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## The Sexual Offender Registration and Notification Act: No More than "Statutory 'Lip Service' to Interstate Commerce"

Lindsey B. Fetzer

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# The Sexual Offender Registration and Notification Act: No More than "Statutory 'Lip Service' to Interstate Commerce"<sup>1</sup>

Lindsey B. Fetzer\*

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\* J.D., *magna cum laude*, Washington and Lee University School of Law, 2010; B.A., Vanderbilt University, 2006. I thank Professor John D. King of Washington and Lee University for his patience, support, and guidance.

1. See *United States v. Powers*, 544 F. Supp. 2d 1331, 1335 (M.D. Fla. 2008) (holding that a provision criminalizing the failure to register or update sex-offender registration was beyond the scope of Congress's power under Commerce Clause).

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*Introduction*

Brandon was a senior in high school when he met a 14-year-old girl on a church youth trip. With her parents’ blessing, they began to date, and openly saw each other romantically for almost a year. When it was disclosed that consensual sex had occurred, her parents pressed charges against Brandon. Brandon was convicted of sexual assault and placed on the sex offender registry in his state.<sup>2</sup>

Enacted in 2006, Title I of the Adam Walsh Act (AWA)<sup>3</sup> contains a comprehensive revision of the national standards for sex offender registration and notification.<sup>4</sup> That Title of the AWA, the Sexual Offender Registration and Notification Act (SORNA), creates a new federal crime allowing for the prosecution of individuals who fail to register as required by SORNA.<sup>5</sup> The failure to register crime is codified at 18 U.S.C. § 2250(a).<sup>6</sup> Notably, § 2250(a)(2)(B) requires that an offender convicted of a state sex offense travel in interstate commerce before he can be subject to federal prosecution under § 2250(a)(2)(B).<sup>7</sup>

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2. HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US, Sept. 2007, at 5, available at <http://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf>.

3. Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. §16901.

4. Sex Offender Registration and Notification Act 42 U.S.C.A. 16913 (West 2010).

5. See 18 U.S.C. § 2250(a) (2006) (making it a crime for anyone who "knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act").

6. See *id.* (making the failure to register or update sex-offender registration a crime).

7. See *id.* (making it a crime for anyone who "travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country" and knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act).

Pursuant to SORNA, if Brandon has ever traveled or will ever travel in interstate commerce, he is subject to prosecution for the federal crime of failure to register.<sup>8</sup> Brandon's travel in interstate commerce need neither be with the intent of evading registration requirements nor contemporaneous with his hypothetical failure to register.<sup>9</sup> Brandon, a high school student convicted of having consensual sex with his teenage girlfriend, will have to register in the jurisdiction in which he lives, in the jurisdiction where he goes to school, and in the jurisdiction where he is employed.<sup>10</sup> If at any time Brandon fails to register, he will be subject to up to ten years of incarceration.<sup>11</sup> There is no requirement that the penalty imposed for failure to register be proportional to the penalty imposed for the original crime.<sup>12</sup>

This Note argues that § 2250(a)(2)(B) impermissibly exceeds Congress's Commerce Clause authority. Although all circuit courts considering this issue have upheld the constitutionality of § 2250(a)(2)(B), a growing minority of federal district courts are striking down § 2250(a)(2)(B) as an impermissible exercise of congressional power.<sup>13</sup> To consider SORNA and its relationship with the Commerce Clause, this Note consists of four substantive Parts.

Part I analyzes the history of sex offender registration and notification statutes. After a brief historical overview, this Part focuses on the Wetterling Protection and Safety Act and its presumed deficiencies. Part II focuses on the AWA, SORNA, and 18 U.S.C. § 2250. This Part surveys the scope of the legislation, examines the specific language of the failure to register crime, and highlights the various constitutional issues that have arisen.

Next, Part III provides an overview of modern Commerce Clause jurisprudence, summarizes each of the relevant circuit court decisions, and highlights some of the federal district courts considering this issue. Part III exposes the varied application of *Lopez*, *Morrison* and *Raich* to SORNA by

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8. *See id.* (making the failure to register or update sex-offender registration a crime).

9. *See id.* (stating only "travel[ing] in interstate or foreign commerce" as a condition for prosecution, with no mention of intent to evade the registration requirement).

10. *Id.*

11. *See* 18 U.S.C. § 2250 (2006) (noting that whoever violates this provision "shall be fined under this title or imprisoned not more than 10 years, or both").

12. *Id.*

13. *See e.g.*, *U.S. v. Nasci*, 632 F. Supp. 2d 194, 196 (N.D.N.Y. 2009) (declaring that SORNA was not a constitutional exercise of Congress's power under the Commerce Clause).

lower courts. Finally, this Note considers whether § 2250(a)(2)(B) is a permissible exercise of congressional commerce powers. Notwithstanding the presence of the jurisdictional element, Part IV concludes that § 2250(a)(2)(B) is inadequate to support Commerce Clause authority. In reaching this conclusion, this Note suggests that courts should apply some level of heightened scrutiny to Commerce Clause challenges and posits that § 2250(a)(2)(B) cannot be sustained under any of the three *Lopez* categories of permissible regulation.

### *I. The History of Sex Offender Registration and Notification Statutes*

#### *A. Early State Legislation*

While Title I of the AWA is new, sex offender registration and notification laws are not.<sup>14</sup> Although most registration laws were promulgated in the 1990s, a few states have had registration statutes for over seventy years.<sup>15</sup> In 1937, Florida was the first state to adopt a registration law; the law, however, required registration only of those convicted of felonies involving moral turpitude and living in the state's three most populous counties.<sup>16</sup> In 1947, California "enacted the nation's first registration law of state-wide application, targeting convicted sex-offenders."<sup>17</sup> Despite lobbying efforts, interest by state governments in sexual offender registration statutes remained, at best, moderate—by 1989 only twelve states had implemented registration laws.<sup>18</sup>

A radical change in public policy occurred in the 1990s.<sup>19</sup> Several high-profile sexual assaults of children by convicted sex offenders incited

14. Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. 16901.

15. See HUMAN RIGHTS WATCH, *supra* note 2, at 35 ("While a few states have had sex offender registries since the 1940s, most states began creating registries in the 1990s.").

16. See generally WAYNE A. LOGAN, KNOWLEDGE AS POWER: A HISTORY OF CRIMINAL REGISTRATION LAWS IN AMERICA (Stanford Univ. Press 2008) (providing a general discussion on the history of state and federal sexual offender registration and notification statutes), and Wayne A. Logan, *Sex Offender Registration and Community Notification: Past, Present and Future*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 5 (2008) [hereinafter Logan, *Sex Offender Registration*] (discussing the history of sexual offender registration and notification statutes).

17. Logan, *Sex Offender Registration*, *supra* note 16.

18. See *id.* (discussing local and state registration laws).

19. See *id.* ("From 1990 onward, however, public policy radically changed when a handful of high-profile sexual assaults of children by ex-offenders inspired legislative attention.").

community outrage and, as a response, notification statutes rapidly swept the country.<sup>20</sup> Most notably, the tragic assault and murder of Megan Kanka was the catalyst for New Jersey to enact the first notification statute aptly named Megan's Law.<sup>21</sup>

*B. An Overview of Federal Legislation Leading up to the Adam Walsh Act: The Wetterling Act*

Shortly after New Jersey signed its registration statute into law, President Clinton enacted the first federal offender registration law—the Jacob Wetterling Crimes against Children and Sexual Violent Offenders Registration Act ("Wetterling Act").<sup>22</sup> The Wetterling Act conditioned certain "federal law enforcement funding on the States' adoption of sex offender registration laws and set [] minimum standards for state programs."<sup>23</sup> In 1996, the Act was amended to include provisions for community notification.<sup>24</sup> The Wetterling Act, and its later amendments, did not impose federal criminal liability for failure to comply with the statutory requirements.<sup>25</sup> According to its principal author, the purpose of the Wetterling Act was to prod all states to enact sex offender legislation laws and to provide for a national registration system to handle offenders

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20. *See id.* (discussing how the sexual abuse and murder of Megan Kanka by a convicted sex offender spawned national interest in state legislation—such legislation became known as "Megan's Laws"); *see also* Smith v. Doe, 538 U.S. 84, 89 (2003) (describing that the seven-year-old girl, Megan Kanka "was sexually assaulted and murdered in 1994 by a neighbor who, unknown to the victim's family, had prior convictions for sex offenses against children").

21. *See* N.J. STAT. ANN. §§ 2C:7–12 (2001) (declaring that "the public safety will be enhanced by making information about certain sex offenders contained in the sex offender central registry . . . available to the public through the Internet").

22. *See* 42 U.S.C. § 14071 (2006) (stating that the Attorney General shall establish guidelines for State programs); *see also* Corey R. Yung, *One of These Laws is Not Like the Others: Why The Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 HARV. J. ON LEGIS. 369, 372 (2009) (discussing the enactment of the Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act).

23. *Doe*, 538 U.S. at 89–90.

24. *See* 42 U.S.C. § 14071(e)(2) (2006) ("The State or any agency authorized by the State shall release relevant information that is necessary to protect the public concerning a specific person required to register under this section . . .").

25. *See* 42 U.S.C. § 14071(d) (2006) (discussing that the failure to register under a State program will subject the individual to "criminal penalties in any State in which the person has so failed").

who move from one state to another.<sup>26</sup> Conditioned upon the receipt of federal funding, by 1996 every state had enacted some type of sexual offender registration legislation.<sup>27</sup>

## II. *The Sexual Offender Registration and Notification Act (SORNA)*

Although the Wetterling Act successfully prompted all states and the District of Columbia to enact some type of Megan's Law, the Act failed to establish an effective uniform national registration system.<sup>28</sup> Despite various amendments to the Act, an estimated 100,000 out of 500,000 offenders remained "unregistered and their locations unknown to the public and law enforcement."<sup>29</sup> Additionally, "there [remained] a 200,000 person difference between all of the state registries and the federal National Sex Offender Registry."<sup>30</sup> To strengthen registration and notification provisions and to cure deficiencies of past legislation, in 2005, three separate bills were introduced into Congress.<sup>31</sup> The bill known as the Adam Walsh Act soon gained bipartisan approval.<sup>32</sup>

On July 27, 2006, President Bush signed the AWA into law.<sup>33</sup> Named after Adam Walsh, the AWA was enacted on the twenty-fifth anniversary of his abduction and disappearance.<sup>34</sup> This comprehensive piece of

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26. 139 CONG. REC. H10321 (1993); *see also* HUMAN RIGHTS WATCH, *supra* note 2, at 42 ("One of the goals of the Act was to create more uniformity among state registration schemes, to avoid some of the confusion as to registration requirements when registrants moved to different states.").

27. *See* HUMAN RIGHTS WATCH, *supra* note 2, at 52 (noting that all 50 states and the District of Columbia passed their own Megan's Laws).

28. *See id.* at 42 (noting that uniformity will be elusive because the "Act does not limit the authority of states to go beyond federal law").

29. 152 CONG. REC. H5722 (2006).

30. *Id.* at H5726.

31. *See* Logan, *Sex Offender Registration*, *supra* note 16, at 6 (discussing the enactment of three separate bills that sought to strengthen registration and notification in various ways).

32. *See id.* at 6–7 (noting that the Adam Walsh Act gained approval under the leadership of Congressman Mark Foley).

33. Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. § 16901; *see also* Logan, *Sex Offender Registration*, *supra* note 16, at 7 n.22 ("Under the terms of the AWA, the Wetterling Act and other federal registration provisions will cease to be in effect either as of July 27, 2009 or one year after the availability of computer software to be used by states to implement the AWA, whichever is later.").

34. *See* Kris Axtman, *Efforts to Grow to Keep Tabs on Sex Offenders*, CHRISTIAN SCIENCE MONITOR, July 28, 2008, at 1 (noting that child advocates call the Adam Walsh

legislation sought to "protect the public from sex offenders and offenders against children . . . [and to] establish[] a comprehensive national system for the registration of those offenders."<sup>35</sup> The Act instituted sweeping changes giving the federal government significantly more control over the regulation of sex offenders.<sup>36</sup>

*A. Overview of Title I of the Adam Walsh Act: The Sexual Offender Registration and Notification Provision (SORNA)*

SORNA, Title I of the AWA, functions as an independent and stand-alone piece of legislation.<sup>37</sup> In passing SORNA, Congress sought to "close potential gaps and loopholes under the old law, and [to] generally strengthen the nationwide network of sex offender registration and notification programs . . . ."<sup>38</sup> To protect the public from sex offenders, SORNA requires the creation of a national sex offender registry,<sup>39</sup> makes registration of qualifying offenders mandatory,<sup>40</sup> creates a federal substantive crime for failing to register,<sup>41</sup> and retroactively applies to offenses committed before the promulgation of SORNA.<sup>42</sup> Although the general effectiveness of SORNA raises legitimate questions, this Note

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Child Protection and Safety Act of 2006 "the most sweeping sex-offender legislation in 25 years . . . "); see also Ron Ishoy, *Adam Walsh Murder Case Unsolved, But Tragedy Helped Change U.S. Laws*, MIAMI HERALD, July 28, 1991, at 1A (reporting that the abduction of Adam Walsh from a shopping mall in Florida served as the catalyst for his father, John Walsh, to advocate for missing children and to host the television show *America's Most Wanted*).

35. See Logan, *Sex Offender Registration*, *supra* note 16, at 7 (citing 42 U.S.C. § 16901 (2006)).

36. See Craig Albee, *SORNA: What Every Wisconsin Criminal Defense Lawyer Should Know*, 16 THE WISC. DEFENDER 1, 2 (2008) (noting that the AWA established a new national sex offender registration law (SORNA), eliminated statutes of limitations for most offenses, created new substantive crimes, increased mandatory minimum and statutory maximum sentences for federal crimes against children and sex crimes, and created a national sex offender registry).

37. See Sex Offender Registration and Notification Act, 42 U.S.C. § 16901 (2010) (declaring the purpose of the Sex Offender Registration and Notification Act).

38. The National Guidelines for Sex Offender Registration and Notification, 72 Fed. Reg. 30210-01 (May 30, 2007).

39. 42 U.S.C. § 16912(a) (2006).

40. 42 U.S.C. § 16911 (2006).

41. 18 U.S.C. § 2250(a) (2006).

42. 28 C.F.R. § 72.3 (2007).

focuses exclusively on the constitutional issues raised by the new federal crime for failing to register as a sex offender.<sup>43</sup>

*B. The New Federal Crime for a Sex Offender's Failure to Register:  
18 U.S.C. § 2250(a)*

*1. Analysis of Statutory Language*

Distinct from the Wetterling Act, SORNA makes it a federal felony to knowingly fail to register as a sex offender. Pursuant to the crime for failing to register, "sex offenders are required to comply with the SORNA registration requirements in the jurisdictions in which they reside, are employed, or attend school as mandatory conditions of their federal supervision . . . and may be prosecuted under 18 U.S.C. § 2250 if they fail to do so."<sup>44</sup> The statute provides:

(a) In general. —Whoever—

(1) Is required to register under the Sex Offender Registration and Notification Act;

(2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification and Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of

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43. As a general matter, a number of factors intimate that SORNA fails to accomplish its stated purpose of effectively promoting public safety. First, SORNA is both over-inclusive and under-inclusive in scope. While the legislation imposes an overly broad definition of "sex offender" it simultaneously fails to address many issues inextricably intertwined with public safety. *See, e.g.*, 42 U.S.C. § 16911(5)(A)(i) (2006) (defining a sex offender as an individual convicted of "a criminal offense that has an element involving a sexual act of sexual contact with another"). For example, SORNA fails to acknowledge that family friends and acquaintances commit the vast majority of sex offenses against children. Second, unfettered access to online databases makes it unduly burdensome for the sex offender to re-assimilate into the community. Registry requirements make it difficult for the offender to secure stable employment or housing and, in some circumstances, has led to vigilante violence. *See* Daniel L. Feldman, *The "Scarlett Letter Laws" of the 1990's: A Response to Critics*, 60 ALB. L. REV. 1081, 1103 (1997) (stating that between seventy-five and eighty-nine percent of sex offenses are committed by relatives and friends). Finally, the relationship between SORNA and public safety is unknown. Very little empirical research speaks to the effectiveness of either SORNA or previous legislation. *See generally* Sarah Welchans, *Megan's Law: Evaluations of Sexual Offender Registries*, 16 CRIM. JUST. POL'Y REV. 123 (2005) (providing a literature review of the empirical evaluations of sex offender registration and community notification policies).

44. The National Guidelines for Sex Offender Registration and Notification, 72 Fed. Reg. 30210-01 (May 30, 2007).

the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update registration as required by the Sex Offender Registration and Notification Act

shall be fined under this title or imprisoned not more than ten years, or both.<sup>45</sup>

As evidenced by § 2250(a), the failure to register crime encompasses two distinct groups of offenders.<sup>46</sup> Section § 2250(a)(2)(A) requires that, regardless of interstate travel, all sex offenders convicted of federal crimes register, and § 2250(a)(2)(B) requires that those sex offenders convicted of state crimes register only when the individual travels in interstate commerce.<sup>47</sup> That said, only § 2250(a)(2)(B) contains a jurisdictional element. While both provisions are subject to constitutional scrutiny, this Note focuses exclusively on the constitutionality of § 2250(a)(2)(B).

Section 2250(a) imposes the stringent penalty of up to ten years imprisonment upon individuals who knowingly fail to either register or update their registration.<sup>48</sup> Separate provisions contained within SORNA delineate the requirements for who is required to register, how that individual initially registers, and when that individual must update such registry information.<sup>49</sup> There is no requirement that the penalty imposed for the failure to register be proportional to the penalty imposed for the original crime.<sup>50</sup> The penalty clause of §2250(a) "can be an order of magnitude greater than the maximum allowable for the offender's original offense."<sup>51</sup> Finally, although the statute's mens rea element requires knowledge,

45. 18 U.S.C. § 2250(a) (2006).

46. *See id.* (making failure to register or update sex-offender registration a crime for both sex offenders in general and sex offenders who travel in interstate or foreign commerce).

47. 18 U.S.C. § 2250(a)(2)(B) (2006).

48. *See* 18 U.S.C. § 2250(a) (2006) (stating that those who are required and knowingly fail to register "shall be fined under this title or imprisoned not more than 10 years, or both").

49. *See* 42 U.S.C. § 16911 (2006) (defining a sex offender as "anyone who has committed a sex offense" and creating a three-tiered system which categorizes offenders based upon the seriousness of their offense(s) and imposes various levels of registry requirements).

50. *See* 42 U.S.C § 16913 (2006) (defining the initial registry requirements for offenders and providing how those offenders can keep their registry current).

51. Yung, *supra* note 22, at 380.

knowledge is presumed under American common law.<sup>52</sup> Accordingly, § 2250(a) has been interpreted to function as a strict liability crime.<sup>53</sup>

## 2. Constitutional Challenges to 18 U.S.C. § 2250(a)(2)(B)

The constitutionality of 18 U.S.C. § 2250(a)(2)(B) has been challenged on several grounds. These challenges have been met with relatively little success.<sup>54</sup> First, defendants argue that Congress unconstitutionally delegated its legislative authority to the Attorney General and, consequently, that SORNA violates the nondelegation doctrine.<sup>55</sup> Second, defendants assert that SORNA violates the Ex Post Facto Clause by increasing the punishment one received for the commission of a sex offense that occurred before SORNA's effective date.<sup>56</sup> Third, advancing several varying rationales, defendants argue that SORNA violates the Due Process Clause.<sup>57</sup> Finally, defendants contend

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52. *See id.* (discussing the mens rea requirement and the presumption of knowledge of the law).

53. *See id.* ("It is hard to imagine many fact patterns in which lack of knowledge is a defense since knowledge of the law is presumed under U.S. common law.")

54. *See generally* Tracy Bateman Farrell, *Validity, Construction, and Application of Federal Sex Offender Registration and Notification Act (SORNA)*, 42 U.S.C.A. §§ 16902 *et seq.*, its *Enforcement Provision*, 18 U.S.C.A. § 2250, and *Associated Regulations*, 30 A.L.R. FED. 2d 213 (2008) [hereinafter 30 A.L.R. FED. 2d 213] (providing a collection and analysis of cases, updated weekly, that have considered the constitutionality of SORNA).

55. *See, e.g.*, *United States v. Gould*, 526 F. Supp. 2d 538 (D. Md. 2007) (holding that SORNA does not violate the nondelegation doctrine); *see generally* 30 A.L.R. FED. 2d 213, *supra* note 54 (providing an exhaustive list of the cases that have considered whether SORNA violates the nondelegation doctrine). To date, no federal court considering the issue has found that Congress violated the nondelegation doctrine by giving the Attorney General the authority to issue a ruling as to the retroactive application of SORNA. *See* 30 A.L.R. FED. 2d 213, *supra* note 54.

56. *Compare* *United States v. Ditomasso*, 552 F. Supp. 2d 233 (D.R.I. 2008) (holding that SORNA does not violate the Ex Post Facto Clause), *with* *United States v. Gillette*, 553 F. Supp. 2d 524 (D.V.I. 2008) (holding that SORNA was unconstitutional as applied to those who traveled in interstate commerce before the effective date of SORNA). *See generally* 30 A.L.R. FED. 2d 213 (providing a list of the cases considering the Ex Post Facto Clause and SORNA).

57. *See* *United States v. Pitts*, 2008 WL 474244 (M.D. La. 2007) (holding that the defendant's procedural due process rights were not violated on the ground that the defendant did not have notice of SORNA's registration requirement), *and* *United States v. Mason*, 510 F. Supp. 2d 923 (M.D. Fla. 2007) (holding that SORNA did not violate substantive due process because the legislation was rationally related to a legitimate government interest). *But see* *United States v. Barnes*, 2007 WL 2119895 (S.D.N.Y. 2007) (holding that the defendant's procedural due process rights were violated on the ground that the defendant did

that Congress's enactment of SORNA is an impermissible exercise of its Commerce Clause powers.<sup>58</sup>

*III. The Commerce Clause and SORNA: Supreme Court Jurisprudence and Federal Court Treatment of Commerce Clause Challenges to SORNA*

Unlike state laws, a federal law must be premised on an enumerated power.<sup>59</sup> Basic to the American scheme of federalism, this requirement sought to create spheres of authority to "ensure protection of our fundamental liberties."<sup>60</sup> "[T]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite."<sup>61</sup> The Constitution delegated the power to regulate interstate commerce to Congress.<sup>62</sup> Congress finds constitutional support for 18 U.S.C. § 2250(a)(2)(B) in the Commerce Clause.<sup>63</sup>

*A. Modern Commerce Clause Jurisprudence: Lopez, Morrison, and Raich*

The scope of congressional powers under modern Commerce Clause jurisprudence is largely defined by three cases: *United States v. Lopez*,<sup>64</sup> *United States v. Morrison*,<sup>65</sup> and *Gonzalez v. Raich*.<sup>66</sup> In *Lopez*, Chief Justice Rehnquist, for the first time in sixty years, held that Congress, by

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not have notice of SORNA's registration requirement).

58. See *infra* Part III and accompanying notes and text (discussing the validity of the Commerce Clause challenges to SORNA).

59. See James Madison, *The Federalist No. 45* (1788), reprinted in THE FEDERALIST PAPERS, 292–93 (C. Rossiter ed., 1961) [hereinafter *The Federalist No. 45*].

60. *United States v. Lopez*, 514 U.S. 549, 552 (1995).

61. *The Federalist No. 45*, at 292–93.

62. See U.S. CONST. art. 1, § 8, cl. 3 ("Congress shall have the power to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes.").

63. See *e.g.*, CONG. REC. H5715 (daily ed. July 25, 2006) (discussing the impact of child pornographers on interstate commerce).

64. *United States v. Lopez*, 514 U.S. 549, 552 (1995) (affirming the Fifth Circuit and concluding that Congress overreached the scope of the Commerce Clause).

65. *United States v. Morrison*, 529 U.S. 598, 601–02 (2000) (holding, per Justice Rehnquist, that parts of the Violence Against Women Act (VAWA) exceeded Congress's Commerce Clause powers).

66. *Gonzales v. Raich*, 545 U.S. 1, 33 (2005) (holding that Congress had the authority to regulate intra-state marijuana trade, because it was an economic, albeit illegal, activity).

passing the Gun-Free School Zones Act<sup>67</sup> (GFSZA) had overreached the scope of the Commerce Clause.<sup>68</sup> The Court emphasized that Congress failed both to make specific findings as to how the regulated activity affects interstate commerce and to include a jurisdictional nexus between the activity being regulated and interstate commerce.<sup>69</sup> Five years later, the Court again struck down non-economic, criminal legislation in *United States v. Morrison*.<sup>70</sup> Although Congress in *Morrison* did provide detailed findings with regard to how gender-related crimes impacted the travel of women, the Court found the causal relationship to be too attenuated.<sup>71</sup> Importantly, both cases employed some level of heightened review.<sup>72</sup> Post *Lopez* and *Morrison* there is not much room for completely intrastate non-economic regulation to survive judicial review.<sup>73</sup> *Lopez* and *Morrison* notwithstanding, in *Gonzalez v. Raich*, the Court upheld the Controlled Substances Act (CSA) as a permissible use of congressional commerce authority.<sup>74</sup> Distinguishing *Lopez* and *Morrison*, the Court characterized the CSA as regulating "quintessentially economic activities".<sup>75</sup> The Court held that the CSA regulated commodities for which there was an interstate market, albeit an illegal one.<sup>76</sup> Affording Congress great deference, the Court concluded that Congress had a rational basis to regulate the

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67. 18 U.S.C. § 922, *invalidated by* *United States v. Lopez*, 514 U.S. 549, 552 (1995).

68. *See* *United States v. Lopez*, 514 U.S. 549, 567 (1995) (affirming the appellate courts' conclusion that the GFSZA exceeded congressional commerce authority).

69. *Id.* at 562.

70. *See* *United States v. Morrison*, 529 U.S. 598, 601–02 (2000) (holding, per Justice Rehnquist, that parts of the Violence Against Women Act (VAWA) exceeded Congress's Commerce Clause powers).

71. *See id.* at 614 (reasoning that the Government's arguments were too attenuated and "[i]f accepted petitioners reasoning would allow Congress to regulate any crime as long as the nationwide aggregated impact of that crime has substantial effects on employment, transit or consumption").

72. *See id.* (stressing that simply because Congress sees a rational reason for regulating a particular non-economic conduct under the Commerce Clause does not make it permissible).

73. *See, e.g.,* *Gonzales v. Raich*, 545 U.S. 1, 33 (holding that Congress had the authority to regulate intra-state marijuana trade, because it was an economic, albeit illegal, activity).

74. *See id.* at 2 ("Congress' Commerce Clause authority includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.").

75. *See id.* at 3 ("[T]he CSA regulates quintessentially economic activities: the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market.").

76. *See id.* at 18 ("[R]espondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market.").

production and consumption of marijuana for personal, medicinal use.<sup>77</sup> Although distinguishable from *Lopez* and *Morrison*, *Raich* undeniably marks a departure from a narrow conception of the Commerce Clause.

### I. United States v. Lopez: *The Federalism Revolution—Part One*

In the landmark opinion of *United States v. Lopez*, the Court held that the Gun-Free School Zone Act of 1990, which made it a federal offense for an individual to possess a firearm in a school zone, exceeded congressional Commerce Clause authority.<sup>78</sup> The Court first noted the overarching federalism principles, which guided its decision to effectively narrow the scope of congressional commerce powers.<sup>79</sup> Respect for the "numerous and indefinite"<sup>80</sup> powers that are to remain with the State governments drove the majority opinion—"[j]ust as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."<sup>81</sup>

The Court then looked to the history of Commerce Clause jurisprudence and, drawing from the structure of prior case law, laid out the proper framework by which courts should analyze Commerce Clause challenges: *Lopez* articulated three broad categories of activity that Congress may regulate under its commerce power.<sup>82</sup> "First, Congress may regulate the use of the channels of interstate commerce."<sup>83</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>84</sup> "Finally, Congress's

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77. *See id.* at 20 ("Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.").

78. *See* *United States v. Lopez*, 514 U.S. 549, 552 (1995) (affirming the Fifth Circuit and concluding that Congress overreached the scope of the Commerce Clause).

79. *See id.* (highlighting that the Federal Government is one of enumerated powers, that the enumerated powers are "few and defined," and that the powers reserved for the states are "numerous and indefinite").

80. *Id.*

81. *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

82. *Id.* at 558.

83. *Id.*

84. *Id.*

commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce."<sup>85</sup>

Analyzing the GFSZA under the third *Lopez* prong, the Court drew guidance from prior case law sustaining regulations that ‘substantially affected’ interstate commerce. Writing for the majority, Rehnquist drew the distinction between economic and non-economic regulations and concluded, “[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”<sup>86</sup> To determine whether an *economic* activity has a substantial effect on interstate commerce, prior case law permits the effect to be viewed in the aggregate—even if the individual instances of conduct have de minimis impact on interstate commerce if, viewed in the aggregate, they have a substantial effect on interstate commerce, the regulation will be sustained.<sup>87</sup> The distinction between economic and non-economic activities likely proved outcome determinative in *Lopez*: because this criminal statute could not be termed ‘economic’ or ‘commercial’ in nature, the Court held that it could not be “sustained under the Court’s cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.”<sup>88</sup> Allowing aggregation would unduly expand the scope of federal power such that the Court would be “hard pressed to posit any activity by an individual that Congress is without power to regulate.”<sup>89</sup>

Although the non-economic nature of the statute did not, per se, bring the GFSZA outside of the realm of congressional commerce authority, additional infirmities mandated the conclusion that Congress unconstitutionally exceeded its powers.<sup>90</sup> No one factor being dispositive, the Court first noted that the GFSZA lacked a jurisdictional element, “which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.”<sup>91</sup> Second, “[n]either the statute nor its legislative history

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85. *Id.* at 558–59.

86. *Id.* at 560.

87. *See generally* *Wickard v. Filburn*, 317 U.S. 111 (1942) (announcing and employing the aggregation principle; in *Wickard* the Court aggregated individual instances of home-grown wheat to conclude that, in the aggregate, the activity had a substantial effect on interstate commerce).

88. *United States v. Lopez*, 514 U.S. 549, 561 (1995).

89. *Id.* at 564.

90. *See id.* at 567–68 (concluding that Congress exceeded its powers).

91. *Id.* at 562.

contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone."<sup>92</sup> Finally, the Court deemed too attenuated the "costs of crime" and "national productivity" arguments advanced by the Government, which sought to demonstrate the substantial effect that guns in school posed to interstate commerce.<sup>93</sup>

Importantly, *Lopez* made no mention of the rational basis test espoused in earlier Commerce Clause jurisprudence. The question was not whether Congress could have rationally concluded that the guns in school, regardless of any interstate movement, substantially affected interstate commerce, but rather whether the sufficient nexus to interstate commerce actually existed.<sup>94</sup> The *Lopez* Court held that the GFSZA failed to fit into any of the three broad categories of permissible congressional regulation.<sup>95</sup> The Court concludes, "[t]o uphold the Government's contentions here, we 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 the sort retained by the States."<sup>96</sup>

## 2. United States v. Morrison: *The Federalism Revolution—Part Two*

In *United States v. Morrison*, the majority struck down parts of federal legislation regulating gender-motivated violence—a non-economic, intrastate activity.<sup>97</sup> The Violence Against Women Act (VAWA) gave women a private, federal cause of action for lawsuits subject to gender-motivated violence.<sup>98</sup> When analyzing the constitutionality of the statute's civil remedy, the Court determined that the proper inquiry was whether the statute substantially affected interstate commerce.<sup>99</sup> Attempting to clarify

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92. *Id.*

93. *See id.* at 564 ("Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement of education where States have historically been sovereign.").

94. *Id.*

95. *Id.* at 568.

96. *Id.* at 567.

97. *See* *United States v. Morrison*, 529 U.S. 598, 601–02 (2000) (affirming the Fourth Circuit and concluding that Congress lacked the constitutional authority to enact the civil remedy of VAWA).

98. *Id.* at 605.

99. *Id.* at 609 ("Petitioners do not contend that these cases fall within either of the first two categories of Commerce Clause regulation. They seek to sustain § 13981 as a regulation

*Lopez*'s third prong, Rehnquist outlined four factors that courts should balance when considering whether something "substantially affects" interstate commerce.<sup>100</sup> A court should consider: 1) whether the activity being regulated is commercial or economic in nature; 2) whether the statute contains a jurisdictional element to limit its scope; 3) whether congressional findings reflect effects upon interstate commerce; and 4) whether the nexus or link between the activity being regulated and interstate commerce is attenuated.<sup>101</sup>

Applying these four factors, the Court first reiterated the centrality of the economic versus non-economic distinction to its decision in *Lopez*—"a fair reading of *Lopez* shows that the non-economic, criminal nature of the conduct at issue was central to our decision in that case."<sup>102</sup> Like the GFSZA, "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."<sup>103</sup> Second, the statute at issue contained no semblance of a jurisdictional element.<sup>104</sup> Third, the Court looked to the existence of legislative fact-finding and found that the statute *was* supported by findings suggesting the link between gender-motivated violence and interstate commerce.<sup>105</sup> However, the Court emphasized that "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."<sup>106</sup> Finally, the Court reasoned that the arguments suggesting that gender-motivated crimes have a substantial affect on interstate commerce were too attenuated.<sup>107</sup> The Court reasoned, "[i]f accepted, petitioners' reasoning would allow Congress to regulated any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption."<sup>108</sup> By acknowledging the existence of legislative findings but still striking down the statute, the Court implied that none of the four factors were dispositive. Rather, the four factors operated as a balancing test utilized to determine whether Congress acted within the appropriate scope of its commerce authority.

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of activity that substantially affects interstate commerce.").

100. *Id.* at 608–10.

101. *Id.* at 608–10.

102. *Id.* at 610.

103. *Id.* at 613.

104. *Id.*

105. *Id.* at 614.

106. *Id.* (citations omitted).

107. *Id.* at 615.

108. *Id.* at 614.

Despite the presence of legislative findings, the Court, with ease, struck down the statute.<sup>109</sup> Emphasizing the non-economic, criminal nature of the regulated activity, the Court disallowed the aggregation of individual instances of conduct.<sup>110</sup> The Court reasoned that the aggregation would eviscerate traditional state police powers—crimes of gender-motivated violence are local problems and have traditionally been addressed by local governments.<sup>111</sup> Again, some form of heightened judicial scrutiny was employed—"whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, can be settled finally only by this court."<sup>112</sup> *Lopez* and *Morrison* give teeth to the "outer limits" of congressional commerce authority and stand for the proposition that federal statutes, which both attempt to regulate non-commercial activity and lack the necessary nexus between the activity being regulated and interstate commerce, are unlikely to survive judicial scrutiny.<sup>113</sup>

### 3. United States v. Raich: *Carving Back on the Federalism Revolution*

The Court's opinion in *Raich* signifies an undeniable step away from Rehnquist's "federalism revolution."<sup>114</sup> In *Raich*, the Court considered Congress's power to regulate the controlled substances

109. *Id.* at 617.

110. *See id.* at 613. The Court stated:

Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nations' history our cases have upheld Commerce Clause regulation only where that activity is economic in nature.

111. *Id.* *See* United States v. *Lopez*, 514 U.S. 549, 561 n.3 ("When Congress criminalizes conduct already denounced as criminal by the States, it effects a change in the sensitive relation between federal and state criminal jurisdiction." (internal citations omitted)).

112. United States v. *Morrison*, 529 U.S. 598, 614 (2000).

113. *See, e.g.*, Illya Somin, *Gonzalez v. Raich: Federalism as Casualty of the War on Drugs*, 15 CORNELL J. L. & PUB. POL'Y 507, 513 (2006) ("At the very least *Morrison* and *Lopez* stand for the proposition that the use of aggregation to justify regulation of 'noneconomic' activity is strongly disfavored, even if it is not categorically forbidden.").

114. *See id.* at 508 ("The Supreme Court's recent decision in *Gonzalez v. Raich* marks a watershed moment in the development of judicial federalism. If it has not quite put an end to the Rehnquist Court's 'federalism revolution,' it certainly represents an important step in that direction.").

market even when such a market was purely intrastate.<sup>115</sup> California's "Compassionate Use Act of 1996" permits the limited use of marijuana for medicinal purposes.<sup>116</sup> In direct tension with the state regulation, the Controlled Substances Act (CSA) expressly prohibits individuals from "possessing, obtaining, or manufacturing cannabis for their personal medical use."<sup>117</sup>

In upholding the CSA the Court focused its inquiry to the third *Lopez* category. First, in announcing a broad definition of economics, Raich stated, "[e]conomics refers to the production, distribution and consumption of commodities."<sup>118</sup> Applying this definition, the Court characterized the CSA as "quintessentially economic" in nature<sup>119</sup> and, in effect, distinguished the statutes at issue in *Lopez* and *Morrison*.<sup>120</sup> At the very least, *Lopez* and *Morrison* strongly disfavored the aggregation of *non-economic* instances of conduct.<sup>121</sup> By characterizing the statute at issue as "economic" in nature, however, the Court was able to apply the aggregation principle utilized in *Wickard v. Filburn*<sup>122</sup>—the de minimis character of the individual instances being regulated is immaterial when the general regulatory statute bears a substantial relation to interstate commerce.<sup>123</sup>

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115. *Gonzalez v. Raich*, 545 U.S. 1, 9 (2006) (discussing Congress's ability to regulate the controlled market, despite the fact that the action purely takes place in California).

116. *Id.* at 5.

117. *Id.* at 7.

181. *See id.* at 25–26 (utilizing the definition of "economic" from the WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966) and defining economics as the "production, distribution and consumption of commodities").

119. *Id.* at 3.

120. *Id.*

121. *See United States v. Morrison*, 529 U.S. 598, 613 (2000) ("While we do not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, 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." (citing *United States v. Lopez*, 514 U.S. 549, 559–60 (1995)) (internal citations omitted)).

122. *See Wickard v. Filburn*, 317 U.S. 111, 131 (1942). The Court held:

Where, between seed time and harvest, the Agricultural Adjustment Act was amended so as to change the quota and penalty provisions, but the penalty provided by the amendment for farm marketing excess is incurred . . . such facts did not establish that the amendment was invalidly "retroactive" or that it denied "due process of law."

*Id.*

123. *See United States v. Raich*, 545 U.S. 1, 17 (stating that "when a general regulatory statute bears a substantial relation to commerce the de minimis character of individual instances arising under that statute is of no consequence" (citations omitted)).

Characterizing a statute as economic in nature will often prove outcome determinative; such a classification will not only make the aggregation principle applicable to a finding that a regulated activity "substantially affects" interstate commerce but also appears to allow for greater deference to congressional fact-finding.

*Lopez* permits congressional regulation of a noneconomic intrastate activity when the activity being regulated is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity [is] regulated."<sup>124</sup> Some scholars denote this as the "broader regulatory scheme exception."<sup>125</sup> Here, the Court finds that a "primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets"—a broader regulatory scheme.<sup>126</sup> As such, the Court reasons, "the regulation is squarely within Congress's commerce power because production of the commodity meant for home consumption, be it wheat [the commodity at issue in *Wickard*] or marijuana, has a substantial effect on supply and demand in the national market for that commodity."<sup>127</sup> Although the regulation of the interstate illegal drug market is within congressional power, the prohibition on the production of homegrown, purely local marijuana hardly appears to be an "essential part" of the larger regulation of an economic activity, which would be undercut but for the regulation.<sup>128</sup>

Perhaps most notably, the Court accorded more deference to congressional fact-finding in *Raich* than it did in either *Lopez* or *Morrison*. The Court stated: "[i]n assessing the scope of Congress's authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce, but only whether a 'rational basis' exists for so

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124. *United States v. Lopez*, 514 U.S. 549, 561 (1995).

125. *See generally* Somin, *supra* note 113, at 50 (discussing congressional regulation of noneconomic intrastate activity).

126. *Raich*, 545 U.S. at 19.

127. *Id.*

128. *See* Somin, *supra* note 113, at 50 (suggesting that the Court in *Raich*, "completely ignored *Lopez*'s statement that the broad regulatory scheme exception applies only in cases where inclusion of the noneconomic activity is 'essential' to the enforcement of the regulatory framework").

concluding."<sup>129</sup> By re-introducing the rational basis test to Commerce Clause challenges, the Court undeniably expands the Congress's powers under the Commerce Clause.

*B. Appellate Court Treatment of Commerce Clause Challenges to SORNA*

As of March 29, 2009, four Circuits have considered Commerce Clause challenges to SORNA.<sup>130</sup> The Seventh, Eighth, Tenth and Eleventh Circuits have all rejected defendants' arguments.<sup>131</sup> Although all of the circuit courts have upheld the constitutionality of SORNA, the rationales employed by the various circuits are inconsistent.<sup>132</sup> As demonstrated by these four opinions, the proper application of *Raich* to subsequent Commerce Clause challenges is unclear.

*1. Seventh Circuit Treatment: United States v. Dixon*

In *United States v. Dixon*,<sup>133</sup> the Seventh Circuit disposed of the defendant's Commerce Clause argument in two sentences.<sup>134</sup> The court's opinion made no mention of *Lopez*, *Morrison*, or *Raich*. Judge Posner reasoned that § 2250(a)(2)(B) fit into the second *Lopez* category—that § 2250(a)(2)(B) regulates the "instrumentalities of interstate commerce or persons or things in interstate commerce, even though the threat may come only from intrastate activities."<sup>135</sup>

Judge Posner then relied on the Mann Act, 18 U.S.C. § 2421, to dispel the defendant's argument that "the movement of a person as distinct from a thing across state lines is not 'commerce' within the meaning of the Constitution's Commerce Clause."<sup>136</sup> The Seventh Circuit found that because the Mann Act, like § 2250(a)(2)(B), regulates "persons" rather than "things" in interstate commerce, § 2250(a)(2)(B) must be permissible under

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129. *Raich*, 545 U.S. at 22 (citations omitted).

130. *See infra* Part III.B (discussing the varying rationales used by the circuit courts to uphold SORNA).

131. *Id.*

132. *Id.*

133. *United States v. Dixon*, 551 F. 3d 578 (7th Cir. 2008).

134. *See id.* at 584 (finding *Dixon*'s Commerce Clause arguments to be without merit).

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

136. *Id.*

the second *Lopez* category.<sup>137</sup> *Dixon*, however, fails to draw critical distinctions between § 2250(a)(2)(B) and the Mann Act: the Mann Act explicitly requires that the movement of persons in interstate commerce be with the specific intent to engage in prostitution.<sup>138</sup> Conversely, § 2250(a)(2)(B) lacks either intent or temporal restrictions and simply requires that the offender have traveled, at one time or another, in interstate commerce.<sup>139</sup> Section 2250(a)(2)(B) and the Mann Act are distinguishable, because § 2250(a)(2)(B) regulates a far broader swath of conduct than does the Mann Act.

2. *Eighth Circuit Treatment: United States v. May and United States v. Howell*

In *United States v. May*,<sup>140</sup> the Eighth Circuit considered whether SORNA violated the Commerce Clause. The court held that 18 U.S.C. § 2250(a)(2)(B) was a permissible exercise of congressional commerce authority.<sup>141</sup> In so holding, the court found that SORNA "derives its authority from each prong of *Lopez* and most specifically, the ability to regulate 'persons or things in interstate commerce' and 'the use of the channels of interstate commerce.'"<sup>142</sup>

In sustaining the regulation under the first *Lopez* category, the court pointed to its holding in *United States v. Brooks*<sup>143</sup>—" [i]t has long been established that Congress may forbid or punish use of interstate commerce as an agency to promote immorality or the spread of evil or harm to the people of the states from the state of origin."<sup>144</sup> When citing *Brooks*, the

137. *Id.*

138. See 18 U.S.C. § 2421. The statute states that:

Whoever knowingly transports any individual in interstate or foreign commerce, on in any Territory or Possession of the United States, *with the intent that such individual engage in prostitution*, or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both.

*Id.* (emphasis added).

139. See 18 U.S.C. § 2250(a)(2)(B) (regulating those sex offenders who "travel[] in interstate commerce . . .").

140. *United States v. May*, 535 F.3d 912 (8th Cir. 2008).

141. See *id.* at 921–22 (holding that SORNA fits within the first two prongs of *Lopez* and is a permissible exercise of congressional Commerce Clause authority).

142. *Id.* at 921.

143. *United States v. Brooks*, 267 U.S. 432 (1925).

144. *May*, 535 F.3d at 921 (quoting *Brooks v. United States*, 267 U.S. 432, 436 (1925)).

Eighth Circuit failed to consider the scope of § 2250(a)(2)(B). Section 2250(a)(2)(B) does not penalize the *travel* of sex offenders. Rather, the statute penalizes the sex offenders who, at one time or another, have traveled in interstate commerce, and fail to register.<sup>145</sup> If Congress intended to forbid the "spread of evil or harm"<sup>146</sup> it would have restricted the travel of sex offenders; Congress, however, chose only to penalize an offender's failure to register.<sup>147</sup>

Attempting to fit SORNA into the third prong of *Lopez*, the court emphasized that § 2250(a)(2)(B) contained the requisite "jurisdictional hook."<sup>148</sup> The court, however, failed to address any of the other *Morrison* considerations (whether the activity being regulated is economic in nature, whether legislative findings speak to the substantial effect on interstate commerce, and whether the nexus between interstate commerce and the activity being regulated is "attenuated").<sup>149</sup> By treating the presence of the jurisdictional element as dispositive, the court misapplied the holdings in *Lopez* and *Morrison*. Although both courts indicated that the presence of a jurisdictional element may be necessary to bring a regulated activity into the realm of constitutionality, neither holding suggested that the mere presence of a jurisdictional element would be sufficient.<sup>150</sup> By striking down the gender-motivated violence statute even though it contained legislative fact finding, *Morrison* made clear that none of the four factors are sufficient to a finding of constitutionality.<sup>151</sup> Conversely, the *Lopez* Court required that the jurisdictional element limit the reach of the regulation to those activities that "have an explicit connection with or effect on interstate commerce."<sup>152</sup>

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145. See 18 U.S.C. § 2250(a)(2)(B) (regulating those sex offenders who "travel[] in interstate commerce and who fail to register their sex offender status").

146. *May*, 535 F. 3d at 921–22 (quoting *Brooks*, 267 U.S. at 436 (1925)).

147. *Id.*

148. See *id.* at 922 (noting that the neither the Gun-Free School Zones Act nor the VAWA contained the necessary jurisdictional elements and that "SORNA includes an express and clear jurisdictional element for individuals not convicted pursuant to federal jurisdiction" (citations omitted)).

149. *Id.*

150. See *United States v. Morrison*, 529 U.S. 598, 613 (2000) ("Although *Lopez* makes clear that such a jurisdictional element would lend support to the argument that § 13981 is sufficiently tied to interstate commerce, Congress elected to cast § 13981's remedy over a wider, and more purely intrastate, body of violent crime.").

151. See *id.* at 614 (stating "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so" (citing *Lopez*, 514 U.S. at 557 (1995))).

152. See *United States v. Lopez*, 514 U.S. 549, 562 (1995) (noting that the Gun Free

The Eighth Circuit again considered and rejected challenges to the constitutionality of SORNA in *United States v. Howell*.<sup>153</sup> Relying on previously decided cases, the court quickly dismissed Commerce Clause challenges to the constitutionality of 18 U.S.C. § 2250(a)(2)(B).<sup>154</sup> Although § 16913 is outside of the scope of this Note, the in-depth analysis and approach the court takes proves useful.<sup>155</sup>

Although the court eventually adopted a broad construction of the congressional Commerce Clause powers, it conceded that, "a narrow discussion which only analyzes § 16913 under the three categories of *Lopez* casts doubt on the constitutionality of § 16913."<sup>156</sup> The court highlighted that § 16913 neither contains a jurisdictional element limiting the statute's scope nor is supported by evidence demonstrating that the registration requirements substantially affects interstate commerce.<sup>157</sup> Nevertheless the court concluded that "the broad authority granted to Congress through both the Commerce Clause and the enabling necessary and proper clause reveals that the statute is constitutionally authorized."<sup>158</sup>

The Eighth Circuit looked to the "language, statutory scheme, declaration of purpose, and legislative history" of SORNA to hold that that the purpose, intent, and focus of SORNA is to regulate the interstate movement of sex offenders.<sup>159</sup> The court stated that § 16913 was a reasonable "means," even if reaching a wholly intrastate sex offender, to attain the legitimate "end" of regulating both the channels and instrumentalities of interstate commerce.<sup>160</sup> Therefore, the court reasoned

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School Zones Act "has no express jurisdictional element which might limit its reach to a discrete set of firearm possession that have an explicit connection with or effect on interstate commerce").

153. 552 F.3d 709 (8th Cir. 2009).

154. *See id.* at 713 (stating that the Eighth Circuit has already ruled that § 2250 is constitutional under the Commerce Clause and that it will adhere to its previous holding).

155. *See generally* 42 U.S.C. § 16913 (requiring that under subsection (a) sex offenders register in each jurisdiction where they live, work or go to school and under subsection (c) their registration must be updated within three days of changing place of residence, work or school). Section 16913 contains no jurisdictional element and reaches purely intrastate activity. *Id.*

156. *Howell*, 552 F.3d at 715.

157. *Id.*

158. *Id.*

159. *Id.* at 717.

160. *See id.* ("The registration requirements are reasonably adapted to the legitimate end of regulating 'persons or things in interstate commerce' and 'the use of the channels of interstate commerce. Covering the registration of wholly interstate sex offenders is merely incidental to Congress's tracking of sex offenders in interstate commerce." (citations

that because SORNA was interstate in focus and regulated the "transient nature of sex offenders," the purpose or "end" of SORNA must be legitimate.<sup>161</sup> Accordingly the court reasoned that all means reasonably or rationally related to this end are appropriate.<sup>162</sup> These underlying assumptions not only advance a broad reading of the stated purpose of SORNA but also of congressional Commerce Clause powers.

### 3. Tenth Circuit Treatment: *United States v. Hinkley* and *United States v. Lawrance*

On two separate occasions, the Tenth Circuit considered and upheld the constitutionality of SORNA. In *United States v. Hinkley*, the court found SORNA to be easily distinguishable from *Lopez* and *Morrison*.<sup>163</sup> Citing *May*, the court found that SORNA fit into both the first and second prongs of *Lopez* and held that "by requiring that a sex offender travel in interstate commerce before finding a registration violation, SORNA remains well within the constitutional boundaries of the Commerce Clause."<sup>164</sup>

One day after the *Hinkley* opinion was issued, the Tenth Circuit again upheld the constitutionality of SORNA in *United States v. Lawrance*.<sup>165</sup> Judge Kelly thought it was irrelevant whether or not a sex offender's failure to register "substantially affected" interstate commerce; he held that SORNA fit comfortably within the first two prongs of *Lopez*.<sup>166</sup> In rejecting a Commerce Clause challenge the court concluded, "SORNA clearly intends to regulate interstate activity, i.e., the evasion of sex

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omitted)); *see also* *McCulloch v. Maryland*, 17 U.S. 316, 413 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

161. *United States v. Howell*, 552 F.3d 709, 717 (8th Cir. 2009).

162. *See id.* ("[A]ll means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." (quoting *McCulloch v. Maryland*, 17 U.S. 316, 413 (1819))).

163. *See United States v. Hinkley*, 550 F.3d 926, 940 (10th Cir. 2008) (emphasizing the presence of the jurisdictional element found in SORNA and absent from the GFSZA and VAWA).

164. *Id.*

165. *United States v. Lawrance*, 548 F.3d 1329 (2008).

166. *Id.* at 1337.

offender registration requirements by offenders who have crossed jurisdictional lines."<sup>167</sup>

Both *Lawrance* and *Hinkley* construe the scope of the Commerce Clause in an unduly broad manner.<sup>168</sup> The Tenth Circuit seems to conclude that, because the first and second *Lopez* prongs have traditionally been aimed at "keep[ing] the channels of interstate commerce free from immoral and injurious uses," congressional regulation of sex offenders, a group of individuals typically viewed as "immoral," is permissible.<sup>169</sup> What the Tenth Circuit fails to recognize, however, is that Congress has not restricted the "travel" of offenders in interstate commerce.<sup>170</sup> Congress subjects all those who have been convicted of a sex offense in state court and who have, either before or after their conviction, traveled in interstate commerce to the requirements and penalties of § 2250(a)(2)(B).<sup>171</sup> However, nothing in either the language of § 2250(a)(2)(B) or the legislative history of SORNA so much as implies that SORNA seeks to regulate the *travel* of offenders so as to "keep the channels of interstate commerce free from immoral and injurious uses."<sup>172</sup> Rather, failing to register is the regulated activity.<sup>173</sup> If such a regulation were sustained, no meaningful limits on congressional commerce authority would remain.

#### 4. *Eleventh Circuit Treatment: United States v. Ambert and United States v. Powers*

The first time that the Eleventh Circuit reviewed a constitutional challenge to SORNA, the court ruled in favor of the defendant without

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167. *Id.*

168. *See, e.g., id.* (affirming Congress's right to regulate even the spread of evil if it occurs through the channels of interstate commerce).

169. *See id.* (inferring that Congress may regulate sex offenders based on their spread of harm and immorality between states (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964))).

170. *See* 18 U.S.C. § 2250(a) (requiring sex offenders who travel interstate to register or update registration in order to avoid fines and imprisonment).

171. *See* 18 U.S.C. § 2250(a)(2)(B), (a)(3) ("Whoever . . . travels in interstate commerce . . . and . . . knowingly fails to register . . . shall be fined under this title or imprisoned . . .").

172. *Heart of Atlanta Motel, Inc.*, 379 U.S. at 256 (quoting *Caminetti v. United States*, 242 U.S. 470, 491 (1917)).

173. *See* 18 U.S.C. § 2250(a)(3) (fining or imprisoning sex offenders who knowingly fail to register or update registration after traveling in interstate commerce).

reaching the substantive constitutional issues.<sup>174</sup> However, the Eleventh Circuit subsequently considered and upheld the constitutionality of SORNA in *United States v. Ambert*.<sup>175</sup> In *Ambert*, the court focused on *United States v. Ballinger*,<sup>176</sup> in its decision.<sup>177</sup> *Ballinger* upheld the constitutionality of a statute that criminalized church-based arson where the "offense is in or affects interstate or foreign commerce."<sup>178</sup> The *Ballinger* court reasoned that congressional power to regulate the channels and instrumentalities of interstate commerce includes "the power to prohibit their use for harmful purposes, even if the targeted harm itself occurs outside the flow of commerce and is purely local in nature."<sup>179</sup> Further, the court in *Ballinger* noted that this power includes the "power to reach criminal conduct in which the illegal acts ultimately occur intrastate, when the perpetrator uses the channels or instrumentalities of interstate commerce to facilitate their commission."<sup>180</sup>

Applying *Ballinger*, the court found that because § 2250(a)(2)(B) contains the requisite jurisdictional element and focuses on offenders who travel in interstate commerce, the "use of the *channels* and *instrumentalities* of interstate commerce is necessarily part of the commission of the targeted offense under 18 U.S.C. § 2250."<sup>181</sup> The court further reasoned that § 2250(a)(2)(B) is indistinguishable from either *Ballinger* or the Mann Act and that § 2250(a)(2)(B) "does no more than employ Congress' lawful

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174. See *United States v. Madera*, 528 F.3d 852, 859 (11th Cir. 2008) (holding that "[b]ecause [defendant's] indictment concerns his failure to register during the gap period between SORNA's enactment and the Attorney General's retroactivity determination, [defendant] cannot be prosecuted for violating SORNA during that time").

175. See *United States v. Ambert*, 561 F.3d 1202, 1210 (11th Cir. 2009) (finding that § 2250(a) "is a proper regulation falling under either of the first two *Lopez* categories because it regulates both the use of channels of interstate commerce and the instrumentalities of interstate commerce").

176. See *United States v. Ballinger*, 395 F.3d 1219, 1230 (11th Cir. 2005) (en banc) (holding that Congress's commerce authority includes the power to punish a church arsonist who uses the channels and instrumentalities of interstate commerce).

177. See *Ambert*, 561 F.3d at 1210–11 ("This Court further explained the proper boundaries of Congress' ability to regulate the channels and instrumentalities of interstate commerce in *United States v. Ballinger* . . .").

178. See *id.* at 1211 (quoting 18 U.S.C. § 247(b) and recognizing that Congress has used its power to enact similar statutes which prevent harmful action based on its ability to control the channels and instrumentalities of commerce).

179. *Id.* (quoting *Ballinger*, 395 F.3d at 1226).

180. *Id.* (emphasis added) (quoting *Ballinger*, 395 F.3d at 1226).

181. *United States v. Ambert*, 561 F.3d 1202, 1211 (11th Cir. 2009).

commerce power to prohibit the use of channels or instrumentalities of commerce for harmful purposes."<sup>182</sup>

By stating that the "use of the *channels* and *instrumentalities* of interstate commerce is necessarily part of the commission of the targeted offense under 18 U.S.C. § 2250,"<sup>183</sup> the court plainly errs. As previously discussed, § 2250(a)(2)(B) remains distinct from the Mann Act.<sup>184</sup> Section 2250(a)(2)(B) merely requires that the sex offender travel in interstate commerce.<sup>185</sup> Conversely, the Mann Act requires that the travel in interstate commerce be with "intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense . . . ."<sup>186</sup> By including the intent restriction the Mann Act regulates only that conduct directly related to interstate commerce.

The statute upheld in *Ballinger* requires that the offense either be "in" interstate commerce or "affect" interstate commerce.<sup>187</sup> Although these restrictions do not impose an explicit intent restriction, the connection between the activity being regulated and interstate commerce must be direct.<sup>188</sup> In effect, the statute in *Ballinger* places temporal restrictions on the connection between interstate commerce and the activity being regulated. In no way does the statute purport to suggest that if an arsonist had at one time traveled in interstate commerce that he would, automatically and permanently, be subjected to federal regulation. However, under § 2250(a)(2)(B), if an offender at any time before or after the commission of the underlying crime has traveled in interstate commerce, he is subject to the statutory requirements of SORNA.<sup>189</sup>

182. *Id.*

183. *Id.*

184. *See supra* Part III.B.1 (finding that because the Mann Act requires that the travel in interstate commerce be with the intent to commit a crime it is distinct from § 2250(a)).

185. *See* 18 U.S.C. § 2250(a)(2)(B) ("[T]ravels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country . . . .").

186. *See* 18 U.S.C. § 2421 ("Whoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense . . . .").

187. *See* 18 U.S.C. § 247(b) (providing that "[t]he circumstances referred to in subsection (a) are that the offense is in or affect interstate or foreign commerce").

188. *See* *United States v. Ballinger*, 395 F.3d 1219, 1228 n.5 (11th Cir. 2005) ("[Section] 247 contains an *explicit* requirement of an appropriate nexus with interest commerce, so that church arson may be prosecuted *only* when 'the offense is in or affects interstate or foreign commerce.'" (quoting 18 U.S.C. § 247(b))).

189. *See* 18 U.S.C. § 2250(a)(2)(B) ("(a) In general. —Whoever—(1) is required to

Section 2250(a)(2)(B) does not require that the travel in interstate commerce be for harmful purposes.<sup>190</sup> By failing to require that the travel in interstate commerce be in some way related to the offense, § 2250(a)(2)(B) is distinct from the statute upheld in *Ballinger*. Consequently, the Eleventh Circuit expands the scope of both the first and second *Lopez* categories.

In the most recent appellate court decision, the Eleventh Circuit again upheld the constitutionality of SORNA. The Eleventh Circuit in *United States v. Powers*,<sup>191</sup> reversed a strong district court opinion.<sup>192</sup> The district court found the failure to register statute to be criminal and non-economic in nature, the jurisdictional element to be void of substance and accordingly, and that § 2250(a)(2)(B) lacked the necessary nexus to interstate commerce.<sup>193</sup> The Eleventh Circuit reiterated its holding in *Ambert*: "*Ambert* controls here. The district court erred in dismissing the indictment against Powers on the ground that SORNA exceeded Congress's authority under the Commerce Clause."<sup>194</sup>

### *C. Federal District Court Treatment of the Commerce Clause Challenges to SORNA*

A large number of district courts have considered Commerce Clause challenges to SORNA.<sup>195</sup> The vast majority of those courts find

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register under the Sex Offender Registration and Notification Act . . . (2)(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian Country . . .").

190. *See id.* (neglecting to include any language on harmful purpose).

191. *See United States v. Powers*, 562 F.3d 1342, 1343 (11th Cir. 2009) (per curiam) (holding the registration provisions of SORNA do not violate the Commerce Clause and fall within Congress's power to regulate interstate commerce).

192. *See id.* ("The district court erred in dismissing the indictment against Powers on the ground that SORNA exceeded Congress's authority under the Commerce Clause.").

193. *See United States v. Powers*, 544 F. Supp. 2d 1331, 1336 (M.D. Fla. 2008) ("If an individual's mere unrelated travel in interstate commerce is sufficient to establish a Commerce Clause nexus with purely local conduct, then virtually all criminal activity would be subject to the power of the federal government.").

194. *Id.* at 1343.

195. *See Corey Rayburn Yung, The Sex Offender Registration and Notification Act and the Commerce Clause*, 21 FED. SENT'G. REP. 133, 134 (2008) [hereinafter *The Sex Offender Registration and Notification Act and the Commerce Clause*] ("As of October 12, 2008, at least fifty-four district courts have issued opinions on a Commerce Clause challenge.").

that SORNA falls within Congress's Commerce Clause powers.<sup>196</sup> Although the percentage of courts that have upheld the constitutionality of SORNA is overwhelming, the underlying analysis for such conclusions is often misapplied and varies widely.<sup>197</sup>

*1. District Courts Finding that § 2250(a)(2)(B) Is a Permissible Exercise of Congressional Commerce Clause Power*

The majority of district courts have rejected Commerce Clause challenges to § 2250(a)(2)(B) by finding that the activity being regulated fits into the second *Lopez* prong—instrumentalities of commerce or persons or things in interstate commerce.<sup>198</sup> Analyzing the regulated activity under the second *Lopez* category, the court in *United States v. Ditomasso*<sup>199</sup> was satisfied that the presence of the jurisdictional element in SORNA adequately distinguished the statute in *Lopez* and *Morrison* and accordingly, upheld the constitutionality of § 2250(a)(2)(B).<sup>200</sup> In supporting this conclusion, the court surmised that an activity being regulated under the second *Lopez* category is required to be neither economic in nature nor contain a specific element requiring that the interstate travel be with the intent not to register.<sup>201</sup>

In *United States v. Vardaro*,<sup>202</sup> the district court upheld the constitutionality of SORNA relying on the second *Lopez* category.<sup>203</sup> As the majority of federal district courts have done, the *Vardaro* court emphasized the presence of the jurisdictional element limiting SORNA

196. *See id.* at 134 ("Only three of those fifty-four opinions have found that SORNA was not a proper exercise of federal power.").

197. *See id.* ("While courts have largely been consistent in rejecting Commerce Clause challenges, the reasons offered and methodology employed have varied widely.").

198. *See id.* (relaying the fact that most courts have found SORNA justified under the second prong of the *Lopez* analysis).

199. *See United States v. Ditomasso*, 552 F. Supp. 2d 233, 247 (D.R.I. 2008) (finding § 2250 a valid exercise of congressional power under the Commerce Clause).

200. *See id.* at 245–46 (finding that § 2250(a) is "clearly constitutional" under the second *Lopez* prong); *see also id.* at 246 (distinguishing *Lopez* and *Morrison*).

201. *See id.* at 246–47 (noting both that the Court in *Lopez* allowed Congress to regulate "persons . . . in interstate commerce, even though the threat may come only from intrastate activities" and that defendant lacks the necessary legal authority demonstrating that "intent is a necessary element of the second prong").

202. *See United States v. Vardaro*, 575 F. Supp. 2d 1179, 1185 (D. Mont. 2008) (upholding the constitutionality of SORNA under the second prong of the *Lopez* test).

203. *Id.*

prosecutions to those who have traveled in interstate commerce.<sup>204</sup> These two cases serve only as two of the many examples of district courts upholding the constitutionality of § 2250(a)(2)(B) under the second prong of *Lopez*.<sup>205</sup>

Additionally, numerous federal district courts have analyzed and upheld § 2250(a)(2)(B) under the third *Lopez* category. For example, in *United States v. Holt*,<sup>206</sup> the Southern District of Iowa concluded, "[a] rational basis exists for concluding that the activity regulated by SORNA substantially affects interstate commerce."<sup>207</sup> Similarly, in *United States v. Madera*,<sup>208</sup> the district court sustained a § 2250(a)(2)(B) challenge under the third *Lopez* prong and reasoned that Congress's desire to track sex offenders as they move between states satisfies the rational basis test articulated in *Raich*.<sup>209</sup>

Of those courts striking down SORNA as an unconstitutional violation of congressional Commerce Clause powers, many have done so without specifically declaring § 2250(a)(2)(B) unconstitutional. Rather, these courts have struck down SORNA by declaring unconstitutional the registration provision codified at 42 U.S.C. § 16913.<sup>210</sup> Courts have held that, unlike § 2250(a)(2)(B), § 16913 neither contains the requisite jurisdictional element nor regulates the channels or instrumentalities of

204. *See id.* at 1186 ("SORNA's criminal provision at 18 U.S.C. § 2250 contains an appropriate jurisdictional element which expressly limits SORNA prosecutions to those individuals who have traveled in interstate commerce. [This shows] Congress was acutely aware of the breadth of its power . . .").

205. *See* 30 A.L.R. FED. 2d 213, *supra* note 54 (listing cases considering the constitutionality and application of SORNA).

206. *See* *United States v. Holt*, No. 3:07-cr-0630-JAJ, 2008 WL 1776495, at \*3 (S.D. Iowa Apr. 14, 2008) (upholding the constitutionality of SORNA under the third *Lopez* prong (*citing* *United States v. Raich*, 545 U.S. 1, 22 (2005))).

207. *Id.*

208. *See* *United States v. Madera*, 474 F. Supp. 2d 1257, 1265 (M.D. Fla. 2007) (finding the Adam Walsh Child Protection and Safety Act of 2006 constitutional).

209. *See id.* at 1265 ("This rational basis test [laid out in *Raich*] is clearly met through Congress's desire to track sex offenders as they move between states, in order to promote the public safety.").

210. *See, e.g.,* *United States v. Waybright*, 561 F. Supp. 2d 1154, 1165 (D. Mont. 2008) (holding that though § 2250(a) is a valid exercise of Congress's power under the Commerce Clause, § 16913 regulated all sex offenders regardless of whether they traveled in interstate commerce and, therefore, was not a valid exercise of Congress's power under the Commerce Clause); *United States v. Hall*, 577 F. Supp. 2d 610, 623 (N.D.N.Y. 2008) (holding that though § 2250(a) was constitutional under the Commerce Clause, § 16913 is unconstitutional because it lacks a jurisdictional element and applies to all sex offenders regardless of whether they travel in interstate commerce).

interstate commerce.<sup>211</sup> Consequently, most of these courts have dismissed defendants' indictments reasoning that "a conviction under § 2250(a) is invalid because the criminal penalty statute demands the Government prove the defendant was required to register under § 16913."<sup>212</sup> However, while the court in *United States v. Thomas*,<sup>213</sup> concluded that § 16913 was an impermissible exercise of Congress's Commerce Clause power, it upheld the indictment as valid under the Necessary and Proper Clause.<sup>214</sup> The position taken in *Thomas* is unique.<sup>215</sup> With the exception of *Thomas*, regardless of the statutory provision deemed unsustainable under commerce authority, the effect is the same—the defendant's indictment is dismissed.

## 2. District Courts Finding § 2250(a)(2)(B) to Be an Impermissible Exercise of Congressional Commerce Clause Power

A growing minority of federal courts have found § 2250(a)(2)(B) to be an impermissible exercise of congressional Commerce Clause powers. Before being overturned by the Eleventh Circuit in *United States v. Powers*, the district court held that § 2250(a)(2)(B) could not be justified under any of the *Lopez* categories.<sup>216</sup> Focusing its analysis on the third *Lopez* prong, the court found that the statute was criminal in nature and did not deal with commerce or any sort of economic enterprise.<sup>217</sup> *Powers* opined that the supposed "jurisdictional element" was naked, superficial, and did not bring

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211. See, e.g., *United States v. Hall*, 577 F. Supp. 2d 610, 620 (N.D.N.Y. 2008) (finding that a conviction under § 16913 "raises greater constitutional concern than § 2250(a) because it lacks a jurisdictional element restricting its application to individuals who travel in interstate commerce").

212. See *id.* at 622 (finding that the interrelatedness between § 2250 and § 16913 demands that neither be upheld under the Commerce Clause due to the lack of any connection to interstate commerce in § 16913).

213. See *United States v. Thomas*, 534 F. Supp. 2d 912, 922 (N.D. Iowa 2008) (holding § 16913 constitutional under the Necessary and Proper Clause).

214. See *id.* at 920–22 (broadening the application of § 16913 under the Necessary and Proper Clause).

215. See, e.g., *United States v. Guzman*, 582 F. Supp. 2d 305, 314 (N.D.N.Y. 2008) (finding that § 16913 is neither constitutional under the Commerce Clause nor a "reasonably adapted means to achieve a constitutional objective" and, therefore, rejecting the Necessary and Proper Clause argument accepted in *Thomas*).

216. See *United States v. Powers*, 544 F. Supp. 2d 1331, 1334–45 (M.D. Fla. 2008) ("Like the statutes at issue in *Lopez* and *Morrison*, SORNA has nothing to do with commerce or any form of economic enterprise.").

217. See *id.* at 1335 ("SORNA has nothing to do with commerce or any form of economic enterprise.").

§ 2250(a)(2)(B) into the realm of constitutionality—the Commerce Clause requires more than "statutory 'lip service' to interstate commerce."<sup>218</sup> In so reasoning, the court noted that "[i]f an individual's mere unrelated travel in interstate commerce is sufficient to establish a Commerce Clause nexus with purely local conduct, then virtually all criminal activity would be subject to the power of the federal government. Surely our founding fathers did not contemplate such a broad view of federalism."<sup>219</sup> Despite the sound reasoning by this district court, the Eleventh Circuit, bound by its prior holding in *United States v. Ambert*, reversed the district court and found § 2250(a)(2)(B) to be a permissible exercise of Congress's Commerce Clause authority.<sup>220</sup>

For the Southern District of Florida, Chief Judge Zloch, in *United States v. Myers*,<sup>221</sup> held that both § 16913 and § 2250(a)(2)(B) violated the Commerce Clause.<sup>222</sup> With regard to § 2250(a)(2)(B), the court concluded:

Contrary to *Powers*, the Court finds that by enacting § 2250 Congress did not attempt to regulate an activity that substantially affects interstate commerce. Rather, the statute's language regulates sex offenders who have traveled in interstate commerce. *Congress, however, has no power to regulate a person simply because at some earlier time he has traveled in interstate commerce.* Therefore . . . the Court will grant the instant Motion To Dismiss Indictment . . . .<sup>223</sup>

In so holding, the court focused on the first two *Lopez* prongs. Looking at the first *Lopez* category, Chief Judge Zloch acknowledged that Congress may regulate the channels of interstate commerce by "criminalizing the travel of those who carry a proscribed intent or article" but concluded that Congress "may not attach regulations on a person simply because he has once innocently availed himself of his constitutional right through the channels of interstate commerce."<sup>224</sup> He reasoned that the first

218. *Id.*

219. *Powers*, 544 F. Supp. 2d at 1336; *see also* 30 A.L.R. FED. 2d. 213, *supra* note 54 (quoting *Powers*).

220. *See United States v. Powers*, 562 F.3d 1342, 1343 (11th Cir. 2009) (finding § 2250(a) to be a permissible exercise of congressional Commerce Clause authority).

221. *See United States v. Myers*, 591 F. Supp. 2d 1312, 1349–50 (S.D. Fla. 2008) (holding that enactment of SORNA exceeded Congress's Commerce Clause powers and defendant's interstate travel did not have sufficient impact on interest commerce to permit his prosecution).

222. *See id.* (holding that both § 16913 and § 2250(a) impermissibly exceed Congress's Commerce Clause powers).

223. *Id.* at 1317.

224. *Id.* at 1348.

*Lopez* category permits Congress to regulate interstate commerce by "barring from its channels a certain class of goods or people that it deems harmful."<sup>225</sup> The first *Lopez* prong operates to exclude those objects or persons whose "movement across state lines [is] with the proscribed purpose or status."<sup>226</sup> The first *Lopez* category focuses on regulating the *actual movement* through interstate commerce.<sup>227</sup>

Conversely, § 2250(a)(2)(B) focuses on criminalizing a sex offender's failure to register. The statute does not regulate the travel of sex offenders, for it neither bars offenders from the use of the channels of interstate commerce nor restricts their use by including an intent limitation.<sup>228</sup> Finally, § 2250(a)(2)(B) fails to include a temporal restriction that limits an offender's period of federal regulation to those times in which he is "using" or is "in" interstate commerce.<sup>229</sup> By correctly placing emphasis on the actual movement through the channels of interstate commerce, the court properly rejected the argument that § 2250(a)(2)(B) regulated activity pursuant to the first *Lopez* prong.<sup>230</sup>

The court then looked to the purpose and language of the second *Lopez* prong. The language of the second prong reads, "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>231</sup> The Southern District of Florida found that the purpose of the second *Lopez* category was to address "Congress's power to regulate and protect such persons from threats *while traveling or about to travel* in interstate commerce."<sup>232</sup> The second prong regulates the "means of conveying people and goods across state lines."<sup>233</sup> It does not

225. *Id.* at 1328 (citing *United States v. Rybar*, 103 F.3d 273, 288–89 (3d Cir. 1996) (Alito, J., dissenting)).

226. *Id.*

227. *See id.* ("By excluding certain persons from the channels of interstate commerce, the focus of the prohibition is on the person or thing's movement across state lines with the proscribed purpose.")

228. *See* 18 U.S.C. § 2250(a)(2)(B) (restricting only the manner in which the sex offenders must register).

229. *See id.* (failing to include any time restrictions in the statute).

230. *See* *United States v. Myers*, 591 F. Supp. 2d 1312, 1349-50 (S.D. Fla. 2008) (finding § 2250 "is in no way a regulation of persons in interstate commerce").

231. *Id.* at 1348 (citations omitted) (quoting *United States v. Lopez*, 514 U.S. 549, 558 (1995)).

232. *Id.* at 1329 (emphasis added).

233. *Id.* at 1341 (quoting *United States v. Rybar*, 103 F.3d 273, 288–89 (Alito, J., dissenting)).

operate to allow Congress to regulate any person who has, at one point or another, traveled across state lines.<sup>234</sup>

Chief Judge Zloch correctly states that the courts which have relied on the second *Lopez* category to sustain § 2250(a)(2)(B) "have interpreted the phrase 'persons in interstate commerce' to give Congress plenary jurisdiction over a person once he has traveled in interstate commerce."<sup>235</sup> Rather than acquiescing to increased judicial justification of § 2250(a)(2)(B) under the second category, the Southern District of Florida concludes that language and historical use of the second *Lopez* category "is addressed to Congress's power to regulate and protect such persons from threats while traveling in interstate commerce. It involves things 'actually being moved in interstate commerce, *not all people and things that have ever moved across state lines.*'"<sup>236</sup> Applying this standard, the court concludes that § 2250(a)(2)(B) impermissibly exceeds the scope of congressional commerce authority.

#### *IV. Evaluating Commerce Clause Challenges to 18 U.S.C. § 2250(a)(2)(B)*

##### *A. The Economic/Non-economic Distinction and the Appropriate Level of Deference to Be Accorded Congressional Findings of Fact*

##### *1. Level of Deference Accorded to Congressional Fact-Finding in Recent Commerce Clause Jurisprudence*

As a preliminary matter, one must consider the level of deference to be accorded to congressional fact-finding. Breaking from prior Commerce Clause jurisprudence, the Court in *Lopez* and *Morrison* omitted any explicit reference to the amount of deference given to congressional fact-finding.<sup>237</sup>

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234. *See id.* at 1329 (stating that regulation under the second *Lopez* category "does not mean that once a person has traveled in interstate commerce a regulation is attached to him").

235. *United States v. Myers*, 591 F. Supp. 2d 1312, 1337 (S.D. Fla. 2008).

236. *Id.* at 1348 (emphasis in original) (quoting *United States v. Patton*, 451 F.3d 615, 622 (10th Cir. 2006)).

237. *See United States v. Lopez*, 514 U.S. 549, 613 (1995) (Souter, J., dissenting) ("[Congressional findings] tell us what Congress actually has found, not what it could rationally find. If, indeed, the Court were to make the existence of explicit congressional findings dispositive in some close or difficult cases something other than rationality review would be afoot."); *see also United States v. Morrison*, 529 U.S. 598, 614 (2000) ("[T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.").

Nonetheless, the *Lopez* decision implies some form of heightened judicial review; Rehnquist appears to qualify rational basis review and to treat "deference under the rationality rule as subject to gradation according to the commercial or noncommercial nature of the immediate subject of the challenged regulation."<sup>238</sup> Additionally, *Lopez* implies that if Congress had provided legislative findings regarding the effect on interstate commerce, some increased deference to Congress might be entertained.<sup>239</sup> By announcing that the Court will independently evaluate constitutionality under the Commerce Clause, the question was not whether Congress could have rationally concluded that the Gun Free School Zones Act or the Violence Against Women Act substantially affected interstate commerce, but rather, whether those statutes actually had a substantial affect on interstate commerce.<sup>240</sup> In *Morrison*, the Court echoed *Lopez*, providing that "whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a *judicial rather than legislative question*, and can be settled finally only by this Court."<sup>241</sup>

Conversely, the Court in *Raich*, by applying a rational basis level of review, accorded Congress great deference.<sup>242</sup> The Court distinguished *Lopez* and *Morrison* by stating that the regulated activities in the earlier cases were non-economic in nature and outside of the scope of

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238. *Lopez*, 514 U.S. at 608 (1995) (Souter, J., dissenting).

239. *See id.* at 562 (majority opinion) (citations omitted) ("Although as a part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce[.]; *but see* United States v. Morrison, 529 U.S. 598, 614–16 (2000) (rejecting Congress's findings even though VAWA is supported by numerous statistics regarding the serious impact that gender-motivated violence has on victims, and noting that determining whether an activity contains the sufficient nexus to interstate commerce is a judicial rather than legislative question).

240. *See Lopez*, 514 U.S. at 563 ("But to the extent that congressional findings would enable [the Court] to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.").

241. *Morrison*, 529 U.S. at 614 (2000) (Black, J., concurring) (emphasis added) (internal quotations omitted) (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273 (1964)).

242. *See United States v. Raich*, 545 U.S. 1, 22 (2006) ("In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding.").

congressional Commerce Clause power.<sup>243</sup> Although the level of deference accorded in *Raich* cannot be ignored, a narrow reading of *Raich* suggests that the level of scrutiny applied to § 2250(a)(2)(B) turns on whether the activity is commercial or non-commercial in nature.

## 2. Application of Appropriate Scrutiny to § 2250(a)(2)(B): The Economic/Non-economic Distinction

No reading of the activity being regulated in § 2250(a)(2)(B) could possibly suggest that "travel" in interstate commerce is "economic" or "commercial in nature." In adopting an expansive construction of the term "economic," the majority in *Raich* states "[e]conomics' refers to 'the production, distribution and consumption of commodities.'"<sup>244</sup> Section 2250(a)(2)(B) is criminal rather than economic in nature. Even this expansive definition of economics cannot include creating a federal criminal penalty for sex offenders who violate their registration requirements. The stated purpose of SORNA is to protect the public from sex offenders.<sup>245</sup> In an effort to accomplish this goal, SORNA criminalizes a convicted sex offender's failure to register.<sup>246</sup> According to the language of *Lopez* and *Morrison*, neither the means (criminalizing the failure to register) nor the larger end (public safety) can be considered economic in nature.<sup>247</sup> Any "costs of crime" or similar economic argument will be deemed, as required by *Lopez*, "too attenuated."<sup>248</sup>

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243. See *id.* at 25 ("Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic.").

244. *Id.* at 26 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)).

245. See 42 U.S.C. § 16901 ("In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this chapter establishes a comprehensive national system for the registration of those offenders.").

246. *Id.*

247. See *United States v. Lopez*, 514 U.S. 549, 561 (1995) (finding that simple gun possession is not an economic activity because it "is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated"); see also *United States v. Morrison*, 529 U.S. 598, 613 (2000) ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. . . . [T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.").

248. See *Lopez*, 514 U.S. at 563–64 (rejecting the "costs of crime" argument as too attenuated); see also *Morrison*, 529 U.S. at 617 ("We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that

Like the GFSZA, § 2250(a)(2)(B) is a "criminal statute that by its terms has nothing to do with commerce or any sort of economic enterprise . . . ." <sup>249</sup> Further, like the GFSZA, § 2250(a)(2)(B) "is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." <sup>250</sup> Although § 2250(a)(2)(B) is a part of the Adam Walsh Act, in no way can the federal failure to register provision as applied to convicted state sex offenders be deemed "essential" to the survival of the AWA. Accepting that § 2250(a)(2)(B) is akin to the non-economic activities that were being regulated in *Lopez* and *Morrison* and distinct from the "quintessentially economic" activity being regulated in *Raich*, courts should apply the more searching level of judicial scrutiny utilized in *Lopez* and *Morrison*. When analyzing the constitutionality of § 2250(a)(2)(B), courts should focus on whether the activity actually possesses the requisite nexus to interstate commerce, not whether Congress could have rationally concluded that such a nexus exists.

*B. Analyzing Potential Commerce Clause Arguments and § 2250(a)(2)(B) Under the Three Lopez Prongs*

As previously stated, the Supreme Court has "identified three broad categories of activity that Congress may regulate under its commerce power." <sup>251</sup> Section 2250(a)(2)(B) has been analyzed primarily under the second category, but has also been sustained under the third *Lopez* category. The following discussion will consider which, if any, of the *Lopez* categories can uphold the constitutionality of § 2250(a)(2)(B). This Part concludes that none of the three permissible categories for regulation can support the constitutionality of § 2250(a)(2)(B).

*1. Congress's Ability to Regulate the "Channels of Interstate Commerce"*

First, "Congress may regulate the use of the channels of interstate commerce." <sup>252</sup> As of this writing, no Supreme Court jurisprudence defines

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conduct's aggregate effect on interstate commerce.").

249. *Lopez*, 514 U.S. at 561.

250. *Gonzales v. Raich*, 545 U.S. 1, 24 (2005).

251. *Lopez*, 514 U.S. at 558 (citing *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 276–77 (1981); *Perez v. United States*, 402 U.S. 146, 150 (1971)).

252. *Lopez*, 514 U.S. at 558.

the scope of congressional commerce authority under this category.<sup>253</sup> Historically, however, Commerce Clause jurisprudence sustained congressional regulations under this category in an effort to keep the channels "free from immoral or injurious uses."<sup>254</sup> In essence, the first *Lopez* category allows Congress to "exclude from the commerce [those things] whose use in the states for which they are destined it may conceive to be injurious to public health, morals or welfare."<sup>255</sup> In defining the scope of this category, the Court in *United States v. Caminenti*,<sup>256</sup> stated, "[i]t may be conceded, for the purpose of this argument, that Congress has no power to punish one who travels in interstate commerce merely because he has the intention of committing an illegal or immoral act at the conclusion of his journey . . . . It seeks to reach and punish the movement in interstate commerce . . . ."<sup>257</sup>

Accepting *Caminenti*, the dispositive inquiry is what Congress seeks to punish. Congress can regulate the channels of interstate commerce so that their *use* is neither immoral nor injurious. To accomplish this stated goal, Congress is free to regulate the travel or *actual movement* of persons or things through the channels of interstate commerce; however, Congress may not regulate immoral or injurious conduct committed once the individual has reached his destination. If Congress could regulate any individual who has ever, at one point in his life, "used" the channels of interstate commerce, the Commerce Clause would impose no meaningful constraints upon the powers of the federal government.

The language of § 2250(a)(2)(B) regulates those sex offenders who "travel[] in interstate commerce."<sup>258</sup> Determining the activity that is being regulated is pivotal to an analysis of the first *Lopez* category. Here, the jurisdictional element purporting to furnish § 2250(a)(2)(B) with the requisite nexus to interstate commerce does not criminalize or

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253. See *Gonzales v. Raich*, 545 U.S. 1, 33–34 (2005) (summarizing Supreme Court Commerce Clause jurisprudence and stating that "our cases have *mechanically recited* that the Commerce Clause permits congressional regulation" of the channels of interstate commerce, implying this category's lack of definition (emphasis added)).

254. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964) (internal quotations omitted).

255. *United States v. Myers* 591 F. Supp. 2d 1312, 1328 (S.D. Fla. 2008) (quoting *United States v. Darby*, 312 U.S. 100, 114 (1941)).

256. See *generally* *Caminenti v. United States*, 242 U.S. 470 (1917) (affirming two appellate court decisions affirming convictions under the White Slave Traffic Act).

257. *Id.* at 491 (emphasis added).

258. 18 U.S.C. § 2250(a)(2)(B).

regulate the act of travel; rather the travel in interstate commerce is "divorced from the criminal act of knowingly failing to register as a sex offender."<sup>259</sup> The jurisdictional element is regulatory in nature. The jurisdictional element is merely an administrative regulation for prosecuting individuals for failing to register and only requires that the sex offender has traveled, at some undefined time, in interstate commerce.<sup>260</sup> The lack of any temporal or intent requirements attached to the jurisdictional element demonstrates that Congress did not intend to regulate the movement of sex offenders in interstate commerce as is required under the first prong. Congress can regulate the channels of interstate commerce by prohibiting persons with a proscribed intent from traveling through the channels, but it cannot regulate the local activity that the person partakes in once he has ceased traveling in interstate commerce. Section 2250(a)(2)(B) cannot be sustained under this first *Lopez* category.

2. *Congress's Ability to Regulate and Protect "the Instrumentalities of Interstate Commerce, or Persons or Things in Interstate Commerce, Even Though the Threat May Come from Only Intrastate Activities"*

The second category, although wrongly relied on by a majority of courts, does not justify the enactment of § 2250(a)(2)(B). The language reads, "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>261</sup> The issued opinions relying upon the second *Lopez* category seem to suggest that once a person has traveled across state lines, Congress is free to regulate that individual in any way it sees fit. For example, the district court in *Mason* held that Congress is empowered to "regulate those individuals or things that travel in interstate commerce without regard to the reason for their

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259. *Myers*, 591 F. Supp. 2d at 1348.

260. *See id.* at 1335 (finding that rather than containing any jurisdictional element, the statute is a "blanket regulation falling upon all sex offenders, whether or not they have traveled across state lines or whether or not they undertake any action related to interstate commerce").

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

movement."<sup>262</sup> As the court in *United States v. Myers* suggests, this construction is unduly broad.<sup>263</sup>

Although the jurisdictional element found in § 2250(a)(2)(B) technically makes a sex offender a "person . . . in interstate commerce," this seeming compliance is not sufficient. Particularly important is the complete lack of temporality associated with the jurisdictional element. By failing to either include a temporality or intent restriction, the nexus between failing to register and the activity being regulated disappears. An intent restriction would limit regulation to those sex offenders who traveled across state lines with the intent to evade registration requirements. Similarly, a temporal restriction would limit regulation to those sex offenders whose travel in interstate commerce was contemporaneous with their failure to register. Both temporal and intent restrictions would serve to create the necessary nexus between interstate commerce and the activity being regulated—the failure to register.

In addition to the lack of any temporal or intent-based element, reading the second *Lopez* category in totality rather than in isolation reveals that § 2250(a)(2)(B) does not fit into the second category. *Gibbs v. Babbitt*,<sup>264</sup> a Fourth Circuit case speaking to Congress's power under this second *Lopez* category, is illustrative.<sup>265</sup> In *Gibbs*, the Fourth Circuit stated that, although the red wolves in question had been transported through interstate commerce, that alone is not sufficient to make them a "thing" in interstate commerce.<sup>266</sup> Analogously, although the sex offenders have traveled in interstate commerce, that alone should not be enough to make them "persons" in interstate commerce. In sum, "[t]his category, as evidenced by the cases cited as exemplars, consists of Congress's power over the instrumentalities of interstate commerce, like planes and trains. Section 2250 does not concern such instrumentalities of interstate

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262. *United States v. Mason*, 510 F. Supp. 2d 923, 932 (M.D. Fla. 2007).

263. *See United States v. Myers*, 591 F. Supp. 2d 1312, 1340 (S.D. Fla. 2008) ("By articulating the categories in *Lopez*, the Supreme Court did not create new powers for Congress beyond those it traditionally enjoyed. It simply formulated a convenient rhetorical tool for lower courts and practitioners alike to quickly identify the historically accepted forms of Congress's Commerce Clause power." (internal citation omitted)).

264. *See Gibbs v. Babbitt*, 214 F.3d 483, 506 (4th Cir. 2000) (holding that a regulation limiting the taking of wolves on private land was valid under the Commerce Clause).

265. *See id.* at 491 (declining to find that wolves that have been transported through interstate commerce constitute a "thing" within interstate commerce).

266. *Id.*

commerce or the carriage of persons on such instrumentalities."<sup>267</sup> Section 2250(a)(2)(B) does not implicate the second *Lopez* prong.

3. *Congress's Ability to Regulate Those Things that Have a "Substantial Effect" on Interstate Commerce*

An analysis under the third *Lopez* category proves similarly problematic. The Court in *Morrison* articulated four factors speaking to whether a regulated activity has a substantial effect on interstate commerce.<sup>268</sup> With regard to this third category, *Morrison* directs courts to consider: (1) whether the activity being regulated is commercial or economic in nature; (2) whether the statute contains a jurisdictional element to limit its scope; (3) whether congressional findings reflect effects upon interstate commerce; and (4) whether the nexus of link between the activity being regulated and interstate commerce is attenuated.<sup>269</sup> Applying these four factors, § 2250(a)(2)(B) cannot be said to have a substantial effect on interstate commerce.

First, as discussed in Part III (A)(2), the activity being regulated is not economic in nature.<sup>270</sup> Although finding that criminalizing the failure to register is "non-economic" does not per se bring the statute outside of the realm of constitutionality, the Court disfavors aggregation of the individual instances of non-economic conduct.<sup>271</sup> In disallowing the aggregation of the individual incidents of conduct, the *Morrison* Court states: "While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, 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>272</sup> The above excerpt articulates that the Court not only strongly disapproves of the aggregation of individual instances of conduct, but also that no regulation of a non-economic intrastate activity has ever been sustained.

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267. *United States v. Myers*, 591 F. Supp. 2d 1312, 1348 (S.D. Fla. 2008).

268. *United States v. Morrison*, 529 U.S. 598, 610–12 (2000).

269. *Id.*

270. *Supra* Part III.A.2 and accompanying notes and text.

271. *See Morrison*, 529 U.S. at 613 (finding it dispositive that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity").

272. *Id.*

Separation of powers underlies this result.<sup>273</sup> Allowing the aggregation of individual instances of non-economic conduct would undermine the police power reserved to the states. Justice Thomas reasoned, "we always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power[.]"<sup>274</sup> Rationalizing that, in the aggregate, a sex offender's failure to register has a substantial affect on interstate commerce would, undeniably, allow Congress to exercise a police power.

Second, although § 2250(a)(2)(B) contains an express jurisdictional element, the jurisdictional element is insufficient; the jurisdictional element regulates far too broad a swath of conduct.<sup>275</sup> *Morrison* requires that the jurisdictional element either: (a) limit the reach of the statute to the conduct that has an "explicit connection with or effect on, interstate commerce," or (b) that the jurisdictional element "establish that the enactment is in pursuance of Congress's regulation of interstate commerce."<sup>276</sup> As suggested by the Middle District of Florida in *United States v. Powers*,<sup>277</sup> § 2250(a)(2)(B) neither limits the reach of the failure to register provision to those offenders with an explicit connection to, or effect on, interstate commerce, nor establishes that § 2250(a)(2)(B) is pursuant to Congress's power to regulate commerce.<sup>278</sup> First, lacking the necessary intent and temporal requirements, the jurisdictional element can hardly be considered limiting—those offenders who have traveled at any time and for any reason in interstate commerce are subjected § 2250(a)(2)(B).<sup>279</sup> Second, in no way

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273. See, e.g., *United States v. Lopez*, 514 U.S. 549, 567–68 (1995) (finding that the Constitution requires "a distinction between what is truly national and what is truly local" (internal citations omitted)).

274. *Id.* at 584 (Thomas, J., concurring) (emphasis omitted).

275. See, e.g., *The Sex Offender Registration and Notification Act and the Commerce Clause*, *supra* note 195, at 136 ("The limits [of the jurisdictional element] must correspond with the scope of the Commerce Clause. Congress cannot merely include the magic words 'interstate commerce' (which it did not even do in SORNA) and expend the limit to be adequate.").

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

277. *United States v. Powers*, 544 F. Supp. 2d 1331 (M.D. Fla. 2008).

278. See *id.* at 1335 (stating that the jurisdictional element in § 2250(a)(2)(B) neither limits the reach of the statute to that conduct which has an explicit connection with or effect on interstate commerce nor establishes that the statute is in pursuance of congressional power to regulate interstate commerce).

279. See *The Sex Offender Registration and Notification Act and the Commerce Clause*, *supra* note 195, at 136 ("In the case of § 2250(a)(2)(B), the jurisdictional language is insufficient because it includes no temporal connection between travel and failing to register, and prior travel does not inherently have a substantial effect on interstate commerce.").

can regulating all offenders who have, at one point or another, traveled in interstate commerce substantially affect interstate commerce.<sup>280</sup> The jurisdictional element fails to furnish the necessary ties or nexus between an offender's failing to register and interstate travel.<sup>281</sup> A jurisdictional element must not be naked or superficial; a jurisdictional element must be more than "statutory lip service"; merely including the words "who have traveled in interstate commerce" does not satisfy the demands of the Commerce Clause.<sup>282</sup> Third, "SORNA's legislative history lacks any clear congressional findings concerning the effect of sex offender registration upon interstate commerce."<sup>283</sup> Congress's failure to include any congressional findings assessing the relationship between a sex offender's failure to register and interstate commerce lends further support for the notion that § 2250(a)(2)(B) impermissibly exceeds the scope of congressional authority pursuant to the Commerce Clause.<sup>284</sup> Finally, the fourth *Morrison* consideration asks courts to consider whether the link between that which is being regulated and the effect on commerce is attenuated.<sup>285</sup> As discussed with respect to the second *Morrison* consideration, by failing to include either intent or temporal restrictions, Congress cannot rationally claim that criminalizing a sex offenders' failure to register under § 2250(a)(2)(B) has more than an attenuated nexus to interstate commerce.<sup>286</sup>

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280. See *Powers*, 544 F. Supp. 2d. at 1335 (internal quotations omitted) ("The mere fact that the individual has, at some point, traveled in interstate commerce does not establish that his or her subsequent failure to register substantially affects interstate commerce").

281. See *id.* ("[Section] 2250(a) does contain a 'jurisdictional element' which purports to establish a link between the failure to register as a sex offender and interstate commerce . . . this supposed link is superficial and insufficient to support a finding of substantial affect on interstate commerce.").

282. See *id.* ("[T]his supposed link is superficial . . . [t]he Commerce Clause . . . require[s] more than statutory lip service to interstate commerce . . . [t]he mere fact that the individual has, at some point, traveled in interstate commerce does not establish that . . . [he] substantially affects interstate commerce.").

283. *United States v. Guzman*, 582 F. Supp. 2d 305, 312 (N.D.N.Y. 2008).

284. See *United States v. Morrison*, 529 U.S. 598, 612 (2000) ("While Congress normally is not required to make formal findings . . . the existence of such findings may enable us to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce." (internal citations and quotations omitted)).

285. See *id.* ("Finally, our decision in *Lopez* rested in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated.").

286. *The Sex Offender Registration and Notification Act and the Commerce Clause*, *supra* note 279 and accompanying text.

In no meaningful way can § 2250(a)(2)(B) be considered an economic activity.<sup>287</sup> The relationship between criminalizing a sex offender's failure to register and commerce is in no way direct. Because § 2250(a)(2)(B) is non-economic in nature, the individual instances of conduct cannot be aggregated when determining whether substantial effect on interstate commerce exists.<sup>288</sup> Each individual instance of conduct must substantially affect interstate commerce.<sup>289</sup> Even if a court were to apply a rational basis level of review, § 2250(a)(2)(B) cannot be sustained under the third *Lopez* category.

### V. Conclusion

Although all four circuit courts reaching the substantive issue have upheld the constitutionality of § 2250(a)(2)(B), a careful examination of existing Commerce Clause jurisprudence intimates the opposite conclusion. When considering the constitutionality of § 2250(a)(2)(B), courts should engage in more than a perfunctory, result-oriented analysis. Increased judicial approval of § 2250(a)(2)(B) not only exposes sex offenders to the unduly burdensome and disproportional failure to register penalties but also, "signal[s] an important shift in what the *Lopez* Court called the 'sensitive relation between federal state and state jurisdiction.'"<sup>290</sup> Even after its decision in *Raich*, it seems that if the Court were to uphold § 2250(a)(2)(B) as a valid exercise of Congress's Commerce Clause powers, it would have to overturn *Lopez* and *Morrison*. Stare decisis and a faithful interpretation of the Constitution should prohibit this result.

Commerce Clause jurisprudence concludes that the Court should apply rational basis review for most economic Commerce Clause cases.<sup>291</sup> However, *Lopez* and *Morrison* suggest that when legislation affects

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287. *Supra* Part IV.A.2.

288. *See Morrison*, 529 U.S. at 617 ("We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce.").

289. *See id.* at 613 ("While we need not adopt a categorical rule against aggregating the effects of noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of interstate activity only where that activity is economic in nature.").

290. Logan, *Sex Offender Registration*, *supra* note 16, at 9.

291. *See Katzenbach v. McClung*, 379 U.S. 294, 303–04 (1964)("[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.").

individual's rights, the Court should give less deference to Congress. The level of review turns on whether the legislation is economic in nature. Even accepting the broad definition of "economic" employed in *Raich*, in no way can § 2250(a)(2)(B) be considered economic or commercial in nature. Therefore, when considering the constitutionality of § 2250(a)(2)(B), the Court should apply a more searching level of review. Considering, as the Court did in *Lopez* and *Morrison*, whether § 2250(a)(2)(B) actually falls within the purview of Congress's Commerce Clause powers requires a court to find that the legislation is unconstitutional.<sup>292</sup> Any meaningful Commerce Clause analysis reveals that § 2250(a)(2)(B) regulates neither the channels nor the instrumentalities of commerce. Finally, any argument that § 2250(a)(2)(B) has a substantial affect on interstate commerce is simply too attenuated. Even the most expansive constructions of congressional commerce authority recognize that this power is subject to outer limits.<sup>293</sup> Although these limits undeniably shift with time, extending commerce authority to § 2250(a)(2)(B) signals an unprecedented expansion of Congress's commerce authority. Rather than employing a prudential or consequential method of constitutional interpretation, courts should look to the judicial decisions defining the text of the Commerce Clause. Faithfully applying the Court's Commerce Clause jurisprudence directs the conclusion that Congress overreached its commerce authority.

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292. See *United States v. Morrison*, 529 U.S. 598, 619 (2000) ("[W]e conclude that the Commerce Clause does not provide Congress with authority to enact [the statute at issue]."), and *United States v. Lopez*, 514 U.S. 549, 580 (1995) ("The statute before us upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power.").

293. See *United States v. Lopez*, 514 U.S. 549, 556–57 (1995) (articulating that the Commerce Clause has always been subject to constraints and outer limits).