Immigration (Cristina Rodriguez, Fall 2010)

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# General

1. Terminology
   1. **Exclusion**
      1. Legal concept, being pushed back at the border.
         1. Mezei, on Ellis Island, but legal fiction that not yet in US. Still exclusion, bc he’s seeking entry.
   2. **Deportation**
      1. Kicking someone out
   3. **Removal** **Proceeding**
      1. 1996, collapses E and D into this. Each still has different standards though.

# Foundations of Congress’s Plenary Power

1. History pre-Chinese Exclusion
   1. ***Gibbons v. Ogden***
      1. NY law restricting ferry crossings in NJ, struck down saying this was in scope of Fed Power – under Commerce Clause (distinguishing from police powers, which belong to states).
   2. Burlingame Treaty – 1868
      1. To import cheap labor, precursor to modern guest worker treaties.
2. Origins of Imm law – Chinese Exclusion Cases
   1. Era when SC crystallizes source of Cong’s power.
      1. Make up the contemporary power to pass the INA
      2. Foundation of persistent resistance to judicial review
   2. 2 Major Laws
      1. Chinese Exclusion Law of 1882
         1. Need certificate of residence – papers please.
         2. Need 2 white witnesses (*FYT*)
      2. Final Chinese Exclusion Act of 1888
         1. Prohibits all migration of Chinese. Stranded about 30k people

### *Chae Chan Ping* (1889) pg 120 [Field]

* 1. Stranded by 1888 act. Argues Act violates Burlingame Treaty.
  2. Irrelevant – statute passed after treaty, later in time controls as they are on equal footing.
     1. Also, exec may have less power with respect to Cong (if a subsequent treaty, may not trump)
  3. Also argues Cong doesn’t have the Const authority. Held they do.
     1. Incident of sovereignty – necessary to prevent being controlled by other nations.
     2. Federal power – court doesn’t even address that it’s not enumerated and possibly reserved for the states/people – goes straight to sov.
  4. Went out of way to say fed power is exclusive, when only needed to say fed has the power.
     1. Absolute power to exclude
     2. Leaves open Q of whether power to deport.

## Plenary Power: What would ABSOLUTE Cong power mean?

* 1. Exclusively Federal Power: Complete. Only to fed gov’t, not states.
     1. Though overtime, fed has given some power to states
  2. Incident of Sovereignty: No external constraints from other nations. Only subject to the limitations to which the nation consents, but what is consent?
  3. No Judicial review: Does this mean const doesn’t apply?
     1. Justifications? Political question? Lack of expertise? Beyond courts in that people aren’t inside country. Natl Security (PQ).
     2. Court willing to address DP concerns, and to read statutes in a way that enforces const norms.
  4. Why absolute?
     1. Coordination btwn fed and state issue? Single state could mess it up for the whole country otherwise?
  5. Includes ability to exclude and deport, and court has broadened it to include terms and conditions of residency.
  6. Modified – some Procedural limitations
     1. DP – applies at diff stages (Plasencia, Zadvydas, Yamataya – courts have always been willing to oversee exec *treatment* of non-Cs.)
     2. Possibly also substantive? (Fiallo, Harisiades, Chadha)
  7. (Also Political Constraints on way Cong exercises PP)

### Const sources of PP?

* 1. Naturalization Clause
     1. But imm and naturalization are different. Could argue imm is N&P to implement naturalization laws.
  2. Migration/Importation Clause
     1. Says can’t regulate before 1880, implying can after, but not affirmative grant of power. Understood to be about slave trade.
  3. The War Clause
     1. Art 1, Clause 11 (make and declare war) - N&P to relations to prevent war. Attenuated
     2. Art 1, Clause 15 (call forth militia, repel invasion) – imms as invaders
  4. But there are non-enumerated Foreign Affairs powers we recognize
     1. Acquire territory, consulates abroad, foreign policy doctrines. A foreign affairs penumbra?
        1. But many so mundane, not worth mentioning in Const. Imm not mundane.

### Commerce Clause

* 1. Henderson – court struck down statute requiring bonds from imms – this was the “commerce of foreign relations” – this movement of people has a substantial affect on commerce.
  2. Not relied on in CCP bc isn’t robust yet. Also, CC is not exclusive – allows for some state regulation, even if preempts state regulation.
     1. Today, Cong can justify the whole INA with the CC

1. ***Ekiu*** (1892) pg 134
   1. She arrives, exclude her bc don’t believe her husband is a C. DP claim – couldn’t challenge admin findings of fact in court, couldn’t put on evidence.
   2. Held – no violation of DP.
      1. This IS DP. Cong decides procedure. Cong as more competent than court?
      2. Reinforces CCP that no jud review.

### *Fong Yue Ting v. US* (18903) pg 136 [Gray]

* 1. F already in US. 1892 Exclusion Act – presumption all Chinese are here unlawfully, rebut with certificate, need 1 credible white witness. Arrested for not having certificate.
  2. Power to deport is absolute, like power to exclude. 2 rationales.
     1. (1) a nation can protect itself with removal just as much as exclusion.
     2. (2) individual is here as a matter of grace, not right. Can be taken away.
  3. Scholarly critique
     1. Self-defense by D not clearly within prerogatives of state
        1. Once here, have an interest, should be protected. Was consent to their entry.
        2. Have to show a genuine threat – being a foreigner is not inherently a threat.
  4. Fields dissent – no external limits on sov, but by the Const, we’ve limited ourselves (why wouldn’t this also constrain exclusion? Get an interest over time, punishment rationale not as strong in E, D as more of an affirmative act)
     1. Also sees D as punishment, so 4/5/6/8As come into play.
        1. Punishment – affects freedom, deprive of relationships, property interests. Or just returning person “home”
     2. Seems somewhat counter to his CCP opinion – but there, maybe about whether the power existed, here, DP in that power.

### Knauff v. Shaughnessy (1950) pg 155

* 1. Non-C wife excluded under statute giving AG power to exclude some w/o hearing based on confidential info.
  2. Held Const – part of fundamental right to exclude.
     1. Also possibly inherent in Exec’s right to exclude – more dangerous proposition.
     2. Also inside/outside distinction – had never been a US resident
     3. “Whatever the procedure authorized by Cong is, it is DP as far as an alien denied entry is concerned.”

1. ***Chew*** pg 158
   1. Chinese sailor, married to US C, served in WWII, in Coast Guard, excluded in SF and NY, AG denies hearing.
   2. Court says he was assimilated into status as continually residing alien – never really left (working, US boat, security clearance)
      1. Avoids Const Q of hearing – since continual, Nationality Act didn’t apply to him.

## Due Process

* 1. Held to apply to both E and D contexts, to a limited extent. But the application is much stronger and clearer in D context.

### [E] *Mezei* (1953) pg 156 [Clark]

* 1. ∆ lived in US for 25 yrs, home and family. Left for 19 months to see dying grandma (behind iron curtain). Detained at Ellis, but saying not yet admitted. Unclear if he has C anywhere, concerns of indefinite detention.
     1. ∆ claiming some kind of hearing, procedural DP.
        1. But, court says this is not D, but E.
     2. We refuse to let him in just bc no one else will take him – won’t let external forces dictate our behavior (but, onus on us, as he lived here for so long?)
  2. 19 months – too long, broke chain of residency.
  3. Jackson dissent
     1. Legally free, but not really, some vested interest. Also worried about conduct of the govt.
     2. Wrote Youngstown “zone of twilight” concurrence – concerned with defining Exec power and restraints by Cong.
     3. ∆ doesn’t have right to Substance (right to enter), but does to Procedure (grounds of E and a fair chance to overcome), and courts have power to oversee procedure.
     4. Const speaks of persons, not “citizens” – DP should apply.
        1. But only arguing for procedure here, and DP has substantive component – should those also apply?
     5. DP not just about rights of individ – about restraint on gov’t.
  4. All or nothing approach
     1. Hard to give medium DP – check boxes?

1. [E] ***Boumediene***
   1. Have a habeas right to have a “meaningful opportunity” to challenge detention – what does that mean?
      1. Court doesn’t mention Mezei. Not clear if overruled.
         1. Factual diff – M wants in, B out, diff remedies, M w/in the jx.
2. ***Kiyemba*** (DC 2009) pg 171
   1. Uighurs held at Gtmo, not enemy coms, but no country would take them, can’t return to China for fear of persecution. Habeas claim.
   2. DP didn’t compel their release (got hearings to say not ECs), bc release would be in US, against wishes of exec.

### [E] Landon v. Plasencia (1982) Supp

* 1. Π LPR, in US 12 yrs, leaves for 4 days, caught smuggling people back in.
  2. Claims he was denied DP and that should have a D hearing rather than E.
     1. Court – E hearing, was seeking entry – court determining what “entry is” – every time LPR leaves, has to “enter” again? Rough.
     2. But, says has **some right to DP! In Exclusion**! Doesn’t say how much, remands to lower court to see if she got it.
        1. Theory that your Const status changes if resident, ties of permanence. But, if leave for long time, can lose that status.
           1. Mezei may have got hearing under *Landon*, or maybe was gone too long.

1. [D] ***Yamataya v. Fisher*** (1903) pg 171
   1. Court acknowledges DP is required for D. Says she got it.

## Substantive Review?

* 1. Substantive review meaning consideration of whether the substantive grounds for admission, exclusion, or removal (such as membership in the Communist party) are themselves const, irrespective of whether alien has had the opp. to argue that he/she is not a Communist/falls into an admission category, etc. . . .

### *Harisiades* (1952) pg 177 [Jackson]

* 1. 3 Comms, left party before a D ground, Cong later said former membership is a ground, all ordered deported.
  2. **Substantive DP claim** – substantive right to remain.
     1. LPRs arguing have an absolute right to remain just as C’s, and if not, Cong must have a rational basis for the decision to deport, and a reasonable opp for JR.
        1. Court rejects. But does discuss reasonableness of fear of Comm’s – leaves open Q if court might strike down a substantive imm decision at what point if really unreasonable.
  3. 1A Claim
     1. Fails – would count as incitement, which isn’t protected.
  4. Ex Post Facto
     1. Fails – limited to penal laws, D is civil.
  5. Jackson wrote Mezei – consistent? H got the procedures Jackson wanted in M, found to be Comms.

### *F*i*allo v. Bell* (1977) pg 188

* 1. Like Harisiades, a substantive challenge to the const of an INA provision.
  2. EP claim based on gender and legitimacy – statute prevents out of wedlock children to C fathers from getting C, or if C’s, can’t bring in non-C dads.
     1. Π’s are C’s, more robust rights, but court treats much like *Harisiades* – form of review not appropriate.
  3. Marshall dissent – in heightened scrutiny, needs extra review. More rigorous than DP review – EP review!
     1. Claim isn’t to a substantive right, but to not be discriminated against in the allocation of benefits.
  4. This looking to the rights of the C’s on the inside, or the non-C’s on the outside? Maj seems to be focusing on outside – right to enter, rather than right to bring people in.

Cracks in the Plenary Power – Chadha, Zadvydas, Clark, DeMore

### *Zadvydas v. Davis* (2001) pg 206 [Breyer]

* 1. Question: statute allowing AG to detain an admitted alien beyond the removal period means indefinitely, or reasonable period of time. Aliens ordered removed, but nowhere to send them.
     1. Read into statute (§ 241(a)(6)) a “reasonable time” limitation.
        1. Avoid answering Q of whether indefinite would be const.
        2. Reasonable as 6 months.
  2. Distinguishes from Mezei – he was excluded, not in US.
  3. Scalia dissent – should never be a situation where the courts could order release- categorically, DP doesn’t apply. Π’s got their process, ordered removed, this is the result.
  4. Kennedy dissent – they got process, but may be situations where courts should intervene.
  5. Breyer – Cong must be explicit if going to do something so drastic.
     1. Indef detention not a permissible means to implement power to remove, so don’t read statute to authorize.
  6. Const problem w/detention – 5th A and DP – need special justification.
     1. Interests here:
        1. Trying to Remove - but not possible – removal has to be plausible and foreseeable
        2. Safety - DP precedents lead court to say finding of dangerousness has to be individualized, not categorical
  7. Who is Z like? Mezei (legally outside), Yamataya and Kim (still legally inside and protected by Const), or Plasencia (status is being assimilated, though P never ordered R or E)
     1. Court didn’t overrule *Mezei*, decisions in conflict in that neither have ANY right to be in US, but M can be detained indefinitely possibly.
        1. Boumediene and Kiyemba don’t mention Z, mention M – elephant in the room.
  8. Unclear if case is start of reinvigorated DP review in imm proceedings, possibly moving to recognition of substantive rights (freedom from indefinite detention, seems substantive if courts can order you admitted), or just a single outlier case, only for the extreme facts of Z.

***Clark v. Martinez*** (2005) pg 223 [Scalia]

* 1. Same Q as in Z, but for inadmissible aliens – under same statute.
  2. Court basically bound by Z – would be weird to interpret the same language differently depending on the ∆.
  3. Reasonable time limit applies to inadmissible aliens also.
  4. Thomas dissent – doesn’t really care about stare, re-frame as an as-applied challenge depending on ∆, not a Const challenge.
     1. Bc Z used const avoidance, implied 2 interps of statute – just apply the other one here. Sorry dude.
  5. If had overruled Mezei, wouldn’t be in such discord w/past precedent
     1. Note, this isn’t Const decision – Cong can change statute to differentiate btwn inadmissible and ∆ aliens.

### *DeMore v. Hyung Joon Kim* (2003) pg 226 [Rehnquist]

* 1. Key debate is how individualized a determination must be to satisfy DP.
  2. § 236(c) requires detention of agg fels during removal proceedings. Argue violates DP bc INS doesn’t have to make an individ determination.
     1. Held: Cong may require detention “for the brief period necessary”
        1. Emphasis on brief?
        2. Rational basis – whatever DP Cong gives is enough.
     2. Z and Clark not Const decisions, so doesn’t require DP individualized hearings here.
        1. Stronger here, in that no final order, still a right to be in US, but, have committed a potentially serious crime. No threat of indef detention.
  3. Gov’t justifications
     1. (1) ensure presence of crim aliens at R proceedings
     2. (2) protect public.
     3. Note- Exec wanted hearings, reduce costs of detention. But this is a statute – Rehn chooses Cong’s side.
  4. Debate over whether had a hearing already or not. Kenn thinks did, Breyer doesn’t – but if had, know would be R quickly, not so bad. Fact that ∆ contesting can draw it out, needs hearing for detention.
  5. OC, Scalia, Thomas – concur in result, but say court shouldn’t have any jx/review here at all.
  6. Souter dissent – violates DP, need individualized showing of fear of flight and danger. We only detain people on narrow bases, gen not on categories.

# Alienage Law

1. What is it?
   1. Are there limitations on govt power outside the context of D, when imm law isn’t implicated?
      1. Alienage law and imm law treated as separate areas, but do they have the same conception of gov and fed power?
   2. What are the ways the govt can regulate the terms and condistions of residence?
      1. Does the power to do so constitute part of the imm power?
   3. States can be strictly scrutinized, unless political function, but Fed classifications are rational basis review.

### *Wong Wing v. U.S.* (1896) supp [Shiras]

* 1. Struck down hard labor provision of Chin. Excl. laws, preceded ultimate removal.
     1. Court crossing over from purely procedural to substance. Z later blurs further.
  2. Q: what are the limitations of a person subject to exclusion, how can they be treated by fed govt?
     1. This is punishment, whereas D wasn’t.
        1. Detention pending D narrowly serves the purposes of R, but hard labor doesn’t serve those purposes – so maybe out of realm of imm law and into treatment of persons.
     2. DP required, jury trial, for punishment.
  3. Stands for outer limits of what gov’t can do in relation to its power to exclude.

### *Yick Wo v. Hopkins* (1886) supp [Mathews]

* 1. SF ordinance, need permit to have biz, in laundry industry, all white people got permits, no Chinese did.
     1. Not facially discrim, but discrim in application.
        1. SF- NO reason for difference, only possible reason was racial animus.
  2. Same era as Chinese Excl cases.
     1. This not about Cong’s imm power, and about people already living here.
  3. Result – states more highly restricted in how they can treat aliens as opposed to C’s, while Fed has more room.

1. ***Truax v. Raich*** (1915) pg 1247 (in Graham)
   1. Court strikes AZ employment statute requiring half ee’s be C’s
      1. Right to work is central to right to live
      2. Suggests the state law was effectively a regulation of imm, of entry
   2. Leaves open possibility of restrictions of advance a Special Public Interest.
   3. **Special Public Interest**? – limited resources may want to reserve for C’s?
      * 1. Self-govt – voting, office holding, policing
        2. Funding – Generally rejected
        3. Natural resources –
           1. *Takahashi*: limits commercial fishing to C’s

Struck – right to live, freedom of K and liberty.

* + - * 1. PA law on hunting upheld
      1. But after Takahashi, prob not much SPI exemption left

### *Graham v. Richardson* (1971) pg 1244 [Blackmun]

* 1. Arises in period of welfare rights litigation under Warren Court, finding ways in Const to protect welfare rights of C’s generally. Abruptly ended in 1972
  2. Q: can states condition welfare benefits on C status? EP case or Fed/State preemption case?
     1. PA (C req), AZ (15 yr residency req)
     2. Held: No, cannot.
  3. EP
     1. State fails Special Public Interest exception
     2. Court now **rejects the Privilege/Right distinction** for EP.
        1. Rights – protected by Const
        2. Privileges – govt decides to give access to, maybe like property with a property interest (some interests more important, like welfare and education)
        3. 14A doesn’t distinguish – EP is a restraint on arbitrary govt action that is unequal, regardless if what is at stake is something the govt created.
     3. **Find aliens as a suspect class**
        1. Court not willing to go so far to say *unauthorized* imms are.
           1. Prob need just as much protection, but would be much harder to distinguish and legislate, could be costly.
           2. Would interfere w/Plenary Power.
     4. No compelling interest for govt
        1. Saving money not enough
           1. *Shapiro* – saving welfare costs cannot justify an invidious classification. CA 1 yr eligibility req interfered w/right to travel – people couldn’t move there cuz couldn’t live.
  4. Fed interest in not having a patchwork of state laws that affect the way that imms/people move – want an integrated nat’l economy.
  5. Pre-emption
     1. Argument that fed law authorized AZ statute – dictum: Cong can’t authorized individ states to violate EP.

### *Mathews v. Diaz* (1976) supp [Stevens]

* 1. Here, Federal welfare classification, 5 yr residence req for Medicare Part D. EP challenge.
  2. No strict scrutiny here
     1. Stark line btwn state and fed.
     2. **Defines Imm power to include regulation of terms of residence**
        1. All the process Cong decides to give is all the process that is required.
        2. But doesn’t really fall under the rationales/sources we’ve articulated for Cong’s power over imm
           1. Not really about naturalization, or foreign affairs, not so much sovereignty concerns
     3. Matter that it’s Medicare (healthcare) rather than welfare (right to live)
  3. Court invokes flexibility – Cuban refugees – if we give them less benefits, we can take more. There are tradeoffs, should be for Cong to make.

### *Plyler v. Doe* (1982) pg 1194 [Brennan]

* 1. Undoc imms not a protected class
     1. But struck down statute barring children from school under rational basis.
     2. Focused on consequences of rule (creating a 2nd class), valued of education, innocent children
        1. Also, fed relies on unauth imm, suggests complicity.
           1. Does this mean all fed does and doesn’t do is consent, now ties states’ hands?
        2. Might be diff if Cong has authorized.
           1. Is this a pre-emption case? Really bc state is intruding upon fed power.
  2. Brennan “anti-subordination” view of EP, Burger view is to prevent arbitrary/irrational classifications stemming from invidiousness

1. 1996 – Cong cuts non-C’s off fed benefits – states determine qualifications for Medicaid.
   1. Unconst to allow states to discrim?
      1. Is this imm power, or authorizing states to discrim?
      2. But if Cong delegates PP, justifications for the power no longer apply, should no longer be const…but justifications applied when fed made choice to delegate.
2. ***Adarand***
   1. Between Diaz and Shalala – Before, federal classifications for benign purposes (affirmative action) received more deference bc 14A was intended to remedy state action, gave Cong power to do so in § 5. States got heightened scrutiny.
      1. **removes fed/state distinction – same EP standards apply**
   2. ***City of Chicago v. Shalala*** – argue that Adarand meant same EP standards also apply in alienage context.
      1. Rejects. Powerful example of how plenary power still exists.
3. Cases after Shalala
   1. Alyesisa- 2002 NY case – while NY authorized to prevent non-C’s from some Medicaid benefits, was a violation of EP bc Graham says you cannot devolve power to states to violate the const (so, basically declared a fed law unconst).
   2. 10th Cir – if Cong, in administering its PP, thinks states should make these judgments, that’s fine.
4. ***Sugarman v. Dougall*** (1973) supp [Blackmun]
   1. Special interest doctrine evolves into the **Political Functions** **doctrine**
   2. Court strikes down NY flat ban on non-Cs working in civil service
      1. While some justifications, was a tailoring problem.
         1. Not narrowly tailored, suggestive of discrim.
      2. But, possible a more narrowly tailored law would be ok.
         1. Justified by interest of creating political community (jury, judge, high office, voting)
      3. Trying to carve out a space for states, if state’s sov function is involved.

# Citizenship

1. Significance
   1. Imm and C – both relate to production of natl identity and culture. C as endpoint of imm/naturalization.
      1. How we define laws of one effect the other.
      2. C moving from PP to realm of the const.
   2. Knowledge of who belongs where.
      1. Clear rules to ensure people have incentives to bond/assimilate
   3. Welfare states – C matters for re-distribution of wealth.
   4. (See class 8 notes for debate on Content/value of C)
2. Content
   1. More than right to vote.
   2. Right to Remain
      1. If a C, not subject to imm laws.

### Jus Soli - Acquisition of C

* 1. 14th A direct response to Dred Scott
  2. Definition of C: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."
     1. If a US C, then C of the state where you reside.
     2. “Subject to the jx thereof” – ambiguous, meant to qualify/limit
        1. w/o, would be hard to argue against universal birthright, imported from common law.
        2. Common law exceptions – children of foreign diplomats, if hostile invaders- **bc don’t owe allegiance**.
  3. § **301** – Nationals and C’s at birth
  4. ***Elk v. Wilkins*** (1884) pg 1291
     1. Held not C – not born under jx of US but of his tribe
     2. Establishes that what matters is to whom you owed allegiance when born.

### *Wong Kim Ark* (1898) supp

* 1. Born in US of Chinese parents, leaves, excluded under Chin Excl Act – π argues is a C!
  2. Says a C - Text of 14th not limited to just black people.
     1. Π had no other allegiance, not within common law exceptions.
     2. If hadn’t said C, would entrench a group as non-Cs.
        1. Cong could also do same to others in future. Undermine equalizing force of 14A.
  3. Goes against Cong intent (Chinese not fit to be in country, prob not want as C’s), but const trumps. Could also say Cong only worried about 1st generation imms, less second, as harder to assimilate. Modernist view – then, much more racialized.

1. Schuck and Smith
   1. C at birth doesn’t apply to ill imms – read consent into “subject to jx thereof” – jx as a legal/political creation, need consent on behalf of govt.
      1. Also need consent of person – say native Americans ARE subject to jx, but don’t consent, so excluded.
   2. WKA – textualist reading, suggests consent post 14A is irrelevant – 14A is the consent, applies to all born here.
   3. Also, have applied EP jx broadly – tough to have such disparate interps w/in same clause. (and would eviscerate EP to have Schuck consent def of jx)

### Jus Sanguinis

* 1. Why have it?
     1. Prevent statelessness, for those serving abroad, allow people travel/work abroad.
     2. Theory of a tie – match C with those who have ties
     3. Quasi-ethnic nationalism – nationalism as bloodline.
  2. INA §§ 301-309
     1. § 301(c): if both parents are US citizens, and one parent resident sometime before birth of child, then child born abroad is a citizen
     2. § 301(g): if one parent is a citizen, then this parent must have lived in US for 5 years, with at least 2 after parent was 14 years old

1. Source of Authority for Jus Sanguinis?
   1. Naturalization power
      1. Is it natur, or a means to adopt natur? Conflating naturalized Cs and birthright Cs.
         1. Make sense? Natur is transferring loyalties, involves consent and volunatriness. Harder to takeaway birthright.
            1. Matters for Prez.
   2. Cong have this power in the first place?
      1. Necessary – nation needs it.
      2. History – some form of this rule since 1779
      3. Source of power may affect deference (less scrutiny if PP)
      4. Unresolved (*Flores Villar*, this term)
2. Conditions Subsequent
   1. Have to do certain things before a certain age
      1. 1934-78, imposed upon those born abroad.
   2. Source of the power that justifies making people come back to become a C?
      1. Bellei – naturalization power, Cong can control
         1. Court only asks if being done arbitrarily
         2. Dissent – this is a const q, once given C, there is a liberty interest, and taking it away may violated DP w/o a compelling interest.
   3. 1978 – did away with conditions subsequent
      1. Not retroactive though – still comes up for people born before.
3. Gender Distinctions in Jus Sanguinis
   1. Always had a gender component.
   2. INA § 309 – children born out of wedlock. Father must show blood relationship [(a)(1)], and while under 18, have to legitimated in domicile, acknowledge paternity, estabilish paternity in court [(a)(2)].
      1. Last 3 are proxies for ties to father and US.

### *INS v. Nguyen* (2001) supp [Kennedy]

* 1. N convicted of drug charge, deported, raises defense of C.
  2. Argues requirements of 309 are unconst under EP – only blood req should.
     1. Intermed scrutiny
  3. Two main interests mentioned by maj
     1. Biological ties – mom present at birth, certain she’s the mom – *she* knows, but does INS?
        1. Isn’t this interest met by (a)(1)?
     2. Real everyday ties
        1. Demonstrating ties. Kenn emphasis on *opportunity* to develop ties.
        2. Stereotype that is over/under-inclusive
        3. Why not focus on the *actual* tie?
     3. (ties are to parent, parent as proxy for the state)
  4. OC – nothing about this is consistent with our gender jurisprudence.
  5. Because EP, leveling – if they leveled up, made harder for women – fear of Kenn’s.

### *Flores Villar v. US* (current) supp briefs

* 1. Relation btwn PP and standard of review
  2. When π was born, father literally couldn’t meet the 5 yrs after 14 yrs req, as he was 16, so impossible for π to get C from his father.
     1. EP violation – not imposed on women.
  3. Harder for this to survive intermed scrutiny, will prob get to PP Q (unless say law fails rational basis, still dodge PP Q)
     1. Should there be more deference?
        1. ACLU arguing C at birth, not within PP power of Cong.
           1. But under existing law, FV is clearly not a C at birth.
        2. Maybe, bc natur, Court won’t 2nd guess Cong (like anti-Comm reqs which would otherwise violate 1A for Cs)
        3. No entitlement to jus sanguinis C, just like imm – why can’t Cong create whatever criteria it wants?
  4. Argument that many other countries have matrinlineal C, this was to combat statelessness, give to women
     1. But also countries where may not get C thru mother – children born abroad to US C fathers could be stateless – undermines argument that main concern is statelessness.
  5. Does the gender distinction re-enforce stereotypes? Inherent harm in the distinction. No biological justification

1. Currently
   1. Trend toward convergence.
      1. UK – former empire, colonials could return and get C. More limited now, only kids born to C or LPRs
   2. Ireland – fear of anchor babies, Sang to Cs and LPRs
   3. France – double Soli – if 2nd gen, automatically a C
   4. Reasons
      1. Democratic values. Stability (borders, knowing who is and isn’t C), countries fluctuating from places of emigration to imm, rise of imm.
2. Ideal set of nationality laws?
   1. Carnegie – 3rd gen (here, grandchildren of the imms) should get C at birth. 2nd gen who’s C’s were LPRs should get C after several years (time as proxy for acculturation and loyalty). Foreign born children treated as 2nd gen.
   2. But, does this apply if the 1st gen was illegal?

## Naturalization

* 1. Not born in US, but reasons why you should be a C.
  2. Shift from courts to agency/admin process. Why?
     1. Relieve burden on courts, greater control in exec, easier to control agency discretion. Outcomes have essentially been the same.
  3. **§ 316 Criteria**
     1. Residency – 5 yrs, unless married to a C, then 3
     2. Language, oath
     3. NO economic req in US
     4. Civics exam
     5. Good moral character - § 101(f)
     6. Attachment to Const principles – vague. Communists explicitly excluded.

1. Denaturalization
   1. Basic principle imposed by courts – for govt to revoke C, must have clear, unequivocal, and convincing evidence that the statutory grounds are met.
   2. 1990- Cong – can deN people if evidence of fraud or mistaken naturalization (theory that correcting error of first petition), but 9th Cir rejected.
   3. § 340(a) – criteria
      1. Willful misrepresentation of a material fact for the procurement of naturalization.

### *Kungys v. US* (1988) pg 1388 [Scalia]

* 1. Lied in both visa and N app about where and when born, work during war. His good moral character is questionable b/c he lied. Illegally procured under § 340(a)?
  2. Q: What is **Material**?
     1. Past, *Chaunt* test – need C&C evidence that the fact would have warranted a denial or would have been useful in an investigation leading to the discovery of other facts warranting denial.
        1. Confusing, unworkable, Scalia wants to toss.
     2. Scalia plurality def: natural tendency to influence a decision maker by C&C unequivocal evidence.
        1. Wants something that isn’t “but for.” Not really clearer.
     3. Stevens test – the statement concealed a disqualifying fact or hindered the discovery of such a fact. Must be a causal relationship.
  3. To some extent, the debate is about level of process – balancing interests of maintaining C against govt interest in combating fraud.

## Expatriation pg 1357

* 1. Applies without regard to how citizenship was originally acquired
  2. Today, requires CONSENT of the individual.
  3. Common law – couldn’t renunciate – indefeasible perpetual allegiance
     1. Passed Expat Act in response to war of 1812 – ability to relinquish C is a Fundamental Right.
     2. 1907- another act, expat of any national who became a C elsewhere, and any woman who married a foreigner
        1. Upheld in McKenzie (1915): expat power as N&P to inherent sovereign powers
     3. 1940 – more grounds – service in armed forces of another, voting in another
     4. 1958 – Case trilogy where court intervenes.
  4. *Perez v. Brownell*
     1. Upheld deN of any C who voted in a foreign election. (*Afroyim* overrules)
        1. Foreign affairs power invoked – embarrassing for a C to vote in a foreign election.
     2. Voluntariness presumed to be required, but intent not required.
  5. *Trop v. Dulles*
     1. Provision deN military deserters in time of war – declared punitive and C&U under 8th.
     2. Cited for VALUE of Citzenship – discussing how important.
  6. *Nishikawa v. Dulles*
     1. No const issue – about burden of proof.
     2. Gov’t has to prove expatriating acts by ∆ by clear, unequivocal and convincing evidence.

### *Afroyim v. Rusk* (1967) pg 1359

* 1. Overruled Perez - **Section 1 of 14th Amend gives every C a const right to remain a citizen unless he voluntarily relinquishes that citizenship**.
  2. § 349(a) – lose C if voluntarily do the following:
     1. Naturalize elsewhere, oath of allegiance elsewhere, military, formal renunciation, treason.
  3. Distinguish between Voluntary and Intent
     1. Act can be voluntary, must intend to give up C though.
        1. Some acts inherently intend to give up C?
     2. Open Q: what does voluntary relinquish mean, can Cong make standards?
  4. 14th doesn’t say that you can’t lose C or that you need specific intent…
     1. Warren – **Citizenship is the right to have rights** – the most fundamental, need most to take away. (but don’t want to ground all rights in C)

### *Vance v. Terrazas* (1980) pg 1360 [White]

* 1. Dual C from birth, at 22 gets certif. of allegiance in Mex, says expressly renouncing. State Dept says loss of C.
     1. § 349(a)(2) – lose C if make oath/allegiance to another country – govt must establish by a preponderance of the evidence, and voluntariness of the expat conduct is rebuttably presumed.
        1. Court reads “specific intent” into statute – saving construction.
  2. Question of standard of proof
     1. **Held: Preponderence is ok**.
        1. This is lower than criminal reqs!
           1. Characterize as Civil (even said didn’t threaten loss of liberty!). Stevens disagrees – great loss of liberty
        2. Cong enforces 14A and created lower courts (so can create standards of proof) – but this presumes 14th also gives power to TAKE C, not just give.
        3. Nishikawa not a problem, as was about statutory interp, no const holding. Cong changed, see no reason to overturn.
        4. Dissent/Concur – even if Cong can set the standards, court still obligated to review.
  3. Presumption of voluntariness
     1. Gov’t doesn’t have to show much evidence – Court ok, because still have to show intent. Duress as a defense.
  4. Brennan dissent – can only Formally renounce.

1. Intent to Maintain C
   1. State Dept has changed, list of actions on intent to maintain C
      1. Pay taxes, keep passport.
      2. Acknowledge can do some expat acts and still want to be a C
   2. Now presumption to keep citizenship when naturalized abroad.

# Part II: The Statutory and Administrative Regulation of Immigration

# Admissions Categories

## The Federal Bureaucracy

* 1. Post 9/11, DHS created, merging of agencies
     1. References to the AG still, but deemed to mean head to new dept
     2. INS references are either USCIS, ICE or CBP
        1. Removed INS from DOJ – separation of enforcement and adjudication functions
  2. **CBP – Customs and Border Protection** (DHS)
     1. Enforcement, border inspections at all points of entry
  3. **ICE – Immigration and Customs Enforcement** (DHS)
     1. Enforcement, works in the interior – investigations, detention, some elements of D
  4. **USCIS – US Citizenship and Immigration Services** (DHS)
     1. Service, handles apps for imm benefits
  5. **EOIR – Exec Office for Imm Review** (in DOJ)
     1. Adjudication, three offices
     2. **Office of the Chief Imm Judge**
        1. Coordinates IJs, preside over removal hearings.
     3. **BIA – Board of Imm Appeals**
        1. Hears appeals of IJ decisions
        2. AG has statutory authority to review decisions
     4. OCAHO – Office of Chief Admin Hearing Officer
        1. Evidentiary hearings for unauth employment of non-Cs
  6. Dept of State
     1. Role in issuing or denying visas
  7. Dept of Labor
     1. Does labor certification.
  8. **Non-Immigrants** – fit in a statutory slot – students, tourists, business vistoris, etc.
  9. **Imms** – all other non-Cs.
     1. LPRs – documentation of status via green card, renew periodically. Get more benefits, harder to get.

## Quotas - § 201

* 1. Exempt
     1. **Immediate relatives** of C’s (spouses, parents, children)
     2. **Parolees** – permitted temporarily at discretion of Sec of Homeland
        1. Not Admitted – legally considered outside US.
     3. Occasional statutory group on a one shot basis
  2. Worldwide Caps
     1. Family sponsored imms
        1. 480k minus last year’s immediate relatives plus unused emp based visas, but min of 226k
     2. Employment based imms
        1. 140k plus any unused family from previous year
     3. Diversity imms (greencard lottery)
        1. Ceiling of 50k
  3. Per Country Caps
     1. Count as from the country of your birth.
     2. Combined numbers of family sponsored and emp imms from a country may not exceed 7% of the worldwide limits
        1. Family based 2A are exempt
     3. Diversity – no more than 7% from one country
     4. Also generally about a 25k limit per a country
        1. Complicated – lots of queues.

## Preference Categories - § 203

* 1. Family Sponsored
     1. (1st Preference) unmarried sons and daughters (over 21 yrs) of C’s
        1. 23,400 plus any unused visas from (4)
     2. (2nd Preference) spouses and unmarried kids of LPRs
        1. 114,200, plus any visas (1) doesn’t use, plus the amount the family sponsored ceiling exceeds 226,000 (so any amount above floor goes here).
        2. Sub-split
           1. **2A**s – the spouses and children (under 21)

No quota! Not subject to country ceilings

Get priority. 77% of this preference.

Also exempt 75% of 2A floor from per-country limits.

* + - * 1. **2B**s – unmarried kids over 21
    1. (3rd Preference) the married kids
       1. 23,400 plus any that (1) and (2) don’t use
    2. (4th Preference) brothers and sisters over 21 yrs of Cs
       1. 65k, plus any 1-3 don’t use.
       2. Most over-subscribed category
  1. Employment Based
     1. (EB-1) Priority Workers – Extraordinary ability
        1. 28.6% of emp visas
        2. Don’t need labor certification (§212(a)) – can self petition.
     2. (EB-2) Professionals with advanced degrees and exceptional ability
        1. 28.6% (generally about 40k)
        2. Need **labor certification** – ensure there aren’t American workers for the job.
           1. There’s a national interest waiver
        3. Need a sponsor/job offer
     3. (EB-3) Skilled Workers – equivalent of a bachelor’s degree.
        1. 28.6% (generally about 30k)
        2. Unskilled visas within this, about 5k (of about 30k)
        3. Need labor cert, but no natl interest waiver
     4. (EB-4) Religious workers and certain long-term foreign ees of US
        1. 7.1%, no labor cert
     5. (EB-5) Entrepreneurs - Employment Creation
        1. Invest at least $1mm, emply at least 10 Americans
        2. 7.1%, no labor cert
  2. Temporary workers **§ 101(a)(H)**
     1. H1B are technical skills visas, often working in Silicon Valley
     2. H2 – low skilled temporary workers, e.g. agricultural workers and seasonal workers—numbers in the hundreds of thousands
        1. Compare this number to the 5k that get in through permanent visas
        2. H(ii)(a) – have more rights, right to federally funded legal services, free housing, and federal enforcement of your contract. Wages determined differently.

## Marriage

* 1. General rule – valid if valid in place of celebration
     1. Exceptions if done for imm benefits , proxy marriages (not actually there – mail order. Unless consummated), same sex.
  2. Same sex doesn’t really count
  3. ***Adams v. Howerton*** (9th 1982) pg 267
     1. Same sex couple, married in CO, wants to bring spouse to country.
     2. Two questions:
        1. Marriage valid under state law?
           1. Court skips – not clear.
        2. If so, recognized under federal law?
           1. No. Said Cong didn’t intend § 201(b) to include gay spouses. (plain meaning of marriage and that gays were possibly excluded under psychopathic personality)
     3. EP and DP claims rejected – rational basis, plus plenary power.
        1. Now, substantive DP more developed – different?

1. **Fraudulent Marriage (§ 204(c))**
   1. For imm purposes, marriage must be **Legally and Factually valid**.
      1. Test- whether, at the time, parties intended to establish a life together
   2. Shams
      1. Bilateral – beneficiary (imm spouse) pays the other
      2. Unilateral – imm deceives the other as to their feelings
      3. Tough to prove – serious invasions of privacy.
   3. IMFA – Imm Marriage Fraud Amendment of 1986
      1. Conditional perm status for 2 years, then interview, condition removed.
         1. Both parties have to file to remove – proxy for real union
      2. Are discretionary waivers for extreme hardship, or if marriage is terminated but not fault of imm, instances of abuse.
      3. § 5 **(INA § 204(g**)): Non-Cs who marry Cs while in removal proceedings have to live outside the US for 2 years before returning – combat fraud
         1. Struck down in 1990 on EP by NC court, then Cong changed – exception if can show marriage was genuine w/C&C evidence.
   4. Case before 1996 reforms – judge said marriage was a sham bc it ended, 9th Cir reversed.
      1. Separation is poor proxy of intent in marriage, they end all the time. Can’t subject non-Cs to a higher standard in marriage than Cs.

## Employment

* 1. Note that there is a temporary regime that dwarfs the perm regime (about 37mm nonimms admitted in 2007 – includes workers and visitors for business or pleasure
  2. Labor Certification - § 212(a)
     1. In criteria for admissibility – w/o it, inadmissible.
     2. Protect Am workers (including LPRs already in the system), balance w/needs of Am employers.
     3. Have to show (1) no Am workers available and (2) entry won’t affect wages of current workers)
     4. 1996 audit – labor cert kind of a sham – 99% already in US, 74% already working, 11% never worked after
  3. PERM - 2005
     1. Try to streamline long certification process
     2. (1) ER starts process, looks at Schedule A – list of pre-certified professions (historic shortages, like nurses), bypass other steps, file petition with USCIS
     3. (2) File with regional ETA (Emp and Training Admin)
        1. List evidence you tried to get US workers and list prevailing wage as stated under State Workers Agency.
        2. Can appeal if rejected.
  4. Interpretative issues
     1. Prevailing wage - local/state/national? Private/non-profit? For similarly situated employees (not occupation as a whole)
     2. **Business necessity** – qualifications requested by the Er must be necessary – can’t be so narrow that you’ll never find anyone other than the imm.
        1. *Information Industries* Test – **reqs bear a reasonable relation to the occupation in the context of the ER’s biz and essential to perform the job duties**.
        2. Now an ONet database w/job descrips to compare
  5. ***Matter of Graham*** (BALCA 1990) pg 310
     1. Q: reqs for a live-in nanny/housecleaner justified by biz necessity?
        1. Argued husband on call, watch kids last minute, etc. Clearly wanted specific lady – but is a live-in that out there?
     2. Court says no – basically evidentiary holding, didn’t meet the Info. Ind. test.
        1. ER needs to show that there aren’t cost affective alternatives
           1. Not saying what the answer is, but that Er needs to give more info and effort in determining necessity.
  6. Papademetriou & Yale-Loehr (PYL) essay on reformulating (pg 341)
     1. Three tiers of workers to let in.
        1. (1) Geniuses - same
        2. (2) Point system
        3. (3) Investors – same
     2. Tier 2, move from a shortage analysis to one that focuses on long term needs of economy
        1. Once the job offer (which ensure the need will be met) and the Er attestation (wage, no strike, notice to current ee’s) are met, then the alien has to qualify under the point system.
     3. Can and Aus use this. C-Rod thinks we’re headed there- not great, but better
     4. Points are less discretionary, more objective (but make assumptions about qualities when assigning point values), easier, faster
        1. But may limit type of labor – less low skill. Less diversity, too simplistic, concerns of competition
        2. Who decides point values? Cong? Admin agency? More adjustable over time if an AA.

# The Ethics, Politics and Economics of Imm Admissions

1. Two major questions
   1. (1) Who we admit reflects what we think the purpose of imm policy is.
   2. (2) Screening- how to pick, how to implement the system (also D)
2. Purposes of US Imm Policy?
   1. Control access to C
   2. Economic growth/well being
   3. Promote diversity
   4. Global moral commitments (asylum, overpop in other areas, freedom of movement, global economic growth, natl identity)
   5. Intl politics
   6. Family/Marriage
   7. Natl Security – more to screening elements
   8. Population building (in the past)
   9. Fiscal/demographic benefits (not old people)

# Grounds of Exclusion and Removal

1. A vs. D
   1. More grounds in A
   2. Health ground, public charge, only technically in A, but can possibly be D if found inA at time of A on these grounds
   3. Agg Fel only applies to D
   4. Timing of when they apply
   5. IJ’s apply D grounds, many apply A

## Admissibility

* 1. Apply to: non-C’s seeking admission
     1. ports of entry
     2. In US trying to switch status
     3. In US, entered w/o inspection (applicable post 1996)
  2. Grounds applied by:
     1. Consular officials during visa app
     2. CBP at entry
     3. CIS when adjusting status
  3. Admission: Means the lawful entry of an alien into the US after inspection and authorization

## Entry

* 1. Meaning evolved over time. Alien stowaway who escaped 🡪 entry, but alien who absconded from detention during removal proceeding 🡪 no entry.
     1. Used in defining A (why *Fleuti* may still be relevant)
  2. Re-Entry? Apply A or D grounds? Led to *Fleuti*

### *Fleuti* (1963) pg 529

* + 1. LPR in country several years, several hour trip to Mex, D proceeding 3 years later arguing he was excludable at time of return for being gay.
    2. § 101(a)(13): Entry is any coming of an alien to the US, with exceptions for LPRs who did not intend to leave or left involuntarily
       1. Court reads into this “depart in a manner which can be regarded as meaningfully interruptive of the alien’s permanent residence” – length of time gone and purpose of leaving
          1. Terrible use of absurd results canon – harsh results are not absurd results.
  1. 1996 bright line rule
     1. NOT seeking A unless were absent more than 180 days, committed crime abroad, etc.
        1. If one of these, don’t need new visa, but must meet A grounds
     2. Most courts say Fleuti irrelevant after this, but one court says the categories are only proxies, Fleuti still applies in that court must look into absurd results and/or whether person meant to disrupt LPR status.

## Inadmissibility § 212(a)

* 1. Statute (a) has grounds, rest are waivers – scour for waivers!
     1. Meeting the waiver prereqs isn’t enough, still discretionary
  2. Health grounds
     1. Imm must show doesn’t have certain communicable diseases or drug problems
  3. Public charge grounds
     1. If become a PC w/in 5 yrs, for reasons that didn’t arise while in US, can be D (theory that A grounds weren’t applied properly when you entered)
     2. Don’t want imms imposing welfare costs
     3. If can’t show on own, need an affidavit of support from someone in US – since 1996, affidavits enforceable for 10 yrs.

1. **Imm Control Grounds § 212(a) (6), (7), (9).**
   1. Imm fraud, smuggling, other imm offenses – bar to entry
   2. (9) If unlawfully present for 180 days-Year 🡪 inA for 3 yrs
   3. (9) If unlawfully present for 1 year or more 🡪 inA for 10 yrs
   4. (9) If ordered removed and try to come back 🡪 barred for life, but bar can be waived after 10 yrs
2. **National Security**
   1. History of natl sec grounds – Alien Sedition Act gave Prez power to D aliens who were threats to nation.
      1. WWI – had to show person advocated govt overthrow, but in Cold War, mere membership was sufficient.
      2. 1952 act codified, Court read in “meaningful association” to prevent 1A concerns.
      3. Less use over time.
   2. 1990 – reorganized grounds. Two basic provisions
      1. **§212(a)(3)(C): foreign policy grounds**
         1. Case of former AG of Mexico, fled here, D bc keeping him insulated him from charges, foreign policy threat.
         2. Reasonableness standard that imm will interfere with foreign policy
      2. **§212(a)(3)(B): terrorism grounds**
         1. Gradual expansion over time – AEDPA.
         2. Exclude those who incite terrorist activity or are members of designated Foreign Terrorist Orgs (or materially support FTOs)
         3. § 219 – process for designating FTOs.
            1. Process to avoid overbreadth problems, uniform designations, deterrant
            2. § 233B – crim penalties and freezing of assets if support these orgs
            3. DP and 1A concerns

1A concerns have failed (*Holder v. Humanitarian Law Projec*t)

* + - 1. Statute defines T activity, defines “engage, T org.

## Material Support Provision

### *Matter of SK* (BIA 2006) pg 444

* + 1. Gave Chin Natl Front money – they are resisting the junta in Burma.
    2. (Q1) CNT a T org? – Yes.
       1. US doesn’t recognize Burmese leg acts, complicated relationship. Statute intentionally broad.
    3. (Q2) Material support?
       1. Support doesn’t have to be in connection w/T activities. $ is fungible, still helps.
       2. De minimis argument rejected
          1. Cong trying to prevent the relationships
          2. But doesn’t “material” have to mean something?
          3. Is she really a threat to natl security, which is what Cong trying to prevent.
    4. BIA can’t grant SK a waiver- AG can, but hasn’t delegated this power to the BIA.
    5. Concur- bound by statute, but call to Cong that it’s too broad!

### Holder v. Humanitarian Law Project

* + 1. Criminal case – petitioners in US.
    2. Petitioners (π) wanted to donate $ for humanitarian reasons to two T orgs. Hum. purposes didn’t matter to the court.
    3. Question – what is meant by **Material Support**?
       1. 1A- 9th found this to require O’Brien intermediate test for speech w/non speech elements. Deference for natl security.
          1. SC – said strict scrutiny, as conduct doesn’t predominate, but law still passes!
       2. Vagueness of “personnel & training”
          1. DOJ tried to clarify w/reg, Cong clarified in 2004 that training requires teaching skills, added “service,” “expert advice & assistance,” and a knowledge req (know a T org).
       3. Π arguing for specific intent (to further T activity) req
          1. Rejected. Cong added knowledge. Knows how to add specific intent if wanted to.
    4. Const as applied, terms sufficiently clear, knowledge req as safety valve – you know a T org, so you assume the risk.
       1. But independent advocacy is ok
       2. Decision clarifies that natl sec grounds are quite broad.
    5. Does this apply in inadmissibility grounds?
       1. Doesn’t – inA has lower knowledge (reasonably should know) standard, might sweep up more people
       2. Does – interpret whole code as coherent, so same standards should apply to very similar material support provisions.
          1. Policing the same activities.
          2. Also, not even clear that can make a 1A claim in imm context

## Criminal Law Grounds

* 1. Agg Fel is only a D ground, not an inA ground
     1. Deportability § 237(a): Agg Fel, drugs, crime of moral turpitude
     2. InA - § 212(a): Drugs, CMT
  2. Crimes of Moral Turpitude
     1. How to define? Subset of really vile crimes
  3. ***Marciano*** (8th 1971) pg 561
     1. Stat rape a CMT? Three approaches
     2. (1) Traditional (categorical approach)
        1. Not fact dependent – if can commit the crime w/o MT, then not CMT. Both under and overinclusive, but more under – higher burden on govt.
     3. (2) Pino approach
        1. If crime generally involves MT, irrespective of statutory elements of the crime. Also categorical?
        2. But stat rape is strict liability, unclear if MT.
     4. (3) Dissent (fact dependent)
        1. Look at facts of case, situation in which crime occurred to determine if MT was present. Costly on gov’t. Not same over/under probs of (1), but less predictable.
     5. But **how to define Moral Turpitude**?
        1. Courts have said fraud is.
        2. Community standards. But evolve over time. Whose community?
        3. State definitions of crimes – allowing state to define? Lack of uniformity in imm context.
           1. Let people into the country, not a state. But, any way around this?
        4. Federal common law?
           1. Voluntary and involuntary manslaughter, tax evasion are.
           2. Prison escape (natural to want freedom), smuggling an alien (helping a person), carrying a concealed weapon, aren’t.
        5. Intent has emerged as key
     6. *Silva Trevino* case (Mukasey/7th approach) – Look at statute, if possible to be convicted w/o MT, then look to facts – but IJs looking beyond the record! Looking at things not proven in crim proceedings.
        1. Should courts defer to BIA/AG judgment on CMT?
           1. Imm area of their expertise, but crimes are the courts’ area. But CMT is in imm code – Chevron less about expertise and more about where power delegated?

## Aggravated Felonies

* 1. Originally added in 1988 to address drug trafficking crimes, expanded and made retroactive in 1996 under IRIRA
  2. Defined in 101(a)(43) – murder, rape, illicit trafficking, crimes of violence
  3. Consequences
     1. Not eligible for most forms of relief from removal
        1. No cancellation of removal
        2. No voluntary deportation
        3. No withholding
     2. Barred for life from entering US w/o govt consent
     3. Detention mandatory during removal
     4. No judicial review of D order
  4. **What is a crime of violence**?
     1. ***Leocal*** (2004) pg 576 [Rehnquist] – FL DUI – crime of violence?
        1. Looks to 18 USC § 16 – use of force…v. person or property
        2. Statutory interp – DUI about negligence, not “employment” of force – narrower def of “use” than govt wanted.
        3. Court- Cong trying to get at violent crimes.
  5. If something’s a state felony but fed misD, AgFel? Fed felony but state misD?
     1. § 101(a)(43)(B)- …including a drug trafficking crime ( § 942(c) of Title 18 🡪 any felony punishable under Controlled Substances Act).
     2. ***Lopez*** (2006) pg 583– convicted of state felony, but it’s a fed misD – fall under (43)(B)? (No)
        1. Gov’t arguing it’s *punishable* under CSA, just not as a felony.
           1. Court – bad reading of statute – meant felony.

Also 942 isn’t about imm – read it in larger fed context

* + - * 1. Also, statute says “trafficking,” ∆ only convicted of possession – not in ordinary meaning of trafficking
    1. ***Guerrero-Perez*** (pg 576) – state misD, fed felony
       1. ∆, argues statute is called AgFel, he was only convicted of a misD. But, considered a felony federally – uniformity demands imputing that definition to the crime irrespective of how state charges. Also, AgFel is a term of art, Cong gets to define.

# Admissions Procedures

1. General (pg 503)
   1. Const required procedures are much lighter at A stage than removal stage.
      1. More protections over time for removal hearings that are exclusion hearings
         1. Can appeal denial of family visa to BIA (USCIS stage, in US)
         2. Appeal denial of emp authorization to AAO (USCIS, US)
         3. Basically no review if apply at consular office in another country, can appeal to head of the office, but it.
   2. Why less review?
      1. Persons abroad, who never enter US, have less interests to protect
      2. Consular office – interacting w/person, trust credibility determination more than those looking at docs.

## Expedited Removal (pg 506)

* 1. Adopted in 1996 to apply to ports of entry. Concern that people were entering w/fraudulent docs, seeking asylum, getting full benefits of removal hearing.
     1. Concern with sending all w/fraud docs back is that it is harsh to ask Ay seekers to have all their docs in order, may be failing in our obligation to not return people to persecution.
  2. Primary inspection – first encounter, may determine secondary inspection is needed (either bc docs lacking or look suspicious)
     1. Ay remedy – “Credible Fear Determination” made at secondary inspection
        1. Problems – happens w/in 48 hours – can’t get too deep, language barrier, determined by one person.
        2. More women rejected – we give less credibility to their persecution claims, less likely to talk about it in this context, less likely to make eye contact, LGBT women easier to cover.
  3. ER expanded in 2004 to within 100 miles of border, if not in US more than 14 days and not Mexican – can be put on plane back.
     1. Not Mexican’s bc they have been subject to immediate removal for some time.
  4. § 238 – Adminstrative Removal (sometimes called ER)
     1. When removing an AggFel (not LPRs).
     2. Less expedited than ER, can still see and rebut evidence, right to counsel at own expense.

1. Adminstrative Parole
   * 1. AG allows individuals in temporarily – no perm status.
     2. Meant as an emergency mechanism (see dying child)
     3. Legal status can be removed at any time, but sometimes last years.

## Adjustment of Status pg 508 (§ 245)

* 1. Not much sense in making people leave. Plus, charge $1k!
  2. Handled by USCIS
     1. Apply for AOS and visa together, applies same criteria that a consular office would.
  3. NOT available (§ 245) to non-C’s who worked before ok, if have unlawful status on day of filing
  4. A visa must be “immed available” at time the adjustment app is filed – when your priority date is reached or your preference category is current
  5. IRIRA – no review (including judicial) of any judgment regarding relief under 245 – applies to both USCIS and IJ decisions of AOS.
  6. **§ 245(i)**
     1. Allows people who entered unlawfully but who are otherwise eligible for a visa to adjust status – exempts them from disqualifications created by entry w/o inspection.
     2. Was important because used to allow you to not trigger § 212(a)(9)(B)(i)(I) (leave after 180 days, not admissible for 3 years) because you could adjust w/o leaving.
     3. Without, some people will never be LPR b/c of unlawful presence
        1. Why not remove the unlawful presence exclusion?
     4. Currently only applies to thos who filed petitions for imm classification or for labor cert before 2001.
     5. NOTE: §245(i) is notwithstanding the provisions of (a)-(c), so people who are disqualified under (c) may nonetheless be eligible to adjust status under §245(i)

# Removal Proceedings and Judicial Review

1. Removal Proceedings
   1. Begin with a Notice to Appear (NTA) – officially commences removal proceeding and vests jx in IJ.
      1. Detention mandatory for AggFels, some crime related grounds
   2. Required to give info on access to legal services and right to counsel at own expense. Miranda does not apply.
2. **Basic procedure of removal proceeding** (§ 287(a)) pg 649:
   1. ICE serves as prosecutor and must show by clear and convincing evidence that individual is not a citizen of the U.S.
   2. Burden then shifts to non-citizen to prove by clear and convincing evidence that he or she is lawfully present in the country, on some lawful immigrant or nonimmigrant visa
   3. Burden then shifts to ICE to prove deportability grounds by clear and convincing evidence
   4. If alien is found deportable, IJ then look at grounds for discretionary or other kinds of relief (asylum, voluntary departure, adjustment of status, etc.)

### Lopez – Mendoza (1994)

* 1. Whether an admission of unlawful presence made subsequent to an unlawful arrest can be excluded under Exclusionary Rule in RP.
  2. SC – Exclusionary Rule does not apply. 4th Amendment does, INS has separate scheme to protect 4A rights. Exclusionary Rule about cost/benefits in criminal, huge social costs if applied in imm.
     1. But, if evidence that 4A consistently violated, may change

1. Structure of Imm Adjudication
   1. DOJ 🡪 EOIR 🡪 BIA and OCIJ 🡪 IJ’s. BIA appl’d to Ct Apps.
   2. Cong, in response to Wong Yang Sun (1950) said the APA was not applicable to imm hearings.
   3. **IJs** now separate from enforcement.
      1. Actual vs. perceived indpendence, INS more likely to follow procedural rules
2. Problems with IJs
   1. Ct of Apps displeased – bad work, logic and reasoning. Bad attitude.
      1. Result of lack of familiarity w/countries and asylees, too many cases.
      2. No adequate check on IJs by BIA bc of 2002 reforms, so circuit courts bear the consequences
   2. Has become politicized also
      1. Pre 2004 – hired through EOIR
      2. Bush, shifted to DOJ and up to White House
         1. IJs are not political appointees, but were treated as such.

## BIA

* 1. Not created by statute, but by AG by regulation. Appointed and serve at his/her pleasure.
  2. Review appeals from IJs and certain USCIS decisions. Their decisions reviewable by AG, also courts of appeals.
  3. 1999 Streamlining – one member review and affirmance w/o opinion (AWO) in some situations
  4. 2002 – One member review the norm, reduced board from 23 to 11 (now 15), more deference to IJ factual findings.
     1. Battle backlog. Also political reasons (rid of all liberal IJs)
  5. 3 panel review for important or hard cases, 7 categories
     1. (1) clearly erroneous decisions (2) erroneous factual decisions (3) question of national import (4) wants to reverse BIA decision (5) new question of law (6) settle IJ inconsistencies (7) ?
  6. Capital Area Imm Rights Coalition v. DOJ
     1. Challenged streamlining as A&C under APA.
        1. Was notice and comment, justified changing its mind, had a study of streamlining. Not A&C
  7. Results of streamlining
     1. AWO hard for appeals to review – more taken to Ct App bc less confidence in outcome and don’t feel heard
        1. Appeals actually longer, prolong finality
     2. Bad decisions
     3. Appeals actually longer
  8. Suggested Reforms
     1. Encourage one member written opinions, more 3 member panels in complex cases, publish opinions as precedent.
  9. Or Major Reforms
     1. Create Article 1 courts w/trial and appellate bodies
     2. Ind Agency – (trial level ALJs and Commission at top) more permanence and development of expertise in the appellate body, exec would have some policy control, could only remove commission member for cause, rulemaking process would lend transparency, more prestigious (get better people).
     3. IJs become ALJs, have most decisional independence
        1. Politically impractical – take away power from AG
        2. Have an Art III appellate tribunal.
  10. How to balance accountability and independence – now, too much accountability.

## Right to Counsel

* 1. ***Lozada*** (BIA) – though no const right to counsel, do have const right to fair hearing, and if your counsel interferes with that right, there was a const violation. Error needs to be egregious
  2. ***Compean*** (BIA 2009) – Mukasey certified case to himself, overturned Lozada – if no right to counsel, how a right to effective assistance of counsel
     1. Holder vacated – going through rulemaking process, defining how to procedurally and substantively define IAC.
  3. ***Padilla v. KY*** (2010) - ∆ here for 40 yrs, caught with pot, told to plead guilty as wouldn’t have D consequence. Lawyer wrong. Argues IAC.
     1. Maj – if clear D is a result, explain. If less clear, don’t have to explain, but do have to say there may be D consequences.
        1. What is clear?!
        2. Too great a burden on crim defense lawyers? What if ∆ can’t afford an imm attorney?
     2. Concur – stupid test. Need only say there may be D consequences and can’t mislead.
        1. But would this incentive silence, so as not to mislead.
     3. Scalia – if duty to warn, why only this collateral consequence? Slippery slope – also have to warn about others. But are there others that might raise same DP concerns as D?
     4. Does this move toward categorizing D as a penalty?
  4. “privilege at no expense to gov’t”
     1. No right, but Clinton INS interpreted as govt CAN’T pay, even if wanted.

## Administrative Review

* 1. Must precede judicial review – exhaust all admin remedies by right. Appeal IJ decision to BIA, 2 kinds.
     1. Motion to Reopen
        1. New facts found, weren’t presented, and couldn’t have been discovered at the time of the first hearing.
        2. Need prima facie case for relief- can’t be irrelevant fact
        3. Must file within 90 days
        4. Can’t file if left country – problem if agreed to voluntary D – if stay & file, then in non-compliance with VD, but if leave, have to forego motion.
           1. *Dadda* – if motion to reopen, can withdraw VD
     2. Motion to Reconsider
        1. Call attention to errors of law.
        2. Have to file within 30 days

## Judicial Review (§ 242)

### Habeas

* + 1. Opp to challenge legality of detention only – usually requires a const claim
       1. Padilla arose on habeas
    2. Pre 1961, was the only way to challenge D orders
       1. But only worked for those in custody.
  1. APA- presumption of JR unless Cong says otherwise.
     1. Marcello – 1955 – Court holds APA doesn’t apply to D proceedings themselves
  2. 1961 – Cong amended INA, scheme of review
     1. E orders could be challenged only in district court via habeas
     2. D, sole review was Hobbs Act (pg 760) – review to Ct of Apps.
  3. 1996 – major changes – AEDPA, IRIRA, Welfare Act (later supplemented by REAL ID act)
  4. **AEDPA** (Anti-terrorism and Effective Death Penalty Act)
     1. Limited to 1 habeas filing, high standard of review, limits scope of review for removal orders
        1. No review for AggFel or drugs
  5. **IIRIRA** (Illegal Immigration Reform and Immigrant Responsibility Act)
     1. Expanded AggFel grounds, limited forms of relief, created today’s system of JR.
     2. Also created 287(g) program delegating power to state and localities.
  6. **Welfare Act**/PRWORA
     1. Limits access of certain non-Cs to certain benefits. States determine eligibility.
  7. How much should Cong be able to strip jx?
     1. Const - Suspension Clause issue
        1. Usually fails – Cong can strip in the imm context, but in 1996 unclear if can strip habeas altogether or not.
     2. Separation of Powers – court’s job, but not original jx, Cong does have power.

1. **§ 242** (as amended by IIRIRA)
   1. (a)(1) **Hobbs Act Review** – norm is to petition the Ct Apps, no review for expedited removal (242(e) – challenge ER by habeas – argue that a C/LPR and not meant to be subject to ER)
      1. Now E and D also go through Hobbs Act, no habeas.
      2. Is Hobbs an adequate substitute for habeas?
         1. Lose a layer of review (Dist Ct), time restriction is huge)
   2. (b) process for filing petitions – 30 day time limit, review of admin record only, not facts
   3. (a)(2) – **jx stripping**
      1. (A) – limits review in 235(b) – ER
      2. (B) Denials of discretionary relief (waivers, cancellations) are not reviewable – not about law, about discretion, no need to review.
      3. *Kucana v. Holder* (supp) – denials of motions to reopen and reconsider are reviewable – statutory interp, didn’t fall under title, as they are authorized by regulation. (but regs adopted pursuant to authority under the Title, so not slam dunk statutory interp).
      4. (C) Criminal grounds – no review of D orders for AggFels, CMT, or drugs
      5. (D) Added by REAL ID, **preserves JR of const Qs and Qs of law**
         1. Meant to keep statute const.
         2. But, is cruelty a Q of law, or discretion? Pg 765
            1. What is a Q of law? Include application of law to fact? If not, does that preclude the *substance* of habeas review – challenging detention in an individual case.
   4. Is this an adequate substitute for habeas?
      1. Boumediene- substance, not form, is what matters for habeas.

### *INS v. St. Cyr* (2001) pg 775 [Stevens]

* 1. Two stages of **Removal Process**
     1. (1) **Eligibilty** – are you deportable?
     2. (2**) Relief determination** – waivers, cancellation, VD. 2 parts.
        1. (2-1) Eligibility for relief (legal determination)
        2. (2-2) AG decides if get relief (discretionary determ)
  2. Question – can a non-C barred from judicial review by § 242(a)(2)(C) still file a **habeas**?
     1. This is pre-REAL ID, which now says notwithstanding 28 USC 2241 (habeas clause).
  3. ∆, C of Haiti, in US for 10 years. Pled guilty to selling a controlled substance, right before the two acts. INA § 212(c) (LPR here for 7 yrs could apply for a waiver), would have been eligible, before two acts. D hearings after 212(c) repealed by Acts.
  4. ∆ saying should get to be *considered* for 212(c) relief
     1. Court – eliminating 212(c) retroactively would have been a new legal consequence, Cong should have been clear.
     2. So 212(c) applies to St. Cyr.
        1. But, **does court have jx to tell AG that**?
  5. **Does 242 strip 2241 jx**?
     1. Won’t presume Cong meant to- has to be clear, bc may present a const problem – clear statement rule.
     2. Also presumption of JR.
     3. But was there a clear statement – title of section “eliminates review by habeas” – Stevens avoided by saying “habeas” wasn’t actually mentioned in section, only JR.
  6. **Suspension Clause – is there a *right* to habeas** in it? Doesn’t actually say what habeas IS. Is there a Const minimum?
     1. Is what St. Cyr asking for in this conception?
     2. INS arguing this is beyond the 1789 conception
        1. Court – the history is inconclusive. Also look at historical practice since, expanding (Scalia- this is a one way ratchet)
  7. Scalia arguing strange result – so now, criminals can file habeas, whereas others can only file for review. More rights if criminal.
     1. But policy anomaly may not be a legit consideration in const interp.

1. When Habeas Available?
   1. Constitutionality/legality of detention
   2. Damages claims based on violation of const rights independent of R order.
   3. Failure to adjudicate imm benefits petition.
2. How does Boumediene affect St Cyr? Confirms 4 basic things
   1. (1) Const min of habeas exists, unclear what the min is though.
      1. Cong thinks REAL ID is the min.
   2. (2) 1789 is, at minimum, the floor
   3. (3) Suspension clause applies to non-Cs also. Includes non-enemy aliens and possibly some enemy aliens
      1. Bc extends to effective control areas, also to E proceedings (Mezei)?
         1. DC Circuit said no in *Kiyemba*. Habeas courts must have the ability to order release.
   4. (4) Const requires greater possibilities for review wtr exec detention.

# Relief from Removal

## Cancellation § 240A

* 1. Written into law in 1996, replaced former § 212(c) that St. Cyr was seeking
     1. Limits scope – no more than 4000 a year (with some safety valves) for Part B.
     2. Bars JR of most discretionary determinations, AggFels not eligible.
  2. **1st Prong/”Part A” – LPR for at least 5 yrs, continuous residency for 7.**
  3. **2nd Prong/”Part B” – for non-imms and persons who entered w/o inspection – must show hardship, continuous presence for 10 yrs**.
     1. Two hurdles
        1. Establish statutory eligibility
        2. Then receive favoarable exercise of discretion
     2. Most commonly used by non-C’s out of status, but LPRs who don’t qualify for A can still use B.
     3. If granted, removal canceled and get LPR status.
  4. **Hardship** has fluctuated between “exceptional and extremely unusual” and “extreme”. Burden on non-C to prove, have evidence/affidavits
     1. Separation from family/livelihood aren’t unusual.
        1. Economic detriment not enough (INS v. *Jong Ha Wang* pg 608)
     2. Family always been in US, don’t speak native language, etc. may count.
     3. ***Matter of Recinas*** (BIA 2002) pg 618 – adult, 4 young US C kids 2 Mex C kids – heavy financial burden, lack of support from father, US kids don’t know Spanish, all extended family in US lawfully, no family in Mex. Qualifies, but on outer limits of what does.
     4. If illness where treatment could only be in US.
     5. If circumstances change after proceeding but before actual removal and become eligible, can move to re-open. Denial appealable to BIA.
  5. IRIRA –
     1. relief available to both inA and D nonC’s, even when the particular charge doesn’t rest on entry or admission.
     2. § 306(a)(2) No JR of any judgment granting relief under 240A.
  6. **Continuous Presence**
     1. Stop-time rule – continuous residency clock stops when NTA served, reduces incentive to prolong the proceedings
     2. 2 bright line rules
        1. Can’t have a single absence of more than 90 days
        2. Can’t have cumulative absences of more than 180 days.
     3. Some victims of abuse, presence req is only 3 years.

## Voluntary Departure § 240B

* 1. Non-C can leave of own accord, pay costs, not subject to 10 yr limitation of return (bc doesn’t have entry of Removal)
     1. Not available for AggFels
  2. Pros for non-C
     1. Speeds up process, not in detention
     2. If later enter w/o inspection, only a misdemeanor bc no removal order on your record (otherwise a felonyP
  3. Saves gov’t money, space, resources, expedites.
  4. If get VD and then don’t leave, ineligible for most remedies for 10 yrs.
  5. 240B(a) – either in lieu of R proceeding or before R proceeding complete
     1. May be required to post bond, get as long as 120 days to leave
  6. 240B(b) – at conclusion of R proceeding
     1. additional ineligibility grounds, bond is mandatory, only 60 days.

1. Other forms of relief pg 625
   1. Registry
   2. Private Bills
   3. Adjustment of Status

Other Topics in Immigration and Asylum Law

# Refugee and Asylum Law

1. Forms of relief
   1. Refugee
   2. Asylum
   3. Legalization
   4. Registry provision (register if here for # of year, qualify. Outdated, current date to be here since is in the 70s)
   5. Prosecutorial discretion.
2. Lot of ambiguity in the law. Outcome depends a lot on the judge and jx.
   1. Important issue in R hearings, as it operates as kind of relief.
3. UN High Commission on Refugees has 2 missions
   1. (1) Protection
      1. Article 33 – **Non-Refoulement**. Don’t send someone who is present in the country back when a well-founded fear of persecution.
         1. No obligation to *accept* refugees.
         2. No int’l human right to asylum.
   2. (2) Finding a permanent solution

## Defining Refugee

* 1. **§ 101(a)(42):** [persecution or well-founded fear of persecution] [on account of] race, religion, nationality, [political opinion] or membership in a particular [social group] (and unable/unwilling to return bc of this fear).
     1. Groups left off for many reasons – trying to get to a certain type of individually targeted form of oppression.
     2. Ones left off may be temporary situations, home country may be able to provide relief, inequalities are always present.
  2. “**Well-founded**”
     1. (a) possess characteristics the govt seeks to overcome by means of punishment
        1. 9th cir rejected that the suffering must be *in order to* punish.
     2. (b) govt aware or could easily become aware of his possession of the characteristic
     3. (c) capable of punishing him
     4. (d) inclination to punish him

## Refugee Selection

* 1. Prez sets the # of people who enter on a yearly basis.
     1. Prez supposed to consult with Cong. What does that mean?
     2. Prez better able to respond quickly, more insulated from politics, more aware of foreign policy concerns/info
        1. In a way, a restriction on Prez’s original parole power – more transparency here, Cong has input.
  2. Admin agencies decide how to allocate the visas according to the criteria the statute sets out. Must advance humanitarian interests of the US. Processes visas while refugees are still in countries of origin.
  3. Subject to criteria – can’t be resettled elsewhere, have to be admissible (some waivers, like for membership in totalitarian party, but not for controlled substances, terrorism, foreign policy concerns)
  4. Preference scheme developed by USCIS and State, 3 priority levels
     1. Individuals referred by UNHCR, US embassy, or an NGO
     2. Admissions on group basis
     3. Nationals of designated countries w/family relationships in US.

1. **Withholding vs. Asylum**
   1. Withholding long present, in 1968 became mandatory, in 1980 complemented by adopting asylum
   2. Often, an app for ay will include one for WH also, app for one treated as app for the other.

## Asylum § 208

* 1. Two types of ay apps
     1. **Affirmative**
        1. File before removal initiated. Ay admin officials in USCIS to review these.
     2. **Defensive**
        1. Claim raised during R proceedings and adjudicated by IJs.
  2. Allow people to remain at least temporarily, within a year can become perm.
  3. After eligibility determination, is a **discretionary grant**.
  4. **Standard: “on account of” or “well-founded fear of” persecution**.
     1. Reasonable person. Book - 1 in 10 chance. C-Rod – 25%
     2. Subjective component of fear (though still have to show evidence of the risks that justify the fear)

## Withholding of Removal § 241(b)(3)

* 1. Prohibits returning persons to country in which person is persecuted (nonrefoulement). Temporary (potentially permanent, of adjustment becomes possible or is authorized by Congress)
  2. After eligibility determination, mandatory to grant (to accord w/int’l obligations)
     1. Convention has legal exceptions: serious int’l crimes, serious nonpolitical crime, and in US since 1996, AgFel.
  3. **Standard of Review: “life or freedom” “would be threatened**.”
     1. More likely than not standard.

### *Matter of Acosta* (BIA 1985) pg 895

* 1. El Salvador, founder of COTAXI, life threatened by guerillas, several drivers killed, cab burned, in US.
  2. No actual fear of gov’t, as threats not from them. Facts have changed, no longer possesses the characteristics the guerillas were targeting.
  3. Even if was well-founded, doesn’t fit into a refugee category.
  4. Not unable to return to country – could go to other cities.
  5. “*Traditionally, a refugee has been an individual in whose case the bonds of trust, loyalty, protection, and assistance existing between a C and his country have been broken and have been replaced by the relation of an oppressor to a victim*.”

1. **Evidence**
   1. Objective evidence. Country conditions.
   2. Corroboration helpful (testimony, documents)
   3. Story of individual persecution – credibility is huge.
      1. Problem with relying on credibility so much
         1. People hesitant to talk, judge biases, lack of eye contact seen as not credible, effects of PTSD misunderstood
         2. Hard to appeal.
2. ***INS v. Cardozo-Fonseca*** (1987) pg 999
   1. Question is whether Ay § 208’s “well-founded fear” incorporates the more-likely-than-not standard from withholding.
      1. No, they are different.
      2. Cong intended to use different language, wanted a different standard.

## Harm

* 1. Mere harm vs. persecution?
     1. Persecutor intent doesn’t matter, but it matters whether it was done for one of the grounds of persecution, whether there was some objective suffering, and it is enough that the person experienced it as harm.
     2. Intent to punish is not relevant.
  2. **Individualized harm**
     1. Generally harsh conditions aren’t enough.
        1. ***Chang*** (BIA 1989) pg 913 – one child limit was not persecution. Forced sterilization not technically involved, but BIA hinted that still wouldn’t be enough. Bush and Cong, forced sterilization is persecution.
     2. But general circumstances don’t negate harm if there is an additional showing of individualized harm (9th Cir).
     3. Generalized harms to a particular group give a presumption of persecution, bc well founded fear supported
  3. *Acosta*, **harm definition** reaffirmed
     1. **Deprivation of life or physical freedom**, or severe targeted economic deprivation. Holistic analysis.
     2. Other countries – deny human dignity

1. Persecution examples
   1. Forced sterilization
   2. NOT economic deprivation generally, but maybe specific, targeted upon an individual would be.
   3. Excessive penalties on account of one of the grounds of persecution. Hesitant if penalty is after a trial, but perhaps if SO disproportionate like DP for theft or stoning for adultery.
   4. NOT forced conscription.

## Nexus requirement

* 1. Must be a connection to the motive of the persecutor
     1. A motive to overcome [protected ground], rather than a motive to harm.
  2. “**on account of**”- Protected ground doesn’t have to be the sole motive for persecution, but must be central to the persecutor’s motive.
  3. ***INSv. Elias – Zacarias*** (1992) pg 918
     1. Like Acosta, denied Guerillas, asking for Ay.
     2. BIA says guerillas were not acting “on account of” political opinion of ∆ - were acting to further own goals.
        1. No evidence that EZ refused guerillas on political grounds rather than fear
     3. Scalia – statute about protecting people who act on their own, disfavored political beliefs and are persecuted for it, not deterring guerillas.
     4. **Neutrality** as a political opinion? Left open.
        1. If not, are we only protecting extremism? Resisting the debate is a political position.
        2. Stevens thinks so.
  4. **Doctrine of Imputed Political Opinion**
     1. If refuse guerillas, do they impute a political opinion to you? Can this count as persecution, even if person didn’t have a political motive?
     2. Pretextual? What evidence to show? Separating political motives from other motives is hard.
     3. Left open by Elias-Zacarias.
        1. Scalia doubtful, INS thinks it’s good.

## Social Group

* 1. *Acosta* basic definition: **immutability** defines the group (e.g. sexual orientation and gender) or **characteristics that we ought not expect people to chang**e, even if they are not immutable
  2. BIA adds two more
     1. **Visibility** – society perceives group to be salient
        1. Theory that if not visible, tough to persecute. But, if you fear persecution, you try to be invisible! (Posner)
        2. “social” modifying “group” – implies role in society.
        3. Double edged sword- removes some groups, but may add some that are more visible but not necessarily united by an immutable characteristic, but should be protected.
     2. **Particularity** – particular enough to define, not too amorphous.
  3. More narrowly you define a group, more likely you are able to show all the members are persecuted. Larger the group, harder to show “on account of.”
  4. Gender
     1. Explicitly a social group under UNHCR, INS guidelines recognize and state that sexual violence can count as persecution.

### Fatin

* 1. Iranian woman, pushes for 3 definitions of social group
     1. (1) Women in Iran
        1. Says possible, but no evidence pers on account of woman – such a large group makes ‘on account of’ tough
        2. Was a different case where IJ found woman as SG.
     2. (2) Women who don’t want to conform
        1. Fatin here. Forced veil doesn’t rise to level of pers.
        2. Might have won if could show abhorrent to wear the veil, no real difference btwn the lashes of punishment and wearing the veil.
     3. (3) Iranian women who refuse to conform to gender laws
        1. No evidence she refused. Refusing as a sign of the importance to the victim of not conforming – harsh punishment.
           1. Too much to ask someone to suffer this kind of harm to qualify as a refugee?

### Actions by non-state actors

* 1. If carried over framework to non gov’t actors?
     1. Floodgate of cases. Many problems are universal and Ay won’t solve them.
     2. Point of refugee is to protect them from the state – asylum as a substitute for state protection where state has broken down.
  2. What if state can’t protect or prevent persecution? Such as rebel groups, or domestic violence.
     1. Germany – state must be involved or somehow complicit – passive toleration counts. Some concept of blame
     2. US/NZ – **state is unable or unwilling to stop persecution**.
  3. What is “unable to protect”?
     1. *DeShaney* – child absue, child services didn’t intervene despite being aware of what was going on. Mother sued on EP and DP. Claim failed as not state action.
     2. When state inaction and when a policy decision? *DeShaney*, issue of intrusiveness was a policy reason.
     3. What is lack of capacity? Had capacity in *DeShaney*, decided not to.
  4. Factors to look for
     1. Evidence of knowledge – police reports, testimony from neighbors (common knowledge)
     2. Could you find protection elsewhere in the state?
     3. Cultural evidence (controversial)
     4. Comparative ability of US to protect? DV here!

## Convention Against Torture

* 1. US ratified in 1994. Is a **nonrefoulement** provision – relief is mandatory.
     1. Don’t return if **substantial** grounds for believing they’d be tortured
        1. We have interpreted substantial as **more likely that not** (that you *will* be tortured, not that you believe you would be).
     2. US added provision bars aliens that fall within 241(b)(3)(B) – past persecution, serious crimes, terrorist acts, etc. outside the US.
  2. File for CAT relief, say being tortured. Two kinds of relief (diff than CAT)
     1. **Withholding of Removal** – (if no in 241(b)(3)
     2. **Deferral of Removal** – wait to remove you until the danger is over. Applicable to those who fall in 241(b)(3). Easier to revisit case later and send someone back.
     3. CAT relief not permanent.
  3. Look at actual requirements of convention, **Article 33**.
     1. Severe mental anguish.
        1. Senate interpreted – require the mental anguish to have some relationship to mind altering state that includes the imposition of mind altering substances.
     2. Confinement probably not enough.
     3. Exception if incidental to lawful sanctions.
     4. Targeted at eliciting information
     5. Senate requires an imminence requirement.
  4. Judicial Review
     1. § 2242(d) – eliminates it, at least w/r/t review of permissibility of regulations.
     2. REAL ID – re-includes review of final orders of removal
     3. Violation of the CAT? Unclear

## Interdiction

* 1. Began before/with Reagan and mass Haitian exodus. Costs of detaining/paroling too high, led to tightening.
     1. 1992, Bush I began returning people w/o any screening (used to get some on boat), Clinton continued til 1994.
  2. When stopping imms on the high seas
  3. Justified on two grounds
     1. **§ 212(f)** – catch all, allows Prez to prevent entry to any alien if Prez finds that entry “would be detrimental to the interests of the U.S.”
     2. Prez inherent authority as **Commander in Chief**, using Coast Guard.
  4. Important policy tool bc of: cost – cheaper to turn away, avoid thousands of Ay hearings (implies we think nobody qualifies for Ay), distance ourselves from int’l obligations, prevent people from risking high seas. Encourages people to not come.
     1. But ignore legit Ay claims.
  5. Consistent with withholding obligations?
     1. *Sale* says yes.
  6. ***Sale v. Haitian Centers Council*** (1993) pg 1065 [Stevens+7]
     1. Dispute over what “return” means
        1. Court says “return” just another way of saying “exclusion,” doesn’t apply bc they aren’t at our borders.
        2. Relying on American law to interpret int’l history.
     2. Argue doesn’t apply, bc basically means exclusion- applies at the border. But, Cong knows the term exclude, didn’t use it.
     3. Argue in 1980, replaced “within US” with “return” to remove distinction btwn excludable and deportable
        1. Blackmun – this was meant to remove geographical limitations. Don’t presume US only – not ambiguous, meant to not have geo. limitations.
     4. Argue that “AG shall not deport” separates exec, this is the CG acting.
        1. Blackmun – statute meant to bring US in line with Convention, AG is just shorthand. Statute also says AG’s delegates, CG acting as AG delegate.
        2. CG now in DHS, so this issue wouldn’t arise today.
     5. Blackmun vehement dissent – you’re warping the word’s obvious meaning!

# Illegal Immigration

1. History and stats
   1. There are 11mm unauthorized imms in US. About 30% of foreign born pop are unauthorized. About 50% here unlawfully are Mexican, another 22% from Latin America. Substantial number in last decade. About 60% entered w/o inspection, about 40% are visa overstayers.
2. Enforcement
   1. (1) Border Enforcement
   2. (2) Interior Enforcement
   3. (3) Attrition – adopting policies that make life so bad, encourage self-D.

## Border Enforcement

* 1. Run mostly by CBP, some ICE involvement (overlapping jx, border seen as going into interior)
  2. (1) Fencing (low tech). Motion detectors, lighting, cameras, drones (high tech)
  3. (2) People – increase risk of apprehension
  4. Beefed up major entry points, but channeled elsewhere
  5. (3) Crim sanctions at the border – up the ante. Now, Operation Streamline - can plea to a misdemeanor of illegal crossing, raises cost of future re-entry.
  6. (4) Anti-trafficking laws – aimed at the coyotes and smuggling
  7. (5) Cooperation w/foreign officials – information sharing across the border too.

## Interior Enforcement

* 1. Run by ICE
  2. **Mainly ER sanctions**, Home raids (not done by this administration), Task forces related to gangs, drugs, crimes
  3. **IRCA** - Strategy that focuses more on ERs or EEs – eliminate incentives w/in
     1. Exacerbate problems in the workplace?
  4. Try to get to people who overstay
     1. But if sanction ERs, may not hire temp visas bc afraid will expire and they’d be punished.
     2. Track more? But concerns of harassment.
  5. Shift costs to private sector – but Americans have an anti-regulatory bias.
  6. Better screening – more input on who stays/goes – fence is unilateral

### Hoffman Plastics v. NLRB (2002) [Rehnquist]

* 1. What constitutes “knowledge” of someone’s undoc/illegal status?
  2. Undoc Imm (UI) got job with fraudulent docs. Was illegally fired for union activity**. NLRB awards back pay. SC reverses**.
  3. Court cites two cases (sit-down and mutiny), court ruled those who engaged in illegal activity couldn’t be awarded backpay despite labor violations
     1. There, the reason for the discharge was also the unlawful act.
     2. Breyer – fired here no connection to UI act – was a purely unlawful labor practice.
  4. *Sure Tan* – backpay not awarded bc UI would have to re-enter country. But not case here. Doesn’t really address Sure Tan, goes right to merits.
  5. IRCA and NLRA in conflict. IRCA later, may be relevant.
     1. Maj – Cong would not have intended for UI to get awarded for work that could not have been done lawfully and was procured through fraud.
  6. Breyer – absurd for maj to say awarding backpay would create ill imm incentives.
     1. **Maj focuses too much on IRCA, fails to consider the impact of the ruling on the labor law regime**.

1. **Spectrum for remedies that can and cannot apply** – issue is where backpay applies
   1. Reinstatement – would be inconsistent with IRCA.
   2. Pay for work done – Fair Labor Standards Act, nor IRCA conflict (and to not might conflict with 13A)
   3. Court thinks backpay is closer to reinstatement.
      1. But lost wages if injured (Madeira), but not for products liability.
   4. Title VII? *Rivera*.

### *Rivera v. NBCO* (7th 2004): ER can’t inquire into imm status of Title VII π.

* 1. ER had sought status in discovery, said might be relevant to remedies.
  2. This is a court balancing, not an admin – more competence?
  3. Also, bc about discrim, may balance different.
     1. IRCA not undermined in same way
     2. Title VII meant to be given broad effect.

### *Balbuena* (NY 2006) pg 1223

* 1. Most cases after Hoffman were state cases
  2. Rejected challenge to application of NY worker’s comp to unauth worker.
     1. State interpreting state law.
        1. State workers comp in heart of state police power
     2. This is about personal injury – injury is not unlawful, no worker misconduct. Strong interest in preventing ER misconduct.
  3. Here, no fraudulent docs. Diff if had been?
  4. Fed law preempt?
     1. **Distinguish from Hoffman – here, remedy is to make someone whole**, whereas backpay for work never done is more of a collective remedy in the sense of promoting broader policy objectives.
        1. Also, really no argument that it will encourage ill imms.

1. *Madeira v. Affordable Housing* (SDNY) – undoc worker injured, not precluded from seeking lost wages b/c didn’t present fraudulent docs (affirmed by CA2).
2. Legalization pg 1178
   1. Why do we want?
      1. Economics – inevitable that there will be ill imms
      2. Family unity/social cohesion – humanitarian concerns
      3. Social costs – health, safety, growing inequality
      4. Democracy costs – subject to laws, but can’t vote. Fairness. Don’t want a constituency who isn’t heard
      5. Externalities – costs on similarly situated workers, citizens getting social security no-match letters, inconsistent w/economic growth
      6. Resources- frees up enforcement resources
      7. Improved working conditions/tax revenues
      8. Reciprocity – by virtue of their contributions, have earned right to recognition.
   2. Mechanisms of Legalization
      1. 1986 – IRCA mass legalization of 2.6m people
         1. But have to wait til a critical point. Political opponents can extract major concessions.
         2. But periodic amnesty doesn’t incentive ill imm as it is never certain
      2. Registry
         1. On what considerations?
         2. How to NOT incentivize future ill imm?
      3. Rolling legalization (France)
         1. INA registry originally meant to do this, but not functional, as currently requires a pre-1972 entry.
      4. Admin – prosecutorial discretion, parole in place, deferred action
      5. Prevent ill imm in future
         1. Temp worker program
         2. Open borders system
         3. Invest in economic development of other countries
      6. Make adjustment and cancellation of removal Part B easier
      7. Localize the process – allow states to decide who to legalize (would need some mechanism for federal recognition)
   3. Factors to Consider
      1. Presence – set length of time to ensure contacts, but not encourage ill imms.
      2. Proof of employment and paying taxes
         1. But emp is supposed to be unlawful
      3. Likelihood to become a public charge
      4. Point system?
      5. Waivers/immunity from D for people who don’t demonstrate criteria
         1. (so if you apply and don’t get legalization, you aren’t D)

# Federalism

1. Who has the power to regulate Imm and what is the scope of that power?
   1. Many cases today about preemption
   2. *Graham* - Lays out federalism theory for why states can’t discrim against aliens – but that was LPRs - What about UIs?
      1. Case about AZ SB1070 survived because it stated as claim as to EP
   3. *DeCanas* is the main case on state’s ability to regulate ill imms.
2. Three kinds of laws at issue
   1. (1) ER sanctions
      1. Hazelton – if hire a UI, can you have your biz license revoked? Can a state make E-Verify mandatory?
   2. (2) Landlord sanctions
   3. (3) Ways in which state/local police participate
      1. Programs where fed authorizes
      2. States assert own authority

### *Graham v. Richardson* (1971) pg 1244 [Blackmun]

* 1. States conditioning welfare benefits on C status. Held no, can’t.
     1. EP and preemption arguments.
  2. Q- do states have more authority if UIs?

## Constitutional Pre-Emption

* 1. Const has delegated (explicitly or structurally) power exclusively to fed gov’t.
  2. State can’t regulate at all, even if Fed has no law on the books
  3. Also comes up in foreign affairs.

## Statutory Preemption

* 1. When Cong has passed a statute that preempts a state from acting
  2. **Express pre-emption**
     1. Express statement in statute saying state and local laws are pre-e.
     2. IRCA – language that preempts states from imposing add’l crim or civil sanctions relating to employment or UI’s
        1. Savings clause – except through licensing (issue in Hazelton)
  3. **Field Pre-emption**
     1. When fed reg scheme is so comprehensive that it occupies the field such that it is reasonable to infer that Cong left no room for states to supplement.
     2. Hard to prove, rare. Has to be really extensive. Depends on how you define the field
  4. **Conflict/Implied Pre-emption**
     1. If a s/l law makes it impossible to enforce the fed law
     2. If a s/l law is an obstacle to enforcing or thwarts the fed purpose.

### *DeCanas* (1976) pg 1251

* 1. CA labor cord – no ER shall knowingly employ an alien not entitled to lawful residence in the US if emp would have an adverse effect on lawful resident workers.
     1. Unclear if conflict with fed law at the time (pre-IRCA)
  2. Some room for state regulation where within state police power and affects immigrants that is not “immigration regulation”
     1. **Where is the line between affecting imms and immigration regulation**?
     2. **Imm reg – statutes affecting entry/exclusion and terms and conditions of their residence in the US, basic contours of their status**.
        1. But what are T&C?
  3. Remanded on implied conflict pre-e, ask CA to interpret their law, ask if conflicts with federal. IRCA passed in meantime, clearly pre-empts.
     1. Was also a field pre-e claim, but failed.

### *Hazelton* (3rd) supp (and comparable 9th Cir case just argued at SC)

* 1. Statute at issues takes away a biz license from employers who employ UIs.
  2. **ER Sanctions**:
     1. Dist Ct:
        1. Found express pre-e: taking a license is so extreme as to be a sanction, absurd if you can’t fine but you can kill a biz.
        2. (But textual ordinary meaning – just means licensing?)
     2. 3d Cir- rejects express pre-e, but says there is conflict pre-e.
        1. Make sense if expressly saved, but still in conflict?
        2. Cong had limited info when adopted, would not have adopted state policies that undermines the scheme as a whole
        3. Court notes 3 priorities of IRCA
           1. Controlling hiring of unauth workers
           2. Not creating incentives for discrim
           3. Not overburdening ERs.
        4. Local law places too much emphasis on controlling hiring of unauth workers at expense of other goals.
     3. 9th – no pre-e, conflict or express.
     4. **Note: § 274A is about unlawful employment of aliens**.
  3. **E-verify mandatory**
     1. 3d- conflict pre-e. Cong made it voluntary. Requiring it can impose burdens on ER’s (high error rate), Cong wanted flexibility.
     2. 9th – Not necessarily an obstacle – Cong never said states couldn’t require participation.
     3. Ill case – tried to forbid ER’s from using E-Verify, was pre-e: Cong wanted it to be available, can remove a fed tool off the table.
  4. **Housing laws** (not as prevalent)
     1. Presumption Against Pre-e: presume, in favor of state law to ensure courts don’t over-interpret to displace legit state law. Also, states have residual power, fed enumerated, so assume fed smaller, more limited).
        1. Court rejects the presumption againt pre-e here.
           1. Law clearly about about preventing certain non-Cs from living in H, not in traditional state power. About movement of imms, clearly in fed power.
           2. Does this regulate movement more than ER sanctions? Court says yes – directly about where imms can live. But not that different. Also, aggregate effect.
     2. **Pre-empted**
        1. Const feel, maybe field.

### 287(g) –

* 1. DHS enters agreements with jx’s, local police can enforce imm laws Const?
     1. Graham dicta – Cong can’t delegate outside it’s const authority – if plenary authority to enforce imm laws, then it can’t delegate that power to the states.
     2. But, gov’t is still in charge – shouldn’t they be allowed to delegate, like choice to deny/not deny benefits (Shalala?)
     3. Plyler – if Cong had invited schools to exclude kids, may have been ok.
  2. Policy arguments
     1. Maybe S/L are more influenced by local bias?
     2. S/L more inclined to enforce imm laws more broadly b/c nature of their jobs? Affect prosecutorial discretion.
     3. Police less trusted in community if will be asked about status when crimes are reported.
        1. CA has explicit policy against this.
     4. BUT, so many more points of contact (force multiplier) – more efficient.

### SB1070

* 1. AZ law requires S/L police to ask about status during any lawful contact – stop, detention, arrest. Most extreme of these laws
     1. NJ – inquire when arrest someone
     2. Other states require cops to cooperate w/ICE in investigations
  2. Pre-emption?
     1. Dist Ct – yes, bc federal level would have to respond to local laws
     2. Also EP fear, harassment of citizens and interfere w/liberty of people who are here legally.