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Constitutional Law - The Supreme Court Still Hasn't Found What It Should Be Looking for: A Test That Effectively and Consistently Defines Punishment for Constitutional Protection Analysis

William F. Shimko

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CONSTITUTIONAL LAW — The Supreme Court Still Hasn't Found What It *Should* Be Looking For: A Test That Effectively and Consistently Defines Punishment for Constitutional Protection Analysis, *Smith v. Doe*, 123 S. Ct. 1140 (2003).

INTRODUCTION

In 1985, John Doe I pleaded *nolo contendere* to a charge of sexual abuse of a minor; prior to his plea, the court had determined that he had sexually abused his daughter while she was between the ages of nine and eleven.¹ Doe I was sentenced to twelve years in prison, four of which were suspended.² After his release in 1990, a court determined that he showed a very low risk of recidivism and that he was not a pedophile.³ Following this determination, Doe I was granted custody of his minor daughter and later married.⁴ One year prior to Doe I, John Doe II entered a *nolo contendere* plea to one count of sexual abuse of a minor.⁵ Doe II was sentenced to eight years in prison, was also released in 1990, and completed a rehabilitation program for sex offenders.⁶

Four years after both Does were released from prison, the Alaska legislature passed the Alaska Sex Offender Registration Act (ASORA).⁷ Although ASORA was enacted after both Does were convicted of their sex offenses, they were both subject to its requirements.⁸ Both were required to initially register as sex offenders, and then to re-register quarterly every year

1. *Smith v. Doe*, 123 S. Ct. 1140, 1146 (2003); *Doe v. Otte*, 259 F.3d 979, 983 (9th Cir. 2001).

2. *Otte*, 259 F.3d at 983. After his release from prison, Doe I was required to serve out a mandatory period of parole and supervised probation; however, the Alaska Board of Parole released him two years early from his parole requirements, citing “his low risk for reoffense and his compliance with treatment program requirements.” Brief for Respondents at 1, *Godfrey v. Doe*, 123 S. Ct. 1140 (2003) (No. 01-729).

3. *Smith*, 123 S. Ct. at 1146; *Otte*, 259 F.3d at 983. Brief for Respondents at 1, *Godfrey v. Doe* (No. 01-729) (“He is not a pedophile, and treating professionals stated it was unlikely that he would commit another offense.”).

4. *Otte*, 259 F.3d at 983. Brief for Respondents at 1, *Godfrey v. Doe* (No. 01-729) (“[Doe I] has since remarried, has established a business, and he has reunited with his children, including the victim of his offense.”).

5. *Otte*, 259 F.3d at 983 (“one count of sexual abuse of a minor for sexual abuse of a 14-year-old child”); Brief for Respondents at 1, *Godfrey v. Doe* (No. 01-729).

6. *Otte*, 259 F.3d at 983; *Smith*, 123 S. Ct. at 1146.

7. ALASKA STAT. § 12.63.010 (LexisNexis 2002) (enacted on May 12, 1994); *Smith*, 123 S. Ct. at 1145.

8. *Smith*, 123 S. Ct. at 1146; *Otte*, 259 F.3d at 983. “Although convicted before the passage of [ASORA], respondents are covered by it.” *Smith*, 123 S. Ct. at 1146. ASORA specifies that “[a] sex offender . . . who is physically present in the state shall register as provided in this section;” therefore, any sex offender, whether convicted before or after ASORA was enacted, inside or outside of Alaska, must register under ASORA. ALASKA STAT. § 12.63.010 (LexisNexis 2002).

for the remainder of their lives.⁹ After registering, their personal information would be forwarded to the central registry and most of it would be made available to the public.¹⁰

Immediately after ASORA was passed, Doe I, Jane Doe (wife of Doe I), and Doe II brought a 42 U.S.C. § 1983 claim against the Commissioner of the Alaska Department of Public Safety and the Alaska Attorney General alleging that ASORA as applied to them, was void under the Ex Post Facto and Due Process Clauses of the United States Constitution.¹¹ The United States District Court for the District of Alaska initially granted a preliminary injunction against Alaska disseminating the Does' information, then granted summary judgment for the state.¹² On appeal, the Ninth Circuit Court of Appeals reversed the District Court of Alaska's judgment, holding that ASORA's retroactive application violated the Ex Post Facto Clause.¹³

Alaska then appealed to the United States Supreme Court and the Court granted certiorari.¹⁴ The Supreme Court, using the Intent/Effects test,

9. *Smith*, 123 S. Ct. at 1146; ALASKA STAT. §§ 12.63.010(a), 12.63.010(d)(2) (LexisNexis 2002) ("A sex offender . . . required to register for life . . . shall, not less than quarterly, on a date set by the department, provide written verification to the department, in the manner required by the department . . .").

10. *Smith*, 123 S. Ct. at 1146.

11. *Smith*, 123 S. Ct. at 1146; *Rowe v. Burton*, 884 F. Supp. 1372, 1372 (D. Alaska 1994). As this case was appealed to the Supreme Court, the names of Alaska's Commissioner of Department of Public Safety and Attorney General continually changed; therefore, the name of this case changed from *Rowe v. Burton* to *Doe v. Otte* to *Smith v. Doe* (with various other names for the case on the briefs at each level of court). Another name change occurred because an Alaska resident, James Rowe, petitioned the court to have the name of the case changed because one of the plaintiffs originally was given the pseudonym James Rowe (later John Doe I). The real James Rowe complained that he was suffering ill effects from the use of his name in this case. *See Otte*, 259 F.3d at 983 n.1.

12. *Smith*, 123 S. Ct. at 1146; *Burton*, 884 F. Supp. at 1388 ("Plaintiffs James Rowe and John Doe must register under [ASORA], provided, however, that [Alaska] shall not disseminate the information concerning James Rowe and John Doe received pursuant to registration to the public pending further order of this court."). The Does' Supreme Court brief explains the lack of a published record of the summary judgments and offers a citation for them: "The opinions and orders of the United States District Court for the District of Alaska dated March 31, 1999, and August 12, 1999, are not reported; they are reproduced at [the appendix to the petition for certiorari] 69a and 118a, respectively." Brief for Petitioners at 1, *Godfrey v. Doe I*, 123 S. Ct. 1140 (2003) (No. 01-729).

13. *Smith*, 123 S. Ct. at 1146.; *Otte*, 259 F.3d at 995. The Ex Post Facto Clause is contained within Article I, section 10 of the United States Constitution which states:

No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, [E]x [P]ost [F]acto law, or law impairing the obligation of contracts, or grant any title of nobility.

U.S. CONST. art. 1, § 10. Pared down for this analysis, the Ex Post Facto Clause basically states that, "[n]o state shall . . . pass any . . . [E]x [P]ost [F]acto law." *Id.*

14. *Otte v. Doe*, 534 U.S. 1126 (2003).

reasoned that since neither the intent nor the effects of ASORA's requirements were punitive in nature, ASORA did not constitute an extra punishment for crimes committed before its enactment.¹⁵ Based on this reasoning, the Court held, in a six-three decision, that ASORA's retroactive application did not violate the protections of the Ex Post Facto Clause.¹⁶

This note will discuss the need for a new effects test which all courts could use to better define punishment. Such a test is required in order to determine whether sex offender registration acts like ASORA unconstitutionally punish those who committed crimes before its enactment. To accomplish this, this note will provide a summary of the basis on which the Supreme Court's decision rests. Then, this note will cover the reasoning of the Court in the majority, concurring, and dissenting opinions' applications of the *Mendoza-Martinez* test. After viewing the application of the *Mendoza-Martinez* test, the major problems inherent in it and their causes will be examined. Next, the Supreme Court's application of the *Mendoza-Martinez* test in *Smith v. Doe* will be compared with the application of the *Mendoza-Martinez* test by the United States District Court for the District of Alaska and the United States Court of Appeals for the Ninth Circuit. Then, this note will delve into the future of punishment jurisprudence in light of the *Smith* decision. Finally, given the problems with the *Mendoza-Martinez* test, an alternative test will be offered and discussed.

BACKGROUND

The Alaska Sex Offender Registration Act (ASORA)

ASORA is Alaska's version of the Megan's Laws passed by every state, the District of Columbia, and Congress.¹⁷ The federal government required each state to pass a Megan's Law in order to receive certain law enforcement funding.¹⁸ ASORA was passed, along with the Megan's Laws of all the other states, for the purpose of protecting the public from sex of-

15. *Smith*, 123 S. Ct. at 1154 ("Our examination of [ASORA]'s effects leads to the determination that respondents cannot show, much less by the clearest proof, that the effects of the law negate Alaska's intention to establish a civil regulatory scheme.").

16. *Smith*, 123 S. Ct. at 1154 ("[ASORA] is nonpunitive, and its retroactive application does not violate the Ex Post Facto Clause.").

17. *Id.* at 1145. Megan's Law was named for seven year old Megan Kanka who was sexually assaulted and murdered by a neighbor, who, unknown to Megan's family, had prior sexual assault convictions. *Id.* at 1145. For all fifty state statutes, see Brief for Petitioners at 3 n.1, *Godfrey v. Doe*, 123 S. Ct. 1140 (2003) (No. 01-729).

18. *Smith*, 123 S. Ct. at 1145. The federal law requiring Megan's Laws is named the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act. 42 U.S.C. § 14071 (2000).

fenders.¹⁹ The Alaska Legislature confirmed this purpose with the following legislative findings as stated in ASORA:

- (1) [S]ex 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 the public safety.²⁰

ASORA consists of a registration requirement and a notification system.²¹ It requires any sex offender who is physically present in the state to register with either the Department of Corrections or local law enforcement authorities, depending on whether they are incarcerated.²² When registering, each offender must provide his or her name, aliases, identifying features, address, place of employment, date of birth, conviction information, driver's license number, information about vehicles to which he or she has access, and information about any post conviction treatment, as well as permitting him or herself to be photographed and finger printed by the requisite authorities.²³

Registrants are separated into two categories.²⁴ The first, for offenders convicted of a single, non-aggravated sex crime, requires the offender to

19. *Id.* at 1147 (quoting 1994 Alaska Sess. Laws ch. 41, § 1) ("The legislature . . . identified 'protecting the public from sex offenders' as the 'primary governmental interest of the law.'"); *Doe v. Otte*, 259 F.3d 979, 991 (9th Cir. 2001) ("That purpose, of course, is public safety . . .").

20. *Rowe v. Burton*, 884 F. Supp. 1372, 1375-76 (D. Alaska 1994).

21. *Smith*, 123 S. Ct. at 1145 ("The Alaska law, which is our concern in this case, contains two components: a registration requirement and a notification system.").

22. *Id.*; ALASKA STAT. § 12.63.010(a), (b) (LexisNexis 2002). Specifically, regarding which offenders must register where, ASORA requires:

A sex offender . . . required to register under (a) of this section shall register with the Department of Corrections if the sex offender . . . is incarcerated or in person at the Alaska state trooper post or municipal police department located nearest to where the sex offender . . . resides at the time of registration.

ALASKA STAT. § 12.63.010(b) (LexisNexis 2002).

23. *Smith*, 123 S. Ct. at 1145-46; ALASKA STAT. § 12.63.010(b)(1)-(2) (LexisNexis 2002).

24. *Smith*, 123 S. Ct. at 1146; ALASKA STAT. § 12.63.020(a) (LexisNexis 2002).

register annually for fifteen years.²⁵ The second category, for offenders convicted of two or more sex offenses, or at least one aggravated sex offense, requires the offender to register quarterly each year for life.²⁶ Registrants must notify authorities if they move, change facial features, borrow a car, seek psychiatric treatment, or change employers.²⁷

If the offenders do not register as required, they are subject to criminal prosecution.²⁸ For the life registrants, failure to register is a class "C" felony, punishable by up to five years in prison.²⁹ For the fifteen year regis-

25. *Smith*, 123 S. Ct. at 1146; ALASKA STAT. § 12.63.020(a)(2) (LexisNexis 2002). ASORA requires the following of offenders convicted of a single, non-aggravated sex crime:

(a) The duty of a sex offender . . . to comply with the requirements of AS 12.63.010 for each sex offense . . .

(2) ends 15 years following the sex offender's . . . unconditional discharge from a conviction for a single sex offense that is not an aggravated sex offense . . . if the sex offender . . . has supplied proof that is acceptable to the department of the unconditional discharge . . .

ALASKA STAT. § 12.63.02(a)(2) (LexisNexis 2002). "Sex offense" and "aggravated sex offense" are defined by statute. *Id.* § 12.63.100(6), (1).

26. *Smith*, 123 S. Ct. at 1146; ALASKA STAT. § 12.63.020(a)(1) (LexisNexis 2002). ASORA requires the following of an offender convicted of an aggravated sex crime or two or more sex offenses:

(a) The duty of a sex offender or child kidnapper to comply with the requirements of AS 12.63.010 for each sex offense or child kidnapping

(1) continues for the lifetime of a sex offender or child kidnapper convicted of

(A) one aggravated sex offense; or

(B) two or more sex offenses, two or more child kidnappings, or one sex offense and one child kidnapping; for purposes of this section, a person convicted of indecent exposure before a person under 16 years of age under AS 11.41.460 more than two times has been convicted of two or more sex offenses . . .

ALASKA STAT. § 12.63.020(a)(1) (LexisNexis 2002).

27. *Smith*, 123 S. Ct. at 1152, 1157; *Doe v. Otte*, 259 F.3d 979, 984 n.4 (9th Cir. 2001).

28. *See infra* notes 29-30.

29. ALASKA STAT. §§ 11.56.835, 12.55.125(e) (LexisNexis 2002). ASORA defines failure of life registrants to register and classifies the crime in § 11.56.835. ASORA states:

(a) A person commits the crime of failure to register as a sex offender in the first degree if the person violates AS 11.56.840 . . .

(d) Failure to register as a sex offender . . . in the first degree is a class C felony.

Id. § 11.56.835. ALASKA STAT. § 12.55.125(e) provides the term of imprisonment for a class C felony:

(e) A defendant convicted of a class C felony may be sentenced to a definite term of imprisonment of not more than five years . . .

trants, failure to register is a class “A” misdemeanor, punishable by imprisonment of up to one year.³⁰ Also, each year a fifteen year registrant fails to register, a year is added to the remainder of his or her registration requirement.³¹

The information provided by the offenders is then forwarded to the Alaska Department of Public Safety and placed in the central sex offender registry for the state.³² ASORA did not specify how the information was to be made available to the public, but Alaska chose to make the information available on the internet.³³ However, the public does not have access to the entirety of the information registrants are required to furnish, but visitors to the website can view

the sex offender’s . . . name, aliases, address, photograph, physical description [,] license [and] identification numbers of motor vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, length and conditions of sentence, and a statement as to whether the offender or kidnapper is in compliance with [the update] requirements . . . or cannot be located.³⁴

Id. § 12.55.125(e).

30. *Id.* §§ 11.56.840, 12.55.135(a). ASORA defines failure of life registrants to register and classifies the crime in § 11.56.840. ASORA states:

(a) A person commits the crime of failure to register as a sex offender . . . in the second degree if the person knowingly fails to (1) register, (2) file the written notice of change of address, (3) file the annual or quarterly written verification, or (4) supply all of the information required to be submitted under (1)—(3) of this subsection

(b) Failure to register as a sex offender or child . . . in the second degree is a class A misdemeanor.

Id. § 11.56.840. Alaska Statute § 12.55.135(a) provides the term of imprisonment for a class A misdemeanor: “A defendant convicted of a class A misdemeanor may be sentenced to a definite term of imprisonment of not more than one year.” *Id.* § 12.55.135(a).

31. *Id.* § 12.63.020(a)(2)(A) (“the registration period . . . is tolled for each year that a sex offender . . . fails to comply with the requirements of this chapter”); *Smith v. Doe*, 123 S. Ct. 1140, 1146 (2003); *Otte*, 259 F.3d at 990.

32. *Smith*, 123 S. Ct. at 1146.

33. *Id.* The Alaska Department of Public Safety Sex Offender Registration Central Registry, available at <http://www.dps.state.ak.us/nsorcrt/asp/> (last visited Dec. 5, 2003).

34. *Smith*, 123 S. Ct. at 1146. It is important to note that all of the information available is a matter of public record, thus, it is available to the public regardless of whether it is posted on the internet. *Id.* at 1151.

As of December 5, 2003, over 4100 sex offenders were listed on Alaska's sex offender website.³⁵ Since June 30, 2000, the notification website has been accessed over 492,000 times, and the individual pages for offenders' information have been accessed over 1,750,000 times.³⁶

The Ex Post Facto Clause and Prior Cases

The Ex Post Facto Clause of the Constitution forbids the states from passing any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed."³⁷

The legal background of virtually every Ex Post Facto Clause case weaves its way back to the landmark case of *Calder v. Bull*, in which the Supreme Court gave its most expansive discussion of the Ex Post Facto Clause to date.³⁸ In *Calder*, the Court of Probate for Hartford disapproved of and refused to record a will that would have vested property in Calder and his wife, the heiress of deceased.³⁹ Following this ruling, the Connecticut legislature passed a law which revised the decision and directed a new hearing on the will.⁴⁰ After a new hearing the Court of Probate for Hartford approved the will, which was probated and recorded, and the right to the property was declared to be in Bull and his wife, disinheriting Calder and his

35. Alaska Department of Public Safety Sex Offender Registration Central Registry Search System, available at <http://www.dps.state.ak.us/nSorcr/htm/allframe.htm> (last visited Dec. 5, 2003).

36. See *supra* notes 33, 35. This web page is the gateway to the individual offender pages and does not include a counter. In order to obtain the number quoted in the text, an individual record must be accessed. In order to protect the anonymity of the offender whose information was accessed for the purposes of this note, the author has chosen to not publish the precise website address. On or about December 1, 2003, the Alaska Department of Public Safety Sex Offender Registration Central Registry Search System website was redesigned and the counters were removed from the website. Therefore, the statistics in the text are valid for the period of June 30, 2000 through November 14, 2003.

37. U.S. CONST. art. I, § 10; *Rowe v. Burton*, 884 F. Supp. 1372, 1377 (D. Alaska 1994) (quoting *Weaver v. Graham*, 450 U.S. 24, 28 (1981)).

38. *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). *Calder* provided four different examples of Ex Post Facto laws congruous with the Ex Post Facto Clause. *Id.* at 390.

39. *Id.* at 386-87.

40. *Id.* at 386. Explaining the Legislature of Connecticut's action, the Supreme Court noted,

The Legislature of Connecticut, on the 2nd Thursday of May 1795, passed a resolution or law, which, for the reasons assigned, set aside a decree of the court of Probate for Harford, on the 21st of March 1793, which decree disapproved of the will of Normand Morrison . . . made the 21st of August 1779, and refused to record the said will; and granted a new hearing by the said Court of Probate, with liberty of appeal therefrom, in six months.

wife.⁴¹ Calder and his wife challenged the statute that had effectively disinherited them, and after an extensive appeals process, they were unsuccessful in their attempt to regain their property rights because the Supreme Court held that the prohibitions of the Ex Post Facto Clause did not apply to them.⁴² The Court reasoned that the Ex Post Facto Clause had a criminal component meant to keep a state legislature from passing a law that retroactively applied to an action of a person punishing him after his action had been committed.⁴³ Because the Calders had made no action, nor was any action punished as criminal by the legislature, the Calders' claim was rejected.⁴⁴ In perhaps the most cited portion of the opinion, the Court provided four different examples of Ex Post Facto laws:

1st. Every law that makes an action, done before the passing of a law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receive less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.⁴⁵

As *Calder* displayed, a proper definition of punishment is critical to Ex Post Facto analysis; if a new law does not create a punishment, that law cannot violate the Ex Post Facto Clause.⁴⁶ Since *United States v. Ward* in 1980, the Supreme Court and lower courts have used the Intent/Effects test to determine "whether a particular statutorily defined penalty is civil or criminal[.]" and thereby have used the test as a method to define punishment.⁴⁷ The first prong of the Intent/Effects Test requires the court to de-

41. *Id.* at 386-87; Danielle Kitson, *Supreme Court Review: It's an Ex Post Facto: Supreme Court Misapplies the Ex Post Facto Clause to Criminal Procedure Statutes*, 91 J. CRIM. L. & CRIMINOLOGY 429, 433-34 (2001).

42. *See Calder*, 372 U.S. (3 Dall.) at 391-92; Kitson, *supra* note 41 at 433-34.

43. *See Calder*, 372 U.S. (3 Dall.) at 391 (stating Ex Post Facto laws are, "only those that create, or aggravate, the crime; or encrease [sic] the punishment, or change the rules of evidence, for the purpose of conviction").

44. *Id.* at 394. The Supreme Court noted that "the Legislatures of the several states, shall not pass laws, after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it." *Id.* at 390. Following this statement, the Supreme Court limited the protection of the Ex Post Facto Clause to certain, mostly criminal, laws, stating, "I do not think [the Ex Post Facto Clause] was inserted to secure the citizen in his private rights, of either property, or contracts." *Id.*

45. *Id.* at 390.

46. *See supra* notes 38-45 and accompanying text.

47. *United States v. Ward*, 448 U.S. 242, 248 (1980). In *Ward*, a civil penalty of five-hundred dollars was assessed by the Coast Guard as a result of an oil discharge from land *Ward* was leasing into a tributary of the Arkansas River. *Id.* at 246-47. After his administra-

termine whether the legislature intended for the statute to establish a civil proceeding or a punishment.⁴⁸ Although not discussed in *Ward*, the first prong of the Intent/Effects test presents a threshold requirement for the use of the second prong: If the intent of the legislature was punishment, the inquiry is over, the statute is considered punitive and in violation of the Ex Post Facto Clause.⁴⁹ However, if the legislature indicated a civil intent, the second prong of the test is undertaken to determine whether the effects of the statute negate the civil intention.⁵⁰

Seventeen years before *Ward*, in *Kennedy v. Mendoza-Martinez*, the Supreme Court developed an effects test used to determine if a statute imposed a punishment which *Ward* applied as the second prong of the Intent/Effects test.⁵¹ In 1942, *Mendoza-Martinez*, possessing dual American-

tive appeal of the penalty was denied, *Ward* filed suit to enjoin the United States from collecting the penalty. *Id.* at 247. The United States District Court for the Western District of Oklahoma rejected *Ward's* claim that "the reporting requirements of [section] 311(b)(5) [of the Federal Water Pollution Control Act], as used to support a civil penalty under [section] 311(b)(6), violated his right against compulsory self incrimination." *Id.* On appeal by *Ward*, the United States Court of Appeals for the Tenth Circuit, using the *Mendoza-Martinez* test, reversed the district court decision because section 311(b)(6), although denominated as a civil penalty, "was sufficiently punitive to intrude upon the Fifth Amendment's protections against compulsory self incrimination." *Id.* at 247-48. The Supreme Court, using the Intent/Effects Test with the *Mendoza-Martinez* test as the basis for the Effects prong, reversed, holding that a civil penalty under section 311(b)(6) of the Federal Water Pollution Control Act was civil and did not violate the constitutional protection against compulsory self-incrimination. *Id.* at 250-51. The Supreme Court announced the Intent/Effects test as follows:

This Court has often stated that the question whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction. Our inquiry in this regard has traditionally proceeded on two levels. First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention. In regard to this latter inquiry, we have noted that 'only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground.'

Id. at 248-49 (internal citations omitted). In *Russell v. Gregoire*, the Ninth Circuit Court of Appeals gave the "Intent/Effects Test" name to the two-part analysis announced by the Supreme Court in *Ward*. *Russell v. Gregoire*, 124 F.3d 1079, 1084 (9th Cir. 1997). This two part analysis is the same analysis used by the Supreme Court in *Smith v. Doe*. See *Smith v. Doe*, 123 S. Ct. 1140, 1147 (2003). Although the Intent/Effects name was not used in the Supreme Court's opinion it was used in the oral argument of *Smith* before the Supreme Court. Oral Argument at 9, *Smith v. Doe*, 123 S. Ct. 1140 (2003) (No. 01-729). In his concurring opinion in *Smith*, Justice Souter called the Intent/Effects test the "Kennedy-Ward test." *Smith*, 123 S. Ct. at 1155 (Souter, J., concurring).

48. *Ward*, 448 U.S. at 248.

49. See *Ward*, 448 U.S. at 248-29; *Smith*, 123 S. Ct. at 1147 ("If the intention of the legislature was to impose punishment, that ends the inquiry.").

50. *Ward*, 448 U.S. at 248-49.

51. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

Mexican citizenship, purposely left the United States for Mexico in order to evade military service during World War II.⁵² During his absence, in 1944, Congress enacted section 401(j) of the Nationality Act.⁵³ Section 401(j) provided that a citizen of the United States would lose his citizenship if he left the country in order to evade military service.⁵⁴ After his voluntary return in 1946, Mendoza-Martinez pled guilty and was convicted of evasion of his service obligations.⁵⁵ Upon his release from prison, Mendoza-Martinez lived in the United States for another five years, after which, he was served with an arrest warrant for deportation proceedings under section 401(j) of the Nationality Act because he remained outside of the country after section 401(j) of the Nationality Act was passed.⁵⁶

After he was ordered to be deported, Mendoza-Martinez brought a declaratory judgment action seeking a declaration of his status as a citizen, of the unconstitutionality of section 401(j), and of the voidness of all orders of deportation directed against him.⁵⁷ After an unsuccessful attempt in the United States District Court for the District of Southern California and an equally unsuccessful appeal to the Ninth Circuit Court of Appeals, the Supreme Court vacated the judgment and remanded the cause back to the district court.⁵⁸ On remand, the district court held section 401(j) of the Nationality Act unconstitutional; the case was then directly appealed to the Su-

52. *Id.* at 147.

53. *Id.* at 148.

54. *Id.* at 146 n.1. Section 401(j) of the Nationality Act of 1940 states:

A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by . . . (j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States.

58 Stat. 746 (1944).

55. *Mendoza-Martinez*, 372 U.S. at 147. Mendoza-Martinez was sentenced and served one year and one day for his violation of section 410(j) of the Nationality Act of 1940. *Id.*

56. *Id.* at 147-48.

57. *Id.* at 148.

58. *Id.* Discussing the procedural history of *Mendoza-Martinez*, the Supreme Court provided:

A single-judge District Court in an unreported decision entered judgment against Mendoza-Martinez in 1955, holding that by virtue of [section] 401(j), which the court held to be constitutional, he had lost his nationality by remaining outside the jurisdiction of the United States after September 27, 1944. The Court of Appeals for the Ninth Circuit Court of Appeals affirmed the judgment.

Id. (internal citation omitted). The Supreme Court "vacated the judgment and remanded the cause to the District Court for reconsideration in light of its decision a week earlier in *Trop v. Dulles*." *Id.* (internal citation omitted). *Trop v. Dulles* held that the Eighth Amendment did not permit Congress to take away petitioner's citizenship as punishment for a crime. *Trop v. Dulles*, 365 U.S. 86, 101 (1958).

preme Court which remanded it once more.⁵⁹ The district court once again ruled that section 401(j) of the Nationality Act was unconstitutional and added that the statute was “essentially penal in character and deprive[d] [Mendoza-Martinez] of procedural due process.”⁶⁰ Once again, the Attorney General appealed to the Supreme Court.⁶¹ The Supreme Court reasoned that Congress’ intent in passing section 401(j) of the Nationality Act was punitive and section 401(j) of the Nationality Act was unconstitutional because it employed a deprivation of nationality sanction without allowing Mendoza-Martinez the procedural safeguards of the Fifth and Sixth Amendments.⁶²

In its opinion, the Supreme Court posited a seven-factor test for determining whether the effects of a statute are punitive, made up of “tests traditionally applied to determine whether an Act of Congress is penal or

59. *Mendoza-Martinez*, 372 U.S. at 148-49. The District Court for Southern California, in another unreported decision, held section 401(j), “in light of *Trop*,” “unconstitutional because [it was] not based on any rational nexus between the content of a specific power in Congress and the action of Congress in carrying that power into execution.” *Id.* After the direct appeal under 28 U.S.C. § 1252, the Supreme Court remanded the cause, *sua sponte*, “this time with permission to the parties to amend the pleadings to put in issue the question of whether the facts as determined on the draft-evasion conviction in 1947 collaterally estopped the Attorney General from now claiming that Mendoza-Martinez had lost his American citizenship while in Mexico.” *Id.*

60. *Id.* at 149. The District Court for the Southern District of California’s opinion was unreported; therefore no reasoning for this addition to the invalidity of section 401(j) is available. *See id.* at 149 n.3.

61. *Id.* at 149.

62. *Id.* at 166, 169-70. The Supreme Court stated:

But the legislative history and judicial expression with respect to every congressional enactment relating to the provisions in question dating back to 1865 establish that forfeiture of citizenship is a penalty for the act of leaving or staying outside the country to avoid the draft. This being so, the Fifth and Sixth Amendments mandate that this punishment cannot be imposed without a prior criminal trial and all its incidents, including indictment, notice, confrontation, jury trial, assistance of counsel, and compulsory process for obtaining witnesses. If the sanction these sections impose is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking. We need go no further.

Id. at 166. Later, the Supreme Court incorporated the above reasoning into its holding, stating that section 401(j) was punitive

because the objective manifestations of congressional purpose indicate conclusively that the provisions in question can only be interpreted as punitive. A study of the history of the predecessor of § 401(j), which is worth a volume of logic, coupled with a reading of Congress’ reasons for enacting § 401 (j), compels a conclusion that the statute’s primary function is to serve as an additional penalty for a special category of draft evader.

Id. at 169-70.

regulatory in character.”⁶³ The seven factors, which form the basis of the District Court of Alaska’s, Ninth Circuit Court of Appeals’, and Supreme Court’s reasoning in *Smith v. Doe*, are:

(1) whether the sanction involves an affirmative disability or restraint, (2) whether it has historically been regarded as a punishment, (3) whether it comes into play only upon a finding of scienter, (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence, (5) whether the behavior to which it applies is already a crime, (6) whether an alternative purpose to which it may rationally be connected is assignable for it, and (7) whether it appears excessive in relation to the alternative purpose assigned.⁶⁴

Although the Supreme Court intimated that the outcome of this test would show the punitive nature of the statutes in question, it did not apply this test in the *Mendoza-Martinez* opinion.⁶⁵ Instead, they opted out of applying the test because “the objective manifestations of congressional purpose indicate[d] conclusively that the provisions in question can only be interpreted as punitive.”⁶⁶

PRINCIPAL CASE

Smith v. Doe was an Ex Post Facto case of first impression for the Supreme Court—to date, the Court had never before considered whether a

63. *Id.* at 168.

64. *Mendoza-Martinez*, 372 U.S. at 168-69 (numerical indicators added). For cases supporting factor one, see *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 377 (1866); *United States v. Lovett*, 328 U.S. 303, 316 (1946); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960). For cases supporting factor two, see *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320-321 (1867); *Ex parte* Wilson, 114 U.S. 417, 426-429 (1885); *Mackin v. United States*, 117 U.S. 348, 350-352 (1886); *Wong Wing v. United States*, 163 U.S. 228 (1896). For cases supporting factor three, see *Helwig v. United States*, 188 U.S. 605, 610-612 (1903); *Child Labor Tax Case*, 259 U.S. 20, 37-38 (1922). For cases supporting factor four, see *United States v. Constantine*, 296 U.S. 287, 295 (1935); *Trop v. Dulles*, 356 U.S. 86, 96 (1958). For cases supporting factor five, see *Lipke v. Lederer*, 259 U.S. 557, 562 (1922); *United States v. La Franca*, 282 U.S. 568, 572-573 (1931); *Constantine*, 296 U.S. at 295. For cases supporting factor six, see *Cummings*, 71 U.S. (4 Wall.) at 319; *Lipke*, 259 U.S. at 561-62; *La Franca*, 282 U.S. at 572; *Dulles*, 356 U.S. at 96-97; *Flemming*, 363 U.S. at 615, 617. For cases supporting factor seven, see *Cummings*, 71 U.S. (4 Wall.) at 318; *Helwig*, 188 U.S. at 612; *Constantine*, 296 U.S. at 295; *Rex Trailer Co. v. United States*, 350 U.S. 148, 154 (1956).

65. *Mendoza-Martinez*, 372 U.S. at 169 (“Here, although we are convinced that application of these criteria to the face of the statutes supports the conclusion that they are punitive, a detailed examination along such lines is unnecessary . . .”).

66. *Id.* at 169. The Supreme Court held that “the provisions in question,” were punitive, because *Mendoza-Martinez* was joined with another similar case against section 349(a)(10) of the Immigration and Nationality Act, which superseded the Nationality Act of 1940 under which *Mendoza-Martinez* was deported. *Id.* at 151-52, 186.

sex offender registration act violated the Ex Post Facto Clause.⁶⁷ The Court began its opinion by recognizing that, “the framework for our inquiry . . . is well established.”⁶⁸ The Court explained that this framework consisted of a two prong test, sometimes labeled the Intent/Effects Test, although not referred to as such in *Smith*.⁶⁹

To determine the Alaska Legislature’s intent, the Court followed *Hudson v. United States*, which required the Court to determine whether the legislature had expressly or impliedly indicated a civil or punitive preference for ASORA.⁷⁰ The Court found express evidence of intent in the text of ASORA which identified “‘protecting the public from sex offenders’ as the ‘primary governmental interest of the law.’”⁷¹ Relying on *Kansas v. Hendricks*, the Court noted that “an imposition of restrictive measures on sex offenders adjudged to be dangerous is ‘a legitimate non-punitive governmental objective and has been historically so regarded.’”⁷² The Court held that “nothing on the face of [ASORA] suggests that the legislature sought to create anything other than a civil . . . scheme designed to protect the public from harm.”⁷³

The Does argued that the legislature’s real, unstated intent could be gleaned from other sources apart from ASORA.⁷⁴ In support of this argument, the Does pointed to the fact that the Alaska Constitution lists protecting the public as one of the purposes of criminal administration.⁷⁵ Thus, “because it must be presumed that the legislature was aware of the mandated

67. *Smith v. Doe*, 123 S. Ct. 1140, 1146 (2003).

68. *Id.*

69. *Smith*, 123 S. Ct. at 1146-47. See *supra* note 47 for a discussion of the naming of the Intent/Effects Test.

70. *Smith*, 123 S. Ct. at 1147 (citing *Hudson v. United States*, 522 U.S. 93, 99 (1997)) (“The courts ‘must first ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.’”).

71. *Id.* at 1147 (quoting 1994 Alaska Sess. Laws ch. 41, § 1).

72. *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997)). *Hendricks* dealt with a statute passed by the Kansas legislature which established the procedures and possibility of post incarceration confinement of sex offenders that could be applied to people who committed crimes before its passage. KAN. STAT. ANN. § 59-2901 *et seq.* (1994); see also *Hendricks*, 521 U.S. at 350-53. The statute was challenged by *Hendricks*, a prisoner who was the first person to be affected by it, on constitutional grounds including the Ex Post Facto Clause. *Hendricks*, 521 U.S. at 350. After the Kansas Supreme Court invalidated the statute only on Due Process grounds, Kansas and *Hendricks* petitioned the Supreme Court, who granted certiorari, on the Due Process issue as well as Double Jeopardy and Ex Post Facto grounds. *Matter of Care and Treatment of Hendricks*, 259 Kan. 246, 261 (1996); *Kansas v. Hendricks*, 518 U.S. 1004 (1996). The Supreme Court reversed the opinion of the Kansas Supreme Court holding the statute was not punitive and therefore violated none of the constitutional provisions at issue. *Hendricks*, 521 U.S. at 369.

73. *Smith*, 123 S. Ct. at 1147 (quoting *Hendricks*, 521 U.S. at 361).

74. See generally *Smith*, 123 S. Ct. at 1147. The Does argued that the mandates of the Alaska Constitution and the placement of ASORA in the Alaska Code of Criminal Procedure manifest the actual punitive intent of ASORA. See *id.* at 1147-48.

75. *Id.* at 1147.

goals of penal administration[,] it is unreasonable to infer a regulatory purpose from legislative findings aimed at accomplishing one of those penal goals.”⁷⁶ The Court, relying on *Flemming v. Nestor*, reasoned that “where a legislative restriction ‘is an incident of the State’s power to protect the health and safety of its citizens,’ it will be considered ‘as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment.’”⁷⁷

The Does also pointed to ASORA’s registration provisions, which were placed in the criminal procedure code of Alaska.⁷⁸ The Does argued that this placement evidenced the criminal intent of the legislature in enacting ASORA.⁷⁹ The Court reasoned based on the following facts that despite its place of codification, ASORA’s intent was not punitive.⁸⁰ First, ASORA’s notification provisions were codified in the Alaska’s “Health, Safety, and Housing Code” which was not part of the criminal code.⁸¹ Second, non-punitive intent was found in *United States v. One Assortment of 89 Firearms* despite the statute’s placement in the criminal code.⁸² Third, “Alaska’s Code of Criminal Procedure contains many provisions that do not involve criminal punishment.”⁸³

76. Brief for Respondents at 23, *Godfrey v. Doe*, 123 S. Ct. 1140 (2003) (No. 01-729) (internal citation omitted).

77. *Smith*, 123 S. Ct. at 1147 (quoting *Flemming v. Nestor*, 363 U.S. 603, 616 (1960)). Regarding the precedent used to rebut the Does’ argument, the Court noted, “[t]hese precedents instruct us that even if the objective of [ASORA] is consistent with the purposes of the Alaska criminal justice system, the State’s pursuit of it in a regulatory scheme does not make the objective punitive.” *Smith*, 123 S. Ct. at 1148.

78. Brief for Respondents at 25, *Godfrey v. Doe* (No. 01-729). ASORA’s main registration provision is placed in Title 12 of the Alaska Statutes which is the Alaska Code of Criminal Procedure. ALASKA STAT. § 12.63.010 (LexisNexis 2002).

79. Brief for Respondents at 25, *Godfrey v. Doe* (No. 01-729). The Does argued:

Here, the registration triggering provisions are codified in Alaska’s Title 12 which defines punishment and criminal procedure. ALASKA STAT. 12.63.010. Codification in the criminal code was intended by the drafters and sponsors of the legislation because the sponsors followed the mandates of the Legislative Drafting Manual, which requires new statutes to be codified in the appropriate sections of the code, depending upon the subject matter and purpose of the legislation.

Id.

80. See *Smith*, 123 S. Ct. at 1148.

81. *Id.*

82. *Id.* In *United States v. One Assortment of 89 Firearms*, a Double Jeopardy case, the Supreme Court held, using similar reasoning to that in *Smith*, that forfeiture proceedings brought under 18 U.S.C. § 924(d) did not violate the Double Jeopardy clause because they were not punitive, but remedial in nature. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364-66 (1984).

83. *Smith*, 123 S. Ct. at 1148. As examples of such provisions that were placed in the Alaska Code of Criminal Procedure, but that do not involve criminal punishment, the Court provided:

The Supreme Court agreed with both the District Court of Alaska and the Ninth Circuit Court of Appeals that ASORA's intent was non-punitive.⁸⁴ Since the Court came to this conclusion, it moved to the second prong of the Intent/Effects test, which requires an examination of the effects the statute has upon the people to which it applies.⁸⁵ In order to find the statute punitive based on the effects, a heightened burden of proof is required.⁸⁶ Only the clearest proof of punitive effect will be enough to overcome the presumption of constitutionality normally afforded a legislature by the courts.⁸⁷

Title 12 of Alaska's Code of Criminal Procedure (where the Act's registration provisions are located) contains many provisions that do not involve criminal punishment, such as civil procedures for disposing of recovered and seized property, . . . ; laws protecting the confidentiality of victims and witnesses, . . . ; laws governing the security and accuracy of criminal justice information, . . . ; laws governing civil postconviction actions, . . . ; and laws governing actions for writs of habeas corpus, . . . , which under Alaska law are "independent civil proceedings," *State v. Hannagan*, 559 P.2d 1059, 1063 (Alaska 1977). Although some of these provisions relate to criminal administration, they are not in themselves punitive. The partial codification of the Act in the State's criminal procedure code is not sufficient to support a conclusion that the legislative intent was punitive.

Id.

84. *Id.* at 1149.

85. *Id.* at 1147 (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)).

86. *Id.* at 1155 (Souter, J., concurring). The heightened burden or "clearest proof" standard was originally developed by the Supreme Court in *Flemming v. Nestor*. *Flemming v. Nestor*, 363 U.S. 603, 617 (1960). In *Flemming*, the Court remarked:

We observe initially that only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground. Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed. Moreover, the presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it. "It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void."

Id. at 617 (citing *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810)).

87. *Smith*, 123 S. Ct. at 1147 (quoting *Hudson v. United States*, 522 U.S. 93, 100 (1997)). The "clearest proof" burden is most succinctly stated at the beginning of the Court's analysis:

If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme "is so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil'". Because we "ordinarily defer to the legislature's stated intent," "only the clearest proof" will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty. . . ."

In order to determine whether the effects of a statute are punitive, courts normally turn to the seven factor test posited but not applied in *Kennedy v. Mendoza-Martinez*.⁸⁸ The *Mendoza-Martinez* factors are not embodied in any particular constitutional provision, but instead are used to determine whether a statute is punitive, thus violating the particular constitutional provision in question.⁸⁹ Therefore, the Court explained that “[the factors] are neither exhaustive nor dispositive, but useful guideposts.”⁹⁰ Of the seven factors the Court dwelled on five, and dealt with them in varying degrees of depth.⁹¹

The first factor considered by the Court was whether the result of ASORA resembled any historical forms of punishment.⁹² The Court noted the Ninth Circuit Court of Appeals’ remark that sex offender registration acts “are of fairly recent origin.”⁹³ The Does argued that the whole act, but primarily the notification provisions of ASORA, were similar to the shaming punishments of the colonial period and the registration of criminals in the

Id. (internal citations omitted).

88. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963). See *supra* text accompanying notes 64–66 for the seven factors and why they were not applied in *Kennedy v. Mendoza-Martinez*.

89. *Smith*, 123 S. Ct. at 1149. The Court explained that “[t]hese factors, which migrated into our [E]x [P]ost [F]acto case law from double jeopardy jurisprudence, have their earlier origins in cases under the Sixth and Eighth Amendments, as well as the Bill of Attainder and the Ex Post Facto Clauses.” *Id.*

90. *Id.* at 1149.

91. *Id.* at 1149, 1154. Regarding the five factors it dealt with, the Court stated,

The factors most relevant to our analysis are whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose.

Id. at 1149. Disposing of the other two factors, the Court noted,

The two remaining *Mendoza-Martinez* factors—whether the regulation comes into play only on a finding of scienter and whether the behavior to which it applies is already a crime—are of little weight in this case. The regulatory scheme applies only to past conduct, which was, and is, a crime. This is a necessary beginning point, for recidivism is the statutory concern. The obligations the statute imposes are the responsibility of registration, a duty not predicated upon some present or repeated violation.

Id. at 1154.

92. *Id.* at 1149; *Mendoza-Martinez*, 372 U.S. at 168.

93. *Smith*, 123 S. Ct. at 1149 (quoting *Doe v. Otte*, 259 F.3d 979, 989 (9th Cir. 2001)). The first sex offender registration act was passed in 1990 by the state of Washington; when Alaska passed ASORA in 1994, the same year as the famous New Jersey Megan’s Law and the United States’ Jacob Wetterling Act (mandating sex offender registration acts for continued reception of certain federal funding), Alaska was the thirty-second state to enact such a statute. Klaas Kids Foundation, available at <http://www.meganslaw.org/> (last visited Nov. 16, 2003); Brief for Petitioners at 5, *Godfrey v. Doe* (No. 01-729); see *supra* note 17 for a citation to a list of all 50 state statutes.

1930s.⁹⁴ As examples of colonial shaming punishments, the Does specifically cited public exposure, public mocking, and ostracism from the community, while the Court added “humiliated offenders [made] to stand in public with signs cataloguing their offenses[,]” labeling and branding (such as the Scarlet Letter), and public whipping and pillory to the list.⁹⁵ The Does asserted that internet publication was similar to such shamings in that both punishments were motivated by the desire of the public to know who the criminals were and where they were located.⁹⁶ However, the Court felt that the purpose and procedure of ASORA outweighed the humiliation which it considered “but a collateral consequence of a valid regulation.”⁹⁷ The Court held that ASORA’s principal intent and effect “[was] to inform the public for its own safety, not to humiliate the offender.”⁹⁸ The Court concluded that because the intent of ASORA is public safety, widespread, efficient, cost effective, and convenient access to sex offenders’ information is necessary to fulfill that objective.⁹⁹

The second factor the court considered was whether ASORA subjected offenders to an affirmative disability or restraint.¹⁰⁰ To determine whether an affirmative disability or restraint existed, the Court’s test inquired into how the effects of ASORA were felt by those subjected to it.¹⁰¹ The majority stated, “If the disability or restraint was minor and indirect, [ASORA]’s effects are unlikely to be punitive.”¹⁰² Basing its opinion on the lack of physical confinement produced by ASORA’s effects, the lack of restraint in life activities of the registrants, the lack of evidence of pejorative effects on the offenders, the painful effects experienced stemming not from ASORA but from conviction, in-person registration not being mandatory, and reasoning that the effects of ASORA were not like probation, the Court held that ASORA did not impose punitive restraints on the offenders.¹⁰³

94. *Smith*, 123 S. Ct. at 1149-50; Brief for Respondents at 33-35, *Godfrey v. Doe* (No. 01-729). The Supreme Court summarized the Does’ argument: “Respondents contend that Alaska’s compulsory registration and notification resembles these historical punishments, for they publicize the crime, associate it with his name, and, with the most serious offenders, do so for life.” *Smith*, 123 S. Ct. at 1150.

95. *Smith*, 123 S. Ct. at 1150; Brief for Respondents at 33-35, *Godfrey v. Doe* (No. 01-729).

96. Brief for Respondents at 34, *Godfrey v. Doe* (No. 01-729).

97. *Smith*, 123 S. Ct. at 1150. The Court declared, “The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation.” *Id.*

98. *Id.*

99. *Id.*; see *supra* note 97.

100. *Smith*, 123 S. Ct. at 1151; *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963).

101. *Smith*, 123 S. Ct. at 1151 (“Here we inquire how the effects of [ASORA] are felt by those subject to it.”).

102. *Id.*

103. *Id.* at 1151-52. A succinct version of the Court’s reasoning is as follows:

The third factor the Court reviewed was whether ASORA fulfilled the traditional goals of a criminal/punitive statute: Deterrence and retribution.¹⁰⁴ The Does argued that ASORA was punitive because it deterred people from committing sexual offenses.¹⁰⁵ The Court concluded this argument “prove[d] too much,” because “[if] the mere presence of a deterrent purpose renders such sanctions ‘criminal,’” the government could not effectively engage in regulation.¹⁰⁶ The Court noted that the Ninth Circuit Court of Appeals had held that ASORA was retributive because of the required length of

[ASORA] imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint. . . . [ASORA] does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences. . . . [T]he record in this case contains no evidence that [ASORA] has led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred through the use of routine background checks by employers and landlords. . . . [A]lthough the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from [ASORA’s] registration and dissemination provisions, but from the fact of conviction, already a matter of public record. The State makes the facts underlying the offenses and the resulting convictions accessible so members of the public can take the precautions they deem necessary before dealing with the registrant. . . . [ASORA], on its face, does not require these updates to be made in person. And, as respondents conceded at the oral argument before us, the record contains no indication that an in-person appearance requirement has been imposed on any sex offender subject to [ASORA]. . . . [P]robation and supervised release entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in case of infraction. By contrast, offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision. Although registrants must inform the authorities after they change their facial features (such as growing a beard), borrow a car, or seek psychiatric treatment, they are not required to seek permission to do so. A sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, but any prosecution is a proceeding separate from the individual’s original offense.

Id. (internal citations omitted).

104. *Id.* at 1152; *Mendoza-Martinez*, 372 U.S. at 168.

105. *Smith*, 123 S. Ct. at 1152. The Does argued,

The ASORA promotes traditional aims of punishment—retribution and deterrence. The lower court found the ASORA primarily retributive because of the lifetime registration requirement, quarterly verification of the same information four times per year, excessive notification and because there was no way to escape the ASORA’s effect, and not merely because of a misstatement of the law. Here, petitioners admit that the ASORA is intended to deter future crime, although they wrongly contend that retributive and deterrent goals are insufficient to classify the ASORA as penal.

Brief for Respondents at 37, *Godfrey v. Doe* (No. 01-729) (internal citations omitted).

106. *Smith*, 123 S. Ct. at 1152.

registration.¹⁰⁷ However, the Court reasoned that ASORA's registration obligations were not retributive due to their length.¹⁰⁸ The Court explained that the registration obligations were "reasonably related to the danger of recidivism, and this is consistent with the regulatory objective."¹⁰⁹

The fourth factor examined was ASORA's rational connection to a non-punitive purpose.¹¹⁰ This factor was identified by the Court as "a '[m]ost significant factor'" in its decision.¹¹¹ The Does conceded that the public safety purpose of ASORA is "valid, and rational[.]" but argued that ASORA was not narrowly drawn to accomplish its public safety purpose.¹¹² The Court held that although not a precise fit, the effects did not make the non-punitive purpose "of public safety, which [wa]s advanced by alerting the public to the risk of sex offenders in their community," a sham or mere pretext.¹¹³

The final factor explored was whether ASORA appeared excessive in relation to its assigned regulatory purpose.¹¹⁴ The Court acknowledged

107. *Id.* (citing *Doe v. Otte*, 259 F.3d 979, 990 (9th Cir. 2001)) ("[T]he length of the reporting requirements appears to be measured by the extent of the wrongdoing . . .").

108. *Id.* at 1152. The Court stated:

The Court of Appeals was incorrect to conclude that the Act's registration obligations were retributive because "the length of the reporting requirement appears to be measured by the extent of the wrongdoing, not by the extent of the risk posed." The Act, it is true, differentiates between individuals convicted of aggravated or multiple offenses and those convicted of a single nonaggravated offense. The broad categories, however, and the corresponding length of the reporting requirement, are reasonably related to the danger of recidivism, and this is consistent with the regulatory objective.

Id. (internal citations omitted).

109. *Id.* at 1152.

110. *Id.*; *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). It is important here to note the distinction between the terms "alternative purpose" and "regulatory purpose." *Mendoza-Martinez* used "alternative purpose," while the Supreme Court in *Smith* uses "regulatory purpose" and "purpose." *Mendoza-Martinez*, 372 U.S. at 168, 169; *Smith*, 123 S. Ct. at 1152. Because this case started as a suit by the Does claiming that ASORA was unconstitutional, they agreed that the purpose is valid but they espoused that the purpose of ASORA was still punishment. Brief for Respondents at 38, *Godfrey v. Doe* (No. 01-729). The Does asserted that "[t]he alternative purpose assigned by the legislature is protection of the public through deterrence of future sex offenses. Although, this alternative purpose is valid, and rational, it does not compel the conclusion that the ASORA is civil rather than penal." *Id.* (internal citation omitted). The "alternative purpose" therefore, would be whatever Alaska claimed as ASORA's purpose—protecting public safety. *Smith*, 123 S. Ct. at 1152 ("[ASORA] has a legitimate nonpunitive purpose of 'public safety,' which is advanced by alerting the public to the risk of sex offenders in their community.").

111. *Smith*, 123 S. Ct. at 1152 (quoting *United States v. Ursery*, 518 U.S. 267, 290 (1996)).

112. *Id.*

113. *Id.*; *id.* (quoting *Doe v. Otte*, 259 F.3d 979, 991 (9th Cir. 2001)).

114. *Id.* at 1153-54; *Mendoza-Martinez*, 372 U.S. at 169. See *supra* note 110 for a discussion on the distinction between "alternative purpose" and "regulatory purpose."

the Ninth Circuit Court of Appeals' holding that the effects of ASORA were excessive—and therefore punitive—because it applied to all convicted offenders regardless of their future risk of recidivism.¹¹⁵ But, the Supreme Court explained that a state could decide that a conviction posed sufficient evidence of recidivism without violating the protections of the Ex Post Facto Clause if the conclusion was based on findings of a high recidivism risk and dangerousness of a particular class of crimes.¹¹⁶ The Court also stated that ASORA's reporting requirements were not excessive because of their length due to the fact that "most reoffenses d[id] not occur within the first several years after release, but may occur 'as late as 20 years following release.'"¹¹⁷

The second excessive effect cited by the Ninth Circuit Court of Appeals was the extremely wide dissemination of the information on the internet and the pejorative effects of ASORA.¹¹⁸ Responding to this, the Supreme Court focused on two facts: The passive nature of the notification system and the need to make the information easily accessible.¹¹⁹ The Court reasoned that the notification system was "passive" because, "[a]n individual [who wants to find information on a sex offender] must seek access to the information."¹²⁰ The need for easy access to information was justified by the

115. *Smith*, 123 S. Ct. at 1153 (citing *Otte*, 259 F.3d at 991-92).

116. *Smith*, 123 S. Ct. at 1153. The Court then provided the basis required by citing a United States Department of Justice, Bureau of Justice Statistics study which provided that, "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *Id.*

117. *Id.* (quoting R. Prentky, R. Knight & A. Lee, U.S. Dept. of Justice, National Institute of Justice, *Child Sexual Molestation: Research Issues 14* (1997)).

118. *Id.* at 1153; *Otte*, 259 F.3d at 992-93. The Ninth Circuit Court of Appeals reasoned:

[I]n Alaska, information as to all sex offenders is made available worldwide on the internet without any restriction and without regard to whether the individual poses any future risk. Broadcasting the information about all past sex offenders on the internet does not in any way limit its dissemination to those to whom the particular offender may be of concern.

Id. at 992.

119. *Smith*, 123 S. Ct. at 1153. The Supreme Court explained how it concluded that ASORA's notification system was a "passive one."

As we have explained, however, the notification system is a passive one: An individual must seek access to the information. The Web site warns that the use of displayed information "to commit a criminal act against another person is subject to criminal prosecution." <http://www/dps.state.ak.us/nSorcr/asp/> (as visited Jan. 17, 2003) (available in the Clerk of Court's case file). Given the general mobility of our population, for Alaska to make its registry system available and easily accessible throughout the State was not so excessive a regulatory requirement as to become a punishment.

Id.

120. *Id.*

“general mobility of our population[.]”¹²¹ For these reasons, the Supreme Court held that ASORA was not excessive in relation to its purpose of protecting public safety.¹²²

Ultimately, the Court held that the evidence of the effects of ASORA, as demonstrated through the *Mendoza-Martinez* test, did not show by the clearest proof that the effects negated “Alaska’s intention to establish a civil regulatory scheme.”¹²³ Therefore, the Court concluded that ASORA was non-punitive and its retroactive application did not violate the Ex Post Facto Clause.¹²⁴

Concurring Opinions

Two concurring opinions were filed. Justice Thomas wrote “to reiterate that ‘there is no place for [an implementation] based challenge in our [E]x [P]ost [F]acto jurisprudence.’”¹²⁵ In his succinct concurring opinion, Justice Thomas, citing *Seling v. Young* and *Hudson*, remarked that the Court should not look at the effects of the statute, but rather categorize a statute as civil or criminal by examining it on its face.¹²⁶ Since ASORA did not “specify a means of making registry information available to the public,” Justice Thomas believed that by “considering whether internet dissemination renders ASORA punitive,” the Court’s opinion “strayed too far from the statute.”¹²⁷ “With this qualification,” Justice Thomas concurred in the judgment that ASORA’s retroactive application did not violate the protections of the Ex Post Facto Clause.¹²⁸

Justice Souter’s concurring opinion was premised on a different concern.¹²⁹ His opinion outlined his anxiety with the heightened burden of

121. *Id.* Specifically the Court meant “the general mobility of our population” in reference to sex offenders. *Id.* at 1153. The Court pointed to a study which found that “38% of recidivist sex offenses in the State of Washington took place in jurisdictions other than where the previous offense was committed.” *Id.* at 1154.

122. *Id.*

123. *Id.*

124. *Id.* The Court concluded:

Our examination of [ASORA’s] effects leads to the determination that respondents cannot show, much less by the clearest proof, that the effects of the law negate Alaska’s intention to establish a civil regulatory scheme. [ASORA] is nonpunitive, and its retroactive application does not violate the *Ex Post Facto* Clause.

Id.

125. *Id.* (Thomas, J., concurring) (quoting *Seling v. Young*, 531 U.S. 250, 273 (2001)).

126. *Id.* (Thomas, J., concurring) (citing *Seling*, 531 U.S. at 273-74; *Hudson v. United States*, 522 U.S. 93, 100 (1997)).

127. *Id.* (Thomas, J., concurring).

128. *Id.* (Thomas, J., concurring).

129. *Id.* at 1154-56 (Souter, J., concurring).

proof—the need to show by the clearest proof that the effects of a statute are so punitive that they negate the non-punitive intent in enacting the statute—required if the legislature’s intent is determined to be non-punitive.¹³⁰ However, Justice Souter did not completely disagree with the heightened burden; he felt that it should only be used when the intent of the legislature is clearly civil—which was, in his opinion, not as clear as the majority made it seem.¹³¹ Justice Souter agreed with the evidence the majority relied on for its civil classification of ASORA’s intent, but with a caveat.¹³² As proof that there was evidence that pointed toward a punitive intent for ASORA, Justice Souter pointed to the lack of express designation of civil intent in ASORA, the codification of ASORA in the criminal code, the required written notification of ASORA’s requirements as a “necessary condition of any guilty plea,” that “the written judgment must set out the requirements” of ASORA, and finally, that ASORA “mandated a statement of the requirement as an element of the actual judgment of conviction for covered sex offenses.”¹³³

Justice Souter’s uneasiness with the majority opinion did not end with the intent of ASORA, but extended to the effects as well.¹³⁴ Justice Souter questioned the regulatory purpose of the act when he pointed out that by using offenders’ past crimes as a basis for determining the scope of ASORA’s requirements, ASORA could be construed as punishing indiscriminately.¹³⁵ He also believed that the dissemination of the registrants’

130. *Id.* at 1155 (Souter, J., concurring). Justice Souter wrote:

As the Court says, our cases have adopted a two-step enquiry to see whether a law is punitive for purposes of various constitutional provisions including the *Ex Post Facto* Clause. At the first step in applying the so-called *Kennedy-Ward* test, we ask whether the legislature intended a civil or criminal consequence; at the second, we look behind the legislature’s preferred classification to the law’s substance, focusing on its purpose and effects. We have said that “only the clearest proof” that a law is punitive based on substantial factors will be able to overcome the legislative categorization. I continue to think, however, that this heightened burden makes sense only when the evidence of legislative intent clearly points in the civil direction.

Id. (Souter, J., concurring) (internal citations omitted).

131. *Id.* (Souter, J., concurring).

132. *Id.* (Souter, J., concurring). Justice Souter wrote: “[I] not only agree with the Court that there is evidence pointing to an intended civil characterization of [ASORA], but also see considerable evidence pointing the other way.” *Id.* (Souter, J., concurring).

133. *Id.* (Souter, J., concurring); ALASKA R. CRIM. P. 11(c)(4); ALASKA STAT. § 12.55.148 (LexisNexis 2002); ALASKA R. CRIM. P. 32(c).

134. *See Smith*, 123 S. Ct. at 1155-56 (Souter, J., concurring).

135. *Id.* at 1155-56 (Souter, J., concurring). Justice Souter stated,

The fact that the Act uses past crime as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, 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

information and the resulting humiliation was a severe burden (disability/restraint) on the offenders because Alaska had selected that particular information to be made public, and not the information of people who had other types of convictions.¹³⁶

In the end, although he considered arguments similar to those espoused by the dissenting opinions and the Ninth Circuit Court of Appeals, the presumption of constitutionality normally afforded a legislature's actions broke the civil/non-civil tie, and Justice Souter agreed with the majority that ASORA did not violate the protected rights of Does I and II.¹³⁷

Dissenting Opinions

Justice Ginsburg, with whom Justice Breyer joined, wrote a dissent which is similar in thought and reason to Justice Souter's concurring opinion.¹³⁸ Like Justice Souter, Justice Ginsburg also critiqued the heightened burden of clearest proof, which the majority required for the effects of a statute to outweigh the intent.¹³⁹ Invoking *Mendoza-Martinez* as a guide, Justice Ginsburg believed the purpose and effect of an act should be neutrally evaluated absent conclusive evidence of intent.¹⁴⁰ Agreeing with Justice Souter that the Alaska Legislature's intent was not clear from the text of ASORA, Justice Ginsburg evaluated the same elements as the majority but ended up at a contrary result.¹⁴¹ Justice Ginsburg noted that the punitive

argument that the ulterior purpose is to revisit past crimes, not prevent future ones.

Id. (Souter, J., concurring).

136. *Id.* at 1156 (Souter, J., concurring). Justice Souter did not specify any other type of conviction to compare with sex offenses; he simply stated his concern was the fact that Alaska had selected only some conviction information out of its "corpus of penal record" for "broadcasting." *Id.* (Souter, J., concurring).

137. *Id.* (Souter, J., concurring) ("What tips the scale for me is the presumption of constitutionality normally accorded a State's law. That presumption gives the State the benefit of the doubt in close cases like this one, and on that basis alone I concur in the Court's judgment."). For the similar evidence considered by Justice Souter and Justice Ginsburg's dissenting opinion, see *infra* note 138.

138. Both Justices Ginsburg and Souter questioned the use of the heightened burden of proof when legislative intent is not clear, saw some punitive effect in the registration obligations and notification provisions, thought the notification resembled historical forms of punishment, and were troubled by the use of past crime as a trigger for ASORA. Compare *Smith*, 123 S. Ct. at 1159 (Ginsburg, J., dissenting) with *id.* at 1154-56 (Souter, J., concurring).

139. *Id.* at 1159 (Ginsburg, J., dissenting).

140. *Id.* (Ginsburg, J., dissenting) ("[I]n resolving whether the Act ranks as penal for [E]x [P]ost [F]acto purposes, I would not demand 'the clearest proof' that the statute is in effect criminal rather than civil. Instead, guided by *Kennedy v. Mendoza-Martinez*, I would neutrally evaluate the Act's purpose and effects.").

141. *Id.* (Ginsburg, J., dissenting). Specifically, Justice Ginsburg believed that ASORA resembled the historical humiliation punishments; that the purpose of the statute could be viewed as retributive because it applies to all convicted offenders; and that ASORA is excessive in relation to its purpose. *Id.* at 1159-60 (Ginsburg, J., dissenting).

effect of ASORA was evidenced by the fact that ASORA applies to all convicted offenders regardless of future risk, ASORA's registration requirements are exorbitant, and ASORA does not take into consideration the possibility of rehabilitation.¹⁴² Based on these facts and her desired neutral evaluation of the purpose and effects, Justice Ginsburg would have held that ASORA violated the Ex Post Facto Clause with respect to sex offenders to whom it retroactively applied.¹⁴³

Justice Stevens, who also dissented, chose not to use the seven factor *Mendoza-Martinez* test, but instead focused on whether ASORA deprived the registrants of their constitutionally protected interest in liberty.¹⁴⁴ Based on the significant affirmative disabilities brought about by the registration prong of ASORA and the severe stigma placed on those required to register, Justice Stevens concluded that ASORA deprived the registrants of their constitutionally protected liberties.¹⁴⁵

142. *Id.* at 1160 (Ginsburg, J., dissenting). Concerning ASORA's lack of consideration for the possibility of rehabilitation, Justice Ginsburg pointed to Doe I's rehabilitation and subsequent regaining of custody of his minor daughter as the primary example of ASORA's problems. *Id.* (Ginsburg, J., dissenting).

143. *Id.* (Ginsburg, J., dissenting) ("Satisfied that [ASORA] is ambiguous in intent and punitive in effect, I would hold its retroactive application incompatible with the Ex Post Facto Clause, and would therefore affirm the judgment of the Court of Appeals.").

144. *Id.* at 1157-58 (Stevens, J., dissenting). Justice Stevens's dissent was written for *Smith* and its sister case, *Connecticut Dept. of Public Safety v. Doe*, which was a due process challenge of a Connecticut statute. *Connecticut Dept. of Public Safety v. Doe*, 123 S. Ct. 1160, 1163 (2003).

145. *Smith*, 123 S. Ct. at 1157 (Stevens, J., dissenting). Justice Stevens described the affirmative disabilities and severe stigma as follows:

The statutes impose significant affirmative obligations and a severe stigma on every person to whom they apply. In Alaska, an offender who has served his sentence for a single, nonaggravated crime must provide local law enforcement authorities with extensive personal information—including his address, his place of employment, the address of his employer, the license plate number and make and model of any car to which he has access, a current photo, identifying features, and medical treatment—at least once a year for 15 years. If one has been convicted of an aggravated offense or more than one offense, he must report this same information at least quarterly for life. Moreover, if he moves, he has *one* working day to provide updated information. Registrants may not shave their beards, color their hair, change their employer, or borrow a car without reporting those events to the authorities. Much of this registration information is placed on the Internet. In Alaska, the registrant's face appears on a webpage under the label "Registered Sex Offender." His physical description, street address, employer address, and conviction information are also displayed on this page.

The registration and reporting duties imposed on convicted sex offenders are comparable to the duties imposed on other convicted criminals during periods of supervised release or parole. And there can be no doubt that the "[w]idespread public access," to this personal and constantly updated

Instead of continuing to use the *Mendoza-Martinez* test, Justice Stevens proposed three characteristics of whether a statute is punitive which could be viewed as a punitive nature or punishment definition test.¹⁴⁶ First, courts should consider whether the sanction constituted a severe deprivation of the offender's liberty.¹⁴⁷ Second, courts should examine whether the sanction was imposed on everyone who was convicted of a relevant criminal offense.¹⁴⁸ Finally, courts should determine whether the sanction is only imposed on those criminals found in the second characteristic.¹⁴⁹ Although Justice Stevens admitted there were some problems with this analysis, he argued those problems are distinguishable and that his analysis should be used in place of the seven factor *Mendoza-Martinez* test.¹⁵⁰ Based on his analysis, Justice Stevens would have held that ASORA violated the Constitution when applied to pre-enactment offenses.¹⁵¹

ANALYSIS

We must remember that the Ex Post Facto Clause was intended to protect all society and not just individuals subjected to punishment after the fact. Indeed, if we permit the erosion of constitutional rights even for those who are not deserving of protection—those who may be viewed as the current epitome of evil—all society will suffer in the long run.¹⁵²

The Supreme Court's decision in *Smith* will cause all of society to suffer in the long run. Any statute, such as ASORA, which is based on the premise that "the primary interests of persons convicted of sex offenses are less important than the government's interest in public safety," is a sign that we, as a society, are losing our conception of civil rights.¹⁵³ This erosion has

information has a severe stigmatizing effect. In my judgment, these statutes unquestionably affect a constitutionally protected interest in liberty.

Id. (Stevens, J. dissenting) (internal citations omitted).

146. *Id.* at 1157 (Stevens, J., dissenting).

147. *Id.* (Stevens, J., dissenting).

148. *Id.* (Stevens, J., dissenting).

149. *Id.* (Stevens, J., dissenting).

150. *Id.* at 1157-58 (Stevens, J., dissenting). Justice Stevens reasoned that *Deveau v. Braisted*, *Hawker v. New York*, *NLRB v. Allison-Chalmers Manufacturing Company*, and *Kansas v. Hendricks* could be distinguished from *Smith* "because in each a prior conviction was a sufficient condition for the imposition of the burden, but it was not a necessary one[.]" whereas the burden in *Smith* is a necessary one from a prior conviction. *Id.* (Stevens, J., dissenting) (citing *Deveau v. Braisted*, 363 U.S. 144 (1960); *Hawker v. New York*, 170 U.S. 189 (1898); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967); *Kansas v. Hendricks*, 521 U.S. 346 (1997)).

151. *Smith*, 123 S. Ct. at 1158 (Stevens, J., dissenting).

152. *Doe v. Pataki*, 940 F. Supp. 603, 623 (S.D.N.Y. 1996).

153. *Rowe v. Burton*, 884 F. Supp. 1372, 1376 (D. Alaska 1994) (quoting 1994 Alaska Sess. Laws ch. 41 § 1).

been caused by allowing the belief that “[s]ex offenders are the scourge of modern America, the ‘irredeemable monsters’ who prey on the innocent” to influence legislation and ultimately lessen the rights that people who have served their debt to society are supposed to enjoy.¹⁵⁴

Beyond the civil rights issue, there is another reason to disagree with the holding and reasoning of the Court in *Smith*. It flatly illustrates the third example set forth by *Calder v. Bull* as an Ex Post Facto law, which is that “[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed [is an Ex Post Facto law].”¹⁵⁵ The ASORA requirements have now become part of the actual judgment of conviction for sex offenses in Alaska; if either Doe were convicted today the ASORA requirements would be part of the judgment against him—specifically, he would be informed of the ASORA requirements at his sentencing.¹⁵⁶ Although the majority opinion dismissed this provision as a “logical” method to alert “convicted offenders to the civil consequences of their criminal conduct,” the placement of the notice seems dubious.¹⁵⁷ By placing the notice in the penalty phase of a trial, a reasonable person would probably consider the registration and notification requirements a criminal penalty similar to probation or supervised release, and not a civil penalty.¹⁵⁸

The erroneous opinion reached in *Smith* signals the need to determine whether the Supreme Court’s reasoning was flawed. Because the Supreme Court applied the two prong Intent/Effects test to reach this problematic decision, either the Intent reasoning, the Effects reasoning, or both could be troublesome. This note will specifically examine the second of these options: whether the *Mendoza-Martinez* test is a flawed method of analyzing the Effects prong of the Intent/Effects test in order to determine whether

154. Wayne A. Logan, *Liberty Interests in the Preventative State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167, 1167 (1999) (quoting David van Biema, *Burn Thy Neighbor*, TIME, July 26, 1993, at 58).

155. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798).

156. See *Smith*, 123 S. Ct. at 1155 (Souter, J., concurring); ALASKA R. CRIM. P. 11(c)(4); ALASKA STAT. § 12.55.148 (LexisNexis 2002); ALASKA R. CRIM. P. 32(c). Justice Souter did not think this fact proved that the legislative intent behind ASORA was punitive, only that it raised issues concerning whether the legislative intent behind ASORA had been “clearly civil.” *Smith*, 123 S. Ct. at 1155 (Souter, J., concurring).

157. *Id.* at 1149.

158. See generally *Doe v. Otte*, 259 F.3d 979, 990 (citing *United States v. Soto-Olivas*, 44 F.3d 788, 790 (9th Cir. 1995)). The Ninth Circuit Court of Appeals reasoned,

The duty of sex offenders to report quarterly to their local police stations may be analogized to the duty imposed in a judgment of conviction on other defendants to report regularly to a probation officer or to comply with the conditions of supervised release. Such obligations are part of the punishment meted out through a defendant’s criminal sentence.

Id. at 990.

the effects of a statute belie the legislature's stated intent. This choice is not meant to belittle the Intent prong of the Intent/Effects Test. Indeed, it is important to determine the legislature's intent because it alone can end an Ex Post Facto inquiry.¹⁵⁹ But, the Effects inquiry is arguably more important because legislatures can easily avoid Intent problems simply by stating a non-punitive intent and ensuring the statute's legislative history is devoid of evidence of a punitive intent. Therefore, the second step of the analysis, which requires the court to examine the effects of the statute and determine whether these effects are contrary to the stated intent, becomes exceedingly important.

The Problem with the Mendoza-Martinez Test

The problem with the *Mendoza-Martinez* test is its application.¹⁶⁰ As one commentator has stated, "[a]pplication of the *Mendoza-Martinez* factors has been inconsistent at best."¹⁶¹ The Court's misapplication of the *Mendoza-Martinez* test is deeply rooted and stems from two different causes. The first cause is the fact that the *Mendoza-Martinez* test has morphed into something other than what the Supreme Court originally announced in 1963, leaving jurisprudence with two *Mendoza-Martinez* tests. Comparing the original test with its present day namesake, these crucial differences will be highlighted and examined. The second cause of the application problem faced by courts today is the subjective reasoning that the test engenders.¹⁶² By exploring the diverse opinions from the District Court of Alaska and the Ninth Circuit Court of Appeals in *Smith*, and the Supreme Court justices' opinions in *Smith* and *Mendoza-Martinez*, the magnitude of the application problem caused by subjective reasoning will become apparent. This analysis endeavors to show that whether applied in its original form or today's version, the application problem inherent in the *Mendoza-Martinez* test raises concern over its continued use.

159. *Smith*, 123 S. Ct. at 1147 ("If the intention of the legislature was to impose punishment, that ends the inquiry.").

160. See Alex B. Eyssen, Comment, *Does Community Notification for Sex Offenders Violate the Eighth Amendment's Prohibition Against Cruel and Unusual Punishment? A Focus on Vigilantism Resulting from "Megan's Law,"* 33 ST. MARY'S L.J. 101, 121 (2001) ("The subjectivity of the *Mendoza-Martinez* test makes it difficult to accurately apply; subsequently, many lower courts differ in their analysis of a statute's punitive effect."); Michael J. Langer, Note, *Can Anyone Stop Big Brother? New York's Drunk Driving Laws Do Not Pass the Constitutional Test,* 28 HOFSTRA L. REV. 1147, 1172 (2000) ("Thus, such a test, while a good basis for analysis, can be subject to multiple interpretations. It is not difficult to foresee that judges will weigh certain factors more than other factors, most likely on their subjective viewpoint of the issue.").

161. Daniel L. Feldman, *The "Scarlet Letter Laws" of the 1990s: A Response to Critics,* 60 ALB. L. REV. 1081, 1088 (1997).

162. See *supra* note 160.

1. The Original Mendoza-Martinez Test v. Today's Mendoza-Martinez Test

As the following two formulations illustrate, over the last forty years, the *Mendoza-Martinez* test has evolved into something that resembles the original only in its use of the seven factors which comprise it. First, to determine whether a statute was punitive in effect, the original *Mendoza-Martinez* test required the court to examine:

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 are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face.¹⁶³

As applied by the Supreme Court, the *Mendoza-Martinez* test from *Smith* was:

If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is “so punitive either in purpose or effect as to negate [the State’s] intention’ to deem it ‘civil.’” Because we “ordinarily defer to the legislature’s stated intent,” “only the clearest proof” will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty¹⁶⁴

In analyzing the effects of [ASORA] we refer to the seven factors noted in *Kennedy v. Mendoza-Martinez*, as a useful framework. These factors, which migrated into our [E]x [P]ost [F]acto case law from double jeopardy jurisprudence, have their earlier origins in cases under the Sixth and Eight Amendments, as well as the Bill of Attainder and the Ex

163. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (internal notations omitted).

164. *Smith*, 123 S. Ct. at 1147 (internal citations omitted).

Post Facto Clauses. Because the *Mendoza-Martinez* factors are designed to apply in various constitutional contexts, we have said they are "neither exhaustive nor dispositive," but are "useful guideposts" ¹⁶⁵

Between 1963 and 2003, three major differences have arisen. Although not entirely evident from these case excerpts, the first difference, as the discussion below will illustrate, is that the Court has shifted from testing the effects of the statute as evident on its face, to testing some of the effects of the statute in the real world. The second difference is the amount of proof required to allow the effects of the statute to outweigh the intent. The final difference is the Court's instructions on how to weigh the factors.

(a) Effects on the Face or Effects in the Real World

The first misapplication of the *Mendoza-Martinez* test is highlighted by Justice Thomas in his concurring opinion. *Mendoza-Martinez* specifically required that, "these factors must be considered in relation to the statute on its face."¹⁶⁶ Justice Thomas' concurring opinion was the only part of the *Smith* decision that picked up on the original intention of how to use the *Mendoza-Martinez* test.¹⁶⁷ Justice Thomas reasoned that based on the "on its face" requirement, the Court should not have even discussed the effects of the internet dissemination of the Does' information because ASORA made no provision for a method of notification.¹⁶⁸ According to Justice Thomas, "the determination whether a scheme is criminal or civil must be limited to the analysis of the obligations actually created by the statute."¹⁶⁹ Although internet dissemination is the only part of the decision that strays from the "on its face" mandate of *Mendoza-Martinez*, it is a departure nonetheless.¹⁷⁰

(b) Amount of Proof Required

In *Smith*, the Court deferred to the legislature's stated intent that ASORA was civil in nature.¹⁷¹ The Court maintained that when using the

165. *Id.* at 1149 (internal citations omitted).

166. *Mendoza-Martinez*, 372 U.S. at 169.

167. *Smith*, 123 S. Ct. at 1154 (Thomas, J., concurring).

168. *Id.* (Thomas, J., concurring). Justice Thomas noted that ASORA did not specify a means of notification; therefore, "[b]y considering whether Internet dissemination renders ASORA punitive, the Court has strayed from the statute." *Id.* (Thomas, J., concurring).

169. *Id.* (Thomas, J., concurring) (citing *Seling v. Young*, 531 U.S. 250, 273-74 (2001)).

170. *See supra* text accompanying note 163.

171. *Smith*, 123 S. Ct. at 1152 ("[ASORA]'s rational connection to a non-punitive purpose is a '[m]ost significant' factor in our determination that [ASORA]'s effects are not punitive." (quoting *United States v. Ursery*, 518 U.S. 267, 290 (1996))). In its discussion of factor six, the Court, although supposedly using the *Mendoza-Martinez* test to ensure ASORA was not punitive despite the civil intent it had found earlier, relied specifically on that stated intent of public safety as "a most significant factor" in their determination. *Id.* Such deference to stated intent should not be surprising when it is remembered that the "cleared proof" standard

Mendoza-Martinez test, “only the clearest proof [of punitive effects] will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.”¹⁷² This approach to using the test cannot be found in *Mendoza-Martinez*.¹⁷³

After *Smith* and the new *Mendoza-Martinez* test, a punitive effect that merely points to a possible punitive intent probably does not rise to the level of an effect that is “so punitive either in purpose or effects as to negate [the State’s] intention’ to deem it ‘civil.’”¹⁷⁴ Today, for an effect subject to the new test, with its “clearest proof standard,” a large hurdle must be overcome in order to find punitive intent evidenced through the effects of a statute; whereas, under the original *Mendoza-Martinez* test, which lacked a “clearest proof standard,” any effect could have possessed greater meaning because of the lack of a hurdle. Such a high standard as “clearest proof” will not provide the protective measure the Court desires for the new *Mendoza-Martinez* test. Using the *Mendoza-Martinez* test to ensure that a statute’s stated civil intent is not subservient to a hidden punitive intent will be problematic because judges have not been able to, and likely will not be able to, agree on either the nature of the effects in question, or whether this higher burden of “clearest proof” should even be used.¹⁷⁵

(c) Weighing the Seven *Mendoza-Martinez* Factors

Unlike the express statements from *Mendoza-Martinez* on when and how to use the original test—absent clear intent, apply the factors to the statute on its face—*Mendoza-Martinez* is more secretive with respect to how the multiple factors that make up the test are to be weighed.¹⁷⁶ The *Mendoza-Martinez* Court provided the following guidance on the relationship between the seven factors that comprise its test: The factors “are all relevant to the

to overcome stated civil intent began with the phrase, “[b]ecause we ordinarily defer to the legislature’s stated intent . . .” *Smith*, 123 S. Ct. at 1147 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)).

172. *Id.* (quoting *Hudson v. United States*, 522 U.S. 93, 100 (1997)).

173. *See supra* text accompanying note 163 for the specific requirements of the *Mendoza-Martinez* test.

174. *Smith*, 123 S. Ct. at 1147 (quoting *United States v. Ward*, 448 U.S. 242, 248-49); Andrew J. Gottman, Note, *Fair Notice, Even for Terrorists: Timothy McVeigh and a New Standard for the Ex Post Facto Clause*, 56 WASH. & LEE L. REV. 591, 614-15 (1999) (discussing the current status of *Mendoza-Martinez*).

175. *See generally*, Langer, *supra* note 160 at 1172 (discussing the likely subjective weighing of the *Mendoza-Martinez* factors and the problem that weighing engenders). The divergent rulings of the District Court of Alaska, Ninth Circuit Court of Appeals, and the justices on the Supreme Court in *Smith*, give evidence that Langer’s premonition of subjective rulings in cases applying the *Mendoza-Martinez* test is not a simple prophecy, but reality. For further discussion on the differing opinions concerning the punitive nature of the effects of ASORA, *see infra* text accompanying notes 185-220. For further discussion on the use of the “clearest proof standard,” *see supra* text accompanying notes 85-86, 129-30, 138-39.

176. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

inquiry, and may point in different directions.”¹⁷⁷ The most troubling aspect of this assistance is that despite the probability that the factors might point in different directions, the Court provided no suggestion on how to weigh the factors when they point in different directions.¹⁷⁸

The only assistance the *Mendoza-Martinez* Court gave regarding application of the seven factors was the aforementioned, “[a]bsent conclusive evidence of congressional intent as to the penal nature of the statute, these factors must be considered in relation to the statute on its face.”¹⁷⁹ Hereto, there has been no effort made to help courts weigh or balance these factors against one another.¹⁸⁰ This lack of guidance on weighing the factors of the *Mendoza-Martinez* test has led to differing views on how to apply the test.¹⁸¹

To ameliorate this problem, in *Smith*, as in other cases subsequent to *Mendoza-Martinez*, the Supreme Court offered its own guidance on using the test: “Because the [*Mendoza-Martinez*] factors are designed to apply in various constitutional contexts, we have said they are neither exhaustive nor dispositive.”¹⁸² Unfortunately, most courts, including the Supreme Court, have been applying the factors both exhaustively and dispositively, depending on the case; in so doing, as is shown by the divergent conclusions in *Smith*, courts have found that the factors point in many different directions just as the *Mendoza-Martinez* Court predicted.¹⁸³

177. *Id.* at 169.

178. *Id.* Although the Court did remark that they were “convinced that application of these criteria to the face of the statutes supports the conclusion that they are punitive,” it offered no insight into how it reached that conclusion. *Id.*

179. *Id.*

180. *See id.* at 168-69.

181. Courts have dealt with this advice in varied ways. The District Court of Alaska, the Ninth Circuit Court of Appeals, and the Supreme Court, each apply the test, find factors pointing in divergent directions, and subjectively weigh the factors. *See infra* text accompanying notes 185-220. Other Supreme Court cases, such as *Ward* and *89 Firearms*, quickly apply the test to each factor (the *Ward* Court did not even include its reasoning regarding each factor in its opinion), and then subjectively weigh them. *See* *United States v. Ward*, 448 U.S. 242, 249-51 (1980); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365-66 (1984). On the other end of the spectrum are *Artway v. Attorney General of the State of New Jersey* and *Doe v. Poritz*, which flatly rejected the *Mendoza-Martinez* test because of its lack of specific guidance. *Artway v. Attorney General of the State of New Jersey*, 81 F.3d 1235 (3d Cir. 1996), and *Doe v. Poritz*, 662 A.2d 367 (N.J. Sup. Ct. 1995).

182. *Smith v. Doe*, 123 S. Ct. 1140, 1149 (2003); *Ward*, 448 U.S. at 249; *89 Firearms*, 465 U.S. at 365; *Hudson v. United States*, 522 U.S. 93, 99 (1995).

183. In *Smith*, the Supreme Court held that the statute was not punitive despite the fact that it found factor three punitive but of little weight. *Smith*, 123 S. Ct. at 1154. The Court did not even reach a conclusion regarding whether factor five was punitive or non-punitive. *Id.* The Court also stated that factor six was a “[m]ost significant’ factor in our determination” *Id.* at 1152 (quoting *United States v. Ursery*, 518 U.S. 267, 290 (1996)) (alteration in original). In contrast, the Ninth Circuit Court of Appeals found factor seven to be highly significant in deciding that ASORA was punitive. *Doe v. Otte*, 259 F.3d 979, 991-93 (9th Cir. 2001). Apparently, it was significant enough to overcome its findings that factors two,

This unguided treatment of the factors by the *Smith* courts further highlights the second example of the application problem inherent in the *Mendoza-Martinez* test: Subjectivity. In order to arrive at consistently reached, coherent conclusions in cases where an analysis of the factors points to both punitive and non-punitive effects, the courts need a consistent method of weighing these seven factors if the *Mendoza-Martinez* test is to be used. Now, after *Smith*, no such method exists, and it is left up to the discretion of the court in each case to make its own subjective determination as to the punitive nature of a statute's effects.¹⁸⁴ This grave problem, illustrated in the next section, provides more evidence to abandon not only the new version, but also the original *Mendoza-Martinez* test.

2. Subjectivity

There is an even more pressing concern than the subjective weighing of factors by the courts. Because the *Mendoza-Martinez* test invites judges to subjectively measure the effects of the statute in question, the courts cannot consistently and methodically weigh the factors if those same courts, and even the justices that comprise each court, cannot agree on whether the factors themselves individually point toward a punitive character. Despite the fact that all three courts in this case agreed on the intent behind ASORA, their application of the *Mendoza-Martinez* test factors was far from in accord, as will be shown below.¹⁸⁵ The following discussion sketches the holdings of the District Court of Alaska, Ninth Circuit Court of Appeals, and Supreme Court in *Smith* with respect to each of the seven *Mendoza-Martinez* factors, and the reasoning the Ninth Circuit Court of Appeals and the District Court used in arriving at these decisions.¹⁸⁶ Since the Supreme Court's reasoning has already been discussed, its reasoning will be further noted only as needed.

three, and six pointed toward the statute being non-punitive. *Id.* at 989, 991. Finally, the District Court of Alaska also had factor weighing issues—it found that factors three and five evidenced punitive intent, but gave them little weight. *Rowe v. Burton*, 884 F. Supp. 1372, 1378-79 (D. Alaska 1994). Even having known these differing opinions, neither the Supreme Court nor the Ninth Circuit Court of Appeals considered using a different test despite the mandate that the *Mendoza-Martinez* factors are “neither exhaustive, nor dispositive;” instead, they continued to apply *Mendoza-Martinez*. *Smith*, 123 S. Ct. at 1149 (“In analyzing the effects of [ASORA] we refer to the seven factors noted in *Kennedy v. Mendoza-Martinez* as a useful framework.”); *Otte*, 259 F.3d at 986 (citing *Russell v. Gregoire*, 124 F.3d 1079, 1086 (9th Cir. 1997)) (“When considering a statute's effect, we rely on an analysis of seven factors set forth by the Supreme Court in *Mendoza-Martinez*.”).

184. Langer, *supra* note 160, at 1172 (“It is not difficult to foresee that judges will weigh certain factors more than other factors, most likely on their subjective viewpoint of the issue.”).

185. *Smith*, 123 S. Ct. at 1149 (“We conclude, as did the District Court and the Court of Appeals, that the intent of the Alaska Legislature was to create a civil, nonpunitive regime.”).

186. See *supra* text accompanying notes 92-122 for a discussion on the Supreme Court's reasoning on each factor it considered.

It is easiest to start with the issues on which all of the courts agreed. Each court determined that the sanctions at issue in ASORA bore no resemblance to historical punishments; therefore, each held factor two to point toward a non-punitive characterization of ASORA.¹⁸⁷ The Ninth Circuit Court of Appeals reasoned, based on precedent, that because sex offender registration statutes are of fairly recent origin they are not analogous to historical shaming punishments.¹⁸⁸ The District Court of Alaska, discussing only registration in relation to parole, reasoned that registration was not “imbued by history with a punitive connotation.”¹⁸⁹ All three courts also held that ASORA’s purpose—to protect public safety—was non-punitive (factor six), based on their respective conclusions that the stated purpose of protecting public safety evidenced the legislature’s non-punitive intent.¹⁹⁰ Considering that the District Court of Alaska, Ninth Circuit Court of Appeals, and Supreme Court all reached the same conclusion with regard to these two factors, subjectivity is not an overwhelming concern with respect to these factors. Subjectivity becomes apparent in the conclusions reached by each court with regard to the other five factors.

Regarding factor one, whether the sanction created an affirmative disability or restraint, the Supreme Court majority determined that ASORA created no such disability or restraint.¹⁹¹ In contrast, the Ninth Circuit Court of Appeals unanimously reasoned that ASORA’s registration requirement imposed a “significant affirmative disability,” based on the “onerous condi-

187. *Smith*, 123 S. Ct. at 1149-51; *Otte*, 259 F.3d at 989; *Burton*, 884 F. Supp. at 1378.

188. *Otte*, 259 F.3d at 989 (citing *Russell v. Gregoire*, 124 F.3d 1079, 1092 (9th Cir. 1997)).

189. *Burton*, 884 F. Supp. at 1378. The District Court of Alaska did not view sex offender registration acts as “imbued by history with a punitive purpose” because they are not like the punishments of parole and supervised release. *Id.* The District Court stated,

However, there are very substantial differences between the condition of one who is a registrant and one released on parole or subject to supervised release. Registration entails no obligation to accept continuing supervision, submit to searches, perform community service, live in a particular place or otherwise comply with any of the myriad and often intrusive conditions of parole or supervised release.

Id.

190. *Smith*, 123 S. Ct. at 1152 (“We conclude . . . that the intent of the Alaska Legislature was to create a civil, non[-]punitive regime.”); *Otte*, 259 F.3d at 991 (“The existence of a non-punitive purpose for [ASORA], protecting public safety, unquestionably provides support, indeed the principal support, for the view that [ASORA] is not punitive for Ex Post Facto Clause purposes.”); *Burton*, 884 F. Supp. at 1379 (“As explained in connection with the discussion of [ASORA]’s design, the registration requirement is rationally related to an entirely proper and non-punitive purpose, the protection of society from crime.”). The Supreme Court also considered and rebutted the Does’ argument that because the statute was not a “close or perfect fit with the nonpunitive aims it seeks to advance,” by stating that “[t]he imprecision . . . does not suggest that [ASORA]’s nonpunitive purpose is a ‘sham or mere pretext.’” *Smith*, 123 S. Ct. at 1152 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997)).

191. *Smith*, 123 at 151, 152. See *supra* text accompanying notes 100-104 for the Supreme Court’s reasoning on factor one.

tions,” such as quarterly or yearly in-person registration, and divulgence of personal information.¹⁹² Likewise, the Ninth Circuit Court of Appeals held that the notification provisions imposed an affirmative disability because “world-wide” distribution of the offenders “lurid past” would undoubtedly produce “obloquy and scorn” for the sex offenders.¹⁹³ The District Court of Alaska split, which would become its common practice, holding that the registration requirement’s effects were not punitive because the restraint was “brief” and “*de minimis*,” but that the notification requirement’s effects were punitive because of the possibility that public stigma and ostracism “would affect both [Does’] personal and professional lives.”¹⁹⁴

Concerning factor three, whether the sanction comes into play only on the finding of scienter, the Supreme Court mentioned but did not discuss the scienter requirement.¹⁹⁵ Reasoning that not all sex offenses in Alaska require a finding of scienter for conviction, the Ninth Circuit Court of Appeals held that ASORA did not become applicable only upon a finding of scienter, which prevented factor three from pointing toward a punitive characterization.¹⁹⁶ Contrarily, the District Court of Alaska, only ruling on ASORA’s registration provision, held that since the “Registration Act is premised upon the past knowingly wrongful conduct of the registrant . . . [it] would indicate the law is punitive.”¹⁹⁷ Although the district court found this factor evidence of punitive effect, it also noted that it should be given little weight in the overall balancing test of the factors.¹⁹⁸

192. *Otte*, 259 F.3d at 987.

193. *Id.* at 987-88. The Ninth Circuit Court of Appeals was concerned that easy accessibility of the sex offender’s information on the internet would lead to instances such as the one in the record before it where “one sex offender subject to [ASORA] suffered community hostility and damage to his business after printouts from the Alaska sex offender registration internet website were publicly distributed and posted on bulletin boards.” *Id.*

194. *Burton*, 884 F. Supp. at 1378.

195. *Smith*, 123 S. Ct. at 1154. In *Burton*, the District Court of Alaska defined scienter as “knowingly wrongful conduct.” *Burton*, 884 F. Supp. at 1378. The only time the Supreme Court mentioned scienter in *Smith* was in the following sentence, after which no discussion of the scienter factor occurred: “The two remaining *Mendoza-Martinez* factors—whether the regulation comes into play only on a finding of scienter and whether the behavior to which it applies is already a crime—are of little weight in this case.” *Smith*, 123 S. Ct. at 1154.

196. *Otte*, 259 F.3d at 989. In Alaska, not all sex offenses require a finding of scienter. Those which do not require scienter are: First Degree Sexual Abuse of a Minor, Second Degree Sexual Abuse of a Minor, Third Degree Sexual Abuse of a Minor, Fourth Degree Sexual Abuse of a Minor, and Incest. *See* ALASKA STAT. §§ 11.41.434, 11.41.436, 11.41.438, 11.41.440, 11.41.450 (LexisNexis 2002). The Alaska sex offenses which require scienter are: First Degree Sexual Assault, Second Degree Sexual Assault, Third Degree Sexual Assault, Fourth Degree Sexual Assault, Unlawful Exploitation of a Minor, First Degree Indecent Exposure, and Second Degree Indecent Exposure. *See id.* §§ 11.41.410, 11.41.420, 11.41.425, 11.41.427, 11.41.455, 11.41.458, 11.41.460.

197. *Burton*, 884 F. Supp. at 1378-79.

198. *Id.* The District Court of Alaska noted:

Factor four asks whether ASORA deters crime and is retributive.¹⁹⁹ The Supreme Court held it does neither, and therefore is not punitive.²⁰⁰ The Ninth Circuit Court of Appeals held that ASORA “may have some deterrent effect,” but based on the “onerous registration obligations” such as the frequency of registration, the penalties for not registering, and the length of registration, that the act was “inherently retributive.”²⁰¹ The District Court of Alaska stated that, “[t]he Registration Act is obviously meant to deter crime[,]” but initially reasoned that the “mechanism of deterrence may not be sufficiently similar to the ordinary mechanism of deterrence to be an indicator of punitive effect.”²⁰² The district court reasoned that because the registration requirements of ASORA were only a *de minimis* burden that they would not cause “other[] similarly inclined” sex offenders to “modify future behavior to avoid the unpleasant consequence [of registration].”²⁰³ However, the district court did reason that the effects that may come from notification, scorn and ostracism of sex offenders, could have a deterrent effect, and therefore “the fourth factor is a strong indicator that [ASORA] has a punitive effect.”²⁰⁴

In relation to factor five, whether the behavior to which ASORA applies is already a crime, the Supreme Court, as previously mentioned, discussed the punitive likelihood of the factor but ultimately dismissed it.²⁰⁵ However, the Ninth Circuit Court of Appeals and the District Court of

This factor must necessarily be considered a light weight in the balance, for, if accorded substantial significance, it would dictate decisions which could not be squared with the result in cases like *United States v. Huss*. Evaluation of the third factor therefor [sic] provides some indication that the challenged law has a punitive effect.

Id. (internal citation omitted). In *United States v. Huss*, the Ninth Circuit Court of Appeals used the following test to determine whether a statute is punitive in design:

To negate any inference of a punitive design, the past conduct must be relevant to the regulated activity, and “if the past conduct . . . is not the kind of conduct which indicates unfitness to participate in the activity, it will be assumed . . . the purpose of the statute is to impose an additional penalty.” If, on the other hand, “the past conduct can reasonably be said to indicate unfitness to engage in the future activity the assumption will be otherwise.”

Burton, 884 F. Supp. at 1377 (quoting *United States v. Huss*, 7 F.3d 1444, 1448 (9th Cir. 1993) (internal citation omitted).

199. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963).

200. *Smith*, 123 S. Ct. at 1152. See *supra* text accompanying notes 104-109 for the Supreme Court’s reasoning on factor four.

201. *Otte*, 259 F.3d at 990.

202. *Burton*, 884 F. Supp. at 1379.

203. *Id.*

204. *Id.*

205. *Smith*, 123 S. Ct. at 1154. See *supra* note 91 for the Supreme Court’s discussion and dismissal of factor five.

Alaska did discuss the factor and both agreed that the behavior was already a crime and found punitive effect.²⁰⁶ The Ninth Circuit Court of Appeals noted that in a previous case, one of its reasons for holding that a sex offender registration act was not punitive was that the act applied to sex offenders who were not found guilty of a crime, as well as to those who were found guilty.²⁰⁷ Based on the fact that ASORA did not have a similar provision, instead only applying to those convicted of a sex offense, the Ninth Circuit Court of Appeals held that, “this factor also provides support for the conclusion that [ASORA]’s effect is punitive.”²⁰⁸ The district court answered the question of whether the behavior to which ASORA applied was already a crime with a simple sentence: “It is.”²⁰⁹ It also stated this factor cannot be given great weight in the analysis.²¹⁰

Finally, regarding factor seven, whether ASORA is excessive in relation to its public safety purpose, the Supreme Court held it was not excessive and therefore not-punitive.²¹¹ In contrast, based on the fact that ASORA did not take into account the possibility of rehabilitation or likelihood of recidivism, and also the unrestricted access to the personal information that ASORA provided, the Ninth Circuit Court of Appeals held that ASORA was exceedingly broad.²¹² The Ninth Circuit Court of Appeals also noted that this factor was “highly significant” in its analysis of the punitive effect of ASORA.²¹³ Once again, the District Court of Alaska split its analysis into

206. *Otte*, 259 F.3d at 991; *Burton*, 884 F. Supp. at 1379.

207. *Otte*, 259 F.3d at 991; *Russell v. Gregoire*, 124 F.3d 1079, 1091 (9th Cir. 1997) (challenging the Washington state sex offender registration statute on Ex Post Facto grounds).

208. *Otte*, 259 F.3d at 991.

209. *Burton*, 884 F. Supp. at 1379.

210. *Id.*

211. *Smith v. Doe*, 123 S. Ct. 1140, 1153 (2003). See *supra* text accompanying notes 114-22 for the Supreme Court’s reasoning on factor seven.

212. See *Otte*, 259 F.3d at 991-93.

213. *Id.* at 991. The Ninth Circuit Court of Appeals believed this was a “highly significant factor” because of the “exceedingly broad” nature of the statute. *Id.* at 991, 993. The Ninth Circuit Court of Appeals noted that its “unlimited breadth” was best characterized by the fact that ASORA made no provisions for the rehabilitation of the sex offender. *Id.* at 993. As an example of this, the Ninth Circuit Court of Appeals referred to Doe I:

Indeed, the punitive effect caused by the excessiveness of the statute’s provisions in relation to its non-punitive purpose is exemplified by John Doe I’s case. Convicted of sexual abuse of his minor daughter, Doe I was successfully rehabilitated. After his release from prison, a state court determined that he was not a pedophile, and that he posed a very low risk of reoffending. On that basis, the court returned his minor daughter to his custody. Nevertheless, under the Alaska statute’s registration provisions, Doe I would be forced to submit to in-person registration at his local police department four times a year, every year, and, under its notification provisions, he would be compelled forever to suffer the unremitting social obloquy and ostracism that would accompany his being publicly labeled a sex offender on Alaska’s world-wide internet website. Presumably, in any state that does not provide for unlimited public disclosure of sex of-

the two components of ASORA.²¹⁴ Based on the *de minimis* burdens imposed by the registration requirements, the district court held that the registration requirements were not excessive in relation to the purpose of protecting public safety.²¹⁵ The district court's decision on the excessiveness of the notification provisions offered no specific holding, instead it noted that in some jurisdictions that have heard similar cases, ASORA would be considered non-punitive, while in others it would not withstand scrutiny and be judged to be punitive.²¹⁶ However, this indecisive holding is more sensible in light of the district court's global holding that the registration requirements were not punitive, but the notification provisions were punitive.²¹⁷

Overall, the Supreme Court held that ASORA was not punitive and could be retroactively applied to the Does and other pre-enactment offenders; the Ninth Circuit Court of Appeals held that ASORA was punitive and could not be retroactively applied; and, the District Court of Alaska, in its first ruling for a preliminary injunction, held that the registration requirements of ASORA were not punitive but that the notification aspect of ASORA was punitive.²¹⁸

In summary, there was one test, three courts, and three entirely different opinions. Whether applied as it is now, or in its original form, the *Mendoza-Martinez* test, because it involves the unguided weighing of factors, is an example of subjectivity in legal thought.²¹⁹ When the same facts result in three drastically different opinions it is quite clear that something is wrong with the *Mendoza-Martinez* test. With the recent denial of rehearing by the Supreme Court, *Smith* and its version of the ineffective *Mendoza-Martinez* test is apparently here to stay.²²⁰

fender information in all cases in which a defendant has ever been convicted of a sex offense, the record of John Doe I's past incest conviction would not be disseminated by state officials to the world at large for the rest of his life.

Id.

214. *Burton*, 884 F. Supp. at 1379.

215. *Id.* at 1380.

216. *Id.* The District Court of Alaska provided:

Thus, in none of the four jurisdictions does it appear likely that the Registration Act would be considered non-punitive. On the other hand, but for the provision requiring public dissemination of information, the Registration Act would likely withstand scrutiny when measured by the logic of the New Hampshire, Washington, Arizona, and Illinois opinions.

Id.

217. *Id.* at 1379.

218. *Smith v. Doe*, 123 S. Ct. 1140, 1154 (2003); *Otte*, 259 F.3d at 995; *Burton*, 884 F. Supp. at 1379.

219. *See supra* note 160.

220. *Smith v. Doe*, 123 S. Ct. 1925 (2003).

The Future After Smith v. Doe

Before *Smith*, the *Mendoza-Martinez* test was the essence of the Court's definition of punishment. Because *Smith* continued the use of *Mendoza-Martinez*, punishment jurisprudence is still devoid of a universal, effective method for defining punishment.²²¹ Moreover, in missing the opportunity to create a new way to define punishment, the Supreme Court upheld what has been called the most burdensome sex offender registration and notification law considered by a federal court of appeals.²²² The problems created by this opinion are numerous.

First, the Supreme Court's decision in *Smith* has set a precedent. Courts across the nation—at least the federal courts—will now look to the newer *Mendoza-Martinez* test for guidance in determining whether sex offender registration acts constitute punishment and violate the constitutional clause being used to challenge these statutes.²²³ This precedent is especially alarming when two facts are considered. First, as of the Ninth Circuit Court of Appeals' 2001 decision in *Doe v. Otte*, the only sex offender registration act that had been upheld which did not take into account the offender's risk of recidivism was upheld using the *Mendoza-Martinez* test.²²⁴ It would

221. Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British practice of Banishment and Its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115, 135 (1999) ("Despite the Court's ambivalence in its subsequent use and citations of its decision in *Kennedy v. Mendoza-Martinez*, the opinion still contains the essence of the Court's substantive approach for making the regulatory/punitive distinction."); Amy L. Van Duyn, Note, *The Scarlet Letter Branding: A Constitutional Analysis of Community Notification Provisions in Sex Offender Statutes*, 47 DRAKE L. REV. 635, 642 (1999) ("Because there is no universal definition of punishment, courts will continue to utilize different tests to determine whether community notification provisions constitute punishment.")

222. *Otte*, 259 F.3d at 993. "The act imposes more substantial burdens on those subject to its registration and notification requirements than does any legislation enacted by any other state, the provisions of which have been considered by a federal court of appeals." *Id.*

223. See generally *Artway v. Attorney General of the State of New Jersey*, 81 F.3d 1235, 1261-63 (1996) (outlining the various reasons why courts have rejected the *Mendoza-Martinez* test). Before *Smith*, federal courts were free to disregard the *Mendoza-Martinez* test in sex offender registration statute cases on two premises. First, courts could limit the *Mendoza-Martinez* test to the Fifth and Sixth Amendment criminal procedure protections context in which it was first used. *Id.* at 1262 (citing *Austin v. United States*, 509 U.S. 602, 610 n.6 (1993)). Second, "[e]ven when the Court has recited the *Mendoza-Martinez* factors, including in *Mendoza-Martinez*, it has played them down." *Id.* at 1262 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167 (1963)). Finally, the fact that the Supreme Court itself stated that the *Mendoza-Martinez* factors were "neither exhaustive nor dispositive" means the test can be disregarded, especially given the indeterminate and unwieldy nature of the test. *Id.* at 1263 (quoting *Mendoza-Martinez*, 372 U.S. at 169). Following the Supreme Court's use of *Mendoza-Martinez* in *Smith*, these valid excuses have now lost their potency.

224. *Otte*, 259 F.3d. at 993 n.11; see *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000). In *Femedeer*, *Femedeer* brought a 28 U.S.C. §1983 claim against the state of Utah, constitutionally challenging, on Ex Post Facto and Due Process grounds, the amendment to its sex offender registration act which made it retroactive and all of the information in the registry public. *Femedeer*, 227 F.3d at 1246-1248. The District Court of Utah, applying the *Men-*

seem obvious that people who were convicted of sex offenses but have been rehabilitated should not be subject to the same burdens as non-rehabilitated sex offenders, but the *Smith* opinion raises the possibility that this fact no longer needs to be considered because it upheld a statute that provides no opportunity to be released from some or all of the registration obligations.²²⁵ Second, because every state's sex offender registration statute has different provisions, they will continue to be constitutionally challenged. Using a test with such questionable results is very troubling in light of the fact that it will now be used in all federal courts whenever any of these forty-nine other statutes are challenged.²²⁶

Second, *Smith* and its use of the *Mendoza-Martinez* test continues the further tightening down on sex offenders' rights that has been occurring over the recent past.²²⁷ Apparently, the courts, driven by a societal notion that non-incarcerated sex offenders should have fewer rights than "regular" citizens, are not going to protect the rights of sex offenders.²²⁸ This notion is not confined only to everyday society, but is also held by state legislatures who have decided that sex offenders' interest in liberty is not as important as

doza-Martinez test, held that the amendment was unconstitutional on both grounds. *Femedeer v. Haun*, 35 F. Supp. 2d 852, 861 (D. Utah 1999). The Tenth Circuit, also applying the *Mendoza-Martinez* test, reversed the District Court of Utah's decision. *Femedeer*, 227 F.3d at 1255.

225. See generally *Smith v. Doe*, 123 S. Ct. 1140, 1160 (2003) (Ginsburg, J., dissenting) ("However plain it may be that a former sex offender currently poses no threat of recidivism, he will remain subject to long-term monitoring and inescapable humiliation."); *Otte*, 259 F.3d at 991-93 (discussing the excessiveness of ASORA compared to the sex offender registration statutes of other states).

226. See *supra* note 17 for a citation to all fifty state statutes.

227. Michael L. AtLee, Note, *Kansas v. Hendricks: Fighting for Children on the Slippery Slope*, 49 MERCER L. REV. 835, 842 (1998) (discussing the further "tightening down" on sex offenders after civil commitment was ruled constitutional in *Hendricks*).

228. Donna Marie-Koth & Candace Reid Gladston, *Megan's Laws Should Survive the Latest Round of Attacks*, 13 ST. JOHN'S J. LEGAL COMMENT. 565, 582-83 (1999). The authors write:

In expressing concern for the rights of convicted sex offenders, we must not completely lose sight of the purpose of [sex offender registration acts] and the unpleasant reality that sex offenders are unlikely to be "cured" in the present system or rehabilitated in prison. Moreover, there is a dearth of programs and facilities to cure convicted offenders once they are released, even assuming they would participate in a curative program. In the district court's zeal to protect convicted sex offenders who have been classified at high risk levels, the court failed to consider the countless children who may be sexually abused by these high level offenders, pending appellate review of the decision in *Doe v. Pataki* or until each offender comes before a court for a new assessment as mandated by the *Doe v. Pataki* decision.

Id. Lori N. Sabin, Note, *Doe v. Portiz: A Constitutional Yield to an Angry Society*, 32 CAL. W. L. REV. 331 n.170 (1996) (quoting Denver, Colorado, citizen as saying, "I disagree with the notion that [sex offenders have] paid their debt to society. I don't believe the people have rights anymore.").

the states' interest in protecting "regular" citizens.²²⁹ Based on the lack of registration statutes for other crimes, it could be argued that sex offenders have the least amount of guaranteed rights of any criminal that can be released back into society.²³⁰

Third, after the *Smith* opinion, the continued use of the Intent/Effects test with the "clearest proof" standard is disconcerting. That an effects test with such questionable results is supposed to be able to provide the "clearest proof" of a surreptitious punitive nature in an effort to override the civil intent of a statute is astounding. Under this new precedent, a person attempting this challenge may win in one court, but as the procedural history of *Smith* illustrates, that decision is not likely to stand.²³¹ The Supreme Court could have taken a step to provide uniformity, but instead it opted for the status quo.²³²

Fourth, and perhaps most troubling to those who are not the "scourge of modern America," is the fact that this opinion will likely have

229. *Rowe v. Burton*, 884 F. Supp. 1372, 1376 (D. Alaska 1994) (quoting Alaska Sess. Law, ch. 41, § 1). The Alaska Legislature's legislative findings included the statement, "[T]he privacy interests of persons convicted of sex offenses are less important than the government's interest in public safety." *Id.*

230. *Smith*, 123 S. Ct. at 1156 (Souter, J., concurring). Justice Souter illustrated this point:

While the Court accepts the State's explanation that the Act simply makes public information available in a new way, the scheme does much more. Its point, after all, is to send a message that probably would not otherwise be heard, by selecting some conviction information out of its corpus of penal records and broadcasting it with a warning. Selection makes a statement, one that affects common reputation and sometimes carries harsher consequences, such as exclusion from jobs or housing, harassment, and physical harm.

Id. (Souter, J., concurring) (internal citation omitted).

231. The District Court of Alaska initially granted a preliminary injunction for the *Does*. *Burton*, 884 F. Supp. at 1380, 88 ("It is this court's conclusion that plaintiffs are likely to succeed on the merits of the claim that [ASORA] violates the prohibition on [E]x [P]ost [F]acto legislation . . ."). Later, a different judge granted summary judgment for the state. *Doe v. Otte*, 259 F.3d 979, 983 (9th Cir. 2001) ("[T]he parties in 1998 filed cross-motions for summary judgment. A different district judge granted the state's motion, and this appeal followed."). On appeal, the Ninth Circuit Court of Appeals reversed and remanded the second District Court of Alaska decision. *Otte*, 259 F.3d at 995 ("We conclude that the Alaska Sex Offender registration Act violates the Ex Post Facto Clause. We therefore reverse and remand the district court's orders granting summary judgment for the state officials . . ."). Finally, the Supreme Court reversed the decision of the Ninth Circuit Court of Appeals. *Smith*, 123 S. Ct. at 1154 ("The judgment of the Court of Appeals for the Ninth Circuit is reversed . . .").

232. Robert R. Hindman, Note, *Megan's Law and Its Progeny: Whom Will the Courts Protect?*, 39 B.C. L. REV. 201, 229-30 (1997) ("Inevitably, the United States Supreme Court will rule on the constitutionality of the sex offender registration statutes. In so doing, the Court will develop a test to determine whether a particular statute constitutes punishment . . . [A] uniform framework to guide the courts should be developed.").

effects beyond the world of punishment jurisprudence.²³³ This erosion of the constitutional rights of sex offenders may signal the beginning of all of society suffering in the long run.²³⁴ A possible example of this comes from one of the main points upon which the Supreme Court relied when it held ASORA constitutional, that the information released to the public was already available as a matter of public record.²³⁵ It is debatable just how public the information was—after all, how many people really go to the courthouse record room and search for this type of information, even know they can, or know how to start such a search? However, the fact remains that the Supreme Court is correct, the information is public; but so is much of the information that we want to keep private. Similarly to sex offenders, this information includes our history, address, identification numbers, and even our date of birth.²³⁶

The Supreme Court had generally protected this right to privacy, but now it seems that the right to privacy may not be as secure as previously thought.²³⁷ As the government is continually allowed to become more of a crime preventer rather than a crime punisher, the move to the “preventative state” will affect everyone—not just the “irredeemable monsters who prey on the innocent” whose pictures and information on the internet have been viewed over 1.75 million times in a little over three years.²³⁸ This flawed decision both lessened sex offenders’ current rights and laid the groundwork for even more egregious violations against them and society in the future. In order to turn this disturbing trend, a new test needs to be formed to effectively and consistently define punishment and determine whether these statutes deprive sex offenders of their constitutionally protected rights.

New Test: The Stevens Alternative in Smith

Before this decision, various alternate tests to *Mendoza-Martinez* had been developed by courts around the United States to define punishment and determine whether sex offender registration or other types of laws constituted punishment.²³⁹ Among these, the ones which had garnered the most

233. Logan, *supra* note 154, at 1167; *see supra* text accompanying note 152.

234. *See supra* text accompanying note 152.

235. *See Smith*, 123 S. Ct. at 1150, 1151.

236. *Id.* at 1152.

237. *See generally* Logan, *supra* note 154, at 1179-86 (discussing protected and unprotected personal liberty rights directly or tangentially related to sex offender registration statutes).

238. Logan, *supra* note 154, at 1170 (quoting Carol S. Steiker, *Supreme Court Review Foreword: The Limits of the Preventative State*, 88 J. CRIM. L. & CRIMINOLOGY 771, 774 (1998)); *see supra* text accompanying note 36.

239. A list of some of the possible tests follows. These tests are “popular” alternatives, although some also utilize parts of or the entire *Mendoza-Martinez* test. *United States v. Ward*, 448 U.S. 242, 249-50 (1980) (using a dual Intent/Effects Test utilizing *Mendoza-Martinez* and the “clearest proof standard,” basically the same complete Intent/Effects Test used by the Supreme Court in *Smith*); *United States v. Halper*, 490 U.S. 435, 448 (1989)

attention were the *Artway* Test developed by the United States Court of Appeals for the Third Circuit, the *Pataki* Test advanced by the United States Court of Appeals for the Second Circuit, and the *Poritz* Test originated by the Supreme Court of New Jersey, all of which were created to assess the punitive nature of sex offender registration statutes.²⁴⁰ While *Pataki* discussed *Mendoza-Martinez* and ultimately rejected four arguments based on its factors, *Artway* and *Poritz* specifically disclaimed the use of the *Mendoza-Martinez* test, relying on the Supreme Court's statement in *Austin v. United States*, that "*Mendoza-Martinez* is inapplicable outside the context of determining whether a proceeding is sufficiently criminal in nature to warrant criminal procedural protections of the Fifth and Sixth Amendments."²⁴¹ Although these tests have achieved some degree of positive status in jurisprudential circles, it is not apparent whether the three *Smith* courts would have reached consistent conclusions by using one of these other tests because they include elements similar to those in the *Mendoza-Martinez* test.²⁴²

Ideally, a new test should fix the problems highlighted in the *Mendoza-Martinez* test and put courts in a better position to determine whether a statute constitutes punishment. This new test should have fewer factors,

(using a Double Jeopardy test asking whether a civil sanction can fairly be said solely to serve a remedial purpose, or can only be explained as also serving either retributive or deterrent purposes); *Austin v. United States*, 509 U.S. 602, 619 (1993) (examining whether the provision or its legislative history contradict the historical understanding of the punishment); *De Veau v. Braisted*, 363 U.S. 144, 160 (1960) ("whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation . . ."); *Doe v. Pataki*, 940 F. Supp. 603, 620 (S.D.N.Y. 1996) (using a four prong test: (1) intent of statute; (2) design of statute; (3) history surrounding statute; (4) effects of the provisions); *United States v. Usery*, 518 U.S. 267 (1996) (using a test very similar to *Smith*); *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 779-80 (1994) (examining whether character of the actual sanctions approaches punishment).

240. *Artway v. Attorney General of the State of New Jersey*, 81 F.3d 1235, 1263 (1996) (using a three prong test: (1) actual purpose; (2) objective purpose; (3) effects of the provision); *Doe v. Pataki*, 120 F.3d 1263, 1276-84 (2nd Cir. 1997) (using a two prong test: (1) legislative intent and (2) whether registration/notification constitutes punishment in fact); *Doe v. Poritz*, 662 A.2d 367, 404-05 (N.J. Sup. Ct. 1995) ("Characterization of a provision or sanction as punishment depends . . . not only on the legislative purpose but on the implementing provisions. If the implementing provisions go beyond that regulatory purpose—if they are excessive in fact—and have a punitive impact, punishment results, regardless of the claimed regulatory intent.").

241. *Pataki*, 120 F.3d at 1275-76, 1280-81; *Austin*, 509 U.S. at 610 n.6; *Artway*, 81 F.3d at 1262; *Poritz*, 662 A.2d at 398-404. *Pataki* rejected arguments based on *Mendoza-Martinez* factors two (historical analogues), three (scienter), five (whether the behavior to which the sanction applies is already a crime), and seven (excessiveness of the statute in relation to its purpose). *Pataki*, 120 F.3d at 1280-84.

242. *Artway* relied on legislative intent, the historical analogues of the provision, and the effects of provision. *Artway* 81 F.3d at 1263. *Pataki* relied on legislative intent, effects of the provision, relation to criminal activity, excessiveness of the provisions, the goals of criminal law (deterrence, retribution, incapacitation), and historical analogues. *Pataki*, 120 F.3d at 1278-81, 1283. *Poritz* relied on legislative intent, and the effects of the provision. *Poritz*, 662 A.2d at 404-05.

guidance on weighing the factors if needed, and an announcement and application of the test in order to guide future courts in their subsequent application of it. It also should not rely on the application of too many of the factors of the *Mendoza-Martinez* test as did the alternative tests discussed above, and it should be more protective of the rights of those governed by it. Such a test was provided by Justice Stevens in his dissenting opinion: "In my opinion, a sanction that (1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person's liberty is punishment."²⁴³

The first prong of Stevens's test actually includes what he refers to as the second and third "characteristics" of the punitive nature of a sex offender registration sanction.²⁴⁴ Together, those two characteristics are whether the sanction "[is] imposed on everyone who is convicted of a relevant criminal offense and [is] imposed only on those criminals."²⁴⁵ This prong of the test allows discussion of two requirements that have been used to determine whether sex offender registration acts are punitive. The first requirement is that in order to be non-punitive, a statute must require more than a conviction to come under its auspices.²⁴⁶ Specifically, this means that

243. *Smith v. Doe*, 123 S. Ct. 1140, 1158 (2003) (Stevens, J., dissenting) (emphasis added). The emphasis is added to show the conjunctive nature of the test. The author acknowledges that a test that involves a determination of a "severe impairment of liberty" will still involve subjective reasoning, but based on the amount of precedent on personal liberties, that reasoning will arguably be better guided. See generally Logan, *supra* note 154, at 1179-86 (discussing protected and unprotected personal liberty rights directly or tangentially related to sex offender registration statutes).

244. *Smith*, 123 S. Ct. at 1157 (Stevens, J., dissenting). Justice Stevens explained his characteristic of punitive nature in the following manner:

It is also clear beyond peradventure that these unique consequences of conviction of a sex offense [registration and notification requirements] are punitive. They share three characteristics, which in the aggregate are not present in any civil sanction. The sanctions (1) constitute a severe deprivation of the offender's liberty, (2) are imposed on everyone who is convicted of a relevant criminal offense, and (3) are imposed only on those criminals.

Id. (Stevens, J., dissenting).

245. *Id.* (Stevens, J., dissenting).

246. See generally *id.* at 1157-58 (Stevens, J., dissenting) (discussing cases where conviction was not a necessary condition for the imposition of the burdens a sanction generates). Justice Stevens used the statute in *Hendricks* as an example of such an argument:

Likewise, in *Kansas v. Hendricks*, the Court held that a law that permitted the civil commitment of persons who had committed or had been charged with a sexually violent offense was not an [E]x [P]ost [F]acto law. But the fact that someone had been convicted was not sufficient to authorize civil commitment under Kansas law because Kansas required another proceeding to determine if such a person suffered from a "mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence." Nor was the conviction even a necessary predicate for the commitment. (Kansas' civil commitment pro-

sex offenders who are found to be incompetent to stand trial or that are “civilly confined as sexual psychopaths” would also be subject to registration.²⁴⁷ The second requirement for non-punitive nature, although not illustrated by Justice Stevens in his dissenting opinion, is that the statute takes into account the possibility of rehabilitation.²⁴⁸ Allowing a sex offender to prove that he or she has been rehabilitated would be a step beyond simply basing registration on conviction because it would allow convicted offenders the opportunity to either not have to register or to be subject to less onerous registration and notification requirements.²⁴⁹

Obviously dismayed by the *Mendoza-Martinez* test, Justice Stevens’ test takes a different tack on defining punishment—Justice Stevens focuses on liberty.²⁵⁰ The second prong of his two prong test is that the sanction,

cedures also applied to individuals charged with a sexually violent offense but found incompetent to stand for trial, or found not guilty by reason of insanity or by reason of mental disease or defect). While one might disagree in other respects with *Hendricks*, it is clear that a conviction standing alone did not make anyone eligible for the burden imposed by that statute.

Id. (Stevens, J., dissenting) (internal citations omitted).

247. See *Doe v. Otte*, 259 F.3d 979, 991 (9th Cir. 2001). In *Otte*, the Ninth Circuit Court of Appeals noted its own opinion in *Russell v. Gregoire* and the Tenth Circuit Court of Appeals’ opinion in *Femedeer v. Haun*, as examples of requiring registration for other offenders than those convicted in order for a sex offender registration statute to be considered non-punitive. *Id.* (citing *Russell v. Gregoire*, 124 F.3d 1079, 1091 (9th Cir. 1997); *Femedeer v. Haun*, 227 F.3d 1244, 1252 n.3 (10th Cir. 2000)).

248. See generally *Smith*, 123 S. Ct. at 1159 (Ginsburg, J., dissenting) (discussing the excessiveness of ASORA in relation to its non-punitive purpose because it does not take into account the possibility of rehabilitation in deciding how the statute will apply to each offender). Justice Ginsburg spent a great deal of her dissenting opinion on this rehabilitation argument. *Id.* at 1159-60 (Ginsburg, J. dissenting). A sampling follows:

The Act applies to all convicted sex offenders, without regard to their future dangerousness. And the duration of the reporting requirement is keyed not to any determination of a particular offender’s risk of reoffending, but to whether the offense of conviction qualified as aggravated. . . . And meriting heaviest weight in my judgment, [ASORA] makes no provision whatever for the possibility of rehabilitation: Offenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation. However plain it may be that a former sex offender currently poses no threat of recidivism, he will remain subject to long-term monitoring and inescapable humiliation.

Id. (Ginsburg, J., dissenting). See also *Otte*, 259 F.3d at 991-93, for a similar argument on rehabilitation and citations to other cases with rehabilitation arguments.

249. See generally *Otte*, 259 F.3d at 993 (arguing that *Doe* I’s successful rehabilitation allowed him to regain custody of his minor daughter, but does not allow him to avoid ASORA’s registration and notification provisions, whereas in another state with a rehabilitation provision, he probably would not be subject to these provisions).

250. *Smith*, 123 S. Ct. at 1158 (Stevens, J., dissenting). Justice Stevens’s dismay with *Mendoza-Martinez* was evident in the following quotation: “No matter how often the Court

“constitute[s] a severe deprivation of the offender’s liberty”²⁵¹ This prong would focus on the effects of the statute, but it would not do so through the constraining presence of multiple factors and the weighting problem that accompanies them because its focus is simply on the deprivation of liberty.²⁵²

In his punishment analysis of ASORA, Justice Stevens provided a test to define punishment which does not include the pitfalls of *Mendoza-Martinez*. The test has two conjunctive prongs which do not have to be weighed against each other because one pertains to liberty and the other to which sex offenders the statute encompasses, as opposed to the seven prongs of unknown joining or weight in *Mendoza-Martinez*.²⁵³ The Stevens Test was applied to the facts of the case in which it was announced, and it did not directly rely on any of the elements of *Mendoza-Martinez*.²⁵⁴ Also, it permitted a discussion of rehabilitation as a means of protecting the rights of sex offenders who may not need to be subjected to the provisions of ASORA.²⁵⁵ Ultimately, due to these differences, it appears the Stevens Test may enable courts to better define punishment and determine whether a “civil” sex offender registration statute fits that definition and is therefore not “civil,” but unconstitutional.

may repeat and manipulate multifactor tests that have been applied in wholly dissimilar cases . . . [the Court should not continue to use such tests].” *Id.*

251. *Id.* at 1157 (Stevens, J., dissenting).

252. *See generally id.* at 1157-58 (Stevens, J., dissenting) (discussing the effects of the statute as they relate to a deprivation of liberty). Indeed, Justice Stevens relied on many of the same effects used by Justice Souter’s concurring opinion in *Smith*, the district court, and the Ninth Circuit Court of Appeals *Smith* opinions, to reason that ASORA “severely impairs a person’s liberty” *Id.* at 1158. *Compare id.* at 1157 (Stevens, J., dissenting) (highlighting the “significant affirmative obligations” such as the quantity and quality of information that must be provided by the sex offenders and the requirements placed on the sex offenders to update their information whenever they move (update within one day), “shave their beards, color their hair, change their employer, or borrow a car”) with *Otte*, 259 F.3d at 987-89 (discussing the amount and type of information that must be provided). *Compare Smith*, 123 S. Ct. at 1158 (Stevens, J., dissenting) (pointing to the severe stigma that internet publication of their information places on sex offenders along with the obligations restricting liberty) with *id.* at 1157 (Souter, J., concurring) (discussing dissemination and humiliation) and *Otte*, 259 F.3d at 988-89 (“humiliation, ostracism, public opprobrium, and the loss of job opportunities”) and *id.*, 259 F.3d at 993 (discussing dissemination) and *Rowe v. Burton*, 884 F. Supp. 1372, 1378 (D. Alaska 1994) (discussing dissemination and possible ostracism).

253. *Smith*, 123 S. Ct. at 1158 (Stevens, J., dissenting). Paraphrased from the text of Justice Stevens’ opinion, the Stevens Test can be stated as: A sanction is punishment if it is imposed on everyone who commits a criminal offense and not on anyone else; and, severely impairs a person’s liberty. *See id.* at 1157-58 (Stevens, J., dissenting). The first prong covers the people to whom the statute applies and the second prong investigates whether the liberty interests of those to whom the statute applies are impaired. *See id.* (Stevens, J., dissenting).

254. For analysis of the first prong (application), *see generally Smith*, 123 S. Ct. at 1157-58 (Stevens, J. dissenting). For analysis of the second prong (liberty), *see generally id.* at 1157 (Stevens, J. dissenting).

255. *See supra* text accompanying notes 248-49.

CONCLUSION

By following a defective test, the Supreme Court, in its decision in *Smith*, essentially codified a method of defining punishment. That method, the *Mendoza-Martinez* test, has proved wholly inadequate to provide a consistent basis for this very determination, ensuring a questionable future full of divergent court opinions and weakened civil rights. This inadequacy stems from its changing provisions and overwhelming reliance on subjective opinion. Testing the effects of a statute is necessary to determine whether it constitutes punishment; without such a test, any punishment is justifiable.²⁵⁶ However, using a flawed test accomplishes the same result.²⁵⁷ In this instance, the *Mendoza-Martinez* test and *Smith* do not provide a clear answer to a growing problem; instead they merely promise additional constitutional drama in the future.²⁵⁸ Let us hope that the future includes a new effects test—such as the one proffered by Justice Stevens—to define punishment, one that can provide effective, consistent results.

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256. *Doe v. Pataki*, 940 F. Supp. 603, 622 (S.D.N.Y. 1996).

257. The United States District Court for the Southern District of New York, which said that any punishment is justifiable without testing its effects, opted against using the *Mendoza-Martinez* test to analyze the effects of New York's Megan's Law. *Pataki*, 940 F. Supp. at 619-21. Thus, it can be deduced that the test likely would not have produced the result the Court thought was appropriate, which was to find the New York statute unconstitutional because it violated the provisions of the Ex Post Facto Clause. *Id.* at 631.

258. Logan, *supra* note 154, at 1230.