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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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In 2003, the U.S. Supreme Court issued its only two opinions regarding the constitutionality of sex offender registration and notification statutes. The two opinions, Smith v. Doe *and* Connecticut Department of Public Safety v. Doe *("*DPS*"), upheld the Alaska and Connecticut registry and notification laws against Ex Post Facto Clause and due process challenges. Three years later, the federal Sex Offender Registration and Notification Act ("SORNA") was passed as part of the Adam Walsh Child Protection and Safety Act. The federal statute was very different from the state statutes that the Court reviewed. Most notable among the differences was the creation of the federal crime of "failure to register," which was punishable by up to ten years imprisonment. Despite the significance of the disparities between the state and federal laws, district courts across the country have virtually rubber stamped the criminal provisions of SORNA as constitutional. The district courts' reasoning has been almost entirely based upon superficial, mechanical applications of the Court's decisions in* Smith *and* DPS. *This article contends that most district courts have been severely misguided in reading the two Court opinions and the statutory provisions of SORNA. Consequently, this Article concludes that either Congress should amend SORNA, or courts should strike down portions of SORNA on Ex Post Facto Clause, due process, and Commerce Clause grounds.*

I. INTRODUCTION

On March 5, 2003, the U.S. Supreme Court, in *Smith v. Doe*[1] and *Connecticut Department of Public Safety v. Doe*[2] ("*DPS*") held that the Alaska[3] and Connecticut[4] sex offender registry and notification statutes were constitutional. The two state statutes were relatively modest—with small penalties for failing to register—and were only reviewed in regards to limited constitutional issues.[5] At the time of the two Court decisions, all fifty states had

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[1] 538 U.S. 84 (2003).

[2] 538 U.S. 1 (2003).

[3] *See* ALASKA STAT. § 12.63.010(a), (b) (2000).

[4] See CONN. GEN. STAT. §§ 54-251, -252, -254 (2001).

[5] *See infra* notes 33–78 and accompanying text.

enacted sex offender registry and notification statutes ("Megan's Laws").[6] The Supreme Court opinions seemingly ensured that registries would remain a permanent fixture of America's sex offender policy.

Three years after those decisions, on the twenty-fifth anniversary of the abduction of Adam Walsh from a shopping mall in Florida,[7] President George W. Bush signed into law the Adam Walsh Child Protection and Safety Act of 2006 ("AWA").[8] Title I of the AWA consisted of the Sex Offender Registration and Notification Act ("SORNA").[9] SORNA required the creation of a nationwide online sex offender registry and notification system,[10] mandated federal registration by sex offenders according to a three-tier classification scheme,[11] created the crime of failing to register, which was punishable by up to ten years imprisonment,[12] and applied to offenders who committed sex offenses prior to the enactment of the statute.[13]

Despite substantial differences between SORNA and the state statutes reviewed by the Supreme Court, federal courts across the nation have rubber stamped SORNA's provisions based upon mechanical applications of the Court's opinions in *Smith* and *DPS*.[14] Courts have concluded that SORNA is "essentially identical" to,[15] "strikingly similar to,"[16] "nearly identical to,"[17] "nearly indistinguishable from,"[18] and "functionally indistinguishable from"[19] the statutes that the Supreme Court previously reviewed. A district court in Louisiana perhaps best articulated the belief that SORNA represented nothing different when it wrote, "[t]he same analysis [as in *Smith*]

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[6] "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." *Smith*, 538 U.S. at 89. "By 1996, every State, the District of Columbia, and the Federal Government had enacted some variation of Megan's Law." *Id.* at 90.

[7] *See* Kris Axtman, *Efforts Grow to Keep Tabs on Sex Offenders*, CHRISTIAN SCI. MONITOR, July 28, 2006, at 1.

[8] Pub. L. No. 109-248, 120 Stat. 587 (2006) (codified at 42 U.S.C. §§ 16901–91 (2006)).

[9] AWA tit. I, 120 Stat. at 590–611 (codified at 42 U.S.C. § 16901–16917 (2006)).

[10] *See* 42 U.S.C. §§ 16912(a), 16919 (2006).

[11] *See* 42 U.S.C. § 16911.

[12] *See* 18 U.S.C. § 2250(a) (2006).

[13] The U.S. Department of Justice's implementing regulation interpreted SORNA as having retroactive application. *See* 28 C.F.R. § 72.3 (2007).

[14] *See infra* notes 127–39 and accompanying text.

[15] United States v. Utesch, No. 2:07-CR-105, 2008 U.S. Dist. LEXIS 40498, at *19 (E.D. Tenn. Feb. 14, 2008) (citing United States v. Cardenas, 2007 U.S. Dist. LEXIS 88803 (S.D. Fla. Nov. 5, 2007)).

[16] *Cardenas*, 2007 U.S. Dist. LEXIS 88803, at *27; United States v. Markel, No. 06-20004, 2007 U.S. Dist. LEXIS 27102, at *2–3 (W.D. Ark. Apr. 11, 2007).

[17] United States v. Muzio, No. 4:07CR179 CDP, 2007 U.S. Dist. LEXIS 40294, at *7 (E.D. Mo. June 4, 2007).

[18] United States v. Hinen, 487 F. Supp. 2d 747, 755 (W.D. Va. 2007).

[19] United States v. Samuels, 543 F. Supp. 2d 669, 676 (E.D. Ky. 2008); United States v. LeTourneau, 534 F. Supp. 2d 718, 721 (S.D. Tex. 2008).

applied to the similar facts in the case at bar must produce the same result."[20]

Such reliance by courts is fundamentally misplaced. Beyond missing the statutory differences between SORNA and the state laws reviewed by the Supreme Court, lower courts have repeatedly ignored the language of the opinions in *Smith* and *DPS* on which those courts are ostensibly relying. Further, whereas the laws reviewed by the Court did not enable viable challenges based upon the Fifth Amendment Due Process Clause, the Ex Post Facto Clause, or the Commerce Clause, SORNA has run roughshod over the rights derived from those constitutional provisions. Those disjunctions between the lower courts and established constitutional law can be cured either by appellate court action or modest congressional amendments to SORNA.

Part II 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 III addresses the registration and notification provisions of SORNA. Part IV posits that some prosecutions for the crime of failing to register are in conflict with the Ex Post Facto Clause. Part V contends that SORNA does not afford sufficient fair warning for some defendants as required by the Fifth Amendment. Part VI argues that the criminal provisions of SORNA are an unconstitutional exercise of federal power. The Article concludes by discussing the future of SORNA challenges and other federal efforts to regulate sex offenders.

II. 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.[21] While many scholars have questioned the efficacy of such laws in actually decreasing recidivism by offenders,[22] there is little reason to think these ar-

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[20] United States v. Pitts, No. 07-157-A, 2007 U.S. Dist. LEXIS 82632, at *16 (M.D. La. Nov. 7, 2007).

[21] For a more elaborate and helpful discussion of the history of registration laws, see Wayne Logan, *Sex Offender Registration and Community Notification: Past, Present, and Future*, 34 New Eng. J. on Crim. & Civ. Confinement 3 (2007).

[22] Notable 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 do serve a deterrent function for persons not on the registry since fear of notification might act as a deterrent for committing sex offenses. J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?* (Nat'l Bureau of Econ. Research, Working Paper No. 13803, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1100663. *See also* Jeffrey C. Sandler et al., *Does a Watched Pot Boil?: A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law*, 14 Psychol. Pub. Pol'y & L. 284 (2008) (concluding that "[r]esults provide no support for the effectiveness of registration and community notification laws in reducing sexual offending by: (a) rapists, (b) child molesters, (c) sexual recidivists, or (d) first-time sex offenders. Analyses also showed that over 95% of all sexual offense arrests were committed by first-time sex offenders, casting doubt on the ability of laws that target repeat offenders to meaningfully

guments will cause a retrenchment of such approaches in the near future.[23] Because this Article is more concerned with doctrinal and constitutional impact than utilitarian effects, only a brief summary of the 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 originated in the 1990s.[24] 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."[25] Within the same year, President Clinton signed into law the Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act ("Wetterling Act") as part of the Violent Crime Control and Law Enforcement Act of 1994.[26]

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.[27] In response, states across the nation adopted Megan's Laws, often with little or no debate.[28] Soon, every state and federal territory had a sex offender registration law.[29] Specifics of the statutes varied from state to state, but they bore similarity to the original statute drafted in New Jersey.[30] Notification provisions were added in many jurisdictions so that persons could receive notice when an offender moved into their neighborhood.[31] With the development of the

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reduce sexual offending."); Jill S. Levenson & David A. D'Amora, *Social Policies to Prevent Sexual Violence: The Emperor's New Clothes?*, 18 CRIM. JUST. POL'Y REV. 168, 180–82 (2007).

[23] Historically, America's fear of sex offenders has been cyclical. As a result, laws based upon that fear have come and gone. However, the 1990s marked a shift to a state of perpetual panic wherein sex offender restrictions continue to garner substantial support with no sign that fear-driven legislation will abate. Michael O'Hear, *Perpetual Panic*, 21 FED. SENT'G REP. 69 (2008).

[24] Most registration laws emerged in the 1990s, although California had requirements as early as 1947. *See* HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US 35 n.91 (2007) [hereinafter NO EASY ANSWERS].

[25] N.J. STAT. ANN. § 2C:7-1-7-11 (1994). *See also* ERIC S. JANUS, FAILURE TO PROTECT: AMERICA'S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE 16 (2006).

[26] Pub. L. No. 103-322, tit. XVII, subtit. A, 108 Stat. 1796, 2038–42 (1994) (codified at 42 U.S.C. § 14071 (2006)); *see also* JANUS, *supra* note 25, at 16.

[27] *See* JANUS, *supra* note 25, at 16.

[28] *See* Wayne Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257, 280 (2005).

[29] *See* Smith v. Doe, 538 U.S. 84, 90 (2003).

[30] *See* 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).

[31] *See id.* at 39.

Internet, sex offender registries appeared online with search functionality.[32] As these laws created important new legal issues, litigation challenging the statutes soon emerged. Eventually, the legal challenges reached the Supreme Court.

B. U.S. Supreme Court Review of State Registration and Notification Statutes

The U.S. 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. First, 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. Second, in *DPS*, the Court determined whether the failure to provide an 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.[33] The Court was reviewing the judgment of the Court of Appeals for the Ninth Circuit, which held that the Alaska statute's retroactive application was in violation of the Ex Post Facto Clause of Article I of the Constitution.[34] The Supreme Court concluded that the Ninth Circuit had erred and that the Alaska statute was consistent with the Ex Post Facto Clause.[35] Justice Kennedy wrote the opinion of the Court, although several other justices wrote separate opinions.[36]

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[32] *See id.* at 53–54.

[33] 538 U.S. at 89.

[34] U.S. CONST. art. I, § 10, cl. 1; Doe v. Otte, 259 F.3d 979 (9th Cir. 2001). 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 section 1 of the Fourteenth Amendment. *Otte*, 259 F.3d at 987.

[35] *Smith*, 538 U.S. at 105–06.

[36] 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. Since the Internet was not the required means of disseminating the registry information, Thomas argued that it should not be subjected to challenge. *Id.* at 106–07 (Thomas, J., concurring). 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. Nonetheless, Justice Souter concurred in the outcome. *Id.* at 107–10 (Souter, J., concurring).

Justice Stevens, joined by Justice Ginsburg, dissented and argued that the majority's methodology was fundamentally flawed. *Id.* at 110–14 (Stevens, J., dissenting). Justice Stevens argued that any analysis should have started with the question of whether there was a liberty interest at stake. It was clear to Justice Stevens that the Alaska statute included restrictions analogous to parole or supervised release. *Id.* at 111. Justice Stevens further argued that registration and

The Supreme Court used traditional methodology to decide if the Alaska statute violated the Ex Post Facto Clause. Article I, section 9, clause 3 of the U.S. Constitution provides, "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."[37]

The "disadvantage" to a person can occur based upon two possible determinations by the Court: (1) the legislature intended the statute to be punitive; or (2) the statute's effects are "so punitive . . . as to negate [the State's] intention to deem it 'civil.'"[38] If either of those determinations results in a punitive finding, then a statute is deemed an unconstitutional violation of the Ex Post Facto Clause.

The Ninth Circuit had held that the Alaska statute was retrospective,[39] and that while the statute was not intended to be punitive, its effects were, in fact, so punitive as to negate the Alaska legislature's intent.[40] Thus, the Ninth Circuit found the statute unconstitutional.[41]

The Supreme Court concurred with the portions of the Ninth Circuit's opinion that found that the statute was retrospective and the state's intent was for the statute to be civil, not punitive, in nature.[42] The Court then turned to the more difficult issue of whether the statute's effects were punitive in effect. The Court stated that "only the clearest proof" of punitive effects would override the intent of the legislature.[43] As in previous cases, the Court used the seven factor test outlined in *Kennedy v. Mendoza-Martinez*[44] to analyze the statute's effects.[45] The *Mendoza-Martinez* factors were "neither exhaustive nor dispositive," but were a useful means of determining whether the effects of a statute were punitive.[46]

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notification would be constitutional if included as part of the defendant's sentencing process at the original trial. *Id.* at 114.

Justice Ginsburg, joined by Justice Breyer, also dissented in *Smith*. *Id.* at 114–18 (Ginsberg, J., dissenting). Like Justice Souter, Justice Ginsburg argued that the finding of "clearest proof" was not required. *Id.* at 114. However, unlike Justice Souter, Justice Ginsburg found that the Alaska statute was so punitive as to neutralize any civil intent by the legislature. *Id.* at 115. 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. *Id.* at 117–18. For Justice Ginsburg, the excessiveness of the restrictions in relation to the purpose served was dispositive. *See id.* at 116 (noting that "[w]hat ultimately tips the balance for me is the Act's excessiveness in relation to its nonpunitive purpose").

[37] 450 U.S. 24, 29 (1981).

[38] *Smith*, 538 U.S. at 92 (quoting Kansas v. Hendricks, 521 U.S. 346 (1997)).

[39] *Otte*, 259 F.3d at 993.

[40] *Id.*

[41] *See id.*

[42] *Smith*, 538 U.S. at 92–93.

[43] *Id.* at 92 (quoting Hudson v. United States, 522 U.S. 93, 100 (1997)).

[44] 372 U.S. 144, 168–69 (1963).

[45] *Smith*, 538 U.S. at 97.

[46] *Id.* (quoting United States v. Ward, 448 U.S. 242, 249 (1980)).

Although there are seven *Mendoza-Martinez* factors, the *Smith* court listed only the five that were critical for its determination:

> 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.[47]

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.[48] The Court rejected the respondent's contention that sex offender registration and notification served the same functions as traditional shaming punishments.[49] Importantly, the Court distinguished shaming punishments by noting that all of the information in the public registry was already a matter of public record.[50] The online registry simply made access to that public information more efficient.[51]

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

In regards to the third factor, whether the statute served the traditional aims of punishment, the Court found that it did not.[57] On this issue, the Court's reasoning was a bit confused. It concluded that the statute served the function of deterrence (since the State conceded the point), but noted that

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[47] *Id.* 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.

[48] *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." (citation omitted) (quoting Doe v. Otte, 259 F.3d 979, 989 (9th Cir. 2001)).

[49] *Id.* at 97–98.

[50] *Id.* at 98.

[51] *Smith*, 538 U.S. at 98–99.

[52] *Id.* at 99–102.

[53] *See id.* at 101.

[54] *Id.* at 100.

[55] *Id.* at 100–01.

[56] *Id.* at 101–02.

[57] *Smith*, 538 U.S. at 102–04.

many civil regulations served a deterrent function.[58] While the Court's observation that civil regulation often served a deterrent function was 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 aims of punishment under *Mendoza-Martinez*. The Court then turned to a discussion of whether the statute was retributive.[59] It concluded that the statute had no retributive function because the duration of the obligations was roughly tied to the risk posed by an offender.[60]

Through its handling of the third factor, the Court seemed to have collapsed its analysis of the third and fourth factors: whether the statute serves a non-punitive purpose. The Court's arguments in regard 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."[61] 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.[62]

With regard to the fifth factor, that the regulation was excessive in relation to the regulatory purpose, the Court found that the Alaska statute was sufficiently proportionate.[63] The issue was not whether 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."[64] The Court noted the high rate of long-term recidivism of sex offenders as supporting a proper relationship between the regulation and its purpose.[65] Moreover, as the Court noted, the distribution of information from the registry was passive.[66] That is, a person had to request information from the registry—it was not automatically distributed.[67]

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[58] *Id.* at 102.

[59] *Id.*

[60] *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.

[61] *Id.* at 102 (quoting United States v. Ursery, 518 U.S. 267, 292 (1996)).

[62] *Id.* at 102–03.

[63] *Smith*, 538 U.S. at 103.

[64] *Id.* at 105.

[65] *Id.* at 103–04 (noting that "[t]he duration of the reporting requirements is not excessive. Empirical research on child molesters, for instance, has shown that, '[c]ontrary 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 ET AL., U.S. DEP'T OF JUSTICE, CHILD SEXUAL MOLESTATION: RESEARCH ISSUES 14 (1997)).

[66] *Id.* at 104–05.

[67] *See id.*

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.[68] Consequently, the Court found that the Alaska statute was not in violation of the Ex Post Facto Clause.[69] As a result of the decision in *Smith*, retroactivity has become the norm in drafting subsequent sex offender laws.[70]

2. Connecticut Department of Public Safety v. Doe

The decision in *DPS* addressed the constitutionality of a similar sex offender registration statute in Connecticut.[71] However, the challenge focused solely on whether due process entitled a defendant to a hearing before being listed on the state's registry.[72] 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.'"[73] Chief Justice Rehnquist, writing for the majority, reversed the judgment of the Second Circuit and held that there was no procedural due process violation.[74]

The purpose of the registry information was the key distinction between the holding of the Supreme Court and that of the Second Circuit.[75] 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.[76] The Supreme Court 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.[77] Because the offender had already received procedural protections at the time of his or her original trial and sentencing, no further process was due.[78] The odd implication of the Supreme Court's ruling is that if a state did exempt some

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[68] *Id.* at 105–06.

[69] *Smith*, 538 U.S. at 105-106.

[70] *See generally* Logan, *supra* note 21, at 5–8.

[71] Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 3–4 (2003).

[72] *See id.* at 4.

[73] *Id.* (quoting Doe v. Dep't of Pub. Safety *ex rel*. Lee, 271 F.3d 38, 44, 46 (2d Cir. 2001)).

[74] Unlike the opinion in *Smith*, the opinion in *DPS* was brief and unanimous. Justice Scalia wrote a separate concurrence to argue that a statute could properly curtail all due process if the underlying substantive liberty interest was not fundamental. *Id.* at 8–9 (Scalia, J., concurring). 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. *Id.* at 9–10 (Souter, J., concurring). Justice Stevens's dissent in *Smith* also constituted a separate concurrence in *DPS*. *Id.* at 10 (Stevens, J., concurring).

[75] *See id.* at 4–6.

[76] *See id.*

[77] *Id.*

[78] *See 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 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").

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, a state is insulated from a due process challenge.

III. Sex Offender Registration and Notification Act

SORNA forms the backbone of federal sex offender[79] registration law.[80] While the Act had originally been proposed as a separate bill, it was put together with several other proposals into the larger AWA.[81] The AWA, among other things, also included new mandatory minimums for certain crimes,[82] regulations related to bail for sex offenders,[83] provisions for the post-incarceration commitment of certain sex offenders to federal treatment facilities,[84] and specific evidentiary rules in federal child pornography cases.[85] SORNA, while only one title of the AWA, is an independent piece of legislation and is the sole focus of this article. SORNA has its own jurisdictional restrictions,[86] operative language,[87] and funding provisions.[88] SORNA

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[79] SORNA defines a sex offender as "an individual who was convicted of a sex offense." 42 U.S.C. § 16911(1) (2006). 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). Subparagraphs (B) and (C) of § 16911(5) limit the definition of "sex offense" in some cases of foreign conviction and consensual sexual conduct. 42 U.S.C. § 16911(5)(B), (C).

[80] As the preamble of the statute notes, SORNA "establishe[d] a comprehensive national system for the registration" of "sex offenders and offenders against children." 42 U.S.C. § 16901 (2006). The discussion of SORNA herein is largely limited to the portions most relevant to the constitutional challenges against the Act. For a more detailed discussion of SORNA, see Wayne Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 Ohio St. J. Crim. L. 51 (2008).

[81] *See* Press Release, White House Office of the Press Sec'y, Fact Sheet: The Adam Walsh Child Protection And Safety Act Of 2006 (July 27, 2006), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727-7.html.

[82] *See, e.g.*, 18 U.S.C. § 3559(f)(1) (2006).

[83] 18 U.S.C. § 3142.

[84] 42 U.S.C. § 16971.

[85] 18 U.S.C. § 3509(m)(1)–(2).

[86] 18 U.S.C. § 2250(a)(2)(B).

[87] 42 U.S.C. §§ 16911–16929.

[88] While the Act provided for initial funding, the AWA has remained largely unfunded since. *FUND ADAM and John Walsh Urge Congress to Fund The Adam Walsh Child Protec-*

left certain decisions, such as its retroactivity, to be made later by the Office of the Attorney General.[89]

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) those creating a national registry. The first category has already been used extensively in prosecuting sex offenders across the country.[90] The second category has not yet been fully implemented because states have until July 2009 to comply with the national registry requirements of SORNA.[91]

1. Failure to Register (Section 2250(a))

In order to create a sex offender registry, legislatures place the 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. The elements of the crime are defined as follows:

> (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

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tion and Safety Act of 2006, REUTERS, Apr. 24, 2008, *available at* http://www.reuters.com/article/pressRelease/idUS225949+24-Apr-2008+PRN20080424.

[89] *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 . . . ."); § 16912(b) (stating that "[t]he Attorney General shall issue guidelines and regulations to interpret and implement this [title]").

[90] *See infra* notes 133–41 and accompanying text.

[91] 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. § 16912(b). At the time of this Article's publication, no state has fully complied with the AWA, and members of Congress have proposed that an extension be granted for states to comply with the Act. Letter from Senator Patrick Leahy, et al., to Attorney General Eric Holder, Jr. (Mar. 19, 2009), *available at* http://judiciary.senate.gov/resources/documents/111thCongress/upload/031909Leahy-Specter-Conyers-SmithToHolder.pdf [hereinafter *Leahy Request*].

> (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.[92]

There are several interesting portions of the crime to note. First, because § 2250(a)(2) is phrased in the disjunctive, the crime of failure to register includes essentially two classes of offenders: (1) those convicted of federal sex crimes who fail to register;[93] and (2) those convicted of state sex crimes who travel in interstate or foreign commerce and fail to register.[94] Those two groups present slightly different legal problems as discussed herein.[95]

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 is a defense since knowledge of the law is presumed under U.S. common law. Third, the statute carries a rather sizable prison term of up to ten years for a single violation.[96] This penalty can be an order of magnitude greater than the maximum allowable for the offender's original offense.[97]

The text of § 2250(a) relies on 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.[98] 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.[99]

SORNA divides offenders into three categories.[100] 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.[101] Tier

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[92] 18 U.S.C. § 2250(a) (2006).

[93] *See* 18 U.S.C. § 2250(a)(2)(A).

[94] *See* 18 U.S.C. § 2250(a)(2)(B).

[95] *See infra* notes 272–91 and accompanying text.

[96] 18 U.S.C. § 2250(a).

[97] 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.

[98] 42 U.S.C. § 16913(a) (2006).

[99] *See* 42 U.S.C. § 16913(c).

[100] The duration for registration for each offender tier is set forth in 42 U.S.C. § 16915. The frequency with which offenders in each tier must register in person is set forth in 42 U.S.C. § 16916.

[101] 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 offenders have committed less serious crimes than tier III offenders, have a limited period of registration, and have fewer obligations under SORNA than do tier III offenders.[102] Tier I offenders—all those offenders who do not fit in the other two tiers—are subject to the shortest period of requirements and have the fewest obligations under SORNA.[103] Under certain circumstances, an offender with a clean record might be able to reduce his or her time listed on the registry.[104]

(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).

[102] 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
> (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).

[103] 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).

[104] 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).

At the time that SORNA became 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.[105] Instead, SORNA left the retroactivity decision to the Attorney General.[106] 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.[107] 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, Apprehending, Registering, and Tracking office ("SMART") issued a lengthier set of guidelines to be used in the implementation of SORNA.[108]

2. Creation of a National Sex Offender Registry

SORNA mandates that each state assist in 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.[109] 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, there is an open question as to whether states will be as ready to comply.[110] While many

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[105] However, at least one court has concluded that the statute does so specify. In *United States v. Waybright*, 561 F. Supp. 2d 1154, 1171 (D. Mont. 2008), the court found that § 16913 applied retroactively by the text of the statute.

[106] 42 U.S.C. § 16913(d).

[107] 28 C.F.R. § 72.3 (2007) ("The 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").

[108] These guidelines became effective on July 2, 2008. National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 128 (July 2, 2008).

[109] 42 U.S.C. § 16925(a).

[110] The National Conference of State Legislatures ("NCSL") issued a statement explaining why states have not yet complied with the requirements of SORNA. National Conference of State Legislatures, 2007–2008 Policies for the Jurisdiction of the Law and Criminal Justice Committee, http://www.ncsl.org/statefed/LAWANDJ.HTM#AdamWalsh (last visited Mar. 1, 2009). NCSL requested that Congress amend the AWA to limit the burden of the Act. *Id.* 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 . . . .

legislatures have discussed legislation that would fully comply with SORNA, only a handful of states have passed such laws.[111] Even among the states with compliance statutes, none has been deemed to have fully complied with the Act.[112] The national registry does not present the same constitutional 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).[113]

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

As of March 28, 2009, the Seventh,[114] Eighth,[115] Tenth,[116] and Eleventh[117] Circuits had issued opinions concerning the constitutionality of § 2250(a). Each rejected all of the defendants' constitutional arguments against prosecutions for failing to register. Given the sheer number of cases in process in district courts, it is only a matter of time before the rest of the federal appellate courts will be forced to review constitutional claims against SORNA.

As of January 20, 2009, there had been at least 114 district court opinions that specifically addressed constitutional challenges to § 2250(a).[118] Of those opinions, eighty-eight rejected all constitutional challenges made by sex offenders against SORNA.[119] Four opinions found an Ex Post Facto

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> 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.

Id.

[111] *See* John Gramlich, *Will States Say 'No' to Adam Walsh Act?*, STATELINE.ORG, Jan. 23, 2008, http://www.stateline.org/live/details/story?contentid=273887.

[112] *See Leahy Request*, *supra* note 91.

[113] *See infra* note 271 and accompanying text.

[114] United States v. Dixon, 551 F.3d 578 (7th Cir. 2008).

[115] United States v. May, 535 F.3d 912 (8th Cir. 2008). The Eighth Circuit subsequently affirmed its judgment in *May* and found § 16913 constitutional under the Commerce Clause in *United States v. Howell*, 552 F.3d 709 (8th Cir. 2009).

[116] United States v. Hinckley, 550 F.3d 926 (10th Cir. 2008); United States v. Lawrance, 548 F.3d 1329 (10th Cir. 2008).

[117] United States v. Ambert, No. 08-13139, 2009 U.S. App. LEXIS 5275 (11th Cir. Mar. 6, 2009).

[118] This number is based upon a search of the LexisNexis "Federal Court Cases, Combined" database on January 20, 2009.

[119] United States v. Morgan, No. 1:08-CR-73, 2008 U.S. Dist. LEXIS 105289 (N.D. Ind. Dec. 31, 2008); United States v. Yelloweagle, No. 08-cr-00364-WYD, 2008 U.S. Dist. LEXIS 105479 (D. Colo. Dec. 23, 2008); United States v. Contreras, No. EP-08-CR-1696-PRM, 2008 U.S. Dist. LEXIS 102994 (W.D. Tex. Dec. 19, 2008); United States v. Summers, No. 8:08CR256, 2008 U.S. Dist. LEXIS 101456 (D. Neb. Dec. 16, 2008); United States v. Lamere, No. 08-CR-475, 2008 U.S. Dist. LEXIS 101116 (N.D.N.Y. Dec. 15, 2008); United States v. Keleher, No. 1:07-cr-00332-OWW, 2008 U.S. Dist. LEXIS 105532 (E.D. Cal. Nov. 19, 2008);

United States v. Morris, No. 08-0142, 2008 U.S. Dist. LEXIS 104029 (W.D. La. Nov. 14, 2008); United States v. Reeder, No. EP-08-CR-977-DB, 2008 U.S. Dist. LEXIS 105968 (W.D. Tex. Oct. 31, 2008); United States v. Santana, No. EP-08-CR-978-DB, 2008 U.S. Dist. LEXIS 106463 (W.D. Tex. Oct. 31, 2008); United States v. Webster, No. CR-08-227-D, 2008 U.S. Dist. LEXIS 86559 (W.D. Okla. Oct. 24, 2008); United States v. Hardy, No. 07-MJ-108-FHM, 2008 U.S. Dist. LEXIS 84955 (N.D. Okla. Oct. 22, 2008); United States v. Pena, 582 F. Supp. 2d 851 (W.D. Tex. 2008); United States v. Crum, No. CR08-255RSL, 2008 U.S. Dist. LEXIS 83563 (W.D. Wash. Oct. 8, 2008); United States v. Hardy, No. 07-mj-108-FHM, 2008 U.S. Dist. LEXIS 79931 (N.D. Okla. Oct. 7, 2008); United States v. Elmer, No. 08-20033-01-KHV, 2008 U.S. Dist. LEXIS 73220 (D. Kan. Sept. 23, 2008); United States v. Vazquez, No. 07-CR-565, 2008 U.S. Dist. LEXIS 76840 (N.D. Ill. Sept. 22, 2008); United States v. Stevens, 578 F. Supp. 2d 172 (D. Me. 2008); United States v. Slater, No. MO-08-CR-131, 2008 U.S. Dist. LEXIS 81288 (W.D. Tex. Sept. 15, 2008); United States v. Pena, No. MO-08-CR-127, 2008 U.S. Dist. LEXIS 81287 (W.D. Tex. Sept. 15, 2008); United States v. Vardado, 575 F. Supp. 2d 1179 (D. Mont. 2008); United States v. Brown, No. 08-0224-WS, 2008 U.S. Dist. LEXIS 66285 (S.D. Ala. Aug. 28, 2008); United States v. Hann, 574 F. Supp. 2d 827 (M.D. Tenn. 2008); United States v. Torres, 573 F. Supp. 2d 925 (W.D. Tex. 2008); United States v. Shenandoah, 572 F. Supp. 2d 566 (M.D. Pa. 2008); United States v. Robinson, No. 1:08cr76, 2008 U.S. Dist. LEXIS 65024 (E.D. Va. Aug. 19, 2008); United States v. Gagnon, 574 F. Supp. 2d 172 (D. Me. 2008); United States v. Van Buren, No. 3:08-CR-198, 2008 U.S. Dist. LEXIS 61765 (N.D.N.Y. Aug. 8, 2008); United States v. Oakley, No. 8:07CR437, 2008 U.S. Dist. LEXIS 69984 (D. Neb. July 31, 2008); United States v. Trent, 568 F. Supp. 2d 857 (S.D. Ohio 2008); United States v. Van Buren, No. 3:08-CR-198, 2008 U.S. Dist. LEXIS 56702 (N.D.N.Y. July 23, 2008); United States v. Heth, No. EP-08-CR-667-FM, 2008 U.S. Dist. LEXIS 104131 (W.D. Tex. July 21, 2008); United States v. Fuller, No. 5:07-CR-462 (FJS), 2008 U.S. Dist. LEXIS 46950 (N.D.N.Y. June 13, 2008); United States v. Tong, No. CR-08-20-RAW, 2008 U.S. Dist. LEXIS 41589 (E.D. Okla. May 23, 2008); United States v. Cochran, No. CR-08-18-RAW, 2008 U.S. Dist. LEXIS 41588 (E.D. Okla. May 23, 2008); United States v. David, No. 1:08CR11, 2008 U.S. Dist. LEXIS 38613 (W.D.N.C. May 9, 2008); United States v. Ditomasso, 552 F. Supp. 2d 233 (D.R.I. 2008); United States v. Mason, No. 6:07-cr-52-Orl-19GJK, 2008 U.S. Dist. LEXIS 33850 (M.D. Fla. Apr. 24, 2008); United States v. Craft, No. 4:07CR3168, 2008 U.S. Dist. LEXIS 33860 (D. Neb. Apr. 23, 2008); United States v. Holt, No. 3:07-cr-0630-JAJ, 2008 U.S. Dist. LEXIS 31523 (S.D. Iowa Apr. 14, 2008); United States v. Akers, No. 3:07-CR-00086(01)RM, 2008 U.S. Dist. LEXIS 30271 (N.D. Ind. Apr. 3, 2008); United States v. Villagomez, No. CR-08-19-D, 2008 U.S. Dist. LEXIS 26814 (W.D. Okla. Apr. 2, 2008); United States v. Pitts, No. 07-157-JVP-CN, 2008 U.S. Dist. LEXIS 11071 (M.D. La. Feb. 14, 2008); United States v. Utesch, No. 2:07-CR-105, 2008 U.S. Dist. LEXIS 40498 (E.D. Tenn. Feb. 14, 2008); United States v. Thomas, 534 F. Supp. 2d 912 (N.D. Iowa 2008); United States v. Hester, No. 1:07-CR-376, 2008 U.S. Dist. LEXIS 9231 (N.D.N.Y. Feb. 7, 2008); United States v. Hacker, No. 8:07CR243, 2008 U.S. Dist. LEXIS 7793 (D. Neb. Feb. 1, 2008); United States v. Samuels, 543 F. Supp. 2d 669 (E.D. Ky. 2008); United States v. LeTourneau, 534 F. Supp. 2d 718 (S.D. Tex. Jan. 9, 2008); United States v. Baccam, No. 07-30008, 2008 U.S. Dist. LEXIS 5451 (W.D. Ark. Jan. 8, 2008); United States v. Dixon, No. 3:07-CR-72(01) RM, 2007 U.S. Dist. LEXIS 94257 (N.D. Ind. Dec. 18, 2007); United States v. Gould, 526 F. Supp. 2d 538 (D. Md. 2007); United States v. Brown, No. 08-0224-WS, 2007 U.S. Dist. LEXIS 91328 (S.D.N.Y. Aug. 28, 2007); United States v. Elliot, No. 07-14059-CR-GRAHAM, 2007 U.S. Dist. LEXIS 91665 (S.D. Fla. Dec. 10, 2007); United States v. Adkins, No. 1:07-CR-59, 2007 U.S. Dist. LEXIS 90737 (N.D. Ind. Dec. 7, 2007); United States v. Pitts, No. 07-157-A, 2007 U.S. Dist. LEXIS 82632 (M.D. La. Nov. 7, 2007); United States v. Cardenas, No. 07-80108-Cr-Hurley/Vitunac, 2007 U.S. Dist. LEXIS 88803 (S.D. Fla. Nov. 5, 2007); United States v. Carr, No. 1:07-CR-73, 2007 U.S. Dist. LEXIS 81700 (N.D. Ind. Nov. 2, 2007); Levine v. Pennsylvania State Police, No. 4:07-CV-1453, 2007 U.S. Dist. LEXIS 76679 (M.D. Pa. Oct. 16, 2007); United States v. Gill, 520 F. Supp. 2d 1341 (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, No. 4:07-CR-053-SPM, 2007 U.S. Dist. LEXIS 75384 (N.D. Fla. Oct. 10, 2007); United States v. Beasley, No. 1:07-CR-115-TCB, 2007 U.S. Dist. LEXIS 85793 (N.D. Ga. Oct. 10, 2007); United States v. Lovejoy, 516 F. Supp. 2d 1032 (D.N.D. 2007); United States v. May, No. 4:07-cr-00164-JEG,

Clause violation when the indictment relied on allegations of conduct during the "gap period."[120] Nine opinions found an Ex Post Facto Clause violation when the indictment relied on allegations of conduct before SORNA was enacted.[121] Six opinions found § 2250(a) to be an unlawful exercise of federal power inconsistent with the Commerce Clause.[122] Two opinions found a

2007 U.S. Dist. LEXIS 70709 (S.D. Iowa. Sept. 24, 2007); United States v. Kent, No. 07-00226-KD, 2007 U.S. Dist. LEXIS 69819 (S.D. Ala. Sept. 20, 2007); United States v. Mitchell, No. 07CR20012, 2007 U.S. Dist. LEXIS 66114 (W.D. Ark. Sept. 6, 2007); United States v. Lawrance, No. CR-07-166-D, 2007 U.S. Dist. LEXIS 75518 (W.D. Okla. Sept. 5, 2007); United States v. Kelton, No. 5:07-cr-30-Oc-10GRJ, 2007 U.S. Dist. LEXIS 65430 (M.D. Fla. Sept. 5, 2007); United States v. Buxton, No. CR-07-082-R, 2007 U.S. Dist. LEXIS 76142 (W.D. Okla. Aug. 30, 2007); United States v. Bennett, No. 07CR20040, 2007 U.S. Dist. LEXIS 63152 (W.D. Ark. Aug. 27, 2007); United States v. Torres, No. 07-50035, 2007 U.S. Dist. LEXIS 60119 (W.D. Ark. Aug. 15, 2007); United States v. Hulen, No. 07-30004, 2007 U.S. Dist. LEXIS 60113 (W.D. Ark. Aug. 15, 2007); United States v. Sawn, No. 6:07cr00020, 2007 U.S. Dist. LEXIS 59382 (W.D. Va. Aug. 14, 2007); United States v. Gonzales, No. 5:07cr27-RS, 2007 U.S. Dist. LEXIS 58035 (N.D. Fla. Aug. 9, 2007); United States v. Marcantonio, No. 07-60011, 2007 U.S. Dist. LEXIS 55645 (W.D. Ark. July 31, 2007); United States v. Roberts, No. 6:07-CR-70031, 2007 U.S. Dist. LEXIS 54646 (W.D. Va. July 27, 2007); United States v. Muzio, No. 4:07CR179 CDP, 2007 U.S. Dist. LEXIS 54330 (E.D. Mo. July 26, 2007) (court found for defendant on statutory grounds, but decided Commerce Clause argument against defendant); United States v. Lang, No. CR-07-0080-HE, 2007 U.S. Dist. LEXIS 56655 (W.D. Okla. July 13, 2007); United States v. Husted, No. CR-07-105-T, 2007 U.S. Dist. LEXIS 56662 (W.D. Okla. June 29, 2007); United States v. Lang, No. CR-07-0080-HE, 2007 U.S. Dist. LEXIS 56642 (W.D. Okla. June 5, 2007); United States v. Muzio, No. 4:07CR179CDP, 2007 U.S. Dist. LEXIS 40294 (E.D. Mo. June 4, 2007); United States v. Mason, 510 F. Supp. 2d 923 (M.D. Fla. 2007); United States v. Hinen, 487 F. Supp. 2d 747 (W.D. Va. 2007); United States v. Markel, No. 06-20004, 2007 U.S. Dist. LEXIS 27102 (W.D. Ark. Apr. 11, 2007); United States v. Manning, No. 06-20055, 2007 U.S. Dist. LEXIS 12932 (W.D. Ark. Feb. 23, 2007); United States v. Templeton, No. CR-06-291-M, 2007 U.S. Dist. LEXIS 8930 (W.D. Okla. Feb. 7, 2007); United States v. Madera, 2007 U.S. Dist. LEXIS 3029 (M.D. Fl. 2007).

[120] United States v. Davis, No. 07-60003, 2008 U.S. Dist. LEXIS 17112 (W.D. La. Jan. 22, 2008); United States v. Terwilliger, 2008 U.S. Dist. LEXIS 375 (S.D. Cal. Jan. 2, 2008); United States v. Patterson, 8:07CR159, 2007 U.S. Dist. LEXIS 83191 (D. Neb. Nov. 8, 2007); United States v. Cole, No. 07-cr-30062-DRH, 2007 U.S. Dist. LEXIS 68522 (S.D. Ill. Sept. 17, 2007).

[121] United States v. Gillette, 553 F. Supp. 2d 524 (D.V.I. 2008); United States v. Aldrich, No. 8:07CR158, 2008 U.S. Dist. LEXIS 11411 (D. Neb. Feb. 14, 2008); United States v. Kent, No. 07-00226-CG, 2008 U.S. Dist. LEXIS 10044 (S.D. Ala. Feb. 8, 2008); United States v. Howell, No. CR07-2013-MWB, 2008 U.S. Dist. LEXIS 7810 (N.D. Iowa. Feb. 1, 2008); United States v. Bonner, No. 07-00264-KD, 2007 U.S. Dist. LEXIS 92248 (S.D. Ala. Dec. 11, 2007); United States v. Wilson, No. 2:06-cr-867 TC, 2007 U.S. Dist. LEXIS 76722 (D. Utah Oct. 16, 2007); United States v. Stinson, 507 F. Supp. 2d 560 (S.D. W. Va. 2007); United States v. Dillenbeck, No. 4:07-cr-213-RBH, 2007 U.S. Dist. LEXIS 66896 (D.S.C. Sept. 7, 2007); United States v. Smith, 481 F. Supp. 2d 846 (E.D. Mich. 2007).

[122] United States v. Waybright, 561 F. Supp. 2d 1154 (D. Mont. 2008); United States v. Powers, 544 F. Supp. 2d 1331 (M.D. Fla. 2008); United States v. Hilton-Thomas, No. 08-20721-CR-ZLOCH, 2009 U.S. Dist. LEXIS 1929 (S.D. Fla. Jan. 13, 2009); United States v. Myers, No. 08-60064-CR-ZLOCH, 2008 U.S. Dist. LEXIS 99384 (S.D. Fla. Dec. 9, 2008); United States v. Guzman, 582 F. Supp. 2d 305 (N.D.N.Y. 2008); United States v. Hall, 577 F. Supp. 2d 610 (N.D.N.Y. 2008). Subsequent to the original opinion in *Hall*, the court rejected the government's motion for reconsideration. United States v. Hall, No. 5:08-CR-174, 2008 U.S. Dist. LEXIS 98343 (N.D.N.Y. Dec. 4, 2008).

due process violation.[123] Seven opinions avoided reaching the constitutional questions by rendering a finding on statutory grounds in favor of the defendant.[124]

The large majority of opinions that have upheld the constitutionality of § 2250(a) have relied heavily on the Supreme Court decisions in *Smith* and *DPS*. These two cases have also been cited in disposing of claims unrelated to those reviewed by the Court in *Smith* and *DPS*.[125] 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. There are 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, language, and effects of the respective statutes. Claims under three constitutional provisions should result in § 2250(a) being found unconstitutional. These provisions are the Ex Post Facto Clause, the Fifth Amendment Due Process, and the Commerce Clause.

IV. 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 Clause.[126] 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 of whether a statute is retrospective and whether it is intended to be punitive. If it is not intended to be punitive, a court must consider whether the actual effects of the law override the intent of the legislature.

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[123] *Aldrich*, 2008 U.S. Dist. LEXIS 11411 (also finding an Ex Post Facto Clause violation); United States v. Barnes, No. 07 Cr. 187, 2007 U.S. Dist. LEXIS 53245 (S.D.N.Y. July 23, 2007).

[124] United States v. Rich, No. 07-00274-01-CR-W-HFS, 2007 U.S. Dist. LEXIS 89609 (W.D. Mo. Dec. 5, 2007); United States v. Rich, No. 07-00274-01-CR-W-HFS, 2007 U.S. Dist. LEXIS 91131 (W.D. Mo. Oct. 31, 2007); United States v. Deese, No. CR-07-167-L, 2007 U.S. Dist. LEXIS 70677 (W.D. Okla. Sept. 21, 2007) (avoiding finding an Ex Post Facto violation by interpreting statute not to apply retrospectively); United States v. Sallee, No. CR-07-152-L, 2007 U.S. Dist. LEXIS 68350 (W.D. Okla. Aug. 13, 2007); United States v. Heriot, No. 3:07-323, 2007 U.S. Dist. LEXIS 54807 (D.S.C. July 27, 2007); United States v. Smith, 528 F. Supp. 2d 615 (S.D. W.Va. 2007); United States v. Kapp, 487 F. Supp. 2d 536 (M.D. Pa. 2007).

[125] For example, the Ninth Circuit in *United States v. Byun*, in finding against the defendant on the interpretation of a statutory element, found the holding of *Smith* to be persuasive on the issue. 539 F.3d 982, 993 n.14 (9th Cir. 2008) ("Here, 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) . . . ." (parallel citations omitted)).

[126] *See supra* notes 33–70 and accompanying text.

A. Section 2250(a) is Retrospective

In *Smith*, the Court quickly found that the Alaska statute was retrospective.[127] 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's statement that the statute applies to crimes prior to the passage of the Act and the holding in *Smith*, there should be little dispute that § 2250(a) is retrospective.

However, lower 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, approximately one-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.[128] Strangely, even among those courts that have found an Ex Post Facto violation, none has concluded that SORNA was retrospective based only upon the inclusion of past crimes.[129]

United States v. Pitts[130] illustrates the ways that prosecutions under § 2250(a) are reaching back in time.[131] Glenn Aubrey Pitts was convicted of a sex offense in 1992 and last allegedly traveled between states sometime between October 1998 and November 2001. Five years later, just months after the AWA was enacted, Pitts was arrested and charged with failing to register under § 2250(a). Despite the fact that significant portions of the al-

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[127] Smith v. Doe, 538 U.S. 84, 90 (2003).

[128] *See, e.g.*, United States v. Fuller, No. 5:07-CR-462 (FJS), 2008 U.S. Dist. LEXIS 46950, at *9–10 (N.D.N.Y. June 13, 2008); United States v. Utesch, No. 2:07-CR-105, 2008 U.S. Dist. LEXIS 40498, at *16–17 (E.D. Tenn. Feb. 14, 2008); United States v. Passaro, No. 07-CR-2308 BEN, 2007 U.S. Dist. LEXIS 97641, at *30–31 (S.D. Cal. Dec. 17, 2007).

[129] 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 to register" necessitates review of 42 U.S.C. § 16913 (2006). 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. 42 U.S.C. § 16913(d). 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.

[130] No. 07-157-A, 2007 U.S. Dist. LEXIS 82632, at *5 (M.D. La. Nov. 7, 2007).

[131] For further explanation of the significance of the *Pitts* fact pattern, see Corey Rayburn Yung, *The Sex Offender Registration and Notification Act and the Commerce Clause*, 21 FED. SENT'G REP. 133 (2008).

leged conduct necessary to sustain an indictment occurred years before the passage of SORNA, the district court refused to dismiss the indictment against Pitts.[132]

The district court opinion in *United States v. Husted*[133] offered another disturbing fact pattern. In 1993, Michael Ray Husted was convicted of aggravated criminal sex abuse of a child.[134] Because of that conviction, Husted was required by state law to register as a sex offender in Oklahoma, where he resided.[135] In June 2006, Husted left Oklahoma and moved to Missouri.[136] Under Missouri law, Husted was not required to register because the Missouri Supreme Court ruled that the state's 1995 sex offender registration law did not apply retroactively to persons who committed crimes prior to the enactment of the statute.[137] And because he had left the state, Husted was no longer required to register in Oklahoma.

About one month after Husted made his move between states, SORNA was signed into law. Some time afterwards, Husted was charged in the Western District of Oklahoma for failing to register as a sex offender as required by SORNA. Husted challenged his indictment on multiple grounds, including the argument that his prosecution under SORNA was an unconstitutional Ex Post Facto punishment.[138] Husted's sex offense and interstate travel both occurred prior to the passage of SORNA. Further, Husted resided in a state where state law did not require him to register because Missouri's registration law was held not to apply retroactively. However, the district court rejected Husted's argument solely based upon the contention that the prosecution was not retrospective.[139]

Those courts finding that § 2250(a) is not retrospective primarily reason that the failure to register under that section is a "new offense." Therefore, the punishment under the section is unrelated to the defendant's prior bad acts.[140] Stated another way, § 2250(a) "does not criminalize the fact that the [d]efendant committed a sex offense prior to the statute's enactment."[141]

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[132] *Pitts*, 2007 U.S. Dist. LEXIS 82632, at *12–13.

[133] 2007 U.S. Dist. LEXIS 56662 (W.D. Okla. June 29, 2007), *rev'd on other grounds*, 545 F.3d 1240 (10th Cir. 2008) (reversing on statutory grounds without addressing the Ex Post Facto Clause issue).

[134] *Id.* at *2.

[135] *Id.*

[136] *Id.*

[137] *Id.* at *2–3.

[138] *Id.* at *10–14.

[139] *Husted*, 2007 U.S. Dist. LEXIS 56662 at *14 ("The offense with which Defendant is charged had not been completed when SORNA took effect. No ex post facto violation arises from applying Section 2250 to Defendant's failure to update his registration and to register after July 27, 2006.").

[140] *See, e.g.*, United States v. Gould, 526 F. Supp. 2d 538, 548 (D. Md. 2007) ("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." (citation omitted)).

[141] United States v. Cardenas, No. 07-80108-Cr-Hurley/Vitunac, 2007 U.S. Dist. LEXIS 88803, at *27 (S.D. Fla. Nov. 5, 2007).

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 . . . ."[142] This interpretation ignores the structure of § 2250(a). In cases where the sex offender has previously been convicted under state law, interstate travel is an essential element of the crime. In this respect, it is just as important as failure to register. Without both elements, a person previously convicted of a sex crime under state law cannot be found guilty of violating § 2250(a). 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 prior sex offense are not parts of the crime.

Second, courts have held that failing to register is a continuing act occurring after the passage of SORNA, so the date of travel and the prior sex offense are wholly irrelevant.[143] In such cases, the indictment merely alleges any violative 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 requirements that the offender "travels" and "fails to register" are both written in the present tense.[144] Such language supports the contention that the Act be construed as "contemplat[ing] a single act even though there may be continuing effects."[145] Further, the offense is complete at the moment the

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[142] United States v. Lang, No. CR-07-0080-HE, 2007 U.S. Dist. LEXIS 56642, at *8 (W.D. Okla. June 5, 2007).

[143] *See, e.g.*, United States v. Dixon, No. 3:07-CR-72(01) RM, 2007 U.S. Dist. LEXIS 94257, at *7–8 (N.D. Ind. Dec. 18, 2007) ("The *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."); United States v. Carr, No. 1:07-CR-73, 2007 U.S. Dist. LEXIS 81700, at *2, *6–8 (N.D. Ind. Nov. 2, 2007) (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."); United States v. Lawrance, No. CR-07-166-D, 2007 U.S. Dist. LEXIS 75518 at *11–12 (W.D. Okla. Sept. 5, 2007) ("The offense set forth in § 2250 is potentially a continuing one, as a 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.")

[144] 18 U.S.C. § 2250(a) (2006).

[145] United States v. Wilson, No. 2:06-cr-867, 2007 U.S. Dist. LEXIS 76722, at *6 (D. Utah Oct. 16, 2007) (quoting United States v. Dunne, 324 F.3d 1158, 1165 (10th Cir. 2003)).

offender fails to register at the required time—no further actions make it a continued offense.[146]

Even accepting that a violation of § 2250(a) is a continuing offense, this 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.[147] Thus, defendants who traveled between states prior to the passage of SORNA could be prosecuted.[148] This argument turns the Ex Post Facto Clause into a nullity. The federal government would be free to punish any criminal conduct that occurred prior to passing a statute as long as it included an element of interstate travel, and the interstate travel occurred subsequent to the passage of the law.

In defense of the position of most courts, some may point to the line of opinions holding no Ex Post Facto violations in prosecutions under 18 U.S.C. § 922(g) for being a felon in possession of a firearm. In such cases, the fact that the person had committed a felony prior to the underlying statute's enactment was not a basis for an Ex Post Facto violation.[149] However, such cases are distinguishable for three reasons. First, in SORNA cases such as *Pitts*, the defendants engaged in no new conduct after the passage of the Act. However, when a felon comes to possess a firearm, he or she is engaging in a criminal act. Even if that felon already possesses a weapon, he or she can dispose of it. In contrast, a sex offender need take no affirmative action after the enactment of SORNA to be punished. Further, the offender is unable to relieve him— or herself of the obligation to register in the way a felon can "relieve" him— or herself of a firearm. The sex offender is situated such that his or her eligibility for registration might be based entirely on conduct prior to the enactment of SORNA. That there is a subsequent obligation to register based upon that eligibility makes a SORNA prosecution, in some cases, wholly dependent on the offender's conduct before SORNA was enacted.

Second, even in cases where interstate travel occurred after the passage of SORNA, an Ex Post Facto problem remains. Interstate travel is not only

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[146] *See Wilson*, 2007 U.S. Dist. LEXIS 76722, at *4–5; United States v. Beasley, No. 1:07-CR-115-TCB, 2007 U.S. Dist. LEXIS 85793, at *9–10 (N.D. Ga. Oct. 10, 2007).

[147] *See, e.g.*, United States v. Adkins, No. 1:07-CR-59, 2007 U.S. Dist. LEXIS 90737, at *12 (N.D. Ind. Dec. 7, 2007) ("[I]t 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.").

[148] *See, e.g.*, United States v. Pitts, No. 07-157-A, 2007 U.S. Dist. LEXIS 82632, at *13–17 (M.D. La. Nov. 7, 2007) (finding no Ex Post Facto violation even though the indictment against the defendant only alleged interstate travel prior to the enactment of SORNA).

[149] *See, e.g.*, United States v. Mitchell, 209 F.3d 319, 322–23 (4th Cir. 2000).

wholly legal conduct; it is a fundamental right.[150] It was only included within § 2250(a) to provide a jurisdictional basis for federal action. If the conduct critical to the court's finding occurs after the passage of the act, but is constitutionally protected, that should not preclude an Ex Post Facto argument by the defendant. If it were otherwise, every federal criminal statute would only need an interstate travel element to allow all punishment to be applied retroactively as soon as the defendant crossed state lines. As an example, assume a new drug possession statute without a statute of limitations and with an interstate travel element is enacted. Using the reasoning of existing SORNA opinions, prosecutors would be free to prosecute persons for possession of narcotics in the 1950s so long as they traveled in interstate commerce after the passage of the law. Such an exception would effectively swallow the rule of the Ex Post Facto Clause.

Third, and perhaps most important, is the *Smith* majority's lack of serious consideration for the argument that registries are not retrospective.[151] In *Smith*, the retrospectivity finding should have been more difficult than in most SORNA cases. Because the Court was only reviewing the listing on the registry itself, the fact that it included past crimes was the only possible way in which the statute could be retrospective. Yet, that was sufficient for the Court to conclude that the statute was retrospective. In contrast, under

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[150] A long line of cases has firmly established that interstate travel is a fundamental right. Among the various U.S. Supreme Court discussions of the right, Justice Stewart's concurrence in *Shapiro v. Thompson*, 394 U.S. 618, 642–43 (1969) (Stewart, J., concurring), is perhaps the most helpful for appreciating the significance of the right:

> "The constitutional right to travel from one State to another . . . has been firmly established and repeatedly recognized." *United States v. Guest*, 383 U.S. 745, 757. This constitutional right, which, of course, includes the right of "entering and abiding in any State in the Union," *Truax v. Raich*, 239 U.S. 33, 39, is not a mere conditional liberty subject to regulation and control under conventional due process or equal protection standards. "[T]he right to travel freely from State to State finds constitutional protection that is quite independent of the Fourteenth Amendment." *United States v. Guest*, *supra*, at 760, n. 17. As we made clear in *Guest*, it is a right broadly assertable against private interference as well as governmental action. Like the right of association, *NAACP v. Alabama*, 357 U.S. 449, it is a virtually unconditional personal right, guaranteed by the Constitution to us all.

Id. (internal citations omitted). One could argue that the right to bear arms embodied in the Second Amendment is at least as important as the right to interstate travel. After the Court's decision in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), affirming an individual rights conception of the Second Amendment, this argument would have greater force. Cass Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246 (2008). However, the majority constructed this right as not applying to convicted felons, leaving the law in that area largely undetermined. *Heller*, 128 S. Ct. at 2816–17 (noting that, "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons. . ."). If there is an individual right to bear arms as articulated by the majority, it is unclear why such a right does not extend to felons after release. Certainly, if the right to bear arms is found to apply to convicted felons, the distinction described herein would not survive since the right to bear arms for felons would at least be of equal status as the right to interstate travel for felons. However, such a result would necessarily invalidate such gun possession statutes in a way that would obviate the need for a viable distinction.

[151] *See supra* note 42 and accompanying text.

SORNA, in addition to the retrospective nature of the past crimes creating the registration obligation, interstate travel and failure to register might have occurred before the passage of the Act. Thus, the case for retrospectivity is even stronger under SORNA than it was in *Smith*. Even if one believes that the felon-in-possession cases are in tension with the portion of *Smith* that found the Alaska statute retrospective, district and circuit courts should follow *Smith* on this issue and find that sex offender registration and notification requirements which include prior acts by the defendant are necessarily retrospective.[152]

B. The Punitive Intent of Section 2250(a)

The next step in an Ex Post Facto Clause analysis is determining if the legislative body adopting the statute at issue intended it 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 is little ambiguity as to whether § 2250(a) was intended to be punitive. The statute was placed in the U.S. criminal code and included a prison term of up to ten years.[153] 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.[154] Nonetheless, most courts have found that Congress's intent was not punitive.[155] Typically, courts have read *Smith* as "essentially compel[ling] that conclusion."[156]

The opinion in *Smith* only considered whether it was punitive for a sex offender to be listed on the state registry. The opinion does not control

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[152] This may simply be an area where there is intractable tension in the doctrine. In this case, district and appellate courts should certainly follow the more applicable line of cases, embodied in *Smith*, rather than the felon-in-possession cases which, while similar, might be distinguishable, as discussed in this Part.

[153] *See* United States v. Smith, 481 F. Supp. 2d 846, 852–53 (E.D. Mich. 2007) ("The Supreme Court held in *Smith* that the Alaska legislature selected [to classify the statute as] 'civil.' In the instant case, Congress picked 'criminal,' [as shown by] the felony failure to register violation [appearing] in Title 18 of the Federal Code: Crimes and Criminal Procedure.").

[154] *See* United States v. Kent, No. 07-00226-KD, 2007 U.S. Dist. LEXIS 69819, at *6 (S.D. Ala. Sept. 20, 2007) ("[I]t is obvious that 18 U.S.C. § 2250 was meant to be punitive, hence the possible ten year sentence.").

[155] *See, e.g.*, United States v. Pitts, No. 07-157-A, 2007 U.S. Dist. LEXIS 82632, at *16–17 (M.D. La. Nov. 7, 2007) ("As 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* United States v. Bonner, No. 07-00264-KD, 2007 U.S. Dist. LEXIS 92248, at *5 (S.D. Ala. Dec. 12, 2007) ("It is obvious that 18 U.S.C. § 2250 was meant to be punitive, hence the possible ten year sentence.").

[156] *See, e.g.*, United States v. Lang, No. CR-07-0080-HE, 2007 U.S. Dist. LEXIS 56642, at *5 (W.D. Okla. June 5, 2007).

whether prosecuting someone for the crime of failing to register is punitive.[157] Nonetheless, courts have entirely missed that distinction and have cited *Smith* as foreclosing any Ex Post Facto Clause challenge.[158] The Eighth Circuit's reasoning in *United States v. May* is typical of courts reviewing Ex Post Facto claims in holding that, "[a]s was the case in *Smith*, SORNA's registration requirement demonstrates no congressional intent to punish sex offenders."[159]

This reliance on *Smith* is patently wrong 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:

> 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.[160]

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

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[157] *See* United States v. Beasley, No. 1:07-CR-115-TCB, 2007 U.S. Dist. LEXIS 85793, at *7 (N.D. Ga. Oct. 10, 2007) ("In *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.").

[158] The decision in *Pitts*, 2008 U.S. Dist. LEXIS 11071, at *6–7, is an example of the failure to recognize the distinction between the questions of 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. (citations omitted).

[159] 535 F.3d 912, 920 (8th Cir. 2008).

[160] Smith v. Doe, 538 U.S. 84, 101–02 (2003).

any subsequent criminal prosecution could be applied to acts committed before the Alaska statute was passed.[161]

The primary reason that courts have relied heavily on the outcome in *Smith* is that they saw both the language of the federal and state statutes and purposes of those statutes to be aligned.[162] The purpose stated for SORNA (and the AWA) is "to protect the public from sex offenders and offenders against children."[163] From that brief statement of a "public safety" interest[164] courts have inferred a non-punitive purpose of § 2250(a).[165] It is a mistake for courts to rely on such a statement of purpose, since it could apply to any wholly criminal and punitive law that applies 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.[166] These courts have concluded that the placement of the majority of the statute in Title 42 of the U.S. Code (concerning public health and welfare) outweighs the placement of § 2250(a) in Title 18 (the criminal code).[167] This argument would allow Con-

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[161] 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.

United States v. Elliot, No. 07-14059-CR-GRAHAM, 2007 U.S. Dist. LEXIS 91655, at *11 (S.D. Fla. Dec. 13, 2007).

[162] *See, e.g.*, *Pitts*, 2007 U.S. Dist. LEXIS 82632, at *16–17; United States v. Mason, 510 F. Supp. 2d 923, 929 (M.D. Fla. 2007).

[163] 42 U.S.C. § 16901 (2006).

[164] United States v. Hinen, 487 F. Supp. 2d 747, 755 (W.D. Va. 2007).

[165] *See, e.g.*, United States v. Buxton, No. CR-07-082, 2007 U.S. Dist. LEXIS 76142, at *11 (W.D. Okla. Aug. 30, 2007) ("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." (citation omitted)).

[166] *See, e.g.*, United States v. Cardenas, No. 07-80108-cr-Hurley/Vitunac, 2007 U.S. Dist. LEXIS 88803, at *29 (S.D. Fla. Nov. 5, 2007) ("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.

[167] *See, e.g.*, *Hinen*, 487 F. Supp. 2d at 756 ("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.").

gress 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.[168] 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 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 failure to register. Further, the argument that the Alaska statute included a criminal penalty ignores a substantial difference in magnitude of the penalty. SORNA authorizes a fine and sentence up to ten years for a single violation.[169] The statutes at issue in *Smith* considered a first time failure to register as a "Class A Misdemeanor" and either a repeat offense or a failure to register with intent to escape detection so as to facilitate a sex offense or kidnapping as a "Class C Felony."[170]

A comparison of the government agency involved in *Smith* and the agency created by SORNA also indicates 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 civil and criminal function, the Court inferred that its control of promulgating regulations did not indicate a punitive intent.[171] 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. In contrast to the Alaska Department of Public Safety, SMART serves no other civil regulatory functions that would indicate a civil purpose.

Few courts have addressed the agency issue specifically. One court has responded to the agency argument by noting that the agency in control does "not necessarily render the Act punitive."[172] While certainly true, the Supreme Court has made clear that the agency in control should factor into the

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[168] *See, e.g.*, United States v. Adkins, No. 1:07-CR-59, 2007 U.S. Dist. LEXIS 90737, at *11 (N.D. Ind. Dec. 7, 2007) ("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.'" (citation omitted)); United States v. Torres, No. 07-50035, 2007 U.S. Dist. LEXIS 60119, at *4 (W.D. Ark. Aug. 18, 2007) ("Failure to register under the Alaska law carried a criminal penalty, just as 18 U.S.C. § 2250 does for failure to register under SORNA.").

[169] 18 U.S.C. § 2250(a) (2006).

[170] ALASKA STAT. §§ 11.56.835, 840 (1998).

[171] Smith v. Doe, 538 U.S. 84, 96 (2003). ("[A]side 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.").

[172] *Adkins*, 2007 U.S. Dist. LEXIS 90737, at *11.

overall calculation. Thus far, no court has seriously considered this factor in applying *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's punitive intent.

C. Punitive Effects of Section 2250(a)

Even assuming that Congress's intent in passing § 2250(a) was civil in nature, courts could 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 congressional intent. 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.'"[173] A problem with any challenge to a registration scheme under the Ex Post Facto Clause based upon punitive effects 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.[174]

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 *United States v. 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.[175]

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[173] *Smith*, 538 U.S. at 92 (2003) (quoting Kansas v. Hendricks, 521 U.S. 346, 361 (1997)).
[174] *Id*. at 92.
[175] 487 F. Supp. 2d 747, 756–57 n.8 (W.D. Va. 2007).

The statement that the "only" difference between the Alaska statute and SORNA relates to in-person appearances 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. All five of the factors discussed in *Smith*, as well as one other factor, are relevant to § 2250(a) and are 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 were similar to traditional or historical punishments. While the Court considered analogies to shaming and banishment punishments, it ultimately concluded that listing on registry was not so punitive as to neutralize the legislature's intent that the statute be civil.[176] 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.

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, such as 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.[177] Under § 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

[176] *See supra* note 68 and accompanying text.
[177] *See supra* notes 53–57 and accompanying text.

> indication that an in-person appearance requirement has been imposed on any sex offender subject to the Act.[178]

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 of personal appearance.[179]

SORNA requires sex offenders in all three tiers to engage in periodic personal appearances for registration. For tier I offenders, personal appearances to verify registry information and update the offender's photograph are yearly requirements.[180] For tier II offenders, appearances are required every six months,[181] and tier III offenders must appear in person every three months.[182] SORNA'S 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 every year for the duration of his or her life. Such a requirement is consistent with those cases wherein the Court has found a clear affirmative restraint.[183] Further, the possibility of a prison sentence undoubtedly represents the "paradigmatic affirmative disability or restraint."[184]

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.[185] To reach the opposite conclusion would potentially call into question a variety of legitimate government regulation.[186]

As to § 2250(a), however, the traditional aims of punishment are much clearer. The maximum penalty is ten years in prison. The Sentencing Guidelines recommend a range, depending on various circumstances of the offense and the defendant's criminal history, from 10 to 125 months.[187] The judge must consider the guideline range and a variety of other factors and is required to impose a sentence that complies with the traditional purposes of

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[178] *Smith*, 538 U.S. at 101 (citation omitted).
[179] *See supra* note 53 and accompanying text.
[180] *See* 42 U.S.C. § 16916(1) (2006).
[181] *See* 42 U.S.C. § 16916(2).
[182] *See* 42 U.S.C. § 16916(3).
[183] *See, e.g.*, Johnson v. United States, 529 U.S. 694 (2000) (finding that supervised release constituted an affirmative restraint on an individual).
[184] *Smith*, 538 U.S. at 100.
[185] *Id.* at 102.
[186] *See id.*
[187] U.S. Sentencing Guidelines Manual § 2A3.5 (2008).

punishment.[188] A person who is sentenced for failing to register will suffer retribution and be incapacitated. Further, the sentencing of sex offenders sends a specific and general deterrence message.

4. Rational Connection to a Non-Punitive Purpose

The Court considered the rational connection to a non-punitive purpose the most important factor in *Smith*. The "public safety" rationale applies in the case of § 2250(a) as it did in *Smith*. However, if the "public safety" rationale is treated as wholly civil, then it is hard to imagine any criminal statute that could 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 difficult to imagine any statute that would not survive an Ex Post Facto Clause claim. The only apparent rejoinder to such a concern is to consider whether the statutory penalty under review is excessive in relation to the non-punitive purpose.

5. Excessiveness in Relation to Non-Punitive Purpose

The Alaska statute only includes limited requirements and minor penalties, which could not have been deemed excessive if the goal of public safety was served. Section 2250(a), however, incorporates requirements that go beyond what is needed to secure public safety. Even without sex offender cooperation, the federal government can obtain all (or almost all) of the sex offender registry information from states and public records. As a result, the degree of offender compliance does little to further public safety.

In contrast, the penalties for violation of § 2250(a) are quite high. A person who has 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.[189] There is no sense of proportionality in deeming an offender safe enough to serve no prison time for the original crime but imposing a long prison sentence for failing to serve an administrative function.

6. Behavior Already Criminal

One factor that the Court did not consider in *Smith* was whether the behavior regulated was already defined as criminal.[190] That was because there was no "behavior" being regulated by the inclusion of information in a

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[188] *See* 18 U.S.C. § 3553(a) (2006).

[189] 18 U.S.C. § 2250(a).

[190] Given that this factor was one of the factors cited by the Ninth Circuit in its review of the case, the omission is strange. *See* Doe v. Otte, 259 F.3d 979, 991 (9th Cir. 2001). Even in cases where the defendant has lost an Ex Post Facto challenge, the U.S. Supreme Court has recognized that if the act is already criminal, that should be considered as part of its analysis. United States v. Ward, 448 U.S. 242, 249–50 (1980).

registry. In contrast, failing to register is the behavior that is regulated by § 2250(a). Since every state and federal territory had adopted a criminal law for failing to register under state registry requirements prior to SORNA's enactment, 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.

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 that allows for a heavy penalty for violation even if the elements of those crimes include past conduct. 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.[191] Further, the opinion in *Smith* quickly dismissed any government argument that the statutes were not retrospective.[192] Based upon the opinion in *Smith*, the logical outcome should be that § 2250(a) is retrospective and punitive in intent (without even needing to reach the more difficult punitive effects question). District courts should dismiss indictments against persons whose sex offenses, failures to register, or alleged interstate travels occurred 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 amend § 16913(d) or § 2250(a) to exclude prior sex offenses and prior interstate travel by offenders. This would make the crime of failing to register operate in a manner 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 the congressional amendments suggested 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.

V. SORNA and 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

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[191] *See supra* note 152 and accompanying text.
[192] *See supra* note 43 and accompanying text.

law."[193] Due process is a large umbrella under which many individual rights exist; among those is a limited right to fair warning or notice.[194] But because the case law concerning the scope of the fair notice right is limited, the exact confines of that right are largely undefined.

In *Lambert v. California*,[195] perhaps the most significant Supreme Court opinion concerning fair warning, 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 Fourteenth Amendment. 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.[196]

Critical to the Court's reasoning in *Lambert* was that the defendant's obligation to register was based only upon her status as a felon. To the Court, it was a basic violation of a person's Fourteenth Amendment rights to punish him or her for a crime of omission without any notice of the duty of registration. While *Lambert* was decided fifty years ago, the fair notice principle embodied within the opinion continues to have resonance with the modern Court.[197]

Given the similarities between SORNA and the California law at issue in *Lambert*, a due process challenge to the newer federal statute might have some success. Without giving notice to offenders, it is unclear how SORNA honors the right to fair warning. The end result, as in *Lambert*, is that persons are being punished for "wholly passive" conduct without any semblance of fair warning.

Moreover, SORNA itself appears to be intended to implement *Lambert*. The mens rea element of the offense described in § 2250(a) is "knowingly fail[ing] to register or update a registration *as required by [SORNA].*"[198] SORNA, in turn, imposes explicit duties on local and federal officials to give notice of and explain the precise registration requirements. First, it creates interlocking notice and registration requirements directed at "appropriate officials," the Attorney General, and "sex offenders."[199] It requires an "appro-

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[193] U.S. CONST. amend. V.

[194] *See* United States v. Lanier, 520 U.S. 259, 265 (1997).

[195] 355 U.S. 225 (1957).

[196] *Id.* at 228.

[197] *See Lanier* 520 U.S. at 265 ("no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed").

[198] 18 U.S.C. § 2250(a)(3) (2006) (emphasis added).

[199] *See* 42 U.S.C. §§ 16911, 16913, 16915–17 (2006); 18 U.S.C. § 4042(c)(3).

priate official," shortly before release from custody, or if not in custody, immediately after sentencing, to: (1) inform the offender of and explain his or her duties under SORNA; (2) require the offender to "read and sign a form stating that the duty to register has been explained and that the sex offender understands the registration requirement"; and (3) ensure that the sex offender is registered.[200] Second, for federal sex offenders, the Bureau of Prisons or the supervising probation officer is to notify the person "of the requirements of [SORNA] as they apply to that person."[201] Third, the Attorney General of the United States is required to prescribe rules for the notification and registration of persons who are not able to be notified and registered in accordance with § 16917(a).[202] Such rules apply to persons who were convicted before July 27, 2006 or before SORNA was implemented in the jurisdiction if the Attorney General deems those persons to be subject to SORNA (as he has by a regulation issued February 28, 2007). The rules also apply to other persons who are unable to be notified and registered as required by § 16917(a), such as federal prisoners and federal defendants sentenced to probation.[203]

Despite those requirements, the Attorney General's regulation of February 28, 2007 does not provide rules for the notification and registration of persons who are not able to be notified and registered in accordance with § 16917(a). The final SMART Guidelines issued by the Attorney General in June 2008 recognize that the notice required by the statute is not possible at least until a jurisdiction in which the person lives, works, or is a student implements the registry provisions of SORNA.[204] Thus, even insofar as SORNA incorporates provisions for notice, the right to some warning as seemingly necessitated by *Lambert* is being abridged for persons in states that may not have implemented SORNA and who are not notified and registered under § 16917(a). In some cases, an offender may have committed a crime decades before and have no obligation to register in his or her jurisdiction, yet would be expected to know of his or her registration requirements under SORNA.

A. Court Response to Lambert *Challenges to Section 2250(a)*

Despite the seemingly clear applicability of *Lambert*, courts that have reviewed due process claims against SORNA have rarely discussed the opin-

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[200] 42 U.S.C. § 16917(a).
[201] 18 U.S.C. § 4042(c).
[202] *See* 42 U.S.C. §§ 16917(b), 16913(d).
[203] *Id.*
[204] *See* National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. at 38063 ("With respect to sex offenders with pre-SORNA or pre-SORNA implementation convictions," and only as to those "who remain in the prisoner, supervision, or registered sex offender populations at the time of implementation . . . jurisdictions should endeavor to register them with SORNA as soon as possible.").

ion.[205] Typically, courts cite the Supreme Court's decision in *DPS* to support the contention that a defendant has no viable due process claim.[206] This citation to *DPS* is inapposite because the due process issue in that case was very different. *DPS* concerned whether a person was entitled to a separate hearing before being listed on the state registry.[207] Those few courts that have addressed *Lambert* have distinguished it in at least one of four ways.

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*.[208] However, there are substantial problems in holding that notice of state requirements provides notice of federal require-

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[205] This simply may have been the result of how each of the cases was 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. *See, e.g.*, United States v. Contreras, No. EP-08-CR-1696-PRM, 2008 U.S. Dist. LEXIS 102994, at *14–15 (W.D. Tex. Dec. 19, 2008); United States v. Summers, No. 8:08CR256, 2008 U.S. Dist. LEXIS 101456, at *6–7 (D. Neb. Dec. 16, 2008); United States v. Lamere, No. 08-CR-475, 2008 U.S. Dist. LEXIS 101116, at *7 (N.D.N.Y. Dec. 15, 2008).

[206] *See, e.g.*, United States v. Mason, 510 F. Supp. 2d 923, 930 (M.D. Fla. 2007).

[207] *See supra* note 74 and accompanying text.

[208] *See, e.g.*, United States v. Cochran, No. CR-08-18-RAW, 2008 U.S. Dist. LEXIS 41588, at *3 (E.D. Okla. May 23, 2008) ("As 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."); United States v. LeTourneau, 534 F. Supp. 2d 718, 722–23 (S.D. Tex. 2008) ("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." (citations omitted)); United States v. Howell, No. CR07-2013-MWB, 2008 U.S. Dist. LEXIS 7810, at *28 (N.D. Iowa Feb. 12, 2008) ("Here 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 . . . ."); United States v. Samuels, 543 F. Supp. 2d 669, 674 (E.D. Ky. 2008) ("In 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."); United States v. Gould, 526 F. Supp. 2d 538, 544 (D. Md. 2007) ("*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."); United States v. May, No. 4:07-cr-00164-JEG, 2007 U.S. Dist. LEXIS 70709, at *17 (S.D. Iowa Sept. 24, 2007) ("Both Defendants knew they had an obligation to keep their sex offender registrations current and received plenty of information regarding those registration obligations."); United States v. Adkins, No. 1:07-CR-59, 2007 U.S. Dist. LEXIS 90737, at *14–16 (N.D. Ind. Dec. 7, 2007); United States v. Torres, No. 07-50035, 2007 U.S. Dist. LEXIS 60119, at *5–6 (W.D. Ark. Aug. 15, 2007) ("[D]efendant's notice of his registration

ments. 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 the federal statute.[209] The penalties, frequency of registration, information required, and classification scheme of SORNA are all different from statutes addressing similar concerns at the state level. The fact that an offender may be 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.[210] This argument also contradicts the claim made by courts in rejecting Commerce Clause challenges.[211] 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 in response to Commerce Clause challenges.[212] Further, as discussed in the *Husted* case above, some defendants are being prosecuted for federal registration violations in instances where they are not required to register under state law.[213]

In response to concerns that the state registration requirements are different than those in 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.[214] That interpretation of SORNA is not supported by

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requirements under state law is sufficient to support a charge that he knowingly violated SORNA.").

[209] *See* United States v. Barnes, No. 07 Cr. 187, 2007 U.S. Dist. LEXIS 53245, at *10 (S.D.N.Y. July 23, 2007).

[210] *See id.* at *10–17. Of the few courts that have examined the procedural due process claim in depth, only Judge Sand noted 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.

[211] *See infra* notes 250–97 and accompanying text.

[212] *See infra* notes 250–97 and accompanying text.

[213] *See supra* notes 133–39 and accompanying text.

[214] *See, e.g.*, United States v. Gould, 526 F. Supp. 2d 538, 542 (D. Md. 2007) ("Although 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

the text of the statute. Further, a defendant would not have notice that meeting state registration requirements would fulfill SORNA requirements. If the argument were reversed, and the defendant were arguing that he or she had met SORNA's requirements by meeting lesser state requirements, it is unlikely the court would embrace a "best efforts" standard.

The second way that courts have attempted to distinguish *Lambert* is by emphasizing the government's strong interest in protecting society from sex offenders.[215] These courts do not seem to acknowledge that the same rationale could have supported the ordinance in *Lambert*, and yet it was not part of the Court's considerations in finding the ordinance unconstitutional.[216] At the very least, even if there is a countervailing social interest, courts should engage in a more sophisticated balancing test rather than a curt dismissal of the due process argument.

Third, some courts have tended to see due process challenges to SORNA as a kind of mistake of law defense.[217] Under American common law, mistake of law is almost never a defense. However, the opinion in *Lambert* constituted an important exception to that general rule.[218] 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.[219] The courts argue that lack of notice in those situations amounts to a declaration that the defendant should

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implement SORNA does not preclude Gould's prosecution under § 2250(a)."). As the *Gould* court noted, for example, Maryland did not require extensive reporting of the employer's information in many circumstances. *Id.* at 542 n.3.

[215] *See, e.g.*, United States v. May, No. 4:07-cr-00164-JEG, 2007 U.S. Dist. LEXIS 70709, at *17–18 (S.D. Iowa Sept. 24, 2008) ("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)).

[216] *See generally Lambert*, 355 U.S. 225.

[217] *See, e.g.*, United States v. Samuels, 543 F. Supp. 2d 669, 674–75 (E.D. Ky. 2008) ("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."); United States v. Cardenas, No. 07-80108-Cr-Hurley/Vitunac, 2007 U.S. Dist. LEXIS 88803, at *37–38 (S.D. Fla. Nov. 5, 2007) (". . . Defendant's due process challenge amounts to a claim that ignorance of the law excuses non-compliance."); United States v. Kent, No. 07-00226-KD, 2007 U.S. Dist. LEXIS 69819, at *4 (S.D. Ala. Sept. 20, 2007); United States v. Roberts, No. 6:07-CR-70031, 2007 U.S. Dist. LEXIS 54646, at *5 (W.D. Va. July 27, 2007) ("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.").

[218] *See supra* notes 195–96 and accompanying text.

[219] *Roberts*, 2007 U.S. Dist. LEXIS 54646, at *6.

not be punished for being ignorant of the law. However, in each of those cases a defendant was in possession of or was distributing some commercial product, which the defendant should have been aware brought special burdens. In contrast, in *Lambert* and under SORNA prosecutions, defendants were entirely passive and possessed no high-risk item, yet they were subject to criminal prosecution for merely failing to take any action. Sex offenders are subject to restrictions, as was the defendant in *Lambert*, merely because of the status of having been convicted of a prior crime.

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.[220] Such is not the case, these courts say, with regard to sex offenders. 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 could lead to the bizarre result that anyone whose liberties are curtailed in any way loses the fair notice due process right as well. This is a dangerous rule, and there is nothing in due process constitutional law to support that doctrinal claim. The Court's decision in *Lambert* implicitly rejected this idea, since felons in general would seem to carry the same burden as sex offenders.

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*[221] illustrates the problem. In finding that the defendant had notice of SORNA requirements because of existing North Carolina registration requirements, the court distinguished its decision from *Lambert*.[222] The court made this distinction by citing the North Carolina Supreme Court's ruling that a defendant had fair notice of North Carolina registration because he previously had notice of South Carolina registration requirements.[223] 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.[224] Such courts have

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[220] *See, e.g.*, United States v. Craft, No. 4:07CR3168, 2008 U.S. Dist. LEXIS 33860, at *15 (D. Neb. Apr. 23, 2008) ("In 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.' ").

[221] No. 1:08CR11, 2008 U.S. Dist. LEXIS 38613 (W.D.N.C. May 9, 2008).

[222] *Id.* at *18.

[223] *See* State v. Bryant, 614 S.E.2d 479, 488 (N.C. 2005) ("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.").

[224] *See David*, 2008 U.S. Dist. LEXIS 38613, at *18–19 ("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.").

created a logical house of cards whereby the first registration statute which survived a *Lambert* challenge guarantees the constitutionality of all subsequent statutes, even if a particular defendant was afforded absolutely no notice and engaged in wholly passive conduct.

While *Lambert* is an older precedent, and fair notice is rarely considered in modern cases, the decision is still good law and continues to be cited by the Supreme Court.[225] Sex offenders who were convicted and released before the passage of SORNA were not given actual notice of the registration requirements to which they are now subject. Among the constitutional arguments this Article discusses, the *Lambert* claim is probably least likely to succeed simply because the area of law is so poorly-defined.[226] Nonetheless, courts should at least confront the *Lambert* opinion and stop relying on *DPS* until the Court again chooses to intervene and clarify whether *Lambert* still has legal relevance.

B. Providing Due Process

As with the conflict between SORNA and the Ex Post Facto Clause, a legislative fix is possible for SORNA in regards to due process. Congress could simply mandate that the requirements of SORNA be fulfilled so that notice is given to all persons subject to federal registration.[227] In this way, 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 could dismiss indictments against offenders who received no notice as to federal registration requirements.

VI. 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 ques-

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[225] Notably, *Lambert* was cited in *Ring v. Arizona*, 536 U.S. 584, 607 (2002).

[226] Justice Stevens perhaps best articulated the view that *Lambert* lacks significance in modern law when he noted that, "[*Lambert*'s] application has been limited, lending some credence to Justice Frankfurter's colorful prediction in dissent that the case would stand as 'an isolated deviation from the strong current of precedents—a derelict on the waters of the law.'" Texaco, Inc. v. Short, 454 U.S. 516, n.33 (1982).

[227] 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 (2006) ("The Attorney General shall prescribe rules for the notification of sex offenders who cannot be registered [upon release from federal prison]").

tion as to whether SORNA is a constitutional use of federal power. Unlike the states, the federal government may only enact law if there is an underlying enumerated power specified in the Constitution. In defending SORNA as a constitutionally permitted exercise of congressional power, the government has relied mainly on the Commerce Clause.[228]

A. Commerce Clause Jurisprudence

The Commerce Clause authorizes Congress "[t]o regulate Commerce . . . among the several States."[229] Beginning in 1995, the Supreme Court embarked on a revitalization of the moribund area of Commerce Clause jurisprudence.[230] In *United States v. Lopez*,[231] the Court struck down the Gun-Free School Zones Act ("GFSZA"). 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."[232] The Court found that the GFSZA did not regulate in any of the three legitimate areas.[233] In reaching that determination, the Court found the lack of any jurisdictional language that limited the scope of the GFSZA to be significant.[234]

After its decision in *Lopez*, the Court struck down portions of the Violence Against Women Act ("VAWA") in *United States v. Morrison*.[235] 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.[236] 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 the activity being regulated has a "substantial effect" on interstate commerce. The four factors were: (1) whether the activity was economic; (2) whether there was a jurisdictional limitation; (3) whether Congress offered legislative findings sup-

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[228] U.S. CONST. art. I, § 8, cl. 3.

[229] *Id.*

[230] *See* Jonathan Adler, *Is* Morrison *Dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751, 754 (2005) ("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.").

[231] 514 U.S. 549 (1995).

[232] *Id.* at 558–59.

[233] *Id.* at 560.

[234] *Id.* at 561 (" § 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce").

[235] 529 U.S. 598 (2000).

[236] *Id.*

porting a substantial effect; and (4) whether a nexus existed between the activity regulated and interstate commerce.[237] Among the four factors, the Court weighed the first and fourth most heavily.[238] Using the test, the Court held that while sexual violence might have some effect on interstate commerce, there was not a sufficient nexus to find portions of the statute constitutional.[239]

But when the Court issued its opinion in *Gonzalez v. Raich*,[240] what seemed like a revolution reviving the Commerce Clause came to a screeching halt.[241] *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 allowed for the possession and use of marijuana for medicinal purposes.[242] Nonetheless, Raich was prosecuted under the CSA because she possessed six marijuana plants for personal use.[243]

Raich's challenge to the CSA failed because the Court concluded that the Act was a constitutional exercise of Congress's commerce power.[244] Citing the New Deal precedent of *Wickard v. Filburn*,[245] the Court concluded that intrastate marijuana possession has substantial interstate economic effects.[246] As with *Morrison*, the decision in *Raich* was entirely based upon a finding that the statute at issue fit into the third *Lopez* category.[247]

Since the decision in *Raich*, some commentators have concluded that almost any Commerce Clause challenge of a federal statute is doomed to fail.[248] However, the Court has not taken the opportunity to review any other statutes to give further guidance on the state of Commerce Clause jurisprudence.[249] 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*.

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[237] *See id.* at 612–13.

[238] *See* Adler, *supra* note 230, at 760 (noting that "[m]ost 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").

[239] *Morrison*, 529 U.S. at 616.

[240] 545 U.S. 1 (2005).

[241] *See* Ilya Somin, Gonzales v. Raich*: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL'Y 507, 508 (2006) ("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.").

[242] *See* CAL. HEALTH & SAFETY CODE § 11362.5 (2005).

[243] *See Raich*, 545 U.S. at 7.

[244] *Id.* at 33.

[245] 317 U.S. 111 (1942).

[246] *Raich*, 545 U.S. at 10–11.

[247] *Id.* at 17 ("Only the third category is implicated in the case at hand.").

[248] *See* Somin, *supra* note 230, at 508.

[249] *See, e.g.*, United States v. Betcher, 534 F.3d 820 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 962 (2009); United States v. Hawkins, 513 F.3d 59 (2d Cir. 2008), *cert denied*, 128 S. Ct. 2488 (2008).

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

In the face of that ambiguity, courts have overwhelmingly concluded that § 2250(a) prosecutions can proceed based upon Commerce Clause jurisdiction. Most of the courts that have reviewed Commerce Clause claims have quickly disposed of the arguments with citations to *Raich*.[250]

Among the courts that have upheld 18 U.S.C. § 2250(a) and 42 U.S.C. § 16913 against Commerce Clause challenges, there are a 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.[251] A few courts have found that the statute is potentially supported by the third *Lopez* category.[252] In *United States v. May*, the Eighth Circuit reached the unusual conclusion that § 2250(a) prosecutions could be justified under the first category.[253] Courts that have relied on the first two categories have regularly applied the standards in *Morrison* and *Lopez* that concern the third category.[254] The chief reason that courts have found no Commerce Clause problems is the specific jurisdictional limitation in the elements of § 2250(a).[255] Courts also commonly conflate the Commerce Clause justifications of the national registry with those of § 2250(a).[256]

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[250] *See, e.g.*, United States v. Tong, No. CR-08-20-RAW, 2008 U.S. Dist. LEXIS 41589 (E.D. Okla. May 23, 2008). The *Tong* decision is 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.

Id. at *5. What made the lone citation to *Madera* even more troubling was that that case had already been argued on appeal before the Eleventh Circuit Court of Appeals. Coincidentally, on the same day as the *Tong* opinion, the Court of Appeals issued its *Madera* ruling and reversed the judgment of the district court, albeit without reaching the Commerce Clause question. *See* United States v. Madera, 528 F.3d 852 (11th Cir. 2008).

[251] *See infra* notes 271–85 and accompanying text.

[252] *See, e.g.*, United States v. Brown, No. 07 Cr. 485 (HB), 2007 U.S. Dist. LEXIS 91328, at *10 (S.D.N.Y. Dec. 12, 2007) ("The fact is that even if this argument was persuasive, other courts have found SORNA to be valid under the third Lopez category."); *Madera*, 474 F. Supp. 2d at 1265.

[253] *See infra* note 267 and accompanying text.

[254] *See, e.g.*, United States v. Hinen, 487 F. Supp. 2d 747, 757–58 (W.D. Va. 2007) (applying the jurisdictional limitation and nexus parts of the substantial effects test to find the statute was justified under the second *Lopez* category).

[255] *See infra* notes 262–64 and accompanying text.

[256] *See, e.g.*, United States v. David, No. 1:08CR11, 2008 U.S. Dist. LEXIS 38613, at *25 (W.D.N.C. May 9, 2008) (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 that a § 2250(a) prosecution was a proper exercise of Commerce Clause power).

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

C. The Commerce Clause Claims under Section 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 travel in interstate commerce. This group fits under § 2250(a)(2)(A) and has a rather straightforward constitutional challenge, which should be successful. Thus far, only a small number of defendants have been prosecuted under this subsection.[257]

Under § 2250(a)(2)(A), an offender can be found guilty of failing to register even if he or she has never traveled in interstate commerce. This is because Congress made subparagraphs (A) and (B) disjunctive requirements wherein an offender must travel in interstate commerce *or* have been convicted under federal law. For persons who have never traveled 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 under federal control are potentially subject to a lifetime under that control. Because the persons under § 2250(a)(2)(A) have never engaged 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 has been sentenced under a federal act is 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, and the government can return to assert control over the offender for a life-

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[257] *See, e.g.*, United States v. Yelloweagle, No. 08-cr-00364-WYD, 2008 U.S. Dist. LEXIS 105479 (D. Colo. Dec. 23, 2008) (rejecting Commerce Clause challenge because the prior federal conviction provided a basis for federal jurisdiction); United States v. Santana, No. EP-08-CR-978-DB, 2008 U.S. Dist. LEXIS 106463 (W.D. Tex. Oct. 31 2008) (holding that a prior conviction under federal law meant that there was no basis for a Commerce Clause challenge); United States v. Reeder, No. EP-08-CR-977-DB, 2008 U.S. Dist. LEXIS 105968 (W.D. Tex. Oct. 31, 2008) (holding that the Commerce Clause supported prosecution because state law was not implicated); United States v. Senogles, 570 F. Supp. 2d 1134, 1147 (D. Minn. 2008) (holding that the Commerce Clause supported federal legislation based entirely upon cases in which prosecutions were made under § 2250(a)(2)(B)).

time. Such an outcome is unsupportable under any existing Commerce Clause case law.

Yet, that is what every court that has reviewed a prosecution under § 2250(a)(2)(A) has held. The court in *United States v. Yelloweagle* explained:

> Congress plainly has the authority to criminalize the failure to register based on a prior federal sex offense conviction, and I find that Congress does not need to provide any outside source of authority for this legislation. Accordingly, I find that Defendant's prosecution under § 2250(a)(2)(A) does not violate the Commerce Clause.[258]

The court's view may be defensible for defendants currently in federal custody. However, for offenders that have been released, this position, adopted by district courts, seems to fully embrace the notion that once a person has been subject to federal criminal law, he or she is always subject to federal law. This argument is *sui generis* and without basis under existing law, as demonstrated by the lack of authority cited by courts reviewing such prosecutions.

The Fourth Circuit recently issued an opinion, *United States v. Comstock*,[259] concerning another portion of the AWA, which casts serious doubt on the arguments made by district courts in § 2250(a)(2)(A) cases. In *Comstock*, the court considered whether there was federal jurisdiction for provisions of the Act that provided for civil commitment of a sex offender upon release from federal custody.[260] Notably, in a unanimous opinion, the Court rejected Commerce Clause jurisdiction for such a provision because:

> [t]he fact of previously lawful federal custody simply does not, in itself, provide Congress with any authority to regulate future conduct that occurs outside of the prison walls. For example, although the Government may regulate assaults occurring in federal prisons, the Government cannot criminalize all assaults committed by former federal prisoners.[261]

Thus, the court specifically rejected the argument that prior Commerce Clause jurisdiction over a sex offender grants lifetime jurisdiction.

D. The Commerce Clause Claims under Section 2250(a)(2)(B)

The second group of offenders requires a more intricate examination. Yet, a careful review of existing precedent still supports challenges to the

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[258] 2008 U.S. Dist. LEXIS 105479, at *5.
[259] 551 F.3d 274 (4th Cir. 2009).
[260] 18 U.S.C. § 4248 (2006).
[261] *Comstock*, 551 F.3d at 281.

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 SORNA provisions and interstate commerce.[262] However, as noted previously, § 2250(a)(2)(B) includes a jurisdictional limitation that requires the government to prove that a defendant is a person who "travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country."[263]

Notably, there is no temporal or factual connection required as part of that jurisdictional limitation. 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 traveled in interstate commerce years before SORNA was passed.[264] It is also conceivable that a person might travel in interstate commerce after failing to register, triggering indictment under SORNA. The opinion by the District Court of the Western District of Oklahoma in *United States v. Husted* explains the rationale for allowing indictments of sex offenders who committed crimes well before the passage of SORNA:

> [T]he 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

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[262] *See* United States v. Brown, No. 07 Cr. 485 (HB), 2007 U.S. Dist. LEXIS 91328, at *11 (S.D.N.Y. Dec. 12, 2007) (acknowledging that "Congress has made no explicit findings to show a relation between the activity covered by the Act and interstate commerce").

[263] 18 U.S.C. § 2250(a)(2)(B) (2006).

[264] *See, e.g.*, United States v. Pitts, No. 07-157-A, 2007 U.S. Dist. LEXIS 82632, at *5 (M.D. La. Nov. 7, 2007) (noting that the alleged interstate travel was between 1998 and 2001, years before the passage of SORNA). *But see* United States v. Thomas, 534 F. Supp. 2d 912, 919 (W.D. Iowa 2008) ("[SORNA] only criminalizes those sex offenders who fail to register within three or fewer business days of travel across state lines"). The temporal requirement set forth in *Thomas* is not supported by the language of the statute or any of its legislative history. The more common interpretation by courts has been to suggest that Congress's intent was to require no temporal connection between the interstate travel and the failure to register.

> confines of one state after July 27, 2006, despite congressional intent to compel registration through criminal sanctions . . . .[265]

While such a determination has obvious Ex Post Facto Clause implications, as discussed above,[266] the lack of a temporal connection also creates substantial Commerce Clause problems discussed below.

Most courts reviewing Commerce Clause challenges have failed to elucidate which *Lopez* category justifies § 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 first, second, or third *Lopez* category.

1. Channels of Interstate Commerce

The first court to uphold SORNA under the first *Lopez* category was the Eighth Circuit in *United States v. May*.[267] The court's holding was anomalous and has not been discussed by many other courts. In *May*, the court found that the defendant had used the channels of interstate commerce and thus could be subject to regulation under the first *Lopez* category.[268] The court based its holding on a single case, *Brooks v. United States*,[269] a 1925 Supreme Court opinion holding that the Commerce Clause supports punishment "that was intended to prevent the use of interstate commerce to facilitate . . . forms of immorality."[270] Such a broad statement of congressional power is from a different era in Commerce Clause jurisprudence and surely does not account for the *Lopez* categories that mark modern doctrine. It is difficult to reconcile such a broad statement of federal jurisdiction with the outcomes in *Lopez* and *Morrison*, which also involved "forms of immorality."

The court's holding seemingly collapses the first and second categories together, since every "use of channels of interstate commerce" necessarily involves a person or thing in interstate commerce. It is more reasonable to assume the first category applies to an actual regulation of the channel, not the person. Nothing about SORNA regulates the "channels" of commerce. Accordingly, the first category argument by the Eighth Circuit is likely to be an outlier and cannot be supported under modern Commerce Clause doctrine. Insofar as there is any residual argument under the first category, the arguments under the second category would apply here as well, since the Eighth Circuit treats the two categories similarly.

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[265] No. CR-07-105-T, 2007 U.S. Dist. LEXIS 56662, at *9 (W.D. Okla. June 29, 2007) (citing H.R. REP. NO. 109-218, pt. 2 (2005)).

[266] *See supra* Part IV.

[267] 535 F.3d 912, 921 (8th Cir. 2008).

[268] *Id.*

[269] 267 U.S. 432 (1925).

[270] *May*, 535 F.3d at 922 (quoting *Brooks*, 267 U.S. at 437).

2. 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."[271] 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 is "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. 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. In fact, a prosecution under SORNA can occur when a person changes jobs or residences within a state so long as there was interstate travel at some other date unrelated to the change of job or residence.[272] 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 has ever been "in" interstate commerce could be subject to federal criminal law under the Commerce Clause.

As noted in the district court opinion in *Husted*, Congress arguably intended 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 congressional 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 difficult to reconcile with the language of those opinions.

The facts at issue in the recent Eleventh Circuit case, *United States v. Ambert*, illustrate the significance of the absence of a factual or temporal

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[271] United States v. Lopez, 514 U.S. 549, 558 (1995).

[272] The obligations to register under 42 U.S.C. § 16913(c) contain no jurisdictional limitation. Consequently, an offender must update his or her registry information whether or not travel between states has occurred as long as one of the following conditions exist: "change of name, residence, employment, or student status." 42 U.S.C. § 16913(c) (2006).

nexus between the travel and failing to register.[273] In that case, the defendant became a resident of Florida before the enactment of SORNA,[274] and he failed to register in that state.[275] On July 6, 2007, the State issued a warrant for his arrest for violation of Florida registration law.[276] On July 9, 2007, Ambert took a brief trip to California and returned to Florida two days later.[277] He did not have any new obligation to change his registration status based upon that brief trip. Nonetheless, that three-day excursion, which was wholly unrelated to Ambert's failure to register, served as the sole basis for alleged travel in interstate commerce needed to support his indictment under § 2250(a).[278] This means any crime can be federalized simply by adding an interstate travel element and waiting for any alleged criminal to cross state lines, if even for a moment. From that point on, the alleged criminal is beholden to federal law. This view of the Commerce Clause is unending and inconsistent with both *Morrison* and *Lopez*.

While not addressing the above concern directly, some courts have compared the requirements of SORNA with the Mann Act,[279] which criminalizes transportation of persons across state lines for purposes of prostitution.[280] However, the analogy to the Mann Act is inapt for two reasons. First, the Mann Act criminalizes action in the course of traveling 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. Thus, there is no strong connection with interstate travel under SORNA as there is under the Mann Act. Second, the Mann Act applies to persons who have the requisite intent to commit prostitution by crossing state lines.[281] The travel is part of the *mens rea* of the criminal act. For SORNA, the offender's travel is wholly unrelated to the mental state needed to fail to register. Whereas there is a strong nexus between travel and prostitution under the Mann Act, the relationship between

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[273] No. 08-13139, 2009 U.S. App. LEXIS 5275 (11th Cir. Mar. 6, 2009).

[274] *Id.* at *2 (noting that "Ambert moved from California to Tallahassee, Florida in early 2006.").

[275] *Id.* at *3.

[276] *Id.*

[277] *Id.*

[278] *Id.* at *8–9 (noting that the indictment was supported by the fact that the defendant "traveled in interstate commerce . . . on July 9–11, 2007."). The court also held in the alternative that any earlier, unspecified interstate travel could also serve as the basis for an indictment under § 2250(a). *Id.* at *9-10.

[279] 18 U.S.C. § 2421 (2006).

[280] *See, e.g.*, United States v. Thomas, 534 F. Supp. 2d 912, 919 (N.D. Iowa 2008) ("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 . . . .").

[281] The Mann Act contains an extra mens rea term such that the travel between state lines must be with the intent to facilitate the prostitution of an individual. As the statute states, "Whoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with *intent* that such individual engage in prostitution . . . ." 18 U.S.C. § 2421 (2006) (emphasis added).

travel and failing to register under SORNA is attenuated. Indeed, had Congress followed the language of the Mann Act, there would be no federal jurisdiction problem with SORNA.

Other courts have analogized SORNA's requirements to those of the crime of being a felon in possession of a firearm.[282] In such cases, the government need not show that the defendant was actually in possession of a firearm when crossing state lines.[283] Instead, the government must show that the firearm traveled 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 an economic good, a gun, traveling across state lines and expressly provides that it is insufficient for a person to merely travel across state lines to trigger Commerce Clause jurisdiction.[284] 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.[285]

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 the activity is 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 were 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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[282] *See, e.g.*, United States v. Elliot, No. 07-14059-CR-GRAHAM, 2007 U.S. Dist. LEXIS 91655, at *8–9 (S.D. Fla. Dec. 10, 2007) ("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).").

[283] *See, e.g.*, *id.*

[284] *See, e.g.*, United States v. Stinson, 507 F. Supp. 2d 560, 567 (S.D. W. Va. 2007).

[285] *See, e.g.*, *id.*

3. Activities that Substantially Affect Interstate Commerce

While only a handful of 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 this category.[286] 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, has a substantial effect on interstate commerce. The four *Morrison* factors 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 because under *Raich*, as Ilya Somin has argued, "virtually any interstate movement qualifies as 'economic activity' that Congress can regulate at will."[287] Consequently, failure to register by sex offenders subsequent to interstate travel may be 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 be superfluous.

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.

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[286] *See* Gonzalez v. Raich, 545 U.S. 1, 22 (2005) ("We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding."). 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.

[287] Posting of Ilya Somin to Volokh Conspiracy, http://www.volokh.com/posts/1208754924.shtml (Apr. 21, 2008, 1:15 EST). *See also* Posting of Orin Kerr to Volokh Conspiracy, http://www.volokh.com/posts/1208709089.shtml (Apr. 20, 2008, 12:13 EST) (arguing against a decision striking down § 2250(a)(2)(B), and 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").

Third, the language of *Raich* is not as expansive as Somin argues. The Court relied on a dictionary to define "economics" as "the production, distribution, and consumption of commodities."[288] It is difficult 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."[289] In *Raich*, the Court found that possession of small amounts of marijuana in aggregate could have an effect on the national illegal marijuana market.[290] 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.[291] Such is the case with § 2250(a)(2)(B).

Fourth, *Morrison* speaks to whether activities related to sex crimes are economic activities. In *Morrison*, the court held that an alleged rape by a college football player was an example of a non-economic activity that could not be regulated under federal law.[292] While the plaintiff argued that sexual violence had systemic effects on the economic system, the court rejected that argument. If rape and sexual abuse are 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 of the *Morrison* substantial effects test is whether Congress has included in the statute a jurisdictional limitation. This 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 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

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[288] Gonzalez v. Raich, 545 U.S. 1, 25–26 (2005) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)).

[289] *Id.* at 17 (citation omitted).

[290] *Id.*

[291] *See id.* at 25 ("Despite 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.").

[292] United States v. Morrison, 529 U.S. 598, 627 (2000).

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 that such a nexus exists, courts have adopted several rationales.

Some courts have asserted that SORNA embodies 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."[293] 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.[294] This 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 a function entirely duplicative with state registration under the interpretation of the statute adopted by most courts that have addressed the issue.

Other courts have argued that the national registry provisions are "interrelated" with the criminal provisions such that the Commerce Clause justifications for the registry provisions apply to the criminal provisions as well.[295] This argument does not survive scrutiny. Congress could easily have

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[293] United States v. Ditomasso, 552 F. Supp. 2d 233, 246 (D.R.I. 2008). *See also* United States v. Brown, No. 07 Cr. 485 (HB), 2007 U.S. Dist. LEXIS 91328, at *10 (S.D.N.Y. Dec. 12, 2007) ("[T]he 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. 19,244 (1996)).

[294] As Wayne Logan has argued, a chief innovation of sex offender registries has been to incorporate provisions for offenders coming from other jurisdictions. *See* Logan, *supra* note 28, at 284–88.

[295] *See, e.g.*, United States v. Hacker, No. 8:07CR243, 2008 U.S. Dist. LEXIS 7793, at *5 (D. Neb. Feb. 1, 2008) ("This Court agrees with other district courts' interpretations of *Lopez*

created the national registry by only requiring information from the states. It further simply could have required information from offenders, leaving punishment for violations to the states. 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 empower Congress to insert tangentially related crimes with no interstate limitation into any information-providing bill in order to survive Commerce Clause challenges.

Another potential argument in favor of federal jurisdiction for SORNA prosecutions is that under the Necessary and Proper Clause, § 2250(a) is merely a necessary and proper means for the enforcement of the national registry. This argument, however, is inherently suspect since all of the prosecutions thus far have occurred with no national registry in place. Further, the Fourth Circuit opinion in *Comstock*, discussed above, is also persuasive on this point. The court, in reviewing a parallel argument in the civil commitment context, noted that:

> The Government's principal argument is that its ability to establish and maintain a "federal criminal justice and penal system" somehow renders § 4248 necessary and proper and thus constitutional . . . . The Government cites no precedent in support of this novel theory . . . . This argument must fail. Of course, Congress may establish and run a federal penal system, as necessary and proper to the Article I power (usually the Commerce Clause) relied on to enact federal criminal statutes. And, consistent with its role in maintaining a penal system, the federal government possesses broad powers over persons during their prison sentences. But these powers are far removed from the indefinite civil commitment of persons after the expiration of their prison terms, based solely on possible future actions that the federal government lacks power to regulate directly.[296]

The reasoning in *Comstock* also applies in the SORNA context. Without a proper Commerce Clause basis for a SORNA prosecution, the Necessary and Proper Clause cannot serve such a broad function without creating limitless federal jurisdiction.

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

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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.").

[296] United States v. Comstock, 551 F.3d 274, 281 (4th Cir. 2009).

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 touchstone for addressing Commerce Clause challenges. Even under the rational basis standard, § 2250(a)(2)(B) cannot survive because there is no reasonable argument that the aggregation of sex offender registration has a substantial effect on interstate commerce. 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.[297]

E. Reconciling SORNA with the Commerce Clause

There has been substantial doom-saying concerning the death of states' rights due to the ever-expanding interpretation of the Commerce Clause.[298] 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 persons who have 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 traveling between states, since no temporal connection is required. Further, persons who have ever been in any form of federal control (even outside of prison) could 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, SORNA punishes persons who crossed state lines and who committed a crime wholly unrelated to such travel. If the precedent set by SORNA is extended into other realms, our modern society of constant travel may put a large portion 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 under state law who did travel in interstate commerce, the issue may require

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[297] This Article has focused exclusively on the doctrine of the Commerce Clause in regards to the federal/state issues involved. Of course, the subtext to any such doctrinal analysis is the concept of federalism. There is simply not enough space to adequately address all the federalism arguments in detail herein. Fortunately, such a thorough examination of the larger federalism issues is available elsewhere. *See* Logan, *supra* note 80, at 88–108.

[298] *See, e.g.*, Somin, *supra* note 241, at 508.

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 an unconstitutional expansion of federal authority.

Amending SORNA to cure its Commerce Clause problems would be straightforward. Congress could fix SORNA by adopting two simple measures.[299] 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* or use the model of the Mann Act so the travel is explicitly linked with the failure of register. Thus, Congress could mandate that a person be subject to the provisions of SORNA only 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.

VII. Conclusion

Federal district and circuit 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 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 necessary changes are quite minor. Similarly, appellate courts could either find SORNA prosecutions unconstitutional or construe § 2250(a) to require that the interstate travel be tied to the failure to register, as is the case under the Mann Act.

The concerns of sex offenders are not likely to resonate with the general public or even the legal community. However, "sex offenders" are not universally the archetypal characters lying in wait to kidnap and rape children;[300] many have committed relatively petty offenses, such as the youthful

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[299] The possibility of a congressional solution fits well with Lino A. Graglia's proposal to have the Court withdraw from Commerce Clause decision-making. *See* Lino A. Graglia, Lopez*,* Morrison*, and* Raich*: Federalism in the Rehnquist Court*, 31 Harv. J.L. & Pub. Pol'y 761, 784–86 (2008).

[300] The myth of the stranger as the typical sex offender continues to mislead policymakers in designing effective laws to combat sexual violence. *See* No Easy Answers, *supra* note 24, at 24 ("Sexual violence against children as well as adults is overwhelmingly perpetrated by family members or acquaintances. The U.S. 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.").

indiscretion of public exposure, or an act of engaging in prostitution.[301] There are over 500,000 sex offenders in the United States and that number will continue to grow.[302] 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 added to that already substantial mix. While the cause of stopping sexual violence is a good one, it is a mistake to make constitutional exceptions to target the population of convicted sex offenders.

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

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[301] *See id.* at 5 ("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").

[302] *See* Paula Lehman & Tom Lowry, *The Marshal of MySpace*, BUS. WK., Apr. 23, 2007, at 86.