

# NOTES

## DELEGATED TO THE STATE: IMMIGRATION FEDERALISM AND POST- CONVICTION SENTENCING ADJUSTMENTS IN *MATTER OF THOMAS & THOMPSON*

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*In Matter of Thomas & Thompson, former Attorney General William Barr argued that states have no role to play in immigration matters and thus, state adjustments to a criminal sentence post-conviction will not be given effect for adjudicating deportability based on criminal grounds under section 101(a)(48)(B) of the Immigration and Nationality Act without an underlying substantive or procedural flaw in the original criminal case. The former Attorney General incorrectly assumed that states cannot be involved in immigration decisionmaking. Not only is it constitutionally permissible for the federal government to delegate certain immigration powers to the states, but the immigration code does so in many places. Careful examination of the text and legislative history of section 101(a)(48)(B) reveals that whatever sentence the state deems operative counts for immigration purposes—even if state law considers the operative sentence a later adjustment—implying that Matter of Thomas & Thompson put forth an erroneous interpretation.*

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\* Copyright © 2022 by David G. Blitzer. J.D. Candidate, 2022, New York University School of Law; B.A., 2010, Williams College. I am grateful to Professor Adam Cox for providing invaluable feedback and support throughout the development of this Note. This Note originated in Professor Stephen Holmes's class on *The Federalist*, and I appreciate his initial encouragement of this topic. I would also like to thank Thomas Hislop, Yonas Takele, Rupali Srivastava, Daphne Fong, Ben Hoynes, Christopher Ioannou, Miranda Katz, Sara Greaves, Luiza Leão, Garrett Donnelly, and the editors of the *New York University Law Review* for their essential feedback. Additionally, Professor Helen Hershkoff, Professor Shirley Lin, and Daily Guerrero have been amazing mentors throughout law school, and conversations with Anaika Miller have been essential to shaping my legal philosophy. I am likewise indebted to my family—Michael Blitzer, Marin Blitzer, German Duran, Sr., Teresa Duran, Nancy Duran, Leo Gonzalez, German Duran, Jr., Emilio Gonzalez, and Andrés Gonzalez—and all of my friends for their support. And above all else, I am grateful to my wife, Julie Duran, and our wonderful cats for their love and encouragement.

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## INTRODUCTION

Since the late 1800s, a dominating federal presence has defined immigration law. Given how vital immigration has been to the growth of the nation, and how fierce the anti-immigrant backlash has been with each successive wave of immigration, it is perhaps no surprise that the national government has felt the need to oversee it.<sup>1</sup> In our current immigration jurisprudence, the federal government has a plenary and exclusive role in matters of admission, exclusion, and deportation.<sup>2</sup> The rhetoric of recent Supreme Court decisions paints a picture of federal control with little room for the states to play a role.<sup>3</sup>

As a result, battles between states and the federal government over immigration policy have been raging since America’s inception<sup>4</sup>

<sup>1</sup> See DANIEL J. TICHENOR, *DIVIDING LINES* 1–5 (2002) (providing an overview of “long-term shifts between restricting and expanding immigration opportunities”); see also *infra* Section II.B.

<sup>2</sup> See *infra* Section II.B.

<sup>3</sup> See *infra* notes 98–99 and accompanying text.

<sup>4</sup> See *infra* Section II.A.

and attempts by states to influence immigration matters continue into the present.<sup>5</sup> This federalism fire became a conflagration when Donald Trump was elected President. Along with senior adviser Stephen Miller, former President Trump sought to leverage executive authority to the maximum extent possible to prevent noncitizens from coming or staying in the United States,<sup>6</sup> despite the protests of many states who sought to protect noncitizens in their communities from a deportation system that they increasingly saw as biased and unfair.<sup>7</sup> Because historically the federal government has been given the majority of authority to govern immigration law regardless of state preferences, President Trump was quite successful in his efforts.<sup>8</sup>

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<sup>5</sup> See, e.g., Bianca Figueroa-Santana, Note, *Divided We Stand: Constitutionalizing Executive Immigration Reform Through Subfederal Regulation*, 115 COLUM. L. REV. 2219, 2235–39 (2015); Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074, 2083–90 (2013); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 799–804 (2008); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 590–609 (2008); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 59–67; Hiroshi Motomura, *Federalism, International Humans Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1365–69 (1999); Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1628–39 (1997) [hereinafter Spiro, *Learning to Live with Immigration Federalism*]; Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 VA. J. INT'L L. 121, 127–34 (1994) [hereinafter Spiro, *Demi-Sovereignities*]. See generally Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557 (2008) (describing the increased influence of state criminal, employment, and welfare law on immigration law). It also should be noted, however, that sometimes federalism arguments are just a vessel for “ideological” arguments about substantive immigration policy. See Daniel Kanstroom, *Immigration Enforcement and State Post-Conviction Adjudications: Towards Nuanced Preemption and True Dialogical Federalism*, 70 U. MIA. L. REV. 489, 493–94 (2016) (arguing that both those who oppose and those who support state immigration enforcement support federal enforcement when it favors their cause).

<sup>6</sup> See Jason DeParle, *How Stephen Miller Seized the Moment to Battle Immigration*, N.Y. TIMES (Aug. 17, 2019), <https://www.nytimes.com/2019/08/17/us/politics/stephen-miller-immigration-trump.html> [https://perma.cc/376F-DAZ7].

<sup>7</sup> See, e.g., Brief for the States of New York, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia as Amici Curiae in Support of Respondents, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965) (opposing the legality of an executive order that restricted noncitizens from largely Muslim countries); Christina Goldbaum, *State Courts Become Battleground over Trump’s Sanctuary Cities Policy*, N.Y. TIMES (Dec. 12, 2018), <https://www.nytimes.com/2018/12/12/nyregion/sanctuary-cities-state-courts.html> [https://perma.cc/CNW6-SFC6]; Caitlin Dickerson & Zolan Kanno-Youngs, *Border Patrol Will Deploy Elite Tactical Agents to Sanctuary Cities*, N.Y. TIMES (Feb. 14, 2020), <https://www.nytimes.com/2020/02/14/us/Border-Patrol-ICE-Sanctuary-Cities.html> [https://perma.cc/F6RN-VKCG].

<sup>8</sup> See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2415 (2018) (holding that the Executive had complete discretion under the immigration code to restrict noncitizens from largely Muslim countries through executive order).

However, such an allocation of power has not always existed and is not an “inevitable” constitutional framework.<sup>9</sup> In fact, it is very different from the state of immigration law from the Founding to the 1870s, where the states largely controlled immigration matters.<sup>10</sup> Even though the presence of noncitizens<sup>11</sup> may be relevant to foreign affairs and national security, the benefits and burdens of noncitizens are largely borne by the states.<sup>12</sup> When noncitizens are deported, it is the local communities that are most affected, not the federal government.<sup>13</sup> This is especially true when it comes to the presence of noncitizens with criminal convictions.<sup>14</sup>

The immigration code, which is codified in the Immigration and Nationality Act (INA), specifies that certain criminal convictions (with certain accompanying sentences) can result in a noncitizen’s deportation.<sup>15</sup> The decision of whether to deport the noncitizen thus lies with the federal government.<sup>16</sup> However, state judges have often tried to shield a noncitizen from immigration consequences after a conviction, either by vacating or modifying the conviction or changing the underlying sentence so as to render the noncitizen no longer eligible for deportation, flummoxing the immigration bureaucracy.<sup>17</sup>

These immigration consequences are adjudicated through the Department of Justice.<sup>18</sup> The structure of the immigration courts, however, differ from the typical agency structure. There are trial-level courts in which a noncitizen faces removal.<sup>19</sup> While appeals go to the

<sup>9</sup> Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1840 n.34 (1993).

<sup>10</sup> See *infra* Section II.A.

<sup>11</sup> Throughout the text, I will use the term “noncitizen.” I will only use the term “alien” when citing a particular statute or judicial opinion.

<sup>12</sup> See *infra* notes 305–08 and accompanying text.

<sup>13</sup> See *infra* Conclusion.

<sup>14</sup> See *infra* notes 309–12 and accompanying text.

<sup>15</sup> See Immigration and Nationality Act (INA) § 237(a)(2), 8 U.S.C. § 1227(a)(2).

<sup>16</sup> See *Arizona v. United States*, 567 U.S. 387, 396 (2012) (“Congress has specified which aliens may be removed from the United States and the procedures for doing so.”).

<sup>17</sup> See Adiel Kaplan, *AG Barr Issues 2 Decisions Limiting Ways Immigrants Can Fight Deportation*, NBC NEWS (Oct. 29, 2019, 9:43 AM), <https://www.nbcnews.com/politics/immigration/ag-barr-issues-2-decisions-limiting-ways-immigrants-can-fight-n1073026> [<https://perma.cc/VT3N-ULZ9>] (describing how some states have mechanisms available to “retroactively shorten” sentences that have been used to avoid immigration consequences).

<sup>18</sup> See *About the Office*, U.S. DEP’T OF JUST. EXEC. OFFICE FOR IMMIGR. REV., <https://www.justice.gov/eoir/about-office> [<https://perma.cc/3L6D-6MQ2>].

<sup>19</sup> In 1996, Congress renamed all legal processes to exclude a noncitizen from the country removal proceedings, encompassing both exclusion and deportation. See *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, § 304, 110 Stat. 3009–546, 587–96; Andrew Moore, *Criminal Deportation, Post-Conviction Relief and the Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J. 665, 668 n.10 (2008).

Board of Immigration Appeals (BIA)—the appellate body responsible for interpreting the INA and exercising the agency’s adjudicatory power—the Attorney General is the ultimate authority and has the tremendous power to self-certify cases and overrule the BIA.<sup>20</sup>

Although President Trump employed many methods of compromising immigration law adjudication, including pressuring immigration judges to compromise the due process rights of noncitizens,<sup>21</sup> the unique structure of the immigration courts was key to his strategy. The certification power of the Attorney General served as the lynchpin of President Trump’s strategy to fundamentally change immigration law and the rights of noncitizens: His attorneys general used it extensively to alter (and arguably rewrite) immigration law, reaching tenuous legal conclusions largely to match President Trump’s policy preferences.<sup>22</sup>

One of those cases was *Matter of Thomas & Thompson*.<sup>23</sup> Former Attorney General William Barr held that state judges have no right to change the underlying sentence after a conviction to prevent immigra-

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<sup>20</sup> See INA § 103(a)(1), 8 U.S.C. § 1103(a)(1) (“[D]etermination and ruling by the Attorney General with respect to all questions of law shall be controlling.”); 8 C.F.R. § 1003.1 (“The Board [of Immigration Appeals] Members shall be attorneys appointed by the Attorney General to act as the Attorney General’s delegates in the cases that come before them.”); see also *Board of Immigration Appeals*, U.S. DEPT. OF JUST. (Sept. 14, 2021), <https://www.justice.gov/eoir/board-of-immigration-appeals> [<https://perma.cc/X5C7-96AN>].

<sup>21</sup> See Michael Vastine, *An Immigration Defense Lawyer Walked into a Barr. . . The Impact of Trump’s Justice Department on the Defense of Criminal Immigrants*, 25 BARRY L. REV. 57, 58–60 (2020) (outlining the Trump administration’s significant changes to immigration policy and restrictions of immigration judges’ independence). See generally TESS HELLGREN, REBECCA CASSLER, GRACIE WILLIS, JORDAN CUNNINGS, STEPHEN MANNING, MELISSA CROW & LINDSAY JONASSON, INNOVATION L. LAB, S. POVERTY L. CTR., *THE ATTORNEY GENERAL’S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL* (2019), [https://www.splcenter.org/sites/default/files/com\\_policyreport\\_the\\_attorney\\_generals\\_judges\\_final.pdf](https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf) [<https://perma.cc/EAT5-YH9H>]. President Trump is also not the only President to distort immigration law and compromise immigration adjudication. See, e.g., Dory Mitros Durham, Note, *The Once and Future Judge: The Rise and Fall (and Rise?) of Independence in U.S. Immigration Courts*, 81 NOTRE DAME L. REV. 655, 682–84 (2006) (describing efforts by former President George W. Bush’s Attorney General John Ashcroft to pressure immigration judges).

<sup>22</sup> See Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1210–11 (2021) (describing some of the fourteen certification cases by the administration and scholarly commentary noting how these cases demonstrated an “erosion of BIA precedent”); HELLGREN ET AL., *supra* note 21, at 24–25. At least one former attorney general explicitly argued that an attorney general *should* use their authority for “advancing legal and policy-based interpretations of the immigration laws.” Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General’s Review Authority*, 101 IOWA L. REV. 841, 920 (2016).

<sup>23</sup> 27 I. & N. Dec. 674 (Att’y Gen. 2019).

tion consequences,<sup>24</sup> and that a sentence modification<sup>25</sup> only counts for immigration purposes if there are substantive or procedural defects rendering the original sentence invalid.<sup>26</sup> More broadly, the Attorney General argued that states should play no role in the determination of immigration consequences, believing this the exclusive province of the federal government.<sup>27</sup> As immigration attorney Rose Cahn said at its publication, “What this is is a real shot fired against states who are leading the effort to bring the federal immigration consequences in line with the intended consequences of state offenses.”<sup>28</sup> This Note will argue that *Matter of Thomas & Thompson* was wrongly decided and should be overturned by a court of appeals or vacated by the current attorney general, as it both relied on a fundamentally flawed assumption about the role of states in immigration matters and its holding is inconsistent with the text and history of the INA.

Part I will discuss how the BIA developed conflicting caselaw about when state post-conviction mechanisms would change a non-citizen’s eligibility for removal on criminal grounds and explain how *Matter of Thomas & Thompson* sought to make federal law uniform.

Because Attorney General Barr’s opinion relied significantly on the underlying assumption that states should have little involvement in immigration matters, Part II will then examine the development of immigration law in the United States to show not only that states historically played a role in immigration law, but also that the Supreme Court’s decision to make the immigration power exclusively federal is constitutionally specious. It will also show that, despite the Attorney General’s assertions, the immigration code gives the federal government the power to share immigration decisionmaking with the states, a power that it often exercises. Part III will then demonstrate that the section at issue in *Thomas & Thompson* delegates to the states the power to determine whether the length of a noncitizen’s sentence should trigger deportation, and that *Thomas & Thompson* was incorrectly decided. This should result in reversal even though such a holding creates inconsistency about when a state judge’s actions are effective for immigration purposes, as subsequent changes to a criminal conviction in state court are not given effect under the INA. Finally, the Note will conclude by advocating for legislation that would clear up this doctrinal confusion by delegating all final decision-

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<sup>24</sup> See *infra* notes 80–86 and accompanying text.

<sup>25</sup> Throughout this Note, I will use the terms “sentence adjustment” and “sentence modification” interchangeably.

<sup>26</sup> See *infra* note 85 and accompanying text.

<sup>27</sup> See *infra* notes 88–93 and accompanying text.

<sup>28</sup> Kaplan, *supra* note 17.

making regarding convictions and sentencing to the states. Contrary to Attorney General Barr's dicta in *Thomas & Thompson*, the states are best situated to make this decision rather than the federal government. More importantly, the assumption that the federal government should inflexibly prevent states from protecting noncitizens in their communities from deportation contradicts the core philosophy of federalism and reflects a single-minded and categorical way of thinking at odds with the interests of the United States and the rights of noncitizens.

## I

### MATTER OF THOMAS & THOMPSON'S REJECTION OF POST-CONVICTION STATE INFLUENCE IN DEPORTATION BASED ON CRIMINAL GROUNDS

One of the crucial battles for control between the states and the federal government in immigration law involves deportation based on criminal grounds. States not only play a critical role in crafting the laws by which noncitizens will be found deportable, but states also play a role in arresting, prosecuting, and screening noncitizens based on these laws.<sup>29</sup> However, while the federal government has traditionally encouraged the states to play this role,<sup>30</sup> it has increasingly tried to prevent state attempts to interfere with deportation proceedings initiated after a conviction.<sup>31</sup> Here, the federal government has often found itself, when attempting to deport a noncitizen, at odds with the legal mechanisms that states employ to modify, alter, or even eliminate a criminal conviction or its attendant length of imprisonment after the fact. This federalist tug-of-war gave rise to *Matter of Thomas & Thompson*.<sup>32</sup>

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<sup>29</sup> See *infra* notes 167–69 and accompanying text.

<sup>30</sup> Nathalie A. Bleuzé, Note, *Matter of Roldan: Expungement of Conviction and the Role of States in Immigration Matters*, 72 U. COLO. L. REV. 817, 846–49 (2001); see also Adam B. Cox & Eric A. Posner, *Delegation in Immigration Law*, 79 U. CHI. L. REV. 1285, 1337–39 (2012) (describing the advantages of delegation to states); INA § 287(g), 8 U.S.C. § 1357(g) (giving the federal government power to delegate to state and local authorities the power to arrest noncitizens for immigration violations); Kanstroom, *supra* note 5, at 509 (“[S]tate convictions are seen as merely ‘a useful way for the federal government to identify individuals who, because of their criminal history, may be appropriate for removal.’” (quoting *Saleh v. Gonzales*, 495 F.3d 17, 24 (2d Cir. 2007))); *infra* notes 166–71 and accompanying text (describing how federal immigration law incorporates state law and decisionmaking).

<sup>31</sup> See Kanstroom, *supra* note 5, at 512–13; Bleuzé, *supra* note 30, at 828; Moore, *supra* note 19, at 681–86; Jason A. Cade, *Deporting the Pardoned*, 46 U.C. DAVIS L. REV. 355, 409 (2012); see also *infra* note 298 (describing this inconsistency). I also want to acknowledge that Professor Cox first alerted me to this inconsistency.

<sup>32</sup> 27 I. & N. Dec. 674 (Att’y Gen. 2019).

### A. *Criminal Grounds of Deportation*

Under the INA, noncitizens convicted of a crime can be deported.<sup>33</sup> Certain criminal convictions automatically trigger deportation, while other convictions only do so if the sentence length reaches a certain threshold.<sup>34</sup> The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) amended the INA to include these definitions.<sup>35</sup> Peculiarly, the immigration code might still count convictions that have been legally eliminated by the state, such as certain vacated convictions,<sup>36</sup> or formal sentences that noncitizens never had to serve because they were suspended.<sup>37</sup>

A conviction is defined by subsection 101(a)(48)(A) of the INA as a “formal judgment of guilt of the alien entered by a court” either through trial, plea bargain, or *nolo contendere*, where a judge “has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.”<sup>38</sup> A sentence, meanwhile, is defined by subsection 101(a)(48)(B) as “the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.”<sup>39</sup>

When IIRIRA was passed, uncertainty was created about how to establish the existence of a conviction and measure the length of imprisonment for immigration purposes. This is because states employ a variety of procedural mechanisms after conviction and/or sentencing that affect how that conviction and/or sentence is treated under state law, broadly termed “post-conviction events.” For example, some states will vacate convictions or alter sentences based on good

<sup>33</sup> INA § 237(a)(2), 8 U.S.C. § 1227(a)(2). One of the most widely used grounds of deportability, the aggravated felony, *id.* § 237(a)(2)(A)(iii), is defined in subsection 101(a)(43) of the INA, *id.* § 101(a)(43), 8 U.S.C. § 1101(a)(43). Interactions with the criminal justice system can occur at both the state and federal level. My focus for this Note is on convictions issued by state criminal justice systems.

<sup>34</sup> INA § 237(a)(2), 8 U.S.C. § 1227(a)(2); *see also, e.g., id.* § 101(a)(43)(F) (“[A] crime of violence . . . for which the term of imprisonment [sic] at least one year . . . .”); *id.* § 101(a)(43)(Q) (“[A]n offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more . . . .”); *id.* § 101(a)(43)(T) (“[A]n offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years’ imprisonment or more may be imposed . . . .”).

<sup>35</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 322, 110 Stat. 3009–546, 628–29.

<sup>36</sup> *Matter of Roldan-Santoyo*, 22 I. & N. Dec. 512, 521 (B.I.A. 1999), *rev’d on other grounds sub nom. Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000).

<sup>37</sup> INA § 101(a)(48)(B), 8 U.S.C. § 1101(a)(48)(B).

<sup>38</sup> *Id.* § 101(a)(48)(A).

<sup>39</sup> *Id.* § 101(a)(48)(B).



behavior during probation.<sup>40</sup> Traditionally, the BIA credited these post-conviction events.<sup>41</sup> After IIRIRA, the INA specifically said that two post-conviction events would no longer count: deferred adjudications of convictions<sup>42</sup> and suspended sentences.<sup>43</sup> Moreover, the INA only explicitly sanctions one post-conviction mechanism for affecting the conviction or the length of imprisonment: If the President of the United States or a state governor grants a “full and unconditional pardon,” certain convictions are no longer grounds for deportation.<sup>44</sup> As a result, after IIRIRA, there was a series of state post-conviction mechanisms whose effect for immigration purposes was unclear, as their legal significance in the INA was neither explicitly credited nor specifically eliminated.<sup>45</sup> Thus, the BIA had to grapple with whether the existence of a conviction, under subsection 48(A), and the length of imprisonment, under subsection 48(B), should be measured, for immigration purposes, at the time of conviction and initial sentencing or be affected by a series of other post-conviction state legal actions.

Moreover, if some post-conviction state legal actions can change the immigration consequences for the noncitizen, which ones should count? Any decision by a state court to change the conviction or underlying sentence? Only those modified for rehabilitative purposes rather than immigration purposes? Or must there be an underlying legal defect that invalidates the earlier conviction or sentence? The next Section will survey the BIA caselaw on both subsection 48(A) and subsection 48(B) and explain how the BIA came to different conclusions about the effect of post-conviction proceedings on each of the provisions.

## B. *The BIA’s Rulings on Post-Conviction State Action*

### 1. *Convictions Under Subsection 48(A)*

Over a series of cases, the BIA ultimately held that only the original conviction matters for immigration purposes under subsection

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<sup>40</sup> *E.g.*, IDAHO CODE § 19-2604 (2022); *see also infra* note 48.

<sup>41</sup> Brief of Amici Curiae American Immigration Lawyers Association et al. in Support of Petitioner at 4–5, 7–8, *Zaragoza v. Garland*, Nos. 19-3437, 20-1591 (7th Cir. Aug. 12, 2020) [hereinafter AILA Brief] (citing numerous BIA precedents prior to *Thomas & Thompson* that honor state post-conviction events); *see also* Moore, *supra* note 19, at 679–86; Cade, *supra* note 31, at 381–82; Bleuzé, *supra* note 30, at 818–19; Kanstroom, *supra* note 5, at 512.

<sup>42</sup> INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A); *see also* H.R. REP. NO. 104-828, at 224 (1996) (Conf. Rep.) (providing Congress’s reason for the change).

<sup>43</sup> INA § 101(a)(48)(B), 8 U.S.C. § 1101(a)(48)(A); *see also* H.R. REP. NO. 104-828, at 224.

<sup>44</sup> INA § 237(a)(2)(A)(vi), 8 U.S.C. § 1227(a)(2)(A)(vi).

<sup>45</sup> *See infra* Section I.B.

48(A) and that any adjustment or erasure of the conviction by the state would only affect removal if it were due to an underlying legal defect. In so ruling, the BIA rejected eliminating convictions where the court's motive was either rehabilitative (e.g., a reward for good behavior) or to assist the noncitizen in avoiding deportation.

While the BIA originally held in *Matter of Ozkok* (1988) that some post-conviction adjustments could count for immigration purposes,<sup>46</sup> Congress enacted subsection 48(A) of IIRIRA with the explicit purpose of overturning *Ozkok*.<sup>47</sup> In *Matter of Roldan-Santoyo* (1999) and *Matter of Pickering* (2003), the BIA interpreted the new definition of subsection 48(A), holding that only the original conviction counted for immigration purposes, ignoring any post-conviction adjustments.<sup>48</sup>

Prior to IIRIRA, in *Matter of Ozkok*, the BIA held that there were three requirements for a conviction to count for immigration purposes:

- (1) a judge or jury has found the alien guilty or he has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilty [*sic*];
- (2) the judge has ordered some form of punishment, penalty, or restraint on the person's liberty to be imposed . . . ; and
- (3) a judgment or adjudication of guilt may be entered if the person violates the terms of his probation or fails to comply with the requirements of the court's order, without availability of further proceedings regarding his guilt or innocence of the original charge.<sup>49</sup>

In *Roldan-Santoyo*, the BIA had to interpret the changes made by IIRIRA and recognized that Congress wanted "uniformity in the treatment of" noncitizens with regard to the definition of a conviction and did not want different outcomes depending on the state where the noncitizen was convicted.<sup>50</sup> It noted that Congress had specifically removed the third prong of *Ozkok* as part of its definition of a convic-

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<sup>46</sup> *Matter of Roldan-Santoyo*, 22 I. & N. Dec. 512, 516 (B.I.A. 1999), *rev'd on other grounds sub nom.* Lujan-Armendariz v. I.N.S., 222 F.3d 728 (9th Cir. 2000) (citing *Matter of Ozkok*, 19 I. & N. Dec. 546, 551 n.6 (B.I.A. 1988)).

<sup>47</sup> See *infra* note 50 and accompanying text.

<sup>48</sup> *Matter of Pickering*, 23 I. & N. Dec. 621, 622 (B.I.A. 2003), *rev'd on other grounds sub nom.* *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006) (citing *Roldan-Santoyo*, 22 I. & N. Dec. 512) (listing examples of such adjustments, such as attempts to "expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt").

<sup>49</sup> *Ozkok*, 19 I. & N. Dec. 546, at 551–52 (B.I.A. 1988).

<sup>50</sup> Moore, *supra* note 19, at 683 (citing *Roldan-Santoyo*, 22 I. & N. Dec. at 521); Kanstroom, *supra* note 5, at 507–08.

tion.<sup>51</sup> The BIA then held that this statutory revision was intended to remove the immigration law effect of “states’ ameliorative statutes” (i.e., state post-conviction events).<sup>52</sup> Importantly, *Roldan-Santoyo* cited the House Conference Report on IIRIRA where Congress specifically cited *Ozkok* and discussed its decision to remove this third prong,<sup>53</sup> and held that the immigration courts should disregard state post-conviction mechanisms, designed to eliminate a conviction, that were permitted under *Ozkok*: “We thus have a clear indication that Congress intends that the determination of whether an alien is convicted for immigration purposes be fixed at the time of the original determination of guilt, coupled with the imposition of some punishment.”<sup>54</sup> Thus, even if the state no longer considered the noncitizen legally convicted under its own law, this would not matter when determining whether the noncitizen was convicted under subsection 48(A), as “federal courts are not to look to the various state rehabilitative statutes to determine whether a conviction exists for immigration purposes.”<sup>55</sup>

Subsequently, in *Matter of Pickering* (2003),<sup>56</sup> the BIA affirmed *Roldan-Santoyo*, rejecting as broadly as possible state measures to adjust the nature of the conviction.<sup>57</sup> On the other hand, it distinguished cases where convictions “had been vacated on the merits,” as those convictions are then rendered void under section 237 of the

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<sup>51</sup> *Roldan-Santoyo*, 22 I. & N. Dec. at 518.

<sup>52</sup> *Id.* at 518; see also Kanstroom, *supra* note 5, at 506 (identifying the desire that IIRIRA would “standardize the federal definition of a ‘conviction’ for immigration purposes”).

<sup>53</sup> H.R. REP. NO. 104-828, at 224 (1996) (Conf. Rep.).

<sup>54</sup> *Roldan-Santoyo*, 22 I. & N. Dec. at 521. In dissent, Board Member Villageliu argued that the BIA’s reading, in dicta, was overbroad and that the legislative history actually suggested a more limited desire by Congress to ensure that deferred adjudications still counted as convictions and that suspended sentences that were not “actually imposed” still counted and that neither the history nor the text “expressly evince[s] any will on the part of Congress to include all vacated or expunged criminal convictions within the definition of a conviction.” *Id.* at 530–32 (Villageliu, Board Member, dissenting) (quoting H.R. REP. NO. 104-828, at 224). Others have also argued the legislative history does not show that Congress meant to rule out all state post-conviction mechanisms for expunging a conviction. See Kanstroom, *supra* note 5, at 513, 513 n.108; Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 676, 676 n.92 (2015) (citing *Roldan-Santoyo*, 22 I. & N. Dec. at 529–46 (Villageliu, Board Member, dissenting)); AILA Brief, *supra* note 41, at 6 (noting the “singular purpose” of subsection 48(A)).

<sup>55</sup> *Roldan-Santoyo*, 22 I. & N. Dec. at 521–23.

<sup>56</sup> 23 I. & N. Dec. 621 (B.I.A. 2003), *rev’d on other grounds sub nom.* *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006). Note that *Pickering v. Gonzales* cites other circuits whose rulings were consistent with the BIA in *Pickering*. See *Pickering*, 465 F.3d at 266 (citing the Fifth, Sixth, Seventh, and Ninth Circuits). *Pickering* itself also cites both the First and Second Circuit’s interpretations of subsection 48(A). See *infra* notes 189–99 and accompanying text.

<sup>57</sup> See *Pickering*, 23 I. & N. Dec. at 622 (citing *Roldan-Santoyo*, 22 I. & N. Dec. 512).

INA.<sup>58</sup> Thus, the holding in *Pickering* distinguishes between “convictions vacated on the basis of a procedural or substantive defect . . . and those vacated because of post-conviction events, such as rehabilitation or immigration hardships.”<sup>59</sup> Thus, immigration courts must analyze the legal reasoning for the state post-conviction relief to determine if the conviction counts for immigration purposes under subsection 48(A).

## 2. Sentences Under Subsection 48(B)

Prior to IIRIRA, sentence modifications counted for immigration purposes.<sup>60</sup> After IIRIRA, the BIA, as it had done with convictions under subsection 48(A), had to determine the extent to which Congress had changed the definition of a sentence under subsection 48(B). Although the BIA held that, after IIRIRA, only the original conviction mattered under subsection 48(A), the Board held that state post-conviction sentencing adjustments still counted despite several attempts to persuade them otherwise.<sup>61</sup>

For most of the INA’s history, sentence adjustments counted for immigration purposes.<sup>62</sup> In *Matter of Martin*, the BIA held that because, under state law, the initial sentence “is regarded as void and of no force and effect . . . [,] [t]he new, reduced sentence stands as the only valid and lawful sentence.”<sup>63</sup> At the same time, *Matter of Castro* and *Matter of Esposito* held that where the court’s suspension of the “execution” of the sentence did not count for immigration purposes, the suspension of the “imposition” of the sentence did.<sup>64</sup> IIRIRA very

<sup>58</sup> *Id.* at 622–23 (affirming *Matter of Rodriguez-Ruiz*, 22 I. & N. Dec. 1378 (B.I.A. 2000)).

<sup>59</sup> *Id.* at 624. This was different from *Roldan-Santoyo*, which had only considered a “state rehabilitative statute which purports to erase the record of guilt.” *Id.* at 623 (quoting *Roldan-Santoyo*, 22 I. & N. Dec. at 523). As Board Member Villageliu noted, the BIA’s broader statement about post-conviction relief in *Roldan-Santoyo* was only dicta, *see supra* note 54, whereas it was necessary to the holding of *Pickering*. *See Pickering*, 23 I. & N. Dec. at 623. *Pickering* also cites the precedents of several circuit courts to justify its position. *Id.* at 623–24 (citing the First, Second, Fifth, Sixth, and Ninth circuits); *see also* Kanstroom, *supra* note 5, at 519–20 (describing the consolidation of this rule).

<sup>60</sup> AILA Brief, *supra* note 41, at 7–8.

<sup>61</sup> *See id.* at 3, 8–9 (citing *Matter of Cota-Vargas*, 23 I. & N. Dec. 849 (B.I.A. 2005)).

<sup>62</sup> *See id.* at 4–5, 7–8 (citing numerous BIA precedents prior to *Thomas & Thompson*); *see also* Moore, *supra* note 19, at 684–85.

<sup>63</sup> *Matter of Martin*, 18 I. & N. Dec. 226, 227 (B.I.A. 1982); *see also* AILA Brief, *supra* note 41, at 7–8 (describing the lasting significance of *Martin*).

<sup>64</sup> *See Matter of Esposito*, 21 I. & N. Dec. 1, 3 (B.I.A. 1995) (citing *Matter of Castro*, 19 I. & N. Dec. 692, 694–95 (B.I.A. 1988)); *see also* *United States v. Limones-Valles*, No. 16-CR-4060, 2016 WL 11383834, at \*11 (N.D. Iowa Oct. 19, 2016) (describing the difference between suspending the execution of a sentence, suspending the imposition of a sentence, and refraining from imposing any sentence at all as part of a “stay of imposition”), *report and recommendation adopted by* 2016 WL 7489446 (N.D. Iowa Dec. 30, 2016).

clearly eliminated the effect of any suspended sentence, as the statutory language stated that the sentence would not be affected by “any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.”<sup>65</sup> But it remained unclear whether the statute changed the effect of post-conviction sentence modifications.<sup>66</sup>

In *Matter of Song* (2001), the BIA affirmed *Matter of Martin* despite IIRIRA, ruling that if a noncitizen submits new evidence that a state court has subsequently “revised” the length of a sentence *nunc pro tunc*, the later sentence could replace the original sentence for judging eligibility for deportation under subsection 48(B).<sup>67</sup> The opinion seems to be based implicitly on a literal textualism of the “term of imprisonment” as announced by the state court at the time of the removal proceedings.<sup>68</sup> However, while it is literally true that the state sentence issued no longer possesses a certain length of time as before, rendering the previous sentence “a historic legal fiction,”<sup>69</sup> the BIA provided little reasoning for why the subsection 48(B) should be read in such a manner. However, the BIA explicitly rejected that the logic of *Roldan-Santoyo*, which governed convictions under subsection 48(A), should apply to sentences under subsection 48(B).<sup>70</sup> *Pickering* was then subsequently decided in 2003, after *Song*. Even though the BIA in *Pickering* held that changes to an initial conviction under subsection 48(A) would only matter for immigration purposes if due to an underlying legal defect, the BIA initially did not transpose such a logic to the definition of a sentence under subsection 48(B).<sup>71</sup> In *Matter of Cota-Vargas* (2005), the BIA held that while the text and legislative history of subsection 48(A) demonstrated the intent of Congress to eliminate the effect of post-conviction state rehabilitative measures on the definition of “conviction,” as outlined in *Roldan-Santoyo*<sup>72</sup> and affirmed by several federal courts of appeals,<sup>73</sup> there was no such language in subsection 48(B) evincing such a congressional intent.<sup>74</sup> Thus, the court declined to extend the *Pickering* rationale to sentences under subsection 48(B), likewise holding that other

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<sup>65</sup> INA § 101(a)(48)(B), 8 U.S.C. § 1101(a)(48)(B); AILA Brief, *supra* note 41, at 7–8.

<sup>66</sup> See AILA Brief, *supra* note 41, at 8.

<sup>67</sup> See *Matter of Song*, 23 I. & N. Dec. 173, 174 (B.I.A. 2001) (holding that the term of imprisonment under INA § 101(a)(43)(G) was determined by the newer sentence); AILA Brief, *supra* note 41, at 8.

<sup>68</sup> See *infra* notes 204–05 and accompanying text.

<sup>69</sup> Vastine, *supra* note 21, at 64.

<sup>70</sup> See Moore, *supra* note 19, at 684–85; AILA Brief, *supra* note 41, at 8; *Song*, 23 I. & N. Dec. at 174.

<sup>71</sup> AILA Brief, *supra* note 41, at 8–9.

<sup>72</sup> See *supra* notes 48–55 and accompanying text.

<sup>73</sup> See *supra* notes 56, 59.

<sup>74</sup> See *Matter of Cota-Vargas*, 23 I. & N. Dec. 849, 852 (B.I.A. 2005).

forms of “modifications” were not prohibited as “suspensions” were under subsection 48(B).<sup>75</sup>

While the argument for the difference was based on the text and history of subsection 48(B), the inconsistency of *Pickering*’s application to these different subsections is still doctrinally confusing. The rule permits a state judge to exercise their discretion to limit a non-citizen’s sentence but not their underlying conviction, such that the noncitizen can avoid immigration consequences. *Matter of Thomas & Thompson* rectified this doctrinal confusion by overruling both *Matter of Song* and *Matter of Cota-Vargas*.<sup>76</sup>

### C. *Matter of Thomas & Thompson*

In *Matter of Thomas & Thompson* (2021), noncitizen Joseph Lloyd Thompson was in removal proceedings pursuant to being rendered deportable for committing “a crime of violence” with an accompanying prison sentence of twelve months.<sup>77</sup> During these removal proceedings, Thompson petitioned a Georgia state court on a “Motion to Modify Sentence” to reduce his original sentence to eleven months and twenty-seven days, years after he had served the sentence. Even though “Thompson did not identify any defect in the original criminal proceeding,” he was granted the motion.<sup>78</sup> Despite concerns that the state court had granted the motion with Thompson’s immigration consequences in mind, the BIA held that under *Cota-Vargas*’s interpretation of subsection 48(B), they had to honor the modified sentence, which the state now considered the term of imprisonment.<sup>79</sup>

Attorney General Barr reversed the Board, overruling the guiding precedents, and held that there was no basis in the statute for crediting state adjustments of the term of imprisonment.<sup>80</sup> After recounting *Pickering*’s analysis of why most state post-conviction

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<sup>75</sup> See *id.* at 851–52.

<sup>76</sup> *Matter of Thomas & Thompson*, 27 I. & N. Dec. 674, 674 (Att’y Gen. 2019). It also overruled *Matter of Estrada*, which had developed a test for determining whether a “clarification” of an order was valid for a noncitizen’s deportability. *Id.* at 674–75. The Attorney General noted that part of the frustration with these various precedents was that figuring out if a state order was a modification, which was always honored for immigration purposes, and a clarification, which was only sometimes honored, “turn[ed] on how the state court itself labels the order, not on any objective distinctions between the two categories.” *Id.* at 675.

<sup>77</sup> *Id.* at 678 (citing INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F)). Vernon Thomas had originally received a clarification of his sentence from twelve months to eleven months and twenty-eight days, but the immigration judge did not accept the clarification as valid under the *Estrada* factors. *Id.*

<sup>78</sup> *Id.* at 679.

<sup>79</sup> See *id.* at 679.

<sup>80</sup> See *id.* at 680–81.

mechanisms cannot alter or adjust what is considered the “conviction” at “the original determination of guilt,”<sup>81</sup> the Attorney General suggested that a similar textual move occurs in subsection 48(B) when the length of imprisonment is determined “regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.”<sup>82</sup> Moreover, he argues that subsection 48(A) works in tandem with 48(B).<sup>83</sup> He argues that the intent of subsection 48, as a whole, suggests that “Congress made clear that immigration consequences should flow from the original determination of guilt.”<sup>84</sup> He likewise held that, as in *Pickering*, the only post-conviction adjustments to sentences that would be recognized for immigration purposes would be those made pursuant to an underlying legal defect that nullifies the sentence.<sup>85</sup> He explicitly rejected changes made for “rehabilitative or immigration reasons.”<sup>86</sup> He also noted the potential technical difficulty created when federal immigration judges have to closely interpret state court procedures to figure out what sentence counts for state purposes.<sup>87</sup>

But more importantly, Attorney General Barr’s analysis rested on the premise that the state cannot change “Congress’s judgment as to whether the alien should be removed” because they “do not change the underlying gravity of the alien’s action.”<sup>88</sup> To justify this proposition, the Attorney General frequently cited the importance of “uniformity in the law” and “inconsistencies among the state[s],”<sup>89</sup> while dismissing any federalism concerns. According to Barr, such a reading of subsection 48(B) does not “‘arrogate’ to the federal government ‘the power to determine the effectiveness of state court orders.’ . . . [It] simply determines the effect of that order for the purposes of federal immigration law.”<sup>90</sup>

*Thomas & Thompson* elicits a larger question about the state’s role in immigration consequences. The Attorney General’s interest, in part, was to ensure that “similarly situated aliens in different states

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<sup>81</sup> *Id.* at 681–82.

<sup>82</sup> *Id.* at 682 (quoting INA § 101(a)(48)(B), 8 U.S.C. § 1101(a)(48)(B)).

<sup>83</sup> *See id.* (explaining that section 48(B) contains similar language to subsection 48(A)).

<sup>84</sup> *Id.*

<sup>85</sup> *See id.* at 683.

<sup>86</sup> *Id.*

<sup>87</sup> *See id.* at 682.

<sup>88</sup> *Id.* at 683 (citing *Saleh v. Gonzales*, 495 F.3d 17, 25 (2d Cir. 2007)).

<sup>89</sup> *Id.* at 683 (first citing *Herrera-Inirio v. INS*, 208 F.3d 299, 305 (1st Cir. 2000); and then citing *Pinho v. Gonzales*, 432 F.3d 193, 205 (3d Cir. 2005)).

<sup>90</sup> *Id.* at 688. He likewise held that the Full Faith and Credit Act does not apply, holding in particular that the Act is not implicated in terms defined in a federal statute. *Id.* at 686 (first citing *Herrera-Inirio*, 208 F.3d at 307; and then citing *Saleh*, 495 F.3d at 26.

will face similar consequences.”<sup>91</sup> But he also assumed a priori that the state has no business exercising its influence on immigration matters.<sup>92</sup> Put more bluntly, the Attorney General did not want state judges, uncomfortable with the deportation consequences of convictions, changing terms of imprisonment such that those convicted can avoid such consequences.<sup>93</sup>

The normative question here is separate from the legal one. Ultimately, *Thomas & Thompson*’s logic rests on the assumption that the immigration code requires federal uniformity in all aspects of immigration law because “the state court does not have the authority to make immigration-law determinations.”<sup>94</sup> This concurrently implies that the federal government cannot delegate decisionmaking power to the states. As the next Part will argue, however, such an interpretation not only ignores history of constitutional interpretation of the immigration power, but it also ignores the extent to which the immigration code *already* delegates decisionmaking to the states and incorporates its determinations.<sup>95</sup>

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<sup>91</sup> *Id.* at 684.

<sup>92</sup> *Id.* at 683 (citing *Saleh*, 495 F.3d at 25).

<sup>93</sup> I want to acknowledge that this idea came up in Professor Adam Cox’s class on Immigration and the Rights of Noncitizens. See also Moore, *supra* note 19, at 701; Cade, *supra* note 31, at 401; Kanstroom, *supra* note 5, at 520 (citing *Matter of Marroquin-Garcia*, 23 I. & N. Dec. 705, 713 (Att’y Gen. 2005)) (noting state judges’ adjustments of post-conviction consequences often lack a basis in a legal defect).

<sup>94</sup> *Thomas & Thompson*, 27 I. & N. Dec. at 680. Although, some have argued uniformity is constitutionally required based in Article I, § 8’s requirement of a “uniform Rule of Naturalization.” Ava Ayers, *Discriminatory Cooperative Federalism*, 65 VILL. L. REV. 1, 18–24 (2020) (arguing that the “uniform rule” of the Naturalization Clause limits the ability of the federal government to devolve powers to the state that would disrupt “uniform” rules of immigration). See generally Iris Bennett, Note, *The Unconstitutionality of Nonuniform Immigration Consequences of “Aggravated Felony” Convictions*, 74 N.Y.U. L. REV. 1696 (1999); Christina LaBrie, Note, *Lack of Uniformity in the Deportation of Criminal Aliens*, 25 N.Y.U. REV. L. & SOC. CHANGE 357 (1999). While the Court has never held this, the clause still looms in the background of immigration federalism cases. See *Arizona v. United States*, 567 U.S. 387, 394 (2012) (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936)) (“The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. This authority rests, in part, on the National Government’s constitutional power to ‘establish an [sic] uniform Rule of Naturalization.’”).

<sup>95</sup> Kanstroom, *supra* note 5, at 494; Bleuzé, *supra* note 30, at 847. See *infra* Section II.C. I would like to acknowledge that Professor Cox first alerted me to the concept that the immigration code incorporates state determinations in many ways.



## II

### IMMIGRATION LAW IN EARLY AMERICA AND THE RISE OF FEDERAL DOMINATION OF IMMIGRATION LAW

Since the 1880s, the federal government has, in theory, exclusively controlled immigration law.<sup>96</sup> However, such an arrangement was neither envisioned by the Founders nor had its basis in the historical practice of the early years of the United States, which arguably envisioned a robust role for the states in immigration decisionmaking. Likewise, the Constitution does not explicitly provide an exclusive federal immigration power.<sup>97</sup> Given how firmly rooted the idea of near federal exclusivity is in immigration law jurisprudence,<sup>98</sup> and how reluctant courts are to any suggestion that states should play a role in immigration law,<sup>99</sup> the existence of such a discrepancy should make us consider whether the Constitution really allocates power in this manner. As such, a preemption analysis is required to determine the nature of the federal control.

Professor Clare Huntington argued that there are three types of preemption: structural, dormant, and statutory.<sup>100</sup> Under structural preemption, only the federal government can control the power.<sup>101</sup> Under dormant power preemption, the federal government has control over the power but can delegate the power to the states as long as it is “activating an underlying state authority.”<sup>102</sup> Under statutory preemption, states can act in an area of “traditional state competence” unless the federal government enacts a particular statute stripping the states of such a power.<sup>103</sup> Huntington argued, and this Note agrees, that only one type of preemption mandates exclusive federal power: structural preemption based in the Constitution.<sup>104</sup>

The Court often speaks of the immigration power as if it is a case of structural preemption:

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part

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<sup>96</sup> See *infra* Section II.B.

<sup>97</sup> See *infra* Section II.B.

<sup>98</sup> See, e.g., *Arizona*, 567 U.S. at 394 (“The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens.”).

<sup>99</sup> See, e.g., *id.* at 416 (“The National Government has significant power to regulate immigration. . . . Arizona may have understandable frustrations with the problems caused by illegal immigration while that *process* continues, but the State may not pursue policies that undermine federal law.”).

<sup>100</sup> Huntington, *supra* note 5, at 808–11.

<sup>101</sup> *Id.* at 808–09.

<sup>102</sup> *Id.* at 809–10.

<sup>103</sup> *Id.* at 810–11.

<sup>104</sup> *Id.* at 808–11.

of these sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be *granted away* or restrained on behalf of any one.<sup>105</sup>

This Part will prove that this idea is deeply flawed. It will analyze the history of the states' role in immigration in early America and argue that for the first sixty years of American history, the states were explicitly empowered to make immigration decisions. Moreover, when the federal government did begin to dominate immigration, its rationale for this dominance laid on bare foundations. Thus, while the federal government may now choose to preempt states from regulating deportation, there is no reason why the federal government needs to retain this power exclusively and why it cannot delegate decision-making to the states. In fact, several provisions of the immigration code would be unconstitutional were this delegation not possible.

### A. *History of State Regulation of Immigration*

While later cases claim that federal dominance in immigration law was built into the Constitution, the actual historical practice under the Founding generation bears little resemblance to such a claim. Gerald L. Neuman points out that it is a “myth” that the United States had open borders prior to the passage of federal immigration legislation in the 1870s and 1880s.<sup>106</sup> As such, the argument that immigration law only began with the federal assertion of authority, and that the Founders had not contemplated the issue of immigration, is incorrect.<sup>107</sup> Moreover, given the assertion of federal dominance, it has also masked how some powers related to foreign security have been retained by the states while “immigration law” has not.<sup>108</sup> Thus, it is important to analyze both how the Founders viewed the balance between state and federal governments in immigration and what role states actually played in immigration prior to the foundational immigration cases starting in the 1880s.

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<sup>105</sup> See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) (emphasis added); Nikolas Bowie & Norah Rast, *The Imaginary Immigration Clause 5* (unpublished manuscript) (on file with author) (quoting *Chae Chan Ping*).

<sup>106</sup> Neuman, *supra* note 9, at 1833–34.

<sup>107</sup> See *id.* at 1834, 1838–39 (decrying some contemporary scholars' use of the myth of open borders to suggest that the Founders never considered “unlawful migration”); see also *infra* Section II.A.1.

<sup>108</sup> *Id.* at 1839–40 (“States retain other powers whose abuse could have international repercussions, such as taxation of foreign corporations and prosecution of aliens for local crimes.”); see also *infra* note 146.

## 1. *Founding Skepticism of the Deportation Power*

In *The Federalist No. 17*, Alexander Hamilton argues that the Constitution grants power to the federal government over certain areas in which its competency would be greater, such as “commerce, finance, negotiation [sic] and war.”<sup>109</sup> It grants to the states, on the other hand, power over certain areas that the federal government is less competent to administer, particularly the police power.<sup>110</sup>

Where the immigration power lies in this schematic is less clear.<sup>111</sup> While the federal government generally did not pass immigration statutes in the Founding era,<sup>112</sup> the Alien Act of 1798, which gave the President unilateral power to deport noncitizens deemed treasonous from friendly nations, reveals the Founders’ divisions.<sup>113</sup> When debating the bill, proponents tried to identify a variety of constitutional bases for deportation, including the war power, the defense power, the Commerce Clause, the Necessary and Proper Clause, and the Migration Clause.<sup>114</sup> Some defenders of the Alien Act also argued that the noncitizens had “no rights” under the Constitution with which to constrain that power or that the Constitution’s limitation of the federal government only concerned “domestic affairs.”<sup>115</sup>

In contrast, detractors believed that since the Constitution, as a document of limited government, had not explicitly given that power to the federal government, it was retained by the states.<sup>116</sup> James

<sup>109</sup> THE FEDERALIST NO. 17, at 75–76 (Alexander Hamilton) (Terence Ball ed., 2003). I want to acknowledge that this idea came from Professor Stephen Holmes’s class on THE FEDERALIST.

<sup>110</sup> See *id.*, at 77 (explaining that because state governments are “the immediate and visible guardian of life and property,” they are better positioned to supervise criminal and civil justice rather than federal governments).

<sup>111</sup> See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 99–100 (2002) (describing the early debate between the states’ claim under the police power and the federal government’s claim under various clauses of the Constitution).

<sup>112</sup> See Neuman, *supra* note 9, at 1834 (explaining that states predominantly regulated the “transborder movement of persons”); see also Cleveland, *supra* note 111, at 81 (“There is little reason to believe that the Framers contemplated creating a federal immigration power.”).

<sup>113</sup> See Cleveland, *supra* note 111, at 87–88, 88 n.616. See generally Gerald Neuman, *Whose Constitution?*, 100 YALE L. J. 909 (1991).

<sup>114</sup> Cleveland, *supra* note 111, at 89–90. Some defenders of the bill even acknowledged that immigration “under normal circumstances” was a state power. Matthew J. Lindsay, *Immigration, Sovereignty, and the Constitution of Foreignness*, 45 CONN. L. REV. 743, 762 & n.97 (2013) (first citing 9 ANNALS OF CONG. 1986 (1799) (statement of Rep. Otis); and then citing *id.* at 1991 (statement of Rep. Harper)).

<sup>115</sup> Cleveland, *supra* note 111, at 92–94 (quoting and discussing various congressional reports debating the Alien Act).

<sup>116</sup> *Id.* at 89 (citing 8 ANNALS OF CONG. 1955 (1798) (statement of Rep. Albert Gallatin)); see also *id.* at 95–96 (explaining that opponents of the Alien Act argued that

Madison argued that the power to expel non-enemy noncitizens once present in the country resides in the “municipal law, and must be tried and punished according to that law only,”<sup>117</sup> and that the protections of due process in the Constitution applied to noncitizens, noting the use of the word “persons,” not “citizens.”<sup>118</sup> Once noncitizens had entered the United States, their right to remain vested unless there was a criminal ground to take it away.<sup>119</sup>

While the constitutionality of the Alien Act was never determined before it lapsed,<sup>120</sup> Madison’s Report casts serious doubt that there was a consensus among the Founders about the immigration power. More importantly, it cautions that just because the federal government’s affairs with other nations are implicated in immigration matters, does not mean the federal government possesses the power exclusively, especially in matters of deportation.<sup>121</sup>

## 2. *Practice of States in the Early Years of America*

Given the lack of federal regulation of immigration in the early years of America, regulation of immigration largely occurred through state law. In Professor Gerald L. Neuman’s research, states passed many laws that were not called “immigration laws” but were designed to restrict access of certain immigrants (as well as others) to that state.<sup>122</sup> In particular, laws that implicated the “regulation of the movement of criminals; public health regulation; regulation of the movement of the poor; regulation of slavery; and other policies of racial subordination.”<sup>123</sup>

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although the Constitution granted the federal government the power to deport enemy noncitizens during war time, it did not have the power to deport friendly noncitizens).

<sup>117</sup> *Id.* at 94 (quoting James Madison, Report on the Virginia Resolutions, in 4 DEBATES IN THE SEVERAL STATES CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 556 (J.B. Lipincott Co. 2d ed. 1907) [hereinafter Madison’s Report]).

<sup>118</sup> *Id.* at 96–97, 96 n.659, 97 n.660 (citing 8 ANNALS OF CONG. 1956 (1798) (statement of Rep. Albert Gallatin)).

<sup>119</sup> *Id.* at 94–95 (citing Madison’s Report, *supra* note 117, at 556). A final reason, less relevant for the purposes of this Note, was that the Migration Clause prohibited any such act until 1808. *Id.* at 92 n.638.

<sup>120</sup> *Id.* at 98.

<sup>121</sup> Madison’s Report, *supra* note 117, at 557 (“[T]he offence being committed by the individual, not by his nation, and against the municipal law, not against the law of nations,—the individual only, and not the nation is punishable; and the punishment must be conducted according to the municipal law, not according to the law of nations.”); *cf.* Trump v. Hawaii, 138 S. Ct. 2392, 2446 (2018) (Sotomayor, J., dissenting) (“Although national security is unquestionably an issue of paramount public importance, it is not ‘a talisman’ that the Government can use ‘to ward off inconvenient claims—a ‘label’ used to ‘cover a multitude of sins.’” (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1862 (2017))).

<sup>122</sup> Neuman, *supra* note 9, at 1837–38; *see generally id.* at 1841–84.

<sup>123</sup> *Id.* at 1841. Regarding “other policies of racial subordination,” a big concern was the migration of free Black people into slaveholding states. *Id.* at 1865–66. Southern states

In the early years of America, it was not only acceptable for states or municipalities to prevent anyone with a criminal conviction from entering its borders (even United States citizens), but many states regularly banished or conditionally pardoned (in exchange for self-exile) those convicted of crimes,<sup>124</sup> and those states that limited this punishment usually only limited it for American citizens.<sup>125</sup> Thus, in the early years of the United States, states exercised the essential functions of exclusion and deportation against those convicted of crimes, including noncitizens, without any claims that this was constitutionally deficient.<sup>126</sup>

Today, states have a diminished right to exclude anyone, and so the Court has effectively overruled such state power more broadly, leaving the federal government as the only sovereign that can fill the void.<sup>127</sup> Nonetheless, history reveals that in the early years of America, the Founding generation and beyond believed that states had a critical role to play in deportation decisions while having great skepticism that the federal government possessed such a power.<sup>128</sup>

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were terrified that the migration of free Black people would lead to uprisings by or the flight of enslaved people. *Id.* at 1867–69.

<sup>124</sup> *Id.* at 1841–42, 1842 n.46, 1844–45, 1845 n.63. Neuman notes that many British loyalists were expelled from the United States and that dicta from the Supreme Court approved of this. *Id.* at 1844 n.62 (first citing *Cooper v. Telfair*, 4 U.S. 14, 19 (1800) (Patterson, J.); and then citing *id.* at 20 (Cushing, J.) (“The right to confiscate and banish, in the case of an offending citizen, must belong to every government.”)).

<sup>125</sup> *Id.* at 1844–45, 1845 n.63.

<sup>126</sup> Some might argue that the absence of federal regulation, and the concurrent assertion of state regulation, in immigration matters stems not from Founding approval, but from a fear of what regulating immigration at the federal level could implicate, especially the movement of free Black people. *See infra* note 129 and accompanying text. However, the Supreme Court had affirmed that the state has the power to remove those considered a threat to its well-being even though such thinking is deeply problematic. *See id.* at 1890 (first citing *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 625 (1842); and then citing *Moore v. Illinois*, 55 U.S. (14 How.) 13, 18 (1853)); *see also* Lindsay, *supra* note 114 at 776–77 (citing Matthew J. Lindsay, *Preserving the Exceptional Republic: Political Economy, Race, and the Federalization of American Immigration Law*, 17 *YALE J.L. & HUMAN.* 181, 191 (2005)) (noting that immigration was also viewed as a local issue in the early nineteenth century, in part, because many believed the success of an immigrant largely hinged on the treatment received in a given locality).

<sup>127</sup> *See* Neuman, *supra* note 9, at 1847 n.72 (citing *Edwards v. California*, 314 U.S. 160 (1941) (holding that people of low income have a right to travel)).

<sup>128</sup> *But see* Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 *N.Y.U. L. REV.* 493, 559–60, 560 n.343 (2001) (pointing out that such action might have been unconstitutional and that, even if it was constitutional at the time enacted, that the Reconstruction Amendments might have eliminated such power). It is also worth noting that the historical power to exclude does not necessarily imply any power to affirmatively include—I want to acknowledge Daphne Fong for this point.

## B. *The Rise of the Federal Immigration Power*

What then was the basis for the federal dominance in immigration law that came to pass and what is the legitimacy of its constitutional foundations? What began as a search for an enumerated power mutated into an inherent power argument with little basis in the Constitution.

Throughout the nineteenth century, the Supreme Court was deeply conflicted about whether the Constitution spoke to the immigration power. In the early part of the century, the Court often worried about how federal regulation of the movement of people would implicate the movement of both enslaved people and free Black people and so evaded the issue to avoid triggering a civil war.<sup>129</sup> At the same time, the Court originally saw immigration as a local issue implicating the police power.<sup>130</sup> However, in the *Passenger Cases*, the Court eventually held that the Commerce Clause covered the migration of people.<sup>131</sup> The Justices seemed most convinced that the federal government had to control immigration policy because of fears that East Coast states could limit immigration to Western states promoted by the federal government and, consequently, impair the growth of the United States.<sup>132</sup> Nascent claims of the need for inherent federal power also began to emerge<sup>133</sup> as well as claims of field preemption.<sup>134</sup> As the United States required immigrants to extend the Western

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<sup>129</sup> See Neuman, *supra* note 9, at 1889–90 (citing a letter from Chief Justice John Marshall, explicitly stating that he avoided ruling on the constitutionality of regulation of movement of free Black people).

<sup>130</sup> See Lindsay, *supra* note 114, at 778–81 (citing *New York v. Miln*, 36 U.S. 102, 141 (1837) (describing how the Justices viewed the management of poor immigrants as a matter of local safety and a burden that the state would have to bear)); Neuman, *supra* note 9, at 1887 (describing how the Court viewed such tasks as the duty of the state); Cleveland, *supra* note 111, at 100–03.

<sup>131</sup> Cleveland, *supra* note 111, at 103–06, 103 n.702 (citing *The Passenger Cases*, 48 U.S. 283, 408 (1849)).

<sup>132</sup> See *id.* at 103–04 (citing *Passenger Cases*, 48 U.S. at 461 (Grier, J., concurring)). But see Lindsay, *supra* note 114, at 783 (arguing that the majority preserved *Miln*'s proposition that states could exclude noncitizens with a reason based in the police power, such as for reasons of poverty or public health—just not without any reason at all).

<sup>133</sup> Cleveland, *supra* note 111, at 104 (citing *Passenger Cases*, 48 U.S. at 423–24, 427 (Wayne, J., concurring)) (highlighting how Justice Wayne argued that the Commerce Clause “incorporat[es]” the idea of inherent sovereignty).

<sup>134</sup> See *Passenger Cases*, 48 U.S. at 442 (Catron, J., concurring) (discussing how various federal laws regulating flow of goods and people from foreign nations indicate that “Congress has covered, and has intended to cover, the whole field of legislation” over immigration). Justice Catron tied this preemption specifically to the purpose of fostering immigration to the United States, fearing the states’ ability to defy this purpose. *Id.* at 442–43; see also Lindsay, *supra* note 114, at 785–86 (describing how several Justices’ opinions find an overall federal pro-immigration purpose that preempts any state exclusion even if the immigration power is not exclusive).

Frontier, the federal government's need for immigration was given more credence than a state's tolerance for immigrants.

After the Civil War, when the Justices were no longer anxious about how immigration law implicated the institution of slavery, the argument for "exclusive federal power" began to grow.<sup>135</sup> In *Henderson v. New York*,<sup>136</sup> the Court struck down state immigration measures in a unanimous decision, locating this power in the Commerce Clause, once again discussing the importance of immigration to American commerce.<sup>137</sup> The Court also held that this Commerce Clause power was exclusively federal.<sup>138</sup>

The Court came up with the same rationale to strike down a California tax statute in *Chy Lung v. Freeman*.<sup>139</sup> While the Court again invoked the Commerce Clause,<sup>140</sup> the Court also began to hint at how treatment of immigrants after they enter the United States might implicate foreign affairs.<sup>141</sup> Here, the Court was solicitous about how one state's actions might affect the whole country's economic and political relationships with other countries, as it believed the United States should speak with "one voice": "If that government should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer or all the Union?"<sup>142</sup> The Court also manifestly began to argue that the states should not have a role in immigration matters: "The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to

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<sup>135</sup> See Cleveland, *supra* note 111, at 106 (explaining how the Civil War and the Fourteenth Amendment eliminated any "questions regarding the power of states to regulate the entry of" enslaved people and made the Court more willing to find that the Foreign Commerce Clause encompassed exclusive federal authority over immigration).

<sup>136</sup> 92 U.S. 259 (1875).

<sup>137</sup> Cleveland, *supra* note 111, at 107–08 & n.733 (citing *Henderson*, 92 U.S. at 270) (highlighting how the Court in *Henderson* emphasized that immigration has become an aspect of commerce with foreign nations as well as its significance to the national economy).

<sup>138</sup> See *id.* at 108 (explaining that the Court in *Henderson* held that Congress held exclusive power over immigration pursuant to the Foreign Commerce Clause); see also Huntington, *supra* note 5, at 823 n.151 (citing *Henderson*, 92 U.S. at 272–74) (explaining that the Court in *Henderson* held that Congress has exclusive authority over immigration).

<sup>139</sup> Cleveland, *supra* note 111, at 108–09 (citing *Chy Lung v. Freeman*, 92 U.S. 276 (1875)).

<sup>140</sup> *Id.* at 109 (citing *Chy Lung*, 92 U.S. at 280).

<sup>141</sup> See *id.* at 109 (citing *Chy Lung*, 92 U.S. at 279–80) (noting how the *Chy Lung* Court feared that the state statute could cause conflicts between the United States and other countries); Spiro, *Demi-Sovereignities*, *supra* note 5, at 137–38, 154 (same). Cleveland also emphasizes the Court's fear of "unequal and arbitrary state treatment" for noncitizens. See Cleveland, *supra* note 111, at 109.

<sup>142</sup> See Spiro, *Demi-Sovereignities*, *supra* note 5, at 138 (quoting *Chy Lung*, 92 U.S. at 279–80); see also *id.* at 134–44, 144 n.96 (describing this opinion as the "one voice" argument); Huntington, *supra* note 5, at 813 (same).

Congress, and not to the States.”<sup>143</sup> While Madison had warned in his *Report* to be suspicious of foreign affairs arguments made on behalf of immigration matters,<sup>144</sup> the Court, when faced with the potential exclusion of Chinese noncitizens in contradiction to U.S. treaties,<sup>145</sup> decided that a very real foreign affairs issue mandated national oversight.<sup>146</sup> Here, the Court was staking a claim for the federal exclusivity of the immigration power.<sup>147</sup> Thus, the Court deemed the state’s sovereign authority to expel noncitizens insignificant compared to quenching America’s thirst for immigrant labor,<sup>148</sup> grasping at the Commerce Clause and the foreign affairs power to supply constitutional foundations.<sup>149</sup>

However, as states saw the Court swat down their de facto exclusion laws, political pressure built for a national exclusion project.<sup>150</sup> With the passage of the Chinese Exclusion Acts, the Court had to develop a firm rationale for the federal government’s power to

<sup>143</sup> *Chy Lung*, 92 U.S. at 280. Michael J. Wishnie emphasizes this quote to argue that immigration law is the exclusive province of the federal government and cannot be “devolve[d]” to the states. Wishnie, *supra* note 128, at 529–30.

<sup>144</sup> See Madison’s Report, *supra* note 117, at 557 (“[T]he offence being committed by the individual, not by his nation, and against the municipal law, not against the law of nations,—the individual only, and not the nation is punishable; and the punishment must be conducted according to the municipal law, not according to the law of nations.”).

<sup>145</sup> See Cleveland, *supra* note 111, at 112–13 (discussing how the 1868 Burlingame Treaty with China encouraged significant Chinese immigration to America).

<sup>146</sup> See Spiro, *Demi-Sovereignties*, *supra* note 5, at 138 (discussing how *Chy Lung* “elevated the issue of immigration to a plane implicating, at least in theory, the very survival of the nation”). However, Peter J. Spiro notes that the Court left in place other state laws that “discriminated against legal resident aliens for purposes of land ownership, employment on public works projects, and state licensing schemes” while noting the lower likelihood of conflict with other countries based on these laws. See *id.* at 139–40; see also *supra* note 109 and accompanying text (noting how Alexander Hamilton thought commerce, finance, negotiations with foreign powers, and war fell within the federal government’s ambit of authority but was silent on the issue of immigration); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 262–63 (noting how in the Court’s history, it has invoked the foreign affairs rationale under the plenary power doctrine without actually analyzing how the law impacts foreign affairs).

<sup>147</sup> Legomsky, *supra* note 146, at 267.

<sup>148</sup> See Cleveland, *supra* note 111, at 112 (describing how Chinese immigration was explicitly encouraged in order to build the transcontinental railroad).

<sup>149</sup> Note, however, that one could make a “necessary and proper” argument given how states’ actions, permitted under the police power in a vacuum, were deliberately interfering with efforts to expand commerce, a national domain according to Hamilton, and thus, required federal preemption. See *supra* note 109 and accompanying text. Clare Huntington argues that rather than structural preemption, the Supreme Court precedent affirming federal control is actually based in statutory preemption, whose constitutional authority, presumably, would be the necessary and proper clause. See *infra* Section II.C.

<sup>150</sup> Cleveland, *supra* note 111, at 115–17.



exclude and, eventually, to deport. The Court did so without reference to any enumerated power.

In *Chae Chan Ping*, the country's inherent authority as a nation became the foundation for the federal government's power to exclude noncitizens.<sup>151</sup> The Court, unanimously, believed that exclusion was necessary for a country's "self-preservation."<sup>152</sup> Thus, the power to exclude was not only nationalized but justified outside of the text of the Constitution.<sup>153</sup> The Court specifically saw immigrants as "vast hordes of its people crowding in upon us" and a type of foreign "aggression."<sup>154</sup> Thus, the Court warped the traditional sovereign power of "repel[ing an] invasion" to include the exclusion of non-citizens<sup>155</sup> in a racist and shameful opinion.<sup>156</sup>

The Court extended the inherent power doctrine to federal deportation in *Fong Yue Ting*: "The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace [is] an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare."<sup>157</sup> The Court never cited any enumerated or structural constitutional authority for its proposition.<sup>158</sup> It also firmly

<sup>151</sup> See *id.* at 129 (noting how the Court in *Chae Chan Ping* relied on "international principles of territoriality" to assert that the federal government has "absolute authority to prevent people from entering its borders"). It is worth noting that part of what brought on this finding was a need for the federal government to exclude Chinese laborers due to a surplus in the labor market even though the original need for immigration is what lodged the power in the federal government against the states in the first place. See Legomsky, *supra* note 146, at 288 (emphasizing that although "Chinese immigrants began arriving in California in earnest around 1850, when labor was in short supply," Congress later passed the Chinese Exclusion Act in 1882 once the labor market became saturated).

<sup>152</sup> *Chae Chan Ping v. United States*, 130 U.S. 581, 608 (1889).

<sup>153</sup> Cleveland, *supra* note 111, at 130 ("Without explaining how this particular power [to exclude immigrants] had been incorporated into the enumerated powers, [the Court] assumed that the Constitution bestowed on the United States all the foreign relations powers of independent nations . . ."); see also *infra* notes 163–64 and accompanying text.

<sup>154</sup> *Chae Chan Ping*, 130 U.S. at 606.

<sup>155</sup> *Id.* at 605; see also Lindsay, *supra* note 114, at 804, 806–07 (noting the development of the "invasion" metaphor within the broader U.S. discourse around immigration as well as within *Chae Chan Ping*).

<sup>156</sup> See Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 18–21 (1998) (describing the racist origins of the plenary power doctrine); cf. *Arizona v. United States*, 567 U.S. 387, 436 (2012) (Scalia, J., concurring in part and dissenting in part) ("Its citizens feel themselves *under siege* by large numbers of illegal immigrants who invade their property, strain their social services, and even place their lives in jeopardy." (emphasis added)). See generally Lindsay, *supra* note 114, at 747–49, 765–804 (examining how changing attitudes towards immigrants led to the invasion metaphor that was essential for implicating foreign security and thus "nationalizing" the immigration power).

<sup>157</sup> *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893).

<sup>158</sup> Cleveland, *supra* note 111, at 143. Cleveland noted that Justice Gray just states "[t]he [C]onstitution of the United States speaks with no uncertain sound on this subject." *Id.*

lodged this power in the federal government as a matter of “international relations.”<sup>159</sup> While several Justices argued in dissent that non-citizens possess greater due process rights in deportation than in exclusion, none disputed that the federal government possessed this power.<sup>160</sup>

Thus, after *Chae Chang Ping* and *Fong Yue Ting*, the federal government possessed an exclusive and potentially unlimited power to exclude and deport that would reverberate throughout the rest of immigration law’s history.<sup>161</sup> However, questions of federalism still remained. First, *The Passenger Cases*, *Henderson*, and *Chy Lung* affirmed that states cannot, on their own, exclude or deport non-citizens. Likewise, *Chae Chan Ping* and *Fong Yue Ting* granted the federal government the authority to exclude and deport. However, these cases do not address whether the federal government and the states can work together to make decisions about whether noncitizens enter or remain. For that, an analysis of the nature of the federal immigration power is required.

### C. Which Type of Preemption?

Even if immigration law now recognizes federal dominance, it is still unclear if the inherent sovereignty doctrine preempts states from playing any role whatsoever in the immigration decisions of the United States. Recall that in Professor Huntington’s general framework, mentioned earlier, unless it is a case of structural preemption, both the federal government and the states may enjoy authority over

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(quoting *Fong Yue Ting*, 149 U.S. at 711); see also *infra* notes 163–64 and accompanying text.

<sup>159</sup> *Fong Yue Ting*, 149 U.S. at 705 (quoting *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892)).

<sup>160</sup> See Cleveland, *supra* note 111, at 144–49 (discussing how the dissenting Justices in *Fong Yue Ting* agreed that “ordinary constitutional principles” generally extend to noncitizen residents but not necessarily to noncitizens entering the country).

<sup>161</sup> See Legomsky, *supra* note 146, at 255–59 (summarizing the reach of the Plenary Power Doctrine through the 1970s in cases such as *Fiallo v. Bell*, 430 U.S. 787 (1977)). But see Bowie & Rast, *supra* note 105, at 5, 29–30 (arguing that *Chae Chan Ping* itself did not create such power and that the Supreme Court in later cases such as *United States ex rel Knauff Shaughnessy*, 338 U.S. 537 (1950) “misread[]” and gave life to the inherent power doctrine); Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257, 258–59 (2000) (“The plenary power cases use strong language in support of the idea that Congress can do what it wants, but they may be largely dicta.”). This Note does not express an opinion as to whether *Chae Chan Ping* itself or later interpretations of the case created the Plenary Power Doctrine. For the purposes of this Note, the rhetoric of *Chae Chan Ping* gave rise to an exclusive federal immigration power whose foundations are questionable.

certain issues.<sup>162</sup> While the Court's inherent sovereignty argument seemed to imply structural preemption in the context of immigration, Huntington argued that Congress's real authority over immigration can only be found in statutory preemption because both the federal government and the states possess "initial authority" in this area,<sup>163</sup> and that there is no textual or structural basis for federal exclusivity in the Constitution.<sup>164</sup> But most significantly, she questioned how there could be structural preemption given the nature of the immigration code.<sup>165</sup> The immigration code as written incorporates various aspects of state law that essentially allow the state to make the determination of whether a noncitizen is eligible for deportation.<sup>166</sup> Thus, the notion that states are structurally preempted from participation in immigration matters is not only undermined by the absence of constitutional justification and the early years of American history, but also by the fact that such a position would also render many portions of the existing immigration code unconstitutional.

Many scholars have recognized that states play a crucial role in determining which citizens are deported since states largely control the criminal justice process that leads to a conviction and sentence resulting in deportation<sup>167</sup> and the majority of convictions leading to

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<sup>162</sup> See *supra* notes 100–04 and accompanying text.

<sup>163</sup> Huntington, *supra* note 5, at 808, 811, 824–25. She argued that such authority falls under the state's "police power to regulate health and safety." *Id.* at 825; accord *Arizona v. United States*, 567 U.S. 387, 416–22 (2012) (Scalia, J., concurring in part and dissenting in part) (recognizing Arizona's residual sovereign power to exclude only as withdrawn by the federal government's sovereign power and subsequent preemption).

<sup>164</sup> Huntington, *supra* note 5, at 812–19; see generally *Chae Chan Ping v. United States*, 130 U.S. 581, 605 (1889) (alluding to Huntington's idea of statutory preemption by noting that state laws must give way to differing federal laws). *But see, e.g., supra* note 94; Wishnie, *supra* note 128, at 529–30 (observing that the Court has historically used structural arguments in support of exclusive federal power over immigration law); Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 297 (2011) ("[A] constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve." (quoting dicta from *De Canas v. Bica*, 424 U.S. 351, 356 (1976), *superseded by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101, 100 Stat. 3359, 3368 (1986), as recognized in *Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582, 590 (2011))). See generally Stumpf, *supra* note 5, at 1601 (collecting diverse scholarly opinions on immigration federalism and whether the federal government can devolve the immigration power).

<sup>165</sup> See *infra* notes 173–76 and accompanying text.

<sup>166</sup> See Kanstroom, *supra* note 5, at 494 (highlighting the interplay between enforcement of federal immigration law and state criminal adjudications given that state criminal convictions can provide a basis for deportation under federal law); see also Cade, *supra* note 31, at 359–60, 365 (same); Moore, *supra* note 19, at 672 (same); Bleuzé, *supra* note 30, at 847 (same).

<sup>167</sup> See Cox & Posner, *supra* note 30, at 1329–49 (outlining various ways in which federal immigration law gives power to states to determine which immigrants will be deported,

deportation come from state law.<sup>168</sup> States differ on both the criminality of certain conduct (e.g., marijuana possession) as well as the severity of any resulting punishment, dictating divergent immigration consequences for noncitizens.<sup>169</sup> Prosecutors have “considerable discretion” over whether to charge a noncitizen in the first place as well as which crimes (with their accompanying sentences) to charge, potentially considering immigration consequences during the plea bargain.<sup>170</sup> State police officers also often screen arrested noncitizens and provide the federal government with information about which noncitizens to deport.<sup>171</sup>

However, while states may play a functional role in immigration law, none of the previous examples deprive the federal government of the final decision of whether to charge the noncitizen with deportability, a power critical to the Court’s ruling in *Arizona v. United States*, the last high-profile immigration federalism case.<sup>172</sup> But the immigration code contains provisions that would be unconstitutional if there were structural preemption because the ultimate decision is based in “inconsistent state laws.”<sup>173</sup> A state governor’s pardon can eliminate the immigration consequences of certain convictions.<sup>174</sup>

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such as through state criminal adjudications, among other things); Kanstroom, *supra* note 5, at 494, 496, 509–11 (discussing how state criminal convictions can provide a basis for deportation under federal law); Moore, *supra* note 19, at 667 (same); Stumpf, *supra* note 5, at 1593 (same); Cade, *supra* note 31, at 409 (same); Bleuzé, *supra* note 30, at 820, 846–47 (same). See generally Huntington, *supra* note 5, at 793 (claiming that “[c]ontinued adherence to structural preemption obscures the robust role that all levels of government play in the regulation of immigration”).

<sup>168</sup> Kanstroom, *supra* note 5, at 501; see Bleuzé, *supra* note 30, at 820 (noting how states do “most of the work” when it comes to prosecuting noncitizens for crimes); Cade, *supra* note 31, at 365 (“[T]he federal government primarily depends on states and their criminal justice systems to determine in the first instance whether lawfully present immigrants are criminals and therefore deportable under federal law.”).

<sup>169</sup> Huntington, *supra* note 5, at 819; see Bleuzé, *supra* note 30, at 846–47 (describing the “lack of uniformity” in what constitutes a deportable offense under federal immigration law given that deportable offenses are defined “by reference to state statute or sentence”); Moore, *supra* note 19, at 669 (same); Kanstroom, *supra* note 5, at 503 (same); Bennett, *supra* note 94, at 1700 (same); LaBrie, *supra* note 94, at 358 (same).

<sup>170</sup> Cox & Posner, *supra* note 30, at 1333–34; Bleuzé, *supra* note 30, at 827; see also Padilla v. Kentucky, 559 U.S. 356, 373 (2010) (encouraging plea bargaining that explicitly considers immigration consequences).

<sup>171</sup> Cox & Posner, *supra* note 30, at 1334–37; see Stumpf, *supra* note 5, at 1595 (describing the role that state and local police play in enforcing immigration law post-September 11, 2001).

<sup>172</sup> See *Arizona v. United States*, 567 U.S. 387, 409 (2012) (“§ 6 violates the principle that the removal process is entrusted to the discretion of the Federal Government. . . . Decisions of this nature touch on foreign relations and must be made with one voice.” (citations omitted)).

<sup>173</sup> Huntington, *supra* note 5, at 819; see also *supra* note 169.

<sup>174</sup> See *supra* note 44 and accompanying text; Cade, *supra* note 31, at 357–60 (describing how crediting pardons, the immigration code “giv[es] preclusive effect to these core state

Likewise, the validity of a marriage in order for a spouse to apply for an immigration benefit is “determined according to the law of the place of celebration.”<sup>175</sup> These federal statutes are explicitly delegating to state law the determination of the immigration benefit or consequence. Thus, the argument for structural preemption is contradicted not only by lack of underlying constitutional foundation but also the immigration code itself.

This would suggest that the federal government can devolve immigration powers to the states when it is an area of “traditional state competence.”<sup>176</sup> If this is the case, then we have to interrogate the extent of preemption in the INA rather than reflexively declare that state determinations have no role. *Thomas & Thompson’s* contention that immigration decisions should not involve the states then is patently false, and a careful analysis of subsection 48(B) is required to determine to whom Congress has delegated the final decision of which sentence counts for immigration purposes.

### III

#### THE IMMIGRATION AND NATIONALITY ACT DELEGATES DECISIONMAKING POWER TO THE STATES UNDER SECTION 101(A)(48)(B)

*Thomas & Thompson’s* foundational assumption was that federal uniformity in immigration law is paramount and that, legally, states have no role to play in this field of regulation.<sup>177</sup> Part II has demonstrated that this premise, while echoed in key foundational cases such as *Chy Lung*, is false. States have historically played, and currently play, a vibrant role in immigration law. If states then can be involved in immigration decisionmaking, an analysis of the immigration code is required in order to determine when the federal government explicitly

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processes . . . at the heart of state autonomy”); Kanstroom, *supra* note 5, at 512–16 (noting how the inclusion of the pardon power from the immigration code’s inception intentionally disrupted the goal of federal uniformity).

<sup>175</sup> *Matter of Gamero*, 14 I. & N. Dec. 674, 674 (B.I.A. 1974). See generally Huntington, *supra* note 5, at 819 (citing Howard F. Chang, *Public Benefits and Federal Authorization for Alienage Discrimination by the States*, 58 N.Y.U. ANN. SURV. AM. L. 357, 360 (2003)) (noting how the INA “incorporates inconsistent state laws governing criminal conduct and marriage”); Kanstroom, *supra* note 5, at 491 n.1 (same). I would like to acknowledge Professor Cox for suggesting this as an example of such an issue.

<sup>176</sup> Huntington, *supra* note 5, at 810–11. Note that the question of “delegating” authority from the federal government to the states is a contested question that requires fuller treatment than is given here. See, e.g., Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 RUTGERS L. REV. 331, 332 n.2 (1998). Thus, this is a preliminary conclusion.

<sup>177</sup> See *supra* notes 91–92 and accompanying text.

has delegated an immigration determination to the states and in what manner it has done so.

First, it must be said that with both the definition of conviction under subsection 48(A) and the definition of length of imprisonment under subsection 48(B), the INA has actually *already* delegated the bulk of the decisionmaking to the state since the state decides to charge and sentence the noncitizen in the first place.<sup>178</sup> The real question is whether the statute at issue in *Thomas & Thompson* leaves *final* decisionmaking to the state.

In *Pickering*, the BIA held that, for the purposes of subsection 48(A), only the original conviction mattered.<sup>179</sup> Subsequent efforts by the state to alter the original conviction would only count if it invalidated the original conviction due to substantive or procedural defects.<sup>180</sup> In *Thomas & Thompson*, Attorney General Barr came to the same conclusion about subsection 48(B), largely based on the *Pickering* rationale, holding that the initial length of the sentence was what mattered for federal immigration purposes.<sup>181</sup> Likewise, the only sentence adjustments that would affect immigration consequences would be those that had underlying substantive or procedural defects, which would render the original sentence a nullity.<sup>182</sup>

But Attorney General Barr, assuming no state involvement, failed to conduct a meaningful inquiry of subsection 48(B), assuming that the text and legislative history of subsection 48(A) and subsection 48(B) were largely the same. While *Pickering*'s holding that subsection 48(A) counts the initial conviction for immigration purposes was well-founded, *Thomas & Thompson*'s conclusion that subsection 48(B) only counts the initial sentence turns on an erroneous interpretation of the statute's text and legislative history. In fact, the statute explicitly links the sentence for immigration purposes to the state definition of the sentence. Moreover, the Attorney General's argument that subsection 48 functions as a distinct whole ignores that background against which Congress legislated.

This Part proceeds in two sections. Section III.A will frame the key conceptual questions upon which an interpretation of subsection 48(B) must hinge. Since Attorney General Barr based his analysis of subsection 48(B) in *Thomas & Thompson* on *Pickering* and its interpretation of subsection 48(A), Section III.B will analyze the text and legislative history of both subsection 48(A) and subsection 48(B) to

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<sup>178</sup> See Bleuzé, *supra* note 30, at 847; *supra* notes 167–72 and accompanying text.

<sup>179</sup> See *supra* notes 56–58 and accompanying text.

<sup>180</sup> See *supra* notes 58–59 and accompanying text.

<sup>181</sup> See *supra* notes 80–82 and accompanying text.

<sup>182</sup> See *supra* notes 85–86 and accompanying text.

reveal that Congress intended for these two subsections to be interpreted differently.

### A. *Congressional Intent and the Presumption of Federal Uniformity*

In *Thomas & Thompson*, the Attorney General's core argument was that the rationale that was employed in *Pickering* to interpret subsection 48(A) applies equally to subsection 48(B).<sup>183</sup> The first argument is that the text and legislative history of subsection 48(A) are similar to that of subsection 48(B).<sup>184</sup> The second is that subsection 48 functions as a cohesive whole, designed to focus on the original conviction.<sup>185</sup> However, there is an embedded premise in either argument. The BIA in *Pickering*, as well as federal courts that have analyzed subsection 48(A), held that there is a presumption of federal uniformity when interpreting statutes more generally.<sup>186</sup> Thus, under either argument, determining whether state post-conviction mechanisms dictate the operative sentence must be read in light of this presumption. Thus, an analysis of the merits of *Thomas & Thompson* will largely depend on two questions: Is the text and legislative history of subsection 48(B) so distinct from subsection 48(A) that, in isolation, it overcomes the federal presumption? And, should 48(B) be interpreted as part of a broader scheme along with subsection 48(A) or can it be interpreted independently? This Section will explain how these two questions emerge from the Attorney General's use of *Pickering* in *Thomas & Thompson*.

In *Thomas & Thompson*, the Attorney General discussed at length the decision in *Pickering*.<sup>187</sup> First, he argued that the text and legislative history behind subsection 48(A) are similar to subsection 48(B).<sup>188</sup> In particular, the language in subsection 48(B) that ignores any "suspension of the imposition or execution of that imprisonment or sentence" means that the statute ignores all "'suspensions' (whether occurring at the time of sentencing or thereafter)."<sup>189</sup> He also argued that subsection 48, as a whole, evinces a congressional

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<sup>183</sup> See *supra* notes 81–82 and accompanying text. Note that *Thomas & Thompson* did not always make a clear distinction between these two arguments though both seem to be present (at least implicitly).

<sup>184</sup> See *infra* notes 188–89 and accompanying text.

<sup>185</sup> See *infra* note 190 and accompanying text.

<sup>186</sup> See *infra* notes 194–97 and accompanying text.

<sup>187</sup> Matter of *Thomas & Thompson*, 27 I. & N. Dec. 674, 680–84 (Att'y Gen. 2019).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 682 (citing INA § 101(a)(48)(B), 8 U.S.C. § 1101(a)(48)(B)).

intent to focus on the original “fact” of conviction<sup>190</sup> that implicitly extends to the original sentence under subsection 48(B) as well:

Congress has determined that an alien who is convicted of a crime that is sufficiently serious to warrant a significant sentence should be subject to removal. Later alterations to that sentence do not correct legal defects, do not change the underlying gravity of the alien’s action. They accordingly do not affect Congress’s judgment as to whether that alien should be removed.<sup>191</sup>

Thus, there are two distinct arguments. One is that the textual language of subsection 48(B) on its own suggests that only the initial sentence should count. But the other is that subsection 48 operates as a whole and that, perhaps, the function of subsection 48(B) is much narrower: Rather than a positive definition of what constitutes the length of sentence that carries its own force, subsection 48(B) was merely added to foreclose the use of suspended sentences and does not overcome the gravitational pull of subsection 48’s emphasis on the original conviction. Thus, a key question is whether Congress’s focus on the original adjudication of guilt in subsection 48(A) merits reading subsection 48(B) in a harmonizing manner.

Additionally, a key doctrinal underpinning of *Pickering*, which is echoed in federal court jurisprudence, is that federal laws are presumed to be uniform and not depend on state laws.<sup>192</sup> The Attorney General did not explicitly state this, but he alluded to it when assuming that congressional silence about state post-conviction mechanisms should be read in favor of federal uniformity: “Paragraph (A) and paragraph (B) simply do not address vacatur, modifications, or clarifications. This silence, however, provides no reason to depart from Congress’s focus on the alien’s original conviction and sentence in either of those provisions.”<sup>193</sup> For the Attorney General, the power of subsection 48 as a whole demands more clear language from subsection 48(B) that Congress had something different in mind regarding sentences.

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<sup>190</sup> *Id.* at 682. It bears note that immigration law is not the only context in which federal courts look to the simple “fact” of state criminal convictions—without “relitigating the validity” of the prior state judgment or decision: It also happens, for instance, when crafting criminal sentences under the Federal Sentencing Guidelines. *See, e.g.*, *United States v. Jones*, 415 F.3d 256, 265 (2d Cir. 2005). This, like federal immigration law, exemplifies a type of “cooperative federalism” in which state judgments provide an expedient tool for federal judges to reach decisions. *See Kanstroom, supra* note 5, at 509; *supra* note 30.

<sup>191</sup> *Thomas & Thompson*, 27 I. & N. Dec. at 683.

<sup>192</sup> *See infra* notes 194–97 and accompanying text.

<sup>193</sup> *Thomas & Thompson*, 27 I. & N. Dec. at 684.



The background of this issue merits more discussion than it was given in *Thomas & Thompson* because it was key to how the BIA understood subsection 48(A) in *Pickering*. The BIA in *Pickering* discussed extensively how federal courts had previously interpreted subsection 48(A).<sup>194</sup> For example, in *United States v. Campbell*, cited as support in *Pickering*, the Second Circuit explicitly interpreted subsection 48(A)'s definition of conviction to only be based on the initial finding of a conviction: "No pertinent provision in Title 8 [the immigration code] gives controlling effect to state law. And no provision excepts from this definition a conviction that has been vacated."<sup>195</sup> The Second Circuit noted that while Congress may subordinate a federal definition to state law, the presumption is that state law does not affect the federal definition.<sup>196</sup> The Second Circuit quoted the Supreme Court's decision in *Dickerson v. New Banner Institute, Inc.*: "[W]hen Congress enacts a statute[,] . . . it does not intend to make its application dependent on state law."<sup>197</sup>

As a result, Section III.B will evaluate *Thomas & Thompson* by focusing on two questions: whether the text and legislative history of subsection 48(B) show that the original sentence counts for immigration consequences, and whether Congress wanted subsection 48 to function holistically to foreclose any state post-conviction action from interfering with immigration consequences. In the background of both questions is whether or not 48(B) can overcome the *Dickerson* presumption of federal uniformity.

### B. Interpreting Subsection 48(B)

This Section will address the two questions posed by Section III.A. First, an analysis of the text and legislative history of IIRIRA reveals that while subsection 48(A) seems explicitly to favor federal uniformity for the definition of conviction, subsection 48(B) overcomes the *Dickerson* presumption and explicitly allocates the decision to state law. Second, the Attorney General's argument that an inter-

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<sup>194</sup> Matter of *Pickering*, 23 I. & N. Dec. 621, 623–24 (B.I.A. 2003), *rev'd on other grounds sub nom.* *Pickering v. Gonzalez*, 465 F.3d 263 (6th Cir. 2006).

<sup>195</sup> *United States v. Campbell*, 167 F.3d 94, 98 (2d Cir. 1999).

<sup>196</sup> *Id.* at 97; *see also* Kanstroom, *supra* note 5, at 508–09. I am indebted to Kanstroom's discussion of *Dickerson*, *Campbell* and *Herrera-Inirio*, *infra* note 201.

<sup>197</sup> *Campbell*, 167 F.3d at 97 (quoting *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 119 (1983), *superseded by statute on other grounds*, 18 U.S.C. § 921(a)(20)). The *Dickerson* court explained the rationale: "This, however, was not because Congress wanted to tie those disabilities to the intricacies of state law but because such convictions provide a convenient, although somewhat inexact, way of identifying 'especially risky people.' There is no inconsistency in the refusal of Congress to be bound by postconviction state actions." *Dickerson*, 460 U.S. at 120 (quoting *United States v. Bass*, 404 U.S. 336, 345 (1971)).

pretation of subsection 48(B) depends on its relationship to subsection 48 as a whole is incorrect given that Congress was legislating against an administrative history that treated convictions and sentences as separate definitions and that counted post-conviction sentencing adjustments. Finally, the Section will explore what a *Chevron* analysis of this question would look like, concluding that the Attorney General's interpretation should not receive deference.

1. *The Text and Legislative History of Subsection 48(B) Is Distinct from Subsection 48(A)*

The language of subsection 48(A) focuses on the fact of conviction:

The immigration statute defines "conviction," with respect to an alien, as either (1) a "formal judgment of guilt," or (2) a "judge[']s order [that] some form of punishment, penalty, or restraint on the alien's liberty . . . be imposed" following (a) a finding of guilt by "a judge or jury," or (b) the alien's "plea of guilty or nolo contendere," or (c) the alien's "admi[ssion of] sufficient facts to warrant a finding of guilt."<sup>198</sup>

Thus, as the *Campbell* court held, the statutory definition emphasizes the existence of the conviction itself, as "[n]o pertinent provision in [the immigration code] gives controlling effect to state law. And no provision excepts from this definition a conviction that has been vacated."<sup>199</sup> Therefore, the use of state laws that subsequently "erase" a conviction<sup>200</sup> do not change the fact that the noncitizen was found guilty in some form. It is the initial act of conviction that the text itself emphasizes.<sup>201</sup>

The First Circuit came to a similar determination in *Herrera-Inirio v. INS*, also cited in *Pickering*, linking its understanding of subsection 48(A) back to the House Conference Report from IIRIRA cited earlier in *Roldan-Santoyo*: "This new provision, by removing the third prong of *Ozkok*, clarifies congressional intent that even in cases

<sup>198</sup> *Campbell*, 167 F.3d at 97–98 (alteration in original) (quoting INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(B)).

<sup>199</sup> *Id.* at 98.

<sup>200</sup> For this wording, see *Matter of Roldan-Santoyo*, 22 I. & N. Dec. 512, 523 (B.I.A. 1999).

<sup>201</sup> See Kanstroom, *supra* note 5, at 509 n.89 (citing *Saleh v. Gonzales*, 495 F.3d 17, 24 (2d Cir. 2007)). Note that Kanstroom also cited *Campbell* and *Herrera-Inirio* to note the primacy of the original conviction. See *id.* at 508 & n.88; see also *id.* at 520 ("[State expungements of convictions] entirely unrelated to the legal propriety of the underlying judgment of conviction' . . . in other words, do not relate to 'the factual basis for, or the procedural validity of, the conviction.'" (quoting *Matter of Marroquin*, 23 I. & N. Dec. 705, 713 (Att'y Gen. 2005))); Moore, *supra* note 19, at 683 (emphasizing the "initial finding of guilt").

where adjudication is ‘deferred,’ the *original* finding or confession of guilt is sufficient to establish a ‘conviction’ for purposes of the immigration laws.”<sup>202</sup> Thus, the First Circuit believed that “[t]he emphasis that Congress placed on the *original* admission of guilt plainly indicates that a subsequent dismissal of charges, based solely on rehabilitative goals . . . does not vitiate that original admission.”<sup>203</sup>

Subsection 48(B), on the other hand, explicitly ties the definition of a sentence to state law. Recall that subsection 48(B) states that “[a]ny reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.”<sup>204</sup> The text of the statute explicitly links the length of the imprisonment to the amount of time the state court orders. As Professor Michael Vastine noted, the phrase “ordered by a court” means that the definition is inextricably dependent on the “period of incarceration” the court orders.<sup>205</sup> Thus, when a judge resents a noncitizen to a reduced length of imprisonment, that is the sentence the noncitizen was “*ordered*” to serve by a court of law, even if it occurred after the sentence was already served, and so the length of imprisonment is defined by the state law determination.<sup>206</sup> There is no language to suggest that Congress “intend[ed] to focus on the initial sentence.”<sup>207</sup> Prior to *Thomas & Thompson*, in *Garcia Lopez v. Ashcroft*, the Ninth Circuit agreed with this interpretation of subsection 48(B), stating “a state court expungement of a conviction is qualitatively different from a state court order to classify an offense or modify a sentence. In the latter situation, the state court is clearly construing the nature of the conviction pursuant to state law.”<sup>208</sup>

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<sup>202</sup> *Herrera-Inirio v. INS*, 208 F.3d 299, 306 (1st Cir. 2000) (quoting H.R. REP. NO. 104-828, at 224 (1996) (Conf. Rep.)) (emphasis added); see also *supra* note 54 and accompanying text.

<sup>203</sup> *Herrera-Inirio*, 208 F.3d at 306 (emphasis in original).

<sup>204</sup> INA § 101(a)(48)(B), 8 U.S.C. § 1101(a)(48)(B).

<sup>205</sup> Vastine, *supra* note 21, at 64.

<sup>206</sup> See *id.*

<sup>207</sup> Moore, *supra* note 19, at 704 (“Congress did not express in its definition of ‘term of imprisonment’ any intention to focus on the initial sentence, nor did it reveal any intent to prevent state and federal judge involvement in immigration matters.”).

<sup>208</sup> 334 F.3d 840, 846 (9th Cir. 2003), *overruled on other grounds* by Ceron v. Holder, 747 F.3d 773 (9th Cir. 2014). Other courts have noted the distinction when noncitizens have tried to argue the reverse—that *Matter of Song* and *Matter of Cota-Vargas*’s interpretation of subsection 48(B) should be used to invalidate a vacated conviction under subsection 48(A). AILA Brief, *supra* note 41, at 9–10. See, e.g., *Rumierz v. Gonzales*, 456 F.3d 31, 41 n.11 (1st Cir. 2006) (noting the inapplicability of *Matter of Cota-Vargas*’s interpretation of INA § 101(a)(48)(B) to INA § 101(a)(48)(A)); *Boar v. Holder*, 475 F. App’x 615, 620 (6th Cir. 2012) (same).

Moreover, subsection 48(B)'s prohibition on post-conviction adjustments is much narrower than the Attorney General argued in *Thomas & Thompson*, as it only means to clarify that suspended sentences do not affect the operative sentence. He interpreted the phrase "suspension of the imposition or the execution"<sup>209</sup> too broadly, ignoring that "suspension" is a term of art that refers specifically to instances where a defendant can avoid actually serving the sentence if the defendant complies with certain requirements.<sup>210</sup> As Professor Vastine pointed out, the "state court's order itself" determines the length of sentence for immigration purposes, and since only "suspensions" are prohibited, other forms of sentence modifications are then permitted by the statute under the *expressio unius est exclusio alterius* canon.<sup>211</sup>

The most prominent case to have interpreted the term "suspension" in subsection 48(B) did so narrowly in cases considering probated sentences. The Eleventh Circuit, in *United States v. Ayala-Gomez*, construed the federal definition as "a procedural act that precedes a court's authorization for a defendant to spend part or all of the imposed prison sentence outside of prison."<sup>212</sup> The court in *Ayala-Gomez* concluded that subsection 48(B) creates a "ceiling (in most circumstances) of the time a defendant can spend in prison if he violates a condition of his suspension or probation."<sup>213</sup> Thus, the ceiling of the *ordered* sentence is what counts and suspensions are only those that withdraw the noncitizen from serving that sentence. Likewise, in *United States v. Guzman-Bera*, the Eleventh Circuit ruled that a judge's direct sentencing of a noncitizen to probation, rather than sentencing the noncitizen and then granting probation, was not a suspended sentence.<sup>214</sup> This suggests that federal courts have interpreted the meaning of a "suspension" formally, not flexibly. Despite this, the Attorney General assumed that cases such as *Thompson's*, where the state court actually changed the substantive sentence, are the same as "suspensions," grouping them all together as "post-sentencing

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<sup>209</sup> INA § 101(a)(48)(B).

<sup>210</sup> See *Suspended Sentence*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A sentence postponed so that the convicted criminal is not required to serve time unless he or she commits another crime or violates some other court-imposed condition.").

<sup>211</sup> Vastine, *supra* note 21, at 64.

<sup>212</sup> 255 F.3d 1314, 1319 (11th Cir. 2001).

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

<sup>214</sup> 216 F.3d 1019, 1020–21 (11th Cir. 2000) (*per curiam*); *accord* *United States v. Banda-Zamora*, 178 F.3d 728, 730 (5th Cir. 1999); *United States v. Gonzalez-Coronado*, 419 F.3d 1090, 1093 (10th Cir. 2005); *United States v. Mondragon-Santiago*, 564 F.3d 357, 368–69 (5th Cir. 2009); *see also* *Hernandez v. Holder*, 760 F.3d 855, 860 (8th Cir. 2014) (collecting and synthesizing the foregoing cases).

events,” without a strong rationale in the text for assuming that subsection 48(B) develops such a category.<sup>215</sup>

This narrower interpretation is supported by the House Conference Report. The report’s discussion of subsection 48(B) only mentioned that the reference to “suspended sentences” was to clarify that even when the judge suspended the imposition of the sentence (i.e., where the judge issued a particular sentence but then refrained from imposing it), that the “suspended sentence” still counted for immigration purposes, as the “purpose of this provision is to overturn current administrative rulings” where the BIA held to the contrary, i.e., *Castro* and *Esposito*.<sup>216</sup> The House Conference Report did not mention post-conviction adjustments to the underlying sentence.<sup>217</sup> This “specific purpose” was recognized by the BIA in *Matter of S-S*.<sup>218</sup>

Despite the Attorney General’s assertion that *Pickering*’s logic applies to subsection 48(B),<sup>219</sup> *Pickering*, in fact, leaned heavily on a legislative history that does not concern subsection 48(B). *Pickering* explicitly cited *Roldan-Santoyo*’s holding that the original conviction was what counted for immigration purposes under subsection 48(A).<sup>220</sup> In *Roldan-Santoyo*, the BIA held that IIRIRA amended subsection 48(A) to specifically eliminate relief from deportation based on “deferred convictions,”<sup>221</sup> referring, once again, to the House Conference Report to justify its holding, as *Herrera-Inirio* also noted.<sup>222</sup> Importantly, the House Conference Report emphasized its desire to change the definition of conviction from that in *Matter of*

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<sup>215</sup> See *id.* at 859–60. Note, however, that Board Member Villageliu’s dissent brought up the same issue in *Roldan-Santoyo*: In both cases, the BIA and the Attorney General ignored the narrower terms of art used in both the statute and the legislative history to construct a broader policy against post-conviction relief even where the statute itself might have left room for states to provide post-conviction relief. See *supra* note 54. The Attorney General, in fact, highlighted this aspect of the *Pickering* rationale to justify the broader interpretation of subsection 48(B). See *infra* note 235 and accompanying text. Moreover, as amici argue in *Zaragoza v. Garland*, a “suspension” is not a “post-sentencing event.” AILA Brief, *supra* note 41, at 17.

<sup>216</sup> H.R. REP. NO. 104-828, at 224 (1996) (Conf. Rep.); *supra* notes 64–65 and accompanying text.

<sup>217</sup> H.R. REP. NO. 104-828, at 224 (failing to mention post-conviction sentencing adjustments such as resentencing, merely stating that “any court ordered sentence is considered to be ‘actually imposed’”).

<sup>218</sup> 21 I. & N. Dec. 900, 902 (B.I.A. 1997).

<sup>219</sup> See *supra* notes 81–82 and accompanying text.

<sup>220</sup> *Matter of Pickering*, 23 I. & N. Dec. 621, 622 (B.I.A. 2003), *rev’d on other grounds sub nom.* *Pickering v. Gonzalez*, 465 F.3d 263 (6th Cir. 2006).

<sup>221</sup> See *supra* Section I.B.1 for a discussion of *Pickering*’s affirmation and extension of *Roldan-Santoyo*.

<sup>222</sup> See also *supra* note 54 and accompanying text.

*Ozkok*, a case that did not concern the length of sentence: “This section deliberately broadens the scope of the definition of ‘conviction’ beyond that adopted by the Board of Immigration Appeals in *Matter of Ozkok*.”<sup>223</sup> Thus, the Attorney General employed the legislative history of subsection 48(A) to interpret subsection 48(B) without a clearly stated rationale.<sup>224</sup> This was the same reason that the BIA originally refused to extend the *Pickering* logic to subsection 48(B) in *Cota-Vargas*.<sup>225</sup> Ultimately, the text and legislative history of subsection 48(B), at least when considered in isolation, overcome the presumption of federal uniformity. However, the Attorney General’s argument relied on a larger point: that subsection 48 controls subsection 48(B).

## 2. The “Whole Text” Argument Ignores the Administrative History of Convictions and Sentences in the Immigration Code

Attorney General Barr also relied heavily on the idea that the purpose of subsection 48 more broadly was to forbid “post-sentencing events.”<sup>226</sup> Interpreting subsection 48(B) then comes down to a question of congressional intent. Did IIRIRA merely amend the definition of conviction under subsection 48(A) in response to *Ozkok* and create a positive definition of a sentence in subsection 48(B), whose only specification is that suspended sentences still count as sentences? Or was subsection 48, as a whole, designed to ensure that noncitizens could not use state mechanisms to evade immigration consequences, requiring affirmative language to credit post-conviction mechanisms?

Whether subsection 48 can be read as a whole is critical for inferring congressional intent. This subsection was drafted against the previous administrative background regarding changes in sentences and convictions.<sup>227</sup> Essentially, previous definitions of convictions and sentences (seemingly) overcame the *Dickerson* presumption of uniformity, but it is unclear if changes from IIRIRA meant that the operative definitions no longer overcame this presumption. Consequently, if subsection 48 is meant to function as a whole that emphasizes “the underlying gravity” of the original conviction and sentence,<sup>228</sup> then this would have made clear the desire for federal uniformity, and the Attorney General is correct that more affirmative language would

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<sup>223</sup> H.R. REP. NO. 104-828, at 224 (1996) (Conf. Rep.); see also *supra* notes 49–55 and accompanying text.

<sup>224</sup> See also AILA Brief, *supra* note 41, at 7–10 (echoing this lack of justification).

<sup>225</sup> See *supra* notes 72–75 and accompanying text.

<sup>226</sup> See *Matter of Thomas & Thompson*, 27 I. & N. Dec. 674, 682–84 (Att’y Gen. 2019).

<sup>227</sup> See *supra* notes 46–54, 62–67 and accompanying text.

<sup>228</sup> See *supra* note 191 and accompanying text.

then be required to suggest that post-conviction sentence modifications still count. However, if subsection 48(A) and subsection 48(B) have their own separate meanings, then, as currently written, subsection 48(B) does not alter the administrative background against which Congress legislated in the way that subsection 48(A) does.<sup>229</sup> If this is the case then, subsection 48(B) rebuts the *Dickerson* presumption of federal uniformity and thus does not require affirmative language to count post-conviction sentence adjustments. An exploration of the history against which it was enacted reveals that subsection 48(B) must be read distinctly from subsection 48(A).

Although he does not use these terms, the Attorney General is essentially making a “whole text” argument that subsection 48(B)’s meaning only becomes clear when considered within subsection 48.<sup>230</sup> In *King v. Burwell*, Chief Justice Roberts argued that an unusual statutory interpretation was “necessary for the [Act] to function . . . and to avoid the type of calamitous result that Congress plainly meant to avoid.”<sup>231</sup> In *Cota-Vargas*, Board Member Pauley, in dissent, similarly argued that there is “implicit or inherent authority in an adjudicative agency created to interpret a statute to disregard efforts intended solely to undermine the legislative intent and thereby interfere with its very reason for being,” when advocating that the *Pickering* rationale be applied to subsection 48(B).<sup>232</sup> As Professor Andrew Moore remarked, “[t]here is no reason to think Congress would be less concerned about judges undermining of federal authority through modification of sentences rather than vacation or alteration of the record of conviction.”<sup>233</sup>

There is legislative history to support this position. Although not cited in *Thomas & Thompson*, IIRIRA House Conference Report provided a broader statement of intent before discussing the particular textual provisions in subsections 48(A) and 48(B):

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<sup>229</sup> Note that this background is also relevant for the argument in Section III.B.1 that subsection 48(B), when analyzed by itself, overcomes the *Dickerson* presumption of federal uniformity. However, I include these arguments here as they are most persuasive for overcoming the argument that subsection 48 was intended to function as a whole.

<sup>230</sup> See *King v. Burwell*, 576 U.S. 473 (2015) (“If the statutory language is plain, we must enforce it according to its terms. But oftentimes the ‘meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.’” (citation omitted) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000))); see also ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS*, at xiii, 167 (2012). I wanted to acknowledge Christopher Ioannou for suggesting this argument. See also *supra* note 207 and *infra* note 281.

<sup>231</sup> *Burwell*, 576 U.S. at 498.

<sup>232</sup> 23 I. & N. Dec. 849, 854–56 (B.I.A. 2005) (Pauley, Board Member, dissenting).

<sup>233</sup> Moore, *supra* note 19, at 704.

As the Board noted in *Ozkok*, there exist in the various States a myriad of provisions for ameliorating the effects of a conviction. As a result, aliens who have clearly been guilty of criminal behavior and whom Congress intended to be considered ‘convicted’ have escaped the immigration consequences normally attended upon a conviction.<sup>234</sup>

Thus, for Attorney General Barr, there must be stronger, affirmative language in subsection 48(B) to suggest that Congress was amenable to state post-conviction changes altering the operative sentence: “Yet paragraph (A)’s definition of ‘conviction’ is equally silent about ‘vacatur,’ and the Board nonetheless determined in *Matter of Pickering* that vacatur unrelated to the merits will not have immigration consequences.”<sup>235</sup> For the Attorney General, subsection 48 functions as whole to exclude any state post-conviction actions from counting because they “do not change the underlying gravity of the alien’s action.”<sup>236</sup> One could argue that the failure to mention post-conviction sentence adjustments when drafting subsection 48(B)<sup>237</sup> suggests that Congress did not want to make an exception for such sentence adjustments, something the Attorney General noted in *Thomas & Thompson*.<sup>238</sup> In fact, the Fifth Circuit made such an argument when interpreting the validity of vacated convictions under subsection 48(A):

If Congress had not wanted vacated convictions to remain valid for the purpose of the immigration laws, it easily could have included an exception for vacated convictions in the statutory definition. The problem of vacated convictions occurred frequently enough that Congress must have anticipated the problem, yet it chose to remain silent. . . . [T]he INA proves that Congress knew how to write exceptions for certain kinds of post-conviction relief.<sup>239</sup>

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<sup>234</sup> H.R. REP. NO. 104-828, at 224 (1996) (Conf. Rep.) (emphasis added) (citation omitted).

<sup>235</sup> *Thomas & Thompson*, 27 I. & N. Dec. 674, 684 (Att’y Gen. 2019) (citing *Matter of Pickering*, 23 I. & N. Dec. 621, 624 (B.I.A. 2003), *rev’d on other grounds sub nom. Pickering v. Gonzalez*, 465 F.3d 263 (6th Cir. 2006)).

<sup>236</sup> *Id.* at 683.

<sup>237</sup> See Kanstroom, *supra* note 5, at 513 (arguing that the legislative history of the definition of “conviction” does not illuminate whether Congress considered the “viability of post-conviction state actions”); see also Cade, *supra* note 31, at 419 (discussing congressional silence regarding vacatur and expungements); Moore, *supra* note 19, at 668 (same); AILA Brief, *supra* note 41, at 3 (same).

<sup>238</sup> See *supra* notes 193, 215 and accompanying text.

<sup>239</sup> *Renteria-Gonzalez v. INS*, 322 F.3d 804, 813 (5th Cir. 2002); see also Moore, *supra* note 31, at 687 (citing *Renteria-Gonzalez*); accord *Matter of Roldan-Santoyo*, 22 I. & N. Dec. 512, 522–23 (B.I.A. 1999).



The Fifth Circuit argued that the exception for pardons shows that Congress knew how to give effect to post-conviction relief.<sup>240</sup> But this is where the background against which Congress legislates is critical. Before *Thomas & Thompson*, the BIA and federal courts had always treated “convictions” and “sentences” as “analytically distinct” concepts.<sup>241</sup> The distinction is further underscored not only by the choice to divide them into separate subsections, but also by the House Conference Report’s separate discussion of subsection 48(A) and subsection 48(B).<sup>242</sup> It would be strange to set out a definition of a sentence in its own distinct section and then intend that such a subsection does not have its own operative power. As noted earlier, historically, the assumption by the BIA was that vacated convictions and sentence modifications mattered for immigration purposes,<sup>243</sup> something the BIA emphasized in refusing to reconsider *Cota-Vargas*: “Our long-standing default rule has been that a judgment modifying a criminal sentence . . . is to be given effect in immigration proceedings.”<sup>244</sup> In IIRIRA, while Congress explicitly revised this understanding regarding subsection 48(A), it did not mention anything in subsection 48(B) regarding sentence modifications despite *Matter of Martin* holding that sentence modifications would count.<sup>245</sup> In fact, as amici argued in *Zaragoza v. Garland*, a Seventh Circuit case currently considering the validity of *Thomas & Thompson*, because subsection 48(B) explicitly added that suspended sentences would still count as sentences for immigration purposes, disrupting the previous understanding, this is further evidence that “had Congress intended to overrule additional precedent, it would have done so explicitly.”<sup>246</sup> Amici noted that there is force to an administrative rule pre-dating a statute that has been modified in one way but not another.<sup>247</sup> Additionally, as Professor Jason A. Cade has pointed out, Congress has demonstrated

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<sup>240</sup> *Renteria-Gonzalez*, 322 F.3d at 813.

<sup>241</sup> AILA Brief, *supra* note 41, at 4–10 (surveying the history of BIA and federal caselaw treating statutory definitions of convictions and sentences distinctly); *see also supra* note 208 and accompanying text.

<sup>242</sup> *See* H.R. REP. NO. 104-828, at 224 (1996).

<sup>243</sup> AILA Brief, *supra* note 41, at 7–8 (citing numerous BIA precedents prior to *Thomas & Thompson*); *see also* Moore, *supra* note 19, at 679–86 (surveying cases where the BIA considered state post-conviction relief); Cade, *supra* note 31, at 381–82; Bleuzé, *supra* note 30, at 818–19; Kanstroom, *supra* note 5, at 512.

<sup>244</sup> *Matter of Cota-Vargas*, 2006 WL 2008266, at \*6 (B.I.A. 2006).

<sup>245</sup> *Matter of Martin*, 18 I. & N. Dec. 226, 227–28 (B.I.A. 1982).

<sup>246</sup> AILA Brief, *supra* note 41, at 16.

<sup>247</sup> *Id.* (“The Supreme Court has long explained that the presumption that Congress adopts a particular administrative rule pre-dating a statute when it re-enacts the statute without change is strongest when Congress supersedes or otherwise changes *other* administrative rules that pre-date the statute.”) (citing *Lorillard v. Pons*, 434 U.S. 575, 581–82 (1978)).

in other statutes that it can be clear when it wants to override state processes.<sup>248</sup> Professor Cade justified this “whole code” argument based on the Medicare and Medicaid Patient and Program Protection Act of 1987, in which Congress specified that ineligibility based on convictions includes the language, “regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged.”<sup>249</sup>

The strongest support for the Attorney General’s argument, the broader language in the House Conference Report prefacing subsection 48, has flaws. Those prefatory remarks repeatedly mentioned “convictions” but did not mention sentences.<sup>250</sup> The House Conference Report also distinctly named the cases it sought to overrule.<sup>251</sup> It noted that it wanted to eliminate the third prong of *Ozkok* in order to make sure the original conviction counted.<sup>252</sup> The report also specifically mentioned that it wanted to overrule *Castro* and *Esposito*’s understanding of when suspended sentences would count.<sup>253</sup> It did not mention *Martin*,<sup>254</sup> once again implying that it did want to revise its understanding that state modifications would count for immigration purposes.

The Attorney General’s whole text argument largely relied on arguments about intent, one narrower and one broader. First, that the narrow purpose of subsection 48 was to prevent noncitizens from using state post-conviction mechanisms from ameliorating immigration consequences. But he also implicitly argued the drafters most likely *would have* wanted to prevent post-conviction adjustments from affecting the definition under subsection 48(B). IIRIRA had the effect of making removal more categorical, less discretionary, and limiting access to relief.<sup>255</sup> It also promoted federal uniformity and limited the

<sup>248</sup> Cade, *supra* note 31, at 419.

<sup>249</sup> *Id.* (citing 42 U.S.C. § 1320a-7(i)(1)); accord AILA Brief, *supra* note 40, at 19–20. Professor Cade argued more broadly that a clear statement rule should be required for the federal government to override “integral components of the states’ administration of their general criminal laws” by ignoring post-conviction state actions. Cade, *supra* note 31, at 360; accord AILA Brief, *supra* note 41, at 17–20 (“Given this well-established constitutional design, Congress must be clear if it intends to alter the balance of power between the federal government and the states.”).

<sup>250</sup> See *supra* note 234 and accompanying text.

<sup>251</sup> H.R. REP. NO. 104-828, at 224 (1996) (Conf. Rep.).

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> See Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1938–39 (2000) (noting that the Act eliminated “the individualized assessment of the appropriateness of deportation”); Bleuzé, *supra* note 30, at 818 (noting that the Act made more individuals eligible for deportation and limited the procedural safeguards available to individuals with

ability of states to interfere with federal immigration matters.<sup>256</sup> Moreover, some have argued that the elimination of the Judicial Recommendation against Deportation (JRAD) in 1990,<sup>257</sup> which had allowed criminal law judges to effectively block deportation consequences at their discretion, showed that Congress did not want such judges interfering with immigration matters.<sup>258</sup>

But such arguments require an interpretation that flatly ignores clear statutory language and speculates about what Congress *would have intended*, either in the specific subsection or in the text as a whole. The Supreme Court has generally avoided such broad intent arguments<sup>259</sup> that ignore statutory language as interpretive guides in recent years.<sup>260</sup> The Supreme Court stated this even more forcefully in *United States v. Locke*:

But the fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do. “There is a basic difference between filling a gap left by Congress’ silence and rewriting rules that Congress has affirmatively and specifically enacted.”<sup>261</sup>

Moreover, many congresspeople who voted for IIRIRA were surprised at its extent when it took effect, suggesting the fallacy of such a notion.<sup>262</sup> And finally, the JRAD was eliminated in a separate statute, so using the purpose of one statute to infer the purpose of another is a

convictions); Moore, *supra* note 19, at 667 (same); Cade, *supra* note 31, at 363 (noting that federal immigration law seeks to uniformly and categorically determine which noncitizens convicted of crimes should be deported); Kanstroom, *supra* note 5, at 518–19 (noting that the elimination of the Judicial Recommendation against Deportation represented a “substantial hardening of deportation laws”).

<sup>256</sup> Moore, *supra* note 19, at 668 (first citing *Matter of Roldan-Santoyo*, 22 I. & N. Dec. 512 (B.I.A. 1999); and then citing *Renteria-Gonzalez v. INS*, F.3d 804, 813–14 (5th Cir. 2002)); Kanstroom, *supra* note 5, at 506. While IIRIRA was passed to ensure federal uniformity, it also “gave an increased role to state actors in enforcement of immigration policy.” Bleuzé, *supra* note 30, at 820.

<sup>257</sup> See Cox & Posner, *supra* note 30, at 1339 n.185 (citing Immigration Act of 1917, Pub. L. No. 64-301, § 19, 39 Stat. 874, 889–90, *repealed by* Immigration Act of 1990, Pub. L. No. 101-649, § 505, 104 Stat. 4978, 5050); Kanstroom, *supra* note 5, at 506.

<sup>258</sup> Moore, *supra* note 19, at 705 n.300 (citing *Matter of Cota-Vargas* 23 I. & N. Dec. 849, 856 (B.I.A. 2005) (Pauley, Board Member, dissenting)).

<sup>259</sup> See, e.g., *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 108 (2007) (Scalia, J., dissenting) (“That is a judge-empowering proposition if there ever was one, and in the century since, the Court has wisely retreated from it, in words if not always in actions.”).

<sup>260</sup> See, e.g., *Holy Trinity Church v. United States*, 143 U.S. 457 (1892) (relying on the anti-absurdity canon).

<sup>261</sup> 471 U.S. 84, 95 (1985) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).

<sup>262</sup> Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TUL. L. REV. 1, 26 (2014) (noting that many congresspeople who voted for punitive

weak argument. Such arguments also rest on the assumption that the immigration code's only purpose is to maximize the ability of the federal government to deport and that state post-conviction mechanisms merely interfere with this goal. To the contrary, the federal government, throughout the immigration code, delegates decisions to the states,<sup>263</sup> and the purpose of an immigration code is not always to maximize the capacity to deport but rather to balance a variety of interests in the regulation of admission, only one of which is the goal of deportation.<sup>264</sup> To give effect to one particular purpose is to ignore the "legislative bargaining" reflected in the statute's text.<sup>265</sup> Given that the text of subsection 48(B) binds the sentence to the state court's order, interpreting subsection 48(B) as a delegation to state authority merely reflects a choice about how best to determine whether a non-citizen has met the criteria for removal.<sup>266</sup> In this case, Congress chose not to revise the historical assumption that state sentencing modifications count for immigration purposes, whether Congress meant to or not. To interpret otherwise is to rewrite the statute. Thus, since subsection 48 does not function as a whole, and subsection 48(B) is its own distinct section, IIRIRA did not change the understanding that post-conviction sentencing adjustments would be effective. Subsection 48(B) then overcomes the *Dickerson* presumption of federal uniformity and does not require affirmative language to count post-conviction sentencing adjustments.

Thus, *Thomas & Thompson's* two central arguments both fail. Subsection 48(A) and subsection 48(B) are two distinct subsections that do not need to be read together. Moreover, the text and legislative history of subsection 48(A) is not the same as subsection 48(B). Consequently, the text and legislative history of subsection 48(B) reveal that the operative sentence for immigration purposes is that which is "ordered by a court of law," permitting state post-conviction sentence modifications and overcoming the *Dickerson* presumption of federal uniformity.

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immigration reforms registered "surprise and disappointment" when they learned of its effects on some deportations).

<sup>263</sup> See *supra* notes 165–75 and accompanying text; see also *supra* note 54.

<sup>264</sup> Cf. Kanstroom, *supra* note 5, at 512, 515–16 ("Thus, when the system of federal removal was first created, states were empowered not only to create federal deportations but to avoid them as well.").

<sup>265</sup> See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2409–12 (2005).

<sup>266</sup> See *supra* note 30, *infra* note 281, and accompanying text.

### 3. Chevron Deference

However, the language of “ordered by the court” in subsection 48(B) is arguably still not strong enough to overcome the presumption, as federal courts had already held that federal judges’ sentence modifications will not count for immigration purposes under subsection 48(B).<sup>267</sup> It is possible that the term is too ambiguous to overcome the federal presumption though this Note does not believe this to be the case.<sup>268</sup> If the terms “suspension” and “ordered by the court” are ambiguous, or if it is unclear whether subsection 48(A) and 48(B) function together or independently, then the question emerges whether, under the *Chevron* doctrine, the Attorney General should be given deference to interpret these terms<sup>269</sup>—something that *Thomas & Thompson* curiously did not discuss.<sup>270</sup> The argument in support of Attorney General deference is deficient for a number of reasons. First, it is debatable whether the interpretation of legal terms such as these actually would qualify for *Chevron* deference under a *Mead* analysis.<sup>271</sup> There have also been a number of commentators who

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<sup>267</sup> See Moore, *supra* note 19, at 705 (citing Matter of Cota-Vargas 23 I. & N. Dec. 849, 854 (B.I.A. 2005) (Pauley, Board Member, dissenting) (noting decisions in federal courts of appeals that have barred federal judges from altering sentences to impact the results of immigration proceedings)).

<sup>268</sup> See AILA Brief, *supra* note 41, at 14–17 (arguing that subsection 48(B) is not ambiguous).

<sup>269</sup> The Supreme Court has held that *Chevron* deference applies to the immigration code in a unanimous opinion. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424–25 (1999) (specifically upholding a BIA decision under *Chevron* deference). The Court also made clear that this applied to the Attorney General as well. *Id.* at 424. It also passes *Mead*’s requirement that “Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law.” *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001), because section 103(g)(2) of the INA delegates authority to the Attorney General to “establish such regulations, prescribe such forms of bond, reports, entries, and other papers, issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section.” INA § 103(g)(2), 8 U.S.C. § 1103(g)(2); see also John W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings of INS v. Ventura*, 18 GEO. IMMIGR. L.J. 605, 618–20 (2004) (arguing that 103(g)(2) passes *Mead*’s requirement).

<sup>270</sup> See Vastine, *supra* note 21, at 64 (“Notably, *In re Thomas and Thompson* cited neither *Chevron* nor *Brand X* to explain its departure from eighteen years of precedent. Instead, the Attorney General’s declaration was one more of fiat, flatly rejecting three decisions made under the Attorney General’s predecessors’ direction as lacking basis in the INA.”).

<sup>271</sup> See *id.* at 64–65 (noting that *Chevron* does not require deference to an agency’s interpretation of statutory language). John W. Guendelsberger noted that the second provision of *Mead* requires that Congress “delegated authority or responsibility to implement a particular provision or fill a particular gap.” Guendelsberger, *supra* note 269, at 620–21 (quoting *Mead*, 533 U.S. at 229). He also noted that there are a number of cases where courts have refused to accord *Chevron* deference where the Attorney General or the BIA are interpreting basic legal terms. *Id.* at 621–22 (citing Third and Ninth Circuit

have argued that it is improper for the Attorney General, as the nation's prosecutor, to be given such deference,<sup>272</sup> especially during the certification process.<sup>273</sup> Others have argued that because *Thomas & Thompson* has criminal law implications, its "dual-application" status does not require *Chevron* deference.<sup>274</sup> Some current Supreme Court Justices have questioned the purpose of *Chevron* deference

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caselaw rejecting interpretations of such provisions as statutes of limitations and effective date provisions while also pointing out Fourth Circuit caselaw that deferred to an Attorney General interpretation of statute of limitations). Furthermore, Cooley R. Howarth, Jr. has argued that *Chevron* makes sense when implementing a statute (applying law to fact) as opposed to "genuine" interpretation. Cooley R. Howarth, Jr., *United States v. Mead Corp.: More Pieces for the Chevron/Skidmore Deference Puzzle*, 54 ADMIN. L. REV. 699, 710–11 (2002).

<sup>272</sup> See, e.g., Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1201–02 (2021) (arguing that *Chevron* deference makes less sense in immigration settings because immigration enforcement requires little specialized expertise, is not covered by the APA, and that "political accountability" is not present in adjudication settings); Rebecca Sharpless, *Zone of Nondeference: Chevron and Deportation for a Crime*, 9 DREXEL L. REV. 323, 334–35, 348 (2017) (describing the Supreme Court's prohibition on "defer[ring] to the Attorney General's interpretation of ambiguous criminal statutes in individual criminal prosecutions" and that the Attorney General's role as "prosecutor-in-chief" creates a conflict of interest that undermines the rationale of *Chevron*). But see Patrick J. Glen, *The Case for Chevron Deference to Immigration Authorities*, 71 DUKE L.J. ONLINE 19, 25 (2021) (arguing for *Chevron* deference to immigration authorities based on the INA, political accountability, and the agency's expertise, while also conceding that "there will still be strictly legal questions to which deference will not apply"). Glen noted, however, that the INA explicitly states that "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." *Id.* at 26 (citing INA § 103(a)(1)). However, if such legal questions engender separation of powers concerns, a congressional statute would not supersede the Constitution. See *supra* note 271, *infra* note 275, and accompanying text.

<sup>273</sup> See Mary Holper, *The New Moral Turpitude Test: Failing Chevron Step Zero*, 76 BROOK. L. REV. 1241, 1274–82 (2011) (arguing that when the Attorney General, "without indicating to the parties or any interested groups that he was considering overhauling," significantly changes the immigration law through certification, it violates the spirit of *Mead*'s preference for agency procedures that "foster[] fairness and deliberation" (quoting *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001))).

<sup>274</sup> AILA Brief, *supra* note 41, at 10–14 (arguing that the Attorney General's determination in *Thomas & Thompson* does not deserve deference under a *Chevron* analysis even if ambiguous because of its potential as a "dual-application" statute with criminal law implications). There have been cases where the Supreme Court has rejected the BIA's interpretation of criminal statutes. See Guendelsberger, *supra* note 269, at 621 & n.94 (noting that courts have not extended *Chevron* deference to the BIA's interpretations regarding aggravated felonies invalid); Sharpless, *supra* note 272, at 334–35 (arguing that the Attorney General should not be granted *Chevron* deference on interpreting ambiguities in criminal law). But see Patrick J. Glen, *Interring the Immigration Rule of Lenity*, 99 NEB. L. REV. 533, 575–76 (2021) (noting that the Supreme Court "has not definitively resolved the question" and arguing that even in dual-application cases, "*Chevron* is such a tool to be applied *prior* to resort to lenity").

where a court has already spoken to the issue,<sup>275</sup> as the Ninth Circuit already did regarding subsection 48(B).<sup>276</sup>

However, even if the statute is ambiguous and *Chevron* deference applies, the Supreme Court has adopted a “rule of lenity” in immigration cases, which counsels reading “ambiguous” immigration statutes in a noncitizen’s favor.<sup>277</sup> This creates a complex analysis pitting *Chevron* deference against the rule of lenity and does not yield a clear answer.<sup>278</sup> However, permitting *Chevron* deference to usurp the rule of lenity would be strange given that administrative expertise is irrelevant to the question of fair notice, which is usually the rationale of the rule of lenity.<sup>279</sup> Given how serious immigration consequences are, not only is fair notice required, but the legislature should be clear if it wants to condemn someone to deportation.<sup>280</sup> Administrative expertise does not seem to facilitate either of these two goals. Thus, even if ambiguous, the Attorney General’s interpretation of subsection 48(B) should not receive *Chevron* deference.

Regardless of the doctrinal inconsistency created, the text of subsection 48(B) dictates that the sentence that counts for immigration purposes is the one *ordered by the court*, leaving the determination to the state for *any* reason: The judge may order the sentence reduced for legal defects, rehabilitative purposes, or distinctly to help the

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<sup>275</sup> See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1150 (10th Cir. 2016) (Gorsuch, J., concurring) (expressing frustration based on separation of powers concerns that the BIA rejected a Tenth Circuit interpretation of a statute on remand and that the Circuit was forced to accept this rejection under *Brand X*’s interpretation of *Chevron*); see also *infra* note 313. I wanted to acknowledge Christopher Ioannou for suggesting my use of this case.

<sup>276</sup> See *supra* note 208 and accompanying text.

<sup>277</sup> See Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 *YALE L.J.* 545, 568 & n.120 (1990) (tracing the line of cases that support such a rule of lenity). Board Member Villageliu argued for such an interpretation of INA § 101(a)(48)(A) in *Matter of Roldan-Santoyo*, 22 *I. & N. Dec.* 852, 532 (B.I.A. 1999) (Villageliu, Board Member, dissenting); see also AILA Brief, *supra* note 41, at 20–21 (noting that as a “dual-application statute[]” with implications in both “criminal and civil” law, there is particular reason to apply the rule in *Thomas & Thompson*).

<sup>278</sup> See Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 *GEO. IMMIGR. L.J.* 515, 577 (2003) (arguing that the rule of lenity in immigration cases should be “one factor among several” in a Step Two *Chevron* analysis with the weight of lenity depending on the legal issue); Sharpless, *supra* note 274, at 341–51 (arguing against *Chevron* deference in cases involving deportation based on criminal grounds (in any form) because of the rule of lenity). *But see* Glen, *supra* note 274, at 561–71 (arguing that *Chevron* deference functionally displaced the rule of lenity and that, despite its invocation, the rule played very little role in key cases after *Chevron*’s enactment).

<sup>279</sup> See Sharpless, *supra* note 272, at 351 (noting the relationship between lenity, fair warning, and deference).

<sup>280</sup> See *United States v. Bass*, 404 U.S. 336, 348 (1971) (describing the purpose of the rule of lenity in criminal law); see also Sharpless, *supra* note 272, at 350–51 (“The severity of deportation supports a broad principle of nondeference.”).

noncitizen avoid immigration consequences. Ultimately, the Attorney General's decision in *Thomas & Thompson* deliberately ignored the very possibility that the INA can credit when states exercise post-conviction relief for immigration purposes given how much of the immigration code delegates decisionmaking to the states.<sup>281</sup>

### CONCLUSION

However, such a reading of subsection 48(B) creates an inconsistency with subsection 48(A) that is hard to justify. In one provision, a state judge is prevented from considering immigration consequences when modifying the nature of a conviction. In another, the state judge is perfectly free to change the underlying sentence for immigration purposes.<sup>282</sup> The question then remains about whether this doctrinal inconsistency *should* exist.

This Note believes that states are in a better position to make both determinations than the federal government.<sup>283</sup> The purpose of an arrest or criminal conviction is fundamentally different from the desire to remove an immigrant from a community. A conviction can serve a variety of penological purposes: e.g., rehabilitation, retribution, deterrence, incapacitation.<sup>284</sup> But just because the state is motivated by a penological purpose does not signal that the community wants the noncitizen permanently removed.<sup>285</sup> If a given locality wants to keep noncitizens, even after they have been convicted of crimes, why should the federal government prevent them from doing so? Of course, noncitizens could move to other localities, meaning other states might have to bear the cost of this decision. But intuitively, noncitizens are more likely to remain in immigrant-friendly states rather than move to states hostile to immigrants.

Moreover, as Professor Nancy Morawetz pointed out shortly after IIRIRA's passage, a rule of automatic deportation based on a criminal conviction will always fail to capture the individual circum-

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<sup>281</sup> See Kanstroom, *supra* note 5, at 513 (noting the ambiguity in the legislative history of the 1996 changes to the INA regarding Congress's perspective about post-conviction relief); see also *supra* Section II.C (discussing the role of the states in the INA); Figueroa-Santana, *supra* note 5, at 2245–53; Huntington, *supra* note 5, at 819; *supra* notes 54, 207.

<sup>282</sup> See *supra* note 233 and accompanying text.

<sup>283</sup> For a similar argument made immediately after *Roldan-Santoyo*, see Bleuzé, *supra* note 30, at 840–50 (arguing that state law on post-conviction proceedings should count for immigration purposes due to effect of immigration on states).

<sup>284</sup> See generally SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS*, ch. 2 (2017) (describing the different justifications for punishment).

<sup>285</sup> See *supra* note 249; Cade, *supra* note 31, at 394–95, 397 (arguing that post-conviction mechanisms “promote community welfare” that is undermined when immigration laws ignore such decisions).



stances of the noncitizen—such a conviction provides dubious evidence of “the [noncitizen’s] ties to this country, the person’s record of rehabilitation, the risk of future criminal activity, or the consequences that deportation would have for the individual’s family.”<sup>286</sup> Any legal mechanism that ameliorates this ill-conceived method and allows judges to exercise discretion will invariably produce better and more fair outcomes about which noncitizens should be allowed to stay.<sup>287</sup>

Thus, Congress should take affirmative steps to ensure that the post-conviction mechanisms employed by states will be respected.<sup>288</sup> Members of Congress recently proposed the U.S. Citizenship Act, which included provisions to amend both subsection 48(A) and subsection 48(B), overruling by statute both *Pickering* and *Thomas & Thompson*. A conviction that were to be “dismissed, expunged, deferred, annulled, invalidated, withheld, or vacated” would no longer count for immigration purposes.<sup>289</sup> It would also make the sentence “ordered by a court” the governing sentence for immigration purposes and would even go further and “exclude any portion of a sentence of which the imposition or execution was suspended.”<sup>290</sup> It would even bring back the Judicial Recommendation against Removal (formerly known as the JRAD),<sup>291</sup> which would bar removal if “the sentencing court issues a recommendation to the Secretary that the noncitizen not be removed on the basis of the conviction.”<sup>292</sup>

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<sup>286</sup> Morawetz, *supra* note 255, at 1959.

<sup>287</sup> See Bleuzé, *supra* note 30, at 841, 850 (describing the role of judicial discretion in shaping immigration matters through discretion’s ability to consider cases on an individual basis); Moore, *supra* note 19, at 709–11 (arguing that restoring discretion will create more uniformity because judges will feel less “compel[led]” to “interfere with immigration processes in order to avoid unfair results”); Kanstroom, *supra* note 5, at 515–19 (noting that when criminal grounds of deportation were first enacted, sentencing discretion (as it operated under the JRAD) was deliberately intended to offset the severity of immigration consequences) (citing *Padilla v. Kentucky*, 559 U.S. 356, 363–64 (2010)).

<sup>288</sup> This suggestion is in the spirit of others who have argued that Congress should take a more active role in defining the nature of immigration law jurisprudence, particularly regarding the nature of state and federal power over immigration. See Rodríguez, *supra* note 5, at 630–31 (“Instead of jumping to preempt or occupy territory, Congress should adopt a presumption against preemption, or direct prohibition of state authority in this area.”); Bowie & Rast, *supra* note 105, at 70–78 (arguing that Congress should actively use legislation to reframe the constitutional default of federal plenary power).

<sup>289</sup> U.S. Citizenship Act of 2021, H.R. 1177, 117th Cong. § 1202(a) (2021).

<sup>290</sup> *Id.*

<sup>291</sup> See *supra* note 257 and accompanying text.

<sup>292</sup> U.S. Citizenship Act of 2021, H.R. 1177, 118th Cong. § 1202(b) (2021); see also Yolanda Vasquez, *Advising Noncitizen Defendants on the Immigration Consequences of Criminal Convictions: The Ethical Answers for the Criminal Defense Lawyer, the Court, and the Sixth Amendment*, 20 LA RAZA L.J. 31, 39–40 (2010) (“Because the criminal court judge spent more time on the criminal case and was more familiar with all of the circumstances of the case, the criminal court judge was seen as more knowledgeable about these factors than the immigration court judge.”); Kanstroom, *supra* note 5, at 516 (“The

But why should Congress leave states in charge of this decision instead of promoting a system of federal uniformity? As noted in Section II.B, the principal rationale for limiting the states' ability to make unilateral immigration decisions was the fear that the aversion of particular states to immigration would limit the larger immigration goals of the nation.<sup>293</sup> The concern was that states could act contrary to the national interest in immigration. Framed that way however, the issue is not that states can never influence immigration decisions, but rather, they should only be involved when it is in the national interest to include them.

The most notable justification is the "one voice" rationale—that it could jeopardize our relations with foreign nations if their citizens do not consistently know how they will be dealt with in the United States.<sup>294</sup> Many commentators have noted that this rationale is in decline.<sup>295</sup> Those who favor an exclusive role for the federal government will argue there is a strong interest in treating noncitizens equally throughout the country and are concerned that differential treatment of immigrants in different states will both harm international commerce and equal protection of immigrants.<sup>296</sup> However, as

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history of the JRAD shows considerable recognition that the state court sentencing judge was in the best position to determine whether the sanction of deportation should be added to the criminal sanctions."); Bleuzé, *supra* note 30, at 828 (same).

<sup>293</sup> See *supra* notes 130–38 and accompanying text.

<sup>294</sup> See *Chy Lung v. Freeman*, 92 U.S. 275, 279–80 (1875) (emphasizing the importance of federal, rather than state, power related to passing laws about foreign citizens); *supra* note 143 and accompanying text (describing origin of "one voice" rationale).

<sup>295</sup> See Spiro, *Demi-Sovereignties*, *supra* note 5, at 162–63 (arguing that states have larger international reputations today that prevent actions of individual states from being attributed to the entire country in a way that implicates foreign affairs as was described in *Chy Lung*); Huntington, *supra* note 5, at 816–18 (noting the decrease in foreign affairs-based explanations for preemption); Rodríguez, *supra* note 5, at 590–91, 613–17 (arguing that "immigration is neither exclusively nor primarily a national security or foreign relations issue" and that America's fractured and divided attitude towards immigration undermines the case for federal exclusivity). *But see* Motomura, *supra* note 5, at 1362 (arguing that even if the "one voice" rationale has eroded, federal commitment to international human rights has become the dominant rationale for federal exclusivity).

<sup>296</sup> See Rodríguez, *supra* note 5, at 619 (noting the Court's decisions to "nationaliz[e] . . . citizenship by the Fourteenth Amendment" and allow "freedom of travel within the boundaries of the United States"); Wishnie, *supra* note 128, at 553 ("Given the choice, one should reject a constitutional theory that endorses the creation of state and local laboratories of bigotry against immigrants."). *But see* Figueroa-Santana, *supra* note 5, at 2245–53 (noting potential for balkinization of immigrant rights in different states while arguing that immigrants' rights in different states are already balkanized, that federal exclusivity actually does not effectively protect the rights of noncitizens, and that federal exclusivity has been used as a proxy for equal protection instead of allowing a robust equal protection jurisprudence to emerge); Huntington, *supra* note 5, at 819 ("[T]he INA already incorporates inconsistent state laws governing criminal conduct and marriage."); Bleuzé, *supra* note 30, at 841, 847 (noting the "mixed system" in post-conviction proceedings and "variations" in state criminal laws).

noted earlier, the treatment of immigrants is already radically different in different parts of the country, especially when it comes to deportation on criminal grounds.<sup>297</sup> The differences in charging practices, criminal statutes, and conviction standards already subjects noncitizens to vastly different immigration risks. To permit inconsistency in some areas but not others makes less sense,<sup>298</sup> especially on issues where those states might be in the best position to make the decision.<sup>299</sup>

More specifically, commentators such as Professor Daniel Kanstroom have noted that it can be very difficult to tell when a state post-conviction mechanism is purely rehabilitative or when it is employed based on a procedural or substantive defect.<sup>300</sup> Ironically, in *Pickering* itself, the Sixth Circuit reversed the BIA, not on the legal standard, but because the BIA had misinterpreted the relevant trial court's motives for the post-conviction relief.<sup>301</sup> This difficulty is only compounded by the fact that what states consider a procedural or substantive defect varies widely.<sup>302</sup> Moreover, state judges often manufacture such defects when the real goal is to prevent deportation.<sup>303</sup> The test in *Pickering* and *Thomas & Thompson* actually creates less uniformity.<sup>304</sup>

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<sup>297</sup> See *supra* notes 167–71 and accompanying text.

<sup>298</sup> See Moore, *supra* note 19, at 711–13 (“It is disingenuous to claim uniformity as a driving interest if the policy of uniformity only matters when it hurts non-citizens by denying the effectiveness of post-conviction relief that would help them avoid deportation or other negative immigration consequences.”); Bleuzé, *supra* note 30, at 848 (noting the asymmetry of permitting delegation for stricter enforcement but not for amelioration); Cade, *supra* note 31, at 409 (“Congress relies heavily on the states to identify, prosecute and sentence criminal noncitizens. But under the prevailing interpretation of the statute, the federal government ignores some state decisions to correct mistakes, reintegrate the most sympathetic offenders, allocate scarce resources, and so on.”). Moore also argued more generally that uniformity is impossible to achieve as long as federal law is so dependent on state law. See Moore, *supra* note 19, at 669.

<sup>299</sup> See *supra* note 287 and accompanying text.

<sup>300</sup> Kanstroom, *supra* note 5, at 520–21; see also AILA Brief, *supra* note 41, at 22–23 (noting that this approach creates “pseudo criminal trials” where immigration judges, who lack “substantive expertise” have to make these determinations about the purpose for the conviction); Moore, *supra* note 19, at 687–92 (outlining federal circuit courts’ splits on post-conviction relief and applying *Pickering*); Cade, *supra* note 31, at 382–83 (noting courts’ points of divergence in applying the *Pickering* rule).

<sup>301</sup> See Kanstroom, *supra* note 5, at 521 n.156.

<sup>302</sup> See Moore, *supra* note 19, at 692–701 (noting the differences between states’ understandings of defects).

<sup>303</sup> See *id.* at 701; Cade, *supra* note 31, at 401.

<sup>304</sup> See Kanstroom, *supra* note 5, at 520–21 (describing the variation in practice and the lack of uniformity in this area of law); Moore, *supra* note 31, at 687 (concluding that there is a lack of uniformity in federal courts application of *Pickering*); Cade, *supra* note 31, at 382–83 (same).

While the “one voice” rationale has diminished, the compelling reasons for states to play a role in immigration have only increased. States are in the best position to evaluate the benefits and burdens of a larger immigrant population, and they can structure their policies so as to attract more immigrants or discourage their residence.<sup>305</sup> Immigrants choosing to reside where they are most desired and accepted creates more efficient outcomes than trying to force immigration policy where, even if state policies are struck down, anti-immigrant feelings will linger.<sup>306</sup> Moreover, states that adopt restrictionist policies will be in a better position to evaluate the costs and benefits of such decisions and will have to take responsibility for their negative effects, as they will no longer be able to blame more pro-immigrant states or policies.<sup>307</sup> Most importantly, if states that favor restrictive policies are forced to feel these effects, the anti-immigrant rhetoric,

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<sup>305</sup> See Rodríguez, *supra* note 5, at 638–39 (describing the benefits of “regulatory competition or from population sorting in which immigrants settle into welcoming communities”); Schuck, *supra* note 5, at 70 (“Moreover, the burdens imposed by immigrants . . . are disproportionately felt at the state and local level, which suggests that states are in the best position to assess and manage the tradeoffs among conflicting public goals peculiar to their polities.”); Peter H. Schuck, *Some Federal-State Developments in Immigration Law*, 58 N.Y.U. ANN. SURV. AM. L. 387, 390 (2002) (describing the economic burdens states face in receiving immigrants that the federal government does not have to internalize and the unequal economic benefit received by the federal government through payroll and income taxes); Spiro, *Demi-Sovereignties*, *supra* note 5, at 125–27 (describing how some states incur more costs from undocumented immigration than others in the absence of federal “burden-sharing”); Cade *supra* note 31, at 405 (noting that states have to “absorb[] and compensate[] for the consequences of the federal rules for noncitizens”); Moore, *supra* note 19, at 713 (describing how post-conviction relief would minimize costs for states); Bleuzé, *supra* note 30, at 840–49 (arguing that state has an interest in guaranteeing its own penological goals, mitigating costs of state support of immigration enforcement, and attracting noncitizens). *But see* Huntington, *supra* note 5, at 806 (noting that recent influxes of noncitizens to areas of the country that traditionally have not experienced high levels of immigration often trigger such measures); Gulasekaram & Ramakrishnan, *supra* note 5, at 2078–81 (“Our data and analysis show that, for the most part, state and local immigration laws are not, as commonly assumed, compelled responses tailored to regionally specific, immigration-induced concerns. . . . Instead, we uncover simpler, more consistent motivations: partisan opportunities and political entrepreneurship.”); Stumpf, *supra* note 5, at 1614–15 (“The lack of empirical support for prioritizing immigrants in criminal legislation suggest that motives other than crime control underlie at least some of the subnational criminal laws focusing on noncitizens.”).

<sup>306</sup> See Rodríguez, *supra* note 5, at 639 (describing noncitizens as commonly choosing to reside in “welcoming communities” as well as noting that “preempting local laws that aim to exclude immigrants will not make for a better integration environment, because the sentiments behind the preempted ordinances are likely to remain and fester”); Spiro, *Learning to Live with Immigration Federalism*, *supra* note 5, at 1628 (noting that noncitizens will be more likely to avoid living in “hostile” states).

<sup>307</sup> See Rodríguez, *supra* note 5, at 639 (describing how local communities will feel the “economic consequences of pushing immigrants out of places they helped revitalize”); Spiro, *Demi-Sovereignties*, *supra* note 5, at 167 (analyzing how international repercussions to state restrictionist actions will discipline states).

whose empirical veracity is dubious, might actually diminish as they see other states reaping the benefits of such immigration.<sup>308</sup> For deportation decisions in particular, states are in a better position to determine if the noncitizen should be removed given that the state has tried the case and reviewed the relevant facts about the noncitizen.<sup>309</sup> The state will also be in the best position to evaluate the costs of that deportation to the community.<sup>310</sup>

Ultimately, while the national government might have a greater interest in matters of exclusion and admission, where it is unknown where a noncitizen might decide to live in the United States, the act of deporting a noncitizen entails the removal of a noncitizen from a particular community. The evaluation of the costs and benefits of removing that noncitizen in the name of safety is a decision in which the state has better information.<sup>311</sup> This will not only allow states to maximize the benefits for their own citizens; states will ultimately make more informed decisions than the federal government, benefiting the entire country by retaining noncitizens who are essential to our communities.<sup>312</sup>

This Note hopes that courts of appeals will reconsider the Attorney General's determination of *Thomas & Thompson*. It also urges the current Attorney General to use the certification power to

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<sup>308</sup> See Rodríguez, *supra* note 5, at 639 (noting the economic consequences of anti-immigrant rhetoric and the resulting desire of states to be viewed as immigrant-friendly).

<sup>309</sup> See Cox & Posner, *supra* note 30, at 1339–40 (noting that state and local authorities have superior information and can better evaluate if a person should be removed); Bleuzé, *supra* note 30, at 841 (same). *But see* Rodríguez, *supra* note 5, at 633 (“[A] coherent immigration system must begin by assuming primary federal control over admissions limits and removal standards.”).

<sup>310</sup> See Morawetz, *supra* note 255, at 1950–51 (describing potential for self-deportation of remaining family members to maintain family unity); Bleuzé, *supra* note 30, at 840–41, 845–46 (describing the possible harm to labor demand, public benefits implications, and deprivation to families); Rodríguez, *supra* note 5, at 595 (noting that the costs of enforcement and economic loss from immigrant flight may lead states to re-evaluate harsh immigration policies). One thing that should also be considered is the psychological harm and resulting costs to the development of future citizen children. See Luis H. Zayas & Laurie Cook Heffron, *Disrupting Young Lives: How Detention and Deportation Affect US-Born Children of Immigrants*, AM. PSYCH. ASSOC. (Nov. 2016), <https://www.apa.org/pi/families/resources/newsletter/2016/11/detention-deportation> [<https://perma.cc/K8AB-DJXN>]; cf. Plyler v. Doe, 457 U.S. 202, 230 (1982) (rejecting denial of education to undocumented children, in part, because of the importance of their development as future citizens).

<sup>311</sup> See Stumpf, *supra* note 5, at 1587 (“Because crime control is a centerpiece of state power, closer ties between immigration and criminal law have a particularly strong impact on the domestication of immigration law.”); *supra* notes 305–10 and accompanying text.

<sup>312</sup> This presumes that grounds of deportation should be based on the self-interest of the state and the United States. I believe grounds of deportation should instead be premised on the human rights of noncitizens, which would exclude deportation on criminal grounds, but the aforementioned presumption only strengthens the larger normative argument.

vacate *Thomas & Thompson* and correctly interpret subsection 48(B), which is well within their authority to do.<sup>313</sup> Finally, if *Thomas & Thompson* is affirmed, states who want to protect their noncitizens should adjust their criminal statutes by lowering the sentence of crimes that carry a penalty of a year to 364 days, as California did.<sup>314</sup> These changes will not work retroactively<sup>315</sup> but can nonetheless ensure that fewer noncitizens are deported in the future while sacrificing little of the state's penological goals. Such measures also might be a better indication of state preference than individual decisions by judges. Local prosecutors can also structure charges to avoid immigration consequences.<sup>316</sup>

But more importantly, this Note urges the Attorney General and the courts to pay closer attention to whether federal law has committed an immigration decision to state discretion. Rather than blindly accept that only the federal government should decide these matters, they should redirect immigration law to its constitutional foundations and let it reflect the best principles of federalism, permitting the federal government to delegate its decisionmaking power on issues where states' knowledge of the needs of their communities will produce the best outcome for the entire country.

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<sup>313</sup> An agency is not bound by a previous agency's interpretation and may change it. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984). All that is required is a "reasoned explanation" acknowledging the reasons for that change. *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 514–15 (2009). Even if a court of appeals affirms *Thomas & Thompson* before this can happen, the Attorney General is barred from subsequently issuing a new interpretation of a statute only if there exists "a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005).

<sup>314</sup> See Vastine, *supra* note 21, at 65–66 & n.60 (describing how California's amendment to section 18.5 of its penal code made it so that "no California misdemeanors will have a potential for a 365 day sentence").

<sup>315</sup> See *id.* at 66 (citing *Matter of Velasquez-Rios*, 27 I. & N. Dec. 470, 471 n.2 (B.I.A. 2018), *aff'd sub nom.* *Velasquez-Rios v. Wilkinson*, 988 F.3d 1081 (9th Cir. 2021)).

<sup>316</sup> See Cox & Posner, *supra* note 30, at 1334 n.164 (describing the policy of the District Attorney of Santa Clara County to structure plea bargains to prevent immigration consequences where such consequences seem unfair given the crime committed); Kaplan, *supra* note 17 (describing the growth of such arrangements); see *supra* note 170 and accompanying text.