THE UNCONSTITUTIONALITY OF NONUNIFORM IMMIGRATION CONSEQUENCES OF "AGGRAVATED FELONY" CONVICTIONS

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In this Note, Iris Bennett analyzes the "aggravated felony" provision of the Immigration and Nationality Act, which requires the deportation of noncitizens convicted of a number of crimes under federal or state law. Bennett discusses the implications of the provision in light of the Constitution's Naturalization Clause, which requires a "uniform Rule." She argues that the aggravated felony provision, as amended in 1996 by the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act, results in nonuniform immigration consequences for state criminal convictions because of varying state standards and definitions. After surveying courts' treatment of the constitutional provisions for uniformity in immigration, taxation, and bankruptcy law, Bennett demonstrates that the jurisprudence of the uniformity requirement in immigration law is in need of further elaboration. She argues that the Naturalization Clause requires that the operation of immigration law not vary based on differences in state law and proposes a doctrinal model of constitutional uniformity for courts confronting this issue.

INTRODUCTION

Under our system of government, immigration law[1] has traditionally been recognized as a matter of national rather than state policy.

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[1] In this Note, "immigration law" refers to the law that pertains to immigrants specifically with respect to their immigration status (i.e., the set of rules governing the admission, naturalization, residence, and deportation of immigrants). See De Canas v. Bica, 424 U.S. 351, 355 (1976) (describing any immigration regulation as "essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain").

Scholars have distinguished such regulation from what they have called "alienage law"—laws directed at the rights and obligations of immigrants in other respects, such as their rights under generally applicable wage and hour laws, constitutional protections in criminal proceedings, and access to public benefits. See Mathews v. Diaz, 426 U.S. 67, 77 (1976) (distinguishing between laws directed at regulation of immigration per se and laws directed at status of immigrants in other respects); see also Linda S. Bosniak, Membership, Equality, and the Difference that Alienage Makes, 69 N.Y.U. L. Rev. 1047, 1060-62 (1994) (describing commentators' distinction between laws directed at immigration per se and

Congress, not state legislatures, determines the rules for who shall be admitted to this country, the conditions upon which they may remain, and whether and how they may be expelled.[2] Because immigration policy implicates interests of a national scope, such as the nature and shape of the national polity, authority over immigration is appropriately vested in the federal government. Moreover, this principle is rooted in the Constitution.[3]

Less often discussed but of equal importance is the concomitant principle, also based in the Constitution, that immigration law should be uniform throughout the nation. Indeed, the sole constitutional provision referring to matters of immigration law directs Congress to "establish an *uniform* Rule of Naturalization."[4] However, the

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laws directed at matters "outside" immigration, according to which aliens enjoy rights "largely indistinguishable from [those] afforded to citizens").

Another distinction is that "alienage law" cases focus on *state* government action directed at immigrants; most notably, those cases have developed a special branch of equal protection doctrine identifying legal permanent residents as a suspect class. See Graham v. Richardson, 403 U.S. 365, 372 (1971) (stating that "[a]liens as a class are a prime example of a 'discrete and insular' minority" and applying strict scrutiny review to state law denying welfare benefits to certain lawful permanent residents). This Note does not address the "alienage law" sphere, although there are compelling arguments for abandoning this legal fiction and applying protective legal principles from "alienage" caselaw to immigration law. See T. Alexander Aleinikoff, Federal Regulation of Aliens and the Constitution, 83 Am. J. Int'l L. 862, 869-70 (1989) (arguing against immigration/alienage law fiction); Bosniak, supra, at 1061-64 (same). Indeed, the Supreme Court has blurred the line where *federal* government action is concerned, albeit to the detriment of noncitizens. See *Mathews*, 426 U.S. at 81-84 (holding that restriction of Medicare benefits for legal permanent residents was exercise of Congress's "immigration law" power subject only to rational basis review).

[2] See Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948) (holding that states "can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens").

[3] There are several nonexclusive sources of Congress's power over immigration, including the Naturalization Clause, U.S. Const. art. I, § 8, cl. 4; the commerce power, U.S. Const. art. I, § 8, cl. 3; see, e.g., Chy Lung v. Freeman, 92 U.S. 275, 280 (1875) (citing Congress's exclusive power to regulate "commerce with foreign nations," including admission of citizens of foreign nations into country); Henderson v. Mayor of New York, 92 U.S. 259, 270 (1875) (citing Commerce Clause power); The Passenger Cases, 48 U.S. 283, 307-08 (1849) (citing Congress's exclusive power to regulate "commerce with foreign nations"); the war power, U.S. Const. art. I, § 8, cl. 11; see, e.g., Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) (citing war power); the foreign affairs power, recognized in caselaw although not specified explicitly in the Constitution, see, e.g., *Mathews*, 426 U.S. at 67 (citing "our relation with foreign powers"); and the inherent power of the sovereign to define the polity, recognized in caselaw as a structural aspect of our governmental system, see Laurence H. Tribe, American Constitutional Law § 5-16, at 358 (2d ed. 1988) (stating that Congress's power to regulate admission, stay, and naturalization of aliens is "an inherent incident of national sovereignty, committed exclusively to national, as opposed to state or local control"). See generally Toll v. Moreno, 458 U.S. 1, 10 (1982) (discussing various sources of Congress's immigration power).

[4] U.S. Const. art. I, § 8, cl. 4 (emphasis added). Although the Naturalization Clause explicitly refers to naturalization only and not other areas of immigration law, the courts

Supreme Court has never directly construed the meaning of the "uniform Rule" requirement,[5] although it has examined uniformity requirements in the Taxation and Bankruptcy Clauses and set some limits on nonuniformity resulting from the operation of state law in those areas.[6]

The Immigration and Nationality Act (INA) provides that noncitizens[7] legally residing[8] in the United States may be deported based on certain criminal convictions.[9] In 1996, Congress amended the INA pursuant to two expansive statutes, the Antiterrorism and Effective

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have broadly interpreted the power conferred by this provision as encompassing the immigration field as a whole. See, e.g., *Takahashi*, 334 U.S. at 419 ("The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization."); see also *Graham*, 403 U.S. at 382 (referencing implications of Naturalization Clause uniformity requirement for legal permanent residents' access to welfare benefits).

[5] See infra Part I.B.

[6] See infra Part I.C.

[7] See Nancy Morawetz, Rethinking Retroactive Deportation Laws and the Due Process Clause, 73 N.Y.U. L. Rev. 97, 107 (1998) (using term "noncitizen" interchangeably with "immigrant" and referring in both cases to person who is not U.S. citizen and can be deported, as opposed to naturalized immigrant); Christopher L. Eisgruber, Birthright Citizenship and the Constitution, 72 N.Y.U. L. Rev. 54, 57 (1997) (using term "noncitizen" interchangeably with "alien" in same manner as Morawetz); see also Hiroshi Motomura, Federalism, International Human Rights, and Immigration Exceptionalism, 70 U. Colo. L. Rev. 1361, 1361 & n.1 (1999) (using term "noncitizen" and acknowledging that it is broader category than immigrant). In legal terminology such persons are also referred to as "aliens." See Immigration and Naturalization Act (INA) § 101(a)(3), 8 U.S.C. § 1101(a)(3) (1994) (defining alien as "any person not a citizen or national of the United States"). While "noncitizen" is somewhat of a misnomer because the persons to whom it refers are presumably citizens of some nation, it is preferred in this Note because of the pejorative overtones of the word "alien." This Note also uses the term "immigrant," but it must be remembered that while an immigrant may be a U.S. citizen, this Note is concerned only with those who are not.

[8] These persons are referred to as lawful permanent residents or green card holders. See 1 Charles Gordon et al., Immigration Law and Procedure § 1.03[2][c][ii][B], [2][f] (1999) (referring to lawful permanent residents as "green card" holders and explaining procedures to obtain permanent resident status). There are also "nonresident" immigrants who are lawfully present on a *temporary* basis, e.g., as students or temporary workers. See id. § 1.03[2][e][iii] (explaining various temporary immigrant visas). Finally, there are "undocumented" or "illegal" immigrants, who are noncitizens who entered the country without permission or overstayed a temporary visa. See Thomas Alexander Aleinikoff et al., Immigration: Process and Policy 273 (3d ed. 1995) (referring to "undocumented aliens" as persons who entered without permission or overstayed visa); 1 Gordon et al., supra, § 1.03[2][d][ii][G] (explaining that immigrants who enter without entry documents are inadmissible). Undocumented immigrants are not the topic of this Note because their lack of legal authorization to reside in the United States makes them subject to removal in any case.

[9] See INA § 237(a)(2), 8 U.S.C. § 1227(a)(2) (Supp. III 1997) (providing for deportation based on various types of criminal convictions).

Death Penalty Act of 1996 (AEDPA)[10] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[11] and in the process, exponentially increased the risk of deportation for noncitizens on criminal grounds.[12] Among other dramatic changes, Congress greatly expanded a category of offenses triggering deportation labeled "aggravated felonies."[13] The aggravated felony provision now appears to include a number of crimes that may not seem deserving of their menacing label, such as petty theft, perjury, and misdemeanor assault and battery.[14]

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10 Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 28, 40, 42 U.S.C.).

11 Pub. L. No. 104-208, 110 Stat. 3009, 3009-546 (1996) (codified as amended in scattered sections of 8, 18 U.S.C.).

12 This Note will often refer to the two laws, the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), in conjunction as AEDPA/IIRIRA because both laws made amendments to the aggravated felony provisions of the INA relevant to the issues discussed here.

It is worth noting that the catalyzing event behind AEDPA was the 1995 Oklahoma City bombing. See Note, Blown Away? The Bill of Rights After Oklahoma City, 109 Harv. L. Rev. 2074, 2074-75 (1996) (describing how Congress and President reacted to bombing by quickly introducing and passing AEDPA). The legislation was thus ostensibly directed at combating terrorism but revolutionized immigration law in ways that went far beyond any such goal. See Terry Coonan, Dolphins Caught in Congressional Fishnets—Immigration Law's New Aggravated Felons, 12 Geo. Immigr. L.J. 589, 589 (1998) (referencing ostensible goal of AEDPA to fight terrorism and how actual legislation was much broader in scope); Kevin R. Johnson, The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens, 28 St. Mary's L.J. 833, 878 (1997) (same).

13 The aggravated felony category was established in 1988, at which time it included only murder, drug trafficking, and weapons trafficking. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469 (codified as amended at 8 U.S.C. § 1101(a)(43) (1994 & Supp. III 1997)). Although subsequently amended to include additional crimes, it continued to confine itself to what are arguably more serious offenses than many of the offenses included after the 1996 amendments. See Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5048 (codified as amended at 8 U.S.C. § 1101(a)(43) (1994 & Supp. III 1997)) (adding money laundering, crimes of violence with sentence of at least five years, and foreign convictions with term of imprisonment completed within previous 15 years); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305, 4320-22 (codified as amended at 8 U.S.C. § 1101(a)(43) (1994 & Supp. III 1997)) (adding various firearms offenses, monetary transactions from illegally derived funds, theft or burglary with sentence of at least five years, alien smuggling for commercial gain, and trafficking in false documents).

AEDPA added additional crimes to the aggravated felony list, while IIRIRA both added crimes and lowered the sentencing threshold from five years to just one for those aggravated felonies whose definition hinges on this factor. See AEDPA § 440(e), 8 U.S.C. § 1101(a)(43) (1994 & Supp. III 1997) (adding, inter alia, alien smuggling not for commercial gain, failure to appear for service, obstruction of justice, and perjury); IIRIRA § 321, 8 U.S.C. § 1101(a)(43) (1994 & Supp. III 1997) (adding, inter alia, rape, sexual abuse of minor, and lowering sentencing threshold for, inter alia, crimes of violence, theft offenses, obstruction of justice, and perjury).

14 See INA § 101(a)(43)(F), (G), (S), 8 U.S.C. § 1101(a)(43)(F), (G), (S) (Supp. III 1997). While the terms "petty theft" and "misdemeanor assault and battery" do not ap-

The AEDPA/IIRIRA aggravated felony amendments raise serious questions vis-à-vis the uniformity requirement in immigration law because their operation will engender dramatic *non*uniformity. The INA provides that both federal and state law convictions can constitute aggravated felonies,[15] and thus, while states cannot directly mandate immigration consequences for criminal offenses,[16] the operation of state law can lead indirectly to deportation of immigrants. Existing variations in state substantive criminal law and sentencing schemes mean that whether an individual is deemed to have committed an aggravated felony may depend on the state law under which he was prosecuted.

The uniformity problem posed by the AEDPA/IIRIRA amendments is not entirely new. The INA has attached immigration consequences to at least some state law convictions since its inception in

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pear within INA § 101(a)(43), these crimes appear to fall within the "theft," § 101(a)(43)(G), and "crime of violence," § 101(a)(43)(S), provisions when the relevant state law allows for a sentence of one year. See infra Part II.

The amendments accomplish this dramatic expansion not only by increasing the substantive categories of crimes and lowering the sentencing threshold, where applicable, but also by deeming any order of incarceration or confinement by the sentencing court, whether or not imposed or executed, a "sentence" for purposes of the provision. See INA § 101(a)(48)(B), 8 U.S.C. § 1101(a)(48)(B) (Supp. III 1997) (reflecting changes made by section 322 of IIRIRA). Thus, a sentence of one year probation may be deemed a sentence of imprisonment of at least one year for purposes of the INA, rendering the individual deportable even though she never served a day in jail. As Manuel D. Vargas of the New York State Defenders Association has suggested, advocates should note that this change raises yet another risk of nonuniformity since states vary as to whether they consider probation a suspended sentence of imprisonment or a distinct disposition where a sentence of imprisonment would be imposed only if and when probation was violated. Compare, e.g., N.Y. Penal Law § 65.00(3)(d) (McKinney 1998) (providing that sentence of imprisonment is imposed only if and when probation is violated), with Tex. Crim. P. Code Ann. art. 42.12(2)(2B) (West 1998) (providing that sentence of "community supervision," i.e., probation, constitutes suspended sentence of imprisonment). Advocates should be prepared to argue, then, that it is unconstitutional pursuant to the Uniformity Clause to consider a sentence of probation as a sentence for purposes of the INA. See Telephone Interview with Manuel D. Vargas, Director, Criminal Defense and Immigration Project, New York State Defenders Association (May 4, 1999).

[15] See Immigration Act of 1990 § 501(a), 8 U.S.C. § 1101(a)(43) (1994 & Supp. III 1997) (clarifying that state crimes are included as aggravated felonies).

[16] See, e.g., Chy Lung v. Freeman, 92 U.S. 275, 276, 281 (1875) (ruling that California could not prevent entry of Chinese immigrant women for being "lewd and debauched"); United States v. Romeo, 122 F.3d 941, 943 (11th Cir. 1997) (holding that only immigration judges have authority to order deportation); United States v. Abushaar, 761 F.2d 954, 959, 960-61 (3d Cir. 1985) (holding that ordering noncitizen to leave country as condition of probation constitutes order of deportation and exceeds authority of state criminal courts); Sanchez v. State, 508 S.E.2d 185, 187 (Ga. Ct. App. 1998) (following *Abushaar* and *Romeo* in granting relief from revocation of probation where ground for revocation was petitioner's violation of condition that he return to native Mexico).

1952;[17] the "aggravated felony" concept, which has always encompassed state law convictions, dates from 1988.[18] Nor is the uniformity problem limited to the aggravated felony provisions.[19]

The radical expansion of the aggravated felony provisions,[20] however, means that unprecedented numbers of immigrants are subject to deportation on this ground. The new laws have already had the effect of dramatically increasing the number of deportations.[21] As these numbers grow, so will the problem of nonuniformity.

In addition, the impact of the aggravated felony provisions is compounded by numerous other changes in the law pertaining to "aggravated felons," such as mandatory detention during deportation or removal proceedings,[22] the elimination of discretionary relief from deportation or removal,[23] and a permanent bar against reentry into the

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17 See In re Lee Wee, 143 F. Supp. 736, 737-38 (S.D. Cal. 1956) (determining that noncitizen's gambling convictions precluded naturalization under INA).

18 See supra note 13.

19 There are other categories of crimes that trigger deportability but are not the subject of this Note, most notably, crimes of "moral turpitude." See INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I) (1994) (excluding noncitizens who commit crime of moral turpitude); INA § 237(a)(2)(A), 8 U.S.C. § 1227(a)(2)(A)(i) (Supp. III 1997) (providing for deportation on grounds of commission of crime of moral turpitude). Advocates should be aware that the uniformity problems that plague the aggravated felony provisions are present with respect to crimes of moral turpitude as well, since that category also includes state crimes. See 6 Gordon et al., supra note 8, § 71.05[1][c][ii]. Indeed, given the even greater vagueness attendant to this provision relative to the aggravated felony provision, and the fact that Congress has not provided any statutory definition, the problem might be even more acute. See Telephone Interview with Manuel D. Vargas, supra note 14; see also 6 Gordon et al., supra note 8, § 71.05[1][d][i] (explaining scope of moral turpitude category and noting its breadth and flexibility).

In Marciano v. INS, 450 F.2d 1022 (8th Cir. 1971), for example, the Eighth Circuit held that a noncitizen's state law conviction for statutory rape was a "crime involving moral turpitude" subjecting him to deportation even though the conduct at issue would not have been criminal in more than half of the states. See id. at 1024, 1026. One judge, dissenting on other grounds, acknowledged that the petitioner had raised a uniformity challenge but stated:

> It is obvious that there is a large element of happenstance involved in the determination of which aliens are deported and which are not, and it seems likely that Congress would have preferred a more nearly uniform treatment of aliens if it had anticipated this disparity in the law's application. However, this is a matter for the Congress rather than the courts.

Id. at 1026 n.1 (Eisele, J., dissenting) (noting petitioner's argument that he should not be deported based on conduct legal in twenty-seven states).

20 See supra note 13.

21 See Mirta Ojito, Change in Laws Sets Off Big Wave of Deportations, N.Y. Times, Dec. 15, 1998, at A1.

22 See INA § 236(c), 8 U.S.C. § 1226(c)(1) (Supp. III 1997).

23 See AEDPA § 440(d), 8 U.S.C. § 1252(a)(2)(B) (Supp. III 1997) (barring immigrants with aggravated felony convictions from applying for discretionary relief pursuant to former INA § 212(c), eliminated by IIRIRA, Pub. L. No. 104-208, § 304(b), 110 Stat. 3009, 3009-597 (1996), which permitted immigration judges to waive deportation based on equi-

United States.[24] Moreover, a number of consequences attaching to aggravated felonies under prior law, such as the bar to naturalization[25] or the dramatic sentencing enhancement faced by an individual convicted of illegal reentry after deportation,[26] will now apply to a much greater range of persons. Finally, the Immigration and Naturalization Service (INS) contends that the expanded "aggravated felony" definition and its consequences operate retroactively, meaning that an individual with an old conviction may be subject to automatic deportation without possibility of relief.[27] In all, the changes wrought by the

ties such as immigrant's length of residence, rehabilitation, and family/community ties); INA § 240A, 8 U.S.C. § 1229b (Supp. III 1997) (instituting new discretionary cancellation of removal relief provision but barring noncitizens with aggravated felony convictions from eligibility). Prior to 1996, discretionary relief was critical in alleviating the dire effects of deportation provisions: Between 1989 and 1994, over half of all immigrants who petitioned under former INA § 212(c) demonstrated sufficient equities to be permitted to stay in this country. See Mojica v. Reno, 970 F. Supp. 130, 178 (E.D.N.Y. 1997).

[24] See INA § 212(a)(9)(A)(ii), 8 U.S.C. § 1182(a)(9)(A)(ii) (Supp. III 1997). Previously, reentry was barred for 20 years. See INA § 212(a)(6)(B), 8 U.S.C. § 1182(a)(6)(B) (1994) (repealed 1996).

[25] See INA § 318, 8 U.S.C. § 1429 (1994).

[26] A noncitizen who reenters the country illegally after being deported on aggravated felony grounds can be imprisoned for up to 20 years. See INA § 276(b)(2), 8 U.S.C. § 1326(b)(2) (Supp. III 1997). The Federal Sentencing Guidelines impose an automatic 16-step sentencing enhancement in these cases, which can mean an increase of several years. See U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(B) (1997) (incorporating aggravated felony definitions of 8 U.S.C. § 1101(a)(43) (1994 & Supp. III 1997)). Even minor or nonviolent offenses suffice. See, e.g., United States v. Graham, 169 F.3d 787, 788 (3d Cir. 1999) (upholding imposition of 70- to 87-month sentence for illegal reentry instead of what would have been 21- to 27-month sentence in absence of noncitizen's previous "aggravated felony" convictions for attempted possession of marijuana and petit larceny, both misdemeanor offenses under state law). Moreover, authorities in some areas of the country appear to have engaged in "sweeps" of both jails and immigrant neighborhoods in an effort to identify and prosecute individuals in this situation. See Katherine A. Brady et al., California Criminal Law and Immigration § 9.22, at 9-44 (Immigrant Legal Resource Ctr. 1995).

[27] The IIRIRA-amended *definition* of aggravated felonies is explicitly retroactive, applying to convictions entered "before, on, or after" the enacting statute's effective date. See IIRIRA § 321(b), 8 U.S.C. § 1101(a)(43) (1994 & Supp. III 1997); see also Maria v. McElroy, No. 98 CV 6596, 1999 WL 680370, at *14 (E.D.N.Y. Aug. 27, 1999) (surveying cases finding that section 321 of IIRIRA makes new definition retroactive to old convictions). The courts have disagreed, however, as to whether and how these consequences apply retroactively. Compare LaGuerre v. Reno, 164 F.3d 1035, 1041 (7th Cir. 1998) (agreeing with argument of Immigration and Naturalization Service (INS) that bar operates retroactively), with *Maria*, 1999 WL 680370, at *26 (holding that bar to discretionary relief does not apply to pre-1996 criminal conduct); see also Henderson v. Reno, 157 F.3d 106, 130 (2d Cir. 1998) (rejecting INS argument that noncitizen was ineligible for discretionary relief where deportation case was pending as of change in law), cert. denied sub nom. Navas v. Reno, 119 S. Ct. 1141 (1999); Goncalves v. Reno, 144 F.3d 110, 126 (1st Cir. 1998) (rejecting INS argument that noncitizen was ineligible for discretionary relief although he had applied for relief prior to change in law).

The careful and particularized statutory analysis required by the Supreme Court's general retroactivity jurisprudence provides support for the view that the retroactivity of the

amended aggravated felony and related statutory provisions are notable both for their harshness and for the fact that they apply to individuals who many would argue deserve more humane treatment.[28]

This Note argues that because the amended aggravated felony provisions of AEDPA/IIRIRA lead to different immigration consequences depending on the state law under which the immigrant is convicted, these provisions violate the constitutional requirement of uniformity in immigration law.[29] In Part I, this Note describes current doctrinal understandings of "uniformity" in the constitutional sense, looking first at the discussion of uniformity in immigration caselaw and then at the discussion of this principle in taxation and bankruptcy caselaw—the only other areas where the Constitution expressly requires it. This examination shows that uniformity doctrine in the immigration law context is underdeveloped and in need of a clear model. Part II illustrates the uniformity problem by analyzing two offenses which fall within the aggravated felony provisions: statutory rape and misdemeanor assault and battery. Part III proposes a framework for the courts that would address the uniformity problem. This discussion

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new definition is a distinct question from the retroactivity of consequences attaching to such convictions. See Lindh v. Murphy, 521 U.S. 320, 325, 327-30 (1997) (noting general presumption against retroactivity and carefully scrutinizing legislative text, structure, and history to determine if Congress clearly intended retroactive effect); Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939, 946 (1997) (noting presumption against retroactivity is "deeply rooted"); Landgraf v. USI Film Prod., 511 U.S. 244, 265, 280 (1994) (holding that presumption against retroactive legislation is fundamental principle of American law and statutes shall not be construed to operate retroactively absent clear congressional intent to that effect); see also Lettman v. Reno, 168 F.3d 463, 466-67 (11th Cir. 1999) (rejecting INS argument that section 321 of IIRIRA makes retroactive various immigration consequences for aggravated felony convictions); Anjali Parekh Prakash, Note, Changing the Rules: Arguing Against Retroactive Application of Deportation Statutes, 72 N.Y.U. L. Rev. 1420, 1424 (1997) (arguing against retroactivity of bar to discretionary relief on statutory construction grounds). Finally, there are also constitutional arguments against retroactivity in this context. See Morawetz, supra note 7, at 146-47 (arguing against retroactivity of bar to discretionary relief on due process grounds).

[28] See Coonan, supra note 12, at 590-92 (recounting stories of individuals subject to automatic deportation as "aggravated felons" despite relatively minor degree of crimes committed and mitigating factors like long-term U.S. residence); Anthony Lewis, Editorial, Is This America?, N.Y. Times, Sept. 21, 1999, at A29 (criticizing INS for operating "so inflexibly, so mercilessly" in handling case of pregnant immigrant woman with colorable claim of U.S. citizenship who was put into deportation proceedings and detained in facility located more than two thousand miles from her family based on drug offense for which she served only 30 days in jail); Hilary E. MacGregor, Paying for Crime—in More Ways than One, L.A. Times, Oct. 19, 1999, at A1.

[29] For arguments that the uniformity requirement also pertains to the "alienage law" sphere, such as public benefits, see Gilbert Paul Carrasco, Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection, 74 B.U. L. Rev. 591 (1994); Liza Cristol-Deman & Richard Edwards, Closing the Door on the Immigrant Poor, 9 Stan. L. & Pol'y Rev. 141 (1998); Zoe Neuberger, Developments in Policy: Welfare Reform, 16 Yale L. & Pol'y Rev. 221, 223-40 (1997).

points out that interpretative models do exist from which courts can and should draw, and proposes that courts develop a systematic and constitutionally grounded way of dealing with problems of nonuniformity in the immigration context. Finally, Part III addresses possible counterarguments to the claim that uniformity is required and to the proposed approach.[30]

I
UNIFORMITY DOCTRINE IN THE COURTS

A. History of the Naturalization Clause

The uniformity requirement in immigration law is rooted textually in the Naturalization Clause, which directs Congress "[t]o establish an uniform Rule of Naturalization."[31] This clause is one of three constitutional provisions requiring uniformity of the law. The other two are the Taxation Clause, which requires that "all Duties, Imposts and Excises shall be uniform,"[32] and the Bankruptcy Clause, which requires "uniform Laws on the subject of Bankruptcies."[33]

Prior to the adoption of the Constitution, under the Articles of Confederation, each state was free to adopt its own rules for conferring citizenship.[34] This system generated confusion and disputes among the states and subjected individual aliens to inconsistent rules as to their rights and obligations.[35] This state of affairs became the subject of much criticism in the period immediately preceding the

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[30] Clearly, another route to solving the problems discussed in this Note is the legislative one. However, the focus here will be on judicial solutions and arguments advocates can utilize in litigation—specifically, constitutional arguments—on behalf of immigrants. For an invaluable resource concerning the changes wrought by IIRIRA and AEDPA in the workings of the INA criminal deportation provisions, their applicability to specific convictions, their immigration consequences, and strategies for both criminal defense and immigration attorneys, see generally Manuel D. Vargas, Representing Noncitizen Criminal Defendants in New York State (New York State Defenders Ass'n 1998).

[31] U.S. Const. art. I, § 8, cl. 4.

[32] Id. art. I, § 8, cl. 1.

[33] Id. art. I, § 8, cl. 4.

[34] See generally William W. Crosskey, 1 Politics and the Constitution in the History of the United States 487-88 (1953) (describing states' various naturalization rules under Articles of Confederation); James H. Kettner, The Development of American Citizenship, 1608-1870, at 224-25 (1978) (discussing framers' desire for uniformity in naturalization laws); Carrasco, supra note 29, at 630-34 (discussing states' naturalization powers under Articles of Confederation, and drafting and meaning of Naturalization Clause); Michael T. Hertz, Limits to the Naturalization Power, 64 Geo. L.J. 1007, 1009-17 (1976) (same).

[35] See The Federalist No. 42, at 286 (James Madison) (Jacob E. Cooke ed., 1961) (explaining that immigration power should belong solely to federal government because "[b]y the laws of several States, certain descriptions of aliens who had rendered themselves obnoxious, were laid under interdicts inconsistent, not only with the rights of citizenship, but with the privilege of residence").

Constitutional Convention and, in fact, was one of the issues that led to calls for the Convention to take place.[36]

At the Convention, the New Jersey delegation proposed that a clause be adopted ensuring that naturalization rules "be the same in every State."[37] This idea, ultimately formulated as the Naturalization Clause's requirement of a "uniform Rule," easily won acceptance.[38] The lack of extended debate among the Convention delegates over the Naturalization Clause and the subsequent dearth of legislative history have not made interpretation any easier.[39] Nonetheless, commentary before and after the adoption of this provision confirms that the framers believed that consistent rules throughout the country were needed.[40] Moreover, the framers drew a direct connection between the exclusivity of Congress's power over this field—which has been recognized time and again[41]—and the uniformity requirement. As Alexander Hamilton wrote in The Federalist No. 32, the power over naturalization must "necessarily be exclusive; because if each State had power to prescribe a Distinct Rule there could be no Uniform Rule."[42]

B. Uniformity in Immigration Caselaw

There is today no clearly established doctrine concerning the "uniform Rule" requirement. The Supreme Court has never directly addressed the meaning of this provision, and the handful of lower

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36 James Madison, for example, lamented the problem and asserted that a uniform rule provision should be proposed for the Constitution. See 1 The Writings of James Madison 226-27 (Gaillard Hunt ed., 1900). Madison noted prior to the Convention that "[a]mong the defects which had been severely felt [in the Articles of Confederation] was that of a uniformity in cases requiring it, as laws of naturalization, bankruptcy, a Coercive authority operating on individuals and a guaranty of the internal tranquility of the States." 1 James Madison, The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America 12 (Gaillard Hunt & James Brown Scott eds., Prometheus Books 1987) (1787).

37 1 The Records of the Federal Convention of 1787, at 245 (Max Farrand ed., 1911).

38 See George T. Curtis, 2 History of the Origin, Formation, and Adoption of the Constitution of the United States with Notices of Its Principal Framers 328 (1865).

39 See Carrasco, supra note 29, at 632.

40 See, e.g., The Federalist No. 42, supra note 35, at 286 (querying with respect to aliens subject to inconsistent rules under prior system:

> What would have been the consequence, if such persons, by residence or otherwise, had acquired the character of citizens under the laws of another State . . . ? The new Constitution has accordingly with great propriety made provision against them . . . by authorising the general government to establish an uniform rule of naturalization throughout the United States.);

see also supra notes 34-38 and accompanying text.

41 See supra notes 2-3 and accompanying text.

42 The Federalist No. 32, at 201 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

courts that have done so disagree with one another. Moreover, the analysis in these cases has been cursory at best.

Some courts have accorded relatively little importance to the uniformity requirement. In *Kharaiti Ram Samras v. United States*,[43] which appears to be the earliest reported decision considering a "uniform Rule" challenge to an immigration statute, the Ninth Circuit rejected the claim that according aliens different naturalization rights based on their race violates the requirement of uniformity under the Naturalization Clause.[44] Uniformity in the constitutional sense, said the court, "relates to geography only."[45] The *Samras* court failed, however, to elaborate upon what this relation entails.[46]

Samras did not consider whether the operation of federal immigration law may be affected by state law: The classification in question was not affected by state law nor did its operation vary according to geography.[47] In *In re Lee Wee*,[48] however, the court considered a case that did involve the interaction of local criminal codes and federal immigration law. In *Lee Wee*, the court denied a naturalization petition based on the applicant's gambling conviction under a city ordinance even though his conduct (playing cards) was lawful in the neighboring municipality.[49] The court summarily rejected the peti-

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[43] 125 F.2d 879 (9th Cir. 1942).

[44] See id. at 880, 882 (denying petition for citizenship by South Asian immigrant where federal naturalization statute then in effect permitted only "free white persons" and persons of "African nativity . . . [or] descent" to naturalize).

This is not to say that racial classifications in immigration law are unproblematic. There are powerful arguments that the Fifth Amendment's equal protection guarantee makes such classifications problematic. See, e.g., Jean v. Nelson, 472 U.S. 846, 880-81 (1985) (Marshall, J., dissenting) (arguing that policy of detaining Haitian asylum seekers rather than paroling them into United States may violate equal protection where based on race and national origin without regard for whether "central immigration concerns" are at stake). Since the decision in *Samras*, overt racial classifications in immigration law have been prohibited as a matter of statute and/or regulation. See, e.g., Immigration and Nationality Act of 1952 § 202(a)(1)(A), 8 U.S.C. § 1152(a)(1) (1994) (prohibiting racial discrimination in issuance of visas); 8 C.F.R. § 212.5 (1999).

[45] *Samras*, 125 F.2d at 881.

[46] See id.

[47] Furthermore, the court's perfunctory approach appears to have been heavily influenced by the plenary power doctrine, according to which judicial review of congressional action in the immigration arena is extremely limited. See generally Derek Ludwin, Note, Can Courts Confer Citizenship? Plenary Power and Equal Protection, 74 N.Y.U. L. Rev. 1376, 1382-90 (1999). The court questioned whether it should even be deciding the case, but noted that neither side argued justiciability and thus it decided the uniformity question with minimal discussion. See *Samras*, 125 F.2d at 881.

[48] 143 F. Supp. 736 (S.D. Cal. 1956).

[49] See id. at 738. The petitioner was convicted under a Los Angeles city ordinance; the same acts were legal in neighboring Gardena. See id. at 737-38. The INA provided that two or more "gambling" convictions precluded an applicant from satisfying the good moral character requirement to naturalize. See INA § 101(f)(5), 8 U.S.C. § 1101(f)(5) (1994)

tioner's Uniformity Clause argument, citing *Samras* and two federal bankruptcy cases and stating only that "[t]he law must be general and uniform in its provisions, but its working and operation may be very different in different states, owing to their diverse conditions and circumstances."[50]

During the same period in which *Lee Wee* was decided, the 1950s, a number of courts confronted a uniformity problem strikingly similar to the one posed by the aggravated felony scheme. At that time, the INA barred persons who had committed "adultery" from satisfying the "good moral character" requirement for, inter alia, naturalization and voluntary departure.[51] There were at least four different civil and criminal definitions among the various state jurisdictions,[52] and, because "adultery" was not defined in any federal law, courts faced a dilemma as to what definition to use.

The INS argued that "adultery" should be defined according to the law of the state where the conduct occurred.[53] Thus, just as with today's aggravated felony provisions, disparate immigration consequences could attach to the same underlying conduct simply by virtue of one's state of residence. Several courts agreed and held as a matter of statutory construction that state criminal or civil law definitions of

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(imposing bar for two or more gambling convictions); INA § 316(a)(3), 8 U.S.C. § 1427(a)(3) (1994) (requiring good moral character for naturalization).

50 *Lee Wee*, 143 F. Supp. at 738 (citing bankruptcy case of Darling v. Berry, 13 F. 659 (D. Iowa 1882)). State and local criminal laws, under this reasoning, presumably, are simply preexisting "diverse conditions and circumstances."

51 See INA § 101(f)(2), 8 U.S.C. § 1101(f)(2) (1976) (adultery committed within five years prior to application for naturalization precludes finding of good moral character), repealed by Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 2(c)(1), 95 Stat. 1611, 1611 (codified at 8 U.S.C. § 1101(f)(2) (1994)). Voluntary departure allows a deportable alien to leave the country without receiving an order of deportation and incurring any attendant legal penalties. The issue became moot after 1981 when Congress eliminated the adultery bar. See id. (striking adultery bar).

52 See Marvin M. Moore, The Diverse Definitions of Criminal Adultery, 30 U. Kan. City L. Rev. 219, 223-25 (1962) (describing four different definitions of criminal adultery: 1) at common law, both parties are guilty of adultery if woman is married; 2) under canon law, either or both of married parties are guilty; 3) both parties are guilty of adultery so long as either party is married; 4) both parties are guilty if woman is married, but, if woman is not married, then only man is guilty); Comment, State Adultery Law and the "Good Moral Character" Naturalization Requirement, 7 Harv. J. on Legis. 294, 300-01 (1970) (describing four distinct definitions of criminal adultery). Furthermore, some states recognized defenses that other states did not. See, e.g., In re Johnson, 292 F. Supp. 381, 383 (E.D.N.Y. 1968) (noting that some state laws forgive adulterous conduct if parties later marry, some state laws do not consider conduct to be adultery unless accompanied by "open and notorious cohabitation," and some states hold that ignorance of marital status of other party is defense).

53 See, e.g., Moon Ho Kim v. INS, 514 F.2d 179, 181 (D.C. Cir. 1975) (rejecting theory of respondent INS that state law definition of adultery should apply).

adultery should control.[54] Without reaching the constitutional question—or even acknowledging that it existed—these courts implicitly presumed that at least this form of incorporating state law into a federal immigration scheme was constitutional.

Support for a stricter view of uniformity can be found, however, in a number of other cases, some of which refer to the uniform rule provision explicitly while others rely on the principle of uniformity in immigration law without alluding to this provision. In *Nemetz v. INS*,[55] the Fourth Circuit rejected the INS's argument that a noncitizen who admitted engaging in consensual homosexual sodomy could not be naturalized because such conduct was criminalized in his state of residence and therefore, according to the INS, he had admitted to committing a "crime of moral turpitude."[56] Observing that such conduct is subject to radically different treatment under the various state laws, the court held that to deny Nemetz's application would violate the uniformity requirement by making naturalization turn on an "accident of geography."[57] And in *In re Edgar*,[58] another court held that it had to interpret the INA provision "in the light of [the Uniformity Clause]" and that doing so meant using a uniform federal definition of "adultery" when applying the then-existing adultery bar against naturalization.[59] Since there was no such federal statutory definition, the court developed one as a matter of federal common law.[60]

Edgar was not alone in its approach to the adultery bar against naturalization: While refraining from ruling on constitutional grounds, other courts criticized the arbitrariness of hinging naturalization on variations in state law and relied on the Naturalization Clause

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[54] See Brea-Garcia v. INS, 531 F.2d 693, 695, 697 (3d Cir. 1976) (applying state law of adultery to deny noncitizens' application for voluntary departure because "[a]rguably, Congress intended to defer to the state in which an alien chooses to live for the precise definition of adultery and other conduct inconsistent with good moral character"); In re C—C—J—P—, 299 F. Supp. 767, 768 (N.D. Ill. 1969) (using New York state criminal definition to deny naturalization on adultery grounds); In re Naturalization of O—N—, 233 F. Supp. 504, 507 (S.D.N.Y. 1964) (denying naturalization on adultery grounds and looking to New York criminal statute for definition because Congress's language shows "unequivocal" intent); In re Cienfuegos, 17 I. & N. Dec. 184, 185-86 (B.I.A. 1979) (denying voluntary departure and following *Brea-Garcia* in applying state civil law adultery definition).

[55] 647 F.2d 432 (4th Cir. 1981).

[56] Id. at 435. Unlike the gambling offense at issue in *Lee Wee*, the INA does not specifically identify homosexual sodomy as a bar to a finding of good moral character. However, the INA provides that an alien who has been convicted of, or who admits "having committed . . . a crime involving moral turpitude" cannot meet the good moral character requirement. See INA § 212(a)(2), 8 U.S.C. § 1182(a)(2)(A)(i)(I) (1994).

[57] *Nemetz*, 647 F.2d at 435.

[58] 253 F. Supp. 951 (E.D. Mich. 1966).

[59] See id. at 953.

[60] See id.

as support for developing a federal common law definition of adultery.[61] One court, for example, observed that "the Constitution favor[s] a uniform test for citizenship."[62] Another observed that the divergence in state law definitions "sits uncomfortably" with the Naturalization Clause.[63] A third found it "unnecessary to address ourselves as to whether there is a Constitutional requirement with respect to uniformity of immigration laws" but held that Congress sought uniformity in this instance.[64] Still other courts reached the same result without referencing the Naturalization Clause but, rather, by interpreting the statute in light of the importance of uniformity and fairness in the administration of federal immigration law.[65]

These courts differed significantly from *Lee Wee*, then, in holding that immigration consequences should not hinge on what the *Nemetz* court called "accident[s] of geography."[66] None of these cases, however, undertook an extensive inquiry into the parameters of the uni-

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[61] See Moon Ho Kim v. INS, 514 F.2d 179, 180-81 (D.C. Cir. 1975) (reversing Board of Immigration Appeals's (BIA) denial of voluntary departure because noncitizen's conduct did not rise to level of adultery under federal common law standard); In re Naturalization of Schroers, 336 F. Supp. 1348, 1350 (S.D.N.Y. 1971) (granting naturalization petition because noncitizen's conduct was not adulterous as matter of federal law and "Congress did not intend to create different tests for naturalization depending on something as fortuitous as where the petitioner engaged in the extra-marital intercourse or where the petitioner resides at the time he seeks to be admitted to citizenship"); In re Naturalization of Johnson, 292 F. Supp. 381, 384-85 (E.D.N.Y. 1968) (granting naturalization petition because noncitizen's conduct did not rise to level of adultery under state or federal law); In re Briedis, 238 F. Supp. 149, 151-52 (N.D. Ill. 1965) (same).

[62] *Schroers*, 336 F. Supp. at 1349.

[63] *Johnson*, 292 F. Supp. at 383.

[64] See *Moon Ho Kim*, 514 F.2d at 180, 181. The court was actually making a distinction between "immigration" and "citizenship [i.e., naturalization]," as the case concerned an application for voluntary departure rather than for citizenship. The court took it as a given that the Constitution requires uniformity for citizenship but did not define what that would entail. See id. at 180; see also *Briedis*, 238 F. Supp. at 151 (holding that Congress, acting pursuant to its authority under Naturalization Clause, intended to establish "uniform [federal] standard" for adultery).

[65] Wadman v. INS, 329 F.2d 812, 817 (9th Cir. 1964) (noting that Congress did not intend "technical application" of INA because "hardship and injustice would result" and therefore holding that isolated acts of intercourse by married person did not implicate adultery bar); In re Mayall, 154 F. Supp. 556, 560-61 (E.D. Pa. 1957) (looking to national standard to determine whether noncitizen failed good moral character requirement where, according to state law, noncitizen's marriage was invalid because it was product of adulterous relationship but noting that

> if at the time petitioner was married in Pennsylvania, she resided in and was married in any territory or state of the United States . . . other than Pennsylvania, Louisiana or Tennessee, such a marriage would have been valid and recognized . . . and her moral character would never have been questioned by the Naturalization Service).

[66] Nemetz v. INS, 647 F.2d 432, 435 (4th Cir. 1981); see also In re Edgar, 253 F. Supp. 951, 953 (E.D. Mich. 1996) ("[I]n reaching decision upon the meaning of the federal act, we are not remitted to a patchwork of state laws."); supra notes 61-65 and accompanying text.

formity requirement as a matter of constitutional law. They resolved the dilemma they faced by ruling as a matter of statutory interpretation.[67]

While there is a paucity of caselaw explicitly construing the Uniformity Clause, over the years uniformity has been a theme in the Supreme Court's immigration jurisprudence. These cases provide doctrinal support for principles that should inform a more clearly defined uniformity theory.

As far back as 1875, the Supreme Court invoked the principle of uniformity in two landmark cases concerning state immigration regulation laws, *Henderson v. Mayor of New York*[68] and *Chy Lung v. Freeman*.[69] In *Henderson*, the Court struck down a state alien registration law because "[regulation of immigration requires] a uniform system or plan. The laws which govern the right to land passengers in the United States from other countries ought to be the same in New York, Boston, New Orleans, and San Francisco."[70]

In *Chy Lung*, the Court struck down a state alien inspection statute under which the California State Supreme Court had ordered several Chinese immigrants deported,[71] noting that state laws regulating immigration might be overly harsh towards noncitizens and pose a danger to international relations.[72] The Court stated, "Individual foreigners, however distinguished at home for their social, their literary, or their political character, are helpless in the presence of this potent [state Commissioner of Immigration]. . . . [A] silly, an obstinate, or a wicked commissioner may bring disgrace upon the whole country."[73]

Over half a century later in *Hines v. Davidowitz*,[74] the Court again stressed the role that uniformity in immigration, naturalization, and deportation plays both in preserving international relations and in ensuring consistent and, thus, fair treatment of noncitizens when it struck down another state alien registration statute.[75] The Court averred that "the treatment of aliens, in whatever state they may be located, [is] a matter of national moment."[76] Moreover, the Court,

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67 See, e.g., *Edgar*, 253 F. Supp. at 953.

68 92 U.S. 259 (1875).

69 92 U.S. 275 (1875); see also People v. Compagnie Generale Transatlantique, 107 U.S. 59, 60 (1882) (following *Henderson* and *Chy Lung* in striking down local tax on immigrant passengers arriving by foreign vessels to New York ports).

70 *Henderson*, 92 U.S. at 273.

71 See *Chy Lung*, 92 U.S. at 276-77, 281.

72 See id. at 279.

73 Id.

74 312 U.S. 52 (1941).

75 See id. at 63-65.

76 Id. at 73.

while expressly leaving open the question of whether the Constitution *requires* any alien registration rule to be uniform throughout the country, instead ruled on federal preemption grounds and observed approvingly that Congress, by seeking "to protect the personal liberties of law-abiding aliens through one uniform national registration system," had acted consistently with the Uniformity Clause.[77]

Uniformity has also surfaced as a theme in caselaw concerning states' attempts to regulate the lives of noncitizens living within their borders, as opposed to immigration per se. In *Graham v. Richardson*[78] the Supreme Court intimated that a uniform immigration law would not countenance state law-based variation in noncitizens' access to welfare benefits: "Congress' power is to 'establish an uniform Rule of Naturalization.' A congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene this *explicit constitutional requirement of uniformity*."[79] The Court ruled as a matter of equal protection,[80] however, not uniformity, and—while it implied that the uniformity requirement is clear and stringent—it failed to discuss the concept further.

Over the years, then, courts have invoked uniformity as an important principle in immigration, such as where states have attempted to regulate this field,[81] and in *Graham*, the Supreme Court hinted that even Congress could not authorize state law-based nonuniformity.[82] Moreover, in these cases, the courts have both echoed the framers' concern about the problems of inconsistency and unfairness in allowing state by state variation and noted the potential for foreign policy problems. The courts have recognized that it is not a proper role for state governments to set immigration policy.[83]

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77 See id. at 73, 74. For an even more recent example of a court nullifying a state scheme to regulate immigration, see League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 786-87 & app. A (C.D. Cal. 1995) (striking down on federal preemption grounds provisions of California's Proposition 187, 1994 Cal. Legis. Serv. Prop. 187 (West) (codified in scattered sections of Cal. Educ., Gov't, Health & Safety, Penal, Welf. & Inst. Codes), including § 5(c)(2), which directs state government employees to notify any suspected illegal alien "of his or her apparent illegal immigration status, and that the person must either obtain legal status or leave the United States").

78 403 U.S. 365 (1971).

79 Id. at 382 (emphasis added) (quoting U.S. Const. art. I, § 8, cl. 4).

80 See id. at 376.

81 See supra notes 68-77 and accompanying text.

82 See *Graham*, 403 U.S. at 382.

83 See Hines v. Davidowitz, 312 U.S. 52, 62-68 (1941); see also Karl Manheim, State Immigration Laws and Federal Supremacy, 22 Hastings Const. L.Q. 939, 985 (1995) (arguing that "[l]aws making it a state offense to violate federal immigration statutes are the modern version of state registration and exclusion laws. The only reasons to do so are

This brings us back full circle to the aggravated felony provisions where, to date, the limited caselaw has echoed the doctrinal patterns explored above. Here too, uniformity has arisen as an adjudicative principle, but the constitutionality of the provisions overall has yet to be confronted directly.

The one aggravated felony provision where the uniformity problem has been broached is that concerning "drug trafficking" crimes.[84] The Board of Immigration Appeals (BIA) and at least one federal court of appeals have found as a matter of statutory interpretation that a state law offense will not trigger deportation pursuant to this provision unless it could have been punished as a federal felony offense.[85] Thus, in such cases, the court must examine the elements of the individual's state law conviction to determine if there is a sufficient analogy to a federal drug trafficking crime.[86]

In reaching this interpretation, the BIA acknowledged that uniformity is important to achieve a fair and consistent immigration policy.[87] The BIA observed that, absent a federal law analogy requirement, differences among the states as to how they classify es-

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either dissatisfaction with the federal government's enforcement of its own laws or to further burden immigration. Neither is a legitimate local interest."). But see *League of United Latin Am. Citizens*, 908 F. Supp. at 775 (upholding provisions of Proposition 187 that criminalized, as matter of state law, making and using of false immigration documents because these provisions only "indirectly affect immigration" and are a "legitimate exercise of the police power of the state").

84 See INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B) (1994).

85 See In re L—G—, Interim Dec. No. 3254, 1995 WL 582051 (B.I.A. Sept. 27, 1995); In re Davis, 20 I. & N. Dec. 536, 541-43 (B.I.A. 1992); In re Barrett, 20 I. & N. Dec. 171, 177-78 (B.I.A. 1990); see also Aguirre v. INS, 79 F.3d 315, 316-18 (2d Cir. 1996) (following *In re L—G—* and reversing decision in Jenkins v. INS, 32 F.3d 11 (2d Cir. 1994)). These decisions are based on the fact that the INA specifically provides that drug trafficking aggravated felonies are those offenses defined as "any felony *punishable under* [various federal statutes]." INA § 101(a)(43)(B) (emphasis added) (referencing 18 U.S.C. § 924(c)(2) (1994) (listing laws that prohibit and punish drug trafficking)).

86 It is immaterial whether under state law the offense is classified as a misdemeanor or a felony. The issue is whether the offense is "punishable under" federal law as a felony. See *L—G—*, 1995 WL 582051; *Aguirre*, 79 F.3d at 317-18 (abandoning *Jenkins* rule and holding that petitioner's state court drug offense is not aggravated felony); United States v. Graham, 927 F. Supp. 619, 621 (W.D.N.Y. 1996) (holding that alien's New York misdemeanor conviction for marijuana sale was aggravated felony because any controlled substance sale is punishable as felony under federal law).

This point is not to be confused with the general principle that the aggravated felony provisions do not turn on the offense's classification as a misdemeanor or felony—whether under state or federal law. The specific language of the drug trafficking aggravated felony provision makes the difference here. See INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B) (1994) ("The term 'aggravated felony' means illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18).").

87 See *L—G—*, 1995 WL 582051 (expressing BIA's "concern for the uniform application of the immigration laws").

sentially identical offenses would lead to disparate immigration consequences and "unfair results for aliens in some cases."[88]

These policy concerns should apply to the entire aggravated felony scheme. However, the larger problem of nonuniformity remains unaddressed because the drug trafficking caselaw, like the adultery cases, is premised on statutory construction rather than constitutional analysis.[89]

As this survey demonstrates, uniformity problems in immigration law are neither new nor likely to go away.[90] Whether by ruling as a matter of statutory construction, as in the adultery cases,[91] or by invoking uniformity but ruling on other constitutional grounds,[92] the courts have never confronted the constitutional question fully and directly.

Perhaps the lack of direct constitutional analysis in this area is no surprise. Scholars have observed that one byproduct of the courts'

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[88] See id.

[89] Advocates should be mindful of the fact that courts have not followed the *In re L—G—* rule in the different but related illegal reentry context, in which an alien who is deported as an aggravated felon is subject to dramatically enhanced sentencing upon a conviction for illegal reentry into the country. In the reentry context, courts have defined an "aggravated felony" as any offense that is a felony under *either* the law of the state of conviction *or* federal law. See United States v. Pornes-Garcia, 171 F.3d 142, 147 (2d Cir. 1999) (reasoning that concern for uniform application of immigration laws present in *Aguirre* not at issue in sentencing context); United States v. Briones-Mata, 116 F.3d 308, 310 (8th Cir. 1997) (same); United States v. Restrepo-Aguilar, 74 F.3d 361, 365 (1st Cir. 1996) (holding that drug offense constitutes aggravated felony because it is felony under state law even though it is misdemeanor under federal law, despite fact that state-by-state inconsistencies might thereby result in sentencing context).

[90] Yet another example is the caselaw involving adultery and INA § 212(c) waivers of deportation. Prior to AEDPA/IIRIRA, a deportable alien had the opportunity to demonstrate equities that warranted consideration for a waiver of deportation. Among these equities were family ties in the United States. The question then arose over how family ties would be defined, as state laws vary as to the nature of relationships accorded formal status under the law. In *Kahn v. INS*, 36 F.3d 1412 (9th Cir. 1994), the Ninth Circuit held that the BIA could not refuse to consider a noncitizen's long-standing domestic relationship simply because her state of residence, California, did not recognize common-law marriages, which the Board had found conclusive in denying her relief. See id. at 1414-15. The majority found for the petitioner, not on constitutional grounds, but based on the principle that, absent congressional intent to the contrary, when Congress enacts a federal statute it is not making application of the federal act dependent on state law. See id. The majority admonished the Board to adopt a "flexible, uniform" standard under which the noncitizen would not be per se barred from presenting evidence about the substance of her relationship. See id. at 1415. On the other hand, Judge Kozinski, writing in dissent, argued that "[f]ar from shunning state law, federal law frequently relies on it—and without compromising national uniformity," citing to bankruptcy, RICO, federal firearms, and tax law. See id. at 1416-17 (Kozinski, J., dissenting).

[91] See supra notes 51-54, 54-65 and accompanying text.

[92] See supra notes 68-81 and accompanying text.

often mechanical invocation of the plenary power doctrine[93] is that the constitutional jurisprudence of immigration is notably underdeveloped when compared with other areas of law.[94] The courts' apparent reluctance directly to address what is required by the uniform rule provision is arguably an example of the courts' more general reticence in this arena.

On the other hand, Hiroshi Motomura has observed that in immigration jurisprudence the courts' statutory interpretation is influenced to an unusual degree by mainstream constitutional law principles (such as due process or equal protection), or what he calls "phantom constitutional norms."[95] Something akin to this approach may be at work with respect to the uniformity principle, which the courts invoke for purposes of statutory interpretation but fail to use to constitutionalize a doctrine. As a result of the courts' reluctance to construct a doctrine of uniformity, litigants face uncertainty and ambiguity.[96]

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[93] Under the plenary power doctrine, the courts give great deference to Congress in setting substantive immigration policy—the terms as to who may enter and who will be removed from the country. See Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("[I]t is important to underscore the limited scope of judicial inquiry into immigration legislation."); Mathews v. Diaz, 426 U.S. 67, 84 (1976) ("[I]t is the business of the political branches of the Federal Government, rather than that of either the States or the Federal Judiciary, to regulate the conditions of entry and residence of aliens."); The Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581, 606 (1889) (leaving to legislature decision as to which foreigners can be excluded).

[94] See Hiroshi Motomura, Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation, 100 Yale L.J. 545, 550-54 (1990) (analyzing how under classical immigration law, courts have been extraordinarily reluctant to adjudicate noncitizens' claims as matter of constitutional law, even where questions of race or national origin discrimination in immigration law arise); see also T. Alexander Aleinikoff, Aliens, Due Process and "Community Ties": A Response to Martin, 44 U. Pitt. L. Rev. 237, 258-59 (1983) (discussing courts' "hands-off" approach to due process in immigration law); Ludwin, supra note 47, at 1382-90 (explaining how Court engages in limited judicial review in immigration context, even in adjudicating equal protection claims). It is not unreasonable to say that more than ordinary judicial restraint is at work in the immigration arena. See Motomura, supra, at 550-60.

[95] Motomura, supra note 94, at 549. Motomura's analysis specifically concerns the courts' use of constitutional norms from other areas of public law in interpreting immigration statutes that they often refuse to evaluate in an explicitly constitutional matter. See id. The result is an "aberrational form of the typical relationship between statutory interpretation and constitutional law" because the courts often reach results that are more generous or protective towards noncitizens as a matter of statutory analysis than they are willing to reach as a matter of constitutional analysis. See id.

[96] See Motomura, supra note 94, at 600-03, 611-12 (making this argument with respect to phantom equal protection and due process norms); see also Jean v. Nelson, 472 U.S. 846, 867-68 (1985) (Marshall, J., dissenting) (criticizing majority's decision to rule on Haitian detention policy on nonconstitutional grounds as ill founded and setting poor guidance for lower courts and executive branch). Graham v. Richardson, 403 U.S. 365 (1971), presents another example. There, the Court ruled on equal protection grounds but referenced the uniformity requirement as support. See id. at 382. Yet the two principles derive from two separate clauses in the Constitution and are at least somewhat distinguishable. Compare

This lack of predictability is particularly problematic with respect to the aggravated felony provisions.

C. *Uniformity Under the Taxation and Bankruptcy Clauses*

Unlike the "uniform Rule" requirement of the Naturalization Clause, the Constitution's provision for uniformity in federal taxation and bankruptcy law has been the subject of direct scrutiny by the Supreme Court.[97] In these arenas, the Court has developed an explicit doctrine to describe what the Constitution requires: "geographical uniformity."[98] Thus, a brief exploration of the uniformity doctrine in taxation and bankruptcy is helpful in understanding the model(s) of uniformity available under existing constitutional jurisprudence. Moreover, this doctrine allows one to consider whether application of

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U.S. Const. art. I, § 8, cl. 4, with U.S. Const. amend. XIV, § 1. At the heart of the equal protection principle is the notion that the Constitution does not permit disparate treatment of individuals or groups based on prejudice. See Tribe, supra note 3, § 16-1, at 991-94 (providing overview of equal protection principles). Equal treatment in this context is inextricably linked with notions of fairness and nondiscrimination. See id. § 16-1, at 992-93 & n.13. While the Uniformity Clause's requirement of "equality" throughout the nation in immigration law may implicate notions of fairness, it is also based on other, distinct concerns such as national sovereignty and federal-state relations. By intermingling references to equal protection and uniformity without further elucidation, *Graham* makes for ambiguous constitutional precedent when litigating the aggravated felony provisions.

This is not to say that equal protection may not be a plausible route for attacking disparate immigration consequences under AEDPA/IIRIRA. In Garberding v. INS, 30 F.3d 1187 (9th Cir. 1994), the Ninth Circuit considered an INA provision allowing for relief from deportation if a conviction was expunged under either federal law or a state counterpart to federal expungement law, but not if the expungement was under a state law that was not the *exact* counterpart to federal law. See id. at 1188-90. The conviction in question—first-time possession of marijuana—had been expunged under a broader state statute and would have been eligible for expungement under the federal law. See id. at 1190-91. Under these circumstances, the court found the deportation order to violate equal protection rational basis review because it was "wholly irrational" to base deportation on the "fortuitous circumstance" of the difference in state law. See id.

97 The Supreme Court's earliest examination of the uniformity requirement in the taxation context was in the Head Money Cases (Edye v. Robertson), 112 U.S. 580 (1884), which rejected a uniformity challenge pursuant to the Taxation Clause to a duty levied by Congress on carriers of aliens arriving in the United States by seaport. See id. at 594-95. The Court ruled that the uniformity provision did not apply because this duty was not a "tax" within the meaning of the Constitution but stated in dicta that the charge comported with uniformity in any event because it "operates precisely alike in every part of the United States." See id. at 594. This type of language would be echoed by the Court in its seminal cases in bankruptcy and taxation. See Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 189-90 (1902) (interpreting uniformity requirement in Bankruptcy Clause); Knowlton v. Moore, 178 U.S. 41, 96 (1900) (interpreting and examining legislative history of uniformity requirement in Taxation Clause); see also United States v. Ptasynski, 462 U.S. 74, 85-86 (1983) (taxation); Regional Rail Reorganization Act Cases, 419 U.S. 102, 160-61 (1974) (bankruptcy); Fernandez v. Wiener, 326 U.S. 340, 359-60 (1945) (taxation); In re Sullivan, 680 F.2d 1131, 1135 (7th Cir. 1982) (bankruptcy).

98 *Knowlton*, 178 U.S. at 96; *Hanover Nat'l Bank*, 186 U.S. at 188.

such principles in the immigration context would address the problems caused by the aggravated felony provisions.[99]

The Court laid down the foundations for its uniformity doctrine in *Knowlton v. Moore*,[100] a taxation case in which the Supreme Court rejected a uniformity challenge by taxpayers to the War Revenue Act of 1898, which levied taxes on the legacies and distributive shares of personal property.[101] The taxpayers argued that the tax was nonuniform because, inter alia, the tax rate depended upon the relationship between the legatee/distributee and the deceased person[102] but testamentary and intestacy laws vary from state to state.[103]

The Court engaged in an extensive analysis of the Taxation Clause and the history and policy underlying its uniformity provision and concluded that it was intended to prevent the federal government from discriminating against states or their residents by imposing differential tax burdens based on geography.[104] What the Constitution requires, then, is "geographical uniformity," which is "synonymous with the expression 'to operate generally throughout the United States.'"[105] The Court ultimately held that a tax is constitutional so long as Congress applies the same tax rate throughout the country on

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[99] The word "uniform" does not necessarily have the same meaning in the three different constitutional contexts. There are arguments that, if anything, the requirement is stricter in immigration than in the other two areas. See infra notes 116-25 and accompanying text.

[100] 178 U.S. 41 (1900).

[101] See *Knowlton*, 178 U.S. at 43, 46, 109-10 (relying in part on U.S. Const. art. I, § 9).

[102] For example, the rate was 75 cents for every one hundred dollars for siblings of the deceased but $1.50 for every one hundred dollars for descendants of these siblings. See id. at 62 n.1.

[103] See id. at 107-08. Variations in state law would mean that, depending on the state, persons having the same consanguine relationship (e.g., siblings) would obtain different rights to the deceased's property and therefore would be affected differently by the federal tax. The Court also rejected the argument that the tax was nonuniform because it exempted personal property below ten thousand dollars and because it was progressive (the tax rate increased according to the amount of the legacy or share). See id. at 83-84, 108-10. The Court characterized this argument as a claim for "intrinsic uniformity," which it said was not required. See id. at 88-89. Note that in Kharaiti Ram Samras v. United States, 125 F.2d 879 (9th Cir. 1942), the Ninth Circuit agreed that "the restriction of uniformity relates to geography only" and rejected the plaintiff's argument that Congress could not provide differing naturalization rights to noncitizens of different racial origins. See id. at 881. Indeed, this claim is arguably analogous to the claim raised against progressive taxation in *Knowlton*. See 178 U.S. at 109.

[104] See *Knowlton*, 178 U.S. at 96.

[105] Id.

a particular subject.[106] Here, Congress had merely established nationwide rules for the taxation of particular subjects.[107]

In *Hanover National Bank v. Moyses*,[108] decided just two years after *Knowlton*, the Court considered constitutional uniformity under the Bankruptcy Clause. *Hanover National Bank* upheld against a uniformity challenge a federal bankruptcy law that defined exempt assets for bankruptcy purposes as those assets exempt under the various state insolvency laws.[109] A bankruptcy law is geographically uniform,[110] and therefore constitutional, said the Court, so long as each state's exemptions are recognized, "although [the law] may result in certain particulars differently in different States."[111]

The Court's uniformity doctrine in taxation and bankruptcy is not entirely clear or uncontroversial. Commentators differ as to whether the "geographical uniformity" discussed in *Knowlton* and *Hanover National Bank* is really one and the same. Some argue that *Knowlton* enunciated a distinct uniformity model which the Court then eviscerated in the bankruptcy context and that *Hanover National Bank*, but not *Knowlton*, permits incorporation of state law into the relevant federal statutory framework.[112] Others point out that there are federal tax statutes that incorporate state law into their operation without being held unconstitutional under *Knowlton*: For example, federal law levies an excise tax on community property, but only certain states have laws creating such property.[113]

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106 See id. at 84, 108 (agreeing with view that "wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate").

107 See id. at 108 (stating that tax scheme levied taxes based on certain "degree[s] of relationship or want of relationship to the deceased, wherever existing").

108 186 U.S. 181 (1902).

109 See id. at 189-90.

110 The Court adopted this term, which it had recently coined in *Knowlton*, without explanation and summarily rejected the idea that the Constitution requires "personal" uniformity (presumably, that would mean that a law could not operate differently with respect to different persons). See id. at 188.

111 Id. at 190.

112 See Judith Schenck Koffler, The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity, 58 N.Y.U. L. Rev. 22, 83-84 (1983) (arguing that *Hanover Nat'l Bank* "makes a mockery" of *Knowlton* rule and that absurdity of *Hanover Nat'l Bank* rule would be apparent if applied in taxation context since it would mean federal government could not tax subjects that state governments chose not to tax); Neuberger, supra note 29, at 239 (arguing that in bankruptcy, but not taxation, uniformity can include "only uniform federal incorporation of divergent state rules"); see also Carrasco, supra note 29, at 635 & n.233 (agreeing with Professor Koffler that *Hanover Nat'l Bank* took *Knowlton* one step further and in essence "purports" to find uniformity where there was none).

113 See Fernandez v. Wiener, 326 U.S. 340, 359-60 (1945) (upholding against uniformity challenge federal tax on community property rights created by state law even though some states have no such law); Hertz, supra note 34, at 1018-19 & n.69 (citing *Fernandez* and

The view that *Knowlton* sets out a stricter standard than *Hanover National Bank*, though not without its limitations,[114] is at least arguable. Allowing state bankruptcy exemption laws to determine the federal exemption standard may be different from allowing state law to determine the existence or amount of a type of property subject to a national taxation rule. In the former instance, but not the latter, state law is expressly adopted as federal law.

Some commentators argue that application of the *Knowlton* model of geographic uniformity to the Naturalization Clause requires that immigration law not incorporate state law so as to yield differing results for persons residing in the various states based on differences in state law.[115] Others argue that if this result is not required in the taxation field, the Naturalization Clause requires stricter uniformity than either the Taxation or Bankruptcy Clauses due to its distinct language, history, and underlying policy.[116]

Comparison of these provisions by the courts is difficult to find. The Seventh Circuit, however, has engaged in at least a cursory comparison of the Bankruptcy and Naturalization Clause requirements.[117] The Court observed that the latter appears to impose a stricter standard, namely, one that does not allow reference to state law where that leads to nonuniform results.[118]

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arguing that both Taxation and Bankruptcy Clauses permit tax and bankruptcy law to incorporate state law by applying federal law to state-created property rights). Another example might be federal tax law relating to punitive damages awards in a wrongful death action: These awards generally are taxable under federal law but are excludable if the state where the taxpayer resides allows only punitive damages. See Internal Revenue Code § 104(c)(2), 26 U.S.C.A. § 104(c)(2) (West Supp. 1999); 1 Jacob Mertens, Jr., The Law of Federal Income Taxation § 4.09, at 4-17 (1997) (noting that federal tax law may be written to take into account varying state laws, as in area of taxing punitive damages).

114 Those taking this view tend to focus on the *Knowlton* Court's rejection of the petitioners' claim that progressive taxation violates the uniformity requirement and the Court's holding that Congress may tax in such manner pursuant to nationally applicable rules. See, e.g., Koffler, supra note 112, at 77-79. However, this claim is not the one most apposite to a discussion of when federal law may incorporate state law into its operation because progressive taxation does not involve variation based on differences in state law.

115 See Carrasco, supra note 29, at 635-36 (arguing that Naturalization Clause requires "a *Knowlton*-like geographic uniformity that exists independent of state law"); Hertz, supra note 34, at 1017 (arguing that uniform rule provision requires naturalization law "that produces the same result in every state"); Koffler, supra note 112, at 86 (same).

116 See Hertz, supra note 34, at 1015-17 (discussing text, legislative history, and policy of "uniform Rule" requirement).

117 See In re Sullivan, 680 F.2d 1131, 1135 (7th Cir. 1982) (upholding against uniformity challenge federal bankruptcy statute that allows states to "opt out" of scheme of uniform federal exemptions).

118 See id. at 1135. The court specifically distinguished Nemetz v. INS, 647 F.2d 432 (4th Cir. 1981), discussed supra text accompanying notes 55-57, upon which the petitioners challenging the bankruptcy scheme relied, because the case involved a naturalization statute.

The text, history, and underlying policy of the Naturalization Clause support the view that it requires uniformity at least as strict as that theoretically set out by the *Knowlton* Court. First, textually, the term "rule" implies a more narrow concept than either "laws" (Bankruptcy Clause) or "all Duties, Imposts and Excises" (Taxation Clause), as does the fact that "rule" is in the singular form as compared to the broad sweep of "laws" or "duties."[119]

Second, as a matter of history and policy, there is evidence that the Naturalization Clause requirement was intended to be particularly strict. Uniformity in the Taxation Clause is rooted in the framers' concern that, on the one hand, Congress must be able to levy taxes essential for sustaining the federal government, but, on the other hand, must not discriminate among the states through its tax policy.[120] Uniformity in the Bankruptcy Clause was intended to promote the economic well-being of the nation by establishing a single market for the extension of credit in which states could not interfere based on localized interests.[121] Uniformity in the Naturalization Clause, however, is rooted in the specific history of disparate naturalization rules in the various states and the idea that these disparities caused interstate tension, compromised relations between this nation and other nations, and was unfair to noncitizens.[122]

Given these differences in text, history, and policy, certain forms of incorporation of state law may be compatible with the purposes of the Taxation and Bankruptcy Clauses. Indeed, in the area of taxation, the framers were very concerned about discrimination but may have envisioned some forms of concurrent regulation by the states.[123] With

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119 See Hertz, supra note 34, at 1015-16; see also Carrasco, supra note 29, at 633-34 (arguing that textual differences between Naturalization and Bankruptcy Clauses, i.e., between use of words "Rule" and "Laws," imply stricter model envisioned by framers in immigration context). These textual differences are not insignificant, since interpreting provisions of the Constitution requires that effect must be given to each word. See Knowlton v. Moore, 178 U.S. 41, 87 (1900). This point is supported by analogy to state caselaw concerning the not infrequent state constitutional provisions for a uniform "rule" of taxation—this caselaw indicates that the term "rule" imposes much greater restrictions on a government's ability to classify property for purposes of taxation. See Hertz, supra note 34, at 1016 (discussing state caselaw).

120 See *Knowlton*, 178 U.S. at 95-96.

121 See Koffler, supra note 112, at 48-50.

122 See supra notes 34-42 and accompanying text.

123 See The Federalist No. 32, at 201 (Alexander Hamilton) (Jacob E. Cooke ed. 1961). Moreover, the rights affected are arguably different in kind. See Hertz, supra note 34, at 1018-20 (pointing out that while both taxation and bankruptcy laws operate upon state-created rights and obligations, such as property rights, naturalization law depends upon political status of individuals vis-à-vis national sovereign); see also Lawrence Ponoroff, Exemption Limitations: A Tale of Two Solutions, 71 Am. Bankr. L.J. 221, 221-22 (1997) (noting inevitable interplay between federal bankruptcy law and state property law).

respect to the bankruptcy power, the idea that states have concurrent power to regulate insolvencies—at least where not preempted by federal law—has been long-standing.[124] By contrast, no such concurrent regulation was envisioned in the naturalization arena.[125] The incorporation of state law definitions of criminal offenses so as to trigger disparate immigration consequences is simply incompatible with the purpose and history of the Naturalization Clause.

II
How the Aggravated Felony Provisions Open the Door to Nonuniformity

There are two main ways in which the aggravated felony provisions invite nonuniformity in immigration consequences. First, there are problems of definition. The INA for the most part does not define the crimes it labels "aggravated felonies" but instead refers to them by everyday terms such as theft, assault, and statutory rape. Different states, however, define the requisite elements for these commonly labeled crimes differently. Thus, certain conduct committed in one state may lead to conviction of what could be deemed an aggravated felony while the same conduct in another state will not. Second, in a number of categories the aggravated felony definition turns on the sentence imposed. Therefore, differences in state sentencing schemes will result in variance as to whether the same underlying crime is considered an aggravated felony.

A. The Definition Problem: Statutory Rape

All fifty states have laws criminalizing sexual relations with a person based solely on the fact that the person is below what is typically referred to as the "age of consent."[126] This offense will be referred to

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[124] See Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 196-99 (1819) (holding that grant of bankruptcy power to Congress did not prevent states from regulating insolvencies); Rhodes v. Stewart, 705 F.2d 159, 163 (6th Cir. 1983) ("It is fundamental that the state and federal legislatures share concurrent authority to promulgate bankruptcy laws . . . ." (citation omitted)); Joseph Lamport, Note, The Preemption of Bankruptcy-Only Exemptions, 6 Cardozo L. Rev. 583, 583-88 (1985) (describing and analyzing respective power of federal and state governments over bankruptcies and insolvencies under Constitution). But see Koffler, supra note 112, at 47-51, 106 (arguing that once Congress acts in bankruptcy field, states should not be able to regulate area concurrently, such as through defining bankruptcy exemptions, so as to create nonuniformity).

[125] See The Federalist No. 32, supra note 42, at 201; Hertz, supra note 34, at 1018-20.

[126] See Richard A. Posner & Katharine B. Silbaugh, A Guide to America's Sex Laws 44-64 (1996) (surveying statutory rape laws of all 50 states).

This Note does not address the crime of child sexual abuse, which is subject to its own set of criminal statutes. See, e.g., Cal. Penal Code § 269 (West 1999) (providing that commission of certain sexual acts upon child under 14 and more than 10 years younger than

here as statutory rape, although it is variously labeled under state law.[127] Statutory rape, which appears to fall within the "sexual abuse of a minor" aggravated felony classification,[128] exemplifies how differences in state criminal law can trigger nonuniform immigration consequences due to variances in how the states define the relevant offense(s). The following scenario is far from unrealistic.

When Hector M. was nineteen years old, he had consensual sex with his fifteen-year-old girlfriend.[129] The young woman's mother disapproved and pressed charges. In New York, where Hector and his

actor constitutes "aggravated sexual assault of a child"); N.Y. Penal Law § 130.35 (McKinney 1998) (providing that sexual intercourse with female under 11 constitutes "rape in the first degree").

127 See, e.g., N.Y. Penal Law §§ 130.55, 130.60 (McKinney 1998) ("sexual abuse"); Ariz. Rev. Stat. Ann. § 13-1405 (West 1998) ("sexual conduct with a minor"); 18 Pa. Cons. Stat. Ann. § 3122.1 (West 1999) ("statutory sexual assault").

128 The INA does not define the term "sexual abuse of a minor" and this provision has yet to be interpreted by the BIA or the courts. INA § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A) (Supp. III 1997). The INS, however, has already taken the position that it encompasses state law statutory rape convictions. See Xiong v. INS, 173 F.3d 601, 607-08 (7th Cir. 1999) (referring to INS argument that statutory rape is "sexual abuse of a minor" aggravated felony but refusing to consider argument because not raised until administrative appeal).

Advocates should be prepared to counter INS arguments in this regard. The INS may cite to the fact that there is a federal criminal statute entitled "sexual abuse of a minor" that is basically a statutory rape law. See 18 U.S.C. § 2243(a) (1994). The agency may argue that Congress must be presumed to have been aware of that wording in the federal criminal statute and therefore clearly intended to include statutory rape as an aggravated felony. Immigrants' advocates can argue to the contrary—that analysis of the other aggravated felony provisions shows that Congress knew how to refer to other federal statutes when it wanted to do so, e.g., in the "crime of violence" and drug trafficking aggravated felony provisions, and that Congress's failure to make such reference in this instance shows it did not intend for the federal criminal definition of sexual abuse of a minor to apply. See INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (Supp. III 1997) (explicitly referring to 18 U.S.C. § 16 (1994), for definition of "crime of violence"); INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B) (1994) (explicitly referring to other provisions of federal criminal code to define drug trafficking crimes); see also Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) (stating that Congress's intent must be construed by attention to specific language as well as "the specific context in which that language is used, and the broader context of the statute as a whole" (citations omitted)); INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987) (observing that court must look carefully at statutory history and structure in making interpretation); Goncalves v. Reno, 144 F.3d 110, 127 (1st Cir. 1998), cert. denied, 119 S. Ct. 1140 (1999) (insisting that court must look to particular statutory provision "not in isolation, but in the context of . . . [the statute] and in light of the [statute's] overall structure").

129 This hypothetical is modeled on the true story of Jesus Collado, whose case became notorious as an example of the new law's overreaching. In 1997, the INS sought to deport him on the basis of a 23-year-old New York misdemeanor statutory rape conviction that arose out of consensual sexual relations with his girlfriend when they were both teenagers. See Mirta Ojito, Old Crime Returns to Haunt an Immigrant, N.Y. Times, Oct. 15, 1997, at B1. The case drew intense media and public scrutiny, and ultimately the INS desisted in its efforts. See Mirta Ojito, Immigrant Fights Off His Deportation, N.Y. Times, Sept. 4, 1998, at B3.

girlfriend lived, the age of consent is seventeen.[130] Ultimately, Hector pleaded guilty to "sexual misconduct,"[131] a form of misdemeanor statutory rape under New York law, for which he was sentenced to probation for three years.[132] Years later, upon reentering the United States after visiting his mother in Mexico for two weeks, he told the INS agents about this conviction when asked if he had any criminal record. The INS immediately placed him in removal proceedings, arguing that his conviction constituted an aggravated felony pursuant to the INA's "sexual abuse of a minor" provision.[133] Ironically, if Hector had lived in Maryland rather than New York, his girlfriend would have been above the state's age of consent and as a matter of state law, he would not have committed the offense of statutory rape.[134]

A complicating factor is that there are many differences among these laws as to critical elements of the offense.[135] The age of consent, for example, varies from fourteen to eighteen.[136] In addition, while some states define the offense solely with reference to the age of consent,[137] others require some minimum age difference between the parties.[138] Many states assign varying degrees of seriousness to the

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130 See N.Y. Penal Law § 130.05(3)(a) (McKinney 1998) (providing that persons under 17 years old cannot consent to sexual acts).

131 N.Y. Penal Law § 130.20 (McKinney 1998) (providing that sexual intercourse with female without her consent is Class A misdemeanor).

132 See N.Y. Penal Law § 65.00(3)(b) (McKinney 1998) (permitting sentence of three years probation for Class A misdemeanors).

133 See INA § 101(a)(43)(A).

134 The age of consent in Maryland is 14. See Md. Ann. Code art. 27, §§ 463, 464A (1987). However, the age of consent is 16 for third degree sexual assault if the offender is 21 or older. See Md. Ann. Code art. 27, § 464B (1998).

It should be noted that application of a uniformity principle, while it would help our hypothetical Hector, would not help all noncitizens in similar situations and, indeed, might not have helped Mr. Collado, discussed supra note 129.

135 Statutory rape laws are a paradigmatic example of what has been labeled the "crazy quilt of laws" regulating sexual behavior in this country. Posner and Silbaugh, supra note 126, at 2.

136 See, e.g., Ala. Code § 13A-6-70(c)(1) (Supp. 1998) (declaring age of consent as 16); Cal. Penal Code § 261.5(a) (West 1999) (age 18); Colo. Rev. Stat. §§ 18-3-403(1)(e), 18-3-405 (1998) (age 15); 720 Ill. Comp. Stat. Ann. §§ 5/12-13(4), 5/12-16(c) (West 1999) (age 17); Me. Rev. Stat. Ann. tit. 17A, §§ 253(1)(B), 254 (West 1998) (age 14); N.Y. Penal Law § 130.25 (McKinney 1998) (age 17); 18 Pa. Cons. Stat. Ann. § 3122.1 (West 1999) (age 16); Tex. Penal Code Ann. § 22.011(c)(1) (West 1999) (age 17); Vt. Stat. Ann. tit. 13, § 3252(a)(3) (1998) (age 16); Wash. Rev. Code Ann. § 9A.44.079(1) (West Supp. 1999) (age 16).

137 See, e.g., Ariz. Rev. Stat. Ann. § 13-1405 (West 1998); Fla. Stat. Ann. § 794.05 (West Supp. 1999); S.C. Code Ann. § 16-3-655 (Law. Co-op. Supp. 1998).

138 See, e.g., 18 Pa. Cons. Stat. Ann. § 3122.1 (West Supp. 1999) (criminalizing sexual intercourse with person under 16 where actor is four or more years older); Tenn. Code Ann. § 39-13-506(a) (Supp. 1998) (criminalizing sexual penetration with person under 18 where actor is at least four years older); cf. 18 U.S.C. § 2243(a) (1994) (criminalizing sexual acts with person at least 12 but younger than 16 and at least four years younger than actor).

offense according to the extent of such age difference and differ as to how they do so.[139] State laws also vary in that some states recognize a mistake of age defense[140] while others do not.[141]

Yet another set of variations emerges when one compares the various state laws with the analogous federal criminal statute, which criminalizes certain sexual acts with a person who is at least twelve but less than sixteen years old and at least four years younger than the actor.[142] Most state laws are broader than the federal law with respect to one or more elements.[143] In sum, the potential for nonuniformity

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139 See, e.g., Cal. Penal Code § 261.5(a)-(d) (West 1999) (providing that age of consent is 18 but offense is misdemeanor if actor is no more than three years older than victim, offense may be misdemeanor or felony if actor is more than three years older, and offense is felony if actor is over 21 and victim is under 16); N.Y. Penal Law §§ 130.25(2), 130.55 (McKinney 1998) (providing that intercourse with person under 17 is misdemeanor but intercourse between person at least 21 and another person under 17 can be prosecuted as felony).

140 See, e.g., 720 Ill. Comp. Stat. Ann. § 5/12-17(b) (West 1999) (providing affirmative defense if actor reasonably believed victim was at least 17); Mont. Code Ann. § 45-5-511 (1998) (providing affirmative defense if actor reasonably believed person older than 16 and person was actually 15 or 16); Or. Rev. Stat. § 163.325 (1997) (providing affirmative defense if actor reasonably believed person was over specified age of consent, which for some sexual activity is 16 and for others 18).

141 See, e.g., Ariz. Rev. Stat. Ann. § 13-1405 (West 1998); Cal. Penal Code § 261.5 (West 1999); Mass. Gen. Laws Ann. ch. 265, § 23 (West 1999); N.Y. Penal Law § 15.20(3) (McKinney 1998).

142 See 18 U.S.C. § 2243(a) (1994). It is an affirmative defense that the actor reasonably believed the other person to be at least 16 years old or that the parties were married. See id.

143 For example, many state jurisdictions do not require the same age gap between actor and victim in cases where the federal statute does so, and some state jurisdictions do not require any age gap at all. See, e.g., Ariz. Rev. Stat. Ann. § 13-1405 (West 1998) (no age gap requirement); Cal. Penal Code § 261.5 (West 1999) (no age gap requirement although age difference affects grading of offense); Ga. Code Ann. § 16-6-3 (1999) (same); Mass. Gen. Laws Ann. ch. 265, § 23 (West 1999) (no age gap requirement); Mich. Comp. Laws Ann. §§ 750.520b, 750.520d (West Supp. 1999) (same); N.J. Stat. Ann. §§ 2C:14-2, 2C:14-3 (West 1999) (no age gap requirement although age difference affects grading of offense); Wash. Rev. Code Ann. §§ 9A.44.076, 9A.44.079 (West Supp. 1999) (requiring three-year gap when victim is under 14, and two-year gap when victim is between 14 and 16).

Only a handful of state laws appear to be as narrow or more narrow than the federal statute in terms of the age specifications for offender and victim. See Colo. Rev. Stat. §§ 18-3-403, 18-3-405 (1998) (criminalizing sexual conduct where victim is under 15 and at least four years younger than actor); Del. Code Ann. tit. 11, §§ 762(d), 768 (1998) (criminalizing sexual contact with victim younger than 16 but providing defense where victim is at least 12 and actor is no more than four years older); Md. Ann. Code art. 27, §§ 463, 464A (1987) (criminalizing sexual intercourse between one person who is under 14 and another person who is at least four years younger); W. Va. Code § 61-8B-5(a)(2) (1999) (criminalizing sexual intercourse with person under 16 and at least four years younger than actor); Wyo. Stat. Ann. § 6-2-303 (Michie 1999) (criminalizing sexual intercourse with person under 12 and at least four years younger than actor).

Another area of difference is the range of conduct proscribed. For example, many state statutes, but not the federal statute, criminalize touching through clothing. Compare

pursuant to the "sexual abuse of a minor" aggravated felony provision is extensive.[144]

B. The Sentencing Threshold Problem: Misdemeanor Assault and Battery

Eighteen-year-old Isabel Villanueva was so angry when her mother hit her after Isabel came home late from a date that she called the police to get even.[145] But when the police told her mother that she "could be heading back to Mexico" for her action, Isabel immediately dropped the charges.[146] She said later, "I was pretty scared, I didn't even know about the law."[147]

"The law" Isabel did not know about was the INA, which designates as an aggravated felony any "crime of violence" for which a sentence of at least one year is imposed.[148] A "crime of violence" includes any offense "that has as an element the use, attempted use, or threatened use of physical force against the person or property of another," a broad definition that almost certainly encompasses the misdemeanor assault crime allegedly committed by Mrs. Villanueva.[149]

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18 U.S.C. § 2243(a) (1994), with, e.g., 720 Ill. Comp. Stat. Ann. § 5/12-12 (West Supp. 1998), and N.J. Stat. Ann. § 2C:14-1(d) (West Supp. 1999).

144 Advocates should also be prepared to contend with INS arguments that statutory rape convictions, in particular felony convictions, are per se aggravated felonies pursuant to the "crime of violence" provision where the requisite sentence of at least one year is imposed. See INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (Supp. III 1997). This provision, drawing its definition of "crime of violence" from a separate section of the federal criminal code, renders any felony offense that "involves a substantial risk" of physical force against another person an aggravated felony. See 18 U.S.C. § 16 (1994). The BIA has already held that it will consider felony statutory rape a per se aggravated felony under this provision. See In re B—, Interim Dec. No. 3270, 1996 WL 170049 (B.I.A. Mar. 28, 1996). The Seventh Circuit, however, which is the first court of appeals to consider this issue, refused to apply a per se rule to a Wisconsin felony statutory rape conviction because, according to the court, the Wisconsin law encompasses conduct that does not, "by its nature, involve[ ] a substantial risk [of] physical force." See Xiong v. INS, 173 F.3d 601, 607 (7th Cir. 1999). Those confronted with this situation may also wish to raise the uniformity issue, and argue that state statutory rape convictions cannot be per se aggravated felonies because they vary so much with respect to each other as well as to the analogous federal statute. See discussion infra Part III. For further discussion of arguments advocates may face and counterarguments they can raise with respect to statutory rape and the aggravated felony provisions, see Brady et al., supra note 26, app. 9-C.

145 See Howard LaFranchi, How One Teen Almost Got Her Mother Deported, Christian Sci. Monitor, July 7, 1998, at 1.

146 See id.

147 Id.

148 See INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (Supp. III 1997).

149 See id. The INA takes its definition of the term "crime of violence" from a federal criminal statute, which provides that:

> The term "crime of violence" means—
>
> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

Something else Isabel probably did not know is that if she and her mother lived in nearby Arizona instead of Texas, Mrs. Villanueva would not have been at risk for deportation as an "aggravated felon" even if she were convicted and sentenced to the maximum possible term: In Texas, the maximum sentence for misdemeanor assault is one year, whereas in Arizona it is only six months.[150]

Immigrants' advocates have expressed great concern about the fact that, by lowering the INA sentencing threshold from five years to one, IIRIRA makes a number of *misdemeanor* offenses, including misdemeanor assault and battery, into aggravated felonies.[151] While the scope of the amended "crime of violence" category has yet to be fully litigated, it seems clear that the INS—and probably the BIA—will take a broad view that includes misdemeanor offenses.[152] What has been less remarked upon is that this change will also result in

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> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16 (1994).

Misdemeanor assault and battery crimes would fall under the aggravated felony category pursuant to § 16(a), which, unlike § 16(b), is not limited to felony offenses.

The critical question under § 16(a) is whether the offense includes one of the requisite elements, i.e., the use, attempted use, or threatened use of physical force against another person or his property. See United States v. Gonzalez-Lopez, 911 F.2d 542, 547 (11th Cir. 1990) (holding in immigration context that "crime of violence" classification looks to elements of offense rather than underlying conduct); cf. Taylor v. United States, 495 U.S. 575, 602 (1990) (holding in federal sentencing context that "crime of violence" classification looks to elements of offense). This is different from the requisite analysis under § 16(b). See In re Alcantar, 20 I. & N. Dec. 801, 809 (B.I.A. 1994) (determination under § 16(b) is "categorical" or "generic" approach).

150 Compare Ariz. Rev. Stat. Ann. § 13-1203(B) (West 1989) (classifying assault as Class 1 misdemeanor), and id. § 13-707 (setting maximum sentence for Class 1 misdemeanor at six months), with Tex. Penal Code Ann. § 22.01(b) (West 1994 & Supp. 1999) (classifying assault as Class A misdemeanor), and id. § 12.21(2) (West 1994) (specifying maximum sentence for Class A misdemeanor as one year).

151 See Laura S. Washington, An Anti-immigration Law that Has Crossed the Line, Chi. Trib., Oct. 27, 1997, at 15 (reporting statement by Diego Bonesatti, immigration and citizenship coordinator at Illinois Coalition for Immigrant and Refugee Protection, that immigrants convicted of shoplifting and simple battery are now aggravated felons); see also Brady et al., supra note 26, § 5-3 (counseling advocates on how to avoid one-year sentence in "crime of violence" cases as sentence imposed is key, not misdemeanor/felony classification).

The "crime of violence" category is not new, but IIRIRA lowered the minimum sentence from five years to one. See IIRIRA, Pub. L. No. 104-208, § 321(a)(3), 110 Stat. 3009, 3009-627 (amending INA § 101(a)(43)(F)).

152 In the different but related context of 18 U.S.C. § 16(b), for example, the BIA construed the term "crime of violence" to include the offense of driving under the influence, thus taking a broad view of the § 16(b) requirement of a "risk of substantial force." See In re Magallanes-Garcia, Interim Dec. No. 3341, 1998 WL 133301 (B.I.A. Mar. 19, 1998). While the statutory issues are different where § 16(b) is involved, the expansiveness of the approach is instructive.

nonuniform immigration consequences for essentially identical conduct because maximum penalties for these offenses vary above and below the one-year threshold depending on state law. Even a brief inquiry into this area amply demonstrates the problem.

Misdemeanor assault and battery is really a collection of variously named offenses[153] that includes intentionally, recklessly, or negligently causing physical injury to another person,[154] attempting to inflict physical injury,[155] and intentionally creating an apprehension in another person of imminent physical injury.[156] Each of these offenses is potentially an aggravated felony if the requisite sentence is imposed.[157]

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153 These offenses are variously labeled assault, battery, simple assault, simple battery, or the lowest degree of assault or battery in the relevant penal code. See, e.g., Ariz. Rev. Stat. Ann. § 13-1203 (West 1989) (labeling offense as assault); Cal. Penal Code § 242 (West 1999) (labeling as battery); Colo. Rev. Stat. § 18-3-204 (1998) (assault in the third degree); La. Rev. Stat. Ann. § 14:38 (West 1997) (simple assault); N.C. Gen. Stat. § 14-33 (1998) (simple assault, simple assault and battery). In some states "assault" is defined as the attempt to cause physical injury, with battery being the completed act. See, e.g., Cal. Penal Code § 240 (West 1999); N.M. Stat. Ann. § 30-3-1 (Michie 1994). In other states, assault includes both the attempt and the completed act. See, e.g., Minn. Stat. Ann. § 609.224 (West Supp. 1999); Miss. Code Ann. § 97-3-7 (1999).

154 States vary as to how they handle the element of intentionality. Typically, the misdemeanor offense of causing physical injury includes purposely, knowingly, or recklessly causing physical injury, or negligently causing such injury with a deadly weapon. See, e.g., N.J. Stat. Ann. § 2C:12-1(a) (West 1995) (defining simple assault as: purposely, knowingly, or recklessly causing bodily injury to another; attempting "by physical menace to put another in fear of imminent serious bodily injury"; or "negligently caus[ing] bodily injury to another with a deadly weapon"); Or. Rev. Stat. § 163.160 (1997) (defining assault in fourth degree similarly to New Jersey statute). Sometimes, however, there are variations. In Connecticut, for example, the mens rea of recklessness is included only where the injury is serious, and the "deadly weapon" requirement where the actor is only negligent is more broadly defined. See Conn. Gen. Stat. Ann. § 53a-61(a) (West 1994) (defining assault in third degree as: intentionally causing physical injury; recklessly causing serious physical injury; or negligently causing physical injury with "deadly weapon, dangerous instrument, or electronic defense weapon"). Another example is Florida, where the relevant statutes refer to "culpable negligence" and "intentional" conduct but not to conduct that is "reckless" or "knowing." See Fla. Stat. Ann. § 784.05(2) (West 1992) (defining act of inflicting actual personal injury on another through culpable negligence as misdemeanor in first degree); id. § 784.03(1)(a) (defining battery as actual and intentional touching or striking of another person or intentionally causing bodily harm to another).

155 See, e.g., Cal. Penal Code § 240 (West 1999) (defining this act as assault); Idaho Code § 18-901(a) (1997) (same).

156 See, e.g., Ariz. Rev. Stat. Ann. § 13-1203(A)(2) (West 1989) (defining this act as assault); Miss. Code Ann. § 97-3-7(1)(c) (1999) (defining as simple assault); N.Y. Penal Law § 120.14 (Consol. 1998) (menacing in second degree).

157 Intentionally or recklessly causing physical injury to another person is potentially an aggravated felony because it has as an element the "use of physical force." Creating fear of imminent physical harm in another person is potentially an aggravated felony because it has as an element the "threatened use of physical force." Attempting to cause physical injury to another person is potentially an aggravated felony because it has as an element the "attempted use of physical force." Other forms of nonconsensual touching are poten-

Within each one of these subcategories, maximum state law sentences vary above and below one year. For example, in exactly half of the states, the maximum penalty for intentionally or recklessly causing physical injury to another person[158] is at least one year,[159] while in the other half, the maximum penalty is less than one year.[160]

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tially aggravated felonies because they have as an element the "use of physical force." See 8 U.S.C. § 1101(a)(43)(F) (Supp. III 1997); 18 U.S.C. § 16 (1994).

158 Intentional and reckless infliction of injury is generally classified as the same class of offense and is generally penalized equally. See, e.g., Ark. Code Ann. §§ 5-4-401, 5-13-203 (Michie 1997); Conn. Gen. Stat. Ann. § 53a-61 (West 1994); N.J. Stat. Ann. §§ 2C:12-1(a), 2C:43-8 (West 1995); N.Y. Penal Law § 120.00 (Consol. 1998); 18 Pa. Cons. Stat. Ann. § 2701 (West 1983 & Supp. 1999); Tex. Penal Code Ann. § 22.01 (West 1994 & Supp. 1999).

159 See Ala. Code §§ 13A-6-22, 13A-5-7 (1994) (allowing penalty of at least one year for assault in third degree); Alaska Stat. §§ 11.41.230, 12.55.135 (Michie 1998) (one year penalty for assault in fourth degree); Ark. Code Ann. §§ 5-4-401, 5-13-203 (Michie 1997) (battery in third degree); Colo. Rev. Stat. §§ 18-1-106, 18-3-204 (1998) (assault in third degree); Conn. Gen. Stat. Ann. § 53a-61 (West 1994) (assault in third degree); Del. Code Ann. tit. 11, §§ 611, 4206 (1995) (assault in third degree); Fla. Stat. Ann. § 784.03 (West 1992 & Supp. 1999) (battery); Ga. Code Ann. §§ 17-10-3 (1997), 16-5-20 (1999) (simple assault); Haw. Rev. Stat. §§ 701-107, 707-712 (1993) (assault in third degree); Ind. Code Ann. §§ 35-42-2-1(a)(1), 35-50-3-2 (West 1998) (battery); Iowa Code Ann. §§ 708.1, 708.2(2), 903.1(1)(b) (West 1994 & Supp. 1999); Md. Ann. Code art. 27, § 12A (1957) (second degree assault); Mass. Gen. Laws Ann. ch. 265, § 13A (West 1990) (assault or assault and battery); Mo. Ann. Stat. §§ 565.070[1](1), 557.021 (West 1999) (assault in third degree); Neb. Rev. Stat. §§ 28-106, 28-310 (1998) (assault in third degree); N.H. Rev. Stat. Ann. §§ 625:9[IV](a), 651:2[I], 651:2[II](c) (1996) (simple assault); N.Y. Penal Law §§ 70.15, 120.00 (Consol. 1998) (assault in third degree); Or. Rev. Stat. §§ 161.545, 163.160 (1997) (assault in fourth degree); 18 Pa. Cons. Stat. Ann. §§ 106, 1104, 2701 (West 1998 & Supp. 1999) (simple assault); R.I. Gen. Laws § 11-5-3 (1994) (simple assault or battery); S.D. Codified Laws §§ 22-6-2, 22-181 (Michie 1998 & Supp. 1999) (simple assault); Tex. Penal Code Ann. §§ 12.21, 22.01 (West 1994 & Supp. 1999) (assault); Vt. Stat. Ann. tit. 13, § 1023 (1998) (simple assault); Va. Code Ann. §§ 18.2-11, 18.2-57 (Michie 1996 & Supp. 1999) (simple assault or simple assault and battery); Wash. Rev. Code Ann. §§ 9A.36.041 (West 1988), 9.92.020 (West 1998) (assault in fourth degree).

Most states in this group set the maximum sentence at exactly one year. A few states set it at greater than one year. See Colo. Rev. Stat. §§ 18-1-106, 18-3-204 (1998) (18 months); Md. Ann. Code art. 27, §12A (1957) (10 years); Mass. Gen. Laws Ann. ch. 265, § 13A (West 1990) (2.5 years); 18 Pa. Cons. Stat. Ann. § 106(b)(7) (West 1998) (two years).

160 See Ariz. Rev. Stat. Ann. §§ 13-707, 13-1203 (West 1989) (assault); Cal. Penal Code §§ 242, 243 (West 1999) (battery); Idaho Code § 18-904 (1997) (battery); 720 Ill. Comp. Stat. Ann. § 5/12-3 (West 1993), 730 Ill. Comp. Stat. Ann. § 5/5-8-3 (West 1997) (battery); Kan. Stat. Ann. §§ 21-3412, 21-4502 (Supp. 1998) (battery); Ky. Rev. Stat. Ann. §§ 508.030, 532.020 (Michie 1990) (assault in fourth degree); La. Rev. Stat. Ann. §§ 14:33, 14:35 (West 1997) (simple battery); Me. Rev. Stat. Ann. tit. 17-A, §§ 207, 1252 (West 1983 & Supp. 1999) (assault); Mich. Comp. Laws Ann. § 750.81(1) (West Supp. 1999) (assault and assault and battery); Minn. Stat. Ann. § 609.224 (West Supp. 1999) (assault in fifth degree); Miss. Code Ann. § 97-3-7 (1999) (simple assault); Mont. Code Ann. § 45-5-201 (1997) (assault); Nev. Rev. Stat. §§ 193.150, 200.471 (1997) (assault); N.J. Stat. Ann. §§ 2C:12-1, 2C:43-8 (West 1995 & Supp. 1999) (simple assault); N.M. Stat. Ann. §§ 30-3-1, 31-19-1 (Michie 1994) (assault); N.C. Gen. Stat. §§ 14-3, 14-33 (1998) (simple assault or simple assault and battery); N.D. Cent. Code §§ 12.1-17-01, 12.1-32-01 (1997) (simple assault); Ohio Rev. Code Ann. §§ 2903.13, 2929.21 (West 1997 & Supp. 1999) (assault); Okla. Stat. tit. 21, §§ 642, 644 (1991 & Supp. 1998) (battery); S.C. Code Ann. § 22-3-560 (Law. Co-op. Supp.

Similar variation occurs with respect to offenses of assault and/or battery[161] and purposely creating apprehension of imminent physical injury in another person.[162] Finally, there are individual state idiosyncrasies.[163] In sum, there is potential for substantial disparities in immigration consequences based on sentencing law variations for noncitizens convicted of state law misdemeanor assault and battery crimes.

1998) (assault and battery); Tenn. Code Ann. §§ 39-13-101, 40-35-110, 40-35-111 (1997) (assault); Utah Code Ann. §§ 76-3-204, 76-5-102 (1995 & Supp. 1998) (assault); W. Va. Code § 61-2-9 (1997) (assault); Wis. Stat. §§ 939.51, 940.19 (1997 & Supp. 1998) (battery); Wyo. Stat. Ann. § 6-2-501 (Michie 1999) (battery).

[161] Some states specifically define the attempt to injure another person as a crime and prescribe a maximum punishment, although the penalties vary above and below one year. Compare Cal. Penal Code §§ 240, 241 (West 1999) (six months), and N.M. Stat. Ann. §§ 30-3-1, 31-19-1 (Michie 1994) (six months), and Idaho Code Ann. §§ 18-901, 18-902 (1997) (three months), with Minn. Stat. Ann. § 609.224 (West Supp. 1999) (one year). Other states label the completed act as either assault or battery but do not separately define the attempted act. In these states, the attempt is presumably punishable according to the state's general provisions for inchoate offenses. This introduces yet another source of variation above and below the one year threshold because some states subject attempts to the same maximum penalty as the accomplished act, while others impose reduced penalties. Thus, two states that both permit sentences of up to one year for the completed act of purposely injuring another person may diverge when it comes to attempts. Compare Conn. Gen. Stat. Ann. §§ 53a-51, 53a-61 (West 1994) (providing that third degree assault is punishable by sentence of one year and that attempt is crime of same grade and degree as most serious offense attempted), with Ark. Code Ann. §§ 5-3-203, 5-4-401, 5-13-203 (Michie 1997) (providing that third degree battery is punishable by up to one year but attempt to commit misdemeanor is punishable by up to 90 days), and N.Y. Penal Law §§ 70.15, 110.05, 120.00 (Consol. 1998) (providing that third degree assault is punishable by up to one year but attempt to commit misdemeanor is punishable by up to 90 days).

[162] Most but not all states set the threshold at below one year for this offense. For states that permit sentences of at least one year, see, e.g., Alaska Stat. §§ 11.41.230, 12.55.135 (Michie 1998); Conn. Gen. Stat. Ann. §§ 53a-61, 53a-62 (West 1994); 18 Pa. Cons. Stat. Ann. §§ 1104, 2701(a)(3), (b) (West 1988 & Supp. 1999). For states that set the maximum sentence at below one year, see, e.g., Ariz. Rev. Stat. Ann. §§ 13-707, 13-1203(A)(2) (West 1989); Colo. Rev. Stat. §§ 18-1-106, 18-3-206 (1998); Fla. Stat. Ann. §§ 775.082, 784.011 (West 1992); 720 Ill. Comp. Stat. Ann. §§ 5/5-8-3, 5/12-1 (West 1997 & Supp. 1999); Kan. Stat. Ann. §§ 21-3408, 21-4502 (1995 & Supp. 1998); N.M. Stat. Ann. §§ 30-3-1, 31-19-1 (Michie 1994); N.Y. Penal Law §§ 70.15, 120.15 (Consol. 1998).

[163] For example, Connecticut *requires* that a one year sentence be imposed for the offense of intentionally causing physical injury to another person. See Conn. Gen. Stat. Ann. § 53a-61 (West 1994). New Jersey, by contrast, not only limits the maximum sentence to only six months but also provides that "simple assault" is a "disorderly persons offense" rather than a "crime" as defined by the state constitution and "shall not give rise to any disability or legal disadvantage based on conviction of a crime." See N.J. Stat. Ann. §§ 2C:1-4(b), 2C:12-1(a), 2C:43-8 (West 1995 & Supp. 1999). Most states distinguish between injury, serious injury, and injury caused with a weapon or other object. Georgia, however, does not distinguish for penalty purposes between different degrees of injury *unless* a weapon or other object is involved. Compare Ga. Code Ann. §§ 17-10-3 (1997), 16-5-20 (1999) (offering punishment of no more than one year for simple assault), with Ga. Code Ann. § 16-5-21 (1999) (offering punishment of as much as 20 years for aggravated assault, defined as assault with deadly weapon).

The potential for the aggravated felony provisions to result in nonuniform immigration consequences goes far beyond the offenses of statutory rape and misdemeanor assault and battery. The problem has already begun to surface in other areas, including petty theft offenses[164] and driving under the influence,[165] and is foreseeable with respect to still more, such as obstruction of justice.[166] Indeed, the problem arguably infects the entire aggravated felony scheme.

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164 See INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G) (Supp. III 1997). In the closely related illegal reentry context, the Third Circuit ruled that a New York misdemeanor petit larceny conviction for which a one year sentence was imposed is an aggravated felony for purposes of enhanced sentencing under the federal sentencing guidelines for a noncitizen convicted of illegal reentry. See United States v. Graham, 169 F.3d 787 (3d Cir. 1999). The defendant did not raise a uniformity challenge but instead argued that Congress did not intend for state law misdemeanors to count as "aggravated felonies" for purposes of enhanced sentencing. See id. at 792. Rejecting this argument, the court noted that misdemeanor offenders who are sentenced to a full year "are obviously the most serious misdemeanants, and we can see a rational reason that Congress might include them in the class of defendants worthy of extra punishment." Id. Yet a noncitizen convicted of misdemeanor larceny in a state that provides for a maximum sentence of less than one year would not face enhanced sentencing for this conviction. See, e.g., Ariz. Rev. Stat. Ann. §§ 13-707, 13-1802 (West 1998 & Supp. 1999). This result is hardly "rational."

There should be little doubt that the INS will also use such misdemeanor convictions as a basis for removing noncitizens from the country. See Rafael Alvarez, Immigration Law Delays Plans for Transplant: Revision in 1996 Makes Misdemeanor an "Aggravated Felony," Balt. Sun, Aug. 13, 1998, at 1B (describing case where immigrant who stole $59 worth of drapes was placed in removal proceedings for misdemeanor shoplifting conviction).

165 The BIA ruled that a noncitizen convicted under Arizona law of "aggravated driving under the influence" was convicted of a "crime of violence" pursuant to 18 U.S.C. § 16(b) (1994) because his offense was a felony and involved a "substantial risk of physical force against the property or person of another," and, therefore, was an aggravated felony pursuant to INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (Supp. III 1997). See In re Magallanes-Garcia, Interim Dec. No. 3341, 1998 WL 133301 (B.I.A. Mar. 19, 1998). Based on this case, immigration judges in Texas subsequently began ruling that a Texas felony conviction for driving under the influence is per se a "crime of violence" aggravated felony. See Simon M. Azar-Farr, An Immaculately Foggy Case: *Matter of Magallanes-Garcia* Examined, 75 Interpreter Releases 1397, 1398 (1998). Yet there are critical differences between the Texas and Arizona statutes, such that a person convicted of a felony offense for certain conduct in one state would not necessarily be subject to a felony conviction in the other. See id. at 1402. Therefore, any per se rule is inappropriate and compromises uniformity.

166 See INA § 101(a)(43)(S), 8 U.S.C. § 1101(a)(43)(S) (Supp. III 1997). The "obstruction of justice" provision opens the door to nonuniformity in two ways. First, the INA does not define the term "offense[s] relating to obstruction of justice" nor does it refer to the federal criminal law provisions pertaining specifically to "obstruction of justice." See 18 U.S.C. §§ 1501-1517 (1994 & Supp. III 1997). Courts may deem any of the multifarious state law offenses with similar labels, see, e.g., Ala. Code §§ 13A-10-1 to 13A-10-14 (1994) (obstruction of public administration); Cal. Penal Code §§ 92-186.20 (West 1999) ("crimes against public justice"), to be aggravated felonies. Yet these state law offenses differ both from each other and from the federal statute and moreover often encompass conduct not included within the more carefully delineated federal provisions. Compare, e.g., Cal. Penal Code § 158 (West 1999) (including exciting litigation), and Tex. Penal Code Ann. § 38.03

III
EFFECTUATING THE UNIFORMITY PRINCIPLE

A. A Proposal

In light of the problems exposed here, the courts should develop an explicit model of constitutional uniformity. Such a model may not be a complete solution to the vagaries—or harshness—of current immigration law.[167] Such doctrinal development would, however, help prevent nonuniform immigration consequences for state law criminal convictions, promote fairness, and ensure that immigration law is con-

(West 1994) (resisting arrest), with 18 U.S.C. §§ 1501-1517 (1994 & Supp. III 1997), and United States v. Aguilar, 515 U.S. 593 (1995) (setting forth specific elements required to satisfy 18 U.S.C. § 1503, which is most broadly worded of these sections); see also Ala. Code § 13A-10-2 commentary (1994) (noting that obstruction of justice category is "reversion to the common law idea where any punishable misdeed which was not recognized as a distinct crime was usually called 'obstruction of justice'"); In re Batista-Hernandez, 17 Immig. Rep. (MB) B1-323, B1-335 (B.I.A. July 15, 1997) (Rosenberg, dissenting) (criticizing majority for holding that federal "accessory after the fact" conviction is per se "obstruction of justice" aggravated felony even though "obstruction of justice" is term of art referring to acts specifically delineated by federal statute and not necessarily encompassing noncitizen's conduct).

Second, there is the same problem as with other aggravated felonies tied to the one-year sentencing threshold, namely, variation in state sentencing schemes above and below this threshold for equivalent underlying conduct. Compare, e.g., Ariz. Rev. Stat. Ann. §§ 13-707, 13-2402 (West 1989) (impairing governmental operations by force or violence punishable by up to six-month sentence), with 18 Pa. Cons. Stat. Ann. §§ 106, 5101 (West 1998) (impairing administration of law by force punishable by up to two years imprisonment).

The importance of the sentencing threshold for these crimes is illustrated by a recent case arising in the somewhat different circumstance of a *federal* obstruction of justice conviction. In that case, the petitioner, Jorge De Cardenas, a lobbyist residing in Miami, was convicted under federal law and sentenced to 365 days for obstructing justice in a contract kickback scheme. His lawyer, Linda Osberg-Braun, sought the U.S. Attorney's cooperation in obtaining a one-second reduction in his sentence so that he would not be deportable as an aggravated felon. See Prisoner Wants Sentence Cut by One Second, Reuters, Jan. 11, 1999 (on file with the *New York University Law Review*). The U.S. Attorney refused to cooperate, however, and Mr. Cardenas continues to face removal based on this conviction. See Telephone Interview with Linda Osberg-Braun, Attorney for Jorge De Cardenas (May 29, 1999). Yet in Ms. Osberg-Braun's considered view, her client could probably have gotten the necessary reduction in sentence if his criminal defense attorney had requested it at the time of sentencing. See id. Since Mr. Cardenas was prosecuted and sentenced to one year under federal law, his case is not a product of the uniformity problem analyzed here. It is certainly conceivable, however, that other persons will be prosecuted for "obstruction of justice" crimes under state laws that vary as to whether they impose the critical one-year sentence, in which event those sentenced to one year may find, like Mr. Cardenas, that their fates turn on their sentence being one second too long.

167 See Christina LaBrie, Note, Lack of Uniformity in the Deportation of Criminal Aliens, 25 N.Y.U. Rev. L. & Soc. Change (forthcoming Mar. 2000) (making several proposals with respect to nonuniformity and unfairness of using state criminal convictions including greater use of federal criminal definitions and reinstatement of right to discretionary relief).

sonant with the Constitution. The following proposal is informed by and consistent with the text, history, and policy animating the uniformity requirement, including two important principles: 1) states must not be permitted to interfere with the nation's relations with other sovereign powers, and 2) individual noncitizens should be protected from inconsistent treatment by the states.[168]

First, where the aggravated felony provision refers to an offense for which there is a federal law definition, the courts should apply the federal definition to an individual's state law conviction to determine whether it falls within the parameters of federal criminal law. If it cannot be determined that in the state criminal prosecution the person was necessarily convicted of the requisite federal elements, then the conviction should not be considered an aggravated felony.

This is the approach taken by the BIA and federal courts as a matter of statutory construction towards drug trafficking aggravated felonies in *In re Barrett*, *In re L—G—*, and *Aguirre v. INS*.[169] It is also appropriately analogized to *Taylor v. United States*,[170] where the Supreme Court confronted a uniformity problem under the federal sentencing guidelines provision for enhanced sentencing for individuals with certain predicate convictions. In *Taylor*, the issue was how to apply these provisions to an individual with two prior state law convictions for "burglary," an offense that ostensibly would fall within the enhanced sentencing provision but is variously defined by the different states.[171] There was no constitutional question in *Taylor*, nor was the statute clear as to Congress's intent, but the Court reasoned that Congress would not have intended for federal sentencing enhancement to turn on how the individual's conduct is labeled under state law.[172] Therefore, the Court held that a federal sentencing court must look beyond the state law label and instead apply a uniform definition when determining whether the predicate offense subjects an individual to enhanced sentencing.[173]

One question that arises with this approach is where a court should look for the federal definition it seeks to apply. If there is a definition provided by a federal criminal statute, then that is the most

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168 See supra notes 55-79 and accompanying text.

169 See supra notes 86-88 and accompanying text.

170 495 U.S. 575 (1990).

171 Taylor had four convictions, two of which he conceded were violent felonies. The characterization of his two burglary convictions thus became determinative of whether sentence enhancement was appropriate. See id. at 579-80; see also 18 U.S.C. § 924(e)(1) (1994) (providing for sentence enhancement where person has three previous violent felony convictions).

172 See *Taylor*, 495 U.S. at 590-91.

173 See id. at 592.

direct source.[174] Thus, a state law statutory rape conviction could not constitute an aggravated felony unless the requisite elements under the analogous federal statute, such as age of consent and four-year age gap between the parties, were met.[175]

Where there is no statutory definition, the court should look to other sources. Other viable sources include federal caselaw, the federal sentencing guidelines, the Model Penal Code, the common law, and the District of Columbia criminal code.[176] In *Taylor*, there was no federal statute on point and the Court believed that the traditional common law definition was so narrow as to be out of step with contemporary criminal justice policy.[177] Therefore, the Court used the "generic, contemporary" definition of burglary.[178] This Court also referenced the Model Penal Code as support, noting that the Code's definition coincided with the "generic" one.[179] *Taylor* thus established a uniform definition for the sentencing guidelines as a matter of federal common law.[180]

Another question is where the court should look to determine whether an individual's state law conviction satisfies the federal definition; that is, should the court look only to the formal elements of the crime charged or should it look to the individual's actual conduct. To the extent that courts have considered this question, the former approach has dominated. In *Taylor*, for example, the Supreme Court confronted this problem and concluded that a "formal categorical approach" is appropriate.[181] This means that the sentencing court is to look not at the underlying factual record of the conviction but instead

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174 See, e.g., 18 U.S.C. § 2243(a) (1994) (sexual abuse of minor); 18 U.S.C. §§ 1501-1518 (1994) (obstruction of justice); Brady et al., supra note 26, § 9.9, at 9-19 to 9-20 (making this proposal with respect to obstruction of justice crimes); id. app. 9-C, at 7 (making this proposal with respect to statutory rape).

175 Compare 18 U.S.C. § 2243(a) (1994) (establishing age of consent at sixteen years and requiring four-year age gap between parties for violation), with N.Y. Penal Law § 130.55 (McKinney 1998) (establishing age of consent at seventeen years and allowing affirmative defense if minor is more than fourteen and age differential is less than five years).

176 See Telephone Interview with Manuel D. Vargas, supra note 14 (pointing out these various sources for federal definition and observing that, for example, courts have even looked to District of Columbia criminal code to determine whether offenses committed in foreign jurisdictions constitute crimes of moral turpitude under INA); see also *Taylor*, 495 U.S. at 580 (raising possibility of utilizing definitions provided by common law, Model Penal Code, and earlier version of federal sentencing statute).

177 See *Taylor*, 495 U.S. at 593.

178 See id. at 598.

179 See id. at 598 n.8.

180 The Court in *Taylor* resorted to this approach because Congress had deleted a previously existing statutory definition—inadvertently, the Court believed—contained within the federal sentencing guidelines themselves. See id. at 582-90.

181 See id. at 600.

is to compare the state criminal statute under which the person was convicted to the federal definition to determine if the person was *necessarily* convicted of the federal elements.[182] Similarly, in *In re Alcantar*, the BIA used this formal approach to determine whether an individual's state law conviction constituted a "crime of violence" under 18 U.S.C. § 16(a).[183]

The court need go no further than the state statute where the statute is by definition limited to conduct encompassed within the federal definition. If, however, the state law encompasses a broader array of acts, not all of which would be subject to prosecution under the federal definition, then the court could examine the charging papers and jury instructions to determine whether the jury had to find all the requisite elements in order to convict.[184] What the court may not do under the rule in *Taylor* or *Alcantar* is look at the underlying factual record.[185] This formal approach is not without its difficulties or criticisms.[186] It would be workable in the aggravated felony context, however, and it is a point in its favor that it finds support in prior analogous caselaw.

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182 See id. at 599. If necessary, it would also be consistent with this approach for the court to look to the state courts' construction of the statutory elements of the state crime. Cf. 6 Gordon et al., supra note 8, § 71.05[1][d][ii] (describing use of this method in crime of moral turpitude context).

183 20 I. & N. Dec. 801, 809 (B.I.A. 1994) (holding that "crime of violence" definition under 18 U.S.C. § 16(a) (1994) turns on whether state crime has as element "use, attempted use, or threatened use of physical force").

184 See *Taylor*, 495 U.S. at 602.

185 See id. at 600; *Alcantar*, 20 I. & N. Dec. at 809 (describing "categorical approach" as requiring inquiry into "offense's inherent potential for risk of physical force as opposed to actual harm caused").

186 The other approach would be to look at the underlying conduct in a particular case rather than the elements of the state crime as defined by statute and/or caselaw. In the adultery cases the courts applying a uniform rule approach had to use this method since they were facing situations where the individuals had not been convicted of any crime. See supra note 61. However, this method poses certain problems given the likely disparity in the quality of the record from case to case and, therefore, difficulty for the court in making such an assessment. See *Taylor*, 495 U.S. at 601; see also Franklin v. INS, 72 F.3d 571, 580-81 (8th Cir. 1995) (Bennett, J., dissenting) (noting that categorical approach rather than examination of underlying facts is black letter rule in crime of moral turpitude context and citing cases to this effect); United States ex rel. Robinson v. Day, 51 F.2d 1022, 1022-23 (2d Cir. 1931) (holding that crime must "by its definition" involve moral turpitude); cf. Kahn v. INS, 36 F.3d 1412, 1415 (9th Cir. 1994) (adopting "flexible, uniform approach" of looking at substance of noncitizen's domestic relationship to determine whether noncitizen has satisfied family ties equitable factor for INA § 212(c) relief rather than allowing INS to exclude per se domestic relationship not recognized by state statute). But see Marciano v. INS, 450 F.2d 1022, 1026, 1028-29 (8th Cir. 1971) (Eisele, J., dissenting) (advocating looking to underlying conduct).

Second, where the aggravated felony definition hinges on the sentence imposed, as with the "crime of violence" provision,[187] a different approach must be taken to ensure uniformity. Here, for offenses where state maximum sentences vary above and below the critical one-year threshold, courts should hold that these offenses cannot constitute aggravated felonies. This approach would admittedly carve out from the aggravated felony list a number of state misdemeanor crimes, including but not limited to the misdemeanor assault and battery crimes discussed here. But no less is required by the Naturalization Clause. Moreover, it is difficult to conceive of another method whereby the courts could ensure the law satisfies the uniformity requirement.[188]

B. Some Problems—and Answers

One likely response to the argument and proposals made by this Note is that, even if the aggravated felony provisions create nonuniformity, the plenary power doctrine precludes the courts from acting so as to make it more uniform.[189] The question of whether Congress may use a particular conviction for deporting an immigrant is, the argument would go, quintessentially a question of substantive immigration policy with which the courts may not interfere.[190] This view permits judicial review, but it is essentially a rational basis stan-

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187 See INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (Supp. III 1997).

188 There is another possible approach, suggested by Manuel D. Vargas of the New York State Defenders Association, which is to recognize only those state convictions that are analogous to federal felony offenses. Under federal law, a felony is an offense that is subject to a sentence of more than one year. See 18 U.S.C. § 3559(a) (1994). This would mean that a state misdemeanor assault and battery conviction, for example, could only constitute an aggravated felony if the state law permitted the imposition of a sentence of more than one year. The result would again be that in most cases only state felony offenses would count under the INA. See Telephone Interview with Manuel D. Vargas, supra note 14.

189 See Fiallo v. Bell, 430 U.S. 787, 792 (1977) (underscoring "limited scope of judicial inquiry into immigration legislation"); Fong Yue Ting v. United States, 149 U.S. 698, 731 (1893) (holding that substantive deportation statutes are subject to highly deferential review); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) (stating that:

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.);

The Chinese Exclusion Case, 130 U.S. 581, 606 (1889) (holding that courts must subject substantive federal rules as to who may enter United States to highly deferential review because of congressional power based on concerns such as national security, sovereignty, and territorial self-preservation, all of which are beyond scope of judiciary).

190 See supra notes 1-2 and accompanying text.

dard that most courts would likely find insufficient to justify the judicial intervention necessary here.[191]

Congress's plenary power over immigration, however, is not immune from constitutional limitations. Perhaps most notably, the Supreme Court has long held that immigration law must be consistent with both procedural and substantive due process.[192] Thus, to say that Congress's power is plenary does not obviate the uniformity requirement. Uniformity is another necessary limitation on Congress's plenary power. Indeed, unlike the application of the Due Process Clause to the immigration context, this limitation is explicitly prescribed by the Constitution's text.[193] Enforcing this provision after such long neglect may require some boldness on the part of the courts, but that does not make it any less required.[194] As with due process protections, enforcing uniformity does not endanger Congress's ability to set immigration policy in accordance with its political judgment, which is what the plenary power doctrine ostensibly protects.[195] It only sets certain parameters for that policy.

Moreover, enforcement of the uniformity provision as proposed here is consistent with, and a logical extension of, the active role already taken by the courts in policing state laws pertaining to immigrants.[196] As Alexander Hamilton observed, uniformity is the logical concomitant to the doctrine that Congress's power over immigration

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191 *Fiallo* sets out a "'facially legitimate and bona fide reason'" standard of review, which is equivalent to rational basis review. See 430 U.S. at 794-95 (quoting Kleindienst v. Mandel, 408 U.S. 753, 770 (1972)). But cf. Garberding v. INS, 30 F.3d 1187, 1190-91 (9th Cir. 1994) (finding immigration provision unconstitutional under rational basis equal protection review because it was irrational to hinge deportability on state in which individual was convicted).

192 See The Japanese Immigrant Case, 189 U.S. 86, 100-01 (1903) (holding that administrative officers exercising power under provisions of deportation statutes must comport with procedural due process); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (holding that statute subjecting noncitizens to hard labor for violation of immigration law violated substantive due process).

193 See U.S. Const. art. I, § 8, cl. 4.

194 It must be acknowledged that, because the aggravated felony provisions are at the heart of Congress's substantive immigration power, in contrast to the *procedures* used to implement that power, enforcing uniformity here is a significant doctrinal step. It has been somewhat easier for courts to find that immigration procedures were subject to constitutional limitations. See INS v. Chadha, 462 U.S. 919, 940-41 (1983) ("The plenary authority of Congress over aliens . . . is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power.").

195 See, e.g., *Nishimura Ekiu*, 142 U.S. at 659 (noting that Constitution has committed control over international relations to Congress); *Chinese Exclusion Case*, 130 U.S. at 603-04 (stating that power to exclude aliens is incident of national sovereignty and central to nation's independence from foreign nations).

196 See supra notes 2-3, 16 and accompanying text.

is exclusive vis-à-vis the states and the principle that the states have no legitimate interest in regulating immigration.[197]

Indeed, in the related but distinct area of alienage jurisprudence, the courts have developed an equal protection doctrine premised on the recognition that states have little legitimate interest in singling out immigrants for differential treatment with respect to such issues as education, welfare benefits, or employment rights.[198] These are areas in which the state government's interest is ostensibly greater and the federal government's interest is less obvious than it is in immigration matters proper, such as those at issue here.[199]

The twist on the nonuniformity problem stemming from the IIRIRA/AEDPA amendments is, of course, that these are federal laws which incorporate certain aspects of state law into their functioning. Nonuniformity results from the way that federal legislation intersects with already-existing state criminal law. The closest the Supreme Court has ever come to addressing whether federal law may authorize such nonuniformity is its statement in *Graham v. Richardson* that Congress may not authorize states to adopt their own rules for legal immigrants to qualify for public benefits, and that statement was dictum.[200] The Supreme Court already has recognized, however, in its constitutional jurisprudence of taxation, that a constitutional uniformity problem may arise where federal law references or incorporates

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197 See supra notes 2-3 and accompanying text.

198 See Plyler v. Doe, 457 U.S. 202, 230 (1982) (holding that states may not deny education to undocumented immigrant children); Graham v. Richardson, 403 U.S. 365, 374-76 (1971) (holding that states may not discriminate as to welfare benefits); Truax v. Raich, 239 U.S. 33, 42-43 (1915) (holding that states may not deny right to employment to legally admitted immigrants).

199 While lack of a legitimate state interest in making certain classifications is relevant to any equal protection analysis, arguably the lack of a legitimate state interest in establishing classifications based on immigration/citizenship status has been more important than usual for the branch of equal protection analysis pertaining to immigrants. See Tribe, supra note 3, § 16-23, at 1550 n.57; see also *Plyler*, 457 U.S. at 225-26 (observing that "[s]tates enjoy no power with respect to classification of aliens"); Mathews v. Diaz, 426 U.S. 67, 85 (1976) ("Insofar as state welfare policy is concerned, there is little, if any, basis for treating persons who are citizens of another State differently from persons who are citizens of another country."); *Truax*, 239 U.S. at 41 (state police power does not extend to authority to deny employment to noncitizens lawfully admitted to reside in United States).

200 See *Graham*, 403 U.S. at 382. Of course, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 7, 8, 21, 25, 42 U.S.C.), may call that statement into question—at least until the constitutionality of that provision is challenged and ruled upon. See Cristol-Deman & Edwards, supra note 29, at 144 (arguing that PRWORA violates Uniformity Clause but observing that it is far from clear that Supreme Court would so rule); Neuberger, supra note 29, at 238-39 (stating that, despite suggestion in *Graham*, it is unclear whether Supreme Court would find PRWORA unconstitutional).

state law.[201] The text, history, and purpose of the uniformity requirement in the immigration context support the view that it is at least as strict as that promised by the Court in the taxation context—that is, it should not allow state law to be utilized so as to trigger nonuniform legal consequences.[202] The truncated state of the doctrine in the immigration field only demonstrates the need for courts to reach and answer this question.

Another objection to the proposal for uniformity is that there is nothing unusual about the incorporation of state law into a federal law scheme and that it is well within Congress's power to do so in this area. The INS has already taken this position in the related context of crimes of moral turpitude and naturalization.[203] Judge Kozinski of the Ninth Circuit has argued that it is both permissible and common for federal law, including immigration, federal sentencing, bankruptcy, and taxation statutes, to utilize state law.[204] "Far from shunning state law," he argues, "federal law frequently relies on it—and without compromising national uniformity."[205]

However, these arguments do not hold up. First, as demonstrated by the statutory analysis previously, uniformity *is* compromised dramatically by the AEDPA/IIRIRA amendments—or the term effectively has no meaning.[206] The question is whether it is permissibly compromised. Second, state criminal laws cannot be allowed to have this result because their purpose is not to determine immigration policy. States have the authority pursuant to the police powers reserved to them under the Constitution to regulate their residents' conduct through criminal laws in accordance with local mores.[207] It is thus not surprising that state criminal laws differ from each other since they reflect localized policies and values.[208] State criminal laws, however,

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201 See supra Part I.C.

202 See supra Part I.C.

203 For example, in Nemetz v. INS, 647 F.2d 432 (4th Cir. 1981), the INS argued that reference to state sodomy laws was correct because states traditionally have the power to police public morality, and Congress, in its immigration legislation, has deferred to this power. See Monroe Leigh, Judicial Decisions, 76 Am. J. Int'l L. 160, 166 (1982) (reporting *Nemetz* oral argument).

204 See Kahn v. INS, 36 F.3d 1412, 1416-17 (9th Cir. 1994) (Kozinski, J., dissenting).

205 Id. at 1416 (Kozinski, J., dissenting).

206 See supra Part II.

207 See U.S. Const. amend. X.

208 An example of this is the California statute criminalizing statutory rape. The legislative history indicates that it is directed not at sexual abuse but rather at the prevention of teenage pregnancy. See Brady et al., supra note 26, app. 9-C, at 6. Yet under AEDPA/IIRIRA, this offense may constitute an aggravated felony. See supra Part II.A. Differences in state sentencing laws similarly reflect policy choices that either have nothing to do—or should have nothing to do—with the one-year threshold that can trigger deportation.

like state adultery laws, are not generally legislated with immigration consequences in mind and do not take into account the relative interests at stake including the human impact of deportation.[209] It is worth noting that some courts expressed concern in the adultery cases that persons whom Congress would not consider morally condemnable might suffer adverse immigration consequences based on technicalities of state law.[210]

Moreover, established constitutional doctrine tells us that even if state governments or electorates might wish to determine immigration policy at a local level, they are not permitted to do so under our constitutional system.[211] State criminal laws *should* reflect localized concerns while immigration, by contrast, should be a matter of national policy.[212]

Another objection is the argument that the aggravated felony provision already constitutes a uniform national policy: The "uniform policy" is that Congress wishes to take into account, when setting immigration policy, whether a noncitizen has lived according to the mores of her community.[213] A state's criminal laws are the direct expression of these values and customs, and Congress, the argument would go, is well within its power to require noncitizens to abide by them. This argument, however, ignores the substance of how the aggravated felony provisions operate. Just as states may not impose deportation for state criminal convictions, thereby directly creating nonuniform immigration law, so Congress may not use state laws to achieve that result indirectly.

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209 See In re L—G—, Interim Dec. No. 3254, 1995 WL 582051 (B.I.A. Sept. 27, 1995) (Holmes, concurring) (noting that INA would truly be "'baffling skein of provisions'" if its interpretation involved "follow[ing] words and phrases through various statutes that were enacted to serve purposes other than those related to the immigration laws" (quoting Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977))).

210 See, e.g., In re Briedis, 238 F. Supp. 149, 151 (N.D. Ill. 1965) ("Congress intended to establish a uniform standard by codifying both those decisions in federal courts denying naturalization on grounds of morally reprehensible adultery, and those taking into consideration the extenuating circumstances which make the adultery at issue merely technical, and not a threat to public morality."). There is no question that Congress intended to make it dramatically easier to deport immigrants convicted of crimes and that many members of Congress were far less concerned with the impact on the immigrants in question than in facilitating their speedy removal. But even this Congress imposed certain limits on such deportations by specifying certain crimes and setting minimum sentencing thresholds.

211 See Plyler v. Doe, 457 U.S. 202, 225 (1982) ("The States enjoy no power with respect to the classification of aliens."); Mathews v. Diaz, 426 U.S. 67, 84 (1976) (holding that federal government but not states could deny welfare benefits to certain aliens because "it is the business of the political branches of the Federal Government, rather than that of . . . the States . . . to regulate the conditions of entry and residence of aliens"); see also supra notes 68-79 and accompanying text.

212 See supra notes 1-3 and accompanying text.

213 This was the INS's argument in *Nemetz*. See supra note 203.

A final objection is that, in enforcing uniformity as proposed in this Note, there is a risk of federalizing criminal law. This would run contrary to the basic structure of our criminal justice system, which leaves it in large part to the states to police these matters. In fact, however, this is not what would occur. The courts would be analyzing and interpreting federal criminal law, and setting up definitional standards, only as a matter of immigration law. The meaning of a given conviction is always distinguishable under criminal and immigration law, respectively.[214] The fact that "misdemeanors" can be "aggravated felonies" for purposes of the INA makes this point clear. Indeed, *Taylor v. United States* demonstrates that these distinctions can be made even within the criminal law context itself; there, the Supreme Court constructed a definition of "burglary" to be used in sentencing and was not engaging in impermissible federalization of the criminal law since it created no classification pursuant to which an individual could be subject to prosecution.[215] Under the proposals made here, courts would not be creating federal criminal law. Rather, they would be interpreting federal immigration law so as to conform to the Constitution.

CONCLUSION

This Note has argued that the amended aggravated felony provisions create nonuniform immigration consequences for state criminal convictions and that this result contravenes the constitutional requirement of a uniform immigration law. This Note has argued further that the Uniformity Clause requires that courts overcome their reluctance to develop constitutional doctrine in the immigration field and hold that such nonuniform consequences are unconstitutional.[216]

The numerous changes made by AEDPA and IIRIRA to the aggravated felony and related statutory provisions have raised the stakes dramatically for noncitizens convicted of these crimes. The new laws

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214 The courts have even construed the same exact term, "aggravated felony," to have a different meaning in the INA context than in the criminal sentencing context. See supra note 89. These decisions are very problematic, but they go to show that such distinctions can be made so that federalization of criminal law is not at issue here.

215 See supra notes 170-85 and accompanying text (discussing *Taylor*).

216 If there is a tenable statutory argument that Congress did not intend for a given state criminal conviction to constitute an aggravated felony because Congress intended for a uniform definition to apply, then of course advocates and the courts should not ignore this argument. Certainly, there have been times in the past when Congress has invoked the principle of uniformity in immigration law. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 115, 100 Stat. 3359, 3384 (1986) ("It is the sense of the Congress that . . . the immigration laws of the United States should be enforced vigorously and uniformly . . . ."). This Note merely suggests that courts probably need to confront this issue in constitutional terms and should be willing to do so.

encompass more crimes, including some that would not be considered "aggravated" from a criminal justice perspective. They make for more state by state disparities than ever before, and attach a greater number and more drastic consequences to these convictions than ever before. These facts may, it is hoped, encourage the courts to confront a long-standing problem in the constitutional jurisprudence of immigration law, namely, the failure to give expression to the Naturalization Clause's uniformity requirement.

Noncitizens have a different relationship to the polity than do citizens. They are, however, part of our society, and they are contemplated within our constitutional scheme. The Uniformity Clause is fundamental to this scheme. The courts can and should breathe life into this clause—until now at most a "phantom constitutional norm"—and make it constitutional flesh.