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Deporting the Pardoned

Jason A. Cade
University of Georgia School of Law, cadej@uga.edu

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Deporting the Pardoned

Jason A. Cade[*]

Federal immigration laws make noncitizens deportable on the basis of state criminal convictions. Historically, Congress implemented this scheme in ways that respected the states' sovereignty over their criminal laws. As more recent federal laws have been interpreted, however, a state's decision to pardon, expunge, or otherwise set aside a conviction under state law will often have no effect on the federal government's determination to use that conviction as a basis for deportation. While scholars have shown significant interest in state and local laws regulating immigrants, few have considered the federalism implications of federal rules that ignore a state's authority to determine the continuing validity of its own convictions.

This Article contends that limitations on the preclusive effect of pardons, expungements, appeals, and similar post-conviction processes undermine

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sovereign interests in maintaining the integrity of the criminal justice system, calibrating justice, fostering rehabilitation, and deciding where to allocate resources. In light of the interests at stake, Congress should be required to clearly express its intent to override pardons and related state post-conviction procedures. A federalism-based clear statement rule for statutory provisions that restrict generally applicable criminal processes would not constrain the federal government's power to set immigration policy. Congress remains free to make its intent clear in the statute. But the rule would ensure that Congress, rather than an administrative agency, has made the deliberative choice to upset the usual constitutional balance of federal and state power.

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INTRODUCTION

On May 24, 2010, just after Arizona Governor Janice Brewer signed the controversial, anti-immigrant S.B. 1070 into law,[1] New York Governor David Paterson created a special panel to expedite review of pardon applications from immigrants deportable as a result of past criminal convictions. As Paterson made clear in statements to the press, the purpose of the panel was to counter "extremely inflexible" deportation laws and to "set an example for how to soften the blow in those cases of deserving individuals caught in the web of our national immigration laws."[2] Over the next six months, the pardon panel received about 1,100 pardon petitions.[3] In December of 2010, Paterson issued full and unconditional pardons to thirty-three noncitizens.[4]

The noncitizens pardoned by Paterson all had reformed following a single conviction in the 1970s, 80s or 90s.[5] Most of their convictions

[1] *See* Support Our Law Enforcement and Safe Neighborhoods Act, ch. 13, 2010 Ariz. Sess. Laws 450, *amended by* Act of Apr. 30, 2010, ch. 211, 2010 Ariz. Sess. Laws 1070. At the time of its passage, S.B. 1070 contained the most restrictive state regulations affecting immigrants in the country. Its explicit purpose was to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States" and to cause immigrant "attrition through enforcement." Support Our Law Enforcement and Safe Neighborhoods Act, ch. 13, sec. 1, 2010 Ariz. Sess. Laws 450, 450. On June 25, 2012, the Supreme Court enjoined three significant provisions of S.B. 1070 as preempted. *See* Arizona v. United States, 132 S.Ct. 2492, 2510 (2012).

[2] Diana Carlton, *Paterson wades into national immigration debate with 'pardon' panel*, CAPITOL CONFIDENTIAL (May 5, 2010, 5:19 PM), http://blog.timesunion.com/capitol/archives/44299/paterson-wades-into-national-immigration-debate-with-pardon-panel.

[3] *See* Patrick Young, *Paterson's Pardon Panel Deserves to be Made Permanent*, LONG ISLAND WINS (Jan. 3, 2011), http://www.longislandwins.com/index.php/blog/post/patersons_pardon_panel_deserves_to_be_made_permanent.

[4] Because media accounts were unclear about the total number of pardons Governor Paterson granted, I submitted a request to the state's Department of Corrections, pursuant to New York's Freedom of Information Law (FOIL). *See* NEW YORK DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, F.O.I.L. UNIT, *Foil Log No. 12-0054: NY Gubernatorial Pardons* 1 (Jan. 23, 2012) (listing pardons granted by New York Governors since 2003) (on file with author).

[5] *See* Press Release, Governor of New York State, Governor Paterson Announces Pardons (Dec. 24, 2010), *available at* http://www.governor.ny.gov/archive/paterson/press/122410-GovPatersonAnnouncesPardons.html. A few of the noncitizens had concurrent but still relatively minor convictions. *See id.*

became deportable offenses retroactively. One recipient of a pardon was Francisco Moya de Leon, a lawful permanent resident of the United States since 1988 whose wife and children are U.S. citizens. When Moya de Leon applied for naturalization in 2009, the immigration agency denied his application and put him into removal proceedings on the basis of a 1994 drug possession conviction, despite strong equities and an otherwise clear record.[6]

One might think Paterson's Christmastime pardon of Moya de Leon promised a happy conclusion. Whether exercised by a state governor or the President, a full and unconditional pardon is generally understood to be a final judgment by the chief executive of a sovereign government that a conviction under that sovereign's law no longer stands.[7] And Moya de Leon's pardon, like the others that Paterson granted to noncitizens, contained language explicitly releasing him from "all sentences, judgments and executions" based on the conviction, even specifically mentioning "relief from removal."[8]

Unfortunately for Moya de Leon, the Board of Immigration Appeals ("BIA" or "Board") has held that a pardon will not remove the immigration consequences of a conviction for a controlled substance offense. Indeed, as the BIA has interpreted the Immigration and Nationality Act ("INA"),[9] a pardon by the President of the United States or a state governor will only preclude deportation on the basis of certain (albeit important) categories of convictions. Nor are pardons the only state process that, despite otherwise eliminating, deferring, or undoing convictions, are deemed to have limited effect in immigration proceedings. Under current rules, a noncitizen may be deported on the basis of a conviction pending on direct appeal, judicially expunged, or

[6] *See id.* (noting, among other factors, that one of Moya de Leon's children grew up to become a police officer).

[7] *See infra* Part II. The power structures and procedures of state pardon mechanisms vary, but all states appear to provide for a central or at least strong role for the governor in the decision-making process. *See* Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-By-State Resource Guide*, THE SENTENCING PROJECT (June 2008), *available at* http://www.sentencingproject.org/detail/publication.cfm?publication_id=115 [hereinafter *Relief*].

[8] *See, e.g.*, Pardon of Francisco Moya de Leon by Governor David Paterson 1 (Dec. 22, 2010) (on file with author); Pardon of [redacted] by Governor David Paterson (Dec. 30, 2010) (on file with author).

[9] The INA comprehensively sets forth the terms of admission for noncitizens and the circumstances under which they will become removable from the United States. *See generally* Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1537).

treated as a deferred adjudication or suspended sentence under state law.[10]

Scholars have paid little attention to these federal immigration rules and their implications for the constitutional balance of federal and state power. While the proliferation of sub-federal laws affecting immigrants has inspired an abundance of academic and political interest, that interest is focused primarily on whether state or local laws that regulate immigrants infringe on federal authority.[11] But as federal immigration policy becomes increasingly intertwined with state criminal enforcement, core state structures are impacted in significant ways.[12] Some of the federal rules run counter to state criminal justice interests, intruding on state autonomy in underappreciated and perhaps unintended ways.

In making deportation laws hinge on convictions under the laws of any sovereign, Congress relies heavily on state criminal procedures that identify, prosecute, and sentence noncitizens. Through this choice, which represents huge resource-savings benefits to the federal government, Congress has in essence incorporated state laws of general applicability into the federal regulatory scheme. This is not a new scheme,[13] nor is it unique to immigration regulation.[14] But until

[10] *See infra* Part I.D.

[11] The scholarship being generated in this area is too voluminous to fully cite. For a sampling, see Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 252 (2011); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 789-92 (2008); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 28 (2007); Cristina M. Rodriguez, *The Significance of the Local in Immigration Reform*, 106 MICH. L. REV. 567, 567 (2008); Juliet Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1557 (2008). For an informative account of how state laws and actors use immigration status in criminal prosecution and sentencing to both advantage and disadvantage defendants, see Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1423, 1433 (2011).

[12] *See, e.g.*, Jason A. Cade, *The Plea Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. (forthcoming June 2013) (manuscript at 34-39) (on file with author) (arguing that federal immigration enforcement programs targeting noncitizens in the criminal justice system sometimes create overwhelming incentives to plead guilty to minor crimes regardless of immigration status, the strength of the prosecutor's case, or underlying guilt).

[13] The federal government has been deporting citizens on the basis of state convictions since the Immigration Act of 1917. *See infra* Part I.B.2.

[14] Deportation is only one of many federal collateral consequences that Congress has attached to state convictions. *See generally* ABA COMM'N ON EFFECTIVE CRIMINAL SANCTIONS, INTERNAL EXILE: COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL

relatively recently, federal immigration law respected post-conviction state processes such as pardons, appeals, and expungements, as well as alternative dispositions such as deferred adjudications and suspended sentences.[15]

By giving preclusive effect to these core state processes, the historical approach preserved interests at the heart of state autonomy. Though less frequently used in recent times, pardons have been a vital tool of governance since the earliest known legal codes.[16] Rooted in sovereignty, pardons were integral to the power to punish from colonial times to at least the early twentieth century.[17] Appeals, deferred adjudications, and expungements also comprise integral components of the states' administration of their general criminal laws. Individually and collectively, these processes work to ensure systemic integrity, correct errors, calibrate punishment, encourage rehabilitation, conserve judicial and penal resources, and remove civil disabilities.[18]

In view of the significant systemic interests at stake, the relevant statutory rules should be read to avoid conflicts with state authority to the extent possible. Statutory construction based on implication or extrapolation is insufficient in this context; rather, Congress should be required to make its intent to override pardons or other core state post-conviction processes explicit in the statute. Where plausible doubts can be raised about a construction that encroaches on a state's sovereign criminal powers, courts should interpret the statute to preserve state authority. This clear statement rule — a federalism canon — would ensure that Congress, rather than an administrative agency, has made the considered and deliberate decision to upset the usual balance of powers in our dual sovereign system. Lacking the binding force of *Marbury*-style judicial review, however, the federalism canon would not prevent Congress from subsequently clarifying its intent in the text of the statute.

The Supreme Court has long used a variety of federalism canons to shore up state authority against federal encroachment, even where

LAWS AND REGULATIONS (Jan. 2009), *available at* http://www.pdsdc.org/resources/publication/collateral%20consequences%20of%20conviction%20in%20federal%20laws%20and%20regulations.pdf (describing the negative effects that may result from pleading guilty or nolo contendere to various crimes).

[15] *See infra* Parts I.B, I.D.

[16] *See* KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 15 (1989) (describing the history of the pardon power since the Babylonian Code of Hammurabi).

[17] *See infra* Part II.B.

[18] *See infra* Part II.

Congress acts within its enumerated constitutional powers.[19] On the other hand, the Court has never employed a federalism canon in the context of immigration regulation. This absence is perhaps not overly surprising given the deference long accorded the federal government in setting deportation policy.[20] Although the power to regulate the selection and exclusion of immigrants is not enumerated in the Constitution, the Court decreed in the late nineteenth century that Congress has plenary power to regulate immigration as a corollary of national sovereignty.[21] This high degree of deference has allowed Congress to regulate immigrants in ways that would never be permissible if applied to citizens.[22] The interpretive rule I propose does no injury to the federal government's immigration authority, however plenary it might be. Indeed, the Court already employs a variety of other clear statement rules in immigration cases, such as the more generalized canon of constitutional avoidance and the presumption against retroactivity.[23] These tools of statutory construction require a higher than usual degree of clarity in the text of a statute when

[19] *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 619-29 (1992) (discussing the Court's use of "super strong clear statement rules" to protect federalism values).

[20] *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 546-57 (1990) (describing how the plenary doctrine declares that Congress and the Executive have often exclusive authority over immigration decisions).

[21] *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893) ("The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.")

[22] For a sampling of the hundreds of scholarly articles discussing the plenary power doctrine, most of which are critical, see Laura J. Arandes, *Life Without Parole: An Immigration Framework Applied to Potentially Indefinite Detention at Guantanamo Bay*, 86 N.Y.U. L. REV. 1046, 1056-59 (2011); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 6-7 (1998); Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 289, 296-97 (2000); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIG. L.J. 339, 339-41 (2002); Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1133-35 (1995).

[23] *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 299, 315 (2001) (employing both these canons to construe the INA to: (1) not preclude habeas jurisdiction; and (2) not retroactively eliminate discretionary relief to deportation).

constitutional concerns are at stake, even if these concerns fall short of actual limits on congressional authority.[24]

As federal immigration policies become increasingly intertwined with state criminal justice structures, a federalism canon may be essential to ensure that traditional state authority over generally applicable governmental processes like the administration of criminal justice is not lightly or inadvertently disregarded. The justifications for the use of the federalism canon in other areas apply with at least as much force in the immigration context.[25] Reliance on the national political process, for instance, is unlikely to adequately safeguard the federalism interests at stake, because the individuals most affected by deportation rules often have relatively little political power. An interpretive rule requiring Congress to express its intention to override a pardon or appeal clearly in the statute would increase the likelihood that legislators actually confront the federalism issues.[26]

Although I analyze the implications of the federal rules for a range of state post-conviction processes, my focus is on the pardon restrictions.[27] The first two Parts of this Article place the immigration rules that limit these kinds of state processes in context. Part I illustrates how Congress attaches federal deportation consequences to criminal conduct punishable by states. Drawing in part on early immigration files held at the National Archives, I show that pardons and other post-conviction processes have long been considered

[24] *See* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 406-07 (2010) (explaining that clear statement rules "insist that Congress speak with unusual clarity when it wishes to effect a result that, although constitutional, would disturb a constitutionally inspired value"); *see, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 575 (2006) (requiring a clear statement from Congress to replace traditional adjudication procedures in terrorism prosecutions). Larry Solan has observed that the Supreme Court may sometimes employ clear statement rules, for example in national security cases like *Hamdan*, where there is reason to be concerned with "an excessively broad interpretation of a legitimate statute by the executive." LAWRENCE M. SOLAN, THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION 193-94 (2010). Such concerns also have force in the immigration context, where the executive branch's interpretation of statutory law has tremendous impact on the implementation of immigration policy. *See, e.g.*, Adam B. Cox & Christina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 492-510 (2009) (describing how the Executive uses both inherent and delegated powers to drive immigration policy).

[25] *See infra* Part III.

[26] *See infra* Part III.

[27] I focus on the pardon restrictions primarily for reasons of scope. Additionally, the fact that pardons issue from the chief executive (in almost every state) and are theorized as integral components of the power to punish foregrounds the threat to state sovereignty posed by imposing limitations. *See infra* Part II.

preclusive of removal in immigration proceedings. Part II situates these state criminal processes within the dual sovereign constitutional structure and reviews the functions that these powers play in governance, specifically addressing the implications of the federal immigration constraints for state autonomy. Part III then argues that Congress should be required to make its intent to override pardons and other core state criminal processes unmistakably clear. As I hope to demonstrate, the application of a federalism canon in the immigration context is justified where federal law intrudes on generally applicable criminal processes. Applying the federalism canon to the INA, there is insufficient clarity that Congress intended to limit the effect of pardons to remove the immigration consequences of state convictions. Finally, I briefly address some of the considerations for applying the federalism canon to other state post-conviction processes implicated by the federal rules.

I. FEDERAL DEPORTATION ON THE BASIS OF STATE CRIMINAL CONVICTIONS THAT HAVE BEEN PARDONED, EXPUNGED, SET-ASIDE, OR APPEALED

A. The General Scheme

Federal immigration law endeavors to uniformly determine which noncitizens convicted of crimes should be deported through category-based labels of criminal activity.[28] Lawfully present noncitizens become removable when their state or federal convictions and sentences match up with one of the INA's many categories of deportable offenses.[29] Although adjudicatory discretion plays some role in whether criminal noncitizens will ultimately be deported, that role is very small.[30] Likewise, prosecutorial discretion at the agency level remains rarely exercised, despite a highly publicized campaign by the Department of Homeland Security under President Obama to

[28] *See* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1938-41 (2000).

[29] The INA divides the grounds of removal from the United States into two categories: deportability and inadmissibility. In general, the grounds of deportability apply to noncitizens who are lawful permanent residents (LPRs), while the grounds of inadmissibility apply to noncitizens seeking lawful entry for the first time, as well as some LPRs who temporarily travel abroad. *See infra* text accompanying notes 97-99.

[30] *See infra* text accompanying notes 103-04 (discussing the difficulty of obtaining discretionary relief at the immigration level under current law).

refine enforcement priorities.[31] ICE prosecutors almost never exercise discretion for the benefit of noncitizens with criminal records.[32]

The category in which a noncitizen's conviction falls also impacts eligibility for naturalization, admissibility, mandatory detention, and judicial review of a removal order.[33] Some of the broader categories, such as aggravated felonies, crimes involving moral turpitude ("CIMT"), controlled substance convictions, and firearms convictions, sweep in many types of criminal offenses. Other categories are very specific — for example, a conviction for high-speed flight from an immigration checkpoint or failure to register as a sex offender. While in limited exceptions federal law provides that noncitizens may become deportable solely on the basis of an immigration judge's administrative determination of criminality, the vast majority of the

[31] In 2011, the general counsel of Immigration and Customs Enforcement under the Obama Administration issued two memorandums setting forth priorities for more nuanced prosecutorial discretion in deportation proceedings in light of the government's limited resources and the high numbers of respondents on immigration court dockets. *See* Memorandum from John Morton, General Counsel, U.S. Department of Homeland Security, Immigration and Customs Enforcement, to All Field Office Directors, All Special Agents in Charge, and All Chief Counsel 5 (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf (outlining policy for ICE to refrain from pursuing noncitizens with close family, educational, military, or other ties in the U.S., instead focusing limited resources on persons with criminal records or who pose threats to public safety or national security); Memorandum from John Morton, General Counsel, U.S. Department of Homeland Security, Immigration and Customs Enforcement, to All ICE Employees 1-4 (Mar. 2, 2011), *available at* http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf (outlining ICE's enforcement priorities). Nevertheless, in the year following the Morton memos, ICE closed less than 1.5% of pending cases, and the backlog of pending matters in immigration court actually rose from 298,173 in September 2011 to 314,417 in July 2012. *See* Meghan McCarthy, *'Prosecutorial Discretion' barely dents immigration case backlog*, TUCSON SENTINEL (July 16, 2012), http://www.tucsonsentinel.com/local/report/071512_immig_cases/prosecutorial-discretion-barely-dents-immigration-case-backlog; *Immigration Court Backlog Tool*, TRAC IMMIGRATION, http://trac.syr.edu/phptools/immigration/court_backlog (last visited Aug. 10, 2012). In part, internal agency resistance has stymied efforts to institute widespread and uniform application of prosecutorial discretion. Specifically, the National ICE Counsel — the union representing ICE agents — has refused to allow their members to participate in the prosecutorial discretion training. *See* Julia Preston, *Agents' Union Stalls Training on Deportation Rules*, N.Y. TIMES, Jan. 7, 2012, at A15.

[32] *See* Cade, *supra* note 12, at 13-14 (arguing that ICE rarely exercises prosecutorial discretion even where the noncitizen has only misdemeanor convictions).

[33] *See, e.g.*, Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1681-88 (2011) (describing how the federal immigration system assesses criminal convictions).

INA's category-based deportation provisions require an actual state or federal conviction.[34]

Although either federal or state convictions can fall within the INA's categories of deportable offenses, the 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. Federal criminal prosecutions have grown significantly in the last forty years,[35] but they are far eclipsed by the number of state criminal prosecutions. In the first eleven months of 2012, the federal government reported 154,353 new prosecutions.[36] In contrast, each of the fifty states typically has more than 100,000 criminal prosecutions per year, and larger states like New York and California have many times that amount.[37] Moreover, more than half of federal prosecutions are for illegal entry

[34] A noncitizen is subject to the human trafficking deportability ground merely on the basis of knowledge or "reason to believe" on the part of the consular officer, Secretary of Homeland Security, Secretary of State, or Attorney General. *See* Immigration and Nationality Act § 237, 8 U.S.C. § 1227(a)(2)(F) (2008) (incorporating Immigration and Nationality Act § 212(a)(2)(H), 8 U.S.C. § 1182(a)(2)(H)). Similarly, a noncitizen found engaging in terrorist activities or in conduct implicating national security grounds, or "who is, or at any time after admission has been, a drug abuser or addict" is deportable even in the absence of a conviction. *See id.* § 237(a)(2)(B)(ii), (a)(4)(A)-(B), 8 U.S.C. § 1227(a)(2)(B)(ii), (a)(4)(A)-(B). Finally, noncitizens who were inadmissible at time of entry under Immigration and Nationality Act § 237(a)(1)(A) are deportable without a conviction. *See id.* § 237(a)(1)(A), 8 U.S.C. § 1227(a)(1)(A).

[35] *See* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 56-60, 102-04, 164-65 (2007); Marc Mauer & Meda Chesney-Lind, *Introduction*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 6, 10 (2002); James A. Strazzella & William W. Taylor, *Federalizing Crime - Examining the Congressional Trend to Duplicate State Laws*, CRIM. JUST., Spring 1999, at 4, 7.

[36] *Prosecutions for 2012*, TRACFED, http://tracfed.syr.edu/results/9x2050ab974312.html (last visited Nov. 26, 2012) (noting that at this pace, the annual total of prosecutions will be 168,385 for fiscal year 2012).

[37] In 2011, New York had close to 500,000 criminal prosecutions. *See 2007-2011 Disposition of Adult Arrests, New York State*, NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES, http://www.criminaljustice.ny.gov/crimnet/ojsa/dispos/nys.pdf (last visited June 9, 2012). In California the number was over 1,000,000 in 2009. *Total Law Enforcement Dispositions of Adult and Juvenile Arrests, 2009*, CALIFORNIA DEPT. OF JUSTICE, http://stats.doj.ca.gov/cjsc_stats/prof09/00/5.htm (last visited June 11, 2012). *See generally Criminal – Total Caseloads 2009*, COURT STATISTICS PROJECT, STATE COURT CASELOAD STATISTICS, http://www.courtstatistics.org/Other-Pages/StateCourtCaseloadStatistics.aspx (last visited June 11, 2012) (outlining total criminal caseloads by state for 2009).

and reentry violations, rather than for the non-immigration crimes that fall within the INA's categories of deportable offenses.[38]

B. The Historical Context

Federal laws predicating deportation on the basis of state convictions are almost 100 years old. The government has used convictions and other indicia of criminal behavior in exclusion and naturalization proceedings for even longer. As the following sections show, federal laws that imposed immigration consequences on the basis of convictions historically gave effect to pardons and other post-conviction procedures.

1. Pre-1917 Pardons in Immigration Cases

Federal immigration control in the late nineteenth and early twentieth centuries looked very different than the highly regulated regime that we have now. The first federal exclusion act was passed in 1875,[39] but it was not until 1917 that the law provided for deportation on the basis of post-entry convictions.[40] The early decades of the twentieth century saw intense congressional debate about how to regulate immigration effectively.[41] Although much of the legislation proposed during that time was aimed at increasing the grounds of exclusion, Congress also began to consider bills to deport immigrants

[38] *See Prosecutions for 2012*, TRAC, http://tracfed.syr.edu/results/9x2050ab974312.html (last visited Nov. 26, 2012).

[39] Immigration Act of 1875, ch. 141, 18 Stat. 477, 477-78.

[40] *See* Immigration Act of 1917, ch. 28, § 19, 39 Stat. 874, 889 (providing for deportation on the basis of crimes involving moral turpitude committed within five years of entry). In 1907, Congress enacted a statute providing that any noncitizen woman found to be a prostitute within three years of entering the United States shall be deported. *See* Immigration Act of 1907, ch. 1134, § 3, 34 Stat. 898, 900. As Professor Kanstroom notes, this law was part of "the long-standing attempt to prevent the entry of prostitutes into the United States." *See* DANIEL KANSTROOM, DEPORTATION NATION 125 (2007). Significantly, under the 1907 law and its revision in 1910 (36 Stat. 263), no conviction was required; the status of being a prostitute served to evidence the noncitizen's unfitness for admission at the time of entry. *See id.* at 125-26, n. 221; *see also* E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798-1965, 146, 167 (1981) (demonstrating that after the 1907 Act, Congress began to consider bills making noncitizens deportable for U.S. convictions, but did not pass such a law until 1917).

[41] *See generally* HUTCHINSON, *supra* note 40, at 134-67 (providing an overview of congressional debate regarding United States immigration regulation from 1903 to 1917).

on the basis of post-entry criminal conduct.[42] This shift reflected the widespread public perception of a major crime wave in the early twentieth century, with immigrants often blamed for the perceived rising criminality.[43]

Even before the rise of deportation on the basis of domestic convictions, however, the efficacy of pardons, both foreign and domestic, sometimes arose in exclusion and other immigration proceedings. An 1885 Attorney General Opinion indicated that even a foreign pardon, if unconditional, would overcome grounds of inadmissibility.[44] Early cases under the jurisdiction of the Bureau of Immigration and Naturalization within the Department of Labor[45] tend to show that pardons were generally understood to remove the immigration consequences that would follow the fact of conviction, just as they removed other collateral disabilities. The Bureau of Immigration routinely submitted letters opposing (but occasionally supporting) federal pardons for noncitizens convicted of smuggling or prostitution-related offenses.[46] In re-entry cases, pardons were distinguished from procedures such as parole, with only the former sufficient to remove a charge of criminality.[47] Law enforcement

[42] *See* KANSTROOM, *supra* note 40, at 125-33.

[43] *See id.* at 133 (noting that more than fifty major crime studies were published in the early twentieth century).

[44] *See* Immigrant Act, 18 Op. Att'y Gen. 239, 239-240 (1885) (citing to Supreme Court cases and international law treatises to conclude that foreign pardon, so long as unconditional, makes applicant admissible for entry to the U.S.).

[45] Early immigration case files, which were under the jurisdiction of the Department of Labor from 1903 to 1940 (called the Department of Commerce & Labor until 1913), are stored in the National Archives in Washington, D.C.

[46] Most of these cases involved offenses under The White Slave Traffic Act of June 25, 1910 ("The Mann Act"), 36 Stat. 825, which prohibited the importation or interstate transportation of women for immoral purposes. *See, e.g.*, DEPARTMENT OF COMMERCE AND LABOR, BUREAU OF IMMIGRATION AND NATURALIZATION, SUBJECT FILE NO. 53,145-48 (July 17, 1912) (containing Bureau of Immigration letter opposing federal pardon of noncitizen's deportable prostitution-related offense under the Mann Act); DEPARTMENT OF COMMERCE AND LABOR, BUREAU OF IMMIGRATION AND NATURALIZATION, SUBJECT FILE NO. 53,344-70 (June 18, 1912) (same); DEPARTMENT OF COMMERCE AND LABOR, BUREAU OF IMMIGRATION AND NATURALIZATION, SUBJECT FILE NO. 53,138-60 (Feb. 19 1912) (same); DEPARTMENT OF COMMERCE AND LABOR, BUREAU OF IMMIGRATION AND NATURALIZATION, SUBJECT FILE NO. 53,028-17 (Aug. 30, 1911) (containing letter from Bureau of Immigration to Attorney General supporting noncitizen's application for a pardon for smuggling charge because noncitizen supplied valuable information about a smuggling ring through Canada, which led to the removal of a corrupt immigration officer who was a key player).

[47] *See, e.g.*, DEPARTMENT OF COMMERCE AND LABOR, BUREAU OF IMMIGRATION AND NATURALIZATION, SUBJECT FILE NO. 52,395-36 (June 3, 1909) (Bureau of Immigration memorandum denying reentry following short trip abroad to lawful permanent

authorities sometimes requested pardons to prevent immigration consequences for noncitizens who aided the prosecution of others.[48]

A 1908 debate on the floor of the House of Representatives regarding a bill to add a ground of deportation on the basis of criminal convictions also provides a glancing indication that pardons in that era were understood to remove immigration consequences:[49]

> Mr. SULZER.[50] Suppose a governor should pardon a man.
>
> Mr. BENNET.[51] Then the law would not act on him.
>
> Mr. SULZER. He would be restored to all his rights, and hence could not be sent back.
>
> Mr. BENNET. Yes.
>
> Mr. SULZER. There is nothing in your bill to that effect, however.
>
> Mr. BENNET. The pardon wipes out the conviction. This law only acts at the expiration of his sentence. Similarly it would not act on a man on whom sentence was suspended.[52]

Because a governor's pardon restores a state convict "to all his rights," it was understood (by Representative Bennet, at least) that the convict would not be deportable on the basis of the conviction. Representative

resident convicted of second degree murder on basis that governor's parole insufficient to overcome exclusion grounds, but noting that "[i]f the instrument were a full and unconditional pardon, Musso would be restored thereby to a position of absolute innocence"); DEPARTMENT OF COMMERCE AND LABOR, BUREAU OF IMMIGRATION AND NATURALIZATION, SUBJECT FILE NO. 52,080-160 (1917) (Department of Justice opposition to lawful permanent resident's request for pardon to facilitate return from Mexico where he fled in 1911 to avoid prosecution for smuggling charges).

[48] *See, e.g.*, DEPARTMENT OF COMMERCE AND LABOR, BUREAU OF IMMIGRATION AND NATURALIZATION, SUBJECT FILE NO. 53,943-14 (Aug. 23, 1916) (Bureau of Immigration letter supporting Attorney General pardon for noncitizen in view of his rehabilitation and valuable assistance given in rounding up smugglers).

[49] Much of the debate over the proposed deportation law concerned other matters. *See, e.g.*, 42 CONG. REC. 2752 (1908) (debating, inter alia, the non-uniformity of felonies among the states and the potential inclusion of minor crimes).

[50] Representative William Sulzer, a Democrat from New York, served in Congress from March 1895 to December 1912, and then went on to become governor of New York. *See* WILLIAM F. STEVENSON, BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS 1774-1927, H.R. DOC. NO. 783, at 1585 (1928).

[51] Representative William Bennet, a Republican from New York, served in Congress from March 1905 to March 1911. From 1907 to 1910 he was a member of the United States Immigration Commission. *See id.* at 693.

[52] 42 CONG. REC. 2753 (Mar. 2, 1908).

Sulzer did not seem to disagree, though his comments suggest he thought the pardon's nullifying effect on the conviction should be made explicit in the statute.

In sum, the available evidence indicates that in the era before deportation on the basis of post-entry criminal conduct, processes that deferred or removed a conviction under state law were commonly given preclusive effect in immigration proceedings.

2. Pardons and the 1917 Act

The first significant criminal deportation bill was passed in 1917, over President Wilson's veto. Section 19 of the Immigration Act of 1917 provided that a noncitizen would be deportable for a single conviction for a "crime involving moral turpitude" committed within five years of entry, or two convictions for crimes involving moral turpitude committed at any time, so long as the sentence of imprisonment for each conviction was at least one year.[53]

The 1917 Act provided that "the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned."[54] The statute thus contemplated pardons as a complete defense to both of the statutory grounds for deportation on the basis of criminal convictions. The Act also created a mechanism for the presiding state judge to weigh in on whether a criminal conviction should lead to removal in a particular case, a process called a Judicial Recommendation Against Deportation ("JRAD"), which remained in effect until 1990.[55]

The legislative debates leading to the 1917 Act only briefly concerned the relevance of state pardons.[56] The fleeting discussion that occurred does not resolve whether Congress included the pardon provision to ensure that those implementing the law would be sure to give pardons their full effect (as suggested by the debate about the proposed bill in 1908), or whether Congress believed the inclusion of

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[53] *See* Immigration Act of 1917, ch. 28, § 19, 39 Stat. 874, 889.

[54] *See id* at 889-90.

[55] *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1479-80 (2010) (discussing JRADs).

[56] 53 CONG. REC. 5172 (1916) (statement of Representative James Mann) ("But there are cases where the pardon is properly granted. There may be many cases where a parole is frequently granted. Now, ought not there to be some method . . . ."); *id.* (statement of Representative John Burnett) ("If the gentleman will permit, that is provided for. I will call attention to it, in the proviso on page 41: That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned.").

the pardon exemption was necessary to confer a defense to removal that would otherwise not exist.[57]

In the decades following the 1917 Act, domestic pardons were often used to allay the deportation consequences of a conviction.[58] In the 1930s, for example, New York Governor Herbert Lehman granted 110 pardons to convicted noncitizen felons who had served their prison terms.[59] One recipient was an Italian who, attempting to reenter the United States from a Canadian vacation, had been denied on grounds that his childhood theft conviction ("to help keep his family warm") in the United States was a crime involving moral turpitude before time of entry.[60]

Throughout the early twentieth century, Congress continued to enact additional criminal deportation grounds, including convictions related to subversion,[61] wartime and neutrality acts,[62] false registration,[63] and narcotics offenses.[64] Notwithstanding this growth in deportable offenses, courts and the immigration authorities interpreted each new ground of criminal deportation to incorporate pardons as a complete defense to removal.[65] As an internal policy

[57] Congress occasionally legislatively "authorizes" where no explicit authorization is (or should be) required. For example, in the post-Civil War era Confiscation Acts and Tax Cases, Congress gave the President the power to pardon related offenses against the U.S., but as the Supreme Court later clarified, this grant was completely superfluous in light of the Pardon Clause. *See infra* Part III.C.

[58] *See, e.g.*, IMMIGRATION AND NATURALIZATION SERV. DEP'T OF JUSTICE, IMMIGRATION MANUAL §§ 655.27, 655.26 n.14 (1946) (citing to BIA and Solicitor of Labor files concerning pardons) (on file with author); *see also id.* § 655.27 n.19d.

[59] *See* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 76, 81 (2004) (citing *Deportation of Criminals, Preservation of Family Units, Permit Noncriminal Aliens to Legalize Their Status: Hearing Before the S. Comm. on Immigration*, 74th Cong. 122 (1936)); *Pardons, Commutations, and Reprieves*, *in* PUBLIC PAPERS OF GOVERNOR HERBERT S. LEHMAN, 1933-1942 (1935-1947), 444-52.

[60] *See* NGAI, *supra* note 59, at 76, 81.

[61] Immigration (Dillingham-Hardwick) Act of 1918, ch. 186, § 4, 40 Stat. 1012 (codified as amended at 8 U.S.C. § 137-3 (1950)) (repealed 1952); *see* IMMIGRATION & NATURALIZATION SERV., DEP'T OF JUSTICE, *supra* note 58, § 655.26 n.13.

[62] *See* Act of May 10, 1920, ch. 174, § 2(a), 41 Stat. 593.

[63] *See* Act of June 28, 1940, ch. 439, § 35(c), 54 Stat. 675 (codified at 8 U.S.C. § 457) (repealed 1952).

[64] *See* Act of Feb. 18, 1931, ch. 224, 46 Stat. 1171 (codified as amended at 8 U.S.C. § 156(a) (1950)) (repealed 1952) (providing for the deportation of aliens engaged in narcotics trafficking); *see also* 21 U.S.C. § 175 (1922) (repealed 1952) (providing for deportation of aliens convicted of importing or exporting narcotics).

[65] *See* G, 4 I. & N. Dec. 73, 74, 81 (B.I.A. 1950) (holding that respondent's certificate of executive clemency is a pardon within the meaning of the 1917 Immigration Act, relieving him of all consequences stemming from his convictions for larceny, burglary, and receiving stolen property); G, 3 I. & N. Dec. 808, 808-09, 812

manual for the immigration agency's officers in effect for much of the twentieth century observed, a full pardon by a governor for offenses against the laws of that state prevented or removed all of the penalties and disabilities consequent upon conviction.[66]

3. Pardons and the 1952 and 1956 Acts

In 1952, Congress reworked the immigration and nationality laws into a new code.[67] The McCarran-Walter Act of 1952, passed over President Truman's veto,[68] created the INA, added stricter provisions concerning deportation and exclusion, and changed the immigration quota scheme.[69]

Most relevant here, the 1952 Act restructured the statutory provisions affecting pardons and JRADs.[70] Consistent with all prior immigration legislation since 1917, section 241(b) of the Act clearly precluded deportation for any alien convicted of a crime involving moral turpitude if granted a JRAD or a full and unconditional pardon by the President or a state governor.[71] But the restructured code placed

(B.I.A. 1949) (holding that pardon granted by Attorney General terminates deportation proceedings based on respondent's charges of assault with intent to murder); *see, e.g.*, IMMIGRATION & NATURALIZATION SERV., DEP'T OF JUSTICE, *supra* note 58, §§ 655.27, 655.26 n.14 (citing to BIA and Solicitor of Labor files concerning pardons) (on file with author).

[66] IMMIGRATION & NATURALIZATION SERV., DEP'T OF JUSTICE, *supra* note 58, § 655.27 (on file with the author).

[67] This legislation was dubiously referred to as the "Wetback Act." *See* Act of Mar. 20, 1952, Pub. L. No. 283, 66 Stat. 26 (incorporating some of the provisions of the Immigration Acts of 1917 and 1920, as well as legislation passed earlier in 1952 that had focused only on preventing illegal entry through criminal provisions); *see also* HUTCHINSON, *supra* note 40, at 302-10.

[68] Truman's veto message criticized the McCarran-Walter Act's continuation of the national origins quota system, application of racial criteria (rather than a less-discriminatory criteria based on national origin) for quota allocation, and increased severity in both admission and deportation provisions. *See* H.R. REP. NO. 82-520, at 153-56 (1952), *available at* http://bulk.resource.org/gao.gov/82-414/00002063.pdf; HUTCHINSON, *supra* note 40, at 307.

[69] *See, e.g.*, HUTCHINSON, *supra* note 40, at 302-10 (describing these aspects of the Act in greater detail).

[70] The 1952 Act, like its predecessors, allowed the sentencing court to make a recommendation against deportation to the Attorney General, at the time of sentencing or within thirty days thereafter. Immigration and Nationality Act of 1952, Pub. L. No. 414, § 241(b), 66 Stat. 163, 208 (allowing same).

[71] *Id. See, e.g.*, L, 6 I. & N. Dec. 355, 356-57 (B.I.A. 1954) (observing that a gubernatorial pardon is not rendered conditional where granted with the words "to prevent deportation" and is therefore effective to preclude deportation); T, 6 I. & N. Dec. 214, 216 (B.I.A. 1954) (terminating deportation proceedings where respondent

the deportation categories for convictions related to controlled substances, weapons, alien registration, and prostitution in a different statutory provision, which did not explicitly provide an exception for pardoned offenses.[72]

Despite these statutory changes, judicial and administrative decisions continued to interpret the Act to give effect to pardons and JRADs in certain situations outside the enumerated limitations in the 1952 Act. Thus, in *United States ex rel. De Luca v. O'Rourke*,[73] the Eighth Circuit held that JRADs granted before the statutory changes would continue to preclude deportation even for immigrants convicted of narcotics offenses.[74] In another example, the Board held that gubernatorial pardons continued to defeat exclusion, not just deportation, on the basis of domestic convictions for crimes involving moral turpitude, over the immigration agency's strenuous objection that the new structure of the statute limited the pardon's effect to the specifically enumerated grounds of deportation.[75] Although these decisions did not turn on Congress's power to limit state pardons, they arguably evince reluctance to depart from the long-held recognition that domestic pardons, if full and unconditional, would remove the immigration consequences of a conviction.[76]

was granted a full and unconditional pardon from the Acting Governor of Hawaii, then only a U.S. territory).

[72] *Compare* Immigration and Nationality Act § 241(a)(1) (providing that any alien within one or more of the excludable classes at the time of entry shall be deported upon order of the Attorney General), *with* §§ 241(a)(11)-(18) (stating that deportation of an alien convicted of controlled substances, weapons, alien registration, or prostitution shall not apply if the President or a Governor grants the alien a full and unconditional pardon subsequent to conviction).

[73] 213 F. 2d 759 (8th Cir. 1954).

[74] *See id.* at 764-65; *see also Ex parte* Robles-Rubio, 119 F. Supp. 610, 613-14 (N.D. Cal. 1954) (holding that, because of the savings clause in the 1952 Immigration Act, the previous recommendation against deportation still applied and relieved petitioner from deportation).

[75] *See* H, 6 I. & N. Dec. 90, 96-97 (B.I.A. 1954) ("As long as there is a full and unconditional pardon granted by the President or by a Governor of a State covering the crime which forms the ground of deportability, whether in exclusion or in expulsion, the immunizing feature of the pardon clause applies, and such a crime no longer forms a basis for deportability."); *see also* S, 5 I. & N. Dec. 10, 10 (B.I.A. 1953) (holding that a Certificate of Restoration of Civil Rights issued in 1946 by the Governor of the State of Washington has the same effect as a pardon and prevents deportation on the basis of crime committed in the United States before the alien's last entry).

[76] *See, e.g.*, H, 6 I. & N. Dec. at 96 (B.I.A. 1954) (finding "no sound basis in logic or reason to hold that this pardoning forgiveness or immunity" does not apply to the exclusion grounds).

A report by the Senate Judiciary Committee in 1955 observed such decisions with apparent frustration: "Contrary to this Department's contention, the [Immigration Act's pardon] section has been interpreted as possibly applying to the deportation of aliens convicted of narcotic offenses."[77] The Committee therefore proposed an amendment that would make the pardon provision specifically "inapplicable to any alien charged with being deportable under section 241(a)(11)" — the ground of deportation for controlled substance offenses.[78] The Narcotics Control Act of 1956 adopted this language, though it did not state that any other grounds of deportability would also be outside a pardon's reach.[79] Following that statutory clarification, the BIA and courts easily concluded that pardons would not prevent deportation for drug possession convictions.[80]

C. Current Limitations on Pardons

With that understanding of the historical context, we can now consider the limitations on pardons in the INA as currently interpreted by the agency and a few courts. The analysis is somewhat technical, but this level of detail is necessary to fully explain the consequences of these rules for noncitizens in immigration proceedings.

The basic organization of the present INA dates back to the Immigration Act of 1990.[81] That Act eliminated the explicit statutory restriction on pardons for drug convictions, which had been in place since the 1956 legislation.[82] The newly structured code affirmatively provided that three deportation categories would not apply where the underlying conviction has been pardoned,[83] but was silent about the effect of pardons for all other deportation categories. The legislative record of the 1990 Act does not appear to contain a discussion of pardons or what effect they should have in immigration proceedings,

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[77] COMM. ON THE JUDICIARY, S. REP. NO. 1997 (S. 3760) (1955).

[78] *Id.*

[79] Narcotic Control Act of 1956, Pub. L. No. 84-728, § 301, 70 Stat. 567, 575.

[80] *See, e.g.*, Yuen v. INS, 406 F.2d 499, 500-02 (9th Cir. 1969); Lindner, 15 I. & N. Dec. 170, 171 (B.I.A. 1975); Lee, 12 I. & N. Dec. 335, 337 (B.I.A. 1967).

[81] *See generally* Immigration Act of 1990, 101 Pub. L. No. 649, 104 Stat. 4978 (showing the same basic structure as the INA).

[82] *See generally id.* (repealing former Section 241(b)); Narcotic Control Act of 1956, 70 Stat. at 575.

[83] *See* Immigration Act of 1990 §§ 602(a)(2)(A)(i)-(iv), 104 Stat. at 4978 (referring to crimes of moral turpitude, multiple criminal convictions, and aggravated felony convictions).

so it is unclear whether Congress considered the implications of the statute's structure for the effect of pardons.[84]

Most recently, Congress again significantly modified the INA in 1996 with back-to-back bills adding numerous grounds of deportation.[85] Currently, a subsection in the part of the INA setting out the grounds of deportation provides that four of the categories — crimes involving moral turpitude, multiple criminal convictions, aggravated felonies, and high-speed flight from an immigration checkpoint — will not apply "if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several states."[86] Elsewhere the INA sets forth other categories of deportation, which, as with previous versions of the Act, do not explicitly mention the effect of pardons.[87]

Arguably, Congress may not have considered the cumulative implications of many of the last minute statutory changes that were made on the floor and in committee riders to the two 1996 omnibus statutes.[88] Nothing in the legislative history of either bill reveals any consideration of pardons.[89] All the same, the Board and the few courts

[84] The most relevant document is a 1981 Report by the Select Commission on Immigration and Refugee Policy. This document indicates that the American Bar Association urged Congress to eliminate the specific statutory provision making pardons inapplicable to narcotics convictions and to give pardons preclusive effect for all convictions. *See* IGOR I. KAVASS & BERNARD D. REAMS, JR., THE IMMIGRATION ACT OF 1990: A LEGISLATIVE HISTORY OF PUB. L. NO. 101-649 291 (1997) (reproducing the Final Report of the Select Commission on Immigration and Refugee Policy, Serial No. J-97-38, May 5, 6, and 7, 1981, *available at* http://ia600400.us.archive.org/31/items/finalreportofsel1981unit/finalreportofsel1981unit.pdf).

[85] *See generally* Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 (making omnibus consolidated appropriations for the fiscal year ending September 30, 1997, and for other purposes); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat 1214 (providing additional resources to deter terrorism, provide justice for victims, and provide for an effective death penalty).

[86] Immigration and Nationality Act § 237(a)(2)(A)(vi), 8 U.S.C. § 1227(a)(2)(A)(vi) (2008).

[87] *See id.* §§ 237(a)(2)(A)-(E), §§ 1227(a)(2)(A)-(E) .

[88] *See* Nancy Morawetz, *INS v. St. Cyr: The Campaign to Preserve Court Review and Stop Retroactive Application of Deportation Laws*, *in* IMMIGRATION LAW STORIES 279, 282 (David A. Martin & Peter H. Schuck eds., 2005) (describing controversial last-minute measures inserted into the 1996 immigration bills); Margaret H. Taylor, *Demore v. Kim: Judicial Deference to Congressional Folly*, *in* IMMIGRATION LAW STORIES, *supra*, 343, 352-53.

[89] *See also infra* Part III.C.

to have considered the issue interpret the current statute to give effect to pardons only for the specifically enumerated grounds.

Matter of Suh[90] is illustrative of the Board's approach to the current statute. In that case, the BIA considered the effect of a full pardon from the state of Georgia for the respondent's conviction of sexual battery of a minor. Although the Board found that the pardon made the respondent no longer removable as an aggravated felon, it held that he remained deportable on the ground of a conviction for a crime of domestic violence or child abuse.[91] Sexual battery offenses, the agency observed, are not explicitly exempted by pardons.[92] The BIA further noted that in 1996 Congress added domestic violence, child abuse, and high speed flight as new deportable offenses, but put only high speed flight in the list of categories giving preclusive effect to a pardon. Therefore, the Board concluded, there is no "'implicit' waiver . . . where the statute so clearly states which removal grounds may be [eliminated by a pardon]."[93]

Under the Board's interpretation, the deportation categories excluded from the reach of a pardon include, among others, firearms offenses, domestic violence offenses, and controlled substance offenses.[94] The most significant single exclusion is the controlled substance category, accounting for over twenty-five percent of all criminal deportations in 2010.[95] Under the agency's interpretation of the statute, well over one-quarter of all deportations on the basis of

[90] 23 I. & N. Dec. 626 (B.I.A. 2003).

[91] *See id.* at 626-28.

[92] *See id.* at 628.

[93] *See id.*; *see also In re* Al-Jailani, 2004 WL 1739163, at *1-2 (B.I.A. June 28, 2004) (holding that a domestic violence conviction is not within waiver provision).

[94] *See, e.g.*, *In re* Garcia-Lopez, 2007 WL 2825112 (B.I.A. Aug. 30, 2007) (finding no statutory basis to conclude that a pardon waives a controlled substance ground of removability).

[95] *See* OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SECURITY, IMMIGRATION ENFORCEMENT ACTIONS: 2010, 4 (2011) [hereinafter DHS IMMIGRATION ENFORCEMENT ACTIONS: 2010], *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf. In recent years this category accounted for even higher percentages of removal: almost 30% in 2009 and almost 36% in 2008. *See* OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SECURITY, IMMIGRATION ENFORCEMENT ACTIONS: 2009, 4 (2010), *available at* http://www.dhs.gov/xlibrary/assets/statistics/ publications/enforcement_ar_2009.pdf; OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SECURITY, IMMIGRATION ENFORCEMENT ACTIONS: 2008, 4 (2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ enforcement_ar_08.pdf.

criminal convictions are deemed to be unpardonable for immigration purposes.[96]

None of the INA's separate grounds of inadmissibility mention pardons.[97] The inadmissibility categories apply to: (1) noncitizens who seek to enter the United States, including certain lawful residents who temporarily sojourn abroad; (2) immigrants who are physically present in the country without being lawfully admitted following inspection; and (3) noncitizens eligible to adjust (upgrade) their status.[98] The few administrative and judicial decisions to confront the issue have read the statute to give no effect to pardons where a ground of inadmissibility is charged, even where an equivalent deportation ground *would* be eliminated by the pardon.[99]

In contrast, the U.S. Department of State, interpreting the same statute, came to a different conclusion. The State Department regulations governing consular processing for visa applicants abroad direct that applicants shall *not* be considered inadmissible for crimes

[96] *See* DHS IMMIGRATION ENFORCEMENT ACTIONS: 2010, *supra* note 95. A more precise estimate is difficult because DHS's statistics do not break down the types of criminal convictions leading to deportation into sufficient detail to discern how many would give preclusive effect to a pardon under the Board's interpretation. Additionally, in some cases the Immigration and Customs Enforcement ("ICE") prosecutors in removal proceedings have significant control through discretionary charging decisions to influence whether a pardon will be effective. For example, if a controlled substance offense is instead charged only under the drug trafficking aggravated felony ground, a full and unconditional pardon will be considered preclusive of removal. But, as I discuss below, this anomaly only heightens the federalism concerns raised by the scheme. *See infra* Part III.C.

[97] *See* Immigration and Nationality Act §§ 212(a)(1)-(10), 8 U.S.C. §§ 1182(a)(1)-(10) (2010).

[98] *See, e.g.*, *id.* § 1255(a) (stating that a person must be admissible to the United States to adjust status to lawful permanent resident).

[99] *See* Aguilera-Montero v. Mukasey, 548 F.3d 1248, 1252 (9th Cir. 2008); Balogun v. U.S. Att'y Gen., 425 F.3d 1356, 1362-63 (11th Cir. 2005); *In re* Irabor, 2006 WL 2008305, at *3 (B.I.A. 2006) (holding that the statutory language regarding pardons "does not apply to aliens charged with inadmissibility under section 212(a) of the Act"). Although not explicitly relied on in these decisions, there is an important distinction between the inadmissibility ground and deportability grounds. Unlike the deportation categories, which generally require a conviction, foreign-born persons seeking admission (or readmission in some cases) can be held inadmissible simply on the basis of an administrative finding of criminal conduct. *See, e.g.*, Immigration and Nationality Act § 212(a)(2), 8 U.S.C. § 1182(a)(2) (providing that inadmissibility grounds apply where the noncitizen admits committing the underlying acts); *id.* § 212(a)(2)(C)-(D), § 1182(a)(2)(C)-(D) (providing that inadmissibility grounds apply where the noncitizen commits controlled substance trafficking or prostitution/commercialized vice); *id.* § 212(a)(3), § 1182(a)(3) (providing that inadmissibility grounds apply where the noncitizen commits espionage or sabotage).

involving moral turpitude[100] on the basis of a conviction that has been fully and unconditionally pardoned by a governor or the President.[101] Moreover, earlier Board decisions determining the effect of pardons in exclusion proceedings appear to be in tension with the more limiting construction the agency now gives to the INA.[102]

Administrative and judicial decisions determining the effect of pardons on the noncitizen's eligibility to seek various forms of discretionary relief from removal or to naturalize only complicate the picture. The statutory sections dealing with naturalization or with discretionary alternatives to deportation, such as cancellation of removal or voluntary departure, do not address whether pardons will have any effect. Nevertheless, a number of Board decisions have held pardons *will* remove the statutory bars to obtaining discretionary relief from removal.[103] At least one federal court seems to disagree, concluding that pardons do not remove statutory bars for asylum relief such as an aggravated felony conviction.[104] As for naturalization, the case law suggests that a pardon removes statutory bars to becoming a

[100] *See* Immigration and Nationality Act § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I).

[101] *See* 22 C.F.R. §§ 40.21(a)(5), 40.22(c) (2012).

[102] *See* Rahman, 16 I. & N. Dec. 579, 580 (B.I.A. 1978) (holding that reentering lawful residents are within the terms of President Carter's 1977 pardons to Vietnam War draft resisters, which specifically included noncitizens excludable for violation of the Military Selective Service Act); K, 9 I. & N. Dec. 121, 125 (B.I.A. 1960) (holding that JRADs and pardons overcome grounds of inadmissibility where refugee seeks to adjust status to lawful permanent residence); H, 6 I. & N. Dec. 90, 96 (B.I.A. 1954) (finding "no sound basis in logic or in reason to hold that this pardoning forgiveness or immunity" ineffective to prevent deportation on ground of inadmissibility at time of entry in exclusion proceedings as well as deportation proceedings); E-V, 5 I. & N. Dec. 194, 196 (B.I.A. 1953) (holding that noncitizen seeking admission who has been pardoned cannot be excluded on the ground that he has admitted the essential elements of the pardoned offense).

[103] *See, e.g.*, Ali, 2007 WL 1126092 (B.I.A. Feb. 20, 2007) (remanding for consideration of discretionary relief where respondent was no longer deportable as aggravated felon following pardon for child molestation conviction); *In re* Rosales-Lopez, 2004 WL 2374358, at *1 (B.I.A. July 26, 2004) (recognizing pardoned noncitizen charged as aggravated felon was eligible for discretionary voluntary departure); H, 7 I. & N. Dec. 249 (B.I.A. 1956) (remanding to allow respondent to seek discretionary relief where larceny conviction was pardoned, and respondent was not statutorily precluded from showing good moral character).

[104] *See* Eskite v. Dist. Dir., 901 F. Supp. 530, 536-39 (E.D.N.Y. 1995) (denying a petition for writ of habeas corpus where a noncitizen received a pardon subsequent to a BIA decision finding him ineligible to overcome the statutory bar to apply for asylum or other discretionary relief as an aggravated felon, on the grounds that "Congress did not intend to waive deportability in the cases of aliens convicted of drug-related offenses").

citizen where the prohibitions are predicated on the fact of conviction,[105] although many courts hold that a pardon will not remove the permanent good moral character bar for murder convictions.[106]

A final nuance of the federal scheme with respect to the effect of pardons warrants particular scrutiny. Under the Board's interpretation of the INA, certain offenses fall under more than one ground of removability, leading to the bizarre result that a pardon for the predicate offense may be simultaneously applicable and inapplicable to prevent deportation.[107] This paradox appears to primarily be the result of the dramatically expanded list of aggravated felonies, many of which overlap with categories of offenses that show up elsewhere in the statute.[108] For example, aggravated felonies are defined to include convictions for illegal trafficking in firearms[109] or trafficking in controlled substances,[110] as well as convictions for certain sexual offenses.[111] Under the Board's interpretation of the INA, a pardon will be a complete defense to deportation on the basis of a conviction charged as one of these aggravated felony categories. If charged under

[105] *See, e.g.*, Daddona v. United States, 170 F.2d 964 (2d Cir. 1948) (petitioner granted an executive pardon who had good behavior while in prison is eligible for naturalization); *In re* Sperduti, 81 F. Supp. 833, 835 (M.D. Pa. 1949) (recommending petitioner be admitted to citizenship where granted a pardon and showed good behavior); *In re* Balestrieri, 59 F. Supp. 181, 181-82 (N.D. Cal. 1945) (recommending petitioner be admitted to citizenship because pardoned by the Governor of California, young at the time the crime was committed, and showed subsequent good behavior).

[106] *See, e.g.*, *In re* Siacco, 184 F. Supp. 803, 805 (D. Md. 1960) (finding a murder conviction to be an absolute and perpetual bar to naturalization, unless pardoned because of improper conviction); *In re* De Angelis, 139 F. Supp. 779 (E.D.N.Y. 1956) (holding that conviction for murder precludes applicant from establishing good moral character notwithstanding a pardon). *But see* Adam Klasfeld, *"No Man is Beyond Redemption," Judge Says in Granting Citizenship*, COURTHOUSE NEWS SERVICE (July 12, 2011), http://www.courthousenews.com/2011/07/12/38064.htm (reporting on grant of naturalization by Judge Denny Chin in S.D.N.Y. to man convicted twenty-five years prior of first-degree manslaughter).

[107] *See* ANNE MARIE GALLAGHER, PRIVATE BILLS & PARDONS IN IMMIGRATION 63-64 (2008); DAN KESSELBRENNER & LORY ROSENBERG, IMMIGRATION LAW & CRIMES § 4.23, 4-112 to 114 (2008); Samuel T. Morison, *Presidential Pardons and Immigration Law*, 6 STAN. J. C.R. & C.L. 253, 255-56 (2010).

[108] *See* Immigration and Nationality Act § 101(a)(43) (2006) (listing aggravated felonies).

[109] *Id.* § 101(a)(43)(C).

[110] *Id.* § 101(a)(43)(B).

[111] "[A]ggravated felony" includes: rape or sexual abuse of a minor, child pornography, and transportation for the purpose of prostitution. 8 U.S.C. § 1101(a)(43) (2010).

the firearms, controlled substances, or domestic violence categories of deportation, however, a pardon will have no effect.

To illustrate, recall that in *Matter of Suh* the government had charged a respondent convicted of a single sexual battery conviction under Georgia law with two grounds of deportability. The Board held that the respondent's full pardon for the underlying state offense eliminated the aggravated felony basis for removal, but had no effect on the domestic violence deportability ground.[112] The Board rejected the respondent's argument that this result was irrational and upheld the deportation order against him.[113]

Note that under this view of the statute, whether or not a pardon is applicable turns on the federal agency's choice of which of several applicable removal grounds to list in the charging instrument it files with the immigration court, or on the gratuitous decision of whether to charge more than one independently sufficient ground, rather than on the nature of the underlying offense itself. Thus, the Board has given preclusive effect to a pardon for a child molestation conviction where the respondent was charged solely with deportability as an aggravated felon, even though he could also have been charged under the domestic violence provision.[114] And in another case, the Board held that a noncitizen who received a pardon for a state drug trafficking offense was not deportable where ICE charged him under the trafficking in controlled substances aggravated felony category, rather than under the general controlled substances deportation ground.[115]

The implication of the Board's interpretation of the statute, then, is that in many situations, rank and file agency prosecutors have ultimate discretion — through formal charging decisions — to determine whether or not a pardon will prevent the deportation of a noncitizen. The scheme thus introduces great potential for arbitrariness with respect to whether a sovereign pardon will be given effect, and, as a result, whether the pardoned noncitizen will be deported. This risk of arbitrary agency action raises doubts about the soundness of the Board's current interpretation, a subject to which I return later.[116] But first it will be useful to learn more about how

[112] Suh, 23 I. & N. Dec. 626, 627 (B.I.A. 2003).

[113] *Id.* at 628.

[114] *See* Ali, 2007 WL 1126092, at *1-2 (B.I.A. Feb. 20, 2007).

[115] *See* Rosales-Lopez, 2004 WL 2374358, at *1 (B.I.A. July 26, 2004) (giving pardon preclusive effect where noncitizen was charged only under drug trafficking aggravated felony category rather than controlled substance category).

[116] *See infra* Part III.

federal law, as interpreted by the Board and some courts, restricts the effect of other state post-conviction processes in immigration proceedings.

D. Current Limitations on Deferred Adjudication, Expungements, and Appeals

The government and some courts have interpreted federal law to limit the immigration effect of deferred adjudications, expungements, appeals, and other state post-conviction processes in various ways. These processes are similar to pardons in terms of the state interests they further, although they may be less closely (or at least less obviously) tied to the police power of the sovereign executive.[117] And as with pardons, the federal government historically gave effect to these post-conviction processes. Here again the analysis must be somewhat technical to illustrate the fact that the restrictive rules do not flow from clear statutory text but rather are disputable matters of interpretation.

With the 1996 passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),[118] Congress first defined the term "conviction" for immigration purposes. The INA states that a conviction is "a formal judgment of guilt . . . entered by a court or, if adjudication of guilt has been withheld, where – (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed."[119] Courts and the BIA have interpreted this definition to limit the immigration effect of various means through which state defendants can elude or eradicate a conviction, both before and after sentence has been imposed.

IIRIRA's definition of conviction was actually a partial incorporation of how the BIA previously defined the term in a case called *Matter of Ozkok*.[120] The *Ozkok* test held that a noncitizen is convicted for immigration purposes if: (1) the court finds him or her guilty; or (2) in cases where adjudication is withheld, the noncitizen pleads guilty, no contest, or admits to facts sufficient for a finding of guilt, and the court orders some form of punishment or restraint on liberty, and

[117] *See infra* Part II.C.

[118] Pub. L. 104-208, 110 Stat. 3009-546 (1996).

[119] 8 U.S.C. § 1101(a)(48)(A) (2006).

[120] 19 I. & N. Dec. 546 (B.I.A. 1988).

failure to comply with court orders or probation would result in an entry of guilt against the noncitizen.[121] Thus, the modified definition of conviction as enacted in the INA eliminated the Board's requirement that for a suspended sentence or deferred adjudication to qualify as a conviction for immigration purposes, an adjudication of guilt must automatically follow from violation of the terms of probation or a court order.[122] Under the INA's definition, a noncitizen defendant who receives a deferred adjudication or pleads no contest may not avoid the immigration consequences that follow a conviction. For immigration purposes, it is only necessary that a judge order some form of punishment, even if suspended, and it makes no difference whether the state itself would recognize the resolution of the case as a conviction.[123] This rule prevents many diversionary treatment or supervision programs for minor offenders from avoiding the immigration consequences of a conviction.[124]

Less defensibly (as a matter of statutory interpretation), the INA's definition has also been held to include state convictions that have been vacated or set-aside under a wide variety of state processes if the post-conviction relief is to reward rehabilitation, or for other purposes not going to the merits of the underlying conviction.[125] Although occasional federal and administrative decisions since the 1950s determined that certain record-altering state criminal processes did not eliminate deportability, these decisions were highly fact-specific.[126] As a general matter, federal courts and the Board have long held that

[121] *See id.* at 551-52.

[122] *See* H.R. REP. NO. 104-828, at 223-24 (1996) (Conf. Rep.).

[123] *See, e.g.*, Matter of Punu, 22 I. & N. Dec. 224, 226-29 (B.I.A. 1998) (finding congressional intent to treat deferred adjudications as convictions for immigration purposes "regardless of specific procedures in States").

[124] *See e.g.*, COMMITTEE ON CRIMINAL JUSTICE OPERATIONS, NEW YORK CITY BAR, THE IMMIGRATION CONSEQUENCES OF DEFERRED ADJUDICATION PROGRAMS IN NEW YORK CITY (June 2007) (explaining that because diversionary programs in New York require an upfront guilty plea, immigration consequences will attach even if the plea is later vacated and sentence never entered upon the defendants' completion of the program).

[125] *See* Pickering, 23 I. & N. Dec. 621, 624 (B.I.A. 2003) (holding that only convictions quashed or vacated on grounds of "procedural or substantive defects in underlying proceedings" will be eliminated for immigration purposes), *rev'd on other grounds*, Pickering v. Gonzales, 465 F.3d 263 (6th Cir. 2006).

[126] *See, e.g.*, United States *ex rel.* Piperkoff v. Esperdy, 267 F.2d 72 (2d. Cir. 1959) (holding that coram nobis motion twenty-two years after the defendant's original sentencing with the purpose of issuing a JRAD is not valid because Congress intended JRADs to be issued within thirty days of sentence); A-F-, 8 I. & N. Dec. 429, 446 (B.I.A. 1959) (inferring Congressional intent to recognize expungements for drug offenses only where the state procedure raises doubt about the validity of the underlying proceeding).

vacaturs, expungements, and similar post-conviction procedures remove the immigration consequences that follow conviction.[127] For example, courts interpreted the Board's definition of conviction in *Ozkok* not to include convictions that had been expunged, except in the case of drug offenses.[128]

Following IIRIRA, however, a majority of the BIA sitting en banc in *Matter of Roldan* concluded that Congress had intended to implement a uniform approach to convictions for immigration purposes that focused on the initial finding of guilt, obviating any distinction between states "where rehabilitation is achieved through the expungement of records . . . rather than in a state where the procedure achieves the same objective simply through deferral of judgment."[129] Accordingly, the Board held, expungements or similar procedures pursuant to state rehabilitative statutes do not remove the immigration consequences of convictions.[130]

A few years later, the BIA allowed in *Matter of Pickering* that post-conviction relief addressing a substantive or procedural defect in the underlying proceedings would continue to eliminate convictions for immigration purposes.[131] But the many subsequent administrative and

[127] The rule that convictions set aside or expunged under state law have not achieved sufficient finality for purposes of deportation dates back to administrative case law from the 1940s and 1950s. *See generally* Andrew Moore, *Criminal Deportation, Post-Conviction Relief and the Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J. 665, 679-86 (2008) (tracing the history of the administrative and federal case law parsing the effectiveness of post-conviction procedures in removing immigration consequences).

[128] *See, e.g.*, Yanez-Popp v. INS, 998 F.2d 231, 235 (4th Cir. 1993) ("We agree with the Board that narcotic offenders must be dealt with seriously and uniformly and unless a conviction is vacated on its merits, a revoked state conviction is still a "conviction" for federal immigration purposes.").

[129] Roldan-Santoyo, 22 I. & N. Dec. 512, 521 (B.I.A. 1999), *rev'd on other grounds*, Lujan-Armendariz v. INS, 222 F.3d 728 (9th Cir. 2000) (holding on equal protection grounds that expungement of first time drug offenses under state law should be given preclusive effect where the offender would meet the requirements of the Federal First Offender Act (FFOA)), *overruled by* Nunez-Reyes v. Holder, 646 F.3d 684 (9th Cir. 2011) (holding that equal protection does not require expunged state convictions to be treated the same as federal drug convictions expunged under FFOA).

[130] *See* 22 I. & N. Dec. at 512. The *Roldan* majority cited to a "Joint Explanatory Statement" in the congressional record, but that document only "clarifies congressional intent that even in cases where adjudication is 'deferred,' the original finding or confession of guilt is sufficient to establish a 'conviction' for the purposes of the immigration laws." *Id.* at 531 (quoting and citing H.R. REP. NO. 104-828, at 223-24 (1996) (Conf. Rep.)).

[131] *See* Pickering, 23 I. & N. Dec. 621, 624 (B.I.A. 2003), *rev'd on other grounds*, Pickering v. Gonzales, 465 F.3d 263 (6th Cir. 2006); Rodriguez-Ruiz, 22 I. & N. Dec. 1378, 1379-80 (B.I.A. 2000).

federal decisions attempting to elaborate whether post-conviction relief is in fact on the merits, and thus valid for immigration purposes, have produced a complex and inconsistent doctrine.[132] For example, courts widely diverge on critical applications of the *Pickering* rule, such as which party has the burden of showing that post-conviction relief was not for rehabilitative purposes, and whether it is appropriate for the agency to question the motives of the state court that vacated the judgment.[133] As a result, the immigration consequences of similar state procedures vary widely across jurisdictions.[134]

Finally, the Office of Immigration Litigation — the branch of the Department of Justice (DOJ) that litigates immigration appeals in federal court — argues that under the INA's definition of conviction, noncitizens may be deported while their convictions are still pending on direct appeal.[135] Although there does not appear to be any indication in the legislative history that Congress was thinking about the effect of direct appeals on deportation when it enacted IIRIRA,[136] a few federal courts have agreed with the DOJ's position.[137]

Here too the historical context will help demonstrate how radical this interpretation is. In *Pino v. Landon*, a 1955 per curiam decision, the Supreme Court held that a conviction is not sufficient for deportation until it is "final."[138] While *Pino* itself did not involve an appeal, subsequent circuit courts were unanimous in holding that convictions had not achieved sufficient finality under *Pino* until direct appellate review had been completed or waived.[139] The BIA never questioned this finality rule. In *Matter of Ozkok*, for example, the Board observed, "[i]t is well established that a conviction does not attain a sufficient degree of finality for immigration purposes until

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[132] *See* MARY E. KRAMER, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY 85-97 (4th ed. 2009).

[133] *See id.*

[134] *See* Moore, *supra* note 127, at 686-91.

[135] *See* Respondent's Answer to Petition for Rehearing En Banc at 6-7, Planes v. Holder, No. 07-70730 (9th Cir. Oct. 21, 2011).

[136] *See* Ashwin Gokhale, *Finality of Conviction, the Right to Appeal, and Deportation Under* Montenegro v. Ashcroft*: The Case of the Dog that Did Not Bark,* 40 U.S.F. L. REV. 241, 270-74 (2005).

[137] *See* Planes v. Holder, 652 F.3d 991, 996 (9th Cir. 2011); Waugh v. Holder, 642 F.3d 1279, 1284 (10th Cir. 2011); Montenegro v. Ashcroft, 355 F.3d 1035, 1037 (7th Cir. 2004); *see also* Moosa v. INS, 171 F.3d 994, 1009 (5th Cir. 1999) (concluding in dicta that IIRIRA abrogated the finality rule).

[138] 349 U.S. 901, 901 (1955).

[139] *See* Gokhale, *supra* note 136, at 246 n.35 (collecting cases).

direct appellate review of the conviction has been exhausted or waived."[140]

Nevertheless, in *Montenegro v. Ashcroft*, the Seventh Circuit held that the immigration statute as amended in 1996 "treats an alien as 'convicted' once a court enters a formal judgment of guilt."[141] IIRIRA, the court concluded, "eliminated the finality requirement for a conviction[] set forth in *Pino* . . . ."[142] The federal courts have split on this issue. While at least two other circuits also have squarely found that IIRIRA abrogated the finality rule,[143] others have held that a conviction is not sufficiently final for immigration purposes while pending on appeal.[144] Although the BIA has not taken a definitive position, a recent en banc decision reveals that the Board members are divided on whether the INA's definition of conviction should be interpreted to upset the long-standing finality rule.[145]

E. Summary of the Restrictions

As this Part has shown, the federal government continues to increase its use of state convictions for purposes of deporting noncitizens. At the same time, the Board, DOJ, and courts have interpreted the current Act to restrict the efficacy for deportation purposes of the back-end processes in the states' criminal justice systems. But because these restrictions are based on constructions of the INA, rather than on unequivocal statutory text, the rules are in some disarray.

To summarize, the BIA has construed the INA to give effect to pardons for some deportation categories but not others, and to have no effect on grounds of inadmissibility. The State Department, on the other hand, interpreting the same statute, has concluded that a domestic pardon *will* overcome inadmissibility (at least for crimes involving moral turpitude). Meanwhile, administrative and judicial

[140] Matter of Ozkok, 19 I. & N. Dec. 546, 552 n.7 (B.I.A. 1988).

[141] *Montenegro*, 355 F.3d at 1037.

[142] *Id.*

[143] *See* Planes v. Holder, 652 F.3d 991, 996 (9th Cir. 2011); Waugh v. Holder, 642 F.3d 1279, 1284 (10th Cir. 2011); *see also* Moosa v. INS, 171 F.3d 994, 1009 (5th Cir. 1999) (concluding in dicta that IIRIRA abrogated the *Pino* finality rule).

[144] *See* Paredes v. Att'y Gen. of U.S., 528 F.3d 196, 198 (3d Cir. 2008) (holding that "[a] conviction does not attain a sufficient degree of finality until direct appellate review of the conviction has been exhausted or waived"); United States v. Garcia-Echaverria, 374 F.3d 440, 446 (6th Cir. 2004) ("To support an order of deportation, a conviction must be final.").

[145] *See* Cardenas Abreu, 24 I. & N. Dec. 795, 798, 802, 813-15 (B.I.A. 2009).

conclusions about whether pardons will remove the immigration consequences that follow convictions for purposes of naturalization or discretionary relief from removal are not uniform.

Similarly, the BIA and many courts have interpreted the INA's definition of conviction to include expungements if granted for rehabilitative or immigration purposes, though the text of the statute says nothing about the effect of such procedures. Courts diverge on the application of this rule in crucial ways, such as which party has the burden of proof and whether immigration courts should second-guess the state court's motives. Finally, some federal courts of appeals have held, as the DOJ argues, that a conviction has achieved sufficient finality for deportation even where pending on direct appeal. Other federal courts disagree, and how the Board will rule is uncertain.

The picture that emerges from all this is hardly one of statutory clarity or uniform national policy. To the contrary, even if one were to consider nothing more than how the rules are interpreted by federal agencies and courts, it is apparent that the location where the immigration proceedings take place will often make a crucial difference to the immigration effect of the various state criminal processes. As the next Part shows, the prevailing interpretation of the INA has significant consequences for regulatory autonomy in an area of traditional state authority. Part III will then connect the significance of pardons and other post-conviction procedures in state governance to the lack of clear textual intent to limit these processes.

II. THE IMPLICATIONS OF THE FEDERAL RULES FOR STATE AUTONOMY

Federal rules that use state convictions to establish deportability while ignoring or limiting the effect of pardons and other post-conviction processes have serious implications for state authority in an area of traditional dominion. Although it is beyond the scope of this paper to attempt to demonstrate with precision the impact of the federal scheme, even at first blush the consequences for the functioning of state systems and on state autonomy are not trivial. Post-conviction processes implement state interests in criminal justice and other areas of governance well within the police powers reserved to the states when the Constitution was ratified. The pardon, in particular, was considered integral to the sovereign's power to punish at the time of the framing.

A. The Power to Punish and Pardon as Constitutionally Reserved State Police Power

The historical sovereignty of states regarding their own criminal laws is in little dispute. In brief, at the nation's founding, many representatives were very concerned with retaining dominion over matters within state jurisdiction and preventing central consolidation of power. At the Constitutional Convention, a proposed federal veto power over state authority was rejected, and there was considerable doubt that at least nine of the thirteen states would ratify the Constitution.[146] Consensus developed among the Framers that the national government's authority would be limited and that each state would retain primary regulatory authority over residents within its borders.[147]

The Constitution achieved this limited central government with both finite enumerations of power and express prohibitions such as section 9 of Article I and (later) the Bill of Rights.[148] The states retained residual sovereignty to administer criminal and civil justice, to tax residents, and to legislate regarding internal polity, all of which have been called the "police power."[149] There is general consensus that the Tenth Amendment codified the reserved police powers by explicitly recognizing the states' retention of nondelegated powers,[150]

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[146] *See* JOSEPH ELLIS, AMERICAN CREATION 102-26 (2007).

[147] James Madison for instance, one of the era's leading proponents of centralized authority, wrote in the *Federalist* that "[t]he powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite." THE FEDERALIST NO. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961); *see also* ELLIS, *supra* note 146, at 102-26; Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1451 (1987); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 326 (1997).

[148] *See* Amar, *supra* note 147, at 1440.

[149] *See, e.g.*, THE FEDERALIST NO.17 (Alexander Hamilton) (explaining that the "ordinary administration of criminal and civil justice" belongs "to the province of State governments"); Letter from Alexander Hamilton to James Duane (Sept. 3, 1780), *in* SELECTED WRITINGS AND SPEECHES OF ALEXANDER HAMILTON 28 (Frisch ed., 1985) ("The confederation in my opinion should give Congress complete sovereignty; except as to that part of internal police, which relates to the rights of property and life among individuals and to raising money by internal taxes."); *see also* THE FEDERALIST NO. 74 (Alexander Hamilton); *see generally* Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 747-48, 771-94 (2007) (tracing the antecedents of state police powers to the political theory and practice from England and Europe that strongly influenced the development of government in America's early years).

[150] *See* Heath v. Alabama, 474 U.S. 82, 89 (1985) (explaining that with matters of criminal justice, each state's power to prosecute derives from its inherent sovereignty, as given to it (or as recognized) by the Tenth Amendment, rather than from the federal government); Legarre, *supra* note 149, at 778-80.

and some scholars have identified further textual restraints on federal interference with state autonomy.[151]

State sovereignty over criminal law was of special concern to the Framers. At the New York Ratifying Convention, for example, Alexander Hamilton, perhaps the most fervently nationalist of the founders, conceded the distinct spheres the federal and state governments would control:

> But the laws of Congress are restricted to a certain sphere, and when they depart from this sphere, they are no longer supreme or binding. In the same manner the states have certain independent powers, in which their laws are supreme: *For example, in making and executing laws concerning the punishment of certain crimes, such as murder, theft &c. the states cannot be controlled.*[152]

Yet national power expanded. Consolidation was perhaps inevitable, however far beyond the Framers' anticipations.[153] But even as the federal government has used the Commerce Clause to increase its role in criminal prosecutions and other historically local areas of regulation,[154] state control over the administration of criminal law within sovereign borders has persevered.[155]

In *United States v. Lopez*, the Court took the opportunity to remind Congress that "in areas such as criminal law enforcement . . . States historically have been sovereign," striking down the Gun-Free School

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[151] *See, e.g.*, Deborah Merritt, *The Guaranty Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 33-36, 69 (1988) (finding evidence in the ratification debates that Article IV's "Guarantee Clause" was intended not just as a limit on state power, but also as a "modest restraint" against federal interference with state autonomy).

[152] Alexander Hamilton, Speech in the N.Y. Ratifying Convention (June 28, 1788), *in* SELECTED WRITINGS AND SPEECHES OF ALEXANDER HAMILTON, *supra* note 149, at 238 (emphasis added).

[153] *See, e.g.*, DAVID SHAPIRO, FEDERALISM: A DIALOGUE 113 (1995) (describing how the scope of federal government has necessarily expanded); Friedman, *supra* note 147, at 366-78 (describing the historical, technological, and economic forces leading to centralization of power).

[154] *See, e.g.*, William W. Schwarzer & Russell R. Wheeler, *On the Federalization of the Administration of Civil and Criminal Justice*, 23 STETSON L. REV. 651, 664 (1994) (saying that "few subjects within the traditional scope of state concerns remain beyond the authority of Congress to regulate"); James Strazella, *The Federalization of Criminal Law*, 1998 ABA SEC. CRIM. JUSTICE REP. 5, 7 (1998) (describing how the federal government has expanded its use of the Commerce Clause).

[155] *See* SIMON, *supra* note 35, at 21 ("Perhaps more than any other form of public law, criminal law is associated with sovereignty . . . .").

Zones Act on the grounds that gun possession near schools is a matter for states and localities rather than the federal government.[156] Five years later, the Court reiterated that there was "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of victims."[157] Despite more recent jurisprudence signaling that the policing of the federal government's reach under its Commerce Clause authority might have run its course,[158] the Court has never backed away from the principle, embodied in the constitutional structure, that states retain dominion over their criminal laws.

The pardon, like other clemency powers, is rooted in a sovereign's inherent authority to govern its own affairs, especially through punishment and forgiveness.[159] Pardons have been used in this country from the time of the colonies as a component of criminal justice and to promote social cohesion by encouraging rehabilitation and removing the collateral consequences that follow conviction.[160] Today each of the fifty states constitutionally provides for the exercise of pardons and other forms of clemency,[161] and the Supreme Court has held that a state's use of the pardon power is virtually unreviewable.[162]

There is little doubt that clemency powers were understood to fall within the sovereignty and self-governance that were reserved to the

[156] United States v. Lopez, 514 U.S. 549, 564 (1995).

[157] United States v. Morrison, 529 U.S. 598, 617-18 (2000).

[158] *See* Gonzales v. Raich, 545 U.S. 1, 7-9 (2005) (upholding congressional power under the Commerce Clause to criminalize possession of marijuana under federal law as part of a comprehensive statute addressing narcotics trafficking, even in a state that allowed marijuana for medical use).

[159] *See* MOORE, *supra* note 16, at 15; Anthony J. Bellia Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L.J. 949, 984-85, 999 (2006); Daniel Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power From the King*, 69 TEX. L. REV. 569, 572-73 (1991) [hereinafter *Quality of Mercy*].

[160] CHRISTEN JENSEN, THE PARDONING POWER IN THE AMERICAN STATES 4-7 (1922) (discussing pardon powers in the colonial governments of Virginia, New England, Massachusetts, Maine (which belonged to Massachusetts), Maryland, Connecticut, Rhode Island, the Carolinas, New York, New Jersey, New Hampshire, Pennsylvania, Delaware, and Georgia); *see also* Herrera v. Collins, 506 U.S. 390, 411-12 (1993) ("Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted."); William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 497-501 (1977).

[161] Kathleen Ridolfi & Seth Gordon, *Gubernatorial Clemency Powers: Justice or Mercy?*, 24 A.B.A. CRIM. JUST. 26, 31 (2009); Margaret Colgate Love, *Relief*, *supra* note 7.

[162] Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 280 (1998).

states when the national government was created.[163] Anthony Bellia has demonstrated that a fundamental precept of the law of nations during this country's early history was that the sovereign's power to pardon was inseparable from the power to punish.[164] Alexander Hamilton, Joseph Story, and other prominent participants at the Federal Convention of 1787 and in the ratification debates certainly held this view.[165] Indeed, James Madison's notes from the Federal Convention show that he believed it would take a measure of constitutional proportion to legitimately divest states of the power to pardon any crimes prosecuted in state courts, including federal crimes.[166] Ultimately, the importance that the national government's founders placed on executive clemency is evident in their decision to allocate nearly unfettered authority to pardon federal offenses to the President, which the Supreme Court has interpreted to be limited only by a few other textual commitments in the Constitution.[167] Other post-conviction processes that defer, alter, or revoke the continuing validity of the conviction, while not historically tied to sovereignty, also comprise indispensable tools of modern criminal justice and governance more generally. As interpreted, current immigration rules affect these processes in numerous ways, imposing externalities and costs in an area constitutionally reserved to states.

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[163] Hamilton observed that in New York, for example, the governor's power to pardon perhaps extended even further than would the proposed national Constitution, at that time reaching even cases involving impeachment (though not including treason or murder). Yet, there was never an implication that states could not define their pardon power as they saw fit. THE FEDERALIST NO. 69 (Alexander Hamilton).

[164] Bellia, *supra* note 159, at 984-88; *see also* W.H. HUMBERT, THE PARDONING POWER OF THE PRESIDENT 14-20 (1941); Duker, *supra* note 160, at 501-06.

[165] *See* Bellia, *supra* note 159, at 984-88.

[166] 1 RECORDS OF THE FEDERAL CONVENTION 317 (James Madison) (Max Farrand ed., 1966) ("[I]n most if not all of the States, the Executives have by their respective Constitutions the right of pard[oning]. How could this be taken away from them by a legislative ratification only?"). Madison's concern, as Professor Bellia explains, arose from William Paterson's "New Jersey Plan" at the Convention, which called for state courts to adjudicate federal penal actions. Madison believed that something more than ratification of such a plan by state legislatures would be sufficient to legitimately remove the pardon power of state executives. Bellia, *supra* note 159, at 986.

[167] U.S. CONST. art. II, § 2, cl. 1 (conferring on the President "[p]ower to grant Reprieves and Pardons for Offenses against the United States"). For a thorough discussion of the textual limits on the President's pardon power, see Morison, *supra* note 107, at 278-88.

Federalism is often defined in terms of the values that it serves.[168] Writing for the majority in *Gregory v. Ashcroft*,[169] for example, Justice O'Connor emphasized the instrumental nature of federalism:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.[170]

Thus, as the Court and federalism scholars have observed, a healthy federalism protects individual liberty,[171] enhances political accountability,[172] allows states to be laboratories of innovation,[173] and preserves room for cultural diversity.[174] In particular the Court has scrutinized federal legislation that disproportionately burdens some states or localities, especially with respect to their traditional authority

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[168] *See* SHAPIRO, *supra* note 153, at 76-106; Michael C. Dorf, *Instrumental and Non-Instrumental Federalism*, 28 RUTGERS L.J. 825, 828 (1997); Friedman, *supra* note 147, at 386-405; Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491-1511 (1987); Trevor W. Morrison, *The State Attorney General and Preemption*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 81, 83 (William W. Buzbee ed., 2009). There are, of course, many varieties of federalism discourse and just as many critiques. My references to the values of federalism are necessarily a stylized account of the doctrine.

[169] 501 U.S. 452 (1991).

[170] *Id.* at 458.

[171] United States v. Lopez, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring) (arguing that the federalist structure is vital to securing freedom); Friedman, *supra* note 147, at 402-05 (arguing that throughout history, states have served as political form for expressing popular sentiment, sometimes regrettably as with opposition to school desegregation, and sometimes positively as with opposition to the Alien and Sedition Acts).

[172] Friedman, *supra* note 147, at 395 (explaining that political accountability encompasses not just electoral accountability but moral approval and ease of access).

[173] SHAPIRO, *supra* note 153, at 87-88; Friedman, *supra* note 147, at 397-98 (arguing that the value of states as laboratories of experimentation is best defended as the benefits of seeing what works when states by necessity innovate in individual ways to address pressing problems).

[174] Friedman, *supra* note 147, at 401-02 (arguing that federalism "enhances our lives by preserving and creating diversity"); A.E. Dick Howard, *Garcia and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 GA. L. REV. 789, 795 (1985) (arguing that "federalism both reflects and encourages pluralism, allowing individual idiosyncrasies to flourish"); Merritt, *supra* note 151, at 8 (arguing that the federalist balance contributes to diversity).

over criminal law.[175] As the following sections show, the immigration rules for pardons and other post-conviction processes have practical and political consequences for states that implicate many of these federalism values.

B. Systemic Legitimacy

Pardons have long been recognized as integral to maintaining the legitimacy of the criminal justice system through error correction and individuation in punishment. In the Supreme Court's words, pardons and other clemency powers "exist[] to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law."[176] The constitutional Framers considered clemency to be a "fail-safe" for justice.[177] In the nineteenth century, state courts often explicitly recognized the error correcting functions of pardons and the responsibility of the sovereign to ensure just convictions under state law.[178] At common law, judges could not order new trials following felony convictions, leaving the pardon as the only means of redress where the verdict was not supported by the evidence.[179] Pardons also were often necessary to secure the testimony of witnesses

[175] In *United States v. Lopez*, for example, Justice Kennedy's opinion criticized the "territorial operation" of the Gun-Free School Zones Act, which he observed would distort the daily activities in some localities while having no impact on others. 514 U.S. at 581-83.

[176] *Ex parte* Grossman, 267 U.S. 87, 120 (1925).

[177] JEFFREY CROUCH, THE PRESIDENTIAL PARDON POWER 11 (2009).

[178] *See, e.g.*, *In re* Flournoy, 1 Ga. 606, 607 (1846) ("[The pardon] power is given to the executive to relieve against the possible contingency, under all systems of laws, of a wrongful conviction."); State v. Alexander, 76 N.C. 231, 234 (1877) ("There are cases where he has been improperly convicted and asks not for mercy but for justice."); Knapp v. Thomas, 39 Ohio St. 377, 381 (1883) (concluding that a pardon "is, in effect, a reversal of the judgment, a verdict of acquittal, and a judgment of discharge thereon").

[179] *See, e.g.*, Commonwealth v. Green, 17 Mass. 515, 534 (1822) (noting that, under English common law, one convicted of a capital felony in a trial where an "irregularity" occurred could obtain redress only through a royal pardon); People v. Comstock, 8 Wend. 549, 549 (N.Y. 1832) (ruling that judge has no power to grant new trial following felony conviction); Ball v. Commonwealth, 35 Va. 726, 727-28 (1837) (holding that judge has power to grant a new trial after conviction where evidence is "utterly insufficient" to support the verdict, but acknowledging this holding is a departure from the common law rule recognized by the trial court that generally only a pardon could redress this injustice in felony cases); King v. Oxford, 13 East 411, 416, n.b (1811); King v. Mawbrey, 6 T.R. 619, 625 (1796).

or codefendants in criminal prosecutions, which, while not exactly error correction, may still be conceptualized as justice enhancing.[180]

Though pardons are less frequently granted in recent years, it is not hard to find contemporary examples of the use of clemency powers to remedy defects or calibrate punishment. Governor Paterson exercised the justice-correcting function of pardons in at least one noncitizen's case in 2010. At age fifteen, lawful permanent resident Marlon Powell used a fake ID to gain admission to a club, where he was arrested for misdemeanor drug possession.[181] He was then convicted in the adult criminal system and sentenced to nine months in jail, apparently under the mistaken belief that he was at that time twenty-one years old.[182] Had Powell been adjudicated a Youthful Offender, his misdemeanor conviction would not have been a deportable offense.[183] Based on this error (and Powell's apparent rehabilitation), Paterson granted him a pardon.[184]

Former Illinois Governor George Ryan pardoned four death row inmates whom he believed to be innocent,[185] and then, showing that clemency can be used to ensure justice on a wider-scale, commuted the sentences of 167 convicts on death row to life without parole in light of strong evidence the state system was leading to wrongful convictions.[186] In another recent example, Governor Tim Kaine of Virginia issued an absolute pardon in 2007 to a death row inmate exonerated by DNA evidence following a wrongful conviction for

[180] *See, e.g.*, Watson v. State, 90 Tex. Crim. 576, 579 (Tex. Crim. App. 1922) (noting that the accomplice, Charley Chambers, testified against defendant in exchange for a pardon by the Governor of Texas). This function of the pardon, of course, has less use today because prosecutors can offer immunity from prosecution.

[181] *See* Press Release, Governor of New York State, Governor Paterson Announces Pardons (Dec. 6, 2010), *available at* http://www.governor.ny.gov/archive/paterson/press/120610Pardons.html.

[182] *Id.*

[183] *See* Devison-Charles, 22 I. & N. Dec. 1362, 1366 (B.I.A. 2000) (holding that an adjudication under New York Criminal Procedure Law Article 720 youthful offender procedures is not a conviction for immigration purposes).

[184] As the Board has construed the INA, however, Paterson's pardon will not remove the immigration consequences of a drug conviction. Resentencing would have been far more effective, but apparently the problem was that Powell had already been ordered removed by the time of the pardon. *See* Governor Paterson Announces Pardons, *supra* note 5. I discuss Paterson's pardon of Powell further in Part III.

[185] Jodi Wilgoren, *4 Death Row Inmates Pardoned*, N.Y. TIMES (Jan. 11, 2003), http://www.nytimes.com/2003/01/11/us/4-death-row-inmates-are-pardoned.html.

[186] Governor Ryan defended the clemency as an act of justice, not mercy, in light of a three-year study finding that more convicts on death row had been exonerated than executed in the state since 1977. Ridolfi & Gordon, *supra* note 161, at 26.

capital murder and rape.[187] Indeed, there have been 297 post-conviction DNA exonerations in the United States to date, many of which were followed by pardons.[188] Frequently governors are asked to grant reprieves (a related clemency power) to delay execution where new evidence or a new basis for appeal comes to light.[189]

As these examples show, pardons and other clemency powers are integral, if judiciously exercised, components of justice and calibrated punishment in the state system. To a large extent, of course, other state procedures now play a significant role in systemic integrity. Direct appellate review of trial court convictions, for instance, serves to maintain the legitimacy of state power, correct trial court errors, and assure uniform application of the criminal law within the state.[190] Nearly every state guarantees defendants both the right of appeal[191] and the effective assistance of appellate counsel.[192] While a "substantial percentage" of state convictions are reversed on appeal,[193] the appellate process serves as more than just a check on the legality of a conviction. A healthy appeals system also helps maintain confidence in the fairness and legitimacy of the criminal justice system, which in many states is undergoing tremendous resource strain at the trial level.[194] Public defender offices too have very high caseloads nationwide, raising the specter of compromised

[187] Maria Glod, *Former Death-Row Inmate Officially Declared Innocent*, WASH. POST (July 7, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/07/06/AR2007070602051.html.

[188] *See Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited Aug. 26, 2012).

[189] *See* Kobil, *Quality of Mercy*, *supra* note 159, at 578 (discussing reprieves as a clemency power).

[190] *See, e.g.*, Gokhale, *supra* note 136, at 264, nn.152-53 (pointing to an "enduring consensus" among state legislatures that the right of direct appeal is essential to the foundation of criminal law and legitimacy of the criminal justice system).

[191] U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, STATE COURT ORGANIZATION 1998 173-75 (2000).

[192] *See* Douglas v. California, 372 U.S. 353, 357 (1963) (holding that the defendant has a constitutional right to counsel where there is an appeal as of right); Griffin v. Illinois, 351 U.S. 12, 18 (1956) (holding that a rule denying adequate appellate review is indistinguishable from a rule that denies the right to defend oneself in trial court).

[193] Gokhale, *supra* note 136, at 271; Jon O. Newman, *A Study of Appellate Reversals*, 58 BROOK. L. REV. 629, 633 (1992).

[194] *See Written Testimony of Attorney General Eric Holder to Senate Judiciary Committee*, U.S. DEP'T OF JUSTICE (Nov. 18, 2009), http://www.justice.gov/ag/testimony/2009/ag-testimony-0911181.html (discussing the funding and oversight issues contributing to the indigent defense "crisis" throughout the nation).

representation.[195] Frequently, indigent defendants proceed without counsel at all.[196] These pressures not only increase the importance of the appellate process in maintaining the legitimacy of the system at both individual and societal levels, but also suggest clemency powers such as pardons remain vital.

C. Rehabilitation, Community Impact, and Membership

Sovereigns govern through post-conviction processes in other ways too. Pardons promote community welfare by encouraging reformation and by removing the crippling disabilities that attach to convictions and frequently affect more than just the offender. States have long recognized that where "properly granted," a merciful pardon is "wise public policy,"[197] and every state has long used clemency "for merciful and beneficent purposes."[198] Throughout this country's history, such purposes have included rewarding rehabilitation, promoting good behavior in prisons, and determining that the offender (or the

[195] *See, e.g.*, Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967 (2012) (outlining the high caseloads public defenders face); Kaitlin C. Gratton, Note, *Desperate Times Call for Desperate Measures: Reclassifying Drug Possession Offenses in Response to the Indigent Defense Crisis*, 53 WM. & MARY L. REV. 1039, 1045-55 (2012).

[196] *See generally* Robert C. Boruchowitz, Malia N. Brink, & Maureen Dimino, *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts*, 2009 NAT'L ASS'N OF CRIM. DEF. LAW. 10, 14-17 (discussing absence of counsel as a serious problem in misdemeanor courts); GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE, AMERICAN BAR ASSOCIATION STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, 22-26 (2004) (discussing current problems with indigent representation in criminal proceedings).

[197] Knapp v. Thomas, 39 Ohio St. 377, 381 (1883) ("Though sometimes called an act of grace and mercy, a pardon, where properly granted, is also an act of justice, supported by a wise public policy.").

[198] Sterling v. Drake, 29 Ohio St. 457, 465 (1876); *see, e.g.*, Baldwin v. Scoggin, 15 Ark. 427, 431 (1855) (stating that most governments consider it wise to include pardoning power somewhere in government); State ex rel. Daniel v. Rose, 29 La. Ann. 755, 760 (1877) (explaining Louisiana's pardoning power); State v. Baptiste, 26 La. Ann. 134, 136-37 (1874) (explaining rationale behind Louisiana's pardoning power); Rich v. Chamberlain, 104 Mich. 436, 441 (1895) (explaining Michigan's pardoning power); Jones v. Board, 56 Miss. 766, 770 (1879) (explaining Mississippi's pardoning power); State v. Foley, 15 Nev. 64, 69 (1880) (explaining Nevada's pardoning power); State v. Bowman, 145 N.C. 452, 454 (1907) (explaining North Carolina's pardoning power); *Knapp*, 39 Ohio St. at 381 (explaining North Carolina's pardoning power); Wood v. Fitzgerald, 3 Or. 568, 574 (1870) (explaining prevalence and rationale behind pardoning power); Diehl v. Rodgers, 169 Pa. 316, 323 (1895) (explaining Pennsylvania's pardoning power); Young v. Young, 61 Tex. 191, 193 (1884) (explaining Texas' pardoning power); Lee v. Murphy, 63 Va. (22 Gratt.) 789, 797 (1872) (explaining Virginia's pardoning power).

offender's family or community) has suffered enough and no more punishment or disabilities are warranted under the circumstances.[199] Especially throughout the twentieth century, pardons were widely used to restore civil rights and remove the disabilities that result from a state conviction, including, as discussed above, immigration penalties.[200] Sovereigns have also used pardons to promote social cohesion on a broad scale, particularly after times of civil unrest.[201]

State laws providing for expungements, vacaturs, and similar procedures on rehabilitative grounds similarly further state interests in encouraging reformation, conserving state and local resources, and renewing membership rights in appropriate cases. Studies have documented the decline in recidivism associated with restoration of civil status through these kinds of processes.[202]

Many states also use diversionary programs and other deferred adjudication processes to conserve vital state resources as well as to encourage rehabilitation.[203] A study by the Vera Institute of state sentencing policies from 2001 to 2010 shows that states have "found it increasingly difficult to justify using the most expensive intervention — prison — for people convicted of low-level property and drug

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[199] *See, e.g.*, State *ex rel.* Van Orden v. Sauvinet, 24 La. Ann. 119, 121 (1872) ("We can scarcely think it compatible with the genius of liberal government and free institutions, that there should be no shield to protect an individual against a tyrannical exercise by a judge of his power to punish for contempt . . . a hasty and petulant fiat of a judge."); Perkins v. Stevens, 41 Mass. (24 Pick.) 277, 278-80 (1834) ("It is only a full pardon of the offence which can wipe away the infamy of the conviction, and restore the convict to his civil rights.").

[200] *See* Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1183, 1186, 1190-91 (2010) [hereinafter *Twilight*] (noting that most presidential pardons after 1930 were granted "to restore civil rights" including many "to avert deportation"); *see also supra* Part I.B (providing examples of gubernatorial pardons used to remove immigration consequences).

[201] See, for example: John Adams's pardoning of the Fries' Rebels; the wide-scale Civil War era pardons exercised by Abraham Lincoln, Andrew Johnson, and Ulysses S. Grant; Theodore Roosevelt's pardoning of Filipinos convicted of crimes while under Spanish rule; and Jimmy Carter's pardons of Vietnam Selective Service Act violators. *See* MOORE, *supra* note 16, at 51, 63, 81.

[202] *See, e.g.*, JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 168-70 (2005) (citing a range of studies).

[203] Margaret Colgate Love, *Alternative to Conviction: Deferred Adjudication as a Way of Avoiding Collateral Consequences*, 22 FED. SENT'G REP. 6, 6-13 (2009) [hereinafter *Alternative to Conviction*]; SECOND CHANCES IN THE CRIMINAL JUSTICE SYSTEM: ALTERNATIVES TO INCARCERATION AND REENTRY STRATEGIES, COMM'N ON EFFECTIVE CRIMINAL SANCTIONS, AMER. BAR ASSOC. 13-15 (2007), *available at* http://www.pardonlaw.com/materials/rev_2ndchance(3).pdf.

offenses . . . ."[204] The Pennsylvania code identifies the purposes of deferred adjudication programs as "the rehabilitation of the offender" and "the prompt disposition of charges, eliminating the need for costly and time-consuming trials or other court proceedings."[205] In Connecticut, alternative sentencing programs have rendered prison "the option of last resort" due to its comparative costliness.[206] In New York, Oregon, and Michigan, prosecutors have endorsed diversionary programs out of recognition that they reduce recidivism.[207] And many states directly acknowledge that a purpose of deferred adjudication programs is to help defendants avoid the collateral consequences of a conviction in appropriate cases.[208] Incarceration prevents offenders from working, which in many cases directly impacts their families and communities. Even after release, a criminal record makes it difficult for many offenders to find employment, retain low-income housing or other benefits, or obtain loans. These and other collateral consequences impede offenders' abilities to provide for their families and themselves, often leading to cycles of recidivism and incarceration.[209]

Through diversionary programs, rehabilitative expungements, and pardons, state and local governments can adjust the social impact of convictions. These tools are of increasing importance, especially in minor, mostly public-order cases, where, as recent studies and scholars have shown, convictions often are produced en masse in a system driven more by efficiency than evidence.[210]

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[204] Adrienne Austin, CRIMINAL JUSTICE TRENDS: KEY LEGISLATIVE CHANGES IN SENTENCING POLICY, *2001-2010*, VERA INST. OF JUST., 2 (Sept. 2010).

[205] *See Committee Introduction to Ch. 3*, THE PENNSYLVANIA CODE, http://www.pacode.com/secure/data/234/chapter3/chap3toc.html (last visited Sept. 30, 2012).

[206] *See* COMM'N ON EFFECTIVE CRIM. SANCTIONS, AMER. BAR ASSOC., *supra* note 203, at 13.

[207] *Id.* at 14-15.

[208] Love, *Alternative to Conviction*, *supra* note 203, at 6-13.

[209] *See, e.g.*, Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 UC DAVIS L. REV. 277, 300 (2012) ("The large number and harsh nature of collateral consequences illustrate how even a low-level conviction that seems to begin with arrest and end in front of the judge can actually have an impact not only on that person's life, but also on the lives of family members and the person's community.").

[210] *See, e.g.*, Boruchowitz, Brink, & Dimino, *supra* note 196, at 11, 14 (presenting evidence that the majority of public defenders who represent misdemeanor defendants are likely to be over-burdened, inexperienced, and subjected to pressure from the prosecutor and judge to encourage rapid assents to the government's plea offers); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1705-06 (2010) (arguing that in low-stakes cases, the defendant's actual culpability is presumed or irrelevant); John D. King, *Procedural*

Thus, in addition to saving the state the fiscal costs of incarceration, states use diversionary programs and expungement processes to break cycles of recidivism and reduce the impact on the offenders' families and communities. But in many instances, these programs will not be viable alternatives for noncitizens, with the result that neither the individual nor the community will benefit.[211] In general, the incentive to avoid removal, which is now all but ordained for many categories of convictions, will usually far outweigh all other concerns for lawful permanent residents. As the Supreme Court put it, "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence."[212] When the defendant is less willing to plead to certain offenses or accept diversionary dispositions in early stages of the process out of fear of deportation, this in turn consumes more of the state's prosecutorial, judicial, and defense resources.[213]

Justice, Collateral Consequences, and the Adjudication of Misdemeanors, *in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE 3 (Erik Luna & Marianne Wade eds., 2011) (unpublished manuscript) ("Efficiency is by far the predominant animating value in misdemeanor prosecutions in the United States today, and there is a vast distance between that value and whichever one comes in second."); Alexandra Natapoff, *Misdemeanors*, 85 S. CALIF. L. REV. (forthcoming 2012) (manuscript at 4-5), *available at* http://papers.ssrn.com/so13/papers.cfm?abstract_id=2010826 ("Far from accidental, the slipshod quality of petty offense processing is a dominant systemic norm that competes vigorously with and sometimes overwhelms foundational values of due process and adversarial adjudication."); Roberts, *supra* note 209, at 306-09 (discussing the structural features of misdemeanor courts that produce coercion in the plea bargain process).

[211] A few examples of states that require guilty pleas before entering community supervision or other kinds of diversionary programs include New York, Michigan, Georgia, and Oklahoma. *See* GA. CODE ANN. § 16-13-2 (West 2012) (drug treatment); MICH. COMP. LAWS. ANN. § 769.4a (West 2012) (domestic violence); MICH. COMP. LAWS. ANN. § 600.1068 (West 2012) (drug treatment); N.Y. CRIM. PROC. LAW § 216.05.4 (West 2012) (judicial diversion); OKLA. STAT. ANN. tit. 43A, § 3-452 (West 2012) (drug treatment).

[212] INS v. St. Cyr, 533 U.S. 289, 322 (2001) (internal quotation marks omitted).

[213] As of 1999, at least twenty-one states funded nearly all of the working indigent public defense offices. *See* Carol J. DeFrances, DEP'T OF JUST., BUREAU OF JUST. STATISTICS STATE-FUNDED INDIGENT DEFENSE SERVICES, 1999, 1 (2001), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/sfids99.pdf (noting that in 1999, twenty-one states funded 90% or more of indigent criminal defense). Many other states partially fund indigent public defense. *See, e.g.*, *Welcome to Washington State OPD*, WASHINGTON STATE OFFICE OF PUBLIC DEFENSE, http://www.opd.wa.gov (last visited Mar. 6, 2012) (noting that the mission of the Washington State Office of Public Defense is "to ensure the effective and efficient delivery of indigent defense services funded by the state" (internal quotations omitted)).

Pardons and other post-conviction processes also restore (or occasionally preserve) membership status that the state takes away through its criminal apparatus.[214] Penal law regulates in part by using or threatening the power of the state to revoke or alter the membership of those subject to its jurisdiction. When a person is convicted, their membership status changes. Most directly, a convicted person's membership in the community is revoked (at least temporarily) by incarceration. But even after the initial sentence is served, membership continues to be altered through the stigma and collateral consequences that follow a conviction. These civil disabilities thus become "instruments of 'social exclusion,'" creating "a permanent diminution in social status of convicted offenders, a distancing between 'us' and 'them.'"[215] Provision in the law for pardons, even if only sparingly used, reflects a society's recognition that a return to membership is always on the table, and that "no one ever completely forfeits their humanity."[216] This particular function does not completely map onto the immigration rules, of course, because the national government has primary say in the membership decisions about noncitizens. But a sovereign's right to revoke or restore membership consequences that follow from its own criminal law is distinct. Though the federal government may have the power where noncitizens are concerned to displace or trump the membership decisions that states implement through the use pardons, our rules of interpretation should assume that Congress would choose to do so carefully and deliberately.

D. Resource Allocation and Other Costs

Another significant consequence of these federal rules is that states may be forced to invest in more sophisticated procedures to facilitate the state interests discussed above, such as error-correction and individuation in punishment. Specifically, states may have to expend more upfront resources in almost every case involving noncitizens,

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[214] *See* Andrew Brien, *Mercy Within Legal Justice*, 24 SOC. THEORY & PRAC. 83, 83-84 (1998).

[215] Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT, *supra* note 35, at 19.

[216] Daniel T. Kobil, *Mercy in Clemency Decisions*, *in* FORGIVENESS, MERCY, AND CLEMENCY 36, 52-54 (Austin Sarat & Nasser Hussain eds., 2007). Kobil takes as a symbolic example the story of Billy Moore. After release from prison in 1991 following his commutation from death row in Georgia, Billy became a minister and a friend of the family of the man he had murdered many years ago. *Id.* at 54, 62 n.99.

because they cannot count on back-end remedies for situations where the state system produced flawed convictions, or where the severity of the immigration consequence far outweighs the state penalty. Although the Supreme Court held in *Argersinger v. Hamlin* that a defendant's right to counsel extends to misdemeanor prosecutions,[217] states and localities are not constitutionally required to provide counsel where there is no threat of incarceration. Unsurprisingly, many states permit convictions against defendants without a right to counsel for offenses not punishable by imprisonment.[218] New Jersey, for example, has a range of "Disorderly Persons" offenses,[219] for which no right to counsel attaches under state law if the prosecutor does not seek jail time for the offender.[220] Yet minor offenses, even if uncounseled, can trigger deportation and other serious immigration consequences,[221] as recently upheld by the BIA.[222]

[217] Argersinger v. Hamlin, 407 U.S. 25, 30-34 (1972) (holding that the Sixth Amendment prohibits states from incarcerating indigent defendants without providing defense counsel in the criminal prosecution, regardless of whether the charge is a felony or misdemeanor); *see also* Alabama v. Shelton, 535 U.S. 654, 667 (2002) (holding that courts cannot impose incarceration on the basis of a misdemeanor probation violation unless the defendant had counsel in the underlying adjudication).

[218] *See, e.g.*, ARK. R. CRIM. P. 8.2(b) (2003); CONN. GEN STAT. § 51-296(a) (2011); FLA. R. CRIM. P. 3.111(b)(1) (West 2009); ME. R. CRIM. P. 44(a)(1) (West 2009); MASS. ANN. LAWS ch. 211D, § 2B (West 2011); N.D. R. CRIM. P. 44(a)(2) (West 2009); OHIO CRIM. R. 44(B) (West 2009); S.C. CODE ANN. § 17-3-10 (1976); S.D. CODIFIED LAWS § 23A-40-6.1 (West 2009); VT. STAT. ANN. tit. 13, §§ 5201(4)-(5), 5231 (West 2009); VA. CODE ANN. § 19.2-160 (West 2009); WYO. STAT. ANN. § 7-6-102(a)(v) (West 2009). *See generally* Alice Clapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585 (2011) (arguing that the rule that defendants who do not face incarceration have no right to counsel requires reexamination where deportation is a consequence of the conviction).

[219] *See* N.J. STAT. ANN. 2C:1-4(b) (West 1981).

[220] *See* N.J. Ct. R. § 7:3-2(b) (2004), *available at* http://www.judiciary.state.nj.us/rules/r7-3.htm (providing that the court will assign a municipal public defender or assign counsel to an indigent defendant who faces a "consequence of magnitude"); N.J. Ct. R., Second Appendix to Part VII Guidelines for Determination of Consequence of Magnitude (2004), *available at* http://www.judiciary.state.nj.us/rules/r7-2nd_appendix.htm (stating that the judge is to consider, inter alia, whether a sentence of imprisonment will be imposed); Rodriguez v. Rosenblatt, 58 N.J. 281, 295 (1971). There is no blanket right to counsel in New Jersey.

[221] Many of the New Jersey Disorderly Persons offenses, for example, could lead to deportation. *See, e.g.*, N.J. STAT. ANN. 2C:21-2.4 (West 2001) (passing bad checks); N.J. STAT. ANN. 2C:35-10(a)(4) (West 1997) (possession of less than fifty grams of marijuana); N.J. STAT. ANN. 2C:20-8 (West 1997) (theft of services); *see also* Castillo v. Attorney Gen. of the U.S., 411 Fed. Appx. 500, 502-03 (3d Cir. 2011) (remanding to BIA to determine in the first instance whether conviction for a "disorderly person's offense" under former version of the New Jersey law is a "crime" triggering removal

An upshot, then, of federal rules that severely curtail the effectiveness of the state's traditional post-conviction remedies is that if states want to ensure the integrity of the justice system and reduce the impact of minor convictions in deserving cases, they may have to invest more resources in preconviction processes. For example, states would need to provide counsel for noncitizens arrested for minor offenses even where not constitutionally required and to better fund existing defender offices.[223] But these kinds of expenditures are prohibitively costly for most jurisdictions, and lack of representation has been recognized as a systemic problem in misdemeanor courts throughout the country.[224] The restrictive immigration rules thus impede the states' freedom to use back-end processes to help ensure the integrity of their administration of criminal justice.

As described above, the loss of many types of diversionary programs as an option for many nonresidents represents a significant cost of implementing the federal rules. Deferred adjudication programs are attractive to states because they avoid trial, encourage rehabilitation, are less punitive in appropriate cases, and save the state money on trial litigation.[225] If diversionary programs are not a viable option for noncitizens, there will be more trials and/or more incarceration, intensifying the resources expended by the state or local jurisdiction. Removing the effectiveness of post-conviction relief for noncitizen residents may also undermine the state goals of rehabilitation and integration.[226]

under the crime involving moral turpitude category); Hussein v. Attorney Gen. of the U.S., 413 Fed. Appx. 431, 433-35 (3d Cir. 2010) (deferring to BIA's determination that New Jersey disorderly person's offense conviction for possessing drug paraphernalia constituted removable offense relating to a controlled substance); Cuellar-Gomez, 25 I. & N. Dec. 850, 860 (B.I.A. 2012) (holding that a municipal marijuana violation with no right to counsel counts as a conviction for immigration purposes).

[222] *See* Cuellar-Gomez, 25 I. & N. Dec. at 860 (holding that a municipal marijuana violation with no right to counsel counts as a conviction for immigration purposes).

[223] *See supra* text accompanying notes 217-18.

[224] *See* Gratton, *supra* note 195, at 1045-49 (describing the nationwide indigent defense crisis); Cade, *supra* note 12, at 20-23 (summarizing reports and articles concerning the frequent lack of appointed representation in minor cases). The misdemeanor representation problem is complicated by *Padilla v. Kentucky*, which held that the Sixth Amendment requires counsel to advise noncitizen defendants about the deportation consequences of a guilty plea. Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010).

[225] *See supra* Part II.C.

[226] *See supra* Part II.C.

In addition to the implementation costs for the state system that result from the decreased incentives for noncitizens to agree to certain dispositions, the Board's interpretation of the INA can also lead to circumvention costs where the state actors endeavor to work around the limited effect given to post-conviction proceedings.[227] Because judicial vacaturs will only prevent removability if granted on the basis of a procedural defect or other non-rehabilitative grounds, noncitizens have an incentive to frame all post-conviction attacks as on the merits. And again, because deportation is such a severe penalty, judges and prosecutors may sometimes be complicit in the pretense.[228] In some cases courts are simply silent about the reasons post-conviction relief is granted; in others evidence of rehabilitation appears to have been important factor in achieving a vacatur despite the court's characterization of the relief as procedural.[229] The varied application of the rules limiting the consequences of expungements that are not on the merits may result in fairness costs, including disparities in outcomes for similarly situated defendants within or across states or localities.[230]

Deporting someone who still has a direct appeal pending also raises substantial due process concerns. Some states, for example, have dismissed the criminal appeals of noncitizens that have been deported as moot.[231] Even where the appeal is not mooted by the defendant's removal, it may be very difficult to access counsel and to prepare a successful appeal once he or she has been deported.[232] Many public

[227] *See* Robert A. Mikos, *Enforcing State Law in Congress's Shadow*, 90 CORNELL L. REV. 1411, 1422-33 (2005) (explaining the hidden implementation, circumvention, and fairness costs of federal collateral consequences in general for states).

[228] *See* Moore, *supra* note 127, at 669 (describing how judges "shape their decisions granting post-conviction relief to make it appear as though there is a substantive and procedural problem with the underlying criminal proceeding").

[229] *See id.* at 701-04 (discussing cases where there is evidence that state vacaturs were motivated by rehabilitative or deportation concerns).

[230] *Cf.* Mikos, *supra* note 227, at 1427-32 (discussing the fairness costs that result from differences in underlying state criminal laws that give rise to the federal sanctions).

[231] *See, e.g.*, Gokhale, *supra* note 136, at 264 (collecting cases from other states); Labe M. Richman, *Deported Defendants: Challenging Convictions From Outside U.S.?*, N.Y.L.J., June 14, 2006, *available at* http://nycrimbar.org/Members/WhatsNew/Articles/NYLJ-06-14-06.html (collecting New York Appellate Division cases that dismissed criminal appeals as moot following deportation). *But see* People v. Ventura, 17 N.Y.3d 675, 681-82 (2011) (holding that intermediate appellate court abused its discretion in dismissing the timely filed appeal of defendants involuntarily deported while their appeals were pending).

[232] *Cf.* Thapa v. Gonzales, 460 F.3d 323, 331 (2d Cir. 2006) (recognizing the difficulties faced by an alien in pursuing an effective immigration appeal while

interest offices have resource constraints or other restrictions that would not allow them to represent a defendant who is residing in another country.

E. Checks and Balances

Scholars have observed that pardons and other clemency powers are vested with the chief executive in part as checks on the power of the legislature to define criminal law and the power of the judiciary to apply those laws and punishments.[233] For example, pardons can signal to the legislative branch the need for law reform.[234] As a Justice Department study noted in 1939, the pardon "has been the tool by which many of the most important reforms in the substantive criminal law have been introduced."[235]

Ohio Governor Richard Celeste, for instance, granted clemency to numerous women who had killed their batterers in an effort to achieve systemic changes in criminal prosecutions and sentencing at the trial level.[236] Governor Ryan's commutations of death row inmates in Illinois similarly served to bring attention to systemic errors in the justice system.[237] The reforming function of pardons can also be seen in Governor George Washington Donaghey's 1912 pardoning of 360 men serving long sentences for minor felonies in Arkansas's notoriously harsh penitentiary and convict-lease prison system. Governor Donaghey labeled their punishment a "revengeful hell," citing black men sentenced to as long as thirty-six years for forging orders for 18 quarts of whiskey and a youth who died after being

abroad); Dorelien v. U.S. Attorney Gen., 317 F.3d 1314, 1325 (11th Cir. 2003) (describing IIRIRA's authorization of appeals from abroad as a "Herculean task").

[233] *See* CROUCH, *supra* note 177, at 14-19 (discussing the check and balance feature of presidential pardon power); Rachel Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1361-62 (2008); Jerry Carannate, *What to Do about the Executive Clemency Power in the Wake of the Clinton Presidency?*, 47 N.Y.U. L. REV. 325, 347 (2003); *see also Ex Parte* U.S., 242 U.S. 27, 41-42 (1916).

[234] Love, *Twilight*, *supra* note 200, at 1184.

[235] U.S. DEP'T OF JUSTICE, 3 THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES: PARDON 295-96 (1939) (describing how pardons led to formal legal recognition of self-defense, insanity, and infancy defenses).

[236] Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L.J. 217, 321 (2003) (describing Governor Celeste's goal of systemic changes in the trial process through his "clemency project"); Richard F. Celeste, *Executive Clemency: One Executive's Real Life Decisions*, 31 CAP. U. L. REV. 139, 141-42 (2003). Governor Celeste also granted eight death penalty commutations in 1991.

[237] *See* Barkow, *supra* note 233, at 1361-62.

forced to work in blazing heat with a fever.[238] Some criticized the pardons at the time because the governor used them to accomplish the end of the convict-lease system, an objective he had not been able to achieve through the legislature.[239] But Donaghey's actions illustrate that the pardon power can be a politically complex means of checking the administration of criminal laws by other state actors.[240]

Pardons were also used more recently to rectify the actions of a corrupt police officer named Tom Coleman in Tulia, Texas.[241] In 1999, Coleman arrested forty-six persons for drug distribution. Although there was no physical evidence in any of the cases, thirty-eight were convicted on the sole basis of Coleman's testimony, some receiving jail sentences as long as ninety years. Four years later, Officer Coleman's testimony was found to be not credible, and Governor Perry pardoned thirty-five of the wrongly convicted residents.[242]

It is not difficult to imagine situations in which a governor might wish to issue pardons to noncitizens to curb overreaching law enforcement or legislatures. There is recent evidence, for example, that some localities have used the criminal apparatus to systematically harass and discriminate against foreign-born residents.[243] The current

[238] *See* George W. Donaghey, *Why I Could Not Pardon the Contract System*, *in* 45 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 22, 22 (1913); *Governor To Free 360 Convicts To-Day: Donaghey of Arkansas Uses Pardoning Power as Blow at Long-Fought Lease System*, N.Y. TIMES, Dec. 17, 1912, at 1.

[239] *See Governors Discuss the Granting of Pardons*, N.Y. TIMES, Jan. 19, 1913, at SM11.

[240] *See infra* Part III.C.

[241] *See generally* NATE BLAKESLEE, TULIA: RACE, COCAINE, AND CORRUPTION IN A SMALL TEXAS TOWN (2005) (discussing this story); ANGELA DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 40 (2007) (same).

[242] *See* DAVIS, *supra* note 241, at 40; *Gov. Perry pardons 35 Tulia defendants*, CNN.COM (Aug. 22, 2003), http://articles.cnn.com/2003-08-22/justice/tulia.pardons_1_pardons-narcotics-trafficking-task-force-regional-narcotics-trafficking-task?_s=PM:LAW.

[243] *See, e.g.*, Billy Ball, *DOJ ends federal immigration program in Alamance County*, INDYWEEK.COM (Sept. 26, 2012) (reporting on a Department of Justice report accusing Alamance County, North Carolina deputies and Sheriff Terry Johnson of biased policing against immigrants); Peter Applebome, *Police Gang Tyrannized Latinos, Indictment Says*, N.Y. TIMES, Jan. 24, 2012, at A1, *available at* http://www.nytimes.com/2012/01/25/nyregion/connecticut-police-officers-accused-of-mistreating-latinos.html (discussing the arrest of four police officers in East Haven following a Justice Department investigation of their mistreatment of immigrants, particularly Hispanic residents); Marc Lacey, *U.S. Says Arizona Sheriff Shows Pervasive Bias Against Latinos*, N.Y. TIMES. Dec. 16, 2011, at A1, *available at* http://www.nytimes.com/2011/12/16/us/arizona-sheriffs-office-unfairly-targeted-latinos-justice-department-says.html (reporting the Justice Department's finding of "a pervasive culture of discriminatory bias against Latinos" within the Maricopa County

federal scheme, by curtailing the effect of pardons for deportation purposes, could impede a governor's ability to fully counteract the damage done by this kind of discriminatory prosecution. Consequently, the intragovernmental intricacies attendant to any exercise of the pardon power should inform construction of statutory text that does not unequivocally express congressional intent to restrict pardons in ways that may impact this checking function.

F. Democratic Accountability

Finally, the federalism goal of democratic accountability is jeopardized when a governor's pardon is not given effect in immigration proceedings. Governors are the democratically elected chief executives of each sovereign state. As chief executives, they bear ultimate responsibility and authority for proper implementation of the state's laws. Federalism recognizes that decisions about how to punish and who to forgive for transgressions of the laws of a sovereign are best made by the sovereign itself, within the bounds of the constitution. Pardons are "lodged in the governor, not for the benefit of the convict only, but for the welfare of the people, who may properly insist upon the performance of that duty by him, if a pardon is to be granted."[244] If governors do not execute such duties in ways that are sufficiently responsive to "localized priorities," they may pay the price on Election Day.[245] In general, local governments should be accountable for processes that impact perception of the systemic integrity of the criminal justice system, as well as the importance of membership decisions and the community impact of convictions under that government's laws.

G. Conclusion

The interests that pardons, deferred adjudications, appeals, and other post-conviction processes serve — systemic legitimacy,

Sheriff's Office); TREVOR GARDNER & AARTI KOHLI, THE CHIEF JUSTICE EARL WARREN INSTITUTE ON RACE, ETHNICITY & DIVERSITY, THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM 1 (Sept. 2009), *available at* http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf (describing how "immediately after Irving, Texas law enforcement had 24-hour access . . . to ICE in the local jail, discretionary arrests of Hispanics for petty offenses — particularly minor traffic offenses — rose dramatically").

[244] Rich v. Chamberlain, 104 Mich. 436, 441 (1895) (noting that pardons are "as much an official duty as any other act").

[245] *Cf.* Morrison, *supra* note 168, at 85 (discussing how the electoral accountability of state attorneys general incentivizes them to be responsive to "localized priorities").

calibrated punishment, restoration of membership, resource allocation, and sometimes even law reform — are central to sovereign control over criminal justice and to governance more broadly. Individuals, of course, feel these impacts too. The federal rules directly affect the noncitizens (and indirectly their families and communities) whose right to remain in this country hinges on the immigration consequences of a pardon or other state procedure. More broadly, the federal rules affect the citizens and taxpayers whose criminal cases play out differently as the state system absorbs and compensates for the consequences of the federal rules for noncitizens. None of this is to say that Congress cannot constitutionally enact laws with these sorts of impacts on state institutions and individuals, whatever the cost for federalism values. Within Congress's sphere of authority, its law is supreme so long as it does not transgress other constitutional limitations. Congress's power to set immigration policy, the Supreme Court has long held, is at least as plenary as any of its enumerated powers.[246]

But it is not at all clear that Congress intended or even considered the intrusions of these federal rules on traditional state authority. Certainly the INA does not expressly indicate congressional intent to override pardons, appeals, or expungements, nor does the legislative record suggest that these post-conviction processes were on legislators' minds in enacting the definition of conviction for immigration purposes.[247] And as discussed above, the agency, government, and courts have interpreted the relevant statutory provisions of the INA in diverse and inconsistent ways, casting doubt on the clarity of the statutory text.[248]

A political risk, pardons are now infrequently granted in most states.[249] The limitations on the effectiveness of pardons to prevent deportation that the Board and courts have read into the INA may make governors even more reluctant to exercise the power, regardless of whether the pardon would otherwise be appropriate on justice or mercy grounds. If the pardon will not actually return a person to the place previously occupied in the community because he or she will be deported, a governor is likely to give the pardon request less consideration, no matter the merits of the pardon petition. When New

[246] Kleindienst v. Mandel, 408 U.S. 753, 766 (1972).

[247] *See infra* Part III.

[248] *See supra* Part I.

[249] *See* Barkow, *supra* note 233, at 1349; Daniel T. Kobil, *How to Grant Clemency in Unforgiving Times*, 31 CAP. U. L. REV. 219, 223-24 (2003); Love, *Twilight*, *supra* note 200, at 1205.

York Governor David Paterson decided in 2010 to expedite and expand consideration of pardon applications from immigrant residents facing removal, many potential applicants were affirmatively advised by experienced immigration attorneys not to bother applying, regardless of whatever evidence there might be of their rehabilitation, community and family ties, or other factors supporting their eligibility for clemency.[250] We can surmise that of the more than 1,000 applicants, at least some were unsuccessful not because of the lack of merit in their applications, but because of the panel's doubts about the efficacy of a pardon to prevent removal in their particular cases.

Though Congress likely can constitutionally attach federal consequences to a state conviction without giving effect to pardons, whatever the direct or indirect influence this policy might have on a governor's decision to use the pardon power, it is important to be clear whether Congress in fact intended to impose such a significant externality on a state's sovereign power. In the next Part, I argue that doubts about congressional intent to intrude on gubernatorial pardon decisions and similar state powers should inform construction of the INA in a way that will respect Congress's authority over immigration policy while ensuring that constitutional federalism values are not discarded as a byproduct of an agency's interpretation of a statutory provision lacking sufficient clarity.

III. A FEDERALISM CANON FOR FEDERAL IMMIGRATION POLICY

As the first two Parts of this Article demonstrate, federal immigration rules limiting pardons and other post-conviction procedures implicate processes that implement and embody state interests at the center of government authority. In this Part, I argue that where Congress has not made explicitly clear its intention to intrude on these sovereign processes in the language of the statute, agencies and courts should interpret the statute in ways that preserve state authority. The use of this federalism canon of construction would ensure that Congress has directly confronted whether to override state autonomy over generally applicable governmental processes.[251]

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[250] *See, e.g.*, IMMIGRATION PARDON PROJECT, PRO BONO ATTORNEY'S PARDON APPLICATION PROCEDURE ¶ 7, *available at* http://www.reentry.net/ny/library/folder.328444 (advising that the foremost component of the pardon application should be to identify "what forms of immigration relief would be available to your client upon receiving a pardon").

[251] *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331-32 (2000); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1603-09 (2000) [hereinafter

As I noted at the outset of this Article, this approach is a recognizable means of safeguarding state authority. The Court has increasingly used clear statement canons to protect federalism values.[252] To date, however, the Court has not had occasion to apply a federalism canon in the immigration context, although it has used other kinds of clear statement rules in the service of construing the INA so as not to disturb important constitutional values.[253] In *INS v. St. Cyr*,[254] for example, the Court declined to apply legislation to conduct occurring before its enactment where Congress had not plainly indicated that it "specifically considered the potential unfairness that retroactive application would produce."[255] As I show below, the justifications underlying the use of a federalism canon where the construction of federal law threatens a state's core power to determine the continuing validity of its own convictions apply with at least as much force in the immigration context as in other areas of federal authority.

A. The Supreme Court's Federalism Canon

The Court's federalism canon requires an unequivocal expression of congressional intent before interpreting a statute to impede or infringe on state sovereign powers.[256] In *Gregory v. Ashcroft*[257] — the first case to fully express this canon — the Supreme Court construed the federal Age Discrimination in Employment Act not to apply to state judges.[258] Justice O'Connor's majority opinion acknowledged that the Court's interpretation of the statute was strained, but nevertheless held that statutes should not be interpreted to "upset the usual constitutional

Constitutional Avoidance] (explaining that the Court's clear statement rules protect underenforced constitutional norms).

[252] *See* Eskridge & Frickey, *supra* note 19, at 619-29; Manning, *supra* note 24, at 403.

[253] *See, e.g.*, INS v. St. Cyr, 533 U.S. 289 (2001) (employing the presumption against retroactivity and the canon of constitutional avoidance to interpret the effect of the 1996 amendments to the INA).

[254] *Id.* at 291.

[255] *Id.* at 317; *see also* Hamdan v. Rumsfeld, 548 U.S. 557, 576 (2006) (requiring a clear statement from Congress to replace traditional adjudication procedures in terrorism prosecutions).

[256] Gregory v. Ashcroft, 501 U.S. 452, 464 (1990) (emphasis added) ("[I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be *absolutely certain* that Congress intended such an exercise.").

[257] *Id.*

[258] *Id.* at 467.

balance of federal and state powers" unless Congress has made "its intention to do so 'unmistakably clear in the language of the statute.'"[259]

Unlike the related presumption against preemption,[260] the federalism canon appears to require more than *evidence* of congressional intent to preempt state law. If stringently applied, the Court's federalism canon demands a clear *statutory statement* of intent to displace core state functions.[261] In the absence of an explicit textual indication of Congress's intent to intrude on areas of state sovereignty, the federalism canon requires those implementing a statute to interpret it in such a way as to protect areas of traditional authority even where this would not be the most straightforward construction.[262] And though the process of identifying "traditional state functions" can be ambiguous at the fringes, the potential for error is tolerable because Congress can subsequently clarify its intent.[263]

Part of the justification in *Gregory* for a super-strong interpretive rule against congressional intrusion on state sovereignty was based on the limitations of any other means of enforcing constitutional federalism. The Court's previous decision in *Garcia v. San Antonio Metropolitan Transit Authority*,[264] although acknowledging the importance of state sovereignty, essentially left the national political process as the only safeguard against federal regulation of core state functions.[265] Justice O'Connor tied the narrowness of that legislative remedy to the need for a strong federalism canon: "[I]nasmuch as this Court in *Garcia* has left primarily to the political process the

[259] *Id.* at 460-61; *see also id.* at 461 ("States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.").

[260] The presumption against preemption "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[261] Robert R.M. Verchick & Nina Mendelson, *Preemption and Theories of Federalism*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 13, 13, 28 (William W. Buzbee ed., 2009).

[262] *See, e.g.*, Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172-73 (2001) (invalidating a federal agency's interpretive rule that asserted federal jurisdiction over intrastate waters under the Clean Water Act, as this might serve as an "encroachment upon a traditional state power" without a clear statutory mandate); Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991).

[263] Young, *Constitutional Avoidance*, *supra* note 251, at 1606-07.

[264] 469 U.S. 528 (1985).

[265] *Id.* at 552, 556 (overruling Nat'l League of Cities v. Usery, 426 U.S. 833 (1976)).

protection of the States against intrusive exercises of Congress'[s] Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise."[266]

The use of a federalism canon is especially appropriate to evaluate the statutory provisions considered in this Article, because the immigration scheme predicates deportation on state criminal law processes but, as interpreted, does so in piecemeal fashion. 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.

The argument for reliance on the national political process to safeguard federalism also rests upon presumptions that generally are not applicable in the immigration context.[267] The federal political process that is structured to take the interests of states into account "is not engaged unless Congress turns its attention to the particular issue at hand."[268] However, as was the case with the amendments to the INA in 1996, immigration provisions are frequently inserted as last minute riders to omnibus bills with little or no debate.[269] A canon requiring explicit statutory clarity to override generally applicable police powers would highlight the federalism issues implicated, ensuring that deliberative legislative processes actually take place.

Additionally, reliance on political process as a federalism safeguard assumes that congressional action will have similar effects for significantly large aggregates. But rules that limit the ability of pardons and other state procedures to remove immigration consequences will primarily affect only individuals with relatively little national political power. Even lawful permanent residents, though permanent members of national and local communities, lack the right to vote. The politically weak nature of those who are most affected by this particular invasion of state authority thus makes it important to have a rule requiring Congress to express its intentions clearly in the statute, because such a rule will force Congress to actually confront the

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[266] *Gregory*, 501 U.S. at 464 (emphasis added).

[267] *Cf.* Bellia, *supra* note 159, at 1010-12 (discussing the limitations of political safeguards to protect state interests affected by the proposed Lawsuit Abuse Reduction Act of 2005).

[268] Morrison, *supra* note 168, at 93-94.

[269] *See* Morawetz, *supra* note 88, at 282 (describing controversial last-minute measures inserted into the 1996 immigration bills); Taylor, *supra* note 88, at 352-53 (same).

federalism issues. Finally, the political processes argument presumes that if a statute invades state authority in some manner, states will react by coming to a consensus to act and amend the law. But it is often more difficult to undo federal legislation than to enact it, and immigration law is particularly entrenched.[270]

In sum, whatever the merits of the political process argument in the usual case, the use of a federalism canon is especially appropriate where primary impact of the federal rules falls on an insular and politically powerless group of persons, as noncitizens in state criminal justice systems surely are. An interpretive rule mandating statutory clarity will ensure that Congress, rather than an agency virtually immune from political checks, is making the decision to upset the usual federalism balance.

B. The Plenary Power Objection

In light of the great deference historically accorded Congress in setting immigration policy,[271] some courts might hesitate to consider any federalism limit on Congress's immigration power.[272] While over

[270] *See* Mariano-Florentino Cuéllar, *The Political Economies of Immigration Law*, 2 U.C. IRVINE L. REV. 1 (2012) (describing how the various dynamics producing the structure of modern immigration law create powerful obstacles to legislative change); Bellia, *supra* note 159, at 1012 (arguing that federal legislation restricting state authority is easier to enact than repeal). *See also* E. Donald Elliot, Comment to *Obsolete Law—The Solutions*, THE ATLANTIC (Mar. 30, 2012, 9:00 AM), http://www.theatlantic.com/national/archive/2012/03/obsolete-law-0151-the-solutions/255141 ("Congress can only take on a few big problems a year, usually in response to a crisis. Revisions of existing laws rarely rise to that level; most existing laws work badly, but tolerably badly, and thus do not rise above Congress's threshold of pain." (emphasis in original)); Ryan Young & Jacqueline Otto, *The Big Repeal*, THE AM. SPECTATOR (Aug. 9, 2011, 6:07 AM), http://spectator.org/archives/2011/ 08/09/the-big-repeal (stating that repeal is politically expensive because "every program and regulation has its vocal defenders").

[271] *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893) ("The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.").

[272] Very little case law has directly addressed federalism challenges based on conflicts between federal immigration laws and state laws of general applicability. The few exceptions do not reveal careful reasoning. *See* Herrera-Inirio v. INS, 208 F.3d 299, 307-08 (1st Cir. 2000) (rejecting a Tenth Amendment challenge to treating a deferred adjudication followed by formal exoneration under Puerto Rican law as a conviction for immigration purposes because regulation of immigration is "uniquely a matter of federal, not local, concern"); ACLU of New Jersey, Inc. v. Cnty. of Hudson, 799 A.2d 629, 639 (N.J. Super. Ct. App. Div. 2002), *cert. denied*, 803 A.2d 1162 (N.J.

time the Court has recognized some important constitutional limits on plenary power, the doctrine is still kicking around, well over one hundred years later.[273]

But the plenary power doctrine is largely irrelevant to the application of a federalism canon, even in the immigration context. A court's decision to apply a clear statement rule says nothing about the deference that Congress is due. Rather, the purpose of the interpretive rule is to ensure that it is in fact *Congress* that has determined to discard a constitutional value through legislation within its sphere of authority, rather than an agency or court. While implementation of a federalism canon thus does impose a "clarity tax" on federal legislation,[274] that procedural burden is outweighed by the benefit of preserving state authority from inadvertent intrusion where pardons and other processes implementing generally applicable criminal laws are concerned.[275]

Furthermore, it is worth observing that the Court's 1983 decision *INS v. Chadha*[276] makes even a substantive federalism challenge to plenary power at least plausible. In *Chadha*, the Court held that a provision in the INA authorizing either house of Congress to override an administrative officer's grant of discretionary relief from deportation violated the Constitution's requirements for law-making, including bicameralism and presentment to the President, thereby running afoul of separation of powers.[277] Although the government vehemently invoked the plenary power doctrine,[278] the Court tersely

2002) (holding that an interim agency regulation prohibiting state jail officials from disclosing the identities of any detainees held on behalf of the INS superseded a New Jersey disclosure law requiring public disclosure of the identities of all jail inmates). *But see* Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313 (2004) (arguing that courts should not find preemption where Congress has not acted).

[273] *See generally* Motomura, *supra* note 20 (describing how the plenary doctrine maintains that Congress and the Executive have broad and typically exclusive dominion over immigration decisions).

[274] *See* Manning, *supra* note 24, at 403.

[275] As should be clear from Part II, gubernatorial pardons and other criminal processes are distinct from state laws that regulate immigrants in some way on the basis of their status, raising questions about whether the state is encroaching on a field preempted by the federal government.

[276] 462 U.S. 919 (1983).

[277] *Id.* at 947-59.

[278] *See, e.g.*, Reply Brief of the House of Representatives at 2-14, INS v. Chadha, 462 U.S. 919 (1982) (No. 80-1832), 1982 WL 607218 (devoting twelve pages to the argument that the plenary power doctrine should control the result in the case). At oral argument, counsel for the House of Representatives protested, "[N]either the presentment clause nor the general separation of powers doctrine can be said to be an

observed that while Congress has "plenary authority" over immigration policy, it must choose "a constitutionally permissible means of implementing that power."[279]

Read broadly, the *Chadha* decision stands for the proposition that deference to Congressional immigration power is inappropriate where the cost is invasion of territory constitutionally committed elsewhere.[280] But again, the important point here is that a federalism canon does not substantively limit Congressional power. The canon ensures that Congress has carefully exercised its power before federalism values are disregarded.

C. The Federalism Canon Applied to the Immigration Rules

The federalism doctrine applies where Congress's intent to intrude on traditional state authority is in question and another less invasive construction is plausible. Obviously, the impact of clear statement rules and other interpretive canons hinges on the clarity of the particular text at issue and other evidence of congressional intent. Of course, if the federalism canon requires an express statement in the text of the statute, as the *Gregory* Court suggested is necessary where an interpretation of the statute would displace core state functions, evidence of intent in the legislative history will be less relevant.[281] The strength of the federalism canon to be applied may thus be critical in some cases. Below I consider whether the application of a federalism

imperious restriction upon the choice of means selected by Congress to execute its power over the naturalization or deportation of aliens." BARBARA HINKSON CRAIG, CHADHA: THE STORY OF AN EPIC CONSTITUTIONAL STRUGGLE 204 (1990). Justice White too would have let the legislative veto provision survive at least this particular challenge in light of the Court's proclamation that "[o]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens."; *Chadha*, 462 U.S. at 1000 (White, J., dissenting) (internal quotation marks omitted) (quoting and citing Kleindienst v. Mandel, 408 U.S. 753, 766 (1972)).

[279] *Chadha*, 462 U.S. at 940-41.

[280] *Cf.* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 303 (1984) (indicating that the *Chadha* decision suggests a departure from the notion of plenary congressional power over immigration). Of course, the Court's recognition in *Chadha* that the federal government's implementation of immigration plenary power is subject to constitutionally structured limits on Congress, such as separation of powers, was based specifically on the Constitution's textual requirements of bicameralism and presentment to the President. But, as discussed, the Constitution's vertical structural limits come not from specific textual provisions but from the limited powers given to the national government. *See supra* Part II.

[281] *See* Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 23 n.90 (2004).

clear statement rule is sufficient to overcome the agency's limiting interpretation of the pardon clause and then turn briefly to the other post-conviction processes.

As the following section shows, if courts apply a super-clear statement rule, the Board's interpretation of the statute with respect to pardons may fail. On the other hand, if the federalism canon applied requires only a more modest thumb on the scale, the question may be closer.

1. The Federalism Canon Applied to the Limitations on Pardons

To be sure, beginning with the text of the statute, one might reasonably infer from the INA's statutory text that Congress intended pardons to be effective only in the enumerated deportation categories. The BIA relied on the *expressio unius* cannon to support this interpretation.[282] But this reading, even if the most straightforward construction, is not compelled. Congress has not directly stated in the INA that pardons will *not* be effective for any categories of deportation.[283] As I argue here, an alternate construction of the statute is plausible for a number of reasons.

As noted, the version of the INA in effect from 1956 to 1990 directly mandated that pardons would not preclude removal on the basis of drug offense convictions,[284] confirming that Congress knows how to make explicit its intention to override traditional state authority when it wishes to do so. Because this prior provision was in effect at the same time that the INA specifically continued to list other deportation categories for which pardons would be a safety against removal, it is reasonable to conclude that Congress has not always had the *expressio unius* canon in mind when amending this particular provision to explicitly name pardons for some crimes and not others.[285]

Turning to the legislative history — which, under a strict application of the federalism canon, is unnecessary — there is little to support the Board's construction. Congress has barely debated the pardon section in the INA over the course of a century.[286] Additionally, nothing in the legislative record leading to the enactment

[282] *See supra* text accompanying notes 82-99.

[283] *Cf.* Gregory v. Ashcroft, 501 U.S. 452, 467 (1991) ("[I]n this case we are not looking for a plain statement that judges are excluded [from the Age Discrimination in Employment Act]. We will not read the ADEA to cover state judges unless Congress has made it clear that judges are *included*."(emphasis in original)).

[284] *See supra* Part I.B.3.

[285] Thanks to Anthony Ruiz, NYU Law School class of 2014, for this observation.

[286] *See supra* Parts I.B-I.C.

of the federal definition of conviction in IIRIRA reveals congressional concern about the effect of executive pardons.[287] Rather, it appears that Congress was focused on ensuring that deferred adjudications are treated as convictions where there has been a finding of guilt.[288] Thus, with respect to pardons, the evidence of congressional intent to override state sovereign authority is at best mixed. That ambiguity is reflected in the inconsistencies across administrative and judicial decisions interpreting the effect of pardons on immigration consequences in other contexts, such as naturalization and discretionary relief. Unclear Congressional intent is also underscored by the fact that the U.S. Department of State came to a different interpretation of the enumerated crime involving moral turpitude category, determining that pardons would remove the inadmissibility consequences of such convictions.[289]

The Board's interpretation of the pardon section in the INA also leads to a number of highly problematic applications. These doubtful results lend additional support for an alternate construction that does not override state authority. First, the BIA's interpretation leads to a plainly unconstitutional result with respect to the President's pardon power. Since the 1952 Act, the text in the INA giving explicit effect to pardons in certain deportation categories has referred to both presidential and gubernatorial pardons in the same sentence.[290] As a result, the logic of the Board's linguistic interpretation of the INA would also deny preclusive effect to presidential pardons for convictions outside the enumerated categories, thus violating the Pardon Clause.[291]

A long and undisturbed line of Supreme Court precedent interpreting the Pardon Clause makes clear that the President's power to pardon "is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders."[292] Thus, in *United States v. Padelford*,[293] the Court held that

[287] *See supra* text accompanying notes 88-89.

[288] *See supra* Part I.D; *see also infra* text accompanying notes 305-308.

[289] 22 C.F.R. §§ 40.21(a)(5), 40.22(c) (2006) (directing consular officers not to consider visa applicants inadmissible on the basis of crimes involving moral turpitude that have been fully and unconditionally pardoned by a governor or the President).

[290] *See* Immigration and Nationality Act of 1952 § 241(b), Pub. L. No. 82-414, 66 Stat. 208 (1952). *See generally* Part I.B (discussing these references in these categories).

[291] *See* U.S. CONST. art. II, § 2, cl. 1 (providing that the President "shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment").

[292] *Ex Parte* Garland, 71 U.S. 333, 380 (1866). *See generally* Morison, *supra* note

President Lincoln's pardon "relieved [Padelford] from any penalty which he might have incurred," including civil forfeiture of property for having aided the Confederate rebellion.[294] Soon after, the Court rebuffed Congress's attempt to restrict the effect of a Presidential pardon, admonishing that "the legislature cannot change the effect of such a pardon any more than the executive can change a law."[295] In subsequent cases, the Court continued to unequivocally confirm that a pardon "releases the offender from all disabilities imposed by the offense, and restores to him all his civil rights . . . ."[296]

The fact that the Board's construction of the text would logically lead to an unconstitutional application where the President's power is concerned casts further doubt on the agency's construction of the statute. If the INA were instead interpreted to give preclusive effect to full and unconditional pardons of both sovereigns, the potential for unconstitutional application of the statute to presidential pardons is avoided. It may be theoretically possible, if awkward, to sever and excise the language in the INA provision affecting presidential pardons.[297] But the severability inquiry should not kick in until the constitutional question is reached.[298]

The second problematic application of the prevailing interpretation of the pardon section in the INA has to do with the ability of immigration prosecutors to charge the same offense under alternate or multiple grounds of deportation. As discussed in Part I.D, because certain convictions fall within more than one category of deportation

107, at 304-24 (describing the history of the Supreme Court's Pardon Clause jurisprudence).

[293] United States v. Padelford, 76 U.S. 531, 543 (1869).

[294] *Id.* While the statute at issue explicitly authorized presidential pardons, the *Padelford* Court did not address whether such authorization was strictly required. The Court later made clear, however, that the purported authorization was in fact superfluous. *See* United States v. Klein, 80 U.S. 128, 139, 141 (1872).

[295] *Klein*, 80 U.S. at 147-48.

[296] Knote v. United States, 95 U.S. 149, 152 (1877); *see also* Boyd v. United States, 142 U.S. 450, 453-54 (1892) (holding that pardon removes, as a consequence of a larceny conviction, the disability to testify as a witness).

[297] *See, e.g.*, Carlin Commc'ns, Inc. v. FCC, 837 F.2d 546, 549 (2d Cir. 1988) (finding the words "obscene or indecent" severable from a provision of the Federal Communications Commission Authorization Act of 1983 that established conditions under which providers of an "obscene or indecent" message would have a defense to prosecution).

[298] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 107-09 (1976) (severing subsection H from those portions of the Federal Election Campaign Act of 1971 that were first found "constitutionally infirm"). Moreover, the canon of constitutional avoidance requires courts to avoid the constitutional question, if possible, through an alternate construction.

— some of which are held to be negated by pardons and some of which are not — the agency's rank and file prosecutors have unfettered discretion in many cases to choose whether to negate the effect of a gubernatorial or presidential pardon through the formal deportation charge. But this discretion permits arbitrary results. A unanimous Supreme Court recently admonished in *Judulang v. Holder*[299] that the outcome of a noncitizen's eligibility for relief from removal may not "rest on the happenstance of an immigration official's charging decision."[300] Under the prevailing interpretation of the pardon provision, for many deportable crimes, "everything hangs on the fortuity of an individual official's decision. An alien appearing before one official may suffer deportation; an identically situated alien appearing before another may gain the right to stay in this country."[301]

Additionally, there is little apparent rationality for which deportation categories would be removed by a pardon. Convictions for simple possession of a controlled substance, for example, trigger removal despite a pardon, while convictions for illicit drug trafficking would fall within the aggravated felony category and thus be precluded by a pardon. Similarly, it is possible that a governor's pardon would be held ineffective where a judicial resentencing or vacatur (if on the merits) would eliminate the immigration consequence of the conviction. Recall Governor Paterson's pardon of Marlon Powell's drug offense. If, instead of the pardon, Powell had been resentenced as a Youthful Offender, then he would not be deportable no matter the category of removal.[302] The Board's interpretation of the statute thus treats sovereign pardons as inferior to post-conviction judicial resentencing, at least for certain categories of removal. All of these problems underscore the federalism concerns inherent in the current interpretation of the statute.

On the other hand, one must confront the fact that reading the statute to give effect to pardons in all deportation categories would appear to make the INA section mentioning pardons superfluous.

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[299] 132 S. Ct. 476 (2011).

[300] *Id.* at 486.

[301] *Id.*; *see also id.* at 478 ("By hinging a deportable alien's eligibility for discretionary relief on the chance correspondence between statutory categories — a matter irrelevant to the alien's fitness to reside in this country — the BIA has failed to exercise its discretion in a reasoned manner.").

[302] Powell's situation was complicated by the fact that he had already been ordered removed by the time of Paterson's pardon, leaving him, at best, with the opportunity to make a motion to reopen his proceedings. This complication might explain why he sought a pardon instead of judicial resentencing, although there could be other reasons such as problems of proof.

Perhaps the current pardon provision in the INA is a vestige of that first criminal deportation statute in 1917. In light of the common understanding in that era that a pardon would restore a person to all his rights,[303] the 1917 Act plausibly mentioned the preclusive effect of pardons to ensure that immigration officials — tasked with implementing an immigration scheme that for the first time provided for deportation on the basis of state convictions — would continue to fully respect the state's traditional authority to undo the effect of those convictions through the sovereign pardon power. Indeed, as deportation categories were periodically enacted in the decades following the 1917 Act, pardons continued to be held effective for each, until Congress made explicit its intention to place controlled substances offenses outside the reach of pardons for immigration purposes from 1956 to 1990.[304] The fact that Congress added multiple categories of deportable offenses in 1996 and only placed some in the pardon provision section of the INA is more problematic, although the legislative sequence leading to the enactment of those immigration laws casts some doubt on the underlying intentionality.

Ultimately, though, it may not be essential to resolve the superfluity objection in order to successfully apply the federalism canon here, given the range of problems with the immigration agency's construction. Rules of thumb for divining legislative intent, while useful tools for statutory interpretation in general, may be inappropriate in a wide range of situations.[305] Statutory interpretation is a holistic endeavor, and the Court has sometimes rejected the plain language of a statute where it would lead to an absurd result.[306] Even "the rule against redundancy does not necessarily have the strength to turn a tide of good cause to come out the other way."[307]

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[303] *See supra* Parts I.B.1-I.B.2.

[304] *See, e.g.*, H-, 6 I. & N. Dec. 90, 96 (B.I.A. 1954) (finding "no sound basis in logic or reason to hold that this pardoning forgiveness or immunity" does not apply in exclusion proceedings as well as deportation proceedings); *see also supra* Part I.B.

[305] *See* LAWRENCE M. SOLAN, THE LANGUAGE OF STATUTES 69 (2010).

[306] *See, e.g.*, United States v. Granderson, 511 U.S. 39, 45 (1994) (rejecting the most natural textual reading of a Sentencing Guidelines provision on the grounds that it leads to an absurd result); United States v. Wilson, 503 U.S. 329, 334 (1992) (rejecting an interpretation of the Sentencing Reform Act that "would make the award of credit [for time-served] arbitrary"); Green v. Block Laundry Mach. Co., 490 U.S. 504, 510 (1989) ("No matter how plain the text of the Rule may be we cannot accept an interpretation that would deny a civil plaintiff the same right to impeach an adversary's testimony that it grants to a civil defendant.").

[307] Gutierrez v. Ada, 528 U.S. 250, 258 (2000); *see also* Landgraf v. USI Film Prods., 511 U.S. 244, 259 (1994).

On balance, the immigration agency's interpretation of the effect of pardons in the current INA should be rejected if the federalism canon is rigorously applied. Congress has not made its intention to override the states' sovereign pardon power unmistakably clear in the statute, and there are many reasons to doubt the agency's construction. Until that clarity burden is met, state pardons should be given preclusive effect wherever the immigration consequences are predicated on the underlying state conviction.

2. A Brief Look at the Federalism Canon Applied to Other Post-Conviction Processes

In this section I will briefly address some of the salient considerations in applying the federalism canon to the other post-conviction processes, though for reasons of scope I reach only tentative conclusions.

As an initial matter, it appears that deferred adjudications and diversionary programs are less protected by a federalism canon. In addition to the fact that the text explicitly directs that deferred adjudications will count as convictions for immigration purposes where there has been a finding of guilt and some penalty imposed, even if withheld,[308] the legislative record suggests that Congress very much had such processes in mind when it partially enacted the *Ozkok* definition of conviction.[309] Thus, while federal rules reducing the viability of diversionary programs or other community supervision alternatives to incarceration for noncitizens may be unwise as a matter of policy and certainly impose costs on states, they do appear to unequivocally reflect Congress's intent.

On the other hand, the text of the INA says nothing about whether expungements and appeals will affect the immigration consequences

[308] *See* Immigration and Nationality Act § 101(a)(48)(A), 8 U.S.C. § 1101 (2011) (defining a conviction for immigration purposes as "a formal judgment of guilt . . . entered by a court or, if adjudication of guilt has been withheld, where (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere, or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed"); *id.* ("Any 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.").

[309] *See, e.g.*, H.R. REP. NO. 104-828, at 224 (1996) (Conf. Rep.) (indicating that Congress intended the partial enactment of the *Ozkok* decision to hold that a confession of guilt is sufficient to establish a conviction for immigration purposes, even in cases where adjudication is deferred).

of a state conviction. As discussed previously, in *Matter of Rolden*, the Board inferred from the INA's definition of conviction congressional intent that any post-conviction processes not addressing the merits would be ineffective to remove immigration consequences.[310] As the dissents in that case noted, however, the legislative record only evinced intent to eliminate deferred adjudications and said nothing of vacaturs and expungements.[311] While courts have deferred to the agency's view that judicial expungements on rehabilitative or immigration relief grounds will not remove deportation consequences, the lack of uniform implementation of that rule across circuits reflects the unclear statutory grounding.

Similarly, the sharp division among the federal circuits (and members of the Board) regarding whether a noncitizen can be removed while a direct appeal is pending suggests that the finality question too is far from resolved by the statutory text. And there are a host of other reasons to doubt a construction of the statute that removes the longstanding rule against deporting noncitizens with a pending appeal. For example, the Court has recognized that due process requires that convicted defendants have a right to meet with their attorney to prepare a direct appeal of the conviction,[312] and that appellate processes must be "adequate and effective."[313] Federal rules that allow deportation or mandatory immigration detention before a direct appeal is completed cut against this authority.

Last, but perhaps most importantly, there is no question that Congress knows how to textually make clear its desire to override state criminal processes for purposes of federal consequences when it wishes. The Medicare and Medicaid Patient and Program Protection Act of 1987, for example, sets forth mandatory and permissive exclusions from state health care programs on the basis of certain convictions. The statute defines convictions for purposes of the exclusions to include "a judgment of conviction . . . entered against the individual or entity by a Federal, State, or local court, *regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged*."[314] That

[310] *See* Matter of Roldan-Santoyo, 22 I. & N. Dec. 512, 527 (B.I.A. 1999).

[311] *See id.* at 529-46.

[312] Procunier v. Martinez, 416 U.S. 396, 419-21 (1974), *overruled on other grounds by* Thornburgh v. Abbott, 490 U.S. 401, 413-14 (1989); *see also* Lewis v. Casey, 518 U.S. 343, 350-51 (1996) (holding that defendants must have a "reasonably adequate opportunity" to challenge their convictions).

[313] Evitts v. Lucey, 469 U.S. 387, 392 (1985).

[314] *See* 42 U.S.C.A. § 1320a-7(i)(1) (2010) (emphasis added).

Congress has elsewhere been so explicit where it wants federal rules to trump traditional state authority over generally applicable police powers justifies application of a strict federalism canon in this context.

It appears, then, that application of the federalism canon would also give preclusive effect to expungements and similar procedures, whatever basis the state has for granting them. Similarly, the canon seems to easily permit an interpretation of the statute that precludes a noncitizen from being deported while his or her conviction is pending on direct appeal. With respect to deferred adjudications, on the other hand, the statutory text expresses sufficient clarity to overcome the federalism canon, a result also supported by the legislative record.

CONCLUSION

Current immigration law has been criticized for its severe restrictions on discretionary relief and its dragnet approach of sweeping in numerous minor offenses under the many provisions providing for deportation on the basis of state criminal convictions. Compounding the problems this scheme creates, adjudicators in charge of administering immigration policies interpret the law to limit the authority of states to determine the continuing validity of those convictions through core state processes like pardons, appeals, and expungements. This interpretation transgresses the ancient principle that the sovereign's power to punish should include the power to forgive.

Ideally, Congress would explicitly clarify through federal legislation that it respects state authority to remove the immigration consequences of convictions through pardons, expungements, and similar procedures. In the meantime, clear statement rules like the federalism canon can protect state authority to maintain the systemic integrity of criminal justice and exercise membership decisions within a traditional sphere of authority. This interpretive safeguard may be critical as federal immigration policies become increasingly intertwined with state justice structures. While not ultimately constraining Congress's authority to set immigration policy, the federalism canon will help ensure that legislators confront the federalism values at stake when federal rules invade states' generally applicable criminal laws.