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The Development of the Hypothetical Federal Felony: A Solution to Nonuniformity in Immigration.

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NOTE

THE DEVELOPMENT OF THE HYPOTHETICAL FEDERAL FELONY: A SOLUTION TO NONUNIFORMITY IN IMMIGRATION

AUDRA J. FERGUSON-ALLEN*

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I. Introduction

Immigration has been accepted as being strictly within the power of the federal government.[1] The Naturalization Clause of the United States Constitution requires that there be a "uniform Rule of Naturalization."[2] However, Congress has not stated, and the United States Supreme Court has not interpreted that rule to mean that uniformity is required in all aspects of immigration policy. Uniformity potentially provides benefits such as predictability and evenhandedness in the law. In 2006, the Supreme Court issued a decision supporting the view that there should be uniformity in immigration.[3]

In *Lopez v. Gonzales*, Jose Antonio Lopez illegally entered the United States in 1986, but he became a legal permanent resident in 1990.[4] In 1997, Lopez was convicted for aiding and abetting another person's possession of cocaine in South Dakota, a felony under state law.[5] Soon after Lopez's release, the Immigration and Naturalization Service (INS) initiated removal proceedings against Lopez on two separate grounds.[6] The first ground was for a controlled substance violation under 8 U.S.C. § 1227 (a)(2)(B)(i).[7] The second ground was for an aggravated felony conviction based on drug trafficking under 8 U.S.C. § 1227 (a)(2)(A)(iii).[8] Lopez conceded removability for the controlled substance violation and

1. *See infra* Part II.A.
2. U.S. Const. art. I, § 8, cl. 4.
3. Lopez v. Gonzales, 127 S. Ct. 625 (2006).
4. *Id.* at 628.
5. *Id.* Lopez was convicted and sentenced to a five-years prison term. He was released after fifteen months for good conduct. *Id.*
6. *Id.*
7. 8 U.S.C. § 1227 (a)(2)(B)(ii) (2006) (stating that [a]ny alien who at any time after admission has been convicted of a violation of . . . any law or regulation . . . relating to a controlled substance . . . other than a single offense involving possession for one's own use of [thirty] grams or less of marijuana, is deportable.").
8. 8 U.S.C. § 1227(a)(2)(A)(iii). "Any alien who is convicted of an aggravated felony at any time after admission is deportable." *Id.*

applied for cancellation of removal. However, an immigration judge denied his application in November 2002[9] because 8 U.S.C. § 1229b(a)(3) forbids cancellation of removal for an alien convicted of an aggravated felony.[10] The Board of Immigration Appeals (BIA) and the Eighth Circuit both affirmed the immigration judge's decision.[11]

The Supreme Court, in an eight to one decision, held that an offense which is a felony under state law but only a misdemeanor under the Controlled Substances Act (CSA) is not an aggravated felony for Immigration and Nationality Act (INA) purposes.[12] The Court examined the text of the relevant statutes and reasoned that an offense must "proscribe[ ] conduct punishable as a felony under that federal law."[13] The Court indirectly addressed the issue of uniformity by noting that Congress may allow the immigration consequences to vary depending on the state classification if Congress does not define the crime as a federal statute.[14] In other words, although the conduct was prosecuted as a state felony rather than a federal felony, it still must satisfy the elements of a federal felony for it to qualify as an offense under the CSA for INA purposes. Justice Thomas, the lone dissenter, identified the two elements of a drug trafficking crime.[15] "First, the offense must be a felony; second, the offense must be capable of punishment under the Controlled Substances Act."[16] Therefore, under Justice Thomas's view, a state felony offense

9. *Lopez,* 127 S. Ct. at 628.

10. *Id.* ("At first, the [judge] agreed with Lopez that his state offense was not an aggravated felony because the conduct it proscribed was no felony under the [CSA]. But after the [BIA] switched its position on the issue, the same judge ruled that Lopez's drug crime was an aggravated felony . . . under state law . . . . and the judge ordered him removed.").

11. *Id.* at 629 ("The BIA affirmed, and the Court of Appeals affirmed the BIA.").

12. *Id.* at 633 ("We cannot imagine that Congress took the trouble to incorporate its own statutory scheme of felonies and misdemeanors if it meant courts to ignore it whenever a State chose to punish a given act more heavily.").

13. *Id.*

14. *Lopez*, 127 S. Ct. at 633.

> Thus, an alien convicted by a State of possessing large quantities of drugs would escape the aggravated felony designation simply for want of a federal felony defined as possessing a substantial amount. This is so, but we do not weigh it as heavily as the anomalies just mentioned on the other side. After all, Congress knows that any resort to state law will implicate some disuniformity in state misdemeanor-felony classifications, but that is no reason to think Congress meant to allow the States to supplant its own classifications when it specifically constructed its immigration law to turn on them. *Id.*

15. *Id.* at 634 (Thomas, J., dissenting) ("Lopez's state felony offense qualifies as a 'drug trafficking crime' as defined in § 924(c)(2). A plain reading of this definition identifies two elements . . . ."). *Id.*

16. *Id.* (Thomas, J., dissenting) ("No one disputes that South Dakota punishes Lopez's crime as a felony. . . . Likewise, no one disputes that the offense was capable of

would qualify if, at a minimum, it would be punishable anywhere under the CSA. Thus, it would qualify even if punishable only as a misdemeanor under the CSA. Justice Thomas reasoned that a plain reading of the statute supported his position, and his reading would avoid some of the problems created by the majority's opinion.[17] As this Note will explore in further detail, it is actually the view taken by Justice Thomas that would lead to several problems and would create nonuniformity in immigration policy.

In the past, "the INS seldom deported criminal aliens immediately after their release from prison."[18] Additionally, criminal aliens convicted of a crime and subject to deportation proceedings were not detained by the justice system, and many failed to appear at their deportation hearings.[19] Further, the INS had trouble identifying aliens convicted of a deportable crime, even though they remained in the United States.[20] In fact, the 1990s started out with movements to deport criminal aliens.[21] This sparked a surge for the reformation of immigration laws and several "statutes enacted by Congress in 1996—arguably the harshest changes ever enacted in this field—sent shock waves through immigrant communities."[22] However, in the late 1990s favorable public sentiment toward immigrants began to grow and "until September 11, 2001 there was even

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punishment under the CSA. . . . Lopez's possession offense therefore satisfies both elements, and the inquiry should end there."). *Id.*

17. *Id.* (Thomas, J., dissenting) (stating that one of the problems created by the majority's opinion is that an alien convicted of a misdemeanor under state law could be eligible for deportation if, under the CSA, the offense is a felony).

18. Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1104 (1995).

19. *Id.* ("Those criminal aliens who were subject to deportation proceedings frequently were not detained, and many failed to appear for their hearings.").

20. *See id.* ("Indeed the agency had no way to identify aliens who had been convicted of a crime."); *see also* U.S. Gen. Accounting Office, GAO/GGD-88-3, Criminal Aliens: INS's Enforcement Activities 17–30 (1987) (stating "[n]o one knows how many deportable criminal aliens exist").

21. *See* Immigration Act of 1990, Pub. L. No. 101–649, § 510, 104 Stat. 4978 (1990) (codified at 8 U.S.C. § 1251 (1994)) (adding that in 1990, Congress decided to step in to alleviate the problem, and the Immigration Act of 1990 was enacted to require the INS to file a report with Congress documenting its efforts to increase deportation of criminal aliens); *see also* Ronald J. Ostrow, *INS Assailed for Not Deporting Immigrant Criminals*, L.A. TIMES, Nov. 10, 1993, at A13 (discussing growing public safety concerns with respect to INS's failure to deport criminal aliens).

22. STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY vi (2005).

> The 1996 legislation broadened the grounds for excluding and expelling noncitizens, narrowed the possibilities for discretionary relief in compassionate cases, truncated many of the adjudication procedures, barred judicial review of important decision of

serious talk of an expanded guest worker program and an ambitious amnesty [program]."[23]

The warm welcome did not last long. The terrorist attacks on September 11, 2001 resulted in a call for reform of those federal agencies whose mission related to national security.[24] To many people, the term "immigrant" began growing synonymously with the term "terrorist."[25] In response to the attacks, a zero-tolerance approach was taken which resulted in counterterrorism legislation that had a harsh effect on immigrant communities.[26] As a result of the terrorism fear, "immigration law [is being used] in lieu of criminal law to detain or deport those alleged to be involved in terrorism without resort to the criminal justice system."[27] Sanctions imposed by immigration law strike a much greater fear in an alien than criminal sanctions because immigration law results in much harsher consequences than criminal law. In its annual report for 2004, the U.S. Department of Homeland Security (DHS) reported that "202,842 foreign nationals were formally removed from the United States."[28] Of the total removed, 88,897 were criminal aliens, and seventy-seven percent of those criminal aliens were from Mexico.[29] Of interest in this Note is that 37.5% of the criminal aliens removed were removed because of drug-related of-

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immigration officials, added new restrictions to asylum, and cut off millions of lawful immigrants from major welfare programs. *Id.*

See also Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 84 (2005) (noting that two of the major legislative changes in 1996 were "the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) . . . [which] subjected both noncitizens convicted of crimes and those with past criminal convictions to mandatory detention and deportation without the avenues of relief traditionally available to detainable and deportable aliens.").

23. STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY vi (2005) (suggesting that until the attacks on September 11, 2001, expanding the guest worker program and undertaking an ambitious amnesty proposal received serious consideration).

24. *Id.* at 2 ("The Homeland Security Act of 2002 (HSA) brought almost all of those agencies under a single new umbrella, the Department of Homeland Security (DHS).").

25. Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 85 (2005) (arguing that immigration law was used to attack terrorism).

26. *Id.* at 86–87 (stating that such legislation included the "USA PATRIOT Act, the Homeland Security Act (HSA), and the Enhanced Border Security and Visa Entry Reform Act (EBSVERA)").

27. Juliet P. Stumpf, *Penalizing Immigrants*, 18 FED. SENT'G REP. 264 (2006) (citing Nora V. Demleitner, *Misguided Prevention: The War on Terrorism as a War on Immigrant Offenders and Immigration Violators*, 40 CRIM. L. BULL. 550, 560–62 (2004)).

28. MARY DOUGHERTY, DENISE WILSON & AMY WU, IMMIGRATION ENFORCEMENT ACTIONS: 2004, 1 (2005), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/AnnualReportEnforcement2004.pdf.

29. *Id.*

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fenses.[30] "Immigration law almost invariably makes a noncitizen removable."[31] Furthermore, although there are a few exceptions,[32] "a noncitizen is removable regardless of the severity of the violation of immigration law."[33] However, in light of the *Lopez* decision by the United States Supreme Court, it may be possible that we are seeing the beginning of another shift in favor of immigrants.[34] In a stretch of laws which has cracked down on immigration, *Lopez* opens up the potential for avenues of relief from deportation for those convicted of a simple possession offense. However, the decision does not allow an immigrant to avoid deportation entirely. It only precludes a simple possession offense's classification as an aggravated felony. An alien convicted of simple possession is still removable, but may be available to apply for cancellation of removal.[35]

The decision by the Supreme Court may signal a shift toward leniency in the immigration context. The Court also seems to be supporting uniformity which is expressly denounced by Justice Thomas' dissent.[36] While it does not appear that we are likely to see favorable legislation towards immigrants in the near future, it does provide some avenue of relief from removal for those convicted of simple possession offense. Also, the decision by the Supreme Court which uses the "hypothetical federal felony" may have some influence on other areas of immigration that look to the laws of the states. In an effort to encourage uniformity in immigration, Congress should consider the use of a hypothetical offense which would bring all immigrants, regardless of the state they are residing in, under a unified system. The use of the hypothetical federal felony in *Lopez* could be applied in those areas of immigration law which allow state classifications to determine whether the offense qualifies as an aggravated felony.

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30. *Id.*

31. Juliet P. Stumpf, *Penalizing Immigrants*, 18 FED. SENT'G REP. 264 (2006) (stating that "removal" is defined by the Department of Homeland Security as "[t]he expulsion of an alien from the United States. This expulsion may be based on ground [sic] of inadmissibility or deportability.").

32. 8 U.S.C. § 1182(a)(2)(A)(ii) (2006) (explaining that crimes involving moral turpitude may be excepted from removal after a balancing of various factors including the age of the noncitizen, the maximum sentence for the offense, and the sentence actually imposed).

33. Juliet P. Stumpf, *Penalizing Immigrants*, 18 FED. SENT'G REP. 264 (2006).

34. *See generally Lopez*, 127 S. Ct. at 625.

35. 8 U.S.C. § 1229b(a)(3) (2006) ("The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien has not been convicted of any aggravated felony.").

36. *Lopez*, 127 S. Ct. at 637 (Thomas, J., dissenting) (stating that Congress clearly is not concerned about allowing immigration law to turn on varying state classifications because it is allowed for other aggravated felony classifications).

In light of the recent *Lopez* decision by the United States Supreme Court, this Note will examine the opinion of the Court as to whether a simple drug-possession offense must meet the elements of the federal CSA or whether a felony under state law is sufficient to qualify as an aggravated felony for purposes of removability. Part I will discuss the history and background of immigration law and the term "aggravated felony." Part II will examine the split among the federal circuit courts regarding those circuits which will be affected by the decision of the United States Supreme Court. Part III will examine the statute and the language that lends to the complexity of the issue. Specifically, it will look at theories of statutory interpretation and how they apply to 8 U.S.C. § 1101(a)(43)(B) which lists "illicit trafficking" as an aggravated felony. Finally, Part IV will look at how the hypothetical federal felony perspective could bring about greater uniformity in immigration policy and the problems which are created by nonuniformity in immigration.

II. History And Background Of Immigration Law And The Term "Aggravated Felony"

Immigration can be a very complex topic. Immigration law has been recognized as exclusively within the power of the federal government.[37] Also, in light of the recent terrorist attacks, a push to remove criminal aliens has been rejuvenated.[38] Further, the use of the term aggravated felony only adds to the complexity. As will be discussed in the following sections, the term aggravated felony describes neither an offense which is aggravated nor a felony.[39] Also, the statute that will be examined refers to several different sections within the INA. Therefore, it will be necessary to examine how the statute developed into one which has caused much confusion in the law and among the courts.[40]

A. *History of Immigration Law*

Immigration is now almost exclusively within federal power; however, it was not always this way.[41] Until the late nineteenth century, American immigration law was largely a matter governed by the individual states.[42] The confusion as to who should have the power resulted because the "Constitution does not expressly authorize the federal government to

37. *See infra* Part II.A.
38. *See infra* Part II.B.
39. *See infra* Part II.B.
40. *See infra* Part II.C.
41. Stephen H. Legomsky, Immigration and Refugee Law and Policy 2 (2005).
42. *Id.*

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regulate immigration."[43] Immigration law has been described as a different field of law.[44] The type of power Congress has over immigration has been described by the Supreme Court as "plenary" which gives special deference to Congress.[45]

The Supreme Court has recognized that the "[p]ower to regulate immigration is unquestionably exclusively a federal power."[46] Alexander Hamilton stated that the immigration power was one of the few powers "exclusively delegated to the United States."[47] Further, the power "to establish a uniform rule of naturalization . . . must necessarily be exclusive; because if each State had power to prescribe a distinct rule, there could not be a uniform rule."[48]

B. *Aggravated Felony? Not Really Aggravated and Not Necessarily a Felony*

The background and power over immigration are important in order to understand the confusion surrounding the term "aggravated felony." Aggravated felony is a term of art that refers to a crime which does not need to be aggravated, nor is necessarily a felony. Noting this confusion, one judge stated:

Common sense and standard English grammar dictate that when an adjective – such as "aggravated" – modified a noun – such as "felony" – the combination of the terms delineates a subset of the noun. One would never suggest, for example, that by adding the adjective "blue" to the noun "car," one could be attempting to define items that are not, in the

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43. *Id.* at 104.

44. Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1995) ("For more than a hundred years, the Supreme Court of the United States has been telling us that immigration law is just plain different. In constitutional matters, the Court has translated those differences into an official doctrine of special judicial deference to Congress.").

45. STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 926 (2005).

46. De Canas v. Bica, 424 U.S. 351, 354 (1976).

47. THE FEDERALIST NO. 32, at 221 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (explaining that naturalization is one of the few areas over which the federal government has exclusive power).

48. *Id.* at 221 (remarking that the only way to ensure uniformity is to allow the federal government power to establish and enforce naturalization); *see also* Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948) ("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. . . . Under the Constitution the states are granted no such powers . . . ."); *see also* Chirac v. Lessee of Chirac, 15 U.S. 259, 269 (1817) (stating that the fact "[t]hat the power of naturalization is exclusively in congress does not seem to be, and certainly ought not to be, controverted . . . .").

first instance, cars. In other words, based on the plain meaning of the terms "aggravated" and "felony," we should presume that the specifics that follow in the definition of aggravated felony under INA § 101(a)(43) serve to elucidate what makes these particular felonies "aggravated"; we certainly should not presume that those specifics would include offenses that are not felonies *at all*.[49]

In other words, the term aggravated felony does not define those offenses which one would sensibly presume.

Aggravated felony was added by Congress to the federal immigration law in 1988 and is defined at 8 U.S.C. § 1101(a)(43) and includes over twenty different offenses.[50] Conviction of an aggravated felony carries with it severe consequences which include not only removal but ineligibility for cancellation of removal.[51] Also conviction of an aggravated felony precludes relief for asylum.[52] Therefore, it should be clear that if a crime is deemed to be an aggravated felony, it carries severe and often life-altering ramifications with no avenue for relief.

The issue presented in this Note was complicated by the addition of the term "aggravated felony." Moreover, as will be demonstrated, the definition of illicit trafficking as an aggravated felony is further confused by the various sections involved in determining the meaning of the term "illicit trafficking."[53] Furthermore, it is the statute itself which leads practitioners and judges to question whether it applies only to the hypothetical federal felony, which would allow for uniformity, or whether it is depen-

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49. United States v. Pacheco, 225 F.3d 148, 157 (2d Cir. 2000) *cert. denied*, (Straub, J. dissenting) (recognizing the normative process of relating words to meanings); *see also Lopez*, 127 S. Ct. at 630 (humorously pointing out, "Humpty Dumpty used a word to mean 'just what [he chose] it to mean – neither more nor less.'" (citing LEWIS CARROLL, ALICE IN WONDERLAND AND THROUGH THE LOOKING GLASS 198 (New York: Julian Messner 1982) (1960))).

50. STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 553 (2005).

51. 8 U.S.C. § 1229b(a)(3) (2006); *see also Lopez*, 127 S. Ct. at 625 (citing U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (2005)) ("The Federal Guidelines attach special significance to the "aggravated felony" designation: a conviction of unlawfully entering or remaining in the United States receives an eight-level increase for a prior aggravated felony conviction, but only four levels for 'any other felony.'").

52. 8 U.S.C. § 1158(b)(2)(B) (2006); *see also* Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 93 (2005) ("Asylum seekers are foreign nationals who seek to enter the United States based upon allegations of their persecution at the hands of the government of the country from which they are fleeing. Unlike refugees, they arrive without prior State Department clearance").

53. *See infra* Part II.C.

dent on the state classification, which would encourage nonuniform consequences.[54]

C. *The Development of the Current Statute*

In *Lopez*, the Supreme Court focused on the meaning of § 101(a)(43)(B) of the INA.[55] The challenge in interpreting the statute was that "[t]he general phrase 'illicit trafficking' is left undefined"[56] and instead points to § 924(c) of Title 18 stating that a drug-trafficking crime is "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46."[57] Section 1101(a)(43) states that an aggravated felony includes those offenses described therein whether in violation of state law or federal law.[58]

1. Pre–1988

Before 1988, an alien could be deported for a drug trafficking crime which was defined as "any felony in violation of Federal law involving the distribution, manufacture, or importation of any controlled substance."[59] Simply stated, the crime had to be a federal offense in order to be punishable by deportation. The definition of "drug trafficking" did not allow drug trafficking offenses to be considered state offenses until the Anti-Drug Abuse Act of 1988.[60]

2. Post–1988

The Anti-Drug Abuse Act of 1988 "had the biggest impact on criminal-alien enforcement, affecting the deportation, detention, and readmission of noncitizens convicted of offenses falling into the new classification of aggravated felonies."[61] Under the Anti-Drug Abuse Act of 1988, the definition of "drug trafficking crime" was changed to "any felony punishable

54. *See infra* app. A (referring to offenses and violations, and distinguishing which are "state or federal").

55. *Lopez*, 127 S. Ct. at 625.

56. *Id.* at 628. *But cf. id.* at 635 (Thomas, J., dissenting) (arguing that the term "illicit trafficking" is defined and "include[s] anything defined as a 'drug trafficking crime' in § 924(c)(2)").

57. 18 U.S.C. § 924(c)(2) (2006) (defining the term "drug trafficking crime").

58. 8 U.S.C. § 1101(a)(43) (2006) (defining the term "aggravated felony").

59. 18 U.S.C. § 924(c)(2) (1982) (defining drug trafficking crimes).

60. *See* Brief of Petitioner at 15, Lopez v. Gonzales, 127 S. Ct. 625, No. 05-547 (8th Cir. Sept. 18, 2006) (citing 18 U.S.C. § 924(c)(2) (1982)).

61. Jeff Yates, Todd A. Collins & Gabriel J. Chin, *A War on Drugs or a War on Immigrants? Expanding the Definition of "Drug Trafficking" in Determining Aggravated Felon Status for Noncitizens*, 64 MD. L. REV. 875, 884–85 (2005).

under the Controlled Substances Act."[62] The Anti-Drug Abuse Act of 1988 created confusion from the outset.[63] Moreover, there was nothing to indicate that the change was meant to widen the meaning of drug trafficking crime to include a simple possession offense which happened to be punished as a felony by the state.[64] Nor was there any indication that Congress was aware of the nonuniform consequences which would result from the clarification.

Unfortunately, this was the effect in several circuits.[65] Nonetheless, U.S. Sen. Joe Biden, who was the principal drafter of the Act, stated that the change was merely to "clarif[y] the scope of 18 U.S.C. §§ 924(c) and 929(a)."[66]

However, the Anti-Drug Abuse Act did create problems, mainly in the form of causing a lack of uniformity and a split among the federal circuit courts. The Act also brought the first provisions of the term "aggravated felony" into the INA. Such provisions took away any avenues of relief for those aliens convicted of an offense classified as an aggravated felony.[67] The statute defines aggravated felony as "murder, any drug trafficking crime . . . or any attempt or conspiracy to commit any such act, committed within the United States."[68] The provision was described as "focusing on a particularly dangerous class of 'aggravated alien felons,' that is, aliens convicted of murder and drug . . . trafficking."[69]

62. 18 U.S.C. § 924(c)(2) (2000) (defining drug trafficking crimes).

63. *See* Jeff Yates, Todd A. Collins & Gabriel J. Chin, *A War on Drugs or a War on Immigrants? Expanding the Definition of "Drug Trafficking" in Determining Aggravated Felon Status for Noncitizens*, 64 MD. L. REV. 875, 885 (2005) ("The implementation of the 1988 Act immediately yielded confusion over whether its aggravated felony provisions applied to state drug offenses committed by noncitizens.").

64. *See* Chisom v. Roemer, 501 U.S. 380, 396 (1991) (concluding if there is no indication in the statute that Congress intended to make a major change, it should be considered evidence that Congress did not intend the change). "We reject that construction because we are convinced that if Congress had such an intent, Congress would have made it explicit in the statute[.]" *Id.*

65. *See infra* Part II.

66. 134 CONG. REC. S17360-02 (1988).

67. 8 U.S.C. § 1229b(a)(3) (2006).

68. Act of Nov. 18, 1988, Pub. L. No. 100-690 § 7342 (codified as amended at 8 U.S.C. § 1101(a) (2000)).

69. 134 CONG. REC. S17301-01 (1988).

It is clear that Congress was not aware that the Act could potentially encompass the minor drug offenses; rather, Congress' aim was at targeting the serious felons such as the drug cartels. Moreover, it can hardly be said that a person convicted of simple possession of marijuana (or other substance) is part of a "particularly dangerous" class of aggravated felons. *Id.*

In 1990, the BIA attempted to define the term "punishable under" within the definition of drug trafficking.[70] In *In re Barrett*, an alien was convicted of a possession offense which was classified as a felony under Maryland law.[71] The alien was then charged as deportable for having been convicted of an aggravated felony.[72] The issue was whether the term "punishable under" meant that a violation had to have resulted in a conviction under federal law, or whether it was sufficient that the elements of the crime could have rendered it a felony under the CSA.[73] The court held that the "definition of 'drug trafficking crime' . . . encompasse[d] state convictions for crimes analogous to offenses under the Controlled Substances Act[.]"[74] This used what has been referred to as the "hypothetical federal felony" rule in which persons were actually convicted under the state law, but the elements of their offense would have rendered the act a felony under the CSA.[75]

More changes arose in the Immigration Act of 1990.[76] During the same year the BIA decided *In re Barrett*, Congress explicitly clarified that the definition of aggravated felony not only included federal drug trafficking crimes, but also "any illicit trafficking in any controlled substance."[77] The Committee report stated that:

Current law clearly renders an alien convicted of a Federal drug trafficking offense an aggravated felon. It has been less clear whether a state drug trafficking conviction brings that same result, although the Board of

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70. *In re* Barrett, 20 I. & N. Dec. 171, 173 (BIA 1990); *see also* 18 U.S.C. § 924(c)(2) (2006) (defining "drug trafficking crime" as "any felony punishable under the Controlled Substances Act . . .").

71. *In re* Barrett, 20 I. & N. Dec. 171, 171–72 (BIA 1990) (citing MD. CODE ANN., CRIM. LAW §§ 27-286, 27-287, and 27-287A (West 2007)).

72. *In re* Barrett, 20 I. & N. Dec. 171, 172 (BIA 1990).

73. *Id.* at 174.

> The resolution of the question whether state crimes are included in the definition of "drug trafficking crime" depends on whether the phrase "punishable under" is properly read as limiting the definition to "convictions under" the federal laws listed in 18 U.S.C. § 924(c)(2), or whether the definition is satisfied by proving a conviction that includes all the elements of an offense for which an alien "could be convicted and punished" under the cited federal laws. *Id.*

74. *Id.* at 177–78.

75. *See* Gerbier v. Holmes, 280 F.3d 297, 304 (3d Cir. 2002) (stating that the definition of a drug trafficking crime encompasses state convictions where it can be shown that the state conviction includes the same elements as the applicable federal law).

76. Immigration Act of 1990, Pub. L. No. 100–649, 104 Stat. 4978 (1990) (codified as amended in scattered sections of Title 8 of the United States Code) ("AN ACT to amend the Immigration and Nationality Act to change the level, and preference system for admission, of immigrants to the United States, and to provide for administrative naturalization, and for other purposes.").

77. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5048 (1990).

Immigration Appeals in *Matter of Barrett* (March 6, 1990) has recently ruled that it does. Because the Committee concurs with the recent decision of the Board of Immigration Appeals and wishes to end further litigation on this issue, section 1501 of H.R. 5269 specifies that drug trafficking (and firearms/destructive device trafficking) is an aggravated felony whether or not the conviction occurred in state or Federal court.[78]

This report demonstrates that Congress was not trying to include those offenses which would be felonies under state law but misdemeanors under federal law. Rather, it was Congress's intention to clarify that an aggravated felony would include state drug offenses that would be punishable as a felony under federal drug laws. The offense did not have to be a federal conviction, but by requiring that it meet the elements of a federal offense, it would ensure that aliens in similar situations would be treated similarly.

Furthermore, after Congress passed the Act, the BIA placed a limit on the determination of drug offenses as an aggravated felony through the use of a test.[79] The court stated that "the alien's offense must be a felony offense under one of the three statutes listed in 18 U.S.C. § 924(c)(2), or it must be analogous to a felony offense under one of the three statutes in section 924(c)(2)."[80] However, not all circuit courts agree with the test set forth by the BIA, and in *In re L—G—*, the BIA reaffirmed its previous position, but recognized that the precedent within the Second Circuit required the BIA to allow a state felony drug conviction to qualify as an aggravated felony.[81] However, the BIA also stated that "we disagree with the court's decision and believe it may lead to unfair results for aliens in some cases. We therefore respectfully decline to follow *Jenkins v. INS* outside the jurisdiction of the Second Circuit."[82] The BIA's statements seem like a foreshadowing of the events to come because unfair results were exactly the outcome when the Board changed its view in 2002.

In 2002, with *In re Yanez-Garcia*, the BIA stepped back from its previous position that a drug offense must meet the elements of a felony under

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78. H.R. REP. NO. 101–681 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6553.

79. *In Matter of* Davis, 20 I. & N. Dec. 536, 541 (BIA 1992), *overruled by In re* Yanez-Garcia, 23 I. & N. Dec. 390, 390 (BIA 2002) (holding that whether a drug offense is an aggravated felony shall be determined by the "decisional authority from the federal circuit court of appeals . . ."), *abrogated by* Lopez v. Gonzales, 127 S. Ct. 625 (2006).

80. *In Matter of* Davis, 20 I. & N. Dec. 536, 543 (BIA 1992).

81. *In re* L—G—, 21 I. & N. Dec. 89 (BIA 1995) (noting the Second Circuit's decision in Jenkins v. I.N.S., 32 F.3d 11 (2d Cir. 1994)).

82. *In re* L—G—, 21 I. & N. Dec. 89, 102 (BIA 1995). *See also* ARTHUR CONAN DOYLE, THE STARK MUNRO LETTERS 365 (1895) ("We surely know by some nameless instinct more about our futures than we think we know.").

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the CSA.[83] The BIA instead decided to defer to the interpretation given by that circuit or if the circuit had not had an occasion to speak on the issue to look to the majority of the circuits which had spoke on the issue.[84] Also, the BIA struggled to apply their own rule when it ignored the Second Circuit's decision to treat the term aggravated felony differently for purposes of sentence enhancement and deportation.[85] The failure of the BIA to adequately take a stance on the issue led the circuit courts to consider the issue and determine whether they would follow the state classification perspective or the hypothetical federal felony approach.[86]

III. Split Among the Federal Circuit Courts

The lack of uniformity drew a clear split among the circuits.[87] Moreover, as the Supreme Court stated in the *Lopez* case, there was a conflict among "the Circuits about the proper understanding of conduct treated as a felony by the State that convicted a defendant of committing it, but as a misdemeanor under the CSA."[88] Several circuits have held, under the state classification (or label) perspective, that a state drug felony was an aggravated felony. Other circuits held, under the hypothetical felony perspective, that a state felony had to meet the requirements of a CSA felony.[89] To further complicate matters, the Second Circuit and the Ninth Circuit treated the definition of aggravated felony differently for sentence enhancement purposes than for immigration purposes.[90]

A. *State Classification*

Under a state classification or label perspective,[91] "state drug offenses that are classified or labeled as felonies by the relevant state properly

83. *In re* Yanez-Garcia, 23 I. & N. Dec. 390, 396–97 (BIA 2002).

84. *Id.*

85. *Id.* at 397–98. *see* Aguirre v. I.N.S., 79 F.3d 315, 317 (2d Cir. 1996) (applying the hypothetical federal felony approach); *see also* United States v. Pornes-Garcia, 171 F.3d 142, 145 (2d Cir. 1999) (adopting the state classification approach for sentence enhancement).

86. *In re* Yanez-Garcia, 23 I. & N. Dec. 390, 390–91 (BIA 2002).

87. *Lopez* 127 S. Ct. at 629.

88. *Id.*

89. *Id.*

90. *See infra* Part III.C.

91. This approach has also been called the "guidelines approach." *See* Josh Adams, Note, *The Conundrum of Classifying State Drug Offenses Under the Immigration and Nationality Act: Guidelines Approach or Hypothetical Federal Felony Test?*, 31 Vt. L. Rev. 185 (2006) ("The federal circuits and Board of Immigration Appeals (BIA) have developed two tests for answering this question: the Hypothetical Federal Felony Test (HFFT) and the Guidelines Approach (GA).").

qualify as drug trafficking crimes under § 924(c)(2) and, therefore, aggravated felonies under INA § 1101(a)(43).[92] Essentially, a state drug felony qualifies as an aggravated felony under the state classification or label perspective. The general explanation for holding this way was based on the idea that this was an express policy decision by Congress.[93] In other words, if Congress wanted only federal offenses to qualify, it could have broadly stated this in the statute. The Supreme Court disagreed with that view.[94]

The Eighth Circuit Court held that "the definitions of the terms [aggravated felony and drug trafficking] at issue indicate that Congress made a deliberate policy decision to include as an 'aggravated felony' a drug crime that is a felony under state law but only a misdemeanor under the CSA."[95]

Holding similarly, the Fifth Circuit was one of the first circuits to unequivocally choose the state classification perspective in the immigration context.[96] The pinnacle case for the Fifth Circuit with regards to the application of the state classification perspective in the immigration context is *United States v. Hernandez-Avalos.*[97] The Court stated that it agreed with *Briones-Mata* in that the statutory language was clear and Congress was making an intentional policy decision.[98]

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92. Jeff Yates, Todd A. Collins & Gabriel J. Chin, *A War on Drugs or a War on Immigrants? Expanding the Definition of "Drug Trafficking" in Determining Aggravated Felon Status for Noncitizens*, 64 MD. L. REV. 875, 892 (2005) (describing the state classification or label perspective approach applied by a majority of the circuits).

93. *Id.* at 897.

94. *Lopez*, 127 S. Ct. at 633. (denying the Government's argument that Congress intended such an interpretation of the statute).

95. United States v. Briones-Mata, 116 F.3d 308, 310 (citing United States v. Restrepo-Aguilar, 74 F.3d 361, 366 (1st Cir. 1996)). It is interesting to note that the Eighth Circuit believed that the terms showed a deliberate policy decision by Congress, yet the Supreme Court did not view this as a policy decision. "Congress can define an aggravated felony of illicit trafficking in an unexpected way. But Congress would need to tell us so, and there are good reasons to think it was doing no such thing here." *Lopez*, 127 S. Ct. at 630.

96. Jeff Yates, Todd A. Collins & Gabriel J. Chin, *A War on Drugs or a War on Immigrants? Expanding the Definition of "Drug Trafficking" in Determining Aggravated Felon Status for Noncitizens*, 64 MD. L. REV. 875, 892 (2005) (noting that from their review of the circuits, "only the Fifth Circuit has unequivocally chosen the state classification perspective").

97. United States v. Hernandez-Avalos, 251 F.3d 505 (5th Cir. 2001). This case is important because it expressly rejected the idea of interpreting the statute differently based on whether it was for sentencing cases or immigration cases. *Id.* at 509.

98. *Id.* at 510. (holding that the statutory language is clear and is applied the same way in both sentencing and immigration cases).

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As stated previously, there has been some confusion within the Second Circuit on the issue. However, earlier in *Jenkins,*[99] the Second Circuit appeared to follow the state classification perspective. The Court held that the offense qualified as an aggravated felony even though it was only a misdemeanor under federal law.[100] The Court relied heavily on the "unambiguous language of the statute."[101]

The First Circuit, Eleventh Circuit, and the Tenth Circuit followed the state classification perspective for the same reasons as the other circuits. The First Circuit held that a state felony offense would be regarded as an aggravated felony even if it was only a misdemeanor under federal law.[102] The First Circuit Court relied on the Second Circuit's reading of the statute in *Jenkins* even though the *Restrepo-Aguilar* Court recognized that the BIA's position was to the contrary.[103] The Eleventh Circuit held that the plain language of the statute which defines felony as any federal or state offense would make the alien's offense an aggravated felony. [104] The Tenth Circuit held that even though it was only a felony under New York law, it still fell within the meaning of § 924(c)(2).[105]

B. *Hypothetical Federal Felony*

Several circuits did not believe that a state felony conviction was enough to make the offense an aggravated felony. The courts that fol-

99. Jenkins v. I.N.S., 32 F.3d 11 (2d Cir. 1994) (holding that although an alien was convicted of a state felony for possession of a controlled substance, the offense was only a misdemeanor under federal law).

100. *Jenkins*, 32 F.3d at 15. After this decision, the Board of Immigration Appeals expressly disagreed with this decision and stated that they refused to follow its precedent outside the Second Circuit. *Id.*

101. *Id.* at 14. It is interesting that the Second Circuit found the language to be "unambiguous," yet it has caused a split among the circuits because the language of the statute has been interpreted differently.

102. United States v. Restrepo-Aguilar, 74 F.3d 361, 365 (1st Cir. 1996), *abrogated by* Lopez v. Gonzales, 127 S. Ct. 625 (2006) (regarding an alien who pled guilty in Rhode Island to a felony state drug possession which was a misdemeanor under the CSA).

103. *Restrepo-Aguilar*, 74 F.3d at 364.

104. United States v. Simon, 168 F.3d 1271, 1272 (11th Cir. 1999) (explaining the effect of the Court's holding), *abrogated by* Lopez v. Gonzales, 127 S. Ct. 625, 633 (2006) ("In sum, we hold that a state offense constitutes a 'felony punishable under the Controlled Substance Act' only if it proscribes conduct punishable as a felony under that federal law."). Mr. Simon had been convicted of a Florida felony offense for possession of cocaine. United States v. Simon, 168 F.3d 1271, 1272 (11th Cir. 1999). The decision in *Simon* was in the sentence enhancement context. *Id.*

105. United States v. Cabrera-Sosa, 81 F.3d 998, 1000 (10th Cir. 1996) ("Second, it is undisputed that Mr. Cabrera-Sosa's 1990 conviction was a felony within the meaning of section 924(c)(2) even though it was a state conviction."). Mr. Cabrera-Sosa sold crack cocaine to an undercover officer; this resulted in a conviction for felony possession of cocaine. *Id.* This decision was based on sentencing enhancement. *Id.* at 999.

lowed the hypothetical federal felony rule generally expressed a need for national uniformity in the immigration laws and believed that the term felony meant an offense that would be punishable as a federal felony.[106]

The Third Circuit chose to follow the hypothetical federal felony idea in *Gerbier v. Holmes.*[107] The Third Circuit held that since the conviction was only punishable as a misdemeanor under federal law, it did not constitute a drug trafficking crime and was not an aggravated felony.[108] The Court noted that if "§ 924(c)(2) [was interpreted] in the same manner as the Courts of Appeals that have interpreted the relevant language in the Sentencing Guidelines cases, aliens convicted of drug offenses in different states that punish similar offenses differently would be treated differently with respect to deportation and cancellation of removal."[109] The Court also pointed out a possible hypothetical as follows:

A person convicted of a single offense of simple possession of 30 grams or less of marijuana in North Dakota, where the offense is punishable as a felony, *see* N.D. Cent. Code § 19.03.1-23(6) (2000), would be subject to deportation without the possibility to apply for cancellation of removal under 8 U.S.C. § 1229b(a)(3), whereas a person convicted of the same offense in Montana, where this crime is only a misdemeanor . . . would not be subject to deportation.[110]

The Sixth and Seventh Circuits also chose to follow the hypothetical federal felony. The Seventh Circuit held "[t]here is no hint that commission of a state drug offense is now to be deemed the commission of a federal drug offense."[111] Writing for the Court, Judge Posner stated that a state classification "is inconsistent with the interest in *uniform standards for removal*, and is inconsistent with the legislative history."[112] The Sixth Circuit supported its position to follow the hypothetical federal felony

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106. *See generally* Gerbier v. Holmes, 280 F.3d 297, 311, 316 (3d Cir. 2002) (stating that a "policy favoring uniformity in the immigration context is rooted in the Constitution" and whether the conviction is a felony under state law is irrelevant to whether it would be punishable as a felony under federal law).

107. *Id.* at 307–08 ("[W]e conclude that the "hypothetical federal felony" route is the preferable reading of § 924(c)(2)."). In *Gerbier*, the alien pled guilty to a state conviction of possession of cocaine. *Id.* at 307–08. It was a felony under Delaware law but did not meet the requisite elements for a felony under the CSA. *Id.* at 200–02.

108. *Id.* at 318 ("Thus, his conviction does not constitute a 'drug trafficking crime' as defined in § 942(c)(2), and he has, thereby, not been convicted of an 'aggravated felony' for purposes of § 1101(a)(43) of the INA.").

109. *Id.* at 312 (explaining the nonuniformity that would occur should the court rely on state felony classifications, instead of interpreting convictions under federal classifications).

110. *Id.*

111. Gonzales-Gomez v. Achim, 441 F.3d 532, 534 (7th Cir. 2006) (regarding an alien who was convicted of a small possession of cocaine).

112. *Id.* at 533 (emphasis added).

perspective by referencing the legislative history which clarified the statutory language.[113]

C. *Immigration Versus Sentence Enhancement*

Both the Second and Ninth Circuits chose to treat the definition of aggravated felony differently for immigration purpose and sentence enhancement purposes. The Ninth Circuit, in *Cararez-Gutierrez v. Ashcroft*, held that "a state drug offense is not an aggravated felony for immigration purposes unless it is punishable as a felony under the CSA or other federal drug laws named in the definition of 'drug trafficking crime,' or is a crime involving a trafficking element."[114] However, the Court previously held that a possession offense was an aggravated felony for sentence enhancement purposes if it was a felony under state law.[115]

The Second Circuit, in *Aguirre v. INS*, rejected its decision in *Jenkins v. INS*, concluding "the interests of nationwide uniformity outweigh[ed] . . . adherence to Circuit precedent in this instance."[116] The Court held that out of concern for disparate treatment of aliens, it would abandon the previous precedent in *Jenkins*.[117] This seems like a logical reason based on the idea that the power over immigration within the exclusive federal realm.[118] However, the Second Circuit also held that, for sentence enhancement purposes, a drug offense only had to qualify as a state felony in order for it to be an aggravated felony.[119]

The circuit split has been a large debate within the context of the immigration community. The split in the circuits also has a huge impact on the number of aliens being deported since "[d]rug crimes alone account for

113. United States v. Palacios-Suarez, 418 F.3d 692, 699–700 (6th Cir. 2005) (citing to the House Judiciary Committee Report, which stated it concurred with the BIA's decision in *Matter of Barrett)*. The BIA reasoned that it did not have to be convicted as a federal drug offense to qualify as an aggravated felony. *Id.* Mr. Palacios-Suarez had previously been convicted twice for drug possession, both of which were state felonies. *Id.* at 694. This was a case in the context of sentence enhancement. *Id.* However, the court stated that it declined to treat the language differently for immigration purposes than for sentence enhancement. *Id.* at 697.

114. Cararez-Gutierrez v. Ashcroft, 382 F.3d 905, 919 (9th Cir. 2004). In this case, the alien was convicted of possession of methamphetamine. *Id.* However, this offense was not punishable as a felony under federal law. *Id.* at 908.

115. United States v. Ibarra-Galindo, 206 F.3d 1337, 1341 (9th Cir. 2000).

116. Aguirre v. I.N.S., 79 F.3d 315, 317 (2d Cir. 1996). This case involved an alien who was convicted of possession of a controlled substance which was a felony under New York law, but was only a misdemeanor under the CSA. *Id.* at 316.

117. *Aguirre*, 79 F.3d at 317–18 ("Accordingly, we have sought and obtained the concurrence of the *Jenkins* panel to abandon that precedent and therefore grant the petition for review and remand for consideration of petitioner's requests for discretionary relief.").

118. *See supra* Part II.A.

119. United States v. Pornes-Garcia, 171 F.3d 142, 147–48 (2d Cir. 1999).

nearly half of all criminal alien deportations."[120] In addition, the decision as to what drug offenses constitute aggravated felonies may "define both the future of national immigration policy as well as the fortunes of thousands of immigrants"[121] because an aggravated felony makes an alien ineligible for relief. The largest problem is the uncertainty in this area which created imbalance. With many circuits following either the state classification perspective or the hypothetical felony perspective and a few circuits following both perspectives, it is clear there are difficulties that attorneys face when advising their clients on the availability of relief from deportation. However, it is clear after a closer look at the statutory language that the confusion and controversy is not without some justification.

IV. Statutory Language Attributes to the Confusion

The meaning of the statutory language can only be discovered when the statute is read in whole sections.[122] As stated previously, the statute at issue has undergone several changes since the 1980s.[123] From the very beginning, the 1988 Act led to confusion as to whether the aggravated felony provisions applied to state drug offenses which were committed by aliens.[124] The statute creates confusion because it references other sections, which, in turn, points to other sections. This leaves one to jump from section to section to discern the meaning of the statutory language, and results in leaving the reader perplexed. The confusion has had collateral effects on defense attorneys.[125] It becomes difficult to advise a client

120. Robert A. Mikos, *Enforcing State Law in Congress's Shadow*, 90 CORNELL L. REV. 1411, 1446 (2005) (discussing the Immigration and Naturalization Act's deportation policies and the most common offenses).

121. Jeff Yates, Todd A. Collins & Gabriel J. Chin, *A War on Drugs or a War on Immigrants? Expanding the Definition of "Drug Trafficking" in Determining Aggravated Felon Status for Noncitizens*, 64 MD. L. REV. 875, 894 (2005) (outlining the interpretations of drug offenses as aggravated felonies).

122. *Lopez*, 127 S. Ct. at 631 ("That is why our interpretive regime reads whole sections of a statute together to fix on the meaning of any one of them, and the last thing this approach would do is divorce a noun from the modifier next to it without some extraordinary reason.").

123. *See supra* Part II.C.

124. Jeff Yates, Todd A. Collins & Gabriel J. Chin, *A War on Drugs or a War on Immigrants? Expanding the Definition of "Drug Trafficking" in Determining Aggravated Felon Status for Noncitizens*, 64 MD. L. REV. 875, 885 (2005) (citing Leader v. Blackman, 744 F.Supp. 500, 502, 504 (S.D.N.Y. 1990)).

125. Brief for Amer. Bar Ass'n as Amici Curiae in support of Petitioner at 22, Lopez v. United States, 126 S. Ct. 651, Nos. 05-547, 05-7664 (2006) (stressing the confusion by stating "the statute can be a labyrinth of traps for the unwary, even for counsel armed with manuals such as the ABA's *The Criminal Lawyer's Guide to Immigration Law – Questions and Answers*.").

when the statute is incoherent.[126] When there is no relief available and mandatory deportation would be the result of a conviction, a defense attorney is much more likely to advise their client to go to trial instead of taking a plea bargain.[127] Also, defendants who are threatened by mandatory deportation are more likely to expend resources after conviction to pursue an appeal, seek a withdrawal of pleadings, or attempt a collateral attack on their convictions.[128]

Not only does the jumping from section to section to analyze the statutory language create confusion, but the statute also continually refers to "state or federal" law.[129] The result of the confusion is a lack of uniformity. However, the illicit trafficking section is not the only aggravated felony provision which creates this problem of nonuniformity. There are also provisions that only provide general labels to offenses and therefore, leave the courts to discern the meaning.[130] For example, the INA does not define, for the most part, the crimes which are labeled aggravated felonies but only refers to them by general terms such as assault, statutory rape, and theft.[131] Since states may give different meanings to the terms, there may be a lack of uniformity as to the definitions of the words.[132] Therefore, it is easy to see how the statutory construction contributes and may even foster the lack of uniformity.

A. *What, if Anything, Does "Statutory Interpretation" Really Glean?*

Before looking at exactly what meaning the Court in *Lopez* attributed to the statute, it is interesting to note how the Supreme Court may have analyzed the statute. There are several different theories on statutory interpretation and how a court should determine the meaning of a statute.[133] As will be demonstrated, "legislative intent and purpose prove to be distressingly malleable, and even such 'hard' evidence as statutory text turns out to be quite flexible."[134] The use of statutory interpretation has been described as follows:

Do not expect anybody's theory of statutory interpretation, whether it is your own or somebody else's, to be an accurate statement of what

126. *Id.*

127. *Id.* at 24.

128. *Id.* at 21.

129. *See* app. A.

130. *See* Iris Bennett, Note, *The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions*, 74 N.Y.U. L. REV. 1696, 1721 (1999).

131. *See id.*

132. *See id.*

133. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 324–25 (1990)..

134. *Id.* at 325.

courts actually do with statutes. The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.[135]

This statement clearly indicates that statutory interpretation theories are just that –theories. The courts do not always tell us what they are doing when they are evaluating the statutory language.

Nonetheless, "statutory interpretation has reemerged as an important topic of academic theory and discussion."[136] The *Lopez* Court did not tell us, in rendering its decision, exactly which theory of statutory interpretation they took; however, based on some statements, it can be hypothesized that the Court was following more of a textualist view.[137] This was likely done because of some of the major flaws in the other approaches to statutory interpretation. However, it could also be possible that it is true that the courts have no intelligible theory on statutory interpretation.

1. Traditional Statutory Interpretation Theories Seem to Break Down[138]

There are three main theories in statutory interpretation: intentionalism, purposivism, and textualism.[139] After further analysis of these views though, it becomes clear that no view is necessarily superior over the others. It also becomes clear that there is no flawless view.[140]

a. Intentionalism

"Under this view, the Court acts as the enacting legislatures faithful servant, discovering and applying the legislature's original intent."[141] U.S. Sen. Joe Biden stated, with regard to the definition of aggravated

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135. ANTONIN SCALIA, A MATTER OF INTERPRETATION 14 (1997) (quoting HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1169 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994)).

136. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

137. *See generally* Lopez v. Gonzales, 127 S. Ct. 625 (2006).

138. *See generally* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 325 (1990) (arguing that each theory fails because each theory suffers from "flawed assumptions, indeterminacy, and nonexclusivity").

139. *Id.* at 324–25.

140. This may also be the reason why there is a "drought rather than a glut of treatises [on the subject of statutory interpretation]." ANTONIN SCALIA, A MATTER OF INTERPRETATION 15 (1997).

141. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 325 (1990).

felony, that the change was to "clarif[y] the scope of 18 U.S.C. §§ 924(c) and 929(a)."[142] However, giving weight to a subgroup may come into conflict with Article I, Section 7 of the Constitution,[143] which requires both bicameralism and presentment. As such, even if it was the Sen. Biden's intention, other members of Congress could have other intentions for the enactment of the statute.

The Supreme Court did not explicitly discuss the intent of Congress. Congress did, however, make reference to that which it intended to codify in *In re Matter of Barrett,*[144] but *Barrett* did not specify whether a state crime had to be analogous to a federal felony.[145] More specifically, it did not state whether it had to meet the elements of a felony or if the elements of a misdemeanor would be sufficient.[146] Also, the Court in *Lopez* stated that if Congress's intent was for the words to have a meaning other than their everyday meaning, Congress would need to let the Court know.[147] Therefore, it is fairly clear that the Supreme Court did not follow the intentionalist theory.

b. Purposivism

Purposivism is the idea that the judiciary should be looking at the purpose and follow the interpretation which would support that purpose.[148] This theory, however, is based on the assumption that the legislature is

142. Section Analysis of Judiciary Committee Issues in H.R. 5210, 134 CONG. REC. S17360 (1988).

143. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 327 (1990) ("Moreover, any theory of interpretation that formally gives conclusive weight to the views of the legislative subgroup is in tension with bicameralism and presentment requirements of Article I. Article I, Section 7 provides that legislation is not valid law unless it has been passed by both chambers of Congress and presented to . . . the President[.]").

144. *See Matter of* Barrett, 20 I. & N. Dec. 171 (BIA 1990) (discussing the definition of "drug trafficking crime" for purposes of qualifying as an "aggravated felony" under the Immigration and Nationality Act).

145. *Lopez*, 127 S. Ct. at 632 n.8.

146. *See Matter of* Barrett, 20 I. & N. Dec. 177–78 (BIA 1990) ("We conclude that the definition of 'drug trafficking crime' for purposes of determining drug related 'aggravated felonies' within the meaning of the Immigration and Nationality Act encompasses state convictions for crimes analogous to offenses under the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Martime Drug Law Enforcement Act.").

147. *Lopez*, 127 S. Ct. at 630 ("The everyday understanding of 'trafficking' should count for a lot here, for the statutes in play do not define the term, and so remit us to regular usage to see what Congress probably meant.").

148. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 332–39 (1990).

reasonable.[149] Regardless of the potential problems, the Supreme Court has previously relied on this approach to dismiss interpretations that may be grounded in the text and history, but would bring about a result that would be in conflict with the purpose of the statute.[150] However, the *Lopez* Court did not mention the purpose behind the statute. Perhaps the *Lopez* Court, like many critics, discredited the intentionalism and purposivism theories.[151]

c. Textualism

Textualism is the idea that statutory interpretation should come from the apparent meaning of the statutory language.[152] This is a version of the "plain meaning rule."[153] Legal scholars have argued that since the text is the only thing actually enacted into law, citizens should be able to rely on clear statutory text to determine their rights.[154] "The text is the law, and it is the text that must be observed."[155]

Textualism is not free from problems. Textualism tends to oversimplify the implication of statutory text.[156] Furthermore, the courts can aspire

149. *Id.* at 334 (noting that some economists have suggested that whoever controls the legislative agenda determines the legislative results). Additionally, when the judiciary does try to implement a purpose, it may actually be undoing "a deliberate and precisely calibrated deal worked out in the legislative process." *Id.* at 335.

150. *Id.* at 333 (suggesting that purposivism, as an alternative to intentionalism, has been relied upon by the Supreme Court to ensure that statutory interpretations are consistent with their respective purposes) (citing as examples Equal Emp. Opportunity Comm'n v. Com. Office Prods. Co., 486 U.S 107, 114–22 (1988); United States v. Fausto, 484 U.S. 439, 443–48 (1988)).

151. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 340 (1990) (positing that some critics and judges, having discredited both intentionalism and purposivism, suggest a return to the "plain meaning rule" where focus turns on the meaning of the statutory language).

152. *Id.* at 340–45 (explaining that textualism emphasizes the statutory words selected by the legislature as the sole means for interpreting the statute itself).

153. *Id.* at 340 (stating that "several judges of the law and economics school have responded to the critique of purposivism by urging as a grand theory the return to some version of the old "plain meaning rule").

154. *Id.* at 337 ("Moreover, it is argued, citizens ought to be able to rely on clear statutory text to determine their rights and duties.").

155. ANTONIN SCALIA. A MATTER OF INTERPRETATION 22 (agreeing with Justice Holmes's remark in an article by him concerning the construction of statutes).

156. William N. Eskridge, Jr. & Phillip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 341 (1990) ("Whether or not language itself is intrinsically indeterminate, one would have to concede that general politicized terms such as 'discrimination' are susceptible of different interpretations.").

for complete objectivity, but ultimately the interpreter's own context and current values may largely influence the interpretation.[157]

In *Lopez v. Gonzales*, the United States Supreme Court relied heavily on textualism.[158] In order to reach its decision, the Court assessed the meaning of the terms used in the statute; more specifically, the Court looked at the everyday meaning of the word "trafficking."[159] An analysis of the detail that the *Lopez* Court gave to each phrase within the statute demonstrates the amount of weight the Court put on the text of the statute.

B. *Break Down of Statutory Language*

The Supreme Court is correct in stating that we must "read[ ] whole sections of a statute together to fix on the meaning of any one of them[.]"[160] However, certain parts of the statute must be pulled apart in order to attempt to give meaning to terms which appear simple on the face but are quite complex. Therefore, the following sections will looks at some key phrases in the statute such as "illicit trafficking," "any felony punishable," and "whether in violation of Federal or State law" and how the phrases create problems in interpretation and the ultimate decision of the *Lopez* Court as to their meanings. The chart in Appendix A is used to visually provide an idea of how the statute jumps from section to section and also provides for an easier view of the statute as a whole.[161] The reasoning of the Supreme Court as to how to define the phrases seems to support a preference toward uniformity in immigration. At the very least, the fact that the Supreme Court is even giving a definition to the terms supports the idea of uniformity in immigration. Further, if Congress gave more specific definitions to the general terms which are used in the INA, it would minimize the problem of lack of uniformity.

157. *Id.* at 343 ("Where current values and historical context strongly support an interpretation, a determinate text will not stand in the way.").

158. *See generally* Lopez v. Gonzales, 127 S. Ct. 625 (2006) (determining whether a permanent resident was to be convicted of an aggravated felony as defined by the INA).

159. *See id.* at 630 ("The everyday understanding of 'trafficking' should count for a lot here, for the statutes in play do not define the term, and so remit us to regular usage to see what Congress probably meant.").

160. *Id.* at 631 (emphasizing that the entire statute must be read to understand any one part of the statute).

161. *See* app. A (displaying how a statute jumps from section to section and providing an easier view of a statute in its entirety).

1. "Illicit Trafficking"

An aggravated felony includes "'illicit trafficking' in a controlled substance . . . including a drug trafficking crime[.]"[162] Furthermore, the term "traffickers" has been defined as persons who have been "convicted of any Federal or State offense consisting of the distribution of controlled substances."[163] The Supreme Court has determined, and it is a canon of statutory construction, that where a statutory term is ambiguous it should be given its "ordinary or natural meaning."[164] It has been argued that illicit trafficking does not include the simple possession of a controlled substance.[165] However in *Lopez*, the Government argued that it was possible that Congress purposely chose not to limit the offenses to illicit trafficking but instead expanded it by adding that "the qualifying offenses 'includ[e] a drug trafficking crime (as defined in section 924(c) of Title 18).'"[166] Conversely, it was argued that although there may be some drug trafficking crimes which would constitute illicit trafficking, not all drug trafficking crimes would subsume illicit trafficking.[167]

In evaluating the term illicit trafficking the Supreme Court stated, "[t]he everyday understanding of 'trafficking' should count for a lot here, for the statutes in play do not define the term[.]"[168] This is exactly the problem which was stated previously: many of the crimes which constitute aggravated felonies are not defined but are only stated generally.[169] The Court further stated that reading a simple misdemeanor as a trafficking offense would be just the result the English language would not expect.[170]

162. 8 U.S.C. § 1101(a)(43)(B) (2006).

163. 21 U.S.C. § 862(a)(1) (2006).

164. Leocal v. Ashcroft, 543 U.S. 1, 9 (2004) ("When interpreting a statute, we must give words their 'ordinary or natural' meaning.").

165. *See* Salinas v. United States, 547 U.S. 188 (2006) (per curium).

166. Brief for the Respondent at 36, Lopez v. Gonzalez, 127 S. Ct. 625, No. 05-547 (2006) ("In so doing, Congress sought to ensure that the category of controlled substance offenses that can trigger an aggravated felony designation would include certain types of offenses less commonly associated with 'trafficking[.]'").

167. Brief for Amer. Bar Ass'n as Amici Curiae in support of Petitioner at 9–10, Lopez v. United States, 126 S. Ct. 651, Nos. 05-547, 05-7664 (2006).

168. *Lopez*, 127 S. Ct. at 630 (citing F.D.I.C. v. Meyer, 510 U.S. 471, 476 (1994)).

169. *See supra* Part IV.

170. *Lopez*, 127 S. Ct. at 630. *But cf. Lopez*, 127 S. Ct. at 635 (Thomas, J., dissenting) (stating that the term "illicit trafficking" is defined by Section 1101(a)(43)(B) of Title 8 as, at least in part, a "drug trafficking crime" under § 924(c)(2)).

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2. "Any Felony Punishable"

The term "drug trafficking" is defined as "any felony punishable under the Controlled Substances Act . . . ."[171] Therefore, in order to define "drug trafficking," one has to ascertain the meaning of "any felony punishable."

The Government, in an attempt to broaden the meaning of "any felony" and thereby expand the number of deportable immigrants, has argued the term "any" has an "expansive meaning" and there is nothing that restricts this expansive meaning.[172] Further, the Government argues that in sentencing proceedings they only need to prove that there was a conviction.[173]

Judge Posner explained, in an opinion by the Seventh Circuit, a violation of a state drug felony is not, standing alone, punishable; but it must be a felony under the CSA.[174] The Supreme Court agreed with Judge Posner and determined that to read the phrase to incorporate misdemeanors "would be so much trickery, violating 'the cardinal rule that statutory language must be read in context.'"[175] Therefore, there would still be a conviction; only instead of looking at whether the conviction was a felony under state law, the tribunal would look at the offense itself and see if that offense would actually qualify as a felony under the Controlled Substance Act.[176]

3. Whether in Violation of Federal or State Law

An aggravated felony "applies to an offense . . . whether in violation of Federal or State law."[177] However, the key question is whether this phrase means that an offense can be a state felony but only a federal misdemeanor and still qualify as an aggravated felony. At first glance and without further understanding of the context, it would appear to

171. 18 U.S.C. § 924(c)(2) (2006).

172. Brief for the Respondent at 19, Lopez v. Gonzalez, 127 S. Ct. 625, No. 05-547 (2006).

173. *Id.* at 20 (citing 8 U.S.C. § 1229a(c)(3)(B) (2006)). "But in civil immigration and federal sentencing proceedings, the government need only prove the fact of a conviction, and the INA provides that the conviction can be proved simply by producing proper documentation of the conviction." *Id.*

174. Gonzales-Gomez v. Achim, 441 F.3d 532, 534 (7th Cir. 2006) ("The Controlled Substances Act does not purport to punish state drug felonies[.]").

175. *Lopez,* 127 S. Ct. at 631 (quoting General Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 582 (2005)).

176. *See* Gonzales-Gomez v. Achim, 441 F.3d 532, 534–35 (7th Cir. 2006) ("So long as the quantity is known, there is rarely any mystery about whether the defendant committed a felony violation of the Act, as well as committing a felony under state law.").

177. 8 U.S.C.§ 1101(a)(43) (2006).

cover both. However, after closer review, the statute does not seem to cover those state felonies which would only be federal misdemeanors.

The Government, in *Lopez*, argued that Congress, in 8 U.S.C. § 1101(a)(43), did not focus on the identity of the convicting jurisdiction; instead, it focused on the definition of categories of criminal convictions.[178] Therefore, Congress eliminated any requirement that there be a hypothetical federal felony when that section was incorporated into the aggravated felony provision.[179]

On the other hand, the statement that it applies to an offense in "violation of Federal or State law" does not change the descriptions of the offenses.[180] Therefore, the offense still must be an illicit trafficking crime, which is defined by the CSA;[181] and, as stated earlier, the CSA requires that it be a federal felony which is punishable under the CSA.[182]

The Supreme Court stated that before applying the expansive definition given by the Government, the Court must ask "whether it would have some use short of wrenching the expectations raised by normal English usage[.]"[183] The Court determined that there are two purposes the phrase serves. First, it provides a description of "offense"; it covers either a state offense or a federal offense.[184] Secondly, it confirms that a state offense whose elements would render it a felony under the CSA is an aggravated felony.[185] The Court also recognized that there was nothing to suggest that Congress changed the meaning of "felony punishable under the [CSA]."[186] Therefore, the phrase at the 8 U.S.C § 1101(a)(43) did not change the definition in § 924(c) that it must meet the elements of a federal felony.

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178. Brief for the Respondent at 15, Lopez v. Gonzalez, 127 S. Ct. 625, No. 05-547 (2006) ("Congress thus focused the definition [of aggravated felonies] on categories of criminal convictions, without regard to the identity of the prosecuting authority.").

179. *Id.* at 15–16.

> [C]ongress eliminated any arguable hypothetical-federal-felony requirement . . . into the aggravated-felony provision of the INA. The INA provides, without qualification, that the definition of "aggravated felony" applies to a conviction for a drug trafficking crime described in Section 1101(a)(43)(B) . . . without regard to whether the offense was "in violation of Federal or State law." *Id.*

180. 8 U.S.C. § 1101(a)(43) (2006).

181. Brief of Petitioner at 27, Lopez v. Gonzales, 127 S. Ct. 625, No. 05-547 (8th Cir. 2006) ("But the description of the offense remains unchanged: it must be 'illicit trafficking in a controlled substance.'").

182. *Supra* Part. IV. B.2.

183. *Lopez*, 127 S. Ct. at 631.

184. *Id.*

185. *Id.* ("[I]t confirms that a state offense whose elements include the elements of a felony punishable under the CSA is an aggravated felony.").

186. *Id.* (quoting 18 U.S.C. § 924(c)(2) (2006)).

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C. *Potential Conflict with 8 U.S.C. § 1227(a)(2)(B)(i)*

If a state chose to make possession in any amount a felony, this would create a problem with 8 U.S.C. § 1227(a)(2)(B)(i) because it states that a single offense of possession is not deportable offense.[187] This further demonstrates a dire need for a uniform system of immigration laws because it would eliminate such problems. Section 1227(a)(2)(B)(i) of Title 8 provides that a single offense of possession for one's own use is not a deportable offense.[188] Under the Government's interpretation in *Lopez*, a state's choice to make a single cigarette of marijuana a felony would render the convicted alien deportable.[189] Such a statute, assuming that the typical marijuana cigarette is less than thirty grams, would be in conflict with 8 U.S.C. § 1227(a)(2)(B)(i) (2006), which provides that a single offense of possession of less than thirty grams of marijuana for one's own use is not deportable.[190] Under the Government's interpretation in *Lopez*, "if a State makes it a felony to possess a gram of marijuana the congressional judgment is supplanted, and a state convict is subject to mandatory deportation because the alien is ineligible for cancellation of removal."[191] Under a unified system of immigration laws, there would be no such controversy because the state would automatically look to the federal system to determine the status of a criminal alien. Similar use of

187. *See* 8 U.S.C. § 1227(a)(2)(B)(i) (2006) ("Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.").

188. *See id.*

189. *See* Gonzales-Gomez v. Achim, 441 F.3d 532, 535 (7th Cir. 2006) (stating that "if a state made the possession of one marijuana cigarette a felony, which it is perfectly entitled to do, it would be in effect annexing banishment from the United States to the criminal sanction").

190. *See* 8 U.S.C. § 1227(a)(2)(B)(i) (2006) ("Any alien at any time after admission has been convicted of a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), *other than a single offense involving possession for one's own use of 30 grams or less of marijuana*, is deportable." (emphasis added)).

191. *Lopez*, 127 S. Ct. at 633 (demonstrating that, under the Government's interpretation, if a state were to treat the single instance of possession of less than thirty grams of marijuana for personal use as a felony, then an alien convicted by the state would be subject to deportation in contradiction of congressional intent). The Court also identified "several States [which] treat possession of less than [thirty] grams of marijuana as a felony." *Id.* at n.10. For example, Florida punishes possession of twenty grams or more of marijuana as a felony. *See* FLA. STAT. §§ 893.13 (6) (a) – (b), 775.082(3)(d)(2006). Also, Nevada, North Dakota, and Oregon each punish, as a felony, possession of more than one ounce (28.3 grams) of marijuana. *See* NEV. REV. STAT. §§ 453.336(1)-(2) (2004), §§ 453.336(4), 193.130 (2003); N.D. CENT. CODE ANN. §§ 19-03.1-23(6) (Lexis Supp. 2005), 12.1-32-01(4) (Lexis 1997); ORE. REV. STAT. § 161.605(3) (2003).

the hypothetical federal felony is applicable to other areas of immigration law which are not uniform.

V. Is the Hypothetical Federal Felony the Solution to Nonuniformity?

In his dissent, Justice Thomas argued that the majority's opinion created more problems than it actually solved because a state may deem an offense a misdemeanor which is a felony under the CSA.[192] While this problem may occur, federal law should trump state law. The majority recognized that the CSA generally treats possession as a misdemeanor regardless of the amount; therefore, an alien may escape designation as an aggravated felon even when he or she possessed a large amount.[193]

However, the Court also correctly stated that this problem was not as great as the problem of convicting those aliens of an aggravated felony when it was only a misdemeanor under the CSA.[194] With the harsh consequences of removal without relief hanging over the noncitizen, it is better to err on the side of conservitivism and national uniformity. Even for those who believe that we should be pushing an agenda that deports more aliens, a policy supporting national uniformity works in everyone's favor. Predictability benefits all sides. It creates certainty so that those involved in the justice system and those convicted aliens know what the consequences of their actions will be. Even if Congress had explicitly created a statute which stated that possession of any amount of an illicit substance is an aggravated felony which does not allow for relief, there would exist an expectation as to the result if an alien was convicted of possession. The largest problem occurs when, like the status prior to the *Lopez* decision, there is ambiguity in the law.

Illicit trafficking was not the only offense which had results which varied from state to state. There are still several aggravated felony designations that vary depending on the harshness or leniency of the laws of the

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192. *Lopez*, 127 S. Ct. at 637–38 (Thomas, J., dissenting) ("[T]he Court admits that its reading will subject an alien defendant convicted of a state misdemeanor to deportation if his conduct was punishable as a felony under the CSA. Accordingly, even if never convicted of a felony, an alien becomes eligible for deportation based on a hypothetical federal prosecution. It is at least anomalous, if not inconsistent, that an actual misdemeanor may be considered an aggravated felony.").

193. *Id.* at 633 ("[S]ome States graduate offenses of drug possession from misdemeanor to felony depending on quantity, whereas Congress generally treats possession alone as a misdemeanor whatever the amount. . . . Thus, an alien convicted by a State of possessing large quantities of drugs would escape the aggravated felony designation simply for want of a federal felony defined as possessing a substantial amount.").

194. *See id.* ("This is so, but we do not weigh it as heavily as the anomalies just mentioned on the other side.").

respective state. Examples of some of the offenses includes: prostitution, child pornography, fraud, sexual abuse, burglary, and obstruction of justice.

If a drug offense must meet the hypothetical felony, will these offenses ever have to rise to the level of a hypothetical federal felony? Would this be such a bad idea? It may help to promote national uniformity in immigration. Now that the Supreme Court has affirmed the idea of the hypothetical federal felony, this may be the way that a more unified system of immigration law can be state created. Offenses should be tested against the elements of a federal offense. If they meet the elements of the federal offense, then the state offense would qualify as an aggravated felony. If it does not meet the elements of a federal offense, then regardless of the state conviction, it would not qualify as an aggravated felony. If there is not a federal law on the issue, then Congress should develop a uniform set of laws which would apply to all immigrants.[195] It has been argued that courts should not evaluate all of these issues under statutory interpretation but, rather, under an analysis of constitutional construction in order to establish a uniform rule.[196] However, as much as courts may try to establish uniformity in immigration, it is difficult when state laws are not uniform. Therefore, it should be Congress who helps to ease the duty of the courts in the task of creating a unified system. A unified immigration system would not only make it easier on the courts, but it would make it easier on attorneys to render advice to their clients and would put all the states on equal footing. This is what the Constitution demands and anything less than uniformity seems unconstitutional.

VI. Conclusion

The Supreme Court has yet to explicitly determine that all aspects of immigration must be completely unified.[197] Furthermore, this decision,

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195. *See* Iris Bennett, Note, *The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions*, 74 N.Y.U. L. Rev. 1696, 1730 (1999) ("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 . . . . Such doctrinal development would, however, help prevent nonuniform immigration consequences for state law criminal convictions, promote fairness, and ensure that immigration law is consonant.").

196. *Id.* at 1713. "[T]he larger problem of nonuniformity remains unaddressed because the drug trafficking caselaw, like the adultery cases, is premised on statutory construction rather than constitutional analysis." *Id.* "As a result of the courts' reluctance to construct a doctrine of uniformity, litigants face uncertainty and ambiguity. This lack of predictability is particularly problematic with respect to the aggravated felony provisions." *Id.* at 1715.

197. *See id.* at 1698 ("[T]he Supreme Court has never directly construed the meaning of the 'uniform rule' requirement, although it has examined uniformity requirements in the

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although it results in a more unified system, does not state that immigration laws must be consistent with national uniformity. The Court seems reluctant to step in and make a drastic statement about the direction of immigration regulation. The last time the Court made reference to the boundaries of power in immigration was in *Graham v. Richardson*.[198] In that case, the Court stated that Congress may not authorize states to unconstitutionally deny equal protection rights by allowing states to adopt differing welfare qualification rules for aliens.[199] With the power in Congress's hands to establish a unified system, it seems unlikely that a change will come about anytime soon. Congress's focus seems to be on deporting more aliens. Such as in the case of simple possession, states tend to classify these offenses in a stricter way than the federal government. Therefore, the result is the deportation of more immigrants. However, even if Congress wanted to continue with their goal of increased deportation, it could still be done under a unified system. The problem occurs when the INA relies on states to give meaning to terms which are vaguely mentioned. Instead, Congress should incorporate its own set of definitions into the INA which could describe the exact elements of the offense. Then, using the hypothetical federal felony model, if the state offense met those elements, it would qualify as an aggravated felony.

For now, it is hard to determine whether there will ever be a completely unified set of immigration laws. It seems for the time being, the focus is on safeguarding the "homeland" from any future terrorist attacks. This has the unfortunate consequence of shifting the focus to those individuals who did not have the good fortune of being born in this country.

Taxation and Bankruptcy Clauses and set some limits on nonuniformity resulting from the operation of state law in those areas.").

198. *See* Graham v. Richardson, 403 U.S. 365 (1971) (holding that provisions of state welfare laws conditioning benefits on citizenship and imposing durational residency requirements violated equal protection rights).

199. *See id.* at 382 ("Although the Federal Government admittedly has broad constitutional power to determine what aliens shall be admitted to the United States, the period they may remain, and the terms and conditions of their naturalization, Congress does not have the power to authorize the individual States to violate the Equal Protection Clause.").

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Appendix A

An aggravated felony is an "illicit trafficking in a controlled substance . . . including drug trafficking crimes as defined by § 924(c)(2)."[200]

The "term applies to an offense described in this paragraph whether in violation of Federal or state law. . . ."[201]

"Drug trafficking" is defined as "any felony punishable under the Controlled Substances Act. . . ."[202]

"Felony" is defined by the Controlled Substances Act as any Federal or State offense classified by applicable Federal or State law as a felony.[203]

Under the same title which defines "drug trafficking," defines felony to mean an offense which is punishable by more than one year in prison.[204]

200. 8 U.S.C.A. § 1101(a)(43)(B) (West 2008).
201. 8 U.S.C.A. § 1101(a)(43) (West 2008).
202. 18 U.S.C.A. § 924(c)(2) (West 2008).
203. 21 U.S.C.A. § 802 (13) (West 2008).
204. 18 U.S.C.A. § 3559(a) (West 2008).