

Understanding Immigration Law

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Preface

As the nation well knows, the election of President Donald Trump in 2016 brought dramatic changes to immigration law and policy. The almost daily news about immigration policies and programs, controversies, and tweets by none other than the President, make it extremely difficult to keep up with the breaking news, much less endeavor to fully grasp and explain the developments in a straight-forward fashion. Needless to say, the authors found it challenging to prepare the third edition of *Understanding Immigration Law*.

Even without the many immigration initiatives of the Trump administration, there are many challenges to writing a coherent volume synthesizing and summarizing the immigration laws of the United States.

First, immigration is one of the most contentious public policy issues of the new millennium, a characteristic that requires great care in attempting to provide a balanced approach to the subject matter. A heated national debate over reform of the immigration laws has raged for more than a decade. President Trump's regular immigration statements and initiatives have fueled—and, at times, coarsened—the debate.

The contentiousness of the prolonged national discussion of immigration reform is a function of the complex and, at some level, deeply personal issues implicated by the policy questions facing the nation. Specifically, immigration law and policy must respond to competing demands and interests that touch on contested conceptions of national identity, class and socioeconomic status, race and culture, gender and sexuality, and related issues at the epicenter of the modern “culture wars.” Simply finding the proper tone to facilitate rational discussion of legitimate differences of opinion on immigration law and policy often is easier said than done.

Second, U.S. immigration law is famous for its complexity. Only the much-maligned Internal Revenue Code rivals the intricate, lengthy, and all-too-often opaque Immigration and Nationality Act of 1952 (INA), the comprehensive American immigration law. *See Castro-O’Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1988) (“With only a small degree of hyperbole, the immigration laws have been termed ‘second only to the Internal Revenue Code in complexity.’”) (citation omitted); *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977) (stating that the U.S. immigration laws resemble “King Minos’s labyrinth in ancient Crete”). Consequently, explaining concisely and clearly the statute’s intricacies and nuances requires considerable care and attention. In preparing *Understanding Immigration Law*, we worked to strike the appropriate balance between providing the basics without getting lost in the minutiae of the immigration laws.

Part of the complexity arises from the fact that U.S. immigration law deviates in fundamental respects from mainstream public law, a characteristic referred to as “immigration exceptionalism.” *See* David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 Nw. U.L. REV. 583 (2017) (attempting to reconcile various doctrines believed to exemplify immigration exceptionalism). As the Supreme Court has emphasized, “[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.” *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976). Chapter 2 summarizes how

Congress at various times has barred from our shores the poor, certain racial minorities, noncitizens with politically unpopular views, gays and lesbians, and others. Although the Supreme Court has extended constitutional protections to noncitizens in certain circumstances, it has never overruled its foundational decisions upholding racially discriminatory immigration laws and establishing the rule that the courts lack the power to review the constitutionality of the substantive immigration admissions criteria passed by Congress. *See, e.g., Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581 (1889). Debate continues over whether the U.S. Constitution applies to the evaluation of the immigration laws and, if so, how. *See generally* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) (examining the modern vitality of the bar to judicial review of the constitutionality of the immigration laws). Through a series of immigration initiatives, including three controversial executive orders barring the admission of noncitizens from several predominantly Muslim nations, President Trump has revived the debates over the application of the U.S. Constitution to immigration law and policy. *See Trump v. Hawaii*, 138 S. Ct. 2392 (2018). Needless to say, immigration exceptionalism requires a considerable amount of explanation and analysis. *See, e.g.,* Ch. 6 (discussing judicial review of immigration matters).

To exacerbate the complexities, Congress regularly amends the Immigration and Nationality Act, at times in relatively small ways but in other instances with sweeping changes. The many amendments slowly have made the law lengthier and more complex, if not clearer and easier to understand. Moreover, the Executive Branch (*see* Ch. 5) regularly announces immigration policies, promulgates new rules and regulations, and amends existing policies, rules, and regulations. The courts and the administrative immigration appellate tribunal, the Board of Immigration Appeals (BIA), issue a steady stream of immigration decisions. (And President Trump's first Attorney General, Jeff Sessions, was willing to employ the rarely-used power of referring BIA rulings to himself for review.). Changes in law and policy, including the Supreme Court's immigration decisions, the Deferred Action for Childhood Arrivals (DACA) (and its controversial proposed expansion in 2014 and the announced rescission by the Trump administration in 2017), *see* Ch. 12, President Trump's new directions in immigration law and enforcement, and more, have required extensive revisions to the second edition of *Understanding Immigration Law*.

Another challenge looms over immigration law scholars: Monumental change in the law—perhaps even long-debated comprehensive immigration reform—is an omnipresent possibility. Congress at times has enacted massive changes in the immigration laws with little notice. *See* Ch. 2. In 1990, for example, Congress surprised many observers with an overhaul of the immigration laws and expanded avenues for lawful immigration. In 1996, Congress passed two pieces of far-reaching reform legislation focused on immigration enforcement, including restricting judicial review of agency immigration decisions, expanding the grounds for removal (especially on crime-based grounds), and making immigrant detention mandatory in many circumstances; one influential observer characterized the two laws as “the most radical reform of immigration law in decades—or perhaps ever.” PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS* 143 (1998). Within months of September 11, 2001, Congress passed the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), which not only added tough new immigration provisions ostensibly designed to combat terrorism but also made much more far-reaching changes to the immigration laws. In 2005, Congress passed the REAL ID Act, Pub. L. No. 109-13, 119 Stat. 302, which changed a variety of

provisions of the immigration laws in the name of national security. More recently, the proposed Reforming American Immigration for Strong Employment (RAISE) Act, S. 1720, 115th Cong. (2017) discussed in Ch. 18, would cut legal immigration by half by increasing the emphasis on “merit” over family ties, which serve as the foundation of the current U.S. immigration laws.

Since publication of the first edition of *Understanding Immigration Law* in 2009, debates in Congress about comprehensive immigration reform repeatedly have come and gone. Despite numerous proposals, Congress has failed to enact a major immigration reform package. It came close in 2013, when the Senate passed a reform bill, but the House of Representatives never voted on it. Congress also has been unable to pass any of the versions of the so-called DREAM Act that would regularize the immigration status of many undocumented college students. See Ch. 18. President Trump’s rescission of DACA in 2017 fueled another round of protests, litigation, and congressional debate over immigration reform.

The inability of Congress to enact immigration reform legislation has contributed to the long-running, and frequently over-heated, national debate over immigration. Building on DACA in 2012, President Obama in 2014 announced another deferred action policy (Deferred Action for Parents of Americans (DAPA)), which caused nothing less than a national furor; a deadlocked Supreme Court allowed a lower court injunction barring DAPA’s implementation to stand. See *United States v. Texas*, 136 S. Ct. 2271 (2016). The proposed policy never went into effect.

In the absence of congressional action, state and local governments have acted. Early in the new millennium, a growing number of state and local governments passed laws, such as Arizona’s S.B. 1070, designed to facilitate enforcement of the immigration laws, claiming that the Obama administration was not doing its job. In sharp contrast, the election of President Trump on an enforcement-centered immigration platform unprecedented in modern U.S. history, led a number of states, such as California, and localities to respond through “sanctuary laws” designed to protect immigrants from what the state and local governments viewed as overzealous federal immigration enforcement efforts. Legal challenges followed. Chapter 4 considers the constitutionality of those state and local laws and policies and whether they intrude on the federal power to regulate immigration.

Current events also regularly change—sometimes dramatically—the immigration landscape. In addition to the attempted rescission of DACA in 2017, the Trump administration issued three executive orders banning the admission into the United States of noncitizens from predominantly Muslim nations; ended Temporary Protected Status (TPS) for hundreds of thousands of Salvadoran, Haitian, and Nicaraguan noncitizens; increased border enforcement in a multitude of ways, including workplace raids; proposed dramatic expansion of expedited (i.e., summary) removal; increasingly relied on immigrant detention; and made many more changes to immigration enforcement. The Trump administration responded to Central American families seeking asylum by separating children from their detained parents, which provoked bipartisan criticism that led the administration to, among other things, adopt a family detention policy. The third edition of *Understanding Immigration Law* integrates those developments in an up-to-date summary of immigration law.

Despite the many challenges, *Understanding Immigration Law* strives to lay out the basics of current U.S. immigration law in an accessible way for newcomers to the field.

The early chapters of this volume offer background about the intellectual, historical, and constitutional foundations of U.S. immigration law. They also identify factors that have historically fueled migration from other countries to the United States, including the economic “pull” of jobs and family in this country and the “push” of economic hardship, political instability, and other aspects of life in sending countries. The core of this volume provides a capsule summary of the law concerning admissions and removals under the Immigration and Nationality Act, as amended, as well as various implementing regulations. Chapter 18 concludes by offering thoughts about the future of U.S. immigration law.

Understanding Immigration Law is designed to serve as a supplement to students using the many excellent immigration law casebooks, including THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA, MARYELLEN FULLERTON & JULIET STUMPF, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* (8th ed. 2016), LENNI B. BENSON, LINDSAY A. CURCIO, VERONICA M. JEFFERS & STEPHEN W. YALE-LOEHR, *IMMIGRATION AND NATIONALITY LAW: PROBLEMS AND STRATEGIES* (2013), RICHARD A. BOSWELL, *IMMIGRATION AND NATIONALITY LAW: CASES AND MATERIALS* (5th ed., 2018), BILL ONG HING, JENNIFER M. CHACÓN & KEVIN R. JOHNSON, *IMMIGRATION AND SOCIAL JUSTICE* (2018), and STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* (6th ed. 2015). *IMMIGRATION STORIES* (David A. Martin & Peter H. Schuck eds., 2005) provides intriguing background for a number of leading Supreme Court immigration decisions.

For up-to-date immigration law news and analysis, visit the Immigration Prof blog, <http://lawprofessors.typepad.com/immigration/>, which is managed by, among others, two co-authors (Kevin R. Johnson and Bill Ong Hing) of *Understanding Immigration Law*. LexisNexis Newsroom: Immigration Law (<http://www.lexisnexis.com/legalnewsroom/immigration/default.aspx>) also provides immigration news, court decisions, and other immigration materials.

A Note on Terminology

Although not defined in the Immigration & Nationality Act, the phrase “illegal aliens” often surfaces in the public debate over immigration. See generally MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004) (tracing the origins of the “illegal alien” in U.S. law and society). Some activists and political leaders, for example, frequently advocate mass deportation of “illegal aliens” from the United States. See, e.g., John Binder, *Trump Speaks Directly to DACA Illegal Aliens: Democrats “Using You For Their Own Purposes”*, BREITBART, Mar. 23, 2018, <http://www.breitbart.com/big-government/2018/03/23/trump-speaks-directly-to-daca-illegal-aliens-democrats-using-you-for-their-own-purposes/>. As that usage suggests, the use of the very term “illegal aliens” ordinarily betrays a particular political bent in the speaker. Because the lawfulness of the immigration status of some undocumented immigrants is not always clear, characterizing them as “illegal” is not entirely accurate. Moreover, the term “illegal aliens” serves to de-humanize people, subtly normalizing and legitimizing their harsh treatment under the law. For those reasons, we avoid use of the term in this book.

Similarly, the term “alien,” the organizing principle of the Immigration & Nationality Act, has negative connotations. See Kevin R. Johnson, “Aliens” and the U.S. Immigration Laws: *The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263 (1997); Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 FORDHAM L. REV. 1545 (2011); D. Carolina Nuñez, *War of the Words: Aliens, Immigrants, Citizens, and the Language of Exclusion*, 2013 BYU L. REV. 1517. However, because the entire immigration statute is organized around “aliens,” we must at times employ it, although striving to always do so cautiously and sensitively. At the same time, *Understanding Immigration Law* avoids referring to immigrants and their sending countries in the disparaging ways that President Trump does. See, e.g., Josh Dawsey, *Trump Derides Protections for Immigrants from “Shithole” Countries*, WASH. POST, Jan. 12, 2018, https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html?utm_term=.d7519fdf7fab (reporting on President Trump’s inflammatory comments about granting relief from removal to noncitizens from certain developing nations); Janell Ross, *From Mexican Rapists to Bad Hombres, the Trump Campaign in Two Moments*, WASH. POST, Oct. 20, 2016, https://www.washingtonpost.com/news/the-fix/wp/2016/10/20/from-mexican-rapists-to-bad-hombres-the-trump-campaign-in-two-moments/?utm_term=.5d3f1301f1c9 (reviewing President Trump’s derogatory statements about Mexican immigrants).

