

# ONE OF THESE LAWS IS NOT LIKE THE OTHERS: WHY THE FEDERAL SEX OFFENDER REGISTRATION AND NOTIFICATION ACT RAISES NEW CONSTITUTIONAL QUESTIONS

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## INTRODUCTION

On March 5, 2003, the United States Supreme Court, in *Smith v. Doe*<sup>1</sup> (“*Smith*”) and *Connecticut Department of Public Safety v. Doe*<sup>2</sup> (“*DPS*”) held that the Alaska<sup>3</sup> and Connecticut<sup>4</sup> sex offender registry and notification statutes were constitutional. The two state statutes were relatively modest with small penalties for failing to register and subjected to a limited review by the Court.<sup>5</sup> At the time of the two Court decisions all fifty states had enacted sex offender registry and notification statutes (“Megan’s Laws”<sup>6</sup>).<sup>7</sup> The Supreme Court opinions seemingly sanctified the laws of the states and ensured that registries would remain a permanent fixture of America’s sex offender policy.

Three years after those opinions were issued, on the twenty-fifth anniversary of the abduction of Adam Walsh from a shopping mall in Florida, President George W. Bush signed into law<sup>8</sup> the Adam Walsh Child Protection and Safety Act of 2006 (“AWA”).<sup>9</sup> Title I of the AWA consisted of the Sex Offender Registration and Notification Act (“SORNA”).<sup>10</sup> SORNA required the creation of a nationwide online sex offender registry

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<sup>1</sup> 538 U.S. 84 (2003).

<sup>2</sup> 538 U.S. 1 (2003).

<sup>3</sup> ALASKA STAT. §§ 12.63.010(A), (B) (2000).

<sup>4</sup> CONN. GEN. STAT. §§ 54-251, 54-252, 54-254 (2001).

<sup>5</sup> See *infra* notes 38-96 and accompanying text.

<sup>6</sup> “Megan’s Laws” are named after Megan Kanka. As the Court in *Smith* noted, “Megan Kanka was a 7-year-old New Jersey girl who was sexually assaulted and murdered in 1994 by a neighbor who, unknown to the victim’s family, had prior convictions for sex offenses against children.” 538 U.S. at 89.

<sup>7</sup> 538 U.S. at 89-90 (noting that, “[b]y 1996, every State, the District of Columbia, and the Federal Government had enacted some variation of Megan’s Law.”)

<sup>8</sup> Kris Axtman, *Efforts Grow to Keep Tabs on Sex Offenders*, CHRISTIAN SCIENCE MONITOR, Jul. 28, 2008, at 1.

<sup>9</sup> PUB. L. NO. 109-248.

<sup>10</sup> 42 U.S.C. § 16901.

and notification system,<sup>11</sup> made mandatory federal registration by sex offenders according to a three-tier classification scheme,<sup>12</sup> created the crime of failing to register which was punishable by up to ten years imprisonment,<sup>13</sup> and applied to offenders who committed sex offenses prior to the enactment of the statute.<sup>14</sup>

Quite simply, “one of these [laws] is not like the others. One of these [laws] just doesn’t belong.”<sup>15</sup> Whereas the statutes at issue before the Supreme Court in 2003 did not enable viable challenges based upon Fifth Amendment due process, the Ex Post Facto Clause, and the Commerce Clause, SORNA has run roughshod over constitutional rights derived from those constitutional provisions. Portions of SORNA differ so radically from the Alaska and Connecticut laws that courts should reconsider constitutional claims against SORNA that were previously litigated against state statutes. Further, SORNA raises at least one important new constitutional question that the Supreme Court has not yet considered. A careful review of SORNA in relation to prior case law on several constitutional claims shows conflicts that make portions of the federal statute unconstitutional.

Despite the constitutional infirmities of SORNA, federal courts across the nation have rubber stamped the Act’s provisions based upon mechanical applications of the Supreme Court’s opinions in *Smith* and *DPS*.<sup>16</sup> Courts have concluded that SORNA is “essentially identical to”<sup>17</sup> “strikingly similar to,”<sup>18</sup> “nearly identical to,”<sup>19</sup> “nearly indistinguishable from,”<sup>20</sup> and

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<sup>11</sup> 42 U.S.C. §§ 16912(a), 16919.

<sup>12</sup> 42 U.S.C. § 16911.

<sup>13</sup> 18 U.S.C. § 2250(a).

<sup>14</sup> 28 C.F.R. § 72.3.

<sup>15</sup> I apologize for doing an injustice to the immortal lyrics sung by, among other Sesame Street characters, Cookie Monster and Big Bird, from the song *One of These Things is Not Like the Others*. See <http://www.metrolyrics.com/one-of-these-things-is-not-like-the-others-lyrics-sesame-street.html>.

<sup>16</sup> See *infra* notes 126-34 and accompanying text.

<sup>17</sup> *United States v. Utesch*, 2008 U.S. Dist. LEXIS 40498 (E.D. Tenn. 2008) (noting that, “Alaska’s statute and SORNA are essentially identical.”) (citing *United States v. Cardenas*, 2007 U.S. Dist. LEXIS 88803, n.3 (S.D. Fla. 2007)).

<sup>18</sup> *United States v. Cardenas*, 2007 U.S. Dist. LEXIS 88803 at \*27 (S.D. Fla. 2007); *United States v. Markel*, 2007 U.S. Dist. LEXIS 27102 at \*2-\*3 (W.D. Ark. 2007) (noting that, “[i]n *Smith*, the Supreme Court considered a law imposed by the state of Alaska which was strikingly similar to SORNA.”).

<sup>19</sup> *United States v. Muzio*, 2007 U.S. Dist. LEXIS 40294 at \*7 (E.D. Mo. 2007) (noting that, “the court upheld the constitutionality of an Alaska sex offender registration statute which is nearly identical to the provisions of the current SORNA law.”) (rejected in part on other grounds in *United States v. Muzio*, 2007 U.S. Dist. LEXIS 54330 (E.D. Mo. 2007)).

<sup>20</sup> *United States v. Hinen*, 487 F. Supp. 2d 747 at 755 (W.D. Va. 2007) (noting that, “[t]he contours of the statutory scheme at issue in *Smith* are nearly indistinguishable from the one at issue here.”).

“functionally indistinguishable from”<sup>21</sup> the statutes that the Supreme Court reviewed. A district court in Louisiana perhaps best embodied the belief that SORNA represented nothing different when it wrote, “[t]he same analysis [as in *Smith*] applied to the similar facts in the case at bar must produce the same result.”<sup>22</sup> Such reliance by courts is fundamentally misplaced. Beyond missing the statutory differences between SORNA and the state laws reviewed by the Court, district courts have repeatedly ignored the language of the opinions in *Smith* and *DPS* on which those courts are ostensibly relying. Thankfully, this disjunction between district courts and established constitutional law can be cured either by appellate court action or modest congressional amendments to SORNA.

Part I of this article offers a brief history of sex offender registry and notification laws and discusses the Supreme Court’s opinions in *Smith* and *DPS*. Part II addresses the registration and notification provisions of SORNA. Part III posits that some prosecutions for the crime of failing to register are in conflict with the Ex Post Facto Clause. Part IV contends that SORNA does not afford sufficient fair warning for some defendants as required by the Fifth Amendment. Part V argues that the criminal provisions of SORNA are an unconstitutional exercise of federal power. I conclude by discussing the future of SORNA challenges and other federal efforts to regulate sex offenders.

## I. STATE SEX OFFENDER REGISTRATION AND NOTIFICATION STATUTES

Sex offender registration and notification statutes have emerged as integral portions of the effort to diminish sexual violence in the United States. While many scholars have questioned the efficacy of such laws in actually decreasing recidivism by offenders,<sup>23</sup> there is little reason to think such arguments will cause a retrenchment of such approaches in the near future. Because this article is more concerned with doctrinal and constitutional impact than utilitarian effects, only a brief summary of the

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<sup>21</sup> *United States v. Samuels*, 543 F. Supp. 2d 669 at 676 (E.D. Ky. 2008) (noting that, “[t]hus, SORNA’s registration requirement is functionally indistinguishable from the Alaskan requirement at issue in *Smith*.”); *United States v. LeTourneau*, 534 F. Supp. 2d 718 at 721 (S.D. Tx. 2008) (noting that, “SORNA’s registration requirement is functionally indistinguishable from the Alaskan requirement at issue in *Smith*.”).

<sup>22</sup> *United States v. Pitts*, 2007 U.S. Dist. LEXIS 82632 at \*16 (M.D. La. 2007).

<sup>23</sup> Notably among the various criticisms of registration and notification laws is a recent study by J.J. Prescott and Jonah E. Rockoff finding that registration and notification laws do not decrease recidivism by registered sex offenders. They also found that notification laws to serve a deterrent function for non-registered persons. J.J. Prescott and Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1100663](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1100663).

history and policy-making environment for such laws is included below. That capsule of background information is followed by a more extensive review of the two Supreme Court opinions regarding sex offender registration and notification laws.

*A. A Brief History of State Sex Offender and Notification Statutes*

Sex offender registration and notification laws are of relatively recent origin.<sup>24</sup> Less than three months after the death of Megan Kanka, a New Jersey girl who was raped and killed by a previously convicted sex offender, the state enacted the first “Megan’s Law.”<sup>25</sup> Within the same year, President Clinton signed into law the Jacob Wetterling Crimes against Children and Sexually Violent Offenders Registration Act (“Wetterling Act”)<sup>26</sup> as part of the Violent Crime Control and Law Enforcement Act of 1994.<sup>27</sup>

The Wetterling Act was a significant foray by the federal government into the area of sex offender registration as it conditioned receipt of federal law enforcement funds upon states adopting registration laws.<sup>28</sup> In response, states across the nation adopted Megan’s Laws, often with little or no debate.<sup>29</sup> Soon, every state and federal territory had a sex offender registration law.<sup>30</sup> Specifics of the statutes varied from state to state, but they bore similarity to the original statute drafted in New Jersey.<sup>31</sup> Notification provisions were added in many jurisdictions so that persons could receive notice when an offender moved into their neighborhood.<sup>32</sup> With the development of the Internet, sex offender registries soon appeared on the Internet with search functionality.<sup>33</sup> As these laws created important

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<sup>24</sup> Most registration laws emerged in the 1990’s although a few states had requirements as early as the 1940’s. Human Rights Watch, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US, Sep. 2007, at 35 [hereinafter “No Easy Answers”].

<sup>25</sup> N.J. STAT. §§2C:7-1-7-11; ERIC S. JANUS, FAILURE TO PROTECT: AMERICA’S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE 16 (2006).

<sup>26</sup> 42 U.S.C. § 14071 (2000).

<sup>27</sup> PUB. LAW. 103-322 (1994); Janus, *supra* note 25, at 16.

<sup>28</sup> Janus, *supra* note 25, at 16.

<sup>29</sup> Wayne Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257, (2005) (noting that, “[t]oday, all U.S. jurisdictions have registration laws in effect, prompted by the federal government’s threats in the Jacob Wetterling Act (1994) and Megan’s Law (1996) to withhold funds from non-compliant states.”).

<sup>30</sup> *DPS*, 538 U.S. at 89.

<sup>31</sup> No Easy Answers, *supra* note 24, at 38 (noting that one of the purposes of the AWA was to create uniformity among the states in terms of registration requirements).

<sup>32</sup> *Id.* at 39.

<sup>33</sup> *Id.* at 53-54.

new legal issues, litigation challenging the statutes soon emerged. Eventually, the legal challenges reached the Supreme Court.

*B. United States Supreme Court Review of State Registration and Notification Statutes*

The United States Supreme Court has only ruled on the constitutionality of sex offender registration and notification statutes in two cases: *Smith* and *DPS*. Those two opinions were issued on the same day and provide the only specific guidance from the Court on how to adjudicate constitutional challenges to similar statutes. In its two decisions, the Court reviewed two claims: 1) in *Smith*, the Court considered whether inclusion of persons who committed crimes prior to the enactment of a registry statute violated the Ex Post Facto Clause; and 2) in *DPS*, the Court determined whether the failure to provide adequate hearing before inclusion in the registry violated procedural due process.

*1. Smith v. Doe*

In *Smith*, the Supreme Court considered Alaska's decision to include in its registry offenders who had committed crimes prior to the adoption of the registry statute.<sup>34</sup> The Court was reviewing the judgment of the Court of Appeals of the Ninth Circuit which held that the Alaska statute's retroactive application was in violation of the Ex Post Facto Clause of Article I<sup>35</sup> of the Constitution.<sup>36</sup> The Supreme Court concluded that the Ninth Circuit had erred and that the Alaska statute was consistent with the Ex Post Facto Clause.<sup>37</sup> Justice Kennedy wrote the opinion of the Court.

In order to decide if the Alaska statute violated the Ex Post Facto Clause, the Supreme Court used its traditional methodology in such cases. Article I, Section 9, subsection (3) of the United States Constitution provides, that "No Bill of Attainder or ex post facto law shall be passed." In *Weaver v. Graham*, the Supreme Court explained the two "critical elements" for a showing that a statute violates the Clause: 1) "it must be retrospective, that is, it must apply to events occurring before its enactment"; and 2) "it must disadvantage the offender affected by it."<sup>38</sup>

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<sup>34</sup> 538 U.S. at 89.

<sup>35</sup> § 10, cl. 1. Because the statute in question was promulgated by a state, the Ninth Circuit had based its holding on the application of the Ex Post Facto Clause to state actions through the adoption of the Due Process Clause of § 1 of the Fourteenth Amendment.

<sup>36</sup> *Doe v. Otte*, 259 F.3d 979 (9th Cir. 2001).

<sup>37</sup> *Smith*, 538 U.S. at 105-06.

<sup>38</sup> 450 U.S. 24, 29 (1981).

The “disadvantage” to a person can occur based upon two possible determinations by the Court: (1) if the legislature intended the statute to be civil and non-punitive; or (2) if the statute was not intended to be punitive, were its effects, “so punitive either in purpose or effect as to negate [the State’s] intention to deem it ‘civil.’”<sup>39</sup> If either of those questions resulted in a punitive finding, then the statute would have been deemed an unconstitutional violation of the Ex Post Facto Clause. The Ninth Circuit had held that the statute was retrospective, not intended to be punitive, but its effects were so punitive as to negate the Alaska legislature’s intent.<sup>40</sup> The Ninth Circuit thus held that the statute was unconstitutional.<sup>41</sup>

The Supreme Court succinctly concurred with the portions of the opinion of the Ninth Circuit that the statute was retrospective and the state’s intent was for the statute to be civil, and not punitive, in nature.<sup>42</sup> Having determined the intent of the Alaska legislature, the Court turned to the more difficult issue of whether the statute’s effects were punitive in nature. The Court noted that “only the clearest proof” of punitive effects would override the intent of the legislature.<sup>43</sup> As in previous cases, the Court used the seven factor test outlined in *Kennedy v. Mendoza-Martinez*<sup>44</sup> to analyze the effects of the Alaska statute.<sup>45</sup> The *Mendoza-Martinez* factors were “neither exhaustive nor dispositive,” but served a useful means of determining whether the effects of a statute were punitive.<sup>46</sup>

The *Smith* court listed the five *Mendoza-Martinez* factors that were critical for its determination as:

... in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose.<sup>47</sup>

<sup>39</sup> *Smith*, 538 U.S. at 92 (quoting *Kansas v. Hendricks*, 521 U.S. 346 (1997)).

<sup>40</sup> *Otte*, 259 F.3d at 993 (noting that, “[w]e conclude that the effects of the Alaska Sex Offender Registration Act are unquestionably punitive.”).

<sup>41</sup> *Id.*

<sup>42</sup> *Smith*, 538 U.S. at 93.

<sup>43</sup> *Id.* at 92 (quoting *Hudson v. United States*, 522 U.S. 93, 100 (1997)).

<sup>44</sup> 372 U.S. 144, 168-169 (1963).

<sup>45</sup> *Smith*, 538 U.S. at 97.

<sup>46</sup> *Id.* (quoting *United States v. Ward*, 448 U.S. 242, 249 (1980)).

<sup>47</sup> *Smith*, 538 U.S. at 97. The Court omitted extensive discussion of the two other factors noting that, “[t]he two remaining *Mendoza-Martinez* factors – whether the regulation comes into play only on a finding of scienter and whether the behavior to which it applies is already a crime – are of little weight in this case.” *Id.* at 105. One of these factors, that the behavior in question is already a crime, may have relevance in a future challenge to SORNA as noted *infra*.

For the first factor, whether the scheme in the statute was historically regarded as punitive, the Court focused on the recent evolution of sex offender registry laws.<sup>48</sup> The Court rejected the respondent's contention that sex offender registration and notification served the same functions as traditional shaming punishments.<sup>49</sup> Importantly, the Court distinguished shaming punishments by noting that all of the information in the public registry was already a matter of public record.<sup>50</sup> The online registry simply made access to that public information more efficient.<sup>51</sup>

As to the second factor, that the statute imposed an affirmative restraint, the Court found no such restraint through the minimal reporting requirements in the Alaska statute.<sup>52</sup> The lack of any personal appearance requirement after the initial reporting was significant to the Court.<sup>53</sup> The Court noted that the offender was free to change residence or job at will under the registry law.<sup>54</sup> The Court differentiated the sex offender registry requirements from several other legal requirements that the Court had considered to be affirmative restraints in other contexts.<sup>55</sup> Whereas the Ninth Circuit had held that the registry restrictions were analogous to the restraints of a probation system, the Court rejected such comparisons.<sup>56</sup>

In regards to the third factor, whether the statute served the traditional aims of punishment, the Court found that it did not.<sup>57</sup> On this issue, the Court's reasoning was a bit confused. The Court concluded that the statute served the function of deterrence (since the State conceded the point), but noted that many civil regulations served a deterrent function.<sup>58</sup> While the Court's observation, that civil regulation often served a deterrent function, was clearly correct, its argument implied that a deterrent effect could never prove that the statute serves a traditional aim of punishment. That would be an argument for never considering deterrence as part of the traditional aim of punishment *Mendoza-Martinez* factor.

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<sup>48</sup> *Id.* (noting that, "the sex offender registration and notification statutes 'are of fairly recent origin' which suggests that the statute was not meant as a punitive measure, or, at least, that it did not involve a traditional means of punishing." (internal citation omitted) (quoting *Otte*, 259 F.3d at 989).

<sup>49</sup> *Smith*, 538 U.S. at 97-98.

<sup>50</sup> *Id.* at 98.

<sup>51</sup> *Id.* at 98-99.

<sup>52</sup> *Id.* at 99-102.

<sup>53</sup> *Id.* at 101.

<sup>54</sup> *Id.* at 100.

<sup>55</sup> *Id.* at 100-101.

<sup>56</sup> *Id.* at 101-102.

<sup>57</sup> *Id.* at 102-104.

<sup>58</sup> *Id.* at 102.

Perhaps recognizing the shortcomings of its deterrence argument, the Court quickly turned to a discussion of whether the statute was retributive.<sup>59</sup> The Court concluded that the statute had no retributive function because the duration of the obligations was roughly tied to the risk posed by an offender.<sup>60</sup> As with the deterrence, this argument by the Court seemed sloppy and confused. The statute could easily be argued to have been applying restrictions on offenders as “payback” for their past crimes. Simply arguing that the obligation was proportionate to the risk represented did nothing to counter the fact that the statute may also have been retributive.

Through its confused handling of the third factor, the Court seemed to have collapsed its analysis of the third factor with the fourth factor: whether the statute serves a non-punitive purpose. The Court’s arguments in regards to serving the traditional aims of punishment were entirely based upon showing non-punitive purposes. Perhaps this conflation is the future direction of the Court indicated by its statement in *Smith* that “[t]he Act’s rational connection to a nonpunitive purpose is a ‘most significant’ factor in our determination that the statute’s effects are not punitive.”<sup>61</sup> In analyzing the fourth factor, the Court concluded that the public safety goal of preventing sex offender recidivism was sufficient to show a rational connection to a non-punitive purpose.<sup>62</sup>

In analyzing the fifth factor, that the regulation was excessive in relation to the regulatory purpose, the Court found that the Alaska statute was sufficiently proportionate.<sup>63</sup> In analyzing the issue, the Court need not find that the legislature chose the ideal method of regulation. Instead, the state need only show that, “the regulatory means chosen [were] reasonable in light of the nonpunitive objective.”<sup>64</sup> In analyzing this issue, the Court noted the high rate of long-term recidivism of sex offenders as supporting a proper relationship between the regulation and its purpose.<sup>65</sup> Also of note for the Court was that the distribution of information from the registry was

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.* On this point, the Court simply noted that there was a very limited tiered risk assessment. While no individual determinations were made, there was a loose relationship between the duration of listing and the seriousness of the original offense.

<sup>61</sup> *Id.* (quoting *United States v. Ursery*, 518 U.S. 267, 292 (1996)).

<sup>62</sup> *Smith*, 538 U.S. at 103.

<sup>63</sup> *Id.* at 103

<sup>64</sup> *Id.* at 105.

<sup>65</sup> *Id.* at 103-04 (noting that, “[t]he duration of the reporting requirements is not excessive. Empirical research on child molesters, for in-stance, has shown that, ‘contrary to conventional wisdom, most reoffenses do not occur within the first several years after release,’ but may occur ‘as late as 20 years following release.’” (quoting R. PRENTKY, R. KNIGHT, AND A. LEE, U.S. DEPT. OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, CHILD SEXUAL MOLESTATION: RESEARCH ISSUES 14 (1997)).

passive.<sup>66</sup> That is, a person had to request information from the registry – it was not automatically distributed.<sup>67</sup>

Based upon its analysis of the *Mendoza-Martinez* factors, the Court concluded that the effects of the Alaska statute were not so punitive as to negate the legislature’s non-punitive intent.<sup>68</sup> Consequently, the Court found that the Alaska statute was not in violation of the Ex Post Facto Clause.<sup>69</sup> As a result of the decision in *Smith*, retroactivity has become the norm in drafting subsequent sex offender laws.

Several other justices wrote separate opinions in *Smith*. Justice Thomas concurred, but argued that the majority should not have discussed the “implementation based challenge” considering the use of the Internet in posting the registry.<sup>70</sup> Since the Internet was not the required means of disseminating the registry information, Thomas argued that it should not be subjected to challenge.<sup>71</sup> Justice Souter also wrote separately to argue for rejection of the majority’s “clearest proof” requirement for an Ex Post Facto Clause challenge based upon punitive effects.<sup>72</sup> Nonetheless, Justice Souter concurred in the outcome.<sup>73</sup>

Justice Stevens, joined by Justice Ginsburg, dissented and argued that the majority’s methodology was fundamentally flawed.<sup>74</sup> Justice Stevens argued that any analysis should have started with the question of whether there was a liberty interest at stake.<sup>75</sup> It was clear to Justice Stevens that the Alaska statute included restrictions analogous to parole or supervised release.<sup>76</sup> Justice Stevens further argued that registration and notification would be constitutional if included as part of the defendant’s sentencing process at the original trial.<sup>77</sup>

Justice Ginsburg, joined by Justice Breyer, also dissented in *Smith*.<sup>78</sup> Like Justice Souter, Justice Ginsburg argued that the finding of “clearest proof” was not required.<sup>79</sup> However, unlike Justice Souter, Justice Ginsburg found that the Alaska statute was so punitive as to neutralize any civil intent

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<sup>66</sup> *Smith*, 538 U.S. at 104-105.

<sup>67</sup> *Id.* (noting that, “[a]s we have explained, however, the notification system is a passive one...”).

<sup>68</sup> *Id.* at 105-06.

<sup>69</sup> *Id.*

<sup>70</sup> *Smith*, 538 U.S. at 106-07 (Thomas, concurring).

<sup>71</sup> *Id.* at 106-07 (Thomas, concurring).

<sup>72</sup> *Smith*, 538 U.S. at 107-10 (Souter, concurring).

<sup>73</sup> *Id.* at 107-10 (Souter, concurring).

<sup>74</sup> *Smith*, 538 U.S. at 110-14 (Stevens, dissenting).

<sup>75</sup> *Id.* at 111 (Stevens, dissenting).

<sup>76</sup> *Id.* at 111 (Stevens, dissenting).

<sup>77</sup> *Id.* at 114 (Stevens, dissenting).

<sup>78</sup> *Smith*, 538 U.S. at 114-18 (Ginsburg, dissenting).

<sup>79</sup> *Id.* at 114-15 (Ginsburg, dissenting).

by the legislature.<sup>80</sup> Justice Ginsburg recounted the many restrictions placed upon offenders by the registry and noted the many cases where offenders who were not considered “dangerous” were nonetheless branded as sex offenders for life.<sup>81</sup> For Justice Ginsburg, the excessiveness of the restrictions in relation to the purpose served was dispositive.<sup>82</sup>

## 2. *Connecticut Department of Public Safety v. Doe*

The decision in *DPS* addressed the constitutionality of a similar sex offender registration statute in Connecticut.<sup>83</sup> However, the challenge to the statute’s constitutionality was solely focused on issues of procedural due process.<sup>84</sup> The Court of Appeals for the Second Circuit held that Connecticut’s registration and notification statute “deprived registered sex offenders of a ‘liberty interest,’ and violated the Due Process Clause because officials did not afford registrants a predeprivation hearing to determine whether they are likely to be ‘currently dangerous.’”<sup>85</sup> The Supreme Court reversed the judgment of the Second Circuit and held that no process was due. Chief Justice Rehnquist wrote the opinion of the Court.

The key distinction between the holding of the Supreme Court and that of the Second Circuit was in determining the purpose of the registry information.<sup>86</sup> According to the Supreme Court, the Second Circuit was under the mistaken impression that the registry listing was an assessment of the offender’s current level of dangerousness.<sup>87</sup> The Supreme Court ultimately concluded that the registry was only a statement of past convictions and explicitly denied that any determination was made as to the offender’s dangerousness to the community.<sup>88</sup> Because the offender already received procedural protections at the time of his or her original trial and sentencing, no further process was due.<sup>89</sup> The odd implication of the

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<sup>80</sup> *Id.* at 115 (Ginsburg, dissenting).

<sup>81</sup> *Id.* at 117-18 (Ginsburg, dissenting).

<sup>82</sup> *Id.* at 116 (Ginsburg, dissenting) (noting that, [w]hat ultimately tips the balance for me is the Act's excessiveness in relation to its nonpunitive purpose.”).

<sup>83</sup> *DPS*, 538 U.S. at 3-4.

<sup>84</sup> *Id.* at 4.

<sup>85</sup> *Id.* at 4 (quoting *Doe v. Department of Public Safety ex rel. Lee*, 271 F.3d 38, 44, 46 (2001)).

<sup>86</sup> *DPS*, 538 U.S. at 4-6.

<sup>87</sup> *Id.* at 4-6.

<sup>88</sup> *Id.* at 4-6 (noting that, “Connecticut, however, has decided that the registry requirement shall be based on the fact of previous conviction, not the fact of current dangerousness. Indeed, the public registry explicitly states that officials have not determined that any registrant is currently dangerous.”).

<sup>89</sup> *Id.* at 7 (noting that, “[h]ere, however, the fact that respondent seeks to prove –that he is not currently dangerous – is of no consequence under Connecticut's Megan's Law. As

Supreme Court's ruling is that if a state did exempt some offenders through a dangerousness determination, then it would be vulnerable to a due process challenge by offenders who remained on the registry. However, by giving process to none of the offenders, the state was insulated from a due process challenge.

Unlike the opinion in *Smith*, the opinion in *DPS* was brief and unanimous. Justice Scalia wrote separately to argue that a statute could properly curtail all due process if the underlying substantive liberty interest was not fundamental.<sup>90</sup> Justice Souter wrote a lengthier concurrence, joined by Justice Ginsburg, emphasizing that the majority opinion did not bar any challenge to a sex offender registration statute on substantive due process grounds.<sup>91</sup> Justice Stevens' dissent in *Smith* also constituted a separate concurrence in *DPS*.<sup>92</sup>

## II. SEX OFFENDER REGISTRATION AND NOTIFICATION ACT

SORNA forms the backbone of federal sex offender<sup>93</sup> registration law.<sup>94</sup> While the Act had originally been proposed as a separate bill, it was

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the DPS Website explains, the law's requirements turn on an offender's conviction alone – a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest.”).

<sup>90</sup> *DPS*, 538 U.S. at 8-9 (Scalia, concurring).

<sup>91</sup> *DPS*, 538 U.S. at 9-10 (Souter, concurring) (noting that, “I join the Court's opinion and agree with the observation that today's holding does not foreclose a claim that Connecticut's dissemination of registry information is actionable on a substantive due process principle.”).

<sup>92</sup> *DPS*, 538 U.S. at 110 (Stevens, dissenting).

<sup>93</sup> SORNA defines a sex offender as “an individual who was convicted of a sex offense.” 42 U.S.C. § 16911(1). A “sex offense” is defined as:

Generally. – Except as limited by subparagraph (B) or (C), the term “sex offense” means –

- (i) a criminal offense that has an element involving a sexual act or sexual contact with another;
- (ii) a criminal offense that is a specified offense against a minor;
- (iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of title 18, United States Code) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of title 18, United States Code;
- (iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note); or
- (v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

42 U.S.C. § 16911(5). The aforementioned “subparagraph[s] (B) and (C)” limit the definition of “sex offense” in some cases of foreign conviction and consensual sexual conduct. 42 U.S.C. §§ 16911(5)(B) and (C).

<sup>94</sup> As the text of the statute notes, SORNA, “established a comprehensive national system for the registration” of “sex offenders and offenders against children.” 42 U.S.C. § 16901.

put together with several other proposals into the larger AWA.<sup>95</sup> The AWA, among other things, also included new mandatory minimums for certain crimes,<sup>96</sup> regulations related to bail for sex offenders,<sup>97</sup> provisions for the post-incarceration commitment of certain sex offenders to federal treatment facilities,<sup>98</sup> and specific evidentiary rules in federal child pornography cases.<sup>99</sup> SORNA, while only one section of the AWA, is a fully-independent piece of legislation and is the sole focus of this article. SORNA has its own jurisdictional restrictions,<sup>100</sup> operative language,<sup>101</sup> and funding provisions.<sup>102</sup> As part of its passage, SORNA left certain decisions to be made at a later date by the Office of the Attorney General.<sup>103</sup>

### A. Statutory Provisions

SORNA's provisions can be divided into two major categories: 1) those related to the crime of failing to register; and 2) the provisions to create a national registry. The first category has already been used extensively in prosecuting sex offenders across the country.<sup>104</sup> The second category has not yet been fully implemented because states have until July 2009 to comply with the national registry requirements of SORNA.<sup>105</sup>

#### 1. Failure to Register (§ 2250(a))

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<sup>95</sup> FACT SHEET: THE ADAM WALSH CHILD PROTECTION AND SAFETY ACT OF 2006, available at: <http://www.whitehouse.gov/news/releases/2006/07/20060727-7.html>.

<sup>96</sup> *See, e.g.*, 18 U.S.C. § 3559(f)(1).

<sup>97</sup> 18 U.S.C. § 3142.

<sup>98</sup> 42 U.S.C. § 16971.

<sup>99</sup> 18 U.S.C. §§ 3509(m)(1)-(2)

<sup>100</sup> 18 U.S.C. 2250(a)(2)(B).

<sup>101</sup> 42 U.S.C. §§ 16911-16929.

<sup>102</sup> While the Act provided for initial funding, the AWA has remained largely unfunded since. PR NEWSWIRE, *Adam and John Walsh Urge Congress to Fund The Adam Walsh Child Protection and Safety Act of 2006*, Apr. 24, 2008.

<sup>103</sup> *See, e.g.*, 42 U.S.C. § 16913(d) (stating that, “[t]he Attorney General shall have the authority to specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this Act [enacted July 27, 2006] or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders...”); 42 U.S.C. § 16912(b) (stating that, “The Attorney General shall issue guidelines and regulations to interpret and implement this title.”).

<sup>104</sup> *See infra* notes 126-34 and accompanying text.

<sup>105</sup> The exact statutory language requires states to comply within three years of enactment of SORNA or one year after certain software is made available for use in creation of the registry. 42 U.S.C. § 16924(a). The Act further authorizes the Attorney General to extend the deadline no more than twice for a period of one year per extension. 42 U.S.C. § 16912(b).

In order to create a sex offender registry, legislatures put a burden on offenders to provide certain information. Failure to provide such information or to make appearances can result in a range of criminal penalties. SORNA created a new federal crime for failing to register at 18 U.S.C. § 2250(a). The elements of the crime are defined as:

(a) In General. – Whoever –

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

(2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both.

There are a few interesting portions of the crime to note. First, because § 2250(a)(2) was phrased as a disjunctive, the crime of failing to register included essentially two classes of offenders: 1) those convicted of federal sex crimes who failed to register;<sup>106</sup> and 2) those convicted of state sex crimes who travelled in interstate or foreign commerce and failed to register.<sup>107</sup> Those two groups present slightly different legal problems as discussed herein.<sup>108</sup> Second, the only mens rea requirement in the statute is that an offender “knowingly” fail to register. It is hard to imagine many fact patterns in which lack of knowledge by the offender is a defense since knowledge of the law is presumed under American common law. As a result, failure to register has been interpreted to be essentially a strict liability crime.<sup>109</sup> Third, the statute carries a rather sizable prison term of up to ten years for a single violation.<sup>110</sup> This penalty can be an order of

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<sup>106</sup> 18 U.S.C. § 2250(a)(2)(A).

<sup>107</sup> 18 U.S.C. § 2250(a)(2)(B).

<sup>108</sup> See *infra* notes 237-59 and accompanying text.

<sup>109</sup> See generally, Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U.L. REV. 295 (2006).

<sup>110</sup> In addition to the ten year maximum under federal law, SORNA requires every complying state to have a statutory penalty of at least a year in prison for violating the requirements of the Act. 42 U.S.C. § 16913(e) (the statute states that, “[e]ach jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this title.”).

magnitude greater than the maximum allowable for the offender's original offense.<sup>111</sup>

The text of § 2250(a) relies on upon other provisions of SORNA to define when a person is a sex offender who must register and what means are necessary to update registry information. These definitions are located at 42 U.S.C. § 16913. Section 16913 provides that an offender must register in any jurisdiction where he or she resides, works, or is a student.<sup>112</sup> Within three business days of an offender's change in name, residence, employment, or student status, the offender must appear in person to change the relevant registry information.<sup>113</sup>

SORNA divides offenders into three categories. Tier III offenders have committed the most serious crimes, are subject to the longest period of registration, and have more obligations under the registration scheme.<sup>114</sup> Tier II offenders have committed less serious crimes than Tier III offenders, have a limited period of registration, and have less obligations under SORNA than do Tier III offenders.<sup>115</sup> Tier I offenders are all those

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<sup>111</sup> There is no provision in the statute for a proportional penalty related to the original offense. Since offenders may have served no prison time for the original crime, the difference in penalties between the original offense and for failing to register can be substantial.

<sup>112</sup> 42 U.S.C. § 16913(a).

<sup>113</sup> 42 U.S.C. § 16913(c).

<sup>114</sup> The statute provides that:

The term 'tier III sex offender' means a sex offender whose offense is punishable by imprisonment for more than 1 year and –

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

(i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of title 18, United States Code); or

(ii) abusive sexual contact (as described in section 2244 of title 18, United States Code) against a minor who has not attained the age of 13 years;

(B) involves kidnapping of a minor (unless committed by a parent or guardian); or

(C) occurs after the offender becomes a tier II sex offender.

42 U.S.C. § 16911(4).

<sup>115</sup> The statute provides that:

The term 'tier II sex offender' means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and –

(A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:

(i) sex trafficking (as described in section 1591 of title 18, United States Code);

(ii) coercion and enticement (as described in section 2422(b) of title 18, United States Code);

(iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a)) of title 18, United States Code;

(iv) abusive sexual contact (as described in section 2244 of title 18, United States Code);

(B) involves –

(i) use of a minor in a sexual performance;

(ii) solicitation of a minor to practice prostitution; or

offenders who did not fit in the other two Tiers, are subject to the shortest period of requirements, and have the least obligations under SORNA.<sup>116</sup> Under certain circumstances, an offender with a clean record might be able to reduce his or her time listed on the registry.<sup>117</sup>

At the time that SORNA was made into law, the statute did not specify whether the registration requirements applied to offenders who were convicted of sex offenses before the passage of the statute.<sup>118</sup> Instead, SORNA left the retroactivity decision to the Attorney General. On February 28, 2007, the Attorney General issued a rule that required offenders convicted before the passage of SORNA to comply with SORNA's registration requirements.<sup>119</sup> The time between the passage of the Act and the Attorney General's statement is referred to as the "gap period" when it was ambiguous whether SORNA would be applied retroactively. In June 2008, the Attorney General's Sex Offender Sentencing, Monitoring,

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(iii) production or distribution of child pornography; or  
(C) occurs after the offender becomes a tier I sex offender.

42 U.S.C. § 16911(3).

<sup>116</sup> The statute provides that: "The term 'tier I sex offender' means a sex offender other than a tier II or tier III sex offender." 42 U.S.C. § 16911(2).

<sup>117</sup> The conditions for a change in status are as follows:

The full registration period shall be reduced as described in paragraph (3) for a sex offender who maintains a clean record for the period described in paragraph

(2) by--

(A) not being convicted of any offense for which imprisonment for more than 1 year may be imposed;

(B) not being convicted of any sex offense;

(C) successfully completing any periods of supervised release, probation, and parole;

and  
(D) successfully completing of an appropriate sex offender treatment program certified by a jurisdiction or by the Attorney General.

(2) Period.--In the case of--

(A) a tier I sex offender, the period during which the clean record shall be maintained is 10 years; and

(B) a tier III sex offender adjudicated delinquent for the offense which required registration in a sex registry under this title, the period during which the clean record shall be maintained is 25 years.

(3) Reduction.--In the case of--

(A) a tier I sex offender, the reduction is 5 years;

(B) a tier III sex offender adjudicated delinquent, the reduction is from life to that period for which the clean record under paragraph (2) is maintained.

42 U.S.C. § 16915(b).

<sup>118</sup> However, at least one court has reached a different conclusion on this point. In *U.S. v. Waybright*, the court found that § 16913 applied retroactively by the text of the statute. *Waybright* at 37-38.

<sup>119</sup> 28 C.F.R. § 72.3 (2007) (the rule stated that, "[t]he requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of the Act.").

Apprehending, Registering, and Tracking office (“SMART”) issued the lengthier set of guidelines to be used in the implementation of SORNA.<sup>120</sup>

## 2. Creation of a National Sex Offender Registry

SORNA mandates that each state take measures for the creation of a national sex offender registry. Failure to implement SORNA’s requirements for any fiscal year will cause a state to lose ten percent of funds authorized under the Omnibus Crime Control and Safe Streets Act of 1968.<sup>121</sup> This conditioning of funds mirrors the approach used in the Wetterling Act which resulted in all fifty states enacting registration and notification laws. However, because the provisions of SORNA are more onerous and unfunded, it is an open question as to whether states will be as ready to comply.<sup>122</sup> While many legislatures have discussed legislation that would fully comply with SORNA, only a handful of states have passed such laws.<sup>123</sup> The national registry does not represent the same constitutional

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<sup>120</sup> The National Guidelines for Sex Offender Registration and Notification, June 2008, available at: [http://www.ojp.usdoj.gov/smart/pdfs/final\\_sornaguidelines.pdf](http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf) [hereinafter “SORNA Guidelines”].

<sup>121</sup> “For any fiscal year after the end of the period for implementation, a jurisdiction that fails, as determined by the Attorney General, to substantially implement this title shall not receive 10 percent of the funds that would otherwise be allocated for that fiscal year to the jurisdiction under subpart 1 of part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3750 et seq.)” 42 U.S.C. § 16925(a).

<sup>122</sup> The National Conference of State Legislatures (“NCSL”) issued a statement explaining why states have not yet complied with the requirements of SORNA. NCSL requested that Congress amend the AWA to limit the burden of the Act. Among the specific recommendations related to SORNA were to:

2. Reinstitute the incentive grant provisions of the Act to permit States to submit application for determination of compliance....
4. Permit states to classify sex offenders according to their current state laws. The imposition of federally-defined tier classifications are confusing when compared to state crime classes and definitions, and therefore are overly-burdensome for states.
5. Permit states to penalize sex offenders according to their current state laws, including penalties for failure to register as required.
6. Incorporate flexibility in the implementation of the registration and publication requirements so as not to run afoul of any state’s constitution or statutory provisions. Every state has means by which registration information is publicly accessible, in accordance with state law....
8. Allow states to define which juvenile offenders meet criteria for sex offender registration. States must preserve authority for which juvenile offenders are treated like adults, under what circumstances and for how long....
10. Provide that technological record-keeping requirements be contingent upon appropriations of sufficient funding to states to implement these changes.

National Conference of State Legislatures, *2007 – 2008 Policies for the Jurisdiction of the: Law and Criminal Justice Committee*, available at: <http://www.ncsl.org/statefed/LAWANDJ.HTM#AdamWalsh>.

<sup>123</sup> John Gramlich, *Will states say 'no' to Adam Walsh Act?*, STATELINE.ORG, Jan. 23,

difficulties as do the provisions under 2250(a). Consequently, this article is focused on prosecutions for the crime of failing to register as defined in 2250(a). Nonetheless, it is important to recognize the national registry functions of SORNA because, as will become clear, courts often confuse those provisions with 2250(a).<sup>124</sup>

### B. Federal Court Response to Prosecutions under § 2250(a)

Thus far, no federal appellate court has issued an opinion as to the constitutionality of § 2250(a).<sup>125</sup> There have been at least eighty-one district court opinions issued in cases where constitutional challenges were raised concerning § 2250(a).<sup>126</sup> Seventy-three of those eighty opinions actually reached the constitutional questions before the district courts. Of those opinions, fifty-seven rejected all constitutional challenges made by sex offenders against SORNA.<sup>127</sup> Four opinions found an Ex Post Facto Clause

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2008.

<sup>124</sup> See *infra* note 236 and accompanying text.

<sup>125</sup> No federal appellate court has rendered an opinion on constitutional challenges to SORNA, but the Court of Appeals for the Eleventh Circuit, in *U.S. v. Madera*, 2008 U.S. App. LEXIS 11078 (11th Cir. 2008), found for the defendant on statutory grounds avoiding the constitutional questions. The Ninth Circuit and Eighth Circuit also issued opinions that did not resolve any constitutional questions. *United States v. Byun*, 2008 U.S. App. LEXIS 13846 (9th Cir. 2008) (holding that a non-categorical approach should be taken to determine if the underlying crime made a person a sex offender); *United States v. Jorge-Salgado*, 520 F.3d 840 (8th Cir. 2008) (holding that the district court did not abuse its discretion by making sex offender status a condition of supervised release).

<sup>126</sup> As of July 20, 2008, on Lexis-Nexis, there were eighty district court opinions issued in regards to the constitutionality of SORNA's crime of failure to register. There was also at least one opinion not yet available on Lexis-Nexis which found for the defendant on Commerce Clause grounds. *United States v. Waybright*, Not Currently Available on Lexis (D. Mont. 2008), available at: [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/files/waybright\\_awa\\_ruling.pdf](http://sentencing.typepad.com/sentencing_law_and_policy/files/waybright_awa_ruling.pdf). One opinion found a Commerce Clause violation. *United States v. Powers*, 544 F.Supp.2d 1331 (M.D. Fla. 2008).

<sup>127</sup> *United States v. Fuller*, 2008 U.S. Dist. LEXIS 46950 (N.D.N.Y. 2008); *United States v. Tong*, 2008 U.S. Dist. LEXIS 41589 (E.D. Ok. 2008); *United States v. Cochran*, 2008 U.S. Dist. LEXIS 41588 (E.D. Ok. 2008); *United States v. David*, 2008 U.S. Dist. LEXIS 38613 (W.D.N.C. 2008); *United States v. Ditomasso*, 2008 U.S. Dist. LEXIS 37870 (D. R.I. 2008); *United States v. Mason*, 2008 U.S. Dist. LEXIS 33850 (M.D. Fla. 2008); *United States v. Craft*, 2008 U.S. Dist. LEXIS 33860 (D. Neb. 2008); *United States v. Holt*, 2008 U.S. Dist. LEXIS 31523 (S.D. Ia.) ; *United States v. Akers*, 2008 U.S. Dist. LEXIS 30271 (N.D. Ind. 2008); *United States v. Villagomez*, 2008 U.S. Dist. LEXIS 26814 (W.D. Ok. 2008); *United States v. Villagomez*, 2008 U.S. Dist. LEXIS 26814 (W.D. Ok. 2008); *United States v. Pitts*, 2008 U.S. Dist. LEXIS 11071 (M.D. La. 2008); *Utesch*, 2008 U.S. Dist. LEXIS 40498; *United States v. Thomas*, 534 F. Supp. 2d 912 (N.D. Ia. 2008); *United States v. Hester*, 2008 U.S. Dist. LEXIS 9231 (N.D.N.Y. 2008); *United States v. Hacker*, 2008 U.S. Dist. LEXIS 7793 (D. Neb. 2008); *Samuels*, 543 F. Supp. 2d

violation when the indictment relied on allegations of conduct during the “gap period.”<sup>128</sup> Nine opinions found an Ex Post Facto Clause violation when the indictment relied on allegations of conduct before SORNA was enacted.<sup>129</sup> Two opinions found § 2250(a) to be an unlawful exercise of

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669; *LeTourneau*, 534 F. Supp. 2d 718; *United States v. Baccam*, 2008 U.S. Dist. LEXIS 5451 (W.D. Ark. 2008); *United States v. Dixon*, 2007 U.S. Dist. LEXIS 94257 (N.D. Ind. 2007); *United States v. Aldrich*, 2007 U.S. Dist. LEXIS 96455 (D. Neb. 2007); *United States v. Gould*, 526 F. Supp. 2d 538 (D. Md. 2007); *United States v. Brown*, 2007 U.S. Dist. LEXIS 91328 (S.D.N.Y. 2007); *United States v. Elliot*, 2007 U.S. Dist. LEXIS 91655 (S.D. Fla. 2007); *United States v. Adkins*, 2007 U.S. Dist. LEXIS 90737 (N.D. Ind. 2007); *Pitts*, 2007 U.S. Dist. LEXIS 82632; *Cardenas*, 2007 U.S. Dist. LEXIS 88803; *United States v. Carr*, 2007 U.S. Dist. LEXIS 81700 (N.D. Ind. 2007); *Levine v. Pennsylvania State Police*, 2007 U.S. Dist. LEXIS 76679 (M.D. Pa. 2007); *United States v. Gill*, 2007 U.S. Dist. LEXIS 76446 (D. Utah 2007) (court found for the defendant on statutory grounds, but still decided Ex Post Facto Clause argument against defendant); *United States v. Ambert*, 2007 U.S. Dist. LEXIS 75384 (N.D. Fla. 2007); *United States v. Beasley*, 2007 U.S. Dist. LEXIS 85793 (N.D. Ga. 2007); *United States v. Lovejoy*, 2007 U.S. Dist. LEXIS 72988 (D. N.D. 2007); *United States v. May*, 2007 U.S. Dist. LEXIS 70709 (S.D. Ia. 2007); *United States v. Kent*, 2007 U.S. Dist. LEXIS 69819 (S.D. Ala. 2007); *United States v. Mitchell*, 2007 U.S. Dist. LEXIS 66114 (W.D. Ark. 2007); *United States v. Lawrance*, 2007 U.S. Dist. LEXIS 75518 (W.D. Ok. 2007); *United States v. Kelton*, 2007 U.S. Dist. LEXIS 65430 (M.D. Fla. 2007); *United States v. Buxton*, 2007 U.S. Dist. LEXIS 76142 (W.D. Ok. 2007); *United States v. Bennett*, 2007 U.S. Dist. LEXIS 63152 (W.D. Ark. 2007); *United States v. Torres*, 2007 U.S. Dist. LEXIS 60119 (W.D. Ark. 2007); *United States v. Hulen*, 2007 U.S. Dist. LEXIS 60113 (W.D. Ark. 2007); *United States v. Sawn*, 2007 U.S. Dist. LEXIS 59382 (W.D. Va. 2007); *United States v. Gonzales*, 2007 U.S. Dist. LEXIS 58035 (N.D. Fla. 2007); *United States v. Marcantonio*, 2007 U.S. Dist. LEXIS 55645 (W.D. Ark. 2007); *United States v. Roberts*, 2007 U.S. Dist. LEXIS 54646 (W.D. Va. 2007); *Muzio*, 2007 U.S. Dist. LEXIS 54330 (court found for defendant on statutory grounds, but ruled against the Commerce Clause claim); *United States v. Lang*, 2007 U.S. Dist. LEXIS 56655 (W.D. Ok. 2007); *United States v. Husted*, 2007 U.S. Dist. LEXIS 56662 (W.D. Ok. 2007); *United States v. Lang*, 2007 U.S. Dist. LEXIS 56642 (W.D. Ok. 2007); *Muzio*, 2007 U.S. Dist. LEXIS 40294; *United States v. Mason*, 2007 U.S. Dist. LEXIS 37122 (M.D. Fla. 2007); *Hinen*, 487 F. Supp. 2d 747; *Markel*, 2007 U.S. Dist. LEXIS 27102; *United States v. Manning*, 2007 U.S. Dist. LEXIS 12932 (W.D. Ark. 2007); *United States v. Templeton*, 2007 U.S. Dist. LEXIS 8930 (W.D. Ok. 2007); *United States v. Madera*, 2007 U.S. Dist. LEXIS 3029 (M.D. Fl. 2007).

<sup>128</sup> *United States v. Davis*, 2008 U.S. Dist. LEXIS 17112 (W.D. La. 2008); *United States v. Terwilliger*, 2008 U.S. Dist. 375 (S.D. Ca. 2008); *United States v. Patterson*, 2007 U.S. Dist. LEXIS 83191 (D. Neb. 2007); *United States v. Cole*, 2007 U.S. Dist. LEXIS 68522 (S.D. Il. 2007).

<sup>129</sup> *United States v. Gillette*, 2008 U.S. Dist. LEXIS 28775 (D. V.I.); *United States v. Aldrich*, 2008 U.S. Dist. LEXIS 11411 (D. Neb. 2008); *United States v. Kent*, 2008 U.S. Dist. LEXIS 10044 (S.D. Al. 2008); *United States v. Howell*, 2008 U.S. Dist. LEXIS 7810 (N.D. Ia. 2008); *United States v. Bonner*, 2007 U.S. Dist. LEXIS 92248 (S.D. Ala. 2007); *United States v. Wilson*, 2007 U.S. Dist. LEXIS 76722 (D. Utah 2007); *United States v. Stinson*, 507 F. Supp. 2d 560 (S.D. W.V. 2007); *United States v. Dillenbeck*, 2007 U.S. Dist. LEXIS 66896 (D. S.C. 2007); *United States v. Bobby Smith*, 481 F. Supp. 2d 846 (E.D. Mich. 2007).

federal power inconsistent with the Commerce Clause.<sup>130</sup> Two opinions found a procedural due process violation.<sup>131</sup> Seven opinions avoided reaching the constitutional questions by rendering a finding on statutory grounds in favor of the defendant.<sup>132</sup>

Among the large majority of opinions that have upheld the constitutionality of § 2250(a), there has been a heavy reliance on the Supreme Court decisions in *Smith* and *DPS*. This reliance has extended to the citation of the two cases concerning claims unrelated to those reviewed by the Court in those cases.<sup>133</sup> While the decisions in *Smith* and *DPS* should certainly be addressed by any court reviewing a SORNA case, the failure to distinguish the statutes in those cases from the federal law is alarming.

SORNA bears many similarities to the Connecticut and Alaska statutes that the Court upheld against limited constitutional challenges. However, there are very substantial differences which give rise to new constitutional claims and potentially reinvigorate previous challenges that failed. The differences between SORNA and the state laws arise from distinctions in jurisdiction, statutory language, and effects of the respective statutes. Claims in three areas, two old and one new, should result in § 2250(a) being found unconstitutional: the Ex Post Facto Clause, procedural due process, and the Commerce Clause.

### III. SORNA AND THE EX POST FACTO CLAUSE

In *Smith*, the Court was persuaded by arguments that the Alaska sex offender registration and notification law did not violate the Ex Post Facto

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<sup>130</sup> *United States v. Powers*, 544 F.Supp.2d 1331 (M.D. Fla. 2008); *Waybright*.

<sup>131</sup> *Aldrich*, 2008 U.S. Dist. LEXIS 11411 (Aldrich also found an Ex Post Facto Clause violation); *United States v. Barnes*, 2007 U.S. Dist. LEXIS 53245 (S.D.N.Y. 2007).

<sup>132</sup> *United States v. Rich*, 2007 U.S. Dist. LEXIS 89609 (W.D. Mo. 2007); *United States v. Rich*, 2007 U.S. Dist. LEXIS 91131 (W.D. Mo. 2007); *United States v. Deese*, 2007 U.S. Dist. LEXIS 70677 (W.D. Ok. 2007) (court avoided finding an Ex Post Facto violation by finding that the statute should not be interpreted to apply retrospectively); *United States v. Sallee*, 2007 U.S. Dist. LEXIS 68350 (W.D. Ok. 2007) (court avoided finding an Ex Post Facto violation by finding that the statute should not be interpreted to apply retrospectively); *United States v. Heriot*, 2007 U.S. Dist. LEXIS 54807 (D. S.C. 2007); *United States v. Marvin Smith*, 2007 U.S. Dist. LEXIS 43040 (S.D. W. Va. 2007); *United States v. Kapp*, 2007 U.S. Dist. LEXIS 38849 (M.D. Pa. 2007).

<sup>133</sup> For example, the Ninth Circuit in *U.S. v. Byun* in finding against the defendant concerning the interpretation of a statutory element found the holding of *Smith* to be persuasive on the issue. *Byun*, at n.14 (noting that, “[h]ere, however, we are faced not with a statute that imposes criminal punishment, but rather with a civil statute creating registration requirements. *See Smith v. Doe*, 538 U.S. 84, 105-06 (2003) (holding that Alaska’s sex offender registration statute is civil and nonpunitive, and therefore retroactive application of the Act does not violate the Ex Post Facto clause).”).

Clause. However, the statutory differences between SORNA and the Alaska statute are so significant that, unlike the Alaska statute, § 2250(a) should be struck down on the grounds reviewed in *Smith*. As was the case in *Smith*, the proper analysis of an Ex Post Facto Clause challenge requires a determination if a statute is retrospective and whether it is intended to be punitive. If it is not punitive, a court must consider whether the effects of the law are so punitive as to override the intent of the legislature.

A. *Section 2250(a) is Retrospective*

In *Smith* the Court quickly found that the Alaska statute was retrospective.<sup>134</sup> Since the statute included persons in the registry based upon prior convictions for sexual offenses, there was no real argument on the issue of whether the Alaska statute was retrospective. In a typical § 2250(a) case, an indictment might include up to three different allegations that are retrospective: 1) the prior sex offense conviction which was the only retrospective component in *Smith*; 2) interstate travel before the passage of SORNA (or the Attorney General's statement on retroactivity); and 3) failure to register before the passage of SORNA (or the Attorney General's statement on retroactivity). Based upon the promulgation of the Attorney General statement that the statute applies to crimes prior to the passage of the Act and the holding in *Smith*, there should be no dispute that § 2250(a) is retrospective.

However, district courts across the nation have reached a different conclusion. Despite the fact that SORNA has the same retrospective component as did the Alaska statute in addition to two other potential retrospective issues, about half of the courts that have rejected Ex Post Facto challenges to § 2250(a) have done so based upon a finding that the statutory provision was not retrospective. Strangely, even among those courts that have found an Ex Post Facto violation, none has concluded that the act was retrospective based only upon the inclusion of past crimes.<sup>135</sup>

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<sup>134</sup> *Smith*, 538 U.S. at 90.

<sup>135</sup> The explanation for this seeming contradiction probably stems from the vague wording of § 2250(a)(1). That section states that a defendant must be "... required to register under the Sex Offender Registration and Notification Act" as an element of the crime. To determine whether a person is "required" necessitates a review of 42 U.S.C. § 16913. Section 16913(d) leaves to the Attorney General whether registration obligations exist for persons who have committed sex crimes previous to the passage of SORNA. Since the Attorney General has now made the decision to make § 16913 retrospective, the net result of § 2250(a)(1) is to make § 2250(a) a retrospective crime. It is unclear why district courts have not reached this determination based upon a proper reading of the statute.

The primary argument offered by courts for why § 2250(a) is not retrospective is that the failure to register under § 2250(a) is a “new offense.” Therefore the punishment under the section is unrelated to prior bad acts by the defendant.<sup>136</sup> Stated another way, § 2250(a), “does not criminalize the fact that the Defendant committed a sex offense prior to the statute's enactment.”<sup>137</sup> Several courts have concluded that even when a defendant engaged in interstate travel and failed to register before the passage of the Act, the statute is not retrospective. Such courts have relied on three arguments to support the contention that the Act is not retrospective.

First, courts have held that “...SORNA is not criminalizing the defendant's interstate travel or his having been convicted of a sex offense, but rather his post-enactment failure to register...”<sup>138</sup> This interpretation, while facially appealing, ignores the construction of § 2250(a). In cases where the sex offender was previously convicted under state law, interstate travel is an essential element of the crime. It is functionally equivalent to the failure to register. Without both elements, a person previously convicted of a state sex crime cannot be found guilty of a § 2250(a) violation. The government has the burden to prove that the offender did travel in interstate commerce and was convicted of a prior sex offense. While the court may perceive the failure to register as the more important element, it is simply wrong to say the interstate travel and a prior sex offense are not parts of the acts that are criminalized.

Second, courts have held that failing to register is a continuing act occurring after the passage of SORNA and the date of travel and prior sex offense are wholly irrelevant.<sup>139</sup> In such cases, the indictment merely

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<sup>136</sup> See, e.g., *Gould*, 526 F. Supp. 2d at 548 (noting that, “Indeed, only upon an offender's failure to register under SORNA, a new offense, do the enhanced penalties apply. Accordingly, SORNA does not violate the Ex Post Facto Clause.” (internal citation omitted)).

<sup>137</sup> *Cardenas*, 2007 U.S. Dist. LEXIS 88803 at \*27.

<sup>138</sup> *Lang*, 2007 U.S. Dist. LEXIS 56642 at \*8.

<sup>139</sup> See, e.g., *Dixon*, 2007 U.S. Dist. LEXIS 94257 \*7-\*8 (noting that, “[t]he ex post facto clause does not foreclose this prosecution.... Mr. Dixon contends ... he already had traveled and failed to register by the time SORNA was enacted.... Mr. Dixon had a continuing duty to register after traveling in interstate commerce. He did not do so and (as the court understands the facts) had not done so by or within the time period alleged in the indictment.”); *Carr*, 2007 U.S. Dist. LEXIS 81700 at \*2, \*6-\*8 (accepting the government position that, “the ex post facto clause is only implicated when all of the elements of an offense have been completed before a statute's effective date. The government contends that the offense of failing to register is not completed until a sex offender knowingly fails to register under SORNA, and that a person can only knowingly fail to register under SORNA after it went into effect.”); *Lawrance*, 2007 U.S. Dist. LEXIS 75518 at \*11-\*12 (noting that, “[t]he offense set forth in § 2250 is potentially a continuing one, as a

alleges any act that occurred after the passage of SORNA. Taken to its logical conclusion, this interpretation of the statute would create the absurd result of allowing the government to issue a separate § 2250(a) count for each moment in time that a defendant failed to register. The language of the statute also supports an interpretation that the offense is not continuing. The element requirements that the offender “travels” and “fails to register” are both written in the present tense. Such language supports the contention that the Act be construed as “contemplat[ing] a single act even though there may be continuing effects.”<sup>140</sup> Further, the offense is complete at the moment the offender fails to register at the required time – no further actions make it a continued offense.<sup>141</sup>

Even accepting a violation of § 2250(a) is a continuing offense, it does not squarely address the situation wherein a defendant traveled between states, an element of the crime, before the enactment of § 2250(a). Courts upholding SORNA against ex post facto claims have advanced the argument that if any portion of the defendant’s criminal actions occurred after the passage of the Act, then there was no retrospective application of the penalties under SORNA.<sup>142</sup> Thus, defendants who traveled between states prior to the passage of SORNA could be prosecuted.<sup>143</sup> This argument turns the Ex Post Facto Clause on its head. The government would be free to punish any criminal conduct that occurred prior to passing a statute as long as it included a single element of the crime that occurred after passing the act. This element could be something that is in itself wholly non-criminal (such as a requirement that a defendant travel between states after passing the act).

Based upon any reasonable reading of § 2250(a) after the promulgation of the Attorney General’s statement on retroactivity, it is clear that the crime of failing to register as applied in many cases is retrospective. Courts should reach the same determination as the Court did in *Smith* – sex

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convicted sex offender has an ongoing duty to register and maintain a current registration; a violation of that duty continues to occur so long as the convicted offender remains unregistered or fails to take steps to keep his registration current.”)

<sup>140</sup> *Wilson*, 2007 U.S. Dist. LEXIS 76722 at \*6 (quoting *United States v. Dunne*, 324 F.3d 1158, 1165 (10th Cir. 2003)).

<sup>141</sup> *Wilson*, 2007 U.S. Dist. LEXIS 76722 at \*4-\*5; *Beasley*, 2007 U.S. Dist. LEXIS 85793 at \*9-\*10.

<sup>142</sup> *See, e.g., Adkins*, 2007 U.S. Dist. LEXIS 90737 at \*12 (noting that, “... it is not relevant that some elements of the offense in this case occurred prior to the applicability of SORNA to the Defendant, namely the obligation to register and the interstate travel. What is relevant is that the Defendant remained unregistered in the state of Indiana after SORNA became applicable to him.”).

<sup>143</sup> *See, e.g., Pitts*, 2007 U.S. Dist. LEXIS 82632 at \*13 -\*17 (finding no Ex Post Facto violation even though the indictment against the defendant only alleged interstate travel prior to the enactment of SORNA).

offender registration and notification requirements which include prior acts by the defendant are necessarily retrospective.

*B. The Punitive Intent of § 2250(a)*

The next step in an Ex Post Facto Clause analysis is determined if the legislative body adopting the statute at issue intended the statute to be punitive. If the intent is punitive, that ends the analysis in favor of the challenge to the statute.

Unlike the statute in *Smith*, there should be little ambiguity as to whether § 2250(a) was intended to be punitive. The statute was placed in the criminal code and included a prison term of up to ten years.<sup>144</sup> While other portions of SORNA, such as the formation of the national registry, are ostensibly regulatory, there is little to suggest § 2250(a) was intended to serve a similar civil function.<sup>145</sup> Nonetheless, most courts have not found that Congress' intent was punitive.<sup>146</sup> Typically, courts have read *Smith* as "essentially compel[ing] that conclusion."<sup>147</sup>

The opinion in *Smith* only considered whether it was punitive for a sex offender to be listed on the state registry. The opinion should have no controlling authority on whether prosecuting someone for the crime of failing to register is punitive.<sup>148</sup> Nonetheless, courts have entirely missed that distinction and have cited *Smith* as foreclosing any Ex Post Facto

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<sup>144</sup> *Bobby Smith*, 481 F. Supp. 2d at 852-53 (noting that, "The Supreme Court held in *Smith* that the Alaska legislature selected 'civil.' In the instant case, Congress picked 'criminal,' the felony failure to register violation in Title 18 of the Federal Code: Crimes and Criminal Procedure.").

<sup>145</sup> *Kent*, 2007 U.S. Dist. LEXIS 69819 at \*6 (noting that "it is obvious that 18 U.S.C. § 2250 was meant to be punitive, hence the possible ten year sentence.").

<sup>146</sup> *See, e.g., Pitts*, 2007 U.S. Dist. LEXIS 82632 at \*16-\*17 (noting that, "[a]s to the first prong of the test, the Congress clearly intended this to be a civil, nonpunitive, regulatory regime. Congress stated that intent in the text of the statute by declaring that the Sex Offender Registration and Notification Act was established '[i]n order to protect the public from sex offenders and offenders against children.' See 42 U.S.C. § 16901. Nothing in the Walsh Act suggests that this was intended to be anything else."); *But see, Bonner*, 2007 U.S. Dist. LEXIS 92248 at \*5 (noting that, "... it is obvious that 18 U.S.C. § 2250 was meant to be punitive, hence the possible ten year sentence.").

<sup>147</sup> *Lang*, 2007 U.S. Dist. LEXIS 56642 at \*5.

<sup>148</sup> *Beasley*, 2007 U.S. Dist. LEXIS 85793, at \*7 ("[i]n *Smith*, the issue was whether the registration requirement within Alaska's Sex Offender Registration Act violated the Ex Post Facto Clause as to sex offenders convicted before the enactment of those requirements.... Here, the issue is very different. It is whether imposing criminal penalties for traveling to and residing in a new state and not registering as a sex offender in that new state at a time before the Attorney General issued his interim regulation violates the Ex Post Facto Clause.").

Clause challenge.<sup>149</sup> This reliance in *Smith* is shocking given that the majority opinion expressly stated that it was not considering the type of challenge brought as the result of a criminal prosecution under § 2250(a). The Court limited its holding by noting that:

A sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, but any prosecution is a proceeding separate from the individual's original offense. Whether other constitutional objections can be raised to a mandatory reporting requirement, and how those questions might be resolved, are concerns beyond the scope of this opinion.<sup>150</sup>

Because *Smith* was a civil action contesting whether the listing on the registry was an Ex Post Facto violation, the Court simply did not address whether any subsequent criminal prosecution could be applied to acts committed before the Alaska statute was passed.<sup>151</sup>

The primary reason that courts have relied heavily on the outcome in *Smith* is that they saw the federal and state statutes and purposes of those statutes to be aligned.<sup>152</sup> The purpose stated for SORNA specifically and

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<sup>149</sup> The decision in *Pitts*, 2008 U.S. Dist. LEXIS 1107 at \*6-\*7, is an example of the failure to recognize the distinction between whether listing is punitive and whether serving prison time for failing to register is punitive. The Court rejected the distinction as follows:

Pitts acknowledges that *Smith v. Doe*, precludes any ex post facto attack upon the civil registration and notification requirements of the Sex Offender Registration and Notification Act. He argues however that *Smith* is not controlling on the issue of whether the government may enforce the criminal penalties provided by 18 U.S.C. § 2250 against a defendant who traveled in interstate commerce prior to either the enactment of the Walsh Act or the Attorney General's promulgation of the interim rule. The criminal act with which Pitts is charged, however, is his failure to register or update his registration after enactment of the Walsh Act. As defense counsel has noted, the element of interstate travel included in § 2250(a) is a jurisdictional element. It serves as an invocation of congressional power to create binding legislation and does not criminalize interstate travel. Therefore, the interstate travel element does not inflict retroactive punishment and the application of 18 U.S.C. § 2250 to this defendant does not violate the Ex Post Facto Clause.

*Id.* at \*6-\*7.

<sup>150</sup> *Smith*, 538 U.S. at 101-02.

<sup>151</sup> One district court explained the clarity of the distinction between the holding in *Smith* and its application to prosecutions under 2250(a):

[T]his Court finds those courts' reliance on the Supreme Court's holding in *Smith v. Doe* misplaced. In particular, *Smith v. Doe* involved a 42 U.S.C. § 1983 challenge by two convicted sex offenders who were required to register under the Alaska Sex Offender Registration Act, not a criminal prosecution. Thus, while the Supreme Court found that the registration requirements under the Alaska statute were not punitive in nature, the Court never addressed the question of whether a separate proceeding for a criminal prosecution for failure to comply with the statute could run afoul of the Constitution, if applied retroactively.

*Elliot*, 2007 U.S. Dist. LEXIS 91655, at \*11.

<sup>152</sup> See, e.g., *Pitts*, 2007 U.S. Dist. LEXIS 82632 at \*16-\*17; *Mason*, 2007 U.S. Dist. LEXIS 37122 at \*12-\*13.

the AWA generally was “to protect the public from sex offenders and offenders against children.”<sup>153</sup> From that brief statement of a “public safety,”<sup>154</sup> courts have inferred a non-punitive purpose of § 2250(a).<sup>155</sup> It is a mistake for courts to rely on such a statement to determine Congressional intent. That statement of purpose could apply to any wholly criminal and punitive law which applied penalties to sex offenses.

The placement of § 2250(a) in the criminal code is also quite notable as to Congressional intent. However, even courts that have recognized the placement within the criminal code have nonetheless concluded that the overall civil intent of the AWA is more significant.<sup>156</sup> These courts have concluded that because the majority of the statute was placed in Title 42 the U.S. Code (concerning public health and welfare), that fact outweighs the placement of § 2250(a) in Title 18 (the criminal code).<sup>157</sup> This argument would allow Congress to turn any criminal law into a regulatory one simply by packaging the criminal provisions with many related civil provisions.

Some courts have argued that *Smith* controls because that statute also attached criminal penalties for failure to register.<sup>158</sup> That argument ignores the very different procedural posture between *Smith* and prosecutions under § 2250(a). At no point in *Smith* did the Court consider the criminal penalty

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<sup>153</sup> 42 U.S.C. § 16901.

<sup>154</sup> *Hinen*, 487 F. Supp. 2d at \*755.

<sup>155</sup> *See, e.g., Buxton*, 2007 U.S. Dist. LEXIS 76142 at \*11 (noting that, “Congress expressly stated that the purpose of SORNA was ‘to protect the public from sex offenders and offenders against children’. This Court concurs with the above cases wherein the courts concluded that SORNA’s stated purpose is non-punitive.” (internal citation omitted)).

<sup>156</sup> *See, e.g., Cardenas*, 2007 U.S. Dist. LEXIS 88803 at \*29 (noting that, “Like the Alaska statute in *Smith*, SORNA was entirely codified in a section of the code, civil in nature, which is devoted to ‘Public Health and Welfare,’ with the exception of the new federal failure to register crime which is codified in Title 18. The preponderance of SORNA relates to a national registration system that cures defects in the state systems and provides uniformity in the management of sex offender registration information. For these reasons, this Court finds that SORNA is a civil, non-punitive law.”); *Buxton*, 2007 U.S. Dist. LEXIS 76142 at \*11.

<sup>157</sup> *See, e.g., Hinen*, 487 F. Supp. 2d at 756 (noting that, “SORNA is codified in Title 42, which deals with provisions relating to the public health and welfare. Though the FFR provision was placed in Title 18, which deals with crimes and criminal procedure, the majority of the Act was codified in Title 42. The placement of SORNA in Title 42 of the United States Code is yet another indication that Congress believed it was creating a civil, nonpunitive regime for the purpose of public safety.”).

<sup>158</sup> *See, e.g., Adkins*, 2007 U.S. Dist. LEXIS 90737 (noting that, “The Defendant next argues that an even more important distinction is that ‘the Alaskan Statute was not tied to a criminal statute.’ However, the Alaskan statute was tied to a criminal statute. Under the Alaskan regime, a ‘sex offender who knowingly fails to comply with the Act is subject to criminal prosecution.’” (internal citation omitted); *Torres*, 2007 U.S. Dist. LEXIS 60119 at \*4 (noting that, “[f]ailure to register under the Alaska law carried a criminal penalty, just as 18 U.S.C. § 2250 does for failure to register under SORNA.”).

for non-compliance because that issue was not properly before the Court. In contrast, § 2250(a) prosecutions only revolve around the potential prison sentence for failing to provide information. Further, the argument that the Alaska statute included a criminal penalty ignores a substantial difference in magnitude of penalty. SORNA authorizes a fine and sentence up to ten years for a single violation.<sup>159</sup> The statute at issue in *Smith* considered a first time failure to register as a “Class A Misdemeanor.”<sup>160</sup>

Other portions of the decision in *Smith* also indicate that courts should find that § 2250(a) was intended to be punitive. The Court in *Smith* considered the procedural protections afforded and the agency charged with promulgating implementing regulations for the statute. Because the Alaska Department of Public Safety served a dual function, the Court inferred that its control of promulgating regulations did not indicate a punitive intent.<sup>161</sup>

In the case of SORNA, the agency with authority to draft promulgating regulations is very different than the one in Alaska. SORNA provides for the creation of SMART. This office’s sole duty is to administer and implement the provisions of SORNA. Consequently, in contrast to the Alaska Department of Public Safety, SMART serves no other civil regulatory functions to indicate a civil nature.

Few courts have addressed the agency issue specifically. However, the response to the argument has simply been to argue that the agency in control does “not necessarily render the Act punitive.”<sup>162</sup> While certainly true, the Supreme Court has made clear that the agency in control should factor into the overall calculation. Thus far, no court has seriously entertained that argument in examining *Smith*.

District courts have seemingly relied on the outcome in *Smith* to determine legislative intent without reviewing the reasoning behind that outcome. The Court in *Smith* made clear it was not considering the criminal penalties for failure to register. Section 2250(a)’s punishment provisions, placement in the criminal code, and agency controlling implementation all give clear indications of Congress’ punitive intent.

### C. Punitive Effects of § 2250(a)

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<sup>159</sup> 18 U.S.C. § 2250(a).

<sup>160</sup> 1998 AK. ALS 106. Alaska has subsequently amended its statute to make a first time violation a Class C Felony. Alaska Stat. § 11.56.835

<sup>161</sup> Id. (noting that, “... aside from the duty to register, the statute itself mandates no procedures. Instead, it vests the authority to promulgate implementing regulations with the Alaska Department of Public Safety, §§ 12.63.020(b), 18.65.087(d) – an agency charged with enforcement of both criminal and civil regulatory laws.”)

<sup>162</sup> *Adkins*, 2007 U.S. Dist. LEXIS 90737, at \*11.

Even assuming that Congress' intent in passing § 2250(a) was civil in nature, courts should still find that, in many cases, there is an Ex Post Facto Clause violation. The next step in the ex post facto analysis is to determine if the effects were so punitive as to override the intent of Congress. A defendant must show that the effects of a statute are "so punitive either in purpose or effect as to negate [the legislature's] intention to deem it 'civil.'"<sup>163</sup> A problem with any challenge based upon punitive effects to a registration scheme under the Ex Post Facto Clause is that the Supreme Court requires the "clearest proof" that a statute is so punitive as to override the intent that the statute be regulatory in nature.<sup>164</sup>

Similar to the process used by district courts for other challenges to § 2250(a), courts have used a superficial, mechanical application of the decision in *Smith* in reviewing the punitive effects of the provision. The court in *Hinen* provided a typical analysis of the punitive effects of SORNA:

Undertaking a similar analysis [as in *Smith*] is unnecessary in this case, since the effects of the federal registration requirements are nearly identical compared to those involved with the Alaska statutory scheme at issue in *Smith*, I am bound to follow *Smith's* conclusion that the effects of sex offender registration requirements do not negate legislative intent that such registration requirements be nonpunitive....

This statute varies from the Alaska statute in only one respect. Under SORNA, a sex offender is required to make periodic in-person appearances to provide an updated photograph and verify registration information. Such in-person appearances were not required under the Alaska statute. However, the mere requirement that a person keep his registration information current by personal appearance does not indicate that SORNA is punitive in effect.<sup>165</sup>

The statement that the "only" difference between the Alaska statute and SORNA can only be based upon the most cursory examination of the two laws. A review of the relevant *Mendoza-Martinez* factors illustrates the distinctions between the Alaska and federal laws. For § 2250(a) all five of the factors discussed in *Smith* as well as one other are relevant and discussed below.

#### 1. Historical or Traditional Punishment

In *Smith*, the Court was faced with the question of whether listing on a registry and resultant community notification of the registry information

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<sup>163</sup> *Smith*, 538 U.S. at 92 (quoting *Kansas v. Hendricks*, 521 U.S. 346 (1997)).

<sup>164</sup> 538 U.S. at 92.

<sup>165</sup> *Hinen*, 487 F. Supp. 2d at 756-57, n.8.

was similar to traditional or historical punishments. While the Court considered analogies to shaming and banishment punishments, it ultimately concluded that listing on a registry was not punitive.

In reviewing § 2250(a), the analysis should be quite different. Instead of reviewing the punitive effects of listing in a registry, a court should recognize the rather obvious point that a sentence of up to ten years in prison is historically, traditionally, and currently regarded as punishment. As a result, a court should find that this factor weighs heavily in the defendant's favor.

## 2. Affirmative Disability or Restraint

In *Smith*, the Court addressed whether the Alaska registry statute created an affirmative restraint or disability. It considered social effects like limited housing and employment options and provisions for reporting by the offender. Given that the social effects were attenuated from the statute and the other limits on the sex offenders were minor, the Court concluded that no such restraint existed. With § 2250(a), however, the restraints and disabilities on the offender are more pronounced.

A critical difference between the Court's decision in *Smith* and the opinion of the Ninth Circuit in reviewing the same case was whether a personal appearance was required for registration. If such an appearance was regularly required, it could constitute an affirmative restraint on the sex offender. As the Court explained:

The Court of Appeals reasoned that the requirement of periodic updates imposed an affirmative disability. In reaching this conclusion, the Court of Appeals was under a misapprehension, albeit one created by the State itself during the argument below, that the offender had to update the registry in person. The State's representation was erroneous. The Alaska statute, on its face, does not require these updates to be made in person. And, as respondents conceded at the oral argument before us, the record contains no indication that an in-person appearance requirement has been imposed on any sex offender subject to the Act.<sup>166</sup>

Because the Ninth Circuit had been misinformed about whether a personal appearance was required for registration, it concluded that the Alaska statute did create an affirmative restraint on a sex offender. The Supreme Court, having a corrected record, found that no such restraint existed because there was no requirement for personal appearances.

SORNA requires all three tiers of sex offenders to engage in periodic personal appearances for registration. For Tier I offenders, personal

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<sup>166</sup> 538 U.S. at 101. (internal citation omitted)

appearances for verification of registry information and updating of the offender's photograph is a yearly requirement.<sup>167</sup> For Tier II offenders, appearances are required every six months.<sup>168</sup> And Tier III offenders must appear in person every three months.<sup>169</sup>

The personal appearance requirements of SORNA put the statute in a very different category than the Alaska statute. For Tier III offenders, an offender will have at least four required appearances for the duration of their lives. Such a requirement is consistent with those cases wherein the Court has found a clear affirmative restraint.<sup>170</sup> Further, the possibility of a prison sentence undoubtedly represents the "paradigmatic affirmative disability or restraint."<sup>171</sup> Because of the significant personal appearance requirements of SORNA and the possibility of imprisonment, the language of the *Smith* court indicates that a Court of Appeals or the Supreme Court should find that SORNA does in fact affirmatively restrain a sex offender.

### 3. Traditional Aims of Punishment

As noted earlier, the issue in *Smith* was simply whether the Alaska registry and notification requirements served a traditional aim of punishment. The *Smith* Court rightfully noted that simply because a statute deters regulated persons from illicit conduct does not indicate that the law is punitive.<sup>172</sup> To reach the opposite conclusion would potentially call into question a variety of legitimate government regulation.<sup>173</sup>

With § 2250(a), however, the traditional aims of punishment are much clearer in the statute. A person who is sentenced for failing to register will suffer retribution and be incapacitated. And the sentencing of sex offenders will send a specific and general deterrence message. Consequently, whereas the Alaska statute could viably be distinguished from serving traditional punishment aims, § 2250(a) embodies every example of such aims.

### 4. Rational Connection to a Non-punitive Purpose

The rational connection to a non-punitive purpose is the factor that the Court considered most important in *Smith*. The "public safety" rationale applies in the case of § 2250(a) as it did in *Smith*. However, if the "public

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<sup>167</sup> 42 U.S.C. § 16916(1).

<sup>168</sup> 42 U.S.C. § 16916(2).

<sup>169</sup> 42 U.S.C. § 16916(3).

<sup>170</sup> *Johnson v. United States*, 529 U.S. 694 (2000).

<sup>171</sup> *Smith*, 538 U.S. at 100.

<sup>172</sup> *Smith*, 538 U.S. at 102.

<sup>173</sup> *Id.*

safety” rationale is treated as wholly civil then it is hard to imagine any criminal statute that would be found punitive. Every criminal law is aimed at protecting public safety. Offenders are meant to be deterred from acting criminally. If they do violate the law, they are punished. If the rational connection to a non-punitive purpose factor is read so broadly then it is hard to imagine any statute that would not survive an Ex Post Facto Clause claim. The only apparent rejoinder to such a concern is whether the statute under review is excessive in relation to the non-punitive purpose. As a result, after the Court’s decision in *Smith*, it is difficult to discuss the rational connection factor without also discussing the excessiveness factor.

#### 5. Excessiveness in Relation to Non-Punitive Purpose

The limited effects of the Alaska statute on the offenders could not have been deemed excessive if the goal of public safety was served. This was because the Alaska statute was only considered with its limited requirements and minor penalties. Section 2250(a), however, has requirements that go beyond what is needed to secure public safety. Even without sex offender cooperation, the federal government can get all (or almost all) of the sex offender registry information from states and public records. As a result, the degree to which offender compliance is required is minimal in relation to the public safety rationale.

In contrast, the penalties for violation of § 2250(a) are quite high. A person who served no prison time for a sex offense misdemeanor could find him- or herself in prison for up to ten years for failing to register. At a minimum, an offender convicted under § 2250(a) will be sentenced to at least a year in prison. There is no sense of proportionality in applying a penalty for an offender deemed safe enough to serve no prison time for their original crime, but has to serve a long prison sentence for failing to serve an administrative function. Consequently, courts should find that unlike the statute in *Smith*, § 2250(a) is excessive in relation to the non-punitive public safety purpose.

#### 6. Behavior Already Criminal

One factor that the Court did not consider in *Smith* was whether the behavior regulated was already defined as criminal. That was because there was no “behavior” being regulated by the inclusion of information in a registry. In contrast, failing to register is the behavior that is regulated by § 2250(a). Since every state and federal territory has previously adopted a criminal law for failing to register under state registry requirements, the behavior regulated by SORNA is already defined as criminal. This point has

been made especially clear because before any state had complied with the requirements of SORNA, the government prosecuted sex offenders under § 2250(a) for failing to register under state law. Because the behavior regulated by § 2250(a) is already criminal, any district court should also consider this factor that was not at issue in *Smith* and find it in favor of the defendant.

#### *D. Resolving the Violation of the Ex Post Facto Clause*

The reliance on the outcome in *Smith* as the basis for district court opinions has created a set of nonsensical results in regards to Ex Post Facto Clause challenges to SORNA. According to the majority of district court precedents, it is constitutionally permissible for Congress to create a criminal law which includes a heavy penalty for violation and as the elements of those crimes past conduct by persons. Such a situation is directly at odds with the meaning of the Ex Post Facto Clause and the language of the *Smith* opinion. The Court in *Smith* wrote that it was not reviewing the meager criminal penalties of the Alaska statute. Further, the opinion in *Smith* quickly dismissed any government argument that the statutes were not retrospective. Based upon the opinion in *Smith*, the logical outcome should be a finding that § 2250(a) is retrospective and punitive in intent (and thus not even reaching the more difficult punitive effects question). As a result, district courts should dismiss indictments against persons whose sex offenses, failure to register, or alleged interstate travel were prior to the Attorney General's statement of retroactivity.

While courts should act to repair the damage done to ex post facto doctrine, Congress or the Attorney General could correct the problems with § 2250(a) without any court intervention. Congress could simply amend § 16913(d) or § 2250(a) to exclude prior sex offenses and prior interstate travel by offenders. This would put § 2250(a) in line with every other federal criminal statute and make the crime of failing to register operate in a way consistent with the Ex Post Facto Clause. Because SORNA delegated the decision of retroactivity to the Attorney General, that executive office could act similarly to Congress by changing its prior determination on retroactivity. By issuing a new rule, the Attorney General would put the Act in accordance with the constitutional requirements of the Ex Post Facto Clause.

#### IV. SORNA AND PROCEDURAL DUE PROCESS

The Fifth Amendment of the Constitution provides that “[n]o person ... shall ... be deprived of life, liberty, or property, without due process of

law.”<sup>174</sup> Due process is a large umbrella under which many individual rights exist. Among those protected is a limited right to fair warning or notice.<sup>175</sup> The exact confines against the fair notice right are largely undefined due to the limited case law concerning the scope of the right.

However, in perhaps the most significant Supreme Court opinion concerning fair warning, *Lambert v. California*, the Court held that a statute requiring a felon to register with the City of Los Angeles without notice was inconsistent with the Due Process Clause of the Fifth Amendment.<sup>176</sup> The Court held that because the defendant was unaware of the registration requirements, it would be unconstitutional to punish her under the registration law:

Engrained in our concept of due process is the requirement of notice.... Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act.... the principle is equally appropriate where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case.<sup>177</sup>

Critical to the Court’s reasoning in *Lambert* was that the defendant’s obligation to register was only based upon her status as a felon. To the Court, it was a basic violation of a person’s Fifth Amendment rights to punish him or her for a crime of omission without any notice of the duty of registration. While the decision in *Lambert* was fifty years ago, the fair notice principle embodied within the opinion continues to have resonance with the modern court in cases like *U.S. v. Lanier*.<sup>178</sup>

#### A. Court Response to Lambert Challenges to § 2250(a)

Despite the seemingly clear applicability of *Lambert*, courts that have reviewed procedural due process claims have rarely discussed the opinion.<sup>179</sup> Typically, courts cite the Supreme Court’s decision in *DPS* to support the contention that a defendant has no viable procedural due process claim.<sup>180</sup> This citation to *DPS* is inapplicable because the due process issue

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<sup>174</sup> U.S. Const. amend. V.

<sup>175</sup> *U.S. v. Lanier*, 520 U.S. 259, 265 (1997).

<sup>176</sup> 355 U.S. 225 (1958).

<sup>177</sup> *Id.* at 228.

<sup>178</sup> 520 U.S. 259, 265 (1997) (holding that, “that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.”).

<sup>179</sup> This may have simply been the result of how the cases were briefed. The trend does seem to be changing, however, as several recent opinions have at least discussed *Lambert* before finding no procedural due process violation.

<sup>180</sup> See, e.g., *Mason*, 2007 U.S. Dist. LEXIS 37122 at \*16.

in that case was different. *DPS* concerned whether a person was entitled to a separate hearing before being listed on the state registry. Among those courts that have addressed *Lambert* and found against the defendant, there have been four distinctions made.

First, the fact that sex offenders have notice of state registration requirements has been the key point for every court that has rejected the defendant's argument based upon *Lambert*.<sup>181</sup> As to such courts,<sup>182</sup> there are substantial problems in holding that notice of state requirements provides notice of federal requirements. The courts' position that state requirements provide notice treats § 2250(a) as an "empty vessel" duplicating state laws, a claim which is not supported by the provisions of

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<sup>181</sup> See, e.g., *Cochran*, 2008 U.S. Dist. LEXIS 41588 at \*3 (noting that, "[a]s the government notes, a defendant's awareness of his duty to register under state law has been accepted as satisfactory for Due Process Clause purposes in a majority of district courts."); *LeTourneau*, 534 F. Supp. 2d at 722-23 (noting that, "The issue of notice in SORNA is different from the situation presented to the United States Supreme Court in *Lambert v. California*, where a conviction for failure to register was overturned because the defendant had no actual knowledge of a duty to register as a felon. The *Lambert* holding only applies when a 'person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case.' *Lambert* is inapplicable to the vast majority of cases under SORNA because most defendants have been shown to be well aware of their duty to keep their registration current and to update their registration upon moving to a new state." (internal citations omitted)); *Gould*, 526 F. Supp. 2d at 544 (noting that, "*Lambert* is inapplicable to this case. Gould was well aware of his duty to update his registration in Pennsylvania, and he had previously been convicted of failing to provide necessary registration information in West Virginia. Thus, when Gould moved to Maryland, and failed to register, his prior knowledge of a duty to register under state law qualified as effective notice under SORNA."); *May*, 2007 U.S. Dist. LEXIS 70709 at \*17 (noting that, "[b]oth Defendants knew they had an obligation to keep their sex offender registrations current and received plenty of information regarding those registration obligations.").

<sup>182</sup> See, e.g., *Howell*, 2008 U.S. Dist. LEXIS 7810 at \*28 (noting that, "[h]ere it undisputed, for the purposes of defendant Howell's motion to dismiss, that the laws of the State of Michigan, both before and after the enactment of SORNA, required defendant Howell to register as a sex offender. Defendant Howell registered as a sex offender with the State of Michigan, and he registered as a sex offender there. Moreover, there is no dispute that under the laws of Iowa, the facts alleged in the indictment give rise to a duty for a sex offender such as defendant Howell to register with the state. Defendant Howell, therefore, had sufficient notice that a failure to register was illegal..."); *Samuels*, 543 F. Supp. 2d at 673 (noting that, "[i]n this case, Samuels was well aware of his duty to update his registration in New York for ten years. Thus, when he moved to Kentucky and failed to register or update his registration, his prior knowledge of a duty to register under state law qualified as effective notice under SORNA. Samuels' notice of his registration requirements under New York law is sufficient to support a charge that he knowingly violated SORNA."); *Adkins*, 2007 U.S. Dist. LEXIS 90737 at \*14-\*16; *Torres*, 2007 U.S. Dist. LEXIS 60119 at \*5-\*6 (noting that, "defendant's notice of his registration requirements under state law is sufficient to support a charge that he knowingly violated SORNA.").

the federal statute.<sup>183</sup> The penalties, frequency of registration, information required, and classification scheme of SORNA are all different than similar requirements at the state law. The fact that an offender is required to meet the very different state requirements with very different penalties gives no notice to sex offenders that they are also responsible for federal registration under SORNA.<sup>184</sup> This argument also contradicts the claim made by courts in rejecting Commerce Clause challenges explained in Part V of this article.<sup>185</sup> If it is true that state laws provide full notice of federal obligations, then the federal statutes serve no gap-filling function as the government has argued as a justification for federal involvement.<sup>186</sup>

In response to concerns that the registration requirements of states are different than those required by SORNA, one court seemingly created a “best efforts” standard whereby defendants were held obligated under federal law to register as much information as the individual state required even if full compliance with SORNA was impossible because the state had not complied with SORNA’s requirements.<sup>187</sup> Such an interpretation of SORNA is not supported by the text of the statute. Further, it would be impossible for a defendant to have notice that meeting state registration requirements would fulfill SORNA requirements that the defendant was not made aware. If the argument were reversed and the defendant were arguing that he or she had met SORNA’s requirements by meeting lesser state

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<sup>183</sup> *Barnes*, 2007 U.S. Dist. LEXIS 53245 at \*10.

<sup>184</sup> Of the few courts that have seriously examined the procedural due process claim, only Judge Sand appreciated the differences embodied in SORNA. In *Barnes*, Judge Sand wrote:

The government contends that SORNA is essentially an empty vessel that does nothing to alter the state laws of registration. Because Defendant knew he had to register under then-existing state law as a sex offender when he moved, he was therefore on notice that he would have to register under SORNA, because SORNA, the government asserts, adds nothing to the existing state requirement.

The Court rejects this position. While it is true that defendant was required to register under both New York and New Jersey state law, he was given ten days to do so; failure to do so being a misdemeanor for the first time offender. SORNA makes it a felony to move to another state and fail to register....

Just as in *Lambert*, the failure to act leading to criminal penalty in this case is in the failure to register after crossing the border between two jurisdictions as required by a statute of which she was not aware. This case is even more compelling than *Lambert* because SORNA was made applicable to Defendant the same day as his arrest. This Court does not find persuasive the government's argument that because Defendant had notice of the state requirement notice of SORNA's entirely different penalty sufficed.

*Id.* at \*10-\*17.

<sup>185</sup> See *infra* notes 257-58 and accompanying text.

<sup>186</sup> *Id.*

<sup>187</sup> See e.g., *Gould*, 526 F. Supp. 2d at 542 (noting that, “[a]lthough the obligations imposed under SORNA differ from those under Maryland law, Gould had a duty to register his name and address with the Maryland authorities. Maryland's failure to implement SORNA does not preclude Gould's prosecution under § 2250(a).”).

requirements, it is unlikely the court would be as embracing of a “best efforts” standard.

Second, one court concluded that the interest in protecting society from sex offenders outweighed any due process violation.<sup>188</sup> That argument was also present in *Lambert* since the registry in that case included all felons and the Court found it unpersuasive then. Further, even if there is a countervailing social interest, the Court should engage in a more sophisticated balancing test rather a curt dismissal of the due process argument.

Third, courts have characterized the due process challenge to SORNA as being a mistake of law defense.<sup>189</sup> Under American common law, a mistake of law is almost never a defense. In explaining why the due process claim is actually a mistake of law claim, courts typically analogize SORNA defendants to “[o]wners of firearms, doctors who prescribe narcotics, and purchasers of dyed diesel” who argued that they did not know they were violating a criminal law.<sup>190</sup> The courts argue that lack of notice in those situations amounts to a declaration that the defendant should not be punished for being ignorant of the law. However, in each of those cases a defendant was in possession or distributing some economic good of which the defendant should have been aware brought special burdens. In contrast, in *Lambert* and under SORNA, defendants were entirely passive, possessed no high-risk item, and were subject to criminal prosecution for merely failing to take any action.

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<sup>188</sup> *May*, 2007 U.S. Dist. LEXIS 70709 at \*17-\*18 (noting that, “SORNA’s stated goal ‘to protect the public from sex offenders and offenders against children’ clearly outweighs any injustice to Defendants caused by disposing of the knowledge requirement.” (quoting *United States v. Freed*, 401 U.S. 601, 609-10 (1971))).

<sup>189</sup> *See, e.g., Samuels*, 543 F. Supp. 2d at 674-75 (noting that, “Further, it is a well-settled rule of criminal jurisprudence that ignorance of the law or a mistake of law is no defense to criminal prosecution.... Applying that well-settled rule to *Samuels*’ due process argument leads to the inescapable conclusion that his argument must be rejected. Although he was unaware that registration was required under SORNA, his ignorance of the law is not a defense. In this case, Defendant could have registered in Kentucky (or, in the case of New York, updated his registration). Had he registered with Kentucky or updated his registration with New York with his current address, *Samuels* would have complied with SORNA. That he was unaware that the consequences of failure to register or update his registration were possible federal charges is of no consequence.”); *Cardenas*, 2007 U.S. Dist. LEXIS 88803 at \*37-\*38 (noting that, “... Defendant’s due process challenge amounts to a claim that ignorance of the law excuses non-compliance.”); *Roberts*, 2007 U.S. Dist. LEXIS 54646 at \*5 (noting that, “Defendant claims he was denied due process because he received no notification of SORNA’s requirements. This amounts to a claim that ignorance of the law excuses non-compliance.”); *Kent*, 2007 U.S. Dist. LEXIS 69819 at \*4.

<sup>190</sup> *Roberts*, 2007 U.S. Dist. LEXIS 54646 at \*6

Fourth, courts have relied on the language of the opinion in *Lambert* that the defendant in that case was “entirely innocent” and unaware of any wrongdoing.<sup>191</sup> These courts have found that sex offenders are a special class so heavily regulated that they should be more alert as to potential obligations upon them. This argument creates a bizarre and dangerous effect in regards to procedural due process. Every person would seem to have some basic notice of fair warning. However, if that person has their liberties curtailed in a variety of ways then the fair notice due process right is lost as well. Beyond the danger that such a rule represents for any targeted group in American society, there is nothing in due process constitutional law to support that doctrinal claim. And the Court’s decision in *Lambert* expressly rejected this idea since felons in general would seem to carry the same burden.

Even accepting that state registration requirements give notice of federal obligations, a disturbing pattern emerges in the court opinions that distinguish *Lambert*. The decision of the District Court for the Western District of North Carolina in *United States v. David* illustrates the problem.<sup>192</sup> In finding that the defendant had notice of SORNA requirements because of existing North Carolina registration requirements, the court distinguished its decision from *Lambert*.<sup>193</sup> The court made this distinction by citing the North Carolina Supreme Court’s ruling<sup>194</sup> that a defendant had fair notice of North Carolina registration because he previously had notice of South Carolina registration requirements.<sup>195</sup> In other words, federal notice was adequate because state A’s notice was adequate because state B’s notice was adequate because state C’s notice was adequate and on and on. Such courts have created a logical house of

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<sup>191</sup> *Craft*, 2008 U.S. Dist. LEXIS 33860 at \*15-\*16 (noting that, “[i]n other respects, however, the instant case is distinguishable [from *Lambert*]. Clearly, it cannot be said that the defendant was unaware of any wrongdoing or that his failure to register was ‘entirely innocent.’”).

<sup>192</sup> *David*, 2008 U.S. Dist. LEXIS 38613.

<sup>193</sup> *Id.* at \*18.

<sup>194</sup> *State v. Bryant*, 359 N.C. 554, 614 S.E.2d 479, 488 (2005) (noting that, “We find this case rich with circumstances that would move the reasonable individual to inquire of his duty to register in North Carolina such that defendant’s conduct was not wholly passive and *Lambert* is not controlling. First, defendant had actual notice of his lifelong duty to register with the State of South Carolina as a convicted sex offender.”).

<sup>195</sup> *David*, 2008 U.S. Dist. LEXIS 38613 at \*18-\*20 (noting that, “The North Carolina Supreme Court has definitively held that ... North Carolina’s sex offender registration statute, standing alone, does not violate *Lambert*.... Defendant here is in an analogous position to the defendant in *Bryant*, since Defendant, too, had actual notice of his lifelong duty to register as a sex offender in the state where he was convicted, as well as actual notice of his continuing duty to update his registration as he moved from state to state.”).

cards whereby the first registration statute which survived a *Lambert* challenge guarantees the constitutionality of all subsequent statutes.

While *Lambert* is an older precedent and fair notice is really considered in modern cases, the decision is still good law and continues to be cited by the Court. From the clear language of the decision, courts must consider the notice issues raised by defendants in SORNA prosecutions. To do otherwise would create a unique situation under American criminal law whereby a person can be punished for an omission in a situation where no notice of a corresponding duty has been given.

### *B. Special Case of Juvenile Crimes*

Because SORNA includes certain juvenile crimes, there are potentially extra notification requirements related to persons who were convicted as juveniles. SORNA requires listing of certain sex offenses by juveniles in cases where the offense was committed by a person at least fourteen years old.<sup>196</sup> The decision to include juvenile crimes in possibly lifetime registry listings is one of the few issues where some states have expressed serious reservations.<sup>197</sup> Even in states, such as Illinois, that have adopted a full array of sex offender restrictions, lifetime listing of juveniles is highly controversial.<sup>198</sup> As a result, the Illinois legislature overrode the Governor's veto of a bill so that juveniles would have the ability to have their name removed from the state sex offender registry in some circumstances.<sup>199</sup>

The juvenile listing problem presents two special difficulties in regards to procedural due process. First, because most states do not require lifetime registration for juvenile crimes, such persons may not even have state notice of an obligation to register.<sup>200</sup> Second, juveniles are typically afforded greater due process protection under the American system of justice.<sup>201</sup> By failing to distinguish between juveniles and adults in terms of notice, SORNA may run afoul of those rights reserved for juvenile offenders.

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<sup>196</sup> 42 U.S.C. §16911.

<sup>197</sup> Harry Hitzeman, *Attorney praises state's registry override*, DAILY HERALD, Oct. 13, 2007.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> Logan, *supra* note 29, at 298; National Juvenile Justice Network, *New Registration Requirements for Juvenile Sex Offenders*, available at: [http://njjn.org/media/resources/public/resource\\_413.pdf](http://njjn.org/media/resources/public/resource_413.pdf).

<sup>201</sup> No Easy Answers, *supra* note 24, at 129 (noting that, “[c]ourts have not been notably more protective of the rights of juveniles subjected to registration and community notification laws than they have of adults.”).

### C. Providing Procedural Due Process

As with the conflict between SORNA and the Ex Post Facto Clause, a legislative fix is possible for SORNA in regards to procedural due process. Congress could enact a law to provide actual notice to all persons subject to federal registration.<sup>202</sup> Such a requirement already exists for persons being released from federal penitentiaries. For state offenders, Congress could require the information be provided from state databases. Based upon that information, actual notice could be provided to a substantial portion, if not all, sex offenders who are required to register. Such a law would cure the concern in *Lambert* that a person could be punished for completely passive conduct with no notice. Short of a Congressional solution, district courts should dismiss indictments against offenders who received no notice as to federal registration requirements.

## V. SORNA AND THE COMMERCE CLAUSE

Perhaps the most obvious distinction between SORNA and the Connecticut and Alaska statutes concerns the level of government enacting the laws. Because the Supreme Court has only reviewed the two state statutes, it has not addressed a Commerce Clause challenge to sex offender registration and notification statutes. Whereas states have virtually unlimited power to create crimes related to sex offender registration, there is a substantial question as to whether SORNA is a constitutional use of federal power. Unlike actions by states, the federal government needs an underlying enumerated power to support the constitutionality of a specific law. The primary enumerated power offered by the government justifying the use of Congress' power has been that the Act is supported by the Commerce Clause of the Constitution.<sup>203</sup>

### A. Commerce Clause Jurisprudence

The Commerce Clause allows Congress “[t]o regulate Commerce ... among the several States.”<sup>204</sup> Beginning in 1995, the Supreme Court seemingly revitalized the moribund area of Commerce Clause

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<sup>202</sup> Technically, under SORNA, the Attorney General is already supposed to ensure that notice has been given, but that provision has not led to any actual notification policy. 42 U.S.C. § 16917 (providing that, “[t]he Attorney General shall prescribe rules for the notification of sex offenders who cannot be registered [upon release from federal prison]”).

<sup>203</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>204</sup> *Id.*

jurisprudence.<sup>205</sup> In *United States v. Lopez*, the Court struck down the Gun-Free School Zones Act (“GFSZA”).<sup>206</sup> In doing so, the Court outlined three areas wherein Congress can properly act under the Commerce Clause: 1) “the use of the channels of interstate commerce”; 2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities”; and 3) “activities that substantially affect interstate commerce.”<sup>207</sup> The Court found that the GFSZA did not regulate in any of the three legitimate areas.<sup>208</sup> Notable for the Court in reaching that determination was the lack of any jurisdictional language that limited the scope of the GFSZA.<sup>209</sup>

After its decision in *Lopez*, the Court struck down portions of the Violence Against Women Act (“VAWA”) in *U.S. v. Morrison*.<sup>210</sup> Specifically, in *Morrison*, the Court rejected the constitutionality of 42 U.S.C. § 13981 which allowed for a federal cause of action for victims of gender-motivated violence.<sup>211</sup> The decision in *Morrison* utilized and expanded upon the framework outlined in *Lopez*. The primary wrinkle added by *Morrison* was the more elaborate “substantial effects” test to determine the threshold for constitutional action in the third *Lopez* category. *Morrison* introduced a complicated four-factor test to determine whether something regulated had a “substantial effect” on interstate commerce. The four-factors to be analyzed were whether: 1) an activity was economic; 2) there was a jurisdictional limitation; 3) Congress offered legislative findings supporting a substantial effect; and 4) a nexus existed between the activity regulated and interstate commerce.<sup>212</sup> Among the four factors, the first and fourth were given more weight by the Court.<sup>213</sup> Using the test, the Court held that while sexual violence might have some effect on interstate

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<sup>205</sup> Jonathan Adler, *Is Morrison Dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751, 754 (2005) (noting that, “The Supreme Court’s decision invalidating the Gun-Free School Zone Act (GFSZA) in *United States v. Lopez* was quite unexpected. The Court had not struck down a federal statute for exceeding the scope of the Commerce Clause in over one-half century.”).

<sup>206</sup> *U.S. v. Lopez*, 514 U.S. 549 (1995).

<sup>207</sup> *Id.* at 558-59.

<sup>208</sup> *Id.* at 560.

<sup>209</sup> *Id.* at 561 (noting that, “Second, § 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.”).

<sup>210</sup> 529 U.S. 598 (2000).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 612-13.

<sup>213</sup> Adler, *supra* note 205, at 760 (noting that, “Most of the work in *Morrison* was performed by the first and fourth factors - whether the regulated activity was itself economic and whether the hypothesized link between the regulated activity and commerce was so attenuated as to provide a rationale for regulating anything at all.”).

commerce, there was not a sufficient nexus to find portions of the statute constitutional.<sup>214</sup>

What seemed like a revolution reviving the Commerce Clause came to a screeching halt<sup>215</sup> when the Court issued its opinion in *Gonzalez v. Raich*.<sup>216</sup> *Raich* addressed the question of whether, as applied, the Controlled Substances Act (“CSA”) reached beyond the authority granted by the Commerce Clause. California’s Compassionate Use Act,<sup>217</sup> allowed for the possession and use of marijuana for medicinal purposes. Nonetheless, *Raich* was prosecuted under the CSA because she possessed six marijuana plants for personal use.<sup>218</sup>

*Raich*’s challenge to the CSA failed because the Court concluded that the Act was a constitutional exercise of Congress’ power.<sup>219</sup> Citing the New Deal precedent of *Wickard v. Filburn*,<sup>220</sup> the Court concluded that intrastate marijuana possession had substantial interstate economic effects.<sup>221</sup> As with *Morrison*, the decision in *Raich* was entirely based upon a finding that the statute at issue fit into the third *Lopez* category.<sup>222</sup>

Since the decision in *Raich*, some commentators have concluded that almost any Commerce Clause challenge of a federal statute is doomed to fail.<sup>223</sup> However, the Court has not taken the opportunity to review any other statutes to give further guidance on the state of Commerce Clause jurisprudence. As a consequence, lower courts have been left with substantial uncertainty as to the precise meaning of *Raich* in relation to the prior decisions in *Lopez* and *Morrison*.

#### B. Court Review of Commerce Clause Challenges to § 2250(a)

In the face of that ambiguity, all but two district courts that have reviewed Commerce Clause arguments in relation to SORNA have found for the government. Most of the courts that have reviewed Commerce

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<sup>214</sup> 529 U.S. at 616.

<sup>215</sup> Ilya Somin, *Gonzales v. Raich: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J. L. & PUB. POL’Y 507, 508 (2006) (noting that, “The Supreme Court’s recent decision in *Gonzales v. Raich* marks a watershed moment in the development of judicial federalism. If it has not quite put an end to the Rehnquist Court’s ‘federalism revolution,’ it certainly represents an important step in that direction.”).

<sup>216</sup> 545 U.S. 1 (2005).

<sup>217</sup> Cal. Health & Safety Code § 11362.5 (2005).

<sup>218</sup> 545 U.S. at 7.

<sup>219</sup> *Id.* at 33.

<sup>220</sup> *Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>221</sup> 545 U.S. at 10-11.

<sup>222</sup> *Id.* at 17 (noting that, “[o]nly the third category is implicated in the case at hand.”).

<sup>223</sup> Somin, *supra* note 215, at 508.

Clause claims have quickly disposed of the arguments with citations to *Raich*.<sup>224</sup> However, two district court opinions have gone against this trend.

First, in *United States v. Powers*, the United States District Court for the Middle District of Florida held that § 2250(a) was an unconstitutional use of federal power.<sup>225</sup> The court rejected the government's arguments that § 2250(a) could be justified under the second and third *Lopez* categories. The court determined that § 2250(a) did not fit the second category because § 2250(a) made "no effort to regulate the interstate movement of persons who are sex offenders."<sup>226</sup> The court held that § 2250(a) merely punished behavior subsequent to travel, not the person in the course of interstate commerce.<sup>227</sup> Concerning the third *Lopez* category, the court noted that because SORNA had no economic component, it could not fit under any prior precedent under the third category, including *Raich*.<sup>228</sup> Even though § 2250(a) included a jurisdictional element requiring interstate travel, the court held that the language of the limitation was constitutionally inadequate.<sup>229</sup> Because § 2250(a) could not be justified under the Commerce Clause, the court granted the defendant's motion to dismiss the indictment.<sup>230</sup>

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<sup>224</sup> An opinion from the District Court for the Eastern District of Oklahoma in *Tong*, 2008 U.S. Dist. LEXIS 41589, was typical of a cursory examination of a Commerce Clause claim. This was the full extent of the court's opinion in regard to the Commerce Clause argument:

Defendant's sixth argument is that SORNA violates the Commerce Clause by punishing activity that does not substantially affect interstate commerce. The court may sympathize with Defendant's argument, but the weight of the authority is not in his favor. As the government argues, Congress' authority to regulate those engaged in interstate travel is sufficient to make enactment of SORNA a constitutional exercise of its power and not in violation of the Commerce Clause. See *United States v. Madera*, 474 F.Supp.2d 1257, 1265 (M.D. Fla. 2007). Defendant's sixth argument is also overruled.

The lone citation to *Madera* was additionally troubling because that case had been argued on appeal before the 11th Circuit Court of Appeals. And as a coincidence, on the same day as the *Tong* opinion, the 11th Circuit issued its *Madera* ruling and reversed the judgment of the district court (albeit without reaching the Commerce Clause question). *Madera*, 2008 U.S. App. LEXIS 11078.

<sup>225</sup> *Powers*, 544 F.Supp.2d at 1333-36.

<sup>226</sup> *Id.* at 1334.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 1335 (noting that, "... SORNA has nothing to do with commerce or any form of economic enterprise. Activities held to affect interstate commerce have been uniformly economic in character, or had some effect on the national market.").

<sup>229</sup> *Id.* (noting that, "[t]he 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.").

<sup>230</sup> *Id.* at 1336.

Second, the United States District Court for the District of Montana issued an opinion in *United States v. Waybright* holding that SORNA's requirements as applied to the defendant were an unconstitutional exercise of federal power.<sup>231</sup> However, unlike the court in *Powers*, the court in *Waybright* found no constitutional error in regards § 2250(a). The court argued that although the "failure [of § 2250(a)] to require a connection between the jurisdictional element of travel and the criminal act of failing to register ... [was] not fatal."<sup>232</sup> Instead, the Court held that § 16913's requirements had no jurisdictional limitation and applied regardless of whether a person travelled in interstate commerce. Thus, the indictment of the defendant failed because without the requirements of § 16913, an indictment under § 2250(a) was impossible.

Among the courts that have upheld § 2250(a) and § 16913 against Commerce Clause challenges, there are few notable patterns. Most courts that have found that SORNA is justified under the Commerce Clause have done so by finding that the statute fits into the second *Lopez* category. Only two courts have found that the statute is potentially supported by the third *Lopez* category.<sup>233</sup> Despite the consistency of courts in finding that § 2250(a) is justified under the second category, courts regularly apply the standards in *Morrison* and *Lopez* that concern the third factor.<sup>234</sup> The chief reason that courts have found no Commerce Clause problems is the specific jurisdictional limitation in the elements of § 2250(a).<sup>235</sup> Courts have also commonly conflated the Commerce Clause justifications of the national registry with those of § 2250(a).<sup>236</sup>

For purposes of analyzing the constitutionality under the Commerce Clause of SORNA, there are two core classes of sex offenders with distinct legal arguments: 1) offenders who were originally convicted under federal law who did not travel in interstate commerce and failed to register prosecuted under § 2250(a)(2)(A); and 2) offenders who were convicted

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<sup>231</sup> *Waybright*.

<sup>232</sup> *Id.* at 12.

<sup>233</sup> *Brown*, 2007 U.S. Dist. LEXIS at \*10 (noting that, "[t]he fact is that even if this argument was persuasive, other courts have found SORNA to be valid under the third *Lopez* category."); *Madera*, 2007 U.S. Dist. LEXIS at \*22-\*23.

<sup>234</sup> *See, e.g., Hinen*, 487 F. Supp. 2d at 757-58 (applying the jurisdictional limitation and nexus parts of the substantial effects test to find the statute was justified under the second *Lopez* category).

<sup>235</sup> *See, e.g., Hinen*, 487 F. Supp. 2d at

<sup>236</sup> *See, e.g., David*, 2008 U.S. Dist. LEXIS 38613 at \*25 (noting that, "the interstate tracking of convicted sex offenders as they migrate around the country is a matter well within the scope of Congress's power" in order to find a 2250(a) prosecution was a proper exercise of Commerce Clause power).

who traveled in interstate commerce and failed to register prosecuted under § 2250(a)(2)(A).

*C. The Commerce Clause Claims under § 2250(a)(2)(A)*

The first category of persons with a Commerce Clause argument against § 2250(a) is those persons who were convicted of a sex crime under federal jurisdiction and did not subsequently travelled in interstate commerce. This group fits under § 2250(a)(2)(A) and has a rather straight-forward constitutional challenge which should be successful. Thus far, none of the defendants in cases under SORNA with published opinions has fit into this category so no case law has developed.<sup>237</sup>

Under § 2250(a)(2)(A), an offender can be found guilty of failing to register even if he or she never travelled in interstate commerce. This is because Congress made (A) and (B) disjunctive requirements wherein an offender had to travel in interstate commerce or have been convicted under federal law. For persons who have never travelled between states, there is no clear connection between SORNA and interstate commerce. Even under the most liberal interpretations of the Commerce Clause, it is difficult to imagine a persuasive government argument that all persons who were once

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<sup>237</sup> However, a challenge currently awaiting argument in the Fourth Circuit, *United States v. Comstock*, concerning a separate provision of the AWA may shed light on the government's potential position in such a case. *Comstock* concerns whether the provisions of the AWA allowing diversion of certain sex offenders to civil treatment facilities is proper under the Commerce Clause. After losing the Commerce Clause argument at the district court level, the government has seemingly abandoned any claim that the provisions of the AWA are constitutional under the Commerce Clause. Instead, the government is largely relying on the claim that the Necessary and Proper Clause provides that a person in federal prison control is necessarily within the purview of the federal government for purposes of regulating their post-release.

The government's argument seems dubious insofar as the Necessary and Proper Clause cannot provide the sole jurisdictional "hook" for federal action. However, even if the government's argument in *Comstock* prevails, a similar argument surely should not apply in the case of SORNA's requirements beyond the initial registration. Once the offender has been released from federal custody and performed their initial registration duties under SORNA, there is no viable Necessary and Proper Clause argument that five years later, when the offender changes address within the same state, federal authority is still proper in requiring an updating of the registration. Nonetheless, given its initial failing in *Comstock*, the government is likely to assert similar claims in SORNA cases where a person was convicted under federal law and did not travel between states.

The Necessary and Proper Clause has received at least some mention in a SORNA prosecution, although its relevance is unclear. *Pitts*, 2007 U.S. Dist. LEXIS 82632 at \* 12-13 (noting that, "...because 18 U.S.C. § 2250(a) is a valid component of the Walsh Act under the Necessary and Proper Clause, it is not an impermissible attempt by the Congress to exercise police power as defendant contends.") (internal citation omitted).

under federal control are subject to potentially lifetime exercise of that control. Because the persons under § 2250(a)(2)(A) have never challenged in interstate commerce, any justification under the second *Lopez* category is impossible.

That would only leave an argument under the third *Lopez* category. The government's likely position under such a theory is untenable. The government would have to contend that any person who was sentenced under a federal act was subject to federal prosecution in the commission of any future crimes. This position would turn the Commerce Clause into a spider web whereby any person convicted of a federal crime is permanently ensnared in the federal web and the government can return to assert control over the offender for a lifetime. Such an outcome is unsupportable under any existing Commerce Clause case law.

#### *D. The Commerce Clause Claims under § 2250(a)(2)(B)*

The second group of offenders requires a more sophisticated examination. Nonetheless, a careful examination of existing precedent should support offenders challenging the Commerce Clause justification offered by the government in § 2250(a)(2)(B) cases. Section 2250(a)(2)(B) has been the subject of all of the Commerce Clause challenges thus far so there is substantial case law at the district court level.

Even though SORNA was passed after the Supreme Court decisions in *Lopez* and *Morrison*, as with the statutes in those cases, Congress made no findings to show a connection between any of the provisions of SORNA and interstate commerce.<sup>238</sup> However, as noted previously, § 2250(a)(2)(B) included a jurisdictional limitation that required the government prove that a defendant was a person who "travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country."<sup>239</sup>

Notably, there is no temporal connection required under the text of SORNA. The tense of the statute is also imprecise as to when an offender would be traveling in interstate commerce. As a result, courts have allowed indictments of sex offenders who travelled in interstate commerce years before SORNA was passed.<sup>240</sup> The opinion by the District Court of the

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<sup>238</sup> *Brown*, 2007 U.S. Dist. LEXIS 91328, at \*11 (accepting the defendants argument that, "... Congress has made no explicit findings to show a relation between the activity covered by the Act and interstate commerce.").

<sup>239</sup> 18 U.S.C. § 2250(a)(2)(B).

<sup>240</sup> However, one court noted that, "[SORNA] only criminalizes those offenders who fail to register within three or fewer business days of travel across state lines." *Thomas*, 534 F. Supp. 2d. at 919. Such a temporal requirement is not supported by the language of the statute or any legislative history. The more common interpretation by courts has been to suggest that Congress' intent was to require no temporal connection between the interstate

Western District of Oklahoma in *United States v. Husted* explained the rationale for allowing indictments of sex offenders who committed crimes well before the passage of SORNA:

... the legislative history of the statute shows Congress chose not to incorporate a temporal requirement but, instead, intended to encompass all sex offenders and to resolve problems with tracking an often transient group, many of whom become "lost" after release from custody or supervision or after initial registration.... Interpreting Section 2250 to require interstate travel after SORNA's effective date would defeat congressional purpose to prevent sex offenders from avoiding registration. Under Defendant's view, a sex offender could violate SORNA with impunity from federal prosecution so long as he or she stayed within the confines of one state after July 27, 2006, despite congressional intent to compel registration through criminal sanctions...<sup>241</sup>

While such a determination has obvious Ex Post Facto Clause implications, as discussed herein,<sup>242</sup> the lack of a temporal connection also creates substantial Commerce Clause problems.

Most courts reviewing Commerce Clause challenges have failed to elucidate which *Lopez* category justified § 2250(a)(2)(B) as a lawful exercise of federal power. Nonetheless, it is helpful to evaluate whether the statutory provision can be supported by either the second or third *Lopez* category as those are the only justifications that have been offered thus far.

#### 1. Persons in Interstate Commerce

Since the decision in *Lopez*, there has not been significant appellate court litigation concerning the meaning of the second category embodied by the phrase, "persons or things in interstate commerce, even though the threat may come only from intrastate activities."<sup>243</sup> Does it mean that a person need actually be "in" interstate commerce at the moment of regulation? Or is it possible that once a person was "in" interstate commerce, they are subject to federal prosecution for subsequent activities for some period of time (or indefinitely)?

The meaning of the word "in" favors the interpretation that a person need actually be "in" interstate commerce at the moment regulation occurs. Section 2250(a) does not actually regulate a sex offender at that moment.

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travel and the failure to register.

<sup>241</sup> *Husted*, 2007 U.S. Dist. LEXIS 56662 at \*9 (citing H.R. Rep. No. 109-218 (Sept. 7, 2005)).

<sup>242</sup> See *infra* notes 134-73 and accompanying notes.

<sup>243</sup> 514 U.S. 558.

An offender is free to travel between states at will. It is only after being in a new state for a certain period of time with an intent to change residence that the offender is subject to federal regulation and prosecution. At such a moment, the offender is no longer “in” interstate commerce. The position of courts rejecting such an interpretation has simply removed any notion of time from interpreting the second *Lopez* category. Thus, any person who was ever “in” interstate commerce could be subject to federal criminal law under the Commerce Clause.

As noted in the district court opinion in *Husted* quoted above, Congress arguably intended such an outcome that offenders could be punished for failure to register as long as they ever traveled in interstate commerce at any prior time (or at least subsequent to their original conviction). The *Husted* court’s interpretation of Congress’ intent, if correct, removes any notion that Congress was merely regulating the travel of persons between states as the second *Lopez* category would seem to require. In the modern era where interstate travel is commonplace, the court’s interpretation would allow criminalization of every conceivable offense at the federal level as long as the government included a jurisdictional limitation that mandated prior interstate travel. That means that the statutory provisions struck down in *Lopez* and *Morrison* could be revived simply by appending the prior interstate travel requirement. Such an outcome is hard to reconcile with any of the language in those opinions.

While not addressing the above concern directly, some courts have compared the requirements of SORNA with the Mann Act<sup>244</sup> which criminalizes transportation of persons across state lines for purposes of prostitution.<sup>245</sup> However, the analogy to the Mann Act is inapt for two reasons. First, the Mann Act criminalizes action in the course of travelling across state lines. If a person is crossing state lines to commit an act of prostitution, he or she can be arrested at the state border. Under SORNA, a sex offender is free to cross state lines numerous times and law enforcement authorities cannot arrest the person. Thus, there is no strong connection between the interstate travel under SORNA as is the case with the Mann Act. Second, the Mann Act applies to persons who have the requisite intent to commit prostitution by crossing state lines. The travel is part of the mens rea of the criminal act. For SORNA, the offenders travel is wholly unrelated to the mental state needed to fail to register. Whereas there is a strong nexus

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<sup>244</sup> 18 U.S.C. § 2421.

<sup>245</sup> *Thomas*, 534 F. Supp. 2d. at 919 (noting that, “Section 2250 is similar to a variety of criminal statutes in the United States Code that federalize activities that were otherwise the subject of state criminal law.... For example, the Mann Act outlaws the transportation of persons across state lines for prostitution...”).

between travel and prostitution under the Mann Act, the relationship between travel and failing to register under SORNA is attenuated.

Other courts have analogized SORNA's requirements to those under the crime of being a felon in possession of a firearm.<sup>246</sup> In such cases, the government need not show that the defendant was actually in possession of a firearm when crossing state lines.<sup>247</sup> Instead, the government must show that the firearm travelled across state lines at some point. However, the analogy breaks down and actually favors the defendant's position in a typical SORNA case. The crime of felony possession puts the emphasis on a good travelling across state lines and expressly provides that it is insufficient for a person to merely travel across state lines to trigger Commerce Clause jurisdiction.<sup>248</sup> Not surprisingly, no court has found that felony possession is justified in a particular case by the second *Lopez* category even though the government's position in SORNA cases would imply such an argument. Further, the analogy to felony possession is especially strained because that crime squarely fits under the third *Lopez* category while the citing courts have classified SORNA as being under the second *Lopez* category.<sup>249</sup>

This last problem is endemic in district court opinions that have upheld § 2250(a) against Commerce Clause challenges. Perhaps owing to the dearth of case law under the second category, courts have applied the rules and standards for the third *Lopez* category to claims under the second. Such application is untenable. The Supreme Court has never applied such reasoning to the second category. Importantly, it is hard to imagine it ever would. The first factor under the third category as explained in *Morrison* is that an activity be economic. For regulating persons in interstate commerce, this factor is a potential non sequitur. A person traveling on an interstate bus who kidnaps a passenger is surely subject to the language of the second *Lopez* category even though the passenger is engaging in non-economic activity. For similar reasons, the application of the "nexus" requirement is misplaced. Even assuming the application of the third category factors to second category claims was viable, as explained below, a fair application of those factors would favor the defendant. Consequently, courts reviewing Commerce Clause challenges to § 2250(a) should conclude that such claims cannot be supported under the second *Lopez* category.

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<sup>246</sup> *Elliot*, 2007 U.S. Dist. LEXIS 91655, at \*8-\*9 (noting that, "... SORNA is very similar to those cases involving a felon in possession of a firearm in violation of Title 18, U.S.C. § 922(g).").

<sup>247</sup> *Id.*

<sup>248</sup> *See, e.g.*, 507 F. Supp. 2d. at 567.

<sup>249</sup> *Id.*

## 2. Activities that Substantially Affect Interstate Commerce

While only two courts have found persuasive arguments under the third *Lopez* category, such arguments are probably stronger than those under the second category because of the expansive language in *Raich*. The third category has been subject to significant litigation and courts have upheld a variety of statutes as proper exercises of Congressional power under the third category. After *Raich*, the third category of *Lopez* is the easiest for a statute to meet because the Court applied a very deferential rational basis standard.<sup>250</sup> Nonetheless, under the best readings of *Lopez* and SORNA, courts should reject government justifications for § 2250(a) under the third *Lopez* category.

An analysis of the third category hinges on whether Congress had a rational basis to believe that the activity regulated, in this case sex offender registration, had a substantial effect on interstate commerce. The four factors elucidated in *Morrison* control such an analysis. The first factor is whether the activity regulated is an economic activity.

At first blush, it might seem impossible to think that a person's decision to register as required by law could be construed as an economic activity. However, a colorable argument is possible. Ilya Somin has argued that, "[a]ccording to *Raich*, virtually any interstate movement qualifies as 'economic activity' that Congress can regulate at will."<sup>251</sup> Consequently, failing to register by sex offenders who do not register subsequent to interstate travel is possibly an economic activity.

Nonetheless, the argument that sex offender registration is an economic activity fails for four reasons. First, such an interpretation would collapse the second and third *Lopez* categories together. If all persons traveling in interstate commerce were engaged in economic activity then the "persons or things in interstate commerce" portion of the second *Lopez* category would have no meaning.

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<sup>250</sup> *Raich*, 545 U.S. at 22 (noting that, "[w]e 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.").

<sup>251</sup> Ilya Somin, *Can Congress Regulate Interstate Moves by Sex Offenders Because they count as "Economic Activity" under Gonzales v. Raich?*, VOLOKH CONSPIRACY, available at: <http://www.volokh.com/posts/1208754924.shtml>. Orin Kerr at Volokh Conspiracy echoed Somin's broad interpretation of *Raich* and argued against a decision striking down 2250(a)(2)(B) under the Commerce Clause. Orin Kerr, *Congress Has No Power to Regulate Traveling in Interstate Commerce By Unregistered Sex Offenders, District Court Judge Holds*, VOLOKH CONSPIRACY, available at: <http://www.volokh.com/posts/1208709089.shtml> (noting that, "[t]he issue is whether Congress is regulating interstate commerce, not whether its chosen criteria for regulating interstate commerce themselves have an independent nexus to interstate commerce.").

Second, the argument fails for the same reasons that § 2250(a) cannot be supported under the second *Lopez* category. A person who was previously in interstate commerce may have engaged in economic activity. However, the moment at which SORNA's obligations apply, that person is no longer in the process of an economic act. An interpretation that allows federal jurisdiction whenever a person has previously engaged in an economic activity is truly limitless and is unsupportable so long as *Morrison* and *Lopez* remain good law.

Third, the language of *Raich* is not as expansive as Somin argues. The Court relied on a dictionary definition to define "economics" as "the production, distribution, and consumption of commodities."<sup>252</sup> It is hard to construe a sex offender's failure to register as having anything to do with producing, distributing, or consuming commodities. Further, while economic activity is seemingly defined broadly, the Court only adopted the definition insofar as the "total incidence of a practice poses a threat to a national market."<sup>253</sup> In *Raich*, the possession of small amounts of marijuana in aggregate could have an effect on the national illegal marijuana market.<sup>254</sup> With sex offender registration, there is no conceivable national market and thus *Raich*'s definition is inapplicable to SORNA. Indeed, as the Court noted in *Raich*, *Morrison* was a different case because combating sexual violence by super-charging state law violations was not regulating an economic activity even though such violence had a substantial economic effect.<sup>255</sup> Such is the case with § 2250(a)(2)(B).

Fourth, the decision and language of *Morrison* speaks more clearly about whether activities related to sex crimes are economic activities. In *Morrison*, the court held an alleged rape by a college football player was an example of a non-economic activity that could not be regulated under federal law.<sup>256</sup> While the plaintiff argued that sexual violence had systemic effect on the economic system, the court rejected that argument. If rape and sexual abuse were not economic activities, then it strains reason to think registration by offenders subsequent to conviction for such crimes is an economic activity.

The second factor, that Congress applied a jurisdictional limitation has been the core focus of courts giving serious treatment to Commerce Clause challenges. There is a clear jurisdictional limitation to § 2250(a)(2)(B) in

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<sup>252</sup> *Raich*, 545 U.S. at 25-26 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)).

<sup>253</sup> *Raich*, 545 U.S. at 17 (internal citation omitted).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 25 (noting that, "[d]espite congressional findings that such crimes had an adverse impact on interstate commerce, we held [in *Morrison*] the statute unconstitutional because, like the statute in *Lopez*, it did not regulate economic activity.").

<sup>256</sup> *Morrison*, 529 U.S. at 627.

that a defendant, in a typical case, must be someone who “travels in interstate commerce.” Is this language sufficient? It cannot be the case that Congress need merely repeat the magic words “interstate commerce” and an act will be found constitutional. The jurisdictional limitation must match the confines that the Court has laid out as the proper scope of the Commerce Clause. Such language should require the inclusion of any of the *Lopez* factors such as “persons ... in interstate commerce” or regulating an activity that has “substantial effects” on interstate commerce. In the case of § 2250(a), however, Congress has not included the *Lopez* language. Instead, Congress adopted and most district courts have now upheld language that is substantially broader than that articulated by the Court. As previously explained, Congress’s language, as interpreted by courts like *Husted*, has placed no limit on the scope of the Commerce Clause. Consequently, upon further examination, the second factor does not favor the government’s position in Commerce Clause challenges.

The third factor is whether Congress has made findings that the activity regulated has a substantial effect on interstate commerce. With SORNA, Congress made no such findings. Given that SORNA was passed well after the decisions in *Lopez* and *Morrison*, this omission is especially notable. As a result, this factor cuts strongly against a finding that sex offender registration substantially affects interstate commerce.

The final factor in evaluating substantial effects concerns whether there is a “nexus” between the activity regulated and interstate commerce. This has been the factor that has garnered the most attention among district courts in § 2250(a) cases. In finding such a nexus exists, courts have adopted several rationales.

Some courts have asserted that SORNA fills a gap-filling function because state registration cannot account for offenders moving between states. As one court noted, “SORNA, including the criminal component, prevents sex offenders from being lost in the cracks *between* state regulations, a matter which is beyond the power of any one state to comprehensively address.”<sup>257</sup> Thus, for reasons that are not fully articulated, courts presume a nexus to interstate commerce. This argument fails to divide the national registry functions of SORNA from § 2250(a). It is certainly true that the national registry serves a potentially gap-filling function. However, § 2250(a) serves no such purpose. It punishes offenders who were already eligible to be punished under state law.<sup>258</sup> This has been

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<sup>257</sup> *Ditomasso*, 2008 U.S. Dist. LEXIS 37870 at \*32; *Brown*, 2007 U.S. Dist. LEXIS 91328, at \*10 (noting that, “the Act here was enacted in response to the concern that sexual offenders were ‘falling through the cracks’ by moving from state to state and failing to update their registries.” (citing 142 Cong. Rec. S8777 (1996))).

<sup>258</sup> As Wayne Logan has argued, a chief innovation of sex offender registries has been

made clear by the fact that courts have repeatedly held that even though no state had yet complied with SORNA, offenders could be prosecuted under § 2250(a) for failing to meet state registration requirements. Section 2250(a) serves an function entirely duplicative with state registration under the interpretation of the statute adopted most courts that have addressed the issue.

Other courts have argued that the national registry provisions are “interrelated” from the criminal provisions so the Commerce Clause justifications for the registry provisions apply to the criminal provisions.<sup>259</sup> This argument does not survive scrutiny. Congress could easily have created the national registry by only requiring information from the state. It further could have required information from offenders, but left violations for the states to punish. That Congress included a new crime for failure to register requires an independent analysis of Commerce Clause issues as to that crime. To hold otherwise would simply allow Congress to throw in tangentially related crimes with no interstate limitation to any information providing bill and survive Commerce Clause challenges.

In the end, the idea that there is a nexus between sex offender registration and interstate commerce is contrary to common-sense and the specific language in *Morrison*. In *Morrison*, Congress had issued findings about the effects of sexual violence against women, but the Court found that such findings were insufficient to show a substantial effect on interstate commerce. While *Raich* represented an overall retrenchment of the Commerce Clause revolution, the import of the decision is tied to activities like drug possession and distribution which deal with economic goods. For issues like sexual violence, the opinion in *Morrison* is still the lodestone for addressing Commerce Clause challenges. Even under the rational basis standard, which is very forgiving in other contexts, § 2250(a)(2)(B) cannot survive because there is no remotely reasonable argument that the aggregation of sex offender registration has a substantial effect on interstate commerce. And based upon the opinion in *Morrison* as well as a reasonable interpretation of the meaning of the *Lopez* factors, the constitutionality of § 2250(a)(2)(B) is seriously suspect.

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to incorporate provisions for offenders coming from other jurisdictions. Logan, *supra* note 29, at 284-88.

<sup>259</sup> See, e.g., *Hacker*, 2008 U.S. Dist. LEXIS 7793 at \*5 (noting that, “This Court agrees with other district courts’ interpretations of *Lopez* and *Morrison* insofar as they have determined that the purpose of SORNA to track sex offenders from one jurisdiction to another and create a comprehensive national offender registry constitutes a rational basis to conclude that failing to register in a local jurisdiction substantially affects interstate commerce. Therefore, because the registration requirements and the penalty provision are interrelated, the penalty provision § 2250 also does not violate the Commerce Clause.”).

*E. Reconciling SORNA with the Commerce Clause*

There has been substantial doom-saying concerning the death of state's rights due to the ever-expanding interpretation of the Commerce Clause. While it is too easy to add to such overly-pessimistic rhetoric, the provisions of SORNA really do represent an unprecedented expansion of federal power. If the government ultimately prevails against Commerce Clause challenges to SORNA, then any person who has ever traveled in interstate commerce may be subject to federal criminal prosecution for crimes having no interstate component. According to the text of the statute as interpreted by most courts, this would include persons who committed crimes years after the traveling between states since no temporal connection is required. Further, persons who have ever been in any form of federal control (even beyond prison) would be forever trapped within the federal sphere of criminal control. Such outcomes go beyond the already broad reach embodied in *Raich*. With SORNA, there is no commercial good at issue that might have some de minimis effect on interstate commerce. Instead, there are just persons who might or might not have crossed state lines and who committed a crime wholly unrelated to such travel. In our modern society of constant travel, the precedent set by SORNA truly puts a large majority of the nation under the purview of federal criminal authority.

Lower courts have been confounded concerning the continued viability of *Morrison* after *Raich*. Further, the language of *Raich* gives courts legal cover for upholding § 2250(a). For offenders who were convicted under federal law but did not travel in interstate commerce, even the language of *Raich* probably offers no respite for the government. However, for offenders who did travel in interstate commerce, the issue may require a Supreme Court opinion. If the Commerce Clause is to have any meaning in protecting persons from permanent federal jurisdictional control, then the Court should find that the language of § 2250(a) is insufficiently limiting on federal authority.

The above concerns are all the more troubling because of how simple it would be to amend SORNA to cure its Commerce Clause problems. Congress could fix SORNA by adopting two simple measures.<sup>260</sup> First, Congress could remove § 2250(a)(2)(A). Doing so would mean that all persons subject to SORNA's regulations must at least travel in interstate commerce. Second, Congress could amend § 2250(a)(2)(B) to more closely follow the language the Court has utilized in *Lopez* and *Morrison*. Thus,

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<sup>260</sup> The possibility of a congressional solution fits well with Lino A. Graglia's proposal to have the Court withdraw from Commerce Clause decision-making. Lino A. Graglia, *Lopez, Morrison, and Raich: Federalism in the Rehnquist Court*, 31 HARV. J.L. & PUB. POL'Y 761, 784-86 (2008).

Congress could require that a person would be subject to the provisions if SORNA insofar as travel between state lines has resulted in a failure to register. Short of Congressional action to correct the deficiencies of SORNA, however, § 2250(a) should be struck down by federal courts.

#### CONCLUSION

District courts across the country have superficially relied on the opinions in *Smith* and *DPS* to uphold § 2250(a) against viable constitutional challenges. Further, perhaps because of the confusing state of Commerce Clause law after *Raich*, district courts have adopted an untenable view of federal jurisdiction. As a result, there has been notable damage done to the doctrines of procedural due process, ex post facto punishment, and the Commerce Clause. These constitutional problems can be cured with either legislative or judicial action. In the case of legislation, the changes made are quite minor and could be enacted with little effort. Similarly, appellate courts could step in and put § 2250(a) back in line with case law for other criminal laws.

The concerns of sex offenders are not likely to resonate with the general public or even the legal community. However, many “sex offenders” are not the archetypal characters lying in wait to kidnap and rape children<sup>261</sup> – many have committed relatively petty offenses such a youthful indiscretion of public exposure or an act of engaging in prostitution.<sup>262</sup> There are over 500,000 sex offenders in the United States and that number will continue to grow.<sup>263</sup> And many offenders subject to SORNA’s requirements have not been arrested for crimes in decades. These persons are already subject to a bevy of limitations on their liberties. The heavy penalties and restrictions of SORNA have been added to that already substantial mix. While the cause of

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<sup>261</sup> The myth of the stranger as the typical sex offender continues to mislead policymakers in designing effective laws to combat sexual violence. No Easy Answers, *supra* note 24, at 24 (noting that, “sexual violence against children as well as adults is overwhelmingly perpetrated by family members or acquaintances. The US Bureau of Justice Statistics has found that just 14 percent of all sexual assault cases reported to law enforcement agencies involved offenders who were strangers to their victims. Sexual assault victims under the age of 18 at the time of the crime knew their abusers in nine out of 10 cases: the abusers were family members in 34 percent of cases, and acquaintances in another 59 percent of cases.”).

<sup>262</sup> *Id.* at 5 (noting that the category of “sex offenders” includes, “... in many states, people who urinate in public, teenagers who have consensual sex with each other, adults who sell sex to other adults, and kids who expose themselves as a prank are required to register as sex offenders.”).

<sup>263</sup> Paula Lehman and Tom Lowry, *The Marshal of Myspace*, BUSINESS WEEK, Apr. 23, 2007, at 86.

stopping sexual violence is a good one, it is mistake to make constitutional exceptions to target the population of convicted sex offenders.

The precedents set by district courts, if upheld, will have long term deleterious effects on American criminal justice. If the majority district court opinions concerning the Commerce Clause are upheld, then there will truly be no bounds to federal criminal jurisdiction. The district court opinions concerning the Ex Post Facto clause allow for punishment of any number of prior bad acts by persons so long as any conduct can be connected to the present. And the notion that persons should have at least some warning before being punished for merely doing nothing embodied in *Lambert* will effectively be lost if the district court opinions survive. Those results are losses not just for sex offenders – they affect us all.

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