

2011]

THE ADAM WALSH ACT'S SEX OFFENDER REGISTRATION AND
NOTIFICATION REQUIREMENTS AND THE COMMERCE
CLAUSE: A DEFENSE OF CONGRESS'S POWER TO
CHECK THE INTERSTATE MOVEMENT OF
UNREGISTERED SEX OFFENDERS

MATTHEW S. MINER*

I. INTRODUCTION

THE Adam Walsh Child Protection and Safety Act (the Adam Walsh Act or the Act) has been under relentless attack since it was enacted in 2006.¹ Litigants and academics have faulted the Act's civil commitment provisions for unreformed sex offenders, resulting in a case before the Supreme Court last term.² Defendants have attacked the various penalty provisions in the Act under the Eighth Amendment.³ The Act's Sex Offender Registration and Notification Act (SORNA) provisions have also been challenged, including an ex post facto challenge that made its way to the Supreme Court this year.⁴ In addition to these challenges, another prominent legal claim often raised against the Act's registry provisions is that Congress lacked the power to create such a law under the Commerce and Necessary and Proper Clauses of the Constitution.

* Republican Staff Director, U.S. Senate Committee on the Judiciary. B.A., University of Cincinnati; J.D., University of Michigan Law School. In my previous role as Chief Counsel for Crime and Terrorism to the Committee, I participated in the weeks of staff negotiations regarding the final drafting of the Adam Walsh Child Protection and Safety Act. I would like to thank Hannibal Kemerer, William Hall, Nick Rossi, Brian Benczkowski, Joe Matal, and the editorial staff of the Villanova Law Review for their helpful comments and suggestions on this Article. The views expressed in this Article are solely my own.

1. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587.

2. *See* *United States v. Comstock*, 130 S. Ct. 1949, 1954 (2010) (finding civil commitment statute constitutional under Necessary and Proper Clause).

3. *See, e.g.*, *United States v. Farley*, No. 1:07-CR-196-BBM, 2008 U.S. Dist. LEXIS 104437, at *10 (N.D. Ga. Sept. 2, 2008), *rev'd*, 607 F.3d 1294 (11th Cir. 2010) (finding that thirty-year mandatory sentence for aggravated sexual abuse violated Eighth Amendment).

4. *Carr v. United States*, 130 S. Ct. 2229 (2010).

To date, a handful of courts⁵ and legal commentators⁶ have questioned the constitutionality of—specifically the Commerce Clause basis for—SORNA’s sex offender registration requirements and failure-to-register penalty. Even though such views are against the great weight of federal court authority,⁷ such arguments persist and are raised in case after case. Numerous law review articles were published in the last year to advance such views.⁸ Additionally, a group of law professors questioned SORNA under the Commerce Clause in an amicus brief to the Supreme Court this term.⁹

At the core of these objections is a question about whether Congress exceeded its power under the Constitution’s Commerce Clause¹⁰ when it created a nationwide sex offender registry¹¹ and a federal penalty for sex

5. *See, e.g.*, *United States v. Myers*, 591 F. Supp. 2d 1312 (S.D. Fla. 2008), *vacated*, 584 F.3d 1349 (11th Cir. 2009); *United States v. Guzman*, 582 F. Supp. 2d 305 (N.D.N.Y. 2008), *rev’d*, 591 F.3d 83 (2d Cir. 2010); *United States v. Hall*, 577 F. Supp. 2d 610 (N.D.N.Y. 2008), *rev’d*, 591 F.3d 83 (2d Cir. 2010); *United States v. Waybright*, 561 F. Supp. 2d 1154 (D. Mont. 2008); *United States v. Powers*, 544 F. Supp. 2d 1331, 1336 (M.D. Fla. 2008), *rev’d*, 562 F.3d 1342 (11th Cir. 2009).

6. *See* Corey Raburn 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, 371-72 (2009); Corey Rayburn Yung, *The Sex Offender Registration and Notification Act and the Commerce Clause*, 21 FED. SENT’G REP. 133, 134 (2008) [hereinafter *Yung II*]; Anne Marie Atkinson, Comment, *The Sex Offender Registration and Notification Act (SORNA): An Unconstitutional Infringement of States’ Rights Under the Commerce Clause*, 3 CHARLESTON L. REV. 573 (2009); Robin Morse, Note, *Federalism Challenges to the Adam Walsh Act*, 89 B.U. L. REV. 1753, 1787 (2009).

7. *See, e.g.*, *United States v. George*, 625 F.3d 1124 (9th Cir. 2010); *United States v. Guzman*, 591 F.3d 83 (2d Cir. 2010); *United States v. Whaley*, 577 F.3d 254 (5th Cir. 2009); *United States v. Gould*, 568 F.3d 459 (4th Cir. 2009); *United States v. Ambert*, 561 F.3d 1202 (11th Cir. 2009); *United States v. Dixon*, 551 F.3d 578 (7th Cir. 2008), *rev’d*, 130 S. Ct. 2229 (2010); *United States v. Hinckley*, 550 F.3d 926 (10th Cir. 2008); *United States v. May*, 535 F.3d 912 (8th Cir. 2008).

8. *See supra* note 6.

9. *See* Brief of Law Professors as Amici Curiae in Support of Petitioner at 18-19 n.6, *Carr v. United States*, 130 S. Ct. 2229 (2009) (No. 08-1301), 2009 WL 4818499, at *19 (arguing that Mann Act was incorrectly relied upon to justify SORNA under Commerce Clause and asserting that disconnect in SORNA’s criminal provisions “between the interstate travel element and the failure to register element puts the jurisdictional basis for SORNA in such cases on shaky ground”).

10. U.S. CONST. art. I, § 8, cl. 3 (stating that Congress shall have power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”).

11. Through SORNA, Congress created a nationwide sex offender registry through provisions codified within title 42, chapter 151 of the United States Code. For example, Congress required states to maintain a sex offender registry conforming to the registration requirements stated elsewhere in chapter 151. 42 U.S.C.A. § 16912(a) (West 2010). SORNA also required sex offenders to register in each jurisdiction where the offender resides, works, or is enrolled as a student. *Id.* § 16913. Specifically, the sex offender registration provision codified at Section 16913 provides:

(a) In general—A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial

offenders who fail to register under the Act.¹² Indeed, at the heart of these objections is a question about the degree to which Congress actually intended to regulate the interstate movement of sex offenders when it passed the Act, rather than a broader intent to cause and enforce purely intrastate registration requirements.¹³

These concerns are unfounded, as can be shown by the record before Congress and the legislative debate that preceded passage of the Adam

registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) Initial registration—The sex offender shall initially register—

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) Keeping the registration current—A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

(d) Initial registration of sex offenders unable to comply with subsection (b)—The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).

(e) State penalty for failure to comply—Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.

Id.

12. SORNA codified a failure-to-register penalty at 18 U.S.C.A. § 2250(a) (West 2010). Section 2250(a) provides:

Whoever—

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

(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 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.

Id.

13. *See, e.g.,* Atkinson, *supra* note 6, at 597 (arguing that SORNA failure-to-register criminal penalty “punishes individuals for ‘knowingly failing to register,’ not for interstate travel for the purpose of avoiding registration or for failing to register, as the sex offender is in the act of traveling in interstate commerce”).

Walsh Act in 2006.¹⁴ Although Congress did not issue a clear report summarizing the legislative history behind the Act, the existing legislative record clearly shows that Congress was confronted by the very real consequences of the unregistered movement of sex offenders.¹⁵ Throughout Congress's consideration and debate over the Adam Walsh Act and related bills, members of Congress and hearing witnesses repeatedly cited the then-very recent tragic cases of sex offenders who relocated or traveled across state lines to avoid detection.¹⁶ Oft-cited in this congressional debate were North Dakota college student Dru Sjodin¹⁷ and the family of Shasta and Dylan Groene,¹⁸ each of whom was victimized by a sex offender who had been convicted, released, and registered in one state, but committed heinous offenses in another state where his location was unknown to law enforcement and the community. Members and hearing witnesses¹⁹ also cited the tragic case of Jessica Lunsford, who was kidnapped, abused, and murdered by a Florida sex offender who fled to Georgia after committing his crimes. At the time of his arrest in Augusta, Georgia, Jessica Lunsford's killer was on his way to buy a bus ticket to Tennessee.²⁰

II. THE CASE OF AN INTERSTATE SEX OFFENDER AND HIS INTERSTATE CRIME SPREE

The Groene case is a particularly strong example of the record before Congress during negotiations and debate over the Adam Walsh Act in 2006. In addition to being cited throughout the debate over the Act, the

14. See *infra* Part IX.

15. For a further discussion of the legislative record, see *infra* Part IX.

16. For a further discussion of cases cited during the congressional debates and hearings, see *infra* Part IX.

17. See 152 CONG. REC. S8016-17 (daily ed. July 20, 2006) (statement of Sen. Byron Dorgan) (citing kidnapping, rape, and murder of Dru Sjodin, Senator Dorgan's introduction of Dru's Law to improve sex offender registries, and his reference to Groene case sex offender, Joseph Duncan, at town hall meeting in North Dakota *before* Groene case occurred and Duncan was found to have traveled cross-country to offend again).

18. See 152 CONG. REC. S8019-20 (daily ed. July 20, 2006) (statement of Sen. Maria Cantwell) (describing Groene case during Adam Walsh Act debate and explaining that that terrible episode "did not have to happen").

19. See *Protecting Our Nation's Children from Sexual Predators and Violent Criminals: What Needs to be Done?: Hearing Before the H. Comm. on the Judiciary*, 109th Cong. 6-8 (2005) (statement of Tracy Henke, Acting Asst. Att'y Gen., Office of Justice Programs, U.S. Dept. of Justice) (citing cases of Jessica Lunsford and Megan Kanka in explaining need for nationwide sex offender registry); *id.* at 15 (statement of Ernie Allen, Pres. & CEO, Nat'l Ctr. for Missing and Exploited Children) ("There are at least 100,000 non-compliant offenders; people like the killer of Jessica Lunsford, who was not where he was supposed to be and whose presence was unknown to the police or Jessica's family even though he lived 150 yards down the street from her and had worked construction at her elementary school.").

20. Jim Tunstall, *Convict Sought in 'Jessie' Case Is Arrested*, TAMPA BAY ONLINE, Mar. 18, 2005, <http://news.tbo.com/news/MGBWK9E2EAE.html>.

disappearance of eight-year-old Shasta and nine-year-old Dylan Groene in May 2005 sparked intense media attention and fixed the American public's attention on the problem of recidivist child predators.

The Groene case starts with the disturbing history and travels of Joseph E. Duncan, III, a repeat sex offender who committed sex crimes in Washington, Minnesota, and Idaho, but was registered in only one state, North Dakota. Duncan was first convicted in the State of Washington in 1980 of raping a fourteen-year-old boy at gunpoint.²¹ After a twenty-year sentence, which included at least two stints on parole—both revoked—and travel to four states,²² Duncan moved to Fargo, North Dakota, where he enrolled in computer science classes at North Dakota State University.²³

Upon arriving in Fargo, Duncan reportedly registered as a Level III sex offender in compliance with North Dakota law.²⁴ Although Duncan's time in Fargo appears to have been incident-free, in 2004 Duncan traveled to Detroit Lakes, Minnesota, with a video camera in tow.²⁵ He approached two small boys who were playing on a school playground, pulled down one of the boys' pants, and fondled him.²⁶ The boy was six years old.²⁷ Based on this incident, Duncan was again charged with a sex crime—this time for child molestation.²⁸

Despite his prior criminal history, Duncan appears to have been the beneficiary of a gap in state information sharing when, on April 5, 2005, Becker County Judge Thomas Schroeder set a \$15,000 bail for Duncan.²⁹ According to later reports, Judge Schroeder was unaware at the time of the bail hearing that Duncan was a Level III sex offender—the degree regarded as most serious and most likely to reoffend.³⁰ Duncan posted bond with the help of a friend in Fargo and soon thereafter absconded.³¹ Within weeks, Duncan traveled to yet another state, Idaho, to begin a horrific crime spree.

21. *My Intent Is to Harm . . . Then Die*, SPOKESMAN REV., July 3, 2005, <http://www.spokesmanreview.com/sections/duncan/?ID=78386>.

22. *Probation Records Reveal Duncan's Travels*, SPOKESMAN REV., Aug. 4, 2005, <http://spokesmanreview.com/sections/duncan/?ID=83414>.

23. *My Intent is to Harm . . . Then Die*, *supra* note 21.

24. *Id.*

25. *Id.*; *Minn. County Sued over Joseph Duncan's Release*, ASSOCIATED PRESS, Dec. 5, 2005, <http://wcco.com/topstories/Joseph.E.Duncan.2.353500.html>.

26. *My Intent is to Harm . . . Then Die*, *supra* note 21.

27. *Id.*

28. *Id.*

29. *Minn. County Sued over Joseph Duncan's Release*, *supra* note 25.

30. *Id.*

31. *Fargo Businessman Helped Idaho Suspect Make Bail*, BISMARCK TRIB., July 12, 2005, http://www.bismarcktribune.com/news/state-and-regional/article_4173cb3e-a297-5365-afb1-75ec3567f97a.html.

On the night of May 16, 2005, after spotting Shasta and Dylan Groene in bathing suits near their house,³² and thereafter spying on the house for a series of nights,³³ Duncan broke into their Wolf Lodge, Idaho home with a sawed-off shotgun and tied up the children's mother, Brenda Groene, and her fiancé, Mark McKenzie. Duncan then beat the two adults to death with a framing hammer and killed Shasta and Dylan's thirteen-year-old brother Slade,³⁴ who was last seen by Shasta staggering in a doorway and collapsing with a fatal head wound. Duncan planned the burglary and murders to kidnap Shasta and Dylan.³⁵

What happened thereafter was even more horrific and tragic. Duncan bound the children³⁶ and took them to a primitive campsite in Montana where he repeatedly abused them for weeks.³⁷ After videotaping his sexual abuse of Dylan, he murdered the nine-year-old boy by shooting him twice.³⁸ The first shot was in the abdomen; the second shot was to the

32. Nicholas K. Geranios, *Trial to Open for Sex Offender in Family's Slayings*, ORLANDO SENTINEL, Oct. 16, 2006, at A4 ("Police think it was the children in their swimsuits that caught the attention of pedophile Joseph Edward Duncan III, triggering a spree of savage slayings, kidnapping and child rape. The registered sex offender, on the run from a child-molestation charge in Minnesota, drove past the rural home where 8-year old Shasta Groene and her 9-year old brother, Dylan, were frolicking in May 2005, investigators say."); *The Case Against Joseph Duncan: A Year in Review*, SPOKESMAN REV. (Spokane, Wash.), May 13, 2006, at 6A ("Minutes from court hearing reveal Duncan told Shasta Groene that he was driving past the family's home, visible from Interstate 90, saw the girl playing in her swimsuit and stalked the family for two or three days before the killings.").

33. See *The Case Against Joseph Duncan: A Year in Review*, *supra* note 32 (describing how Joseph Duncan broke into home and killed Shasta Groene's mother, stepfather, and brother, "[a]fter using night vision goggles to stalk a Wolf Lodge family for up to three days").

34. See *id.* ("They are bludgeoned to death with a framing hammer.").

35. Betsy Z. Russell, *Duncan: "I was on a Rampage"*, SPOKESMAN REV., Aug. 23, 2008, <http://www.spokesmanreview.com/sections/duncan/?ID=258055>.

36. Taryn Brodwater & Becky Kramer, *Court Transcripts Detail Groene Case: Court Documents Discuss Investigators' Search, Give Information on Groene, McKenzie Deaths*, SPOKESMAN REV. (Spokane, Wash.), Oct. 22, 2005, at 1B (discussing how Shasta Groene reportedly told authorities "she and Dylan were bound and gagged and then placed in the truck. Shasta told detectives that she believed it was Montana where Duncan had taken her and her brother because he had shown it to her on a map.").

37. Nicholas Geranios, *Trial Nears One Year After Rescue*, DESERET MORNING NEWS (Salt Lake City, Utah), July 1, 2006, at B6 ("Found in Duncan's vehicle was a digital video and computer equipment that Kootenai County prosecutor Bill Douglas said contain 'vile' images of what happened to the children at a primitive campsite in Montana.").

38. Patrick Orr, *Duncan Doesn't Plead for His Life*, IDAHO STATESMAN, Aug. 14, 2008, at 1 (describing prosecutor's closing arguments in death sentencing phase of Duncan's trial, including how "Duncan [was] accused of taking Dylan to a remote cabin away from the campsite, where he videotaped his rape of the boy" and how "Duncan killed Dylan in front of his sister, first shooting the boy in the stomach. [T]he prosecutor [Moss] said that as the boy pleaded for his life, Duncan reloaded the shotgun, put it against the boy's head and fired as his sister watched.").

boy's head.³⁹ Duncan later lied to Shasta about the gunshot to Dylan's stomach, claiming it was an accident "merely to win her compliance."⁴⁰ What happened to Shasta has not been as extensively reported, most likely out of respect for her status as a child victim and because she was the only member of her family in the Wolf Lodge home to survive Duncan's crimes.

Shasta's kidnapping and abuse ended nearly six weeks after it began. In the early morning hours of July 2, 2005, a Denny's waitress in Coeur d'Alene, Idaho recognized the little girl when she and Duncan entered the restaurant.⁴¹ The waitress and others at the restaurant phoned authorities, and Shasta was rescued that evening.⁴² Duncan later told authorities that he was bringing Shasta to Coeur d'Alene to see her father.⁴³

III. THE PUSH FOR COMPREHENSIVE FEDERAL SEX OFFENDER REGISTRY LEGISLATION

The tragedy of the Groene case helped drive the congressional push for a seamless national sex offender registry.⁴⁴ When the Senate first passed a bill containing a national sex offender registry in July 2005, then-United States Senator Larry Craig cited the Groene case as justification for the legislation: "While I grimace at the federal mandate to the states, the interstate nature of these cases and the tragic results of any failures warrant it. I hope and pray this will prevent another tragedy like the Groene case."⁴⁵ Senator Maria Cantwell of Washington, where Duncan was first convicted, cited the Groene case in connection with her efforts to create a federal failure-to-register penalty—something later included in the SORNA provisions of the Adam Walsh Act.⁴⁶ In justifying the need for federal legislation, she explained, "[t]here is a wide disparity among the states . . . that is being exploited by sex offenders with tragic conse-

39. *Id.*

40. Russell, *supra* note 35.

41. See Geranios, *supra* note 37 ("Several [people at the restaurant] called 911, and waitress Amber Deahn stalled the two to give police time to respond. After what seemed like an agonizing wait, three officers entered the restaurant, arrested Duncan, and brightened the region's spirits with the miraculous rescue.").

42. *Id.*

43. Taryn Brodwater, *Duncan: 'It Had to End'*, SPOKESMAN REV., June 27, 2006, <http://www.spokesmanreview.com/sections/duncan/?ID=137498>.

44. See *The Case Against Joseph Duncan: A Year in Review*, *supra* note 32 (listing July 6, 2005, in timeline of events with caption stating: "Steve Groene urges the public to lobby congressmen, senators, and 'even the president' to keep sexual predators off the street.").

45. Betsy Z. Russell, *Senate Calls for National Sex Offender Registry*, SPOKESMAN REV. (July 29, 2005), <http://www.spokesmanreview.com/sections/duncan/?ID=82462>.

46. Jim Camden, *Cantwell Urges Consistent Sex Offender Laws: Senator Proposing Stricter, Federal Legislation*, SPOKESMAN REV., Oct. 15, 2005, <http://www.spokesmanreview.com/sections/duncan/?ID=95984>.

quences.”⁴⁷ When a comprehensive sex offender registry bill—a precursor to the Adam Walsh Act—passed the Senate in May 2006, Senator Mike Crapo of Idaho again referenced the Groene tragedy: “More stringent national registration requirements for sex offenders, especially violent sex offenders, will reduce the likelihood that the terrible events of last summer in North Idaho could ever be repeated”⁴⁸

In July 2006, the Adam Walsh Child Protection and Safety Act was finally enacted in response to the Groene case and many similar cases of recidivist crimes by sex offenders. In signing the bill into law on July 27, 2006, President George W. Bush stated that the Act’s SORNA provisions “will help prevent sex offenders from evading detection by moving from one state to the next.”⁴⁹

IV. THE ADAM WALSH ACT AND THE SEX OFFENDER NOTIFICATION AND REGISTRATION ACT

In the Adam Walsh Act, Congress established, *inter alia*, a national sex offender registry with unified standards and information sharing across the patchwork of state and tribal registries, a registration requirement for persons entering the United States, and federal criminal penalties for sex offenders who travel in interstate or foreign commerce or “Indian country” and knowingly fail to register or update their registration. The Act contains other provisions aimed at child exploitation prevention, including new criminal penalties for enticement, civil commitment procedures for unreformed sex offenders, and new Bail Reform Act provisions.

The SORNA provisions within the Adam Walsh Act built on the foundation of the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Act (the Wetterling Act) passed in 1994.⁵⁰ In the Wetterling Act, Congress required the United States Attorney General to promulgate guidelines by which the States would establish sex offender registries, including offender addresses, for certain offenders within their jurisdictions.⁵¹ The Wetterling Act’s mandate was tied to federal funding insofar as states faced a ten percent cut in federal law enforcement funding if they failed to comply with the guidelines.⁵² The Wetterling Act did not create a federal penalty for failure to register under state law, but re-

47. *Id.*

48. Betsy Z. Russell, *Bill Makes Sex Offender Registration Mandatory*, SPOKESMAN REV., May 9, 2006, <http://www.spokesmanreview.com/sections/duncan/?ID=129963>.

49. Press Release, The White House, President Signs H.R. 4472, the Adam Walsh Act Child Protection and Safety Act of 2006 (July 27, 2006), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727-6.html>.

50. *See* Jacob Wetterling Crimes Against Children and Sexually Violent Offender Act, Pub. L. No. 103-322, Title XVII, §§ 170101-303, 108 Stat. 1796, 2038-45 (1994) (codified at 42 U.S.C. § 14071 (2006)).

51. 42 U.S.C. § 14071(a)-(b) (2006).

52. *Id.* § 14071(g)(2).

lied upon individual states to enact their own failure-to-register penalties.⁵³

The Wetterling Act was later modified in response to the tragic case of Megan Kanka, a seven-year-old New Jersey girl who was lured into the garage of a repeat sex offender who lived in her neighborhood, purportedly to see his new puppy.⁵⁴ She was thereafter raped and murdered, and the offender, Jesse Timmendequas, dumped her body in a park.⁵⁵ Megan's family was completely unaware of the sex offender's presence in their neighborhood, and they were clear to say that, had they known, they would never have allowed Megan to play outside without constant supervision.⁵⁶ Megan's Law, passed in 1996, added a community notification requirement to the Wetterling Act.⁵⁷ Congress also modified the Wetterling Act in 1996 to create a national sex offender tracking database via the Pam Lyncher Sexual Offender Tracking and Identification Act.⁵⁸

Even against this history of legislation, the Adam Walsh Act represents the most aggressive congressional action to address child crimes and sex offender registration. The SORNA provisions go beyond the Wetterling Act to create more detailed requirements for state sex offender registries, as well as a national public registry that can be accessed via the Internet by reference to zip code and geographic area. SORNA also creates a federal failure-to-register penalty that makes it a felony offense for anyone to fail to register under state law, where the person: (1) has previously been convicted of a federal offense; or (2) has traveled in interstate or foreign commerce and failed to register.⁵⁹

V. WHY SORNA MATTERS: HOW SEX OFFENDER REGISTRIES HELP PREVENT AND SOLVE SEX CRIMES AGAINST CHILDREN

Some commentators have suggested that federal failure-to-register laws will not curb recidivism among sex offenders⁶⁰ or will prevent only a

53. *Id.* § 14071(d).

54. See BUREAU OF JUSTICE ASSISTANCE, OFFICE OF JUSTICE PROGRAMS, U.S. DEPT. OF JUSTICE, *Background Information on the Act and its Amendments*, <http://www.ojp.usdoj.gov/BJA/what/2a2jwactbackground.html> (last visited Mar. 6, 2011).

55. William Glaberson, 'Megan' Trial Set to Begin Amid Scrutiny, N.Y. TIMES, May 5, 1997, at B4, available at <http://select.nytimes.com/gst/abstract.html?res=F40610FF39540C768CDDAC0894DF494D81&scp=2&sq='Megan'%20Trial%20Set%20to%20Begin%20Amid%20Scrutiny&st=cse>.

56. See *Background Information on the Act and its Amendments*, *supra* note 54.

57. BUREAU OF JUSTICE ASSISTANCE, OFFICE OF JUSTICE PROGRAMS, U.S. DEPT. OF JUSTICE, *Overview and History of the Jacob Wetterling Act*, <http://www.ojp.usdoj.gov/BJA/what/2a1jwachhistory.html>.

58. See *id.*

59. 18 U.S.C. § 2250(a) (2006).

60. See Yung, *supra* note 6, at 371-72 (stating that "many scholars have questioned the efficacy of . . . [sex offender registry] laws in actually decreasing recidivism by offenders").

small number of sex crimes.⁶¹ These suggestions, however, misapprehend the role and importance of sex offender registries in law enforcement, as well as the gap-filling nature of both SORNA's registration requirements and federal failure-to-register penalty.

A. *The Role of Sex Offender Registries in the Prevention and Solving of Sex Crimes*

As noted above, when critics of SORNA's sex offender registry and penalty provisions discuss the utility of these provisions, they often make arguments that fail to capture the true value and intended benefit of a seamless sex offender registry system. For example, one academic has questioned the impact of registries by citing a study of recidivism and suggesting that registries do not actually reduce recidivism.⁶² But such an argument ignores the fact that sex offender registries were not created as a palliative remedy to help sex offenders behave better. Rather, the push for sex offender registries and their improvement via SORNA was driven by an acknowledgement that sex offenders will often commit further sex crimes after their release.⁶³ Indeed, the floor debate on the bill was punctuated by references to repeat sex offenders and recidivism rates.⁶⁴ Simply put, Congress created SORNA with the belief that communities and law enforcement need to have information on sex offenders within their communities precisely *because* they may reoffend.⁶⁵

61. See Morse, *supra* note 6, at 1787 (asserting that Adam Walsh Act's civil commitment provision and "failure to register penalty would prevent only a small number of federal sex crimes").

62. Yung, *supra* note 6, at 371 n.22.

63. See *Protecting Our Nation's Children from Sexual Predators and Violent Criminals: What Needs to be Done?: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 109-31, at 9 (2005) (written statement of Tracy Henke, Acting Asst. Att'y Gen., Office of Justice Programs, U.S. Dept. of Justice) (noting in written testimony in connection with sex offender registry proposals "continued and new concerns about new crimes being committed by sex offenders").

64. See, e.g., 109 CONG. REC. S8029 (daily ed. July 20, 2006) (statement of Sen. Arlen Specter) ("Statistics show that sex offenders prey most often on juveniles; that two-thirds of the sex offenders currently in State prisons are there because they have victimized a child. Compared with other criminals, sex offenders are four times more likely to be rearrested for a sex crime. It is estimated that some 500,000 children are sexually abused each year. According to Department of Justice statistics, child molesters have been known to re-offend as late as 20 years after their release from prisons.").

65. See *id.*; see also *Protecting Our Nation's Children from Sexual Predators and Violent Criminals: What Needs to be Done?: Hearing Before the H. Comm. on the Judiciary*, 109th Cong. 109-31, at 15 (statement of Ernie Allen, Pres. & CEO, Nat'l Ctr. for Missing and Exploited Children) ("We need to do a better job of identifying those who represent the greatest risk and those whose criminal histories should forfeit any right to be on the streets and close to innocent children. But at a minimum, we must know where all of these convicted sex offenders are, and what they're doing.").

The value of these registries and notification programs to citizens, and in particular to parents, can best be explained by looking to cases where parents and victims were unaware of the presence of sex offenders in their area due to the lack of an effective registry or the relocation of an unregistered sex offender.⁶⁶ For example, the parents of Megan Kanka—the seven-year-old little girl who was raped and murdered by a twice-convicted sex offender—were outraged to learn that the offender, Jesse Timmendequas, had been able to move into their neighborhood anonymously without parents being able to take basic precautions.⁶⁷ As Megan's mother has said repeatedly since her daughter's death, "If we had known there were three convicted pedophiles across the street, Megan would be alive today."⁶⁸

Registries also play a vital role—perhaps their most vital role—in supporting law enforcement's efforts to solve child abductions and sex crimes in the hours and days after a disappearance. The first hours after a child's disappearance are critical. A Department of Justice publication explains that "the actions of parents and of law enforcement in the first 48 hours are critical to the safe recovery of a missing child."⁶⁹ The critical time period is likely much shorter. Three-quarters of children who are kidnapped and later murdered are killed within the first three hours of their abduction.⁷⁰ Time is literally a life-and-death matter in such cases.

66. See, e.g., David Hench, *Victim: Sex Offense Law Has Holes*, PORTLAND PRESS HERALD, Dec. 8, 2004, at A1 ("Michelle Tardif believes she would have been more careful as a girl had she known then that her Saco [Maine] neighbor was a sexually violent predator. When Tardif was 10, Joseph J. Tellier snatched her off her bicycle, drove her to a secluded spot in the woods, raped her and beat her to the brink of death.").

67. See *Jurors Order Death Sentence for Megan Kanka's Killer* (CNN television broadcast June 20, 1997), available at <http://www.cnn.com/US/9706/20/kanka.verdict.pm/> ("The Kankas and their neighbors were outraged that they were never informed that Timmendequas had two previous sex convictions when he moved into the neighborhood. He was convicted in a 1981 attack on a 5-year-old child and an attempted sexual assault on a 7-year-old.").

68. Gene Warner, *When Tears Are Not Enough: Megan Kanka's Mother Shares the Story of Her Daughter's Murder by a Pedophile, a Tragedy that Became a Crusade*, BUFFALO NEWS, Feb. 7, 2002, at B1; see also Paula Zahn *Now: Protecting Children from Sexual Predators*, 2005 WLNR 6253487 (Westlaw) (CNN television broadcast Apr. 21, 2005) (transcript on file with author) (containing interview with Maureen Kanka, who said: "If we had known there were three sex offenders across the street, my daughter would be alive and well today.").

69. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, *WHEN YOUR CHILD IS MISSING: A FAMILY SURVIVAL GUIDE* (1998), available at <http://www.ojjdp.ncjrs.gov/pubs/childdismissing/ch1.html>.

70. See Press Release, Office of Justice Programs, U.S. Dep't of Justice, *Innovations in Rescuing Abducted Children Highlighted at National Amber Alert Conference* (Nov. 13, 2007), available at http://www.ojp.usdoj.gov/newsroom/press_releases/2007/ojjdp07062.htm (quoting Acting Assistant Att'y Gen. Cybele Daley's statement that "[s]eventy-four percent of children who are kidnapped and later found murdered are killed within the first three hours after being taken").

The very short time period first responders have to save an abducted child's life explains why law enforcement needs an accurate registry of known sex offenders who live or work in the area where a child disappears.⁷¹ In the immediate aftermath of a child's disappearance, law enforcement often questions sex offenders located in close proximity to the disappearance. Indeed, an investigative checklist produced jointly by the Department of Justice and the National Center for Missing and Exploited Children lists the following action step for first responders in missing children cases: "Review sex-offender registries to determine if individuals designated as sexual predators live, work, or might otherwise be associated with the area of the child's disappearance."⁷² This investigative step is, of course, only helpful if the registry is reliable and comprehensive, as shown by the tragic case of nine-year-old Jessica Lunsford, who was kidnapped from her bedroom by a convicted sex offender in 2005 and thereafter raped and murdered.⁷³

In the Lunsford case, law enforcement took the usual precaution of contacting sex offenders who were registered as living near Jessica's home.⁷⁴ This step should have led law enforcement to a nearby home—within sight of the Lunsford home—where convicted sex offender John Couey lived.⁷⁵ But, Couey had not registered at that address.⁷⁶ Accord-

71. LEXISNEXIS WHITE PAPER, USING GROUNDBREAKING TECHNOLOGY TO ENHANCE LAW ENFORCEMENT EFFORTS TO LOCATE SEX OFFENDERS, https://www.lexisnexis.com/government/insights/whitepapers/Sex_Offenders.pdf ("Sex offenders who do not continued to live at their registered addresses present an increasingly daunting law enforcement problem. Recent cases of child abductions in Florida and Idaho demonstrate that sex offenders who move without registering, particularly across state lines, leave law enforcement officials without investigative leads, especially during the all-important forty-eight hours after a child is abducted.").

72. OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, INVESTIGATIVE CHECKLIST FOR FIRST RESPONDERS (2006), available at http://www.missingkids.com/en_US/publications/NC88.pdf.

73. Abbie Vansickle & Justin George, *Was Jessica Lunsford a Captive for 3 Days?*, ST. PETERSBURG TIMES, May 27, 2005, at 1B, available at http://www.sptimes.com/2005/05/27/news_pf/Citrus/Was_Jessica_Lunsford_.shtml.

74. See e.g., Chris Hawke, *Girl's Body Found Near Home*, CBS NEWS, Mar. 19, 2005, <http://www.cbsnews.com/stories/2005/03/19/national/main681752.shtml> (stating "detectives grew interested in Couey while interviewing all registered sex offenders in the area. They tried to contact Couey at his home in Homasassa five days after Jessica disappeared and discovered he no longer lived there"); see also John Evander Couey: *Sex Offender Living in Plain Sight*, <http://www.amw.com/fugitives/capture.cfm?id=30871> (last visited Mar. 6, 2011) (America's Most Wanted case file) ("Early in the investigation, deputies focused on known sex offenders who were living near the Lunsford home. Couey was a registered offender, but his registered address on Grover Cleveland Boulevard in Homosassa was miles away from the Lunsford home on South Sonata Avenue, and authorities first focused on offenders who lived closer.").

75. See *Sex Offender Living in Plain Sight*, *supra* note 74 ("As the search broadened to include Couey, deputies discovered that he had left his registered address without notifying authorities. His new address immediately raised suspicions—it was on South Snowbird Terrace, within sight of the Lunsford home.").

76. *Id.*

ingly, the critical first steps taken by law enforcement in the hours after Jessica disappeared missed the very sex offender who had abducted her and the home where she was held captive, abused, and eventually smothered to death in a plastic trash bag.⁷⁷ Some reports suggest that Jessica was alive for up to three days after her abduction before she was killed.⁷⁸ If true, a reliable sex offender registry might very well have saved her young life.

B. *SORNA's Registry Provision and the Federal Failure to Register Penalties Were Necessary to Fill Gaps in, and Provide Greater Enforceability to, the Existing State-by-State Registry System*

By the time the Adam Walsh Act was under debate, it had become clear that the state-by-state system of sex offender registries had gaps⁷⁹ and that tens of thousands of sex offenders had fallen or snuck through those gaps in the system.⁸⁰ These flaws in the system were brought home in written testimony submitted to the House Judiciary Committee in June 2005:

[T]here are many problems in the state programs that thwart the original Congressional intent in passing the [Wetterling] Act. The federal scheme leaves a great deal of discretion to the states in how they implement their individual registration programs. As a result, there is a significant lack of consistency and uniformity from state to state. There are also serious discrepancies among the states, creating loopholes in the laws that permit sex offenders to cross state lines and remain undetected. We know that registered sex offenders often “forum-shop” in order to achieve anonymity. Some examples of the discrepancies in the state statutes are the following:

- in 8 states the offender *alone* has the burden to notify the authorities in a new state when moving into that state.

77. *See id.* (“Couey told detectives he placed her inside a garbage bag and that she lay down in the hole without a fight. The medical examiner listed the cause of death as suffocation.”).

78. *See Vansickle & George, supra* note 73 (“John Couey told investigators he kept Jessica Lunsford bound inside his bedroom closet for at least three days and hid inside his bedroom when detectives came to his mobile home to ask about her, according to documents released Thursday.”).

79. *See* 109 CONG. REC. S8029 (daily ed. July 20, 2006) (statement of Sen. Arlen Specter). Senator Specter stated, “There are currently State laws which require registration of sex offenders, but unfortunately they have proved to be relatively ineffective, which requires the Federal Government to act on the national level.” *Id.*

80. Office of Justice Programs, U.S. Dep’t of Justice, *Sex Offender Tracking Strengthened by Adam Walsh Act*, THE FRONT LINE, Winter 2007, at 4, available at http://www.missingkids.com/en_US/publications/NC93.pdf (“Before the Adam Walsh Act, many sex offenders took advantage of inconsistencies in state laws, moving to other states or simply slipping under the radar of law enforcement to evade registration requirements.”).

- in 2 states *neither* the offender nor the state authorities are required to notify authorities in a new state—in another 3 states this issue is not even addressed.
- in only 8 states an offender's probation or parole *may* be revoked for failure to comply with registration duties.
- in 31 states the penalty for failure to comply with registration duties is only a misdemeanor.
- in 3 states offenders have more than 10 days to notify the authorities when they change their address.⁸¹

At the same hearing, both members of Congress and witnesses discussed the 100,000 sex offenders whose whereabouts were unknown due to flaws in the system or offenders relocating without registering their new locations.⁸² By the time the Adam Walsh Act was nearing passage in the Senate one year later, the two lead Senate sponsors of the Act cited an even larger number—150,000—of known, but unregistered sex offenders who had fallen through gaps in the state-by-state registry system.⁸³ In sum, when Congress enacted the SORNA provisions of the Adam Walsh Act, it was clear a federal solution was needed.⁸⁴

81. *Protecting Our Nation's Children from Sexual Predators and Violent Criminals: What Needs to be Done?: Hearing before the H. Comm. on the Judiciary*, 109th Cong. 109-31, at 17-18 (2005) (statement of Ernie Allen, Pres. & CEO, Nat'l Ctr. for Missing and Exploited Children).

82. *See id.* at 14 ("Mr. Chairman, you mentioned it in your opening remarks. Today, there are 550,000 registered sex offenders in the United States, but at least 100,000 of those offenders are non-compliant.").

83. *See* 109 CONG. REC. S8013 (statement of Sen. Orrin Hatch) ("There are more than a half-million registered sex offenders in the United States. Those are the ones we know. Undoubtedly there are more. That number is going to go up. Over 100,000 of those sex offenders are registered but missing. That number is going to go down. We are going to get tough on these people. Some estimate it is as high as 150,000 sex offenders who are not complying. That is killing our children."); 109 CONG. REC. S8014 (statement of Sen. Joseph Biden) ("The National Center for Missing and Exploited Children, as Senator Hatch has indicated, estimates there are over 550,000 sex offenders nationwide, and more than 20 percent of them are unaccounted for. I would argue that there are a whole lot more than 550,000, who never get caught up in the criminal web for a thousand different reasons that I do not have time to explain. But at a minimum, this means there are as many as 150,000 of these dangerous sex offenders out there, individuals who have already committed crimes and may, unless we do something, continue to jeopardize the most vulnerable among us.").

84. *See* Michael Gormley, *Megan's Mother Launches Crusade; Seeks Federal Law to Track Pedophiles*, THE RECORD (Bergen County, N.J.), May 4, 2005, at A06 (quoting Maureen Kanka, Megan's mother, in her advocacy for federal registry law: "Every state has a different law and every state has a different variation. . . . We can have a tough, uniform law and the only way I think we can do that is to have a federal law.").

VI. A MINORITY OF FEDERAL DISTRICT COURTS HAVE QUESTIONED THE
CONSTITUTIONALITY OF SORNA'S REGISTRY AND PENALTIES
UNDER THE COMMERCE CLAUSE

In a series of now-reversed decisions, a number of federal district courts in the past two years have held that Congress acted beyond its Commerce Clause powers under the United States Constitution when it enacted within the Adam Walsh Act a nationwide registry requirement and a federal offense for unregistered sex offenders who travel in interstate or foreign commerce.

In April 2008, United States District Judge Gregory A. Presnell of the Middle District of Florida ruled that the Adam Walsh Act's SORNA registration requirements and the associated criminal penalties codified at 18 U.S.C. § 2250(a) "violate[] Congress' power under the Commerce Clause and [are], therefore, unconstitutional."⁸⁵ In so ruling, Judge Presnell dismissed the notion that the SORNA requirements or penalties deal "with the regulation of channels or instrumentalities of commerce."⁸⁶ He also found that the court was not "dealing with the regulation of persons or things in interstate commerce."⁸⁷ In the conclusion of his opinion reversing the conviction for failure to register, Judge Presnell wrote that "the Adam Walsh Act was enacted with a commendable goal—to protect the public from sex offenders. However a worthy cause is not enough to transform a state concern (sex offender notification) into a federal crime."⁸⁸ Not mentioned in that same conclusion was that the defendant, Robert Powers, had lived in multiple states since his release from prison on a sex offense conviction—but only registered as a sex offender in one, the state from which he was released from prison.⁸⁹ Despite the defendant's unregistered relocation to and residence in Florida and his arrest in yet another state, Washington,⁹⁰ Judge Presnell ruled against the constitutionality of the Act because "mere unrelated travel in interstate commerce" is insufficient to create a Commerce Clause nexus with the "purely local conduct" of failing to register.⁹¹ This analysis seems to com-

85. *United States v. Powers*, 544 F. Supp. 2d 1331, 1336 (M.D. Fla. 2008), *vacated and remanded*, 562 F.3d 1342 (11th Cir. 2009). At the same time Judge Presnell ruled in favor of the defendant in *Powers*, he also ruled in favor of another registry violation defendant named Tommy Williams Buckius. See Jim Leusner, *Judge Frees Out-of-State Sex Offenders*, ORLANDO SENTINEL, Apr. 19, 2008, at B4 (discussing Judge Presnell's twin rulings in *Powers* and *Buckius* cases).

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

87. *Id.* at 1333-34.

88. *Id.* at 1336.

89. *Cf. id.* at 1332 ("In compliance with South Carolina law, Mr. Powers registered as a sex offender on November 13, 1995. Mr. Powers moved to Florida in 2007 to live with his mother in Orlando. He failed to register as a sex offender in Florida On December 4, 2007, Mr. Powers was arrested, while working in the state of Washington, and charged with a violation of SORNA for failing to register in Florida.")

90. *Id.*

91. *Id.* at 1336.

pletely miss the underlying purpose of the Act's registry provisions, which was to place some meaningful check on the unregistered and undetected movement of sex offenders across jurisdictional lines.⁹²

At the same time he ruled in favor of the defendant in *Powers*, Judge Presnell also ruled against the constitutionality of SORNA in another case, *United States v. Buckius*, on very similar grounds. The impact of Judge Presnell's twin decisions in *Powers* and *Buckius* was short-lived. Within a year, the Eleventh Circuit reversed both decisions, finding that Congress acted within its Commerce Clause power in enacting SORNA.⁹³

Judge Presnell was not, however, alone in his view of SORNA under the Commerce Clause. In December 2008, a second federal district court in Florida ruled against the constitutionality of the SORNA registration and penalties. In *United States v. Myers*,⁹⁴ Judge William Zloch granted the defendant's motion to dismiss the indictment for failure to comply with state registration requirements while traveling in interstate commerce.⁹⁵ In so ruling, Judge Zloch appeared to recognize that he was going out on a limb, yet he nonetheless stated the crux of his decision in emphatic terms:

Against the great weight of persuasive authority on this matter, and for reasons other than those expressed in *Powers* and *Waybright*, the Court finds that both § 16913 [the state registry provision] and § 2250 [the federal criminal penalty] exceed Congress's grant of authority under the Commerce Clause. . . . Congress, however, has no power to regulate a person simply because at some earlier time he has traveled in interstate commerce.⁹⁶

Judge Zloch then proceeded to a detailed history of Federal Commerce Clause jurisprudence, from the Supreme Court's 1824 ruling in *Gibbons v. Ogden* through its 2005 decision in *Gonzales v. Raich*.⁹⁷

The precise facts of defendant Myers' crime cannot be described because they were never discussed in the court's thirty-eight page discussion of the Adam Walsh Act and the Commerce Clause. The omission of these facts from the decision, however, squares with the ruling insofar as the judge was evaluating a facial challenge to the constitutionality of the SORNA penalties. In sustaining that challenge, Judge Zloch found that "the regulation is not aimed at the individual's travel, nor is it directed at

92. See Press Release, The White House, 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>.

93. *United States v. Powers*, 562 F.3d 1342 (11th Cir. 2009).

94. 591 F. Supp. 2d 1312 (S.D. Fla. 2008), *vacated and remanded*, 584 F.3d 1349 (11th Cir. 2009).

95. *Id.* at 1316-17.

96. *Id.*

97. *Id.* at 1318-27 (citing *Gibbons v. Ogden*, 22 U.S. 1 (1824), and *Gonzales v. Raich*, 545 U.S. 1 (2005)).

protecting the instrumentalities of interstate commerce. . . . The regulated activity, the failure to register, is completely local, non-economic activity, similar to possession of a gun in a school zone and gender-motivated violence.”⁹⁸

Acting on the authority of a prior decision, the Eleventh Circuit vacated Judge Zloch’s dismissal of the indictment and remanded the case for further proceedings.⁹⁹ That prior decision, *United States v. Ambert*,¹⁰⁰ affirmed yet another Florida federal district court ruling, this one upholding the constitutionality of SORNA under the Commerce Clause.¹⁰¹

Rulings against SORNA have not been confined to Florida. A series of similar rulings were issued by Judge David Hurd in a pair of cases before the United States District Court for the Northern District of New York.¹⁰² However, unlike the rulings in *Powers* and *Meyers*, Judge Hurd did not dispute the adequacy of Section 2250’s interstate travel requirement under the Commerce Clause.

For example, in *United States v. Hall*, Judge Hurd dismissed the indictment against David Hall, a sex offender who failed to register under New York law and thereafter moved to Virginia.¹⁰³ Despite this broader ruling, Judge Hurd rejected the defendant’s claim that Section 2250’s interstate commerce element was insufficient “because it does not require the defendant to travel in interstate commerce with the intent to violate the statute.”¹⁰⁴ Judge Hurd noted that the Supreme Court in *United States v. Lopez*¹⁰⁵ made clear that “Congress may regulate ‘persons or things in interstate commerce, even though the threat may come from only intrastate activities.’”¹⁰⁶ Based on the *Lopez* authority, he rejected the defendant’s challenge to the failure to register statute, reasoning that “Congress may safeguard against conduct that is wholly intrastate so long as the federal statute extends only to individuals who travel in interstate commerce.”¹⁰⁷

Judge Hurd’s ruling on the constitutionality of Section 2250 did not, however, end his Commerce Clause analysis. After concluding that Section 2250, writ large, is constitutional because it contains an interstate

98. *Id.* at 1338.

99. *United States v. Myers*, 584 F.3d 1349 (11th Cir. 2009).

100. 561 F.3d 1202 (11th Cir. 2009).

101. *Id.* at 1215 (“In short, we hold that Ambert is bound by the Sex Offender Registration and Notification Act, and that §§ 16913 and 2250 of the statute are constitutional both facially and as applied. Accordingly, we affirm.”).

102. *United States v. Hall*, 577 F. Supp. 2d 610, 623 (N.D.N.Y. 2008); *United States v. Guzman*, 582 F. Supp. 2d 305, 312 (N.D.N.Y. 2008); *United States v. Hall*, 588 F. Supp. 2d 326, 329 (N.D.N.Y. 2008). Each of these decisions was reversed in a single, consolidated opinion. See *United States v. Guzman*, 591 F.3d 83 (2d Cir. 2010).

103. *Hall*, 577 F. Supp. 2d at 613.

104. *Id.* at 619.

105. 514 U.S. 549 (1995).

106. *Id.* (quoting *United States v. Lopez*, 514 U.S. 549, 558 (1995)).

107. *Id.*

commerce element, he proceeded to analyze the first element of the statute in isolation to determine if it could be justified on commerce grounds. The first element under Section 2250 is failure to register under SORNA's registration requirement, which is codified at 42 U.S.C. § 16913. The defendant in *Hall* had argued that "Congress lacks the constitutional authority to require individuals convicted of state [and] local offenses to register as sex offenders" and that this lack of federal legislative jurisdiction would nullify any failure to register conviction "because the duty to register as a sex offender pursuant to SORNA is a required element of the federal criminal statute."¹⁰⁸ After analyzing Section 16913's registration requirement under both the Commerce Clause and Congress's spending power, Judge Hurd concluded that "§ 16913 is not a valid exercise of Congressional authority. . . . It then follows that a conviction under § 2250(a) is invalid because the criminal penalty statute demands the Government must prove defendant was required to register under § 16913."¹⁰⁹

Shortly after the *Hall* decision, Judge Hurd confronted similar legal questions in *United States v. Guzman*.¹¹⁰ Like the defendant in *Hall*, the convicted sex offender in *Guzman* moved out of state and failed to notify the sex offender registry authorities in both New York and his new state of residence.¹¹¹ Unlike in *Hall*, however, the government raised new arguments in defense of the constitutionality of Section 16913's registration requirements.¹¹² Among its new arguments, the government asserted that Section 16913 was justified under the Constitution's Necessary and Proper Clause as a necessary control on interstate movement of sex offenders and an essential predicate to the failure-to-register penalty.¹¹³ Judge Hurd rejected this argument, reasoning that Congress lacked the authority to create a nationwide system of sex offender registration. In doing so, he cited the narrower scope of the federal failure-to-register penalty to suggest that the government was asserting an incoherent argument:

The Government's reasoning then begs the question: If, according to the Government, Congress has the power to regulate the intrastate activity of sex offenders, why does § 2250 only enforce the registration requirements after a sex offender travels in interstate commerce? It is difficult to reconcile Congress's decision to

108. *Id.*

109. *Id.* at 622.

110. 582 F. Supp. 2d 305 (N.D.N.Y. 2008).

111. *Id.* at 308.

112. *Id.* at 309.

113. *See id.* at 313 ("The Government asserts that the federal duty to register under § 16913, regardless of whether a sex offender travels in interstate commerce, 'is a necessary step toward carrying out [SORNA's] goal.' The Government argues that without a uniform registration requirement throughout the country, sex offenders may more easily cross state lines undetected and the purpose of SORNA may be defeated. The Government attempts to show that § 16913 is a reasonably adapted regulation of intrastate activity because the overall regulatory scheme of SORNA 'could be undercut' otherwise." (citation omitted)).

forego a criminal penalty for the intrastate registration of sex offenders with the Government's argument that Congress has the power to regulate such activity and that the overall regulatory scheme of SORNA could be undercut if not for the creation of a national registration requirement.¹¹⁴

The Second Circuit disagreed with this reasoning and reversed Judge Hurd's rulings in *Hall* and *Guzman*.¹¹⁵ The appellate court found that Congress had adequate legislative jurisdiction to enact the federal failure-to-register penalty under the Commerce Clause¹¹⁶ and Section 16913's registration requirements under the Necessary and Proper Clause.¹¹⁷

VII. A HANDFUL OF LAW REVIEW ARTICLES AND COMMENTATORS HAVE ALSO QUESTIONED THE COMMERCE CLAUSE BASIS FOR THE FEDERAL SORNA REQUIREMENTS AND PENALTIES

In his 2009 article, *One of These Laws Is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*,¹¹⁸ Professor Corey Rayburn Yung sets forth a thoughtful, yet highly critical, analysis of the history behind sex offender notification laws and the constitutionality of SORNA's registry and failure-to-register provisions under each of the above-cited provisions of the Constitution.¹¹⁹ In so doing, Professor Yung concludes that "SORNA has run roughshod over the rights derived from" a variety of constitutional provisions, including "the Fifth Amendment Due Process Clause, the Ex Post Facto Clause, [and] the Commerce Clause."¹²⁰

With regard to SORNA and the Commerce Clause, Professor Yung first discusses the Supreme Court's decisions in *United States v. Lopez*,¹²¹ *United States v. Morrison*,¹²² and *Gonzales v. Raich*,¹²³ to set forth the framework the Supreme Court has most recently used to evaluate the constitutionality of federal statutes under the Commerce Clause. He then examines SORNA against this framework, noting that "Congress made no findings to show a connection between any SORNA provisions and interstate commerce," but also noting that SORNA's criminal penalty "includes a jurisdictional limitation that requires the government to prove that a defendant is a person who 'travels in interstate or foreign commerce, or

114. *Id.* at 314.

115. *United States v. Guzman*, 591 F.3d 83 (2d Cir. 2010).

116. *See id.* at 90 ("We have no difficulty concluding that § 2250(a) is a proper congressional exercise of the commerce clause under *Lopez*.").

117. *Id.* at 91.

118. Yung, *supra* note 6.

119. *Id.*

120. *Id.* at 371.

121. 514 U.S. 549 (1995).

122. 529 U.S. 598 (2000).

123. 545 U.S. 1 (2005).

enters or leaves, or resides in, Indian country.’”¹²⁴ This latter point is a major distinguishing feature from the federal statute at issue in *Lopez*, which had no such jurisdictional element. In rejecting the Gun-Free School Zones Act under the Commerce Clause, the *Lopez* Court was clear to point out that the Gun-Free Act’s prohibition on the possession of a firearm within 1,000 feet of a school “contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.”¹²⁵ The *Lopez* Court contrasted the Gun-Free School Zones Act against the federal prohibition on possession of a firearm by a felon, which expressly contains an element that the possession be “in commerce or affecting commerce.”¹²⁶ The *Morrison* Court similarly addressed a statute with “no jurisdictional element establishing that the federal cause of action is in pursuance of Congress’ power to regulate interstate commerce.”¹²⁷

In recognizing the jurisdictional element in SORNA, Professor Yung concedes that the federal government can regulate and criminalize *certain* registry violations involving interstate travel. He asserts, however, that Congress acted too broadly in SORNA by not requiring a closer relationship between a person’s failure to register and travel in interstate commerce.¹²⁸ In the portion of his article proposing ways to bring SORNA within the Commerce Clause, he writes that Congress could modify the statute “so the travel is explicitly linked with the failure to register.”¹²⁹ Specifically, he suggests that “Congress could mandate that a person be subject to the provision of SORNA only insofar as travel between state lines has resulted in a failure to register.”¹³⁰ He repeatedly cites as a constitutional comparison to SORNA the Mann Act,¹³¹ which relates to the interstate transportation of prostitutes.¹³²

Professor Yung’s contention appears to misapprehend the evil at which SORNA was aimed, namely the problem of recidivist sex offenders moving about to evade the scrutiny that comes with registration and law enforcement and community attention. Joseph Duncan, the sex offender who kidnapped Shasta Groene and killed her family in Idaho, was registered in North Dakota. Just before departing on his horrific crime spree,

124. Yung, *supra* note 6, at 413.

125. *Lopez*, 514 U.S. at 561.

126. *Id.* at 561-62.

127. *Morrison*, 529 U.S. at 613.

128. See Yung, *supra* note 6, at 416-17 (“For SORNA, the offender’s travel is wholly unrelated to the mental state needed to fail to register.”).

129. *Id.* at 423.

130. *Id.*

131. See 18 U.S.C. § 2421 (2006) (creating felony punishable up to ten years imprisonment for anyone who “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, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so”).

132. *Id.*

he was arrested in Minnesota where he sexually molested a six-year-old child on a playground. Under Professor Yung's reconstruction of SORNA, an offender like Duncan might not be subject to arrest in advance of another heinous crime even if his registration lapsed, unless it could be proved that that he knowingly failed to register with the intent to travel to other states.

Professor Yung's core contention appears to be that SORNA's prohibition and exercise of authority under the Commerce Clause is overly broad, only minimally related to interstate travel, and, therefore, an unconstitutional exercise of federal Commerce Clause authority. In sum, he believes that the movement of an unregistered sex offender across state lines is not enough to satisfy federal jurisdiction unless it is directly tied to the registry violation.¹³³ Such a requirement would, however, be a dramatic departure from Supreme Court precedent and a tightening of the standard for Commerce Clause jurisdiction over the movement of persons or things in interstate commerce.

In *Scarborough v. United States*,¹³⁴ the Supreme Court sustained a much broader exercise of legislative jurisdiction in relation to the federal statute barring felons from possessing firearms in or affecting interstate commerce.¹³⁵ The petitioner in *Scarborough* was convicted of possessing firearms that had traveled in interstate commerce *before* he was convicted of a felony offense and thereby prohibited from possessing certain guns. He argued that federal law could not bar felons from possessing firearms unless the firearms had traveled interstate after the petitioner became a felon. The Supreme Court rejected the argument: "In this case, the history is unambiguous and the text consistent with it. Congress sought to reach possession broadly, with little concern for when the nexus with commerce occurred."¹³⁶ Indeed, the Court noted Congress's "intent to outlaw possession [of firearms] without regard to movement" for those with felony convictions,¹³⁷ but that the element requiring interstate movement of the firearm was added as a gloss to provide the necessary nexus to the Commerce Clause to render the statute constitutional.¹³⁸

133. See, e.g., Yung, *supra* note 6, at 416 ("Thus, there is no strong connection with interstate travel under SORNA as there is under the Mann Act.").

134. 431 U.S. 563 (1977).

135. *Id.* at 577.

136. *Id.*

137. *Id.* at 574.

138. *Id.* at 575 ("It seems apparent from the foregoing [legislative history] that the purpose of Title VII was to proscribe mere possession but that there was some concern about the constitutionality of such a statute."); cf. Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 718-19 (1995) ("Even if the Court reexamined *Scarborough* [after *United States v. Lopez*], however, it might find sufficient grounds to distinguish *Lopez*. The history of federal gun control is lengthy and convoluted; findings associated with a prior version of the felon provision might persuade the Court that Congress acted constitutionally. Apart from any legislative history, the Court might discover that gun possession by convicted felons implicates national interests to a greater degree than do other types of gun possession.

The statute under consideration in *Scarborough* and the resulting decision contrast starkly with the interstate commerce nexus in SORNA. Unlike the federal felon-in-possession statute, which does not require both a firearm and some interstate movement of the felon and/or his gun post-conviction, the SORNA statute requires both a failure to register *and* interstate movement of the felon post-conviction. Despite these significantly greater ties to interstate commerce, Professor Yung concludes that SORNA represents a vast expansion of Commerce Clause power, such that jurisdiction under that Clause would be “unending” if SORNA were deemed constitutional.¹³⁹

Professor Yung similarly faults SORNA’s failure-to-register penalty for federally convicted sex offenders, claiming that Section 2250(a)(2)(A) lacks a constitutional basis. He argues that “[e]ven 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.”¹⁴⁰ In a related article, Professor Yung has argued that “a holding of Commerce Clause authority based only upon a prior felony conviction would create a flypaper theory of the Clause whereby any person who entered federal jurisdiction for just a moment was committed to such jurisdiction for life.”¹⁴¹

These arguments, while interesting, run up against the reality that federal district courts have repeatedly declined to review the failure-to-register penalty for federal convicts under the Commerce Clause, claiming that jurisdiction under the Clause is not implicated by Section 2250(a)(2)(A).¹⁴² Although the jurisdictional authority for Section 2250(a)(2)(A) may not be as clear as these district courts have concluded, it is also not as indirectly linked to federal jurisdiction as Professor Yung has asserted. As explained below,¹⁴³ SORNA requires federally convicted sex offenders to register for the first time before they are released from imprisonment in a Federal Bureau of Prisons institution.¹⁴⁴ It would be

Former felons, for example, may be more likely than other gun-toting citizens to participate in interstate crime networks or receive guns in violation of other federal gun control measures. Rationales of this nature might be developed to uphold the ban on gun ownership by felons.”).

139. Yung, *supra* note 6, at 416.

140. *Id.* at 411.

141. Yung II, *supra* note 6, at 135.

142. See, e.g., *United States v. Thompson*, 595 F. Supp. 2d 143, 146 (D. Me. 2009) (agreeing with “fellow district courts that the Commerce Clause is not implicated in a prosecution under § 2250(a)(2)(A)”); *United States v. Yelloweagle*, Crim. No. 08-cr-00364-WYD, 2008 WL 5378132, at *2 (D. Colo. Dec. 23, 2008) (same); *United States v. Santana*, 584 F. Supp. 2d 941, 946-47 (W.D. Tex. 2008) (same).

143. See *infra* notes 192-93 and accompanying text.

144. 42 U.S.C. § 16913(b)(1) (2006) (setting forth initial registration requirement for sex offenders who are still completing federal sentence of imprisonment).

anomalous for the federal government to lack the authority to penalize a failure to comply with the federal registration requirement imposed on a federal inmate within a federal prison. Far from flypaper, the authority more closely resembles the sorts of controls that are imposed on federal convicts through conditions of supervised release. In challenging such a justification of federal jurisdiction, Professor Yung cites the Fourth Circuit decision that was overturned by the Supreme Court in *United States v. Comstock*¹⁴⁵ last term. *Comstock* dealt with the federal authority to civilly commit dangerous sex offenders charged with or convicted of federal sex crimes.¹⁴⁶ The Fourth Circuit held that Congress lacks the constitutional authority to create a civil commitment mechanism for dangerous and un-reformed sex offenders beyond the term of their federally imposed sentence.¹⁴⁷ In a seven-to-two decision, the Supreme Court reversed the Fourth Circuit and held that Congress possessed the power to create such a civil commitment authority under the Necessary and Proper Clause.¹⁴⁸ As discussed below, the Supreme Court's ruling helps clarify the jurisdictional basis for Section 2250(a)(2)(A) by explaining the federal government's need to exercise jurisdiction over certain potentially dangerous federal inmates who would otherwise be discharged into communities that are unaware of, and unprepared for, the inmates' arrival.¹⁴⁹

Views similar to Professor Yung's were recently published in an article by Anne Marie Atkinson.¹⁵⁰ Unlike Professor Yung, who appears to recognize *some* authority by which Congress can regulate the interstate movement of unregistered sex offenders, Ms. Atkinson takes a much narrower view. She writes that,

[a]lthough regulations on sex offenders who engage in interstate travel are necessary, the determination of how and when to regulate should remain a decision for the states. . . . To leave this power in the hands of Congress as a power given to them under the Commerce Clause would be a gross deviation from the Framers' intentions.¹⁵¹

In the analysis portion of her article, she reviews federal court decisions that affirm or reject the constitutionality of SORNA under the Commerce Clause, criticizing the courts that have affirmed the Act's constitutionality as having "essentially rubber-stamped SORNA's criminal provisions as constitutional," and charging that they did "so by applying superficial interpretations of Congress's power under the Commerce Clause."¹⁵²

145. 551 F.3d 274 (4th Cir. 2010), *rev'd*, 130 S. Ct. 1949.

146. Yung, *supra* note 6, at 412.

147. *Comstock*, 551 F.3d at 284-85.

148. *Comstock*, 130 S. Ct. at 1965.

149. *See infra* notes 204-09 and accompanying text.

150. Atkinson, *supra* note 6.

151. *Id.* at 600.

152. *Id.* at 587.

Ms. Atkinson takes a much more friendly view of the courts and decisions that agree with her position—as expressed in the title of her article—that SORNA is an “unconstitutional infringement of States’ rights under the Commerce Clause.”¹⁵³ In reviewing the minority of decisions that reject SORNA’s compliance with the Commerce Clause, she writes that “these holdings have been reached through proper interpretation of Congress’s Commerce Clause power.”¹⁵⁴ In favorably analyzing the cases rejecting SORNA’s constitutionality, Ms. Atkinson writes:

Although the statute stands for a just cause, it has not been proven that states are incapable of enforcing sex offender registration requirements without Congress’s help. In fact, the court [in *United States v. Powers*] found the opposite to be true because each state has implemented its own registration requirements as it sees fit.¹⁵⁵

This part of Ms. Atkinson’s analysis, however, conflicts directly with the findings of federal district courts that have analyzed the issue.¹⁵⁶ As one of these courts explained, “SORNA is intended to accomplish something the states themselves had not accomplished, and something that has a distinctly national character[;]”¹⁵⁷ namely, “track[ing] registered sexual offenders as they move from state to state.”¹⁵⁸

Ms. Atkinson’s conclusion that individual state registries have not proven ineffective also conflicts with the facts of the Groene case, discussed above, where a state court judge in Minnesota was unaware of the full extent of Joseph Duncan’s sex offense record when he granted Duncan bail.¹⁵⁹ The judge’s lack of information appears to have been due to gaps in sex offender registry information sharing between North Dakota and Minnesota.¹⁶⁰

In the conclusion of her article, Ms. Atkinson challenges the scope of SORNA, asserting that the statute has an unprecedented reach. Specifically, she asserts that “SORNA merely requires that a convicted sex offender travel to another state to face criminal charges.”¹⁶¹ This assertion,

153. *Id.* at 573.

154. *Id.* at 587.

155. *Id.* at 593.

156. See *United States v. Van Buren*, No. 3:08-CR-198, 2008 WL 3414012, at *13 (N.D.N.Y. Aug. 8, 2008), *aff’d*, 599 F.3d 170 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 483 (2010) (explaining that SORNA was enacted to cure gaps in state-by-state registry system to better track interstate movement of sex offenders); *United States v. Ditomasso*, 552 F. Supp. 2d 233, 236 (D. R.I. 2008) (“SORNA is essentially an effort by Congress to close the loopholes in previous sex offender registration legislation and to standardize registration across the states.”).

157. *Van Buren*, 2008 WL 3414012, at *15.

158. *Id.*

159. See *supra* notes 29-31 and accompanying text.

160. *Id.*

161. Atkinson, *supra* note 6, at 600.

however, exaggerates the reach of SORNA and plays upon the notion that the Act somehow penalizes sex offenders in a per se manner. As explained below, SORNA's criminal provision requires both a knowing violation of federal law and travel in interstate commerce. Specifically, for any person who has been convicted under a state sex offense law to violate SORNA, he or she must: (1) be required to register under the tiered system established under the Act; (2) knowingly fail to register; and (3) thereafter travel in interstate commerce.¹⁶²

VIII. CONGRESS ACTED WITHIN ITS COMMERCE CLAUSE POWERS IN ENACTING THE ADAM WALSH ACT

Congress did not exceed its authority under the Commerce Clause, but enacted a federal failure-to-register penalty that is narrowly confined to sex offenders who move in interstate or foreign commerce or who were convicted of crimes within federal jurisdiction. Although some courts and critics have claimed the Act's registry and failure-to-register provisions exceed Congress's Commerce Clause powers,¹⁶³ the text and history of the statute show that Congress drafted the registry provisions in a way that squares with long-standing Commerce Clause jurisprudence. Indeed, even an otherwise harsh critic of the Act's registry provisions has conceded that:

[Commerce Clause objections] appear to be misplaced, as almost every court considering Commerce Clause challenges has held SORNA to be an appropriate exercise of congressional authority. Congress anticipated challenges to its Commerce Clause powers, which is reflected in the fact that SORNA's criminal provision contains a jurisdictional element that enables Congress to regulate interstate travel of sex offenders.¹⁶⁴

In enacting the sex offender registry and failure-to-register provisions of the Adam Walsh Act, Congress acted pursuant to the enumerated jurisdiction and powers granted in Article 1, Section 8 of the Constitution, and in particular the power "[t]o regulate Commerce with foreign Nations and among the several States and with the Indian Tribes"¹⁶⁵

It is beyond the scope of this Article to discuss all aspects of Congress's ability to legislate under the Commerce Clause. At issue here is Congress's power to regulate the movement of persons and illegal activity across State lines, which is well-established.¹⁶⁶ Although there has been

162. 18 U.S.C. § 2250 (2006).

163. See *supra* Parts VI-VII.

164. Jacob Frumkin, *Perennial Punishment? Why the Sex Offender Registration and Notification Act Needs Reconsideration*, 17 J.L. & POL'Y 313, 325-27 (2008).

165. U.S. CONST., art. I, § 8, cl. 3.

166. See David M. Crowell, *Gonzales v. Raich and the Development of Commerce Clause Jurisprudence: Is the Necessary and Proper Clause the Perfect Drug?*, 38 RUTGERS L.J. 251, 284 (2006) ("*Lopez* reaffirmed the federal government's authority under

significant debate about Congress's power to regulate purely intrastate conduct that substantially affects commerce,¹⁶⁷ the Supreme Court has long recognized Congress's power under the Commerce Clause as it relates to interstate activity and the movement of persons across state lines.¹⁶⁸ For example, even as the Supreme Court sought to check a misuse of Commerce Clause jurisdiction in *United States v. Lopez*,¹⁶⁹ it identified "three broad categories of activities Congress may regulate under its commerce power," including the power "to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities."¹⁷⁰

Unlike Commerce Clause authority under the "effects test," this latter category of federal legislative jurisdiction is well-established and largely uncontroversial. Courts have consistently affirmed the constitutionality of

the Commerce Clause to regulate persons or things moving in interstate commerce.").

167. See, e.g., Richard Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1444 (1980) ("The commerce clause does not say 'Congress shall have the power to regulate commerce, and all matters affecting commerce with foreign nations, among the several states, and with the Indian tribes.'"); see also *United States v. Lopez*, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.").

168. See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 573 (1997) (ruling that state tax law exemption violated dormant Commerce Clause and noting that exemption at issue dealt with "the transportation of persons across state lines that has long been recognized as a form of 'commerce'"); *Lopez*, 514 U.S. at 558 (citing three bases for Commerce Clause authority, including that "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities."); *Brooks v. United States*, 267 U.S. 432, 436-37 (1925) (affirming Congress's authority to enact National Motor Vehicle Theft Act and stating, "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other states from the state of origin. In doing this, it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce."); *Hoke v. United States*, 227 U.S. 308, 323 (1913) (affirming Congress's authority to prohibit interstate travel in aid of prostitution and explaining that "Congress has power over transportation 'among the several states'" and that "Congress, as an incident to [such power], may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations."); *Champion v. Ames*, 188 U.S. 321, 325 (1903) (upholding Congress's authority to forbid interstate trafficking in lottery tickets and writing that Court's rulings on Commerce Clause "show that commerce among the states embraces . . . intercourse, . . . traffic, [and] the transit of persons. . . . They also show that the power to regulate commerce among the several states is vested in Congress as absolutely as it would be in a single government.").

169. 514 U.S. 549 (1995).

170. *Id.* at 558.

federal statutes that prohibit the illegal movement of persons and things in interstate commerce. Such rulings have embraced bans on the interstate movement of prostitutes,¹⁷¹ stolen vehicles,¹⁷² child pornography,¹⁷³ lottery tickets,¹⁷⁴ forged securities,¹⁷⁵ and stolen property.¹⁷⁶ When the Supreme Court heard challenges to early civil rights legislation, the Court cited Congress's clear and long-standing authority to regulate the movement of persons in interstate commerce. In affirming Congress's authority to ban discrimination in public accommodations in *Heart of Atlanta Motel, Inc. v. United States*,¹⁷⁷ the Court traced the history of its Commerce Clause case law and found that it was "settled as early as 1849" that "intercourse" in commerce "included the movement of persons through more States than one."¹⁷⁸ Indeed, Congress's authority to regulate the movement of persons is so well-established that a leading constitutional law treatise dedicates an entire section to the subject.¹⁷⁹

As discussed above, critics have attacked SORNA's constitutionality on commerce grounds on two main fronts. The first argument, which in all

171. See *Hoke*, 227 U.S. at 323 (affirming Congress's power to regulate the interstate movement of prostitutes).

172. See *Brooks*, 267 U.S. at 436-37 (affirming Congress's authority to enact National Motor Vehicle Theft Act which banned interstate transport of stolen vehicles).

173. See *United States v. Sirois*, 87 F.3d 34, 40 (2d Cir. 1996) (affirming challenge to defendant's conviction under 18 U.S.C. § 2251(a) on commerce grounds, explaining "[i]t is well-established that Congress can regulate activities that involve interstate or international transportation of goods and people, regardless of whether the transportation is for a 'commercial purpose'"), *cert. denied*, 519 U.S. 942.

174. See *Champion v. Ames*, 188 U.S. 321, 325 (1903) (upholding Congress's authority to outlaw interstate trafficking of lottery tickets).

175. See *McElroy v. United States*, 455 U.S. 642 (1982) (rejecting defendant's argument that federal prosecutor must prove that forgery itself occurred in interstate commerce rather than security, which was at some point forged, traveled across state lines). In its *McElroy* decision, the Court reasoned:

Congress has sought to aid the States in their detection and punishment of criminals who evade state authorities by using the channels of interstate commerce. Based on this congressional purpose, the trial judge in the present case correctly instructed the jury that they could find the petitioner guilty of violating § 2314 if they found that the forgeries occurred during the course of interstate commerce, which includes a 'continuation of a movement that began out of state,' even though movement of the forged checks was restricted to one State.

Id. at 659.

176. See *Russell v. United States*, 119 F.2d 686, 688 (8th Cir. 1941) ("There can be no doubt of the power of Congress to make transportation in interstate commerce of stolen articles a crime.").

177. 379 U.S. 241 (1964).

178. *Id.* at 255-56.

179. See RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 11.10, at 252 (4th ed. 2007) (stating in Treatise's sub-chapter "Commerce as Movement of Persons" that "[t]he judicial definition of commerce includes the movement of persons").

but one respect is easy to dismiss, is that SORNA's failure-to-register penalty has an insufficient link to interstate commerce to permit federal legislation. The second argument is more sophisticated and asserts that SORNA's registry provisions exceed Congress's power to regulate commerce because those provisions—unlike the failure-to-register penalty—do not contain a jurisdictional link to interstate commerce.

A. *Section 2250(a)(2), the Commerce Clause, and the Movement of Persons in Interstate Commerce*

As discussed above, the federal failure-to-register penalty has alternate jurisdictional elements, each of which implicates a different constitutional basis for legislative jurisdiction.¹⁸⁰ The first jurisdictional element deals with sex offenders who were previously “convicted 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.”¹⁸¹ The second alternate jurisdictional element is very different, requiring either interstate or foreign travel, or travel or residence in “Indian country.”¹⁸² The former implicates more traditional areas of exclusive or concurrent federal criminal jurisdiction, while the latter is clearly an exercise of traditional Commerce Clause jurisdiction. Despite the obvious differences between the two alternate jurisdictional elements, critics tend to fault both provisions on Commerce Clause grounds.¹⁸³

Taking the second element first, there is simply no merit to the argument that the Commerce Clause fails to provide legislative jurisdiction to reach unregistered sex offenders who travel in interstate or foreign commerce. Notwithstanding the handful of rulings and law review articles that fault Section 2250(a)(2)(B)'s constitutionality under the Commerce Clause, the reality is that the statute contains an express jurisdictional element of the sort approved in case after case before the Supreme Court and lower federal courts.¹⁸⁴ As Professor Lawrence Tribe writes in his constitutional law treatise, this kind of statute—the sort “containing a jurisdictional element expressly requiring the trier of fact to find some sort

180. See 18 U.S.C. § 2250(a)(2) (2006) (setting forth alternate jurisdictional elements including one element to govern those who travel in interstate or foreign commerce and one to govern those whose sex offense conviction was under federal law or within jurisdiction over which federal government has exclusive or concurrent criminal jurisdiction).

181. *Id.* § 2250(a)(2)(A).

182. *Id.* § 2250(a)(2)(B).

183. See *Yung II*, *supra* note 6, at 134 (“Each of these groups [under the two elements of Section 2250(a)(2)] presents a slightly different legal question in regard to the Commerce Clause.”).

184. See 18 U.S.C. § 2250(a)(2)(B) (including as element for federal failure-to-register penalty that person “travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country”); see also LAWRENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 829-30 (3d ed. 2000) (discussing line of cases approving criminal statutes with jurisdictional elements that were left untouched by *Lopez* or even cited approvingly by Court in that decision).

of connection or link to interstate commerce”—was “left largely untouched” by the Supreme Court’s *Lopez* decision.¹⁸⁵ Similarly, the Supreme Court’s decision in *United States v. Morrison*,¹⁸⁶ which invalidated a civil remedy against sexual assault perpetrators on commerce grounds, did not speak to a statute with a jurisdictional element tied to interstate commerce or travel.¹⁸⁷ The statute at issue had no such element,¹⁸⁸ and the lack of such an element was likely dispositive. The *Morrison* Court’s majority noted that a criminal penalty enacted within the Violence Against Women Act contained an express jurisdictional element very similar to that contained in Section 2250(a)(2)(B).¹⁸⁹ The Court noted that “[t]he Courts of Appeals have uniformly upheld this criminal sanction as an appropriate exercise of Congress’ Commerce Clause authority.”¹⁹⁰ Accordingly, the notion that Congress may regulate the interstate movement of unregistered sex offenders appears to be well supported by the text of the Constitution, the governing case law, and the legislative record, which is described in more detail in Part IX below.

The next and thornier question is whether the failure-to-register penalty can constitutionally be applied without a travel requirement to sex offenders who were convicted under federal law or in a jurisdiction over which the Constitution confers exclusive or concurrent federal criminal jurisdiction.¹⁹¹ As one critic of the Act has written, “[f]or a court to hold that a conviction without interstate travel was a proper exercise of congressional power would seemingly make the scope of the Commerce Clause limitless.”¹⁹² This criticism, of course, assumes that the failure-to-register penalty for federal sex offenders relies upon the Commerce Clause for

185. TRIBE, *supra* note 184, at 829.

186. 529 U.S. 598 (2000).

187. *See id.* at 613 (“Like the Gun-Free School Zones Act at issue in *Lopez*, § 13981 contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress’ power to regulate interstate commerce. Although *Lopez* makes clear that such a jurisdictional element would lend support to the argument that § 13981 is sufficiently tied to interstate commerce, Congress elected to cast § 13981’s remedy over a wider, and more purely intrastate, body of violent crime.”).

188. *Id.*

189. *Id.* at 613 n.5 (citing 18 U.S.C. § 2261(a)(1), which states, “[a] person who travels across a State line or enters or leaves Indian country with the intent to injure, harass, or intimidate that person’s spouse or intimate partner, and who, in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner, shall be punished as provided in subsection (b)”).

190. *Id.*

191. *Cf. Morse*, *supra* note 6, at 1773 (“Section 2250(a)(2)(A) is not a means for the government to obtain information about sex offenders so that it can punish them based on a jurisdictional hook, interstate movement; it is an end itself that imposes criminal penalties on federal offenders who fail to register, despite the fact that their crimes have no connection to interstate commerce.”).

192. *Yung II*, *supra* note 6, at 134.

legislative jurisdiction.¹⁹³ The federal courts that have addressed the constitutionality of that provision have, however, repeatedly stated that the first element in Section 2250(a)(2) does not rest on commerce jurisdiction.¹⁹⁴ Rather, those courts have held that Commerce Clause analysis is wholly unnecessary because sex offenders under the first element were convicted under federal law—whether the United States Code, Uniform Code of Military Justice, or the law of some location over which the federal government exercises territorial jurisdiction.¹⁹⁵

Regardless of the merits of the Commerce Clause arguments in opposition to Section 2250(a)(2)(A), there is nonetheless a degree of absurdity in the claim that the federal government can create a nationwide sex offender registry requirement, but then is without authority to penalize a federal convict's failure to comply with that law. Indeed, the absurdity becomes more extreme when one realizes that, under SORNA, a convicted sex offender must register before being released from prison.¹⁹⁶ Therefore, sex offenders convicted under federal law are required to register while in the custody of the Federal Bureau of Prisons.¹⁹⁷ It would be highly anomalous for Congress to lack the authority to punish registry violations in such circumstances.

The authority at issue in the registry context resembles the sorts of controls that are imposed on released felons through conditions of super-

193. *Cf.* *United States v. Senogles*, 570 F. Supp. 2d 1134, 1147 (D. Minn. 2008) (explaining how “the provisions of Section 2250(a)(2)(A) do not raise Commerce Clause concerns, as they require that the defendant have a previous conviction under Federal law”).

194. *See, e.g.*, *United States v. Thompson*, 595 F. Supp. 2d 143, 146 (D. Me. 2009) (“This Court agrees with its fellow district courts that the Commerce Clause is not implicated in a prosecution under § 2250(a)(2)(A).”); *United States v. Yeloweagle*, Crim. No. 08-cr-00364-WYD, 2008 WL 5378132, at *2-3 (D. Colo. Dec. 23, 2008) (“Like the other district courts that my research has revealed to have addressed the issue, I find that § 2250(a)(2)(A) raises no Commerce Clause implications. Furthermore, I find that 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.”); *United States v. Santana*, 584 F. Supp. 2d 941, 946 (W.D. Tex. 2008) (“As state laws are not implicated, Congress’ Commerce Clause authority, granting Congress the power ‘to regulate Commerce with the foreign Nations, and among the several States’ does not represent the underlying principle through which Congress drafted § 2250(a)(2)(A).”).

195. *See, e.g.*, *Santana*, 584 F. Supp. 2d at 946 (denying defendant’s motion to dismiss indictment on Commerce Clause grounds because “defendants indicted under § 2250(a)(2)(A) are held accountable for violations of federal—not state—law, which falls squarely within Congress’ exclusive jurisdiction”).

196. *See* 42 U.S.C. § 16913(b)(1) (2006) (requiring that sex offender’s initial registration, if incarcerated, shall occur “before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement”).

197. *See id.*; *see also* *United States v. Van Buren*, No. 3:08-CR-198, 2008 WL 3414012, at *4 (N.D.N.Y. Aug. 8, 2008) (describing process by which federal sex offenders are advised of their obligation to register while still in federal custody), *aff’d*, 599 F.3d 170 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 483 (2010).

vised release and related matters. Such controls have been affirmed as to federal convicts even where the person is no longer in custody and where the person has not traveled in interstate commerce. For example, in *United States v. Reynard*,¹⁹⁸ the Ninth Circuit affirmed Congress's authority to require the collection of DNA samples from those who were previously convicted under federal law.¹⁹⁹ The *Reynard* court based its ruling on the fact that, while every state had some form of DNA collection law within their individual states, there was no similar authority for the collection of DNA samples from those convicted of federal crimes.²⁰⁰ Federal DNA collection was required to supplement the state laws because the problem—supporting a comprehensive DNA database—was one that defied a local solution insofar as federal convicts might fall between the gaps in the law.²⁰¹ At least one federal district court has cited the *Reynard* decision to uphold the constitutionality of an indictment charging Section 2250(a)(2)(A)'s penalty for federally convicted sex offenders.²⁰² That court concluded, “[w]hether directed to federal sexual offenders only, or to all sexual offenders who travel in interstate commerce, SORNA does not offend traditional notions of federalism because it addresses something each state does not have the power to accomplish—track registered sexual offenders as they move from state to state.”²⁰³

The gap-filling need for *federal* regulation of federally convicted sex offenders is brought home by the reality that federal sex offenders leave federal custody in one state and are released in another jurisdiction where they may or may not stay. As the Solicitor General recently explained in a brief to the Supreme Court in a related matter involving federally convicted sex offenders:

[T]here can be no assurance that a State will be willing or able to assume responsibility for a person upon his release from federal prison—particularly a person with whom the State may have had only limited connections and who might thus be likely to travel to, and pose a threat to the public in, other States.²⁰⁴

Had SORNA not created a federal registration requirement for federally convicted sex offenders, a gap in the nationwide registry system would have remained. Simply put, a federal penalty was needed to ensure registry compliance by federally released inmates.

Congress's creation of such a penalty demonstrates its recognition that the federal government has an interest in, and a responsibility for, sex

198. 473 F.3d 1008 (9th Cir. 2007).

199. *Id.* at 1023-24.

200. *Id.* at 1023.

201. *Id.* at 1023-24.

202. *Van Buren*, 2008 WL 3414012, at *12-13.

203. *Id.* at *13.

204. Brief for the United States at 41, *United States v. Comstock*, 130 S. Ct. 1949 (2010) (No. 08-1224).

offenders who might quickly drift from federal custody to places where detection and prosecution might be unlikely. After all, up to the time of release, the federal government is the jurisdiction with custody of the offender and full knowledge of his or her crimes and conduct while in custody. To this end, SORNA's criminal penalty for federally convicted offenders who fail to register is merely recognition of the federal government's responsibility for the safe release of inmates in its care.²⁰⁵ As the Supreme Court explained in dictum last term, "it is entirely reasonable for Congress to have assigned the Federal Government a special role in ensuring compliance with SORNA's registration requirements by federal sex offenders—persons who typically would have spent time under federal criminal supervision."²⁰⁶

Despite the authority and reasoning cited above, questions still remain about the extent of the federal government's power to regulate federally convicted sex offenders after their release. These questions appear to be fading, however, with the Supreme Court's recent decision in *United States v. Comstock*.²⁰⁷ In *Comstock*, the Court affirmed the federal government's authority to civilly commit "mentally ill, sexually dangerous federal prisoner[s] beyond the date the prisoner[s] would otherwise be released" under the Necessary and Proper Clause.²⁰⁸ In so ruling, the Court relied upon the federal government's role as custodian of inmates already in Bureau of Prisons custody, reasoning that "as federal custodian, it has the constitutional power to act in order to protect nearby (and other) communities from the danger federal prisoners may pose."²⁰⁹ Concurring in the Court's judgment in *Comstock*, Justice Kennedy wrote: "Federal prisoners often lack a single home state to take charge of them due to their lengthy prison stays, so it is incumbent upon the National Government to act."²¹⁰ The *Comstock* opinion and its supporting analysis lend strong support to

205. *Cf. id.* at 42 (discussing "longstanding recognition that the federal government's relationship with federal prison inmates or those charged with federal offenses creates interests and responsibilities that would not exist if they had not come into federal custody" and that "some of those interests and responsibilities should not terminate automatically at the close of a prison term").

206. *Carr v. United States*, 130 S. Ct. 2229, 2238 (2010).

207. 130 S. Ct. 1949 (2010).

208. *Id.* at 1954.

209. *Id.* at 1961 ("If a federal prisoner is infected with a communicable disease that threatens others, surely it would be 'necessary and proper' for the Federal Government to take action, pursuant to its role as federal custodian, to refuse (at least until the threat diminishes) to release that individual among the general public, where he might infect others And if confinement of such an individual is a 'necessary and proper' thing to do, then how could it not be similarly 'necessary and proper' to confine an individual whose mental illness threatens others to the same degree?" (citation omitted)).

210. *Id.* at 1968 (Kennedy, J., concurring).

the notion that Congress had a jurisdictional basis for enacting Section 2250(a)(2)(A) under the Necessary and Proper Clause.²¹¹

B. *Section 16913 as a “Necessary and Proper” Adjunct to Section 2250(a)*

Critics claim the nationwide federal sex offender registry codified at Section 16913 lacks any connection to commerce across jurisdictions. This is misleading. Although Section 16913 requires sex offenders to register in the state where they reside, it would be an oversimplification to say that the registry provisions are purely intrastate or that they fail to focus on sex offender movement. For example, the registry provisions require sex offenders to register “in each jurisdiction” where the offender resides, works, and studies.²¹² The provisions also require sex offenders to appear in person and update their registry information within three days of relocating their residence, employment, or place of study.²¹³ Other provisions within SORNA contain information-sharing tools and requirements to ensure registry information is shared across jurisdictions, including for sex offenders who enter the United States.²¹⁴

Nonetheless, if the above-described provisions did not exist, it would admittedly be difficult to justify the type of nationwide federal sex offender registry contained in Section 16913 in the absence of Section 2250(a)’s criminal penalty with its jurisdictional limits. Although arguments could be advanced under *Lopez*’s third-prong and the effects test, or based on Congress’s spending power due to funding triggers in SORNA, neither argument would fully explain why Section 16913 needed to be enacted in the Adam Walsh Act to address sex offenders’ cross-jurisdiction movement. A better argument—and one more in line with SORNA’s complete text and purpose—is that Section 16913 was “necessary and proper for carrying into [e]xecution”²¹⁵ the federal failure-to-register penalty codified at Section 2250(a).

Under the Necessary and Proper Clause, Congress has the power to “make all Laws which shall be necessary and proper for carrying into Exe-

211. Despite the various arguments for and against the Commerce Clause basis for the failure-to-register penalty for federal sex offenders, the reality is that the debate may prove to be largely academic. In the small number of reported cases under Section 2250(a)(2)(A), many also involved charged violations of 2250(a)(2)(B), along with its interstate travel component. *See, e.g.*, *United States v. Thompson*, 595 F. Supp. 2d 142, 145-46 (D. Me. 2009). Accordingly, prosecutors may be charging unregistered sex offenders with both prongs of the statute to ensure that they can rely upon the portion of the statute with the strongest claim to federal legislative jurisdiction if later challenged.

212. 42 U.S.C. § 16913(a) (2006).

213. *Id.* § 16913(c).

214. *Id.* §§ 16919, 16921(b), 16923, 16928.

215. U.S. CONST. art. I, § 8, cl. 18.

cution the foregoing Powers,”²¹⁶ including the power to regulate commerce.²¹⁷ As one authority explains this Clause:

It authorizes what is “necessary to render effectual the particular powers that are granted.” Congress thus can make laws about something otherwise outside the enumerated powers, insofar as those laws are “necessary and proper” to effectuate federal policy for something within an enumerated power. Although not independently valid under another enumerated power, such laws are supported by this clause to the extent that they constitute a means by which federal policy can be executed under an enumerated power.²¹⁸

The federal registration requirement codified at Section 16913 falls squarely into this category.

When Congress decided to create a federal failure-to-register penalty to better regulate sex offenders who move across state lines,²¹⁹ it had to define in clear and enforceable language what “failure to register” actually means.²²⁰ Although Congress could theoretically have relied upon the registry law existing in each state in 2006 and made such laws the federal standard for registry violations,²²¹ the federal failure-to-register penalty would have been tied to fifty disparate requirements, any one of which could have flaws that could render federal enforcement impossible. Moreover, changes to those laws could create ambiguity as to the standard that triggers a federal criminal violation. By the time the Adam Walsh Act was passed, Congress had already been informed that disparate state registration requirements were creating compliance problems and contained gaps through which at least 100,000 sex offenders had fallen.²²² As Ernie Al-

216. *Id.*

217. *Id.* art. I, § 8, cl. 3.

218. EDWIN MEESE III ET AL., *THE HERITAGE GUIDE TO THE CONSTITUTION* 147 (2005).

219. *United States v. George*, 625 F.3d 1124, 1129 (9th Cir. 2010) (explaining that “SORNA was enacted to keep track of sex offenders” across jurisdictions); *United States v. Howell*, 552 F.3d 709, 716 (8th Cir. 2009) (“Thus, the statutory scheme Congress created to enforce § 16913 demonstrates Congress was focused on the interstate movement of sex offenders, not the intrastate activity of sex offenders.”) *cert. denied*, U.S. Ct. 2812.

220. *See George*, 625 F.3d at 1129 (stating that SORNA registration “requirements are clear and easy to understand” and noting that “[t]he government is correct in that ‘[i]t is a reasonable construction of 18 U.S.C. § 2250 that the registration requirements mentioned should be found in 42 U.S.C. § 16913, the section from SORNA entitled ‘Registry requirements for sex offenders’”).

221. *Cf.* 2 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* 195 (4th ed. 2007) (“However, Congress can enact legislation prescribing that the federal pollution standard in each state shall be the same as the state standard. Then, it is not abdicating its authority but merely incorporating by reference future legislation.”).

222. *Protecting Our Nation’s Children from Sexual Predators and Violent Criminals: What Needs to be Done?: Hearing Before the H. Comm. on the Judiciary*, 109th Cong. 19

len, the President and CEO of the National Center for Missing and Exploited Children, testified in June 2005:

A great deal of discretion is left to the States—appropriately—in how they implement their registration programs. But the result is that there is a significant lack of consistency and uniformity from State to State. There are loopholes that permit sex offenders to cross State lines and remain undetected. We know that registered sex offenders often forum shop in order to achieve anonymity.²²³

Against such testimony, it was reasonable for Congress, in enacting a federal failure-to-register penalty for interstate violators, to view a uniform national registration standard as a “necessary and proper” adjunct to that penalty.²²⁴ After all, how could the federal government effectively outlaw the interstate movement of unregistered sex offenders from one state to the next if the registration requirements in those states—or the triggers for such registration—were all different?²²⁵

To evaluate the propriety of the federal registry requirement as a necessary and proper component of the federal failure-to-register penalty, it is helpful to look to the Supreme Court’s decision in *Gonzales v. Raich*,²²⁶ and specifically to Justice Scalia’s concurrence in that case.²²⁷ In *Raich*, the Supreme Court confronted the respondents’ claim that the Federal Controlled Substances Act (CSA) could not constitutionally be applied to their personal—and, therefore, local—use of marijuana for medicinal purposes, especially in light of California’s enactment of the Compassionate Use Act.²²⁸ The Compassionate Use Act had exempted California physicians, patients, and primary caregivers from prosecution for the possession or cultivation of “marijuana for the personal medical purposes

(2005) (statement of Ernie Allen, Pres. & CEO, Nat’l Ctr. for Missing and Exploited Children).

223. *Id.* at 14.

224. See *United States v. Van Buren*, No. 3:08-CR-198, 2008 WL 3414012, at *14 (N.D.N.Y. Aug. 8, 2008) (“[T]he purpose of SORNA is to provide a comprehensive national system of registration of sex offenders—including a listing of the offender’s current residences, and the sharing of such information in order to protect the public from these individuals. The registration and updating requirements of § 16913 are necessary to make § 2250(a)—a regulation of interstate commerce—effective.”), *aff’d*, 599 F.3d 170 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 483 (2010); see also 152 CONG. REC. S8030 (daily ed. July 20, 2006) (statement of Sen. Bill Frist) (“Loopholes in the current system allow some sexual predators to evade law enforcement, placing our children at risk. While many States, including my own home State of Tennessee, have registries, this information is not always shared with other States. By creating a national registry, we are closing the loopholes that allow offenders to slip through the cracks.”).

225. See 152 CONG. REC. S8012 (daily ed. July 20, 2006) (statement of Sen. Orrin Hatch) (referring to “patch-work quilt” of varied state registry laws).

226. 545 U.S. 1 (2005).

227. *Id.* at 33-42 (Scalia, J., concurring).

228. *Id.* at 5-8 (majority opinion).

of the patient upon the written or oral recommendation or approval of a physician.”²²⁹

The Court’s majority, in an opinion by Justice Stevens, affirmed the CSA’s application to local cultivation and medicinal use of marijuana, even where California law permitted such conduct.²³⁰ The Court’s opinion rested on a broad Commerce Clause rationale that looked to whether Congress could rationally conclude that such local activity could substantially affect interstate commerce and undercut the federal regulation of controlled substances.²³¹

Justice Scalia concurred in the Court’s judgment, but did so on a somewhat different legal ground,²³² albeit one that was mentioned by the Court’s majority.²³³ In particular, he explained Congress’s authority to regulate purely intrastate marijuana cultivation and medicinal use as a necessary component of a broader regulation of interstate commerce.²³⁴ In doing so, he explained how Congress is authorized under the Necessary and Proper Clause to regulate intrastate activity if such regulation is both essential and reasonably adapted to the broader regulation of interstate commerce:

The regulation of an intrastate activity may be essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not itself “substantially affect” interstate

229. CAL. HEALTH & SAFETY CODE § 11362.5(d) (West 2007).

230. See *Raich*, 545 U.S. at 31-33 (rejecting California exemption for prescribed marijuana as “broad enough to allow even the most scrupulous doctor to conclude that some recreational use would be therapeutic” and rejecting California’s cultivation exception on same basis Supreme Court had affirmed federal regulation of locally cultivated and consumed wheat crops in *Wickard v. Filburn*, 317 U.S. 111 (1942)).

231. See *id.* at 22 (“Thus, as in *Wickard* [*v. Filburn*], when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to ‘make all Laws which shall be necessary and proper’ to ‘regulate Commerce . . . among the several States.’ That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.” (quoting U.S. CONST. art. I, § 8)).

232. See *id.* at 33 (Scalia, J., concurring) (“I write separately because my understanding of the doctrinal foundation on which that holding rests is, if not inconsistent with that of the Court, at least more nuanced.”); see also MEESE, *supra* note 218, at 105 (“It would follow that Congress could regulate a local activity only if its purpose comports with its delegated power to regulate commerce and the regulation is plainly adapted to its interstate commerce purpose. So concluded Justice Antonin Scalia in his concurrence in *Gonzales v. Raich* (2005), upholding federal regulation of locally grown and consumed marijuana, otherwise legal under state law.”).

233. See *Raich*, 545 U.S. at 22 (noting that Congress’s regulation of local cultivation was “necessary and proper” adjunct to its Commerce Clause authority to regulate marijuana trafficking generally).

234. See Crowell, *supra* note 166, at 296 (“Justice Scalia added that *noneconomic* local activity could be regulated if necessary to a more general regulatory scheme.”).

commerce. . . . Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce. The relevant question is simply whether the means chosen are “reasonably adapted” to the attainment of a legitimate end under the commerce power.²³⁵

Citing a prior Supreme Court decision, Justice Scalia further explained that “where Congress has the authority to enact a regulation of interstate commerce, ‘it possesses every power needed to make that regulation effective.’”²³⁶

At least two federal Courts of Appeals have cited Justice Scalia’s concurrence in *Raich* as a basis for affirming the constitutionality of Section 16913 under the Necessary and Proper Clause.²³⁷ In a consolidated opinion in *United States v. Guzman*,²³⁸ the Second Circuit reversed two lower court rulings against the constitutionality of SORNA. After acknowledging that “[t]he analysis of the constitutionality of SORNA’s underlying registration requirement, § 16913, is more difficult” than the straightforward analysis needed for the interstate failure-to-register penalty,²³⁹ the panel looked to the Necessary and Proper Clause and Justice Scalia’s concurrence cited above.²⁴⁰ The Second Circuit then affirmed the constitutionality of Section 16913, reasoning that “[r]equiring sex offenders to update their registrations due to intrastate changes of address or employment status is a perfectly logical way to help ensure that states will more effectively be able to track sex offenders when they do cross state lines.”²⁴¹

In *United States v. Howell*, the Eighth Circuit reached the same conclusion in a consolidated ruling that affirmed the constitutionality of Section 16913 under the Necessary and Proper Clause.²⁴² The Eighth Circuit’s analysis explains clearly why the nationwide registration requirement, which reaches intrastate conduct, is necessary for the enforcement of the interstate failure-to-register penalty:

When § 16913 is analyzed in relation to the purpose of SORNA, it is evident § 16913 is an “appropriate aid[] to the accomplishment” of tracking the interstate movement of sex offenders. The requirements of § 16913 help establish a system by which the government can monitor the location and travels of sex offenders.

235. *Raich*, 545 U.S. at 37 (Scalia, J., concurring) (citation omitted).

236. *Id.* at 36 (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-19 (1942)).

237. *See* *United States v. Guzman*, 591 F.3d 83, 91 (2d Cir. 2010) (citing Justice Scalia’s concurrence in *Raich* to affirm Congress’s legislative jurisdiction to enact Section 16913), *cert. denied*, 130 S. Ct. 3487; *United States v. Howell*, 552 F.3d 709, 714-15 (8th Cir. 2009) (same), *cert. denied*, 129 S. Ct. 2812.

238. 591 F.3d 83 (2d Cir. 2010).

239. *Id.* at 90.

240. *Id.* at 91.

241. *Id.*

242. *Howell*, 552 F.3d at 716-17.

Although § 16913 may reach a wholly intrastate sex offender for registry information, § 16913 is a reasonable means to track those offenders if they move across state lines. In order to monitor the interstate movement of sex offenders, the government must know both where the offender has moved and where the offender originated. Without knowing an offender's initial location, there is nothing to ensure the government would know if the sex offender moved. The registration requirements are reasonably adapted to the legitimate end of regulating "persons or things in interstate commerce" and "the use of the channels of interstate commerce." Covering the registration of wholly intrastate sex offenders is merely incidental to Congress's tracking of sex offenders in interstate commerce.²⁴³

Similar opinions have been issued by other Courts of Appeals affirming Section 16913 under the Constitution's Necessary and Proper Clause.²⁴⁴ In sum, criticisms of Section 16913 on Commerce Clause grounds miss the mark, albeit by only fifteen clauses in the Constitution.²⁴⁵

IX. IN ENACTING THE ADAM WALSH ACT, CONGRESS MADE CLEAR ITS
DESIRE TO CREATE A UNIFORM SEX OFFENDER REGISTRY TO
ADDRESS THE UNREGISTERED MOVEMENT
OF SEX OFFENDERS

Throughout the text and legislative history of the Adam Walsh Act, Congress made clear its intent to create a comprehensive nationwide registry system to regulate the movement and activities of sex offenders across jurisdictions and across state lines.²⁴⁶ Per the text of the Act, the criminal

243. *Id.* at 717 (citations omitted).

244. *See, e.g.*, *United States v. Ambert*, 561 F.3d 1202, 1212 (11th Cir. 2009) (affirming constitutionality of SORNA's registration requirement under Necessary and Proper Clause, writing "Section 16913 is reasonably adapted to the attainment of a legitimate end under the commerce clause. The requirement that sex offenders register under § 16913 is necessary to track those offenders who move from jurisdiction to jurisdiction.").

245. Justice Alito's concurrence in the recently-decided *Comstock* case further bolsters the application of Necessary and Proper jurisdiction to federal criminal provisions like the registry requirements of Section 16913:

The Necessary and Proper Clause provides the constitutional authority for most federal criminal statutes. In other words, most federal criminal statutes rest upon a congressional judgment that, in order to execute one or more of the powers conferred on Congress, it is necessary and proper to criminalize certain conduct, and in order to do that it is obviously necessary and proper to provide for the operation of a federal criminal justice system and a federal prison system.

United States v. Comstock, 130 U.S. 1949, 1969 (2010) (Alito, J., concurring).

246. *See* 18 U.S.C. § 2250(a)(2)(B) (2006) (providing, as element of federal failure-to-register offense, that person "travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country"); 42 U.S.C. § 16901 (2006) (stat-

prohibition on failure to register expressly applies to two categories of sex offenders: (1) those who fail to register after moving in interstate or foreign commerce or in “Indian country”;²⁴⁷ and (2) those who fail to register after a federal conviction or a conviction otherwise within federal military or territorial jurisdiction.²⁴⁸ The text of the Act does not purport to create a broad federal criminal penalty that would reach purely intrastate registry violations.²⁴⁹ Rather, the Act’s basic text shows Congress’s focus on the interstate movement of unregistered sex offenders.²⁵⁰

Similarly, the House and Senate floor debates on the bill also exhibited a focus on the undetected movement of sex offenders across state lines. Namely, in the debates immediately preceding votes on the bill, member after member cited the need to fill the gap in the then-existing state-by-state registry system to prevent sex offenders from slipping through the cracks in the system by relocation or interstate travel.²⁵¹ Below is a sample of the record that was developed during the debate and passage of the Act.

Then-Senator Joseph Biden, a lead sponsor²⁵² of the Adam Walsh Act, explained how the Act would prevent the undetected interstate movement of convicted sex offenders:

ing purpose of SORNA registry provisions to be to establish “a comprehensive national system for the registration of [convicted sex] offenders”); *Id.* § 16913 (“A sex offender shall register, and keep the registration current, *in each jurisdiction* where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, *a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.*” (emphases added)).

247. 18 U.S.C. § 2250(a)(2)(B).

248. *Id.*

249. *See, e.g.,* United States v. Howell, 552 F.3d 709, 716 (8th Cir. 2009), *cert. denied*, 129 S. Ct. 2812. In *Howell*, the Eighth Circuit reasoned:

Under § 2250, Congress limited the enforcement of the registration requirement to only those sex offenders who were either convicted of a federal sex offense or who move in interstate commerce. 18 U.S.C. § 2250(a)(2). With this limitation, a resident of Iowa who has been convicted of a state sex offense and who does not leave Iowa would never be subject to federal sanctions if he fails to register. The Iowa resident could only be punished under Iowa law for failure to register. A wholly intrastate offender would never be reached by federal enforcement power. This limitation demonstrates Congress’s intention to punish only interstate offenders. Instead of creating a federal crime for failure to register regardless of interstate movement, Congress understood its limited interstate commerce power and reserved prosecution of wholly intrastate offenders to the states.

Id.

250. *See* 18 U.S.C. § 2250(a)(2)(B) (creating interstate travel element to federal failure-to-register offense for those not convicted under federal or tribal law).

251. *See* 152 CONG. REC. H5705-31 (daily ed. July 25, 2006) (setting forth final House debate on Act); 152 CONG. REC. S8012-31 (daily ed. July 20, 2006) (containing closing Senate debate on Hatch amendment that became Adam Walsh Act).

252. The Senate amendment containing the final version of the Adam Walsh Act was sponsored by Senator Orrin Hatch and cosponsored by Senators George

One of the biggest problems in our current sex offender registry system happens when registered sex offenders travel from one State to another.

Delaware has worked hard to keep track of the 3,123 sex offenders registered to my State. But there are other States that are not so advanced and whose systems are not so sophisticated.

This bill fully integrates and expands the State systems so that communities nationwide will be warned when high-risk offenders come to live among them. And we target resources under this bill at the worst of the worst and provide Federal dollars to make sure States aren't left holding the bag.

We also require the U.S. Department of Justice to create software to share with the States in order to allow for information to be shared instantly and seamlessly among them. When a sex offender moves from New Jersey to Delaware, for example, we have to be absolutely sure that Delaware authorities know about it.²⁵³

Senator Orrin Hatch, the Senator who introduced the amendment that became the Adam Walsh Act, described the intended role of the Act's national registry and penalty provisions:

It creates a National Sex Offender Registry with uniform standards for the registration of sex offenders, including a lifetime registration requirement for the most serious offenders. This is critical to sew together the patch-work quilt of 50 different State attempts to identify and keep track of sex offenders.

. . . .

Laws regarding registration for sex offenders have not been consistent from State to State [N]ow all States will lock arms and present a unified front in the battle to protect children. Websites that have been weak in the past, due to weak laws and haphazard updating and based on inaccurate information, will now be accurate, updated and useful for finding sex offenders.²⁵⁴

Allen, Joseph Biden, Conrad Burns, Maria Cantwell, Norm Coleman, Mark Dayton, Mike DeWine, Byron Dorgan, John Ensign, Bill Frist, Chuck Grassley, Judd Gregg, Kay Bailey Hutchison, Jon Kyl, Mel Martinez, Barbara Mikulski, Lisa Murkowski, Bill Nelson, Harry Reid, Rick Santorum, Jeff Sessions, Olympia Snowe, Arlen Specter, Jim Talent, and Craig Thomas. *See Cosponsor List for S. Amdt. 4686 to H.R. 4472*, THOMAS, <http://www.thomas.gov/cgi-bin/bdquery/z?d109:SP04686:@@P> (last visited Mar. 6, 2011) (listing cosponsors of bill).

253. 152 CONG. REC. S8014 (daily ed. July 20, 2006) (statement of Sen. Joseph Biden).

254. 152 CONG. REC. S8012-13 (daily ed. July 20, 2006) (statement of Sen. Orrin Hatch).

2011] THE ADAM WALSH ACT & THE COMMERCE CLAUSE 91

Representative Earl Pomeroy, a House sponsor²⁵⁵ of the Act, gave the example of Alfonso Rodriguez and his travel across state lines in describing the need for a uniform national sex offender registry. Rodriguez, a convicted sex offender in the State of Minnesota, crossed into North Dakota to kidnap and kill University of North Dakota student Dru Sjodin.

The individual now on trial for her murder was a registered sex offender, but only across the State line, which, in the context of Grand Forks, North Dakota, is just across the river. So Alfonso Rodriguez, . . . long incarcerated in the State of Minnesota, identified as a high risk sex offender within the State of Minnesota, but unknown to those of us in North Dakota.

We need a national registry so we know where these high risk predators are and we can find them²⁵⁶

Another sponsor of the Act, Senator Maria Cantwell, described the need to “close the gap between Federal and State sex offender registration and notification programs” and cited the example of Joseph Duncan, who, though convicted of rape in Washington, was lost in the then-existing patchwork of unconnected state registries.²⁵⁷ Senator Cantwell described for the Senate how Duncan was left to commit heinous crimes against a family in Idaho after being released by a Minnesota judge who was unaware of his past:

Last June, the entire Nation was horrified by the kidnapping and murders of the Groene family and the tragic crimes upon little Shasta Groene.

Joseph Duncan was a convicted sex offender who beat Brenda Groene; her 13-year-old son, Slade; and her boyfriend, Mark McKenzie to death. Their bodies were found in their home in Idaho on May 16, 2005. The killings captured the national headlines and prompted a massive search for the two

255. The House bill that was amended to create the Adam Walsh Act was sponsored by Congressman James Sensenbrenner, Jr., and cosponsored by Representatives Richard Baker, Leonard Boswell, Ginny Brown-Waite, Dan Burton, Ken Calvert, Shelley Moore Capito, Ben Chandler, Robert (Bud) Cramer, Jr., Tom DeLay, Mark Foley, Randy Forbes, Elton Gallegly, Jim Gibbons, Paul Gillmor, Virgil Goode, Jr., Sam Graves, Mark Green, Katherine Harris, Melissa Hart, Mark Kennedy, John Kline, Thaddeus McCotter, Cathy McMorris Rodgers, Dennis Moore, Mike Pence, Ted Poe, Earl Pomeroy, Jon Porter, David Reichert, Thomas Reynolds, Edward Royce, Pete Sessions, Christopher Smith, Lamar Smith, Curt Weldon, Lynn Westmoreland, and Ed Whitfield. See *Cosponsor List for H.R. 4472*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR04472:@@P> (last visited Mar. 6, 2011).

256. 152 CONG. REC. H5725 (daily ed. July 25, 2006) (statement of Rep. Earl Pomeroy).

257. 152 CONG. REC. S8019-20 (daily ed. July 20, 2006) (statement of Sen. Maria Cantwell).

Groene children, 8-year-old Shasta and her 9-year-old brother, Dylan.

Six weeks later, on July 2, restaurant workers in Idaho recognized Shasta and called the police. Dylan's remains were found later in western Montana.

This did not have to happen.

In 1980, Duncan was convicted of rape in Washington State. He was sentenced to 20 years in prison [H]e was released on parole in 1994.

In 2000, he moved to Fargo, where he registered with the North Dakota Sex Offender Registry, but before long he had moved again and both the North Dakota and Washington State registries lost track of him.

In April of 2005, a Minnesota judge released Duncan on bail after he had been charged with child molestation. Duncan promptly skipped town. Minnesota issued a warrant for his arrest that May because he had not registered as a sex offender in that State, but by that time it was too late. On May 16, the Groene family was found dead and it wasn't until July 2 that Shasta was recovered.

Joseph Duncan was essentially lost by three States. He moved from State to State to avoid capture. No one knew where he was nor even how to look for him.²⁵⁸

Then-Majority Leader Bill Frist amplified the statements of his fellow Senators and bill sponsors:

Loopholes in the current system allow some sexual predators to evade law enforcement, placing our children at risk. While many States, including my own home State of Tennessee, have registries, this information is not always shared with other States. By creating a national registry, we are closing the loopholes that allow offenders to slip through the cracks.²⁵⁹

Senator Harry Reid, who was then the Senate's Minority Leader and a cosponsor of the Act, spoke about the need for the Act and cited the "problem when sex offenders cross State lines. The bill before us will establish uniform rules for the information sex offenders are required to report and when they are required to report it. It will also give law enforcement agencies the tools they need to enforce these requirements."²⁶⁰

258. *Id.*

259. 109 CONG. REC. S8030 (daily ed. July 20, 2006) (statement of Sen. Bill Frist).

260. 152 CONG. REC. S8030 (daily ed. July 20, 2006) (statement of Sen. Harry Reid).

A Senate Judiciary Committee report further attested to the Adam Walsh Act's role in correcting gaps in the patchwork of state-by-state sex offender registries. This report, entitled *Activities Report of the Committee on the Judiciary, United States Senate, 2005-2006*,²⁶¹ explained how the National Sex Offender Registry "provisions were designed to establish uniform standards for the registration of sex offenders, including a lifetime registration requirement for the most serious offenders. Prior to the passage of the Adam Walsh Act, a gap existed in the law governing how different states track convicted sex offenders."²⁶²

The House Judiciary Committee held hearings prior to the passage of the Adam Walsh Act and heard testimony from National Center for Missing and Exploited Children President and CEO, Ernie Allen, on June 9, 2005.²⁶³ At a hearing titled *Protecting Our Nation's Children from Sexual Predators and Violent Criminals: What Needs to be Done?*, Mr. Allen described in detail the gaps in the then-existing state-by-state registry system, including the very real risk of undetected interstate travel by registered and unregistered sex offenders:

Today, there are 550,000 registered sex offenders in the United States, but at least 100,000 of those offenders are non-compliant—literally, missing.

A great deal of discretion is left to the States—appropriately—in how they implement their registration programs. But the result is that there is a significant lack of consistency and uniformity from State to State. There are loopholes that permit sex offenders to cross State lines and remain undetected. We know that registered sex offenders often forum shop in order to achieve anonymity.

Let me just cite a few examples of the discrepancies we believe exist. In eight States, the burden to notify authorities in the new State to which the offender is moving is solely attached to that offender. So only he has the obligation to tell the State to which he's moving. In two States, neither the offender nor the State authorities are required to notify authorities in the new State. In another three States, this issue is not even addressed in the law.²⁶⁴

Prior to passage of the Adam Walsh Act, Congress considered various proposals for updating the sex offender registry and notification program to fill gaps in the state-by-state registration system. In 2005, the House

261. See S. REP. No. 109-369, at 16 (2007).

262. *Id.* at 16.

263. *Protecting Our Nation's Children from Sexual Predators and Violent Criminals: What Needs to be Done?: Hearing Before the H. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Ernie Allen, Pres. & CEO, Nat'l Ctr. for Missing and Exploited Children).

264. *Id.* at 19-20.

Judiciary Committee issued a report to accompany *House Report 3132*, the Children's Safety Act of 2005.²⁶⁵ The report reflected the Committee's concerns about the limitations in state registry systems that are exposed through interstate travel by sex offenders:

The most significant enforcement issue in the sex offender program is that over 100,000 sex offenders, or nearly one-fifth in the Nation are "missing," meaning that they have not complied with sex offender registration requirements. This typically occurs when the sex offender moves from one State to another. When a sex offender fails to register in a State in which he or she resides, there is no effective system by which the States can notify each other about the change in a sex offender's status. H.R. 3132 will address this problem in several ways.²⁶⁶

The strong record of the intent behind the Act does not stop with the statements within the Congressional Record. In signing the bill into law, President George W. Bush explained his Administration's understanding of the intent behind the bill:

First, the bill I sign today will greatly expand the National Sex Offender Registry by integrating the information in state sex offender registry systems and ensuring that law enforcement has access to the same information across the United States. It seems to make sense, doesn't it? See, these improvements will help prevent sex offenders from evading detection by moving from one state to the next. Data drawn from this comprehensive registry will also be made available to the public so parents have the information they need to protect their children from sex offenders that might be in their neighborhoods.²⁶⁷

X. CONCLUSION

Based on this record, it should be clear that Congress acted within its enumerated powers under the Commerce and Necessary and Proper Clauses of the Constitution when it enacted the Adam Walsh Act and created a uniform system to identify and register sex offenders nationwide. As demonstrated by the text of the Act, the Congressional Record, Committee Reports, and hearing records, Congress acted to cure a gap in the then-existing system to regulate and monitor convicted sex offenders and prevent their undetected movement in interstate and foreign commerce. The fact that members of Congress justified their support and sponsorship

265. H.R. REP. NO. 109-218, at 26 (2005).

266. *Id.*

267. Press Release, The White House, President Signs H.R. 4472, the Adam Walsh Act Child Protection and Safety Act of 2006 (July 27, 2006), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727-6.html>.

2011] THE ADAM WALSH ACT & THE COMMERCE CLAUSE 95

of the legislation by citing specific examples of sex predators who traveled unregistered across state lines to commit offenses further shows that Congress was focused on the interstate movement (i.e., commerce) of sex offenders when the Adam Walsh Act was enacted. Recent academic articles and court decisions claiming that the Adam Walsh Act's SORNA provisions lack a constitutional foundation appear to turn a blind eye to this record. The Act's text and legislative record establish the constitutionality of the registry provisions. Perhaps this is why federal courts have begun overwhelmingly to affirm SORNA's constitutionality under the Commerce and Necessary and Proper Clauses. One can only hope that future courts will follow this trend in the case law and recognize the plainly interstate nature of the problem SORNA was designed to address.

