The Sex Offender Registration and Notification Act: The Need to Break the Constitutional Mold

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COMMENT

THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT: THE NEED TO BREAK THE CONSTITUTIONAL MOLD

INTRODUCTION

Between 1937 and 1995, the United States Supreme Court failed to strike down a single piece of federal legislation for falling outside the authority granted by the Commerce Clause.1 In 1995, however, the Supreme Court shifted gears and adopted a more restrictive view of the Commerce Clause.2 In United States v. Lopez3 and United States v. Morrison,4 the Court struck down federal legislation as outside the purview of the Commerce Clause, but suggested in the text of its decisions that the legislation may have been better suited against constitutional challenge if it had contained a number of elements.5 The Court recommended that Congress bolster a statute’s legislative history with findings supporting that statute’s connection to interstate commerce.6 Moreover, in Gonzales v. Raich, the Court suggested that a

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1 Erwin Chemerinsky, The Rehnquist Revolution, 2 PIERCE L. REV. 1, 2 (2004) (“From 1937 until 1995, not one federal law was invalidated as exceeding the scope of Congress’ Commerce Clause authority.”).
3 Id.
5 See Lopez, 514 U.S. 549; Morrison, 529 U.S. 598. In Gonzales v. Raich, 545 U.S. 1 (2005), the Court upheld the federal Controlled Substances Act, but nonetheless offered further guidance on ways for Congress to draft its legislation in a way that would satisfy constitutional scrutiny. Id. at 32-33.
6 Lopez, 514 U.S. at 561-63. In rejecting the Gun-Free School Zones Act as outside the bounds of congressional authority, the Court stated, “Section 922(q) is not an essential part of a
statute with an attenuated connection to interstate commerce might be upheld if it supports a larger scheme regulating economic activity.\(^7\) The Court also recommended that Congress incorporate a jurisdictional hook into its legislation, limiting that legislation’s application to circumstances that substantially affect interstate commerce.\(^8\)

As a result of the Supreme Court’s instruction, Congress has altered its legislation so that it fits a particular mold, ready for resistance against constitutional challenge. By utilizing congressional findings, large economic regulatory schemes, and the jurisdictional hook, Congress created a constitutional mold that purports to limit legislation’s effect to those circumstances that substantially affect interstate commerce.\(^9\) This constitutional mold sometimes increases a piece of legislation’s connection to interstate commerce by properly limiting the application of that legislation; other times, however, Congress superficially attaches these elements to legislation without adding any substantive value. By abusing its constitutional mold, Congress has been able to gain access to nontraditional areas of federal regulation, including criminal conduct that has traditionally been within the purview of the states’ police power.\(^10\)

The Sex Offender Registration and Notification Act (SORNA) is an example of legislation that utilizes the constitutional mold, as it contains a jurisdictional hook that expressly limits its application to activities that affect interstate commerce.\(^11\) SORNA’s jurisdictional hook states that a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. . . . Second, § 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce. . . . We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.”\(^{12}\) Id. (internal citations omitted).

\(^7\) Raich, 545 U.S. at 32-33.

\(^8\) Id.

\(^9\) Christopher DiPompeo, Federal Hate Crime Laws and United States v. Lopez: On a Collision Course to Clarify Jurisdictional-Element Analysis, 157 U. PA. L. REV. 617, 671 (2008);


\(^{11}\) Tara M. Stuckey, Note, Jurisdictional Hooks in the Wake of Raich: On Properly Interpreting Federal Regulations of Interstate Commerce, 81 NOTRE DAME L. REV. 2101, 2105 (2006) (“The jurisdictional hook, or element, is a statutory clause that serves as a nexus between three points – a piece of legislation, Congress’s constitutional power to enact that legislation, and Congress’s power to regulate the particular conduct at issue.” (footnote omitted)); see 18 U.S.C.A. §
sex offender is guilty of violating its provisions if, after that offender travels in interstate commerce, he or she fails to register or update a registration as required. This hook provides federal jurisdiction over sex offenders even though SORNA’s purpose is to regulate criminal conduct and thus traditionally within the states’ power to regulate. SORNA, therefore, exemplifies the way jurisdictional hooks have taken Congress beyond its traditional bounds.

Although much has been said about these topics separately, this Comment examines SORNA as an example of Congress’s ability to abuse jurisdictional hooks to invade the states’ police power. Part I will provide context to the discussion by examining the history and current scope of proper congressional authority, including Congress’s affirmative authority under the Commerce Clause, as well as the countervailing limitation of the Tenth Amendment. Part I also provides examples of proper jurisdictional hooks and identifies common characteristics that belong to those hooks. Part II describes SORNA’s jurisdictional hook in detail and evaluates it as an example of a superficial jurisdictional hook with the sole purpose of providing a basis for federal jurisdiction and infringing on the states’ police power. Part III presents a solution to the problem of Congress’s federal invasion of the states’ police power. That Part begins by asserting that the Supreme Court should take a stronger stance in ensuring that Congress’s constitutional mold adequately relates its legislation to interstate commerce. It then argues that the United States Supreme Court should

2250(a) (Westlaw 2011) (“Whoever – (1) is required to register under the Sex Offender Registration and Notification Act; (2) . . . (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; 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.”).

12 18 U.S.C.A. § 2250(a) (Westlaw 2011) (emphasis added) (“Whoever – (1) is required to register under the Sex Offender Registration and Notification Act; (2) . . . (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; 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.”).

13 See Lochner, 198 U.S. at 53.

address Congress’s pattern of creating legislation like SORNA by reviving the strength of the Tenth Amendment as last seen in the second era of the Court’s Commerce Clause jurisprudence.

I. A CONSTITUTIONAL MOLD

In 1995, the Supreme Court struck down a piece of federal legislation for exceeding its permissible scope under the Commerce Clause for the first time since 1937. Since that decision, Congress has sought ways to reclaim the broad power it previously enjoyed under the Commerce Clause. As part of this endeavor, Congress has taken various approaches recommended by the Court, including presenting extensive congressional findings to support its legislation, and enacting large regulatory schemes capable of concealing statutes that exceed congressional authority. Additionally, Congress has inserted

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15 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 145 (3d ed. 2009).
17 See 18 U.S.C.A. § 922(q) (Westlaw 2011); see also Diane McGimsey, Comment, The Commerce Clause and Federalism After Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole, 90 CALIF. L. REV. 1675, 1709 (2002) (“Taking the Court’s cue that it would not review the channels and instrumentalities prongs of Congress’s Commerce Clause power, Congress passed a revised version of the GFSZA, adding that the firearm in question must have ‘moved in’ or must ‘otherwise affect[] interstate or foreign commerce.’ Although the Court stated in Lopez that Congress cannot have a general police power, and although the rationales espoused in the early channels and instrumentalities cases were probably never intended to justify congressional regulation of a firearm that had once passed through interstate commerce via a state line crossing fifty years earlier, the revised GFSZA shows that Congress is likely to use the jurisdictional element to accomplish regulation with only an attenuated link to interstate commerce. . . . The Court probably did not intend Lopez to serve as a mere statute-drafting seminar.” (footnotes omitted)).
18 United States v. Lopez, 514 U.S. 549, 561-63 (1995). In rejecting the Gun-Free School Zones Act as outside the bounds of congressional authority, the Court stated, “Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. . . . Second, § 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce. . . . We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no
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jurisdictional hooks into legislation in order to make an express connection between that legislation and interstate commerce.19 This was the case with SORNA and is the focus of this Comment.

To understand how Congress manipulates the bounds of its authority through the use of a jurisdictional hook, it is helpful to discuss the history, as well as the current scope, of proper congressional authority. Because jurisdictional hooks are most often linked to congressional authority under the Commerce Clause,20 this Part describes the existing Commerce Clause jurisprudence. It also explains the history and current scope of the countervailing limit to Congress’s commerce power, the Tenth Amendment. Some jurisdictional hooks do, in fact, bring legislation within the purview of the commerce power by ensuring that legislation will only apply to those activities and circumstances that genuinely affect interstate commerce.21 These jurisdictional hooks contain common characteristics not found in superficial jurisdictional hooks like that found in SORNA. The Supreme Court should look to these characteristics in evaluating Congress’s use of the jurisdictional hook, and the Court should uphold only those jurisdictional hooks that bring their accompanying legislation within the purview of federal authority.

A. THE FOUR ERAS OF COMMERCE CLAUSE JURISPRUDENCE

It is often stated that the federal government is one of enumerated powers, and, to enact legislation, it must do so under the authority of one of those powers.22 Congress’s most utilized authority is that which stems from the Commerce Clause.23 The countervailing force against

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20 Erwin Chemerinsky, The Rehnquist Revolution, 2 PIERCE L. REV. 1, 2 (2004) (“From 1937 until 1995, not one federal law was invalidated as exceeding the scope of Congress’ Commerce Clause authority. Countless criminal and civil laws were enacted under this constitutional power. It was by far the most frequent source of authority for federal legislation.”).
21 See, e.g., 18 U.S.C.A. §§ 1202(b), 2312, 2313(a) (Westlaw 2011).
23 U.S. Const. art. I, § 8, cl. 3 (“To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”); Erwin Chemerinsky, The Rehnquist Revolution, 2 PIERCE L. REV. 1, 2 (2004) (“From 1937 until 1995, not one federal law was invalidated as
Congress’s authority under the Commerce Clause and the Necessary and Proper Clause is the principle of state sovereignty guided by the Tenth Amendment.24

The Commerce Clause states that Congress shall have the power “[t]o regulate [c]ommerce . . . among the several [s]tates.”25 This phrase, although short, has been subject to a wide array of interpretation over the course of four eras.26 The first era of Commerce Clause jurisprudence, typified by Gibbons v. Ogden, proved relatively uneventful.27 In 1890, however, “concurrent with the Industrial Revolution and the growth of the national economy, Congress began using the Commerce Clause much more extensively to regulate businesses.”28 At that point, the Supreme Court entered the second era of Commerce Clause jurisprudence, and established limits on the breadth of the commerce power.29 In the early twentieth century, the Court went so far as to bar manufacturing and production from the meaning of “commerce”30 and limit the definition of “among the states” to goods and activities that involved two or more states.31

In addition to limiting the scope of the Commerce Clause during the second era, the Court also “held that Congress violates the Tenth Amendment when it regulates matters left to state governments.”32 In Hammer v. Dagenhart, the Court rejected Congress’s attempt to regulate child labor by prohibiting the interstate transportation of goods produced using child labor.33 The Court reasoned that “[t]he control by Congress exceeding the scope of Congress’ Commerce Clause authority. Countless criminal and civil laws were enacted under this constitutional power. It was by far the most frequent source of authority for federal legislation.”). Congress also uses its complementary authority under the Necessary and Proper Clause to “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.” U.S. CONST. art. I, § 8, cl. 18.

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24 U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).
25 U.S. CONST. art. I., § 8, cl. 3.
26 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 141 (3d ed. 2009) (“There have been roughly four eras of Commerce Clause jurisprudence.”).
27 See Gibbons v. Ogden, 22 U.S. 1 (1824); see also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 144 (3d ed. 2009) (“During the remainder of the nineteenth century, until the 1890s, there were relatively few cases considering the scope of Congress’s Commerce Clause power.”).
28 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 145 (3d ed. 2009).
29 Id.
32 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 145 (3d ed. 2009).
33 Hammer v. Dagenhart, 247 U.S. 251, 271 (1918), overruled by United States v. Darby,
over interstate commerce cannot authorize the exercise of authority not entrusted to it by the Constitution. The maintenance of the authority of the states over matters purely local is . . . essential to the preservation of our institutions . . . ." 34 Going beyond a mere limitation on the commerce power, the Court affirmed the independent restriction of the Tenth Amendment, stating that sustaining the federal child labor statute at issue would “sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the states.” 35

The second era of Commerce Clause and Tenth Amendment jurisprudence continued until the economic crisis of the Great Depression, at which point Congress’s penchant for economic and business regulation gained popularity. 36 For nearly sixty years, between 1937 and 1995, the Court did not overturn a single piece of legislation for violating the Commerce Clause. 37 During those years, Congress’s grant of authority was so broad that it led the Honorable Alex Kozinski of the Ninth Circuit to brand it the “Hey, you-can-do-whatever-you-feel-like Clause.” 38 Not surprisingly, this third era of Commerce Clause jurisprudence also rejected any independent meaning of the Tenth Amendment. 39 In United States v. Darby, the Court overruled Hammer v. Dagenhart and allowed a federal regulation of minimum wage, explaining that the Tenth Amendment was “but a truism that all is retained which has not been surrendered.” 40

In 1995, the Supreme Court again shifted gears in United States v. Lopez. 41 In Lopez, the federal legislation at issue was the Gun Free School Zones Act (“GFSZA”), which made it a federal crime to possess a gun within 1,000 feet of a school. 42 Under the 1937-1995 era of the Commerce Clause, the Court almost certainly would have permitted such legislation. 43 However, in Lopez, the Court limited the breadth of

312 U.S. 100 (1941).
34 Id. at 275 (citation omitted).
35 Id. at 276.
36 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 159 (3d ed. 2009).
39 See United States v. Darby, 312 U.S. 100, 124 (1941).
40 Id.
42 Id. at 551.
43 During this era, Congress’s power under the Commerce Clause was extremely broad. See Erwin Chemerinsky, The Rehnquist Revolution, 2 PIERCE L. REV. 1, 2 (2004) (“From 1937 until 1995, not one federal law was invalidated as exceeding the scope of Congress’ Commerce Clause
Congress’s commerce authority to three broad areas: (1) “the use of the channels of interstate commerce,” (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce,” and (3) “activities having a substantial relation to interstate commerce.”

Because the GFSZA did not involve the first two Lopez categories, and the Court found no indication that the GFSZA had a “substantial effect” on interstate commerce, the Court declared it outside the purview of congressional authority.

Five years later, in United States v. Morrison, the Court applied the criteria presented in Lopez to invalidate the Violence Against Women Act (“VAWA”). In the VAWA, Congress sought to create a federal penalty for committing a gender-motivated crime. In response to the Court’s rejection of its use of Commerce Clause authority in Lopez, Congress presented extensive findings concerning the effect of gender-motivated violence on interstate commerce as support for the VAWA. Included in those findings was the conclusion that gender-motivated violence, and regulation controlling such violence, affected an individual’s willingness to travel interstate to areas considered dangerous in the public eye. In addition, Congress reasoned that individuals were likely to be less productive when threatened with gender-motivated violence, thereby also affecting interstate commerce. The Court rejected these assertions and, quoting the language in Lopez, stated that “simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it

authority. Countless criminal and civil laws were enacted under this constitutional power. It was by far the most frequent source of authority for federal legislation.”). It is likely that the Court would not have struck down the Gun-Free School Zones Act, as it did not strike down other, similar legislation. See e.g., Hoke v. United States, 227 U.S. 308 (1913) (upholding a law prohibiting the transportation of a woman in interstate commerce for purposes of prostitution); Hipolite Egg Co. v. United States, 220 U.S. 45 (1911) (upholding a congressional act prohibiting impure food and drugs from being transported in interstate commerce); Champion v. Ames, 188 U.S. 321 (1903) (upholding a law enacted to keep the channels of commerce free from use in the transportation of lottery tickets).

44 Lopez, 514 U.S. at 558-59.
45 Id. at 567-68.
47 42 U.S.C.A. § 13981(b) (Westlaw 2011) (“All persons within the United States shall have the right to be free from crimes of violence motivated by gender . . . .”).
50 Id.
Because the VAWA constituted a “regulation and punishment of intrastate violence that [was] not directed at the instrumentalities, channels, or goods involved in interstate commerce,” the Court invalidated it as an improper use of the Commerce Clause.\(^{52}\)

Most recently the Court reaffirmed Congress’s power to regulate intrastate activities under the Commerce Clause, to a degree, in *Gonzales v. Raich*.\(^ {53}\) There, the Court upheld the Controlled Substances Act,\(^{54}\) which prohibited the local cultivation and possession of marijuana. Respondents, users of marijuana under California’s Compassionate Use Act,\(^ {56}\) argued that they had no commercial impact because they personally grew all of the marijuana they used.\(^ {57}\) The Court, however, relied on *Wickard v. Filburn*\(^ {58}\) to establish that legislation that is part of a larger regulatory scheme is properly within the purview of commerce authority.\(^ {59}\) Despite respondents’ cultivation and use of marijuana having no effect on interstate commerce, the Court found that it was reasonable for Congress to regulate these activities in order to effectively regulate the national market for the illegal drug.\(^ {60}\)

With the onset of its new era of Commerce Clause jurisprudence – the fourth\(^ {61}\) – the Supreme Court has also embarked on a new era of Tenth Amendment jurisprudence. However, contrary to the strong protection for states’ rights seen during the second era, the Court’s most recent interpretation of the Tenth Amendment is diluted.\(^ {62}\) Instead of preserving the traditional police power of the states to regulate the “safety, health, morals, and general welfare of the public,”\(^ {63}\) the Court instead preserved the more administrative elements of state sovereignty.\(^ {64}\) Under what appears to be the emergence of the fourth era of Tenth Amendment jurisprudence, the Court has simply prevented

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51 Id. at 602, 614 (quoting United States v. Lopez, 514 U.S. 549, 557 n.2 (1995)).
52 Id. at 602, 618.
53 Gonzales v. Raich, 545 U.S. 1 (2005).
55 Raich, 545 U.S. at 5.
56 CAL. HEALTH & SAFETY CODE § 11362.5 (Westlaw 2011).
57 Raich, 545 U.S. at 20.
59 Raich, 545 U.S. at 17-22.
60 Id. at 32-33.
61 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 183 (3d ed. 2009).
64 See Printz, 521 U.S. 898; New York v. United States, 505 U.S. 144.
Congress from “commandeer[ing] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.”

B. PROPER JURISDICTIONAL HOOKS: THOSE LIMITING LEGISLATION’S EFFECT TO ACTIVITIES AFFECTING INTERSTATE COMMERCE

Since its commerce power was circumscribed between 1995 and 2005, Congress has sought to comply with the Court’s instructions concerning the attributes and requirements of constitutionally permissible legislation. Although Congress has taken advantage of the presumption of constitutionality the jurisdictional hook creates, there is, admittedly, a reason why this presumption exists. Often, as in the circumstances that follow, the inclusion of a jurisdictional hook brings legislation within the purview of federal authority to regulate. These proper jurisdictional hooks share characteristics, including the ability to (1) limit the statute’s effect to those activities that substantially affect interstate commerce, and (2) create a connection between the jurisdictional hook and the criminal activity being regulated. Importantly, these characteristics are not found in jurisdictional hooks like that in SORNA.

Many jurisdictional hooks adequately connect legislation to interstate commerce by ensuring that the scope of the legislation is limited to activities that actually affect interstate commerce, and that the interstate travel has some relation to the criminal activity being

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66 See 18 U.S.C.A. § 922(q) (Westlaw 2011); see also Diane McGimsey, Comment, The Commerce Clause and Federalism After Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole, 90 CALIF. L. REV. 1675, 1709 (2002) (“Taking the Court’s cue that it would not review the channels and instrumentalities prongs of Congress’s Commerce Clause power, Congress passed a revised version of the GFSZA, adding that the firearm in question must have ‘moved in’ or must ‘otherwise affect[] interstate or foreign commerce.’ Although the Court stated in Lopez that Congress cannot have a general police power, and although the rationales espoused in the early channels and instrumentalities cases were probably never intended to justify congressional regulation of a firearm that had once passed through interstate commerce via a state line crossing fifty years earlier, the revised GFSZA shows that Congress is likely to use the jurisdictional element to accomplish regulation with only an attenuated link to interstate commerce.” (footnotes omitted)).

67 See, e.g., 18 U.S.C.A. §§ 1202(b), 2312, 2313(a) (Westlaw 2011).

68 Jurisdictional hooks should limit a statute’s effect to those activities that “substantially affect” interstate commerce, as that was the standard articulated by the Court in United States v. Lopez, 514 U.S. 549, 558-59 (1995).

69 See, e.g., 18 U.S.C.A. §§ 1202(b), 2312, 2313(a) (Westlaw 2011).
regulated.70 For example, the federal kidnapping statute provides that a person who knowingly transports or transfers proceeds of a kidnapping, or “receives, possesses, conceals, or disposes” of such proceeds after they have traveled in interstate commerce, is guilty of a crime. 71 Of course, most United States currency has traveled in interstate commerce. However, unlike SORNA, the federal kidnapping statute places a real limit on the application of the statute, applying it only to that currency which has actually been used in a kidnapping.72 Furthermore, the jurisdictional hook in the federal kidnapping statute provides a connection between the criminal activity being regulated and the interstate travel. The kidnapping statute will never affect wholly innocent interstate travel, as someone convicted for violating this statute is required to have had knowledge of the currency’s role in the kidnapping.73

Similarly, the original federal carjacking statute, passed in 1919, contains a substantive jurisdictional hook that distinguishes it from 1992 legislation intended to toughen federal carjacking law.74 The 1919 statute, commonly known as the Dyer Act, provides that anyone who transports a motor vehicle in interstate commerce, knowing that the vehicle was stolen, is guilty of a crime.75 This statute, therefore, limits its application to criminal activity that substantially affects interstate commerce.76 Conversely, the 1992 legislation provides that “[w]hoever . . . takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce” shall be fined or imprisoned.77 This statute will reach almost every individual who steals a car, since there is no nexus between the criminal act and the vehicle or offender’s interstate travel.78

Although the two statutes are very similar, the Dyer Act contains a

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70 Lopez, 514 U.S. at 558-59; see, e.g., 18 U.S.C.A. §§ 1202(b), 2312, 2313(a) (Westlaw 2011).
72 See id.
73 Id.
75 18 U.S.C.A. § 2312 (Westlaw 2011). The legislation also provides that anyone who “receives, possess, conceals, stores, barter, sells, or disposes of any motor vehicle . . . which has crossed a State or United States boundary after being stolen, knowing the same to have been stolen” shall be guilty of a federal crime. 18 U.S.C.A. § 2313 (Westlaw 2011).
76 See id.
78 See id.
jurisdictional hook that “ensure[s] that a regulated activity substantially affects interstate commerce,” thereby ensuring that it is an appropriate use of federal authority. The Dyer Act limits its focus to circumstances when an individual steals a car and takes it across state lines. Each time a federal prosecutor obtains a conviction under the Dyer Act, the defendant is someone who knowingly transported a stolen car across state lines or otherwise knowingly dealt with a stolen car that had recently been transported across state lines. When compared with the 1992 legislation expanding the reach of federal carjacking law, the substantive nature of the Dyer Act becomes even more apparent.

The 1992 federal carjacking statute expands federal jurisdiction by allowing federal prosecution of any person who has stolen a car that, at one point in time, traveled across state lines. This allows the legislation to apply to defendants who steal cars and transport them across state lines – the same defendants guilty under the Dyer Act – and, more importantly, a defendant who steals a car and moves it across town. Unlike the jurisdictional hook in the Dyer Act, the jurisdictional hook in the 1992 federal carjacking statute provides no real limitation on the type of activities it affects; so long as the stolen car moved in interstate commerce at some point, it falls under this statute. After 1992, therefore, a federal prosecutor may pursue almost any person who has stolen a car, since practically all cars have traveled in interstate commerce at some point – most even before they are sold. Furthermore, the jurisdictional hook in the 1992 federal carjacking statute has no necessary nexus to the actual criminal activity. In a circumstance where a car was moved in interstate commerce during its manufacture, and stolen several years after the car’s sale, the car’s interstate travel has no relation to the criminal activity. The Dyer Act, unlike the 1992 carjacking statute and other examples of more recent federal legislation (such as SORNA), has a necessary and meaningful nexus to interstate commerce; for these reasons, the Dyer Act falls within the appropriate purview of the Commerce Clause.

Although the use of jurisdictional hooks is prevalent, the judicial
response to their use has been mixed. The Supreme Court has not expressly ruled on the issue; however, most courts of appeals have held that the mere existence of a jurisdictional hook, by itself, cannot guarantee constitutionality. This purported case-by-case analysis concerning the sufficiency of a jurisdictional hook is effective in theory. Beyond the refusal to uphold legislation solely on the basis of a jurisdictional hook, however, no clear guidelines have been set forth for the use of the jurisdictional hook. This ambiguity allows courts full discretion to determine which jurisdictional hooks are sufficient. In circumstances like SORNA, this discretion manifests itself in emotional and political concerns taking precedence over concerns for federal restraint.

II. THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT

SORNA is a textbook example of Congress’s use of a superficial jurisdictional hook to obtain federal authority over a traditionally state-regulated field. An understanding of SORNA’s background and structure is essential in order to recognize the pretextual nature of its jurisdictional hook. Unlike the Dyer Act, which provided a clear and

84 Although courts of appeals considering the issue have held that the mere presence of a jurisdictional hook is insufficient to guarantee constitutionality, courts have still been willing to uphold jurisdictional hooks without any real discussion as to their sufficiency. Compare United States v. Rodia, 194 F.3d 465, 472 (3d Cir. 1999) (“The mere presence of a jurisdictional element . . . does not in and of itself insulate a statute from judicial scrutiny under the Commerce Clause, or render it per se constitutional.”) (quoting United States v. Bishop, 66 F.3d 569, 585 (3d Cir. 1995)), with United States v. George, 625 F.3d 1124, 1129-30 (9th Cir. 2010) (discussing SORNA’s jurisdictional hook as follows: “SORNA was enacted to keep track of sex offenders. Such offenders are required to ‘register, and keep registration current, in each jurisdiction’ where the offender lives, works, or goes to school. As stated by the Eighth Circuit, ‘[t]his language indicates Congress wanted registration to track the movement of sex offenders through different jurisdictions.’ Under § 2250, Congress limited the enforcement of the registration requirement to only those sex offenders who were either convicted of a federal sex offense or who move in interstate commerce.’ The requirements of § 16913 are reasonably aimed at ‘regulating persons or things in interstate commerce and the use of the channels of interstate commerce.’) (internal citations omitted)).

85 See Rodia, 194 F.3d at 472 (“The mere presence of a jurisdictional element . . . does not in and of itself insulate a statute from judicial scrutiny under the Commerce Clause, or render it per se constitutional.”) (quoting United States v. Bishop, 66 F.3d 569, 585 (3d Cir. 1995))); Christopher DiPompeo, Federal Hate Crime Laws and United States v. Lopez: On a Collision Course to Clarify Jurisdictional-Element Analysis, 157 U. PA. L. REV. 617, 650 (2008) (“Nearly every federal court of appeals that has considered the question has held that the mere presence of a jurisdictional element is not sufficient to ensure a statute’s constitutionality.”).

86 See the congressional discussion of SORNA, where one supporter asked, “Isn’t it common sense to protect young schoolchildren in the first place by keeping these pedophiles locked up with lengthy prison sentences? Isn’t it common sense that coddling repeated sex offenders with self-esteem courses and rehabilitation doesn’t work, and that locking them up works?” 152 CONG. REC. H647-05 (daily ed. March 8, 2006) (statement of Mr. Keller).
substantive connection to interstate commerce, SORNA’s connection to interstate commerce is superficial. SORNA’s jurisdictional hook has no genuine purpose in controlling interstate commerce; instead, it acts merely as a mechanism to guarantee federal jurisdiction. For these reasons, SORNA serves as an ideal example of a case in which the Court should intervene and find such legislation beyond the constitutional powers of Congress.

A. HISTORY OF SORNA

Under SORNA, a person who meets the definition of a sex offender must register where he or she lives, works, and goes to school, and must keep the registration current. The offender must also initially register in the state where he or she was convicted. The duration of a sex offender’s registration requirement is based on his or her classification under SORNA. To be guilty of an offense under SORNA, a sex offender must (1) be required to register, (2) travel in interstate commerce, and (3) knowingly fail to register or update as required. The United States Supreme Court recently clarified that an offender must complete these elements in sequential order in order to have violated this

87 42 U.S.C.A. § 16913(a) (Westlaw 2011).
88 Id.
89 42 U.S.C.A. § 16911 (Westlaw 2011) (“Tier I sex offender: The term “tier I sex offender” means a sex offender other than a tier II or tier III sex offender. . . . Tier II sex offender: The term “tier II sex offender” means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and -- (A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor: (i) sex trafficking (as described in section 1591 of Title 18); (ii) coercion and enticement (as described in section 2422(b) of Title 18); (iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a)) of Title 18; (iv) abusive sexual contact (as described in section 2244 of Title 18); (B) involves -- (i) use of a minor in a sexual performance; (ii) solicitation of a minor to practice prostitution; or (iii) production or distribution of child pornography; or (C) occurs after the offender becomes a tier I sex offender. . . . Tier III sex offender The term “tier III sex offender” means a sex offender whose offense is punishable by imprisonment for more than 1 year and -- (A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense: (i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18); or (ii) abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years; (B) involves kidnapping of a minor (unless committed by a parent or guardian); or (C) occurs after the offender becomes a tier II sex offender.”).
90 42 U.S.C.A. § 16913(a) (Westlaw 2011) (“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.”).
section, thereby excluding offenders who traveled in interstate commerce prior to SORNA’s enactment. 92

However, SORNA is only the most recent effort in fifteen years of congressional attempts to regulate sex offenders. 93 In 1994, Congress encouraged states to enact some form of sex-offender registry by passing the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (“Jacob Wetterling Act”). 94 When states were slow to comply with the Jacob Wetterling Act, Congress amended the legislation to include Megan’s Law, making public notification of a sex offender’s presence compulsory. 95 Courts consistently upheld Megan’s Law and the Jacob Wetterling Act, and by 1997 all fifty states had enacted some version of a sex-offender registry. 96

The Jacob Wetterling Act and Megan’s Law provided states with a great deal of discretion concerning registry requirements, leaving the nation with a multitude of various requirements. 97 As a result of these differences, over 100,000 people who were legally required to register as sex offenders failed to do so. 98 In 2006, in an attempt to prevent individuals from slipping through the cracks, Congress enacted SORNA as part of the Adam Walsh Act. 99 Congress designed SORNA to

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92 Carr v. United States, 130 S. Ct. 2229 (2010). In Carr, the Court did not have the occasion to rule on SORNA’s permissibility under the Commerce Clause. Therefore, the highest authorities on the issue are the decisions of the United States courts of appeals.


94 Id.


97 Terra R. Lord, Comment, Closing Loopholes or Creating More? Why a Narrow Application of SORNA Threatens to Defeat the Statute’s Purpose, 62 OKLA. L. REV. 273, 280 (2010) (“Because the Wetterling Act established only a baseline recommendation for sex offender registration requirements, the states maintained significant discretion in deciding which crimes triggered registration, appropriate tracking methods, and punishment provisions. As a result, the sex offender registration laws varied significantly from state-to-state.” (citing Lara Geer Farley, Note, The Adam Walsh Act: The Scarlet Letter of the Twenty-First Century, 47 WASHBURN L.J. 471, 476-80 (2008))).


establish a comprehensive national sex-offender registry to ensure uniform requirements that would prevent individuals from avoiding compliance due to inconsistent standards. Unlike the Jacob Wetterling Act and Megan’s Law, SORNA came equipped with a myriad of specific requirements with which states had to comply in order to receive federal funding. For example, in 2010, the Attorney General issued the National Guidelines for SORNA, requiring that, in collecting a sex offender’s name, a state must obtain

[t]he name of the sex offender (including any alias used by the individual). The names and aliases required by this provision include, in addition to registrants’ primary or given names, nicknames and pseudonyms generally, regardless of the context in which they are used, any designations or monikers used for self-identification in Internet communications or postings, and ethnic or tribal names by which they are commonly known.

If a state fails to “substantially comply” with the administrative provisions of SORNA, it risks ten percent of its federal funding from the Omnibus Crime Control and Safe Streets Act. Nonetheless, by August 2010, four years after SORNA’s enactment, only Delaware, Florida, Ohio, the Confederated Tribes of the Umatilla Indian Reservation, and the Confederated Tribes and Bands of the Yakama Nation had substantially implemented SORNA. Presumably because of the high cost of compliance, the other 237 registration jurisdictions have requested and received extensions until July 27, 2011. Despite this,
more than 700,000 people were registered as sex offenders in various registries in 2009, a clear indication that sex-offender legislation like SORNA is affecting the lives of individuals. ¹⁰⁶

Not surprisingly, SORNA has faced a number of constitutional challenges spanning the breadth of jurisprudence addressing congressional authority.¹⁰⁷ Offenders convicted under its terms have brought challenges to the Act based on, among other things,¹⁰⁸ Congress’s lack of authority to enact the legislation.¹⁰⁹

At least nine federal courts of appeals have held that Congress has the affirmative authority to enact SORNA under both the Commerce Clause and the Necessary and Proper Clause.¹¹⁰ Under these holdings, Section 2250, the section establishing the requirements for a sex offender to be guilty of a violation under SORNA, is constitutional.¹¹¹ Section 2250’s jurisdictional hook provides that a violation of SORNA can only occur if a person has traveled in interstate commerce.¹¹² By inserting this element, Section 2250 directly conforms to the Supreme Court jurisprudence allowing Congress to regulate people traveling in interstate commerce.


¹⁰⁷ See, e.g., Carr v. United States, 130 S. Ct. 2229 (2010); United States v. George, 625 F.3d 1124 (9th Cir. 2010); United States v. Shenandoah, 595 F.3d 151 (3d Cir. 2010); United States v. Guzman, 591 F.3d 83 (2d Cir. 2010); United States v. Cain, 583 F.3d 408 (6th Cir. 2009); United States v. Zuniga, 579 F.3d 845 (8th Cir. 2009); United States v. Whaley, 577 F.3d 254 (5th Cir. 2009); United States v. Gould, 568 F.3d 459 (4th Cir. 2009); United States v. Ambert, 561 F.3d 1202 (11th Cir. 2009); United States v. Howell, 552 F.3d 709 (8th Cir. 2009); United States v. Lawrance, 548 F.3d 1329 (10th Cir. 2008).

¹⁰⁸ Challenges have been brought against SORNA based on an offender’s obligation to register before SORNA was enacted, and before the Attorney General issued SORNA’s final guidelines. See Terra R. Lord, Comment, Closing Loopholes or Creating More? Why a Narrow Application of SORNA Threatens to Defeat the Statute’s Purpose, 62 OKLA. L. REV. 273, 280 (2010). Challenges have also been brought against SORNA’s civil commitment provision. See Robin Morse, Note, Federalism Challenges to the Adam Walsh Act, 89 B.U. L. REV. 1753 (2009). All of these challenges are beyond the scope of this Comment. A comprehensive list of challenges brought against SORNA can be found at Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking (SMART), U.S. Department of Justice, Sex Offender Registration and Notification Case Law Summary: January 2008-July 2009 (2009), available at http://www.ojp.usdoj.gov/smart/caselaw/caselawsum.pdf.

¹⁰⁹ See, e.g., George, 625 F.3d 1124; Shenandoah, 595 F.3d 151; Guzman, 591 F.3d 83; Zuniga, 579 F.3d 845; Whaley, 577 F.3d 254; Gould, 568 F.3d 459; Ambert, 561 F.3d 1202; Howell, 552 F.3d 709; Lawrance, 548 F.3d 1329.

¹¹⁰ Id.

¹¹¹ Id.

¹¹² Section 2250 also requires that, in order to be guilty of violating SORNA, a sex offender must be required to register under § 16913 and must have failed to register or update a registration after having traveled in interstate commerce.
Courts have also consistently validated the congressional authority to pass Section 16913. Section 16913 simply requires that all sex offenders register where they live, work, and go to school, and thereby is outside the purview of any of the three *Lopez* categories. Nevertheless, courts have found authorization for this “complementary” section of SORNA within the Necessary and Proper Clause. The Second Circuit, for example, found that “[r]equiring sex offenders to update their registrations due to intrastate changes of address or employment status is a perfectly logical way to help ensure that states will more effectively be able to track sex offenders when they do cross state lines.” According to the majority of jurisdictions, the intrastate activity regulated by Section 16913 is “reasonably adapted” to the goal of creating a comprehensive national sex-offender registry. By justifying Section 2250 under Congress’s Commerce Clause authority, and Section 16913 under the Necessary and Proper Clause, courts have uniformly accepted the contention that SORNA is a valid exercise of congressional authority.

B. SORNA’S JURISDICTIONAL HOOK

SORNA’s jurisdictional hook, requiring that a sex offender have

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113 *Guzman*, 591 F.3d at 90; *see also* United States v. Lopez, 514 U.S. 549 (1995).

114 *Shenandoah*, 595 F.3d at 160; *Guzman*, 591 F.3d at 91; *Whaley*, 577 F.3d at 261; *Gould*, 568 F.3d at 471; *Ambert*, 561 F.3d at 1212; *Howell*, 552 F.3d at 717.

115 42 U.S.C.A. § 16913 (Westlaw 2011); *Lopez*, 514 U.S. at 558-59 (Congress may regulate (1) “the use of the channels of interstate commerce,” (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce,” and (3) “activities having a substantial relation to interstate commerce”); *see also* *Guzman*, 591 F.3d at 91; *Gould*, 568 F.3d at 471 (implicitly acknowledging that § 16913 does not fall within the purview of the Commerce Clause by upholding § 2250 under the Commerce Clause, but using the Necessary and Proper Clause to uphold § 16913.).

116 *Whaley*, 577 F.3d at 259.

117 *Guzman*, 591 F.3d at 91.

118 *Shenandoah*, 595 F.3d at 160; *Guzman*, 591 F.3d at 91; *Whaley*, 577 F.3d at 261; *Gould*, 568 F.3d at 471; *Ambert*, 561 F.3d at 1212; *Howell*, 552 F.3d at 717.

119 United States v. George, 625 F.3d 1124 (9th Cir. 2010); *Shenandoah*, 595 F.3d 151; *Guzman*, 591 F.3d 83; United States v. Cain, 583 F.3d 408 (6th Cir. 2009); United States v. Zuniga, 579 F.3d 845 (8th Cir. 2009); *Whaley*, 577 F.3d 254; *Gould*, 568 F.3d 459; *Ambert*, 561 F.3d 1202; *Howell*, 552 F.3d 709; United States v. Lawrance, 548 F.3d 1329 (10th Cir. 2008).

120 *Shenandoah*, 595 F.3d at 160; *Guzman*, 591 F.3d at 91; *Whaley*, 577 F.3d at 261; *Gould*, 568 F.3d at 471; *Ambert*, 561 F.3d at 1212; *Howell*, 552 F.3d at 717.

121 *George*, 625 F.3d 1124; *Shenandoah*, 595 F.3d 151; *Guzman*, 591 F.3d 83; *Cain*, 583 F.3d 408; *Zuniga*, 579 F.3d 845; *Whaley*, 577 F.3d 254; *Gould*, 568 F.3d 459; *Ambert*, 561 F.3d 1202; *Howell*, 552 F.3d 709; *Lawrance*, 548 F.3d 1329.
traveled in interstate commerce before a failure to register can be a violation, has yielded rulings that the legislation is constitutional. However, despite this judicial approval, SORNA’s jurisdictional hook does nothing to ensure that its application will be limited to the subset of instances that actually affect interstate commerce. Furthermore, SORNA’s jurisdictional hook does nothing to ensure that the criminal activity being regulated is related to interstate travel. Because SORNA fails to satisfy either of the characteristics common to substantive jurisdictional hooks, it resembles jurisdictional hooks that courts have deemed insufficient to sustain legislation. On a policy level, moreover, nothing in SORNA helps to alleviate the fundamental issues presented by its federal intrusion outside of constitutionally prescribed bounds.

1. SORNA’s Jurisdictional Hook Fails to Limit Its Application to Circumstances That Substantially Affect Interstate Commerce

SORNA’s jurisdictional hook is similar to the one in the Child Pornography Prevention Act (CPPA). Courts found the CPPA’s jurisdictional hook insufficient to sustain the legislation because it failed to limit its impact to those activities and circumstances that substantially affect interstate commerce in the manner required by United States v. Lopez. Because SORNA suffers from the same defect as the CPPA, the Court should apply a similar analysis to invalidate it.

The CPPA, in relevant part, provides that any person who “knowingly possesses” child pornography that has “been mailed, or has been shipped or transported using any means or facility of interstate or

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122 18 U.S.C.A. § 2250(a) (Westlaw 2011); see also George, 625 F.3d 1124; Shenandoah, 595 F.3d 151; Guzman, 591 F.3d 83; Cain, 583 F.3d 408; Zuniga, 579 F.3d 845; Whaley, 577 F.3d 254; Gould, 568 F.3d 459; Ambert, 561 F.3d 1202; Howell, 552 F.3d 709; Lawrence, 548 F.3d 1329.


125 See 18 U.S.C.A. § 2252(a)(4)(B) (Westlaw 2011); see also United States v. Rodia, 194 F.3d 465, 473 (3d Cir. 1999) (“As a practical matter, the limiting jurisdictional factor is almost useless here, since all but the most self-sufficient child pornographers will rely on film, cameras, or chemicals that traveled in interstate commerce and will therefore fall within the sweep of the statute.”); United States v. Maxwell, 386 F.3d 1042 (11th Cir. 2004), vacated, 546 U.S. 801 (2005), rev’d, 446 F.3d 1210 (11th Cir. 2006); United States v. McCoy, 323 F.3d 1114, 1124 (9th Cir. 2003), overruled by Gonzales v. Raich, 545 U.S. 1 (2005); United States v. Kallestad, 236 F.3d 225, 229 (5th Cir. 2000). Although these courts found that the CPPA’s jurisdictional hook was insufficient to sustain the legislation, it was eventually upheld under an analysis of the sort applied in Raich. 545 U.S. 1.
foreign commerce . . . or which was produced using materials which
have been mailed or so shipped or transported, by any means including
by computer” is guilty of a federal offense. In evaluating Congress’s
power to enact the CPPA, courts reaffirmed that the proper role of the
jurisdictional hook would be to “ensure a statute’s constitutionality when
the element either limits the regulation to interstate activity or ensures
that the intrastate activity to be regulated falls within one of the three
categories of congressional power.”

Because the CPPA’s
jurisdictional hook did not sufficiently limit its reach to those activities
that substantially affect interstate commerce, courts reviewing its
constitutionality deemed the jurisdictional hook insufficient to sustain the
legislation.

The Third Circuit, as well as other courts considering the issue,
determined that the jurisdictional hook was too attenuated to
appropriately limit the reach of the CPPA. Section 2252 of the CPPA,
a statute prohibiting the making of child pornography using film or
cameras that traveled in interstate commerce, was labeled “almost
useless . . . since all but the most self-sufficient child pornographers will
rely on film, cameras, or chemicals that traveled in interstate commerce
and will therefore fall within the sweep of the statute.” Section 2252,
therefore, did not bear a sufficient nexus to interstate commerce because
it “encompasse[d] virtually every case imaginable, so long as any
modern-day photographic equipment or material has been used.”
Practically, therefore, the Third Circuit rejected the CPPA’s
jurisdictional hook because it did not limit its effect to a subset of
circumstances where interstate commerce was substantially affected.

Similar to the jurisdictional hook in the CPPA, SORNA’s
jurisdictional hook serves no real limiting function. The requirement that
a person travel in interstate commerce encompasses the vast majority of
the population. The Supreme Court recently had the opportunity to

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127 Rodia, 194 F.3d at 473 (citing United States v. Bishop, 66 F.3d 569, 594 (3d Cir. 1995));
see also McCoy, 323 F.3d at 1124.
128 Id.
129 Rodia, 194 F.3d at 473.
130 Id.
131 McCoy, 323 F.3d at 1124 (emphasis in original).
132 WENDELL COX & JEAN LOVE, AMERICAN HIGHWAY USERS ALLIANCE, 40 YEARS OF THE
US INTERSTATE HIGHWAY SYSTEM: AN ANALYSIS (1996), available at
http://www.publicpurpose.com/freeway1.htm (“Each year, nearly one trillion person miles are
carried on the interstate highway system --- a figure equal to providing trips around the world for 37
million people --- more people than live in Pennsylvania, Illinois, and Ohio combined. In its 40
years, more than 17 trillion person miles have been traveled over the interstate highway system.”).
address this overbreadth but declined to do so. 133 In United States v. Carr, the defendant’s last interstate travel was at least two years prior to his indictment under SORNA. 134 Although the Court ultimately held that SORNA did not apply to Carr, it based its holding on the fact that Carr’s interstate travel was complete prior to SORNA’s enactment in 2006. 135 In other words, the Court did not consider any temporal limitation on the connection between a person’s interstate travel and his or her failure to register, other than the requirement that the travel have occurred since 2006. 136 The limitation imposed by the Court in Carr is therefore insufficient to address the attenuation between a sex offender’s failure to register and his or her travel in interstate commerce. Under the present jurisprudence interpreting SORNA, a sex offender could travel from California to Nevada in 2006, live in Nevada for 4 years as a convicted and registered sex offender, and be convicted of violating SORNA in 2011 for moving across town and failing to update a registration. 137 This result becomes more absurd the longer SORNA is in effect. 138

2. SORNA’s Provisions Do Not Support a Genuine Connection Between Interstate Commerce and the Criminal Activity Being Regulated

In addition to encompassing nearly every individual convicted of a sex offense, SORNA also fails to require any connection between an offender’s interstate travel and his or her failure to register as a sex offender. When an individual’s interstate travel is months or years prior to that individual’s failure to register as a sex offender, that interstate travel is almost certainly unrelated to the criminal activity at issue. Without a requirement that the offender’s interstate travel be conducted with the intention of avoiding registration requirements, there is no guarantee that even recent interstate travel will be related to the criminal activity. Moreover, there is no evidence that Congress even sought to

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134 Id. at 2233.
135 Id. at 2236-42.
136 Id.
137 Concededly, there is no caselaw indicating that SORNA has been used in this manner. However, current law would permit this application, which becomes more likely as more time passes since 2006.
138 For example, consider the same scenario in which a sex offender travels interstate in 2006, and then resides in the same state until 2030. That person may be convicted of violating SORNA in 2030 for moving across town and failing to update a registration, based solely on that person’s interstate travel in 2006.
genuinely relate an offender’s interstate travel to the national sex-offender registry. SORNA’s text and legislative history provide evidence that the real focus of the Act is to create a national registry for sex offenders. The majority of SORNA’s provisions enable its implementation or address the criminalization of a sex offender’s failure to register in a particular jurisdiction. In fact, the only language that addresses a sex offender’s interstate travel is the jurisdictional hook in Section 2250. The remaining text of the legislation defines relevant terms, sets out jurisdictional requirements, and identifies when, where, and how individuals so labeled must register. The focus of SORNA’s text, therefore, is not the regulation of interstate commerce; rather, it is simply the “regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce.”

SORNA’s statutory provisions appear to be consistent with the motivation of its drafters. Its legislative history indicates three themes: (1) protection of children, (2) prevention of crime, and (3) uniformity among sex-offender registry laws. Before SORNA was enacted, members of Congress and other individuals speaking on behalf of the proposed legislation expressed their horror at the “recent cases of abductions and murders of children by sex offenders,” and supported the

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143 42 U.S.C.A. § 16911 (Westlaw 2011).


bill because of its “vital improvements to strengthen the ability of our justice system to protect children from sex offenders.” One supporter commented, “Isn’t it common sense to protect young schoolchildren in the first place by keeping these pedophiles locked up with lengthy prison sentences? Isn’t it common sense that coddling repeated sex offenders with self-esteem courses and rehabilitation doesn’t work, and that locking them up works?” Section 16901 lists the identity and provides a brief description of multiple victims who were sexually assaulted or murdered by individuals who had previous sex-offense convictions.

Section 16901 also identifies SORNA’s purpose to “protect the public from sex offenders and offenders against children” by creating a national and comprehensive system of registry to track all convicted sex offenders. Congress appears to have believed that a uniform system of law was the best way of accomplishing this goal. Senators praised SORNA’s standardization, stating that, “Today there is far too much disparity among State registration requirements and notification obligations for sex offenders. . . . Child sex offenders have exploited this . . . .

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153 42 U.S.C.A. § 16901 (Westlaw 2011) (“[I]n response to the vicious attacks by violent predators against the victims listed below, Congress in this chapter establishes a comprehensive national system for the registration of those offenders: (1) Jacob Wetterling, who was 11 years old, was abducted in 1989 in Minnesota, and remains missing. (2) Megan Nicole Kanka, who was 7 years old, was abducted, sexually assaulted, and murdered in 1994, in New Jersey. (3) Pam Lychner, who was 31 years old, was attacked by a career offender in Houston, Texas. (4) Jetseta Gage, who was 10 years old, was kidnapped, sexually assaulted, and murdered in 2005, in Cedar Rapids, Iowa. (5) Dru Sjodin, who was 22 years old, was sexually assaulted and murdered in 2003, in North Dakota. (6) Jessica Lunsford, who was 9 years old, was abducted, sexually assaulted, buried alive, and murdered in 2005, in Homosassa, Florida. (7) Sarah Lunde, who was 13 years old, was strangled and murdered in 2005, in Ruskin, Florida. (8) Amie Zyla, who was 8 years old, was sexually assaulted in 1996 by a juvenile offender in Waukesha, Wisconsin, and has become an advocate for child victims and protection of children from juvenile sex offenders. (9) Christy Ann Fornoff, who was 13 years old, was abducted, sexually assaulted, and murdered in 1984, in Tempe, Arizona. (10) Alexandra Nicole Zapp, who was 30 years old, was brutally attacked and murdered in a public restroom by a repeat sex offender in 2002, in Bridgewater, Massachusetts. (11) Polly Klaas, who was 12 years old, was abducted, sexually assaulted, and murdered in 1993 by a career offender in California. (12) Jimmy Ryce, who was 9 years old, was kidnapped and murdered in Florida on September 11, 1995. (13) Carlie Brucia, who was 11 years old, was abducted and murdered in Florida in February, 2004. (14) Amanda Brown, who was 7 years old, was abducted and murdered in Florida in 1998. (15) Elizabeth Smart, who was 14 years old, was abducted in Salt Lake City, Utah in June 2002. (16) Molly Bish, who was 16 years old, was abducted in 2000 while working as a lifeguard in Warren, Massachusetts, where her remains were found 3 years later. (17) Samantha Runnion, who was 5 years old, was abducted, sexually assaulted, and murdered in California on July 15, 2002.”).
stunning lack of uniformity, and the consequences have been tragic.\textsuperscript{155} Senator DeWine stressed, "There is no easy way to access information from different jurisdictions,"\textsuperscript{156} and Senator Reid pointed out that "[SORNA] will . . . give law enforcement agencies the tools they need to enforce these requirements."\textsuperscript{157}

The emotional response that is created by legislation aimed at sex offenders who victimize children is understandable and justified; however, it blurs the true issue of whether the legislation in question is permissible under the Constitution. In nearly one hundred pages of congressional records reflecting the discussion of SORNA’s implications, interstate commerce is mentioned only once, and then only in the context of child pornography, an unquestionably economic activity.\textsuperscript{158} SORNA’s text and legislative history indicate that the criminal activity Congress sought to regulate has no connection to interstate commerce, thereby making it an inappropriate use of its authority under the Commerce Clause.

3. SORNA Lacks Any Other Ground on Which the Supreme Court May Uphold It

Absent the jurisdictional hook, Congress has a number of other means to enact legislation under the Commerce Clause.\textsuperscript{159} For example, although courts consistently declared the CPPA’s jurisdictional hook insufficient to sustain the legislation, it was eventually upheld as part of a


\textsuperscript{156} Id. at 22 (statement of Sen. DeWine of Ohio).

\textsuperscript{157} Id. at 30 (statement of Sen. Reid of Nev.).

\textsuperscript{158} Id. at 27 (statement of Sen. Biden of Del.).

\textsuperscript{159} See, e.g., Gonzales v. Raich, 545 U.S. 1, 17 (2005) (“As we stated in Wickard, ‘even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.’” (quoting Wickard v. Filburn, 317 U.S. 111, 125 (1942))); United States v. Lopez, 514 U.S. 549, 558-59 (1995) (holding that Congress may regulate (1) “the use of the channels of interstate commerce,” (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce,” and (3) “activities having a substantial relation to interstate commerce”). This Comment does not purport to examine and exhaust all of the ways Congress could have validly enacted SORNA; this Comment merely disposes of the Raich analysis under which the CPPA was eventually upheld. See Raich, 545 U.S. 1. For a thorough discussion of SORNA’s viability under the Commerce Clause and Necessary and Proper Clause, see Sanford L. Bohrer & Matthew S. Bohrer, Congressional Power to Criminalize ‘Local’ Conduct: No Limit in Sight, 64 U. MIAMI L. REV. 1221 (2010); Matt Miller, Comment, A New Breed of Sex Offender Legislation: Why the National Sex Offender Registry Violates Federalism, 78 U. CIN. L. REV. 759 (2009); Robin Morse, Note, Federalism Challenges to the Adam Walsh Act, 89 B.U. L. REV. 1753 (2009).
broader regulatory scheme.\textsuperscript{160} Like respondents’ intrastate possession of marijuana in \textit{Raich}, and the intrastate possession of wheat in \textit{Wickard}, a child pornographer’s intrastate possession of child pornography stimulates and maintains the demand for the interstate market in child pornography.\textsuperscript{161} As the Third Circuit described in \textit{Rodia}, a “common sense understanding of the demand-side forces . . . helps to demonstrate the strong nexus between the intrastate possession of and the interstate market in child pornography. . . . \[T\]his nexus provides a limiting principle of the type sought in \textit{Lopez} . . . .”\textsuperscript{162} The Third Circuit’s pre-\textit{Raich} decision was unique in its analysis; however, after the Supreme Court decided \textit{Raich} in 2005, courts had no choice but to uphold the CPPA under a similar theory.\textsuperscript{163}

Unlike the intrastate possession of child pornography criminalized by the CPPA, the requirement that sex offenders register their whereabouts affects no interstate market. By no stretch of the imagination are sex offenders an economic commodity. Again looking to the Third Circuit’s insightful opinion in \textit{Rodia}, the nexus present between the intrastate possession of and interstate market in child pornography is not “present in criminal regulations that attempt to limit or ban behavior that does not involve an exchange of goods, such as murder or assault. This limit is particularly important in the criminal context, which is an area that traditionally has been regulated by the states.’”\textsuperscript{164}

SORNA’s “jurisdictional element is directed at overcoming the legal hurdle of obtaining federal jurisdiction, rather than an aspect of the primary subject matter Congress wishes to control.”\textsuperscript{165} The lack of nexus between the crime of failing to register and interstate commerce makes SORNA’s jurisdictional element too attenuated to survive genuine scrutiny like that from the second era of Commerce Clause and Tenth Amendment jurisprudence; in fact, SORNA’s jurisdictional hook is too attenuated to survive even the less stringent review imposed by the courts reviewing the CPPA.

Because SORNA’s jurisdictional hook does nothing to limit its effect to activities that substantially affect interstate commerce, and

\begin{thebibliography}{99}
\bibitem{footnote160} See, e.g., United States v. Maxwell, 386 F.3d 1042 (11th Cir. 2004), \textit{vacated}, 546 U.S. 801 (2005), \textit{rev’d}, 446 F.3d 1210 (11th Cir. 2006).
\bibitem{footnote161} United States v. Rodia, 194 F.3d 465 (3d Cir. 1999); \textit{see also Raich}, 545 U.S. 1; \textit{Wickard}, 317 U.S. 111.
\bibitem{footnote162} \textit{Rodia}, 194 F.3d at 478-79.
\bibitem{footnote163} \textit{See, e.g., Maxwell}, 386 F.3d 1042.
\bibitem{footnote164} \textit{Rodia}, 194 F.3d at 479.
\bibitem{footnote165} \textit{Maxwell}, 386 F.3d 1042.
\end{thebibliography}
provides no relation between the criminal activity being regulated and interstate commerce, it cannot fall within congressional authority to regulate under the Commerce Clause. However, SORNA offends more than the principle that Congress may regulate only within the scope of one of its enumerated powers; SORNA also offends the external limitations on federal authority to regulate. Federal regulation of criminal conduct, as in SORNA, runs counter to principles of federalism. For these reasons, courts should hold that SORNA and legislation like it infringes on the Tenth Amendment.

4. **SORNA’s Jurisdictional Hook Implicates Negative Consequences for Federalism**

The Supreme Court has noted that the federal commerce power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.166

Thus, the Court acknowledged that fundamental principles are put at risk when the Court fails to prevent Congress from regulating outside the scope of its permissible authority.167 As discussed above, Congress did not create SORNA’s jurisdictional hook with the intention of bringing the legislation within the permissible scope of authority. This, however, is a mere procedural deficiency, easily solved by an alteration to SORNA’s statutory text. SORNA’s infringement on principles of federalism is more difficult to resolve.

The seminal Commerce Clause cases, *United States v. Lopez*168 and *United States v. Morrison*,169 identified the consequences of legislation passed outside Congress’s authority. The Supreme Court found that both

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167 United States v. Morrison, 529 U.S. 598, 613 (2000) (“Under the[s] theories . . ., it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.” (citing Lopez, 514 U.S. at 564))


the GFSZA and the VAWA were examples of “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.”170

Having defined the GFSZA and the VAWA as criminal statutes, the Court assessed the consequences of allowing Congress to legislate in the field of criminal jurisprudence. Chief Justice Rehnquist, writing for the Court in *Lopez*, warned that allowing Congress to regulate violent crime could create an outcome where Congress could regulate any activity that it found was related to the economic productivity of individual citizens . . . . Under the[se] theories . . . , it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.171

Conceding that Congress may, in some cases, regulate intrastate activity, the Court maintained that “the Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation.”172 The Court later identified that it could “think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.”173 The Supreme Court struck down both the GFSZA and the VAWA not only because they lacked sufficient relation to interstate commerce, but also because their criminal focus threatened the United States’ dual system of governance.174

Less than eighteen months after the Court’s decision in *Lopez*, Congress amended the GFSZA to apply to possession of a “firearm that has moved in or that otherwise affects interstate or foreign commerce” in a school zone.175 The amendment’s only change was the inclusion of a jurisdictional hook and congressional findings.176 The Ninth Circuit upheld this version of the GFSZA, although it is difficult to imagine that this brief amendment alleviated the substantial concerns espoused by the

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170 *Morrison*, 529 U.S. at 610 (citing *Lopez*, 514 U.S. at 561).
171 *Morrison*, 529 U.S. at 613 (quoting *Lopez*, 514 U.S. at 564) (emphasis added).
172 *Lopez*, 514 U.S. at 566.
173 *Morrison*, 529 U.S. at 616-618.
174 See *Lopez*, 514 U.S. 549; *Morrison*, 529 U.S. 598.
Court only a few years earlier. 177 This jurisdictional hook does not limit the reach of the statute – nearly all guns will have traveled in interstate commerce at some point during their manufacture or sale. 178 Most of the guns involved in GFSZAs convictions will probably have achieved their interstate travel before even coming into the possession of the defendant, thereby negating any connection between the criminal activity being regulated, and the gun’s travel in interstate commerce. 179 More fundamentally, the jurisdictional hook added to the GFSZA does nothing to address its substantive focus. Congress is still regulating the possession of guns within 1000 feet of a school – the very activity the Supreme Court prevented it from regulating eighteen months earlier. 180

SORNA presents a very similar case. SORNA could easily be amended to apply only to sex offenders who travel in interstate commerce with the intent of avoiding registration requirements. Equally effective would be an amendment applying SORNA only to those sex offenders who fail to update a registration within a reasonable time after traveling in interstate commerce. 181

Although these changes would bring SORNA into conformity with jurisdictional hooks deemed constitutional and increase SORNA’s relation to interstate commerce under existing jurisprudence, these changes would do nothing to alleviate SORNA’s assault on federalism. With or without the jurisdictional hook, SORNA seeks to regulate the registration of individuals convicted of state and federal sex crimes – a statutory scheme historically within the purview of the states. With these changes, SORNA would simply resemble the revised GFSZA. 182

Because legislation that infringes on states’ police power should be declared unconstitutional, the United States Supreme Court should adopt

177 See, e.g., United States v. Dorsey, 418 F.3d 1038, 1046 (9th Cir. 2005) (“Contrary to the prior version of § 922(q) discussed in Lopez, the current version includes a ‘requirement that [the defendant’s] possession of the firearm have a[ ] concrete tie to interstate commerce.’” (internal citations omitted)). For a thorough discussion of the revised GFSZA’s constitutional deficiencies, see Seth J. Safra, Note, The Amended Gun-Free School Zones Act: Doubt as to Its Constitutionality Remains, 50 DUKE L.J. 637 (2000).


179 Id.


181 SORNA currently contains a requirement that sex offenders update their registration “not later than 3 business days after each change of name, residence, employment, or student status.” 42 U.S.C.A. § 16913(c) (Westlaw 2011). This does not address the issue of the interstate travel being related to the criminal activity, because the failure to update a registration within three business days can still occur after an intrastate change in residence.

the view of federalism and the strength of the Tenth Amendment last seen in the second era of constitutional jurisprudence.183

III. A SUSTAINABLE SOLUTION

In a time when Congress has “seiz[ed] upon [the Court’s] language”184 to ensure a presumption of constitutionality, the strong interpretation given to the Tenth Amendment during the second era of Commerce Clause and Tenth Amendment jurisprudence is necessary to preserve our “dual system of government.”185 The Supreme Court should require that a jurisdictional hook purporting to support legislation adequately connect that legislation to interstate commerce. However, even if the legislation satisfies this requirement, the Court should also scrutinize it to ensure that it does not offend principles of federalism. With this perspective, the Court should invalidate SORNA and address the present imbalance between federal and state authority.

The Court in *Hammer v. Dagenhart* espoused the principles of the second era of Commerce Clause and Tenth Amendment jurisprudence.186 In *Hammer*, the Court looked beyond Congress’s purported connection to interstate commerce and concluded that Congress’s attempt to regulate child labor did not “regulate transportation among the states, but aim[ed] to standardize the ages at which children may be employed in mining and manufacturing within the states.”187 Moreover, the *Hammer* Court used the Tenth Amendment to curtail Congress’s interference with the states’ “regulation of their civil institutions.”188 If the Supreme Court used this analysis to evaluate SORNA’s constitutionality, it would almost certainly declare it an invalid use of congressional authority.

Looking beyond SORNA’s jurisdictional hook, a second-era approach would yield the conclusion that “[t]he act in its effect does not regulate transportation among the states,”189 but instead aims to “to protect the public from sex offenders and offenders against children.”190 Like the revised GFSZA, and the legislation at issue in *Hammer v. Dagenhart*, SORNA regulates conduct that is outside the purview of

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184 *Gonzales v. Raich*, 545 U.S. 1, 46 (2005) (O’Connor, J., dissenting).
185 *Lopez*, 514 U.S. at 557.
187 *Id.* at 271-72.
188 *Id.* at 274.
189 *Id.* at 272.
federal authority, irrespective of its superficial jurisdictional hook.\textsuperscript{191} Under a second-era approach, the Court would not only strike down SORNA for falling outside the bounds of congressional authority, but also for circumventing the Tenth Amendment. Protecting the public from sex offenders falls squarely within the “safety, health, morals, and general welfare,” which states have historically had the exclusive authority to protect.\textsuperscript{192} Therefore, under the second era’s structure of a limited Commerce Clause and a strong Tenth Amendment, SORNA would be “in a two-fold sense . . . repugnant to the Constitution.”\textsuperscript{193}

Concededly, striking down SORNA under a second-era Commerce Clause and Tenth Amendment analysis would prevent Congress from regulating a dangerous group of offenders. The list of names of children victimized by repeat offenders provided by SORNA’s statutory text is sufficient to identify the importance of the issue;\textsuperscript{194} that importance is further supported by the countless children not identified by name in the legislation. However, the Court in the second era of Commerce Clause and Tenth Amendment jurisprudence acknowledged such countervailing policies as well. The Court in \textit{Hammer} conceded, “there should be limitations upon the right to employ children in mines and factories in the interest of their own and the public welfare.”\textsuperscript{195} However, those fears did not control then, and they should not control now. The Supreme Court in the second era found that concerns over child labor could be deferred to the expertise of the states.\textsuperscript{196} In contrast, concerns over the balance of authority between the federal and state governments cannot be similarly deferred. For that reason, in \textit{Lopez} and \textit{Morrison}, Chief Justice Rehnquist found it proper to reject Congress’s attempt to regulate violent crime.\textsuperscript{197} The Chief Justice stated, “In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate


\textsuperscript{193} \textit{Hammer}, 247 U.S. at 276.

\textsuperscript{194} 42 U.S.C.A. § 16901 (Westlaw 2011).

\textsuperscript{195} \textit{Hammer}, 247 U.S. at 275. These concerns are continually recognized, as was the case nearly 80 years later in \textit{United States v. Lopez}, 514 U.S. 549, 581 (1995) (”[I]t is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises . . . .”).

\textsuperscript{196} \textit{See Hammer}, 247 U.S. at 275.

commerce has always been the province of the States.” These principles apply equally now.

CONCLUSION

Using tools like the jurisdictional hook, congressional findings, and the complex regulatory scheme, Congress has circumvented the traditional limits of its authority and entered the bounds of what should be governed by state regulation. The Sex Offender Registration and Notification Act is representative of this practice. By no stretch of the imagination are sex offenders an economic commodity appropriately regulated by Congress. Nonetheless, courts have upheld SORNA because of its direct, but superficial, connection to interstate commerce. The Supreme Court should “decline the invitation to permit Congress to achieve power beyond its constitutional reach simply by uttering pretextual incantations evoking the phantasm of commerce.”

However, instead of simply overturning SORNA as being outside the bounds of congressional authority, the Court should go one step further. In accepting a challenge to SORNA, the United States Supreme Court should address Congress’s pattern of creating legislation like SORNA by reviving the strength of the Tenth Amendment last seen in the second era of the Court’s applicable jurisprudence. It has been suggested that the Court would be unwilling to overrule years of theory and precedent in favor of a new analytical scheme. However, history

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198 Id.
201 United States v. George, 625 F.3d 1124 (9th Cir. 2010); United States v. Shenandoah, 595 F.3d 151 (3d Cir. 2010); United States v. Guzman, 591 F.3d 83 (2d Cir. 2010); United States v. Cain, 583 F.3d 408 (6th Cir. 2009); United States v. Zuniga, 579 F.3d 845 (8th Cir. 2009); United States v. Whaley, 577 F.3d 254 (5th Cir. 2009); United States v. Gould, 568 F.3d 459 (4th Cir. 2009); United States v. Ambert, 561 F.3d 1202 (11th Cir. 2009); United States v. Howell, 552 F.3d 709 (8th Cir. 2009); United States v. Lawrance, 548 F.3d 1329 (10th Cir. 2008).
202 United States v. Maxwell, 386 F.3d 1042, 1062 (11th Cir. 2004), vacated, 546 U.S. 801 (2005), rev’d, 446 F.3d 1210 (11th Cir. 2006).
has demonstrated that this is not the case. In fact, each time the Court has reconsidered Congress’s commerce authority, it has correspondingly reconsidered the purview of the Tenth Amendment. Still within a few years of its most recent Commerce Clause decision, the Court should take this opportunity to be clear in protecting that which “divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: ‘Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.’”

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204 See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 141 (3d ed. 2009) (“There have been roughly four eras of Commerce Clause jurisprudence.”).

205 Id.


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