Immigration Outline  
Legomsky Spring 2006

I. Policy and Concepts  
a. Immigration Race, Culture and Language  
i. Brimelow – “Alien Nation” – immigration increases non-white core which is will cause failure of nation: Definition of nation includes ethnocultural core, Yugoslavia example  
1. Burden of proof should be on those who wish to change what is good  
2. Resp. (Johnson): Racist attitudes represented in immigration b/c its acceptable  
i. Symbolism – Granola rather than mosaic (distinct, but side by side) or melting pot  
b. Immigration and Constitution  
i. Needs to be national law b/c free movement b/t states makes uniformity important, also state decisions can embroil entire country b/c issues are national in scope, eg. Prop 187  
1. Counter: states have different interests (welfare, schooling) and should have say in how those interests are affected  
ii. Early Cases  
1. Chae Chan Ping (Chinese Exclusion Case) – CCP leaves country w/ voucher to return, but voucher cancelled and he is denied admission  
   a. Independent nation must have right to exclude aliens  
   b. Executive and Legislative branch decisions conclusive on judiciary, lack of Constitutional interpretive power in immigration explained by  
      i. Sovereign powers not subject to Constitution  
      ii. License – if no right to be here Constitution doesn’t apply  
      iii. Non-justiciable political question  
2. Eiku – When it comes to immigration decisions due process doesn’t apply – Congressional decision is due process  
3. Fong Yu Ting – plenary power and no due process extended to deportation  
4. Mezey – alien has precarious tenure, when he leaves no due process  
   a. Court must tolerate what it believes is bad legislation  
   b. Indefinite detention is acceptable  
iii. Harisiades (1952) – 3 LPR’s with families were once communists and Congress passed law making them deportable for this  
1. Due process is largely immune from judicial review b/c it is foreign policy  
   a. Immigration power is plenary, part of sovereign power  
2. LPRs have privileges not rights and they can be taken away  
   a. Significance of choosing to remain an LPR rather than naturalize?  
3. On 1st amendment claim court applies the same standard as to citizens  
   a. Statute read to avoid Constitutional problems  
4. Law is not an ex post facto law b/c it is civil in nature (Settled law)  
iv. Zavydas (2001) – Z found deportable after serving sentence for crime, but US can’t remove b/c no one will take them – 3 major conceptual changes  
1. Majority reads an implicit limit to detention time – “reasonable to deport”  
   a. Statute read to avoid Constitutional problems  
2. Plenary Power is “subject to important constitutional limitations” – 4 possible readings of what is left of plenary power doctrine  
   a. Likely: plenary power still signifies special judicial deference, but deference a matter of degree; greater the deprivation of indiv. liberty, the more insistent Court will be on substantial explanation for policy  
   b. Possibly: Courts incursion into plenary power is detention specific and doctrine still remains in tact w/ respect to decisions as to who to admit  
   c. Possibly: Plenary power doctrine no longer requires special deference on immigration, only recognition that immigration is broadly defined  
   d. Unlikely: Court only meant to refer to due process authority, but this interpretation doesn’t account for result in Zavydas  
3. Due Process Clause applies to all “persons” within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.
4. Dissent (Kennedy) Statutory language applies to deportable and not admitted; those not admitted can be held indefinitely according to Mezei; thus statute should be read to indefinitely hold deportable

v. Plenary Power: Supreme Court and lower court have moved beyond the absolutist concept of plenary power embraced by language in the older opinions and fashioned a number of escapes, exceptions, and limitations – see p231

1. Interpret immigration statutes favorably to non-citizens in order to avoid the need to decide constitutional questions and the harsh results of plenary power
2. Recognize and use noncitizen’s right to review under Habeas Corpus
3. Procedural Due Process is clearly required in expulsion cases and in most cases involving exclusion of returning LPRs and constitutional arguments can be framed as procedural or substantive due process. Thus, characterize challenges as procedural in order to avoid problems of plenary power.
4. Translate the plenary power doctrine into a rational basis test – lower courts have done and the Supreme Court seemed to follow suit
5. Subject immigration statutes to 1st Amendment standards. Harisiades-immigration statutes are subject to same 1st Amend standards as other statutes
6. Characterize as separation of powers - less vulnerable to plenary power
7. Use Zavydas’ willingness to consider Constitutional limitations when prolonged detention is challenged

c. Three principles of statutory interpretation.

i. Literal Plain Meaning Rule – Plain-language, even if the result is absurd. Rule has no application if the language is ambiguous.
ii. Social Purpose Rule – Ascertain the purpose of the legislation by looking to language, structure of statutory scheme, legislative history, etc.
iii. Golden Rule – Intermediate approach. Plain-language, unless doing so would produce an absurd result, in which case ascertain the purpose of the legislation.

II. Admission Priorities and Quotas

a. Immigrant Priorities - §203

i. Exempt Groups – no limits and persons not counted against numerical quotas
   1. Immediate relatives of US citizens (not LPRs)
      a. Spouses of US citizens
      b. Unmarried, children (under 21) of US citizens
      c. Parents of over-21 US citizens
   2. Parolees – Temporary “parole” into US granted by Sec of Homeland Security
      a. Can’t adjust status if you are a parolee - §245(B)
   3. Specific other groups by statute of Congress
   4. No wait, only so long as it takes to process administration

ii. Family Sponsored Immigrants
   1. Worldwide annual limit: 480K – Immediate relatives from previous year + Unused employment visas from previous year (plus adjustments for small groups child born to LPR and parolees); minimum ceiling of 226,000
   2. Preferences w/in family sponsored immigrants
      a. First: Unmarried sons and daughters of US citizens (over 21)
         i. 23,400 + unused 4ths
      b. Second: 114,200 + unused firsts + excess of family sponsored of 226K
         i. 2A: spouses and children (under 21) of LPRs
            1. At least 77% of second preference visas for 2A
            2. 75% exempted from per-country limits
         ii. 2B: unmarried sons and daughters of LPRs (over 21)
      c. Third: Married sons and daughters of US citizens
         i. 23,400 + unused 1s and 2s
      d. Fourth: Brothers and Sisters of over-21 US citizens
         i. 65K + unused 1s, 2s and 3s

iii. Employment Based Immigrants –p294
   1. Worldwide annual limit: 140K + Unused family visas from previous year
2. Preferences for employment based visas: 1-3 general priority, 4 and 5 different
   a. 1st: Priority Workers – 28.6% employment-based + unused 4s and 5s
      i. Extraordinary ability in science, arts, educ, business, athletics
         1. Extraordinary = level of expertise indicating that the
            individual is one of the small percentage who have
            risen to the very top of their field of endeavor
         2. Major leagues not enough, all-star not required –
            Legomsky calls “superstars”
         3. Extraordinary prong of 1st pref is the only group that
            can self petition for visas
      ii. Outstanding Professors and Researchers
      iii. Multinational Executives and Managers
   b. 2nd: 28.6% of the employment based + any leftover 1sts
      i. Members of the professions holding advanced degrees
      ii. OR Aliens of exceptional ability in science arts, or business
         1. Doesn’t expressly include athletics or education, but
            govt. interprets art to include athletics
      iii. LABOR CERTIFICATION and job offer REQUIRED
         1. Job offer requirement waived if job is in the national
            interest (only for 2d pref, not the 3d)
   c. 3rd: 28.6% of employment based + extra 1s and 2s
      i. Skilled workers
      ii. Professionals w/o advanced degrees
      iii. Other workers who show labor needed (no more than 10K)
      iv. LABOR CERTIFICATION REQUIRED
   d. 4th: “Special workers” 7.1% of employment based (no adds)
      i. Religious workers and long term employees of the US govt
   e. 5th: “Employment Creation” 7.1% of employment based (no adds)
      i. Invest at least $1M each and employ 10 Americans
      ii. Argue encouragement of jobs v. buying entrance
      iii. Extreme requirements compared to Canada and Aus
         1. 2yr conditional must show not used to evade law

iv. Diversity Immigrants
   1. Worldwide annual limit: 50K
      a. Foreign states classified as high or low admission if more than 50K
         admitted as LPR’s from that country in preceding 5 year. All Diversity
         visas go to low admission states
      b. To determine who gets visas out of the low admission states - §203(c)
         i. Classify six regions (Africa, Asia, Europe, NA, Oceania, and
            MX, Carribean and SA) as low or high admission based on if
            accounted for more or less than 1/6 of LPRs in last 5 years
         ii. Divide visas between high and low admission regions
            according to percentages of LPRs from high and low regions
            in last 5 years
         iii. Within the regional groups allocate according to population of
            the low admission states in the region
      c. Not more than 7k may go to natives of a single state
   2. Who receives diversity visas
      a. Europe and Africa received the most
      b. List of 15 high admission countries on p340 – no diversity visas
   3. Diversity immigration brings diverse immigrant stream and benefits those
      countries that are currently the majority of American population
      a. Used b/c current family rules snowball spots toward same countries
      b. Argue that immigration laws give same weight to similar circumstances
      c. Current efforts to repeal – racist undertones?

b. Special Rules for Immigrant Preferences
i. Accompanying or following to join - §203(d)
   1. Spouse or child accompanying or following to join a family, employment, or diversity visa is entitled to same preference and place in line as principal
      a. Must be spouse or child before principal admitted as LPR
      b. If spouse less than 2 years when receiving LPR status- conditional status – see marriage fraud protection below
      c. Children must still be under 21 when LPR status obtained
   2. NO comparable provision for the spouse or child of immediate relative
ii. Priority Date determines which of the eligible class are admitted
   1. Priority dates become “current” on monthly basis
   2. Transfer of status: Once a petition is filed individual can always move categories and keep priority date; best to get priority date whenever eligible for a category
iii. Classification for Immigrant Preferences
   1. Children and Death
      a. Child Status Protection Act freezes age of child for delays in admin processing, but not for delays attributable to numerical ceilings
         i. Date frozen when petition filed for child or child becomes immediate relative
         ii. For LPRs date frozen when visa current and approved minus amount of time visa was pending (questionable application)
      b. Term child defined in §101(b)(1) and parent defined in (b)(2)
         i. Child out of wedlock: dad must prove bona fide relationship
            1. Nyguen – SCt upholds gender based distinctions for citizenship by decent
            ii. Legitimation: Child must be given same rights as full child to be legitimated under US immigration law
            iii. Step-siblings – to be siblings under immigration law
               1. Must be children of common parent
               2. In order for sibling relationship to continue
                  a. Marriage that created must still exist
                  b. OR must actually be a sibling relationship
            iv. Matter of Morillion – remarriage to new wife before first child 18 created a stepmother relationship; 2nd child w/ new wife created sibling relationship
      c. If petitioner dies so does the petition
   2. Spouses – must meet reqs of state (country) law and federal immigration law
         i. Even if state requirements for marriage are met, extra marriage requirements for immigration law must be met
            1. Extra federal requirements supported by fed. problem of fraudulent marriage, not contemplated by state
         ii. Ct upholds under rational review
         iii. Purpose of statute suggests allowing same sex marriage spouses b/c there is similar hardship for separation in both
      b. DOMA – Made it clear that same sex marriage is not covered, but never constitutionally reviewed
iv. Marriage Fraud Protection Statutes
   1. LPR status acquired due to young marriage - §216
      a. If LPR status through 2A or immediate relative on basis of marriage less than 2 years old, LPR status is conditional
         i. Must jointly petition to remove condition just before 2d anniversary as LPR (w/in 90 days - §216(d)(2)(A))
         ii. Interview at 2nd anniversary must establish that marriage is genuine and that marriage still exists
            1. If established – then full LPR
2. If not, LPR terminates and subject to deportation
   a. Exception for domestic abuse and some other hardships
   b. Conditional period counts toward naturalization years; full LPR rights

2. If married during deportation proceedings deportable person must either
   a. Prove that marriage was real by clear and convincing evidence
   b. OR deported person must leave country for two years and then the marriage will be counted toward immigration status
   c. Labor Certification – required for 2d and 3d employment preference categories: §212(a)(5)(A)
      i. Requirements
         1. Not enough able, willing, and available US workers
            a. PERM allows employer to sign statement subject to perjury stating he has taken all of the necessary steps to find employees
            b. Even if non-citizen more qualified, employer must hire citizen or no one at all (unless teacher or exceptional science or arts – p296)
         2. Not going to affect the wages of the US work force
      ii. Precertified Occupations – List grants automatic labor certification for certain jobs
          1. Physical therapists, nurses, and “exceptional ability in science or arts”
      iii. Employer must document that the job is not described w/ unduly restrictive requirements
          1. Presumptively unduly restrictive requirements if (Marion Graham case)
             a. Requirements are other than those normally required for job in US
             b. Exceed the requirements in the DOT (now ONET)
             c. Include a foreign language
             i. Difficulty if workforce or customers don’t speak English
             d. Involve a combination of duties
                i. Cannot hire immigrant if feasible to hire 2 people
                ii. “Prohibitively expensive” makes infeasible, but requires more than just showing of efficiency
             e. Require the employee to live on employer’s premises
          2. Unduly restrictive presumption overcome if it is “business necessity” (or its functional equivalent for the combination of duties or live in requirements)
             a. Duties and requirements must bear reasonable relationship to employment in context of employer’s business
             b. Duties and requirements are essential to perform the job
                i. Slight change from Information Industries where reqs must bear reasonable relationship and be essential to duties – p303
                ii. Certifying Officers cannot review reasonableness of duties only reasonableness of requirements
          iv. Balance btwn American business needs and need to compete on international market
             1. Stringent standard hurts employers, immigrants, and consumer (weak employer)
             2. Lenient standard hurts qualified American employees
          v. After Labor Cert granted visa petition filed w/USCIS
      d. Nonimmigrant Priorities – §101(a)(15)
         i. Most have no quota, but now skilled and unskilled temp workers do
         ii. Inter’l Union of Bricklayers (1985) – CA gold mine buys equipment from German Co. w/ guarantee to hire Germans to install; B-1 visas not allowed on social purpose rule
            1. B-1 (temporary business visas that doesn’t need labor cert.) granted and union complains that company should have used H1-B or H2-B (require labor cert)
            2. Today workers can come to train Americans, but not to work
         iii. Temporary Workers
            1. H-1B, O and P of INA §101(a)(15) being considered in Bush’s proposal
            2. H = temporary worker, L= intercompany transfer, J = exchange
               a. Require 2 year return to home country
            3. See page 362-67 and statute p18-29 for further info
            4. Problem with what to do with temporary workers who have completed their stay
               a. Swiss philosopher – We sought workers, and human beings came
         iv. K admits aliens who come to conclude marriage w/ USC until they get status
v. Exchange Visitors
   1. F-1 student visas –
   2. J-1 students and educ’l exchange – if scholarship provided by US or home govt. must return to home country for 2 years before becoming an LPR - §212(e)
   a. Waiver if will be persecuted, hardship to US citizen spouse or child, requested interest of US govt. agency, or home country waives interest
   b. Waivers given w/ discretion and discretion never exercised when participation in program funded by US or home govt.

vi. Intent to remain
   1. Dual Intent – Can come to US on temporary visa that requires intent to leave by having the intent to leave unless you have a permanent way to stay
   2. Ethical issues - Lawyer responsibility to explain law vs. encouraging fraud
      a. Lawyer must explain law, but cannot tell how to avoid being caught
      b. Zealous advocacy does not require attorney to press for all advantages

III. Admission Limits and Procedures
   a. Inadmissibility Grounds
      i. Necessity and Integrity of Documents –
      1. Need for valid documents
         a. §212(a)(7) excludes if no passport or visa subject to 212k waiver
         i. §212(k) provides waiver if applicant has visa and did not and could not have reasonably known he was inadmissible
         b. §212(a)(5) excludes employment based if no labor cert
      2. Documents obtained by fraud - §212(a)(6)(C)
         a. (i) If you have fraudulently or willfully misrepresented fact in procuring visa, document for admission, or admission – inadmissible for life
            i. Fraud Waiver - §212(i): Waiver available at discretion of AG for extreme hardship to citizen or LPR spouse, son or daughter
            ii. While being caught getting fake birth cert. probably doesn’t fit into statute, INS would argue dangerous proximity
         b. (ii) – If falsely representing as citizen for any benefit – inadmissible
      3. Noncitizens present in US w/o admission or parole and those who arrive at places other than official ports of entry are inadmissible - §212(a)(6)(A)
         a. Battered spouses excepted if battery connected to entry (ii)
         b. Alien present but not admitted is deemed an applicant for admission
      ii. Noncitizens unlawfully present - §212(a)(9)(B)(i), (ii), and (C)
         1. Noncitizens “unlawfully present” for 180 days – inadmissible for 3yrs
            a. Voluntary departure prior to removal proceeding in this case allows avoiding 5-10yr ban on removal for 3 year ban
            b. Can strategically go to removal proceeding and if offered voluntary departure at this point, can have no ban
         2. Noncitizens “unlawfully present” for one year or more – inadmissible for 10 yrs
            a. Voluntary departure prior to removal or after still results in 10yrs
            b. If no voluntary departure, then removal, but still 10 yr ban under B(ii)
         3. Unlawfully present for aggregate of more than one year who enters or attempts to enter without being admitted is inadmissible for 10yrs - §212(a)(9)(C)(i)(I)
            a. AG can consent to application for admission (ii) [waiver below N/A]
         4. Counting of time for unlawful presence
            a. Under 18 time not counted for “unlawfully present”
            b. Time w/ bona fide application for asylum doesn’t count unless employed w/o authorization
            c. INS Interpreted to unlawful presence contemplate continuous unlawful presence not aggregate of 2 stays
            d. Tolling of periods: nonfrivolous application for change or extension of status tolls the unlawfully present time when application pendent
i. USCIS liberal interpretation of 120 day limit and application only to 3 year bar in statute: INS memo authorizing stay during pendency; thus, practically extending the tolling
e. Unlawful presence begins counting at overstay or if violation of terms of nonimmigrant status at time when IJ determines violation occurred
f. EOIR finds that time from Notice to Appear to removal does not count toward unlawful presence against INS interpretation
i. No comprehensive regulations yet
g. With voluntary departure time before depart date doesn’t count
h. Time in detention probably doesn’t count b/c can’t leave

5. Waiver 9(B)(v): Extreme hardship to citizen or LPR spouse or parent to satisfaction of AG makes an individual eligible for a discretionary waiver
   a. No judicial review of waiver

iii. Inadmissibility due to Removal Procedures
    1. Failure to attend removal hearing – inadmissible for 5 years §212(a)(6)(B)
   2. Noncitizens ordered removed on removal procedure upon arrival – inadmissible for 5 yrs - §212(a)(9)(A)
      a. If on removal procedure after arrival – inadmissible for 10yrs
      b. 20 years for second offenders
   3. Removed for any reason and enters or attempts to enter without being admitted is inadmissible for 10yrs - §212(a)(9)(C)(i)(II) [Exception as below in (ii) of same section]
   4. AG has discretion to waive this inadmissibility ground by consenting to the person applying for admission before they leave for US §212(a)(9)(A)(iii)

iv. Criminal and Related Grounds for exclusion - §212(a)(2)
    1. Alien convicted of or who admits crime of moral turpitude or law relating to a controlled substance or any conspiracy or attempt thereof is inadmissible
       a. “Young and long ago”- Exception for if crime was committed when under 18 and conviction and time served ended more than 5 years ago
       b. “Piddly offense exception” if the max penalty for the crime < 1yr and sentence < 6mo.
       c. No discretion for these exceptions
    2. Conviction of 2 or more offenses w/ aggregate sentences of >5yrs inadmissible
    3. Drug traffickers, prostitutes, criminals asserting immunity in past inadmissible
    4. Waiver for Criminal §212(h): AG can waive criminal inadmissibility of immigrant at discretion if
       a. Activities occurred > 15 years before date of application, would not be contrary to national welfare, safety, or security, AN rehabilitated
       b. OR extreme hardship to citizen or LPR spouse, parent, son, or daughter
       c. OR domestic violence involved
    5. BUT, Individual is NOT ELIGIBLE for criminal activity waiver if
       a. Convicted of murder or criminal acts involving torture
       b. Previously admitted as LPR and since convicted of aggrivated felony
          i. Drug crimes listed, but exception for < 30g of pot
       c. Previously admitted as LPR and has not lawfully resided continuously in US for period of 7 years

    1. If known or reasonably believed to come to violate law – inadmissible
    2. If has engaged in terrorist activity, is member of terrorist org, etc. – inadmissible
       a. Terrorist activity includes use of explosive, firearm, or other weapon with intent to endanger the safety of one or more individuals
       b. Also includes preparing or planning, soliciting funds, etc
    3. If entry or proposed activities are reasonably believed to have adverse foreign policy consequences – inadmissible
       a. Can’t be stopped from coming on basis protected by 1st Amendment
    4. If individual is or has been member of totalitarian party – inadmissible
a. Exception if membership terminated 2/5 yrs ago (stat 119) and not a threat to security of US

5. Participants in Nazi persecutions, genocide, or torture - inadmissible

vi. Economic Grounds for Exclusion
1. Labor cert req’d. for 2d and 3d pref employ immigrants and H nonimmigrants
2. Public charge - § 212(a)(4): Inadmissible if likely to become public charge
   a. Person is a public charge if primarily dependent on US govt. to survive
      i. Public assistance programs usable depending on whether program is intended to be primary source of income
   b. To prove not a public charge can show job or sufficient funds to support until a job is found
   c. Factors to consider: age; health; family status; assets, resources, and financial status; education and skills; and affidavits of support
      i. Affidavit of support must be binding K and sponsor must be person petitioning for admission (cosponsor allowed)- §213A
      1. Also if individual applies for welfare the sponsors money is deemed part of immigrant’s income
      2. Sponsor must show income 125% of poverty level
      3. Family prefs must have affidavit of support
   d. Public Charge ground may be waived with public charge bond

3. Excludable if formally renounced citizenship to avoid taxes - §212(a)(10)(E)

vii. Public Health and Morals Grounds for exclusion
1. Neither physical nor mental disorder basis for exclusion unless specified threat to public safety
2. §212(a)(1)(A)(i) expressly excludes noncitizens who are determined to have communicable disease of public health significance including HIV
   a. Sec. of Homeland Security can waive exclusion for spouses and other close family members, but gay males have seldom benefited
   b. Medical test for admission will always include blood test for HIV

viii. Waivers to inadmissibility other than those found directly after inadmissibility grounds
1. AG at discretion through the Sec. of State may admit as nonimmigrant if inadmissible under any category in §212(a) under §212(d)(3)(A) (not terrorists)
2. §212(i) waives fraud grounds if AG gives discretion, extreme hardship to USC or LPR spouse, or parent
   a. No judicial review of this waiver
3. §212(h) waives criminal admissibility if 15 yrs ago, rehabbed, and not contrary to national interest; extreme hardship to USC or LPR spouse, parent, son, or daughter, or not primary domestic abuser, so long as
   a. Can’t apply if torturer, aggravated felon (other than <30g of pot) or not in US for last 7 years

b. Admission Procedure – see Treatise explanation on p462
   i. Four hurdles to admission
      1. Labor cert. if necessary – employers must file (other than 1st pref extraordinary)
      2. Visa Petition filed w/ USCIS – Establish person meets particular status of entry
         a. Focus on relationship of petitioner to beneficiary
      3. Getting a visa – once petition approved by USCIS, beneficiary files application w/ appropriate US consulate abroad
         a. Must persuade consulate that he fits applicable status and none of the affirmative grounds for inadmissibility applies
         b. Paperwork and sometimes a personal interview
   4. Admission to the US
      a. Appear at authorized port of entry w/ visa
         i. Visa essential but not sufficient – Immigration inspector reexamines non-citizen to assure no inadmissibility applies
   ii. Visa Petition Procedure to Admission
1. I-130 (family) or I-140 (employment) filed proving status, sent to regional center, denial unusual but can appeal to BIA (family) Admin Appeals (employ)
2. USCIS forwards to Nat’l Visa Center which reviews and send to consulate
3. Consulate notifies beneficiary that papers arrived, beneficiary must gather documents and set up appointment
4. Interview w/ consular officer
5. FBI reviews record
6. If no problem consular gives visa
7. Show visa at port of entry, in theory another check (usually cursory)
   a. Must be clearly w/o a doubt entitled to admission
   b. If CBP officer not satisfied removal hearing before IJ
   c. Appealable to BIA and then to court
8. Full LPR status once you enter (unless 2 year conditional)

iii. In domestic violence UAWA allows woman to file w/o needing husband petitioner
   1. Practical problems to establish abuse
   2. To self-petition must show noncitizens entered marriage in good faith
      a. Abusive person may not be willing to help this

iv. Who does not need a visa to enter US
   1. LPR leaving and reentering just needs reentry permit
   2. Refugees do not need visa
   3. Visa waiver program certain countries don’t require for B-1 (business) and B-2 (tourist) visas

v. Visa denials
   1. Many denied for technical reasons which can be easily cured
   2. Final visa denial by consular officer offer no judicial or admin review
      a. Can get advisory opinion from visa office – usually only have a good chance of getting advisory opinion if requested by consular officer
   3. Should there be review – see p475
      a. Argues consular officers need check to power especially w/ judgment calls, inconsistent to deny due process, short orig review due to $
      b. Argue no b/c consular officers are better trained, political ?, much of basis for decision is fact an nuance of interview, extra cost to review

vi. Adjustment of status
   1. §245 adjusts from nonimmigrant to permanent residence
      a. Must have been INSPECTED and ADMITTED
      b. If ever out of status, ineligible for adjustment (some employment based offers 180 days)
   2. §248 changes w/in nonimmigrant status (2 year return requirements of H,J, L)
   3. If adjustment unavailable due to not being admitted or inspected can do stateside criteria program
      a. Must be 1) present in 3d country and 2)lawfully in 3d country

c. Deportability Grounds – IIRIRA changed terminology to removal after arrival, but substantively deportation proceedings still different from exclusion
   i. Fleuti (1963) – reentry after visit to MX used to deport Fleuti b/c homosexual made him inadmissible at entry; remanded for determination of entry according to Fleuti factors
      1. Innocent, casual, and brief excursion by resident alien may not be intended as a departure disruptive of resident alien status; therefore doesn’t make “entry”
      2. There is reentry when departure is intended which can be determined by
         a. The length of time the alien is absent
         b. Purpose for the visit – if purpose contrary to imm laws interruption of residence would be meaningful
         c. Whether travel documents were needed – could cause immigrant to think which would make interruption of residence meaningful
   3. Changes from Fleuti
      a. IIRIRA changes make a person deportable for being inadmissible at time of entry rather than excluded at time of entry
ii. Entry while inadmissible - §237(a)(1)(A): any alien who at time of entry or adjustment was inadmissible under the law at the time is deportable

1. §101(a)(13): admission is lawful entry after inspection or authorization
   a. Not admission unless
      i. Relinquished permanent residence
      ii. Absence of 180 contiguous days
      iii. Engaged in illegal activity after departing
      iv. Departed while under removal process
      v. Committed §212(a)(2) crime
         1. Does this mean if you ever commit a crime and leave you become deportable
         2. Incompatible w/ §237(a)(2) which says deportable for moral turpitude w/in 5 years after admit
      vi. Attempting to enter at other than port of entry or hasn’t been admitted
   b. If one of the six events has occurred should, does statute imply that LPR is making an admission on return (Fleuti converse)
      i. Most courts have ruled converse is implied; Fleuti factors mean nothing
      ii. At least one court has held that if one of six subcategories is met then the Fleuti factors determine if there is an admission

2. §237(a)(1)(H) Waiver at discretion of AG if inadmissible at entry for fraud or misrepresentation if
   a. Individual was son, daughter, spouse, or parent of citizen or LPR
   b. AND was in possession of visa or equivalent (not necessarily valid) and was otherwise admissible except for
      i. Lack of valid labor cert (direct result of fraud) OR
      ii. Lack of valid immigration document (direct result of fraud)
   c. Also waives inadmissibility directly resulting from fraud

3. If illegally enter, then legally enter after inadmissibility wears off 3/5/10yrs, then DHS cannot deport after legal entry for inadmissible at time of entry
   a. Lack of cases suggest DHS interprets deportability if inadmissible at time of most recent entry
   b. Contrary interpretation would defeat length of inadmissibility

4. If a waiver was available at the time of inadmissible entry and the individual is later deported for inadmissible at time of entry, can apply waiver retroactively
   a. Look at the facts at the time of original inadmissible entry

iii. Deportable on criminal ground §237(a)(2)

1. If convicted of crime involving moral turpitude committed w/in 5 years of admission and sentence of 1yr or longer possible
   a. Moral turpitude looks at the crime in the abstract (as defined)
      i. Treatises characterize crimes of moral turpitude
   b. Conviction must have formal judgment of guilt, with some form of punishment, and procedure with constitutional safeguards
      i. Conviction not final until direct appeal decided
   c. 5yrs btwn admit and crime: Idea that after time belongs to our society

2. If convicted of 2+ crimes of moral turpitude, not arising out of the same scheme of criminal misconduct

3. If convicted of “aggravated felony” any time after admission - §101(a)(43)
   a. Crimes of violence –Offense which has as an element the use or threatened use of physical force against person or property OR any other felony offense that by its nature involves substantial risk that physical force may be used in course of committing
      i. Leocal v. Ashcroft – Court rejects BIA inclusion of DUI causing serious bodily injury w/in crime of violence
1. Rejects Chevron deference b/c Court has as much expertise in crime of violence and BIA interpretation based on changed interpretation
   
   2. Crime of violence categorically determined
      
      b. Theft offenses or burglary w/ term of imprisonment of >1yr
      
      c. Fraud, deceit, or tax evasion w/ loss > 10K
      
      d. Failure to appear or obstruction of justice grounds

4. Should deportation be based on actual, possible, or served sentence
   
   a. Who should decide on policy being served leg., judge, parol board
   
   b. What facts should be before the decisionmaker
   
   c. How much variability do we want in the decisions

5. §242(a)(2)(C) no judicial review of removal for criminal conviction grounds

   d. Relief from Removal for Deportable Citizens
     
     i. Lasting Relief: Cancellation of Removal
        
        1. Cancellation of Removal §240A – A for LPRs, B for all (mainly undocs)
           
           a. Part A: AG may cancel removal of inadmissible or deportable alien if
              
              i. Has been LPR for not less than 5 years
                 
                 1. LPR status doesn’t terminate until administratively final removal order – final order of BIA or expiration of possibility of appeal
                 
                 2. LPR status not met when obtained unlawfully
              
              ii. Has resided in US continuously for 7 years after admitted
                 
                 1. Notice to appear stops continuous residence period, but only applies to notice in current case
                 
                 2. Continuous residence unless meaningful interruption
                 
                 3. No req that residence be lawful (in LRP prong)
              
              iii. Has not been convicted of aggravated felony
                 

           b. Part B: AG may cancel removal and adjust status to LPR, an alien who is inadmissible or deportable if (commonly undocumented)
              
              i. 10yrs continuous physical presence immediately before app.
                 
                 1. No continuous presence if departed for period in excess of 90 days, or aggregate of 180 days
              
              ii. Person of good moral character for 10yr period
                 
                 1. §101(f) has several classes who lack good moral character as a matter of law
              
                 iii. Has not been convicted of offense under listed statutes
                 
                 iv. Removal would result in exceptional and extremely unusual hardship to spouse, parent, or child citizen or LPR
                 
                 1. Typically most formidable hurdle
                 
                 2. Discretionary in nature and not directly reviewable
              
              v. Other notes to cancellation part B
                 
                 1. Based on compassion for those with established roots
                 
                 2. Certain groups under easier rules, NACARA –p606
                 
                 3. Majority granted to undocumented immigrants

           c. Apply for cancellation while removal proceedings pending before IJ
              
              i. If eligibility comes after removal proceedings motion to reopen can be granted at discretion of IJ/BIA
              
              ii. Cancellation unavailable for 10 years for those who fail to appear at removal hearing or meet other obligations

2. Registry - §249: AG may grant LPR status to those who have been in the US before cutoff of 1/1/1972 and continually resided in the US since then
   
   a. Different than cancellation part B in that there is no requirement of exceptional and extremely unusual hardship to spouse
   
   b. Requires continuous residence rather than presence from set time

3. Legalization – one time programs offering LPR status to undocumented
4. Adjustment of status used as a defense to removal
   a. Must be inspected and admitted, must have remained in status
5. Private Bills – individual bills used to be used widely, disfavored
ii. Limited Relief
   1. Voluntary Departure §240B: Most common form of discretionary relief
      a. Part A: In lieu of removal proceedings or before removal proceedings have completed;
         i. Must not be deportable under aggravated felony or terrorist,
         ii. Must leave at own expense, Bond MAY be required,
         iii. Practically necessary to save expense
         iv. Voluntary departure prior to commencement of admission procedure inadmissible for 3 years - §212(a)(9)(A)
      b. Part B: At the conclusion of removal proceedings
         i. Must have at least 1yr physical presence immediately before,
            At least 5 years of good moral character, Must show financial means to depart on own, Must post bond, Must not be deportable under aggravated felony or terrorist, Maximum 60 days to depart
2. Deferred Action – prosecutorial discretion for deportation, legality debated
3. Objections to Destination - §241(b) sets multiple step approach to choosing removal destination
4. Stays of Removal – Discretionary; gives more time before executing removal
   a. Used most often with motion to reopen
      i. Motion doesn’t automatically stay removal so motion to reopen is normally coupled with motion to stay

e. Deportation Procedure
   i. Independence of Immigration Judges – formerly thought to be completely independent, but Chief IJ (admin) overruled determination of Judge Van Wyke after ex parte comm.
      1. IJ recused himself and case publicized for lack of independence
   ii. The right to representation in immigration removal cases
      1. Two INA provisions provide right to representation at no cost to govt.
      2. Four categories can represent individuals in removal proceedings
         a. Attorneys
         b. Law students and graduates not yet admitted to bar
            i. Can work under any non-profit, can’t get paid by client, can’t receive $ and academic credit, not limited to 3Ls
            ii. More representatives, but less insurance that they are excellent
         c. Reputable individuals
         d. Accredited representatives
   3. Under the 5th Amendment there must be fundamental fairness which sometimes leads to the appointment of counsel for an indigent alien
      a. 6th Amendment right to counsel applies only in criminal context
      b. Fundamental fairness determined case-by-case on three factors after Aguilera-Enriquez (1975)
         i. Importance of individual interest in deportation case
            1. Has person been admitted? Is person LPR?
         ii. Importance of the public/govt. interest
            1. Govt. expense? Counsel in discretionary procedure?
         iii. How valuable is the safeguard to the accuracy of the decision
            1. Attorney could add facts, raise issues in investigation
   4. Legal aid organizations cannot provide help if they receive $ from govt.
5. Equal Access to Justice provides attorneys fees if govt. position is not justified
   iii. Discipline of Attorneys – two significant reasons for attorney discipline under INA
      1. Engages in frivolous behavior (good faith determination)
a. Problematic if attorney must know before argument if frivolous
   i. Chill of novel arguments
b. Legitimate interest in stopping govt from remaking arguments for stay
2. Engages in conduct that constitutes ineffective assistance
   a. Too many motions to reopen caused this rule – prior lawyer has
      consequence for signing ineffective counsel affidavit
3. Concern that attorneys between rock and hard place
4. ABA concern that justice department rules make double burden for counsel
iv. Ineffective Counsel
1. People v. Pozo – immigrant not told that guilty plea will result in removal when
   he asks the attorney, court doesn’t allow withdrawal of guilty plea
   a. To withdraw plea, ineffective counsel and prejudice in consequence
   b. Must be direct consequences, not collateral consequences
2. Courts more willing to overturn if client finds issues than if brought up at
   removal proceeding
3. Three elements required to assert in a motion based on ineffective counsel
   (Matter of Lozada)
   a. Relevant facts including details of agreement with former counsel
   b. Allegations presented to former counsel w/ opportunity to respond
      i. Any response included in motion
   c. Affidavit reflecting whether complaint filed w/ appropriate authorities
v. Fed evidence rules don’t apply – if probative and fundamentally fair it is admissible
1. Govt. must prove noncitizen, person must prove admission, then govt. must
   prove deportability with clear and convincing evidence
   a. Silence about citizenship admissible, but doesn’t meet clear and
      convincing evidence standard on its own
f. Deportation Appeals Process – process after IJ has ordered person removed
   i. Two questions for appeal – is person deportable? Is person eligible for waiver or relief?
   1. Appeal usually considers relief b/c deportability is straight forward
   2. §242(a)(2)(B) takes away the right to appeal discretionary decision
   3. §242(a)(2)(C) cannot get review of removal for criminal conviction grounds
   ii. File notice of appeal w/ BIA – automatically stays removal
      1. Shortcuts to counteract frivolous appeals to stay removal
         a. Summary dismissal – used when notice fails to identify errors w/
            enough specificity; no transcript or govt. brief; a few days
         b. Single member affirmance without opinion (AWOs)
            i. Saves time of having 3 people consider, no discussion element
            ii. Decreases uniformity of decisions
            iii. Lose guidance of opinion and framing issue for court
            iv. Increase appeals b/c individuals do not receive explanation
      2. Requirements of appeal
         a. Specifically identify findings of fact or conclusions of law challenged
            i. If law presented, supporting authority must be cited
   iii. Independence of BIA – politics takes away from role of protecting minority rights
   iv. Can only obtain judicial review when you have exhausted administrative remedies
      1. In immigration you skip the district court level and file petition for review w/
         Court of Appeals
      2. Only individual has a right to appeal b/c AG can unilaterally reverse
   v. St. Cyr found that statute can’t have meant to deny habeas corpus, but now statute is
      explicit in denying this relief – no constitutional determination yet
IV. Asylum and Refugees
   a. Refugee and Asylum Overview
      i. Refugees – §101(a)(42) defines a refugee for US law
         1. If definition is not met, Secretary has power to parole individual into US
         a. Restricted to individual aliens with compelling reasons (used to be used
            for large groups, but this practice stopped by Congress)
ii. Offshore refugees – reaches outside of US, to bring for permanent US settlement - §207
1. Little case law b/c no judicial review of denial
2. Process – p929
   a. President decides how many people authorized to enter for coming year then develops geographic allocations
      i. Set by President not Congress b/c
         1. Foreign policy – more FP than immigration b/c implicates that home country can’t protect
         2. Changes in flows necessitate quick decisions
      ii. Congress requires intense consultation - prev abuse of parole
   b. US refugee workers decide if status is met. §207(c) May admit if
      i. Refugee
      ii. Not firmly resettled elsewhere
      iii. Admissible – Secretary waives most requirements of admis.
         1. Cannot waive drug traffickers, terrorists, Nazis, danger to public, and against foreign policy
      iv. Of special humanitarian concern
   c. Secretary of Homeland Security decides who to admit
      i. Priorities determine who gets in if more than limit
   d. After 1 yr in US person becomes eligible to adjust to LPR unless there is subsequent determination that person was not refugee at original time

iii. Onshore refugees – people that have already made it to the US border or interior
1. Asylum - §208: must meet definition of refugee and get discretionary decision
   a. Allows person to remain temporarily, usually for good
   b. Carries the right to bring specific family members
   c. Application deemed to apply in alternative for withholding
2. Withholding of Removal - §241(b)(3): Must show fear of persecution (doesn’t depend on meeting refugee definition or discretion)
   a. US will not return you to home persecuting country
   b. Often turns into de facto asylum
      i. US law tracks language and in cases is more liberal
   d. Withholding protection does not apply if alien
      i. Ordered, incited, assisted or participated in persecution on one of the 5 enumerated grounds
      ii. Convicted by final judgment of particularly serious crime and is danger to US (aggravated felony w/ aggregate >5yrs sentence or as determined by AG = particularly serious crime)
      iii. Reasons to believe individual committed serious non-political crime outside US before arrival
      iv. Reasonable grounds to believe that person is danger to security of the US
   iv. Refugee flow is affected by competition for resources (population increase especially in poor countries), economic inequality, human rights abuse, and pull factors (controversial)
   v. Exclusions from Asylum
      1. Firm Resettlement elsewhere
      2. Prior criminal conduct (persecution of others, threat to nat’l security, aggravated felony, serious crime and remain danger to community)
   vi. If admitted for Asylum §209 adjusts status to LPR after 1 year
   vii. Possible responses to refugees
      1. Repatriation – send person back to original country
         a. Unthinkable and illegal unless situation has changed
         b. Even if government is changed usually only used in voluntary cases
      2. Local integration – leave the person in the first country of asylum
a. Unfair to have developing countries bear burden of refugees  
b. Generosity of bordering states beginning to change – pressure on US

3. Permanent resettlement – resettlement in a 3rd (usually more developed) country  
a. Developed countries don’t want (Encouraged by sharing programs)  
b. Large change for people who leave poor country

b. Asylum Substance – must be refugee
   i. Definition of Refugee – A person outside of their last country of residence who is unable or unwilling to return to and is unable or unwilling to avail herself of the protection of that country b/c of persecution or a well founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion

   1. Past persecution or fear of future persecution
      a. Consider if individualized, Past (§101(a)(42) and Matter of Chen say past persecution suffices), all choices persecution, prosecution pretext, and Primary reason (Matter of Acosta), non state actor, nexus (but-for)
      2. On account of one of 5 groups
      3. Well founded
      4. Not disqualified

   ii. Persecution: Infliction of objectively serious harm or suffering that is subjectively experienced as serious harm by applicant regardless of whether persecutor intends to cause harm (Justice Dept proposed definition)

      1. Matter of Acosta (BIA 1985) – El Salvador native who runs tax co-op threatened by guerillas with fear of govt. being against socialist organization
         a. Suggests that fear of persecution must be primary motive in asylum
            i. If there is well founded fear it will be the primary motive
         b. Suggests that individual must be targeted for persecution
            i. Doesn’t make sense if group is persecuted (Nazi Germany)
            ii. Rejecting claim simply b/c others face similar threats has been firmly rejected

      2. Either a threat to the life or freedom of, or infliction of suffering or harm upon, those who differ in a way regarded as offensive – Refugee Act of 1980
      3. Must prove individual persecution unless (p951)
         a. The applicant establishes a pattern or practice in his or her country of persecution of a group similarly situated
         b. AND applicant establishes inclusion in group so fear is reasonable
      4. Prosecution is not persecution unless the prosecution is pretext
         a. Excessive punishment and selective enforcement evidence pretext
      5. If options given, then all options available must be considered persecution
      6. Consider Universality v. Cultural Relativism

   iii. Race, Religion, Nationality, social group or political opinion (race, religion, nationality not often argued in the US)

      1. Political Opinion
         a. Elias Zacharias (1992) guerillas in Guetemala threaten to kill or kidnap if Elias doesn’t join them
            i. SCt holds he is not persecuted on account of political opinion, thus doesn’t reach whether neutrality is public opinion
               1. Scalia: must be for his not attackers political opinion
               2. Dissent: Problems of proof if must show that it was b/c of victims political opinion
                  a. Act manifests the political opinion
            ii. Question is how likely the persecution and how likely it was based on an area of human rights concern
         b. Imputed political opinion – if persecutors think that person has political opinion and persecute based on this belief, then asylum can be granted
            i. Even if wrongly attributed to you it is enough
            ii. Even if cynically imputed opinion suffices- Army general who will claim woman is subversive if she runs
c. Refugee sur place - If conditions change while abroad can still be refugee, but when conditions due to refugee actions cause change the court is less likely to grant refugee status based on political opinion

2. Social Group
   a. Tests for Social Group
      i. Matter of Accosta Immutability test: to be social group the characteristic that defines the group must be one that members cannot change or should not be required to change b/c it is fundamental to their individual identities or consciousnesses
         1. Ejusdem generic – other categories are immutable
         2. Asylum to those who can’t avoid persecution
         3. Immutable characteristic must have been immutable at the time of decision (gang member can’t go back)
      ii. Sanchez Trujillo Voluntary Relationship Test: to be social group people must be cohesive
          1. Focuses on voluntary association of members
          2. Counter-intuitive b/c less need of protection
      iii. Hernandez – 9th Cir. applies either immutability OR relationship test
      iv. Justice Department suggests immutability test w/ list of factors most likely in an either or fashion (p982-83)
   b. Applying social group to sexual orientation
      i. Matter of Toboso-Alfonso – Cuban treated unfairly and threatened b/c he is gay
         1. Charged simply due to status not acts
            a. If acts, then maybe prosecution and must prove pretext
         2. Immutability test – can change? Should change?
   c. Gender as a social group
      i. Cultural relativism affects whether it is considered persecution
         1. Women holding other women to laws makes it even more problematic
         2. Sending countries reaction to be considered
      ii. Dilemma b/c gender discrimination in private sphere rather than public and world tends to ignore private
      iii. Matter of Kasinga (1996) – social group defined as young women who have not had FGM
         1. Court claims to follow Fatin, but Fatin says opposition of practice does not make persecution
            a. Worse than forced dress explains difference
   3. Nexus or the but-for test
      a. Fatin (3d Cir. 1993) – nexus for on account of
         i. To make a claim based on social group
            1. Must identify particular social group
            2. Show that you are member as defined
            3. Show well founded fear based on member
         ii. Possible groups for Fatin
            1. Women- no well founded fear
            2. Unwilling to wear fador – does it rise to the immutability which makes it persecution
            3. Interrelation of social group/persecution etc.
      b. Legomsky favors the but-for test which simply decides if the persecution was but for the social group (or other)
         iv. The Non-state actor: Persecution if govt. is “unwilling or unable” to control the actor
            1. Problem in guerilla and domestic abuse cases
2. Matter of RA (BIA 1999) – RA fled Guatemala to escape prolonged and savage beatings from husband, denied asylum b/c persecution could not be linked to political opinion or social group
   a. Reno vacated and ordered stay for pending regulations, still pending
   b. Unclear whether US will grant asylum for domestic violence
3. Justice Dept. proposed regulations (p1036): persecution must be inflicted by govt. or a group that govt. is unwilling or unable to control
   a. Regs further define unable not to include situations where govt. is taking reasonable steps to control the harm (unwilling = unwilling to assert reasonable effort?)
   b. Justice Dept. regs recognize that granting asylum gives less incentive for home country to fix problem
4. “On account of” could suggest that govt. must be unwilling or unable to control actor due to motivation of 5 enumerated groups
   a. New Zealand and other emerging countries find that persecution by either country or govt can be based on group
   b. US law has not yet encountered this problem

v. Problems
1. Lawyer forced to work in fields w/ heart condition
   a. Life threatening nature makes it persecution
   b. Lawyer not social group, but group could be those w/ Western thought
   c. Possibly imputed political opinion with Western thought
   d. True political opinion difficult due to Elias-Zacharias b/c political opinion only based on overt manifestation
2. Govt. denouncing homosexuals. Punish sodomy w/ 10 years, threats and allowing violence like firebombs
   a. Threat of prosecution might not meet persecution, need pretext
      i. Prosecution based on acts or status
      ii. Can people engaged in acts be a social group
   b. Individuals provide well-founded fear, but non-state actor probs
3. Woman from country that expects women to be homemakers, not go to college
   a. Large group argument has lost favor
   b. Severity of harm not enough to be persecution b/c it is not a threat to life or person
4. Protestant couple in country that does not allow birth control
   a. Must be persecution on all options
   b. Cultural relativism vs. universality
   c. Group of persecution: religion – jailing for act not religion – need pretext, political opinion – similar arguments
5. Lady who cannot restrain from speaking out in country that kills those that do
   a. If can’t restrain herself and that is social group – then persecution
   b. But if restraint from speaking out is not persecution – then NO

c. Asylum Process
i. Burdens of Proof:
   1. For asylum individual must show that they are refugee under §208
      a. Well founded, fear of, persecution, on account of 5 enumerated groups
         i. Requires reasonable fear
         ii. One court found 1/10 chance well founded
      b. Brings right to stay and bring family
   2. For withholding individual must show under §241(b)(3)
      a. Life or freedom would be threatened on account of 5 enumerated group
         i. Stevick (US S.Ct) Requires clear probability which is interpreted as preponderance of the evidence
         ii. Scrutiny to US for such a high standard
      b. Just guarantees not sent back to persecutor
   3. Larger burden for withholding than asylum b/c withholding is mandatory
4. Past persecution sets rebuttable presumption of well founded fear of future persecution which govt must refute
   a. Important even though asylum can be granted on past persecution b/c most often reason for denying discretion is past persecution, but no well founded fear of future persecution
5. Credibility of Witnesses – problem b/c testimony is necessarily self-serving
   a. Damaize-Job (9th Cir. 1986) – overturns IJ witness credibility determination b/c can’t base witness credibility on
      i. Birth date discrepancies that are obviously due to language
      ii. Failure to marry mother of two children
      iii. Failure to apply for asylum in countries on way to US
1. Firm resettlement would deny asylum

ii. Exclusions from Asylum
   1. Firm Resettlement elsewhere
   2. Prior criminal conduct (persecution of others, threat to nat’l security, aggravated felony, serious crime and remain danger to community)

iii. Two places where asylum can be granted
   1. USCIS through DHS if you affirmatively bring application
      a. If not granted then case sent to IJ for removal where asylum claim can be used again
      b. Less expensive process than IJ
   2. IJ’s if in removal process: Serves as adversarial process protecting rights

iv. Discouraging asylum
   1. Filing deadline: 1 yr after arrival w/ 2 exceptions (doesn’t apply to withholding)
      a. Changed circumstances affect eligibility for asylum
      b. Extraordinary circumstances that explain delay in filing
   2. Safe third country limitation – agreement btwn US and Canada like Europe
   3. Expeditied removal – If person arrives w/o documents or the immigration inspector suspects fraud expedited removal is begun
      a. If asylum claimed immigration officer determines if there is “credible fear”, but majority never get this test
   4. Interdiction Program – boarding vessels on high seas and turning them back
      a. Policy says to give interview, but this is avoided
      b. Supreme Court says nonrefoulment does not apply on high seas

   i. Senate determined that treaty was non-self-executing
      1. Cannot argue violation of treaty in US courts, only violation of US statute
      a. If self-executing US obligated by CAT
   2. US statute includes Senate reservations, declarations, and understandings
   3. If self-executing treaty conflicts w/ federal statute the two are equals for US law
      a. Hornbooks - latter in time controls, but Courts try to avoid conflict
   ii. Differences between CAT and refugee provisions
      1. CAT used when individual treated badly enough to constitute torture, but does not fit persecution definition because it is not based on one of 5 grounds
      a. CAT doesn’t apply if persecution doesn’t rise to level of torture
   2. Article 3: Absolutely no refoulment if there is torture, unlike withholding
   3. Almost always couple CAT application with asylum application
   4. Also refugee does not apply to people on high seas, but torture does
   iii. CAT requirements vs. Senate understandings (CAT -1148, Senate- 1152, Stat-1153)
      1. CAT Art 1: Act is torture if 1) intentionally inflicts, 2) severe 3) physical or mental, pain and suffering, so long as 4) inflicted by or at instigation of or with the consent or acquiescence of a public official or person in official capacity
         a. Senate: act must be specifically intended to inflict severe physical or mental pain or suffering
         b. Senate: Mental pain or suffering refers to prolonged mental harm caused by or resulting from
i. Intentional infliction or threatened infliction of severe physical pain or suffering

ii. Administration, application, or threatened application of mind altering substances or procedures calculated to disrupt profoundly the senses or the personality
   1. Argue that calculated to disrupt includes all that CAT intended, but that would make 4 prongs superfluous

iii. The threat of imminent death

iv. The threat that another person will be subject to death, severe pain and suffering, or the administration or application of mild altering substances or procedures

c. Senate: Torture only applies to acts directed against persons in the offenders custody or physical control
   i. Acquiescence of govt., but only offender must have control

d. Senate: Acquiescence requires the public official have awareness of such activity and breach a legal responsibility to intervene
   i. Understanding and noncompliance w/ legal procedure is not per se torture
   ii. Question whether breach of legal responsibility refers to US or international law

2. CAT Art. 3: Cannot refoul a person if there are substantial grounds for believing that he would be in danger of being subjected to torture
   a. Senate: Substantial grounds means “more likely than not”

iv. Deferral of Removal rather than Withholding for criminals eligible under CAT
   1. US statute excludes individuals who are ineligible for withholding under §241(b)(3)(B) to the extent consistent w/ obligations under the convention
      a. CAT does not include any exceptions – compare stat309, p1148
   2. If person is in this category of meeting CAT but failing §241(b)(3) they get deferral of removal rather than withholding
      a. Deferral makes it much easier for the govt. to remove the person when the conditions change
      b. Available b/c CAT does not contain language against returning to the site of past torture

V. Concerns Related to Immigration Law
   a. Immigration and National Security
      i. Movements in national security: increased use of preventative detention, intelligence gathering, widening of definition of terrorist activities, Increased procedural shortcuts
      ii. Preventative Detentions –
         1. Benefits: prevention of harmful acts from dangerous individuals, ability to interrogate, deterrent effect on planning violent act
         2. Costs: Reduction of civil liberties, radicalizes detainee or others in the community, economic cost of detention, difficult to prepare b/c no attorney
      iii. ICE appeal of IJ release order results in automatic stay of detention
         1. Possibly govt. inside info who doesn’t want to give up terrorism suspicion info, but categorical detention gets affects those not suspected of terrorist interests
            a. Question is whether false positive or false negative is better
         2. Hold until cleared – even those removed held until FBI clears of terrorism
   iv. NSEERS – Registry of individuals from certain countries– removed those who registered but were out of status
   v. Procedural Shortcuts in Court
      1. Terrorism Removal Court – Special procedure only if Secretary has classified information that alien is an alien terrorist
         a. Balance individual liberty against need to protect from terrorist activity
            i. If govt has info that incriminates terrorist, but release of info would endanger national security – suspicious
         b. Procedure: See p877
i. Special attorney is helpful, but if individual doesn’t know what to defend against, they cannot provide proper facts
   1. Special attorneys only for LPRs
2. Closed removal hearing – protects alien and nat’l security
3. Secret evidence hearing – protects aliens ability to put on case

vi. Profiling –
   1. Schuck: stereotypes are not necessarily bad if used properly
   2. Argue that most stereotyping not useful b/c such small percentage is dangerous if taken to its end there should be no checks at all at airports
   3. Argue that govt. stereotyping leads to stereotyping and violence of outsiders
   4. Can we separate decisions based wholly on profile from those that take into account elements of profiling?
   5. Separation of profiling and discrimination is difficult

b. Undocumented Immigrants/Migrants
   i. Trend to merge immigration and criminal law
      1. Entry w/o inspection is misdemeanor and overstay may be crime in new bill
      2. Crime to defraud US govt
   ii. Employer sanctions
      1. Types of offenses
         a. Civil offense to hire non-USC unauthorized to work
         b. Hire w/o taking procedural steps = civil offense
            i. Must check certain docs unless casual domestic employment
         c. If pattern and practice of committing offense, then becomes criminal
      2. Fear that employer sanctions would create discrimination so accompanied by two provisions
         a. GAO study to see if substantial increase in discrimination
            i. Found increase in discrimination either by asking for more papers or denying jobs
         b. Civil offense to discriminate against someone eligible to work
      3. Enforcement has ground to a halt
      4. Should there be employer sanctions
         a. Yes, b/c stopping employer takes away incentive to come to US
         b. No, not worthwhile b/c of cost to employer and govt.
         c. No, just increases the use of fake documents
            i. Database to match name and SSN
   iii. Education limits for undocumented migrants
      1. Cost of education bothers states most
      2. Prop 187 – denied undocumented migrants from public school, required school to check status and report to INS, and required school to tell family to leave
         a. Dist. Ct. stuck down, Gov Davis used consent judgment to stop appeal
         b. Pyler v. Doe invalidated similar TX law b/c federal govt. didn’t have employer sanctions so it was wrong to force school to do INS work
            i. Disproportionate negative affects on children made law unacceptable
         c. Unclear whether law like this would survive today
      3. Post-secondary govt. subsidies
         a. Taxes paid support universities
            i. Most undocumented migrants pay taxes, but pay less on average b/c of less income
            ii. TPs would pay the difference which makes it like welfare
         b. Denial would discourage people from coming to the US to pursue further education
         c. Federal policy would stop reace to the bottom
   iv. Drivers licenses for undocumented migrants
      1. Pros – as argued by Professor Stock
         a. Nat’l Security databases enhanced by info due to licenses
b. Licensed drivers increases the safety on the road for all
2. Cons – arguments that it allows to fly or deters from US are weak
3. Real ID allows licenses w/ disclaimer, but these aren’t very useful b/c you must
give info at DMV and the ID flags your presence

c. Citizenship – citizen and national are technically different, but we will use as the same
   i. As a society we have decided that laws based on the accident of birth are socially and
economically unacceptable, but citizenship and immigration rules are based on birth
      1. It is up to each country to decide who is or is not a citizen
   ii. Citizenship acquired through birth – categories on page 1271
      1. Jus Soli – acquired by being born on US soil
         a. Never granted for just birth in country, even liberal citizenshipUS has
            requirement that born subject to US jurisdiction
            i. No citizenship for children of diplomats and those born in
               occupied territory
         b. Before “Citizenship w/o Consent” everyone assumed birthright jus soli,
            but now arguments for not conferring on those born to undocumented
            i. Practical problem for children born here w/o citizenship
               On the other hand changing rule would eliminate pull factor
               1. Pull factor b/c gift of citizenship to child
               2. Parents gain LPR status when child 21
               3. Possible statutory eligibility for withholding
            iii. Fundamental argument that birth on soil does not have the
                 type of connection that we want for citizenship
      2. Jus Sanguinis – acquired by being born to a US citizen
         a. Normally has restrictions such as residence requirement for parents
      3. Establishing residency from many years ago: taxes, SS records, utility bills
         a. For purposes of physical presence Fleuti factors may be used, for
            residence short leave will not easily have adverse affects
   iii. Citizenship acquired after birth – Naturalization §316
      1. Basic substantive Criteria
         a. Lawful Permanent Residence – 5 yrs (spouse of USC 3 years)
         b. Residence and Physical Presence
            i. Must reside continuously in US for 5yrs immediately before
               application to naturalize (after admission as LPR) and from
               time of application to the time of citizenship
               1. Absence of 6 months to one year breaks continuous
                  residence unless applicant establishes that he did not
                  in fact abandon residence
               2. Absence of more than one year breaks continuous
                  residence unless job w/ US corp overseas
            ii. Must physically present in US for at least half of 5yrs before
            iii. Spouse of citizen can become citizen in 3 years rather than 5
         c. Good moral character during all periods in which residence and
            physical presence are required
         d. Must be 18 or older to apply for administrative naturalization
            i. Children automatically citizens if USC parent, under age 18,
               resides in US as LPR, and resides in legal custody of parent
               ii. If child doesn’t meet this parent can apply if one USC parent,
                   either USC parent or grandparent on that side has been
                   physically present in US for 5 years, under 18, and child
                   resides outside US, but is currently present after lawful admit
         e. Must demonstrate an understanding of the English language including
            an ability to read, write, and speak in ordinary usage
         f. Must have knowledge and understanding of fundamentals of history
            and principles and form of govt. of US
g. Must not have been in politically excluded group under §313 for 10 years immediately before application until oath
h. Must demonstrate attachment to principles of the US Constitution

2. Basic Procedure – currently AG has sole authority to naturalize
   a. Administrative naturalization
      i. Individual files application with USCIS
      ii. USCIS examiner interview applicant and conducts whatever investigation is necessary to grant or deny
      iii. If USCIS examiner grants application, individual takes oath of allegiance to the US
         1. If denied, applicant may request hearing before IJ
         2. If hearing results in denial, may appeal to dist court
   b. Alternatives to naturalization
      i. Naturalization of newly acquired territories
      ii. Children automatically citizens if USC parent, under age 18, resides in US as LPR, and resides in legal custody of parent
         1. Applies to biological and adopted children
   iv. Losing Citizenship
      1. Failure to satisfy a condition subsequent (since repealed, but not retroactive)
         a. Oath regains citizenship
      2. Denaturalization: Revocation of Naturalization under §340(a)
         a. Naturalization revoked if it was illegally procured or achieved by misrepresentation of fact or fraud
            i. Illegal procurement doesn’t require misrepresentation or fraud
      3. Expatriation: §349
         a. If citizen voluntarily commits any of several specified acts with the intent to relinquish citizenship – found expatriated
            i. Requirement of intent under Vance v. Terrazas
         b. Taking away citizenship with no intent if no allegiance
            i. Problem of statelessness if not a dual national
            ii. Loss of citizenship cannot be applied as punishment
               1. Treason is proper punishment rather than loss of citizenship
      c. US State Department position that if you renounce you did not mean it
   4. Dual citizenship
      a. Arguments against
         i. Unjust enrichment of 2 citizenships and associated rights
         ii. Practical problems w/ forced military service
         iii. Voting rights usually tied to citizenship and vote should not be controlled by those with divided loyalty
            1. But divided loyalty is normal part of life not an by-product of dual citizenship
      b. Arguments for Dual citizenship
         i. Citizenship comes with rights, but also with obligations and liabilities
   5. Reasons for citizenship as a concept
      a. Why do we need
         i. Need for international law?
         ii. Need for domestic law? -Currently public assistance, voting, and certain federal jobs based on citizenship, but it could be based on lawful residence or other requirements
         iii. Citizenship for sovereignty?
      b. In the end we have citizenship as a convenient bundle of rights to classify people for all of these benefits
         i. Emotional component to citizenship and we have an underlying adherence to this
ii. Practical consequences of eliminating would result in massive change