CONSTITUTIONAL CHALLENGES TO MEGAN'S LAW: A YEAR'S RETROSPECTIVE

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I. INTRODUCTION

Hard cases may or may not make bad laws, but they do not make easy laws. The recently enacted statutes, commonly know as Megan's Law, illustrate how complex laws can evolve from a difficult case.[1] Following Megan Kanka's tragic death,[2] the New Jersey legislature acted swiftly to prevent crimes committed by repeat sex offenders. The legislature attempted to warn residents about sex offenders living in their communities by including in Megan's law a community notification ("Notification") provision.[3] Formerly convicted sex offenders, however, contend that the notification statute is unconstitutional on several grounds, including violating the United States Constitution Fourteenth Amendment Due Process Clause.[4] Courts that have reviewed these challenges, however, have not yet clearly resolved the underlying constitutional issues. In fact the federal courts[5] and state courts[6] of New Jersey strongly disagree with each other about the reporting requirement based on their conflicting understandings of the nature of punishment, privacy, and due process engendered by the debate.

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[1] The two provisions that have given rise to constitutional challenge are N.J. STAT. ANN. §§ 2C:7-1 to -5 (West 1995 Supp.) (sex offender registration provision), and N.J. STAT. ANN. §§ 2C:7-6 to -11 (West 1995 Supp.) (community notification provision).

[2] Megan Kanka was murdered in July 1994 by a previously convicted sex offender.

[3] *See* N.J. STAT. ANN. §§ 2C:7-6 to -11.

[4] *See* Artway v. Attorney General, 876 F. Supp. 666 (D.N.J. 1995), *vacated*, 81 F.3d 1235 (3d Cir. 1996), *reh'g denied*, 83 F.3d 594 (3d Cir. 1996).

[5] *See id. See also* Diaz v. Whitman, No. 94-6376 (D.N.J. Jan. 6, 1995) (Bissell, J.) (entering preliminary injunction against Tier II community notification based on likelihood of success on Ex Post Facto and procedural due process claims); W.P. v. Poritz 931 F. Supp. 1187, 1198 (D.N.J. 1996). (Bissell, J.) (certifying class action and entering statewide preliminary injunction against all community notification).

[6] *See* Doe v. Poritz, 662 A.2d 367 (N.J. 1995) (upholding community notification provisions against ex post facto challenge, but imposing substantial revisions to bring statute into compliance with procedural due process requirements).

Moreover, civil rights and civil liberties lawyers employ other constitutional challenges to Megan's Law. Although Megan's Law contains a number of provisions, it is the requirement of community notification for high risk ("Tier III") or moderate risk ("Tier II") sex offenders that has attracted the most public attention and the most persistent legal challenges. Constitutional arguments against community notification have generally fallen into three categories: (1) retroactive application of community notification to those whose offenses predated the enactment of Megan's Law amounts to the imposition of new punishment that violates not only the Ex Post Facto Clause,[7] but also the proscriptions against Double Jeopardy[8] and Bills of Attainder;[9] (2) community notification invades a constitutionally protected privacy interest in being free from government disclosure of personal information; and (3) the mechanism adopted by New Jersey in classifying the former sex offender's risk of reoffense, and determining the extent of public notification, does not comport with the requirements of the Due Process Clause.[10] The Ex Post Facto and the Bill of Attainder Clauses, for instance, form the bases for arguments that Megan's Law imposes impermissible punishments on previously convicted sex offenders. These relatively obscure constitutional clauses offers new dimensions to analyzing the constitutionality of Megan's Law.

II. THE NATURE OF PUNISHMENT

Challengers to the New Jersey community notification statute include convicted sex offenders whose underlying sexual offenses occurred before October 31, 1994, the date that the provisions were enacted into law. The timing of these convictions is intrinsic to whether the retroactively applied notification laws are constitutionally permissible under the Ex Post Facto Clause, the Bill of Attainder Clause, and the Double Jeopardy Clause. Under the Ex Post Facto Clause, the government may not, among other things, apply a law retroactively if it "changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed."[11] The Bill of Attainder Clause forbids legislatures from engaging in "[l]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial."[12] Finally, the Double Jeopardy Clause prohibits "a second prosecution for the same offense after conviction[,] and multiple punishments for the same offense."[13]

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[7] *See* U.S. CONST., art. I, § 9, cl. 3.

[8] *See* U.S. CONST. amend. V.

[9] *See* U.S. CONST. art. I, § 9, cl. 3.

[10] *See* U.S. CONST. amend. XIV.

[11] Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798); *accord* Collins v. Youngblood, 497 U.S. 37, 42-43 (1990).

[12] United States v. Brown, 381 U.S. 437, 448-49 (1965).

[13] United States v. Halper, 490 U.S. 435, 440 (1989).

Thus, the dispositive issue under each of these three clauses is whether retroactive application of the community notification provisions of Megan's Law amounts to new "punishment."[14] Accordingly, the immediate doctrinal disagreement between New Jersey Attorney General's office ("State") and Megan's Law challengers hinges on the methodology for defining and identifying punishment. The State has largely relied upon assertions of non-punitive legislative motive; meanwhile, the challengers argue that whether a state-imposed sanction is "punishment" does not depend on the alleged purity of motive on the part of the legislature. Rather, the challengers argue that courts must "assess[] the character of the actual sanctions imposed on the individual by the machinery of the state."[15]

A. *Prior United States Supreme Court Precedent*

In its most recent Ex Post Facto decision, the United States Supreme Court noted that in defining punishment, it has "previously declined to articulate a single 'formula' for identifying those legislative changes that have a sufficient effect on substantive crimes or punishments to fall within the constitutional prohibition."[16] The lack of any comprehensive framework for defining punishment has directly impacted litigation challenging Megan's Law. Initially, most challengers to the law adopted the seven factors for punishment described over thirty years ago in *Kennedy v. Mendoza-Martinez*.[17] These factors included the following:

> [1] [w]hether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, [7] and whether it appears excessive in relation to the alternative purpose . . . .[18]

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[14] This argument also applies to defendants convicted under plea bargaining agreements. Under the Due Process Clause defendants must be fully informed of the consequences of the plea. *See* Boykin v. Alabama, 395 U.S. 238 (1969). The apparent terms and conditions of the plea agreement must be fulfilled. *See* Santobello v. New York, 404 U.S. 257 (1971). These considerations, however, also merge into the question of whether the state is imposing new punishment, since implementation of a purely regulatory, non-punitive mechanism would not be deemed to be a breach of the original plea agreement. *See, e.g.*, Rowe v. Burton, 884 F. Supp. 1372 (D. Alaska 1994) (addressing whether Alaska's sex offenders registration law violates U.S. CONST. Art. I, § 10, cl. 1, prohibiting ex post facto laws that impair contracts, by impairing plea bargaining agreements).

[15] *Halper*, 490 U.S. at 447.

[16] California Dep't of Corrections v. Morales, 115 S. Ct. 1597, 1603 (1995) (citations omitted).

[17] 372 U.S. 144 (1963) (loss of citizenship constituted punishment requiring procedural safeguards of Fifth and Sixth Amendments).

[18] *Mendoza-Martinez*, 372 U.S. at 168-69.

These rules provided a self-contained functional set of tests by which the effects of the provision could be analyzed. Indeed, most prior cases involving some form of community notification regarding convicted sex offenders followed the *Mendoza-Martinez* criteria.[19]

The State, on the other hand, has stressed the inquiry into subjective legislative motive as the principal method for determining punishment. In *De Veau v. Braisted*,[20] for instance, the Court explained that "[t]he 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."[21] Similarly, the United States Court of Appeals for the Seventh Circuit[22] recently applied a subjective test in defining punishment for Ex Post Facto purposes, noting that "[t]he Supreme Court has consistently required 'unmistakable evidence of punitive intent' to characterize a sanction as punishment."[23] Thus, in the context of Megan's Law, the State offers the laudable legislative aim to protect children and other potential victims of sexual offenses as a remedial goal that negates any inference of punitive intent.

Selecting between the stark choices in jurisprudence presented by these two approaches in Megan's Law litigation implicates an important principle of judicial methodology: shall the results of constitutional adjudication depend on a court's ability to engage in hindsight reconstruction of a legislature's benign subjective intent,[24] or must the court also assess the objective character of the actual

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[19] For cases applying *Mendoza-Martinez* factors in assessing retroactive application of community notification provisions, see Rowe v. Burton, 884 F. Supp. 1372 (D. Alaska 1994); and State v. Noble, 829 P.2d 1217, 1221-24 (Ariz. 1992); and State v. Ward, 869 P.2d 1062, 1068-74 (Wash. 1994). *See also In re* Reed, 663 P.2d 216, 218-20 (Cal. 1983) (applying the *Mendoza-Martinez* factors to registration statute). *Cf.* People v. Adams, 581 N.E.2d 637, 641 (Ill. 1991) (declining to use *Mendoza-Martinez* factors where evidence of legislative intent was conclusive); State v. Babin, 637 So. 2d 814, 824 (La. Ct. App. 1994), *writ denied*, 644 So. 2d 649 (La. 1994); State v. Payne, 633 So. 2d 701, 702-03 (La. Ct. App. 1993), *writ denied*, 637 So. 2d 497 (La. 1994)(holding that retroactive application of registration provision violated Ex Post Facto Clause); and State v. Costello, 643 A.2d 531, 533 (N.H. 1994) (analyzing the facial intent of the legislature without citation to *Mendoza-Martinez*).

[20] 363 U.S. 144 (1960) (finding no ex post facto violation in retroactive application of state law prohibiting unions from collecting dues if any officer or agent of the union was convicted felon).

[21] *Id.* at 160.

[22] *See Bae v. Shalala*, 44 F.3d 489 (7th Cir. 1995) (rejecting ex post facto claim against statute permanently prohibiting involvement in drug product approval applications based upon defendant's conviction for bribery).

[23] *Id.* at 494.

[24] Although the usual distinction is made between "remedial" and "punitive," the two are not mutually exclusive. Remedial measures are presumably those which seek to prevent future harm, as opposed to punish for past misconduct. But as the Supreme Court noted, historically legislatures often inflicted deprivations upon potential malefactors in

sanction imposed by the State?[25] Clearly, proponents of individual rights advocate establishing constitutional protections based on empirical evidence of effects, rather than on subjective motive. "Even a clear legislative classification of a statute as 'non-penal' would not alter the fundamental nature of a plainly penal statute."[26] Total reliance on the purported subjective purpose of a legislature in defining constitutional protections would render those protections nugatory in most practical cases.

In *United States v. Halper*,[27] the Court articulated a test for punishment that appears to lower the threshold for finding legislative sanction to be punitive, although it did so in language that has generated confusion and lent support to both sides of the issue.[28] In finding that a sizable fine, imposed in a civil proceeding after the defendant's conviction for Medicare fraud, violated the Double Jeopardy Clause, *Halper* clearly indicated that ostensibly civil sanctions could nevertheless constitute punishment.[29]

> We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. Furthermore, retribution and deterrence are not legitimate nonpunitive governmental objectives. From these premises, it follows that a civil sanction that cannot be fairly said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand that term. We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second

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order to prevent future misconduct. *See* United States v. Brown, 381 U.S. 437, 458-59 (1965) (finding that "preventative" measure designed to avoid future undesirable events was nonetheless punishment for purposes of the Bill of Attander Clause). The Supreme Court noted:

> [T]he labels "criminal" and "civil" are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties. The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads.

United States v. Halper, 490 U.S. 435, 447-48 (1989).

Thus, Doe's frequent reference to the remedial and preventative nature of Megan's Law, in addition to being suspect on the merits, is also irrelevant. It is perfectly possible for a measure to be both preventative and thus remedial, while at the same time being punitive.

[25] "[A] legislature may not insulate itself from an ex post facto challenge simply by asserting that a statute's purpose is to regulate rather than punish prior conduct. The overall design and effect of the statute must bear out the non-punitive intent." United States v. Huss, 7 F.3d 1444, 1447-48 (9th Cir. 1993) (citing United States v. Ward, 448 U.S. 242, 248-49 (1980)).

[26] Trop v. Dulles, 356 U.S. 86, 95 (1958) (plurality opinion).

[27] 490 U.S. 435 (1989).

[28] *See id.* at 449.

[29] *See id.* at 450.

> sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.[30]

By defining punishment in terms of two goals that yield empirical data — deterrence and retribution — *Halper* supports the argument that ascertaining the nature of punishment requires applying a functional test. *Halper* also attempted to supplement the qualitative test for punishment by recommending a quantitative approach to assess statutes characterized by both punitive and non-punitive aspects.[31] This qualitative model, however, measures punishment based on sujective inquiry into legislative intent.[32]

Concurring in *Halper*, Justice Kennedy noted the importance of the distinction between subjective and objective tests: "In approaching the sometimes difficult question whether an enactment constitutes what must be deemed a punishment, we have recognized that a number of objective factors bear on the inquiry."[33] After outlining the objective *Mendoza-Martinez* factors, Justice Kennedy further cautioned:

> Today's holding, I would stress, constitutes an objective rule that is grounded in the nature of the sanction and the facts of the particular case. It does not authorize courts to undertake a broad inquiry into the subjective purposes that may be thought to lie behind a given judicial proceeding. Such an inquiry would be amorphous and speculative, and would mire the courts in the quagmire of differentiating among the multiple purposes that underlie every proceeding, whether it be civil or criminal in name. It also would breed confusion among legislators who seek to structure the mechanisms of proper law enforcement within constitutional commands.[34]

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[30] *Id.* at 448-49.

[31] The bill of attainder cases also provide a useful frame of reference for both the Ex Post Facto clause analysis, and the procedural due process analysis. First, it is instructive to note that "punishment" for purposes of the Bill of Attainder Clause is not limited to deprivation of life, liberty, or property. In Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866), the Court stated, "We do not agree with the counsel of Missouri that 'to punish one is to deprive him of life, liberty, or property, and that to take from him anything less than these is no punishment at all . . . .' The deprivation of any rights, civil or political, previously enjoyed, may be punishment." *Id.* at 320. This same expansive definition of punishment can be applied to the Ex Post Facto Clause.

In *Cummings*, the Supreme Court held that a Congressional act, requiring as a prerequisite to practicing certain professions, an oath that one had not supported the Confederacy in the Civil War, effectively prevented a person from enjoying his livelihood, and thus amounted to an unconstitutional imposition of punishment by the legislature. *Accord* Ex Parte Garland, 71 U.S. (4 Wall.) 333 (1966) (holding that a statute prohibiting practice of law without oath of prior loyalty constitutes bill of attainder). The Supreme Court also held that a statute which prohibited certain members of the Communist party from federal employment was a bill of attainder. *See* United States v. Lovett, 328 U.S. 303, 315-16 (1946).

[32] *See Halper*, 490 U.S. at 448.

[33] *Id.* at 453 (Kennedy, J., concurring).

[34] *Id.* (emphasis added).

Despite the Supreme Court's liberal approach, the federal courts considering retroactive application of community notification provisions have employed an objective test to assess a statute's punitive nature.[35] As a result, these courts have consistently granted preliminary and declaratory relief against retroactive application of community notification.[36]

In *Austin v. United States*,[37] the Court extended the reliance on extrinsic evidence by introducing a historical analysis of a statute's punitive nature. Recalling the *Halper* qualitative factors, *Austin* reiterated the inquiry into whether "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes."[38] The Court then held that civil forfeiture is "punishment" subject to the Excessive Fines Clause of the Eighth Amendment.[39]

The Court's historical analysis of punishment can be detected in other areas of the law, such as taxation. For example, in *Department of Revenue v. Kurth Ranch*,[40] the Court refined the inquiry into retributive and deterrent effects by holding that Montana's Dangerous Drug Tax violated the Double Jeopardy Clause.[41] Moreover, *Kurth Ranch* expanded the historical inquiry begun in *Austin*. Whereas fines and forfeitures such as those involved in *Halper* "are readily characterized as sanctions," taxes have typically served the remedial purpose of raising revenue.[42] Thus, in light of the historical understanding of the remedial role of taxation, Kurth Ranch suggests that a high tax rate combined with a deterrent purpose would not automatically render a tax punitive.[43] For example, "vice taxes," including taxes on alcohol or tobacco, do not constitute "punishment" even though they attempt to discourage the taxed activity.[44] The Court,

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[35] *See* Artway v. Attorney General, 81 F.3d 1235, 1263 (3d Cir. 1996); *See also* W.P. v. Poritz 931 F. Supp. 1199, 1213 (D.N.J. 1996).

[36] *See* Artway v. Attorney General, 876 F. Supp. 666 (D.N.J. 1995), *vacated*, 81 F.3d 1235 (3d Cir. 1996); *reh'g denied*, 83 F.3d 594 (3d Cir. 1996). *See also* Diaz v. Whitman, No. 94-6376 (D.N.J. Jan. 6, 1995) (Bissell, J.) (applying *Mendoza-Martinez* factors and entering preliminary injunction against Tier II community notification based on likelihood of success on Ex Post Facto and procedural due process claims); W.P. v. Poritz, 931 F. Supp. 1187, 1198 (D.N.J. 1996) (Bissell, J.) (certifying class action and entering statewide preliminary injunction against all community notification).

[37] 509 U.S. 602 (1993).

[38] *Id.* at 2806 (quoting *Halper*, 490 U.S. at 448).

[39] The Court concluded that "at the time the Eighth Amendment was ratified, forfeiture was understood at least in part as punishment and whether forfeiture under statute in question] should be so understood today." *Id.*

[40] 114 S. Ct. 1937 (1994).

[41] The Montana law taxed illegal drugs and equipment at rates up to 400%. Because Montana levied this tax in a separate proceeding, after the defendants were tried and sentenced, this punishment violated the Double Jeopardy Clause. 114 S. Ct. at 1948.

[42] *Id.* at 1946.

[43] *See id.* at 1947.

[44] The Court does not consider vice taxes to be punishment because the government permits the activity to continue to the extent that the taxpayer places greater utility on the

however, found that these salutary justifications "vanish when the taxed activity is completely forbidden, for the legitimate revenue-raising purpose that might support such a tax could be equally well served by increasing the fine imposed upon conviction."[45] *Kurth Ranch* reasoned that a tax on illegal activity did not operate in the "usual" manner; accordingly, the historically non-punitive purposes of taxes could not save Montana's Dangerous Drug Tax from being construed as "punishment."[46] In essence, because most tax schemes reveal some deterrent purpose, or some preferred status in relation to other taxed activity, the Court adopted a historical approach.

B. *Challenges to New Jersey's Megan's Law*

In 1995, the first challenges to retroactive application of community notification under Megan's Law appeared.[47] Applying the *Mendoza-Martinez* factors, the federal distict courts found, under the objective "deterrent and retributive purpose" test, that community notification contained elements of punishment in violation of the Ex Post Facto Clause.

By contrast, in *Doe v. Poritz*,[48] the Supreme Court of New Jersey adopted a predominantly subjective definition of "punishment," explicitly rejecting the use of any objective tests such as the *Mendoza-Martinez* factors.[49] Rather, as Justice Stein observed in dissent, "the Court's inquiry both begins—and ends—with legislative intent."[50] The *Doe* opinion implored, "[A] law does not become punitive simply because its impact, in part, may be punitive unless the only explanation for that impact is a punitive purpose: an intent to punish."[51] Doe further explained that demonstrating subjective legislative intent increases the challenger's burden of proof: "Where the stated legislative intent is remedial, the burden on those claiming there is a hidden punitive intent is 'the clearest proof' of that intent."[52]

Typically, courts examine legislative intent to interpret a statute's operative meaning.[53] The *Doe* court, however, did not question the meaning of Megan's

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benefit derived than the cost (including the tax). *See id.*

[45] *Id.* at 1948.

[46] *See id.*

[47] *See* Artway v. Attorney General, 876 F. Supp. 666 (D.N.J. 1995), *vacated*, 81 F.3d 1235 (3d Cir. 1996); *reh'g denied* 83 F.3d 594 (3d Cir. 1996); *see also* Diaz v. Whitman, No. 94-6376 (D.N.J. Jan. 6, 1995) (Bissell, J.) (entering preliminary injunction against Tier II community notification based on likelihood of success on Ex Post Facto and procedural due process claims).

[48] 662 A.2d 367 (N.J. 1995).

[49] *Id.* at 397-99.

[50] *Id.* at 431 (Stein, J., dissenting).

[51] *Id.* at 388.

[52] *Id.* (citing United States v. Ward, 448 U.S. 242, 248-49 (1980); Flemming v. Nestor, 363 U.S. 603, 617 (1960)).

[53] Legislatures, therefore, often provide secondary evidence of how their words are to be construed. In this case, however, there is no documentation of legislative intent or his-

Law. Rather, the court employed evidence of legislative intent as a means to cure the statute's possible unconstitutionality. Accordingly, the *Doe* majority reasoned that the legislators created Megan's Law without additional punitive purposes. In using this approach, the court focused on legislative "motive" under the guise of examining legislative "intent."

Doe, therefore, unveiled a distinctions between laws that are "honestly motivated" (which it would uphold) and laws that are infected with a "hidden intent" to punish (which it would "unmask" and strike down).[54] In so doing, the court may have planted itself squarely in the "quagmire" described by Justice Kennedy in *Halper*.[55] The inquiry into subjective legislative motive posed by *Doe* is not readily capable of proof or disproof by judicially cognizable standards. Judicial attempts to penetrate the legislature's subconscious can quickly degenerate into a determination as to what the motive should have been. This substituted judgment approach is, therefore, an unsubtle and inappropriate aggrandizement of the judicial function.

In addressing constitutional matters, however, courts should not employ sibylic judgments to discern legislative goals. Overwhelmingly, legislators do not label statutes as "non-punitive"[56] or "punitive." Examining legislative intent,

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tory apart from the words of the statute itself, which simply do not address whether the legislature intended to be punitive or not, but rather engage in the more typical discussion of what the legislature intended to accomplish, and the circumstances that led it to do so.

Of course, some members of the Supreme Court, and particularly Justice Scalia, have become extremely critical of using extrinsic legislative history, even to interpet the meaning of the words of a statute. *See, e.g.*, Blanchard v. Bergeron, 489 U.S. 87, 98 (1989) (Scalia, J., concurring in part and concurring in the judgment); *see generally* Note, *Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160, 161; P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 254 & n.57 (1992) (noting criticism by Justice Scalia on use of legislative history).

[54] *See Doe*, 662 A.2d at 388.

[55] United States v Halper, 490 U.S. 433, 452 (1989) (Kennedy, J., concurring).

[56] Although the usual distinction is made between "remedial" and "punitive," the two are not mutually exclusive. Remedial measures are presumably those which seek to prevent future harm, as opposed to punish for past misconduct. But as the Supreme Court noted, historically legislatures often inflicted deprivations upon potential malefactors in order to prevent future misconduct. *See* United States v. Brown, 381 U.S. 437, 458-59 (1965) (finding that "preventative" measure designed to avoid future undesirable events was nonetheless punishment for purposes of the Bill of Attander Clause). As *Halper* noted:

> [T]he labels "criminal" and "civil" are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties. The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads.

490 U.S. at 447-48.

therefore, often results in "amorphous and speculative" inquiry, as described by Justice Kennedy.[57] A court that must ascertain legislative motive frenquently offers conclusory syllogisms or tautologies to restate its fervent but unsubstantiated faith in the legislature's motive. Under the *Doe* approach, one must accept, as a matter of truth, the conclusion that the legislative motive was non-punitive. Accordingly, challengers to Megan's Law found untenable *Doe's* acquiescence to legislative intent.

C. *Artway v. Attorney General*

Challengers and proponents of Megan's Law hoped that the United States Court of Appeals for the Third Circuit's decision in *Artway v. Attorney General*[58] would resolve the basic differences in how the lower federal courts and the New Jersey state courts defined "punishment." Although the court of appeals delayed disposition of Mr. Artway's particular challenge to community notification based on justiciability grounds,[59] it offered definitive guidance for analyzing the constitutionality of retroactive notification. After reviewing prior Supreme Court precedent, including *De Veau*,[60] *Halper*,[61] *Austin*,[62] *Kurth Ranch*,[63] and *Morales*,[64] Judge Becker synthesized a three-prong analysis in defining punishment: (1) actual purpose, (2) objective purpose, and (3) effect:

> We must look at actual purpose to see 'whether the legislative aim was to punish.' If the legislature intended Megan's Law to be 'punishment,' i.e., retribution was one of its actual purposes, then it must fail constitutional scrutiny. If, on the other hand, 'the restriction of the individual comes about as a relevant incident to a regulation,' the measure will pass this first prong.
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> If the legislature's actual purpose does not appear to be to punish, we look next to its 'objective' purpose. This prong, in turn, has three subparts. First, can the law be explained solely by a remedial purpose? If not, it is 'punishment.' 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 retrib-

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[57] *Halper*, 490 U.S. at 452 (Kennedy, J., concurring).

[58] Artway v. Attorney General, 81 F.3d 1235 (3d Cir. 1996).

[59] The court's delayed decision was based on justiciability grounds. Since Mr. Artway moved out of New Jersey to avoid registration with law enforcement authorities, the process by which he would be classified as Tier I (low risk of reoffense), Tier II (moderate risk of reoffense) or Tier III (high risk of reoffense) never occurred. The *Artway* court therefore found that it was entirely speculative whether Artway would ever be subjected to any form of community notification, thus rendering his claim unripe for adjudication. *See id.*

[60] De Veax v. Braisted, 363 U.S. 144, 160 (1960).

[61] *Halper*, 490 U.S. at 448.

[62] Austin v. United States, 509 U.S. 602, 610 (1993).

[63] Department of Rev. v. Kurth Ranch, 114 S. Ct. 1937, 1947 (1994).

[64] Department of Corrections v. Morales, 115 S. Ct. 1597, 1601-04 (1995).

> utive but did intend it to serve some 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. Unless the partially deterrent measure meets both of these criteria, it is 'punishment.' If the measure meets both of these criteria and the deterrent purpose does not overwhelm the salutary purpose, it is permissible under *Kurth Ranch.*
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> Finally, if the purpose tests are satisfied, we must then turn to the effects of the measure. If the negative repercussions -- regardless of how they are justified — are great enough, the measure must be considered punishment. This inquiry, guided by the facts of decided cases, is necessarily one 'of degree.'[65]

The *Artway* court rejected literal application of the *Mendoza-Martinez* punishment factors for purposes of the Ex Post Facto Clause.[66] The court reasoned that *Mendoza-Martinez* intended these factors to be reserved for determining whether a sanction was so punitive as to be criminal in nature, and thus trigger the procedural safeguards of the Fifth and Sixth Amendments.[67] Although it agreed with the Supreme Court of New Jersey that *Mendoza-Martinez* was not applicable to the determination of punishment under the Ex Post Facto Clause, it rejected *Doe* "insofar as it failed to take this recognition to its logical conclusion (in addition to its neglect of history under *Austin* and its total disregard of effects)."[68]

Although the Third Circuit declined to decide the constitutionality of retroactive application of community notification, *Artway* lends considerable support to future challenges based upon the Ex Post Facto Clause and related provisions. First, it established that the definition of punishment did not depend exclusively on legislative motive, but required inquiry into the historical understanding and functional effect of the measure in question.[69] Both the "objective purpose" and the "effects" prong of the tests rely in large measure upon such empirically discoverable facts. Even though the court rejected the *Mendoza-Martinez* factors in name, it effectively extracted and rearticulated those elements which characterized community notification as punishment: the reference to the historical and functional analyses in assessing a measure's retributive and deterrent effect.

Artway's more detailed parsing of the successive mechanisms for determining punishmnet will likely support the conclusion that a measure is punitive. Although the court describes its test as having three elements, in reality there appear to be at least five, with the second "objective purpose" prong being independently provable by three different methods. A retroactive measure must

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[65] Artway v. Attorney General, 81 F.3d 1235, 1263 (3d Cir. 1996) (citations omitted).

[66] *See id.* at 1262.

[67] *See id.* at 1261-63. "We think that a seven factor balancing test — with factors of unknown weight that 'may often point in differing directions,' is too indeterminate and unwieldy to provide much assistance to us here." *Id.* at 1263 (quoting *Mendoza-Martinez*, 372 U.S. at 169).

[68] *Id.* at 1262 n.26.

[69] *See id.* at 1263.

satisfy each of these five tests in order to satisfy constitutional challenge. Despite conceding that the inquiry into "effects" is "necessarily one 'of degree,' "[70] the court did not invite comparison between the burden imposed and the desired positive social effects; rather, it asked whether the effects had passed some threshold level, beyond which they would constitute punishment.[71] The court, therefore, did not cast the inquiry into practical effect as a balancing test between the interests of the sex offender and those of the public — a contest in which challengers would be unlikely to prevail.[72]

In contrast, *Artway* also depended on a historical and functional analysis, effectively reducing the seven "factors" of *Mendoza-Martinez* to a somewhat diffused balancing test. The final two *Mendoza-Martinez* factors, whether an alternative purpose to which the measure may rationally be connected is assignable and whether any burden appears "excessive" in relation to the alternative purpose,[73] invite such balancing, unrestrained by definitional or quantitative limits. Thus, *Artway*'s methodology appears to have gone further than urged by earlier challengers: it combined a historical and functional analysis of punishment with a series of "threshold" tests that did not require weighing societal benefit with individual burden.

III. Due Process and Reputation

The focus on the retroactivity of the community notification provisions of Megan's Law has somewhat eclipsed other aspects of constitutional challenge. The due process challenges to the manner in which New Jersey implements community notification, however, have resulted in some substantial judicial revisions to the law.

As originally implemented, Megan's Law gave county prosecutors, as the registrant's litigaitve adversary,[74] sole discretion to perform the following: classify a

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[70] *Id.* (citing *Morales*, 115 S. Ct. at 1603).

[71] *See id.*

[72] The court further noted:

> Artway marshals strong reasons that notification would have devastating effects. In addition to the ostracism that is part of its very design, notification subjects him to possible vigilante reprisals and loss of employment. And unlike the mere fact of his past conviction, which might be learned from an employment questionnaire or public records, notification under Megan's Law features the State's determination — based overwhelmingly on past conduct — that the prior offender is a future danger to the community.

Id. at 1266.

[73] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963). As Justice Stein noted in his dissent in Doe, "the last two factors of *Mendoza-Martinez* consistently are referred to as a shorthand test for determining punishment." Doe v. Poritz, 662 A. 2d 367, 433 (N.J. 1995) (Stein, J. dissenting).

[74] "Unbiased fact finders are fundamental to a full and fair hearing and procedural due process." Falcone v. Dantinne, 420 F.2d 1157, 1166 (3d Cir. 1969).

registrant as Tier II ("moderate risk of reoffense");[75] classify the registrant as Tier III ("high risk");[76] and determine the manner and extent of notification.[77] This mechanism raised serious procedural due process concerns under the federal and state constitutions.

Before deciding what process is due, however, a court must determine whether there exists a cognizable liberty or property interest sufficient to trigger Fourteenth Amendment protections.[78] To a large extent, substantive due process privacy interest arguments against government disclosure of private information have been overshadowed by unresolved procedural due process issues.[79] Nevertheless, identifying a substantive privacy interest — even one that is outweighed by significant state interests — raises a constitutionally cognizable liberty interest claim under the Fourteenth Amendment.[80] For example, in *Doe* the Supreme Court of New Jersey found that public safety concerns outweighed the privacy interest against government disclosure of personal information.[81] The court, however, concluded that federal and state constitutional principles regard as "liberty interests," privacy and reputation, including the stigma from community notification.[82] The court concluded that depriving such liberty interests triggers procedural due process protection.[83]

Doe applied the correct analysis, since the Fourteenth Amendment protects "the individual interest in avoiding disclosure of personal matters."[84] Although *Doe* found no privacy interest in preventing disclosure of matters contained in the public record,[85] the court could extend this rationale to recognizing a privacy interest in other information not readily accessible to the public, such as place of employment, school, or vehicle description.[86] Moreover, as *Doe* also noted, the Supreme Court of the United States has held that privacy interests are implicated where the government "exposes various bits of information that, although accessible to the public, may remain obscure."[87] Thus, permissable searches of court

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[75] *Doe*, 662 A.2d at 378.

[76] *Id.*

[77] *See id.*

[78] *See id.* at 417.

[79] *See generally*, Rosalie Berger Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process*, 16 U. DAYTON L. REV. 313 (1991).

[80] *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

[81] *See generally, Doe* 662 A.2d at 367.

[82] *See id.* at 408-09.

[83] *See id.* at 417.

[84] Whalen v. Roe, 429 U.S. 589, 599-600 (1977).

[85] *See Doe*, 662 A.2d at 407.

[86] *But see id.* at 408 (finding no privacy interest in information concerning individual's name, appearance, or place of school or employment).

[87] *Id.* at 408-09. *See also* United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989) (reasonable expectation of privacy created under the Freedom of Information Act ("FOIA") in "rap sheet" compiling record of public convictions).

records do not destroy the privacy interest against affirmative government publication of that information, even when they reveal personal information.[88]

A cognizable liberty interest for procedural due process purposes may also be found in state-created liberty interests.[89] *Doe* found that the New Jersey Constitution regards reputation as a liberty interest.[90] This observation rendered moot the State's principal argument that *Paul v. Davis*[91] permits community notification and other systematic injury to reputation without prior notice and an opportunity to be heard. In addition, the federal constitution recognizes an interest in "avoiding the disclusure of personal matters."[92] Megan's Law's notification scheme permits publication of a registrant's residence, school, and place of employment. These powers, however, infringe on the defendant's right to be free from unwarranted government disclosure of personal information. Damage to reputation coupled with a cognizable privacy invasion amounts to deprivation of a protectable liberty interest that requires application of procedural due process.[93]

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[88] United States v. Reporters Committee, 489 U.S. 749, 764 (1989). Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information. *See id.* at 764.

[89] *See e.g.*, Hewitt v. Helms, 459 U.S. 460, 466 (1983); *See also* Morrissey v. Brewer, 408 U.S. 471 (1972); and Layton v. Beyer, 953 F.2d 839, 845 (3d Cir. 1992). *Cf.* Sandin v. Conner, 115 S. Ct. 2293, 2297-2300 (1995) (affirming cognizability of state created liberty interest under federal due process clause but rejecting Hewitt's methodology of determining existence of liberty interest).

[90] *See Doe*, 662 A.2d at 419-20.

[91] 424 U.S. 693 (1976) (individual official's random act of injury to "reputation" does not deprive plaintiff of "liberty interest").

[92] Whalen v. Roe, 429 U.S. 589, 599-600 (1977). *See also Reporters Committee*, 489 U.S. at 769-70 (applying Whalen in FOIA context to prevent disclosure of information that is functionally private even though formally on the public record).

[93] *See, e.g.*, Borucki v. Ryan, 827 F.2d 836, 843 (1st Cir. 1987) (concluding that *Paul* does not prevent a liberty violation when damage to reputation is coupled with an invasion of privacy); *see also* Jones v. Palmer Media, Inc., 478 F. Supp. 1124, 1129 (E.D. Tex. 1979) (holding that defamation can give rise to constitutional violation when coupled with privacy invasion).

Paul's refusal to acknowledge reputation per se as a constitutionally cognizable liberty interest properly applies only to situations in which an individual state actor is responsible for the disclosure of damaging information, and not when the dissemination is required by a statute:

> The thrust of the Supreme Court's decision in [*Paul v.*] *Davis* was that not every defamation, merely because committed by a state official while abusing his powers, constitutes a violation of due process. The distinction in this respect between *Davis* and the instant case is critical. In *Davis*, state officers had exercised official powers in furtherance of their own designs for purposes clearly beyond the scope of their responsibilities. Here, by contrast, the hiring and firing of a school supervisor was the responsibility of the Community School Board under state law.

Huntley v. Community Sch. Bd. of Brooklyn, 543 F.2d 979, 985 (2d Cir. 1976), cert. denied, 430 U.S. 929 (1977). *Paul* was thus merely a precursor to Parratt v. Taylor, 451

By allowing county prosecutors to determine a resgistrant's risk of reoffense, without notice or hearing, the New Jersey legislature created a mechanism that infringed on a sex offender's liberty interests. Typically, a state may limit a liberty interest only after a "neutral fact finder" conducts an inquiry into whether the factual predicates for such deprivation exist.[94] Prosecutors, however, are by the very nature of their position not neutral fact finders with respect to criminal defendants.[95] As the Supreme Court noted in *Ford v. Wainwright*,[96] "[t]he commander of the State's corps of prosecutors cannot be said to have the neutrality for reliability in the factfinding process."[97]

Guided by procedural due process requirements, the New Jersey Supreme Court essentially legislated a remedy to cure unconstitutional prosecutorial determinations of risk of reoffense: judicial review of a prosecutor's Tier classification and proposed form of notification at the request of any registrant.[98] Although the court committed the decision to a judicial officer for review, its decision has not ended due process challenges to the risk of reoffense determination procedures.[99] Without detailed explanation, *Doe* unilaterally imposed the ultimate burden of persuasion on the registrant to refute by a preponderance of the evidence the county prosecutor's factual assessment of risk of reoffense and

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U.S. 527 (1981), and Hudson v. Palmer, 468 U.S. 517 (1984) (finding that procedural due process was not violated if compensation for random injuries inflicted by individual state officials was generally left to state law). But as the Court later noted in Zinermon v. Burch, 494 U.S. 113 (1990), systematic deprivation of a liberty interest caused not by the acts of a lone individual but inherent in the statutory scheme itself requires procedural protection. This logic is equally applicable to Megan's Law, which requires the systematic dissemination of information pursuant to legislative authority. Furthermore, *Paul* noted that damage to reputation when coupled with the loss of some other tangible element did rise to the level of a protectable liberty interest. *See* Valmonte v. Bane, 18 F.3d 992, 999 (2d Cir. 1994) (citing *Paul*, 424 U.S. at 1161); *See also* Ventetuolo v. Burke, 596 F.2d 476, 483 (1st Cir. 1979) (limiting Paul's application to defamation causes of action only). *See, e.g.*, Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) (cited with approval in *Paul*, 424 U.S. at 708) (loss of "right" to purchase liquor); Bell v. Burson, 402 U.S. 535, 539 (1971) (loss of driving privileges); and *Valmonte*, 18 F.3d at 1000-01 (loss of potential employment where law required inclusion of plaintiff's name in registry of child abusers).

[94] *See Doe* 662 A.2d at 421.

[95] *See generally* Zinermon v. Burch, 494 U.S. 113 (1990); Parham v. J.R., 442 U.S. 584, 606 (1979); Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

[96] 477 U.S. 399 (1986).

[97] *Id.* at 417 (striking down statute in part due to provision allowing state experts to evaluate inmate competency prior to execution). "We need not impugn the motives of a prosecutor to require that an independent decision-maker review the Tier classification." *Doe*, 662 A.2d at 421.

[98] *See Doe* 662 A.2d at 681-87.

[99] Although the Third Circuit in *Artway* found the due process challenges to the burdens of proof laid out by the *Doe* court to be "forceful," it declined to dispose of those claims, since it found Artway's challenge not yet ripe. Artway v. Attorney General, 81 F.3d 1235, 1252 (3d Cir. 1996).

method of notification.[100] The State need only meet an initial burden of production by presenting evidence that justifies the prosecutor's decision (which evidence would typically not be much of a "burden" of a prosecutor to produce).

By declaring that the county prosecutor, is acceptable as a risk-of-reoffense expert, *Doe* magnified procedural due process concerns.[101] The presumption in favor of the prosecutor's findings is mandatory, not permissive. *Doe* instructs that judges "shall affirm the prosecutor's determination unless . . . persuaded by a preponderance of the evidence that it does not conform to the laws and Guidelines."[102] Arguably, this standard established a constitutionally excessive presumption against the registrant.[103]

The general tests for ascertaining procedural due process requirements require balancing the following: (1) the private interests affected by the proceeding; (2) the risk of error imposed by the procedure created by the State; and (3) the countervailing interest in using the procedures it adopted.[104] Registrants, therefore, argue that (1) they have a significant private interest in not being branded a dangerous sex offender; (2) the fact that the State possesses greater resources counsels that it should bear a greater share of the burden of proof, and (3) the State's interest is in an accurate determination of risk of reoffense, not in notifying the community in all cases.

Despite the state supreme court's continuing attempts[105] to revise the risk-of-reoffense statute, the procedural due process concerns raised by the current statutory scheme may provide a continuing source of constitutional difficulty. Certainly, any intuitive notion of due process suggests that it is the State, not the registrant, who should bear the burden of proof in matters related to community notification.[106] For all practical purposes, imposing the ultimate burden of proof

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[100] *See Doe*, 662 A.2d at 383.

[101] *See id.* at 384.

[102] *Id.* at 383.

[103] *Cf.* Virgin Islands v. Parrilla, 7 F.3d 1097 (3d Cir. 1993) (striking down statute creating rebuttable mandatory presumption); *accord* Sandstrom v. Montana, 442 U.S. 510, 524 (1979) (presumption that has effect of shifting burden of persuasion on criminal defendant violates due process).

[104] *See* Mathews v. Eldridge, 424 U.S. 319 (1976). *See also* Heller v. Doe, 113 S. Ct. 2637, 2644 n.1 (1993) (*Mathews'* tests apply to burdens of proof).

[105] *See* In the Matter of the Registrant C.A., 666 A.2d 1375 (N.J. App. Div. 1995), *cert. granted*, 670 A.2d 1068 (N.J. 1996). In *C.A.*, the Appellate Division of the New Jersey Superior Court found that it was permissible to use uncorroborated hearsay statements of purported victims in ascertaining risk of reoffense, even though the accused was not convicted of any crime. *See id.* at 1377-78. The context of the case as well as preliminary indications from the supreme court indicate that it may be considering further revisions in the Risk Assessment Scale adopted by the state attorney general subsequent to *Doe*.

[106] *Cf.* Santosky v. Kramer, 455 U.S. 745 (1982) (state bears burden of persuasion by clear and convincing evidence for parental-rights termination); Addington v. Texas, 441 U.S. 418 (1979) (same for civil commitment proceedings).

As the Third Circuit noted in dictum in Brown v. Fauver, 819 F.2d 395 (3d Cir. 1987),

on the registrant effectively confirms the prosecutor's factual determinations. This constitutional problem is compounded by the evidentiary task that *Doe* imposes on the registrant to dispel the presumption that he will not reoffend, or that the method of notification chosen by the prosecutor is not appropriate for his case. Predicting a risk of reoffense is at best an inquiry into intangibles. When faced with such an indeterminate issue, imposing the ultimate burden of persuasion on the defendant places him at a drastic disadvantage. This conclusion is predicated on assumptions that future conduct is amenable to "expert" testimony.[107] Based on the limited knowledge of assessing risk of reoffense, establishing the county prosecutor or his proxy as the presumptive authority simply creates an artificial advantage over the registrant.

IV. CONCLUSION

Much comment has been made of the emotionally charged circumstances in which Megan's Law was passed. As the Third Circuit noted, even as it was avoiding a definitive ruling on the most controversial aspects of the law:

> The circumstances of this enactment, which generated such sparse legislative history, gives us pause. Megan's Law was rushed to the floor as an extraordinary measure, skipping committee consideration and debate entirely. It is just these 'sudden and strong passions to which men are exposed' that the Framers designed the Ex Post Facto and Bill of Attainder Clauses to protect against.[109]

In raising what may appear to be arcane constitutional arguments in the face of public pressure for an immediate response to a crisis, it is difficult to match such passion. Perhaps one benefit of the Third Circuit's decision not to render an immediate verdict on the constitutionality of retroactive application of Megan's Law is the opportunity on both sides of the issue to revisit some of its more troublesome aspects with the tempering benefit of hindsight.

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even in the context of a prison administrative proceeding (where the State generally receives great deference), if the "a burden of proof [upon the State is] lower than a preponderance of the evidence, then it follows that an inmate can be punished for acts which he in all probability did not commit. We have grave doubts about the constitutionality of such a regulation." *Id.* at 399 n.4.

Although the Third Circuit found challenges on these due process issues "forceful," it did not reach the merits of the arguments, again because Artway's claims were not ripe. Artway v. Attorney General, 81 F. 3d 1235, 1269 (3d Cir. 1996).

[108] *Doe* admits that much of the research in this area is "conflicting in its conclusions." *See Doe*, 662 A.2d at 384.

[109] *Artway*, 81 F.3d at 1264 (quoting Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 137-38 (1810)).