Post-Incarceration Controls of Convicted Sex Offenders

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Summary

The United States witnessed increased attention to sex offender management policy at the federal, state, and local levels beginning in the 1990s. As a result, laws have been enacted which impose a variety of post-incarceration controls on sex offenders, including but not limited to registration and community notification requirements, civil commitment, global positioning system (GPS) monitoring and tracking, and residency restrictions. Two recent U.S. Supreme Court cases—*United States v. Carr* and *United States v. Comstock*—involved challenges to such controls passed at the federal level. This report provides background information and examines relevant case law, with a particular focus on registration requirements and residency restrictions.

Legislation enacted to protect the community from sex offenders is not a novel concept. At the federal level, Congress has passed a series of laws adopting the use of sex offender registries and community notification for sexually violent offenders and those committing offenses against children. Most recently, as part of the Adam Walsh Child Protection and Safety Act of 2006 (P.L. 109-248), Congress passed the Sex Offender Registration and Notification Act (SORNA). The statute categorizes sex offenders into three tiers, with progressively longer and more scrutinizing registration requirements for each tier.

Proponents argue that post-incarceration restrictions are necessary to reduce a demonstrably high recidivism rate, safeguard potential victims, and assist law enforcement in tracking offenders. Opponents question the restrictions' practical impact on recidivism rates and argue that the controls may be disproportionate to the crimes committed.

As some commentators question the efficacy of these controls, courts are assessing their constitutionality. Defendants have invoked a myriad of constitutional grounds in challenges to post-conviction restrictions. With some exceptions, federal courts have generally upheld the restrictions. For example, in a 2003 case, *Smith v. Doe*, the U.S. Supreme Court upheld Alaska's sex offender registration requirements against an ex post facto challenge. Applying *Smith*, federal courts of appeals have also generally upheld the federal registration law against such challenges. However, as restrictions have increased in both number and severity, questions remain. Is it possible that a statute's purpose or effect is so punitive as to negate a legislature's apparent non-punitive intent? Under what circumstances may these restrictions be applied? Can states and localities apply these restrictions retroactively? These are some of the issues likely to emerge in pending and future federal court cases.

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Introduction

The United States witnessed an increase in sex offender management policy at the federal, state, and local levels beginning in the 1990s. As a result, laws have been enacted which impose a variety of post-incarceration controls on sex offenders. Three such controls—residency restrictions, registration requirements, and civil commitment—are especially at issue in judicial decisions in recent years. In two cases decided in the spring of 2010, *United States v. Comstock*[1] and *United States v. Carr*,[2] the U.S. Supreme Court addressed questions raised by federal civil commitment and registration requirements. Residency restrictions are a matter of state law but also implicate federal constitutional guarantees.

Proponents of strong post-incarceration controls argue that the restrictions are necessary to reduce a demonstrably high recidivism rate, safeguard potential victims, and assist law enforcement in tracking offenders. Opponents question the restrictions' efficacy and argue that they are disproportionate to the crimes committed. As challenges to state and federal laws move through the courts, many questions remain. Should an offender be subjected to restrictions for crimes which occurred decades ago? Should juveniles be subjected to the same restrictions as adults? These and other policy issues may be informed by judicial determinations.

This report examines background and case law related to registration requirements and residency restrictions. The related issue of civil commitment was at issue in *Comstock*. In that case, the Supreme Court held that a federal statute authorizing the civil commitment of "sexually dangerous persons," 18 U.S.C. § 4248, is within Congress's authority. For more information on *United States v. Comstock* and other challenges to the federal civil commitment statute, see CRS Report R40958, *United States v. Comstock: Supreme Court Review of Civil Commitment Under the Adam Walsh Act*, by (name redacted).

Registration Requirements

Although specific requirements and parameters vary, all 50 states and the District of Columbia require persons convicted of sex offenses to register where they live or work.[3] The requirements are enforced with associated state and federal criminal penalties.

The obligation to register typically continues after a person has served a sentence, in some cases remaining in effect long after incarceration. Registration may have dual goals of assisting law enforcement and preventing future crimes. In many states, the latter goal is facilitated by making lists of registered sex offenders available to the public.

[1] No. 08-1224, slip op., (May 17, 2010).

[2] No. 08-1301, slip op., (June 1, 2010).

[3] For more information on recently enacted state laws, see National Conference of State Legislatures, *Sex Offender Enactments Database*, http://www.ncsl.org/default.aspx?tabid=19158.

The Federal Statutory Framework: Sex Offender Registration and Notification Act (SORNA)

During the past few decades, Congress passed laws encouraging states to enact progressively more rigorous registration requirements. It first conditioned the receipt of federal grant funding on states' establishment of such requirements in 1994.[4] It strengthened the grant conditions in 1996, with the passage of what is popularly known as "Megan's Law."[5] In response, all 50 states and the District of Columbia enacted registration requirements and accompanying criminal provisions.

Most recently, Congress enacted the Sex Offender Registration and Notification Act (SORNA) as part of the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act).[6] The statute, 42 U.S.C. § 16913, requires every "sex offender"[7] to register (and maintain the registration) in any jurisdiction in which he or she resides, works, is a student, or was convicted.[8] It provides timelines for initial registration and for keeping the registration current.[9]

The statute also withholds 10% of Byrne Justice Assistance Grant funds from states that do not substantially implement registration systems conforming to guidelines established by the Attorney General.[10] The guidelines require the creation of more stringent and complex parameters than had previously been required. They organize persons convicted of sex offenses into three tiers, calling for progressively more scrutiny and longer registration requirements for each tier. The requirements appear intended to create a comprehensive system to track convicted offenders as they move between jurisdictions.[11]

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[4] The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act ("Jacob Wetterling Act"), enacted as § 170101 of the Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322, codified as amended at 42 U.S.C. § 14071. The law withheld 10% of funds that would otherwise be allocated to states pursuant to the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3765, unless states enacted registration requirements fulfilling specified criteria within three years.

[5] P.L. 104-145.

[6] P.L. 109-248.

[7] SORNA defines "sex offender" as "an individual who was convicted of a sex offense." 42 U.S.C. § 16911(1). The definition of "sex offense" generally includes five categories of convictions, namely:

> (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 [specified f]ederal offense …;
>
> (iv) a [specified] military offense …; or
>
> (v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

42 U.S.C. § 16911(5).

[8] 42 U.S.C. § 16913(a).

[9] *Id.* at §§ 16913(b), 16913(c).

[10] 42 U.S.C. § 16912. *See also* The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030 *et seq.* (July 2, 2008). In addition, the statute requires the Attorney General to maintain a national database of registered sex offenders. 42 U.S.C. § 16919(a).

[11] *See* 42 U.S.C. § 16901 (stating that the act "establishes a comprehensive national system"). *See also,* The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38045 (July 2, 2008) ("While sex offender registration and notification … are generally carried out through programs operated by the individual states … their effectiveness depends on also having effective arrangements for tracking of registrants as they move among jurisdictions …. Congress concluded that the patchwork of standards that had resulted from piecemeal amendments (continued...)

The deadline by which states and other jurisdictions were to have substantially implemented the SORNA guidelines was July 27, 2009. However, the Adam Walsh Act authorized the Attorney General to grant two one-year extensions.[12] The Attorney General first issued a blanket extension through July 27, 2010, and more recently extended the deadline by an additional year (until July 27, 2011) for specified jurisdictions.[13] Despite Adam Walsh Act provisions authorizing financial assistance to states to support implementation,[14] there has been some resistance to implementation, in part because of perceived costs to states.[15] Substantive concerns with the federal requirements have also slowed progress toward implementation in some states. One aspect that has proven problematic is the application of public notification requirements to persons whose convictions for sex offenses occurred when they were minors.[16] On May 14, 2010, the Department of Justice published proposed supplemental guidelines, which would "augment or modify certain features" of the National Guidelines to address that and other concerns.[17] As reported by the Department of Justice, three states (Delaware, Florida, and Ohio) are currently in compliance with the guidelines issued pursuant to SORNA.[18]

In addition to the registration requirements and guidelines, SORNA established a new federal criminal provision, 18 U.S.C. § 2250, which provides criminal penalties for "sex offenders"[19] who "knowingly fai[l] to register or update a registration as required by [SORNA]." Specifically, § 2250 applies when a person (1) was convicted of a federal sex offense and fails to register; or (2) was convicted of a state sex offense and fails to register after traveling in interstate commerce.[20] An affirmative defense to conviction under the statute exists in specified circumstances when "uncontrollable circumstances prevented [an] individual from complying."[21] Penalties may include fines and no more than 10 years' imprisonment.[22]

An early question asked in cases challenging SORNA was whether § 2250 applies in the many states that have not implemented SORNA's guidelines. Rejecting the argument that § 2250 is not applicable in non-implementing jurisdictions, federal courts generally interpret § 2250 as providing criminal liability for an individual's failure to comply with state registration

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should be replaced with a comprehensive new set of standards … that would close potential gaps and loopholes under the old law, and generally strengthen the nationwide network of sex offender registration and notification programs.").

[12] P.L. 109-248, § 124(b).

[13] *See* U.S. Department of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, *SORNA Extensions Granted*, http://www.ojp.gov/smart/pdfs/SORNA_Extensions_Granted.pdf.

[14] P.L. 109-248, § 126(a).

[15] Some states have undertaken cost-benefit analyses to determine whether they should implement the guidelines. *See* National Conference of State Legislatures, *Cost-Benefit Analyses of SORNA Implementation* (Jan. 2010), http://www.ncsl.org/?tabid=19499.

[16] *See* Department of Justice, *Supplemental Guidelines for Sex Offender Registration and Notification*, 75 Fed. Reg. 27362 (May 14, 2010) (characterizing the application to minors as "one of the largest impediments to SORNA implementation.").

[17] *Id.*

[18] In addition to those states, the Justice Department has determined that two Indian nations have fully implemented SORNA requirements. *See* U.S. Department of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, http://www.ojp.gov/smart/.

[19] 42 U.S.C. §§ 16918 (b) and (c).

[20] 18 U.S.C. §§ 2250(a)(2)(A), 2250 (a)(2)(B).

[21] 18 U.S.C. § 2250(b).

[22] 18 U.S.C. § 2250(a).

requirements in place prior to SORNA's enactment.[23] As mentioned, every state established a registration program by the mid-1990s to comply with federal grant conditions. To reach that conclusion, courts rely on the statutory text, which defines a "sex offender registr[y]" as a "registry of sex offenders, and a notification program maintained by a jurisdiction," without specifying that the registry must be one that implements the guidelines promulgated pursuant to SORNA.[24]

Another key question that arose with regard to the criminal provision was the extent to which it applies retroactively. The statute authorizes the U.S. Attorney General to "specify the applicability of the requirements ... to sex offenders convicted before [SORNA's enactment] or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders."[25] Pursuant to that authority, the Attorney General promulgated a rule applying the registration requirements to persons convicted before SORNA's enactment.[26] Thus, at least following the Attorney General's ruling on the question, § 2250 applies to persons who were convicted of sex offenses prior to SORNA's enactment.

United States v. Carr

A more complicated question regarding the retroactive application of SORNA's criminal provision arose in cases in which a defendant's interstate travel, rather than only the sex offense conviction, predated SORNA's enactment. In a June 2010 ruling, *United States v. Carr*,[27] the U.S. Supreme Court held that § 2250 does not apply to persons whose interstate travel predated SORNA's enactment.[28] Prior to the decision, the U.S. courts of appeals had reached different conclusions on that question.[29]

Thomas Carr, the defendant in the case, was convicted of first degree sexual abuse in Alabama in 2004 and subsequently registered as a sex offender in that state. After several months, but before

[23] *See, e.g.*, United States v. George, 579 F.3d 962, 965-66 (9th Cir. 2009); United States v. Gould, 568 F.3d 459, 463-64 (4th Cir. 2009).

[24] 42 U.S.C. § 16911(9).

[25] 42 U.S.C. § 16913(d). Some courts have interpreted the provision authorizing the ruling as having authorized the Attorney General to determine whether the statute applied retroactively; *see, e.g.*, United States v. Hatcher, 560 F.3d 222, 226-29 (4th Cir. 2008), while other courts have interpreted it as merely authorizing the Attorney General to determine how the statute would be implemented with regard to those persons for whom it had a retroactive effect. *See, e.g.*, United States v. May, 535 F.3d 912 (8th Cir. 2008). *See also*, United States v. Guzman, 591 F.3d 83, 91 (2d Cir. 2010) ("[A] circuit split exists about whether § 16913(d) does in fact authorize the Attorney General to determine the 'retroactive' applicability of SORNA to sex offenders convicted prior to its enactment, or whether it only allows the Attorney General to determine how, as a practical matter, SORNA ... should be implemented with response to those convicted before [it] was enacted."). The question has become an important threshold inquiry in cases challenging the Attorney General's ruling on retroactivity on the grounds that it violates the notice and comment requirements of the Administrative Procedure Act. *See* United States v. Utesch, 596 F.3d 302 (6th Cir. 2010); United States v. Cain, 583 F.3d 408 (6th Cir. 2009).

[26] 28 C.F.R. § 72.3.

[27] No. 08-1301, slip op., (June 1, 2010).

[28] No. 08-1301, slip op., (June 1, 2010).

[29] *Compare* United States v. Husted, 545 F.3d 1240, 1243 (10th Cir. 2008) ("Congress' use of the present tense form of the verb 'to travel' indicates that SORNA's coverage is limited to those individuals who travel in interstate commerce after the Act's effective date.") *with* United States v. Dixon, 551 F.3d 578, 583 (7th Cir. 2008), *cert. granted sub nom.* Carr v. United States, 130 S. Ct. 47 (2009) (holding that the requirement that a defendant must have traveled in interstate commerce serves as a "constitutional predicate for the statute" rather than "a temporal requirement").

Congress enacted SORNA, he moved from Alabama to Indiana and failed to register as a sex offender there. In 2007, after SORNA's enactment, Carr was indicted and convicted in federal court for violating § 2250. Carr challenged the federal conviction on two grounds, arguing that (1) § 2250 does not apply to Carr, because his interstate travel predated SORNA's enactment; and (2) if § 2250 does apply, its application to Carr violates the Ex Post Facto Clause. In an unpublished opinion, the district court rejected both arguments,[30] and the U.S. Court of Appeals for the Seventh Circuit affirmed.[31]

The U.S. Supreme Court did not reach the Ex Post Facto Clause question. Instead, it resolved the case by agreeing with the first of Carr's grounds for challenging his conviction. Namely, as mentioned, it held that § 2250 does not apply to persons whose interstate travel predates SORNA's enactment. In an opinion by Justice Sotomayor, the Court reached that conclusion after a review of the statutory text and framework. First, the Court stated that it is "sensible to conclude," based on the sequence of elements provided in § 2250, that the travel requirement was intended to follow the effective date of the federal registration requirement.[32] Second, it asserted that the present-tense form of the verb "travels" "reinforces [that] conclusion," and noted a lack of precedent for interpreting present-tense verbs as retroactively applicable in criminal statutes.[33] Finally, it concluded that Congress's use of the present-tense verb form was consistent with the use of the present tense in other provisions in the statute that were clearly not intended to apply retroactively, such as the element requiring a failure to register.[34]

Constitutional Challenges to SORNA

The Court's ruling in *Carr* restricts the application of SORNA's criminal provision (§ 2250) in cases that might otherwise implicate the Ex Post Facto Clause and other constitutional guarantees. Nevertheless, fact scenarios distinct from the circumstances at issue in *Carr* are likely to trigger constitutional questions.

Various constitutional challenges have been raised against § 2250 or SORNA's underlying registration requirement. The most common constitutional theories argue that the provisions violate the Ex Post Facto Clause; exceed Congress's Commerce Clause power; violate a defendant's Fifth Amendment due process rights; or represent an unconstitutional delegation of legislative power.[35] With a few notable exceptions,[36] the U.S. courts of appeals have upheld the federal registration provisions and § 2250.

[30] United States v. Carr, No. 1:07-CR-73 (N.D.Ind. filed Nov. 2, 2007).

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

[32] No. 08-1301, slip op., (June 1, 2010), at 7.

[33] *Id.* at 7-8.

[34] *Id.* at 10.

[35] Examples of other legal theories invoked by some defendants include that the registration scheme unconstitutionally interferes with a defendant's right to travel, *see, e.g.*, United States v. Ambert, 561 F.3d 1202 (2009), or that it violates the Administrative Procedure Act, *see, e.g.*, United States v. Shenandoah, 595 F.3d 151 (3d Cir. 2010). The Administrative Procedure Act argument has been the basis for a successful challenge in at least one U.S. court of appeals, *see* United States v. Cain, 583 F.3d 408 (6th Cir. 2009) (holding that the U.S. Attorney General failed to comply with the typical 30-day notice and comment procedures as required by the Administrative Procedure Act, 5 U.S.C. § 511 *et seq.*, and vacating the defendant's conviction on that basis). Other federal courts of appeals have rejected that argument. *See, e.g.*, United States v. Gould, 568 F.3d 459, 469-70 (4th Cir. 2009) (holding that the "good cause" exception in the Administrative Procedure Act justified the Attorney General's decision to promulgate a final (continued...)

Ex Post Facto

The U.S. Constitution prohibits the enactment of any ex post facto law.[37] The Ex Post Facto Clause prohibits the enactment of laws that (1) criminally punish actions that were lawful when done; (2) aggravate (i.e., expand the scope of) a crime to make it greater than when it was when committed; (3) make the punishment for a crime greater than when the crime was committed; or (4) alter the rules of evidence after the offense to aid in convicting the offender.[38]

There appears to be broad consensus that Congress's intent when it enacted SORNA was to establish a civil regulatory scheme rather than a criminal one.[39] However, a statute may be found to violate the Ex Post Facto Clause despite a stated civil or regulatory purpose if the law is found to have a punitive effect.[40] The punitive effect must be demonstrated with "only the clearest proof."[41] A few courts have held that analogous state registration laws applied retroactively violated the Ex Post Facto Clause of the state or the U.S. Constitution.[42]

As mentioned, the Supreme Court did not reach the question of SORNA's compliance with the Ex Post Facto Clause in *United States v. Carr*.[43] The leading Supreme Court case addressing the ex post facto implications of a registration requirement is *Smith v. Doe*,[44] a 2003 case in which the Court upheld an Alaska registration statute. In *Smith*, the U.S. Court of Appeals for the Ninth Circuit held that the Alaska registration statute violated the Ex Post Facto Clause.[45] Applying factors from a 1963 case, *Kennedy v. Mendoza-Martinez*,[46] the Supreme Court reversed. The

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rule without adhering to the 30-day notice and comment procedures typically required by 5 U.S.C. § 553).

[36] The two major exceptions at the federal court of appeals level are found in decisions by the U.S. Courts of Appeals for the Sixth and Ninth Circuits. The Sixth Circuit held that the manner in which the Attorney General determined the criminal provision's retroactive application failed to comply with the Administrative Procedure Act, 5 U.S.C. § 511 *et seq*. *See* United States v. Utesch, 596 F.3d 302 (6th Cir. 2010); United States v. Cain, 583 F.3d 408 (6th Cir. 2009). The Ninth Circuit held that SORNA's retroactive application to juvenile offenders is an unconstitutional violation of the Fifth Amendment Ex Post Facto Clause. *See* United States v. Juvenile Male, 590 F.3d 924 (9th Cir. 2010), discussed *infra*.

[37] U.S. Const. art. 1, § 9, cl. 3 ("No ... ex post facto Law shall be passed.").

[38] *See* Calder v. Bull, 3 U.S. 386 (1798). Alternatively, the Court described the reach of the Clause as extending to laws that "alter the definition of crimes or increase the punishment for criminal acts." Collins v. Youngblood, 497 U.S. 37, 43 (1990) (quoting Beazell v. Ohio, 269 U.S. 167-169-170 (1925)).

[39] *See, e.g.*, United States v. Juvenile Male, 590 F.3d 924, 930 (9th Cir. 2010) (holding that Congress had enacted SORNA "to establish a civil regulatory scheme rather than a criminal one"); United States v. May, 535 F.3d 912, 920 (8th Cir. 2008) ("Congress' intent was to enact a regulatory scheme that is civil and non-punitive") (internal citations omitted). *See also* 42 U.S.C. § 16901 (stating that the purpose of the statute is "to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators.").

[40] Smith v. Doe, 538 U.S. 84, 92-93 (2003).

[41] *Id*. at 92 (citations omitted).

[42] *See, e.g.*, Artway v. Attorney General, 876 F. Supp 666 (D. N.J. 1995), *vac'd on other grounds*, 81 F.3d 1235, 1271 (3d Cir.) (invalidating the retroactive application of New Jersey's registration law); State v. Letalien, 985 A.2d 4 (Me. 2009) (holding that Maine's registration law imposes an ex post facto punishment as applied retroactively to some offenders).

[43] No. 08-1301, slip op., (June 1, 2010).

[44] 538 U.S. 84 (2003).

[45] *See* Doe v. Otte, 259 F.3d 979 (9th Cir. 2001).

[46] 372 U.S. 144 (1963) (striking down, on ex post facto grounds, federal statutes that divested U.S. citizens of their citizenship if they were found to have remained outside the United States during wartime for purposes of evading the draft). *See also*, discussion regarding the Ex Post Facto Clause, *infra*.

factors require a court to consider whether a law (1) involves an affirmative disability or restraint; (2) has historically been regarded as a punishment; (3) comes into play only on a finding of a requisite mental state; (4) will promote the traditional aims of punishment—namely retribution and deterrence; (5) applies to behavior that is already considered criminal; (6) has an alternative purpose to which it may rationally be connected; and (7) appears excessive in relation to the alternative purpose assigned.[47] Of these, the Court stated in *Smith* that the most important factor is whether a statute can be connected with a non-punitive purpose.[48] Thus, the Court's rationale in upholding the Alaska law rested primarily on the Court's characterization of the Alaska law as having sufficient non-punitive justifications and a civil regulatory character.

It is unclear whether the Court's reasoning in *Smith* will extend to future cases challenging SORNA. The federal statute differs from state laws such as the Alaska law at issue in *Smith* in ways that some commentators argue are legally significant.[49] For example, the Alaska statute in *Smith* was not codified in a criminal code or accompanied by substantial criminal penalties. In contrast, § 2250 is codified with federal criminal statutes and authorizes penalties of up to one year imprisonment.[50] In addition, in *Smith*, the Court indicated that its conclusion might have been different if more evidence had been presented to demonstrate that the registration requirement had a punitive effect.[51] Hinting at this possibility is a sentence from Justice Souter's concurring opinion in *Smith*, in which he states, "for me this is a close case."[52]

With one exception, U.S. courts of appeals which have ruled on the issue to date have applied the seven *Mendoza-Martinez* factors and the rationale in *Smith v. Doe* to uphold SORNA against ex post facto challenges. Echoing the Supreme Court's rationale, they have generally emphasized Congress's non-punitive intent in enacting SORNA and thus rejected ex post facto challenges.[53]

The exception to that trend is a decision by the U.S. Court of Appeals for the Ninth Circuit in *United States v. Juvenile Male*.[54] As is typical in challenges to § 2250, the defendant in *Juvenile Male* was an adult who had failed to register upon moving to a new state. However, the underlying conviction for a sex offense occurred when the defendant was a juvenile, as a result of non-consensual sexual activity that occurred when the defendant was 13 to 15 years old. Because none of the federal courts of appeals had considered challenges to § 2250 in cases in which the underlying conviction was based on a defendant's juvenile delinquency, the Ninth Circuit noted that the case presented "a matter of first impression—in our court and in any other circuit court."[55] The court cited the *Mendoza-Martinez* factors and *Smith v. Doe*, but noted that the factors serve only as "useful guideposts."[56] Emphasizing the distinct impacts that the SORNA

[47] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69, (1963).

[48] Smith v. Doe, 538 U.S. 84, 102 (2003).

[49] *See, e.g.*, Corey Rayburn Yung, One of These Laws is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions, 46 Harv. J. on Legis. 369 (2009).

[50] *See id.* at 392; 18 U.S.C. § 2250(a)(3).

[51] *See Smith*, 538 U.S. at 105-06 (characterizing the Court's holding as having followed from an insufficient degree of proof presented by the respondents).

[52] Smith v. Doe, 538 U.S. 84, 107 (2003) (Souter, J., concurring in the judgment).

[53] *See, e.g.*, United States v. Zuniga, 579 F.3d 845, 849 (8th Cir. 2009); United States v. Lawrance, 548 F.3d 1329, 1332-1336 (10th Cir. 2008).

[54] 590 F.3d 924 (9th Cir. 2010).

[55] *Id.* at 927.

[56] *Id.* at 931 (citing Smith v. Doe, 538 U.S. 84, 97 (2003)).

registration requirements would create for former juvenile offenders, the court held that *Smith* was not controlling.[57] In particular, the court noted that federal statutes emphasize secrecy in juvenile justice proceedings to facilitate rehabilitation; in contrast, *Smith* emphasized the long tradition of public trials and justice, including the public availability of court records. Thus, the court held that unlike convicted adults, the federal registration requirements impose a new stigma on former juvenile offenders in violation of the Ex Post Facto Clause. In June 2010, the Supreme Court issued a *per curiam* (i.e., "for the Court") opinion, in which it suggested that the government's appeal in *Juvenile Male* may be moot and certified to the Montana Supreme Court a threshold question on that issue.[58]

As discussed, the Supreme Court's holding in *Carr* appears to have made moot ex post facto challenges arguing that SORNA is unconstitutional as applied to persons whose interstate travels predated SORNA's enactment. However, ex post facto questions continue to arise in other cases. Although federal courts have rejected broad challenges on ex post facto grounds, questions remain in *Juvenile Male*, and could reach the Supreme Court in another case involving unique punitive impacts or grey area timelines. For example, one concern is that ex post facto concerns may be implicated if a defendant's failure to register occurred too soon after the federal law took effect.[59] That concern is intertwined to some degree with due process and applicability arguments.[60]

Due Process

Some defendants have argued that SORNA's criminal provision violates their Fifth Amendment due process rights.[61] In substantive[62] due process claims, they have advanced two related theories: (1) insufficient notice of the crime; and (2) impossibility. Regarding notice, the general rule is that ignorance of the law is no excuse.[63] However, in a 1957 case, *Lambert v. California*,[64] the Supreme Court struck down a conviction under a Los Angeles ordinance on lack-of-notice grounds. The ordinance at issue in *Lambert* required registration by all convicted felons living within the city. The Court noted that the Los Angeles ordinance was "entirely different" from

[57] *Id.* at 932-33.

[58] United States v. Juvenile Male, No. 09-940, slip op., (June 7, 2010). Specifically, the Court has requested that the Montana Supreme Court address whether the duty to register was contingent upon terms of a now-ended term of federal supervised release, or whether it continues as an independent requirement under Montana law.

[59] *See Id.* at 586 (holding that the Ex Post Facto Clause requires that some "minimum grace period … be given a person who faces criminal punishment for failing to register as a convicted sex offender").

[60] *See* United States v. Dixon, 551 F.3d 578, 586 (7th Cir. 2008) (noting the "close relation" between due process and ex post facto concerns regarding the opportunity given a defendant to comply with a law after it has been enacted).

[61] *See* U.S. Const. amend. V ("No person shall … be deprived of life, liberty, or property, without due process of law").

[62] Perhaps because the federal registration requirement relies on determinations made pursuant to underlying state statutes, procedural due process has been a less prevalent argument than substantive due process in challenges to SORNA. In *Conn. Dep't of Pub. Safety v. Doe*, the U.S. Supreme Court upheld a Connecticut registration statute against a Due Process Clause challenge. 538 U.S. 1 (2003). In that case, the defendant challenged the Connecticut statute on procedural due process grounds, arguing that the Fourteenth Amendment to the U.S. Constitution required the defendant to be granted a hearing to determine whether he is dangerous before he is required to register. The Court rejected that argument because it held that Connecticut's statute was triggered by a past conviction rather than present dangerousness. It did not consider other constitutional arguments.

[63] Cheek v. United States, 498 U.S. 192, 199 (1991) (noting that the rule that "ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system.").

[64] 355 U.S. 225 (1957).

most registration laws, because "[v]iolation of its provisions is unaccompanied by any activity whatever" and because "circumstances which might move one to inquire as to the necessity of registration are completely lacking."[65] Specifically, it held that a defendant must have received actual notice of the city's ordinance before a conviction for failure to register would survive a due process challenge.[66] *Lambert* has thus been characterized as an exception to the general "ignorance is no excuse" rule,[67] although it is a narrow exception.[68]

Federal courts have distinguished *Lambert* in cases challenging SORNA. For example, in *United States v. Gould*,[69] the U.S. Court of Appeals for the Fourth Circuit characterized the ordinance in *Lambert* as "an isolated city ordinance" applicable to a "broad class of all felons."[70] In contrast, it noted that SORNA applied to state sex offender registration statutes already in existence, implying that individuals convicted of sex offenses would likely already be aware of state requirements. Thus, the court concluded that no notice issue was implicated. Several other U.S. courts of appeals have addressed the issue and reached the same conclusion.[71]

The second substantive due process argument, impossibility, is closely related to arguments regarding the statute's applicability. As applied to SORNA, the impossibility argument is that a violation of § 2250 is technically impossible in the many states that have not yet implemented SORNA. As in challenges on applicability grounds, the federal courts of appeals have generally rejected this argument, holding that a defendant's knowledge that he or she is violating state law is sufficient notice for purposes of due process guarantees.[72]

Commerce Clause

In enacting SORNA, Congress relied on the Commerce Clause, one of its enumerated powers. The Clause states that Congress may "regulate commerce ... among the several states."[73] The U.S. Supreme Court has interpreted the Commerce Clause as authorizing Congress to regulate three categories, delineated by the Court in *United States v. Lopez*: [74] (1) channels of interstate commerce; (2) instrumentalities or interstate commerce; and (3) "'those activities having a substantial relation to interstate commerce.'"[75] Section 2250, the criminal provision accompanying SORNA, is, by its language, limited to persons who travel in interstate commerce.[76] Although at least one U.S. district court held that the registration requirements and §

[65] *Id.* at 229.

[66] *Id.* ("We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand.").

[67] *See, e.g.*, United States v. May, 535 F.3d 912, 921 (8th Cir. 2008) ("[The defendant] correctly notes that [*Lambert*] is an exception to the general 'ignorance of the law is no excuse' maxim….").

[68] Texaco, Inc. v. Short, 454 U.S. 516, 537 n. 33 (1982) (noting that *Lambert*'s "application has been limited").

[69] 568 F.3d 459 (4th Cir. 2009), *cert. denied*, 78 U.S.L.W. 3499 (2010).

[70] *Id.* at 468.

[71] *See id.* at 468-69; United States v. May, 535 F.3d 912, 921 (8th Cir. 2008); United States v. Hinckley, 550 F.3d 926, 938 (10th Cir. 2008).

[72] *See, e.g.*, United States v. Hester, 589 F.3d 86, 93 (2d Cir. 2009); United States v. Brown, 586 F.3d 1342, 1349-50 (11th Cir. 2009).

[73] U.S. Const. art. I, § 8.

[74] 514 U.S. 549 (1995).

[75] *See id.* at 558. *See also* United States v. Morrison, 529 U.S. 598, 609 (2000).

[76] 18 U.S.C. § 2250(a) (except for persons on federal territory, in the District of Columbia, or within the jurisdiction of (continued...)

2250 exceed Congress's Commerce Clause power,[77] the U.S. courts of appeals to have considered that argument to date appear to have rejected it. In particular, they have interpreted § 2250 as falling within the first of the *Lopez* categories—that is, regulation of the channels of interstate commerce.[78]

The underlying registration statute, 42 U.S.C. § 16913, has been perceived to present a somewhat more difficult case. The challenge arises because it has not been construed as a regulation of the channels or instrumentalities of interstate commerce; thus, it must be justified under the third *Lopez* category—that is, regulating activities that bear a substantial relationship to interstate commerce. Activities may be held to be substantially related to interstate commerce even if Congress has made no "particularized findings" explaining such an effect.[79] Giving differing rationales, the courts of appeals have generally upheld § 16913 as being within the "substantially related" category. Some courts have emphasized that the registration requirement is part of an overall scheme aimed to track persons convicted of sex offenses as they travel through interstate commerce.[80] Others have characterized the federal registration requirements as crafted to address concerns that persons convicted of sex offenses would evade state attempts to prevent recidivism by crossing state lines.[81] A final rationale emphasizes that § 16913 is justified because it is integrally linked to § 2250, the criminal provision which is viewed as having a relatively strong Commerce Clause basis.[82]

Non-Delegation Doctrine

Defendants have challenged § 16913(d), the provision which authorizes the Attorney General to determine applicability of the registrations, relying on a non-delegation doctrine theory. As a general rule, Congress "cannot delegate its legislative power to another branch."[83] However, it may delegate authorities that are guided by an "intelligible principle"—that is, that "clearly delineat[e] the general policy, the public agency which is to apply it, and the boundaries of this

(...continued)

Indian tribal law, requiring that a person "travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country" as a prerequisite to criminal liability).

[77] *See, e.g.*, United States v. Myers, 591 F. Supp. 2d 1312 (S.D. Fla. 2008), *vac'd by* United States v. Myers, 584 F.3d 1349 (11th Cir. 2009).

[78] *See, e.g.*, United States v. Whaley, 577 F.3d 254, 258 (5th Cir. 2009) ("Because § 2250 applies only to those failing to register or update a registration after traveling in interstate commerce … it falls squarely under the first *Lopez* prong."). A few circuit courts have even suggested that Congress is authorized to enact § 2250 by virtue of both the first and second prongs articulated in *Lopez*—that is, regulation of channels and regulation of instrumentalities of interstate commerce. *See, e.g.*, United States v. Ambert, 561 F.3d 1202, 1210 (11th Cir. 2009) ("Section 2250 is a proper regulation falling under either of the first two *Lopez* categories because it regulates both the use of channels of interstate commerce and the instrumentalities of interstate commerce.").

[79] Gonzales v. Raich, 545 U.S. 1, 21 (2005) ("While congressional findings are certainly helpful … the absence of particularized findings does not call into question Congress' authority to legislate.").

[80] *See, e.g.*, United States v. Howell, 552 F.3d 709, 716 (8th Cir. 2009) (interpreting the statutory language as indicating that Congress intended the "registration to track the movement of sex offenders through different jurisdictions").

[81] United States v. Gould, 568 F.3d 459, 473 (4th Cir. 2009) (stating that the federal registration scheme was crafted to "dea[l] with an extensive interstate movement of recidivists seeking to avoid state-created registration requirements.").

[82] *See, e.g.*, United States v. Guzman, 591 F.3d 83 (2d Cir. 2010) (emphasizing that § 2250 and § 16913 "'… are clearly complementary: without § 2250, § 16913 lacks federal criminal enforcement, and without § 16913, § 2250 has no substance.'") (quoting United States v. Whaley, 577 F.3d 254, 259 (5th Cir. 2009)).

[83] United States v. Mistretta, 488 U.S. 361, 372 (1989). This rule stems from a separation of powers concern: the U.S. Constitution provides that "[a]ll legislative powers ... shall be vested in" the legislative branch. U.S. Const. art. I, § 1.

delegated authority."[84] Throughout the past century, the Supreme Court has typically upheld challenged delegations of authority after concluding that they are guided by intelligible principles.[85] The U.S. courts of appeals that have addressed the issue have followed suit in cases challenging § 16913 under the non-delegation doctrine, despite disagreement[86] regarding specifically what authority § 16913(d) delegated to the Attorney General.[87] In doing so, courts have held that in enacting § 16913(d), Congress made all of the necessary legislative determinations, and left the Attorney General only a relatively narrow question, for which it had given the Attorney General sufficient "intelligible principles" to guide the decision.[88]

Residency Restrictions

While federal laws govern mandatory registration and community notification, many states and localities have gone further by enacting residency restrictions.[89] These laws were first implemented in 1995[90] in the aftermath of the highly publicized murder of nine-year-old Florida resident Jessica Lunsford by a previously convicted sex offender. The laws vary in scope and duration.[91] The most common type prohibits sex offenders from residing within a certain distance of specified places where children congregate (e.g., schools, churches, parks, and libraries). Distance markers generally range from 1,000 to 2,000 feet from the designated place. For example, Alabama's residency restriction statute prohibits adult sex offenders from living within 2,000 feet of a school or child care facility or within 1,000 feet of the victim's residence.[92]

Variations also exist on the applicability of these restrictions. Some jurisdictions impose these restrictions on those designated as sexual offenders regardless of the type of crime, age of victim, or risk of reoffending. Thus, it is possible that an individual convicted of possession of child pornography or public indecency 10 years ago can be restricted in the same manner as an

[84] *Id.* at 372-73 (quoting American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946)).

[85] A U.S. court of appeals noted that the Supreme Court has not invalidated a federal statute on non-delegation grounds since 1935. United States v. Ambert, 561 F.3d 1202, 1213 (11th Cir. 2009).

[86] Some courts of appeals have interpreted the provision as authorizing the Attorney General to determine whether the statute should be applied retroactively. *See, e.g.*, United States v. Madera, 528 F.3d 852 (11th Cir. 2008). Other courts of appeals have held that the provision merely authorized the Attorney General to determine how past offenders would be notified of the statute's retroactive application. *See, e.g.*, United States v. May, 535 F.3d 912, 915-19 (8th Cir. 2008). *See also*, discussion of this debate in the section describing arguments regarding the applicability of the registration provision, *supra*.

[87] *See, e.g.*, United States v. Ambert, 561 F.3d 1202, 1213-14 (11th Cir. 2009); United States v. Whaley, 577 F.3d 254, 263-64 (2009).

[88] *See, e.g.*, *Ambert*, 561 F.3d at 1213.

[89] Federal law requires public housing authorities to reject any applicants who are on a lifetime sex offender registry. See, 42 U.S.C. § 13663; see also, Cunningham v. Parkersburg Housing Authority, 2007 WL 712392 (S.D. W. Wa. 2007) (upholding 42 U.S.C. § 13663 as valid under Congress's spending power inasmuch as the ban was related to the federal interest in providing decent housing for low-income families).

[90] Jill S. Levenson, *Residence Restrictions and Their Impact on Sex Offender Reintegrations, Rehabilitation, and Recidivism*, ATSA Forum, XVIII(2) 2 (2007), http://www.csom.org/ref/ResidenceRestrictions.pdf.

[91] Some statutes are broader and also include employment restrictions. For example, under Alabama law, offenders are prohibited from accepting or maintaining employment within 500 feet of a "school, childcare facility, playground, park, athletic field or facility, or any other business or facility having a principal purpose of caring for, educating, or entertaining minors." Ala. Code§ 15-20-26(a).

[92] Ala. Code § 15-20-26(a). *See also*, Lee v. State, 895 So. 2d 1038 (Ala. Crim. App. 2004) (finding residency restriction statute constitutional despite challenge on ex post facto grounds).

individual with several arguably more serious convictions for molesting young children, with one of the crimes happening relatively recently. However, in other jurisdictions restrictions are limited to offenders convicted of only the most serious offenses or deemed most likely to reoffend based on some type of risk assessment. For example, under Arkansas law, it is unlawful for sex offenders assessed by the state to be level three (high risk) or level four (sexually violent predator) to live within 2,000 feet of a school or child care facility.[93] Some statutes are only applicable to sex offenders who are on some type of supervised release, while others apply for a lifetime. Several statutes contain grandfather clauses exempting sex offenders who had established residency before the statute's enactment[94] and/or prior to a designated entity's (school or child care facility) moving to within the given distance of their homes.[95] Legislators and others are debating the efficacy of these restrictions as courts are determining the constitutional limits of enacting such laws.

Proponents of these restrictions argue the need to safeguard potential victims—especially minors. They contend that such restrictions reduce an offender's temptation and ability to reoffend by limiting sex offenders' access to children.[96] However, because most residency restrictions apply to all registered sex offenders, regardless of the victim's age, opponents argue that these restrictions are overly broad and do not serve to protect residents.[97] Instead, opponents argue that these restrictions can cause a myriad of unintended consequences, such as[98] (1) isolating offenders, potentially forcing them to live in rural areas that may lack sufficient employment opportunities, transportation, housing, and treatment; (2) creating homelessness, making it difficult for law enforcement to track offenders;[99] (3) causing offenders to go underground and not update registration information; and (4) preventing offenders from residing with supportive family members who live in restricted areas. Media accounts have described the hardships suffered by sex offenders and their families.[100] For example, five Florida men were reportedly forced to live under the Julia Tuttle Bridge between Miami and Miami Beach when they could not procure any other restriction-compliant housing.[101]

In enacting residency restrictions, legislators must strike a delicate balance in protecting communities from sex offender recidivism without violating the rights of offenders. As these laws comprise both civil and criminal characteristics, the critical threshold issue is whether the laws

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[93] Ark. Code Ann. §§ 5-14-128(a); 12-12-913(j)(1)(A). *See* Weems v. Little Rock Police Dep't, 453 F.3d 1010 (8th Cir. 2005) (upholding the constitutionality of the residency restriction statute against an ex post facto challenge).

[94] See, e.g., Ala Code § 15-20-26(a).

[95] See, e.g., Tenn. Code Ann. § 40-39-211.

[96] *See* Ctr. For Sex Offender Mgmt., *Sex Offender Registration: Policy Overview and Comprehensive Practices* 1 (1999), http://www.csom.org/pubs/sexreg.pdf.

[97] See Sarah E. Agudo, Irregular Passion: The Unconstitutionality And Inefficacy Of Sex Offender Residency Laws, 102 NW. U. L. Rev. 307 (2008); Caleb Durling, Never Going Home: Does It Make Us Safer? Does It Make Sense? Sex Offenders, Residency Restrictions And Reforming Risk Management Law, 97 J. Crim. L. & Criminology 317 (2006).

[98] *See* Human Rights Watch, *No Easy Answers: Sex Offender Laws in the U.S.* 4 (2007), http://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf.

[99] For example, a Michigan appeals court ruled that homeless sex offenders do not have to register as a sex offender under state law. People v. Dowdy, 2010 Mich. App. LEXIS 214 (decided Feb. 2, 2010).

[100] *See, e.g.*, Stephanie Chen, *After Prison, Few Places for Sex Offenders To Live*, Wall St. J., Feb. 19, 2009, at A16, http://online.wsj.com/article/SB123500941182818821.html (describing the hardships suffered by a Georgia sex offender and his family, who spent two years searching for a residence that complied with state law).

[101] John Zarrella and Patrick Oppman, *Florida Housing Sex Offenders Under Bridge*, Apr. 6, 2007, http://www.cnn.com/2007/LAW/04/05/bridge.sex.offenders/index.html.

are designed or operate as civil remedies or criminal penalties. Criminal laws, even those labeled as civil remedies, must provide constitutional protections to criminal defendants,[102] while civil or non-punitive regulations do not require the same adherence to substantive and procedural safeguards.[103] Defendants have challenged residency restrictions under a host of constitutional grounds, such as an infringement of substantive and procedural due process rights under the Fourteenth Amendment, an infringement of the right against self-incrimination under the Fifth Amendment, and an infringement of the Eighth Amendment's prohibition of cruel and unusual punishment.[104] While courts have generally rejected these constitutional challenges, defendants have had mixed results when arguing that residency restrictions violate the Ex Post Facto Clause. State courts have generally found narrowly tailored statutes constitutional, while striking down statutes that either lacked a grandfather clause or were overly broad.[105] On the federal level, defendants have been unsuccessful with their challenges.[106]

Doe v. Miller

In *Doe v. Miller*,[107] the Eighth Circuit upheld Iowa's sex offender residency restriction statute[108] against several constitutional challenges brought by a class of convicted offenders covered by the act.[109] The plaintiffs had convictions which predated the law's effective date and covered an array of sexual crimes, including indecent exposure, "indecent liberties with a child," sexual exploitation of a minor, assault with intent to commit sexual abuse, lascivious acts with a child, and second and third degree sexual abuse.[110] All had problems obtaining compliant housing. As such, the plaintiffs filed suit asserting that the residency restriction statute was facially unconstitutional. The district court agreed and held that the statute violates several constitutional

[102] *See, e.g.*, United States v. Ward, 448 U.S. 242, 248 (1980) (stating that "[t]he distinction between a civil penalty and a criminal penalty is of some constitutional import.").

[103] *See, e.g.*, Kansas v. Henricks, 521 U.S. 346 (1997) (concluding that civil commitment requirements were sufficiently tailored to meet non-punitive purpose); *accord* Seling v. Young, 531 U.S. 250, 263 (2001) (deciding that commitment of sexually violent felons was a civil remedy that did not impact the constitutionality of the statute under Ex Post Facto or Double Jeopardy Clauses).

[104] *See, e.g.*, Doe v. Miller, 298 F.Supp. 2d 844, 865-66 (S.D. Iowa 2004) (describing the various constitutional claims brought by the plaintiff class under the Ex Post Facto Clause, the Due Process Clause, and the Fifth and Eighth Amendments of the U.S. Constitution). *See, e.g.*, State v. Serring, 701 N.W. 2d 655, 670 (Iowa 2005) (rejecting plaintiff's Eighth Amendment claims).

[105] *See, e.g.*, Nasal v. Dover, 862 N.E.2d 571 (2d Dist. Miami County 2006) (holding that retroactive application of the state residency restriction affected a registered sex offender's substantive right to maintain his residence, and was, therefore, unconstitutionally retroactive as applied to him where the offender owned and occupied his home near a school prior to the statute's enactment).

[106] *See, e.g.*, Weems v. Little Rock Police Dept., 453 F.3d 1010 (8th Cir. 2006) (holding that Arkansas' residency restriction statute did not contravene substantive due process, as it rationally advanced the legitimate governmental purpose of protecting children from the most dangerous sex offenders).

[107] 405 F.3d 700 (8th Cir. 2005).

[108] Iowa Code Ann. § 692A.2A (prohibiting individuals convicted of certain sex offenses involving minors from residing within 2,000 feet of a school or registered child care facility). For an extensive discussion of the decisions in *Doe v. Miller*, both in the Southern District of Iowa and in the Eighth Circuit, see Michael J. Duster, Note, *Out of Sight, Out of Mind: State Attempts to Banish Sex Offenders*, 53 Drake L. Rev. 711 (2005).

[109] The class of sex offenders had convictions that predated the law's effective date. The plaintiffs committed a range of sexual crimes, including indecent exposure, "indecent liberties with a child," sexual exploitation of a minor, assault with intent to commit sexual abuse, lascivious acts with a child, and second and third degree sexual abuse. *Doe*, 405 F.3d at 706.

[110] *Doe*, 405 F.3d at 706.

protections, namely the Ex Post Facto Clause; the Fifth Amendment right to avoid self-incrimination; and both procedural and substantive due process guarantees. The district court issued a permanent injunction against enforcement. On appeal, the Eighth Circuit rejected all of the plaintiffs' assertions and found instead the statute constitutional as a civil measure enacted for the non-punitive purpose of protecting children.

Procedural Due Process

The Due Process Clause of the Fifth Amendment provides that "[n]o person shall be…deprived of life, liberty, or property without due process of law."[111] Challenges to residency restrictions have invoked both procedural and substantive due process arguments. Procedural due process, based on principles of "fundamental fairness," addresses which legal procedures are required to be followed. Relevant issues include notice, opportunity for hearing, confrontation and cross-examination, discovery, basis of decision, and availability of counsel. The plaintiffs argued that the statute violated procedural due process inasmuch as it did not provide an individualized determination of dangerousness for persons affected by the statute. In other words, the statute deprived them of an "opportunity to be heard."[112] Relying on U.S. Supreme Court precedent,[113] the Eighth Circuit found that due process does not entitle a defendant to a hearing to establish a fact immaterial under the statute.[114] Instead, the court found that the statute applied equally to all offenders convicted of specific crimes against minors and regardless of what estimates of future dangerousness might be proven in individual hearings.[115] The court noted that unless the plaintiffs "can establish that the substantive rule established by the legislative classification conflicts with some provision of the U.S. Constitution, there is no requirement that the State provide a process to establish an exemption from the legislative classification."[116]

Substantive Due Process

The plaintiffs further asserted that the residency restrictions amounted to a violation of substantive due process. Under the doctrine of substantive due process, the Supreme Court has held that certain fundamental rights, while not expressly recognized in the Constitution's text, are subsumed within the notion of liberty in the Due Process Clause. Some of these rights encompass contraception, abortion, marriage, procreation, education (elementary level), and interpersonal relationships.[117] These aspects—broadly termed "private family life"—are constitutionally

[111] U.S. Const. amend. V.

[112] *Doe*, 405 F.3d at 709.

[113] *See*, Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 7 (2003) (stating that "even assuming, arguendo, that [the sex offender] has been deprived of a liberty interest, due process does not entitle him to a hearing to establish a fact that is not material under the [state] statute").

[114] *Doe*, 405 F.3d 708 (citing *Conn. Dep't*, 538 U.S. at 7).

[115] *See also* State v. Seering, 701 N.W.2d 655 (Iowa 2005).

[116] *Doe*, 405 F.3d at 709 (citing *Conn. Dep't*, 538 U.S. at 7-8).

[117] In addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, Loving v. Virginia, 388 U.S. 1 (1967); to have children, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); to marital privacy, Griswold v. Connecticut, 381 U.S. 479 (1965); to use contraception, *id.*; Eisenstadt v. Baird, 405 U.S. 438 (1972); to bodily integrity, Rochin v. California, 342 U.S. 165 (1952); and to abortion, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).

protected against government interference. As such, they are subject to strict scrutiny review, and a governmental entity must demonstrate that the challenged regulation is narrowly tailored to a compelling interest.[118] Where there is no fundamental right involved, the government must demonstrate that there is a rational basis for its action. This level of judicial review, referred to as rational basis review, is characterized by its deference to legislative judgment. Because of the distinction between strict scrutiny and rational basis review, a determination of whether there is a fundamental right is central to a substantive due process analysis.

The plaintiffs argued that the restriction violated the fundamental rights of certain individuals to live and travel where they choose and to have privacy and choice in family matters. The Eighth Circuit rejected these arguments. Instead, the court held that the Iowa statute did not implicate any fundamental right that would trigger strict scrutiny because the statute did not directly regulate family relationships or prevent family members from residing with a sex offender in a residence that complies with the statute.[119]

The court also rejected the plaintiffs' assertion that the residency restrictions interfered with their constitutional right to travel by substantially limiting the ability of sex offenders to establish residences in Iowa. The court held that the statute's effects in discouraging travel to and within Iowa did not amount to a violation of a fundamental right. Relying on Supreme Court precedent, the Eighth Circuit noted that the right to interstate travel embraces three different components: "the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State."[120] The Eighth Circuit noted that the residency restrictions do not "directly impair the exercise of the right to free interstate movement" as offenders are free to travel in and out of the state.[121] Moreover, the statute treated nonresidents who visited Iowa the same as residents. Further, the statute did not discriminate against citizens of other states who chose to establish residence in Iowa. Thus, the Eighth Circuit declined to recognize a fundamental right to interstate travel.[122]

Using a rational basis review and giving legislative deference, the court found that the statute was rationally related and advanced the state's legitimate interest in protecting children.[123]

Self-Incrimination

The Eighth Circuit disagreed that the Iowa statute represented a violation of the Self-Incrimination Clause of the Fifth Amendment. The Self-Incrimination Clause of the Fifth Amendment, applicable to the federal government and to the states through the Fourteenth

[118] *See. e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977); Washington v. Glucksberg, 521 U.S. 702 (1997).

[119] *Doe*, 405 F.3d at 710-13.

[120] *Doe*, 405 F.3d at 711 (citing Saenz v. Roe, 526 U.S. 489, 500 (1999)).

[121] *Doe*, 405 F.3d at 711 (citing *Saenz*, 526 U.S. at 501).

[122] *Doe*, 405 F.3d at 712. The court declined to address whether there is a fundamental right to intrastate travel or "to live where you want." Instead, the court noted that even if such a right existed, it would not require strict scrutiny analysis. *See also* Formaro v. Polk County, 773 N.W.2d 834 (Iowa 2008) (finding that the residency restriction statute did not violate the sex offender's right to intrastate travel and freedom of association).

[123] *Doe*, 405 F.3d at 714.

Amendment,[124] provides that "no person shall be compelled in any criminal case to be a witness against himself." The Eighth Circuit held that the residency restriction did not compel a sex offender to provide any information that might be used in a criminal case.[125] The court noted that the statute only regulates where the sex offender may reside.[126]

Ex Post Facto

The court also rejected the plaintiffs' claim that the Iowa statute represented an impermissible ex post facto law. Sex offender residency restrictions are generally challenged under the ex post facto prohibition of punishments that are greater than existed when a crime was committed, because, when applied to offenders who were convicted before the applicable statute's enactment, they impose restrictions that offenders could not have foreseen at the time of their criminal acts.[127] Applying the Supreme Court's analysis in *Smith v. Doe*,[128] the Eighth Circuit found that the plaintiffs failed to establish that the statute's punitive effects overrode the legislature's intent to enact a non-punitive, civil regulation to protect citizens' safety. The court found evidence of non-punitive intent in the legislature's choice to codify the residency restriction act alongside Iowa's sex offender registration requirement in a code chapter which the Iowa Supreme Court had previously held to be non-punitive.

In determining whether the statute's punitive effects were sufficient to negate or override the legislature's intent to create a civil, non-punitive regulatory scheme, the court relied on the five factors the Court used in *Smith v. Doe*: (1) whether the law has been regarded in U.S. history and traditions as punishment; (2) whether it promotes the traditional aims of punishment (deterrence and/or retribution); (3) whether it imposes an affirmative disability or restraint; (4) whether it has a rational connection to a non-punitive purpose; and (5) whether it is excessive with respect to that purpose.[129] The court rejected the class's argument that the residency restrictions constituted effective banishment and thus were of a form traditionally regarded as punishment. Using a narrow interpretation of the term "banishment," the majority reasoned that the residency restrictions were less severe as offenders retained access to the areas, schools or childcare facilities in any manner short of establishing a residence. Moreover, the act's grandfather provision allowed many offenders to continue living in restricted areas.[130] While acknowledging that the statute might have some deterrent effect, the majority gave such effect little weight because the law's primary purpose was to reduce the temptation to reoffend and not to control offender behavior through negative consequences.[131] The court concluded that the statute did,

[124] Malloy v. Hogan, 379 U.S. 1 (1964).

[125] The plaintiffs did not specifically challenge the portion of the statute that requires sex offenders to register their addresses with the county sheriff. The court opined that a challenge to the registration requirements would be premature as there was no record that registration information provided by an offender had been used to further a criminal prosecution.

[126] *See also* State v. Seering, 701 N.W. 2d 655 (Iowa 2005) (upholding the residency restriction statute against a Fifth Amendment challenge).

[127] *See, e.g.*, Doe v. Miller, 405 F.3d 700, 718 (8th Cir. 2005) (characterizing the sex offenders' ex post facto challenge as contending that Iowa's residency restriction statute increases punishment for criminal acts after those acts have been committed).

[128] 538 U.S. 84, 92 (2003).

[129] 538 U.S. at 97.

[130] *Doe*, 405 F.3d at 719-20.

[131] *Doe*, 405 F.3d. at 720.

however, impose an affirmative restraint upon convicted offenders. Finally, the majority held that the statute bore a rational connection to the protection of minors by reducing the risk of sex offender recidivism and concluded that the statute was reasonably related to the protection of minors despite its lack of individualized risk assessment and despite the absence of any scientific evidence supporting the legislature's specific choice of 2,000 feet. Weighing all the factors, the Eighth Circuit concluded that Iowa's residency restriction was a civil regulation, not a criminal punishment, and therefore was not an unconstitutional ex post facto law.[132] The Supreme Court subsequently denied the petition for certiorari.[133]

Challenges to Residency Restrictions Under State Law

While defendants have been unsuccessful at the federal level, state challenges have produced mixed results. For example, the Indiana Supreme Court concluded that, as applied to the defendant, the state residency restrictions violated the Ex Post Facto Clause of the state constitution because of their punitive effect.[134] In *State v. Pollard*, the court found that while there was ambiguity as to whether the legislature intended to enact a civil or regulatory scheme, the punitive effect was sufficient to negate the intent. The statute applied retroactively to sex offenders who had established ownership and property rights in a residence prior to the statute's effective date, and forced them to relinquish some or all of their ownership rights or face a felony charge. Also, the statute did not provide an exemption for ownership impacted by later construction of a protected facility or area. The court wrote, "Restricting the residence of offenders based on conduct that may have nothing to do with crimes against children, and without considering whether a particular offender is a danger to the general public, the statute exceeds it non-punitive purposes."[135]

Conversely, in *Lee v. State*,[136] the Alabama Court of Criminal Appeals upheld Alabama's sex offender residency restriction statute[137] against an ex post facto challenge. Applying the analysis used in *Smith v. Doe*,[138] the court found that the statute was facially non-punitive because the legislature made findings of fact indicating that the legislation's purpose was to protect the public from the threat of recidivist sex offenders. Applying the factors, the court concluded that the plaintiff could not demonstrate a punitive purpose or effect because the trial record lacked any factual basis upon which to allege that the residency restriction was traditionally viewed as punishment or was excessive in light of its non-punitive purpose.[139] Similarly, the Iowa Supreme

[132] *See also* Weems v. Little Rock Police Dep't, 453 F.3d 1010 (8th Cir. 2005) (upholding Arkansas's sex offender residency restriction against an ex post facto challenge); Graham v. Henry, 2006 WL 2645130, at *4-5 (N.D. Okla. Sept. 14,2006) (rejecting a challenge to the Oklahoma residency restriction); Doe v. Baker, No. Civ. A 1:05-CV-2265, 2006 WL 905368 (N.D. Ga. Apr. 5, 2006) (upholding Georgia's sex offender residency restriction finding that the Georgia legislature's intent was to create a civil regulatory scheme).

[133] Doe v. Miller, 405 F. 3d 700 (2005), *cert. denied*, 546 U.S. 1035 (2005).

[134] State v. Pollard, 908 N.E.2d 1145, 1150-53 (Ind. 2009) (articulating the reasons that Indiana's residency restriction were punitive in effect).

[135] *Pollard*, 908 N.E.2d at 1153.

[136] 895 So. 2d 1038 (Ala. Crim. App. 2004); See also, People v. Leroy, 838 N.E.2d 769 (Ill. App. Ct. 2005) (reasoning that while the residency restriction statute imposed an affirmative disability and had some deterrent effect, the record was devoid of any evidence suggesting that the statute banished offenders from their community).

[137] Ala. Code § 15-20-26(a).

[138] 405 F.3d 700 (8th Cir. 2005).

[139] *See also* Denson v. State, 600 S.E. 2d 645 (Ga. Ct. App. 2004) (upholding Georgia's sex offender residency restriction statute against an ex post facto challenge). The court held that, because an offender could only be punished (continued...)

Court followed the Eighth Circuit's reasoning in *Doe v. Miller*[140] and upheld its residency restriction statute against several challenges, including an ex post facto challenge. In *State v. Seering*,[141] the plaintiff was convicted of lascivious conduct with a minor.[142] Upon his release from a halfway house, Mr. Seering was arrested for living within 2,000 feet of a daycare center.[143] He subsequently moved with his wife and daughter into a camper located on a piece of abandoned farm property, where the family remained until the property owner demanded they move.[144] Meanwhile, Mr. Seering filed a motion to dismiss the criminal charge against him for violating the statute. An Iowa district court granted the motion, finding the statute unconstitutional on several grounds, including ex post facto.[145] However, the Iowa Supreme Court reversed, finding that the statute was civil in nature because it was designed to protect the health and safety of minors. Moreover, the statute did not punish conduct that occurred prior to the statute's enactment or increase punishment for a crime after its commission.

While courts have split on the question of whether residency restrictions violate the Ex Post Facto Clause, and generally rejected other challenges, still one more argument has found success. Under the Takings Clause of the Fifth Amendment, the Supreme Court of Georgia found the residency restriction statute to be an impermissible taking without adequate compensation when applied to a sex offender who was a homeowner forced to move after a child care facility opened within the restricted zone.[146]

Georgia's Residency Restriction and the Takings Clause

Georgia's residency restriction prohibits registered sex offenders from residing "within 1,000 feet of any child care facility, church, school, or area where minors congregate."[147] Anthony Mann, a registered sex offender, resided at his parents' home when Georgia's residency restriction became effective.[148] Mann's probation officer notified him that he was in violation of the statute, as a child care facility was located within 1,000 feet of the home.[149] Mann filed the first of two lawsuits (*Mann I*), claiming the residency restriction "unconstitutionally permits a regulatory taking without just and adequate compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution."[150] Mann ultimately lost the suit as the court

(...continued)

under the restriction by committing a new crime by failing to change residences, the statute did not impose additional punishment for a prior conviction.

[140] 405 F.3d 700 (8th Cir. 2005).

[141] 701 N.W. 2d 655 (Iowa 2005).

[142] *Id.* at 659.

[143] *Id.* at 659-60.

[144] *Id.* at 660.

[145] *Id.*

[146] Mann v. Georgia Dept. of Corr. *(Mann II)*, 653 S.E.2d 740, 745 (Ga. 2007). However, the court held that the statute did not constitute an impermissible taking with respect to his ownership interest in a restaurant.

[147] Ga. Code. § 42-1-15. An area where minors congregate is defined as including "all public and private parks and recreation facilities, playgrounds, skating rinks, neighborhood centers, gymnasiums, school bus stops, public libraries and public and community swimming pools." Ga. Code Ann. § 42-1-12(a)(3).

[148] Mann v. State *(Mann I)*, 603 S.E.2d 283, 285 (Ga. 2004).

[149] *Id.*

[150] *Id.*

found that he had only a minimal property interest in the living arrangements he had in his parents' home.[151]

While his first suit was pending, Mann purchased a home with his wife in Clayton County, Georgia, in compliance with the residency restriction. However, a child care facility subsequently opened within 1,000 feet of Mann's home, and Mann was again notified by his probation officer that he was in violation of the residency restriction. Mann filed a second suit (*Mann II*) seeking a declaration that section 42-1-15 was unconstitutional because it authorizes the regulatory taking of his property without any compensation as required by both the U.S. Constitution and Georgia law.[152]

The Takings Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment,[153] provides that private property shall not "be taken for public use, without just compensation."[154] Takings fall in one of two categories: physical or regulatory. Physical takings constitute a "'direct appropriation' of property," "or the functional equivalent of a 'practical ouster of [the owner's] possession.'"[155] As such, a physical taking would involve a direct government appropriation or physical invasion of private property.[156] Today, the U.S. Supreme Court also recognizes "regulatory takings," which occur when government regulation of private property is "so onerous that its effect is tantamount to a direct appropriation or ouster."[157] Both regulatory and physical takings may be compensable under the Fifth Amendment.[158]

There are two types of regulatory takings: total and partial. A "total regulatory taking" occurs when government regulation deprives an owner of "all economically beneficial use" of his or her property.[159] Under this narrow category, the government must pay just compensation, except to the extent that "background principles of nuisance and property law" existing when the property was acquired independently restrict the owner's intended use of the property.[160]

A "partial regulatory taking" may occur when the government regulation deprives an owner of a substantial, but less than total, portion of the economic use or value of his or her property. In *Penn Central Transportation Co. v. City of New York*,[161] the Supreme Court laid out general guidance for determining whether a partial regulatory taking has occurred. A court will consider several factors, including the regulation's economic impact on the landowner, the extent to which the regulation interferes with "distinct" or "reasonable" investment-backed expectations, and the character of the government action.[162] In considering these facts, courts are instructed to keep in mind the purpose of the Takings Clause, which is to prevent the government from "forcing some

[151] *Id.*

[152] *Mann II*, 653 S.E.2d at 742.

[153] Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897).

[154] U.S. Const. amend V.

[155] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992).

[156] Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 537 (2005).

[157] Id.

[158] Id.

[159] *Lucas*, 505 U.S. at 1015.

[160] *Lingle*, 544 U.S. at 537 (quoting *Lucas*, 505 U.S. at 1026-32).

[161] 438 U.S. 104 (1978).

[162] *Id.* at 124. While Penn Central referred to "distinct" investment-backed expectations, later Supreme Court takings decisions changed "distinct" to "reasonable." *See, e.g.,* Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[163]

The *Mann II* court used the *Penn Central* test, since there was no direct appropriation or physical invasion of Mann's property, and Mann was not deprived of all economically beneficial use of his property. At the very least, Mann could sell or rent his property to someone else. In assessing the economic impact on Mann, the court noted that the statute's effect would be to force Mann to find another residence and thereby maintain two residences until the house violating the residency restriction could be sold or rented.[164] If Mann chose to sell the house, he would be met with numerous expenses, such as closing costs, attorney fees, and realtor commissions.[165] To purchase a new residence, Mann would face these costs a second time, plus expenditures such as escrow deposits and utilities transfers.[166]

Unlike most takings cases, the economic impact to be borne by Mann under Georgia's residency restriction had the potential to repeatedly recur. As the court noted, under the terms of the statute "there is no place in Georgia where a registered sex offender can live without being continually at risk of being ejected."[167] The residency restriction contained no grandfather or "move-to-the-offender" exception, thereby forcing sex offenders who were there first to move any time a new child care facility, church, school, or "area where minors congregate" opened in the area.[168] Moreover, due to the state-mandated publication of sex offenders' residential addresses, anyone could look up the information, build an "area where minors congregate," and force a sex offender out of the area.[169] Thus, while the economic impact of the residency restriction on Mann might be relatively small at any one time, the statute creates the potential for a sex offender to face a never-ending series of expenses. As such, the court found that the residency restriction "does not merely interfere with," but "positively precludes [Mann] from having any reasonable investment-backed expectation in any property purchased as his private residence."[170]

The *Mann II* court found that the net result of Georgia's residency restriction was analogous to net results of a physical taking or ouster. As the court stated, "[u]nlike the situation in the typical regulatory takings case, the effect of [section 42-1-15] is to mandate [Mann's] immediate physical removal from his ... residence. It is 'functionally equivalent to the classic taking in which the government directly ... ousts the owner from his domain.'"[171]

Finally, the Mann II court concluded by examining whether the residency restriction serves the purpose of the Takings Clause or forces "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[172] The court stated that "[a]ll of

[163] Palazzolo v. Rhode Island, 533 U.S. 606, 617-18 (2001) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

[164] Mann v. Georgia Dep't of Corr. (*Mann II*), 653 S.E..2d 740, 744 (Ga. 2007).

[165] Id.

[166] Id.

[167] *Id.* at 742.

[168] *Id.* at 742.

[169] *Id.* at 742-43.

[170] *Id.* at 744.

[171] Mann v. Georgia Dep't of Corr. *(Mann II)*, 653 S.E.2d 740, 744 (Ga. 2007) (quoting Lingle v. Chevron U.S.A, 544 U.S. 528, 542 (2005).

[172] *Mann II*, 653 S.E.2d at 745.

society benefits from the protection of minors, yet registered sex offenders alone bear the burden of the particular type of protection provided by the residency restriction…. No burden is placed on third parties to aid in providing this protection," even though the addresses of sex offenders are made publicly available.[173] The court concluded that given "the magnitude and character of the burden [section 42-1-15] imposes on the property rights of registered sex offenders and how that burden is distributed among property owners ... justice requires that the burden" be spread through the payment of compensation.[174] The Supreme Court of Georgia then found the residency restriction "unconstitutional to the extent that it permits the regulatory taking of [Mann's] property without just and adequate compensation."[175]

Conclusion

Although defendants invoke different constitutional provisions to challenge restrictions, some overarching themes may be drawn regarding post-incarceration controls. One theme involves timing: As new and existing controls continue to apply retroactively to individuals whose conviction for a sex offense predated the control, legal questions will persist regarding the constitutional limits. More broadly, a continuing dilemma in ex post facto and other challenges arises because post-conviction controls generally comprise both civil and criminal elements. Fundamental to the outcome of their characterization are twin propositions: criminal laws, even those labeled as civil remedies, must afford constitutional protections to criminal defendants; while civil non-punitive regulations do not require the same adherence to substantive and procedural safeguards. As restrictions have increased in both number and severity, questions arise. For example, is it possible that a statute's effect is so punitive as to negate a legislature's apparent non-punitive intent? Under what circumstances may these restrictions be applied?

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[173] Id.

[174] Id.

[175] *Id.* It should be noted that after this decision, the Georgia legislature amended the statute to provide exemptions for property owners. Sex offenders who own real property and reside on such would be exempt if a child care facility, church, school, or area where minors congregate subsequently locates itself within 1,000 feet of the property. Also, sex offenders who own and reside on the real property are exempt if they established property ownership before July 1, 2006. *See* Ga. Code Ann. § 42-1-15.