Smith v. Doe: Judicial Deference Towards the Legislative Intent Behind a Broad, Punitive Civil Law Betrays the Core Principles of the Ex Post Facto Clause

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Note

SMITH V. DOE: JUDICIAL DEFERENCE TOWARDS THE LEGISLATIVE INTENT BEHIND A BROAD, PUNITIVE CIVIL LAW BETRAYS THE CORE PRINCIPLES OF THE EX POST FACTO CLAUSE

In Smith v. Doe I, the United States Supreme Court considered whether the Alaska Sex Offender Registration Act (ASORA) violated the Ex Post Facto Clause of Article I of the United States Constitution by retroactively imposing mandatory registration and notification provisions on sex offenders. In a 6-3 decision, the Court held that the provisions of ASORA were both civil and nonpunitive and thus did not violate the Ex Post Facto Clause. Specifically, the Court determined that the purpose of ASORA is civil because the legislature designed the statute to protect the public from sex offenders. Furthermore, the Court found that ASORA's effects were nonpunitive, did not impose an affirmative disability, and were not overly broad or excessive in light of the statute's stated purpose. In so hold-

1. 538 U.S. 84 (2003).
2. Alaska Stat. §§ 12.63.010, 18.65.087 (2002). The law requires an individual who has been convicted of a sex offense to register in person with the local law enforcement authority. Id. § 12.63.010(b). The sex offender must provide the following information: name, address, place of employment, date of birth, conviction information, aliases, and driver's license number. Id. § 12.63.010(b)(1)(A). A person convicted of a single sex offense must register annually for fifteen years. Id. § 12.63.020(a)(2). A person convicted of two or more sex offenses must register annually for the rest of his life. Id. § 12.63.020(a)(1). The Act also establishes a "central registry of sex offenders." Id. § 18.65.087(a). Information subject to public disclosure includes the sex offender's name, address, photograph, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, and length of sentence. Id. § 18.65.087(b).
3. The Department of Public Safety has published the registry information on its website at http://www.dps.state.ak.us/nSorcr/asp/.
5. Smith, 538 U.S. at 89.
6. Id. at 92.
7. Id. at 105. The Court rejected Does' argument that ASORA resembles colonial shaming punishments such as branding or banishment. Id. at 98. Although acknowledging that ASORA's notification provision may impose a stigma on registrants, the Court distinguished ASORA from historical shaming punishment by reasoning that publicity of the registrant's crime was not an integral part of ASORA's regulatory purpose. Id.
8. Id. at 100.
9. Id. at 105.
ing, the Court failed to require ASORA’s provisions to serve the legislature’s stated intent of protecting the public from sex offenders. Instead of following its earlier holding in Kansas v. Hendricks, the Court in Smith upheld an overly broad statute that burdens more people than necessary. In so doing, the Court set a precedent that allows states to enact broad, punitive sex offender registration and notification provisions that violate the Ex Post Facto Clause.

I. THE CASE

John Doe I and John Doe II were each convicted of sexual abuse of a minor, an aggravated sexual offense under Alaska law. Doe I pled nolo contendere to the charge of sexually abusing his daughter over the course of two years. Upon Doe I’s release from prison, a court granted him custody of his daughter after determining that he was rehabilitated. Similarly, Doe II pled nolo contendere to the charge of sexually abusing a fourteen-year-old girl. Doe I and Doe II spent eight years in prison and were released in 1990. In 1994, Alaska enacted ASORA, which requires convicted sex offenders to register with local law enforcement authorities. In addition, ASORA authorizes the public disclosure of information collected in a central registry of sex offenders, which the Department of Public Safety maintains.

In 1994, Doe I and Doe II, along with Doe I’s wife, filed a complaint in the United States District Court for the District of Alaska. They asserted that ASORA violated their procedural and substantive due process rights, their federal constitutional privacy rights, and the

10. See 1994 Alaska Sess. Laws 41, § 1 (listing the legislative findings behind ASORA).
11. 521 U.S. 346 (1997). In Hendricks, the Court stated that it is necessary to narrowly tailor a sex offender statute’s effects to its civil intent for it to survive an ex post facto challenge. Id. at 371.
12. Smith, 538 U.S. at 91.
13. Doe I v. Otte, 259 F.3d 979, 983 (9th Cir. 2001).
14. Id. In deciding to grant Doe I custody of his daughter, the court relied in part on psychiatric evaluations concluding that Doe I had “a very low risk of reoffending” and was “not a pedophile.” Id. (internal quotation marks omitted).
15. Id.
16. Id.
17. Alaska Stat. §§ 12.63.010, 18.65.087 (2002); see supra note 2 and accompanying text (discussing ASORA’s provisions).
19. Doe I’s wife, a registered nurse, alleged that disclosing her husband’s criminal history would undermine relationships in her professional life, including her ability to acquire and care for patients. Doe I, 259 F.3d at 983.
20. Id. at 995.
Ex Post Facto Clause. In addition, they sought leave to proceed under pseudonyms, but the court denied this request. Eventually, in 1998, after the district court granted the Does leave to proceed under pseudonyms, the parties filed cross-motions for summary judgment. The district judge granted the State's motion for summary judgment. The Does then appealed to the United States Court of Appeals for the Ninth Circuit, claiming that ASORA violated the Ex Post Facto Clause.

The Court of Appeals chose not to resolve the case on due process grounds. Rather, it based its decision on the narrower issue of whether ASORA violated the Ex Post Facto Clause. The court used the two-step "intent-effects test" to determine whether ASORA's registration and notification requirements constituted a punishment in violation of the Ex Post Facto Clause. After examining the legislative findings and ASORA's structure, the court found that the intent of ASORA was to address the public's fear of the high rate of recidivism among sex offenders. Thus, the court concluded that the purpose of the statute was nonpunitive. The court then proceeded to the second step of the test, considering the statute's effect on convicted

21. Id.
22. Id. at 983. The Does appealed this denial to the United States Court of Appeals for the Ninth Circuit. Id. The Court of Appeals dismissed the appeal because the district court had not yet entered a final judgment in the case. Id. On remand from the Court of Appeals, the district judge dismissed the complaint when the Does would not amend it to include their real names. Id. The Does then appealed to the Court of Appeals, which reversed the district court and held that the Does could proceed under pseudonyms. Id.
23. Id.
24. Id.
25. Id. at 982.
26. Id.
27. Id.
28. Id. at 985 (internal quotation marks omitted). The intent-effects test is a two-step inquiry used in ex post facto cases to determine if a statute should be classified as punitive. United States v. Ward, 448 U.S. 242, 248 (1980). The first level of the test requires a determination of whether the legislature's intent in enacting the statute was punitive or civil. Id. If the court determines that the legislature had a civil intent, it proceeds to the second level, where it inquires whether the statute's provisions are so punitive either in purpose or effect that the statute should be held punitive. Id. at 249.
29. Doe I, 259 F.3d at 985.
30. Id. at 986. The Alaska legislature made the following findings:

(1) sex offenders pose a high risk of reoffending after release from custody;
(2) protecting the public from sex offenders is a primary governmental interest;
(3) the privacy interests of persons convicted of sex offenses are less important than the government's interest in public safety; and
(4) release of certain information about sex offenders to public agencies and the general public will assist in protecting public safety.
31. Doe I, 259 F.2d at 986.
sex offenders. Using the seven factors set forth in Kennedy v. Mendoza-Martinez, the court concluded that ASORA's effects were punitive.

The Court of Appeals held that the effects of ASORA's provisions, as examined under the Mendoza-Martinez factors, provided the "clearest proof" that the statute violated the Ex Post Facto Clause. The court reversed the district court's order granting summary judgment for the State and remanded the case for further proceedings consistent with its decision.

The State appealed to the United States Supreme Court, which granted certiorari to determine whether ASORA violated the Ex Post Facto Clause. Specifically, the Court considered whether ASORA imposed a punitive registration and public notification burden on sex offenders who had already served prison sentences for their crimes.

II. LEGAL BACKGROUND

A. The Constitutional Prohibition Against Ex Post Facto Laws

Article I of the United States Constitution prohibits the states from passing "any . . . ex post facto Law." The Ex Post Facto Clause proscribes the enactment of any law that "imposes punishment for an act that was not punishable at the time it was committed or imposes additional punishment to that then prescribed." A law is considered

32. Id.
33. 372 U.S. 144, 168-69 (1963). The seven factors listed in Mendoza-Martinez are: Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

34. Doe I, 259 F.3d at 993-94.
35. Id. at 994. The court found the punitive effects of ASORA's overbreadth to be exemplified by Doe I's case because a previous court had found him to be successfully rehabilitated. Id. at 993. The court compared ASORA's lack of regard for actual future risk to the cases decided by other federal courts of appeal. Id. With only one exception, each court had upheld only those sex offender registration and notification laws with provisions tailored to the risk posed by the offender. Id. at 992.

36. Id. at 995.
38. Id. at 92.
ex post facto if it satisfies two criteria. First, the law must be retrospective, that is, "it must apply to events occurring before its enactment." Second, the law must disadvantage the affected offender. Additionally, a civil law may violate the Ex Post Facto Clause if a court finds that the law's effect is punitive.

In addition, the Framers of the Constitution designed the Ex Post Facto Clause to protect individuals who could be vulnerable to retribution extending beyond their original sentence, particularly if the public sentiment is one of revenge and anger toward a specific offense. In such an instance, the Ex Post Facto Clause "restricts governmental power by restraining arbitrary and potentially vindictive legislation." The Supreme Court has acknowledged that it was the Framers' intent for laws to provide notice of their effects. Moreover, the Clause ensures that a person who is convicted of a crime can depend on her sentence, rather than fear the risk of future punishment.

B. Punishment or Civil Penalty—the Deciding Factor

Historically, ex post facto jurisprudence has focused on whether the challenged civil statutory provision imposes a punishment or a civil penalty. Although laws that impose additional punishment are prohibited, the Court has found that nonpunitive civil regulations do not violate the Ex Post Facto Clause even if they impose a hardship. Consequently, the Court has drawn a distinction between laws that are punitive and laws that are civil, even though they may be burden-

41. Id. at 29.
42. Id.
43. Id. The classic example of an ex post facto law is a criminal law that illegalizes conduct that, when committed, was not a punishable criminal offense. See, e.g., Miller v. Florida, 482 U.S. 423, 435-36 (1987) (finding unconstitutional a state statute that increased the sentence for a crime as applied to a defendant who had committed the crime before the statute's enactment).
44. See, e.g., Smith v. Doe I, 538 U.S. 84, 92 (2003) (noting that the clearest proof that a statutory scheme is punitive will transform a civil regulation into a criminal penalty, thus violating the Ex Post Facto Clause).
45. Doe I v. Otte, 259 F.3d 979, 982 (9th Cir. 2000).
46. Weaver, 450 U.S. at 29.
47. Id.
48. Id.
49. See Hawker v. New York, 170 U.S. 189, 200 (1898) (holding that removal of one's right to practice medicine based on a prior conviction is not an additional penalty but rather a civil regulation of qualifications for physicians to practice medicine).
some. Yet when evaluating a statute's effect to determine whether it is civil or punitive, the Court has struggled to define how closely tailored the fit must be between the statute's stated purpose and the burden it imposes.

The requirement of a close fit between the statutory intent and actual risk of harm, particularly when a state is exercising its police power, has not always been present. In *Hawker v. New York*, the Court considered the constitutionality of a state law that prohibited convicted felons from practicing medicine. Under this statute, a physician was indicted for the unlawful practice of medicine because of his status as a convicted felon. Despite the fact that the physician's disqualifying conviction predated the enactment of the statute by fifteen years, he was tried, convicted, and fined. The Supreme Court affirmed the conviction, determining that the statute was enacted pursuant to the State's proper exercise of police power—protecting the citizens of New York from "physicians of bad character." The Court concluded that a past felony conviction calls into question a physician's fitness to practice medicine. Therefore, the Court held that the legislation did not constitute an additional penalty, and as such, the Court concluded that the statute did not violate the *Ex Post Facto* Clause.

More than fifty years later, in *De Veau v. Braisted*, the Court again upheld the use of a past conviction as a bar to employment in a specified occupation. In 1920, a waterfront labor organization employee pled guilty to a charge of grand larceny. Thirty-three years later, the New York Legislature passed the Waterfront Commission Act, prohibiting ex-felons from holding office in waterfront labor organizations. As a result of the law's passage, the employee was suspended from his position as the secretary-treasurer of a waterfront labor organization.

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51. See, e.g., United States v. One Assortment of 89 Firearms, 465 U.S. 354, 362 (1984) (framing the issue as whether a statute "is intended to be, or by its nature, necessarily is, criminal and punitive, or civil and remedial").
52. 170 U.S. 189 (1898).
53. *Id.* at 190.
54. *Id.* at 191.
55. *Id.*
56. *Id.* at 196.
57. *Id.* at 195.
58. *Id.* at 196.
59. *Id.* at 200.
60. 363 U.S. 144 (1960).
61. *Id.* at 160.
62. *Id.* at 145-46.
63. *Id.* at 146.
64. *Id.*
He then filed suit, claiming that his suspension constituted additional punishment in violation of the *Ex Post Facto* Clause.\(^6\) To determine whether the statute was civil or punitive, the Court examined the intent of the legislature, noting that the inquiry turned on whether the legislative intent was to punish the person for a past activity or to restrict the person as a part of a "relevant incident to a regulation of a present situation."\(^6\)

The Court accepted the legislature's finding that the corrupt practices of ex-felons who worked on the waterfront created appalling working conditions.\(^6\) The Court held that the statute's prohibition against the employment of ex-felons as officers in waterfront labor organizations was nonpunitive and thus was a valid exercise of the State's police power designed to protect the public's safety.\(^6\)

For the first time, in *Flemming v. Nestor*,\(^6\) the Court asserted that a nonpunitive statute must be aimed at the actual behavior or status with which the statute is concerned.\(^7\) The Court considered whether a provision of the Social Security Act that terminated old-age, survivor, and disability insurance benefits to aliens deported after September 1, 1954 violated the *Ex Post Facto* Clause.\(^7\) In this case, an alien was deported in 1956 for having been a member of the Communist Party from 1933 to 1939.\(^7\) The Court analyzed whether the termination of benefits was characterized properly as punishment, with the following premise in mind:

> Where the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly upon one affected. The contrary is the case where the statute in question is evidently aimed at the person or class of persons disqualified.\(^7\)

The Court found that the cessation of the alien's benefits was rationally connected to the purpose of the statute.\(^7\) The Court held that

\(^{65}\) *Id.* at 145.

\(^{66}\) *Id.* at 160 (emphasis added).

\(^{67}\) *Id.* at 157-58.

\(^{68}\) *Id.* at 158.

\(^{69}\) 363 U.S. 603 (1960).

\(^{70}\) *Id.* at 614 (discussing the balance between the interests of the state's police power and the individual's rights against punishment for prior conduct).

\(^{71}\) *Id.* at 613.

\(^{72}\) *Id.* at 605.

\(^{73}\) *Id.* at 614.

\(^{74}\) *Id.* at 617. The Court concluded that Congress was concerned with the termination of benefits for those persons permanently living outside the country, rather than punishing persons deported on certain grounds. *Id.* at 618-19. The petitioner argued that, because
the termination of the alien's benefits was not punitive in intent or effect. Thus, the Court concluded that the statute did not violate the *Ex Post Facto* Clause.

C. The Development and Evolution of the Supreme Court's Intent-Effects Test to Determine Whether a Law Violates the *Ex Post Facto* Clause

Although the Court's focus on the states' exercise of police power allowed it to conclude that the regulations at issue in *Hawker* and *De Veau* were civil rather than punitive, the inquiry into statutory intent has been more difficult for the Court in subsequent cases. As a result, the Court has developed an analytical framework for determining whether a law is punitive or civil in the context of *ex post facto* cases: a two-level intent-effects test. The first element of the test requires an examination of the legislature's intent behind the enactment of the statute at issue. Specifically, a court must determine whether the legislature either expressed or implied a preference for the statute to be classified as either civil or punitive. In making this determination, a court must examine various factors such as the actual label Congress did not apply the termination provision to all deportees, Congress punished only certain acts leading to deportation. *Id.* at 619. Specifically, Congress did not apply the termination provision to persons deported on the following grounds: being institutionalized due to mental illness, becoming a public charge within five years after entry, failing to maintain or comply with the conditions of admission as a nonimmigrant, and knowingly and for gain inducing or aiding another alien to enter the country illegally. *Id.* at 620 n.13.

75. *Id.* at 621.

76. *Id.* The Court recognized that the exercise of police power is an insufficient rationale to justify the targeting of burdensome civil statutes at a class of people defined by their past activities. *Id.* at 614.

77. See, e.g., *Weaver v. Graham*, 450 U.S. 24, 37-39 (1981) (Rehnquist, J., concurring). Justice Rehnquist agreed with the majority that the statute, which altered the availability of "gain time through good conduct" of prisoners convicted before the law, violated the *Ex Post Facto* Clause. *Id.* at 37. Yet Justice Rehnquist found the case a difficult decision when considering the opportunities to earn additional gain time afforded by the new statute not available under the old law. *Id.* at 37-38.

78. The Court has applied the intent-effects test to cases involving the constitutional issues of due process, self-incrimination, double jeopardy, and *ex post facto* laws. See, e.g., *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (applying the intents-effects test to due process, double jeopardy, and *ex post facto* law); *Smith v. Doe I*, 538 U.S. 84, 92-93 (2003) (applying the intents-effects test to *ex post facto* law). Thus, when examining whether a statute violates the *Ex Post Facto* Clause, the Court has drawn on precedent from cases dealing with each of these issues. See *Hendricks*, 521 U.S. at 348.


81. *Id.* In most instances, courts defer to the legislature's intent in enacting the statute. *Hendricks*, 521 U.S. at 361.
given to the provision,\textsuperscript{82} the procedural mechanisms in place for enforcing the statute,\textsuperscript{83} and whether the statute is located within a state's criminal or civil code.\textsuperscript{84} If a court is satisfied that the legislature intended to establish a civil penalty, it proceeds to the second level of the intent-effects test. The second level requires a court to determine whether the statute is "so punitive either in purpose or effect" as to negate the legislature's intent to establish a civil penalty.\textsuperscript{85} A court cannot, however, invalidate the legislature's intent without the "clearest proof" that the statute is punitive in effect.\textsuperscript{86} To assist courts with the application of the second level of the intents-effects test, the Supreme Court has articulated seven factors that have traditionally been used to determine whether a law is punitive in effect.\textsuperscript{87}

1. The Mendoza-Martinez Factors.—In \textit{Kennedy v. Mendoza-Martinez},\textsuperscript{88} the Court considered whether a federal law, the Nationality Act of 1940, violated the Due Process Clause when, without prior court or administrative proceedings, the law divested a citizen of his American citizenship because he left the country to evade military service during wartime.\textsuperscript{89} Specifically, the Court examined whether the divestiture of

\begin{footnotesize}
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\textsuperscript{82} See \textit{Hudson v. United States}, 522 U.S. 93, 103 (1997) (finding that Congress's intent for a monetary penalty to be civil in nature is evidenced by the statute "expressly provid[ing] that such penalties are civil") (internal quotation marks omitted); \textit{Hendricks}, 521 U.S. at 361 (noting that the description of the Kansas Sexually Violent Predator Act as creating a "civil commitment procedure" indicated the State's intent to create a civil proceeding) (emphasis omitted); \textit{Ward}, 448 U.S. at 249 (finding that the fact that Congress had labeled the sanction as a "civil penalty" made it "clear that Congress intended to impose a civil penalty").

\textsuperscript{83} See \textit{Hudson}, 522 U.S. at 103 (finding it significant that the authority to issue sanctions was conferred on an administrative agency); \textit{United States v. Ursery}, 518 U.S. 267, 278 (1996) (finding that procedural mechanisms such as the lack of a notice requirement and the use of a summary administrative procedure to impose sanction indicated that Congress intended the statutory provision to be civil); \textit{United States v. One Assortment of 89 Firearms}, 465 U.S. 354, 363 (1984) (concluding that Congress designed a forfeiture provision as a remedial sanction given that the forfeiture provision was to be enforced by an action \textit{in rem}).

\textsuperscript{84} See \textit{Hendricks}, 521 U.S. at 361 (concluding that the placement of the Act within Kansas's probate code rather than its criminal code helped support a finding of civil intent).

\textsuperscript{85} \textit{Ward}, 448 U.S. at 249.

\textsuperscript{86} \textit{Hudson}, 522 U.S. at 99-100 (citation omitted). The clearest proof standard acknowledges the deference generally accorded legislative actions. \textit{Flemming v. Nestor}, 363 U.S. 603, 617 (1960). This deference towards legislative decisions prevents a court from automatically choosing a reading of a statute that results in its invalidation; rather, it requires the clearest proof that the statute is so punitive in effect as to prevail over the legislature's intent. \textit{Ward}, 448 U.S. at 249.


\textsuperscript{88} 372 U.S. 144 (1963).

\textsuperscript{89} \textit{Id.} at 184.
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citizenship imposed an additional penalty for the crime of draft avoidance.\textsuperscript{90} The Court acknowledged that, in past cases, it was difficult to determine whether a statute was punitive or regulatory.\textsuperscript{91} The Court listed seven factors traditionally used to make this determination:

\begin{itemize}
  \item [1] whether the sanction involves an affirmative disability or restraint,
  \item [2] whether it has historically been regarded as a punishment,
  \item [3] whether it comes into play only on a finding of scienter,
  \item [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence,
  \item [5] whether the behavior to which it applies is already a crime,
  \item [6] whether an alternative purpose to which it may rationally be connected is assignable to it, and
  \item [7] whether it appears excessive in relation to the alternative purpose assigned.\textsuperscript{92}
\end{itemize}

In \textit{Mendoza-Martinez}, the Court concluded that the application of these factors to the facts of the case demonstrated that the statute was punitive.\textsuperscript{93} After examining the legislative history, however, the Court found that this additional analysis was unnecessary because Congress had enacted the statute with the intent to impose further punishment on those who evaded military service by leaving the country.\textsuperscript{94} Thus, the Court held that the statute was unconstitutional because it deprived individuals of their citizenship without the procedural guarantees of the Fifth and Sixth Amendments.\textsuperscript{95}

2. \textit{The Dilution of the Mendoza-Martinez Factors.}—The \textit{Mendoza-Martinez} factors do not provide a dispositive test for determining whether a statute's purpose is punitive.\textsuperscript{96} Rather, the Court has de-
scribed the factors as providing "useful guideposts" for determining the effect of the statute in question.97 Later cases illustrate this advisory use of the factors as well as the eventual dilution of specific factors' significance.

For instance, the Court has diluted the effect of the fifth Mendoza-Martinez factor, thereby permitting states to enact civil regulations based on criminal conduct.98 In United States v. Ward,99 the Court considered whether a civil penalty imposed under the Federal Water Pollution Control Act was a criminal case within the meaning of the Fifth Amendment's guarantee against compulsory self-incrimination.100 The Act required a lessee of an offshore drilling facility to report to the federal government any discharge of oil or hazardous substances into navigable waters.101 In addition, the Act imposed a monetary penalty for any such discharge.102 In its application of the intent-effects test, the Court concluded that Congress's intent was civil because the sanction was labeled as a "civil penalty."103 The Court then applied the Mendoza-Martinez factors to assess the actual effect of the statute's provisions.104 Although the Court agreed that the behavior to which the penalty applied—discharging oil or hazardous substances into navigable waters—was already a crime, the Court found that the placement of the criminal penalty in one statute and the civil penalties in another statute enacted seventy years later diminished the importance of the fifth Mendoza-Martinez factor in its analysis.105 The Court held that the monetary penalty was civil in nature; therefore, the reporting requirement did not violate the reporter-violator's right against compulsory self-incrimination.106

The Court continued to weaken the significance of the fifth Mendoza-Martinez factor in United States v. One Assortment of 89 Firearms.107 In this case, the defendant was charged with dealing firearms without

100. Id. at 244.
101. Id. at 244-45.
102. Id.
103. Id. at 249.
104. Id.
105. Id. at 249-50.
106. Id. at 255. The Court has held repeatedly that legislatures "may impose both a criminal and a civil sanction in respect to the same act or omission." United States v. Ursery, 518 U.S. 267, 292 (1996).
a license. \(^{108}\) During the execution of a search warrant at the defendant's home, the Bureau of Alcohol, Tobacco, and Firearms seized a cache of firearms. \(^{109}\) After a jury subsequently acquitted the defendant, the United States, under the Gun Control Act, pursued an action in rem for the forfeiture of the seized firearms. \(^{110}\) In its analysis of the constitutionality of the forfeiture provision, the Court applied the two-level intent-effects test. \(^{111}\) First, the Court determined that the provision furthered the broad, remedial aim of keeping dangerous weapons from unlicensed dealers and thus concluded that Congress's intent was civil in nature. \(^{112}\) Second, in its application of the fifth Mendoza-Martinez factor, the Court found that, although selling firearms without a license was already a crime, precedent allowed Congress to impose both a criminal and a civil sanction for the same act. \(^{113}\) The Court held that, because the forfeiture mechanism was not an additional penalty, the provision at issue was not barred by the Double Jeopardy Clause. \(^{114}\) Thus, the Court continued to diminish the significance of the fifth Mendoza-Martinez factor—whether the targeted conduct is already a crime.

Similarly, the presence of a deterrent effect is of little import in the application of the fourth Mendoza-Martinez factor—whether the act's effect furthers the traditional aims of punishment. \(^{115}\) In United States v. Ursery, \(^{116}\) the Court once again considered whether civil forfeitures of property were punishment for purposes of the Double Jeopardy Clause analyses. \(^{117}\) In Ursery, the defendant was convicted and sentenced to prison for growing marijuana. \(^{118}\) The federal government instituted civil forfeiture proceedings against the defendant's house. \(^{119}\) The Court concluded, as it had in 89 Firearms, that the tradi-

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108. Id. at 355.
109. Id.
110. Id. at 356.
111. Id. at 363.
112. Id. at 364. The Court also found that Congress's civil intent was clearly demonstrated by the statute's procedural mechanisms for enforcement. Id. at 363. The enforcement provision incorporated by reference procedures of the Internal Revenue Code that provided that an action to enforce a forfeiture was a proceeding in rem. Id. Proceedings in rem traditionally have been viewed as civil proceedings. Id.
113. Id. at 365 (quoting Helvering v. Mitchell, 303, 399 U.S. (1938)).
114. Id. at 366.
117. Id. at 270.
118. Id. at 272.
119. Id. at 271. The forfeiture proceedings resulted from the use of the house to facilitate illegal activities. Id. The police had found marijuana growing adjacent to the house and discovered marijuana seeds, stems, stalks, and a grow light within the house. Id.
tional intent of actions *in rem* was civil. After concluding that Congress's intent was to provide a remedial civil sanction, the Court looked to the provision's effect. Specifically, the Court considered whether the sanctions were "so punitive in form and effect as to render them criminal despite Congress'[s] intent to the contrary." While acknowledging in its application of the fourth *Mendoza-Martinez* factor that civil forfeitures may serve the purpose of deterrence, the Court concluded that the primary effect of such forfeitures served nonpunitive ends. In so concluding, the Court recognized that "we long have held that [deterrence] may serve civil as well as criminal goals." Additionally, the Court further minimized the importance of the fifth factor as it had in *Ward* and *89 Firearms* by finding it to be inconsequential that the statute was tied to criminal activity. Thus, the Court held that civil forfeitures do not constitute punishment under the Double Jeopardy Clause.

Moreover, the Court's decisions in *Hudson v. United States* represented a further weakening of the importance of the *Mendoza-Martinez* factors. The Court considered whether the Double Jeopardy Clause bars subsequent criminal prosecution of individuals whom the government has sanctioned in previous administrative hearings. In *Hudson*, the Office of the Comptroller of the Currency alleged that the defendants had violated numerous federal banking statutes. To resolve the administrative proceedings, the defendants agreed to be barred from participating in the affairs of any insured depository institution. In addition, they agreed to pay monetary penalties. Subsequently, the defendants were indicted on charges stemming from

120. *Id.* at 278.
121. *Id.* at 274.
122. *Id.* at 290.
123. *Id.* at 292.
124. *Id.* at 284. Congress's nonpunitive goal in this case was to "confiscate property used in violation of the law and to require disgorgement of the fruits of illegal conduct." *Id.* Congress also sought to discourage property owners from allowing their property to be used for illegal purposes, to abate a nuisance, and to ensure that persons do not profit from their illegal acts. *Id.* at 290-91.
125. *Id.* at 292.
126. *Id.*
127. *Id.* The Court noted that *in rem* civil forfeiture historically was not regarded as punishment and that the government was not required to demonstrate scienter to establish that the property was subject to forfeiture. *Id.*
129. *Id.* at 95-96.
130. *Id.* at 96.
131. *Id.* at 97.
132. *Id.*
the earlier allegations, which the administrative hearings had addressed. Applying the first level of the intent-effects test, the Court found that Congress expressly provided that the penalties were civil. Furthermore, the Court noted that Congress had authorized administrative agencies to issue debarment orders. Accordingly, the Court turned to the second level of the test and applied the Mendoza-Martinez factors to determine whether the sanctions were punitive in effect. The Court affirmed its conclusion in Ursery; it noted that, although the imposition of both monetary penalties and debarment sanctions had a deterring effect, these penalties did not render the Act punitive. Moreover, the Court asserted that conduct that triggers a civil regulation may be the subject of a criminal penalty without first requiring a finding of a punitive intent. The Court held that the Double Jeopardy Clause did not bar the later criminal prosecution because the administrative proceedings were civil. Therefore, the Court slowly moved away from the test it had originally developed in Kennedy.

3. The Court Returns Narrow Tailoring to Ex Post Facto Cases.—In Kansas v. Hendricks, the Court addressed a law pertaining to sex offenders. The Court considered whether civil commitment of a sex offender following criminal confinement violated the Ex Post Facto Clause. The Kansas Sexually Violent Predator Act had specific procedures that provided for the civil commitment of persons who, due to a "mental abnormality" or a "personality disorder," were likely to engage in "predatory acts of sexual violence." In this case, the State

133. Id. at 97-98.
134. Id. at 103.
135. Id.
136. Id. at 104.
137. Id.
138. Id.
139. Id. The Court found that the sanctions did not impose an "affirmative disability or restraint." Id. at 104. Additionally, the Court noted that monetary penalties and debarment historically were viewed as punishment. Id. Finally, the Court found that scienter was not required, in the sense that the provisions applied to any person who violated the statutes, regardless of the violator's state of mind. Id. The Court concluded that a penalty could be imposed even in the absence of bad faith. Id.
140. See Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (listing the seven factors used to determine whether a statute is punitive in purpose or effect).
142. Id. at 350.
143. Id.
144. Id. As applied to a currently confined person, the statute requires the custodial agency to notify the local prosecutor sixty days before the anticipated release of a person who might have met the Act's criteria. Id. at 352. The prosecutor is required to decide
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filed a petition seeking the civil commitment of a convicted sex offender who was scheduled for release after serving ten years in prison for an offense involving a minor. At the civil commitment hearing required by the statute, the jury found beyond a reasonable doubt that the sex offender currently met the criteria of a sexually violent predator. Consequently, the trial court ordered the sex offender committed to the Secretary of Social and Rehabilitation Services for placement in a secure mental health facility.

On appeal, the Supreme Court applied the intent-effects test and determined that the intent of the statute was civil. Examining the legislature's intent, the Court found it to be pertinent that the State placed the Act in its probate code rather than its criminal code. The Court described the Act as creating a "civil commitment procedure." Satisfied that the legislative intent was civil, the Court applied the Mendoza-Martinez factors to determine whether the "clearest proof" existed to show that the Act was so punitive in effect as to overcome the express civil intent of the legislature. First, the Court determined that the statute did not implicate either of the two primary aims of criminal punishment: retribution or deterrence. Regarding retribution, the Court focused on the statute's use of past criminal activity as evidence for determining present or future dangerousness. Additionally, the Court found that neither a criminal conviction nor a finding of scienter was required. Instead, the civil commitment was based on the finding of a current mental abnormality or personality disorder. Concerning deterrence, the Court

within forty-five days whether to file a petition in state court seeking the person's involuntary civil commitment. If the prosecutor files such a petition, the court is required to determine whether probable cause exists to support a finding that the person was a "sexually violent predator." If the court finds probable cause, the individual must undergo a professional evaluation followed by a trial to determine beyond a reasonable doubt whether the individual is a sexually violent predator. If at 352-53.

145. Id. at 353-54.
146. Id. at 355.
147. Id. at 356. The statute provided that a person who was designated a sexually violent predator be transferred to the Secretary of Social and Rehabilitation Services for "control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large." Id. at 353 (citation omitted).
148. Id. at 361.
149. Id.
150. Id. (emphasis omitted).
151. Id.
152. Id. at 361-63. The Court concluded that the statute was not retributive because culpability for prior criminal conduct was not at issue. Id. at 362.
153. Id. at 362.
154. Id.
155. Id.
noted that, because persons committed under the statute were by definition unable to control their behavior, such persons were unlikely to be deterred.\textsuperscript{156}

Because restricting the freedom of the "dangerously mentally ill" is within the police power of a state, the Court concluded that the law did not involve an affirmative disability or restraint.\textsuperscript{157} The Court rebutted the argument that the confinement's indefinite duration indicated punitive intent, noting that the indefinite duration was not linked to any punitive purpose.\textsuperscript{158} The Court stated that the indefinite duration was related to the stated purpose of confinement, which was to detain the individual until his mental abnormalities no longer posed a threat to others.\textsuperscript{159} Additionally, the Court found that the provision's procedural safeguards were further evidence of the State's intent to confine the law's effects to a narrow class of individuals—those who posed a risk to society.\textsuperscript{160} The Court held that, because the statute's penalty was narrowly tailored to its stated intent, the civil commitment of sexually violent offenders following their criminal confinement did not violate the \textit{Ex Post Facto} Clause.\textsuperscript{161}

III. THE COURT'S REASONING

In \textit{Smith v. Doe I}, the United States Supreme Court reversed the judgment of the Ninth Circuit Court of Appeals and held that ASORA was not punitive in intent or effect and thus did not violate the \textit{Ex Post Facto} Clause.\textsuperscript{162} Writing for the majority,\textsuperscript{163} Justice Kennedy applied the two-level intent-effects test to determine whether ASORA was a civil proceeding and, if so, whether it was punitive in intent or effect.\textsuperscript{164}

\begin{itemize}
\item \textsuperscript{156} \textit{Id.} The Court also concluded that the conditions surrounding confinement did not suggest that the State had a punitive purpose in passing the Act. \textit{Id.} at 363. The conditions for committed sex offenders were essentially the same as those of any other involuntarily committed patient. \textit{Id.}
\item \textsuperscript{157} \textit{Id.} at 363.
\item \textsuperscript{158} \textit{Id.}
\item \textsuperscript{159} \textit{Id.}
\item \textsuperscript{160} \textit{Id.} The safeguards required the State to determine annually beyond a reasonable doubt that the committed individual continued to satisfy the initial standards for commitment. \textit{Id.} at 364.
\item \textsuperscript{161} \textit{Id.} at 368. The Court determined that the prerequisite finding of current or future dangerousness served the intent of the statute to protect the public from persons likely to reoffend. \textit{Id.}
\item \textsuperscript{162} Smith v. Doe I, 538 U.S. 84, 105-06 (2003).
\item \textsuperscript{163} Justice Kennedy was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas. \textit{Id.} at 88.
\item \textsuperscript{164} \textit{Id.} at 92.
\end{itemize}
Applying the first level of the test, the majority looked to the legislature’s purpose for ASORA and found that the State’s expressed purpose to protect the public from dangerous sex offenders was a legitimate, nonpunitive governmental aim. The Court rejected the Does’ argument that, because the Alaska Constitution considered protecting the public to be a goal of criminal administration, ASORA was punitive. In addition, the Court found that the formal aspects of ASORA, such as the location of the registration provision in the State’s criminal procedure code, did not transform ASORA into a criminal statute. The Court noted that in Title 12, where ASORA’s registration provisions were located, the legislature had included other provisions that did not involve criminal punishment. Finally, because authority is vested in the Alaska Department of Public Safety to regulate ASORA’s notification and registration provisions, the Court concluded that the Alaska legislature intended to create a civil, nonpunitive statute.

Turning to the second level of the test, the Court determined that five of the seven Mendoza-Martinez factors were relevant to its analysis of ASORA. First, the Court rejected the Does’ argument regarding the second Mendoza-Martinez factor, whether the sanction at issue has historically been considered a punishment. Despite the Does’ contention that ASORA resembled historical shaming punishments used in colonial times, the Court found that sex offender registration and notification statutes are only a recent legal development. The Court distinguished ASORA from colonial shaming punishments by noting that these punishments involved either a provision for face-to-face shaming or expulsion from the community, whereas the humiliation associated with ASORA’s public

165. Id. (quoting Kansas v. Hendricks, 521 U.S. 346, 363 (1997)).
166. Id. at 92.
167. Id. at 95-96.
168. Id. at 95. The Court found it logical to provide notice to those subject to ASORA and concluded that initiating the criminal process to supplement a civil statutory scheme does not transform the civil statutory scheme into a punitive one. Id. at 96.
169. Id. at 96. But see Kansas, 521 U.S. at 364-65 (finding that the procedural safeguards demonstrate the legislature’s nonpunitive intent to protect the public by confining only those who are truly dangerous).
170. Smith, 538 U.S. at 96. The Court determined that two of the Mendoza-Martinez factors, “whether the regulation comes into play only on a finding of scienter” and “whether the behavior to which [the regulation] applies is already a crime,” were not important to the case because the statute only applied to past criminal conduct. Id. at 105.
172. Smith, 538 U.S. at 96.
notification provision was only a collateral consequence of a constitutional regulation.\(^{173}\)

Second, the Court found that ASORA did not impose an affirmative restraint or disability.\(^{174}\) The Court observed that ASORA did not restrain the Does' activities and rejected their argument that ASORA's notification provision diminished their employability.\(^{175}\) Moreover, the Court noted that the information obtainable through the public notification provision was also available through criminal background checks.\(^{176}\) The Court reasoned that, because the information regarding prior sex offenses was accessible through other means, ASORA did not impose any additional burden on the Does by providing the information to the general public on the internet.\(^{177}\)

Third, the Court concluded that the presence of a deterrent effect did not render ASORA punitive.\(^{178}\) The Court noted that, in *Hudson v. United States*, it found that the presence of a deterrent purpose was not enough to render a civil sanction criminal because such a holding would undermine the government's ability to implement effective regulations.\(^{179}\) The Court further noted its dilution of the fourth *Mendoza-Martinez* factor in *United States v. Ursery*, where it observed its well-established precedent that a civil statute may serve both civil as well as criminal goals.\(^{180}\) Therefore, following the reasoning of the *Hudson* and *Ursery* Courts, the *Smith* Court concluded that the presence of a deterrent effect did not, by itself, transform ASORA into a punitive regulation.\(^{181}\)

Considering the sixth *Mendoza-Martinez* factor, "whether an alternative purpose to which [the sanction] may rationally be connected is assignable to it,"\(^{182}\) the Court rejected the Does' argument that the statute was overly broad in relation to its stated goal of public safety.\(^{183}\) Analyzing this factor, the Court distinguished *Hendricks*, where it had held that, for a statute to survive an *ex post facto* challenge, the statute's penalty must be narrowly tailored to its stated purpose.\(^{184}\) The Court focused on the difference between the burdens that the two acts im-

\(^{173}\) *Id.* at 97-98.

\(^{174}\) *Id.* at 99-100.

\(^{175}\) *Id.* at 100.

\(^{176}\) *Id.*

\(^{177}\) *Id.* at 101.

\(^{178}\) *Id.* at 102.


\(^{181}\) *Smith*, 538 U.S. at 102.


\(^{183}\) *Smith*, 538 U.S. at 102-03.

posed—confinement imposed by the act in Hendricks versus registration imposed by ASORA.\textsuperscript{185} Additionally, the Court concluded that, rather than permitting a jury to determine an individual's dangerousness,\textsuperscript{186} it was appropriate in the case of sex offenders to allow the public to assess the risk of danger based on the information provided on the registry website.\textsuperscript{187} The Court found that ASORA was not required to fit closely or perfectly with its nonpunitive purpose.\textsuperscript{188} Thus, the Court concluded that ASORA's failure to provide for a determination of current dangerousness was not evidence of a punitive purpose.\textsuperscript{189}

Finally, the Court considered the duration of the reporting requirement and the wide dissemination of information to the public in its application of the seventh Mendoza-Martinez factor—whether the sanction seems excessive notwithstanding the alternative purpose to which it is assigned.\textsuperscript{190} The Court concluded that the duration of the reporting requirement was not excessive in light of empirical research on child molesters, which showed that most reoffenses do not occur within the first few years after the sex offender is released.\textsuperscript{191} Regarding the wide dissemination of information on the internet, the Court made two observations.\textsuperscript{192} First, the Court noted that the information available on the internet constituted passive notification, as the public must seek access to the information by visiting the website.\textsuperscript{193} Second, the Court noted that the mobility of offenders made the wide availability of the information sensible.\textsuperscript{194} Therefore, the Court concluded that the regulatory means chosen by the Alaska legislature were reasonable in light of ASORA's nonpunitive objective.\textsuperscript{195} As such, based on its application of these five Mendoza-Martinez factors, the Court held that ASORA's effects did not negate the State's intent to establish a civil regulation. The Court concluded that ASORA was nonpunitive and did not violate the Ex Post Facto Clause.\textsuperscript{196}

\textsuperscript{185} Smith, 538 U.S. at 104.
\textsuperscript{186} This determination is required by the civil commitment statute in Hendricks, 521 U.S. at 352-53.
\textsuperscript{187} Smith, 538 U.S. at 102-03.
\textsuperscript{188} Id. at 103.
\textsuperscript{189} Id.
\textsuperscript{190} Id. at 103.
\textsuperscript{191} Id. at 104.
\textsuperscript{192} Id. at 105.
\textsuperscript{193} Id.
\textsuperscript{194} Id.
\textsuperscript{195} Id. at 105.
\textsuperscript{196} Id. at 105-06.
Justice Thomas wrote a concurring opinion to reiterate his view expressed in Selig v. Young,\(^{197}\) that an implementation-based challenge is out of place in \textit{ex post facto} jurisprudence.\(^{198}\) Justice Thomas, therefore, would not have considered whether the placement of the information on the internet renders ASORA punitive because internet notification was not required by ASORA.\(^{199}\)

In a separate opinion, in which he concurred in the Court’s judgment, Justice Souter noted that, based on the evidence presented, ASORA could be considered either civil or punitive.\(^{200}\) Justice Souter stated that the clearest proof standard is appropriate only when application of the first level of the intent-effects test clearly reveals that the legislature’s intent is civil.\(^{201}\) In this case, Justice Souter noted that ASORA did not designate the provisions as being clearly civil in contrast to the statutes at issue in past cases.\(^{202}\) Considering the effect of ASORA, Justice Souter observed the public’s harsh treatment of sex offenders.\(^{203}\) With this observation in mind, he questioned the civil nature of the statute.\(^{204}\) Specifically, he questioned ASORA’s use of an individual’s criminal history as the statute’s trigger.\(^{205}\) He was concerned that ASORA’s construction would result in its overinclusive application to individuals who did not pose any threat to the community.\(^{206}\) Ultimately, Justice Souter agreed with the judgment because of “the presumption of constitutionality normally accorded to a State’s law.”\(^{207}\)

In his dissent, Justice Stevens contended that the central issue in Smith involved substantive due process rather than the \textit{Ex Post Facto} Clause.\(^{208}\) He opined that ASORA imposed a significant restraint on

\(^{197}\) 531 U.S. 250, 273 (2001). In Selig, the majority held that an act that is found civil cannot also be punitive as applied to an individual. \textit{Id.} at 267. Therefore, the Court rejected a prisoner’s argument that Washington State’s Community Protection Act of 1990, which authorized civil commitment of sexually violent predators, was punitive as applied because of the conditions of his confinement. \textit{Id.} at 263.

\(^{198}\) Smith, 538 U.S. at 106 (Thomas, J., concurring).

\(^{199}\) \textit{Id.}

\(^{200}\) \textit{Id.} at 106 (Thomas, J., concurring).

\(^{201}\) \textit{Id.}

\(^{202}\) \textit{Id.}

\(^{203}\) \textit{Id.} at 107.

\(^{204}\) \textit{Id.} at 109.

\(^{205}\) \textit{Id.}

\(^{206}\) \textit{Id.} at 108-09.

\(^{207}\) \textit{Id.} at 110.

\(^{208}\) \textit{Id.}
the Does’ liberty interests.\textsuperscript{209} Furthermore, Justice Stevens took issue with the majority’s \textit{ex post facto} jurisprudence.\textsuperscript{210} He noted that, in \textit{ex post facto} cases where acts were held nonpunitive, conviction of a crime was not a necessary condition to impose the statute’s burden.\textsuperscript{211} Justice Stevens concluded that because ASORA imposes its requirements on any individual who commits a criminal sex offense, but not on anyone else, the act was punitive.\textsuperscript{212} Additionally, because ASORA impaired a registrant’s liberty interest, Justice Stevens concluded that ASORA imposed punishment in violation of the \textit{Ex Post Facto} Clause.\textsuperscript{213}

In her dissent, Justice Ginsburg echoed Justice Stevens’s view that, because it was unclear whether the legislature intended ASORA to be civil or punitive, the clearest proof standard should not be applied. Instead, she neutrally evaluated the purpose and effects of ASORA.\textsuperscript{214} In her application of the \textit{Mendoza-Martinez} factors, Justice Ginsburg found ASORA punitive in effect.\textsuperscript{215} Justice Ginsburg unequivocally determined that ASORA imposed an affirmative restraint and disability—the first \textit{Mendoza-Martinez} factor.\textsuperscript{216} She found its reporting obligations to be “onerous and intrusive” and its notification provision to expose registrants “to profound humiliation and community-wide ostracism.”\textsuperscript{217} In addition, Justice Ginsburg considered ASORA’s registration and reporting provisions to be comparable to the conditions of supervised release or parole and ASORA’s public notification provision similar to historical shaming punishments.\textsuperscript{218} In her application of the fourth \textit{Mendoza-Martinez} factor, Justice Ginsburg concluded that ASORA’s retributive aim was demonstrated by the statute’s only trigger—prior criminal convictions.\textsuperscript{219}

\begin{footnotes}
\item 209. Id. at 110-11 (Stevens, J. dissenting). Justice Stevens found that ASORA imposed considerable affirmative obligations as well as a severe stigma on each person to whom ASORA applied. Id.
\item 210. Id. at 111.
\item 211. Id.
\item 212. Id. at 113.
\item 213. Id. Justice Breyer joined in the dissent. Id.
\item 214. Id. at 115 (Ginsburg, J. dissenting).
\item 215. Id.
\item 216. Id. Justice Ginsburg agreed with the Ninth Circuit’s finding that ASORA imposed an affirmative disability by subjecting offenders to burdensome conditions that are similar to probation or parole. Id.
\item 217. Id. at 116.
\item 218. Id. Regarding the shaming nature of the public notification provision, Justice Ginsburg noted that the registrant’s face is posted on a webpage under the label “Registered Sex Offender.” Id. at 118.
\item 219. Id.
\end{footnotes}
While acknowledging that the Court had held some laws to be civil regulations despite their burdensome provisions, Justice Ginsburg found ASORA so excessive in relation to its nonpunitive purpose as to render the statute punitive.\textsuperscript{220} Because ASORA lacked both a requisite finding of future dangerousness and a relationship between the duration of the reporting requirement and the risk of reoffense, Justice Ginsburg determined that ASORA was overinclusive because it applied to sex offenders who no longer posed a threat to the community.\textsuperscript{221} The dispositive factor for Justice Ginsburg was the lack of a provision in ASORA that could account for the possibility of rehabilitation or physical incapacitation of a sex offender.\textsuperscript{222} Thus, after finding that ASORA had an ambiguous intent and a punitive effect, Justice Ginsburg concluded that ASORA violated the \textit{Ex Post Facto} Clause.\textsuperscript{223}

IV. Analysis

In \textit{Smith v. Doe I}, the Supreme Court held that the registration and notification provisions of ASORA were civil and nonpunitive in both intent and effect and concluded that ASORA did not violate the \textit{Ex Post Facto} Clause.\textsuperscript{224} Although the Court applied the two-level intent-effects test traditionally used in \textit{ex post facto} cases to ASORA to determine whether the sex offender registration and notification provisions were punitive, the Court ultimately deferred to the legislature in its application of each factor.\textsuperscript{225} The Court found that the effects of ASORA's provisions were not so overly burdensome as to negate the State's intent to establish a civil regulation.\textsuperscript{226} In so concluding, the Court abandoned the workable standard it had set forth in \textit{Kansas v. Hendricks} and removed from the protection of the \textit{Ex Post Facto} Clause a class of persons whom the clause was intended to protect.\textsuperscript{227} Rather than require the provisions to be tailored to the purpose of the

\begin{footnotes}
\footnotetext[220]{Id.}
\footnotetext[221]{Id.}
\footnotetext[222]{Id.}
\footnotetext[223]{Id.}
\footnotetext[224]{Id. at 105-06.}
\footnotetext[225]{Id.}
\footnotetext[226]{Id.}
\footnotetext[227]{See Weaver v. Graham, 450 U.S. 24, 29 (1981) (noting that the \textit{Ex Post Facto} Clause "restricts governmental power by restraining arbitrary and potentially vindictive legislation"). Sex offenders have been the object of community outrage and vigilante retribution; therefore, they are easy targets for "vindictive legislation" passed by legislators eager to please an angry and fearful public. See Michelle Pia Jerusalem, Note, \textit{A Framework for Post-Sentence Sex Offender Legislation: Perspectives on Prevention, Registration, and the Public's "Right" to Know}, 48 \textit{VAND. L. REV.} 219, 220-31 (1995).}
\end{footnotes}
statute, the Smith Court asserted that a law’s provisions need not closely fit the nonpunitive goals the legislature desires to advance. Specifically, the majority failed to require the State to provide for a finding of dangerousness before subjecting prior offenders to the statute’s burdensome registration and notification provisions. The majority justified its departure by focusing on the degree of the burden imposed by ASORA, a distinction not made in prior ex post facto cases. By failing to require ASORA’s provisions to serve the statute’s stated intent, the Court set a precedent that allows states to enact broad, punitive measures that violate the Ex Post Facto Clause.

A. Evaluating the Constitutionality of ASORA Required a Higher Level of Scrutiny than the Court Applied

1. ASORA Warranted Less Deference Because the Legislative Intent was Ambiguous.—Rather than deferring to the legislature and marginalizing the effect of the Mendoza-Martinez factors, the Court should have used the factors to determine whether the provisions of the statute actually serve the expressed intent of the legislature. First, because the legislature’s intent was ambiguous, rather than express, ASORA warranted less deference. In cases where the Court has required the clearest proof that a statute is punitive in effect, the Court has found that the legislature unambiguously stated that its intent was civil. For example, the Ward Court determined that labeling a sanction as “civil” indicated the express civil intent of the legislature. In Ward, Congress labeled the sanction in the Federal Water Pollution Control Act as a civil penalty, whereas it labeled other sanctions in the same statute as criminal penalties. In contrast, the intent of the Alaska legislature was not as apparent. ASORA does not expressly

228. In Hendricks, the Court held that because a statute’s penalty was narrowly tailored to its stated intent, it did not violate the Ex Post Facto Clause. 521 U.S. 346, 371 (1997).
229. Smith, 538 U.S. at 102-03.
230. Id.
231. Id. at 104 (referring to ASORA’s provision as being the “more minor condition of registration” as compared to the civil confinement imposed by the statute in Hendricks).
232. See id. at 115 (Ginsburg, J., dissenting) (finding that ASORA’s intent was ambiguous).
234. Id.; see also Hudson v. United States, 522 U.S. 93, 103 (1997) (finding that Congress expressly provided that the penalties were civil and thus the statute’s intent clearly was civil); Kansas v. Hendricks, 521 U.S. 346, 361 (1997) (finding that the statute described the regulatory provision as a civil commitment procedure).
235. Ward, 448 U.S. at 249.
236. See Smith, 538 U.S. at 108 (Souter, J., concurring) (concluding that ASORA’s intent is unclear because the legislature failed to label the provisions civil).
refer to the obligations imposed as civil. Additionally, the location of ASORA’s registration requirements in Alaska’s criminal code suggests that the legislature did not intend to create a purely civil statute. Moreover, the Court contradicted itself when it found that the lack of procedural safeguards in ASORA indicated a nonpunitive intent. In Hendricks, the Court had concluded that the inclusion of procedural safeguards demonstrated the legislature’s intent to limit the application of the statute to persons who posed an actual danger to society. This limit on the statute’s application supported the legislature’s stated intent to protect society from dangerous people. The lack of such safeguards in ASORA, conversely, allows the Act to apply to persons who are not sexual predators. Therefore, because the legislature did not clearly express a civil intent, the Court should have afforded the legislature less deference in its application of the Mendoza-Martínez factors.

Justice Ginsburg took this approach in her dissent. Rather than require the clearest proof that the statute was punitive in effect, Justice Ginsburg applied a more neutral standard. Based on her application of the factors, Justice Ginsburg concluded that ASORA’s provisions were so punitive in effect as to overcome the legislature’s ambiguous intent. The majority should have used this approach to ensure that ASORA did not violate the Ex Post Facto Clause. When a legislature enacts a statute that imposes a significant burden on an unpopular class of people, the Court must closely examine whether the legislature acted with nonpunitive aims or sought to satisfy a community’s feelings of revenge, outrage, and fear. Thus, the Court should have given the Alaska legislature less deference and used Ginsburg’s more neutral standard to determine whether ASORA’s effect was punitive or civil.

237. Id.
238. Id.
239. See id. at 96 (reasoning that ASORA’s lack of procedural safeguards implies that the legislature intended the Act to be civil in nature).
241. Id.
242. See Smith, 538 U.S. at 116 (Ginsburg, J., dissenting) (contending that because ASORA applies to all convicted sex offenders regardless of future dangerousness, the Act’s scope exceeds its purpose).
243. Id. at 95 (noting that some of ASORA’s provisions relate to criminal administration).
244. Id. at 115 (Ginsburg, J., dissenting).
245. Id.
246. See id. at 108-09 (Souter, J., concurring). Justice Souter called it “naive” for the majority to look no further than the legislature’s safety objective given society’s attitude towards sex offenders. Id.
2. The Court’s Deferential Application of the Mendoza-Martinez Factors Caused It to Ignore ASORA’s Incongruity with the Ex Post Facto Clause.—Rather than hold ASORA to constitutional standards, the majority’s application of the Mendoza-Martinez factors ignores ASORA’s subtle incongruities with the Ex Post Facto Clause. The majority deferred to the legislature’s decision in every regard, even when the resulting provision had no relation to ASORA’s purpose and therefore did not serve its supposed civil intent. For example, when applying the first factor, “[w]hether the sanction involves an affirmative disability or restraint,” the majority concluded that ASORA did not impose an affirmative disability because the registrants were not unemployable as a consequence of the public notification provision. The Court noted that if an employer wanted to, he could learn of a registrant’s offense through a routine criminal background check. This observation ignores the heart of the issue regarding the notification provision and employability: the potential loss of customers when the public becomes aware that sex offenders work at a particular place of business. The fear of losing customers would likely result in businesses refusing to hire those identified on the registry. Thus, it was irrelevant that information in the sex offender registry already was available to potential employers. It is the ease with which the public is able to access this information that negatively impacts a registrant’s employability and thus imposes an affirmative disability.

Additionally, the Court glossed over two of the Mendoza-Martinez factors that deserved further examination. First, the Court concluded that the third factor, whether the regulation is activated only

247. Id. at 115-16 (Ginsburg, J., dissenting) (explaining how the majority ignored the issues relevant to three of the Mendoza-Martinez factors: whether the sanction involves an affirmative disability or restraint, whether the regulation is triggered by scienter alone, and whether the behavior addressed is already a crime).

248. Id. at 99.

249. Doe I v. Otte, 259 F.3d 979, 988 (9th Cir. 2001). The court highlighted that the breadth of ASORA’s effect likely would render the plaintiffs “completely unemployable” because an employer would not want to risk losing business should the public find out that the employer hired a sex offender. Id.

250. Id.

251. See Smith, 538 U.S. at 105 (reasoning that scienter and the acts targeted by the statute were not important to this case). But see Note, Prevention Versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offenders, 109 Harv. L. Rev. 1711, 1722 (1996) (concluding that the “scienter” factor is “patently inapplicable to sex offender laws” because scienter is “ambiguous in the context of sex offender statutes . . . because although the sex offender laws themselves do not require criminal culpability, they apply only to individuals who have been found criminally culpable for sexual misconduct”).
after finding scienter, did not apply to ASORA. After finding scienter, did not apply to ASORA. ASORA applies only to those convicted of a sex offense; thus, it applies only to those offenders found to have scienter. However, the proposed civil intent of ASORA is to protect society from repeat sex offenders. By allowing scienter alone to trigger the provision, ASORA provides no protection to society from those persons who may have committed a sex offense but were not convicted criminally because of their lack of scienter. Most importantly, the requirement of scienter gives the impression that ASORA "retributively targets past guilt." Dismissing the application of this Mendoza-Martinez factor prevented the Court from reaching the conclusion that a statute triggered by scienter cannot have a civil intent.

In past cases, the Court has minimized the importance of the fifth factor, whether the behavior addressed in the statute is already a crime. The Court did, however, examine this factor in Hendricks. The Hendricks Court found that the use of past criminal activity did not indicate a punitive effect because past criminal activity was used as evidence in determining present or future dangerousness. This rationale conflicts with the use of past criminal activity in ASORA, as past criminal activity is the sole trigger for ASORA's provisions. The Alaska legislature's treatment of criminal activity ought to have signaled to the Court that it needed to consider the ex post facto implications presented by the statute as a whole. Nonetheless, the Smith Court dismissed the implications of ASORA's reliance on past criminal activity. The majority's deferential application of the Mendoza-Martinez factors allowed the Court to conclude that, despite ASORA's

252. Smith, 538 U.S. at 105.
253. Id. at 90.
254. Id. at 93.
255. See Kansas v. Hendricks, 521 U.S. 346, 362 (1997) (noting that the application of the Kansas Sexually Violent Predator Act to persons absolved of criminal responsibility as well as to those convicted of a sex offense serves the Act's purpose of protecting the public from repeat sex offenders).
256. Smith, 538 U.S. at 116 (Ginsburg, J., dissenting).
257. See Hendricks, 521 U.S. at 362 (observing that "[t]he existence of a scienter requirement is customarily an important element in distinguishing criminal from civil statutes").
258. See supra notes 99-114 (discussing the diminishing importance of the fifth Mendoza-Martinez factor in cases involving ex post facto claims).
259. 521 U.S. at 362.
260. Id.
incongruities with the *Ex Post Facto* Clause, the statute does not violate the Constitution.\textsuperscript{263}

**B. The Court Failed to Follow Its Holding in Hendricks Where It Required the Statute’s Provisions to be Tailored to the Statute’s Stated Intent**

1. *The Majority Focused on the Nature of Burden Alone Rather than Comparing the Burden to the Statute’s Civil Intent.*—The majority justified its departure from *Hendricks* by focusing on the difference in burdens imposed by the two statutes.\textsuperscript{264} The Court observed that the objective of the statute in *Hendricks* was the involuntary confinement of dangerous individuals, whereas ASORA imposes the less severe condition of a registration requirement.\textsuperscript{265} The threat of indefinite confinement in *Hendricks* caused the Court to examine closely the Act’s effects as compared to its civil intent.\textsuperscript{266} The *Smith* Court was, however, less concerned with the burden ASORA imposed and thus used a more ambiguous and less protective standard—that which is reasonable in light of the statute’s nonpunitive objective.\textsuperscript{267} The Court mistakenly compared the burdens imposed in two different statutes rather than comparing the burden of ASORA with the Alaska legislature’s civil intent. *Ex post facto* jurisprudence is not concerned with degrees of burden *per se*.\textsuperscript{268} Rather, it requires courts to examine the burden as it applies to those individuals affected by the statute in comparison with the statute’s proposed civil purpose.\textsuperscript{269} Therefore, the issue should be whether the burden inflicted by the statute has an effect beyond its civil purpose, regardless of the degree of the burden.\textsuperscript{270} This standard was announced by the Court in *Hendricks* and should have been applied in *Smith*. Accordingly, the Court’s failure to apply this standard in *Smith* represented a departure from its holding in *Hendricks*. This departure sets a precedent which allows states to convict persons of crimes and, at a later time, impose punitive regulations that violate the *Ex Post Facto* Clause.

\textsuperscript{263} *Id.* at 105.

\textsuperscript{264} *Id.*

\textsuperscript{265} *Id.*

\textsuperscript{266} Kansas v. Hendricks, 521 U.S. 346, 357-59 (1997).

\textsuperscript{267} *Smith*, 538 U.S. at 105.

\textsuperscript{268} See Simeon Schopf, "*Megan’s Law": Community Notification and the Constitution*, 29 COLUM. J.L. & SOC. PROBS. 117, 134 (1995) (noting that the proper constitutional issue is not the degree of burden on the defendant but whether the burden increases the punishment for the crime).

\textsuperscript{269} *Id.*

\textsuperscript{270} *Id.*
2. THE COURT FAILED TO ADDRESS ASORA'S UNDERINCLUSIVE NATURE.—In Smith, the Court did not follow its holding in Hendricks when it allowed the State to impose a burden on ASORA's registrants that fails to reach certain individuals who may pose the danger that ASORA attempts to regulate. First, ASORA does not require the registration of all individuals who may be sexual predators. For example, ASORA does not impose requirements on individuals who have committed a sexual offense but were not convicted because they were incompetent to stand trial. As Justice Stevens noted in his dissent, ASORA departs from the statutes examined in Hendricks and Hawker in that ASORA's sanctions are triggered solely by criminal convictions. For example, in Hawker, although a physician was barred from practicing medicine as a result of a past felony conviction, hypothetically, a physician could be barred from the practice of medicine because he or she was deemed no longer competent. Likewise, the burden of civil commitment imposed in Hendricks applied not only to those convicted of a sex offense, but also to those found not guilty of a sex offense but are nonetheless dangerous to others. The fact that ASORA's provisions are triggered by criminal activity does not alone make ASORA punitive. However, the fact that its provisions are only triggered by criminal activity indicates a retributive and punitive purpose. Therefore, the majority should have required that such an act apply to all those who posed a risk of reoffense in order for the act to be deemed civil in effect.

3. THE COURT FAILED TO CORRECT ASORA'S OVERINCLUSIVE EFFECT THEREBY BURDENING MORE PERSONS THAN NECESSARY TO SERVE THE STATUTE'S CIVIL INTENT.—Moreover, while restricting the imposition of the burden to only convicted sex offenders, ASORA affects more people than necessary to serve the civil intent. The Alaska legislature acted on the premise that all persons convicted of a sex offense pose a future danger to soci-

272. See Smith, 538 U.S. at 90. ASORA applies only to those actually convicted of a sex offense. Id.
273. Id.
274. Id. at 112 (Stevens, J., dissenting).
275. Id. at 113.
276. Kansas v. Hendricks, 521 U.S. 346, 352 (1997). In addition to applying to those convicted of a sexually violent offense, the Kansas Act applied to persons who had been charged with a sexual offense but had been found incompetent to stand trial, not guilty by reason of insanity, or not guilty because of a mental disease or defect. Id.
277. See id. at 362 (noting that under the Kansas Act, a criminal conviction is not a prerequisite for commitment and persons absolved of criminal responsibility may still be confined, suggesting that the statute does not punish for past misdeeds).
The Court allowed the State to rely on statistics that described the risk of reoffense among sex offenders. But, it ignored other studies that found that the risk of reoffense may not be as high as what is commonly believed. The Court also ignored the possibility of rehabilitation, exemplified by Doe I in the instant case. The commitment statute in Hendricks acknowledged the possibility of rehabilitation by requiring a yearly evaluation to determine if a confinee still posed a danger. The Court ignored the lack of a similar provision in ASORA, again allowing the provisions to have a broader effect than necessary to achieve ASORA's purpose. By allowing ASORA to reach beyond those who pose a danger, the majority again set a precedent for the broad application of punitive regulations which do not serve a civil intent and thus violate the Ex Post Facto Clause.

4. The Court Allowed the Legislature to Delegate Its Role to the General Public.—Rather than requiring a provision for individual determinations of dangerousness, the majority allowed the State to delegate to the public the duty to assess the risk based on accurate, public information regarding the registrants' past convictions. However, the information provided to the public via the notification provision is not complete because it includes nothing about an offender's rehabilitation or treatment, which could mitigate the risk of reoffense. Additionally, the general public is not equipped or trained to assess the risk that convicted sex offenders pose. The Court should not allow states to delegate this responsibility to the general public.

278. See 1994 Alaska Sess. Laws 41, § 1 (stating the legislature's finding that sex offenders have a high rate of recidivism following their release from custody).
279. Smith, 538 U.S. at 102-03.
280. Jerusalem, supra note 227, at 220-31. Sex offenders are thought to have the highest rates of recidivism. Id. True rates of recidivism are, however, difficult to ascertain. Id. Statistics on sex offender recidivism rates are inconsistent. Id. For example, studies have shown recidivism rates as low as 20% and as high as 80%. Id.
281. Smith, 538 U.S. at 117 (Ginsburg, J. dissenting).
283. Smith, 538 U.S. at 117 (Ginsburg, J. dissenting).
284. Id. at 104.
285. See ALASKA STAT. § 18.65.087(b) (2002). Information available to the public on the internet through Alaska's Central Registry includes the sex offender's name, address, photograph, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, and length of sentence. Id.
286. See Colleen Miles, Note, Just Desserts, or a Rotten Apple? Will the Ninth Circuit's Decision in Doe v. Otte Stand to Ensure that Convicted Sex Offenders are Not Excessively Punished?, 32 GOLDEN GATE U. L. REV. 45, 79 (2002) (arguing that the burden of protection should fall on law enforcement officials by imposing a period of supervised probation of released sex offenders).
287. Id.
dricks, for example, the legislature required a professional evaluation and then a judicial ruling on whether a person presented a danger to the public. In this way, Kansas ensured that the decision to impose a burden on an individual was based on the actual risk of harm rather than the fears of the general public.

C. The Court Ignored the Purpose of the Ex Post Facto Clause and Abandoned a Workable Standard for Use in Ex Post Facto Cases

The Court's approach in Smith ignores the goal of ex post facto jurisprudence—to determine whether the intent of the legislature is "to punish [the] individual for past activity," or to restrict the individual pursuant to "a regulation of a present situation." When a state is allowed to enact a law that imposes burdens based only on an individual's past activity rather than on his or her current situation, the law should be deemed punitive and unconstitutional. Otherwise, states may impose further punishment under the guise of civil regulation. Retroactive punishment by states disguised as civil regulation is particularly hazardous in cases involving persons convicted of crimes that have raised the public ire.

288. Kansas v. Hendricks, 521 U.S. 346, 352-53 (1997). Before civil commitment was imposed on a sex offender, the Kansas Act required the individual to have a professional evaluation and a trial to determine whether the individual was a sexually violent offender. Id. Additionally, once a sex offender was committed, the Act required the committing court to conduct an annual review to determine whether the person was still a danger to society. Id. at 353.

289. Id. at 358.


291. Id.

292. Smith v. Doe I, 538 U.S. 84, 108-09 (2003) (Souter, J., concurring). Justice Souter was wary of the use of past crime as the trigger for ASORA's application, particularly when taking into account the "pervasive attitudes toward sex offenders." Id. at 109.

The fact that the Act uses past crime as the touchstone... serves to feed suspicion that something more than regulation of safety is going on; when a legislature uses prior convictions to impose burdens that outpace the law's stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones.

293. See generally Jerusalem, supra note 227 (offering a critique of current sex offender laws and suggesting as an alternative a nationwide registration system combined with measures for rehabilitation). Categories of crimes such as sex offenses are particularly vulnerable to unconstitutional, ongoing retribution by a state. Id. at 228. As a result of highly publicized and tragic attacks on children by convicted sex offenders, an angry public has demanded legislatures to respond. Id. Legislators receive pressure from their constituents to enact laws that cover all sex offenders, regardless of the offender's actual risk to the community and regardless of the burden placed on the offender. Id. at 233. These sex offender laws have led to damaging consequences for some registrants. See Doe I v. Otte,
The Smith Court has set a precedent that allows states to enact punitive laws that violate the *Ex Post Facto* Clause. First, the Court allowed the State to direct ASORA's burden towards a class of individuals—convicted sex offenders—rather than towards ASORA's civil concern—the protection of its citizens from those likely to commit sex offenses. In its analysis, the Court ignored its holding in *Flemming v. Nestor*, where the Court observed that a statute is punitive if it is directed at a class of persons rather than at the actual activity that the legislature intends to regulate.

As the Court concluded in *Flemming*, targeting a class of individuals places a statute outside the realm of civil regulation. The concern in *Flemming* was whether Congress imposed retroactive punishment on a class of individuals—members of the Communist party—under the guise of civil regulation of deportees. The Court concluded that the burden imposed by the regulation bore a rational connection to the purpose of the statute. The Court found that the legislature's concern was deportation itself rather than the status that led to deportation. In contrast, ASORA applies to a class of persons—those who have been convicted of sex offenses—regardless of whether they actually pose a current danger of committing a sex offense. As the Court observed in *Flemming*, aiming legislation at a class of people rather than at a specific legislative concern is not a regulatory action.

Legislation is not punitive, however, if the provisions are necessary to effectuate the civil intent of the legislature. Because regulating sex offenders as a class was not necessary to serve ASORA's civil purpose, ASORA could not be considered a regulatory action. Moreover, the Smith Court's decision ignored both *Flemming* and the spirit of the *Ex Post Facto* Clause.

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259 F.3d 979, 987 (9th Cir. 2001) (recounting evidence that one sex offender subject to ASORA suffered community hostility and damage to his business after printouts from the registration website were distributed publicly and posted on bulletin boards).

294. Smith, 538 U.S. at 104.
296. Id.
297. Id. at 613.
298. Id. at 617.
299. Id. at 618-19.
301. *Flemming*, 363 U.S. at 614.
302. Id.
V. Conclusion

In *Smith v. Doe* I, the Supreme Court held that ASORA's registration and notification provisions were punitive in neither purpose nor effect and, therefore, concluded that ASORA did not violate the *Ex Post Facto* Clause.\(^{303}\) In so holding, the Court failed to require ASORA's provisions to serve the legislature's stated intent and thus departed from its decision in *Hendricks*.\(^{304}\) The *Smith* Court should have found the legislature's intent to be ambiguous and applied the *Mendoza-Martinez* factors with less deference. Such an application would have been consistent with *Hendricks*. Because of ASORA's lack of a present dangerousness requirement\(^{305}\) and its burdensome effect on registrants, the Court should have found that ASORA was punitive. This holding would have provided a standard by which state legislatures could enact regulatory provisions tailored to their intent while protecting those convicted of related crimes from retroactive punishment.

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\(^{303}\) *Smith*, 538 U.S. at 105-06.

\(^{304}\) *Kansas v. Hendricks*, 521 U.S. 346, 368 (1997) (holding that because the Kansas Sexually Violent Predator Act was narrowly tailored to its stated intent, the act did not violate the *Ex Post Facto* Clause).

\(^{305}\) See *Smith*, 538 U.S. at 116 (Ginsburg, J., dissenting) (noting that ASORA lacks a future dangerousness requirement).