
THE JURISDICTIONAL ELEMENT OF 18 U.S.C. § 844(i), A FEDERAL CRIMINAL COMMERCE CLAUSE STATUTE

INTRODUCTION

The federal government has declared war on crime.¹ To fight the battle, Congress has chosen to federalize many common law crimes.²

1. In the early 1980s, the federal government began its war on crime. Presidents and members of Congress have boasted loudly of their opposition to crime and called for tough federal solutions. "Like politicians everywhere, they don't want to be labeled 'soft on crime.'" Aaron Epstein, *Using U.S. Laws Is Just Tough Talk*, ARIZ. REPUBLIC, Jan. 29, 1994, at A1.

2. The "war on crime" began in 1981 and has buried the federal courts with thousands of criminal cases, for which the federal judiciary is unsuited. "The result is that civil cases are neglected and our federal prisons are bulging with prisoners, many of whom should not be there at all." Don Edwards, *Congress Swamped the Courts*, WASH. POST, July 7, 1993, at A21. Representative Don Edwards reports that a Library of Congress study found that in its "War on Crime" Congress enacted nearly 1,600 laws federalizing state laws, swamping the federal courts. *Press Conference with Representative Don Edwards (D-CA) and Michael Quinlan, Former Director of the Federal Bureau of Prisons*, FED. NEWS SERVICE, Nov. 1, 1993.

Now Congress is preparing to create more federal crimes, despite what Senate Majority Leader George Mitchell called "the myth that you can do something about violent crime by simply declaring it to be a federal crime as opposed to a state crime."

Franklin Zimring, director of the Earl Warren Legal Institute at the University of California's Berkeley campus, agrees that it's a myth.

"Without changing our system, the largest help the federal government can provide is check-writing (subsidizing local police) and rule-changing (such as gun-control). The rest is symbolic posturing — and there's tons of that."

Epstein, *supra* note 1, at A1.

Historically, the Supreme Court has adopted a passive role in reviewing those federal criminal statutes enacted under the commerce power.³ In May 1995, however, the Supreme Court, in *United States v. Lopez*,⁴ overturned a criminal Commerce Clause⁵ statute as beyond the reach of congressional authority. The abrupt change of stance⁶ and the slim majority⁷ makes *Lopez*'s ramifications uncertain.⁸ In addition, the bold holding draws attention away from a pivotal, yet more subtle debate over federal criminal Commerce Clause jurisdiction, which has been brewing for a quarter century.⁹ This debate may prove to be another avenue of assault on the previously unassailable Commerce Power.

3. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 4.10(c), at 165-66 (4th ed. 1991).

4. 115 S. Ct. 1624 (1994).

5. U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have power . . . [to] regulate commerce . . . among the several states . . .").

6. Justice Stevens described the majority's decision as radical. *Id.* at 1651 (Stevens, J., dissenting). Justice Souter explained that the Court should defer to congressional findings "if there is any rational basis for such a finding." *Id.* (Souter, J., dissenting) (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276 (1981)). He praised this policy as the "paradigm of judicial restraint." *Id.* (quoting *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993)). The historical lenience of Commerce Clause judicial review, Souter explained, "reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution, and our appreciation of the legitimacy that comes from Congress' political accountability in dealing with matters open to a wide range of possible choices." *Id.* at 1641-52. In addition, the majority "decision [in *Lopez*] tugs the Court off course, leading it to suggest opportunities for further developments that would be at odds with the rule of restraint to which the Court still wisely states adherence." *Id.* at 1652.

7. *Lopez* was a five-to-four decision. Three of the dissenters, Justices Stevens, Souter, and Breyer, wrote vigorous dissents.

8. The Supreme Court has already vacated one decision for remand in accordance with the *Lopez* decision. See *Edwards v. United States*, 115 S. Ct. 1819 (1995). Interpretation, however, may prove problematic. As Justice Breyer explained, "the [*Lopez*] holding creates three serious legal problems. First, the [*Lopez*] holding runs contrary to modern Supreme Court cases that have upheld congressional actions despite connections to interstate or foreign commerce that are less significant than the effect of school violence." 115 S. Ct. at 1662 (Breyer, J., dissenting). "The second legal problem the Court creates comes from its apparent belief that it can reconcile its holding with earlier cases by making a critical distinction between 'commercial' and noncommercial 'transactions.'" *Id.* at 1663. "The third legal problem created by the [*Lopez*] holding is that it threatens legal uncertainty in an area of law that, until this case, seemed reasonably well settled." *Id.* at 1664.

9. See *infra* part III and accompanying text for a discussion of the debate over the scope of the jurisdictional element of § 844(i).

Title XI of the Organized Crime Control Act of 1970¹⁰ makes arson a federal crime.¹¹ Title XI extends federal jurisdiction in arson cases involving damage to nearly all types of property.¹² In particular, 18 U.S.C. § 844(i) outlaws malicious damage or destruction, by fire or explosive, of property used in interstate commerce or in any activity affecting interstate commerce.¹³ The statute is a rarity among criminal Commerce Clause statutes because the character of the property, rather than the type of activity, triggers federal criminal jurisdiction.¹⁴

No court suggests that Congress lacks the power to extend the reach of the Commerce Clause to all property damaged or destroyed by arson.¹⁵ The debate over § 844(i) concerns the types of property Congress chose to give federal protection.¹⁶ Some courts permit federal prosecution of effectively all property.¹⁷ Other courts, however, exclude

10. Organized Crime Control Act of 1970, Pub. L. No. 91-452, Title XI, 84 Stat. 956 (codified at 18 U.S.C. §§ 840-879 (1988 & Supp. II 1990)). The Organized Crime Control Act now is referred to as the Comprehensive Crime Control Act.

11. Title XI is not the first statute Congress passed to punish arsonists. In 1825, Congress enacted provisions criminalizing the burning of federal vessels. 4 STAT. 115, 117-118 (1825). See *infra* part II.A. for a discussion of the history of federal arson penalties.

12. Title XI creates criminal penalties for the damaging by fire of buildings and premises of the federal government, federally supported institutions, and businesses in general. H.R. REP. NO. 16,699, 91st Cong., 2d Sess. 12 (1970), reprinted in 1970 U.S.C.C.A.N. 4007, 4011. Whether Title XI also extends protection to private property and public premises such as police stations, churches, and synagogues is the subject of debate. See *infra* part III.

13. § 844(i) states in part:

Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be [imprisoned or fined].

18 U.S.C. § 844(i) (1988).

14. See *infra* part I.D. for a comparison of the language of § 844(i) with other criminal Commerce Clause statutes.

15. See, e.g., *United States v. Ryan*, 9 F.3d 660, 676 (8th Cir. 1993) (Arnold, C.J., concurring in part and dissenting in part), *aff'd*, 41 F.3d 361 (8th Cir. 1994) (*en banc*).

16. See *infra* notes 102-12 and accompanying text for a discussion of the type of property receiving federal protection.

17. See, e.g., *United States v. Stillwell*, 900 F.2d 1104 (7th Cir. 1990) (finding receipt of interstate natural gas by a private residence enough to trigger federal jurisdiction), *cert. denied*, 498 U.S. 838 (1990); *United States v. Moran*, 845 F.2d 135 (7th Cir. 1988) (holding that the use of a computer owned by a business involved in interstate commerce,

private property from the statute's reach.¹⁸ The courts' disagreement arises from conflicting interpretations of the jurisdictional element of § 844(i).

This Note examines the proper scope of Commerce Clause power when employed as the jurisdictional element in the *prima facie* case of federal arson. Part I traces the development of federal criminal law. Part II explores the history of arson as a federal crime. Part III outlines judicial interpretation of the jurisdictional element of 18 U.S.C. § 844(i). Part IV critiques three legal tests used to apply the jurisdictional element by examining the plain meaning and legislative history of § 844(i) and applying principles of statutory construction. Part V proposes a narrow, two-step, "function" test for federal jurisdiction in arson cases. In conclusion, part VI makes suggestions to both Congress and the judiciary.

I. FEDERAL CRIMINAL LAW

A. Federal Jurisdiction

"Jurisdiction" is the power of a court to hear a case, to make factual inquires, to apply the law, and to render judgement.¹⁹ All federal jurisdiction originates in the United States Constitution.²⁰ The Constitution empowers federal courts to adjudicate all cases, civil and criminal, arising under the Constitution, the laws of the United States, and

and interstate business telephone calls at a private residence which was bombed by defendant, afforded sufficient basis for jurisdiction). See *infra* notes 146-53, 163-69 and accompanying text for a discussion of the rationale supporting this expansive view.

18. See, e.g., *United States v. Mennuti*, 639 F.2d 107, 113 (2d Cir. 1981) (holding that Congress did not exercise the commerce power to protect private residences); *United States v. Monholland*, 607 F.2d 1311, 1316 (10th Cir. 1979) (finding that nothing in the statute indicated Congress intended to include all property); *United States v. Montgomery*, 815 F. Supp. 7, 11 (D.D.C. 1993) (holding that "it is inconceivable that . . . the Congress that approved Section 844(i) contemplated that such a statute . . . would be applied to convert into enclaves protected by federal criminal law every private home . . ."). See *infra* notes 126-45 and accompanying text (discussing the rationale for this restrictive view).

19. See generally *Police Comm'r of Boston v. Municipal Court of Dorchester Dist.*, 374 N.E.2d 272, 285 (Mass. 1978); HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* (1973); 8 *FEDERAL PROCEDURE*, L. Ed. §§ 22:37-22:53 (1992); *BLACK'S LAW DICTIONARY* 853, (6th ed. 1990).

20. U.S. CONST. art. III.

treaties.²¹ Because the laws of the United States do not include either civil or criminal common law, federal criminal jurisdiction is limited to cases involving activities specifically made criminal by either the Constitution or Congress.²²

The Constitution itself enumerates only a limited number of criminal activities: counterfeiting,²³ piracy on the high seas,²⁴ treason,²⁵ offenses against the Law of Nations,²⁶ and impeachment.²⁷ All other federal crimes are congressional creations. Congress gave federal district courts exclusive²⁸ and original jurisdiction over all these offenses against the United States.²⁹ This expansive jurisdiction has an inherent limitation, however. Federal courts only have authority over offenses that Congress has the power to make criminal. In practice, this theoretical limitation lacks bite. While the Supreme Court has the power of judicial review, criminal statutes are almost never struck down.³⁰

21. U.S. CONST. art. III, § 2.

22. *See id.*

23. U.S. CONST. art. I, § 8, cl. 6 (Congress has the power “[t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States . . .”).

24. U.S. CONST. art. I, § 8, cl. 10 (Congress has the power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations . . .”).

25. U.S. CONST. art. III, § 3, cl. 2 (Congress has the power “to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted”). The Constitution provides that treason against the United States “shall consist only in levying War against them, or, in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.” U.S. CONST. art. III, § 3, cl. 1.

26. U.S. CONST. art. III, cl. 6.

27. U.S. CONST. art. I, § 3, cls. 6 & 7.

28. Both federal and state courts have jurisdiction, however, when an act constitutes a crime against federal and state authorities. *United States v. Lanza*, 260 U.S. 377 (1922). The Supreme Court has held that a federal conviction after a state conviction does not violate the double jeopardy clause. *Abbate v. United States*, 359 U.S. 187 (1959). *See generally* Annotation, *Conviction or Acquittal in Federal Court as Bar to Prosecution in State Court for State Offense Based on Same Facts — Modern View*, 6 A.L.R. 4th 802 (1981).

29. 18 U.S.C. § 3231 (1988). The Supreme Court, however, does not have original jurisdiction over criminal cases. *See generally* ARMISTEAD M. DOBIE & MASON LADD, *FEDERAL JURISDICTION AND PROCEDURE* 285-93 (Warren A. Seavey ed., 1940).

30. “Under the modern decisions . . . the power of Congress was recognized as broad enough to reach all phases of the vast operations of our national industrial system.” Flood

The only real restriction is congressional discretion.³¹

B. Congressional Authority

The need for federal criminal law flows from three federal responsibilities: protecting uniquely federal interests, supplanting local law enforcement when state authorities are unwilling or unable to provide protection, and ensuring adherence to federal administrative regulations.³² To fulfill these responsibilities, Congress can legislate criminal penalties under any one of the specifically enumerated powers, such as the Commerce Clause,³³ the Necessary and Proper Clause,³⁴ or the War Powers Clause.³⁵

v. Kuhn, 407 U.S. 258, 286 (1972) (Douglas, J., dissenting) (citations omitted). *But see* United States v. Lopez, 115 S. Ct. 1624 (1995) (striking down a criminal commerce clause statute).

31. Chief Justice Marshall foresaw this problem. In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), he remarked:

The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from [the Commerce Clause's] abuse. They are the restraints on which the people must often rely solely, in all representative governments.

Id. at 197.

32. L.B. Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROBS. 64, 66 (1948); *see also* WAYNE R. LAFAYE AND AUSTIN W. SCOTT, JR., CRIMINAL LAW, § 2.8(c) at 124 (2d ed. 1986) (discussing the three federal responsibilities).

33. U.S. CONST. art. I, § 8, cl. 3.

34. U.S. CONST. art. I, § 8, cl. 18.

35. U.S. CONST. art. I, § 8, cl. 11. Historically, Congress created federal criminal laws sparingly. In the early years of U.S. history, Congress legislated criminal penalties only in cases of direct threat to federal power. Schwartz, *supra*, note 32, at 65. In 1789, Congress promulgated the first federal criminal statute which punished customs fraud and bribery of customs officials. Act of July 31, 1789, ch. 5, §§ 34-35, 1 STAT. 29 (codified in current form at 18 U.S.C. § 201 (1988)). One year later, Congress passed "An Act for the Punishment of Certain Crimes against the United States" which created criminal sanctions for, among other things, perjury in a federal court and bribery of a federal judge. Act of April 30, 1790, ch. 9, § 1, 1 STAT. 112 (codified in scattered sections of 18 U.S.C.). *See generally* Richard H. Brody, Note, *The Proposed Federal Criminal Code: An Unwarranted Expansion in Federal Criminal Jurisdiction*, 39 OHIO ST. L.J. 132, 133-41 (1978) (discussing the early development of federal criminal jurisdiction). States oversaw all other criminal concerns. DOBIE & LADD, *supra*, note 29, at 286. After the Civil War, however, Congress recognized a need for federal criminal penalties when state governments were unwilling to protect individual rights. Schwartz, *supra* note 32, at 65.

Congress often invokes the commerce power to federalize criminal activity. These criminal Commerce Clause statutes can be broken into two categories.³⁶ "Type I" statutes federalize a crime, regardless of the case-by-case effect on interstate commerce. For example, all extortionate credit transactions³⁷ and any possession of a firearm by a convicted felon³⁸ are federal crimes, even if in some individual cases, the crime

In 1866, Congress passed the Civil Rights legislation, 14 STAT. 27 (1866) (codified at 18 U.S.C. § 51-52 (1946)), which in appropriate circumstances created a federal forum for assault, murder, and threats.

Today, the sheer number and scope of congressionally created crimes is mind-numbing. To keep pace with the rapid expansion of the late nineteenth and early twentieth centuries, the federal government increasingly relied upon federal agencies to ensure the welfare of the nation. These agencies fulfilled their role by enacting regulatory measures. Schwartz, *supra*, note 32, at 66. Schwartz lists a few: "Interstate transportation, communication, and power distribution, the wholesomeness and proper labeling of food, the marketing of grain and securities, wages and hours of labor, the hunting of migratory game, and in wartime the price and distribution of nearly all commodities . . ." *Id.* Criminal sanctions, as a method of enforcement, were a natural corollary to administrative regulations. *Id.*

A former U.S. Attorney laments that:

The 3,000 criminal laws enacted since 1789 have no general standardized definitions or logical consistency. Criminal statutes are haphazardly placed throughout the 50 titles of the U.S. Code. The provisions go from the ridiculous to the deadly serious. A prohibition against unauthorized use of the likeness of "Smokey the Bear" appears next to statutes dealing with murder, kidnapping, and rape.

There are some 80 separate theft offenses and 20 counterfeiting and forgery offenses. It is hard to find two that read alike. There are some 50 false-statement offenses.

There are close to 80 culpability terms that define the mental element necessary to commit various federal offenses. They range from knowingly and willful to improperly, feloniously, maliciously, wantonly, lasciviously and corruptly. Most of these terms have been interpreted by the courts in widely varying and sometimes contradictory manners.

Otto G. Obermaier, *Revamping the Criminal Patchwork*, N.J. L.J., Dec. 5, 1994, at 25.

36. Although statutes have not been formally classified as "type I" and "type II", the Supreme Court has noted the distinction.

"Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce . . . It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have such effect . . . And sometimes Congress itself has said that a particular activity affects the commerce. . . ."

Perez v. United States, 402 U.S. 146, 152 (1970) (quoting *United States v. Darby*, 312 U.S. 100, 120 (1941)).

37. 18 U.S.C. §§ 891-96 (1988).

38. 18 U.S.C. App. § 1202(a) (1970), *repealed by* Pub. L. No. 99-308, § 104(b), 100 Stat. 459 (1986).

has no nexus with interstate commerce.³⁹ The Supreme Court and circuit courts have found that type I statutes are within the Commerce Clause power of Congress for two reasons. First, Justice Holmes explained, it may be "necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented . . ."⁴⁰ Second, the criminal activity, when considered in the aggregate, may have a substantial effect on the nation's economy.⁴¹

"Type II" statutes are type I statutes with a narrower scope. Purely intrastate incidences of the crime are not federalized by type II statutes. Type II statutes require, as an element of the crime, that the prohibited activities have a case-by-case effect on interstate commerce. For example, as part of the *prima facie* case, the federal prosecutor must prove that the particular conduct charged involved: transportation in interstate commerce,⁴² shipping, or receipt in interstate commerce,⁴³ possession in or affecting commerce,⁴⁴ affecting commerce by robbery or extortion,⁴⁵ traveling in interstate commerce,⁴⁶ property used in

39. Type I statutes often include a section in which Congress states explicitly that the crime in general affects interstate commerce. The Supreme Court has held, however, that Congress does not need to make such particularized findings in order to legislate. *Perez*, 402 U.S. at 156.

40. *Perez v. United States*, 402 U.S. 146, 154 (1971) (quoting Justice Holmes in *Westfall v. United States*, 274 U.S. 256, 259 (1926)).

41. "[E]ven if [a person's] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'"

Perez, 402 U.S. at 151-52 (quoting *Wickard v. Filburn*, 317 U.S. 111, 125 (1942)). Courts have used this rationale to justify many federal criminal statutes. *See, e.g.*, *Perez v. United States*, 402 U.S. 146 (1971) (18 U.S.C. § 891 - loan sharking); *United States v. Becker*, 461 F.2d 230 (2d Cir. 1972) (18 U.S.C. § 1511, 1955(b) - gambling); *United States v. Lopez*, 459 F.2d 949 (5th Cir. 1972) (21 U.S.C. §§ 841(a), 846 - drug trafficking), *cert. denied sub nom. Llerena v. United States*, 409 U.S. 878 (1972).

42. National Stolen Property Act, 18 U.S.C. § 2312 (1988 & Supp. IV 1992); *see also* Federal Kidnaping Act, 18 U.S.C. § 1201(a)(1) (1988); Transportation for Illegal Sexual Activity and Related Crimes Act, 18 U.S.C. § 2421 (1988).

43. Anti-Carjacking Act, 18 U.S.C. § 2119 (Supp. IV 1992).

44. Gun Control Act, 18 U.S.C. § 922(g) (1988).

45. Hobbs Act, 18 U.S.C. § 1951(a) (1988).

46. Murder-for-Hire Act, 18 U.S.C. § 1952(a) (1988 & Supp. IV 1992).

interstate or foreign commerce or in any activity affecting commerce.⁴⁷ As a subset of type I, type II statutes are clearly within congressional Commerce Clause power. Legitimate challenges to type II statutes go to the proper scope of the statutes rather than the limits of congressional authority.⁴⁸

This Note focuses on type II statutes, in particular, the proper scope of Commerce Clause power when employed as the jurisdictional basis for a federal crime. In challenges to prosecutions under type II statutes, the government must establish a nexus between a particular crime and interstate commerce for each charge. For example, 18 U.S.C. § 844(i) prohibits use of explosives to damage or destroy property used in interstate commerce or any activity affecting interstate commerce. If a bomb destroys an automobile, is the automobile used in or affecting interstate commerce when it is made intrastate, housed intrastate, and driven intrastate except for several job-related trips each month across state lines?⁴⁹ If an arsonist destroys a private home, is the house used in interstate commerce or an activity affecting interstate commerce when the house receives natural gas from an out-of-state utility company,⁵⁰ or the owner keeps in the home a personal computer purchased out-of-state?⁵¹ Courts must provide well-reasoned, consistent answers to these questions.

C. *Judicial Interpretation*

Principles of statutory construction may be at odds in federal

47. 18 U.S.C. § 844(i) (1988).

48. See *United States v. Ryan*, 9 F.3d 660, 675 (8th Cir. 1993); *aff'd*, 41 F.3d 361 (8th Cir. 1994) (*en banc*) (explaining that federal courts always have subject matter jurisdiction in federal criminal cases) (Arnold, C.J., concurring in part and dissenting in part). One court explained that "[a]s a practical matter, at least since the watershed decisions of 1937-1942, the political process, and not the courts, has been the states' only real defense against commerce-based federal incursions." *United States v. Ramey*, 24 F.3d 602, 606, 606 n.4 (4th Cir. 1994) (citing *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942); and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)).

49. See *United States v. Monholland*, 607 F.2d 1311 (10th Cir. 1979).

50. See *Ramey*, 24 F.3d 602; *Ryan*, 9 F.3d 660; *United States v. Stillwell*, 900 F.2d 1104 (7th Cir. 1990).

51. *Ryan*, 9 F.3d 660.

criminal Commerce Clause statutes.⁵² The Supreme Court interprets Commerce Clause statutes very broadly.⁵³ The scope of the commerce power is limited primarily by Congress' choice of words. For example, use of the phrase "affecting commerce" invokes the full jurisdictional reach of Congress' Commerce Clause power.⁵⁴ Other phrases such as "in commerce" or "engaged in commerce" imply a more limited exercise of the Commerce Clause power, but nonetheless sweep broadly.⁵⁵

In contrast, the judiciary limits the scope of federal criminal statutes in accordance with two significant policy concerns.⁵⁶ First, courts narrowly interpret criminal statutes unless the meaning is plain and clear.⁵⁷ Ambiguity concerning the ambit of criminal laws is thus resolved with lenity.⁵⁸ Second, courts narrowly interpret federal criminal statutes because common law crimes are traditionally state matters.⁵⁹ Courts will not alter the federal-state balance unless Congress clearly conveys its intent to do so.⁶⁰

Criminal Commerce Clause statutes consequently embody the inherent tension between traditional criminal law and broad commerce

52. See generally John L. Panneton, *Federalizing Fires: The Evolving Federal Response to Arson Related Crimes*, 23 AM. CRIM. L. REV. 151 (1985) (examining the rapid growth of federal criminal jurisdiction in connection with arson-related offenses).

53. See NOWAK & ROTUNDA, *supra* note 3, § 4.9 at 160-63.

54. *Russell v. United States*, 471 U.S. 858, 859 (1985); *Scarborough v. United States*, 431 U.S. 563, 571-72 (1977).

55. *Scarborough*, 431 U.S. at 571; *United States v. American Bldg. Maintenance Indus.*, 422 U.S. 271, 276 (1975).

56. See Jeanne F. Philips, Note, *Determining the Proper Scope of Section 2113(b) of the Federal Bank Robbery Act*, 51 FORDHAM L. REV. 536 (1982) (discussing the rule of lenity and federal-state balance in the context of section 2113(b) of the Federal Bank Robbery Act).

57. *United States v. Bass*, 404 U.S. 336, 349 (1971).

58. *Rewis v. United States*, 401 U.S. 808, 812 (1971). However, "canons of clear statement and strict construction do 'not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature.'" *United States v. Bass*, 404 U.S. 336, 351 (1971) (quoting *United States v. Bramblett*, 348 U.S. 503, 510 (1955)).

59. *Bass*, 404 U.S. at 349. Congress has recognized, at least on paper, that "the Federal government should . . . impos[e] criminal sanctions only to the extent that misconduct obstructs a specific federal function and leav[e] punishment for the misconduct itself to State and local governments." SENATE COMM. ON THE JUDICIARY, CRIMINAL CODE REFORM ACT OF 1977, S. Rep. No. 95-605, 95th Cong., 1st Sess. 29 (1977).

60. *Bass*, 404 U.S. at 349.

power. A quick glance at Supreme Court decisions, however, seemingly resolves the conflict. In *Scarborough v. United States*, the Court explained that policy concerns relevant to federal criminal law only influence statutory construction when the meaning of the statute is unclear.⁶¹ Thus, the words “affecting commerce” should be plain and clear. In *Russell v. United States*, the Court held that “affecting commerce” invokes the full powers of the Commerce Clause even in a criminal statute.⁶² This full power is expansive. In *Perez v. United States*, the Court found that the full power of the Commerce Clause can reach even purely intrastate activity.⁶³

While it might be possible to summarily dispose of jurisdictional issues raised by type II statutes, this Note suggests that important textual nuances narrow the scope of some federal criminal Commerce Clause statutes.⁶⁴ *Perez* involved a challenge to the constitutional authority to promulgate a type I statute.⁶⁵ At issue in type II statutes, however, is the case-by-case application of the jurisdictional element.

D. *The Jurisdictional Elements of Criminal Commerce Clause Statutes*

Not all type II statutes are similarly drafted.⁶⁶ Many authorize federal jurisdiction after proof of activities such as transporting,⁶⁷

61. 431 U.S. 563, 577 (1977) (citing *United States v. Bramblett*, 348 U.S. 503, 510 (1955)).

62. See, e.g., *Russell v. United States*, 471 U.S. 858 (1984).

63. *Perez v. United States*, 402 U.S. 146 (1970).

64. In *United States v. Ramey*, 24 F.3d 602 (4th Cir. 1994), Judge Michael, in his dissent, explained the mistake of many courts. “[T]he issue is not so much the extent of Congress’ power under the Commerce Clause as it is what Congress actually said in § 844(i). The majority was blinded by its assumption that the commerce power is ‘nearly boundless’ . . . and therefore failed to take a hard look at the statutory language.” *Id.* at 610 (Michael, J., dissenting) (citation omitted).

65. *Perez*, 402 U.S. at 147.

66. See generally Brody, *supra* note 35, at 140-41 (discussing jurisdiction as an element of federal offenses); Tracy W. Resch, Comment, *The Scope of Federal Criminal Jurisdiction Under the Commerce Clause*, 1972 U. ILL. L.F. 805 (discussing the jurisdictional elements of federal criminal statutes created under congressional commerce power).

67. National Stolen Property Act, 18 U.S.C. § 2312 (1988 & Supp. IV 1992); see also Federal Kidnaping Act, 18 U.S.C. § 1201(a)(1) (1988); Transportation for Illegal Sexual Activity and Related Crimes Act, 18 U.S.C. § 2421 (1988).

"shipping or receiving"⁶⁸ in interstate commerce, possession in or affecting commerce,⁶⁹ robbery or extortion affecting commerce,⁷⁰ or travel in interstate commerce.⁷¹ However, in 18 U.S.C. § 844(i), which federalizes criminal penalties for arson, Congress conditioned jurisdiction or proof of nexus between the particular type of property harmed and interstate commerce.⁷² Section 844(i) authorizes federal jurisdiction when a person maliciously damages or destroys "property used . . . in any activity affecting interstate or foreign commerce."⁷³ Courts have disagreed on whether this variation alters the scope of federal criminal jurisdiction.⁷⁴

II. ARSON AS A FEDERAL CRIME

A. History

Federal criminal penalties for arson originally extended only to territories outside state jurisdictions.⁷⁵ As early as 1825, Congress outlawed arson in federal buildings and on the high seas.⁷⁶ Congress later established criminal penalties for arson within the special maritime territorial jurisdiction of the United States⁷⁷ and on Indian reservations.⁷⁸ Prosecutions for arson did not extend into state jurisdictions until Congress decided to protect particular types of property: United

68. Anti-Carjacking Act, 18 U.S.C. § 2119 (Supp. IV 1992).

69. Gun Control Act, 18 U.S.C. § 922(g) (1988).

70. Hobbs Act, 18 U.S.C. § 1951(a) (1988).

71. Murder-for-Hire Act, 18 U.S.C. § 1952(a) (1988 & Supp. IV 1992).

72. See *supra* note 13 for the precise language of § 844(i); see also *Russell v. United States*, 471 U.S. 858 (1985) (analyzing § 844(i)).

73. 18 U.S.C. § 844(i) (1988).

74. See *infra* part III for a discussion of judicial interpretation of the jurisdictional element of § 844(i).

75. See generally Panneton, *supra* note 52, at 158-61 (discussing the growth of federal arson jurisdiction).

76. Act of March 3, 1825 § 2, 4 Stat. 115.

77. 18 U.S.C. § 81 (1988) ("Whoever, within the special maritime and territorial jurisdiction of the United States, willfully and maliciously sets fire to or burns, or attempts to set fire to or burn any building . . . shall be . . . [fined or imprisoned].").

78. 18 U.S.C. § 1153(a) (1988) ("Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely . . . arson . . . within the Indian country, shall be subject to the same law and penalties as all other persons . . . within the exclusive jurisdiction of the United States.").

States property,⁷⁹ articles in foreign commerce,⁸⁰ communication facilities,⁸¹ and aircraft or aircraft facilities.⁸² Thus, in earlier years, federal jurisdiction over arson was restricted to territories outside state jurisdiction and a few specified types of properties.⁸³

Federal prosecutors circumvented the limited federal jurisdiction by characterizing arson as other federal crimes.⁸⁴ For example, the mail fraud statute was used to prosecute arson. In 1872, Congress established criminal penalties for mail fraud,⁸⁵ which involves a plan to defraud and

79. 18 U.S.C. § 1361 (1988) (“Whoever willfully injures or commits any depredation against any property of the United States, or of any department or agency thereof, or any property which has been or is being manufactured or constructed for the United States, or any department thereof . . . [shall be fined or imprisoned].”).

80. 18 U.S.C. § 1364 (1988) (“Whoever, with intent to prevent, interfere with, or obstruct or attempt to prevent, interfere with, or obstruct the exportation to foreign countries of articles from the United States, injures or destroys, by fire or explosives, such articles or the places where they may be whole in such foreign commerce . . . [shall be fined or imprisoned].”).

81. 18 U.S.C. § 1362 (1988) (“Whoever willfully or maliciously injures or destroys any of the works, property, or material of any radio, telegraph, telephone or cable, line, station, or system, or other means of communication, operated or controlled by the United States . . . [shall be fined or imprisoned].”).

82. 18 U.S.C. § 32 (1988). The Aircraft and Motor Vehicles statute punishes:

(a) Whoever willfully—

(1) sets fire to . . . any aircraft in the special aircraft jurisdiction of the United States or any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce;

. . . .

(3) sets fire to . . . any air navigation facility . . . if such fire . . . is likely to endanger the safety of any such aircraft in flight;

(4) with intent to damage, destroy, or disable any such aircraft, sets fire to . . . any appliance or structure, ramp, landing area, property, machine, or apparatus, or any facility or other material used, or intended to be used, in connection with the operation, maintenance, loading, unloading or storage of any such aircraft or any cargo carried or intended to be carried on any such aircraft

Id.

83. See generally, Panneton, *supra* note 52 (tracing the growing federal involvement in arson prosecutions).

84. *Id.* at 161-62.

85. 18 U.S.C. § 1341 (1988). In its current form, the Mail Fraud statute punishes: Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or

a use of the mails to execute that plan.⁸⁶ Criminal arson with a vague connection to the mails can be prosecuted under the mail fraud statute.⁸⁷ Jurisdiction, which is based on the Postal Power, is easy to prove.⁸⁸ Moreover, the government in a mail fraud prosecution does not have to show that defendant actually participated in the arson — only that a fraud was intended.⁸⁹

Not all arson, however, can be characterized as misuse of the mailman.⁹⁰ The government has also relied on three other federal statutes to prosecute arson.⁹¹ In 1965, Congress added arson to the list of criminal offenses in the Travel Act.⁹² Congress intended to target organized crime, using the Commerce Clause to punish arson facilitated by interstate travel or transportation.⁹³ The Supreme Court upheld the statute, finding that Congress clearly conveyed its intent to alter the

takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon . . . any such matter or thing .

...

Id.

86. See *Pereira v. United States*, 347 U.S. 1, 8 (1954) (discussing the elements of mail fraud).

87. See Panneton, *supra* note 52, at 161-69.

88. U.S. CONST. art. I, § 8, cl. 7. Congress has the power “[t]o Establish Post Offices and Post Roads” *Id.*

89. See Panneton, *supra* note 52, at 163.

90. One commentator, citing a government report, noted that in 1977 only 4% of arsons were profit motivated. Of the rest, 47% and 30% were motivated by revenge and pyromania, respectively. Panneton, *supra* note 52, at 169.

91. *Id.* at 161-92 (Mail and Wire Fraud, Travel Act, and Gun Control Act).

92. 18 U.S.C. § 1952 (1988 & Supp. IV 1992). The Travel Act provides:

(a) Whoever 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,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3) shall be [fined or imprisoned].

(b) As used in this section (i) “unlawful activity” means . . . (2) . . . arson in violation of the laws of the State in which committed or of the laws of the United States

Id.

93. See S. REP. NO. 351, 89th Cong., 1st Sess. (1965), reprinted in 1965 U.S.C.C.A.N. 1847 (noting that the purpose of the Travel Act was to thwart arson-for-profit schemes).

federal-state balance.⁹⁴ In 1968, Congress passed the Gun Control Act,⁹⁵ which prohibited receipt, transportation, or delivery of an unregistered firearm in interstate commerce. Within the definition of firearm, Congress included the phrase “destructive device.”⁹⁶ “Destructive device” included many of the explosives often used by arsonists.⁹⁷ Thus, the government could prosecute arsonists indirectly for receipt, transportation, or possession of unregistered explosives.⁹⁸ Prosecutors have also used the Racketeer Influenced and Corrupt Organizations Act (RICO)⁹⁹ to punish arson-for-profit schemes.¹⁰⁰ Prosecutors use RICO, but prefer other statutes because of the administrative burdens associated with RICO prosecutions.¹⁰¹

94. *Perrin v. United States*, 444 U.S. 37, 50 (1979).

95. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified at 26 U.S.C. §§ 5801-5812 (1988)).

96. 26 U.S.C. § 5845(a)(8) (1988).

97. Section 5845(f) defines destructive device as “(1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device” 26 U.S.C. § 5845(f).

98. *See Panneton, supra* note 52, at 175-76. Arsonists rarely register their Molotov cocktails, so prosecution is almost always available under the Gun Control Act. *Id.* at 176.

99. Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, tit. IX, § 901(a), 84 Stat. 941 (1970) (codified at 18 U.S.C. §§ 1961-68 (1988 & Supp. II 1990)).

100. Panneton, *supra* note 52, at 182. Congress enacted RICO in 1970 as Title IX of the Organized Crime Control Act. RICO punishes:

Any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1962(a) (1988).

RICO defines “racketeering activity” as “any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year. . . .” 18 U.S.C. § 1961(1) (1988).

101. To proceed with a RICO prosecution, government attorneys must convince the Department of Justice that either that organized crime involvement is significant or that local law enforcement is unlikely to act and the federal government has a significant interest in the case. Panneton, *supra* note 52, at 192.

B. 18 U.S.C. § 844(i)

Section 844(i), the federal arson statute, requires the government to prove four elements in an arson prosecution: that defendant, (1) by means of fire¹⁰² or use of explosives,¹⁰³ (2) maliciously (3) damaged or destroyed or attempted to damage or destroy (4) property¹⁰⁴ used in (a) interstate commerce or (b) any activity affecting interstate commerce.¹⁰⁵ The phrase "affecting interstate commerce" is a term of art which signals that Congress intended to exercise its Commerce Clause power to the fullest extent.¹⁰⁶ Section 844(i) invokes this plenary jurisdiction.¹⁰⁷ Categorization of property as "in interstate commerce" is subsumed under "affecting interstate commerce" and is therefore superfluous.¹⁰⁸

102. When first enacted, § 844(i) did not include fires. Consequently, courts stretched the meaning of explosives to include most ingredients used to start fires. To legitimate strained interpretations, Congress amended § 844(i) in the Anti-Arson Act of 1982 to include fires. See Anti-Arson Act of 1982, Pub. L. No. 97-298, 96 Stat. 1319 (1982).

103. § 844(j) defines explosive as:

Gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, other explosive or incendiary devices within the meaning of paragraph (5) of section 232 of this title, and any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion.

18 U.S.C. § 844(j).

See generally Wesley Kobylak, Annotation, *Meaning of the Term "Explosive" Within 18 U.S.C.S. § 844(i) Prohibiting Damage or Destruction of Property Used in Interstate Commerce by Means of Explosive*, 61 A.L.R. Fed. 899 (1983) (summarizing case law regarding the meaning of "explosive" within § 844(i)).

104. "Property" encompasses "any building, vehicle, or other real or personal property. . . ." 18 U.S.C. § 844(i).

105. § 844(i) also includes property used in foreign commerce or in activities affecting foreign commerce. *Id.*

106. *NLRB v. Reliance Fuel Corp.*, 371 U.S. 224, 226 (1963); see also *United States v. Mennuti*, 639 F.2d 107, 111 n.3 (2d Cir. 1981) (noting that the phrase "affecting commerce" has been used by Congress and the courts for various purposes).

107. *Russell v. United States*, 471 U.S. 858, 859 (1985); see *supra* note 54 and accompanying text.

108. The availability of alternative proofs seem unnecessary. Property "in commerce" typically refers to instrumentalities of commerce such as airplanes. Property used in an activity "affecting interstate commerce" is very broad and includes all such property "in

While Congress intended § 844(i) to be a very broad provision, the original House bill only criminalized arson related to “business property.”¹⁰⁹ The final draft, however, did not include this business requirement.¹¹⁰ The legislative history suggests that Congress removed the phrase to extend jurisdiction to the destruction of some types of non-commercial property, specifically churches, synagogues, and police stations.¹¹¹

commerce.” The term “affecting commerce” embraces “the fullest jurisdictional breadth possible constitutionally permissible under the commerce clause.” *NLRB v. Reliance Fuel Corp.*, 371 U.S. 224, 226 (1963). Thus, courts have not needed to refer to the “in commerce” alternative. For example, in *United States v. Keen*, 508 F.2d 986 (9th Cir. 1975), *cert. denied*, 421 U.S. 929 (1975), the Ninth Circuit found that a commercial fishing boat which shipped catches interstate was part of an industry affecting interstate commerce. *Id.* at 990. The court did not need to rely on the fact that interstate commercial fishing boats are instrumentalities “in commerce.”

109. The original language in the House bill read: “(f) [w]hoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other real or personal property used for business purposes by a person engaged in commerce or in any other activity affecting commerce . . .” H.R. 16,699, 91st Cong., 2d Sess. (1970).

110. 18 U.S.C. § 844(i) (1970).

111. During hearings before Congress, the Assistant Attorney General, Will R. Wilson, discussed the scope of the original language of H.R. 16,699 § 837(f) which later became 18 U.S.C. § 844(i): “Since the term ‘affecting commerce’ embraces ‘the fullest jurisdictional breadth constitutionally permissible under the commerce clause.’ *NLRB v. Reliance Fuel Corp.*, 371 U.S. 224, 226 (1963), subsection (f) would cover damage by explosives to substantially any business property.” *To Amend Title 18 of the United States Code to Provide for Better Control of Interstate Traffic in Explosives: Hearings on H.R. 17154, H.R. 16699, H.R. 18573 and Related Proposals Before the Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 37 (1970) [hereinafter *Explosive Control Hearings*]. Representative Rodino of New Jersey then asked Mr. Wilson what types of property would be covered.

Mr. Rodino. Mr. Wilson, subsection (f) of section 837, as proposed by H.R. 16699, applies to structures used “for business purposes.” I am a little bit in the dark. Would this section and these words cover the bombing of police stations. Would they cover the bombing of a private home? Just what would new section 837 (f) cover?

Mr. Wilson. I don’t believe it would cover either public buildings or private homes under normal use, but what this is designed for is the business office, where the business is in interstate commerce, giving the Federal Government a basis for jurisdiction. It is to broaden the thing, to get at such things as the bombing of business offices in New York City, where the business is in interstate commerce.

Mr. Rodino. Would it apply to the bombing of churches, synagogues, or religious edifices?

Mr. Wilson. I don’t think so.

Id. at 56.

III. JUDICIAL INTERPRETATION OF THE JURISDICTIONAL ELEMENT OF § 844(i)

The Constitution offers a number of jurisdictional bases for federal criminal sanctions. In § 844(i), Congress relied on the authority of the Commerce Clause for jurisdiction.¹¹² As a type II statute, § 844(i) requires proof of a nexus between the alleged criminal activity and interstate commerce.¹¹³ Many type II statutes tie the case-by-case nexus requirement to an activity such as transportation¹¹⁴ or possession.¹¹⁵ To establish jurisdiction under § 844(i), however, the government must prove that the damaged or destroyed property was used in an activity affecting interstate commerce.¹¹⁶ Courts debate what types of property qualify as "used in any activity affecting commerce" so as to satisfy the nexus on a case-by-case basis.¹¹⁷

Later in the *Explosive Control Hearings*, the Chairman asked Mr. Wylie how far jurisdiction should extend.

The Chairman. You mean any building should be included in the statute?

Mr. Wylie. Yes; [sic] that is my judgement, and I think it is under our definition.

The Chairman. I do not think it is included in the language in section (f) . . . of the bill. A church or a private dwelling would not be included or a police station would not be included. It is not used for 'business purposes.'

....

The Chairman. The question is whether you want to broaden it to cover a private dwelling or a church or other property not used for business.

Mr. Wylie. As far as I am concerned we could leave out the word [sic] 'used for business purposes,' and it would help the situation.

The Chairman. You feel we should broaden it?

Mr. Wylie. Yes, sir.

Id. at 300.

Representative Clark MacGregor of Minnesota believed "[n]early all types of property w[ould] now be protected by the Federal law." 116 CONG. REC. 37,187 (1970).

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

113. *United States v. Bass*, 404 U.S. 336, 339 (1971).

114. *See supra* notes 42-43 and accompanying text.

115. *See supra* note 44 and accompanying text.

116. *United States v. Stillwell*, 900 F.2d 1104, 1106 (7th Cir. 1990), *cert. denied*, 498 U.S. 838 (1990); *United States v. Voss*, 787 F.2d 393, 397 (8th Cir. 1986), *cert. denied*, 479 U.S. 88 (1986).

117. *See infra* part IV for an analysis of what type of property properly satisfies the nexus.

In early § 844(i) cases, courts used a *de minimis* standard to determine if the property in question had been used in an activity affecting commerce.¹¹⁸ Applying this standard, federal courts assumed jurisdiction under § 844(i) over destroyed property that was used in an activity having even *de minimis* contact with interstate commerce.¹¹⁹ For example, courts found evidence sufficient to establish jurisdiction when: a bookstore sold books that had traveled interstate;¹²⁰ a commercial fishing boat shipped catches interstate;¹²¹ a tavern sold liquor that had moved in interstate commerce;¹²² a paint shop worked on and stored products of interstate commerce;¹²³ a hydraulic excavator was manufactured, sold, shipped, and financed in another state;¹²⁴ one tenant of a building operated a restaurant that purchased and sold gum, candy, and vegetables that had moved in interstate.¹²⁵

In *United States v. Monholland*,¹²⁶ the Tenth Circuit faced a challenge to § 844(i) jurisdiction in a case that involved a pickup truck that a state judge used to travel to and from work.¹²⁷ The judge testified that he drove the truck on federal highways to tour a five county territory, but that he did not drive the truck interstate.¹²⁸ The Second Circuit overturned the conviction for lack of jurisdiction.¹²⁹ The court did not apply the *de minimis* rule. Instead, the court insisted that for jurisdiction to be proper, the property must bear some real relationship

118. *United States v. Sweet*, 548 F.2d 198, 202 (7th Cir. 1977), *cert. denied*, 430 U.S. 969 (1977); *see also* *United States v. Schwanke*, 598 F.2d 575, 578 (10th Cir. 1979) (citing *Sweet* as authority for the *de minimis* rule); *United States v. Grossman*, 608 F.2d 534, 536 (4th Cir. 1979) (citing *Schwanke* as authority for the *de minimis* rule).

119. *E.g.*, *Sweet*, 548 F.2d at 202.

120. *United States v. Corbo*, 555 F.2d 1279, 1282 (5th Cir. 1977), *cert. denied*, 434 U.S. 928 (1977).

121. *United States v. Keen*, 508 F.2d 986, 990 (9th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975).

122. *Sweet*, 548 F.2d at 200.

123. *United States v. Nashawaty*, 571 F.2d 71, 75-76 (1st Cir. 1978).

124. *United States v. Grossman*, 608 F.2d 534, 537 (4th Cir. 1979).

125. *United States v. Schwanke*, 598 F.2d 575, 578 (10th Cir. 1979).

126. 607 F.2d 1311 (10th Cir. 1979).

127. *Id.* at 1314.

128. *Id.*

129. *Id.* at 1320.

to commerce.¹³⁰

Two years later, in *United States v. Mennuti*,¹³¹ the Second Circuit reviewed §844(i) convictions for damage to two private single-family dwellings.¹³² The government argued that the "affecting interstate commerce element was satisfied because both residences were built and rebuilt with out-of-state materials.¹³³ Furthermore, the homes received telephone and electric lines that traveled in interstate commerce.¹³⁴ Finally, one of the properties was rented rather than owned by the inhabitants. The court dismissed the convictions without reference to the *de minimis* standard.¹³⁵

The *Mennuti* court examined both the statutory language and legislative history. Writing for the court, Judge Friendly pointed to the legislative history recognizing that § 844(i) "is a very broad provision covering substantially all business property."¹³⁶ He noted, however, that the word "used" indicated that the damaged property must itself be used in commerce or in an activity affecting commerce.¹³⁷ Judge Friendly defined commerce as "commercial intercourse."¹³⁸ He explained that the phrase "affecting commerce" invoked the full extent of Commerce Clause power, but did not eliminate the necessity of a business connection.¹³⁹

Two months after *Mennuti*, the Second Circuit re-emphasized Friendly's private property, business property distinction. In *United*

130. *Id.* at 1316.

131. 639 F.2d 107 (2d Cir. 1981).

132. *Id.* at 108 n.1. Individuals conspired to destroy two private residences in an arson-for-profit scheme. *Id.* at 108.

133. *Id.*

134. *Id.*

135. *Id.* at 113.

136. *Id.* at 111 (quoting H.R. 1549, 91st Cong., 2d Sess, reprinted in 1970 U.S.C.C.A.N. 4046-4047).

137. *Id.*

138. *Id.* at 110.

139. *Id.* He did however note a caveat: the Commerce Clause might reach the burning of private residences, but in § 844(i), Congress has chosen not to extend jurisdiction. *Id.* at 113.

States v. Barton,¹⁴⁰ the court upheld jurisdiction on facts very similar to those in *Mennuti*. The court distinguished *Mennuti* by commenting that when property is commercial,¹⁴¹ receipt of food and utilities that traveled interstate satisfies § 844(i).¹⁴² The statute does not apply to private dwellings, however, despite links to interstate financing, insurance, fueling, and construction.¹⁴³ Moreover, the Second Circuit implied that the private property, business property and de minimis tests were not mutually exclusive.¹⁴⁴ In dictum, the *Barton* court employed the de minimis standard as a second step to the private/business distinction.¹⁴⁵

In 1985, the Supreme Court addressed § 844(i) in *Russell v. United States*.¹⁴⁶ In an uncharacteristically short opinion, the Court deemed the interstate commerce nexus satisfied because the destroyed property was a rental apartment complex.¹⁴⁷ Congress unquestionably has authority over the rental of real estate as an activity affecting commerce.¹⁴⁸ Thus, the Court reasoned that even local apartment rentals are part of a much broader commercial rental market.¹⁴⁹

The *Russell* opinion added ambiguity to an already complicated analysis. The Court found that § 844(i) invoked full congressional power

140. 647 F.2d 224 (2d Cir. 1981), *cert. denied*, 454 U.S. 857 (1981). The trial judge instructed the jury to find that the buildings were used in interstate commerce:

If food or drink moving in interstate commerce is sold there, or if oil or gas moving in interstate commerce is used to heat the building, or if the owner of the building is insured against loss or damage to the building by an insurance company that does business in more than one state.

Id. at 231.

141. The "social clubs" housed gambling operations from which the building owners derived their principal income. *Id.* at 232.

142. *Id.*

143. *Id.* at 232 n.8.

144. *Id.* at 232.

145. *Id.* at 323-33.

146. 471 U.S. 858 (1985).

147. Defendant owned a two-unit apartment building that he used as rental property. *Id.* at 858.

148. *Id.* at 862. This overruled part of the *Mennuti* opinion. See 639 F.2d at 113; *supra* notes 131-39 and accompanying text.

149. *Russell*, 471 U.S. at 862.

under the Commerce Clause.¹⁵⁰ As authority, the opinion cited the legislative history and the phrase "affecting commerce" in the statute itself.¹⁵¹ However, the Court did not offer a bright-line rule to apply in jurisdictional challenges to § 844(i). Nor did the opinion apply the de minimis rule or make a private property, business property distinction.¹⁵² The Court stated simply that § 844(i) applies only to property that is "used" in an "activity" that affects commerce.¹⁵³

In a case decided after *Russell, United States v. Voss*,¹⁵⁴ defendant owned a real estate business.¹⁵⁵ She unwittingly hired an undercover agent to burn one of the company's properties so that she could collect on an insurance policy.¹⁵⁶ The court reversed the conviction for lack of jurisdiction.¹⁵⁷

The decision in *Voss* turned on the jury instruction. Unlike the prosecutor in *Russell*, the government in *Voss* did not rely on the rental character of the property to establish the requisite nexus.¹⁵⁸ Instead, the government asked the judge to instruct the jury that jurisdiction was proper if defendant's business owned the property and the business purchased insurance from any carrier outside the state.¹⁵⁹ The Eighth

150. *Id.* at 859.

151. *Id.* at 860.

152. See *United States v. Stillwell*, 900 F.2d 1104, 1107 (7th Cir. 1990) (commenting that the *Russell* opinion did not address whether the statute "would cover a private family residence if the supply of interstate natural gas was its only connection to interstate commerce"), *cert. denied*, 498 U.S. 838 (1990).

153. *Russell*, 471 U.S. at 862.

154. 787 F.2d 393 (8th Cir. 1986), *cert. denied*, 479 U.S. 888 (1986).

155. Anne Voss, the owner of Voss Associates, Inc., a real estate business, insured for \$15,000 a vacant residential property she owned, after agreeing to pay \$500 to have it burned. *Id.* at 396.

156. The Illinois State Police, Division of Criminal Investigation (DCI), and the Federal Bureau of Alcohol, Tobacco, and Firearms were jointly investigating arson activity in the St. Louis metropolitan area. The joint enterprise placed agents in the field posing as arsonists-for-hire. *Id.* at 395.

157. The court reversed, "reluctantly" finding that ample grounds for jurisdiction that the prosecutor had not asserted. *Id.* at 397-98. For example, Voss had a real estate license in Missouri. Her company rehabilitated, then resold real estate. The fire insurance on the property stated the building was under rehabilitation. *Id.* at 398.

158. See *supra* notes 147-48 and accompanying text.

159. The jury instruction provided:

If you find beyond a reasonable doubt that the building at 1207 Tyler, St. Louis, Missouri, was owned by Voss Associates Incorporated and further find that Voss

Circuit held these findings inadequate as a matter of law to support a nexus with interstate commerce.¹⁶⁰ The de minimis standard, explained the court, guards the federal-state balance.¹⁶¹ Jurisdiction on such thin jury findings would starve the standard of content.¹⁶²

Courts were much less receptive to the private property, business property analysis after *Russell*.¹⁶³ In fact, the Seventh Circuit decided in *United States v. Stillwell* that *Russell* invalidated the distinction.¹⁶⁴ In *Stillwell*, the court held that receipt by a private residence of out-of-state natural gas satisfied the jurisdictional requirement of § 844(i).¹⁶⁵ The court emphasized that the jurisdictional test should not consider whether or not the property is used for a business purpose.¹⁶⁶ The plain language of § 844(i) covered property regardless of its characterization as private or business.¹⁶⁷ The Fourth Circuit agreed, holding in

Associates Incorporated purchased insurance from an insurance carrier doing business in a state other than the State of Missouri, then you are instructed that as a matter of law that the building at 1207 Tyler was used in an activity affecting interstate commerce.

787 F.2d at 396 n.1.

160. *Id.* at 397.

161. *Id.*

162. *Id.*

163. *See, e.g., United States v. Patterson*, 792 F.2d 531, 535 (5th Cir. 1986) (noting that the *Russell* opinion “casts doubt on the *Mennuti* reasoning that the property involved must be devoted to commercial purposes before § 844(i) applies”), *cert. denied*, 479 U.S. 865 (1986).

164. 900 F.2d 1104, 1109 (7th Cir. 1990) (“We believe the Supreme Court squarely rejected the rationale of *Mennuti* in *Russell*”), *cert. denied*, 498 U.S. 838 (1990); *see also supra* note 163 (quoting similar language in *Patterson*, a Fifth Circuit decision).

165. 900 F.2d at 1107. The parties stipulated at trial “that the only nexus between Stillwell’s house and interstate commerce was that Northern Illinois Gas Company supplied Stillwell’s house with natural gas it obtained from sources outside the State of Illinois.” *Id.* at 1106.

The Seventh Circuit faced this issue previously in *United States v. Russell*, 738 F.2d 825 (7th Cir. 1984), *aff’d*, 471 U.S. 858 (1985), but based its holding on grounds other than a natural gas theory to avoid conflict with *Mennuti*. 738 F.2d at 827.

166. *Stillwell*, 900 F.2d at 1107.

167. *Id.* at 1108.

In *United States v. Ryan*, 9 F.3d 660 (8th Cir. 1993), *aff’d*, 41 F.3d 361 (8th Cir. 1994) (*en banc*), a three judge panel of the Eighth Circuit agreed that the receipt and use of natural gas from across state borders is an activity that directly affects interstate commerce. 9 F.3d at 666. Unlike the Seventh Circuit, however, the Eighth Circuit refused to extend this holding to private property. The Court referred to the privately owned home in

*United States v. Ramey*¹⁶⁸ that use of electricity from an interstate power grid provided sufficient connection with interstate commerce.¹⁶⁹

Recently, another test to decide whether receipt of interstate utilities at private property provides a sufficient nexus to establish jurisdiction under § 844(i) emerged in an Eighth Circuit case. In *United States v. Ryan*,¹⁷⁰ Chief Judge Arnold advocated a two-step nexus test.¹⁷¹ In *Ryan*, defendant managed a health club owned by his father.¹⁷² The father ordered his son to close the club when it experienced financial difficulties.¹⁷³ A month later, a fire destroyed the building and killed two firemen.¹⁷⁴ Before the fire, defendant had begun preparations to

Stillwell, which was used solely for residential purposes, as an example of property beyond the reach on § 844(i). *Id.* at 667. It would be interesting to know how this panel would have characterized the residence in *United States v. Barton*, 647 F.2d 224 (2d Cir. 1981). In *Barton*, the private residence housed an illegal gambling operation. *See supra* notes 140-45 and accompanying text (discussing *Barton*).

It is important to note that this panel decision is without precedential value because the Eighth Circuit vacated the panel opinion by granting rehearing en banc. *United States v. Ryan*, 41 F.3d 361 (8th Cir. 1994). Strangely, the court en banc did not rule on the merits of the jury instruction, *i.e.*, whether receipt of out-of-state natural gas is sufficient to establish a nexus with interstate commerce. At trial, defendant did not object to the jury instructions, and consequently a "plain error" standard applied on appeal. *Id.* at 366. The court en banc held only that the jury instructions did not rise to the level of plain error. *Id.* at 367.

168. 24 F.3d 602 (4th Cir. 1994).

169. The court borrowed the logic of *Wickard v. Filburn*, 317 U.S. 111 (1942). The majority reasoned that although the amount of electricity used in the case was trivial, similarly situated buildings, in the aggregate, have an enormous effect on interstate commerce. *Ramey*, 24 F.3d at 607. The court concluded: "The class of activities not only 'affects' commerce, but is in fact the *raison d'être* of an interstate business. Congress has the power to protect this commerce from destruction by fire." *Id.* In his dissent, Judge Michael faulted the majority for misunderstanding Commerce Clause legislation. He lamented that "[t]he majority was blinded by its assumption that the commerce power is 'nearly boundless' . . . and therefore failed to take a hard look at the statutory language." *Ramey*, 24 F.3d at 610 (*en banc*) (Michael, J., dissenting) (citation omitted).

170. 9 F.3d 660 (8th Cir. 1993), *aff'd*, 41 F.3d 361 (8th Cir. 1994) (*en banc*). This three judge panel decision was vacated by the subsequent rehearing. For details on the subsequent history *see supra* note 167.

171. *Ryan*, 9 F.3d at 674, 676 (Arnold, C.J., concurring in part and dissenting in part).

172. *Id.* at 662.

173. *Id.*

174. *Id.* at 663.

sell the club.¹⁷⁵ The trial judge instructed the jury to find jurisdiction proper if defendant's father owned and leased the club to an out-of-state corporation.¹⁷⁶ Alternatively, the jury was instructed to find the interstate nexus satisfied if the club was heated with natural gas supplied from outside the state.¹⁷⁷

Reviewing the conviction, the Eighth Circuit began with the assumption that the club was a commercial endeavor.¹⁷⁸ The inquiry began and ended with the simple question of whether the jury instructions, when supported by the facts, would establish a nexus between the club and interstate commerce, as a matter of law.¹⁷⁹ The court held that they did.¹⁸⁰

Chief Judge Arnold dissented because he disagreed with the court's methodology. Arnold insisted that the court should walk through both steps in the two-part inquiry, rather than assuming that the property was commercial.¹⁸¹ The court should first examine the function of the property.¹⁸² Next, the court should ask whether that function affected interstate commerce.¹⁸³ Arnold noted that in this case, at the time of the fire, the club was permanently closed and no longer available for commercial use.¹⁸⁴ Thus, receipt of out-of-state natural gas, without proof that the club was a commercial enterprise, did not satisfy the

175. Ryan removed his personal property from the building and took a photographic inventory of the interior. *Id.* at 662.

176. *Id.* at 666. Apparently, the senior Ryan leased the club to an out-of-state corporation he owned. *Id.*

177. *Id.*

178. The court cited numerous decisions which found that temporary closings did not remove a business from interstate commerce. *Id.* at 666 n.3.

179. *Id.* at 666.

180. *Id.* at 667. In dictum, the court stated its belief that the record contained alternative grounds for finding that the nexus was satisfied. These grounds could not be considered, however. The trial judge had not instructed the jury to weigh these facts. *Id.* at 667 n.4.

181. Arnold concurred with all other parts of the opinion save one. *Ryan*, 9 F.3d at 674 (Arnold, C.J., concurring in part and dissenting in part).

182. *Id.* at 675.

183. *Id.*

184. *Id.*

requisite nexus.¹⁸⁵ Arnold recommended remanding the case for a new trial with instructions to apply a two-part nexus test.¹⁸⁶

IV. ANALYSIS

The controversy over § 844(i) jurisdiction boils down to one issue — in addition to business property, what types of private property trigger federal jurisdiction in arson cases? Congressional discretion restricted the range of property that triggers § 844(i) jurisdiction.¹⁸⁷ Some, but not all, types of private property damaged or destroyed by arson are subject to federal prosecution.¹⁸⁸ The plain meaning and legislative history of the statute, in addition to principles of statutory construction, favor a narrow reading of the statute.

Although terms of the statute appear to both limit and expand § 844(i) jurisdiction, the plain meaning of the statute suggests a narrow interpretation. "Affecting commerce" is a term of art Congress uses to indicate its intent to invoke the full power of the Commerce Clause.¹⁸⁹ As a practical matter, "affecting commerce" is a black hole through which all associated language is sucked into federal jurisdiction.¹⁹⁰

185. Nor does out-of-state ownership alone establish that the building's function had an effect on interstate commerce. *Id.*

186. *Id.* at 676. Dissenting in *Ramey*, Judge Michael adopted a similar line of reasoning. Michael emphasized that the language of the statute necessitated a primary question: "For what 'activity' is the [property] 'used'?" *United States v. Ramey* 24 F.3d 602, 610 (4th Cir. 1994). (Michael, J., concurring in part and dissenting in part). Judge Michael commented that § 844(i) requires at minimum a business "tinge" to the property. *Id.* at 611.

187. See *supra* note 111 (discussing the congressional debate); *infra* notes 197-203 and accompanying text for an analysis of the legislative history.

188. *Russell v. United States*, 471 U.S. 858, 862 (1985).

189. See *supra* note 62 and accompanying text.

190. Chief Justice Rehnquist insists that plenary Commerce Clause jurisdiction has a limit.

Thus, it would be a mistake to conclude that Congress' power to regulate pursuant to the Commerce Clause is unlimited. Some activities may be so private or local in nature that they simply may not be *in* commerce. Nor is it sufficient that the person or activity reached have *some* nexus with interstate commerce. Our cases have consistently held that the regulated activity must have a *substantial* effect on interstate commerce.

Hodel v. Virginia Surface Mining & Reclam. Ass'n., Inc., 452 U.S. 264, 310-11 (1981) (Rehnquist, J., concurring); see also *United States v. Lopez*, 115 S. Ct. 1124, 1630-31 (1995). Yet, that limit is difficult to envision. The Supreme Court has deferred to congressional findings in even the most extreme cases. See e.g., *Perez v. United States*,

Thus, the plain meaning appears to authorize federal jurisdiction over all property.¹⁹¹ Nonetheless, in this statute, jurisdiction is only conferred when property is “used . . . in any activity affecting interstate or foreign commerce.”¹⁹² This restriction limits the statute’s broad “affecting interstate commerce” language.¹⁹³

Comparison with the jurisdictional elements of other federal criminal statutes supports this narrow interpretation. In other federal criminal statutes, Congress hinged jurisdiction on a specified activity.¹⁹⁴ In § 844(i), however, Congress did not limit the type of activity involved, but instead limited the subject of the activity. The variation suggests a different scope of jurisdiction.

The plain meaning of § 844(i) indicates that “use” necessitates a function inquiry.¹⁹⁵ Yet, limiting jurisdiction to a property’s function does not resolve the conflict between broad and narrow interpretations. The Supreme Court’s interpretation of the plain meaning seemingly

402 U.S. 146 (1971) (holding that conviction for intrastate loan sharking was permissible under Commerce Clause even when Court found that criminal activities had no connection to interstate commerce); *Wickard v. Filburn*, 102 U.S. 111 (1942) (finding federal regulation of home-grown wheat for self-consumption proper under Commerce Clause); *United States v. Darby*, 312 U.S. 100 (1941) (allowing federal regulation of a class of activities without proof that the particular intrastate activity of the manufacturer affected commerce); *see also supra* note 41 and accompanying text (listing various criminal activities that Congress has federalized).

191. No court would claim that the language authorizes jurisdiction over all property. *See infra* note 207.

192. Section 844(i) offers two bases for jurisdiction. The first, “in commerce,” is a subset of the second “in any activity affecting commerce.” Thus, this analysis only focuses on the latter touchstone. *See supra* note 108 and accompanying text for further explanation of the “in commerce” prong. The Supreme Court noted that “*by its terms, however, the statute only applies to property that is ‘used’ in an ‘activity’ that affects commerce.*” *Russell v. United States*, 471 U.S. 858, 862 (1985).

193. *But see* *United States v. Stillwell*, 900 F.2d 1104, 1109 (7th Cir. 1990) (finding that, in *Russell*, the Supreme Court broadened interpretation of the statute), *cert. denied*, 498 U.S. 838 (1990).

194. *See supra* note part I.D. (describing this facet of other criminal commerce clause statutes).

195. Unfortunately, the *Russell* Court did not define “used.” The dictionary defines the verb to “use” as “to carry out a purpose or action.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2524 (1986). Webster’s defines the noun “use” as: “a particular service or end: PURPOSE, OBJECT, FUNCTION . . .” *Id.* at 2523. Thus, Chief Judge Arnold appropriately recharacterized the use requirement into a function test. *See supra* notes 181-86 and accompanying text for a discussion of Judge Arnold’s analysis.

necessitates a two-step analysis: (1) How was the property "used?" and (2) Do any activities for which the property was "used" affect interstate commerce?¹⁹⁶ The first step limits jurisdiction to property that serves the function of the property. The second step, however, can be interpreted to expand this limitation to the infinite range of relationships that characterize a property's function. In the second step, "affecting commerce" sucks the limiting term "used" into unlimited federal jurisdiction over all property damaged or destroyed by arson.

The legislative history suggests that this is a perverse result.¹⁹⁷ Congress recognized that private residences would not be protected,¹⁹⁸ even though it made no amendment to remedy the omission.¹⁹⁹ In addition, two principles of statutory construction favor a narrow

196. See *United States v. Ryan*, 9 F.3d 660 (8th Cir. 1993), (Arnold, C.J., concurring in part and dissenting in part), *aff'd*, 41 F.3d 361 (8th Cir. 1994) (*en banc*).

197. The legislative history indicates that not all property is protected. See *infra* note 198. Yet, with only "affecting commerce" as a guideline, even "the use of out-of-state nails in the construction of a private residence would establish jurisdiction . . ." *United States v. Moran*, 845 F.2d 135, 138 (7th Cir. 1988).

198. During congressional debate over § 844(i), protection of private residences was discussed:

Mr. Hungate. Mr. Chairman, is there anywhere in that language to which the gentleman refers which would provide for an investigation where there was a bombing of a residence—not in interstate commerce?

Mr. Celler. There is none today and you must remember that the mere bombing of a private home even under this bill would not be covered because of the question of whether the Congress would have the authority under the Constitution.

116 CONG. REC. 35,359 (1970).

199. See *United States v. Montgomery*, 815 F. Supp. 7, 11 (D.D.C. 1993) ("It is inconceivable that . . . the Congress that approved Section 844(i) contemplated that such a statute . . . would be applied to enclaves protected by federal criminal law every private home . . ."); see also *United States v. Mennuti*, 639 F.2d 107, 113 (2d Cir. 1981) (holding that Congress did not exercise the power to protect private residences); *United States v. Monholland*, 607 F.2d 1311, 1316 (10th Cir. 1979) (finding that nothing in the statute indicated Congress intended to include all property). But see *United States v. Stillwell*, 900 F.2d 1104 (7th Cir. 1990), *cert. denied*, 498 U.S. 838 (1990). The Seventh Circuit, however, believed that the congressional debate reflected that:

In reaching his conclusion, Representative Celler did not rely on congressional intent to exclude private homes. Rather, he relied on the fact that Congress may not have the power under the commerce clause to reach private homes. The inference is that if a private residence did have a sufficient connection with interstate commerce to satisfy the commerce clause, the statute would cover that residence.

Id. at 1109; see *supra* note 198 for text of debate.

interpretation.²⁰⁰ First, in criminal statutes, ambiguity should be resolved in favor of the defendant.²⁰¹ Second, courts should not alter the sensitive federal-state balance because arson is traditionally a state matter.²⁰² Congress did not plainly and clearly convey the intent to protect private property. "Used" is an ambiguous characterization of property.²⁰³ Thus, courts should only permit prosecution for damaging or destroying business property, and other facilities open to large segments of the public such as churches, synagogues, and police stations.

The challenge is fashioning a rule from the language of § 844(i) that includes the property mentioned above, but excludes all else. Courts have struggled to articulate a test that accurately reflects the plain meaning of the statute and faithfully fulfills congressional intent. The two methods of analysis the courts have developed are flawed.²⁰⁴

The de minimis test is overinclusive. The de minimis test is not limited to activities for which the property is used.²⁰⁵ Under a de minimis test, any relationship between the property and commerce triggers federal jurisdiction,²⁰⁶ and effectively, all property comes

200. *But cf.* Jeanne F. Philips, Note, *Determining the Proper Scope of Section 2113(b) of the Federal Bank Robbery Act*, 51 *FORDHAM L. REVIEW* 536 (1982) (arguing that the non-Commerce Clause jurisdictional element of section 2113(b) of the Federal Bank Robbery Act should not be narrowly interpreted notwithstanding the rule of lenity and the sensitive federal-state balance).

201. *Rewis v. United States*, 401 U.S. 808, 812 (1971); *United States v. Bass*, 404 U.S. 336, 347 (1971); *see supra* note 57 and accompanying text.

202. Panneton, *supra* note 52 at 161; *see supra* notes 59-60 and accompanying text.

203. A property may have many functions, some of which, but not all affect interstate commerce. *See infra* notes 209-16 and accompanying text for a discussion of the problems associated with a function test.

204. *See supra* part III for an outline of the two tests applied to the jurisdictional element of § 844(i).

205. The Seventh Circuit explained that "[a]ccording to *Russell*, Congress intended § 844(i) to reach every private residence it constitutionally has the power to reach, whether or not the residence is used for commercial purposes." *United States v. Stillwell*, 900 F.2d at 1104, 1109 (7th Cir. 1990), *cert. denied*, 498 U.S. 838 (1990).

206. For example, following the rationale used by the Supreme Court in *Perez v. United States*, 402 U.S. 146 (1971), the *Stillwell* court held that "the relevant inquiry is whether the aggregate class of activities, here, all arson of private homes supplied with interstate natural gas, has more than a de minimis effect on interstate commerce." *Stillwell*, 900 F.2d at 1111. Under a de minimis standard, the minimal links to commerce necessary to establish jurisdiction border on outrageous. Arguing that a de minimis standard applied, the prosecutor in *United States v. Montgomery* offered as proof of jurisdiction over the burning of a private residence:

within the reach of § 844(i).²⁰⁷

On the other hand, the private/business test is underinclusive. The private/business test narrows the range of property that triggers § 844(i) jurisdiction.²⁰⁸ The private/business test, however, draws an inappropriate distinction. Under a private/business test, all private property is excluded from § 844(i) jurisdiction. Therefore, the statute cannot protect such quasi-public facilities as churches, synagogues, and police stations.

A two-step function test, as suggested by Chief Judge Arnold in *Ryan*, is faithful to the plain meaning of § 844(i), but must navigate two problems. First, the function of property is not always clear. A function test requires that courts limit identification of function to the property's primary role.²⁰⁹ In some cases, when choosing the primary role of the property, the court must split hairs. For example, imagine the case of parents with an empty nest.²¹⁰ If they rent out the attic to college

Magazine subscriptions delivered to the [owners'] home; their use of computer software manufactured by IBM in Armonk, New York; the mailing of an \$80 check to California for [one owner's] nursing board certification; the supply of natural gas, insurance on the house and van, and financing for the home from sources outside the District; the employment of a housekeeper during the week, including the provision of room and board for her and the fact that she "regularly sends a portion of her salary back to Chile"; and [the owner's] part-time, \$5500-per-year job in nurse training as an "independent contractor" for Mosby Year Book Inc.; not to mention the use of their van for shopping trips to Freshfields of Bethesda.

United States v. Montgomery, 815 F. Supp. 7, 11 n.6 (D.D.C. 1993). Judge Oberdorfer found such evidence insufficient to establish jurisdiction. *Id.* at 11.

207. See, e.g., *United States v. Stillwell*, 900 F.2d 1104 (7th Cir. 1990) (finding receipt of interstate natural gas by a private residence enough to trigger federal jurisdiction), *cert. denied*, 498 U.S. 838 (1990); *United States v. Moran*, 845 F.2d 135 (7th Cir. 1988) (holding that use of computer owned by business involved in interstate commerce and interstate business telephone calls at private residence which was bombed by defendant afforded sufficient basis for jurisdiction); see also *supra* notes 118-30 and accompanying text (discussing the rationale supporting the de minimis test).

208. See *supra* notes 131-45 and accompanying text.

209. The dictionary defines the noun "function" as: "The action for which a person or thing is specially fitted, used, or responsible or for which a thing exists: the activity appropriate to the nature or position of a person or thing: *Role, Duty, Work . . . Purpose.*" (emphasis added). WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 920 (1986).

210. The *Ryan* case presents a prime example of the potential difficulties courts face in characterizing function. In *Ryan*, the dissent suggested the case be remanded to the trial court to determine the "function" of the building. The building in *Ryan* a defunct health club, and at the time was unused. See *supra* notes 172-77 and accompanying text (discussing the *Ryan* case). First, who decides this question, i.e. is it a factual matter for

students during the school year, how will the house be characterized under a function test?²¹¹ What is the result if the parents later move into a smaller home but let the recent graduates continue to rent the old home?²¹² The potential for multiple roles is not a fatal flaw, but merely requires courts to conduct careful analysis.²¹³

Second, the language of the statute does not clearly convey which types of property Congress intended to protect. Because of the broadly interpreted "affecting commerce," the function limitation is doomed to the black hole of universal federal jurisdiction.²¹⁴ Principles of statutory construction, however, require courts to interpret the statute narrowly for two reasons. First, because § 844(i) levies criminal penalties and the meaning of "property used . . . in any activity affecting commerce" is not "plain and clear," the rule of lenity is invoked.²¹⁵ Second, the federal power should not be read so broadly as to disturb the sensitive federal-state balance.²¹⁶ Thus, like the *de minimis* test, the two-step function

the jury or rather a legal question for the court? Second, what criteria should be used in the determination. In *Ryan* the facts did not generate a clear, common-sense response.

211. This fact scenario could go either way. On one hand, the Supreme Court in *Russell* clearly stated that rental property is protected. Nevertheless, the home's function is as a private residence. Perhaps the home should not be characterized as business property when the rental is incidental to its the primary role as a home.

212. Here, the result seems clear. When the owners moved out, the function of the property changed from a private residence to a rental unit. Under *Russell*, an arsonist would face federal charges under § 844(i) for burning the house, the property would be protected by § 844(i).

213. Courts already make such distinctions. *See, e.g.,* *United States v. Barton*, 647 F.2d 224 (2d Cir. 1981) (permitting jurisdiction when gambling in private residence created a commercial character to the home), *cert. denied*, 454 U.S. 857 (1981); *United States v. Miller*, No. 89-5646, 1991 U.S. App. LEXIS 3564, at *8-*9 (4th Cir. March 7, 1991), *reported as Table Case*, 927 F.2d 597 (4th Cir. 1991) (declining to rule on whether use of an out-of-state natural gas satisfies jurisdictional element, but allowing jurisdiction when owner of out-of-state private residence sold used auto parts, performed mechanical repairs and body work on autos from the residence, and posted notices in other states to solicit customers).

214. *See supra* note 190 and accompanying text.

215. *See United States v. Bass*, 404 U.S. 336, 347 (1971).

216. Upsetting the federal-state balance has very real consequences. First, it usurps state sovereignty. Justice Black observed: "Federal assumption of the job of enforcing [state criminal] laws must of necessity tend to free the states from a sense of responsibility for their own local conditions." *Rutkin v. United States*, 343 U.S. 130, 142 (1952) (Black, J., dissenting). Second, it results in a "substantial extension of federal police resources." *Bass*, 404 U.S. at 350. Third, it "adversely impact[s] criminal procedure in the Federal courts . . . [It] swamp[s] the Federal courts with routine cases that states are better

test is unable discriminate between property Congress did and did not intend to protect.

V. PROPOSAL

To correct these problems in the statute, Congress should amend § 844(i). Congress should insert the "for business purposes" language which was cut from the original bill. In addition, Congress should specifically include churches, synagogues, police stations and other building deserving special consideration.²¹⁷ Congressional findings that these buildings affect commerce will insure that these institutions are protected.

In the more likely event that Congress does not amend the statute according to this proposal, then it is recommended that the courts adopt a two-part function test as Judge Arnold has proposed in his dissent in *United States v. Ryan*. Courts should ask first, what is the function of the property and then, does this function affect commerce. In addition, due to statutory ambiguity and concerns for the federal-state balance of power, courts should narrow the test.

First, courts should characterize the primary function of the property as either business or nonbusiness. If the property has a business function, then jurisdiction would be proper. If the property has a nonbusiness function, then jurisdiction would be presumed improper. The presumption could be rebutted if the government shows that a nonbusiness property nevertheless affects commerce.

As described, this two-part function test would protect churches, synagogues, and police stations under § 844(i). Applying the test, federal jurisdiction would be per se improper since the function of these buildings is nonbusiness. However, because churches, synagogues, and

equipped to handle, and will weaken the ability of these courts effectively to deal with the difficult criminal cases that present uniquely Federal issues." Letter from the Honorable Vincent L. Broderick, Chairman, Committee on Criminal Law and Probation Administration of the Judicial Conference of the United States, to Representative Henry Hyde of the House Committee on the Judiciary 2 (Nov. 22, 1991), reprinted in *Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations for 1993, Hearings before a Subcomm. of the House Committee on Appropriations*, 102d Cong., 2d Sess. 437, 438 (1992).

217. Churches, synagogues, and police stations can be characterized as nonprofit, quasi-public property. Perhaps other similar types of property should be protected — for example, art museums, parks, zoos.

police stations are publicly-oriented property, operating in a nonprofit capacity, the presumption would be rebutted and the property protected under § 844(i).

This test is faithful to the plain meaning of the statute, congressional intent, and judicial rules of statutory construction. This test follows a two-step methodology that limits the inquiry to the property's use. All business property is protected. In addition, some private property is covered but only if its function rises to a commercial level.²¹⁸ This narrow interpretation of § 844(i) satisfies both the rule of lenity and concerns for the federal-state balance of power.

VI. CONCLUSION

Congress should learn from the mistakes of § 844(i). In the future, Congress should be careful to specify the types of activity and property it seeks to protect through criminal sanctions. In addition, the judiciary should be very cautious when interpreting § 844(i). Congress apparently intends to continue the trend to federalize common law crimes.²¹⁹ In the process, some of the new criminal penalties may hinge federal jurisdiction on the type of injury, as in § 844(i), rather than the specific activity. In that case, the twenty-five year debate over the meaning of "property used . . . in any activity affecting commerce" may prove valuable as guiding precedent to future debates.

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218. For purposes of § 844(i), property can be characterized along a spectrum according to the degree of its relationship with commerce. At the two ends of the spectrum are purely private and purely commercial property. Purely private property is only theoretical. Out of an infinite number of relationships, commerce will touch all property in some respect.

219. See *supra* notes 1-2 and accompanying text.

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