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The Devil in US. v. Jones: Church Burnings, Federalism, and a New Look at the Hobbs Act

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I. Introduction

[In the wake of Lopez,] [t]his is not the first occasion on which this Court has agonized over the propriety of the gambit of prosecuting criminal

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conduct which has historically and traditionally been prosecuted under the state system as a federal crime in order to maximize punishment.[1]

The "agon[y]" of the Fifth Circuit played itself out in *United States v. Hickman*.[2] After Hickman admitted to participating in a series of robberies in the Beaumont, Texas area, a federal jury convicted him of six separate violations of 18 U.S.C. § 1951, also known as the Hobbs Act.[3] In March 1997, the district court sentenced Hickman to 3,180 months imprisonment, or about 265 years.[4] On appeal, Hickman claimed that the amounts he stole from the businesses "were fairly trivial or that the businesses themselves only had a minor role in interstate commerce."[5] Hickman cited *United States. v. Lopez*[6] for the proposition that the government must show that each robbery had a "substantial" effect on interstate commerce.[7]

Before *Lopez*, a federal district court would have considered such an argument a non-starter. And even after *Lopez*, very few district courts engaged in serious discussion of re-examining the standard of review for interstate commerce claims.[8] So when the Court of Appeals for the Fifth Circuit stated that a "review of Supreme Court authority raises serious questions regarding whether aggregation principles can be used as the Commerce Clause jurisdiction hook under the Hobbs Act when the underlying crimes arise from a purely

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1. United States v. McFarland, 264 F.3d 557, 558 (5th Cir. 2001), *reh'g en banc granted*, 281 F.3d 506 (5th Cir. 2002).

2. *See* United States v. Hickman, 151 F.3d 446, 456 (5th Cir. 1998) (discussing nexus between local crimes and federal enforcement), *cert. denied*, 530 U.S. 1203 (2000).

3. The Hobbs Act reads, in relevant part: "[W]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce . . . by robbery or extortion . . . in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both." 18 U.S.C. § 1951(a) (2000).

4. *Hickman*, 151 F.3d at 453.

5. *Id.* at 456.

6. 514 U.S. 549 (1995).

7. *Hickman*, 151 F.3d at 456; *see* United States v. Lopez, 514 U.S. 549, 567-68 (1995) (maintaining that, even under aggregation standard, guns in school zones did not have substantial effect on interstate commerce). In *Lopez*, the Supreme Court considered the constitutionality of 18 U.S.C. § 922(q)(2)(A), a federal statute criminalizing possession of a gun or ammunition in designated "school zones." *Id.* at 551. Petitioner, charged under the Gun-Free School Zones Act, challenged only the Act's constitutionality in his defense. *Id.* at 551-52. In a decision surprising to many observers, the Supreme Court found that 18 U.S.C. § 922(q)(2)(A) exceeded congressional power to regulate under the Commerce Clause because the prohibited conduct did not substantially affect interstate commerce. *Id.* at 565. Further, the Court went on to express deep concern over the encroachment of the federal government on the states' police powers. *Id.* at 564.

8. *See infra* Part IV.B (discussing reluctance of federal courts to re-examine standard jurisdictional analysis of federal robbery and arson statutes in light of *Lopez*).

local crime spree,"[9] the court signaled a new level of concern with interstate commerce issues as applied in federal criminal statutes. Unfortunately for Hickman, the Fifth Circuit declared itself bound by circuit precedent holding that the Government need only prove aggregation to establish the jurisdictional hook in a case involving such local conduct.[10]

The Fifth Circuit found the facts in *Hickman* sufficiently disturbing to order an en banc rehearing, which is the only method for overturning such precedent in that circuit.[11] A full sixteen-judge panel considered arguments during the rehearing, and on June 21, 1999, the Fifth Circuit issued its decision.[12] The vote was a tie. Precedent stood. In his dissenting opinion, Judge Higginbotham bemoaned the "ad hoc and random use of the Hobbs Act" and the "dramatic reach of federal power."[13] But without further guidance from the Supreme Court, such an argument could make little headway. Then came *Jones v. United States*.[14] This Note addresses whether the circuit courts have used *Jones* correctly as a means to end judicial agonizing in cases like that of Masontae Hickman.

In the years immediately following *Lopez*, there was an abundance of judicial teeth-gnashing in some circuits, but little actual change. In 2000, the

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9. United States v. Hickman, 151 F.3d 446, 456 (5th Cir. 1998).

10. *See id.* (discussing concepts of aggregation and point at which aggregation of local crimes has "substantial effects" on interstate commerce).

11. *See id.* (discussing Fifth Circuit requirements for overturning established judicial precedent).

12. *See Hickman*, 179 F.3d at 231 (finding that tie vote precluded overruling of circuit precedent set in *United States v. Robinson*, 119 F.3d 1205 (5th Cir. 1997), which established strictly de minimis standard for Hobbs Act convictions); *see also* United States v. McFarland, 264 F.3d 557, 558 (5th Cir. 2001) (bemoaning fact that prior circuit precedent mandated de minimis standard when reviewing Hobbs Act prosecutions), *reh'g en banc granted*, 281 F.3d 506 (5th Cir. 2002). On facts similar to those in *Hickman*, federal prosecutors charged McFarland with four counts of violating the federal robbery statute after he committed four robberies netting about $2,000. *Id.* at 557-58. McFarland robbed three gas stations and a liquor store, waiting until he was the only customer in the store and then brandishing a gun. *Id.* A federal jury sentenced McFarland to 1170 months, or about ninety-seven years in federal prison. *Id.* at 558. Under Texas law, the jury could have sentenced him to as little as five years in prison, with an absolute maximum of thirty years. *Id.*

13. *Hickman*, 179 F.3d at 243 (Higginbotham, J., dissenting).

14. *See* Jones v. United States, 529 U.S. 848, 859 (2000) (holding that, for purposes of federal arson statute, residential arson does not fall within congressional jurisdiction). In *Jones*, the Supreme Court considered the extent to which the federal arson statute, 18 U.S.C. § 844(i), covered the burning of residential property. *Id.* at 852-57. A federal district court convicted Jones of burning his cousin's house, which was exclusively a residence. *Id.* at 851. The Supreme Court found that exclusively private residences do not substantially effect interstate commerce, even when receiving goods and services from out of state, and thus are not covered under the statute. *Id.* at 858-59.

Supreme Court's decision in *United States v. Morrison*[15] helped dispel the notion that *Lopez* was simply a flash in the pan.[16] However, it was not until the Court took up the case of Dewey J. Jones, accused of lobbing a Molotov cocktail into his cousin's home, that the circuit courts received guidance in the application of existing and regularly used federal criminal statutes.[17] Given the strong language of *Jones v. United States*, the judicial ambivalence should have abated. Unfortunately, through stubborn adherence to traditional modes of jurisprudence, many circuit courts still refuse to heed the Supreme Court's call. This refusal to read the writing on the wall has left the circuits split over the proper scope and reach of several federal criminal statutes. As a result, the justice courts dispense through these laws remains uneven and possibly unconstitutional.

This Note examines the effect of recent Supreme Court decisions on the application of federal criminal statutes to traditionally state-prosecuted crimes. Although this Note discusses the post-*Lopez*, pre-*Jones* wanderings of the circuit courts, the primary focus is an analysis of the *current* application of these federal criminal statutes. After a careful dissection of the Court's unanimous decision in *Jones*, this Note considers the proper application of the Court's teachings. This Note uses circuit court opinions regarding church burnings as a method of exploring issues directly related to the holding in *Jones*, but with a more expansive reach. This Note also employs the Hobbs Act to illustrate the divergent opinions of the circuit courts, as well as to demonstrate the potentially enormous impact of *Jones* on the daily conduct of federal prosecutors.[18] In conclusion, this Note proposes combining the Supreme Court's two-part test in *Jones* with a rationality-in-aggregation standard to reform the operation of the Hobbs Act.[19] Such a test would leave the Hobbs

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15. 529 U.S. 598 (2000).

16. *See* United States v. Morrison, 529 U.S. 598, 627 (2000) (finding that elements and effects of violence against women do not have sufficient nexus with interstate commerce to sustain 42 U.S.C. § 13981, a provision of the Violence Against Women Act). In *Morrison*, the Supreme Court considered the constitutionality of providing a federal civil remedy for crimes motivated by gender animus. *Id.* at 607. A college student brought such a suit against her alleged attacker following a violent incident on the campus of the Virginia Polytechnic Institute. *Id.* at 603. The Supreme Court found that the effects of violence against women on interstate commerce were too attenuated for Congress to legislate in that area. *Id.* at 615-18.

17. The jurisdictional element of the federal criminal statute under which Jones was convicted, 18 U.S.C. § 844, provides that "[w]hoever maliciously damages or destroys, or attempts to damage or destroy, . . . real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall [be subject to various penalties] . . . ." 18 U.S.C. § 844(i) (2000).

18. *See infra* Part V (examining impact of *Jones* on validity of Hobbs Act prosecutions).

19. *See infra* Part VI (proposing application of two-part *Jones* test combined with rationality-in-aggregation standard to reform Hobbs Act jurisdictional limits).

Act intact and, hopefully, would allay the concerns of those who feel the cold shadow of the federal government falling across plains traditionally occupied by the states.

II. United States v. Lopez

The 1995 decision in *Lopez* marked a turning point in Commerce Clause jurisprudence. For the first time since 1936, the Supreme Court struck down a statute on the grounds that Congress exceeded its power to regulate interstate commerce.[20] Stating that there were "three broad categories of activity that Congress may regulate under its commerce power,"[21] the Court focused its decision on the aggregation principle of the third category, the ability of Congress to regulate "those activities having a substantial relation to interstate commerce."[22] The Court went on to find that the Gun-Free School Zones Act, 18 U.S.C. § 922(q)(1)(A),[23] exceeded congressional power because the nexus between the prohibited acts and interstate commerce as a whole was too attenuated.[24] Even in the aggregate, the Court found that the harmful effects of guns in schools did not have a sufficiently substantial effect on interstate commerce.[25] While the Court limited its holding to one specific statute, the implications resonated throughout vast areas of federal law.

After the Supreme Court issued its decision in *Lopez*, various commentators and scholars immediately began to reexamine their positions using the

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20. *See* Carter v. Carter Coal Co., 298 U.S. 238, 309 (1936) (holding act regulating price of coal and setting number of hours for miners had only indirect effect on interstate commerce and therefore was outside scope of congressional power). *But see* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 12-13 (1937) (proclaiming congressionally enacted labor laws valid in spite of previous term's holding in *Carter*).

21. *See* United States v. Lopez, 514 U.S. 549, 558-60 (1995) (discussing three avenues through which Congress may regulate "commerce"). The *Lopez* Court understood these avenues to be as follows: (a) Congress may regulate the use of the channels of interstate commerce, such as roads, railways, and waterways; (b) Congress may regulate the instrumentalities of interstate commerce, such as boats and airplanes, and persons or things in interstate commerce (c) Congress may regulate activities that have a "substantial relation" to interstate commerce. *Id.* This Note focuses exclusively on the substantial effects prong in the context of localized criminal activity.

22. *Id.*

23. *See* Gun-Free School Zones Act, 18 U.S.C. § 922(q)(1)(A) (Supp. V 1993) (criminalizing knowing possession of firearm in school zones).

24. *See Lopez*, 514 U.S. at 561 ("Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic activity, no matter how broadly one might define those terms.").

25. *See id.* at 567 ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.").

Court's holding. Some saw *Lopez* as the first step in a gradual rollback of congressional power to regulate "commerce."[26] Most scholars, however, argued that *Lopez* stood only as a minor speed bump in the road toward increasing the federalization of crime. Noting that "the dominant theme of this century has been the expansion of federal jurisdiction,"[27] some commentators were quick to point out that as long as there are sensational crimes and pervasive social problems to which Congress feels compelled to respond, Congress will continue enacting statutes authorizing federal jurisdiction over an ever-widening range of criminal conduct.[28] Even those favoring a return to a more restrictive form of federalism, at least in the context of traditionally state-prosecuted crimes, noted that two Justices for the majority seemed to suggest that simply retooling the jurisdictional hook would cure the constitutional defect in the Gun-Free School Zones Act.[29]

The Supreme Court left the lower federal courts to themselves in the muddled aftermath of *Lopez*. The language of *Lopez* seemed to contradict itself; the majority conceded that previous cases had given "great deference to congressional action," but noted that the facts of the case did not warrant an expansion of that deference.[30] The Court offered no test other than suggesting that courts base their examination on "what is truly national and what is truly local."[31] The lower federal courts generally followed one of two paths in the period immediately following *Lopez*. Most circuit courts did little more than mention *Lopez* while maintaining the barest of de minimis standards for

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26. *See* Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* U.S. v. Lopez, 94 MICH. L. REV. 554, 555-57 (1995) (suggesting abandonment of current tests for Commerce Clause authority, asking instead, "Is there some reason the federal government must be able to do this, some reason why we cannot leave the matter to the states?").

27. Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 767 (1999). Richman goes on to argue that as federal jurisdiction over criminal matters has expanded, so too have efforts by federal law enforcement officials to limit expectations of federal power. *Id.* Ultimately, he feels that congressional regulation in this field constitutes an abdication of the responsibility for deciding what should and should not be subject to federal prosecution. *Id.* at 758.

28. *See* Susan A. Erhlich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825, 825-27 (2000) (citing recent examples of such "news-driven" legislation, namely proposals to criminalize allowing children to possess weapons and recent federal "carjacking" statutes, passed after rash of such incidents raised awareness on Capitol Hill).

29. *See* Regan, *supra* note 26, at 560, 567-68 (criticizing Rehnquist opinion in *Lopez* for being "unsatisfactory" and noting that Justice Kennedy and Justice O'Connor would consider Gun-Free School Zones Act constitutional if Congress reworked jurisdictional elements to spell out connection between guns in school zones and interstate commerce).

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

31. *Id.* at 567-68.

criminal conduct prosecuted federally under a Commerce Clause theory.[32] However, a select few lower courts ventured into new territory.[33] Both approaches offer insight into the direction the various circuit courts will take after the *Jones* decision.

A quick examination of the circuits in which *Lopez* did not affect the courts' reasoning proves helpful when viewed next to circuits willing to use *Lopez* to deny federal jurisdiction over traditionally locally prosecuted crimes. The United States Courts of Appeals for the Seventh, Eighth and Tenth Circuits all reaffirmed their belief that the Government need prove only the faintest of interstate commerce connections in Hobbs Act prosecutions.[34] The most influential of these cases, *United States v. Bolton*,[35] used extremely flexible aggregation theories to justify holding that money stolen from four businesses and an individual, the potential use of which was the purchase of goods moving in interstate commerce, satisfied the jurisdictional prerequisites of the Hobbs Act.[36] The Court in *Bolton* relied heavily on the fact that, while the Gun-Free School Zones Act contained no express jurisdictional hook, the Hobbs Act's jurisdictional mandate is quite clear.[37] Further, the *Bolton* court, without explaining its reasoning, found that extortion and petty robbery

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32. *See* United States v. Farmer, 73 F.3d 836, 843 (8th Cir. 1996) (reaffirming de minimis standard as de facto standard for all Hobbs Act prosecutions); United States v. Bolton, 68 F.3d 396, 399-401 (10th Cir. 1995) (same); United States v. Stillo, 57 F.3d 553, 449-61 (7th Cir. 1995) (same). *Bolton* has emerged as the most cited case to support the proposition that *Lopez* did not affect the Government's need to prove only a de minimis connection to interstate commerce.

33. *See infra* notes 44-63 and accompanying text (discussing lower federal courts that reconsidered validity of de minimis standard in light of *Lopez*).

34. *Supra* note 32.

35. 68 F.3d 396 (10th Cir. 1995).

36. *See* United States v. Bolton, 68 F.3d 396, 400-01 (10th Cir. 1995) (finding that theft of money to be used to purchase goods moving in interstate commerce exposed defendant to federal charges). The Court of Appeals for the Tenth Circuit considered whether the defendant's theft of money to be used in interstate commerce could "affect" interstate commerce in a manner sufficient to subject him to federal prosecution under the Hobbs Act. *Id.* at 399. The defendant robbed four restaurants and one individual, absconding with less than five thousand dollars total. *Id.* at 397-98. The Tenth Circuit found that the proper standard for judging whether the defendant's crimes had a sufficient effect on interstate commerce was the de minimis standard, a standard unaffected by the Supreme Court's decision in *Lopez*. *Id.* at 399. Using theories of aggregation, the Tenth Circuit held that a showing of the slightest effect on interstate commerce could, if repeated on a larger scale, substantially affect interstate commerce. *Id.*

37. *See id.* (discussing jurisdictional elements in Hobbs Act as compared to Gun-Free School Zones Act).

inherently affect interstate commerce, whereas gun possession in a school zone does not.[38]

A. *Post-*Lopez *State of Federal Arson Law*

After *Lopez*, arson statutes generally were unassailable under the de minimis standard. The Court of Appeals for the Eighth Circuit reaffirmed its application of the de minimis standard to federal arson statutes in *United States v. Rea*.[39] In *Rea*, the Eighth Circuit found that the Government satisfied the de minimis standard by proving that a church targeted for arson included a Sunday school annex that purchased books from out of state.[40] And in *Jones*,[41] the Court of Appeals for the Seventh Circuit unanimously affirmed the conviction of Dewey Jones under 18 U.S.C. § 844(i).[42] Although the circuits making these decisions seemed to consider them rather elementary, it is surprising that they did not engage in a more searching analysis before affirming the convictions given the Supreme Court's federalism concerns in *Lopez*.[43] The Supreme Court's subsequent decision in *Jones* proved these decisions wrong or, at the very least, misguided.

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38. *See id.* at 398 (finding that extortion inherently affects interstate commerce in ways that guns in school zones do not).

39. 169 F.3d 1111 (8th Cir. 1999). This case proves particularly enlightening because the *Jones* decision examined the same statute and reached a contrary result.

40. *See* United States. v. Rea, 169 F.3d 1111, 1113-14 (8th Cir. 1999) (concluding that church annex had sufficient nexus with interstate commerce under de minimis test because congregation used annex as school, which in turn bought textbooks traveling in interstate commerce), *vacated*, 530 U.S. 1201 (2000). In *Rea*, the defendant conspired to cover his brother's theft of church computer equipment by burning the church annex from which his brother stole the equipment. *Id.* at 1112. Defendant later admitted his involvement, but claimed that the church did not use the annex in "interstate commerce or in any activity affecting interstate commerce." *Id.* (quoting 18 U.S.C. § 844(i) (1994)). The Eighth Circuit found that the loss of several items purchased in interstate commerce, including a piano, curriculum materials, and religious literature, combined with the fact that several church members congregated in the annex, was sufficient to establish connections with interstate commerce. *Id.* at 1113. Notably, the defendant appealed this decision after reading *Jones*. *See* United States v. Rea, 223 F.3d 741, 742 (8th Cir. 2000) (rehearing appeal in light of *Jones* decision). Following the *Jones* decision, the Eighth Circuit decided to remand the case for further findings of fact to determine whether the annex was "used in" commerce as defined by the Supreme Court in *Jones*. *Id.* at 744.

41. 178 F.3d. 479 (7th Cir. 1999).

42. *See* United States v. Jones, 178 F.3d 479, 481 (7th Cir. 1999) (finding federal arson statute applicable to burning of purely residential dwelling).

43. *See* United States v. Lopez, 514 U.S. 549, 567-68 (1995) (noting that, when determining jurisdictional requirements in criminal matters, courts should determine what constitutes national interest permissibly regulated by Congress and what constitutes local interest outside congressional reach).

A more reasoned post-*Lopez* approach to deciding federal jurisdiction under the Commerce Clause came from the Court of Appeals for the Ninth Circuit. The first post-*Lopez* case decided on *Lopez* grounds involved the federal arson statute, 18 U.S.C. § 844(i).[44] The defendant in *United States v. Pappadopoulos*[45] conspired with her husband and a friend to burn her own home to collect the insurance payment.[46] The fact that the home received natural gas from out of state constituted the sole interstate commerce nexus presented by the Government.[47] Quoting heavily from *Lopez*, the *Pappadopoulos* court found that, because the function of the residence did not involve any commercial enterprise and in light of the tenuous connection with interstate commerce presented by the Government, the federal legislation improperly intruded into a field traditionally occupied by the states.[48] The Ninth Circuit did not speak directly to the issue of the de minimis standard and mentioned the issue of aggregation only in passing.[49] The court summed up its decision by saying that the offense in question was "a simple state arson crime"

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44. 18 U.S.C. § 844(i) (2000); *see supra* note 17 (providing text of federal arson statute).

45. 64 F.3d 522 (9th Cir. 1995).

46. *See* United States v. Pappadopoulos, 64 F.3d 522, 527-28 (9th Cir. 1995) (finding no nexus between crime of burning one's own home and interstate commerce). In *Pappadopoulos*, the Ninth Circuit considered whether a residential property owned by the defendant had sufficient ties to interstate commerce as defined in the federal arson statute. *Id.* at 524-25. The Government relied on the fact that the home received natural gas from out-of-state. *Id.* Further, an out-of-state insurer insured the home and was the target of attempted insurance fraud. *Id.* at 525-26. Finding only tangential and unsubstantial links to interstate commerce, the Ninth Circuit held that federal prosecution of the defendant unconstitutionally intruded into the realm of traditionally state prosecuted crimes. *Id.* at 530.

47. *Id.* at 528.

48. *See id.* at 527-29 (emphasizing that intrusion of federal criminal legislation into traditional areas of state concern violated important and basic tenets of basic federalism); *see also* United States v. Denalli, 73 F.3d 328, 331 (11th Cir. 1996) (per curiam) (reversing federal conviction for arson of private residences because Government failed to prove that arson substantially affected interstate commerce). Although relevant, *Denalli* is of little probative value as the per curiam decision fails to explain the reasons for the conclusions it draws. *Id.* at 330. In *Denalli*, the Court of Appeals for the Eleventh Circuit cited both *Lopez* and *Pappadopoulos* briefly, but did not address such issues as aggregation or the de minimis standard. *See id.* at 329-30 (reciting holdings in *Lopez* and *Pappadopoulos* as relevant precedent). More confusingly, the Eleventh Circuit mentioned and then dismissed the fact that the victim often worked from home, producing documents for a company contracting with the Canadian Government. *Id.* at 330-31. This case arguably is an awkward step in the right direction, but one with little reasoning to guide its outcome.

49. *See Pappadopoulos*, 64 F.3d at 528 (relying on principles of federalism while ignoring deeper questions of how these principles should inform standards used in such situations).

and that "[i]t should have been tried in state court."[50] Ultimately, the Ninth Circuit reached a tenable conclusion in *Pappadopoulos*, but relied too heavily on broad notions of federalism. Rather, the *Pappadopoulos* court should have examined precisely what level of proof regarding the interstate commerce nexus the Government must present in such situations.[51]

B. *Post-*Lopez *State of Hobbs Act Law*

Decided less than a year after *Bolton*, the Northern District of California's decision in *United States v. Woodruff*[52] marked a radical departure from traditional deference to a minimal jurisdictional showing in Hobbs Act cases.[53] The defendant had robbed three northern California jewelry stores of approximately $618,000 worth of jewelry.[54] All store owners testified that they purchased most of the stolen jewelry from out of state and that they served a significant out-of-state clientele.[55] However, in the face of this testimony, District Judge Vaughn Walker refused to sustain the conviction, concluding that the Government failed to show that the defendant's conduct "in the aggregate, would lead to a substantial effect on commerce."[56]

The *Woodruff* court first concluded that, due to the decisions in *Lopez* and *Pappadopoulos*, the de minimis standard no longer applied in the Ninth Circuit.[57] In doing so, the court specifically identified and then rejected the

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50. *Id.*

51. In many ways, one might characterize *Pappadopoulos* more as a reaction against overreaching federal statutes than as a studied and deliberate application of the law. Policy reasons aside, it is important to focus on the exact articulation of the law in such cases.

52. 941 F. Supp. 910 (N.D. Cal. 1996).

53. *See* United States v. Woodruff, 941 F. Supp. 910, 928 (N.D. Cal. 1996), *vacated*, 122 F.3d 1185 (9th Cir. 1997) (finding chief issue in *Woodruff* to be responsibility of state to prosecute such crimes as local communities see fit and not leave such duty to unelected federal judges and prosecutors). In *Woodruff*, District Court Judge Vaughn Walker heard the defendant's claim that his jewelry robbing spree did not affect interstate commerce as contemplated by the jurisdictional language of the Hobbs Act. *Id.* at 918-20. Despite finding that the defendant had taken over $600,000 worth of jewelry, composed predominately of materials from without the state of California and intended predominantly for sale out-of-state, Judge Walker agreed with the defendant. *Id.* at 929. Judge Walker based much of his decision on the fact that the Government relied almost solely on aggregation principles to support its jurisdictional argument. *Id.* at 922. Finding this line of reasoning no longer persuasive after *Lopez*, Judge Walker granted defendant Woodruff's motion for judgment of acquittal. *Id.* at 930.

54. *See id.* at 914 (reciting facts leading to arrest and conviction of defendant).

55. *Id.*

56. *Id.*

57. *See id.* at 923 (finding *Lopez* and *Pappadopoulos* more persuasive than applicable Ninth Circuit precedent, which applies only de minimis standard when making interstate commerce jurisdictional inquiries).

holdings in *Bolton*, *Stillo* and *Farmer*, stating that the "application of the Hobbs Act in the manner these courts have proposed is fundamentally inconsistent with *Lopez*."[58] The court further expressed its opinion that courts maintained their acceptance of the de minimis standard to avoid the daunting task of drawing boundaries between state and federal authority.[59] It is an issue the court did not sidestep. Clearly, the *Woodruff* court accepted this challenge.

Recognizing the lack of judicial clarity surrounding federal criminal statutes based on interstate commerce claims, the *Woodruff* court cited the overarching need to articulate some type of standard to draw a line between what is and what is not interstate commerce.[60] The court then took a unique approach. Instead of finding guidance in a technical aspect of the law, like the principle of aggregation or the substantial effects test, it chose the nebulous concept of federalism to help delineate the line between federal and state authority.[61] Stating that "criminal activity that violates both state and federal law should be prosecuted in state court unless a case for federal prosecution has been made,"[62] the *Woodruff* court decided the case on policy grounds, rather than on established Ninth Circuit precedent. Much of the court's justification seems to come from the language in *Lopez* discussing the limits of federalism in the criminal context.[63]

The Supreme Court probably would think it strange to derive a test for interstate commerce connections from a general discussion of federalism issues. But the *Woodruff* court's test raises an interesting question. Is a test based solely on federalism viable after *Lopez*? More to the point, is it a test the Supreme Court would entertain? Ultimately, the answer to these questions is no, as weaknesses in the test are apparent.[64] A test based solely on principles of federalism allows for far too much subjectivity and, applied on a national

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58. *Id.* at 928.

59. *Id.*

60. *See id.* (noting need to "draw a line demarking the boundaries between federal and state authority").

61. *See id.* at 928-30 (proclaiming that traditionally state crimes should be province of states absent some compelling interest, such as highly sophisticated crimes or trials that may unduly tax state resources).

62. *Id.* at 929.

63. *See id.* at 928 (noting that "states, not the federal government, 'possess the primary authority for defining and enforcing criminal law'" (quoting United States v. Lopez, 514 U.S. 549, 561 n.3 (1995)); *id.* at 928 ("When Congress federalizes what is traditionally considered a state crime, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'" (quoting *Lopez*, 514 U.S. at 561 n.3)).

64. Not only did the Ninth Circuit vacate Judge Walker's decision, United States v. Woodruff, 122 F.3d 1185, 1186 (9th Cir. 1997), but also the Supreme Court denied certiorari. Woodruff v. United States, 522 U.S. 1082 (1998).

scale, would create even more confusion than exists already. But the *Woodruff* court comes the closest of all lower federal courts to ascertaining the intent and spirit of the Supreme Court after *Lopez*. Despite the fact that this decision stood isolated for several years, the subsequent decision in *Jones* vindicated the *Woodruff* court's opinion, as do the slowly changing attitudes of many circuit courts.

Perhaps the most eloquent opinion opposing the maintenance of a de minimis standard, or at least favoring the radical alteration of that standard, comes from the dissenting opinion of Judge Higginbotham in *United States v. Hickman*.[65] Rarely cited because it has no precedential value, the opinion outlines a test that insists upon rationality in aggregation.[66] This rationality has bite; Judge Higginbotham would require Congress to "identify a non-pretextual, rational basis for concluding that there are sufficient interactive effects among activities to allow them to be aggregated."[67] Higginbotham's opinion maintains that *Lopez* draws a line between national and local interests,[68] and his rationality test stands the best chance of effectively identifying that line. The opinion then applies its rationality-in-aggregation test to the Hobbs Act and concludes that courts should declare the Act unconstitutional.[69] The fact that Judge Higginbotham came within one vote of changing Fifth Circuit precedent to preclude the constitutionality of Hobbs Act convictions stands as testament to the judicial discomfort with such federal statutes. And that was before *Jones*.

III. Jones v. United States

Jones v. United States[70] originated in the Northern District of Indiana, where federal prosecutors charged the defendant with arson,[71] making an illegal destructive device[72] and using a destructive device during and in

65. *See* United States v. Hickman, 179 F.3d 230, 231 (5th Cir. 1999) (Higginbotham, J., dissenting) ("We would hold that substantial effects upon interstate commerce may not be achieved by aggregating diverse, separate individual instances of intrastate activity where there is no rational basis for finding sufficient connections among them.").

66. *Id.* at 242.

67. *Id.*

68. *Id.*

69. *See id.* at 243 (Higginbotham, J., dissenting) (suggesting striking all Hobbs Act convictions as unconstitutional).

70. 529 U.S. 848 (2000).

71. 18 U.S.C. § 844(i) (2000).

72. 26 U.S.C. § 5861(f) (2000).

relation to a crime of violence.[73] Jones challenged only the arson conviction, claiming that 18 U.S.C. § 844(i) exceeded Congress's power under the Commerce Clause.[74] He urged the Court of Appeals for the Seventh Circuit to follow the lead of the Ninth Circuit in *Pappadopoulos* and the Eleventh Circuit in *Denalli*, holding the arson of residential property to be outside the scope of 18 U.S.C. § 844(i).[75]

A three-judge panel unanimously declined to do so. Citing prior circuit precedent established in *United States v. Hicks*,[76] the Seventh Circuit panel maintained its stance that *Lopez* had not changed the fundamental analysis of arson statutes in relation to residences.[77] Noting that Jones's argument was "a tough row to hoe,"[78] the panel used the aggregation standard to uphold his conviction.[79] The panel cited *Hicks* for the proposition that "proof of a small effect" on interstate commerce is enough to allow congressional regulation under the Commerce Clause.[80] Further, the panel reaffirmed that "the residential housing industry is interstate in character"[81] and went on to note that the "non-commercial character of the torched building strikes us as irrelevant" given the ties to interstate commerce through such things as the use of gas and electricity, the use of out-of-state building materials, and the use of out-of-

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73. 18 U.S.C. § 924(c) (2000).

74. *See* United States v. Jones, 178 F.3d 479, 480 (1995) (outlining charges against Jones and his claims and strategy on appeal).

75. *Id.*

76. 106 F.3d 187 (7th Cir. 1997).

77. *See* United States v. Hicks, 106 F.3d 187, 189 (7th Cir. 1997) (finding that federal arson statute required only "some effect on commerce" and that both residential and commercial structures satisfied such standard). In *Hicks*, a Wisconsin jury convicted the defendant of setting fire to a restaurant in an attempt to collect the insurance proceeds. *Id.* at 188. On appeal, the defendant argued that 18 U.S.C. § 844(i) was unconstitutional in light of *Lopez*. *Id.* The defendant argued that *Lopez* precluded all federal arson prosecutions for arsons not "substantially" affecting interstate commerce. *Id.* Comparing the effect of the loss of one restaurant to the seven-trillion dollar gross national product of the United States, the defendant claimed that his crime had no more than a de minimis effect on interstate commerce. *Id.* The Seventh Circuit, in an opinion authored by Judge Posner, disagreed. *Id.* at 188-89. The court stated that the "aggregate effect of such arsons on commerce is substantial," noting that the aggregate effects of an action are the ones that "count, in deciding whether an activity is within Congress's power under the commerce clause." *Id.* In the course of affirming Hicks' conviction, the Seventh Circuit went out of its way to distinguish and criticize the Ninth Circuit's decision in *Pappadopoulos*. *Id.* at 189.

78. *Jones*, 178 F.3d at 480.

79. *Id.* at 481.

80. *Id.* at 480.

81. *Id.*

state insurance companies.[82] The Seventh Circuit found these factors constituted substantial effects on interstate commerce.[83]

The Seventh Circuit's rejection of Jones's argument seems fairly perfunctory. The court focused on the issue of whether courts should treat residential arson differently from arson of commercial property.[84] The court quoted *Hicks* extensively, dismissing Jones's argument that language in *Hicks* that undermined his claims was mere dicta.[85] Overall, the opinion runs less than three pages and reveals no serious legal concern over any of the issues raised.

Like the Seventh Circuit, the Supreme Court handed down a unanimous decision in the case of *Jones v. United States*.[86] Like the Seventh Circuit, the Supreme Court's decision was relatively short and to the point. Unlike the Seventh Circuit, however, the Supreme Court ruled *for* Jones, accepting his argument that the federal arson statute could not reach the burning of a residential establishment.[87] Accordingly, the Court vacated Jones's 18 U.S.C. § 844(i) conviction, leaving him with two other unchallenged convictions.[88]

The Supreme Court focused the first portion of its discussion in *Jones* on the language of the statute, namely the meaning of the word "used." Employing established rules of interpretation,[89] the Court defined the word "used," within the context of 18 U.S.C. § 844(i), as "active employment."[90] Under this

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82. *Id.* (quoting *Hicks*, 106 F.3d at 189).

83. *See id.* at 481 (noting that arson committed by Jones was part of national scourge of arsons costing millions of dollars in damages). The Seventh Circuit pointed to federal statistics reporting a one-year total of 19,888 residential arsons out of 33,848 building arsons and estimated that such fires cost the nation $280 million in collective losses in 1997. *Id.* The Seventh Circuit further noted that these arsons affect gas and telephone lines and disrupt the daily lives of the victims by forcing them to seek shelter in hotels. *Id.* The latter consequence of arson convinced the Seventh Circuit that Congress may regulate such criminal activity because the Supreme Court already had found it permissible for Congress to regulate the conduct of hotels in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). *Jones*, 178 F.3d at 481. The Seventh Circuit did not stop there, however, noting that arson "leads friends and loved ones to travel from other states to give comfort to the victims, and so on." *Id.* The possibilities are endless.

84. *Id.*

85. *Id.* at 480-81.

86. Jones v. United States, 529 U.S. 848, 850 (2000).

87. *See id.* at 851-52 (reversing Seventh Circuit's judgment that 18 U.S.C. § 844(i) reaches residential properties).

88. *See id.* at 859 (noting status of Jones's convictions and sentence).

89. *See id.* at 857 (noting that courts should not treat any statutory language as "surplusage," especially when such language defines elements of offense).

90. *Id.* at 856.

interpretation, the Court noted that the only "active employment" of the property Jones burned was the day-to-day living of his cousin's family.[91] While this may seem simple wordplay, the Court defined "use" in relation to the property itself, rather than in relation to the effect the property had on the outside world.[92] In other words, the Court found that to determine the "use" of the property as contemplated by the statute, a court must consider only the property's employment. Thus, it is no surprise that the Court rejected the Government's argument that outside factors should define the term "use." The Court considered and dismissed the claims that Jones's cousin and his family "used" the residence to obtain a mortgage from an Oklahoma lender, "used" the residence to obtain an out-of-state insurance policy, and "used" the residence to receive natural gas from outside the state of Indiana.[93] Once the Court defined the statutory meaning of the term "use" to include only "active employment" of the property, any argument relying on the secondary effect of that property on external markets was certain to fail.

Noting the two methods of interpretation of the term "use" leads to a weightier discussion of why the Court felt the Government's definition was erroneous. The Court stated that the Government's interpretation of the statutory language gave Congress an almost unlimited power to regulate under 18 U.S.C. § 844(i) because virtually all buildings receive utility or insurance services from corporations with out-of-state connections.[94] But, given the extreme judicial deference to Congress in this area,[95] why did the Court pick this case to break with precedent? More importantly, does the *Jones* decision signal a shift in the Court's thinking about the relationship of the Commerce Clause and the congressional power to regulate crime?

In *Lopez* and *Morrison*, the Court overturned the Gun-Free School Zones Act (GFSZA) and the Violence Against Women Act (VAWA), respectively, in the former case on the grounds that findings of fact by Congress were

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91. *Id.*

92. *See id.* (defining "use" of property burned as solely "the everyday living of Jones's cousin and his family").

93. *See id.* at 855 (dismissing Government arguments concerning "use" of residence in question that Seventh Circuit upheld as valid).

94. *See id.* at 857 (noting that under Government's "expansive interpretation of § 844(i), hardly a building in the land would fall outside the federal statute's domain").

95. *See* Katzenbach v. McClung, 379 U.S. 294, 305 (1964) (finding that restaurant's use of meat and mustard traveling in interstate commerce satisfied jurisdictional elements of Title II of Civil Rights Act of 1964). For a basic overview of the aggregation doctrine, see *Wickard v. Filburn*, 317 U.S. 111, 133 (1942) (holding that Congress may regulate individual farmer's growth of wheat for purely private consumption on grounds that such consumption, when aggregated throughout entire economy, implicates interstate commerce).

insufficient to establish a nexus with interstate commerce, and in both cases on the grounds that the statute lacked the requisite jurisdictional elements to give Congress the power to regulate the subject matter.[96] More importantly, the Court in both cases signaled its unease with legislation based on an aggregation theory that would give Congress virtually unlimited power to regulate criminal activity.[97] Although it may seem that *Jones* is simply a logical extension of *Lopez* and *Morrison*, *Jones* is distinguishable in three important areas. First, the statute in question had a valid jurisdictional element. Second, the *Jones* Court merely reinterpreted a long-standing statute instead of striking down an untested one. Third, *Jones* marks the first time the Court has relied almost solely on principles of federalism to guide its decision.

In *Jones*, the Court echoed the theme of contrasting what is "truly national and what is truly local"[98] and elevated the notion from simple dicta to a controlling principle of Commerce Clause interpretation. Justice Ginsburg stated that the Court must interpret statutes in such a way as to avoid constitutional questions[99] and, because she found that legislation giving Congress virtually unlimited power to regulate arson would be unconstitutional, she read 18 U.S.C. § 844(i) narrowly. Thus, the Court spared the statute the fate of the VAWA and the GFSZA and deemed Jones's conviction, rather than the entire statute, unconstitutional.[100] Although it may seem a basic proposition, it is important to note that the Court used principles of federalism to justify its contention that federalizing virtually all arson crimes would be unconstitutional.

In support of the idea that the federal government may not constitutionally criminalize residential arson, the Court stated that arson is a "paradigmatic common-law state crime."[101] This characterization further and perhaps definitively distinguishes *Jones* from *Morrison* and *Lopez*. Neither VAWA nor

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96. *Compare* United States v. Morrison, 529 U.S. 598, 615 (2000) (finding no jurisdictional element but sufficient, even excessive, legislative findings) *with* United States v. Lopez, 514 U.S. 549, 563 (1995) (finding both lack of jurisdictional element and insufficient congressional findings to support legislation).

97. *See Morrison*, 529 U.S. at 618-19 (observing Court's inclination to reject "readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power" (quoting *Lopez*, 514 U.S. at 584-85)); *Lopez*, 514 U.S. at 564 ("Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.").

98. *Lopez*, 514 U.S. at 568.

99. *See Jones*, 529 U.S. at 858 (noting constitutional avoidance doctrine).

100. *Id.* at 859.

101. *Id.* at 858.

GFSZA regulated crimes traditionally thought to fall exclusively under state control. The VAWA regulated "gender motivated violence,"[102] and the GFSZA regulated possession of a weapon in a school zone.[103] Although one might view crimes of violence and possession of weapons as matters of traditional state interest, both Acts elevated such activities to new and previously unknown criminal activities through the inclusion of an intent element in the Violence Against Women Act and an element based on locale in the Gun-Free School Zones Act.[104] Thus, if the Court recognizes these statutes as creating new forms of criminal activity, the argument against such statutes cannot legitimately rely on a theory that the statutes intruded on an area of "traditional" state interest. Further, Justice Ginsburg omitted the discussion of economic versus non-economic effects as a determining factor when deciding whether Congress may regulate under the substantial effects and aggregation theories. In both *Lopez* and *Morrison*, the Court expended much judicial energy on just such a discussion.[105] Justice Ginsburg's omission of this discussion indicates that *Jones*, while relying on *Morrison* and *Lopez* for much of its reasoning, is fundamentally different from either case. This fundamental difference arises from the fact that Jones committed a traditional "common-law state crime."[106] That realization colors much of the rest of this Note.

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102. *See* 42 U.S.C. § 13981(c) (1994) (defining offense as committing "a crime of violence motivated by gender"); *id.* § 13981(d)(1) (defining crime of violence motivated by gender as one "due, at least in part, to an animus based on the victim's gender"); United States v. Morrison, 529 U.S. 598, 627 (2000) (holding that 42 U.S.C. § 13981(c) exceeded congressional power under Commerce Clause).

103. *See* 18 U.S.C. § 922(q)(2)(A) (2000) (making it federal offense to knowingly possess firearm "at a place that the individual knows, or has reasonable cause to believe, is a school zone"); United States v. Lopez, 514 U.S. 549, 567-68 (1995) (holding that 18 U.S.C. § 922(q)(2)(A) exceeded congressional power under Commerce Clause).

104. It is arguable that the Supreme Court recognizes the possession of a weapon as primarily a federal, not state, interest given prior rulings affirming the constitutionality of federal "felon in possession" laws. *See* United States v. Bass, 404 U.S. 336, 347 (1971) (finding felon-in-possession statute valid provided that Government shows "requisite nexus with interstate commerce"). However, the *Lopez* Court found that the coupling of such a concept with gun-carrying non-felons and local schools, perhaps the purest example of an area of traditional state concern, impermissibly strained the bounds of federalism. *See Lopez*, 514 U.S. at 559-61 (holding that Gun-Free School Zones Act exceeded congressional power under Commerce Clause).

105. *See Morrison*, 529 U.S. at 610-11 (discussing implications of regulating non-commercial activity under Commerce Clause, and noting that when courts have upheld federal regulation of intrastate activity, "the activity in question has been some sort of economic endeavor"); *Lopez*, 514 U.S. at 567 ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.").

106. *See Jones*, 529 U.S. at 858 (rejecting federalization of "paradigmatic" state crime of

Lastly, the Supreme Court offered a simple two-part test to guide lower courts in determining whether the arson of property violates 18 U.S.C. § 844(i).[107] Courts first should look first to the function of the building (its "use") and then should examine whether that function affects interstate commerce.[108] The Court first drew this test from *United States v. Ryan*,[109] in which Chief Judge Arnold of the Court of Appeals for the Eighth Circuit dissented with respect to the connection between a permanently closed fitness center and interstate commerce.[110] Finding that the gym was no longer "a going concern" due to financial reasons, Judge Arnold dismissed the facts that an out-of-state interest owned the gym and that the gym received natural gas from out of state.[111] He then offered a test to determine when such buildings are subject to 18 U.S.C. § 844(i); courts first should make an inquiry "into the function of the building itself, and then a determination of whether that function affects interstate commerce."[112] The Supreme Court adopted this test in *Jones* for use in determining the jurisdictional validity of federal arson prosecutions.[113]

Before moving on to a discussion of *Jones*'s future effect, it is important to take note of both the opinion's author and its unanimity. Justice Ginsburg

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arson).

107. *See id.* at 854 ("The proper inquiry, we agree, 'is into the function of the building itself, and then a determination of whether that function affects interstate commerce.'" (quoting United States v. Ryan, 9 F.3d 660, 675 (8th Cir. 1993))).

108. *Id.*

109. 9 F.3d 660 (8th Cir. 1993).

110. *See* United States v. Ryan, 9 F.3d 660, 674-76 (8th Cir. 1993) (Arnold, C.J., dissenting in part and concurring in part) (dissenting with respect to Government's establishment of sufficient connection between abandoned gym and interstate commerce). In *Ryan*, the Eighth Circuit considered an appeal from a defendant convicted of setting fire to his permanently closed fitness center in order to recover insurance proceeds. *Id.* at 662-64. Two firemen died in the fire, creating circumstances that formed the predominant basis of the appeal. *Id.* Judge Arnold dissented from the majority's conclusion that the defendant used the building in interstate commerce as defined by 18 U.S.C. § 844(i). *Id.* at 673 (Arnold, C.J., dissenting in part and concurring in part). Stating that there was no showing that the defendant involved the defunct fitness center in interstate commerce, Judge Arnold cast doubts on the validity of all of the subsequent federal convictions under the statute. *Id.* at 674 (Arnold, C.J., dissenting in part and concurring in part). In his dissent, Judge Arnold stated that the Eighth Circuit should adopt a two-part test based on the function of the burned building. *Id.* at 675 (Arnold, C.J., dissenting in part and concurring in part). Based on his interpretation of prior Supreme Court decisions, he offered the test the Court ultimately adopted in *Jones*. *Id.* (Arnold, C.J., dissenting in part and concurring in part).

111. *Id.* at 674 (Arnold, C.J., dissenting in part and concurring in part).

112. *Id.* at 675 (Arnold, C.J., dissenting in part and concurring in part).

113. *See Jones*, 529 U.S. at 854 (adopting test espoused by Judge Arnold in *Ryan*).

dissented in both *Lopez* and *Morrison*, so it is odd that the Court would choose her to speak on a matter potentially more influential than either of those decisions. In fact, all four of the Justices who dissented in both *Morrison* and *Lopez* (Stevens, Souter, Ginsburg and Breyer) joined in the *Jones* opinion. One of the reasons that the Justices could come to a unanimous decision was that, at its core, *Jones* was simply an interpretation of 18 U.S.C. § 844(i). If the majority had wished to declare the entire statute unconstitutional, as in *Lopez*, then support for the decision almost certainly would have weakened. Moreover, federalism enjoys favor from both factions of the Court when it suits their needs.[114] As the opinions in *Lopez* and *Morrison* demonstrate, Chief Justice Rehnquist, the author of both opinions, as well as Justices O'Connor, Kennedy, Scalia and Thomas, are all comfortable using federalism as a guiding principle upon which to base an opinion.[115] And, in an unlikely concurrence, Justice Thomas joined Justice Stevens to concur in *Jones*.[116] Justice Stevens wrote to confirm his belief that federal preemption of state law is presumptively suspect.[117] Concerned with the practical application of the

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114. *See* Bush v. Gore, 531 U.S. 98, 123 (2000) (Stevens, J., dissenting) ("When questions arise about the meaning of state laws, . . . it is our settled practice to accept the opinions of the highest courts of the States as providing the final answers."). Justices Stevens, Ginsburg, and Breyer dissented in *Bush* on the grounds that the Court should insulate the review of state election procedures from review by federal courts in the name of federalism. *Id.* at 124-25 (Stevens, J., dissenting). The majority felt it proper for the federal courts to intervene in state election procedures and interpret state law in the name of equal protection. *Id.* at 112-22. Such conclusions seem at odds with preconceived notions of the respective Justices' judicial and political philosophies.

115. Justice Thomas is so comfortable using federalism as a guiding principle that he would use it as a basis for abolishing the substantial effects test altogether. *See* United States v. Lopez, 514 U.S. 549, 585-602 (1995) (Thomas, J., concurring) (observing "how far we have departed from the original understanding [of the Founders' use of the word 'commerce']" and detrimental effects of recent Commerce Clause jurisprudence on notions of federalism). Almost as long as the majority opinion, Justice Thomas's concurrence criticized many New Deal Commerce Clause cases and signaled his willingness to use federalism as a sword to strike down the "blank check" of the substantial effects test. *Id.* at 602 (Thomas, J., concurring). Perhaps more intriguingly, Justice Thomas predicted a full five years before *Jones* that the dissenting justices in *Lopez* might be willing to reconsider the substantial effects test. *See id.* (Thomas, J. concurring) ("Unless the dissenting Justices are willing to repudiate our long-held understanding of the limited nature of federal power, I would think that they, too, must be willing to reconsider the substantial effects test in a future case."). That future case turned out to be *Jones*, at least to the extent that the Justices reconsidered the *scope* of the substantial effects test, if not its overall viability. *See also* United States v. Morrison, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) (describing substantial effects test as "rootless and malleable" and "inconsistent with the original understanding of Congress'[s] powers").

116. *Jones*, 529 U.S. at 859 (Stevens, J., concurring).

117. *See id.* (Stevens, J., concurring) (proclaiming well-established "presumption against

decision, Justice Stevens noted that under the federal statute Jones would have received up to thirty-five years in prison, compared to only ten years under Indiana laws.[118] This, Stevens wrote, may "effectively displace a policy choice made by the State."[119] Thus, in the context of intrusion by federal criminal legislation into areas of traditional state control, the principles of federalism appeal, at least in part, to the ideologies of all members of the Court. The more conservative wing clearly would like to see a reduction of federal intervention into state affairs, and the more liberal wing of the court may, as Justices Ginsburg and Stevens did, find benefits in allowing states some discretion to be more or less lenient toward criminals. Principles of federalism are proving an attractive weapon with which to trim the creeping tendrils of the federal government that threaten to intrude on traditional state criminal concerns.

For all of *Jones*'s language concerning state common-law crimes and the distinction between what is local and what is national, its holding is fairly narrow,[120] as if the Court desired to test new principles, but did not yet want to build a sweeping opinion around them. The Court never articulated when and how to apply these principles. For example, how does one determine what constitutes "traditionally local criminal conduct?"[121] How does *Jones* affect the continued viability of the "substantial effects" test as articulated in *Lopez*? More importantly, what standard should lower courts employ when judging the effects of criminal conduct as it relates to interstate commerce? Unfortunately, the language in *Jones* gives the lower courts a shove, but little direction. The manner in which the lower courts interpret these issues will affect wide swaths of federal criminal law, and it is difficult to overstate the potential effects of *Jones* on federal prosecution of crime.

Speaking for the Court, Justice Ginsburg did not find it necessary to define traditional state crime, although she used the concept freely throughout the heart of her opinion.[122] Her reluctance to define such a concept leads to the conclusion that either it is too amorphous to define properly or that it is so obvious to any observer that it deserves no comment. For purposes of this Note, the Court's naked declaration that "arson is a paradigmatic common-law

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federal pre-emption of state law").

118. *Id.* (Stevens, J., concurring).

119. *Id.* (Stevens, J., concurring).

120. *See id.* (holding that 18 U.S.C. § 844(i) "covers only property currently used in commerce or in an activity affecting commerce").

121. *Id.* at 858 (quoting United States v. Bass, 404 U.S. 336, 350 (1971)).

122. Justice Ginsburg's opinion uses the terms "common-law state crime" and "traditionally local criminal conduct" interchangeably. *See id.* (applying same meaning to both phrases).

state crime"[123] gives sufficient support to the subsequent treatment of arson as a traditional state crime.

*IV. Post-*Jones *Church-Burning Prosecutions*

An examination of lower courts' treatment of *Jones* should begin with cases that do not involve residential arson, but that otherwise mirror the facts of *Jones* as nearly as possible. Church burning fits this bill nicely. Churches are neither purely residential nor strictly commercial. Their ambiguity serves as a perfect test of a court's reading of *Jones* because it forces a court to define what is "active employment" in interstate commerce.[124] The diversity of types of churches further forces a court to spin out its reasoning when explaining its holding.

A. Courts Acknowledging the Ideals of Jones

The Court of Appeals for the Fifth Circuit captured the spirit of *Jones* in *United States v. Johnson*.[125] In November 1999, the Fifth Circuit reversed the conviction of Robert Earl Johnson, accused of burning a Methodist church in Hopewell, Texas.[126] The fact that he entered a conditional plea of guilty complicated matters for Johnson. After conviction, he retracted his plea, claiming that the Government had charged him erroneously with a federal crime.[127] Citing *Lopez*, Johnson argued that his crime did not have "substantial impact on interstate commerce," an argument the Government used the aggregation theory to resist.[128] The Fifth Circuit found the four facts that the

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123. *Id.*

124. *Id.* at 856.

125. *See* United States v. Johnson, 194 F.3d 657, 659-61 (5th Cir. 1999), *vacated*, 530 U.S. 1201 (2000), *aff'd on reh'g*, 246 F.3d 749 (5th Cir. 2001) (finding that factual basis of defendant's plea failed to reflect necessary connection to interstate commerce and subsequently vacating plea). The Fifth Circuit in *Johnson* examined the connection between church property and the jurisdictional hook of the federal arson statute. *Id.* at 659-60. Johnson pleaded guilty to burning a one-story church to destroy evidence of prior thefts of church property. *Id.* at 658. He later sought to withdraw his plea, arguing that the factual basis for the plea was insufficient to establish a constitutionally-significant effect on interstate commerce under 18 U.S.C. § 844(i). *Id.* at 659. The Fifth Circuit agreed, finding that the Government failed to present any information relating the activities of the church to participation in a judicially cognizable level of interstate commerce. *Id.* at 662-63.

126. *See id.* (vacating Johnson's conviction).

127. *Id.* at 660.

128. *See id.* (discussing continued viability of aggregation theory with respect to substantial effects test). It also is important to note that the Fifth Circuit found 18 U.S.C. § 844(i) "strikingly similar" to the Hobbs Act federalization of certain types of theft. *Id.* at 661. The

Government relied upon insufficient to establish a nexus with interstate commerce.[129] In support of its position, the Government argued that out-of-state church members paid tithes, that the church was a member of a national religious organization, that the church disseminated its funds to out-of-state causes, and that an out-of-state insurer paid the church's claim.[130] The Fifth Circuit concluded that none of these facts entailed an "explicit connection or effect upon interstate commerce."[131] The *Johnson* court found that the Government's best evidence was that of the insurance payment by an out-of-state insurer, but even that did not have more than a "speculative" effect on interstate commerce.[132] Thus, using the clearly erroneous standard, the court vacated Johnson's guilty plea and remanded the case.[133] The Government appealed the decision to the Supreme Court, which vacated the judgment and remanded the case for review in light of the intervening decision in *Jones*.[134] In reaffirming the original vacation of Johnson's sentence, the Fifth Circuit apparently believed that the Supreme Court had vindicated its original decision,[135] and added only a brief mention that the Government failed to present any evidence regarding whether the church was "being actively employed for commercial purposes."[136]

The Western District of Tennessee took a different approach to *Jones*. In *United States v. Rayborn*,[137] the court read *Jones* to contain a two-part test: Was the property "actively used" in interstate commerce, and if not, did the building by itself substantially affect interstate commerce?[138] Although the

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court concluded that because the Fifth Circuit uses the aggregation theory in Hobbs Act cases, it is permissible to use aggregation in federal arson cases. *Id.* In a special concurrence by Judge Garwood, two judges took issue with the aggregation theory as applied to 18 U.S.C. § 844(i). *See id.* at 664 (Garwood, J., concurring) ("[A]rsons under section 844(i) are simply not a meaningful 'class of activities' suitable for aggregation.").

129. *See id.* at 662 (discussing burned church's connection to interstate commerce).

130. *See id.* (listing Government's arguments as to church's connection to interstate commerce).

131. *Id.*

132. *Id.*

133. *Id.* at 662-63

134. United States v. Johnson, 530 U.S. 1201 (2000).

135. *See* United States v. Johnson, 246 F.3d 749, 752 (5th Cir. 2001) (noting that nothing in *Jones* is inconsistent with, or suggests prior error in, Fifth Circuit's prior decision in case).

136. *Id.*

137. 138 F. Supp. 2d 1029 (W.D. Tenn. 2001).

138. *See* United States v. Rayborn, 138 F. Supp. 2d 1029, 1031-35 (W.D. Tenn. 2001) (devising two-part test based on functionality of building in relation to interstate commerce). In *Rayborn*, the Western District of Tennessee considered the functional aspects of a church,

Jones opinion does not mention this test, the *Rayborn* court called this the "function test."[139] Using this test, the court vacated the federal conviction of a pastor for the burning of his own church.[140] The court rejected the Government's argument that, because the church bought several service trucks from out of state and used building material from out of state, the church "actively engaged" in interstate commerce.[141] Such factors, the court noted, "have no bearing on [the church]'s actual function."[142] Applying the second prong of its function test, the court held that the church, even though it maintained a low level radio station that broadcast gospel programming to various neighboring states, did not engage in any activity affecting interstate commerce.[143] The court carefully noted, however, that these broadcasts were of church sermons only and that the radio station did not sell advertising.[144] Further, the *Rayborn* court echoed the Supreme Court's focus on local and national concerns.[145]

Although drawing from *Jones* a "test" the Supreme Court never specifically named, the *Rayborn* court was faithful to the spirit of *Jones*. Indeed, given the straightforward wording of *Jones*, such church burning decisions

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burned by the defendant, that the Government claimed satisfied the jurisdictional elements of 18 U.S.C. § 844(i). *Id.* at 1032-33. Evidence of such a connection included the fact that the church, located in Tennessee, served congregants from Mississippi and Arkansas, collected an average of $9000 a week in donations, and ran a low-level radio station. *Id.* at 1031. Using a two-part test crafted from the language of *Jones*, the *Rayborn* court found such contacts simply too minimal to establish a connection with interstate commerce and dismissed the defendant's federal arson indictment. *Id.* at 1036.

139. *Id.* at 1032.

140. *Id.* at 1036.

141. *Id.* at 1034. *Compare id.* (listing possible connections with interstate commerce such as collection of tithes, operation of radio station and organization of picnics) *with Jones*, 529 U.S. at 853-55 (listing possible connections with interstate commerce, such as retaining out-of-state insurance and paying for natural gas delivered from out of state). *Rayborn* presented variations on the facts presented in *Jones*, but the *Rayborn* court devoted more attention to aggregation issues than the Supreme Court did. *See Rayborn*, 138 F. Supp. 2d at 1036 (explaining that multiplying church's activities on national scale would not raise criminal activity to level of "substantially affecting interstate commerce").

142. *Id.* at 1034.

143. *See id.* at 1031, 1035 (noting that station broadcast into Arkansas and Mississippi, but finding that such activities were minor and secondary to church's primary noncommercial function).

144. *Id.* at 1036.

145. *See id.* at 1034 (noting that Supreme Court in *Jones* regarded respect for local and national concerns as guiding principle).

should be fairly simple.[146] Unfortunately, most of the lower courts that have considered the question have chosen to ignore the spirit of *Jones*.

B. Courts Misreading Jones

Before *Jones*, the Supreme Court expressed concern with the propriety of including churches under the umbrella of the federal arson statute.[147] The first post-*Jones* circuit court decision addressing church burnings came from the Court of Appeals for the Tenth Circuit in *United States v. Grassie*.[148] The petitioner, motivated by religious animus, defaced four Roswell, New Mexico churches belonging to the Latter Day Saints sect and burned one to the ground.[149] At trial, Grassie stipulated that the burned church was "engaging in activities affecting interstate commerce"[150] and thus did not challenge the

146. *Cf.* United States v. Odom, 252 F.3d 1289, 1297 (11th Cir. 2001) (reversing convictions under 12 U.S.C. § 844(i) because Government failed to prove church "was used in or affected" interstate commerce). The Court of Appeals for the Eleventh Circuit, faced with facts similar to those in *Rayborn*, turned to *Jones* for guidance when determining whether the Government adequately proved a connection with interstate commerce. *Id.* at 1294. In *Odom*, the Government relied on the fact that the burned church received donations from two out-of-state donors, bought a "handful" of Bibles from out of state, and was an in-state member of a church organization with out-of-state ties. *Id.* at 1296-97. The Eleventh Circuit articulated the two-part test of *Jones*, but added a third element, namely whether the "commerce in which the building is involved sufficiently affects interstate commerce." *Id.* at 1294. Under this test, the court found that the Government failed to prove a connection between the burned church and interstate commerce. *Id.* at 1296-97. This third element of the test creates serious problems in the application of the test. First, the third element confuses the line between the building itself and the function of the entity using the building. Should the inquiry be whether the actual burned church affects interstate commerce, or should the inquiry focus on whether the function of churches affects interstate commerce? Second, assuming that the court finds that the inquiry should be into the effect of the actual burned church on interstate commerce, the third element leads the court right back down the same road that ends in muddled theories of aggregation and de minimis standards. The third element effectively negates the first two elements of the *Jones* test.

147. *See* Russell v. United States, 471 U.S. 858, 860-61 (1985) (discussing legislative history indicating congressional intent to cover church property under 18 U.S.C. § 844(i)). However, the *Russell* Court went on to note that "[b]y its terms, . . . the statute only applies to property [here, in the context of churches] that is 'used' in an 'activity' that affects commerce." *Id.* at 862. This would indicate that the Supreme Court desired to restrict the reach of the federal arson statute long before it had the opportunity to speak to the issue in *Jones*.

148. *See* United States v. Grassie, 237 F.3d 1199, 1209-10 (10th Cir. 2001) (finding church to be charitable organization with substantial connections to interstate commerce), *cert. denied*, 533 U.S. 960 (2001).

149. *See id.* at 1202 (detailing offense committed by petitioner before his arrest).

150. *Id.* at 1204.

interstate commerce connection.[151] However, after reading *Jones*, Grassie appealed his sentence, arguing that the evidence presented against him was insufficient to support a finding that the church actively engaged in interstate commerce.[152] The Tenth Circuit disagreed, citing the case of *Camps Newfound/Owatonna, Inc. v. Town of Harrison*[153] for the proposition that the Commerce Clause applies to charitable and nonprofit entities, bringing them within the scope of the federal arson statute.[154] The court's apparent reasoning was that because the Supreme Court has applied the Commerce Clause to nonprofit entities, it is not necessary to engage in further inquiry into a church's connection with interstate commerce.[155] While such a reading of *Campus Newfound* is not illogical, a more accurate reading is that a nonprofit *may*, but will not necessarily, have interstate commerce connections sufficient

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151. *See id.* at 1204-05 (outlining petitioner's defense strategy). The Tenth Circuit opined that the reason Grassie chose to stipulate to the interstate commerce connection was that he wished to avoid testimony by church members as to the worth of their place of worship. *See id.* at 1210 (noting that "the stipulation was clearly a tactical decision by the defense to avoid having the jury hear extensive and doubtless emotionally charged testimony"). If this assumption is correct, it raises further questions regarding the inherent fairness of forcing a defendant to choose between subjecting himself to such testimony and defending himself from a potentially extra-constitutional federal arson charge.

152. *Id.* at 1207.

153. 520 U.S. 564 (1997).

154. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 584 (1997) (finding that, because charitable and nonprofit organizations are major participants in interstate market for goods, their activities come within scope of Commerce Clause). In *Camps Newfound*, the Supreme Court considered whether a Maine statute exempting local charitable institutions from property tax violated the dormant Commerce Clause. *Id.* at 568. A nonprofit organization failed to qualify for the tax exemption because 95% of its campers were from out of state, and the organization filed suit. *Id.* at 567-61. The Supreme Court found that the statute violated the dormant Commerce Clause because it favored nonprofit organizations serving in-state campers over those serving primarily out-of-state campers. *Id.* at 584. More importantly for this discussion, the Supreme Court found, as a basis for its judgment, that because nonprofit and charitable organizations constitute a major percentage of the market for goods and services moving in interstate commerce, they are subject to Commerce Clause analysis. *Id.* at 583-85. The *Rayborn* court cited *Camps Newfound* in its opinion as well, noting that the church at issue ran a children's summer camp. *United States v. Rayborn*, 138 F. Supp. 2d 1029, 1033 (W.D. Tenn. 2001). The *Rayborn* court, however, correctly combined *Camps Newfound* and *Jones* in its interstate commerce analysis, whereas the *Grassie* court simply avoided any meaningful interstate commerce analysis at all. *See* United States v. Grassie, 237 F.3d 1199, 1204-09 (10th Cir. 2001) (omitting discussion of connection with interstate commerce of specific church burned by defendant).

155. *See Grassie*, 237 F.3d at 1209 (suggesting that finding church subject to Commerce Clause obviates need for deeper analysis into nature of church's connection with interstate commerce). Lower courts should not read *Camps Newfound* as a *per se* rule that all nonprofits automatically pass the interstate commerce test.

to support federal jurisdiction.[156] This principle does not, however, obviate the need for a court to scrutinize these interstate commerce connections, something that the *Grassie* opinion fails to do.[157]

The Tenth Circuit gave Grassie's claim cursory treatment at best, addressing the interstate commerce connection in a footnote.[158] Gathering information from several encyclopedias,[159] the Tenth Circuit listed the manner in which the *national* organization of the Church of Jesus Christ of Latter-Day Saints affects interstate commerce, including, but not limited to, its work in the areas of genealogy, education, athletics, and "proselyting [sic]."[160] The Tenth Circuit never once mentioned the connection between interstate commerce and the church that actually burned down.[161] The court engaged in no discussion of the "active employment" of the burned church. The court never mentioned the difference between what is local and what is national. The brief discussion of the church's connections to interstate commerce focused not on the property that gave rise to the federal charge, but on the religious organization as a national entity. This evidences a misreading of *Jones* and renders the interstate commerce discussion worthless.

How, then, did the *Grassie* court err so badly on this issue? First, the three judge panel may have given the defendant's initial stipulation undue weight. As Judge Douglas stated in her examination of *Grassie*, because the appellate standard of review favors the prevailing party, the court gave the Government the benefit of the doubt as to whether the defendant's stipulation that the churches engaged in interstate commerce meant that the congregations "actively employed" them in interstate commerce.[162] Second, Grassie's acts

156. *See Camps Newfound*, 520 U.S. at 584-85, 586-89 (examining connections of nonprofit and charitable institutions with interstate commerce, but suggesting that such organizations may lack sufficient interstate commerce connections in some cases).

157. *See Grassie*, 237 F.3d at 1210 (concluding interstate commerce analysis with comment that "nothing in *Jones* purports to limit *Camps*").

158. *See id.* at 1210 n.7 (relying on information found in encyclopedias to further discussion on extent to which national organization of Church of Jesus Christ of Latter Day Saints influences interstate commerce).

159. *Id.*

160. *See id.* (listing various national activities of Church of Jesus Christ of Latter Day Saints).

161. Although the court briefly mentioned the churches that Grassie vandalized, it never specifically discussed the burned church or examined its nexus with interstate commerce. *Id.* at 1204. The court went on to list several items lost due to Grassie's acts, such as basketballs, teaching equipment and sacerdotal accessories, and implied that, because the church "obviously purchased [these items] in interstate commerce," no further inquiry into the nexus between the crimes committed and interstate commerce was necessary. *Id.*

162. *See* United States v. Rayborn, 138 F. Supp. 2d 1029, 1035 (W.D. Tenn. 2001) (speculating that in *Grassie*, defendant's stipulation that church engaged in interstate commerce

were so extreme and motivated by such obvious religious hatred that the Tenth Circuit may have felt obligated to impose the maximum sentence possible.[163] Third, this may be a simple case of old habits dying hard. Perhaps in the Tenth Circuit's experience, such attacks had no chance of success, and it did not feel the need to upset established methods of judicial review concerning such claims. Whatever the reason for the Tenth Circuit's decision, one should criticize the court less for reaching a poorly reasoned decision than for refusing to engage in the correct type of analysis in the first place. Unfortunately, the Tenth Circuit is not alone.[164]

The Court of Appeals for the Eighth Circuit misinterpreted *Jones* as well. In *United States v. Beck*,[165] the Eighth Circuit refused to review a trial court's acceptance of the defendant's guilty plea,[166] including his admission that the church he burned was "a building and activity which affected and was used in interstate commerce."[167] The Eighth Circuit listed several facts as supporting such a plea, namely that the church had 1400 members, housed a school, had an affiliation with a national religious organization, and collected money that it then donated to national and international ministries.[168] Because the defendant failed to enter a conditional plea, the court reviewed his claim under the standard of plain error.[169] Without engaging in any type of *Jones* analysis, the Eighth Circuit held that the trial judge had disposed properly of the case on the

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influenced subsequent definitions of term "affected" in favor of Government).

163. *See* United States v. Grassie, 237 F.3d 1199, 1202 (10th Cir. 2001) (detailing Grassie's systematic destruction of five Mormon churches, focusing on his elaborate, time-consuming efforts to permanently destroy such buildings).

164. For a similar mistreatment of a church burning case, see United States v. Tush, 151 F. Supp. 2d 1246, 1252 (D. Kan. 2001) (discussing similarities between churches burned by defendants Grassie and Tush). In *Tush*, the court considered whether to uphold a guilty plea after challenge when the defendant had stipulated the church's connection with interstate commerce. *Id.* at 1248-49. The defendant argued that *Jones* created doubt as to the validity of his plea, claiming that the church had only a "passing connection" with interstate commerce. *Id.* at 1251. After conceding that the defendant was correct in stating that *Jones* precluded consideration of the fact that the church purchased religious supplies from out of state to establish a legitimate connection with interstate commerce, the court upheld the conviction on the grounds that the church had out-of-state visitors and thus was "actively used" in interstate commerce. *Id.* at 1253.

165. 250 F.3d 1163 (8th Cir. 2001).

166. *See* United States v. Beck, 250 F.3d 1163, 1167 (8th Cir. 2001) (holding that trial judge did not commit plain error in accepting guilty plea stipulating connection with interstate commerce).

167. *Id.* at 1165.

168. *See id.* (listing facts that court found to support connection between burned church and interstate commerce).

169. *Id.* at 1166.

facts provided.[170] Had it engaged in a *Jones* analysis, the Eighth Circuit would have noticed the similarities between the facts in *Beck* and *Jones*. Just as the Supreme Court concluded in *Jones* that the Government could not claim that one "used" a building in the "activity" of receiving natural gas, securing a mortgage, or receiving an insurance policy,[171] the Eighth Circuit should have understood that one cannot "use" a church in the "activity" of national affiliation, of fund disbursement, or of gathering its members, none of whom were from out of state.[172] Arguably, the facts that the church housed a school and that it distributed funds to out-of-state entities could support a connection with interstate commerce, but it would have been necessary for the trial court to apply a *Jones* analysis to these factors. Without complete information as to the nature of the church's interstate dealings, the Eighth Circuit should have remanded the case to the trial judge for further findings of fact to determine whether plain error had occurred. Neither the trial court nor the Eighth Circuit engaged in any type of *Jones* analysis when deciding *Beck*.[173] Both ignored the Supreme Court's concerns with federalism in their cursory examination and subsequent affirmation of the defendant's conviction, exactly the type of situation the Court hoped to avoid.

In *United States v. Rea*,[174] only months before *Beck*, the Eighth Circuit reached a decision supportable under the framework of *Jones*.[175] Working in tandem with his brother, the defendant in *Rea* burned a church to destroy evidence of his prior theft of a church computer.[176] After his brother agreed to cooperate with the Government, the defendant entered a conditional plea of guilty, reserving the right to appeal the district court's denial of his motion to dismiss the indictment on subject matter grounds.[177] On facts similar to those discussed in *Jones*, the Eighth Circuit concluded that the church's use of

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170. *See id.* (finding that neither of defendant's contentions "support a finding of plain error").

171. *See Jones*, 529 U.S. at 857-59 (finding Government's contention that one could "use" home in "activity" of receiving natural gas, mortgage, and insurance was inconsistent with congressional intent underlying 18 U.S.C. § 844(i)).

172. *See* United States v. Beck, 250 F.3d 1163, 1165 (8th Cir. 2001) (listing factors relating to interstate commerce analysis considered by trial court).

173. *See id.* at 1164-67 (declining to reference analysis of interstate commerce claims under reasoning outlined by Supreme Court in *Jones*).

174. United States v. Rea, 223 F.3d 741 (8th Cir. 2000).

175. *See id.* at 744 (analyzing defendant's claim that *Jones* required review of whether church he burned maintained sufficient ties to interstate commerce). The Eighth Circuit decided *Rea* on May 18, 2000, less than three months before the filing of *Beck* on August 11, 2000.

176. *See id.* at 742-43 (discussing circumstances of criminal activity of defendant in relation to burned church).

177. *See id.* at 743 (discussing procedural history in *Rea*).

materials purchased in interstate commerce and its use of natural gas from an out-of-state source did not constitute a sufficient connection with interstate commerce.[178] The Supreme Court had previously granted the defendant's petition for writ of certiorari[179] and remanded the case, after which the Eighth Circuit reversed the defendant's conviction.[180] Given the facts of the case, a remand for review in light of *Jones* was the correct result.[181] More importantly, the Eighth Circuit correctly applied the two-part test of *Jones* to reach its result, examining the function of the building itself and then determining whether that function affected interstate commerce.[182] The difference between *Rea* and *Beck* is that defendant Beck failed to enter a conditional plea, subjecting him to the higher burden of "plain error" to attain a reversal.[183] In light of the difference between federal and state prosecution and the Supreme Court's concern with federalism, the Eighth Circuit erred in not reversing defendant Beck's claim, especially as it correctly articulated the test for such cases a few months earlier in *Rea*. Such mistakes point not only to the confusion created by extending *Jones* beyond its immediate context, namely the burning of a residential property, but also to federal judicial reluctance to comply with the strong spirit of federalism underlying *Jones*.

*V. Post-*Jones *Hobbs Act Prosecutions*

A. Background

Rea not only provides an example of the correct application of *Jones* to arson cases, but also it provides an avenue to begin the exploration of much

178. *See id.* at 743-44 (finding that Government failed to establish jurisdictional element of 18 U.S.C. § 844(i)).

179. *See* United States v. Rea, 530 U.S. 1201 (2000) (granting certiorari and remanding case for rehearing in light of *Jones*). The Eighth Circuit then remanded the case to the trial judge for further findings of fact. United States v. Rea, 223 F.3d 741, 744 (8th Cir. 2000). The trial judge, using principles culled from *Jones*, determined that the church had a substantial impact on interstate commerce. *See* United States v. Rea, No. Crim. 97-235, 2001 WL 407238 (D. Minn. Apr. 18, 2001) (reinstating federal criminal conviction).

180. *See* United States v. Rea, 223 F.3d 741, 744 (D. Minn. 2001) (reversing Rea's conviction and remanding case for further findings of fact in light of *Jones*).

181. The facts of *Rea* mirrored those in *Jones* in that the Government in *Rea* relied on evidence that the burned church annex "received" out-of-state books and computer equipment and that church groups "used" the annex as a gathering place. *See* United States v. Rea, 169 F. 3d 1111, 1113 (8th Cir. 1999) (listing Government evidence of connection with interstate commerce).

182. *See* United States v. Rea, 223 F.3d 741, 743 (8th Cir. 2000) (applying interstate commerce analysis outlined in *Jones* in church burning context).

183. *See* United States v. Beck, 250 F.3d 1163, 1166 (8th Cir. 2001) (concluding that under "plain error" standard, reversal was inappropriate).

wider extensions of *Jones*. While certain instances of arson, especially the burning of churches, certainly warrant the attention of the federal justice system, convictions under federal arson statutes constitute only one-tenth of one percent of all federal convictions.[184] For 1999, the most recent year for which data is available, this works out to exactly 168 offenders, placing arson in the same category as bribery (165 convictions) and forgery (128 convictions).[185] Thus, while the holding in *Jones* is important, the infrequency of arson prosecutions limits *Jones*'s direct effect on the federal criminal justice system. However, *Jones* clearly influences the interpretation, if not the constitutionality, of other federal statutes that federal prosecutors utilize more often.

One such statute employed by federal prosecutors across the country is 18 U.S.C. § 1951, the federal robbery statute, otherwise known as the Hobbs Act.[186] According to the Department of Justice, federal courts convicted 1656 defendants of robbery in 1999, representing 2.5% of all federal convictions.[187] Invoked approximately twenty-five times more often than 18 U.S.C. § 844(i),[188] the Hobbs Act represents an area of federal law enforcement far more important in terms of convictions than the federal arson statute. Thus, if lower courts interpret *Jones* to apply to Hobbs Act prosecutions, the importance of the Supreme Court's dicta and concerns expressed in *Jones* extend beyond arson cases. And, given the similarities between crimes covered by the Hobbs Act and those covered by 18 U.S.C. § 844(i), the spirit underlying *Jones* moves easily from the federal arson statute to the federal robbery statute.

The Hobbs Act applies to "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion."[189] Compared to the federal arson statute, which states that the statute applies only to property "used in" interstate commerce,[190] the language of the Hobbs Act indicates that Congress intended to invoke a broader range of its powers under the Commerce Clause. In light of the Court's concern with federalism in *Jones*,[191] the question is whether this

184. UNITED STATES DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1999, at 67 tbl. 5.1 (2001) [hereinafter FEDERAL JUSTICE STATISTICS].

185. *Id.*

186. 18 U.S.C. § 1951 (2000).

187. FEDERAL JUSTICE STATISTICS, *supra* note 184, at 67 tbl. 5.1.

188. *Id.* at 67 tbl. 5.1.

189. 18 U.S.C. § 1951(a) (2000).

190. 18 U.S.C. § 844(i) (2000).

191. *See Jones*, 529 U.S. at 858 (declaring that reading federal arson statute broadly "significantly change[s] the federal-state balance" in negative manner).

language is over-broad to the point of being unconstitutional, or whether there exists an interpretation of this language that avoids such a problem. However, by ignoring *Jones* altogether, several circuits have adopted a third, unfortunate approach.

The language of the Hobbs Act presents circuit courts with several interpretive problems when analyzing it in a post-*Jones* context. As the Supreme Court stated in *Jones*, courts have an obligation to avoid constitutionally dubious interpretations of statutes.[192] In *Jones*, the Supreme Court refused to interpret language broadly to avoid impermissible federal intrusion into areas of traditional state concern, namely the exercise of states' police powers.[193] The Hobbs Act also affects the states' ability to exercise their police powers. Indeed, given the Hobbs Act's broad jurisdictional hook and the relatively high numbers of convictions under the Act,[194] the Hobbs Act arguably represents an intrusion into areas of state concern even greater than the federal arson statute.

Writing for a unanimous Court in *Jones*, Justice Ginsburg stated that were the Court to "adopt the Government's expansive interpretation of § 844(i), hardly a building in the land would fall outside the federal statute's domain."[195] If courts gave such an expansive interpretation to the jurisdictional language of the Hobbs Act, virtually every robbery, burglary, or petty theft would be subject to federal prosecution, given that it is difficult to imagine any product or service that does not "affect[] commerce or the movement of any article or commodity in commerce."[196] Fortunately, *Jones* and its predecessors teach the lower courts how to avoid such unconstitutional constructions by outlining the guiding principles of federalism to limit federal incursion into areas of state interest[197] and by providing a simple two-part test to evaluate interstate com-

192. *Id.* at 851 (citing Edward J. Debartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

193. *See Jones*, 529 U.S. at 860 (Stevens, J. concurring) ("[W]e should interpret narrowly federal criminal laws that overlap with state authority unless congressional intention to assert its jurisdiction is plain.").

194. *See* FEDERAL JUSTICE STATISTICS, *supra* note 184, at 67 tbl. 5.1 (comparing percentage of total federal convictions by offense in fiscal year 1999).

195. *See Jones*, 529 U.S. at 857 (noting that interpreting federal arson statute to include virtually every building in United States would render statute unconstitutional because it would exceed congressional powers under Commerce Clause and constitute impermissible infringement on states' police powers).

196. 18 U.S.C. § 1951(a) (2000).

197. *See* United States v. Morrison, 529 U.S. 598, 618 (2000) (noting that "Founders denied the National Government [police powers] and reposed them in the States").

merce claims.[198] The fate of the Hobbs Act hinges on the correct application of these principles and tests.

Starting with the *Lopez* decision, the Supreme Court signaled that it would give special attention to cases challenging the traditional role of the police power.[199] In *Morrison*, the Court directly addressed the conflict between state and federal police powers, saying that it could "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."[200] This passage serves as notice that the Court intends to defend vigorously the line between state and federal police powers.[201] Both *Lopez* and *Morrison* reference the noneconomic nature of a federal statute that the Court ultimately found unconstitutional;[202] *Jones*, for its part, interprets a federal statute so that it does not apply to what the Court believes to be noncommercial activity.[203] How, then, do the teachings of these cases affect federal prosecu-

198. *See Jones*, 529 U.S. at 854 ("The proper inquiry, we agree, 'is into the function of the building itself, and then a determination of whether that function affects interstate commerce.'" (quoting United States v. Ryan, 9 F.3d 660, 675 (8th Cir. 1993) (Arnold, C.J., concurring in part and dissenting in part))).

199. *See* United States v. Lopez, 514 U.S. 549, 567 (1995) (finding that Government's rationale supporting jurisdictional element of Gun-Free School Zones Act would, through use of overly expansive definition of interstate commerce, grant Congress "a general police power of the sort retained by the States"). In *Lopez*, the Supreme Court showed more concern with the possibility of granting the federal government a police power through misuse of the Commerce Clause than with the direct effect of overly broad statutes on the police powers of the states. *Id.* The Court repeatedly noted that the Founders did not intend to give the federal government such powers, but did not focus specifically on the negative effects such a power would have on the police powers of the states. *See id.* at 566 ("The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation."). In his concurrence, Justice Thomas picked up the same theme by outlining the Founders' notions of the term "commerce" in detail, but neither he nor any member of the majority mentioned the term "federalism" in connection with the idea of police powers. *See id.* at 585 (Thomas, J., concurring) (detailing Founders' understanding of term "commerce" and how they intended its use in Constitution).

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

201. *See id.* ("The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.").

202. *See id.* at 617 ("We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."); *Lopez*, 514 U.S. at 561 (finding Gun-Free School Zones Act had nothing to do with "'commerce' or any sort of economic enterprise," thus falling out of reach of congressional power to regulate commerce).

203. *See Jones*, 529 U.S. at 856 (holding "that an owner-occupied residence not used for any commercial purpose does not qualify as property 'used in' commerce or commerce-affecting activity").

tions for the forceful stealing of money or goods, a crime that arguably has direct and inseparable links to the flow of interstate commerce?

The answer is simple in theory, but difficult in application. Bearing in mind the Supreme Court's strong language about the virtues of federalism, lower courts should look first to the two-part test articulated by the Supreme Court in *Jones*[204] and apply its relevant provisions to situations in which federal jurisdiction over common robbery is at issue. The Court in *Jones* said that the proper inquiry was first "into the function of the building itself, and then a determination of whether that function affects interstate commerce."[205] Applying this test to the forceful stealing of money or goods, lower courts first should consider the source of the money, namely whether the perpetrator stole from an individual or from a business with ties to interstate commerce. An examination of the source of stolen money, private or commercial, correlates directly with *Jones* in that the Supreme Court's scrutiny of the federal arson statute began with an examination of whether the structures burned were purely residential or involved commercial activity.[206] Asking whether the money in a Hobbs Act prosecution came from private individuals or from businesses parallels the Supreme Court's concern in an 18 U.S.C. § 844(i) prosecution with the type of structure burned.[207]

Second, courts should consider the actual effect of the stolen money or goods on interstate commerce. This satisfies the second prong of the *Jones* analysis.[208] In other words, does the property taken have such a substantial effect on interstate commerce as to warrant federal protection? And throughout such deliberations, the lower courts should remember the Supreme Court's warning that there must "be a distinction between what is truly national and what is truly local."[209]

B. Robbery of an Individual

Some lower courts already have begun an examination of the source of stolen property as the first part of a *Jones*-style two-part test. In *United States*

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204. *See id.* at 854 (stating proper test to determine nature of burned building in context of interstate commerce).

205. *Id.* (quoting United States v. Ryan, 9 F.3d 660, 675 (8th Cir. 1993)).

206. *See id.* at 854-56 (discussing how differences between private and commercial property affect analysis of jurisdictional elements of federal arson statute).

207. *Id.*

208. *See id.* at 854 (finding that, after examination of "function" of property, courts should consider "whether that function affects interstate commerce" (quoting *Ryan*, 9 F.3d at 675)).

209. United States v. Lopez, 514 U.S. 549, 567-68 (1995).

v. Lynch,[210] the Court of Appeals for the Ninth Circuit considered the effects of the robbery of an individual on interstate commerce.[211] After carefully considering the defendant's claim that the Government failed to establish that the Hobbs Act gave federal authorities jurisdiction to prosecute the robbery of a private individual,[212] the Ninth Circuit concluded that the federal government indeed could prosecute the robbery of individuals, but only if the effect on interstate commerce reached a certain threshold.[213] The court cited *Lopez* for the proposition that the federal government may not "pile inference upon inference" to achieve the requisite connection with interstate commerce[214] and echoed the Supreme Court's concern in *Jones* with federal infringement on crimes traditionally prosecuted by the states.[215] The Ninth Circuit took note of the decisions of sister circuits that had considered the proper method of analyzing the jurisdictional elements of Hobbs Act prosecutions for the

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210. 265 F.3d 758 (9th Cir. 2001).

211. *See* United States v. Lynch, 265 F.3d 758, 760 (9th Cir. 2001) (stating that inquiry into Hobbs Act jurisdiction parallels inquiry into limits placed on Congress by Commerce Clause). In *Lynch*, the Ninth circuit reviewed a Hobbs Act conviction connected with a particularly brutal crime. *Id.* at 759-60. With the help of a co-defendant, appellant murdered a Nevada resident near his father's ranch in Montana, dismembered and burned the body, and then used the dead man's ATM card to withdraw $5,000 from his account. *Id.* The State of Montana originally tried and convicted Lynch on multiple counts, but the Montana Supreme Court reversed these convictions, finding that a wiretap used by Nevada authorities violated Montana law. *Id* at 760. Hoping that the Nevada wiretaps would be admissible in federal court, federal prosecutors tried Lynch in federal court for violations of the Hobbs Act and for carrying a firearm during a crime of violence. *Id.* The defendant appealed his subsequent conviction and twenty-five-year sentence, claiming that the Government failed to establish federal jurisdiction over the robbery of a private individual. *Id.* The Ninth Circuit adopted a test first articulated by the Fifth Circuit for use in determining when the robbery of an individual rises to the level of a crime substantially affecting interstate commerce. *Id.* at 762. The Ninth Circuit then remanded the case to the trial court with instructions to apply the newly adopted standard. *Id.* at 764.

212. *See id.* at 760-61 (analyzing relationship of Hobbs Act to Commerce Clause).

213. *See id.* at 761-62 (noting that, in general, "the taking of small sums of money from an individual has its primary and direct impact only on that individual and not on the national economy"). In this case, because the victim was dead, the robbery did not even harm the victim, although one could argue that the robbery harmed his heirs and estate.

214. *See id.* at 761 (noting that "[t]he de minimis effect standard, however, is not a means for the federal government 'to pile inference upon inference'" (quoting *Lopez*, 514 U.S. at 567)).

215. *See id.* at 761 ("[R]obbery and extortion, particularly of individuals, have traditionally been the province of the states."). The Ninth Circuit reached this conclusion after stating that robbery, at first glance, clearly seems to fall within the category of activities that implicate interstate commerce because it "involve[s] the forced transfer of currency or of goods that can be exchanged for currency." *Id.*

robbery of an individual[216] and found that such circuits have employed two different methods.[217]

The *Lynch* court cited the United States Court of Appeals for the Sixth Circuit's decision in *United States v. Wang*[218] as an example of a court distinguishing the robbery of an individual and the robbery of a business without resorting to any pre-defined test.[219] In *Wang*, the Sixth Circuit noted that the de minimis standard employed by the trial judge no longer applies to robbery of an individual after *Lopez*.[220] After a lengthy discussion of the effects of *Lopez* on the court's analysis,[221] the Sixth Circuit moved to the second prong of *Jones* analysis and scrutinized the relationship of the stolen money to interstate commerce.[222] The Sixth Circuit concluded that the stolen money,

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216. *See id.* at 762 ("Several of our sister circuits have identified the difficulty inherent in respecting the line between state and federal jurisdiction when applying the Hobbs Act to defendants charged with the robbery or extortion of private individuals."); *infra* notes 218-35 and accompanying text (discussing circuit court cases cited or examined by *Lynch* court).

217. *See* United States v. Lynch, 265 F.3d 758, 762 (9th Cir. 2001) (noting that Fifth, Eighth, and Eleventh Circuits have adopted "*Collins* test" to determine existence of interstate commerce connection in context of robbery of private individuals, and noting that Fourth, Sixth, and Seventh Circuits acknowledge inherent difference between robbery of individuals and robbery of businesses).

218. 222 F.3d 234 (6th Cir. 2000).

219. *See* United States v. Wang, 222 F.3d 234, 240 (6th Cir. 2000) (finding that defendant's criminal activity did not affect interstate commerce within meaning of Hobbs Act simply because he robbed restaurant owner of profits from restaurant doing business in interstate commerce). In *Wang*, the Sixth Circuit considered the effect of robbing private individuals of profits derived from a business operating in interstate commerce. *Id.* at 237-38. The defendant in *Wang* entered the Tennessee home of a married couple who owned a Chinese restaurant doing business in interstate commerce. *Id.* at 236. After assaulting the couple and repeatedly threatening to kill them, he absconded with $4200, of which only $1200 actually belonged to the restaurant. *Id.* After the district court convicted the defendant of a Hobbs Act violation, he appealed, claiming that the evidence was insufficient to support a finding that his robbery affected interstate commerce in a legally cognizable manner. *Id.* at 237. The Sixth Circuit, while recognizing the legitimacy of the de minimis standard for certain crimes, found that the requisite showing for the robbery of an individual differs from that for the robbery of a business. *Id.* at 238.

220. *See id.* at 239 (noting that "the *Lopez* Court declined to apply the aggregation principle in conjunction with long chains of causal inference[s]" to find substantial effect on interstate commerce and that piling of inferences would be requisite to establish jurisdiction).

221. *See id.* at 239-40 (noting that *Lopez* requires stricter standard than de minimis examination). The Sixth Circuit cited *Lopez* and *Morrison*, but not *Jones*. This may be due in part to the fact that the court was uncertain how to interpret the language of *Jones* in the context of the Hobbs Act, given that the Supreme Court decided *Jones* only three months before the Sixth Circuit decided *Wang*.

222. *See id.* at 240 (finding that stealing $1200 of restaurant's money from restaurant owners did not implicate interstate commerce).

by itself, had no effect on interstate commerce[223] and that, without a further showing, *Lopez* and *Morrison* prevented the court from assuming that such robbery would have an effect on interstate commerce through nationwide repetition of such acts.[224] Ultimately, the importance of the Sixth Circuit's use of such analysis is two-fold; it indicates a willingness by a circuit court to reexamine Hobbs Act jurisdictional claims in light of recent Supreme Court precedent and, more importantly, it indicates that courts can apply effectively the test set out in *Jones*, or at least a rough approximation thereof, in a Hobbs Act setting.

The Ninth Circuit also cited the case of *United States v. Diaz*[225] to illustrate a situation in which a sister circuit, post-*Jones*, adopted a formal test to determine at what point the robbery of an individual affects interstate commerce in a federally cognizable manner under the Hobbs Act.[226] In *Diaz*, the United States Court of Appeals for the Eleventh Circuit found that the three-part test provided in *United States v. Collins*[227] effectively differentiated between the robbery of an individual and the robbery of a business.[228] The *Collins* court had held that robberies or extortions perpetrated on individuals affect interstate commerce in three situations: first, when the crime depletes the assets of an individual directly engaged in interstate commerce; second, when the crime causes the individual to deplete the assets of an entity engaged in interstate commerce; and third, when the crime victimizes so many people or involves the loss of such a large amount of money that there will be a cumulative effect on interstate commerce.[229]

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223. *Id.* at 240.

224. *See id.* (emphasizing Supreme Court's warning about federal infringement on traditionally state-prosecuted crimes, such as robbery, and focusing less on implications of *Lopez* and *Jones* on aggregation as valid standard).

225. United States v. Diaz, 248 F.3d 1065 (11th Cir. 2001). In *Diaz*, the Eleventh Circuit found that the *Collins* test was satisfactory for determining when the robbery of an individual affects interstate commerce under the Hobbs Act. *Id.* at 1084. The defendants in *Diaz*, practitioners of Santeria, orchestrated a crime spree that involved the kidnapping and torture of several wealthy church patrons in an effort to extort money from them. *Id.* at 1075-82. Ultimately, the court found that the Government proved that the defendants' actions substantially affected interstate commerce. *Id.* at 1089.

226. *See* United States v. Lynch, 265 F.3d 758, 762 (9th Cir. 2001) (citing *Diaz* as recent case adopting *Collins* test).

227. *See* United States v. Collins, 40 F.3d 95, 99-101 (5th Cir. 1994) (establishing three-part test to determine when robbery of individual implicates interstate commerce as defined in Hobbs Act).

228. *See Diaz*, 248 F.3d at 1084-85 (adopting *Collins* test as suitable for situations involving Hobbs Act as applied to robbery of individual).

229. *See Collins*, 40 F.3d at 100 (outlining three-part test for determining when robbery

The Ninth Circuit, concluding that *Lopez* and *Morrison* mandate stricter scrutiny of Hobbs Act prosecutions of robberies of individuals,[230] adopted the *Collins* test.[231] Deciding that the *Collins* test provided the best possibility of consistent application of a national law,[232] the Ninth Circuit noted that the test is useful in defining what constitutes a state offense[233] and provides defendants with a predictable way of determining which law enforcement body will have jurisdiction over their alleged crimes.[234] By adding its name to the list of circuit courts that differentiate between the robbery of an individual and that of a business, the Ninth Circuit joins at least six other circuits that have concluded that the jurisdictional reach of the Hobbs Act requires close scrutiny in order to avoid federal interference with state areas of concern.[235] This indicates a shift toward recognizing the first prong of the *Jones* test in the

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perpetrated on individuals is prosecutable under Hobbs Act). In *Collins*, the defendant stole the victim's cell phone, preventing him from making business calls and attending a business meeting. *Id.* at 97-98. The Fifth Circuit found that the victim's nexus to interstate commerce through his affected business was too tenuous for federal criminal prosecution under the Hobbs Act. *Id* at 100.

230. *See Lynch*, 265 F.3d at 762 (finding need to delineate clearly the "distinction between what is national and what is local" in situation in which there exists risk of federal intrusion into state offenses (quoting United States v. Morrison, 529 U.S. 598, 608 (2000))).

231. *See id.* at 764 (joining Fifth Circuit in adopting *Collins* test).

232. *See id.* at 763 ("[T]he Hobbs Act has nationwide criminal application; as a matter of fairness, defendants should be treated equally throughout the nation.").

233. *See id.* (finding *Collins* test effective method of defining "what might otherwise be a never-ending catch-all for what should be state offenses").

234. *See id.* ("[T]he proposed test provides defendants with 'some means of knowing which of the two governments' will have oversight over their actions." (quoting United States v. Lopez, 514 U.S. 549, 576-77 (1995) (Kennedy, J. concurring))). This reason for adopting the *Collins* test, while noble, may not have much practical value. The Ninth Circuit assumes that the defendant will know the difference between federal and state prosecution as well as the levels to which his conduct must rise to be subject to either. Because it is unlikely that a Hobbs Act defendant will take the time to consider the ramifications of his criminal activity on interstate commerce, the only value in this rationale for adopting the *Collins* test, if any, lies in the formulation of a post-arrest defense strategy.

235. *Compare* United States v. Wang, 222 F.3d 234, 238-40 (6th Cir. 2000) (noting need to differentiate between robbery of individual and robbery of business, but offering no test to apply routinely in such situations), *and* United States v. Buffey, 899 F.2d 1402, 1404-06 (4th Cir. 1990) (same), *and* United States v. Mattson, 671 F.2d 1020, 1023-25 (7th Cir. 1982) (same), *with* United States v. Lynch, 265 F.3d 758, 761-62 (9th Cir. 2001) (adopting three-part test to determine when Government may prosecute robbery of individual under Hobbs Act), *and* United States v. Diaz, 248 F.3d 1065, 1084-85 (11th Cir. 2001) (same), *and* United States v. Collins, 40 F.3d 95, 99-101 (5th Cir. 1994) (same).

Hobbs Act context,[236] at least to the extent that these circuit courts require a heightened showing of a nexus with interstate commerce.[237]

Ultimately, *Jones* demands more. After examining the function of the burned building, an exercise roughly analogous to examining the source of the money in the Hobbs Act context,[238] courts are to proceed to *Jones*'s second prong – determining whether such function affects interstate commerce.[239] In the case of the Hobbs Act, this correlates to asking whether the function of money affects commerce.[240] Should courts be free to end their inquiry into the level of effect on interstate commerce after determining whether the stolen money or goods came from an individual or business? To do so would create a two-tiered system requiring a higher level of proof to establish jurisdictional links under the Hobbs Act for the robbery of an individual, but requiring no

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236. *See Jones*, 529 U.S. at 854-55 (concluding that proper inquiry when considering jurisdictional elements of federal arson statute is to examine first function of building itself and then building's connection to interstate commerce).

237. Decisions retaining the de minimis standard in cases involving the robbery of an individual demonstrate the importance of properly utilizing *Jones*. The decision of the Court of Appeals for the Second Circuit in *United States v. Jamison*, 299 F.3d 114 (2d Cir. 2002), illustrates the extremes to which the de minimis standard can be stretched to support federal jurisdiction over a Hobbs Act conviction. A jury convicted the defendant of a Hobbs Act violation after he shot and robbed a drug dealer. *Id.* at 115. The victim, three-time convicted felon Andre "Boogaloo" Porter, commingled proceeds from drug sales with receipts from a legitimate clothing enterprise he owned. *Id.* at 116-17. At trial, the Government contended that, because the money stolen "could have been" used to purchase cocaine, a "commodity" in interstate commerce, the interstate element of the Hobbs Act had been satisfied. *Id.* at 117. Thus, the Government argued that the robbery deprived the victim of his ability to buy an illegal good theoretically moving in interstate commerce. *Id.* While one might view this robbery as a social benefit considering the nature of the interstate product, the Second Circuit accepted the Government's argument after noting that *Lopez* did not change its reasoning and expressly rejecting the holdings in both *Collins* and *Wang*. *Id.* at 118-19. The court particularly focused on Porter's statement that he intended to use the ill-gotten money to buy "drugs or clothing, whatever." *Id.* at 119. In dissent, Judge Jacobs cited both *Wang* and *Collins* for the proposition that the de minimis standard no longer represents good law when considering the robbery of an individual. *Id.* at 122 (Jacobs, J., dissenting). Further, he noted the absurdity of resting a federal conviction on the vague statement of a three-time convicted felon as to his intent when disbursing his drug profits. *Id.* at 122-23 (Jacobs, J., dissenting).

238. *See supra* notes 204-09 and accompanying text (discussing how test outlined in *Jones* is equally effective when applied to jurisdictional analysis in Hobbs Act prosecutions).

239. *See Jones*, 529 U.S. at 854 ("The proper inquiry, we agree, 'is into the function of the building itself and then a determination of whether that function affects interstate commerce.'" (quoting United States v. Ryan, 9 F.3d 660, 675 (8th Cir. 1993) (Arnold, C.J., concurring in part and dissenting in part))).

240. *See* United States v. Lynch, 265 F.3d 758, 761 (9th Cir. 2001) (noting that Hobbs Act presents difficulty in analyzing activities that necessarily implicate commerce).

additional scrutiny for the robbery of a business.[241] While courts should apply the first prong of the *Jones* test rigorously, it serves as little more than an indicator of when the court should use heightened scrutiny when examining the nexus between the crime committed and interstate commerce.[242] The real examination of Hobbs Act jurisdictional elements occurs in the second prong of *Jones*. *Jones* instructs lower courts to determine "whether [the] function [of the burned building] affects interstate commerce."[243] The parallel test for the Hobbs Act would be an examination of "whether [the] function [of the stolen money] affects interstate commerce." But how do courts define what "affects" commerce under the *Jones* test?

To answer this question, the *Jones* Court turned first to the statutory language of 18 U.S.C. § 844(i).[244] A similar look at the broad language of the Hobbs Act gives courts little guidance regarding the limits of the statute's applicability because it applies to anyone who "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion."[245] The statute's language is so broad that, to paraphrase the Court in *Jones*, hardly a robbery in the land would fall outside its scope.[246] Such an expansive reading creates doubt about the statute's constitutionality,[247] and the Court has long noted the need to avoid constitutionally suspect interpretations.[248] Thus, the courts must define

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241. The *Collins* test, for example, would satisfy this higher level of scrutiny for the robbery of an individual. *See* discussion accompanying *supra* notes 210-37 (discussing differing approaches, including adoption of *Collins* test, to raising level of scrutiny for connections between interstate commerce and robbery of an individual). However, it may lead to untenable results. An example would be the case in which the theft of five dollars from a phone company leads to no searching review of the connection between the crime and interstate commerce, while the extortion of millions of dollars from a kidnaped businessman receives heightened scrutiny with respect to the jurisdictional elements of the Hobbs Act.

242. *See Lynch*, 265 F.3d at 761-62 (stating that taking small sums of money generally affects only victim, not national economy, suggesting that such behavior does not fall within jurisdiction of federal statutes).

243. *See Jones*, 529 U.S. at 854 (outlining two-part test to determine whether owners "used" burned property in interstate commerce).

244. *See id.* at 853-55 (discussing congressional meaning of words "used in" as set out in federal arson statute).

245. 18 U.S.C. § 1951(a) (2000).

246. *See Jones*, 529 U.S. at 857 (commenting on expansive nature of federal arson statute as proposed by federal prosecutors).

247. *See id.* (noting that in areas of traditional state concern, such as prosecution of criminal activity, courts should treat interpretations of federal statutes allowing federal incursion as constitutionally suspect without clear manifestation of congressional intent).

248. *See id.* ("[W]here a statute is susceptible of two constructions, by one of which grave

the term "affect" in a manner consistent with the principles of federalism espoused in *Jones*, as well as in *Lopez* and *Morrison*.

VI. Conclusions

One question raised by *Jones* and its predecessors that remains is whether the de minimis standard as applied to robbery of a business is still good law. Circuit courts addressing the question have held that it is.[249] The de minimis standard remains in effect even in the Fifth Circuit, which has engaged in heated debate over the standard's validity.[250] Occasionally, circuit courts use the aggregation theory to justify such a standard;[251] others simply exclude the supporting aggregation rationale and immediately conclude that an offense need have only a de minimis effect on commerce because Congress authorized such a standard by exercising its full authority under the Commerce Clause.[252] But given the Supreme Court's limiting of congressional language in *Jones*[253] and given the Court's warning to lower courts to draw a line between local and national issues,[254] can circuit courts continue to justify basing federal jurisdiction merely on a showing that the criminal activity has some nexus, regardless how tenuous, with interstate commerce?

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and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." (quoting United States *ex rel.* Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909))).

249. *See* United States v. Lynch, 265 F.3d 758, 762-63 (9th Cir. 2001) (continuing, even post-*Jones* and post-*Morrison*, to require only de minimis connection between criminal act and interstate commerce); United States v. Gray, 260 F.3d 1267, 1269-71 (11th Cir. 2001) (same); United States v. Morris, 247 F.3d 1080, 1085-86 (10th Cir. 2001) (same); United States v. Peterson, 236 F.3d 848, 852 (7th Cir. 2001) (same); United States v. Wang, 222 F.3d 234, 238 (6th Cir. 2000) (same).

250. *See* United States v. McFarland, 264 F.3d 557, 558-59 (5th Cir. 2001) (finding that in commercial setting *Jones* and *Morrison* did not overrule precedent establishing de minimis standard for effect on interstate commerce in Hobbs Act prosecutions).

251. *See* United States v. Gray, 260 F.3d 1267, 1273-75 (11th Cir. 2001) (recounting history of and modern practical application of aggregation theory).

252. *See* United States v. Morris, 247 F.3d 1080, 1087 (10th Cir. 2001) (upholding de minimis standard without discussing aggregation theory by noting Congress's intent to invoke its full authority under Commerce Clause).

253. *See Jones*, 529 U.S. at 858-59 (applying constitutional doctrine in order to narrow jurisdictional reach of federal arson statute).

254. *See* United States v. Lopez, 514 U.S. 549, 567 (1995) (finding that, to avoid unconstitutional federal intrusion into local affairs, courts must maintain distinct boundaries between federal and local criminal prosecutions); *see also supra* notes 98-106 and accompanying text (examining federalism rationale underlying *Jones* decision).

A. Application of the Jones *Two-Part Test*

Circuit courts often distinguish the Hobbs Act from the federal arson statute and the statutes at issue in *Morrison* and *Lopez* by noting that robbery is an inherently economic activity.[255] But economic activity is whatever the Supreme Court says it is. In *Jones*, the Supreme Court agreed that receiving natural gas from out of state and using property as collateral to secure a loan did not constitute a commercial use of the property.[256] The effects were simply too minimal. What about a gunman who takes $5000 from a department store? Or $400 from a restaurant? Or $5 from a hotdog stand? At what point does an individual robbery simply cease affecting interstate commerce? Fortunately, the second prong of the *Jones* test helps lower courts make this determination.[257]

Adapting the second prong of the *Jones* test to Hobbs Act prosecutions,[258] lower courts should ask whether the function of the robbed commercial establishment has sufficient "effects" on interstate commerce.[259] If a court finds that the function inherently affects interstate commerce, then the Hobbs Act applies to the robbery. But if the court finds that the function of the robbed establishment did not inherently affect interstate commerce, then the Hobbs Act could not reach such crimes.[260]

B. Non-Pretextual, Rational Basis for Aggregation

This application of the *Jones* test raises the question of how to determine what type of establishment, through its function, affects interstate commerce. This brings us back to Judge Higginbotham's dissent in *United States v.*

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255. This distinction turns on the assumption that Congress may regulate anything having to do with commerce.

256. *See Jones*, 529 U.S. at 855-57 (holding that, were Court to adopt Government's evidence of "use" of property to receive natural gas and serve as collateral for loan from out-of-state bank as proof of connection with interstate commerce, then robbery of virtually any building in nation would be subject to federal prosecution under 18 U.S.C. § 844(i)).

257. *See id.* at 854 ("The proper inquiry, we agree, 'is into the function of the building itself, and then a determination of whether that function affects interstate commerce.'" (quoting United States v. Ryan, 9 F.3d 660, 675 (8th Cir. 1993) (Arnold, C. J., concurring in part and dissenting in part))).

258. *See id.* (focusing inquiry on whether damaged property "affects" commerce at constitutionally cognizable level).

259. *Id.*

260. *See id.* (focusing on function of victim establishment rather than effect of criminal act on victim establishment when examining connections to interstate commerce).

Hickman.[261] In *Hickman*, Judge Higginbotham argued for a "rationality in aggregation" test,[262] meaning that he would require Congress to "identify a non-pretextual, rational basis for concluding that there are sufficient interactive effects among activities to allow them to be aggregated."[263] Under this test, Congress would need to identify its reasons for believing that the prohibited activity affects interstate commerce.[264]

Likewise, *Lopez* and *Morrison* serve as examples of Congress failing to show a "non-pretextual, rational basis" for aggregating local criminal activity sufficient to satisfy the interstate commerce requirement.[265] In *Lopez*, Congress included no evidence, either in the language of the statute or in its legislative history, of the deleterious effects that guns in school zones have on interstate commerce.[266] Such findings, had they existed, might have established a non-pretextual, rational basis on which to base federal legislation of local crimes through the aggregation theory and might have overcome the Court's reservations concerning the incursion of federal police powers into areas of traditional state control.[267] But, as Justice Rehnquist stated, "simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."[268] The Court went on

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261. *See* United States v. Hickman, 179 F.3d 230, 231 (5th Cir. 1999) (rehearing, en banc, question of whether de minimis standard remains good law in Fifth Circuit).

262. *See id.* at 242 (Higginbotham, J., dissenting) (proposing that prosecuting local robberies using aggregation theory violates constitutional bounds of federal government when Congress has not provided rational basis for connecting such crimes to larger national problem).

263. *Id.* (Higginbotham, J., dissenting).

264. Such rationale would, of course, be subject to review by the Supreme Court, which would continue to examine the validity of congressional reasoning. *See infra* note 271 and accompanying text (noting Supreme Court's zealous affirmation of its prerogative to decide ultimately what constitutes interstate commerce).

265. *See* United States v. Morrison, 529 U.S. 598, 614 (2000) (noting that Congress supported Violence Against Women Act with "numerous findings" regarding effect of gender-motivated violence on interstate commerce); United States v. Lopez, 514 U.S. 549, 563 (1995) (noting that Congress included no legislative findings in either Gun-Free School Zones Act or its legislative history).

266. *See Lopez*, 514 U.S. at 563 (noting lack of legislative findings in Gun-Free School Zones Act). The Supreme Court also rejected the argument that Congress possessed enough "accumulated institutional expertise regarding the regulation of firearms" that courts should impute to the legislation some rational connection between guns in school zones and detrimental effects on interstate commerce. *Id.* The Court went on to note that Congress has no duty to include such findings, but such findings would have facilitated reviewing court's task of examining the connection between the prohibited conduct and interstate commerce. *Id.*

267. *See id.* at 564 (detailing and dismissing Government's unsupported argument that violence in schools threatens learning environment, leading to decreased national productivity).

268. *Id.* at 557 n.2 (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n., Inc., 452

to reject the Government's post-hoc rationale for believing that guns in school zones affect interstate commerce.[269]

In *Morrison*, the Court rejected the "non-pretextual, rational basis" offered by Congress in an attempt to justify the implementation of the civil remedy provision of the Violence Against Women Act.[270] Quoting from *Heart of Atlanta Motel*, the Court proclaimed itself to be the ultimate arbiter of what legislation Congress permissibly may pass under its Commerce Clause powers.[271] The Court concluded that, although Congress had identified a non-pretextual basis for believing that violence against women, repeated on a national scale, negatively affected interstate commerce, such belief was irrational.[272] Thus, the Court struck down the civil remedy provision of the Violence Against Women Act.[273]

Further, evidence exists that the Supreme Court engaged in the non-pretextual, rational basis test for aggregation in *Jones*. The Court found that Congress had not stated clearly its intent to federalize the burning of purely residential property.[274] The Court did not reach the broader question of which types of commercial properties would fall permissibly under the federal arson statute, although Justice Scalia joined Justice Thomas in making clear that he expressed no view on whether the statute would reach all buildings used for commercial applications.[275]

U.S. 264, 311 (1981) (Rehnquist, J., concurring in judgment)).

269. *See id.* at 563-64 (rejecting Government's "costs of crime" argument theorizing that guns in school zones increase security costs and decrease effective learning, leading to decreased national productivity).

270. *See Morrison*, 529 U.S. at 615 (rejecting Government's argument that violence against women substantially affects interstate commerce on grounds that link between violence and commerce is too attenuated).

271. *See id.* at 614 ("[W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court." (quoting Heart of Atlanta Motel v. United States, 379 U.S. 241, 273 (1964) (Black, J., concurring))).

272. *See id.* at 617-19 (finding congressional findings less credible because they relied on disfavored theory that violence against women diminishes national productivity and increases costs of medicine and insurance).

273. *See id.* at 627 (Thomas, J., concurring) (concluding that congressional power does not extend to enactment of VAWA).

274. *See Jones*, 529 U.S. at 858 (stating that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance" (quoting United States v. Bass, 404 U.S. 336, 349 (1971))). And even if Congress does convey its purpose clearly, the Supreme Court may still find that purpose illegitimate. *See supra* note 271 and accompanying text (discussing Court's role as final arbiter of what "affects" interstate commerce).

275. *See Jones*, 529 U.S. at 860 (Thomas, J., concurring) (reserving judgment as to

The benefit of combining the two-part *Jones* test with an insistence on rationality in aggregation lies both in the ease of its implementation and the clear delineation between state and federal concerns that results. In the context of the Hobbs Act, lower courts would need only look to the legislative history to determine whether Congress provided a non-pretextual rational basis for subjecting the robbery of the commercial establishment in question to the aggregation theory. Using Judge Higginbotham's rationality-in-aggregation test, courts would attempt to determine whether Congress had established such a foundation. Were the trial court to find that Congress provided a non-pretextual, rational basis for aggregation, the Hobbs Act would then apply. If not, the matter would remain under local jurisdiction. Further, Congress would be free to add findings as to the effect of the robbery of certain types of establishments on interstate commerce, the rational basis of which would be subject to judicial review.[276]

A brief examination of the history of the Hobbs Act provides guidance when examining Congress's original rationale for using an aggregation theory to prohibit robbery. The modern version of the Hobbs Act sprang from the Federal Anti-Racketeering Act of 1934, the aim of which was to curb racketeering "in connection with price fixing and economic extortion directed by professional gangsters."[277] In 1945, Congress enacted what is now known as the Hobbs Act to curb the increasing problem of highway robbery,[278] with the impetus for the Act coming from the increased extortion and robbery of interstate trucking by union members.[279] The nature and operation of these unions frustrated local law enforcement efforts, giving rise to congressional

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whether 18 U.S.C. § 844(i) permissibly allows federal prosecution of arson of any buildings used for commercial activity). Such a special exception leads one to believe that both Justices seriously would consider rejecting the idea that the federal arson statute does, in fact, cover the arson of all buildings used in commercial activity.

276. *See supra* note 271 and accompanying text (noting Supreme Court's insistence that it alone remain ultimate arbiter of whether activity has adequate effects on interstate commerce).

277. H.R. REP. NO. 73-1833, at 2 (1934). The Act also targeted nationally known Depression-era gangsters such as John Dillinger and George "Machine Gun" Kelly. 91 CONG. REC. 11843, 11848 (1945).

278. *See* United States v. Local 807, 315 U.S. 521, 528-30 (1942) (explaining evolution of Anti-Racketeering Act of 1934); United States v. Woodruff, 941 F. Supp. 910, 916-17 (N.D. Cal. 1996) (stating that Hobbs Act was intended to curtail highway robbery), *vacated and remanded*, 122 F.3d 1185 (9th Cir. 1997).

279. *See* 91 CONG. REC. 11913 (1945) (statement of Sen. Whittington) ("The [Hobbs] bill is to prevent a repetition of the physical violence by members of labor unions on those engaged in interstate commerce."). The Supreme Court's decision in *Local 807*, in which the Court found labor unions exempt from the 1934 Anti-Racketeering Act, prompted expansion of the Hobbs Act. *Local 807*, 315 U.S. at 536. According to testimony, members of unions around New York City charged $9.42 to "park" large trucks, and $8.41 for smaller ones. *Id.* at 526.

action in the form of a federal statute.[280] In short, Congress found adequate reason to believe that threats to overland shipping interests constituted a threat to interstate commerce.[281] Under the rationality-in-aggregation test, it would be entirely plausible to conclude that Congress's informed determination that the states cannot effectively address a specific type of criminal activity provides a non-pretextual, rational basis for federal jurisdiction over that crime.[282]

Utilizing the *Jones* test combined with a requirement of a non-pretextual rational basis for aggregation clears up many of the nagging questions that the current implementation of the Hobbs Act raises. No longer would circuit courts need to agonize over the propriety of the de minimis standard.[283] Justice would cease to vary from circuit to circuit; a uniform treatment of Hobbs Act offenders would emerge as federal courts across the nation employed the same test.

Perhaps more importantly, such a test draws a clear line between national and local interests. By looking to the Hobbs Act itself and to congressional intent, lower federal courts would prosecute only those crimes allowable under the Supreme Court's *Jones* test. If lower courts are able to strike the fine balance between national and local interests in the prosecution of crime by applying the *Jones* test, the Supreme Court will lay to rest its fear of a federal law usurping state criminal justice systems. And if the *Jones* test functions as the Supreme Court intended, an even higher interest will be served – that of justice.

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280. *See* 91 CONG. REC. 11917 (1945) (statement of Sen. Rivers) (asserting that farmers "have had no protection under the laws of the state of New York. The Hobbs bill protects them with the armed might of the Federal Government"). Senator Rivers defended the Hobbs Act against claims that it impermissibly intruded on the rights of states to prosecute local criminal activity, especially crimes committed by labor unions. 91 CONG. REC. 11917 (1945) (statement of Sen. Rivers). He claimed that the raison d'etre of the Hobbs Act sprung from the fact that states, especially New York, could not, or did not, protect farmers from such highway extortion. 91 CONG. REC. 11917 (1945) (statement of Sen. Rivers).

281. 91 CONG. REC. 11902, 11924 (1945) (statement of Sen. Rivers).

282. 91 CONG. REC. 11911 (1945) (statement of Rep. Jennings) ("[T]he States have not been effectively prosecuting robbery and extortion affecting interstate commerce and the Federal Government has an obligation to do so.").

283. *See* United States v. McFarland, 264 F.3d 557, 558 (5th Cir. 2001) (noting that Fifth Circuit "agonized over the propriety of the gambit of prosecuting criminal conduct which has historically and traditionally been prosecuted under the state system").