The Ex Post Facto Clause and the Jurisprudence of Punishment

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“It is a fair summary of history to say that the safeguards of liberty have
frequently been forged in controversies involving not very nice people.”1

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I. Introduction

By any estimate, Leroy Hendricks would rank among society's worst. His chilling thirty-year career as a child sex offender began in 1955 when, at the age of twenty, he pled guilty to indecently exposing himself to two young girls. Subsequent years witnessed a stream of other convictions: in 1957, for playing strip poker with a teenage girl; in 1960, for molesting two young boys at a carnival; in 1963, for molesting a seven-year-old girl; and in 1967, for sexually assaulting an eight-year-old girl and an eleven-year-old boy.

Upon being paroled in 1972, Hendricks sexually abused his own step-children for several years, and in 1984 pled guilty to taking indecent liberties with two other adolescent boys. Although Hendricks was eligible to receive a sentence of 45 to 180 years because he was a habitual felon, the State of Kansas dropped one count of child abuse and permitted him to serve only two concurrent sentences of five to twenty years. Under these terms, Hendricks could look forward to release in 1994, after serving ten years.

Kansas authorities, however, had other ideas for how Hendricks, then sixty years old, could spend the rest of his life. In the wake of the highly publicized July 1993 rape and murder of Agnes Schmidt by a recently paroled sex offender, an ad hoc group which included members of Ms. Schmidt's family, law enforcement personnel, and parole board members organized to prevent such a tragic recurrence. The efforts of the Schmidt Task Force culminated in 1994, just before Hendricks was scheduled to be released from prison, with the enactment of the Kansas Sexually Violent Predator Act (SVPA). As applied, the SVPA subjected Hendricks to likely indefinite involuntary civil commitment—after the completion of his prison term.

Sexual offenders such as Hendricks posed a special problem to Kansas legislators: although the suffering from "anti-social personality features" made them

3. See id.
4. See id.
5. See id. Altogether, Hendricks spent roughly half his life between the ages of twenty and sixty imprisoned for reported sex offenses. Hendricks also showed a persistent disdain for treatment, even though his sentences were extended as a result. According to Hendricks, "treatment was bullshit." Id.
7. See id. The record does not indicate whether Hendricks was ever charged in connection with the assault on his step-children.
8. See id.
9. See In re Hendricks, 912 P.2d at 136. Under the terms of the Kansas Habitual Criminal Act, Hendricks would have been eligible for parole in the year 2007 at the age of 73. It remains unclear why Kansas dismissed the third count and refrained from prosecuting him as a habitual criminal.
10. See id.
11. KAN. STAT. ANN. § 59–29a02(a) (1994). The SVPA defines a "sexually violent predator" as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence." The Act was modeled after a nearly identical scheme enacted by the State of Washington in 1990. See WASH. REV. CODE § 71.09.010 (1990).
"unamenable to existing treatment modalities," the absence of "mental disease or defect" among such offenders made them ineligible for conventional involuntary civil confinement.12 Added to these practical treatment challenges was the recognition that, although relatively few in number, "sexually violent predators" were an "extremely dangerous group" whose peculiar psychological makeup made them "likely to engage in [future] sexually violent behavior."13

Frustrated with this unmet interstitial need, and wanting to keep Leroy Hendricks off the streets, the Legislature passed the SVPA to ensure the "long-term care and treatment"14 of persons such as Hendricks. Paradoxically, however, Kansas had not taken any of the steps necessary to provide such treatment,15 prompting the Kansas Supreme Court to characterize the Legislature's "treatment" motivation as "somewhat disingenuous,"16 an inference buttressed by the fact that commitment (and hence "treatment") occurred only when the "predator" faced imminent release from prison.17

In enacting the SVPA, Kansas fell in line with a distinctly modern trend: the enactment of laws designed to impose additional, retrospective sanctions on persons already punished under a state's criminal laws. Although in the recent past Americans seemed content to impose harsh prison sentences, and leave it at that, today this is no longer enough. Ours has become a "jurisprudence of prevention,"18 and the foremost target of our obsessive concern is the loathsome, seemingly irredeemable sex offender.19 Compelling evidence of this trend lies in

12. KAN. STAT. ANN. § 59-29a01.
13. Id.
14. Id.
15. See In re Hendricks, 912 P.2d at 131 (stating that while in custody Hendricks found no professionals were available who were specifically dedicated to treatment of sexually violent predators).
16. Id. at 136.
17. Id. See Hendricks, 117 S. Ct. at 2094 (Breyer, J., dissenting) ("It is difficult to see why rational legislators who seek treatment would write the Act in this way—providing treatment years after the criminal act that indicated its necessity."). That the State felt predators to be unamenable to treatment before release, while still in prison, is evident from the Preamble of the SVPA itself: "The legislature further finds that the prognosis for rehabilitating sexually violent predators in a prison setting is poor . . . ." KAN. STAT. ANN. § 59–29a01 (1994).
18. See generally Edward P. Richards, The Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Individuals, 16 HASTINGS CONST. L.Q. 329 (1989) (providing interesting treatment of how American courts have grappled with threats of epidemic and disease). In one prescient passage, Richards observed that "[f]rom an individual rights perspective, the most troubling scenario is the evolution of a model that uses public health and safety rhetoric to justify procedures that are, in essence, punishment and detention . . . . The potential consequence for a dangerous individual would be indeterminate detention, indistinguishable from punitive imprisonment." Id. at 386.
both the tsunami of copy-cat "Megan's Laws" sweeping the nation,\textsuperscript{20} and the numerous recently enacted "Sexual Predator" laws,\textsuperscript{21} of which the Kansas SVPA is but one example.\textsuperscript{22} Along with substantially increased sentences for new sex

\begin{quote}
(1997) (noting nationwide proliferation of 100-year plus sentences for sex offenders and suggesting ascendance of "newly revised [sentencing] theory: nothing succeeds like excess.").
\end{quote}


\textsuperscript{22} The success of sex offender registration and notification requirements appears mixed at best, if not downright counterproductive. See Michael L. Bell, Pennsylvania's Community Notification Law: Will It Protect Communities from Repeat Sex Offenders?, 34 DUQ. L. REV. 635, 656 (1996) ("[A] large number of released sex offenders . . . report false addresses or never register with the proper authorities."); Mike Allen, Girl's Slaying Exposes Limits of Connecticut "Megan's Law," N.Y. TIMES, Aug. 28, 1998 at B1 (describing failure of law to prevent murder of young victim, noting inadequacy of registry). Whether such concerns will have much effect remains to be seen. As noted by one commentator: "The main purpose of these laws cannot be merely to prevent future crimes. Rather, by denouncing released sex offenders, these laws satisfy the community's social and emotional need to define itself in a way that excludes these offenders." Brian J. Telpner, Comment, Constructing Safe Communities: Megan's Laws and the Purposes of Punishment, 85 GEO. L.J. 2039, 2068 (1997).

Meanwhile, the tangible adverse effects of such provisions are becoming increasingly evident. In mid-February 1998, convicted sex offender Thomas Varnum committed suicide days after Maine authorities began to inform his neighbors of his prior offense. See Suicide Is Recalled As Maine Revisits Megan's Law, WASH. POST, Feb. 17, 1998, at A2 (noting that Varnum left taped message that he could not "live in a world where there was no forgiveness."). In July 1998, California sex offender Michael Patton ended his life under similar circumstances. See Todd S. Purdum, Death of Sex Offender Tied to Megan's Law, N.Y. TIMES, July 9, 1998, at A15. In June 1998, five gunshots were fired into the home of New Jersey sex offender Frank Perna, about whom police notified neighbors less than two weeks before. See Robert Hanley, Shots Fired at the House of Rapist Out on Parole, N.Y. TIMES, June 17, 1998, at B1.

21. "Sexual predator" laws have their historical roots in the "sexual psychopath" laws popular in the late 1930's, but recently have largely succumbed to desuetude or repeal. See Marna J. Johnson, Comment, Minnesota's Sexual Psychopathic Personality and Sexually Dangerous Persons Statute: Throwing Away the Key, 21 WM. MITCHELL L. REV. 1139, 1141 (1996); AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Std 7-8.1 (1989) (recommending repeal of sexual psychopath laws). In contrast to the old laws, which diverted offenders to treatment in lieu of prison, the new "sexual predator" laws seek to have offenders committed to mental institutions in addition to (and after) prison. Johnson, supra, at 1141 n.12. The Supreme Court upheld the constitutionality of Minnesota's "psychopath" law in 1940. See Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 276 (1940). For an overview of criticism of such statutes, more generally see Andrew Horwitz, Sexual Psychopath Legislation: Is There Anywhere to Go But Backwards?, 57 U. PITK. L. REV. 35, 38-48 (1995).

22. At this time, twelve jurisdictions have "predator" statutes, permitting offenders to be institutionalized upon their release from prison. See NATIONAL CONFERENCE OF STATE LEGISLATURES, CIVIL COMMITMENT LAWS, AUGUST 1998 (pub. date) (citing Arizona, California, Florida, Illinois, Iowa, Kansas, Minnesota, Missouri, North Dakota, New Jersey, Washington, Wisconsin).
offenders, the interventions form a comprehensive strategy of social control with great appeal to a frustrated public clamoring for protection from sex offenders.\(^{23}\)

That this should occur now is not surprising for the ingredients are at the ready: an obvious empathy for the targets of sexual abuse, especially children;\(^{24}\) a radicalized, politically empowered “victims’ rights” movement;\(^{25}\) Americans’ unmitigated desire to impose yet harsher prison sentences on criminals, and concomitant disavowal of the “rehabilitative ideal”\(^{26}\) and widespread distrust over the justice system’s capacity to protect citizens from violent crime.\(^{27}\) Nor can


\(^{25}\) See, e.g., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1996, Table 2.23 (U.S. Dep’t of Justice eds., 1997) (reporting that 48% of those asked about confidence in ability of police to protect citizens from violent crime replied “not very much” or “none at all.”); Flawed Law, WALL ST. J., July 9, 1996, at A18 (arguing that the
the role of the media—in whose glare the "mad" and the "bad" have become synonymous—be underestimated. While twenty years ago the sexual abuse and killings of Polly Klaas and Megan Kanka would have ignited local concern, today they serve as galvanizing national rallying causes for changes in the ways sex offenders are treated. The tragedies become emotionally compelling "narratives" or "paradigms," the horrible details of which serve as catalysts to promote swift changes in the justice system.

These historic forces have coalesced to create a combustible mix of compelling issues that legislators, already acutely sensitive to emerging public opinions and concerns, have found difficult to resist. Perhaps emboldened by the notable

public is dissatisfied with "progressive psychologists, who insist that perverts and hardened criminals can be rehabilitated if put in the right therapy program . . . .")

28. See, e.g., Tupper Hull, Polly Case Huge Boost to Anti-crime Drive, SAN FRANCISCO EXAMINER, Dec. 11, 1993, at A5 (regarding Polly Klaas); Maury Povich Show, Sept. 8, 1994 (regarding Megan Kanka). To an overwhelming extent, Americans today get their information about crime from media sources, which play a critical role in "agenda-setting" in politics. See Beale, supra note 24, at 44–50; Katherine Beckett, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 62–63 (1997). See also Roy E. Lotz, CRIME AND THE AMERICAN PRESS 2 (1991) ("Crime runs rampant in the American press; papers do such a brisk business in crime that they are, in effect, advertising disorder.").

29. See John Q. La Fond, Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control, 15 Puget Sound L. Rev. 655, 677 (1992) ("Stories are compelling. . . . Lawmakers use narrative when constructing the paradigm case. . . . to pass laws that promise the public that this case will never happen again."). See also Beale, supra note 24, at 57 (discussing studies on "overgeneralization, i.e., the excessive degree to which people base views on a few cases or even a single case.").

At the same time, the stereotyped image of the unrepentant sex offender fuels the public perception of the "otherness" of such offenders, making it less likely that constituents will speak out against draconian measures imposed on sex offenders. See Markus K. Dubber, The Right to Be Punished: Autonomy and Its Demise in Modern Penal Thought, 16 LAW & HIST. REV. 113, 136 (1998) (stating that since the Enlightenment, "violent offenders [have been] perceived as radically different and thus precluded from empathic identification. As a disgrace to human nature, they quite literally lacked the fundamental characteristics of humanity that make identification and therefore empathy possible."). See also Prenkty ET AL., supra note 24, at 16 ("Society resists treating sexual offenders . . . because to do so is perceived as a humane response to intolerable behavior.").


One event from Congress's consideration of the new Rules is emblematic of the legislative dynamic. Rising to urge his colleagues to vote for the measure, Senate Majority Leader Robert Dole invoked the disturbing case of Charles Getz, convicted of raping his 11-year old daughter. Getz's conviction had been overturned in the Delaware Supreme Court because evidence of his prior sexual assaults had been improperly admitted. Senator Dole proclaimed that the "tragic result" of the prohibition against allowing character evidence was that "the defendant walked." However, Getz did not "walk"; he was immediately retried without the character evidence, convicted, and sentenced to life in prison. See Margaret C. Livnah, Branding the Sexual Predator: Constitutional Ramifications of Federal Rules of Evidence 413 Through 415, 44 CLEV. ST. L. REV. 169, 171 (1996).
popularity of innovative "Scarlet Letter" sanctions of the 1980s, and the success of "hybrid" administrative sanctions such as "civil" fines and forfeitures, American legislatures with lightning speed have moved to impose novel new post-confinement methods of social control that strain our historic understandings of "punishment." What is surprising, however, is that this sea-change is taking place in an apparent constitutional vacuum. Since its origin in 1787, the Ex Post Facto Clause, prominently set forth in Article I of the United States Constitution, has unequivocally prohibited state and federal governments from enacting "ex post facto laws"—penal laws that are retroactive in their effect. In this constitutional capacity, the Clause has guarded against the "hydraulic pressures" that periodically beset our majoritarian political processes and compel lawmakers to impose retroactive punishments on maligned individuals and groups "of the moment."

Over the centuries, the Clause has been invoked by a veritable "who's who" of scorned Americans—from supporters of the Confederacy in the late 1860s, to immigrants in the late 1800s, to Communist sympathizers in the 1950s. To this list, we can now add sex offenders. That sex offenders are deserving of disdain is not the issue, for they surely are. The issue, rather, is whether they deserve the protection of the Constitution, which they surely do.

In its Fall 1996 term, the Supreme Court addressed Leroy Hendricks's claim that his involuntary "civil" commitment under the Kansas SVPA was in reality retroactive punishment, imposed in violation of the Ex Post Facto Clause. By a 5–4 margin, with Justice Clarence Thomas writing for the majority, the Court rejected

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31. See generally Jon A. Brilliant, Note, The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions, 1989 DUKE L.J. 1357 (discussing "proliferation" of such punishments: requiring a purse snatcher to wear "tap shoes"; forcing a drunk driver to apologize in a local newspaper; and requiring a child molester to place a warning sign on his car, in 3" letters, stating: "DANGEROUS SEX OFFENDER—NO CHILDREN ALLOWED."); Douglas Litowitz, The Trouble With "Scarlet Letter" Punishments, 81 JUDICATURE 52 (1997) (describing several such punishments and arguing that "shunning" is ineffectual).


33. Professor Mary Cheh noted this trend in 1991, saying: "We are in the midst of fundamentally altering the way we approach criminal justice problems. Law enforcement authorities are no longer content to fight crime with the traditional methods of arrest, prosecution, and jailing . . . . At the moment, law enforcement practices are running ahead of our legal theories and our procedural systems." Mary M. Cheh, Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction, 42 HAST. L.J. 1325, 1413 (1991). See also Bill McCollum, The Struggle for Effective Anti-Crime Legislation—An Analysis of the Violent Crime Control and Law Enforcement Act of 1994, 20 U. DAYTON L. REV. 561, 561 (1995) (according to Congressman McCollum, "[f]requent news reports of vicious crimes shock and frighten the public and send policy makers searching for new solutions.").

34. Article I actually contains two Ex Post Facto Clauses, one applying to the States, U.S. CONST. art. I, § 10, cl. 1, and another to Congress, U.S. CONST. art. I, § 9, cl. 3. For present purposes, the respective Clauses will be referred to collectively.


Hendricks' claim, concluding that the SVPA was remedial and non-punitive in nature, and hence consistent with the Ex Post Facto Clause's proscription against retroactive punishment.37

The Court's decision that the SVPA did not impose "punishment" is yet another entry in its ongoing examination of the "punishment question," a matter of threshold constitutional significance, potentially triggering a broad array of constitutional protections, including those of the Fifth, Sixth, and Eighth Amendments, as well as the Bill of Attainder and Ex Post Facto Clauses. Despite this importance, the Court's numerous decisions in the area have amounted to an incoherent muddle. Indeed, one would be hard-pressed to identify an area of constitutional law that betrays a greater conceptual incoherence.38 Until recently, this abiding tolerance by the Court for its intellectual disarray has been regrettable, but of relatively little constitutional consequence.

With Hendricks, however, the Court made a major misstep with enormous potential consequences that extend far beyond any narrow definitional quest. In a sharp departure from its settled jurisprudence, dictating that the punishment question be assessed in terms of "the evils" the constitutional provision was "designed to eliminate,"39 the Court addressed Hendricks's ex post facto claim in blatant disregard for the basic purposes of the Ex Post Facto Clause.

In our increasingly punitive, public opinion-sensitive age, Hendricks can only be taken as an ominous development. Feeling the public's urgent desire for aggressive, innovative methods of social control, American legislatures today are pressing the envelope of the criminal-civil distinction like never before—enacting post-confinement sanctions that betray a shrewd awareness of the importance of the "criminal" label. This tendency, of course, is not unique, for the Ex Post Facto Clause arose out of this very concern for legislative vindictiveness. What is unique, and most troubling, is the disappearance of the Clause from modern constitutional discourse, and the Court's abdication of its constitutional duty to give meaning to it. Hendricks stands as proof of that abdication.

This Article seeks to develop a meaningful analytic framework to answer the punishment question from the standpoint of the Ex Post Facto Clause. After examining the majority and dissenting opinions in Hendricks in Part II, Part III discusses the historic origins and purposes of the Ex Post Facto Clause. Part IV of the Article canvasses the Court's extended, unsuccessful endeavor to articulate and apply a reliable jurisprudence on the "punishment question," and Part V attempts to formulate a reliable, constitutionally based approach to resolving the punishment question in a manner consistent with the Ex Post Facto Clause. With the punishment question properly framed, it is hoped, the Clause itself can be rescued from its ill-deserved desuetude for the precise historic times in which the Framers intended it to operate.

38. See infra notes 125–166 and accompanying text.
II. KANSAS v. HENDRICKS

A. The Certification of Leroy Hendricks

In August 1994, less than one month before he was to be released from prison, the State of Kansas petitioned to have Leroy Hendricks branded a “sexually violent predator,” and pursuant to the SVPA, the local district court found probable cause for his certification. At the ensuing commitment trial, Hendricks testified that although he had not had any urge to sexually molest children since 1985, and was aware that if he did molest he would likely spend the rest of his life in prison, he was a “pedophile” and that when he “g[ot] stressed out” he could not “control the urge” to molest. Hendricks also admitted that, while he did not wish to reoffend, the only “guarantee” that he would not do so was for him “to die.”

The jury concluded that Hendricks was a “sexually violent predator.” As a result, he was eligible to petition for annual assessment of whether his “mental abnormality or personality disorder has so changed that [he was] safe to be at large and will not engage in acts of sexual violence if discharged.”

Hendricks appealed his commitment, arguing, inter alia, that the SVPA violated substantive and procedural due process, constituted an impermissible ex post facto

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40. The SVPA defines a “sexually violent predator” as “any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of violence.” KAN. STAT. ANN. § 59-29a02(b) (1994). Under the SVPA, commitment determinations are to be made near the conclusion of the sexual offender’s prison term, the rationale being that the “treatment” needs of such offenders are “very long term” and prison is not conducive to their cure. KAN. STAT. ANN. § 59-29a01 (Supp. 1996). The State agency having custody of the offender is to notify the local prosecutor within ninety days of the expected release of the offender. KAN. STAT. ANN. § 59-29a03(a) (1994). The prosecutor then must decide whether to petition for involuntary commitment. KAN. STAT. ANN. § 59-29a04 (1994). If a petition is filed, a hearing is held to decide whether probable cause exists to determine whether the offender is a “sexually violent predator.” If probable cause exists, the offender is then transferred to an “appropriate secure facility” for evaluation. KAN. STAT. ANN. § 59-29a05 (1994).

41. Hendricks unsuccessfully moved for dismissal of the petition in the trial court on ex post facto, double jeopardy, substantive due process, and equal protection grounds. In re Hendricks, 912 P.2d at 130.

The Kansas Legislature amended the SVPA after Hendricks’s commitment in respects not relevant to the case. KAN. STAT. ANN. §§ 59-29a01 to 17 (Supp. 1996).

42. In re Hendricks, 912 P.2d at 131.

43. Hendricks, 117 S. Ct. at 2078.

44. KAN. STAT. ANN. § 59-29a08 (1997). Alternatively, the Secretary of Social Services is empowered to certify an offender’s improved mental condition and authorize the offender to petition the court for release. A procedure similar to that already described then ensues. KAN. STAT. ANN. § 59-29a10 (1997).

As a practical matter, however, Hendricks faced a decidedly uphill battle to establish “probable cause” that he would not pose a risk if released. Given the incalculable professional and personal risks associated with an incorrect certification of non-dangerousness, risk-averse decision-makers are likely to over-predict dangerousness, resulting in the indefinite commitment of offenders. See Horwitz, supra note 21, at 44 n. 49 (discussing social science literature in support of over-predicting dangerousness). Exacerbating this situation is the significant disdain for sex offenders within the psychiatric community itself, another factor which lessens the likelihood of release. Id. See also Vernon L. Quinsey & Ann Maguire, Maximum Security Psychiatric Patients, Actuarial and Clinical Prediction of Dangerousness, 1 J. INTERPERSONAL VIOLENCE 143, 145 (1986) (discussing evident inability of professionals to accurately predict future dangerousness).
law, and placed him in double jeopardy. The Supreme Court of Kansas reversed on the substantive due process ground alone. According to the court, the SVPA's pre-commitment requirement of "mental abnormality or personality disorder" fell short of the Fourteenth Amendment's "substantive" requirement of "mental illness," a constitutional minimum the Kansas court inferred from the United States Supreme Court decisions in Addington v. Texas and Foucha v. Louisiana. The SVPA, the Kansas Supreme Court reasoned, impermissibly permitted indefinite civil confinement on what amounted to a mere finding of "dangerousness," an outcome expressly prohibited by Foucha.

The State of Kansas successfully petitioned the U.S. Supreme Court for certiorari, and the case came up for oral argument during the Fall 1996 term.

B. The Majority's Holding

The five-member majority, in an opinion by Justice Clarence Thomas, concluded that the SVPA passed constitutional muster in all respects. First, as to substantive due process, the Court held that a finding of "mental illness" is not a prerequisite for involuntary civil commitment. Contrary to the Kansas Supreme Court's interpretation of Foucha and Addington, the majority held that the phrase "mental illness" is "devoid of any talismanic significance," and therefore the SVPA's baseline requirements of "mental abnormality" and "personality disorder" were constitutionally acceptable. These two criteria, the Court held, ensured that the SVPA's added requirement that an individual be "convicted of or charged with a sexually violent offense" avoided the possibility that confinement could arise on threat of mere "dangerousness" alone. As a result, the SVPA's criteria served to "limit involuntary civil confinement to those who suffer volitional

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45. See In re Hendricks, 912 P.2d at 138.
46. 441 U.S. 418 (1979).
48. See In re Hendricks, 912 P.2d at 138.
49. Not surprisingly, the Hendricks appeal drew the attention of multiple amici. Five amicus briefs were submitted on behalf of petitioner State of Kansas (representing 20 groups and individuals, and 45 jurisdictions), and 6 briefs were submitted on behalf of respondent and cross-petitioner Leroy Hendricks (representing 16 groups).
50. Chief Justice Rehnquist and Justices O'Connor and Scalia joined in Justice Thomas's majority opinion. See Hendricks, 117 S. Ct. at 2075. Justice Kennedy "join[ed] the Opinion of the Court in full" and wrote separately to "caution against dangers inherent when a civil confinement law is used in conjunction with the criminal process, whether or not the law is given retroactive application." Id. at 2087 (Kennedy, J., concurring).
51. Id. at 2080. The Court was at pains to observe that it has "never required state legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance." Id. at 2081. Cf. Foucha, 504 U.S. at 113-14 (Thomas, J., dissenting) ("Louisiana cannot possibly extend Foucha's incarceration ... since it is impossible to civilly commit someone who is not mentally ill.").
52. Hendricks, 117 S. Ct. at 2080-81.
53. Id.
impairment rendering them dangerous beyond their control.” With the class of persons thus “narrow[ed],” substantive due process was satisfied.

Justice Thomas next turned to the principal question at hand: whether the “civil” commitment provision of the SVPA constituted “punishment,” making its retroactive application as to Hendricks impermissible under the Ex Post Facto Clause of the U.S. Constitution.

The majority characterized the punishment question before it as being “first of all a question of ‘statutory construction,’” and concluded that the SVPA was non-punitive on two bases: first, its “placement” in the Kansas probate code; and second, the Kansas Legislature’s description of the SVPA as a “civil commitment procedure.” Under the Court’s facial mode of legislative analysis, the SVPA plainly passed muster: “Nothing on the face of the statute suggests that the legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm.”

The Court next turned to the “purpose and effect” of the SVPA, acknowledging that a “‘civil label is not always dispositive.’” According to the Court, the SVPA lacked the earmarks of a punitive scheme insofar as it did not “implicate” the main penal goals of retribution or deterrence. It lacked retributive purpose because it did not “affix culpability for prior criminal conduct,” despite its requirement that an individual be “convicted of or charged with a sexually violent offense.” This requirement, the Court held, was employed solely for “evidentiary purposes, either to demonstrate that a ‘mental abnormality’ exists or to support a finding of future dangerousness.” That the SVPA is “‘tied to criminal activity’ is ‘insufficient to render the [statute] punitive.’”

Nor did the SVPA require a finding of scienter, another hallmark of the criminal law; rather, commitment was based on the finding that an individual had a “mental abnormality” or “personality disorder.” According to the Court, no deterrent

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54. Id. at 2080.
55. Id. Justice Breyer, writing in dissent, essentially endorsed the majority’s view that “mental abnormality” was a constitutionally acceptable standard to justify involuntary civil commitment, also deferring to the rights of states to “follow one reasonable professional view, while rejecting another.” Id. at 2087–88 (Breyer, J., dissenting).
56. The ex post facto claim was before the Court as a result of Hendricks’s successful cross-petition. The Court actually granted review on both double jeopardy and ex post facto grounds. However, in the course of the Court’s adjudication of the case, the ex post facto challenge assumed predominant status. See id. at 2087 (Kennedy, J., concurring) (“Though other issues were argued to us, as the case has matured it turns on whether the Kansas statute is an ex post facto law.”).
57. Id. at 2081 (citing Allen v. Illinois, 478 U.S. 364, 368 (1986)).
58. Id. at 2082.
59. Id.
60. Id. (quoting Allen, 478 U.S. at 369).
61. Id.
62. Id.
63. Id. (quoting United States v. Ursery, 518 U.S. 267, 292 (1996)).
64. Id. (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963)).
purpose was served because those with a “mental abnormality” or “personality disorder” by definition are “unlikely to be deterred by the threat of confinement.”

The Court also discounted the fact that Hendricks had been involuntarily incapacitated by the State, another hallmark of punishment. Citing United States v. Salerno, which approved the preventive detention for a limited duration of pretrial detainees under the Bail Reform Act of 1984, the Court stated that the mere fact that the SVPA imposed an “affirmative restraint” on Hendricks did not make the law punitive. "The State may take measures to restrict the freedom of the dangerously mentally ill. This is a legitimate non-punitive governmental objective and has been historically so regarded.”

The potentially indefinite duration of Hendricks’ confinement also was of no moment. In fact, Justice Thomas reasoned that “[f]ar from any punitive objective, the confinement’s duration is instead linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others.” Furthermore, because the SVPA provided for annual review of a predator’s status, “commitment was only potentially indefinite,” again indicative of a non-punitive purpose.

Similarly, the Court rejected Hendricks’ argument that the array of procedural safeguards embodied in the SVPA, including the requirements that “predator” status be predicated on an initial finding of probable cause, and that commitment itself be based on proof beyond a reasonable doubt, made the SVPA punitive. According to the Court, the procedural protections merely served to ensure that “only a narrow class of particularly dangerous individuals” be confined under the SVPA. “That Kansas chose to afford such procedural protections does not transform a civil commitment proceeding into a criminal prosecution,” Justice Thomas reasoned.

Finally, the Court addressed Hendricks’ argument that the SVPA was necessarily punitive because it failed to ensure “treatment” for his acknowledged pedophilic condition. The Court held that, even assuming the non-existence or inefficacy of treatment opportunities, confinement is constitutionally acceptable when persons “pose a danger to others,” as when the State involuntarily confines “persons afflicted with an untreatable, highly contagious disease.” The Court buttressed

65. Id.
68. Id.
69. Id.
70. Id.
71. Id.
72. Id.
73. Id. at 2084 (citing Compagnie Francaise de Navigation a Vapeur v. Louisiana Bd. of Health, 186 U.S. 380 (1902) (holding constitutionally acceptable involuntary quarantine of persons suffering from communicable disease).
its conclusion with the observation that it was illogical to disallow confinement of the dangerously insane merely because no acceptable treatment was available. In the Court’s words, “[t]o conclude otherwise would obligate a State to release certain confined individuals who were both mentally ill and dangerous simply because they could not be successfully treated for their afflictions.”  

Furthermore, even presuming that Hendricks was treatable, the SVPA was constitutional even if treatment was not its “overriding concern”; there was still “the possibility that an ancillary purpose of the [SVPA] was to provide treatment.”  

C. The Dissent

Justice Breyer, writing for the now-“liberal” block of the Court, consisting of himself and Justices Stevens, Souter, and Ginsburg, dissented from the majority’s conclusion that the SVPA did not constitute “punishment,” and hence was not violative of the Ex Post Facto Clause.  

The dissent first noted “certain resemblances” between the SVPA and “traditional criminal punishments,” but found the historical connections insufficient in themselves to render the SVPA “punitive” in design or effect. However, because “important features of the Act point[ed] in opposite directions,” Justice Breyer urged, the Court was obliged to place “particular importance upon those features that would likely distinguish between a basically punitive and a basically nonpunitive purpose.”

Under this view, the question deserving particular attention was whether the

diseases). The majority’s position on this question tracks the view earlier advanced by the California courts. See Hubbart v. Superior Court, 58 Cal. Rptr. 2d 268, 282 (1996) (construing California Sexually Violent Predator Act, stating: “There is no constitutional requirement that commitment be based on amenability to treatment.”).

74. Hendricks, 117 S. Ct. at 2084.

75. Id. Justice Thomas offered the fact that “somewhat meager” treatment was available to Hendricks could perhaps be explained by the SVPA being in its early stages of implementation. Id. at 2085.

76. As noted supra note 55, Justice Breyer did not dissent from the majority’s conclusion that the SVPA satisfied substantive due process notwithstanding its failure to incorporate a “mental illness” standard. Justices Stevens and Souter joined in this conclusion. See Hendricks, 117 S. Ct. at 2087–90 (Breyer, J., dissenting). Justice Ginsburg, however, expressly elected not to join the dissent on this point, while still agreeing with the other dissenters that the SVPA violated the Ex Post Facto Clause. Id.

77. Id. at 2090. The dissent noted several such “resemblances”: most significantly, offenders are “secure[ly]” confined, a traditional aim of the criminal law; only those previously convicted are targeted; such confinement occurs through the efforts of criminal justice system actors; and criminal law procedural guarantees and standards of proof are employed. Id. at 2090–91.

78. See id. at 2091. For instance, the dissent characterized as unimportant that “criminal behavior triggers the Act.” This requirement served to “screen[] out those whose past behavior does not concretely demonstrate the existence of a mental problem or future potential danger.” As did the majority, Justice Breyer concluded that a conviction might serve an important noncriminal “evidentiary purpose.” Id. Cf. Dep’t of Revenue v. Kurth Ranch, 511 U.S. 767, 781 (1994) (deeming it significant a “so-called tax is conditioned on the commission of a crime,” and finding requirement indicative of punitive intent).

79. Hendricks, 117 S. Ct. at 2091 (Breyer, J., dissenting).
provision evidenced a “concern for treatment.” This therapeutic concern dominated the Court’s analysis in Allen v. Illinois, itself relied upon by the Hendricks majority. According to Justice Breyer:

The Allen Court’s focus upon treatment, as a kind of touchstone helping to distinguish civil from punitive purposes, is not surprising, for one would expect a nonpunitive statutory scheme to confine, not simply in order to protect, but also in order to cure . . . [A] statutory scheme that provides confinement that does not reasonably fit a practically available, medically oriented treatment objective, more likely reflects a primarily punitive legislative purpose.81

Applying this standard, Justice Breyer found several reasons to infer punitive purpose. First, the Kansas Supreme Court itself had determined that treatment was not a significant objective under the SVPA, a matter of record which he scolded the majority for ignoring.82 Second, that Kansas designed the SVPA to provide “treatment” only after offenders completed their criminal sentences made clear that the State did not view treatment as an important objective.83 Furthermore, as of the time of Hendricks’s commitment, Kansas had neither taken the necessary fiscal and practical steps to affect treatment, nor provided Hendricks with any treatment for his condition.84 Third, the SVPA’s failure to require the consideration of a less restrictive intervention (such as a halfway house) militated in favor of a punitive purpose.85 Finally, of the seventeen other states with similar involuntary commitment statutes, only Kansas had the dual characteristics of delaying treatment and failing to offer a less restrictive placement, at least when such a post-confinement measure was imposed retroactively.86

On these bases, the dissent concluded that the SVPA was not “simply an effort to commit Hendricks civilly, but rather an effort to inflict further punishment upon him” in violation of the Ex Post Facto Clause.87

81. Hendricks, 117 S. Ct. at 2092 (Breyer, J., dissenting).
82. See id. at 2092–93.
83. See id. at 2093–94.
84. See id. at 2093. Support for this latter point, not insignificant to the dissent’s analysis, was a source of sharp dispute between the majority and dissent. According to the dissent, the only evidence that Hendricks was receiving treatment came from sources external to the record (a statement by the Kansas Attorney General at oral argument and a footnote contained in a state habeas corpus proceeding nearly a year after Hendricks was committed). Justice Breyer condemned the majority’s use of the extraneous information, even if reliable. Id. Moreover, he added, even if considered, such information nonetheless showed that Kansas was not providing treatment to Hendricks. Id.
85. See id. at 2094.
86. See id. at 2095. Justice Breyer noted that Iowa alone delayed civil commitment (and hence treatment) and failed to explicitly consider less restrictive alternatives. Iowa, however, only applied its provision prospectively. Id.
87. See id. at 2088.
III. THE PLACE OF THE EX POST FACTO CLAUSE IN AMERICAN
CONSTITUTIONAL LAW

A. History and Origins of the Ex Post Facto Clause

The Framers of the U.S. Constitution adopted the Ex Post Facto Clause to protect future Americans against oppressive, retroactively imposed, legislative enactments. The enduring prominence of the Clause stems as much from its location in Article I, a position otherwise reserved for structural issues of broad democratic governance, as from its emphatic prohibition: "No state shall . . . pass any . . . ex post facto law." 88

The Supreme Court's classic interpretation of the Clause came in the 1798 case of Calder v. Bull, 89 where Justice Chase characterized the types of laws encompassed within the prohibition:

1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender. 90

In the Civil War era, the Court stated the goal of the Clause more succinctly as barring 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 . . . ." 91

Pronouncements attending the adoption of the Constitution make clear the Framers' near obsessive concern over the threat of retroactively-designed laws. Mindful of the excesses of Parliament, not to mention colonial governments, 92 James Madison proclaimed that "ex post facto laws . . . are contrary to the first principles of the social compact, and to every principle of sound legislation." 93

88. U.S. CONST. art. I, § 10, cl. 1. The Framers highlighted their profound concern over ex post facto lawmaking by also prohibiting ex post facto laws by Congress. See U.S. CONST. art. I, § 9, cl. 3. Concern over retroactive legislation is evident elsewhere in Article I, which also prohibits bills of attainder in two different sections. See U.S. CONST. art. I, § 9, cl. 3 (as to Congress); art. I, § 10, cl. 1 (as to States).
89. 3 U.S. (3 Dall.) 386 (1798).
90. Id. at 390.
93. The Federalist No. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961). Justice Story echoed this
Fellow-Federalist Alexander Hamilton considered the bar against ex post facto laws among the three "[greatest] securities to liberty and republicanism [the Constitution] contains." 94

The basis for the Framers' antipathy was two-fold. First, ex post facto laws are especially unfair because they deprive citizens of notice of the wrongfulness of behavior, and thus result in unjust deprivations. The Clause therefore ensures that legislative acts "give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." 95 Such notice, the Court has repeatedly asserted, is of particular importance in the context of the criminal law, where the deprivations—and hence potential unfairness—are greatest. 96 "[F]air warning of that conduct that will give rise to criminal penalties is fundamental to our concept of constitutional liberty." 97 Very recently the Court stated:

[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. 98

The second but certainly no less significant concern giving rise to the Clause
was the fear of arbitrary and vindictive lawmaking. Madison highlighted the Framers' concern: "[t]he sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation, that sudden changes and legislative interferences . . . become jobs in the hands of enterprising and influential speculators . . ." Hamilton wrote: "Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves."

In *Calder v. Bull*, Chief Justice John Marshall shared an equally suspicious view of retroactive legislation and the questionable motives and political forces that can give rise to it:

> With very few exceptions, the advocates of such laws were stimulated by ambition, or personal resentment, and vindictive malice. To prevent such, and similar, acts of violence and injustice, I believe, the Federal and State Legislatures, were prohibited from passing any bill of attainder, or any ex post facto law.

Almost ten years later, in *Fletcher v. Peck*, Marshall noted:

> Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, *with some apprehension, the violent acts which might grow out of the feelings of the moment* . . . The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state.

In short, the Ex Post Facto Clause was designed to guard against the Framers' fears of retroactive penal laws forged by "hot-blooded" legislatures, laws that deprive Americans of notice that particular behavior is wrongful and/or serve to subject them to vindictive or arbitrary sanctions retroactive in their effect.

**B. The Court's Interpretation of the Ex Post Facto Clause**

The Court has applied the Clause relatively infrequently since its origin, most often, as Chief Justice Marshall noted, in response to legislative enactment.

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99. Weaver, 450 U.S. at 29.
100. The Federalist, No. 44, at 351 (James Madison) (Hamilton ed., 1880).
102. 3 U.S. (3 Dall.) 386 (1798).
103. Id. at 389.
104. 10 U.S. (6 Cranch) 87 (1810).
105. Id. at 137–38 (emphasis added). For a more modern articulation of this ageless concern, see City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), where Justice Stevens wrote, "the constitutional prohibitions against the enactment of ex post facto laws and bills of attainder reflect a valid concern about the use of the political process to punish or characterize past conduct of private citizens." J.A. Croson Co., 488 U.S. at 513 (Stevens, J., concurring).
106. For an early but comprehensive treatment of the seminal case law see Breck P. McAllister, Ex Post Facto Laws in the Supreme Court of the United States, 15 Cal. L. Rev. 269 (1927).
directed towards maligned persons "of the moment." Thus, for example, the Court has addressed ex post facto challenges to retroactive legislation resulting in deportations on the basis of political sympathies during "red scares," changes in resident alien status during times of ethnic distrust, and revocation of professional privileges enjoyed by those sympathetic to the cause of the Confederacy in the wake of the Civil War.

In keeping with this central concern for legislative bias, the Court's ex post facto decisions have been marked by a predominant desire to divine legislative intent and purpose. For instance, in *DeVeau v. Braisted*, on ex post facto grounds, union officials challenged the New York Waterfront Act, which effectively prevented convicted felons from working for the New York waterfront unions. The Court closely scrutinized the legislative record pertaining to the Act and concluded that Congress intended to regulate the waterfront, not punish ex-felons. The Court characterized its ex post facto inquiry as follows:

> The mark of an ex post facto law is the imposition of what can fairly be designated punishment for past acts. The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is 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, such as the proper qualifications for a profession.

In *Trop v. Dulles*, the Court characterized the determination of legislative purpose as dispositive:

> Each time a statute has been challenged as being in conflict with the constitutional prohibitions against bills of attainder and ex post facto laws, it

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108. See Galvan v. Press, 347 U.S. 522 (1953). See also Warren v. United States Parole Comm'n, 659 F.2d 183, 186–87 (D.C. Cir. 1981) (stating that "[o]ur understanding of the basis of the prohibition against ex post facto laws has changed remarkably little since [1798] ... From the outset, then, the ex post facto clauses have been understood to have been principally aimed at curtailing legislative abuses.").
111. See Doe v. Pataki, 120 F.3d 1263, 1273 (2d Cir. 1997) ("Since at least 1898, the Supreme Court has focused upon the intent underlying the enactment of, or the end served by, the challenged sanction as the touchstone of the ex post facto analysis."). *cert. denied*, 118 S.Ct. 1066 (1998).
113. *Id.* at 153–54.
114. *Id.* at 160.
115. *Id.* (emphasis added). In *Hawker v. New York*, 170 U.S. 189 (1898), a physician convicted of a felony in 1878 (performing an abortion) asserted that he had been impermissibly "punished" as a result of a law passed in 1893 that barred him from practicing medicine on the basis of his felony conviction. The Court rejected the physician's ex post facto challenge, concluding that the "state [was] not seeking to further punish a criminal, but rather only to protect its citizens from physicians of bad character." *Hawker*, 170 U.S. at 196.
has been necessary to determine whether a penal law was involved . . . . The controlling nature of such statutes normally depends on the evident purpose of the legislature.\textsuperscript{117}

Similarly, the Court’s seminal ex post facto opinions have evinced a great sensitivity for legislative context—heeding the political climate at the time the legislation originated. In the 1866 case of \textit{Cummings v. Missouri},\textsuperscript{118} for example, the Court addressed a provision of the Missouri Constitution, newly amended just after the Civil War, that conditioned the holding of specified public offices, and participation in religious and legal occupations upon the taking of a “loyalty oath” attesting, \textit{inter alia}, that the individual had “been truly and loyally on the side of the United States against all enemies thereof, foreign and domestic . . . .”\textsuperscript{119} A Roman Catholic priest indicted for preaching without first having taken the loyalty oath sued, claiming that the retroactive application of the provision was impermissible on ex post facto and bill of attainder grounds. The Court agreed, making plain its concern for the legislative context in which the oath requirement arose:

The counsel for Missouri closed his argument in this case by presenting a striking picture of the struggle for ascendency in that State during the recent Rebellion between the friends and enemies of the Union, and of the fierce passions which that struggle aroused. It was in the midst of the struggle that the present constitution was framed, although it was not adopted by the people until the war had closed. It would have been strange, therefore, had it not exhibited in its provisions some traces of the excitement amidst which the [constitutional] convention held its deliberations. It was against the excited action of the States, under such influences as these, that the framers of the Federal Constitution intended to guard.\textsuperscript{120}

The \textit{Cummings} Court emphasized the essential role of legislative purpose and context: “The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact.”\textsuperscript{121}

In short, the Court has insisted that in seeking to determine whether a given “legislative aim was to punish” for ex post facto purposes, the statutory provision in question must “be placed in the context of the structure and history of the legislation of which it is a part.”\textsuperscript{122} Echoing Chief Justice Marshall’s concern in

\textsuperscript{117} \textit{Id.} at 96 (emphasis added).
\textsuperscript{118} 71 U.S. (4 Wall.) 277 (1867).
\textsuperscript{119} \textit{Id.}
\textsuperscript{120} \textit{Id.} at 322. The Court used an identical analysis that same term in \textit{Ex parte Garland}, 71 U.S. (4 Wall.) 333, 378 (1867), to strike down on ex post facto grounds a similar loyalty oath that barred appellant, who had served in high-ranking Confederate political positions, from practicing law.
\textsuperscript{121} \textit{Cummings}, 71 U.S. (4 Wall.) at 320.
\textsuperscript{122} \textit{DeVeau}, 363 U.S. at 147.
Calder v. Bull\textsuperscript{123} in 1798, the second Justice Harlan commented on the skepticism the Court should normally employ in the ex post facto context:

[T]he policy of the prohibition against ex post facto legislation would seem to rest on the apprehension that the legislature in imposing penalties on past conduct . . . may be acting with a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or classes of persons.\textsuperscript{124}

Before the protections of the Clause can be triggered, however, the Court must first establish that the legislative enactment constitutes "punishment." The impermissible ex post facto effect of a law is not diminished, or disguised, by lending a civil or remedial form to that which is "essentially criminal."\textsuperscript{125} The Court’s effort to develop a reliable constitutional framework for this quest is addressed next.

\textbf{IV. THE SUPREME COURT AND THE PUNISHMENT QUESTION}

Whether a given legislative enactment imposes "punishment" is a matter of threshold constitutional significance, potentially triggering not just the protections of the Ex Post Facto Clause, but also those of a broad array of other constitutional provisions as well.\textsuperscript{126} Despite this importance, the Supreme Court’s case law on the punishment question in recent times has been so inconsistent that it borders on the unintelligible,\textsuperscript{127} evidencing a decidedly circular, at times patently result-driven effort to distinguish whether a sanction is "civil" or "criminal," "preventive" or "punitive," "regulatory" or "retributive."\textsuperscript{128}

\textsuperscript{123} 3 U.S. (3 Dall) 386 (1798).
\textsuperscript{124} James v. United States, 366 U.S. 213, 247 n.3 (1961) (Harlan, J., concurring in part and dissenting in part). See also Ho Ah Kow v. Nunan, 12 F. Cas. 252, 256 (C.D. Cal. 1879) (Field, J., sitting on circuit) ("When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men.").
\textsuperscript{125} Burgess v. Salmon, 97 U.S. (7 Otto) 381, 385 (1878).
\textsuperscript{127} Justice Marshall commented on this state of affairs in United States v. Salerno, where, after the majority characterized pretrial detention as "regulatory," and hence not violative of due process, he surmised: "The majority's technique for infringing this right is simple: merely redefine any measure which is claimed to be punishment as 'regulation,' and, magically, the Constitution no longer prohibits its imposition . . . . [T]he majority's argument is merely an exercise in obfuscation." United States v. Salerno, 481 U.S. 739, 760 (1987) (Marshall, J., dissenting). See generally J. Morris Clark, Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis, 60 Minn. L. Rev. 379, 392-97 (1976) (surveying the Court's inconsistent theoretical approaches on the punishment question).
\textsuperscript{128} Not surprisingly, this lack of clarity is evident in the opinions of the lower courts as well. See, e.g., Doe v. Pataki, 120 F.3d 1263, 1272 (2d Cir. 1997) (" 'Punishment'—along with its many cognates and synonyms, for instance, 'penal,' 'punitive,' 'penalty,' and 'criminal'—is an imprecise concept with meanings that vary depending on the purpose for which the concept is defined."); cert. denied, 118 S. Ct. 1066 (1998); Artway v. New
Over the past thirty-five years, the justices have enunciated and applied numerous tests on the punishment question. Only very recently did the Court resolve that the answer to whether a particular sanction is "punishment," at bottom, should be driven by the identity of the particular constitutional challenge before the Court. As will be discussed shortly, this recognition itself is important, permitting at last the beginnings of a more reasoned and reliable basis on which to resolve cases. In the meantime, however, it is instructive to examine the tests the Court has used in recent times to resolve the "punishment question."

A. Mendoza-Martinez and the Transformation of the Punishment Question

In 1963, in Kennedy v. Mendoza-Martinez, the Court struck down on Fifth and Sixth Amendment grounds, federal statutes that divested individuals of their U.S. citizenship when such individuals departed from or remained outside of the country for the purpose of evading the military draft. The Court held that such proceedings were "criminal" in nature and invalidated the statutes because they failed to provide the panoply of constitutional procedural safeguards available to citizens in criminal matters, including the right to jury trial, to confront witnesses, and to enjoy the assistance of counsel. In reaching its decision, the Court identified seven "relevant" factors that—in the absence of "conclusive" legislative intent of a punitive purpose—can be considered:

1. Whether the sanction involves an affirmative disability or restraint,
2. whether it has historically been regarded as a punishment,
3. whether it comes
4. Jersey, 81 F.3d 1235, 1242 (3d Cir. 1996) (stating that "the law on 'punishment' is complicated and in some disarray."); United States v. All Assets of G.P.S. Automotive Corp., 66 F.3d 483, 491 (2d Cir. 1995) ("[T]he appropriate inquiry is no longer whether the particular forfeiture in the case at hand is remedial or punitive, but whether the statute upon which the Government relies for the forfeiture is itself remedial or punitive."). See also Ludwig Wittgenstein, Philosophical Investigations 138-242 (G.E.M. Anscombe trans., 1958) (1953) (postulating the futility of definitional ventures because, in the end, words are devoid of intrinsic meaning). Cf. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 232 (1824) ("One-half the doubts in life arise from the defects of language.").
5. 129. This incoherence, however, is not without possible excuse. At least in part the disarray results from the fact that, in the Court's words, "[t]he notion of punishment, as we commonly understand it, cuts across the division between the civil and criminal law." United States v. Halper, 490 U.S. 435, 447-48 (1989). Further complicating matters is the reality that "sanctions frequently serve more than one purpose," Austin v. United States, 508 U.S. 602, 610 (1993), making it all the more difficult to say with certainty whether a given sanction is "punishment." The modern impulse to impose quasi-criminal sanctions has complicated matters still further. See, e.g., Mann, supra note 32; William J. Stuntz, Substance, Process, and the Civil-Criminal Line, 7 J. Contemp. Leg. Issues 1 (1996). As Stephen Schulhofer has observed, "[t]he Framers, for all their prescience, did not anticipate post-modernism. They apparently thought they knew what the 'criminal' process was." Stephen J. Schulhofer, Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, With Particular Reference to Sexually Violent Predator Laws, 7 J. Contemp. Legal Iss. 69, 78-79 (1996).
6. 130. See infra notes 157-166 and accompanying text.
8. 132. Id. at 165-66.
9. 133. Id. at 167.
into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution or 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 . . . inquiry . . . .

However, because the Court found “conclusive” proof in the legislative history of punitive intent on the part of Congress, [135] the Court did not examine the seven factors, which the Court admitted “often point in differing directions.” [136]

The Mendoza-Martinez factors over the years have been applied in a highly selective and ultimately inconsistent manner. [137] The Court itself has stated that the factors are “neither exclusive nor dispositive” [138] and the factors have been manipulated to the point of “lack[ing] any real content.” [139] Commentators have condemned the Mendoza-Martinez factors as being so “open-ended” as to be meaningless. [140] Indeed, to this day, the Court has yet to brand a nominally civil sanction as criminal pursuant to the Mendoza-Martinez factors. [141]

The next significant development in the case law came in 1989, in United States v. Halper, [142] where the Court addressed whether the Fifth Amendment’s Double Jeopardy Clause was violated when the manager of a medical laboratory was assessed a $130,000 fine after first being convicted of Medicare fraud and sentenced to two years imprisonment and a $5,000 fine. [143] The Court decided that “punishment” had been twice imposed, focusing on the “effect” or “excessive-

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134. Id. at 168-69.
135. Id. at 169.
136. Id.
137. See, e.g., United States v. Ward, 448 U.S. 242 (1980) (examining only one factor, the fifth, and concluding that a statute permitting a “civil penalty” for water pollution was not punitive, barring invocation of the Fifth Amendment guarantee against self-incrimination). Not surprisingly, the varied applications of the Mendoza-Martinez factors have resulted in contradictory constitutional findings relating to similar statutory provisions. The most recent example of these contradictions can be found with respect to the various formulations of “Megan’s Law.” See, e.g., Doe v. Pataki, 940 F. Supp. 603 (S.D.N.Y. 1996) (finding notification provision of New York law punitive), rev’d, 120 F.3d 1263 (2d Cir. 1997), cert. denied, 118 S. Ct. 1066 (1998); Rowe v. Burton, 884 F. Supp. 1372 (D. Alaska 1994) (holding community notification provision of Alaska’s law punitive and hence violative of Ex Post Facto Clause), dismissed sub nom., Doe I v. Burton, 85 F.3d 635 (9th Cir. 1996); Doe v. Poritz, 662 A.2d 367 (N.J. 1995) (finding notification provision of New Jersey law nonpunitive); State v. Ward, 869 P.2d 1062 (Wash. 1994) (en banc) (holding Washington law nonpunitive); State v. Noble, 829 P.2d 1217 (Ariz. 1992) (en banc) (finding sex offender registration requirement of Arizona law nonpunitive); In re Reed, 663 P.2d 216 (Cal. 1983) (en banc) (holding California registration requirement punitive).
139. Bell v. Wolfish, 441 U.S. 520, 565 (1979) (Marshall, J., dissenting). See also Opinion of the Justices to the Senate, 668 N.E.2d 738, 750 (Mass. 1996) (“Although [the Mendoza-Martinez test] has been invoked repeatedly, it is doubtful whether the Court is prepared to apply it seriously . . . .”).
140. See Cheh, supra note 33, at 1358 (“Although [the Mendoza-Martinez test] has been invoked repeatedly, it is doubtful whether the Court is prepared to apply it seriously . . . .”).
143. Halper, 490 U.S. at 435.
ness” of the sanction. The Court stated:

While recourse to statutory language, structure, and intent is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general matter, [such an] approach is not well suited to the context of the “human interests” safeguarded by the Double Jeopardy Clause’s proscription of multiple punishments.

In reaching its result the Court at once disavowed any mechanistic definition of punishment and the need for any threshold inquiry into legislative design and purpose, focusing instead on the impact a given sanction has upon the targeted individual: “[Fifth Amendment] protection is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state.”

144. The penalty under the False Claims Act amounted to 220 times the damages actually suffered by the government. Id. at 441. On this basis, the fine bore “no rational relation” to the putative remedial purpose—compensating the government for its costs. Id. at 449.

145. Id. at 447.

146. The Court stated:

Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment. These goals are familiar. We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. Id. at 448.

The Court elaborated that a civil sanction is punishment if it “cannot be fairly said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes.” Id. (emphasis added). The patent circularity of this pronouncement conflicted with the Court’s recognition that “[t]he notion of punishment, as we commonly understand it, cuts across the division between the civil and criminal law.” Id. at 447-48.

Halper, since its issuance, has been harshly criticized. See, e.g., Linda S. Eads, Separating Crime From Punishment: The Constitutional Implications of United States v. Halper, 68 WASH. U. L.Q. 929, 952 (1990) (arguing that Halper “extended the concept of double jeopardy protection beyond recognition, and in doing so created a new doctrine that courts and litigants will find difficult to confine.”). Early in its 1997–1998 term, the Court expressly disavowed the approach adopted in Halper, substituting the test used in United States v. Ward, 448 U.S. 242, 248–49 (1980), another case arising under the Fifth Amendment. See Hudson v. United States, 118 S. Ct. 488, 494 (1997) (stating that “Halper’s deviation from longstanding double jeopardy principles was ill considered” and, as established by subsequent cases, “unworkable”). Hudson is discussed at length infra notes 161–70 and accompanying text.

147. Halper, 490 U.S. at 447. Justice Frankfurter elsewhere expressed similar disenchantment with the use of “labels” when the “human interests” of the Double Jeopardy Clause were on the line:

The argument seems to run thus: Double jeopardy means attempting to punish criminally twice; this is not an attempt to punish criminally because it is a civil proceeding; it is a civil proceeding because, as a matter of “statutory construction,” it is a “civil sanction” which is being enforced here; and the sanction is “civil” because it is “remedial” and not “punitive” in nature. Such dialectical subtleties may serve well enough for purposes of explaining away uncritical language in earlier cases . . . . But they are too subtle when the problem is one of safeguarding the humane interests for the protection of which the double jeopardy clause was written into the Fifth Amendment.

Four years later, in *Austin v. United States*, the Court staked out yet another analytic position on the punishment question, this time with respect to the Eighth Amendment's Excessive Fines Clause regarding in rem civil forfeitures. In *Austin*, the Court held that application of the *Mendoza-Martinez* factors should be limited to the constitutional context in which that case arose, namely, one asking whether Petitioner in effect faced a "criminal prosecution," warranting invocation of Fifth and Sixth Amendment procedural protections. The *Austin* Court went on to state that "[i]n addressing the separate question of whether punishment is being imposed, the Court has not employed the test[] articulated in *Mendoza-Martinez* . . . ." Because the *Austin* Court had before it a claim sounding in the Eighth Amendment's Excessive Fines Clause, and the Court was not concerned with the nature of the proceeding for Fifth and Sixth Amendment purposes, the *Mendoza-Martinez* factors did not apply. Instead, consistent with its Eighth Amendment jurisprudence more generally, the Court undertook an extended analysis of whether forfeiture, in both an historical and a contemporary sense, has been conceived as punishment. According to *Austin*, a measure that has historically served a punitive role is punishment unless the statutory text or legislative history establish a contrary conclusion.

One year later, in *Department of Revenue v. Kurth Ranch*, the Court was asked whether the Double Jeopardy Clause barred the State of Montana from assessing a tax for marijuana possession after Montana had imposed a criminal conviction for the same conduct. The Court backed away from the strict historical approach employed in *Austin*, concluding that the Montana tax was "punitive" because it was more than eight times the market value of the marijuana seized. The Court proceeded to note other "unusual features" of the tax, each militating in favor of deeming the tax punitive: (1) the tax was conditioned on the arrest for the crime giving rise to the tax and (2) the tax was levied on goods the taxpayer neither owned nor possessed when the tax was imposed.

149. *Id.* at 610 n.6.
150. *Id.*
152. See *Austin*, 509 U.S. at 610–11. The Court's opinion focused on historic views of forfeiture, considering the contemporary status of forfeiture only in terms of the "legislative history" of the two federal forfeiture provisions at issue. *Id.*
153. See *id.* at 619.
155. See *id.* at 780.
156. See *id.* at 783. Writing for the majority, Justice Stevens concluded: "Taken as a whole, this drug tax is a concoction of anomalies, too far-removed from a standard assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis." *Id.* at 783 (footnote omitted).
The punishment question took yet another turn in 1996 when the Court in *United States v. Ursery*\(^{157}\) considered whether in rem forfeiture following criminal prosecution constituted double jeopardy. The Court answered in the negative and articulated a two-pronged test, asking: One, "whether Congress intended [the] proceedings ... to be criminal or civil"; and two, whether under the seven-factor *Mendoza-Martinez* test "the proceedings are so punitive in fact as to 'persuade us that the forfeiture proceeding[s] may not legitimately be viewed as civil in nature,' despite Congress's intent."\(^{158}\)

To reach its result, however, the Court needed to somehow distinguish *Austin*, which also involved in rem forfeiture. The Court accomplished this by limiting *Austin*’s historical ("categorical") mode of analysis to the constitutional context in which it arose, the Excessive Fines Clause of the Eighth Amendment, "a constitutional provision which we never have understood as parallel to, or even related to, the Double Jeopardy Clause of the Fifth Amendment."\(^{159}\) The Court hastened to provide the following provision-specific assessment of its recent decisions on the punishment question:

*Halper* dealt with in personam civil penalties under the Double Jeopardy Clause; *Kurth Ranch* with a tax proceeding under the Double Jeopardy Clause; and *Austin* with civil forfeitures under the Excessive Fines Clause. None of these cases dealt with the subject of this case: in rem civil forfeitures for purposes of the Double Jeopardy Clause.\(^{160}\)

The Court’s most recent decision on the punishment question, *Hudson v. United States*,\(^{161}\) handed down in December 1997, reaffirms the Court’s announced fealty to constitutional context. *Hudson* concerned a double jeopardy challenge against both a criminal indictment and a monetary fine imposed in response to banking improprieties.\(^{162}\) The Court renounced the test it had announced in *Halper*, also a double jeopardy case.\(^{163}\) According to the *Hudson* Court, *Halper* had "deviated from [the Court’s] traditional double jeopardy doctrine . . . ."\(^{164}\) *Halper*’s focus on "excessiveness" was replaced by the dual intent-effects test enunciated in *United States v. Ward*, another Fifth Amendment case, which itself incorporated the test

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\(^{158}\) Id. at 288. The Court related that this approach derived from three “remarkably consistent” (citation omitted) prior decisions concerning civil in rem forfeiture, all arising in the double jeopardy context: *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972) (per curiam); and *Various Items of Personal Property v. United States*, 282 U.S. 577 (1931).

\(^{159}\) *Ursery*, 518 U.S. at 288. The *Ursery* Court’s two-pronged focus corresponded to that articulated in *89 Firearms*, an approach the Court characterized as “more refined, perhaps” than that used “in *Various Items.*” Id. at 278.

\(^{160}\) Id. at 286.

\(^{161}\) Id. at 288.

\(^{162}\) Id. at 288.

\(^{163}\) 118 S. Ct. 488 (1997).

\(^{164}\) See id. at 491–92.

\(^{165}\) See id. at 494.
of *Mendoza-Martinez* (a Fifth and Sixth Amendment Case). Concurring in the result, Justice Souter noted: "we have already recognized that *Halper*'s standards for identifying what is criminally punitive under the Fifth Amendment needed revision ... and there is obvious sense in employing common criteria to point up the criminal nature for purposes of both the Fifth and Sixth Amendments."

Significantly absent from Chief Justice Rehnquist’s opinion for the Court in *Hudson* is any mention whatsoever of *Hendricks*, decided a mere six months before.

**B. The Hendricks Court’s Misdirected Inquiry**

Viewed in terms of the Court’s recent cases on the punishment question, *Hendricks* is an anomaly. A narrow question was before the Court: did the involuntary civil commitment component of the SVPA constitute “punishment,” in violation of the Ex Post Facto Clause? As in virtually all of the Court’s modern decisions on the punishment question, the Court framed its quest as being one of “statutory construction,” but examination of the Court’s analysis reveals several fundamental problems.

1. **The Court’s Acontextual Inquiry**

As noted, the Court’s recent decisions on the “punishment question,” most notably in *Ursery*, *Austin*, and *Hudson*, highlight an acute sensitivity for constitutional context, placing a heavy emphasis on the functional role played by the given constitutional provision at issue. This approach is neither new nor novel. Historically, the Court has admonished that the applicability of a particular test for double jeopardy purposes closely resembles the “intent-effects” announced in *Ursery*, 518 U.S. 267 (1996), another double jeopardy case.

166. *Hudson*, 118 S. Ct. at 500 (Souter, J., concurring) (citing several Fifth Amendment punishment question cases as well as *Mendoza-Martinez*, which involved Fifth and Sixth Amendment claims). *See also Ward*, 448 U.S. at 248 (discussing the mutual concern of the Fifth and Sixth Amendments over “criminal” versus “civil” penalties).

The *Hudson* Court’s new double jeopardy test draws on that stated in *United States v. Ward*, which first asks "whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or another.” *Hudson*, 118 S. Ct. at 493 (citing *Ward*, 448 U.S. at 248). *Hudson* goes on to assert that "[e]ven in those cases where the legislature 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” to transform the ostensibly civil sanction into a penal one. *Id.* (citing *Ward*, 448 U.S. at 248–49 and using the *Mendoza-Martinez* factors to make this latter determination). Finally, only the “clearest proof” will “override legislative intent and transform a denominated civil penalty into a criminal penalty.” *Id.* (citing *Ward*, 448 U.S. at 249).

167. *Hendricks*, 117 S.Ct. at 2081. One notable exception to this standard was *United States v. Halper*, 490 U.S. 435 (1989), since repudiated by the Court. *See Hudson*, 118 S. Ct. at 493–94 (“*Halper* marked the first time we applied the Double Jeopardy Clause to a sanction without first determining that it was criminal in nature.”).


constitutional provision should turn on the "reasons" it was included in the Constitution and "the evils it was designed to eliminate."171

Hendricks, however, marks a distinct departure from this approach. The Hendricks majority addressed the ex post facto claim before it in utter disregard for the historic purposes and design of the Ex Post Facto Clause, failing to cite a single ex post facto case in the face of two hundred years of case law interpreting the central purpose and role of the Ex Post Facto Clause in the American constitutional system.172 Instead, the Hendricks Court relied on cases arising under the Fifth and Sixth Amendments,173 and inappropriately adopted the highly deferential two-pronged "intent-effects" test employed by the Court in Ursery, a double jeopardy case.174

The Court's infidelity gives little reason to be comforted by its assurance that its ex post facto jurisprudence is premised on "‘substance, not shadows.'"175
Indeed, one would be hard-pressed to find circumstances more demanding of “substance” than the facts of Hendricks. The narrow target group of the Kansas SVPA, the highly repulsive nature of the persons it targets, and its retroactive design, should have triggered an acute sensitivity to the core concerns and purposes of the Ex Post Facto Clause. Such sensitivity, however, was plainly absent from the majority’s opinion.

The failure of the Hendricks majority (including Chief Justice Rehnquist, the author of Ursery) to follow the Court’s unequivocal command to interpret the punishment question in constitutional context is especially ironic—and unjustified—in light of the fact that the Court had before it the Ex Post Facto Clause, a provision of profound significance to the American constitutional framework.

2. Undue Deference to Legislative “Labels”

Furthermore, the Hendricks Court’s analytic method in its “statutory construction” of the SVPA flies in the face of accepted case law on the punishment question. As noted by the Court in Kurth Ranch,177 “the legislature’s description of a statute as civil does not foreclose the possibility that it has a punitive character.”178 Similarly, in Collins v. Youngblood,179 the Court observed that “simply by labeling a law [as regulatory], a legislature does not thereby immunize it from scrutiny under the Ex Post Facto Clause.”180 The basis for this abiding suspicion is obvious: governments have strong incentives to avoid labeling a given sanction as “criminal.” Aside from the appeal of avoiding application of the manifold constitutional constraints associated with the imposition of “punish-

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176. The Court’s detour has not gone unnoticed by the lower courts. The Ninth Circuit, in its recent opinion upholding Washington State’s version of “Megan’s Law” against an Ex Post Facto Clause challenge, observed:

We are mindful that Ursery was a Double Jeopardy Clause case, and that it warned against lifting a test for punishment from one constitutional provision and applying it to another. In Hendricks, however, the Court used the same test for the Double Jeopardy and Ex Post Facto Clauses, leading us to conclude that the test for punishment is the same for both clauses.


178. Id. at 777.
180. Id. at 46. See Cummings v. Missouri, 71 U.S. (4 Wall) 277, 325 (1867) (“[T]he Constitution deals with substance, not shadows. The inhibition was labeled at the thing, not the name.”).
the "clearest proof" standard employed by the Hendricks Court itself warrants serious reexamination. Although the Court cited its 1980 decision in United States v. Ward186 as authority for the "clearest proof" standard, the standard's true intellectual forebear is the 1960 decision in Flemming v. Nestor.187 In Nestor, the Court faced bill of attainder, ex post facto, and Sixth Amendment challenges to the federal Social Security Act, the application of which retroactively terminated Mr. Nestor's social security benefits because he was a resident alien deported for his

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181. See Carol S. Steiker, Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide, 85 GEO. L.J. 775, 777-78 (1997) ("Deeply embedded in Anglo-American law...is a sharp procedural divide between criminal and civil cases. In criminal cases, the U.S. Constitution requires a long list of costly, thumb-on-the-scale procedural protections that are not required, and thus rarely employed, in civil cases."). See also Cheh, supra note 33, at 1326 (describing the advantages of the civil route in drug seizures and forfeitures because the government can acquire the subject property without submitting to the expensive and arduous dictates of the criminal process).
182. See generally Susan R. Klein, Civil In Rem Forfeiture and Double Jeopardy, 82 IOWA L. REV. 183 (1996) (stating that prosecutors increasingly are employing civil in rem forfeiture to gain tactical advantages over criminal targets).
183. See Hendricks, 117 S. Ct. at 2082.
184. Id.
185. See id. at 2075.
prior membership in the Communist Party. The 5–4 majority articulated the following standard:

We observe initially that only the clearest proof could suffice to establish the unconstitutionality of a statute [on the basis of legislative purpose] ... [T]he 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.

While the Nestor "clearest proof" standard has been invoked sporadically since 1960, the standard's evident reluctance to scrutinize legislative purpose is antithetical to the punishment question, particularly with respect to ex post facto analysis. As discussed, with the notable exception of Hendricks, the Court's ex post facto opinions have been predicated on a avowed effort to discern legislative purpose. Indeed, in DeVeau v. Braisted, an ex post facto case handed down just two weeks before Nestor, the Court reaffirmed that the fundamental question in ex post facto analysis "is whether the legislative aim was to punish that individual for past activity . . . ."

Whatever value the Nestor "clearest proof" standard has as a general tenet of

188. Nestor immigrated to the United States from Bulgaria in 1913, and lived and worked in his adopted land until 1956, when at the age of 69 he was deported for having been a Communist from 1933–1939. See id. at 605.
189. Id. at 617.
191. Notwithstanding its purported disavowal of legislative history, the Nestor Court in fact resorted to the legislative record in trying to assess the underlying purpose of the Social Security Act. However, because virtually none existed, the effort was to no avail. See Nestor, 363 U.S. at 619. In this respect, the Nestor Court distinguished the record before it from United States v. Lovett, 328 U.S. 303 (1946) that where a bill of attainder violation was found, because in that case the Court had relied "in large measure on the specific Congressional history which the Court was at pains to spell out in detail." Nestor, 363 U.S. at 615. Still yet, the Court cited several of its cases were premised on legislative history, noting instances in which the "Court's first-hand acquaintance with the events and mood" was determinative in assessing whether a nominally civil penalty was actually punitive. Id.
In the end, it can also be argued that the Court's apparent belittlement of legislative purpose in Nestor amounted to mere dictum. The principal claim before the Court, the bill of attainder challenge, did not succeed because the Social Security Act did not "single [Nestor] out," thus failing the sine qua non of a bill of attainder violation. See Lovett, 328 U.S. at 316 (stating that bills of attainder are "designed to apply to particular individuals"). The Nestor majority continued:

[e]ven were that history to be taken as evidencing Congress' [punitive motivation], we do not think this, standing alone, would suffice to establish a punitive purpose. This would still be a far cry from the situations [of cases involving bills of attainder] . . . where the legislation was on its face aimed at particular individuals.

Nestor, 363 U.S. at 619.
192. See supra notes 107–24 and accompanying text.
194. Id. at 160 (emphasis added).
statutory construction, in Hendricks the standard effectively imposed an irrebuttable presumption in favor of finding a civil intent on the part of the Kansas Legislature. Rather than demanding reduced judicial scrutiny of legislative purpose—basic to the "clearest proof" standard—the Ex Post Facto Clause demands assiduous, heightened scrutiny of legislative purpose.

4. Abdication of Constitutional Role

With its blind deference to the assurances of the Kansas Legislature, Hendricks in the end also raises fundamental concerns over whether the Court has abdicated its role as constitutional arbiter in our tripartite system. As recently observed by

195. Judge Becker of the Third Circuit recently questioned uncritical application of the Nestor standard for this same reason, stating:

I warn against placing too much emphasis on the meaning of "clearest proof." As [Nestor] and its progeny make patent, the standard is intended as a kind of warning to the federal courts to give legislatures the benefit of the doubt. It is thus consistent with familiar canons of statutory interpretation and constitutional adjudication stating that legislatures are rational bodies that intend to function within their powers to enact lawful measures.

196. In Hudson, Justices Souter, Breyer, and Ginsburg, while agreeing that the penalty at issue did not qualify as "punishment" under Ward and Mendoza-Martinez, faulted the Court's continued use of the "clearest proof" standard. Justice Souter viewed the "clearest proof" standard merely as "a function of the strength of the countervailing indication of the civil nature (including the presumption of constitutionality enjoyed by an ostensibly civil statute making no provision for the safeguards guaranteed to criminal defendants)." Hudson, 118 S. Ct. at 500-01 (Souter, J., concurring in result) (citation omitted). He also doubted that resort to the standard would be the "rare case," as previously assured by the Court, given the "expanding use of ostensibly civil forfeitures and penalties . . . a development doubtless spurred by the increasingly inviting prospect of its profit to the Government." Id. Justices Breyer and Ginsburg, for their part, called the "clearest proof" standard "misleading" and urged "consign[ing] it to the same legal limbo where Halper now rests." Id. (Breyer, J., with Ginsburg, J., concurring in result).

197. See California Dep't of Corrections v. Morales, 514 U.S. 499, 522 (1995) (Stevens, J., dissenting) (declaring that "the concerns that animate the Ex Post Facto Clause demand enhanced, and not . . . reduced, judicial scrutiny").

The Third Circuit recently commented on the Hendricks Court's new approach:

[T]he Supreme Court had previously required this degree of deference only in cases where the issue before it was "whether a proceeding is effectively criminal so that the procedural protections of the Fifth and Sixth Amendments must apply" in that proceeding. After Hendricks, however, it seems clear that similar deference to the legislative judgment is required whenever legislative measures are challenged on the basis of the Ex Post Facto and Double Jeopardy Clauses.

E.B., 119 F.3d at 1096. On this basis, the E.B. court had no difficulty rejecting the petitioners' ex post facto challenge to New Jersey's "Megan's Law." Id. at 1097 (stating that the Court must "give substantial deference" to the "legislature's declared purpose").

198. A core mission of the judiciary, of course, is the countermajoritarian role it plays relative to the other branches of government. See Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 25 (2d ed. 1986) (stating that the "courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess."). Justice Douglas characterized the role as follows:

The judiciary is an indispensable part of the operation of our federal system. With the growing complexities of government it is often the one and only place where effective relief can be obtained
Professor Richard Fallon, "[i]dentifying the 'meaning' of the Constitution is not the Court's only function. A crucial mission of the Court is to implement the Constitution successfully."

In *Trop v. Dulles*, Chief Justice Warren characterized the Court's oversight role as follows:

> We are oath-bound to defend the Constitution... [t]he Judiciary has the duty of implementing the constitutional safeguards that protect individual rights. When the Government acts to take away [a] fundamental right... the safeguards of the Constitution should be examined with special diligence... We cannot push back the limits of the Constitution merely to accommodate challenged legislation.

Alexander Hamilton made this same point in *Federalist Number 78*, asserting that the Court plays a crucial role as a constitutional buffer, giving effect to the fundamental rights of the governed in the face of the at times arbitrary powers of legislators:

> [T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned by their authority.... Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.

... [W]here wrongs to individuals are done by violation of specific guarantees, it is abdication for courts to close their doors. Marshall wrote in *Marbury v. Madison*... that if the judiciary stayed its hand in deference to the legislature, it would give the legislature "a practical and real omnipotence."


199. Richard H. Fallon, Jr., *Foreward: Implementing the Constitution*, 111 HARV. L. REV. 56, 57 (1997); see also id. at 61 ("The indispensable function of constitutional doctrine... is to implement the Constitution.").


201. Id. at 103–04 (1958). See *Alexis De Tocqueville, Democracy in America* 152 (Phillips Bradley et al. eds., 1946) (1840) (arguing that Justices "must be statesmen, wise to discern the signs of the times, not afraid to brave the obstacles that can be subdued, nor slow to turn away from the current when it threatens to sweep them off... ").


> The words of the Constitution are not authoritative for fetishistic reasons, but because they are the verbal embodiment of certain collective decisions made by the people. The theory of judicial review is not based on any claim that judges are superior to the people, but on the claim that in enforcing the Constitution, they are carrying out the will of the people. It follows, then, that judges act legitimately under the Constitution only when they are faithfully enforcing those collective decisions.

As Professor Bickel observed, the unique institutional position of the judiciary, freed of the coercive forces that beset the executive and legislative branches "lengthens everyone's view." *BICKEL, supra* note 198, at 26.
As the Court itself recently observed, it "has the duty to review the constitutional-ity of congressional enactments," notwithstanding Congress's insistence that an enactment is constitutional. This mandate can be traced back to *Marbury* itself, in which Chief Justice Marshall intoned: "[t]he very essence of civil liberty ... consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."}

The extremely deferential approach of *Hendricks*, an opinion which relied on not a single ex post facto case to support its holding, effectively read the Ex Post Facto Clause out of the Constitution. That this eschewal should occur with respect to the Ex Post Facto Clause, one of the select, enumerated "affirmative" limitations on the legislative branch, and a constitutional provision as to which there exists no dispute over either its "original" or modern understanding, is especially disenchanting. The time has long since passed when the Ex Post Facto Clause proscription was conceived as a "political obligation that voters will enforce politically." Rather, it is a constitutional imperative that the judiciary is duty-bound to zealously uphold and implement. Still more ominous, with *Hendricks*, the Court has sanctioned a "constitutional evil." By ignoring the core purposes of the Clause, the Court has given the go-ahead to a broad array of

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204. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Professor J.M. Balkin recently articulated the command even more forcefully: "Fidelity is not a virtue but a precondition. It's not just a good thing, but the point of the practice of constitutional interpretation. To claim to interpret the Constitution is already to claim to be faithful to it." J.M. Balkin, *Agreements With Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703, 1705 (1997).
205. See John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333, 341 (1998) ("Affirmative limitations qualify the authority otherwise granted to the legislature, with the result that even properly enacted ex post facto laws are invalid and legally ineffective, to be treated by the courts as legal nullities.").
206. See McConnell, *supra* note 96, at 1280 n.53 (1997) (stating that the "drafting history" of the Ex Post Facto Clause "is especially clear" and its interpretation "is therefore uncomplicated by disagreements over historical evidence ... "). Cf. Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (resorting to the view that "specific guarantees in the Bill of Rights have penumbras, formed by emanations ... ").
207. Harrison, *supra* note 205, at 338 (analyzing differing views of Chief Justice Marshall in *Marbury* and Pennsylvanian Supreme Court Justice John Gibson, the latter deeming the Clause a mere political control on legislatures).
208. See *Marbury*, 5 U.S. (1 Cranch) at 178.
209. Balkin, *supra* note 204, at 1706 n.6 (noting that the "Constitution can be responsible for injustices because it permits them (e.g., slavery and police abuse) or because it prohibits government from engaging in reforms necessary to ameliorate them (e.g., the use of the Tenth Amendment to prohibit child labor laws).""). As representative of such an instance, one can point to the Court's opinion in *Harmelin v. Michigan*, 501 U.S. 957 (1991) which, against an Eighth Amendment proportionality challenge, upheld a mandatory life-without-parole sentence based on petitioner's conviction, his first, for possessing 650 grams of cocaine. In the wake of *Harmelin*, state and federal courts have shown a marked reluctance to entertain proportionality claims. See, e.g., Henderson v. State, 910 S.W.2d 656,660 (Ark. 1995) (citing *Harmelin* and upholding sentence of life imprisonment for first-time offender convicted of selling three "rocks" of crack cocaine). See generally Wayne A. Logan, *Proportionality and Punishment: Imposing Life without Parole on Juveniles*, 33 WAKE FOREST L. REV. 101 (1998) (discussing dramatic effect of *Harmelin* on proportionality review).
possible future injustices in the years to come.210

5. "Punishment" Versus "Enhancement"

Finally, Hendricks is all the more perplexing given the relative cohesion of the Court's recent opinions on the related question of whether a particular legislative enactment constitutes an impermissible "punishment enhancement" under the Ex Post Facto Clause.211 The "enhancement question" arises, in the words of the Ninth Circuit, with "changes in the law that decrease the chances that a prisoner will be released from prison early or will receive a shorter prison term."212 These cases turn "on whether the change increase[s] the quantum of punishment attached to an already-committed crime. The Court . . . ha[s] no need to determine the threshold question of whether the sanction was punishment since a criminal sentence of imprisonment is plainly punishment."213 Rather than being asked whether the SVPA subjected Leroy Hendricks to an "increase" in punishment, the Hendricks Court was faced with the question of whether his involuntary civil commitment was "punishment."

Significantly, only four months before Hendricks was decided, the Court handed down Lynce v. Mathis,214 which involved a Florida statute that canceled provisional early release credits awarded to alleviate prison overcrowding. Proclaiming that the Constitution "places limits on the sovereign's ability to use its law-making power to modify bargains it has made with its subjects,"215 the Lynce Court unanimously struck down the Florida law on ex post facto grounds.216

Although the Court has never expressly stated that two distinct bodies of

210. In this sense, the extreme facts of Hendricks, involving involuntary detention without promise of treatment in the wake of a criminal conviction, can and doubtless will be used to justify lesser intrusions on personal liberties because they are "non-penal." Indeed, with Hendricks decided, challenges to the notification provisions of "Megan's Laws," which do not entail physical detention, have been readily rebuffed. See, e.g., E.B. v. Verniero, 119 F.3d 1077 (3d Cir. 1997), cert. denied, 118 S. Ct. 1039 (1998); Roe v. Farwell, 999 F. Supp. 174 (D. Mass. 1998).

211. See Collins v. Youngblood, 497 U.S. 37, 42 (1990) (finding Clause guards against any law which: (1) punishes an act which was innocent when committed; (2) retroactively increases punishment for a crime; and (3) retroactively deprives one of a defense available at the time an offense was committed).

212. Russell v. Gregoire, 124 F.3d 1079, 1085 (9th Cir. 1997), cert. denied, 118 S.Ct. 1191 (1998). The Court added that "[p]roperly viewed, ["enhancement question" cases] are not punishment-defining cases at all." Id. See also Opinion of the Justices to the Senate, 668 N.E.2d 738, 751 (Mass. 1996) (distinguishing "penal" versus "concededly penal" orientation). But see Neal v. Shimoda, 131 F.3d 818, 824–27 (9th Cir. 1997) (construing and applying, in a decidedly "enhancement" context, Hendricks in ex post facto challenge to prison program that classified sex offenders and required participation in sex offender treatment as a precondition of parole eligibility).

213. Russell, 124 F.3d at 1085.


215. Id. at 895. Plainly, the Court's point here applies with equal force to Leroy Hendricks. When Hendricks pled guilty in 1984 he had no idea of the possible application to him of the SVPA, enacted ten years hence, and which would likely subject him to indefinite "civil confinement."

216. See id. The Court's approach can perhaps best be described as "effects-based," focusing on "objective considerations" relative to how an inmate's sentence is affected. See also id. at 897 (reaffirming "effects-oriented" approach taken in California Dept of Corrections v. Morales, 514 U.S. 499 (1995)).
The jurisprudence exist, their distinctiveness is nonetheless evident.\textsuperscript{217} In stark contrast to the hodgepodge jurisprudence of \textit{Hendricks, Lynce} represents a remarkably consensus-based effort by the Court to forge a principled framework to answer the enhancement question.\textsuperscript{218} The jurisprudential chaos of the sharply divided \textit{Hendricks} Court, when compared with \textit{Lynce}, is all the more striking because the punishment question and the enhancement question emanate from the same constitutional concern.\textsuperscript{219}

Whatever the merits of the Court's case law on the enhancement question, the evident disparity between \textit{Hendricks} and \textit{Lynce} further highlights the need to formulate a reliable, constitutionally based approach to resolving the punishment question in the ex post facto context. The next part tries to do just that.

\textbf{V. A PROPOSED APPROACH}

Any effort to create a framework for addressing the punishment question in the ex post facto context must give effect to the dominant purpose of the Clause: to

\begin{itemize}
\item \textsuperscript{217} Indeed, it is noteworthy that \textit{Lynce} does not even mention any of its “punishment-defining” cases, instead relying exclusively on its prior cases in the “punishment-enhancement” area. \textit{See, e.g.}, California Dep't of Corrections \textit{v. Morales}, 514 U.S. 499 (1995); Collins \textit{v. Youngblood}, 497 U.S. 37 (1990); Miller \textit{v. Florida}, 482 U.S. 423 (1987); Weaver \textit{v. Graham}, 450 U.S. 24 (1981). This jurisprudential chasteness, on its face, is readily distinguishable from \textit{Hendricks}, which failed to cite a single ex post facto case, and principally relied instead on Fifth and Sixth Amendment precedents.

One can only speculate on the etiology of this apparent difference in approaches. Quite possibly, the relative consistency of the enhancement question (“concededly penal”) line of cases derives from the fact that enhancement lends itself to a more quantitative analysis. \textit{See Morales}, 514 U.S. at 509 (“[W]e have long held that the question of what legislative adjustments ‘will be held to be of sufficient moment to transgress the constitutional prohibition’ \textit{must be a matter of degree}.”) (emphasis added) (citation omitted). The punishment question, on the other hand, usually turns on questions of penological theory, and is complicated by the fact that sanctions often at once serve both punitive and remedial purposes. \textit{See David Garland, Punishment and Modern Society: A Study in Social Theory} 16–17 (1990) (“[P]unishment is in fact a complex set of interlinked processes and institutions rather than a uniform object or events . . . . It is not susceptible to a logical or formulaic definition . . . .”); \textit{Nicola Lacey, State Punishment: Political Principles and Community Values} 4–15 (1988) (discussing difficulties with defining “punishment”).

All this notwithstanding, one is tempted to ask, at least from the perspective of Leroy Hendricks, whether his case actually was perhaps about “enhancing” his punishment after all, given that he never technically left the custody of the State.

\textit{See Lynce}, 117 S. Ct. at 896–97 (describing evolution of the jurisprudence); \textit{Morales}, 514 U.S. at 516 (Stevens, J., dissenting) (“In light of the importance that the Framers placed on the Ex Post Facto Clause, we have always enforced the prohibition against the retroactive enhancement scrupulously.”).

\textit{Morales} itself was a 7–2 decision, with Justice Thomas writing for the majority, concluding that amending parole procedures to decrease frequency of parole suitability hearings was not violative of the Clause. \textit{Morales}, 514 U.S. at 516. \textit{See also Miller}, 482 U.S. at 423 (unanimously holding that retroactive revision in sentencing guideline was violative); \textit{Weaver}, 450 U.S. at 24 (concluding without dissent that retroactive decrease in “gain-time” for good behavior was violative); \textit{Lindsey v. Washington}, 301 U.S. 397 (1937) (unanimously finding violation when offender was sentenced under law that required 15 year sentence, when law in effect at time of offense gave court discretion to impose lesser sentence).

\textit{See Calder v. Bull}, 3 U.S. (3 Dall.) 386, 397 (1798) (opinion of Paterson, J.) (examining historical sources and concluding that “[t]he enhancement of a crime, or penalty, seems to come within the same mischief as the creation of a crime or penalty”). \textit{See also Opinion of the Justices to the Senate}, 668 N.E.2d 738, 751 (Mass. 1996) (acknowledging that it is not “easy to determine” which category is at play).
guard against legislative vindictiveness and abuse. Hendricks, however, manifestly failed to do this, and instead adopted an approach at radical odds with the purposes of the Ex Post Facto Clause.220

A. The Case for Heightened Scrutiny of Legislative Purpose Under Ex Post Facto Analysis

As discussed, the Hendricks Court's highly deferential, facial method of construction, coupled with its insistence that there exist the "clearest proof" to contradict this "manifest intent," created an impossibly high proof threshold, and in the precise context where the opposite approach should have obtained. Logic and constitutional principle compel that the Court should adopt a juristic approach of exacting scrutiny on questions of legislative purpose when addressing the punishment question relative to ex post facto claims.221

The Court's seminal ex post facto cases—including Cummings v. Missouri222 and Ex parte Garland223—make clear that an ex post facto challenge, by definition, requires demanding scrutiny of legislative purpose. Above all, the Court's mission in ex post facto analysis is to determine whether there was a "legislative aim to punish"; to answer this question, the enactment must "be placed in the context of the structure and history of the legislation of which it is a part."224

"Purpose scrutiny," especially over the past two decades, has played an increasingly significant role in constitutional analysis,225 especially in areas of constitutional interpretation closely aligned with the animating concerns of the Ex Post Facto Clause. For instance, in the equal protection context, legislative intent

220. Professor Lawrence Tribe has also noted the Court's recurrent insensitivity to the purposes and goals of the Clause. He notes in his treatise that the Court "has not been systematically attentive to the purposes of the ex post facto ban . . . ." LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 637 (2d ed. 1988).

221. Because retribution and revenge play a central role in the impulse to punish, logic would dictate that the effort to discern this purpose should be peculiarly sensitive to identifying any such vengeful sentiments. See JAMES F. STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 99 (MacMillan, 1863) ("[T]he criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite."). See also JOEL FEINBERG, THE EXPRESSIVE FUNCTION OF PUNISHMENT, reprinted in THE PHILOSOPHY OF LAW 636 (4th ed. 1991) ("Punishment is a conventional device for the expression of attitudes of disapproval and reprobation, either on the part of the punishing authority or of those in whose name the punishment is imposed."); H.L.A. HART, PROLEGOMENON TO THE PRINCIPLES OF PUNISHMENT, reprinted in H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4-5 (1968) (setting forth five-part definition of "punishment," the fourth requirement prescribing that "[i]t must be intentionally administered by human beings . . . .")

222. 71 U.S. (4 Wall) 277 (1867).

223. 71 U.S. (4 Wall) 333 (1867).


225. See Ashutosh Bhagwat, Purpose Scrutiny in Constitutional Analysis, 85 CAL. L. REV. 297, 301 (1997) (identifying "trend within the Court's jurisprudence toward an increased focus" on governmental purpose); Fallon, supra note 199, at 90–97 (noting same and also discussing Court's use of "surrogate" measures to discern purpose).
plays a critical role relative to whether a particular classification is discriminatory. In *Reno v. Bossier Parish School Board* a voting rights case handed down in the same term as *Hendricks*, the Court assessed Louisiana's proposed redistricting plan and emphasized that "assessing a jurisdiction's motivation in enacting voting changes is a complex task requiring a 'sensitive inquiry into such circumstantial and direct evidence as may be available.'" Harkening back to its decision in *Arlington Heights v. Metropolitan Housing Development Corp.* the Court asked whether "invidious discriminatory purpose was a motivating factor ..." and considered, in addition to the possible discriminatory "impact" of the redistricting plan, a non-exclusive list of other factors, including: "the historical background of the [jurisdiction's] decision'; '[t]he specific sequence of events leading up to the challenged decision'; '[d]epartures from the normal procedural sequence'; and '[t]he legislative or administrative history, especially ... [any] contemporary statements by members of the decisionmaking body.'

Legislative context also played a crucial role in the Court's 1985 case *Hunter v. Underwood*. In *Hunter*, the Court addressed whether a provision of the 1901 Alabama Constitution disenfranchised black voters in violation of the U.S. Constitution, and looked squarely at the historical record to answer whether the Alabama Legislature harbored a discriminatory purpose. Chief Justice Rehnquist stated: "The historical record showed that the Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks. The delegates to the all-white convention were not secretive about their purpose." Noting the unequivocally racist floor statements of the president of the convention, the Court had no difficulty finding the provision unconstitutional.

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226. See Richmond v. J.A. Croson Co., 488 U.S. 469, 491 (1989) ("'[T]he Framers of the Fourteenth Amendment ... desired to place clear limits on the States' use of race as a criterion for legislative action, and to have the federal courts enforce those limitations.'").


228. *Id.* at 1502 (quoting *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).

229. 429 U.S. 252, 265 (1977). *Arlington Heights* built upon the Court's prior holding in *Washington v. Davis*, 426 U.S. 229 (1976), where the Court rejected the less demanding disproportionate impact test in favor of an approach that sought to discern whether a discriminatory purpose motivated the legislative enactment at issue.

230. *Bossier Parish School Bd.*, 117 S. Ct. at 1503 (citing *Arlington Heights*, 429 U.S. at 268). In *Massachusetts v. Feeney*, 442 U.S. 256 (1979) the Court stated that proof of "discriminatory purpose" implies "more than intent as volition or intent as awareness of consequences.... It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 279.


232. *Id.* at 229.

233. See *id.* at 233. See also *Rogers v. Lodge*, 458 U.S. 613 (1982): To reject an examination into subjective intent is not to rule that the reasons for legislative action are irrelevant. Customary indicia of legislative intent provide an adequate basis for ascertaining the purpose that a law is intended to achieve. The formal proceedings of the legislature and its committees, the effect of the measure as evidenced by its text, the historical setting in which it was
The Court’s analytic approach to discerning legislative purpose in the equal protection context shares much the same core concern that animates (or should animate) ex post facto analysis: both seek to discern and root out the legislative results of inherently internal mental processes, the motivations of which are rarely evident on the face of laws themselves. For obvious reasons, any modern-day legislator would be loath to directly express racial animus, and, as discussed above, legislators have strong incentive to cloak or obfuscate punitive purpose.

The two areas of constitutional interpretation have other parallels as well. For one, the racial and ethnic minorities protected by the Fourteenth Amendment, like the “outgroups” most likely to raise colorable ex post facto claims (e.g., political radicals and hardcore criminals), both historically have faced animus within society, and thus have been subject to animus-driven legislative enactments. As noted by Justice Stevens: “[t]here is obviously little legislative hay to be made cultivating the multiple murderer vote.”

More generally, as Professor Donald Dripps recently noted, the criminal sanction historically has been used both to “disabl[e] political opposition” and as a means to express “malice toward

enacted, and the public acts and deeds of its sponsors and opponents, provide appropriate evidence of legislative purpose.

458 U.S. at 644 n.28 (1982) (citation omitted) (Stevens, J., dissenting).

234. The Court’s adoption of this approach is of relatively recent vintage. As recently as Palmer v. Thompson, 403 U.S. 217 (1971), the Court expressly refused to examine the motivations of the local legislative body in the face of what clearly appeared to be racially motivated discriminatory behavior (concerning the decision by the City Council of Jackson, Mississippi to close the town’s public swimming pools rather than desegregate them). Some five years later, however, in Washington v. Davis, 426 U.S. 229 (1977), and especially in Arlington Heights, 429 U.S. at 252, the Court effectively renounced its prior deference to legislative pronouncements of equal treatment and adopted a totality of the circumstances approach—seeking objective indications of subjective illicit intent and placing prime importance on legislative motivation. See also Bush v. Vera, 517 U.S. 952 (1996); Shaw v. Hunt, 517 U.S. 899 (1996); Miller v. Johnson, 515 U.S. 900 (1995); Hunter v. Underwood, 471 U.S. 222 (1985); Rogers v. Lodge, 458 U.S. 613 (1982). See generally Fallon, supra note 199, at 91, 94–96 (discussing same).


235. See BICKEL, supra note 198, at 62 (“Very occasionally, the racist motive may be provable. For the most part, it can only be surmised.”). Arguably, however, the psychology entailed in the respective impulses differ, insofar as racial animus can have a significant subconscious component. See Charles R. Lawrence III, The Id, The Ego, and Equal Protection: Reckoning With Unconscious Racism, 39 STAN. L. REV. 317 (1989).

236. See supra notes 143–144 and accompanying text.

237. Plainly, those coming within the punishment cross-hairs of legislatures can also, in demographic terms, fall within traditional “footnote four” Carolene Products categorization. See United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) (referring to “prejudice against discreet and insular minorities” that impairs avenues of political redress, “and which may call for a correspondingly more searching judicial inquiry . . . .”).

238. California Dep’t of Corrections v. Morales, 514 U.S. 499, 522 (1995) (Stevens, J., dissenting). See also Krent, supra note 98, at 2168–69 (“Legislators need not fear that enacting most criminal measures will dry up campaign coffers. Throughout history, criminal offenders have been from the poorest strata in society . . . . Nor will legislators necessarily lose votes if they are insensitive to the needs of convicted felons. Felons often cannot vote . . . .”).
members of identifiable groups . . . ." 239

Another closely aligned area where the Court has intensely scrutinized legislative purpose is the Bill of Attainder Clause, which with its identical concerns for vindictiveness and retroactive punishment, is in many ways the constitutional "twin" of the Ex Post Facto Clause. 240 The Court's modern bill of attainder decisions in United States v. Lovett, 241 Nixon v. Administrator of General Services, 242 and Selective Service System v. Minnesota Public Interest Research Group, 243 reveal a remarkably consistent body of jurisprudence on the punishment question, each highlighted by a predominant concern for legislative purpose. Chief Justice Burger stated the test as follows:

In deciding whether a statute inflicts forbidden punishment, we have recognized three necessary inquiries: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive purposes"; and (3) whether the legislative record "evinces" a congressional intent to punish. 244

The Court's application of the test in Minnesota Public Interest is itself instructive. There the Court considered whether retroactive application of the federal Military Selective Service Act (MSSA), which denied financial aid to male students that evaded the Vietnam War draft, amounted to an impermissible bill of attainder. After first reviewing the purposes of the Bill of Attainder Clause and the results reached in several of its landmark bill of attainder and ex post facto cases, the Court determined that the sanction "impose[d] none of the burdens historically
associated with punishment”; the sanction amounted to the “‘mere denial of a noncontractual governmental benefit. No affirmative disability or restraint is imposed.’”

The Court next addressed whether the “challenged statute can reasonably be said to further nonpunitive goals,” and focused exclusively, and at length, on the legislative record of the MSSA. The Court found “convincing support” for the view that “Congress sought, not to punish anyone,” but rather to promote compliance with draft registration and fairness in allocation of scarce federal resources, both legitimate regulatory ends. The Court also scrutinized the statements of legislators in the committee reports and floor debates leading up to the passage of the MSSA, and on this basis ultimately found a lack of punitive intent.

By adopting what amounts to a “totality-of-the-circumstances” test in the bill of attainder and equal protection contexts the Court has made clear that scrutiny of legislative history and context must play a central role in legislative construction in these constitutional contexts. In so doing, it has embraced and put into effect Chief Justice Marshall’s belief that “[w]here the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived.” Or, perhaps more cynically, as Justice Cardozo offered: “Weasel words will not avail to defeat the triumph of intention when once the words are read in the setting of the whole transaction.”

As the foregoing discussion should make clear, the same concerns that drive the Court’s scrutiny of legislative purpose in the equal protection and bill of attainder contexts should drive evaluation of the punishment question for ex post facto purposes. The challenge remains, however, to achieve a workable method of achieving this goal.

245. Id.

246. Id. (citing Flemming v. Nestor, 363 U.S. 603, 617 (1960)). The Court made clear that although the first prong is denominated a “historical” inquiry, it is not a static one, but rather changes over time. Id. (stating that the “list of punishments forbidden . . . has expanded to include legislative bars to participation by individuals or groups in specific employments or professions.”). This flexibility, Chief Justice Burger implied, springs from prongs (2) and (3) of the test, which assess whether the legislature had a “nonpunitive goal” in endorsing the enactment in question. Id. at 853–54.

247. Id. at 850.

248. See id.

249. See id. at 855–56.

250. See id. at 856 n.15. The Court’s resort to the legislative record in both the second and third prongs of the Nixon test arguably marked a departure from Nixon, which strictly conceived of the second prong as a “functional test . . . analyzing whether the law . . . viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes.” Nixon, 433 U.S. at 475.


B. A New Test Articulated

In Kansas v. Hendricks, the Court applied the two-pronged "intent-effects" test which it first articulated in its other double jeopardy opinion in United States v. One Assortment of 89 Firearms, and later employed in United States v. Ursery. Very recently, in Russell v. Gregoire, the Ninth Circuit interpreted Hendricks as follows:

The first part of the test ("intent") looks solely to the declared purpose of the legislature as well as the structure and design of the statute... The second part of the test ("effects") requires the party challenging the statute to provide "the clearest proof" that the statutory scheme is so punitive either in purpose or effect as to negate the State's nonpunitive intent.

Faced with an ex post facto challenge to Washington's "Megan's Law," the Ninth Circuit discerned a nonpunitive intent under the first prong on the basis of the law's preamble, an inference buttressed by the law's overall regulatory structure and design. Citing Hendricks, the Ninth Circuit in Russell rejected an invitation to take into account the volatile legislative context in which the provision originated. According to the court, "[h]owever quickly a law was passed, and however heated the public sentiment around it, we look to the legislature's manifest intent—which is found in the text and structure of the law." The court then examined the "effects" of the law, and applying the Mendoza-Martinez factors, found lacking, not surprisingly, the "clearest proof" needed to overcome the announced nonpunitive legislative intent.

As Russell makes apparent, the "intent-effects" test plainly has ease of use to recommend it. This ease, however, underscores the fundamental inadequacy of the test, especially in the ex post facto context. By uncritically accepting the legislature's representations of nonpunitive intent, the Russell court (and the Hendricks majority) really only applied the "effects" prong of the test, itself nothing more than an application of the much-maligned Mendoza-Martinez factors, and a highly selective, result-driven application at that.

This criticism, however, is not to say that "effects" should play no role, or even a diminished role, in ex post facto punishment jurisprudence. At some point, as the Supreme Court has noted, even an avowedly nonpunitive sanction can be "so

256. 124 F.3d 1079 (9th Cir. 1997), cert. denied, 118 S. Ct. 1191 (1998).
257. Id. at 1087–88.
258. Id.
259. See Russell, 124 F.3d at 1088.
260. The Hendricks Court's essentially "effects"-driven test, ironically, bears a striking resemblance to the inquiry conducted in the "enhancement question" (Lynce) line of cases, which, as discussed in Part V of this Article, expressly disavows any focus on legislative purpose.
punitive in either purpose or effect” that punishment has been imposed. What is required is an approach to ascertaining legislative purpose that is at once far more comprehensive in scope and critical in method.

The challenge, therefore, lies in synthesizing the mix of motivational, theoretical, and practical concerns that constitute “punishment.” Although imperfect, the approach adopted by the Third Circuit in its 1996 opinion in *Artway v. Attorney General of New Jersey* is the best judicial effort yet formulated to arrive at a workable test.

In addressing an ex post facto challenge to New Jersey’s “Megan’s Law,” the *Artway* court formulated a three-pronged test that scrutinizes legislation in terms of: “(1) actual purpose, (2) objective purpose, and (3) effect.” Under this formulation, if the actual, subjective intent of the legislature was to punish, conclusive proof of an ex post facto violation is present. If, on the other hand, hardship is merely an “incident to a regulation,” then nonpunitive purpose can be inferred. To ascertain this subjective purpose, one looks to legislative findings contained in the enactment, as well as the statute’s “circumstances” and legislative history.

The second part of the *Artway* test, the “objective” prong, has three subparts, with a negative answer to any of the three compelling a conclusion that the sanction is punitive:

First, can the law be explained solely by a remedial purpose? . . . Second, even if some remedial purpose can fully explain the measure, does a historical analysis show that the measure has traditionally been regarded as punishment? If so, and if the text or legislative history does not demonstrate that this measure is not punitive, it must be considered “punishment.” Third, if the legislature did not intend a law to be retributive but did intend it to serve some

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262. Professor Carol Steiker very recently provided a helpful effort to synthesize the work of several moral and legal philosophers to provide a definition of punishment, so that we can “know it when we see it” and better assess the role of procedure in that assessment. See Steiker, *supra* note 181, at 775.
263. 81 F.3d 1235 (3d Cir. 1996). The Third Circuit reaffirmed its commitment to the three-factor *Artway* test, dismissing arguments that the Supreme Court’s holdings in *Ursery* and *Hendricks*, both handed down after *Artway*, invalidated *Artway*. See *E.B. v. Verniero*, 119 F.3d 1077, 1094–95 (3d Cir. 1997), *cert. denied*, 118 S. Ct. 1039 (1998). In so doing, however, the Court was constrained to admit that *Hendricks’s* introduction of the “clearest proof” standard formerly limited to use in the contexts of the Fifth and Sixth Amendments, amounted to a significant procedural change:

After *Hendricks* . . . it seems clear that similar deference to the legislative judgment is required whenever legislative measures are challenged on the basis of the [Ex Post Facto Clause] . . . . Accordingly, in *Artway* terms, if we determine that the actual legislative purpose was remedial, we must sustain [the law] against the current challenges unless its objective purpose or its effect are sufficiently punitive to overcome a presumption favoring the legislative judgment.

Id. at 1096.
264. Id. at 1263.
265. See id.
266. See id. at 1264.
mixture of deterrent and salutary purposes, we must determine (1) whether historically the deterrent purpose of such a law is a necessary complement to its salutary operation and (2) whether the measure under consideration operates in its "usual" manner, consistent with its historically mixed purposes.267

Finally, if neither the subjective nor objective tests evinces a punitive purpose, one must ask whether the "effects" of the sanction compel the conclusion that punishment has been imposed. "If the negative repercussions—regardless of how they are justified—are great enough, the measure must be considered punishment."268

Artway has appeal for two reasons. First, the test correctly insists upon a meaningful and predominant focus on legislative purpose. By assessing both subjective and objective indicia of purpose, the Artway test maximizes the likelihood of an accurate evaluation. Second, its more lenient proof regime is consistent with ex post facto analysis, in stark contrast to the "heavy burden" and "clearest proof" requirements of Hendricks.

However, a central challenge remains: How to discern legislative purpose? This challenge is discussed next.

C. Discerning Purpose From "Falderal": The Challenge of Discerning Punitive Purpose

Since at least the 1880s, the Supreme Court has looked to legislative history to inform its understanding of legislative purpose.269 As discussed above, the Court's seminal ex post facto decisions, as well as its equal protection and bill of attainder decisions, are dominated by a desire to divine purpose on the basis of the legislative record. Very recently, however, the Court's use of legislative history has come under fire from "New Textualist" critics, the most prominent among them being Associate Justice Antonin Scalia and Judge Frank Easterbrook of the Seventh Circuit.270 From their perspective, the use of legislative history to infer intent—or "Intentionalism"—has two fundamental flaws.271 First, legislative

267. Id. at 1263.
268. Id.
271. One commentator defined the respective approaches as follows: Intentionalism refers to the use of a variety of tools, including legislative purpose and legislative history, in an effort to determine the intent of the legislature when it included a particular word or phrase in a statute. Textualism refers to the use of a different set of tools, including dictionary
history is unreliable due to its relative indeterminacy: the unwieldy legislative process, representing a cacophony of views pointing in different directions, cannot yield a single message. In the words of Judge Easterbrook, “intent is elusive for a natural person, fictive for a collective body.” In Justice Scalia’s words, “the quest for the ‘genuine’ legislative intent is probably a wild-goose chase.” Judge Easterbrook has stated, “To lend authoritative effect to unenacted legislative history is to treat the carefully crafted legislative process as ‘mere falderal.’”

The New Textualist camp further posits that, even if a singular intent could be identified, it should be rejected for any of a number of reasons, including: the risk that the record has been “manufactured” to support judicial inferences that otherwise might not garner the support of a legislative majority; the improbability that legislators familiarize themselves with the legislative record, precluding the likelihood that a vote in favor of a bill is tantamount to an endorsement of the record; and the verity that legislators are motivated by multiple reasons, many of them irrelevant, that extend far beyond salient ones of public policy when they vote on legislation.

The New Textualists’ second concern is constitutional: that use of legislative history is contrary to the bicameralism, presentment, and veto provisions of Article I, insofar as legislative history is elevated to the status of law without having satisfied the express procedural requirements of the legislative process.

The impact of the New Textualists’ attack has been indisputable, igniting sharp

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definitions, rules of grammar, and canons of construction, in an effort to derive the putatively objective meaning of the statutory word or phrase.


273. Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 DUKE L.J. 511, 517. A similar sentiment was earlier expressed by Alexander Bickel: “Legislative motives are nearly always mixed and nearly never professed. They are never both unmixed and authoritatively professed on behalf of an entire legislative majority.” ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 214 (1962).

274. Frank H. Easterbrook, Legal Interpretation and the Power of the Judiciary, 7 HARV. J.L. & PUB. POL’Y 87, 92 (1984). See also Easterbrook, supra note 272, at 68–69 (“No matter how well we can know the wishes and desires of legislators, the only way the legislature issues binding commands is to embed them in a law.”).

275. See Kenneth W. Starr, Observations About the Use of Legislative History, 1987 DUKE L.J. 371, 377 (“It is well known that technocrats, lobbyists and attorneys have created a virtual cottage industry in fashioning legislative history so that the Congress will appear to embrace their particular point of view in a given statute.”).

276. See Hirschey v. FERC, 777 F.2d 1, 7–8 (D.C. Cir. 1985) (Scalia, J., concurring) (finding legislative record suspect).


278. See Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 621 (1991) (Scalia, J., concurring) (“[W]e should try to give the text its fair meaning, whatever various committees might have had to say—thereby affirming the proposition that we are a Government of laws not of committee reports.”); Thompson v. Thompson, 484 U.S. 174, 192 (1987) (Scalia, J., concurring) (stating that legislative history is a “frail substitute . . . for bicameral vote upon the text of a law and its presentment to the President.”). But see William N. Eskridge, Jr., The New Textualism, 37 UCLA L. REV. 621, 671–75 (1990) (challenging Justice Scalia’s constitutional claims).
debate both on the Court and among commentators. The vigor and heat of the lofty, high-stakes debate, however, has obscured a fundamental point in legislative analysis, a point with special significance to the discussion here.

In addressing the punishment question in Kansas v. Hendricks, the Court's raison d'être was to evaluate the Kansas Legislature's purpose in enacting the SVPA, an objective that differs in important ways from the interpretative mission of determining legislative intent or meaning. The Court in Hendricks was not sitting in its interpretative capacity as "agent," asking how the Kansas Legislature itself would answer a question prompted by an ambiguity arising under the involuntary commitment provisions of the SVPA, and seeking to give effect to that will. Rather, the Court was asked whether the Kansas Legislature's purpose was to punish the already-punished Leroy Hendricks. From this perspective, the SVPA was a "purposive" act, consistent with Justice Frankfurter's belief that all "[l]egislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government."
The interpretative precept that statutes have general purposes as well as specific intents (or meanings) is well-established in Anglo-American law, tracing its origins to the "Mischief Rule" of sixteenth century Britain where courts interpreted statutes on the basis of the "mischief and defect[s]" they sought to redress. Down the years, a long line of prominent American jurists and academics have recognized this "purposive" distinction in statutory interpretation, including: Justices Holmes and Frankfurter, Judges Jerome Frank and Learned Hand, and professors such as Lon Fuller, Max Radin, Henry M. Hart, Jr. and Albert M. Sacks. More recently, Professors William Eskridge, Alexander Aleinikoff, and Ronald Dworkin, as well as Justice Scalia and Judge

a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living. . . . Every statute must be conclusively proved to be a purposive act."].

285. See Heydon's Case, 76 Eng. Rep. 637, 638, 3 Co 7a (Exch. 1884); 1 WILLIAM BLACKSTONE, COMMENTARIES *87-*88 (stating that courts should consider the "mischief" at which a statute was aimed). See also DONALD GIFFORD, STATUTORY INTERPRETATION 43–57 (1990); John F. Manning, Textualism as a Nondelegation Doctrine, 97 COLUM. L. REV. 673, 733 n.253 (1997) ("Courts have traditionally examined the events precipitating a statute's enactment to gain insight into its meaning.").

Although early British courts typically did not examine legislative histories, principally because none existed, their interpretative strategy extended well beyond the strict text of the statute itself. See, e.g., Stowel v. Lord Zouch, 75 Eng. Rep. 536, 556 (C.P. 1869) ("Every thing which is within the intent of the makers of the Act, although it be not within the letter, is as strongly within the Act as that which is within the letter . . . .").

286. For an insightful treatment of the intellectual lineage of the "purposive" approach, and the role legislative history has played in it, see William N. Eskridge, Legislative History Values, 66 CH.-KENT L. REV. 365, 391–95 (1990). Earlier in this Section, broad reference was made to the "Intentionalist" camp. One commentator recently offered this refinement:

A purposivist judge finds law by measuring a statute's language against the statute's purpose. For the task of discerning purpose, legislative history is a common choice. An intentionalist finds law by reconstructing congressional intent, also frequently relying on legislative history. Intentionalism differs from purposivism because a statute can be interpreted to have a broader purpose beyond the one intended.


287. See United States v. Whitridge, 197 U.S. 135, 143 (1905) ("[T]he general purpose [of a statute] is a more important aid to the meaning than any rule which grammar or formal logic may lay down.").

288. See Frankfurter, supra note 284, at 527.


292. See generally Max Radin, Statutory Interpretation, 43 HARV. L. REV. 863 (1930). Alexander Bickel, for his part, wrote that when seeking to discern the "purpose" of an enactment, use of legislative history permits discovery of "which one of a number of related policies—all permissible on principle—the legislature intended to effectuate." ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 62 (1962).

293. See Hart & Sacks, supra note 283, at 1378.


295. See Aleinikoff, supra note 283, at 24.

296. See RONALD DWORIN, LAW'S EMPIRE 330 (1986).

297. See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 144 (1997) ("[T]he import of language depends on its context, which includes the occasion for, and hence the evident purpose of, its utterance.").
Richard Posner,\textsuperscript{298} have acknowledged this important difference. The distinction offered fifty years ago by then-Professor Archibald Cox between the two forms of legislative “intent” retains its usefulness today:

In one sense, \textit{[intent]} carries a concept of \textit{purpose} and signifies the general aim or policy which pervades a statute but has yet to find specific application . . . In a second sense \textit{[intent]} . . . carries the more immediate concept of \textit{meaning} and indicates the specific, particularized application which the statute was “intended” to be given.\textsuperscript{299}

Professor Cox added:

[s]ome such purpose lies behind all intelligible legislation, for while individual congressmen may occasionally disagree even as to the broad purposes to be accomplished by a bill . . . their conflicting views may be fairly said to blend in a resultant, just as their differences regarding the words to be enacted are merged by the legislative process into a final product.\textsuperscript{300}

To illustrate his point, Cox examined the Fair Labor Standards Act. The “purpose” of the FLSA, he observed, was to “raise the standards of living of workers engaged in interstate commerce or in the production of goods for commerce.”\textsuperscript{301} However, when Congress “defined production to include ‘any process or occupation necessary to the production thereof,’ Congress ‘intended’ (in the second sense) to make the act applicable to maintenance workers in the executive offices of interstate producers.”\textsuperscript{302}

To the extent “intent” comes into play at all with regard to the punishment question, then, it does so in the form of “institutionalized intention,” which Professor Ronald Dworkin characterizes as “a policy or principle . . . enacted so that it becomes part of the legislation.”\textsuperscript{303} Contrasted against “collective understanding,” which Dworkin rightfully deems an inscrutable “psychological” construct, institutionalized intention is embedded in the legislative enactment,\textsuperscript{304} and

\begin{footnotes}
\footnote{299. Archibald Cox, \textit{Judge Learned Hand and the Interpretation of Statutes}, 60 HARV. L. REV. 370, 370–71 (1947). To state the distinction, however, is not to understand how the different types of “intent” differ. This is because “[i]ntent is unfortunately a confusing word, carrying within it both the teleological concept of purpose and the more immediate concept of meaning . . . Purpose and meaning commonly react upon each other. Their exact differentiation would require an extended philosophical essay.” James M. Landis, \textit{A Note on “Statutory Interpretation,”} 43 HARV. L. REV. 886, 888 (1930).}
\footnote{300. Cox, \textit{supra} note 299, at 370–71.}
\footnote{301. \textit{Id.} at 371.}
\footnote{302. \textit{Id.} (footnote omitted).}
\footnote{303. RONALD DWORKIN, A MATTER OF PRINCIPLE 320 (1985). See also Taylor, \textit{supra} note 280, at 340 (“[M]eaning is to be found in the world of the text . . . . A statute is a public act whose meaning is not necessarily the same as the sum of the private intentions of those who voted in its favor.””).}
\footnote{304. See Dworkin, \textit{supra} note 296, at 322. See also Dworkin, \textit{supra} note 303, at 342–54. Alexander Bickel identified this distinction as well. According to Professor Bickel, inquiry into the “dominant purpose” of a
5
is susceptible of interpretation.\textsuperscript{305}

Of course, the foregoing recognition does not resolve precisely how "purpose" is to be meaningfully identified. As noted, the Court has frequently resorted to legislative materials to assist in its interpretation of statutes.\textsuperscript{306} Over time it has also been apparent that even within the body of legislative sources there exists a hierarchy, with committee reports and sponsors' statements being considered especially probative.\textsuperscript{307} Less consensus exists over the use of floor debates and statements of non-sponsors who speak on behalf of a bill, the concern stemming from the practical difficulty of inferring intent from numerous speakers.\textsuperscript{308}

\begin{quote}
legislative act "need not be regarded as an attempt to diagnose true motive, as if legislative action were a neurotic symptom that the Court is obliged to trace to its cause." Bickel, supra note 273, at 208–09. Professor Bickel was thus at pains to avoid Justice Cardozo's admonition in \textit{United States v. Constantine}, 296 U.S. 287, 299 (1935), that the Court should not partake in "psychoanalysis" of the "motives of a legislative body or assume them to be wrongful," a field to which the Court is "unaccustomed." Id.

The Court itself very recently reiterated this important distinction in \textit{NCUA v. First Nat'l Bank & Trust}, 118 S. Ct. 927 (1998). In \textit{NCUA}, banks sought to limit the ability of credit unions to enlist members from businesses unaffiliated with the existing credit union membership base. A threshold issue was whether the banks had standing to litigate their claim. In finding standing to exist, the Court, with Justice Scalia joining Justice Thomas's majority opinion, relied heavily on the legislative history of the Federal Credit Union Act and the historical context of the 1930's in which it originated. Id. at 937.

305. William Eskridge similarly observes that the legislative record is significant for its "truth value," and offers the Court's historic heavy reliance on the writings of Madison, Hamilton, and Jay in \textit{The Federalist Papers} by way of analogy. The collected essays, first printed anonymously in newspapers of the time, have become an interpretative benchmark for the Court in its constitutional analyses, notwithstanding the fact that only one of the authors was a ratifying delegate in New York's consideration of the U.S. Constitution:

\begin{quote}
Just as the Federalist's defenses of constitutional choices are often persuasive evidence of constitutional policies, so legislative history can sometimes provide guidance to the statutory interpreter by giving an indication of widely shared designs. And just as the essays by Madison and Hamilton set forth insightful views about political theory, legislative history is often illuminating for its normative value.
\end{quote}

William M. Eskridge, Jr., \textit{Legislative History Values}, 66 CHI.-KENT L. REV. 365, 439–40 (1990). See also Manning, supra note 285, at 733 ("Just as a book or newspaper or law review article may reveal the reasons for passing legislation, so too might the legislative history, which is itself produced by well-informed observers on the scene.")

306. Professor Cox notes that "even during periods in which legislative materials were not accepted for the purpose of showing the correct interpretation of a statute, the Supreme Court referred to them to disclose its general purpose." Cox, supra note 299, at 379 n.27 (citing, by way of example, Holy Trinity Church v. United States, 143 U.S. 457, 463–65 (1892); United States v. Union Pacific Railroad, 91 U.S. 72, 79 (1875); Preston v. Browder, 1 Wheat. 115 (1816)).


308. The Second Circuit recently expressed this difficulty: "Since any member can make a floor speech, there is scant utility in totaling up the number of speeches on each side of an issue and attempting to divine congressional intent from the quantity of Congressional Record pages generated on either side." Butts v. City of New York Dep't of Hous., 990 F.2d 1397, 1405 (2d Cir. 1993).
However, the Court has often looked to floor speeches to infer legislative purpose, and lent prominent effect to the utterances of mere proponents of legislation.\textsuperscript{309} Nor has the Court limited itself to the statements of persons with a voting role in the legislative process; it has frequently examined the views of non-legislators that played no express role in the drafting process.\textsuperscript{310}

The pitfalls of accepting such legislative grist at face value are well known, as the New Textualists and others have made clear.\textsuperscript{311} But even the most died-in-the-wool among them concede the importance of the legislative record in the interpretative process.\textsuperscript{312} As Professor George Taylor recently observed, "although use of legislative history can produce inaccuracies in interpretation, so can recourse to the statute alone."\textsuperscript{313} New Textualist stalwart Justice Antonin Scalia himself recently parsed the legislative record to infer congressional purpose. In \textit{United States v. Fausto},\textsuperscript{314} the Court considered whether the grievance procedures

\begin{itemize}

\item \textsuperscript{310} See Allison C. Giles, Note, The Value of Nonlegislators' Contributions to Legislative History, 79 GEO. L.J. 359 (1990) (discussing the Court's reliance on nonlegislators' views and providing a non-exhaustive list of 50 cases between 1904 and 1989 in which the Court considered such materials). William Eskridge has commented that "[n]onlegislator statements were most useful to the Court as evidence that the statute embodied a certain political consensus or compromise whose details were worked out outside the formal legislative process." \textit{William N. Eskridge, Jr., Dynamic Statutory Interpretation} 220 (1994). Professor Eskridge also observes that the Burger Court even indulged in "'subsequent legislative history,' the interpretation expressed by members of Congress after a statute has been enacted." Id. at 221.

\item \textsuperscript{311} See supra notes 270–80 and accompanying text. See also William N. Eskridge, Jr., Legislative History Values, 66 CHI.-KENT L. REV. 365, 413 (1990) ("legislative history ... is not a fixed context. Like the statute itself, it is subject to interpretation. What the legislative history 'is' depends upon what the interpreter physically finds, what she then selects from the materials available, what background values or assumptions influence her reading of the materials, and how individual materials fit with the big picture.").

\item \textsuperscript{312} Even arch-Textualist Judge Easterbrook has observed that context can be key in ascertaining statutory "meaning": Legislation speaks across the decades, during which legal institutions and linguistic conventions change. To decode words one must frequently reconstruct the legal and political culture of the drafters. Legislative history may be invaluable in revealing the setting of the enactment and the assumptions its authors entertained about how their words would be understood. \textit{In re Sinclair}, 870 F.2d 1340, 1342 (7th Cir. 1989) (Easterbrook, J.). Professor George Taylor recently observed, [\textit{As textualism increasingly recognizes}, textual analysis cannot rest on a text's internal context alone; terms gain meaning through interpretation in light of larger external contexts. ... To the extent, however, that textualism acknowledges the inextricable role of external context in determining textual meaning, it must also admit that interpretation can function only on criteria outside the text.

Taylor, \textit{supra} note 280, at 377–78.

\item \textsuperscript{313} Id. at 381 (footnote omitted). See also Colinvaux, \textit{supra} note 286, at 1137 ("Like the meaning of words, statutory interpretation is contextual. ... [I]n order to understand what it means to interpret a statute one should look to the context in which it occurs: the process of lawmaking.").

\item \textsuperscript{314} 484 U.S. 439 (1988).
\end{itemize}
set forth in the Civil Service Reform Act constituted the exclusive remedy for civil
servants aggrieved by personnel actions. Writing for the majority, Justice Scalia
looked to an accompanying Senate Report to infer that Congress acted with the
purpose of replacing the pre-Act system of redress; this, in tandem with the highly
detailed remedial framework of the Act, implicitly barred alternative pre-existing
remedies.\textsuperscript{315}

Nor has the Court limited its review to the narrow confines of the actual
legislative record. As in \textit{Cummings v. Missouri} and \textit{Ex Parte Garland}, and
consistent with the "Mischief Rule," the Court has looked to the broader historical
record to gauge the originating conditions giving birth to statutes.\textsuperscript{316} In 1930,
Professor James Landis colorfully spoke to the necessity of looking to the larger
forces at play:

\begin{quote}
A statute rarely stands alone. Back of Minerva was the brain of Jove, and
behind Venus the spume of the ocean. So of the statute, it is the culmination
often of long legislative processes. . . . Such material frequently affords a guide
to the intent of the legislature conceived of in terms of purpose. To deal, for
example, with the Trade Disputes Act of 1906 without regard to the fact that it
followed upon a Liberal-Labor victory, would be to thwart known legislative
hopes and desires . . . . To ignore legislative processes and legislative history in
the processes of interpretation, is to turn one's back on whatever history may
reveal as to the direction of the political and economic forces of our time.\textsuperscript{317}
\end{quote}

This sensitivity to legislative context—encompassing not just the narrow legisla-
tive history of a provision but also the broader social and political events giving
rise to it—is especially appropriate in ex post facto analysis. Statutes do not take
form in a vacuum, an understanding inherent in the Ex Post Facto Clause itself. Ex
post facto analysis, in short, demands keen sensitivity to the social, economic, and
political context in which legislative initiatives take root and gain approval.\textsuperscript{318}

\begin{footnotes}
\begin{enumerate}
\item \textsuperscript{315} See id. at 444.
\item \textsuperscript{316} As one leading authority on statutory interpretation put it:

\begin{quote}
It is established practice in American legal processes to consider relevant information concerning
the historical background of enactment . . . . These extrinsic aids may show the circumstances
under which the statute was passed, the mischief at which it was aimed and the object it was
supposed to achieve.
\end{quote}

NORMAN J. SINGER, 2A SUTHERLAND ON STATUTORY CONSTRUCTION § 48.03, at 315 (5th ed. 1992) (citations
omitted). See Butts v. City of New York Dep't of Hous., 990 F.2d 1397, 1405 (2d Cir. 1993) (finding
"enlightenment" in the "sequence of events" leading to passage of statute in question); CASS R. SUNSTEIN, AFTER
THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 186 (1990) ("Inevitably, statutory construction
is an exercise of practical reason in which text, structure, history, and purpose interact with the background
understandings in the legal culture."); W. David Slawson, Legislative History and the Need to Bring Statutory
Interpretation Under the Rule of Law, 44 STAN. L. REV. 383, 414 (1992) ("All expressions gain their meanings
from context.").
\item \textsuperscript{317} Landis, supra note 299, at 891–92.
\item \textsuperscript{318} Implicit in the Court's use of the legislative record is the recognition that the paramount importance of the
Court's inherent duty to interpret the Constitution trumps separation of powers and pragmatic concerns that
\end{enumerate}
\end{footnotes}
Nixon v. Administrator of Gen. Srvs.\textsuperscript{319} a bill of attainder case, is a modern exemplar of how the Court should scrutinize legislative context in ex post facto cases. In Nixon, former President Richard M. Nixon challenged the constitutionality of the Presidential Recordings and Materials Preservation Act (PRMPA), which permitted the government to take custody of his presidential papers and materials. The PRMPA in effect abrogated an individual depository agreement Nixon had signed with the General Services Administration under which Nixon would retain all legal rights in his materials and under which he permit the destruction of some of those materials. With the Watergate investigation looming, Nixon sued to enjoin implementation of the PRMPA, arguing inter alia that it singled him out for retroactive “punishment” in violation of the Bill of Attainder Clause.

In seeking to determine if the PRMPA “further[ed] nonpunitive legislative purposes,” the Court framed its standard as follows: “[w]here such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers.”\textsuperscript{320} The Nixon Court carefully scrutinized House and Senate Reports it believed made clear that Congress, rather than seeking to punish Nixon, instead legitimately acted to preserve Nixon’s papers for historical, judicial, and civic reasons.\textsuperscript{321} In addition, the Court found that this purpose was evident from the express terms of the PRMPA itself.\textsuperscript{322}

\begin{itemize}
  \item It seems clear that the actions of both Houses of Congress were predominantly precipitated by a resolve to undo the recently negotiated [General Services Administration] agreement, the terms of which departed from the practice of former Presidents in that they expressly contemplated the destruction of certain Presidential materials . . . . The relevant Committee Reports thus cast no aspersions on [Nixon’s] personal conduct and contain no condemnation of his behavior as meriting the infliction of punishment.\textsuperscript{323}
\end{itemize}

\textsuperscript{319} 433 U.S. 425 (1977).
\textsuperscript{320} Id. at 475–76.
\textsuperscript{321} See id. at 476–77.
\textsuperscript{322} See id. at 477.
\textsuperscript{323} Id. at 479.
The *Nixon* Court also looked to the Senate floor debates, giving special emphasis to the statement of a "key sponsor" of the PRMPA, North Carolina Senator Sam Ervin, who, in response to an opponent's attempt to mischaracterize safeguards contained in the legislation and brand it as a bill of attainder, "expressly den[d] any intention . . . of imposing punitive sanctions." This evidence, the Court found, distinguished *Nixon* from its prior bill of attainder decision in *United States v. Lovett*, "where a House Report expressly characterized individuals as 'subversive . . . and . . . unfit . . . to continue in Government employment.'"  The Court, however, was at pains to make clear that a "formal legislative announcement of moral blameworthiness or punishment" was not a prerequisite to concluding that the enactment constituted a bill of attainder. But at the same time, the decided absence from the legislative history of any congressional sentiments expressive of this purpose is probative of nonpunitive intentions and largely undercuts a major concern that prompted the bill of attainder prohibition: the fear that the legislature, in seeking to pander to an inflamed popular constituency, will find it expedient openly to assume the mantle of judge—or, worse still, lynch mob.

The *Nixon* Court's exacting inquiry was faithful to the animating concerns surrounding the Bill of Attainder Clause, concerns nearly identical to those of the Ex Post Facto Clause, and which dominated the Court's seminal ex post facto cases, most notably *Cummings v. Missouri* and *Ex parte Garland*. Unfortunately, this sensitivity was notably absent from *Hendricks*. The next section illustrates how a more searching inquiry into legislative purpose, like that carried out in *Nixon*, could have been conducted on the basis of the *Hendricks* record.

**D. Hendricks Reexamined**

In *Hendricks*, the Court satisfied itself that "Kansas's objective" in passing the Sexual Predators Act was "civil," essentially because Kansas stated it was so and because the SVPA was inserted in the probate code. This "manifest intent" was not overcome by the "clearest proof" that the SVPA was "so punitive either in purpose or effect as to negate [Kansas's] intention to deem it 'civil.'" In reaching its conclusion, however, the Court flatly ignored undisputed, plenary

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324. *Id.* at 479–80 & n.44.
325. 328 U.S. 303 (1946).
326. *Id.* at 480 (quoting *United States v. Lovett*, 328 U.S. 303, 312 (1946)).
327. *Id.*
328. *Id.* (citation omitted). The Court noted, but ultimately discounted, the volatile historic events swirling around the genesis of the PRMPA. See *id.* at 483–84.
329. See supra notes 118–22 and accompanying text.
331. *Id.*
evidence in the record raising serious questions about the putative civil purpose of the Kansas SVPA.

First, the Court failed to recognize that the SVPA was part of a larger package of harsh determinate sentencing laws that at once increased criminal penalties for future sex offenses and mandated enhanced penalties for "predatory sex offenders." These demonstrably criminal sanctions, however, targeted only future sex offenders; left untouched were the small but not insignificant population of offenders already imprisoned under older, more lenient indeterminate sentencing laws. One Kansas prosecutor summed up the legislative strategy as follows:

It is not difficult to understand why legislators are reluctant to stop after simply increasing the criminal sentences that may be imposed on sex offenders in the future. Such laws will indeed punish and incapacitate future offenders and may deter some potential offenders from ever committing sex offenses. But it is difficult to inform constituents that there is nothing more that can be done to protect the public from past offenders who are now being or soon will be released from prison.

In sum, it was at prior offenders, like Hendricks, that the SVPA's involuntary commitment scheme was directed, lending the SVPA a strong criminal cast.

Second, the Court totally ignored extensive evidence in the record of unabashed expressions of punitive intent in the legislative evolution of the SVPA, a great deal of which emanated from key players in the legislative process. For instance, in testifying before the Kansas Legislature on behalf of the SVPA, Kansas Attorney General Robert Stephan stated:

Most new laws against criminal conduct tend to provide punishment after the victimization has occurred. Senate Bill 525 will act prospectively and be preventive of criminal conduct and not just punitive. You have a rare opportunity to pass a law that will keep dangerous sex offenders confined past their scheduled prison sentence. As I am convinced none of them should ever be released, I believe you, as legislators, have an obligation to enact laws that will protect our citizens through incapacitation of dangerous offenders.

Stephan's successor, current Attorney General Carla Stovall, described the SVPA's goal as keeping sexual offenders "locked up indefinitely" because Kansas could not "open [its] prison doors and let these animals back into [its] commu-

332. See McAllister, supra note 23, at 427 (noting that sentence enhancements and the SVPA were enacted in "response to the Stephanie Schmidt case.").
333. Id. at 434.
334. See KAN. STAT. ANN. § 21-3810(c) (making escape pending "predator" status trial an "aggravated" felony; no similar penalty associated with escape from standard civil commitment).
ties.\textsuperscript{337} Extensive testimony from a long list of mental health professionals, including representatives of the agency theoretically responsible for treatment under the SVPA, confirmed that the result of commitment would very likely be indefinite confinement, rather than treatment in the hope of release.\textsuperscript{338} The reasons for this ranged from the practical reality that mental health professionals would be extremely reluctant to certify that offenders could ever be safely returned to the community,\textsuperscript{339} to the acknowledged lack of effective treatment in Kansas for pedophiles.\textsuperscript{340}

The SVPA itself became law amid a landslide of support. The Kansas House approved the legislation 101-23 and the Senate 40-0, in a single day,\textsuperscript{341} largely due to the efforts of the Schmidt Task Force, which proposed the SVPA to the legislature for consideration. The Task Force included the following: the mother, father, and sister of Ms. Schmidt; Kansas Attorney General Robert Stephan; a local district attorney; law enforcement personnel; the State Victims' Rights Coordinator; parole board members; probation officers; legislators; and several concerned citizens. It did not include any mental health professionals.\textsuperscript{342} When one Task Force member was confronted with the reality that, because effective treatment was lacking, commitment would de facto amount to a life term, the response was "So be it."\textsuperscript{343}

\textsuperscript{337} Id.
\textsuperscript{339} See id.
\textsuperscript{340} Id.
\textsuperscript{341} Kelly A. McCaffrey, Comment, The Civil Commitment of Sexually Violent Predators in Kansas: A Modern Law for Modern Times, 42 KAN. L. REV. 887, 888 (1994). Bills proposing involuntary post-confinement commitment were proposed in the 1991 and 1992 Kansas legislative sessions, but were defeated both times in the House. The Schmidt murder and rape ignited new interest, resulting in the law's ultimate convincing margin of victory in 1994. See id. at 889.
\textsuperscript{342} Id. at 887 n.2.
\textsuperscript{343} Hendricks, 117 S. Ct. at 2087 (Kennedy, J. concurring) (citing testimony of Schmidt Task Force Member Jim Blaufuss). It is interesting to note that the State of Washington's sexual predator law was borne of strikingly similar public outrage and fury, likewise stemming from a high-profile sexual assault. As in Kansas, the Governor appointed a task force, and the task force's proposals steam-rolled through the Legislature (by a unanimous vote). See David Boerner, Confronting Violence: In the Act and In the World, 15 U. PUGET SOUND L. REV. 525, 575 (1992). Mr. Boerner, a task force member and chief drafter of the statute, commented:

I had no doubt that if the legislature was to extend the length of the sentences previously imposed, the courts would find the legislation unconstitutional. While the members of the Task Force could accept the legal judgment, they could not accept the result.

Id. at 550.

A similar history characterized the evolution of New Jersey's sexual predator law. See Claudine M. Leone, New Jersey Assembly Bill 155, A Bill Allowing the Civil Commitment of Violent Sex Offenders After the Completion of a Criminal Sentence, 18 SETON HALL LEGIS. J. 890 (1994). The New Jersey Legislature, embroiled in an election year, and under an emergency suspension of its rules that resulted in no hearings in the State House and limited hearings in the Senate, approved the legislation within a mere three months of Megan Kanka's death. See Symposium, Critical Perspectives on Megan's Law: Protection vs. Privacy, 13 N.Y.L.S. J. HUM. RTS. 1, 57
Finally, in a curious twist for the Supreme Court’s conservatives, who otherwise voice great concerns for federalism and comity, the *Hendricks* Court utterly ignored the Kansas Supreme Court’s evaluation of the purpose driving its own Legislature. The Kansas court found it “clear that the primary objective of the Act is to continue incarceration and not to provide treatment.” The *Hendricks* majority’s inexplicable neglect of the Kansas court’s authoritative understanding deviated from well-settled law. Addressing an ex post facto challenge in 1937 for a unanimous Court, Justice Stone stated:

This Court, in applying the ex post facto prohibition of the Federal Constitution to state laws, accepts the meaning ascribed to them by the highest court of the state. But when their meaning is thus established, whether the standards of punishment set up before and after the commission of an offense differ, and whether the later standard is more onerous than the earlier within the meaning of the constitutional prohibition, are federal questions which this Court will determine for itself.  

Altogether, the record in *Hendricks* provided strong reason to be wary of accepting the Kansas Legislature’s reflexive assurance that it was seeking only to “treat,” not punish, sexual offenders. The SVPA originated with the gruesome rape and murder of a young woman by a released “sexual predator,” and little occurred in the evolution of the SVPA that was inconsistent with the initial punitive impulse. At a minimum, as suggested by Justice Breyer in his *Hendricks* dissent, the Court should have been obliged to “place particular importance upon those features that would likely distinguish between a basically punitive and basically nonpunitive purpose.” The compelling evidence of punitive purpose in the record, considered with the other statutory-based indicia of intent (e.g., the fact that involuntary confinement is involved; the fact that individuals are stigmatized as “predators”; the fact that “treatment” is imposed only on persons previously convicted of a criminal offense, at the end of their sentences; and the at best secondary treatment objective) belied the Kansas Legislature’s ostensible nonpunitive design.

The SVPA doubtless served to extend the time (perhaps indefinitely) during which Kansans could live without fear of a visit from Leroy Hendricks. But the

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(1997). See also Robert Hanley, *Megan’s Law is Questioned as Injunction is Extended*, N.Y. TIMES, July 10, 1996, at B6 (recounting that legislators rushed bill through session with scant hearings in response to plea of Megan’s parents and supporters); Bill Sanderson, *Glamour Politics Isn’t the Name of the Game*, THE RECORD (New Jersey), Sept. 3, 1995, at O5 (“After a tearful testimonial from Megan Kanka’s mother, the lawmakers ignored the few witnesses who raised questions.”).


Hendricks Court simply refused to acknowledge, let alone weigh, the indicia of punitive purpose, and instead uncritically rubber-stamped the assurance of the Kansas Legislature. In doing so, it ignored the core purpose of the Ex Post Facto Clause, the very constitutional provision it was charged with interpreting and applying.

VI. CONCLUSION

If the Ex Post Facto Clause is to remain, in James Madison's words, a fundamental "constitutional bulwark in favor of personal security and private rights,"\(^\text{347}\) it must be treated as such by the Court. Since its origin, the Clause has guarded against legislative vindictiveness, a threat no less pertinent today than at the time of the Framers. Indeed, parallels between Southern sympathizers of the 1860s, Communists of the 1950s, and chronic sexual offenders of the 1990s are obvious.\(^\text{348}\) Given the politically charged atmosphere in which the Kansas Legislature enacted its Sexually Violent Predator Act, one would have expected a keen sensitivity on the part of the Court to legislative purpose, especially given the array of other indicia pointing to the punitive nature of the SVPA. But such sensitivity was not forthcoming from the Hendricks majority.

With Hendricks, the Court endorsed a constitutional end-run. Faced with the imminent release of Leroy Hendricks in 1994, Kansas "cut corners"\(^\text{349}\) and used its newly adopted SVPA to revive an option it inexplicably passed up in 1984, namely, the incapacitation of Hendricks "until he exhaled his last breath and his spirit departed this earth ...."\(^\text{350}\) Fairly viewed, while certainly an innovative "gap-filling" strategy,\(^\text{351}\) the Kansas SVPA represents nothing more than an

\(^{347}\) The Federalist No. 44, at 299 (James Madison).

\(^{348}\) This point was eloquently made by New Jersey Supreme Court Justice Stein in a case addressing whether the sex offender registration and notification provisions of "Megan's Law" violated the Ex Post Facto Clause:

The Constitution's prohibition against ex post facto laws reflects an enduring value that transcends the most pressing concerns of this or any day and age. Today, our concern is with prior sex offenders; in the 1950s the legislative concern focused on Communists; and in the late 1860s Congress was determined to punish legislatively those who had supported the Confederacy. Future legislatures will doubtlessly find reasons to deal harshly with other groups that pose an apparent threat to the public safety.

Doe v. Poritz, 662 A.2d 367, 441 (N.J. 1995) (Stein, J., dissenting). Another commentator put it this way: "As America moves into the twenty-first century, we must determine to what extent individual liberties must be sacrificed for the common good. Ideals of liberty and privacy are stretched to the limit as modern fears of street crime merge with ancient fears of plague." Richards, supra note 18, at 329.

\(^{349}\) Hendricks, 117 S. Ct. at 2098 (Breyer, J., dissenting) (stating that the Ex Post Facto Clause "provides an assurance that, where so significant a restriction of an individual's basic freedoms is at issue, a State cannot cut corners. Rather, the legislature must hew to the Constitution's liberty-protecting line.").

\(^{350}\) In re Hendricks, 912 P.2d at 139 (Lockett, J., concurring).

\(^{351}\) Schulhofer, supra note 129, at 78-79. Professor Schulhofer has observed that in one sense the concern over sexual predator statutes is of "little long-term import," because increasingly, the states have moved away from indeterminate sentences, instead imposing draconian sentences on chronic offenders such as Hendricks from the outset. At the same time, writing before Hendricks was issued, Schulhofer noted that concerns will persist with
instance of shrewd legislative legerdemain, and the Supreme Court’s approval of it surely bodes ill for the future. Where this sort of legislative behavior will end is difficult to say, for while it is sex offenders that garner our attention today, society has no shortage of targets on which to focus its anxiety and disdain.352

Some time soon, yet another legislature will succumb, in Chief Justice Marshall’s words, to “feelings of the moment . . . those sudden and strong passions to which men are exposed.”353 The potential political gain is simply too great, and the political risk too small, for events to be otherwise.354 While we would like to

“first offenders and less serious offenders . . . as the state [sic] may determine to seek long-term incapacitation of those offenders after conviction or when they reach the end of the single-digit prison or jail sentence they are likely to face in any foreseeable penal regime.” Id. at 76 n.44.

In this regard, it is worthwhile to note that the number of sexual offenders potentially coming within the net is not small. Data from Minnesota, for instance, indicate that 40% of persons sentenced in 1992 for first-degree sexual conduct did not receive prison time. See Johnson, supra note 21, at 1188. Those receiving prison terms averaged sentences of 10.5 years, and of the defendants with three or more prior convictions, almost 17% served less than one year or no time whatsoever. Id.

352. At oral argument, Justice O’Connor inquired of Kansas Attorney General Stovall: “How would this be cabined in the future . . . if we uphold it? Could a state lock up any violent offender who’s diagnosed as having a mental abnormality of some kind . . . and at the same time be likely to commit more crimes in the future?” Transcript at *4.

Yet another consequence of this “blurring” of criminal sanctions is that Eighth Amendment proportionality analysis will be effectively precluded. See Dubber, supra note 29, at 136 (“[T]he distinctions in American law between (civil) commitment and (criminal) punishment and between punitive and remedial commitment insulate the State from challenges to the legitimacy of its punishment practices . . . . [T]he State manages to escape scrutiny of its punitive power by classifying its coercive practices as anything but punishment.”). For instance, a first-time sex offender can now receive a determinate sentence of ten years and thereafter be “civilly” committed for the remainder of his life, without being permitted to challenge the State’s intervention on Eighth Amendment grounds.

353. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 137–38 (1810). See also Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994) (warning that a legislature’s “responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.”); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 83 (1921) (“‘Statutes are designed to meet the fugitive exigencies of the hour.’”).


354. Paul Brest has recognized the “practical problems that confront a legislator whose constitutional obligations conflict with the political demands of his office,” and has further observed that “[p]erhaps it is naive to assume that the Constitution will often prevail when political interests are threatened.” Paul Brest, The Conscientious Legislator’s Guide to Constitutional Interpretation, 27 STAN. L. REV. 567, 601 (1975). See also John Q. La Fond, Washington’s Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control, 15 U. PUGET SOUND L. REV. 655, 702 (1992) (“No politician wants to face a sixty second political attack on television by his campaign opponent claiming ‘he voted against community safety and in favor of sexually violent predators.’ ”); Michael J. Perry, The Constitution, the Courts and the Question of Minimalism, 88 NW. U. L. REV. 138 (1993) (“The principal reason for doubting that ordinary politicians can generally do a good job of specifying constitutional indeterminacy is that for most members of the Congress, incumbency is a fundamental value.”).

Testament to the appeal of the sex offender issue is seen in Washington State, in the “Tennis Shoe Brigade,” so named because its members sent thousands of sneakers to legislators in 1990 in symbolic concern for the victims of child sex abuse. One brigade member, Patty Murray, was elected to the U.S. Senate in 1994. Another leader, Ida Ballasiotes, is now a State representative. Turning Point: The Revolving Door: When Sex Offenders Go Free (ABC television broadcast, Sept. 21, 1994).
think that legislators, many of whom are educated in the law, would be sensitive to constitutional demands with respect to retroactive sanctions, reality and reason dictate to the contrary.\textsuperscript{355} In the meantime, there is much work to be done if the Ex Post Facto Clause is to be resurrected from the constitutional dust heap to which it has now been relegated by the Court.\textsuperscript{356}

\textsuperscript{355} In striking down on ex post facto grounds the notification provision of New York's "Megan's Law," a holding later reversed by the Second Circuit in the wake of Hendricks, Judge Dennis Chin commented on the constitutional doubts voiced by Assembly members who nonetheless were willing to "take a chance regardless of what it may be, the Constitution," because of their view that sex offenders did not deserve protection. Doe v. Pataki, 940 F. Supp. 603, 622 n.15 (S.D.N.Y. 1996), rev'd, 120 F.3d 1263 (2d Cir. 1997), cert. denied, 118 S. Ct. 1066 (1998). Judge Chin also noted that one bill sponsor acknowledged that the law was "punitive to a degree by describing the effort made to 'assure' that the Act would be considered 'more regulatory than punitive.'" Id.

One can also plausibly infer from the sponsor's statement a self-conscious desire to "shade" the law in such a way as to mitigate in favor of a nonpunitive inference. A similar mentality appeared to pervade the evolution of Washington State's sexual predator law. A member of the task force which drafted the law commented that she was aware that the law "flies in the face of the Bill of Rights." Turning Point, supra note 309. Indeed, Kansas's decision to place the SVPA in its probate code can be interpreted as another such instance.

In light of the foregoing, and with no reason to think that such sentiments are unrepresentative of typical legislative sentiment, Professor Brest's hope in 1975 that legislators will take to heart, and be motivated by constitutional constraints, would appear to be in vain. See generally Brest, supra note 354. See also Illinois v. Krull, 480 U.S. 340, 366 (1987) (O'Connor, J., dissenting) (dissenting from the majority's invocation of the "good faith" exception to the exclusionary rule with regard to police reliance on a statute authorizing warrantless administrative searches: "Providing legislatures a grace period during which police may freely perform unreasonable searches . . . creates a positive incentive to promulgate unconstitutional laws.").

\textsuperscript{356} Like so many other areas of constitutional law in the past twenty years, some hope for this resuscitation might lie in state constitutional law. As noted by long-time California Supreme Court Justice Stanley Mosk:

When the Supreme Court truck careens from one side of the constitutional road to the other, state courts have two alternatives. They can shift gears and also change directions, thus achieving subservient consistency with Washington. Or, they can retain existing individual rights by reliance on the independent non-federal grounds found in the several state constitutions.

Mosk, supra note 19, at 561.

Virtually all states have some ex post facto provision in their Constitution, not all identical in form to their federal counterpart. As a result, the promise exists that individual "bulwarks" against retroactive penal laws can be erected in the states themselves. See Neil C. McCabe & Cynthia A. Bell, Ex Post Facto Provisions of State Constitutions, 4 EMERGING ISSUES ST. CONT. L. 133, 133 n.4 (1991) (stating that forty-six of the fifty states have provisions that ban ex post facto laws). The authors observe that least one state, Tennessee, apparently affords greater protection than that afforded by the federal Ex Post Facto Clause. Id. at 148–51 (citing and discussing Miller v. State, 584 S.W.2d 758 (Tenn. 1979)). See generally Jennifer Friesen, State Courts as Sources of Constitutional Law: How to Become Independently Wealthy, 72 NOTRE DAME L. REV. 1065 (1997) (discussing growth of independent state constitutional law and lauding the trend).