

# Toward a New Understanding of “Affirmative Disability or Restraint” in the Preventive State

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The Ex Post Facto Clause is a unique and critically important constitutional provision. It is unique because it contains one of the few civil liberty protections in the body of the U.S. Constitution.<sup>1</sup> It is critically important because of the role the Framers intended it to play in curbing burdensome retroactive laws enacted by legislatures. Indeed, testament to the Framers’ considerable concern,<sup>2</sup> the Constitution includes not one but two prohibitions of ex post facto laws, limiting the retroactive lawmaking wherewithal of Congress (Article I, section 9)<sup>3</sup> and state legislatures (Article I, section 10).<sup>4</sup>

The problematic nature of ex post facto laws and the need to prohibit them was repeatedly recognized at the nation’s origin. James Madison, in *The Federalist Papers*, saw ex post facto laws as “contrary to the first principles of the social compact, and to every principle of sound legislation,”<sup>5</sup> and regarded the Clause as a “constitutional bulwark in favour of personal security and private rights.”<sup>6</sup> His *Federalist Papers* co-contributor, Alexander Hamilton, recognized that ex post facto laws “have been, in all ages, the favorite and most formidable instruments of tyranny,”<sup>7</sup> and considered the ex post facto prohibitions in the Constitution as among

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<sup>1</sup> Most individual rights, of course, are contained in the Bill of Rights and its amendments.

<sup>2</sup> See *Weaver v. Graham*, 450 U.S. 24, 29 n.8 (1981) (“So much importance did the [c]onvention attach to [the ex post facto prohibition], that it is found twice in the Constitution.” (quoting *Kring v. Missouri*, 107 U.S. 221, 227 (1883)); *State v. Letalien*, 985 A.2d 4, 13 (Maine 2009) (“The framers’ decision to include the ex post facto clause in the body of the Constitution adopted in 1787, and not to defer consideration to the amendment process that would follow, is evidence that the framers viewed the federal ban on ex post facto laws as fundamental to the protection of individual liberty.”). Although, as noted, Article I contains two ex post facto provisions, for ease of reference the provisions are referred to collectively here as the Clause.

<sup>3</sup> U.S. CONST. art. I, § 9, cl. 3.

<sup>4</sup> *Id.* § 10, cl. 1.

<sup>5</sup> THE FEDERALIST NO. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961) [hereinafter THE FEDERALIST]. Joseph Story, respected legal scholar and U.S. Supreme Court justice, later echoed this same sentiment: “[r]etropective laws . . . neither accord with sound legislation nor with the fundamental principles of the social compact.” JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, VOLUME II, at § 1398 (Melville M. Bigelow ed., 1994).

<sup>6</sup> THE FEDERALIST NO. 44, *supra* note 5, at 282 (James Madison).

<sup>7</sup> *Id.*, THE FEDERALIST NO. 84, *supra* note 5, at 512 (Alexander Hamilton).

the “greate[st] securities to liberty and republicanism [the Constitution] contains.”<sup>8</sup> Early decisions of the Supreme Court echoed these sentiments. In 1810, for instance, Chief Justice John Marshall in *Fletcher v. Peck*<sup>9</sup> said of the motivations behind the Clause and other legislative limits imposed in Article I that

it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed.<sup>10</sup>

The subject of today’s panel, the reentry challenges faced by individuals convicted of criminal offenses, highlights the continued importance of the Clause. As a result of its decades-long embrace of “tough on crime” policies, the nation now has unprecedented numbers of individuals with criminal convictions,<sup>11</sup> subject to an expansive array of collateral consequences, often retroactively imposed.<sup>12</sup>

My presentation today will focus on a single but critically important aspect of ex post facto doctrine. It concerns the threshold question in any ex post facto challenge: whether the sanction retroactively imposed is punitive in nature. The requirement originated in one of the earliest decisions of the Supreme Court, *Calder v. Bull*,<sup>13</sup> which held that the Clause prohibits only retroactive laws that are punitive

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<sup>8</sup> *Id.* at 511. *See also* ANTI-FEDERALISTS VERSUS FEDERALISTS: SELECTED DOCUMENTS 50–51 (John D. Lewis ed.) (1967) (noting that although the authors of the *Federalist Papers* made most of their arguments on the basis of practical principles of governance, their arguments in favor banning ex post facto laws were based on natural law).

<sup>9</sup> *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

<sup>10</sup> *Id.* at 137–38; *see also* *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 266 (1827) (“Why did the authors of the constitution turn their attention to this subject, which, at the first blush, would appear to be peculiarly fit to be left to the discretion of those who have the police and good government of the State under their management and control? The only answer to be given is, because laws of this character are oppressive, unjust, and tyrannical; and, as such, are condemned by the universal sentence of civilized man.”); *id.* at 330–31 (Trimble, J., concurring) (“The language shows, clearly, that the whole clause was understood at the time of the adoption of the constitution to have been introduced into the instrument in the very same spirit, and for the very same purpose, namely, for the protection of personal security and of private rights.”).

<sup>11</sup> *See* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1803 (2012) (noting that we live in an era of “mass conviction, not (just) mass imprisonment”). *See also* FRANKLIN E. ZIMRING, *THE INSIDIOUS MOMENTUM OF AMERICAN MASS INCARCERATION* 181 (2020) (“The expansion of felony convictions and their related disabilities now threatens tens of millions of Americans. The pathological excess of penal disabilities and overincarceration in the United States are fraternal if not identical twins.”).

<sup>12</sup> *See generally* MARGARET C. LOVE, JENNY ROBERTS & WAYNE A. LOGAN, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW, POLICY, AND PRACTICE* (4th ed. 2021).

<sup>13</sup> *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

(as opposed to civil or remedial) in nature.<sup>14</sup> Whether a law is punitive is determined by a multifactor test later prescribed in *Kennedy v. Mendoza-Martinez*.<sup>15</sup> One of these factors will be examined here: whether a retroactive law imposes an “affirmative disability or restraint.”<sup>16</sup>

The discussion will proceed as follows. To set the stage for the recommendations to come later, Part I provides an overview of the historic purposes and modern importance of the Clause. Part II examines the Court’s modern case law on the affirmative disability or restraint factor in punishment question analysis, focusing in particular on its landmark 2003 decision in *Smith v. Doe*,<sup>17</sup> which regarded physical incapacitation as the sine qua non of affirmative disability or restraint. Using the Sixth Circuit’s recent decision in *Does #1-5 v. Snyder*<sup>18</sup> as its lodestar, Part III sketches a new way of conceiving of affirmative ability or restraint, one not myopically wedded to physical incapacitation as its benchmark, an approach consistent with the structural constitutional function of the Ex Post Facto Clause and sensitive to modern realities of preventive social control.<sup>19</sup>

## I. STRUCTURAL PURPOSES AND MODERN IMPORTANCE OF THE CLAUSE

As noted, the Framers of the Constitution unequivocally condemned ex post facto laws and were acutely aware of the tendency of legislatures to enact them.<sup>20</sup> Over time, the Supreme Court has recognized that the Clause has several purposes. One, already noted, aligns with its location in Article I of the Constitution (which specifies the powers and limits of the legislative branch): the Clause “restricts governmental power by restraining arbitrary and potentially vindictive legislation”

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<sup>14</sup> *Id.* at 393.

<sup>15</sup> *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963).

<sup>16</sup> *Id.* at 168.

<sup>17</sup> *Smith v. Doe*, 538 U.S. 84 (2003).

<sup>18</sup> 834 F.3d 696 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 55 (2017).

<sup>19</sup> See, e.g., Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 338, 340 (2015) (noting the modern “mode of aggregate preemptive restraint and control” resulting from the imposition of collateral consequences of conviction, which “constitute[s] a broad preventive scheme that restricts the autonomy of nineteen million people on the basis that they are likely to commit future crimes”). For additional recognition of this shift see, e.g., ERIC S. JANUS, *FAILURE TO PROTECT: AMERICA’S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE* (2006); Jennifer C. Daskal, *Pre-Crime Restraints: The Explosion of Targeted, Noncustodial Prevention*, 99 CORNELL L. REV. 327 (2014); Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167 (1999); Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321 (2008); Michael L. Rich, *Limits on the Perfect Preventive State*, 46 CONN. L. REV. 883 (2014); Carol S. Steiker, *Foreword: The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771 (1998).

<sup>20</sup> For an extended account of this Framing Era history see WAYNE A. LOGAN, *THE EX POST FACTO CLAUSE: ITS HISTORY AND ROLE IN A PUNITIVE SOCIETY* ch. 1 (2022).

and guards against “legislative abuses.”<sup>21</sup> The Ex Post Facto Clause does not prohibit passage of arbitrary or vindictive laws generally, but rather only those that are arbitrary or vindictive due to their retroactive force.<sup>22</sup> Barring retroactive criminal laws ensures that legislatures do not succumb to the political temptation of singling out for disadvantage readily identified “unpopular groups or individuals.”<sup>23</sup> As Justice Gorsuch recently noted, barring retroactivity “prevents majoritarian legislatures from condemning disfavored minorities for past conduct they are powerless to change.”<sup>24</sup>

By targeting retroactivity, the Clause serves another important constitutional value: the separation of governmental powers. As the Court stated in *Weaver v. Graham*,<sup>25</sup> the Clause “upholds the separation of powers by confining the legislature to penal decisions with prospective effect.”<sup>26</sup> The ex post facto prohibition prevents legislatures from intruding upon a judicial prerogative—determining liability and imposing punishment on the basis of past conduct. In this respect, the Ex Post Facto Clause differs from the Bill of Attainder Clause, also in Article I, its constitutional

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<sup>21</sup> *Weaver v. Graham*, 450 U.S. 24, 29 (1981). *See also Stogner v. California*, 539 U.S. 607, 611 (2003) (emphasizing “fairness” concerns and the expectation that the government “play by its own rules,” stating that “the Clause protects liberty by preventing governments from enacting statutes with ‘manifestly unjust and oppressive’ retroactive effects”) (citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1798)); *Carmell v. Texas*, 529 U.S. 513, 533 (2000) (“There is plainly a fundamental fairness interest . . . in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.”); *Lynce v. Mathis*, 519 U.S. 433, 440 (1997) (“[T]he Constitution places limits on the sovereign’s ability to use its lawmaking power to modify bargains it has made with its subjects.”).

<sup>22</sup> *See Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 266 (1827) (“The injustice and tyranny which characterizes ex post facto laws, consists altogether in their retrospective operation.”).

<sup>23</sup> *See Landgraf v. USI Film Products*, 511 U.S. 244, 246 (1994) (acknowledging that a legislature’s “responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals”); *see also Eastern Enterprises v. Apfel*, 524 U.S. 498, 548 (1998) (Kennedy, J., concurring) (citation omitted) (“[R]etroactive lawmaking is a particular concern for the courts because of the legislative ‘tempt[ation] to use retroactive legislation as a means of retribution against unpopular groups or individuals.’”).

<sup>24</sup> *Sveen v. Melin*, 138 S. Ct. 1815, 1826 (2018) (Gorsuch, J., dissenting). *See also* Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 693 (1960) (a retroactive statute “may be passed with an exact knowledge of who will benefit from it”); Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143, 2171 (1996) (“Prospectivity ensures that the legislature is at least willing to impose punishment on a larger group of people whose identities are unknown. The generality of the prospective provision helps prevent singling-out.”).

<sup>25</sup> *Weaver*, 450 U.S. 24.

<sup>26</sup> *Id.* at 29 n.10. *See also Stogner*, 539 U.S. at 611 (citation omitted) (recognizing that the Clause guards against “allowing legislatures to pick and choose when to act retroactively,” which “risks both ‘arbitrary and potentially vindictive legislation,’ and erosion of the separation of powers”).

“twin,”<sup>27</sup> which also turns on whether a law is punitive in nature.<sup>28</sup> A bill of attainder is “a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.”<sup>29</sup> It thus honors separation of power concerns by barring legislative usurpation of judicial authority in individual cases, which need not be retroactive in operation.<sup>30</sup> The Ex Post Facto Clause, on the other hand, bars retroactive criminal laws of general effect, a kind of lawmaking thought especially vulnerable to separation of powers abuse.<sup>31</sup>

A third and final purpose of the Clause is to guard against retroactive laws depriving individuals of notice, undercutting their ability to rely on the law to guide their actions. Only in 1977, in *Dobbert v. Florida*, did the Court expressly identify notice as a concern,<sup>32</sup> but it since has often been invoked.<sup>33</sup> Notice of a legal change would be important, for instance, to an “indigent defendant engaged in negotiations that may lead to an acknowledgment of guilt and a suitable punishment.”<sup>34</sup> Notice and frustration of reliance is also at issue when a legislature retroactively criminalizes previously innocent conduct.<sup>35</sup>

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<sup>27</sup> See Bryant Smith, *Retroactive Laws and Vested Rights II*, 6 TEX. L. REV. 409, 412 (1928) (citations omitted) (“Ex post facto laws and bills of attainder, twin sisters of legislative oppression . . . were so vivid in the political background of the framers of the constitution and so obnoxious to their ideals of justice as to call for an express constitutional prohibition.”). See also *United States v. Lovett*, 328 U.S. 303, 323 (1946) (Frankfurter, J., concurring) (“Frequently, a bill of attainder was . . . doubly objectionable because of its ex post facto features. This is the historic explanation for uniting the two mischiefs in one clause—‘No Bill of Attainder or ex post facto Law shall be passed.’”).

<sup>28</sup> See *Foretich v. United States*, 351 F.3d 1198, 1218 (D.C. Cir. 2003) (“[T]he principal touchstone of a bill of attainder is punishment.”).

<sup>29</sup> *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 468 (1977); see also *Lovett*, 328 U.S. at 315.

<sup>30</sup> See *United States v. Brown*, 381 U.S. 437, 442 (1965) (noting that the Bill of Attainder Clause is intended to serve as a “general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature”).

<sup>31</sup> See Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 994–95 (2006).

<sup>32</sup> *Dobbert v. Florida*, 432 U.S. 282, 298–99 (1977).

<sup>33</sup> See, e.g., *Weaver v. Graham*, 450 U.S. 24, 28–29 (1981) (“[T]he Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.”).

<sup>34</sup> *Lynce v. Mathis*, 519 U.S. 433, 440 (1997).

<sup>35</sup> Concern for notice, however, is not so much at issue in other contexts. For instance, it is of little moment with a retroactive change in a courtroom evidentiary rule, at issue in *Carmell v. Texas*, 529 U.S. 513 (2000). It was unlikely that Carmell, when engaging in his alleged sexual abuse of a minor, relied to his detriment on a courtroom rule of evidence that was later amended to his disadvantage. Ultimately, governmental fairness, not notice, was what drove the Court’s decision in *Carmell* to invalidate the law challenged: “[t]here is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.” *Id.* at 533. Ultimately, a basic practical reason limits the constitutional importance of notice. As the Court

As the preceding discussion makes clear, over the decades several important values and purposes of the Clause have been identified, with the Supreme Court attaching varying degrees of importance to them. Overall, it can be said that concern over arbitrary or vindictive legislation, its attendant fundamental unfairness, and to a lesser extent notice, are the predominant concerns. At its core, the Clause guards against the powerful political forces often affecting legislatures, which can drive enactment of retroactive penal laws at the expense of disfavored individuals “of the moment.”<sup>36</sup> This is especially so given the many social control measures retroactively imposed by modern-day legislatures, such as lifelong satellite technology tracking,<sup>37</sup> which the Framers could not have possibly imagined, yet which validate their concerns and amplify the need for a robust Clause.<sup>38</sup>

## II. THE PARAMETERS OF “AFFIRMATIVE DISABILITY OR RESTRAINT”

Today, a court determines whether a retroactive law is punitive, and therefore potentially violative of the Clause, by using a two-step analysis: (1) did the legislature have a punitive aim in enacting the law? If so, the analysis ends (but it never does, as a practical matter, because legislators recognize that an expression of punitive intent might doom a law’s retroactive application). If the legislature intended the law to be civil or remedial in nature, a court (2) considers whether it is “so punitive either in purpose or effect as to negate [the State’s] intention’ to deem it ‘civil.’”<sup>39</sup> In its 1963 decision *Kennedy v. Mendoza-Martinez*,<sup>40</sup> the Supreme Court

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put it in *Miller v. Florida*, 482 U.S. 423 (1987), “[t]he constitutional prohibition against *ex post facto* laws cannot be avoided merely by adding to a law notice that it might be changed.” *Id.* at 431.

<sup>36</sup> *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810) (Marshall, C.J.).

<sup>37</sup> See, e.g., Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147 (2022).

<sup>38</sup> For discussion of the many significant shifts in the nation’s social and political zeitgeist, in which ever-harsher criminal justice policy has come to dominate, see PETER K. ENNS, *INCARCERATION NATION: HOW THE UNITED STATES BECAME THE MOST PUNITIVE DEMOCRACY IN THE WORLD* (2016); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007).

<sup>39</sup> *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (citation omitted). Also, because a court ordinarily defers to a legislature’s stated intent, “only the clearest proof” will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.” *Smith v. Doe*, 538 U.S. 84, 92 (2003) (citations omitted).

<sup>40</sup> *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

provided a seven-factor test,<sup>41</sup> which the Court in its 2003 decision *Smith v. Doe*,<sup>42</sup> narrowed to five as “most relevant” to its ex post facto analysis:

[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.<sup>43</sup>

*Smith*, the Supreme Court’s most recent ex post facto decision, involved a challenge to Alaska’s sex offender registration and community notification law. The law required individuals previously convicted of specified sex offenses to provide identifying information to law enforcement (e.g., a current photo, home and work addresses, vehicle description), update it in the event of any change, and verify its accuracy on at least an annual basis (and sometimes four times per year), for up to their lifetimes.<sup>44</sup> This information, intended to enable police to monitor registrants and facilitate investigations in the wake of a reported sex crime, was then provided to Alaskans (via a government-operated website), with the goal of allowing them to take self-protective measures against any possible recidivist sex crimes committed by registrants.<sup>45</sup>

After deeming the Alaskan law non-punitive in intent,<sup>46</sup> the Court assessed the five factors identified above, finding none satisfied.<sup>47</sup> With respect to whether the law retroactively imposed “affirmative disability or restraint,” the Court emphasized at the outset that the law “imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint.”<sup>48</sup> Moreover, the law imposed “obligations . . . less harsh than the sanctions of occupational debarment, which we have held to be nonpunitive. The Act does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences.”<sup>49</sup> In support, the Court noted that the record contained “no evidence that

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<sup>41</sup> *See id.* at 168–69:

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

<sup>42</sup> *Smith*, 538 U.S. 84.

<sup>43</sup> *Id.* at 97.

<sup>44</sup> *Id.* at 90, 117.

<sup>45</sup> *Id.* at 93.

<sup>46</sup> *Id.* at 96.

<sup>47</sup> *Id.* at 97–103.

<sup>48</sup> *Id.* at 100.

<sup>49</sup> *Id.* (citations omitted).

the Act has led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred through the use of routine background checks by employers and landlords.”<sup>50</sup> Elaborating, the Court stated that

[a]lthough the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record. The State makes the facts underlying the offenses and the resulting convictions accessible so members of the public can take the precautions they deem necessary before dealing with the registrant.<sup>51</sup>

The Court also rejected the view that the law imposed an affirmative disability or restraint because it required that identifying information updates and periodic verifications occur in-person, concluding that the record did not specify that they must be in-person.<sup>52</sup> Finally, the Court rejected the argument that the law was “parallel” to probation and parole, indisputably criminal sanctions, because the registrants “are free to move where they wish and to live and work as other citizens, with no supervision.”<sup>53</sup> Moreover, “[a]lthough registrants must inform the authorities after they change their facial features (such as growing a beard), borrow a car, or seek psychiatric treatment, they are not required to seek permission to do so.”<sup>54</sup>

*Smith*, decided almost two decades ago, is the go-to precedent for state and federal courts assessing ex post facto claims.<sup>55</sup> In reaching its finding that the Alaska law was non-punitive in purpose and effect, the Court dismissed as “minor” the many significant non-physical burdens of registration and community notification, such as the requirement that registrants regularly confirm their registry information (possibly every three months) and alert authorities of any changes in the interim. In so concluding the Court ignored a basic teaching of several of its earlier decisions that a retroactive law is ex post facto if it makes “more burdensome the punishment for a crime,”<sup>56</sup> without consideration of degree of the burden imposed.<sup>57</sup>

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 101.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> For an extended critique of *Smith*'s application of the *Mendoza-Martinez* factors and the factors themselves, see LOGAN, *supra* note 20, at 122–34, as well as the problematic nature of the “clearest proof” of punitive intent requirement, *see id.* at 134–35, and the tendency of some courts to reject “as applied” challenges and consideration of the “effects” of a challenged law, *see id.* at 132–34.

<sup>56</sup> *See Collins v. Youngblood*, 497 U.S. 37, 42 (1990); *Dobbert v. Florida*, 432 U.S. 282, 292 (1977); *Beazell v. Ohio*, 269 U.S. 167, 169 (1925).

<sup>57</sup> The discussion here should not be taken as an endorsement of the affirmative disability or restraint factor itself, as it is problematic. For instance, a fine, a longstanding sanction used by the



More important is the *Smith* Court's use of imprisonment as the "paradigmatic affirmative disability or restraint," which a non-carceral retroactive sanction by definition cannot satisfy.<sup>58</sup> When assessing whether the affirmative disability or restraint factor is satisfied courts look to the Court's 1997 decision in *Kansas v. Hendricks*,<sup>59</sup> which held that involuntary, potentially life-long commitment of "sexually violent predators" is not punitive. As the Seventh Circuit Court of Appeals recently said of *Hendricks*, "[e]ven when the Supreme Court confronted a state law imposing a paradigmatic form of restraint—involuntary confinement—the Court held that this did not make the law punitive."<sup>60</sup>

The carceral focus was on full display in another Seventh Circuit decision, *Belleau v. Wall*,<sup>61</sup> which rejected an ex post facto claim against a law retroactively requiring lifetime wearing of a global positioning system (GPS) tracking device. Worn on the ankle continuously, requiring payment of a monthly fee, and requiring recharging for an hour each day, the device was used by state corrections authorities to monitor individuals on probation or parole.<sup>62</sup> Writing for the court, Judge Richard Posner reasoned that a "monitoring law is not punishment; it is prevention."<sup>63</sup> Citing *Hendricks*, he wrote that

the difference between having to wear the monitor and being civilly committed is that the former measure is less likely to be perceived as punishment than is being imprisoned in an asylum for the criminally insane. So if civil commitment is not punishment, as the Supreme Court has ruled, then *a fortiori* neither is having to wear an anklet monitor.<sup>64</sup>

Judge Posner reasoned that "[h]aving to wear the monitor is a bother, an inconvenience, an annoyance, but no more is punishment than being stopped by a

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criminal justice system, does not impose what one would generally consider an "affirmative disability or restraint." See, e.g., *United States v. Gelais*, 952 F.2d 90, 97 (5th Cir. 1992).

<sup>58</sup> As the Wisconsin Supreme Court stated in a recent decision rejecting an ex post facto claim, "'disability and restraint' are 'normally understood to mean imprisonment.'" *State v. Schmidt*, 960 N.W.2d 888, 898 (Wis. 2021) (citation omitted). Worthy of note is the *Schmidt* court's use of "affirmative disability and restraint," not "affirmative disability or restraint," specified in *Smith. Id.*

<sup>59</sup> *Kansas v. Hendricks*, 521 U.S. 346 (1997). In *Hendricks*, the Court acknowledged that the civil commitment scheme involved "an affirmative restraint," but noted that even physical detainment "'does not inexorably lead to the conclusion that the government has imposed punishment.'" *Id.* at 363 (citation omitted).

<sup>60</sup> *Hope v. Comm'r of Ind. Dep't of Corr.*, 9 F.4th 513, 532–33 (7th Cir. 2021) (citing *Hendricks*, 521 U.S. at 363).

<sup>61</sup> *Belleau v. Wall*, 811 F.3d 929 (7th Cir. 2016).

<sup>62</sup> *Id.* at 931–32.

<sup>63</sup> *Id.* at 937.

<sup>64</sup> *Id.*

police officer on the highway and asked to show your driver's license is punishment, or being placed on a sex offender registry . . . [is] punishment.”<sup>65</sup>

### III. A NEW APPROACH

By focusing on carceral restraint, *Smith* failed to take account of a critically important shift in correctional strategies that has occurred in recent years, of which sex offender registration and community notification is a notable illustration. The legal requirement to personally provide registry information, certify at specified intervals its accuracy, and update it regarding any changes (such as growing a beard or driving a different car), under threat of prosecution for failing to do so, represents a unique “disability or restraint.” Surely no less consequential are the negative consequences flowing from community notification, whereby a registrant’s identifying information is publicly disseminated by government-run websites and other means, which often results in harassment, job loss, forced residential moves, and vigilantism.<sup>66</sup>

By viewing such consequences as mere unintended byproducts of disseminated public information, a non-punitive “legitimate governmental objective,” the *Smith* majority failed to recognize that registration and community notification laws result

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<sup>65</sup> *Id.* For an alternative characterization of what is entailed in wearing a tracking device see *Riley v. N.J. State Parole Bd.*, 98 A.3d 544, 559 (N.J. 2014):

[The petitioner must be] tethered to an electronic device that must be recharged every sixteen hours, and therefore he cannot travel to places where there are no electrical outlets. In addition to the requirement that he tell his parole officer before he leaves the State, Riley cannot travel to places without GPS reception because his tracker will be rendered inoperable and his parole officer will be unable to monitor his whereabouts . . . Moreover, the tracking device, permanently strapped to Riley's leg, causes pain when he sleeps . . . If Riley were to wear shorts in a mall or a bathing suit on the beach, or change clothes in a public locker or dressing room, or pass through an airport, the presence of the device would become apparent to members of the public. The tracking device attached to Riley's ankle identifies Riley as a sex offender no less clearly than if he wore a scarlet letter. His parole officer may also send audible messages to Riley on the tracker that he may receive in a public place.

Similarly illustrative is the dissent of six judges from the Sixth Circuit Court of Appeals’ denial of the defendant's petition for rehearing en banc regarding the retroactive application of GPS monitoring in *Doe v. Bredeesen*, 507 F.3d 998 (6th Cir. 2007), *cert. denied*, 555 U.S. 921 (2008). See *Doe v. Bredeesen*, 521 F.3d 680, 681 (6th Cir. 2008) (Keith., J., dissenting from denial, joined by Martin, Daughtrey, Moore, Cole, and Clay, J.J.) (calling the tracking device “a catalyst for public ridicule . . . a form of shaming, humiliation, and banishment, which are well-recognized historical forms of punishment” and asserting that “[t]he majority, in upholding the Surveillance Act, deliberately turned a blind eye to the obvious effects of forcing [the defendant] to wear such a large box on his person”).

<sup>66</sup> See Kelly Socia, *The Ancillary Consequences of SORN*, SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION LAWS: AN EMPIRICAL EVALUATION, at 78 (Wayne A. Logan & J.J. Prescott eds., 2021). For in-depth discussion of the history and nature of registration and community notification laws, as well as their impact on legal doctrine, governance, and privacy, see generally WAYNE A. LOGAN, *KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA* (2009).

in a “hidden custody” of targeted individuals.<sup>67</sup> By design, the laws seek to achieve the controlling surveillance effect of Jeremy Bentham's Panopticon, with its central tower and inspector's lodge.<sup>68</sup> Like the Panopticon, notification endeavors to make those subject to it feel that they are being watched,<sup>69</sup> what Michel Foucault described as “a state of conscious and permanent visibility that assures the automatic functioning of power. So to arrange things that the surveillance is permanent in its effects, even if it is discontinuous in its action.”<sup>70</sup>

In short, the Court, in drawing a constitutional line, should have exhibited greater awareness of the ongoing evolution toward non-carceral social control methods.<sup>71</sup> Concluding that such strategies seek to achieve prevention, not impose punishment, and therefore do not impose a “disability or restraint,” as Judge Posner did in *Belleau v. Wall* with respect to life-long satellite tracking, ignores a fundamental shift in the evolution of the nation's social control arsenal.<sup>72</sup>

In a recent decision, the Sixth Circuit Court of Appeals recognized this shift and accorded it importance in its affirmative restraint or disability analysis. In *Does # 1-5 v. Snyder*,<sup>73</sup> the Sixth Circuit of Appeals invalidated on federal ex post facto grounds Michigan's registration and community notification law that, like many other recently amended state laws, not only requires in-person information verification and updating by registrants, but also limits where they can live, “loiter,” and work (e.g., not within 1,000 feet of a school). To the Sixth Circuit, Michigan's retroactive law was “something altogether different from and more troubling than Alaska's [circa 2000] first-generation registry law [addressed in *Smith*].”<sup>74</sup>

In assessing the affirmative disability or restraint factor, the unanimous court, in an opinion authored by Judge Alice Batchelder, found that the Michigan law “requires much more from registrants than did the statute in *Smith*,” deeming “[m]ost significant . . . its regulation of where registrants may live, work, and ‘loiter.’”<sup>75</sup> The

<sup>67</sup> This phrase is borrowed from STANLEY COHEN, *VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT AND CLASSIFICATION* 71 (1985).

<sup>68</sup> See JEREMY BENTHAM, *THE PANOPTICON WRITINGS* (Miran Božovič ed., Verso Books 1995) (1791).

<sup>69</sup> See REG WHITAKER, *THE END OF PRIVACY: HOW TOTAL SURVEILLANCE IS BECOMING A REALITY* 35 (1999) (“The Inspector sees without being seen. His presence, which is also an absence, is in his gaze alone. Of course, the omnipresence of the Inspector is nothing more than an architectural artifice, really just an elaborate conjuring trick.”).

<sup>70</sup> MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 201 (Alan Sheridan trans., Vintage Books 1979).

<sup>71</sup> See generally DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001).

<sup>72</sup> Cf. *United States v. Brown*, 381 U.S. 437, 458 (1965) (recognizing in a Bill of Attainder challenge that “[o]ne of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment”).

<sup>73</sup> *Does # 1-5 v. Snyder*, 834 F.3d 696, 703 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 55 (2017).

<sup>74</sup> *Id.* at 705.

<sup>75</sup> *Id.* at 703.

“restrictions put significant restraints on how registrants may live their lives.”<sup>76</sup> The court also attached significance to the fact that, unlike the Alaska law, the Michigan law required that registrants appear in person, both initially and for updates, possibly for their lifetimes, which the court regarded as “direct restraints on personal conduct.”<sup>77</sup> Furthermore, the court rejected the state’s argument that the “restraints are not physical in nature” and that the law’s effects on petitioners were therefore “minor and indirect,” like those in the Alaska law challenged in *Smith*.<sup>78</sup> In so doing, the court provided the critically important observation that

surely something is not “minor and indirect” just because no one is actually being lugged off in cold irons bound. Indeed, those irons are always in the background since failure to comply with these restrictions carries with it the threat of serious punishment, including imprisonment. These restraints are greater than those imposed by the Alaska statute by an order of magnitude.<sup>79</sup>

Equally unavailing was Michigan’s effort to use occupational disbarment as a metric for assessing punishment, as the Supreme Court did in *Smith*. The court reasoned that “no disbarment case we are aware of has confronted a law with such sweeping conditions or approved of disbarment without some nexus between the regulatory purpose and the job at issue. [The Michigan law’s] restrictions are again far more onerous than those considered in *Smith*.”<sup>80</sup> The court concluded by invoking the

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* The *Snyder* court’s language echoes that of the Supreme Court over a century before in *Weems v. United States*, 217 U.S. 349 (1910). In *Weems*, which originated in the Philippines, then a U.S. territory, the Court addressed a challenge to “cadena temporal,” a punishment involving a period of imprisonment wearing chains while performing hard labor, as well as subsequent suffering of “accessory penalties,” “civil interdiction,” “perpetual absolute disqualification,” and “subjection to surveillance during life.” The Court regarded the punishment as violative of the Eighth Amendment’s prohibition of cruel and unusual punishment, attaching particular importance to the post-imprisonment penalties imposed, and their debilitating effect on Weems:

Its minimum degree is confinement in a penal institution for twelve years and one day, a chain at the ankle and wrist of the offender, hard and painful labor . . . These parts of his penalty endure for the term of imprisonment. From other parts there is no intermission. His prison bars and chains are removed, it is true, after twelve years, but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate, not being able to change his domicil[e] without giving notice to the ‘authority immediately in charge of his surveillance,’ and without permission in writing. He may not seek, even in other scenes and among other people, to retrieve his fall from rectitude. Even that hope is taken from him, and he is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty. . . .

*Id.* at 366.

<sup>80</sup> *Snyder*, 834 F.3d at 704.

structural constitutional role of the Clause, noted earlier, stating that “the fact that sex offenders are so widely feared and disdained by the general public implicates the core counter-majoritarian principle embodied in the Ex Post Facto [C]ause.”<sup>81</sup>

The reasoning and result in *Snyder* mark a very important shift. Being mindful of the structural constitutional role of the Clause and recognizing that physical incapacitation should not be the dispositive metric of the affirmative disability or restraint analysis—that one need not be “lugged off in cold irons bound”—liberates courts from the historically hidebound understanding driving *Smith*. By utilizing a framework attuned to modern forms of non-carceral social control, *Snyder* adopted an approach absent from the Supreme Court’s modern ex post facto doctrine, one in line with the Court’s more general view that a constitutional provision should turn on the “reasons” it was included in the Constitution and “the evils it was designed to eliminate.”<sup>82</sup>

Although absent from the Court’s modern ex post facto doctrine, constitutional purposivism is integral to the Court’s case law concerning the Bill of Attainder Clause (BOAC), which as noted earlier is considered the constitutional “twin” of the Ex Post Facto Clause and also prohibits legislative imposition of punishment.<sup>83</sup> In *Carmell v. Texas*,<sup>84</sup> the Court recognized the “kinship between bills of attainder and ex post facto laws,”<sup>85</sup> which is evident in the numerous challenges invoking both clauses dating back decades.

In its 1965 decision *Brown v. United States*,<sup>86</sup> the Court invalidated on BOAC grounds a law making it a crime for a Communist Party member to serve as an officer or employee of a labor union. Tracing the historical events giving rise to the inclusion of the BOAC in the Constitution,<sup>87</sup> the Court stated that while historical instances of attainders provided some guidance, “the proper scope of the Bill of Attainder Clause, and its relevance to contemporary problems, must ultimately be sought by attempting to discern the reasons for its inclusion in the Constitution, and the evils it was designed to eliminate.”<sup>88</sup> The BOAC, the *Brown* Court stated, “was

<sup>81</sup> *Id.* at 705–706.

<sup>82</sup> *United States v. Brown*, 381 U.S. 437, 442 (1965). *See also, e.g.*, *Dufresne v. Baer*, 744 F.2d 1543, 1546 (11th Cir. 1984) (“When subjecting a law to ex post facto scrutiny, courts should bear in mind the related aims of the ex post facto clause . . .”).

<sup>83</sup> *See supra* notes 27–30.

<sup>84</sup> *Carmell v. Texas*, 529 U.S. 513 (2000).

<sup>85</sup> *Id.* at 536. *See also* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 513 (1989) (Stevens, J., concurring) (“The constitutional prohibitions against the enactment of ex post facto laws and bills of attainder reflect a valid concern about the use of the political process to punish or characterize past conduct of private citizens.”); *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 469 n.30 (1977) (citation omitted) (“The linking of bills of attainder and ex post facto laws is explained by the fact that a legislative denunciation and condemnation of an individual often acted to impose retroactive punishment.”).

<sup>86</sup> *Brown*, 381 U.S. 437.

<sup>87</sup> *Id.* at 441–42.

<sup>88</sup> *Id.* at 442.

intended not as a narrow, technical (and therefore soon to be outmoded) prohibition . . . .”<sup>89</sup>

This same insistence on constitutional purpose, generous construction, and temporal flexibility was evidenced in the Court’s next BOAC decision, *Nixon v. Administrator of General Services*.<sup>90</sup> In *Nixon*, the Court rejected a BOAC claim brought by President Richard Nixon against the federal Presidential Recordings and Materials Preservation Act, which allowed the government to take custody of his presidential papers and materials, preventing their possible destruction. Nixon sued to enjoin implementation of the Act, arguing *inter alia* that it singled him out for punishment in violation of the BOAC. Although the Court rejected the challenge, it recognized that its BOAC cases provided a “broad and generous meaning to the constitutional protection against bills of attainder.”<sup>91</sup> Importantly, moreover, the Court added that its “treatment of the scope of the Clause has never precluded the possibility that new burdens and deprivations might be legislatively fashioned that are inconsistent with the bill of attainder guarantee.”<sup>92</sup>

In *Snyder*, the Sixth Circuit commendably adopted a similarly “broad and generous meaning,”<sup>93</sup> one sensitive to constitutional purpose<sup>94</sup> and willing to consider the effects of “new burdens and deprivations . . . legislatively fashioned.”<sup>95</sup> *Snyder* was guided by a key interpretive principle animating the Supreme Court’s earlier ex post facto decisions, one sensitive to the practical impact, not the form, of the law challenged. As the Court stated in its 1867 decision *Cummings v. Missouri*,<sup>96</sup> which invalidated a state law restrictively subjecting Confederate sympathizers to occupational prohibitions, the ex post facto prohibition is

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<sup>89</sup> *Id.*

<sup>90</sup> *Nixon*, 433 U.S. 425.

<sup>91</sup> *Id.* at 469.

<sup>92</sup> *Id.* at 475. The Court’s decisions applying the anti-retroactivity presumption provide useful insight into the kinds of burdens warranting attention. In *Vartelas v. Holder*, 566 U.S. 257 (2012), which addressed whether Congress intended for an immigration law to apply retroactively, the Court stated that the anti-retroactivity presumption arises when retroactive application of a law would “tak[e] away or impai[r] vested rights acquired under existing laws, or creat[e] a new obligation, impos[e] a new duty, or attac[h] a new disability, in respect to transactions or considerations already past.” *Id.* at 266 (quoting *Society for Propagation of Gospel v. Wheeler*, 22 F. Cas. 756, 767 (No. 13,156) (CCNH 1814) (Story, J.)). The assessment of whether a law should be applied retroactively, the Court stated in *Martin v. Hadix*, 527 U.S. 343 (1999), ultimately “demands a commonsense, functional judgment about ‘whether the new provision attaches new legal consequences to events completed before its enactment.’” *Id.* at 357–58 (citation omitted). *Cf.* *Piasecki v. Ct. of Common Pleas, Bucks Cnty., Pa.*, 917 F.3d 161 (3d Cir. 2019) (concluding that sex offender registration requirements were sufficiently restrictive to constitute “custody” for purposes of raising a federal habeas corpus petition).

<sup>93</sup> *Nixon*, 433 U.S. at 469.

<sup>94</sup> *Brown*, 381 U.S. at 442.

<sup>95</sup> *Nixon*, 433 U.S. at 475.

<sup>96</sup> *Cummings v. Missouri*, 71 U.S. 277 (1866).

intended to secure the liberty of the citizen, [and] cannot be evaded by the form in which the power of the State is exerted. If this were not so, if that which cannot be accomplished by means looking directly to the end, can be accomplished by indirect means, the inhibition may be evaded at pleasure. No kind of oppression can be named, against which the framers of the Constitution intended to guard, which may not be effected [sic].<sup>97</sup>

#### CONCLUSION

The temptation for Congress and state legislatures to pass burdensome retroactive laws is age-old and, if recent history is to serve as a guide, will not abate any time soon. The Ex Post Facto Clause, as Chief Justice Marshall observed not long after the nation's formation, was designed to guard against such laws, inspired by the "feelings of the moment" and the "sudden and strong passions" that can beset legislative bodies.<sup>98</sup> As Justice Stephen Breyer recognized in his dissent in *Kansas v. Hendricks*, where the majority deemed likely life-long involuntary commitment non-punitive for ex post facto purposes, the Clause "provides an assurance that, where so significant a restriction of an individual's basic freedoms is at issue, a [legislature] cannot cut corners. Rather, the legislature must hew to the Constitution's liberty-protecting line."<sup>99</sup>

As a constitutional matter, this fidelity is important because, much as the Supreme Court has said with regard to the Fourth Amendment, the Clause should "provide *at a minimum* the degree of protection it afforded when it was adopted."<sup>100</sup> Suffice it to say, twenty-first century America differs in myriad important ways from the late eighteenth century known to the Framers when they included the Ex Post Facto Clause in Article I of the Constitution. What they would recognize, however, is the modern legislative penchant to single out disdained individuals (today, very often persons previously convicted of crimes) for burdensome retroactive laws.

This essay has focused on an important, but not the sole, aspect of modern ex post facto doctrine in need of retooling—the "affirmative disability or restraint" factor courts use when assessing whether a retroactive law is punitive in nature, and therefore prohibited by the Ex Post Facto Clause.<sup>101</sup> Doing so, it is hoped, will help

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<sup>97</sup> *Id.* at 329. See also *Weaver v. Graham*, 450 U.S. 24, 31 (1981) (reiterating that "it is the effect, not the form, of the law that determines whether it is *ex post facto*"). For fuller discussion of how the "punishment question" might be retooled, see LOGAN, *supra* note 21, ch. 6.

<sup>98</sup> *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810) (Marshall, C.J.).

<sup>99</sup> *Kansas v. Hendricks*, 521 U.S. 346, 396 (1997) (Breyer, J., dissenting).

<sup>100</sup> *United States v. Jones*, 565 U.S. 400, 411 (2012) (emphasis in the original). See also *id.* at 406 (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001) ("[W]e must 'assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'").

<sup>101</sup> For examination of other ways in which modern ex post facto doctrine might be retooled, including whether the Clause should also prohibit retroactive civil, not only criminal laws, and extend coverage beyond *Calder's* four specified kinds of retroactive laws, see LOGAN, *supra* note 20, ch. 7.

resuscitate and fortify the liberty-protecting constitutional bulwark the Clause was intended to provide.