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The Commerce Clause: Border Crossing + Church Burning = Interstate Commerce (A Formula for Federalizing Common Law State Crimes)

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THE COMMERCE CLAUSE: BORDER CROSSING + CHURCH BURNING = INTERSTATE COMMERCE (A FORMULA FOR FEDERALIZING COMMON LAW STATE CRIMES)

United States v. Ballinger, 395 F.3d 1218 (11th Cir. 2005)

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Respondent, a practicing Luciferian from Indiana, drove his van south to Georgia where he set fire to five churches.[1] One of the arsons resulted in the death of a volunteer firefighter.[2] Respondent pleaded guilty in federal court to five counts of church arson[3] in violation of the Church Arson Prevention Act (CAPA).[4] Respondent subsequently challenged his convictions on constitutional grounds, arguing that the CAPA exceeded Congress's Commerce Clause powers as applied to him.[5] Respondent argued that the federal commerce power could not reach his acts because the church burnings—noneconomic, purely intrastate crimes—lacked a sufficient nexus to interstate commerce.[6]

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* For Kelly, my wife and best friend, whose love, support, patience, and integrity inspires me everyday.

1. United States v. Ballinger, 395 F.3d 1218, 1223 (11th Cir. 2005) (en banc). Respondent, accompanied by his girlfriend, left Indiana partly in response to a call to Respondent's home from an FBI agent. *Id.* En route to Georgia, Respondent burned three churches in three states. *Id.* He burned three more churches on his way back to Indiana. *Id.* at 1224. Respondent had expressed hostility toward organized Christianity, and he described the burning of churches as his "work" and his "business." *Id.* at 1223.

2. The firefighter was killed when the roof of the New Salem United Methodist Church in Banks County, Georgia collapsed. *Id.* Three other volunteer firefighters were injured in the blaze. *Id.*

3. United States v. Ballinger, 312 F.3d 1264, 1265 (11th Cir. 2002) (panel opinion). Respondent received a life sentence on one count in connection with the death of the volunteer firefighter. *Id.* at 1268 n.2. Respondent was sentenced to concurrent twenty-year terms on the remaining four counts. *Id.*

4. 18 U.S.C. § 247 (2000). The statute provides, in relevant part, that "[w]hoever . . . intentionally defaces, damages, or destroys any religious real property, because of the religious character of that property . . . shall be punished." *Id.* The statute includes a jurisdictional element requiring the government to prove that the offense "is in or affects interstate or foreign commerce." *Id.*

5. *Ballinger*, 395 F.3d at 1224. Respondent advanced his "as-applied" challenge in two related arguments. First, he argued that the statute exceeded the bounds of Congress's Commerce Clause powers as applied to his acts. *Id.* He also pressed a statutory construction argument, maintaining that the statute should not be read to cover his acts, as Congress did not have the power to reach his crimes. *Id.* Additionally, Respondent argued that the CAPA was facially unconstitutional because Congress does not have the power to proscribe church burning, an argument the instant court rejected in quick fashion. *Id.* at 1226.

6. *Id.* at 1224.

A three-judge panel of the Eleventh Circuit Court of Appeals agreed with Respondent, reversing the convictions on the ground that the church arsons were beyond the reach of Congress's commerce powers and thus not covered by the CAPA.[7] A majority of the Eleventh Circuit vacated the panel's decision and the court considered Respondent's appeal en banc.[8] Affirming Respondent's convictions, the en banc court HELD that, since Respondent had crossed state lines to commit church arson, his crimes were properly regulated under Congress's authority to protect the channels and instrumentalities of commerce.[9]

The Constitution created a federal government of enumerated powers.[10] Powers not vested in Congress by the Constitution remain the province of the States.[11] This system of dual sovereignty, known as federalism, creates a dynamic tension between federal and state power—a tension that reduces the risk of tyranny and abuse from either front and ultimately protects the liberties of citizens.[12] Congress relies on the Commerce Clause[13] as constitutional authority for a broad range of legislation. This broad power, however, is not without limits,[14] and the duty to interpret those boundaries lies with the Supreme Court.[15] From 1937 to 1995, the Court's Commerce Clause decisions took a broad view of federal commerce power, triggering an expansion of federal regulation of conduct and transactions.[16] Then

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7. *Ballinger*, 312 F.3d at 1276.

8. *Ballinger*, 369 F.3d at 1238-39.

9. *Ballinger*, 395 F.3d at 1222.

10. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819).

11. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

12. *See, e.g.*, New York v. United States, 505 U.S. 144, 181 (1992) ("[T]he Constitution divides authority between federal and state governments for the protection of individuals."); Gregory v. Ashcroft, 501 U.S. 452, 458-59 (1991) ("[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. . . . In the tension between federal and state power lies the promise of liberty.").

13. U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States."

14. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 557 (1995) (noting that the scope of the Commerce Clause "'may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government'") (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).

15. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803).

16. From the late nineteenth century until 1937, the Court held a narrow view of the Commerce Clause, regularly striking down legislation as beyond the reach of the federal commerce power when the targeted activity had only an indirect effect on interstate commerce. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 17-18 (1895) (distinguishing manufacturing from commerce in holding that a sugar refinery was beyond the reach of the Sherman Act). Then, for

came the Court's landmark decision in *United States v. Lopez*, a case that sent shockwaves through the status quo.[17]

Lopez involved a facial attack on the federal Gun-Free School Zones Act (GFSZA)[18] by a twelfth-grader who was charged, under the statute, with possession of a gun on campus.[19] Striking down a piece of Commerce Clause legislation for the first time in nearly sixty years, a divided Court held that Congress's attempt to criminalize mere possession of a firearm at a school exceeded the bounds of federal commerce power.[20] The Court began by summarizing nearly two centuries of Commerce Clause jurisprudence, outlining three broad categories under which Congress may regulate commerce.[21] First, Congress may regulate the channels of interstate commerce.[22] Second, Congress may "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities."[23] Finally, Congress may regulate those activities that have a substantial effect on interstate commerce.[24]

Finding that the first two prongs did not apply to the GFSZA,[25] the

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nearly sixty years following *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the National Labor Relations Act as applied to a far-flung steel-producing company), the Court's deferential approach to Commerce Clause legislation resulted in a broad expansion of federal regulations. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 608 (2000) (characterizing the Court's Commerce Clause jurisprudence after *Jones & Laughlin Steel Corp.* as providing Congress "considerably greater latitude"). The Court's attitude toward the Commerce Clause during this era led Judge Alex Kozinski to refer to the Commerce Clause as the "Hey, you-can-do-whatever-you-feel-like Clause." Judge Alex Kozinski, *Introduction to Volume Nineteen*, 19 HARV. J.L. & PUB. POL'Y 1, 5 (1995).

17. *See Lopez*, 514 U.S. at 567-68; *see also* Alistair E. Newbern, Comment, *Good Cop, Bad Cop: Federal Prosecution of State-Legalized Medical Marijuana After* United States v. Lopez, 88 CAL. L. REV. 1575, 1607-08 (2000) (describing the reaction to *Lopez* in the courts and the academic community).

18. 18 U.S.C. § 922(q)(1)(A) (Supp. V 1988) (criminalizing knowing possession of a firearm in a school zone).

19. *Lopez*, 514 U.S. at 551.

20. *Id.* at 551, 567-68. Chief Justice Rehnquist wrote the opinion for the five-member majority, which also included Justices Kennedy, O'Connor, Scalia, and Thomas. *Id.* at 550.

21. *Id.* at 558-59.

22. *Id.* at 558 (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256 (1964); United States v. Darby, 312 U.S. 100, 114 (1941)).

23. *Id.* (citing Shreveport Rate Cases, 234 U.S. 342 (1914)).

24. *Id.* at 558-59 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).

25. The Court offered little guidance for future application of the first two prongs. The Court stated only that neither prong provided authority for the GFSZA because criminalizing gun possession in school has nothing to do with regulating the use of or protecting the channels or instrumentalities of interstate commerce. *Id.* at 559. For an argument that the three *Lopez* prongs should be shelved in favor of a doctrine that asks simply whether there is some reason the federal government must be able to regulate a particular activity or some reason the matter cannot be left to the states, see generally Donald H. Regan, *How to Think About the Federal Commerce Power*

Court analyzed the statute under the substantial commercial effect prong.[26] In striking down the GFSZA, the Court cited a number of problems with the statute,[27] but it indicated that the noneconomic nature of gun possession was the fatal flaw.[28] The Court also rejected the Government's argument that Congress has the power to regulate noneconomic, intrastate activity when the activity, viewed in the aggregate, substantially affects interstate commerce.[29] Recognizing that the Court's prior Commerce Clause opinions suggested a possible expansion of federal power, the Court declined the invitation to open that door.[30] To do so, the Court stated, would be tantamount to giving Congress virtually plenary power to legislate in areas historically reserved to the states—family law, education, and criminal law, for example.[31] Thus, the Court's rationale for shaking up the status quo and calling a halt to the expansion of the federal commerce power was rooted in the notion that federalism values must be protected.[32]

In *United States v. Morrison*, the Court reaffirmed the *Lopez* commitment to federalism and added another layer of restriction on Congress's commerce power.[33] In *Morrison*, the Court held unconstitutional the civil remedy portion of the Violence Against Women

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and Incidentally Rewrite United States v. Lopez, 94 MICH. L. REV. 554 (1995).

26. *Lopez*, 514 U.S. at 559.

27. In addition to the noneconomic nature of gun possession, the Court identified the following factors as problematic: the lack of a jurisdictional element ensuring a nexus between the regulated activity and interstate commerce; the lack of congressional findings setting forth a connection to interstate commerce; the lack of a connection to a national regulatory scheme whose efficacy would be undermined if Congress could not reach the activity; and the fact that the statute sought to regulate activity that traditionally was within the purview of the states. *Id.* at 561-68. Scholars have criticized the *Lopez* Court for failing to offer guidance on how to apply these factors to future cases. *See, e.g.*, Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253, 1258 (2003) (faulting *Lopez* for not indicating which factor was fatal to the statute, and for not suggesting how each factor should be weighted).

28. *See Lopez*, 514 U.S. at 559-61, 567.

29. *Id.* at 563-68.

30. *Id.* at 567.

31. *Id.* at 564. Justice Kennedy, in a concurring opinion, asserted that, under principles of federalism, states have a vital role in serving as "laboratories for experimentation." *Id.* at 581 (Kennedy, J., concurring). The GFSZA, however, would strip states of that role. *Id.* at 583. Moreover, were the federal government to take over regulation of entire areas of traditional state concern, the boundaries between federal and state authority would become blurred and "political responsibility would become illusory." *Id.* at 577.

32. The majority opinion concluded by stating that failure to draw the line on federal commerce power would mean "that there never will be a distinction between what is truly national and what is truly local." *Id.* at 567-68.

33. United States v. Morrison, 529 U.S. 598, 614 (2000) (5-4 decision). Chief Justice Rehnquist, author of the majority opinion in *Lopez*, again wrote the opinion for the majority in *Morrison*. *Id.* at 600. As in *Lopez*, the justices split along ideological lines, with Justices Kennedy, O'Conner, Scalia, and Thomas joining the majority opinion. *Id.*

Act (VAWA),[34] which created a private right of action for female victims of violence.[35] Analyzing the case under the substantial commercial effect prong, the Court began by citing *Lopez* for the proposition that federal regulation of intrastate conduct is presumptively invalid unless the targeted conduct is economic in nature.[36] The Court also added gloss to the channels and instrumentalities prongs by stating that the power to regulate intrastate violence is left exclusively to the states unless that violence targets the channels or instrumentalities of interstate commerce.[37]

The key question in *Morrison* was whether congressional findings about the effects of the targeted activity on interstate commerce, a missing ingredient in *Lopez*, could save an otherwise suspect statute from judicial invalidation.[38] The Court said no.[39] The Court emphasized that simply because Congress concludes that "'a particular activity substantially affects interstate commerce does not necessarily make it so.'"[40] According to the Court, whether an activity substantially affects interstate commerce is ultimately a judicial rather than a legislative question.[41] Invoking the strong federalism themes of *Lopez*, the Court refused to defer to Congress's findings when the result of such deference would be to convert the Commerce Clause into a general police power.[42]

In *United States v. Jones*,[43] the Court again relied heavily on the federalism principles of *Lopez* in narrowly construing the reach of the federal omnibus arson statute.[44] Unlike the statutes involved in *Lopez* and

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34. 42 U.S.C. § 13981 (1995). The statute was passed pursuant to both Congress's Commerce Clause powers and Section 5 of the Fourteenth Amendment. *Morrison*, 529 U.S. at 607.

35. *Id.* at 601-02. The plaintiff, a student at Virginia Polytechnic Institute, brought suit under the statute, alleging she had been raped by two football players. *Id.* at 602-03. The Court struck down the statute as violative of both the Commerce Clause and the Fourteenth Amendment. *Id.* at 627.

36. *Id.* at 610-11. The Court stated that "a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case." *Id.* at 610. The Court further stated that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Id.* at 613.

37. *Id.* at 618. The Court continued: "Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Id.*

38. *See id.* at 614-15. In enacting the VAWA, Congress made numerous findings regarding the effects of gender-motivated violence on interstate commerce—effects that included deterring travel and employment, diminishing national productivity, and increasing medical costs. *Id.* at 615 (quoting H.R. CONF. REP. No. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839).

39. *Id.* at 614.

40. *Id.* The Court quoted *Lopez* as support for this proposition. *Id.*

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

42. *Id.* at 615; *see also* Denning & Reynolds, *supra* note 27, at 1258-60.

43. 529 U.S. 848 (2000).

44. *Id.* at 851, 857-58. The Court announced the decision in *Jones* one week after it decided

Morrison, the federal arson statute contained a jurisdictional hook, requiring the government to prove that the damaged property was "used in interstate . . . commerce or in any activity affecting interstate . . . commerce."[45] Reversing petitioner's arson conviction, a unanimous Court[46] held that the statute could not be read to apply to an arsonist who burns a residential dwelling.[47] The Court opted for a narrow interpretation of the statute in order to avoid the dubious constitutional conclusion that residential arson—"'traditionally local criminal conduct'"—is "'a matter for federal enforcement'" under the Commerce Clause.[48] The Court reasoned that if such an attenuated connection to interstate commerce[49] could serve as the basis for federal regulation of the "paradigmatic common-law state crime" of arson, then "hardly a building in the land would fall outside the federal statute's domain."[50] Thus, the Court's analysis in interpreting the statute was guided by the federalism principles brought to the fore in *Lopez*.[51]

In affirming Respondent's convictions for church arson,[52] the instant court applied neither the substantial commercial effect test of *Lopez* and *Morrison*, nor the narrow interpretative approach of *Jones*. Instead, the

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Morrison.

45. 18 U.S.C. § 844(i) (Supp. IV 1994). The statute makes "damaging or destroying, by means of fire or an explosive, any . . . property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce a federal crime." *Id.*

46. Justice Ginsburg, who dissented in both *Lopez* and *Morrison*, wrote the opinion of the Court.

47. *Jones*, 529 U.S. at 850-52, 857-59.

48. *Id.* at 857-59 (quoting United States v. Bass, 404 U.S. 336, 350 (1971)). The Court relied on the interpretive rule adopted in *United States* ex rel. *Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909), that "'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'" *Jones*, 529 U.S. at 857.

49. The government argued that the dwelling in question in *Jones* was used in at least three activit[ies] affecting commerce: (1) the homeowner used the dwelling as collateral to obtain and secure a mortgage from an out-of-state lender; (2) the homeowner obtained an out-of-state insurance policy on the home; and (3) the homeowner received natural gas from out-of-state sources. *Jones*, 529 U.S. at 855 (quoting Brief for the United States at 19-23 (No. 99-5739)).

50. *Id.* at 857-58. Justice Ginsburg continued, "Practically every building in our cities, towns, and rural areas is constructed with supplies that have moved in interstate commerce, served by utilities that have an interstate connection, financed or insured by enterprises that do business across state lines, or bears some other trace of interstate commerce." *Id.* at 857.

51. *Id.* The Court stated that "[t]o read § 844(i) as encompassing the arson of an owner-occupied private [dwelling]" would significantly change the federal-state balance. *Id.* at 858; *see also* Thomas Heyward Carter, III, Note, *The Devil in* U.S. v. Jones*: Church Burnings, Federalism, and a New Look at the Hobbs Act*, 59 WASH. & LEE L. REV. 1461, 1475 (2002) (raising the possibility that *Jones* signals a change in the Court's approach to the relationship between the Commerce Clause and congressional power to regulate crime).

52. United States v. Ballinger, 395 F.3d 1218, 1227, 1240 (2005) (Marcus, J.). The en banc court decided the case by a vote of ten to three. *See id.* at 1221, 1243.

instant court relied on the channels and instrumentalities prongs of *Lopez* in holding that Congress had the constitutional authority under the Commerce Clause to proscribe Respondent's church arsons.[53] The instant court asserted that there was no need to analyze the case under the substantial commercial effect prong since Respondent used the channels (highways) and instrumentalities (Respondent's van) of interstate commerce to carry out his crimes.[54] The instant court further asserted that the scope of Congress's authority under the first two *Lopez* prongs encompassed the power to prevent the channels and instrumentalities of interstate commerce from being used to facilitate harmful acts, even when the proscribed harmful act is consummated outside the flow of commerce.[55] In the instant case, a border crossing was enough to bring Respondent within the ambit of the Commerce Clause.[56]

After concluding that Congress could proscribe Respondent's activities, the instant court addressed the question of whether the text of the CAPA actually did so.[57] Without mentioning the federalism themes of *Lopez* or the narrow interpretation rule of *Jones*,[58] the instant court gave broad effect to the jurisdictional hook in the CAPA.[59] The instant court held that by using the words "in or affects interstate . . . commerce" in the jurisdictional hook, Congress invoked the federal government's full authority under the Commerce Clause.[60] Thus, since Respondent, by crossing state lines, used the channels and instrumentalities of interstate commerce to carry out his crimes, and since Congress had the power to

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53. *Id.* at 1227-28. By contrast, the Eleventh Circuit panel opinion followed *Lopez* and *Morrison* in analyzing the CAPA under the substantial commercial effect test, since the statute regulated the activity of arson, not the travel to the scene. United States v. Ballinger, 312 F.3d 1264, 1269 (2002). The panel opinion resolved the case using the narrow interpretation rule of *Jones*, concluding that the statute could not be read to reach Respondent's conduct since the churches in question did not have a substantial effect on interstate commerce. *Id.* at 1271-73.

54. *Ballinger*, 395 F.3d at 1227.

55. *Id.*

56. *Id.* at 1228.

57. *Id.* at 1230.

58. The majority cited *Lopez* only for the general proposition that Congress's commerce powers are limited to three categories and to distinguish the CAPA, which contains a jurisdictional element, from the statute in *Lopez*, which did not. *Id.* at 1225, 1228 n.5, 1235.

59. *Id.* at 1235, 1240.

60. *Id.* at 1240. The instant court also pointed to the legislative history of the statute. *Id.* at 1239-40. As originally enacted, the statute's jurisdictional element required that the government prove that the defendant, in committing the offense, traveled in interstate commerce or used a facility or instrumentality of interstate commerce. *Id.* at 1239 (quoting Pub. L. No. 100-346, § 1, 102 Stat. 644 (1988)). The law as amended in 1996 replaced that language with the "in or affects interstate . . . commerce" language. *See* 18 U.S.C. § 247 (2000). The House Report accompanying the 1996 amendment indicates that Congress intended to broaden the reach of the statute by mirroring *Lopez*'s articulation of the extent and nature of the commerce power. *Ballinger*, 395 F.3d at 1240 (citing H.R. REP. NO. 104-621, at 10 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1082, 1091).

regulate such conduct, the instant court concluded that the CAPA reached Respondent's crimes.[61]

The dissenters[62] criticized the majority's failure to adhere to the federalism principles central to the holdings in *Lopez*, *Morrison*, and *Jones*.[63] Judge Hill argued that, because the CAPA regulates the noneconomic intrastate activity of church burning, federalism values should have led the majority to examine Respondent's crimes under the more restrictive substantial commercial effect prong.[64] Judge Hill asserted that Congress's intention that the CAPA reach offenders who use the channels and instrumentalities of interstate commerce to burn churches does not mean courts should abandon the judiciary's duty to uphold the Constitution.[65] Furthermore, Judge Hill argued that by deferring to congressional intent, the majority glossed over the fact that the CAPA criminalizes the act of church burning, not the use of the interstate highway system to reach the church.[66]

The instant court has opened the door to expanded federal enforcement of noneconomic intrastate crimes by abandoning the federalism tenets undergirding *Lopez* and its progeny. The majority's failure to acknowledge

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61. *Ballinger*, 395 F.3d at 1228, 1240.

62. Judges Tjoflat, Birch, and Hill each wrote dissenting opinions. *See id.* at 1243 (Tjoflat, J., dissenting); *id.* at 1248 (Birch, J., dissenting); *id.* at 1253 (Hill, J., dissenting). Judges Tjoflat and Hill disagreed with the majority's broad statutory interpretation; each would have reversed on the ground that the statute cannot, consistent with the Commerce Clause, be read to apply to church arson simply because the arsonist crossed a state line. *Id.* at 1248 (Tjoflat, J., dissenting); *id.* at 1257 (Hill, J., dissenting). Judge Birch would have reached the constitutional question and invalidated the CAPA as beyond the limits of the Commerce Clause. *Id.* at 1248 (Birch, J., dissenting).

63. Judge Birch, for example, wrote that

> by failing to appreciate the significance of federalism, the majority has misconstrued the limits of the Commerce Clause and allowed a federal statute to regulate intrastate noneconomic conduct in an area of law traditionally protected from federal intrusion. Thus, the majority has burned yet another bridge to our federalist foundations.

Id. at 1253 (Birch, J., dissenting).

64. *Id.* at 1255-56 (Hill, J., dissenting); *cf.* United States v. Odom, 252 F.3d 1289, 1295-97 (11th Cir. 2001) (reversing an arson conviction because the government could not show a substantial effect on interstate commerce).

65. Judge Hill explained, "As *Lopez*, *Morrison*, and *Jones* have made clear, no jurisdictional hook, nor any mantric invocation by Congress of its 'fullest authority under the Commerce Clause' can establish federal jurisdiction over an intrastate activity that judicial review determines does not have the constitutionally required substantial effect on interstate commerce." *Ballinger*, 395 F.3d at 1256-57 (Hill, J., dissenting).

66. *Id.* at 1257 (Hill, J., dissenting). Indeed, as Judge Hill pointed out, "numerous federal statutes . . . explicitly[] criminalize travel in interstate commerce in order to commit a traditional common-law crime." *Id.* at 1254 n.1 (Hill, J., dissenting).

the obvious federalism concerns at stake is particularly striking given the wide-ranging scholarly reaction and predictions of a Commerce Clause revolution generated by *Lopez*.[67] Thus, the instant court's silence can be interpreted to imply that the strong current of federalism underlying the holdings in *Lopez*, *Morrison*, and *Jones* carried no precedential weight.[68] That begs the question of whether those opinions can be limited to their facts.[69] If so, judges and federal prosecutors can avoid the constraints of federalism merely by pointing to neat factual distinctions.[70]

The instant court's approach thus portends a jurisprudential shift toward a watered-down Commerce Clause, with the inquiry focusing not on the *activity* Congress is seeking to regulate, but rather, on whether Congress used the right language.[71] Specifically, the instant court has opened an escape hatch from the restrictive substantial commercial effect prong by using the channels and instrumentalities prongs to sustain federal enforcement of noneconomic intrastate activity.[72] Moreover, the instant court's broad interpretation of the CAPA's jurisdictional element signals a departure from the more judicially-aggressive, narrow interpretation rule of *Jones*.[73]

Under the rationale used in *Lopez*, *Morrison*, and *Jones*, the instant case would have been decided, and Respondent's convictions reversed, under the substantial commercial effect prong.[74] *Morrison* indicated that Commerce Clause regulation of intrastate activities can only be sustained when the targeted activity is both economic in nature and has a substantial effect on interstate commerce.[75] The instant court, however, managed to maneuver around *Morrison*'s federalism constraints by identifying a new

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67. *See* Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 30 (2001) (concluding that *Lopez* signals a federalism revolution); *see also* Christy H. Dral & Jerry J. Phillips, *Commerce By Another Name: The Impact of* United States v. Lopez *and* United States v. Morrison, 68 TENN. L. REV. 605, 609-10 (2001) (characterizing scholarly reaction to *Lopez*).

68. For an argument that lower courts have been reluctant to take *Lopez* seriously, even after *Morrison*, see Denning & Reynolds, *supra* note 27, at 1256.

69. *See, e.g.*, Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 389-91 (suggesting that federal courts often avoid the federalism constraints of *Lopez* by finding factual distinctions, such as a jurisdictional element in a statute).

70. *See id.*

71. *See Ballinger*, 395 F.3d at 1256-57 (Hill, J., dissenting).

72. *See supra* notes 52-53 and accompanying text; *see also* Antony Barone Kolenc, Casenote, *Commerce Clause Challenges After* United States v. Lopez, 50 FLA. L. REV. 867, 927-29 (1998) (surveying cases in which federal courts have used the channels and instrumentalities prongs to uphold legislation).

73. *See supra* note 48 and accompanying text.

74. *See Ballinger*, 395 F.3d at 1256-57 (Hill, J., dissenting).

75. *Id.* at 1254-55 (Hill, J., dissenting) (citing United States v. Morrison, 529 U.S. 598, 613 (2000)).

and powerful use for the channels and instrumentalities prongs: to broaden the scope of a jurisdictional element.[76] Under the instant court's approach, a broadly-worded jurisdictional element that invokes the full commerce power would allow federal enforcement of any noneconomic intrastate crime.[77] A federal prosecutor would only need to show that the defendant used a channel or instrumentality of interstate commerce to facilitate the crime—crossing state lines would be sufficient—in order to justify federal jurisdiction.[78]

The implications of this approach were fully displayed in the instant case. Respondent committed a noneconomic, common-law state crime.[79] His acts destroyed local churches, devastated local congregations, and disrupted local communities.[80] The proper venue for exacting justice is a local state court, where the affected community can observe local representatives administering local law.[81] However, the expansive Commerce Clause regime advanced by the instant court threatens such local independence.[82]

Jones provided the instant court with a custom-fit model for resolving the instant case under the narrow interpretation rule.[83] Indeed, the instant case had much in common with *Jones*: Both cases involved an arson prosecution and both statutes contained jurisdictional elements purporting to invoke the full extent of Congress's commerce powers.[84] Under the *Jones* narrow interpretation rule, Respondent's church arsons were beyond the reach of Congress because his crimes did not substantially affect interstate commerce.[85] Congress's choice of statutory language is irrelevant under *Jones* if federal regulation offends the federalism tenets

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76. *See id.* at 1256-57 (Hill, J., dissenting). For a discussion of how *Lopez* and *Morrison* created a massive loophole by failing to address the channels and instrumentalities prongs, see Diane McGimsey, Comment, *The Commerce Clause and Federalism after* Lopez *and* Morrison*: The Case for Closing the Jurisdictional-Element Loophole*, 90 CAL. L. REV. 1675, 1679-80 (2002).

77. *Ballinger*, 395 F.3d at 1257 (Hill, J., dissenting).

78. *Id.* (Hill, J., dissenting); *see also* McGimsey, *supra* note 76, at 1679-80 (arguing that a "jurisdictional element . . . can be easily satisfied" under the channels and instrumentalities prong by showing "a simple state-line crossing, however remote in time or purpose").

79. *See supra* note 64 and accompanying text.

80. *Ballinger*, 395 F.3d at 1251 (Birch, J., dissenting).

81. *See id.* at 1251-52 (Birch, J., dissenting); *see also id.* at 1251 n.4 (Birch, J., dissenting) (pointing out that "[s]tate criminal statutes would have outlawed [Respondent's] conduct in each of the States in which he committed church arson").

82. *See, e.g.*, New York v. United States, 505 U.S. 144, 168-69 (1992) (discussing how federal encroachment into state matters undermines governmental accountability).

83. *See Ballinger*, 395 F.3d at 1255-56 (Hill, J., dissenting).

84. *Compare Ballinger*, 395 F.3d at 1221-22, 1224, *with* Jones v. United States, 529 U.S. 848, 850-52 (2000).

85. *Ballinger*, 395 F.3d at 1256-58 (Hill, J., dissenting).

of *Lopez*.[86] By indicating that a state-line crossing is enough to satisfy a jurisdictional element, and thus avoiding judicial review of whether the proscribed act substantially affected commerce, the instant court significantly departed from *Jones*.[87] In so doing, the instant court has invited further expansion of federal law enforcement into areas traditionally reposed in the police powers of the states.[88]

Lopez, *Morrison*, and *Jones*, taken cumulatively, unmistakably stand for the proposition that lower courts must view Commerce Clause challenges through the lens of federalism, lest the power of the federal government become limitless. A federal government of enumerated powers presupposes important roles for the states: to experiment, to make policy choices about issues of local concern, and to bring government closer to the people. Thus, the Commerce Clause can be properly understood as limiting the federal power to activities of national concern: activities covered by a nationwide regulatory scheme such as terrorism, transportation, and drug trafficking. These were the types of activities the *Lopez* Court clearly had in mind in sketching out the three prongs of commerce power.[89]

A substantive interpretation, the proper approach considering how *Morrison* and *Jones* reaffirmed *Lopez*'s themes, focuses on the common thread running through each prong: the requirement of a meaningful nexus between the regulated activity and interstate commerce. *Jones* is the model for this approach. A formalistic interpretation, a less preferable but more popular approach among lower courts, focuses instead on linguistic tools and minor distinctions between cases.[90] For this approach, the instant case stands as a model. Maybe, as many have suggested, the standards articulated in *Lopez* are ambiguous and unworkable and need tidying up.[91] Until that day comes, the instant court's decision offers a formula for expanding the power of the federal government at the expense of the states.

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86. *Id.* at 1255 (Hill, J., dissenting).

87. *Id.* at 1256 (Hill, J., dissenting).

88. *Id.* at 1257 (Hill, J., dissenting).

89. *See supra* notes 21-24 and accompanying text.

90. *See generally* Reynolds & Denning, *supra* note 69 (surveying the response to *Lopez* in the lower courts).

91. *See, e.g.*, McGimsey, *supra* note 76, at 1736 (arguing that the Court should clarify the scope of the channels and instrumentalities prongs).