NEW YORK UNIVERSITY
JOURNAL OF LAW & LIBERTY

DYNAMIC INCORPORATION, RIGHTS RESTORATION, AND 18 U.S.C. § 922(G)(1)

D. Bowie Duncan *

INTRODUCTION

A felony conviction carries consequences beyond imprisonment. Felons often have trouble securing housing or employment post-release. They may be disqualified from receiving public assistance, including food stamps, subsidized housing, and financial aid.[1] Felons are also categorically prohibited from serving in the armed forces.[2] And, most relevant here, a felony conviction typically

* J.D. Candidate, 2022, University of Texas School of Law; B.A., 2019, University of Virginia. All errors are my own.

[1] U.S. COMM'N ON CIV. RTS., COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES 1–2, 25–27 (2019).

[2] 10 U.S.C. § 504(a).

deprives felons of their civil rights, including the rights to vote, hold public office, serve on a jury, and possess firearms.

But so too do state legislatures provide mechanisms for restoring felons' rights. States vary widely in how, when, and whether to restore these rights. Some states restore certain rights automatically; others do so on a case-by-case basis; some states restore most or all rights shortly after release; others are stingier, restoring perhaps the right to vote automatically but making it more difficult for felons' other rights to be restored.[3]

This Note focuses on one right in particular: the right to keep and bear arms, enshrined in the Second Amendment of the Constitution.[4] Yet the purpose of this Note is not to analyze the constitutionality of restrictions on felons' gun rights, a disputed topic since the Supreme Court's decision in *District of Columbia v. Heller*.[5] Instead, this Note focuses on how states' mechanisms for restoring felons' civil and gun rights influence the federal felon-in-possession law, which prohibits persons convicted of federal or state felonies from possessing firearms.[6] It does so through the lens of "dynamic incorporation," a process by which Congress incorporates the changing policy judgments of state legislatures into federal law.

In a recent article, Joshua M. Divine extolls the benefits of dynamic incorporation and encourages Congress to use the tool more often in federal criminal law.[7] Divine identifies a few existing instances of dynamic incorporation in federal criminal law, including the felon-in-possession law. Yet he argues that the felon-in-

---

[3] *See infra* Section II.B.

[4] U.S. CONST. amend. II.

[5] District of Columbia v. Heller, 554 U.S. 570 (2008). After years of ducking post-*Heller* (and post-*McDonald*) Second Amendment cases, the Supreme Court recently granted cert in New York State Rifle & Pistol Association v. Corlett, No. 20-843, 2021 WL 1602643 (U.S. Apr. 26, 2021).

[6] 18 U.S.C. § 922(g)(1).

[7] Joshua M. Divine, *Statutory Federalism & Criminal Law*, 106 VA. L. REV. 127, 133 (2020).

possession law is a poor example of dynamic incorporation because it provides state legislatures few incentives to change their own criminal laws to influence the application of the federal felon-in-possession law.[8] This Note concedes that states are unlikely to change their own laws simply to influence how the felon-in-possession law applies. It argues, however, that Divine misses an important second layer of dynamic incorporation in the felon-in-possession law: the rights-restoration provision in 18 U.S.C. § 921(a)(20). This provision exempts a felon from the felon-in-possession law when his civil rights—the rights to vote, hold public office, and serve on a jury—have been restored under state law, provided the state does not expressly limit the felon's gun rights.[9]

Under the felon-in-possession law, the laws of the convicting jurisdiction, often a state, determine what constitutes a conviction for "a crime punishable by imprisonment for a term exceeding one year," triggering the felon-in-possession prohibition. The laws of the convicting jurisdiction also determine whether a felon's civil rights have been restored. So, the statute provides states more than one way to influence whether the federal felon-in-possession law applies. First, they can define a predicate offense as punishable by imprisonment for a year or less. And second, they can exempt a felon who would otherwise be subject to the prohibition in § 922(g)(1) by restoring his civil rights without otherwise limiting his gun rights.

This second way is more congruous with the goals of dynamic incorporation. States are likely to take into account how their own laws interact with the felon-in-possession law's rights-restoration provision. Those wishing to preserve the option of federal prosecution of felons who possess firearms may well choose not to restore one or more civil rights, or to impose explicit limitations on felons' gun rights. Those wishing to free certain felons from the threat of federal firearms prosecution may automatically restore these felons' civil rights upon release or shortly thereafter, without

---

[8] *See infra* Sections I.B, I.C.
[9] 18 U.S.C. § 921(a)(20).

imposing any limitations on their gun rights. The rights-restoration provision is nonetheless an imperfect mechanism for dynamic incorporation. Its text, and how courts have interpreted the text, restricts states' capacity to influence the federal felon-in-possession law without abandoning local judgments as to when, whether, and to what extent felons' civil and gun rights should be restored.

This Note proceeds in three parts. Part I briefly diagnoses a problem that has been diagnosed many times before: the federalization of criminal law. It then provides an overview of dynamic incorporation, a potential solution to this problem, and offers two scholars' differing views on the benefits and costs of dynamic incorporation. Part I concludes by introducing the federal felon-in-possession law and examining how it dynamically incorporates state law, including through the rights-restoration provision. Part II begins by surveying how courts have interpreted the rights-restoration provision and related provisions in § 921(a)(20). It then reviews the diverse ways states restore civil and gun rights, using three states' restoration procedures as examples. Finally, drawing on lessons from Parts I and II, Part III proposes three amendments to § 921(a)(20) that would allow states to more directly influence how the federal felon-in-possession law applies.

I. FEDERALIZATION, DYNAMIC INCORPORATION, AND 18 U.S.C. § 922(G)(1)

A. THE FEDERALIZATION OF CRIMINAL LAW

The Framers envisioned a limited role for the federal government in criminal law. The Constitution gives Congress jurisdiction over a small subset of crimes: counterfeiting;[10] "Piracies and Felonies committed on the high Seas";[11] "Offenses against the Law of

[10] U.S. CONST. art. I, § 8, cl. 6.
[11] *Id.* art. I, § 8, cl. 10.

Nations";[12] and treason.[13] Outside these few areas, criminal law was thought to be the province of the states. This was the natural result of limiting the federal government's powers. In *The Federalist No. 45*, James Madison explained the effect of creating a federal government of "few and defined" powers and reserving the remaining powers to the states, writing:

> The [powers of the federal government] will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce . . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.[14]

Criminal law falls into the latter category. It concerns the "internal order" of the state and the "lives, liberties, and properties" of its citizens. Today, however, the federal government has an outsized role in criminal law, with roughly 4,500 federal laws carrying criminal penalties.[15] The Supreme Court's generous reading of the Commerce Clause[16] has been the impetus behind this so-called "federalization" of criminal law.[17] Under the purported authority granted to it by the Commerce Clause, the federal government

---

[12] *Id.*

[13] *Id.* art. III, § 3, cl. 2.

[14] THE FEDERALIST NO. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961).

[15] Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 538 (2012).

[16] The Commerce Clause gives Congress power "to regulate Commerce . . . among the several states." U.S. CONST. art. I, § 8, cl. 3.

[17] For an article surveying and challenging the various criticisms of the federalization of criminal law, see Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1 (2012).

criminalizes everything from marijuana possession[18] to animal crushing.[19]

Since the New Deal, the Court has read the Commerce Clause broadly to allow Congress to regulate almost any activity, including activity that occurs solely within the boundaries of a state.[20] The more recent "revolutionary" cases in which the Court moved to rein in its Commerce Clause jurisprudence—*United States v. Lopez*,[21] *United States v. Morrison*,[22] and *National Federation of Independent Business v. Sebelius*[23]—have in fact done "little to limit Congress's still-extensive Commerce Clause power."[24] They reinforced the substantial-effects test, which allows Congress to regulate even intrastate activity as long as it has a substantial effect on interstate commerce,[25] and clarified that Congress's Commerce power extends only to existing

---

[18] 21 U.S.C. § 841(a)(1); *see also id.* § 812 (establishing the five schedules of controlled substances).

[19] Preventing Animal Cruelty and Torture Act, Pub. L. No. 116-72, 133 Stat. 1151 (2019). The statute, likely unnecessary in light of state animal-cruelty laws, is designed to criminalize the reprehensible behavior underlying "animal crush videos," which typically depict women crushing, stomping on, or impaling small animals like gerbils. *Crush Videos*, ANIMAL WELFARE INST. [https://perma.cc/ES4Q-7ZEL] (last visited Oct. 24, 2021).

[20] For the classic cases expanding Congress's Commerce power, see, for example, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), United States v. Darby Lumber Co., 312 U.S. 100 (1941), NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), and Houston E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342 (1914).

[21] 514 U.S. 549 (1995) (holding that the Gun-Free School Zones Act, which lacked a jurisdictional element at the time, was unconstitutional under the Court's substantial-effects test).

[22] 529 U.S. 598 (2000) (similarly holding that a section of the Violence Against Women Act was unconstitutional under the substantial-effects test).

[23] 567 U.S. 519 (2012) (holding that the Affordable Care Act's individual mandate could not be sustained under the Commerce Clause because, rather than regulating existing economic activity, the mandate compelled individuals to engage in economic activity).

[24] Diane McGimsy, *The Commerce Clause and Federalism after* Lopez *and* Morrison*: The Case for Closing the Jurisdictional-Element Loophole*, 90 CALIF. L. REV. 1675, 1706 (2002).

[25] *Lopez*, 514 U.S. at 558–59

economic activity,[26] but did not otherwise disturb the Court's expansive Commerce Clause jurisprudence.[27]

Under this jurisprudence, federal statutes that include jurisdictional elements (requiring the regulated entity to have travelled in or affected interstate commerce) pass constitutional muster.[28] Federal criminal laws, including the felon-in-possession law,[29] often include these jurisdictional elements,[30] freeing them from potentially successful Commerce Clause challenges in light of *Lopez* and *Morrison*. Indeed, the lack of a jurisdictional element was one of the main reasons the Court struck down the Gun-Free School Zones Act (GFSZA) in *Lopez*[31] and a section of the Violence Against Women Act in *Morrison*.[32]

Thus, despite *Lopez*, *Morrison*, and *Sebelius*, Congress's Commerce power, its primary means of legislating in areas like criminal law traditionally thought to be the prerogative of the states, remains extensive. Given the political benefits of federal criminalization,[33] Congress is unlikely to independently cede that

---

[26] *Sebelius*, 567 U.S. at 552.

[27] The Court's post-*Lopez* and *Morrison* decision in Gonzales v. Raich, 545 U.S. 1 (2005), holding that Congress could regulate the production and use of homegrown marijuana under the Commerce Clause, confirms that Congress's Commerce power is still extensive.

[28] McGimsy, *supra* note 24, at 1700, 1706.

[29] 18 U.S.C. § 922(g)(1).

[30] The Court has held that there need only be a minimal nexus between the regulated activity and interstate commerce for the jurisdictional element to be satisfied. *See, e.g.*, Scarborough v. United States, 431 U.S. 563, 564, 577 (1977) (holding that proof that a felon possessed a gun that had previously travelled through interstate commerce was enough to sustain a conviction under the felon-in-possession law, which then, like now, prohibited felons from possessing firearms "in commerce or affecting commerce").

[31] *Lopez*, 514 U.S. at 561.

[32] *Morrison*, 529 U.S. at 613 ("Like the Gun-Free School Zones Act at issue in *Lopez*, § 13981 [of the Violence Against Women Act] contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce.").

[33] Congresspersons often wish to present themselves as "tough on crime," Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 881 (2005), or to criminalize behavior to satisfy a voting bloc, *see supra* note 17.

power. Proponents of federalism must therefore look to other mechanisms for achieving federalism's goals. Statutory federalism is one such mechanism.

B. STATUTORY FEDERALISM

Statutory federalism operates through dynamic incorporation, which allows state legislatures to affect the application and scope of federal law.[34] Certain federal statutes, typically civil, although sometimes criminal, incorporate the laws of the fifty states to determine whether and how federal law applies. Where this is the case, a change in state law may result in a corresponding change in federal law. That is what makes this form of statutory incorporation dynamic.[35] This subpart provides a few examples of dynamic incorporation in federal law, then presents two scholars' differing views on the benefits and costs of dynamic incorporation.

In a recent article championing dynamic incorporation, Joshua M. Divine identifies four categories of dynamic-incorporation statutes: the "opt-out" statute, the "opt-in" statute, the "triggering" statute, and the "scope" statute.[36] Under an opt-out statute, people who comply with state law are exempt from prosecution under the pertinent federal statute.[37] An example is the GFSZA, which was amended after *Lopez* to include a jurisdictional element. The GFSZA prohibits persons from possessing firearms in a school zone[38] but exempts persons who are licensed to possess a firearm by the state in which the school zone is located.[39] So if an individual is duly licensed under state law, the federal prohibition does not apply.

---

[34] Divine, *supra* note 7, at 133.

[35] *Id.* at 134. Incorporation is static, by contrast, when federal law incorporates state law only as it existed at the time the federal statute was adopted. *Id.*

[36] *Id.* at 138–43.

[37] *Id.* at 138.

[38] 18 U.S.C. § 922(q)(2)(A).

[39] *Id.* § 922(q)(2)(B)(ii).

Opt-in statutes penalize violations of state law at the federal level.[40] An example of an opt-in statute is the Assimilative Crimes Act. This Act, which applies only when criminal conduct is not punishable under federal law, adopts state criminal law in areas of concurrent or exclusive federal jurisdiction[41] located within a state. In other words, it converts violations of state law into violations of federal law by incorporating state law as it existed at the time of the offense.[42] So a state may "opt in" to federal prosecution by criminalizing certain behavior under state law. If the state does not (at T1) criminalize the behavior under state law, federal law will not apply. If the state then (at T2) criminalizes the same behavior, federal law will apply. This change in state law results in a corresponding change in federal law. Because the state chose—as a matter of state law—to create a new offense, federal prosecutors may now prosecute individuals for that offense under *federal* law.[43] Thus, at some level, the state has "opted in" to federal law, to use Divine's term.

Triggering statutes, for their part, apply when violating state or federal law triggers a federal criminal prohibition or sentencing enhancement. Divine considers these statutes the weakest form of dynamic incorporation. They are distinct from opt-in statutes in that violating state law is merely one way for the federal law to apply. Under opt-in statutes, by contrast, the federal law will not apply *unless* the person violates state law.[44] One example of a triggering statute is the Controlled Substances Act, which provides sentencing enhancements for people with prior felony drug offenses (state or

---

[40] Divine, *supra* note 7, at 139.

[41] A military base, for example, or other lands or buildings acquired by the United States. 18 U.S.C. § 7(3).

[42] 18 U.S.C. § 13. A murder on federal land would likely be prosecuted under this statute.

[43] The Major Crimes Act, which incorporates state law for crimes committed in Indian Country when "not defined and punished by Federal law," is another example of an opt-in statute. 18 U.S.C. § 1153(b).

[44] Divine, *supra* note 7, at 140.

federal).[45] The federal felon-in-possession law, described in detail in the next subpart, is at one level a triggering statute as well.

Finally, scope statutes allow "states to define how broadly or narrowly a federal provision will apply," typically by adopting individual states' definitions of key terms in a federal statute.[46] Civil law provides the best example of a scope statute. The Equal Access Act requires federally funded "secondary schools" to provide all extracurricular student clubs equal access to school facilities.[47] Under the statute, a secondary school is defined as "a public school which provides secondary education *as determined by State law*."[48] So a state's definition of secondary education determines the extent to which the Equal Access Act applies.[49]

In his article on the subject, Divine details several benefits of dynamic incorporation. One benefit is that it reduces inertia in reforming federal criminal law by increasing the number of potential sources of change. When federal law dynamically incorporates state law, each state has an opportunity to update federal law as it applies in the state. It is not incumbent solely on the federal government, which faces substantial political and structural barriers to legislating, to update federal law. Rather, all fifty state legislatures may update federal law by changing their own laws, increasing the likelihood that federal law will receive a much needed updating.[50] This, in turn,

---

[45] 21 U.S.C. § 841(b)(1)(E)(ii). Similarly, for someone to commit "international terrorism" under federal law, they must have in part engaged in conduct that violates state or federal law or would violate state or federal law "if committed within the jurisdiction of the United States or of any State." 18 U.S.C. § 2331(1)(A).

[46] Divine, *supra* note 7, at 142.

[47] 20 U.S.C. § 4071.

[48] *Id.* § 4072(1) (emphasis added).

[49] The Fifth and Fourteenth Amendments' Due Process Clauses also incorporate state statutory or common law into their definitions of "property." Divine, *supra* note 7, at 142; *see also* Bd. of Regents of St. Colls. v. Roth, 408 U.S. 564, 577 (1972) ("Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .").

[50] Divine, *supra* note 7, at 154.

makes legislating at the federal level more efficient. It allows the federal government to preserve resources that would otherwise go towards updating outdated federal criminal laws. And it also allows Congress to "rely on the experience, research, and writing of" state legislatures, rather than spending time and resources drafting the particulars of a criminal statute at the front-end.[51]

At the same time, dynamic incorporation encourages state legislatures to experiment with lawmaking—to serve as the lauded "laboratories of democracy." [52] Where statutes dynamically incorporate state law, state legislatures will know their efforts to change state law will not be in vain: their legislation will not be preempted by federal law.[53] Yet dynamic incorporation also leaves federal prosecution on the table for states that wish to keep it. It is thus similar to traditional federalism in that it defers to local judgments as to what should or should not be criminal. But it differs from traditional federalism in that it provides states *federal* resources to pursue criminal enforcement on matters both the federal and state governments deem important.[54]

Dynamic incorporation may also reduce political barriers to passing new federal legislation. Statutes that dynamically incorporate state law are less likely to provoke substantial political opposition from members of Congress interested in protecting state policies and interests. For example, a congressman would almost certainly oppose a statute that decriminalizes certain behavior (like marijuana possession) at the federal level if his state widely supports criminalization. Yet he is much less likely to oppose an opt-out

---

[51] *Id.* at 134.

[52] *See* 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.").

[53] Divine, *supra* note 7, at 158.

[54] *Id.*

statute that allows certain states to forgo federal criminalization but preserves federal criminalization in his state.[55]

Finally, dynamic incorporation can help reinforce the separation of powers. "Federalization," and the resulting overlap between federal and state criminal law, has increased the powers of both federal and local law enforcement officers, who work together in pursuing criminal prosecution and benefit from each other's knowledge and resources.[56] Local police serve as information gatekeepers. This gatekeeping role gives them substantial power to influence federal prosecution: they can either impede or enable federal prosecution by sharing information with federal enforcement authorities. It also facilitates forum-shopping, empowering local police to avoid defendant-friendly state substantive, procedural, or sentencing laws "by shifting defendants to federal court."[57]

Dynamic incorporation provides a check on this troubling enforcement discretion by countering it with "a cooperative relationship between federal and state legislatures."[58] The powers of federal and state legislatures alike increase under dynamic incorporation. State legislatures are given an opportunity to decide when federal law (and thus federal and local enforcement discretion) applies,[59] while Congress faces less inertia in updating its own criminal laws. The newfound power, in short, provides an opportunity to the fifty state legislatures, as well as Congress, to better oversee how federal law is enforced.[60]

Though he recognizes several of the potential benefits identified above, Professor Wayne A. Logan, in an earlier article on the same

---

[55] *Id.* at 159.

[56] *Id.* at 170.

[57] *Id.* at 132.

[58] *Id.* at 180.

[59] *Id.* at 132 ("Because [state] legislatures shape federal law, they can narrow the circumstances in which local officials are able to evade the constraints of state law.").

[60] *Id.* at 132, 181.

subject,[61] is far more critical of the deference dynamic incorporation accords to states. He identifies four major issues with dynamic incorporation. First, it injects arbitrariness into federal criminal law. Federal law is supposed to apply uniformly across the United States, but dynamic incorporation introduces an element of variability from state to state.[62] So a Texan who engages in the same behavior as an Idahoan may be convicted of a federal crime, while the Idahoan might escape criminal prosecution altogether. Second, dynamic incorporation aggrandizes the federal government by providing it a more efficient way to expand federal criminal law.[63] Certain federal criminal laws might not exist, or might be narrower in scope, if Congress chose not to incorporate state substantive laws or criminal histories. Third, by removing Congress from the policymaking process, dynamic incorporation reduces the number of "labs" of democracy from fifty-one to fifty.[64] Finally, when the federal government dynamically incorporates state law, it abdicates its criminal lawmaking authority. This abdication, in turn, reduces "political transparency and democratic accountability" at the federal level.[65] It also, we might add, raises constitutional concerns. Is it constitutional for Congress to circumvent Article I, Section 7, by delegating lawmaking authority to state legislatures?[66]

Logan highlights important issues with dynamic incorporation, but—by focusing his concerns on disuniformity[67]—he overlooks the

---

[61] Wayne A. Logan, *Creating a "Hydra in Government": Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. REV. 65 (2006).

[62] *Id.* at 90.

[63] *Id.* at 96.

[64] *Id.* at 84.

[65] *Id.* at 85.

[66] *See* Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1368–69 (1996) ("Nondelegation questions . . . arise where Congress simply incorporates state laws as they are and as they may change *in futuro*, without guidelines.").

[67] *See, e.g.*, Logan, *supra* note 61, at 84 ("[F]ederal deference has significant consequences for the federal criminal justice system and the thousands of individuals it processes annually. With it, federal law is infused with the variegated normative

benefits of federalism generally and the extent to which dynamic incorporation can advance federalism's goals in the twenty-first century. It is, of course, true that dynamic incorporation leads to variation in the application of federal criminal law. That is in large part the purpose of it. Statutory federalism, like traditional federalism, "allows many solutions to bubble up from below, rather than requiring one solution to be prescribed from above."[68] It leaves room for states to take different approaches to the pressing social problem of the day. And perhaps most importantly (as the rural–urban divide widens), statutory federalism respects regional differences in criminal law.

Dynamic incorporation thus provides a partial, and politically feasible, solution to the problem of federalization of criminal law. It allows Congress to "prohibit" certain behavior at the federal level but to leave it to the states to determine whether or how the federal prohibition will apply. It allows members of Congress to send a tough-on-crime message to their constituents by "criminalizing" something while at the same time advancing several of the goals of federalism.

C. THE FEDERAL FELON-IN-POSSESSION LAW

Turning to the primary subject of this Note, the felon-in-possession law is an additional example of dynamic incorporation in federal criminal law. This subpart provides an overview of the federal felon-in-possession law and the definition subsection used to determine whether an individual has a predicate conviction to trigger the statute. It then offers a preliminary discussion on how the felon-in-possession law dynamically incorporates state law. The subpart

---

positions of states, which in the process creates significant individual and systemic-level disuniformity in the application of national law.").

[68] J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1706 (2004).

also introduces the reader to Logan's and Divine's criticisms of the felon-in-possession law and suggests that both scholars overlook the rights-restoration provision, which functions as a second layer of dynamic incorporation in the felon-in-possession law.

The federal felon-in-possession law is only part of a broader statutory gun-rights prohibition. Title 18 U.S.C § 922(g) prohibits certain classes of persons from "ship[ing] or transport[ing] in interstate or foreign commerce, or possess[ing] in or affecting commerce, any firearm or ammunition."[69] Felons, or, to be precise, persons who have "been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year," are one of nine classes of prohibited persons under the statute.[70]

Section 921(a)(20), the relevant definition provision, elaborates on what constitutes a predicate felony conviction under the felon-in-possession law. It first excludes two categories of crimes—certain white-collar felonies and misdemeanors punishable under state law by less than two year's imprisonment—from the definition of "crime punishable by imprisonment for a term exceeding one year."[71] Next, and most important here, § 921(a)(20) clarifies what constitutes a "conviction." This part of the definition has three key clauses, which may be separated as follows:

> *The Choice-of-Law Clause*. "What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held."[72]
>
> *The Exemption Clause*. "Any conviction which has been expunged, or set aside or for which a person has been

[69] 18 U.S.C. § 922(g) (2018).

[70] *Id.* § 922(g)(1). Other prohibited persons include fugitives from justice, unlawful drug users or addicts, and the mentally ill, as well as persons who have been convicted of a misdemeanor crime of violence. *Id.* § 922(g)(2), (3), (4), (9).

[71] *Id.* § 921(a)(20).

[72] *Id.* Congress enacted this clause in response to the Supreme Court's decision in *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103 (1983), which held that federal, not state, law controlled what constitutes a conviction under 18 U.S.C. § 922(g)(1).

pardoned *or has had civil rights restored* shall not be considered a conviction for purposes of this chapter."[73] The exemption clause is modified by:

The Unless Clause. Pardon, expungement, or restoration of civil rights bars consideration of a prior conviction for purposes of § 922(g)(1) "*unless* such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms."[74]

Section 921(a)(20) thus includes two layers of dynamic incorporation. The first is embodied in the choice-of-law clause, which provides that the laws of the convicting jurisdiction—the federal or a state government[75]—determine whether something constitutes a crime punishable by over a year's imprisonment. Where the predicate offense is a state offense, state law determines whether the offense is punishable by over a year's imprisonment. The second layer comes through the rights-restoration provision, located within the exemption clause. As a result of a Supreme Court decision extending the choice-of-law clause to the exemption clause,[76] the laws of the convicting jurisdiction here, too, determine whether a felon has had his civil rights restored. A state felon thus may be exempt from the felon-in-possession law if the state in which he was convicted restored his civil rights. A third layer, in the unless clause, underlies the second, though this Note treats it as part of the second. Under the unless clause, a felon whose civil rights have otherwise been restored by a state is *not* exempt from the felon-in-possession

---

[73] 18 U.S.C § 921(a)(20) (emphasis added).
[74] *Id.* (emphasis added).
[75] Despite the broad "convicted in any court" language in § 922(g)(1), the Supreme Court has read the statute to exclude convictions in foreign courts. Small v. United States, 544 U.S. 385 (2005).
[76] *See infra* Section II.A.4.

law if state law or his certificate of rights restoration expressly restricts his gun rights.[77]

In their respective articles on dynamic incorporation, Logan and Divine, both of whom focus on the first layer of dynamic incorporation identified above, criticize the federal felon-in-possession law. Logan argues that the statute creates fairness and equality concerns because it incorporates varying state judgments on how to define crimes, whether to penalize certain behavior at all, and what penalty to impose if so. It also indirectly incorporates differing state prosecutorial policies.[78] The result is interstate variation in the application of the federal felon-in-possession law. A felon in one state might be a misdemeanant in another.

Divine, for his part, views the felon-in-possession law as a bad example of dynamic incorporation. He classifies it as a triggering statute, where violating state law may serve as a predicate to trigger federal law.[79] At one level, this is the proper classification: a conviction for a state offense punishable by over a year's imprisonment triggers the federal felon-in-possession law. And as a triggering statute, the felon-in-possession law gives states little exclusive control over its application and, accordingly, few incentives to change their own laws to affect how it applies. So many state felony offenses could trigger the federal felon-in-possession law that changing the sentencing range for one offense would have minimal effects on when the federal law applies.[80] Moreover, a state is unlikely to reduce the sentencing range for an offense to under one year simply to help state criminals avoid the federal felon-in-possession law.

Divine's analysis of the first layer of dynamic incorporation in the felon-in-possession law is well taken, but he, as well as Logan, overlooks the second layer in § 921(a)(20): the rights-restoration

---

[77] *See infra* Sections II.A.5–7.
[78] Logan, *supra* note 61, at 76–78, 80.
[79] Divine, *supra* note 7, at 141.
[80] *Id.* at 142.

provision. This provision functions as an underlying opt-out option for states. States can opt out of the federal felon-in-possession law by restoring felons' civil rights, provided they do not otherwise limit felons' gun rights.[81] And they can do so automatically by operation of state law.[82] That state law can affect the application of federal law in such a sweeping manner renders the rights-restoration provision, on the surface, a more effective mechanism for dynamic incorporation than the opt-out option for individuals licensed to possess firearms under the GFSZA.[83]

Yet the rights-restoration provision is an imperfect mechanism for dynamic incorporation. For it to apply, states generally have to restore a felon's rights to vote, hold public office, *and* serve on a jury, while imposing no restrictions—not even partial restrictions—on his gun rights. This is quite a hurdle to overcome, and it means that state legislatures' judgments as to whether a felon should be permitted to possess a firearm often do not prevail at the federal level.

II. RIGHTS RESTORATION

A. JUDICIAL INTERPRETATIONS OF § 921(A)(20)

With the aim of assessing § 921(a)(20)'s adequacy as a dynamic-incorporation provision, this subpart considers some of the primary interpretive questions surrounding § 921(a)(20). The Supreme Court, as we will see, has answered a few of these questions. The remaining questions either have broad consensus among circuits or are the source of a circuit split.

The two-part test several circuits apply to rights-restoration cases provides a useful framework for analyzing such cases and previews some of the answers to the interpretive questions below. At step one,

[81] The "unless clause" can be seen as providing an *opt-in* option for states that otherwise restore felons' civil rights.

[82] *See infra* Section II.A.3.

[83] *See supra* notes 38–39 and accompanying text.

the court determines whether the convicting state restored "essentially all civil rights of [the] convicted felon [], whether affirmatively with individualized certification or passively with automatic [statutory] reinstatement." [84] At step two, the court determines "whether the defendant was nevertheless expressly deprived of the right to possess a firearm by some provision of the restoration law or procedure of the state of the underlying conviction."[85]

1. Which Civil Rights Need to be Restored?

Though "civil rights" is not defined in § 921(a)(20), courts have consistently held that the phrase generally implicates three rights: (1) the right to vote; (2) the right to hold public office; and (3) the right to serve on a jury.[86]

2. How Many of these Civil Rights Need to be Restored?

Usually all of them. The rights-restoration provision includes a semantic oddity in that it bars consideration of "[a]ny conviction . . . for which a person . . . *has had civil rights restored*,"[87] leaving open the question how many civil rights need to be restored. At the very least, restoration of one civil right is not enough. As the Eleventh Circuit put it, "[b]ecause § 921(a)(20) requires the restoration of 'civil rights'—plural—more than one of [the] three key civil rights must be restored to satisfy the statutory requirements."[88] Other circuits' decisions are consistent with this view: restoration of the right to vote alone, for example, does not satisfy § 921(a)(20).[89]

---

[84] United States v. Thomas, 991 F.2d 206, 213 (5th Cir. 1993).
[85] *Id.*
[86] Logan v. United States, 552 U.S. 23, 28 (2007).
[87] 18 U.S.C. § 921(a)(20) (emphasis added).
[88] United States v. Thompson, 702 F.3d 604, 607 (11th Cir. 2012).
[89] *E.g.*, United States v. Brown, 408 F.3d 1016 (8th Cir. 2005); United States v. Huff, 370 F.3d 454 (5th Cir. 2004); United States v. Horodner, 91 F.3d 1317 (9th Cir. 1996); United States v. Hassan El, 5 F.3d 726 (4th Cir. 1993).

Furthermore, many courts have read the rights-restoration provision to require "substantial" restoration of rights.[90] Though the phrase is perhaps a vestige of early cases in which courts were still sorting out what "civil rights" meant, courts' interpretations of "substantial" seems to be, in most cases, "all." Indeed, circuits tend to hold that the rights-restoration provision is satisfied only where the three key civil rights are restored. For instance, the Second Circuit has held that the rights-restoration provision does not apply to a felon whose rights to vote and hold public office are restored under state law but whose right to serve on a jury is not.[91] The Ninth Circuit has held the same,[92] as has the Fourth Circuit,[93] both concluding that a felon's civil rights are not substantially restored when he is barred from serving on a jury. The Tenth Circuit explicitly requires all three rights to be restored.[94]

The Fifth Circuit, for its part, follows the "substantial" restoration approach[95] and seems to generally favor restoration of all three civil rights.[96] But it does not require all three rights to be restored when state law provides a *generalized* rights restoration, even if one right is

---

[90] *E.g.*, United States v. Metzger, 3 F.3d 756, 758 (4th Cir. 1993) ("The restoration of civil rights need not be complete, but it must be substantial."); United States v. Cassidy, 899 F.2d 543, 549 (6th Cir. 1990) (holding that, given the absence of any indication otherwise by Congress, the rights-restoration provision does not require "full" restoration of rights).

[91] United States v. Bullock, 550 F.3d 247, 250 (2d Cir. 2008).

[92] *Horodner*, 91 F.3d at 1319.

[93] *Metzger*, 3 F.3d at 759 ("The district court correctly found these barriers to jury service to preclude a finding of the substantial restoration of civil rights necessary to satisfy § 921(a)(20) . . . .").

[94] United States v. Flower, 29 F.3d 530, 536 (10th Cir. 1994) ("[T]he rights to vote, serve on a jury, and hold public office, as well as the right to possess firearms, must *all* be restored under § 921(a)(20) before a prior conviction may be excluded on the basis of restoration of civil rights.").

[95] United States v. Chenowith, 459 F.3d 635, 638 (5th Cir. 2006).

[96] United States v. Huff, 370 F.3d 454, 461 (5th Cir. 2004) (concluding that a defendant whose rights to vote, to possess firearms, and, on assumption, to hold public office were restored under Texas law could not satisfy the requirements of § 921(a)(20) because his jury rights were still limited).

elsewhere limited by statute. The Fifth Circuit indicated in *United States v. Dupaquier*[97] that "restoration of the three key civil rights [is not] the sine qua non of the restoration of a felon's rights."[98] That case concerned a defendant with predicate Louisiana felony convictions. Before looking to whether Louisiana law restored the three specific civil rights, the Court looked to whether Louisiana law provided a generalized restoration of rights. And the Louisiana constitution at the time restored felons', including the defendant's, full rights of citizenship upon full discharge from their sentences. The Court thus determined that the defendant's rights had been restored for purposes of § 921(a)(20),[99] even though Louisiana law separately barred felons from serving on juries.[100]

Under the prevailing approach, however, even when state law allows a felon to possess firearms, federal law will typically bar him from doing so if the state has not restored the felon's three key civil rights. This means that § 921(a)(20) does not directly incorporate states' judgments on gun rights but rather requires states to make additional judgments on whether a felon's three key civil rights should be restored. And state legislatures' judgments on whether these rights should be restored (should a felon *really* be able to serve on a jury?) are likely to take precedence over considerations of how those judgments will influence the federal felon-in-possession law.

3. How can States Restore these Civil Rights?

As we will soon see, states take varying approaches to restoring felons' civil rights. Some automatically restore civil rights by statute (passive restoration); others authorize governors, judges, or other officials to restore civil rights on a case-by-case basis (active restoration); and some do a bit of both.[101] Though some early cases

---

[97] 74 F.3d 615 (5th Cir. 1996).
[98] *Id.* at 618.
[99] *Id.* at 618–19.
[100] *Id.* at 618.
[101] *See infra* Section II.B.

favored active restoration alone, today both active and passive restoration count for purposes of the rights-restoration provision.

A Ninth Circuit case demonstrates the current approach. The defendant in *United States v. Gomez*[102] had previously been convicted in Idaho of five felonies.[103] An Idaho statute, however, automatically restored Gomez's and other felons' civil rights upon full discharge from prison and probation. The government argued that this restoration did not count for purposes of the felon-in-possession law because the rights-restoration provision requires restoration by "individual affirmative act," not by statute.[104] Noting that Congress did not expressly require individualized affirmative rights restoration in § 921(a)(20), the Ninth Circuit rejected the government's argument. That Idaho law automatically restored Gomez's rights was enough to satisfy the rights-restoration provision. And because Idaho law had fully restored Gomez's civil rights without imposing any restrictions on his gun rights, his felon-in-possession conviction below was in error.[105]

Though other circuits had taken the opposite view from *Gomez*,[106] the Supreme Court resolved the issue of whether passive restoration counts for purposes of § 921(a)(20) in *Caron v. United States.*[107] Favoring the *Gomez* approach, the Court wrote:

> Massachusetts restored petitioner's civil rights by operation of law rather than by pardon or the like. This fact makes no difference. Nothing in the text of § 921(a)(20) requires a case-

---

[102] 911 F.2d 219 (9th Cir.1992).
[103] *Id.* at 219.
[104] *Id.* at 221.
[105] *Id.* at 222.
[106] *See, e.g.*, U.S. v. Ramos, 961 F.2d 1003, 1010–11 (1st Cir. 1992), *overruled by* U.S. v. Caron, 77 F.3d 1 (1st Cir. 1996).

[107] Caron v. U.S., 524 U.S. 308 (1998). This case is discussed in more detail below. *See infra* Section II.A.5.

> by-case decision to restore civil rights to this particular offender. While the term "pardon" connotes a case-by-case determination, "restoration of civil rights" does not.[108]

Allowing for passive restoration, as this interpretation does, is critical for § 921(a)(20)'s effectiveness as a dynamic-incorporation provision. The passive-restoration interpretation gives state legislatures the power to exempt categories of felons from the felon-in-possession law all at once. An interpretation requiring restoration on a case-by-case basis would, by contrast, greatly limit state legislatures' capacity to influence the application of the felon-in-possession law. Case-by-case restoration is costly, time-consuming, and typically the bailiwick of governors and judges, not state legislatures, resulting in far fewer felons' civil rights being restored.

4. Does the Rights-Restoration Provision Apply When a Jurisdiction Other Than the Convicting Jurisdiction Restores a Felon's Civil Rights?

No. The Supreme Court in *Beecham v. United States*[109] unanimously held that the laws of the convicting jurisdiction determine whether a felon's civil rights have been restored for purposes of § 921(a)(20).[110] Two *federal* felons argued that they could not be convicted under the felon-in-possession law because their rights had been restored under *state* law.[111] The Court rejected this argument, holding that § 921(a)(20)'s choice-of-law clause extends to the exemption clause as well. Both the choice-of-law clause and the exemption clause, of which the rights-restoration provision is a part, speak of "convictions." The choice-of-law clause provides that the laws of the convicting jurisdiction determine "[w]hat constitutes a conviction." And though it nowhere mentions what jurisdiction determines whether a felon's civil rights have been restored, the

[108] *Id.* at 313.
[109] 511 U.S. 369 (1994).
[110] *Id.* at 371, 374.
[111] *Id.* at 370.

exemption clause provides that a prior offense "shall not be considered a conviction" if the felon in question has had civil rights restored.[112]

The most sensible reading, wrote the Court, is that the laws of the convicting jurisdiction govern the determination whether something "shall not be considered a conviction" under the exemption clause, just as the laws of the convicting jurisdiction govern whether something "constitutes a conviction" under the choice-of-law clause.[113] "The effect of post-conviction events" like restoration of civil rights "is . . . just one element of the question what constitutes a conviction."[114]

So to trigger the exemption under § 921(a)(20) for felons whose civil rights have been restored, the *convicting* jurisdiction must have restored the felon's civil rights. Restoration by a jurisdiction other than the convicting jurisdiction will not trigger the exemption. And because the federal felons in *Beecham* had their civil rights restored under state but not federal law, they could not take advantage of § 921(a)(20)'s exemption clause.[115]

Beecham makes clear that federal felons have little chance of evading the felon-in-possession law. As the Court acknowledged, the federal government does not have a mechanism for restoring civil rights.[116] And though Congress created a mechanism for felons to apply to the Bureau of Alcohol, Tobacco, and Firearms (BATF) for relief from firearm disabilities,[117] it has not funded the provision

---

[112] *Id.* at 371.
[113] *Id.*
[114] *Id.* at 372.
[115] *Id.* at 374. Courts have naturally extended *Beecham*'s holding to cases in which a defendant has a predicate felony conviction in a state where his rights have *not* been fully restored but is prosecuted under the federal felon-in-possession law in a state where his rights have been fully restored. *E.g.*, United States v. Collins, 61 F.3d 1379, 1381–83 (9th Cir. 1995).
[116] *Beecham*, 511 U.S. at 373.
[117] 18 U.S.C. § 925(c) (2018).

since 1993, and the BATF does not process applications.[118] Thus, only a presidential pardon can exempt a federal felon from the felon-in-possession law.

5. Does the Unless Clause Prevent a Felon from Taking Advantage of the Rights-Restoration Provision when State Law Partially Restricts the Felon's Gun Rights?

Yes. Recall that a felony may not serve as a predicate conviction under the felon-in-possession law if a felon's civil rights have been restored "*unless* such . . . restoration of civil rights expressly provides that the [felon] may not . . . possess . . . firearms."[119] In *Caron v. United States*,[120] the Court interpreted the unless clause as applying when the convicting jurisdiction restricts a felon's gun rights in *any way*—even when the felon is permitted, under state law, to possess the firearm he is charged with possessing under the felon-in-possession law.[121] Caron, the defendant in the case, was convicted of four felon-in-possession counts after federal agents seized a number of rifles and shotguns in his Massachusetts home. Massachusetts allowed Caron to possess rifles and shotguns, without restriction, but restricted his right to possess handguns.[122] All parties agreed that Caron's civil rights, lost as a result of several prior felony convictions, had been automatically restored under Massachusetts law.[123] The Court determined that, though state law allowed Caron to possess the rifles and shotguns the government had seized, the unless clause applied. Caron's prior convictions therefore could be counted for purposes of § 922(g)(1).[124]

Caron had first urged the Court to read the unless clause as "allow[ing] an offender [whose rights have been restored] to possess

[118] U.S. v. Bean, 537 U.S. 71, 74–75 (2002).
[119] 18 U.S.C. § 921(a)(20) (emphasis added).
[120] 524 U.S. 308 (1998).
[121] *Id.* at 314–17.
[122] *Id.* at 311.
[123] *Id.* at 313.
[124] *Id.* at 316.

what [firearms] state law permits him to possess, and nothing more."[125] But this common-sense approach was impermissible given the unless clause's language, wrote the Court. The plural use of "firearms" in the phrase "may not . . . possess . . . firearms" instead commanded one of two all-or-nothing approaches: "Either the restorations forb[id] possession of 'firearms' and the convictions count for all purposes, or they d[o] not and the convictions count not at all."[126]

This left the Court with two possible interpretations of the unless clause: (1) "it applies when the State forbids one or more types of firearms," the government's preferred interpretation; or (2) "it does not apply if State law permits one or more types of firearms," Caron's preferred interpretation.[127] The Court adopted the government's interpretation. It reasoned that Caron's interpretation would yield a bizarre result contrary to Congress's intent. The felon-in-possession law, under Caron's interpretation, would not, for instance, apply to a felon who possesses an extremely dangerous gun when the state permits him to own a single, less dangerous gun. This interpretation would greatly limit the reach of the federal felon-in-possession law. And Congress, by implementing the law, intended to provide a broad, protective policy to keep guns out of the hands of people it deemed dangerous, even if the states did not.[128]

Justice Thomas dissented, focusing on the plain meaning of the statute. "Massachusetts law," he wrote, "did not 'expressly provid[e]' that [Caron] 'may not . . . possess . . . firearms."[129] To the contrary, Massachusetts law permitted Caron to possess rifles and shotguns, with only a partial limitation on his right to possess

---

[125] *Id.* at 314.
[126] *Id.*
[127] *Id.*
[128] *Id.* at 315.
[129] *Id.* at 317 (Thomas, J., dissenting).

handguns.[130] If nothing else, Thomas argued, the rule of lenity—requiring a court to read ambiguous criminal statutes in the manner most favorable to the defendant—ought to have resolved the case in Caron's favor.[131]

The result in *Caron* inhibits states from directly influencing how the felon-in-possession law applies. A state has, in effect, two choices. It could, on the one hand, impose no limitations on a felon's gun rights, thereby freeing him from the threat of conviction under the felon-in-possession law (assuming his civil rights have been restored); or it could restrict the felon's gun rights, however minimally, thereby subjecting him to the felon-in-possession law under any circumstances. A state's tailored approach will not be reflected at the federal level, which raises concerns about notice and fairness.[132]

6. When a Felon's Rights are Restored Actively (By Certificate), Should the Court Look to the Whole of State Law or Just to the Language of the Restoration Certificate to Determine Whether the Felon's Rights Restoration Expressly Limits His Gun Rights?

There is a circuit split on this question. *United States v. Cassidy*,[133] an early Sixth Circuit case, demonstrates one side of the split. Cassidy was convicted of a felony marijuana trafficking offense under Ohio law but received a "Restoration to Civil Rights" certificate upon his release from prison.[134] This certificate did not expressly limit Cassidy's gun rights, but Ohio's felon-in-possession law separately prohibited him from possessing a firearm. The district court concluded that Cassidy did not have a predicate conviction for purposes of § 922(g)(1) because his civil rights had been restored, and

[130] *Id.*
[131] *Id.* at 319.
[132] *See id.* ("Ex-felons cannot be expected to realize that a federal statute that explicitly relies on state law prohibits behavior that state allows.").
[133] 899 F.2d 543 (6th Cir. 1990).
[134] *Id.* at 544.

his rights-restoration certificate did not expressly limit his gun rights.[135]

The Sixth Circuit reversed. Relying on legislative history and the purpose of the statute, it concluded that courts should look to the whole of state law, not just to the text of the rights-restoration certificate, to determine both whether a felon's civil rights have been restored and whether his gun rights have nonetheless been restricted.[136] Thus, because Ohio law prohibited Cassidy from possessing a firearm, his marijuana trafficking offense could serve as a predicate conviction under the felon-in-possession law.[137]

A Fifth Circuit case demonstrates the other side of the split. In *United States v. Chenowith*,[138] an Ohio manslaughter conviction served as the predicate felony for Chenowith's felon-in-possession conviction below.[139] As in *Cassidy*, Chenowith's civil rights had been restored by certificate upon his release from prison, and the certificate did not expressly limit his gun rights.[140] Ohio law, however, prohibited Chenowith from possessing firearms.[141]

The Fifth Circuit held that courts should *not* look beyond the source of the restoration—here, a certificate—to determine whether a felon's gun rights have been restricted. The plain language of the unless clause resolved the issue, in the court's view.[142] A conviction for which a felon's civil rights have been restored may not serve as a predicate conviction under the felon-in-possession law "unless *such* . . . restoration of civil rights expressly provides that" the felon may not possess firearms.[143] The word "such" in the unless clause

---

[135] *Id.* at 545.
[136] *Id.* at 546–49.
[137] *Id.* at 550.
[138] 459 F.3d 635 (5th Cir. 2006).
[139] *Id.* at 636.
[140] *Id.* at 636–37.
[141] *Id.* at 638.
[142] *Id.* at 639.
[143] 18 U.S.C. § 921(a)(20) (emphasis added).

suggests that courts should look only to the actual source of restoration to determine whether a felon's rights restoration imposes express limitations on his gun rights.[144] And because Chenowith's rights-restoration certificate did not expressly provide that he could not possess firearms, his manslaughter conviction could not serve as a predicate felony under the felon-in-possession law.[145]

The Fifth Circuit's approach, though faithful to the plain meaning of the unless clause, hinders the extent to which state legislatures' judgments on gun rights can prevail at the federal level. Indeed, it ignores state felon-in-possession laws altogether when states restore felons' civil rights by certificate.

7. When a Felon's Civil Rights are Restored Passively (By Statute), Should the Court Look to the Whole of State Law or Just to the Statutory Provision that Restored His Civil Rights to Determine Whether the Felon's Rights Restoration Expressly Limits his Gun Rights?

The prevailing approach is to look to the whole of state law, not just to the statutory provision restoring a felon's civil rights, to determine whether a felon's gun rights are expressly limited. The Seventh Circuit in *United States v. Erwin*,[146] for instance, rejected the defendant's argument that, because the statutory provision that restored his civil rights did not expressly limit his gun rights, he did not have a predicate conviction for purposes of the felon-in-possession law. This was not, in the Seventh Circuit's view, "a plausible interpretation of a statute that is designed to require federal rules to track state law."[147] In *Erwin*, one statutory provision restored the defendant's civil rights, while a separate provision forbade him from possessing firearms. The court concluded that the Illinois provision that prohibited him from possessing firearms triggered the

---

[144] United States v. Herron, 45 F.3d 340, 341 (9th Cir. 1995).
[145] *Chenowith*, 459 F.3d at 640.
[146] 902 F.2d 510 (7th Cir. 1990).
[147] *Id.* at 512.

unless clause, meaning the defendant still had a predicate conviction under § 921(a)(20).[148]

Though not deciding the issue, the Fifth Circuit expressed doubts about *Erwin*'s holding in *U.S. v. Thomas*,[149] writing that the "expansive reasoning from *Erwin* [is] difficult to square with that unambiguous language of § 921(a)(20)."[150] When, on this contrary view, one statutory provision automatically restores a felon's civil rights, courts should look only to that provision to determine whether it expressly limits the felon's gun rights. The source of the felon's rights restoration is that provision alone, so the question is whether "*such* . . . *restoration* of civil rights *expressly provides* that the person may not . . . possess . . . firearms."[151] Given that states that automatically restore felons' civil rights often restrict their gun rights in a separate statutory provision (usually a state felon-in-possession law), this approach would greatly limit states' capacity to influence the application of the federal felon-in-possession law through their own laws. But it does not seem to have been explicitly adopted by any circuit.

8. Have a Felon's Civil Rights Been "Restored" if He Never Lost Them?

No. In *Logan v. United States*,[152] the question was whether the defendant Logan's prior misdemeanor battery convictions, punishable by up to three years imprisonment,[153] qualified as predicate convictions for a sentencing enhancement under the Armed Career Criminal Act (ACCA), to which § 921(a)(20) applies.[154] Logan argued that, because he did not lose any civil rights under

---

[148] *Id.* at 512–13.
[149] 991 F.2d 206 (5th Cir. 1993).
[150] *Id.* at 213.
[151] 18 U.S.C. § 921(a)(20).
[152] 552 U.S. 23 (2007).
[153] *Id.* at 29.
[154] 18 U.S.C. § 924(e)(1).

state law as a result of his misdemeanor convictions, they could not serve as predicate convictions under the ACCA. Retaining rights, he maintained, is functionally equivalent to restoring them after they have been lost.[155] The Court rejected this argument. The plain meaning of restore is "to give back something that had been taken away."[156] Because Logan's civil rights had never been taken away, they could not be restored, and the exemption in § 921(a)(20) did not apply.[157] Thus, in light of *Logan*, a defendant living in a state, such as Maine, that does not revoke felons' civil rights will not have recourse to the rights-restoration provision.[158]

B. RIGHTS RESTORATION IN THE STATES

As the cases above suggest, states provide varying procedures for restoring the rights to vote, hold public office, serve on a jury, and possess firearms. "Some states restore civil rights by statute; others authorize officials to issue certificates of restoration to felons after a specified period; still others 'restore rights in a piecemeal fashion' by a combination of statutes or by certificate and statute."[159] Below are a few examples of how rights restoration functions in the states. The sample states—Idaho, Virginia, and Texas—were selected to illustrate the diversity in rights restoration across states. Each example ends with a brief discussion on how the state's restoration procedures would interact with § 921(a)(20), as courts have interpreted it.

1. Idaho

Idaho automatically restores all four rights upon full discharge from a felon's sentence, with an important exception for gun rights. A felony sentence in Idaho "suspends all the civil rights of the person

---

[155] *Logan*, 552 U.S. at 29–31.
[156] *Id.* at 31 (internal citation and quotation marks omitted).
[157] *Id.* at 33–37.
[158] *Id.* at 33.
[159] U.S. v. Bost, 87 F.3d 1333, 1335 (D.C. Cir. 1996).

so sentenced."[160] But "full rights of citizenship" are restored "upon completion of imprisonment, probation and parole as the case may be."[161] Note Idaho's requirement that felons complete probation and parole before their rights are restored. Other states are more generous about the timing of restoration, restoring at least some rights upon discharge from actual incarceration.[162]

Idaho law includes a typical exception for gun-rights restoration, limiting automatic restoration to *non-violent* felons.[163] Though violent felons' gun rights are not automatically restored, they can apply to the Commission of Pardons and Parole for restoration of gun rights. The Idaho Code nonetheless prohibits the Commission from considering such applications until five years after full discharge of a felon's sentence.[164] Many other states that restore felons' gun rights limit restoration to non-violent felons or otherwise exclude certain felons from automatic restoration.[165]

A person convicted of a non-violent Idaho felony whose sentence has been fully discharged will therefore not have a predicate felony conviction for purposes of the federal felon-in-possession law. By contrast, a felon who has not completed his term of probation or parole will have a predicate felony conviction. So too will a violent felon whose civil rights have been restored but who has not yet had his gun rights restored by the Commission of Pardons and Parole

---

[160] IDAHO CODE § 18-310(1) (2019).

[161] *Id.* § 18-310(2).

[162] *See e.g.*, R.I. CONST. art. III, § 1 (restoring the right to vote upon discharge from prison). Felons in Vermont retain the right to vote during incarceration. VT. STAT. ANN. tit. 28, § 807 (2019).

[163] IDAHO CODE § 18-310(1) (2019).

[164] *Id.* § 18-310(3); *see also id.* § 18-3316 (prohibiting felons from possessing firearms unless their rights have been restored under Idaho law).

[165] *E.g.*, R.I. GEN. LAWS § 11-47-5(a)(1) (2019) (prohibiting people "convicted in [Rhode Island] or elsewhere of a crime of violence" from possessing firearms); S.C. CODE ANN. § 16-23-20(A)(1), (B) (2019) (same); *see also* MICH. COMP. LAWS § 750.224f(1), (2), (10) (2019) (restoring gun rights for violent felons and drug offenders five years after full discharge and for all other felons three years after full discharge).

(which is difficult to achieve in any event)—Idaho law expressly denies such felons the right to keep and bear arms. But, on the whole, a felon with a predicate Idaho conviction has a good chance of having a valid rights-restoration defense.

2. Virginia

Unlike Idaho, Virginia does not automatically restore felons' civil or gun rights by statute. A mixture of statutory and constitutional law deprives felons of their civil rights. The Virginia constitution disenfranchises all felons whose civil rights have not "been restored by the Governor or other appropriate authority."[166] And under Virginia's constitution, the right to hold public office is contingent on the right to vote, meaning a felon's right to hold public office is restored only if his right to vote is restored.[167] State law also disqualifies felons from jury service.[168]

Restoration of these rights requires affirmative action of the governor of Virginia. The Virginia constitution grants the governor both the pardon power and the power "to remove political disabilities consequent upon conviction for offenses committed prior or subsequent to the adoption of this Constitution."[169] Historically, then, an unpardoned felon would have to petition the governor for rights restoration through the Office of the Secretary of the Commonwealth.[170]

Virginia has since adopted a quasi-automatic rights-restoration process. In 2016, then-Governor Terry McAuliffe issued several executive orders automatically restoring voting rights to all felons

[166] VA. CONST. art. II, § 1.
[167] *Id.* art. II, § 5.
[168] VA. CODE ANN. § 8.01-338 (2019).
[169] VA. CONST. art. V, § 12.
[170] VA. CODE ANN. § 53.1-231.1 (2019). A felon may also petition his local circuit court for restoration of voting rights, but the circuit court applies stricter eligibility standards and its restoration order is subject to the governor's approval or disapproval. *Id.* § 53.1-231.2.

who had been fully discharged from their sentences.[171] The Supreme Court of Virginia, however, struck this approach down in *Howell v. McAuliffe*,[172] holding that the governor must make clemency decisions on a case-by-case basis.[173] Governor McAuliffe then implemented an expedited rights-restoration program, which still exists today, reviewing and granting rights restoration on a case-by-case basis to all eligible felons, even those who do not petition the governor. Certain felons, typically violent ones, still must petition the governor under this program, but nearly three-quarters of their applications are approved. Felons are sent a letter and grant order when their rights have been restored, serving as a certificate of restoration.[174]

Restoration of gun rights is a different matter. Virginia law categorically prohibits felons from possessing firearms.[175] A felons' gun rights may be restored by pardon or, according to statute, gubernatorial restoration.[176] Though statutory law provides that the governor can restore gun rights, the Virginia supreme court has said otherwise. It held in *Gallagher v. Commonwealth*[177] that the governor has power to restore only political rights, not gun rights, under Virginia's constitution.[178] Thus, absent a pardon, only local circuit courts can restore felons' gun rights,[179] an unlikely prospect for most felons.

A felon convicted under Virginia will find it difficult to take advantage of the rights-restoration provision. Even though the

---

[171] *Voting Rights Restoration Efforts in Virginia*, BRENNAN CTR. FOR JUST. (Apr.20, 2018) [https://perma.cc/HQQ6-2CAG].

[172] 788 S.E.2d 706 (Va. 2016).

[173] *Id.* at 337–48.

[174] *Virginia: Restoration of Rights & Record Relief*, RESTORATION OF RTS. PROJECT (Aug. 28, 2020) [https://perma.cc/3TY3-BYYL].

[175] VA. CODE ANN. § 18.2-308.2(A) (2019).

[176] *Id.* § 18.2-308.2(A).

[177] 732 S.E.2d 22 (Va. 2012).

[178] *Id.* at 26.

[179] *Id.*

general trend seems to be toward restoring felons' civil rights quasi-automatically upon release, Virginia law makes it quite difficult for felons' gun rights to be restored. And the Fourth Circuit follows the *Cassidy* approach of looking to the whole of state law, rather than the certificate alone, when deciding whether felons' gun rights are expressly limited.[180] It is therefore unlikely that a felon convicted in Virginia will be able to escape prosecution under § 922(g)(1): Virginia law expressly prohibits felons from possessing firearms.

3. Texas

The Lone Star State takes a hybrid approach, restoring the right to vote automatically but requiring a gubernatorial pardon, certificate of restoration, or judicial clemency to restore the other two civil rights. The state also partially restores a felon's right to possess firearms, with minimal chances for full restoration. Texas's hybrid approach, as we will see, substantially limits the extent to which an individual with a predicate state felony conviction can take advantage of § 921(a)(20)'s rights-restoration exemption.

Like most other states, Texas restores felons' voting rights automatically. As a background rule, Texas's constitution prohibits felons from voting, "subject to such exceptions as the Legislature may make."[181] Texas law automatically restores a felon's right to vote upon full discharge of "the person's sentence including any term of incarceration, parole, or supervision, or completed a period of probation ordered by any court."[182]

As with the right to vote, Texas law categorically prohibits felons from holding public office.[183] But unlike the right to vote, a felon's right to hold public office is not automatically restored upon full discharge of the felon's sentence. Instead, the right to hold public office may only be restored by pardon or some other release, likely

[180] United States v. Walker, 39 F.3d 489, 491 (4th Cir. 1994).
[181] TEX. CONST. art. VI, § 1(a)(3).
[182] TEX. ELEC. CODE ANN. § 11.002(a)(4)(A) (2019).
[183] TEX. CONST. art. XVI, §§ 2, 5; TEX. ELEC. CODE ANN. § 141.001(a)(4) (2019).

judicial, from disability.[184] Because this requires affirmative action on the felon's part, and is difficult to achieve in any event, a Texas felon is highly unlikely to have his right to hold public office restored.

Texas law treats the right to serve on a jury more or less the same as the right to hold public office, prohibiting felons and misdemeanant thieves from serving on petit juries.[185] The provision disqualifying felons from jury service does not specify how a felon might, despite the conviction, become eligible to sit on a jury, but restoration of civil rights is still available by pardon or, for federal and foreign convictions, by application to the governor for rights restoration.[186]

And that leaves the right to keep and bear arms. Texas law prohibits a felon from possessing firearms within five years of release from prison or release from parole or community or mandatory supervision, whichever is later.[187] After this five-year period has ended, a felon is permitted to possess firearms only in "the premises at which the person lives."[188]

Full restoration of gun rights in Texas is possible under limited circumstances. An individual is not subject to the state firearm prohibition if a court dismisses proceedings against and discharges him after he successfully completes a term of deferred adjudication[189] or if a court otherwise exercises its limited clemency power.[190]

---

[184] TEX. ELEC. CODE ANN. § 141.001(a)(4); *see also* Opinion Letter from Ken Paxton, Tex. Att'y Gen., to the Hon. Marco A. Montemayor, at 2–3 (May 22, 2019) (interpreting section 144.001(a)(4) and surveying how an individual may be released from disabilities resulting from a felony conviction).

[185] TEX. CONST. art. 5, § 14; TEX. GOV'T CODE ANN. § 62.102(8) (2019); *see also* TEX. CODE CRIM. PROC. art. 19.A.101 (2019) (providing the same disqualifications in the grand jury context).

[186] TEX. CODE CRIM. PROC ANN. art. 48.05(a).

[187] TEX. PENAL CODE ANN. § 46.04(a)(1) (2019).

[188] *Id.* § 46.04(a)(2).

[189] TEX. CODE CRIM. PROC ANN. art. 42A.111(c).

[190] *Id.* art. 42A.701(f) (releasing a defendant from all disabilities resulting from an offense if the judge sets aside the conviction under the *very* limited circumstances specified in article 42A.701).

Pardon is the only other means by which a felon's gun rights may be restored under state law. Yet even a pardon is unlikely to restore a felon's gun rights in Texas. The pardon power in Texas is vested in the governor, who may exercise that power only on recommendation of the Board of Pardons and Paroles.[191] A pardon normally restores a felon's rights to vote, serve on a jury, and hold public office but not the right to possess a firearm.[192] The Board may, on application from a felon, recommend restoration of gun rights, but it does so "only in extreme and unusual circumstances which prevent the applicant from gaining a livelihood."[193] Full restoration of a felon's gun rights, even in the event of a pardon, is therefore extremely unlikely under Texas law.

Given that only the right to vote is automatically restored under Texas law, a Texas felon will rarely get past step one in the two-step test for determining whether a felon is exempt from the federal felon-in-possession law.[194] And even if all of a felon's civil rights are restored by the grace of the governor or a local judge, he is almost certain to fail at step two. It is tremendously difficult to have gun rights fully restored in Texas, and the partial, possession-only-at-home restriction that applies to all felons virtually guarantees that the unless clause will defeat a Texas felon's rights-restoration defense.

III. RECOMMENDATIONS

Drawing on the lessons from Parts II and III, this Part recommends three amendments to § 921(a)(20) that would allow

---

[191] TEX. CONST. art. IV, § 11; TEX. CODE CRIM. PROC ANN. arts. 48.01, 48.03; TEX. GOV'T CODE ANN. § 508.50.

[192] *What is the Effect of a Full Pardon?*, TEX. BD. OF PARDONS & PAROLES (February 13, 2017) [https://perma.cc/D4KE-BQJQ].

[193] 37 TEX. ADMIN. CODE § 143.12 (2019).

[194] *See, e.g.*, United States v. Maines, 20 F.3d 1102, 1104 (10th Cir. 1994) (concluding that a Texas felon's rights had not been restored for purposes of § 921(a)(20) because Texas law restored only the right to vote).

states to more directly influence when the federal felon-in-possession law applies.

A. AMEND THE UNLESS CLAUSE

One option is to amend the unless clause to better allow states' policy judgments regarding gun rights to prevail at the federal level. The proposed amendment would read: Pardon, expungement, or restoration of civil rights bars consideration of a prior conviction for purposes of this chapter "unless such pardon, expungement, [] restoration of civil rights, *or the laws of the convicting jurisdiction* expressly provide[] that the person may not ship, transport, possess, or receive *the firearm or* firearms *the person is charged with possessing*."

By adding the language "or the laws of the convicting jurisdiction," this amendment would codify the holding in *Cassidy* that courts should look to the whole of state law, not just the rights-restoration certificate, when determining whether a felon's gun rights are expressly limited.[195] It would overturn the contrary holding in *Chenowith*[196] and similar cases, thereby ensuring that states that restore felons' civil rights by certificate will be able to preserve the option of federal felon-in-possession enforcement if state law forbids felons from possessing firearms. By limiting the unless clause to "the firearm or firearms the person is charged with possessing," the amendment would also overturn *Caron*'s holding that a partial restriction on a felon's gun rights triggers the unless clause, even if state law permits the felon to possess the firearms he is charged with possessing.[197] On the whole, the amendment would keep the rights-restoration requirement in place but ensure that state legislatures' judgments as to whether a felon should be permitted to possess a firearm are respected when a felon's civil rights have been restored.

---

[195] United States v. Cassidy, 899 F.2d 543 (6th Cir. 1990).
[196] United States v. Chenowith, 459 F.3d 635 (5th Cir. 2006).
[197] Caron v. United States, 524 U.S. 308 (1998).

The unless-clause amendment is not particularly revolutionary and is perhaps the most politically feasible of the three. The portion codifying the *Cassidy* holding would only affect felons living in circuits that follow the *Chenowith* approach. And it would expand, not limit, the reach of the federal felon-in-possession law. The portion overturning *Caron* would offset this expansion of the felon-in-possession law somewhat. The changes resulting from this portion of the amendment would only apply in states that partially restrict felons' gun rights and is unlikely to receive much pushback, given notice and fairness concerns. Both portions of the amendment would allow states to influence the application of the federal felon-in-possession law more directly, making § 921(a)(20) a better vehicle for dynamic incorporation.

B. AMEND THE RIGHTS-RESTORATION PROVISION TO REQUIRE THAT FEWER CIVIL RIGHTS BE RESTORED

Another option is to amend the rights-restoration provision to specify which civil rights are implicated and to reduce the number of civil rights that must be restored. The amended provision would read: "Any conviction . . . for which a person . . . has had *the right to vote, the right to hold public office, or the right to serve on a grand and petit jury* restored shall not be considered a conviction for purposes of this chapter." This amendment would codify the prevailing approach of construing the phrase "civil rights" to mean the rights to vote, hold public office, and serve on a jury. Yet it would also depart substantially from the prevailing approach of requiring all three of these rights to be restored. And it would resolve the ambiguity in the phrase "has had civil rights restored," which might suggest that only two civil rights need be restored.

Reducing the number of civil rights that must be restored would make the application of the federal felon-in-possession law more closely contingent on state policy judgments as to whether felons should be permitted to possess firearms. Under the amendment, a felon would not be subject to the federal felon-in-possession law if his right to vote has been restored and his right to possess firearms is not expressly limited under state law. Note that this may perversely incentivize state legislatures to refuse to restore rights it would

otherwise restore. But that would only be the case in states that wish to treat felons, or certain categories of felons, who possess firearms more leniently under state law but to otherwise preserve the option of federal felon-in-possession prosecution for all felons with predicate state convictions. Some form of the unless clause would remain in place. The requirement that at least one civil right be restored would ensure that states still make some judgment as to whether felons should be permitted to undertake civic duties. This provides an additional safeguard against possibly heedless restoration of gun rights at the state level and renders the amendment more politically viable than the final option suggested below.

C. INCLUDE A SAFE HARBOR FOR FELONS WHO ARE ALLOWED TO POSSESS FIREARMS UNDER STATE LAW

The final option is to include a safe harbor[198] in the federal felon-in-possession law for felons who would not be subject to a state felon-in-possession law in the jurisdiction in which he was convicted of the predicate offense. This option would free state felons from prosecution under the felon-in-possession law if possessing a firearm would not be a crime under state law. Though the rights-restoration provision functions as a quasi-safe harbor in many cases, the existing federal felon-in-possession law does not include a pure safe harbor. A felon permitted to possess certain firearms under state law may still be prosecuted under the federal law if (under the prevailing approach) one of his civil rights has not been restored,[199] if the convicting state imposes a partial limitation on his gun rights,[200] or if he never lost his civil rights as a result of the conviction.[201]

---

[198] Divine considers statutes that allow states to "create safe harbors against federal liability" "the most robust form of dynamic incorporation." Divine, *supra* note 7, at 131.

[199] *See supra* Section II.A.2.

[200] Caron v. United States, 524 U.S. 308 (1998).

[201] Logan v. United States, 552 U.S. 23 (2007).

By incorporating a safe harbor, each state's felon-in-possession law would directly influence the application of the federal felon-in-possession law for individuals convicted of felonies in their respective states. The option is likely to result in significant interstate variation in the application of the federal felon-in-possession law. That is a desirable result. Traditional federalism values local judgments, especially on criminal matters, and the safe-harbor option would completely defer to states' judgments as to whether felons should possess firearms. It would preserve the federal enforcement option for states that wish to prohibit some or all felons from possessing firearms. Yet it would also allow states that wish to permit some or all felons to possess firearms to forgo federal enforcement altogether. This would resolve the notice concerns that arise where federal and state criminal law conflict, while also checking local enforcement discretion by taking forum shopping for felon-in-possession crimes off the table.[202]

Congress could impose limits on the safe harbor to make it more politically feasible and to maintain an independent role for the federal government in prosecuting certain high-risk felons, regardless of state felon-in-possession laws. Though state law itself would likely address concerns about felons with a high propensity for violence,[203] Congress could set a limit on the number of predicate offenses to which the safe harbor would apply to address concerns that particularly high-risk felons could escape prosecution under state or federal felon-in-possession laws. The proper number is beyond the scope of this Note, but such a provision limiting the safe harbor would allow the federal government to prosecute repeat offenders it considers particularly dangerous. This safe-harbor option, with or without the limitation just described, would still face significant political opposition. It is nonetheless far more feasible

---

[202] *See supra* notes 55–57 and accompanying text.
[203] *See, e.g.*, *supra* notes 160–162 and accompanying text.

than repealing the federal felon-in-possession law, the preferred approach for traditional federalists.

CONCLUSION

Since the early twentieth century, the federal government has greatly expanded its reach in criminal law. As a result, federalism is in a bad way. Dynamic incorporation can help right the course. By deferring to state policy judgments in federal criminal law, dynamic incorporation helps secure many of the benefits of federalism: experimentation, localism, and, to some extent, decentralization. But it also preserves the option of federal criminal enforcement for states that wish to keep it. This "potent tool for modern forms of federalism"[204] is both politically feasible and efficient. It is worthy of expansion, too. There is room for more and better dynamic incorporation not only in the federal felon-in-possession law but also throughout the U.S. Code.

---

[204] Divine, *supra* note 7, at 197.