ICE = Bureau of Immigration and Customs Enforcement
CBP = Bureau of Customs and Border Protection
- Both part of DHS

Immigration Service entity = USCIS = US Citizenship and Immigration Services

Department of Justice has lost INS, but retains Executive Office of Immigration Review (EOIR)

Given reorganization
- Regulations referring to “department, commission, agency, officer, or office” that Homeland Security Act had transferred elsewhere is deemed to refer to Secretary, etc. in the department where authority was transferred to.

Division of the world:
- National vs. alien
  o Citizen vs. noncitizen
- Immigrant and nonimmigrant (temporary visitors)

The theoretical stuff

Any limitations on immigration morally defensible? Nett Article
- Starts w/ general right to equalize opportunities
- Right to free movement essential to this
- Benefits:
  o Help people get along
  o Nationalism would exist, but “denatured,” no longer a “sacred cow”
  o Modest step to do away w/ situational inopportunity @ relatively low world cost
    ▪ Social waste from preventing movement
  o Could help solve overpopulation
- Costs:
  o “Disequalibrium” and new stresses
  o People would respond to this as utopian – ideological problem to go w/ practical
  o Brain drain, etc.
  o Preserving one country’s employment, housing, political system in “swamping”
  o Limiting births to “culturally acceptable levels”

Shuck article
- Pretty much “America is an amazingly diverse nation; diverse in its diversity; and American democracy / culture and diversity works a lot better than in other areas that are threatening to fragment”
*Brimelow* – Alien Nation
- Nation’s ethnic balance, population can’t be changed without risking dramatic consequences
- Burden of proof should be on those who want to change our nation, not on people who oppose current (lenient) immigration policy
- Multicultural societies don’t work well
- A nation is an ethnocultural community – interlacing of ethnicity and culture
- Immigration worked well in the past b/c
  - Pauses for “digestion”
  - Elites wanted the immigrants to assimilate, and ensured that they did (and those measures have been abandoned)
- Used to have national origin quota (w/ exception for Asians), abolished it; Brimelow doesn’t like that

*Johnson* – fear of an alien nation – book review of *Brimelow*

Different metaphors to describe US
- Melting pot – people move toward homogeneity
- Patchwork quilt – groups remain distinct, one nation w/ emphasis on separateness
- “Granola” – each ingredient brings out the best in the others
ConLaw Stuff

Chinese Exclusion Case
- US has the power to regulate immigration, which is implicit in its sovereignty and nationhood
  - In particular, Congress has the power to exclude noncitizens
- US, and US ONLY (not states), has the power to regulate immigration
  - Fuzzy boundaries: but states can deny benefits to noncitizens, etc.
  - The closer something gets to saying, “you can’t come in,” more likely it is to be “immigration”
- Still good law, cited as precedent

Ekiu v. US
- Whatever procedure Congress chooses in exclusion setting is due process
- No procedural DP concerns in exclusion of noncitizens

Fong Yue Ting – extended these principles from exclusion to deportation
- Every country has right and power to deport noncitizens
- That power resides w/ Congress, not states.
- When Congress exercises such power, it’s immune from procedural due process requirements. Whatever it authorizes is due process
  - This part is no longer good law, see Japanese Immigrant Case. Congress must respect procedural DP

Yamakaia v. Fisher (Japanese Immigrant Case)
- In deportation context, the one constitutional right that does apply is procedural DP
- Never been able to reconcile the 2; Yamakaia came last & is presumably good law

Shaugnessy v. US ex. rel. Mezei (Mezei)
- Procedural due process does not apply to admission (exclusion) of a returning LPR
  - Practical result of exclusion for Mezei was indefinite detention, which raises additional DP concerns
  - Mezei was treated as if he was stopped at the border; being stuck in Ellis Island didn’t mean he had entered the country
- In Lamden, the Court tried to distinguish Mezei: returning LPR, subject to exclusion, is entitled to DP provided the person is not outside the country for “too long.”

Harisiades v. Shaugnessy – LPRs deported b/c of membership in Communist Party
- Deportation provisions are “largely immune” from judicial review; Court lacks power to review under substantive due process (but not lacking complete power to review, which is why Frankfurter only concurred)
- Law still unsettled on this, but note cases:
  - Turner v. Williams – Congress can constitutionally exclude anyone who believes in anarchy, no matter how harmless
  - Mandel: Congress’s decision to exclude Comm. Party members, but AG can waive that in non-immigrant situation
- Ex post facto does not limit deportation power – applies only to criminal statutes
Zadvydas v. Davis
- Statute, **INA 241(a)(6)**, which allows alien to be detained beyond removal period, only allows detention for a period reasonably necessary to bring about removal. Does not allow indefinite detention
  - Statutory language: “may be detained beyond the removal period”
  - Interpreting the statute thus to avoid constitutional concerns
  - Choice is between indefinite detention & release w/ conditions (not at large release)
- Reasonableness measured by the need to remove; recognize Executive primacy in this area
- Liberal statutory interpretation has been used to escape some harsher applications of plenary power doctrine
- Subsequent regulations:
  - Determine whether removal is likely
  - If likely, then detention may continue, subject to review every 6 mo.
  - If unlikely, then release on appropriate conditions
    - If conditions violated, returned to custody until next 6 mo review

Clark v. Martinez
- Statute also interpreted to bar indefinite detention of inadmissible noncitizens (those who are still @ borders)
  - NOT a reconsideration of the ConLaw point from Mezei, though its continuing validity may be questionable if Court is concerned about detention cases
- Scalia switched sides & wrote maj. op.; no way to distinguish this case under the statute

Where are we now?
- Courts will often interpret statutes favorably to avoid constitutional questions & harsh results of plenary power doctrine
- Noncitizens have right to judicial review of removal orders by habeas corpus
- Procedural due process required in expulsion, in most cases involving exclusion of returning LPRs
- Even w/ respect to substantive DP or EP, plenary power doctrine may be translated into a “rational basis” test
- Immigration statutes may be subject to same 1st amendment standards as other statutes
- Separation of power challenges (*Chadha*) may be less vulnerable to plenary power
- Willingness to consider constitutional limitations for prolonged detention
Immigrant Priorities
- Administrative backlog, processing times lead to wait of about 12 months now (once approved); goal is to eliminate backlog & get processing down to 6 months.
- VISA BULLETIN, p. 254 – shows varying priority dates.

Exempt from Immigrant Priorities: Immediate Relatives. **INA 201(b)(2)(A)(I)**
- Who falls into this category:
  - Spouses of US citizens
  - Children of US citizens (children = unmarried, under 21)
  - Parents of over-21 US citizens (have had 21st b-day)
- Not subject to numerical limits
  - Don’t have to wait for entry (at least, don’t have to wait for priority date)
  - Not counted against quota for purposes of other people
- **INA 201(f):** has procedures for setting dates of ages & such, for determining who is an immediate relatives (like child’s age or date of marriage)

Accompanying / Following to join
- **INA 203(d):** spouse or child, as defined in **INA 101(b)(1)(A-E),** may get the same status as spouse / parent, if not otherwise eligible, if accompanying or following to join.
  - Those code provisions deal with who is a child
- Person accompanying / following to join must have this status @ the time that the relevant person attained LPR status – not enough to gain the status later and file
- There is no provision for accompanying or following to join someone who comes in as immediate relative. Only can accompany / follow to join people coming in as LPRs. REMEMBER THIS
  - The fastest way for a person to get in may not be the fastest way for a couple to get in
- A spouse or child is regarded as “accompanying” until 6 months after the issuance of that immigrant’s visa; no time limit on “following to join.
  - **ANY LEGAL SIGNIFICANCE TO THAT?**

Worldwide limits
- Per country limit: combined #s of family-sponsored and employment-based, from any one country may not exceed 7% of the combined quotas (same limit for every country). **202(a)(2)**
- Employment-based immigrants are exempt from per-country limits in any calendar year in which [total worldwide ceiling] > [worldwide # of qualified applicants]. **INA 202(a)(5)(A)**

Family-sponsored Immigrants.
- Total worldwide quota (ceiling) = 480K – [last year’s immediate relatives] + [last year’s unused employment-based]. **INA 201(c)**
  - Or, if this formula is less than 226K, bumped up to 226K
- Orders are first-come, first served, except for per-country limit
  - All people who are exempt from worldwide limit (immediate relatives, for ex.) are exempt from per-country limit
- Preference system:
- Unmarried sons & daughters of US citizens: 23,400 + number left over from 4th preference. **INA 203(a)(1)**
- Spouses and unmarried sons / daughters of LPRs. **203(a)(2)**
  - Spouses or children of LPRs (2A)
  - Unmarried sons and daughters of LPRs (2B)
  - 114,200 + the number (if any) by which worldwide level exceeds 226,000
  - At least 77% must go to 2A
  - 75% of this 2A floor (the 77%) is exempted from per-country limits. **202(a)(4)**
- Married sons and daughters of US citizens: 23,400 + any visas not required for classes 1 and 2. **INA 203(a)(3)**
- Brothers and sisters of citizens
  - Citizens must be at least 21
  - 65,000 visas + those left over from 1-3

### Employment-based Immigrants

- Total worldwide quota (ceiling) = 140K + [last year’s unused family-sponsored]. **INA 201(d)**

#### Preference system:
- 1st: Priority workers – extraordinary ability in designated fields; outstanding professors and researchers; multinational execs and managers
  - Execls don’t need level of acclaim, but there are other requirements
  - 28.6% of visas, + any that 4th and 5th don’t need
- 2nd: Members of professions holding advanced degrees; aliens of “exceptional ability
  - Requires labor cert
  - 28.6% of visas, + any that 1st don’t need
- 3rd: Skilled workers, professionals w/ bachelor’s degrees, other workers who can show labor is needed
  - Requires labor cert
  - 28.6% of visas, plus any that 1st and 2nd don’t need
- 4th: “Special immigrants” – religious workers, long-term foreign employees
  - Defined under **101(a)(27)**, but (A) and (B) are exempt from numerical limitations
  - 7.1% of employment visas – no provision for adding unneeded stuff from other areas
- 5th: “employment creation” – entrepreneurs
  - Few people come in under this; lot of restrictions: if you pull out $$ or lay off employees w/in 2 year period, that is basis for removal
  - 7.1% - also no provision for adding unneeded visas from other areas

#### Labor certification: **212(a)(5)(A)**
- An alien entering US to perform skilled or unskilled labor is inadmissible unless Sec of Labor has determined
- Not sufficient workers who are able, willing, and *qualified and available @ time of application & place for work
  - “Equally qualified” for teachers, or those with exceptional scientific ability
- Employment of such alien will not adversely affect wages & conditions of US workers similarly employed
  - *Matter of Marion Graham*: if job requirements are any of the following, they are presumptively unduly restrictive & can only be supported by showing of “business necessity.”
    - Job reqs other than those normally required for job in US
    - Exceed requirements listed in D.O.T.
    - Include a foreign language
    - Involve a combination of duties
    - Require worker to live on employer’s premises
- Business necessity: *Information Industries* test: employer must demonstrate that
  - Job (duties and) requirements bear a reasonable relationship to occupation in context of employer’s business
    - (duties and) is addition of labor dept. reg
  - Essential to perform, in reasonable manner, the job duties as required by employer
  - But, BALCA rejected an interpretation that asks gov’t to look to the tasks employers can ask employees to perform. Look at qualifications & requirements only – Not sure on that
    - It’s probably not business necessity if clients prefer (but don’t need to) transact in non-English language, or if workforce predominantly doesn’t speak English (hire a translator)
    - Nothing that prevents a person from coming in, getting certified for one job (where there is need), then leaving for another job

**Diversity Immigrants**
- Worldwide limit = 55K for each year. *INA 201(e)*
  - Figure is now reduced to 50,000 as offset some of special admissions for Guatemalan and Salvadorans
- Same deal as for family-sponsored immigrants – no more than 7% may come from any particular country

**Practice tip:**
- If you have a choice between filing a family-sponsored petition or going in as immediate relative, file the petition
  - Don’t know for sure that you’ll become a citizen. Get the clock rolling on LPR status first
  - 2A petition is converted to immediate relative petition if the person naturalizes
- If all petitioning relatives die, the petition dies with them
  - Exception for people who died during 9/11 – if you were seeking to immigrate based on family (which died) or business (destroyed)
Do we need to have knowledge of all the 1-time remedies, like V-visas?

“Aging out” and Child Status Protection Act
- Freeze child status at time of application
- Administrative proceeding time doesn’t count against applicant
- But, statute doesn’t freeze beneficiary’s age while waiting for priority date to become current
- For immediate relative purposes, beneficiary’s age is frozen as of date of filing visa petition (person treated as under 21 if was under 21 when parent filed petition). 201(f)
  - Also makes adjustment if beneficiary becomes an immediate relative while some other visa petition is pending (2A petition, then parent naturalizes)
- For 2As, child’s age is age @ time that visa becomes available, but reduced by amount of time the petition was pending. 203(h)
  - This can lead to weirdness, positive advantage from processing delay while waiting for priority date to become current. See p. 253, last P.

Marriage
- Has to be valid in the jurisdiction where it occurred
- Has to be a marriage for the purpose of US immigration laws
  - Same-sex marriage partner doesn’t count as spouse for purpose of US immigration laws. Adams v. Howerton
  - Actual state recognition of same-sex marriage makes the issues in Adams more pressing
- Test for validity of marriage (factually genuine): @ inception of marriage, parties must have intended to establish a life together
- Sham marriage
  - Bilateral arrangements when spouses marry to facilitate immigration
  - Beneficiary deceives petitioning spouse about beneficiary’s feelings & intentions
  - Primary means for ferreting these out: interview
- Immigration Marriage Fraud Amendments: Whenever noncitizen receives LPR status ... by virtue of a marriage less than 2 years old, LPR status is subject to conditions subsequent. INA 216:
  - If AG finds that marriage was entered to procure immigration status, or was judicially annulled or terminated (other than by spouse’s death), or that a fee was given for filing petition, LPR status terminated. INA 216(b)(1)
  - Conditional resident & spouse have an affirmative duty to petition for removal of the condition & to appear for interview. INA 216(c) – 90 days b/f 2nd anniversary of admission as LPR. INA 216(d)(2)(A)
    - If decision is favorable, condition removed. INA 216(c)(3)(B)
    - If unfavorable, 216(c)(3)(C), or petition not filed on time, or one fails to appear to interview, 216(c)(2)(A), LPR status terminated
- Statutory waiver if:
  - Removal would entail “extreme hardship,” §216(c)(4)(A) – hardship for conditional resident, spouse, dependent child
  - Qualifying marriage entered into in good faith, terminated (other than by death of spouse), alien not at fault in failing to meet petition & interview requirements, §216(c)(4)(B)
  - Battered spouses, INA §216(c)(4)(C)

- Get from someone what happens if you get married during deportation proceedings; my notes aren’t clear on that.

Child
- To be siblings, people need to show that they are children of a common parent. Matter of Mourillon
- Term “child” = unmarried person under 21, various conditions under §101(b)(1-2)

Non-immigrants
- §101(a)(15) lays out the types. Common practice to refer to sub-letters beyond that (§101(a)(15)(J)(1) becomes J-1)
- Most have no numerical limits; some are subject to quotas
  - **H1B**: highly skilled temporary worker. Usually fills up on the first day of each year
    - Principle vehicle for temporary professional workers, requires that a person be in a “specialty occupation”
    - “Specialty occupation” requires “theoretical and practical application of a body of highly specialized knowledge”
    - To be “in” the occupation, §214(i)(2)
    - May be admitted for up to 6 years, §214(g)(4)
    - Must get labor cert
    - Cap of 65K for this sort of visa
  - **H2B**: unskilled temporary worker – must have residence w/ no intent to abandon; must be coming in temporarily
    - **H2A** status – deals specifically w/ agricultural workers
  - **H-3s**: trainees
  - **Bs**: alien coming into US temporarily for business or pleasure, has residence & no intention of abandoning, not coming in for purpose of performing skilled or unskilled labor
    - “For pleasure” = tourists (B-2s)
  - **E**: treaty trader (1) and investor (2)
    - Admitted for 2 yrs w/ unlimited # of possible extensions
    - Regulations require intent to depart upon termination of E-status
  - **F1** – Student visa: must be in us temporarily & solely for purpose of education; must have home w/ no intent of abandoning
    - Now admitted for “duration of status”; if unable to complete studies in time, student applies to university for extension
    - Must demonstrate sufficient funds. §212(a)(4)
    - Restrictions on which schools they can attend, p. 385
o **J1** – Student, teacher, etc., having residence in foreign country w/ no intent of abandoning, coming temporarily for program (educational visitors)
  - Slightly more liberal entrance requirements
  - Biggest hitch is **212(e)**, “anti-brain-drain,” requires that you can’t apply for immigrant visa, LPR status, or non-immigrant visa until you have resided & been physically present in country of nationality for 2 years from departure from US
    - Waiver provisions for hardship, for persecution
    - Only applies if you fall into category (i-iii)
    - (i): if $$ comes from gov’t to individual (even indirectly, through foundation)
    - (ii): if country requires certain services
    - Country may waive objection

o **O** category – “extraordinary” athletes, entertainers, scientists, artists, etc.

o **P** – internationally recognized athletes, members of internationally recognized entertainment groups performing specific events

o **S** visas = snitch visas

o **K** visas: **K-1** for fiancées, **K-2** for noncitizen minor children following to join
  - **214(d)** requires that the fiancées have met each other during the 2-year period preceding filing of petition
  - **K-3** and **K-4** visas for noncitizen spouses, to allow them to work while waiting for processing delays in LPR status (immediate relative)

- Many of these authorize spouses & kids following to join – see the relevant statute provisions

*I*nternational *U*nion:
- Deference (not complete deference) to agency interpretation under *Chevron*
- Dispute between whether workers for a company to install a machine had to come in under **H1**, or whether they could come in as **Bs** (temporarily for business)
- Balance reached: foreign workers for a company from which US company bought a machine are allowed to come in and train others how to install / service the machine, but can’t do so themselves

*Intent to remain permanently:*
- Preconceived intent to remain will bar from most nonimmigrant visas, but “dual intent” is OK
- Dual intent = intent to remain in this country in accordance w/ the law (I will go back if I can’t become an LPR or get another visa)
- Ethical issues involved w/ counseling clients about this
Exclusion Grounds (for admission)

- **235(a)(1):** alien who is either present in US but not admitted, or arrived in US (whether @ designated port, & including those interdicted) is an applicant for admission
  - Practically speaking, this means people in the country w/o having been admitted have to contend with admissions grounds, not deportability grounds

- **212(a)(1) – Public health**
  - (A) – General, excludes ppl w/ “communicable disease of public health significance” which includes HIV / AIDS – variety of other parts as well, w/ immunization and such.
  - (B) – Waiver authorized, see 212(g)
  - (C) – Exception from immunization requirement for adopted children 10 years of younger.

- **212(a)(2) – Criminal, etc.**
  - (A) Conviction of certain crimes: crime involving moral turpitude, or violation of laws of State / US
    - But, exception if alien was under age + 5 years b/f date of application for visa
    - Or, if maximum penalty < 1 yr
  - (B) Multiple criminal convictions – any alien convicted of 2 of more offenses, for which aggregate sentences were 5+ years, is inadmissible
  - (C) Controlled substances traffickers
  - (D) Prostitution and commercialized vice
  - (E) Aliens involved in serious criminal activity who’ve asserted immunity from US prosecution
  - (F) Waiver – see 212(h): Waives (A)(i)(I); (B); (D); (E) for offenders whose offenses are well in the past & have been rehabilitated; some relatives of US citizens + serious hardship. It’s discretionary
    - Unavailability to anyone who was convicted of aggravated felony after being admitted as LPR – harsher for LPRs, but that’s how it goes
      - But, covers those unlawfully admitted to permanent res.
  - (G) Foreign gov’t officials who have committed severe violations of religious freedom
  - (H) Traffickers in persons
  - (I) Money laundering

- **212(a)(3)**
  - (A): alien inadmissible if consular officer / AG knows / has reason to believe the alien seeks to enter to violate law, etc.
  - (B): exclusion for terrorists, advocates of terrorism, representatives & members of terrorist organization, has received training from terrorist groups, is spouse or child of one inadmissible (unless they didn’t / shouldn’t have known)
    - (B)(iii) – broad definition of terrorism
- (iv) – engage in terrorist activity defined
  - (C): inadmissibility for alien that pose foreign policy risks
    - But not for officials / candidates if their beliefs, actions, etc. would be lawful w/in US
    - Above also applies to other nonofficials, unless Secretary of State determines that it would compromise a compelling US interest
  - (D): immigrant membership in Communist or other totalitarian party
    - Exception for involuntary, past membership
  - (E): Participation in Nazi persecution, genocide, or commission of act of torture, or extrajudicial killing (under color of law).
  - (F): Association w/ terrorist organizations

- 212(a)(4) – Public Charge
  - (A) – renders inadmissible anyone likely to become public charge
  - (B) – factors in decision
  - (C) – for family-sponsored immigrants, requires filing of affidavit of support (which is now a binding contract and has ramifications on p. 440

- 212(a)(5) – Labor Certification

- 212(a)(6)
  - (A)(i): Alien present w/o being admitted or paroled, or arriving @ US @ time or place other than as designated by AG, is inadmissible
  - (A)(ii): Exception for certain battered women & children
  - (B): failure to attend removal proceeding makes you inadmissible for 5 yrs
    - **I think this means while proceedings are pending**
  - (C): fraud in procuring documentation, admission, or falsely claiming citizenship makes you flat inadmissible forever
    - Falsely claiming citizenship itself doesn’t require fraud, but there’s an exception carved out for people who do it honestly in some circumstances
    - Surreptitious entry is not itself fraud
    - **212(i): discretionary waiver of inadmissibility for fraud, given extreme hardship**
  - (D): stowaways
  - (E): smugglers
    - **212(d)(3)(11) – authorizes discretionary waiver of (a)(6)(E) – smugglers**
  - (F): people subject to final order for violation of document fraud statute are inadmissible
    - **212(d)(3)(12) – authorizes discretionary waiver of (a)(6)(F) – inadmissible for doc. fraud**

- 212(a)(7) – Documentation requirements (A = immigrants; B = nonimmigrants)
  - (A)(i)(I): Inadmissible if not in possession of valid documentation
  - (A)(i)(II): Inadmissible if visa issued w/o compliance w/ procedures
  - (B): nonimmigrants not in possession of valid docs, for periods of time
  - General waiver authorized

- 212(a)(9)(A) – Aliens previously removed
  - (i) – arriving alien: w/in 5 years, or 20 years in case of 2nd offense
- **212(a)(9)(B)** – Aliens unlawfully present
  - **(i)(I)**: If unlawfully present for more than 180 days but under 1 year, and voluntarily departed prior to commencement of removal proceedings; inadmissible for 3 years after departure / removal
    - Requires continuous unlawful presence
    - Presence doesn’t become unlawful if a person violates terms of admittance other than by overstaying (F-1 drops out of school)
  - **(i)(II)** Unlawfully present in US for 1+ yrs.; inadmissible for 10
    - Requires continuous unlawful presence
  - **(ii)** Unlawfully present if here after expiration of period of stay, or w/o being admitted or paroled
  - **(iii)** Exceptions:
    - **(I)**: For minors – that time doesn’t count
    - **(II)**: Time doesn’t count while you have a bona fide asylum claim pending, unless person was working w/o authorization
    - **(III)**: Family unity
    - **(IV)**: Battered women under (6)(A)(ii)
  - **(iv)** Tolling: if you’ve been lawfully admitted / paroled, and have filed a nonfrivolous application for change of extension of status
    - DHS interpretation of tolling provision of (9)(B): statute says “120 days,” but DHS has interpreted this to toll the entire time that the application is being processed
    - Covers both 10 year and 3 year bar
  - **(v)**: Waiver: AG has discretion to waive **(i)** for immigrants who are spouse / son / daughter of citizen / LPR if refusal of admission would result in extreme hardship

- **212(a)(9)(C)**: inadmissible for @ least 10 years if you were unlawfully present for aggregate period of >1 year, or ordered removed.
- If judge grants you voluntary departure, and you voluntarily depart, you’re not inadmissible under either the ½ to 1 year OR the “failure to appear”
- Extremely important waiver provision: **212(d)(3)(A)**. Allows waiver of almost anything, except for some national security grounds under **212(a)(3)**. Alien can come into US temporarily as a nonimmigrant, upon AG’s approval.
  - Waiver only applies to immigrants; nonimmigrants won’t be (immediately) affected by it. But, if they come over and then plan to apply...
Admission Procedure

- Authority for issuing visas, basic information that must be furnished: \textbf{221, 222}
  - Once issued, valid only for limited amount of time – immigrant visas expire after 6 mo. \textbf{221(c)}
- Immigrants applying under 2nd and 3rd employment-based prefs must get labor cert
- Visa petition, filed w/ USCIS
- Getting a visa: after petition is approved, beneficiary files application w/ consulate
  - Persuade that applicant fits definition & none of grounds for inadmissibility apply
  - LPR who leaves country doesn’t need visa; green card good if only gone for <1 year (otherwise, apply for re-entry permit)
  - Refugees don’t need visas
  - Have waiver for \textbf{B-1} and \textbf{B-2} entrants from some countries
- No judicial, administrative review from denial of visa; principal consular officer required to review, but that’s impossible so he’ll do spot-checks
  - Rarely, you’ll get advisory letter from visa office (which doesn’t bind CO, but he must explain disagreement) or action from a congressman
- Actual admission, w/ visa in hand @ US, w/ possibly another check
  - If someone believes you’re “clearly and w/o doubt entitled to be admitted,” you’re admitted, & given docs
  - If not, go back or to removal proceeding; removal appealable by right to BIA, and then right of judicial review @ CoA
- Expedited removal: immediately sent back if officer determines inadmissible for lacking documents or for fraud. \textbf{235(b)(2)(A)}
  - Exception: if you claim US citizenship, LPR status, or seek asylum (formally or by saying sth about persecution)
  - Most won’t contest, under \textbf{9A}, formal removal order bars admissibility for 5 years
- Discretion to temporarily “parole” into US, \textbf{212(d)(5)}
- There’s a lot more specifics on admission procedure, 485-90, than I’m noting
- Adjustment of status – do that in US w/o needing to get visa
  - Substantive requirements: must make application, must be eligible to meet immigrant visa and must be admissible; immigrant visa must be immediately available. \textbf{245(a)}
  - No longer just enough to meet substantive requirements; can’t apply unless \textit{inspected and admitted} or \textit{paroled} (have to be here as nonimmigrant; not enough to just sneak in). \textbf{245(a)}
    - But, there is an exception which would allow a person to just pay a fee, \textbf{245(i)} (applies to people classified under \textbf{245(c)}) – this potentially dodges the issue of deportation and a \textbf{9B} time-ban for overstaying
    - That fee provision has lapsed
o Unless you fall into one of several categories (immediate relative), can’t apply if you were ever out of status while in US. 245(c)

o 245(k) – allows an alien to adjust status if eligible to receive immigrant visa under 1st-3rd work preference
- For adjustment, visa must be “immediately available” – that means current priority date

Big problems w/ unauthorized practice of law in conjunction w/ admission procedures, people taking advantage of immigrants (Hispanic communities especially)
Deportability Grounds
- Now, “removed” is used to cover both the exclusion and deportation contexts
  o Exclusion: removal of people upon arrival (including those never admitted)
  o Deportation: removal of people other than upon arrival
- Sometimes, the word “entry” is still around – have to know what it means
  o General test for entry: in order to make an entry, you need to be “free of physical restraint

Fong Haw Tan: if there’s an ambiguity in deportation statute, should be construed in favor of the noncitizen & against the gov’t
- Has little practical significance; doesn’t really move Court to do what it wouldn’t otherwise

Rosenberg v. Fleuti: dealing with the meaning of “entry”
- If alien’s trip from the country is “innocent, casual, and brief,” then court will hold that “departure was not intended.”
- Construe 101(a)(13) to require intent to depart in a manner disruptive of alien’s permanent residence
  o Inadmissibility at time of entry is a deportability ground, 237(a)(1)(A); Fleuti would have been inadmissible @ time of entry if he were “entering”
- Now, how much of Fleuti survived IIRIRA
- 101(a)(13)(A): now, talks of “admission” and “admitted”: mean lawful entry of alien into US by inspection & authorization
- Now, exceptions in 101(a)(13)(C) – LPR shall not be regarded as seeking admission unless:
  o (i) has abandoned or relinquished [LPR] status
  o (ii) has been absent from US for continuous period of 180 days
  o (iii) has engaged in illegal activity after having departed US
  o (iv) has departed US while under legal process seeking removal
  o (v) Has committed an offense under 212(a)(2) ▪ Does this mean that once LPR commits a crime, he’s forever barred from invoking the returning LPR exception? Or, did Congress intend to reach only offenses connected w/ the trip?
  o (vi) Attempting to enter @ time or place not authorized
- BIA has taken the position that the “unless” clause implies the converse – that any of these 6 categories is a necessary and sufficient grounds to say that LPR is seeking admission. Don’t need to separately look to Fleuti. Most courts follow this
  o But, opinion has not been unanimous. Some courts read the 6 exceptions as opening the question whether LPR seeks admission; then, look to Fleuti factors
Deportability grounds:

- **237(a)(1)(A):** Inadmissible @ time of entry or adjustment of status
  - Charge would look like this: deportable under this statute because inadmissible under X statute.
  - Often used to correct errors in admission process, such as where person entered, while inadmissible, b/c of fraud.
  - Anomaly: no inadmissibility ground for people who were inadmissible at a previous entry, but that person becomes immediately & forever deportable (unlike 3 year bar for the 180-day period)
  - L has never seen this issue litigated.
  - That would be fixed by my reading, which would take “inadmissible @ time of entry” to mean “this entry” or “most recent entry.”

- **237(a)(1)(B):** Alien present in violation of INA or any other law, or whose nonimmigrant visa has been revoked, is deportable.
  - This sometimes covers people who fail to comply w/ conditions for their stay, which is also covered by ... 

- **237(a)(1)(C):** Violation of nonimmigrant status or condition of admission (work permit, interview to determine validity of marriage, public health).

- **237(a)(1)(E):** Smuggling – doesn’t apply in cases of family reunification; Sec of DHS can waive this, in discretion, for when alien was smuggling only certain family members (and no one else).

- **237(a)(1)(H):** Provision for waiving certain frauds.
  - Can waive and thus 237(a)(1)(A) deportability (above) based on 212(a)(6)(C)(i) (doc fraud) violations for aliens who:
    - Are of certain relation to US citizen or LPR.
    - In possession of immigrant visa or equivalent document, & was otherwise admissible except for grounds of inadmissibility under 5A (labor cert) and 7A (lack of valid visa) of 212(a), that directly result from the fraud.
  - If you were inadmissible for some other reason than the fraud (besides 5A and 7A), still inadmissible.
  - Confusing, unresolved hypo of Legomsky’s: what does directly result from the fraud mean?
    - Waiver is to waive dishonesty, but why would you ever lie if there weren’t another reason that you’d have been inadmissible?
    - Does this provision require forgiveness of the lie and treating the person as if they lie they told was true (e.x., if you were inadmissible b/c married, and claimed to be single)?
  - 212(h) can also apply – you’d have to be seeking that waiver retroactively – whether, at the time of entry, the person could have received that waiver of the doc fraud violations of 6C(i).

- **237(a)(3)(D):** False citizenship claim as deportability ground.
  - Any alien who falsely claims citizen or represents self as citizen for benefit under INA is deportable.
  - Exception for people who reasonably believed he was citizen, resided in US until 16, had natural / adoptive parents who were citizens.
237(a)(2) – criminal offenses
  o (A)(i): Alien convicted of crime of moral turpitude committed w/ in 5 years after admission, and crime for which >1 year can be imposed, is deportable
    ▪ NOT 10 years – that’s for aliens provided LPR status under 245(j) (Snitch visas)
    ▪ Also, looking at whether the crime was committed w/ in 5 yr. window, not whether alien was convicted in 5 year window
    ▪ To determine whether crime involves moral turpitude, look to elements, not facts of case
    ▪ Moral turpitude = actions are “vile, depraved, and wicked”
      • Any crime of dishonesty involves moral turpitude, beyond that, it’s hard to say
      • Larceny; aggravated assault (but not simple assault); voluntary (but not involuntary) manslaughter
  o (ii): 2 or more crimes of moral turpitude, not arising out of single scheme is deportable. 2 definitions of single scheme:
    ▪ Crimes must “take place at one time, there must be no substantial interruption that would allow participant to disassociate self from enterprise & reflect on what he did” – 1st circuit, BIA (entitled to Chevron deference?)
    ▪ 9th Circuit, maybe 2nd: “were planned at the same time and executed in accordance with that plan.”
  o Pre-1990, judges could issue JRAD under former 241(b)(2) for crimes under (A)(i-ii), which prohibited judge from deporting on the basis of the particular crime (that’s gone now)
  o (iii): Aggravated felony, @ any time after admission, deportable
    ▪ 101(a)(43): lists about 20 categories of crime that qualify as aggravated felonies (under some, crime doesn’t have to actually be felony to qualify)
    ▪ Look to the statute! Not writing all these out
    ▪ Don’t forget foreign country paragraph @ end
    ▪ (F) defined ag.fel. to include crime of violence, under 18 usc 16
    ▪ Look to elements, not facts of case, to determine crime o’ violence
    ▪ Definition of crime of violence: top, p. 556
    ▪ “Use” of physical force requires active employment. And under (b), risk that physical force may be “used” requires the same; not dealing with negligent, reckless, accidental application of force
    ▪ DUI doesn’t fall under here, even if it leads to crash
    ▪ Possession of a gun wouldn’t either – neither use of physical force nor risk of it in possessing gun (thought maybe in later crime)
  o (iv): High speed flight – deportable
  o (v): Waiver authorized if alien is granted full & unconditional pardon
  o (B)(i): anyone convicted of violation or conspiracy to violate controlled substances law is deportable – except for single offense involving possession for one’s own use of 30 grams or less of pot
(ii): Any alien who is, at any time after admission has been, a drug abuser or addict is deportable

- (C): Certain firearm offenses
- (D): Miscellaneous crimes – espionage, etc.
- (E): domestic violence, stalking, child abuse, neglect, abandonment

- (3)(B) – failure to register or falsification of docs.
- (4)(B) – terrorist grounds are the same as for admission
- (5) – noncitizen who becomes a public charge w/in 5 years after entry is deportable unless he/she can affirmatively show causes arising after entry

What is a conviction? 101(a)(48)(A):
- A formal judgment of guilt entered by court
- If adjudication of guilt has been withheld:
  - Judge / jury has found alien guilty or alien has either pled guilty, nolo contendere, or has admitted sufficient facts to warrant finding of guilt, and
  - Judge has ordered some form of punishment / penalty / restraint
- Expungment under a state rehabilitative statute does not erase conviction (BIA interpretation)
  - Exception: state statutes that correspond to federal juvenile delinquency provisions
- Question of whether expungements under the Federal First Offender Act survives IIRIRA, and whether expungements under that act for first-time narcotics offenders wipe out conviction
- If final judgment of conviction is entered, but judgment is reversed or vacated, that doesn’t suffice for removal purposes – AG declares there’s “no formal adjudication of guilt.”

Cancellation of removal – part A. 240A(a) – only to certain LPRs
- AG (sometimes Sec of DHS, sometimes AG) may cancel removal of an alien who is inadmissible or deportable from US if alien
  - Has been LPR for not less than 5 years
    - LPR status “terminates upon entry of a final administrative order of exclusion, deportation, or removal”
      - Final when BIA affirms it or time for filing appeal lapses
    - LPR status procured by fraud not recognized at all for cancellation
    - Notice to appear may terminate continuous physical presence, but NOT LPR status; that terminates by removal order. So LPR status (but not physical presence) can accumulate during removal proceedings
  - Has resided in US continuously for 7 years after being admitted in any status
    - Counts nonimmigrant stays
    - The statute doesn’t say “lawful continuous residence” – might interpret it to include periods of unlawful residence. Then again, might not; another open question
  - Has not been convicted of aggravated felony
Applicant must show that he/she merits the favorable exercise of discretion
Way the law is now is due to trilogy of cases:
  - Remedy available for both admissibility and deportability, even when particular charge doesn’t rest on entry or admission (codified after Matter of L and In re GA)
  - No distinction between someone leaving & someone who doesn’t (codified after In re Francis)
Cancellation of removal – part B. 240A(b) – for certain nonpermanent residents, but can be used by LPRs who don’t qualify for (a)
  - Allows cancellation of removal and adjustment of status to LPR (does both), when
    - Alien has been physically present in US for continuous period of 10 years
    - Has been person of good moral character during that period
    - Hasn’t been convicted of offense under 212(a)(2), 237(a)(2), or 237(a)(3) (except in case of 237(a)(7) where AG decides to grant a waiver
    - Establishes that removal would result in “exceptional and extremely unusual hardship” to the alien’s spouse, parent, or child, who is a citizen or LPR
  - Same 2 hurdles – eligibility & favorable exercise of discretion
  - Limit under (e)(1): to 4000 individuals in 1 fiscal year
Special branch of Cancellation Part B for battered spouses & children, (b)(2); requirements are loosened
  - 10 years becomes 3 years
  - Downgraded to extreme hardship, and may result in extreme hardship to alien, in addition to child / parent. Spouse not included. And none of those people have to be citizens.
AG exercising discretion really amounts to IJ’s discretion
Disqualifications from both, 240A(c), includes:
  - J-visas (2 year return requirement) & haven’t fulfilled it
  - Terrorists
  - Aggravated felons
Special rules for both, 240A(d):
  - Continuous presence terminates when alien gets notice to appear or has committed an offense that renders alien inadmissible
    - What if removal proceedings are subsequently cancelled? Does that play in? That’s an open question – could argue as immigrant’s lawyer that Congress didn’t intend a baseless notice to wipe out continuity
  - Also if alien departed from US for period > 90 days, or aggregate periods > 180 days
    - This speaks only to continuous physical presence, we have no statutory guidance on whether this applies to continuous residence as well.
    - It probably does not; would have to use some other sort of test (Fleuti?)
  - Those reqs don’t apply to army service

RELIEF FROM REMOVAL
249 – “Registry”
- Allows AG to grant discretionary LPR status to a person who:
  o (a) Entered US prior to 1/1/72
  o (b) has continuously resided (not harder “continuous physical presence”) in US since entry
  o (c) is person of good moral character
  o (d) is not ineligible to citizenship and not deportable under 237(a)(4)(B) (terrorist)
- Also cannot be inadmissible under 212(a)(3)(E) (terrorists) or under 212(a) for more serious criminals

LEGALIZATION OF AGRICULTURAL WORKERS IN 1986 – 210
CUBANS AND HATIANS IN 1986, p. 611
NICARAGUANS AND CUBANS IN 1997, p. 611
HATIANS IN 1998, p. 611

ADJUSTMENT OF STATUS, 245
- People who typically qualify are immediate relatives

DEFERRED ACTION
- Prosecutorial discretion and unreviewable, see 242(g)

VOLUNTARY DEPARTURE, 240B
- In exchange, no formal removal order issues
  o As a practical matter, must be done shortly after master calendar, p. 618
  o People would go for this b/c once removed, noncitizens are ineligible to return to US for at least 10 years. 212(a)(9)(A)
- Certain deportability grounds make one ineligible, (a)(1)
- Voluntary departure not valid for more than 120 days, (a)(2)
- Voluntary departure @ alien’s own expense, (b)(1)
- If you get voluntary departure once and fail to honor it (or have failed to appear @ proceedings), you’re barred from voluntary departure for 10 years. 240(b)(7), 240B(d)
- Very few requirements under (a), except the timing issue and that you not be a terrorist
- (b)’s restrictions are slightly larger – covers more national security / ideological grounds
  o Also have to show good moral character, financial means to depart, post bond

Removal
- 241(b) deals with destination of the alien
  o First step (C): designation “may” be disregarded if country doesn’t accept
  o Second(D): designation “shall” be disregarded – but regulations construe that as requiring IJ to order removal to that country if country accepts, and gives IJ discretion if country does not
Jama v. ICE: Step 3—(E)(i) through (E)(iv)—don’t require acceptance by receiving country
“Fourth step” is the only step for which country’s acceptance is a prerequisite to removal. 241(b)(2)(E)(vii)

Stays of removal – ICE can grant temporary stay in its discretion
- But motion to reopen doesn’t automatically stay removal; once removal effected, the motion to reopen is withdrawn
- Bring both motions together

Citizenship is a complete defense to removal

Removal Procedure
- Authorization to practice, p. 655
- 240(b)(4)(A): no right to counsel @ government’s expense, for alien
  - Notes make it sound like there will sometimes be a DP right to counsel, depending on the facts. That’s not the impression I got
- Hard to get representation; often comes from Legal Aid, pro bono services
  - Policy of no federal $ to legal aid for immigrants
  - Also, hard to get $$ through Equal Access to Justice Act: requires adversarial proceedings, and removal proceedings are deemed nonadversarial (until they get to judicial review, maybe)
    - Act allows prevailing party in certain adversarial proceedings to recover atty fees from gov’t
- Disciplining of practitioners:
  - Sanctions for frivolous claims, ineffective assistance
    - Good faith defense to frivolous claims sanction
  - Ineffective assistance – wanted to deter from the filing of motions to reopen based on ineffective assistance; need cooperation of prior lawyer, they’re not going to give it now
- People v. Pozo: is it ineffective assistance to tell a suspect that guilty plea makes you deportable? Can ineffective assistance be a grounds for withdrawing such pleas?
  - Don’t come down on either absolute
  - Must show that it was ineffective – below minimal standard of professional competence
    - There, it’s important if the record shows atty knowledge that D was alien
  - Must show prejudice – that accused would have not pled (but not that accused would have won)
  - Matter of Lozada, 3rd full p. p. 682 for list of ineffective assistance reqs, in terms of documentation & such
    - Affidavit – what counsel did / didn’t do
    - Allegations vs. counsel & opportunity for him to respond
    - Was complaint filed w/ appropriate disciplinary authority
More likely to find it ineffective assistance of counsel if client spots the issue & asks atty, who disregards possibility, than if neither realizes the possibility.

- Standard rules of evidence do not apply to removal proceeding; evidence need only be probative & fundamentally fair (though egregious violation of 4th amendment or other liberties might keep stuff out, per Lopez-Mendoza)
  - So, 4th amendment doesn’t generally bar stuff – one exception might be if gov’t seized stuff b/c of racial background
  - Problem: 235(a)(5) allows requiring of aliens to state facts under oath; unclear whether the judge can compel person to talk if person remains silent – this could run up against constitution

- Burden of proof:
  - ICE has burden of proving that person is not a citizen
    ▪ If person remains mute here, maybe get @ their testimony by immunizning them from prosecution?
    ▪ Inferences of silence are permissible in deportation proceedings, where they’re not in criminal cases, but alone are not enough to satisfy the “clear, unequivocal, and convincing evidence” standard
  - Then, person against whom proceedings are brought has burden of proving “time, place, & manner” of entry; if not sustained, person is rebuttably presumed to be here in violation of law, & deportable under 237(a)(1)(B)

Appellate Process
- Either noncitizen or ICE has right of review by BIA
  - A lot of summary dismissals & 1 member affirmances w/o opinion (no opinion issued, decision by 1 member rather than 3-member panel)
  - W/ affirmances without opinion, you lose precedential value
- Review from there by circuit courts
- Judicial review of orders of removal – governed by 242
  - Under 242(a)(2)(B), no court can review any AG discretionary grants of relief under 212(h) or any other party of Title II of INA
    ▪ This just means that the discretionary component is non-reviewable. If you were found ineligible for exercise of discretion, court can review those facts
  - Under 242(a)(2)(C), courts similarly lack power to review removal order for alien who is convicted of certain criminal offenses; but do have the power to review whether alien really is removable
- Big independence problem now

Motion to Reopen / Reconsider
- Reopen: based on new facts that were not available & could not have been discovered or presented prior
  - Only 1, must be filed w/in 90 days of final administrative order
  - May deny motions to reopen if:
- Movant hasn’t established prima facie case for underlying substantive relief sought
- Movant hasn’t introduced previously unavailable, material evidence
- If seeking discretionary relief, hasn’t established eligibility for it
  - Reconsider: to call attention to errors of fact or law in prior Board decision
    - Only 1, must be filed w/in 30 days of final administrative order
  - Denials reviewable only for abuse of discretion
**National Security**

Detention in connection w/ removal proceedings, 236
- 236(a)(2) deals w/ the conditions under which AG can release aliens

Mandatory detention of suspected terrorists, 236A
- Generally requires certification by AG of grounds to believe that alien falls w/in one of several categories

Designation of an organization as terrorist: 219 (to be coupled with 212(a)(3)(B))
P. 874-90: truncated procedures / procedural shortcuts for removal in terrorist context

Profiling

Dispute over whether better immigration control would have prevented 9/11
Asylum

- “Overseas refugees.” – noncitizens who qualify for refugee status and haven’t yet reached US. For these, talking about admitting into US
- Others: those who have reached US territory & request relief from persecution
- Remedies:
  - “Asylum,” INA 208 – right to remain in US (sometimes permanently)
    - Grants right to remain, right to bring in family
  - “Withholding of removal” (nonrefoulement), INA 241(b)(3)
    - Only grants right not to be returned
    - Language of “life or freedom would be threatened” is different from “persecution” – be aware.
  - Every asylum application is also deemed to be an application for withholding of removal, in the alternative
- Refugee definition, 101(a)(42)
  - Part A
    - Outside of country of nationality (or, if no nationality, outside country of residence), and
    - Unable or unwilling to return to, & unable and unwilling to avail self of protection of that country, b/c of
    - Persecution or a well founded fear of persecution
      - Past persecution automatically qualifies you
      - “Well founded fear” means that you expect it; doesn’t require that you subjectively fear it
    - On account of race, religion, nationality, membership in particular social group, or political opinion
  - Part B – in special circumstance, President after appropriate consultation can do away with the “outside the country” req.
  - Forced abortion / involuntary sterilization made special under statute
- Under INA 207(a), president makes annual determination of how many refugees to admit in upcoming fiscal year. 207(a)(2)
  - Must first consult with Congress, 207(a, b, d, e)
  - May admit any refugees that are not affirmatively resettled & admissible. 207(c)(1)
  - Refugees automatically exempted from certain exclusion grounds (labor cert., public charge, doc. requirements); secretary has discretion to waive others. 207(c)(3)
    - Otherwise, refugees subject to same general exclusion grounds
  - Spouses & children accompanying or following to join admitted under same criteria. 207(c)(2) – age freeze for child in (B)
  - Refugee status may be terminated after the fact, on determination that refugee didn’t meet definition @ time of admission. 207(c)(4)
  - 209(a), refugee whose status hasn’t terminated & who is still admissible gets LPR status after 1 year
    - For those admitted for asylum (had to be onshore first), adjustment of statuts grounds are in 209(b, c) – have to be here 1 yr.
- Secretary of Homeland Security determines priorities (of who to admit), determines how many officers to deploy; USCIS officers in field make determinations
- Did away w/ parole power for refugees, absent “compelling reasons in the public interest w/ respect to that particular alien. **212(d)(5)(B)**
- Chart of presidential authorizations, p. 930
- Asylum procedure (onshore):
  - If person files for asylum while in removal proceedings, filed w/ IJ & reviewable by BIA
  - If “affirmative application,” nonadversarial proceeding; denial of asylum reviewable *de novo* by IJ; subject again to normal appeals

**Matter of Acosta**
- Fear of persecution should be the person’s primary motivation for seeking asylum
  - But I has never seen a case in practice where another fear hurts your case
- Membership in Taxi driver’s cooperative didn’t count as social group
  - Membership in social group must be determined by an “immutable characteristic,” either
    - Beyond power of the individual to change, or
    - So fundamental to identity that individual ought not be required to change.
  - This isn’t a factor that the person can’t change or shouldn’t be required to change
- Social group as member of a profession may be possible if, even if you left, you would be targeted based on education / training (gets closer to immutable) (in reality, all people who had been westernized)
  - Or, if the persecutor believed that there was something inherently wrong w/ membership in a profession, *would that matter?*
- Inability / unwillingness to return to country requires danger in whole country, not just a part
- Persecution must be targeted at the person
  - 2 concerns here: condemning another culture; or the sheer #s of people that would qualify
  - The view that action doesn’t qualify as persecution if it happens to a large segment of the population fell out of favor in ‘80s.
  - But, a person does not need to prove a fear of *personal* persecution if the person establishes: 1) a pattern or practice of persecuting a certain group, and 2) membership in that group
    - **What amount of the targeting requirement survives?**
  - Also, if a large group is the social group, but the persecution or discrimination only happens to a small # of that group, makes it less likely to happen to you
- Persecution is tied to harm

Person might have a choice of conduct – persecuted if I do A, not if I do B
- If option B is persecution, however, then you still fall under the statute
Also the persecution / prosecution distinction
- Prosecutions will be treated as persecution if you can show that the prosecution was a pretext for persecution
- Or, if the penalty is excessive, compared to crime; can be evidence of pretext

**INS v. Elias-Zacharias**
- “Political opinion” persecution must be on account of V’s political opinion, not P’s political objectives
  - By way of comparison to this case, persecution would have to be on account of your religion, not b/c of gov’t’s religious agenda.
- Question of whether neutrality can be political opinion
  - Neutrality (or other action) for the sake of saving your ass isn’t political opinion, or a manifestation of such
- In theory, under the majority’s rationale, no one could ever qualify for asylum on the basis of political opinion. You would have to be punished for the opinion itself rather than manifestation
  - Dissent: act is manifestation of political opinion (not that this would stop prosecution, see Tim McVeigh)
- Reality has to exist somewhere between majority & dissent

**Imputed Political Opinion**
- It’s enough that you’re being prosecuted on the basis of a political opinion that someone imputes to you (even if wrongly)
- Unsure what would happen in case of falsely / cynically imputed political opinion (accuse you of subversion if you don’t do X) – if you reject that, have to inquire into persecutor’s motives
- Act like fleeing can be imputed political opinion
  - Run into the EZ problem – were you fleeing just to escape doing something that you didn’t want? Or persecution? And if so, what meaning will the persecutor impute to flight?
- By the same token, could also have imputed membership in social group

**Sanches-Trujillo v. INS**
- Sets forth a separate test for social group, that subsequent case law has interpreted as supplementing the Acosta “immutable characteristic” test:
  - Group must be “cohesive and homogeneous”
    - Cohesive implies voluntary membership; can call this the “voluntary association” test
- No jurisdiction really uses this test

**DOJ proposed rule**
- Immutability; must exist @ time of membership (obviously, can’t change the past)
- Immutability necessary, but not sufficient – look to non-exclusive list of other factors, pp. 982-83
  - Sanches-Trujillo test is a factor
  - Also, factors talked about on pp. 1026-27
- Social group must itself exist independently of persecution; can’t be defined by persecution

**Matter of Toboso-Alfonso**
- Homosexuality can count as a social group
- Important that he was persecuted on basis of being homosexual, not on basis of having committed homosexual acts – that might just have been prosecution
- If “people engaging in homosexual sodomy” was the social group, have to ask whether that’s so immutable that they shouldn’t be required to give it up (is forced chastity / celibacy persecution)?

Gender persecution
- Not a grounds w/in statute; comes in through social group

Fatin v. INS
- To make a claim based on social group, must:
  - Identify a particular social group
  - Show membership in group
  - Show well-founded fear of persecution based on (on acct of) membership
- Women can be a social group
  - But persecution doesn’t happen solely because of this (where did solely come from?)
- Could also classify a social group as “all women who refuse to comply w/ X”
  - If a person feels so strongly about sth that the person is willing to risk punishment, that belief may be immutable under Acosta
  - But she’s not a member
- Could also be “objecting women,” but again, hasn’t shown that conformity is persecution
- Not everything that intrudes into autonomy is persecution

Matter of Kasinga
- Female genital mutilation is persecution
  - Subjective intent to punish / malignant intent not required
- Social group: women who haven’t had FGM and oppose the practice
  - Could say “refuse to conform,”; not like they have a choice, but still, will be subject to practice against their will
- Was significant that she hadn’t had FGM performed yet (see below)
- Rosenberg’s concurrence: surplusage to define social group in terms of Kasinga’s opposition to the practice
  - Determination of “persecution on account of social group” requires determination that the agent of persecution is seeking to overcome the social group.

Who’s persecuting (nonstate actors)
- Must be either government or someone that the government is unable / unwilling to control
  - “Unable / unwilling” pretty much takes up the whole universe of explanations
  - For purposes of determining unable / unwilling, look at the steps that the government is taking. That’s not necessary or sufficient,
- Question comes up most commonly in domestic violence (Matter of RA) & persecution of women
- If private actor is persecuting, and claim that gov’t is standing by
Who must be motivated by race, etc.? Private actor? Gov’t, in standing by? Both?

Questions seem unresolved

- UNHCR’s take:
  - No requirement that persecutor be state actor
  - Acts by local populace = persecution if “knowingly tolerated” by authorities, or if authorities “refuse, or prove unable, to offer effective protection”
  - If persecution happens, haven’t they always proved unable?

- DOJ’s take:
  - In evaluating unable / unwilling: should look at whether gov’t has taken reasonable steps to control infliction of harm / suffering; whether applicant has reasonable access to state protections
  - Following are relevant: gov’t complicity; attempts by applicant to obtain protection; gov’t’s response to attempts; “perfunctory” official action; pattern of unresponsiveness; general country conditions & gov’t denial of services; nature of gov’t’s policies w/ respect to harm or suffering; any steps the gov’t has taken to prevent infliction of harm / suffering.

Causation and “on account of”: L’s proposal

- On account of should be interpreted as “because of”
  - Congress did amend withholding provision to mean “because of” not “on account of”
  - Would reject the Fatin “solely” business

- Could bring in principles of tort & crim law
  - But-for test, would be sufficient but not necessary condition
    - Might be instances when motives would be enough to prompt persecution; so but for test would fail b/c persecution would have occurred even w/o convention ground.
      - What does this mean, persecution would have happened even w/o convention ground?
        - Thus, look to “substantial factor”: if act was “substantial factor” in producing claimed consequence, still viewed as a case
  - Proximate cause: removes causation when consequences were unforeseeable, or intervening forces were too numerous, too unforeseeable, or too independent

Mixed motive persecutions:

- Forbidden ground need not be the sole motive for persecution, but it must be “central”; not enough that motive be tangential or incidental.

Standards of proof

- For withholding, person must establish a “clear probability,” which means “more likely than not,” that life or freedom threatened on 1 of 5 grounds
- But, “well-founded fear”: requires something less than “more likely than not”; not spelling out precise degree necessary
  - Fear is “well-founded” if a “reasonable person in applicant’s circumstances would fear persecution.
  - Clearly less than 50% chance.
- 9th circuit has used 10% as a benchmark before, if person believes risk is 10% by “objective circumstances personally known to him.”
- Asylum regulations now make part of Acosta explicit – persecution is not well-founded if it is “reasonable to expect applicant” to relocate internally

METHODS OF PROOF
- Material facts:
  - Asylum is discretionary; person whose claim is based solely on part persecution will have claim denied unless
    - “Compelling” reasons for being unable / unwilling to return
    - Reasonable possibility of other serious harm upon removal
  - Also, withholding doesn’t make past persecution a basis for eligibility
  - Past persecution gives rise to presumption of well-founded fear, rebutted if:
    - Any “fundamental change in circumstances” (personal or country) that eliminates the fear
    - Showing that A could avoid future persecution by relocating w/in country
  - Sometimes, BIA and courts have found well-founded fear, even when no danger of repetition of act (sterilization, FGM), based on “continuing harm”
  - Asylum is seldom denied on discretionary grounds – situation of past persecution but no well-founded fear is pretty much it.
- Relevant evidence
  - Often all you have is witness; becomes credibility determination, look at things like internal consistency
  - Same principles apply to withholding of removal, 241(b)(3)(C)
  - In recent years, BIA has increasingly affirmed IJs’ denials of asylum for “lack of corroborating evidence.”
  - Damaize-Job:
    - Minor (obviously wrong, and in no way helpful) inconsistencies will not support adverse credibility assessment
    - Not marrying the mother of his kids didn’t matter
    - Applicants need not show why they didn’t apply for asylum in other countries that they passed through; conditions at home are all that’s relevant (unless firmly resettled)
  - State department country reports: also considered by those involved in asylum adjudication process
  - Increasingly allowing other sources too (reports from volunteer agencies, international orgs, etc.)

Exceptions to eligibility:
- Those firmly resettled, disqualifies:
  - From overseas refugee program, 207(c)(2)
  - From ability to claim asylum, 208(b)(2)(A)(vi)
  - No such limitation in withholding
Person is considered “firmly resettled” if, prior to arriving in US, person had an offer to resettle permanently in a country

- Exception from that: firm resettlement not found if entry in 3rd country was:
  - Necessary consequence of flight from persecution
  - Person remained in country only so long as necessary to engage onward travel
  - Significant ties not established
- Conditions attached can be “so substantially and consciously restricted” that in fact the person wasn’t resettled.

- “Undesirable grounds,” past wrongdoing
  - For asylum, 208(b)(2)(A)(i to v); 208(b)(2)(B)(i)
  - For withholding, 241(b)(3)(B)
  - “Particularly serious crime” = aggravated felony, under earlier portion of statute (for withholding, must be agg. fel + 5 years)

Asylum Procedure
- 2 separate systems in place: USCIS, EOIR
- EOIR procedure: removal hearing; asylum petition filed before IJ
- USCIS – “affirmative applications” – officer either grants application or refers case to IJ, in which case it goes into removal hearing
- More summary process for some entering noncitizens: those w/o documents & those suspected of fraud
- Possible problems:
  - Political bias for granting asylum to applicants from countries that are unfriendly; against granting asylum to applicants from allied / friendly countries
  - Long delays
  - Unfounded claims
  - Fiscal costs of the present process – “two bites” – one before USCIS, other before IJ
  - Procedural fairness: access to counsel, quality of interpreters; possible national security vulnerabilities (post-9/11); lack of preparedness / energy invested in consideration

Other procedural issues
- Filing deadline of one year from applicant’s arrival; must be proved by applicant by clear & convincing evidence. 208(a)(2)(B).
  - Exceptions: “changed circumstances which materially affect applicant’s eligibility”; “extraordinary circumstances relating to delay in filing. 208(a)(2)(D)
- Safe 3rd country: 208(a)(2)(A) – agreement between US and Canada
- Expedited removal: immigration officer determines that arriving noncitizen is inadmissible for lack of documentation or fraud. 235(b)(1)(A)(i)
  - If person requests asylum or fear of persecution, officer interviews person & performs interview to determine if “credible fear of persecution 235(b)(1)(B)(i,ii)
“Credible fear” requires “significant possibility that A could establish eligibility for asylum.” 235(b)(1)(B)(v).
- If such proof, then person put in regular removal proceedings for full hearing of asylum / withholding claim
  - Finding of no credible fear: order person removed; write up report. 235(b)(1)(B)(iii)(I,II)
  - Judge reviews finding quickly, 235(b)(1)(B)(iii)(III)
  - No other administrative review unless person attests, under penalty of perjury, that person has been admitted as LPR, asylee, or refugee
  - Most expedited removal is based on fraud, which is important b/c
    - Fraud makes person inadmissible for life, 212(a)(6)(C)
    - Invalid documentation: 5 years. 212(a)(9)(A)(i)

- Detention
- Criminal Prosecution of Asylum-Seekers for Illegal Entry
- Denying Employment Authorization:
  - USCIS barred from granting work authorization until 180 days after filing of application. 208(d)(2)
  - Upon receiving asylum, person automatically acquires right to work. 208(c)(1)(B)
- Sanctioning Frivolous Applications
  - Under 208(d)(4)(A), Secretary of DHS must warn every applicant of consequences of filing a frivolous application
  - Anyone who has filed frivolous application & received notice is “permanently ineligible for any benefits” under 208(d)(6)
- Application Fees
- Preinspection, 235(A)(a)(5)(C)
- Visas and Carrier Sanctions – 273: practical consequence: refugee won’t get chance to apply for asylum w/o false document convincing enough to fool carrier
- Interdiction on High Seas

CONVENTION AGAINST TORTURE
- CAT, pp. 1148-51
  - Article 1: defines torture: severe pain / suffering is intentionally inflicted for variety of reasons, when such pain/ suffering is inflicted by, or @ instigation of, or w/ consent / acquiescence of public official
  - Article 2: no state shall return a person to a place where there are substantial grounds for believing that person would be in danger of being subject to torture
- Senate resolution, pp. 1151-53; understandings
  - To be torture, act must specifically be 1) intended to inflict severe physical or mental pain or suffering; 2) mental pain or suffering refers to prolonged mental harm resulting from (one of four factors)
    - Intentional infliction of physical pain
    - Administration, or threatened admin, of mind altering substances or other things calculated to disrupt the senses
    - Threat of imminent death
Threat that another will be subject to this
- Torture applies only to acts directed against persons in offender’s custody or physical control
  - In cases of “acquiescence,” unclear whether the “offender” is the private actor or the acquiescing official
- Acquiescence requires knowledge on part of public official
  - Awareness + breach of legal duty to intervene
  - Duty to intervene might be under domestic law, but could also be under international law
- Noncompliance w/ applicable legal procedural standards is not per se torture
  - “Substantial grounds for believing” = more likely than not
    - Enabling legislation, pp. 1153-54
      - US won’t return any person to a country where there are substantial grounds for believing the person would be in danger of torture
      - Excludes aliens described under 241(b)(3)(B) (exceptions to withholding of removal), to the maximum extent possible under treaty obligations
        - But, CAT’s prohibition on sending people back is absolute

What does the CAT add?
- Doesn’t matter why person is being tortured (vs. 5 classes for asylum)
- Torture convention applies on high seas; US thinks that refugee convention doesn’t (world disagrees)
- Prohibition on sending people to torture is absolute, vs. conditional exclusion from refugee conventions
- Persecution may not always rise to level of torture (refugee convention needed too)
Undocumented Migrants and Citizenship

Employer sanctions:
- Crime to knowingly hire a non-US citizen who’s not authorized to work (doesn’t cover citizens, LPRs, non-immigrants who can work (H visas), non-immigrants who USCIS has authorized pursuant to discretion
  - Deliberate failure to investigate suspicious circumstances imputes knowledge
    - Also, goes beyond willful blindness to include “reason to know”
    - But, only have to verify that the doc on its face appears genuine
  - Doesn’t apply to employees hired b/f act (1986)
  - Doesn’t apply to “casual employment by individuals who provide domestic service in a private home that is sporadic, irregular, or intermittent.”
- Pattern & practice of employer doing this can be criminal offense
- Civil offense to hire w/o procedural steps – check documentation, attest to checking it
- To compensate for discrimination caused by this, also a civil offense to discriminate against someone who’s authorized to work & is LPR or citizen by a) national origin, or b) citizenship (can’t have a US citizen only policy)
- Employer sanctions have ground to a virtual halt

CA Prop 187:
- No public elementary or secondary school in CA can enroll any student in US that’s present unlawfully
- Struck down on preemption grounds
- SC case, Pyle v. Doe, held similar Texas statute unconstitutional; unclear how that would fare w/ current court
- What about statute disqualifying people present unlawfully from residency for purposes of in-state college tuition?
- Disqualification from drivers’ licenses as a deterrent? Stock article makes a compelling case why that is stupid

Acquiring citizenship
- *Jus soli* (right of the soil): birth in US produces US citizenship so long as you are “subject to the jurisdiction of [the US]”
  - Not subject to our jurisdiction: children of diplomats; of enemy occupying force
  - Some pushing for reinterpretation of the constitution to argue that children of undocumented parents are within our jurisdiction
- *Jus sanguinis* (right of blood)
  - Different requirements at different times; turns on how many of your parents were citizens & how long they had resided in US at the time of your birth
  - Their citizenship, in turn, turns on the laws around at the time of their birth
  - Statute: 301 (c (2 cit. parents), g (1 cit. parent) are most important)
  - See chart on p. 1271
  - Could be difficulties in establishing ancestral residence in US
If parents have citizenship but it doesn’t descend to you, for whatever reason, don’t forget regular immediate relatives & family-sponsored immigration!

- Naturalization – citizenship acquired after birth, 101(a)(23)
  - Must be admitted as LPR, 318
  - 5-yr residence requirements, ½ that for continuous physical presence, after admission for LPR status, 316(a)
  - Good moral character required, 316(a)(3)
  - Only 18 and up can apply for administrative naturalization, 334(b)
  - English proficiency, 312(a)(1); knowledge of civics, 312(a)(2)
  - Political disqualifications, 313
  - Must swear oath of allegiance, 337(a); demonstrate attachment to principles of constitution, 316(a)
  - Racial restrictions; sex discrim on naturalization abolished, 311

- Child Citizenship Act
  - Citizenship attaches automatically on any child with (320):
    - US citizen parent
    - Child is under 18
    - Child resides in US as LPR, under legal & physical custody of parent
  - Another route, through affirmative application 322:
    - Has one citizen parent (who must apply)
    - Either citizen parent or grandparent has been physically present in US for 5 years, @ least 2 of which b/f 18
    - Child is under 18
    - Child resides in US in legal & physical custody of citizen parent but is temporarily present in US after lawful admission

Losing citizenship
- Failure to satisfy condition subsequent
  - Still affects some people; repeal of retention requirements not retroactive
  - Ppl can retain citizenship by oath of allegiance

- Denaturalization (revocation of naturalization; only applies to naturalized citizens), INA 340
  - Citizenship must be “illegally procured,” which means citizenship gained when not in fact eligible for it
  - Does not require fraud; no statute of limitations
  - Judicial denaturalization must be proved by clear & convincing evidence; lesser standard for administrative denaturalization

- Expatriation (applies to everyone), INA 349
  - Cannot lose citizenship without your consent
  - Voluntary commission of any of several specified acts, w/ intent to relinquish citizenship
  - If you take oath renouncing US citizenship, state department now assumes you didn’t mean it; if you did really mean it, you have to appear before US Consulate overseas and sign a document attesting as much

- Dual nationality:
- Most common way to acquire: at birth
- World used to detest is
  - Unjust enrichment
  - Conflicting loyalty

Do we need citizenship for our domestic laws?
  - Would reshape world order, but could have various other classification schemes; residence requirements, international passport regime; other rules governing entry
  - Citizenship has legal implications, but also has an emotional component beneath the surface – heritage, family, quasi-ethnicity
  - Need to look at various laws and ask, “is citizenship something that we should use as a criterion for this program?”