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Immigration Enforcement and State Post-Conviction Adjudications: Towards Nuanced Preemption and True Dialogical Federalism

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The relationship between federal immigration enforcement and state criminal, post-conviction law exemplifies certain inevitable complexities of preemption and federalism. Because neither perfect uniformity nor complete preemption is possible, we must consider two questions: First, whether (and, if so, how) state courts adjudicating rights should account for legitimate federal immigration law goals, such as uniformity and finality? Second, how should federal courts deploy preemption and federalism principles when faced with challenges by federal authorities to such state court actions? This article offers a framework of "dialogical federalism," seeking to normalize certain tensions under a rubric of dialogue, rather than formal hierarchy or efficiency. The framework respects state courts' rights adjudication, while also taking account of the history, current norms, structure of immigration enforcement, and contemporary models of preemption and federalism.

State enforcement agents and state courts are deeply engaged in immigration-related processes. But they often must do so in the context of historically powerful sub-federal sys-

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tems, such as criminal law enforcement, retroactivity analysis, etc. The best state court decisions balance autonomy, fidelity to state precedent, and protections of rights with awareness of federal concerns. There is no precise formula, but nuanced state court adjudications should help federal courts, when considering preemption challenges to state actions, to resist formalistic (and unrealistic) field preemption or plenary power preemption. The benefits of this approach could be substantial. With equal protection as a backstop, it could empower the states to define the confines of political communities, thereby offering a truly transformative model of the new immigration federalism.

There may be some ambiguity as to what constitutes cooperation under the federal law . . .

Arizona v. United States, 132 S. Ct. 2492, 2507 (2012).

INTRODUCTION

This article considers the relationship between federal immigration enforcement and state criminal, post-conviction law. This relationship exemplifies certain inevitable complexities of preemption and federalism. The article's main premise is that perfect uniformity

or complete preemption would be simplistic, ahistorical, and ultimately impossible. Two questions flow from this: First, *whether* (and, if so, *how*) state courts adjudicating rights should take account of such legitimate federal immigration law goals as uniformity and finality?[1] Second, how should federal courts deploy preemption and federalism principles when faced with challenges by federal authorities to such state court actions? This article offers a framework of "dialogical federalism." This is essentially a variant of "cooperative" or "dialectical" federalism that aims to normalize certain tensions under a rubric of dialogue rather than formal hierarchy or efficiency.[2] The framework takes account of the history, current norms, and structure of immigration enforcement, as well as the most relevant contemporary models of preemption and federalism.[3]

It has long been axiomatic that federal law preempts conflicting state laws relating to immigration enforcement, even those that purport to "mirror" federal enforcement goals.[4] As the Supreme Court put it in 1875, "[t]he passage of laws which concern the admission

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[1] These problems are not unique to criminal law. *See, e.g.*, Howard F. Chang, *Public Benefits and Federal Authorization for Alienage Discrimination by the States*, 58 N.Y.U. ANN. SUR. AM. L. 357, 360 (2002) (noting how state marriage laws affect immigration law).

[2] *See* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1047 (1977) (describing "a model of hierarchical imposition of federally determined values; and a model of fragmentation, justifying value choices by the states"); *see also* Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 249 (2001) (arguing for an approach, "premised on dialogue and intergovernmental relations as a way to negotiate, rather than avoid, conflict and indeterminacy"). *Cf.* Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 668 (2001) ("[T]he Supreme Court has suggested that [the cooperative federalism model] best describes those instances in which a federal statute provides for state regulation or implementation to achieve federally proscribed policy goals.").

[3] Or, as Heather Gerken has usefully pluralized, "federalisms." Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1551 (2012) ("It would be useful if federalism debates were more attentive to the fact that there are many federalisms, not one. . . . It would be useful if scholars were more attentive to the fact that the questions federalism raises need not involve an either/or answer. Often they will involve a both/and.").

[4] Chy Lung v. Freeman, 92 U.S. 275, 280 (1875).

of citizens and subjects of foreign nations to our shores belongs to Congress and not to the States."[5] This model has also been applied to deportation.[6] The model is moderately stable, but—as we shall see—there are many exceptions and pesky qualifications. Moreover, though the recent cascade of state immigration enforcement laws seems to have peaked; its impact on preemption doctrine and, more broadly, on "immigration federalism" remains to be fully assessed.

The complexities of immigration preemption and immigration federalism were apparent before—and remain so after—*Arizona v. United States*, in which the Supreme Court invalidated various state initiatives, but (provisionally) allowed state law enforcement agents to investigate immigration status under certain circumstances.[7] Though the Court saw some aspects of immigration enforcement as "a harmonious whole," the system is better described as "a patchwork of overlapping and potentially conflicting authority."[8]

This patchwork challenges doctrinal stability and clarity. Historically, some courts and scholars have tried to meet this challenge by

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[5] *Id.*

[6] *See* Fong Yue Ting v. United States, 149 U.S. 698, 727 (1893) (upholding federal deportation law that required Chinese noncitizens to produce a "credible white witness").

[7] Arizona v. United States, 132 S. Ct. 2492, 2510 (2012) (holding that sections 3, 5(C), and 6 of Arizona's *Support Our Law Enforcement and Safe Neighborhoods Act* (S. B. 1070) were preempted by federal law, but provisionally upholding a provision that allowed law enforcement to investigate a person's immigration status. "This opinion does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect . . ."); *see also* Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1973, 1987 (2011) (upholding Arizona law that mandated revocation of business licenses for employers who hire undocumented workers); *see generally* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1840 n.34 (1993) (noting that, though federal supremacy and strong preemption are well-accepted, this is neither "natural nor inevitable" as a feature of federalism).

[8] *Arizona v. United States*, 132 S. Ct. at 2502; Monica W. Varsanyi et al., *A Multilayered Jurisdictional Patchwork: Immigration Federalism in the United States,* 34 L. & POL'Y 138, 138 (2012) ("Our findings suggest that immigration federalism, when viewed through the lens of local law enforcement, looks more like a patchwork of overlapping and potentially conflicting authority than a systematic approach to immigration enforcement."); *see also* Lina Newton, *Policy Innovation or Vertical Integration? A View of Immigration Federalism from the States,* 34 L. & POL'Y 113, 117–18 (2012).

differentiating pure immigration law (i.e., the control of the entry and residence of noncitizens) from alienage law (which allows states to regulate the rights of noncitizens in various ways).[9] Such a dichotomy is workable for some purposes, as it defends the legitimacy of federal oversight of pieces of the patchwork. But it does not help us to differentiate legitimate state immigration enforcement (if there can be such) from that which should be preempted.[10]

Uniformity is a powerful goal and a siren song in this realm. Indeed, uniformity has been praised in recent years *both* by those who oppose strenuous state immigration enforcement and by those who support it.[11] The ACLU *amicus* brief in *Arizona v. United States* approvingly recites that, "This Court has long recognized the special need, expressed in the Constitution, for uniformity and federal supremacy in the immigration area."[12] Similarly, the *amicus* brief written on behalf of Representative Lamar Smith, *et al*., argues that the Arizona legislation was "a multi-faceted effort to *assist* federal authorities in implementing several well-established federal policies: removing illegal aliens from the United States and eliminating incentives that cause many such aliens to seek to remain here."[13]

This convergence could of course be explained instrumentally: Those who oppose such immigration enforcement support federal preemption when it seems in their ideological interest to do so.[14]

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[9] *See, e.g.*, Varsanyi et al., *supra* note 8, at 154 n.2.

[10] Some argue that "field preemption" renders all such efforts unsustainable. *See* Drew C. Harris, *A Supremacy Clause Battle:* Chamber of Commerce v. Whiting *and the Gradual Shift to State Immigration Enforcement*, 32 IMMIGR. & NAT'LITY L. REV. 837, 851 (2011).

[11] *See, e.g.*, Brief Amici Curiae of the American Civil Liberties Union et al. in Support of Respondent at 2, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182).

[12] *See, e.g.*, *id.*

[13] Brief of U.S. Reps. Lamar Smith et al. as Amici Curiae in Support of Petitioners at 3–4, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182) (emphasis added).

[14] For a fuller explication of this instrumentalist model, see Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1080 (2014) (noting that partisan federalism "'involves political actors' use of state and federal governments in ways that articulate, stage, and amplify competition between the political parties, and the affective individual processes of state and national identification

Those who seek stronger enforcement defend state involvement by arguing that it merely aims to assist federal authorities.[15] However, such instrumental motivations explain litigants better than judges.[16] Is there a doctrinally solid and consistent theoretical model that could better explain how the various forms of state immigration action do/should relate to federal immigration enforcement?[17] The full answer to this broad question is beyond the scope of this article.[18] However, state post-conviction adjudications that implicate immigration enforcement are a good starting point for such a project. They reveal a most salient fact: Federal immigration enforcement *already* (and inevitably) involves state laws and adjudications. The hard questions are how best to understand and how to structure this

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that accompany this dynamic."); Larry D. Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1528 (1994); *see generally* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000) (examining how party politics has preserved the states' voice in national councils by linking political fortunes of state and federal officials).

[15] *See* Bulman-Pozen, *supra* note 14, at 1080–81. It could also be explained if one side is clearly wrong, as may well be the case. My point, however, is not about correctness, but about the appeal to uniformity by both sides. Supporters of enforcement may also, of course, argue for robust federalism. The apotheosis of this approach was Justice Scalia's remarkable concurrence in *Arizona v. United States,* which renders largely irrelevant all Supreme Court immigration law precedents since the Grant Administration. Arizona v. United States, 132 S. Ct. 2492 (2012) (Scalia, J., concurring). By Supreme Court immigration law precedents since the Grant Administration, I mean since *Chy Lung v. Freeman*, 92 U.S. 275 (1875).

[16] Though preemption theories are well-described in general as "a muddle." Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232 (2000).

[17] For an engaging dialogue along similar lines, see Pratheepan Gulasekaram & Rose Cuison Villazor, *Sanctuary Policies & Immigration Federalism*: *A Dialectic Analysis*, 55 WAYNE L. REV. 1683, 1685 (2009); *see also* Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L. J. 703, 748–49 (2013) ("The Supreme Court's recent rulings in *Arizona v. United States* and *Chamber of Commerce v. Whiting* portend a new era of *immigration federalism*, defined not by state and local efforts to enforce immigration laws and deport immigrants, but rather by state and local experimentation with measures intended to foster immigrant inclusion.").

[18] This is largely due to the multi-faceted nature of the state/federal relationship and the complexity of preemption and federalism doctrines.

relationship.[19] Let me be candid about the unavoidable problem of a normative baseline: This essay seeks a doctrinal model that comports with a critique of current federal enforcement as disproportionately harsh and violative of basic human rights.[20] The model proposed herein thus tends to support preemption in such situations as the "force-multipliers" attempted in Arizona, Alabama, etc., while counseling federal deference to state adjudications that protect basic rights in immigration enforcement settings. The obvious challenge is to justify this in a non-instrumentalist way.[21]

This article begins with an examination of the basic principles governing federal preemption and federalism in immigration law. It then considers the history of the relationship between state criminal laws and federal deportation together with a more specific analysis of the most important recent case to navigate these waters: *Padilla v. Kentucky*.[22] It closely examines a question that has spawned much

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[19] *See* Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 4 (2007) ("[T]heories of preemption need to accept the truisms that the federal and state governments have largely overlapping jurisdictions, that each level of government is acutely aware of what the other is doing, and that each level regulates with an eye to how such regulation will affect the other.").

[20] *See* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 19 (2007); DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA 63 (2012). For a recent report about the harshness of the enforcement system, see HUMAN RIGHTS WATCH, A PRICE TOO HIGH: US FAMILIES TORN APART BY DEPORTATIONS FOR DRUG OFFENSES 79 (2015), http://www.hrw.org/sites/default/files/reports/us0615_ForUpload_0.pdf.

[21] For a catalogue of federalism(s), see Judith Resnik, *Federalism(s)' Forms and Norms: Contesting Rights, De-essentializing Jurisdictional Divides, and Temporizing Accommodations*, *in* FEDERALISM AND SUBSIDIARITY: NOMOS LV 363, 371 (James E. Fleming & Jacob T. Levy eds., 2014) ("administrative federalism, cooperative federalism, competitive federalism, creative federalism, cultural federalism, dialectical federalism, dialogical federalism, dual federalism, fiscal federalism, intrastatutory federalism, noncategorical federalism, polyphonic federalism, territorial federalism, and the like. . .[any of which Resnik has been hesitant to assume] provides a stable and general account."); Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1914 n.169 (2014).

[22] 559 U.S. 356 (2010) (a noncitizen criminal defendant has a constitutional right to effective assistance of counsel about potential deportation consequences).

recent federal and state litigation: whether *Padilla's* norms are "retroactive."[23] The Supreme Court ruled against retroactivity in *Chaidez v. United States*.[24] This ruling, however, does not bind state courts due to "considerations of comity."[25] States may "give broader effect to new rules of criminal procedure than is required."[26] But significant state variation seems uniquely problematic where a major federal enforcement system is predicated on state criminal adjudications. It is surely an oddity worth pondering that a noncitizen who pled guilty to a drug offense in Massachusetts in 2009 may now successfully contest deportation through state court post-trial motions, while a noncitizen who took an identical plea deal in New Hampshire faces mandatory deportation and life-time banishment from the United States.[27]

The article's proposed framework neither fully embraces nor completely condemns such oddities. Rather it seeks to explain why they exist and to explore possible hidden benefits to the apparent jurisprudential cacophony.

The essential conclusion is that state enforcement agents and state courts are deeply engaged in immigration-related processes. This engagement implicates normatively powerful sub-federal systems, such as criminal law enforcement, retroactivity analysis, etc. The best state court decisions balance autonomy, fidelity to state precedent, and protections of rights with some awareness of federal

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[23] I put this word in quotation marks intentionally, as some courts and commentators have seen retroactivity as an inapposite framework for the question of whether *Padilla*'s norm were in effect prior to the Supreme Court's decision in the case itself. *See* Christopher N. Lasch, *The Future of* Teague *Retroactivity, or "Redressability," After* Danforth v. Minnesota*: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Post-conviction Proceedings*, 46 AM. CRIM. L. REV. 1, 8–27 (2009).

[24] 133 S. Ct. 1103, 1107 (2013) (holding that *Padilla v. Kentucky* crafted a "new rule").

[25] *See* Danforth v. Minnesota, 552 U.S. 264, 279–80 (2008) ("[C]onsiderations of comity militate in favor of allowing state courts to grant habeas relief to a broader class of individuals than is required by *Teague*.").

[26] *Danforth*, 552 U.S. at 266.

[27] Chang, *supra* note 1, at 360 ("[A]liens that commit the same act in different states may face different immigration consequences because the states in which they commit the crime may convict them under laws that define the crime differently.").

concerns. There can be no precise formula. When federal courts consider preemption challenges, such sophisticated, nuanced state court adjudications should help them to resist formalistic (and unrealistic) field preemption or plenary power preemption. The benefits of this dialogue could be substantial, as state courts could help to develop transformative, rights-protective models of immigration federalism.

I. PREEMPTION AND FEDERALISM IN IMMIGRATION ENFORCEMENT

> *We will not accept an interpretation of the Immigration and Nationality Act that permits, let alone requires, speculation by federal agencies about the secret motives of state judges and prosecutors.*
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> *Pinho v. Gonzales*, 432 F.3d 193, 214 (3d Cir. 2005).

The nuances of preemption and "immigration federalism" have spawned a robust recent literature.[28] Some have argued in favor of

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[28] *See, e.g.*, Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673, 1673 (critiquing "forced federalism," which "limits states to a narrow set of enforcement decisions based on federally defined norms."); Stephen Lee, *De Facto Immigration Courts*, 101 CAL. L. Rev. 553, 553 (2013) ("This Article traces out the implications of a world where criminal courts (especially at the state level) operate as de facto immigration courts."); Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1361 (1999) (defining immigration federalism as "states and localities play[ing a role] in making and implementing law and policy relating to immigration and immigrants[]"); David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 157 (2012) (examining how the intertwining of criminal law and immigration law tends "to treat legal rules and legal procedures as interchangeable tools"); Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1627 (1997); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376–77 (2006) (exploring the causes and theoretical underpinnings of the criminalization of immigration law).

such state immigration enforcement measures as useful "force multipliers."[29] Others have opposed such measures—both on equality/anti-discrimination and federalism grounds—with equal vigor.[30] Some have questioned the conventional wisdom that states are more hostile to immigration than federal authorities.[31] Indeed, contrary to the general opposition by immigrant-rights advocates to most state enforcement of immigration laws, some have argued that there could be progressive benefits for immigrants from immigration-related state actions.[32]

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[29] *See, e.g.*, Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 181 (2005) (arguing in favor of immigration-based arrests by state and local officials); Jeff Sessions & Cynthia Hayden, *The Growing Role for State & Local Law Enforcement in the Realm of Immigration Law*, 16 STAN. L. & POL'Y REV. 323, 327, 329 (2005) (arguing in favor of state and local enforcement of federal immigration law).

[30] *See, e.g.*, Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 252–61, 291–95 (2011) (arguing that the "the mirror-image theory fails to identify a legitimate source of state authority to legislate on immigration matters"); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CINN. L. REV. 1373, 1377, 1401 (2006) (focusing on possible "racial profiling or other abuses of authority"); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 515–18 (2001) (describing discriminatory state laws and anticipating more such laws in the future); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1088–95 (2004) (arguing that state and local police have no "inherent authority" to enforce federal immigration laws and that they have been preempted by federal law).

[31] *See* Peter H. Schuck, *Taking Immigration Federalism Seriously*, U. CHI. LEGAL F. 57, 59–60, 65–66 (2007).

[32] *See* Spiro, *supra* note 28, at 1636 (describing possible benefit of immigration federalism's "steam valve" function); *see also* Victor C. Romero, *Devolution and Discrimination*, 58 N.Y.U. ANN. SURV. AM. L. 377, 384–85 (2002) (arguing that "devolution" could benefit same-sex partners if federal immigration law recognized same-sex unions sanctioned by states); Peter L. Markowitz, *Undocumented No More: The Power of State Citizenship*, 67 STAN. L. REV. 869, 875 (2015) (seeking to fill the void in "modern scholarship that explores the power of states to advance inclusive constructions of state citizenship").

Some scholars have highlighted the inevitability of federal/state overlaps due to the nature of the immigration enforcement system.[33] Peter Schuck, for example, notes that the "federalist default" arrangement involves extensive reliance "on state and local involvement, including in the enforcement of federally-promulgated rules."[34] Clare Huntington explains that "authority over pure immigration law is shared among levels of government."[35] This, she suggests, makes "state and local involvement in immigration [] far less suspect," and makes possible "more nuanced debate."[36] Similarly, Cristina Rodríguez has called for "a modus vivendi regarding immigration regulation by all levels of government."[37] Stella Burch Elias has broadly asserted that we now live in an era of "a new direction for 'immigration federalism'" in which there is "ample opportunity for different varieties of state and local engagement with noncitizen residents."[38] This evokes a theory of federalism that recognizes, as

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[33] *See* Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 792–93 (2008) (arguing strongly against "structural preemption," stating, "[o]nce it is clear that the Constitution allows a role for subnational polities in immigration, the conventional and contested values of federalism become operable."); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 571–72, 609–10, 615–17 (2008) (arguing that all levels of government operate as an integrated system to manage immigration assimilation); Schuck, *supra* note 31, at 64, 67–84 (arguing against federal exclusivity in employment-based admissions, criminal justice, and employer sanctions); *see also* Ming H. Chen, *Immigration and Cooperative Federalism: Toward A Doctrinal Framework*, 85 U. COLO. L. REV. 1087, 1087–88 (2014) (explaining that "cooperative federalism in immigration is legally permissible and normatively desirable in some instances."); Spiro, *supra* note 28, at 1627 (discussing "'steam-valve' virtues of federalism" in the immigration context); Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 121 (1994) (examining federal exclusivity through the lens of international law and suggesting that "[a]s a practical matter, immigration is now largely a state-level concern.").

[34] Schuck, *supra* note 30, at 65–66 (noting that "[i]ndeed, it is hard to think of a national program (other than Social Security) that is run *entirely* by the federal government without any state involvement").

[35] Huntington, *supra* note 33, at 791–92.

[36] *Id.* Huntington defines "pure" immigration law as "the rules governing the admission and removal of non-citizens." *Id.* at 791.

[37] Rodríguez, *supra* note 33, at 570.

[38] Burch Elias, *supra* note 17, at 705 ("The *Arizona* Court's reinvigoration of the doctrine of broad federal power in the immigration arena does not foreclose all

Judith Resnik posits, that "the domains of authority are not fixed but renegotiated as conflicts emerge about the import of rights and the content of jurisdictional allocations."[39]

Such dynamic approaches are especially useful in this arena. States have long been deeply engaged in various forms of immigration regulation and enforcement, though the modalities are not always as clear as contemporary anti-immigrant legislation.[40] Immigration enforcement through state criminal justice systems is thus a very well-worn path.[41] Still, Cristina Rodríguez argues that a com-

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state action pertaining to immigrants and immigration . . . . [it] provides ample opportunity for different varieties of state and local engagement with noncitizen residents—some of which will be novel and some of which will involve the further development or redirection of preexisting laws and policies."); *see also*, Peter L. Markowitz, *Undocumented No More: The Power of State Citizenship*, 67 STAN. L. REV. 869, 875 (2015) (seeking to fill the void in "modern scholarship that explores the power of states to advance inclusive constructions of state citizenship"); *see also* Markowitz, *supra* note 32; Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. Rev. 2074, 2081 (2013) (highlighting that "state and local immigration laws are part of an orchestrated legislative cascade, mostly unrelated to underlying policy concerns," and "the inherent structure of our federalist system creates a dynamic feedback loop whereby subfederal immigration policies hinder comprehensive federal reform efforts").

[39] Resnik, *supra* note 21, at 363.

[40] *See* Jason Cade, *Deporting the Pardoned*, 46 U.C.D.L. REV. 355, 365 (2012).

[41] *See generally id.* (noting that "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."). Other such pathways—beyond the scope of this essay—include marriage, divorce, child custody, adoption, and SIJ adjudications in state courts. *But see* Lee, *supra* note 28, at 558 (noting that "Congress created an enforcement system that attaches immigration consequences to criminal convictions without formally empowering any party within the criminal courts to make immigration-related decisions" and suggesting ways to "accommodate this reality"); Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL'Y 367, 458–63 (1999) (proposing a "federalist solution" to the problem of "removing criminal aliens"). For a contrary view, see HANNAH GLADSTEIN ET AL., MIGRATION POL'Y INST., BLURRING THE LINES: A PROFILE OF STATE AND LOCAL POLICE ENFORCEMENT OF IMMIGRATION LAW USING THE NATIONAL CRIME INFORMATION CENTER DATABASE, 2002-2004, 29 (2005); *see also* Andrew Moore, *Criminal Deportation, Post-Conviction Relief*

prehensive immigration system must maintain primary federal control over removal standards as an integral organizational function without which "the system would be chaotic."[42] But, from the earliest crime-based United States federal exclusion and deportation statutes to the present, *state*, not federal, convictions have undergirded the vast majority of crime-based federal immigration enforcement actions, especially "*post-entry social control*" deportations.[43] Put simply, since the beginning of the modern deportation regime in the early twentieth century, vastly more people have been deported for violating state (and even local) criminal laws than for violating federal criminal law.[44] Thus, in many respects this "chaotic" model has long been the norm.[45] Indeed, as a central feature of immigration enforcement, it may not be chaotic at all, simply dynamic or multifaceted (or dialectical or dialogical).[46]

Federalism, as Judith Resnik writes, "offers an analytic and a history of practices demonstrating the capacity to sustain toleration within polities of plural legal norms."[47] However, there is no area of domestic law where federalism would seem so weak—and where preemption is more powerfully implemented—than immigration enforcement. This is our basic dilemma.

And The Lost Cause Of Uniformity, 22 GEO. IMMIGR. L.J. 665, 668 (2008) (critiquing the distinction between post-conviction relief that is effective for eliminating grounds for deportation and relief that is not effective).

[42] Rodríguez, *supra* note 33, at 633.

[43] *See* Lee *supra* note 28, at 571–77; *see generally* KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY, *supra* note 20 (discussing how the deportation system is one of "post-entry social control"); *see also* Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201, 203 (1994) (noting the overlap between "alienage" law and immigration law in practice).

[44] *See* Lee *supra* note 28, at 576–77.

[45] *See id.* at 578–79 (noting that "local prosecutors can manipulate a noncitizen's removability by adjusting the charges supporting a conviction—by plea bargaining 'creatively' with the noncitizen's lawyer."); *see also* Rodríguez, *supra* note 33, at 633 (describing as "chaotic" an immigration system in which the federal government does not maintain primary control over removal standards).

[46] *See infra* Part II; *see also* Rodríguez, *supra* note 33, at 633 (describing as "chaotic" an immigration system in which the federal government does not maintain primary control over removal standards).

[47] Resnik, *supra* note 21, at 364.

Federal preemption doctrine, in general, stems from the Supremacy Clause,[48] and the "fundamental principle of the Constitution . . . that Congress has the power to preempt state law."[49] In the immigration context, this has long been buttressed by notions of "plenary" federal power, resulting in rather binary and heavy-handed models.[50] Indeed, more than a half century ago, the Supreme Court noted that exclusive federal immigration power, "has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government."[51] As the Court reiterated in 2012, a decision on removability is especially sensitive in that "[d]ecisions of this nature touch on foreign relations and must be made with one voice."[52] This model counsels virtually inevitable preemption and tends to trump federalism concerns.[53] It has potential virtues of predictability, clarity, and uniformity. However, as Robert Cover and Alex Aleinikoff noted long ago, such paradigms (in which a predominant voice is sought) imply that "conflict and indeterminacy are dysfunctional."[54] This—to reiterate—is not the only way to view federalism in general. Nor is it the best way to view immigration federalism.[55]

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[48] U.S. CONST. art. VI, cl. 2.

[49] Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000).

[50] *See, e.g.*, Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 601–03 (2013) (arguing that the Supreme Court improperly used plenary power reasoning in *Arizona v. United States*).

[51] Galvan v. Press, 347 U.S. 522, 531 (1954).

[52] Arizona v. United States, 132 S. Ct. 2492, 2506–07 (2012). It is not obvious, for example, that a Massachusetts vacation of a guilty plea really impacts foreign relations.

[53] *See id.; see also* Peter J. Spiro, *Rebuttal, State Action on Immigration (Bad and Good) After* Arizona v. United States, 161 U. PA. L. REV. ONLINE 105, 106 (2012) ("By situating immigration policy within the federal government's broad power over foreign affairs, the Court reversed its typical preemption analysis, which, as part of a broader federalism agenda, has been increasingly protective of state action.").

[54] Cover & Aleinikoff, *supra* note 2, at 1047.

[55] *See* Robert A. Schapiro, *Monophonic Preemption*, 102 NW. U. L. REV. 811, 812 (2008); Robert A. Schapiro, *Justice Stevens's Theory of Interactive Federalism*, 74 FORDHAM L. REV. 2133, 2143 (2006); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 249 (2005).

As lower courts previously held, and as the Supreme Court explained in *Arizona v. United States*, federal immigration law is "extensive and complex."[56] As the Court noted, "the pervasiveness of federal regulation does not diminish the importance of immigration policy to the States."[57] Of course, state laws relating to immigration enforcement are routinely preempted if they conflict with federal law.[58] And "the purpose of Congress is the ultimate touchstone in every pre-emption case."[59] In the realm of criminal deportations, however, the two spheres of state and federal law simply have not been—and cannot realistically be—hermetically sealed from one another.[60] Thus, the "purpose" of Congress is contradictory: to achieve federal uniformity but also to incorporate and to rely upon state laws, adjudications, and norms.

It is thus unsurprising that, in upholding one of Arizona's initiatives, the Court noted that "[c]onsultation between federal and state officials is an important feature of the immigration system."[61] The recognition of such consultation legitimates dialogue between state courts and federal authorities. As an example, the Court imagined that "a person might be stopped for jaywalking in Tucson and be unable to produce identification."[62] Arizona's Section 2(B) instructs state officers to make a "'reasonable' attempt to verify his immigration status with ICE."[63] However, the Court, signaling some deference, noted that "[t]he *state courts* may conclude that, unless the person continues to be suspected of some crime for which he may

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[56] *Arizona*, 132 S. Ct. at 2499.

[57] *Id.* at 2500.

[58] Particularly where the challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 2501 (internal citations and quotations omitted). This has long been recognized as "a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Id.* (citing Crosby v. National Foreign Trade Council, 530 U. S. 363, 373 (2000)).

[59] United States v. Arizona, 641 F.3d 339, 345 (9th Cir. 2011).

[60] *Arizona*, 132 S. Ct. at 2510–11 (holding that §§ 3, 5(C), and 6 of Arizona's *Support Our Law Enforcement and Safe Neighborhoods Act* (S. B. 1070) were preempted by federal law, but upholding a provision that allowed law enforcement to investigate a person's immigration status).

[61] *Id.* at 2496.

[62] *Id.* at 2509.

[63] *Id.*

be detained by state officers, it would not be reasonable to prolong the stop for the immigration inquiry."[64] Indeed, the concluding paragraph of the Court's analysis of Section 2(B) explicitly awaits a "definitive interpretation from the state courts" with what amounts to a hint that state courts should try to avoid a construction that "creates a conflict with federal law."[65] Thus, the state courts must (or at least should) take federal law into account when ruling on the state law's scope. Conversely, federal courts should pay greater attention to—and be less inclined to broadly preempt—thoughtful rights-based rulings by state courts even if they may impede federal uniformity.

Clearly, this is a model of dialogue, not dualism. Robert Schapiro has suggested that federalist dualism should be replaced by "polyphonic federalism," which "seeks to harness the interaction of state and national power to advance the goals associated with federalism."[66] This is clearly applicable to immigration law enforcement.[67] As Cover and Aleinikoff noted, once we reject both a "hierarchical imposition of federally determined values" and a "model of fragmentation, justifying value choices by the states," we can recognize that "conflict and indeterminacy" are not necessarily dysfunctional.[68] Indeed, they may be productive. Values may evolve into rights as lawyers fight about their implications in various settings. Conflicts will arise, of course, as values are interpreted differently by the two court systems. But, if federal courts can avoid imposing a solution based on crude and blunt preemption doctrines, then "an open-ended dialogue can ensue."[69] In that way, "[t]he 'dialectical [or dialogical] federalism' that emerges becomes the driv-

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[64] *Id.* (emphasis added).

[65] *Id.* at 2510.

[66] Schapiro, *Toward a Theory of Interactive Federalism*, *supra* note 55, at 244.

[67] *Cf.* Printz v. United States, 521 U.S. 898, 929, 935 (1997) (striking down the Brady Handgun Violence Prevention Act on the ground that Congress cannot "commandeer" state executive officials to carry out a federal mandate); New York v. United States, 505 U.S. 144, 175–76 (1992) (holding that Congress cannot "commandeer" state lawmakers by requiring them to pass legislation dictated by Congress).

[68] *See* Cover & Aleinikoff, *supra* note 2, at 1047.

[69] *Id.* at 1048.

ing force for the" more sophisticated and more legitimate "articulation of rights" that straddle the intertwined state criminal and federal immigration systems.[70]

We should not ignore the difficulties of such dialogues. Any nuanced or subtle model of immigration federalism is hindered by the contentious state of contemporary debate. The stakes in boundary state/federal conflicts over immigration policies are high; the legal and policy debates are fierce. Litigation between Arizona and the United States over immigration enforcement was described by one prominent supporter of state power as "a battle of epic proportions . . . about a state's right to enforce the laws of this land and protect its citizens from those who break our laws."[71] On the other side, a leading immigrant rights advocate saw the Arizona lawsuit as a bulwark against mob rule.[72] The depth of conflict may be due in part to "partisan federalism," per Jessica Bulman-Pozen, in which "federalism provides the institutional terrain for disputes that are substantive in nature."[73] It may also be due to the influence of "restrictionist issue entrepreneurs" who target certain states and localities for political reasons, rather than due to real burdens created by alleged federal under-enforcement.[74] The Supreme Court, as noted,

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[70] Cover & Aleinikoff, *supra* note 2, at 1048; *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111–98, 240 (1962) (describing "passive virtues" that facilitate the conversation between courts and political actors).

[71] Marc Lacey, *Appeals Court Rules Against Arizona Law*, N.Y. TIMES (April 11, 2011), http://www.nytimes.com/2011/04/12/us/12arizona.html?_r=0 ("'This battle is a battle of epic proportions,' Mr. Pearce said in a statement suggesting he was not surprised by the ruling. 'It is about a state's right to enforce the laws of this land and protect its citizens from those who break our laws.'").

[72] *Id.* ("'One of the reasons we have a judiciary is so that mobs don't rule, so that when the Legislature oversteps its bounds there is someone to stop them,' said Omar Jadwat of the A.C.L.U. Immigrants' Rights Project.").

[73] Bulman-Pozen, *supra* note 14, at 1080 (noting that partisan federalism "involves political actors' use of state and federal governments in ways that articulate, stage, and amplify competition between the political parties, and the affective individual processes of state and national identification that accompany this dynamic.").

[74] *See* S. Karthick Ramakrishnan & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism*, 44 ARIZ. ST. L.J. 1431, 1436–46 (2012) (showing relationship between local partisanship and restrictive immigration laws).

ultimately recognized the inevitability of *some* state/federal overlaps.[75] Still, we are left with the muddle that some state legislation and some state adjudication relating to immigration enforcement may stand, though the federal government may expressly preempt any such efforts. Put another way, the complexity of immigration enforcement seems to *demand* federal acquiescence to certain state actions, in light not only of practicality and legitimate state interests, but also of federalism. But a credible framework has remained elusive.[76]

To be sure, tension between state variability and autonomy and federal goals of uniformity is not new in this realm. Federal legislation, agency rules, and agency adjudication have episodically aimed to override state variation, but never with complete success. In 1959, for example, the Attorney General ruled that state expungements of narcotics offenses would have no effect on immigration proceedings.[77] In 1990, Congress eliminated the Judicial Recommendation Against Deportation (JRAD) that had empowered state court judges to prevent the use of state convictions for deportation.[78] Most fundamentally, in 1996, Congress sought to standardize the federal definition of a "conviction" for immigration purposes.[79] Still, peculiarities remain.[80] The Board of Immigration Appeals (BIA), for example, has held that when a state court vacates a conviction for reasons

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[75] Arizona v. United States, 132 S. Ct. 2492, 2510 (2012).

[76] *See, e.g.,* Chamber of Commerce of United States of America v. Whiting, 131 S. Ct. 1968, 1973. Kerry Abrams has referred to the *Arizona* decision as "a doctrinally empty reaffirmation of federal power." Abrams, *supra* note 50, at 602.

[77] A—F—, 8 I. & N. Dec. 429, 445 (B.I.A. 1959).

[78] *See infra* Section II. A.

[79] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 322, 110 Stat. 3009-546, 628 (1996) (providing a statutory definition for the term "conviction" for immigration purposes).

[80] *See, e.g.*, a series of cases reviewing the effects of state rehabilitative statutes. Cruz-Garza v. Ashcroft, 396 F.3d 1125, 1128–29 (10th Cir. 2005); Renteria-Gonzalez v. I.N.S., 322 F.3d 804, 812–14 (5th Cir. 2002); Murillo-Espinoza v. I.N.S., 261 F.3d 771, 774 (9th Cir. 2001); Herrera-Inirio v. I.N.S., 208 F.3d 299, 305 (1st Cir. 2000); Moosa v. I.N.S., 171 F.3d 994, 1002 (5th Cir. 1999). *Cf.* Song, 23 I. & N. Dec. 173, 174 (B.I.A. 2001) (terminating removal proceedings where defendant's criminal sentence was reduced and the crime for which he was convicted no longer fell within the meaning of an aggravated felony); *see also* Martin, 18 I. & N. Dec. 226, 227 (B.I.A. 1982) (finding a defendant's initial sentence void and of no effect).

"solely related to rehabilitation or to avoid adverse immigration hardships," the conviction may still justify deportation.[81] But the BIA will defer to a state court's decision to vacate due to a procedural or substantive defect in the underlying criminal proceedings.[82] Strangely, the BIA will also defer to state courts' resentencing of a non-citizen from a sentence of one year to three hundred and sixty days in order to avoid deportation consequences.[83] This essay suggests that these are not merely anomalous phenomena. Rather, they reflect the inevitably dialectical nature of federal immigration enforcement based on state criminal proceedings where basic rights are adjudicated.

This dialectic has survived federal courts' generally dismissive approach to challenges to federal overrides of state post-conviction remedies.[84] The definition of "conviction" for immigration purposes was, for a time, accepted as "a fluid one."[85] However, federal immigration agencies worried that "most states had adopted one or more

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[81] Pickering v. Gonzales, 465 F.3d 263, 266 (6th Cir. 2006) (citing Pickering, 23 I. & N. Dec. 621, 624 (B.I.A. 2003)). *Cf.* Adamiak, 23 I. & N. Dec. 878, 881 (B.I.A. 2006) (A "conviction was vacated by the trial court pursuant to section 2943.031 of the Ohio Revised Code because of a defect in the underlying criminal proceedings, i.e., the failure of the court to advise him of the possible immigration consequences of his guilty plea." The conviction was no longer valid for immigration purposes.); Rodriguez-Ruiz, 22 I. & N. Dec. 1378, 1380 (B.I.A. 2000) (A conviction that has been vacated pursuant to Article 440 of New York Criminal Procedure Law does not constitute a conviction for immigration purposes.). Also, a pardon will not remove the immigration consequences of a conviction for a controlled substance offense. Aguilera-Montero v. Mukasey, 548 F.3d 1248, 1250–51 (9th Cir. 2008); Cade, *supra* note 40, at 375.

[82] *See Adamiak*, 23 I. & N. Dec. at 879.

[83] *See Song*, 23 I. & N. Dec. at 174; *see also Martin*, 18 I. & N. Dec. at 227.

[84] Such challenges are often made under the Full Faith and Credit Act, and under the Fifth or Tenth Amendments. Matsushita Elec. Indus. Co., Ltd. v. Epstein, 516 U.S. 367, 369 (B.I.A. 1996) (Under the FFCA, a federal court generally must give a state court judgment "the same effect that it would have in the courts of the State in which it was rendered."). The FFCA provides that "records and judicial proceedings of any court of any such State . . . shall be proved or admitted in other courts within the United States . . . . [and] shall have the same full faith and credit in every court within the United States" as in the courts of that State. 28 U.S.C. § 1738 (2012).

[85] Roldan-Santoyo, 22 I. & N. Dec. 512, 514–15 (B.I.A. 1999) (noting that "[i]n the absence of a statutory definition, this Board, with direction from the Su-

methods of mitigating the consequences of a conviction . . .”[86] Congress said the BIA in 1999 did not intend “that there be different immigration consequences accorded to criminals fortunate enough to violate the law” in states where certain procedures happened to be available.[87] A typical refrain was offered by the First Circuit Court of Appeals:

> [N]o provision in the I & N Act gives controlling effect to state law or requires the INS to do an about-face if a state, pursuant to a diversionary disposition scheme, retroactively erases a conviction.[88]

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preme Court and the Attorney General, struggled for more than 50 years to reconcile its definition with the increasing numbers of state statutes providing ameliorative procedures affecting the ‘finality’ of a conviction under state law.”) (citing Pino v. Landon, 349 U.S. 901, 901 (1955); Ozkok, 19 I. & N. Dec. 546, 548 (B.I.A. 1988); G—, 9 I. & N. Dec. 159, 160 (B.I.A. 1960); A—F—, 8 I. & N. Dec. 429, 436 (B.I.A. 1959); L—R—, 8 I. & N. Dec. 269, 270 (B.I.A. 1959); O—, 7 I. & N. Dec. 539, (B.I.A. 1957); F—, 1 I. & N. Dec. 343, 348 (B.I.A. 1942)).

[86] *Roldan-Santoyo*, 22 I. & N. Dec. at 515 (citing Ozkok, 19 I. & N. Dec. 546, 550 (B.I.A. 1988)). The Board of Immigration Appeals repeatedly reiterated its (aspirational) understanding of “a long-standing rule that [the determination of] whether a conviction exists for purposes of a federal statute is a question of federal law and should not depend on the vagaries of state law.” *Ozkok*, 19 I. & N. Dec. at 551 n.6. Indeed, the Board went so far as to conclude that “the language of the statutory definition and its legislative history provide clear direction that this Board and the federal courts are not to look to the various state rehabilitative statutes to determine whether a conviction exists for immigration purposes.” *Roldan-Santoyo*, 22 I. & N. Dec. at 521.

[87] Murillo-Espinoza v. I.N.S., 261 F.3d 771, 774 (9th Cir. 2001) (i.e., “in a state 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.”)

[88] Herrera-Inirio v. INS, 208 F.3d 299, 305 (1st Cir. 2000) (“To the exact contrary, state rehabilitative programs that have the effect of vacating a conviction other than on the merits or on a basis tied to the violation of a statutory or constitutional right in the underlying criminal case have no bearing in determining whether an alien is to be considered ‘convicted’ under section 1101(a)(48)(A).”) (citing United States v. Campbell, 167 F.3d 94, 98 (2d Cir. 1999); *Roldan-Santoyo*, 22 I. & N. Dec. at 521; Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 119 (1983); United States v. Cuevas, 75 F.3d 778, 782 (1st Cir. 1996)).

Similarly, the Second Circuit found the BIA's tendency to ignore state post-conviction remedies to be "reasonable."[89] As the Second Circuit reasoned in the context of the use of a state "youthful offender" adjudication as a prior conviction in sentencing:

> [T]he "principles of federalism and comity embodied in the full faith and credit statute," . . . are not endangered when a sentencing court, not questioning the propriety of the state's determination in any way, interprets how to apply New York's youthful offender adjudications to a Guidelines analysis.[90]

The basic proposition is that "the federal sentencing court is neither refusing to recognize nor re-litigating the validity of [the defendant's] New York state judgment of conviction or his youthful offender sentence."[91] Rather, it is merely "acting upon the fact of [the defendant's] prior conviction."[92]

In this model of immigration law, "from a practical perspective" state convictions are seen as merely "a useful way for the federal government to identify individuals who, because of their criminal history, may be appropriate for removal."[93] This sort of "cooperative federalism" raises at least two distinct problems. First, state processes, even those based on state constitutional conceptions of justice and fairness, are rendered irrelevant even though Congress has expressly used state convictions as the prerequisite to many types of

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[89] Because it was "entirely consistent with Congress' intent in enacting the 1996 amendments to broaden the definition of conviction." Saleh v. Gonzales, 495 F.3d 17, 24 (2d Cir. 2007) (the definition of conviction focuses on "the original attachment of guilt (which only a vacatur based on some procedural or substantive defect would call into question) and imposes uniformity on the enforcement of immigration laws."); *see also* Pickering v. Gonzales, 465 F.3d 263, 266 (6th Cir. 2006); Alim v. Gonzales, 446 F.3d 1239, 1250 (11th Cir. 2006); Pinho v. Gonzales, 432 F.3d 193, 195 (3d Cir. 2005); Ramos v. Gonzales, 414 F.3d 800, 805–06 (7th Cir. 2005); Cruz-Garza v. Ashcroft, 396 F.3d 1125, 1128–9 (10th Cir. 2005); Resendiz-Alcaraz v. U.S. Att'y Gen., 383 F.3d 1262, 1268–71 (11th Cir. 2004); *Murillo-Espinoza*, 261 F.3d at 774.

[90] United States v. Jones, 415 F.3d 256, 265 (2d Cir. 2005).

[91] *Id.*

[92] *Id.*

[93] *Saleh*, 495 F.3d at 24.

deportation.[94] Second, it depends (to avoid double jeopardy and other constitutional problems) on the doctrine that deportation is merely a civil "collateral" consequence of state criminal convictions. But this doctrine has been challenged by *Padilla v. Kentucky*, which held that a noncitizen criminal defendant has a constitutional right to effective assistance of counsel in criminal proceedings not only as to the defense of the criminal case, but also as to advice about potential deportation consequences.[95]

The historically blended system of immigration enforcement thus embodies inevitable deep tensions.[96] As Peter Schuck has recounted, some federalist arrangements are based on the sovereignty

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[94] It is not however, entirely unique to immigration law. The Supreme Court once held that, for federal systems such as gun control, state convictions "provide a convenient, although somewhat inexact, way of identifying 'especially risky people'"[sic] and therefore "[t]here is no inconsistency in the refusal of Congress to be bound by post-conviction state actions . . . that vary widely from State to State and that provide less than positive assurance that the person in question no longer poses an unacceptable risk of dangerousness." Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 120 (1983) (Firearms disabilities imposed by 18 U.S.C. § 922 (2012) applied with respect to a person who pleaded guilty to a state offense punishable by imprisonment for more than one year, when the record of the proceeding subsequently was expunged under state procedure following a successfully served term of probation.). *But see* the Firearms Owners' Protection Act (FOPA), 100 Stat. 449 (1986), in which Congress amended § 921(a)(20) in response to *Dickerson.* The amended provision excludes: "Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored . . . unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." 18 U.S.C. § 921(a)(20); Logan v. United States, 552 U.S. 23, 28 (2007).

[95] Padilla v. Kentucky, 559 U.S. 356, 369–74 (2010); *see* Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky: *The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1468 (2011); Daniel Kanstroom, Padilla v. Kentucky *and the Evolving Right to Deportation Counsel: Watershed or Work-in-Progress?* 45 NEW ENG. L. REV. 305, 306 (2011); *see also* César Cuauhtemoc García Hernandez, *Criminal Defense After Padilla v. Kentucky*, 26 GEO. IMMIGR. L.J. 475, 479–87 (2012).

[96] *See, e.g.*, Firearms Owners' Protection Act (FOPA), 100 Stat. 449 (1986) (providing that, for purposes of the statute, a "conviction" is defined under the law of the jurisdiction where the proceedings were held).

of the states.[97] But many powers exercised by the states today involve "a bewilderingly complex system of federal-state relationships in which the states participate in programs enacted and largely funded by Washington."[98] The relationship between state criminal law—as informed by state constitutional adjudications—and federal immigration law, has aspects of both of these forms of federalism. Where federal enforcement *depends* upon state enforcement through the states' police powers, the old dictum becomes especially salient that "courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'"[99] Substantively, states are of course largely free to craft whatever criminal/constitutional norms they choose. However, there are deep overlaps between state criminal law and federal immigration law. State adjudicative autonomy is thus potentially in conflict with the fact that states operate under, and are obliged to respect, certain federal immigration policies and supervision.[100]

It is thus clear that there has been a long and complex historical relationship among state post-conviction mechanisms, state constitutional norms, and federal immigration law.[101] Indeed, though sometimes seen as the quintessential example of an arena in which federal power is at its zenith, immigration enforcement well-illustrates

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[97] Schuck, *supra* note 31, at 66. ("That is, state authority inheres in the constitutional settlement among the states and the people, whereby only limited powers . . . were delegated to the national government while all other powers were reserved to the states and the people.")

[98] *Id.; see also* Chin & Miller, *supra* note 30, at 255 ("Cooperative enforcement is a familiar idea throughout our federal system and a pervasive concept in American criminal justice.").

[99] Arizona v. United States, 132 S. Ct. 2492, 2501 (2012) (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Wyeth v. Levine, 555 U.S. 555, 565 (2009)).

[100] Schuck, *supra* note 31, at 65; s*ee also* Schuck & Williams, *supra* note 41, at 420–421 (citing Pressman and Wildavsky's study on policy implementation in support of the proposition that the current removal system does not make sense). In the end, however, as Heather Gerken has noted, "*[b]oth* devolution and centralization are means to an end. They are, in fact, means to the same end: a well-functioning democracy." Gerken, *supra* note 21, at 1891.

[101] *See, e.g.*, MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE 1 (2006).

Schapiro's polyphonic conception, in which "it is the dynamic interaction among states and the national government that forms the true sound of federalism."[102] This state/federal relationship may be both confrontational and cooperative, as polyphony, like dialogue, accepts both dissonance and harmony.[103] Let us now consider specifics.

II. THE INEVITABLE ROLE OF STATE COURTS IN DEPORTATION PROCEEDINGS: FROM THE JRAD TO *PADILLA* AND ITS PROGENY

> *We have not expressly stated that art. 12 [of the Massachusetts Declaration of Rights] demands that defense counsel provide defendants with accurate advice concerning the deportation consequences of a guilty plea or conviction at trial. That such a right exists, however, is implicit . . . .*
>
> *Commonwealth v. Sylvain*, 995 N.E.2d 760, 771 (Mass. 2013).

When the modern *post entry social control deportation* system was first crafted in the early twentieth century, federal enforcement was mediated by a variety of state measures, including the availability of gubernatorial pardons, expungements, rehabilitative measures and, most subtly, state adjudicative norms.[104] Goals of federal uniformity have, however, long been powerful in this realm. Consider,

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[102] Schapiro, *Toward a Theory of Interactive Federalism*, *supra* note 55, at 249.

[103] *See id.*

[104] Expungement means either a statute that permits a deferred adjudication of a conviction (in which case a judgment is never entered), or a court vacation or setting aside of a judgment of conviction pursuant to a rehabilitative statute. As the Ninth Circuit has explained, "[under a] 'vacatur' or 'set-aside' [statute], a formal judgment of conviction is entered after a finding of guilt, but then is erased after the defendant has served a period of probation or imprisonment and his conviction is ordered dismissed by the judge . . . . [Under a] 'deferred adjudication' [statute], no formal judgment of conviction or guilt is ever entered. Instead, after the defendant pleads or is found guilty, entry of conviction is deferred, and then during or after a period of good behavior, the charges are dismissed and the judge orders the defendant discharged." Lujan-Armendariz v. I.N.S., 222 F.3d 728, 734, n.11 (9th Cir. 2000); *see also* Marroquin, 23 I. & N. Dec. 705, 708 (A.G. 2005);

for example, the Attorney General's 1960 opinion that rendered state expungements inapplicable to narcotics cases.[105] As the Attorney General argued, "to follow the Board's view [allowing expungements to defeat deportation] would make the deportability of the alien depend upon the vagaries of state law."[106] The powerful goals of federal uniformity were summarized in his conclusion:

> It is hardly to be supposed that Congress intended, in providing for the deportation of aliens convicted of narcotic violations, to extend preferential treatment to those convicted in the few jurisdictions, which, like California, provide for the expungement of a record of conviction upon the termination of probation.[107]

After more than a century of evolution, most express reliance on state remedial measures has disappeared, and the norm of federal uniformity has clearly ascended. However, the legislative history of the 1996 federalization of the definition of conviction sheds virtually no light on whether congress even considered—let alone can be said to have had an opinion about—the viability of post-conviction state actions.[108] A brief historical look at some of these measures demonstrates why it may be impossible to completely achieve uniformity, even if Congress were to try.

P–, 9 I. & N. Dec. 293, 295 (A.G. 1961) (conviction set aside pursuant to writ of coram nobis for a constitutional defect could not serve as basis for order of deportation).

105 A—F—, 8 I. & N. Dec. 429, 446 (B.I.A. 1960).

106 *Id.*

107 *Id.*

108 As the Attorney General recounted in *Marroquin*, 23 I. & N. Dec. at 710, the main focus of the 1996 legislative change was to standardize rules for determining whether a state court's decision to withhold an adjudication of guilt prior to the entry of a formal judgment of conviction would count for immigration purposes. *See* HYDE, JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H.R. CONF. REP. No. 104-828 at 199, 223 (1996) [hereinafter Conf. Rep.].

A. *The JRAD*

The history of the Judicial Recommendation Against Deportation (JRAD) offers a fascinating example of state/federal overlap.[109] Essentially, the JRAD allowed a state court sentencing judge to rule definitively against deportation, thereby trumping federal supremacy and preemption in practice.[110] For nearly a century, this was seen as legitimate, if not essential, for many reasons including efficiency, fairness, and federal deference to state power.[111]

The JRAD was first crafted in 1917 as part of a rather comprehensive reorganization of United States immigration law.[112] Much of that reorganization involved the creation of bridges and relationships between state criminal laws and deportation.[113] These connections derived more from public perceptions than from strong empirical data about immigrant criminality.[114] Indeed, the highly influential Dillingham Commission began its 1911 report on immigration and crime by noting that "[n]o satisfactory evidence has yet been produced to show that immigration has resulted in an increase in crime disproportionate to the increase in adult population."[115] Still, the Commission suggested that immigration had wrought certain changes in "the character of crime."[116] The report opined that there had been increases in certain types of violent crimes, certain "offenses against public policy" (i.e., "disorderly conduct, drunkenness, vagrancy" and "many offenses incident to city life") and, the

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[109] Immigration Act of February 5, 1917, ch. 29, § 19, 39 Stat. 874, 889-90 [hereinafter 1917 Immigration Act]; *see also* Immigration & Nationality Act of 1952, 8 U.S.C. § 1251(b)(2) (1988), *repealed by* Immigration Act of 1990, Pub. L. 101-649, § 602(b), 104 Stat. 4978.

[110] *See* 1917 Immigration Act § 19; *see also* Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299, 1330–31 (2011).

[111] *See* Markowitz, *supra* note 110, at 1330–31.

[112] *See* 1917 Immigration Act § 19.

[113] *See* KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY, *supra* note 20, at 6 (discussing that "[t]he current deportation system['s growth was] . . . . closely linked to the development of the Federal Bureau of Investigations (FBI) . . . . Those who today face deportation for minor crimes would likely be surprised to learn that they bear the burden of decades of government frustration over [] well-known criminals").

[114] *See id.*

[115] U.S. IMMIGRATION COMM'N, REPORT OF THE IMMIGRATION COMM'N: IMMIGRATION AND CRIME, S. DOC. NO. 61-750, at 1 (3d Sess. 1911).

[116] *Id.* at 2.

rather charmingly named, "offenses against chastity."[117] Indeed, the Commission specifically noted that Native American born offenders "exhibited in general a tendency to commit more serious crimes than did the immigrant."[118] Nevertheless, the Commission saw it as a "serious" and "inexcusable[] defect . . . that aliens admitted to this country . . . may pursue a criminal career without danger of deportation."[119] Thus, the Commission recommended that "provision should be made for ridding the United States of aliens who, within a relatively short time after arrival, become criminals."[120] The outer recommended limit was the period of naturalization, lasting typically five years.[121]

The Immigration Act of 1917 contained a provision that provided for the deportation of various noncitizens who were convicted of certain types of crimes (particularly crimes "involving moral turpitude" and prostitution-related offenses) after their admission to the United States.[122] State convictions were absolutely central to this model. The bitter aspects of state criminal processes were, so to speak, ameliorated by the sweet. The 1917 law thus created the JRAD and further stated that the deportation of "aliens" convicted of a crime involving moral turpitude shall not apply to one who has been pardoned.[123] Thus, when the system of federal removal was first

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[117] *Id.*

[118] *Id.* at 167.

[119] U.S. IMMIGRATION COMM'N, REPORT OF THE IMMIGRATION COMM'N: IMMIGRATION AND CRIME, S. DOC. NO. 61-747, at 34 (3d Sess. 1911).

[120] *Id.*

[121] *Id.*; *see* Kanstroom, *Smart(er) Enforcement: Rethinking Removal*, 30 VA. J.L. & POL. 465 (2015) (suggesting a return to such a five year statute of limitations)

[122] Immigration Act of 1917, ch. 28, §§ 19, 39 Stat. 874, 889-90 (1917).

[123] *Id.* The later, codified version, 8 U.S.C. § 1251(b) (1988), *repealed by* Immigration Act of 1990, Pub. L. 101-649, § 602(b), 104 Stat. 4978, reads as follows:

> The provisions of subsection (a)(4) of this section [the moral turpitude ground] respecting the deportation of an alien convicted of a crime or crimes shall not apply . . .
>
> (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing

created, states were empowered not only to create federal deportations but to avoid them as well.

There was a deep logic to this that is worth recalling. The history of the JRAD shows considerable recognition that the state court sentencing judge was in the best position to determine whether the sanction of deportation should be added to the criminal sanctions.[124] When JRADs were invoked, they could be powerful discretionary modes of relief from deportation. JRADs, for moral turpitude convictions, bound the (former) INS.[125] Though INS retained authority to deport on other grounds, many types of offenses were deemed crimes of moral turpitude so the potential reach of a JRAD was significant.[126] Moreover, it is apparent that state court judges (and prosecutors and defense attorneys) were acutely aware of the deportation sanction. This leads not only to concern about it, but to ever-changing attempts to become involved with it. However, as Margaret Tay-

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> sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter. The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a)(11) of this section.

[124] Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1144 (2002) (citing 53 CONG. REC. 5171 (1916) (statement of Rep. Powers) ("[A]t the time the judgment is rendered and at the time the sentence is passed, the judge is best qualified to make these recommendations.")).

[125] Janvier v. United States, 793 F.2d 449, 452–53 (2d Cir. 1986) (JRAD "has consistently been interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation."). *Accord* Velez-Lozano v. I.N.S., 463 F.2d 1305, 1307–08 (D.C. Cir. 1972); Haller v. Esperdy, 397 F.2d 211, 213 (2d Cir. 1968); United States *ex rel*. Santarelli v. Hughes, 116 F.2d 613, 616–17 (3d Cir. 1940).

[126] *See, e.g.*, Jordan v. De George, 341 U.S. 223, 227 ("In the construction of the specific section of the Statute before us, a court of appeals has stated that fraud has ordinarily been the test to determine whether crimes not of the gravest character involve moral turpitude."). However, convictions for narcotics offenses were removed from the scope of the JRAD in 1956. Jew Ten v. I.N.S., 307 F.2d 832, 834 (9th Cir. 1962).

lor and Ronald Wright have noted, the original congressional linkage between deportation and sentencing remained an unfinished project.[127] A main reason for this was the venerable doctrine that deportation has long been formalistically viewed as a civil sanction, not criminal punishment.[128] Also, in practice, the possibility of a JRAD did not always come to the attention of sentencing judges.[129]

Still, the very idea of the JRAD put considerable pressure on the doctrine that deportation was merely a civil, collateral consequence of state criminal convictions. Indeed, some non-citizens claimed ineffective assistance of counsel because their attorneys had misadvised them about the JRAD option.[130] Courts are divided on whether this could warrant reopening a guilty plea.[131] The JRAD also empowered state judges, who, in turn, could apply state and even local norms to the federal deportation system.[132] As the Second Circuit Court of Appeals noted in its 1986 decision in *Janvier v. United States,*[133] the JRAD was seen by some courts as "part of the sentencing process, a critical stage of the prosecution to which the Sixth Amendment safeguards are applicable."[134] Indeed, the *Janvier* court saw deportation as inextricably linked to the underlying crime and therefore, subject to the sentencing discretion of the state court judge "who best knew the facts" and who may have thought that "the drastic penalty of deportation was unwarranted."[135] The JRAD remained

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127 Taylor, *supra* note 124, at 1148.

128 *See* KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY, *supra* note 20, at 15–20 (discussing the lack of constitutional protections afforded persons facing deportation).

129 *See* Taylor & Wright, *supra* note 124, at 1148.

130 *See Janvier*, 793 F.2d at 451.

131 *See, e.g.*, Retamoza v. State, 874 P.2d 603, 607 (Idaho Ct. App. 1994) (surveying precedents).

132 *See Janvier*, 793 F.2d at 453 (concluding that JRADs were "designed to make the total penalty for the crime less harsh and less severe when deportation would appear to be unjust").

133 *Id.*

134 Taylor & Wright, *supra* note 124, at 1146 (citing Janvier v. United States, 793 F.2d 449, 452–53 (2d Cir. 1986)).

135 *Id*.

part of immigration law until its repeal in 1990.[136] A House committee offered a strong *volte-face* from the 1917 model:

> Because the Committee is convinced that it is improper to allow a court that has never passed on the immigration related issues involved in an alien's case to pass binding judgment on whether the alien should be deported, section 1504 states that judicial recommendations will no longer protect aliens from deportation . . . .[137]

This assertion of a technocratic norm (with implicit nods to strong federal preemption) thus dovetailed with a substantial hardening of deportation laws in this era, which reached its apotheosis in 1996.[138]

The elimination of the JRAD did not initially spawn much pivotal judicial reaction. The repeal inspired some constitutional challenges.[139] The statute said that repeal took effect immediately and applied "to convictions entered before, on, or after" the date of enactment.[140] Some contended that this violated the *ex post facto* clause.[141] Courts, however, generally rejected such claims.[142]

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[136] Immigration Act of 1990, Pub. L. 101-649, §§ 505(b), 602(b), 104 Stat. 4978, 5050. The INS interpreted this language to render ineffective only those JRADs entered after November 29, 1990, when Congress enacted the JRAD repeal; any JRAD entered before that date "continues to be valid and continues to have the effect of precluding the use of the conviction to establish deportability." Elimination of Judicial Recommendations Against Deportation, 56 Fed. Reg. 8906 (Mar. 4, 1991) (implementing the JRAD repeal).

[137] H.R. REP. NO. 101-681, pt. 1, at 149 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6472, 6555.

[138] Padilla v. Kentucky, 559 U.S. 356, 363–64 (2010).

[139] *See, e.g.*, Matos v. United States, 631 A.2d 28, 32–33 (D.C. Cir. 1993); United States v. Koziel, 954 F.2d 831, 834–35 (2d Cir. 1992); United States v. Bodre, 948 F.2d 28, 34–35 (1st Cir. 1991) (discussing the fact that a JRAD motion was issued concurrently with the criminal sentence "does nothing to alter the precept that deportation is not punishment."); People v. Cuello, 591 N.Y.S.2d 409, 428 (App. Div. 1992); *see also* United States v. Yacoubian, 24 F.3d 1, 4 (9th Cir. 1994) (treating an appeal of an injunction to enforce a JRAD order as civil, because "[t]he mere fact that the JRAD is part of the sentencing process does not convert *it* or proceedings enforcing it into criminal proceedings") (emphasis in original).

[140] Immigration Act of 1990 § 505(b).

[141] See cases cited *supra* note 139.

[142] See cases cited *supra* note 139.

More recently, though, the elimination of the JRAD loomed notably large in the Supreme Court's majority decision in *Padilla v. Kentucky*.[143] As Justice Stevens' opinion recounted, the removal of the JRAD, together with certain harsh changes enacted by Congress in 1996, had rendered removal "practically inevitable" if a noncitizen "has committed a removable offense."[144] These changes to immigration law "dramatically raised the stakes of a noncitizen's criminal conviction," thus, highlighting the importance of "accurate legal advice" regarding deportation consequences in state court criminal proceedings.[145]

In addition to its powerful implications for our understanding of the juridical nature of deportation itself (i.e., as punishment or not), *Padilla* illuminates the inherent tension discussed above between state and federal actors. Like the JRAD of old, *Padilla*'s norms straddle goals of federal supremacy and uniformity and state autonomy. This becomes especially interesting when such norms derive from state constitutions or declarations of rights. Indeed, even the BIA—in its major opinion interpreting federal uniformity in the meaning of a conviction—deferred to some state determinations including: "where the alien has had his or her conviction vacated by a state court on direct appeal, wherein the court determines that vacation of the conviction is warranted on the merits, or on grounds relating to a violation of a *fundamental statutory or constitutional right* in the underlying criminal proceedings."[146] The Attorney General later reiterated this interpretation, concluding that the federal

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143 *Padilla*, 559 U.S. at 363–64.

144 *Id.*

145 *Id.* at 364.

146 Roldan-Santoyo, 22 I. & N. Dec. 512, 523 (B.I.A. 1999) (emphasis added). The Board did not reach the issue of the effect of "noncollateral challenges to a conviction on these grounds that are pending in state court while an alien is in deportation proceedings." *Id. See also* Pickering, 23 I. & N. Dec. 621 (B.I.A. 2003) (evaluating the actions of a Canadian court which had quashed a conviction for LSD possession without specifying why it had done so). The BIA in *Pickering* concluded that if the court had quashed the conviction solely for rehabilitative purposes or to avoid immigration hardships, it would not be recognized. *Id.* at 624. However, had the court redressed a "procedural or substantive defect in the underlying proceedings," then the conviction would not be meaningful for immigration purposes. *Id. But see* L—, 6 I. & N. Dec. 355, 356 (B.I.A. 1954) (stating that a

definition of "conviction" "encompasses judgments of conviction that . . . have been entered but then vacated or set aside [pursuant to an expungement statute] for reasons that do not go to the legal propriety of the original judgment and that continue to impose some restraints or penalties upon the defendant's liberty."[147]

This approach has largely stood the test of time.[148] The essential rule now is that state post-conviction relief that is granted, so to speak, "on the merits," will effectively bind federal authorities and will prevent deportation.[149] If, however, a state court acts pursuant to a rehabilitative statute or a state expungement mechanism, its action is likely to be ignored by federal immigration authorities.[150]

The most basic reason for this distinction was offered by the Attorney General in *Matter of Marroquin*: state laws that authorize the subsequent expungement of a conviction "typically do so for reasons that are entirely unrelated to the legal propriety of the underlying judgment of conviction."[151] These reasons, in other words, do not relate to "the factual basis for, or the procedural validity of, the conviction."[152] When considering specific state statutes abstractly this rule seems passably clear. But in practice, there has been much variation. It turns out to be no simple matter to determine whether state action is ameliorative.[153] Case law varies substantively and procedurally, including who has the burden on the critical question.[154]

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gubernatorial pardon is not rendered conditional due to the words "to prevent deportation.").

147 Marroquin, 23 I. & N. Dec. 705, 715 (A.G. 2005).

148 Saleh v. Gonzales, 495 F.3d 17, 23 (2d. Cir. 2007); Pinho v. Gonzales, 432 F.3d 193, 198 (3d Cir. 2005); Parikh v. Gonzales, 155 Fed. App'x 635, 638 (4th Cir. 2005); Cruz-Garza v. Ashcroft, 396 F.3d 1125, 1128–29 (10th Cir. 2005).

149 *Marroquin*, 23 I. & N. Dec. at 715.

150 *See* Moore, *supra* note 41, at 668; *Marroquin*, 23 I. & N. Dec. at 715.

151 *Marroquin*, 23 I. & N. Dec. at 713.

152 *Id.*

153 *See* MARY E. KRAMER, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY: A GUIDE TO REPRESENTING FOREIGN-BORN DEFENDANTS 85–94 (4th ed. 2009).

154 *See id.* at 88–89.

One cannot cite this body of case law as a stellar example of uniformity.[155] Also, when we deal with state judicial determinations under such standards as "the interest of justice" the doctrinal picture starts to look particularly murky.[156]

For state judges, consideration of federal goals and possible preemption may affect, limit, impede, or even (in rare cases) expand the protection of rights in certain state constitutional adjudications.[157] This prompts variants of the questions posed in this article's introduction. *Should* state judges consider federal goals at all in these sorts of cases? If so, how, and how much? For federal judges, conversely, awareness of the venerable and inevitable nature of this porosity should refine analyses of federal supremacy and preemption in immigration enforcement law. But how? In both cases, the legislative trends are clear. The realm of "post-conviction relief" from removal has moved from "a presumption of full faith and credit with a few limited exceptions such as narcotics" to a rule that is virtually limited to state adjudications based on an "underlying defect in the criminal conviction."[158] And yet, uniformity and supremacy remain elusive.[159]

B. Padilla v. Kentucky *and its Federal and State Progeny*

In *Padilla*, the Supreme Court held that the Sixth Amendment norms of *Strickland v. Washington*[160] applied to noncitizen Jose Padilla's claim that his criminal defense counsel was ineffective due to allegedly incorrect advice concerning the risk of deportation.[161]

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155 *See id.* at 85–94.

156 *See, e.g.*, People v. McLernon, 94 Cal. Rptr. 3d 570, 578 (Cal. Ct. App. 2009). Indeed, the Sixth Circuit Court of Appeals eventually disagreed with and overruled the BIA's evaluation of the Canadian court's motives in *Pickering* itself. *See* Pickering v. Gonzales, 465 F.3d 263, 271 (6th Cir. 2006) (vacating the BIA's decision and reversing and remanding "to the Board of Immigration Appeals for entry of an order terminating deportation proceedings and quashing the order of deportation").

157 *See e.g.*, United States v. Arizona, 641 F.3d 339, 344–46 (9th Cir. 2011).

158 *See* Moore, *supra* note 41, at 686.

159 *Id.*; Cade, *supra* note 40, at 381–83.

160 466 U.S. 668, 689–94 (1984).

161 Padilla v. Kentucky, 559 U.S. 356, 366, 374 (2010).

Contrary to the Kentucky Supreme Court (and others), such advice was not "categorically removed from the ambit of the Sixth Amendment right to counsel" even though deportation is still nominally a civil sanction.[162] As I have previously recounted, there is a lot packaged within this line of reasoning, especially as to the constitutional understanding of deportation. "Justice Stevens's majority opinion cannot fully be squared with the historical, formalist relegation of deportation to the realm of civil collateral consequences . . . ."[163] Indeed, Justice Stevens spoke at the conference for which this article was written. I had the opportunity to ask him whether he thought we had reached a point where at least some forms of deportation should be considered "punishment" for constitutional purposes. His refreshingly simple and candid answer: "Yes."

Though the *Padilla* opinion was groundbreaking in many respects, its recognition of a duty of criminal defense counsel to advise about deportation was not a new idea for many states.[164] A general right to effective assistance of counsel has long been mandated by some state constitutions.[165] Moreover, state courts have repeatedly recognized that application of the standards announced in *Strickland* inevitably involved nuanced applications of state norms.[166] This had

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[162] *Id.* at 366.

[163] Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky: *The Challenging Construction of the Fifth-and-a-Half Amendment*, *supra* note 95, at 1466.

[164] This is a fact of which the Court was well aware. *See e.g.*, Brief of the Nat'l Assn. of Criminal Defense Lawyers et al. as Amici Curiae in Support of Petitioner at 9–10, Padilla v. Kentucky, 559 U.S. 356 (2010) (No. 08-651); *see also* I.N.S. v. St. Cyr, 533 U.S. 289, 322 n.48 (2001) (citing laws in eighteen states and the District of Columbia which require "trial judges [to] advise defendants that immigration consequences may result from accepting a plea agreement"). *But see* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699 (2002) (noting that "eleven federal circuits, more than thirty states, and the District of Columbia" held that defense counsel need not discuss with their clients the collateral consequences of a conviction, including deportation).

[165] *See, e.g.*, People v. Soriano, 240 Cal. Rptr. 328, 334, 336 (Cal. Ct. App. 1987) (citing CAL. CONST., art. I, § 15, granting petition for writ of habeas corpus, and remanding the case to the trial court to allow noncitizen defendant to withdraw his guilty plea because he was deprived of effective assistance of counsel).

[166] *See* People v. Pozo, 746 P.2d 523, 526–27 (Colo. 1987).

sometimes, pre-*Padilla*, included a specific right to advice about immigration consequences, though courts were generally tentative to go quite that far.[167] In 1987, the Supreme Court of Colorado noted in *People v. Pozo* that the justices were not "prepared to state in absolute terms," that an attorney had a duty "to advise an alien client of the possible deportation consequences of a guilty plea."[168] However, the application of "*an objective standard of reasonable conduct"* led them to conclude that the lower court's "underlying concern over counsel's failure to engage in rudimentary legal investigation [was] compelling."[169] This duty, said the Colorado court, did not stem from a duty to advise *specifically* about deportation consequences, but rather "from the more fundamental principle that attorneys must inform themselves of material legal principles that may significantly impact the particular circumstances of their clients."[170] The important point for our purposes is that there was long decisional history about related issues in states pre-*Padilla*. Justice Stevens's majority opinion referred to this history many times, as did innumerable *amici*.[171]

However, one of the dissenters in *Pozo*, Justice Rovira, highlighted two major recurring problems: finality and complexity.[172] Both of these issues seem to support state court deference to federal enforcement priorities. They might also, if too simplistically understood, lead to unwise federal court preemption decisions. Justice Rovira recounted *United States v. Timmreck*,[173] a 1979 Supreme Court case in which a criminal defendant had "sought habeas corpus relief and alleged that his guilty plea was involuntary because he was unaware of the mandatory parole term that would result from his conviction. The Supreme Court unanimously held that no relief should be granted,[174] concluding with a concern that ironically relied

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167 *See id.* at 526–28.
168 *Id.* at 527.
169 *Id.* at 528.
170 *Id.* at 529.
171 Padilla v. Kentucky, 559 U.S. 356, 363–64 (2010).
172 *See Pozo*, 746 P.2d at 533 (Rovira, J., dissenting).
173 441 U.S. 780 (1979).
174 *Pozo*, 746 P.2d at 533 (Rovira, J., dissenting).

in part upon a 1971 dissent by Justice Stevens,[175] destined, some 40 years later, to be the author of *Padilla:*

> Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice.[176]

Clearly, one way to read *Padilla* is as a rejection of this concern as a general matter in favor of a more robust regime of rights protection to be jointly (dialogically) implemented by state and federal courts.

The same is true for the problem of complexity, which was strongly considered by Justice Alito (joined by Chief Justice Roberts) in *Padilla*.[177] They accepted a duty not to "unreasonably" provide incorrect advice.[178] However, beyond that, they saw only a duty

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[175] United States v. Smith, 440 F.2d 521, 528–29 (7th Cir. 1971) (Stevens, J., dissenting).

[176] *Pozo*, 746 P.2d at 533 (Rovira, J., dissenting) (quoting *Timmreck*, 441 U.S. at 784 (1979)). It may come as a surprise to some readers to consider how Justice Stevens viewed such questions early in his career. His dissent began with the proposition that, "[f]undamental fairness may require discussion of certain important consequences in specific cases, but a rigid rule that makes a guilty plea vulnerable whenever a trial judge fails to supplement counsel's advice with an enumeration of all significant consequences of the plea is neither necessary to the maintenance of civilized standards of procedure nor desirable." United States v. Smith, 440 F.2d 521, 527 (7th Cir. 1971) (Stevens, J., dissenting). He then continued, "[t]he 'consequences' of the plea of guilty which relate to voluntariness, and therefore have constitutional significance, are consequences of the plea rather than consequences of the conviction. . . . The consequences of conviction have a different significance. They relate to the wisdom of a decision to plead guilty rather than to the voluntariness of the decision. A variety of factors enter into the exercise of judgment which produces that decision. Among them are counsel's appraisal of the likelihood of a successful defense, the admissibility of critical items of evidence, the question whether the accused can conscientiously make a false denial of guilt, the opprobrium that may result from a public trial, an estimate of the sentence which the judge may impose, and the chance of probation or parole. An erroneous appraisal of any of those factors affects the wisdom of the plea, but does not make it involuntary." *Id.* at 530. Justice Stevens also noted that "[t]he most effective safeguard against manifest injustice is competent counsel." *Id.* at 535.

[177] Padilla v. Kentucky, 559 U.S. 356, 375–88 (2010) (Alito, J., concurring).

[178] *Id.*

to "advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the alien wants advice on this issue, the alien should consult an immigration attorney."[179] Because of the complexity of immigration law, they did not agree "that the attorney must attempt to explain what those consequences may be."[180] "Incomplete legal advice [by criminal defense lawyers who are not experts in immigration law]" they wrote, "may be worse than no advice at all because it may mislead and may dissuade the client from seeking advice from a more knowledgeable source."[181] This is a legitimate concern, to be sure. But, it supports a right to deportation counsel, not a depreciated duty standard for the only lawyer who may actually be available.[182]

As state courts began to apply and interpret *Padilla*'s norms, it is unsurprising that their readings varied. The particularly hard question was that of retroactivity. Here, per *Teague v. Lane*,[183] courts must consider whether the Court's criminal procedure decisions are "novel."[184] When the Court announces a "new rule," a person whose conviction is already final may not benefit from the decision in a habeas or similar proceeding.[185] Under *Teague*'s model, "a case announces a new rule when it breaks new ground or imposes a new obligation" on the government.[186] In another formulation, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[187] A holding is not so dictated, the Court later clarified, unless it would

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179 *Id.*

180 *Id.*

181 *Id.* at 382.

182 Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky: *The Challenging Construction of the Fifth-and-a-Half Amendment*, *supra* note 95, at 1467–69.

183 489 U.S. 288 (1989).

184 Chaidez v. United States, 133 S. Ct. 1103, 1107 (2013) ("*Teague* makes the retroactivity of our criminal procedure decisions turn on whether they are novel.").

185 *Id. Teague* contained two exceptions: "watershed" rules and rules placing "conduct beyond the power of the criminal law-making authority to proscribe." *Teague*, 489 U.S. at 311.

186 *Teague*, 489 U.S. at 301.

187 *Id.* (emphasis in original).

have been "apparent to all reasonable jurists."[188] *Teague* also made clear that a case does *not* "announce a new rule, [when] it '[is] merely an application of the principle that governed'" a prior decision to a different set of facts.[189] Clearly, the application of *Teague* to *Padilla* was not going to be a simple task, owing to the complexity of the constitutional status of deportation.

The Court undertook this task in *Chaidez v. United States*, and concluded that "*Padilla* would not have created a new rule had it only applied *Strickland*'s general standard to yet another factual situation—that is, had *Padilla* merely made clear that a lawyer who neglects to inform a client about the risk of deportation is professionally incompetent."[190] "But *Padilla*," wrote Justice Kagan, "did something more."[191] The case, as noted above, "considered a threshold question: Was advice about deportation 'categorically removed' from the scope of the Sixth Amendment as a 'collateral consequence' . . . ?"[192] On this view, the *Padilla* Court had answered "a question about the Sixth Amendment's reach that we had left open, in a way that altered the law of most jurisdictions."[193] However one views *Chaidez*, its retroactivity reasoning only binds federal courts. As noted above, this is due to "considerations of comity," recognized by *Danforth v. Minnesota.*[194] States may "give broader effect than federal courts do to new rules of criminal procedure."[195] But how should they do so? How much should uniformity count in the calculus when immigration federal enforcement is affected by a state court retroactivity ruling?

Some state courts had answered the basic question before *Chaidez*. The Maryland Supreme Court, for example, concluded that "*Padilla* did not 'overrule[] prior law and declare[] a new principle

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188 Lambrix v. Singletary, 520 U.S. 518, 528 (1997).

189 *Teague*, 489 U.S. at 307 (quoting Yates v. Aiken, 484 U.S. 211, 216–17 (1988)).

190 Chaidez v. United States, 133 S. Ct. 1103, 1108 (2013).

191 *Id.* at 1108.

192 *Id.*

193 *Id.* at 1110.

194 *See* Danforth v. Minnesota, 552 U.S. 264, 279–80 (2008) (discussing that "considerations of comity militate in favor of allowing state courts to grant habeas relief to a broader class of individuals than is required by *Teague*").

195 *Id.* at 266.

of law.'"[196] "Rather, *Padilla* applied 'settled precedent [i.e., *Strickland*] to [a] new and different factual situation[],' and, therefore, that decision 'applies retroactively.'"[197] Since *Chaidez*, the calculus for some state courts has changed. Some courts, highlighting uniformity and finality, have simply deferred to the federal system.[198] For example, in *Thiersaint v. Commissioner of Correction*, the Connecticut Supreme Court expressly rejected petitioners' argument that "the state's interest in fairness and due process protections weighs more heavily than uniformity with the federal standard."[199] Rather, the Court offered an extended argument that *Padilla* was a "new rule" and that *Chaidez*, therefore, was correctly decided.[200] The Connecticut Court also noted that "the state's interest in fairness and due process protections must be balanced against the importance of the finality of convictions."[201] The Court specifically agreed with the Supreme Court's observation in *Teague* that "[w]ithout finality, the criminal law is deprived of much of its deterrent effect."[202]

Other state court decisions defer much less to the federal system, both as to the application of *Teague* as understood in *Chaidez* and as to federal enforcement uniformity goals more generally. For example, in *Commonwealth v. Sylvain*, the Massachusetts Supreme Judicial Court (SJC) highlighted the "general principle that States are independent sovereigns with plenary authority to make and enforce

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196 Denisyuk v. State, 30 A.3d 914, 925 (Md. 2011) (quoting State v. Daughtry, 18 A.3d 60, 78 (Md. 2011)).

197 *Id.* (citing Potts v. State, 479 A.2d 1335, 1341 (Md. 1984)). However, "[o]ur research discloses several reported appellate court decisions holding that *Padilla* does not have retroactive application." *Id.* at 924 n.7 (citing United States v. Chang Hong, No. 10-6294, 2011 WL 3805763 (10th Cir. Aug. 30, 2011), Chaidez v. United States, 655 F.3d 684 (7th Cir. 2011), Barrios-Cruz v. State, 63 So. 3d 868 (Fla. Dist. Ct. App. 2011); Gomez v. State, No. E2010-01319-CCA-R3-PC, 2011 WL 1797305 (Tenn. Crim. App., May 12, 2011); Miller v. State, 196 Md. App. 658, 11 A.3d 340 (2010)).

198 For more general examples of this sort of phenomenon, see Mary C. Hutton, *Retroactivity in the States: The Impact of* Teague v. Lane *on State Postconviction Remedies*, 44 ALA. L. REV. 421, 458–59, 461–62 (1993).

199 Thiersaint v. Comm'r of Corr., 111 A.3d 829, 842 (Conn. 2015).

200 *Id.* at 845.

201 *Id.* at 842.

202 *Id.* (citing Teague v. Lane, 489 U.S. 288, 309 (1989)).

their own laws as long as they do not infringe on the [F]ederal constitutional guarantees."[203] Thus, "considerations of comity militate in favor of allowing [S]tate courts to grant [collateral] relief to a broader class of individuals than is required by *Teague*."[204] The SJC thus saw "an important distinction between the existence of a Federal substantive right or remedy, the contours of which are fixed by Federal law, and the procedural availability of such a right, the scope of which may be set by State law."[205] Based on this authority to conduct an independent review, the SJC did not see itself as required "to blindly follow that court's view of what constitutes a new rule."[206] As the Maryland Supreme Court had boldly asserted, "[e]ven if the Supreme Court ever were to hold that *Padilla* is not retroactive under *Teague*, that holding would have no adverse effect on our analysis here."[207] This seems exactly right as a model for proactive dialogical federalism. The state court, operating in a rights-protecting mode, is applying its own norms. It does this with awareness of—but without excessive deference to—federal models of retroactivity or concerns about uniformity.

Similar examples of state court autonomy arise around the problem of proving "prejudice."[208] *Padilla,* as noted*,* applied the two-part test of *Strickland*.[209] This demands proof, first, that trial counsel's performance failed to meet "prevailing professional norms" and, second, that the deficient performance actually prejudiced the defendant.[210] This latter prong, according to some courts, requires state courts to assess whether a defendant "might rationally be more concerned with removal than with a term of imprisonment."[211] Note

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[203] Commonwealth v. Sylvain, 995 N.E.2d 760, 770 (Mass. 2013) (citing Danforth v. Minnesota, 552 U.S. 264, 280 (2008)).

[204] *Id.* (citing *Danforth*, 552 U.S. at 279–80).

[205] *Id.*

[206] *Id.* (citing Rhoades v. State, 233 P.3d 61 (Idaho 2010), *cert. denied* 131 S. Ct. 1571 (2011)).

[207] Denisyuk v. State, 30 A.3d 914, 924–25 n.8 (Md. 2011).

[208] Padilla v. Kentucky, 559 U.S. 356, 369 (2010).

[209] *Id.* at 366.

[210] *Id.* at 366–69.

[211] *See* Zemene v. Clarke, 768 S.E.2d 684, 691–92 (Va. 2015) (explaining that the Sixth Amendment right to effective assistance of counsel is violated by failure to advise about the possible immigration consequences of a conviction) (quoting United States v. Orocio, 645 F.3d 630, 643 (3d Cir. 2011)); *see also* People v.

the important implication here: *Such an inquiry clearly demands some understanding and application of immigration law, both abstractly and as likely to be applied by federal authorities.* A New York appellate court concluded, for example, that "the strength of the People's evidence, the potential sentence, and the effect of prior convictions" must be weighed against a variety of immigration law factors, including, for example, whether, "an alien has significant ties to his or her country of origin, or has only resided in the United States for a relatively brief period of time, or has no family here."[212] In such cases, "a decision to proceed to trial in lieu of a favorable plea agreement may be irrational in the face of overwhelming evidence of guilt and a potentially lengthy prison sentence."[213] However, for a long-term lawful permanent resident, the calculus might well be different.[214]

Conversely, some state courts focus almost exclusively on the sentence, rather than on the removal.[215] Even those courts that applied the prejudice prong this strictly, however, cannot avoid at least *some* inquiry into immigration law, per the logic of *Padilla*.[216]

The most impressive state court decisions navigate between state norms and respectful awareness of federal enforcement realities. In *Commonwealth v. Marinho*, the Massachusetts Supreme Judicial

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Picca, 947 N.Y.S.2d 120, 124–25 (N.Y. App. Div. 2012). For an excellent exegesis of this case, see César Cuauhtémoc García Hernández, *NY APP CT*: *Padilla Prejudice Inquiry Considers Defendant's Desire to Remain in USA*, CRIMMIGRATION.COM (July 19, 2012, 9:00 A.M.), http://crimmigration.com/2012/07/19/ny-app-ct-padilla-prejudice-inquiry-considers-defendants-desire-to-remain-in-usa/.

212 *Picca*, 947 N.Y.S.2d at 129.

213 *Id.*

214 Though this too depends on a nuanced evaluation of many factors. *See, e.g.*, Pilla v. United States, 668 F.3d 368, 373 (6th Cir. 2012) (discussing the defendant's ineffective assistance *coram nobis* claim based on *Padilla* that failed because the evidence of guilt was "overwhelming" and the defendant faced a longer prison term along with removal if convicted after trial); *see also* Neufville v. State, 13 A.3d 607, 614 (R.I. 2011) (stating that no prejudice is shown if the defendant could have received a longer sentence at trial than by plea).

215 *Neufville*, 13 A.3d at 614 ("[W]hen counsel has secured a shorter sentence than what the defendant could have received had he gone to trial, the defendant has an almost insurmountable burden to establish prejudice.") (citing Rodrigues v. State, 985 A.2d 311, 317 (R.I. 2009)).

216 *See, e.g., id.*

Court considered the duties of defense counsel, post-*Padilla*.[217] The majority opinion is fascinating in that it takes account of the federal system. But it does so with little deference to federal enforcement goals of uniformity or finality. Put another way, the SJC offers what amounts to a Massachusetts take on immigration enforcement through a very broad reading of *Padilla*. As the SJC put it,

> Underlying the Supreme Court's decision that deportation consequences are not "collateral" to the criminal justice process and thus not removed from a noncitizens' Sixth Amendment right to counsel is a deep appreciation of the "seriousness of deportation" for noncitizen defendants. Indeed, "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence."[218]

CONCLUSION: TOWARDS NUANCED PREEMPTION AND TRUE DIALOGICAL IMMIGRATION FEDERALISM

> *The 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.*
>
> James Madison, *The Federalist No. 45*, *in* THE FEDERALIST 308, 313 (Jacob E. Cooke ed., 1961).

The baroque relationship between federal immigration enforcement and state criminal law demands hard thinking about both preemption and federalism.[219] The best doctrinal models should facilitate cooperation and "tolerate tension."[220] The latter is especially important in the realm of claims regarding rights. A fruitful starting

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217 Commonwealth v. Marinho, 981 N.E.2d 648, 657 (Mass. 2013).

218 *Id.* (internal citations omitted).

219 *See* Cade, *supra* note 40, at 407–10.

220 Rodríguez, *supra* note 33, at 610.

point is what Heather Gerken has termed "the power of the servant."[221] States exercise power in cooperative regimes, as federal "servants," not as separate sovereigns.[222] As administrators of the federal regime, states often have a great deal of discretion in carrying out federal policies in "the nooks and crannies of the administrative system."[223] Power of this type looks more like that "wield[ed] . . . [by] . . . a street-level bureaucrat" than that exercised by a separate and autonomous government.[224] Thus, state power depends on "integration and interdependence."[225] This model accounts for much real-world state power in immigration enforcement. However, viewing state courts applying state criminal and state constitutional norms as merely servants in "a complex amalgam of state and local actors who administer national policy" undervalues both state normativity and state historical authority.[226]

The Massachusetts Supreme Judicial Court has adopted substantial aspects of the *Padilla* opinion and made them central to its own state constitutional analysis. While one may (as I do) applaud this approach, it requires some defense. The best defense is this: It is clear from *Arizona v. United States* that State action related to immigration enforcement may neither expressly conflict with federal enforcement priorities nor may it contravene fundamental constitutional rights. This is why the Court only *tentatively* upheld Arizona's SB 1070, Section 2(B).[227] Constitutional conformity requires state enforcement agents and state courts to be deeply engaged in immigration-related processes. But they often must do so in the context of historically powerful sub-federal systems, such as criminal law enforcement, retroactivity analysis, etc. Thus, the best state court decisions balance autonomy, fidelity to state precedent, and protections of rights with awareness of federal concerns. There is no precise formula, but nuanced state court adjudications should help federal

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[221] Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 38 (2010).

[222] *See id.* at 38–39.

[223] *See id.* at 34, 37.

[224] *Id.*

[225] *Id.* at 37.

[226] *Id.* at 7.

[227] *See supra* Part I (discussing the decision in *Arizona v. United States*, 132 S. Ct. 2492 (2012)).

courts, when considering preemption challenges to state actions, to resist formalistic (and unrealistic) field preemption or plenary power preemption. Moreover, the benefits of this approach could be substantial. With equal protection as a backstop, it could empower the states to "define the boundaries of their own political communities" thereby offering a truly transformative model of the new immigration federalism.[228]

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[228] Markowitz, *supra* note 38, at 877.