

# THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT AND ITS COMMERCE CLAUSE IMPLICATIONS

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## I. INTRODUCTION

On July 27, 2006, the 25<sup>th</sup> anniversary of the abduction and murder of Adam Walsh, President George W. Bush signed into law the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act).<sup>1</sup> The Adam Walsh Act was enacted for the purpose of “protect[ing] children from sexual exploitation and violent crime,” including kidnapping, child abuse, child pornography, and other crimes against children.<sup>2</sup>

As part of the Adam Walsh Act, Congress “establishe[d] a comprehensive national system for the registration of [sex] offenders” pursuant to the Sex Offender Registration and Notification Act (SORNA).<sup>3</sup> Prior to SORNA, the establishment of sex offender registries had been a state obligation, as Congress’ only legislation with regard to registration concerned merely encouraging or coercing states to set up state-wide registries.<sup>4</sup>

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1. *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified in scattered sections of 18 U.S.C. and 42 U.S.C. (2006)). Section 2 declares the Act as being in recognition of Adam Walsh, who at the age of six years old, was abducted from a mall on July 21, 1981. Walsh was later discovered to have been murdered. 120 Stat. at 589.

2. 120 Stat. at 587.

3. 42 U.S.C. § 16901 (2006).

4. In 1994, Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994 (“Wetterling Act”), which coerced states to set up sex offender registries by threatening to withhold federal funding if they refused to do so. *See* Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No., 103-322, 108 Stat. 2038, 2042 (1994) (codified as amended at 42 U.S.C. § 14071 (2006)). The Wetterling Act was later amended in 1996 by Megan’s Law to require the public dissemination of relevant registration information, which was not required, but merely allowed, by the original act. *See* Megan’s Law, Pub. L. No. 104-145, § 2, 110 Stat. 1345 (1996) (codified as amended at 42 U.S.C. § 14071(d) (2006)). Section 129 of SORNA expressly repeals the Wetterling Act and other previously enacted legislation that established sex offender registration programs. *See* Sex Offender Registration and Notification Act, Pub. L. No. 109-248, § 129, 120 Stat. 587, 600 (2006) (establishing that the repeal will be effective the later of either three years after the date of the Act’s enactment or the availability of the necessary registration software as described in sections 123 and 124 of SORNA).

SORNA creates three tiers of sex offenders, distinguished based on the character of the underlying offense.<sup>5</sup> SORNA requires sex offenders of all tiers to register in each jurisdiction where they reside, are employed, are a student, and in which they were convicted (if different from where they reside).<sup>6</sup> SORNA also requires that sex offenders keep the information in their registration current by informing the jurisdiction of any changes within three business days of said change.<sup>7</sup> To ensure compliance with these requirements, SORNA's enforcement provision makes it a federal offense when an individual, who is required to register under SORNA, knowingly fails to do so after traveling in interstate commerce.<sup>8</sup>

Aside from these requirements placed on sex offenders, SORNA also requires states to "maintain a jurisdiction-wide sex offender registry conforming to the requirements of this subchapter."<sup>9</sup> The states are required to implement SORNA by the later of either July 27, 2009 ("3 years after July 27, 2006") or one year after the date of the availability of the software needed to operate the sex offender registries and websites.<sup>10</sup> States that do not comply with these requirements will lose ten percent of federal funding they would otherwise receive under the Omnibus Crime Control and Safe Streets Act of 1968 for every fiscal year for which they do not comply.<sup>11</sup>

Since its inception, SORNA has faced numerous challenges to its constitutionality, including a challenge to Congress' ability to implement such an act under its power to regulate commerce.<sup>12</sup> Numerous lower federal courts have addressed the issue of the constitutionality of SORNA based on the

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5. See 42 U.S.C. § 16911 (2006). The distinctions are relevant in terms of the duration of the registration period and the number of in-person verifications required to be made. See *id.* §§ 16915-16916.

6. *Id.* § 16913(a).

7. *Id.* § 16913(c).

8. 18 U.S.C. § 2250(a) (2006).

9. 42 U.S.C. § 16912(a) (2006).

10. *Id.* § 16924(a). However, SORNA does allow for the Attorney General to "authorize up to two 1-year extensions of the deadline." *Id.* § 16924(b). In June 2009, U.S. Attorney General Eric Holder authorized a one-year extension of the deadline for states to comply with SORNA. The Thicket at State Legislatures, *Extension for States on Adam Walsh Act*, NATIONAL CONFERENCE OF STATE LEGISLATURES (June 2, 2009), [http://ncsl.typepad.com/the\\_thicket/2009/06/extension-for-states-on-adam-walsh.html](http://ncsl.typepad.com/the_thicket/2009/06/extension-for-states-on-adam-walsh.html). Despite this one-year extension, as of July 2010, only three states are in compliance with SORNA's requirements. See Ashley Michelle Papon, *Four Years Later, Adam Walsh Act Still in Limbo*, GLOBAL SHIFT (July 20, 2010), <http://www.globalshift.org/2010/07/20/four-years-later-adam-walsh-act-still-in-limbo/>.

11. 42 U.S.C. § 16925(a) (2006).

12. See generally Tracy Bateman Farrell, Annotation, *Validity, Construction, and Application of Federal Sex Offender Registration and Notification Act (SORNA)*, 42 U.S.C.A. §§ 16901 *et seq.*, its Enforcement Provision, 18 U.S.C.A. § 2250, and Associated Regulations, 30 A.L.R. FED. 2d 213, 213-64 (2008) (outlining the various challenges to SORNA and the resulting court decisions, including challenges based on the Nondelegation Doctrine, the Ex Post Facto Clause, Procedural and Substantive Due Process, the Commerce Clause, the Tenth Amendment, and others).

Commerce Clause, with the vast majority of courts upholding it against these challenges.<sup>13</sup>

This Note will discuss the possible outcome if the issue of SORNA's constitutionality were to go before the Supreme Court in recognition of recent Supreme Court holdings concerning the constitutionality of congressional criminal regulations based on the Commerce Clause. Part II will evaluate the rulings and rationale behind the most relevant Supreme Court cases that have analyzed congressional criminal legislation for constitutionality under the Commerce Clause. Next, Part III will discuss the rulings of the lower federal courts that have already determined the issue of SORNA's constitutionality based on the Commerce Clause. Finally, Part IV will analyze SORNA based on the Supreme Court cases, with reference to the lower court decisions.

## II. THE SUPREME COURT'S RECENT INTERPRETATIONS OF THE COMMERCE CLAUSE

The Commerce Clause<sup>14</sup> and the limitations it places on Congress' ability to legislate has never been a clearly articulable concept.<sup>15</sup> The Supreme Court has struggled with setting clearly definable limits on Congress' authority and what exactly the Commerce Clause gives Congress the power to regulate. This section will trace the Supreme Court's efforts to define those limits, focusing on the standards the Court has laid out in its most recent decisions concerning the Commerce Clause and federal legislation regarding criminal law.

### *A. Lopez and the Categories Congress May Regulate*

Prior to 1995, almost sixty years passed in which the Supreme Court had not struck down a federal statute in violation of the Commerce Clause.<sup>16</sup> However, in *United States v. Lopez*,<sup>17</sup> the Court struck down a federal statute as

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13. Note that the decisions of these courts will be discussed in more detail in Part III.

14. Article I, § 8 of the Constitution gives Congress the power "[t]o regulate commerce with foreign nations, and among the several States, and with the Indian tribes." U.S. CONST. art. I, § 8.

15. See *United States v. Lopez*, 514 U.S. 549, 566 (1995) (stating that "so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender 'legal uncertainty'" (citation omitted)).

16. Colin V. Ram, Note, *Regulating Intrastate Crime: How the Federal Kidnapping Act Blurs the Distinction Between What is Truly National and What is Truly Local*, 65 WASH. & LEE L. REV. 767, 775 (2008) ("[F]rom 1937 through 1995, the Court refused to invalidate any statute as exceeding Congress's limits under the Commerce Clause.") (citing Erwin Chemerinsky, Keynote Address at the Willamette Law Review Symposium: Laboratories of Democracy: Federalism and State Law Independence (Mar. 11, 2005), in 41 WILLAMETTE L. REV. 827, 830 (2005)).

17. 514 U.S. 549 (1995).

being an unconstitutional exercise of Congress' commerce power.<sup>18</sup> At issue in *Lopez* was the Gun-Free School Zones Act of 1990 (GFSZA), which made it a "federal offense 'for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.'"<sup>19</sup> The statute was struck down in a 5-4 decision based on the Court's finding that the activity being regulated was not "connected in any way to interstate commerce" and thus was not a valid exercise of Congress' commerce power.<sup>20</sup>

In the course of reaching this conclusion, the Court articulated three categories under which the legislation could have fallen in order to have been upheld as a constitutional exercise of Congress' commerce power. "First, Congress may regulate the use of the channels of interstate commerce."<sup>21</sup> Second, Congress may "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities."<sup>22</sup> Third, Congress may "regulate those activities having a substantial relation to interstate commerce . . . i.e., those activities that substantially affect interstate commerce."<sup>23</sup> In using these categories to analyze the GFSZA, the Court determined that the GFSZA did not fit within either of the first two categories,<sup>24</sup> and therefore focused the bulk of their analysis on the third category—whether the activity had a substantial relation to, or substantially affected, interstate commerce.<sup>25</sup>

In evaluating the GFSZA under the third category, the Court articulated various factors that should be considered when determining if the activity Congress is regulating substantially affects interstate commerce: (1) whether

18. *Id.* at 551.

19. *Id.* (citing 18 U.S.C. § 922(q)(1)(A) (1988 & Supp. 1994)).

20. *Id.* at 550-51 (holding the Act unconstitutional because it "neither regulate[d] a commercial activity nor contain[ed] a requirement that the gun possession be connected in any way to interstate commerce").

21. *Id.* at 558 (citing *United States v. Darby*, 312 U.S. 100, 114 (1941); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964) ("[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.") (quoting *Caminetti v. United States*, 242 U.S. 470, 491 (1917))).

22. *Id.* (citing *Houston E. & W. Texas Ry. Co. v. United States*, 234 U.S. 342 (1914); *S. Ry. Co. v. United States*, 222 U.S. 20 (1911) (upholding amendments to Safety Appliance Act as applied to vehicles used in intrastate commerce); *Perez v. United States*, 402 U.S. 146, 150 (1971) ("[F]or example, the destruction of an aircraft (18 U.S.C. § 32), or...thefts from interstate shipments (18 U.S.C. § 659).").

23. *Lopez*, 514 U.S. at 558-59 (citing *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937); *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968)).

24. *Id.* at 559 ("§ 922(q) is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can § 922(q) be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce.").

25. *Id.*

the regulated activity is economic in nature; (2) whether the statute contains a jurisdictional element that established an explicit connection with, or effect on, interstate commerce; (3) whether Congress made express findings regarding the effects of the regulated activity on interstate commerce; and (4) the link between the regulated activity and its substantial effect on interstate commerce.<sup>26</sup>

In making the distinction between economic and non-economic activities, the Court noted that it has only upheld the regulation of intrastate activity that substantially affects commerce when that activity is economic in nature,<sup>27</sup> or where the regulation is “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”<sup>28</sup> Because the Court did not consider the activity of gun possession in a school zone to be economic in nature, nor an “essential part of a larger regulation of economic activity,” it concluded that this factor weighed against a finding of constitutionality.<sup>29</sup>

When analyzing the jurisdictional element factor, the Court looks to whether the statute at issue contains a “jurisdictional element which would ensure, through case-by-case inquiry,” that the activity being regulated is one that substantially affects interstate commerce.<sup>30</sup> The Court made clear that Congress must do more than merely insert the words “in commerce” or “affecting commerce” into the statute; rather, there must also be a “requisite nexus with interstate commerce” that is clear from the statute or through Congress’ purpose in the enactment of the legislation.<sup>31</sup> The Court found that the GFSZA did not satisfy this factor because it did not have an “express

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26. *Id.* at 559-64. Note that in *Lopez* the Court did not clearly establish that these factors were the new standard to be used when evaluating legislation under the third category; however, in *United States v. Morrison*, 529 U.S. 598 (2000), the Court made it clear that these four factors would guide their decisions with respect to analysis under the third category. *See Morrison*, 529 U.S. at 610-16.

27. *Lopez*, 514 U.S. at 559-60 (“Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”). Here, the Court referenced *Wickard v. Filburn*, 317 U.S. 111, 128 (1942), which involved an economic activity and was upheld even though it was “perhaps the most far reaching example of Commerce Clause authority over intrastate activity.” *Lopez*, 514 U.S. at 560.

28. *Lopez*, 514 at 561.

29. *Id.*

30. *Id.*

31. *Id.* at 562. The Court describes a former case, *United States v. Bass*, 404 U.S. 336 (1971), in which “[t]he Court interpreted [a statute], which made it a crime for a felon to ‘receiv[e], posses[s], or transpor[t] in commerce or affecting commerce . . . any firearm.’” *Lopez*, 514 U.S. at 561-62. (quoting *Bass*, 404 U.S. at 337). The Court explained that in that case they required proof of an additional nexus between possession of the firearm and interstate commerce “because the statute was ambiguous and . . . ‘unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.’” *Id.* at 562 (quoting *Bass*, 404 U.S. at 349). The Court set aside the conviction for possession because the government could not establish this additional nexus between the possession and interstate commerce. *Id.*

jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.”<sup>32</sup>

The Court stated that congressional findings, which demonstrate what effects the activity being regulated has on interstate commerce, are not necessary but would certainly be useful in determining whether the activity being regulated had a substantial connection with, or effect on, interstate commerce.<sup>33</sup> For the GFSZA, the Court noted that no congressional findings were made to determine what effects gun possession in school zones had on interstate commerce.<sup>34</sup>

Finally, in evaluating the link between the regulated activity and its substantial effect on interstate commerce, the Court seemed to take a practical approach by looking to see if the activities in fact have a substantial effect on interstate commerce, and if so, if that effect is too far attenuated to be relied on as a reason for Congress’ use of its commerce power.<sup>35</sup> With regard to the GFSZA, the Court refused to accept the government’s arguments<sup>36</sup> for the link between gun possession in school zones and interstate commerce because the arguments required too many inferential steps to come to the conclusion that there were substantial effects on interstate commerce.<sup>37</sup> Further, the Court refused to accept such far-fetched arguments for fear that Congress

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32. *Lopez*, 514 U.S. at 562. Note that after the statute was struck down “Congress amended the Act to require that the gun in possession previously traveled through or otherwise affected interstate commerce.” *United States v. Mason*, No. 6:07-cr-52-Orl-19GJK, 2008 WL 1882255, at \*2 n.6 (M.D. Fla. Apr. 24, 2008) (referencing 18 U.S.C. § 922(q)). The amendment has since been upheld, though not by the Supreme Court as the amended act has not gone before it. *See United States v. May*, 535 F.3d 912, 922 (8th Cir. 2008) *cert. denied*, 129 S. Ct. 2431 (2009) (citing *United States v. Danks*, 221 F.3d 1037, 1038-39 (8th Cir. 1999), which upheld the GFSZA after Congress added a jurisdictional element to the statute).

33. *Lopez*, 514 U.S. at 562. (“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.”).

34. *Id.* at 563 (“[T]o 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.”).

35. *See id.* at 563-68.

36. The government made several arguments as to how gun possession in a school zone would affect interstate commerce including: (1) “the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population”; (2) “violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe”; and (3) “the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment.” *Id.* at 563-64.

37. *See id.* at 567 (“To uphold the Government’s contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”).

would then be allowed to regulate almost any activity using its commerce power.<sup>38</sup>

### B. *The Court's Reaffirmation of Lopez in Morrison*

Five years after *Lopez*, the Court once again had occasion to determine the constitutionality of a congressional action regarding criminal law based on the Commerce Clause. At issue in *United States v. Morrison*<sup>39</sup> was the Violence Against Women Act of 1994 (VAWA), which gave victims of crime motivated by gender a right to bring a civil action for compensatory and punitive damages against the perpetrator.<sup>40</sup> Once again, the Court struck down the statute in a 5-4 decision because it exceeded Congress' commerce power.<sup>41</sup> In coming to their conclusion, the Court reiterated the "three broad categories of activity that Congress may regulate under its commerce power,"<sup>42</sup> and once again focused solely on the third category in its analysis.<sup>43</sup> In analyzing VAWA under the third category, the Court relied on the four factors established in *Lopez*.<sup>44</sup>

When evaluating the economic/non-economic distinction, the Court reiterated that they have only upheld regulations of intrastate activity when the activity is an "economic endeavor."<sup>45</sup> Here, the Court concluded that the regulation of gender-motivated crime was "not, in any sense of the phrase, economic activity."<sup>46</sup> The Court also reiterated the usefulness of a jurisdictional element, which would "establish that the enactment is in pursuance of Congress' regulation of interstate commerce."<sup>47</sup> The Court,

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

39. 529 U.S. 598 (2000).

40. *Id.* at 605 (citing 42 U.S.C. § 13981(c) (1994), which states in relevant part, "[a] person . . . who commits a crime of violence motivated by gender . . . shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate").

41. *Id.* at 600-02.

42. *Id.* at 608 (quoting *Lopez*, 514 U.S. at 558-59).

43. *See id.* at 609 (noting that the petitioners argued that VAWA should be sustained as substantially affecting interstate commerce, and did not argue that VAWA fell under the first two categories; the Court agreed that this was the proper inquiry).

44. *See id.* at 610-16.

45. *Morrison*, 529 U.S. at 611 (citing *Lopez*, 514 U.S. at 559-560). Note however that the Court did not "adopt a categorical rule against aggregating the effects of any noneconomic activity," as it felt there was no need to do so in any of the cases before them. *Id.* at 613.

46. *Id.*

47. *Id.* at 612.

however, found that the VAWA did not contain any jurisdictional element that brought the statute within Congress' commerce power.<sup>48</sup>

The Court once again stated that congressional findings are "not required" but they could be useful to aid the Court in their determination of whether the activity being regulated substantially affects interstate commerce.<sup>49</sup> Unlike with the GFSZA in *Lopez*, the Court found that there were congressional findings with regard to the VAWA and its connection with interstate commerce.<sup>50</sup> However, the Court noted that the "existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation,"<sup>51</sup> rather, congressional findings are merely a useful tool, as the determination of a sufficient link to interstate commerce is a judicial responsibility and not one that can be left to the legislature.<sup>52</sup> The Court believed that the congressional findings,<sup>53</sup> like the arguments in *Lopez*, established a connection that was too far attenuated,<sup>54</sup> and would allow Congress to regulate any activity it wished under its Commerce Clause power—even those which are traditionally the responsibility of the states.<sup>55</sup> The Court noted that such a result would "completely obliterate the Constitution's distinction between national and local authority."<sup>56</sup> The Court's reasoning in *Morrison* is in line with the fourth factor established by *Lopez*, which made clear that the link between the activity being regulated and the effects on interstate commerce cannot be too far attenuated.<sup>57</sup>

48. *Id.* at 613 (finding that Congress did not include a jurisdictional element in the statute but rather chose to "cast § 13981's remedy over a wider, and more purely intrastate, body of violent crime").

49. *Id.* at 612 (citing *Lopez*, 514 U.S. at 562-63).

50. *Id.* at 614 ("§ 13981 is supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families.").

51. *Morrison*, 529 U.S. at 614.

52. *Id.* (quoting *Lopez*, 514 U.S. at 557 n.2) ("[W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.").

53. To establish the link between gender-motivated violence and interstate commerce, Congress claimed that such violence deterred "potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products." *Id.* at 615 (quoting H.R. CONF. REP. NO. 103-711, at 385 (1994)).

54. *Id.* ("The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce.").

55. *Id.* at 615-16 (finding that if they accepted Congress' findings it would allow Congress to regulate "any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption," and would allow Congress to legislate in areas traditionally reserved to the states).

56. *Id.* at 615.

57. See *Morrison*, 529 U.S. at 612.

In concluding that the VAWA was not a constitutional use of Congress' commerce power, the Court noted that Congress could not "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."<sup>58</sup> Rather, the regulation of intrastate violence has always been a responsibility of the states, unless it is "directed at the instrumentalities, channels, or goods involved in interstate commerce."<sup>59</sup>

### *C. Raich and the Aggregate Effects Distinction*

In its most recent decision concerning congressional regulation of criminal law and the Commerce Clause, *Gonzales v. Raich*,<sup>60</sup> the Court upheld, in a 6-3 decision, the Controlled Substances Act (CSA), which criminalized the possession, purchase, or manufacture of cannabis.<sup>61</sup> In the course of reaching its decision, the Court noted the three categories that *Lopez* established under which the legislation must fall, and once again found that only the third category was at issue.<sup>62</sup>

In upholding the CSA, the Court relied on its previous decision in *Wickard v. Filburn*,<sup>63</sup> which established that Congress may regulate a non-commercial activity that, when aggregated, can be shown to have substantial effects on interstate commerce.<sup>64</sup> Similar to the wheat production in *Wickard*, the Court found that the production of marijuana in *Raich*, even though it was grown solely for home-consumption, had a substantial effect on interstate commerce when considered in the aggregate.<sup>65</sup> In making this finding, the Court required

58. *Id.* at 617.

59. *Id.* at 618.

60. 545 U.S. 1 (2005).

61. *Id.* at 1, 7. Challengers of the statute were seeking the enforcement of the Compassionate Use Act of 1996, which allowed for the use and growth of medical marijuana with the approval of a physician, in contradiction of the CSA. *Id.* at 5-7.

62. *Id.* at 16-17.

63. 317 U.S. 111, 127-28 (1942) (holding that Congress could regulate wheat production and its pricing even if the defendant only sold the wheat intrastate because the sale of wheat intrastate, if taken in the aggregate, could have a substantial effect on the interstate wheat market if others were allowed to sell wheat intrastate without any regulation).

64. *Raich*, 545 U.S. at 18 ("Wickard thus establishes that Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.").

65. *Id.* at 19. The Court stated:

Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions. . . . [T]he regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.

*Id.*

only a rational basis to support a conclusion that the activities taken in the aggregate would substantially affect interstate commerce.<sup>66</sup>

In coming to its decision, the Court distinguished this case from *Lopez* and *Morrison*. One difference the Court deemed important was that in *Lopez* and *Morrison*, the challengers sought to invalidate the statute as a whole, whereas here the challengers asked the Court to find the statute invalid as it applied to them.<sup>67</sup> The Court noted that this distinction was “pivotal [because it] has often reiterated that ‘[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power ‘to excise, as trivial, individual instances’ of the class.”<sup>68</sup> Therefore, since Congress may regulate the class of marijuana consumption, the Court had no power to invalidate the enforcement of that regulation in individual instances.<sup>69</sup> Distinguishable from *Lopez*, *Raich* was an instance in which the regulation of home consumption with regard to the challengers was an “essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”<sup>70</sup>

The Court further distinguished the CSA from the statutes at issue in *Lopez* and *Morrison* based on the economic/non-economic distinction. The Court defined “economics” as “the production, distribution, and consumption of commodities,”<sup>71</sup> and found that, unlike in *Lopez* and *Morrison*, what was being regulated in the CSA was “quintessentially economic.”<sup>72</sup> The Court also considered the factor of congressional findings in its analysis, but once again, as with *Lopez* and *Morrison*, the Court made clear that congressional findings, or a lack thereof, were not a dispositive factor in the analysis.<sup>73</sup>

### III. THE LOWER COURTS’ TREATMENT OF SORNA

The constitutionality of SORNA has been challenged in federal courts with regard to two provisions: (a) the registration requirements found in § 113,

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66. *Id.* 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.”).

67. *Id.* at 23.

68. *Id.* (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971)) (emphasis omitted).

69. *Id.*

70. *Raich*, 545 U.S. at 24-25 (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

71. *Id.* at 25 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)).

72. *Id.*

73. *Id.* at 21 (“[W]hile we will consider congressional findings in our analysis when they are available, the absence of particularized findings does not call into question Congress’ authority to legislate.”).

codified at 42 U.S.C. § 16913,<sup>74</sup> and (b) the enforcement provision found at § 141(a)(1), codified at 18 U.S.C. § 2250(a).<sup>75</sup> As previously mentioned, the vast majority of courts addressing the constitutionality of these provisions have upheld them as a valid exercise of Congress' commerce power.<sup>76</sup> This section will analyze the reasoning of the lower courts in concluding that SORNA was either an unconstitutional or constitutional use of Congress' commerce power.

As an initial matter, it is important to note that in analyzing SORNA some courts have utilized § 16913 and § 2250(a) interchangeably (analyzing them together to see if they fit within the *Lopez* categories as a whole), while others have treated them as two separate sections that need to be analyzed against the *Lopez* categories. Those courts that have treated the sections interchangeably have, for the most part, found SORNA to be constitutional under the Commerce Clause.<sup>77</sup> However, the results vary when the sections are analyzed separately.<sup>78</sup>

It is not entirely clear why some courts view the provisions interchangeably and others view them separately. One court suggested that the

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74. In relevant part, 42 U.S.C. § 16913(a) requires that:

[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.

42 U.S.C. § 16913(a) (2006).

75. In relevant part, 18 U.S.C. § 2250(a) creates a federal offense where an individual (1) is required to register under SORNA [established by § 16913]; (2) travels in interstate commerce; and (3) knowingly fails to register or update a registration as required by SORNA. *United States v. Waybright*, 561 F. Supp. 2d 1154, 1160 (D. Mont. 2008), *overruled by* *United States v. George*, 579 F.3d 962, 966 n.2 (9th Cir. 2009).

76. *See, e.g.*, *United States v. May*, 535 F.3d 912, 921-22 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 2431 (2009); *United States v. Pena*, 582 F. Supp. 2d 851, 859-60 (W.D. Tex. 2008); *United States v. Hann*, 574 F. Supp. 2d 827, 834 (M.D. Tenn. 2008); *United States v. Mason*, No. 6:07-cr-52-Orl-19GJK, 2008 WL 1882255, at \*3 (M.D. Fla. Apr. 24, 2008).

77. *See, e.g.*, *United States v. Benton*, No. 2:08-CR-156, 2008 WL 5273971, at \*3 (S.D. Ohio Dec. 16, 2008); *United States v. Van Buren*, No. 3:08-CR-198, 2008 WL 3414012, at \*12-13 (N.D.N.Y. Aug. 8, 2008), *aff'd*, 599 F.3d 170 (2d Cir. 2010); *Hann*, 574 F. Supp. 2d at 834-35.

78. For example, some courts that have separated the provisions determined that § 16913 was unconstitutional under the Commerce Clause. *See, e.g.*, *United States v. Guzman*, 582 F. Supp. 2d 305, 312 (N.D.N.Y. 2008), *rev'd and remanded*, 591 F.3d 83 (2d Cir. 2010); *Waybright*, 561 F. Supp. 2d at 1163-65. Other courts that have made the distinction have upheld § 2250(a) under the Commerce Clause, but have upheld § 16913 under the Necessary and Proper Clause. *See, e.g.*, *United States v. Torres*, 573 F. Supp. 2d 925, 936, 939-40 (W.D. Tex. 2008); *United States v. Thomas*, 534 F. Supp. 2d 912, 921-22 (N.D. Iowa 2008). Two courts have found both sections to be an unconstitutional use under the Commerce Clause when viewing them separately. *See* *United States v. Myers*, 591 F. Supp. 2d 1312, 1349-50 (S.D. Fla. 2008), *vacated and remanded*, 584 F.3d 1349 (11th Cir. 2009); *United States v. Powers*, 544 F. Supp. 2d 1331, 1335-36 (M.D. Fla. 2008), *vacated and remanded*, 562 F.3d 1342 (11th Cir. 2009).

constitutionality of § 2250(a) is sufficient to find § 16913 as constitutional because the provisions are “interrelated components of the larger whole of SORNA.”<sup>79</sup> Another court suggested its decision to view them together was influenced by *Raich*,<sup>80</sup> as the Court refused to declare certain parts of the statute invalid because they were “part of a larger regulatory scheme.”<sup>81</sup> Whatever the reason for deciding to separate the provisions or treat them interchangeably, it is important to note the role this decision plays in courts’ conclusions.

#### A. SORNA as a Constitutional Use of Congress’ Commerce Power

The majority of the courts that have upheld SORNA’s constitutionality with regard to the Commerce Clause have focused their analysis on the second and/or third *Lopez* categories to determine if Congress was acting within its authority when it enacted SORNA.<sup>82</sup> However, there are a small number of courts who have found that SORNA is constitutional even under the first *Lopez* category.<sup>83</sup>

The courts that found SORNA to fit within the first *Lopez* category have interpreted SORNA as regulating the channels of interstate commerce to assure that “those channels will not become the means of promoting or spreading evil, whether of a physical, moral or economic nature.”<sup>84</sup> Accordingly, it follows that Congress may regulate the movement of persons traveling through the channels of interstate commerce.<sup>85</sup>

The majority of the lower courts that found SORNA to be a constitutional use of Congress’ commerce power have determined that the Act falls within

79. *Van Buren*, 2008 WL 3414012, at \*12-13; *see also* *United States v. Crum*, No. CR08-255RSL, 2008 WL 4542408, at \*9 (W.D. Wash. Oct. 8, 2008) (“Section 2250(a) lacks all meaning without reference to § 16913, and § 16913 lacks all effect without reference to § 2250(a).”).

80. *Benton*, 2008 WL 5273971, at \*4.

81. *Id.* (citing the Court’s refusal to “excise a portion of a statute that is otherwise within the reach of the federal power”).

82. *See, e.g.*, *United States v. Hinen*, 487 F. Supp. 2d 747, 757-58 (W.D. Va. 2007), *rev’d*, 560 F.3d 222 (4th Cir. 2009); *United States v. Ditomasso*, 552 F. Supp. 2d 233, 245-46 (D.R.I. 2008), *aff’d*, No.08-2567, 2010 WL 3718849 (1st Cir. Sept. 22, 2010); *United States v. Shenandoah*, 572 F. Supp. 2d 566, 576-77 (M.D. Pa. 2008).

83. *See, e.g.*, *United States v. Whaley*, 577 F.3d 254, 258 (5th Cir. 2009); *United States v. May*, 535 F.3d 912, 921-22 (8th Cir. 2008), *cert. denied*, 129 S.Ct. 2431 (2009); *Waybright*, 561 F. Supp. 2d at 1160-61 (noting that § 2250(a) falls under the first and second categories); *Crum*, 2008 WL 4542408, at \*8 n.2.

84. *Crum*, 2008 WL 4542408, at \*8 n.2 (quoting *United States v. Orito*, 413 U.S. 139, 144 (1973)).

85. *Id.* (“Just as Congress may impose conditions on the movement of certain products . . . so, too, may it impose conditions on the movement of certain people.”) (citation omitted); *Waybright*, 561 F. Supp. 2d at 1160-61 (finding that § 2250(a) fits under the first category because it “requires sex offenders to use the channels of interstate commerce”).

the second *Lopez* category.<sup>86</sup> These courts have focused on the “jurisdictional element” contained in § 2250(a), which requires that in order for a sex offender to be charged with a felony under the Act, he or she must have “travel[ed] in interstate or foreign commerce.”<sup>87</sup> The reasoning of these courts was that the provision requiring the person to travel in interstate commerce limits the application of the Act, and properly links the Act to being a regulation of persons or things in interstate commerce.<sup>88</sup> Because the provision contains this jurisdictional element, it requires that there be proof of interstate activity in order to convict a person under SORNA.<sup>89</sup>

As previously mentioned, the presence of a jurisdictional element is not dispositive of the issue of whether the legislation is validly connected to interstate commerce.<sup>90</sup> Rather, the courts that have relied on the jurisdictional element have noted that Congress still must establish that the activity being regulated has a “de minimis effect” on, or “minimal nexus” with, interstate commerce.<sup>91</sup> The minimal nexus review is derived from a Supreme Court case, *Scarborough v. United States*,<sup>92</sup> in which the Court had to decide the constitutionality of a statute that made it a crime for a convicted felon to possess any firearm “in commerce or affecting commerce.”<sup>93</sup> In the course of deciding that this statute was constitutional under the Commerce Clause, the Court in *Scarborough* established that Congress cannot “dispense entirely with a nexus requirement in individual cases” without making their intent to do so clear;<sup>94</sup> yet the Court required nothing more than a “minimal nexus that the firearm ha[d] been, at some time, in interstate commerce,” unless Congress indicated an intention to require more than the mere minimal nexus.<sup>95</sup> As this minimal nexus requirement is not a heavy burden to bear, the majority of the

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86. See, e.g., *United States v. Guzman*, 591 F.3d 83, 90 (2d Cir. 2010), *cert. denied*, 130 S. Ct. 3487 (2010); *United States v. Ambert*, 561 F.3d 1202, 1210-11 (11th Cir. 2009); *United States v. George*, 579 F.3d 962, 966-67 (9th Cir. 2009), *superseded on reb'g in part by*, No. 08-30339, 2010 WL3768047 (9th Cir. June 2, 2009); *Ditomasso*, 552 F. Supp. 2d at 245-46; *Hinen*, 487 F. Supp. 2d at 757-58.

87. 18 U.S.C. § 2250(a)(2)(B) (2006).

88. “The purpose of requiring that the statute contain an express jurisdictional element is to ensure that the statute’s ‘reach is limited to . . . activities that ‘have an explicit connection with or effect on interstate commerce.’” *United States v. Webster*, No. CR-08-227-D, 2008 WL 4737886, at \*6 (W.D. Okla. Oct. 24, 2008) (citations omitted).

89. When “the statute contains language requiring proof of interstate activity as an element of the crime, the requisite jurisdictional element is present.” *Id.*

90. “A mere statement in a statute that interstate commerce is impacted may not be enough to establish an adequate nexus.” *Ditomasso*, 552 F. Supp. 2d at 246.

91. See, e.g., *United States v. Mason*, No. 6:07-cr-52-Orl-19GJK, 2008 WL 1882255, at \*3 (M.D. Fla. Apr. 24, 2008); *Ditomasso*, 552 F. Supp. 2d at 246.

92. 431 U.S. 563 (1977).

93. *Id.* at 564 (describing the provisions of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968).

94. *Id.* at 568.

95. *Id.* at 575.

courts that have undertaken the minimal nexus review for SORNA have found that it was satisfied.<sup>96</sup>

In determining whether there is a minimal nexus between SORNA and interstate commerce, a number of the courts have also relied on the intent of Congress in enacting the legislation.<sup>97</sup> The intent of Congress has been stated as “protect[ing] the public from sex offenders and offenders against children . . . [by] establish[ing] a comprehensive national system for the registration of those offenders.”<sup>98</sup> Courts have reasoned that because Congress’ intent in enacting the legislation was to prevent sex offenders from traveling and slipping “off the radar screen,” and because “[i]nterstate travel and the movement through the channels of interstate commerce are inherent in this threat,” the minimal nexus between the regulation of sex offenders and interstate commerce is established.<sup>99</sup>

Many of the courts that have relied on the jurisdictional element as bringing this regulation within Congress’ commerce power have declined to undertake any analysis under the third prong relating to substantial effects on interstate commerce, finding it inapplicable when there is a jurisdictional element.<sup>100</sup> Those who have engaged in this more detailed analysis have given it a mere cursory review, and found SORNA to be constitutional under a rational basis review of the third category.<sup>101</sup>

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96. See, e.g., *Mason*, 2008 WL 1882255, at \*3 (finding the crime of failing to register has a minimal nexus with interstate commerce because of Congress’ intent in enacting SORNA was to assure sex offenders do not disappear “off the radar screen”); *Ditomasso*, 552 F. Supp. 2d at 246 (finding the “defendant’s use of the channels of interstate commerce to travel between states meets the minimal nexus”).

97. See, e.g., *United States v. Pena*, 582 F. Supp. 2d 851, 856 (W.D. Tex. 2008); *United States v. Vasquez*, 576 F. Supp. 2d 928, 942 (N.D. Ill. 2008).

98. 42 U.S.C. § 16901 (2006).

99. *Mason*, 2008 WL 1882255, at \*3; see also *Pena*, 582 F. Supp. 2d at 856 (finding that Congress’ intent bolstered the finding that SORNA satisfied the minimal nexus test).

100. See, e.g., *United States v. Webster*, No. CR-08-227-D, 2008 WL 4737886, at \*6 (W.D. Okla. Oct. 24, 2008) (finding the substantial effects test inapplicable because the statute contains the requisite jurisdictional element); *United States v. Hinen*, 487 F. Supp. 2d 747, 758 (W.D. Va. 2007) (finding the substantial effects test inapplicable where a jurisdictional predicate is in the statute), *rev’d*, 560 F.3d 222 (4th Cir. 2009).

101. For example, the court in *United States v. Shenandoah*, 572 F. Supp. 2d 566, 577 (M.D. Pa. 2008), found the third category to be satisfied under the relevant rational basis review. Courts that use the rational basis review have relied on *Lopez*, which in the course of explaining its previous decisions stated that since the time of their *Jones & Laughlin Steel* decision they have “undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce.” *United States v. Lopez*, 514 U.S. 549, 557 (1995); see, e.g., *United States v. Contreras*, No. EP-08-CR-1696-PRM, 2008 WL 5272491, at \*3 (W.D. Tex. Dec. 18, 2008) (explaining that “*Lopez* reaffirmed that Congress needs only a rational basis to conclude that its enactment of the statute comports with the Commerce Clause”). Other courts have relied on *Raich*, which stated that the Court “need not determine whether [the] activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a

*B. SORNA as an Unconstitutional Use of Congress' Commerce Power*<sup>102</sup>

To date only two courts have found SORNA as a whole, meaning both § 2250(a) and § 16913, to be unconstitutional under the Commerce Clause.<sup>103</sup> Two other courts have found that § 16913 on its own is unconstitutional.<sup>104</sup>

The courts that have found SORNA, as a whole, to be unconstitutional have determined that it does not fit within any of the *Lopez* categories. The *Powers* court quickly dismissed the possibility that SORNA fit within the first category of regulating channels or instrumentalities of commerce.<sup>105</sup> In finding that the second category of regulating persons or things in interstate commerce was not satisfied, the court focused on the fact that interstate travel was not “intended to further the crime itself, such that a case by case determination can be made as to whether there is a sufficient nexus between the crime and interstate commerce.”<sup>106</sup> The court concluded that if SORNA were to be sustained it would have to fit within the third category of substantially affecting interstate commerce.<sup>107</sup>

The *Powers* court undertook the analysis established by *Lopez* and *Morrison*, and concluded that SORNA could not be sustained under the third category because it did not regulate an activity that was a “form of economic enterprise,”<sup>108</sup> and the jurisdictional element included in § 2250(a) was “superficial and insufficient to support a finding of substantial affect on

‘rational basis’ exists for so concluding.” *Gonzales v. Raich*, 545 U.S. 1, 22 (2005); *see also* *United States v. Senogles*, 570 F. Supp. 2d 1134, 1148 (D. Minn. 2008).

102. Note that the cases discussed in this section have subsequently been overruled or questioned. However, the analysis undertaken by the courts in these cases remains relevant for purposes of this note, and thus will be discussed and considered. *See* *United States v. Guzman*, 582 F. Supp. 2d 305 (N.D.N.Y. 2008), *rev'd and remanded*, 591 F.3d 83 (2d Cir. 2010); *United States v. Myers*, 591 F. Supp. 2d 1312 (S.D. Fla. 2008), *vacated and remanded*, 584 F.3d 1349 (11th Cir. 2009); *United States v. Powers*, 544 F. Supp. 2d 1331 (M.D. Fla. 2008), *vacated and remanded*, 562 F.3d 1342 (11th Cir. 2009); *United States v. Waybright*, 561 F. Supp. 2d 1154 (D. Mont. 2008), *overruled by* *United States v. George*, 579 F.3d 962, 966, n.2 (9th Cir. 2009).

103. *See Myers*, 591 F. Supp. 2d at 1349-50; *Powers*, 544 F. Supp. 2d at 1335-36.

104. *See Guzman*, 582 F. Supp. 2d at 311-12 (finding § 16913 unconstitutional under the Commerce Clause); *Waybright*, 561 F. Supp. 2d at 1160-61, 1164 (finding § 16913 unconstitutional under the Commerce Clause, while upholding § 2250(a) against Commerce Clause challenges).

105. *Powers*, 544 F. Supp. 2d. at 1333.

106. *Id.* at 1333-34; *see also id.* at 1334 n.3 (explaining that the Court has upheld regulations that criminalize the use of interstate commerce for immoral purposes, such as prostitution, kidnapping, and evading child support). Note that some of the courts that have found SORNA to be constitutional shot down this intent argument reasoning that “[t]here is no constitutional requirement under the second prong of *Lopez* that the ‘person[ ] or thing[ ] in interstate commerce’ travels with intent or is moved with intent to commit a crime.” *United States v. Ditomasso*, 552 F. Supp. 2d 233, 247 (D.R.I. 2008) (citing other cases upholding federal gun offenses that lack an element of intent that have been found constitutional under the second prong), *aff'd*, No.08-2567, 2010 WL 3718849 (1st Cir. Sept. 22, 2010).

107. *Powers*, 544 F. Supp. 2d at 1334.

108. *Id.* at 1335.

interstate commerce.”<sup>109</sup> The court believed that the mere placement of the jurisdictional element in the statute was not enough to prove that there was a link between the activity of not registering and its effect on interstate commerce.<sup>110</sup> The court also stated a concern that allowing Congress to regulate the activity at issue in SORNA would lead to more federal regulation of purely intrastate activity with no link to interstate commerce.<sup>111</sup>

The court in *Myers* took a somewhat different approach in concluding that SORNA was unconstitutional under the Commerce Clause.<sup>112</sup> The court, being cautious as to assure that they undertook the proper analysis, analyzed § 16913 against both *Raich* and *Lopez/Morrison*.<sup>113</sup> The court found § 16913 unconstitutional when analyzing it under *Raich* because, unlike the statute at issue in *Raich*, § 16913 is not part of a broader scheme aimed at regulating the economic market.<sup>114</sup> Similarly, the court found that § 16913 could not be sustained under the *Lopez/Morrison* approach because it did not involve economic activity, contained no jurisdictional element, and there were no congressional findings that established the link with interstate commerce.<sup>115</sup>

In analyzing § 2250(a), the *Myers* court determined that the only categories it could be upheld under were the first and second, because the jurisdictional element in the provision only contemplates a regulation under those categories by using the phrase “in interstate commerce.”<sup>116</sup> In concluding that § 2250(a) did not fit under either category, the court focused on the fact that there was no purpose or intent requirement that linked interstate travel with failing to register.<sup>117</sup> Further, the court was critical of applying the minimal nexus test established in *Scarborough* to SORNA because it would lead to a slippery slope of allowing Congress to reach the offender “in his person, simply because he

109. *Id.*

110. *Id.* (“The mere fact that the individual has, at some point, traveled in interstate commerce does not establish that his or her subsequent failure to register ‘substantially affects interstate commerce.’ Simply put, there is no nexus between the crime (failure to register) and the interstate travel.”).

111. *Id.* at 1336 (“If an individual’s mere unrelated travel in interstate commerce is sufficient to establish a Commerce Clause nexus with purely local conduct, then virtually all criminal activity would be subject to the power of the federal government.”).

112. *United States v. Myers*, 591 F. Supp. 2d 1312, 1349-50 (S.D. Fla. 2008), *vacated and remanded*, 584 F.3d 1349 (11th Cir. 2009).

113. *Id.* at 1330 (“[T]he Court will proceed in an abundance of caution and apply the tests in both *Raich* and *Morrison* to § 16913.”).

114. *Id.* at 1332 (“[T]he stated purpose of SORNA is to establish a national sex offender registry . . . . This is not economic.”).

115. *Id.* at 1335-36.

116. *Id.* at 1337 (“The phrase ‘in interstate commerce’ is a term of art that Congress employs when it uses its power under the first two categories identified in *Lopez*.”).

117. *Id.* at 1338 (“The jurisdictional element of ‘interstate travel’ is an indefinite requirement that only requires a person to have traveled in interstate commerce. The purpose attached to the travel is left unstated and is utterly divorced from the activity being regulated: knowingly failing to register as a sex offender.”).

at some time crossed state lines.”<sup>118</sup> Therefore, the court would not uphold § 2250(a) under the second category because they found it to be an unconstitutional regulation of a person merely because he or she once “traveled across state lines,” without regard to whether the activity had posed a threat to the channels or instrumentalities of interstate commerce.<sup>119</sup>

For those courts that have found that § 16913 alone was not constitutional under the Commerce Clause, the focus has been on the fact that § 16913, unlike § 2250(a), does not contain a jurisdictional element; therefore, some courts have concluded that if the provision were to be sustained, it would have to fall under the third category.<sup>120</sup> The courts found that § 16913 did not satisfy the third category because the regulated activity was not economic in nature, it lacked a jurisdictional element, there were no congressional findings supporting the connection between registration and interstate commerce, and the supposed effects offered by the government were too far attenuated.<sup>121</sup>

#### IV. ANALYZING SORNA UNDER THE SUPREME COURT STANDARDS

##### *A. Determining Which Case is Most Applicable*

As a threshold issue it is important to clarify which Supreme Court cases are most applicable and relevant to the SORNA analysis. This Note has explained the three most recent Supreme Court cases addressing the constitutionality of federal criminal regulations.<sup>122</sup> On the surface, the Court in *Raich* appeared to retreat back to its decades-old deferential approach to congressional regulations under the Commerce Clause that it had adhered to prior to *Lopez*.<sup>123</sup> However, *Lopez* and *Morrison* are not so easily dismissed,

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118. *Myers*, 591 F. Supp. 2d at 1344 (“Extending *Scarborough’s* ‘minimal nexus’ test to a defendant’s person is an exceedingly dangerous proposition because it undermines our deeply entrenched principles of federalism and renders the traditional limitations on federal power illusory.”).

119. *Id.* at 1349 (“Even if the text of *Lopez* meant something other than what this Court has ascribed to it, it could never mean that once a person has traveled across state lines Congress is free to attach any regulation to him it deems fit. Such a reading would mean Congress has greater power under the second *Lopez* category than it does under the third.”).

120. *See* *United States v. Guzman*, 582 F. Supp. 2d 305, 310 (N.D.N.Y. 2008) (noting the government sought to sustain this provision under the third category), *rev’d and remanded*, 591 F.3d 83 (2d Cir. 2010); *United States v. Waybright*, 561 F. Supp. 2d 1154, 1160, 1163 (D. Mont. 2008) (“By its terms, § 16913 does not regulate the use of the channels of interstate commerce or the instrumentalities of interstate commerce. Therefore, it cannot be upheld under either of the first two categories of activity subject to regulation under the Commerce Clause.”), *overruled by* *United States v. George*, 579 F.3d 962, 966 n.2 (9th Cir. 2009).

121. *Guzman*, 582 F. Supp. 2d at 312; *Waybright*, 561 F. Supp. 2d at 1165. Note that the court in *Guzman* also determined that § 16913 could not be sustained under *Raich* and *Wickard* because § 16913 does not regulate activity that is economic in nature, as did the statutes in *Raich* and *Wickard*. *Guzman*, 582 F. Supp. 2d at 310-11.

122. *See supra* Part II.A-C.

123. *See* *Ram*, *supra* note 16, at 775.

especially when comparing the statutes that were at issue in each case and the analysis the Court undertook.

Though all of the statutes addressed in *Lopez*, *Morrison*, and *Raich* involved the regulation of criminal activity, the statute at issue in *Raich* can be distinguished from those in *Lopez* and *Morrison*. As the Court in *Raich* noted, Congress was able to regulate home marijuana consumption because it was an essential piece of a larger regulation of economic activity.<sup>124</sup> Recall that the Court in *Lopez* noted that they have only upheld regulations of intrastate activity when the activity is economic in nature or where it is an essential part of a larger regulation of economic activity.<sup>125</sup> When considering this difference in the statutes, it is easy to see that *Raich* was not overruling the decisions in *Lopez* and *Morrison*; rather, it was in line with those decisions because it followed the earlier holding by the Court that such a situation is one in which Congress may regulate under the Commerce Clause.

In *Lopez* and *Morrison*, the Court refused to accept the government's arguments that there was a connection between the regulated activity and the effects on interstate commerce on the grounds that the connection was too far attenuated and required too many inferential steps to get to that conclusion.<sup>126</sup> It could be argued that the *Raich* decision runs contrary to the Court's reasoning for rejecting the government's argument in *Lopez* and *Morrison*, and therefore overturns this thinking, as it allowed one instance of production of marijuana to be regulated based on the effects that *could* happen if many people engaged in similar actions.<sup>127</sup> However, the aggregation theory used in *Raich* can be differentiated from the attenuation argument addressed in *Lopez* and *Morrison*.

The attenuation situation requires inferential steps, which are more than just repetition of the same action. Rather, they require the assumption that people will alter their thinking and actions based on fear of some harm that they could face. For example, in both *Lopez* and *Morrison*, the government raised arguments that non-regulation of the criminal activity would lead people to not travel in interstate commerce.<sup>128</sup> This argument was upheld in *Heart of Atlanta Motel, Inc. v. United States*;<sup>129</sup> however that case involved concerns of racial discrimination, which was likely the driving force behind the Court's acceptance of such arguments.<sup>130</sup> Further, it must be noted that the *Heart of*

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

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

126. *Id.* at 567; *see also* *United States v. Morrison*, 529 U.S. 598, 615 (2000).

127. *See Raich*, 545 U.S. at 22-25.

128. *See Morrison*, 529 U.S. at 615; *Lopez*, 514 U.S. at 564.

129. 379 U.S. 241, 258-60 (1964) (holding that Congress can place regulations on public accommodations, in the form of the Civil Rights Act of 1964, that wanted to refuse to rent rooms to African Americans because of the effect on interstate travel if the motels were allowed to discriminate in this manner).

130. *See id.* at 252-53.

*Atlanta* case came out prior to *Lopez* and *Morrison*. The Court in subsequent cases has refused to accept such arguments, presumably conveying its unwillingness to consider the activity's effect on a person's psyche as a determining factor in proving a substantial connection between the regulated activity and interstate commerce.

In contrast, the aggregation theory does not require many inferential steps, which include the personal decisions of the population.<sup>131</sup> It merely requires the duplication of one form of behavior that the government may validly regulate even when that behavior is intrastate because of the possibility that their ability to regulate such behavior in the interstate market could be "undercut."<sup>132</sup>

When comparing these two forms of analysis, aggregation and attenuation, *Raich* cannot easily be seen as overruling *Lopez* and *Morrison*. Rather, the aggregated effects analysis that was undertaken in *Raich* is more properly classified as an alternative analysis that can be used when the activity being regulated is akin to the intrastate production, selling, or buying of a commodity. The Supreme Court undertook this alternative analysis in *Wickard* and *Raich*. Both cases involved a statute regulating the production and selling of some commodity that, on its own, did not have a substantial effect on interstate commerce, but when aggregated could be considered to affect the interstate market for that commodity.<sup>133</sup> Because this form of analysis has only been applied to such cases where a commodity is at issue, it is safe to assume that *Lopez* and *Morrison* set the standard of analysis for all other federal statutes not involving such a commodity, at least until the Supreme Court clearly establishes a new standard by which to analyze federal legislation under the Commerce Clause.

In light of this comparison among *Raich*, *Lopez*, and *Morrison*, it seems apparent that SORNA is more analogous to *Lopez* and *Morrison*, as it does not regulate the possession or production of a commodity, but regulates some other form of criminal behavior.<sup>134</sup> Though failure to register is not necessarily akin to criminal behavior, similar to the VAWA in *Morrison*, it involves a form of regulation that affects the perpetrator of some earlier crime.<sup>135</sup> Because of this strong similarity to *Lopez* and *Morrison*, and the distinction from *Raich*, this

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131. See *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942).

132. *Raich*, 545 U.S. at 38 (Scalia, J., concurring); see also *Wickard*, 317 U.S. at 127-28 (explaining that appellant's own contribution to the demand for wheat may be insufficient but taken together with others similarly situated, it can have a substantial affect on the demand and price of the commodity; thus, bringing him under the scope of federal regulation).

133. Recall that *Raich* concerned the regulation of production and home consumption of marijuana. See *Raich*, 545 U.S. at 5-6. *Wickard*, on the other hand, concerned the regulation of production and pricing of home-grown wheat. 317 U.S. at 115.

134. See Sex Offender Registration and Notification Act, Pub. L. No. 109-248, § 102, 120 Stat. 587, 590 (2006) (codified at 42 U.S.C. § 16901(2006)).

135. See *id.* § 113.

Note will analyze SORNA against the rulings established by *Lopez* and *Morrison*.

*B. § 2250(a) and § 16913 – Interrelated or Separated?*

Aside from the determination of which Supreme Court case is most applicable with regard to SORNA, another threshold issue that must be determined is whether § 2250(a) and § 16913 should be treated as interrelated or separated in the analysis of whether SORNA satisfies the Commerce Clause. Recall that the decision of how to treat the two provisions was critical in some of the lower court cases that determined that § 16913 was unconstitutional under the Commerce Clause, while § 2250(a) was constitutional.<sup>136</sup> The basic theory in those cases treating the provisions as interrelated was that they were both indispensable parts of the larger regulatory scheme that is SORNA.<sup>137</sup>

When looking at the wording of the two provisions, specifically § 2250(a), it is apparent that the provisions are interdependent.<sup>138</sup> The federal offense established by § 2250(a) is imposed only when § 16913 is applicable, as the offense can only be imposed on those individuals who are required to register under § 16913.<sup>139</sup> Conversely, § 16913 is effectively meaningless if there is no way to enforce the provision through the threat of punishment resulting from not registering.<sup>140</sup> Considering this mutual dependence between the provisions, it is understandable why many of the lower courts chose to treat the two provisions interchangeably. This argument is further supported by the fact that the purpose of SORNA is to establish a comprehensive registration system.<sup>141</sup> It is debatable whether this system would be possible if both provisions were not placed within SORNA, as they establish the requirements and the enforcement of the registration system.<sup>142</sup>

On the assumption that the two provisions are dependent on each other, it is logical to assume that declaring one provision unconstitutional would, in turn, make the other provision ineffectual, as neither has any meaning or force

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136. *See supra* Part III.B.

137. *See* United States v. Crum, No. CR08-255RSL, 2008 WL 4542408, at \*9 (W.D. Wash. Oct. 8, 2008); United States v. Van Buren, No. 3:08-CR-198, 2008 WL 3414012, at \*12-13 (N.D.N.Y. Aug. 8, 2008).

138. *See Crum*, 2008 WL 4542408, at \*9 (“Section 2250(a) lacks all meaning without reference to § 16913, and § 16913 lacks all effect without reference to § 2250(a).”).

139. *See* 18 U.S.C. § 2250(a) (2006); 42 U.S.C. § 16913 (2006).

140. *See Crum*, 2008 WL 4542408, at \*9.

141. *See* Sex Offender Registration and Notification Act, Pub. L. No. 109-248, § 102, 120 Stat. 587, 590 (2006) (codified at 42 U.S.C. § 16901 (2006)).

142. *See* 18 U.S.C. § 2250 (2006); 42 U.S.C. § 16913 (2006); *see also* United States v. Van Buren, No. 3:08-CR-198, 2008 WL 3414012, at \*7 (N.D.N.Y. Aug. 8, 2008), *aff’d*, 599 F.3d 170 (2d Cir. 2010).

without the other. However, the notion that the two are dependent should not be the basis for allowing the shortcomings of one to be compensated for by the constitutionality of the other. The Supreme Court has the responsibility of testing legislation against constitutional requirements, and declaring those statutes it deems in violation of those constitutional requirements to be an invalid exercise of Congress' power.<sup>143</sup> Therefore, the fact that the Supreme Court has the authority to declare SORNA unconstitutional as a whole if it finds it to be in violation of the Commerce Clause should encompass with it the authority to declare certain provisions of SORNA unconstitutional.

Consider, for example, the GFSZA, which was held unconstitutional in *Lopez*.<sup>144</sup> The GFSZA was a section of what could be considered a larger regulatory scheme known as the Crime Control Act of 1990.<sup>145</sup> Similar to how the Court declared this one part of a larger regulatory scheme to be unconstitutional, the Court would have the authority to declare SORNA, as a part of the larger scheme of the Adam Walsh Act, to be unconstitutional. This could be done by declaring SORNA as a whole to be unconstitutional or by declaring certain provisions of SORNA unconstitutional, thereby rendering it ineffective. Adhering to this logic, the mere fact that two provisions are a part of a larger regulatory scheme does not render the Court incapable of analyzing those provisions separately, as the Court has deemed smaller portions of a larger scheme unconstitutional in previous cases.<sup>146</sup>

Another argument made by a lower court in concluding that the provisions should be analyzed together was that *Raich* supported such a decision.<sup>147</sup> The lower court relied on the fact that the *Raich* Court stated that it "refuse[d] to excise individual components of [the] larger scheme" of regulating the interstate market in a fungible commodity.<sup>148</sup> Further, the Court made the distinction in *Raich* that the challengers in *Lopez* and *Morrison* were claiming that a particular statute or provision fell outside Congress' commerce power entirely, while the challengers in *Raich* were contesting the application of a valid statutory scheme.<sup>149</sup>

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143. *See* *Marbury v. Madison*, 5 U.S. 137, 174-79 (1803) (establishing the Supreme Court's power of judicial review, which includes the authority to test legislative actions against constitutional requirements).

144. *United States v. Lopez*, 514 U.S. 549, 551 (1995).

145. *See* Crime Control Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844 (1990).

146. Note that the Court in *Lopez* did in fact state that Section 922(q) was "not an essential part of a larger regulation of economic activity." *Lopez*, 514 U.S. at 561. However, the point here is that the GFSZA was found unconstitutional even though it was a part of a "larger scheme" encompassed in the Crime Control Act. Similarly, SORNA, as part of a "larger scheme" encompassed in the Adam Walsh Act, could also be found unconstitutional.

147. *United States v. Benton*, No. 2:08-CR-156, 2008 WL 5273971, at \*4 (S.D. Ohio Dec. 16, 2008).

148. *Id.* at \*4 (citing *Gonzales v. Raich*, 545 U.S. 1, 22 (2005)).

149. *Id.* (citing *Raich*, 545 U.S. at 23).

The reliance on *Raich* with regard to the two provisions of SORNA is misplaced. In regards to the notion of refusing to excise individual components of a larger scheme, it must be noted that the Court in making this statement was relying on *Wickard*, which like *Raich*, involved the regulation of the interstate market for a commodity.<sup>150</sup> In connection with these two cases, it was necessary for Congress to be able to regulate the intrastate activity involving the commodities in order for its regulation of that commodity in the interstate market to be effective. But keep in mind that the regulation of the interstate market in that commodity (the larger regulatory scheme) is something that is well within the scope of Congress' commerce power.<sup>151</sup> A deeper reading of the *Raich* opinion can lead to the conclusion that the Court, in refusing to take such action, is limiting this decision to not excise individual components of a statute to situations in which a commodity is at issue, or situations in which the larger regulatory scheme is one within Congress' commerce power. With regard to SORNA, it is arguably true, as this Note suggests, that the larger regulatory scheme of establishing a national sex offender registration is not within Congress' commerce power. Unlike the regulation of a commodity such as wheat or marijuana, the registry bears no substantial relation to interstate commerce.

In consideration of the distinction between the challenges to individual applications of the statute versus challenges to the statute as a whole, it appears that this distinction weighs more favorably in finding that the provisions of SORNA should be separated when they are analyzed under the Commerce Clause. Similar to the challenges raised in *Lopez* and *Morrison*, challenges to SORNA are to Congress' authority to enact the statute as a whole.<sup>152</sup> Though the challenges are aimed largely at the two specific provisions, these provisions represent the crux of SORNA, as they encompass the requirements and enforcement scheme of the act. Therefore, challenges to one or both of these provisions serve as a challenge to SORNA as a whole because SORNA loses all purpose without these provisions. Because the challenge to SORNA is not a challenge to individual applications of a valid

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150. *Raich*, 545 U.S. at 22. The Court in *Raich* noted:

[W]e have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. Thus, as in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its [commerce] authority . . . . That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.

*Id.*

151. *See id.* at 18.

152. *See, e.g.,* *United States v. May*, 535 F.3d 912, 921 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 2431 (2009); *United States v. Vasquez*, 576 F. Supp. 2d 928, 936 (N.D. Ill. 2008).

statutory scheme,<sup>153</sup> the concept that the Court does not have the authority to find individual applications of a *valid* federal regulation has no bearing here.

In light of the analysis of this section, rather than treating the two provisions interchangeably in the Commerce Clause analysis, the more appropriate action would be to analyze them separately against the Commerce Clause and allow for the shortcomings of one provision to be saved through the Necessary and Proper Clause.<sup>154</sup> A number of lower courts have chosen to adopt this analysis in determining the constitutionality of SORNA.<sup>155</sup> Accordingly, this Note will analyze the two provisions separately against the relevant Commerce Clause jurisprudence.

### C. SORNA Under Lopez/Morrison

Any analysis undertaken under the *Lopez/Morrison* cases must be based on the three categories that *Lopez* established.<sup>156</sup> Note that the two cases did not go into an extensive analysis of the first two categories, as they found that neither was applicable to the statutes before them.<sup>157</sup> Therefore, those categories will be analyzed based on the cases the Court cited to when it established these categories in *Lopez*.<sup>158</sup>

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153. Note that the term “individual applications” is not synonymous with the fact that it is individual sex offenders bringing the challenge against SORNA. Recall that the challengers in *Raich* were residents of California challenging the applicability of the CSA to them in light of the conflicting California statute that gave rights concerning the production of medical marijuana. The challengers in *Raich* were not claiming that CSA as a whole was invalid, but that it was invalid as applied to them because of the California statute. 545 U.S. at 6-9. Unlike *Raich*, the individuals bringing claims against SORNA are not challenging the statute as it applies to them in particular; rather, they are challenging Congress’ ability to make such a statute in the first place. *See, e.g., May*, 535 F.3d at 921 (noting that the defendant is alleging “SORNA violates the commerce clause because it fails to establish a constitutionally sufficient nexus to the regulation of interstate commerce”); *Vasquez*, 576 F. Supp. 2d at 936 (noting the defendant’s argument that SORNA is unconstitutional because it does not fit within any of the *Lopez* categories). Therefore, their challenge is to the statute as a whole.

154. The Necessary and Proper Clause “permits Congress to regulate intrastate activities that do not involve interstate commerce if such regulation is necessary to make a regulation of interstate commerce effective.” *United States v. Waybright*, 561 F. Supp. 2d 1154, 1165 (D. Mont. 2008), *overruled by* *United States v. George*, 579 F.3d 962, 966 n.2 (9th Cir. 2009).

155. *See United States v. Torres*, 573 F. Supp. 2d 925, 938-39 (W.D. Tex. 2008) (finding § 16913 constitutional under the Necessary and Proper Clause, and not undertaking an analysis of whether it fit under the Commerce Clause); *United States v. Thomas*, 534 F. Supp. 2d 912, 921-22 (N.D. Iowa 2008) (finding that § 16913 was unconstitutional under the Commerce Clause but constitutional under the Necessary and Proper Clause).

156. *See United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

157. *United States v. Morrison*, 529 U.S. 598, 609 (2000); *Lopez*, 514 U.S. at 559.

158. Note that the district court in *Myers* undertook a similar analysis in determining the meaning of the first two categories. *United States v. Myers*, 591 F. Supp. 2d 1312, 1340-41 (S.D. Fla. 2008), *vacated and remanded*, 584 F.3d 1349 (11th Cir. 2009).

### 1. The Channels of Interstate Commerce

The Supreme Court, in declaring regulations of the channels of interstate commerce to be valid under the Commerce Clause, cited two of its previous cases: *United States v. Darby*<sup>159</sup> and *Heart of Atlanta Motel, Inc. v. United States*.<sup>160</sup> In *Darby*, the Court established the ability of Congress to exclude from commerce “articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use.”<sup>161</sup> Similarly, in *Heart of Atlanta*, the Court noted “the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.”<sup>162</sup>

These findings of the Supreme Court support the notion that the regulation of the channels of interstate commerce was meant to encompass regulating either commodities that travel through commerce or the channels of commerce if they are being used for immoral or injurious purposes. On this reading of the first category, there is no support for either § 2250(a) or § 16913.

Section 16913, as previously stated, requires a sex offender to “register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student.”<sup>163</sup> By its terms this provision has nothing to do with the channels of interstate commerce. It neither regulates an article that is moving through commerce, nor is it an effort by Congress to keep the channels free of immoral use. By its terms, this section requires no involvement whatsoever of the channels of interstate commerce before requiring a person to register. According to § 16913, a sex offender is automatically required to register once he or she is convicted of a qualifying crime, without reference to any travel or use of the channels of interstate commerce.<sup>164</sup> Therefore, by its terms, this provision does not implicate the first category of *Lopez*.

Section 2250(a), as previously stated, makes it a federal offense for a person who is required to register under § 16913 to travel in interstate commerce and

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159. 312 U.S. 100 (1941) (upholding the ability of Congress to ban the shipment of goods that were made by workers who worked more than the established maximum hours or for less than minimum wage).

160. 379 U.S. 241, 258-60 (1964) (holding that Congress can place regulations on public accommodations, in the form of the Civil Rights Act of 1964, that wanted to refuse to rent rooms to African Americans because of the effect on interstate travel if the motels were allowed to discriminate in this manner).

161. 312 U.S. at 114.

162. 379 U.S. at 256 (quoting *Caminetti v. United States*, 242 U.S. 470, 491 (1917)).

163. 42 U.S.C. § 16913(a) (2006).

164. *See id.*

knowingly fail to register as required.<sup>165</sup> No part of this provision can be construed as being in line with the two cases that the Court referenced with regard to the category of the channels of interstate commerce. Here, unlike with § 16913, there is involvement of the channels of interstate commerce, as the channels will need to be used in order for the person to have traveled in interstate commerce, and in turn, be subject to the felony offense. However, this provision does not clearly fit within the concepts that the Court suggested encompassed the first category of *Lopez*.

The regulation of the sex offender under § 2250(a) is not a regulation of an article that will be used for injurious purposes once it reaches its destination, unless the Court's finding could be interpreted as including the regulation of individuals that would be used for injurious purposes. We will not make such a broad assumption here. At first glance it would seem that this provision could fit within the concept of Congress keeping the channels free from immoral or injurious uses. However, when considering the purpose of SORNA and the facts of the case that the Court quoted in finding that Congress may regulate such situations, it is unclear whether it is proper to conclude that SORNA is such a regulation.

The purpose of SORNA is to protect the public and children from sex offenders by establishing a comprehensive national registration system.<sup>166</sup> SORNA is not aimed at protecting the channels of interstate commerce from injurious uses. Even if SORNA could be interpreted as being aimed at preventing sex offenders from using the channels of interstate commerce to get to a destination where they would then commit an offense, the case the Court quoted in *Lopez* and *Caminetti v. United States*<sup>167</sup> suggests that this interpretation of Congress' authority is not correct.

In *Caminetti*, the Court reaffirmed that Congress possessed the authority to regulate activity to protect the channels of interstate commerce from immoral and injurious use.<sup>168</sup> The Court then concluded that Congress had the authority to regulate the transportation of a woman in interstate commerce for the immoral purpose of engaging in prostitution.<sup>169</sup> Unlike the statute at issue in *Caminetti*, SORNA does not involve a requirement that the offender travel by way of the channels of interstate commerce for an immoral purpose.<sup>170</sup> In fact, the regulation does not have any effect until after the travel has occurred.<sup>171</sup> Offenders are not barred from using the channels of interstate

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165. 18 U.S.C. § 2250(a) (2006).

166. 42 U.S.C. § 16901 (2006).

167. *See generally* 242 U.S. 470 (1917).

168. *Id.* at 491.

169. *Id.* at 491-92 (upholding the conviction of defendants under the White Slave Traffic Act).

170. *See* 42 U.S.C. § 16913(a)-(c) (2006); 18 U.S.C. § 2250(a) (2006).

171. The offender is not considered to be in violation of SORNA until three days have passed without registration after having traveled in interstate commerce. *See* 42 U.S.C. §

commerce, but if they do, regulations are placed on them once they reach their destination, and penalties are imposed when they fail to abide by those regulations.<sup>172</sup> In contrast, in *Caminetti*, the crime is committed when the channels are used for immoral purposes.<sup>173</sup> Further, and most notably, the Court in *Caminetti*, prior to its determination that Congress has the authority to keep the channels of interstate commerce free from injurious and immoral purposes, stated “Congress has no power to punish one who travels in interstate commerce merely because he has the intention of committing an illegal or immoral act at the conclusion of the journey.”<sup>174</sup> This statement rebuts the idea that Congress could punish sex offenders who travel in interstate commerce merely because they have the intention of not registering once they reach their destination.<sup>175</sup>

Based on the comparisons between SORNA and the cases the Court cited when establishing the valid regulation of the channels of interstate commerce, it is clear that SORNA does not fit within this category of regulation.

## 2. Instrumentalities of Interstate Commerce or Persons/Things in Interstate Commerce

In establishing that Congress may “regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities,”<sup>176</sup> the Court cited three of its previous decisions: *Shreveport Rate Cases*,<sup>177</sup> *Southern Railway Co. v. United States*,<sup>178</sup> and *Perez v. United States*.<sup>179</sup>

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16913(c) (2006) (requiring registration not later than three business days after specific changes in the offender’s name, residence, employment, or student status).

172. *Id.*; 18 U.S.C. § 2250(a) (2006).

173. *See* 242 U.S. at 488 n.1 (quoting the provisions of the White Slave Traffic Act relevant to the case).

174. *Id.* at 491. The Court then went on to distinguish such a situation with the White Slave Traffic Act, which it stated sought to “reach and punish the movement in interstate commerce of women and girls with a view to the accomplishment of the unlawful purposes prohibited.” *Id.*

175. The district court in *Myers* came to a similar conclusion as the cases cited to in *Lopez* did—that is, it was supportive of the first category. This suggests that the statutes meant to be encompassed by this category are those “concerned with the person or thing’s travel” and not with “regulating the local activity the person engaged in once he ceased traveling in interstate commerce.” *United States v. Myers*, 591 F. Supp. 2d 1312, 1341 (S.D. Fla. 2008), *vacated and remanded*, 584 F.3d 1349 (11th Cir. 2009).

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

177. *Houston E. & W. Texas Ry. Co. v. United States*, 234 U.S. 342, 350-53 (1914) (holding that Congress may regulate railroads that were charging higher rates for interstate travel than for intrastate travel because Congress may regulate railroads as instrumentalities of interstate commerce and the rates of the intrastate travel had a close and substantial relation to interstate commerce).

These cases suggest that the protection of instrumentalities of interstate commerce is meant to encompass those vehicles or other things that are used to carry out commerce, such as trucks, aircrafts, and trains.

The *Perez* case gives some insight into what is meant by the regulation of persons or things in interstate commerce. The example of regulating thefts from interstate shipments suggests that the regulation of persons is meant to encompass situations in which the action being regulated occurs while the person is traveling by way of the instrumentalities or when the action is aimed at harming or affecting the instrumentality.<sup>180</sup>

Based on these interpretations of the cases the Court cited in *Lopez*, it would appear that neither § 16913 nor § 2250(a) would fall within the second category. As was mentioned with respect to the first category, § 16913 by its terms has nothing to do with interstate commerce or the instrumentalities thereof, as it requires registration without any reference to interstate commerce.<sup>181</sup> Section 2250(a) also does not appear to clearly fit within the second category based on the cases the Court cited. Though this provision has the requirement that the offender travel in interstate commerce, which presumably would be by way of an instrumentality of interstate commerce, the provision is neither aimed at the protection of those instrumentalities, nor is it regulating an action that is undertaken while in that instrumentality.<sup>182</sup> Rather, § 2250(a) regulates the offender after he has used those instrumentalities to get to his destination, by requiring he register within three days of traveling in interstate commerce.<sup>183</sup> Therefore, according to the cases the Court cited in *Lopez*, § 2250(a) does not fit within the second category.

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178. 222 U.S. 20, 26-27 (1911) (holding that Congress could require vehicles on a railroad that is a highway of interstate commerce to contain a certain safety feature, including vehicles only moving intrastate traffic, because there is a close and substantial relation to interstate commerce).

179. 402 U.S. 146, 150 (1971) (explaining Congress' ability to regulate for the "protection of the instrumentalities of interstate commerce, as, for example, the destruction of an aircraft (18 U.S.C. § 32), or persons or things in commerce, as, for example, thefts from interstate shipments (18 U.S.C. § 659)").

180. The district court in *Myers* made a similar finding that the second category is centered on the protection of instrumentalities and the people using them. 591 F. Supp. 2d at 1348.

The formula "persons or things in interstate commerce, even though the threat may come only from intrastate activities" is addressed to Congress's power to regulate and protect such persons from threats while traveling in interstate commerce. It involves things "actually being moved in interstate commerce, *not all people and things that have ever moved across state lines.*"

*Id.* (quoting *United States v. Patton*, 451 F.3d 615, 622 (10th Cir. 2006)).

181. *See* 42 U.S.C. § 16913(a) (2006).

182. *See* 18 U.S.C. § 2250(a) (2006).

183. *Id.*

However, as discussed in the previous section, numerous lower court decisions have relied on the second category to find that SORNA was constitutional because of the presence of a jurisdictional element in § 2250(a), and the use of a minimal nexus review.<sup>184</sup> It is conceded that § 2250(a), through its requirement that the offender travel in interstate commerce, contains a jurisdictional element that might limit the reach of the statute to activity that has an “explicit connection with or effect on interstate commerce.”<sup>185</sup> What is contested is the applicability of the minimal nexus test to determine whether there is an explicit connection with interstate commerce.

Recall that the minimal nexus test was established in *Scarborough v. United States*.<sup>186</sup> On the surface it appears that the minimal nexus test is applicable because there is a jurisdictional element in § 2250(a) and there is no clear intent of Congress to dispense with a nexus requirement. Furthermore, the facts of *Scarborough*, in which the Court applied the minimal nexus review, can be analogized to SORNA. In *Scarborough*, the Court affirmed the ability of Congress to regulate the possession of firearms based on the fact that the firearm had been “at some time, in interstate commerce.”<sup>187</sup> A similar argument can be made with SORNA, that in order for Congress to be able to regulate the offender, all they would need to prove is that he or she traveled in interstate commerce at some time, which § 2250(a) already provides a showing of.<sup>188</sup>

However, the fact that the statute in *Scarborough* was regulating the travel of a *thing* across interstate commerce, while SORNA is regulating the travel of a *person*, raises some concerns. If the situation in *Scarborough* were extended to allow the regulation of a person merely because he or she has traveled in interstate commerce at some time, there would potentially be no limit to Congress’ commerce power. On this interpretation, Congress could place any regulation it wishes on an individual if they at some point in their life traveled in interstate commerce. The regulation with SORNA would only require that the individual have traveled in interstate commerce three days prior to failing to register. However, the fact that Congress could reach this individual could lead to a slippery slope of extending the time line beyond three days to a much longer time having passed between the regulated activity and the travel in interstate commerce.<sup>189</sup> The fear of this slippery slope and the possibility of an

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184. *See supra* Part III.A.

185. *United States v. Lopez*, 514 U.S. 549, 562 (1995).

186. *See* 431 U.S. 563, 568 (1977).

187. *Id.* at 575.

188. *See* 18 U.S.C. § 2250(a) (2006).

189. Note that the court in *Myers* made a similar argument that allowing for the minimal nexus test to be applied to regulations of a person would lead to a slippery slope. 591 F. Supp. 2d 1312, 1344 (S.D. Fla. 2008) (“Extending *Scarborough*’s ‘minimal nexus’ test to a defendant’s person is an exceedingly dangerous proposition because it undermines our deeply

all-empowering authority of Congress to regulate under the Commerce Clause is cause for hesitation in applying the minimal nexus test to SORNA.

Beyond the doubt surrounding the results of applying the minimal nexus review test to SORNA, there is also an argument that the minimal nexus review is no longer the proper standard to apply to the jurisdictional element after *Lopez*. Recall that the Court in *Lopez* established four factors that should be considered in analyzing whether the activity being regulated had a substantial effect on interstate commerce.<sup>190</sup> One of the factors they considered in this analysis was whether there was a jurisdictional element that showed the requisite nexus with interstate commerce.<sup>191</sup> The Court did not specifically state in *Lopez* that the nexus requirement was a minimal nexus, suggesting that they perhaps no longer wish to apply such a requirement in the Commerce Clause analysis.<sup>192</sup> Further, as the *Myers* court noted,<sup>193</sup> the Supreme Court recently questioned the adequacy of the minimal nexus test in *United States v. Jones*.<sup>194</sup> The Court in *Jones* rejected an argument that a “private residence had a ‘minimal nexus’ with interstate commerce simply because some of its parts previously traveled in interstate commerce.”<sup>195</sup> This conclusion of the Court suggests that the minimal nexus test is not satisfied by merely showing that the product or the person being regulated had once traveled in interstate commerce.

Another issue concerning the constitutionality of § 2250(a) under the second category is whether the offender, in traveling in interstate commerce, must have the intent to not register. SORNA does not have such an intent requirement, and a number of lower court decisions have determined that there is no need for a showing of intent in order for Congress to be able to regulate the registration of the offenders.<sup>196</sup> One of these courts, as an illustration as to why there is no intent requirement, cites a number of cases in which the regulation of a gun traveling in interstate commerce was upheld despite the absence of an intent requirement.<sup>197</sup> However, a number of decisions uphold federal criminal statutes as a valid use of Congress’

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entrenched principles of federalism and renders the traditional limitations on federal power illusory.”).

190. *United States v. Lopez*, 514 U.S. 549, 558-64 (1995).

191. *Id.* at 558-62.

192. However, take note that *Lopez* largely focused on the third category, so such a conclusion may not be entirely accurate with regard to analyzing the jurisdictional element under the second category. *Id.* at 561-62.

193. 591 F. Supp. 2d at 1347.

194. 529 U.S. 848, 857 (2000).

195. *Myers*, 591 F. Supp. 2d at 1347; *Jones*, 529 U.S. at 857.

196. *See, e.g.*, *United States v. Ditomasso*, 552 F. Supp. 2d 233, 247 (D.R.I. 2008) (“There is no constitutional requirement under the second prong that the ‘person[ ] or thing [ ] in interstate commerce’ travels with intent or is moved with intent to commit a crime.”) (citation omitted) *aff’d*, No.08-2567, 2010 WL 3718849 (1st Cir. Sept. 22, 2010).

197. *Id.*

commerce power where travel in interstate commerce was linked to the intent to commit a crime or where the traveling is somehow part of the crime.<sup>198</sup>

Based on these varying decisions, it is unclear whether the fact that SORNA does not require the intent to not register would be fatal to its constitutionality under the Commerce Clause. However, the lack of an intent requirement demonstrates a disconnection between traveling in interstate commerce and the actual activity that Congress is regulating. In regulating the registration of sex offenders, SORNA has no connection with interstate commerce other than the fact that the individual traveled in interstate commerce prior to failing to register as required. An intent requirement would solidify a nexus between the activity and interstate commerce by requiring the offender to be traveling with the intent to not register upon arriving at his or her destination. Because there is no intent requirement, there is no real nexus between the activity and interstate commerce.

### 3. Substantially Affecting Interstate Commerce

The analysis of SORNA under the third category must be guided by the factors that the Court in *Lopez* and *Morrison* followed in their decisions. Recall that the relevant factors include: (1) whether the regulated activity is economic in nature; (2) whether the statute contains a jurisdictional element which establishes an explicit connection with or effect on interstate commerce; (3) whether Congress made express findings regarding the effects of the regulated activity on interstate commerce; and (4) the link between the regulated activity and its substantial effect on interstate commerce.<sup>199</sup>

#### a. Economic in Nature

The Supreme Court has only upheld regulations under the third category when the activity being regulated is economic in nature or where the activity is an essential part of a larger regulatory scheme of economic activity.<sup>200</sup> With regard to SORNA, neither provision at issue is regulating an economic activity. The provisions are not regulating the “production, distribution, and consumption of commodities.”<sup>201</sup> Rather, they are regulating the actions of a person.<sup>202</sup>

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198. *See, e.g.*, *Hoke v. United States*, 227 U.S. 308, 320-21 (1913) (upholding the Mann Act which criminalizes the transportation of an individual with an intent that such person engage in prostitution).

199. *United States v. Lopez*, 514 U.S. 549, 559-64 (1995).

200. *Id.* at 559-61.

201. *Gonzales v. Raich*, 545 U.S. 1, 25 (2005) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)).

202. *See* 42 U.S.C. § 16913(a) (2006); 18 U.S.C. § 2250(a) (2006).

Nor is the activity that SORNA regulates an essential part of a larger regulatory scheme of economic activity. There are two possibilities of what this larger scheme may be: (a) the two provisions as part of the larger scheme that is SORNA or (b) SORNA as part of the larger scheme of the Adam Walsh Act. The purposes of SORNA and the Adam Walsh Act make it clear that neither is regulating economic activity. Recall that the purpose of SORNA is to establish a “comprehensive national system for the registration” of sex offenders in order to protect the public and children from attacks from those offenders.<sup>203</sup> The purpose of the Adam Walsh Act is to “protect children from sexual exploitation and violent crime,” including kidnapping, child abuse, child pornography, and other such crimes against children.<sup>204</sup> Neither of these stated purposes in any way implicates an economic activity or a larger regulatory scheme of an economic activity. Based on this analysis, this factor does not suggest a finding that SORNA is constitutional under the Commerce Clause.

#### b. Jurisdictional Element

As previously noted, a jurisdictional element might aid in establishing the connection between the activity being regulated and interstate commerce.<sup>205</sup> Section 16913 contains no such explicit jurisdictional element.<sup>206</sup> On the other hand, as has already been discussed, § 2250(a) does contain a jurisdictional element by requiring the offender to have traveled in interstate commerce.<sup>207</sup> However, the jurisdictional element contained in this provision does not fit within the third category, as it only requires the person to have traveled in interstate commerce.<sup>208</sup>

Even if the jurisdictional element required that there be substantial effects on interstate commerce, it is unlikely that Congress could establish the connection between not registering and an effect on interstate commerce. Any effect on interstate commerce because of the failure to register would likely be too far attenuated, as will be explored further in analyzing the factor concerning the link between the activity and the substantial effect.

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203. 42 U.S.C. § 16901 (2006).

204. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified in scattered sections of 18 U.S.C. and 42 U.S.C. (2006)).

205. *See* United States v. Morrison, 529 U.S. 598, 611-12 (2000).

206. 42 U.S.C. § 16913 (2006).

207. 18 U.S.C. § 2250(a) (2006).

208. Recall that the court in *Myers* came to a similar conclusion that the wording of § 2250(a) limited its applicability to the first two categories under *Lopez*. United States v. Myers, 591 F. Supp. 2d 1312, 1337 (S.D. Fla. 2008) (“The phrase ‘in interstate commerce’ is a term of art that Congress employs when it uses its power under the first two categories identified in *Lopez*.”), *vacated and remanded*, 584 F.3d 1349 (11th Cir. 2009).

### c. Congressional Findings

Congressional findings demonstrating the substantial effects that the regulated activity has on interstate commerce, like the jurisdictional element, can be useful in supporting the constitutionality of the statute but are not dispositive.<sup>209</sup> SORNA's legislative history includes statistics on the difficulties of tracking sex offenders who move from state to state and consequently may get "lost" in the process because they fail to register after they relocate.<sup>210</sup> It does not directly address the effects that such situations have on interstate commerce.<sup>211</sup> The findings demonstrating a need for a comprehensive registration system are legitimate, but they do not bear on any substantial relation with, or effect on, interstate commerce.

### d. Link Between the Activity and the Substantial Effects

In analyzing the link between SORNA and its effects, if any, on interstate commerce, it must be determined that the effects are not too far attenuated. It is reasonable to assume that if Congress were to offer an argument as to what substantial effects the non-registration of sex offenders has on interstate commerce, it would take a similar approach to how it presented this argument in *Lopez* and *Morrison*. Congress would argue that the non-regulation of such an activity would lead to violence against children and other persons, and would thus cause a decrease in travel to those places where there was such violence, thereby affecting interstate commerce.<sup>212</sup> However, as has been made clear by the Court in both cases, this argument is too far attenuated and not sufficient to establish a proper link between the activity and interstate commerce.<sup>213</sup> Similarly, any effect on the mindset of citizens as a result of any such violence is not relevant in the consideration. In order for there to be substantial effects, there is a long chain of events which would have to occur, including: an offender failing to register where required, committing an act of violence that would not have otherwise been committed if the offender had

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209. *Morrison*, 529 U.S. at 612.

210. See H.R. REP. NO. 109-218, at 23 (2005) ("Given the transient nature of sex offenders and the inability of the States to track these offenders, it is conservatively estimated that approximately 20 percent of 400,000 sex offenders are 'lost' under State sex offender registry programs.").

211. See *United States v. Powers*, 544 F. Supp. 2d 1331, 1335 n.4 (M.D. Fla. 2008) ("SORNA's legislative history does not include Congressional findings as to the effect upon interstate commerce—if any—of sex offenders' failure to register in their states of residence."), *vacated and remanded*, 562 F.3d 1342 (11th Cir. 2009).

212. Recall that in both cases the government argued that the violence that the statute was regulating would affect the travel plans of citizens. See *Morrison*, 529 U.S. at 615; *United States v. Lopez*, 514 U.S. 549, 564 (1995).

213. *Morrison*, 529 U.S. at 615; *Lopez*, 514 U.S. at 563-64.

registered, the act of violence causing fear in citizens, and that fear preventing people in the future from traveling to places of said violence. Such a connection between the regulated activity and interstate commerce is too far attenuated to support a finding of constitutionality under the Commerce Clause.

#### V. CONCLUSION

Based on the most recent Supreme Court cases addressing the constitutionality of certain criminal regulations under the Commerce Clause, SORNA should not be upheld as a constitutional use of Congress' commerce power if the issue were to go before the Supreme Court. SORNA is most properly analyzed under the decisions in *Lopez* and *Morrison*, based on the strong similarities SORNA has with the statutes at issue in those cases and the analysis the Court undertook. Though *Raich* is the Court's most recent decision concerning the constitutionality of congressional criminal regulations based on the Commerce Clause, the statute at issue in that case and the analysis the Court undertook represented a different line of reasoning that is inapplicable to SORNA.

The Supreme Court in *Lopez* and *Morrison* established the ways in which Congress can regulate under its commerce power, and SORNA does not clearly fit within any of these categories. Based on the cases the Court cited in establishing the categories under which Congress may regulate, SORNA does not fit within the first category of regulating the channels of interstate commerce, nor does it fit within the second category of regulating the instrumentalities of interstate commerce. Further, SORNA does not fit within the third category of substantial effects on interstate commerce when analyzing it under the four factors that the Supreme Court has laid out in *Lopez* and its progeny. This Note has demonstrated that SORNA is not a constitutional use of Congress' commerce power when analyzing the provisions at issue separately, which is the appropriate analysis based on the previous decisions of the Supreme Court regarding congressional criminal provisions and the Court's power to declare legislative actions unconstitutional.<sup>214</sup>

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214. Keep in mind the scope of this Note, as it only analyzes SORNA against Commerce Clause requirements and does not consider whether either or both of the provisions are constitutional under the Necessary and Proper Clause.