CONSTITUTIONAL ISSUES

Plenary power doctrine
Courts will defer to Congress in immigration matters. Congress has an inherent power to regulate immigration – Chinese Exclusion Case
Chinese exclusion law is constitutional b/c:
(1) state sovereign right to regulate immigration
(2) non-citizens have only a revocable license to be here
(3) immigration is a political issue.

Limitations to the plenary power doctrine (Summary p. 115-116)
Courts can:
1. Interpret immigration statutes in favor of the immigrant to avoid confronting a constitutional problem - Zadvydas
2. Review removal orders by way of habeas corpus – St. Cyr
3. Review concerns of procedural due process in expulsion cases, and cases with returning LPRs - Yamataya
4. Review cases of substantive due process (‘equal protection’) to see if Congress had a “rationale basis” for making such a decision. - Fiallo
5. Courts can review statutes that challenge prolonged detention of non-citizens.
   - A non-citizen who has been ordered removed can only be held for a “reasonable period” beyond the 90 days given to remove the non-citizen – Zadvydas.
   - AG can exclude non-citizen without a hearing as authorized under regulations - Mezei

Courts may be able to:
1. Review immigration statutes under First Amendment concerns
   - Still, can deport former members of the Communist party - Harisiades
2. Review constitutional challenges based on separation of powers issues.

ADMISSION

Immigrant Priorities
Immediate Relatives (IR) exempt from quota system, admitted w/o limit §201(b)(2)(A)(i)
1. Spouses of U.S. citizens
2. “children” of U.S. Citizens – (unmarried son or daughter under 21, §101(b)(1))
3. Parents of U.S. citizens, if the citizen is over 21
Also not counted in quota system §201(b)(1)(A-E): LPRs returning from abroad, certain former US citizens, children born to LPRs temporarily abroad, persons receiving certain relief from removal, refugees/ asylees, and parolees (§212(d)(5)- not considered “admitted”)

Family Sponsored §201(c) – p. 141
480,000 / year – [IR(previous year) + children born to LPRs temporarily abroad (previous year)] + unused Employer Based (previous year), at min 226,000
1st: unmarried sons and daughters of US citizens §203(a)(1)
   23,400 + unused 4th
2nd: spouses and unmarried sons and daughters of LPRs
    114,200 + unused 1st + (Total Family Sponsored – 226,000)
    2As – spouses, children of LPRs §203(a)(2)(A)
       get 77% of all 2nd Pref visas
    75% of 2As are exempt from country limits - §202(a)(4)(A)
2Bs – over 21 unmarried (divorced ok) sons and daughters of LPRs §203(a)(2)(B)
3rd: married sons and daughters of US citizens §203(a)(3)  
23,400 + unused 1st and 2nd

4th: siblings of over-age 21 U.S. citizens §203(a)(4)  
65,000 + unused 1st, 2nd, 3rd

**Family-Sponsored Priority Dates**, as of 10/2001 p. 150. 
- if administrative delays cause an immigrant to change status (‘age-out’), the application will automatically be treated as an application under the new category  
- The applicant will be given the original priority date, but still may ‘age-out’ of IR status

**Conditional LPRs for recent marriages §216 – p. 167-168**

- Applies to: LPRs and their children, who receive status as an IR, Family 2nd, or fiancé of US citizen, by a marriage that is less than two years old. Does not apply to accompanying spouses. §216(g)(1)

- Subsequent effects:
  1. If within two years of residence, AG finds that marriage was entered for immigration purposes, or has been annulled, AG must terminate LRP status §216(b)(1)
  2. Conditional LRP and spouse must jointly petition the INS for removal of the condition, and both appear at an INS interview w/in 90 days prior to 2 year anniversary of entrance. At hearing, must show that marriage is (1) valid, (2) not annulled, and (3) not entered into fraudulently, and no fee paid for filing the petition. §216(d)

**Waiver**
If immigrant can show (1) good faith in entrance to marriage, (2) hardship to anyone; the AG may waive the petition and interview requirements. §216(c)(4)

- For Battered Women – 216(c)(4)(C)

**Other Family Requirements p. 172**

A marriage that begins during removal hearings will not be recognized unless (1) couple leaves for 2 years, (2) LPR proves marriage is genuine by clear and convincing evidence. §204(g)
- provision has been constitutionally challenged, but upheld by most courts.

  A “child” must meet the definition under §101(b)(1)
  - (A) born in wedlock, (C) legitimized, or (D) part of bona fide parent-child r’ship

  All marriages must be “genuine” – “parties intend to establish life together” p. 165

**Employment Based - §203(b) p. 142**

- 140,000 / year + unused Family sponsored visas (previous year)

  1st: Superstars / Priority workers §203(b)(1)
  
  - 28.6% + unused 4th and 5th
  - “extraordinary ability in the sciences, arts, education, or athletics” defined at p. 190
  - outstanding professors or researchers
  - certain multinational executives and manager

  2nd: Stars §203(b)(2)
  
  - 28.6% + unused 1st
  - a. Professionals w/ advanced degrees
  - b. People w/ “exceptional ability”

  Applicant must show a job offer.
  - **Waiver** in national interest if applicant can show:
    1. area of employment is one of ‘substantial intrinsic merit’
    2. person’s employment will benefit whole nation, not just area
- particular applicant will serve national interest to a “substantially greater degree” than the available U.S. worker with same qualifications.

3rd: Other Skilled Workers §203(b)(3)
28.6% + unused 1st and 2nd (no more than 10,000 can go to “other workers”)
a. professionals with bachelors degree
b. skilled workers, whose work cannot be completed by U.S. workers
c. “Other” unskilled workers who can perform needed work

4th: Special immigrants §203(b)(4)
7.1%
- “special immigrant” as defined in §101(a)(27), except (A) and (B)

5th: “Employment creation” §203(b)(5)
7.1% - generally only a few hundred are admitted here
- entrepreneurs who invest at least $1M

Labor certification §212(a)(5)
- Non-citizen applying to work under 2nd or 3rd preference must make an application to the certifying officer of the Dept. of Labor.

Must show:
1. No U.S. workers are able and willing to do this work §212(a)(5)(A)(i)(I)
- Job requirements may not be unduly restrictive, and must be a business necessity (could not satisfy need without req’t). – Marion Graham p. 200
  - Job requirements must bear a reasonable r’ship to the occupation in the context of the employer’s business
  - the requirements are essential to perform, in a reasonable manner, the job duties as described by the employer.
2. Employing the non-citizen will not adversely affect U.S. workers
   - pay the prevailing wage. 212(a)(5)(A)(i)(II)

The LPR must stay for a reasonable period of time on the job, after certification and admission. On-the-job experience can not be part of req’ts unless the business has changed.

Per Country Limits §202 – p. 145
- Each country has a yearly quota of 7% of the total family and total employer sponsored visas
- Immigrant is generally ‘charged’ to the court of birth - §202(b)
- If the quota is reached, the visas for that country are allocated among the four family preference categories in the same proportions that apply worldwide. - §202(e)

Diversity §203(c) p. 236-237.
50,000 / year
- split among nations that have less than 50,000 family / employer based immigrants
- the AG then splits the world into six ‘regions’, and grants quotas to the inverse proportion of family / employer based quotas.
- No more than 7% of the total diversity visas may be given to any one nation.

Following to join or Accompanying Spouse §203(d)
- the ‘spouse or child (§101(b)(1)’ of an immigrant who enters under the quota system is accorded the same preference status and place in line as the immigrant
- does not apply to the spouse of child of an immediate relative

Policy concerns w/ immigration quota system: p. 251-259, 266-276, 302-316
Should we have a race-neutral or race-based system?
Do we need one ethno-cultural core?
Nonimmigrant Priorities §101(a)(15) – see chart on p.318-9
An entering non-immigrant must fit into one of 22 categories, and not be excludable.
No numerical limits on any categories, except H-1Bs and H-2Bs

Business Visitors - B1
- Must have a legitimate commercial or professional activity
- Must maintain a foreign residence.

Treaty Traders (E1) and Investors (E2)
- both rely on the language and requirements of a particular treaty (we have 70)
- No foreign residence requirements
- E1’s can come for 2 years 2/ unlimited extensions

Temporary Workers
Specialty Occupation (Temporary Professionals)– H1Bs, defined in §214(i)(1) p. 333-337
- have bachelor’s degree, and employer file a labor condition application
- H-1Bs can stay for up to 6 years
O workers – have extraordinary ability (same as 1st Pref)
- Can stay for 3 years w/ 1-year extensions
P workers – internationally recognized athletes and performing groups.
Lesser Skills H-2s - H-2As work in agriculture, others H-2Bs.
- Both require foreign residence and labor approval; H-2B’s can stay for 3 years
Trainees H-3Bs – require foreign residence, and can stay only 2 years

Students F-1, academic students, M-1 vocational students
- Schools must share information with AG on F-1s
- F-1 can stay for the duration of their student status

Exchange Visitors J-1, spouses and children J-2 p. 359 (ex. Au pair program)
- J-1 can stay for as long as they make satisfactory advancement
- may be excluded from applying for future LPR status, if they get US government money, and are found to be needed by their home country. §212(e)
- AG may waive exclusion upon Sec. of State recommendation based on request of gov’t agency, or request from INS after finding exceptional hardship on non-citizen’s spouse, or child. The Sec. of State has a veto over the hardship applications - Silverman

Tourists B-2
Applicant will be rejected if appears that he wishes to stay longer
Post 9/11, standard tourist visa is only 30 days
No ability to work

Doctrine of dual intent: p. 374 Ok to stay for as long as the law allows; although want to enter immediately as tourist; NOT ok to enter temporarily and seek to stay no matter what the legal implications are.

Fiancés K-1 - works with §214(d)
- Children under K-2; must marry within 90 days of admission

Close Relatives – V
- If a 2A family applicant applied pre-12/2000, can enter and work until gets LPR

Others: T- Victims of trafficking in persons, U – domestic abuse victims
Changing from one nonimmigrant class to another - §248
- Non-citizen must receive favorable discretion from AG
- Mon-citizen was and continues to be lawfully admitted as a nonimmigrant
- certain nonimmigrants are not permitted to change, C, D, K, S visitors, J visitors without wavier.

Exclusion Grounds §212(a)
- These grounds for exclusion apply to all non-citizens (immigrants & nonimmigrants), those outside and inside the U.S. border, who have not been “admitted” (as defined by §101(a)(13) – the only non-citizens on the interior who will be subject to §212(a) sanctions are those who snuck in (§212(a)(6)) or those adjusting status (§245)

Health Grounds §212(a)(1)
- HIV/AIDS patients are inadmissible – concern more with public charge than communicable disease
- Non-citizens not immunized are inadmissible

Criminal Grounds for Exclusion - §212(a)(2)
1. If commit or attempt or conspiracy to commit a crime of moral turpitude §212(a)(2)(A)(i)(I)
   Exception to moral turpitude exclusion:
   a. if applicant <18 at time of crime, AND > 5 years ago OR
   b. max penalty was 1 year in prison AND not sentenced to > 6 months
2. OR violate any U.S. or foreign drug law §212(a)(2)(A)(i)(II)
3. Other criminal provisions: (B) multiple convictions, (C) drug dealers, (D) prostitutes, (E)
   felons who fled jurisdiction, (G) violations of religious freedom, (H) traffickers in persons, (I)
   money laundering
   Waiver §212(h)(1)(B)
   - AG may waive subparagraphs (A)(i)(I), (A)(i)(II) (if less than 30 g of marj), (B), (D), and (E)
   if exclusion results in extreme hardship to U.S. citizen / LPR spouse, parent, son or daughter.
   - If LPR, he cannot get waiver if he has a aggravated felony conviction since became LPR, and
   have resided continuously in U.S. for at least 7 years up to initiation of removal proceedings.

Political Ideology Grounds §212(a)(3)
General Security Issues212(a)(3)(A)
1. If AG has reason to believe applicant is to enter U.S. to violate a law of espionage or
   sabotage, or evade an export law relating to goods, technology, or sensitive info.
2. OR any other unlawful activity
3. OR any activity that purposes to oppose, control or overthrow the U.S. Gov’t by
   unlawful means
   Terrorist Activities §212(a)(3)(B)
   Foreign Policy §212(a)(3)(C)
     - excludable if enter on grounds contrary to foreign policy
     - exceptions for foreign officials, and candidates for foreign offices
   Communist Party §212(a)(3)(D)
     - applies only to immigrants, with broad exceptions
   Nazis §212(a)(3)(E)
Public Charge §212(a)(4)
Any non-citizen who is likely to become a public charge is inadmissible
- requires family-sponsored immigrants to have a sponsor who has earnings at 125% of poverty level, and legally binding affidavit of support

**Labor Certification §212(a)(5)** – see Employment Immigration Requirements

**Present without Admission §212(a)(6)**
A non-citizen who enters surreptitiously is removed for being “inadmissible”

**Fraud §212(a)(6)(C)**
Non-citizen who fraudulently seeks a visa or admission is inadmissible for life and subject to fines §274C.

**Waiver §212(i)**
- AG’s discretion, if extreme hardship from exclusion to U.S. citizen / LPR spouse or parent.

**Document Requirements §212(a)(7)**

**Previous Removal §212(a)(9)(A)**
- If removed at arrival, inadmissible for 5 years after removal - §212(a)(9)(A)(i)
- If removed after arrival, inadmissible for 10 years after removal - §212(a)(9)(A)(ii)
- If removed twice, or even b/c aggregated felony, inadmissible for 20 years - §212(a)(9)(A)(i)

**Waiver**
AG may consent to readmission - §212(a)(9)(A)(iii)

**Previous Unlawful Presence §212(a)(9)(B)**
- If present unlawfully for 180 days to 1 year, inadmissible for 3 years §212(a)(9)(B)(i)(II)
  - Do not count time while under 18 - §212(a)(9)(B)(iii)(I)
- If present unlawfully for more than 1 year, inadmissible for 10 years §212(a)(9)(B)(i)(II)
  - INS will count time at Notice to Appear, EEOIR will not.

**Exceptions – 212(a)(9)(B)(iii)**
(I) Minors, (II) Asylees, (III) Family Unity, (IV) Battered women and children

**Waiver §212(a)(9)(B)(v)**
AG’s may waive §212(a)(9)(B), if extreme hardship to U.S. citizen / LPR spouse or parent.

**General Waiver for Nonimmigrants– 212(d)(3)**
At AG’s discretion, those who are inadmissible on national security grounds do not qualify.

**Admission Procedure §204**

**Nonimmigrant**
1. apply at U.S. consulate
2. Tourist visa issued as stamp in passport
3. Entrance at port

**Immigrant – Family sponsored**
1. U.S. citizen / LPR must petition to INS for beneficiary’s entry
2. Non-citizen must apply for visa at U.S. Consulate
3. Visa issued
4. Entry at port – check by INS for inadmissibility grounds

**Immigrant – Employer sponsored**
1. Petition for Labor Cert by employer to Dept of Labor
2. Petition for visa to INS
3. Visa application to U.S. Consulate
4. Applies for admission at port.

**Petition stage:**
Immigration

- sponsor must act as the petitioner for a non-citizen, except in the case of a victim of domestic abuse who may act as her own petitioner. - §204(a)(B)(iii)

Who can fill out applications / forms?
- must be a licensed attorney, except someone may help a non-citizen fill out the forms, if not for payment and not by one who holds self out to be a lawyer – p. 430, Note 3

Attorney must provide adequate supervision over non-attorney (student) assistants
- atty must maintain direct r’ship with client
- atty must supervise any delegated work
- atty must provide complete professional responsibility for work

Penalties for document Fraud §274C
- Attorney, who doesn’t disclose assistance in a false application, is subject to criminal penalties §274C(e)(1).
- Attorney who knows or recklessly disregards the fact that an application is false is subject to discipline under (e)(1) above - §274C(f)

Visa Application
- None required for returning LPRs, refugees, or tourist/business visitors from 29 preferred countries.
- Visa denials by consular officials are not reviewable by the courts or INS.

Expedited Removal - §235(b)(1)
- If immigration officer determines that non-citizen is inadmissible at border due to fraud (§212(a)(6)(c)) or improper documents (§212(a)(7)), the non-citizen is ordered removed without further hearing, and without ability to appeal. Can challenge citizenship.

Removal §240
- Non-citizen must prove he is “clearly and beyond a doubt entitled to be admitted and not inadmissible” p. 456

Adjustment of Status - §245(a, b, c, k)
- If non-citizen is in US under nonimmigrant status can petition for change to immigrant status, and stay in U.S. to do all paperwork.
- applicant for adjustment of status, (1) must be admissible, and (2) the particular immigrant category must be current.
- 245(i) applies only retroactively if applied pre-1997, to non-citizens who were out of status
- Limited adjustments for 1st, 2nd, 3rd, and some 4th pref employment applicants, who were out of status at one time or another, but are now lawful §245(k).

EXPULSION

Deportability Grounds §237(a)
- Deportation provides a means for Congress to remove from our society non-citizens who it finds injurious to the public welfare
- We deport non-citizen criminal offenders b/c residency is a privilege, and we hold non-citizens to a higher standard.

- To be deportable, a non-citizen must have been admitted: §237(a)
LPR will not be regarded as seeking an admission, unless he does 1 of 6 things in §101(a)(13)(C)
- fixes problem of old statute in Fleuti, that leaving for a few hours could be enough to deport.
- still problem of whether unless necessitates the converse of (C), or only a list of necessary, but not sufficient criteria.

Inadmissible at time of Entry §237(a)(1)(A)
-if non-citizen was inadmissible when entered U.S.

Ex. Non-citizen lied to immigration officer (said had no criminal past, but had committed a crime in violation of 212(a)(2)(A)(i)(I)) and is allowed into U.S. as LPR. Then later found by INS. He is deportable under 237(a)(1)(A) as inadmissible based on 212(a)(2)(A)(i)(I).

Waiver §237(a)(1)(H)

At AG’s discretion, if non-citizen is inadmissible b/c non-citizen entered fraudulently, §212(a)(6)(C)(i), OR other inadmissibility ground directly resulting from such fraud AND (1) non-citizen is otherwise admissible & (2) Citizen / LPR parent, spouse, son or daughter

Smuggling §237(a)(1)(E)

- If a non-citizen has at any time prior to or within 5 years after entry helped a non-citizen to enter the U.S. illegally.

Waiver

- At AG’s discretion, if now LPR and had smuggled a spouse, parent, son or daughter.

Crimes of Moral Turpitude §237(a)(2)(A)(i)

- if non-citizen is convicted of a crime of moral turpitude committed within 5 years after admission AND is convicted of a crime for which a sentence of one year or longer may be imposed (potential punishment).

- any crime that involves dishonesty is a crime of moral turpitude
  - every crime committed under the elements of the statute must involve moral turpitude
  - Court ignores the extreme hypos (mother stealing bread for dying child)

- expungements may not erase “convictions” p. 523

Multiple Crimes §237(a)(2)(A)(ii)

- if non-citizen is convicted of more than one crime of moral turpitude, not arising out a single scheme after admission.
  - Pacheco – look to elapsed time b/w offense, 9th Cir. – look to planning

Aggravated felony §237(a)(2)(A)(iii)

- If any non-citizen is “convicted” (101(a)(48)) of an “aggravated felony” (§101(a)(43))

- If it is a “crime of violence” with at least a one year prison sentence imposed §101(a)(43)(F)

- an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, OR

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

Drug Offenses §237(a)(2)(B)

- If any drug (defined in USC) conviction (except possession of <30 g of marij) after admission

Generally, neither court nor counsel have obligation to notify non-citizen Δ of the possibility of deportation from a criminal guilty plea – Parrino, Pozo

Nazi War Criminals §237(a)(4)(D)

- any non-citizen who would be inadmissible under 212(a)(3)(E) as a Nazi, is deportable.

Other Deportation Grounds


Relief from Deportability

Affirmative Defenses the non-citizen may use at a removal hearing

Cancellation of Removal “Part A” §240A(a)
1. Provides relief to charges (most often criminal convictions) resulting in deportability (§237(a)) or inadmissibility (§212(a))
2. Non-citizen must (1) have been an LPR for at least 5 years, (2) have resided continuously in US for 7 years after having been admitted in any status (includes time as nonimmigrant resident ending w/ notice to appear §240A(d)(1), (3) have not been convicted of an aggravated felony, or deportable under national security grounds.
3. AG has discretion in granting relief
4. Results in non-citizen not being removed and being granted LPR status
5. IJ decides whether to grant relief at removal hearing

Cancellation of Removal “Part B” §240A(b)
1. Provides relief to charges (most often undocumented immigrants) resulting in deportability (§237(a)) or inadmissibility (§212(a))
2. Non-citizen must (1) have had a continuous physical presence (defined §240A(d)(1) one leave for 90 days or aggregate of 180 days ends it) in US for at least 10 years immediately proceeding the application, (2) have been a person of good moral character, (3) has not been convicted of a crime under 212(a)(2), or document fraud under 237(a)(3), (4) shows that removal would be result in “exceptional and extremely unusual hardship” to his citizen / LPR spouse, parent, or child.
Domestic Abuse victims must (1) show victim of domestic abuse from U.S. citizen / LPR parent, spouse or intended spouse, (2) physically present in US for at least 3 years, (3) good moral character, (4) not inadmissible under security grounds, §212(a)(3), nor deportable under marriage fraud §237(a)(1)(G), nor deportable for criminal grounds §237(a)(1-4), nor has been convicted of an aggravated felony, (5) extreme hardship to non-citizen, non-citizen’s child or parent.
3. AG has discretion in granting relief, but rarely denied if applicant qualifies under all else
4. Results in non-citizen not being removed and being granted LPR status
5. IJ decides whether to grant relief at removal hearing

Cancellation of Removal may only be granted to 4000 individuals each year §240A(e)(1).

Motion to Reopen
- Grants an evidentiary hearing to non-citizen to prove the facts necessary for cancellation, and a possible temporary stay of removal.

Registry §249
- AG has discretion to award LPR status to certain non-citizens who entered U.S. prior to 1/1/72.
- Does not apply to non-citizens who are inadmissible under §212(a)(3)(E), or under 212(a) relating to criminals, procurers, subversives, drug violators, or smugglers.
- Non-citizen must have had continuous U.S. residence since entry, be of good moral character, and not ineligible for citizenship, nor deportable as a terrorist §237(a)(4)(B).

General Legalization - §245A
Continual lawful residence since 1982; presence since 1986.

Adjustment of Status §245 – see above discussion on admission procedure.

Private Bills
- Legislation to allow deportation remedy on an individual basis – only very few each year.

Limited Relief

Deferred Action
- INS can use prosecutorial discretion to put a non-citizen’s file at the end of the line
  - may not comport w/ language of §237(a) – “shall be removed”
- Only grants a temporary remedy – non-citizen still does not have legal status

**Voluntary Departure §240B**
- non-citizens may leave prior or during removal proceedings – aggravated felons and terrorists are not eligible - §240B(a)(1)
- As a result, no removal order will be issued – avoids inadmissibility under §212(a)(9)
- non-citizens may also leave at the conclusion of the removal proceedings, subject to the same limitations under subsection (a), and that alien must post a bond, and leave w/in 60 days. §240(B)(b)

**Objections to Deportation §241(b), Txt. p. 623 – Linnas Case**
1. To the country from where the non-citizen entered the U.S.
2. To the country where the port is that the non-citizen left from to the U.S.
3. To the country of his birth.
4. To the country, which now occupies his place of birth
5. To any previous country of residence
6. To the country that controlled the place of his birth at that time.
7. If any of the above is impracticable, to any country that will accept him.

**Procedure §240**
This is procedure for removing deportable non-citizens – takes place at a removal proceeding, but still different from procedures for removing inadmissible non-citizens.
1. **Apprehension** – various standards from reasonable suspicion to probable cause p. 631
2. **Pre-hearing** – Notice to Appear and detention decision w/in 48 hours of arrest
3. **Hearing**

**Representation p. 652**
- A non-citizen at a deportation hearing can be represented by anyone “authorized to practice”
  - includes lawyers, students, and reputable individuals

Public Legal services that receive money from Legal Services Corp (which gets govt money) cannot represent non-citizens, unless they are LPRs, refugees, or battered women
Frivolous behavior by a practitioner may lead to discipline – not just for lawyers §240(a)(6)
Also may be disciplined for ineffective assistance of counsel

**Evidentiary Rules**
- hearsay is admissible until it will be fundamentally unfair to allow the evidence
- exclusionary rule for improperly procured evidence will not apply until means used were truly egregious

**Burden of Proof §240(c)**
*Woodby* (1966) creates standard of “clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true.”
- rejects statutory tests from §242(b)(4)(B) and §240(c)(3).
Harlan’s analysis – should look to consequences of error (social disutility test)
  - If low standard – equal likelihood of error on either side
  - If high standard – more errors against prosecuting party
Also look to (1) which party wants to change the status quo, and (2) party with access to evidence.
1. INS has burden of proving that subject is not a citizen
2. Then burden shifts to non-citizen to prove that he is legal p. 209
3. Then burden back to INS to prove that non-citizen is deportable
4. **Administrative Review** – Either party may appeal IJ decision to the BIA, 23 members, 3 per panel

5. **Judicial Review §242**

General Rule: Can obtain review of removal order by filing petition with Court of Appeals.
- Must first bring before BIA.
- No right to stay in country during appeal, so almost all petitions come w/ motion to stay removal.

Limits on review that appear to have survived from §242.
- No appeal of expedited appeal, except LPRs can challenge on ID §242(a)(2)(A)
- No appeal of a waiver, cancellation, voluntary removal, or anything subject to AG’s discretion §242(a)(2)(B) – Still can review for sufficiency of the evidence.
- No appeal of crime related inadmissibility / deportability grounds. §242(a)(2)(C)
- can still review for whether the non-citizen is removable – p. 725

**Habeas Corpus**
- In 1996, Congress removed specific provision for habeas petition of deportation claims.
- Still have U.S. Constitution (suspension clause) and Habeas Statute (28 USC §2241)
  - St. Cyr, IIRIRA did not repeal §2241 habeas jurisdiction over questions of law
- St. Cyr court reviews by way of the habeas petition a removal order (212(c) violation) that is not reviewable under §242(a)(2)(C).

6. **Removal** – If removal order is affirmed, the INS will take custody of non-citizen until arrival at a port or border.

**Exceptions to Deportation Procedure**: (1) expedited removal §235(b)(1), (2) criminal cases – prison hearings, and judicial removal, (3) in absentia removal, (4) non-citizen re-entering after previous removal §241(a)(5), (5) crew members, (6) terrorist removal proceedings (p. 843-846) §502(b), (7) rescinding adjustment of status §246

**REFUGEES & ASYLUM**

If applicant is granted refugee status can normally attain LPR status after 1 year §209(a)(1)
- Refugee status can be revoked before 1 year, if found that non-citizen should not have been granted refugee status.

Causes of Refugee flows:
- Push factors: natural disasters, wars, persecution, poverty, population growth, epidemics
- Pull factors: prospect for assistance, good conditions in U.S.

**Overseas (Offshore) Refugee Program §207**
- applicant must be present in country outside the U.S., either their native country or another
- About 200,000 annual grants under this program.
- No judicial review of denials of overseas asylum applications
- President makes annual determination of the number of grants, and how the quota is to be allocated in consultation with Congress. §207(b), Txt. p. 864.
- All those who are selected to enter the U.S. must be: §207(c)(1)
  1. within def. of refugee §101(a)(42)
  2. not be firmly resettled in a foreign country
  3. be a special humanitarian interest, and
  4. be admissible.
- Refugees are automatically exempted from certain exclusion grounds (labor cert, public charge, and required documents), and AG can waive the others (except national sec. ones) §207(c)(3)
- AG / President is now also prohibited from paroling any refugee into the U.S., unless there are compelling reasons in the public interest for parole instead of refugee under §207.

§212(d)(5)(B).

**Onshore Refugee Program**
-applicants who are either at U.S. port or interior (non-immigrant visa, overstayed, or undocumented)
- Only 70,000 annual grants under Onshore program.

**Asylum §208**
- Usually apply for asylum as an affirmative defense after initiation of removal hearing
- Applicant must fit §101(a)(42) definition of refugee

  Well-founded fear of persecution OR past persecution based on (1) race, (2) religion, (3) nationality, (4) membership in particular social group, or (5) political opinion. AG must also give a favorable exercise of discretion

**Acosta** test:
1. alien must have a “fear of persecution”
   - Singling out requirement from Bolanos-Hernandez – Persecution must be directed at this non-citizen specifically – is no longer supported
     - Prosecution for criminal activity is not persecution, unless it is pretext.
       - severity of the punishment
       - laws selectively enforced against one group
       - laws are discriminatory themselves
2. fear must be ‘well-founded’
   - Question as to whether threat of forced sterilization is persecution, applicant still much should that the fear of persecution is well founded – p. 892-893
3. persecution feared must be ‘on account of…’

**Political Opinion**
Absence of political expression may not be enough for persecution on account of political opinion – Elias-Zacarias.

**Social Group**
- Membership in a social group is based on immutable characteristic “one that the members of the group cannot change, or should not be required to change because it is fundamental to their individual identities or conscience.” Acosta
- Membership based on cohesive voluntary group OR Acosta immutable – 9th Cir.
- Social group cannot be defined by the persecution – DOJ regulation w/ Acosta std.
- Immutability makes sense as a test of social group b/c it is a specific test, along with four other specific factors (i.e. race, religion)

**Gender**
- no specific allowance for refugee status based on persecution by gender.
- Issues of cultural relativism – some cultures permit discrimination against women, that we do not.
- Test for social group persecution from Fatin.
  - Does the social group pass Acosta immutability test? (women are a social gp)
  - Is the applicant a member of the social group?
  - Will the applicant face persecution based solely on membership in that social group?
- In *Kasinga*, Court relies on *Fatini* rationale, and finds girl to be refugee because of fear of female genital mutilation in her home country.

**Non-state Actors**
- Asylum claims based on persecution by private actors are recognized p. 955
- Suggestion that gov’t must be ‘unwilling’ or ‘unable’ to control the private persecutor

**On account of**
- There must be a connection between the persecution and the protected grounds, some causal nexus – protected grounds need not be the only reason for persecution.
- “but for” test is usually enough – if persecution would not have occurred but for the applicants race/nationality/social group/etc. he has satisfied this prong. – p.966
4. alien must be unable or unwilling to return to his country of nationality or to the country in which he last resided because of persecution or his well-founded fear of persecution.

**Evidentiary Standard of Proof** – “well-founded (reasonable) fear” of persecution
- standard interpreted to mean that a reasonable person in the applicant’s shoes would fear persecution.
- past persecution creates only a rebuttable presumption of future persecution, which can rebutted by showing a change in the country, or that applicant could relocate to another part of the country and avoid persecution.
- If application is based on past persecution alone, discretion must be denied, unless applicant can show a compelling reason for being unable to return, or a reasonable possibility that he may suffer other serious harm upon return. P. 980.
- Most important evidence is usually the applicant’s own testimony b/c documents are hard to find – credibility is very important
- credibility isn’t always enough, especially if the testimony is outrageous (persecution in Canada)
- Courts also rely on Dept. of State reports, which assess human rights conditions in the country – problematic because of foreign policy concerns and no ability to cross-examine the authors.

**Exceptions to Asylum / Withholding**
Apply to Asylum (§208(b)(2)(A)(i-vi)) and Non-return (§241(b)(3)(B)(i-iv)), except as noted:

i. Persecutor - Nazis not eligible for asylum or non-return
ii. been convicted of a ‘particularly serious crime’
iii. alien committed serious nonpolitical crime outside the U.S.
iv. Danger to U.S. Security
v. Terrorist (only §208)
vi. Firm resettlement (only §208)

AG’s discretion – some debate as to whether the manner of entry should be considered – p.1006

**Asylum Procedure**
- Apply for asylum / non-return as a defense at a removal hearing OR
- Make an affirmative application for asylum at a local INS office.
  - affirmative applications will either be approved after a quick procedure, or referred to an immigration judge for beginning of removal procedures.

Problems w/ procedure: political bias, long delays, unfounded claims, fiscal costs, procedural fairness (non-citizens may not be told of asylum)

Possible Reforms: Questions of specialization; Adversarial v. Inquisitorial System

Discouraging Access to System:
1. Must file Asylum application within 1 year of arrival in U.S., unless: §208(a)(2)(b)
1. circumstances have changed in your home country (ex. There was a coup)
2. extraordinary circumstances would cause delay (bad attorney)

2. If applicant passes through a third country that U.S. has a treaty with, U.S. will not adjudicate the asylum application, but send refugee to third country for hearing. §208(a)(2)(A)
   - have treaty only w/ Canada
3. Expedited Removal §235(b)(1)(B) – almost all who are found inadmissible are removed on the spot.
4. Detention – INS will hold applicant pending final ruling
5. Denying Employment Authorization – until 180 days after asylum application §208(d)(2)
6. Sanctioning Frivolous Applications – obligation on atty to warn §208(d)(4)(A), and sanctions on non-citizen for frivolous application §208(d)(6)
7. Application Fees – none charged now, but permitted under §208(d)(3)
8. Interdiction – ‘pushbacks’ before applicants reach shores are part of current U.S. policy

Convention Against Torture – alternative international remedy to Asylum
Nonrefoulement (Non-return) §241(b)(3)
- Applicant’s removal is withheld, but not given refugee status.

Standard of proof – “freedom ‘would be threatened’”
- must establish a clear probability (more likely than not) that his life would be threatened
- Non-return relief is not granted on past persecution alone.
- same test for social group, political opinion as asylum.

CONCLUSION
Undocumented Migrants

Immigration Offense
- Entry without inspection – is a misdemeanor, but after removal, if non-citizen enters again without inspection it will be a felony
- Defrauding the U.S. government is a felony – 18 U.S.C. §1001
- Harboring undocumented migrants “sanctuary movement” was prosecuted under §274

Employment Misconduct - §274A
1. Hiring Violation – civil offense ‘to hire, or to recruit or refer for a fee, for employment in the U.S. an alien knowing the alien is a unauthorized alien - §274A(a)(1)(A)
2. Continuing Employment Violation – civil offense ‘to continue to employ [an] alien in the U.S. knowing the alien is (or has become) an unauthorized alien…” §274A(a)(2)
   - both clauses were grand-fathered in, do not include pre-1986 hires.
   - ‘employment’ does not include casual, occasional employment like house cleaning
   - ‘knowing’ includes constructive knowledge, or deliberate failure to investigate suspicious circumstances.
3. Paperwork Violation – procedural offense to fail to examine certain documents as provided in (b)(1), either one from subsection (B) or one each from (C) and (D) - §274A(a)(1)(B).
   - A violation of 1, 2, or 3 will result in a civil fine

Good Faith Defense to Hiring Violation
- If an employer can demonstrate that they complied in good faith with part(b)’s paperwork requirement, that can be an affirmative defense to a violation of (a)(1)(A)’s hiring violation.
- Employer is also permitted a reasonable amount of time after discovering violation to remedy (fire the worker) the situation – Mester Manufacturing p. 1124
4. Pattern of violations – employer will face $3000 fine / violation and possible 6 month prison term for the pattern or practice of violating Hiring or Continuing Employment part of statute. AG may also bring a civil action seeking an injunction to stop such a pattern - §274A(f)

Employment Discrimination - §274B
1. Cannot discriminate in hiring, recruitment, referral, or firing based on national origin §274B(a)(1)(A).
   - Claims based on “disparate impact” of hiring practice are in doubt – unless there is some proof of ‘knowing and intentional discrimination’ – Txt. p. 1141
2. Cannot discriminate in hiring, recruiting, referral, or firing based on the citizenship status of a protected individual based on citizenship status. §274B(a)(1)(B).
   - protected individual is an LPR, nonimmigrant season ag worker (210(a)), refugee, or asylee, unless non-citizen fails to apply for naturalization within six months of becoming eligible §274(a)(3).
   - If two employees are equally qualified, employer can prefer the citizen (in hiring only, not discharge) over the non-citizen. §274B(a)(4)
3. Cannot require more or different documents than are required by 274A, or refuse to honor documents that appear reasonable on their face, with an intent to discriminate. §274B(a)(6)
   - §274B applies to all employers with 4 or more employees, Title VII requires 15 employees.
   - Also excepted are permissible discrimination under 42 USC 2000e-2 or law, which requires citizenship as part of employment.
   - All 274B violations are punishable by civil fines, there is no criminal provision for patterns

Undocumented Migrants and Public Benefits
Proposition 187, which would deny public school access to the children of undocumented migrants, has been permanently enjoined by a settlement.

Citizenship
- use ‘citizen’ and ‘national’ synonymously even though national is really a bit broader.

Welfare Reform
- After 1996, non-citizens are generally ineligible for unemployment benefits, SSI, and states can make non-citizens ineligible for state assistance programs.
   - exception: If LPR has worked 40 consecutive quarters, becomes eligible for Federal social services
LPRs have same legal obligations as citizens – taxes, why treated differently.
- Congress wanted to keep LPRs from becoming a public charge
   - aren’t there already enough incentives – beneficiary program, ‘public charge’ inadmissibility, which could lead to deportation.

Dangers of devalued citizenship – Cultural, spiritual, political, emotional

Acquiring Citizenship
A. At Birth
   (1) Jus Soli – birth in territory §301(a)
   (2) jus sanguinis – by inheritance §301(g)
   - see chart on Txt. p. 1197 For summary of U.S. citizenship acquisition at birth
B. Naturalization
   1. Must be an LPR §318
   2. Must reside continuously in U.S. for 5 years prior to filing application, and after admission as LPR – physical presence for half that period §316(a)
3. Good Moral character §316(a)(3)
4. At least 18 years old §334(b)
5. An understanding of the English Language §312(a)(1)
6. Knowledge of Civics §312(a)(2)
7. Not a Communist or Anarchist. §313

Loss of Citizenship
A. Denaturalization (Revocation of Naturalization) §340(a)
   - applied often to Nazi War Criminals
   - may be revoked if citizenship was illegally procured, by misrepresentation or concealment of a material fact
   - AG can denaturalize administratively by reopening naturalization if w/in 2 yrs
B. Expatriation §349
   - S. Ct. – a natural born U.S. citizen cannot lose citizenship, unless he intends to relinquish it.

Problems of Statelessness or Dual Citizenship from different laws state to state.