The Georgia Legislature Strikes with a Vengeance! Sex Offender Residency Restrictions & the Deterioration of the Ex Post Facto Clause

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In 2006, Georgia enacted a residency restriction that was "[h]ailed by its sponsors as the 'toughest [sex offender] law in the country.'" Residency restrictions like the one enacted in Georgia represent a novel development in criminal law. Since 2001, when the first sex offender residency restriction was enacted, twenty-two states have passed some form of sex offender residency restriction. Such restrictions either

2. See Doe v. Miller, 405 F.3d 700, 720 (8th Cir. 2005) (explaining that sex offender residency restrictions have a recent origin, similar to sex offender registration laws).
4. ALA. CODE § 15-20-26(a) (LexisNexis Supp. 2006) ("[N]o adult criminal sex offender shall establish a residence or any other living accommodation or accept employment within 2,000 feet of the property on which any school or child care facility is located."); ARK. CODE ANN. § 5-14-128(a) (2006) ("It is unlawful for a sex offender who is required to register . . . and who has been assessed as a Level 3 or Level 4 offender to reside within two thousand feet (2,000') of the property on which any public or private elementary or secondary school or daycare facility is located."); CAL. PENAL CODE §3003(g)(1) (West Supp. 2007) ("[A]n inmate who is released on parole for any violation of [the sex offender statute] shall not be placed or reside, for the duration of his or her period of parole, within one-quarter mile of any public or private school . . . ."); FLA. STAT. ANN. § 947.1405(7)(a)(2) (West Supp. 2007) (prohibiting a sex offender whose "victim was under the age of 18 . . . [from] living within 1,000 feet of a school, day care center, park, playground, designated public school bus stop, or other place where children regularly congregate"); GA. CODE ANN. § 42-1-15(a) (Supp. 2006) ("No individual required to register . . . shall reside or loiter within 1,000 feet of any child care facility, church, school, or area where minors congregate."); 720 ILL. COMP. STAT. ANN. 5/11-9.3(b-5) (West 2002) ("It is unlawful for a child sex offender to knowingly reside within 500 feet of a school building . . . ."); IND. CODE ANN. § 11-13-3-4(g)(2)(B) (LexisNexis 2003) (requiring the parole board to "prohibit the offender from residing within one thousand (1,000) feet of school property . . . for the period of parole, unless the offender
create "[c]hild safety zone[s]," which prohibit a sex offender from loitering in a certain area, or impose "[d]istance [m]arker[s]," which

obtains written approval from the parole board"); IOWA CODE ANN. § 692A.2A(2) (West 2003) ("A person shall not reside within two thousand feet of . . . a public or nonpublic elementary or secondary school or a child care facility."); KY. REV. STAT. ANN. § 17.545(1) (LexisNexis Supp. 2006) ("No registrant . . . shall reside within one thousand (1,000) feet of a high school, middle school, elementary school, preschool, publicly owned playground, or licensed day care facility."); LA. REV. STAT. ANN. § 14:91.1(A) (Supp. 2007) ("Unlawful presence of a sexually violent predator is . . . (2) [t]he physical residing of a sexually violent predator within one thousand feet of any public or private elementary or secondary school, a day care facility, playground, public or private youth center, public swimming pool or free standing video arcade facility."); MICH. COMP. LAWS ANN. § 28.735(1) (West Supp. 2007) ("[A]n individual required to be registered . . . shall not reside within a student safety zone."); MINN. STAT. ANN. § 244.052(3)(k) (West Supp. 2007) ("If the [end-of-confinement review] committee assigns a predatory offender to risk level III, the committee shall determine whether residency restrictions shall be included in the conditions of the offender's release . . . "); MO. ANN. STAT. § 566.147(1) (West Supp. 2007) ("Any person who is a sex offender . . . shall not reside within one thousand feet of any public school . . . or any private school . . . or child-care facility . . . "); N.M. STAT. § 29-11A-5.1(D) (2004) ("[T]he county sheriff shall contact every licensed day care center, elementary school, middle school and high school within a one-mile radius of the sex offender's residence and provide them with the sex offender's registration information . . . ."); OHIO REV. CODE ANN. § 2950.031(A) (LexisNexis 2006) ("No person who has been convicted of . . . either a sexually oriented offense that is not a registration-exempt sexually oriented offense or a child-victim oriented offense shall establish a residence or occupy residential premises within one thousand feet of any school premises."); OKLA. STAT. ANN. tit. 57, § 390 (West Supp. 2007) ("It is unlawful for any person registered pursuant to the Sex Offenders Registration Act to reside, either temporarily or permanently, within a two-thousand-foot radius of any public or private school site, educational institution, playground, park, or licensed child care facility."); OR. REV. STAT. § 144.642(1) (2005) (directing the Department of Corrections to "establish[] criteria to be considered in determining the permanent residence requirements for a sex offender," which rules "shall include . . . (a) [a] general prohibition against allowing a sex offender to reside near locations where children are the primary occupants or users"); S.D. CODIFIED LAWS § 22-24B-23 (2006) ("No person who is required to register as a sex offender . . . may establish a residence or reside within a community safety zone . . . ."); TENN. CODE ANN. § 40-39-211(a) (2006) ("[N]o sexual offender . . . or violent sexual offender, . . . whose victim was a minor, shall knowingly establish a primary or secondary residence or any other living accommodation . . . within one thousand feet (1,000') . . . of any public school, private or parochial school, licensed day care center, other child care facility, public park, playground, recreation center or public athletic field available for use by the general public."); TEX. GOV'T CODE ANN. § 508.187(b) (Vernon 2004) ("A parole panel shall establish a child safety zone applicable to a releasee . . . ."); WASH. REV. CODE ANN. § 9.94A.712(6)(a)(ii) (West Supp. 2007) ("If . . . the victim of the offense was under eighteen years of age at the time of the offense, the court shall . . . prohibit the offender from residing in a community protection zone."); W. VA. CODE ANN. § 62-12-26(b) (LexisNexis Supp. 2007) ("[C]ertain sex offenders shall be . . . prohibited from: [e]stablishing a residence or accepting employment within one thousand feet of a school or child care facility . . . ."). Outside of these states, "hundreds of municipalities" have also added residency restrictions. NIETO & JUNG, supra note 3, at 3.
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prohibit a sex offender from living within a particular distance from a certain place.5 The Georgia law imposes distance markers that restrict registered sex offenders from living within "1,000 feet of any child care facility, church, school, or area where minors congregate."6 The law additionally includes school bus stops as an "area where minors congregate."7 As soon as school bus stops were added to the list of restricted areas, sex offenders challenged the constitutionality of the residency restriction in Whitaker v. Perdue.8

Georgia's sex offender residency restriction violates the Ex Post Facto Clause of Article 1, Section 10 of the United States Constitution because the law retroactively punishes, rather than regulates, previously convicted sex offenders.9 If courts uphold punitive residency restrictions like the Georgia statute, the Ex Post Facto Clause will become a mere surplusage.

This Comment examines the constitutionality of the Georgia sex offender residency restriction in light of the Ex Post Facto Clause.10

5. NIETO & JUNG, supra note 3, at 15 (explaining that "Child Safety Zones" impose loitering restrictions on "areas where children congregate, such as schools, childcare centers, playgrounds, school bus stops, video arcades and amusement parks," while "Distance Marker laws restrict sex offenders from permanently residing within a certain distance of designated places").


7. Id. § 42-1-12(a)(3). The term "[a]reas where minors congregate" covers "all public and private parks and recreation facilities, playgrounds, skating rinks, neighborhood centers, gymnasiurns, school bus stops, and public and community swimming pools." Id. To qualify under the statute, a school bus stop must be "designated [as a stop] by local school boards of education or by a private school." Id. § 42-1-12(a)(19). No other state restricts all registered sex offenders from residing near school bus stops. See id. § 42-1-12(c) (specifying when registration is required, without reference to the age of the victim); Jarvie, supra note 1 ("Georgia . . . is the first state to prohibit living near school bus stops."). But see FLA. STAT. ANN. § 947.1405(7)(a)(2) (West Supp. 2007) (restricting a sex offender from living near a "designated public school bus stop" if the offender's victim was younger than eighteen years old).


9. See Smith v. Doe, 538 U.S. 84, 92 (2003) (explaining that laws that are intended as regulatory measures, but are retroactively punitive in effect, violate the Ex Post Facto Clause).

10. During publication of this article, the Georgia Supreme Court issued an opinion on November 21, 2007, stating that "§ 42-1-15(a) [of the Georgia Code] is unconstitutional because it permits the regulatory taking of appellant's property without just and adequate compensation." Press Release, Supreme Court of Georgia, Supreme Court Issues Substitute Opinion in Sex Offender Ruling (Dec. 13, 2007), available at http://www.gasupreme.us/press_releases/mann_mfr.pdf. However, the Georgia Supreme Court issued a substitute opinion on December 13, 2007, substituting the word "because"
First, this Comment presents an overview of the Ex Post Facto Clause and the Supreme Court's test set out in Smith v. Doe,11 which is used to analyze challenges to potentially ex post facto statutes. Second, this Comment reviews how federal and state courts have applied the Smith test to residency restrictions in the last two years. Third, this Comment analyzes the constitutionality of the Georgia residency restriction, as challenged in Whitaker. Finally, this Comment discusses the potential implications of Whitaker on ex post facto jurisprudence.

I. THE HISTORY OF EX POST FACTO CLAUSE CHALLENGES TO SEX OFFENDER RESIDENCY STATUTES

A. The Ex Post Facto Clause Safeguards Citizens from the Vengeance of Public Officials

Article I, Section 10 of the Constitution states that “[n]o State shall . . . pass any . . . ex post facto Law.”12 Without further explanation, as Justice Chase observed in 1798 in Calder v. Bull, this phrase in the Constitution “is unintelligible, and means nothing.”13 with the phrase, “to the extent that.” Id. The revised opinion states that “§ 42-1-15(a) is unconstitutional to the extent that it permits the regulatory taking of appellant's property without just and adequate compensation.” Mann v. Ga. Dept. of Corrections, No. S07A1043, 2007 WL 4142738, at *5 (Ga. Nov. 21, 2007) (emphasis added). Russ Willard, spokesman for the Attorney General of Georgia, stated that the new ruling “should only protect property owners, not all registered sex offenders, from the residency restriction.” Bill Rankin, High Court Clarifies Residency Ruling, ATL. J.-CONST., Dec. 14, 2007, at E10. But see id. (“Sarah Geraghty, a lawyer for the Southern Center for Human Rights, disagreed with the attorney general’s office’s interpretation: ‘Courts in Georgia have repeatedly held that people who rent their homes have a property interest protected by the Fifth Amendment”’). Thus, sex offenders who rent are still subject to the residency restriction in section 42-1-15(a). See id. In response to the ruling of the Georgia Supreme Court, members of the Georgia legislature prefiled a bill to repeal certain provisions of the residency restriction. H.R. 908, 149th Gen. Assem., Reg. Sess. (Ga. 2007). The new bill retains the residency restrictions of the old law, including the school bus stop provision. Id. However, the bill contains an exception for sex offenders who own their homes before the establishment of a child care facility, church, school, or other area where minors congregate. Id. If this bill is passed, the residency restriction would still apply to offenders who rent or offenders who want to buy a home in a restricted area. At this time, the United States District Court for the Northern District of Georgia has dismissed all claims in Whitaker v. Perdue, except for the ex post facto challenge. Order at 22, Whitaker v. Perdue, No. 4:06-140-CC (N.D. Ga. Mar. 30, 2007); see also id. at 31 (dismissing plaintiff's claim made pursuant to the Takings Clause), available at http://www.schr.org/aboutthecenter/pressreleases/HB1059_litigation/LegalDocuments/Order.re.Def.Mt%20to %20Dismiss.03.30.07.pdf.

11. Smith, 538 U.S. at 92-97 (applying a two-part test, hereinafter referred to as the Smith test, to determine whether a statute is ex post facto).

12. U.S. CONST. art. I, § 10, cl. 1; see also U.S. CONST. art. I, § 9, cl. 3 (prohibiting Congress from enacting ex post facto laws).

13. 3 U.S. (3 Dall.) 386, 390 (1798) (Chase, J.).
The constitutional prohibition against ex post facto laws was added in response to certain laws passed by the Parliament of Great Britain. These laws declared past acts to be treasonous though they were not treasonous when committed, imposed punishment for acts that were not criminal when committed, and decreed stricter punishment than the law attached to the crime at conviction. The Framers of the Constitution feared the tyranny and endangerment of citizens’ rights that resulted from the imposition of these types of ex post facto laws.

_Calder_ was the first case in which the Supreme Court considered the scope of the Ex Post Facto Clause. In _Calder_, Justice Chase explained that a statute is ex post facto if it (1) punishes an act that was not criminal when committed, (2) “aggravates a crime, or makes it greater than it was, when committed,” (3) creates a harsher punishment for a crime after the crime was committed, or (4) “alters the legal rules of evidence” after the commission of the offense for the purpose of obtaining a conviction.

Barring various types of ex post facto laws prevents legislators from...
enacting laws that are "arbitrary or vindictive" and ensures that "statutes give fair warning of their effect." 19

B. Courts Apply the Smith Test to Determine Whether a Statute is Ex Post Facto

Various state sex offender laws have been challenged for violating the Ex Post Facto Clause because they allegedly create a harsher punishment after the sex offender has already been punished for the crime. 20 In Smith v. Doe, the Supreme Court analyzed an ex post facto challenge to a sex offender notification and registration law. 21 The two-part test developed in Smith is the current test that courts apply when determining whether a sex offender residency law violates the Ex Post Facto Clause. 22 The first step of the Smith test is to determine whether the legislature acted with a punitive intent in creating the law. 23 To determine whether the legislature’s objective was punitive, the court examines the statute’s

19. People v. Leroy, 828 N.E.2d 769, 779 (Ill. App. Ct. 2005); see Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994) (explaining how political pressures may lead to the development of retroactive legislation to punish politically unpopular groups); Calder, 3 U.S. (3 Dall.) at 389 (“With very few exceptions, the advocates of such laws were stimulated by ambition, or personal resentment, and vindictive malice.” (emphasis omitted)).


21. Smith, 538 U.S. at 92. Although the offenders were convicted prior to passage of the statute, they were nevertheless required to comply with the restrictions of the statute. Id. at 91.

22. E.g., Bret R. Hobson, Note, Banishing Acts: How Far May States Go to Keep Convicted Sex Offenders Away from Children?, 40 GA. L. REV. 961, 980 & n.121 (2006) (stating that courts addressing the constitutionality of residency restrictions have applied the Smith analysis, which considered the constitutionality of registration-notification laws). There has been some debate over the proper origin of the Smith test. See, e.g., Id. at 979-80 (explaining that the factors used in the Smith test arose from the factors originally enunciated in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)). But see Michael J. Duster, Note, Out of Sight, Out of Mind: State Attempts to Banish Sex Offenders, 53 DRAKE L. REV. 711, 730 (2005) (stating that the five factors of the Smith test and the seven factors of Mendoza-Martinez are different tests); Note, Prevention Versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offenders, 109 HARV. L. REV. 1711, 1720-22 (1996) (arguing that the factors used in Mendoza-Martinez were never “intended . . . to be applied as a litmus test by which to characterize legislation,” that use of the test would lead to inconsistent results, and that some of the factors are unsuitable for analysis of sex offender statutes).

Courts also review the "formal attributes" of the statute's enactment. If the intent of the legislature is punitive, then the law violates the Ex Post Facto Clause without need for further analysis. Thus, courts accord considerable deference to the stated intent of the legislature.

If the legislature enacts the law as part of a civil and nonpunitive regulatory scheme, then a court should apply step two of the Smith test to determine whether the statute is punitive in effect. The Court in Smith analyzed the punitive effect of the statute by evaluating whether "the regulatory scheme: [1]) has been regarded in our history and traditions as a punishment; [2]) imposes an affirmative disability or restraint; [3]) promotes the traditional aims of punishment; [4]) has a rational connection to a nonpunitive purpose; or [5]) is excessive with respect to this purpose." These five factors are "neither exhaustive nor dispositive," but are intended to be "useful guideposts" in analyzing the

24. Id. at 92-93.
25. Id. at 94 (explaining that the formal attributes of the enactment of a statute include "the manner of [a law's] codification or the enforcement procedures it establishes"). Although the location and labels of provisions are factors used when determining legislative intent, "these factors . . . are not dispositive." Id.

Additionally, even if a provision is codified in the state's criminal procedure code, id. at 94-96, "[i]nvoking the criminal process in aid of a statutory regime" is not in itself evidence of punitive intent, id. at 96. For example, the statute at issue in Smith required notification of registration as a part of the plea colloquy or judgment of conviction. Id. The statute gave the authority to implement the regulations to a state agency "charged with enforcement of both criminal and civil regulatory laws." Id. Although the statute involved use of the criminal process, the Court held that the statutory scheme was not punitive but civil. Id.

26. Id. at 92. In Smith, however, the Court held that the legislative objective was nonpunitive. Id. at 96. The legislature's express finding that "sex offenders pose a high risk of reoffending" and its expressed purpose of "protecting the public from sex offenders" persuaded the Court that Alaska's governmental interest was legitimate. Id. at 93 (citing 1994 Alaska Sess. Laws ch. 41, § 1). Similarly, the Court in Kansas v. Hendricks determined that imposing post-incarceration confinement of sex offenders determined to be dangerous was "a legitimate nonpunitive governmental objective." See Kansas v. Hendricks, 521 U.S. 346, 363 (1997), cited in Smith, 538 U.S. at 93.

27. Smith, 538 U.S. at 92-93.
28. Id. at 92 (quoting Hendricks, 521 U.S. at 361; see De Veau v. Braisted, 363 U.S. 144, 160 (1960) ("The question . . . 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 . . . ").

29. Smith, 538 U.S. at 97. The Court omits two of the Mendoza-Martinez factors. See id. These factors are "whether [the law] comes into play only on a finding of scienter" and "whether the behavior to which it applies is already a crime." Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963); see also supra note 22.
punitive effect of a statute lacking punitive intent.\textsuperscript{30} Although the Supreme Court has not yet applied the \textit{Smith} test to determine "the validity of sex offender residency restrictions,"\textsuperscript{31} courts around the country are adopting this two-step approach to determine the validity of their state's residency restrictions.\textsuperscript{32}

\textbf{C. State and Federal Courts Have Used the Smith Test to Conclude That State Residency Restrictions Do Not Violate the Ex Post Facto Clause}

Since the Supreme Court decided \textit{Smith}, sex offenders across the country have filed suits challenging residency restrictions on several constitutional grounds.\textsuperscript{33} Of these grounds, the ex post facto challenges

\begin{itemize}
  \item \textsuperscript{30} \textit{Smith}, 538 U.S. at 97 (quoting United States v. Ward, 448 U.S. 242, 249 (1980), and Hudson v. United States, 522 U.S. 93, 99 (1997)).
  \item \textsuperscript{31} Hobson, supra note 22, at 967.
  \item \textsuperscript{32} \textit{E.g.}, Doe v. Miller, 405 F.3d 700, 718-23 (8th Cir. 2005) (applying the \textit{Smith} test to Iowa's statute that restricts sex offenders from living within two thousand feet of a school or childcare facility); Does v. City of Indianapolis, No. 1:06-CV-865-RLY-WTL, 2006 WL 2927598, at *8-9 (S.D. Ind. Oct. 5, 2006) (applying the \textit{Smith} test to an Indianapolis city ordinance that prohibits sex offenders from living or being found "within 1000 feet of public playgrounds, recreation centers, swimming and wading pools, sports fields and facilities" when children are present, unless such person is accompanied by an adult not required to register as a sex offender); Lee v. State, 895 So. 2d 1038, 1039-44 (Ala. Crim. App. 2004) (applying the \textit{Smith} test to Alabama's statute that restricts sex offenders from living within two thousand feet of a school or daycare facility); People v. Leroy, 828 N.E.2d 769, 779-82 (Ill. App. Ct. 2005) (applying the \textit{Smith} test to an Illinois statute restricting sex offenders from living within five hundred feet of a school); State v. Seering, 701 N.W.2d 655, 659, 666-69 (Iowa 2005) (applying the \textit{Smith} test to Iowa's statute restricting sex offenders from living within two thousand feet of a school or childcare facility); State v. Cupp, No. 21176, 2006 Ohio App. LEXIS 1657, at *3-4, 11-13 (Ct. App. Apr. 7, 2006) (applying the \textit{Smith} test to Ohio's statute that prohibits sex offenders from residing within one thousand feet of a school); see, \textit{e.g.}, Weems v. Little Rock Police Dep't., 453 F.3d 1010, 1016-17 (8th Cir. 2006) (applying the \textit{Smith} test, as addressed in \textit{Miller}, to Arkansas's statute that restricts sex offenders from living within two thousand feet of a school or daycare center).

In \textit{Doe v. Baker}, a federal district court applied the \textit{Smith} test to Georgia's residency restriction law as enacted in 2003, before the law was amended to include school bus stops within the definition of "'area where minors congregate.'" No. Civ.A. 1:05-CV-2265-, 2006 WL 905368, at *1, 3-6 (N.D. Ga. Apr. 5, 2006) (citation omitted). \textit{Compare} Act of June 4, 2003, No. 382, § 1, 2003 Ga. Laws 878 (amending the definition to "include all public and private parks and recreation facilities, playgrounds, skating rinks, neighborhood centers, gymnasiums, and similar facilities providing programs or services directed towards persons under 18 years of age"), \textit{with} Act of Apr. 26, 2006, No. 571, § 24, 2006 Ga. Laws 397 (amending the definition to "include all public and private parks and recreation facilities, playgrounds, skating rinks, neighborhood centers, gymnasiums, \textit{school bus stops}, and public and community swimming pools" (emphasis added)).

33. Hobson, supra note 22, at 970-71 & nn.55-65 ("Offenders have attacked the constitutionality of [residency laws] on several grounds, including that the statutes are unconstitutionally overbroad and vague; permit a regulatory taking without just
are garnering the majority of attention in court opinions. 34

1. Legislative Intent to Protect the Public

If the legislature intends to impose a criminal punishment upon sex offenders, then its act is considered punitive. 35 Courts defer to the legislature's stated objectives when determining whether the intent of the legislature is punitive. 36 The burden to overcome this deference is high; as stated in Smith, "'only the clearest proof' will suffice to override legislative intent." 37

Thus far, courts have agreed that residency restrictions were not created to punish sex offenders. 38 Instead, the courts have viewed the residency restrictions as public safety laws intended to protect children from known sex offenders. 39 For example, in Weems v. Little Rock Police Department, the Eighth Circuit analogized the residency restriction to a registration act that promoted public safety by working in tandem with the residency restriction. 40 The court held that the restriction was therefore an additional regulatory measure intended to promote public

34. Id. at 978 (describing ex post facto challenges to sex offender residency restrictions as having "received slightly more acceptance" from the courts, compared to other constitutional challenges to the restrictions); see, e.g., cases cited supra note 32.
35. Smith, 538 U.S. at 92.
36. See id. (quoting Kansas v. Hendricks, 521 U.S. 346, 361 (1997)).
37. Id. (quoting Hudson v. United States, 522 U.S. 93, 100 (1997)).
39. See Weems, 453 F.3d at 1017 (analyzing the statute's intent in light of the state's registration statute, which works in conjunction with the challenged residency restriction to protect public safety); Miller, 405 F.3d at 719 (stating that the statute "protect[s] the health and safety of Iowa citizens"); Lee v. State, 895 So. 2d 1038, 1042 (Ala. Crim. App. 2004) (explaining that the law was created because the high rate of recidivism among sex offenders endangers "vulnerable segments of the population" who should be protected by residency restrictions); Leroy, 828 N.E.2d at 779 (stating that the statute protects children from known sex offenders); Seering, 701 N.W.2d at 667 (stating that the statute aims to "protect the health and safety of individuals, especially children").
40. 453 F.3d at 1017. The Arkansas Registration Act stated that "'protecting the public from sex offenders is a primary governmental interest.'" Id. (quoting ARK. CODE ANN. § 12-12-902 (2003)). If the Registration Act promoted public safety, the court reasoned, and the residency restriction only applied to offenders registered under the Registration Act, then the residency restriction was also intended to promote public safety. Id.
safety. In Mann v. State, the Supreme Court of Georgia explained that residency restrictions are designed to decrease the potential opportunities for a sex offender to victimize a child.

2. Residency Restrictions as a Historic Form of Banishment

After determining that the legislative intent is non-punitive, the Smith test requires that courts compare the effect of the statute to other historical forms of punishment. Opponents of residency restrictions argue that these laws act as the "effective equivalent of banishment," which is a traditional means of punishment. Banishment is an extreme type of residency restriction that punishes criminals "by compelling them to quit a city, place, or country for a specified period of time, or for life." Sex offenders are considered banished when they are prevented from living in their original community or from moving into a new community.

In Doe v. Miller, the Eighth Circuit held that the Iowa statute at issue was not a form of banishment of sex offenders because it only restricted residency without restricting access to surrounding areas or places of employment. The restriction also contained a grandfather clause that allowed offenders to maintain their residences if they had been established before the enactment of the statute. In addition, although the statute might have relegated Iowa sex offenders to other areas of the

41. Id.
42. 603 S.E.2d 283, 286 (Ga. 2004).
43. Smith v. Doe, 538 U.S. 84, 97 (2003). Colonial punishments included "whipping, pillory, . . . branding, . . . public shaming, humiliation and banishment." Id. at 98. Of these punishments, the most serious was banishment. Id. Banishment was used in the colonial period "when governmental powers expelled people from their colonies for disobeying laws." Matthew D. Borelli, Note, Banishment: The Constitutional and Public Policy Arguments Against This Revived Ancient Punishment, 36 SUFFOLK U. L. REV. 469, 471 (2003). Georgia is one of the few states that still uses banishment as a form of punishment to deter drug dealing and domestic violence. Id. at 478 nn.67-69.
44. E.g., Miller, 405 F.3d at 719.
45. Smith, 538 U.S. at 97-98; Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 n.23 (1963) ("[B]anishment and exile have throughout history been used as punishment."); see also Toni M. Massaro, Shame, Culture, and American Criminal Law, 89 MICH. L. REV. 1880, 1881 (1991) (describing how a child molester in the late 1600s might have been banished or exiled as a form of punishment).
46. Miller, 405 F.3d at 719 (quoting United States v. Ju Toy, 198 U.S. 253, 269-70 (1905) (Brewer, J., dissenting)).
47. Smith, 538 U.S. at 98.
48. 405 F.3d at 719. Although the offenders in Miller were restricted from living near schools and daycare facilities, they were not restricted from accessing areas surrounding the schools or childcare facilities for employment or conducting business. Id.
49. Id. (explaining that the grandfather provision "permits sex offenders to maintain a residence that was established prior to July 1, 2002").
state, it did not restrict sex offenders from engaging in community activities.\textsuperscript{50}

In a case that arose in Georgia before school bus stops were added to the list of protected areas,\textsuperscript{51} the United States District Court for the Northern District of Georgia held that the state's residency statute was not equivalent to banishment.\textsuperscript{52} The court reasoned that the plaintiff had not been banished because he was able to find a new affordable residence in his community, and he could still access the restricted areas for purposes other than residence.\textsuperscript{53} However, in dicta, the court posited that "[a] more restrictive act that would in effect make it impossible for a registered sex offender to live in the community would in all likelihood constitute banishment which would result in an ex post facto problem if applied retroactively to those convicted prior to its passage."\textsuperscript{54} The court thus recognized the possibility that a more restrictive statute could constitute effective banishment.

3. Imposition of an Affirmative Disability or Restraint

When applying the \textit{Smith} test to determine if a statute is punitive in effect, courts also analyze whether the statute imposes an "affirmative disability or restraint."\textsuperscript{55} To determine whether a statute imposes an affirmative disability or restraint, courts examine how the statute affects sex offenders, particularly whether the disability or restraint is of minor and indirect effect.\textsuperscript{56} Although courts seem to agree that residency

\textsuperscript{50} Id. (explaining that the statute did not prevent sex offenders from working or conducting commercial transactions); see also People v. Leroy, 828 N.E.2d 769, 780-81 (Ill. App. Ct. 2005) (holding that preventing an offender from living in his home is not evidence of banishment because the offender could still assimilate into a new community or find housing elsewhere in his hometown); State v. Seering, 701 N.W.2d 655, 667 (Iowa 2005) ("[T]rue banishment goes beyond the mere ‘restriction of one’s freedom to go or remain where others have the right to be: it often works a destruction on one’s social, cultural, and political existence.’” (quoting Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 897 (2d Cir. 1996))).

\textsuperscript{51} See supra note 34 (comparing the old Georgia residency restriction statute with the new statute).


\textsuperscript{53} Id.

\textsuperscript{54} Id. at *4.

\textsuperscript{55} Smith v. Doe, 538 U.S. 84, 97 (2003); id. at 100 (noting that “the paradigmatic affirmative disability or restraint” is imprisonment (citing Hudson v. United States, 522 U.S. 93, 104 (1997))).

\textsuperscript{56} See id. at 99-100. The \textit{Smith} Court held that the Alaska act under consideration did not subject sex offenders to disability or restraint because sex offenders remained free to change jobs or residences. \textit{Id.} at 100. Although the Alaska sex offenders may have had problems finding jobs or housing, these problems predated the statute. \textit{Id.}
restrictions can impose an affirmative disability, they appear to gloss over the importance of this factor in the analysis. For example, the court in Miller explained that the residency restriction imposed an affirmative disability or restraint greater than the disability imposed by the registration statute in Smith. However, the Miller court then compared the residency restriction to an involuntary commitment statute. Because the residency statute was obviously not as disabling as the involuntary commitment statute, which created an extreme disability, the court in Miller concluded that the residency restriction did not impose the requisite level of affirmative disability required under the Smith test.

4. Promotion of Retribution and Deterrence

The fourth factor of the Smith test used to determine if a statute is punitive in effect is whether the statute promotes the traditional aims of punishment: retribution and deterrence. Although courts note that

57. See Doe v. Miller, 405 F.3d 700, 721 (8th Cir. 2005) ("[Section] 692A.2A does impose an element of affirmative disability or restraint . . . ."); State v. Seering, 701 N.W.2d 655, 668 (Iowa 2005) ("These restrictions clearly impose a form of disability."). But see Baker, 2006 WL 905368, at *4 (hesitating to find that the residency restriction was an affirmative disability because "the Supreme Court has granted the states considerable leeway in adopting regulations that impose substantial disabilities").

58. See Miller, 405 F.3d at 721 ("While we agree with the [plaintiffs] that § 692A.2A does impose an element of affirmative disability or restraint, we believe this factor ultimately points us to the importance of the next inquiry . . . ." (emphasis added)); People v. Leroy, 828 N.E.2d 769, 781 (Ill. App. Ct. 2005) ("[A]lthough we would not characterize the disability or restraint imposed . . . as minor or indirect, we are not convinced that the presence of this factor alone is sufficient to create a punitive effect . . . ."); Seering, 701 N.W.2d at 668 ("[A] statute that imposes some degree of disability does not necessarily mean the state is imposing punishment." (citing Smith, 538 U.S. at 100)). One dissenting judge has complained that this approach "unduly minimizes" the disability imposed by the residency restrictions. Leroy, 828 N.E.2d at 789 (Kuehn, J., dissenting).

59. Miller, 405 F.3d at 721.

60. Id. (acknowledging that "the civil commitment scheme at issue in Hendricks . . . permitted complete confinement of affected persons") (citing Kansas v. Hendricks, 521 U.S. 346, 363 (1997)); see also Baker, 2006 WL 905368, at *4 ("Even though the Plaintiff is being forced to move from his home, this disability is nowhere near as significant as the involuntary commitment approved in Hendricks.").

61. Miller, 405 F.3d at 721.

62. See Smith v. Doe, 538 U.S. 84, 102 (2003). The primary purpose of punishment, under the deterrence rationale, is to prevent the commission of future crimes. Massaro, supra note 45, at 1895. Punishment of an offender may act to deter him from future crimes—specific deterrence—or may act to deter others from future crimes—general deterrence. Id. at 1895-96. By contrast, retributive punishment is a form of revenge against the offender, id. at 1892, or "retaliation against someone who 'deserves it,'" id. at 1891. "Revenge is easier to accomplish than . . . other objectives" such as deterrence and rehabilitation. Id. at 1892.
residency statutes could have a deterrent or retributive effect, they shy away from concluding that residency restrictions promote the traditional aims of punishment. Some courts appear to forego the affirmative disability and deterrence analysis altogether because criminal statutes are inherently designed to create an affirmative disability or restraint, whether or not they are punitive. For example, the Supreme Court of Iowa, in State v. Seering, shifted the focus from whether the statute promotes the traditional aims of punishment to whether the statute promotes other aims, such as protecting the health and safety of children. In Miller, the Eighth Circuit drew a very fine distinction between a statute having the purpose of "alter[ing] the offender's incentive structure" to recommit crimes (non-deterrent) and a statute that is "designed to reduce the likelihood of reoffense" (deterrent).
5. Rational Connection to a Nonpunitive Purpose

The Smith test also requires that a court review whether the statute has a "rational connection to a nonpunitive purpose." The statute need not be narrowly tailored to achieve the nonpunitive purpose. Although the existence of a rational connection to a nonpunitive purpose is "a 'most significant' factor" in determining whether a statute's effects are nonpunitive, a statute that lacks such a rational connection is not therefore automatically deemed punitive.

Because strong deference is given to the legislature's purported purpose for the statute, there is little disagreement—even among the dissenting opinions—that there exists a rational relationship between the statute and the purpose of protecting children from known sex offenders. Residency restrictions may appear to be an under-inclusive means of preventing sex offenders from having contact with children, but the test of rational connection allows a state legislature to address problems through incremental steps.

6. Excessiveness in Relation to the Statute's Purpose

The last step in the Smith test is determining whether a residency restriction is excessive in relation to the statute's purpose. In making this determination, the issue is "whether the regulatory means chosen are reasonable in light of the nonpunitive objective." The Eighth Circuit

68. Smith, 538 U.S. at 102.
69. Id. at 103.
70. Id. at 102 (citing United States v. Ursery, 518 U.S. 267, 290 (1996)).
71. See Miller, 405 F.3d at 721.
72. Hobson, supra note 22, at 984 (finding that the level of deference in the Smith test's rational connection factor is similar to that of "rational basis review under substantive due process analysis").
73. See Miller, 405 F.3d at 725 (Melloy, J., dissenting) (agreeing with the majority that a rational connection existed); State v. Seering, 701 N.W.2d 655, 672 (Iowa 2005) (Wiggins, J., concurring in part and dissenting in part) (same). But see People v. Leroy, 828 N.E.2d 769, 793 (Ill. App. Ct. 2005) (Kuehn, J., dissenting) (arguing that no rational connection existed because the statute did not actually further the purpose of protecting children from potential re-offenders).
74. See Seering, 701 N.W.2d at 668 ("We look for a rational connection, which clearly exists . . . ."); see also Lee v. State, 895 So. 2d 1038, 1043 (Ala. Crim. App. 2004) (stating that the plaintiff conceded the existence of a rational, nonpunitive purpose); Leroy, 828 N.E.2d at 781-82.
77. Id. at 105; see Lee, 895 So. 2d at 1044 ("Nothing in the record before us indicates that the . . . residency requirement . . . is anything other than reasonable . . . ."); Seering,
interpreted *Smith* to hold that individualized risk assessments for each offender are not required when evaluating whether the regulatory means are reasonable in light of the legislature’s nonpunitive objective. Whether the statute is ineffective is also irrelevant because the test of a statute’s excessiveness does not require the state to find the best solution to the problem. In *People v. Leroy*, for example, the Illinois Appellate Court explained that the state’s residency statute was not excessive because it did not restrict the movement or activities of sex offenders, and it was the least restrictive geographically as compared to other states’ statutes. The existence of a statute’s grandfather clause may also indicate that the statute is not excessive or unreasonable in light of its purpose.

**D. Georgia’s Residency Restriction**

1. *The Georgia Supreme Court’s Interpretation of the Ex Post Facto Clause’s Application to Georgia’s Sex Offender Residency Restriction*

Prior to the addition of the school bus stop restriction to the state’s sex offender residency restriction statute, the Georgia Supreme Court in *Thompson v. State* ruled that the law did not violate the Ex Post Facto Clause. The court applied a three-step analysis different from the two-step/five-factor analysis employed by the United States Supreme Court in *Smith*. In the first step, when determining whether the Georgia

701 N.W.2d at 668 (reasoning that the residency restriction is not excessive because of the special protection the statute must provide for children).

78. *See Miller*, 405 F.3d at 721 (citing *Smith*, 538 U.S. at 103-04).

79. *See id.* at 722 (addressing the plaintiffs’ claim that “no scientific evidence” supported the effectiveness of the residency restriction at stopping recidivism, by noting that “[t]he excessiveness inquiry of our ex post facto jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy” (quoting *Smith*, 538 U.S. at 105)); *Coston*, 398 F. Supp. 2d at 886.


81. *See Miller*, 405 F.3d at 719; *Coston*, 398 F. Supp. 2d at 886-87 (dismissing the plaintiffs’ argument concerning the lack of a grandfather clause, because the statute contained two different grandfather clauses).

82. *Thompson v. State*, 603 S.E.2d 233, 235-36 (Ga. 2004). Thompson was a convicted child molester who had been “sentenced to serve a probated sentence of ten years.” *Id.* at 234. After the residency restriction took effect a few years into his sentence, Thompson’s probation officer informed him that he was in violation of the statute, because he lived slightly more than 300 feet from a community center. *Id.* at 234. When Thompson refused to move, the State revoked Thompson’s probation; during his probation revocation hearing, Thompson asserted as a defense that the law was ex post facto. *Id.*

83. *Id.* at 235. First, the court determines “whether the law applies retrospectively.” *Id.* If the law does not apply retrospectively, then the law is not ex post facto. *Id.* If the
statute was retrospective, the court analogized the case to *Kansas v. Hendricks*, in which the Supreme Court held that an involuntary civil commitment statute was not retroactive because it neither "'criminalize[d] conduct legal before its enactment, nor deprive[d] Hendricks of any defense that was available to him at the time of his crimes.'" Instead of altering the consequences of an existing offense, the Georgia Supreme Court stated that the law created a new crime based on an offender’s status. Instead of punishing offenders retrospectively, the law declared offenders guilty of an additional felony. Because the law did not pass the first step of the test, the Georgia Supreme Court did not continue with the remaining steps of the analysis.


On April 26, 2006, Governor Sonny Perdue signed House Bill 1059 into law to revise Georgia’s distance marker residency restriction statute. The new law, section 42-1-15, states:

(a) No individual required to register pursuant to Code Section 42-1-12 shall reside or loiter within 1,000 feet of any child care facility, church, school or area where minors congregate. . . .

(b)(1) No individual who is required to register under Code Section 42-1-12 shall be employed by any child care facility, school, or church or by any business or entity that is located within 1,000 feet of a child care facility, a school, or a church.

The new law added school bus stops to the list of areas where minors congregate. Because school boards and private schools designate the

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law does apply retrospectively, then the court determines whether the law is “punitive or regulatory.” *Id.* If the law is punitive, it is ex post facto; and if the law is not punitive but regulatory, the court considers whether the effect of the law is punitive or regulatory. *Id.*

84. *Id.* (quoting Kansas v. Hendricks, 521 U.S. 346, 371 (1997)).

85. *Id.* at 235-36; *see also* Denson v. State, 600 S.E.2d 645, 647 (Ga. Ct. App. 2004) (noting that the defendant sex offender could be punished under the residency law only “if he prospectively chooses to violate the law by continuing to reside at his current address”).

86. Thompson, 603 S.E.2d at 235-36.

87. *Id.*


89. GA. CODE ANN. § 42-1-15 (Supp. 2006). “Area where minors congregate” is defined as “all public and private parks and recreation facilities, playgrounds, skating rinks, neighborhood centers, gymnasiums, school bus stops, and public and community swimming pools.” *Id.* § 42-1-12(a)(3).

90. *Id.* § 42-1-12(a)(3); *see supra* notes 9-10 and accompanying text.
locations of school bus stops, the stops change frequently as families move into neighborhoods and children graduate to higher-level schools. The law contains no procedure for an offender to seek exemption "based on illness, advanced age, or disability." The law contains no grandfather clause for sex offenders who had already established a residence before the statute went into effect; the law applies to every person on the registry. Additionally, sex offenders registering in Georgia range from persons who had consensual sex as minors, to persons who have been convicted of a violent sexual offense.

On behalf of a group of sex offenders, the Southern Center for Human Rights and the American Civil Liberties Union of Georgia filed a complaint on June 20, 2006, in the Northern District of Georgia against the Governor. The complaint raised eight different constitutional challenges against the Georgia statute, including an ex post facto challenge. On June 27, 2006, the court granted a temporary restraining order (TRO) enjoining portions of House Bill 1059 that otherwise prohibit the plaintiffs from living within one thousand feet of a school

91. GA. CODE ANN. § 42-1-12(a)(19).
93. Id. at 5; see also Brief in Support of Motion for Preliminary Injunction to Prevent Nine Elderly and Disabled Plaintiffs from Being Evicted from Their Homes, Nursing Homes and Hospice Care Facilities at 11, Whitaker v. Perdue, No. 4:06-140-CC (N.D. Ga. Oct. 12, 2006), available at http://www.schr.org/aboutthecenter/pressreleases/HB1059_Litigation/LegalDocuments/NursingHomePl.pdf (requesting that the court enjoin enforcement of a particular provision of the residency restriction because the plaintiffs, all of whom were elderly, ill, or disabled, would be forced to leave their homes).
94. See Brief in Support of Motion for Temporary Restraining Order, supra note 88, at 5.
95. See GA. CODE ANN. § 42-1-12(e)(1-8) (Supp. 2006); Jarvie, supra note 1 (explaining that the legislature decided against making an exemption for low-level offenders out of fear that the exemption would somehow apply to everyone on the registry).
96. Complaint, supra note 8, at 1-2, 40-42. The court later extended the class of plaintiffs to include all sex offenders who are registered or will be required to register in the future pursuant to section 42-1-12. Order at 6, Whitaker v. Perdue, No. 4:06-140-CC (N.D. Ga. July 28, 2006), available at http://www.schr.org/aboutthecenter/pressreleases/HB1059_litigation/LegalDocuments/Order.Granting.Class.Cert.7.28.06.pdf. The plaintiff class included Wendy Whitaker, a 26-year-old woman who was convicted of sodomy for engaging in consensual oral sex with a 15-year-old male when she was seventeen years old. Complaint, supra note 8, at 7. Like many of the other plaintiffs included in the suit, Whitaker was convicted of the crime many years prior to enactment of the residency restriction. Id. Plaintiff Jeffrey York, a 22-year-old Georgia resident, pled guilty to sodomy at the age of seventeen for engaging in a consensual act of oral sex with a 15-year-old boy. Id. at 13. As a result of his conviction, York may be forced to move from his grandmother's home because it may be located too close to a school bus stop. Id.
97. Complaint, supra note 8, at 6.
bus stop. On July 11, 2006, the court extended the TRO for ten days to allow for oral argument on the plaintiffs' motion for preliminary injunction. The court later denied the preliminary injunction, explaining that the law was unenforceable at the time because there was no evidence that any school system had officially designated its school bus stops. However, in granting the TRO, the court found that the ex post facto claim had a "substantial likelihood of success on the merits." On August 31, 2006, the court issued an order enjoining enforcement of the school bus stop provision so that the court could more fully consider its constitutionality. On March 3, 2007, the district court dismissed all of the claims against the Georgia statute, except for the ex post facto claim.

II. APPLICATION OF THE TWO-PART SMITH TEST TO THE SCHOOL BUS STOP RESIDENCY RESTRICTION IN WHITAKER V. PERDUE

A. The Intent Behind Georgia's Statute is to Protect the Public from Repeat Offenders

Harsh statutory language does not in itself mandate a finding that the legislature's objective was punitive. But in the case of Georgia's new residency restriction, it is clear that the legislature's intent was to banish offenders from Georgia. Indeed, the residency bill's sponsor, House of Representatives Majority Leader Jerry Keen has stated, "Candidly . . . [sex offenders] will in many cases have to move to another state."
Moreover, the section involving residency restrictions is codified within the title governing penal institutions, and the statute includes the criminal penalty of imprisonment for violating the law.

Although the "formal attributes of a legislative enactment, such as the manner of its codification or the enforcement procedures it establishes, are probative of the legislature's intent," these factors are not dispositive of punitive intent. The Georgia legislature stated that its intent was to protect the public from repeat offenders, and that "[t]he designation of a person as a sexual offender is neither a sentence nor a punishment but simply a regulatory mechanism" in pursuit of that goal. When considerable deference is accorded to the legislature in determining intent, and the legislature's stated intent is to protect the safety of citizens, then the statute will be considered a regulatory scheme. Georgia's pursuit of "a regulatory scheme does not make the objective punitive" in itself.

B. A Statute Restricting Sex Offender Residency Around School Bus Stops is Punitive in Effect

Even though the Georgia legislature's stated intent is nonpunitive, the statute's effect is punitive because it promotes the traditional punishment of banishment. As the court in Baker foresaw, the school bus stop

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107. Id. § 42-1-15(d). House Bill 1059 stated that “[t]he provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act.” Act of Apr. 26, 2006, No. 571, § 30(c), 2006 Ga. Laws 413 (H.B. 1059). The purposeful omission of this language in the codified statute, which prevents an offender from being charged of violating the residency restriction before the statute's enactment, is further evidence of the punitive intent of the legislature. Compare id., with GA. CODE ANN. § 42-1-15 (Supp. 2006).
110. Id.
111. Smith, 538 U.S. at 92-93.
113. See Smith, 538 U.S. at 93-94.
114. Id. at 94.
115. Brief in Support of Motion for Temporary Restraining Order, supra note 88, at 10-11; see Rutherford v. Blakenship, 468 F. Supp. 1357, 1360 (W.D. Va. 1979) (“To permit one state to dump its convict criminals into another is not in the interests of safety and welfare; therefore, the punishment by banishment to another state is prohibited by public policy.” (citing People v. Baum, 231 N.W. 95, 96 (Mich. 1931))).
provision is so much more restrictive that its effect is to "make it impossible for a registered sex offender to live in the community." Because the state has more than 270,000 bus stops, offenders will have great difficulty finding affordable housing. Offenders will never be allowed to settle permanently because the locations of bus stops change every year. Furthermore, since the statute relegates offenders to certain areas, it affects their ability to engage in community activities.

If the new law is enforced, a very large proportion of Georgia's 11,744 sex offenders will have to move. Without the relief of a grandfather clause, for example, all of the plaintiffs in *Whitaker* who committed sex crimes before the enactment of the statute must move and sell their homes. Although the statute does not completely banish all offenders from the state, the statute expels them from their communities and


117. *Judge Revisits Sex Law Today*, AUGUSTA CHRON., July 11, 2006, at 2B (estimating that Georgia has over 270,000 school bus stops).

118. *Compare Baker*, 2006 WL 905368, at *4 (showing that offenders were still able to find affordable housing when the Georgia statute did not contain the school bus stop provision), with Kate Tillotson, *Sex Offenders Congregating at Gordon Highway Motels*, WRDW, Aug. 10, 2006, [http://www.wrdw.com/inplainsight/3540971.html](http://www.wrdw.com/inplainsight/3540971.html) (showing how the school bus stop provision limits sex offenders to only a handful of places to live, such as the two motels on Gordon Highway that now house thirty-one sex offenders).

119. See Tillotson, *supra* note 118 (discussing the development of sex offender communities in motels along a particular highway).

120. See GA. CODE ANN. § 42-1-15(a) (Supp. 2006) (restricting sex offenders' ability to loiter, work, and attend church in the community); Complaint, *supra* note 8, at 11-12.

121. See NIETO & JUNG, *supra* note 3, at 11 (showing that 11,744 sex offenders were registered in Georgia as of 2006); Jarvie, *supra* note 1 (stating that all 490 offenders in DeKalb County will have to move, and all but three of the thirty offenders in Bibb County will have to move); Laurie Ott, *Temporary Stay on Bus Stop Portion of Sex Offender Law Reversed*, WRDW, July 25, 2006, [http://www.wrdw.com/home/headlines/3422686.html](http://www.wrdw.com/home/headlines/3422686.html) (reporting that thirty of the forty offenders in Columbia County will have to move); Tillotson, *supra* note 118 (reporting on a map of Richmond County that indicates the few places that sex offenders could reside). The Georgia statute may render sex offenders homeless, as was the case in Iowa after the state passed a law restricting sex offenders from living within two thousand feet from a school or day care center. Monica Davey, *Iowa's Residency Rules Drive Sex Offenders Underground*, N.Y. TIMES, Mar. 15, 2006, at A1.

122. Order, *supra* note 98, at 2-3 ("Plaintiffs have shown that they will be required to leave their homes and that they have been unable to locate suitable alternative residences in their respective counties of residence or in nearby counties."). *But see* Doe v. Miller, 405 F.3d 700, 719 (8th Cir. 2005) (stating that many of the Iowa sex offenders did not have to change residence because the statute included a grandfather clause for offenders who had established a residence before July 1, 2002).

123. See State v. Seering, 701 N.W.2d 655, 667 (Iowa 2005) (holding that the Iowa statute did not amount to banishment because it "only restrict[ed] sex offenders from residing in a particular area").
cities. An offender who is permanently expelled from his community or home is effectively banished.

The statute is also punitive in effect because it imposes an affirmative disability or restraint upon registered offenders. The statute is more disabling than the registration and notification statute in *Smith*. The Court explained in *Smith* that the registration statute at issue did not lead "to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred through the use of routine background checks." The disability resulted from the conviction, not from the statute's registration and notification requirements. The Court reasoned that the effect of the statute was not disabling because offenders were still "free to move where they wish and to live and work as other citizens, with no supervision."

Unlike the statute challenged in *Smith*, the Georgia statute causes a substantial housing and employment disadvantage that offenders would not have incurred through routine background checks. The Georgia residency restriction not only limits where offenders can reside, but the statute also restricts where offenders can work and loiter. Compared to other states' statutes that have been characterized as imposing a

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124. *See Miller, 405 F.3d at 719* (explaining that "banished offenders historically could not 'return to their original community,' and that the banishment of an offender 'expelled him from the community'" (quoting *Smith v. Doe, 538 U.S. 84, 98 (2003)*)).

125. *See Miller, 405 F.3d at 724* (Melloy, J., concurring and dissenting) (arguing that a law need only "sufficiently resemble[] banishment" to support a finding that it is punitive in effect). The dissenting judge in *Leroy* refuted the argument that banishment must include tarnishing offenders' reputations or making it difficult for offenders to assimilate into new communities. *People v. Leroy*, 828 N.E.2d 769, 785-86 (Ill. App. Ct. 2005) (Kuehn, J., dissenting). The majority in *Leroy* defined banishment using a sentence from *Smith* that Judge Kuehn argued had been taken out of context. *Id.* at 786. In Judge Kuehn's view, the *Smith* Court's reference to one's tarnished reputation that prevents assimilation in a new community "was not an intended consequence of banishment, but it was the overall consequence of being banished, after first being publicly disgraced by other traditional means of punishment." *Id.* Banishment during colonial times meant nothing more than an expulsion from one's home. *Id.* at 786.


127. *See Smith, 538 U.S. at 100-02* (noting that the Alaska statute required offenders to register and to notify authorities when they moved, without placing restrictions on employment or residence).

128. *Id.* at 100.

129. *Id.* at 101.

130. *Id.*


disability or restraint, Georgia’s statute is much more restrictive, thus creating an affirmative disability or restraint.\(^{133}\)

The effect of restricting sex offenders from living near all school bus stops is not “minor and indirect” because the location of the bus stops may continually change, limiting a sex offender’s ability to establish a permanent residence.\(^{134}\) The law forces registered offenders to sell their homes and move to an entirely new community.\(^{135}\) Prohibiting an offender “from living where he has lived his entire life imposes a substantial disability.”\(^{136}\)

The third factor demonstrating the statute’s punitive effect is its promotion of the traditional aims of punishment: deterrence and retribution.\(^{137}\) In *Mann v. State*, Georgia’s Supreme Court described the deterrent effect of the state’s residency restriction when it wrote that “the [residency] statute aims to lessen the potential for those offenders inclined toward recidivism to have contact with, and possibly victimize, the youngest members of society.”\(^{138}\) The legislature explained that the statute was enacted to decrease recidivism rates because “[m]any sexual offenders are extremely likely . . . to repeat their offenses.”\(^{139}\)

The Georgia statute also promotes retribution because it applies equally to everyone on the registry regardless of the type of crime

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133. *Compare* Doe v. Miller, 405 F.3d 700, 721 (8th Cir. 2005) (stating that Iowa’s restriction against living within two thousand feet of a school or childcare facility “does impose an element of affirmative disability or restraint” even though the restriction has a grandfather provision), and *People v. Leroy*, 828 N.E.2d 769, 781 (Ill. App. Ct. 2005) (stating that the Illinois restriction against living within five hundred feet of a school cannot be characterized as only minor or indirect), with § 42-1-15(a)-(c) (restricting employment, loitering, and residency in relation to “area[s] where minors congregate” without including a grandfather provision), and id. § 42-1-12(a)(3) (defining eight types of areas where minors congregate).

134. See *Smith*, 538 U.S. at 100.

135. *E.g.*, *Complaint*, supra note 8, at 7 (describing how plaintiff Wendy Whitaker was forced to move out of her home to comply with another residency restriction, although she still has to pay mortgage on the home).


137. *See State v. Seering*, 701 N.W.2d 655, 672 (Iowa 2005) (Wiggins, J., concurring in part and dissenting in part) (“Even if these effects are secondary and consistent with the regulatory objective, it still amounts to deterrence and retribution promoting the traditional aims of punishment.”).


committed. It subjects all sex offenders to the residency restriction without any concern for the likelihood that any particular offender poses a danger to others. The law is not concerned with the current dangerousness of the offender, but only with the past crime committed. The law retributively targets past offenses more than it aims to prevent future offenses.

The only Smith factor that supports the statute's constitutionality is the residency restriction's rational connection to a nonpunitive purpose, that of protecting the public. Although the school bus stop restriction may negatively impact public safety in practice, the legislature could have reasonably concluded that the restriction would promote public safety by minimizing the risk of repeated sex offenses. The Supreme Court stated in Smith that the promotion of public safety is a valid purpose for a residency restriction, but as Justice Souter cautioned, reliance solely on the statute's rational connection to determine its constitutionality would be "naive... given the pervasive attitudes toward sex offenders."

Lastly, the school bus stop residency restriction is an excessive punishment because it fails to differentiate among different levels of sex

140. See GA. CODE ANN. § 42-1-15 (Supp. 2006) (stating that the law applies to everyone required to register under section 42-1-12); Leroy, 828 N.E.2d at 791 (Kuehn, J., dissenting) (explaining that automatic eviction, without an understanding of the nature of the prior offense, promotes retribution to some degree).

141. Duster, supra note 22, at 733; see Leroy, 828 N.E.2d at 791 (Kuehn, J., dissenting) ("A restriction imposed without consideration for the likelihood of a particular offender to reoffend has to be grounded, at least in part, in furtherance of retribution.").


143. See id.

144. See supra notes 110-11 and accompanying text.

145. See Levenson & Cotter, supra note 138, at 174-75 (showing that residency restrictions prevent sex offenders from living near areas where children congregate while still allowing offenders to live in neighborhoods filled with children); Jarvie, supra note 1 (discussing how the stringency of the Iowa residency restriction may have caused some sex offenders to stop registering).

146. See Doe v. Miller, 405 F.3d 700, 721 (8th Cir. 2005) (discussing the rational connection between the Iowa residency restriction and public safety).

147. Smith, 538 U.S. at 102-03.

148. Id. at 108-09 (Souter, J., concurring in the judgment) (discussing the importance of looking to factors other than a statute's rational connection to public safety because of strong negative attitudes toward sex offenders); Brief in Support of Motion for Temporary Restraining Order, supra note 88, at 9-10 (quoting statements made by Georgia House Majority Leader Jerry Keen, sponsor of the school bus restriction, evincing his negative attitude toward sex offenders).
offenses,149 lacks a grandfather clause,150 applies as long as an offender is required to register, and contains no exceptions.151 The restraint imposed by the school bus residency restriction is so severe that individual assessment of the risk an offender poses to the public must be required, to ensure that the statute’s application to that offender is reasonable.152 Unlike the statute in Leroy, Georgia’s statute further punishes offenders through its additional ban on working and loitering in areas where children congregate.153 Finally, the school bus stop residency restriction is not a reasonable way to promote the safety of children, because the restriction is likely to have no effect on improving the recidivism rates of sex offenders.154 Instead, the residency restrictions will remove sex...
offenders from positive support systems\textsuperscript{155} without preventing them from living in homes close to where minors reside.\textsuperscript{156}

\textbf{C. Georgia's Residency Restriction Violates the Ex Post Facto Clause}

Although there is a rational connection between the bus stop distance marker legislation and the legislature's concern for public safety, the statute is punitive in effect under each of the other Smith factors.\textsuperscript{157} The residency restriction effectively banishes sex offenders from the community.\textsuperscript{158} While acting as an affirmative disability or restraint, the restriction promotes both deterrence and retribution.\textsuperscript{159} Furthermore, the residency restriction is an unreasonable way to promote public safety.\textsuperscript{160} In weighing the Smith factors, Georgia's school bus stop residency restriction clearly violates the Ex Post Facto Clause.

\section{III. IF THE RATIONAL CONNECTION FACTOR IS CONSIDERED DISPOSITIVE, THE EX POST FACTO CLAUSE WILL BECOME A MERE SURPLUSAGE}

\textbf{A. Punitive Residency Restrictions Are Upheld Because Courts Are Treating the Rational Connection Factor as Dispositive}

Despite the restriction's apparent unconstitutionality, Georgia's residency restriction may be upheld because courts are misapplying the Smith test's five factors when determining whether a statute is punitive in

\ldots Placing restrictions on the location of correctionalyl [sic] supervised sex offender residences may not deter the sex offender from re-offending and should not be considered as a method to control sexual offending recidivism.


155. \textit{See} SEX OFFENDER MGMT. BD., \textit{supra} note 154, at 3-4 (showing that sex offenders who had a positive support system had significantly lower recidivism rates).

156. \textit{See} Levenson & Cotter, \textit{supra} note 138, at 175. In the Levenson and Cotter study, sex offenders commented on the irony of residency restrictions: "I couldn't live in an adult mobile home park because a church was 880 [feet] away and had a children's class that met once a week. I was forced to move to a motel where right next door to my room was a family with three children . . . ." \textit{Id.} Another offender stated, "You don't want me to live near a school where the kids are when I'm at work. The way it is now, when I get home from work, they're home, too—right next door." \textit{Id.}

157. \textit{See supra} Part II.B.

158. \textit{See supra} Part II.B.

159. \textit{See supra} Part II.B.

160. \textit{See supra} note 154 and accompanying text (arguing that residency restrictions fail to prevent recidivism).
effect. Similar to the other states' restrictions that have been upheld by courts, Georgia's restriction has a rational connection to public safety. While the rational connection factor is significant, no factor, including the rational connection factor, is dispositive. Although lower courts purport to weigh all five factors, the courts have consistently misapplied the rational connection factor as dispositive. Most strikingly, the court

161. See People v. Leroy, 828 N.E.2d 769, 789-90 (Ill. App. Ct. 2005) (Kuehn, J., dissenting) (noting the court's reluctance to apply certain Smith factors in the analysis of the Illinois statute's punitive effect). Judge Kuehn criticizes the majority in Leroy for giving the affirmative disability factor "only passing attention, dismissing it" with very little comment. Id. at 789. He refers to their analysis as a "cursory deflection" of the "significant and offensive" disability imposed by the residency restriction. Id. Reflecting on the majority's analysis of whether the Illinois statute promoted the traditional goals of punishment, deterrence and retribution, Judge Kuehn views the majority as having "recast the inquiry from a discussion of whether the restriction at issue promotes deterrence,... to a discussion of how all regulatory schemes can carry a deterrent effect and how those regulations are not necessarily punitive in nature." Id. at 790. Similarly, he faults the majority's approach to the issue of retribution as "avoid[ing] any analysis of the real question posed, by misdirection." Id.

162. E.g., Doe v. Miller, 405 F.3d 700, 721 (8th Cir. 2005); Leroy, 828 N.E.2d at 781-82; State v. Seering, 701 N.W.2d 655, 668 (Iowa 2005).


164. See id. at 97 (quoting United States v. Ward, 448 U.S. 242, 249 (1980)).


In Miller, the court concluded that the law had a rational connection to reducing the chance of reoffense, though it conceded that the law had a deterrent effect. Miller, 405 F.3d at 720. After further acknowledging the statute's potentially retributive effect, id., by agreeing that the statute imposes "an element of affirmative disability or restraint," id. at 721, the court discounted the relative importance of these factors, stating that "this... ultimately points us to the importance of the next inquiry: whether the law is rationally connected to a nonpunitive purpose," id. The court ultimately concluded that the residency restriction was not excessive because it had a rational connection to reducing the risk of reoffense. Id. at 722.

In Seering, the court held that the Iowa restrictions "clearly impose[d] a form of disability," but then stated that it "[was] mindful of the objectives of the residency restriction." Seering, 701 N.W.2d at 668. The court avoided the question of excessiveness by stating:

The nature of some governmental restrictions, especially those designed to protect the health and safety of children, may necessarily have some effects related to the goals of punishment. These effects, however, are secondary and largely "consistent with the regulatory objective." . . .

. . . We think it is more difficult to conclude that the restrictions are excessive considering the special needs of children . . . and the imprecise nature of protecting children from the risk that convicted sex offenders might reoffend.

Id. (quoting Smith, 538 U.S. at 102).

In Baker, the court glossed over the issue of deterrence and retribution by stating: "[W]hatever potential this residency restriction might have as a deterrent or as retribution,
in *ACLU v. City of Albuquerque* concluded the residency restriction was not punitive in effect by relying on the rational connection factor without applying any of the other *Smith* factors.  

**B. The Textualist Argument Against Reliance on the Rational Connection Factor**

A court should not rely solely on the *Smith* test's rational connection factor when analyzing a statute on the ground that it violates an explicit textual protection included in the Constitution. The Framers were so concerned with the abuses of legislative power occurring in Great Britain that they included two clauses in the Constitution to protect against the tyranny of ex post facto laws. The Framers thought it necessary to include these clauses even though several states already included ex post facto clauses in their state constitutions. In addition to preventing legislative abuse of power, the Ex Post Facto Clause is included in the Constitution because it "upholds the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law." A clause that the Framers felt was so important deserves a higher level of scrutiny than is afforded by a rational connection factor. The concerns about it is still consistent with a regulatory purpose. ... It is only by considering the disability within the context of the statute's purpose that this Court can determine whether an ex post facto violation has occurred." *Baker*, 2006 WL 905368, at *4.

166. *See* 137 P.3d 1215, 1228 (N.M. Ct. App. 2006).

167. *See* Martin H. Redish & Karen L. Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 45-47 (1987) (discussing how a rational basis test can be used "merely to disguise abstention" by the Supreme Court). The Court's use of a rational basis test may result in a finding in favor of the government with very little judicial review. *See id.* at 46. "Use of a meaningful rational basis test is ... more important for federalism than for equal protection issues," Professor Redish and Ms. Drizin observed, because "[i]f the Court abstains in the federalism area, ... those provisions are effectively rendered meaningless as limitations on congressional authority, which was their clearly intended purpose." *Id.* at 47.

168. *Weaver v. Graham*, 450 U.S. 24, 28 n.8 (1981) (quoting *Kring v. Missouri*, 107 U.S. 221, 227 (1883)); *see* Calder v. Bull, 3 U.S. (3 Dall.) 386, 400 (1798) (Iridell, J.) ("The temptation to such abuses of power is unfortunately too alluring for human virtue; and, therefore, the framers of the American Constitutions have wisely denied to the respective Legislatures, Federal as well as State, the possession of the power itself."); U.S. CONST. art. I, § 10, cl. 1 (applicable to States); id. § 9, cl. 3 (applicable to Congress).

169. *See* Calder, 3 U.S. (3 Dall.) at 391-92 (acknowledging the different state constitutions which already prohibited ex post facto laws before the Framers wrote the Federal Constitution); *THE FEDERALIST* No. 44 (James Madison), *supra* note 16, at 248-49 (explaining that ex post facto laws were already "expressly prohibited by the declarations prefixed to some of the State Constitutions").


171. *See* Calder, 3 U.S. (3 Dall.) at 396 (Paterson, J.) ("[T]he power of passing such [ex post facto] laws should be withheld from legislators; as it is a dangerous instrument in the
legislative abuse and "democratic despotism" that plagued the Framers more than two hundred years ago are still present in society and should not be ignored.\textsuperscript{172}

\textbf{C. The Ex Post Facto Clause is a Mere Surplusage if Courts Rely on the Rational Connection Factor}

The protection against legislative tyranny provided under the Ex Post Facto Clause is lost when courts use the rational connection factor as dispositive of a statute's punitive effect. Because sex offender residency restrictions by nature are rationally connected to minimizing the risk of repeat offenses,\textsuperscript{173} residency restrictions may be upheld regardless of the weight of the other Smith factors. The Ex Post Facto Clause is useless if every residency restriction is upheld without analyzing the other factors that influence a statute's punitive effect.\textsuperscript{174} Therefore, applying the rational connection factor as dispositive of a statute's punitive effect renders the Ex Post Facto Clause a mere surplusage.

\textbf{D. The Development of Other Residency Restrictions Rationally Connected to Public Safety}

If Georgia's school bus stop residency restriction is upheld because of the strength of its rational connection to public safety, state legislatures might begin implementing residency restrictions for other types of crimes. Since the rate of recidivism for sex offenders is lower than that of other serious criminals,\textsuperscript{175} the legislature might implement residency

\begin{footnotes}
\item[172] See Wayne A. Logan, "Democratic Despotism" and Constitutional Constraint: An Empirical Analysis of Ex Post Facto Claims in State Courts, 12 WM. & MARY BILL RTS. J. 439, 443 (2004) ("With the dust now settling from a decade in which U.S. prison populations grew to unprecedented proportions, and legislators attached particular value to being perceived as tough on crime, concern over the democratic despotism feared by the Framers remains as warranted as ever." (footnotes omitted)).
\item[173] Doe v. Miller, 405 F.3d 700, 721 (8th Cir. 2005).
\item[174] See \textsc{The Federalist} No. 84 (Alexander Hamilton), \textit{supra} note 16, at 468 (describing ex post facto laws as "the favorite and most formidable instruments of tyranny").
\item[175] NIETO \& JUNG, \textit{supra} note 3, at 2 ("On average, recidivism rates for all types of sex offenders are lower than for other offenders."); David P. Bryden, The Twenty-Second Annual Kenneth J. Hodson Lecture: Uncharged Misconduct Evidence in Sex Crime Cases: Reassessing the Rule of Exclusion, 141 MIL. L. REV. 171, 192 (1993) (citing ALLEN J. BECK, \textsc{Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983}, 6 (1989), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/pr83.pdf) (showing that within three years of their release, 31.9 percent of those convicted of burglary were rearrested for burglary, 24.8 percent of those convicted of drug offenses were rearrested for a drug offense, and 19.6 percent of those convicted of robbery were rearrested for robbery, but only 7.7 percent of those convicted of rape were rearrested for rape). Although sex
\end{footnotes}
restrictions for other crimes that pose a greater threat to public safety.\footnote{176} Under the pretext of public safety, bank robbers could be restricted from living near banks, methamphetamine users could be restricted from living near drug stores, and minors in possession of alcohol could be restricted from living near bars and liquor stores.\footnote{177} For example, Tennessee has already created a registry for methamphetamine users similar to the registry for sex offenders.\footnote{178} The next logical step after creating a registry of drug users and notifying the public of this information is to create a residency restriction for those listed on the registry.\footnote{179} Because of the high degree of deference afforded to the legislature under the \textit{Smith} test, a court would not question that a residency restriction is imposed to promote public safety.\footnote{180} If courts continue to use the rational connection factor as dispositive of a statute's lack of punitive effect,\footnote{181} then residency restrictions for bank robbers, drug users, and underage drinkers may become plausible regulatory measures.

\begin{footnotes}
\footnote{176}{\textit{Cf.} Matthew Bruun, \textit{Sex Offender Plan Raises Questions}, WORCESTER TELEGRAM \\ & GAZETTE, June 23, 2006, at B5 (quoting a local attorney comparing a statute that restricts sex offenders from living near schools to a hypothetical statute that would restrict bank robbers from living near banks, "'You can walk to a bank, take out a loan, rob it; you just can't live within 2,000 feet of it.'"}). Unlike other forms of restrictions, residency restrictions are unique because they create a pressure among other communities to impose restrictions, out of fear that they otherwise will become a magnet for the criminals who are desperately looking for a place to reside. \textit{See} NIETO \\ & JUNG, \textit{supra} note 3, at 3-4 (explaining that cities are creating laws limiting where sex offenders may live, which creates a concern that sex offenders will move from a town with tougher restrictions to a town with lesser or even no restrictions). Excessive restrictions may be imposed when legislators fear the political consequences of voting against the restriction. For example,

Regina Thomas, \ldots the only senator to vote against the Georgia bill, said that several legislators shared her concerns about how sex offenders were classified and how the law would be enforced, but feared the political consequences of voting against the bill.

"Nobody—Democrat or Republican—wanted to be seen to be voting for child molesting," she said. \textit{Jarvie, supra} note 1.

\footnote{177}{\textit{Cf.} Bruun, \textit{supra} note 176.}

\footnote{178}{\textit{See} TENN. CODE. ANN. § 39-17-431(d) (2006) (discussing maintenance by pharmacists of a registry of "any person purchasing a nonexempt product that contains any immediate methamphetamine precursor").}

\footnote{179}{\textit{See} Hobson, \textit{supra} note 22, at 968-69 (describing the progression of sex offender legislation from registration laws to notification laws to residency restrictions).}

\footnote{180}{\textit{See} \textit{supra} note 37 and accompanying text.}

\footnote{181}{\textit{See, e.g.}, Doe v. Miller, 405 F.3d 700, 721 (8th Cir. 2005).}
\end{footnotes}
IV. CONCLUSION

The United States District Court for the Northern District of Georgia, in Whitaker v. Perdue, must find that the Georgia school bus stop sex offender residency restriction is unconstitutional as a violation of the Ex Post Facto Clause because the statute is punitive in effect. Otherwise, state legislatures will continue to impose their own "arbitrary or vindictive" sentiments upon politically unpopular groups by creating more excessive residency restrictions. Worse, these restrictions will allow judges who have no sympathy for certain types of criminals to impose their own policy views under the banner of a regulatory law. The Ex Post Facto Clause will lose its purpose as a protector against the fluctuating policy of public officials trying to win votes, and eventually, it will become a meaningless clause in the Constitution.

182. See People v. Leroy, 828 N.E.2d 769, 779 (Ill. App. Ct. 2005); Logan, supra note 172, at 496 (describing the Ex Post Facto Clause as "guard[ing] against legislative overreach motivated by political self-interest").

183. See ACLU v. City of Albuquerque, 137 P.3d 1215, 1232 (N.M. Ct. App. 2006) (Robinson, J., specially concurring) ("I have no sympathy for convicted sex offenders and, as far as I am concerned, that is all well and good.").

184. See THE FEDERALIST NO. 44 (James Madison), supra note 16, at 249 (stating that Americans are "weary of the fluctuating policy" that results from ex post facto laws).