DONE THE TIME, STILL BEING PUNISHED FOR THE CRIME: THE IRRATIONALITY OF COLLATERAL CONSEQUENCES IN OCCUPATIONAL LICENSING AND FOURTEENTH AMENDMENT CHALLENGES

McCARLEY MADDOCK*

In 2018, Rudy Carey was dismissed from his job as a substance abuse counselor.1 Despite previously recognizing Rudy as “counselor of the year,” his employer of four years saw one fatal flaw: a previous conviction that prohibited Rudy’s continued employment as a paid substance abuse counselor.2 A Virginia law that prohibits Americans with certain convictions from working as peer substance abuse counselors—without exception—ended Rudy’s ability to follow his passion for helping others address their battles with substance abuse disorders.3 Beyond the individual impact on one man’s career, Virginia’s law ignores the state’s need for more substance abuse counselors and disregards the fact that the best counselors have often overcome addiction themselves.4 While Rudy’s prison sentence ended in 2007, the Virginia law...

---

2. Id.
3. Id.
law creates a punishment that “...will last the rest of his life.”

Virginia’s barrier crime law is not unique. Traditionally, retributive models of criminal justice rely on incarceration as punishment for a crime. Under this theory, punishment should end when the offender is released from prison. Yet, a decentralized web of statutes across the United States undermines this commonsense notion and continues to punish formerly incarcerated persons by denying them access to basic services for re-entry into society such as housing, government benefits, and employment. Specifically, thousands of the formerly incarcerated individuals are barred from working in or pursuing a career of their choice based on state statutes that prohibit entry into a given profession based on criminal history. Around the country, people who have served their prison sentences and repaid their debts to society face “permanent punishments written into law.” Unlike fines or prison time, these collateral consequences “tend to last indefinitely, long after an individual is fully rehabilitated.” For the more than 600,000 offenders released from state and federal prisons each year, the long-term consequences of their convictions do not disappear, even as the prison gates open.

These statutes, often called barrier crime laws or collateral consequence regimes, have remained on the books, in part, because the constituency they affect—those with criminal convictions or arrests—remains politically marginalized. Further, the state laws that limit opportunities for the formerly incarcerated “are notoriously difficult to track down and understand.” With a renewed interest in criminal justice reform emerging across the country, collateral consequence regimes have started to receive increased attention. With more than

---

7. Wimer, supra note 1.
10. See Deep Dive, supra note 4 (discussing the political obstacles to reform).
11. See Berson, supra note 8 at 26 (noting that “[r]elevant laws and regulations ... are notoriously difficult to track down and understand,” and discussing the idea that until recently, judges, prosecutors, and even defense lawyers rarely considered collateral consequences).
12. See Nick Sibilla, BARRED FROM WORKING: A NATIONWIDE STUDY OF OCCUPATIONAL LICENSING BARRIERS FOR EX-OFFENDERS, INST. FOR JUST. 1–2 (2020) (grading each state on its collateral consequences laws for occupational licenses and advocating for
44,000 different collateral consequence laws in existence, states deny the formerly incarcerated a wide range of civil liberties—barring reentry into the workforce with licensing regimes and withholding the right to vote.\textsuperscript{13} In total, these laws create a sweeping deprivation of rights touching the lives of nearly seventy million Americans.\textsuperscript{14}

Collateral consequence regimes raise serious constitutional questions under the Fourteenth Amendment. Specifically, this Note considers the potentially unconstitutional nature of collateral consequences in occupational licensing under a Fourteenth Amendment analysis. In doing so, this Note will proceed in three parts. Part I outlines the Supreme Court’s jurisprudence on the individual’s “right to work” and considers the likely standard of review the courts will use to analyze these occupational barrier laws. Thereafter, Part II will examine historical challenges to collateral consequence regimes and will provide examples of current challenges to collateral consequence employment schemes. Part III introduces a workable standard for judicial review of collateral consequences laws, which Part IV advocates implementing.

I. EMPLOYMENT AS A CONSTITUTIONAL RIGHT

To bring a viable Fourteenth Amendment claim, the plaintiff must assert a constitutional right and articulate how that right has been infringed.\textsuperscript{15} While the Supreme Court has recognized a right to work,\textsuperscript{16} it has never considered the right to be fundamental. First, this Section will survey the Supreme Court’s existing jurisprudence on the right to work. Then, this Section will consider how state constitutions may provide litigants with a mechanism to establish stronger right to work claims. Part I concludes with a discussion of permissible discrimination against ex-offenders and considers the standard of judicial scrutiny courts deploy when evaluating claims for a right to employment.

\begin{footnotes}
\item[(14)] See Sibilla, supra note 12 at 3, 1 (Roughly 8% of adult Americans have a felony conviction. Additionally, in 33 states, licensing boards may deny licenses without differentiating between an arrest and a conviction, punishing potentially innocent people, and giving the restrictions even more sweeping authority.).
\item[(15)] See U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).
\item[(16)] Greene v. McElroy, 360 U.S. 474, 492 (1959).
\end{footnotes}
A. The “Right” to Work

In the past, petitioners in collateral consequence employment challenges have argued the state infringed upon their right to pursue employment after incarceration. This Section surveys the relevant case law at the intersection of the Fourteenth Amendment and the right to work. While the Supreme Court has recognized the right to work, the Court has never considered the right to be fundamental and seems unlikely to do so in the future.

Schware v. Board of Bar Examiners of New Mexico represents the first viable Due Process challenge to a collateral consequence employment barrier based on the right to particular employment. In Schware, the plaintiff challenged the New Mexico Bar’s “good moral character” licensing requirement. Specifically, the New Mexico Bar denied the plaintiff a license to practice law because Schware’s past revealed several arrests that surfaced during the bar application process. In response, Schware filed a Fourteenth Amendment Due Process challenge alleging that the state had violated his Due Process right to a license to practice law in New Mexico. In its analysis, the Court said that “[a] State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clauses of the Fourteenth Amendment.” Further, the Court acknowledged that a state can have high qualifications or standards, but held that “any qualification must have a rational connection with the applicant’s fitness or capacity to practice law.” The Court then analyzed the plaintiff’s history, the circumstances surrounding his previous arrests, and testimony supporting his good moral character at trial. Ultimately, the Court concluded that the state of New Mexico had violated Schware’s right to due process by denying him the opportunity to practice law.

Just two years after Schware’s limited challenge to the New Mexico Bar’s admission requirements, the Supreme Court formally recognized

---

18. Id. at 233. Id. at 234 –37 (explaining the circumstances of the arrest were primarily related to Communist activity).
19. Id. at 233.
20. Id. at 238–39 (citing Dent v. West Virginia, 129 U.S. 114 (1889)).
21. Id. at 239 (emphasis added) (citing Douglas v. Noble, 261 U.S. 165 (1923)).
22. See id. at 239–40 (noting that Schware had no arrests over the past fifteen years, was a good family man, and that the circumstances surrounding his arrests did not result in a conviction).
23. Id. at 247.
the right to work in the 1959 case *Greene v. McElroy.* The plaintiff was discharged from his position as an aeronautical engineer at a company that produced goods for the military after the government revoked his security clearance. The plaintiff sued after being unable to secure employment as an engineer because “for all practical purposes that field of endeavor [was] now closed to him.” The Supreme Court said that “the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the ‘liberty’ and ‘property’ concepts of the Fifth Amendment.” In doing so, the Court held that the government violated the plaintiff’s right to work when it failed to provide a hearing consistent with due process and the “traditional ideas of fair procedure.”

While the dissent sharply critiqued this finding of a right to work as ungrounded in Court precedent, the case has not been overruled by the Supreme Court.

Although the Supreme Court has recognized the right to work, it has not deemed the right fundamental under the *Washington v. Glucksberg* analysis. The Court’s analysis of whether a right is fundamental under the Due Process Clause turns on whether the right is “objectively, ‘deeply rooted in this nation’s history and tradition’” and “‘implicit in the concept of ordered liberty’ so that ‘neither liberty nor justice would exist if they were sacrificed.’” The Court has limited the

---

24. *Greene v. McElroy,* 360 U.S. 474, 492 (1959); *but see* *Lochner v. New York,* 198 U.S. 45, 57–58 (1905) (recognizing “the general right of an individual to be free in his person and in his power to contract in relation to his own labor”). Before the overruling of *Lochner,* the Court generally recognized broader economic substantive due process rights, including those to contract. Courts now broadly disfavor those precedents. *See, e.g.* *Doe v. Rogers,* 139 F. Supp. 3d 120, 154–56 (D.D.C. 2015) (disavowing earlier precedents favoring a fundamental right to work as “inalienable” and holding that plaintiff had failed to establish the right to work in his chosen profession as a fundamental right).

25. *Id.* at 475.

26. *Id.* at 475–76.

27. *Id.* at 492.

28. *See id.* at 508 (directing that the case be remanded and reevaluated in light of the holding that depriving petitioner of the right to work required due process of law).

29. *Id.* at 512 (Clark, J., dissenting).

30. *See Washington v. Glucksberg,* 521 U.S. 702, 705–06 (1997) (declining to hold that the right to assisted suicide was fundamental and therefore protected under the due process clause of the Fourteenth Amendment); *see also* *Doe v. Rogers,* 139 F. Supp. 3d 120, 156 (D.D.C. 2015) (stating that the court would be adopting a new rule if it decided to adopt a heightened standard of review for right to employment cases and emphasizing that the Supreme Court has cautioned against expanding the fundamental rights category).


32. *Id.* at 721 (citing Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937)).
“fundamental rights” label to a select few areas and has repeatedly emphasized its hesitancy to expand the suite of rights considered to be “fundamental.” The *Glucksberg* Court recommended that reviewing courts exercise “the utmost care” when evaluating a potential new fundamental right. Consequently, lower courts have held that the right to work should not be construed as fundamental, and the Supreme Court has not extended the right. Without being considered fundamental, the right to work does not qualify for heightened scrutiny.

**B. The Promise of Heightened Scrutiny**

Without any form of heightened judicial scrutiny, plaintiffs face the nearly impossible challenge of overcoming deference to the government under rational basis review. Achieving heightened scrutiny would require courts to genuinely evaluate the rationale of collateral consequence licensing laws, rather than almost automatically recognizing the validity of a state interest. Given that the Supreme Court is unlikely to consider the right to work fundamental under the *Glucksberg* analysis, this Section argues that state constitutions provide potential avenues to achieve heightened scrutiny for the right to work.

In interpreting their own state constitutions, state courts could create two potentially useful lanes for expanding fundamental rights claims for litigants challenging collateral consequence employment barriers. First, the state constitutions themselves may provide more extensive rights than the federal Constitution. For example, the Alas-
 kan Constitution contains a “right to rehabilitation” for former offenders. Courts have interpreted this to mean the that criminal administration in Alaska must include doing something “to rehabilitate the offender into a non-criminal member of society.” This implies a right for the previously incarcerated to be reintroduced as fully functioning members of society. Several other states share a similar provision. A right to rehabilitation logically includes employment post-incarceration, particularly in situations where the state has provided training for a particular occupation in prison, which commonly happens with professions like cosmetology.

Second, and perhaps more important, state supreme courts may interpret their own constitutional provisions “more broadly than their federal counterpart.” The 2015 Texas Supreme Court decision, Patel v. Texas Department of Licensing and Regulation, struck down occupational licensing requirements for commercial eyebrow threaders, providing an example of greater protection in the right to work context. The plaintiffs in Patel asserted a state constitutional right to “earn an honest living in the occupation of one’s choice free from unreasonable governmental interference” under Article I, Section 19 of the Texas Constitution. The state constitution bars Texas from depriving its citizens “of life, liberty, property, privileges or immunities. . . except by the due course of the law of the land.” Although the majority in the case ultimately concluded that a rational basis-like test with a strong presumption of constitutionality was appropriate, it struck down the regulation as “so oppressive that it violates” the Texas constitution.

42. Id. at 8.
43. See, e.g., MONT. CONST. art. II, § 28 (“Full rights are restored by termination of state supervision for any offense against the state.”).
44. Deep Dive, supra note 4 (noting that occupational skills commonly taught in prisons often require a license subject to collateral consequence barriers).
47. Id. at 74.
48. Id. at 80 (citing TEX. CONST. art. I, § 19).
49. Id. at 87.
50. Id. at 90.
The concurrence in *Patel* would have extended the decision substantially, recognizing that “the right to put your mind and body to productive enterprise . . . is indispensible to human dignity and prosperity.”51 In calling for increased judicial scrutiny for economic rights, Judge Willett argued in a concurrence that, “even if the Texas Due Course of Law Clause mirrored perfectly the federal Due Process Clause, that in no way binds Texas courts to cut-and-paste federal rational-basis jurisprudence that long post-dates enactment of our own constitutional provision. . . .”52 Speaking specifically to licensing requirements, the concurrence argued that government barriers to employment should actually bear “some meaningful relationship to reality.”53 This kind of analysis for collateral consequence reviews would likely mean a much higher success rate for litigants challenging employment barrier laws.

State constitutions could be successful in places other than Texas.54 Significantly, the plaintiffs in *Patel* pointed to twenty other states that use a “real and substantial” test to analyze economic regulations—a heightened standard distinct from federal rational basis review.55 Requiring a real rational basis for conviction bans could do wonders for striking down flat felony prohibitions and other complete bars to employment.

C. “Criminal Problem” and Permissive Discrimination

In addition to analyzing the character of a specific right, courts determine the level of judicial scrutiny to apply by considering the identity of the party bringing the challenge. The legal classification of the formerly incarcerated impacts the likely standard of review courts will apply to state barrier laws. Consequently, even if courts implement a form of heightened scrutiny for collateral consequence regimes, plaintiffs in these cases still face “the criminal problem”—legally sanctioned, permissive discrimination against the formerly incarcerated.

51. *Id.* at 92 (Willet, J., concurring).
52. *Id.* at 98 (Willet, J., concurring).
53. *Id.* at 110 (Willet, J., concurring).
54. Although the Virginia Constitution includes almost identical due process language to the federal Constitution, it includes in its Bill of Rights a section on “Equality and rights of men,” which reads “That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.” VA CONST. art. I, § 1. This is more extensive that the federal equal protection language. See *supra* note 15.
55. *Patel*, 469 S.W.3d at 81.
This Section will first argue that former offenders satisfy the traditional requirements of a suspect class. Then, this Section will introduce the political challenge embodied in the so-called “criminal problem”—which functions as another barrier to any form of heightened scrutiny for state laws targeting the previously incarcerated. Accepting the criminal problem as a realistic bar to heightened scrutiny, this Section examines the level of scrutiny courts have used to evaluate incarcerated individuals’ rights claims and anticipates a similar level of scrutiny will be applied to plaintiffs challenging collateral consequence laws.

The Fourteenth Amendment prevents arbitrary discrimination by the government against its citizens. When evaluating a Due Process claim under the Fourteenth Amendment, the Court’s analysis turns on both the right in question and the legal classification of individuals seeking to exercise that right. The standard of review used to protect any given right or class of people plays a large role in the Supreme Court’s Equal Protection Clause analysis.

Supreme Court jurisprudence applies heightened protection for specific classes of people. Under Carolene Products’ oft-cited footnote 4, the Court prescribes that:

laws that introduce a “prejudice against discrete and insular minorities may be a special condition which tend] to seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”

At first glance, former offenders seem to fit into this discrete and insular minority classification. Laws differentiating based on a criminal record stem from a prejudice against a politically disadvantaged minority. Yet ex-offenders constitute a politically disadvantaged minority that has faced a long history of legally sanctioned discrimination. The Supreme Court has explicitly upheld states’ powers to disenfranchise felons, deeming the ultimate political disadvantage constitutional. The Fourteenth Amendment explicitly sanctions felon disenfranchise-

61. See U.S. Const. amend. XIV, § 2 (penalizing disenfranchisement of any male citizen “except for participation in rebellion, or any other crime”).
minority. Arguably, this principle cuts both ways. It acknowledges a constitutional validity to depriving former offenders of certain rights, but it also helps to ensure the former offenders’ statuses as politically disadvantaged, making a stronger case that they are a suspect class deserving of heightened protection.

This explicit codification of permissible discrimination creates what scholars have referred to as “the criminal problem.”62 Under the traditional analysis, ex-offenders could qualify as a suspect class.63 Unable to vote and “probably . . . discriminated against more than any other group,”64 former offenders face legal rights restrictions based on immutable criminal records.65 Commentary by Laurence Tribe illustrates the rationale motivating the criminal problem. Tribe wrote, “it sounds reasonable: governmental action that burdens groups effectively excluded from the political process is constitutionally suspect.”66 Yet, Tribe dismissed the idea of burglars as a suspect class as “unthinkable” because society has chosen to criminalize the activity.67 Tribe’s analysis reflects a common theme: a societal judgment that former offenders somehow do not deserve as much protection because of their past choices. The laws themselves, and the sanctioned societal discrimination, all go to labeling former offenders as “others.”68

Notwithstanding the public commentary, courts have largely avoided the question of ex-offenders as a suspect class.69 Collateral consequences stem from the moral judgment of society, and the idea persists that former offenders bring the classification on themselves. The idea that the previously incarcerated are a suspect class deserving of strict scrutiny conflicts with our collective societal condemnation of criminality, particularly because classifications based on characteristics like gender receive only intermediate scrutiny.70

63. See id. at 22 (“Criminals clearly fit all the ‘traditional indicia of suspectness.’”).
64. Id.
65. Id. at 23.
67. Id. at 1075.
69. Helfand, supra note 62, at 22.
70. Id. at 23–24.
While the Supreme Court has not directly addressed the issue of classifying former offenders, the Court did outline a standard of review for the constitutional rights of incarcerated individuals in *Turner v. Safley.*71 There, the Court held that “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”72 This standard turned on several factors, including “a ‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify the regulation.”73 Additionally, the Court’s multifactor analysis mentioned alternative ways to exercise the asserted constitutional right and the “ripple effect” that right’s exercise could potentially have on other prisoners.74 The most important takeaway from *Turner* is the Court’s imposition of a version of the rational basis test on prisoner right restrictions. Even while incarcerating individuals, a government “regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational.”75

One of the primary reasons behind the Court’s deference in *Turner* was its reluctance to set precedent for the federal judiciary to intervene in prison administration.76 Yet, this policy consideration is not relevant when evaluating collateral consequence employment regimes, which only occur outside of prison walls. For this reason, the deferential standard of review applied to prisoners’ rights claims in *Turner* may not be the right approach for ex-offenders who have reentered civil society and still face rights deprivation.

As the law stands, the Supreme Court has never identified ex-offenders as a suspect class, and lower courts will likely be reluctant to do so. The status quo leaves this politically disadvantaged, historically discriminated against group with the lowest standard of review: rational basis. Under rational basis review, a court must only find some possible reason for the legislature to have enacted the law.77 This standard of review provides incredible deference to the government, which disadvantages litigants who wish to challenge the laws regulating the rights

72. *Id.*
73. *Id.* (emphasis added).
74. *Id.* at 89–90.
75. *Id.*
76. *Id.* at 89.
of former offenders. The next Section of this Note will explore the limited success plaintiffs have had under the current rational basis review standard.

II: CHALLENGES TO COLLATERAL CONSEQUENCE EMPLOYMENT SCHEMES

The Section will examine historical and contemporary challenges to collateral consequence employment regimes. The analysis below reveals challenges to employment regimes discriminating against the previously incarcerated rarely succeed under rational basis review. Even so, while rational basis review tends to be overwhelmingly deferential to the government, challengers have successfully convinced at least two courts to strike down collateral consequence occupational restriction laws—even under a nominally rational basis review analysis. The following examples show that courts at both the federal and state level have upheld challenges to collateral consequence employment bars under rational basis review.

At the federal level, in Butts v. Nichols, three plaintiffs challenged Section 365.17(5) of the Iowa Code, which prohibited convicted felons from being employed by the Iowa Civil Service.78 The plaintiffs alleged that the prohibition was invalid under Title VII of the Civil Rights Act of 1964 and unconstitutional under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.79 All three plaintiffs had been employed with the City of Des Moines before a resolution by the city council resulted in their terminations under the ban.80 The Iowa district court declined to reach the Title VII claim because the plaintiffs had not gone through the required EEOC process.81 The court also declined to recognize a classification based on a previous conviction as suspect and rejected the plaintiffs’ attempts to invoke strict scrutiny because of racial disparities.82 Lastly, the court concluded that, despite considering the “right to seek employment . . . vital to all individuals as it relates to supporting themselves and their families and maintaining their self-respect and esteem,” there was no support in precedent for a

79. Id.
80. Id. at 574–75.
81. Id. at 577–78.
82. See id. at 578–79 (rejecting the plaintiff’s argument that Section 365.17(5) discriminates on the basis of race, a suspect class, because the evidence submitted to show de facto racial discrimination was inconclusive based upon too many inferences).
fundamental right to public employment. Consequently, the court decided it had no choice but to analyze the claims under the rational basis review.

After determining the standard of review, the district court identified the state interest here as “basically a protective one[]” aimed at preventing felons from violating the public trust again, as they had by previously committing felonies. The state argued that the felons did not have the needed values for public employment, including industry and obedience. While the court recognized those as legitimate interests for the state, it concluded that the means used here had “simply no tailoring in an effort to limit these statutes to conform to what might be legitimate state interests.” Unlike a statute that prevented those convicted of a crime like embezzlement from handling money, which it said would no doubt pass muster, the court emphasized that this was just a flat ban on any and all felonies. The opinion also alluded to the irrational operational results; for instance, someone convicted of a felony like “desertion of a spouse” would be barred from employment, while someone convicted of petty larceny, a misdemeanor, would not be. The court found this especially perplexing because despite the misdemeanor clearly having a tie to honesty, someone with that conviction would be allowed to act as a home inspector.

Numerous other concerns played into the court’s analysis. First, it looked at other decisions around the country that required some tie between the crime and the consequence, suggesting that unrelated consequences can have negative impacts on rehabilitation. The court also emphasized the potential for arbitrariness and the under and overinclusive nature of the law. The court struck down the law under the Equal Protection Clause as “a totally irrational and inconsistent
Meanwhile, at the state level, in *Haveman v. Bureau of Professional & Occupational Affairs*, two plaintiffs seeking cosmetology licenses in Pennsylvania challenged the “good moral character” requirement of Pennsylvania’s Beauty Culture Law under the Due Process and Equal Protection Clauses of the Pennsylvania Constitution. In deciding the case, before beginning its analysis, the court emphasized that there is a strong presumption of constitutionality of laws. After this discussion, the court held that, “[a]lthough the right to engage in a licensed profession is an important right, it is not a fundamental right[,]” and concluded that no heightened scrutiny applied. It proceeded to find a rational basis for regulating cosmetologists’ good moral character, citing a potential state interest in protecting customers who place themselves in a vulnerable position when seeking the services of a cosmetologist.

The plaintiffs, however, were successful on their Equal Protection Clause claim. Pennsylvania law did not impose the same good character requirement on barbers or other employees in a salon despite essentially mirrored roles. The court could not even find a rational basis for differentiating between two people with identical records based on the jobs in question in the case and struck down the requirement for cosmetologists as unconstitutional.

Although the cases described provide outlier examples of success under the rational basis test, *Butts* did not outline a particular test for analyzing whether the Iowa code provision passed muster that could be applied objectively to other provisions or regulations. *Haveman* turned on an equal protection analysis that will not often be so clearly available. In both cases, the courts examined the factual record and circumstances and deemed the provisions irrational without formulating a more general standard. If courts today sought a concrete legal test to consistently apply to collateral consequence regimes, a more solid case law foundation could be derived from disparate impact Civil Rights

---

93. Id. at 581–82.
97. Id. at 576–77.
98. Id. at 579.
99. Id. at 577–78.
100. Id. at 579–80.
III: THE “JUSTIFIED BUSINESS NECESSITY” TEST FOR COLLATERAL CONSEQUENCE EMPLOYMENT REGIMES

Current law creates substantial barriers for successful Fourteenth Amendment challenges to collateral consequence regimes. In light of the significant legal hurdles, challenges to laws barring employment for former convictions have been successfully brought under the disparate impact theory and Title VII of the 1964 Civil Rights Act. This line of cases presents a “business necessity” standard that can be used by courts to evaluate collateral consequence schemes under a rational basis review with bite. This Section will trace the origins of that test in Civil Rights Act litigation. By drawing on the case *Griggs v. Duke Power Co.*, this Section will argue that the “justified business necessity” test provides a workable standard for evaluating all collateral consequence work restrictions.

A. The Griggs Test

*Griggs v. Duke Power Co.* presented the Court with the question of whether a general test used by a company without showing a purpose of racial discrimination could still be invalid under the 1964 Civil Rights Act. First, the Court stated that “the objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.” Therefore, even a facially neutral policy could violate the Act’s intentions.

Then, the Court held that the statute required “the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.” The Court outlined that the “touch-

---

101. See *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290 (8th Cir. 1975) (holding that a policy of refusing employment to applicants previously convicted of a crime other than a minor traffic offense violated Title VII after a showing of disparate racial impact against black applicants).
103. *Id.* at 429–30.
104. *Id.* at 430.
105. *Id.* at 431.
stone” of whether something qualified as an artificial or arbitrary barrier to employment was a “business necessity” test. Additionally, the Court emphasized that the burden to prove the necessity falls onto the employer, rather than the potential employee. The Court held that congressional intent required that “any tests used must measure the person for the job and not the person in the abstract.” Ultimately, the Court struck down the general test used by the power company in Griggs because the record showed no “demonstrable relationship” between the test results and the capability to do the job.

In Green v. Missouri Pacific Railroad Co., the Eighth Circuit extended the business necessity test to criminal conviction schemes. In Green, the Missouri Pacific Railroad Company had a policy of refusing to consider anyone for employment who had been “convicted of a crime other than a minor traffic offense.” Green, who was African-American, applied for a position as a clerk with the railroad in 1970. During the application process, he disclosed that he had a conviction for refusing military induction in 1967 and had completed twenty-one months in prison. Following a denial of his application based on his conviction, Green sued, alleging that the policy violated the Civil Rights Act by operating “to disqualify [B]lacks for employment at a substantially higher rate than whites” while being completely unrelated to the job. Green sued on behalf of himself and a class of similarly situated individuals, and when the District Court denied relief, he appealed to the Eighth Circuit.

Citing Griggs as the seminal case for job qualification challenges under the Civil Rights Act, the Eighth Circuit held that once a prima facie case of discrimination had been established, the burden shifts to the defendants to show that the practice is in fact justified by business necessity. The Eighth Circuit acknowledged that the Supreme Court

---

106. Id.
109. Id. at 431.
111. Id.
112. Id. at 1292–93 (In fn. 14, the Court noted the significance of the nonviolent offense, particularly because Green had only refused after being denied conscientious objector status. The Court could not see how this offense in particular was in any way related to job performance).
113. Id. at 1292.
114. Id.
115. Id. at 1295.
had never addressed a policy like the railroad’s ban on criminal convictions, and it focused on the analysis the Court had used in evaluating other restrictions.\textsuperscript{116} Looking to Eighth Circuit practices, the \textit{Green} court cited a case in which parties had agreed on appeal that “a conviction for a felony or misdemeanor should not ‘per se constitute an absolute bar to employment.’”\textsuperscript{117} The court also examined \textit{Butts v. Nichols}.\textsuperscript{118} Eventually, the court determined that it needed to evaluate the policy under the two part business necessity test: first, whether the prospective employee had the ability to do the work and second, whether any “acceptable alternative that will accomplish the goal equally well with a lesser differential racial impact” existed.\textsuperscript{119}

The railroad company proffered a number of reasons for the conviction ban, including worries about cargo theft, recidivism disrupting employment, violence, and a lack of moral character.\textsuperscript{120} The court voiced skepticism about these reasons, citing a lack of empirically verified evidence, as well as testimony in the record that employment practices banning those with convictions actually enhanced recidivism rates.\textsuperscript{121} Conceding that the reasons given by the railroad might have justified some policies, the court held that there was no adequate justification for a ban this wide-sweeping.\textsuperscript{122} Instead, the court wrote that to place everyone convicted of a crime within the “permanent ranks of the unemployed” merely “because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden.”\textsuperscript{123}

In a more recent case, \textit{El v. Southeastern Pennsylvania Transit Authority}, the Third Circuit elaborated on the business necessity standard.\textsuperscript{124} Citing Equal Employment Opportunity Commission guidelines, the court focused on a three-factor test for evaluating business necessity which listed: “1. The nature and gravity of the offense or offenses; 2. The time that has passed since the conviction and/or completion of

\begin{itemize}
\item \textsuperscript{116} \textit{Id.} at 1296.
\item \textsuperscript{117} \textit{Id.} at 1295–96 (citing \textit{Carter v. Gallagher}, 452 F.2d 315, 326 (8th Cir. 1971).
\item \textsuperscript{118} \textit{Id.} at 1297.
\item \textsuperscript{119} \textit{Id.} at 1298.
\item \textsuperscript{120} \textit{Id.}
\item \textsuperscript{121} \textit{Id.}
\item \textsuperscript{122} \textit{Id.}
\item \textsuperscript{123} \textit{Id.}
\item \textsuperscript{124} \textit{See El v. Se. Pa. Transp. Auth.,} 479 F.3d 232, 238–42 (3d Cir. 2007) (highlighting the history of the business necessity test, ultimately stating “that a discriminatory hiring policy accurately—but not perfectly—ascertains an applicant’s ability to perform successfully the job in question”).
\end{itemize}
the sentence; and 3. The nature of the job held or sought.”

In that case, a bus driver brought a Section VII challenge against a rule preventing those with a “record of any felony or misdemeanor conviction for any crime of moral turpitude or of violence against any person(s)” from being employed. King Transit Services had terminated the plaintiff, a bus driver, because of a murder conviction.

In reviewing the policy, the Third Circuit cited Green as the only other appellate decision challenging a criminal conviction employment policy. The court then proceeded to differentiate the case from Green. First, in contrast to the Green case, which centered around an office job, the bus-driving role required “the employee to be alone with and in close proximity to vulnerable members of society.” Second, the court emphasized the difference between the blanket ban in Green and Southeastern Pennsylvania Transit Authority’s (“SEPTA”) policy, which only banned people with certain convictions—those it considered to have “the highest and most unpredictable rates of recidivism.” This policy focused on a danger to passengers. The court acknowledged that hiring policies have to turn on risk to some degree and said that whether the risk balancing satisfies the business necessity standard is often a matter for district courts and juries to decide.

Because the court was reviewing a motion for summary judgment in favor of SEPTA, the Third Circuit had to evaluate the SEPTA policy. It undertook a careful review of the record of the case and SEPTA’s asserted justifications for its policy. SEPTA argued that the particular bus-driver role placed the plaintiff in close position with especially vulnerable paratransit passengers, who were more often victims of violent crimes. SEPTA also asserted that people who have committed a violent crime are more likely to commit another, a claim the company backed with expert testimony from a criminologist at trial. Arguing that its policy was the most accurate way to screen for

125. Id. at 243.
126. Id. at 236.
127. Id. at 235.
128. Id. at 243.
129. Id.
130. Id.
131. Id.
132. Id.
133. Id. at 245.
134. Id.
135. Id.
136. Id. at 245–46.
the risk to passengers, it defended the lower court’s grant of summary judgment, and the Third Circuit ultimately agreed and upheld the policy.\textsuperscript{137}

Cases using this business necessity standard demonstrate that it can provide a workable test for courts to use to evaluate other collateral consequence employment restrictions. The test is deferential enough to employers to allow for plenty of legitimate safety regulations, as \textit{El v. SEPTA} illustrates. At the same time, the business necessity standard introduces a requirement on those employers to have a legitimate reason other than bias for introducing the regulations. Courts have not had an issue in outlining tests and standards, which suggests that it could be applied across the board to evaluate collateral consequence employment regulations, not just in disparate impact cases. The next Section will further demonstrate the workability of the test using the EEOC guidelines.

\textbf{B. EEOC Guidelines and the “Business Necessity Standard”}

Further supporting the idea that these are workable standards, the EEOC’s 2012 guidelines on employment for those with conviction or arrest records specifically cites the business necessity test used in the disparate impact line of cases.\textsuperscript{138} It introduces the “\textit{Green factors}” in evaluating business necessity, listing “the nature and gravity of the offense or conduct, the time that has passed since the offense or conduct and/or completion of the sentence, and the nature of the job held or sought.”\textsuperscript{139} The EEOC also took inspiration from \textit{El v. SEPTA}, emphasizing that Title VII requires employers to focus on “applicants [who] pose an unacceptable level of risk and those [who] do not.”\textsuperscript{140} Outlining guidance for employers, the EEOC recommended “a targeted screen” evaluating the applicant in light of the \textit{Green factors}.\textsuperscript{141} The EEOC guidelines actually go further than the cases by requiring that employment screening be narrowly tailored to “identify criminal conduct with a demonstrably tight nexus to the position in question.”\textsuperscript{142}

Further, the EEOC adds that blanket “automatic, across-the-board exclusion from all employment opportunities” due to criminal conduct

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{137} Id. at 245–47.
\item \textsuperscript{138} U.S. \textsc{Equal} \textsc{Emp. \textsc{Opportunity} \textsc{Comm’n, EEOC-CVG-2012-1, Enforcement \textsc{Guidance \textsc{on \textsc{the \textsc{Consideration \textsc{of \textsc{Arrest \textsc{and \textsc{Conviction \textsc{Records \textsc{in \textsc{Employment \textsc{Decisions \textsc{under \textsc{Title \textsc{Vii \textsc{of \textsc{the \textsc{Civil \textsc{Rights \textsc{Act}, at 6 (2012).}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}}} \textit{Id} at 17–18.
\item \textsuperscript{140} \textit{Id} at 18 (alteration in original).
\item \textsuperscript{141} \textit{Id} at 21.
\item \textsuperscript{142} \textit{Id} at 21–22.
\end{itemize}
\end{footnotesize}
is inconsistent with business necessity.\textsuperscript{143} As an example, the guidance introduces an online application that begins with a question asking if the applicant has ever been convicted of a crime.\textsuperscript{144} If the application terminates with the answer “yes,” then that is not an acceptable policy under the EEOC guidelines.\textsuperscript{145} The EEOC recommends employers go further—looking at older age at time of release, the facts and circumstances surrounding the initial conviction, employment history, rehabilitation efforts, and bonding programs.\textsuperscript{146}

Importantly, the EEOC report specifies that state and local law are preempted by Title VII, meaning that a business could still be liable under Title VII for enacting an unlawful exclusionary policy, even if it was done in compliance with state or local laws.\textsuperscript{147} Yet, the EEOC policy guidance presents one meaningful problem: plaintiffs must first prove disparate impact in order to fall under Title VII. Establishing a Title VII claim requires the plaintiff to prove several elements, including facts supporting their status as a disadvantaged minority and arguments that the policy in question, although facially neutral, has a disparate impact on minorities.\textsuperscript{148} Additionally, because this standard is only under Title VII, only minorities who have proven that they have faced discrimination for a singular job in their own particular circumstances can bring claims. This severely limits who can bring claims and the subsequent success rate of those claims. A completely irrational ban may survive if the plaintiff's claim of discrimination does not satisfy the court. Given the clear limitations above, Part IV will argue that courts should adopt the business necessity standard when evaluating Fourteenth Amendment challenges to all collateral consequence employment barrier statutes and regulations.

IV. USING THE “BUSINESS NECESSITY STANDARD” TO ADDRESS EMPLOYMENT BARRIERS

Collateral consequence occupational licensing barriers should be evaluated under the business necessity standard regardless of whether the plaintiffs in a particular case are able to prove disparate impact. Blanket bans on employment based on convictions or a lack of “moral

\textsuperscript{143} Id. at 24.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Id. at 26.
\textsuperscript{147} Id. at 33.
character” are almost always irrational. Given the current discussions of criminal justice reform, revising the standard for occupational licensing collateral consequences is necessary. The Supreme Court has recognized a right to work, and it has developed a workable business necessity test for analysis under the disparate impact line of cases. The government itself uses the test to determine whether private employers are complying with Title VII, making it difficult for the government to argue that it is an unworkable or irrational standard. While these challenges must be examined on a case-by-case basis, several important public policy factors apply across all occupational licensing barriers.

First, although some plaintiffs may have difficulty proving disparate impact in individual circumstances, overwhelming racial disparities color the criminal justice system more broadly.149 African Americans accounted for nearly 40 percent of the prison population in 2008, despite being less than 15 percent of the general population.150 The same data shows that Hispanics accounted for a disproportionate amount of the prison population.151 Another study found that, while a criminal conviction reduced the likelihood of a white applicant getting a callback by 50 percent, nearly two-thirds of Black applicants with a conviction did not get a callback, indicating a disparate impact more generally.152 Whether or not a disparate impact is present in a record, it is fairly easy to conclude that when laws ban those with convictions, the consequences mirror the broader disparities.

Second, collateral consequence employment restrictions actually work against one of punishment’s central goals: preventing recidivism. Studies have shown that “harsh collateral consequences unrelated to public safety increase recidivism.”153 Barriers to employment create a massive hurdle for reintegration into society.154 Even without barriers, ex-offenders are often released upon completion of their sentences with “at most, a new change of clothing and a small amount of spending

149. See U.S. COMM’N, supra note 13, at 3 (2019) (explaining that collateral consequences disproportionately affect LGBTQ+ individuals, individuals of color, and individuals with disabilities). The Commission also cited statistics illustrating broader racial disparities. Id. at 19 (citing statistics illustrating the broader racial disparities within the system).
150. JOHN SCHMITT & KRIS WARNER, EX-OFFENDERS AND THE LABOR MARKET, CENTER FOR ECONOMIC AND POLICY RESEARCH, 6 (Nov. 2011).
151. Id.
152. Kimble, supra note 90.
153. Letter from Catherine E. Lhamon, U.S. Comm’n on C.R. Chair, to Donald Trump, President of the U.S., Mike Pence, Vice President of the U.S., and Nancy Pelosi, Speaker of the U.S. House of Representatives (June 13, 2009).
money.” In addition, a conviction can also make an ex-offender ineligible for government benefits, leaving a state of financial desperation that can lead to recidivism. One study found that unemployed formerly incarcerated individuals were three times more likely to reoffend than those who secured steady jobs. Another study found that states with “more burdensome licensing laws” had average rates of recidivism jump by 9 percent, while those with less restrictive laws saw recidivism rates drop by 2.5 percent. This indicates that, rather than protecting the public and facilitating a successful return to society, laws that bar ex-offenders from obtaining certain jobs may prevent reintegration and lead to reincarceration.

Third, the public may also suffer from collateral consequence employment restrictions, making them a harmful public policy for the population. The Center for Economic and Policy Research found that diminished economic opportunities for men with convictions cost the United States economy between $57–65 billion in 2008. Additionally, there is a public safety concern. This sentiment is reflected in testimony from a senior research fellow examining criminal justice reform at the Charles Koch Institute to the Civil Rights Commission, who said:

“90% of the people who enter state prisons in this country will come out of those prisons and they will live next door to you and me, and we all have an interest in making sure that they are successfully reintegrated so they are not hurting people again.”

Democratic Senator Patrick Leahy also emphasized the need to do “everything we can to give [former offenders] the skills and opportunities they need to reintegrate successfully . . . it makes us all safer.”

Further, employment barrier laws contribute to the cycle of crime by keeping reformed ex-offenders from sharing their stories with others. Returning to Rudy Carey’s story, drug treatment centers in Virginia

---

155. Id. at 418.
156. Id. at 421.
157. Id. at 419.
158. Sibilla, supra note 12 at 3.
159. U.S. COMM’N, supra note 13 at 5.
160. Id. at 13.
often look for counselors who have overcome addiction themselves because they are able to help others in ways a well-meaning, well-educated person without similar personal experience with addiction cannot. In such situations, society loses valuable insights that ex-offenders can provide when helping to rehabilitate others.

Fourth, the idea that collateral consequences somehow help to serve the state purpose of deterring crime is irrational. For something to be an effective deterrent, the general public should be aware of it, and the report from the Commission on Civil Rights cites a distinct “lack of public awareness” of collateral consequence laws. One of the challenges with mobilizing support to change these laws is how few people are even aware of them. Under Supreme Court precedent, the only collateral consequence that requires notice to the defendant is potential deportation. With that notable exception, “the prevailing constitutional bottom line is that guilty pleas are immune from attack if a defendant remains ignorant of the collateral consequences.” This is particularly concerning when one considers that at the federal level, 90 percent of defendants plead guilty. With thousands of employment restrictions codified into state law, it would be nearly impossible to be aware of them all. Although some services have begun to catalogue them, it is safe to say it is irrational to consider each of the penalties that accompany a conviction to be a deterrent.

Finally, and perhaps an indicator of more irrationality than any other component of these laws, prisons often train prisoners in the very occupations they then forbid them participating in after release. In some cases, those who have been convicted of a felony are unable to obtain cosmetology licenses, despite prison vocational-education pro-

162. See Deep Dive, supra, note 4 (discussing the value of having those who have struggled with and overcome addiction being able to relate to individuals currently battling it).
164. Deep Dive, supra, note 4 (highlighting that there is very little effort to change the laws because of how limited awareness can be).
165. See generally Padilla v. Kentucky, 559 U.S. 356 (2010) (holding that the defendant did have a valid ineffective assistance of counsel claim when his attorney failed to warn him that pleading guilty to the crime charged could result in his deportation).
168. See BRANHAM, supra note 154 at 420 (providing examples of professions in which this occurs).
grams providing incarcerated individuals with training in cosmetology.\

Plaintiffs in California are currently challenging a similarly irrational scheme. California prisons train “low-risk” offenders as firefighters and allow incarcerated individuals to fight fires throughout the state.169 The incarcerated individuals earn minimal financial compensation, but they receive the same training as other seasonal firefighters throughout the state, and around 3,700 inmates do the work around the state.170 Once released, the ex-offenders can work as seasonal firefighters, but an EMT certification is required in order to work in nearly all career firefighter positions.171 Yet, California law prohibits people convicted of two felonies from receiving an EMT certification, leaving many former inmates who worked as firefighters unable to make a sustainable career out of the skill when they are released.172 While these citizens have paid their debt to society and now seek to help save lives, California law allows them to do so only on a seasonable basis despite a shortage of rural firefighters.173 Removing barriers like this ban could help both the state and the former offenders, but a lack of political action from the legislature and irrational deference leaves these harmful barriers in place.

Deferring to irrational collateral consequence barriers to employment is not only illogical, but it also demonstrates an abdication by courts to ensure that all Americans get the chance to pursue employment, a right at the heart of this “pull yourself up by your bootstraps” nation. No one benefits from preventing people like Rudy Carey from turning their lives around and helping others. Society should be elevating him as an example and using his life experience to help others in crisis, not relegating him and those like him to permanent second-class citizenship. A prison sentence should not be irrationally extended to bar redemption, but that is the reality of many of the flat bans.

A number of responses could be raised to these arguments. First, it could be argued that collateral consequences serve as a deterrent to those committing the crime in the first place, serving a valid purpose in

169. Id.
171. Id.
172. Id.
173. Id.
174. Id.
the criminal justice system: preventing further criminal activity. But many criminal defendants are unaware of the vast reach of collateral consequence penalties in occupational licensing.\footnote{175}{See Brian M. Murray, Are Collateral Consequences Deserved?, 95 NOTRE DAME L. REV. 1031, 1032 (2020) (highlighting that at the plea bargaining stage, many criminal defendants do not know about licensing bars to employment that will stem from the guilty plea).} In Rudy’s case, neither he nor his employer knew about the law until he had been an employee for years.\footnote{176}{Deep Dive, supra, note 4.} In order for the argued deterrent effect of these laws to even be plausible, the laws would need to be more widely publicized, rather than largely unknown.

Second, one could argue that the legislatures, not the courts should be making these calls and judging the rationality of employment barrier laws. The problem with this line of criticism stems from the same “criminal problem” that prevents courts from considering ex-offenders to be a protected class. Political voices and influence create legislative action, and former offenders often have neither. In many states, those with past felony convictions are barred from the polls, leaving them powerless to create change at the ballot box. In addition, the politically disfavored status of ex-offenders, which would make them a protected class under the \textit{Carolene Products} footnote 4, makes political actors less responsive. These are the kind of situations in which political, democratic solutions have failed to provide equal protection, and courts should intervene.

That is not to say there is no place for democratic action. In addition to the legal challenges to the restrictions happening around the country, legislatures should also be acting to address these laws. According to a 2018 poll, roughly 85 percent of Americans support making rehabilitation the primary goal of the criminal justice system over punishment.\footnote{177}{Matt Clarke, 	extit{Polls Show People Favor Rehabilitation over Incarceration}, PRISON LEGAL NEWS (Nov. 6, 2018), https://www.prisonlegalnews.org/news/2018/nov/6/polls-show-people-favor-rehabilitation-over-incarceration/.} In Pennsylvania, following the \textit{Haveman} case that struck down the “good moral character” requirements for cosmetologists, the Pennsylvania legislature repealed all good moral character occupational requirements in the state’s code, proving that the political momentum is also there to make changes.\footnote{178}{Deep Dive, supra, note 4.} By codifying the \textit{Green} factors and the business necessity test, Congress and state legislatures could make a significant change to the criminal justice system that would benefit ex-offenders and the broader community. Common sense changes in this
area could improve thousands of lives, both of ex-offenders and in the communities they re-enter.

V. CONCLUSION

It is fundamentally irrational for the government to promulgate one standard for private employers through the EEOC guidance while allowing legislation around the country that operationally results in similar discriminatory consequences. Legal challenges to collateral consequences face an uphill climb because of the “criminal problem” and the past deference courts have shown to legislative barriers to work, but considering criminal justice reform movements, that could change. Implementing the “business necessity” test to Fourteenth Amendment challenges to the laws would provide mutually beneficial results to the public and to former offenders. Courts could use the *Green* factors to objectively determine whether laws have a rational connection to a legitimate state interest.

All it requires is for courts to acknowledge that unrelated employment bans do not pass even a rational basis review. The courts do not have to create any new rights, and a stricter application of rational basis review will not result in an unworkable, inconsistent standard. The goal of the criminal justice system should be successful reentry of hundreds of thousands of former offenders into society each year. It is time to import the same standard applied to private business hiring decisions and recognize that all of society will benefit.