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NFIB v. Sebelius: A Feather in the Cap of Those Who Challenge SORNA?

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***NFIB v. Sebelius*: A Feather in the Cap of Those Who Challenge SORNA?**

*Bethany Belisle**

Table of Contents

I. Introduction.....	208
II. SORNA: History, Construction, and Constitutional Questions ...	209
A. Legislative History.....	209
B. Section 16913.....	211
C. Section 2250.....	211
D. Nondelegation Doctrine Challenges	213
E. Ex Post Facto Challenges.....	214
F. Commerce Clause Challenges	214
G. History of Commerce Clause Jurisprudence.....	216
III. SORNA in Court: More Questions Than Answers.....	221
A. <i>United States v. Kebedeaux</i>	221
B. <i>United States v. Five Gambling Devices</i>	223
C. <i>NFIB v. Sebelius</i>	224
D. Recent Opinions Considering the Validity of SORNA Under the Commerce Clause.....	227
1. Opinions Holding Section 16913 Constitutionally Invalid.....	227
a. <i>United States v. Myers</i>	227
b. <i>United States v. Nasci</i>	229
2. Opinions Holding Section 16913 Constitutionally Valid.....	231
a. <i>United States v. Robbins</i>	231
b. <i>United States v. Cabrera-Gutierrez</i>	233
IV. Resolving the SORNA Dilemma	234
A. Fear of Sex Offenders	235

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B. Fixing Statutory Deficiencies of SORNA.....	236
C. Supreme Court Action	237
V. Conclusion	238

I. Introduction

The U.S. Supreme Court’s interpretation of the Commerce Clause has shifted many times throughout American history.¹ At times the power has been limited in nature, and at other times very expansive.² In the last twenty years the expansive nature of the Commerce Clause power has come under scrutiny.³ The future of Commerce Clause jurisprudence is still somewhat questionable, due to the fact that the Court has carved out various nuances to what the power covers.⁴

These decisions have led to constitutional challenges of several legislative regimes.⁵ These challenges include the challenge of the Sex Offender Registration and Notification Act as being outside of the scope of Commerce Clause power.⁶ The recent Commerce Clause jurisprudence, in combination with the upholding of the Affordable Care Act on Tax and Spend grounds rather than Commerce Clause grounds, further leads to questions regarding the future of Commerce Clause power.⁷

1. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES 242 (3d ed. 2006) (“Over the course of American history, the Supreme Court has adopted varying views as to the meaning of the commerce clause and the extent to which congressional powers under it are limited by the Tenth Amendment.”).

2. See *id.* at 243 (outlining the various phases of Commerce Clause jurisprudence).

3. See *id.* at 264 (discussing the more recent narrowing of the scope of Commerce Clause power).

4. See *id.* (discussing the Supreme Court’s narrow interpretation of certain statutes to maintain their constitutionality).

5. See *id.* at 264–70 (discussing the attack on the Violence Against Women Act in *United States v. Morrison* and the opposition to the Water Pollution Control Act in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* as two examples of Commerce Clause arguments after *Lopez*).

6. *Infra* Part II.F.

7. See David A. Strauss, *Commerce Clause Revisionism and the Affordable Care Act*, 2012 SUP. CT. REV. 1, 3 (2013)

A central issue in the litigation was whether the Commerce Clause authorized Congress to enact the so-called individual mandate—a provision of the ACA requiring that individuals have health insurance. A majority of the Court, by a vote of 5–4, concluded that the mandate exceeded Congress’s power under the Commerce Clause, although a different 5–4 majority sustained the mandate as an exercise of Congress’s power to tax under the General Welfare Clause.

This Note argues that the federal registration requirement incorporated into the Sex Offender Registration and Notification Act, given the recent course of interpretive limitations, in combination with the Affordable Care Act decision, falls outside of the scope of the Commerce Clause.⁸ The first part of this Note explores the legislative history of the Sex Offender Registration and Notification Act, the constitutional challenges that resulted therefrom, and the history of the Commerce Clause that brings into question the constitutionality of the registration requirements.⁹ Part II discusses *United States v. Kebodeaux* and *NFIB v. Sebelius* and why these recent decisions bring the constitutionality of the federal registration requirement into question and reveal a new perspective to many Circuit Court decisions regarding SORNA.¹⁰ Part III discusses the consequences of this federal overstep and the infringement on states' rights as well as individual liberties.¹¹

II. SORNA: History, Construction, and Constitutional Questions

A. Legislative History

The Sex Offender Registration and Notification Act (SORNA)¹² has been controversial from a constitutional perspective since its passage in 2006.¹³ SORNA was enacted as a part of the Adam Walsh Child Protection and Safety Act of 2006.¹⁴ This law replaced the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994 (Wetterling Act).¹⁵ The Wetterling Act provided that the U.S. Attorney General would promulgate guidelines for states to follow when

8. *Infra* Part III.

9. *Infra* Parts II.A–E.

10. *Infra* Part III.

11. *Infra* Part IV.

12. Sex Offender Registration and Notification Act, 42 U.S.C. §§ 16911–16929 (2012).

13. See Rebecca L. Visgaitis, *Retroactive Application of the Sex Offender Registration and Notification Act: A Modern Encroachment on Judicial Power*, 45 COLUM. J.L. & SOC. PROBS. 273, 282 (2011) (positing that the registration aspect of SORNA was immediately controversial and resulted in many challenged convictions).

14. *United States v. Powers*, 544 F. Supp. 2d 1331, 1331 (2008).

15. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994, Pub. L. No. 103-322, § 170101, 108 Stat. 1796 (1994) (repealed).

implementing state-run registration systems for convicted sex offenders.¹⁶ In 1996, the addition of Megan's Law to this Act made federal funding for state law enforcement dependent on the creation of state databases for the registration of sex offenders.¹⁷ The federal funding for these registration programs was not dependent on states requiring past offenders to register within the new system retroactively.¹⁸ By the year 2000, every state and the District of Columbia had functional sex offender registrations.¹⁹

SORNA replaced a patchwork of state registration systems and guidelines and required convicted sex offenders to register according to uniform federal guidelines.²⁰ SORNA did not expand on the registration requirements for past offenders, but instead directed the Attorney General to promulgate registration requirements.²¹ Attorney General Alberto Gonzalez issued a regulation on February 28, 2007, which explicitly applied SORNA's registration requirements to those who were convicted prior to the passage of SORNA.²² The failure to register according to the federal registration requirements resulted for the first time in a federal criminal penalty.²³

16. *Id.*

17. *See Powers*, 544 F. Supp. 2d at 1331 ("In 1996 the Wetterling Act was amended by Megan's Law, which made the receipt of federal funding for state law enforcement dependent upon the creation of sex offender registration programs. Every state had enacted some variation of Megan's Law by 1997." (citation omitted)).

18. *See* Final Guidelines for Megan's Law and the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 62 Fed. Reg. 39,009, 39,013 (July 21, 1997) ("The Act does not require states to attempt to identify and impose registration requirements on offenders who were convicted of offenses in these categories prior to the establishment of a conforming registration system.").

19. *See* *United States v. Begay*, 622 F.3d 1187, 1190 (9th Cir. 2010) ("As a result of the Wetterling Act, by 2000, all fifty states and the District of Columbia had both sex offender registration systems and community notification programs.").

20. *See* National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,045 (July 2, 2008) ("Ultimately, Congress concluded that the patchwork of standards that had resulted from piecemeal amendments should be replaced with a comprehensive new set of standards . . . that would close potential gaps and loopholes under the old law, and generally strengthen the nationwide network of sex offender registration and notification programs.").

21. *See* Sex Offender Registration and Notification Act, 42 U.S.C. § 16912(b) (2012) ("The Attorney General shall issue guidelines and regulations to interpret and implement this subchapter.").

22. *See* 28 C.F.R. § 72.3 (2011) ("The requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.").

23. *See* *Visgaitis*, *supra* note 13, at 274 ("SORNA also created a new federal crime of failing to register pursuant to a state's requirements, punishable by up to ten years in

B. Section 16913

Section 16913 of SORNA provides:

(a) In general: A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) Initial registration: The sex offender shall initially register—

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) Keeping the registration current: A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.²⁴

This section sets forth the registration requirements.²⁵ It is important to note that § 16913 contains no interstate jurisdictional component to the registration requirement.²⁶ This section defines who qualifies as a sex offender, and also sets forth the three-day time constraint on registration.²⁷ This section is also separated from the component of SORNA that contains the punishment for failure to register, § 2250.

C. Section 2250

Section 2250 of SORNA provides that whoever

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

prison.”).

24. 42 U.S.C. § 16913 (2012).

25. *Id.*

26. *Id.*

27. *Id.*

(2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of 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 a registration as required by the Sex Offender Registration and Notification Act; shall be fined under this title or imprisoned not more than 10 years, or both.²⁸

Section 2250 is the part of the Act that provides for the criminal prosecution of those who fail to register in accordance with § 16913.²⁹ This provision requires the definitions and requirements as set forth in § 16913.³⁰ In *Carr v. United States*,³¹ the Supreme Court explained, “Section 2250 is not a stand-alone response to the problem of missing sex offenders; it is imbedded in a broader statutory scheme enacted to address the deficiencies in prior law that had enabled sex offenders to slip through the cracks.”³² In that same case the Court also considered that § 2250 and § 16913 were enacted with different policies in mind.³³ The Court noted that knowing the purpose behind the enactment of § 16913 “tells us little about the specific policy choice Congress made in enacting § 2250.”³⁴ The question remains as to whether the provisions in § 2250 properly regulate the registration requirements of § 16913.³⁵

28. 18 U.S.C. § 2250 (2012).

29. *Id.*

30. *Id.*

31. 560 U.S. 438 (2010).

32. *Id.* at 455 (citations omitted).

33. *See id.* at 456 (discussing that knowing SORNA’s purpose does not inform one of the policy choices made regarding enforcement of the Act).

34. *Id.*

35. *Cf. NFIB v. Sebelius*, 132 S. Ct. 2566, 2591 (2012)

The Government says that health insurance and health care financing are “inherently integrated.” But that does not mean the compelled purchase of the first is properly regarded as a regulation of the second. No matter how “inherently integrated” health insurance and health care consumption may be, they are not the same thing: They involve different transactions, entered into at different times, with different providers. And for most of those targeted by the mandate, significant health care needs will be years, or even decades, away. The proximity and degree of connection between the mandate and the subsequent commercial activity is too lacking to justify an exception of the sort urged by the Government.

D. Nondelegation Doctrine Challenges

These regulations resulted in numerous challenges under the nondelegation doctrine, but the law was unanimously upheld.³⁶ Many defendants argued that the statute's delegation of the authority to promulgate these registration requirements to the Attorney General was not done with an intelligible principle that the Attorney General had to follow.³⁷ Circuit courts that have addressed this issue have unanimously held that the statute's delegation of authority to decide whether SORNA registration requirements applied retroactively was within Congress's discretion, and that the Act laid out a sufficiently intelligible principle.³⁸ These decisions could reflect the judicial branch's deference to the legislature on issues of delegation of power.³⁹ It is unclear, however, whether the Supreme Court would hold unanimously that SORNA would withstand a nondelegation challenge.⁴⁰ All of these cases were denied certiorari.⁴¹

(citation omitted).

36. *See generally* United States v. Parks, 698 F.3d 1, 7–8 (1st Cir. 2012); United States v. Guzman, 591 F.3d 83, 92–93 (2d Cir. 2010); United States v. Cooper, 750 F.3d 263, 264 (3d Cir. 2014); United States v. Rogers, 468 F. App'x 359, 362 (4th Cir. 2012); United States v. Whaley, 577 F.3d 254, 263–64 (5th Cir. 2009); United States v. Felts, 674 F.3d 599, 606 (6th Cir. 2012); United States v. Goodwin, 717 F.3d 511, 516–17 (7th Cir. 2013); United States v. Kuehl, 706 F.3d 917, 919–20 (8th Cir. 2013); United States v. Ambert, 561 F.3d 1202, 1213–14 (11th Cir. 2009).

37. *See Parks*, 698 F.3d at 7 (“Parks next claims that the Attorney General’s statutory authority to apply the registration requirements to those convicted of sexual offenses before SORNA’s enactment contravenes constitutional limitations on the delegation of legislative power.”).

38. *See id.* (reasoning that the Attorney General’s assessment on this question made perfect sense because of the practical effects this law would have on that office).

39. *See Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“Applying this ‘intelligible principle’ test to congressional delegations, our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”).

40. *See Reynolds v. United States*, 132 S. Ct. 975, 986 (2012) (Scalia, J., dissenting) (“Indeed, it is not entirely clear to me that Congress can constitutionally leave it to the Attorney General to decide—with no statutory standard whatever governing his discretion—whether a criminal statute will or will not apply to certain individuals. That seems to me sailing close to the wind with regard to the principle that legislative powers are nondelegable.”).

41. *Supra* note 36.

E. Ex Post Facto Challenges

The February 28, 2007 regulation was also challenged on ex post facto grounds as extending punishment to those who were found guilty prior to the passage of SORNA.⁴² The Constitution in Article I section 10 provides, “No state shall . . . pass any . . . ex post facto law.”⁴³ Challengers argued that being punished for failing to register for crimes committed before the passage of SORNA in 2006 violated their rights under this clause.⁴⁴ Circuit courts upheld SORNA in the face of these challenges as well,⁴⁵ insisting that the registration requirements imposed by SORNA were not meant to be punitive, but rather were civil penalties for the benefit of informing the public of safety concerns.⁴⁶ The statute punished individuals not for their past sex offenses, but for their current failure to register.⁴⁷

F. Commerce Clause Challenges

The Commerce Clause gives Congress the power “[t]o regulate Commerce with foreign nations, and among the several States.”⁴⁸ The heart of this challenge to the registration requirement in SORNA is that it requires action to be taken even if the crime is purely local.⁴⁹ This argument stems from the three distinct categories of Congress’s regulatory authority under the Commerce Clause: regulation of channels, regulation of instrumentalities, and regulation of activities that have a substantial effect

42. *See* *United States v. Shoulder*, 738 F.3d 948, 954 (9th Cir. 2012) (“[T]oday SORNA’s registration requirement imposes significant hardships on offenders, who are ‘held to public ridicule by community members,’ and face difficulty finding and maintaining both employment and housing.” (citation omitted)).

43. U.S. CONST. art. I, § 10, cl. 1.

44. *See* *United States v. Zuniga*, 579 F.3d 845, 850 (8th Cir. 2009) (stating that Zuniga argued that because SORNA punishes him for behavior that occurred before SORNA was enacted, SORNA violates the ex post facto clause).

45. *See generally* *Shoulder*, 738 F.3d at 954.

46. *Id.*

47. *See* *Zuniga*, 579 F.3d at 850 (“[T]he statute does not punish an individual for previously being convicted of a sex offense, but it instead merely ‘punishes an individual for traveling in interstate commerce and failing to register.’” (quotation omitted)).

48. U.S. CONST. art. I § 8, cl. 3.

49. *See* *United States v. Gould*, 568 F.3d 459, 471 (4th Cir. 2009) (stating that the argument made against SORNA on Commerce Clause grounds was that regulating registration for purely local offenses does not have a substantial effect on interstate commerce).

on interstate commerce.⁵⁰ The Commerce Clause challenges have also failed to overturn the registration requirements of SORNA in most instances.⁵¹ These courts determine that the registration of sex offenders falls within Congress's jurisdiction with regard to channels and instrumentalities of commerce.⁵²

There remains, however, some question as to whether Congress overstepped its Commerce Clause authority in enacting the criminal penalty in SORNA.⁵³ In *United States v. Powers*,⁵⁴ the court determined that the issue of sex offender registration fell outside of the realm of the instrumentalities or channels of interstate commerce.⁵⁵ The court determined that this issue must then fall within the third category—substantial relationship to interstate commerce.⁵⁶ The court in *Powers* determined that there was not a substantial relationship to interstate commerce, and that the law's mere mention of interstate travel did not amount to a sufficient nexus to commerce to give Congress authority to enact this legislation.⁵⁷ This case was vacated and remanded at the appellate

50. See *United States v. Lopez*, 514 U.S. 549, 558 (1995) (recapping Commerce Clause jurisprudence and the three instances when it can be regulated).

51. See *Gould*, 568 F.3d at 471–72 (holding that the registration requirement does not violate the Commerce Clause).

52. See *id.* (noting that the conclusion that SORNA registration requirements falls within the first two *Lopez* categories is consistent with the reasoning of other circuit courts that have found SORNA to be legitimate under the channels and instrumentalities analysis).

53. See Corey Rayburn 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, 407–08 (2010) (“Whereas states have virtually unlimited power to create crimes related to sex offender registration, there is a substantial question as to whether SORNA is a constitutional use of federal power.”).

54. 544 F. Supp. 2d 1331, 1331–36 (M.D. Fla. 2008), *vacated*, 584 F.3d 1349 (11th Cir. 2009).

55. See *id.* at 1333–34 (“Here we are clearly not dealing with the regulation of channels or instrumentalities of commerce. Nor are we dealing with the regulation of persons or things in interstate commerce.”).

56. See *id.* at 1334

Indeed, the statute in question here makes no effort to regulate the interstate movement of persons who are sex offenders. Those persons are permitted to travel freely throughout the country without consequence, so long as they remain registered in the state in which they reside, work and/or go to school. Thus, to withstand scrutiny under the Commerce Clause, this statute must regulate activities that substantially affect interstate commerce.

57. See *id.* at 1335 (“Like the statutes at issue in *Lopez* and *Morrison*, SORNA has nothing to do with commerce or any form of economic enterprise. Activities held to affect interstate commerce have been uniformly economic in character, or had some effect on the national market.”).

level, but it still provided a compelling argument against the constitutionality of SORNA.⁵⁸ The Commerce Clause issue was denied certiorari on March 1, 2010.⁵⁹

G. History of Commerce Clause Jurisprudence

The history of Commerce Clause jurisprudence can be broken into three broad eras.⁶⁰ In the first era, the *Lochner* era, the Court took a formalist approach to Commerce Clause jurisprudence.⁶¹ During this time, the Commerce Clause was dealt with in the literal sense, and it was not clear whether even activities like mining⁶² or regulation of labor⁶³ would be included in the nation's understanding of Congress's power to regulate commerce because they were not interstate and not commerce in the traditional sense.⁶⁴ In the *Lochner* era, there was an emphasis on the economic rights of individuals, and governmental regulation of working conditions or hours infringed on these individual economic rights.⁶⁵ This approach to the Commerce Clause power led to the Court striking down large swaths of federal legislation, such as aspects of the New Deal.⁶⁶

Next came the expansive era of Commerce Clause jurisprudence.⁶⁷ During this era the powers of Congress under the Commerce Clause were

58. *See id.* at 1344 (vacating the order of the district court and remanding).

59. *See* *Gould v. United States*, 559 U.S. 974, 974 (2010) (denying certiorari).

60. *See* Alison L. LaCroix, *The Shadow Powers of Article I*, 123 *YALE L.J.* 2044, 2045–50 (2014) (describing the changes throughout the country's history in the interpretation of the Commerce Clause and federalism generally).

61. *See id.* at 2047 (noting that the 1918 invalidation of the Child Labor Act relied heavily on the Tenth Amendment and the fear of encroaching on the states' police power).

62. *See* *Carter v. Carter Coal Co.*, 298 U.S. 238, 869 (1936) (“We have seen that the word ‘commerce’ is the equivalent of the phrase ‘intercourse for the purposes of trade.’ Plainly, the incidents leading up to and culminating in the mining of coal do not constitute such intercourse.”).

63. *See* *Lochner v. New York*, 198 U.S. 45, 53 (1905) (holding that the New York statute preventing bakers from working over sixty hours a week interfered with an individual's right to contract).

64. *See* LaCroix, *supra* note 60, at 2046–47 (describing the invalidation of the Child Labor Act and the Court's defensive stance towards state police power).

65. *See* CHEMERINSKY, *supra* note 1, at 247 (discussing the aggressive use of judicial authority to invalidate federal statutes to ensure individual economic freedom).

66. *Id.*

67. *See* LaCroix, *supra* note 60, at 2047 (“After 1937, as is well known, the Court adopted an increasingly deferential stance toward congressional regulation under the commerce power.”).

greatly expanded.⁶⁸ The Commerce Clause in combination with the Necessary and Proper Clause gave rise to the government being able to regulate manufacturing,⁶⁹ labor,⁷⁰ and even purely local and non-commercial activity that in the aggregate would affect interstate commerce.⁷¹ The Court deemphasized the economic liberties of the *Lochner* era, and the new scheme of authority under the Commerce Clause encompassed these activities previously thought, to be outside of Congress's reach.⁷² The Commerce Clause was not used to strike down legislation, but rather as a catalyst enabling the federal government to enact sweeping reforms like New Deal legislation and the Civil Rights Act.⁷³

The Rehnquist Court later revived restrictions on Commerce Clause legislation in what is called the new federalism era.⁷⁴ This Court reverted

68. See Craig L. Jackson, *The Limiting Principle Strategy and Challenges to the New Deal Commerce Clause*, 15 U. PA. J. CONST. L. 11, 16 (2012)

The new understanding of the Clause and the implementing authority provided by the substantial effects doctrine effectively dismissed dual federalism—the view that state and federal power regimes are completely separate and distinct—allowing Congress to regulate intrastate activities as appropriate to the circumstances. The limiting principle was Congress's own rationality assessment of its legislation. The new application of the Necessary and Proper Clause allowed the expansion of federal power into areas previously thought reserved for the states.

69. See *United States v. Darby*, 312 U.S. 100, 105 (1941) (holding that Congress could legislate for labor standards even if the labor was solely for the production or manufacturing of lumber that would subsequently enter into interstate commerce).

70. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (holding that minimum wage laws protecting women are a legitimate exercise of legislative power and showing deference to congressional reasoning for promulgating these laws).

71. See *Wickard v. Filburn*, 317 U.S. 111, 127 (1942) (holding that Congress can regulate growth of wheat for purely personal use because of the effect that personal consumption could have on the market as a whole).

72. See CHEMERINSKY, *supra* note 1, at 256–57 (describing the shift in the Court's thinking regarding the scope of Commerce Clause power).

73. See *Heart of Atlanta Motel v. United States* 379 U.S. 241, 357–358 (1964)

In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.

74. See LaCroix, *supra* note 60, at 2049 (noting that the debate over federalism has continued regarding the Commerce Clause but has shifted to bring in a more rigorous debate about the meaning of the Necessary and Proper Clause and to a lesser extent the General Welfare Clause).

back to a more conservative reading of the Commerce Clause and emphasized that the police powers are reserved for the states.⁷⁵ Cases during Chief Justice Rehnquist's tenure overturned laws criminalizing very specific actions, such as possession, that were purely local and in no way related to interstate commerce through a jurisdictional nexus.⁷⁶

In the new federalism era the Court specifically addressed criminal statutes that were not substantially related to interstate commerce.⁷⁷ In the first of these cases, *United States v. Lopez*,⁷⁸ the Court reviewed the Gun Free School Zones Act of 1990, which criminalized the possession of a firearm in a school zone.⁷⁹ The Court concluded that “the proper test requires an analysis of whether the regulated activity ‘substantially affects’ interstate commerce.”⁸⁰ Under this test, the mere possession of a firearm within a school zone did not meet the standard of substantially affecting interstate commerce.⁸¹ The language of the statute was too broad to limit the application to cases where it could be proven that the gun traveled through interstate commerce and the Act failed to withstand the Commerce Clause challenge.⁸² In considering the consequences of the decision in *Lopez*, the Court reasoned,

Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender “legal uncertainty.”⁸³

75. See *United States v. Lopez*, 514 U.S. 549, 567 (invalidating a law prohibiting the possession of a firearm within a school zone). The Court also noted that “[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 of the sort retained by the States.” *Id.*

76. *Id.*

77. See CHEMERINSKY, *supra* note 1, at 265–69 (discussing the Court's decisions in *Lopez* and *Morrison*, both criminal statutes).

78. *United States v. Lopez*, 514 U.S. 549, 549–602 (1995).

79. See *id.* at 551 (describing the Gun-Free School Zones Act).

80. *Id.* at 559.

81. See *id.* at 561 (“Section 922(q) is a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.”).

82. See *id.* at 562 (“Unlike the statute in *Bass*, § 922(q) has no express 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.”).

83. *Id.* at 566.

This was the first time in almost sixty years that the Court declared a federal law unconstitutional as exceeding the scope of the Commerce Clause power.⁸⁴

The Court then added to new federalism in its holding in *United States v. Morrison*.⁸⁵ The question before the Court was whether the civil damages provision of the Violence Against Women Act was constitutional.⁸⁶ The statute at issue in *Morrison* differed from the statute in *Lopez* because the Violence Against Women Act included significant congressional findings regarding the overall economic impact that violence against women has on society.⁸⁷ Despite these findings, the Court still found that there was not a sufficient connection to interstate commerce to warrant Commerce Clause authority.⁸⁸ The Court “reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregated effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.”⁸⁹ This holding narrowed *Lopez* by limiting what Congress could regulate even when it provides findings that show a substantial effect on interstate commerce if it is noneconomic in nature.⁹⁰ In response to congressional findings that violence against women does have a substantial impact on commerce and therefore could be regulated by Congress, the Court writes,

84. See CHEMERINSKY, *supra* note 1, at 264 (“Between 1936 and April 26, 1995, the Supreme Court did not find one federal law unconstitutional as exceeding the scope of Congress’s commerce power.”).

85. *United States v. Morrison*, 529 U.S. 598, 598–627 (2000); see also CHEMERINSKY, *supra* note 1, at 267 (asserting that in *Morrison*, the Court upheld the three part test from *Lopez*).

86. See *Morrison*, 529 U.S. at 601 (describing the factual background and presenting the issue of the constitutionality of civil remedies for violence against women).

87. See *id.* at 614 (“In contrast with the lack of congressional findings that we faced in *Lopez*, § 13981 is supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families.” (emphasis added)).

88. See *id.* at 615 (“The reasoning . . . seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States’ police power) to every attenuated effect upon interstate commerce.”); *id.* (“[A]llow[ing] Congress to regulate any crime [if the] . . . aggregated impact . . . has substantial effects on employment, production, transit, or consumption . . . [encapsulating] gender-motivated violence. . . [because it has] lesser economic impacts than the larger class of which it is a part.”).

89. *Id.* at 617–18.

90. See *id.* at 616 (“Under our written Constitution, however, the limitation of congressional authority is not solely a matter of legislative grace.”).

The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce. If 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, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.⁹¹

More recently, the Court in *Gonzalez v. Raich*⁹² called into question just how much staying power this more stringent Commerce Clause jurisprudence had.⁹³ The Court carved out an exception for regulating goods that never enter interstate commerce when the regulation is part of a scheme that clearly meets the jurisdictional nexus to interstate commerce.⁹⁴ This left open the issue of whether this revival of Commerce Clause invalidations would continue or whether they were simply a blip on the screen of Commerce Clause jurisprudence.⁹⁵ This question seemed to be answered, at least in part, by the Court's reliance on the Tax and Spend Clause—rather than the Commerce Clause—to validate the Affordable Care Act.⁹⁶ It appears that the narrower reading of the Commerce Clause under the Rehnquist era has not been completely abandoned.⁹⁷

91. *Id.* at 615.

92. *Gonzalez v. Raich*, 545 U.S. 1, 1–33 (2005).

93. *See id.* at 57 (Thomas, J., dissenting) (“By holding that Congress may regulate activity that is neither interstate nor commerce under the Interstate Commerce Clause, the Court abandons any attempt to enforce the Constitution’s limits on federal power.”).

94. *See id.* at 22 (majority opinion) (“Congress was acting well within its authority to ‘make all Laws which shall be necessary and proper’ to ‘regulate Commerce . . . among the several States.’” (quoting U.S. CONST., art. I, § 8)); *id.* (“That the regulation ensnares some purely intrastate activity is of no moment. . . . [W]e refuse to excise individual components of that larger scheme.”).

95. *See LaCroix, supra* note 60, at 2049–50 (“[T]he Supreme Court’s ‘federalism revolution’ has . . . shifted from its . . . inquiry into the scope of Congress’s power to regulate interstate commerce, refracted through the Tenth Amendment, to become an inquiry into the transsubstantive reasons for allowing Congress to regulate at all.”); *id.* (“This transformation has been especially significant when the Court views Congress as venturing into a domain not explicitly specified in the text of Article I.”).

96. Affordable Care Act, 26 U.S.C. § 5000A (2012); *see also NFIB v. Sebelius*, 132 S. Ct. 2566, 2587 (2012) (“The individual mandate, however, does not regulate existing commercial activity[,] . . . compel[ling] individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce.” (emphasis added)); *id.* (“[P]ermitting Congress to regulate individuals precisely *because* they

*III. SORNA in Court: More Questions Than Answers**A. United States v. Kebodeaux*

The Supreme Court faced a SORNA challenge more recently in *United States v. Kebodeaux*.⁹⁸ This case involved the failure of Kebodeaux, a former member of the Air Force convicted for having consensual sex with a minor, to register upon moving from San Antonio to El Paso within the state of Texas.⁹⁹ Kebodeaux was convicted of the offense by a special court-marshal in 1999.¹⁰⁰ After being convicted in the U.S. District Court for the Western District of Texas for failing to register, the U.S. Court of Appeals for the Fifth Circuit held that the registration requirement was unconstitutional as applied to Kebodeaux.¹⁰¹ The question specifically before the Court was “whether the Constitution’s Necessary and Proper Clause grants Congress the power to enact SORNA’s registration requirements and apply them to a federal offender who had completed his sentence prior to the time of SORNA’s enactment.”¹⁰² The Court focused on the powers granted to the government under the Military Regulation Clause¹⁰³ and the Necessary and Proper Clause.¹⁰⁴ The Court stated,

Here, under the authority granted to it by the Military Regulation and Necessary and Proper Clauses, Congress could promulgate the Uniform Code of Military Justice. It could specify that the sex offense of which Kebodeaux was convicted was a military crime under that Code. It could punish that crime through imprisonment and by placing conditions upon Kebodeaux’s release. And it could make the civil registration

are doing nothing would open a new and potentially vast domain to congressional authority.”).

97. *See generally id.*

98. *United States v. Kebodeaux*, 133 S. Ct. 2496, 2496 (2013).

99. *Id.* at 2500.

100. *Id.*

101. *Id.*

102. *Id.*

103. *See* U.S. CONST. art. I, § 8, cl. 14 (stating that the Congress shall have the power to “make rules for the Government and Regulation of the land and naval forces”).

104. *See id.* art I, § 8, cl. 18 (stating that Congress shall have the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”).

requirement at issue here a consequence of *Kebodeaux*'s offense and conviction.¹⁰⁵

But Chief Justice Roberts was careful to ensure that the logic presented in the case was applicable only to similar factual scenarios—i.e., military personnel—and was not connected to a federal police power.¹⁰⁶ He went on to note that reading the holding this way could be easier because it appeared that the government had argued for some form of federal police power due to a heightened interest in regulating sex offenders.¹⁰⁷ Nevertheless, it is well established that there exists no federal police power because there is no such underlying grant of constitutional authority.¹⁰⁸

Justice Thomas reiterated this point in his dissent,¹⁰⁹ stating that “[a]s applied to *Kebodeaux*, SORNA does not ‘carr[y] into Execution’ any of the federal powers enumerated in the Constitution. Rather, it usurps the general police power vested in the States.”¹¹⁰ Thomas went on to note that the law exceeded Congress’s power under the Commerce Clause because it punished even those who do not cross state lines.¹¹¹ *Kebodeaux* is a prime example of someone who remained within the borders of Texas and yet was policed by the federal government.¹¹² The decision in *Kebodeaux* leaves the constitutional questions of SORNA as applied to civilians ripe for judicial review.

105. *United States v. Kebodeaux*, 133 S. Ct. 2496, 2503 (2013).

106. *See id.* at 2507 (Roberts, J., concurring) (“I worry that incautious readers will think they have found in the majority opinion something they would not find in either the Constitution or any prior decision of ours: a federal police power.”).

107. *See id.* (“[T]he Solicitor General adopted something very close to the police power argument.”(quotation omitted)); *id.* (“[C]ontending that ‘the federal government has greater ties to former federal sex offenders than . . . the general public,’ and can therefore impose restrictions . . . years after their unconditional release[,] . . . ‘serve[ing] . . . public-protection purposes.’” (quotation omitted)).

108. *See United States v. Morrison*, 529 U.S. 598, 618–19 (2000) (“[W]e *always* have rejected readings of . . . the scope of federal power that would permit Congress to exercise a police power.” (emphasis added) (quoting *United States v. Lopez*, 514 U.S. 549, 584–85 (1995) (Thomas, J., concurring))).

109. *See Kebodeaux*, 133 S. Ct. at 2510 (Scalia, J., dissenting) (“The Constitution creates a Federal Government with limited powers.”).

110. *Id.* (Thomas, J., dissenting) (citations omitted).

111. *See id.* at 2512 (“[Section 2250(a)(2)(A)] applies to all federal sex offenders who fail to register, even if they never cross state lines.”).

112. *Id.* at 2500 (majority opinion).

B. United States v. Five Gambling Devices

In 1953, the Court grappled with an analogous question in *United States v. Five Gambling Devices*.¹¹³ The statute in question there prohibits the shipment of gambling devices in interstate commerce, but also includes registration and reporting provisions.¹¹⁴ Dealers were required to make monthly reports of sales and inventory¹¹⁵ to aid in the regulation of interstate commerce.¹¹⁶ But the gambling devices that the government seized in the case had no connection to interstate commerce and were not alleged by the indictment to have any connection to interstate commerce.¹¹⁷ In fact,

The indictments [did] not allege that the accused dealers, since the effective date of the Act or for that matter at any other time, have bought, sold or moved gambling devices in interstate commerce, or that the devices involved in their unreported sales have, since the effective date of the Act or at any other time, moved in interstate commerce or ever would do so.¹¹⁸

In considering whether a law which potentially created a type of federal police power could be constitutional, the Court noted, “[n]o precedent of this Court sustains the power of Congress to enact legislation penalizing failure to report information concerning acts not shown to be in, or mingled with, or found to affect commerce.”¹¹⁹ The Court found the reporting requirements unconstitutional—although not on Commerce Clause grounds.¹²⁰ Despite this, *Kebedeaux* and *Five Gambling Devices* share

113. *United States v. Five Gambling Devices*, 346 U.S. 441, 442 (1953).

114. *See id.* (“These cases present unsuccessful attempts, by two different procedures, to enforce the view of the Department of Justice as to construction of the Act of January 2, 1951, which prohibits shipment of gambling machines in interstate commerce but includes incidental registration and reporting provisions.”).

115. *See id.* at 453 (noting that the Act required that dealers make detailed reports of inventory, sales, and disclosures of place of business monthly).

116. *See id.* at 442–43 (noting that the Act prohibits transportation of the devices in interstate commerce).

117. *See id.* at 443

The indictments do not allege that the accused dealers, since the effective date of the Act or for that matter at any other time, have bought, sold or moved gambling devices in interstate commerce, or that the devices involved in their unreported sales have, since the effective date of the Act or at any other time, moved in interstate commerce or ever would do so.

118. *Id.* at 442.

119. *Id.* at 446.

120. *Id.* at 452.

factual similarities and their reasoning relates to the issues created by SORNA.

C. *NFIB v. Sebelius*¹²¹

The Affordable Care Act addressed the problem of individuals who are unable to get insurance because of preexisting conditions or other health issues by guaranteeing that these individuals would be able to obtain health insurance.¹²² The Act did this through the “guaranteed-issue” and “community-rating” provisions.¹²³ These provisions prohibited insurance companies from denying health coverage or from charging exorbitant premiums to these individuals.¹²⁴ This guarantee created a large risk for healthcare providers because they were required to provide insurance for these costly patients and these costs would far outweigh the patients’ premiums.¹²⁵ In order to remedy this imbalance, Congress required that all individuals—specifically targeting young and healthy individuals who were likely to opt out of health insurance—purchase insurance.¹²⁶ This solution results in cost-shifting that allows the insurance companies to afford the unhealthy patients by also having a large pool of healthy individuals whose premiums are higher than their health costs.¹²⁷

The Court in *NFIB v. Sebelius* addressed whether Congress can make a law that compels people to enter into commerce.¹²⁸ Ultimately, the

121. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2566 (2012).

122. *See id.* at 2585 (“In the Affordable Care Act, Congress addressed the problem of those who cannot obtain insurance coverage because of preexisting conditions or other health issues.”).

123. *See id.* (describing that the ACA addressed the issue of people with preexisting conditions through using “guaranteed-issue” and “community-rating” provisions).

124. *See id.* (“These provisions together prohibit insurance companies from denying coverage to those with such conditions or charging unhealthy individuals higher premiums than healthy individuals.”).

125. *See id.* (describing the economic realities for insurance companies when they are required to provide coverage for individuals who have expensive medical conditions).

126. *See id.* (“[T]he mandate forces into the insurance risk pool more healthy individuals, whose premiums on average will be higher than their health care expenses. This allows insurers to subsidize the costs of covering the unhealthy individuals the reforms require them to accept.”).

127. *Id.*

128. *See id.* at 2586 (“Given its expansive scope, it is no surprise that Congress has employed the commerce power in a wide variety of ways to address the pressing needs of the time. But Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product.”).

individual mandate was upheld under the Tax and Spend Clause.¹²⁹ Chief Justice Roberts, writing for himself in Part II-A of the opinion, came to the conclusion that compelling people to enter into commerce is not within the power of the legislature.¹³⁰ Justice Ginsburg vehemently disagreed with the Chief Justice in her dissent, insisting that the Affordable Care Act easily falls within the jurisdictional bounds of the Commerce Clause.¹³¹ Justice Scalia, with whom Justice Alito, Justice Thomas, and Justice Kennedy joined, also insisted that the justification for the individual mandate does not fall within the Commerce Clause.¹³² Scholars have been hesitant to give *Sebelius* meaningful precedential weight.¹³³ But the split of votes on the Commerce Clause issue suggests that the new federalism era brought forward in the Rehnquist Court is not completely irrelevant despite the slight expansion in *Raich*.¹³⁴

129. *See id.* at 2594–95 (holding that the individual mandate is legal under the Tax and Spend Clause by construing the language “penalty” in the statute as a tax).

130. *See id.* at 2587

Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority. Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation, and—under the Government’s theory—empower Congress to make those decisions for him.

131. *See id.* at 2609 (Ginsburg, J., concurring in part and dissenting in part) (“Congress chose, instead, to preserve a central role for private insurers and state governments. According to the Chief Justice, the Commerce Clause does not permit that preservation. This rigid reading of the Clause makes scant sense and is stunningly retrogressive.”).

132. *See id.* at 2642 (Scalia, J., dissenting) (“Failure to act does result in an effect on commerce, and hence might be said to come under this Court’s ‘affecting commerce’ criterion of Commerce Clause jurisprudence. But in none of its decisions has this Court extended the Clause that far.”).

133. *See* Lawrence B. Solum, *The Legal Effects of NFIB v. Sebelius and the Constitutional Gestalt*, 91 WASH. U. L. REV. 1, 4 (2013) (“NFIB is unlikely to produce stare decisis effects that are clear and uncontested—one way or the other.”).

134. Chief Justice Rehnquist, Justice Alito, Justice Kennedy, and Justice Thomas all voted that the Commerce Clause was not sufficient authority for the individual mandate. *See generally* NFIB v. Sebelius, 132 S. Ct. 2566 (2012); Gonzales v. Raich, 545 U.S. 1 (2005). Despite these votes being in two different opinions, it suggests that if a similar Commerce Clause issue was presented before the Court, it is reasonable to think that the votes could still favor the new federalism approach to Commerce Clause jurisprudence.

Chief Justice Roberts recognizes that

Given its expansive scope, it is no surprise that Congress has employed the commerce power in a wide variety of ways to address the pressing needs of the time. But Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product. Legislative novelty is not necessarily fatal; there is a first time for everything. But sometimes “the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent” for Congress’s action.¹³⁵

The Chief Justice finds the distinction between regulating that which is already an aspect of commerce and compelling individuals to partake in commerce to be one that is of great importance.¹³⁶ He stresses that the word “regulate” implies that there is something in existence in which to regulate, and that term cannot be extended to encompass the requirements of the individual mandate.¹³⁷ The Chief Justice noted that to expand the meaning of the Commerce Clause power in this way would lead to a massive expansion of federal power.¹³⁸ He writes, “Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority.”¹³⁹ Justice Scalia, in his dissent, reiterates this concern with expanding the federal government to occupy those roles traditionally reserved for the states.¹⁴⁰ He writes, “Whatever may be the conceptual limits upon the Commerce Clause and upon the power to tax and spend, they cannot be such as will enable the Federal Government to regulate all private conduct and to compel the States to function as administrators of federal programs.”¹⁴¹

These Commerce Clause concerns circle back to concerns with the registration requirements in SORNA, where the federal government

135. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2586 (2012).

136. *Id.*

137. *See id.* at 2587 (“The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce.”).

138. *See id.* (“Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation, and—under the Government’s theory—empower Congress to make those decisions for him.”).

139. *Id.* at 2573.

140. *See id.* at 2643 (Scalia, J., dissenting) (describing the historical context for limitations on federal power and reservation of certain powers for the states).

141. *Id.*

compels a large number of individuals to register—an activity that is neither “commercial” nor “interstate.”¹⁴² Chief Justice Roberts wrote, “the proposition that Congress may dictate the conduct of an individual today because of prophesied future activity finds no support in [legal] precedent.”¹⁴³ While sometimes these offenders may move in interstate commerce therefore necessitating registration, interstate activity is not a requirement of § 16913 and registration is required regardless of interstate movement.¹⁴⁴ The concerns raised by the Chief Justice and the dissenters in *Sebelius* present a new angle to attack SORNA and the requirements the federal government places on sex offenders.

D. Recent Opinions Considering the Validity of SORNA Under the Commerce Clause

This Section discusses the different approaches that courts have taken to the Commerce Clause question in SORNA.

1. Opinions Holding Section 16913 Constitutionally Invalid

*a. United States v. Myers*¹⁴⁵

Judge Zloch of the U.S. District Court for the Southern District of Florida found SORNA to be beyond the limits of congressional authority in *United States v. Myers*.¹⁴⁶ Specifically, Judge Zloch held, “[Section 16913] is a universal regulation of certain persons without any regard for their place or participation in interstate commerce, and it is not part of an overlying economic scheme, the regulation of which Congress could

142. 42 U.S.C. § 16913 (2012).

143. *NFIB v. Sebelius*, 132 S.Ct. 2566, 2590 (2012).

144. 42 U.S.C. § 16913.

145. *United States v. Myers*, 591 F. Supp. 2d 1312, 1312–50 (S.D. Fla. 2008).

146. *See id.* at 1349–50

[T]he statutes challenged herein cannot be upheld. Section 16913 transgresses entirely the limits set on Congress by the Commerce Clause. It cannot be defended except by adulteration of the text of the Constitution and controlling caselaw. Section 2250 also exceeds that grant of power made to Congress under the Commerce Clause. It is in no way a regulation of persons in interstate commerce but an exertion of a general police power through an illusory and impermissible jurisdictional nexus.

reasonably anticipate would affect interstate commerce.”¹⁴⁷ The use of the Commerce Clause to invoke SORNA is especially troubling because of its departure from the authority set forth in *Gibbons v. Ogden*.¹⁴⁸ In SORNA, Congress did not use the Commerce Clause in a way that stays true to using federal authority to criminalize behavior—i.e., making it illegal to cross state lines for the *purpose* of committing a crime.¹⁴⁹ The opinion in *Myers* recognizes this use of Commerce Clause power as legitimate because, “by prohibiting this use of the channels of interstate commerce . . . , [Congress] is merely exercising the police power, for the benefit of the public, *within the field of interstate commerce*.”¹⁵⁰ While the court in *Myers* recognized the expansion of Commerce Clause power to regulate activities that substantially affect commerce, it rejects the premise that this power applies to SORNA legislation.¹⁵¹ Specifically, the legislation is not economic in nature, which is relevant when analyzing the statute under *Raich*.¹⁵² *Myers* determines that, “the stated purpose of SORNA is to establish a national sex offender registry to ‘protect . . . the public from sex offenders and offenders against children.’ This is not economic.”¹⁵³

Myers also addresses the constitutionality of § 2250, the underlying Section that contains a jurisdictional element.¹⁵⁴ Section 2250 criminalizes the situation in which a person is required to register under SORNA, travels in interstate and foreign commerce, and knowingly fails to register.¹⁵⁵ Section 2250 differs from other federal criminal statutes in that the travel

147. *Id.* at 1316–17.

148. *See Gibbons v. Ogden*, 22 U.S. 1, 74 (1824)

It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

149. *See United States v. Myers*, 591 F. Supp. 2d 1312, 1320 (S.D. Fla. 2008) (“[T]he person’s travel across state lines with the particular intent or object is what Congress sought to regulate.”).

150. *Id.* at 1320 (alteration in original) (emphasis added) (quoting *Brooks v. United States*, 267 U.S. 432, 437 (1925)).

151. *See id.* at 1333 (“Here there is no congressional record to support Congress having a reasonable basis to conclude that the registration of or failure to register sex offenders would have an impact on a commercial market.”).

152. *See id.* at 1332 (quotation omitted) (finding that given the legislative goals set forth in SORNA it is impossible to read the legislation as regulating an economic market).

153. *Id.* (citations omitted).

154. *See id.* at 1336–49 (giving a detailed analysis of § 2250 and its constitutionality).

155. 18 U.S.C. § 2250 (2012).

requirement is not linked to the criminal behavior.¹⁵⁶ The *Myers* opinion stated, “The purpose attached to the travel is left unstated and is utterly divorced from the activity being regulated: knowingly failing to register as a sex offender.”¹⁵⁷ The inclusion of this provision in SORNA was not aimed at those traveling in interstate commerce, nor was its inclusion aimed at those crossing state lines, rather this aspect of 2250 is indefinite and in no way related to the regulated activity—an individual’s failure to register.¹⁵⁸

*b. United States v. Nasci*¹⁵⁹

In *United States v. Nasci*, SORNA was found to be beyond Congress’s exercise of the Commerce Clause power as well as its Necessary and Proper power.¹⁶⁰ Specifically, the government argued that the registration requirement had two purposes: First, that this registration requirement as set forth in the statute is simply a template for states to incorporate to receive federal funds, and second to impose an obligation on sex offenders that can be enforced through federal criminal sanctions when in federal jurisdiction.¹⁶¹ But this argument fails because the stated purpose of SORNA is to “establish . . . a comprehensive national system for registration of those offenders.”¹⁶² The limited purpose that the government proposed goes against the stated purpose of the statute.¹⁶³ The opinion

156. *See* *United States v. Myers*, 591 F. Supp. 2d 1312, 1320 (S.D. Fla. 2008) (noting that historically Congress regulated criminal activity when the criminal crossed state lines with the intention of committing a crime).

157. *Id.* at 1338.

158. *See id.* (explaining that the regulation is administrative and for the purpose of creating a database rather than protecting and regulating interstate commerce).

159. *United States v. Nasci*, 632 F. Supp. 2d 194, 195–202 (N.D.N.Y. 2009).

160. *See id.* at 199–201 (noting that the congressional decision to include interstate travel requirements precludes Necessary and Proper analysis and that, despite being broad in scope, the Commerce Clause does not grant the authority to regulate sex offenders).

161. *See id.* at 200

The Government argues that § 16913 first serves as a template for registration requirements that states must incorporate into their own registration programs or otherwise receive less federal funds The second purpose of the registration requirements is to impose an obligation on sex offenders that may be enforced through federal criminal sanctions when a violation occurs under circumstances supporting federal jurisdiction, such as the failure to register following interstate travel or failure to register by a person convicted of a federal offense.

(quotation omitted).

162. *Id.*

163. *Id.*

states, “Either SORNA represents Congress’s attempt to encourage states to adopt the registration requirements under § 16913 or the statute unconstitutionally creates a federal obligation for sex offenders to register regardless of whether they remain in-state or were convicted of purely a local sex offense.”¹⁶⁴ The government also relies on the argument that the criminal penalty under § 2250 is constitutional when read in conjunction with the Necessary and Proper Clause, but,

Congress’s decision to limit the criminal penalty statute to sex offenders who travel between states precludes the Government from arguing that § 16913 is constitutional under the Necessary and Proper Clause. The reality of SORNA is that Congress either determined § 16913 was not sufficiently necessary to the interstate tracking of sex offenders so as to criminalize all instances of non-compliance, or alternatively, criminal sanctions were limited to sex offenders who travel in interstate commerce in an attempt to bolster the constitutionality of the statutory scheme and sidestep the Supreme Court’s jurisprudence established in *Lopez*. In either case, § 16913 is not a constitutional exercise of Congress’s power under the Necessary and Proper Clause.¹⁶⁵

This helps explain the constitutional inconsistencies of the justifications of SORNA and the registration requirement.¹⁶⁶

The government also puts forth the argument that this legislation is a national solution to a problem that defies local solutions.¹⁶⁷ This argument points to the difficulties in tracking sex offenders as reason to support the adoption of this far-reaching legislation that perhaps impinges on duties traditionally left to the states.¹⁶⁸ But the court points out that these solutions that have been put into place—specifically *United States v. Sage*,¹⁶⁹ which allowed for criminalization of a parent’s failure to pay child support for a child who resides out of state—dealt with commercial transactions that have a direct relationship to commerce.¹⁷⁰ The registration requirement is

164. *Id.*

165. *Id.* at 199.

166. *See id.* (showing the inconsistencies in justifications for SORNA legislation and the reality of what the requirements of the legislation are).

167. *See id.* at 201 (“The Government also argues that SORNA, including the registration requirements established under § 16913, is a proper exercise of Congress’s Commerce Clause power because the statute addresses a national problem that the states are incapable of solving on their own.”).

168. *See id.* (pointing to this same justification used for federal regulation of child support payments across state lines and justifying the federal registry for the same reasons).

169. 92 F.3d 101 (2d Cir. 1996).

170. *See United States v. Nasci*, 632 F. Supp. 2d 194, 201 (N.D.N.Y. 2009) (acknowledging that the federal government has used Commerce Clause authority to

simply not related to commercial activity in the same way.¹⁷¹ The criminal sanctions deal directly with the failure to register or failure to update one's registration and thus falls outside of the scope of the Commerce Clause power.¹⁷² The court held that "[t]he Commerce Clause, although broad in its scope, does not grant Congress unlimited authority to enact legislation intended to address *any* national issue, let alone registration requirements for sex offenders."¹⁷³

2. Opinions Holding Section 16913 Constitutionally Valid

a. United States v. Robbins¹⁷⁴

The U.S. Court of Appeals for the Second Circuit in *United States v. Robbins* revisits its earlier decision in *United States v. Guzman*¹⁷⁵ in light of Commerce Clause considerations brought forward by the Supreme Court's decision in *Sebelius*.¹⁷⁶ Notably, the *Robbins* decision qualifies its holding by raising several points regarding the opportunity to overturn the holding in *Guzman*:

We decline Robbins' invitation not because his arguments all lack force, nor because the constitutionality of SORNA—particularly when applied within the states—is beyond question, but because the constitutionality of SORNA *as applied to Robbins* remains unaffected by any limitations on Congress's Commerce Clause power that may be found in *NFIB*.¹⁷⁷

This suggests that had the facts been different, the outcome may have been different.¹⁷⁸ *Robbins* entertained the possibility that aspects of SORNA may

regulate activities that defy local solution but pointing out that the activities regulated are inherently economic in nature).

171. *See id.* (contrasting the requirement to update a state sex-offender registry with the payment of child support, Consumer Credit Protection Act, Anti Car Theft Act, and other legislation regulating economic activity).

172. *See id.* (noting that the argument relies of the presumption that § 16913 regulates economic activity, but also stating that this presumption is incorrect).

173. *Id.*

174. 729 F.3d 131 (2d Cir. 2013).

175. 591 F.3d 83 (2d Cir. 2010).

176. *See Robbins*, 729 F.3d at 134 (noting that *Guzman* should be revisited because of the intervening decision in *Sebelius* that could cast doubt on the decision).

177. *Id.* at 132 (citation omitted).

178. *See id.* (stressing that the statute *as applied* to the facts is constitutional, but also pointing out that SORNA raises some questions as to purely local offenses enforced by purely local means).

not pass constitutional muster, but concluded that, *as applied* to the facts at hand, it was legitimate.¹⁷⁹ Because Robbins knowingly traveled in interstate commerce without updating his registration, he did not fit into the category of individuals who do not cross state lines and therefore might fall outside of the scope of interstate commerce.¹⁸⁰ The court held that in Robbins' case, SORNA "not only regulate[d] activity, but activity that directly employ[ed] the channels of interstate commerce."¹⁸¹

While the court in *Robbins* considered the Commerce Clause arguments in *Sebelius arguendo*, it ultimately found that these arguments are either meritless or foreclosed by the Second Circuit's previous decision in *Guzman*.¹⁸² The four arguments that the court addresses from *Sebelius* are that: (1) the Commerce Clause does not give the power to regulate inactivity, (2) Congress cannot regulate activity based on the future possibility of activity, (3) there is no federal police power, and (4) the Necessary and Proper Clause does not add substantive powers that are not enumerated in the Constitution.¹⁸³ The court distinguishes the inactivity in *Sebelius* from SORNA registration requirements because sex offenders opt in to the system through their behavior, and in Robbins' case his registration requirement was triggered by his movement through interstate commerce i.e. activity.¹⁸⁴ Robbins argued that despite the interstate travel provision of SORNA, that is not actually what it is regulating.¹⁸⁵ It is

179. *See id.* (declining to further explore the possibility that SORNA is unconstitutional because as applied to the facts in *Robbins* it was constitutional).

180. *See id.* ("In August 2011, after traveling from New York to Nevada, defendant-appellant Nathan Robbins knowingly failed to update his registration as a sex offender, as he was required to do under the Sex Offender Registration and Notification Act.").

181. *Id.* at 136.

182. *See id.* ("Assuming the accuracy of these propositions *arguendo*, we still find in them nothing that helps Robbins' cause.").

183. *See id.* at 135–36

First, the Commerce Clause does not give Congress the power to regulate inactivity. Second, Congress cannot regulate conduct today based on activity predicted tomorrow. Third, the federal government does not have '[a]ny police power to regulate individuals as such, as opposed to their activities.' Fourth, the Necessary and Proper Clause does not add any 'great substantive and independent' federal powers to those enumerated in the Constitution.

(quotation omitted).

184. *See id.* at 136 ("But unlike the uninsured in *NFIB*, the sex offenders who are subjected to SORNA's requirements have all, in a sense, 'opted in' to the regulated group through their prior criminal activity.").

185. *See id.* (arguing that SORNA regulates offender registration rather than the travel and activities across state lines).

regulating the failure to register the three days after interstate travel.¹⁸⁶ In response to this argument, the court recognizes that it may or may not have merit but, “it is an argument foreclosed by *Guzman* which held in no uncertain terms that § 2250(a) is a valid regulation of ‘persons traveling in interstate commerce.’”¹⁸⁷

*b. United States v. Cabrera-Gutierrez*¹⁸⁸

The U.S. Court of Appeals for the Ninth Circuit also decided this issue in 2013.¹⁸⁹ In *United States v. Cabrera-Gutierrez*, the defendant relied on *Sebelius* and argued that the Commerce Clause power does not give Congress the power to regulate individuals *because* they are doing nothing.¹⁹⁰ The court summarized Cabrera’s argument:

[T]hat ‘the proposition that Congress may dictate conduct of an individual today [i.e., registering as a sex offender] because of prophesied future activity [i.e., interstate travel] finds no support in [the applicable Commerce Clause] precedent.’ Cabrera concludes that because Congress lacks the power to require an individual to register as a sex offender, it follows that it cannot penalize him for failing to register, even if he has traveled in interstate commerce.¹⁹¹

The defendant also differentiated SORNA from the facts in *Sebelius* by arguing that the registration requirements were further removed from the purpose of the Commerce Clause power because SORNA is further removed from commerce.¹⁹²

The Ninth Circuit rejected these arguments, relying on the *Lopez* categories and suggesting that these broad categories encompassed the authority used to enact SORNA.¹⁹³ The court further reasoned that the

186. *See id.* (“[Section] 2250(a), despite its interstate travel provision, does not actually regulate interstate travel, but rather something which occurs (or not) in the three days after such travel.”).

187. *Id.*

188. 756 F.3d 1125 (9th Cir. 2013).

189. *See generally id.*

190. *See id.* at 1129 (asserting that the regulations set forth in SORNA are unconstitutional precisely because they regulate inactivity).

191. *Id.* (alterations in original).

192. *See id.* (noting that the purpose of SORNA is to protect the public from sex offenders through sex offender registration which is far removed from commerce).

193. *See id.* at 1138 (“We conclude, as have our sister circuits, that Congress has the authority under the Commerce Clause to enact SORNA and to require Cabrera to register

Necessary and Proper Clause gave Congress ample authority to enact SORNA and to punish state sex offenders who travel in interstate commerce.¹⁹⁴ Furthermore, Cabrera *did* travel between states, and therefore, at least as applied to these facts, the comparison is not the same as the explanation for *Sebelius*.¹⁹⁵ The court concluded that “Congress had the authority to enact SORNA and that SORNA’s application to Cabrera is constitutional.”¹⁹⁶

IV. Resolving the SORNA Dilemma

In 2003, three years before the enactment of SORNA, the Supreme Court heard two cases regarding the constitutionality of state registration and notification laws.¹⁹⁷ The Court held that these state systems were indeed constitutional and ensured that these programs were a fixture in American exercise of state police power.¹⁹⁸ The state laws reviewed in these cases, however, vary significantly from the requirements of SORNA.¹⁹⁹ The punishments in these registration systems were modest compared to the punishment requirements in SORNA.²⁰⁰ The subsequent rubber stamping of SORNA legislation by many district courts either failed to take into account or superficially reviewed important federal issues that

under SORNA as a sex offender.”).

194. *See id.* at 1131–32

Because SORNA’s registration requirement is necessary to the effectuation of the broader SORNA scheme, we agree with our sister circuits in concluding that the Necessary and Proper Clause provided Congress ample authority to enact § 16913 and to punish a state sex offender who, like Cabrera, traveled interstate, for failing to register.

195. *See id.* at 1132 (“Moreover, SORNA’s application to Cabrera is based on his further admitted activities of traveling in interstate commerce and then failing to register. Thus, SORNA does not punish the type of inactivity addressed in *Sebelius*.”).

196. *Id.*

197. *See* Corey Rayburn Yung, *supra* note 53, at 369–70 (discussing the history of Supreme Court opinions regarding sex offender registration legislation and the prior history to the passing of SORNA).

198. *See id.* at 370 (“The Supreme Court opinions seemingly ensured that registries would remain a permanent fixture of America’s sex offender policy.”).

199. *See id.* (pointing out that the state statutes at issue in the two Supreme Court cases involved relatively minor punishments for failure to register as compared to the possibility of ten years of imprisonment with SORNA).

200. *See id.* (“The two state statutes were relatively modest—with small penalties for failing to register—and were only reviewed in regards to limited constitutional issues.”).

need not be addressed in the cases involving state laws.²⁰¹ The reasoning in *Sebelius* gives courts a chance to review the Commerce Clause deficiencies in SORNA.

A. Fear of Sex Offenders

SORNA and other registration and notification laws are perhaps not the best method of dealing with sexual offenders.²⁰² Sex offenders are often characterized as strangers who abduct their victims at random.²⁰³ This perception is what has informed many policy decisions with regard to sex offenses and the public good.²⁰⁴ In reality, this “stranger danger” composes a small percentage of offenses.²⁰⁵ In fact,

[s]exual violence against children as well as adults is overwhelmingly perpetrated by family members or acquaintances. The U.S. Bureau of Justice Statistics has found that just 14 percent of all sexual assault cases reported to law enforcement agencies involved offenders who were strangers to their victims. Sexual assault victims under the age of 18 at the time of the crime knew their abusers in nine out of 10 cases: the abusers were family members in 34 percent of cases, and acquaintances in another 59 percent of cases.²⁰⁶

These statistics suggests that a sex offender registration might not be as preventative as law makers assume that it is.

201. *See id.* at 371 (“Beyond missing the statutory differences between SORNA and the state laws reviewed by the Supreme Court, lower courts have repeatedly ignored the language of the opinions in *Smith* and *DPS* on which those courts are ostensibly relying. Further, whereas the laws reviewed by the Court did not enable viable challenges based upon the Fifth Amendment Due Process Clause, the Ex Post Facto Clause, or the Commerce Clause, SORNA has run roughshod over the rights derived from those constitutional provisions.”).

202. *See id.* at 423 (suggesting that the public perception of who commits sex offenses is at odds with the statistical data).

203. *See id.* at 423–24 (discussing the misconception that sex offenses are committed by strangers lying in wait to kidnap and rape women and children).

204. *See id.* at 423 n.300 (“The myth of the stranger as the typical sex offender continues to mislead policymakers in designing effective laws to combat sexual violence.”).

205. *See id.* at 423–24 (“However, “sex offenders” are not universally the archetypal characters lying in wait to kidnap and rape children; many have committed relatively petty offenses, such as the youthful indiscretion of public exposure, or an act of engaging in prostitution.”).

206. *See id.* (quoting Human Rights Watch, *No Easy Answers: Sex Offender Laws in the US* 35 n.91 (2007)).

What is also not taken into account is that the definition of a sex offense is broad and can include relatively minor offenses such as indecent exposure.²⁰⁷ In many states offenses such as public urination, consensual sexual intercourse between minors, and prostitution between consenting adults constitute sex offenses.²⁰⁸ The inclusion of these offenses in a national registry with incredibly harsh punishment for failure to register seems counter-productive to the goals of SORNA, and simply creates more individuals for the federal government to keep track of, rather than focusing their resources on sex offenders who are particularly dangerous.

B. Fixing Statutory Deficiencies of SORNA

As written, SORNA still contains questions as to its constitutionality in light of *Lopez*, *Morrison*, *Raich*, and *Sebelius*.²⁰⁹ The questions raised under *Lopez* and *Morrison* could be fixed through simple statutory changes.²¹⁰ Congress could amend § 2250(a)(2)(B) to look more like criminal statutes that came under the purview of the Commerce Clause in the past.²¹¹ This would entail making the failure to register connected in some way to interstate travel or perhaps look more like the Mann Act, where interstate travel in order to commit the crime is a required element.²¹²

207. *See id.* at 424 n.301 (“In many states, people who urinate in public, teenagers who have consensual sex with each other, adults who sell sex to other adults, and kids who expose themselves as a prank are required to register as sex offenders.” (quoting HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US 5 (2007), <https://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf>)).

208. *Id.*

209. *See id.* at 418 (“Nonetheless, under the best readings of *Lopez* and SORNA, courts should reject government justifications for § 2250(a) under the third *Lopez* category.”).

210. *See id.* at 419 (“It cannot be the case that Congress need merely repeat the magic words ‘interstate commerce,’ and an act will be found constitutional. The jurisdictional limitation must match the confines that the Court has laid out as the proper scope of the Commerce Clause.”).

211. *See id.* at 423

Congress could amend § 2250(a)(2)(B) to more closely follow the language the Court has utilized in *Lopez* and *Morrison* or use the model of the Mann Act so the travel is explicitly linked with the failure of register. Thus, Congress could mandate that a person be subject to the provisions of SORNA only insofar as travel between state lines has resulted in a failure to register. Short of congressional action to correct the deficiencies of SORNA, however, § 2250(a) should be struck down by federal courts.

212. *See id.* (suggesting that the language in SORNA look more like the language of the Mann Act, where the travel across state lines is explicitly related to the crime).

This solution is more complicated after the Court's decision in *Sebelius*, but these changes are a step in the right direction to amending this statute that greatly expands federal power into the realm of traditional state authority.²¹³

C. Supreme Court Action

The holding in *Kebedeaux* failed to answer the question of SORNA's constitutionality outside of the realm of military justice, and opened the door for a case with similar facts to appeal all the way to the Supreme Court.²¹⁴ Since the narrowing of Commerce Clause jurisprudence in the 1990s, the Court reads statutes narrowly in order to preserve their constitutionality, or will find statutes constitutional as applied to the facts before the court but leave open the question as to constitutionality of different facts.²¹⁵ Federal courts have acknowledged that the constitutionality of SORNA is in question, but ultimately decided that as applied to the facts before them the statute stands.²¹⁶ This approach does a disservice to the people who are unfairly bound by the requirements of SORNA.²¹⁷ Even if the Court only makes a limited finding with regard to SORNA, it could be helpful in bringing some of the issues with the Act to the public eye.²¹⁸ It is important to remember that, “[w]hile the cause of stopping sexual violence is a good one, it is a mistake to make constitutional exceptions to target the population of convicted sex offenders.”²¹⁹

213. *See id.* at 422 (“While it is too easy to add to such overly-pessimistic rhetoric, the provisions of SORNA really do represent an unprecedented expansion of federal power.”).

214. *See* United States v. *Kebedeaux*, 133 S. Ct. 2496, 2503 (2013) (“Here, under the authority granted to it by the Military Regulation and Necessary and Proper Clauses, Congress could promulgate the Uniform Code of Military Justice.”).

215. *See* CHEMERINSKY, *supra* note 1, at 269–71 (pointing out cases where the Supreme Court has read statutes narrowly so as to avoid the question of constitutionality).

216. *See generally* United States v. *Robbins*, 729 F.3d 131 (2d Cir 2013) (holding that SORNA is valid as applied); United States v. *Cabrera-Gutierrez*, 756 F.3d 1125 (9th Cir. 2013) (holding that SORNA is a valid use of Commerce Clause authority as applied).

217. *See* Yung, *supra* note 197, at 424 (“Many offenders subject to SORNA’s requirements have not been arrested for crimes in decades. These persons are already subject to a bevy of limitations on their liberties. The heavy penalties and restrictions of SORNA have added to that already substantial mix.”).

218. *See id.* (noting that although this issue might have difficulty gaining public traction, the rights at stake are fundamental and need to be addressed by district courts).

219. *Id.*

V. Conclusion

The registration requirements as set forth in SORNA are the creation of a federal police power beyond the powers set forth in the Constitution.²²⁰ This legislation takes behavior normally regulated by the states and creates a federal obligation to register for an offense for which time has already been served.²²¹ Despite claims that this registration requirement is not punishment beyond the sentence, there are real consequences for those who continually have to register for those crimes in their past—such as inability to find work and housing.²²² On top of these difficulties, failure to re-register within three days of changing jobs or residence could result in a federal felony and ten years in prison.²²³ This stigma and punishment is extended to a large group of individuals—many of whom committed minor offenses many years ago.²²⁴ This is the very sort of unjust punishment that our Constitution strives to protect against.

220. *Supra* Part I.D.

221. *Supra* Part I.C.

222. *Supra* Part I.C.

223. 42 U.S.C. § 16913 (2012); 18 U.S.C. § 2250 (2012).

224. *See* Yung, *supra* note 197, at 424 (noting that many offenders who are required to register under SORNA have not been arrested in decades).