

Retroactive Application of the Sex Offender Registration and Notification Act: A Modern Encroachment on Judicial Power

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In the past decade, preventing sexual offenses has become a pressing concern throughout the United States. Following a series of kidnappings and rapes committed by individuals who had previously been convicted of similar offenses, legislatures at both state and federal levels passed extensive legislation creating a system of sex offender registration and community notification. The most recent legislation at the federal level is the Sex Offender Registration and Notification Act of 2006, which created stricter registration requirements that apply to a broader class of offenders and extend for longer durations of time than what was mandated by previous federal legislation. Pursuant to a federal regulation, the Act has been applied retroactively to offenders who had already been given registration requirements and durations at the discretion of judges prior to the Act's passage. This retroactive application means that many offenders now face much harsher registration requirements than what a court may have already deemed necessary. Such disposal of judicial determinations raises significant concerns under the separation of powers doctrine, a fundamental feature of American constitutional jurisprudence. An executive regulation overruling judicial decisions places tension on the balance required by the doctrine. This Note examines the conflict and proposes alternative ways to achieve the goal of keeping communities safe without such constitutional tension.

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I. INTRODUCTION

On July 27, 2006, Congress passed expansive legislation reforming federal sex offender registration requirements. The Sex Offender Registration and Notification Act (SORNA), enacted as Title I of the Adam Walsh Child Protection and Safety Act of 2006,¹ required states to pass legislation adhering to a detailed set of standards regarding registration and community notification requirements for sex offenders.² This Act replaced earlier federal statutes that had only required states to have some form of registration and notification requirements, without providing details on how such requirements should be structured or implemented.³ SORNA's detailed registration scheme was intended to establish greater uniformity among states and ensure that all citizens would be informed about potentially dangerous sexual offenders in their communities.⁴ To that end, it classified offenders based on their crimes, and required all sex offenders to keep their registration current for longer durations than what was required under prior federal legislation.⁵ SORNA also created a new federal crime of failing to register pursuant to a state's requirements, punishable by up to ten years in prison.⁶ After SORNA's passage, the U.S. Attorney General issued a regulation, pursuant to the statute, requiring that the new registration scheme be applied to sex offenders who were already registering in compliance with the earlier laws.⁷ This means that many of-

1. 42 U.S.C. § 16901 (2006).

2. States that fail to substantially implement the federally mandated requirements, as determined by the Attorney General each year, "shall not receive 10 percent of the [criminal justice funding from the federal government] that would otherwise be allocated for that fiscal year . . ." 42 U.S.C. § 16925(a).

3. *Id.* §§ 14071–14073, *repealed by* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, tit. I, § 129(A), 120 Stat. 587, 600 (2006).

4. See Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 OHIO ST. J. CRIM. L. 51, 75–76 (2008) (summarizing legislative debates regarding the passage of the Adam Walsh Act).

5. The minimum registration duration that an offender faced under the prior act was ten years. 42 U.S.C. § 14071(b)(6), *repealed by* tit. I, § 129(A). The minimum duration required under SORNA is fifteen years. 42 U.S.C. § 16915(a)(1).

6. 18 U.S.C. § 2250(a) (2006). SORNA's classification system is discussed at length in Part II.

7. 28 C.F.R. § 72.3 (2011). The Ninth Circuit held that this regulation was unconstitutional, but the Supreme Court vacated their ruling for mootness. *U.S. v. Juvenile Male*, 590 F.3d 924 (9th Cir. 2010), *vacated*, 131 S. Ct. 2860 (2011). Thus 28 C.F.R. § 72.3 is still in effect.

fenders face drastically increased requirements with longer durations of registration, and that they can now be prosecuted at the federal level for failing to adhere to those requirements.⁸

This Note examines the constitutionality of the Attorney General's regulation. It focuses specifically on whether this regulation violates the constitutional separation of powers doctrine by mandating changes to prior adjudications. Part II examines the previous federal law regulating sex offender registration, how SORNA changed this framework, and what the Attorney General's regulation applying SORNA retroactively means for offenders convicted before SORNA's passage. Part III examines the separation of powers doctrine and discusses how it serves to protect judicial power. Part IV argues that retroactive application of SORNA violates the separation of powers doctrine by overruling judicial decisions, and proposes solutions that would avoid this constitutional problem.

II. A HISTORY OF FEDERAL SEX OFFENDER REGISTRATION LAWS

A. BACKGROUND

Before SORNA's passage, federal legislation addressing sex offender registration and community notification requirements was not comprehensive, and individual states filled in the gaps with their own registration regimes.⁹ Sex offender registration became a pressing concern for legislators beginning in the late 1980s and early 1990s, following several abductions and murders committed

8. § 72.3. ("Example 1. A sex offender is federally convicted of aggravated sexual abuse under 18 U.S.C. 2241 in 1990 and is released following imprisonment in 2007. The sex offender is subject to the requirements of the Sex Offender Registration and Notification Act and could be held criminally liable under 18 U.S.C. 2250 for failing to register or keep the registration current in any jurisdiction in which the sex offender resides, is an employee, or is a student."). For many offenders, this means that to avoid criminal liability, they must now register for much longer time periods. *See, e.g.*, Amended Complaint for Declaratory and Injunctive Relief at 3–6, *ACLU of Nevada v. Cortez Masto*, 719 F. Supp. 2d 1258 (D. Nev. 2008) (No. 08-CV-00822); Brief of Appellants at 1–4, *State v. Bodyke*, 933 N.E.2d 753 (Ohio 2010) (No. 2008-2502). The defendants in these cases had been required to register for as little as ten years under prior law, but under SORNA, some had to register for the rest of their lives.

9. Lucy Berliner, *Sex Offenders: Policy and Practice*, 92 NW. U. L. REV. 1203, 1216 (1998).

by individuals who had prior convictions for sex offenses.¹⁰ The 1994 rape and murder of seven-year-old Megan Kanka by a twice-convicted sex offender in New Jersey enraged the public and pushed the issue to the top of the legislative agenda in New Jersey and in the federal government.¹¹ Less than three months later, New Jersey enacted “Megan’s Law,” requiring sex offender registration and community notification by public officials.¹² Congress also took action, passing its own sex offender legislation later that year and adding a community notification requirement two years later.¹³ The idea behind these laws was that individuals who had already been convicted of a sex offense would likely attempt to commit similar crimes, and forcing them to publicly register their addresses would allow parents to protect their children more effectively.¹⁴ To that end, they required sex offenders who were not incarcerated to register with the police department in the municipality where they resided and then verify their address according to a predetermined schedule (usually every ninety days or annually).¹⁵

The remainder of this Part provides a brief history of the federal legislation addressing sex offender registration and notification and the constitutional challenges that have been raised against it.

10. ERIC S. JANUS, *FAILURE TO PROTECT: AMERICA’S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE* 14 (2006).

11. *Id.* at 15.

12. *Id.* at 16.

13. *Id.* This legislation is discussed in depth in Part II.B.

14. See Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435, 454 (2010). Professor Yung argues that this rationale for sex offender registration is flawed. While it is widely believed that sex offender recidivism rates are extremely high, a 2003 Department of Justice study found that these rates are significantly lower than earlier figures that legislatures and courts have relied upon. *Id.*

15. See Robert J. Martin, *Pursuing Public Protection Through Mandatory Community Notification of Convicted Sex Offenders: The Trials and Tribulations of Megan’s Law*, 6 B.U. PUB. INT. L.J. 29, 37–38 (1996); Yung, *supra* note 14, at 451. Many registration laws also require offenders to register the addresses of their places of employment and education as well as their residences. *Id.* at 451. How often offenders must verify their registration and how long they must continue to do so varies, and is discussed thoroughly in the remainder of this Note. See *id.* at 470. For purposes of this Note, the terms “registration” and “registration requirements” refer to an offender’s initial registration and continued verification of his address(es).

B. THE WETTERLING ACT

The first federal sex offender legislation was the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, enacted in 1994.¹⁶ The Wetterling Act was in effect for twelve years before being repealed and replaced by SORNA.¹⁷ It required states to establish programs requiring anyone convicted of a sexually violent offense to register a current address.¹⁸ Most offenders would be required to register for ten years from the date of their release from prison, but “sexually violent predators” could be required to register for the rest of their lives.¹⁹ The Act, which defined “sexually violent predator” as “a person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses,”²⁰ assigned the determination of whether or not a sex offender was a “sexually violent predator” to the courts.²¹ Judges were required to hear recommendations from behavioral experts, victims’ rights advocates, and law enforcement officers before finding that an offender was a sexually violent predator.²² Two years after the Wetterling Act was passed, Congress added a requirement that states establish a system of community notification to inform residents of sex offenders residing in their communities.²³

All fifty states quickly complied with the Wetterling Act, passing their requirements for sex offender registration and community notification.²⁴ Most of these statutes were passed without extensive consideration, and registration requirements and community notification provisions quickly became a general expecta-

16. 42 U.S.C. §§ 14071–14073, *repealed by* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, tit. I, § 129(A), 120 Stat. 587, 600 (2006).

17. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, tit. I, § 129(A), 120 Stat. 587, 600 (2006).

18. 42 U.S.C. § 14071(a)(1), *repealed by* tit. I, § 129(A).

19. 42 U.S.C. § 14071(b)(6), *repealed by* tit. I, § 129(A).

20. 42 U.S.C. § 14071(a)(3)(C), *repealed by* tit. I, § 129(A).

21. 42 U.S.C. § 14071(a)(2), *repealed by* tit. I, § 129(A).

22. 42 U.S.C. § 14071(a)(2)(A), *repealed by* tit. I, § 129(A).

23. ERIC S. JANUS, *FAILURE TO PROTECT: AMERICA’S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE* 16 (2006).

24. *Id.*

tion across the country.²⁵ States developed their own methods to distinguish offenders, generally requiring some classes of offenders to adhere to more stringent registration and notification requirements.²⁶ Some states used a “conviction-based” system, assigning requirements based on the nature of the crime the offender was convicted of, while others used a “risk-based” system, assigning requirements based on an individual offender’s risk of recidivism.²⁷ As of 1999, nineteen states used conviction-based systems.²⁸ The exact method of determining an offender’s risk of recidivism varies, but most states using risk-based systems require some type of hearing in which a court would decide whether an offender’s risk level was high enough that he should be considered a sexually violent predator and given more stringent registration and notification requirements.²⁹ In some states, these judicial determinations are based on the judge’s own opinions.³⁰ In others, courts rule after hearing evidence from experts or recommendations from specialized boards.³¹

Requiring sex offenders to verify their residences long after any criminal sentence ended raised new legal issues. As sex offender registration became widespread, therefore, offenders be-

25. *Id.*

26. Logan, *supra* note 4, at 77–78. In New York, for example, a board of examiners of sex offenders was created to assess offenders’ risk of recidivism. N.Y. CORRECT. LAW § 168-l (McKinney 2011). It bases such assessments on various factors, including the details of the crime committed, the offender’s criminal history, and psychological profiles. *Id.* The board uses this assessment to make a recommendation to a court, which then determines whether an offender was a sexual predator, sexually violent offender, or predicate sex offender. *Id.* § 168-n(1). These classifications correspond to specific registration durations; an offender who is placed into one of these categories must register annually for life, while an offender who is not given one of the labels must register annually for twenty years. *Id.* § 168-h.

27. See Logan, *supra* note 4, at 77–78. For an example of a conviction-based system, see DEL. CODE ANN. tit. 11, § 4121 (West 2011) (categorizing offenders into “Risk Assessment Tiers” according to their crime of conviction). For examples of risk-based systems, see Wayne A. Logan, *A Study in “Actuarial Justice”: Sex Offender Classification Practice and Procedure*, 3 BUFF. CRIM. L. REV. 593, 606–19 (2000). Professor Logan presents details about the systems in states such as Maryland, Ohio, and Wyoming. At the time of his article, all three states required courts to make discretionary judgments about an offender’s risk level before the offender could be categorized in anything above the lowest category. *Id.* at 608–609, 616.

28. Logan, *supra* note 27, at 603 & n.38. The remaining states use risk-based classification systems. *Id.* at 603.

29. For a detailed survey of state practices, see *id.* at 606–19.

30. *Id.* at 616 (describing Wyoming’s system requiring an in camera hearing).

31. *Id.* at 617–18; see also *supra* note 26 (discussing New York State’s classification system).

gan to challenge their states' registration systems.³² The legitimacy of such statutes was confirmed in 2003, when the Supreme Court upheld the sex offender registration and notification statutes in Alaska and Connecticut.³³ In *Smith v. Doe*, the Court addressed Alaska's statute, which created a registry for offenders who, like the plaintiffs in the case, had been convicted of crimes before the statute was adopted.³⁴ The plaintiffs argued that imposing registration requirements on them violated the *ex post facto* clause of the U.S. Constitution.³⁵ In order to prevail on their claim, the plaintiffs needed to demonstrate that the statute was retrospective, and that its effects were punitive in nature.³⁶ The Court acknowledged that Alaska's registration and notification statute was retrospective, since it plainly applied to events that occurred before its enactment.³⁷

However, the Court also held that the law's effects were not punitive.³⁸ The Court looked to five factors in reaching this decision. First, it determined that listing an offender in the state registry was not analogous to traditional shaming punishments, since such a listing was simply distributing information that was already public record.³⁹ Second, it found that the statute did not impose an affirmative restraint — offenders were free to move or change jobs as they wished, as long as they updated their regis-

32. Corey Rayburn Yung, *One of these Laws is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 HARV. J. ON LEGIS. 369, 372–73 (2009).

33. Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003); *Smith v. Doe*, 538 U.S. 84 (2003).

34. *Smith*, 538 U.S. at 89.

35. *Id.* at 91.

36. *Weaver v. Graham*, 450 U.S. 24, 29 (1981) ("In accord with these purposes, our decisions prescribe that two critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." (internal citations omitted)).

37. *Smith*, 538 U.S. at 90.

38. *Id.* at 96.

39. *Id.* at 98–99. Respondents had argued that publishing individuals' statuses as sexual offenders closely resembled colonial punishments that involved public shaming, such as whipping, pillory, branding, and banishment. *Id.* at 97–98. The Court conceded that this was a concern, since the use of any traditional form of punishment would indicate that Alaska had intended the sex offender registry to be punitive. *Id.* at 97. It decided, however, that the state's goal was not to invite public ridicule, which had been the key aspect of colonial shaming punishments. *Id.* at 98–99.

tration.⁴⁰ The Court also found that the statute did not serve traditional aims of punishment, and was not punitive solely because it had a deterrent effect, as the plaintiffs had argued.⁴¹ The Court explained that the law served a deterrent function, but that this function did not necessarily indicate a punitive intent.⁴² The Court noted that various other governmental programs also often serve deterrent functions, and holding that the presence of that function alone meant that such regulations were criminal in nature “would severely undermine the Government’s ability to engage in effective regulation.”⁴³ Finally, the Court held that the statute was rationally connected to the non-punitive purpose of public safety.⁴⁴ Based on all of these factors, the Court concluded Alaska’s statute was not punitive, and therefore was not an unconstitutional ex post facto law.⁴⁵

In *Connecticut Department of Public Safety v. Doe*, the Supreme Court rejected a similar constitutional challenge to Connecticut’s sex offender registration and notification act.⁴⁶ The petitioners argued that under the Due Process Clause of the Fourteenth Amendment, offenders were entitled to a hearing before they could be listed on the state’s sex offender registry.⁴⁷ The Court held that the Constitution’s procedural due process requirement did not mandate such a hearing.⁴⁸ Connecticut’s statute required that offenders be listed on the state registry based solely on their convictions for sexual offenses, and not on case-by-case assessments of the offenders’ danger to others.⁴⁹ Since an offender’s registry listing was simply a listing of his past convictions and not a reflection of his dangerousness, the Court concluded that there was no procedural due process violation.⁵⁰ The

40. *Id.* at 99–100.

41. *Id.* at 102.

42. *Id.*

43. *Id.* (quoting *Hudson v. United States*, 522 U.S. 93, 105 (1997)).

44. *Id.* at 102–03. The Ninth Circuit had ruled that the statute was excessive in relation to this purpose, but the Supreme Court disagreed. *Id.* at 103. It found that sex offender recidivism was a legitimate concern and threat to public safety, and that publicizing the sex offender registry served to mitigate that threat. *Id.* at 102–03.

45. *Id.* at 105–06.

46. *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1 (2003).

47. *Id.* at 6.

48. *Id.* at 8.

49. *See id.* at 4, 7.

50. *Id.* at 7–8. The Court suspected that the respondent intended to raise a substantive due process claim, but the respondent’s brief raised only procedural claims. *Id.* at 8.

Court refrained, however, from deciding whether Connecticut's law violated substantive due process principles.⁵¹

These decisions upholding the Alaska and Connecticut laws were the only opinions the Supreme Court issued regarding the constitutionality of sex offender registration and community notification statutes in the decade after they became so widespread. Since statutes were substantially similar throughout the country, however, the decisions effectively foreclosed challenges to other state registration systems.⁵² Since the *Smith* decision, most states have followed Alaska's example and included past offenders in their sex offender registries.⁵³

C. THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT

More than a decade after the passage of the Wetterling Act and the ensuing state legislation, Congress passed the Adam Walsh Child Protection and Safety Act of 2006, which included SORNA.⁵⁴ The Act arose from a concern that variations in state requirements were allowing hundreds of thousands of sex offenders to exploit loopholes and therefore avoid having to register if they moved between jurisdictions.⁵⁵ To address this issue, SORNA lays out a comprehensive set of national requirements for sex offender registration.⁵⁶ To ensure that states followed the new, comprehensive framework, SORNA also provides that states

Since the question was not properly before the Court, it did not address the details of such an argument and expressed no opinion on the issue. *Id.*

51. *Id.*

52. See Yung, *supra* note 32, at 369–70 (2009) (“The Supreme Court opinions seemingly ensured that registries would remain a permanent fixture of America’s sex offender policy.”).

53. See *id.* at 377.

54. 42 U.S.C. §§ 16901–16991 (2006); see also Logan, *supra* note 4, at 72–74. The Act was named after Adam Walsh, who disappeared in 1981 and was ultimately found dead. Logan, *supra* note 4, at 60, 74. His parents subsequently headed the national crusade for increased control of sex offenders, adopting the idea that the country would be safer for children if sex offenders’ whereabouts were known. *Id.* at 60.

55. *Id.* at 74–75. The seriousness of this problem is not entirely clear, however. Members of Congress repeatedly referred to loopholes created by state legislation as a concern, but did not provide evidentiary support of how this actually affected sex offender registration. Wayne A. Logan, *Sex Offender Registration and Community Notification: Past, Present, and Future*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 7–8 (2008).

56. See Logan, *supra* note 4, at 74–75.

risk losing a portion of federal law enforcement funding if they do not pass legislation complying with these requirements.⁵⁷

SORNA includes two particularly notable provisions. First, it creates a new federal crime for failure to register.⁵⁸ Under the Wetterling Act, states were free to establish their own criminal penalties for sex offenders who failed to register pursuant to their requirements, and there was no federally mandated enforcement mechanism.⁵⁹ SORNA makes failure to register a federal felony and also mandates a minimum ten-year imprisonment sentence.⁶⁰ After SORNA's enactment, federal law enforcement authorities quickly began marshaling resources to investigate and prosecute individuals for failing to register.⁶¹ Not surprisingly, this immediately became a controversial aspect of the new legislation, and convictions under this provision have been challenged frequently.⁶²

The second notable aspect of SORNA is its tiered registration requirement framework. The Act divides sex offenders into three tiers based on the type of crime.⁶³ Tier III encompasses the most severe crimes, and Tier I the least severe.⁶⁴ A Tier III offender is a sex offender who has been convicted of sexual abuse or abusive

57. 42 U.S.C. § 16925(a) (2006). As of October 1, 2011, however, only fifteen states have been deemed to be in compliance. *Adam Walsh Child Protection and Safety Act*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/?tabid=12696> (last modified Oct. 27, 2011). Many states have expressed reservations about SORNA provisions, including its retroactivity and its registration requirements for juveniles. Logan, *supra* note 4, at 82–83. Other states, such as Illinois, determined that the costs of full compliance were so high that it was not in their financial interest to adopt the federal Act in full. Liz Winiarski, *Facing the Compliance Deadline for the Adam Walsh Child Protection and Safety Act, States Are Weighing All the Costs*, 14 PUB. INT. L. REP. 192, 192–93 (2009). Even if most states do not adopt the SORNA provisions in full, however, they still apply to all sex offenders at the federal level. Any sex offender who moves between states will be subject to the federal requirements, and can be convicted under SORNA if he fails to follow them. 18 U.S.C. § 2250 (2006).

58. 18 U.S.C. § 2250.

59. Logan, *supra* note 4, at 68–69.

60. 18 U.S.C. § 2250(a).

61. Yung, *supra* note 14, at 452–53.

62. *See, e.g.*, United States v. Ambert, 561 F.3d 1202 (11th Cir. 2009); United States v. Hinckley, 550 F.3d 926 (10th Cir. 2008); United States v. May, 535 F.3d 912 (8th Cir. 2008); 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. Powers, 544 F. Supp. 2d 1331 (M.D. Fla. 2008), *vacated*, 562 F.3d 1342 (11th Cir. 2009). This Note discusses the general lack of success in these challenges in Part II.D.

63. 42 U.S.C. § 16911 (2006).

64. *Id.*

sexual conduct against a minor under age 13; kidnapping a minor in the course of a sex offense; or any sex offense or attempted sex offense punishable by more than one year in prison after previously committing a Tier II offense.⁶⁵ Tier II includes offenders who have been convicted of certain crimes against a minor, including sex trafficking, coercion and enticement, and abusive sexual conduct.⁶⁶ An offender also falls into Tier II by using a minor in a sexual performance, soliciting a minor to engage in prostitution, or producing or distributing child pornography.⁶⁷ A Tier I offender who is convicted of a subsequent offense also becomes a Tier II offender.⁶⁸ Tier I encompasses every offender who does not meet the specific criteria of Tiers II and III.⁶⁹

These tiers determine the duration of an offender's registration requirements.⁷⁰ SORNA's provisions require sex offenders to keep their registration current for a specific period of time, which can be reduced in some cases if an offender maintains a clean record.⁷¹ Tier I offenders must keep their registration current for fifteen years,⁷² while Tier II offenders must do so for twenty-five years,⁷³ and Tier III offenders must keep their registration current for the remainder of their lives.⁷⁴

1. *Comparing the Wetterling Act and SORNA*

The tiered framework in SORNA was a significant change from the Wetterling Act. While the Wetterling Act applied only to individuals who had been convicted of a sexually violent crime,⁷⁵ SORNA expanded the category of individuals required to register to include anyone convicted of any sex offense.⁷⁶ SORNA

65. *Id.* § 16911(4).

66. *Id.* § 16911(3)(A).

67. *Id.* § 16911(3)(B).

68. *Id.* § 16911(3)(C).

69. *Id.* § 16911(2).

70. *Id.* § 16915(a).

71. *Id.* § 16915(b).

72. *Id.* § 16915(a)(1).

73. *Id.* § 16915(a)(2).

74. *Id.* § 16915(a)(3).

75. *Id.* § 14071, *repealed by* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, tit. I, § 129(A), 120 Stat. 587, 600 (2006).

76. 42 U.S.C. § 16911(1).

also expanded the definition of “sex offense” itself.⁷⁷ Under SORNA, a sex offense is any criminal offense involving a sexual act or sexual contact, as well as certain specified offenses against a minor.⁷⁸ “Sexually violent offense” under the Wetterling Act, on the other hand, encompassed only that narrower range of offenses involving sexual abuse.⁷⁹ Thus, by expanding the class of individuals covered, the SORNA requirements affect a much larger group of offenders.

The Wetterling Act also did not specify how states should distinguish between different sex offenders, and the only duration requirement it imposed was a standard of ten years, with an increase to lifetime registration for sexually violent predators.⁸⁰ SORNA, on the other hand, not only reaches a larger group of people, but also requires them to register more often and for a longer time period. It mandates a conviction-based system of classification, establishing specific requirements based on an individual’s particular crime, but not necessarily on his mental state or risk of recidivism.⁸¹ As discussed earlier, since the Wetterling Act had not specified a method for differentiating various sex offenders, states took varying approaches.⁸² Before SORNA was enacted, some states already used a conviction-based system in which an offender’s registration requirements were based on his individual crime, but other states used a risk-based method, leaving it to judges to decide how dangerous an offender was.⁸³ SORNA requires states to adopt its tier-based approach, forcing those states that used risk-based determinations to make a major

77. 42 U.S.C. § 16911(5).

78. *Id.* The specified offenses against minors include some sexual offenses such as solicitation to engage in sexual conduct and use in a sexual performance, but also include the broader offenses of kidnapping and false imprisonment. *Id.* § 16911(7).

79. *Id.* § 14071(3)(B), *repealed by* tit. I, § 129(A). Sexually violent offenses were the only type of sex offenses covered by the Wetterling Act at all; it provided no definitions for other classes of offenses. *Id.* Therefore, an individual who had committed a crime of a sexual nature but not involving sexual abuse would not have been required to register as a sex offender under the Wetterling Act, but would almost definitely be required to register under SORNA.

80. 42 U.S.C. § 14071, *repealed by* tit. I, § 129(A).

81. *Id.*

82. *See supra* notes 24–31 and accompanying text (discussing conviction-based and risk-based systems enacted by states); *see also* Logan, *supra* note 4, at 77.

83. Logan, *supra* note 4, at 77 (distinguishing between conviction-based and risk-based systems).

change in their approach to sex offender registration requirements.

2. SORNA's Retroactivity Regulation

SORNA left open the question of whether its new, stricter registration requirements applied to sex offenders convicted prior to the statute's enactment. Congress specifically delegated this decision to the Attorney General, granting him "the authority to specify the applicability of the requirements of [SORNA] to sex offenders convicted before July 27, 2006, or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders"⁸⁴ Pursuant to this provision, Attorney General Alberto Gonzalez issued a regulation on February 28, 2007, explicitly applying the SORNA requirements to "all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act."⁸⁵ Based on this regulation, offenders who had been convicted before July 2006 and had been given registration requirements by a judge at the time of their conviction were suddenly placed into one of SORNA's three tiers and given new registration requirements based on that placement.⁸⁶ For some offenders, this constituted only a minor change; for example, if an offender had been convicted of a misdemeanor crime and given the ten-year standard registration requirement under the Wetterling Act, his or her registration duration increased by only five years.⁸⁷ Other offenders, however, faced extreme changes in their requirements. If an offender had been given only a ten-year registration period based on his assessed risk, but now fell into SORNA's Tier III based on his crime, he suddenly was required to register for the rest of his life.⁸⁸

84. 42 U.S.C. § 16913(d).

85. 28 C.F.R. § 72.3 (2011).

86. *Id.*

87. While an increase from ten to fifteen years is certainly not insignificant, it is relatively minor compared to the increase from ten years to life that other offenders faced.

88. There is no public estimate of the number of offenders whose registration requirements have increased pursuant to the SORNA regulation. The best examples of such offenders can be found in challenges to state laws adopting SORNA's tiered registration structure. In a challenge to Nevada's version of the law, for example, the nineteen anonymous plaintiffs consisted almost entirely of individuals who had been adjudicated low-risk offenders, but were being forced to register as Tier III offenders

D. CONSTITUTIONAL CHALLENGES TO THE SEXUAL OFFENDER REGISTRATION AND NOTIFICATION ACT

Many offenders have challenged the provisions of SORNA and the broader Walsh Act, including the new registration regime, as well as the Attorney General's regulation applying it retroactively. Most courts have found that the Act is constitutional.⁸⁹ A few federal district courts have upheld challenges to specific provisions or applications of the law, but most of these decisions have been overruled by circuit courts.⁹⁰ Most cases have not reached the Supreme Court, however, so there is not a precedent set by the highest court that applies to most provisions of SORNA. So far, the Supreme Court has heard only two cases regarding provisions of the Walsh Act.

under the new legislation. Amended Complaint for Declaratory and Injunctive Relief at 3–6, *ACLU of Nevada v. Cortez Masto*, 719 F. Supp. 2d 1258 (D. Nev. 2008) (No. 08-CV-00822). One plaintiff had not been required to register at all prior to the new law. *Id.* at 4. The appellants in a challenge to Ohio's version of SORNA were similarly situated. Two of three appellants were being shifted from low-risk offenders to Tier III offenders, and the other from medium-risk to Tier III. Brief of Appellants at 1–4, *State v. Bodyke*, 933 N.E.2d 753 (Ohio 2010) (No. 2008-2502).

89. *See, e.g.*, *United States v. Pendleton*, 636 F.3d 78 (3d Cir. 2011) (holding that SORNA was a valid exercise of Commerce Clause power); *United States v. DiTomasso*, 621 F.3d 17 (1st Cir. 2010) (holding that SORNA did not violate the Commerce Clause, the Ex Post Facto Clause, or defendant's due process rights); *United States v. Begay*, 622 F.3d 1187 (9th Cir. 2010) (holding that SORNA's application did not violate the Due Process Clause or the Ex Post Facto Clause), *cert. denied*, 131 S. Ct. 3026, 3027 (2011); *United States v. Romeo*, 385 F. Appx. 45 (2d Cir. 2010) (holding that SORNA did not violate the Commerce Clause or the non-delegation doctrine); *United States v. Ambert*, 561 F.3d 1202 (11th Cir. 2009) (holding that SORNA did not violate the Commerce Clause, Ex Post Facto Clause, or Due Process Clause).

90. *See, e.g.*, *United States v. Guzman*, 582 F. Supp. 2d 305 (N.D.N.Y. 2008) (holding that SORNA's registration provision violated the Commerce Clause), *rev'd*, 591 F.3d 83 (2d Cir. 2010), *cert. denied*, 130 S. Ct. 3487 (2010); *United States v. Hall*, 577 F. Supp. 2d 610 (N.D.N.Y. 2008) (holding that SORNA's registration provision violated the Commerce Clause), *rev'd*, 591 F.3d 83 (2d Cir. 2010), *cert. denied*, 130 S. Ct. 3487 (2010); *United States v. Waybright*, 561 F. Supp. 2d 1154 (D. Mont. 2008) (holding that application of SORNA to all offenders, whether or not they travelled in interstate commerce, was an invalid exercise of Commerce Clause power), *overruled by* *United States v. George*, 625 F.3d 1124 (9th Cir. 2010). *See also* *United States v. Nasci*, 632 F. Supp. 2d 194 (N.D.N.Y. 2009) (holding that SORNA's registration provision violates the Commerce Clause). While this case has not been explicitly overruled, the court pointed out that its facts and the constitutional issues it raised paralleled those of *Hall* and *Guzman*. *Id.* at 196. The Second Circuit's subsequent *Guzman* decision should therefore be viewed as implicitly overruling *Nasci* as well. *See Guzman*, 591 F.3d at 86 (ruling that SORNA was valid under the Commerce Clause and reinstating indictments for failing to register pursuant to SORNA's requirements).

In *United States v. Comstock*, the Court held that the Act's federal civil commitment provision was valid under the Necessary and Proper Clause.⁹¹ This provision authorizes district courts to order civil commitment of an individual extending beyond his prison sentence if he has "engaged or attempted to engage in sexually violent conduct or child molestation," "suffers from a serious mental illness, abnormality, or disorder," and is "sexually dangerous to others" as a result of that condition, in that "he would have serious difficulty in refraining from sexually violent conduct or child molestation if released."⁹² The respondents in the case claimed that this provision violated multiple constitutional principles, including the double jeopardy clause, the Ex Post Facto Clause, the Due Process Clause, the Commerce Clause, the Necessary and Proper Clause, and the Sixth and Eighth Amendments.⁹³ The Court limited its analysis to whether Congress had authority to enact this provision under the Necessary and Proper Clause.⁹⁴ Its opinion in this case was fairly narrow; the Court explicitly refrained from ruling on any other constitutional issues or on any other SORNA provisions, so the decision does not have a broad impact on the application of SORNA as a whole.⁹⁵

Soon after *Comstock*, in *Carr v. United States*, the Court addressed the issue of whether SORNA's failure-to-register crime applied to offenders whose interstate travel had occurred before the Act's passage.⁹⁶ Carr argued that applying the provision to offenders who had engaged in interstate travel only before SORNA's enactment would be a violation of the Ex Post Facto Clause.⁹⁷ The Court held that the crime applied only to offenders who had traveled in interstate commerce after the Act's enactment, but based this decision only on the statutory language it-

91. 130 S. Ct. 1949, 1954 (2010).

92. 18 U.S.C. §§ 4247(a)(5)–(6), 4248(d) (2006).

93. *Comstock*, 130 S. Ct. at 1955.

94. *Id.* at 1956 ("In resolving that question, we assume, but we do not decide, that other provisions of the Constitution — such as the Due Process Clause — do not prohibit civil commitment in these circumstances.")

95. *Id.* at 1956, 1965 ("We do not reach or decide any claim that the statute or its application denies equal protection of the laws, procedural or substantive due process, or any other rights guaranteed by the Constitution.")

96. 130 S. Ct. 2229, 2232–33 (2010).

97. *Id.* at 2234.

self.⁹⁸ It found that the statutory language itself imposed criminal liability only upon offenders who engaged in interstate travel without adhering to their SORNA requirements; therefore, it could not apply to offenders who traveled *prior* to the effective date of the SORNA requirements.⁹⁹ Since the Court held that the statute itself did not impose criminal liability based on pre-SORNA travel, it did not address the Ex Post Facto Clause question.¹⁰⁰ Therefore, this case, like *Comstock*, did not have any broader implication for the constitutionality of the SORNA requirements in general. Since the Court did not address any constitutional issue, the case does not establish any constitutional precedent.

Lower federal courts and state courts have heard many more cases challenging the constitutionality of SORNA on various grounds. Federal district courts have heard numerous cases brought by defendants challenging their convictions for failing to register under SORNA, but the vast majority of the challenges have been unsuccessful.¹⁰¹ The few district court decisions that have found constitutional violations have often been overturned by subsequent appellate review.¹⁰² Federal courts of appeals, in

98. *Id.* at 2241–42.

99. *Id.* at 2235–36.

100. *Id.* at 2242. Carr had relocated from Alabama to Indiana in late 2004 or early 2005, before SORNA was passed. *Id.* at 2233. Only this pre-SORNA travel was at issue. *Id.*

101. Yung, *supra* note 32, at 384–86 (2009); *see, e.g.*, *United States v. Stevens*, 578 F. Supp. 2d 172 (D. Me. 2008) (holding that SORNA's application to a sex offender who travelled in interstate commerce after it was enacted did not violate the Ex Post Facto Clause); *United States v. Thomas*, 534 F. Supp. 2d 912 (N.D. Iowa 2008) (holding that SORNA's failure to register crime was a valid exercise of congressional power under the Commerce Clause); *United States v. Samuels*, 543 F. Supp. 2d 669 (E.D. Ky. 2008) (holding that prosecution under SORNA did not violate the Due Process Clause or the Ex Post Facto Clause even though defendant's interstate travel had occurred before SORNA); *United States v. LeTourneau*, 534 F. Supp. 2d 718 (S.D. Tex. 2008) (holding that defendant's knowledge of his registration requirements under state law constituted adequate notice under SORNA).

102. *See, e.g.*, *United States v. Guzman*, 582 F. Supp. 2d 305 (N.D.N.Y. 2008) (holding that SORNA's registration provision violated the Commerce Clause), *rev'd*, 591 F.3d 83 (2d Cir. 2010), *cert. denied*, 130 S. Ct. 3487 (2010); *United States v. Waybright*, 561 F. Supp. 2d 1154 (D. Mont. 2008) (holding that application of SORNA to all offenders, whether or not they travelled in interstate commerce, was an invalid exercise of Commerce Clause power), *overruled by* *United States v. George*, 625 F.3d 1124 (9th Cir. 2010); *United States v. Powers*, 544 F. Supp. 2d 1331 (M.D. Fla. 2008) (holding that the creation of the failure-to-register crime was beyond the scope of congressional power under the Commerce Clause), *vacated and remanded*, 562 F.3d 1342 (11th Cir. 2009).

fact, appear to have universally rejected constitutional challenges to SORNA convictions for failure to register.¹⁰³ Several have held specifically that convictions under SORNA for failing to register do not violate the Ex Post Facto clause, even if the underlying sex offense conviction occurred before SORNA's passage.¹⁰⁴ Interestingly, courts have generally relied upon *Smith v. Doe* as a basis for these decisions, even though that case addressed a somewhat different issue.¹⁰⁵ While *Smith* addressed Ex Post Facto Clause concerns regarding sex offender registration requirements, it only held that requiring offenders to register and update their registration upon relocation was not an ex post facto law.¹⁰⁶ SORNA goes further than the Alaska law that the Supreme Court addressed in *Smith* — it creates a federal crime for failing to register, and through the Attorney General's regulation, it imposes increased registration requirements for offenders in risk-based states who were already given requirements based on their level of dangerousness.¹⁰⁷ There are substantive differences between SORNA and the Wetterling Act, and circuit courts' reliance on *Smith* suggests that they may not fully be taking these differences into account.¹⁰⁸

At least one state court has struck down retroactive application of the SORNA registration requirements.¹⁰⁹ Ohio was the

103. See *United States v. Kendrick*, 647 F.3d 732 (7th Cir. 2011); *United States v. Kebodeaux*, 647 F.3d 137 (5th Cir. 2011), *reh'g granted*, 647 F.3d 605 (5th Cir. 2011); *United States v. Burns*, 418 Fed. Appx. 209 (4th Cir. 2011); *United States v. Pendleton*, 636 F.3d 78 (3d Cir. 2011), *petition for cert. filed*; *United States v. Guzman*, 591 F.3d 83 (2d Cir. 2010), *cert. denied*, 130 S. Ct. 3487 (2010); *United States v. George*, 625 F.3d 1124 (9th Cir. 2010); *United States v. DiTomasso*, 621 F.3d 17 (1st Cir. 2010); *United States v. Ambert*, 561 F.3d 1202 (11th Cir. 2009); *United States v. Hinckley*, 550 F.3d 926 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 2383 (2009); *United States v. May*, 535 F.3d 912 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 2431 (2009); *But see United States v. Utesch*, 596 F.3d 302 (6th Cir. 2010) (reversing defendant's conviction based on a finding that the Attorney General's retroactivity regulation violated the Administrative Procedure Act). Since the court found that the regulation could not apply to the defendant because of procedural problems, it did not reach any of the defendant's constitutional challenges to his conviction. *Id.* at 313.

104. *Ambert*, 561 F.3d at 1207; *Hinckley*, 550 F.3d at 936; *May*, 535 F.3d at 919.

105. Yung, *supra* note 32, at 386. Courts seem to treat *Smith* as standing for the broad proposition that the Ex Post Facto Clause is never implicated by sex offender registration requirements. *Id.* at 392–93.

106. See *Smith v. Doe*, 538 U.S. 84, 105–06 (2003).

107. See *supra* Part II.C.2.

108. See *supra* Part II.C.1 (comparing the Wetterling Act and SORNA).

109. *State v. Bodyke*, 933 N.E.2d 753 (Ohio 2010).

first state to comply with SORNA.¹¹⁰ Its statute, like the federal version, mandated new registration requirements for offenders who had already been given registration requirements by a judge.¹¹¹ Several offenders — including one whose registration requirement would have ended after ten years but had been extended to life under the new regulations — challenged this application of the statute.¹¹² The Ohio Supreme Court held that the retroactive application provision of the statute violated the separation of powers doctrine, and struck down that portion of the statute.¹¹³ While this state court decision is not controlling at the federal level, it is significant that the highest court of the first state to comply with the federal law has found that its analogous state law cannot constitutionally be applied retroactively. Retroactive application of the federal Act may suffer from the same constitutional flaw.¹¹⁴

III. THE SEPARATION OF POWERS DOCTRINE

The separation of powers doctrine has long been recognized as one of the fundamental principles controlling the American system of government.¹¹⁵ While the doctrine itself is not explicitly referenced in the text of the Constitution, it was an important

110. *Id.* at 759 n.4.

111. *Id.* at 759–60. Unlike the federal statute, Ohio's version included this retroactivity provision in its statutory language. *Id.* The Ohio statute required the Ohio Attorney General to classify all prior offenders into the appropriate categories and impose new registration requirements pursuant to those classifications. *Id.*

112. *Id.* at 761; Brief of Appellants at 1–4, *State v. Bodyke*, 933 N.E.2d 753 (Ohio 2010) (No. 2008-2502). The offenders challenged the statute's application on several grounds, claiming that it violated the Ex Post Facto Clause of the federal constitution, the retroactivity clause of Ohio's constitution, the double jeopardy clause of both the state and federal constitutions, and the separation of powers doctrine, and that it constituted cruel and unusual punishment under both the state and federal constitutions. Brief of Appellants at 4. The Court struck down the retroactive application portion of the statute solely based on the separation of powers argument, and therefore did not address any of the other claims. *Bodyke*, 933 N.E.2d at 756.

113. *Bodyke*, 933 N.E.2d at 756. This Note applies much of the *Bodyke* court's reasoning to the analysis of SORNA in relation to the federal separation of powers doctrine. *See infra* Parts III–IV.

114. So far, this issue has not been raised in regard to other state registration and notification laws. This is not surprising, however, since only fifteen states have been deemed in substantial compliance with the federal SORNA requirements. *See supra* note 57.

115. *See, e.g., Kilbourn v. Thompson*, 103 U.S. 168, 190–91 (1880).

consideration for the Framers of the Constitution.¹¹⁶ Leading up to the ratification of the Constitution, the Framers discussed at great length the idea of vesting unique powers in separate branches of government.¹¹⁷ The language of the final document explicitly grants legislative powers to Congress,¹¹⁸ executive powers to the President,¹¹⁹ and judicial power to the Supreme Court and lower courts established by Congress.¹²⁰ This fundamental division has been central to American jurisprudence since the Constitution's ratification. As the Supreme Court explained more than a century ago:

It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. . . . It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.¹²¹

Today, the separation of powers doctrine seems to be universally accepted, and is not often a subject of litigation.¹²² Still, certain modern cases indicate that the doctrine remains a very important consideration. In 1998, for example, Justice Kennedy discussed at length separation of powers concerns in his *Clinton*

116. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219–23 (1995) (discussing the background that led the Framers to focus on separating power between multiple branches of government); *Clinton v. City of New York*, 524 U.S. 417, 450–51 (1998) (Kennedy, J., concurring) (explaining in dicta that the Framers established the separation of powers doctrine to secure political liberty).

117. See, e.g., THE FEDERALIST NOS. 47, 48 (James Madison), NO. 81 (Alexander Hamilton).

118. U.S. CONST. art. I.

119. U.S. CONST. art. II.

120. U.S. CONST. art. III.

121. *Kilbourn v. Thompson*, 103 U.S. 168, 190–91 (1880).

122. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 224 (1995) (noting in dicta that the “constitutional equilibrium” established by the doctrine was well understood by the middle of the 19th century).

v. City of New York concurrence.¹²³ More recently, the Court discussed the importance of the writ of habeas corpus as an enforcement mechanism for separation of powers principles in *Boumediene v. Bush*.¹²⁴ These decisions provide evidence that even if the doctrine is generally well understood, it is still very much a live and active element in American jurisprudence.

The separation of powers doctrine raises questions regarding the Attorney General's regulation requiring retroactive application of the SORNA requirements — the regulation may constitute an encroachment on judicial power because it vacates prior judicial decisions.¹²⁵ The Constitution does not describe the judicial power in the same detail as the other two branches of government; it simply states that the federal judicial power is vested in the federal court system, and explains what cases and controversies these courts have jurisdiction over.¹²⁶ The idea of a separate judicial power reserved for courts alone was undoubtedly of great importance to the Framers, however. In colonial America, legislatures and assemblies frequently overrode courts, overturning

123. *Clinton v. City of New York*, 524 U.S. 417, 449–52 (1998) (Kennedy, J., concurring). Justice Kennedy wrote separately to emphasize that individual liberty was at stake in this case because of the separation of powers issue. *Id.* at 450.

124. *Boumediene v. Bush*, 553 U.S. 723, 743 (2008).

125. One court has stated in dicta that the regulation also violates the separation of powers doctrine because it is the result of an improper legislative delegation to the attorney general. *See United States v. Aldrich*, No. 8:07CR158, 2008 WL 427483, *6 n.5 (D. Neb. Feb. 14, 2008) (noting that determining to whom SORNA applied and when it applied were legislative functions, and could therefore not be left to the Attorney General's discretion). This discussion is unusual and contrary to Supreme Court precedent, however, since the Supreme Court has not struck down federal legislation under the non-delegation doctrine in over seventy-five years. *United States v. Ambert*, 561 F.3d 1202, 1213 (9th Cir. 2009); *see also A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529–42 (1935) (holding a regulation under the National Industrial Recovery Act unconstitutional as an improper delegation of Congress' "essential legislative function"); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (holding that a provision of the National Industrial Recovery Act authorizing the president to prohibit certain shipments in interstate commerce was an impermissible delegation of legislative power, since the Act contained no standards that would limit the president's discretion); ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 328 (2006). Accordingly, every other federal court that has heard cases on this issue has decided that SORNA and the Attorney General's regulation are valid under the non-delegation doctrine. *See, e.g., United States v. Ambert*, 561 F.3d 1202 (11th Cir. 2009); *United States v. Samuels*, 543 F. Supp. 2d 669 (E.D. Ky. 2008); *United States v. LeTourneau*, 534 F. Supp. 2d 718 (S.D. Tex. 2008); *United States v. Gould*, 526 F. Supp. 2d 538 (D. Md. 2007); *United States v. Lovejoy*, 516 F. Supp. 2d 1032 (D.N.D. 2007); *United States v. Hinen*, 487 F. Supp. 2d 747 (W.D. Va. 2007), *vacated*, 560 F.3d 222 (4th Cir. 2009).

126. U.S. CONST. art. III.

specific judgments and ordering new trials.¹²⁷ In drafting the Constitution, the Framers sought to correct this lack of independent and final judicial authority and ensure that judicial decisions would be reviewable only by higher courts, not by other government officials.¹²⁸ Protecting court judgments from review by actors outside the judicial system was clearly an important goal of the separation of powers doctrine embodied by the Constitution.¹²⁹

Courts began to assert judicial authority almost immediately after the Constitution's ratification. Early cases focused on the specific problem that had concerned the Framers — the review of judicial decisions by other branches of government — and recognized that executive and legislative officials could not reopen decisions made by courts.¹³⁰ In *Hayburn's Case*, the Supreme Court suggested that the Attorney General could not review a judicial decision.¹³¹ At least one justice explored similar issues in *Calder v. Bull*, and his opinion has since been viewed to support the proposition that the executive and legislative branches cannot interfere with the final judgments of courts.¹³² A few years after the *Hayburn's* and *Calder* opinions, the Court famously asserted its authority in *Marbury v. Madison*, explaining, “[i]t is emphatically the province and duty of the judicial department to say what

127. See, e.g., *Plaut*, 514 U.S. at 219 (discussing the relationship between courts and legislatures during the colonial era).

128. *Id.* at 219–21.

129. *Id.* at 221 (“This sense of a sharp necessity to separate the legislative from the judicial power, prompted by the crescendo of legislative interference with private judgments of the courts, triumphed among the Framers of the new Federal Constitution.”).

130. See *Hayburn's Case*, 2 U.S. 409 (1792); *Calder v. Bull*, 3 U.S. 386 (1798).

131. *Hayburn's Case*, 2 U.S. at 409. While the Court did not actually reach a decision on the issue, it referred to multiple circuit court decisions, many of which were written by Supreme Court justices serving as circuit court judges at the time. *Id.*; CHEMERINSKY, *supra* note 125, at 56. In *Hayburn's Case*, the justices explained that courts could not make recommendations about pensions, because such decisions were “not of a judicial nature.” 2 U.S. at 409. If courts did make such recommendations, they might be

revised and controlled by the legislature, and by an officer in the executive department. Such revision and control we deemed radically inconsistent with the independence of that judicial power which is vested in the courts; and consequently, with that important principle which is so strictly observed by the constitution of the United States.

Id. The Court has more recently stated that *Hayburn's Case* “stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch.” *Plaut*, 514 U.S. at 218.

132. *Plaut*, 514 U.S. at 223 (quoting *Calder*, 3 U.S. at 398 (Iredell, J., concurring)).

the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."¹³³ In sum, these early decisions established that the courts' judicial power consisted of the ability to define and interpret law, and that these interpretations would not be subject to review by members of the executive or legislative branches.

Since the establishment of these basic judicial powers, government actors outside the judiciary have largely respected the finality of courts' decisions.¹³⁴ In 1995, however, the Supreme Court heard a case that provided an opportunity for an extensive modern discussion of the judiciary's power to issue final judgments.¹³⁵ *Plaut v. Spendthrift Farm* involved a challenge to a provision that had been added to the Securities Exchange Act of 1934.¹³⁶ The provision was enacted following a Supreme Court decision that had imposed time limits on the filing of certain fraud suits.¹³⁷ The amendment to the Securities Exchange Act allowed plaintiffs to file motions to reinstate actions that were initially brought before the Supreme Court decision and would have been timely under the prior law, but were dismissed pursuant to the decision.¹³⁸ The Court held that this provision violated the separation of powers doctrine because it required federal courts to reopen final judgments.¹³⁹ Justice Scalia explained in the majority opinion that, though judgments remain open while appeals are pending, once the highest court has ruled on an issue or the window for appeal has expired, a judicial decision is final.¹⁴⁰ At this point of finality, "a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to *that very case*

133. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

134. See, e.g., *Plaut*, 514 U.S. at 240 ("We know of no previous instance in which Congress has enacted retroactive legislation requiring an Article III court to set aside a final judgment . . .").

135. *Id.* at 213.

136. *Id.* at 214–15.

137. *Id.* at 213 ("*Lampf* held that [l]itigation instituted pursuant to § 10(b) and Rule 10b-5 . . . must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation." (quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 (1991))).

138. *Plaut*, 514 U.S. at 213–15.

139. *Id.* at 240.

140. *Id.* at 227.

was something other than what the courts said it was.”¹⁴¹ The *Plaut* opinion thus reaffirmed the principles of judicial power that were evident in even the earliest cases: that courts have the authority to issue a decision on a particular case or controversy, and that these decisions are constitutionally protected from review by non-judicial actors.

IV. JUDICIAL ENCROACHMENT ANALYSIS APPLIED TO THE RETROACTIVITY REGULATION

As discussed above, courts operating in risk-based regimes under the Wetterling Act made determinations about a sex offender’s risk of recidivism, and then applied statutory registration requirements that corresponded to that risk level.¹⁴² Changing an offender’s registration requirements through legislation overrules the judicial determination of his risk level, such as in cases where an offender was found not to be a sexually violent predator by the court, but must register for life under SORNA. As a result, this Part argues that the Attorney General’s regulation retroactively applying SORNA’s registration scheme violates the separation of powers doctrine by encroaching on judicial determinations. If Congress and the Attorney General want to maintain any retroactive application of SORNA’s requirements, they must find an alternative way to do so.

A. ENCROACHMENT ON JUDICIAL POWER

The retroactivity regulation encroaches on judicial power by changing offenders’ registration requirements that had been adjudicated by a court based on the offenders’ risk level. Under the Wetterling Act, courts explicitly had authority to determine whether offenders were sexually violent predators.¹⁴³ Judges made such determinations based on evidence they heard from behavioral experts, victims’ rights advocates, and law enforce-

141. *Id.*

142. *See supra* notes 27–31 and accompanying text.

143. 42 U.S.C. § 14071(a)(2)(A), *repealed by* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, tit. I, § 129(A), 120 Stat. 587, 600 (2006).

ment officers.¹⁴⁴ A determination that a sex offender was a sexually violent predator represented a final, binding judicial decision. In some states, courts had even more authority than on the federal level in issuing an offender's registration requirements. For example, some states allowed or required judges to differentiate between different classes of offenders based upon several factors, including their findings regarding the danger an offender posed to the community and the offender's likelihood of recidivism.¹⁴⁵ Admittedly, judges were not imposing registration requirements with complete freedom, since they were working within statutory models and guidelines.¹⁴⁶ They could not, for example, assign arbitrary registration durations that were not based on the statutory requirements.¹⁴⁷ They did, however, make discretionary determinations as to what category a particular offender fit into, and then order the appropriate statutory requirements based upon those determinations.¹⁴⁸

Applying the new SORNA requirements retroactively constitutes a radical change in registration requirements for some offenders.¹⁴⁹ If an offender had been convicted, sentenced, and ordered to register for ten years under the Wetterling Act, this meant that a judge had determined that the offender was not a sexually violent predator and therefore did not need to be subjected to harsher requirements.¹⁵⁰ Under SORNA, the same offender may fall into Tier II or Tier III based solely on his crime of conviction; the offender would then be subjected to a twenty-five

144. 42 U.S.C. § 14071(a)(2)(A), *repealed by* tit. I, § 129(A); *see also supra* notes 29–31 and accompanying text.

145. *See* Logan, *supra* note 27, at 608–09, 616–19. *See also supra* notes 26–27, 30 (discussing the systems in place in several states, including New York and Wyoming). These states, among others, required courts to categorize offenders based on factors including their risk of recidivism. Logan, *supra* note 27, at 608–09, 616–19. Courts in Wyoming made findings themselves about an offender's risk level, while New York courts based their decisions on recommendations from a specialized board. *Id.* at 616–19.

146. 42 U.S.C. § 14071(a)(2), *repealed by* tit. I, § 129(A); Logan, *supra* note 27, at 608–09, 616–19 (discussing state classification systems).

147. 42 U.S.C. § 14071(a)(2), *repealed by* tit. I, § 129(A); Logan, *supra* note 27, at 608–09, 616–19 (discussing state classification systems). The author is not aware of any state system allowing judges to assign registration requirements with no statutory basis.

148. 42 U.S.C. § 14071(a)(2), *repealed by* tit. I, § 129(A); Logan, *supra* note 27, at 608–09, 616–19 (discussing state classification systems).

149. *See supra* Part II.C.

150. 42 U.S.C. § 14071(a)(3), *repealed by* tit. I, § 129(A).

year or even lifetime duration of registration requirements.¹⁵¹ Since SORNA also expanded the definition of “sex offense,”¹⁵² some offenders now fall into a SORNA Tier now even though they had not been subject to any registration requirements previously.¹⁵³ Thus, many offenders face increased registration requirements even though a judge previously determined that they did not pose a level of dangerousness or likelihood of recidivism substantial enough to warrant an extended duration of registration.

This means that Congress has, through SORNA, effectively thrown aside courts’ decisions about what category particular offenders fell into. In place of these judicial decisions, Congress has required that these offenders be placed into categories that may be contrary to what a court has already decided. This is quite similar to the circumstances in *Plaut v. Spendthrift Farms*, where the Supreme Court held that federal courts could not be required to reopen final judgments.¹⁵⁴ While the Attorney General’s regulation does not explicitly require cases to be reopened like in *Plaut*, it has the same general effect in states that have used risk-based classification systems. It disregards the final decisions that judges made about offenders’ risk levels, and replaces them with new determinations. The *Plaut* Court used broad language throughout its opinion, suggesting that it was not confining its decision only to the facts of that case.¹⁵⁵ Instead, it explained that such congressional interference in judicial decisions was plainly unconstitutional, even if “an individual final judgment is legislatively rescinded for even the *very best* of reasons.”¹⁵⁶ The Attorney General likely had good reasons for wishing to lengthen the registration requirements for previously convicted sexual offenders, such as avoiding sex offender recidivism and keeping communities informed about local offenders.¹⁵⁷ De-

151. 42 U.S.C. § 16915(a) (2006).

152. See *supra* notes 77–79 and accompanying text.

153. See *id.* § 16911; see also *supra* note 88.

154. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

155. *Id.*

156. *Id.* at 228.

157. The Attorney General did not issue a statement regarding the purpose of the retroactivity regulation, but its goal was likely the same as that of the Adam Walsh Act as a whole: “to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against [a list of victims].” 42 U.S.C. § 16901.

spite these legitimate aims, however, Congress and the Attorney General cannot simply order judicial determinations to be vacated.¹⁵⁸

The Supreme Court of Ohio applied similar reasoning in *State v. Bodyke*, a case raising a separation of powers claim in regard to Ohio's sex offender registration law.¹⁵⁹ Ohio had passed its own Adam Walsh Act in 2007, becoming the first state to comply with the federal mandate.¹⁶⁰ It implemented a tiered, conviction-based registration system very similar to SORNA's.¹⁶¹ The state legislature also directed the state attorney general to reclassify all offenders who had been registering before the statute's passage according to the new tiered system.¹⁶² In *Bodyke*, the court held that this reclassification violated the separation of powers doctrine.¹⁶³ It relied heavily on *Plaut* in reaching this holding, explaining that "judgments cannot be deprived of their 'finality' through statutory conditions not in effect when the judicial branch gave its 'last word' in the particular case,' regardless of the policy behind the legislation."¹⁶⁴ After providing a detailed background of the separation of powers doctrine in Ohio jurisprudence,¹⁶⁵ the court ruled that reclassifying sex offenders pursuant to Ohio's Adam Walsh Act was a clear violation of the doctrine.¹⁶⁶ It acknowledged that the state's legislature had authority to create a new system of sex offender classification and registration requirements,¹⁶⁷ but that this authority did not supersede the fact

158. This analysis may not apply in regards to states that have always used purely conviction-based systems, since no registration requirements in those states were issued based on risk determinations. As discussed previously, however, most states used risk-based systems prior to SORNA. See *supra* note 28 and accompanying text.

159. *State v. Bodyke*, 933 N.E.2d 753 (Ohio 2010); see also *supra* Part III.

160. *Bodyke*, 933 N.E.2d at 759.

161. *Id.*

162. *Id.* at 759–60. In other words, the statute itself applied the new system retroactively, rather than authorizing an interpretive regulation like the federal version.

163. *Id.* at 765–66.

164. *Id.* at 766 (quoting *People v. King*, 37 P.3d 398, 401 (Cal. 2002) (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995))).

165. *Bodyke*, 933 N.E.2d at 763–65.

166. *Id.* at 765–66 ("The AWA's provisions governing the reclassification of sex offenders already classified by judges under Megan's Law violate the separation-of-powers doctrine for two related reasons: the reclassification scheme vests the executive branch with authority to review judicial decisions, and it interferes with the judicial power by requiring the reopening of final judgments.").

167. *Id.* at 766 ("It does not matter that the legislature has the authority to enact or amend laws requiring sex offenders to register To assert that the General Assembly

that the original judicial classifications constituted final judgments.¹⁶⁸ Based on this conclusion, the court ordered that the reclassification provisions of the law be severed.¹⁶⁹

Since no other state or federal courts have ruled on this issue directly, there is no legal precedent contrary to the Ohio decision.¹⁷⁰ One justice wrote a dissenting opinion, arguing that under Ohio's previous statute, a sex offender's classification was not a judicial determination.¹⁷¹ He based this argument on the fact that under the previous statute, a conviction for a sexually oriented offense "automatically conferred on [the offender] the status of a sexually oriented offender."¹⁷² While this is true, his conclusion ignores the rest of the system that had been in place. Despite the automatic categorization as a "sexually oriented offender" for someone convicted of a sexually oriented offense,¹⁷³ the sentencing court could conduct a hearing to decide whether the offender should be categorized under the more serious label of "sexually violent predator."¹⁷⁴ Like the process in other states,

has authority to create a new system of classification does not solve the problem that [the] original classification constituted a final judgment." (quoting *State v. Grate*, No. 2008-T-0058, 2009 WL 2710100, at *3 (Ohio Ct. App. Aug. 28, 2009))).

168. *Bodyke*, 933 N.E.2d at 767.

169. *Id.* at 767–68.

170. *But see* *Lemmon v. Harris*, 949 N.E.2d 803 (Ind. 2011) (holding that an offender's reclassification from "offender" status to "sexually violent predator" status did not violate the separation of powers doctrine). As the court in that case noted, however, it was actually addressing a different issue than what the Ohio court faced. *Id.* at 814. When this offender was originally sentenced, Indiana had a conviction-based system, so he was automatically classified as an offender under the statute in effect at the time. *Id.* Indiana later added the sexually violent predator classification, and amended the statute such that this offender's crime put him within that category. *Id.* at 806–07. No court ever ruled on his sex offender status, dangerousness, or risk of recidivism; his classification and registration requirements simply changed within the conviction-based structure. *Id.* at 814–15.

171. *Bodyke*, 933 N.E.2d at 288 (Cupp, J., dissenting).

172. *Id.* (quoting *State v. Hayden*, 773 N.E.2d 502, 505 (Ohio 2002)).

173. *See* *State v. Cook*, 700 N.E.2d 570, 574 (Ohio 1998) ("A sexually oriented offender is one who has committed a 'sexually oriented offense' as that term is defined in R.C. 2950.01(D) but who does not fit the description of either habitual sex offender or sexual predator."). This definition was found in the prior version of Ohio's sex offender registration law, which was then replaced by its 2007 Adam Walsh Act. *See supra* notes 160–62 and accompanying text.

174. *Logan*, *supra* note 27, at 608–09 and accompanying footnotes. Essentially, Ohio had a partly conviction-based and partly risk-based system. All sex offenders were required to register as at least sexually oriented offenders (the lowest category) based solely on the fact of their conviction. *Id.* Courts then assessed offenders' risk levels and ordered them to register as sexually violent predators (the highest category) if necessary. *Id.*

courts based this decision on factors including the offender's criminal history and risk of recidivism.¹⁷⁵ Therefore, even though the sexually oriented offender status attached as a matter of law when an individual was convicted of a sex offense, a court still made a decision that the offender was *not* a sexually violent predator. Just because an offender fell into the lowest category as a matter of law did not mean that there was no judicial discretion involved in his classification. On the contrary, his classification and registration requirements reflected the fact that a judge did not believe the offender warranted the increased requirements.¹⁷⁶ Justice Cupp's argument that sex offender classification under the former Ohio statute was not a judicial determination is therefore unpersuasive.

B. PROPOSED SOLUTIONS

If the retroactive application of SORNA's registration requirements is unconstitutional due to its violation of the separation of powers doctrine, the regulation cannot stand as written. Assuming that Congress and the Attorney General wish to maintain some retroactive effect, they would need to rework the structure of SORNA's application in a way that avoids the separation of powers conflict.

One way to reach this balance would be a rule subjecting sex offenders convicted before SORNA's enactment to the increased SORNA registration requirements based on their previous categorization, not based on the crime they were convicted of.¹⁷⁷ If an offender were adjudicated into the category with the lowest risk, his requirements would now be the same as SORNA's Tier I requirements. If a court ruled that he was in an intermediate category, his requirements would now correspond to Tier II, and if he were adjudicated in the highest category, he would register according to the Tier III requirements. The key to this solution is

175. *Id.*

176. *Id.*

177. This solution relies on states having previous registration schemes that can easily correspond to SORNA's three tiers. Most risk-based states had at least two levels of offenders, if not three. *Id.* at 608–09, 616–19. Since state systems were not identical, however, a rule implementing this solution would need to be written with language flexible enough to cover these variations.

the fact that under the Wetterling Act, courts made determinations about what risk level an offender fell under, but then simply ordered the statutory registration requirements that corresponded with that category.¹⁷⁸ The requirements themselves, therefore, were not judicial determinations; only an offender's categorization was a final judicial judgment. The rule proposed by this solution would adjust an offender's registration requirements, but not his categorization. This would be a way to increase some requirements while leaving courts' determinations untouched.

The biggest flaw with this solution is that the Attorney General may not have authority to create such a rule; therefore Congress may have to do so itself. While Congress gave the Attorney General authority to issue rules regarding SORNA's retroactive application, this rule may be beyond the scope of the Attorney General's power.¹⁷⁹ Rather than simply regulating the retroactive effect, this rule would apply a slightly modified version of the SORNA requirements to pre-SORNA offenders; essentially, it would apply the requirements associated with each tier, but not tie them to specific crimes. This would actually be adjusting SORNA's registration regime, which Congress may not have intended for the Attorney General to do. To implement this solution, therefore, Congress may have to amend SORNA to insert a provision containing these modified requirements and mandating their application to pre-SORNA offenders.

If these procedural difficulties can be overcome, however, this solution provides a fair compromise between congressional goals and constitutional principles. The rule would avoid violating the separation of powers doctrine, because it would honor the prior judicial determinations of how dangerous each offender was. While some offenders' requirements would not be increased as much as if they were given requirements under SORNA's tiered system, most offenders would still receive some increase in registration requirements.¹⁸⁰ Therefore, the rule would still promote

178. See *supra* note 148 and accompanying text.

179. 42 U.S.C. § 16913(d) (2006).

180. Under the Wetterling Act, the possible registration durations were ten years or life. 42 U.S.C. § 14071(b)(6), *repealed by* tit. I, § 129(A). Under SORNA, the possible durations are fifteen years, twenty-five years, or life. 42 U.S.C. § 16915(a) (2006). Assuming that states had generally implemented the requirements specified in the Wetterling Act,

the general goals of the Walsh Act by keeping and publicizing records of sex offenders' locations for a longer duration than under the Wetterling Act.¹⁸¹ This solution should satisfy Congress and the Attorney General's desire for retroactive effect while maintaining the integrity of judicial determinations classifying sex offenders, therefore avoiding a conflict with the separation of powers doctrine.

V. CONCLUSION

The Attorney General's regulation retroactively applying the SORNA registration requirements to sex offenders convicted before the statute's enactment violates the separation of powers doctrine. The regulation constitutes executive review of courts' final judgments, which has been held to be an unconstitutional encroachment on judicial power. The regulation therefore cannot remain in its current form. Rather, SORNA should be reexamined and pre-SORNA offenders should be subjected to heightened requirements based on the category they were judicially determined to be in at the time of their conviction.

therefore, this solution would increase the registration requirements for all offenders except those who were already required to register for life.

181. See *supra* note 157 and accompanying text.