

Winter 2015

# “When Mercy Seasons Justice”: Interstate Recognition of Ex-Offender Rights

Wayne A. Logan

*Florida State University College of Law*

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## Recommended Citation

Wayne A. Logan, “When Mercy Seasons Justice”: Interstate Recognition of Ex-Offender Rights, 49 U.C. DAVIS L. REV. 1 (2015),  
Available at: <http://ir.law.fsu.edu/articles/212>

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# UC DAVIS LAW REVIEW

VOL. 49, NO. 1



NOVEMBER 2015

## “When Mercy Seasons Justice”: Interstate Recognition of Ex-Offender Rights

Wayne A. Logan\*

*To the great relief of many, states are now rethinking their draconian criminal justice policies of the past several decades. In addition to shrinking prison and jail populations, reforms are underway to expand opportunities for relief from the collateral consequences of conviction, such as the loss of the right to vote, serve as a juror, or work in certain occupations, which can impede the ability of ex-offenders to successfully reintegrate into society. In coming years, as states seek to reduce their high recidivism rates, such relief efforts will likely continue to grow in number; as they do, we should expect to see parallel growth in an important horizontal federalism challenge.*

*The challenge comes when ex-offenders, having secured collateral consequences relief in one state, relocate to another and seek to have their restored status recognized there. When this occurs a legal conflict materializes not unlike that of late witnessed with same-sex marriage.*

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*Unlike same-sex marriage recognition, however, which was the subject of major public debate and legal attention, restoration recognition — despite its potential impact on many millions more lives — has been largely ignored. This Article aims to remedy the deficit, providing the first comprehensive examination of how restoration recognition thus far has been addressed, and outlining a legislative way forward for states, or Congress, to balance the important comity, federalism, and state autonomy interests implicated.*

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## INTRODUCTION

America’s federalist system, in which sovereign states enjoy coequal law-making authority,<sup>1</sup> is custom-made for conflict.<sup>2</sup> That such conflicts would occur was certainly not lost on the Constitution’s Framers, who were at pains to include provisions designed to avoid fractious state relations marking the Articles of Confederation era.<sup>3</sup> Whereas the Constitution contains only one provision regarding legal disputes between states and the federal government (the Supremacy Clause),<sup>4</sup> four provisions speak to interstate disputes. The Full Faith and Credit Clause,<sup>5</sup> Privileges and Immunities Clause,<sup>6</sup> and Fugitive Slave Clause<sup>7</sup> are perhaps best known. Yet equally telling of the Framers’ concern is the Extradition Clause,<sup>8</sup> which requires one state to surrender an individual to another even if the behavior in question does not violate the criminal law of the surrendering state.<sup>9</sup>

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<sup>1</sup> See, e.g., *Underwriters Nat’l Assurance Co. v. N.C. Life & Accident Ins. Guar. Ass’n.*, 455 U.S. 691, 704 (1982) (recognizing the “structure of our Nation as a union of States, each possessing equal sovereign powers”); *Kansas v. Colorado*, 206 U.S. 46, 97 (1907) (“One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest.”).

<sup>2</sup> See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 250 (1992) (“One consequence of dividing a single nation into fifty quasi-sovereign states is a constant need to choose the law that governs interstate disputes.”). As Professor Paul Freund noted over fifty years ago, “[a] federal system presupposes diversity and must cope with corresponding tensions.” Paul A. Freund, *Umpiring the Federal System*, 54 COLUM. L. REV. 561, 561 (1954).

<sup>3</sup> See *New York v. United States*, 505 U.S. 144, 180 (1992) (noting Framers’ awareness of the “disputes that were common under the Articles of Confederation”); THE FEDERALIST NO. 6, at 54 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting “frequent and violent contests” among states). See generally DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 242-48 (Wilson C. McWilliams & Lance Banning eds., 2003) (providing a history of the creation of the Constitution and the events leading up to it).

<sup>4</sup> See U.S. CONST. art. VI, cl. 2 (specifying that the Constitution, federal laws, and treaties enacted pursuant to it “shall be the supreme Law of the Land”).

<sup>5</sup> *Id.* art. IV, § 1.

<sup>6</sup> *Id.* art. IV, § 2, cl. 1.

<sup>7</sup> *Id.* art. IV, § 2, cl. 3.

<sup>8</sup> *Id.* art. IV, § 2, cl. 2; see also *California v. Superior Court*, 482 U.S. 400, 405-07 (1987) (stating that “[t]he Federal Constitution places certain limits on the sovereign powers of the States, limits that are an essential part of the Framers’ conception of national identity and Union,” and noting that the Extradition Clause numbers among these provisions).

<sup>9</sup> See *New Mexico ex rel. Ortiz v. Reed*, 524 U.S. 151, 154 (1998).

Despite these structural mechanisms, interstate conflicts have persisted over time, as the bitter disputes over the enforceability of the federal Fugitive Slave Act in the antebellum era<sup>10</sup> and, more recently, same-sex marriage,<sup>11</sup> attest. This Article addresses another conflict, one arising when an individual subject to a collateral consequence of a criminal conviction — such as the loss of the right to vote, serve on a jury, possess a firearm, or work in particular occupations<sup>12</sup> — secures relief from the disability in one state and asks that the status change be recognized in a new state of residence. Although not legally obligated to do so,<sup>13</sup> states typically use sister-state convictions to trigger their own collateral consequences.<sup>14</sup> Need a state recognize another state's decision to heed the Immortal Bard and afford mercy?<sup>15</sup>

<sup>10</sup> See generally STEVEN LUBET, *FUGITIVE JUSTICE: RUNAWAYS, RESCUERS, AND SLAVERY ON TRIAL* 42-45 (2010) (discussing how the Fugitive Slave Act divided northern and southern states). The Act, passed by Congress pursuant to authority ostensibly granted by the Fugitive Slave Clause, was the subject of litigation for decades, ended only by adoption of the Thirteenth Amendment in 1865. See Robert J. Kaczorowski, *Popular Constitutionalism Versus Justice in Plainclothes: Reflections from History*, 73 *FORDHAM L. REV.* 1415, 1427-29 (2005).

<sup>11</sup> See, e.g., Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 *U. PA. L. REV.* 2143 (2005) (discussing the question of interstate recognition in the context of same-sex marriage); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 *YALE L.J.* 1965 (1997) (same).

<sup>12</sup> See generally NAT'L INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION, [http://www.abacollateralconsequences.org/user\\_guide/](http://www.abacollateralconsequences.org/user_guide/) (last visited Jan. 25, 2015) (providing an overview of collateral consequences imposed by states).

<sup>13</sup> See *Logan v. United States*, 144 U.S. 263, 303 (1892) (citations omitted) (“At common law, and on general principles of jurisprudence, [a conviction in one state] . . . can have no effect, by way of penalty, or of personal disability or disqualification, beyond the limits of the state in which the judgment is rendered.”), *abrogated on other grounds by Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Clark v. Gadden*, 432 P.2d 182, 185 (Or. 1967) (“No state is required to take notice of foreign convictions . . . Each state is free to give foreign convictions such force as it deems proper in the administration of local sentencing policy.”).

<sup>14</sup> See Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 *U. PA. L. REV.* 1789, 1802-03 (2012).

<sup>15</sup> WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1:

The quality of mercy is not strain'd,  
It droppeth as the gentle rain from heaven  
Upon the place beneath . . .  
It is an attribute to God himself;  
And earthly power doth then show likest God's  
When mercy seasons justice.

To date, the question has received only limited attention. While a handful of states have required recognition vis-à-vis particular rights,<sup>16</sup> only a single state, Vermont (adopting a model provision advanced by the Uniform Law Commission<sup>17</sup> and backed by the American Bar Association<sup>18</sup>), has enacted a broad-gauged recognition statute.<sup>19</sup> Meanwhile, on the few occasions the matter has been addressed, courts typically have rejected challenges to state refusal to recognize restored status.<sup>20</sup> As a consequence, individuals who secure relief in one state, and exercise their constitutional right to travel to another state,<sup>21</sup> will likely experience a negative status change in their new

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<sup>16</sup> See *infra* Part I.B.1.

<sup>17</sup> See *Collateral Consequences of Conviction Act*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/Act.aspx?title=Collateral%20Consequences%20of%20Conviction%20Act> (last visited Sept. 28, 2015). In 2015, the Act was considered by legislatures in Maryland, New York, Oregon, and the U.S. Virgin Islands, *id.*, and in prior years by other states including Minnesota, New Mexico, and West Virginia. See *Legislation*, UNIF. LAW COMM’N, <http://uniformlaws.org/Legislation.aspx?title=Collateral+Consequences+of+Conviction+Act> (last visited Oct. 10, 2015).

<sup>18</sup> Letter from Hon. Bernice B. Donald, Sec’y, Am. Bar Ass’n, to John A. Sebert, Exec. Dir., Nat’l Conference of Comm’rs on Unif. State Laws (Apr. 23, 2010), available at <http://www.uniformlaws.org/Shared/Docs/ABA%20Approval%205-11-2010.pdf>. The National Association of Criminal Defense Lawyers likewise urges adoption of recognition. NAT’L ASS’N OF CRIMINAL DEFENSE LAWYERS, COLLATERAL DAMAGE: AMERICA’S FAILURE TO FORGIVE OR FORGET IN THE WAR ON CRIME: A ROADMAP TO RESTORE RIGHTS AND STATUS AFTER ARREST OR CONVICTION 15 (2014) (urging that jurisdictions “give effect to relief granted by other jurisdictions”). The latest draft of the Model Penal Code revision project by the American Law Institute contains a provision allowing individuals with an out-of-state conviction to petition the forum court for relief from a mandatory collateral consequence, directing the reviewing court to “give favorable consideration to any relief already granted to the petitioner by the jurisdiction in which the conviction occurred.” MODEL PENAL CODE: SENTENCING § 6x.05(1)–(3) (Tentative Draft No. 3, Apr. 24, 2014).

<sup>19</sup> See VT. STAT. ANN. tit. 13, § 8009(d)–(e) (2013) (effective Jan. 1, 2016).

<sup>20</sup> See *infra* Parts I.B.2, II.A.

<sup>21</sup> See *City of Chicago v. Morales*, 527 U.S. 41, 53 (1999) (citation omitted) (“[The] ‘right to remove from one place to another according to inclination’ [is] ‘an attribute of personal liberty’ protected by the Constitution.” (quoting *William v. Fears*, 179 U.S. 270 (1900)); *Zobel v. Williams*, 457 U.S. 55, 76-77 (1982) (O’Connor, J., concurring) (“[I]t is difficult to imagine a right more essential to the Nation as a whole than the right to establish residence in a new State.”); *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (“[T]he nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.”), *overruled in part* by *Edelman v. Jordan*, 415 U.S. 651 (1974).

state of residence upon arrival, and even possibly face criminal liability.<sup>22</sup>

Restoration recognition has major practical importance for convicted individuals seeking to reintegrate into society,<sup>23</sup> and for a nation grappling with the staggering human and financial costs of recidivism.<sup>24</sup> It also has major federalism implications, creating interstate tensions similar to those seen lately in the case of same-sex marriage.<sup>25</sup> Much like marriage, collateral consequences policy embodies an expression of state sovereignty and democratic self-will,<sup>26</sup> and states vary in how and whether they make relief available.<sup>27</sup> Unlike same-sex marriage recognition, however, which has been the subject of federal legislation (the Defense of Marriage Act) designed to address interstate conflict,<sup>28</sup> and high-profile litigation,<sup>29</sup> restoration

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<sup>22</sup> See, e.g., *People v. Shear*, 83 Cal. Rptr. 2d 707, 714 (Ct. App. 1999) (allowing prosecution for unlawful possession of a firearm to proceed despite Arizona firearm restoration). Working without an occupational license can likewise have criminal law ramifications. See, e.g., FLA. STAT. ANN. § 481.223 (2015) (criminalizing unlicensed practice as an architect), *held unconstitutional in part by Locke v. Shore*, 682 F. Supp. 2d 1283 (N.D. Fla. 2010).

<sup>23</sup> See generally U.S. DEP'T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 5 (2013) (noting significant impediments to reentry imposed by collateral consequences); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 666-73 (2006) (surveying literature regarding negative effect collateral consequences have on reentry prospects).

<sup>24</sup> See, e.g., Editorial, *Recidivism's High Cost and a Way to Cut It*, N.Y. TIMES (Apr. 27, 2011), <http://www.nytimes.com/2011/04/28/opinion/28thu3.html> (citing study by Pew Charitable Trusts' Center on the States estimating that states would save \$635 million in a single year by reducing their recidivism rates by only ten percent).

<sup>25</sup> See generally Steve Sanders, *The Constitutional Right to (Keep Your) Same-Sex Marriage*, 110 MICH. L. REV. 1421 (2012) (discussing the interstate conflicts between states that allow same-sex marriage and those that do not).

<sup>26</sup> See, e.g., *Oregon v. Ice*, 555 U.S. 160, 170 (2009) (citing *Patterson v. New York*, 432 U.S. 197 (1977) ("[T]he authority of States over the administration of their criminal justice systems lies at the core of their sovereign status"); *Heath v. Alabama*, 474 U.S. 82, 93 (1985) ("The Constitution leaves in the possession of each State 'certain exclusive and very important portions of sovereign power.' Foremost among the prerogatives of sovereignty is the power to create and enforce a criminal code." (quoting THE FEDERALIST NO. 9, at 55 (Alexander Hamilton) (J.E. Cooke ed., 1961))); *State v. Langlands*, 583 S.E.2d 18, 20 n.4 (Ga. 2003) ("A state cannot express its public policy more strongly than through its penal code. When a state defines conduct as criminal and sets the punishment for the offender, it is conveying in the clearest possible terms its view of public policy." (quoting *New Mexico v. Edmondson*, 818 P.2d 855, 860-861 (N.M. 1991))).

<sup>27</sup> See *infra* Part I.A.

<sup>28</sup> See 28 U.S.C. § 1738C (2012) ("No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a

recognition has remained off the nation’s radar. This is so even though the issue potentially affects many millions more individuals. While it cannot be said with certainty how many restored ex-offenders relocate,<sup>30</sup> over sixty-five million Americans have a criminal record, potentially triggering collateral consequences of some kind,<sup>31</sup> an aggregate population that increases by the year.<sup>32</sup>

Despite its theoretical and practical significance and despite the voluminous literature on collateral consequences more generally,<sup>33</sup> interstate recognition has received very little scholarly attention.<sup>34</sup> This Article aims to fill that gap and proceeds as follows. Part I

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relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . .”). The recognition provision was not addressed by the Court in its decision *United States v. Windsor*, 133 S. Ct. 2675, 2682-83 (2013), invalidating DOMA’s restrictive definition of marriage on Fifth Amendment due process grounds. *Id.* at 2693-95.

<sup>29</sup> The Court’s recent landmark decision regarding same-sex marriage, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), had the potential to resolve the interstate recognition question. When granting certiorari in the litigation, which combined several different cases, the Court agreed to decide (1) if there is a constitutional right to same-sex marriage; and (2) whether states must recognize a same-sex marriage lawfully conducted in another state. *See Bourke v. Beshear*, 135 S. Ct. 1041, 1041 (2015) (mem.). Ultimately, a 5-4 majority of the Court resolved the first question in the affirmative, mooted the necessity of resolving the marriage recognition question. *Obergefell*, 135 S. Ct. at 2607-08 (“The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold — and it now does hold — that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.”).

<sup>30</sup> For data on the interstate migration of Americans more generally, see Gregor Aisch & Robert Gebeloff, *Mapping Migration in the United States*, N.Y. TIMES (Aug. 15, 2014), <http://www.nytimes.com/2014/08/16/upshot/mapping-migration-in-the-united-states-since-1900.html>; *State-to-State Migration for States of 8 Million or More*, U.S. CENSUS BUREAU (Dec. 20, 2012), <http://www.census.gov/dataviz/visualizations/028/>.

<sup>31</sup> *See* Chin, *supra* note 14, at 1805.

<sup>32</sup> *See* LAUREN E. GLAZE & DANIELLE KAEBLE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013 at 1 (2014), available at <http://www.bjs.gov/content/pub/pdf/cpus13.pdf> (noting that almost seven million individuals are now incarcerated or subject to community correctional supervision).

<sup>33</sup> For a sampling of the expansive and ever-growing literature, see COLLATERAL CONSEQUENCES RESOURCE CENTER, <http://ccresourcecenter.org/resources-2/resources-books-and-articles/> (last visited Feb. 3, 2015).

<sup>34</sup> *See* MARGARET COLGATE LOVE ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE §§ 1:17, 3:22, 7.24 (2013) (briefly discussing interstate recognition and noting uncertainty surrounding the issue); Flynn Patrick Carey, Note, *Extending the Home Court Advantage: A Call to Update the Arizona Civil Rights Restoration Scheme*, 48 ARIZ. L. REV. 1129, 1132-34 (2006) (examining uncertainty of recognition in Arizona).



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provides an overview of the growing array of relief mechanisms becoming available in states and then discusses the only limited allowance now made for recognition of sister-state restoration outcomes. Part II considers whether, in the absence of a state recognition provision, a newcomer ex-offender<sup>35</sup> to a state might have a federal constitutional basis to force recognition. In the state-federal context, the answer is clear: the Supremacy Clause requires that states recognize and give effect to a presidential pardon of a convicted federal offender.<sup>36</sup> The obligation owed by states to one another, however, is less clear. If anywhere, such an obligation likely would be grounded in provisions designed to promote comity and mediate interstate conflicts, such as the Full Faith and Credit Clause and the Privileges and Immunities Clause contained in Article IV. Such claims, however, have thus far met with almost universal defeat and little reason exists to think that future efforts will be any more successful.

Part III turns to the prospects for increased interstate recognition as a result of legislative change. Individual states have a significant comity-based interest in recognizing one another's restoration decisions. They each also have strong practical interest in promoting the successful reentry of ex-offenders, including newcomers, given the enormous social and economic consequences of recidivism. Recognition, however, is not without cost or complication. A chief difficulty stems from the fact that states can and do vary in their restoration laws and policies, which embody important sovereign political preferences. If not undertaken with sensitivity to state

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<sup>35</sup> The "ex-offender" designation, a shorthand method to refer to an individual at one time convicted of a crime, is used here in the interest of brevity, but with reluctance. The designation allows for the continued stigmatization of individuals convicted of crimes and is at odds with the goal of successful reentry and reintegration. As Professor Duff recently noted, "'ex-' suggests that this is not a role at all: it declares that the description which it qualifies no longer applies; he was an offender, but is no longer. On the other hand, as the phrase is actually used, it suggests that the taint of that — strictly speaking no longer applicable — description persists: the 'ex-offender' still carries the powerfully effective stigma of offending." R.A. Duff, *A Democratic Criminal Law* 18 (U. Minn. L. Sch., Research Paper No. 15-20, 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2618698](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2618698).

<sup>36</sup> See *Bjerkan v. United States*, 529 F.2d 125, 129 (7th Cir. 1975) (recognizing that the federal pardon power for offenses against the United States "must be supreme. It cannot be hindered by the operation of the subordinate governments. The pardon power would be ineffective if it could only restore a convict's federal civil rights"); *Bradford v. Cardoza*, 240 Cal. Rptr. 648, 650 (1987) ("[A] presidential pardon [of a federal conviction] . . . restores an individual's state as well as federal civil rights."). The President, however, lacks constitutional authority to pardon a state conviction. See *In re Bocchiaro*, 49 F. Supp. 37, 38 (W.D.N.Y. 1943) (citing U.S. CONST. art. II).

interests, recognition ultimately could allow the preferences of a single state to control policy nationwide, much as Nevada once did with its divorce policy.<sup>37</sup>

The Article therefore makes the case for adoption of a more conditional approach to interstate recognition, one that allows for forum state restoration law and policy to be taken into account. While ideally the proffered approach would be undertaken organically by states themselves, states might not feel compelled to act. The Article therefore considers the means by which Congress, mindful of the pressing national need to promote reentry, can require or encourage state adoption of recognition provisions.

### I. RESTORATION AND RECOGNITION

Although collateral consequences in some form date back to ancient times,<sup>38</sup> they came to enjoy unprecedented use starting in the 1980s when U.S. criminal justice policy took a far more punitive turn.<sup>39</sup> Today, convictions for serious and non-serious offenses alike<sup>40</sup> trigger collateral consequences that affect convicted individuals in manifold ways.<sup>41</sup> This part first surveys recent state efforts to reduce this

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<sup>37</sup> See, e.g., David P. Currie, *Suitcase Divorce in the Conflict of Laws*: Simons, Rosenstiel, and Borax, 34 U. CHI. L. REV. 26, 26-27 (1966) (“It is no secret that Nevada makes divorce law for the whole country.”).

<sup>38</sup> See Mirjan R. Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 347, 350-56 (1968). The category “collateral consequences” actually encompasses two forms of non-penal disability: a “collateral sanction,” imposed by operation of law as a result of conviction, and a discretionary “disqualification,” also arising from conviction, but imposed after an individualized inquiry by a legal authority. See UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT §§ 2(2), (5), 8 (2010), available at [http://www.uniformlaws.org/shared/docs/collateral\\_consequences/uccca\\_final\\_10.pdf](http://www.uniformlaws.org/shared/docs/collateral_consequences/uccca_final_10.pdf).

<sup>39</sup> Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROBATION 10, 11-15 (1996) (surveying marked increase in collateral consequences between 1986 and 1996). See generally JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 136 (2003) (noting that collateral consequences are “being applied to a larger percentage of the U.S. population and for longer periods of time than at any point in U.S. history.”).

<sup>40</sup> See Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 UC DAVIS L. REV. 277, 302-03 (2011).

<sup>41</sup> The American Bar Association, with a grant from the U.S. Department of Justice, is now in the process of assembling a comprehensive inventory of the collateral consequences imposed by states and the federal government, which number in the tens of thousands, referred to as the National Inventory of the Collateral Consequences of Conviction (“NICCC”). See NAT’L INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION, *supra* note 12. As the NICCC highlights, collateral

proliferation, by removing legal disabilities and restoring rights of ex-offenders, and then examines the extent to which states recognize restoration outcomes of sister-states.

### A. Restoration

Today, state codes contain an increasing array of mechanisms allowing for relief from collateral consequences.<sup>42</sup> First, many states afford relief automatically by operation of law,<sup>43</sup> restoring rights such as voting, serving on a jury, or holding public office after a sentence is served<sup>44</sup> or the passage of a specified number of crime-free years.<sup>45</sup> Automatic relief is less common when it comes to restoration of the right to own or possess a firearm, with a handful of states affording

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consequences come in myriad forms, including lesser known but nonetheless significant disabilities such as losing eligibility to secure student loans and public housing, serve as a foster parent, and obtain certain forms of insurance. *See id.* The focus here, however, is on what are generally seen as the chief collateral consequences of the right to vote, serve on a jury, hold public office, possess a firearm, and limits on employment and eligibility for occupational licensure.

<sup>42</sup> *See* RAM SUBRAMANIAN ET AL., RELIEF IN SIGHT?: STATES RETHINK THE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION, 2009-2014, at 4 (2014) (noting that “[f]rom 2009 through 2014, forty-one states and the District of Columbia enacted 155 pieces of legislation to mitigate the burden of collateral consequences for people with certain criminal convictions”).

<sup>43</sup> Margaret Colgate Love, Executive Director of the Collateral Consequences Resource Center and former U.S. Pardon Attorney, has assembled an extremely helpful web site detailing state and federal restoration provisions, a resource that was of invaluable help in assembling much of the information reported on in this section. *See* Margaret Colgate Love, *NACDL Restoration of Rights Project*, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, <https://www.nacdl.org/ResourceCenter.aspx?id=25091> (last visited June 22, 2015).

<sup>44</sup> *See, e.g.*, GA. CONST. art. II, § 1, para. III (voting); MONT. CONST. art. IV, § 4 (holding public office); ALASKA STAT. § 9.20.020 (2015) (jury service); ALASKA STAT. § 15.05.030(a) (2015) (voting); CONN. GEN. STAT. ANN. § 9-46a(a), (b) (2015) (voting); HAW. REV. STAT. § 831-2(a) (2015) (voting and holding public office); IND. CODE ANN. § 3-7-13-4 (2015) (voting); IND. CODE ANN. § 33-28-5-18 (2015) (jury service); KAN. STAT. ANN. § 21-6613(b) (2015) (voting, holding office and jury service); MINN. STAT. ANN. § 609.165 (2015) (voting and holding public office); MONT. CODE ANN. § 46-18-801(2) (2015) (“all civil rights and full citizenship”); N.C. GEN. STAT. ANN. § 13-1 (2015) (“rights of citizenship”); N.D. CENT. CODE ANN. § 12.1-33-01(1) (2015) (voting and holding public office); OR. REV. STAT. ANN. § 137.281(1), (3) (2015) (voting, jury service, holding public office).

<sup>45</sup> *See, e.g.*, LA. CONST. art. I, § 10(C) (right to hold office restored after fifteen years); MASS. GEN. LAWS ANN. ch. 234A, § 4(7) (2015) (jury right restored after seven years); NEV. REV. STAT. ANN. § 213.157(1)(b)–(c) (2015) (hold office after four years and sit on a criminal jury after six years).

relief after a specified period of time.<sup>46</sup> The same is true regarding removal of occupational or licensure prohibitions.<sup>47</sup>

The second cluster of relief mechanisms is discretionary in nature. The pardon is the best known and oldest method. Today, every state makes pardons available in some form, vesting the authority in various entities, including governors acting alone and independent boards acting with or without governors.<sup>48</sup> If secured, a pardon can afford an expansive range of relief.<sup>49</sup> In Montana, for instance, pardon removes “all legal consequences” of a conviction.<sup>50</sup> In South Carolina, pardon relieves the convicted individual of “all the legal consequences of his crime and of his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty or whatever else the law has provided.”<sup>51</sup>

Pardons, however, have become infrequent in recent years,<sup>52</sup> leaving room for experimentation with other discretionary relief mechanisms. In New York, for instance, a court or designated board can issue a “certificate of relief from disabilities,” when “consistent with the rehabilitation of the eligible offender” and “consistent with the public

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<sup>46</sup> See, e.g., IDAHO CODE ANN. § 18-310(1)(2) (2015) (except for enumerated violent felonies, right lost only during period of sentence, and for enumerated felonies, application considered for restoration of right only after 5 years); KAN. STAT. ANN. § 21-6304(a) (2015) (right restored five years after sentence served for “non-person felony” conviction, or ten years after serving sentence for other felony convictions); ME. REV. STAT. ANN. tit. 15, § 393(2) (2015) (right may be restored five years after discharge, based on application); N.D. CENT. CODE ANN. § 62.1-02-01 (2015) (right lost for ten years after discharge or upon conviction of violent felony or intimidation, for five years if convicted of non-violent felony or Class A misdemeanor).

<sup>47</sup> In Illinois, for instance, with the exception of some specified professions, “all license rights and privileges” are restored after completion of a sentence or discharge from supervision, subject to review. 730 ILL. COMP. STAT. ANN. 5/5-5-5(d) (2015).

<sup>48</sup> See Katie R. Van Camp, Comment, *The Pardoning Power: Where Does Tradition End and Legal Regulation Begin?*, 83 MISS. L.J. 1271, 1286-90 (2014) (describing the six different pardon models currently employed).

<sup>49</sup> See, e.g., *People v. Glisson*, 358 N.E.2d 35, 38 (Ill. App. Ct. 1976) (“[A] pardon removes the penalties and disabilities (resulting from the conviction) and restores [the individual] to all his civil rights.” (quoting *Ex Parte Garland*, 71 U.S. 333, 380 (1866)), *aff’d and rev’d in part by People v. Glisson*, 872 N.E.2d 669 (Ill. 1978); *Doe v. State*, 328 A.2d 784, 787 (N.H. 1974) (stating a pardon “is an act of executive grace completely eliminating all consequences of the conviction . . .”).

<sup>50</sup> MONT. CODE ANN. § 46-23-301(1)(b) (2015).

<sup>51</sup> S.C. CODE ANN. § 24-21-940(A) (2015).

<sup>52</sup> See generally Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169 (2010) (discussing the infrequent exercise of the presidential pardon power since the 1980s).

interest.”<sup>53</sup> Individuals with a single felony or several misdemeanor convictions can secure a certificate

to relieve an eligible offender of any forfeiture or disability, or to remove any bar to his employment, automatically imposed by law by reason of his conviction . . . . Such certificate may be limited to one or more enumerated forfeitures, disabilities or bars, or may relieve the eligible offender of all forfeitures, disabilities and bars. Provided, however, that no such certificate shall apply, or be construed so as to apply, to the right of such person to retain or to be eligible for public office.<sup>54</sup>

Individuals with multiple felonies can seek a “certificate of good conduct,” which affords similar relief.<sup>55</sup>

Connecticut makes available “absolute”<sup>56</sup> and “provisional” pardons.<sup>57</sup> The former negates the fact of a prior conviction, relieving all legal disabilities. The latter functions as a “certificate of rehabilitation” that restores particular rights and removes particular disqualifications.<sup>58</sup> In New Jersey, a certificate “suspends certain disabilities, forfeitures or bars to employment or professional licensure or certification that apply to persons convicted of criminal offenses.”<sup>59</sup> North Carolina also makes available a “certificate of relief,” with similar effect.<sup>60</sup>

States are also expanding opportunities for relief pursuant to traditional expungement and annulment mechanisms. In Indiana, for instance, convicted felons can petition for judicial expungement five or eight years after the date of conviction, or three years after

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<sup>53</sup> N.Y. CORRECT. LAW §§ 702(2), 703(3) (McKinney 2015).

<sup>54</sup> *Id.* § 701(1).

<sup>55</sup> See *Certificate of Relief from Disabilities-Certificate of Good Conduct Application and Instructions*, N.Y. DEP’T CORRECTIONS & COMMUNITY SUPERVISION, [https://www.parole.ny.gov/pdf/DOCCS-CRD-Application\\_Instructions.pdf](https://www.parole.ny.gov/pdf/DOCCS-CRD-Application_Instructions.pdf) (last visited Sept. 8, 2015) (stating the Department has discretion to remove one or all “allowable disabilities”). For more information on New York’s regime, see Joy Radice, *Administering Justice: Removing Statutory Barriers to Reentry*, 83 U. COLO. L. REV. 715, 726-42 (2012).

<sup>56</sup> CONN. GEN. STAT. ANN. § 54-142a(d) (2015).

<sup>57</sup> *Id.* §§ 54-130e(b)–(d).

<sup>58</sup> See David J. Norman, Note, *Stymied by the Stigma of a Criminal Conviction: Connecticut and the Struggle to Relieve Collateral Consequences*, 31 QUINNIPIAC L. REV. 985, 1005-13 (2013).

<sup>59</sup> N.J. STAT. ANN. § 2A:168A-7(a) (2015).

<sup>60</sup> See N.C. GEN. STAT. ANN. § 15A-173.2(d) (2015).

completion of sentence (depending on the offense),<sup>61</sup> which restores the ability to serve on a jury, vote, hold public office, and possess a firearm,<sup>62</sup> and bars use of the conviction to refuse employment or deny licensure.<sup>63</sup> In New Hampshire, courts can annul convictions for less serious offenses and non-recidivists “if in the opinion of the court, the annulment will assist in the petitioner’s rehabilitation and will be consistent with the public welfare.”<sup>64</sup> Upon securing an annulment, an individual “shall be treated in all respects as if he or she had never been arrested, convicted or sentenced,” except (as is commonly the case) that courts may consider the annulled conviction in the event of a subsequent conviction.<sup>65</sup> In Arizona, courts can issue “set-asides” or vacate convictions for less-serious offenses,<sup>66</sup> restoring all rights and relieving the individual from “all penalties and disabilities resulting from the conviction.”<sup>67</sup>

In many states, laws target occupational limits in particular. Ohio, for instance, allows a court to issue a “certificate of qualification for employment” that lifts occupational bars and licensure prohibitions,<sup>68</sup> subject as is commonly the case to exceptions for particular occupations (e.g., a prosecutor or law enforcement officer).<sup>69</sup> Tennessee allows ex-offenders to present a “certificate of employability”<sup>70</sup> to potential employers, negating the effect of otherwise applicable provisions barring issuance of licenses.<sup>71</sup> In New Jersey, one can secure a certificate of rehabilitation that “suspends certain disabilities, forfeitures or bars to employment or professional licensure or certification that apply to persons convicted of criminal offenses.”<sup>72</sup>

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<sup>61</sup> IND. CODE ANN. §§ 35-38-9-2 to -4 (2015).

<sup>62</sup> *Id.* § 35-38-9-10(c) (2015).

<sup>63</sup> *Id.* § 35-38-9-10(b).

<sup>64</sup> N.H. REV. STAT. ANN. § 651:5(I) (2015).

<sup>65</sup> *Id.* § 651:5(X)(a).

<sup>66</sup> ARIZ. REV. STAT. ANN. § 13-907(A) (2015).

<sup>67</sup> *Id.* § 13-907(C).

<sup>68</sup> OHIO REV. CODE ANN. § 2953.25 (2015). A court considers three factors: whether granting relief will materially assist in obtaining work or occupational licensure; whether the individual has a substantial need for the relief in order to live a law-abiding life; and whether granting relief will not pose an unreasonable risk to the safety of the public or the individual. *Id.* § 2953.25(C)(3)(a)–(c).

<sup>69</sup> *Id.* § 2953.25(5).

<sup>70</sup> TENN. CODE ANN. § 40-29-107 (2015).

<sup>71</sup> *See id.* § 40-29-107(m). Tennessee’s criteria for issuance are substantially similar as those of Ohio. *Compare id.* § 40-29-107(i), with OHIO REV. CODE ANN. § 2953.25(C).

<sup>72</sup> N.J. STAT. ANN. § 2A:168A-7 to -8 (2015). The certificate evidences that “the applicant has achieved a degree of rehabilitation indicating that his engaging in the

Finally, some states either refrain from imposing particular collateral consequences in the first place, or significantly circumscribe their application. Colorado does not impose a bar on the right to serve as a trial juror;<sup>73</sup> New York and Massachusetts do not limit the right to hold public office;<sup>74</sup> Vermont does not restrict the right to own or possess a firearm, vote or hold public office;<sup>75</sup> Alabama restricts the right to serve on a jury when an individual is convicted of an “offense involving moral turpitude;”<sup>76</sup> and Maine does not restrict the right to vote, serve on a jury or hold public office.<sup>77</sup> Meanwhile, Colorado<sup>78</sup> and New Jersey<sup>79</sup> afford sentencing courts discretion to relieve defendants of specific collateral consequences, which would otherwise apply by operation of law.

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proposed employment would not be incompatible with the welfare of society.” *Id.* § 2A:168A-3.

<sup>73</sup> See *People v. Ellis*, 148 P.3d 205, 209 (Colo. App. 2006), *habeas corpus granted by Ellis v. Raemisch*, 2014 WL 7464021 (D. Colo. Dec. 12, 2014). A felony conviction, however, may be considered in the empanelment of trial jurors, and individuals convicted of felonies are ineligible to serve as grand jurors. *Frequently Asked Questions*, COLORADO JUDICIAL BRANCH, <https://www.courts.state.co.us/FAQs/> (last visited Sept. 3, 2015).

<sup>74</sup> See Andrea Steinacker, *The Prisoner’s Campaign: Felony Disenfranchisement Laws and the Right to Hold Public Office*, 2003 BYU L. REV. 801, 804.

<sup>75</sup> VT. STAT. ANN. tit. 28, § 807 (2015) (voting); Steinacker, *supra* note 74, at 804 (holding public office). As for firearms, no law expressly bans felons from possession and the state constitution explicitly extends the right without reservation, resulting in de facto preservation of the right. See Jay Buckley, Note, *Firearms for Felons? A Proposal to Prohibit Felons from Possessing Firearms in Vermont*, 35 VT. L. REV. 957, 958, 965-66 (2011).

<sup>76</sup> ALA. CODE § 12-16-60(a)(4) (2015). If lost, the right can be restored by a pardon from the Board of Pardons and Parole. See *id.* §§ 15-22-20 to -40 (2015).

<sup>77</sup> See ME. REV. STAT. ANN. tit. 14, § 1211 (2015) (specifying disqualifications for jury service, none of which refer to jury service); Act of Apr. 28–29, 1982, ch. 705, pt. G, sec. 4, § 1211, 1981 Me. Laws 1263 (deleting language that disqualified individuals with convictions from serving on juries). On voting, see *Felon Voting Rights*, NAT’L CONF. OF ST. LEGISLATURES (July 15, 2014), <http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>. On holding office, see Steinacker, *supra* note 74, at 806.

<sup>78</sup> COLO. REV. STAT. ANN. § 18-1.3-107(1), (3) (2015) (affording court power to “relieve a defendant of any collateral consequences of the conviction, whether in housing or employment barriers or any other sanction or disqualification that the court shall specify”).

<sup>79</sup> N.J. STAT. ANN. § 2A:168A-7 to -8 (2015) (affording court power to issue certificate that “suspends certain disabilities, forfeitures or bars to employment or professional licensure or certification that apply to persons convicted of criminal offenses”).

### B. Recognition

The increasing availability of relief mechanisms in states, and the decision of some states to refrain from or limit imposing certain collateral consequences altogether, create potential conflict of law problems when restored individuals relocate to another state. Historically, states have declined to recognize a prior sister-state pardon, annulment, or vacating of a conviction when sentencing an individual later convicted of a crime in the forum.<sup>80</sup> As the California Supreme Court put it, “the profile of the shadow that conviction casts on later events is the business of the state where those later events occur.”<sup>81</sup>

A forum state’s interest in holding accountable newcomers who violate its criminal laws,<sup>82</sup> however, differs from its treatment of newcomers who remain law-abiding. Over time, states have exhibited greater willingness to recognize sister-state grants of mercy when it comes to collateral consequences.

#### 1. Statute or Regulation

A handful of states statutorily recognize sister states’ restoration of particular rights. With respect to voting, jury service and holding public office:

- Nevada<sup>83</sup> recognizes the right to vote and serve as a civil (but not criminal) juror;
- New Hampshire<sup>84</sup> recognizes the right to vote and hold public office;

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<sup>80</sup> See generally Kimberly J. Winbush, Annotation, *Pardoned or Expunged Conviction as “Prior Offense” Under State Statute or Regulation Enhancing Punishment for Subsequent Conviction*, 97 A.L.R. 5TH 293 (2002 & Supp. 2014) (listing jurisdictions that consider convictions pardoned by foreign states for the purposes of sentence enhancement statutes).

<sup>81</sup> *People v. Laino*, 87 P.3d 27, 37 (Cal. 2004) (citation omitted citing *Poo v. Hood*, 1992 WL 30617, at \*6 (S.D.N.Y. Feb. 12, 1992) (internal quotation marks omitted)).

<sup>82</sup> See, e.g., *State v. Hulbert*, 544 S.E.2d 919, 923-24 (W. Va. 2001) (asserting that failure to consider foreign state conviction would “invite” individuals in search of a “clean slate,” thereby enabling them to continue committing [crimes] in [the] state . . . without realizing the legislatively-intended effects of enhanced punishment for repeat offenders”).

<sup>83</sup> NEV. REV. STAT. ANN. § 213.155(5)(b) (2015); *id.* § 213.157(5)(b) (2015); *id.* § 293.543(2)(b)(2) (2015).

<sup>84</sup> N.H. REV. STAT. ANN. § 607-A:5 (2015).



- North Carolina<sup>85</sup> recognizes the right to vote, serve as juror, and hold public office;
- Nebraska<sup>86</sup> recognizes the right to serve as a juror and hold public office;
- Kentucky<sup>87</sup> recognizes the right to serve as juror; and
- Arkansas<sup>88</sup> recognizes the right to hold public office.

With respect to the right to possess a firearm, Oklahoma,<sup>89</sup> Georgia,<sup>90</sup> Idaho,<sup>91</sup> Virginia,<sup>92</sup> and Washington<sup>93</sup> recognize sister-state restorations. In Virginia, administrative regulation allows for recognition of restored status vis-à-vis the right to vote, serve as a juror, and hold public office.<sup>94</sup>

Vermont, as noted, is the only state to adopt a statutory-based global approach to sister-state recognition.<sup>95</sup> Vermont law requires that a pardon issued by another jurisdiction have “the same effect for purposes of authorizing, imposing, and relieving a collateral consequence” in Vermont as it does in the issuing jurisdiction.<sup>96</sup> With respect to non-pardon forms of relief, as when a conviction has been “relieved by expungement, sealing, annulment, set-aside, or vacation” elsewhere “on grounds of rehabilitation or good behavior,” collateral consequences relief in Vermont accords with that afforded in the restoring state.<sup>97</sup> When “civil rights are restored pursuant to statute,” however, Vermont will extend relief regardless of whether sister-state restoration was predicated on grounds of rehabilitation or good

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<sup>85</sup> N.C. GEN. STAT. ANN. §§ 13-1, 13-2 (2015) (“rights of citizenship”); see also *Relief from a Criminal Conviction*, UNC SCH. OF GOV'T, <http://www.sog.unc.edu/resources/microsites/relief-criminal-conviction/citizenship-rights> (last visited Sept. 4, 2015).

<sup>86</sup> NEB. REV. STAT. ANN. § 29-113 (2015).

<sup>87</sup> KY. REV. STAT. ANN. § 29A.080(2)(e) (2015).

<sup>88</sup> ARK. CODE ANN. § 7-6-102(d) (2015).

<sup>89</sup> OKLA. STAT. ANN. tit. 21, § 1283(B) (2015).

<sup>90</sup> GA. CODE ANN. § 16-11-131(c) (2015).

<sup>91</sup> IDAHO CODE ANN. § 18-3316(3) (2015).

<sup>92</sup> VA. CODE ANN. § 18.2-308.2(B)(iv) (2015); *Restoration of Firearm Rights*, VA. ST. POLICE (July 1, 2015), [http://www.vsp.state.va.us/Firearms\\_Restoration.shtm](http://www.vsp.state.va.us/Firearms_Restoration.shtm).

<sup>93</sup> WASH. REV. CODE. ANN. § 9.41.040(3) (2015).

<sup>94</sup> Telephone and e-mail correspondence with Garry E. Ellis, Virginia Department of Elections (Sept. 29, 2015) (on file with author); Virginia Department of Elections, *General Registrar and Electoral Board Handbook* § 9.1.3.2 (Rev. July 2015) (on file with author).

<sup>95</sup> See VT. STAT. ANN. tit. 13 § 8009 (2013) (effective Jan. 1, 2016).

<sup>96</sup> *Id.* § 8009(d).

<sup>97</sup> *Id.* § 8009(e).

behavior.<sup>98</sup> The sole caveat to non-pardon-based recognition is that no relief will be accorded vis-à-vis the three collateral consequences that Vermont makes unavailable to its own residents.<sup>99</sup>

## 2. Caselaw

Restoration recognition has received only limited attention in state courts. To date, courts in Florida — paradoxically, a state that ranks among the nation’s least generous in restoring rights and removing disabilities of its own residents<sup>100</sup> — have been most receptive. In *Schlenther v. Department of State, Division of Licensing*,<sup>101</sup> the petitioner, who had been convicted of a felony in Connecticut and later had his rights “fully restored” there (by unspecified means) sought to secure a permit to carry a concealed weapon in Florida.<sup>102</sup> The Second District Court of Appeal framed the issue in terms of whether Florida was obligated to show full faith and credit to Connecticut’s restoration outcome.<sup>103</sup>

The court held that Florida’s firearms ban was not intended to apply when “the individual’s civil rights had been suspended and restored by another state, all before the individual arrived in this State.”<sup>104</sup> When the petitioner moved to Florida,

he did so in full possession of all civil rights of Connecticut citizenship. He did not arrive here under a disability. To the contrary, he arrived as any other citizen, with full rights of citizenship. Appellant must not now be required, twenty-five years later, to ask this State to restore his civil rights. They were never lost here.<sup>105</sup>

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<sup>98</sup> *Id.*

<sup>99</sup> *See id.* (cross-referencing section 8012, which disallows relief from sex offender registration, motor vehicle license limitations, and law enforcement employment prohibitions); *id.* § 8012.

<sup>100</sup> *See, e.g.,* Erika Wood, *Turning Back the Clock in Florida*, HUFFINGTON POST (Mar. 10, 2011, 4:36 PM EST), [http://www.huffingtonpost.com/erika-wood/turning-back-the-clock-in\\_b\\_834239.html](http://www.huffingtonpost.com/erika-wood/turning-back-the-clock-in_b_834239.html) (describing Florida as “the most punitive state in the country when it comes to disenfranchising people with criminal convictions in their past.”).

<sup>101</sup> 743 So. 2d 536 (Fla. Dist. Ct. App. 1998).

<sup>102</sup> *Id.* at 536-37.

<sup>103</sup> *Id.* at 537.

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

<sup>105</sup> *Id.*

The court continued:

Once another state restores the civil rights of one of its citizens whose rights had been lost because of a conviction in that state, they are restored and the State of Florida has no authority to suspend or restore them at that point. The matter is simply at an end.<sup>106</sup>

One year later, another Florida intermediate appellate court held likewise. In *Doyle v. Florida Department of State, Division of Licensing*,<sup>107</sup> the petitioner, who had been convicted in New York of a misdemeanor drug offense, but did not lose his right to carry a firearm there, moved to Florida and sought a concealed weapons carry permit. The First District Court of Appeal, citing *Schlenther*, held that Doyle could obtain a permit because New York never withdrew his right to own or possess a firearm,<sup>108</sup> even though the drug offense would have been a felony in Florida and resulted in the loss of the right.<sup>109</sup> According to the *Doyle* court, “[t]he governor of Florida has neither the power to restore the civil rights of out-of-state offenders which have already been restored by another state, nor the authority to restore the civil rights of those whose rights were never suspended by another jurisdiction.”<sup>110</sup>

Intermediate appellate courts in Colorado and Arizona have shown similar deference to restoration in sister-states. In *Seguna v. Maketa*,<sup>111</sup> the Colorado Court of Appeals addressed whether a Michigan felony drug conviction, later set aside by Michigan authorities, qualified under Colorado’s prohibition against possessing a firearm after a felony conviction “under . . . any other state’s law.”<sup>112</sup> The court concluded that the Colorado Legislature’s reference to “other state’s law” required that it look to Michigan law to determine if Seguna was entitled to possess a firearm in Colorado.<sup>113</sup> Because Seguna was

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<sup>106</sup> *Id.*

<sup>107</sup> 748 So. 2d 353 (Fla. Dist. Ct. App. 1999).

<sup>108</sup> *Id.* at 356.

<sup>109</sup> *Id.* at 354.

<sup>110</sup> *Id.* at 356. Compare *id.*, with *Logan v. United States*, 552 U.S. 23, 37 (2007) (holding an exemption in federal firearm law for those with “civil rights restored” did not cover a person “who lost no civil rights” in a state as a result of a state conviction).

<sup>111</sup> 181 P.3d 399 (Colo. App. 1999).

<sup>112</sup> *Id.* at 400-01 (quoting COLO. REV. STAT. § 18-12-108(1) (1999)) (internal quotation marks omitted).

<sup>113</sup> *Id.*; see also *id.* at 402 (“If the legislature had wished to require reference to Colorado law to determine whether a person had been so convicted, it could have made such intent clear.”).

entitled to a set-aside under Michigan law allowing for removal of the firearms disability there, he was eligible to secure a permit to carry a concealed firearm in Colorado.<sup>114</sup>

In *Parker v. City of Tucson*,<sup>115</sup> the Arizona Court of Appeals addressed recognition in a case challenging the eligibility of individuals to circulate ballot initiative petitions. The court addressed a provision in the state constitution and election law that permitted convicted felons to vote and circulate ballot petitions only if “restored to civil rights.”<sup>116</sup> The court concluded that the proviso applied to individuals with in-state and out-of-state felony convictions alike and that “restoration of rights is determined by the law of the jurisdiction in which the conviction occurred.”<sup>117</sup> Applying this standard, the *Parker* court found that the appellants had not had their civil rights restored in their states of conviction and therefore were ineligible to circulate petitions in Arizona.<sup>118</sup>

Finally, the Washington Supreme Court, in *State v. Radan*,<sup>119</sup> also recognized sister-state relief but took a more conditional approach. In *Radan*, the petitioner had been convicted of felony theft in Montana, but secured an early discharge from supervision that resulted in automatic restoration of his right to possess a firearm in Montana.<sup>120</sup> After he had moved to Washington he failed to seek a firearms permit, assuming his Montana restoration of civil rights would apply in Washington.<sup>121</sup> In answering whether Washington would recognize Radan’s restoration absent an application for a firearms permit, the *Radan* court assessed whether the legal basis for restoration in Montana satisfied Washington’s law, which provided in part that

[a] person shall not be precluded from possession of a firearm if the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure

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<sup>114</sup> *Id.* at 403.

<sup>115</sup> 314 P.3d 100 (Ariz. Ct. App. 2013).

<sup>116</sup> *Id.* at 107 (citing ARIZ. CONST. art. VII, § 2(C) (2013); ARIZ. REV. STAT. §§ 19-114(A), 16-101(A)(5) (2013)).

<sup>117</sup> *Id.* at 109 & n.8.

<sup>118</sup> *Id.* at 111-13. Two years earlier, the Arizona Supreme Court, without elaboration, concluded with respect to eligibility to serve on a jury that an individual with an out-of-state felony conviction cannot serve “unless the [prospective] juror’s civil rights have been restored.” *State v. Prince*, 250 P.3d 1145, 1158-59 (Ariz. 2011) (quoting ARIZ. REV. STAT. § 21-201(3) (2011)) (internal quotation marks omitted).

<sup>119</sup> 21 P.3d 255 (Wash. 2001) (en banc).

<sup>120</sup> *Id.* at 256-57.

<sup>121</sup> *See id.* at 256.

based on a finding of the rehabilitation of the person convicted or the conviction or disposition has been the subject of a pardon, annulment, or other equivalent procedure been based on a finding of innocence.<sup>122</sup>

Because Radan had not secured relief in Montana based on a finding of innocence, and did not receive a “pardon, annulment, [or] certificate of rehabilitation,” the court considered whether Montana’s early discharge mechanism qualified as an “other equivalent procedure based on a finding of [] rehabilitation of the person convicted . . . .”<sup>123</sup>

After noting that Washington required “something more than the automatic restoration of an individual’s civil rights,” the Court concluded that even though the Montana restoration was automatic, it was predicated on an “equivalent procedure” that was “based on a finding of [] rehabilitation.”<sup>124</sup> Although unwilling to define the meaning of “finding of rehabilitation,”<sup>125</sup> the Court concluded that Montana’s early discharge mechanism sufficed, as it was based on a recommendation from Radan’s probation and parole officer and a finding by a court that his discharge from supervision was “in the best interests of the probationer and society and ‘will not present unreasonable risk of danger to the victim of the offense.’”<sup>126</sup>

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After a several-decades-long experiment in harsh penalty,<sup>127</sup> states are now acting to soften their sentencing policies, including

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<sup>122</sup> *Id.* at 257 (citing WASH. REV. CODE. § 9.41.040(3) (2001)).

<sup>123</sup> *Id.* at 258 (citing WASH. REV. CODE. § 9.41.040(3) (2001)) (internal quotation marks omitted).

<sup>124</sup> *Id.* at 258-61 (citing WASH. REV. CODE § 9.41.040(3) (2001)) (internal quotation marks omitted).

<sup>125</sup> *Id.* at 260-61 (internal quotation marks omitted).

<sup>126</sup> *Id.* at 260 (quoting MONT. CODE ANN. § 46-23-1011 (2001)). In a footnote, the court observed that Radan could have petitioned a Washington court for restoration and the criteria would have been “far less stringent” than those operative in Montana. *Id.* at 260 n.2. See also *State v. Harrison*, 326 P.3d 800, 804 (Wash. Ct. App. 2014) (holding that a California “certificate of rehabilitation,” while not a pardon serving to restore the right to possess a firearm in California, entailed a judicial finding of rehabilitation even more demanding than that required by Washington law).

<sup>127</sup> On the reasons behind this shift more generally, see JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007); JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003).

undertaking efforts to afford relief from collateral consequences imposed as a result of convictions. To date, however, increased state interest in restoring the rights of their own ex-offenders has not translated into equal dispensation for newcomers who have had their rights restored in another state. The next part examines the extent to which federal constitutional litigation might be available to force recognition.

## II. POTENTIAL CONSTITUTIONAL ARGUMENTS

Given the modest availability of recognition mechanisms and limited redress afforded by courts, the question naturally arises whether recognition might be obliged on the basis of one or more constitutional arguments. This part surveys potential claims that might be brought.

### A. Full Faith and Credit

Although the Constitution does not provide a clear-cut answer to whether states have the power to regulate matters beyond their borders,<sup>128</sup> it does contain “first-in-time” rules that seek to reduce interstate friction.<sup>129</sup> The most prominent of these is the Full Faith and Credit Clause, which requires that “[f]ull Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”<sup>130</sup> The Clause functions as a “nationally unifying force” that “altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws . . . of the others.”<sup>131</sup>

The Full Faith and Credit Clause, however, is “not an inexorable and unqualified command.”<sup>132</sup> For instance, it has long been accepted that “public Acts” (statutes and common law)<sup>133</sup> and “Records” (executive

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<sup>128</sup> See Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 NOTRE DAME L. REV. 1133, 1154 (2010) (noting that “constitutional doctrine to this day does not clearly tell us to what extent states may regulate people and things outside their borders”).

<sup>129</sup> See Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 567 n.264 (2008) (“The first-in-time rule creates a mandatory form of comity that subordinates state policy preferences to systemic concerns about interstate harmony and finality of judgments.”).

<sup>130</sup> U.S. CONST. art. IV, § 1; see also 28 U.S.C. § 1738 (2012).

<sup>131</sup> *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943).

<sup>132</sup> *Pink v. A.A.A. Highway Express, Inc.*, 314 U.S. 201, 210 (1941).

<sup>133</sup> See, e.g., Ralph U. Whitten, *Full Faith and Credit for Dummies*, 38 CREIGHTON L. REV. 465, 471-73 (2005) (discussing interpretations of the Clause and its application

branch action documents)<sup>134</sup> need not be accorded full faith and credit if doing so would violate a state's "legitimate public policy"<sup>135</sup> or would be "obnoxious to the public policy of the forum."<sup>136</sup> By contrast, "judicial Proceedings" (judgments, especially money judgments)<sup>137</sup> have been accorded "exacting operation" and "nationwide force"<sup>138</sup> regardless of policy conflict.<sup>139</sup> More recently, however, the Supreme Court has signaled its willingness to shift course.

Most notably, in *Baker ex rel. Thomas v. General Motors Corp.*,<sup>140</sup> despite insisting that there is "no roving 'public policy exception' to the full faith and credit due judgments,"<sup>141</sup> the U.S. Supreme Court

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to public acts and common law).

<sup>134</sup> See Shawn Gebhardt, Comment, *Full Faith and Credit for Status Records: A Reconsideration of Gardiner*, 97 CALIF. L. REV. 1419, 1444 (2009). The definition and contents of the "records" category has not been illuminated much over time and the Court itself has ignored it. See, e.g., *Baker ex rel. Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998) (stating that its "precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments," omitting reference to records).

<sup>135</sup> *Nevada v. Hall*, 440 U.S. 410, 422 (1979) (citing *Pac. Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493 (1939)).

<sup>136</sup> See, e.g., *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 160-61 (1932) (weighing the validity of a state's public policy argument), *abrogated in part by Crider v. Zurich Ins. Co.*, 380 U.S. 39 (1965).

<sup>137</sup> See *Baker*, 522 U.S. at 232-33 (citing *Matsushita Elec. Ind. Co. v. Epstein*, 516 U.S. 367 (1996)) ("A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land."); see also 18B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4467, at 17 (2d ed. 2002) ("The most familiar application of the full faith and credit statute has involved enforcement of money judgments.").

<sup>138</sup> *Rosin v. Monken*, 599 F.3d 574, 576 (7th Cir. 2010) (quoting *Baker*, 522 U.S. at 233) (internal quotation marks omitted). For discussion of why judgments deserve elevated status over acts and records, see Rex Glensy, Note, *The Extent of Congress' Power Under the Full Faith and Credit Clause*, 71 S. CAL. L. REV. 137, 161 (1997).

<sup>139</sup> See, e.g., *Williams v. North Carolina*, 317 U.S. 287, 294, 299 (1942) (holding that North Carolina must recognize Nevada divorce decree, even though it conflicted with North Carolina policy); *Kennedy v. Supreme Lodge of the World, Loyal Order of Moose*, 252 U.S. 411, 414 (1920) (holding that Illinois must enforce judgment in Alabama wrongful death even though action could not be brought in Illinois); *Fauntleroy v. Lum*, 210 U.S. 230, 237-38 (1908) (holding that Mississippi must enforce Missouri judgment upholding a gambling contract otherwise unenforceable in Mississippi); see also *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 499 (2003) ("Without a rudder to steer us, we decline to embark on the constitutional course of balancing coordinate States' competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause.").

<sup>140</sup> 522 U.S. 222 (1998).

<sup>141</sup> *Id.* at 233 (citing *Estin v. Estin*, 334 U.S. 541 (1948); *Fauntleroy v. Lum*, 210 U.S. 230 (1908)).

refused to require that Missouri honor a Michigan court’s injunction (a “judgment”) barring a particular witness’s testimony.<sup>142</sup> The *Baker* majority also suggested that a judgment need only be recognized for evidentiary (*res judicata*) but not enforcement purposes,<sup>143</sup> a position endorsed by Justice Scalia in his concurrence,<sup>144</sup> several scholars,<sup>145</sup> and recently the Fifth Circuit Court of Appeals.<sup>146</sup>

As noted above, in *Schlenther v. Department of State, Division of Licensing*, the Florida Court of Appeals accorded full faith and credit to a sister-state’s restoration of an individual’s right to possess a firearm.<sup>147</sup> A review of the caselaw, however, makes clear that the

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<sup>142</sup> *Id.* at 226. This point was not lost on Justice Kennedy, who in his concurrence noted the majority’s “reliance upon unidentified principles to justify omitting certain types of injunctions from the doctrine’s application leaves its decision in uneasy tension with its own rejection of a broad public policy exception to full faith and credit.” *Id.* at 245 (Kennedy, J., concurring in judgment). Justice Kennedy added that “[m]y concern is that the majority, having stated the principle [that states are obligated to give effect to each other’s judgments despite contravening public policies], proceeds to disregard it by announcing two broad exceptions.” *Id.* at 243.

<sup>143</sup> *Id.* at 235 (majority opinion) (“Enforcement measures do not travel with the sister state judgment as preclusive effects do . . .”); *id.* at 233 (citations and footnote omitted) (a state judgment “qualifies for recognition throughout the land. For claim and issue preclusion (*res judicata*) purposes. . .the judgment of the issuing State enjoys nationwide force.”).

<sup>144</sup> See *id.* at 241 (Scalia, J., concurring in judgment) (“The Full Faith and Credit Clause did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them, *as evidence*. No execution can issue upon such judgments without a new suit in the tribunals of other States.” (internal quotation marks omitted) (quoting *Thompson v. Whitman*, 85 U.S. (18 Wall.) 457, 462-63 (1873))).

<sup>145</sup> See David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L.J. 1584, 1587-89 (2009); Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201, 1205-08 (2009); James D. Sumner, Jr., *The Full-Faith-and-Credit Clause — Its History and Purpose*, 34 OR. L. REV. 224, 248-49 (1955). For a contrarian view, see Jeffrey M. Schmitt, *A Historical Reassessment of Full Faith and Credit*, 20 GEO. MASON L. REV. 485 (2013).

<sup>146</sup> *Adar v. Smith*, 639 F.3d 146, 153-55 (5th Cir. 2011) (en banc). In *Adar*, Louisiana was asked to give effect to a New York child adoption decree, secured by two fathers, by issuing a birth certificate containing their names. *Id.* at 151. The Louisiana registrar recognized the New York decree but refused to enforce it based on Louisiana public policy prohibiting adoption by unmarried couples. *Id.* at 149-50. The majority concluded that Louisiana was obliged to recognize the sister-state decree but was not required to enforce it. *Id.* at 158-59 (citing *Baker*, 522 U.S. at 232-35). “Obtaining a birth certificate,” the court stated, “falls in the heartland of enforcement, and therefore outside the full faith and credit obligation of recognition.” *Id.* at 160.

<sup>147</sup> *Schlenther v. Dept. of State, Div. of Licensing*, 743 So. 2d 536, 537 (Fla. Dist. Ct. App. 1998).



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position is very much an outlier, with courts regularly refusing recognition on public policy grounds.

In *People v. Shear*,<sup>148</sup> for instance, the California Court of Appeal upheld the petitioner's California conviction for unlawful possession of a firearm based on a prior Arizona felony conviction, even though his right to possess a weapon had previously been restored by Arizona. The court concluded that recognizing restoration would be "obnoxious to the public policy" of California regarding limits on who can lawfully possess a firearm.<sup>149</sup> According to the unanimous court,

There can be few more significant public policies of this state than that of protecting the safety of its citizens by barring convicted felons, persons who have proved unfit to be entrusted with firearms, from possessing them.

. . . .

The Full Faith and Credit Clause does not preclude California from carrying out its public policy of prohibiting convicted felons within its borders from possessing firearms merely because defendant could lawfully possess firearms in Arizona.<sup>150</sup>

In *Blackwell v. Haslam*,<sup>151</sup> the Tennessee Court of Appeals addressed whether a Georgia pardon that restored Blackwell's right to possess a firearm must be recognized in Tennessee. Without pausing to categorize the pardon as an act, record, or judgment,<sup>152</sup> the court directly addressed the public policy question. The court concluded that the two states were at "loggerheads": Georgia allowed restoration of persons convicted of all felonies, whether violent or not, while Tennessee denied restoration eligibility to violent felons.<sup>153</sup> Citing *Shear*, the court held that "the Tennessee statutes on firearm rights are borne of the State's significant interest in 'protecting the safety of its

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<sup>148</sup> 83 Cal. Rptr. 2d 707 (Ct. App. 1999).

<sup>149</sup> *Id.* at 713 (quoting *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 160 (1932)).

<sup>150</sup> *Id.* at 714.

<sup>151</sup> No. M2012-01991-COA-R3-CV, 2013 WL 3379364 (Tenn. Ct. App. 2013).

<sup>152</sup> *See id.* at \*16 n.19 ("It matters not whether Georgia restored Mr. Blackwell's rights through executive pardon, statutory procedure, or otherwise. We are charged in this appeal with determining whether Georgia's restoration of Mr. Blackwell's firearm rights, by any means, conflicts with Tennessee's public policy on the restoration of a convicted felon's firearm rights.").

<sup>153</sup> *Id.* at \*16.

citizens’ by barring persons whom our legislature has deemed unfit to be entrusted with the possession of firearms.”<sup>154</sup>

The *Blackwell* court emphasized that because the restriction was part of the state’s penal code it was especially emblematic of its public policy.<sup>155</sup> The legislature “made the public policy judgments inherent in discharging its constitutional duty” vis-à-vis firearms regulation, and the court felt no need to “abandon [its] fundamental policy in favor of the public policy of another jurisdiction.”<sup>156</sup> Requiring Tennessee to extend full faith and credit to Georgia’s restoration outcome would require “too large a sacrifice by [Tennessee] of its interests in a matter with which it is primarily concerned’ — protecting public safety and preventing crime.”<sup>157</sup>

*In re Winston*<sup>158</sup> provides yet another example of state court resistance to a full faith and credit argument. In *Winston*, a New Jersey appellate court addressed whether Winston, who had secured from New York a “Certificate of Relief from Disabilities” for two prior New York felony convictions, could obtain a New Jersey firearm purchaser identification card and permit to purchase a firearm. The *Winston* court held that while the certificate removed the automatic firearm disability in New York, it did not “alter or affect the criminal conviction[s] to which it relates.”<sup>159</sup> “The Full Faith and Credit Clause,” the *Winston* court wrote, “does not require New Jersey to ignore its law that treats such convictions as automatically disqualifying simply because the [New York] certificates remove that automatic disqualifier under New York’s gun laws.”<sup>160</sup>

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<sup>154</sup> *Id.* at \*17 (citing *Shear*, 83 Cal. Rptr. 2d at 714).

<sup>155</sup> *See id.* (quoting *New Mexico v. Edmondson*, 818 P.2d 855, 860 (N.M. Ct. App. 1991)) (“Tennessee’s penal code conveys ‘in the clearest possible terms [Tennessee’s] view of public policy.’”).

<sup>156</sup> *Id.* (citing *Edmondson*, 818 P.2d at 860-61).

<sup>157</sup> *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 cmt. b (1971)); *see also* *Pardoned Felony Drug Offender Prohibited from Possessing or Purchasing Firearms*, Tenn. Op. Att’y Gen., No. 09-168 (2009), 2009 WL 3479586, at \*4 (concluding that Tennessee need not recognize out-of-state pardon for a felony drug offense conviction, as pardon in Tennessee would not restore right). Because the record was unclear on whether *Blackwell*’s Georgia conviction involved violence, the court remanded the matter to the trial court for determination. *Blackwell*, 2013 WL 3379364, at \*15, \*21.

<sup>158</sup> 101 A.3d 1120 (N.J. Super. Ct. App. Div. 2014).

<sup>159</sup> *Id.* at 1125.

<sup>160</sup> *Id.*; *see also id.* (“There is no constitutional requirement that New Jersey deem *Winston* not disqualified for a permit under its firearms law just because New York has seen fit to do so under its law.”).

Each of the foregoing challenges concerned restoration of the firearm right. Another collateral consequence spurring litigation concerns sister-state recognition of relief from the sex offender registration requirement, a claim that has been uniformly rejected. For instance, in *Donlan v. State*<sup>161</sup> an individual moved to Nevada from California after California had terminated his registration requirement. Noting that the termination resulted from an executive administrative act, and was not a “judgment” of another state,<sup>162</sup> the court invoked the full faith and credit public policy exception.<sup>163</sup> California, the Nevada Supreme Court concluded, had “no authority to dictate to [Nevada] the manner in which it can best protect its citizenry from those convicted of sex offenses.”<sup>164</sup> According to the *Donlan* court, “Nevada does not need to dispense with its preferred mechanism for protecting its populace by virtue of a California executive branch administrative action that terminated Donlan’s requirement to register as a sex offender.”<sup>165</sup>

Similarly, in *Rosin v. Monken*<sup>166</sup> the Seventh Circuit rejected a claim that Illinois must grant relief from registration based on a New York plea agreement expressly stating that the defendant need not register as a sex offender. The court reasoned that the agreement, despite being embodied in a judgment by the court, was important only “for claim and issue preclusion (*res judicata*) purposes,” and Illinois need not give effect to it.<sup>167</sup> According to the *Rosin* court, “Illinois need not dispense with its preferred mechanism for protecting its citizenry by virtue merely of a foreign judgment that envisioned less restrictive requirements’ [sic] being imposed on the relevant sex offender.”<sup>168</sup>

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<sup>161</sup> 249 P.3d 1231 (Nev. 2011).

<sup>162</sup> *Id.* at 1233.

<sup>163</sup> *Id.* at 1233 & n.1.

<sup>164</sup> *Id.* at 1233 (quoting *Rosin v. Monken*, 599 F.3d 574, 577 (7th Cir. 2010)).

<sup>165</sup> *Id.* (citing *Rosin*, 599 F.3d at 577). For an instance of a California court employing similar reasoning to refuse full faith and credit to another state’s relief from registration (Washington), see *Crofoot v. Harris*, 239 Cal. App. 4th 1125 (Cal. App. 2015).

<sup>166</sup> 599 F.3d 574 (7th Cir. 2010).

<sup>167</sup> *Id.* at 576 (citing *Baker ex rel. Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998)).

<sup>168</sup> *Id.* at 577. The court elaborated on what the plea bargain meant:

New York could promise [petitioner] only that he would never have to register as a sex offender within its own jurisdiction. [Petitioner] could not bargain for a promise from New York as to what other states would do based on his guilty plea to sexual abuse in the third degree, for New York had no power to make such a promise.

*Id.*

The court closed by echoing the view adopted by other courts, stating that “[t]he Full Faith and Credit Clause was enacted to preclude the same matters’ [sic] being relitigated in different states as recalcitrant parties evade unfavorable judgments by moving elsewhere. It was never intended to allow one state to dictate the manner in which another state protects its populace.”<sup>169</sup>

As the preceding cases make clear, notwithstanding the limited Florida caselaw to the contrary,<sup>170</sup> there is little reason to conclude that the Full Faith and Credit Clause provides a constitutional basis to require states to recognize and give effect to one another’s restoration outcomes. This is true regardless of whether restoration occurs by automatic operation of statutory law (an “Act”), administrative-executive branch action (a “Record”), or even a judgment (a “Proceeding”). Not only does the public policy exception (whatever its merit<sup>171</sup>) stand in the way,<sup>172</sup> but so too does the reality that a sister-

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<sup>169</sup> *Id.* At other times, the forum court sidesteps the issue. For instance, in rejecting another state’s decision to discontinue registration, a New York appellate court reasoned that “[t]he purpose of the Full Faith and Credit Clause is to avoid conflicts between States in adjudicating the same matters” and that “a different state’s registration requirement is not the same matter.” *People v. McGarghan*, 920 N.Y.S.2d 329, 331 (App. Div. 2011) (citation omitted) (internal quotation marks omitted); *cf.* *Nolan v. Fifteenth Judicial Dist. Attorney’s Office*, 10-1093 (La. App. 3 Cir. 4/6/11); 62 So. 3d 805, 807 (holding that Ohio judgment terminating registration requirement did not preclude Louisiana from requiring registration, as Louisiana was “not seeking to force [petitioner] to register as a sex offender in Ohio”). For a very rare instance of a state suspending its registration requirement, itself triggered by an out-of-state conviction, which was later expunged by the other state, see *Stallworth v. State*, 2013–CA–01643–SCT (¶5) (Miss. 2015); 160 So. 3d 1161. The *Stallworth* court, over a spirited dissent, avoided the full faith and credit question, instead holding that when the petitioner’s “conviction was expunged, he was returned to the status he occupied before his conviction. And because he had no duty [to] register as a sex offender before he was convicted, the expungement relieved him of any further duty to register.” *Id.* at 1164.

<sup>170</sup> See *supra* notes 100–10 and accompanying text.

<sup>171</sup> See, e.g., Robert H. Jackson, *Full Faith and Credit — The Lawyer’s Clause of the Constitution*, 45 COLUM. L. REV. 1, 27 (1945) (“It is hard to see how the faith and credit clause has any practical meaning as to statutes if the Court should adhere to the statement that ‘. . . a state is not required to enforce a law obnoxious to its public policy.’” (quoting *Griffin v. McCoach*, 313 U.S. 398, 507 (1941))); *Kramer*, *supra* note 11, at 1987 (“The measure of repugnance . . . is fixed by the federal Constitution, and states have no business selectively ignoring or refusing to recognize the constitutional laws of sister states because they do not like them.”); *Laycock*, *supra* note 2, at 313 (calling the public policy exception “a relic carried over from international law without reflection on the changes in interstate relations wrought by the Constitution”).

<sup>172</sup> See *supra* notes 148–65 and accompanying text; see also, e.g., *Walker v. Commonwealth*, 127 S.W.3d 596, 601 (Ky. 2004) (“The Full Faith and Credit Clause

state judgment might serve only an evidentiary function and need not be given legal effect by the forum.<sup>173</sup>

### B. Privileges and Immunities

Alternatively, a forum state's refusal to honor the restored status of a newcomer might arguably violate constitutional limits imposed on state authority to impair the rights of new residents. The Privileges and Immunities Clause of Article IV ensures that "[c]itizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."<sup>174</sup> Like the Full Faith and Credit Clause (also contained in Article IV),<sup>175</sup> the Privileges and Immunities Clause was intended to "fuse into one Nation a collection of independent, sovereign States"<sup>176</sup> and designed to "insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy."<sup>177</sup>

The Privileges and Immunities Clause, however, assures protection of only "fundamental" privileges and immunities,<sup>178</sup> those "bearing upon the vitality of the Nation as a single entity."<sup>179</sup> It also does not require that states recognize "special privileges enjoyed by citizens in their own States."<sup>180</sup> Such privileges, the Court wrote in *Paul v. Virginia*, "can have no such operation, except by the permission, express or implied, of those States. The special privileges which

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was designed to give the United States certain benefits of a unified nation, but a judgment of a sister state need not be recognized by another state if it is an improper infringement on the interests of the latter state." (citation omitted) (internal quotation marks omitted)).

<sup>173</sup> See *supra* notes 140–46, 166–68 and accompanying text.

<sup>174</sup> U.S. CONST. art. IV, § 2, cl. 1. Although the text references "citizens," the Clause has been interpreted to treat state residency and citizenship interchangeably. See *Hicklin v. Orbeck*, 437 U.S. 518, 524 n.8 (1978) (citations omitted).

<sup>175</sup> Also known as the "States' Relations Article." *Baldwin v. Fish and Game Comm'n*, 436 U.S. 371, 379 (1978).

<sup>176</sup> *Toomer v. Witsell*, 334 U.S. 385, 395 (1948); see also *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868) ("[W]ithout some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists."), *overruled in part by United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

<sup>177</sup> *Baldwin*, 436 U.S. at 399 (Brennan, J., dissenting) (quoting *Toomer*, 334 U.S. at 395).

<sup>178</sup> *McBurney v. Young*, 133 S. Ct. 1709, 1714 (2013); *Baldwin*, 436 U.S. at 387 (stating that the scope is inclusive of "such basic and essential activities, interference with which would frustrate the purposes of the formation of the Union").

<sup>179</sup> See *Baldwin*, 436 U.S. at 383.

<sup>180</sup> *Paul*, 75 U.S. (8 Wall.) at 180.

[States] confer must, therefore, be enjoyed at home, unless the assent of other States to their enjoyment therein be given.”<sup>181</sup>

Conceivably, forum state refusal to recognize restored eligibility for an occupation could qualify as “vital[]” to national unity, as the Court has deemed problematic state limits on the ability of newcomers to “ply their trade, practice their occupation, or pursue a common calling.”<sup>182</sup> To be actionable, however, one must prove discriminatory protectionist intent,<sup>183</sup> a difficult standard to meet.<sup>184</sup>

Furthermore, even assuming that one or more other rights qualify, a key challenge in any recognition claim would be to establish that restoration is not a “special privilege” bestowed by another state.<sup>185</sup> The Supreme Court has held that a state acts within its power to deny a right to a newcomer when “there are perfectly valid independent reasons for it.”<sup>186</sup> To satisfy this test a state could invoke its sovereign authority to apply its own distinct restoration eligibility criteria and procedures vis-à-vis restoration of the right(s) implicated.

With firearms, for instance, some states have very demanding restoration requirements, such as requiring an individualized finding of fitness<sup>187</sup> or a pardon.<sup>188</sup> Some states preclude restoration altogether,<sup>189</sup>

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<sup>181</sup> *Id.* at 180-81.

<sup>182</sup> *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978); *see also* *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 219 (1984) (citing *Baldwin*, 436 U.S. at 387)) (“[T]he pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause.”). It is for this reason that much of the litigation that could sound in Article IV is instead resolved on Dormant Commerce Clause grounds. *See generally* Brannon P. Denning, *Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine*, 88 MINN. L. REV. 384 (2003) (providing background information on the Dormant Commerce Clause and on Article IV, Section 2, the Privileges and Immunities Clause).

<sup>183</sup> *See* *McBurney*, 133 S. Ct. at 1715 (citing *United Bldg. & Constr. Trades Council*, 465 U.S. 208; *Hicklin*, 437 U.S. at 524; *Toomer v. Witsell*, 334 U.S. 385, 395, 397 (1948)) (“[T]he Court has struck laws down as violating the privilege of pursuing a common calling only when those laws were enacted for the protectionist purpose of burdening out-of-state citizens.”).

<sup>184</sup> *See, e.g., id.* (upholding state law because it had a non-protectionist aim). The existence of protectionist purpose, however, should not be entirely discounted as a possibility, such as might result from pressure applied by occupational cartels (e.g., licensed trades) that do not want competition from newcomers.

<sup>185</sup> *See supra* notes 180–81 and accompanying text.

<sup>186</sup> *Toomer v. Witsell*, 334 U.S. 385, 396 (1948).

<sup>187</sup> *See, e.g.,* OHIO REV. CODE ANN. § 2923.14(D)(2) (LexisNexis 2015) (requiring *inter alia* that “applicant has led a law-abiding life since discharge or release, and appears likely to continue to do so”).

<sup>188</sup> *See, e.g.,* *United States v. Fowler*, No. 95-1207, 104 F.3d 368, at \*4 (10th Cir. 1996) (unpublished table decision) (finding that legislative changes to Colorado

whereas others simply require a period of conviction-free years<sup>190</sup> or never restrict the right in the first instance.<sup>191</sup> With jury service, the right can be restored automatically upon completion of sentence,<sup>192</sup> yet in some states it is not subject to restoration,<sup>193</sup> or requires a pardon.<sup>194</sup> With respect to employment, many states require that there be a nexus between the nature of the offense of conviction and the occupation in question.<sup>195</sup> Some states do not require this nexus,<sup>196</sup> and others only impose a limit during correctional supervision.<sup>197</sup>

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Revised Statutes § 18-12-108 in 1994 prospectively excluded possession of firearms from the restoration provision in the Colorado Constitution, leaving a pardon as the only means to restore the right to possess a firearm); Effect of Governor's Pardon on the Ownership of Firearms, Del. Op. Att'y Gen., No. 03-IB04 (2003), 2003 WL 1088725, at \*2 (analyzing existing law and concluding the legislature intended the Board of Pardons to resolve whether ex-offenders could possess firearms by granting them pardons); KY. REV. STAT. ANN. § 527.040(1) (2015); MO. REV. STAT. ANN. § 571.070.1(1) (2015); NEB. REV. STAT. ANN. §§ 28-1206(1)–(2), 83-1,130(2) (2015); NEV. REV. STAT. ANN. § 202.360(1)(a) (2015).

<sup>189</sup> See, e.g., *Blackwell v. Haslam*, No. M2012-01991-COA-R3-CV, 2013 WL 3379364, at \*16 (Tenn. Ct. App. 2013) (describing Tennessee's denial of restoration of firearm rights for persons convicted of violent felonies, as opposed to non-violent felonies).

<sup>190</sup> See, e.g., KAN. STAT. ANN. § 21-6304(a) (2015) (five or ten year prohibition for "person" or drug offenses); LA. REV. STAT. ANN. § 14:95.1(c) (2015) (right restored after ten years for crime of violence or sex offense); MICH. COMP. LAWS § 750.224f(1)–(2) (2015) (right restored after five years for violent felonies and drug offenses, restored after three years for other felonies); see also, e.g., *State v. Swanson*, 65 P.3d 343, 348-49 (Wash. Ct. App. 2003) (noting that Washington law restores right automatically after specified number of conviction-free years without finding of rehabilitation); cf. *State v. Buonafede*, 814 P.2d 1381, 1383-84 (Ariz. 1991) (holding that automatic civil rights restoration applies regardless of whether the individual is deemed "rehabilitated").

<sup>191</sup> Vermont is one such state. See *supra* note 75 and accompanying text; see also *Selected Vermont Laws Governing the Use and Possession of Firearms*, OFFICE OF THE ATT'Y GEN. OF VT. (May 27, 2014), <http://ago.vermont.gov/divisions/criminal-division/gun-laws.php> (showing no such laws). In Idaho, the right for non-violent felons is lost only while under sentence. IDAHO CODE ANN. §§ 18-310(1)–(3), 18-3316 (2015).

<sup>192</sup> See, e.g., *supra* note 44 and accompanying text.

<sup>193</sup> See, e.g., MICH. COMP. LAWS § 600.1307a(1)(e) (2015) (requiring without qualification that a juror "[n]ot have been convicted of a felony."). For more on juror exclusion, see generally Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592 (2013).

<sup>194</sup> See, e.g., ALASKA STAT. § 11.61.200(b)(1) (2015); HAW. REV. STAT. § 612-4(b)(2) (2015); LA. CODE CRIM. PROC. ANN. art. 401(A)(5) (2015); 42 PA. STAT. ANN. § 4502(a)(3) (2015); S.C. CODE ANN. §§ 14-7-810(1), 24-21-920 (2015); *Oklahoma Department of Corrections, Pardon Information Fact Sheet*, OKLA. DEP'T OF CORR., <http://www.ok.gov/doc/documents/160301ab.pdf> (last visited Sept. 7, 2015).

<sup>195</sup> See, e.g., D.C. CODE § 47-2853.17(a) (2015) (allowing revocation of license for crime bearing directly on the fitness of the person to be licensed); HAW. REV. STAT. § 831-3.1(a) (2015) (providing specific exceptions where a prior conviction can

Further highlighting state prerogative, significant variations exist in the eligibility criteria and procedures used by states when affording collateral consequences relief to individuals convicted in their own courts. Even pardons, the most traditional avenue for relief, vary significantly. States offer different kinds of pardons with different justifications<sup>198</sup> and the pardons themselves differ significantly in the kinds of relief that they afford.<sup>199</sup> Pardons also vary in their eligibility criteria: they can be based on no or nebulous criteria,<sup>200</sup> attach no or little express importance to rehabilitation,<sup>201</sup> and even result from simple personal or political predilection of governors.<sup>202</sup> Finally, enormous variation exists regarding the eligibility criteria for expungement and its effect.<sup>203</sup>

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preclude employment licensing); KY. REV. STAT. ANN. § 335B.020(1) (2015) (allowing disqualification from employment when prior conviction relates directly to the position sought); S.C. CODE ANN. § 40-1-140 (2015) (forbidding disqualification unless a conviction relates directly to employment sought or appropriate board determines otherwise).

<sup>196</sup> See, e.g., GA. CODE ANN. § 43-1-19(a)(3) (2015) (allowing the refusal of a license for any felony conviction).

<sup>197</sup> See, e.g., 730 ILL. COMP. STAT. ANN. 5/5-5-5(d) (2015) (restoring “all license rights and privileges” after completion of sentence or discharge from supervision unless the relevant authority determines it is not in the public interest).

<sup>198</sup> North Carolina, for instance, has a forgiveness pardon, an innocence pardon, and an unconditional pardon, each with different eligibility criteria and impact in terms of restorative relief. See *Definitions/Glossary*, OFFICE OF EXECUTIVE CLEMENCY, <http://www.doc.state.nc.us/clemency/glossary.htm> (last visited July 20, 2015).

<sup>199</sup> In Oklahoma, a pardon restores firearms privileges for non-violent offenders, even allowing a recipient to serve as a peace officer. See OKLA. STAT. ANN. tit. 21 § 1283(B) (2015). However, a pardon might not enable one to secure a professional license. See *Pardon Information Fact Sheet*, OKLA. DEP’T OF CORR., <http://www.ok.gov/doc/documents/160301ab.pdf> (last visited Sept. 7, 2015). In Pennsylvania, a pardon restores all rights and removes all disabilities, including adverse use in a licensing decision. See 18 PA. STAT. ANN. § 9124(b) (2015).

<sup>200</sup> See Van Camp, *supra* note 48, at 1304-06 (citing state examples).

<sup>201</sup> In Pennsylvania, for instance, rehabilitation is only one of several factors for the Board of Pardons to consider. See *Factors Considered by the Board*, PA. BD. OF PARDONS (Aug. 15, 2012), [http://www.bop.state.pa.us/portal/server.pt/community/factors\\_considered\\_by\\_the\\_board/14412](http://www.bop.state.pa.us/portal/server.pt/community/factors_considered_by_the_board/14412). In Nevada, a pardon “does not attest to rehabilitation of a person.” *Community Case Application*, NEV. BD. OF PAROLE COMM’RS 2 (Jan. 2012), [http://parole.nv.gov/uploadedFiles/parolenvgov/content/Information/Application\\_Community.pdf](http://parole.nv.gov/uploadedFiles/parolenvgov/content/Information/Application_Community.pdf).

<sup>202</sup> With the multiple pardons issued in 2012 by outgoing Mississippi Governor Haley Barbour being the most recent widely reported example. See Chad Flanders, *Pardons and the Theory of the “Second-Best,”* 65 FLA. L. REV. 1559, 1571-74 (2013).

<sup>203</sup> See generally Anna Kessler, Comment, *Excavating Expungement Law: A Comprehensive Approach*, 87 TEMP. L. REV. 403, 408-09 (2015) (noting variations).



In sum, despite the importance of the rights and privileges involved, and the very significant impact of their loss to individuals, it is unlikely that a reviewing court would see fit to command a forum state to extend relief on the basis of the Privileges and Immunities Clause.

### C. Right to Travel

Forum refusal to recognize restoration could also possibly be challenged as an infringement of the right to interstate travel.<sup>204</sup> In *Saenz v. Roe*, the Court noted that the “right to travel” embraced “at least three different components”:

[1] the right of a citizen of one State to enter and to leave another State, [2] the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and [3], for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.<sup>205</sup>

The first travel right would not so much be at issue here, because individuals would not be challenging infringement of their freedom of state ingress and egress. The second right, to be “treated as a welcome visitor,” which the Court located in Article IV’s Privileges and Immunities Clause,<sup>206</sup> could be implicated, such as when work or school necessitates, but a challenge would face an uphill battle for reasons discussed in the prior section.<sup>207</sup> The success of a claim sounding in the third travel right — to be treated equally when a “permanent resident” — which the Court located in the Fourteenth Amendment’s Privileges or Immunities Clause,<sup>208</sup> would depend on a reviewing court’s reading of *Saenz*.<sup>209</sup>

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<sup>204</sup> See *supra* note 21 and accompanying text. The right to travel can be limited by state-imposed probation, parole, or other community supervision conditions. The population at issue here, however, mainly concerns persons who have satisfied their penal debt to society. See *Smith v. Doe*, 538 U.S. 84, 101-02 (2003) (noting that convicted individuals who have discharged their penal debt “are free to move where they wish and to live and work as other citizens, with no supervision”).

<sup>205</sup> *Saenz v. Roe*, 526 U.S. 489, 500 (1999).

<sup>206</sup> *Id.*

<sup>207</sup> See *supra* Part II.B.

<sup>208</sup> *Saenz*, 526 U.S. at 502-03 (citing U.S. CONST. amend. XIV, § 1).

<sup>209</sup> *Saenz* reignited interest in the Privileges or Immunities Clause as a possible basis for constitutional challenge, which had been moribund since the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). See generally Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071 (2000) (exploring that historical background).

In *Saenz*, petitioners challenged a California law that restricted the amount of welfare benefits they could receive during their first year of California residency to an amount equivalent to that available in their prior state residence.<sup>210</sup> The Court, by a 7-2 vote, invalidated the durational residency requirement, concluding that it violated a citizen’s “right to be treated equally in her new state of residence.”<sup>211</sup> The requirement was impermissible, even if it only “incidentally” infringed the right to travel to California<sup>212</sup> and enjoyed fiscal justification in the state.<sup>213</sup> The Fourteenth Amendment’s Privileges and Immunities Clause, the Court wrote, ensures the right of citizens, “rich or poor,” to choose a state in which to reside, and states “do not have any right to select their citizens.”<sup>214</sup> According to the *Saenz* majority, “[t]he Fourteenth Amendment, like the Constitution itself, was, as Justice Cardozo put it, ‘framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.’”<sup>215</sup>

*Saenz* offers intriguing possibility based on its embrace of what I have elsewhere called “constitutional collectivism.”<sup>216</sup> Before *Saenz*, the precept was most forcefully invoked in *Edwards v. California*,<sup>217</sup> where the Court addressed yet another California law, one enacted in the wake of the Depression making it a misdemeanor to bring into the State “any indigent person who is not a resident of the State.”<sup>218</sup> Framing the issue as whether the exclusionary law was within California’s police power, the Court acknowledged the major difficulties states faced as a result of the masses of itinerant poor then moving about the land,<sup>219</sup> but refused to condone California’s effort to isolate itself.

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Optimism was dashed, however, in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), when the Court parried efforts to locate the Second Amendment right to bear arms there, instead relying on Fourteenth Amendment incorporation doctrine. *Id.* at 758.

<sup>210</sup> *Saenz*, 526 U.S. at 493-94.

<sup>211</sup> *Id.* at 505.

<sup>212</sup> *Id.* at 504.

<sup>213</sup> *Id.* at 506.

<sup>214</sup> *Id.* at 510-11 (citing U.S. CONST. amend. XIV, § 1).

<sup>215</sup> *Id.* at 511 (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)).

<sup>216</sup> Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 IOWA L. REV. 1, 3 (2006).

<sup>217</sup> *Edwards v. California*, 314 U.S. 160 (1941).

<sup>218</sup> *Id.* at 171 (quoting CAL. WELF. & INST. CODE § 2615 (1941)).

<sup>219</sup> *See id.* at 173 (“The State asserts that the huge influx of migrants into California in recent years has resulted in problems of health, morals, and especially finance, the proportions of which are staggering. It is not for us to say that this is not true.”);

Writing for the Court, Justice Byrnes, invoking Justice Cardozo's "sink or swim" precept, stated that while "[i]t is frequently the case that a State might gain a momentary respite from the pressure of events by the simple expedient of shutting its gates to the outside world," the Constitution does not permit it to do so.<sup>220</sup> As a member of the federal union, California was obligated to assist the needy — "the common responsibility and concern of the whole nation."<sup>221</sup> The state's refusal to do so imposed an impermissible barrier on interstate commerce insofar as the free interstate passage of all citizens, including the poor, affected commerce.<sup>222</sup> Furthermore, the law was problematic in political process terms because it deprived non-resident indigents, the targets of the law, "of the opportunity to exert political pressure upon the California legislature in order to obtain a change in policy."<sup>223</sup>

Helping promote the successful reentry of ex-offenders can certainly be thought "the common responsibility and concern of the whole nation."<sup>224</sup> At the same time, the disparate treatment of newcomers would give rise to political process concerns (especially concerning the right to vote) identified in *Edwards*.<sup>225</sup> States do not typically wish to appear hospitable to ex-offenders,<sup>226</sup> who are also often poor or have little resources, and it is not inconceivable that state refusal of restoration recognition aligns with a desire to discourage their entry.

Nevertheless, a restoration recognition claim would prove difficult to sustain. Refusing to recognize the restored status of a newcomer, while discriminatory in its effect, would not likely be seen as comparable to the overt discrimination embodied in the travel barriers condemned by the Court in *Saenz* and *Edwards*.<sup>227</sup> Moreover, as with

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Logan, *supra* note 216, at 26.

<sup>220</sup> *Edwards*, 314 U.S. 160 at 173-74 (quoting *Baldwin*, 294 U.S. at 523).

<sup>221</sup> *Id.* at 175; *see also id.* at 174-75 ("Recent years, and particularly the past decade, have been marked by a growing recognition that in an industrial society the task of providing assistance to the needy has ceased to be local in character.").

<sup>222</sup> *Id.* at 175-76.

<sup>223</sup> *Id.* at 174.

<sup>224</sup> *Id.* at 175.

<sup>225</sup> *See id.* at 174.

<sup>226</sup> *See* Wayne A. Logan, *Crime, Criminals, and Competitive Crime Control*, 104 MICH. L. REV. 1733, 1733-35 (2006) (noting state desires to reduce crime and natural aversion for appearing too welcoming to potential criminal offenders); Doron Teichman, *The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition*, 103 MICH. L. REV. 1831, 1831-33 (2005) (discussing how state criminal justice policies might serve to discourage entry of individuals with possible propensity to commit crimes).

<sup>227</sup> For an intriguing argument that the Privileges or Immunities Clause was intended to guard against "status-based" discrimination reflected in *Dred Scott*, see

an Article IV Privileges and Immunities Claim,<sup>228</sup> a state would be well positioned to defend its differential treatment of newcomers by asserting its desire to have its own restoration policies enforced.<sup>229</sup>

#### D. Equal Protection

Finally, refusing to recognize a newcomer’s restored status might be challenged under the Equal Protection Clause of the Fourteenth Amendment.<sup>230</sup> As with any equal protection claim, the critical threshold question would be the level of scrutiny that is to be applied. Laws based on classifications that are suspect in character or that impinge on a fundamental right are subject to the most demanding level of scrutiny — strict scrutiny — requiring that a law be narrowly tailored to serve a compelling state interest.<sup>231</sup>

As for the fundamental right prong, certain collateral consequences — such as loss of the right to vote and possess a firearm — impinge on a fundamental right,<sup>232</sup> while other rights such as jury service implicate very significant yet perhaps not fundamental rights.<sup>233</sup> The

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Bruce E. Boyden, *Constitutional Safety Valve: The Privileges or Immunities Clause and Status Regimes in a Federalist System*, 62 ALA. L. REV. 111 (2010). Boyden argues that similar discrimination motivated opposition to same-sex marriage, and that the Clause should function as a “mechanism for ironing out differences” in status-based regimes. *Id.* at 188. Conceivably, the restored status of ex-offenders could be similarly viewed, but would make for an even more ambitious stretch for a reviewing court.

<sup>228</sup> See *supra* Part II.B.

<sup>229</sup> See *Saenz v. Roe*, 526 U.S. 489, 502 (1999) (stating that the Clause bars “discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States”).

<sup>230</sup> U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

<sup>231</sup> See, e.g., *Johnson v. California*, 543 U.S. 499, 505-06 (2005) (regarding suspect classification); *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 205 (2003) (regarding fundamental right), *overruled on other grounds* by *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

<sup>232</sup> See Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 468-71 (2015) (voting); Rob Hillenbrand, Note, *Heller on the Threshold: Crafting a Gun Insurance Mandate*, 95 B.U. L. REV. 1451, 1475-76 & n.148 (2015) (firearms).

<sup>233</sup> See Kevin J. Quilty, Note, *The Unrecognized Right: How Wealth Discrimination Unconstitutionally Bars Indigent Citizens from the Jury Box*, 24 CORNELL J.L. & PUB. POL’Y 567, 588-89 (2015) (noting that jury service has not been deemed a fundamental right but arguing that it should be); Jason C. Miller, *The Unwise and Unconstitutional Hatch Act: Why State and Local Government Employees Should be Free to Run for Public Office*, 34 S. ILL. U. L.J. 313, 338-41 (2010) (noting that the right to run for office has not been deemed a fundamental right but arguing that it should be). See also *Litmon v. Harris*, 768 F.3d 1237, 1242 (9th Cir. 2014) (citation omitted).

right to emigrate also could be affected, such as when a state refuses to recognize another state's removal of an occupational licensure bar and an individual is not able to accept a new job and relocate.

A state, however, likely would have little difficulty identifying a compelling state interest to justify its refusal to recognize restored status of newcomers. At a high level of generality, a state could invoke its police power interest in regulating ex-offenders who enter its jurisdiction.<sup>234</sup> More specifically, it could justify its position by averring its significant interest in regulating jury service, voting, the holding of public office, possession of firearms, and eligibility to work in certain occupations.<sup>235</sup> A state would face only somewhat greater difficulty with respect to the narrow tailoring requirement, again pointing to its sovereign right to adhere to its own restoration eligibility criteria and procedures, not those of another state.<sup>236</sup> Indeed, it could be said that a right is not being taken away at all; rather, that refusal to recognize restoration simply withholds a benefit that a state can withhold entirely.<sup>237</sup>

There is little reason to think that a classification-based challenge would fare better. Ex-convict status itself is not suspect,<sup>238</sup> and a court

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(noting that “[t]he [Supreme] Court has never held that the ‘right’ to pursue a profession is a *fundamental* right, such that any state-sponsored barriers to entry would be subject to strict scrutiny.”).

<sup>234</sup> See Jamila Jefferson-Jones, *A Good Name: Applying Regulatory Takings Analysis to Reputational Damage Caused by Criminal History*, 116 W. VA. L. REV. 497, 520 (2013) (noting that “the continued attachment of ex-offender status[] is usually identified as ‘public safety’ and is, thus, an exercise of the government’s police power”).

<sup>235</sup> See, e.g., FLA. STAT. § 112.0111(1) (2015) (“The Legislature declares that a goal of this state is to clearly identify the occupations from which ex-offenders are disqualified based on the nature of their offenses. . . . in a manner that serves to preserve and protect the . . . safety . . . of the general public . . .”).

<sup>236</sup> Cf. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006) (noting low success rate of strict scrutiny challenges more generally).

<sup>237</sup> A position, for instance, adopted by courts regarding the selective disenfranchisement and re-enfranchisement of convicted felons. See, e.g., *Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010) (citing *Richardson v. Ramirez*, 418 U.S. 24, 26-27 (1974)); *Johnson v. Bredesen*, 579 F. Supp. 2d 1044, 1054 (M.D. Tenn. 2008), *aff’d*, 624 F.3d 742 (6th Cir. 2010); *Madison v. State*, 163 P.3d 757, 769 (Wash. 2007) (en banc) (“Respondents have failed to establish that felons’ right to vote qualifies as an important right under federal case law.”).

<sup>238</sup> See, e.g., *Romero v. Pataki*, 241 Fed. App’x 764, 766 (2d Cir. 2007) (unpublished decision) (“Convicted felons . . . are not a suspect class.”); see also *Turner v. Glickman*, 207 F.3d 419, 425 (7th Cir. 2000) (upholding denial of food stamp benefits to convicted felons); *Heller v. Ross*, 682 F. Supp. 2d 797, 807 (E.D. Mich. 2010) (upholding differential treatment of convicted felons in handling of

would need to be persuaded that newcomer ex-convict status is somehow suspect (or even quasi-suspect), which is unlikely given the modern Court’s reluctance to confer protected status on additional subgroups.<sup>239</sup>

Still, non-recognition might be thought problematic because it violates a state’s more general obligation to treat similarly situated individuals in a similar fashion.<sup>240</sup> When a forum state lacks a recognition mechanism, and makes relief available to its own convicted individuals but not newcomers, such as can occur with pardons,<sup>241</sup> the two populations experience different treatment.<sup>242</sup> The

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occupational licenses).

<sup>239</sup> See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.1.2 (4th ed. 2011) (noting that “the Court has shown little willingness in the past three decades to subject additional classifications to strict or intermediate scrutiny”). *But see* Ben Geiger, Comment, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CALIF. L. REV. 1191, 1192-93 (2006).

<sup>240</sup> *City of Cleburne v. Cleburne Living Cent.*, 473 U.S. 432, 439 (1985).

<sup>241</sup> In Oklahoma, for instance, the right to sit on a jury is only restored by a pardon, OKLA. STAT. ANN. tit. 38, § 28(C)(5) (2015), but only persons convicted in Oklahoma can secure a pardon. *Eligibility*, OKLA. PARDON AND PAROLE BOARD, [http://www.ok.gov/ppb/Pardon\\_Process/Eligibility/index.html](http://www.ok.gov/ppb/Pardon_Process/Eligibility/index.html) (last modified Apr. 19, 2015). In South Carolina, the right to serve on a jury and to possess a firearm is only restored by pardon. S.C. CODE ANN. § 14-7-810(1) (2015) (jury service); *Brunson v. Stewart*, 547 S.E.2d 504, 505 (S.C. Ct. App. 2001) (firearm possession). Again, however, the pardon authority extends only to in-state convictions. Telephone Conversation with Matthew Buchanan, General Counsel, South Carolina Department of Probation, Parole and Pardon Service (Aug. 24, 2015) (transcript on file with author) (South Carolina only grants pardons to persons convicted in state); *see also*, e.g., DEL. CODE ANN. tit. 10, § 4509(b)(6) (2015) (only pardon can restore right to sit on a jury); DEL. CODE ANN. tit. 11, §§ 1448(a)(1), (3), (7) (2015) (only pardon can restore right to own or possess firearm); Telephone Conversation with Judy Smith, Delaware Board of Pardon (Aug. 24, 2015) (transcript on file with author) (Delaware governor has jurisdiction over only state convictions).

<sup>242</sup> Although not the frequent subject of litigation, courts at times have found fault with state laws that subject out-of-state convicted sex offenders to less favorable treatment vis-à-vis registration and community notification. *See, e.g., Doe v. Pa. Bd. of Prob. & Parole*, 513 F.3d 95, 102, 112 (3d Cir. 2008) (invalidating provisions of Pennsylvania law that provided an “extensive adjudicatory process” to in-state but not out-of-state offenders before subjecting them to community notification); *Hendricks v. Jones ex rel. State*, 2013 OK 71, ¶ 1, 349 P.3d 531, 532 (Okla. 2013) (holding that law violated equal protection because it required out-of-state offenders but not in-state offenders to register when convicted before the statute’s enactment date); *cf. ACLU v. City of Albuquerque*, 2006-NMCA-078, ¶¶ 26-30, 139 N.M. 761,137 P.3d 1215, 1227 (N.M. Ct. App. 2006) (finding equal protection violation when city required convicted sex offenders residing in other states to register if they spent a certain amount of time in city while not requiring registration of offenders who lived in neighboring cities and worked in city).

question then becomes whether there exists a “rational relationship between the disparate treatment and a legitimate government objective.”<sup>243</sup> The standard is a deferential one: Variable treatment is permitted unless it “is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the legislature’s actions were irrational.”<sup>244</sup>

Even here, a state would be in a strong position to turn back a constitutional challenge. Refusing to make pardons available to persons with out-of-state convictions, for instance, can be justified on jurisdictional<sup>245</sup> or comity grounds,<sup>246</sup> and a reviewing court would be reluctant to second-guess the parameters of executive pardon authority.<sup>247</sup> At the same time, states could justify refusing to make administrative and judicial relief mechanisms available to newcomers due to the administrative burdens and costs of doing so,<sup>248</sup> as well as the difficulties inherent in assessing the background and conviction history of persons with out-of-state convictions.<sup>249</sup>

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<sup>243</sup> *Starlight Sugar, Inc. v. Soto*, 253 F.3d 137, 145 (1st Cir. 2001).

<sup>244</sup> *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

<sup>245</sup> See, e.g., *Beecham v. United States*, 511 U.S. 368, 372-74 (1994) (interpreting 18 U.S.C. § 921(a)(20) and stating that only federal law can nullify the effect of a federal conviction). On rare occasions courts have held otherwise. See, e.g., *Arnett v. Stumbo*, 153 S.W.2d 889, 891-92 (Ky. Ct. App. 1941) (upholding right of governor to restore office holding right under state law to federal felon in absence of presidential pardon); *Malone v. Shyne*, 2006-2190, p. 18 (La. 9/13/06); 937 So. 2d 343, 356 (La. 2006) (upholding authority of governor to “issue pardons restoring collateral civil rights forfeited solely as a result of state law . . . to persons convicted of federal felonies” that have not been pardoned by the president).

<sup>246</sup> See generally Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 583-89 (1991) (surveying sources of pardon authority).

<sup>247</sup> See, e.g., *Solesbee v. Balkcom*, 339 U.S. 9, 11-12 (1949) (citations omitted), *abrogated by Ford v. Wainwright*, 477 U.S. 399 (1986) (“Seldom, if ever, has this power of executive clemency been subjected to review by the courts.”); *Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 380-81 (1866) (discussing the scope of the pardon power).

<sup>248</sup> Cf. *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2081 (2012) (holding that administrative costs associated with expanding access provide rational basis to uphold law).

<sup>249</sup> See Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257, 271-72, 293 (2005) [hereinafter *Horizontal Federalism*] (noting common problems associated with incomplete or uncertain out-of-state records).

In sum, little basis exists to conclude that restoration recognition can be forced as a result of federal constitutional precedent. The Constitution’s structural provisions designed to ensure interstate comity and freedom of travel, such as the Full Faith and Credit and Privileges and Immunities Clauses, appear to be of only very modest avail. By the same token, as just discussed, locating a recognition challenge in a rights-based or equal treatment argument would very likely founder on the considerable deference accorded to states in the treatment of ex-offenders (whether their own or those coming from other states).

### III. LEGISLATIVE OPTIONS

Given the absence of a viable constitutional basis to compel state recognition of restored status, this part explores potential legislative solutions. Discussion is first framed in terms of the individual states.<sup>250</sup> Because states might not act on their own, however, the discussion considers whether Congress, faced with the pressing national challenge of reentry, could take the initiative.<sup>251</sup>

#### A. States

Ideally, any solution to the difficulties presented by interstate recognition would come organically from states themselves. It is they, individually and collectively, that will have to implement recognition. This part examines the chief considerations that should animate policy deliberation.

##### 1. The Case for Recognition

A chief reason for states to recognize the restoration outcomes of sister-states is that doing so fosters comity.<sup>252</sup> Here, another state has adopted a policy favoring restoration, applied its restoration eligibility criteria to an individual, and granted relief. Refusing recognition amounts to a slap in the face of the issuing state, treating its judgment

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<sup>250</sup> See *infra* Part III.A.

<sup>251</sup> See *infra* Part III.B.

<sup>252</sup> See *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 493 (2003) (noting the Nevada Supreme Court recognized comity as “an accommodation policy, under which the courts of one state voluntarily give effect to the laws and judicial decisions of another state out of deference and respect, to promote harmonious interstate relations” (internal quotation marks omitted)).



like that of a foreign nation,<sup>253</sup> rather than a repeat player in a federated constitutional union.<sup>254</sup> The issuing state has an interest in seeing its outcome honored and given effect in the forum, just as the forum has a reciprocal desire to see its own decisions honored in the issuing state.<sup>255</sup> Indeed, if a sister-state conviction is relied upon to impose a collateral consequence,<sup>256</sup> logic and fairness support acceding to its restorative decision. Moreover, to the extent that a conviction serves as an evidentiary proxy for dangerousness and moral condemnation,<sup>257</sup> a sister-state's decision to restore undercuts this empirical ground, especially if based on an individualized finding of rehabilitation.<sup>258</sup>

Surely no less important, recognition can have tangible practical benefits for forum states. Just as removing obstacles to reentry can lessen the likelihood of recidivism in the convicting state,<sup>259</sup> having a

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<sup>253</sup> See *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943) (noting that since the Constitution's framing states no longer exist as "independent foreign sovereignties, each free to ignore rights and obligations created under the laws . . . of the others").

<sup>254</sup> See Aziz Z. Huq, *Does the Logic of Collective Action Explain Federalism Doctrine?*, 66 STAN. L. REV. 217, 253-54 (2014).

<sup>255</sup> See generally ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 31 (1984) (describing model of sustained cooperation of repeat player participants that "starts with a cooperative choice, and thereafter [the player] does what the other player did on the previous move"); see also generally RUSSELL W. COOPER, *COORDINATION GAMES: COMPLEMENTARITIES AND MACROECONOMICS* 126-50 (1999) (discussing cooperative models applied to governments). An issuing state, moreover, might have practical reason to see that its restoration outcome is recognized, such as when an individual travels to and returns from a contiguous state and is able to provide for himself and any dependents.

<sup>256</sup> See *supra* notes 13-14 and accompanying text.

<sup>257</sup> See *Dickerson v. New Banner Inst., Inc.* 460 U.S. 103, 120 (1983) (stating that convictions provide "a convenient, although somewhat inexact, way of identifying 'especially risky people'" (quoting *United States v. Bass*, 404 U.S. 336, 345 (1971)), *superseded by statute as recognized by* *Logan v. United States*, 552 U.S. 23, 27-28 (2007).

<sup>258</sup> As the Oklahoma Court of Criminal Appeals noted over forty years ago:

There would appear to be some merit to the theory that if the State of Nevada had convicted a person and then nullified that conviction with a pardon, Oklahoma would be bound to give full faith and credit to the act of Nevada nullifying the conviction. Oklahoma could not choose to recognize one act of the sister-state, the conviction, and then ignore its subsequent act which nullified the conviction.

*Kellogg v. State*, 1972 OK CR 345, ¶ 8, 504 P.2d 440, 442 (Okla. Crim. App. 1972).

<sup>259</sup> See *supra* notes 23-24; see also JEREMY TRAVIS, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* 168-70 (2005) (discussing studies showing recidivism reduction as a result of adult education and work programs).

recognition mechanism in place in the forum can provide public safety benefits (and avoid the economic costs associated with recidivism).<sup>260</sup> Recognition can also alleviate notice-related uncertainties experienced by newcomers, which can result in criminal liability (such as with the firearm right)<sup>261</sup> that result in public safety expenditures (prosecution and imprisonment). Taken together, such savings very likely exceed administrative costs associated with creating and maintaining a recognition regime.<sup>262</sup>

Finally, recognition can have possible federalism benefits. When states vary in their restoration policies, recognition can provide a valuable opportunity for intra-state policy experimentation.<sup>263</sup> Carefully monitored, the forum state will be able to assess the impact of restored status, vis-à-vis recidivism and other measures of reentry success (e.g., securing work). At the same time, as Heather Gerken and Ari Holtzblatt recently observed, imported policy outcomes might inspire interest in the foreign norm being replicated in the forum: Foreign norms can “generate friction, and friction has its uses in a democratic system,” in that it can “spur[] democratic engagement.”<sup>264</sup>

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<sup>260</sup> On the significant positive influence employment in particular has in facilitating successful reentry, see, for example, Marlaina Freisthler & Mark A. Godsey, *Going Home to Stay: A Review of Collateral Consequences of Conviction, Post-Incarceration Employment, and Recidivism in Ohio*, 36 U. TOL. L. REV. 525, 531-32 (2005) (examining how employment opportunities promote crime desistance); Matthew Makarios et al., *Examining the Predictors of Recidivism Among Men and Women Released from Prison in Ohio*, 37 CRIM. JUST. & BEHAV. 1377, 1377-89 (2010) (outlining barriers to reentry, including the difficulty in finding and maintaining employment).

<sup>261</sup> See, e.g., *United States v. Wilson*, 159 F.3d 280, 295 (7th Cir. 1998) (Posner, C.J., dissenting) (condemning lack of notice to those subject to federal firearms ban and noting that when a law is not clear it is “not a deterrent. It is a trap”); *United States v. Herron*, 45 F.3d 340, 341, 342-43 (9th Cir. 1995) (noting “anti-mousetrapping rule” contained in federal law banning firearm possession that requires any state pardon, expungement, or restoration of rights must expressly provide that individual “may not ship, transport, possess, or receive firearms” (citations omitted) (internal quotations marks omitted)); cf. *Small v. United States*, 544 U.S. 385, 390 (2005) (rejecting consideration of a foreign nation conviction in part because it would “leave those previously convicted in a foreign court . . . uncertain about their legal obligations”).

<sup>262</sup> See *supra* notes 260–61 and accompanying text.

<sup>263</sup> Cf. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

<sup>264</sup> Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 62-63 (2014).

Opponents of same sex marriage, for instance, find themselves living next to a gay couple married in another state. Residents of blue states have to read the textbooks designated for a conservative Texas market. Skeptics of environmental reform find themselves driving cars that meet California's high emissions standards. As a result, political elites in these states are prodded to reach across political boundaries, not just territorial ones.<sup>265</sup>

By this account a state with a generous restoration policy can serve as a norm entrepreneur vis-à-vis other states.<sup>266</sup>

## 2. The Case Against Recognition

Recognition, however, is not without its challenges. Perhaps most significant is that recognition can effectively superimpose on the forum state the policy preferences of another state.<sup>267</sup> Although not clothed as such, it is this autonomy-based concern that motivates courts to invoke the public policy exception when refusing to afford full faith and credit to sister-state recognition outcomes.<sup>268</sup> In a related sense, recognition can be thought problematic because it short-circuits the democratic process.<sup>269</sup> While it could be the case that forum state

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<sup>265</sup> *Id.* at 63; see also *id.* at 88 (“[W]hen citizens of one state must accommodate the preferences of another’s, they are enlisted in the practice of pluralism. They are reminded that they are not just part of a state but part of a union.”); *id.* at 90 (“Spillovers mitigate the problems associated with policymaking inertia because they provide the friction necessary to ignite the national policymaking process.”). For classic treatments of norm diffusion among states, see Virginia Gray, *Innovation in the States: A Diffusion Study*, 67 AM. POL. SCI. REV. 1174 (1973) (examining why states innovate legislatively and how those innovations spread); Jack L. Walker, *The Diffusion of Innovations Among the American States*, 63 AM. POL. SCI. REV. 880 (1969) (aiming to measure the speed with which innovations are adopted and recognize the principles guiding adoption).

<sup>266</sup> On the phenomenon more generally, see ERIC A. POSNER, *LAW AND SOCIAL NORMS* 32 (2000) (noting norm diffusion among governments); Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 133-35 (2006) (discussing phenomenon of governments heeding one another’s precedents and norms).

<sup>267</sup> See Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 134 (2001) (noting the “negative freedom” of federalism).

<sup>268</sup> See *supra* Part II.A.

<sup>269</sup> See Paul H. Robinson, *The Legal Construction of Norms: Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839, 1867 (2000) (observing that the legislative process affords “an occasion for public debate that can help build norms, with the conclusion of the debate announced by legislative action, or inaction”).

residents approve in whole or part of the issuing state’s particular restoration laws and procedures, and resulting outcome, they might not, and recognition gives short shrift to this possibility.<sup>270</sup> Under such circumstances, legislators can be insulated from political accountability,<sup>271</sup> a deficit that can assume particular importance in the event of a public safety failure, such as could occur when an individual with a restored right to possess a firearm commits a firearm-related crime, or recognition results in an individual securing an occupational license and commits a work-related crime.

Finally, by blurring the lines of normative authority of individual states, recognition risks undercutting a value extolled by the Framers in the vertical federalism context, namely the competition for the “affection of the people,”<sup>272</sup> which Alexander Hamilton posited as being especially at play in the administration of justice.<sup>273</sup> Although it is perhaps unlikely that a given state’s restoration policy alone would affect an individual’s decision to vote with one’s feet,<sup>274</sup> decisions to grant or withhold particular rights (e.g., the right to possess a firearm, hold public office, or serve on a criminal jury) reflect civic and political beliefs of considerable importance.<sup>275</sup> State policy on whether

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<sup>270</sup> See Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 52 (2004) (“[S]tate governments cannot provide fora for political participation and competition unless meaningful decisions are being made in those fora.”).

<sup>271</sup> Cf. *New York v. United States*, 505 U.S. 144, 169 (1992) (stating that accountability is diminished when the federal government commandeers states to execute federal policy).

<sup>272</sup> *United States v. Lopez*, 514 U.S. 549, 576-77 (1995) (Kennedy, J., concurring) (“[T]he Federal and State Governments are to control each other . . . and hold each other in check by competing for the affections of the people.”) (citing THE FEDERALIST NOS. 46, 51 (James Madison)). On the Framers’ vision in this regard more generally, see Todd E. Pettys, *Competing for the People’s Affection: Federalism’s Forgotten Marketplace*, 56 VAND. L. REV. 329, 338-44 (2003).

<sup>273</sup> THE FEDERALIST No. 17, at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (calling the ordinary administration of justice by local governments “the most powerful, most universal, and most attractive source of popular . . . attachment” due in part to it being “the immediate and visible guardian of life and property”).

<sup>274</sup> A concept of course made famous by Charles Tiebout who reasoned that individuals will gravitate to jurisdictions that best align with their personal needs and convictions. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418-19 (1956).

<sup>275</sup> Such differences manifest themselves in the quite marked variations in the restoration opportunities of states. Compare, e.g., 430 ILL. COMP. STAT. ANN. 65/10(c)(1) (2015) (firearm right lost and can be regained only after 20 years), with IDAHO CODE ANN. § 18-310(1)–(2) (2015) (firearm right lost only during sentence, with exception of specified serious violent offenses); DEL. CODE ANN. tit. 11, § 4364 (2015) (person convicted of “infamous crime” cannot serve in public office), with

and when relief should be afforded from occupational disabilities could also have implications for companies that are located in or are perhaps considering relocating to the forum state.<sup>276</sup>

### 3. The Case for a More Conditional Approach

As the preceding discussion highlights, restoration recognition has significant benefits, but is not without complication or concern.<sup>277</sup> In significant part, difficulties arise as a result of recognition being conceived of in unconditional terms. Florida, for example, surely acts within its power when it recognizes sister-state restoration of a firearm right, but democratic transparency and self-governance is diminished when doing so overrides its own restoration procedures and policies.<sup>278</sup> Moreover, recognition can result in the unfair treatment of a forum's own residents, who remain subject to the forum's less generous restoration policy.<sup>279</sup>

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CONN. CODE § 9-46a (right of elector (and thus right to hold public office) restored upon satisfaction of penal sentence), MASS. CONST. art. IX (affording all inhabitants the right to hold office, without restriction), MONT. CONST. art. IV, sec. 4 (restoring right to hold public office upon successful completion of sentence, absent additional legislative qualifications), and N.D. CENT. CODE ANN. § 12.1-33-03(1) (2015) (right to hold future office not lost except during incarceration or stated otherwise by sentence or law); MONT. CODE ANN. sec. 46-18-801(2) (2015) (rights of citizenship regained upon completion of sentence), with LA. CODE CRIM. PROC. ANN. art. 401(A)(5) (2015) (right to serve on a jury never regained absent pardon) and MICH. COMP. LAWS § 600.1307a(1)(e) (2015) (requiring without qualification that a juror “[n]ot have been convicted of a felony.”).

<sup>276</sup> Connecticut law, for instance, provides that “[i]t is [] the policy of [Connecticut] to encourage all employers to give favorable consideration to providing jobs to qualified individuals, including those who may have criminal [] records,” and that the “public is best protected when criminal offenders are rehabilitated and returned to society prepared to take their places as productive citizens.” CONN. GEN. STAT. ANN. § 46a-79 (2015).

<sup>277</sup> See *supra* Part III.A.1–2.

<sup>278</sup> See *supra* notes 101–10 and accompanying text.

<sup>279</sup> Florida's clemency rules track the position taken in the caselaw discussed in the text. See FLA. COMM'N ON OFFENDER REVIEW, RULES OF EXECUTIVE CLEMENCY 4(I)(F) (Mar. 2011), available at [https://www.fcor.state.fl.us/docs/clemency/clemency\\_rules.pdf](https://www.fcor.state.fl.us/docs/clemency/clemency_rules.pdf). The Rules, however, do not allow for recognition of sister-state relief of other collateral consequences; individuals with out-of-state convictions must satisfy the demanding petition requirements that apply to persons with Florida convictions. *Id.* at 9(C), 10(B). The asymmetry figured in litigation arising out of the controversial 2000 Bush-Gore presidential election contest in Florida, in which voting rights groups challenged the purging from eligible elector lists individuals with convictions in states that automatically restored their right to vote. See, e.g., Plaintiffs' Reply in Support of Their Motion for Partial Summary Judgment, *NAACP v. Harris*, No. 01-120-Civ-Gold/Simonton, 2002 WL 32971627 (S.D. Fla. July, 22, 2002).

At the same time, Vermont’s more global statutory approach (based on the Uniform Law Commission’s Collateral Consequences of Convictions Act) is not without problems of its own. Vermont, for instance, requires that unconditional deference be shown to a sister-state pardon, providing that it “has the same effect for purposes of authorizing, imposing, and relieving a collateral consequence in [Vermont] as it has in the issuing jurisdiction.”<sup>280</sup> Such deference can be problematic because it possibly gives short shrift to the very significant differences among state pardon criteria and procedures noted earlier.<sup>281</sup> Global recognition also can afford relief to newcomers not afforded to the forum’s own denizens,<sup>282</sup> a concern that is magnified in states that impose limits on the relief that a pardon can afford.<sup>283</sup>

Vermont’s law regarding recognition of relief by means other than pardon also raises possible concern. In one part, it defers to an “expungement, sealing, annulment, set-aside, or vacation by a court . . . on grounds of rehabilitation or good behavior.”<sup>284</sup> However, states can differ on how “rehabilitation” and “good behavior” are evaluated.<sup>285</sup> Moreover, Vermont law expresses no reservation whatsoever when “civil rights are restored pursuant to statute.”<sup>286</sup> As a result, a right restored in one state by operation of law can result in the right being recognized in the forum, even if the forum imposes more demanding restoration criteria and processes. In Vermont, for instance, a person convicted of a felony will need to secure a pardon if they want to regain the right to serve on a jury.<sup>287</sup> A newcomer from Kansas, where the right is regained upon completion of sentence,<sup>288</sup> will be able to serve on a Vermont jury through Vermont’s recognition of the issuing state’s automatic restoration.<sup>289</sup>

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<sup>280</sup> VT. STAT. ANN. tit. 13, § 8009(d) (2013) (effective Jan. 1, 2016).

<sup>281</sup> See *supra* notes 198–202 and accompanying text.

<sup>282</sup> Vermont’s law does, as noted earlier, have a narrow exception to its otherwise blanket deference: neither a Vermonter nor newcomer can be relieved of (i) sex offender registration and notification; (ii) drivers’ license-related limits; and (iii) ineligibility for employment by law enforcement agencies. See VT. STAT. ANN. tit. 13, § 8012(a) (2013) (effective Jan. 1, 2016). It is unclear whether this proviso applies to individuals receiving a pardon in another state.

<sup>283</sup> See, e.g., *supra* notes 198–99 and accompanying text.

<sup>284</sup> tit. 13, § 8009(e).

<sup>285</sup> See *supra* notes 200–01.

<sup>286</sup> tit. 13, § 8009(e).

<sup>287</sup> See tit. 4, § 962(a)(5) (2015); tit. 12, § 64 (2015).

<sup>288</sup> KAN. STAT. ANN. § 21-6613(b) (2015).

<sup>289</sup> A similar scenario would play out in Virginia, which essentially makes restoration of the right to vote (and also serve on a jury and hold public office) automatic for persons

Unconditional deference can also risk other perhaps more subtle difficulties, including law-evasion. One could, for instance, be convicted in State A, a restoration-restrictive jurisdiction, and engage in a form of “circumvention tourism” by traveling to State B,<sup>290</sup> with its more generous restoration regime, and then returning to State A and demanding recognition of restored status.<sup>291</sup> In the workplace context, recognition of removed disabilities can be problematic if the forum has not established legal protections for employers against negligent hiring and supervision claims that might arise if a restored employee engages in work-related misconduct.<sup>292</sup>

In light of these difficulties, law reform efforts should proceed mindful of the need to accommodate varied state restoration law, policy, and practice. Despite the acknowledged efficiency benefits of uniform laws more generally,<sup>293</sup> and continued interest among states in the model restoration regime promulgated by the Uniform Law Commission,<sup>294</sup> state differences in relief eligibility laws and

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convicted in Virginia of non-violent felonies who have completed their sentence, but imposes a three-year waiting period for individuals convicted in Virginia of violent felonies. See *General Registrar and Electoral Board Handbook*, *supra* note 94, § 9.1.3.1; Secretary of the Commonwealth, *Restoration of Rights*, <https://commonwealth.virginia.gov/judicial-system/restoration-of-and-who-secures-automatic-rights-restoration-rights/> (last visited Sept. 28, 2015). As a result, it seems that an individual convicted in another state of a violent crime who secured automatic restoration will be subject to a less demanding regime than an individual with a Virginia conviction. Telephone and e-mail correspondence with Garry Ellis, Virginia Department of Elections, *supra* note 94. See also *Handbook*, *supra* note 94, § 9.1.3.2 (noting that “[o]ther state laws may provide for restoration through much simpler even automatic processes.”).

<sup>290</sup> Cf. I. Glenn Cohen, *Circumvention Tourism*, 97 CORNELL L. REV. 1309 (2012) (discussing phenomenon in medical treatment context).

<sup>291</sup> For instance, persons convicted in Nebraska and serving a prison sentence there must secure relief from the Nebraska Board of Pardons before regaining the jury service and public office rights. NEB. REV. STAT. ANN. § 29-112 (2015). Yet Nebraska seemingly would unconditionally recognize relief granted by another state with a less demanding regime. See *id.* § 29-113 (2015).

<sup>292</sup> As of 2012, only six states had such protections in place. See *State Reforms Reducing Collateral Consequences for People with Criminal Records: 2011-2012 Legislative Round-Up*, NATIONAL EMPLOYMENT LAW PROJECT 6 (Sept. 2012), available at [http://nelp.3cdn.net/6ab3d3b51b9490b40c\\_cnm6b847q.pdf](http://nelp.3cdn.net/6ab3d3b51b9490b40c_cnm6b847q.pdf).

<sup>293</sup> See, e.g., David Charny, *Competition Among Jurisdictions in Formulating Corporate Law Rules: An American Perspective on the “Race to the Bottom” in the European Communities*, 32 HARV. INT’L L.J. 423, 436 (1991) (uniformity “saves the decisionmakers and transactors the costs of having to develop and learn a multiplicity of rules”).

<sup>294</sup> See *supra* note 17 and accompanying text.

procedures, and the varied policy preferences they embody,<sup>295</sup> will not likely disappear anytime soon.

One way to achieve greater conditionality is for states to have recognition hinge on satisfaction of the forum’s own restoration criteria and procedures on a case-by-case basis. Many states take this approach when assessing whether a conviction from another state warrants recognition for sentence enhancement or sex offender registration purposes,<sup>296</sup> and some states already take a conditional approach to restoration recognition. Arkansas, for instance, restores the right to hold public office on the basis of expungement, and recognizes sister-state restoration only if based on a “similar expunction statute.”<sup>297</sup> Washington State, as noted earlier, takes a similar conditional approach with restoration of the firearm right,<sup>298</sup> as does North Carolina.<sup>299</sup>

The federal government, which uses state convictions to trigger its own collateral consequences,<sup>300</sup> also takes a conditional approach. Federal law prohibiting convicted state felons from possessing firearms, for instance, contains an exception for persons who have had their “civil rights restored” by the convicting state.<sup>301</sup> Federal courts must assess whether in fact a state has restored an individual’s right to vote, serve on a jury and hold public office,<sup>302</sup> a review that can prove quite difficult.<sup>303</sup> If all three civil rights are not restored, the individual remains “convicted” under federal law and is therefore subject to the federal firearm prohibition.<sup>304</sup>

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<sup>295</sup> See, e.g., *supra* note 275 and accompanying text.

<sup>296</sup> See Logan, *Horizontal Federalism*, *supra* note 249, at 260, 279-88.

<sup>297</sup> ARK. CODE ANN. § 7-6-102(d) (2015).

<sup>298</sup> See *supra* notes 119–26 and accompanying text; see also *State v. Harrison*, No. 481-49-5-1, 2002 Wash. App. LEXIS 563, at \*8 (Apr. 1, 2002) (concluding that North Dakota procedure allowing for reduction of felony to misdemeanor, based on successful satisfaction of probation requirements, did not qualify as “other equivalent procedure” based on a “finding of rehabilitation” (quoting *State v. Radan*, 21 P.3d 255, 330 (Wash. 2001) (internal quotation marks omitted))).

<sup>299</sup> See N.C. GEN. STAT. ANN. § 14-415.1(d) (2015) (allowing restoration when person “has been pardoned or has had his or her firearms rights restored if such restoration of rights could also be granted under North Carolina law”).

<sup>300</sup> See Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1721-22 (2003).

<sup>301</sup> 18 U.S.C. § 921(a)(20) (2012).

<sup>302</sup> See *United States v. Thompson*, 702 F.3d 604, 607-08 (11th Cir. 2012).

<sup>303</sup> See generally STEPHEN P. HALBROOK, FIREARMS LAW DESKBOOK § 2:30 (2014).

<sup>304</sup> See, e.g., *United States v. Nix*, 438 F.3d 1284, 1286-87 (11th Cir. 2006) (holding restoration of civil rights is necessary to trigger § 921(a)(20)); *United States v. Brown*, 408 F.3d 1016, 1017 (8th Cir. 2005) (holding that Missouri’s restoration of



In the alternative, states could take an *ex ante* approach, based on analysis of other state restoration protocols, and recognize restored status conferred only by states with kindred criteria and procedures. The up-front comparative law undertaking would be challenging and time-consuming, and would require updating. But it would not be without precedent. States already condition recognition of one another's decisions to grant concealed carry handgun permits on this basis.<sup>305</sup> Similarly, in Texas, where state law requires that a sister-state conviction be for a "substantially similar" offense in order to trigger sex offender registration in Texas, the Department of Public Safety is charged with the responsibility for such assessments and making available any "compilation" created to prosecutor offices.<sup>306</sup>

### B. Congress

In the event that states fail to adopt restoration recognition provisions on their own Congress should step in and advance a provision along the lines suggested above. This part examines possible avenues by which it could do so.

#### 1. Interstate Compact

One way for Congress to act would be through approval of a compact entered into by states that wish to cooperate with respect to interstate recognition of relief. The Compact Clause allows for such agreements,<sup>307</sup> subject to congressional approval.<sup>308</sup> Interstate

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only some rights (juror service and holding public office) were not sufficient to trigger the § 921(a)(2) exemption because other civil rights that were not restored); *United States v. Thomas*, 991 F.2d 206, 213-14 (5th Cir. 1993) (holding that the failure to deny an individual the right to possess a firearm was not equivalent to restoring their civil rights).

<sup>305</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-717, GUN CONTROL: STATES' LAWS AND REQUIREMENTS FOR CONCEALED CARRY PERMITS VARY ACROSS THE NATION 19 (2012) (noting that roughly forty states selectively recognize permits from one or more other states on this basis).

<sup>306</sup> TEX. CODE CRIM. PROC. ANN. art. 62.003 (2015). In an effort to ensure that individuals are registered for the minimum period required by the federal Adam Walsh Act, the website of the Department of Public Safety contains a lengthy, detailed list specifying and comparing registration periods under Texas and federal law. See *Texas Offenses Tiered Under the Federal Adam Walsh Act (42 U.S.C. Section 16911 et seq.)*, TEX. DEP'T OF PUB. SAFETY (Apr. 2013), <https://records.txdps.state.tx.us/SexOffender/Registration%20periods%20SORP%20v%20SORNA%202-2013.pdf>.

<sup>307</sup> U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . .").

<sup>308</sup> Despite the unequivocal quality of its text, the Compact Clause has long been

compacts are common, providing a durable legal framework for handling cross-jurisdictional matters of mutual importance.<sup>309</sup> All states, for instance, are signatories to the Interstate Compact for Adult Offender Supervision,<sup>310</sup> and the Interstate Compact for Juveniles,<sup>311</sup> which are overseen by quasi-governmental commissions dedicated to ensuring the smooth movement of offenders.<sup>312</sup> As with other compacts, interested states would present Congress with a model recognition provision,<sup>313</sup> which would become federal law subsequent to congressional approval.<sup>314</sup>

A compact would have obvious appeal, as it would be the result of negotiated compromise by the states themselves, but it remains unclear whether it would actually come to fruition. The main reason is

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held to admit of exceptions. Most recently, the Supreme Court stated that congressional approval is only necessary when a state agreement “enhance[s] state power to the detriment of federal supremacy.” *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 460, 471 (1978); see also Matthew Pincus, Note, *When Should Interstate Compacts Require Congressional Consent?*, 42 COLUM. J.L. & SOC. PROBS. 511, 513-14 (2009). Consistent with this view, Texas law expressly provides that the Department of Public Safety, responsible for overseeing “extrajurisdictional registrant[s],” “may negotiate and enter into a reciprocal registration agreement with any other state to prevent residents of this state and residents of the other state from frustrating the public purpose of the registration of sex offenders by moving from one state to the other.” TEX. CODE CRIM. PROC. ANN. art. 62.052(c) (2015).

<sup>309</sup> See generally CAROLINE N. BROUN ET AL., *THE EVOLVING USE AND THE CHANGING RULE OF INTERSTATE COMPACTS* (2006) (discussing the development of interstate compacts, including their various advantages); JOSEPH F. ZIMMERMAN, *INTERSTATE COOPERATION: COMPACT AND ADMINISTRATIVE AGREEMENTS* (3d ed. 2012).

<sup>310</sup> See 4 U.S.C. § 112(a) (2012); *Offender Information*, INTERSTATE COMMISSION FOR ADULT OFFENDER SUPERVISION, <http://www.interstatecompact.org/StateDocs/StateDocuments.aspx> (last visited July 28, 2015). See generally Michael L. Buenger & Richard L. Masters, *The Interstate Compact on Adult Offender Supervision: Using Old Tools to Solve New Problems*, 9 ROGER WILLIAMS U. L. REV. 71, 107-15 (2003) (tracing history and evolution of the Compact).

<sup>311</sup> See *Interactive Map*, INTERSTATE COMMISSION FOR JUVENILES, <http://www.juvenilecompact.org/Directory/RegionsStates/Overview.aspx> (last visited July 28, 2015).

<sup>312</sup> See *About the Commission*, INTERSTATE COMMISSION FOR ADULT OFFENDER SUPERVISION, <http://www.interstatecompact.org/About/AbouttheCommission.aspx> (last visited July 28, 2015); *About ICJ*, INTERSTATE COMMISSION FOR JUVENILES, <http://www.juvenilecompact.org/About/Mission,Vision,andValues.aspx> (last visited July 28, 2015). Multiple states are also signatories to the Interstate Corrections Compact, which facilitates transfer and oversight of inmates who for some reason serve time in a state other than where sentenced. See *Interstate Corrections Compact*, NAT’L CENTER FOR INTERSTATE COMPACTS, <http://apps.csg.org/ncic/Compact.aspx?id=82> (last visited July 28, 2015).

<sup>313</sup> See Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 504-05 (2003).

<sup>314</sup> See *Texas v. New Mexico*, 462 U.S. 554, 564 (1983).

that states might not discern a pressing need to subscribe to a coordinated national solution. Unlike other compacts, such as with probationers and parolees, motivated by a need to facilitate the monitoring of individuals subject to continued correctional supervision, restored individuals present neither an ongoing imperative for interstate agency cooperation nor pose an immediate public safety threat.<sup>315</sup> In short, as with other public policy areas marked by state collective action barriers,<sup>316</sup> Congress might need to act on its own.

## 2. Spending Clause

If Congress were to take the initiative, it might seek to do so pursuant to Article I's Spending Clause,<sup>317</sup> which allows the federal government to condition state receipt of funds on compliance with federal conditions on matters concerning the nation's "general welfare."<sup>318</sup> Although congressional resort to the spending authority long served as a virtually unassailable basis for the exercise of federal power,<sup>319</sup> the Court in *National Federation of Independent Business v. Sebelius*<sup>320</sup> signaled that the power is not without limit.

In *Sebelius*, seven members of a highly fractured Court found that a key portion of the Affordable Care Act (the Act), conditioning state receipt of federal Medicaid funding, violated the Spending Clause.<sup>321</sup> The Justices held unconstitutional Congress's threat to withhold

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<sup>315</sup> It also bears mention that compacts can present enforceability problems. First, individuals have neither a direct nor third-party beneficiary interest in having compact terms enforced. *See, e.g., Doe v. Pa. Bd. of Prob. & Parole*, 513 F.3d 95, 104 (3d Cir. 2008) ("The language of the [Interstate Probation and Parole] Compact itself creates rights for the various states who are signatories to it. It does not create rights for probationers or parolees."). Second, little recourse exists to penalize or sanction recalcitrant signatories to compacts. *See, e.g., Alabama v. North Carolina*, 560 U.S. 330, 339-42 (2010) (declining to penalize state that opted out of interstate compact regarding disposition of radioactive waste).

<sup>316</sup> *See Huq, supra* note 254, at 218 (noting need for Congress to act when states exhibit a "collective inability to organize and install their own solutions to pressing policy concerns").

<sup>317</sup> *See* U.S. CONST. art. I, § 8, cl. 1 (providing Congress power "to pay the Debts and provide for the . . . general Welfare of the United States").

<sup>318</sup> *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (citations omitted) ("[T]he exercise of the spending power must be in pursuit of 'the general welfare.'").

<sup>319</sup> *See* Erin Ryan, *The Spending Power and Environmental Law After Sebelius*, 85 U. COLO. L. REV. 1003, 1006 (2014).

<sup>320</sup> *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

<sup>321</sup> *See id.* at 2601-08 (Roberts, C.J., joined by Breyer, J., and Kagan, J.); *id.* at 2659-66 (Scalia, J., joined by Kennedy, J., Thomas, J., and Alito, J., dissenting).

Medicaid funds from states that elected to not satisfy the Act’s required expansion in Medicaid coverage.<sup>322</sup> While unable to agree on a single rationale, the three-member plurality opinion by Chief Justice Roberts and the four-member dissent written by Justice Scalia agreed that Congress’s threat to withhold all Medicaid funds from non-compliant states was so large (amounting to the largest line item in state budgets) that Congress crossed the line from permissible inducement to impermissible coercion.<sup>323</sup>

Unanimity of result but not rationale requires that the Court’s holding be the “position taken by those Members who concurred in the judgment[] on the narrowest grounds.”<sup>324</sup> On this basis, the spending authority take-away from *Sebelius* resides in the narrower plurality opinion of Chief Justice Roberts, which invalidated the Medicaid expansion because (1) it linked state receipt of funds for an extant funding program to a new independent program, and (2) the funds at stake were so significant that their threatened loss amounted to coercion.<sup>325</sup>

Here, Congress would have no difficulty maneuvering the spending-power shoals seemingly created by *Sebelius*. It could either fund new state laws requiring recognition directly<sup>326</sup> or it could condition receipt of federal money on states doing so.<sup>327</sup> If it went the latter route, Congress could pressure state buy-in by tying adoption of a provision to a state’s receipt of a portion of federal criminal justice funding under the Edward Byrne Grant Program.<sup>328</sup> The method is a

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<sup>322</sup> *Id.* at 2608 (Roberts, C.J., joined by Breyer, J., and Kagan, J.).

<sup>323</sup> *See id.* at 2604 (deeming threat “much more than ‘relatively mild encouragement’ — it is a gun to the head”); *id.* at 2661 (Scalia, J., joined by Kennedy, J., Thomas, J., and Alito, J., dissenting) (finding threat “coercive” and stating that “if States really have no choice other than to accept the package . . . the conditions cannot be sustained under the spending power”).

<sup>324</sup> *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)) (internal quotation marks omitted).

<sup>325</sup> *Sebelius*, 132 S. Ct. at 2601-07 (Roberts, C.J.); *see also* Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 *GEO. L.J.* 861, 873 (2013); Ryan, *supra* note 320, at 1007.

<sup>326</sup> *See* Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 *CRIME & JUST.* 377, 399 (2006) (discussing broad array of direct federal grants and in-kind aid disbursed with regard to state criminal justice matters).

<sup>327</sup> *See South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (“Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power ‘to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.’”) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (Burger, C.J.)).

<sup>328</sup> *See, e.g., State v. Tatlow*, 290 P.3d 228 (Ariz. Ct. App. 2012) (discussing how

tried and true one, for instance allowing Congress to repeatedly ratchet up state sex offender registration and community notification laws,<sup>329</sup> despite continued Tenth Amendment-based commandeering challenges.<sup>330</sup> While it could be argued that the initiative runs afoul of the second *Sebelius* concern, threatened withholding of ten percent of funding is not remotely comparable to the impact of lost state Medicaid funds deemed problematic in *Sebelius*.<sup>331</sup>

### 3. Commerce Clause

The Commerce Clause, which empowers Congress to “regulate Commerce . . . among the several States,”<sup>332</sup> could serve as another basis for congressional action. Although the critical threshold requirement of a matter or behavior qualifying as “[c]ommerce” has at times proved controversial, including in *Sebelius*,<sup>333</sup> when ex-offenders change state residences they act as those who “by some preexisting activity bring themselves within the sphere of federal regulation.”<sup>334</sup> Just as courts have repeatedly rejected Commerce Clause challenges to the federal law imposing criminal liability on sex offenders who travel across state lines,<sup>335</sup> Congress would act within its authority when it

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Byrne Act funds are distributed in Arizona); *see also* *How Byrne JAG Grants Are Awarded and Distributed*, NAT’L CRIM. JUST. ASS’N, <http://www.ncja.org/how-byrne-jag-grants-are-awarded-and-distributed> (last visited July 28, 2015).

<sup>329</sup> *See* WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA 55-66 (2009) (surveying federal laws starting with the Jacob Wetterling Act (1994) through the Adam Walsh Act (2006)).

<sup>330</sup> *See* *United States v. White*, 782 F.3d 1118, 1128 (10th Cir. 2015) (joining the Second, Fifth, Eighth, and Ninth Circuits in finding that the Sex Offender Registration and Notification Act does not violate the Tenth Amendment); *see also* *United States v. Felts*, 674 F.3d 599, 608 (6th Cir. 2012) (noting that “Congress. . .has not commandeered Tennessee, nor compelled the state to comply with its requirements. Congress has simply placed conditions on the receipt of federal funds.”).

<sup>331</sup> *See* *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2663 (2012) (Ginsburg, J., concurring and dissenting in part). The point at which coercion becomes intolerable (“real” in the parlance of *Sebelius*), as Kathleen Sullivan long ago noted, is less a constitutional than an “irreducibly normative” judgment. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1428 (1989). For discussion of the dynamic within states affecting whether to submit to federal conditions, and receive funds, *see* Brian Galle, *Federal Grants, State Decisions*, 88 B.U. L. REV. 875, 923-30 (2008).

<sup>332</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>333</sup> *See, e.g.*, Dan T. Coenen, *The Commerce Power and Congressional Mandates*, 82 GEO. WASH. L. REV. 1052 (2014) (discussing the Supreme Court’s use of the Commerce Clause in *Sebelius*).

<sup>334</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2592 (2012).

<sup>335</sup> *See, e.g.*, *United States v. White*, 782 F.3d 1118, 1123-26 (10th Cir. 2015)

regulates the interstate travel of restored ex-offenders. In doing so, legislation should make clear the economic impact associated with state-imposed impediments to the interstate travel of restored individuals, such as with the right to occupational licensure.<sup>336</sup>

Although the Court has admonished that the “Constitution requires a distinction between what is truly national and what is truly local,”<sup>337</sup> such line-drawing would present no difficulty here. If indeed reentry was ever truly the concern of individual states, it no longer is so given the pressing national need to integrate the nation’s many millions of ex-offenders.<sup>338</sup> Rather than constituting an internal police power matter for states alone, as to which “the general welfare of the United States is not concerned,”<sup>339</sup> successful reentry is manifestly a concern warranting the attention of the national legislature.<sup>340</sup>

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(“[W]e discuss the Supreme Court’s decision in *NFIB* and explain why it is not controlling of the Commerce Clause issue presented here [regarding SORNA].” (referring to *Sebelius*, 132 S. Ct. 2566)); *United States v. Anderson*, 771 F.3d 1064, 1071 (8th Cir. 2014) (rejecting a Commerce Clause claim against SORNA and noting continued effect of another decision holding likewise post-*Sebelius*); *United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1129-32 (9th Cir. 2013) (upholding Congress’ power to regulate interstate travel of sex-offenders under the Commerce Clause).

<sup>336</sup> See *supra* notes 68–72 and accompanying text.

<sup>337</sup> *United States v. Morrison*, 529 U.S. 598, 617-18 (2000).

<sup>338</sup> See, e.g., Vicki Lopez Lukis, *Final Report to the Governor, GOVERNOR’S EX-OFFENDER TASK FORCE* app. C, at 39 (Nov. 2006), available at [http://www.pdmiami.com/governors\\_ex-offender\\_task\\_force.pdf](http://www.pdmiami.com/governors_ex-offender_task_force.pdf) (noting that conviction-based employment restrictions may affect “more than one-third of Florida’s 7.9 million non-farm jobs”); John Schmitt & Kris Warner, *Ex-Offenders and the Labor Market*, CENTER FOR ECON. & POL’Y RES. 1 (Nov. 2010), available at <http://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf> (noting that in 2008 criminal record-related employment barriers resulted in almost a full percent reduction in the nation’s employment rate, amounting to a gross domestic product impact as high as \$65 billion). See generally Michelle Natividad Rodriguez & Maurice Emsellem, *65 Million “Need Not Apply”: The Case for Reforming Criminal Background Checks for Employment*, THE NAT’L EMP. L. PROJECT (Mar. 2011), available at [http://www.nelp.org/page/\\_/SCLP/201/65\\_Million\\_Need\\_Not\\_Apply.pdf?nocdn=1](http://www.nelp.org/page/_/SCLP/201/65_Million_Need_Not_Apply.pdf?nocdn=1) (noting critical national economic impact of criminal conviction and the need for changes in the way records affect employment market).

<sup>339</sup> Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 476 (2004) (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., 3d ed. 1966)) (internal quotations marks omitted).

<sup>340</sup> See generally *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 803 (1995) (“[I]n [the] National Government, representatives owe primary allegiance not to the people of a State, but to the people of the Nation . . . Representatives and Senators are as much officers of the entire Union as is the President.”); Wayne A. Logan, *Creating a “Hydra in Government”: Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. REV. 65, 89 (2006) (noting same and providing additional historical evidence in support of the view).

Yet even if Congress enjoys authority to act vis-à-vis emigrating offenders, a potential problem remains in that it could well lack authority to require state officials to implement its legislative will, based on Tenth Amendment anti-commandeering principles set forth in *Printz v. United States*.<sup>341</sup> Directing state executive officials to recognize restoration could raise commandeering concern akin to that in *Printz*, where the Court invalidated a federal law requiring local executive actors to conduct background checks on potential firearms purchasers,<sup>342</sup> and absorb associated costs.<sup>343</sup> However, to the extent that state courts (as opposed to executive actors) are required to do so, commandeering presents less of a concern.<sup>344</sup>

#### 4. Effects Clause

Finally, Congress might act pursuant to power granted under a lesser known part of the Full Faith and Credit Clause to lend “[e]ffect” to the “public Acts, Records, and judicial Proceedings” of states.<sup>345</sup> Congress in the past has acted on its Effects Clause authority in instances of felt national need,<sup>346</sup> with the Parental Kidnapping

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<sup>341</sup> 521 U.S. 898, 928-29, 935 (1997) (holding that “Congress cannot compel the States to enact or enforce a federal regulatory program”).

<sup>342</sup> *Id.* at 933-35 (interpreting a provision of the Brady Handgun Violence Prevention Act).

<sup>343</sup> *Id.* at 930 (identifying “financial burden[s]” of implementing federal policy as an anti-commandeering concern).

<sup>344</sup> See *id.* at 928-29 (suggesting that Congress enjoys greater authority to affect the work of state judges). For a critical take on the federalism-based premise animating the Court’s commandeering prohibition more generally, see Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104 (2013). According to Professor Campbell, Anti-Federalists actually favored federal deployment of state executive and judicial actors to enforce federal law, as a means to preserve state power, and commandeering was widely accepted in the Founding Era and for decades thereafter. *Id.* at 1111.

<sup>345</sup> U.S. CONST. art. IV, § 1. For an account of the Framing Era origins of the Effects Clause, see Engdahl, *supra* note 145. Professor Engdahl asserts that the historical record makes clear that the first clause of the Full Faith and Credit Clause, requiring that states afford full faith and credit to one another’s acts, records, and proceedings, obliges only that states provide them prima facie evidentiary sufficiency; only the “Effects Clause,” pertaining to Congress, requires that they be given legal extra-state effect. *Id.* at 1593-94; see also Sachs, *supra* note 145, at 1202 (examining early congressional consideration of invoking “Effects” Clause in relation to state records).

<sup>346</sup> In the Defense of Marriage Act, Congress paradoxically invoked the Clause to *not require* that same-sex marriages performed in states be given effect in objecting states. See Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1, 21-24 (1997) (surveying objections made by constitutional law scholars regarding congressional use of the Clause in this way). As

Prevention Act of 1980,<sup>347</sup> the 1994 Full Faith and Credit for Child Support Orders Act,<sup>348</sup> and domestic protection orders under the Violence against Women Act (1994 and 2000).<sup>349</sup> Congress intervened to resolve difficulties presented by interstate conflicts in enforcement,<sup>350</sup> and perhaps could do so here. However, Congress has been notably abstemious in invoking its authority to date focusing exclusively on family law.<sup>351</sup> Whether it would do so with respect to restoration recognition, which does not have similarly immediate dire implications, is subject to question.

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In sum, Congress has the means to oblige restoration recognition among states, and while getting the current “do nothing” Congress to act is never a sure thing,<sup>352</sup> reason exists for at least some optimism in the reentry context. With enactment of the Second Chance Act of 2007, which provides state and local governments over \$250 million in grants to develop and implement research-based reentry programs,<sup>353</sup> members of Congress made clear their desire to advance the cause of reentry among states.<sup>354</sup> At the same time, restoration recognition — as with reentry more generally — presents little of the

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noted earlier, the constitutionality of the provision has not been addressed by the Court. *See supra* notes 28–29.

<sup>347</sup> See 28 U.S.C. § 1738A (2012).

<sup>348</sup> See 28 U.S.C. § 1738B; *see also* Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. 2265 (2012).

<sup>349</sup> See 18 U.S.C. § 2265(a).

<sup>350</sup> See Emily J. Sack, *Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders*, 98 *Nw. U. L. REV.* 827, 876-88 (2004).

<sup>351</sup> *Id.* at 876 (“Congress has passed only a handful of specific full faith and credit legislation, focused exclusively in the family law area.”); *see also* Engdahl, *supra* note 145, at 1655-58 (noting that Congress has “rarely” exercised its power in this regard and that any such exercise will be “exceptional”).

<sup>352</sup> See, e.g., Susan Milligan, *The Do-Nothing Congress*, *U.S. NEWS & WORLD REP.* (Sept. 24, 2015), <http://www.usnews.com/news/articles/2014/09/08/the-do-nothing-congress>.

<sup>353</sup> See Second Chance Act of 2007, Pub. L. 110-199, 122 Stat. 657 (2008) (codified as amended at 42 U.S.C. § 17501 (Supp. V. 2012)) (authorizing grants to state governments and nonprofit entities to provide reentry assistance). *See generally* *Second Chance Act (SCA)*, U.S. BUREAU OF JUSTICE ASSISTANCE, [https://www.bja.gov/ProgramDetails.aspx?Program\\_ID=90](https://www.bja.gov/ProgramDetails.aspx?Program_ID=90) (last visited July 28, 2015).

<sup>354</sup> See, e.g., 42 U.S.C. § 17501(a)(1) (2012) (identifying among the Act’s purposes as “break[ing] the cycle of criminal recidivism . . . and help[ing] States, local units of government, and Indian Tribes, better address the growing population of criminal offenders who return to their communities and commit new crimes”).



political downside that typically impedes criminal justice reform initiatives. Not only can lawmakers invoke the positive narrative of individual redemption and cite the human and fiscal costs of recidivism,<sup>355</sup> they can actually score points with constituents from across the political spectrum, given the diverse appeal of firearm rights and securing gainful employment (conservatives and libertarians) and civic and political rights such as voting and jury service (progressives).

#### CONCLUSION

Among the most commonly extolled virtues of American federalism is the legal diversity resulting from its decentralized system of governance.<sup>356</sup> This Article has addressed an outgrowth of this diversity: the conflicts generated when individuals, convicted of a crime in one state, and who later secure relief from collateral consequences of conviction there, seek to have their restored status recognized by another state to which they have relocated. Although it is true, as Judith Resnick has observed, that “laws (like people) migrate, and seepage is everywhere,”<sup>357</sup> with restoration recognition such legal seepage has thus far been limited.

Whether and how states lend legal effect to one another’s restoration outcomes has major implications for horizontal federalism. It also has major practical importance, certainly for ex-offenders, but also for states and a nation struggling to promote the successful reentry of tens of millions of convicted individuals. In its recent landmark decision recognizing a constitutional right to same-sex marriage, the Supreme Court expressed its concern over the “instability and uncertainty” caused by the refusal of some states to recognize same-sex marriages

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<sup>355</sup> Cf. *Statement of Principles*, RIGHT ON CRIME, <http://www.rightoncrime.com/the-conservative-case-for-reform/statement-of-principles/> (last visited July 31, 2015) (discussing the conservative approach to criminal justice policies, especially in terms of cost-effectiveness).

<sup>356</sup> See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“[Federalism] assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes . . . .”); Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1074 (1995) (noting that federalism permits “greater local tailoring and aggregate diversity of policies throughout the nation”); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 402 (1997) (noting the argument that federalism “enhances our lives by preserving and creating diversity”).

<sup>357</sup> Judith Resnick, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564, 1576 (2006).

lawfully entered into in other states,<sup>358</sup> adding that “the disruption caused by the recognition bans is significant and ever-growing.”<sup>359</sup> To date, however, similar concern over emigrant ex-offenders, who seek recognition of their restored status, and who potentially far exceed the number of same-sex married individuals, has failed to garner much public attention.

Although restoration remains out of reach for many because of narrow eligibility criteria, administrative cost, or the difficulty of the process,<sup>360</sup> relief opportunities will likely continue to expand in coming years, and thus so too will conflicts when ex-offenders emigrate. This Article has explored the many important legal and policy ramifications of recognition and highlighted the challenges that it presents. In doing so, it is hoped that the Article has advanced the cause of ensuring, as Shakespeare would have it, that mercy seasons justice.

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<sup>358</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015). By way of example, the Court noted that “[f]or some couples, even an ordinary drive into a neighboring State to visit family or friends risks causing severe hardship in the event of a spouse’s hospitalization while across state lines.” *Id.*

<sup>359</sup> *Id.*

<sup>360</sup> See SUBRAMANIAN ET AL., *supra* note 42, at 33–34.