

SOUTER, J., concurring in judgment

SUPREME COURT OF THE UNITED STATES

No. 01–729

DELBERT W. SMITH AND BRUCE M. BOTELHO,
PETITIONERS *v.* JOHN DOE I ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[March 5, 2003]

JUSTICE SOUTER, concurring in the judgment.

I agree with the Court that Alaska’s Sex Offender Registration Act does not amount to an *ex post facto* law. But the majority comes to that conclusion by a different path from mine, and I concur only in the judgment.

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. See *United States v. Ward*, 448 U. S. 242, 248–249 (1980); *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 168–169 (1963). 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. *Ward*, *supra*, at 249 (quoting *Flemming v. Nestor*, 363 U. S. 603, 617 (1960)). I continue to think, however, that this heightened burden makes sense only when the evidence of legislative intent clearly points in the civil direction. See *Hudson v. United States*, 522 U. S. 93, 113–114 (1997) (SOUTER, J., concurring in judgment). This means that for me this is a close case, for I not only agree with the Court that there is evidence

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pointing to an intended civil characterization of the Act, but also see considerable evidence pointing the other way.

The Act does not expressly designate the requirements imposed as “civil,” a fact that itself makes this different from our past cases, which have relied heavily on the legislature’s stated label in finding a civil intent. See *Hudson, supra*, at 103; *Kansas v. Hendricks*, 521 U. S. 346, 361 (1997); *Allen v. Illinois*, 478 U. S. 364, 368 (1986). The placement of the Act in the State’s code, another important indicator, see *Hendricks, supra*, at 361, also leaves matters in the air, for although the section establishing the registry is among the code’s health and safety provisions, which are civil, see Alaska Stat. §18.65.087 (2000), the section requiring registration occurs in the title governing criminal procedure, see §12.63.010. What is more, the legislature made written notification of the requirement a necessary condition of any guilty plea, see Alaska Rule Crim. Proc. 11(c)(4) (2002), and, perhaps most significant, it mandated a statement of the requirement as an element of the actual judgment of conviction for covered sex offenses, see Alaska Stat. §12.55.148; Alaska Rule Crim. Proc. 32(c) (2002). Finally, looking to enforcement, see *Hudson, supra*, at 103, offenders are obliged, at least initially, to register with state and local police, see §§12.63.010(b), (c), although the actual information so obtained is kept by the State’s Department of Public Safety, a regulatory agency, see §18.65.087(a). These formal facts do not force a criminal characterization, but they stand in the way of asserting that the statute’s intended character is clearly civil.

The substantial indicators relevant at step two of the *Kennedy-Ward* analysis likewise point in different directions. To start with purpose, the Act’s legislative history shows it was designed to prevent repeat sex offenses and to aid the investigation of reported offenses. See 1994 Alaska Sess. Laws ch. 41, §1; Brief for Petitioners 26,

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n. 13. Ensuring public safety is, of course, a fundamental regulatory goal, see, *e.g.*, *United States v. Salerno*, 481 U. S. 739, 747 (1987), and this objective should be given serious weight in the analyses. But, at the same time, it would be naïve to look no further, given pervasive attitudes toward sex offenders, see *infra*, at 4, n. See *Weaver v. Graham*, 450 U. S. 24, 29 (1981) (*Ex Post Facto* Clause was meant to prevent “arbitrary and potentially vindictive legislation”). 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 argument that the ulterior purpose is to revisit past crimes, not prevent future ones. See *Kennedy*, *supra*, at 169.

That argument can claim support, too, from the severity of the burdens imposed. Widespread dissemination of offenders’ names, photographs, addresses, and criminal history serves not only to inform the public but also to humiliate and ostracize the convicts. It thus bears some resemblance to shaming punishments that were used earlier in our history to disable offenders from living normally in the community. See, *e.g.*, Massaro, Shame, Culture, and American Criminal Law, 89 Mich. L. Rev. 1880, 1913 (1991). While the Court accepts the State’s explanation that the Act simply makes public information available in a new way, *ante*, at 11, 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

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carries harsher consequences, such as exclusion from jobs or housing, harassment, and physical harm.*

To me, the indications of punitive character stated above and the civil indications weighed heavily by the Court are in rough equipoise. Certainly the formal evidence of legislative intent does not justify requiring the “clearest proof” of penal substance in this case, see *Hudson*, 522 U. S., at 113–114 (SOUTER, J., concurring in judgment), and the substantial evidence does not affirmatively show with any clarity that the Act is valid. 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.

*I seriously doubt that the Act’s requirements are “less harsh than the sanctions of occupational debarment” that we upheld in *Hudson v. United States*, 522 U. S. 93 (1997), *De Veau v. Braisted*, 363 U. S. 144 (1960), and *Hawker v. New York*, 170 U. S. 189 (1898). See *ante*, at 12–13. It is true that the Act imposes no formal proscription against any particular employment, but there is significant evidence of onerous practical effects of being listed on a sex offender registry. See, e.g., *Doe v. Pataki*, 120 F. 3d 1263, 1279 (CA2 1997) (noting “numerous instances in which sex offenders have suffered harm in the aftermath of notification—ranging from public shunning, picketing, press vigils, ostracism, loss of employment, and eviction, to threats of violence, physical attacks, and arson”); *E.B. v. Verniero*, 119 F. 3d 1077, 1102 (CA3 1997) (“The record documents that registrants and their families have experienced profound humiliation and isolation as a result of the reaction of those notified. Employment and employment opportunities have been jeopardized or lost. Housing and housing opportunities have suffered a similar fate. Family and other personal relationships have been destroyed or severely strained. Retribution has been visited by private, unlawful violence and threats and, while such incidents of ‘vigilante justice’ are not common, they happen with sufficient frequency and publicity that registrants justifiably live in fear of them”); Brief for the Office of the Public Defender for the State of New Jersey et al. as *Amici Curiae* 7–21 (describing specific incidents).