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SEX OFFENDER REGISTRATION

Federal prosecution

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This past July, Wilfredo Madera did something that millions of people do every year: He changed state residences. His legal status, however, complicated matters. A registered sex offender in New York, Madera was required to register with authorities upon his arrival in Florida. As of October, he had failed to do so, risking five years in prison and a \$5,000 fine under Florida law.

By failing to register, Madera joined the thousands of other individuals nationwide who daily violate registration requirements. His case, though, would prove different in a significant way. As a result of the newly enacted Adam Walsh Act, he would be arrested by U.S. marshals, prosecuted in federal court and subject to 10 years' imprisonment and a \$250,000 fine, sanctions far in excess of Florida law. While since 1994 Congress has pressured states to comply with federal registration expectations, threatening loss of funds if they do not, the failure-to-register provision marks a new, complementary *modus operandi*. Congress has now created a criminal offense, making it a federal felony to cross state lines and not register anew.

In October, U.S. marshals undertook Falcon III, a highly publicized roundup of nonregistrants, including Madera, who is the first to be convicted under the new law. A federal trial court recently rejected Madera's several legal challenges, including that Congress exceeded its authority under the Constitution's commerce clause in federalizing what has always been a state crime. The outcome is sure to be appealed and Madera's case, or one like his, will in time likely come before the U.S. Supreme Court. On the commerce clause question, defendants will point to *U.S. v. Lopez*, 514 U.S. 549 (1995), which invalidated a federal law making it a crime to possess a gun near a school, and *U.S. v. Morrison*, 529 U.S. 598 (2000), which struck down a federal provision allowing victims of gender-motivated crime to sue in federal court. They will argue that the failure-to-register provision, like the laws in *Lopez* and *Morrison*, intrudes upon the historic police-power authority of states and lacks a necessary impact on interstate commerce.

Cause for defense optimism, however, will be tempered by *Gonzales v. Raich*, 545 U.S. 1 (2005), where the court held that federal criminal law trumped California's effort to allow medicinal use of marijuana, even though it was grown and used solely in California. The court's willingness to indulge federal authority, even when it harms individuals seeking palliative care, does not bode well for unregistered sex offenders. Moreover, unlike *Raich*, where several states urged the court to defer to California's effort to self-regulate, states here will not likely complain. Every state makes failing to register a crime, and federal involvement in tracking down and prosecuting disdained sex offenders has obvious popular appeal.

A significant shift

The likely outcome, however, should not be permitted to obscure the broader implications of the Walsh Act. Judicial approval of the registration law will signal an important shift in what the *Lopez* court called the "sensitive relations between federal and state criminal jurisdiction." While federal involvement might provide some immediate benefit in combating registration noncompliance, it is not cost-free. With federal subordination of the states, based on Congress' one-two punch of its spending and commerce clause authority, accountability for the efficacy of registration is undercut and citizen confidence in state police-power authority is put at risk. Although the United States cannot be expected to assume prime responsibility in the area, the Walsh Act and Falcon III send the opposite message: The federal government will save the day.

Nor, finally, can the federalization of registration failures be justified by the two chief policy concerns often warranting federal involvement: externalities and interjurisdictional challenges. Unlike firearms regulation, for instance, no evidence exists of state registration laxness contributing to spillover harms in other states. Likewise, interstate travel creates no enforcement barrier, such as prompted prior federal efforts to criminalize "deadbeat dads" whose travel confounded state prosecution. Persons such as Madera can be, and traditionally have been, readily prosecuted under state law.

Frustration over how to handle emigrant sex offenders affords a highly compelling catalyst for increased federal involvement in criminal justice. The challenge, however, should not be resolved by the coming court battles over congressional authority alone, but also with due regard for the impact upon the nation's governing architecture and political culture as a whole.

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