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Contents

Preface xix

Chapter 1 · Understanding and Evaluating U.S. Immigration Law and Policy 3
   A. The Morality of Immigration Restrictions 6
   B. National Sovereignty and Borders 7
      1. Expansive Notions of National Sovereignty 7
      2. Borders and Border Controls 8
      3. The Social Contract and Community Membership 9
   C. International Law’s Limitations on Sovereign Power Over Borders 10
      1. The Rights of Immigrants 10
         a. A Right to Migrate? 10
         b. The “Stake” Theory—A Sliding Scale of Rights for Noncitizens 11
      2. Refugees 13
   D. Determinants of Migration: The Traditional Push and Pull Factor Analysis 13
      1. Economics 14
         a. Push: Poverty and Limited Economic Opportunity 14
         b. Pull: The Demand for Labor 15
      2. Pull: Family Reunification 15
      3. Push: Migration Pressures Generated by U.S. Foreign Policy 16
   E. The Impacts of Immigration on the United States 18
      1. Economic Impacts—The Labor Market 18
      2. Economic Benefits for Employers and Business 21
      3. Benefits to Immigrant Workers 21
      4. Aggregate Benefits to the National Economy 22
      5. Does Increased Immigration Enforcement Make Economic Sense? 24
      6. The Economic Costs of Immigration 25
         a. Downward Wage Pressures 26
         b. Wage Costs to Minorities 28
         c. Increased Economic Inequality 29
      7. Public Benefits 30
      8. Social and Cultural Impacts 33
         a. “Illegal Aliens” and the Influence of Racism, Nativism, Etc. 33
         b. National Identity 36
         c. National Security 38
      9. Crime 39
      10. Environmental Costs 41
   F. Conclusion 42

Chapter 2 · The Evolution of U.S. Immigration Law and Policy 43
   A. Colonial Immigration 44
   B. Early State and Federal Immigration Law and Policy 46
      1. Criminals 46
      2. Paupers 47
3. Blacks 47
4. Religious Views 48
5. Unorthodox Views 49
C. Enslavement of African Workers as Forced Immigration Policy 53
D. The Rise of Comprehensive Federal Regulation: The Chinese Exclusion Era and Beyond 56
1. The Evolution of Chinese Exclusion 56
2. The Gentlemen’s Agreement with Japan 58
3. Filipinos and Asian Indians 59
E. The National Origins Quota System 63
F. The Immigration and Nationality Act of 1952 64
G. The Immigration Reform and Control Act of 1986 (IRCA) 67
1. Reasons Given for Legalization 68
   a. No Alternative to Legalization 68
   b. Spread INS Resources 69
   c. Elimination of the Underclass 69
   d. Equity, Fairness, Dignity, Compassion, and Reality 69
2. Intent of the Special Agricultural Worker Program 70
3. What Legalization Entailed 70
4. Employer Sanctions 71
H. The 1965 Amendments and the Immigration Act of 1990 73
1. The 1965 Framework for Selection 73
2. Restraints on Mexican Immigration in the 1970s 74
3. Affirmative Action for Western Europeans: “Diversity” in the 1980s and 1990s 75
4. Debating Foreign Professional Workers 77
5. More Visas for Temporary Workers: The H-1B Category 79
I. Immigration Reform in 1996 80
1. Antiterrorism and Effective Death Penalty Act of 1996 80
2. Welfare Reform 81
3. Illegal Immigration Reform and Immigrant Responsibility Act 83
J. National Security and Post-9/11 Measures 84
K. The Jekyll and Hyde Obama Era 89
1. Secure Communities 89
2. ICE Detainers 90
3. Detention 91
4. Prosecutorial Discretion 93
5. DACA 95
6. Same-Sex, Binational Couples 97
L. Entering the Trump ICE Age 98
1. The Muslim Ban 98
2. Sanctuary Cities Funding and Shaming Threats 98
3. Termination of DACA 99
4. Stopping Asylum Seekers at the Border 100
5. Unleashing ICE 100
M. The Push for Immigration Reform 102
Chapter 3 · The Federal Immigration Power  
A. The Constitutional Power to Regulate Immigration  
   1. Enumerated Powers  
      a. The Naturalization Power  
      b. The Commerce Power  
      c. Migration and Importation Clause  
      d. The War Power and the National Government’s Obligation to Protect the States Against Invasion  
      e. Immigration-Related Provisions in the Contemporary Public Debate  
    f. Summary  
   2. Implied Powers  
      a. Foreign Affairs Power  
      b. Necessity and Structural Justifications  
B. The Scope of the Federal Power to Regulate Immigration  
   1. The Plenary Power Doctrine  
   2. Federal Preemption of State and Local Immigration Enforcement Laws  
   3. Constitutional Protections for Immigrants  
      a. Individual Rights  
         i. Procedural Due Process  
         ii. Substantive Due Process  
         iii. Equal Protection  
      b. Separation of Powers  
         i. Congressional Limits on Judicial Review  

Chapter 4 · Immigration Federalism  
A. The Alien Land Laws  
B. Firearm Alienage Restrictions  
C. Alienage Suffrage and Other Types of Alienage Political Participation  
D. Noncitizens and Jury Service  
E. The Special Public Interest Doctrine  
F. The Political-Function Exception  
G. Noncitizens and Professional or Occupational Licenses  
H. Noncitizens and Private Employment  
I. Public Benefits  
J. Noncitizens and Public Education  
   1. K-12 Education  
   2. Higher Education  
K. Noncitizens and Worker Rights  
   1. State Employment and Labor Laws  
   2. Day Laborers  
L. Noncitizens and Driver’s Licenses  
M. Landlord/Tenant Immigration Ordinances  
N. Official English/English-Only Laws  
O. Local Immigration Enforcement and Sanctuary  
P. Noncitizens and Family Law  
Q. Refugees  
R. Conclusion
Chapter 5 · Immigration Actors: Federal Agencies and Courts

A. The Political Branches of the Federal Government in Regulating Immigration
   1. Congress
   2. The President and Executive Branch

B. The Administrative Structure of Immigration Law
   1. A Brief History of the Rise and Fall of the INS
   2. Department of Homeland Security
      a. Citizenship and Immigration Services—USCIS
      b. Immigration and Customs Enforcement—ICE
      c. Customs and Border Protection—CBP
   3. Department of State
   4. Department of Justice
      a. Immigration Courts
      b. Board of Immigration Appeals
   5. Department of Labor
   6. Department of Health and Human Services—Office of Refugee Resettlement

C. The Judicial Role in Immigration Law

Chapter 6 · Judicial Review

A. The Need for Judicial Review
   1. The Immigration Agencies
   2. The Immigration Courts and the Board of Immigration Appeals
      a. BIA “Streamlining”
      b. Bias in the Immigration Courts?
   3. The Curious Response of Congress: Restrictions on Judicial Review

B. Constitutional Scope of, and Limits on, Judicial Review of Immigration Decisions
   1. The Constitutional Right to Judicial Review
      a. Admission
         i. The General Rule
      b. Removal
   2. Agency Deference
      a. Fact Finding
      b. Chevron Deference

C. Limits on Judicial Review
   1. Plenary Power Over Noncitizens Seeking Admission
      a. Removal Grounds for Noncitizens
      b. Discrimination Against Noncitizens in the United States
      c. Gender Distinctions in the Nationality Laws
   2. Agency Deference
      a. Fact Finding
      b. Chevron Deference

D. Judicial Review Under the Immigration and Nationality Act
   1. A Brief History of Judicial Review
   2. Limits: “Court Stripping” Provisions of Immigration Reform Legislation
      a. Questions of “Law” (Review) or “Fact” (No Review)
      b. Standards of Review
CONTENTS

3. The Nuts-and-Bolts of Judicial Review
   a. The Petition for Review in the Court of Appeals 281
   b. Exhaustion of Administrative Remedies 282
   c. Exceptions to Judicial Review 282
      i. The Rule of Consular Absolutism 282
      ii. Expedited Removal 284
      iii. Criminal Grounds for Removal 285
      iv. Exercises of Discretion 287

Chapter 7 · Immigrant Visas 289
A. The Fundamentals 289
   1. Worldwide Quotas and Preference Categories 290
      a. Family-Sponsored Visas 291
      b. Employment-Based Visas 293
   2. Per-Country Ceilings and the Visa Bulletin 293
B. Family Immigration 295
   1. Marriage-Based Immigration 296
   2. Domestic Violence 300
   3. Other Family Members 301
   4. Special Immigrant Juvenile Status 305
C. Employment-Based Preference Categories 307
   1. Priority Workers (EB-1) 308
   2. Members of the Professions with Advanced Degrees and
      Noncitizens with Exceptional Ability (EB-2) 310
   3. Skilled Workers, Professionals and Other
      [Unskilled] Workers (EB-3) 311
   4. Employment Creation [Investor] Visas (EB-5) 311
   5. Labor Certification 313
D. Certain Special Immigrants (EB-4) 316
E. Diversity Visas 317
F. Asylees and Refugees 318

Chapter 8 · Nonimmigrant Visas 321
A. Family 322
   1. The V Visa 322
   2. The Fiancée Visa: K Visa 323
B. Business, Employment, and Commercial 324
   1. Temporary Visitors for Business or Pleasure 324
   2. Visas for Business Personnel 325
      a. The Professional Visas: H-1, L, O, and P 325
      b. Lesser Skilled Workers: H-2 Visas 328
      c. Treaty Traders and Investors, and Free Trade Agreement
         Professionals: The E and TN Visas 330
      d. Other Workers: I, Q, and R Visas 331
C. Educational: Students and Scholars 332
D. Human Trafficking and Other Victims of Violence 335
   1. T Visas 335
2. U Visas
E. Other Nonimmigrant Visas

Chapter 9 · Inadmissibility Grounds and Waivers
A. Immigration Control
   1. Smugglers and Traffickers of Aliens
   2. Visa Fraud
   3. Document Fraud
   4. False Claim to U.S. Citizenship
   5. Stowaways
   6. Unlawful Presence in the United States
   7. Prior Removal or Deportation
B. Political and National Security
C. Criminal
   1. Moral Turpitude Crime
   2. Narcotics and Marijuana
   3. Multiple Criminal Convictions
   4. Prostitution and Commercialized Vice
D. Economic—Public Charge
E. Public Health and Morals
   1. Communicable Diseases
   2. Failure to Prove Vaccinations
   3. Mental or Physical Disorder
   4. Drug Addicts and Drug Abusers
F. Special Rules
   1. Asylum and Refugee Status
      a. Persecution of Others
      b. Conviction of a Particularly Serious Crime
      c. Commission of a Serious Non-Political Crime
      d. Danger to U.S. Security
      e. Firm Resettlement or Offer of Safe Haven
   2. Domestic Violence
   3. Special Immigrant Juvenile Status
   4. Nonimmigrant Visas

Chapter 10 · Asylum, Withholding of Removal, Convention Against Torture and Temporary Protected Status
A. The Definition of Refugee
B. The Standards for Asylum
   1. “Fear” of “Persecution”
   2. “Well-Founded” Fear
   3. “On Account of”
      a. Race, Religion, or Nationality
      b. Political Opinion
      c. Membership in a Particular Social Group
   4. Unable or Unwilling to Return
C. Humanitarian Asylum
D. Withholding of Removal
E. Convention Against Torture Relief
F. Bars to Eligibility 376
G. Temporary Protected Status (TPS) 377

Chapter 11 · Admission Procedures 379
A. Overview 379
B. Nonimmigrants 381
  1. Nonimmigrant Visa Applications and Admissions 381
  2. Exceptions to the Visa Requirement 383
     a. Visa Waiver Program Admissions 383
     b. Western Hemisphere Admissions 385
  3. Nonimmigrant Visa Petitions 386
C. Immigrants 387
  1. Immigrant Visa Petitions 387
     a. Processing Delays 387
  2. Overseas Immigrant Visa Consular Processing 389
     a. Review of Visa Denials 391
  3. Adjustment of Status 393
     a. Adjustment Under § 245(i) 396
D. Actual Admission 397
  1. Admissions at the Border 397
  2. Expedited Removal 401
     a. Credible Fear Determinations 404
  3. Before an Immigration Judge 407
  4. Detention and Parole 408

Chapter 12 · Removal 411
A. General Considerations 412
  1. History and Theory of Deportation 412
  2. The 1996 Law 413
     a. Bars to Admissibility 414
     b. Expedited Removal 414
     c. Removal Proceedings 415
     d. Cancellation of Removal 415
     e. Meaning of “Entry” and “Admission” 416
B. Removal Grounds and Waivers 417
  1. Immigration Control Grounds 417
     a. Correcting Errors in Admission upon Entry 417
     b. Post-Entry Immigration Control 418
  2. Criminal Grounds 418
     a. Crimes Involving Moral Turpitude 419
     b. Aggravated Felonies 420
        i. The Categorical Approach 421
        ii. The Modified Categorical Approach 422
     c. Controlled Substances, Firearms, Domestic Violence, and Other Crimes 422
     d. Defining a Conviction 423
  3. Other Removal Grounds 425
C. Relief From Removal 425
  1. Lasting Relief 425
a. Cancellation of Removal  
   i. Lawful Permanent Residents (Cancellation of Removal  
      Part A)  
   ii. Nonpermanent Residents (Cancellation of Removal  
      Part B)  
   iii. Victims of Domestic Violence  
   iv. NACARA  

b. Adjustment of Status  
c. Asylum, Withholding of Removal and  
   Convention Against Torture  
d. Registry (INA § 249; 8 U.S.C. § 1259)  
e. Private Bills  

2. Limited Relief  
   a. Deferred Action and Prosecutorial Discretion  
   b. Voluntary Departure  
   c. Stays of Removal  

Chapter 13 · The Removal Process  
A. Overview of the Removal Process  
B. The Removal Hearing  
   1. Notice to Appear  
   2. Bond and Detention  
   3. Legal Representation  
   4. Evidence, Burden of Proof and Hearing Procedures  
      a. Hearing Procedures  
      b. Evidence  
      c. Burden of Proof and Standard of Proof  
   5. Administrative Review  
   6. Judicial Review  
C. Motions to Reopen or Reconsider  
D. Special Removal Procedures  
   1. Criminal Cases  
      a. Prison Hearings  
      b. Administrative Removal  
      c. Stipulated Removal  
      d. Judicial Removal  
   2. In Absentia Removal  
   3. Reinstatement of Removal  
   4. Crew Members  
   5. National Security  
E. Detention  
   1. Pending Removal  
   2. After an Order of Removal  
   3. Indefinite Detention  

Chapter 14 · Enforcement Against Undocumented Immigrants  
A. Undocumented Immigration  
B. At the U.S./Mexico Border  
   1. Creation and Expansion of the Border Patrol  
   2. Operation Gatekeeper
CONTENTS

a. Development of Operation Gatekeeper 480
b. Results of Operation Gatekeeper 482
3. The Secure Fence Act of 2006 484
4. Operation Streamline 484

C. Human Trafficking 487

D. Legalization 490
1. Amnesty under IRCA (1986) 490
   a. Amnesty for Persons Residing in the United States
      Before January 1, 1982 491
   b. Amnesty Program for Special Agricultural Workers (SAW) 492
2. Cubans and Haitians (1986) 493
   a. NACARA provisions for Nicaraguans and Cubans 496
5. Proposed Legalization Programs 498
   a. AgJOBS 498
   b. Hagel-Daschle 499
   c. Goodlatte-Chambliss 500
   d. SOLVE Act 501
   e. Arizona Bill 501
   f. McCain-Kennedy 502
   g. Hagel-Martinez 502
   h. DREAM Act 505
   i. Border Security, Economic Opportunity and
      Immigration Modernization Act of 2013 507

E. Enforcement at Ports of Entry 510
1. The Automated Entry-Exit System 510
2. U.S.-VISIT/Office of Biometric Identity Management 512
3. NSEERS and Special Registration 514

F. Interior Enforcement of the Immigration Laws 516
1. Employer Sanctions 516
2. Detection Strategies 521
   a. Petitions — NTA Policy 521
   b. Criminal Custody — ICE Detainers 523
   c. Workplace Sweeps 524
   d. Silent Raids 533
   e. Criminal Alien Removal Initiative 535
   f. National Security 536
      i. SEVIS and Other Student-Related Programs 536
      ii. The Penttbom Investigation 538
3. The Scope of Enforcement Powers 540
   a. Interrogations 540
   b. Stops and Arrests 541
      i. Immigration Checkpoints 541
      ii. Racial Profiling 543
   c. Search and Seizure 546
   d. Detention 550
   e. Mandatory Detention During Removal Proceedings 552
   f. Mandatory Detention After a Final Order of Removal 554
   g. Mandatory Detention for Suspected Terrorists 554
Chapter 15 · Crimmigration

A. Federal Immigration Crimes
   1. The Expansion or Enhancement of Old Immigration Crimes
      a. Entry/Re-Entry
      b. Harboring, Smuggling, “Aiding and Abetting,” and Transporting Undocumented Immigrants
      c. Human Trafficking
   2. The Creation of New Federal Immigration Crimes
      a. Border Crimes in the U.S. Workplace
      b. Immigration Marriage Fraud
      c. Citizenship-Related Crimes
   3. The Use of Non-Immigrant Crimes to Target Immigrants
      a. Identity Theft
      b. Targeting the “Terrorist” Immigrant for “Material Support”
      c. Targeting “Humanitarian Workers” for Prosecution
   B. The Padilla Due Process “Revolution”?
      1. Padilla’s Story and Holding
      2. The Meaning of Padilla
      3. Beyond Padilla?
   C. State Immigration Crimes
      1. State Immigration Crimes that “Mirror” Federal Immigration Crimes
         a. Employer Sanctions
         b. Human Trafficking
         c. Harboring, Transporting, and Smuggling
         d. Identity Theft Laws
      2. State Immigration Crimes that Innovate Beyond Federal Immigration Crimes
         a. Housing
         b. Trespass/Unlawful Presence
         c. “Driving While Undocumented”
         d. Workplace “Offenses” Against Immigrants
         e. Bail Restrictions
      3. State Responses to the Federal Criminalization of Immigrants
   D. Conclusion

Chapter 16 · The Rights and Responsibilities of Immigrants

A. Public Benefits
B. Healthcare
C. General Employment-Related Rights and Benefits
D. Employment and Licenses
   1. State Restrictions
   2. Federal Restrictions
E. Employment Discrimination
F. National Origin Discrimination
G. Income Tax Considerations
H. Education Benefits
I. Benefits for DACA Recipients
Chapter 17 · Citizenship 621
A. The Meaning of Citizenship 621
B. Acquiring Citizenship 623
1. Jus Solis 623
   a. Origins 623
   b. Birthright Citizenship for Undocumented Children 624
   c. Native Americans and Their Birthright Citizenship 631
   d. Birthright Citizenship and the Territories 631
   e. The Meaning of “Natural Born Citizen” 634
2. Citizenship by Descent for Children Born Abroad 636
   a. Origins 636
   b. The Statute 638
   c. Gender Discrimination 640
3. Citizenship through Naturalization 643
   a. Origins 643
   b. The Statute 645
      1. Lawful Permanent Residence 646
      2. Residence and Physical Presence 647
      3. Good Moral Character 648
      4. Age 649
      5. English Language 649
      6. Knowledge of Civics 650
      7. Political or Ideological Requirements 651
      8. Attachment to the Principles of the U.S. Constitution 651
   c. Adjudication and Judicial Review 652
   d. Military Naturalization 653
C. Dual Nationality 655
D. Expatriation or Loss of Citizenship 657
   1. The History of Expatriation Laws 657
   2. Constitutional Scrutiny of Expatriation Statutes 659
   3. The Current Law 660
E. Denaturalization 661

Chapter 18 · The Future of American Immigration Law 669
A. Immigration in the Supreme Court 672
   1. The Future of the Plenary Power Doctrine 672
   2. The Roberts Court’s Approach to Immigration Cases: Careful Textual Analysis and Routine Agency Deference 674
B. Immigration Reform in Congress 676
   1. The Status Quo 678
      a. Undocumented Immigration 679
      b. Labor Exploitation 682
      c. Human Trafficking and Death on the Border 683
      d. A Disrespected Immigration Bureaucracy 684
      e. The Need for Reform 685
   2. Constraints on Reform 686
      a. National Security Concerns 686
      b. Fear of the Proverbial “Floodgates” 688
   3. Recent Proposals for Immigration Reform 688
CONTENTS

a. The DREAM Act 692
b. Deferred Action for Childhood Arrivals 693
4. Future Possibilities for Reform 694
5. Increased Economic Integration of Canada, Mexico, and the United States 695
   a. The European Union 696
   b. The Political Feasibility of a Regional Arrangement 697
   c. The Costs of a Regional Migration Arrangement 699
   d. A Possible North American Union 699
C. Conclusion: The Future of U.S. Immigration Law 700

Table of Cases 701

Index 715
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.

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.


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: Illegals 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.