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# ARTICLES

## The New Federalism Meets the Eleventh Circuit's Old Criminal Law

JONATHAN D. COLAN\*

### I. INTRODUCTION

The Eleventh Circuit's recent Commerce Clause jurisprudence reflects the limited effect the Supreme Court's recent line of Commerce Clause decisions has had in restricting the scope of federal criminal law. Although, beginning in *United States v. Lopez*,<sup>1</sup> and continuing through *United States v. Morrison*,<sup>2</sup> the Supreme Court has emphasized the limits of federal power under the Constitution's Commerce Clause, the criteria used by the Supreme Court to weigh the constitutionality of federal statutes has not led to a revolution in federal criminal law. As the Supreme Court has marked the outer limits of federal power, the Eleventh Circuit has reaffirmed federal criminal statutory authority in the areas of firearm possession and sales involving felons, interstate arson crimes, child pornography, sexual communications and trafficking, the Hobbs Act, identity theft, and sex offender registration. While each successive Supreme Court opinion has triggered new rounds of constitutional challenges, the Eleventh Circuit has not wavered in its analysis, and federal criminal law practice in the Eleventh Circuit has remained relatively stable during this period.

### II. THE SUPREME COURT'S EVOLVING CLARITY REGARDING CONGRESS'S COMMERCE CLAUSE POWERS<sup>3</sup>

In 1996, after more than fifty years of recognizing the breadth of

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1. 514 U.S. 549 (1995) (striking down the Gun-Free Schools Zones Act of 1990).

2. 529 U.S. 598 (2000) (striking down the Violence Against Women Act of 1994 ("VAWA")). *Morrison* also analyzed whether VAWA was a permissible exercise of Congress's enforcement authority under Section 5 of the Fourteenth Amendment, but that analysis is beyond the scope of this article. *See id.* at 619-27.

3. I offer, below, only a brief overview of the Supreme Court's Commerce Clause jurisprudence starting with *Lopez*, because the focus of this article is the Eleventh Circuit's

federal commerce power, the Supreme Court “shocked constitutional observers by asserting a judicially-enforceable limit on the power of Congress to regulate interstate commerce.”<sup>4</sup> In *United States v. Lopez*, federal prosecutors charged a twelfth-grade student who brought a loaded, concealed .38-caliber handgun to school with violating the Gun-Free School Zones Act of 1990.<sup>5</sup> The Supreme Court held that despite its history of upholding federal commerce authority, “even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits.”<sup>6</sup>

The Supreme Court started with “first principles” of American federalism, noting that “[t]he Constitution creates a Federal Government of enumerated powers” and that those powers are “‘few and defined.’”<sup>7</sup> The Constitution grants to Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>8</sup>

In *Lopez*, the Supreme Court recognized

three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, 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. Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.<sup>9</sup>

The Supreme Court emphasized that within this final category, “the proper test requires an analysis of whether the regulated activity ‘substantially affects’ interstate commerce.”<sup>10</sup>

The statute in question in *Lopez* “made it a federal offense ‘for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.’”<sup>11</sup> The

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application of the Supreme Court’s guidance on this issue to various federal criminal statutes. A host of more expansive analyses of these Supreme Court decisions exists.

4. Lino A. Graglia, *Lopez*, Morrison, and Raich: *Federalism in the Rehnquist Court*, 31 HARV. J.L. & PUB. POL’Y, 761, 764 (2008).

5. 514 U.S. 549, 551 (1995); *see* 18 U.S.C. § 922(q)(1)(A) (Supp. V 1990) (amending 18 U.S.C. § 922 (1988)).

6. *Lopez*, 514 U.S. at 556–57.

7. *Id.* at 552 (quoting THE FEDERALIST No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961)).

8. U.S. CONST. art. I, § 8, cl. 3.

9. *Lopez*, 514 U.S. at 558–59 (citations omitted).

10. *Id.* at 559.

11. *Id.* at 551 (quoting 18 U.S.C. § 922(q)(1)(A) ( Supp. V 1990) (amending 18 U.S.C. § 922 (1988))).

Supreme Court held that the law exceeded Congress's commerce authority because it "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce."<sup>12</sup> The statute contained "no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."<sup>13</sup> The Supreme Court concluded that because neither the defendant nor the firearm had moved in interstate commerce, "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."<sup>14</sup>

In *United States v. Ballinger*, the Eleventh Circuit received *Lopez*'s "synthesi[s of] more than a century of Commerce Clause activity" as the "definitive description of the commerce power."<sup>15</sup> *Ballinger* upheld the conviction of a man who engaged in an interstate arson spree targeting church buildings.<sup>16</sup> The statute at issue, 18 U.S.C. § 247, made it a federal crime to "deface[ ], damage[ ], or destroy[ ] any religious real property, because of the religious character of that property, or attempt[ ] to do so[, or to] intentionally obstruct[ ], by force or threat of force, any person in the enjoyment of that person's free exercise of religious beliefs, or attempt[ ] to do so," when, for jurisdictional purposes, such conduct "is in or affects interstate or foreign commerce."<sup>17</sup> The Eleventh Circuit held that "the statute falls squarely within Congress' power under the first two *Lopez* prongs to regulate the *channels* and *instrumentalities* of commerce."<sup>18</sup>

Rejecting *Ballinger*'s argument that the Commerce Clause would only allow Congress to proscribe harmful activity "whose ultimate *actus reus* occurs within a channel of commerce," the Eleventh Circuit held that "[s]urely, utilizing the channels and instrumentalities of commerce to facilitate a prolonged, multistate church-burning spree qualifies as an 'injurious use' that Congress may proscribe pursuant to its commerce power."<sup>19</sup> The Eleventh Circuit noted that, unlike the statute at issue in *Lopez*, 18 U.S.C. § 247 contained an express jurisdictional statement addressing conduct "in or affect[ing] commerce."<sup>20</sup> By addressing conduct "in commerce," the statute constitutionally addressed the channels

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12. *Id.*

13. *Id.* at 561.

14. *Id.* at 567.

15. *United States v. Ballinger*, 395 F.3d 1218, 1225 (11th Cir. 2005), *cert. denied*, 546 U.S. 829 (2005).

16. *Id.* at 1221–22.

17. 18 U.S.C. § 247(a), (b) (2002).

18. *Ballinger*, 395 F.3d at 1227.

19. *Id.*

20. *Id.* at 1235.

and instrumentalities of commerce, even if it did not also substantially affect commerce.<sup>21</sup>

Five years after *Lopez*, in *United States v. Morrison*, the Supreme Court considered whether Congress's commerce authority included the power to provide a federal civil remedy against a person who commits "a crime of violence motivated by gender."<sup>22</sup> Proponents of the law sought to defend it under the third *Lopez* prong "as a regulation of activity that substantially affects interstate commerce."<sup>23</sup> The Supreme Court, however, noted that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity" and that, like the act at issue in *Lopez*, VAWA "contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce."<sup>24</sup> In *Morrison*, the Supreme Court specifically refrained from adopting a "categorical rule against aggregating the effects of any noneconomic activity in order to decide [Commerce Clause] cases," but did note that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."<sup>25</sup> Allowing the aggregation of non-economic activity for Commerce Clause analyses, the Supreme Court reasoned, would allow Congress to regulate any criminal activity "as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption."<sup>26</sup> The Supreme Court, accordingly, "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."<sup>27</sup> Thus, "[t]he regulation and punishment of intrastate violence *that is not directed at the instrumentalities, channels, or goods involved in interstate commerce*" was reserved for the States.<sup>28</sup>

The Supreme Court clarified the scope of its Commerce Clause rulings in *Gonzalez v. Raich*.<sup>29</sup> After identifying what lay outside Con-

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21. *Id.* at 1236 (noting the statute's satisfaction of the first two *Lopez* prongs and rejecting the defendant's argument that the statute also needed to satisfy the third *Lopez* prong). See *Jones v. United States*, 529 U.S. 848, 854–57 (2000) (distinguishing between property that is "used in" interstate commerce and property "affecting" interstate commerce).

22. 529 U.S. 598, 605–07 (2000) (quoting VAWA, 42 U.S.C. § 13981(b) (1994)).

23. *Id.* at 609.

24. *Id.* at 613.

25. *Id.*

26. *Id.* at 615.

27. *Id.* at 617.

28. *Id.* at 618 (emphasis added).

29. *Gonzalez v. Raich*, 545 U.S. 1, 32–33 (2005) (upholding Congress's power to prohibit local cultivation and use of marijuana permitted under state law).

gress's commerce powers in *Lopez* and *Morrison*, the Supreme Court took a step back to reaffirm the scope of powers still left to Congress.

Opponents of the federal law in *Raich* did not dispute Congress's general power to regulate the illegal drug trade; they only challenged the law's application to incidents of intrastate manufacture and possession of marijuana in compliance with state law.<sup>30</sup> The Supreme Court held that Congress has the power "to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."<sup>31</sup> "[W]hen '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.'"<sup>32</sup> Relying on its New Deal era decision in *Wickard v. Filburn*,<sup>33</sup> the Supreme Court stated that "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."<sup>34</sup> The fact that the impact on the market of the individual activity at issue in a particular application of the law was "trivial by itself" was not sufficient to render the law an unconstitutional application of Congress's commerce power.<sup>35</sup> Unlike activities such as gun possession near schools<sup>36</sup> or gender-based violence,<sup>37</sup> the activity addressed by the statutory scheme in *Raich* (production, distribution, and consumption of a product—specifically, drugs) was "quintessentially economic."<sup>38</sup> The Supreme Court held that because the Controlled Substances Act is a statute that "directly regulates economic, commercial activity," the Court's prior opinion in *Morrison* cast no doubt on the statute's constitutionality.<sup>39</sup>

The Supreme Court's *Raich* decision disappointed those who had hoped the *Lopez* and *Morrison* decisions would lead to a revolution in American federalism,<sup>40</sup> and pleased those who defend a broader role for

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30. *Id.* at 15. See also *id.* at 23 (distinguishing the facial challenges in *Lopez* and *Morrison* from the as-applied challenge by the litigants in *Raich*).

31. *Id.* at 17 (citations omitted).

32. *Id.* (quoting *United States v. Lopez*, 514 U.S. 549, 558 (1995)).

33. 317 U.S. 11 (1942) (upholding the Agricultural Adjustment Act of 1938's regulation of wheat production).

34. *Raich*, 545 U.S. at 18.

35. See *id.* at 20 (discussing *Wickard v. Filburn*, 317 U.S. 111, 127 (1942)).

36. See *Lopez*, 514 U.S. at 549.

37. See *United States v. Morrison*, 529 U.S. 598 (2000).

38. *Raich*, 545 U.S. at 25.

39. *Id.* at 26.

40. *Accord* Graglia, *supra* note 4, at 790–91; David L. Luck, Note, *Guns, Drugs and . . . Federalism?—Gonzalez v. Raich Enfeebles the Rehnquist Court's Lopez-Morrison Framework*, 61 U. MIAMI L. REV. 237, 279–80 (2006).

federal power.<sup>41</sup> At least with respect to the application of federal criminal law within the Eleventh Circuit, no revolution has appeared.

### III. THE ELEVENTH CIRCUIT'S STEADY APPLICATION OF FEDERAL CRIMINAL LAW IN THE WAKE OF THE SUPREME COURT'S EVOLVING COMMERCE CLAUSE JURISPRUDENCE

#### A. *Felon-In-Possession of Firearms or Ammunition*

As far back as 1996, not quite a year after the Supreme Court issued its *Lopez* decision, the Eleventh Circuit, in *United States v. McAllister*, reaffirmed the validity of 18 U.S.C. § 922(g)'s federal prohibition on the possession of firearms by convicted felons.<sup>42</sup> The statute made it a federal crime for any person who had been convicted of a felony "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."<sup>43</sup> The Eleventh Circuit stated that in bringing his Commerce Clause challenge, "McAllister misunderstands the scope of *Lopez*."<sup>44</sup> The Eleventh Circuit noted the Supreme Court's recognition that the Gun-Free School Zones Act at issue in *Lopez* "by its terms has nothing to do with 'commerce' or any sort of economic enterprise."<sup>45</sup> By contrast, the express jurisdictional statement in § 922(g) "mak[ing] it unlawful for a felon to 'possess in or affecting commerce, any firearm or ammunition'" defeated McAllister's facial challenge to the statute as an impermissible exercise of Congress's commerce clause power.<sup>46</sup>

The Eleventh Circuit also rejected McAllister's argument that *Lopez* had "mark[ed] a significant change, rendering suspect the 'minimal nexus' requirement established by the Supreme Court in *Scarborough*."<sup>47</sup> In that case, the Supreme Court held that the required interstate commerce nexus in the predecessor felon-in-possession statute was satisfied if the government could prove that the firearm had previously traveled in interstate commerce.<sup>48</sup> The government had proven that the firearm McAllister purchased in Georgia had been manufactured

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41. Accord Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 HARV. J.L. & PUB. POL'Y 991, 992, 997 (2008).

42. *United States v. McAllister*, 77 F.3d 387, 389 (11th Cir. 1996), *cert denied*, 519 U.S. 905 (1996).

43. 18 U.S.C. § 922(g)(1) (2005); *McAllister*, 77 F.3d at 389.

44. *McAllister*, 77 F.3d at 390.

45. *Id.* at 389 (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

46. *Id.* at 390 (quoting 18 U.S.C. § 922(g)).

47. *Id.* (discussing *Scarborough v. United States*, 431 U.S. 563, 575 (1977), upholding a predecessor statute to § 922(g) on the grounds that the interstate commerce element is satisfied by demonstrating a "minimal nexus" to commerce).

48. *See id.*; *Scarborough*, 431 U.S. at 575.

in California and shipped to South Carolina.<sup>49</sup> There was no analogous requirement in *Lopez* that the government prove that the gun possessed within the defined school zone had previously traveled in interstate commerce. The Eleventh Circuit relied on this distinction, reasoning that “a law prohibiting the possession of a gun by a felon stems the flow of guns in interstate commerce to criminals.”<sup>50</sup> The Eleventh Circuit held that “[n]othing in *Lopez* suggests that the ‘minimal nexus’ test should be changed,” and that the government’s proof that the gun McAllister possessed had traveled in interstate commerce defeated his as-applied challenge to the statute.<sup>51</sup>

Five years later, in *United States v. Scott*, the defendant argued that the intervening Supreme Court decisions in *Morrison* and *Jones*<sup>52</sup> called into question the Eleventh Circuit’s *McAllister* decision.<sup>53</sup> The Eleventh Circuit noted that *Jones* merely interpreted 18 U.S.C. § 844(i) to avoid any constitutional issue, by not applying its prohibitions to residences not used for any commercial purpose, and that nothing in *Morrison* altered its *McAllister* analysis.<sup>54</sup> The jurisdictional element of § 922(g) immunized the statute against a facial challenge.<sup>55</sup> *Morrison* itself noted the importance of jurisdictional statements in the constitutional analysis.<sup>56</sup> The Eleventh Circuit also reiterated that, as applied to an individual defendant, § 922(g)(1) still required the government “to demonstrate that that the firearm possessed traveled in interstate commerce.”<sup>57</sup> The “minimal nexus” to interstate commerce that sustained the felon-in-possession statute in *McAllister* survived *Morrison*.<sup>58</sup> The Eleventh Circuit has recently reaffirmed that “*McAllister* remains controlling on this issue.”<sup>59</sup>

The Eleventh Circuit’s decision in *United States v. Peters* was an even easier case, because it directly involved the *sale* of firearms to

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49. *McAllister*, 77 F.3d at 388–89.

50. *Id.* at 390.

51. *Id.*

52. *Jones v. United States*, 529 U.S. 848, 850–51 (2000) (holding that 18 U.S.C. § 844(i)’s federal criminalization of arson directed at “property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce” could not be constitutionally applied to a case involving an “owner-occupied residence not used for any commercial purpose . . .”).

53. *United States v. Scott*, 263 F.3d 1270, 1273–74 (11th Cir. 2001), *cert. denied*, 534 U.S. 1166 (2002).

54. *Id.*

55. *Id.* at 1273.

56. *United States v. Morrison*, 529 U.S. 598, 613 (2000).

57. *Scott*, 263 F.3d at 1274.

58. *Id.*

59. *United States v. Charles*, No. 09-12684, 2009 WL 5103556, at \*3 (11th Cir. Dec. 29, 2009).

felons.<sup>60</sup> The court noted that both *Lopez* and *Morrison* “make clear that when the challenged statute regulates activity that is plainly economic in nature, no jurisdictional hook or congressional findings may be needed to demonstrate that Congress properly exercised its commerce power.”<sup>61</sup> The proper focus, under *Lopez*, was on “whether *the regulated activity* ‘substantially affects interstate commerce,’ . . . not [ ] whether an individual instance of conduct prosecuted under the statute substantially affects commerce.”<sup>62</sup> The Eleventh Circuit determined that *Morrison* served to “reinforce[ ] this point.”<sup>63</sup>

While the Court [in *Morrison*] cast real doubt on whether “aggregating the effects of any *noneconomic* activity” could establish a basis for sustaining a Commerce Clause enactment, it reaffirmed the Court’s longstanding practice of “sustain[ing] federal regulation of intrastate activity based upon the activity’s substantial effects on interstate commerce” when “the activity in question has been some sort of economic endeavor.”<sup>64</sup>

The Eleventh Circuit recalled its own long-standing recognition in *McAllister* “that ‘[w]hen viewed in the aggregate, a law prohibiting the possession of a gun by a felon stems the flow of guns in interstate commerce to criminals.’”<sup>65</sup> Regulating the sale of guns to felons was merely “the flip side of this coin.”<sup>66</sup>

### B. *Child Pornography*

One area of law in which the Eleventh Circuit’s jurisprudence changed in response to the Supreme Court’s Commerce Clause cases is its analysis of federal regulation of child pornography; albeit, the change was in the direction of affirming the application of the law that it had previously rejected. In this instance, *Raich*’s clarification of the Supreme Court’s Commerce Clause jurisprudence altered Eleventh Circuit law in favor of federal power.

In *United States v. Maxwell* [*Maxwell I*], the defendant was convicted of two counts of knowingly possessing child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B).<sup>67</sup> The statute made it a federal crime for any person to:

60. See *United States v. Peters*, 403 F.3d 1263, 1271 (11th Cir. 2005) (“Our focus today is on this third [*Lopez*] category, since we have little trouble concluding that the *sale* of firearms to felons directly and substantially affects interstate commerce.”).

61. *Id.* at 1273.

62. *Id.* at 1274 (quoting *United States v. Lopez*, 514 U.S. 549, 559 (1995)).

63. *Id.*

64. *Id.* (quoting *United States v. Morrison*, 529 U.S. 598, 611, 613 (2000)).

65. *Id.* at 1277 (quoting *United States v. McAllister*, 77 F.3d 387, 390 (11th Cir. 1996)).

66. *Id.*

67. *United States v. Maxwell*, 386 F.3d 1042, 1044 (11th Cir. 2004) (*Maxwell I*).

knowingly possess[ ] any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer[.]<sup>68</sup>

The government had not proven that the child pornography Maxwell possessed had moved across state lines, only that the images were produced using materials that had.<sup>69</sup> In its original review of Maxwell's case, the Eleventh Circuit attempted to distinguish the Supreme Court's upholding of wheat production regulations in *Wickard v. Filburn*.<sup>70</sup>

The regulation at issue . . . has no clear economic purpose. It makes no effort to control national trade by regulating intrastate activity. Instead, it attempts to regulate primary conduct directly, even within state borders. Unlike wheat, pornography is a nonrival good. Maxwell is charged with possessing it, and possessing pornography does not result in its consumption such that the overall supply of pornography in the market is reduced. In any event, Congress is clearly not concerned with the supply of child pornography for the purpose of avoiding surpluses and shortages or for the purpose of stimulating its trade at increased prices.<sup>71</sup>

The Supreme Court vacated *Maxwell I* and remanded the case for reconsideration by the Eleventh Circuit in light of *Raich*.<sup>72</sup>

On remand, the Eleventh Circuit recognized that *Raich* had taken a broader view of *Wickard* and concluded that “‘Congress can regulate purely intrastate activity that is not itself ‘commercial,’ . . . if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.’”<sup>73</sup> What distinguished *Raich* from *Lopez* and *Morrison* “was the comprehensiveness of the economic component of the regulation,” even if the individual conduct at issue was not itself commercial.<sup>74</sup> “[W]here Congress has attempted to regulate (or eliminate) an interstate market, *Raich* grants Congress substantial leeway to regulate purely intrastate activity (whether economic or not) that it deems to have the capability, in the aggregate, of frustrating the broader regulation of interstate economic

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68. 18 U.S.C. § 2252A(a)(5)(B) (2006).

69. *Maxwell I*, 386 F.3d at 1045.

70. See 317 U.S. 111, 128 (1942).

71. *Maxwell I*, 386 F.3d at 1057.

72. 546 U.S. 801 (2005) (Mem.).

73. *United States v. Maxwell*, 446 F.3d 1210, 1214 (11th Cir. 2006) (*Maxwell II*), cert. denied, 549 U.S. 1070 (2006) (quoting *Gonzalez v. Raich*, 545 U.S. 1, 18 (2005)).

74. See *id.*

activity.”<sup>75</sup>

The Eleventh Circuit heeded the Supreme Court’s explanation of Congress’s commerce power in *Raich*. The court stated: “We find very little to distinguish constitutionally Maxwell’s claim from Raich’s. Indeed, much of the [Supreme] Court’s analysis could serve as an opinion in this case by simply replacing marijuana and the [Controlled Substances Act] with child pornography and the [Child Pornography Prevention Act].”<sup>76</sup> Reconsidering the issue in light of *Raich*, the Eleventh Circuit affirmed the defendant’s child pornography conviction, without requiring the government to establish that the materials he possessed moved in interstate or foreign commerce.<sup>77</sup>

The Eleventh Circuit recently reaffirmed *Maxwell II* in *United States v. Culver*.<sup>78</sup> While Maxwell had been convicted of possessing child pornography, Culver was convicted of producing it. Culver was convicted on five counts of violating 18 U.S.C. § 2251(a), which makes it a federal crime for:

[a]ny person [to] employ[ ], use[ ], persuade[ ], induce[ ], entice[ ], or coerce[ ] any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct . . . if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer . . . .<sup>79</sup>

Culver argued that the provision could not constitutionally apply to the production of child pornography on 8mm videotape and that his conduct did not meet the jurisdictional requirement of the statute.<sup>80</sup>

The Eleventh Circuit held that Culver’s argument was foreclosed by “[t]he reasoning of *Maxwell II* [which] applies with equal force to § 2251(a).”<sup>81</sup> The government had proved that the magnetic tape used to create the visual images Culver produced was manufactured in Japan and transported to Alabama.<sup>82</sup> The Eleventh Circuit concluded that “Culver’s argument [that the magnetic tape did not fall within the stat-

75. *Id.* at 1215.

76. *Id.* at 1216.

77. *Id.* at 1219; *see also* *United States v. Smith*, 459 F.3d 1276, 1280–81 (11th Cir. 2006), *cert. denied*, 549 U.S. 1137 (2007) (affirming the defendant’s child pornography conviction after its original decision reversing Smith’s conviction was vacated by the Supreme Court in light of *Raich*).

78. 598 F.3d 740 (11th Cir. 2010).

79. *Id.* at 746 (quoting 18 U.S.C.A § 2251(a) (West 2008))

80. *Id.*

81. *Id.* at 747 n.4.

82. *Id.* at 747.

ute's definition of materials] is inconsistent with the plain meaning of the statute, and it ignores the fact that he could not have made the visual depictions at issue without the magnetic tape."<sup>83</sup>

### C. *Communications with Minors for Sexual Purposes*

The Eleventh Circuit had little difficulty upholding Congress's power to prohibit sexually related communications with minors through the use of the internet in *United States v. Hornaday*.<sup>84</sup> 18 U.S.C. § 2422(b) makes it a federal crime to

us[e] the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States [to] knowingly persuade[ ], induce[ ], entice[ ], or coerce[ ] any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense.<sup>85</sup>

Hornaday was convicted after using the internet to contact a person (who turned out to be an undercover government agent) to arrange for sexual encounters with two children.<sup>86</sup> Hornaday challenged his conviction on, among other grounds, the argument that Congress lacked the power to criminalize the use of instrumentalities or channels of interstate commerce to seek out child victims, unless the instrumentalities or channels of interstate commerce (in this case, the internet) were themselves used to communicate with the intended victims.<sup>87</sup>

The Eleventh Circuit dispensed with Hornaday's argument, quickly.

The internet is an instrumentality of interstate commerce. Congress clearly has the power to regulate the internet, as it does other instrumentalities and channels of interstate commerce, and to prohibit its use for harmful or immoral purposes regardless of whether those purposes would have a primarily intrastate impact.<sup>88</sup>

The court analogized Congress's power to "prohibit the use of a telephone or the internet to set up [a scheme to] sexual[ly] abuse . . . children" with its power to "prohibit the use of [such] instrumentalities to set up a fraudulent scheme or to arrange a . . . murder."<sup>89</sup>

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83. *Id.*

84. *United States v. Hornaday*, 392 F.3d 1306, 1310–11 (11th Cir. 2004).

85. 18 U.S.C. § 2422(b) (2006). Subsection (a) of the statute makes it a federal crime to "persuade[ ], induce[ ], entice[ ], or coerce[ ] any individual to travel in interstate or foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense." § 2422(a).

86. *Hornaday*, 392 F.3d at 1308–09.

87. *Id.* at 1311.

88. *Id.* (citations omitted).

89. *See id.*

In *United States v. Evans*,<sup>90</sup> the Eleventh Circuit upheld Congress's constitutional authority to impose federal penalties on anyone who knowingly in or affecting interstate or foreign commerce, . . . recruits, entices, harbors, transports, provides, or obtains by any means a person . . . knowing, or in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act.<sup>91</sup>

Evans raised the familiar argument that his conviction violated the Commerce Clause because all of his conduct occurred within Florida.<sup>92</sup>

The Eleventh Circuit relied on its prior applications of *Raich* in *Maxwell* and *Smith* in rejecting Evans's argument.<sup>93</sup> "Like the [Controlled Substances Act] and the [Child Pornography Prevention Act], the [Trafficking Victims Protection Act of 2000 ("TVPA")] is part of a comprehensive regulatory scheme. The TVPA criminalizes and attempts to prevent slavery, involuntary servitude, and human trafficking for commercial gain."<sup>94</sup> Even if Evans's actions would have only involved enticing a minor into prostitution within Florida, this action "had the capacity when considered in the aggregate with similar conduct by others, to frustrate Congress's broader regulation of interstate and foreign economic activity."<sup>95</sup> In banning the sex trade nationally, Congress had the power to ban it locally.

The Eleventh Circuit's Commerce Clause jurisprudence regarding the use of the instrumentalities and channels of commerce to facilitate the sexual abuse of children has held steady.<sup>96</sup>

#### D. *The Hobbs Act*

The Hobbs Act<sup>97</sup> imposes federal criminal penalties on anyone who "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens

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90. 476 F.3d 1176, 1177 (11th Cir. 2007), *cert. denied*, 552 U.S. 878 (2007).

91. 18 U.S.C.A. § 1591(a)(1) (West 2008). Subsection (a)(2) of the statute makes it a federal crime for anyone to "benefit[ ], financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1)." § 1591(a)(2).

92. *Evans*, 476 F.3d at 1178.

93. *Id.* at 1179.

94. *Id.*

95. *Id.*

96. *See, e.g.*, *United States v. Faris*, 583 F.3d 756, 758–59 (11th Cir. 2009) (affirming a child enticement conviction, relying on *United States v. Hornaday*, 392 F.3d 1306 (11th Cir. 2004)).

97. 18 U.S.C. § 1951(a) (2006).

physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section.”

The Eleventh Circuit has long held that the jurisdictional requirement under the Hobbs Act can be met simply by showing that the offense had a “minimal” effect on commerce.<sup>98</sup> In *United States v. Verbitskaya*, the defendant argued that *Lopez* and *Morrison* called the Eleventh Circuit’s precedents into doubt.<sup>99</sup> After considering the issue, however, the Eleventh Circuit held that neither *Lopez* nor *Morrison* had altered its previous Hobbs Act analyses and that proof of a minimal effect on commerce was sufficient to sustain a Hobbs Act conviction.<sup>100</sup> The court noted that unlike the statutes rejected by the Supreme Court, the Hobbs Act contained “an explicit jurisdictional element” tying enforcement of the Hobbs Act to Congress’s power to regulate interstate commerce.<sup>101</sup>

The Eleventh Circuit’s “minimal” effects requirement for Hobbs Act convictions remains good law.<sup>102</sup>

#### E. Identity Theft

The Eleventh Circuit similarly upheld the application of federal identity-theft statutes based on a showing of a minimal nexus to interstate or foreign commerce, in *United States v. Klopff*.<sup>103</sup> Amongst the jurisdictional provisions set forth in the federal identity-theft statute, 18 U.S.C. § 1028, is a provision prohibiting “the production, transfer, possession, or use” of materials involved in identity theft “in or affect[ing] interstate or foreign commerce.”<sup>104</sup> Klopff’s conviction relied on the fact that he “used one of [his] fraudulent identification documents to verify his identity when applying for [a] storage facility, and, in turn, used that facility to receive mail in connection with [a] credit-card scheme that had a significant effect on interstate commerce.”<sup>105</sup>

The Eleventh Circuit held that “[b]y requiring the government to prove a minimal connection to interstate commerce . . . this statute, in contrast to those in [*Lopez* and *Morrison*], which did not contain jurisdictional requirements, contains a sufficient jurisdictional requirement to

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98. See *United States v. Jackson*, 748 F.2d 1535, 1537 (11th Cir. 1984).

99. *United States v. Verbitskaya*, 406 F.3d 1324, 1331 (11th Cir. 2005), cert. denied, 546 U.S. 1096 (2006).

100. *Id.*

101. *Id.* (quoting *United States v. Gray*, 260 F.3d 1267, 1274 (11th Cir. 2001)).

102. See *United States v. White*, 256 F. App’x 333, 336–37 (11th Cir. 2007) (relying on *Verbitskaya*, 406 F.3d at 1331–32).

103. *United States v. Klopff*, 423 F.3d 1228, 1239 (11th Cir. 2005), cert. denied, 129 S. Ct. 311 (2008).

104. 18 U.S.C. § 1028(c)(3)(A) (2006).

105. *Klopff*, 423 F.3d at 1237.

overcome a Commerce Clause challenge.”<sup>106</sup> That minimal connection could be satisfied by showing that the defendant “had only the intent to accomplish acts, which, if successful, would have affected interstate or foreign commerce.”<sup>107</sup> Klopf’s conviction was affirmed because “sufficient evidence support[ed] a finding that, even if he had not done so already, he intended to use those driver’s licenses in a manner that would have affected interstate commerce significantly.”<sup>108</sup>

The Eleventh Circuit recently reaffirmed *Klopf*’s minimal nexus analysis, in *United States v. Mendez*.<sup>109</sup> The court held that the government’s proof that Mendez intended to use his fraudulent commercial driver’s license to operate a commercial vehicle “sufficiently affects interstate commerce to satisfy the minimal nexus requirement” even if Mendez never left Florida.<sup>110</sup>

#### F. *The Sex Offender Registration and Notification Act*

Last year, in *United States v. Ambert*, the Eleventh Circuit applied the Supreme Court’s Commerce Clause jurisprudence to the Sex Offender Registration and Notification Act (“SORNA”).<sup>111</sup> *Ambert* challenged two aspects of SORNA on Commerce Clause grounds. One section, 42 U.S.C. § 16913, requires sex offenders to “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[.]”<sup>112</sup> while another section, 18 U.S.C. § 2250, imposes federal criminal penalties for “[w]hoever—(1) is required to register under [SORNA]; (2)(A) is a sex offender as defined [by SORNA] . . . ; 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 [SORNA].”<sup>113</sup> Congress’s declared purpose in enacting SORNA was “to protect the public from sex offenders and offenders against children . . . [by] establish[ing] a comprehensive national system for the registration of those offenders.”<sup>114</sup> Among various other challenges to his conviction, *Ambert* challenged the constitutionality of both the registration requirement and the criminal penalties for failure to do so on the grounds that Congress exceeded its commerce

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106. *Id.*

107. *Id.* at 1239.

108. *Id.*

109. *United States v. Mendez*, 528 F.3d 811, 817 (11th Cir. 2008), *cert. denied*, 129 S. Ct. 292 (2008).

110. *Id.*

111. 561 F.3d 1202, 1210–11 (11th Cir. 2009).

112. 42 U.S.C. § 16913(a) (2006).

113. 18 U.S.C. § 2250(a) (2006).

114. 42 U.S.C. § 16901 (2006).

powers in enacting them.<sup>115</sup>

The Eleventh Circuit adopted the reasoning of a recent Eighth Circuit decision, *United States v. Howell*, in upholding Congress's power to require sex offenders to register.<sup>116</sup> The court stated: "As the Eighth Circuit recognized, in enacting § 16913 of SORNA, Congress did not focus on individual local registration as an end in itself, but rather as part of its goal to create a system to track and regulate the movement of sex offenders from one jurisdiction to another."<sup>117</sup> Noting the statute's stated purpose and its focus on offenders who cross jurisdictional boundaries, the Eleventh Circuit stated that "[t]he only federal enforcement provision against individuals is found in § 2250, which explicitly subjects state sex offenders to federal prosecution under SORNA only if they 'travel in interstate or foreign commerce' and fail to register under § 16913."<sup>118</sup> The court explained that "when a sex offender travels from one state to another, he is an instrumentality of interstate commerce, and by regulating these persons in SORNA, Congress has acted under its commerce clause power to regulate an instrumentality."<sup>119</sup> The Eleventh Circuit, thus, held that both SORNA's registration provision and its federal criminal penalties for failing to register fell within Congress's commerce authority.<sup>120</sup>

#### IV. CONCLUSION

While the last decade and a half has seen dramatic opinions from the Supreme Court interpreting the scope of Congress's commerce power and redefining American federalism, the Eleventh Circuit's application of the Supreme Court's guidance to federal criminal law has been less dramatic. The Eleventh Circuit has not ultimately sustained any appellate challenges to a federal criminal statute under the Commerce Clause during this period. Though the Supreme Court undoubtedly found limits to Congress's commerce powers, the Eleventh Circuit has found that the federal criminal statutes brought for its review have all fallen within the limits of Congress's authority.

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115. *Ambert*, 561 at 1204, 1210.

116. *See id.* at 1211–12 (discussing *United States v. Howell*, 552 F.3d 709 (8th Cir. 2009), *cert. denied*, 129 S. Ct. 2812 (2009)).

117. *Id.* at 1212 (citing *Howell*, 552 F.3d at 716).

118. *Id.* (quoting 18 U.S.C. § 2250).

119. *Id.* at 1211.

120. *Id.* at 1212; *see also* *United States v. Powers*, 562 F.3d 1342, 1344 (11th Cir. 2009) (vacating the district court's dismissal of Powers's indictment under SORNA on Commerce Clause grounds, relying on *Ambert*).