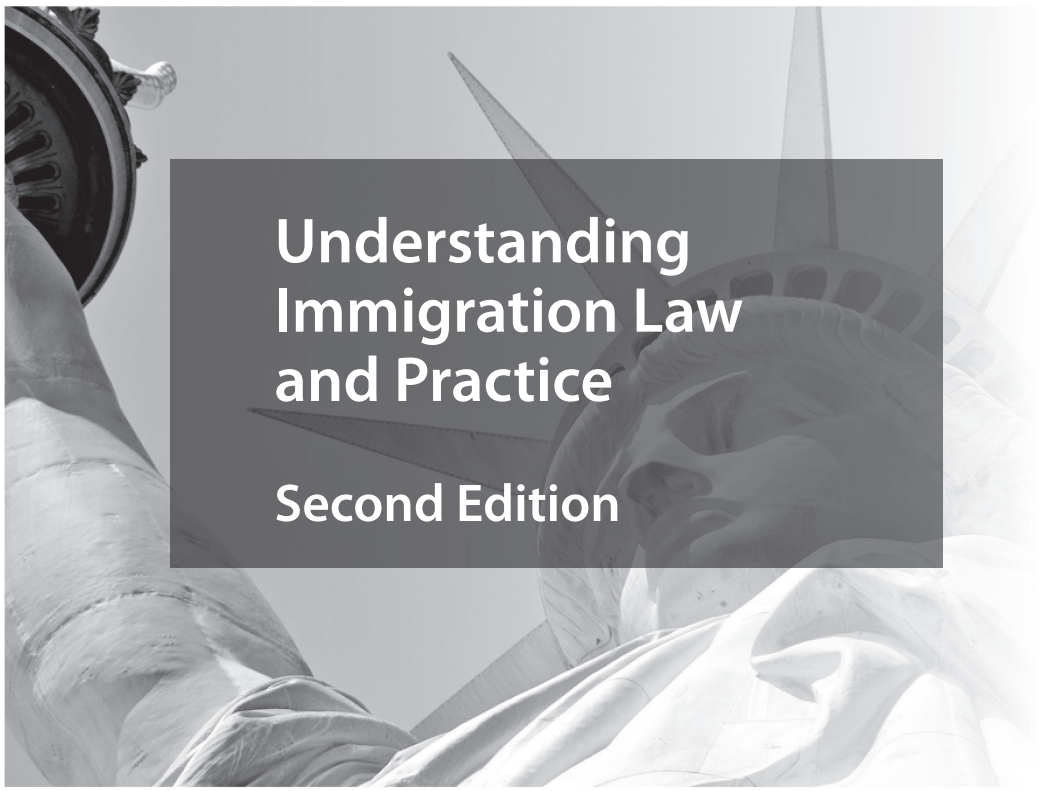
Understanding Immigration Law and Practice



Understanding Immigration Law and Practice

Second Edition

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This book is in memory of my mother, Rebecca Masler Bernstein, who fled Poland with her family in 1921, and of my father, Joseph M. Bernstein, who was the first in his immigrant family to attend college — Yale — after his father came to the United States from Lithuania. Through them I learned about the determination and courage of parents and grandparents who come to the United States so their children can have better lives and, in some cases, by escaping persecution and war, can have life itself. I also pay homage to the immigrants and refugees I have been privileged to serve, who have shared their stories and culture with me, broadening my world immeasurably. Immigrants, after all, breathe life into the patriotic song, "America the Beautiful," well known for its verse to "crown thy good with brotherhood" but also exhorts:

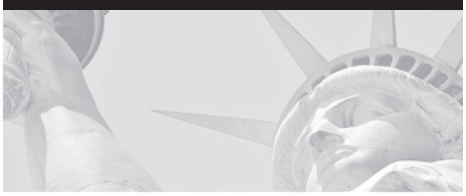
America! America!
God mend thine ev'ry flaw,
Confirm thy soul in self-control,
Thy liberty in law.

— Judith Bernstein-Baker

In loving memory of Omo Oba Moses Olubayode Otaiku Shokoya-Eleshin, my earthly father and the first man I ever loved. May God and our ancestors watch over you always. Rest in perfect peace. 10/19/1935–11/12/2019.

— Ayodele Gansallo

Brief Contents



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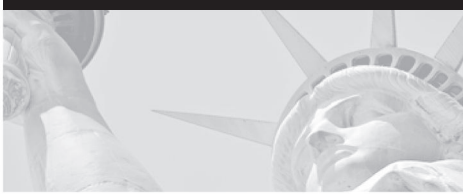

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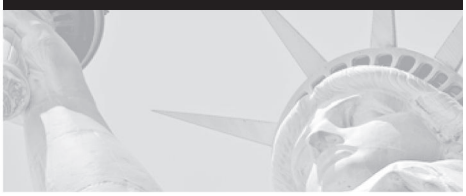

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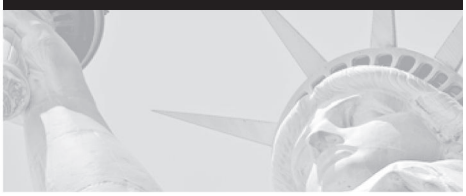
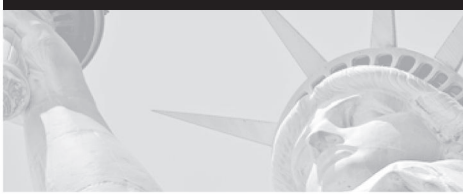


Preface



Three years ago, we sat down to write a textbook that we hoped would encapsulate a relatively small sliver of the immigration laws of this country. We wrote at a time of relative predictability and stability, towards the end of one governmental administration, and the beginning of another. It is fair to say that no one could have predicted what the legal and political landscape would be in the fall of 2019. The population of foreign-born residents living in the United States on a long-term basis has continued to grow. According to the Migration Policy Institute, in 2017 the United States had 44.5 million foreign-born residents, representing 13.7 percent of the total U.S. population of 325.7 million people.[1] Since almost all foreign-born residents interact at some point with the U.S. immigration system, immigration law and policy is a growing field with dramatic impact on the foreign-born, their family members, and the U.S. workforce.

Applying immigration law in a particular case can work to protect refugees, bring needed workers to the U.S., and reunite families, but it can also result in family separation or forced return of a foreign national to that person's home country. Given the high stakes involved in an immigration case, all legal professionals have an obligation to be well-informed and to work within the legal and ethical scope of their profession.

Between us, we have more than 30 years of immigration law experience in nonprofit organizations. Working from this experience, we sought to offer a book that would be easily accessible to both students and teachers, recognizing that, in today's world, both are engaged in busy lives. Because we lacked extensive knowledge of working with those seeking immigration benefits through employment, we turned to wonderful colleagues in the immigration bar to assist us. Their contributions regarding employment-based immigration law issues have been invaluable. Through our combined efforts, we sought to provide a comprehensive textbook covering most aspects of immigration law today. We believe that *Understanding Immigration Law and Practice* goes some way toward achieving that goal. Our book has been used in clinical legal programs, graduate, college, and paralegal courses exploring immigration law and for teaching fundamental substantive law and procedure. It is also used outside the classroom by paralegals, legal practitioners, and attorneys who, new to the field of immigration, wish

[1] J. Zong , J. Batalov, and M. Burrows, *Frequently Requested Statistics on Immigrants and Immigration in the United States* (March 14, 2019), available at https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states.

to refer to it as a guide and resource as they learn to navigate this complex area of law.

In this text, we condense the complicated laws and regulations that make up our immigration system into user-friendly yet comprehensible chapters. It has been a challenge to decide what to include and what to leave out, even more so with the rapid changes that have taken place since the elections in 2016. The book could easily have been three times in length, but that would not have achieved our objective. We have focused on what we considered to be the most important areas to cover. For the more complex issues dealing with those with criminal convictions, we have chosen not to delve too deeply, as more often than not, these cases require the expertise of a lawyer with a background in criminal law or access to someone whose practice focuses on this companion area of law. Rather, we have tried to focus more on issue spotting so that the practitioner might know when to seek assistance from others.

In order to make the book accessible, we offer various scenarios as examples, placing information in contexts that illuminate the lives of those needing representation. Because we believe that posing questions is an invaluable aid to test comprehension and creates a gateway for deeper exploration of the material, we have included numerous "Cases for Discussion," with answers deliberately omitted from the text but available in the online Instructor's Manual. These and the examples used throughout the text emanate from cases we have been involved in through our client interactions and, therefore, offer real-world problems for beginning practitioners to consider. We have included a glossary of terms and acronyms, which are in boldface when they appear in the text for the first time. Other tools for students include learning objectives, marginal notes clarifying key vocabulary, which are in boldface and italicized, and numerous documents and other illustrative materials generated in the course of actual practice.

The last item points to a central aspect of this text. The facts behind many of the examples and cases for discussion are based on real-life situations on which we have advised over the years in the course of direct client representation, although clients' names have been changed to protect their privacy. We have found in our classes that using real cases brings to life the myriad experiences of and problems faced by those who come into contact with the U.S. immigration system. They assist students in translating legal rules and theory into practice. With that necessity in mind, we have sought to balance coverage of statutory and procedural rules with insights into practical information.

We have chosen to use the words "foreign national" rather than "alien" or "illegal alien" when addressing those who are neither U.S. citizens nor lawful permanent residents, or who are here temporarily. We also use this term for those who, for various reasons, may not have permission to be in the United States and are therefore undocumented. We chose this terminology for both the text and for reproduced statutory and regulatory language. Those seeking the unaltered language will need to refer to the original source, which is good practice in any event.

A companion Instructor's Manual is available online at www.wklegaledu.com/Gansallo-Immigration2 to assist those wishing to teach substantive or procedural

immigration law or both. As noted, it includes what we consider appropriate responses to the text's numerous "Cases for Discussion." As with immigration law broadly, these suggested responses take into account the many variables involved in reaching a satisfactory solution. The manual also contains sample PowerPoint slides, tested in the classroom, that can be used in whole or in part, as well as sample exams. Also included are: entire class, small group, and individual exercises for enhanced learning — some of which require use of the Internet; and ideas for homework assignments that call for analyzing fact patterns and applying legal principles.

Today, much of the practice of immigration law depends on the Internet, which is used extensively by the government agencies responsible for implementing the laws in this area. Readers should always check relevant websites and other source material to ensure they have the latest information.

NEW IN THE SECOND EDITION

Immigration law is never static. As an instrument of public policy, it is always changing as societal goals and public priorities change, which has become starkly obvious since the first edition of this book. Although there were no major statutory changes in the Immigration and Nationality Act since our first edition was published, there have been many procedural changes to the implementation and application of the law. This edition includes discussions of significant legal changes arising from case law. We discuss the United States Supreme Court decision in ***Pereira V. Sessions,*** where the question of what must a notice to appear contain in order to be considered valid under the Immigration and Nationality Law was first decided. It subsequently generated a number of additional decisions issued by the Board of Immigration Appeals and circuit courts around the country. We also discuss the Attorney General's decisions in ***Matter of A-B-*** that sought to categorically exclude asylum claims based on domestic and gang-based violence; ***Matter of L-A-B-R-***, which severely restricts the use of continuances in removal proceedings; and ***Matter of Castro Tum***, which limits the ability of immigration judges to administratively close removal proceedings.

On the family-sponsored immigration side, we have included discussions on the new **public charge** regulations, and their requirements, while on the employment-based side, we update the **EB-5** or **investor visa process** with recent changes. Where possible, we have included additional examples and cases for discussion as an aid to learning.

In this edition, we have described how the current administration has, through the exercise of executive authority and agency regulations, increased enforcement, reduced the number of refugee admissions, limited the discretion of immigration judges, and curtailed legal immigration through establishing higher standards for eligibility for nonimmigrant and immigrant visas. Perhaps some of the most sweeping changes have occurred in the area of asylum, where, under one policy, those crossing on the southern border have been forced to

return to Mexico under the Migrant Protection Protocols and wait until their court date in the United States; and under another, foreign nationals have been barred from applying for asylum if they did not first make a request for protection in a "safe third country" through which they traversed. While many of these restrictions have been challenged in the federal courts — called upon to determine if certain presidential and executive actions contravene laws passed by Congress or the U.S. Constitution — we have done our best to incorporate these significant changes through the end of July 2019.

In an effort to encapsulate some of these changes from a policy perspective, we have included a new **Chapter 13, Immigration Enforcement**. It is divided into three parts. Part I examines enforcement action taken abroad to limit the ability of people to come to the United States; part II discusses enforcement action taken both at the U.S. border and within the United States, in the nonemployment context, while part III addresses enforcement action targeted to employers and their workforce. All three sections illuminate the political nature of immigration law at this present time. We have also added a much needed table of cases, in an effort to simplify searches.

Despite our best efforts, it has been almost impossible to keep up with the changes in the law while writing this second edition. Because of space limitations, we have had to be judicious about what we included and with the continued rapid legal changes, some of our updates may be obsolete by the time of publication. Given that, we urge readers to do their own due diligence with respect to keeping abreast of changes as they use this text. Our goal for this text is to provide readers with the tools they will need to conduct their own analysis and research and, more important, to spark their interest in a field we find both challenging and rewarding.

ACKNOWLEDGMENTS

For this edition, we must first thank our trusted partners, Jonathan Grode, of Green and Spiegel LLC, and Wendy Hess, of Landau, Hess, Simon, and Choi, our business immigration gurus who wrote Chapters 2 through 4, and Chapter 7, respectively. Without their expertise and insight, this book would not be complete. Jonathan was also the inspiration for our new Chapter 13, Immigration Enforcement and wrote the employer sanctions section. Thanks, as ever, Jonathan. Several law school professors provided us with critical advice and suggestions on how to improve on and make corrections to our first edition, arising from their own use of our text. We are deeply indebted to Judge Paul Schmidt, formerly Chairman of the Board of Immigration Appeals and a retired immigration judge who now teaches as an Adjunct Professor of Law at Georgetown Law School. From the early days of his adoption of our text, he has offered helpful suggestions on correcting errors and provided significant and invaluable assistance in our efforts to structure discussions related to the *Pereira v. Sessions* decision in this second edition. Professors Denise Gilman, Director of the University of

Texas Law School's Immigration Clinic, and Michele Pistone, Director of Clinic for Asylum, Refugee and Emigrant Services (CARES) at Villanova Law School, both provided significant feedback on how to make the book more relevant to teaching clinical legal programs and for Accredited Representatives respectively. Thank you all, and we look forward to your continued suggestions. We would also like to thank, with great gratitude, Maria Fritzinger Elias, for the many hours she devoted to answering our questions, sometimes late into the night; Karen Pollins of Goldblum and Pollins; and Yuah Jessica Choi of Landau, Hess, Simon, and Choi, three exceptional attorneys without whom Chapter 7 would never have been written. To the team at Green and Spiegel, we especially thank Matthew Galati, who jumped in at the last minute to provide essential updates of the EB-5 investor visa, portion of that chapter, just days after the new regulations took effect. We also thank Andrew Rodgers, Lindsay Parnell, John Rowan, and Marc Kaplan from the firm for their assistance in writing, editing, and reviewing Chapters 2 through 4.

A hearty "thank you" to our colleagues at HIAS Pennsylvania, from whom we have learned so much over the years. Their commitment to excellence in practice and to the immigrants and refugees we serve is without equal. In particular, we wish to thank Lori Alexander, whose almost 40 years of working in the immigration field has made her an invaluable asset; she reviewed a number of our chapters and always offered helpful suggestions, from the perspective of someone who could recite much of the information in this book in her sleep. Our deepest thanks as well to Elizabeth Yaeger and Stephanie Costa, who were always willing to offer anecdotal information, statutory analysis, and legal procedure when requested.

Thank you to our friends in the Philadelphia Immigration Bar who offered their assistance, in particular Wayne Sachs of the Sachs Law Group, LLC, who reviewed and offered critical suggestions for improving Chapter 10, and Thomas Griffin of Surin & Griffin, P.C., who did likewise for Chapter 6; your critiques were always constructive, and we thank you. Our thanks also to William Stock, of Klasko Immigration Law Partners, LLP, and past president of the American Immigration Lawyers Association, for the business-based sample retainer agreement used in Chapter 12. Thank you to Kelsey Logar, a law graduate of the Thomas R. Kline School of Law at Drexel University, who fact-checked our citations in the first edition and kept us on track. In this second edition, we had considerable assistance from Allison Perlin, a third-year student at the University of Pennsylvania Law School. Allison created our new Table of Cases, checked and updated citations and weblinks, paid great attention to detail, while producing materials quickly and efficiently. We would also like to take this opportunity to recognize a stellar Philadelphia immigration lawyer, Lisa Baird, the first attorney to join the staff of HIAS PA and who mentored us both early in our careers, but sadly passed away too soon.

Many thanks to the staff at Wolters Kluwer, particularly Nicholas Lasoff whose careful reading of the text was very helpful, along with his encouragement to be accurate and thorough, and to Susan Boulanger, who provided guidance and encouragement in equal measure for our first edition. Jordon Jepsen showed

flexibility in granting us the needed additional pages to do justice to the constant changes in immigration policy we sought to include. To Sarah Hains of The Froebe Group, who shepherded us through a complex maze that is the book production process, but made sure we made it to the other side unscathed and full of new and useful information. To Nick Walther, Sarah's successor and our editor extraordinaire. Thank you for your patient guidance and for deftly navigating us away from many a self-inflicted wound. Most importantly, thank you for keeping us to some pretty tight deadlines! And, to the many others who reviewed the book and offered suggestions that have greatly improved our original drafts, we thank you.

Finally, we thank our many friends and our families — particularly Karl Baker, Kira Baker-Doyle, Akil Dasan Baker, Noah Gansallo, Obafemi Shokoya, Adekunle Shokoya, and Adewale Shokoya — who have encouraged us all along the way. Without your support, this book and its progeny might never have been completed.

— Ayodele Gansallo and Judith Bernstein-Baker

December 17, 2019

Understanding Immigration Law and Practice

1

Historical Background and Introduction to the U.S. Immigration System

Key Terms and Acronyms

Board of Immigration Appeals (BIA)
Chinese Exclusion Cases
Customs and Border Protection (CBP)
Department of Homeland Security (DHS)
Department of Justice (DOJ)
Department of Labor (DOL)
Department of State (DOS)
Executive Office for Immigration Review (EOIR)
Federal Register Immigration and Customs Enforcement (ICE)
Immigration and Nationality Act (INA)
Immigration Status
Inadmissible
Lawful Permanent Resident (LPR)
Precedent Decisions
Quotas
Regulations
Unauthorized/Undocumented Foreign National
U.S. Citizenship and Immigration Service (USCIS)
Visa

Chapter Objectives

- Provide a historical overview of U.S. Immigration Policy
- Explain the evolution of federal authority in immigration matters

- Describe current agencies and decision-maker roles in the immigration system
- Examine sources of immigration law

In its simplest form, immigration law addresses three questions: which foreign nationals are permitted to enter the United States and for what purpose; who is allowed to stay, and for how long; and who must leave. Current answers to these questions are rooted in the history of immigration law, developed over centuries and which may or may not be relevant to the needs of the country today. In trying to understand these complex questions, it may be helpful to visualize the opening and closing of a gate. At times, the gate is open widely, allowing many foreign-born individuals to visit and remain permanently in the United States; at other times, the gate is closed and as a result, those wanting to immigrate are shut out.

Immigration law is constantly in flux and practitioners often need to research the current state of the law or procedures as they relate to a particular set of facts. This chapter outlines sources of immigration law and policy that are important to utilize in understanding the law and keeping up-to-date. It briefly discusses the evolution of immigration policy and explains the key decision makers and agencies today, an important foundation for any practitioner who may interact with the immigration system.

A. Introduction to the Study of Immigration Law

Today, Congress has the primary authority to decide immigration policy. There is a complex set of agencies in the Executive Branch, including agencies within the **Department of Homeland Security**, or **DHS**, the **Department of State**, or **DOS**, and the **Department of Labor**, or **DOL**, that implement congressional legislation and regulate immigration. These agencies and policies developed over time in response to the evolving needs of the country.

The United States began as a nation with open borders and no controls, and progressed to what exists now, a highly regulated system that endeavors to manage the inflow of people within its borders. How we arrived at this position and where we move from here are always interesting topics of debate. While we do not intend to address future immigration policy, a survey of the past may be a useful starting point.

A.1. Key Definitions

There are some key terms that must be introduced at this point in order to understand the historical background and current structure of our immigration system:

- **Immigration status** refers to a person's status with respect to our immigration laws. This can include either a legal or unlawful status here. There are five general categories of immigration status covered in this text, which are:
  - A **United States citizen** refers to a person who obtains his or her citizenship either by birth, adoption, or naturalization.
  - A **lawful permanent resident**, abbreviated as **LPR**, refers to a foreign national who has immigrated here; that is, the person intends and is authorized to reside permanently and indefinitely in the United States. Individuals who are LPRs have a document as evidence of their immigration status. Formally, it is known as an I-551 Permanent Resident card or stamp and is referred to colloquially as a "**green card**."
  - A **nonimmigrant** refers to a foreign national who is in the United States for a specific purpose such as tourism, temporary work, or study. Most nonimmigrants require a **nonimmigrant visa,** which enables the holder to present him- or herself at a **port of entry** so that a request to enter and remain in the United States in a particular immigration category can be determined by a **Customs and Border Protection**, or **CBP**, officer, who decides whether to approve the application or not. If granted, the foreign national may remain in the country legally for a specific length of time in order to pursue the particular purpose attributed to the visa category. There are many types of nonimmigrant visas and they are usually described by a letter and a number. For instance, tourists are issued B-2 visas, temporary skilled workers receive an H-1B visa, and students receive an F-1 visa.
  - A **refugee** refers to a foreign national who faces persecution in his or her home country and has been granted protection so that s/he does not have to return there. Those who enter the United States as refugees receive their status while outside the country; individuals already physically present in the United States who seek protection apply for **asylum** and, if granted, are known as **asylees.** Refugees and asylees are expected to apply for lawful permanent resident status after one year of the grant of their protective status and eventually can apply to become citizens. A foreign national who is not otherwise eligible to enter the United States as a refugee may be allowed to enter on a temporary basis, known as parole. Granted by an official from the DHS, it is based on an assessment of an emergency, humanitarian concern, or because it is in the public interest. A foreign national granted this status is known as a **parolee.**
  - An **undocumented or unauthorized foreign national** refers to a person who entered the United States without being inspected by U.S. immigration

authorities or who entered lawfully but remains here in violation of the law. This may be because the foreign national has remained beyond any period of authorized stay or because s/he has breached any of the terms of the stay granted to him or her. Those who enter the United States without permission are referred to as having **Entered Without Inspection**, or **EWI.**

- **Lawful Status** refers to a foreign national who is in the country with the permission of the United States government, either on a temporary or permanent basis. For example, a foreign national granted **Temporary Protected Status**, or **TPS**,[1] for eighteen months is in lawful status during that period.
- A ***visa*** is an official document permitting a person to travel to a United States border in order to request permission to enter the country in a specific category.

Visa: An official U.S. government-issued document placed in a foreign national's passport that allows him or her to travel to and apply for admission to the United States at a designated border or port of entry.

B. A Brief History of Immigration Law and Policy

To help understand how immigration laws have changed over time, let us examine a family for a snapshot. Adrianna is a 59-year-old U.S. citizen. Her great-great grandfather, Pio, was from Italy and entered the United States in 1874. Pio had no visa, job offer, or any family members in the United States. When he arrived at the Port of Philadelphia, Pio was briefly inspected by a customs officer appointed by the Commonwealth of Pennsylvania who determined that Pio was young and healthy and likely a strong worker. Accordingly, Pio was permitted to enter the United States to seek employment and stay for as long as he wanted. Pio entered, worked as a bricklayer, and eventually became a U.S. citizen.

Fast forward to 2016 when Adrianna's son, Paul, meets a friend, Domenic, while studying in Italy. Domenic wants to come to the United States to work for a few years and perhaps remain permanently. While there are some exceptions, in general, Domenic must have a visa to be able to come to the United States to work, whether temporarily or permanently. He will need a sponsor — either a family member or an employer — to help him apply for that visa. Intricate rules governing which family member can sponsor Domenic or the types of jobs and employers required for sponsorship exist today to restrict movement that did not exist in Pio's time. Those rules are discussed in detail in Chapters 2 through 4 and 6 and 7.

As the nation matured, many laws were passed that addressed immigration and determined the ability of people like Pio or Domenic to enter lawfully and/or remain permanently in the United States. Presenting a complete survey on immigration law and policy is beyond the scope of this textbook. Rather, we have chosen to include some key pieces of legislation that are representative of particular periods. The history of immigration shows that Congress may enact laws

[1] The concept of Temporary Protected Status is discussed further in Section G of Chapter 5, Asylum and Other Related Humanitarian Relief.

to restrict movement during one period but later may pass legislation to loosen those very restrictions. What follows is a brief summary of certain laws leading up to our current system.

B.1. 1776 to 1875: Migration from a Policy of Open Borders

Prior to 1798, there were few restrictions on immigration to the United States, although Congress did enact legislation to regulate ***naturalization***.

Naturalization: The process by which a foreign national can apply to become a citizen of the United States.

The Naturalization Act of 1790 established procedures for free white persons to achieve citizenship after just two years of residency, which later became five.

In 1798, in response to perceived threats by foreign powers, particularly France, Congress passed a series of individual laws —together known as the Alien and Sedition Acts, which included the Naturalization Act of 1798, the Alien Friends Act, the Alien Enemies Act, and the Sedition Act, which permitted the President to deport foreign nationals perceived to be "dangerous to the peace and safety of the United States,"[2] including noncitizens from countries with which the United States was at war. The Alien and Sedition Acts also made it more difficult for immigrants to become U.S. citizens by increasing the residency requirement to 14 years.[3] These Acts were the beginning of federal controls imposed on immigration. Domestically, they also restricted the ability to criticize the U.S. government, either in print or in speech, by making it a crime to utter statements that were "false, scandalous, or malicious."[4]

The role of the federal government in regulating immigration was supported by the United States Supreme Court in the Passenger Cases, 48 U.S. 283 (1849), which challenged state laws in New York and Massachusetts that empowered localities to tax vessels and individual foreign-born passengers arriving at their ports. Finding that such laws prevented the uniform governing of commerce by the federal government, the Supreme Court declared them unconstitutional because they violated the commerce clause of the United States Constitution.

The American Civil War brought about changes to our citizenship laws and enlarged the rights of all individuals in the United States, whether or not they were citizens, through the passage of the **Fourteenth Amendment** to the U.S. Constitution. Designed to protect the newly freed enslaved people, this Amendment declared that "all persons born or naturalized in the United States and subject to the jurisdiction thereof" were full United States citizens. It further mandated that no state may deprive any person, citizen, or noncitizen, of "life, liberty, or property without due process of law" or deny any person within its jurisdiction the "equal protection" of the law.[5] This language, known as the **due process clause**, means that even noncitizens have certain protections under the Constitution. The scope of these protections, particularly for those who lack immigration status, is often a source of federal litigation.

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[2] The Alien Friends Act, 1798, §1.
[3] The Naturalization Act, 1798, §1.
[4] The Sedition Act, 1798, §2.
[5] United States Constitution, amend. XIV §1.

B.2. 1875 to 1902: Restrictions Begin Through Federal Control of Immigration

By 1875, restrictions based on the characteristics of immigrants and their ethnicity and nationality began to appear. In 1882, the Immigration Act was passed that excluded "idiots, lunatics, convicts, and persons likely to be a public charge." Of great significance in that year was the first major effort to restrict immigration based on race, targeting Chinese immigrants. Previously, the United States and the government of China had enacted the Burlingame-Seward Treaty in 1868, which promoted legal emigration from China to the United States. Under this agreement and another that promoted commerce, Chinese nationals arrived to work in gold mines, agriculture, or to build the western railroads and were considered legal residents. However, economic, cultural, and racial tensions related to the success and number of Chinese immigrants began to build, culminating in the Chinese Exclusion Act of 1882, which created a ten-year moratorium on Chinese labor immigration. It also denied citizenship to Chinese citizens already in the United States.

The legality of this law was challenged by Chae Chan Ping who, pursuant to the Burlingame-Seward Treaty, had lived legally in the United States for many years and had traveled back to China for a visit. The changes in the law created by the Chinese Exclusion Act meant that he was prevented from returning to the United States to resume his residency, even though his trip abroad was for a short period. Ping challenged his exclusion all the way to the United States Supreme Court, which ruled that, despite the terms of the Burlingame-Seward Treaty that should have facilitated his return, Congress had the power to overrule the agreement and therefore exclude Ping.[6]

The Geary Act of 1892[7] extended the Chinese Exclusion Act by providing that Chinese nationals already in the United States who could not obtain a certificate of residency signed by a white citizen — required as a condition of remaining in the United States — could be deported. Fong Yue Ting, a Chinese resident, failed to get a white citizen to certify that he was here legally and was detained and placed into deportation proceedings. Ting had a number of witnesses willing to testify that he was in the country legally, but since they were all of Chinese descent, their testimony carried little weight. His case was also reviewed by the United States Supreme Court in 1893, which held that Congress had the right to both admit and expel foreign-born residents and could overrule previous treaties or legislation.[8]

Through the cases challenging the legitimacy of the laws excluding the Chinese, the doctrine that Congress has the primary power to regulate immigration was established. The exclusion of Chinese immigrants remained in effect until 1943 when, in an effort to recognize Chinese alliance with the United States during the Second World War, the United States Congress passed the Magnuson

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[6] *See Chae Chan Ping v. U.S.*, 130 U.S. 581 (1889).
[7] An Act to Prohibit the Coming of Chinese Persons into the United States of May 1892 (27 Stat. 25).
[8] *Fong Yue Ting v. United States,* 149 U.S. 698 (1893).

Act, which repealed legislation designed to exclude immigration of Chinese people to the United States.[9]

In addition to the Chinese Exclusion Acts, federal regulation of immigration was also strengthened through the Immigration Act of 1891, which gave the federal government direct control of inspecting, admitting, excluding, and processing all immigrants who sought entry to the United States. The Act created the Office of the Superintendent of Immigration within the Department of Treasury. This Office supervised United States' immigration inspectors and created immigration stations that had hearing and detention rooms, administrative offices, medical facilities, and railroad ticket offices. Perhaps the best known of these stations was Ellis Island, located in New York Bay.

B.3. 1903 to 1952: Quotas and Restrictionism

During the late 1800s until the 1920s, the United States experienced a great wave of immigration when over 22 million immigrants entered the country at a time of major industrial growth. As immigrant populations from eastern and southern Europe swelled, resistance also grew to new groups considered to be inferior, uneducated, and economic competitors.

Between 1903 and 1907, the category of immigrants excluded from entering the United States was enlarged to include anarchists, polygamists, epileptics, beggars, individuals with physical or mental defects, those infected with tuberculosis, and children unaccompanied by parents.

In 1907, the Dillingham Commission, a bi-partisan congressional group, was formed to study the impact of immigration on the United States. The commission's work, which was completed in 1911, concluded that immigrants from Eastern and Southern Europe were a major threat to the United States economy and culture and proposed limiting immigrants from these regions. One vehicle to achieve this was a new literacy requirement that was enacted into law in the Immigration Act of 1917.[10] Known as the Literacy Act, the law required that all individuals, sixteen and older, have the ability to read thirty to forty words in their own language, thereby preventing the immigration of illiterate individuals. Interestingly, it did not require the ability to read in English.

Congress passed the Emergency Quota Act in 1921,[11] which provided that the number of immigrants from any region be limited to three percent of the population already living in the United States by 1910, thereby favoring Northern and Western Europeans who were present in the largest numbers at that time. These groups benefitted further from quotas contained in the National Origins Act of 1924,[12] which based the number of immigrants permitted to enter on two percent of those already living in the United States in 1890.

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[9] *See* the Magnuson Act 1943, Pub. L. 78-199, 57 Stat. 600 (1943), also known as the Chinese Exclusion Repeal Act of 1943.
[10] Pub. L. 301; 39 Stat. 874 (1917), §3.
[11] Pub. L. 67-5; 42 Stat. 5 (1921), §2(a).
[12] Pub. L. 68-139; 43 Stat. 153 (1924).

By 1906, the government created the Bureau of Immigration and Naturalization, which was initially under the control of the Treasury Department. Through this agency, uniform standards for achieving naturalization were developed. The Bureau was later placed within the DOL in 1913. At the same time, it was divided into two separate divisions: the Bureau of Immigration and the Bureau of Naturalization. They were reunited again in 1933 as the **Immigration and Naturalization Service**, or **INS**, which was later transferred to the jurisdiction of the **Department of Justice**, or **DOJ**, in 1940. It had responsibility to both grant benefits and enforce immigration law against violators.

Immigration was significantly curtailed from the time of the Great Depression of 1929 through the beginning of World War II. However, the war caused labor shortages in the agricultural sector, prompting President Roosevelt to negotiate a series of bilateral agreements with Mexico to enable Mexican farm workers to enter the United States as temporary workers. Known as the Bracero Program, hundreds of thousands of Mexican nationals were invited to work in the United States after its initiation in 1942, marking a period where immigration was encouraged. Under pressure from reports of poor living conditions and exploitation in the program and from the United States labor movement anxious to create more jobs for American workers, the program was eventually ended in 1964.

Immediately after World War II, restrictive immigration quotas were overlooked as the country sought to get back on its feet. Following the war, some 250,000 Europeans made **stateless** or uprooted from their country of origin because of the conflict, were permitted to enter the United States as refugees. Congress then passed its first refugee legislation, the Displaced Persons Act of 1948,[13] which allowed for an additional 400,000 refugees to enter over a two-year period. "War brides" and fiancées of army personnel also added to this number.

B.4. 1952 to 1986: The Cold War and Elimination of Quotas

In 1952, Congress passed the **Immigration and Nationality Act**, or **INA**, also known as the McCarran-Walter Act.[14] The INA was a partial response to those concerned about communists in the United States, permitting the exclusion or deportation of noncitizens deemed to be subversive and engaged in activities that were prejudicial to the public interest. At the same time, the INA collected and organized many existing statutes into one comprehensive document governing immigration and nationality law. The statute was passed over a veto exercised by President Truman, who viewed it as discriminatory.

The INA maintained the quota system based on the national origin of intending immigrants, thereby continuing to favor immigration from countries in the western hemisphere. The Act tightened screening of applicants and security provisions, especially in relation to those from countries the United States fought against in World War II and those associated with communism. It established a

[13] Pub. L. 80-774; 62 Stat. 1009 (1948).
[14] The McCarran Walter Act, Pub. L. 82-414, 66 Stat. 163 (1952).

preference system, favoring skilled workers and certain relatives of United States citizens and lawful permanent residents, all of which are still in place today.

The discriminatory national origins quotas came to an end through the Immigration and Nationality Act of 1965,[15] which established quotas for those from the eastern or western Hemispheres instead. During the signing ceremony for the legislation, President Lyndon Johnson remarked that the new law "corrects a cruel and enduring wrong in the conduct of the American nation." The law paved the way for profound and unintended demographic shifts in the make-up of America today. Rather than maintain the status quo with regards to the ethnic groups who were already in the United States as many had predicted and sought, the 1965 Act inadvertently opened the door for foreign nationals from all over the world and different backgrounds to immigrate here. The Act's primary purpose of reuniting families became the driving force for increasing ethnic diversity as more non-European groups left their home countries to resettle in the United States. This created a process referred to by some as "chain migration." In addition, the Act permitted immigration based on artistic and special work-related skills and refugee status, all contributing to the current make-up of the country. This law is the centerpiece of a policy that continues to generate ethnic and cultural diversity in populations who immigrate to the United States today.

In the wake of the ad hoc entry of large numbers of refugees from Southeast Asia following the end of the Vietnam War in 1975, Congress sought to provide a more organized system to protect those who were escaping persecution and deserving of protection in the United States. This led to the passing of the Refugee Act of 1980,[16] which was a comprehensive set of laws intended to permit the United States to meet its obligations under international law. The Act created a uniform method to admit and support new refugees, while also creating a system for individuals already in the United States to apply for asylum and thereby seek protection from persecution.

B.5. 1986 to 1996: Enforcement and Legalization

Partially as a result of the Bracero Program, which allowed millions of Mexican men to come to the United States to work as short-term agricultural contract laborers, large farms grew to depend on immigrant labor. Following the termination of the program in 1964, many recent migrant farm laborers no longer had permission to be in the country, nor did they have authorization for employment. The continuing need for farm workers, however, resulted in the presence of large numbers of undocumented migrants who were unable to secure legal status in the United States or permission to work legally. Sensitive to the needs of the farming community for agricultural workers and the problems created by large numbers of undocumented migrants while also concerned about employers hiring

[15] Pub. L. 89-236; 79 Stat. 911 (1965).
[16] Pub. L. 96-212; 94 Stat. 102 (1980).

migrants who were unauthorized to work, Congress passed the **Immigration Reform and Control Act of 1986**, or **IRCA**.[17]

IRCA created an opportunity for unauthorized migrants who had entered the United States before January 1, 1982 and had not been convicted of a felony or three misdemeanors, to legalize their immigration status. It established a procedure by which all employers were required to check the immigration status of their employees, including citizens, to ensure each person was authorized to work. IRCA also created a unit in the DOJ to deal with possible discrimination claims arising from increased scrutiny of immigration status by employers. Another section of the statute allowed nationals of certain countries to enter the United States without a visa for a brief stay, under a program known as the visa waiver program.[18]

Stricter control of immigration was also the subject of the **Immigration Marriage Fraud Amendments Act of 1986**, or **IMFA**.[19] Previously, any person applying to become an LPR based on marriage would be granted this status indefinitely. However, due to concerns that people were engaging in fraudulent marriages in order to obtain immigration benefits, the IMFA limited the grant of status from indefinite to a conditional two-year period, if the marriage occurred less than two years prior to the date of adjudication of the application for status. This requirement, intended to limit **marriage fraud**, obligates couples to remain together for at least two years before jointly petitioning to lift the conditions on the foreign national who is then able to receive LPR status indefinitely. For example, if a couple appears for the marriage adjustment interview 1 year, 11 months, and 29 days after the marriage took place, the adjudicating immigration officer who approves the application can only grant LPR status to the foreign national for a conditional period of two years, requiring a further application to be filed two years later in order for the status to be granted indefinitely. However, if the couple has been married two years and one day at the time of the interview, then the officer must grant LPR status to the foreign national indefinitely.[20] Engaging in marriage fraud became a ground of deportation for the first time in this statute and also a crime for which either party could be criminally charged.

In contrast to the sustained increased controls on immigration, the early 1990s saw a period of openness and reform. The Immigration Act of 1990, or IMMACT 90,[21] increased the level of permanent legal immigration to 700,000 per year, an increase of 35 percent. Immigrants sponsored by family members and employers benefited most from this change. While the worldwide limit later decreased to 675,000 after three years, it still remained higher than previous levels.

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[17] Pub. L. 99-603, 100 Stat. 3359 (1986).
[18] This is discussed in detail in Section E.2.a of Chapter 2, Nonimmigrant Visas for Brief Stays, Studies, and Cultural Exchange.
[19] Pub. L. 99-639, 100 Stat. 3537 (1986).
[20] This is discussed in detail in Section I.1 of Chapter 6, Family Sponsored Immigration and Permanent Resident Status.
[21] Pub. L. 101- 649, 140 Stat. 4978 (1990).

B.6. 1996 to 2001: Increased Enforcement and Economic Limitations

Sentiments against immigrants began to rise again in the mid-1990s as the economy of the United States contracted. Security concerns were also a factor, as there was the first bombing of the World Trade Center in 1993 by foreign nationals. To deal with economic and security threats perceived to be related to immigrants, Congress passed three major laws in 1996: the Antiterrorism and Effective Death Penalty Act, or AEDPA;[22] the Personal Responsibility and Work Opportunity Reconciliation Act, known colloquially as the Welfare Reform Act;[23] and the **Illegal Immigration Reform and Immigration Responsibility Act**, or **IIRAIRA**.[24]

AEDPA created special deportation procedures for persons considered a threat to national security, expanded expedited removal procedures for certain immigrants, and limited **judicial review** of many decisions made by immigration courts. The Welfare Reform Act, among other things, denied most **means-tested federal public benefits** to legal immigrants for a period of five years after entry, and in some cases until a person naturalizes.[25] Undocumented immigrants were denied these benefits completely, unless they secured legal status.

IIRAIRA is a significant piece of immigration legislation enacted to better control the borders, and established new procedures governing admission, deportation, and legalization. One major change was the introduction of the concept of **inadmissibility,** described more fully in Chapter 9, Grounds of Inadmissibility and Deportation. Prior to IIRAIRA, a foreign national who physically entered the United States was subject to deportation proceedings, which meant the government had the burden to prove the person was deportable. A person caught at the border trying to enter the country who did not have a basis to be admitted to the United States was subject to be excluded; in other words, refused permission to enter altogether, and placed in exclusion proceedings before an **immigration judge** who would determine if any **exclusion grounds** applied to her entry into the United States. After the passage of IIRAIRA, that same person is now considered **inadmissible** and referred to as an **arriving alien**.[26] The foreign national is now placed into **removal** rather than **deportation** proceedings, and a final determination will be made as to whether s/he leaves the country or stays. While the proper technical term for deportation is removal, many immigration practitioners still use the old language.

IIRAIRA further expanded the grounds that would make a person inadmissible to or deportable from the United States, introduced border systems to track those entering and leaving the country, made it more difficult for the long-term

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[22] Pub. L. 104-132, 110 Stat. 1214 (1996).
[23] Pub. L. 104-193, title IV; 110 Stat. 2105 (1996).
[24] Pub. L. 104-208, div. C: 110 Stat. 3009 (1996).
[25] The relationship between eligibility for public benefits and legal status is extremely complex and beyond the scope of this text. Readers are advised to review the websites of the various benefit granting agencies for more details.
[26] *See* Section C of Chapter 10, Immigration Court Practice and Relief from Removal.