

IMMIGRATION LAW AND THE RIGHTS OF NONCITIZENS

New York University School of Law
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Overview. This course examines the law, theory, and practice of the U.S. immigration system. At its core are two questions. First, how does law regulate who enters the United States and who is forced to leave? Second, when and why can noncitizens in the United States be treated differently than citizens? To answer these questions, we will examine the history of immigration to the United States, the structure of the immigrant screening system, the constitutional status and conditions of undocumented immigrants, the administrative structures used to enforce immigration law, the growing connection between the immigration and criminal systems in the United States, and state and local efforts to regulate immigrants.

Prerequisites. None. While we can't grapple with immigration law and the rights of noncitizens without delving into constitutional law, administrative law, and a complex statutory scheme, there is no need to have taken constitutional law or administrative law before taking this course.

Meetings. The class meets in Furman 110 on Wednesdays from 2:00 to 3:50 p.m., and Fridays from noon to 1:50 p.m. We will not meet on Wednesday, October 15 and Friday, November 7. We will make these classes up on Monday, October 13 and Monday, November 3. These make-up sessions will both run from 12:25 to 1:50 in Furman Hall 334.

Materials. The casebook is T. Alexander Aleinikoff et al., *Immigration And Citizenship: Process And Policy* (7th ed. 2012) ("CB"). You will also need the 2014 statutory supplement: T. Alexander Aleinikoff et al., *Immigration and Nationality Laws of the United States: Selected Statutes, Regulations and Forms* (2014).

The 2014 supplement is the best way to avoid confusion when we are discussing the statute in class, because we'll often refer to page numbers in this edition. Alternatively, you can download sections from any online database. Cornell's Legal Information Institute is a nice free source. If you use an online source, just beware obsolete material and be aware that the title and section numbers in the Immigration and Nationality Act do not correspond to the chapter and section numbers in the codification that appears in the United State Code.

Schedule. Our schedule is laid out below, with individual reading assignments grouped by class number. All readings that are not in the casebook will be posted to NYU Classes. The assignments are subject to modification, and I will update the syllabus as necessary throughout the semester. I'll alert you to any changes, and the up-to-date syllabus will always be posted to our course site.

In addition to reading the material indicated on the assignments, please read all of the statutory provisions that are relevant to the assignment. Also, while statutory problems frequently appear in the casebook, you may safely skip any problem that is not specifically mentioned in the reading assignment.

Getting Help. My office hours are Fridays from 2pm to 4pm. I also generally have an open door policy, so feel free to drop by at other times or to email me to schedule an appointment outside of office hours.

Class Discussion and Participation. Our class will be discussion-oriented. To make the most of this approach, every class meeting needs to be a cooperative conversation, and the vast majority of us must be ready to participate on any given day. This means that everyone should also expect to be on call every day. Of course, I know that everyone has, from time to time, a day when he or she cannot be prepared. If you will be unprepared to discuss the assigned reading during any particular class, please email me at least one hour before the start of that class to let me know.

Please do not use any electronic device to record class.

Exam and Grading. Your final grade will be based primarily on a three-hour open-book, in-class exam. Final grades will also be adjusted to reflect preparation and participation. High-quality (not necessarily quantity) participation can raise your grade. Being unprepared for class discussion (unless you've let me know in advance) can lower your grade.

Recommended Readings. For students interested in additional reading on the theoretical, historical, ethical, and policy debates surrounding immigration, I would recommend the following books. Feel free to consult me if you'd like guidance about what to read.

- Mae Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (2004)
- Hiroshi Motomura, *Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States* (2007)
- Gerald Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* (1996)
- Lucy Salyer, *Laws Harsh As Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (1995)
- Joseph Carens, *The Ethics of Immigration* (2013)
- Paul Collier, *Exodus: How Migration is Changing Our World* (2013)
- Daniel J. Tichenor, *Dividing Lines: The Politics of Immigration Control in America* (2002)

For authoritative and comprehensive treatises on immigration law, see the 20-volume Gordon, Mailman, & Yale-Loehr, *Immigration Law And Procedures* (available on Lexis); and Ira J. Kurzban, *Immigration Law Sourcebook* (American Immigration Law Foundation, 14th ed.) (2014).

I. CONSTITUTIONAL FOUNDATIONS

The constitutional foundations of federal immigration law date to the late nineteenth century—to a world where the federal government’s power was much more limited, where the administrative state as we know it today scarcely existed, and where Jim Crow laws were sanctioned by the Supreme Court. While this constitutional moment has long since passed, we begin in this early period because these foundational cases raise important questions that still resonate today: What are the doctrinal foundations of federal authority to regulate migration, and how far does that authority extend? What are the historical connections between citizenship, immigration, and race? What is the constitutional difference, if any, between exclusion and deportation? Do individual rights limit the reasons why the government may exclude or deport a noncitizen?

Class 1 Federal Authority to Regulate Immigration

Aug 27 Background on Chinese migration (CB 163-67)
Legomsky & Rodriguez, Sources of Federal Immigration Power
Chae Chan Ping v. U.S
Geary Act of 1892, section 6
Fong Yue Ting (CB 170-84)

Class 2 The Scope of Federal Power

Aug 29 Wong Wing v. United States
Keller v. United States

The Right to Reside: Punishment and Proportionality

Mae Ngai, History of the Border Patrol
Harisiades v. Shaughnessy (CB 652-663, 665-67)
Wishnie, Proportionality

Class 3 Equality, Speech, and Territoriality

Sept 5 Harisiades v. Shaughnessy redux
Kleindienst v. Mandel (CB 614–22)
Fiallo v. Bell (CB 293-302 & n.5)

Class 4 Citizenship: Acquisition and Significance

Sept 10 Yick Wo v. Hopkins (CB 198-201)
Jus soli: Wong Kim Ark (CB 50-69)
Jus sanguinis (CB 38-41)

Class 5 Jus Sanguinis Cont.

Sept 12 INS v. Nguyen (CB 43-49)
Pierre v. Holder (cert petition, July 2014)

Loss of Citizenship

Denaturalization (CB 133-138)
Expatriation (CB 140-156)

II. STATUTORY FRAMEWORK OF EXCLUSION AND DEPORTATION

Today immigration law is formally structured around the INA's complex rules of admissibility, inadmissibility, and deportability, which together comprise the black letter law of the immigrant screening system. A comprehensive survey of these rules could alone easily consume an entire course, and we will make no such attempt. Instead we will use select examples to explore a number of issues central to the structure of the system. For example, we will examine the way the screening system has changed dramatically over time—perhaps most significantly with the rise of deportation and the growth of immigration consequences for criminal convictions. Moreover, while our focus in this part of the course will be principally on the statutory framework, we will continue to tease out the ways in which the Constitution (as well as administrative law) restricts and shapes the system of exclusion and deportation.

A. Admission

Class 6 Quotas and Preferences

Sept 17 A brief history of immigration law (CB 3-24)
Legomsky & Rodriguez, Quota Fundamentals
Preference Categories (CB 277-284)

Family Immigration

Adams v. Howerton (CB 305-13)
Matter of Zeleniak
Marriage fraud (CB 314-23; problem 3(a) on page 321)

Class 7 Labor Admissions

Sept 19 The employer-based selection system (CB 346-56, 369-74, 379-82)
Permanent v. temporary labor migration (CB 382-88, 402-16, 428-35)

B. Inadmissibility and Deportability

Class 8 The Significance of “Admission”

Sept 24 Entry vs. “admission” (CB 582–84, INA § 101(a)(13))

Immigration Control

Inadmissibility (CB 584–86 & problem 4)
Deportability (CB 650-52 & problem 1)
Bars on readmission (CB 594-601)

Inadmissibility v. Deportability

INA §§ 212, 237
Cox & Posner, The Rise of Deportation
Judulang v. Holder

Class 9 National Security

Sept 26 “Subversives” and terrorism (CB 605-14, 625–27)
Material support: Singh-Kaur v. Ashcroft

18 U.S.C. §§ 2339A, 2339B(a)
Duress exception? *Annachamy v. Holder* and CB 638-41

Class 10 Criminal Grounds

Oct 1 Overview (CB 693–701)
The categorical approach (CB 701-21)
Descamps v. United States

Class 11 Immigration Law, Criminal Law, and Federalism

Oct 3 *Lopez & Carachuri-Rosendo* (CB 742–50)
Padilla v. Kentucky (CB 682–93)
Ingrid Eagly, Criminal Justice for Noncitizens

C. Relief from Removal

Class 12 Forms of “Relief”

Oct 8 Waivers of inadmissibility, INA § 212(d)(3)(A), 212(h)
Cancellation of removal (CB 750-56, 763; exercise on CB 763)
Adjustment of status (CB 511-17)
Voluntary departure (CB 788-94)

III. IMMIGRATION PROCEDURE

The law of exclusion and deportation determines who is permitted to enter the United States and who can be coercively removed. But these rules are enforced through elaborate (and sometimes not-so-elaborate) administrative and judicial structures designed to determine who properly falls within the immigration law’s substantive permissions and prohibitions. We will begin by surveying the historical growth of constitutional right to due process in immigration contexts. Then, as with the rules of exclusion and deportation, we will survey key procedural issues from both a constitutional and statutory perspective.

Class 13 The Right to a Fair Hearing (and the significance of “entry,” redux)

Oct 10 *Yamataya v. Fisher* (CB 535-38)
U.S. ex rel. Knauff v. Shaughnessy (CB 531-35)
Kwong Hai Chew v. Colding (CB 539-42)
Shaughnessy v. U.S. ex rel. Mezei (CB 542-50 & n.1)
Landon v. Plasencia (CB 554–60 & nn.1-3)

Class 14 Right to Appointed Counsel: *Ahilan Arulanantham*, ACLU Furman 334 @ 12:25

Oct 13 *Legomsky & Rodriguez*, Background on Removal Proceedings
INA § 240
J.E.F.M. v. Holder (complaint, PI motion, motion to dismiss)

Oct 15: No Class

Class 15 Administrative Removal Process

Oct 17 Admissions procedure (CB 498–502)
Expedited removal (CB 569-73, 575-81)
Reinstatement of removal (CB 1212-16)

Class 16 Judicial Review

Oct 22 INA § 242
The APA, the INA, and the Constitution (CB 1270-80)
INS v. St Cyr and aftermath (1280-87)
Government’s Motion to Dismiss, JEFM, pp. 7-13

Class 17 Detention

Oct 24 Background (CB 1216-23)
Zadvydas v. Davis (CB 1223-35 & n.5)
Demore v. Kim (CB 1238-50)

IV. ENFORCEMENT, UNDER-ENFORCEMENT, AND BEYOND

Parts II and III surveyed the substance and procedure that comprise the *formal system* of exclusion and deportation. But this formal system is only a part of the picture in a world where there are 11 million unauthorized immigrants—and arguably not the most important part. For any area of legal regulation where nearly one-third of the legal subjects are formally in violation of law, legal compliance and the role of discretion necessarily become central questions. This Part documents the informal system of immigration law that has emerged in a world of pervasive enforcement discretion and explores some central questions about that system. We will ask what the current state of affairs means for the legal status of an emerging Presidential immigration law. We will also explore the strategies that might shrink the gap between law on the books and law in practice—either through enforcement or legalization.

Class 18 Enforcement Overview

Oct 29 History and characteristics of unauthorized migration (skim CB 451-85)
Border and interior strategies (CB 920-52)
8 USC §§ 1325, 1326 (INA §§ 275, 276)

Class 19 Employer Sanctions and Labor Rights

Oct 31 Background (CB 952-55)
E-Verify (CB 962-71)
Hoffman Plastics (CB 972-81)

Administrative Relief from Removal

Parole-in-place and prosecutorial discretion (CB 518-21, 778-88)
DACA description (<http://www.dhs.gov/deferred-action-childhood-arrivals>)
Law professor DACA letter
USCIS administrative alternatives memo

Class 20 Presidential Power

Furman 334 @ 12:25pm

Nov 3 Crane v. Napolitano
Heckler v. Chaney
Excerpts on ad law and article II (Aiken)

Legislative Alternatives? Legalization and Future Flows

History of legalization programs
Summary of 2013 Senate Bill

V. FEDERALISM

Today it is well-established that the federal government has exclusive authority to establish the formal rules of exclusion and deportation. States may not write their own versions of the INA. But things were very different in the nineteenth century, when federal power was at a lower ebb and migration was deeply intertwined with issues of slavery. In that early period, states often attempted to regulate immigration in the absence of federal regulation. Moreover, even after federal exclusivity over exclusion and deportation were well-established, states continued to play an important role in immigration law. This part traces the evolving constitutional framework that has managed efforts by states to regulate immigrants and enforce immigration law—whether those efforts are competing with, resisting, or cooperating with the federal government.

Class 21 Early Developments

Nov 5 Mayor of New York v. Miln
Chy Lung v. Freeman
Hines v. Davidowitz

Nov 7: No class

Class 22 Federalism and Equal Protection

Nov 12 Graham v. Richardson (CB 1315-1323)
Matthews v. Diaz (CB 1038-39)
Plyler v. Doe (CB 1040-50)

Class 23 State Efforts at “Enforcement”

Nov 14 De Canas v. Bica (CB 1037-38)
United States v. Arizona
Keller v. City of Fremont

Class 24 “Cooperative” Federalism

Nov 19 Secure Communities (Cox & Miles excerpt)
287(g) (Legomsky & Rodriguez excerpt)
Immigration detainer form
Miranda-Olivares v. Clackamas County
NY Times, Fearing Lawsuits, Sheriffs Balk
TRAC, Immigration detainer stats

VI. ASYLUM AND MIGRATION CRISES

The law of asylum and refugee status raises a number of questions that are quite different than those addressed in the rest of our course. The role of international cooperation, as well as the connection between international law and domestic law, are central to the asylum system but have played a limited role in the rest of immigration law ever since the United States began to pursue a more unilateral approach in the late nineteenth century. Nonetheless, domestic asylum law does raise a number of questions that are of a piece with the rest of the course. This Part explores the role of asylum law during a migration crisis. Using the recent increase in families and unaccompanied children arriving at the southern border as a case study, we will examine how administrative structures and due process shape (and are shaped by) the government's response, how a perceived crisis affects the respective roles of Congress and the President over immigration policy, and how resilient the rules of asylum and refugee law remain in such moments.

Class 25 A Well Founded Fear

Nov 21 Background (CB 812-825)
Mirasawo v. Holder (CB 826-42)
INS v. Cardozo-Fonseca (842-48)

Class 26 Protected Grounds

Nov 26 INS v. Elias Zacharias (CB 850-860)
Matter of Acosta
Matter of M-E-G-V

Class 27 Law During Migration Crises: Children at the Southern Border

Dec 3 Orantes-Hernandez v. Gonzales
In re D-J-
Media coverage of Artesia
Optional: Artesia complaint

Class 28 Reserved for Overflow and Review

Dec 5