

## Banishment and the Right to Live Where You Want

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In thirteen states, those convicted of a sexual crime against children are banned from living within a certain distance of child-centered businesses and buildings. These restrictions are civil, not criminal.<sup>1</sup> There are no time limits on these bans, and no provision is made for a review of this status.<sup>2</sup> Felons affected by such rules have begun to challenge their legality, without success. They have alleged these laws violate a number of rights, including the right to substantive and procedural due process, the right to marry, protection against ex post facto laws, and the right to have a family, among others.<sup>3</sup>

The plaintiffs in *Doe v Miller*<sup>4</sup> made a novel and interesting claim: Iowa's law governing the residency of sex offenders violated their fundamental, substantive, unenumerated right to live where they want.<sup>5</sup> *Washington v Glucksberg*<sup>6</sup> directs courts to consider three factors when determining whether such a right exists: “[T]his Nation’s

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<sup>1</sup> Such laws exist in Alabama, Arkansas, California, Florida, Georgia, Illinois, Iowa, Kentucky, Louisiana, Ohio, Oklahoma, Oregon, and Tennessee. See *Doe v Miller*, 298 F Supp 2d 844, 848 (SD Iowa 2004) (collecting state legislation).

<sup>2</sup> See, for example, *Doe*, 298 F Supp 2d at 849 (noting that the Iowa law “gives no indication as to how long the restriction will apply to any given individual”).

<sup>3</sup> See, for example, *Doe v Baker*, 2006 US Dist LEXIS 67925 (ND Ga 2006) (alleging a violation of substantive due process); *Doe*, 298 F Supp 2d at 844 (holding Iowa law unconstitutional on due process and ex post facto grounds), revd, *Doe v Miller*, 405 F3d 700 (8th Cir 2005) (holding no such violation); *State v Seering*, 701 NW2d 655, 660 (Iowa 2005) (alleging the law is unconstitutional on substantive and procedural due process, ex post facto, self-incrimination, and cruel and unusual punishment grounds); *State v Worst*, 2005 Ohio App LEXIS 5900 (alleging residency restrictions violate property rights); *Phillips v State*, 2005 Ark App LEXIS 903 (alleging a violation of equal protection); *J.L.N. v State*, 894 S2d 751, 752–53 (Ala 2004) (alleging a violation of the right to marry); *Thorpe v Commonwealth*, 2003 Ky App LEXIS 73 (alleging law violated ex post facto restrictions).

<sup>4</sup> 405 F3d 700 (8th Cir 2005).

<sup>5</sup> Seemingly, this formulation of the challenge was not used at trial, only in the appellate proceeding. Compare *Doe*, 298 F Supp 2d at 872–75 (addressing the two rights that the Does claimed were fundamental and violated by the Iowa law: the right to personal choice regarding family matters and the right to travel), with *Doe*, 405 F3d at 709 (noting the Does’ argument “that several ‘fundamental rights’ are infringed by Iowa’s residency restriction, including . . . ‘the fundamental right to live where you want’”). The appeals court nonetheless addressed this claim on the merits and held there was no such right.

<sup>6</sup> 521 US 702 (1997) (providing the method by which substantive due process claims are analyzed).

history and tradition,”<sup>7</sup> “the concept of ordered liberty,”<sup>8</sup> and a “careful description of the asserted fundamental liberty interests.”<sup>9</sup> Had the plaintiffs succeeded, the Iowa law would be subject to review under strict scrutiny, rather than rational basis.<sup>10</sup> Often this distinction makes all the difference. Strict scrutiny has been called “‘strict’ in theory and fatal in fact,”<sup>11</sup> and requires the government to show that the law is necessary to promote a compelling state interest.<sup>12</sup> To satisfy rational basis, a law need only be rationally related to a legitimate state interest.<sup>13</sup>

The plaintiff’s claim was eventually rejected by the appeals court—mandating only rational basis review<sup>14</sup>—but the court did not give this question the full attention it deserved under *Glucksberg*.

This Comment is an attempt to remedy that gap. It concludes that our nation’s historical disapproval of banishment, from colonial times forward, supports a limited right to live where you want. Specifically, people enjoy a fundamental, substantive, unenumerated right to live in the political subdivision of their choice. Because this right is fundamental, it may be infringed only by a law that passes strict scrutiny or after provision of individualized due process.

Part I develops this right. It first shows that the historical treatment of banishment is consistent with this right. It then adduces the liberty interests at stake, which further sharpens the contours of the proposed right. Part II examines how recognition of this right would affect the residency restriction laws mentioned at the outset. An immediate problem appears: is there a principled limit to the scope of this right? There is, and importing doctrine from the “one-person, one-vote” cases supplies a relatively clear rule. Part III identifies public policy interests implicated by these laws.

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<sup>7</sup> Id at 721.

<sup>8</sup> Id.

<sup>9</sup> See *Russ v Watts*, 414 F3d 783, 789 (7th Cir 2005) (explaining the doctrine), citing *Glucksberg*, 521 US at 720–21.

<sup>10</sup> See *Doe*, 405 F3d at 714 (noting that under Supreme Court precedent, restrictions that do not implicate fundamental rights are subject to rational basis review).

<sup>11</sup> See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv L Rev 1, 8 (1972) (conceptualizing the Warren Court’s context-dependent two-tier structure of strict scrutiny review, with the newer iteration “‘strict’ in theory and fatal in fact,” and the older version “minimal . . . in theory and virtually non in fact”).

<sup>12</sup> See *Doe*, 405 F3d at 709 (explaining that fundamental rights may not be infringed unless the infringement is “narrowly tailored to serve a compelling state interest”).

<sup>13</sup> See id at 714 (using the standard of “rationally advancing some legitimate government purpose” to evaluate a statute that did not implicate fundamental rights).

<sup>14</sup> Id at 715–16 (reasoning that protection of children is a sufficient rational basis for the law).

## I. DEFINING AND DEFENDING THE RIGHT

Tradition and liberty demand that people enjoy a fundamental right to live in the political subdivision of their choice, meeting the requirements of the test established in *Washington v Glucksberg*. The argument proceeds in four steps. First, this nation's history shows that people may not be banished from political subdivisions without individualized due process that meets the requirements of criminal conviction. Fundamental rights enjoy identical protection—actions against them must satisfy strict scrutiny. Second, a prohibition levied against the government is logically equivalent to a right enjoyed by the people: if government cannot force a person out of a jurisdiction, they enjoy a right to remain. Third, the liberty interests at stake warrant protection under *Glucksberg*: they are crucial to ordered liberty.<sup>15</sup> The most important liberty interests are political; the nature of these interests cabin the right still further. The political nature of the interests at stake guides the fourth step, the requirement of careful description. Its most precise formulation: people enjoy a fundamental right to live in the political subdivision of their choice.

### A. The Standard

*Glucksberg* and *Lawrence v Texas*<sup>16</sup> are the most recent pronouncements by the court on the boundaries of substantive due process.

*Glucksberg* lays out a two-part analysis for evaluating a claim of a new right.<sup>17</sup> First, the right must be “objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed.”<sup>18</sup> Second, the Court requires a “careful description of the asserted fundamental liberty interest.”<sup>19</sup> *Glucksberg* cites approvingly a litany of rights grounded in this doctrine: the right to marry, to have children, to direct the education and upbringing of one’s children, to marital privacy, to use contraception, to bodily integrity, and to abortion.<sup>20</sup> In the case before it, the Court held that the right to commit

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<sup>15</sup> For an explanation of ordered liberty, see Part I.A.

<sup>16</sup> 539 US 558 (2003) (holding that intimate consensual sexual conduct is protected by substantive due process).

<sup>17</sup> See *Russ v Watts*, 414 F3d 783, 789 (7th Cir 2005) (explaining the doctrine), citing *Glucksberg*, 521 US at 720–21.

<sup>18</sup> *Glucksberg*, 521 US at 721 (internal quotation marks and citations omitted).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 720 (noting that “in a long line of cases, [the Supreme Court has] held that, in addition to the specific freedoms protected by the Bill of Rights, the ‘liberty’ specially protected by the Due Process Clause” includes these rights) (internal citations omitted).

suicide (their preferred description<sup>21</sup>) has no place in this country's history.<sup>22</sup> The Court noted that Washington State has long made suicide or assistance in a suicide illegal.<sup>23</sup> The common-law tradition has featured similar restrictions "for over 700 years."<sup>24</sup>

One court applying the historical prong of *Glucksberg* cited traditions "as early as the Articles of Confederation" in finding a right to intrastate travel.<sup>25</sup> The same court cited cases written as early as 1849 and as recently as 1997 that all spoke to the importance of such freedom.<sup>26</sup> The Eleventh Circuit, in *Williams v Attorney General of Alabama*,<sup>27</sup> required "a showing that the right to use sexual devices is 'deeply rooted in this Nation's history and tradition'" when it was asked to declare a substantive due process right to purchase sex toys.<sup>28</sup> Although perhaps not necessary, these cases suggest it is sufficient to cite historical evidence that positively demonstrates that the interest<sup>29</sup> has been historically protected in order to satisfy *Glucksberg*'s first prong.

Apart from pedigree, the interest must also be crucial to ordered liberty. Though this standard is intended to provide guidelines for analysis "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences" of the court,<sup>30</sup> it is not obvious how to figure out which rights are implicit in the concept of ordered liberty. One circuit court has held that a right is sufficiently important if it is necessary "to carry out our daily life activities."<sup>31</sup> In *Meyer v Nebraska*,<sup>32</sup> the Court wrote that the Fourteenth Amendment protects privileges that are "essential to the orderly pursuit of happiness by free men."<sup>33</sup>

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<sup>21</sup> See *id.* at 722–23 ("We have a tradition of carefully formulating the interest at stake. . . . [T]he question before us is whether [there is a constitutionally protected] right to commit suicide which itself includes a right to assistance in doing so.").

<sup>22</sup> *Id.* at 723 ("Here . . . we are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today.").

<sup>23</sup> See *id.* at 706.

<sup>24</sup> *Id.* at 711.

<sup>25</sup> See *Johnson v Cincinnati*, 310 F3d 484, 497 (6th Cir 2002) (listing several cases in which courts have noted the existence of a right to intrastate travel, though the Supreme Court has never explicitly named intrastate travel as a fundamental right).

<sup>26</sup> See *id.*

<sup>27</sup> 378 F3d 1232 (11th Cir 2004).

<sup>28</sup> *Id.* at 1245 (holding that the right to purchase sexual devices is not protected by the Fourteenth Amendment).

<sup>29</sup> That is, the interest that the plaintiff proposes as a right.

<sup>30</sup> *Glucksberg*, 521 US at 720 (internal quotation marks and citations omitted).

<sup>31</sup> *Johnson*, 310 F3d at 498.

<sup>32</sup> 262 US 390 (1923).

<sup>33</sup> *Id.* at 399 (citing examples of such privileges, including "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, [and] to marry").

*Glucksberg* also requires a careful description of the interest.<sup>34</sup> The Court in *Glucksberg* described the right as the right to commit suicide, a somewhat narrow phrasing. The court in *Williams* rejected the plaintiff's suggestion that a fundamental right to sexual privacy was at stake and examined the history for a right to sexual devices instead.<sup>35</sup> These cases suggest the court will look for the narrowest description of the proposed right that is implicated by the facts.<sup>36</sup>

*Lawrence* complicates the analysis of *Glucksberg*, noting that “[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”<sup>37</sup> This language suggests that while a *Glucksberg* analysis is no longer necessary, it is still sufficient. The dissent in *Lawrence* must agree that *Glucksberg* is still good law: the dissent took the majority to task for expanding the doctrine past the limits of *Glucksberg*.<sup>38</sup>

Even if *Lawrence* is interpreted to rule out a historical analysis in some circumstances, the issue in *Lawrence* is distinguishable. *Lawrence* was concerned with protection against government intrusion into private conduct.<sup>39</sup> This case, on the other hand, involves a question of administration of a public justice system, and questions of what kinds of public costs communities can shift around.<sup>40</sup> Whatever the status of this difficult question, it is not the purpose of this Comment to distinguish when a historical approach is necessary and when the Court will engage in a different inquiry. Suffice it to say that history is still at least one way of conducting this inquiry.

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<sup>34</sup> See 521 US at 703 (observing that “the Court has required a ‘careful description’ of the asserted fundamental liberty interest”). See also *Williams*, 378 F3d at 1241 (noting that the “Supreme Court . . . [has] emphasiz[ed] the importance of beginning substantive-due-process analysis with a ‘careful description’”).

<sup>35</sup> See 378 F3d at 1242 (noting that given “the Supreme Court’s . . . admonition to carefully define the right at stake . . . the district court erred in undertaking to find a generalized ‘right to sexual privacy’”).

<sup>36</sup> See id at 1240 (“Indeed, the requirement of a ‘careful description’ is designed to prevent the reviewing court from venturing into vaster constitutional vistas than are called for by the facts at hand.”), citing *Brockett v Spokane Arcades*, 472 US 491, 501 (1985).

<sup>37</sup> *Lawrence*, 539 US at 572, quoting *County of Sacramento v Lewis*, 523 US 833, 857 (1998) (Kennedy concurring).

<sup>38</sup> *Lawrence*, 539 US at 594 (Scalia dissenting) (“Not once does [the majority] describe homosexual sodomy as a ‘fundamental right’ or a ‘fundamental liberty interest.’”).

<sup>39</sup> See id at 578 (majority) (“The case [ ] involve[s] two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives.”).

<sup>40</sup> See, for example, *Williams*, 378 F3d at 1238 (noting that regulation of public sale of sex toys does not implicate private conduct because “[t]here is nothing ‘private’ or ‘consensual’ about the advertising and sale of a dildo”).

## B. Step One: History

The meat of this Comment focuses on the history of the use of banishment. Courts have noted that banishment has been used by all governments throughout history.<sup>41</sup> American courts have not been completely consistent in their treatment. Nonetheless, the historical treatment of banishment by American courts is consistent with a right not to be banished. Banishment has been permitted when it is imposed in a manner consistent with a modern understanding of (procedural) due process. When attempts to banish individuals fall short of this standard, the banishment is typically disfavored. The only form of banishment to receive wide judicial acceptance at common law is banishment according to a criminal statute after due process has been given—exactly the sort of protection we give to a fundamental right. At the risk of anachronism, the evidence shows that courts have treated banishment as if they were navigating around a fundamental right.<sup>42</sup> This Part I.B develops that evidence; Part I.C. analyzes and defends a set of liberty interests that give sharp boundaries to this potentially amorphous claim.

### 1. Pre-revolutionary use of banishment.

In the earliest days of settlement, banishment was used by religious communities to discipline members. Historians have discovered documents from Salem detailing the banishment of members from 1629 through 1680 for a variety of crimes, including fornication, blasphemy, and refusal to attend church.<sup>43</sup> The detailed records show that banishment was used only after other forms of sanction had failed.<sup>44</sup>

The use of banishment for this purpose was controversial even then. A pamphlet at the time denounced the banishment of Roger Williams in strong terms:

The last fossil of the Theocracy, that remains, is this Sentence of the Court. Let it be “dragged forth from its dread abode”—and formally disposed of. The Massachusetts Bill of Rights, in 1834—made a very thorough end of the Theocratic System—but why

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<sup>41</sup> See, for example, *Poodry v Tonawanda Band of Seneca Indians*, 85 F3d 874, 896 (2d Cir 1996) (“The practice of banishment has existed throughout the history of traditional societies, and in our Anglo-American tradition as well.”).

<sup>42</sup> The doctrines in play—levels of scrutiny, fundamental rights, substantive due process—are recent developments, so the language used in *Glucksberg* does not appear. Courts make decisions *as if* they are applying these doctrines though they could not be doing so.

<sup>43</sup> See generally Ernest W. Baughman, *Excommunications and Banishments from the First Church in Salem and the Town of Salem, 1629–1680*, 113 *Essex Institute Historical Collections* 89 (1977).

<sup>44</sup> *Id.* at 104.

should this obnoxious old keepsake, as a bone of the idol our fathers did allow—be retained? Let it be cremated.<sup>45</sup>

These two historical documents illustrate a pattern that Americans followed until after the dust of the American Revolution settled: though courts were dubious about the power of states to banish offenders, most states did so as a response to significant worries such as treason and war.

## 2. Revolutionary excesses.

Banishment, also referred to as transportation,<sup>46</sup> “provoked some of the most heated denunciations of imperial policy voiced by Americans before the Revolutionary Era.”<sup>47</sup> It was used by Britain as the worst criminal penalty short of capital punishment, and in the eighteenth century, “some 50,000 convicts were transported” to the colonies.<sup>48</sup> If the convict returned, he was subject to execution.<sup>49</sup> Benjamin Franklin proposed shipping rattlesnakes to Britain to return the favor.<sup>50</sup>

After the revolutionary war, the newly independent states repaid the loyalists in kind. Eight of the thirteen colonies officially banished those who had supported Britain, while the remainder passed laws that essentially accomplished the same goal.<sup>51</sup> These banishments were challenged in the American courts and ultimately approved in *Cooper v Telfair*<sup>52</sup>—but the Court was uneasy in its acceptance: “There is, like-

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<sup>45</sup> Rev T.M. Merriman, *The Pilgrims, Puritans and Roger Williams Vindicated* 281 (Arena 1896) (indicating that Williams’ banishment was unpopular among at least some of Salem’s inhabitants).

<sup>46</sup> A. Roger Ekirch, *Bound for America: The Transportation of British Convicts to the Colonies, 1718–1775* vii (Oxford 1987) (noting the use of “transportation” as a euphemism for banishment).

<sup>47</sup> *Id.* at 139 (describing American protests and the negative British response).

<sup>48</sup> *Id.* at 1 (explaining that banishment was “Britain’s primary remedy” for an increase in crime).

<sup>49</sup> *Id.* at 213.

<sup>50</sup> Leonard W. Labaree, ed, 4 *The Papers of Benjamin Franklin* 130 (Yale 1961) (“Thousands [of rattlesnakes] might be collected annually, and transported to . . . the Gardens of the Prime Ministers, the Lords of Trade and Members of Parliament; for to them we are most particularly obliged.”).

<sup>51</sup> Claude Halstead Van Tyne, *The Loyalists in the American Revolution* 237 (P. Smith 1929) (noting that while the individual colonies used different means, their common goal was to banish Loyalists). Many states were quite active in this regard. Georgia passed five laws in as many years aimed at banishing the loyalists. *Id.* at 331–32. Virginia and New York each passed four. *Id.* Massachusetts passed a law banning about eighty-five people by name; the law was called “An Act to prevent the return to this State of certain Persons therein named, and others, who have left this State, or either of the United States, and joined the Enemies thereof.” See *A Collection of Acts or Laws Passed in the State of Massachusetts Bay, Relative to the American Loyalists and Their Property* (London, 1785), online at <http://galenet.galegroup.com> (visited June 26, 2007). Georgia passed a similar law.

<sup>52</sup> 4 US (4 Dall) 14 (1800) (declining to invalidate a Georgia law banishing citizens found guilty of treason). See also Gerald L. Neuman, *The Lost Century of American Immigration Law*

wise, a material difference between laws passed by the individual states, during the revolution, and laws passed subsequent to the organization of the federal constitution. Few of the revolutionary acts would stand the rigorous test now applied.<sup>53</sup>

It is also important to note that *Cooper* relied on a theory of government power that has been completely discredited. The Court reasoned that “wherever the legislative power of a government is undefined, it includes the judicial and executive attributes. . . . It is not within the judicial power, as created and regulated by the constitution of Georgia: and it naturally, as well as tacitly, belongs to the legislature.”<sup>54</sup> The Court essentially said that the legislature has the power to pass a bill of attainder.<sup>55</sup> By the logic of the Court, since the judicial branch typically enjoys the power to banish as a criminal sanction, such a power must belong to the government as a whole—and in the absence of express delegation to a specific branch, the legislature can wield the power. In *United States v Brown*,<sup>56</sup> the Court wrote that “[T]he Bill of Attainder Clause was intended not as a narrow, technical . . . prohibition, but rather as an implementation of separation of powers, a *general safeguard against legislative use of the judicial function* . . . . It was, on the contrary, looked to as a bulwark against tyranny.”<sup>57</sup>

These acts mark the only period of systematic use of banishment in America. Though these laws were popular at the time, it is perhaps best to describe them as episodes in which our behavior did not live up to our own standards. Fifteen states have gone so far as to prohibit banishment in their own constitutions. Alabama, Arkansas, Georgia, Illinois, Nebraska, Ohio, Texas, Vermont, and West Virginia bar banishment outright.<sup>58</sup> Maryland, Massachusetts, New Hampshire, North

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(1776–1875), 93 Colum L Rev 1833, 1844 n 62 (1993) (noting that the Georgia law was approved in dicta).

<sup>53</sup> *Cooper*, 4 US (4 Dall) at 18 (observing that the use of judicial review “to invalidate laws previously enacted, is a very different question, turning on very different principles”). See also *In re Look Tin Sing*, 21 F 905, 910–11 (CC D Cal 1884) (“No citizen can be excluded from this country except in punishment for crime. Exclusion for any other cause is unknown to our laws, and beyond the power of congress.”).

<sup>54</sup> *Cooper*, 4 US (4 Dall) at 18–19.

<sup>55</sup> *Black’s Law Dictionary* defines a bill of attainder as “[a] special legislative act prescribing punishment, without a trial, for a specific person or group.” *Black’s Law Dictionary* 176 (West 8th ed 2004). Bills of attainder are banned under the US Constitution Art I, § 9.

<sup>56</sup> 381 US 437 (1965).

<sup>57</sup> *Id* at 442–43 (emphasis added) (holding that a statute making it illegal for a member of the Communist Party to serve as an officer or employee of a labor union is unconstitutional as a bill of attainder).

<sup>58</sup> Ala Const Art I, § 30 (“No citizen shall be exiled.”); Ark Const Art II, § 21 (“Nor shall any person, under any circumstances, be exiled from the State.”); Ga Const Art I, § 1, ¶ XXI (“Neither banishment beyond the limits of the state nor whipping shall be allowed as a punishment for crime.”); Ill Const Art I, § 11 (“No person shall be transported out of the State for an offense committed within the State.”); Neb Const Art I, § 15 (“Nor shall any person be trans-



Carolina, Oklahoma, and Tennessee mandate no one can be banished without due process.<sup>59</sup> Alabama, Arkansas, Georgia, Illinois, Ohio, Oklahoma, and Tennessee all have one oddity in common: while their state constitutions forbid banishment, they have all adopted laws severely restricting where sex offenders can live.

### 3. The common law development of banishment.

The common law of banishment developed through prompting from all branches of government. At the state level, executive, legislative, and judicial authorities have all tried to banish. Review of such diverse banishment actions have led courts to consider a diverse set of ancillary questions at the same time: the limits of executive power, deference to the legislature, and the limited power of courts. When trying to figure out what the Supreme Court of, say, South Carolina is telling us about banishment, we must be careful not to confuse it with a lesson about the pardon power. This confusion notwithstanding, careful analysis of the historical evidence clearly demonstrates that the power of governments to ban people from political subdivisions is very limited.

*a) Executive banishment.* When American courts first considered banishment as a part of “normal” government life (as opposed to responses to exigent circumstances in the rapidly shifting times of the Revolutionary War<sup>60</sup>) it was mostly in the context of a conditional pardon by the executive. Wm. Garth Snider claims that, “[h]istorically, when banishment has been used as a condition of an executive pardon or parole, it has been upheld with the same unanimity with which sen-

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ported out of the state for any offense committed within the state.”); Ohio Const Art I, § 12 (“No person shall be transported out of the state, for any offense committed within the same.”); Tex Const Art I, § 20 (“No person shall be transported out of the State for any offense committed within the same.”); Vt Const Ch I, Art XXI (“No person shall be liable to be transported out of this state for trial for any offense committed within the same.”); W Va Const Art III, § 5 (“No person shall be transported out of, or forced to leave the State for any offense committed within the same.”).

<sup>59</sup> Md Const Art XXIV (“No man ought to be . . . exiled . . . but by the judgment of his peers, or by the Law of the land.”); Mass Const Pt 1, Art XII (“No subject shall be . . . exiled . . . but by the judgment of his peers, or the law of the land.”); NH Const Pt 1, Art XV (“No subject shall be . . . exiled . . . but by the judgment of his peers, or the law of the land.”); NC Const Art I, § 19 (“No person shall be . . . exiled . . . but by the law of the land.”); Okla Const Art II, § 29 (“No person shall be transported out of the State for any offense committed within the State, nor shall any person be transported out of the state for any purpose, without his consent, except by due process of law.”); Tenn Const Art I, § 8 (“No man shall be . . . exiled . . . but by the judgment of his peers, or the law of the land.”). Presumably, these clauses mean procedural due process.

<sup>60</sup> See Lorenzo Sabine, *A Historical Essay on the Loyalists of the American Revolution* 84 (Walden 1957) (arguing that banishment was preferable to imprisonment for both parties, and a necessary measure in wartime).

tences of banishment have been struck down.”<sup>61</sup> In *Case of Flavell*,<sup>62</sup> the Pennsylvania Supreme Court approved the imposition of banishment as a condition of a pardon, even though it was dubious of the state’s power to banish: “This Act shows that conditional pardons are by no means strange to the jurisprudence of Pennsylvania, even though the condition amounted to banishment or expatriation.”<sup>63</sup> In considering the complex question of whether a felon pardoned with the condition of banishment could serve as a witness if he returned to the state, the New York Supreme Court had little trouble with the idea that banishment could be imposed in the first place.<sup>64</sup> A South Carolina appellate court, in addressing how a change in punishment affected a pardon, seemed to have no trouble with the original imposition of banishment.<sup>65</sup>

b) *Legislative banishment.* Unlike the power of the executive to banish, the legislative power to banish has always been sharply restricted. Early courts often noted that protection against punishment without due process of law stretched back to the Magna Carta.<sup>66</sup> The Constitution adopts this protection and explicitly bans Congress from passing bills of attainder.<sup>67</sup> As noted above, this clause was not seen as a technical allotment of power for the sake of clarity, but a substantive defense against tyranny.<sup>68</sup> One defendant’s lawyer, arguing before the Louisiana Supreme Court, found the idea of legislative banishment absurd and compared it to mass murder:

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<sup>61</sup> Wm. Garth Snider, *Banishment: The History of Its Use and a Proposal for Its Abolition under the First Amendment*, 24 New Eng J on Crim & Civ Confinement 455, 471 (1998) (discussing banishment as a condition of parole or pardon).

<sup>62</sup> 8 Watts & Serg 197 (Pa 1844).

<sup>63</sup> Id at 198.

<sup>64</sup> See *People v Potter*, 4 NY Legal Observer 177, 182 (NY Sup Ct 1846) (observing that banishment is neither “unusual [nor] cruel punishment” and that it “has been inflicted, in this form, from the foundation of our government”).

<sup>65</sup> See *State v Addington*, 2 Bailey 516 (SC App 1831) (holding that the defendant must be banished, even though proper punishment had changed from banishment to whipping, fine, and imprisonment before his sentence had been executed). See also Snider, 24 New Eng J on Civ & Crim Confinement at 471–73 nn 108–17 (cited in note 61) (collecting twentieth century cases).

<sup>66</sup> See for example, *Jackson v Gilchrist*, 15 Johns 89, 1818 NY LEXIS 17, \*5 (NY Sup Court 1818) (argument of counsel) (“It contains the principle of the *English Magna Charta*, and of the Bill of Rights of the people of this state, that no person shall be dispossessed of his freehold . . . but by the lawful judgment of his peers or due process of law.”); See also *State v -----*, 1 Haywood 28, 32 (North Carolina 1794) (“In our constitution, where the Convention are declaring the rights of the people, and use the words of the *Magna Charta* of England, they mean to assert in general, that the people . . . have a right to be governed by their own laws, and not to be subject to laws made by any foreign power.”).

<sup>67</sup> US Const Art I, § 9.

<sup>68</sup> See the discussion of *Brown* in note 56 and accompanying text.

It is mere sophistry to ask if the governor and legislative council had passed an act to banish ten citizens, or decimate the people, whether such an act would be valid, although not disapproved by Congress? With or without the consent of Congress, such an act would be null and void. Our charter was, in its origin and object, a just and lawful act, which required nothing but the consent of Congress (if it even required that) to give it full validity.<sup>69</sup>

c) *Judicial banishment.* The judicial power to banish is even narrower still. The main form of judicial banishment has been a restriction of residency as a condition of parole. The first such case dates back to 1913. In *Cook v Jenkins*,<sup>70</sup> the Georgia Supreme Court held that a judicial suspension of sentence on the condition that the convicted leave the state was illegal because it was beyond the authority of the court to impose.<sup>71</sup>

This issue was considered again fourteen years later in Ohio, where an Ohio Appellate Court held that suspension of sentence on condition of leaving the village was similarly beyond the power of the judiciary.<sup>72</sup> Iowa confronted the same question, and decided it the same way, in a case of banishment from the county.<sup>73</sup> California has faced this question repeatedly, holding every time that banishment cannot be placed as a condition on suspension of sentence.<sup>74</sup> North Carolina,<sup>75</sup> Maryland,<sup>76</sup> Kentucky,<sup>77</sup> Minnesota,<sup>78</sup> and Florida<sup>79</sup> have all

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<sup>69</sup> *State v Orleans Navigation*, 11 Martin 38, 158 (La 1822).

<sup>70</sup> 146 Ga 704, 92 SE 212 (1917).

<sup>71</sup> See *id.*

<sup>72</sup> See *Shondell v Bradley*, 42 Ohio App 8, 181 NE 559, 559–60 (1931) (“As the court imposing sentence had no inherent power to suspend a sentence which had been imposed . . . [the condition] was absolutely void.”).

<sup>73</sup> *Burnstein v Jennings*, 231 Iowa 1280, 4 NW 2d 428, 429 (1942) (“Even the appellant concedes that the lower court had no right to order his removal from the county and of course we agree with this.”).

<sup>74</sup> See generally *Ex parte Scarborough*, 76 Cal App 2d 648, 173 P2d 825 (1946) (striking down a condition of banishment from the city and county); *People v Blakeman*, 170 Cal App 2d 596, 339 P2d 202 (1959) (holding it was beyond the power of the court to banish the defendant from the county); *People v Cortez*, 199 Cal App 2d 839, 19 Cal Rptr 50 (1962) (holding that the law does not authorize an order of banishment); *People v Dominguez*, 256 Cal App 2d 623, 64 Cal Rptr 290 (1967) (noting that the use of banishment as a condition of probation is void); *People v Mannino*, 14 Cal App 3d 953, 92 Cal Rptr 880 (1971) (reiterating that banishment may not be used as a term of probation), citing *Blakeman*, 339 P2d at 202.

<sup>75</sup> See *State v Doughie*, 237 NC 368, 74 SE 2d 922, 924 (1953) (“Such a sentence was beyond the power of the court to inflict.”).

<sup>76</sup> See *Finnegan v State*, 4 Md App 396, 243 A2d 36, 41 (Md Ct Spec App 1968) (“Suspension of sentence conditioned on banishment is beyond [the trial court’s power] and void.”), citing *Bird v State*, 231 Md 438, 190 A2d 804 (1963).

<sup>77</sup> See *Weigand v Kentucky*, 397 SW2d 780, 781 (Ky 1965) (“The Commonwealth concedes it is beyond the power of a court to inflict banishment as an alternative to imprisonment.”).

held that imposition of banishment is beyond the power of courts unless explicitly provided for by statute.<sup>80</sup>

One early line of cases addressed which courts were empowered to impose statutorily-approved banishment. In the late seventeenth century, England created the Court of Assistants, which had jurisdiction over civil appeals and criminal cases in which the punishment extended to loss of life, limb, or banishment.<sup>81</sup> The Massachusetts Supreme Court upheld a conviction for misdemeanor against a claim that the defendant was entitled to a hearing in the analogous court in Massachusetts.<sup>82</sup> Connecticut recognized a similar hierarchy of punishments: punishments involving threat to life, limb, or banishment could only be heard by particular courts.<sup>83</sup> This division of jurisdiction suggests that banishment was considered as serious as a sentence of death or dismemberment.

*d) Other considerations.* Apart from branch-specific restrictions on the power to banish, two more facts are worth noting regarding early legal treatment. In England and in some of the Revolutionary states, women could not hold property or enter into contracts independently of their husbands. Prior to marriage, a woman's father assumed such a role. But if a woman's husband died, she was able to take over some of those roles.<sup>84</sup> The practical justification for this law seems clear. Someone with control over the assets of the household should be able to enter into contracts and devise the property—better

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<sup>78</sup> See *Halverson v Young*, 278 Minn 381, 154 NW2d 699, 702 (1967) (“We are in accord with the great weight of American decisional law which holds that it is beyond the power of a court to impose banishment as a condition of probation.”).

<sup>79</sup> See *Baldwin v Alsbury*, 223 S2d 546, 547 (Fla 1969) (“The court was without power to indefinitely suspend a sentence in return for petitioner's stay out of town.”).

<sup>80</sup> This is not unanimous. Mississippi and Georgia have both recently held that such sentences can be legal. See *Cobb v State*, 437 S2d 1218, 1221 (Miss 1983) (approving probation for aggravated assault on condition that defendant remain 125 miles away from the county) and *Kerr v State*, 193 Ga App 165, 387 SE2d 355, 359 (1989) (approving banishment away from abortion providers). Wisconsin has approved banishment from a city where it furthers the goal of rehabilitation in a case of conviction for stalking. *State v Nienhardt*, 196 Wis 2d 161, 537 NW2d 123, 126 (Wis App 1995) (“Probation conditions may impinge upon [constitutional] rights if they are not overly broad and are reasonably related to the person's rehabilitation.”).

<sup>81</sup> See *Commonwealth v Holmes*, 17 Mass 336, 340 (1821) (explaining the creation of and jurisdiction granted to the Court of Assistants).

<sup>82</sup> *Id.* (noting that because the defendant's crime was a misdemeanor, its punishment “does not extend to life, member or banishment . . . [and the offense] is clearly cognizable by the court of common pleas”).

<sup>83</sup> See *State v Lockwood*, 1 Kirby 106 (Conn Super Ct 1786) (recounting the jurisdictional restrictions on offenses with punishment extending to life, limb, or banishment).

<sup>84</sup> For an explanation of this doctrine, see Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 Yale L J 1641, 1647 (2003) (“Even under coverture, a widow was indisputably a single woman in the eyes of the law. In coverture's terms, she reassumed the status of feme sole as opposed to a feme covert.”).

it be the wife than let the property lie fallow. Wives of men who suffered constructive death—traitors or the banished—enjoyed the same revival of their rights.<sup>85</sup> This expansion of actual death into legal death suggests something about banishment: banishment must impose the same sorts of cost on a family as actual death does. A banished family member is dead for all legal purposes if presence in the jurisdiction is necessary to carry out legal duties and rights. The high costs implicitly recognized by courts in the doctrine of legal death are explicitly tallied by later courts when they begin to strike down banishment sentences even when authorized by law.

These later cases explicitly ground their reasoning on considerations of public policy; the same considerations appear in earlier cases, the second important fact about early treatment. Consider the case of *People v Griffen*.<sup>86</sup> James Griffen murdered one Erastus Coit, who had displaced him in his family life and eventually took Griffen's wife as his own. He was found not guilty by reason of insanity and was sent to an asylum to recover. A year later the superintendent of the asylum wrote the judge, asking him if Griffen might be released, as he made a good recovery. As a condition (among others) of his release, the judge required that Griffen's relatives in Wisconsin take charge of him, "not because I desire to banish a criminal from our territory and inflict him upon that of any other part of our nation, but because I deem it material that he should not be permitted to revisit scenes which cannot fail to disturb him."<sup>87</sup> As early as 1845, then, there was judicial recognition that banishment imposed negative externalities. Instead of rehabilitating or neutralizing the felon's criminal tendencies, the state (or city, or county) simply foists them on neighboring jurisdictions. The crime remains, it simply moves around.<sup>88</sup>

Early state law placed tight restrictions on the power to banish. There were only two uses of banishment that were widely accepted: as a punishment for a crime when that punishment is authorized by statute, and by the executive when done pursuant to the pardon power.<sup>89</sup>

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<sup>85</sup> *Id.*

<sup>86</sup> 1 Edmonds' Selected Cases 126 (NY Sup Ct 1845).

<sup>87</sup> *Id.* at 130.

<sup>88</sup> This case is also interesting as an early example of civil commitment. What result if Griffen were to challenge that condition of his release? This is a harder question as the judge explicitly justifies the restriction as a measure of protection for Griffen, rather than for his original community. We can also think of this as "reverse Tiebout" competition. Instead of jurisdictions competing to attract mobile residents, jurisdictions compete to discourage mobile criminals. See Part I.D.3.

<sup>89</sup> Notice also in that case that the convicted may "refuse" the order of banishment by reentering the jurisdiction and finishing out the sentence. If the prisoner chose banishment in lieu of punishment there is a sense in which there is no cognizable injury, because the convicted

Judges were particularly suspicious of banishments that were done with the approval of only one or two branches. As is commonly noted, conviction and punishment for a crime rely on all three branches: the legislative to pass a law, the executive to enforce, and the judicial to convict. The methods of banishment above all eliminate the role of one of the branches. Legislative banishment, or a bill of attainder, requires the executive to carry out a threat of banishment, but removes the power of the judiciary to judge the actions of the banished. Judicial imposition of banishment as a condition of parole eliminates the role of the legislature by imposing a sentence and condition not allowed by statute. The main avenue for banishment requires the participation of all the branches.<sup>90</sup> Though banishment after due criminal process has the right pedigree, public policy considerations motivate the next generation of judicial attention.

#### 4. Public policy intrudes.

Twentieth century cases focus much more heavily on the policy implications of banishment that are alluded to in *Griffen*. A political unit does not make the world a safer place when it banishes a criminal—it simply moves crime around. In *People v Baum*,<sup>91</sup> the Michigan Supreme Court overturned a sentence of five year banishment from the state of Michigan for violation of liquor law.<sup>92</sup> The court noted two separate grounds for overturning the sentence. The first is the familiar point that the punishment of banishment is not approved by statute. The second is more interesting:

Banishment and deportation were not cruel and unusual punishments at common law. On the contrary, banishment and deportation to criminal colonies was a common method of punishment in England. . . . The American states are not supreme, independent, sovereign states in relation to those things delegated by the people to the federal government, though the states are all in the Union on the basis of equality of political rights. Independent national states have a right to protect their political institutions,

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is now better off as a matter of revealed preference. This reasoning suggests that banishment as a condition of pardon is less worrisome.

<sup>90</sup> The pardon power is the exception, as discussed above. Early courts placed no legal restrictions on the use of the pardon power, but this does not undercut the claim that banishment was under severe legal restrictions. The pardon power has historically been very broad, with virtually no restrictions. The lack of restrictions on banishment through conditional pardon does not serve to distinguish banishment from other things that are deeply rooted in the nation's history: virtually no restrictions are placed on that power.

<sup>91</sup> 251 Mich 187, 231 NW 95 (1930).

<sup>92</sup> 231 NW at 96.

their people, and their independent existence by excluding legally and forcibly undesirable foreigners. . . . To permit one state to dump its convict criminals into another would entitle the state believing itself injured thereby to exercise its police and military power in the interest of its own peace, safety, and welfare, to repel such an invasion. It would tend to incite dissension, provoke retaliation, and disturb that fundamental equality of political rights among the several states which is the basis of the Union itself. Such a method of punishment is not authorized by statute, and is impliedly prohibited by public policy.<sup>93</sup>

This reasoning suggests that sentences of banishment from the state<sup>94</sup> are prohibited even if explicitly authorized by statute because they impose costs on parties who had no input into the decision: neighboring states.<sup>95</sup> Courts are not clear as to how far this logic reaches. *Baum* suggests that banishment should be barred no matter what branch of government authorizes it. North Carolina and California seem to have adopted the broad version of this reasoning. The court in *State v Doughtie*<sup>96</sup> deplores banishment in broad terms:

A sentence of banishment is undoubtedly void. . . . It is not favorable to him to force him to go for two years into another state, where the State of North Carolina can exercise no restraining influence upon him for purposes of reformation. Through the ages the lot of the exile has been hard. There comes ringing down the centuries the words of the Psalmist: "By the rivers of Babylon, there we sat down, yea, we wept, when we remembered Zion." It is not sound public policy to make other states a dumping ground for our criminals.<sup>97</sup>

Here, no attention is paid to the distinction between banishment as approved by statute and banishment imposed by a judge or whether the banishment is from the entire state or a political subdivision. In

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

<sup>94</sup> Does this reasoning only speak to states? There are two threads here. One focuses on the coequal power of states, while the other is independent of the political organization. This raises the possibility that while banishment from a state should be prohibited, banishment from smaller political units should be acceptable. If this is convincing, it must rely on the idea that nearby political units do have a voice in the relevant legislation: the state law that determines sentencing. See Part III below.

<sup>95</sup> This argument has an impressive pedigree. See, for example, *McCulloch v Maryland*, 17 US 316, 428 (1819) (distinguishing federal taxation of states from state taxation of the federal government).

<sup>96</sup> 237 NC 368, 74 SE 2d 922 (1953).

<sup>97</sup> 74 SE 2d at 924.

*Ex parte Scarborough*,<sup>98</sup> the court applied the same logic to an order of banishment from the county, rather than the state.<sup>99</sup> Courts in many states have held that banishment from smaller political divisions such as towns or counties are similarly banned.<sup>100</sup> In *State v Sanchez*,<sup>101</sup> a Louisiana court cited approvingly a federal decision that cast doubt on whether a sentence of banishment was constitutional even if authorized by statute in light of the public policy concerns.<sup>102</sup>

These cases show how ambiguous the reach of the public policy considerations are. Sometimes, courts speak as if all orders of banishment are void; sometimes only those that are unilaterally imposed by judges without provision by the legislature are called into question.<sup>103</sup> It is also not clear how much these considerations establish: is banishment from a state the same as banishment from a county or town? Some courts have treated them the same way.

There are three states that seem to be embracing the use of banishment in all these contexts: Georgia, Mississippi, and Washington.<sup>104</sup> In *State v Collett*<sup>105</sup> the court held that banishment from a seven county area of Georgia was not unconstitutional. Noting the broad power of the sentencing judge in imposing conditions on parole, the Georgia

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<sup>98</sup> 76 Cal App 2d 648, 173 P2d 825 (1946).

<sup>99</sup> 173 P2d at 827 (“The same principle which prohibits the banishment of a criminal from a state or from the United States applies with equal force to a county or city.”).

<sup>100</sup> See, for example, *VanName v VanName*, 308 SC 516, 419 SE2d 373, 374 (SC App 1992):

There was a time when judges in criminal cases would require a defendant under a suspended sentence to live outside the county or state, but such is no longer permitted. Forcing a person to live in a particular area encroaches upon the liberty of an individual to live in the place of his or her choice.

See also *State v Muhammad*, 309 Mont 1, 43 P3d 318, 324 (2002) (holding that banishment from the county was void because it was not “reasonably related to goals of rehabilitation”); *State v Franklin*, 604 NW2d 79, 84 (Minn 2000) (holding that an order prohibiting defendant from entering the city of Minneapolis infringed on her fundamental rights and was not sufficiently related to preservation of public safety).

<sup>101</sup> 462 S2d 1304 (La App 1985).

<sup>102</sup> *Id* at 1309 (“The power to banish, *if it exists at all*, is a power vested in the Legislature and certainly where such methods of punishment are not authorized by statute, it is impliedly prohibited by public policy.”) (emphasis added), quoting *Rutherford v Blankenship*, 468 F Supp 1357, 1360 (WD Va 1979). See also *id* at 1360 (“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.”) (internal citation omitted).

<sup>103</sup> See Part I.B.3.

<sup>104</sup> Georgia has gone the furthest, so the remainder of this Part will discuss only its cases. The cases in Washington involve banishment to remote Alaskan islands in accord with defendants’ tribal customs. See, for example, *State v Roberts*, 77 Wash App 678, 894 P2d 1340, 1341 (1995). Full consideration of the issues in this case would take us too far afield. For a deeper treatment, see generally Stephanie J. Kim, *Sentencing and Cultural Differences: Banishment of the American Indian Robbers*, 29 John Marshall L Rev 239 (1995). For Mississippi, see *Cobb*, 437 S2d at 1220 (holding that banishment from one’s county was legal).

<sup>105</sup> 232 Ga 668, 208 SE2d 472 (1974).



Supreme Court upheld revocation of parole after the defendant violated the term of banishment.<sup>106</sup> The dissenting judge opined that, “banishment from a county as a condition for suspension of a sentence is against public policy because it would permit one county to relegate its criminals to other counties and thereby create dissension, provoke retaliation and tend to disrupt a harmonious relationship between counties.”<sup>107</sup> Reviewing cases in the intervening twenty-nine years, the court in *Sanders v State*<sup>108</sup> held that “[b]anishment is authorized in Georgia only as a reasonable condition of probation or suspension of a sentence.”<sup>109</sup>

### 5. Questions of generality.

The inquiry mandated by *Washington v Glucksberg* first requires a careful description of the liberty interest. The right under consideration here is the right to live where you want. When deciding if the historical evidence supports such a right, there is a prior question of generality. Assuming all the historical evidence presented thus far is correct, there are at least three questions about its generality. Does the historical evidence speak to every government action that moves people between political divisions or does it only speak to banishments beyond the state boundaries? Second, at common law, banishment typically was accompanied by death if you returned. If contemporary sentences merely provide for imprisonment or fines, is it even accurate to call that banishment? Is banishment something imposed in lieu of death by definition? Third, how complete must banishment be? Are you banished from a city if you can spend one hour a day there? How about if you can spend all day there but you simply cannot reside within city limits? The traditional understanding of banishment was that you could not enter the jurisdiction, period. The Iowa Supreme Court pointed to this distinction in holding that Iowa’s residency law does not banish:

Yet, while Seering may have a sense of being banished to another area of the city, county, or state, true 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.” Section 692A.2A, to the contrary, only restricts sex offenders from residing in a particular

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<sup>106</sup> 208 SE2d at 474 (“We see no logical reason why any reasonable condition imposed for probation or suspension of a sentence by a trial court should not be approved.”).

<sup>107</sup> *Id.* (Undercofler dissenting).

<sup>108</sup> 259 Ga App 422, 577 SE2d 94 (2003).

<sup>109</sup> 577 SE2d at 96.

area. Offenders are not banished from communities and are free to engage in most community activities. The statute is far removed from the traditional concept of banishment.<sup>110</sup>

The Iowa Supreme Court's approach creates more questions than it settles. Can the state impose some limitations on free movement and community involvement and still not banish? Perhaps we should balance the two considerations—residency and activity—and demand that restrictions in one be balanced by freedom in another. As the historical evidence makes clear, governments have banished in a variety of ways—why is this one far enough from the core of banishment (whatever that is) to count no longer as banishment at all? In fact, a range of legal authorities have explicitly noted the variety of forms banishments can take:

In Black's Law Dictionary "banishment" is defined as "a punishment inflicted upon criminals, by compelling them to quit a city, place, or country, for a specific period of time, or for life. It is inflicted principally upon political offenders, 'transportation' being the word used to express a similar punishment of ordinary criminals." The same author defines "exile" as banishment, and "transportation" as "a species of punishment consisting in removing the criminal from his own country to another (usually a penal colony), there to remain in exile for a prescribed period." In *Rapalje & Lawrence's Law Dictionary* (vol. 1, page 109), "banishment" is called: "A punishment by forced exile, either for years or for life; inflicted principally upon political offenders, 'transportation' being the word used to express a similar punishment of ordinary criminals." . . . *Vattel Book 1, Sec. 228*, declares: "As a man may be deprived of any right whatsoever by way of punishment—exile, which deprives him of the right of dwelling in a certain place, may be inflicted as a punishment; banishment is always one; for, a mark of infamy cannot be set on any one, but with a view of punishing him for a fault, either real or pretended."<sup>111</sup>

A full discussion about questions of generality is well beyond the scope of this Comment.<sup>112</sup> Nonetheless, three facts are important to note about these questions of generality. First, courts and judges think about residency restrictions at the substate level in the same terms as

<sup>110</sup> *State v Seering*, 701 NW2d 655, 667–68 (Iowa 2005) (internal citations omitted).

<sup>111</sup> *United States v Ju Toy*, 198 US 253, 269–70 (1905) (Brewer dissenting).

<sup>112</sup> For a full discussion, see generally J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 *Cardozo L Rev* 1613 (1990) (criticizing the idea that historical evidence settles the question of what level of generality to ascribe to a right).

they do broader ones. As a formal matter, courts use the *language* of banishment no matter the level of government.<sup>113</sup> As a substantive matter, courts consider the identical issues and interests at the sub-state and statewide levels.<sup>114</sup> Second, the liberty interests at stake are the same if a person is banished permanently or simply prohibited from residing in a certain location.<sup>115</sup> Third, the public policy considerations that have motivated many courts apply no matter the severity of the banishment.<sup>116</sup> So while this Comment cannot settle what level of generality this research should enjoy, the courts that made this history viewed banishment as a general term, encompassing many different forms. Thus this Comment will assume that the historical opinions about banishment extend to its many different forms.

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<sup>113</sup> See, for example, *Collett*, 208 SE2d at 472 (analyzing Georgia law forbidding residency in certain counties using the language of banishment). Courts consider many of the same issues no matter what the level of banishment.

<sup>114</sup> See, for example, *Muhammad*, 43 P3d at 318 (analyzing a restriction on living in a county as an example of banishment); *VanName*, 419 SE2d at 374 (holding that requiring someone to live outside a county or state “encroaches upon the liberty of the individual to live in the place of his or her choice”); *Wyche v State*, 197 Ga App 148, 397 SE2d 738, 739 (1990) (identifying a parole requirement that a drug offender live outside a five-county area as a banishment); *Jacobsen v State*, 536 S2d 373, 375 (Fla App 1988) (holding that an order to leave the county must be reasonably related to rehabilitation); *State v Ferre*, 84 Or App 459, 734 P2d 888, 889 (1987) (holding that a parole condition barring plaintiff from entering county was void because it was too broad to accomplish its purpose); *Johnson v State*, 672 SW2d 621, 622–23 (Tex App 1984) (holding that a parole condition that a plaintiff not enter the county was void because it was overbroad and unreasonable and noting that jurisdictions may not dump criminals on one another); *Wilson v State*, 151 Ga App 501, 260 SE2d 527, 530–31 (1979) (holding that banishment was acceptable if it was reasonable); *State v Culp*, 30 NC App 398, 226 SE2d 841, 842 (1976) (holding that banishing a probationer from part of a county as a condition of probation was void).

<sup>115</sup> See Part I.D. A plurality of the Supreme Court accepted such an argument in *Moore v City of East Cleveland*, 431 US 494, 495 (1997) (Powell) (plurality), where it struck down a law limiting residency in a house to members of a single nuclear family. The law had the effect of preventing a grandmother with primary care duties from living with her grandchildren. The plurality held that this law violated the fundamental right of a family to live together, even though the early cases finding such a right were confined to nuclear families:

To be sure, these cases did not expressly consider the family relationship presented here. . . . But unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment’s Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case.

Id at 500–01.

<sup>116</sup> This does not mean that the extent of banishment will be irrelevant to a particular case. The level of banishment might be relevant to whether the measure is narrowly tailored or not. See, for example, *Franklin*, 604 NW2d at 80 (holding void a condition banishing the probationer from a city because the measure was not reasonably related to the general purposes of probation and the preservation of public safety). If such a condition is not reasonably related to these goals, a fortiori, it is not narrowly tailored to them either.

## 6. Synthesis.

American case law shows the different ways governments have tried to banish those it considers undesirable. While the history does not speak with one voice, some synthesis is possible. Virtually all authorities agree that in the absence of a state constitutional ban, banishment can be included as part of the statutorily determined punishment for crime. Similarly, virtually all authorities agree that banishment cannot be imposed by the legislature. There is a clear majority holding that judges cannot impose banishment as a condition of parole or suspension of sentence. Though the question seems marginal today, all authorities agree that a pardon conditioned on banishment is acceptable.<sup>117</sup>

Does the right not to be banished constitute a right that is “objectively, deeply rooted in this Nation’s history and tradition?”<sup>118</sup> *Glucksberg* noted virtually unanimous agreement that suicide was illegal.<sup>119</sup> Disapproval of banishment is similarly widespread. Moreover, the historical treatment of banishment is consistent with the treatment of a fundamental right: that is, courts’ responses to violations of this proposed right are consistent with an application of strict scrutiny.

To see this last point, consider the forms of banishment observed in the historical record. Imposition of banishment according to dictates of criminal law after receiving due process<sup>120</sup> is not a violation of a fundamental right; or, perhaps better, it is an infringement, but is clearly allowed at common law and under the Fifth and Fourteenth Amendments.<sup>121</sup> A legislative banishment, if not explicitly banned under the Bill of Attainder Clause, would likely not survive strict scrutiny. Even if it is done in pursuit of a compelling state interest (like protecting children from sexual predators), it seems quite unlikely that the state has no other way of protecting that interest.<sup>122</sup> Judicially

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<sup>117</sup> See *Hoffa v Saxbe*, 378 F Supp 1221, 1229 (DDC 1974) (“It is interesting to note that most state courts have found that a pardon conditioned on banishment is an inherent part of the Governor’s general pardoning authority.”).

<sup>118</sup> *Glucksberg*, 521 US at 721.

<sup>119</sup> See text accompanying notes 21–24.

<sup>120</sup> That is, the procedural flavor of due process.

<sup>121</sup> These prohibit deprivation of life, liberty, or property without due process of law. But after due process has been given the situation is different. “Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a retraction justified by the considerations underlying our penal system.” *Wolff v McDonnell*, 418 US 539, 556 (1974). If the state chooses to substitute parole for imprisonment, it can still restrict many rights. See *Coleman v Dretke*, 395 F3d 216, 222 (5th Cir 2004) (noting that as a substitute for imprisonment, restrictions of the rights of paroled felons must be permissible).

<sup>122</sup> And it might not even be particularly effective in the first place. Under the Iowa law, sex offenders are free to spend all their time around schools—they are simply prohibited from living around them. The Iowa County Attorneys Association, a group comprising county prosecutors,

imposed banishment violates (procedural) due process of law because it is a punishment not authorized by statute.

The only form of banishment to receive wide judicial acceptance at common law is banishment according to a criminal statute after due process has been given. Fundamental rights receive exactly the same treatment. Without further guidance from the Court about just how deeply rooted a freedom must be, this identity of treatment should suffice.

### C. Step Two: Who Has the Right?

Banishment is nothing more than a government act barring you from living in a given area. As a logical matter, if government cannot take such an action, then citizens enjoy the right not to have such things done to them. If people cannot be forced out of an area, then they enjoy the right to live where they want, in the sense that government may not prevent them from living there.

This does not mean that government need necessarily provide you with the means to live anywhere you want. It simply means that the government cannot take an action restricting that right. In the language of Wesley Newcomb Hohfeld, a disability on the part of government to ban a person from a jurisdiction implies the correlative right of immunity from being thrown out of a jurisdiction.<sup>123</sup>

Courts do not hew so closely to this language, so translating the rights under discussion into Hohfeld's terms would be another article in itself. At this point, all this Comment argues is that if government cannot banish, then citizens enjoy immunity against government action excluding them from political boundaries. Describing this as a right to live where you want seems to capture most of what is at stake, as long as we do not get confused and think that it implies that the government has to buy you a house in Aspen, for example.<sup>124</sup>

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has publicly stated their opposition to such programs on the grounds that they are ineffective. See *A Potent and Important Prosecutorial Statement against Sex Offender Residency Restrictions* (Feb 9, 2006), online at [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2006/02/a\\_potent\\_and\\_im.html](http://sentencing.typepad.com/sentencing_law_and_policy/2006/02/a_potent_and_im.html) (visited June 16, 2007).

<sup>123</sup> See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* 60 (Yale 1964) (Walter Wheeler Cook, ed) ("Immunity is the correlative of disability ('no-power'), and the opposite, or negation, of liability."). Sticking close to Hohfeld's terms, it would be technically incorrect to say that citizens have a right to live where they want because that would imply a duty on the part of government to ensure that they could live there. The technical term is "immunity," but nothing hangs on this distinction.

<sup>124</sup> This is just as the First Amendment does not require the government to buy its citizens a press, and the Second does not require the States to arm theirs.

#### D. Step Three: Ordered Liberty

This Comment has argued that the right to live in a political division of your choosing satisfies the first prong of the substantive due process inquiry. The historical evidence shows that the power of governments to banish, that is, to exclude someone from living in a particular place, is subject to severe restriction. Further, the restrictions courts have placed on its use are consistent with review under strict scrutiny, which is equivalent to protection as a fundamental right. As a logical matter, the right not to be forced out of a locale is the right to live in that locale if you want. The Comment now turns to the second part of the *Glucksberg* analysis: an inquiry as to whether the claimed right is essential to ordered liberty.

Again, the cases offer little guidance to how exactly one should identify a right that is crucial to ordered liberty. *Glucksberg* aims to protect rights “implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.”<sup>125</sup> A full treatment of the subtleties of this standard is beyond the scope of this Comment; rather it will simply identify some liberty interests that are very important to those we already recognize.

First, note that this standard should not be construed to require that the liberty interest be protected by a legal entitlement *already*—if it were there would be no need for a new right. Thus it should not be decisive if an identified liberty interest is not yet protected by a legal right, or if indeed courts have declined to protect it in the past. That is the purpose of the first prong of the inquiry: a right should be protected now if it has always been protected and it is very important. The fact that it is not yet protected might simply indicate that we do not hew closely enough to our own legal traditions.

##### 1. Voting.

The right to vote is fundamental because it is preservative of all other rights.<sup>126</sup> Most elections at the local, state, and federal level are organized around geographically demarcated districts. One’s political voice and options are determined to a great extent by the area in which one lives. For example, a Democrat who lives in Western Texas has almost no political voice as a practical matter. Because most districts in Western Texas are dominated by Republican candidates, the

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<sup>125</sup> *Glucksberg*, 521 US at 721 (internal quotations omitted), citing *Palko v Connecticut*, 302 US 319, 325 (1937) (defining fundamental rights as those rights without which “a fair and enlightened system of justice would be impossible”).

<sup>126</sup> *Reynolds v Sims*, 377 US 533, 562 (1964) (noting that the right to vote “in a free and unimpaired manner is preservative of other basic civil and political rights”).

impact of a single Democratic voice in those districts is quite small. A vote will have the greatest marginal impact in a district in which parties are equally balanced: if everyone else is committed to one candidate then the election will literally be decided by one voter. Conversely, in a political district dominated by a single party, the marginal impact of each voter is small, at least in the choice between two different parties.<sup>127</sup>

If government is allowed to banish, one important method of political expression is taken away: moving to an area where your political voice is more important.<sup>128</sup> The district court in *Doe v Miller* noted that people affected by Iowa's residency law were forced to live in mostly rural areas to the exclusion of urban areas:

In larger cities such as Des Moines and Iowa City, the maps show that the two thousand foot circles cover virtually the entire city area. The few areas in Des Moines, for instance, which are not restricted, include only industrial areas or some of the city's newest and most expensive neighborhoods. In smaller towns that have a school or child care facility, the entire town is often engulfed by an excluded area. In Johnson County alone, the towns of Lone Tree, North Liberty, Oxford, Shueyville, Solon, Swisher, and Tiffen are wholly restricted to sex offenders under § 692A.2A. Unincorporated areas and towns too small to have a school or child care facility remain available, as does the country, but available housing in these areas is not necessarily readily available.<sup>129</sup>

It seems plausible that voters in urban areas have different political preferences than those living in more rural areas. A politically liberal Democrat might find her political voice much less effective if it has to compete in a district that is overwhelmingly Republican. Addi-

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<sup>127</sup> The choice of Texas is not accidental. This reasoning was behind the strategic decision by state Republicans to reorganize districts to ensure greater Republican representation. Districts that were primarily Democratic were redrawn to be overwhelmingly Democratic. Districts that were primarily Republican were redrawn to be safely Republican, but with as small a majority as was politically comfortable. In so doing, the Republicans ensured that the votes of Democrats had a smaller marginal impact than Republican votes. Similar strategies have been pursued in Colorado and Pennsylvania. See Carl Hulse, *Colorado Court Rejects Redistricting Plan*, NY Times A26 (Dec 2, 2003) (summarizing the debate over Colorado redistricting, including the Colorado Supreme Court's holding that the Colorado Constitution allows redistricting only every ten years, following a census).

<sup>128</sup> This is not a theoretical point. The Free State Project is an effort to recruit 20,000 libertarians to move to New Hampshire. Though the organization does not sponsor political candidates or endorse or oppose legislation, it is clearly an effort to change the political makeup of a state by targeted relocation. See <http://www.freestateproject.org> (visited May 2, 2007).

<sup>129</sup> *Doe*, 298 F Supp 2d at 851.

tionally, if sex offenders are forced to live in an unincorporated area, they are excluded from an entire layer of government.

A natural objection is that since most states have some level of felon disenfranchisement, this should not be considered an important liberty interest for sex offenders, because it has already been taken away. This objection misconceives the inquiry. The argument is that everyone should enjoy the right to live in any given political jurisdiction. Without this right, any law banishing people from a political jurisdiction need only satisfy the standard of rational review—quite easy for a legislature to satisfy through findings of fact in the legislative history.<sup>130</sup> Such a practice would have a significant impact on ordered liberty: it would not be surprising to see legislators move around politically weak minorities to ensure their vote does not have much impact. The argument is not that only felons should enjoy this right—it is that everyone should enjoy this right.

Felon disenfranchisement is relevant only to whether a given law passes strict scrutiny or not. It is possible that, as applied to a person who cannot vote anyway, the state interest in banishment is compelling and narrowly tailored. It might be compelling because there is no competing interest on the part of the felon. It might be narrowly tailored because banishment would impinge only on liberty interests they have already been (appropriately) denied. While this objection has force, it is more properly considered as a restriction on what process must be granted to the banished.

There is another possible description of the challenge facing the banished. Instead of being moved out of a district, what if the district is moved out from under you? Voters find themselves in just such a situation when a state is redistricted following an election. It is quite possible that a person will end up in a district where they have much less power than they did before the redistricting. The Supreme Court has held that such loss of voting power might not be cause for complaint because it is possible that your loss of influence is balanced out by a gain in the political influence of another person with similar interests.<sup>131</sup> Does the banished person still have a complaint?

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<sup>130</sup> See *Minnesota v. Clover Leaf Creamery*, 449 US 456, 464 (1981) (“Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken.”).

<sup>131</sup> This is known as the problem of “virtual representation.” Briefly, even if you are in a district in which your vote is swamped, if there is another person with the same political preferences who enjoys a very powerful individual vote, you might have no cause for complaint. See generally A.H. Birch, *Representation* 51–52 (Praeger 1971) (noting that English Whigs embraced the theory, believing that members of the House of Commons could represent cities lacking representatives so long as such members were “aware of the special problems” of the virtually



She does, for two reasons. First, in the case of redistricting, one can still move into the new district if one would like. Systems of banishment similar to Iowa's are especially bad because there is no way for you to reclaim your voting power if it is important to you.

Second, virtual representation is particularly unlikely to help. A banishment scheme like Iowa's is likely to affect everyone with a certain political interest: not being banished. It makes no sense to say that your loss of political representation is balanced by someone else's gain, for everyone who shares what is likely now your most compelling interest is in the same boat.

It is also important to recall the claim at the beginning of this section: if we demand that liberty interests already be protected by a right to count as essential to ordered liberty, then the doctrine of substantive due process will have no bite at all. If a law hampers the exercise of an existing fundamental right, there is no need to declare a new right: the existing rights will do just fine.

One might object that our fully legal treatment of felons undermines the right to live where you want. All sorts of restrictions are placed on the rights of felons: in many states they cannot vote or own guns. Two concerns might motivate this objection. The first is that since we accept restrictions on the rights of felons to vote, this interest has no bite for them. This objection simply misfires. The question is whether there is a right enjoyed by all people. This question is motivated by restrictions imposed on felons, but they are not the only ones who will enjoy this right.

The second concern stems from the perceived importance of protecting children. If we can restrict the rights of felons to vote, surely we can try to prevent them from abusing children. This objection also misses the point. This Comment is only concerned with the level of scrutiny residency restrictions must pass. It is entirely possible that residency restrictions on sex offenders could pass strict scrutiny: it is hard to imagine a state interest more compelling than protecting children from sex offenders, after all. If banishment were written into the criminal code and it were imposed only after due process, no complaint could be made.<sup>132</sup>

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represented area). Such a theory was implicitly accepted in *Georgia v Ashcroft*, 539 US 461, 482 (2003) (holding that a redistricting which reduced the power of African Americans in some voting districts was valid, in part because it created other districts in which the black vote was more powerful).

<sup>132</sup> See note 121.

## 2. Rights to Travel.

Banishment might violate the right to both intrastate<sup>133</sup> and interstate travel. The Iowa law probably does not have a significant impact on intrastate travel. As noted before, a person targeted by this statute can still move freely around the state, he simply cannot reside in certain areas.

It does have a significant impact on interstate travel however. It is firmly established that there is a fundamental right to interstate travel.<sup>134</sup> As such, the state cannot enact legislation intended to hamper such movement. In *Shapiro v Thompson*,<sup>135</sup> a California law preventing new residents from receiving welfare benefits for one year was struck down because it was intended to prevent migration: “We do not doubt that the one-year waiting-period device is well suited to discourage the influx of poor families in need of assistance. . . . But the purpose of inhibiting migration by needy persons into the State is constitutionally impermissible.”<sup>136</sup>

If residency laws are adopted with the intent of preventing people with criminal records from moving into a state, they will run afoul of the same restriction. This standard is intent-based and notoriously difficult for plaintiffs to prove. Yet some local officials have said as much publicly. Georgia’s legislature recently passed such a law.<sup>137</sup> One of its sponsors, Jerry Keen,<sup>138</sup> described the law’s purpose:

*And that is what we intend to do in Georgia—make our laws so restrictive so that anyone who harms our children would rather leave the state than stay and face harsh punishment and lifetime monitoring. We are going to require all convicted sex offenders to register with the state sex offender registry list for the rest of their lives or as long as they live in Georgia. Any sex offender not convicted in Georgia will be required to register with the state.*

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<sup>133</sup> The Supreme Court has not ruled on whether there is an intrastate right to travel. The Sixth Circuit expressly recognizes a federally protected right to intrastate travel guaranteed by the Fourteenth Amendment. See *Johnson*, 310 F3d at 495. Other circuits have recognized limited freedoms of movement and several state courts have held that their state constitutions protect the right to intrastate travel. See *id.* at 496–98 & nn 2–4.

<sup>134</sup> See *Shapiro v Thompson*, 394 US 618, 629–32 (1969) (collecting cases and reviewing diverse justifications for such a right), overruled on other grounds by *Edelman v Jordan*, 415 US 651 (1974).

<sup>135</sup> 394 US 618 (1969).

<sup>136</sup> *Id.* at 629.

<sup>137</sup> HB 1059, Ga. General Assembly, 2005–2006 (effective July 1, 2006). online at <http://www.legis.state.ga.us> (visited June 26, 2007).

<sup>138</sup> See Sonji Jacobs, ‘06: *GOP Crime Bill Gets Tough; Measure Designed to Guard Children*, Atlanta Journal-Constitution 1D (Dec 18, 2005) (describing the bill’s details and some of its supporters).

Currently, Georgia law limits where a convicted sex offender can live but allows these criminals to work near places where our children play, attend school and congregate. We are not going to allow a convicted sex offender to work within 1,000 feet of a place where our children congregate.<sup>139</sup>

Any law intended to make certain people leave the state is, a fortiori, intended to prevent similar people from entering in the first place. If legislators from other states pass laws with the same intent (as seems likely), there is a good argument that such laws impinge on a fundamental liberty interest.

### 3. Tiebout.

Charles M. Tiebout, in his seminal article *A Pure Theory of Local Expenditures*,<sup>140</sup> provides a solution to the failure of markets to provide public goods. By definition, people cannot be excluded from enjoying public goods, giving everyone an incentive to free-ride. Given that fact, economists argued that a market could never supply efficient levels of public goods like roads, education, and protection. Tiebout realized that given sufficient mobility by citizens (along with other simplifying assumptions<sup>141</sup>), local governments will have to compete with one another to provide the public goods that citizens want, creating a market for local government. The basic idea is that citizens will move into communities that supply the goods and services they value. Thus, Tiebout argued, it is not necessary for a central planner (the federal or state government, depending on the context) to supply desired public goods: local governments will be able to do the same more efficiently.

Some version of this theory has been endorsed in American case law: “This federalist structure of joint sovereigns preserves to the people numerous advantages . . . it allows for more innovation and experimentation in government[] and it makes government more responsive by putting the States in competition for a mobile citizenry.”<sup>142</sup> Although considered in the context of state division of power, the same logic applies to substate political divisions. They are not simply part of a local politician’s full-employment bill: the existence of different local governments preserves the same values as the persistence of sovereign state governments.

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<sup>139</sup> Jerry Keen, *Child Molestation: Legislature: Intensify Efforts to Track and Monitor*, Atlanta Journal-Constitution 5D (Nov 20, 2005) (emphasis added).

<sup>140</sup> Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J Polit Econ 416 (1956).

<sup>141</sup> See id at 419.

<sup>142</sup> *Gregory v Ashcroft*, 501 US 452, 458 (1991) (upholding a state law establishing mandatory retirement for state judges at seventy years of age).

If a state could banish people from political units, competition between these units is compromised. These residency laws frequently leave open only small portions of the state. People living under such restrictions cannot “vote with their feet.” This suggests that local governments will be less responsive to their needs because they enjoy a sort of monopoly power over the banished: they cannot receive their government services from anyone else but they will still be required to pay the same level of taxes.<sup>143</sup>

Such a scenario might seem farfetched if the state law only banished one small class of people. Again, this objection misses the point. A fundamental right to live in a political unit protects everyone, not just sex offenders.

The biggest objection to this account is that current law seems to allow residency restrictions imposed by governments all the time: we call them zoning laws. We exclude people from living in certain areas entirely by zoning land commercial or industrial, and we restrict substantially where people can live through requirements that raise the price of housing above many people’s means: setback requirements, minimum square footage requirements, and maximum occupancy laws.<sup>144</sup>

To take the easy question first, there is no problem with zoning regulations that exclude all people from living in a certain area. No political unit could be zoned entirely commercial or industrial: then no one could live there and no one could vote in the first place. No liberty interest is infringed in that case, because there is no interest to be lost in the first place. The more interesting problem is exclusionary zoning: restrictions that are designed to increase the price of housing so as to exclude the worse-off.

Consider a parallel problem. Bill would like to buy an apartment in Chicago’s exclusive Highland Park neighborhood. Because of a strange combination of events, there are simply no homes on the market and no rentals available in a certain congressional district for a two month period. It is perfectly reasonable to say that, although Bill has a right to live in that neighborhood, this right was not violated here. If no one is willing to sell him a house (and there are no ques-

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<sup>143</sup> In a more standard model of monopoly with price discrimination we expect to see the monopolist extract all the consumer surplus from an exchange until the consumer is indifferent between owning the product and not. In the context of government services this suggests we might expect to see a situation in which the cost of services goes up to the point where a person will be indifferent between, for example, having electricity or not.

<sup>144</sup> See *Elliott v Athens*, 960 F2d 975, 980 (11th Cir 1992) (considering a zoning ordinance with maximum occupancy and setback provisions, but lacking a square footage requirement because the City believed that “too low a number would cause a family to move if a child were born while too high a number would defeat the ability of the City to protect single-family neighborhoods”).

tions of racial discrimination or the like), then Bill has no complaint. The First Amendment does not require that government supply people with printing presses. Similarly, the right to live where you want does not require that housing be supplied, it simply means government may not exclude you from an area without due process.<sup>145</sup>

#### E. Step Four: Careful Description

By now it should be clear why this Comment has argued that the “right to live where you want” should be carefully described as “the right to live in any political unit you want.” All sorts of personal interests will be affected by where you live—and some might be so sensitive as to depend on the block you live on. But only the interests crucial to ordered liberty weigh in this analysis, and these laws fall especially hard on political interests. A general right to live where you want is too broad and not warranted by the facts of these cases. This right is centered on political units.

#### F. Summary

The right to live in the political unit of your choice meets the requirements of *Glucksberg*, so it should be counted as fundamental. Laws that impact this interest are therefore subject to strict scrutiny, in contrast to the holding in *Doe v Miller*. The rest of this Comment will focus on implementation: how should courts apply this right and what is at stake when they do?

## II. APPLYING THE RIGHT

This right is still quite amorphous. Does any regulation that moves people around now require strict scrutiny? Is any political subdivision subject to this rule, no matter how small? To be sure, the present formulation is closer to a standard than a rule, and it is hard to give a principled account of exactly what political subdivisions matter. In some areas, county government could be quite powerful, justifying a right to live in any county in the area. In some places school districts might have enough independent authority to justify a right to live in any school district as well.

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<sup>145</sup> Exclusionary zoning with this effect might be objectionable under the doctrine of “fundamental interests,” however. To paraphrase the reasoning of *Griffin v Illinois*, 351 US 12 (1956), if the government decides to be in the business of zoning, though it need not be, then it must administer the program in such a way that the poor are not excluded. See *id.* at 19 (holding that although there is no right to an appeal, the state is obligated to provide the necessary transcript free of charge to avoid unlawfully discriminating against the indigent). It is not clear that such an argument would be persuasive today.

Similar issues arose in local government voting regulations. The “one-person, one-vote” principle roughly requires that everyone in an electoral district must have equal electoral influence.<sup>146</sup> In the context of districts for the House of Representatives, for instance, this means that electoral districts must be equipopulous. This principle applies “not only to congressional districting plans . . . but also to local government apportionment.”<sup>147</sup> But not all local government. At issue in these cases were laws that restricted the right to vote in certain local elections. In *Avery v Midland County*,<sup>148</sup> the court held that a county-level governing body was governed by the “one-person, one-vote” principle because it enjoyed “general responsibility and power for local affairs.”<sup>149</sup> By contrast, the court declined to apply such a standard in *Sailors v Board of Education of Kent County*,<sup>150</sup> where the school board performed mostly administrative functions.<sup>151</sup> The Court further refined the standard in *Hadley v Junior College District*,<sup>152</sup> where it held the “one-person, one-vote” standard applied when the junior college performed “important governmental functions.”<sup>153</sup> In *Ball v James*<sup>154</sup> the Court held an Arizona water reclamation district need not conform to the “one-person, one-vote” rule and noted two distinguishing factors. First, the water reclamation board exercised a much narrower set of powers: it could not impose property or sales taxes; it could not govern the conduct of citizens; it did not administer the normal functions of government.<sup>155</sup> Second, the government powers it did exercise were very narrow.<sup>156</sup>

The relationship between voting rights and the powers of local government suggests the following per se rule: you have a right to live in a particular political subdivision if that level of government is or would be subject to the “one-person, one-vote” rule. A government that meets the *Ball* factors can tax and control its citizens, and that is

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<sup>146</sup> See *Karcher v Daggett*, 462 US 725, 731 (1983) (“Adopting any standard other than population equality, using the best census data available, would subtly erode the Constitution’s idea of equal representation.”) (internal citation omitted); *Reynolds v Sims*, 377 US 533, 577 (1964) (holding that “the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable”).

<sup>147</sup> *Board of Estimate v Morris*, 489 US 688, 692–93 (1989).

<sup>148</sup> 390 US 474 (1968).

<sup>149</sup> *Id.* at 483.

<sup>150</sup> 387 US 105 (1967).

<sup>151</sup> *Id.* at 109–10.

<sup>152</sup> 397 US 50 (1970).

<sup>153</sup> *Id.* at 54.

<sup>154</sup> 451 US 355 (1981).

<sup>155</sup> *Id.* at 366.

<sup>156</sup> *Id.*

the type of government one might need to flee.<sup>157</sup> A level of government without those powers cannot work the same mischief; in that case, the liberty interests developed above have less bite.

The regulation at issue in *Doe v Miller* left at least half the residential area of most cities uninhabitable by plaintiffs and pushed them to the fringe of urban areas altogether.<sup>158</sup> Cities certainly meet the *Ball* factors: they often enjoy the power to tax and can pass legislation controlling the actions of their residents. Under this rule, the regulation is subject to strict scrutiny because it restricts which city people can live in, a level of government subject to the “one-person, one-vote” rule. Assume for the sake of argument that Iowa school districts exercised the sorts of administrative powers mentioned in *Sailors*. A law that barred people from certain school districts might be just fine, as long as there were still someplace for affected individuals to live in every city and county, for example (assuming those are the narrowest subdivisions subject to the “one-person, one-vote” requirement). The proposed rule will not creep to occupy the entire field. As the example of the school district shows, there are many levels of government which simply do not warrant this degree of protection.

The substantial liberty interests identified here—voting power, interstate travel, and effective intergovernmental competition—can be nullified if a person is not free to choose where to live. That does not mean a person has the right to live on the block of her choice, because block associations do not have sufficient power to undermine liberty. The liberty interests at stake generate the limits of the right to live where you want. The per se rule proposed here is clear, even if the underlying standard is not always so, and captures the political dimension of what is at stake in the decision of where to live.

### III. PUBLIC POLICY CONSIDERATIONS

So far this Comment has argued there is a fundamental right to live in the political division of your choice grounded in the doctrine of substantive due process. Early courts have also struck down sentences of banishment on pure public policy grounds.<sup>159</sup> This section examines whether this logic can be extended to support the broader right to live where you want without recourse to substantive due process.

The argument against state banishment is straightforward: states should not be able to banish criminals because it imposes costs on

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<sup>157</sup> See Part I.D.

<sup>158</sup> *Doe*, 405 F3d at 706.

<sup>159</sup> See generally, for example, *Baum*, 231 NW 95; *Doughtie*, 74 SE 2d 922.

neighboring jurisdictions which do not have a voice in the decision.<sup>160</sup> Banishment from a smaller political unit, such as a city, might be different. A city ordinance that so restricts the residency of a sex offender that he must live outside city limits has the same problematic structure as a state banishment or state taxation of a federal authority: the law imposes externalities on a constituency that has no voice in the process. But if a state law banishes sex offenders from cities, the structure is quite different. In that case, neighboring jurisdictions do have representation in the state legislature, so that while the state is imposing costs on them, the jurisdictions still have a voice in the decision. Of course a state must distribute costs of governance among its citizens; rather than interfere in these choices, courts might do best to let the political process determine how these costs are to be allocated.

The Iowa law, and others like it, should not be voided on public policy grounds precisely because the rural districts in which the sex offenders are forced to live have state representation. Municipal orders of banishment (or county or township), on the other hand, should be considered void for reasons of public policy.

This theoretically motivated distinction seems not to match up with recent events, however. Local communities have passed more restrictive versions of the Iowa law:

The statute has set off a lawmaking race in the cities and towns of Iowa, with each trying to be more restrictive than the next by adding parks, swimming pools, libraries and bus stops to the list of off-limits places. Fearful that Iowa's sex offenders might seek refuge across state lines, six neighboring states have joined the frenzy. "We don't want to be the dumping ground for their sex offenders," said Tom Brusch, mayor of nearby Galena, Ill, which passed an ordinance in January.<sup>161</sup>

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<sup>160</sup> See *McCulloch v Maryland*, 17 US 316, 428 (1819) ("The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation."). See generally John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard 1980). The New Jersey Supreme Court used a version of this argument in striking down exclusionary zoning provisions:

It is plain beyond dispute that proper provision for adequate housing of all categories of people is . . . essential in promotion of the general welfare . . . [T]he general welfare which developing municipalities like Mount Laurel must consider extends beyond their boundaries and cannot be parochially confined to the claimed good of the particular municipality.

*Southern Burlington County NAACP v Mount Laurel*, 67 NJ 151, 336 A2d 713, 727-28 (1975).

<sup>161</sup> Monica Davey, *Iowa's Residency Rules Drive Sex Offenders Underground*, NY Times A1 (Mar 16, 2006) (reporting that many sex offenders have simply stopped reporting their whereabouts rather than follow the restrictions).



Private communities are feeling the same pressure and have responded with private banishments. Panther Valley, a common interest community in New Jersey, approved an amendment to its bylaws which stipulated that no resident could sell or rent his house to a Tier-3 convicted sex offender.<sup>162</sup> Other private communities are apparently considering similar amendments.<sup>163</sup>

Residency restrictions have created a “last-mover” problem: no community, public or private, wants to be the last one left where sex offenders can live. Even a small restriction on where sex offenders can live can cascade, resulting in entire regions that are effectively closed off. Courts should consider these questions when they are asked to rule on the constitutionality of these laws and private actions.<sup>164</sup>

#### IV. CONCLUSION

A limited right to live where you want is justified by history and democratic values. Banishment has only been accepted in rare circumstances, and never as a legislative action; banishment also undermines important political values. These factors together demand protection of a stiffer sort: the right to live where you want must be protected as a fundamental right. Residency restrictions, no matter whom they are directed against, run afoul of these rights. Laws like Iowa’s should be reviewed under strict scrutiny.

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<sup>162</sup> See *Mulligan v Panther Valley Property Owners Association*, 337 NJ Super 293, 766 A2d 1186, 1189 (2001) (explaining that “Tier-3” offenders are those with the highest risk of recidivism). The amendment was upheld at trial, but that decision was reversed on appeal because the record was insufficient. *Id.* at 1193.

<sup>163</sup> Henry Gottlieb, *A Test of the Power to Exclude*, 156 NJ L J 1, 11 (May 3, 1999) (observing, but citing no sources, that many other communities have considered similar measures).

<sup>164</sup> If courts are reluctant to strike down laws on the basis of nebulous policy concerns, the dormant commerce clause provides a better basis. If these laws cause interstate movement of sex offenders, then such laws might be within the jurisdiction of Congress. Even if Congress has declined to legislate in this area, states might still be precluded from doing so themselves. See generally *Southern Pacific Company v Arizona*, 249 US 472 (1919).