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# Congressional Power to Criminalize “Local” Conduct: No Limit in Sight

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## I. INTRODUCTION

There may still be some people who believe that in recent years the courts, led by the Supreme Court, have reflected a view of a limited federal government, specifically of a Congress more limited to its enumerated powers than in the view of the older “activist” judges who arguably reflected a belief in the need for a federal government of more expansive powers.

A good example of this change of paradigm, one might have thought, would be judicial interpretation of Congress’ authority under what has come to be known as the Commerce Clause. The Commerce Clause is part of Article I, Section 8 of the Constitution. Section 8 enumerates specific powers of Congress. The Commerce Clause empowers Congress “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>1</sup> The final clause of Section 8 empowers Congress “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . .”<sup>2</sup> As originally written, and as understood from the meaning of its text when written, one could have argued that this congressional power was limited to regulating what had been the levy of tariffs on imports and exports by the various states against other states. In the Federalist No. 42, James Madison wrote that “[a] very material object of this power was the relief of the States which import and export through other States from the improper contributions levied on them by the latter.”<sup>3</sup> Or one might have argued that the term “commerce” itself was limited to the trade and exchange of goods and transportation for this purpose.<sup>4</sup> While perhaps

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1. U.S. CONST. art. 1, § 8.

2. *Id.*

3. THE FEDERALIST NO. 42, at 238 (James Madison) (Am. Bar Ass’n Classics ed., 2009).

4. See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 112–25 (2001). Justice Thomas endorsed this very position in his concurrence in *United*

not sufficient to overturn a line of decisions beginning in 1824 that endorse a more expansive view of what powers the Commerce Clause enumerates for Congress,<sup>5</sup> one might then have argued for a more limited view of congressional power.

In its decisions in *United States v. Lopez*<sup>6</sup> and *United States v. Morrison*,<sup>7</sup> it did seem as if the Supreme Court was reining in the reigning view of the extent of Congress' power. In *Lopez*, the Court held that the statute there—which made it a crime for an individual to possess a gun in a school zone—was beyond the power of Congress because the law did not (1) regulate any economic activity or (2) contain a requirement that the possession of the gun have any connection to past interstate activity or a predictable impact on future interstate activity.<sup>8</sup> The law at issue was a “brief, single-subject statute making it a crime . . . to possess a gun in a school zone.”<sup>9</sup> In *Morrison*, Congress had created a federal civil remedy for victims of gender-motivated crimes of violence.<sup>10</sup> This time, Congress made findings that such crimes had an adverse impact on interstate commerce, and so the Supreme Court limited its unconstitutionality holding to the fact that “like the statute in *Lopez*, it did not regulate economic activity.”<sup>11</sup> *Lopez* had identified three categories of activity that Congress could regulate under its commerce power: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce and things or persons in interstate commerce; and (3) activities having a substantial relation to interstate commerce.<sup>12</sup> *Mor-*

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*States v. Lopez*, 514 U.S. 549, 585–89 (1995) (Thomas, J., concurring), and in his later dissent in *Gonzales v. Raich*, 545 U.S. 1, 58–59 (2005) (Thomas, J., dissenting).

5. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824). In *Gibbons*, Chief Justice Marshall wrote of a broad power. For example, he defined “among” as “intermingled with,” as well as something that concerns more than one state. *Id.* at 194–95. At issue in *Gibbons* was truly commerce among the states—whether New York could enact legislation regarding navigable waters in conflict with congressional legislation. One could argue that much of what Marshall wrote was not truly part of the holding of the decision. However, one cannot so easily distinguish the Supreme Court’s decision in *Wickard v. Filburn*, 317 U.S. 111 (1942), where the Court ruled that Congress did not exceed its powers under the Commerce Clause when its laws reached the local production of wheat for home consumption in violation of federal law designed to reduce the national production of wheat in order to avoid surpluses and control market prices for the wheat that was sold.

6. 514 U.S. 549 (1995).

7. 529 U.S. 598, 608 (2000) (quoting *Lopez*, 514 U.S. at 557) (“*Lopez* emphasized, however, that even under our modern, expansive interpretation of the Commerce Clause, Congress’ regulatory authority is not without effective bounds.”).

8. *Gonzales*, 545 U.S. at 23–24 (citing *Lopez*, 514 U.S. at 561).

9. *Id.* at 23; see also Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A) (Supp. V 1988), *invalidated by Lopez*, 514 U.S. at 549.

10. See 42 U.S.C. § 13981 (2000), *invalidated by United States v. Morrison*, 529 U.S. 598 (2000).

11. *Gonzalez*, 545 U.S. at 25.

12. *Morrison*, 529 U.S. at 609 (citing *Lopez*, 514 U.S. at 558–59).

tion involved only the third category, and the Supreme Court rejected congressional findings of a substantial effect on interstate commerce,<sup>13</sup> which the Court held justified its concern, expressed in *Lopez*, that to follow Congress’ reasoning might endorse the use of the Commerce Clause “to completely obliterate the Constitution’s distinction between national and local authority . . . .”<sup>14</sup> The Court then held that Congress cannot “regulate noneconomic, violent . . . conduct based solely on that conduct’s aggregate effect on interstate commerce.”<sup>15</sup>

Although for a short period, the Supreme Court seemingly endorsed a more limited view of the reach of the Commerce Clause,<sup>16</sup> that view lasted barely ten years, with a coup de grace administered by none other than Justice Scalia himself.<sup>17</sup> In 2005, the Court rendered its decision in *Gonzales v. Raich*, holding that the local growth and consumption of marijuana for personal, medicinal use, while lawful under California law, was nonetheless unlawful under federal law because Congress had the power to pass the Controlled Substances Act (“CSA”).<sup>18</sup> The CSA prohibits the cultivation, distribution, and possession of marijuana solely for personal medicinal use because such activities, while clearly local, and clearly not part of interstate commerce, affect interstate commerce in the view of Congress.<sup>19</sup> Congress can, of course, prohibit such activities as provided for in *Wickard v. Filburn* and its progeny, and in *Lopez* itself.<sup>20</sup> In *Raich*, the Court did not reject or overrule *Lopez* or *Morrison*, but simply distinguished them on their facts, noting that unlike the statutory scheme in *Lopez*, the statutory scheme in *Raich* “is at the opposite end of the regulatory spectrum[,]” being part of “a lengthy and detailed statute creating a comprehensive framework for regulating the prosecution, distribution, and possession of five classes of ‘controlled substances.’”<sup>21</sup> The Court characterized this scheme as being merely one of many essential parts of a larger regulation of economic activity that would be negatively affected unless intrastate activity was regulated.<sup>22</sup>

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13. According to the Court, Congress found that gender-motivated violence in the aggregate affects interstate commerce by deterring potential victims from traveling interstate, engaging in interstate business, etc. *Id.* at 615.

14. *Id.*

15. *Id.* at 617.

16. *Lopez*, 514 U.S. 549 (1995); *Morrison*, 529 U.S. at 598.

17. *Gonzales v. Raich*, 545 U.S. 1, 33 (2005) (Scalia, J., concurring in the judgment).

18. *Id.* at 32–33.

19. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1236 (codified as amended in scattered sections of 21 U.S.C.).

20. *Lopez*, 514 U.S. at 558–59 (reciting the three categories of lawful congressional regulation under the Commerce Clause, the third of which was that the activities substantially affect interstate commerce).

21. *Gonzales*, 545 U.S. at 24.

22. *Id.* at 24–25; *Lopez*, 514 U.S. at 561.

*Morrison* was distinguished on the ground that “it did not regulate economic activity.”<sup>23</sup>

In his concurrence in *Lopez*, Justice Thomas, accurately it turns out, warned of the use of the Commerce Clause for what he perceived to be state-law issues:

Although I join the majority, I write separately to observe that our case law has drifted far from the original understanding of the Commerce Clause. . . . [I]t seems to me that the power to regulate “commerce” can by no means encompass authority over mere gun possession, any more than it empowers the Federal Government to regulate marriage, littering, or cruelty to animals, throughout the 50 States. Our Constitution quite properly leaves such matters to the individual States, notwithstanding these activities’ effects on interstate commerce. Any interpretation of the Commerce Clause that even suggests that Congress could regulate such matters is in need of reexamination.<sup>24</sup>

In her dissent in *Raich*, Justice O’Connor found the majority’s definition of “economic” to be so broad that every activity is encompassed.<sup>25</sup> Though not explicitly answered by the majority opinion, the question was important: What *wasn’t* an economic activity? The question becomes analogous to the discussion of “closed systems” in physics. Consider a closed box, sealed on all sides. There is some amount of energy inside that box—stored in the particles inside—but if the seal is perfect, then no energy can be exchanged with the world outside the box. This is called a “closed system.” But what good is that box to the outside world, and what good is the outside world to that box, in such a situation? State economies are sometimes imagined to be like these closed boxes, but the reality is that in a proper analogy there would be thousands upon thousands of holes in the box, allowing “energy,” i.e., money, to flow in and out. While activities within the box are “intrastate,” they eventually connect up with interstate activities with varying distances. No intrastate activity truly occurs in isolation, because all intrastate participants are also participants in the interstate economy. Each dollar you spend in your own state is a dollar you cannot spend in the interstate economy, and vice versa. What O’Connor was asking, then, is how separate your intrastate activity must be—how many levels of abstraction does it need to be removed by—before it is safely excluded from the Commerce Clause.

In any event, in *Raich* the Supreme Court returned to its earlier

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23. *Gonzales*, 545 U.S. at 25.

24. *Lopez*, 514 U.S. at 584–85 (Thomas, J., concurring).

25. *Gonzalez*, 545 U.S. at 49 (O’Connor, J., dissenting).

decisions, holding that the Commerce Clause gives Congress the power to regulate the channels of interstate commerce; the instrumentalities of interstate commerce and people or things in interstate commerce; and activities that substantially affect interstate commerce,<sup>26</sup> including "noneconomic" activity and the federal interest it is supposed to promote. The Court relied heavily on the decision that set forth the most expansive view of the power of Congress, *Wickard v. Filburn*.<sup>27</sup> However, the Court based its decision in *Raich* on its determination that the activity at issue—the local production and consumption of marijuana for medicinal purposes lawful under California law but unlawful under Federal law—nonetheless bore a sufficient relationship to interstate commerce for Congress to have a rational basis in determining there was such an interstate effect.<sup>28</sup>

Reading the three decisions together, one can only conclude that even local, noneconomic activity (one must keep in mind that the Commerce Clause is not the Economics Clause) can be found by the Supreme Court to be subject to congressional regulation under the Commerce Clause, so long as at least one of the three *Lopez* categories of regulation is found to be present. In other words, the "closed system" of an intrastate economy is more an illusion than anything else.

A review of recent Eleventh Circuit decisions involving congressional use of the Commerce Clause to criminalize what some might argue are local, or at least noneconomic, activities reveals that *Lopez* is no impediment to approval of a broad interpretation of congressional power. Thus, often with little discussion, the Eleventh Circuit has routinely upheld statutes against the Commerce Clause. This article analyzes decisions in the following areas: the knowing possession of a firearm, the local possession of stolen property, and sex-offender registration.

## II. KNOWING POSSESSION OF A FIREARM

In *Lopez*, the issue was whether Congress simply could prohibit the possession of a firearm when close to a school.<sup>29</sup> The statute in question there, 18 U.S.C. § 922(q)(1)(A), made it a federal offense to knowingly possess a firearm in a school zone.<sup>30</sup> Finding that "[t]he Act neither reg-

26. *Id.* at 16–17.

27. 317 U.S. 111 (1942).

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

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

30. Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A) (Supp. V 1988),

ulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce[,]" the Supreme Court held it unconstitutional.<sup>31</sup> Congress also made it a crime for anyone convicted of a felony, or convicted in any court of a misdemeanor crime of domestic violence, to possess a firearm affecting commerce or to receive a firearm which has been shipped or transported in interstate commerce.<sup>32</sup> Given that jurisdictional hook, every court in the Eleventh Circuit that has examined the issue has upheld the constitutionality of § 922(g). Nonetheless, defendants have repeatedly and unsuccessfully challenged the constitutionality of this law, on its face and as applied. No fewer than seven Eleventh Circuit decisions have addressed the issue in the past year.<sup>33</sup> Facial constitutionality has been uniformly found since 1996 based on the statute's requirement that the firearm previously have travelled in interstate commerce.<sup>34</sup> Thus, a criminal defendant's defense on this issue rests on an "as applied" argument, which requires a lack of proof that the firearm moved in interstate commerce.<sup>35</sup> But what gun ever fails to travel in interstate commerce? In May of 2009, Representative Leo Berman proposed a law to explicitly exclude guns and ammunition manufactured entirely in Texas from all federal gun laws.<sup>36</sup> In the same year, Montana passed exactly such a law.<sup>37</sup> But, even if the gunsmith resides solely in that state—e.g., Montana—and sells his guns only in that state, where did the metals he used come from? What about

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*invalidated* by *United States v. Lopez*, 514 U.S. 549 (1995) ("It shall be unlawful 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.").

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

32. 18 U.S.C. § 922(g)(1), (9) (2006).

33. *See United States v. White*, 593 F.3d 1199, 1205 (11th Cir. 2010) (noting that § 922(g)(9)'s constitutionality has withstood Commerce Clause attack); *United States v. Mims*, No. 09-11966, 2010 WL 31722, at \*2-3 (11th Cir. Jan. 7, 2010) (rejecting a facial and as-applied constitutional attack on § 922(g)(1)); *United States v. Charles*, No. 09-12684, 2009 WL 5103556, at \*3 (11th Cir. Dec. 29, 2009) (rejecting a facial and as-applied constitutional attack on § 922(g)(1)); *United States v. Dorvilus*, No. 09-10197, 2009 WL 4854131, at \*10 (11th Cir. Dec. 17, 2009) (rejecting a facial and as-applied constitutional attack on § 922(g)(1)); *United States v. McCain*, No. 09-11629, 2009 WL 4854126, at \*1 (11th Cir. Dec. 17, 2009) (rejecting a facial constitutional attack on § 922(g)(1)); *United States v. Duncan*, No. 08-16825, 2009 WL 4598305, at \*2 n.5 (11th Cir. Dec. 8, 2009) (rejecting a facial constitutional attack on § 922(g)(1)); *United States v. Battle*, 347 F. App'x 478, 480 (11th Cir. 2009) (rejecting a facial constitutional attack on § 922(g)(1)).

34. *See, e.g., United States v. Mims*, No. 09-11966, 2010 WL 31722, at \*3 (11th Cir. Jan. 7, 2010); *United States v. McAllister*, 77 F.3d 387, 390 (11th Cir. 1996).

35. *See McAllister*, 77 F.3d at 390 (holding that the government showed that the firearm had traveled in interstate commerce); *United States v. Dorvilus*, No. 09-10197, 2009 WL 4854131, at \*10 (11th Cir. Dec. 17, 2009) (holding that the government showed that the firearm was manufactured outside Florida).

36. Lindsay Landry, *Rep. Berman Proposes New Gun Bill*, KETKNBC.COM, May 4, 2009, <http://www.ketknbc.com/news/rep-berman-proposes-new-gun-bill>.

37. Montana Firearms Freedom Act, MONT. CODE ANN. §§ 30-20-101 to -106 (2009).

the equipment he used in his manufacture? Where did his employees come from? Where do the guns go? How separate from the interstate commercial flow need be his manufacturing process?

The statute at issue in *Lopez* was amended by Congress both to add prefatory language about the nationwide problem the statute seeks to address and to require that the firearm possessed in the school zone be one "that has moved in or that otherwise affects interstate or foreign commerce," tracking the language in § 922(g).<sup>38</sup> While the Eleventh Circuit has not addressed this specific issue,<sup>39</sup> given its precedent regarding § 922(g), there is no reason to believe it would not uphold the new § 922(q) against a constitutional challenge. Other circuits have considered the amended § 922(q) and found it constitutional.<sup>40</sup>

### III. MERE LOCAL POSSESSION OF STOLEN PROPERTY

One defendant has argued that Congress cannot make it a crime for him simply to possess or receive stolen goods where he "had no involvement in the interstate transportation of the . . . goods."<sup>41</sup> The Southern District of Florida made short work of his argument, noting that the Eleventh Circuit clearly has rejected the argument that only the interstate process itself is subject to congressional regulation: "congressional power to regulate the channels and instrumentalities of commerce includes the power to prohibit their use for harmful purposes, even if the targeted harm itself occurs outside the flow of commerce and is purely local in nature."<sup>42</sup>

### IV. PROTECTION OF MINORS FROM INTERNET PREDATORS

In *United States v. Faris*, Mr. Faris admittedly used the internet to solicit minors to engage in sexual activity with him, which would be a federal criminal offense; however, he argued that the statute making

38. 18 U.S.C. § 922(q)(1)–(2) (2006).

39. See, e.g., *United States v. Tait*, 202 F.3d 1320, 1323–25 (11th Cir. 2000) (applying § 922(q)(2)(A) without questioning its constitutionality).

40. See, e.g., *United v. Nieves-Castaño*, 480 F.3d 597, 602 (1st Cir. 2007) (noting that the current form of § 922(q) "provide[s] necessary connections to interstate commerce"); *United States v. Dorsey*, 418 F.3d 1038, 1040 (9th Cir. 2005) (explaining that "[t]his new version of § 922(q) . . . incorporates a 'jurisdictional element which would ensure . . . that the firearm possession in question affects interstate commerce'"); *United States v. Danks*, 221 F.3d 1037, 1038–39 (8th Cir. 1999) (noting that § 922(q) "contains language that ensures . . . that the firearm in question affects interstate commerce"). But see *United States v. Hoffmeyer*, No. 00-CR-91-C, 2001 WL 34372871, at \*18–22 (W.D. Wis. Jan. 25, 2001) (stating, in dicta, that the new version of § 922(q) is unconstitutional, notwithstanding the jurisdictional element).

41. *United States v. Roque*, No. 08-20958-CR, 2009 WL 1117482, at \*1 (S.D. Fla. Apr. 24, 2009).

42. *Id.* at \*3 n.2 (citing *United States v. Ambert*, 561 F.3d 1202, 1211 (11th Cir. 2009)).

such conduct unlawful<sup>43</sup> was unconstitutional as applied to him because his conduct was all local.<sup>44</sup> He said his internet communications, telephone calls, emails and travel routes used in his quest to have sex with a minor were confined to Florida.<sup>45</sup> The Eleventh Circuit rejected his arguments. The Court's decision may be of note for two reasons. First, it emphasizes the legal point that mere use of an instrumentality of interstate commerce, like a telephone or the internet, even if never "routed over state lines," does not change the fact that these instrumentalities fall under the ambit of interstate commerce.<sup>46</sup> Second, use of an instrumentality of interstate commerce means the purpose of the use need not itself be economic.<sup>47</sup> The law in this regard is well-settled in the Eleventh Circuit.<sup>48</sup>

## V. SEX OFFENDER REGISTRATION

Congress does not require all convicted felons to register locally. It does require "sex offenders" to do so under the 2006 Sex Offender Registration and Notification Act ("SORNA").<sup>49</sup> Sex offenders who have failed to register as required by 42 U.S.C. § 16913 face criminal prosecution.<sup>50</sup> These requirements apply to sex offenders who have served whatever prison time they may have been sentenced to and even apply to sex offenders sentenced only to probation whose probationary period has expired.<sup>51</sup> As the Eleventh Circuit noted in *United States v. Ambert*, the leading—on point—decision in this Circuit, the purpose of SORNA was to "'protect the public from sex offenders and offenders against children . . . ' by establishing 'a comprehensive national system for the registration of those offenders.'"<sup>52</sup> The constitutionality of

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43. 18 U.S.C. § 2422(b) (2006), which prohibits using any means of interstate commerce to knowingly persuade, induce, entice, or coerce a minor to engage in "any sexual activity for which any person can be charged with a criminal offense."

44. *United States v. Faris*, 583 F.3d 756, 758 (11th Cir. 2009).

45. *Id.*

46. *Id.* at 759.

47. *Id.* (citing *United States v. Ballinger*, 395 F.3d 1218, 1226 (11th Cir. 2005) (en banc)).

48. *See, e.g., United States v. Evans*, 476 F.3d 1176, 1179–40 (11th Cir. 2007) (applying the rationale of *Gonzalez v. Raich* in holding that an instrumentality of commerce may criminalize an activity that is both local and non-economic).

49. 42 U.S.C. §§ 16901–16962 (2006). Section 16913 delineates when and how a sex offender must register under the Act.

50. 18 U.S.C. § 2250 (2006). The penalty can include a fine and up to ten years in prison. § 2250.

51. For example, in *United States v. Ambert*, 561 F.3d 1202 (11th Cir. 2009), *Ambert* had been convicted in 1975 in California under its Crimes Against Children law and sentenced to five years probation, but was required by California law and subsequently SORNA to register in another state if he moved. *Id.* at 1204. *See, e.g., United States v. Griffey*, 589 F.3d 1363 (11th Cir. 2009); *United States v. Cardenas*, 323 F. App'x 854 (11th Cir. 2009).

52. *Ambert*, 561 F.3d at 1205 (quoting 42 U.S.C. § 16901 (2006)).

SORNA has been challenged on a number of grounds,<sup>53</sup> all of which have been rejected in this Circuit,<sup>54</sup> but this article will address only the Commerce Clause challenge. SORNA establishes two categories of sex offenders subject to prosecution: (1) for those convicted as sex offenders under federal law and have not traveled in interstate commerce,<sup>55</sup> and (2) for those that traveled in interstate commerce, regardless of where they were originally convicted.<sup>56</sup> The Eleventh Circuit has not yet considered the first class of sex offenders who failed to register. It has, however, considered the second class and, in *Ambert*, resolved the issue firmly in favor of constitutionality under the Commerce Clause.

In *Ambert*, the Eleventh Circuit decided the case without reference to *Raich*, or even *Morrison*. In Mr. Ambert’s case, as a result of a local law enforcement investigation into a possible sex offense against a child, police learned of Ambert’s presence in Florida and that he was listed as having “absconded from California’s Sex Offender Registry.”<sup>57</sup> He was charged on July 6, 2007 in Florida’s court system with failing to register as a sex offender under Florida law.<sup>58</sup> For reasons not apparent from the decision, Ambert traveled from Florida to California on July 9, 2007 and returned to Florida on July 11, 2007, which resulted in his being indicted in September for traveling in interstate commerce and failing to register under SORNA.<sup>59</sup>

Ambert challenged SORNA as unconstitutional on its face. The Eleventh Circuit dispatched this challenge swiftly. Using the *Lopez* analysis, the court held that Ambert personally was an instrumentality of interstate commerce that traveled through interstate channels to and from California.<sup>60</sup> It did not say that he merely used interstate instrumentalities—e.g. airlines—but that he himself *was* such an instrumentality.<sup>61</sup> The court reiterated the standard that where either of these principles (channels or instrumentalities) applies, the legislation is within the Commerce Power, regardless of whether the “targeted harm itself occurs outside the flow of commerce and is purely local in

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53. Among the grounds were (1) excessive delegation of legislative authority, (2) *ex post facto* law, (3) substantive and procedural due process, and (4) violations of the sex offender’s right to travel. *See Id.*

54. *Id.* at 1206.

55. 18 U.S.C. § 2250(a)(2)(A) (2006).

56. § 2250(a)(2)(B).

57. *Ambert*, 561 F.3d at 1205–06.

58. *Id.* at 1205.

59. *Id.* at 1206.

60. *Id.* at 1210.

61. *Id.* at 1211.

nature.”<sup>62</sup> The court’s rationale, however, was not exactly on point. The court said SORNA is analogous to the statute prohibiting church-based arson in *Ballinger* or the Mann Act, which prohibited the transport of women in interstate commerce for immoral purposes.<sup>63</sup> However, unlike those two situations, where the interstate travel was for the purpose of committing the bad act, in this case, the interstate travel of Ambert was unrelated to his failure to register. Put differently, SORNA only requires that the person at some time travel in interstate commerce, not that the offense be in or affect interstate commerce. The statute at issue in *Ballinger* defines the crimes, then adds as an element that “[t]he circumstances referred to in subsection (a) are that the offense is in or affects interstate or foreign commerce.”<sup>64</sup> The court in *Ambert* did not necessarily see this distinction, stating “SORNA does no more than employ Congress’ lawful commerce power to prohibit the use of channels or instrumentalities of commerce for harmful purposes.”<sup>65</sup> While the circuit courts seem to be uniformly upholding the constitutionality of SORNA under the Commerce Clause,<sup>66</sup> there are those who make a cogent argument against its constitutionality.<sup>67</sup>

The court also rejected a challenge to the registration provision of SORNA<sup>68</sup>, adopting the reasoning of the Eighth Circuit in *United States v. Howell*<sup>69</sup> and relying on the “Necessary and Proper” clause<sup>70</sup> and

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62. *Id.* (quoting *United States v. Ballinger*, 395 F.3d 1218, 1226 (11th Cir. 2005)). *Ballinger* involved the constitutionality of a federal statute that criminalized church-based arson.

63. *Id.*

64. *Ballinger*, 395 F.3d at 1224 (quoting 18 U.S.C. § 247 (2002)). As the *Ballinger* court noted,

The constitutional issue this case raises is whether the Commerce Clause, found in Article I, § 8, clauses 1 and 3 of the United States Constitution, permits Congress to proscribe the conduct of an arsonist who travels by car on the interstate highways through four states, apparently for no other purpose than to burn churches to the ground.

*Id.* at 1227.

65. *Ambert*, 561 F.3d at 1211.

66. *See, e.g.*, *United States v. Gould*, 568 F.3d 459 (4th Cir. 2009); *United States v. George*, 579 F.3d 962 (9th Cir. 2009); *United States v. May*, 535 F.3d 912 (8th Cir. 2008).

67. *See, e.g.*, 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 (2009). *See also* Diane McGimsey, *The Commerce Clause and Federalism After Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole*, 90 CAL. L. REV. 1675 (2002) (proposing a purpose nexus requirement mandating that the traditional jurisdictional prong of Commerce Clause analysis be conformed both to the purposes of the applicable statute and the Commerce Clause power itself in light of the diminished meaningfulness of state-line crossing as an indicator of interstate commerce).

68. *Ambert*, 561 F.3d at 1211.

69. 552 F.3d 709 (8th Cir. 2009).

70. U.S. CONST. art. I, § 8, cl. 18.

Chief Justice Marshall’s words in *M’Culloch v. Maryland*.<sup>71</sup> Thus, the Eleventh Circuit, considering the purposes of SORNA, including the establishment of a national system to counteract the danger of sex offenders slipping through the cracks or exploiting a weak state registration system, found that § 16913, the registration section, “is reasonably adapted to the attainment of a legitimate end under the commerce clause,”<sup>72</sup> echoing Chief Justice Marshall’s words in *M’Culloch*: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”<sup>73</sup>

## VI. CONCLUSION

If current law is read all at once, it appears that, notwithstanding the Supreme Court’s statement in *Morrison* that there are limits, the commerce power may reach into virtually any aspect of intrastate life. One can argue, based on *Ambert* and similar decisions in other circuits, that if a person has ever travelled between states they may be subject to laws governing their behavior even if that behavior occurs completely separately from that travel (e.g., the registering of sex offenders). Similarly, one could argue that if a device’s manufacture involves components that ever travelled interstate, or the device moves in interstate commerce, or the sale of that device will have some collateral impact on interstate commerce, it will be subject to federal law. Put differently, “[i]f the Federal Government can regulate growing a half-dozen cannabis plants for personal consumption (not because it is interstate commerce, but because it is inextricably bound up with interstate commerce)” then can “Congress’ Article I powers—as expanded by the Necessary and Proper Clause—have no meaningful limits[?]”<sup>74</sup>

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71. 17 U.S. (4 Wheat.) 316 (1819).

72. *Ambert*, 561 F.3d at 1212.

73. *M’Culloch*, 17 U.S. at 421.

74. *Gonzales v. Raich*, 545 U.S. 1, 65 (2005) (Thomas, J., dissenting). Justice Thomas put this in the form of a declaration, not a question.