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Connecticut Department of Public Safety v. Doe: The Supreme Court’s Clarification of Whether Sex Offender Registration and Notification Laws Violate Convicted Sex Offenders’ Right to Procedural Due Process

Gabriel Baldwin*

I. INTRODUCTION AND OVERVIEW

While sex offender registration and notification laws have been the subject of both criticism and praise since their widespread enactment in the 1990’s, the issue of whether they violate convicted sex offenders’ rights to procedural due process appears to have been clarified in the Supreme Court case Connecticut Department of Public Safety v. Doe.¹ To arrive at this apparent clarification, the Court first had to struggle to define and limit the contours and boundaries of what determines whether reputation interests are constitutionally protected.

* I would like to thank Lea Keal and the rest of the Journal of the N.A.A.L.J. staff for supporting me and providing me with the opportunity to write this article. I would also like to thank my family, friends, Jocelyn Kuklok, and my feline companion Einstein for their love and encouragement. Finally, I would like to thank the authors who came before me and wrote pieces which analyzed this U.S. Supreme Court case. Their works were helpful in researching and writing this case note. These authors and their respective works are as follows: Kimberly B. Wilkins, Sex Offender Registration and Community Notification Laws: Will These Laws Survive?, 37 U. RICH. L. REV. 1245, 1246-50 (2003); Jennifer G. Daugherty, Sex Offender Registration Laws and Procedural Due Process: Why Doe v. Department of Public Safety Ex Rel. Lee Should be Overturned, 26 HAMLINE L. REV. 713, 739-43 (2003).

In a series of three cases, the Court established and elaborated upon the extent to which reputation interests are liberty interests protected by Fourteenth Amendment procedural due process. During this period, the Court initially appeared to provide a great deal of protection for reputation interests when it issued a broad pronouncement in Wisconsin v. Constantineau. Constantineau held that due process protection would be available for reputation interests where the government attaches a "badge of infamy." In addition, the Court held that notice and an opportunity to be heard would be required "where a person's good name, reputation, honor, or integrity is [put] at stake because of" government action.

In Paul v. Davis and Siegert v. Gilley, the Court subsequently limited Constantineau's holding by introducing additional requirements which determine when reputation interests are considered Fourteenth Amendment protected liberty interests. Paul v. Davis provided that in order for a reputation interest to be considered a liberty interest, a claimant must show not just damage to reputation by state stigmatization, but also that some tangible interest, such as a state legal status or right, was affected by the stigmatization.

In Siegert v. Gilley, the Court further required that in order for reputation interests to be a protected liberty interest, a claimant must show some "special damage and out-of-pocket loss" was caused by the effect of the state's stigmatization upon some tangible interest, such as a state legal status or right. Siegert also provides that if this connection cannot be shown, the state will be considered to be only minimally involved, and no constitutional protection is required because a remedy can still be pursued in a defamation action "under the laws of most States."

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3. Constantineau, 400 U.S. at 437.
4. Id.
5. Id.
6. Davis, 424 U.S. at 699-713, 721; Siegert, 500 U.S. at 233-34.
8. Siegert, 500 U.S. at 233-34.
9. Id.
In *Connecticut Department of Public Safety v. Doe* ("Connecticut Department"), the Court appears to have further clarified the boundaries of what determines whether a reputation interest is constitutionally protected. In *Connecticut Department*, the Court considered whether convicted sex offenders’ reputation interests are liberty interests which receive due process protection when said offenders are submitted to the requirements of sex offender registration and notification laws, i.e. governmental action which seemingly stigmatizes them. After refusing to conduct a post-*Siegert, Paul v. Davis* test, an inquiry which normally is used to determine whether there is a protected liberty interest, the Court held that in order to receive a hearing, a claimant must show that the fact he seeks to establish at the requested hearing is relevant and or material to the regulatory scheme or inquiry at issue.

This note analyzes *Connecticut Department* and prior Supreme Court decisions which define and limit the contours and boundaries of what determines whether a reputation interest is constitutionally protected. Following a review of *Connecticut Department*'s facts, the note provides a brief overview of relevant preceding Supreme Court cases. The note next examines this recent decision by analyzing each of its three opinions. It then discusses the legal and social impact of this decision with respect to administrative agencies and society in general. Finally, the note ends with the conclusion that although the judgment of the Court has apparently clarified whether sex offender registry laws are constitutional as to procedural due process, it leaves open the possibility of a successful equal protection substantive due process attack in the future.

II. **CONNECTICUT DEPARTMENT’S FACTS AND CASES PRECEDING CONNECTICUT DEPARTMENT OF PUBLIC SAFETY V. DOE**

A. Connecticut Department’s Facts

In order to protect against the serious threat that sex offenders pose to juveniles and society as a whole, Connecticut, along with

11. Id.
12. Id. at 6-8.
other states, enacted sex offender registration and notification laws popularly known as "Megan's Laws." Connecticut's statute "applies to all persons convicted of criminal offenses against a minor, violent and nonviolent sexual offenses, and felonies committed for a sexual purpose." The statute requires all such persons to register with Connecticut's Department of Public Safety (the Department) upon release. In most cases, the registration requirement runs for ten years, but in the case of sexually violent offenses, offenders must register for life. The statute requires each registered offender to provide personal information including his or her name, address, photograph, fingerprints, criminal history record, a list of other identifying characteristics, and a DNA sample. The statute also mandates that registered offenders notify the Department of any

13. See Wilkins, supra note 1, at 1246-47. A federal law, the Jacob Wetterling Act, mandates that states enact such laws or become ineligible for ten percent of a formula grant that they would otherwise receive under a state and local law enforcement assistance program. Id. (citing 42 U.S.C. § 14071 (2000)).

14. Conn. Dep't, 538 U.S. at 4. ‘‘Criminal offense[s] against a victim who is a minor’ are defined . . . to include kidnapping, unlawful restraint, and a wide variety of sexual acts against persons under the age of eighteen made criminal by various other specified Connecticut statutes.” Doe, 271 F.3d at 42 n.6 (citing CONN. GEN. STAT. § 54-250(2) (2001)). “Nonviolent sexual offense[s]” are defined in such a way as to render “a wide variety of sexual acts Class A misdemeanors.” Id. n.7 (citing CONN. GEN. STAT. § 54-250(5); CONN. GEN. STAT. § 53a-73a). “Sexually violent offenses” are defined so as to include certain levels of sexual assault, and also kidnappings that the court finds were “committed with intent to sexually violate or abuse the victim.” Id. n.8 (citing CONN. GEN. STAT. § 54-250(11)). The sentencing court determines whether a felony was committed for a sexual purpose. Id. n.9 (citing CONN. GEN. STAT. § 54-254(a)). Upon such a finding, the sentencing court may require the offender to register as a sexual offender. Id.

15. Doe, 271 F.3d at 43 (citing CONN. GEN. STAT. § 54-251(a) (2001)). “Two narrow categories of offenders” are eligible for relief from the statute’s provisions and “need not register . . . if a court so orders upon finding that registration is not required for public safety.” Id. at 45 (citing CONN. GEN. STAT. § 54-251(b), (c)). The first category is “anyone who was convicted of engaging, while under nineteen years of age, in sexual intercourse with a victim who was between thirteen and sixteen years old but at least two years younger than the perpetrator.” Id. The second category is “anyone who was convicted of subjecting another person to sexual contact without the victim's consent.” Id.

16. Id. at 43 (citing CONN. GEN. STAT. § 54-252(a)).

17. Id.; Conn. Dep’t, 538 U.S. at 4.
change in residence and periodically submit an updated photograph.\textsuperscript{18}

Respondent, a Connecticut resident, had been convicted of an offense based on conduct that took place prior to the law's effective date.\textsuperscript{19} The conviction for this offense subjects Respondent to the registration and notification requirements of Connecticut’s statute.\textsuperscript{20} Respondent claimed that the disclosures made and required pursuant to the statute deprived him and other similarly situated registered sex offenders of a "liberty interest," and violated the Due Process Clause because officials did not afford registrants a pre-deprivation hearing to determine whether they are likely to be “currently dangerous”.\textsuperscript{21}

\textsuperscript{18} Conn. Dep’t, 538 U.S. at 4. “The law also covers any Connecticut resident who has been convicted in another jurisdiction of a crime ‘the essential elements of which are substantially the same as any of the crimes’ within the statutory categories.” Doe, 271 F.3d at 42-43 n.10 (citing CONN. GEN. STAT. § 54-253(a)). “The law also imposes a reciprocal obligation on anyone who is registered and lives in another state but regularly travels into or temporarily resides in Connecticut.” Id. at 43 n.12 (citing CONN. GEN. STAT. § 54-253(b)). “In addition, a person convicted of a felony committed for a sexual purpose can also be required to register for ten years at the discretion of the sentencing court.” Id. at 43 (citing CONN. GEN. STAT. § 54-254(a)).

Groups of offenders within two additional categories must also register for life: (i) anyone who has committed a criminal offense against a minor or a nonviolent sexual offense and has a prior conviction of the same type, and (ii) anyone convicted of the crime of sexual assault in the second degree for engaging in sexual intercourse with a victim who is under thirteen years old and more than two years younger than the perpetrator.

Id. at 43 n.11 (citing CONN. GEN. STAT. § 54-251(a)). “A person convicted of a sexually violent offense also must provide ‘documentation of any treatment received for mental abnormality or personality disorder,’ . . . and must verify his or her address once every ninety days.” Id. (citing CONN. GEN. STAT. §§ 54-252(a), 54-257(c)). “Failure to comply with any of these duties constitutes a class D felony, punishable by up to five years in prison.” Id. (citing CONN. GEN. STAT. §§ 54-251(d), 54-252(d), 54-253(c), 54-254(b)).

\textsuperscript{19} Id. at 45.

\textsuperscript{20} Id.

\textsuperscript{21} Id. at 45-46. Respondent also introduced an ex post facto claim which the district court dismissed on the ground that Respondent had “failed, as a matter of law, to demonstrate that the registration law was punitive either in purpose or in effect and therefore granted judgment to the defendants.” Id. at 46 (citing Doe v. Lee, 132 F. Supp. 2d 57, 66-71 (D. Conn. 2001)). On the same day this case was decided, Smith v. Doe, a case featuring an ex post facto challenge to Alaska’s Sex Offender Registration Act, was decided. Smith v. Doe, 538 U.S. 84 (2003). The
Connecticut's statute requires the Department to compile the information gathered from registrants and to publicize it via an offender registry on an Internet website which is made available to the public in certain state offices.\textsuperscript{22} The registry is also made available in non-internet form in state offices.\textsuperscript{23} The registry, whether accessed via the Internet or at a state office, must be accompanied by a warning which states ""[a]ny person who uses information in this registry to injure, harass or commit a criminal act against any person included in the registry or any other person is subject to criminal prosecution.""\textsuperscript{24} Before it was taken offline pursuant to the trial court injunction, the registry website allowed individuals ""to obtain the name, address, photograph, and description of any registered sex offender by entering a zip code or town name.""\textsuperscript{25} The registry, on its website and in non-internet form, features a statement that explicitly indicates that the registry is ""based on the legislature's decision to facilitate access to publicly-available information about persons convicted of sexual offenses.""\textsuperscript{26} It also explicitly states that the state or its officials have ""not considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion within this registry, and has made no determination that any individual included in the registry is currently dangerous.""\textsuperscript{27} The registry also states that ""[i]ndividuals included within the registry are included solely by virtue of their conviction record and state law.""\textsuperscript{28} In addition, the registry contains a statement indicating that ""[t]he main purpose of providing this data on the Internet is to make the information more easily available and accessible, not to warn about any specific individual.""\textsuperscript{29}

\textsuperscript{22} Doe, 271 F.3d at 43-44.
\textsuperscript{23} Id. at 44.
\textsuperscript{24} Id. (citing CONN. GEN. STAT. § 54-258(a)).
\textsuperscript{25} Conn. Dep't, 538 U.S. at 5.
\textsuperscript{26} Id. (quoting Doe, 271 F.3d at 44).
\textsuperscript{27} Id. (quoting Doe, 271 F.3d at 44).
\textsuperscript{28} Id. (quoting Doe, 271 F.3d at 44).
\textsuperscript{29} Id. (quoting Doe, 271 F.3d at 44).
Certiorari was granted to determine whether disclosures made pursuant to Connecticut's sex offender registration and notification statute both deprived registered sex offenders of a "liberty interest," and violated the Due Process Clause because officials did not afford registrants a pre-deprivation hearing to determine whether they are likely to be "currently dangerous." Based upon statements contained in the registry, the Supreme Court's majority concluded that Connecticut decided to base its registry requirement on the fact of previous conviction, not the fact of current dangerousness. The Court, with seven Justices joining in a majority opinion and three other Justices writing concurring opinions, held that no protected liberty interest existed. The majority opinion further held that even assuming arguendo that such an interest existed, a hearing was not required by the Constitution because due process does not require the opportunity to prove a fact that is not material to the State's statutory scheme- in this case, whether a sex offender is currently dangerous.

B. Defining What Determines Whether Reputation Interests are Constitutionally Protected: Cases Prior to Connecticut Department of Public Safety v. Doe

In Wisconsin v. Constantineau, the Court began to establish to what extent reputation interests are liberty interests protected by Fourteenth Amendment procedural due process. In Constantineau, an individual who the state had labeled as an excessive drinker challenged a Wisconsin statute which allowed liquor stores to refuse to sell alcohol to individuals whom the state had labeled as excessive drinkers and who had been listed on a state published excessive drinking list. After hearing Respondent's due process claim made on behalf of himself and other similarly situated sex offenders, the District Court granted summary judgment for Respondent, certified a class of individuals subject to the Connecticut law and permanently enjoined the law's public disclosure provisions. The Court of Appeals affirmed holding that the Due Process Clause entitles class members to a hearing "to determine whether or not they are particularly likely to be currently dangerous before being labeled as such by their inclusion in a publicly disseminated registry."  

30. Conn. Dep't, 538 U.S. at 4-5. After hearing Respondent's due process claim made on behalf of himself and other similarly situated sex offenders, the District Court granted summary judgment for Respondent, certified a class of individuals subject to the Connecticut law and permanently enjoined the law's public disclosure provisions. Id. at 2. The Court of Appeals affirmed holding that the Due Process Clause entitles class members to a hearing "to determine whether or not they are particularly likely to be currently dangerous before being labeled as such by their inclusion in a publicly disseminated registry." Id. at 4.

31. Id.

32. Id.

33. See Constantineau, 400 U.S. 433.
drinkers list. Constantineau challenged the statute on the ground that it violated due process because it labeled him and others similarly situated as excessive drinkers without first affording notice and an opportunity to be heard. The Court deemed the statute unconstitutional and held that there would be due process protection for reputation interests where the government attaches a "badge of infamy," and that notice and an opportunity to be heard would be required "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing."

The Court subsequently limited Constantineau's broad holding in Paul v. Davis. In Davis, an individual challenged the police practice of distributing flyers to local businesses that identified him and others, by use of their name and picture, as suspected shoplifters. The challenge was based on the grounds that the practice deprived the identified individuals of a liberty interest by adversely affecting their reputation, or attaching "a badge of infamy" to them as shoplifters, without first affording them due process in the form of notice and an opportunity to be heard. The Court declared the practice to be constitutional and held that damage to reputation caused by a defamatory statement or stigmatization alone would not implicate a due process liberty or property interest. The Court further held that to maintain a due process claim, one must show that some tangible interest, such as a state legal status or right, was affected by the damage to reputation caused by a defamatory statement or stigmatization. In the wake of Paul v. Davis, the Second Circuit Court of Appeal interpreted Davis' holding and thereby developed what is known as the stigma plus test. Under the first prong of this test, a claimant must show that the statement at issue is capable of being proven false, that it is sufficiently

34. Id. at 434.
35. Id. at 433-34.
36. Id. at 437.
37. Davis, 424 U.S. at 699-713.
38. Id. at 694-97.
39. Id. at 697.
40. Id. at 699-702.
41. Id. at 708-09.
42. See Doe, 271 F.3d at 47.
derogatory to injure their reputation and that the claimant maintains that said statement is false. Under the second prong, a claimant must show that the stigmatization established in the first prong affected some tangible interest, imposed a material, state-imposed burden, or altered claimant's status or rights.

In *Siegert v. Gilley*, the Court added another requirement that claimants must meet in order for reputation interests to be considered protected liberty interests. Siegert, a former government employee who had resigned from his position, claimed that he was denied due process of a protected liberty interest when his former supervisor issued an allegedly bad faith and defamatory report regarding his job performance. Siegert claimed that this report left him unable to obtain appropriate future employment in his field. The Court deemed the reputation interest at issue to be one that does not rise to the level of being constitutionally protected. The Court held that in order for a reputation interest to receive constitutional protection, a claimant must show that some "special damage and out-of-pocket loss" was caused by the effect of the state's stigmatization upon some tangible interest, such as a state legal status or right. If this connection could not be shown, then the state would be considered to be only minimally involved, and no constitutional protection would be required. The Court reasoned that where the state is only minimally involved, there is no need for constitutional protection because such damage would be "actionable under the laws of most states" under a state defamation cause of action.

43. Id.
44. Id.
45. See Siegert, 500 U.S. 226.
46. Id. at 226.
47. Id. at 229.
48. Id. at 233-34.
49. Id. at 234.
50. Id.
51. Id. at 233.
III. DESCRIPTION AND ANALYSIS OF THE OPINIONS

A. The Majority Opinion of the Court Delivered by Justice Rehnquist

In one of three opinions, Chief Justice Rehnquist announced the opinion of the Court, in which he was joined by Justices O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer. Chief Justice Rehnquist began by citing statements on the registry's website and in its non-internet form as supporting the conclusion that Connecticut's registry law is based on "the fact of previous conviction, not the fact of current dangerousness." The Justice also emphasized that "the public registry explicitly states that officials have not determined that any registrant is currently dangerous." After briefly commenting on the policy considerations, recidivist concerns and needs which led to the passage of Connecticut's statute and other sex offender registration and notification statutes, Chief Justice Rehnquist described the specific provisions of the Connecticut statute.

After refusing to conduct a post-Siegert, Paul v. Davis inquiry in order to determine whether Respondent had a protected liberty interest, Chief Justice Rehnquist stated that "even assuming, arguendo, that Respondent has been deprived of a liberty interest, due process does not entitle him to a hearing to establish a fact that is not material under the Connecticut statute" here, whether the respondent is currently dangerous. The Chief Justice then distinguished cases such as Wisconsin v. Constantineau and Goss v. Lopez by emphasizing that in those cases the fact in question was "concededly relevant to the inquiry at hand" while in this case "the fact that Respondent seeks to prove - that he is not currently dangerous - is of no consequence. . . ." The Chief Justice reasoned that the fact of current dangerousness was of no consequence, and no

52. Conn. Dep't, 538 U.S. at 3-8.
53. Id. at 4.
54. Id.
55. Id.
56. Id. at 7.
57. Id. (citing Constantineau, 400 U.S. 433; Goss v. Lopez, 419 U.S. 565 (1975)).
hearing was required because the requirements of the law at issue "turn on an offender's conviction alone - a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest." The Chief Justice further supported his position by citing a statement on the agency's website which essentially states that an offender's alleged non-dangerousness simply does not matter. The Chief Justice continued to support his view by stating that all evidence on record indicated that Connecticut decided to require registration of all sex offenders regardless of whether or not they are currently dangerous.

The Chief Justice then stated that the only plausible successful challenge Respondent could have brought was a substantive due process theory, but that Respondent only presented a substantive claim "recast in 'procedural due process' terms." The Chief Justice further added that even if a substantive due process claim had been presented, the Court could not address it because Respondent expressly disavowed any reliance on substantive Fourteenth Amendment protections. The Chief Justice further added that neither a substantive due process nor Fourteenth Amendment equal protection argument was properly presented to the court. The Chief Justice concluded by holding that Doe's procedural due process rights were not violated because those "who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing are relevant under the statutory scheme." The Chief Justice further held that, in this case, the fact of whether Respondent was currently dangerous was not relevant to the registry's statutory scheme.

Justice Rehnquist's majority opinion concisely phrases what was an unstated logical due process requirement as a rigid requirement, which must be explicitly met before a hearing is constitutionally

58. Conn. Dep't, 538 U.S. at 7.
59. Id.
60. Id.
61. Id. at 7-8 (quoting Reno v. Flores, 507 U.S. 292, 308 (1993)).
62. Id. at 8.
63. Id.
64. Id.
65. Id.
required. However, in reaching the holding in this case the Chief Justice may have faltered by glossing over the wording of the statute’s provisions which allows for judges to discretionarily exempt offenders from the statute’s registration, reporting, and other affirmative requirements. Based upon this less than complete review of the statute, the opinion then perhaps concludes too quickly that an offender’s current dangerousness is irrelevant or immaterial to Connecticut’s statutory scheme and that the statute instead turns only upon the fact of the offender’s conviction.

Justice Souter’s concurring opinion discussed these provisions, which allow judges to grant exemptions to offenders meeting certain criteria. Individuals who qualify for this discretionary relief include cases where the offense was unconsented sexual contact or sexual intercourse between a minor between thirteen and sixteen years old and an offender under nineteen years old but more than two years older than the minor at the time of the offense. Another such provision allows dissemination of registration information to be limited when it is necessary to protect a victim that is related to, the spouse of, or cohabiting with the offender. As Justice Souter pointed out in his concurrence, the statute provides that these judicial decisions to exempt offenders “must rest on a finding that registration or public dissemination is not required for public safety.”

These provisions arguably illustrate that the legislature envisioned creating a statutory scheme that simultaneously provided for public safety by tracking and monitoring all offenders while allowing judges to exempt non-dangerous offenders from the statute’s requirements. In addition, these judicial exemption provisions demonstrate that if a court were required to hold a hearing to determine whether an offender is currently dangerous, then it would be capable of doing so.

While sound for the most part, Chief Justice Rehnquist’s opinion

66. Id.
67. Conn. Dep’t, 538 U.S. at 8.
68. Id.
69. Id.
70. Id.
71. Id.
72. Id.
could have been made more intellectually defensible if these provisions had been briefly discussed and reconciled with the Court’s holding. This reconciliation could have been accomplished by characterizing the issue of current dangerousness as only being relevant or material when the offense at issue falls within one of the statute’s enumerated exemption provisions. By characterizing these provisions in this way, the majority could have acknowledged that current dangerousness is relevant to the statute in some cases while showing that it was not relevant to this case. This would have resulted in a more complete, thorough, and intellectually sound opinion.

B. The Concurrences

1. Justice Scalia’s Concurrence

In joining the Court’s opinion, Justice Scalia concluded that even if the statute implicated a liberty interest, “the categorical abrogation of that liberty interest by a validly enacted statute suffice[d] to provide all the process that is ‘due.’” The Justice supported this view by analogizing the Connecticut registry statute to “a state law providing that no one under the age of 16 may operate a motor vehicle.” He used this analogy to further support the Court’s holding by stating “a convicted sex offender has no more right to additional ‘process’ enabling him to establish that he is not dangerous than . . . a 15-year-old has a right to ‘process’ enabling him to establish that he is a safe driver.”

While Justice Scalia’s analogy provides an easily accessible illustration for his reasoning and the majority’s holding, it may also oversimplify the issue of whether the fact of current dangerousness is relevant to this statute. Justice Scalia’s concurrence, like the majority opinion, fails to consider and fully address the statute’s judicial exemption provisions. As discussed above with respect to

73. Conn. Dep’t, 538 U.S. at 8.
74. Id.
75. Id.
76. See id.
77. Id.
the majority opinion, Justice Scalia’s concurrence would have benefited from a discussion that first acknowledged that current dangerousness would be relevant if the respondent’s case fell within one of the statute’s exemption provisions and then secondly emphasized that such an exemption does not apply to the respondent’s case. If Justice Scalia’s concurrence added such a discussion, then his simple and direct opinion and it’s analogy would be more logical, well-reasoned, and convincing.

2. Justice Souter’s Concurrence in which Justice Ginsburg Joined

Justice Souter began by agreeing with the majority that this case’s holding would not foreclose a future substantive due process challenge. The Justice then stated that if libel were a component of such a claim, it would not stand in the way of such a challenge. The Justice then alluded to the possibility of a future equal protection attack by stating that another challenge, apart from the substantive due process claim discussed by the other opinions, could be brought. The Justice supported this view by briefly examining the provisions of the statute, which allow judges to exempt offenders meeting certain criteria from the statute’s registration, reporting, and other affirmative requirements. Justice Souter continued by explaining that the statute provided that judicial decisions to exempt offenders “must rest on a finding that registration or public dissemination is not required for public safety.” The Justice concluded that these provisions illustrate that “[t]he State thus recognizes that some offenders within the sweep of the [statute’s] publication requirement are not dangerous to others . . . and the legislative decision to make courts responsible for granting exemptions belies the . . . argument that courts are unequipped to

78. Id.
79. Id.
80. Conn. Dep’t, 538 U.S. at 9.
81. Id.
82. Id.
83. Id. at 9-10. In a footnote Justice Souter also commented on similar provisions, which ease the retroactive effect of the statute by allowing courts to discretionarily restrict dissemination of the registry’s information. Id at 10 n.*.
separate offenders who warrant . . . publication from those who do not." Based upon this examination of these provisions, Justice Souter then explicitly left open the possibility of a future equal protection attack on the statute and others like it. The Justice accomplished this by discussing how the statute’s judicial exemption provisions affect individual rights by drawing a line between offenders who are considered eligible to seek discretionary relief from the courts and those who are not. However, the Justice qualified his opinion by explicitly stating that he was merely noting that the Court’s rejection of Respondent’s procedural due process claim did not “immunize publication schemes like Connecticut’s from an equal protection challenge.”

Justice Souter’s concurrence clarified, elaborated, and reaffirmed the possibility of a future substantive due process or equal protection challenge that was only briefly mentioned in the majority opinion. In addition, the concurrence implicitly indicated that current dangerousness was relevant in cases where the statute’s exemptions apply but was not relevant in the case at issue because Respondent did not fall within any of the statute’s exemptions. Justice Souter implied this by discussing the exemption provisions of the statute and how a judge’s grant of an exemption must be based upon a finding that an offender’s compliance with the statute is not required for public safety. However, this opinion could have been clearer if Justice Souter made this point more explicitly.

3. Justice Stevens’ Concurrence

Justice Stevens concurred in the judgment in a combined opinion that examined this case and another sex offender register and notification statute case, Smith v. Doe. Justice Stevens started by asserting that the proper analysis of both cases should begin by

84. Id. at 10.
85. See Conn. Dep’t, 538 U.S. at 9-10.
86. Id. at 9.
87. Id.
88. Id. at 9-10.
89. Smith, 538 U.S. at 109-10.
determining whether a liberty interest was implicated.\textsuperscript{90} In making this determination, the Justice stated that the statute’s impact upon the registrants’ freedom should be considered.\textsuperscript{91} The Justice then described the specific provisions of the statutes in both cases and commented that in both cases they “impose significant affirmative obligations and a severe stigma on every person to whom they apply.”\textsuperscript{92} The Justice then described the obligations under the statute as being “comparable to the duties imposed on other convicted criminals during periods of supervised release or parole.”\textsuperscript{93} Justice Stevens continued by asserting that widespread public access to the personal information required by the statutes has a severe stigmatizing effect.\textsuperscript{94} Justice Stevens then supported this assertion by citing a brief which stated that after their registration information was made widely available offenders experienced threats, assaults, loss of housing, and loss of jobs.\textsuperscript{95} Justice Stevens proceeded to discuss the ex post facto issues addressed in \textit{Smith v. Doe}.\textsuperscript{96}

Although Stevens dissented with respect to the court’s ex post facto holding in \textit{Smith v. Doe}, the Justice concluded his opinion by strongly concurring with the Court’s holding in \textit{Connecticut Department}.\textsuperscript{97} The justice stated that for those convicted after the statutes effective date, “there would be no separate procedural due process violation so long as a defendant is provided a constitutionally adequate trial.”\textsuperscript{98}

Steven’s concurrence is a well written and logical opinion in which he grudgingly supports the majority’s holding and thereby enables it to be used as relatively stable procedural due process precedent in future cases.\textsuperscript{99} Stevens’ conclusion could be read by some as implicitly concluding that no stigmatization results from

\textsuperscript{90} Id. at 110.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Smith, 538 U.S. at 110-11.
\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{99} Id. at 110-12.
having to comply with the statute’s registration and reporting requirements. However, the Justice’s discussion of the stigmatizing effect of the statute’s registration and reporting requirements, described supra, makes the accuracy of this reading unlikely.\textsuperscript{100} In light of this discussion, it appears the Justice may have erred in his opinion by stopping short of fully and thoroughly addressing the issue of whether the registration requirements in fact have a stigmatizing effect.

While it is clear that the disclosure that occurs with the dissemination of the registry’s information sheds a negative light upon registered offenders, what is unclear is whether the information disclosed is false or defamatory and therefore stigmatizes registered offenders.\textsuperscript{101} According to either Paul v. Davis or the Second Circuit’s formulation of the Davis’ holding, a claimant must show that the statement at issue is false and derogatory before it can be deemed stigmatizing.\textsuperscript{102} The information being disclosed pursuant to Connecticut’s statute, like an offender’s conviction along with other objective facts such as their residence and other personal information, is true and non-defamatory.\textsuperscript{103} In addition, the bad light shed or de facto stigmatization which occurs in the wake of this information being disclosed arguably stems from the true fact that the offenders subject to the statute have been convicted of heinous crimes which much of society looks upon with great disdain.\textsuperscript{104} If one follows this analysis to its end, it indicates that perhaps no stigmatization was present in this case and therefore there was likely no reputation liberty interest implicated. Consequently, Justice Stevens may have been able to make his opinion more complete and convincing if a line of reasoning such as this had been explicitly featured. In addition, the majority opinion could have more clearly addressed whether a

\textsuperscript{100} Id. at 110.

\textsuperscript{101} For a more in depth discussion of whether the dissemination of information in this case stigmatized Respondent See Jennifer G. Daugherty, Sex Offender Registration Laws and Procedural Due Process: Why Doe v. Department of Public Safety Ex Rel. Lee Should be Overturned, 26 Hamline L. Rev. 713, 739-43 (2003).

\textsuperscript{102} Davis, 424 U.S. at 699-702, 708-09 (1976); Doe, 271 F.3d 38, 47 (2001).

\textsuperscript{103} Doe, 271 F.3d at 43; see also Conn. Dep’t, 538 U.S. at 7; Daugherty, supra note 101, at 739-43.

\textsuperscript{104} See Daugherty, supra note 101, at 744-45.
liberty interest was present in this case by featuring such a passage.

IV. IMPACT OF THE COURT’S DECISION

A. The Legal and Social Impact of the Court’s Decision

The Court’s decision in *Connecticut Department of Public Safety v. Doe* indicates that future procedural due process challenges to sex offender registry statutes that turn on an offender's conviction alone will be unsuccessful. However, this statement must be qualified by the fact that neither a substantive due process nor an equal protection challenge was heard in this case. It also must be qualified by the fact that the majority opinion and a concurring opinion acknowledged, either implicitly or explicitly, that if such a challenge was brought it may succeed.

Further, the Court’s failure to resolve whether dissemination of registry information stigmatizes registered offenders creates uncertainty in future cases which address the constitutionality of statutory schemes that consider current dangerousness or other considerations to be relevant, i.e., statues that do not turn on the fact of conviction alone. However, in light of the criticism of Stevens’ concurrence, *supra*, it is arguable that if the Court were confronted with such a case, it would likely find that the conviction itself is truthful and therefore dissemination of registry information cannot stigmatize registered offenders. In addition, such a court would also likely find that any de facto stigmatization or bad light shed on registered offenders is attributable to the fact that they have been convicted of a heinous crime which much of society looks upon with great disdain.

In turn, what this decision means for supporters of sex offender

105. *See Conn. Dep’t*, 538 U.S. at 6-7 (2003). In addition, *Smith v. Doe* has held that retroactive application of a similar Alaskan statute was not punitive and therefore did not violate the Ex Post Facto Clause of the Constitution. *Smith*, 538 U.S. at 105.


107. *Id.* at 6-8.


registration and notification statutes is that statutes which resemble Connecticut's will be immune to procedural due process attacks. Further, this case could also be interpreted to mean that statutes that differ from Connecticut's, e.g. ones that do not turn only upon the fact of conviction, will also likely be found not to violate procedural due process. On the other hand, those in the opposition should keep in mind that the court's holding is a narrow one that only explicitly applies to statutes resembling Connecticut's and that it only addresses whether such statutes violate procedural due process.\(^\text{110}\)

Those opposing registration and notification statutes such as this one should also take heart in the fact that the majority and concurring opinions acknowledge the possibility of a future successful equal protection or substantive due process attack.\(^\text{111}\)

\textbf{B. The Decision's Impact upon Federal, State, and Local Administrative Agencies}

1. Impact upon Agencies Implementing Sex Offender Registration and Notification Statutes

In the wake of this decision state agencies and officials who implement sex offender registration and notification statutes like Connecticut's can take comfort in knowing that they can, for now, continue to implement and enforce their statute without being vulnerable to a successful procedural due process attack.\(^\text{112}\)

Agencies and officials who implement sex offender registrations which consider current dangerousness or other considerations to be relevant, i.e., statutes that do not turn on the fact of conviction alone, can also take comfort in this decision. This comfort would be justified in light of the discussion above regarding how no liberty interest would be at issue because dissemination of objective and truthful registry information would likely be found to not truly stigmatize registered offenders. However, this comfort should be tempered by the fact that

\footnotesize{110. Conn. Dep't, 538 U.S. at 6 (citing Constantineau, 400 U.S. 433; Goss, 419 U.S. 565; 538 U.S. at 7).

111. Daugherty, supra note 101, at 744-45.

112. In addition, statutes like Connecticut's may not be subject to an Ex Post Facto Clause attack in light of the holding in Smith v. Doe. Smith, 538 U.S. at 105.}
this opinion leaves these agencies and officials vulnerable to possible successful substantive due process or equal protection challenges.\textsuperscript{113}

In order to eliminate some of this uncertainty, state legislatures could ward off possible equal protection clause attacks by eliminating exemption provisions, which resemble the judicial exemption provisions in Connecticut’s statute. By doing so the legislature would perhaps eliminate any legislative lines drawn between offenders, which could serve as possible grounds for an equal protection attack. However, if this action was taken to protect its statute, a legislature may end up compromising the policy balance it originally accomplished by requiring registration and notification of all sex offenders and then allowing judges to discretionarily exempt offenders whom fall within legislatively created categories. In the end it appears that state agencies, officials, and legislatures must again wait for the Court to speak, only this time they will wait to hear whether these statutes violate substantive due process or the equal protection clause.

2. The Decision’s Impact outside of the Sex Offender Registry Context

Although this case features a compelling and controversial subject, \textit{Connecticut Department’s} holding may also be applicable outside of the sex offender registry context. For one, its holding could be used to confirm the due process constitutionality of other criminal registry systems which turn upon the fact of conviction of a crime other than those covered by statues such as Connecticut’s statute. Some of the offenses that could potentially be addressed by such legislation are violent crimes or controlled substance associated offenses. However, one should keep in mind that while this holding appears to be universally applicable with respect to due process, these hypothetical criminal registry laws, like Connecticut’s statute, could still be subject to constitutional attacks on substantive due process or equal protection grounds.

Secondly, this holding could also be used to confirm the constitutionality of schemes that subject individuals and entities to registration based upon the fact that they have been found guilty of a

\textsuperscript{113} \textit{Id}.
particular civil or regulatory offense after being afforded due process in the form of a civil or administrative proceeding. In other words, this holding could be relied upon by legislatures and rule-making agencies when designing regulatory schemes which subject entities and individuals to affirmative duties and obligations on the basis that they have been convicted of violations of regulations or statutes. Thus, remarkably, this holding could conceivably be applied to non-criminal violations of regulations and statutes, which address subjects ranging from environmental regulation to securities regulation. In the end it appears that the simple and before unstated constitutional requirement embodied in Connecticut Department's holding could be used in many different legal contexts for years to come.

V. CONCLUSION

Although the judgment of the Court clarified the constitutionality of sex offender registry laws as to procedural due process, it clearly leaves open the possibility of successful equal protection or substantive due process attacks in the future. Since the offender in this case relied solely upon a procedural due process theory and presented no substantive due process or equal protection argument, the Court was left without the opportunity to fully address whether these statutes are constitutional in every respect. As a result, the Court was left with little choice but to issue its narrow holding in this case and consequently agencies, officials, legislatures, and others are left waiting for the Court to speak as to whether these statutes violate substantive due process or the equal protection clause.