**I. Constitutional Foundations**

**Citizenship**

* Jus Sanguinis—Entitlement to citizenship on the basis of one’s parentage or ancestry.
* Jus Soli—Entitlement to citizenship on the basis of the place of one’s birth.

|  |
| --- |
| *US v. Wong Kim Ark* (1898)—Ark was born in the US to non-citizen parents themselves ineligible for citizenship. Established that the phrase “subject to the jurisdiction [of the US]” must be interpreted to grant *jus soli* citizenship to all born in the US, with the sole exceptions of children born to diplomats or foreign soldiers during wartime. |

|  |
| --- |
| *Yick Wo v. Hopkins* (1886)—San Francisco passed ordinance granting city discretion to close laundromats in wood buildings; only Chinese-owned laundries were closed. They challenged under Equal Protections and own.   * Discriminatory application of law based on race/nat’l origin violates Equal Protections. |

**Federal Power to Exclude and Deport**

* Page Act of 1875: Banned immigration of Chinese women
* Chinese Exclusion Act of 1882: Banned immigration of Chinese laborers
* Geary Act of 1892: Extended Chinese Exclusion Act; required Chinese non-citizens to carry resident permits; and made failure to carry permit punishable by deportation or one year’s hard labor
  + Remained in effect until 1943.

|  |
| --- |
| *Chae Chan Ping v. United States* (1889)—P visited China after obtaining re-entry certificate, which was then invalidated by the Scott Act. Sued arguing he had right of re-entry. Ct. used the case to speak at length about fed. gov’t’s power to regulate immigration. Upheld his denial of entry. |

|  |
| --- |
| *Fong Yue Ting v. United States* (1893)—Ps were required to present a “white witness” to their prior residence after being found w/out a resident permit. They challenged the Geary Act arguing denial of due process. Ct., relying on *Chae Chan Ping*, ruled that state has the power to deport, and the “white witness” req. was legitimate.   * Established the state’s power to deport and that deportation is not a punishment. |

**Early Limits on Federal Immigration Power**

|  |
| --- |
| *Nishimura Ekiu v. United States* (1892)—Woman claims entitlement to entry under War Brides Act. Fed. administrator denies her claim; orders her deported. She goes to ct. Ct. determines she is entitled to habeas corpus, but that an administrator’s review of her claim was sufficient process b/c Congress did not intend to grant judicial review. |

|  |
| --- |
| *Wong Wing v. United States* (1896)—Individual sentenced to hard labor for violating Geary Act; challenged as unconstitutional non-judicially reviewable punishment. Ct. found that deportation + imprisonment w/out trial need not be judicially reviewable, but hard labor + confiscation of property are punishments, requiring judicial review. |

|  |
| --- |
| *Yamataya v. Fisher* (1903)—*Nishimura* redux. Challenges deportation order as insufficient process, but did not appeal first to Secretary of the Treasury, so no recourse to cts. Ct. establishes that there is some non-arbitrary standard of review for executive officers’ determinations. |

**II. Plenary Power and Immigrants’ Rights**

**Due Process and the Rise of Plenary Power Doctrine**

* *United States ex rel. Knauff v. Shaughnessy* (1950)—Non-citizen seeking entry; no entitlement to due process beyond what Congress requires.
* *Kwong Hai Chew v. Colding* (1953)—Non-citizen resident sailor who leaves on US vessel is entitled to due process in exclusion proceeding. Treated as resident.

|  |
| --- |
| *Shaughnessy v. United States ex rel. Mezei* (1953)—Individual who resided in the US for 25 years leaves for 20 months (much longer than intended), denied re-entry and detained indefinitely. Ct. finds no due process required as to either denial of entry or detention.   * Jackson dissent: Congress can limit substantive but not procedural due process. |

|  |
| --- |
| *Landon v. Plasencia* (1982)—P, resident non-citizen, entered Mexico w/purpose to smuggle non-citizens into the country. Denied re-entry. Ct. ruled she was entitled to due process b/c of brief exit and community ties. Marshall concurrence says insufficient process.   * Could be read as overturning *Mezei* or cabining it to nat. sec. context. |

|  |
| --- |
| *Kerry v. Din* (2015)—Resident non-citizen sued on behalf of husband, who was denied entry, arguing his exclusion infringed her right to live w/her husband. Ct. split three ways:   * Scalia/Thomas/Roberts: No deprivation b/c they could have reunified outside US. * Kennedy/Alito: Sufficient process; ignores *Mathews* + treats immigration as different. * Breyer/Ginsburg/Sotomayor/Kagan: Right to reunification; entitled to procedural but not substantive due process. Process was insufficient b/c “terrorism” too vague. |

**Beyond Due Process: Speech and Equality**

|  |
| --- |
| *Harisiades v. Shaughnessy* (1952)—P ordered deported b/c of Communist Party membership (prior to 1940 Alien Registration Act). Ct.: residency does not create vested right to remain; 1st Am. claim rejected b/c immigration different + communism is violence.   * Ct.: Only punitive laws cannot be retroactive; deportation not punishment. |

|  |
| --- |
| *Kleindienst v. Mandel* (1972)—Marxist economist denied temporary visa by AG based on beliefs. US academics sought order compelling AG to admit Mandel. Ct. rejects; AG has statutory authority to deny entry based on support for communism. |

|  |
| --- |
| *Fiallo v. Bell* (1977)—Immigration code gave preference to parents of citizens except fathers of “illegitimate children.” Challenged as discriminatory against men/fathers. Ct. upheld the restriction under rational basis review.   * Marshall + White dissents: Gender discrimination + citizens affected so heightened scrutiny; gov’t’s reasons are insufficient. |

**Current Debates over the Plenary Power**

|  |
| --- |
| *Sessions v. Morales-Santana* (2017)—LPR son of US citizen father and Dominican mother not entitled to derivative citizenship but would be if parents reversed. Challenges INA provision under Equal Protections. Ct. rules that reasoning behind gender-based distinction is insufficient; invalidates. |

|  |
| --- |
| *Trump v. Hawaii* (2018)—Muslim Ban EO rejected by 9th Cir. Rewritten as EO-2 to include non-Muslim countries + capped refugee cases. SCOTUS stayed injunctions, and EO-2 went into effect. Once it expired, Proclamation extended it and added countries. Ct. (5-4 split) found no discriminatory intent + sufficient nat. sec. justification for order.   * Trump Admin. relies on § 212(f), which gives president broad authority to exclude. |

**III. The Admissions System**

* **The Modern INA**:
* Purposes:
  + (1) substantive screening rules for non-citizens and
  + (2) procedures for applying screening rules.
* Structure
  + (1) **Admissibility (INA § 201–203)**—Grounds of admissibility are:
    - Family-Based Immigration (INA § 203(a))
      * Immediate relatives—spouses, unmarried children, and parents (if petitioner is 21 or younger)
      * Preference categories:
        + FB-1: unmarried children of citizens
        + FB-2A: spouses & children of permanent residents
        + FB-2B: unmarried children of permanent residents
        + FB-3: married children of citizens
        + FB-4: siblings of citizens (if citizen is 21+)
        + Derivative beneficiaries (§ 203(d))—allows spouses & children of applicants to be treated as in the same category to avoid separating families
    - Employment-Based Immigration (INA § 203(b))
      * + Categories 1, 2, and 3 generally must be petitioned for by an employer, while 4 and 5 typically self-petition.
        + Labor certification (§ 212(a)(5)(A)): requirement employer make a good faith effort to find a qualified US citizen before filing application for EB visa. (Schedule A jobs exempt)
        + Prevailing wage req: employers must pay EB visa recipients prevailing wage even if willing to work for less
        + EB programs all provide a pathway to LPR status
      * EB-1A: extraordinary ability in sci., art, educ., bus., or athletics
      * EB-1B: outstanding professors & researchers
      * EB-1C: multinational execs & managers (defined § 101(a)(44))
      * EB-2: advanced degree or exceptional ability
      * EB-3: bachelor’s degree or shortage occupation
      * EB-4: special immigrants
      * EB-5: investors
      * H-1B: credentialed, partially portable, w/pathway to LPR status
      * H-2A & H-2B: uncredentialed, non-portable, and no LPR pathway
      * L-1: temporary visa for employees of binational corp.
    - Diversity lottery winner (capped at 50k annual)
      * Requires high school diploma or 2 yrs+ in occupation requiring 2 yrs+ training/experience
    - Humanitarian admission
      * + Refugees
        + Asylum

|  |
| --- |
| *Dabaghian v. Civiletti* (9th Cir. 1979)—P filed for divorce 2 wks after readjustment, quickly remarried. DOJ rescinded LPR status, claiming sham marriage.   * Proper test: (1) whether marriage was legitimate at inception; (2) whether legitimate at grant of residency. * AG does not have authority to find “factual death” of a marriage. |

**IV. Inadmissibility and Deportability**

* **INA Structure cont.**:
  + (2) **Inadmissibility (INA § 212)** (for entry *and* for visas)
    - § 212(a)—Grounds for inadmissibility
      * (2)(A) Crimes of moral turpitude or relating to controlled substance
      * (2)(B) Multiple crimes w/5+ yr confinement
      * (2)(C) AG knows or has reason to believe is or is related to a drug trafficker
      * (2)(D) Sex Work or Procurement w/10 years of application
      * (2)(H) Human Traffickers and Financial Beneficiaries
      * (3)(B) Terrorism or Material Support for Terrorism
      * (4) Public Charge
      * (6)(A) Non-citizens present w/out admission/parole
        + (ii) Narrow VAWA domestic violence exception
      * (6)(B) Failure to attend removal proceeding
      * (6)(C) Misrepresentation (of citizenship status or in order to gain admission or a visa)
      * (7)(A) Non-citizen present w/out valid visa
      * (9)(A) Prior removal (w/in 10 yrs if removed w/in US or w/in 5 yrs if removed at border)
      * (9)(B) Voluntary departure after 180+ days of unlawful presence (w/in 3 yrs)
      * (9)(B) Any unlawful presence for more than 1 yr (permanent)
    - § 212(h) (Waiver)
      * AG has discretion to waive most § 212(a)(2) criminal grounds of inadmissibility.
  + (3) **Deportability (INA §237)**—Grounds of deportability include:
    - § 237(a)(1) (Deportability)
      * (A) Inadmissible at time of entry
      * (B) Overstaying a visa
      * (C) Failure to maintain nonimmigrant status
      * (D) Failure to satisfy ongoing registration reqs. (e.g. change of address)
      * (G) Marriage fraud
    - § 237(a)(2): Crimes—“conviction” is required, meaning either (i) a judge or jury found them guilty or they pleaded guilty, or (ii) the judge ordered a punishment or penalty on the non-citizen’s liberty.
      * (A)(i): Crimes involving moral turpitude
      * (A)(ii): Multiple convictions
      * (A)(iii): Aggravated felony
      * (B): Controlled substances
      * (C): Firearm offenses
      * (E): Domestic violence/violence against children
      * (F): Trafficking
    - § 237(a)(3)
      * (A) and (B): Errors
      * (C): Document fraud
      * (D): Falsely claiming citizenship
    - § 237(a)(4): Terrorism and national security
    - § 237(a)(5): Public charge
    - § 237(a)(6): Unlawful voter
  + (4) **Relief from removal (INA §240A)**—Grounds include:
    - Long residence
    - Hardship to citizen family members

|  |
| --- |
| *Moncrieffe v. Holder* (2013)—LPR convicted under Ga. statute for possession w/intent to distribute. Would constitute aggravated felony if fed. conviction; but fed. statute would treat this amount as a misdemeanor. Ct.: there must be a categorical approach; state variation in drug possession laws should not lead to variation in deportability. |

|  |
| --- |
| *Descamps v. US* (2013)—Not an immigration case; addresses “modified categorical approach.:   * Modified categorical approach: If state statute broader than fed. equivalent AND unclear whether non-generic factor determinative, ct. looks to extra-statutory materials. * If statute has lower req. of proof, ct. should not recognize prior conviction for cross-statutory purpose (such as, in this case, mandatory min. statute for prior convictions). |

|  |
| --- |
| *Sessions v. Dimaya* (2018)—P rendered deportable for Cali. 1st-degree burglary convictions, which AG argued constituted “crime[s] of violence” under INA §16(b). Gorsuch joined liberals to find “crime of violence” unconstitutionally vague.   * Liberal plurality: Rejected gov’t argument that immigration statutes should get less stringent void-for-vagueness review. * Gorsuch concurrence: All statutes should get stricter void-for-vagueness review. |

* *Lopez v. Gonzales* (2008)—Inverse of *Moncrieffe*; convicted of state misdemeanor that would be fed. felony. §101(a)(43)(B) “including a drug trafficking crime” does not apply.

|  |
| --- |
| *Carachuri-Rosendo v. Holder* (2010)—P pleaded guilty to 2 misdemeanor drug possession charges 2 years apart. Could have been charged w/recidivism, but wasn’t. Unanimous Ct. says cannot be deported for aggravated felony (recidivism) if not charged. |

|  |
| --- |
| *Padilla v. Kentucky* (2010)—P pleaded guilty to drug charges b/c his lawyer advised this would not make him deportable; then ordered deported. P challenged deportation under 6th Am. (right to counsel). Ct. found that def. counsel has duty to warn if deportation is a clear consequence of pleading guilty; if less clear, counsel may not have duty.   * Alito concurrence and Scalia dissent criticize vague duty to warn standard. |

|  |
| --- |
| *Matter of Thomas, Respondent Matter of Thompson* (DOJ 2019)—Modified test(s) for assessing effect of a state court order adjusting a state criminal sentencing that has been found to be ground for deportation. Now, only a modification, clarification, or vacation of sentence based on a *legal defect* (procedural or substantive) will be given effect. |

A picture containing diagram

Description automatically generated

**V. Beyond the INA’s Basic Screening Structure**

**Relief from Removal**

* INA § 240A (Relief from Removal)—The AG, acting thru an immigration judge, can cancel removal; allows non-citizens deemed removable to regularize LPR status
  + § 240A(a) For current LPRs, maintains that status
    - Reqs.: (1) 7 yrs continuous *residence* in US; (2) lawful permanent residence for at least 5 yrs
      * + § 240A(d)(1)(A) Stop-time rule: Time ceases to toll upon service of notice to appear
    - Discretionary considerations: family ties in US; duration of residence; evidence of hardship for citizens/LPRs; military service; employment history; property/business ties; community service; evidence of rehabilitation for criminal offenders; and other evidence of good character
  + § 240A(b) For non-citizens who entered w/out inspection or overstayed nonimmigrant visas, relief confers LPR status
    - Reqs.: (1) 10 yrs continuous *physical presence* (small allowance for departures of >90 days) in US; (2) good moral character; (3) removal would cause exceptional & extremely unusual hardship to a citizen or LPR (treated as a discretionary consideration); (4) subject to 4k annual limit
  + § 212(c)—Precursor to § 240A allowed LPRs to request relief from immigration judge despite removability b/c of countervailing equities.
    - * Can still be invoked for convictions from before April 1997.

**Adjustment of Status**

* INA § 245 (Adjustment of Status)—Allows non-citizens on nonimmigrant visas to have their visa changed to an immigrant visa and acquire LPR status; can serve as a form of relief for non-citizens placed in removal proceedings
  + § 245(a) (Requirements)
    - Inspection and admission or parole (even if inadmissible, as might be the case for a child waved through at the border)
  + § 245(c) (Disqualifications)
    - (2) working w/out a visa
    - (7) some parolees w/out nonimmigrant status
    - (8) otherwise violated terms of visa
    - § 245(k) provides a safe harbor for those in EB categories whose defaults lasted no longer than 180 days
  + § 245(i)—Provided a streamlined adjustment process. Not renewed in 1998. However, still applies to those on whose behalf a visa petition or labor cert. app. were filed before 4/30/2001.

**Parole**

* Grant of temporary leave from immigration detention for “urgent humanitarian reasons or significant public benefit.”
* Power is exercised by specific CBP, ICE, and USCIS officials, not immigration judges.
* Often used as an alternative form of admission.
* Advance parole allows leave to exit the country pending an adjustment application.
* *Trump v. Hawaii* (2018)—Distinguishes admissibility and visa issuance. INA § 202 prohibits discrimination based on national origin in *visa issuance*, but Trump Admin had only (although the court rejects it) discriminated in determining admissibility.

|  |
| --- |
| *Nat’l Ass’n of Manufacturers v. DHS* (N.D.Cal. 2020)—Employers challenged Proclamation suspending issuance of certain nonimmigrant work visas in response to the pandemic. Ct. issued injunction, distinguished *Hawaii III* b/c § 212(f) allows broad discretion but rationale must be foreign affairs, not domestic concerns like unemployment. |

**Enforcement Discretion**

* Agency can defer enforcement, and non-citizen can obtain work authorization upon showing of need under § 274a.12(c)(14).
* Morton Memos (2011)—identified civil rights–based discretion priorities
* DACA (Deferred Action for Childhood Arrivals) (2012)—Policy of prosecutorial discretion for those who arrived in the US as children, completed or are in school, and do not have a felony or significant misdemeanor conviction.
* *Reno v. American Arab Anti-Discrim. Committee* (1999)—Respondents argued they were selectively targeted based on membership in PFLP in violation of 1st and 5th Am. rights. § 242(g) bars judicial review, so Ct. found selective prosecution not reviewable\*.

|  |
| --- |
| *DHS v. Regents of University of Cal.* (2020)—Ps challenged Trump DHS’s rescission of DACA. Ct. ruled that DHS action is reviewable under APA, rescission order was arbitrary & capricious. Ct. identified several procedural errors. |

**VI. Humanitarian Protection**

**Asylum**: Protection against return and grant of broad legal privileges to reestablish life in country of refuge.

**Nonrefoulement**: Protection against return of refugees to persecution.

* INA § 208 (Asylum)—Discretionary asylum based on “well-founded fear of persecution”
  + Persecution: Posner definition from *Osaghae v. INS* (7th Cir. 1991): “punishment for political, religious, or other reasons that our country does not recognize as legitimate.”
    - Includes persecution by nongovernmental actors if the state is unwilling or unable to control that group.
    - No req. of past persecution, but those who have suffered past persecution receive an express presumption of well-rounded fear of future persecution. 8 CFR § 208.13(b)(1). Rebuttable if gov’t can show: (1) fundamental change in circumstances or (2) reasonable ability and expectation of relocation within country of origin.
  + **Affirmative applications**: Those not currently in removal proceedings can file an I-589 application to be reviewed by an immigration officer. If the immigration officer does not find the application meritorious, and the non-citizen lacks lawful status, USCIS will refer them to an immigration judge for removal proceedings.
  + **Defensive applications**: Those currently in removal proceedings can file a defensive application to be reviewed by their immigration judge.
  + **Applications in expedited removal proceedings**: For those apprehended at the border or at sea and subject to expedited removal, if they express fear of return, an immigration officer conducts a credible fear assessment. If the officer finds their fear credible, they are referred to an immigration judge.
  + In all cases, the decision of the immigration judge is appealable to the Board of Immigration Appeals (BIA).
  + **Application Limitations**:
    - Filing deadline: w/in 1 yr of arrival in US
    - Firm resettlement: not available if resettled in another country
    - Persecutors: § 208(b)(2)(A)(i) excludes those who participated in persecution of others (§ 241(b)(3)(B)(i) for withholding of removal)
    - Terrorist Activity (§ 208(b)(3)(B)(iv))
    - Serious Crimes: excludes those who have committed a serious nonpolitical crime outside the US (§ 208(b)(2)(A)(iii); § 241(b)(3)(B)(iii)); or those convicted of a particularly serious crime in the US (§ 208(b)(2)(A)(ii); § 241(b)(3)(B)(ii))
* INA § 241(b)(3) (Withholding of removal)—Mandatory asylum for those whose “life or freedom would be threatened” upon return

**Discretion**

|  |
| --- |
| *INS v. Cardoza-Fonseca* (1987)—P entered US on tourism visa, overstayed, now applies for asylum b/c of association w/anti-Sandinista family. Ct. establishes the “well-rounded fear test” for § 208 asylum:   1. P possesses belief/characteristic subject to persecution 2. Persecutor is aware/could become aware of it 3. Persecutor has capability to punish P 4. Persecutor has inclination to punish P |

**“Particular Social Group”**

|  |
| --- |
| *Matter of A-B-* (AG 2018)—AG adjudication removes domestic violence and gang violence from “particular social group” categories of persecution to merit § 208 asylum b/c group does not exist independently of the persecution it is subject to. |

* DHS Proposed Asylum Regulations (June 15, 2020)—Proposed rule would limit review of asylum/withholding claims to just the specific claim, w/out reaching removability, and substantially limit “credible fear” assessments.

**Trump Administration Attempts to Limit Asylum Cases**

* *Matter of M-S-* (AG 2019)—Barr removed immigration judges’ authority to hold bond hearings for asylum seekers. Litigation is ongoing, but currently enjoined.
* 2018 Rule sought to bar asylum seekers’ claims if they subsequently entered unlawfully. Litigation is ongoing, but SCOTUS upheld injunction in 2018.
* “Metering”—Trump admin. has sought to prevent asylum seekers entry. Litigation is ongoing.
* Migrant Protection Protocols (MPP)—cite INA § 235(b)(2)(C) for authority to keep asylum seekers in Mexico pending removal proceedings. Litigation is ongoing.
* Third-country transit restriction—2019 interim final rule would bar asylum for those who did not seek asylum in countries they passed thru in route to US. Currently enjoined.
* “Off-shoring” agreements—Agreements w/Guatemala, Nicaragua, and Honduras to share refugee burden.

**Temporary Protected Status**

* INA § 244 (Temporary Protected Status)
  + § 244(a)(1): Grants (A) temporary protection against removal and (B) work authorization
  + § 244(b)(1): AG has authority to designate any country (or part of a country) TPS eligible if (A) ongoing armed conflict, (B) natural disaster, or (C) extraordinary temporary conditions for 6–18 months, subject to renewal.

|  |
| --- |
| *Ramos v. Wolf* (9th Cir. 2020)—Overruled Dist. Ct.’s injunction of DHS regulation removing Sudan, Nicaragua, Haiti, and El Salvador’s TPS status. Ct. found APA claim unreviewable under INA § 244a(b)(5)(A) and stated that Equal Protections claim did not demonstrate merit.   * NY Dist. Ct. injunction nullified ruling as to Haiti’s status. |

**VII. Immigration Procedure**

**Admissions & Removal Procedures**

* Admissions: Almost no due process, as persons abroad do not have protected entry interest (*Knauff*; *Mezei*). AG’s decision to exclude not reviewable (*Fong Yue Ting*).
  + Denial of family visa: can appeal to BIA
  + Denial of employment authorization: can appeal to AAO
  + No appeal for denial at foreign consular office except to office head
* Removal proceeding: Must provide due process (*Yamataya*):
  + INA § 239: Notice to appear (must include prima facie showing of removability)
  + INA § 240: Removal Proceedings
* Parole: Allows detained non-citizens temporary release from custody “for urgent humanitarian reasons or significant public benefit.” § 212(d)(5)(A).
* Due Process: (1) Deprivation of life, liberty, or property (5th Am.) requires process (*Goldberg v. Kelly*), which means (2) notice + an opportunity to be heard (*Mathews v. Eldridge*)
  + But in immigration law, there is a threshold question of whether they are entitled to assert the due process clause.

|  |
| --- |
| *Jacinto v. INS* (9th Cir. 2000)—Ct. reviewed due process claim from asylum hearing in which Jacinto was not informed of her right to present affirmative testimony, misled about other rights. Ct. ruled that, like an SSA hearing, an asylum/deportation hearing should have similar due process protections, especially for pro se claimants. Remanded. |

**Expedited Removal**

* INA § 235(b)(1)—Provides for summary expedited removal hearings with limited administrative review.

|  |
| --- |
| *INS v. St. Cyr* (2001)—P pleaded guilty to drug possession b/c it wouldn’t lead to deportation, but under new scheme, it will; argues old scheme should apply to him b/c of reliance; files habeas petition rather than admin. appeal, but 1996 statute limits habeas petitions. Ct. allows habeas petition as alternative to admin. review & agrees §212(c) still applies, preventing deportation.   * § 242(a)(5) amended to prevent non-citizens subject to deportation from using habeas petitions to get judicial review and evade administrative procedures. * § 242(a)(2)(D) limits ct. appeals to constitutional claims and questions of law, which actually would include St. Cyr’s claim. |

|  |
| --- |
| *DHS v. Thuraissigiam* (2020)—P detained near border; granted credible fear hearing, but officer did not find him credible. INA § 242(e)(2) limits review. P challenges under Suspension Clause, claiming § 242(e)(2) removes his habeas right. Alito rules that P is not due habeas; removes entry fiction for at least recent border crossers.   * How far inside the border is the entry fiction removed? 25 miles? Further? |

* *Hernandez v. Mesa* (2020)—CBP agent kills child playing near border. Hernandez family sues in US court. Ct. finds they have no due process rights against their child’s killer.
* INA § 241(a)
  + (a)(1)(A)—When an individual has been ordered removed, (s)he shall be detained pending deportation. (Beginning at the point of not pursuing judicial review.)
  + (a)(6)—If inadmissible and determined a risk to community or unlikely to comply w/removal, can be detained outside removal period.
* INA § 236
  + (a)—Discretionary detainment regime.
  + (c)—If inadmissible/deportable, must be detained.

|  |
| --- |
| *Zadvydas v. Davis* (2001)— Zadvydas detained under § 241(a)(6) post–removal period. Like *Mezei*, but while *Mezei* was about deprivation of a non-right (continuing to live in the US), Zadvydas just wants to be released. Ct.: Release is required for those held for prolonged periods after they’ve been ordered removed. (No longer than 90 days.) |

|  |
| --- |
| *Demore v. Kim* (2003)—Kim was detained pending removal hearing under § 236(c); Kim challenged as a due process violation b/c INS had not found him to be a flight risk/danger to society. Ct. found pre-hearing detention was allowable.   * Differentiating *Zadvydas*: shorter detention w/clear end date (but still ~45 days), and congressional purpose (concern w/possible flight risks). |

|  |
| --- |
| *Jennings v. Rodriguez* (2018)—ACLU sought bond hearings for non-citizens detained 6+ mos. who had passed credible fear interview, since they would be incentivized to stay. Majority ruled there was no time limit/entitlement to periodic bond hearings. |

* *Nielsen v. Preap* (2019)—9th Cir. had ruled that individuals not detained upon release from prison under § 236(c) but later detained were entitled to bond hearing. Ct. overruled; found no right to bond hearing, regardless of how much time had passed.

**VIII. Immigration Federalism**

**State Regulation of Immigrants**

* “Special public interest” doctrine: A state may treat non-citizens differently than citizens in order to protect a “special public interest” in its common property/resources (*Yick Wo*, *Graham*); not applicable if a proxy for race discrimination.
* Equal Protections for non-citizens: Citizenship status can be a suspect classification, so that restrictions on the rights of non-citizens can be subject to strict scrutiny (*Graham*). However, unlike other suspect classifications, status has relevance to certain rights/restrictions, so state laws can make certain restrictions if they are linked to the nature of status.

|  |
| --- |
| *Graham v. Richardson* (1971)—Law denying non-citizens welfare benefits/Law requiring long durational req. for welfare benefits. May be read as establishing citizenship status as a suspect classification on par with race/ethnicity. However, ct.   * But if non-citizens are a suspect class, how can they be denied the right to vote? |

|  |
| --- |
| *Matthews v. Diaz* (1976)—Federal law denies non-citizens supplemental Medicare benefits unless LPRs w/5+ yrs residency. Ct. applies lower level of scrutiny b/c Congress has the power to set immigration policy.   * Citizenship as membership w/gradually accruing bundle of rights. Ct. approves of benefits kicking in after a period of time as w/in this frame. |

**State Autonomy Model**

* Equal Protections Frame: “Alienage” or citizenship status should be treated as a suspect class like race or sex b/c it is discrete & insular + subject to discrimination.
* Plenary Power Frame: Gov’t discrimination against non-citizens should be treated deferentially b/c fed. gov’t needs the power to regulate non-citizens.
* Membership Frame: Fed. gov’t has this power, but states don’t unless the fed. gov’t grants them the power on a distinct issue.

|  |
| --- |
| *Plyler v. Doe* (1982)—Tex. statute allowed dists. to deny undocumented students access to public schools; Tyler Dist. started charging undocumented students tuition to attend. Challenged under Equal Protections. Ct. struck down, treating undocumented status as a suspect class. Could not treat education as a fundamental right.   * Captured important idea, but SCOTUS never cites it. |

|  |
| --- |
| *Arizona v. US* (2012)—Ariz. passes law mandating (1) ID checks and (2) arrests if w/out documentation. US gov’t sues arguing preemption. Ct. invalidates arrest provision but not ID checks, b/c the arrests for civil violations of immigration law are not w/in state police authority.   * ID checks have similar effect to mandatory arrests, incentivizing people to leave. |

**“Cooperative” Enforcement Model**

* INA § 236(a): Empowers AG (and agents) to arrest, detain, and release; prohibits from granting work authorization.
* INA § 287 (Powers of Immigration Agents)
  + (a)(1): Power w/out warrant to interrogate.
  + (a)(2):Power w/out warrant to arrest on suspicion.
  + (g): Performance of immigration agent functions by state agents.
* CAP: Similar to § 287(g), allowed for screening of prisoners’ immigration status in state prisons/jails.
* Secure Communities: Authorized during Bush II, rolled out under Obama. Requires that every individual arrested + booked in any state be screened against federal immigration records.
  + Rollout targeted communities w/large Hispanic populations.

|  |
| --- |
| *US v. California* (9th Cir. 2019)—Cali. passed statutes (1) requiring state AG investigate fed. detention facilities in Cali., (2) requiring employers to withhold certain info. from fed. immigration authorities, and (3) restricting local law enforcement’s cooperation with immigration authorities. Fed. challenged, claiming conflict preemption and intergov’tl immunity. Ct. affirmed dist. ct. that restriction on employer voluntary consent to immigration inspection was preempted, but also invalidated one aspect of inspection req. b/c it imposed an economic burden on the fed. gov’t.   * Currently appealing to SCOTUS. |