year nor more than 10 years.

Kidnapping in the first degree is classified a Class A felony; the sentence for a Class A felony is found in WASH. REV. CODE ANN. § 9.94A.310 (West Supp. 1996). Washington utilizes a sentencing grid, the maximum sentence under which is life imprisonment without parole or the death penalty, while the minimum sentence is 0-60 days imprisonment.

Kidnapping in the second degree is a Class B felony. Sentencing for Class B felonies is also determined by utilizing the sentencing grid that appears in WASH. REV. CODE ANN. § 9.94A.310 (West Supp. 1996).

"Abduction of person; kidnapping or concealing child" is a felony and is punishable by a sentence of a minimum of 1 year imprisonment and a maximum of 10 years imprisonment.

Kidnapping is a Class B felony which, under WIS. STAT. ANN. § 939.50 (West Supp. 1995), carries a maximum sentence of 40 years imprisonment.

If the kidnapper voluntarily releases the victim substantially unharmed and in a safe place prior to trial, this crime is a felony and the sentence is imprisonment of not more than 20 years. If the defendant does not voluntarily release the victim substantially unharmed and in a safe place prior to trial, this crime is a felony and the sentence is imprisonment for not less than 20 years, or for life.