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# Local Man Phones Spiritual Leaders, Ends Up in Federal Prison: Congressional Commerce Power to Curb Discrimination-Motivated Violence

*United States v. Corum*<sup>1</sup>

## I. INTRODUCTION

In the American federalist system, the Constitution gives the national government tremendous power in certain areas and very little in others.<sup>2</sup> In recent years, the constitutional constraint on congressional powers has placed Congress in the difficult position of needing to draft legislation to ensure the safety and welfare of all Americans while having very little clear authority to address the problem. This is especially true in the “new frontier” of civil rights legislation targeting gender, racial, ethnic nationality, and religious-animus-motivated violence.

Unlike the situations in which Congress relied on the Commerce Clause<sup>3</sup> to create civil rights legislation ensuring equal access<sup>4</sup> and opportunity,<sup>5</sup> where legislation is needed to prevent and criminalize violence, Congress cannot rely on the Commerce Clause. This substantial constraint results from the fact that the Commerce Clause does not authorize Congress to extend positive rights in areas traditionally within the competence of the states without a showing of a substantial effect on interstate commerce.<sup>6</sup> Non-economic,

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1. 362 F.3d 489 (8th Cir. 2004), *cert. denied*, 125 S. Ct. 865 (2005).

2. For example, the Fourteenth Amendment gives Congress immense power to remedy discrimination and civil rights violations caused by state action but no ability to address purely private action. On the same note, congressional commerce power only extends to those activities that have a substantial effect on interstate commerce, as activities with a lesser effect directly implicate state police power.

3. U.S. CONST. art. I, § 8, cl. 3, which states in pertinent part, “The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

4. For example, with Title II of the Civil Rights Act of 1964, Congress ensured equal access to all public accommodations “affecting interstate commerce.” 42 U.S.C. § 2000a (2000).

5. For example, with Title VII of the Civil Rights Act of 1964, Congress sought to eliminate discrimination on the basis of race, color, religion, sex, and national origin in all industries affecting commerce. 42 U.S.C. § 2000e (2000).

6. Furthermore, because the “new frontier” of civil rights legislation does not involve state action, Section 5 of the Fourteenth Amendment is of no avail. *See, e.g., United States v. Morrison*, 529 U.S. 598, 619-27 (2000). (holding that Congress does

criminal activity targeting protected groups from discrimination generally does not substantially affect commerce by itself.<sup>7</sup> However, when aggregated and spread across the nation in the form of violence against women, church arson or bombings, or other offenses the violence can have substantial effects on commerce.<sup>8</sup>

Where Congress has acted to prevent such violence, it has had to tread a cautious path in trying to keep its use of power within constitutionally-defined limits while still utilizing the resources of the federal government. In some cases, the violence might occur in interstate commerce, or through the infrastructure supporting it, over which Congress has expansive power.<sup>9</sup> In other cases, congressional power is limited to only those activities which substantially affect commerce.<sup>10</sup> In treading this path, Congress has been very aware of the limitations imposed by the Constitution.<sup>11</sup>

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not have authority under the Fourteenth Amendment to protect victims of gender-motivated violence without state action). *Id.* at 619.

7. See *Morrison*, 592 U.S. at 617 (quoting *United States v. Lopez*, 514 U.S. 549, 568 (1995) (“We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”)).

8. For example, the abuse suffered by one woman at the hands of her spouse does not substantially affect interstate commerce, as it does not change the movement of money and resources across state lines. However, according to the Centers for Disease Control, the cost of domestic violence exceeds an estimated \$5.8 billion per year, with nearly \$4.1 billion in the direct costs of medical and mental health care and nearly \$1.8 billion in the indirect costs of lost productivity. CDC Injury Center, *Costs of Intimate Partner Violence Against Women in the United States*, available at [http://www.cdc.gov/ncipc/pub-res/ipv\\_cost/01\\_executive.htm](http://www.cdc.gov/ncipc/pub-res/ipv_cost/01_executive.htm) (last modified July 21, 2004). At times, these effects can create the feel of a national epidemic. For example, in crafting the Church Arson Prevention Act, Congress was responding to a rapid increase of church arsons over the period of a year and a half, many in predominately African-American churches. 142 CONG. REC. S7418-03 (daily ed. July 8, 1996) (statement of Sen. Frist).

9. See 18 U.S.C. § 2261(a)(1), which states:

A person who travels across a State line or enters or leaves Indian country with the intent to injure, harass, or intimidate that person’s spouse or intimate partner, and who, in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner, shall be punished as provided in subsection (b).

10. See 18 U.S.C. § 844(e) (2000 & Supp. II 2002), which provides:

[w]hoever, through the use of the mail, telephone, telegraph, or other instrument of interstate or foreign commerce, or in or affecting interstate or foreign commerce, willfully makes any threat . . . concerning an attempt or alleged attempt being made, or to be made, to kill, injure, or intimidate any individual or unlawfully to damage or destroy any . . . real or personal property by means of fire or an explosive shall be imprisoned for not more than 10 years or fined under this title, or both.

In *United States v. Corum*,<sup>12</sup> the Eighth Circuit examined two categories of congressional commerce power used to eradicate religious discrimination.<sup>13</sup> The result in this case perpetuates a split among the circuits regarding the extent of congressional authority to regulate non-economic, criminal activity.<sup>14</sup> This Note examines the parameters of the Commerce Clause and the continuing confusion in the Courts of Appeals following the Supreme Court's holdings in *United States v. Lopez*<sup>15</sup> and *United States v. Morrison*.<sup>16</sup>

## II. FACTS AND HOLDING

On July 28, 2001, Minnesota resident Gary Corum called three Twin City area synagogues and left threatening phone messages on their answering machines.<sup>17</sup> The messages threatened physical harm to members of the synagogues and suggested that the caller belonged to a Neo-Nazi, Aryan Supremacy organization.<sup>18</sup> Corum's messages also threatened the use of arson or explosives to damage or destroy the synagogues.<sup>19</sup> Employees of the synagogues immediately contacted the police, who referred the matter to the FBI.<sup>20</sup>

The United States indicted Corum on three counts of violating the Church Arson Prevention Act.<sup>21</sup> Corum was further indicted on three counts of using a telephone to threaten members of or destroy the property of a

*See also Morrison*, 529 U.S. at 618 ("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.").

11. *See* 142 CONG. REC. S7098-04 (daily ed. July 16, 1996) (joint statement of floor managers regarding H.R. 3525, the Church Arson Prevention Act of 1996).

12. 362 F.3d 489 (8th Cir. 2004).

13. *Id.*

14. *See infra* notes 87-119 and accompanying text.

15. 514 U.S. 549 (1995).

16. 529 U.S. 598 (2000).

17. *See Corum*, 362 F.3d at 491.

18. *Id.* In his second call, made to the Bet Shalom Temple, Corum stated, "Listen my Jewish Zionist friends, we're tired of playing games with you. We are going to take over the planet. You're going into gas chambers." *Id.*

19. *Id.* In his first call, made to the Bais Yaakov School, which is housed in the Bais Yisroel Synagogue building, Corum said "We're gonna blow your fucking synagogue up this coming week and send you fuckers to the gas chambers. So good luck in trying to protect your fucking synagogues from the Aryan race. Heil Hitler!" *Id.*

20. Brief for Appellant at 9-10, *United States v. Corum*, 362 F.3d 489 (8th Cir. 2004) (No. 03-2497).

21. *Corum*, 362 F.3d. at 491-92. The Church Arson Prevention Act, in pertinent part, penalizes whoever "intentionally obstructs, by force or threat of force, any person in the enjoyment of that person's free exercise of religious beliefs, or attempts to do so" when the offense "is in or affects interstate or foreign commerce." 18 U.S.C. § 247(a), (b) (2000 & Supp. II 2002).

synagogue in violation of 18 U.S.C. § 844(e).<sup>22</sup> Prior to trial, Corum made a motion to dismiss all six counts.<sup>23</sup> He challenged the constitutionality of the Church Arson Prevention Act on the basis that it was an unlawful exercise of Congress' Commerce Power in that "intrastate telephone threats to religious organizations have no nexus to interstate commerce."<sup>24</sup> Additionally, Corum argued that Section 844(e) was unconstitutional as applied because telephones, when used to make intrastate calls, are not an instrument of interstate commerce.<sup>25</sup>

Following a hearing before a magistrate judge, the district court concluded that both acts were constitutional.<sup>26</sup> It held that the indictment contained an ample factual basis to fulfill the interstate commerce elements of the Church Arson Prevention Act and Section 844(e).<sup>27</sup> At trial, the jury found Corum guilty on all six counts.<sup>28</sup>

Corum moved for a judgment of acquittal, asserting that the Church Arson Prevention Act and 18 U.S.C. § 844(e) were unconstitutional, that the government had failed to meet its burden of proving the interstate commerce element, and that a telephone used to place an intrastate call did not constitute an instrumentality of interstate commerce.<sup>29</sup> The district court denied his motion.<sup>30</sup>

Corum appealed to the Eighth Circuit, claiming that his convictions under Section 844(e) should be set aside because the government had failed to prove his conduct was in or affecting interstate commerce and, alternatively, because the statute as applied was unconstitutional because his threats did not substantially affect interstate commerce.<sup>31</sup> Corum further argued that his con-

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22. *Corum*, 362 F.3d at 491-92. The statute provides:

[w]hoever, through the use of the mail, telephone, telegraph, or other instrument of interstate or foreign commerce, or in or affecting interstate or foreign commerce, willfully makes any threat . . . concerning an attempt or alleged attempt being made, or to be made, to kill, injure, or intimidate any individual or unlawfully to damage or destroy any . . . real or personal property by means of fire or an explosive shall be imprisoned for not more than 10 years or fined under this title, or both.

18 U.S.C. § 844(e) (2000 & Supp. II 2002).

23. *Corum*, 362 F.3d at 492.

24. *United States v. Corum*, No. CR: 01-236 JRT/FLN, 2002 U.S. Dist. LEXIS 12394, at \*14-15 (D. Minn. 2002), *adopted by* *United States v. Corum*, Criminal No. 01-236 (JRT/FLN), 2002 U.S. Dist. LEXIS 10185 (D. Minn. 2002), *aff'd*, 362 F.3d 489 (8th Cir. 2004), *cert. denied*, 125 S. Ct. 865 (2005).

25. *Corum*, 2002 U.S. Dist. LEXIS 12394, at \*14-15.

26. *Corum*, 2002 U.S. Dist. LEXIS 10185, at \*9-10.

27. *Corum*, 362 F.3d at 492. In so ruling, the district court adopted the ruling of the Magistrate Judge. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 492.

victions under the Church Arson Prevention Act should be set aside because the government failed to show that the offense affected interstate commerce.<sup>32</sup> The Eighth Circuit upheld Corum's conviction.<sup>33</sup> For the purposes of Section 844(e), it held that when an accused uses a telephone to convey a threat, the government need not prove anything beyond the use of the telephone to establish the element of interstate commerce.<sup>34</sup> The use of a telephone, even for purely intrastate calls, falls within congressional Commerce Power to regulate instrumentalities of interstate commerce and, thus, affects interstate commerce.<sup>35</sup> The court further held that the government presented sufficient evidence for a jury to find that Corum's threatening phone calls to three local synagogues affected interstate commerce.<sup>36</sup>

### III. LEGAL BACKGROUND

The Commerce Clause of the United States Constitution states that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States."<sup>37</sup> The power of Congress to regulate commerce has historically been, and remains today, one of its most far-reaching powers for addressing economic and social concerns.<sup>38</sup>

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32. *Id.* at 497. Corum also appealed his conviction on the grounds that the Church Arson Prevention Act facially violates the Establishment Clause of the First Amendment. *Id.* at 495-97. The Eighth Circuit Court of Appeals held the statute non-violative of the Constitution as it had a secular purpose, neither advanced nor inhibited religion in its primary or principle effect and did not foster excessive entanglement with religion. *Id.* at 496-97.

33. *Id.* at 497.

34. *Id.* at 495.

35. *Id.* at 494-95.

36. *Id.* at 497. The court's reasoning fails to make clear whether it adopted the district court's rationale that religious organizations engage in and affect interstate commerce. See *United States v. Corum*, Criminal No. 01-236 (JRT/FLN), 2002 U.S. Dist. LEXIS 10185, at \*10-11 (D. Minn. 2002). For discussion about the Eighth Circuit's probable rationale for its second holding, see *infra* notes 134-54 and accompanying text.

37. U.S. CONST. art. I, § 8, cl. 3.

38. *Wickard v. Filburn*, 317 U.S. 111, 127-29 (1942) (holding that congressional commerce power to restrict the production of wheat extended to farmers growing wheat solely for personal consumption because the production affected a wider range of economic regulation). See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 537 (1985) (holding minimum wage provision of the Fair Labor Standards Act applies to employees of state governments by virtue of congressional commerce power); *Katzenbach v. McClung*, 379 U.S. 294, 300-01 (1964) (holding that congressional commerce power extended to barring discrimination in restaurants through the Civil Rights Act of 1964 because discrimination affects the sale of interstate goods and, thus, a part of a larger economic regulation ensuring the free flow of goods interstate); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964) (holding that

In *Gibbons v. Ogden*,<sup>39</sup> Chief Justice John Marshall defined congressional Commerce Power expansively, as:

the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce . . . among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States.<sup>40</sup>

As a result of this expansive reading, the modern Court has broadly interpreted the congressional power to regulate commerce, suggesting that virtually all economic activity falls within the scope of the Commerce Clause.<sup>41</sup> As Justice Kennedy stated in *United States v. Lopez*, “[Marshall’s] statements can be understood now as an early and authoritative recognition that the Commerce Clause grants Congress extensive power and ample discretion to determine its appropriate exercise.”<sup>42</sup> However, the breadth of the Court’s interpretation of the Commerce Clause is not without limit.

In *Gibbons*, Marshall admitted that, in a system of limited enumerated powers, the Constitution demarks a level of commercial activity that is beyond the province of congressional power.<sup>43</sup> He stated that “[t]he completely internal commerce of a State . . . may be considered as reserved for the State itself.”<sup>44</sup> For almost one hundred years, the Court followed Marshall’s paradigm, finding that “[c]ertain activities . . . were . . . within the province of state governments and beyond the power of Congress under the Commerce Clause.”<sup>45</sup>

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commerce power extended to eliminating discrimination in public accommodations through the Civil Rights Act of 1964 because such discrimination impacts interstate travel).

39. 22 U.S. 1 (1824).

40. *Id.* at 196-97. Marshall underscored the breadth of his interpretation by defining the term “commerce” broadly. He stated that it was more than “traffic” between states, it was “intercourse,” suggesting that the clause implicated more than mere trade. *Id.* at 189.

41. See *Wickard*, 317 U.S. at 125.

42. *United States v. Lopez*, 514 U.S. 549, 568 (1995), (Kennedy, J., concurring).

43. *Gibbons*, 22 U.S. at 194-95.

44. *Id.* at 195.

45. *Wickard*, 317 U.S. at 121.

Despite Marshall's concession, beginning in 1937 with *NLRB v. Jones & Laughlin Steel Corp.*,<sup>46</sup> the Supreme Court has upheld congressional power to regulate purely intrastate commerce in a wide range of legislation.<sup>47</sup> For almost sixty years, Congress used its commerce power to enact economic, social, and civil-rights legislation touching every corner of the nation.<sup>48</sup>

In *United States v. Lopez*, the Supreme Court halted Congress' unmitigated use of the Commerce Clause to attack social problems.<sup>49</sup> Lopez, a twelfth-grade high school student in San Antonio, Texas, was convicted of violating the Gun-Free School Zones Act of 1991<sup>50</sup> because he entered school grounds carrying a concealed weapon and ammunition.<sup>51</sup> The Supreme Court reversed Lopez's conviction on the ground that the Act was an unconstitutional use of congressional commerce power.<sup>52</sup> In so holding, the Court identified three broad areas which implicate the congressional power to regulate interstate commerce.<sup>53</sup> First, Congress may regulate the "channels of inter-

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46. 301 U.S. 1 (1937).

47. See, e.g., *Jones & Laughlin Steel Corp.*, 301 U.S. at 36-38 (1937) (upholding the National Labor Relations Act under constitutional challenge as a valid exercise of commerce power). See also, RICHARD L. PACELLE, JR., *THE ROLE OF THE SUPREME COURT IN AMERICAN POLITICS: THE LEAST DANGEROUS BRANCH?* 41-42 (2002).

48. See, e.g., *United States v. Darby*, 312 U.S. 100, 118-23 (1941) (holding the Fair Labor Standards Act of 1938 constitutional, as the manufacture of lumber affects interstate commerce); *Wickard*, 317 U.S. at 127-29 (1942) (holding that the growth of wheat for purely private use affects interstate commerce); *North Am. Co. v. SEC*, 327 U.S. 686, 700-07 (1946) (holding Congress may regulate the ownership of securities by operating companies through its commerce power because such ownership affects interstate commerce); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964) (holding the 1964 Civil Rights Act constitutional, as a privately-owned motel affects interstate commerce); *Katzenbach v. McClung*, 379 U.S. 294, 300-01 (1964) (holding that congressional commerce power extended to barring discrimination in restaurants through the Civil Rights Act of 1964 because discrimination affects the sale of interstate goods and thus a part of a larger economic regulation ensuring the free flow of goods interstate); *Maryland v. Wirtz*, 392 U.S. 183, 188, 192-93 (1968) (holding that congressional commerce power rightfully extended labor condition regulations of the Fair Labor Standards Act to any "enterprise engaged in commerce"); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555-57 (1985) (holding the minimum wage and overtime pay provisions of the Fair Labor Standards Act constitutional under the Commerce Clause and applicable to employees of state governments).

49. *United States v. Lopez*, 514 U.S. 549, 551 (1995).

50. 18 U.S.C. § 922 (q)(1)(A) (1988 ed., Supp. V). The statute made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." *Id.* The Act further defined a school zone as on school property or within 1,000 feet of a school. 18 U.S.C. § 921 (a)(25) (1988 ed., Supp. V).

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

52. *Id.* at 552.

53. *Id.* at 558-59.



state commerce.”<sup>54</sup> Second, Congress may “regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.”<sup>55</sup> Third, congressional commerce power extends to “regulate those activities having a substantial relation to interstate commerce.”<sup>56</sup>

A. 18 U.S.C. § 844(e)

Even prior to *Lopez*, a number of courts of appeals undertook to define the meaning of “instrumentalities of interstate commerce” in light of modern advances in industry and technology.<sup>57</sup> The Court had traditionally interpreted this area of Commerce Clause jurisprudence to include railways, vehicles, and aircraft.<sup>58</sup> Given the dramatic changes in both the traffic and intercourse of interstate commerce, this category now encompasses a great deal more

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54. *Id.* at 558.

55. *Id.*

56. *Id.* at 558-59.

57. In *United States v. Kunzman*, the Tenth Circuit rejected a challenge to the court’s federal jurisdiction over securities fraud. 54 F.3d 1522, 1527 (10th Cir. 1995). The circuit court held that “[a]s long as the instrumentality used is itself an integral part of an interstate system, Congress may regulate intrastate activities involving the use of the instrumentality under the federal securities laws.” *Id.* The Tenth Circuit also noted that the government need not establish a nexus between the conduct and interstate commerce because the use of an instrumentality of interstate commerce was sufficient to establish the jurisdictional element. *Id.*

In *United States v. Weathers*, the Sixth Circuit examined the defendant’s conviction under the federal murder-for-hire statute. 169 F.3d 336, 337 (6th Cir. 1999). The court found that the defendant had communicated his desire to contract for murder through the use of a cellular phone. *Id.* The statute required the use of the “mail or any facility in interstate or foreign commerce.” 18 U.S.C. § 1958 (1996). *Weathers* contended that the jurisdictional element was lacking because the phone call was purely intrastate. *Weathers*, 169 F.3d at 339. Following the Supreme Court’s logic in *Lopez*, the Sixth Circuit determined that the intrastate nature of the telephone call did not defeat federal jurisdiction because without the interstate system of cellular towers and communications equipment the call would not have been possible. *Id.* at 342; *see also* *United States v. Clayton*, 108 F.3d 1114 (9th Cir. 1997) (holding that cellular phones, as well as their identification numbers, are instrumentalities of interstate commerce).

58. *Shreveport Rate Cases*, 234 U.S. 342, 351 (1914) (holding that congressional authority to regulate railroads as instrumentalities of interstate commerce extended to regulating all aspects that have a close and substantial relation to interstate commerce); *S. Ry. Co. v. United States*, 222 U.S. 20, 26 (1911) (holding all locomotives, vehicles or railroad cars to be instrumentalities of interstate commerce); *United States v. Perez*, 402 U.S. 146, 150 (1971) (noting that congressional commerce power extends to the destruction of aircraft because airplanes are instruments of interstate commerce).

than just shipping lanes and air routes.<sup>59</sup> As a result of the rapid advances in telecommunications, several federal circuits have explicitly included the use of intrastate instrumentalities that are a part of an overall interstate system within the meaning of “instrumentalities of interstate commerce” despite the charges of congressional overreaching.<sup>60</sup>

Most pertinently, in *United States v. Gilbert*,<sup>61</sup> Gilbert was charged with making a telephone bomb threat in violation of 18 U.S.C. § 844(e).<sup>62</sup> On appeal to the First Circuit, Gilbert argued that the government failed to produce evidence showing that the telephone system used by her call was part of or routed through an interstate system.<sup>63</sup> In resolving the controversy between intrastate and interstate instrumentalities, the First Circuit held that because all intrastate telephone systems are a part of a larger aggregate system, “[t]he use of the telephone . . . to make a bomb threat was, without more, sufficient to sustain jurisdiction under the [I]nterstate [C]ommerce [C]ause.”<sup>64</sup>

### *B. The Church Arson Prevention Act*

Both the second and third categories of permissible interstate commerce regulation, the instrumentalities of commerce and the activities with a substantial relation to commerce, govern Corum’s challenge to the Church Arson Prevention Act. The period between *Jones & Laughlin Steel Corp* and *Lopez* was clearly the high-water mark for social legislation targeted at protecting civil rights.<sup>65</sup> The effect of *Lopez* as applied to the substantial relationship to interstate commerce category of regulation has resulted in a significant de-

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59. See *United States v. Marek*, 238 F.3d 310, 320 (5th Cir. 2001) (holding that the intrastate use of Western Union to transfer funds satisfied the jurisdictional requirement of the Travel Act because it is an instrumentality of interstate commerce); *United States v. Baker*, 82 F.3d 273, 275 (8th Cir. 1996) (holding that the intrastate use of an ATM qualified as an instrumentality of interstate commerce).

60. *Kerbs v. Fall River Indus.*, 502 F.2d 731 (10th Cir. 1974).

It is not required by [the Securities Exchange Act of 1934] or the rule that the manipulative or deceptive device or contrivance be a part of or actually transmitted in the mails or instrumentality of interstate commerce; it is sufficient that such a device or contrivance be employed *in connection with* the use of the instruments of interstate commerce or the mails.

*Id.* at 737; see also *United States v. Gil*, 297 F.3d 93, 100 (2d Cir. 2002) (holding that private and commercial interstate carriers are instrumentalities of interstate commerce “notwithstanding the fact that they also deliver mailings intrastate”).

61. 181 F.3d 152 (1st Cir. 1999).

62. *Id.* at 153.

63. *Id.* at 157.

64. *Id.* at 158-59.

65. See *United States v. Lopez*, 514 U.S. 549, 573-74 (1995) (Kennedy, J., concurring).

marcation of congressional commerce power, especially as applied to non-economic, social legislation targeted at protecting civil rights.<sup>66</sup>

In *Lopez*, the Supreme Court found that the Gun-Free School Zone Act was an impermissible application of congressional commerce power.<sup>67</sup> First, the Court found that the Act was a criminal statute unrelated to economic matters, either directly or as a part of a larger economic regulatory scheme.<sup>68</sup> Second, the Court expressed concern over the potential scope of the statute, as it did not contain a jurisdictional element limiting its exercise.<sup>69</sup> Third, the Court noted that neither the statute nor the legislative history contained any “express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.”<sup>70</sup> Fourth, the Court worried that the inferential leap necessary to find a nexus between guns in school zones and interstate commerce was so huge that it threatened power traditionally held by the states.<sup>71</sup> Whereas *Jones & McLaughlin Steel Corp.* marked the entrance of the modern application of the Commerce Clause to a wide range of economic matters, *Lopez* established a defined limit to the power exercised by Congress in the name of commerce.<sup>72</sup>

The next Supreme Court analysis of the Commerce Clause came with *United States v. Morrison*, in which the Supreme Court examined the Violence Against Women Act’s<sup>73</sup> civil remedy for gender-motivated violence.<sup>74</sup> In *Morrison*, the plaintiff alleged that the two defendants had raped her while they were all students at Virginia Polytechnic Institute.<sup>75</sup> After failing to ob-

66. See *Morrison*, 529 U.S. at 617 (quoting *United States v. Lopez*, 514 U.S. 549, 568 (1995) (“We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”)).

67. *Lopez*, 514 U.S. at 567.

68. *Id.* at 561. While the Court noted that the line between economic and non-economic concerns is often blurred, it found nothing in the statute that indicated an economic concern or element. *Id.* at 566-67.

69. *Id.* at 561.

70. *Id.* at 562-63 (quotation omitted).

71. *Id.* at 567-68. “[W]e would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.” *Id.* at 567.

72. See *id.* at 568-83 (Kennedy, J., concurring).

73. 42 U.S.C. § 13981 (2000). The Act enforced the right against gender-based violence by stating:

A person . . . who commits a crime of violence motivated by gender and thus deprives another of the right . . . shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

42 U.S.C. § 13981(b), -(c) (2000).

74. *United States v. Morrison*, 529 U.S. 598, 601-02 (2000).

75. *Id.* at 602.

tain a criminal conviction or a satisfactory remedy through the university, the plaintiff sued the two defendants in the United States District Court for the Western District of Virginia, alleging that the attack violated her right “to be free from crimes of violence motivated by gender.”<sup>76</sup> The defendants argued that the statute was unconstitutional because it was an impermissible exercise of congressional commerce power.<sup>77</sup>

The Supreme Court analyzed the statute under the *Lopez* standard, stating that its four-part rationale constituted the appropriate test to determine the statute’s validity.<sup>78</sup> The Court found a number of parallels between *Morrison* and *Lopez*. First, the Court observed that “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”<sup>79</sup> The majority rejected “cost of crime” and “loss of national productivity” arguments because they would allow Congress to regulate all violent crime and all activities that might lead to violent crime, regardless of the attenuation of the connection.<sup>80</sup> Second, like *Lopez*, the Violence Against Women Act did not contain an express jurisdictional element limiting its potential scope.<sup>81</sup> Third, the Court found the connection between gender-motivated crime and interstate commerce too attenuated to establish a substantial connection.<sup>82</sup> Despite finding that Congress had fulfilled the third prong of the *Lopez* test of an economic relationship between gender-motivated violence and interstate commerce, the Court nonetheless found those facts unpersuasive in light of the inferential leap necessary to establish that connection.<sup>83</sup> The Court stated that

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76. *Id.* at 604. See also, *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 132 F.3d 949, 953 (4th Cir. 1997).

77. *Morrison*, 529 U.S. at 604. Both the district court and the Fourth Circuit dismissed the claim, stating that Congress exceeded its authority under the Commerce Clause in enacting section 13981. *Id.* at 604.

78. *Id.* at 609-12.

79. *Id.* at 613. The Court refrained from adopting a categorical rule against aggregating effects on commerce of non-economic activities, but stated that “thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.” *Id.*

80. *Id.* at 612-13. “Under the[se] theories . . . it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement . . . where States historically have been sovereign.” *Id.* at 613 (quoting *United States v. Lopez*, 514 U.S. 549, 564 (1995)).

81. *Id.* The Court noted that, despite the guidance provided by *Lopez*, “Congress elected to cast section 13981’s remedy over a wider, and more purely intrastate, body of violent crime.” *Id.* Moreover, the Court noted that Congress did not need to cast such a wide remedy as it had the ability to limit the Act’s potential scope by providing a jurisdictional element. As an example of a narrowing jurisdictional element, the Court pointed to 18 U.S.C. § 2261(a)(1), which penalizes persons who cross state lines with the “intent to injure, harass, or intimidate” his or her spouse or intimate partner. *Id.*

82. *Id.* at 615.

83. *Id.* at 614-15.

“[i]f accepted, petitioner’s reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.”<sup>84</sup>

The Court found the portion of the Act extending a right to freedom from gender-motivated violence unconstitutional.<sup>85</sup> More specifically, it found that “[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”<sup>86</sup>

Following *Morrison*, the Courts of Appeal for the Tenth and Eleventh Circuits have interpreted the jurisdictional clause in the Church Arson Prevention Act to determine the extent of the government’s burden to prove that the prohibited conduct affected interstate commerce.<sup>87</sup> In *United States v. Grassie*,<sup>88</sup> the defendant was convicted under the Church Arson Prevention Act for burning down one church and defacing and damaging four others.<sup>89</sup> On appeal, the defendant challenged the sufficiency of the government’s evidence on the jurisdictional element supporting his conviction under Section 247 and the propriety of the district court’s instruction to the jury that “any effect at all” on interstate commerce satisfied the statute’s interstate commerce requirement.<sup>90</sup> The Tenth Circuit held that because Congress used the words “affecting commerce” without qualification, it intended to invoke its full commerce power under the Constitution and, therefore, nothing more than a *de minimis* connection to interstate commerce was required.<sup>91</sup>

The *Grassie* Court relied upon its decision in *United States v. Malone*,<sup>92</sup> in which the Tenth Circuit upheld a district court’s jury instruction that the government need prove only a *de minimis* effect on interstate commerce to satisfy the jurisdictional element of the Hobbs Act.<sup>93</sup> The Tenth Circuit stated

84. *Id.* at 615.

85. *Id.* at 617.

86. *Id.* at 618.

87. *See* *United States v. Grassie*, 237 F.3d 1199 (10th Cir. 2001); *United States v. Ballinger*, 312 F.3d 1264 (11th Cir. 2002), *vacated en banc*, 369 F.3d 1238 (11th Cir. 2004). Both cases involved the statute’s first provision, which criminalized destruction of religious real property in interstate commerce, while the case at hand necessarily implicates the second provision. *Grassie*, 237 F.3d at 1201-02; *Ballinger*, 312 F.3d at 1265-66; *see* 18 U.S.C. § 247 (2000).

88. 237 F.3d 1199.

89. *Grassie*, 237 F.3d at 1201. During May and June 1998, defendant engaged in a crime spree throughout New Mexico, destroying property in four Mormon churches on multiple occasions. *Id.* at 1202. The defendant’s serial attacks on Mormon churches culminated on June 28, 2002, when he broke into a church in Roswell, New Mexico, and started a fire that completely destroyed the church. *Id.* at 1203.

90. *Id.* at 1202, 1205-06.

91. *Id.* at 1208-09.

92. 222 F.3d 1286 (10th Cir. 2000).

93. *Id.* at 1208-09; *see* 18 U.S.C. § 1951(a) (2000). (stating “[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article

that given the “virtual national epidemic” of church and synagogue arsons, “mostly identified with African American congregations,” Congress intended to exercise its full authority under the Commerce Clause.<sup>94</sup>

In *United States v. Ballinger*,<sup>95</sup> the Eleventh Circuit faced substantially similar facts to those of the *Grassie* court, but reached a far different result.<sup>96</sup> Ballinger pled guilty under the Church Arson Prevention Act<sup>97</sup> to four counts of church arson.<sup>98</sup> He conditioned his plea on an as-applied and facial determination of the constitutionality of the Act, arguing that while he committed the acts of arson, the statute was unconstitutional both facially and as applied to him.<sup>99</sup> The district court upheld the constitutionality of the act and Ballinger appealed to the Eleventh Circuit.<sup>100</sup>

The Eleventh Circuit considered Ballinger’s facial claim, noting that congressional commerce power “extends to the regulation of activities which are in or affect interstate commerce.”<sup>101</sup> It held that the statute was constitutional on its face because Congress specifically included a jurisdictional element.<sup>102</sup> The Eleventh Circuit reasoned that “[i]n the absence of sufficient proof of the interstate commerce connection, the statute does not apply to the arson charged.”<sup>103</sup> The court further noted that the jurisdictional element saves Commerce Clause regulation from a facial attack because it requires a “case-by-case inquiry, that the activity in question affects interstate commerce.”<sup>104</sup>

The Eleventh Circuit next considered Ballinger’s claim that there was insufficient evidence at trial to show a connection between the acts of arson

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or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.”). 18 U.S.C. § 1951(a) (2000). The *Grassie* Court distinguished the case from *United States v. Jones*, 529 U.S. 848 (2000), because in *Jones*, the Court concluded that Congress had not fully invoked its authority under the Commerce Clause. *Grassie*, 237 F.3d at 1208-09.

94. See 237 F.3d at 1209. The court reviewed the congressional record to determine the impact of church arson on interstate commerce. *Id.* It noted that churches engaged in a number of activities across state lines, including: social services, civil participation, educational and religious activities, the purchase of goods and services, and the collection and distribution of funds. *Id.*; 142 CONG. REC. S7908-04 (1996).

95. 312 F.3d 1264 (11th Cir. 2002), *vacated en banc*, 369 F.3d 1238 (11th Cir. 2004).

96. *Id.*

97. 18 U.S.C. § 247(a)(1).

98. *Ballinger*, 312 F.3d at 1265.

99. *Id.* at 1265-66.

100. *Id.* at 1265.

101. *Id.* at 1268, *citing* *United States v. Lopez*, 514 U.S. 549, 559 (1995).

102. *Id.*

103. *Id.*

104. *Id.* (citation omitted).

and interstate commerce.<sup>105</sup> The court began by addressing the government's burden of proof on the jurisdictional element of Section 247.<sup>106</sup> It noted the three categories of activities over which *Lopez* authorized congressional commerce power, finding that "arson . . . is a purely *intrastate* activity" and falls into the third *Lopez* category.<sup>107</sup> The court reiterated *Lopez*'s holding that Congress may regulate any activity of intrastate commerce if it substantially affects interstate commerce.<sup>108</sup> It noted that "[w]hereas Congress may regulate *any* instrumentality or channel of interstate commerce, the Constitution permits Congress to regulate only those intrastate activities which have a *substantial* effect on interstate commerce."<sup>109</sup>

The Eleventh Circuit next addressed the government's contention that, because Congress had invoked its full authority over interstate commerce, a *de minimis* connection to interstate commerce satisfied the Constitution.<sup>110</sup> The court flatly rejected the notion that the outer limits of congressional authority demanded a lesser connection to commerce.<sup>111</sup> Rather, the court held that when Congress invokes its full authority over the Commerce Clause and "pushes its commerce power to its constitutional limit by seeking to regulate a purely intrastate activity" there must be a substantial effect on interstate commerce.<sup>112</sup>

The Eleventh Circuit distinguished between the regulation of economic and non-economic activity.<sup>113</sup> It stated that when the "regulated intrastate activity is a commercial or economic one," the government may show the required substantial effect through aggregated effects on interstate commerce.<sup>114</sup> The aggregation of local effects is not, however, permissible congressional regulation of "intrastate, *non-economic* activity."<sup>115</sup>

105. *Id.*

106. *Id.* at 1268-69. On this point, defendant argued that the statute requires the government to prove that his arsons had a substantial effect on interstate commerce, while the Government argued that even a *de minimis* connection satisfied the Act. *Id.* at 1269.

107. *Id.* at 1269.

108. *Id.*

109. *Id.* at 1270. The court further noted that the "regulation of purely intrastate activity reaches the outer limits of Congress' commerce power." *Id.*

110. *Id.*

111. *Id.* The court stated "[t]he talismanic repetition over the years of the phrase 'fullest extent' of congressional commerce power has led some to confuse this concept of the outer limits of congressional authority for an independent grant of authority." *Id.*

112. *Id.*

113. *Id.* at 1270-71.

114. *Id.* at 1270. In these cases, the government may add together *de minimis* effects of individual circumstances to create a national picture of the effect on commerce because the regulation is a part of a "larger regulatory scheme affecting interstate commerce." *Id.* See *Wickard v. Filburn*, 317 U.S. 111, 128-29 (holding the effect

The Eleventh Circuit emphasized that the criminal nature of the statute gives rise to a heightened level of scrutiny for traditional common-law state crimes.<sup>116</sup> It stated that the Supreme Court's holdings in *Morrison* and *Lopez* mandate that the government prove that the activity of church arson substantially affected interstate commerce.<sup>117</sup> The Eleventh Circuit reversed the defendant's convictions and remanded the case for a new trial because it found that the government failed to prove that the defendant's arsons substantially affected interstate commerce.<sup>118</sup> The court noted that "[t]he arson of a church has a substantial effect on interstate commerce if its activities prior to the arson substantially affected interstate commerce and the arson of that church terminated those activities."<sup>119</sup>

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of one farmer's growth of wheat for personal use affects the larger national effort to sustain wheat prices and production).

115. *Ballinger*, 312 F.3d at 1270. The court reiterated, "[w]here such regulation is at issue, the Constitution requires that the activity, by *itself*, have economic consequences that *substantially affect* interstate commerce." *Id.* The court further stated, "[n]o aggregation of local effects is permissible to elevate a non-economic activity's insubstantial effect on interstate commerce into a substantial one in order to support federal jurisdiction." *Id.*

116. *Id.*

117. *Id.* at 1271. The court distinguished between the use of aggregation under the Hobbs Act, which plainly regulates economic activity, and the case at hand, in which, like *Morrison*, the "non-economic, criminal nature of the conduct" requires a showing of the conduct at issue's substantial effect on interstate commerce. *Id.* The *Ballinger* court relied upon the Supreme Court's holding in *United States v. Jones*, 529 U.S. 848 (2000), in which the court examined the connection to interstate commerce necessary under the federal arson statute. *See Ballinger*, 312 F.3d at 1271-72. In *Jones*, the court held that a privately owned residence does not affect interstate commerce because the receipt of natural gas, the holding of a mortgage and an insurance policy from out-of-state were insufficient connections to establish that the residence was used in an activity affecting commerce. *See id.* at 1271-72.

118. *Id.* at 1276.

119. *Id.* at 1275. The court relied upon its Commerce Clause jurisprudence from *United States v. Odum*, 252 F.3d 1289 (11th Cir. 2002), where it held that the connections to interstate commerce established by the government in a prosecution under the federal arson act could not be too passive, minimal, and indirect to substantially affect interstate commerce. *Id.* at 1297; *Ballinger*, 312 F.3d at 1275. In *Odum*, the Eleventh Circuit found that the purchase and use of goods from out-of-state donors and contributions to out-of-state church organizations through membership in an intrastate church organization did not substantially affect commerce. *Odum*, 252 F.3d at 1275. In *Ballinger*, the court found all of the church's connections to interstate commerce advanced by the government to be too passive, minimal, and indirect, including "membership in an intrastate church organization that contributed financially to the national church organization that then redistribute[d] the money around the world." *Ballinger*, 312 F.3d at 1275. Some examples of these slight connections include: insurance proceeds from an out-of-state insurance company; use of materials and natural gas purchased in interstate commerce; the purchase of goods and services in



Applying this background to *Corum*, substantial authority exists to punish the defendant in the case at hand under 18 U.S.C. § 844(e) for using a telephone as an instrumentality of commerce.<sup>120</sup> However, *Morrison* places the Eighth Circuit holding under the Church Arson Prevention Act in grave doubt. The federal protection of houses of worship from violence is a regulation of non-economic, criminal behavior with a tenuous connection to interstate commerce.

#### IV. THE INSTANT DECISION

##### A. 18 U.S.C. § 844(e)

In *United States v. Corum*,<sup>121</sup> the Eighth Circuit faced several challenges to the constitutionality of 18 U.S.C. § 844(e).<sup>122</sup> First, *Corum* argued that his convictions should be set aside because the government failed to prove that his conduct had an effect on interstate commerce.<sup>123</sup> He stated that the evidence showed that his three telephone calls were all made intrastate and did not involve any commercial transactions.<sup>124</sup> The government, on the other hand, argued that the evidence was sufficient to satisfy the interstate commerce element of Section 844(e) because the statute, by its plain meaning, included a telephone as an instrument of interstate commerce, and thus the statute applied whenever a telephone was used to convey a threat.<sup>125</sup>

The Eighth Circuit reviewed the sufficiency of the evidence *de novo* in the light most favorable to the government.<sup>126</sup> It began this review by addressing the conduct at issue under Section 844(e) as distinguished from the conduct required under the federal arson statute.<sup>127</sup> The federal arson statute prohibits damaging real or personal property used in interstate commerce by means of fire and explosives and requires proof that the damaged or destroyed property was used in an active employment for commercial purposes and, courts have determined, “not merely a passive, passing or past connection to commerce.”<sup>128</sup> The court found that the federal arson statute criminalized a different kind of activity than Section 844(e) and, therefore, required a

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interstate commerce, including radio broadcasts, food, flowers and groceries; and the attendance at the churches from out-of-state guests, such as hosting of visiting pastors. *Id.* at 1275-76.

120. See *supra* notes 57-64 and the accompanying text.

121. 362 F.3d 489 (8th Cir. 2004), *cert. denied*, 125 S. Ct. 865 (2005).

122. *Corum*, 362 F.3d at 492.

123. *Id.*

124. *Id.* at 493.

125. See *id.*; Brief for the United States as Appellee, *United States v. Corum*, 362 F.3d 489, at \*12 (8th Cir. 2004) (03-2497).

126. *Corum*, 362 F.3d at 492-93.

127. *Id.* at 493; see 18 U.S.C. § 844(i) (Supp. 2004).

128. *Jones v. United States*, 529 U.S. 848, 848-49 (2000).

“different type[] of conduct to establish the required interstate nexus.”<sup>129</sup> The Eighth Circuit held that Section 844(e) merely required the government to prove that Corum used an instrument of interstate commerce, in this case a telephone, to communicate a threat; the plain language of the statute did not compel further proof of an interstate nexus.<sup>130</sup> In so holding, the court stated that telephones, even when their use is strictly intrastate, are instruments of interstate commerce,<sup>131</sup> for “intrastate and interstate telephone communications are a part of an aggregate telephonic system.”<sup>132</sup> Corum’s use of a telephone to make threats clearly fell within the plain language of the statute; thus, the evidence “was sufficient to grant federal jurisdiction over his crime.”<sup>133</sup>

Second, Corum argued that the application of Section 844(e) was unconstitutional under *Lopez*.<sup>134</sup> Corum averred that the purpose of the statute is not to protect the telephone system, and, therefore, the government must prove that a defendant’s use of the phone “was actually used to affect” interstate commerce.<sup>135</sup> The government’s response asserted that the application of the statute to Corum’s threatening calls was within congressional commerce power because “[i]t is well established that telephones, even when used intrastate, are instruments of interstate commerce.”<sup>136</sup>

The Eighth Circuit stated that the instant case clearly falls under the second of the three categories of activity identified by the Supreme Court in *Lopez*.<sup>137</sup> While this was an issue of first impression for the Eighth Circuit, other circuits have held that when a statute regulates an instrument of interstate commerce, no further evidence of interstate commerce was required.<sup>138</sup> The

129. Corum, 362 F.3d at 493; *see, e.g.*, United States v. Odum, 252 F.3d 1289, 1296-97 (11th Cir. 2001) (noting that while churches can and do engage in commerce, evidence showing that the church received donations bought books from an out-of-state source and indirectly contributed to an out of state church organization was “too passive, too minimal and too indirect to substantially affect interstate commerce”); United States v. Ryan, 227 F.3d 1058, 1064 (8th Cir. 2000) (holding that an unoccupied commercial building did not have an active connection to interstate commerce and, thus, was not covered under section 844(i)).

130. Corum, 362 F.3d at 493.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*; Brief of Appellant at 26-27, United States v. Corum, 362 F.3d 489 (8th Cir. 2004) (03-2497).

135. Corum, 362 F.3d at 493.

136. Brief for the United States as Appellee at 12, United States v. Corum, 362 F.3d 489 (8th Cir. 2004) (03-2497).

137. Corum, 362 F.3d at 494; United States v. Lopez, 514 U.S. 549, 558 (1995); *see infra* at III.

138. Corum, 362 F.3d at 494; United States v. Gil, 297 F.3d 93, 100 (2d Cir. 2002) (holding that evidence of substantial effect is unnecessary when a statute regulates an activity defined under the first two *Lopez* categories.); United States v.

Eighth Circuit elected to construe the telephone as an instrumentality of interstate commerce, joining the holdings of the First, Second, Fifth, and Ninth Circuits,<sup>139</sup> and, in so doing, found the First Circuit's holding in *United States v. Gilbert*<sup>140</sup> particularly persuasive.<sup>141</sup>

The Eighth Circuit further noted that its findings were consistent with *United States v. Baker*,<sup>142</sup> in which the court stated that “[p]urely intrastate activity falls within this power when an instrumentality of interstate commerce is used.”<sup>143</sup> Thus, the Eighth Circuit held that 18 U.S.C. § 844(e) merely required proof of the use of an instrumentality of interstate commerce to satisfy the Commerce Clause.<sup>144</sup>

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Marek, 238 F.3d 310, 318-19 (5th Cir. 2001) (holding that the first two categories of *Lopez* extend to intrastate use of instrumentalities of interstate commerce); *United States v. Clayton*, 108 F.3d 1114, 1117 (9th Cir. 1997) (holding that the second *Lopez* category encompasses the use of telephones and no further nexus of interstate commerce is necessary to prove the constitutionality of their regulation).

139. *Gil*, 297 F.3d at 100 (holding that evidence of substantial effect is unnecessary when a statute regulates an activity defined under the first two *Lopez* categories.); *Marek*, 238 F.3d at 318-19 (holding that the first two categories of *Lopez* extend to intrastate use of instrumentalities of interstate commerce); *Clayton*, 108 F.3d at 1117 (holding that the second *Lopez* category encompasses the use of telephones and no further nexus of interstate commerce is necessary to prove the constitutionality of their regulation).

140. 181 F.3d 152 (1st Cir. 1999) (holding that because all intrastate telephone systems are a part of a larger aggregate system, “[t]he use of the telephone . . . to make a bomb threat was, without more, sufficient to sustain jurisdiction under the [I]nterstate [C]ommerce [C]ause.”); see *supra* notes 61-64 and accompanying text.

141. *Corum*, 362 F.3d at 494.

142. 82 F.3d 273 (8th Cir. 1997). In *Baker*, the Eighth Circuit held that an intrastate electronic transfer of funds between two banks connected to an interstate network of ATMs satisfied the jurisdictional clause of the Travel Act. *Id.* at 275-76. The Travel Act criminalizes unlawful acts performed in the “stream of commerce” or using a channel or instrumentality of interstate commerce. 18 U.S.C. § 1952 (2000). It punishes

[w]hoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to

- (1) distribute the proceeds of any unlawful activity; or
- (2) commit any crime of violence to further any unlawful activity; or
- (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.

18 U.S.C. § 1952(a) (2000 & Supp. II 2002).

143. *United States v. Baker*, 82 F.3d 273, 275 (8th Cir. 1997).

144. *Corum*, 362 F.3d at 495.

*B. The Church Arson Prevention Act*

## 1. Eighth Circuit

In *Corum*, the defendant also attacked the sufficiency of the evidence supporting his convictions under the Church Arson Prevention Act,<sup>145</sup> arguing that the government failed to prove the violation was in or affected interstate commerce.<sup>146</sup> The government responded that there was sufficient evidence to show that the offense satisfied the statutory requirements.<sup>147</sup> The Eighth Circuit defined the offense at issue as “the intentional obstruction of or attempt to obstruct the enjoyment of the free exercise of religious beliefs of the members of each of the three synagogues in the Twin Cities area.”<sup>148</sup>

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145. *Id.* at 497.

146. *Id.* *Corum* also challenged the constitutionality of the Church Arson Prevention Act, claiming that it facially violated the Establishment Clause of the First Amendment. *Id.* The Eighth Circuit applied the *Lemon* test and held the statute constitutional, as it had a secular purpose, neither advanced nor inhibited religion in its primary or principle effect, and did not foster excessive government entanglements with religious organizations. *Id.* at 495-96. The court found that the law had a secular purpose because it sought to curb threats of violence targeted against religious institutions that affect interstate commerce. *Id.* at 496. It noted that the rationale for the secular purpose requirement is to “prevent the relevant governmental decision maker – in this case Congress – from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters.” *Id.* (citing *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987)). The court stated that the secular purpose need not be the only purpose of the statute, but that Congress’s motivation must not have been wholly religious. *Id.* The court also found that the statute did not advance or inhibit religion as its primary effect was to “curb violence and threats of violence that adversely affect an aspect of interstate commerce Congress found to be particularly vulnerable to violent interference.” *Id.* Thus, any effect of the statute would not be an advancement of religion by the government itself. *Id.* Finally, the court found that because the government “is not required to engage in persuasive monitoring of or intrusion into the activities of these [religious] organizations,” the statute did not foster an excessive entanglement with religion. *Id.* The Eighth Circuit held the statute constitutional. *Id.* at 497. It noted that the possibility remained that the “Church Arson Prevention Act will be abused in application. However, we believe the best course of action is vigilance as opposed to invalidation of the Act.” *Id.* at 497. For a strikingly contrasting approach to the purpose and effects requirements of the *Lemon* test, see *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003) (holding the Religious Land Use and Institutionalized Persons Act unconstitutional as violative of the Establishment Clause because the statute’s provision requiring courts to apply strict scrutiny to all substantial burdens to the free exercise of religion has the effect of providing greater protection to religiously-motivated conduct than other conscientious conduct, and thus advancing religion).

147. *Id.* at 495.

148. *Id.*

The court noted that it reviews sufficiency of evidence claims *de novo*, viewing the evidence in the light most favorable to the government and would reverse a conviction only if no reasonable jury could have found a defendant guilty beyond a reasonable doubt.<sup>149</sup> The court then held that, based upon the trial record, “the government presented sufficient evidence for the jury to have determined the offense (threatening telephone calls) affected interstate commerce.”<sup>150</sup>

## 2. District Court

In *Corum*, the Eighth Circuit neither sets forth its rationale for finding the evidence supporting the conviction of Corum sufficient under the Church Arson Prevention Act of 1996 nor articulates the government’s burden in proving the jurisdictional element of the statute.<sup>151</sup> However, the district court ruling on Corum’s motion for acquittal held that the government presented sufficient evidence and that a mere *de minimis* showing of an effect on interstate commerce satisfied the statute.<sup>152</sup>

In his motion, Corum argued that the government did not prove that his conduct actually affected interstate commerce.<sup>153</sup> He did not dispute the government’s evidence that all three synagogues affected interstate commerce to some degree, but stated that, under *Morrison*, the government must prove a substantial connection between his offense and interstate commerce.<sup>154</sup> The district court noted that it instructed the jury that “it did not need to find a substantial connection with interstate commerce, but only that Corum’s acts affected interstate commerce to some extent, however slight.”<sup>155</sup> Considering

149. *Id.* at 497.

150. *Id.*

151. *See id.* at 495-97.

152. *United States v. Corum*, No. 01-236, 2003 U.S. Dist. LEXIS 7726, at \*17 (D. Minn. April 17, 2003), *aff’d* 362 F.3d 489 (8th Cir. 2004).

153. *Id.*

154. *Id.* at \*5-6, 7 n.2. The government’s evidence of the three synagogues’ connections to interstate commerce included paying dues to a central organization with offices in other states; members residing in other states and countries, hosting both foreign and out-of-state guest speakers, running a gift shop that sells merchandise from around the world, purchasing religious articles in interstate commerce; and sponsoring students attending camp in other states. *Id.* The district court found that the evidence presented in this case was more significant than that of the churches in *Ballinger*, but the court assumed, *arguendo*, that the contacts were equally significant. *Id.*

155. *Id.* at \*5-6 (quotation omitted). The district court noted that the Eighth Circuit has not set forth the degree of effect required by the jurisdictional element under the statute. *Id.* at \*6. We must assume, by default, that the Eighth Circuit’s holding in this case encompasses the district court’s *de minimis* standard, as it is unclear if the defendant’s conviction would have survived had the court held the government to a higher burden. Because the Eighth Circuit did not set forth its reasoning for finding

the *Ballinger* and *Grassie* holdings, the *Corum* court noted that *Ballinger* was contrary to its own jury instructions but found the Eleventh Circuit's reasoning unpersuasive.<sup>156</sup>

The court reasoned that its instruction was based upon "aggregation" under which "Congress may regulate individual intrastate activities that alone may not substantially affect interstate commerce, but that in the absence of national regulation, 'would undercut a larger regulatory scheme affecting interstate commerce.'"<sup>157</sup> It noted that *Ballinger* held that the aggregation principle only applies to intrastate activities that are commercial or economic in nature and that a "*de minimis* connection to interstate commerce is sufficient only for offenses that are economic or commercial in nature."<sup>158</sup> More specifically, the *Ballinger* court held that the offense of arson under the Church Arson Prevention Act is non-economic and, hence, a *de minimis* showing is insufficient.<sup>159</sup>

The district court disagreed with the *Ballinger* court and held that *Lopez* and *Morrison* did not prevent the use of a *de minimis* connection to interstate commerce.<sup>160</sup> It reasoned that, while *Ballinger* defined the conduct under the statute in terms of arson, the Act actually criminalizes the intentional obstruction of the free-exercise of religion.<sup>161</sup> The district court argued that the stat-

the government's evidence sufficient, it is also unclear to what extent this holding applies to other conduct under the Church Arson Prevention Act, such as the intentional damaging of real property or arson motivated by racial, ethnic or religious animus. See 18 U.S.C. § 247(a)(2) (2000 & Supp. II 2002).

156. *Corum*, 2003 U.S. Dist. LEXIS 7726, at \*6-8 (citing *United States v. Ballinger*, 312 F.3d 1264, 1270 (11th Cir. 2002)). The district court noted that in both *Grassie* and *Ballinger*, the lower courts instructed their juries that minimal proof of a connection to interstate commerce was sufficient. *Id.* at \*6-7. See *supra* text accompanying notes 88-119.

157. *Corum*, 2003 U.S. Dist. LEXIS 7726, at \*8 (citing *Ballinger*, 312 F.3d at 1270 (11th Cir. 2002)). The district court noted that "[a]ggregation applies when a general regulatory statute bears a substantial relation to commerce, and the *de minimis* character of the individual instances arising under that statute is thus of no consequence." *Id.* (emphasis and citations omitted).

158. *Id.* at \*10-11. The district court stated that the *Ballinger* court relied on the Supreme Court's reasoning in *Lopez* and *Morrison*. *Id.* It reasoned that *Lopez* and *Morrison* stand for the proposition that Congress cannot regulate common law, non-economic crimes unless they substantially affect interstate commerce, and to hold otherwise in this case would be contrary to the Supreme Court's mandate. *Id.* at \*11.

159. *Id.*

160. *Id.* The district court reasoned that, because 18 U.S.C. § 247 has both an express jurisdictional element and is supported by congressional findings on the effects of church arson on interstate commerce, the only ground upon which *Morrison* and *Lopez* apply is the finding that the statute is "purely non-economic." *Id.*

161. *Id.* at \*12. The district court also stated that the *Ballinger* majority defines the conduct under the statute to mean "simple arson" because it relies upon *United States v. Jones* and *United States v. Odum* for support. *Id.* at \*12-13 Because *Jones*

ute's purpose and history indicated that it was designed to regulate more than the "local crime of arson."<sup>162</sup> Rather, Congress enacted the Church Arson Prevention Act to "counter a rash of arsons and attacks on houses of worship across the nation." Thus, the district court found that arson of a house of worship may be an economic offense because churches and synagogues "engage in economic activity that effects [sic] interstate commerce."<sup>163</sup> Because churches and synagogues are engaged in commerce, an attack upon them can be an economic offense under 18 U.S.C. § 247, which is consistent with the congressional intent in enacting section 247 to expand federal jurisdiction over attacks on houses of worship.<sup>164</sup> Thus, the district court held that churches engage in commerce, an attack upon them is an economic crime, and, therefore, the aggregation principle applies so that a conviction based upon a *de minimis* standard of proof is correct.<sup>165</sup>

## V. COMMENT

In the instant case, the Eighth Circuit was given two opportunities to clarify its Commerce Clause jurisprudence following *Lopez* and *Morrison*. It

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dealt with the standard of proof for the federal arson statute, the district court determined that the *Ballinger* court mistakenly relied upon *Jones* for guidance. *Corum*, 2003 U.S. Dist. LEXIS 7726, at \*12-13.

162. *Id.* at \*13. The district court stated that for the *Ballinger* court to define the regulated conduct as "mere arson" ignored the purpose of the statute. *Id.* at \*14.

163. *Id.* The district court relied on *United States v. Odum*, which held that, while churches can and do engage in commerce, the government must still prove that the church's activities substantially affected commerce and that the conduct of the defendant affected that activity. 252 F.3d 1289, 1294, 1299 (11th Cir. 2001). Second, the court cited *Camps Newfound/Owatonna v. Town of Harrison, Me.*, which held that state denial of a tax credit to a non-profit church camp because its members were predominately from out of state violates the Dormant Commerce Clause. 520 U.S. 564, 570-71 (1997). In reference to *Town of Harrison*, the district court noted that the Supreme Court held that Congress may regulate charitable and non-profit entities under its Commerce Clause power. *Corum*, 2003 U.S. Dist. LEXIS 7726, at \*15. This authority deserves a bit of clarification. What the Court in *Town of Harrison* said was, "[w]e see no reason why the nonprofit character of an enterprise should exclude it from the coverage of either the affirmative or the negative aspect of the Commerce Clause." *Town of Harrison*, 520 U.S. at 584. At best, this stands for the proposition that the non-profit nature of an entity does not remove it from congressional purview. However, nowhere in the case does the Supreme Court indicate that Congress has a "regulatory scheme" over non-profits or that churches are *per se* commercial in nature, as the district court in *Corum* suggests when it relies upon the above authorities to state that churches are involved in commerce and, therefore, an attack upon them is economic in nature. *Corum*, 2003 U.S. Dist. LEXIS 7726, at \*15.

164. *Corum*, 2003 U.S. Dist. LEXIS 7726, at \*15.

165. *Id.* at \*16-17.

took full advantage of the first to reaffirm the plain meaning of 18 U.S.C. § 844(e) and reiterate its reasoning in line with that of other circuits. However, the Eighth Circuit treated the issue of the sufficiency of the evidence required to prove the jurisdictional element of the Church Arson Prevention Act with short shrift and little foresight. Its holding in the instant case is in contradiction with that of *Lopez* and *Morrison*, and is without even a modicum of reasoning in support.

#### A. Section 844(e)

*Lopez* clearly states that “Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.”<sup>166</sup> Since *Lopez*, the Supreme Court has not had occasion to further define “instrumentalities,” but the term has a historical and detailed definition.<sup>167</sup> There is substantial authority supporting the Eighth Circuit’s holding in the instant case that an intrastate telephone system is an instrumentality of interstate commerce.<sup>168</sup> Proof of that fact, without more, sustains federal jurisdiction under a statute that criminalizes the use of the telephone as an instrumentality of interstate commerce.

#### B. The Church Arson Prevention Act.

In addition to clarifying Congress’ ability to regulate the channels, instrumentalities, and persons or things in interstate commerce, *Lopez* also stated that Congress may regulate purely intrastate activities which have a substantial effect on interstate commerce or which have a *de minimis* effect on commerce but are a part of a larger economic regulatory scheme.<sup>169</sup>

In the case at hand, the Church Arson Prevention Act of 1996 criminalizes damage and destruction to churches and other houses of worship, as well as intentional obstruction of a person’s free-exercise of his or her religion.<sup>170</sup> The Eighth Circuit’s decision to affirm the district court’s *de minimis* standard of proof for the required connection to interstate commerce opened up the statute to greater constitutional attack.

In ruling on Corum’s motion for acquittal, the district court either glazed over or completely avoided all but one of the four prongs of the test estab-

166. United States v. Lopez, 514 U.S. 549, 558 (1995).

167. The definition of “instrumentalities” is ever in flux. As our nation’s technology changes, new infrastructure supporting interstate commerce emerges. However, given the nation’s long reliance on the telephone system as a method of communicating economic messages, the conclusion in the instant case seems self-evident.

168. See *supra* text accompanying notes 52-60.

169. *Lopez*, 514 U.S. at 558-60.

170. 18 U.S.C. § 247 (2000 & Supp. II 2002).



lished by *Lopez* and *Morrison* to determine if intrastate activity substantially affects interstate commerce.<sup>171</sup> First, where *Lopez* and *Morrison* require a heightened showing for non-economic, criminal regulation, the court found that, because churches do affect commerce, the statute was economic in nature.<sup>172</sup> Its reasoning stands not upon a showing of the nationwide economic impact of churches on interstate commerce or even upon the impact of the three synagogues in the instant case, but upon the authority of *Camps Newfoundland/Owatonna v. Town of Harrison*.<sup>173</sup>

In *Camps Newfoundland/Owatonna*,<sup>174</sup> the Supreme Court examined the application of the Dormant Commerce Clause doctrine on the State of Maine's activities in withholding a non-profit tax exemption because the majority of campers at a non-profit, religious camp came from other states.<sup>175</sup> It held that Maine's withholding of the exemption impermissibly burdened interstate commerce.<sup>176</sup> The Court's reasoning in *Camps Newfoundland/Owatonna* is persuasive to show that churches *can* affect commerce and that, if so, Congress *could* regulate them. However, it does not support the proposition that all churches necessarily engage in commercial activity.<sup>177</sup> Such a holding would obliterate the second, and perhaps most important, element set forth in *Lopez* and *Morrison*, as it would allow the regulation of non-economic activities without a jurisdictional limitation.<sup>178</sup>

In *Morrison*, the Court specifically stated that a statute seeking to regulate intrastate activity based upon congressional commerce power must have a jurisdictional element to limit the sweep of the statute.<sup>179</sup> The Court, expressing grave concern with maintaining a meaningful distinction between "what is truly national and what is truly local," stated that "[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States."<sup>180</sup> Thus, the purpose of the jurisdictional element is to restrict federal reach to only those activities that are "truly national."<sup>181</sup>

However, the district court in *Corum* misinterpreted the purpose of the Court's requirement of a jurisdictional element. While it briefly noted the

171. See *United States v. Corum*, No. 01-236, 2003 U.S. Dist. LEXIS 7726, at \*16 (D. Minn. April 17, 2003), *aff'd* 362 F.3d 489 (8th Cir. 2004).

172. *Id.* at \*14-16.

173. *Id.* at \*14-15.

174. 520 U.S. 564 (1997).

175. *Id.*

176. *Id.* at 593-94.

177. *But see Corum*, 2003 U.S. Dist. LEXIS 7726, at \*14-16. The district court stated that "precedent establishes that houses of worship do engage in commerce." *Id.* at \*16-17.

178. See *supra* notes 65-84 and accompanying text.

179. *United States v. Morrison*, 529 U.S. 598, 611-12 (2000).

180. *Id.* 617-18.

181. *Id.* at 618.

requirement, its analysis regarding the “economic nature” of church activities completely abrogates any limitation that the element might have provided. Indeed, the district court found that “attacks or threats to attack houses of worship are commercial or economic in nature.”<sup>182</sup> If this analysis were to be followed, every house of worship and home in America would have sufficient connections with interstate commerce to warrant untold federal legislation, because the Eighth Circuit allowed a *de minimis* connection between interstate commerce and the conduct alleged, regardless of any effect on commerce, to establish federal jurisdiction over a local crime.<sup>183</sup> Not only does this approach obliterate the distinction between what is truly local and what is truly national, but it extends a plenary police power to Congress that is in direct opposition to *Lopez* and *Morrison*.<sup>184</sup>

Perhaps the gravest problem with the district court’s analysis is that it stands in direct opposition to the intent of Congress in passing the Church Arson Prevention Act. In *Lopez*, the Supreme Court criticized the Gun-Free School Zone Act because it contained no congressional findings regarding the effects of gun use and violence on interstate commerce.<sup>185</sup> The presence of such findings would assist the court in evaluating the legislative judgment of how the activity affects interstate commerce.<sup>186</sup> According to the Congressional Record, the sponsors of the Church Arson Prevention Act stated:

In *Lopez*, the Court found that the conduct to be regulated did not have a *substantial effect* upon interstate commerce and, therefore, was not within the Federal Government’s reach under the interstate [C]ommerce [C]ause of the Constitution. Subsection (b),<sup>187</sup> unlike the provision at issue in *Lopez*, *requires the prosecution to prove an interstate commerce nexus* in order to establish a criminal violation.<sup>188</sup>

Members of Congress understood the limitations established in *Lopez* and sought to craft an important piece of social legislation within that frame. However, if the Act is construed without a jurisdictional element, it clearly reaches beyond the activity Congress sought to criminalize and invades an area *Lopez* reserved as “truly local.”<sup>189</sup>

182. *Corum*, 2003 U.S. Dist. LEXIS 7726, at \*17.

183. *Id.*

184. *See Morrison*, 529 U.S. at 618.

185. *United States v. Lopez*, 514 U.S. 549, 563 (1995).

186. *Id.*

187. 18 U.S.C. § 247(b) states, “The circumstances referred to in subsection (a) are that the offense is in or affects interstate or foreign commerce.” 18 U.S.C. § 247(b) (2000 & Supp. II 2002).

188. 142 CONG. REC. S7098-04 (1996) (emphasis added).

189. *See Lopez*, 514 U.S. at 557.

Finally, both *Morrison* and *Lopez* disfavored sustaining Commerce Clause regulation when the nexus is a result of attenuated connections and inferential leaps.<sup>190</sup> The Supreme Court noted its concern that attenuated connections opened the possibility that Congress might regulate whole areas traditionally reserved to the states.<sup>191</sup> It further noted the danger in aggregating the effects of violent, criminal conduct upon interstate commerce because “they would permit Congress to ‘regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.’”<sup>192</sup> The Court stated that “thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.”<sup>193</sup>

While the other three elements presented by *Lopez* and *Morrison* provide guidance, the fourth element is where the Court is most adamant about what is barred by the Constitution, for the Court remains concerned about allowing attenuated connections between activities and interstate commerce to establish federal jurisdiction over a local crime.<sup>194</sup> Nonetheless, the district court in *Corum* did not even mention this element in its analysis.

If all houses of worship affect interstate commerce, the connection must lie in the aggregate effect of church arson on interstate commerce. The nexus must lie either in adding together all the goods that go unpurchased in a given year because of bombing threats or destruction of church property or in all the out-of-state visitors who failed to travel because of fear.<sup>195</sup> Such tenuous connections are exactly what *Lopez* and *Morrison* held unconstitutional, in an effort to prevent the risk of everything in our consumer-driven world becoming viewed by the courts as interstate commerce and, thus, within congressional commerce power.<sup>196</sup>

The Eighth Circuit affirmed the district court’s logic in a mere sentence; it held that “[t]he record reveals that the government presented sufficient evidence for the jury to have determined the offense . . . affected interstate

190. *United States v. Morrison*, 529 U.S. 598, 612-13 (2000); *Lopez*, 514 U.S. at 564-65.

191. *Lopez*, 514 U.S. at 565-66. The Court noted that this “rationale lacks any real limits because, depending on the level of generality, any activity can be looked upon as commercial.” *Id.* at 565. It expressed concern that such reasoning would lead to federal control over education, child rearing, and family law. *Id.* at 565-66.

192. *Morrison*, 529 U.S. at 612-13 (quoting *Lopez*, 514 U.S. at 564).

193. *Id.* at 613.

194. *Id.* at 612-13; *Lopez*, 514 U.S. at 565-66.

195. In fact, these activities are exactly what the *Corum* court found as sufficient proof of the jurisdictional element. See *United States v. Corum*, No. 01-236, 2003 U.S. Dist. LEXIS 7726, at \*7 n.2 (D. Minn. April 17, 2003), *aff’d* 362 F.3d 489 (8th Cir. 2004).

196. *Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 565-66.

commerce.”<sup>197</sup> However, the only reason the jury came to this conclusion was that the district court instructed it that any effect at all would suffice.<sup>198</sup> “Any effect at all” is not a constitutionally appropriate standard in judging the required interstate commerce nexus under the statute. In holding this standard acceptable, the Eighth Circuit reaches beyond the outer limits of commerce power into a realm that threatens the very structure of our federal republic.<sup>199</sup> Moreover, the court distorts the meaning of “economic regulation” until it bears no resemblance to commerce.

The difficulty in scrutinizing congressional commerce power in the Church Arson Prevention Act is that it is a socially compelling cause. Americans want the government to extend positive freedom from violence. That desire is heightened when the violence is motivated by racial, religious, ethnic, national origin or gender-based animus. When faced with the fact that seventy-five church fires occurred nationwide within an eighteen-month period<sup>200</sup> or that one in eight women has been the victim of forcible rape at some point in her lifetime,<sup>201</sup> Americans demand a response from the federal government. A desire to utilize the resources and power of the federal government to remedy wrongs is at its highest when Americans perceive a crime epidemic. The Church Arson Prevention Act passed Congress unanimously because these were not discrete events occurring in one state or region but were nationwide occurrences.<sup>202</sup>

However, giving the federal government a plenary police power over all criminal actions that affect interstate commerce in the aggregate, be they violent rapes, church arsons, gun possessions, or newly emerging threats, would fundamentally change the federal character of the republic.<sup>203</sup> These crimes lie squarely within the general police power of the states to regulate the health, safety, welfare and morals of their citizens; federalizing them oversteps the carefully-crafted balance between national and local government. Given the extensive changes in American society since the founding of the nation, upsetting this balance may be an appropriate course of action, but to do so is a decision that must be given effect by constitutional amendment, not by legislative determination or judicial fiat.

197. *United States v. Corum*, 362 F.3d 489, 497 (8th Cir. 2004). Compare this succinct statement to the almost three pages in which the court outlined its reasoning for finding that a telephone is an instrumentality of interstate commerce. *Id.* at 493-95.

198. *Corum*, 2003 U.S. Dist. LEXIS 7726, at \*5-6.

199. *See, e.g., Lopez*, 514 U.S. at 560-61.

200. 142 CONG. REC. S7297-04 (daily ed. June 28, 1996).

201. Johanna R. Shargel, Note, *In Defense of the Civil Rights Remedy of the Violence Against Women Act*, 106 YALE L.J. 1849, 1850 (1997).

202. 142 CONG. REC. S7297-04 (daily ed. June 28, 1996) (discussing the wave of violence against churches prior to the passage of the Church Arson Prevention Act).

203. *See United States v. Morrison*, 529 U.S. 598, 613 (2000), *Lopez*, 514 U.S. at 565-66.

It is important to see the balance Congress struck in drafting this Act. As Senator Faircloth, one of the sponsors of the statute, suggests:

In most of these cases, State and local law enforcement is more than capable of handling arson investigations. . . . But there may be special circumstances such as criminals moving State to State setting fires where Federal assistance and a Federal statute is needed to adequately resolve the problem and correct the situation.<sup>204</sup>

The Church Arson Prevention Act should not be construed by courts as the federalizing of all church arsons but as a congressional desire to provide the power and the resources of the federal government when the duties and responsibilities of the federal government are implicated.

## VI. CONCLUSION

In *United States v. Corum*, the Eighth Circuit affirmed the district court's holding that a mere *de minimis* connection between interstate commerce and the prohibited conduct satisfied the Commerce Clause because churches engage in commercial activity. In contrast to the circuit court's finding that telephones are instrumentalities of commerce, this decision is patently inconsistent with *Lopez* and *Morrison*. While the Supreme Court denied certiorari in this case, it remains to be seen how the Court will address this issue, as this decision perpetuates a split among the courts of appeals and confusion for Congress in crafting civil rights legislation.

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204. 142 CONG. REC. S6, 937-02, S6, 938 (daily ed. June 26, 1996).