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I. INTRODUCTION

One cannot separate the study of immigration jurisprudence from the study of judicial deference.[1] The historic plenary power doctrine, which shields federal legislative and executive action in immigration law from constitutional review in the courts,[2] and the *Chevron* deference doctrine,[3] which requires federal courts to defer to the Board of Immigration Appeals' (BIA) reasonable interpretations of ambiguous provisions of the Immigration and Nationality Act, are familiar deference doctrines that have had leading and recurring roles in immigration cases[4] and scholarly articles.[5]

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1. *See* Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1671 (2007) ("The history of immigration jurisprudence is a history of obsession with judicial deference.").

2. *See* Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CAL. L. REV. 373, 382 (2004) ("Courts often conceptualize plenary power doctrine as a doctrine of judicial deference."); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (1984) (defining plenary power doctrine as the Court's unwillingness "to review federal immigration statutes for compliance with substantive constitutional restraints"); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 339 (2002) (stating that under the plenary power doctrine, courts have historically conferred "extreme deference" to immigration decisions by the other branches of the federal government).

3. Chevron U.S. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984); *see also, e.g.*, Negusie v. Holder, 555 U.S. 511, 516 (2009).

4. For plenary power doctrine cases, see, for example, Arizona v. United States, 567 U.S. 387, 394–395 (2012) ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. . . . The federal power to determine immigration policy is well settled."); Toll v. Moreno, 458 U.S. 1, 10 (1982) ("Our cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders."); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 542 (1950) (holding that power to exclude or admit immigrants rests with Congress and the President, and above judicial review); Chae Chan Ping v. United States, 130 U.S. 581 (1889) (barring judicial review of an immigrant's case under the Chinese Exclusion Act due to the lack of authority to overturn decisions by the federal legislative or executive branches to exclude immigrants). For *Chevron* doctrine cases, see for example, Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191 (2014) (applying *Chevron* deference to adopt BIA method of determining priority date of petition for immigrant visas); Holder v. Martinez Gutierrez, 566 U.S. 583 (2012) (applying *Chevron* deference to uphold BIA's interpretation of statutory requirements regarding residency requirements for cancellation of removal); INS v. Aguirre-Aguirre, 526 U.S. 415 (1999) (reversing Court of Appeal opinion for failing to apply *Chevron* deference to BIA regarding interpretation of the serious nonpolitical crime provision).

5. For plenary power doctrine articles, see, for example, Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) (assessing the decline of the plenary power doctrine through the court's interpretation of immigration statutes through phantom constitutional norms); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998)

This Article focuses on another type of judicial deference—one that has not yet been addressed by scholars. It has a significant impact on immigration cases involving noncitizen minors and young adults, referred to collectively in this Article as "noncitizen youth," who have state offense findings that are adult-*ish*: adult criminal convictions imposed on minors in state court and state youthful offender findings,[6] together referred to as "youth-adult offense findings." This analysis of deference also brings in a previously-missing voice in the immigration-federalism[7] dialogue—one that belongs to noncitizen youth who have been exposed to their state's juvenile delinquency and criminal systems.

In the understudied field of crimmigration[8] and juvenile justice, this Article exposes the inconsistent deference that the BIA and federal courts yield to state or

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(stating that plenary power doctrine should be reexamined as it was derived from cases that discriminated unlawfully on race); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008) (stating that the plenary power doctrine is the source of federal exclusivity in immigration law, but advocating for a power-sharing relationship between federal, state, and local actors in immigration); David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583 (2017) (acknowledging that the plenary power doctrine had traditionally made immigration law exceptional with respect to rights determination). For *Chevron* deference articles, see, for example, Alina Das, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143 (2015) (evaluating the role of the *Chevron* deference in federal habeas cases challenging immigration detention); Brian G. Slocum, *The Immigration Rule of Lenity and* Chevron *Deference*, 17 GEO. IMMIGR. L.J. 515 (2003) (assessing the conflict between the *Chevron* deference doctrine and the rule of lenity); Sanford N. Greenberg, *Who Says It's a Crime?:* Chevron *Deference to Agency Interpretations of Regulatory Statutes That Create Criminal Liability*, 58 U. PITT. L. REV. 1 (1996) (proposing that *Chevron* deference doctrine should not be applied to criminal liability and deportation cases).

6. Youthful offender findings exist in the realm between juvenile delinquency and adult criminal proceedings. They offer more lenient treatment to minors or young adults than the standard adult criminal defendant due to the individual's age, character, and/or type of offense. While states may call these statutes and their beneficiaries by different names, for purposes of this Article, the statutes shall be referred to as "youthful offender statutes," and the participants as "youthful offenders." For example, in Michigan, the relevant law called the Holmes Youthful Trainee Act, refers to its participants as "youthful trainees." MICH. COMP. LAWS §§ 762.11–.15 (2016). In Washington D.C., the relevant statute is called the Youth Rehabilitation Act. D.C. CODE §§ 24-901 to -907 (2017). In Florida, the relevant program is called the Florida Youthful Offender Act. FLA. STAT. §§ 958.011–.15 (2008).

7. Immigration federalism refers to the broad field of scholarship that examines how states and local governments impact immigrants, and immigration enforcement and policies. *See, e.g.*, Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1361 (1999) (defining immigration federalism as the role that "states and localities play in making and implementing law and policy relating to immigration and immigrants"); Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074, 2076 (2013) (defining "the new immigration federalism" as the "recent resurgence of subfederal legislative activity" by state and local governments "to discover and discourage the presence of undocumented persons," and arguing that these laws are not a necessary response to federal inaction, but are rather politically motivated); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787 (2008) (defining "immigration federalism" as the "increased state and local involvement in immigration" and citing examples of local and state laws, ordinances, measures, and contractual agreements that impact immigrants in negative and positive ways); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 66–67 (2007) (defining "immigration federalism" as "arrangements . . . in which the states operate under, and are obliged to respect, federal immigration policies and supervision").

8. Crimmigration generally refers to the "intersection of criminal and immigration law." Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1708 (2011).

federal authorities in order to determine whether these state youth-adult offense findings are juvenile delinquency adjudications or convictions for immigration purposes. Deference, as revealed in these immigration cases, is an independent tool in legal analysis that the BIA and federal courts use to determine whether they should presumptively accept the judgment or law of the state or federal government, even if the act goes against the statutes or policies of the other.

Specifically, in immigration cases involving state youthful offender dispositions, deference is given to federal actors: the authority of the federal government is elevated over the state through the application of a federal non-immigration law, the Federal Juvenile Delinquency Act ("FJDA"),[9] to determine whether these findings are juvenile delinquencies or convictions for immigration purposes, even if the outcome expressly goes against state action. Meanwhile, in immigration cases reviewing adult state convictions imposed on minors, deference is given to state actors: state authorities are elevated over federal authorities to conclude that these findings remain as convictions for immigration purposes, even if express provisions of the FJDA are violated.

Deference matters. As more fully addressed in Part II of this Article, deference impacts the lives of noncitizen youth who commit offenses that would automatically trigger immigration consequences for adult noncitizens. For example, deference has a direct effect on whether these individuals are allowed to remain in the United States lawfully and whether these individuals will be placed in juvenile-appropriate environments during immigration detention. It also affects eligibility for citizenship and other immigration benefits.

Next, in Parts III, IV, and V of the Article, I set forth evidence of this inconsistent deference and its direct impact on the outcome of immigration cases involving state youth-adult offense findings. In Part III, I give a general background on the immigration consequences of all state and federal juvenile and youth-adult offense findings. Then, in Part IV, I expound on the four ways that deference inconsistently manifests in these cases. In Part V, I analyze whether there is another principle at play that justifies this inconsistent deference, and I conclude that there is not. Overall, these three sections show that the BIA and federal courts, in both the historical and present treatment of state youth-adult offense findings in immigration

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The term has been used to describe specific issues that involve principles of criminal and immigration law. *See, e.g.,* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006) [hereinafter Stumpf, *The Crimmigration Crisis*] (first describing "crimmigration" as the "criminalization of immigration law"); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1467 (2013) (defining crimmigration as "the intertwinement of crime control and migration control" (quoting Joanne van der Leun & Maartije van der Woude, *A Reflection on Crimmigration in the Netherlands*, *in* SOCIAL CONTROL AND JUSTICE 43 (Maria João Guia et al. eds., 2013))); Andrew Moore, *Criminal Deportation, Post-Conviction Relief and the Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J. 665, 667 (2008) (defining crimmigration as the "confluence of immigration and criminal law, in which increasingly harsh treatment of criminals is mirrored in the increasingly harsh treatment of non-citizens in the United States").

9. 18 U.S.C. §§ 5031–5042 (2012). The Federal Juvenile Delinquency Act was amended by the Juvenile Justice and Delinquency Prevention Act of 1974 and by the Comprehensive Crime Control Act of 1984. Amy J. Standefer, Note, *The Federal Juvenile Delinquency Act: A Disparate Impact on Native American Juveniles*, 84 MINN. L. REV. 473, 476–79, 479 n.23 (1999). As courts still refer to this act as the FJDA, the term "FDJA" will be utilized in this Article.

cases, fluctuate between elevating state or federal authorities as the ultimate decider of the nature of these findings for immigration purposes. This analysis showcases immigration federalism concerns, such as the adoption of contradictory beliefs on the role of state and federal governments, and highlights a need to fix deference.

In Part VI, I examine how deference should be corrected. Achieving the proper balance of powers between the federal and state governments for noncitizen youth is different than for adults. While immigration federalism scholarship in crimmigration law has often balanced uniformity, the federal government's plenary power over immigration, and the state's police power,[10] for noncitizen youth, one must also take into account state and federal interests toward youth. The state, through its parens patriae power, has been traditionally tasked with overseeing the general welfare of its youth.[11] Yet, at the same time, immigration consequences are a federal matter, and Congress has expressed its views in the FJDA regarding when and how minors should be treated as adult criminal defendants and thus be exposed to the same consequences as adults.[12]

Lastly, in Part VII, I discuss potential solutions to the problem of deference, such as the passage of new federal legislation, or the incorporation of the FJDA into these youth crimmigration cases. I also assess how state and federal interests are expressed or ignored in each potential solution.

Ultimately, I propose that in order to determine whether state youth-adult offense findings are juvenile delinquency adjudications or convictions for immigration purposes, immigration officials should first defer in a meaningful way to federal authorities, and when applicable, take into account state decisions when state authorities purposefully chose not to impose a standard adult conviction against a noncitizen youth.

II. DEFERENCE MATTERS

A. The Impact of Deference on Noncitizen Youth

Deference impacts how state youth-adult offense findings are interpreted in immigration cases and whether these offenses are viewed as juvenile delinquency acts or convictions for immigration purposes. This determination alone can trigger or bar immigration consequences, such as permanent removal from the United States or automatic denial of discretionary immigration benefits.[13]

Before delving further into the details, I will first provide a quick overview of how state criminal offense findings are handled in immigration cases and how

10. *See, e.g.*, Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557 (2008); Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673 (2011); Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251 (2011); Margaret Hu, *Reverse-Commandeering*, 46 U.C. DAVIS L. REV. 535 (2012).

11. *See* Lois A. Weithorn, *Envisioning Second-Order Change in America's Responses to Troubled and Troublesome Youth,* 33 HOFSTRA L. REV. 1305, 1402 (2005); *see also* John A. Siliciano, Note, *The Minor's Right of Privacy: Limitations on State Action After Danforth and Carey*, 77 COLUM. L. REV. 1216, 1221 (1977).

12. *See* 18 U.S.C. § 5032 (2012).

13. *See, e.g.*, Vargas-Hernandez v. Gonzales, 497 F.3d 919 (9th Cir. 2007).

noncitizen youth can at times be treated differently from noncitizen adults. For noncitizen adults, the analytical journey of determining the federal immigration consequences of their state criminal findings or judgments involves one necessary step: whether the judgment meets the statutory definition of "conviction" under the Illegal Immigration Reform & Immigrant Responsibility Act of 1996 ("IIRIRA").[14] If the two elements of conviction under IIRIRA are met,[15] then the offense finding is considered a conviction for immigration purposes.

However, unlike their adult counterparts, noncitizen youth may have the opportunity to take a different path, one that avoids the application of IIRIRA's definition of conviction altogether. The starting point of their case is often marked by the question of whether their offense finding is a juvenile delinquency adjudication for immigration purposes. An affirmative answer to this question results in a detour from the IIRIRA conviction analysis altogether, since a juvenile delinquency adjudication is *per se* not a conviction or crime under immigration law.[16] Meanwhile, a negative answer results in the progression of the case to the IIRIRA signpost to find that a conviction occurred, assuming that the two IIRIRA requirements are met.

For noncitizen youth with or without lawful status, the labeling of their offense as an adult conviction or juvenile delinquency act carries significant consequences. Except in limited circumstances where a formal judicial finding is not required,[17] the label alone may mean the difference between obtaining and losing immigration benefits for noncitizen youth with or without legal status. For noncitizen youth in this country with legal status, such as lawful permanent residents, a conviction of certain crimes results in near-automatic permanent removal from the United States.[18] Currently, regardless of age, holding a conviction exposes the noncitizen to such a severe and drastic penalty.[19] On the other hand, if the noncitizen's offense is labeled as a juvenile delinquency adjudication, then she will

14. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C. and 18 U.S.C.); *see also, e.g.*, Viveiros v. Holder, 692 F.3d 1, 2 (1st Cir. 2012); Estrada-Ramos v. Holder, 611 F.3d 318, 321 (7th Cir. 2010); Acosta v. Ashcroft, 341 F.3d 218, 222 (3d Cir. 2003).

15. Under IIRIRA, "the term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where— (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed." 8 U.S.C. § 1101(a)(48)(A) (2012).

16. *See* Devison-Charles, 22 I. & N. Dec. 1362, 1365 (B.I.A. 2000) ("We have consistently held that juvenile delinquency proceedings are not criminal proceedings, that acts of juvenile delinquency are not crimes, and that findings of juvenile delinquency are not convictions for immigration purposes.").

17. A juvenile delinquency adjudication of certain conduct may lead to one's removal from the United States. Conduct that makes one inadmissible includes drug abuse or addiction, prostitution, human trafficking, "reason to believe" that one is a drug trafficker, behavior showing a mental condition that poses a current threat to self or others, and false claim of U.S. Citizenship. *See, e.g.*, 8 U.S.C. § 1182(a)(1)(A)(iv), (2)(C)–(D), (2)(H)–(I) (2012). Conduct that makes one deportable include smuggling, drug abuse or addiction, visa fraud, and violation of domestic violence protective orders. *See, e.g.*, 8 U.S.C. § 1227(a)(1)(E), (1)(G), (2)(B), (2)(E)(ii) (2012).

18. Padilla v. Kentucky, 559 U.S. 356, 365–66 (2010).

19. *See id.* at 360 ("The 'drastic measure' of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes." (citation omitted)).

be shielded from any conviction-based inadmissibility or conviction-based deportation proceeding, since a juvenile delinquency finding is inherently not a conviction or a crime.[20] Additionally, a conviction of certain offenses can also permanently bar noncitizens with lawful status from being considered for U.S. citizenship. For example, a conviction of an aggravated felony permanently bars a noncitizen from fulfilling the good moral character requirements for citizenship.[21] However, a juvenile delinquency adjudication of the same underlying offense will only impact the discretionary decision of citizenship, and will not permanently bar eligibility.[22]

Having a conviction or juvenile delinquency adjudication also matters for noncitizens youth who are in the country without lawful status. For these youth, a state juvenile delinquency proceeding may be the means through which they start the process to obtain Special Immigrant Juvenile Status ("SIJS"), a special status awarded by statute which allows these individuals to reside and work in the country lawfully, and eventually obtain permanent legal residence and citizenship.[23] Under the statute, a noncitizen without lawful status is eligible to obtain SIJS if a state court that has jurisdiction over juveniles, including state juvenile delinquency courts, initially finds that the noncitizen has been abused, abandoned, or neglected by one or both parents.[24] Meanwhile, a noncitizen youth without lawful status who is charged or treated as an adult defendant would not be able to request that a state criminal court make such a finding[25] and would instead have to petition another state court that has jurisdiction over juveniles to make such a finding.[26] Even with the required state finding, he may be eventually barred from obtaining an adjustment of status under SIJS in immigration court due to a conviction that bars admission into the United States.[27] Also, while DACA was in effect,[28] the offense label of conviction or juvenile delinquency adjudication affected the award of deferred action under

20. *Devison-Charles*, 22 I. & N. Dec. 1362, 1365 ("We have consistently held that juvenile delinquency proceedings are not criminal proceedings, that acts of juvenile delinquency are not crimes, and that findings of juvenile delinquency are not convictions for immigration purposes.").

21. *See* 8 U.S.C. §§ 1101(a)(43), 1427(a) (2017); 8 C.F.R. § 316.10(b)(1)(ii) (2012).

22. *See, e.g.*, Wallace v. Gonzales, 463 F.3d 135, 138–39 (2d Cir. 2006) (per curiam).

23. *See* 8 U.S.C. § 1101(a)(27)(J) (2012); 8 C.F.R. § 204.11 (2017).

24. *See* 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11.

25. *See* 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11.

26. Depending on the state, various courts may have jurisdiction over juveniles, such as a probate or family court. *See* 8 C.F.R. § 204.11.

27. *See, e.g.*, 8 U.S.C. § 1182(a)(2)(A) (2012) (deeming one who committed or conspired to commit a crime involving moral turpitude to be inadmissible pursuant to exceptions, such as if the crime was committed before the noncitizen was under eighteen years old and more than five years before the application date; or if the maximum penalty for the crime does not exceed imprisonment for one year, and noncitizen was not sentenced in excess of six months).

28. As of September 5, 2017, new applications for DACA are no longer accepted, and the DACA program is set to expire on March 5, 2018. *Deferred Action for Childhood Arrivals 2017 Announcement*, CITIZENSHIP AND IMMIGR SERVS., https://www.uscis.gov/daca2017 (last visited Mar. 20, 2018). The legality of the rescission of DACA is currently pending. On April 24, 2018, the United States District Court for the District of Columbia held that the decision to end DACA "was arbitrary and capricious" and gave the Department of Homeland Security 90 days to provide a better explanation before the court vacates the rescission of DACA and fully restores the DACA program. Nat'l Ass'n for the Advancement of Colored People v. Trump, No. CV 17-1907 (JDB), 2018 WL 1920079, at *1 (D.D.C. Apr. 24, 2018).

DACA. Noncitizen youth with a conviction of a felony, a significant misdemeanor, or three or more other misdemeanor offenses were automatically barred from obtaining deferred action under DACA.[29] However, a juvenile delinquency finding of these same offenses could only impact the discretionary DACA decision.[30] In the event that a program similar to DACA comes to pass in the near future, it is highly likely that there will again be a distinction between undocumented applicants who have convictions versus those with juvenile delinquency adjudications.

Lastly, the label of juvenile delinquency adjudication or conviction impacts immigration detention for all noncitizen youth, regardless of lawful or unlawful status. Noncitizen youth who has been convicted of a state conviction may be detained with adults in immigration detention. Under the *Flores v. Reno* Settlement Agreement,[31] specific guidelines mandate that juveniles in immigration custody be treated with "dignity, respect, and special concern for their particular vulnerability" and placed in "the least restrictive setting appropriate to the minor's age and special needs, provided that such setting is consistent with its interests to ensure the minor's timely appearance before the Immigration and Naturalization Service and the immigration courts and to protect the minor's well-being and that of others."[32] However, these guidelines do not apply for minors who have been convicted and imprisoned for a criminal offense as adults.[33]

Thus, how the BIA and federal courts interpret state youth-adult offense findings in immigration cases, which directly depends on whether immigration officials defer to state or federal authorities, directly impacts whether noncitizen youth are allowed to lawfully remain in the United States, apply for citizenship, seek immigration benefits, and remain in a juvenile-appropriate environment during immigration detention. Negative immigration consequences, which were increased with the passage of IIRIRA, made the interpretation of these youth-adult offense findings as juvenile delinquency acts or convictions an even more significant issue than in the pre-IIRIRA era. The next section provides an overview of the treatment of state and federal youth-adult offense findings in immigration cases, with an emphasis on how IIRIRA impacted the analysis of these findings.

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29. *See Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP AND IMMIGR SERVS., https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca# guidelines (last visited Mar. 20, 2018).

30. A juvenile delinquency adjudication did not automatically strip eligibility for DACA, even though it would be considered in the discretionary decision of whether one should receive deferred action under DACA. *See Frequently Asked Questions*, U.S. CITIZENSHIP AND IMMIGRSERVS., https://www.uscis.gov/archive/frequently-asked-questions (last updated Feb. 14, 2018).

31. Stipulated Settlement Agreement at 4, Flores v. Reno, No. CV 85-4544-RJK(Px) (C.D. Cal. 1997), https://www.clearinghouse.net/chDocs/public/IM-CA-0002-0005.pdf.

32. *Id.* at 7.

33. *See id.* at 4 (stating that the definition of minor does not include an "individual who has been incarcerated due to a conviction for a criminal offense as an adult").

III. IMMIGRATION CONSEQUENCES OF JUVENILE AND YOUTH-ADULT OFFENSE FINDINGS

The present-day definition of "conviction" in immigration law was created in 1996 when Congress passed IIRIRA.[34] Under IIRIRA:

> The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.[35]

Prior to IIRIRA, the BIA attempted to create a uniform definition of conviction through case law.[36] Congress stepped in with a statutory definition through IIRIRA and expanded the definition of "conviction."[37] The BIA and federal courts interpreted this act as manifesting congressional intent to prevent expungements, pardons, and deferred adjudications from erasing a conviction for immigration purposes.[38] IIRIRA and the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996[39] ushered in a dramatic change in immigration law with more restrictions and harsher penalties. Through IIRIRA and AEDPA, Congress imposed stricter consequences for noncitizens residing lawfully in the United States who had criminal convictions, such as mandatory deportation for certain convictions, automatic detention in immigration custody after a criminal sentence was served, and the near-complete elimination of an individualized determination of whether a

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34. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C. and 18 U.S.C.).

35. 8 U.S.C. § 1101(a)(48)(A) (2012).

36. *See* Ozkok, 19 I. & N. Dec. 546, 551–52 (B.I.A. 1988), *superseded by statute*, 8 U.S.C. § 1101(a)(48)(A) (2012), *as recognized in* Mejia Rodriguez v. U.S. Dep't of Homeland Sec., 629 F.3d 1223 (11th Cir. 2011). In *Ozkok*, the BIA ruled that a conviction will be found for immigration purposes where all of the following elements are present:

> (1) a judge or jury has found the alien guilty or he has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilty;
> (2) the judge has ordered some form of punishment, penalty, or restraint on the person's liberty to be imposed (including but not limited to incarceration, probation, a fine or restitution, or community-based sanctions such as a rehabilitation program, a work-release or study-release program, revocation or suspension of a driver's license, deprivation of nonessential activities or privileges, or community service); and
> (3) a judgment or adjudication of guilt may be entered if the person violates the terms of his probation or fails to comply with the requirements of the court's order, without availability of further proceedings regarding the person's guilt or innocence of the original charge.

Id. at 551–52 (footnote omitted).

37. *See, e.g.*, Vieira Garcia v. INS, 239 F.3d 409, 412–13 (1st Cir. 2001).

38. *See, e.g.*, Roldan-Santoyo, 22 I. & N. Dec. 512, 521 (B.I.A. 1999), *rev'd on other grounds*, Lujan-Armendariz v. INS, 222 F.3d 728 (9th Cir. 2000); Jason A. Cade, *Deporting the Pardoned*, 46 U.C. DAVIS L. REV. 355, 373–78 (2012).

39. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104132, 110 Stat. 1214.

noncitizen should be removed from the United States. [40] Determining which judgments actually constituted a conviction for immigration purposes became an even more concerning issue, and thus prompted the BIA and federal courts to assess the impact of IIRIRA's new definition of conviction, if any, on immigration cases evaluating juvenile delinquency adjudications, adult convictions imposed on minors, and youthful offender dispositions.

A. Juvenile Delinquency Adjudications

Four years after the passage of IIRIRA, the BIA made clear that IIRIRA did not affect the civil nature of juvenile delinquency adjudications for immigration purposes, and it clarified that an act of juvenile delinquency is by definition not a conviction in immigration law.[41] The BIA expressed that it had "consistently held that juvenile delinquency proceedings are not criminal proceedings, that acts of juvenile delinquency are not crimes, and that findings of juvenile delinquency are not convictions for immigration purposes."[42] It found that Congress gave no indication of its intent to deviate from this longstanding principle.[43]

Once a federal or state court treats an offense as an act of juvenile delinquency, immigration authorities continue to view the finding as a civil juvenile delinquency finding for immigration purposes.[44] In federal courts, the FJDA determines when a minor obtains a juvenile delinquency finding.[45] Passed by Congress in 1938, the FDJA defines an act of "juvenile delinquency" as "the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult or a violation by such a person of section 922(x)."[46] In order for the FJDA to apply, the individual must be under the age of twenty-one, and have committed the offense prior to turning eighteen years old.[47] Meanwhile, for state courts, state law determines when a young person is placed in a juvenile delinquency proceeding. Both the federal and state court's decision to treat an offense as a juvenile delinquency act remains unchanged in immigration proceedings, and by definition, does not qualify as a conviction for immigration purposes under IIRIRA.

B. State Youth-Adult Offense Findings

While a conventional juvenile delinquency adjudication is inherently not a conviction for immigration purposes, minors or young adults who receive state

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40. *See* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1938–39 (2000).

41. *See* Devison-Charles, 22 I. & N. Dec. 1362, 1371 (B.I.A. 2000).

42. *Id.* at 1365.

43. *Id.* at 1369–70 ("[T]here is no indication that Congress intended to include acts of juvenile delinquency within the meaning of the term 'conviction.'").

44. Federal Juvenile Delinquency Act, ch. 486, § 4, 52 Stat. 765 (1938); 18 U.S.C. § 5031 (2012).

45. 18 U.S.C. § 503 (2012).

46. *Id.* If a person commits a crime before the age of 18, but criminal proceedings begin after the age of 21, then the defendant "may not invoke the protection of the Juvenile Delinquency Act." United States v. Hoo, 825 F.2d 667, 669–70 (2d Cir. 1987).

47. *See Devison-Charles*, 22 I. & N. Dec. at 1367.

youthful offender findings or adult convictions may have their offenses interpreted as convictions under immigration law.

1. Adult Convictions Imposed on Minors

In courts across all 50 states and the District of Columbia, as well as in federal court,[48] a minor may be tried and convicted as an adult criminal defendant. Noncitizens who are tried and receive convictions in adult criminal court while they were minors are considered to have a conviction under IIRIRA for immigration purposes. The BIA and the Courts of Appeals in the First,[49] Second,[50] Ninth,[51] and Eleventh[52] Circuits have all rejected attempts to distinguish adult convictions imposed on minors from standard adult convictions in immigration law. Specifically, courts have denied requests to apply the FJDA in order to determine whether these convictions should be interpreted as a juvenile delinquency finding instead.[53] Equal protection arguments have also failed because state courts were found to have a rational basis to try a minor as an adult.[54]

Even prior to IIRIRA, federal authorities rejected efforts to overrule a state court's decision to charge a minor in adult criminal conviction rather than juvenile court. For example, in 1966, the Ninth Circuit held that even if a state court could have treated a noncitizen as a juvenile offender, the fact that it did not meant that the noncitizen had a conviction for immigration purposes.[55]

2. Youthful Offender Dispositions

Currently, only state youthful offender statutes are in effect.[56] The federal youthful offender statute, the Federal Youth Corrections Act ("FYCA"), which was implemented in 1950 was repealed in 1984.[57]

Before IIRIRA, the BIA and federal courts disagreed on whether state youthful offender dispositions qualified as a conviction in immigration proceedings. At times the BIA and courts compared these state youthful offender statutes to the

48. *See, e.g.*, 18 U.S.C. § 5032 (2012); Catherine J. Ross, *Implementing Constitutional Rights for Juveniles: The Parent-Child Privilege in Context*, 14 STAN. L. & POL'Y REV. 85, 118 (2003); Christine A. Fazio & Jennifer L. Comito, *Rethinking the Tough Sentencing of Teenage Neonaticide Offenders in the United States*, 67 FORDHAM L. REV. 3109, 3121 (1999).

49. *See* Lecky v. Holder, 723 F.3d 1 (1st Cir. 2013);Vieira Garcia v. INS, 239 F.3d 409, 414–15 (1st Cir. 2001).

50. *See* Savchuck v. Mukasey, 518 F.3d 119 (2d Cir. 2008).

51. *See* Rangel-Zuazo v. Holder, 678 F.3d 967 (9th Cir. 2012); Vargas-Hernandez v. Gonzales, 497 F.3d 919 (9th Cir. 2007); Morasch v. INS, 363 F.2d 30 (9th Cir. 1966).

52. *See* Singh v. U.S. Att'y Gen., 561 F.3d 1275 (11th Cir. 2009).

53. *See, e.g.*, *Vieira Garcia*, 239 F.3d at 413–14; *Savchuck*, 518 F.3d 119; *Singh*, 561 F.3d at 1278–79.

54. *See, e.g., Vargas-Hernandez*, 497 F.3d at 923; *Rangel-Zuazo*, 678 F.3d at 969.

55. *See Morasch*, 363 F.2d at 31.

56. *See, e.g.*, ALA. CODE §§ 15-19-1 to -7 (2017); D.C. CODE §§ 24-901 to -907 (2017); FLA STAT. §§ 958.011–.19; Act, MICH. COMP. LAWS §§ 762.11–.16 (2017); N.M. STAT. ANN. §§ 32A-2-3(H), (J), -20 (2017); N.Y. CRIM. PROC. LAW §§ 720.10–.35 (McKinney 2017).

57. 18 U.S.C. §§ 5005–5026 (1976) (repealed 1984).

federal youth offender statute, the FYCA.[58] The FYCA applied to young adults under 22 years old, and by a federal judge's discretion, to young adults aged 22 and 26 who showed the promise of developing into "useful citizens."[59] In addition to alternative federal sentencing options, the FYCA mandated that a conviction automatically be set aside if the youthful offender were unconditionally released from confinement or probation before the maximum period set by the court.[60] The meaning of this set-aside provision was not clearly provided in the FYCA, and some courts found that the provision completely expunged convictions while others did not.[61]

After IIRIRA passed in 1996, the FYCA had already been repealed, and the BIA and federal courts began to compare state youthful offender statutes against the general federal juvenile delinquency law, the FJDA, to determine the nature of these youthful offender dispositions for immigration purposes. In the post-IIRIRA seminal case of *Matter of Devison*[62] in 2000, the BIA held that if a state youthful offender statute conferred an irrevocable status of youthful offender, just as the FJDA conferred a static status of juvenile delinquency to its beneficiaries, then the youthful offender disposition was a juvenile delinquency adjudication for immigration purposes. [63] If it did not, then the youthful offender finding was treated as a conviction for immigration purposes.[64] According to the BIA, the "central issue before both the state and federal courts" was "the offender's status, not his guilt or

58. *See, e.g.*, Andrade, 14 I & N Dec. 651, 651–652 (B.I.A. 1974) (adopting the recommendation of the Solicitor General that that if a state youthful offender statute were similar to the FYCA, then the expunged conviction could not be used to deport an individual); Lima, 15 I & N Dec. 661, 664–65 (1976) (finding that a noncitizen who expunged his narcotics conviction under a general California statute, and sealed the records under a California statute intended for youthful offenders, also had his conviction eliminated for deportation purposes under immigration laws). *But see* Kolios v. INS 532 F.2d 786, 788–90 (1st Cir. 1976) (holding that noncitizen's conviction obtained at 20 years old, which had been set aside under Texas law, was still a conviction for immigration purposes, and rejecting the noncitizen's argument that if he were charged in federal court, he could have had his conviction set aside under the FYCA).

59. United States v. McMains, 540 F.2d 387, 388 (8th Cir. 1976); *see also* Stanley A. Weigel, *Appellate Revision of Sentences: To Make the Punishment Fit the Crime*, 20 STAN. L. REV. 405, 407 (1968).

60. 18 U.S.C. § 5021(b) (1976) (repealed 1984).

61. *Compare* United States v. Doe, 980 F.2d 876, 878–83 (3d Cir. 1992); United States v. Kammerdiener, 945 F.2d 300, 301 (9th Cir. 1991) (finding that conviction that was set aside under the FYCA should be considered expunged for sentencing purposes under the Sentencing Guidelines); Doe v. Webster, 606 F.2d 1226, 1234 (D.C. Cir. 1979); United States v. Purgason, 565 F.2d 1279, 1280 (4th Cir.1977) (finding that "a conviction which is set aside by the court is vacated and can have no further operative effect" while not ruling on the scope of expunction) *with* United States v. McDonald, 991 F.2d 866, 871–72 (D.C. Cir. 1993) (citing with approval a case by D.C. Court of Appeals that found that conviction that had been set aside under the FYCA could be considered to impose current sentence). As for the immigration consequences of a set-aside conviction, there were disagreements in the federal courts about whether a conviction that had been set aside or could be set aside under the FYCA should not be viewed as a conviction in immigration proceedings. *Compare* Hernandez-Valensuela v. Rosenberg, 304 F.2d 639 (9th Cir. 1962) *with* Mestre Morera v. INS, 462 F.2d 1030, 1031 (1st Cir. 1972). The BIA eventually ruled that any conviction that had been set aside under the FYCA, including a serious drug offense, would not be used to deport a noncitizen. *See* Berker, 15 I. & N. Dec. 725, 725 (B.I.A. 1976); Zingis, 14 I. & N. Dec. 621 (B.I.A. 1974); Nagy, 12 I. & N. Dec. 623, 627 (B.I.A. 1968).

62. Devison-Charles, 22 I. & N. Dec. 1362, 1367–68 (B.I.A. 2000).

63. *Id.* at 1372–73.

64. *Id.*

innocence."[65] In other words, if a youthful offender determination is able to "ripen into a conviction upon the occurrence or nonoccurrence of subsequent events[,]"[66] then it is considered a conviction for immigration proceedings, even if it did not actually ripen into a conviction in the original state proceedings.

While these legal standards may appear clear cut, a further examination of the cases reveals that immigration officials and federal courts justify these legal standards with opposing rationales, deferring inconsistently to federal and state authorities to determine the nature of these state youth-adult offense findings for immigration purposes.

IV. DEFERENCE IN FOUR WAYS

The difference in the federal-state relationship in immigration cases when evaluating state youth-adult offense findings is best described as a difference in deference. Federal immigration officials and federal courts defer to different government authorities when they analyze state youth-adult offense findings in immigration proceedings.

In immigration cases that involve adult convictions imposed on minors, the BIA and federal courts elevate state authority over federal authority to justify their finding that these state convictions remain as convictions for immigration purposes. Meanwhile, in cases involving youthful offender dispositions, the power of the federal government is emphasized over the state to analyze whether these findings are juvenile delinquency acts or convictions for immigration purposes.

Deference is specifically manifested in four ways: the express language used by the BIA and federal courts; the inconsistent requirement of the plain language rule; the inconsistent recognition that state youth-adult offense findings can take on a different nature solely for immigration purposes; and the acceptance or rejection of individualized offense assessments made by state actors.

A. Express Language and Reasoning

In immigration cases evaluating adult convictions imposed on minors, the BIA and federal courts employ state-centric language to justify their decision to not alter these convictions for immigration purposes. Meanwhile, in immigration cases that involve youthful offender findings, the BIA and federal courts use language that elevates the authority of the federal government in order to apply the FJDA to determine the nature of these offenses for immigration purposes.

1. Adult Convictions Imposed on Minors: The Federal Government is "Bound" by the State's Decision

In immigration cases involving state adult convictions imposed on minors, the BIA and federal courts use language that underscores the authority of the state government to issue convictions in the manner they deem appropriate. They rule that they are bound by these state decisions and lack the jurisdiction to change them. Thus

65. *Id.* at 1368.

66. V-X-, 26 I. & N. Dec. 147 at 152–53 (B.I.A. 2013).

far, the BIA and the First,[67] Second,[68] Ninth,[69] and Eleventh[70] Circuits have fielded and denied requests by noncitizens to apply the FJDA to construe these convictions as juvenile delinquencies in immigration proceedings.

After Congress passed IIRIRA, the BIA first addressed this issue in the matter of Antonio Vieira Garcia.[71] Antonio Vieira Garcia, a permanent resident who attempted to steal tire rims from a vehicle when he was seventeen years old, was charged in a Rhode Island adult criminal court because of a prior adult charge that had been dropped.[72] He pled guilty to the attempted larceny charge and was sentenced to ten years, of which he had to serve two years in prison, and eight years suspended on probation.[73] Immigration authorities initiated removability proceedings against him due to this aggravated felony since it was a theft offense with an imprisonment term of more than one year.[74]

Vieira Garcia requested that the federal definition of juvenile delinquency in the FJDA be applied to him since he was not yet eighteen years old when he committed the offense.[75] The BIA denied his request; it ruled that a federal standard was not applicable because a state criminal court had already decided that he was an adult, and "[w]hether or not a state court adjudicates an alien's criminal behavior in juvenile proceedings falls outside of our jurisdiction."[76]

The First Circuit affirmed the BIA's decision. It deferred to the state's finding that Vieira Garcia was an adult. It ruled that "[n]either we nor the BIA have jurisdiction to determine how a state court should adjudicate its defendants. Once adjudicated by the state court, as either a juvenile or an adult, we are bound by that determination."[77] It cited to the Constitution's Full Faith and Credit Clause and statutory counterpart to underscore that it was bound by the state's decision.[78] The BIA and First Circuit reiterated this state-centric reasoning and language in in 2012[79] and again in 2013[80] when they denied a permanent resident's request to construe the adult conviction he received as a minor into a juvenile delinquency adjudication for

67. *See* Lecky v. Holder, 723 F.3d 1, 6 (1st Cir. 2013); Vieira Garcia v. INS, 239 F.3d 409, 414–15 (1st Cir. 2001).

68. *See* Savchuck v. Mukasey, 518 F.3d 119, 122 (2d Cir. 2008).

69. *See* Rangel-Zuazo v. Holder, 678 F.3d 967, 968 (9th Cir. 2012); Vargas-Hernandez v. Gonzales, 497 F.3d 919, 923 (9th Cir. 2007); Morasch v. INS, 363 F.2d 30, 31 (9th Cir. 1966).

70. *See* Singh v. U.S. Att'y Gen., 561 F.3d 1275, 1279 (11th Cir. 2009).

71. Letter from Crystal Souza, Supervisory Gov't Info. Specialist, Bd. of Immigration Appeals, to author (Dec. 14, 2015) (on file with author) (providing the unpublished Dec. 10, 1999 BIA opinion on the matter of Antonio Vieira Garcia).

72. *Vieira Garcia*, 239 F.3d at 411.

73. *Id.*

74. *Id.*

75. *Id.*

76. Letter from Crystal Souza, *supra* note 71 (stating such on page 3 of the Dec. 10, 1999 opinion).

77. *Vieira Garcia*, 239 F.3d at 413.

78. *Id*. at 414 (quoting U.S. CONST. art. IV, § 1; citing 28 U.S.C. § 1738).

79. Letter from Crystal Souza, *supra* note 71 (providing the unpublished Oct. 31, 2012 BIA opinion on the matter of Wayne Lecky).

80. Lecky v. Holder, 723 F.3d 1 (1st Cir. 2013).

immigration purposes because he was seventeen years old when he entered his guilty plea.[81]

Other circuit courts that were faced with this same question deferred to state actors and cited the First Circuit's language in *Vieira Garcia* that they were bound by the state's determination. For example, in 2007, the Ninth Circuit in *Vargas-Hernandez v. Gonzales*[82] quoted *Vieira Garcia's* holding that it and the BIA lacked the "jurisdiction to determine how a state court should adjudicate its defendants. Once adjudicated by the state court, as either a juvenile or an adult, we are bound by that determination."[83] It would not construe an adult guilty plea as a juvenile delinquency finding, even though the noncitizen was only sixteen years old when he entered the guilty plea.[84] In 2012, the Ninth Circuit again deferred to state authorities' determination that a noncitizen possessed an adult conviction in *Rangel-Zuazo v. Holder*.[85] It affirmed the BIA's determination that the FJDA did not apply because the state charged him as an adult, and he was charged after he reached eighteen years old, even though he was only thirteen or fourteen years old at the time of offense.[86] The Ninth Circuit found no basis to overrule the state's finding because, irrespective of the noncitizen's age at the time of offense or the nature of the crime, these "factors played no role in the reasoning or outcome" of similar cases, and instead the "decisions turned on lawful decisions of state authorities to try the offenders as adults."[87] It quoted the *Vieira Garcia* language that it did not have "jurisdiction to determine how a state court should adjudicate its defendants. Once adjudicated by the state court, as either a juvenile or an adult, we are bound by that determination."[88]

Similarly, the Second Circuit, relying on *Vieira Garcia*, held in *Savchuck v. Mukasey*[89] in 2008 that it was "bound" by a state court's determination to try an individual as an adult. The court rejected a permanent resident's request to construe his larceny conviction as a juvenile offense because he committed the crime before he turned eighteen years old.[90] Lastly, the Eleventh Circuit in 2009 decided *Singh v. U.S. Attorney General*[91] and quoted *Vieira Garcia* when it held that it was "bound" by the state court's determination. In *Singh* a permanent resident requested that the court construe his guilty plea to theft and burglary counts as juvenile offenses

81. *See id.* at 6 (finding that it did not have "jurisdiction to determine how a state court should adjudicate its defendants," that it was "bound by that determination," and citing to 28 U.S.C. § 1738, the statutory counterpart of the Full Faith and Credit Clause); Letter from Crystal Souza, *supra* note 71 ("Although the respondent argues that he would have qualified for juvenile treatment under federal law, once a conviction has been entered, we do not readjudicate the guilt or innocence of a respondent nor do we address the legitimacy of state laws." (stating such on page 4 of the Oct. 31, 2012 opinion)).

82. Vargas-Hernandez v. Gonzales, 497 F.3d 919, 922 (9th Cir. 2007) (quoting *Vieira Garcia,* 239 F.3d at 412–14).

83. *Id.* at 922.

84. *Id.* at 921–22.

85. Rangel-Zuazo v. Holder, 678 F.3d 967, 968 (9th Cir. 2012).

86. *Id.*

87. *Id.* at 969.

88. *Id.* (quoting Vieira Garcia v. INS, 239 F.3d 409, 413 (1st Cir. 2001)).

89. 518 F.3d 119 (2d Cir. 2008).

90. *Id.* at 121–22.

91. Singh v. U.S. Att'y Gen., 561 F.3d 1275, 1277 (11th Cir. 2009).

because the FJDA would have barred his transfer to adult court based on his age at the time of his guilty plea; the court rejected this argument.[92]

Regardless of the age of noncitizens when they committed the offense (such as thirteen, fourteen,[93] or fifteen[94] years old), the type of crime, or whether the FJDA would have statutorily barred the transfer of the minor to adult court in federal court,[95] the BIA and federal courts have continued to employ state-centric language to defer to the original state decision to confer adult convictions on minors.

2. Youthful Offender Dispositions: The Federal Government Ultimately Decides the Nature of State Offense Findings

Unlike in cases that involve state adult convictions imposed on minors, the BIA and federal courts defer to the federal government in youthful offender cases to determine the nature of these findings for immigration purposes. They use language that elevates the importance of applying a federal standard and also readily embrace the use of the FJDA to evaluate these findings.

In the first youthful offender case that the BIA analyzed after IIRIRA, the BIA questioned whether a youthful offender offense under the New York youthful offender statute resulted in a conviction for immigration purposes under IIRIRA.[96] Rather than relying solely on IIRIRA's definition of conviction, the BIA first turned to the FJDA to evaluate the offense. It justified its reliance on FJDA by stating, "We have . . . held that the standards established by Congress, as embodied in the FJDA, govern whether an offense is to be considered an act of delinquency or a crime."[97] It held that it would "continue to apply a federal standard, analyzing state juvenile or youthful offender proceedings against the provisions of the FJDA."[98] Since the youthful offender status under New York law was "static" and could not be "changed or withdrawn as a result of subsequent behavior," similar to the FDJA, the BIA found that the youthful offender disposition was a juvenile delinquency finding for

92. *Id.* at 1279.

93. *Rangel-Zuazo*, 678 F.3d at 968.

94. *Singh*, 561 F.3d at 1277–79.

95. *Id.*

96. Devison-Charles, 22 I. & N. Dec. 1362, 1366–67 (B.I.A. 2000).

97. *Id.* at 1366.

98. *Id.* at 1371.

immigration purposes.[99] Other similarities[100] and differences[101] between the New York youthful offender statute and the FJDA were deemed immaterial.[102]

Similarly, the Sixth Circuit affirmed the BIA's decision to compare a Michigan youthful offender statute against the FJDA. It stated that the BIA's "reasoning in *Devison* . . . reflected Congressional intent with respect to juvenile adjudications and the [Immigration and Nationality Act]"[103] and therefore it was reasonable to compare state youthful offender statutes against its "federal counterpart."[104] And even though the Michigan statute expressly provided that a youthful offender disposition is "not a conviction for a crime" [105] and that the youthful offender will not lose rights or privileges or have a civil disability,[106] the BIA and Sixth Circuit still found that these youthful offense findings were convictions for immigration purposes. The court made this determination because the Michigan statute did not confer a permanent status like the FJDA, but instead gave state courts discretion to eventually revoke the youthful offender status.[107] The Sixth Circuit also rejected an equal protection argument for the BIA's disparate treatment of the Michigan statute against the New York statute in *Devison*, holding that "[s]imply because states take different approaches to criminal sanctions does not mean that the Board must construe 'conviction' in the broadest possible manner in order to avoid claims of equal protection."[108] The BIA and Sixth Circuit disregarded Michigan's expressed intent—that a youthful offender disposition was not a conviction and would not result in any loss of rights, privilege, or would lead to a civil disability—because it found that Congress intended for the FJDA to be the ruling standard.[109]

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99. *Id.* at 1372.

100. *Id.* at 1367–68 (noting that both statutes have similar definitions of youths and juveniles, state that the adjudication does not constitute a conviction, have similar criteria to determine whether the juvenile will be treated as an adult, require that juveniles sometimes be treated as an adult, and require that records are confidential).

101. *Id.* at 1368 (noting differences, such as New York statute imposing a maximum age that was one year higher than the FJDA, and that the New York statute determined the status of a youthful offender or criminal convict after a conviction, while the FDJA determined the status first, and then started juvenile delinquency or criminal proceedings). While not expressly stated in the opinion, it is also possible that the BIA was motivated to view the New York youthful offender findings as juvenile delinquency adjudications in order to account for the fact that New York was one of the few states that limited juvenile court jurisdiction to juveniles aged 15 or younger. The maximum age was only recently raised from 15 to 17 years old. *New York Approves Reforms to Keep Juvenile Offenders out of Adult Prisons*, NPR (April 10, 2017, 4:28 pm), http://www.npr.org/2017/04/10/523311453/new-york-approves-reforms-to-keep-juvenile-offenders-out-of-adult-prisons (stating that New York raised the maximum age for juvenile court jurisdiction to 17-years-old, after attempting to raise the age for 12 or 13 years).

102. *See* Devison-Charles, 22 I. & N. Dec. 1362, 1367–68 (B.I.A. 2000).

103. Uritsky v. Gonzales, 399 F.3d 728, 735 (6th Cir. 2005).

104. *Id.*

105. *Id.* at 730 (citing MICH. COMP. LAWS § 762.14(2) (2004)).

106. *Id.*

107. *Id.* at 734.

108. *Id.* at 735.

109. *Id.* at 730 (citing MICH. COMP. LAWS § 762.14(2)).

Relying on *Devison*, the BIA and federal courts also compared state youthful offender statutes from the District of Columbia[110] and South Carolina[111] against the FJDA. Even when it was clear that youthful offender statutes imposed a criminal conviction in adult court, such as the D.C. youthful offender statute that imposes convictions and sentences in a standard adult criminal court, the BIA and federal courts still performed the extra analysis of comparing the statute against the FJDA instead of simply applying IIRIRA.[112]

Unlike cases that involve adult convictions imposed on minors, the BIA and federal courts in youthful offender cases emphasize the authority of the federal government to apply a federal non-immigration law, the FJDA, to determine whether youthful offender dispositions are juvenile delinquencies or convictions for immigration purposes.

B. Plain Language Rule and Congressional Legislation Requirement

The difference in deference to state and federal authorities is also evidenced by the BIA's and federal courts' inconsistent application of the plain language rule and the requirement that Congress must expressly legislate the use of the FJDA in immigration proceedings of state youth-adult offense findings.

In cases that involve adult convictions imposed on minors, the BIA and federal courts apply the plain language rule,[113] and they hold that an express statement from Congress is necessary in order to apply the FJDA to overcome a state's decision to convict a minor as an adult. For example, in *Vieira*, the First Circuit found that the "plain language" of IIRIRA "forbids us from adopting such a standard. If Congress had wanted the INS to follow the FJDA at all times, it would have so stated."[114] The Eleventh Circuit reiterated this principle in *Singh* to deny the permanent resident's request to apply the FJDA to an offense he committed when he was fifteen years old; the offense was viewed as an adult conviction in Florida state court, but would not have been tried in federal adult court under the FJDA.[115] The BIA also found in the matter of Antonio Vieira Garcia[116] that "given Congress' clear intent to expand the definition of a conviction, and the lack of any specific exception for juvenile offenders," that convictions imposed on minors were not exempted from conviction-based removal.[117] At first glance, it may appear that the plain language rule is actually effectuating federal congressional intent. However, the rule is only selectively applied. It is only applied in immigration cases of adult convictions imposed on minors to bar the FJDA from potentially altering a state's ruling. It is not

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110. D.C. CODE § 24-901 to 907 (2002); *see also* Badewa v. Att'y Gen. of U.S., 252 F. App'x 473, 477 (3d Cir. 2007); Dung Phan v. Holder, 722 F. Supp. 2d 659, 660 (E.D. Va. 2010).

111. Cole v. U.S. Att'y Gen., 712 F.3d 517, 526 n.2 (11th Cir. 2013).

112. *See, e.g.*, *Badewa*, 252 F. App'x at 476; *Dung Phan*, 722 F. Supp. 2d at 660.

113. INS v. Phinpathya, 464 U.S. 183, 189 (1984) ("This Court has noted on numerous occasions that in all cases involving statutory construction, our starting point must be the language employed by Congress, . . . and we assume that the legislative purpose is expressed by the ordinary meaning of the words used." (citations and internal quotation marks omitted)).

114. Vieira Garcia v. INS, 239 F.3d 409, 413–14 (1st Cir. 2001).

115. Singh v. U.S. Att'y Gen., 561 F.3d 1275, 1279 (11th Cir. 2009).

116. Letter from Crystal Souza, *supra* note 71.

117. *Id.*

equally applied in youthful offender dispositions. As a byproduct, state interests are overprotected in immigration cases of adult convictions imposed on minors. The only way that the BIA or federal courts would overrule a state's decision to convict a minor as an adult for immigration purposes is if Congress expressly stated that the FJDA applied or passed other legislation that exempted such offenses from removal.

The BIA and federal courts do not invoke the plain language rule in immigration cases of youthful offender dispositions, but instead compare state youthful offender statutes against the FJDA even without express legislation. In *Devison*, the BIA justified comparing the New York youthful offender statute against the FJDA by relying on its own precedent.[118] It explained, "[w]e have also held that the standards established by Congress, as embodied in the FJDA, govern whether an offense is to be considered an act of delinquency or a crime."[119] This statement, however, is not accurate. Prior to IIRIRA, the BIA did not use the FJDA to evaluate state statutes geared toward young noncitizens. Instead, it compared them against the FYCA, which was eventually repealed.[120] Also, the BIA has not applied the FJDA in immigration cases that involve adult convictions imposed on minors to determine whether these offenses should be considered a crime or an act of juvenile delinquency. Although inaccurate, the BIA and federal courts have continued to rely on this reasoning to use the FJDA to evaluate youthful offender dispositions.[121] Even without express legislation, the BIA and federal courts defer to a federal standard of juvenile delinquencies to evaluate state youthful offender findings.

C. The Willingness to Change or Not Change the Nature of the State Youth-Adult Offense Findings in Immigration Cases

The difference in deference is also demonstrated by the BIA's and court's refusal or willingness to alter the original state youth-adult offense finding solely for immigration purposes.

In immigration cases involving adult convictions imposed on minors, the BIA and federal courts decline to change the nature of state offenses, and fully accept the state's determination that these convictions remain as convictions. By strictly applying IIRIRA—without first consulting the FJDA—they find that these state findings automatically satisfy the two requirements of a conviction under IIRIRA.

In the matter of Antonio Vieira Garcia,[122] the BIA began its analysis by applying the then-new definition of conviction under IIRIRA and ruling that the conviction imposed on the permanent resident was a conviction for immigration purposes. The First Circuit agreed. It found that IIRIRA's definition of conviction was "clear and unambiguous."[123] By "[a]pplying the statute," the permanent resident's conviction he received as a minor was a conviction under IIRIRA because he pled guilty and the judge ordered punishment—imprisonment.[124] The court

118. Devison-Charles, 22 I. & N. Dec. 1362, 1371 (B.I.A. 2000).

119. *Id.* at 1366.

120. *See Vieira Garcia*, 239 F.3d at 414 (quoting U.S. CONST. art. IV, § 1; citing 28 U.S.C. § 1738).

121. *See supra* Part IV.A.2.

122. Letter from Crystal Souza, *supra* note 71.

123. Vieira Garcia v. INS, 239 F.3d 409, 413 (1st Cir. 2001).

124. *Id.*

rejected the possibility that this state conviction would take on a different interpretation, such as a juvenile delinquency adjudication solely for immigration purposes, if the court applied the FJDA to the conviction before applying IIRIRA.

Similarly, the Ninth Circuit in *Vargas-Hernandez*[125] and *Rangel-Zuazo*[126] held that lawful permanent residents who had convictions obtained while they were minors possessed convictions under immigration law under the straightforward application of IIRIRA.[127] Since the two conditions for a conviction were met under IIRIRA, the state conviction could not change into a juvenile delinquency adjudication in federal court. The Second Circuit[128] and Eleventh Circuit[129] agreed. The Second Circuit found "no support in the text" of IIRIRA for the lawful permanent resident's "inventive" proposal that his conviction should be viewed as a juvenile delinquency adjudication for immigration purposes because had he appeared in a federal court, he would not have been placed in adult criminal court.[130] Simply put, the state conviction met the requirements for the definition of conviction under IIRIRA.[131]

However, for immigration cases involving state youthful offender dispositions, the BIA and federal courts readily acknowledge that state and federal authorities can differ. In these cases, state governments can view an offense finding in one way, but federal immigration authorities are not bound by the state's characterization and are able to interpret the youthful offender disposition in a different way for immigration purposes. The clearest example of this is the BIA and Sixth Circuit's evaluation of Michigan's youthful offender statute.[132] The Sixth Circuit acknowledged that under Michigan law a youthful offender is not considered to have "a conviction for a crime" and would "not suffer a civil disability or loss of right of privilege."[133] If a youthful offender served his probationary period without incident, then he would have his proceedings dismissed.[134] On the other hand, if a youthful offender violated his probationary period, then a court could revoke the youthful offender status, enter a guilty finding, and impose a sentence.[135] While retaining the status of youthful offender, the Michigan statute made clear that a conviction was not actually entered. However, the BIA and Sixth Circuit ruled that despite the statute's express language that youthful offenders do not have a conviction, these findings were still convictions for immigration purposes. Michigan could continue to view youthful offenders as not having a conviction, but federal authorities would override the state's determination and view the same offense

125. Vargas-Hernandez v. Gonzales, 497 F.3d 919, 923 (9th Cir. 2007).

126. Rangel-Zuazo v. Holder, 678 F.3d 967 (9th Cir. 2012).

127. *See id.* at 968; *Vargas-Hernandez*, 497 F.3d at 921, 923.

128. Savchuck v. Mukasey, 518 F.3d 119 (2d Cir. 2008).

129. Singh v. U.S. Att'y Gen., 561 F.3d 1275 (11th Cir. 2009).

130. *Savchuck*, 518 F.3d at 122.

131. *Id.*

132. Hanna v. Holder, 740 F.3d 379 (6th Cir. 2014); Uritsky v. Gonzales, 399 F.3d 728, 730–31 (6th Cir. 2005); V-X-, 26 I. & N. Dec. 147, 152–53 (B.I.A. 2013).

133. *Uritsky*, 399 F.3d at 730 (citing MICH. COMP. LAWS § 762.14(2) (2004)).

134. MICH. COMP. LAWS § 762.14(1) (2004).

135. *Id.* § 762.12 (2015).

finding as a conviction in immigration proceedings.[136] While undoubtedly the same conclusion would be reached if IIRIRA were strictly applied, the BIA and Sixth Circuit nonetheless first compared the Michigan youthful offender statute against the federal juvenile delinquency law, the FJDA, before applying the federal immigration law, IIRIRA, in order to make this determination.

D. Individualized Determination Versus Comparison of Statutes

The final marker that shows the difference in deference is the individualized or wholesale treatment that immigration authorities give to cases involving state youth-adult offense findings.

In immigration cases reviewing convictions imposed on minors, federal authorities defer to the state by fully accepting the state's individualized decision to impose an adult conviction on the minor. The BIA and federal courts do not examine the underlying state statutes for consistency with federal principles.[137]

On the other hand, in immigration cases involving youthful offender dispositions, the BIA and federal courts analyze the state youthful offender statute against the FJDA first. The actual way that state authorities handled specific cases is of secondary concern. For example, in the underlying state case in *Devison*, a state court entered a conviction, but immediately and permanently substituted the conviction with a youthful offender status in accordance with the New York youthful offender statute.[138] The young noncitizen was placed on probation, but later violated his probation and served one year in prison.[139] Regardless of the fact that the youthful offender violated probation and served time in adult prison, the BIA still found that the noncitizen had a juvenile delinquency adjudication because the statute gave a permanent youthful offender status to its beneficiaries.[140] Meanwhile, there was no evidence that the youthful offender in *Uritsky* had a state conviction entered against him, or violated his probation.[141] Nevertheless, because the Michigan youthful offender statute was materially different than the FJDA, the individual actions of the state court as to this youthful offender did not matter. The BIA and federal courts have made it clear that regardless of the actual facts, the state youthful offender statute's similarity to the federal standard, the FJDA, is dispositive. While in some youthful offender cases, it would be inconsequential if the BIA and federal courts examined the individual facts of the case or the statute,[142] the BIA and federal courts have still made it clear that they must first defer to federal authorities via the FJDA.

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136. *Uritsky*, 399 F.3d at 735.

137. *See, e.g.*, Lecky v. Holder, 723 F.3d 1 (1st Cir. 2013); Rangel-Zuazo v. Holder, 678 F.3d 967 (9th Cir. 2012); Singh v. U.S. Att'y Gen., 561 F.3d 1275 (11th Cir. 2009);Savchuck v. Mukasey, 518 F.3d 119 (2d Cir. 2008); Vargas-Hernandez v. Gonzales, 497 F.3d 919 (9th Cir. 2007);Vieira Garcia v. INS, 239 F.3d 409, 414 (1st Cir. 2001); Morasch v. INS, 363 F.2d 30 (9th Cir. 1966); Letter from Crystal Souza, *supra* note 71.

138. Devison-Charles, 22 I. & N. Dec. 1362, 1366–67 (B.I.A. 2000).

139. *Id.* at 1373.

140. *Id.*

141. *Uritsky*, 399 F.3d at 728–731.

142. *See, e.g.*, DungPhan v. Holder, 722 F. Supp. 2d 659, 660, 664 (E.D. Va. 2010) (finding that the District of Columbia's Youth Rehabilitation Act (YRA) gave courts discretion to set aside the conviction after the imposition of an adult sentence and partial completion of the probation sentence under the YRA).

The difference in deference to state and federal authorities in these state youth-adult offense findings is apparent. The question of whether it is justified will be addressed next.

V. UNJUSTIFIED DEFERENCE

There are two arguments that warrant a closer examination to determine if there is another principle at play that independently impacts the level of deference that the BIA and federal courts apply. First, since youthful offender statutes resemble state rehabilitative programs that were targeted in IIRIRA, such as expungements and deferred adjudications, it may be reasonable that the BIA and federal courts are more suspicious of youthful offender findings and choose to defer to federal authorities over state authorities. Second, since youthful offender programs, as a special creature of state law, occupy a space between juvenile delinquency and typical adult criminal law, it is possible that the BIA and federal courts choose to defer more to federal authorities in order to accurately label these findings for immigration purposes. Neither reason holds sufficient weight.

First, one may argue that the BIA and federal courts may hesitate to defer to state authorities in youthful offender cases because they resemble rehabilitative statutes, such as expungement and deferred adjudication statutes that were rendered ineffective in immigration proceedings after IIRIRA. After Congress created an expanded definition of conviction in IIRIRA, the BIA and federal courts found that a state conviction still remained for immigration purposes regardless of whether the conviction was expunged or judgment was deferred.[143] Youthful offender programs, in many ways, resemble state expungement statutes and deferred adjudication programs because they generally offer a more lenient and rehabilitative-focused outcome than those in the regular adult criminal population. For example, the New York youthful offender program directs a state judge to immediately vacate a conviction for youthful offenders.[144] The youthful offender program from D.C. enables a judge in criminal court to suspend a prison sentence, order probation, and eventually set aside a conviction if all terms of probation are fulfilled.[145] Under the Michigan youthful offender statute, courts must dismiss the proceedings and not enter a judgment of conviction against youthful offenders who successfully serve their probationary sentence. However, the statute also gives courts the discretion to revoke the youthful offender status and enter a guilty finding.[146]

This argument, however, does not fully account for the difference in deference. If the main concern were to avoid effectuating state rehabilitative programs, then it is arguable that all youthful offender statutes, including the New York statute, should be viewed as conferring convictions for immigration purposes.

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143. Roldan-Santoyo, 22 I. & N. Dec. 512, 521 (B.I.A. 1999), *rev'd on other grounds*, Lujan-Armendariz v. INS, 222 F.3d 728 (9th Cir. 2000); Cade, *supra* note 38, at 373–78.

144. N.Y. CRIM. PROC. LAW § 720.20(3) (McKinney 1980); *see Devison-Charles*, 22 I. & N. Dec. at 1366–67.

145. D.C. CODE §§ 24-903(a)(1) to -906(e) (2014); *see* Dung Phan v. Holder, 722 F. Supp. 2d 659, 663 (E.D. Va. 2010) *aff'd*, 667 F.3d 448 (4th Cir. 2012).

146. MICH. COMP. LAWS §§ 762.11, .12, .14(1) (2015); *see* Uritsky v. Gonzales, 399 F.3d 728, 730 (6th Cir. 2005).

Even though the New York statute allows a judge to vacate a conviction immediately and enter a permanent status of youthful offender, the fact remains that a state conviction still initially is entered.[147] Furthermore, the BIA and federal courts could just apply IIRIRA, the clear federal standard applicable in immigration proceedings, to ascertain whether these youthful offender dispositions meet the two definitional requirements of a conviction. Instead, they compare the youthful offender statute against the FJDA—it is at precisely this analytical stage that the difference in deference to state authorities versus federal authorities is most apparent.[148] As explained above, the BIA and federal courts first compare state youthful offender statutes against the FJDA and underscore that a federal standard applies to determine whether an offense is a juvenile delinquency act or crime.[149] The same comparison or reasoning is missing in immigration cases of convictions imposed on minors.

Next, some may argue that a difference in deference is warranted because youthful offender programs are specially created by state law and exist in the intermediate realm between juvenile and adult offenders. Deference to federal authorities, therefore, is required in order to figure out whether these findings are convictions or juvenile delinquency acts for immigration purposes. This reasoning also fails because of a significant inconsistency. These same arguments apply to convictions imposed on minors, but instead of deferring to federal authorities, the BIA and federal courts defer to state authorities. In all 50 states and the District of Columbia, transfer laws dictate how minors can be transferred to adult court.[150] And similar to youthful offenders in many ways, these minors with adult convictions also occupy an intermediate space between juvenile and adult offenders. In some states, minors do not know whether they will be viewed as a juvenile or adult until the sentencing occurs.[151] Also, minors with adult convictions may be treated differently than typical adult offenders—they may receive blended sentences, or they may be held in the custody of a juvenile facility.[152] However, rather than applying the FJDA to determine the nature of these proceedings for immigration purposes, the BIA and federal courts unquestionably accept the state court's judgment of a conviction.

As the difference in deference cannot be explained by another independent, rational principle, the next section of the Article will discuss how this inconsistency should be fixed.

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147. N.Y. CRIM. PROC. LAW § 720.20 (McKinney 1980).

148. *See supra* Part IV.

149. *Uritsky*, 399 F.3d at 735; Devison-Charles, 22 I. & N. Dec. at 1366.

150. Sarah Raymond, Comment, *From Playpens to Prisons: What the Gang Violence and Juvenile Crime Prevention Act of 1998 Does to California's Juvenile Justice System and Reasons to Repeal It*, 30 GOLDEN GATE U. L. REV. 233, 251 n.164 (2000).

151. *See, e.g.*, Amanda L. Thatcher, Note, State v. Rudy B.*: Denying Youthful Offenders the Benefit of Apprendi's Bright-Line Rule Before Adult Sentencing*, 43 N.M. L. REV. 317, 325 (2013) (describing that there are three types of juvenile offenders under New York law, and that those charged as a youthful offender will be tried under the general adult criminal procedure, but may be sentenced as an adult or juvenile according to the judge's discretion).

152. *See* PATRICK GRIFFIN, NAT'L CTR. FOR JUVENILE JUSTICE, DIFFERENT FROM ADULTS: AN UPDATED ANALYSIS OF JUVENILE TRANSFER AND BLENDED SENTENCING LAWS, WITH RECOMMENDATIONS FOR REFORM 5 (2008), http://www.modelsforchange.net/publications/181 (follow the link and then select "download").

VI. DEFERENCE: TO WHOM AND HOW

The task of fixing deference involves weighing the various state and federal interests that are implicated for noncitizen youth in the juvenile delinquency and criminal systems. In addition to factoring in the traditional state interest in preserving its state police power, and the federal government's interest in maintaining its supremacy over immigration and true uniformity, one must also take into account both the state and federal government's interests toward youth: the state's parens patriae power and Congress's expressed views on youth in the FJDA.

Elevating deference to the federal government over the state would uphold the interest of federal supremacy over immigration without significantly harming the state's exercise of its police power. It would also ensure that federal interests over youth are fulfilled before federal immigration consequences are imposed without undercutting the state's exercise of its parens patriae power. Lastly, it would further the important goal of uniformity in immigration cases.

A. Deference Should Properly Account for State Police Power and Federal Supremacy Over Immigration

The discussion on immigration federalism in crimmigration issues has often centered on balancing the state police power with the federal plenary power over immigration.[153] Here, the "traditional divide" between state dominance of criminal matters and federal government's plenary power over immigration has broken down,[154] and the federal government's dependency on the state in immigration matters is clearly evident in the areas where the state police power and federal immigration power overlap.[155] State governments "have always been the primary enactors and enforcers of criminal law" and the "primary players in criminal law,"[156] and the federal government relies heavily "on state criminal procedures that identify, prosecute, and sentence noncitizens" in order to find noncitizens who are deportable, inadmissible, or should reap other immigration consequences.[157] The federal government's heavy dependence on the state's police power to find such noncitizens

153. *See* Padilla v. Kentucky, 559 U.S. 356, 363–64.

154. *See, e.g.*, Stumpf, *The Crimmigration* Crisis, *supra* note 8, at 388–89.

155. *See* Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 603–04 (2013).

156. Stumpf, *States of Confusion, supra* note 10, at 1593.

157. Cade, *supra* note 38, at 359; *see* Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 91–92 (2013); Stumpf, *States of Confusion*, *supra* note 10, at 1593.

is apparent from the time of arrest[158] to the final judgment of a criminal case in state court.[159]

In typical adult crimmigration cases, immigration officials and the federal courts unquestionably accept the judgment of state criminal courts[160] unless IIRIRA prohibits it, such as in cases of convictions that were expunged or vacated for rehabilitative reasons.[161] In many ways, it is fitting that state criminal courts have been called "de facto" immigration courts. Under the current system, state prosecutors have the ability to charge noncitizens with offenses that almost guarantee that immigration consequences will result,[162] and state judges can impose sentences that will inevitably trigger or purposefully avoid immigration removal proceedings.[163] Recent events continue to confirm that state and local officials are aware of this immense power. For example, in response to President Trump's immigration policies, the Baltimore's State Attorney's Office has directed its prosecutors to carefully consider immigration consequences before charging noncitizens without lawful status with minor, non-violent offenses.[164] In numerous cases, prosecutors, defense attorneys, and judges have agreed to convict defendants of lesser offenses or to impose shorter sentences in order for them to avoid deportation.[165]

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158. The recent attention on sanctuary and restriction states reveals the significant role that state and local officials have in identifying and transferring noncitizens without status to federal immigration authorities. *See, e.g.*, Manny Fernandez & David Montgomery, *With 'Sanctuary Cities' Ban, Texas Pushes Further Right*," N.Y. TIMES (May 9, 2017), https://www.nytimes.com/2017/05/09/us/texas-sanctuary-cities-immigration.html (reporting that the state of Texas has increased its participation in the enforcement of federal immigration laws by outlawing sanctuary cities, threatening law enforcement officials with jail time and removal if they do not cooperate with immigration authorities, and allowing police officers to inquire about the immigration status of any person who has been arrested or detained); Madison Park, *In a Trump-Defying Move, California's Senate Passes Sanctuary State Bill*, CNN (Apr. 4, 2017, 2:35 AM), http://www.cnn.com/2017/04/04/politics/california-sanctuary-state-bill-sb-54/ (stating that the California Senate passed a bill that would make California the first "sanctuary state," by limiting state and law enforcement officials from cooperating with federal immigration officials); Jennifer Medina and Jess Bidgood, *California Moves to Become 'Sanctuary State,' and Others Look to Follow*, N.Y. TIMES (Apr. 10, 2017), https://www.nytimes.com/2017/04/10/us/sanctuary-states-immigration.html (noting that other states, such as Illinois, New York, and Nevada, have introduced similar legislation as California to become sanctuary states).

159. *See* Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751 (2013).

160. *See* Herrera-Inirio v. INS, 208 F.3d 299, 306–07 (1st Cir. 2000).

161. *See* Moore, *supra* note 8, at 680–92 (discussing past and current treatment of state post-conviction rulings, and noting the uniqueness of the Fifth Circuit to not give effect to vacated convictions even for an underlying procedural or substantive error, unlike sister courts).

162. *See* Stephen Lee, *De Facto Immigration Courts*, 101 CAL. L. REV. 553, 556 (2013).

163. *See* Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1131 (2002).

164. *See* Justin Fenton, *Baltimore Prosecutors Told to Consider Consequences for Prosecuting Illegal Immigrants for Minor Crimes*, BALT. SUN (Apr. 28, 2017), http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-states-attorney-immigrants-20170428-story.html.

165. *See, e.g.*, Jack Encarnacao, *Suspect in Doctors' Slayings Avoided Deportation with Plea Deal for Earlier Bank Heists*, BOS. HERALD (May 10, 2017), http://www.bostonherald.com/news/local_coverage/2017/05/suspect_in_doctors_slayings_avoided_deportation_with_plea_deal_for; *see also* Chris Crowley, *Calling for Changes to State Attorney's Office*, USA TODAY (Apr. 26, 2017), https://www.usatoday.com/story/opinion/2017/04/26/calling-changes-state-attorneys-office/100931588/

Since federal immigration authorities have placed so much deference to and reliance on the state's exercise of its police power with respect to adult noncitizens, there is a strong argument that this should continue to apply for noncitizen youth. Under this rationale, if states choose to treat noncitizen youth as adults or youthful offenders, then federal immigration authorities should respect those findings in their original form. Such authorities should judge those findings solely under IIRIRA, the federal immigration law, without any interference from other federal non-immigration statutes or policies, such as the FJDA.

At the same time, the principle that the federal government has supremacy over immigration has previously justified the application of a federal non-immigration law, like the FJDA, to evaluate youth-adult offense findings in immigration law, and would continue to do so. The longstanding principle that the federal government has supremacy over immigration matters is strongly protected by the Constitution's Foreign Affairs, Naturalization, and Foreign Commerce Clauses, [166] as well as "extraconstitutional theories of inherent national sovereignty,"[167] even if in practice the expression of this power is much more nuanced.[168] As one commentator observed, "Probably no principle in immigration law is more firmly established, or of greater antiquity, than the plenary power of the federal government to regulate immigration."[169] Time and time again, the Supreme Court has protected the federal government's "preeminent role" to regulate immigration issues.[170] In 1875, the Court ruled in *Chy Lung v. Freeman*[171] that the power to regulate the admission of immigrants belonged "solely to the national government."[172] More recently in *Arizona v. United States*,[173] the Court reiterated that the federal government "has broad, undoubted power over the subject of immigration and the status of aliens."[174]

Federal supremacy is protected by legal doctrines like the plenary power doctrine, which grants "extraordinary deference" to federal executive and legislative acts in the immigration realm,[175] and immigration preemption, which invalidates state and local laws that seek to directly regulate immigration, laws that intrude or

(providing specific examples of reduced sentences for criminals who may face immigration consequences).

166. Traditionally, three Constitutional clauses that grant Congress the authority "to regulate interstate commerce, to establish 'an uniform Rule of Naturalization,' and to conduct foreign affairs" support federal authority over immigration matters. *See* Chin & Miller, *supra* note 10, at 264 (citing U.S. CONST. art. I, § 8, cl. 3 (Foreign Commerce Clause); *id.* art. I, § 8, cl. 4 (Naturalization Clause)).

167. Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 532 (2001).

168. *See, e.g.*, Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201, 205 (1994) (noting the "slow erosion of the plenary power doctrine" as evidenced by judicial review of immigration cases).

169. Schuck, *supra* note 7, at 57.

170. Toll v. Moreno, 458 U.S. 1, 10 (1982).

171. 92 U.S. 275 (1875).

172. *See id.* at 280 (striking down California statute that required bond from certain types of immigrants).

173. 567 U.S. 387 (2012).

174. *Id*. at 394.

175. *See* Abrams, *supra* note 155, at 602–03.

are contrary to federal immigration law, or laws that causes conflict so as to undermine Congress's full purposes and objectives in immigration matters.[176] With respect to the issue of excluding or expelling noncitizens, as addressed in this Article, the federal government's plenary power is firmly established.[177]

Furthermore, even though the involvement of the state police power is necessary in the enforcement of immigration law, federal laws ultimately dictate how state police power is given effect for immigration issues. The immigration consequences of a state criminal offense are always judged by a federal standard. Federal law defines what a "conviction" is for immigration purposes[178] and dictates the categories of crimes that affect immigration rights,[179] such as the requirements for a state offense to qualify as an aggravated felony.[180] Even when a federal statutory definition for a type of offense is not defined, such as a crime involving moral turpitude, federal standards created by federal agencies or federal courts are expected to fill out the details.[181] Thus, when it comes to determining immigration consequences, federal authorities are willing to cull through states' judgments and orders to determine which ones should carry immigration consequences. And in order to avoid immigration consequences, state authorities are the ones that have to change the nature of their state criminal proceedings within the confines of federal law.

Immigration statutes do not expressly integrate federal non-immigration statutes or policies regarding youth, but the BIA and federal courts have nevertheless integrated such statutes into immigration proceedings. They justify such action by appealing to the principle of federal supremacy and plenary power over immigration. In *Devison*, the BIA invoked the FJDA to evaluate youthful offender statute because the BIA had previously "held that the standards established by Congress, as embodied in the FJDA, govern whether an offense is to be considered an act of delinquency or a crime."[182] It also ruled that it would "continue to apply a federal standard, analyzing state juvenile or youthful offender proceedings against the provisions of the FJDA."[183] Also, in immigration cases that involve foreign youth offense findings, the BIA explained that "Congress manifested its view as to conduct constituting acts of juvenile delinquency with the enactment of the [FJDA]," and that "[c]onsidering Congress' plenary power to legislate with respect to the classes of aliens that may be admitted to the United States . . . we believe it appropriate to look to the standards fashioned by Congress, embodied in the FJDA, to determine whether

176. *See id.* at 606–09; *see also* Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before Sb 1070*, 58 UCLA L. REV. 1749, 1761 (2011) (indicating that there are three different preemption tests that the U.S. Supreme Court may use to invalidate state or local immigration laws).

177. *See* Cox, *supra* note 2, at 374 (noting that plenary power "insulates" federal immigration law from constitutional challenges).

178. 8 U.S.C. § 1101(a)(48)(A) (2012).

179. *See* 8 U.S.C. § 1227(a)(2)(A) (2012) (listing deportable offenses).

180. *See* 8 U.S.C. § 1101(a)(43) (defining aggravated felony); *see also* 8 U.S.C. § 1227(a)(2)(A)(iii) (stating that aggravated felony is deportable).

181. *See* Hamdan v. INS, 98 F.3d 183, 185 (5th Cir. 1996); *see also* Cabral v. INS, 15 F.3d 193, 195 (1st Cir. 1994).

182. Devison-Charles, 22 I. & N. Dec. 1362, 1366 (B.I.A. 2000).

183. *Id.* at 1371.

a given act is to be considered a delinquency or a crime by United States standards."[184] Furthermore, while the FYCA was in effect, the BIA and several federal courts integrated the set-aside provision of the FYCA to extend the expungement of convictions for immigration purposes and terminate deportation proceedings.[185] Thus, the BIA could continue to appeal to the principle of federal supremacy over immigration in order to apply the FJDA or some other federal standard in all state youth-adult offense immigration cases.

Furthermore, it is questionable whether the application of the FJDA or other youth federal policies in order to determine the nature of state youth-adult offense findings for immigration purposes would materially undermine state police powers. Unlike in other federal-state conflicts in immigration law, such as state laws that make it a state crime to violate federal immigration laws that are invalidated through preemption principles,[186] the application of the FJDA or another potential federal standard would not invalidate state statutes or judgments. State laws regarding transfer of youth to adult court or youthful offender statutes would still remain on the books and be fully enforced in state courts. Federal immigration action would neither eradicate state judgments nor affect the state's ability to impose its own consequences for a state youth-adult offense. The nature of the offense would change solely for immigration purposes. Furthermore, the state offense finding would still exist in the immigration realm, even if it were altered into a juvenile delinquency act for immigration purposes due to the FJDA or a prospective federal standard. A juvenile delinquency finding could still lead to immigration consequences, albeit in a more limited manner, such as affecting citizenship applications or discretionary requests for relief to cancel any future removal proceedings.[187] Lastly, depending on how the FJDA or another federal standard is applied in immigration cases, state action taken in individual cases may have even a greater input than it presently does under the current jurisprudence. Thus, integrating the FJDA or another federal standard into immigration cases involving state youth-adult offense findings would be consistent with the principle of federal supremacy over immigration, and would avoid severely undermining the state's exercise of its police power.

B. Deference Should Properly Balance State and Federal Interests Toward Youth

In addition to the traditional balancing of the federal government's plenary power and supremacy over immigration with the state's police power, deference in youth crimmigration cases must also balance the state and federal interests toward youth as both governments have expressed and implemented policies toward this population.

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184. Ramirez-Rivero, 18 I. & N. Dec. 135, 137 (B.I.A. 1981).

185. *See* Mestre Morera v. INS, 462 F.2d 1030, 1031 (1st Cir. 1972); *see also* Berker, 15 I. & N. Dec. 725, 725 (B.I.A. 1976); Zingis, 14 I. & N. Dec. 621, 624 (B.I.A. 1974); Nagy, 12 I. & N. Dec. 623, 627 (B.I.A. 1968).

186. *See, e.g.*, Arizona v. United States, 567 U.S. 387, 416 (2012) (striking down parts of Arizona's S.B. 1070 law that made it a state misdemeanor for a noncitizen to not fulfill federal alien-registration requirements, or to apply, solicit, or perform work).

187. *See, e.g.*, Wallace v. Gonzales, 463 F.3d 135, 140 (2d Cir. 2006) (explaining that despite the youthful offender status, the court could not "second-guess" the BIA's determination).

Armed with the parens patriae power, states traditionally have been tasked with overseeing the welfare of youth.[188] The state parens patriae doctrine has had a direct impact on the development of juvenile courts[189] and, to this day, is invoked when juvenile courts exercise jurisdiction over those in the juvenile delinquency system.[190]

The federal government recognizes the state's primary role in overseeing youth in both non-immigration and immigration realms. For example, the FJDA itself "strongly defers to state jurisdiction"[191] and narrowly prescribes the few instances when a federal court should take jurisdiction over an offense committed by a juvenile. The FJDA expressly states that a federal district court should not assume jurisdiction over a juvenile offense unless the Attorney General certifies to the district court, after investigation, that a state court does not have or refuses jurisdiction, that the state court does not have adequate programs and services, or that the offense fits into a narrow class offenses, such as a felony crime of violence, and that "there is substantial [f]ederal interest in the case or offense."[192] This certification process was created "to ensure that only where jurisdiction existed nowhere but in the federal courts or where the particular state did not have available programs and services adequate for the needs of juveniles were the federal courts to intrude in a juvenile case."[193] Thus, unless there are specific reasons for federal jurisdiction, federal authorities generally defer to state authorities to handle juvenile offenses.

The federal government's acknowledgement of this unique and traditional state role is also seen in immigration regulations, such as the award of SIJS status to noncitizens in state guardianship or juvenile delinquency proceedings. Undocumented noncitizen juveniles "for whom the state has become a guardian already" [194] may obtain eligibility for SIJS only through state courts.[195] While this status is a federal immigration benefit, state juvenile delinquency courts, in addition to other state courts that oversee the welfare of juveniles, are exclusively tasked with making the initial eligibility determination under state law that the juvenile has been abused, neglected, or abandoned and that reunification with one or both of the immigrant's parents is not viable as a result.[196] Only with this initial eligibility finding are noncitizen juveniles able to apply for SIJS, which allows them to remain

188. *See* Weithorn, *supra* note 11, at 1402–03; *see also* Siliciano, *supra* note 11, at 1221.

189. *See* Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1192–93 (1970).

190. *See* Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 124 (2010) (noting that children in the juvenile justice system are held under the parens patriae doctrine); *see also* Thomas H. Koenig & Michael L. Rustad, *Reconceptualizing the Bp Oil Spill as Parens Patriae Products Liability*, 49 HOUS. L. REV. 291, 310 (2012) (indicating that some states have enumerated their parens patriae powers).

191. Addie C. Rolnick, *Recentering Tribal Criminal Jurisdiction*, 63 UCLA L. REV. 1638, 1680 (2016).

192. 18 U.S.C. § 5032 (2012).

193. United States v. Sechrist, 640 F.2d 81, 84 (7th Cir. 1981).

194. Theo Liebmann, *Family Court and the Unique Needs of Children and Families Who Lack Immigration Status*, 40 COLUM. J.L. & SOC. PROBS. 583, 588 (2007).

195. *See* 8 U.S.C. § 1101(a)(27)(J) (2012); *see also* 8 C.F.R. § 204.11 (2017).

196. 8 U.S.C. § 1101 (2012).

and work in the country lawfully and eventually apply for permanent residency and citizenship.

For these reasons, it is arguable that the state's decision to exercise this parens patriae power to treat minors in a rehabilitative-focused setting and to expose them to juvenile-appropriate consequences should be respected across all forums, including in immigration cases. Under the same reasoning, it is also reasonable that the state's decision to withhold this parens patriae power and adjudicate minors in the adult criminal system also should be carried into the immigration realm.

Federal interests over youth, however, cannot be ignored. The BIA has already acknowledged, although not consistently, that the FJDA reflects congressional policy toward youth offenses and should be used to evaluate youth-adult offense findings in certain immigration cases.[197] Furthermore, the text of the FJDA expressly yields to state jurisdiction primarily to promote the protection and rehabilitation of juveniles; the purpose was not intended to allow states to treat these juveniles as adults and impose adult-appropriate punishments. In fact, the purpose of the entire FJDA is to remove youth from the general criminal process, to prevent the stigma associated with the crime, and to encourage rehabilitation and treatment rather than criminal punishment.[198] The provisions regarding state jurisdiction were implemented to further this goal. As set forth in the official summary and analysis of the amendments to the FJDA in 1974, Congress stated that state jurisdiction was preferred due to the federal courts' inability to handle a large caseload of juvenile cases, which resulted in the transfer of minors from their communities for treatment.[199] By preferring state jurisdiction, Congress predicted that the "the harmful effects of this dislocation would be reduced."[200] If state youth-adult offense findings were viewed as convictions for immigration purposes, which would possibly trigger adult-worthy federal penalties in immigration when state judgments fail to comply with FJDA adult-transfer requirements, then such action would contravene the congressional intent and spirit behind state preference.

By first applying the FJDA or some other federal standard to evaluate all youth-adult offense findings in immigration cases, immigration officials would ensure implementation of federal objectives, including federal interests over youth and congressional purpose toward youth, are met before imposing adult-appropriate federal immigration consequences. At the same time, allowing state decisions to remain unchanged in immigration cases, as long as federal policies against youth are not violated, would ensure that the state parens patriae power is not unnecessarily undercut.

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197. *See* Devison-Charles, 22 I. & N. Dec. 1362, 1366 (B.I.A. 2000) ("[T]he standards established by Congress, as embodied in the FJDA, govern whether an offense is to be considered an act of delinquency or a crime."); Ramirez-Rivero, 18 I. & N. Dec. 135, 137–39 (B.I.A. 1981) ("Congress manifested its view as to conduct constituting acts of juvenile delinquency with the enactment of the [FJDA]. Considering Congress' plenary power to legislate with respect to the classes of aliens that may be admitted to the United States[,] . . . we believe it appropriate to look to the standards fashioned by Congress, embodied in the FJDA, to determine whether a given act is to be considered a delinquency or a crime by United States standards.").

198. *See* United States v. Angelo D., 88 F.3d 856, 858 (10th Cir. 1996); United States v. Bilbo, 19 F.3d 912, 915 (5th Cir. 1994); United States v. King, 482 F.2d 454, 456 (6th Cir. 1973).

199. 120 CONG. REC. 25162 (1974).

200. *Id.*

C. Deference Should Advance True Uniformity

Uniformity is another significant and longstanding goal in immigration policy that influences how immigration officials and courts decide cases. While an imperfect principle, uniformity also tips the scales into deferring first to federal authorities, and then to state authorities.

Immigration law is one of the three areas of laws in which the Constitution requires uniformity.[201] The uniformity requirement is derived from the Naturalization Clause in the Constitution, which mandates Congress "[t]o establish an uniform Rule of Naturalization."[202] Although there is no clear uniformity doctrine, it has been a consistent theme in Supreme Court rulings that has "preoccupie[d] the federal courts."[203] In 1875, the Supreme Court in *Henderson v. Mayor of N.Y.*[204] cited to the uniformity principle to strike down a state law that impacted arriving immigrants.[205] In its recent case in *Arizona v. United States*[206] the Court began its analysis by referencing the federal government's "constitutional power to 'establish an uniform Rule of Naturalization.'"[207] Uniformity ensures fairness[208] and is "crucial to the integrity" of the field of immigration."[209]

While important, uniformity as a principle has its weaknesses; it can be used to justify just about any legal principle or holding as long as it is applied uniformly. In immigration cases that involve both convictions imposed on minors and youthful offender dispositions, the BIA and courts ruled that the FJDA should or should not apply because of uniformity. For example, in a case analyzing a conviction imposed on a minor, the Ninth Circuit followed its sister courts and declined to apply the FJDA.[210] The court observed that its "conclusion also furthers the policy of uniformity in immigration cases, which we have recognized as important on several occasions."[211] Meanwhile, in *Devison*, the BIA alluded to the uniformity requirement in order to apply the FJDA to measure youthful offender statutes. It stated that "[t] he principal thrust of [past cases] – to faithfully apply the new statutory definition [of conviction in IIRIRA] in a manner that will be *consistent across state lines*—is consistent with our holding today. We *continue to apply a federal standard*,

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201. The other two are taxation and bankruptcy. Iris Bennett, *The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions*, 74 N.Y.U. L. REV. 1696, 1704 (1999) (citing U.S. CONST. art. I, § 8, cl. 1 (Taxation Clause); *id.* art. I, § 8, cl. 4 (Bankruptcy Clause)).

202. U.S. CONST. art. I, § 8, cl. 4.

203. Bennett, *supra* note 201, at 1710–11; Cristina M. Rodríguez, *Uniformity and Integrity in Immigration Law: Lessons from the Decisions of Justice (and Judge) Sotomayor*, 123 YALE L.J. FORUM 499, 501–02 (2014).

204. 92 U.S. 259, 273 (1875).

205. *See* Henderson v. Mayor of N.Y., 92 U.S. 259, 273 (1875) ("It is equally clear that the matter of these statutes may be, and ought to be, the subject of a uniform system or plan.").

206. 132 S. Ct. 2492 (2012).

207. *Id*. at 2498.

208. Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1733–36 (2011) (arguing that uniformity should lead to a categorical analysis of convictions for immigration purposes).

209. Rodríguez, *supra* note 203, at 501–02.

210. Rangel-Zuazo v. Holder, 678 F.3d 967, 969 (9th Cir. 2012).

211. *Id.*

analyzing state juvenile or youthful offender proceedings against the provisions of the FJDA."[212] Additionally, in foreign offense cases, the BIA justified its use of the FJDA because of the "desirability of a rule which provides national uniformity in the administration of a federal statute such as the Immigration and Nationality Act."[213]

Legal scholars have also observed the uniformity requirement's imperfection. Uniformity has been called a "siren song"[214] and described as "elusive."[215] "Perfect uniformity" is "simplistic, ahistorical, and ultimately impossible."[216] As there is no clear uniformity doctrine, courts have referred to uniformity in varying degrees. Some courts do not mention uniformity at all, some make cursory references, and others find it essential.[217] The attempts of Congress, courts, and immigration agencies to construe legal standards in the name of uniformity have often resulted in nonuniformity, as demonstrated by the immigration consequences of state convictions[218] or the effects of state post-conviction relief.[219]

Despite these weaknesses, immigration officials, and courts should still pursue uniformity because it is mandated by the Constitution, and would result in a fairer application of immigration laws. Applying the FJDA or another federal standard to evaluate all youth-adult offense findings would further the goal of uniformity in two ways. First, it would ensure that all state youth-adult offense findings are evaluated in the same way, regardless of whether the underlying state offense is a youthful offender finding or an adult conviction imposed on a minor. Second, there would be a consistent and uniform standard to evaluate the variety of state laws that govern when and how minors can be tried and punished as adults.

States impose different maximum age requirements for juveniles to participate in juvenile court proceedings, ranging from fifteen[220] to seventeen years old.[221] States also set their own procedures for transferring minors to adult proceedings; most states provide multiple options to expose minors to adult consequences.[222] Twenty-nine states have statutory exclusion statutes, based on an

212. Devison-Charles, 22 I. & N. Dec. 1362, 1371 (B.I.A. 2000) (emphasis added).

213. Ramirez-Rivero, 18 I. & N. Dec. 135, 137–38 (B.I.A. 1981).

214. Daniel Kanstroom, *Immigration Enforcement and State Post-Conviction Adjudications: Towards Nuanced Preemption and True Dialogical Federalism*, 70 U. MIAMI L. REV. 489, 490–92 (2016).

215. Rodríguez, *supra* note 203, at 503–04.

216. Kanstroom, *supra* note 214, at 490–91.

217. Bennett, *supra* note 201, at 1705–06.

218. Rodríguez, *supra* note 203, at 503–04.

219. Moore, *supra* note 8, at 686.

220. After New York recently raised its maximum age for juvenile court jurisdiction from 15 to 17 years old in 2017, North Carolina is currently the only state that has a maximum age of 15 years old, and is attempting to raise the maximum age to 17 years old. Joe Gamm, *N.C. Looks Again at Raising the Juvenile Justice Age*, NEWS & REC., (Mar. 5, 2017), http://www.greensboro.com/news/crime/n-c-looks-again-at-raising-the-juvenile-justice-age/article_3a065219-f4f7-53eb-8824-0d4d50eeef76.html.

221. *Upper and Lower Age of Juvenile Court Delinquency and Status Offense Jurisdiction,* 2016, OFF. OF JUV. JUST. AND DELINQ. PREVENTION, https://www.ojjdp.gov/ojstatbb/structure_process/qa04102.asp?qaDate=2016 (last visited Mar. 2, 2018).

222. *Provisions for Imposing Adult Sanctions, 2015*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION, https://www.ojjdp.gov/ojstatbb/structure_process/qa04115.asp?qaDate=2015 (last visited Mar. 2, 2018). The 1980s "tough-on-juvenile-crime" attitude in numerous states led to laws that made it easier for minors to be tried and sentenced as adults. *See* Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUVENILE JUSTICE BULLETIN, June 2010, https://www.ncjrs.gov/pdffiles1/

analysis of 2015 statutes. These laws require that certain classes of minors, based on their age and or type of offense, be automatically transferred to adult court.[223] The District of Columbia and forty-six states provide a judicial waiver system that grants judges the authority to transfer minors to adult criminal court proceedings,[224] while fourteen states and the District of Columbia also provide for concurrent jurisdiction whereby prosecutors may directly file charges against minors in adult criminal court.[225] Reverse waiver is available in twenty-five states, which enables juveniles who are in criminal court to petition for their case to be transferred back to juvenile court.[226] Blended sentencing is available in twenty-eight states whereby a juvenile court can impose adult criminal penalties on minors, or an adult criminal court can impose sanctions that are available only to juveniles.[227] A majority of states also have "once an adult, always an adult" laws that mandate perpetual adult treatment for juveniles that have already been adjudicated as adults.[228] Lastly, states enforce different minimum ages for transfer to adult court.[229] Vermont and Wisconsin allow minors as young as ten years old to be transferred.[230] Kansas, Missouri, and Montana

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ojjdp/220595.pdf. Recently, in response to research that shows that adolescent brains do not fully develop until age 25, a handful of states have begun to reform their adult-transfer statutes to make transfer more difficult. *See* Roper v. Simmons, 543 U.S. 551, 569 (2005); SARAH ALICE BROWN, NAT'L CONFERENCE OF STATE LEGISLATURES, TRENDS IN JUVENILE JUSTICE STATE LEGISLATION 2011-2015 (2015), https://www.ncsl.org/documents/cj/Juvenile_Justice_Trends. pdf. Yet, progress has been slow, and states are far from reaching an agreement regarding the age or factors that should dictate when juveniles or young adults should face adult consequences for their actions. *See, e.g.*, Dan Trevas, *Court Reverses Itself — Approves State's Mandatory Bindover for Older Juveniles*, CT. NEWS OH., (May 25, 2017), http://www.courtnewsohio.gov/cases/2017/SCO/ 0525/150677.asp#.WV0B8RQXmhg; Johnathan Silver, *Outlook Uncertain for Bill to Raise Age of Criminal Responsibility,* TEX. TRIB., (Apr. 17, 2017), https://www.texastribune.org/ 2017/04/17/powerful-houston-lawmaker-isnt-sold-raise-age-so-it-just-might-not-hap/; *New York Approves Reforms to Keep Juvenile Offenders out of Adult Prisons,* NAT'L PUB. RADIO, (Apr. 10, 2017), http://www.npr.org/2017/04/10/523311453/new-york-approves-reforms-to-keep-juvenile-offenders-out-of-adult-prisons.

223. *Provisions for Imposing Adult Sanctions, 2015*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION, https://www.ojjdp.gov/ojstatbb/structure_process/qa04115.asp?qaDate=2015 (last visited Mar. 1, 2018) [hereinafter *Provisions for Imposing Adult Sanctions*]; *see also* Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NAT'L CONF. OF ST. LEGISLATURES, (Apr. 17, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx. California voters recently passed Proposition 57, which ends direct filing by prosecutors in criminal court against juveniles.

224. *Provisions for Imposing Adult Sanctions, 2015*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION, https://www.ojjdp.gov/ojstatbb/structure_process/qa04115.asp?qaDate=2015 (last visited Mar. 2, 2018).

225. *Judicial Waiver Offense and Minimum Age Criteria, 2015*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION, https://www.ojjdp.gov/ojstatbb/structure_process/qa04110.asp?qaDate=2015 (last visited Mar. 2, 2018); Teigen, *supra* note 223; *Provisions for Imposing Adult Sanctions*, *supra* note 223.

226. *Provisions for Imposing Adult Sanctions*, *supra* note 223; *Reverse Waiver*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION, (Dec. 1998) https://www.ojjdp.gov/pubs/tryingjuvasadult/transfer4.html.

227. *Provisions for Imposing Adult Sanctions*, *supra* note 223.

228. Teigen, *supra* note 223.

229. *Juveniles Tried as Adults*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION, https://www.ojjdp.gov/ojstatbb/structure_process/qa04105.asp?qaDate=2015&text= (last visited Mar. 2, 2018).

230. *Minimum Transfer Age Specified in Statute, 2015*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION, https://www.ojjdp.gov/ojstatbb/structure_process/qa04105.asp?qaDate=2015&text= (last visited Mar. 2, 2018) [hereinafter *Minimum Transfer Age Specified in Statute*].

enforce a minimum age of twelve.[231] Other states impose a minimum age of thirteen, fourteen, or fifteen, or have no restriction at all.[232]

By enforcing the FJDA or some other federal standard in all cases involving state youth-adult offense findings, the BIA would be able to better fulfill its intent of applying a uniform standard for all state youth-adult offense findings.

VII. SOLUTION

There are two potential solutions that would ensure that immigration officials place greater deference to federal authorities than state authorities when they evaluate youth-adult offense findings. Fixing deference would advance the federal interests toward noncitizen youth, supremacy over immigration, and uniformity in immigration without significantly undermining the state police and parens patriae powers. The first solution involves new federal legislation that sets forth guidelines for noncitizens who commit offenses while they are of minor or young-adult age. The second proposal involves integrating the existing FJDA into immigration cases.

A. Congressional Action

The most direct way to ensure that immigration officials meaningfully defer to federal authorities in the evaluation of state youth-adult offense findings is for Congress to pass legislation that expressly sets forth how these offenses should be handled in immigration cases. Currently, IIRIRA does not expressly define what constitutes a juvenile delinquency adjudication, and it does not prescribe whether youthful offender dispositions or convictions imposed on minors should be handled differently from typical adult convictions for immigration purposes. By passing such legislation, Congress would achieve two objectives: the legislation would promote federal interests for noncitizen youth who commit offenses, and the legislation would maintain the federal government's supremacy over immigration in juvenile and young adult offense matters. Furthermore, a legislative solution would ensure uniform treatment of noncitizen youth across state lines. Such a solution may even be designed to give certain weight to state decisions, thereby protecting the state's exercise of its police and parens patriae powers.

While creating such legislation, Congress should account for findings about youth development that are set forth in recent Supreme Court cases and neuroscience research. With these principles in mind, the legislation should allow for a different and more lenient characterization of offenses committed by those under eighteen years old, or those eighteen years or older whom states have found to be different than a standard adult due to their potential to reform or reduced culpability.

In the most recent sentencing cases pertaining to minors, the Supreme Court, relying on scientific research, made three key findings regarding the difference between juveniles under eighteen years old and adults. Specifically, the Court found that juveniles (1) are more immature and irresponsible; (2) are "more vulnerable or susceptible to negative influences and outside pressures, including peer

231. *Id.*
232. *Id.*

pressure"; and (3) have characters that are "not as well formed as [those] of adult[s]."[233] Neuroscientists have also found—contrary to prior beliefs that brain development stops in the teenage years—that an individual's brain does not fully mature and develop until one is approximately twenty-five years old.[234] Based on the neurological differences between minors and adults, the Supreme Court found that certain punishments against juveniles are unconstitutionally cruel and unusual under the Eighth Amendment: capital punishment,[235] life imprisonment without parole for a nonhomicide offense,[236] and mandatory life imprisonment without parole for a homicide offense.[237]

Immigration law should account for the concept that individuals with "diminished culpability and greater prospects for reform"[238] should be exposed to less severe consequences. Although the Supreme Court has repeatedly stated that deportation or removal is not punishment,[239] the severity of immigration consequences is often more burdensome than criminal punishment. Deportation, one of the most severe immigration consequences that flows from a criminal conviction, has been described as "a most serious" penalty,[240] and "a drastic measure"[241] that may result in "significant harms" to the deported and their family.[242] The Human Rights Watch organization views the current post-IIRIRA deportation process of lawful permanent residents as a human rights violation,[243] and for some, deportation is equivalent to a "death sentence."[244] With such serious consequences on the table,

233. Roper v. Simmons, 543 U.S. 551, 569–70 (2005); *see also* Miller v. Alabama, 567 U.S. 460 (2012) (same); J.D.B. v. North Carolina, 564 U.S. 261 (2011) (same).

234. *Brain Maturity Extends Well Beyond Teen Years*, NAT'L PUB. RADIO (Oct. 20, 2011), http://www.npr.org/templates/story/story.php?storyId=141164708; A. Rae Simpson, *Brain Changes, Mass. Inst. Tech.*, YOUNG ADULT DEV. PROJECT http://hrweb.mit.edu/worklife/youngadult/brain.html.

235. *Roper*, 543 U.S. at 569.

236. *See* Graham v. Florida, 560 U.S. 48 (2011).

237. *See* Miller v. Alabama, 567 U.S. 460 (2012).

238. *Id.* at 471 (quoting *Graham*, 560 U.S. at 68).

239. *See* Arizona v. United States, 132 S. Ct. 2492, 2499 (2012) ("Removal is a civil, not criminal, matter."); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) ("The order of deportation is not a punishment for crime.").

240. Bridges v. Wixon, 326 U.S. 135, 154 (1945).

241. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

242. Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394, 2405 (2013).

243. *Forced Apart (By the Numbers)*, HUMAN RTS. WATCH (April 15, 2009), https://www.hrw.org/report/2009/04/15/forced-apart-numbers/non-citizens-deported-mostly-nonviolent-offenses.

244. *See, e.g.*, Sarah Stillman, *When Deportation is a Death Sentence*, NEW YORKER (Jan. 15, 2018), https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence; Choe Sang-Hu, *Deportation a 'Death Sentence' to Adoptees After a Lifetime in the U.S.*, N.Y. TIMES (July 2, 2017), https://www.nytimes.com/2017/07/02/world/asia/south-korea-adoptions-phillip-clay-adam-crapser.html; Amanda Holpuch, *Iraqi Christians Targeted For Deportation Face 'Death Sentence' In Iraq, Lawyers Say*, GUARDIAN (June 15, 2017, 6:00 PM) https://www.theguardian.com/us-news/2017/jun/15/iraqi-christians-targeted-for-deportation; Erin N. Marcus, *Haiti: A Deportation Death Sentence?*, HUFFINGTON POST, http://www.huffingtonpost.com/erin-n-marcus-md/a-deportation-death-sente_1_b_825785.html (last visited July 11, 2017); Lauren Markoe, *Chaldean Deportations Are a 'Death Sentence.' Why Are Christian Americans Silent?* (June 16, 2017) AMERICA, THE JESUIT REV., https://www.americamagazine.org/faith/2017/06/16/chaldean-deportations-are-death-sentence-why-are-christian-americans-silent.

Congress should adopt the findings of the Supreme Court and apply them to immigration law. When noncitizens under eighteen years old commit offenses that trigger immigration consequences under IIRIRA, their offense should instead be labeled as a juvenile delinquency act for immigration purposes due to the noncitizen youth's "diminished culpability and greater prospects for reform."[245] Likewise, when states purposely refrain from imposing a standard adult conviction on youthful offenders, Congress should allow for the findings to be interpreted as juvenile delinquency adjudications instead of convictions. This policy is justified by the youth's increased prospects for rehabilitation and lessened culpability.

B. Integration of the FJDA in All Immigration Cases Involving Youth-Adult Offense Findings

Another solution is for immigration actors to integrate the FJDA into all cases involving youth-adult offense findings. There are three ways that the FJDA can be applied in these immigration cases, and all three options would advance the goals of uniformity and federal supremacy over immigration. However, the level of deference to federal authorities, the impact on noncitizen youth, and the amount of state input would vary with each option. The first option involves only enforcing the "status" requirement of the FJDA. The second option is to apply the FJDA in the manner it is applied in foreign youth offense cases. Lastly, the third option is to implement the FJDA as the floor, and requiring that states meet the minimum adult-transfer requirements in the FJDA before the offense is interpreted as a conviction for immigration purposes.

1. FJDA "Status" Requirement

The first solution is for immigration officials to extend the "status" requirement of the FJDA that is currently applied in state youthful offender cases into cases involving adult convictions imposed on minors. Currently, in immigration cases that evaluate youthful offender findings, the BIA and federal courts evaluate whether the state youthful offender statute gives its beneficiaries the irrevocable "status" of youthful offender as the FJDA gives its beneficiaries the "status" of a

245. Miller v. Alabama, 567 U.S. 460, 471 (2012) (quoting Graham v. Florida, 560 U.S. 48, 68 (2011)).

juvenile delinquent. Other elements of the FJDA, such as the age limitations,[246] the purpose of the statute,[247] or offense consequences,[248] are not deemed material.

This solution, however, would have a minimal effect. If immigration officials were to extend this "status" requirement to cases involving adult convictions imposed on minors, there would be a small change in the analysis and language of these cases. While immigration officials would take the extra step of introducing and applying the FJDA, there would be no practical difference in the outcome of the cases. Since states would never confer a "status" of juvenile to minors who were convicted as adults, these convictions would continue to be viewed as convictions for immigration purposes.

Implementing only the "status" requirement of the FJDA would result in limited deference to federal authorities since immigration officials would ignore several key provisions of the FJDA. The award of an irrevocable status of juvenile may indeed be the hallmark feature of the FJDA that distinguishes it from typical adult criminal statutes, but the status element cannot be separated from other provisions of the FJDA that specifically sets forth requirements for a juvenile to lose this default status. The FJDA represents Congress' whole intent regarding when juveniles should be treated as typical adult offenders, and when they should incur adult penalties—the status requirement alone is insufficient to fully effectuate congressional intent.

Depending on the type of state youth-adult offense finding, state input would be imbalanced. State youthful offender dispositions would only be interpreted as juvenile delinquency findings in the immigration realm if the youthful offender statute conferred an irrevocable and immediate status of youthful offender. Thus, even if there were clear language from state statutes or clear action from state authorities that youthful offender findings should not be viewed as a conviction,

246. For example, the age requirement of the FJDA is not strictly enforced. The New York youthful offender statute applies to those between thirteen and nineteen years old. N.Y. CRIM. PROC. LAW § 1.20(42) (West 2017); *id.* § 720.10(1). The maximum age of nineteen is one more than the maximum age requirement of the FJDA. Devison-Charles, 22 I. & N. Dec. 1362, 1368 (B.I.A. 2000). Regardless, New York youthful offender dispositions are still construed as juvenile delinquency acts in immigration cases. *Id.* The D.C. youthful offender statute applies to those aged eighteen to twenty-two years old, and the Michigan youthful offender statute applies to those aged seventeen to twenty years old. While these statutes have a greater maximum age requirement than the FJDA, courts underscored that they still referred to the same "age group" as the FJDA. Badewa v. Att'y Gen. of U.S., 252 F. App'x 473, 476–77 (3d Cir. 2007); Uritsky v. Gonzales, 399 F.3d 728, 734 (6th Cir. 2005). Yet, since these statutes do not confer a permanent status of youthful offender, they are viewed as materially different from the FJDA, thus resulting in these youthful offender findings being interpreted as convictions for immigration purposes. *Badewa*, 252 F. App'x at 477.

247. The Sixth Circuit acknowledged that the Michigan youthful offender statute, like the New York youthful offender statute, had a "similar underlying purpose" to the FJDA, but still found that because the Michigan statute did not confer a permanent status of youthful offender, its youthful offender dispositions were convictions for immigration purposes. *Uritsky*, 399 F.3d at 734.

248. For example, in *Uritsky*, there was no indication that the noncitizen youth violated the terms of his probation, had his youthful offender status revoked, or served time in prison. *Uritsky*, 399 F.3d at 735. Regardless, he was still considered convicted of a crime for immigration purposes because his youthful offender status could be revoked. *Id.* On the other hand, the young noncitizen in *Devison-Charles* was found to have a juvenile delinquency adjudication even though he violated his probation and served one year in prison, since his status as a youthful offender did not change. *Devison-Charles*, 22 I. & N. Dec. at 1373.

immigration officials would ignore the state's clear intent if the status requirement were not met. Meanwhile, for adult convictions imposed on minors, the original state decision would continue unchallenged into the immigration realm since these convictions inherently mean that state authorities never intended to confer the "status" of a juvenile offender to these noncitizen youth. Thus, under this option, deference to the federal government would be limited, and state input would be imbalanced depending on the type of state youth-adult offense finding.

2. Foreign Offense Method

A second option is for immigration authorities to apply the FJDA in state youth-adult offense cases in the way it is applied in foreign youth offense cases. In immigration cases involving foreign youth offense findings, immigration officials make two determinations. They determine if the noncitizens meet the age requirements of the FJDA when they committed the foreign offense, and they determine if their age and the nature of crime would make them eligible to transfer to adult court under the FJDA. If so, immigration officials examine how the foreign court actually treated the noncitizen's underlying case. For example, in *Ramirez-Rivero*[249] a noncitizen's foreign offense was automatically deemed a juvenile delinquency adjudication for immigration purposes because he was thirteen years old when he committed the foreign offense, and the FJDA in effect at the time of the BIA's decision barred the transfer to adult court of any minor under sixteen years old.[250]

For noncitizens who committed a foreign offense at an age that makes them eligible for transfer to adult court, then as directed by the FJDA, the nature of the offense is examined using the federal standard set forth in the United States Code. If an equivalent offense is not present, then the District of Columbia Code applies.[251] If the noncitizen is eligible to transfer to adult court under the FJDA, then he has to prove that the foreign court actually treated him as a juvenile and not an adult.[252] If the foreign court "adopts a procedure inherently like the adult procedure in the United States (especially including an adjudicated determination of guilt and a determinate sentence extending into one's adult life)," then the offense is deemed an adult conviction, even if another label were given.[253] This analysis examines the intent of the foreign government, as evidenced by the adjudication and sentence. As the BIA observed, "[t]here is a sharp distinction in American jurisprudence between

249. 18 I. & N. Dec. 135, 137–39 (B.I.A. 1981).

250. At the time of the decision in *Ramirez-Rivero*, 18 I. & N. Dec. 135, 138 (B.I.A. 1981), the FJDA barred any minor under sixteen years old from being tried as an adult. However, under the current version of FJDA, a juvenile who is at least fifteen years old (and in some circumstances, thirteen years old) for certain types of crimes may be transferred to adult court. 18 U.S.C. § 5032 (2012).

251. *See* De La Nues, 18 I. & N. Dec. 140, 142–45 (B.I.A. 1981) ("[In accordance with the FJDA, it was] necessary to look to the nature of his offenses, committed when he was 16 and 17 years of age, in order to determine whether either or both shall, by reason of the maximum punishment imposable, be considered an act of juvenile delinquency rather than a crime under United States standards.").

252. *Id.* at 143–44.

253. *Id.* at 144.

the effort to rehabilitate a youth offender in a juvenile delinquency proceeding from the fixing of criminal guilt and retributive punishment of adult offenders."[254]

If immigration officials were to adopt this solution, then there would be changes to both youthful-offender cases and cases of adult convictions imposed on minors. Regardless of the "youthful offender" or "adult conviction" label from state court, the BIA and federal courts would look at the actual age of the noncitizen at the time of offense. If the FJDA barred the transfer of the minor to adult court, then the offense would be viewed as a juvenile delinquency adjudication for immigration purposes. Specifically, under the FJDA, minors younger than fifteen years old who commit offenses other than crimes of violence or certain drug offenses cannot be transferred to adult court. Likewise, minors under thirteen cannot be transferred to adult court unless they commit certain specified crimes of violence or possess a firearm during the offense.[255] In discretionary cases where the minor would be eligible to transfer to adult court—such as offenses committed between sixteen and eighteen years old, or certain offenses committed before thirteen or fifteen years old—immigration officials would examine how the state actually treated the minor and whether there is evidence of the state's intent to rehabilitate the minor. If there were evidence of rehabilitative intent, such as in the case of some youthful offender programs, then the offense would be viewed as a juvenile delinquency adjudication. If there were no evidence of rehabilitative intent, then it would weigh in favor of viewing the offense as a conviction in the immigration realm.

Adopting this method would effectuate more provisions of the FJDA. Deference to federal authorities would be more substantial than the status-only method since more elements of the FJDA would be enforced in immigration cases. However, other aspects of the FJDA, such as the procedural requirements for transferring minors to adult proceedings, would continue to be overlooked.[256] Also, applying the FJDA in such a strict manner may emphasize aspects of the FJDA that immigration officials or federal authorities do not deem as significant. For example, the age restrictions of the FJDA would be strictly applied in state youth-adult offense cases just as they are in foreign offense cases. Under the FJDA, individuals may only be treated as a juvenile if they committed an offense before the age of eighteen and the case was initiated prior to turning twenty-one.[257] But, in youthful offender cases, the BIA and federal courts have found that individuals who committed offenses after eighteen years old could potentially have a juvenile delinquency adjudication for immigration purposes since these individuals are in the same "age group" as those covered by the FJDA.[258]

As for state interests, there would be a more balanced input from the state than the previously-discussed "status" solution; state action would be individually assessed in each case, regardless of a youthful offender finding or an adult conviction imposed on a minor. After the FJDA age and offense requirements are met for

254. *Id*.

255. 18 U.S.C. § 5032 (2012).

256. *See supra* Part VI.C.

257. 18 U.S.C. § 5031 (2012).

258. Badewa v. Att'y Gen. of U.S., 252 F. App'x 473, 476–77 (3d Cir. 2007); Uritsky v. Gonzales, 399 F.3d 728, 734 (6th Cir. 2005).

juvenile delinquency adjudications, immigration officials would then analyze whether the state sought to treat the noncitizen youth more like a juvenile, with rehabilitation as the main goal, or as an adult. However, this method may automatically restrict and hinder the state's exercise of its parens patriae power for individuals who do not meet the age or offense requirements in the FJDA. For example, the New York youthful offender statute would no longer confer a juvenile delinquency finding to youthful offenders who committed an offense over the age of eighteen, since the FJDA would not allow for it.

Applying the FJDA strictly in a straightforward manner may ensure uniformity in all youth-adult offense cases, and it may ensure that deference to federal authorities is more substantial. However, this method may be too restrictive and limiting. It would emphasize age requirements that the BIA has not yet strictly enforced, and would ignore the exercise of the state's parens patriae powers to those individuals who committed offenses after they turned eighteen years old or are otherwise excluded from the FJDA.

3. FJDA Adult-Transfer Requirements as the Floor

The last option is for the FJDA to set the "floor" for determining when a state youth-adult offense is viewed as a conviction for immigration purposes. Under this scheme, as long as state authorities do not violate the adult-transfer limitations set forth in the FJDA, then the original state finding (a conviction, or otherwise) would exist in its original form in the immigration realm. Otherwise, state youth-adult offense findings would be viewed as juvenile delinquency acts.

Generally, the FJDA provides three safeguards to protect minors from being transferred to adult criminal court by a government motion: age, type of offense, and a judicial transfer hearing. In very limited circumstances, the FJDA calls for the mandatory transfer of minors to adult court. Minors who have previously been found guilty of certain offenses, and who were over the age of sixteen when they committed a felony offense that involves physical force or substantial risk of physical force, or certain other offenses, are mandatorily transferred to adult court without a transfer hearing. [259] Otherwise, minors may be transferred to adult court on a government motion only if they have committed a certain type of offense, are above a specific age, and are subject to a court transfer hearing where they are represented by counsel.[260]

Under the FJDA, minors who committed offenses before they turned thirteen years old can never be transferred to adult proceedings.[261] This contrasts with several states, like Vermont, Wisconsin, Kansas, Missouri, and Montana, that allow minors as young as ten or twelve years old to be treated as adult offenders.[262] In twenty-five states, there is no minimum transfer age.[263] And under current immigration jurisprudence, these noncitizen minors who received adult convictions

259. 18 U.S.C. § 5032 (2012).

260. *Id.*

261. *Id.*

262. *Minimum Transfer Age Specified in Statute*, *supra* note 230.

263. *See id.* (evaluating statutes in 2015).

before they turned thirteen years old would still be viewed as adults with convictions for immigration purposes.

The FJDA also provides that minors may only be transferred to adult criminal court for certain offenses after a judicial transfer hearing where they are represented by counsel.[264] At the transfer hearing, a court must consider factors such as "the age and social background of the juvenile; the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the juvenile's present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's response to such efforts; the availability of programs designed to treat the juvenile's behavioral problems."[265] The court is also directed to consider the "nature of the offense, and "the extent to which the juvenile played a leadership role in an organization, or otherwise influenced other persons to take part in criminal activities, involving the use or distribution of controlled substances or firearms," which would "weigh in favor of a transfer to adult status."[266] Additionally, the FJDA protects minors who committed offenses at ages thirteen or fourteen from transfer unless they allegedly committed the most serious offenses. Specifically, minors who are thirteen years old or older and are alleged to have committed an offense after their thirteenth birthday may be transferred to adult court if they are alleged to have committed certain crimes of violence (such as certain assault offenses, murder, attempted murder or attempted manslaughter), or if they possessed a firearm during certain acts (such as robbery, burglary, bank robbery, aggravated sexual abuse).[267] Meanwhile, minors who allegedly committed offenses between ages fifteen and seventeen can only be transferred for these serious offenses as well as other specified offenses. In addition to the offenses listed for those thirteen years and older, minors who are fifteen years old or older, and are alleged to have committed an offense after their fifteenth birthday, may be transferred to adult court if they are alleged to have committed a felony that is a crime of violence or certain offenses that involve certain controlled substances, firearms, or ammunition.[268]

If immigration officials were to enforce the FJDA transfer-requirements as the floor, then state youth-adult offense findings would only be viewed as convictions for immigration purposes if the original state ruling does not violate age, offense, or court-transfer-hearing requirements of the FJDA. Otherwise, these state youth-adult rulings would be viewed as juvenile delinquencies in the immigration realm. If state authorities choose to go above and beyond the FJDA, and allow greater leniency for youth to obtain juvenile delinquencies or non-convictions in individual cases, then these findings would remain as juvenile delinquencies in the immigration realm.

Applying these FJDA adult-transfer provisions as the minimum requirements in immigration cases would ensure that the minimum federal protections set forth in the FJDA are applied to all noncitizen youth. Under this policy, there would be substantial and meaningful deference to congressional

264. *See* 18 U.S.C. § 5032 (2012).

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

policies regarding when minors may be exposed to federal adult immigration consequences for their offenses. Thus, incorporating the FDJA as the standard would advance federal supremacy over immigration and uniformity.

State youth-adult offense findings would be individually assessed under this method, regardless of the label of conviction or youthful offender finding. Immigration officials would examine each case specifically to determine whether the minimum age, offense, and court-led transfer-hearing requirements are met. They would not evaluate adjudications wholesale by whether the youthful offender statute confers a "status" of youthful offender. Minor-state convictions would remain as convictions as long as minimum FJDA adult-transfer requirements are met. Otherwise, the convictions would be interpreted as juvenile delinquencies solely for immigration purposes. States would not be hindered from enforcing their own penalties and sanctions for these offenses, but the exercise of their state police power would be limited in immigration cases since some convictions would not lead to immigration consequences. Meanwhile, the exercise of the state's parens patriae powers would be fully protected in the immigration realm, since a state decision to treat individuals as juveniles or other rehabilitative-focused programs would not be converted into convictions for immigration purposes.

This option may best effectuate and protect state and federal interests compared to the other two FJDA-related proposals, but it is a difficult solution to implement, especially in cases where minors received adult convictions. In these cases, immigration officials would have to comb through underlying state proceedings to ensure that the age, offense, and transfer-hearing requirements of the FJDA are met before viewing these convictions as convictions in the immigration realm. This process would take more time and analysis than the current process where such state convictions remain in their original form in immigration cases. This is especially problematic considering that the overloaded immigration dockets are already a well-documented issue.[269] Specifically, with respect to the transfer-hearing requirement, immigration officials would need to determine whether all of the FJDA guidelines or just some of them should be carried over into immigration cases. Immigration officials would need to decide whether it is sufficient for a state to have some type of transfer hearing, or whether state transfer hearings must follow the exact guidelines prescribed by the FJDA, such as the required presence of counsel for the minor and judicial consideration of multiple factors.[270] Under the FJDA, a court would consider the following factors to determine whether a minor should be tried as an adult: "the age and social background of the juvenile; the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the juvenile's present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's response to such efforts; the availability of programs designed to treat the juvenile's behavioral problems." Additionally, immigration officials would have to take into consideration the cases where the FJDA allows for mandatory transfer to adult court without a hearing. Minors who

269. *See, e.g.*, Emily Ryo, *Fostering Legal Cynicism Through Immigration Detention*, 90 S. CAL. L. REV. 999, 1007 & n.24, 1010 & n.46 (2017); Andrew R. Arthur, *The Massive Increase in the Immigration Court Backlog*, CTR. FOR IMMIGR. STUD. (July 24, 2017), https://cis.org/Report/Massive-Increase-Immigration-Court-Backlog.

270. *See* 18 U.S.C. 5032 (2012).

have previously been found guilty of certain offenses, minors who were over the age of sixteen when they committed a felony offense that involves physical force or substantial risk of physical force, or certain others offenses qualify for mandatory transfer.[271] For these reasons, the likelihood of applying the entire procedural requirements of the FJDA directly into immigration cases is low, and immigration officials first would need to determine which procedural protections of the FJDA must be fulfilled before treating such state offenses as convictions for immigration purposes.

CONCLUSION

The debate over how state and federal authorities should dictate and influence policies and enforcement in crimmigration matters is a well-seasoned one. It has, however, rarely focused on issues pertaining specifically to noncitizen youth in the crimmigration system. This Article focuses on one important issue facing this population—the interpretation of their state youth-adult offense finding for immigration purposes—and argues for a change to the inconsistent deference that judges and immigration officials give to state authorities or federal authorities to make this determination.

By weighing the traditional interests that are implicated in crimmigration issues (the state's police power, the federal government's supremacy over immigration, and interest in uniformity), as well as interests specific to noncitizen youth (the state's parens patriae power and federal policies toward youth), I recommend that immigration officials should initially defer to the federal government by incorporating the FJDA or another prospective federal standard to determine the nature of these youth-adult offense findings for immigration purposes. Immigration officials then should take state action into account when state authorities have clearly shown that they intended to not expose a noncitizen youth to a standard adult conviction. By implementing this change in deference, immigration officials will be able to advance the important goals of treating noncitizen youth in a uniform and fair manner across state lines, maintaining federal plenary power over immigration, and better respecting state and federal interests toward youth.

271. *Id.*