NAVIGATING GROUND ZERO: IMMIGRATION IN THE FALLOUT OF *MELLOULI* AND *JOHNSON*

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INTRODUCTION

Kate Steinle, a newcomer to San Francisco, California, was shot and killed at the renowned Pier 14 on July 1, 2015.[1] Her shooter, Francisco Sanchez, 45, had been ordered removed from the United States on five prior occasions, and was present in the United States illegally.[2] Just a few months before the shooting, Sanchez was detained by local law enforcement.[3] Pursuant to local policy, Sanchez was released despite a request from the U.S. Immigration and Customs Enforcement Office (ICE) to hold Sanchez.[4] San Francisco County policy only permitted local officials to comply with the ICE detainer if the subject had a "violent felony conviction within the last seven years, or a probable cause for holding issued by a magistrate or judge on a current violent felony."[5] According to law enforcement officials, Sanchez had no such violent felony conviction and was released because ICE did not seek approval from a magistrate or judge.[6]

The horrific murder described above and other crimes of violence perpetrated by aliens who are in the United States conditionally or illegally have reignited a heated political debate over where immigration authority should be couched.[7] Further, a light is shone on the very real probability that federal deference to state cries for more stringent and efficient policies will be necessary to effectively combat the nation's immigration woes.[8]

Immigration law is routinely in a state of flux. A battle began long ago between states and the federal government over which is best positioned to develop and enforce immigration law.[9] The U.S. Supreme Court first

1. Lauren Raab, *Suspect Describes How Fatal San Francisco Shooting Unfolded*, L.A. TIMES (July 5, 2015, 8:10 PM), http://www.latimes.com/local/lanow/la-me-ln-san-francisco-pier-14-shooting-20150705-story.html.

2. *Id.*

3. *Id.*

4. Louis Sahagun & Emily Alpert Reyes, *Fatal Shooting in San Francisco Ignites Immigration Policy Debate*, L.A. TIMES (July 4, 2015, 10:03 PM), http://www.latimes.com/local/california/la-me-0705-sf-shooting-20150705-story.html.

5. *Id.*

6. *Id.*

7. Raab, *supra* note 1.

8. *See* Cindy Carcamo, *More Jails Refuse to Hold Inmates for Federal Immigration Authorities*, L.A. TIMES (Oct. 4, 2014, 7:54 PM), http://www.latimes.com/nation/immigration/la-na-ff-immigration-holds-20141005-story.html.

9. As early as 1875, States contested a federal monopoly on immigration policy development and enforcement. *See* Chy Lung v. Freeman, 92 U.S. 275 (1875). More recent cases

established the federal government's exclusive control over immigration law in *Chy Lung v. Freeman*.[10] For the 125 years following *Chy Lung*, the federal government remained the "dominant, if not exclusive, locus of immigration power."[11]

In more recent times, the notion that the federal government is unable or unwilling to adequately address the immigration issues facing the United States has gained traction.[12] Certain states have made claims that federal inaction weighs heavily on state resources and communities.[13] In an effort to supplement federal enforcement efforts, many states and localities enact subfederal legislation that appears to be aimed at discouraging the presence of unlawful residents[14] within their borders.[15]

In 2012, the Supreme Court reaffirmed the federal government's position as the exclusive immigration authority in the United States.[16] Soon after, President Barack Obama announced the implementation of Deferred Action for Childhood Arrivals (DACA).[17] In 2014, the Obama administration took executive action, revising the federal government's immigration enforcement priorities and allowing the exercise of prosecutorial discretion in certain cases.[18] President Obama's actions only fueled the debate over whether the federal government is able to

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such as *Arizona v. United States* suggest that States will continue to contest the federal government's position as the sole immigration power. Arizona v. United States, 132 S. Ct. 2492, 2500 (2012).

10. *Chy Lung*, 92 U.S. at 280 ("The passage of law which concern the admission of citizens and subject of foreign nations to our shores belongs to Congress, and not to the States.").

11. Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074, 2076 (2013) [hereinafter Gulasekaram & Ramakrishnan, *Immigration Federalism*].

12. *Id.* at 2077.

13. *Arizona*, 132 S. Ct. at 2500.

14. For the purposes of this Article, the class of persons potentially subject to removal proceedings will be referred to as any of the following terms: alien, lawful permanent resident, unlawful resident, noncitizen, immigrant, or nonimmigrant. This is solely in the interest of maintaining language continuity when discussing enforcement statutes and other enforcement literature.

15. For example, Arizona, Indiana, Utah, South Carolina, and other localities such as Hazleton, Pennsylvania, and Valley Park, Missouri all took similar legislative efforts aimed at solving their perceived immigration problems. Gulasekaram & Ramakrishnan, *Immigration Federalism*, *supra* note 11, at 2079–80.

16. "It is fundamental that foreign countries . . . must be able to confer and communicate on this subject with one national sovereign." *Arizona*, 132 S. Ct. at 2498 (citing Chy Lung v. Freeman, 92 U.S. 275, 279–80 (1875)).

17. U.S. CITIZENSHIP AND IMMIGRATION SERV., CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) (last visited Nov. 1, 2016), http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca.

18. Memorandum from the Sec'y of Homeland Sec., *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion_0.pdf.

address the immigration woes facing the United States.[19] As the body of law that impacts immigration enforcement develops, it seems the states—who have historically been on the losing side of the debate—may have a point.[20]

Amidst the active political and scholarly debate surrounding these issues, the Department of Homeland Security (DHS) and ICE attorneys are still working tirelessly to ensure that the immigration laws of this country are adequately enforced. The Obama Administration's revision of enforcement priorities has placed emphasis on aliens with both state and federal criminal convictions.[21] For various reasons, disparity exists between the language of state criminal statutes and their federal counterparts.[22] Predictably, the disparity in the language of these statutes leads to disparity in the conduct that is criminalized under them,[23] and these disparities have begun to pose an obstacle for ICE attorneys when attempting to remove or deny relief to aliens who would otherwise be removable.[24] Consequently, the federal government's reliance on a residual clause found in the United States Code to qualify certain state convictions as "crimes of violence" in their efforts to remove aliens with criminal convictions grew.[25] Further impeding federal efforts to reach and remove certain classes of aliens—those with criminal convictions—was the decision in *Johnson v. United States* which declared the language found at 18 U.S.C. § 16(b) to be unconstitutionally vague.[26] The loss of

19. *Is Obama's Immigration Executive Order Legal?*, U.S. NEWS (last visited Nov. 1, 2016), http://www.usnews.com/debate-club/is-obamas-immigration-executive-order-legal. The issue of whether the executive is constitutionally empowered to influence immigration law through executive action is beyond the scope of this Article. For more, see Pratheepan Gulasekaram & S. Karthick Ramakrishn, *The President and Immigration Federalism*, 67 FLA. L. REV. (forthcoming Jan. 2016) [hereinafter Gulasekarma & Ramakrishn, *The President*].

20. *See infra* Part III.

21. *See supra* note 18.

22. *See infra* Parts II & III.

23. For this reason, the categorical approach was adopted by the Supreme Court. Taylor v. United States, 495 U.S. 575, 602 (1990). *See also* Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013) (holding that the categorical "least culpable test" is to be used when determining if state convictions "necessarily involve" conduct that is criminalized by federal law).

24. Disparity between federal and state lists of controlled substances required the government to pursue removal of *Mellouli* on a state possession of drug paraphernalia conviction, which is not a federal offense. The Supreme Court iterated "[t]he state conviction triggers removal only if, by definition, the underlying crime falls within a category of removable offenses defined by federal law." Mellouli v. Lynch, 135 S. Ct. 1980, 1986 (2015).

25. A crime of violence is defined by 18 U.S.C. § 16(b) as an "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(b) (2012).

26. Johnson v. United States, 135 S. Ct. 2551, 2557 (2012). *See also* Dimaya v. Lynch, No. 11–71307, 2015 WL 6123546, at *1 (9th Cir. Oct. 19th 2015) (applying the ruling in *Johnson v. United States*, 135 S. Ct. 2551 (2015), to the statutory language found in section 101(a)(43)(F) of the INA and likewise finding it unconstitutionally vague).

this important tool has come as a striking blow to the efforts of ICE attorneys who rely on it to bridge the gap created by the categorical approach's consideration of the disparity between state and federal criminal statutes.[27]

States aggressively vocalize their belief that the federal government is unable to adequately address the issue of immigrant migration and settlement, but the system *was* working—to a degree.[28] Though some have taken efforts to show that states are less impacted by this inadequacy than they would like you to believe,[29] the decisions discussed below further limit the federal government's ability to remove aliens with state criminal convictions.[30] As a result, states and municipalities which have previously voiced their dissatisfaction with the federal government's progress in this area fear an increase in socioeconomic impact.[31]

This Article will proceed as follows. Part I further explores the debate between state and federal government over who is best positioned to legislate and enforce immigration policies. The fundamentals of this debate and the Court's ruling in *Arizona* illustrate the need for a federally constructed solution; on the other hand, a feasible solution to the problem posed by current law may require a certain degree of compromise.

Part II discusses the categorical approach and the complimentary "ordinary case" analysis espoused by the Supreme Court in *James v. United States*, and provides a more in–depth look at the Court's rulings in *Mellouli v. Lynch* and *Johnson v. United States*. Part II also provides a hypothetical—set to take place during June 2015—illustrating how the federal government's ability to reach aliens with state criminal convictions was impacted in real time as the *Mellouli* and *Johnson*

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27. *See* Matter of Francisco, 26 I. & N. Dec. 594, 598–600 (B.I.A. 2015). In order to avoid complications created by the disparity in state and federal statutes describing risk–based offenses, the Board of Immigration Appeals (BIA) held that immigration judges should consider the "ordinary case" of a conviction rather than apply the categorical approach. *Id.* at 598–600. The loss of this tool is commensurate, however, with the belief many hold that the United States "is, by and large, obsessed with demanding justice for the alien." James O. Browning & Jason P. Kerkmans, *A Border Trial Judge Looks at Immigration: Heeding the Call to do Principled Justice to the Alien Without Getting Bogged Down in Partisan Politics: Why the U.S. Immigration Laws are not Broken (But Could Use Some Repairs)*, 25 U. FLA. J.L. & PUB. POL'Y 223 (2014).

28. *See generally TRAC Immigration*, SYRACUSE U., http://trac.syr.edu/immigration/ (last visited Nov. 1, 2016), for a general overview of the federal government's efforts to enforce immigration laws.

29. *See generally* Gulasekaram & Ramakrishnan, *Immigration Federalism*, *supra* note 11, (arguing that most state and local immigration laws are not the result of an attempt to address unauthorized migration and the federal government's failure to fix a broken system, but rather a product of a politicized process in which demographic concerns are not necessarily considered relevant factors).

30. *See infra* Part II.C.

31. *See* Gulasekaram & Ramakrishan, *Immigration Federalism*, *supra* note 11, at 2076–79, 2102.

decisions were handed down.[32] It is worth mentioning that this Article explores only one area—immigration—impacted by the *Johnson* decision, which Justice Alito, dissenting, likened to "a nuclear explosion."[33]

Part III examines potential reasons for the disparity that warrants the categorical approach, and its implications for immigration law. These reasons include but are not limited to: time and logistical constraints, motivation to address particular substances or crimes, and motivation to enhance and refine existing criminal statutes.[34] Part III considers state pushback in the form of subfederal immigration legislation and limited participation in ICE detainer programs.[35]

Part IV discusses current initiatives being taken by ICE attorneys to increase their odds of success in removal proceedings. Likewise, Part IV presents potential solutions aimed at satisfying both states' needs for effective and efficient federal enforcement as well as the federal government's need to remain the sole source of immigration law in the United States. Part IV also discusses the Constitutional implications of enacting these solutions.

I. IMMIGRATION FEDERALISM

Before the abolishment of slavery, states enacted and enforced immigration laws in the absence of a uniform federal immigration policy.[36] In fact, federal efforts to enact immigration laws were viewed by many as unconstitutional attempts to regulate slave migration.[37] After the abolishment of slavery, the federal government's control over immigration law developed.[38] In the area of immigrant entry and exit, the judiciary acknowledged the need for the federal government to have exclusive regulative power.[39] The *Chy Lung* Court seemed to concede that, at times, state interference might be necessary, and the Court granted the states a right to intervene in the presence of both federal legislative

32. Mellouli v. Lynch, 135 S. Ct. 1980 (2015) (decided June 1, 2015); Johnson v. United States, 135 S. Ct. 2551 (2015) (decided June 26, 2015).

33. *Johnson*, 135 S. Ct. at 2577 (Alito, J., dissenting).

34. *See infra* Part III.A.

35. Carcamo, *supra* note 8.

36. Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1896–97 (1993).

37. Gulasekaram & Ramakrishnan, *Immigration Federalism*, *supra* note 11, at 2084.

38. Chy Lung v. Freeman, 92 U.S. 275, 279–80 (1875) ("The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States.").

39. *Id.*

silence and vital necessity.[40] Moreover, the Supreme Court seems to have carved out an area where state regulation is acceptable regardless of necessity, alienage law.[41]

Alienage laws do not impact immigrant entry and exit, but otherwise impact immigrants.[42] In this realm, states are afforded the ability to enact laws that are discriminatory against non-citizens when regulating their own process of government or acting in their sovereign functions.[43] Still, state alienage laws are subject to preemption by existing or future Congressional action[44] and equal protection standards.[45] As a result, many state laws have been struck down. For example, in *Graham v. Richardson*, an Arizona law limiting access to public welfare assistance on the basis of citizenship was struck down on equal protection grounds.[46] Given this history of federal dominance and the reluctance of the judiciary to uphold state efforts, these new attempts at subfederal immigration lawmaking come as a surprise to some academics.[47]

A. *The Trend Toward Subfederal Immigration*

Despite extensive efforts by the federal government to regulate and enforce immigration laws in the United States, the "problems posed . . . by illegal immigration must not be underestimated."[48] State and local governments routinely enact laws that discourage immigrant migration within their own borders,[49] and reference both federal inaction and necessity as reasons for doing so.[50] Additionally, many states and localities claim a "mirror" defense, arguing that these subfederal

40. *Id.* The *Chy Lung* Court also limited state interference to the scope of the cited necessity. *Id*.

41. Gulasekaram & Ramakrishnan, *Immigration Federalism*, *supra* note 11, at 2086.

42. *Id*.

43. In *Foley v. Connelie*, 435 U.S. 291, 294–300 (1978), the Supreme Court upheld a New York law keeping noncitizens from obtaining positions as state troopers.

44. Many subfederal legislative efforts have been preempted by the extensive federal immigration regulations. *See* Immigration & Nationality Act, 66 Stat. 163, 8 U.S.C. § 1101 (2012); *see also* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub L. No. 104–208, 110 Stat. 3009.

45. Gulasekaram & Ramakrishnan, *Immigration Federalism*, *supra* note 11 at 2088.

46. 403 U.S. 365, 371 (1971).

47. Gulasekaram & Ramakrishnan, *Immigration Federalism*, *supra* note 11 at 2089.

48. Arizona v. United States, 132 S. Ct. 2492, 2500 (2012).

49. "To address pressing issues related to the large number of aliens within its borders who do not have a lawful right to be in this country, the State of Arizona in 2010 enacted a statute called the Support Our Law Enforcement and Safe Neighborhoods Act." Arizona, 132 S. Ct. at 2497.

50. Muzaffar Chishti & Claire Bergeron, *Hazleton Immigration Ordinance that Began with a Bang Goes out with a Whimper*, MIGRATION POLICY INST. (Mar. 28, 2014), http://www.migrationpolicy.org/article/hazleton-immigration-ordinance-began-bang-goes-out-whimper.

enforcement laws do not conflict with federal efforts because they merely bolster inadequate federal enforcement efforts.[51]

In its brief to the U.S. Supreme Court, the State of Arizona listed the burdens it shoulders to include increases in "crime, safety risks, serious property damage, and environmental problems."[52] Arizona attempted to illustrate the need for state empowerment by pointing out the existence of road–signs near Phoenix—approximately 190 miles from the Mexican border—that read "DANGER—PUBLIC WARNING—TRAVEL NOT RECOMMENDED/Active Drug and Human Smuggling Area/Visitors May Encounter Armed Criminals and Smuggling Vehicles Traveling at High Rates of Speed."[53] Though not always as prevalent, similar burdens are being cited by state and local governments throughout the country as justification for the enactment of like statutes.[54]

B. *A Steadfast Response*—Arizona v. United States

In *Arizona*, the Supreme Court made its disagreement with state claims that federal inaction allowed state interference clear.[55] Citing numerous precedential decisions, the Court reiterated that the federal government holds the position as the exclusive immigration power in the United States.[56] Despite accusations of federal inaction, the Supreme Court held a number of laws enacted by Arizona to be preempted.[57] Federal law preempts state law in two instances: when a state law regulates conduct in a field Congress has determined must be "regulated by its exclusive governance,"[58] and when state law conflicts with federal law.[59] Arizona did not fare well in its mirror defense either, even those laws that appeared to mirror federal enactments to be preempted. The Court stated, "[T]he State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine

51. Arizona, 132 S. Ct. at 2502–03; *see also* Gulasekaram & Ramakrishnan, *Immigration Federalism*, *supra* note 11 at 2096–97.

52. Arizona, 132 S. Ct. at 2500.

53. *Id.*; *see also* Jerry Seper & Matthew Cella, *Signs in Arizona Warn of Smuggler Dangers*, WASH. TIMES (Aug. 31, 2010), http://www.washingtontimes.com/news/2010/aug/31/signs-in-arizona-warn-of-smuggler-dangers/?page=all.

54. Arizona, Georgia, Alabama, South Carolina, and Farmer's Branch, Texas, have all had similar laws enjoined by the Supreme Court or federal courts. Gulasekaram & Ramakrishnan, *Immigration Federalism*, *supra* note 11 at 2083.

55. Arizona, 132 S. Ct. at 2510.

56. *Id.*

57. *Id.*

58. *Id.* at 2501.

59. *Id.*

that prosecution would frustrate federal policies."[60] This is simply not true in the immigration context because removal proceedings are exclusively held in federal courtrooms.

C. *After Arizona*

The Court's *Arizona* opinion raises a number of questions, but makes one thing certain: a solution to the problem of inadequate enforcement must be one that is federally supported.[61] Empirical evidence suggests that states do not feel the negative impact resulting from immigrant migration to the extent they claim.[62] Despite this evidence, a number of states and localities continue to enact subfederal legislation post–*Arizona*, routinely finding themselves on the losing end of ensuing litigation.[63] These efforts are often made with reference to federal inaction.[64] Time and time again, state and local governments cite inadequate enforcement as the cause of their myriad economic and social woes.[65]

Indeed, it has been some time since Congress has turned its eye to immigration reform in a meaningful way since passing the IIRIRA in 1996.[66] Given the persistence of subfederal legislatures,[67] perhaps now is the time for the federal government to act. While the battle over *who* is empowered to shape immigration law rages on,[68] the federal government must recognize the new limits placed on its reach by the Supreme Court.[69] These limitations have presented the federal government with the opportunity to quiet state governments by enacting legislation that defers to state criminal convictions and encourages state participation in ICE detainer programs.[70]

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60. *Id*. at 2503.

61. *See Arizona*, 132 S. Ct. 2510 (reaffirming the federal government's position as sole immigration law power).

62. Gulasekaram & Ramakrishnan, *Immigration Federalism*, *supra* note 11, at 2078–80.

63. Pratheepan Gulasekaram, *Immigration Federalism Post–Arizona*, AM. CONST. SOC. BLOG (Aug. 8, 2013), http://www.acslaw.org/acsblog/immigration-federalism-post-arizona [hereinafter *Post–Arizona*].

64. Gulasekaram & Ramakrishnan, *Immigration Federalism*, *supra* note 11, at 2078.

65. *Id.* at 2075–76.

66. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub L. No. 104–208, 1996 U.S.C.C.A.N. (110 Stat. 3009.)

67. Gulasekaram, *supra* note 63.

68. Danielle Renwick & Brianna Lee, *The U.S. Immigration Debate*, COUNCIL ON FOREIGN RELATIONS (Feb. 26, 2015), http://www.cfr.org/immigration/us-immigration-debate/p11149.

69. *See* Mellouli v. Lynch, 135 S. Ct. 1980 (2015); *see also* Johnson v. United States, 135 S. Ct. 2551 (2015); Dimaya v. Lynch, No. 11–71307, 2015 WL 6123546, at *1.

70. Carcamo, *supra* note 8. State participation in the ICE detainer program is of particular interest to all governmental entities—state, local, and federal—as illustrated by its recent rise to the forefront of media discussions. Sahagun & Reyes, *supra* note 4.

II. THE CATEGORICAL APPROACH IS HERE TO STAY . . . FOR NOW

Prior to *Mellouli* and *Johnson*, the Supreme Court adopted the categorical approach as a method of dealing with disparity between state and federal criminal statutes when applying the Armed Career Criminals Act (ACCA).[71] Subsequently, decisions impacting the ACCA definition of violent felony had been determined to likewise impact immigration law.[72] As such, Supreme Court decisions regarding the ACCA have impacted the removability of aliens entered into removal proceedings pursuant to a criminal conviction.[73] Whether an alien's criminal conviction was obtained under a state or federal statute is significant,[74] because disparity that exists between state and federal statutes may lead to a conviction under a state statute for conduct that is not criminalized by its federal counterpart.[75] Resolving and adequately addressing this disparity presented some difficulty for courts,[76] but eventually resulted in the construction of two approaches to be used in determining whether the behavior that led to a state conviction is encompassed by the corresponding federal statutory definition.[77]

A. *The Paths That Led Here*

The Court adopted the categorical approach to the ACCA in *Taylor v. United States*.[78] This approach calls for courts to determine whether the least culpable conduct criminalized by a state criminal statute would likewise garner a conviction under the state statute's federal

71. Taylor v. United States, 495 U.S. 575, 601 (2015); Armed Career Criminals Act, 18 U.S.C. § 924 (2012).

72. Although *Johnson* was decided in the context of the "violent felony" provision of the Armed Career Criminal Act (ACCA), not 18 U.S.C. § 16(b), the Eleventh Circuit has held that a violent felony under the ACCA is also a "crime of violence" under the U.S. Sentencing Guidelines, which employ the same 18 U.S.C. § 16 definition for crime of violence referenced under INA § 101(a)(43)(F). *See* United States v. Coronado–Cura, 713 F.3d 597, 598–600 (11th Cir. 2013).

73. For example, the decision in *James v. United States*, 550 U.S. 192 (2007), regarding the application of the ACCAs residual clause—at issue in *Johnson*—elicited the BIA's decision in *Matter of Francisco*, 26 I&N Dec. 594 (BIA 2015).

74. For instance, implications under federal law of having one or more state convictions that fit into certain federal categories may include sentence enhancements under the ACCA, removability under the INA, or ineligibility for discretionary relief under the INA. Armed Career Criminals Act, 18 U.S.C. § 924(e)(2)(B)(ii) (2012); INA § 237(a)(2)(A)(iii) (codified at 8 U.S.C § 1227(a)(2)(A)(iii) (2012)); INA § 240A(b) (codified at 8 U.S.C. § 1229b (2012)).

75. Taylor v. United States, 495 U.S. 575, 599–600 (1990).

76. Rory Little, *Opinion Analysis: The Court Strikes Down the ACCA's Residual Clause As Vague. But Is the Real Problem the "Categorical" Approach?*, SCOTUSBLOG.COM (June 29, 2015, 10:55 AM), http://www.scotusblog.com/2015/06/opinion-analysis-the-court-strikes-down-the-accas-residual- clause-as-vague-but-is-the-real-problem-the-categorical-approach/.

77. *Id.*

78. 495 U.S. 575.

counterpart.[79] At first glance, this approach seems reasonable—indeed, it has been upheld as such a number of times.[80] At its legal conclusion, however, this approach requires that as state laws evolve to keep pace with the conduct of its criminal inhabitants, so must their federal counterparts, or the state convictions ultimately become useless for federal prosecutors and—more relevant here—ICE attorneys. This is because the categorical approach demands that the Court examine only the statutory language supporting the conviction on the charging documentation, and not the *actual* conduct underlying each conviction.[81]

Congress then expanded the INA's definition of "aggravated felony" to include any conviction satisfying the "crime of violence" definition found in the U.S. Sentencing Guidelines.[82] This language included what has come to be known as a "residual clause," the apparent purpose of which was providing a "catch–all" for state convictions that do not otherwise fall within those enumerated in the statute(s).[83] The residual clause found in the U.S. Sentencing Guidelines crime of violence definition at 18 U.S.C. § 16(b) describes a crime of violence as an "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."[84]

The Court—recognizing the absurd result the categorical approach demanded when applied to a risk–based qualifier such as the residual clause—adopted the "ordinary case" analysis espoused in *James*.[85] This method of analysis truly embraces the legislative intent behind the residual clause[86] by allowing courts to determine whether the conviction involves, in the "ordinary case," a "substantial risk that physical force against the person or property of another may be used."[87] Claiming to cling to the categorical approach's construct of not examining the perpetrator's individual conduct, the "ordinary case" approach called for courts to consider *imaginary* conduct when determining whether a

79. *Id.* at 599–602.

80. Moncrieffe v. Holder, 133 S. Ct. 1678 (2013); Nijhawan v. Holder, 557 U.S. 29 (2009); James v. United States, 550 U.S. 192 (2007).

81. *Moncrieffe*, 133 S. Ct. at 1684.

82. INA § 101(a)(43)(F) classifies a state conviction as an "aggravated felony" if it meets the definition for "crime of violence" found in the U.S. Sentencing Guidelines at 18 U.S.C. § 16 (2012). 8 U.S.C. § 1101(a)(43)(F) (2012).

83. The language at issue in *Johnson* is very much the same. Armed Career Criminals Act, 18 U.S.C. § 924(e)(2)(B)(ii) (2012); *see also* Little, *supra* note 76.

84. 18 U.S.C. § 16(b) (2012).

85. *James*, 550 U.S. at 208.

86. And by virtue of their similarities, the residual clause found at 18 U.S.C. § 16(b), incorporated into the INA by INA § 101(a)(43)(F). *Compare* 18 U.S.C. § 924(e)(2)(B)(ii) (2012), *with* 18 U.S.C. § 16(b) (2012).

87. 18 U.S.C. § 16(b) (2012).

conviction is described by the residual clause.[88]

To be clear, any allegation that either *Mellouli* or *Johnson* were wrongly decided is beyond the scope of this Article.[89] Rather, these decisions highlight the need for Congress to take immediate action and provide federal enforcement officials with the tools necessary to bridge the gaps created by the categorical approach. Additionally, the scope of state convictions rendered unusable by the categorical approach's "blinders" only stands to grow in number as many state penal statutes are litigated—and therefore evolve—at a much higher rate than their federal counterparts.[90] State convictions are important indicators of noncitizen behavior that the federal government must utilize in order to effectively do its job.[91]

B. *The Rifle Shot*—Mellouli v. Lynch

The difference in levels of culpable conduct described in state and federal statutes poses significant problems for the federal government when attempting to use state convictions against aliens in removal proceedings. This became abundantly clear when the case of Moones Mellouli, a lawful permanent resident with a Kansas conviction for possession of paraphernalia, made its way into the public eye during the early 2015 term of the Supreme Court.[92]

1. The Majority

Mellouli was convicted for possession of drug paraphernalia to "store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body."[93] The facts underlying Mellouli's conviction are as follows. During a 2010 arrest for driving under the influence and driving with a suspended license, officers conducted a search of Mellouli at a Kansas detention facility, discovering "four orange tablets hidden in Mellouli's sock."[94] Mellouli later admitted in an affidavit that the tablets were Adderall and that he was carrying them

88. NAT'L IMMIGRATION PROJECT OF THE NAT'L LAWYERS GUILD, *How* Johnson v. United States *May Help Your Crime of Violence Case* (July 6, 2015), http://www.nationalimmigrationproject.org/legalresources/practice_advisories/pa_Johnson_and_COV_07-06-2015.pdf.

89. *See* Mellouli v. Lynch, 135 S. Ct. 1980, 1991 (2015) (Thomas, J., dissenting); *see also* Johnson v. United States, 135 S. Ct. 2551, 2573–74 (2015) (Alito, J., dissenting).

90. *Infra* Part III.

91. *Supra* note 18 (placing priority on the identification and removal of non–citizens with criminal convictions).

92. *Mellouli*, 135 S. Ct. at 1984–85 (majority opinion).

93. *Id.* at 1983; *see also* KAN. STAT. ANN. § 21–5709(b)(2) (2013 Cum. Supp.).

94. *Mellouli*, 135 S. Ct. at 1985.

without a prescription.[95] Mellouli was initially charged with trafficking contraband in jail, but was allowed to plea to a lesser offense: possessing drug paraphernalia.[96] Mellouli plead guilty to the possession of paraphernalia charge and to driving under the influence.[97] Subsequently, he was sentenced to 359 days imprisonment (suspended) and twelve months' probation.[98]

As a result of these convictions, Mellouli was entered into removal proceedings and found removable under a provision of the INA authorizing the removal of an alien "convicted of a violation of . . . any law or regulation of a State . . . relating to a controlled substance (as defined in section 802 of Title 21)."[99]

This case is a perfect illustration of the constraints the categorical approach puts on federal enforcement efforts in light of the following facts. Adderall is both a federally controlled substance and a controlled substance under Kansas law.[100] However, the charging document filed against Mellouli—while correctly identifying the paraphernalia as a sock—failed to identify the substance the sock was employed to conceal.[101] Additionally, the Kansas statute under which Mellouli was convicted does not require that the substance concealed be listed in the federal statute, rather the state may also obtain a conviction for a substance controlled by Kansas' controlled substance list—which, importantly, controls nine substances that are not controlled by federal law.[102] Further, federal law does not criminalize *possession* of paraphernalia, but does criminalize the *sale* or *commerce* in drug paraphernalia.[103]

After explaining the categorical approach's long history in immigration law,[104] the Court looks to how the Board of Immigration Appeals (BIA) has treated state convictions for possession of

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95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 1984; *see also* Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(B)(i) (2012).

100. *See* 21 C.F.R. § 1308.12(d)(1) (2014); *see also* KAN. STAT. ANN. § 65–4107(d)(1) (2013 Cum. Supp.).

101. *Mellouli*, 135 S. Ct. at 1985; *see also infra* Part II.D.

102. *Compare* 21 C.F.R. § 1308.12(d)(1) (2014), *with* KAN. STAT. ANN. § 65–4107(d)(1) (2013 Cum. Supp.). *See also* KAN. STAT. ANN. § 21–5709(b)(2) (2013 Cum. Supp.) (referencing generically "controlled substance" without cabining its meaning to the federal schedule).

103. *See* 21 U.S.C. § 863(a)–(b) (2012); *see also* Mellouli, 135 U.S. at 1985 (2015) (mentioning the federal definition of paraphernalia includes "any equipment, product, or material . . . primarily *intended or designed for use* in connection with various drug related activities.").

104. *In re Paulus*, 11 B.I.A. 274 (1965) (holding that an alien's California conviction for sale of an unspecified narcotic was not a deportable offense because it was possible the substance was not one controlled by federal law).

paraphernalia.[105] In 2009, the BIA held that paraphernalia convictions differ from drug possession and distribution offenses.[106] The BIA reasoned that paraphernalia convictions "relate[] to" the drug trade in general. Therefore a paraphernalia conviction "relates to" any and all controlled substances, whether on the federal schedule, or not.[107]

This same reasoning led the Eighth Circuit to deny Mellouli's petition for review, stating that Mellouli's conviction "relates to a federal controlled substance because it is a crime . . . associated with the drug trade in general."[108] The Eighth Circuit concluded that a state paraphernalia conviction "categorically relates to a federally controlled substance so long as there is nearly a complete overlap between the drugs controlled under state and federal law."[109] Notably, the BIA embraced similar logic in *Martinez Espinoza*.[110]

The Supreme Court disagreed,[111] finding that "[this approach] to state drug convictions . . . finds no home in the text of [8 U.S.C.] § 1227(a)(2)(B)(i)."[112] The Court also found this approach would lead to "consequences Congress could not have intended," citing that at its logical conclusion, this approach would result in paraphernalia convictions being "treated more harshly than drug possession and distribution [convictions]."[113] For instance, in many circumstances an alien would not be removable for possessing a substance controlled only under state law but would be removable for possessing the sock with which he used to conceal it.[114] The Court found this logic made such little sense that the BIA's interpretation in *Matter of Martinez Espinoza* is owed no deference under *Chevron*.[115]

Indeed, this conclusion *does* make little sense. Undoubtedly, there are those who see merit in the BIA's approach.[116] *Mellouli* finely illustrates the categorical approach's failure to give federal effect to the efforts a

105. *Mellouli*, 135 U.S. at 1988.

106. *In re Martinez Espinoza*, 25 B.I.A. 118 (2009).

107. *Id*. (referencing the provision of the INA rendering an alien removable if "convicted of a violation of . . . any law or regulation of a state . . . *relating to a controlled substance*." Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(B)())(i) (2012)) (emphasis added).

108. Mellouli v. Lynch, 719 F.3d 995, 1000 (2013).

109. *Id.*

110. *Martinez Espinoza*, 25 B.I.A. at 121.

111. Mellouli v. Lynch, 135 S. Ct. 1980, 1991 (2015) (reversing Mellouli's order of removal).

112. *Id.* at 1989.

113. *Id.* This result is explained by the fact that, according to *In re Paulus*, 11 I. & N. Dec. 274, 276 (B.I.A. 1965), drug possession and distribution charges only elicit removal if a federally controlled substance is involved. *Id.*

114. *Id.*

115. *Id.*

116. Mellouli v. Lynch, 719 F.3d 995, 1001–02 (2013).

subfederal jurisdiction makes to protect its own citizens.[117] When couched in these terms, perhaps it is easier to understand why there is such widespread acceptance of the notion that the federal government is unable or unwilling to adequately address the nation's immigration woes.[118] Opponents of the Court's reasoning in *Mellouli* find their loudest voice in Justice Thomas' dissent.[119]

2. Justice Thomas Dissents

Justice Thomas, joined by Justice Alito,[120] clearly states his disagreement with the majority.[121] Arguing that the ACCA's residual clause indeed gives federal effect to "law[s] or regulation[s] of a State . . . relating to a controlled substance (as defined in section 802 of title 21)," Justice Thomas criticizes the lack of comity shown to state criminal convictions by the majority.[122] Additionally, Justice Thomas directs attention to the majority's repeated references to the paraphernalia at issue being a sock, suggesting the majority appears—contrary to its claims—to consider the underlying facts of the case.[123]

Justice Thomas believes the expansive nature of the language "relat[es] to" suggests Congress could not have intended a complete overlap between state and federal controlled substance lists.[124] He illustrates this point by comparing Congress' use of the phrase "which is" in a neighboring provision in place of "relating to," suggesting Congress intentionally chose the more expansive terminology of "relating to" when drafting 8 U.S.C. § 1227(a)(2)(B)(i).[125] Thus, a state conviction involving a substance found on state drug schedules, which in large part consist of federally controlled substances, indeed "relat[es] to" those federally controlled substances.[126]

Further, Justice Thomas articulates an important question at the heart of *Mellouli*: does the removal statute in fact reach the state convictions in

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117. *Mellouli*, 135 S. Ct. at 1995 (Thomas, J., dissenting).

118. Gulasekaram & Ramakrishnan, *Immigration Federalism*, *supra* note 11, at 2077.

119. *Mellouli*, 135 S. Ct. at 1991–95 (Thomas, J., dissenting).

120. In hindsight, Justice Alito's joining in Justice Thomas's dissent in *Mellouli* was no surprise as he wrote the dissent in *Johnson v. United States*, 135 S. Ct. 2551, 2573 (2015) (Alito, J., dissenting).

121. *Mellouli*, 135 S. Ct. at 1991 (Thomas, J., dissenting).

122. *Id.*

123. *Id.* Additionally, Justice Thomas points out that the Court is likewise unable to consider the fact that the pills "were, in fact, federally controlled substances, that Mellouli concealed them . . . while being booked into jail . . . [and] that he was being booked . . . for his second . . . [DUI] in less than one year." *Id.* at 1991 n.1.

124. "In ordinary parlance, one thing can 'relate to' another even if it also relates to other things." *Id.* at 1991–92.

125. *Id.* at 1992; *Compare* 8 U.S.C. § 1227(a)(2)(B)(i) (2012), *with* § 1227(a)(2)(C).

126. *Mellouli*, 135 S. Ct. at 1992 (Thomas, J., dissenting).

question?[127] The majority is accused of assuming that answering "yes" to this question would lead to "consequences Congress could not have intended."[128] In Justice Thomas' eyes this is precisely the consequence Congress intended by using such expansive language—empowering state convictions and providing them with adequate effect in federal venues such as removal proceedings.[129] Acknowledging that the consequence of this interpretation may lead to an alien's removal pursuant to a conviction that does not involve a federally controlled substance, Justice Thomas reasons that "[n]othing about that consequence . . . is so outlandish as to call this application into doubt."[130] To Justice Thomas, and presumably many state and local governments, there is "nothing absurd about removing individuals who are unwilling to respect the drug laws of the jurisdiction in which they find themselves."[131]

The outcome of *Mellouli* was a blow to federal enforcement officials who, due to the categorical approach's lack of consideration of the logistical difficulties in assuring that state and federal penal statutes are in sync, relied on the BIA's interpretations in *Matter of Martinez Espinoza* to reach aliens who have state drug convictions.[132]

Still, ICE attorneys had the ability to bridge this gap when it came to those aliens who had more serious state convictions for violent crimes. This ability was provided by Congress's inclusion of 18 U.S.C. § 16(b)'s "crime of violence" provision in the INA's definition of "aggravated felony."[133] The Supreme Court endorsed it,[134] and similarly, it was reaffirmed as a viable tool by the BIA on June 2, 2015, in its *Matter of Francisco-Alonzo* decision.[135] Exactly twenty-five days later however, the Supreme Court would find similar language in the ACCA unconstitutionally vague,[136] calling into question the federal government's ability to reach even those aliens with state convictions who pose the greatest threat to U.S. citizens.[137]

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127. *Id.* at 1993.

128. *Id.* at 1989, 1993, 1995.

129. *Id.* at 1995.

130. *Id.*

131. *Id.*

132. *In re* Martinez Espinoza, 25 I. & N. Dec. 118 (B.I.A. 2009).

133. INA § 101(a)(43)(F) classifies a state conviction as an "aggravated felony" if it meets the definition for "crime of violence" found in the U.S. Sentencing Guidelines at 18 U.S.C. § 16. 8 U.S.C. § 1101(a)(43)(F) (2012).

134. James v. United States, 550 U.S. 192, 206–07 (2007).

135. *In re* Francisco-Alonzo, 26 I. & &N. Dec. 594, 599 (B.I.A. 2015). This opinion was released by the BIA the day after the Supreme Court announced its ruling in *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015).

136. 18 U.S.C. § 924(e)(2)(B)(ii) (2012).

137. Sejal Zota, *How* Johnson v. United *States May Help Your Crime of Violence Case*, NAT'L IMMIGRATION PROJECT OF THE NAT'L LAWYERS GUILD (July 6, 2015), http://www.nationalimmigrationproject.org/legalresources/practice_advisories/pa_Johnson_and

C. The Nuclear Explosion—Johnson v. United States

While the decision in *Mellouli* meant federal enforcement officials would have a more difficult time making their case in immigration court, the most damaging development to federal immigration enforcement efforts came on June 26, 2015, when the Supreme Court handed down its decision in *Johnson*.[138] The Court admittedly struggled with applying the ACCA's residual clause before[139] and Justice Scalia had on at least one occasion pointed out that the clause should be ruled unconstitutional for its vagueness.[140]

The statute at issue in *Johnson* cannot be found in the Immigration and Nationality Act.[141] Moreover, petitioner Samuel Johnson was not in the country illegally, or conditionally, he was a U.S. citizen suspected of planning to commit acts of terrorism.[142] In fact, while under investigation by the Federal Bureau of Investigation (FBI), Johnson disclosed plans to attack the Mexican consulate in Minnesota, "progressive bookstores, and liberals."[143]

A felon, Johnson was charged with illegally possessing several firearms.[144] Seeking a sentencing enhancement under the ACCA, the government asserted Johnson had three prior convictions for "violent felonies"—one of which was his prior conviction for unlawful possession of a short–barreled shotgun—qualifying Johnson for a sentence enhancement under the ACCA.[145] The District Court agreed with the government, sentencing Johnson to a 15–year prison term; a decision affirmed by the Court of Appeals.[146]

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138. Johnson v. United States, 135 S. Ct. 2551, 2563 (2015). The Court previously considered the ACCA's residual clause on several occasions, none of which yielded a finding that the clause was unconstitutional. *See* Sykes v. United States, 564 U.S. 1 (2011); Chambers v. United States, 555 U.S. 122 (2009); Begay v. United States, 553 U.S. 137 (2008); James v. United States, 550 U.S. 192 (2007).

139. *Johnson*, 135 S. Ct. at 2559–60.

140. *James*, 550 U.S. at 230 (Scalia, J., dissenting).

141. *Johnson*, 135 S. Ct. 2551. The residual clause of the ACCA, in defining a violent felony, includes "any crime punishable by imprisonment for a term exceeding one year . . . that . . . is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*." 18 U.S.C. § 924(e)(2)(B) (2012) (emphasis added).

142. *Johnson*, 135 S. Ct. at 2556.

143. *Id.* Given that Johnson's plans were seemingly motivated by his frustrations with foreign citizens residing in the country, it is a noteworthy and ironic twist of fate, perhaps, that Johnson's appeal to the Supreme Court would have such an impact on immigration enforcement.

144. *Id.* Johnson was alleged to have been in possession of an "AK–47 rifle, several semiautomatic firearms, and over 1,000 rounds of ammunition." *Id.*

145. *Id.*

146. *Id.*

1. Scalia Validated

It is no surprise—given the Court's history with the residual clause—that Justice Scalia would provide the Court's majority opinion in *Johnson*.[147] In his usual way, Justice Scalia reminds the Nation not only that he has said this before, but of the importance of due process and the danger of vague criminal laws.[148] It is not long before the "ordinary case" test espoused in *James* comes under fire.[149] The majority acknowledges that their prior method of analysis is flawed;[150] though the Court made efforts to comply with the avoidance doctrine in the past, the uncertainty associated with the "ordinary case" analysis caused myriad difficulties among the circuits.[151]

Justice Scalia points out that applying the "ordinary case" test requires a Judge to speculate whether the defendant's behavior would—"ordinarily"—result in violence.[152] This requires speculation regarding not only the behavior of the defendant that led to the arrest, but also the potential reactions of passersby, victims, and law enforcement—generally how the crime would pan out in an "average" scenario.[153] For example, regarding the crime of attempted burglary, a Judge may determine that the "ordinary case" of attempted burglary may involve a face–to–face confrontation with a homeowner.[154] Conversely, one may speculate that the "ordinary case" of attempted burglary involves the perpetrator's trespass in a yard, a homeowner yelling "Who's there?" and the perpetrator subsequently running away with no confrontation occurring at all.[155] Finally, the majority points out that the "most telling feature" of the circuit disputes is that they do not revolve around which crimes satisfy the residual clause definition but over what the "ordinary case" test really is.[156] "It has been said that the life of the law is experience" and after nine years struggling to apply the residual clause,[157] the Supreme Court declared the clause unconstitutional for vagueness.[158]

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147. *See* James v. United States, 550 U.S. 192, 214 (2007) (Scalia, J., dissenting); Sykes v. United States, 564 U.S. 1, 28 (2011) (Scalia, J., dissenting).

148. *Johnson*, 135 S. Ct. at 2556–57.

149. *Id.* at 2557–58.

150. *Id.* at 2557–60.

151. *Id.* (citing United States v. Mayer, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, C.J., dissenting); United States v. Whitson, 597 F.3d 1218, 1222 (11th Cir. 2010); United States v. Carthorne, 726 F.3d 503, 514 (4th Cir. 2013)).).

152. *Id.* at 2557.

153. *Id.* at 2257–58.

154. James v. United States, 550 U.S. 192, 203 (2007) (considering an attempted burglary charge under Florida law).

155. *Id.* at 226 (Scalia, J., dissenting).

156. *Johnson*, 135 S. Ct. at 2560.

157. *Id.*

158. *Id.* at 2563.

As a result, the Court expressly overruled its "contrary holdings in *James* and *Sykes*," reversing Johnson's sentence enhancement and remanding the case for further proceedings.[159]

The Court's logic in *Johnson* is not contested.[160] Indeed, the residual clause posed numerous, well–documented issues for even the greatest legal minds of the 21st century.[161] However, the ACCA was not the only statute relying on this residual clause language—or similar language—to bring within its purview the crimes of those who risk perpetrating violence against others.[162] Similarly then, the Court's decision now poses a serious issue for some of the greatest legal minds of the 21st century as Congress must repair the damage done to statutes using like language.[163] For this reason, among others, Justice Alito strongly dissented from the majority's opinion in *Johnson*.[164] In Justice Alito's mind, the impact of the Court's decision on other statutes and areas of the law that relied on the inclusive language found in the ACCA's residual clause is not akin to the "blast from a sawed–off shotgun; it is a nuclear explosion."[165]

2. Justice Alito Dissents

In his dissent, Justice Alito cites numerous points of contention with the majority decision in *Johnson*.[166] Citing *stare decisis* and relying on both *James* and *Sykes*, Justice Alito notes that Justice Scalia was the "*only* Member of the *Sykes* Court" who believed "the residual clause could not be intelligibly applied."[167] In *James*, the Court held the residual clause to be "not so indefinite as to prevent an ordinary person from understanding its scope."[168]

Stare decisis aside, Justice Alito goes on to say he does not find the residual clause vague, stating the "ordinary case" test sets out an "ascertainable standard," thereby satisfying any vagueness concerns.[169] Perhaps Justice Alito has a point; though great disputes occurred over how to determine what constitutes the "ordinary case" of an offense, the majority points out that little dispute arose over *which* offenses satisfied the residual clause language.[170]

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159. *Id.*
160. *See supra* Part II.A.
161. *Johnson*, 135 S. Ct. at 2559–60.
162. *Id.* at 2577 (Alito, J., dissenting).
163. *See id*.
164. *Id.* at 2573–74.
165. *Id*. at 2577.
166. *Id.* at 2573–84.
167. *Id.* at 2575.
168. *Id.* (citing James v. United States, 550 U.S. 192, 210 n.6 (2007)).
169. *Id.* at 2576 (citing United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 (1921)).
170. *Id.* at 2577.

Continuing to outline what he perceives as the real issue at hand, Justice Alito points out that the residual clause is susceptible to another interpretation that is workable.[171] Citing Justice Scalia, he is careful to mention that "[a]s one treatise puts it, [a] statute should be interpreted in a way that avoids placing its constitutionality in doubt."[172] Justice Alito believes interpretation of risk–based offenses calls for a different standard than that set by the categorical approach because of their focus on "conduct" rather than "elements."[173] Therefore, the trier of fact should be able to ascertain, considering the actual conduct of the defendant, whether the residual clause has been satisfied.[174]

Confident that this "real–world conduct" interpretation fits the mold, Justice Alito goes on to state that the concerns which brought the categorical approach into existence in *Taylor* do not apply to the residual clause.[175] Justice Alito advocates for the consideration of a defendant's "real-world conduct" in determining if convictions are encompassed by residual clauses such as the one found in the ACCA,[176] combating the majority's contention that "the [g]overnment has not asked us to abandon the categorical approach in residual-clause cases" with the Court's recognition that it is "[their] plain duty to adopt [a] construction which will save [a] statute from constitutional infirmity."[177]

With an unembellished likeness to Justice Thomas's dissent in *Mellouli*, Justice Alito calls for the abandonment of the categorical approach.[178] If the purpose behind the use of prior convictions for sentence enhancement, or the denial of relief, is to punish the defendant for his undesirable conduct, why would their application be limited to exclude any indication of the conduct engaged in by the defendant? As stated previously, state convictions are invaluable indicators of a defendant's future conduct,[179] and real-world conduct deemed punishable by states should factor into a determination of an alien's removability or eligibility for discretionary relief.[180]

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171. *Id.* at 2578–79.

172. *Id.* at 2578 (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 38, at 247 (2012)).

173. *Id.* at 2578–79.

174. *Id.* at 2578.

175. *Id.* at 2578–79.

176. *Id.* at 2579–81.

177. *Id.* at 2580 (quoting United States *ex rel.* Att'y Gen. v. Del. & Hudson Co., 213 U.S. 366, 407 (1909)).

178. *Id.* at 2580. *See also supra* Part II.B.2.

179. *See supra* Part II.

180. For instance, implications under federal law of having one or more state convictions that fall under federal definitions may include sentence enhancements under the ACCA, removability under the INA, or ineligibility for discretionary relief under the INA. Armed Career Criminals Act, 18 U.S.C. § 924(e)(2)(B)(ii) (2012); 8 U.S.C. § 1227(a)(2)(A)(iii) (2012).

D. *Navigating Ground Zero: A Hypothetical*

To better understand the impact the Court's decisions in *Mellouli* and *Johnson* will have on the removability of aliens with criminal histories, consider the following example:

It is May 21, 2015, and a young attorney began her first day as Assistant Chief Counsel (ACC) at the U.S. Immigration and Customs Enforcement Office in Orlando, Florida. She has been assigned her first case involving José Luis Garcia,[181] a Mexican citizen who was admitted to the United States on January 1, 2013. Garcia was admitted to the country for six months on a B–2 visa—perhaps to visit family or the renowned Pier 14 in San Francisco.[182]

In addition to overstaying his visa,[183] Garcia was arrested nine months into his "temporary stay" in Seminole County, Florida, for possession of drug paraphernalia[184] and burglary.[185] He was subsequently convicted of both crimes and sentenced to twenty months' imprisonment in a Florida penitentiary. Garcia recently completed his sentence[186] and after being held on an ICE detainer[187] was transferred into federal custody and has now entered removal proceedings. Familiarizing herself with the casefile, the ACC reads the police report written on the night of Garcia's arrest,

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181. The name "José Luis Garcia" was chosen based on a review of some of the most common names for Mexican or Hispanic males during the early 21st century and is not intended to represent any real person living or dead. *See Most Common Baby Names in Mexico*, BABYCENTER, http://www.babycenter.com/0_most-common-baby-names-in-mexico_10341179.bc (last updated June 2015); *see also Most Common Last Names for Latinos in the U.S.*, MONGABAY, http://names.mongabay.com/data/hispanic.html (last visited Nov. 1, 2016). Likewise, the hypothetical presented in this Subsection was created for the purposes of illustrating an important legal issue, and any similarities between this hypothetical and any closed, pending, or future removal proceedings is purely coincidental.

182. *See* 8 C.F.R. § 214.1(a)(2) (2012). The INA allows the U.S. Citizenship and Immigration Services to admit nonimmigrants to the United States for business or pleasure. *See* 8 U.S.C. § 1101(a)(15)(B) (2012); *see also* Raab, *supra* note 1.

183. A nonimmigrant visa is void at the conclusion of the nonimmigrant's authorized period of stay in the United States. 8 U.S.C. § 1202(g) (2012). Although actionable, Garcia's overstay alone would not be enough to make him an enforcement priority under current federal policies. *See* Memorandum from the Sec'y of Homeland Sec., *supra* note 18.

184. FLA. STAT. § 893.147(1)(b) (2015).

185. FLA. STAT. § 810.02(3) (2015).

186. Notably, Garcia—who was initially admitted to the country for a temporary visit—has now resided in the U.S. for over two years, twenty months' of which were while incarcerated at considerable expense to taxpayers.

187. "An ICE detainer—or 'immigration hold'—is . . . a written request that a local jail or other law enforcement agency detain an individual for an additional 48 hours . . . after his . . . release date in order to provide ICE agents extra time to decide whether to take the individual into federal custody for removal purposes." *Immigration Detainers*, ACLU, https://www.aclu.org/issues/immigrants-rights/ice-and-border-patrol-abuses/immigration-detainers (last visited Nov. 1, 2016).

which provides the following facts:

> On 09/20/2014, Seminole County Sheriff's Deputy Johnson responded to a report of suspicious activity at a home in Oviedo, Florida. Deputy Johnson made contact with a neighbor, who identified herself as the reporter, and stated that she witnessed a Hispanic male enter the home. The neighbor also informed Deputy Johnson that the homeowners left their home in a hurry earlier that evening.
>
> Deputy Johnson approached the home, knocked on the open front door, identified himself as a police officer, and entered the dwelling. Deputy Johnson heard a noise coming from the master bedroom and entered the room, where he encountered a Hispanic male—later identified as José Garcia—who was rummaging through a dresser and placing items into his pockets. Deputy Johnson noted that Garcia was mumbling to himself, and was "twitchy" in his movements.
>
> Deputy Johnson asked Garcia if this was his home—or if he had permission to be in the home. Garcia responded by looking up, staring blankly, and stammering through the word "No." Deputy Johnson apprehended Garcia, placed him in handcuffs, and notified him of his rights. A quick pat–down led to the discovery of a straight glass pipe—which later tested positive for crack–cocaine—and a long Phillips–head screwdriver.
>
> As Deputy Johnson left the master bedroom with Garcia in handcuffs, a nervous voice shouted, "Who's there?!" from a rear hallway. Deputy Johnson identified himself again and instructed the source of the voice to walk out of the hallway slowly with their hands up. To both Deputy Johnson and José Garcia's surprise, the teenage daughter of the homeowners, Deborah Coates, exited the back hallway, shaking, with her hands raised above her head. After Deputy Johnson explained the situation, Deborah informed him that her parents had left their home hurriedly after being notified of a death in the family, and took her infant brother, Derek, with them. When Garcia entered the home, fifteen year–old Deborah was home alone.

Despite being new to the field of immigration, the ACC knows the detailed report provided by Deputy Johnson will not be considered by the Immigration Judge (IJ) when reviewing Garcia's conviction history.[188] She examines the charging documents filed by the State in Garcia's

188. *See supra* note 81 and accompanying text. *See* Moncrieffe v. Holder, 133 U.S. 1678, 1680-81, 1687 (2013).

criminal proceedings, and notes that Garcia was charged with violating Florida criminal statutes sections 839.147(1)(b)[189] and 810.02(3).[190]

Taking a closer look at the INA, the ACC realizes that both of Garcia's convictions may constitute removable offenses. First, "[a]ny alien who [is] convicted of an aggravated felony. . . [at any time after admission is deportable]."[191] Under the INA, the definition of "aggravated felony" includes "a theft . . . or burglary offense for which the term of imprisonment [is] at least one year."[192]

Likewise, any alien who has been convicted of a violation of "any law relating to a controlled substance" is removable, so long as that conviction is not for "a single offense involving possession for one's own use of 30 grams or less of marijuana."[193] With two theories on which to pursue Garcia's removal in mind, the young ACC seeks the advice of her superiors, who review the charging documents and highlight a troubling obstacle.

It is common practice among state prosecutors to charge defendants with more "general" statutory language. For example, despite Deputy Johnson's detailed report indicating that Garcia burglarized an occupied dwelling, the charging document does not include the "occupied dwelling" language.[194] State prosecutors likely employ this practice because charging under general language incentivizes the acceptance of plea deals.[195] Additionally, this practice may allow state prosecutors to obtain more convictions by proving less elements in court.[196]

Because the categorical approach requires ICE officials to show that Garcia's conduct would have yielded a conviction under federal law, the practice of only including general statutory language on charging documents poses a significant obstacle to federal immigration

189. FLA. STAT. § 839.147(1)(b) (2015) ("It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia . . . [t]o inject, ingest, inhale, or otherwise introduce into the body a *controlled substance*.") (emphasis added).

190. FLA. STAT. § 810.02(3) (2015). Notably, Section 810.02(3) of the Florida Statutes, which describes felony burglary, is further divided into subsections (a)–(f), which describe *where* the burglary may have taken place (for example, a dwelling or structure). *Id.*

191. INA § 237(a)(2)(A)(iii) (codified at 8 U.S.C. § 1227(a)(2)(A)(iii) (2012)).Immigration and Nationality Act, ch. 4, sec. 237 § 237(a)(2)(A)(iii) (codified at 8 U.S.C. § 1227(a)(2)(A)(iii) (2012)).

192. 8 U.S.C. § 1101(a)(43)(G) (2012).101

193. Immigration and Nationality Act, ch. 2378 U.S.C. § 1227(a)(2)(B)(i) (2012).

194. FLA. STAT. § 810.02(3)(a).

195. This incentivizes the acceptance of plea deals because oftentimes a criminal defendant will plea to a less culpable conduct under the more general statutory language.

196. For example, in this case charging Garcia with violating Section 810.02(3) of the Florida Statutes generally rather than the more specific Section 810.02(3)(a) of the Florida Statutes likely proved more effective for state prosecutors because they were not required to prove that the building was a dwelling, and that there was "another person in the dwelling at the time the offender enter[ed]." *See* FLA. STAT. § 810.02(3).

enforcement efforts.[197] Florida's burglary statute has been interpreted to govern conduct that is not considered criminal under federal law. Therefore, the charging report provides insufficient information to be useful to ICE.[198] In other words, although Garcia's conduct *was* criminal in the federal context, the charging document does not indicate that is the case. Instead, the general language on the charging documents leaves open the possibility that the conviction could have been for conduct *only* criminalized by the Florida burglary statute.[199] For this reason, the young ACC abandons the pursuit of removal on Garcia's burglary conviction and focuses instead on the conviction for possession of paraphernalia.

Despite the fact that the charging document for Garcia's paraphernalia charge does not indicate Garcia possessed a pipe used to ingest crack–cocaine, the ACC believes the charge sufficiently "relates to" a controlled substance as defined by 21 U.S.C. § 802. After discussing the merits of her argument with her superiors, she writes and files a brief with the Court asserting Garcia is removable under the INA for a conviction that relates to a controlled substance and waits to appear before an IJ on June 13, 2015.

Monday, June 1, 2015, the ACC enters the office and begins sifting through news articles. Turning her attention to the Supreme Court opinions read that day, she quickly realizes the argument against Garcia has been invalidated by the Court's decision in *Mellouli v. Lynch*,[200] and heads back to the drawing board.

Revisiting the INA's definition of "aggravated felony," the ACC discovers an interesting clause: INA § 101(a)(43)(F) makes "a crime of violence [as defined in 18 U.S.C. § 16] for which the term of imprisonment [is] at least one year" an aggravated felony.[201] 18 U.S.C. § 16 defines "crime of violence" as "any . . . offense that is a felony and . . . involves a substantial risk that . . . force against the person or property of another may be used . . ."[202] The ACC believes Garcia's conviction for burglary may fit into this category.

To vet her theory, she delves into related case law and happens upon *James v. United States*, in which the Supreme Court used the "ordinary case" analysis to hold that a conviction for Florida *attempted* burglary

197. Taylor v. United States, 495 U.S. 575, 599–600 (1990); *see also supra* note 75 and accompanying text.

198. For example, Section 810.011(1) of the Florida Statutes defines "structure" as "a building of any kind . . . which has a roof over it, together with the curtilage thereof." FLA. STAT. § 810.011(1) (2015). This is not the case in the federal context. *See* 18 U.S.C. § 103 (2012).

199. This issue may also be illustrated with a Florida conviction for theft. The Florida theft statute criminalizes a temporary taking where the federal theft statute does not. *Compare* FLA. STAT. § 812.014 (2015), *with* 31 U.S.C. §§ 641–70 (2012).

200. Mellouli v. Lynch, 135 S. Ct. 1980, 1985 (2015); *see also supra* Part II.B.

201. 8 U.S.C. § 1101(a)(43)(F) (2012).

202. 18 U.S.C. § 16(b) (2012).

satisfied the same 18 U.S.C. § 16(b) language found in the Armed Career Criminals Act.[203] Convinced her theory is correct, the ACC writes and files a brief, citing *James* and arguing that Florida burglary *must* satisfy the INA's definition for "aggravated felony."

When the ACC appears for Garcia's hearing on June 13, 2015, the IJ admits he has had little time to review the government's most recently submitted brief. The IJ quickly reviews the points of the brief and informs Garcia that the ACC may have a point.[204] The IJ states he would like to review the matter further and schedules a hearing for June 29, 2015. The young ACC is sure her argument is strong and, for the time being, rests confidently.

Friday, June 26, 2015, the ACC again finds herself sifting through the Supreme Court decisions being handed down on that day. Reviewing the Court's decision in *Johnson v. United States*, the ACC realizes any further efforts to remove Garcia based on his criminal convictions will be fruitless.[205] In a final effort, she prepares an argument to remove Garcia because he overstayed his B–2 visa[206] in his now two–and–a–half year stay in the United States.

Prior to the hearing on June 29, 2015, the ACC meets with Garcia's attorney. Garcia's attorney informs the ACC that while in proceedings, Garcia and a young woman—who is an American citizen—have been sending letters to each other, fallen in love, and were married earlier this month. At the time of their marriage, Mrs. Garcia filed a form I–130,[207] and because USCIS found no concrete indicators of fraud,[208] Mr. Garcia was readmitted to the United States, and is no longer in violation of the INA for overstaying his visa. At this time, the young ACC is left with few options; she abandons her efforts to remove Mr. Garcia, and releases him from federal custody.

Further, approval of the I–130 establishes that the Garcia's marriage

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203. James v. United States, 550 U.S. 192, 195 (2007); *see also supra* note 72 and accompanying text. Similarly, the ACC would have found that the Board of Immigration Appeal also affirmed this logic on June 2, 2015 in *In re Francisco-Alonzo*, 26 I. & &N. Dec. 594, 599 (B.I.A. 2015). *See supra* note 135 and accompanying text.

204. Typically, a respondent in Garcia's position appears for proceedings from the state holding facility via video conference.

205. Johnson v. United States, 135 S. Ct. 2551, 2559–60 (2015); *see also supra* note 72 and accompanying text; *supra* Part II.C.

206. A nonimmigrant visa is void at the conclusion of the nonimmigrant's authorized period of stay in the United States. 8 U.S.C. § 1202(g) (2012).

207. Form I–130 is a petition that can be filed by any lawful permanent resident on behalf of an alien relative who wishes to be admitted to the United States. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., *I–130, Petition for Alien Relative*, https://www.uscis.gov/i-130 (last visited Nov. 1, 2016).

208. Any indication that USCIS screening methods are insufficient is beyond the scope of this Article, and the inclusion of this determination is intended merely for illustrative purposes.

is "bonified" for the purposes of readjustment of status, and Mr. Garcia has submitted a form I–485,[209] which is currently pending before USCIS, and if approved will have the effect of adjusting Mr. Garcia's immigration status to "lawful permanent resident."[210]

The purpose of this hypothetical is not to demean the efforts of our federal government, rather, to highlight the extensive efforts taken by the federal government that—though forged with confidence—ends in futility. State cries of federal inadequacy and attempts at subfederal legislation[211] do little to truly call attention to the fact that the federal toolbox is empty. Worse still, continued state action may carve lines of division within the federal legislature, making a prompt or effective solution less likely.

Below, this Article considers progressive solutions to the barrier presented by the categorical approach and the Supreme Court's ruling in *Johnson*.[212] First however, we examine potential reasons for the disparity that makes the categorical approach such a pervasive problem with regards to federal immigration enforcement and why it matters.

III. DEALING WITH THE FALLOUT

To circumvent the obstacle posed by the categorical approach and adequately arm ICE attorneys, federal and state legislatures must work together to better understand why such disparity exists between federal and state criminal statutes. Further, federal and state legislatures must develop an ICE detainer program that incentivizes state buy–in and limits the states' exposure to liability.

A. *Why the Disparity? State vs. Federal Law Making*

When first confronted with the devastating effects the categorical approach has on the federal effect of state criminal convictions, one might naturally ask, "Why the disparity?" There is no simple answer. Some assert that state legislators are simply more productive than the federal legislature.[213] It also may be the case that state legislatures are simply more motivated to address certain issues on a regular basis, or broaden

209. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., *I–485, Application to Register Permanent Residence or Adjust Status*, https://www.uscis.gov/i-485 (last visited Nov. 1, 2016).

210. Presumably, in this scenario USCIS would wait to conduct an interview with the Garcias prior to the hearing.

211. *See supra* Part I.

212. *See infra* Part IV.

213. Glen Justice, *States Six times More Productive Than Congress*, CQ ROLL CALL (Jan. 27, 2015), http://www.cqrollcall.com/statetrackers/states-six-times-more-productive-than-congress/.

statutory language. In that same vein, it is reasonable to conclude that state criminal statutes are considered—and interpreted—by courts more frequently.

The idea that state legislatures have become more innovative and adept at enacting legislation than Congress is nothing new.[214] New York Senator Jim Lack recognized that state legislatures became more "more professional and developed more capacity" in the 25 years preceding the turn of the millennium.[215] In 2013 and 2014, "all 50 states and Washington D.C. passed a whopping 45,564 bills and resolutions," while the 113th Congress passed a meager 352 bills.[216] Max Behlke, manager of state and federal relations at the National Conference of State Legislatures (NCSL), suggests one reason for this rise in efficiency is that "[s]tates don't have the flexibility to kick the can down the road. They have balanced budget amendments and things they actually have to address."[217]

Aside from budget amendments, state legislatures must also address the general safety of their constituents from year–to–year. Between October 1, 2011 and September 30, 2012, the federal government had only 54 case filings under federal burglary statutes.[218] In stark contrast, during 2012, the State of Florida reported 26,451 burglary arrests.[219] Considering this, state courts and legislatures are simply more motivated to adjust the scope of these and other like-statutes in order to keep their constituents safe.

The same can be said to explain the disparity between state and federal drug schedules.[220] The struggle to regulate synthetic designer drugs provides a perfect example.[221] The synthetic drug trade poses a particularly unique problem to legislators because drug manufacturers are able to slightly modify the chemical makeup of their drugs once each

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214. Carl Tubbesing, *The State–Federal Tug of War*, NAT'L CONF. OF ST. LEGIS. (July/Aug. 1999), http://www.ncsl.org/bookstore/state-legislatures-magazine/sl-mag-the-state-federal-tug-of-war.aspx.

215. *Id.*

216. Justice, *supra* note 213.

217. *Id.*

218. MARK MOTIVANS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2012–STATISTICAL TABLES 17 (2015), http://www.bjs.gov/content/pub/pdf/fjs12st.pdf.

219. FLA. DEP'T OF LAW ENF'T, PART I AND II ARRESTS FOR FLORIDA BY AGE, SEX AND RACE 1998-2015, https://www.fdle.state.fl.us/cms/FSAC/Documents/PDF/arr_age_race.aspx (last visited Nov. 1, 2016).

220. In 2012, the Florida Department of Law Enforcement reported making 127,919 "Drugs/Narcotics" arrests. *Id.* In contrast, the U.S. Department of Justice reported filing on only 28,693 drug offenses. MOTIVANS, *supra* note 218, at 16.

221. Noreen Moustafa, *The Latest Target in the War on Drugs is Often Completely Legal*, AL JAZEERA AM. (Mar. 14, 2013, 5:00 PM), http://america.aljazeera.com/watch/shows/techknow/blog/2014/3/14/producer-s-blog-designerdrugs.html.

compound is outlawed.[222] This problem is not unique to the federal government *or* the states. In July 2012, President Barack Obama enacted a federal ban on synthetic drugs which was "outmoded before [his] signature dried."[223] In Texas, the state legislature still struggles with the regulation of "spice," a synthetic cannabinoid manufactured to mimic the effects of marijuana.[224] Considering these struggles, it is not hard to see why disparity exists between state and federal drug statutes. What is hard to see, perhaps, is why the categorical approach assumes no disparity *would* exist.[225]

As state legislators refine their lobbying skills and learn to work more efficiently, their ability to influence federal issues grows.[226] The federal government has proven unable to keep up with some legislation regulation that regulates synthetic drugs.[227] Moreover, states are arguably better equipped to legislate certain types of conduct because, for the most part, they are the ones enforcing many of these laws.[228] Now, post-millennium legislative efforts by states continue to influence, if not through the law, at least the conversation surrounding immigration.[229]

B. *A Look at the States: State Participation in ICE Detainer Programs*

In some areas, post-millennium legislative efforts by states and municipalities are posing significant obstacles to the federal government's ability to enforce immigration law.[230] These obstacles do little to ease the tension that exists between the federal government and the states. In the instance of Katie Steinle's death, the finger-pointing began immediately. The federal government accused the local law enforcement: "We're not asking local cops to do our job. All we're asking is that they notify us when a serious foreign national criminal offender is

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222. DRUG ENF'T ADMIN., U.S. DEP'T OF JUSTICE, 2015 NATIONAL DRUG THREAT ASSESSMENT SUMMARY 79–84 (Oct. 2015), http://www.dea.gov/docs/2015%20NDTA%20Report.pdf.

223. Moustafa, *supra* note 221.

224. Philip Jankowski, *State Struggles to Crack Down on Lethal Synthetic Drug*, WASH. TIMES, Jan. 11, 2015, http://www.washingtontimes.com/news/2015/jan/11/state-struggles-to-crack-down-on-lethal-synthetic-/?page=all.

225. *See supra* Part II.B.

226. Tubbesing, *supra* note 214.

227. Moustafa, *supra* note 221.

228. *See supra* text accompanying notes 218–219.

229. Tubbesing, *supra* note 214. *See, e.g.*, Gulasekaram & Ramakrishnan, *Immigration Federalism*, *supra* note 11, at 2075–76; *Post–Arizona*, *supra* note 63; Matthew J. Lindsay, *Disaggregating "Immigration Law"*, 68 FLA. L. REV. (forthcoming 2016); NAT'L CONF. OF ST. LEGIS., STATE LAWS RELATED TO IMMIGRATION AND IMMIGRANTS (Jan. 7, 2015), http://www.ncsl.org/research/immigration/state-laws-related-to-immigration-and-immigrants.aspx; *see supra* Part I.

230. *See, e.g.*, Sahagun & Reyes, *supra* note 4.

being released to the street so we can arrange to take custody."[231] San Francisco County Sheriff Ross Mirkarimi fired back: "ICE was informed about San Francisco's position on detainers . . .. but did not seek a court order for Sanchez's transfer as *required under the law*."[232]

The law Sheriff Mirkarimi referenced was adopted in 2013 by San Francisco and requires that the federal government must have detainer requests vetted and ruled on by a federal judge before local facilities will comply.[233] Moreover, a federal court recently ruled that an Oregon county violated one woman's Fourth Amendment rights by complying with an ICE detainer without "probable cause."[234] This kind of liability exposure has undoubtedly encouraged a number of states and municipalities to enact legislation similar to the laws found in San Francisco.[235] For this reason, it is safe to expect increased subfederal efforts to enact immigration legislation in response to the Supreme Court's decisions in *Mellouli* and *Johnson*.[236]

C. *Recent Changes in the Law Incentivize Lack of State Buy-In*

The Supreme Court's refusal to give federal effect to state criminal convictions can only be expected to stoke the debate between the federal government and subfederal legislatures. By abandoning the residual clause language, the Supreme Court has limited the federal government's ability to utilize state criminal convictions for the purposes of removing or denying relief to aliens.[237] If the federal government is unable to remove these residents on the merit of their state convictions, there is little incentive for subfederal legislatures to encourage participation in a program that already has a poor participation rate.[238]

States have made their belief that the federal government is no longer equipped to adequately enforce U.S. immigration laws clear.[239] As the notion that the federal government is unwilling to—or cannot—protect state citizens in accordance with state laws gains traction, an increase in subfederal legislation is a natural response. It is only logical to question, as some have: "[I]s the real problem the 'categorical' approach?"[240]

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231. *Id.*
232. *Id.* (emphasis added) (internal quotation marks omitted).
233. *Id.*
234. *Id.*
235. *See id.*
236. Mellouli v. Lynch, 135 U.S. Ct. 1980 (2015); Johnson v. United States, 135 U.S. Ct. 2551 (2015).
237. *See supra* Part II.C.
238. Carcamo, *supra* note 8.
239. *See supra* note 15 and accompanying text.
240. Little, *supra* note 76.

IV. CRAWLING OUT THROUGH THE FALLOUT: A LOOK FORWARD

Congress must recognize it is time to turn its eye to immigration reform in a meaningful way. Pressure on the federal government to acknowledge its own inadequacies regarding immigration enforcement have never been so great.[241] Some states, like Arizona, have been applying pressure since the early twenty-first century and are seeing positive results.[242] Surely, the federal government must recognize states have *something* to offer.

A. *A Front-Line Solution and Conflict-of-Interest*

Across the United States, the federal government is realizing states do have something to offer. ICE attorneys now make regular efforts to engage state prosecutors and educate them regarding the need for a more specific charging practice.[243] The idea being ICE attorneys may have more success removing undesirable aliens if state charging documents specifically indicate the conviction is for conduct punishable under federal law.[244] But are ICE officials asking too much? State prosecutors charge defendants under general language in an effort to yield more convictions.[245] This inherent conflict-of-interest makes it reasonably certain efforts on behalf of ICE attorneys to change the habits of state prosecutors will be minimally effective. To be most effective, a solution must come from the federal government.[246]

B. *The Federal Solution: A Nod to the States*

Those who support the categorical approach seem to believe it is necessary to protect the right to due process.[247] Justice Thomas disagrees.[248] Stating there is "nothing absurd about removing individuals who are unwilling to respect the . . . laws of the jurisdiction in which they

241. *See* Ian Swanson, *California Republicans Vow to Keep up Pressure on Immigration Reform*, THE HILL: BRIEFING ROOM (Nov. 1, 2015, 6:54 AM), http://thehill.com/blogs/blog-briefing-room/news/258771-california-republicans-vow-to-keep-up-pressure-on-immigration.

242. *See supra* Part I; *see also* Neil Munro, *WSJ: Arizona's Pro-American Immigration Reform Boosts Wages, Productivity, Housing*, BREITBART (Feb. 10, 2016), http://www.breitbart.com/big-government/2016/02/10/wsj-arizonas-pro-american-immigration-reform-boosts-wages-productivity-housing/.

243. MARGARET REGAN, DETAINED AND DEPORTED: STORIES OF IMMIGRANT FAMILIES UNDER FIRE (2015).

244. For example, state prosecutors might include the "dwelling" language of Section 810.02(3)(a) of the Florida Statutes.

245. *See supra* Part II.D.

246. Chy Lung v. Freeman, 92 U.S. 275, 280 (1875).

247. Johnson v. United States, 135 S. Ct. 2551, 2556–57 (2015).

248. Mellouli v. Lynch, 135 S. Ct. 1980, 1995 (2015) (Thomas, J., dissenting).

find themselves," Justice Thomas suggests the time to reassess the categorical approach's impact on the removal of aliens has come.[249] Congress must carefully determine how to revisit immigration law in a way that will preserve the power and interests of the federal government, but also resolve many of the country's immigration woes.[250] To do this effectively, Congress must give the states a nod by giving federal effect to state criminal convictions otherwise rendered ineffective by the categorical approach.[251]

Since the Court's ruling in *Johnson*, a gap exists in the place of INA § 101(a)(43)(F).[252] To fill that gap, Congress must avoid enacting a risk-based, ambiguous, and hard to test residual clause,[253] and should instead expressly defer to state determinations of culpability. For example, Congress may determine that a state felony conviction is sufficient to warrant removal. Likewise, Congress may determine that a theft-related state felony conviction or violence-related state felony conviction is sufficient. By specifically outlining the intent to reach those who have engaged in conduct committed by states, Congress can avoid the pitfalls of categorical approach.[254]

Nonimmigrants are deportable if they have been convicted of an "aggravated felony."[255] Ideally, the aggravated felony definition of the INA § 101(a)(43)(F), abandoned by the Supreme Court in *Johnson*, should be replaced by the following language: "Immigration and Nationality Act § 101, (a) As used in this chapter— . . . , (43) The term "aggravated felony" means— . . . , (F) *Any conviction for conduct determined by any state to be punishable by a term of imprisonment of at least one year; . . .*"

This language will allow ICE officials to maximize the impact of state criminal convictions. In doing so, the federal government will be equipped to recognize the level of protection state legislatures have determined appropriate for their constituents. If an illegal alien, not authorized to reside in any U.S. jurisdiction, engages in conduct that a state determines to be a felony, that alien is subject to removal from the United States. To repurpose a quote from Justice Thomas,[256] nothing about this outcome "is so outlandish as to call this application into"

249. *Id.*

250. *See supra* Part I.

251. *See supra* Part II.A.

252. 8 U.S.C. § 1101(a)(43)(F) (2012).

253. *Id.* (cross-referencing to 18 U.S.C. § 16(b) (2012) for the definition of a "crime of violation"). An additional example may be found within the Armed Career Criminals Act at 18 U.S.C. § 924(e)(2)(B)(ii) (2012). *See also Johnson*, 135 S. Ct. at 2557.

254. Mellouli v. Lynch, 135 S. Ct. 1980, 1989 (2015) (finding that giving the Kansas drug schedule federal effect would lead to "consequences Congress could not have intended").

255. 8 U.S.C § 1227(a)(2)(A)(iii) (2012); *see supra* Part II.D.

256. *Mellouli*, 135 S. Ct. at 1995 (Thomas, J., dissenting).

question.

C. *The Judicial Solution: Underlying Conduct Reconsidered*

Alternatively, the Supreme Court could revisit the arguments made by both Justice Thomas and Justice Alito that the categorical approach does not require triers of fact to blind themselves to the underlying facts of a conviction.[257] Both Justice Thomas and Justice Alito argue that consideration of the facts underlying a state conviction equates to a violation of due process.[258] The notion that a determination made under a residual clause simply requires a different means of analysis than elemental statutes is no more absurd than the outcome of the hypothetical presented above.[259]

D. *Policing the States*

Understandably, the implementation of these solutions will raise concerns about individual rights. The federal government must carefully watch and appropriately impede state attempts to enact unfair and unconstitutional criminal laws.

These solutions should be easily implemented for two reasons. First, the federal government enjoys prosecutorial discretion. There is no reason ICE attorneys cannot examine the facts underlying a conviction and determine if the illegal alien is a person worth prosecuting. The federal government has already made it clear that non-violent, non-offending immigrants are a low enforcement priority.[260]

Second, state laws may be challenged on equal protection grounds pursuant to *Plyler v. Doe*, which provides the same level of protection to illegal immigrants as women.[261] Consider laws that impact women; specifically, abortion laws. States are able to enact legislation that provides women with varying levels of access to abortions, and do so.[262] Keep in mind that a woman who resides in Alabama does not have the same access to a medical procedure as a woman who resides in California, regardless of criminal history.[263] If that is so, there should be

257. *Id.* at 1991–95; *Johnson*, 135 S. Ct. at 2574–84 (Alito, J., dissenting).

258. *Mellouli*, 135 S. Ct. at 1991–95 (Thomas, J., dissenting); *Johnson*, 135 S. Ct. at 2574–84 (Alito, J., dissenting); *see supra* notes 173–174 and accompanying text.

259. *See supra* Part II.D.

260. *See supra* note 18 and accompanying text.

261. *See* Plyler v. Doe, 457 U.S. 202, 217 n.216, 230 (1982) (holding that state laws that limit rights afforded to immigrants based on their status will be subject to intermediate scrutiny); United States v. Virginia, 518 U.S. 515 (1996).

262. *State Policies in Brief: An Overview of Abortion Laws*, GUTTMACHER INST. (Feb. 1, 2016), http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf.

263. *Compare State Facts About Abortion: Alabama*, GUTTMACHER INST., https://www.

nothing unreasonable about subjecting an illegal alien in California to removal for a burglary despite the fact that he may not be subject to removal for that same burglary in Alabama.

CONCLUSION

There is no question that the federal government struggles with immigration enforcement. The level of manpower required to keep track of those crossing the border legally—not to mention illegally—is difficult for the federal government to fund and adequately maintain. States argue that many federal efforts are inefficient and ineffective. The Supreme Court's decisions in *Mellouli* and *Johnson* add weight to this argument and leave the federal government with few options but to entertain the idea of considering state involvement; but how?

It is clear that the power to legislate immigration issues will remain with the federal government for the foreseeable future. State legislators complain that the federal government is unable—or unwilling—to afford their constituents appropriate levels of protection. Considering the current state of the law, one must acknowledge the states' predicament. Likewise, one must also recognize the precarious situation surrounding state participation in ICE detainer programs.

The federal government has the ability to enact legislation that arms ICE attorneys by giving federal effect to state convictions regardless of their underlying facts. The Supreme Court may also resolve this issue by embracing the logic employed by Justice Thomas and Justice Alito. Implementing either solution would be a significant step toward quieting state claims that the federal government is no longer equipped to adequately enforce immigration law.

The relationship between the federal government and the states regarding immigration must change. This battle, and its divisive nature, will soon become unsustainable. Arizona should be free of signs warning its citizens of human smugglers. Kate Steinle should be alive and with her family. After all, "[i]t has been said that the life of the law is experience."[264]

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guttmacher.org/pubs/sfaa/alabama.html (last visited Nov. 1, 2016), *with State Facts About Abortion: California*, GUTTMACHER INST., https://www.guttmacher.org/pubs/sfaa/california.html (last visited Nov. 1, 2016).

264. Johnson v. United States, 135 S. Ct. 2551, 2560 (2015).