

IMMIGRATION LAW AND POLICY: SELECTED ISSUES

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Yale University
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Course Syllabus

This seminar will explore a number of intriguing and difficult legal-policy topics related to the almost unprecedented level of immigration that the U.S. has been experiencing. As of now (I am open to suggestion), we shall focus on the following: (1) the plenary power doctrine; (2) admissions; (3) citizenship; (4) deportation and detention, including that of suspected terrorists; (5) refugee/asylum law; and (6) equal protection of legal and undocumented aliens (especially welfare, language, and labor rights). I plan to spend one or two classes on each of these topics, hopefully leaving a little time at the end of the semester for some students to present their papers.

Readings. Three books are required. The first, Stephen H. Legomsky, Immigration and Refugee Law & Policy (Foundation Press) (below, "Legomsky") will soon be published in a 4th edition. Legomsky has kindly permitted me to give you, free of charge, an electronic version of the new chapters as he completes them. If certain chapters are not completed in time for our use in the course, we can use his 3rd edition (2002) and 2003 Supplement. Also required are my book, Citizens, Strangers, and In-Betweens: Essays on Immigration and Citizenship (Westview, 1998, paper ed. 2000) (below, "Schuck"), of which I shall assign substantial portions, and a statutory supplement: Aleinikoff, Martin, & Motomura, Immigration and Nationality Laws of the United States: Selected Statutes, Regulations, and Forms (West Group, 2004) (below, "INA").

The statutory supplement and a limited number of copies of my book can be purchased at Book Haven. For reasons that I'll explain, the remaining copies of my book must be purchased directly from my assistant, Sarah Grant (room 349, x26769); make your \$15 checks payable to Yale Law School. Copies of the three required books are also on reserve in the library.

Additional required readings -- cases, journal articles, and newspaper articles -- will be cited or posted on the course Blackboard so that you can download them. Everything I post will be posted to the "Course Documents" section of the Blackboard. Since we will not have time to discuss the "Problems" contained in the Legomsky casebook, you are not required to read and work on them.

Some other sources, although not assigned, may be useful to you. Along with Legomsky, the other leading casebook is T. Aleinikoff, D. Martin, & H. Motomura, Immigration and Citizenship: Process and Policy (West, 5th ed., 2003). A treatise on immigration law is Gordon & Gordon, Immigration Law and Procedure (Matthew Bender, student ed.). A more tendentious but sometimes useful survey is the National Lawyers Guild's Immigration Law and Defense. The library subscribes to a loose-leaf service, Interpreter Releases, which covers current immigration law developments and which circulates first to me. All of these materials are on reserve in the library.

Class discussions. This is not a lecture course; class discussions will revolve around the readings. I shall lead discussions, but starting with week 2, I shall assign two or more of you to bear special responsibility for preparing for each week's topic, so think about which of the topics particularly interests you; I'll circulate a sign-up list at the first class. Active participation by all students, however, is always expected.

Papers: It is essential that each student meet with me as soon as possible to discuss paper topics. The best papers -- and the most rewarding research experiences -- result when students work on subjects in which they have developed an independent interest and intellectual agenda. Accordingly, you should try to come into our initial office meeting with one or more possible areas or topics to which I can react and then help you refine. If you cannot identify a topic on your own, I shall try to help you develop one. Almost any topic of law, policy, theory, or practice that can be plausibly related to the seminar is eligible for consideration.

I am prepared to supervise a limited number of papers on an SAW basis, and those who wish to write a SAW must indicate this, and their proposed topic, as soon as possible. As for “substantial” papers, I am certainly willing to give “substantial paper” credit but I cannot assure anyone in advance that yours will qualify for it, nor can I even define “substantial” except for the obvious indicia such as ambition, complexity, difficulty of research, length, etc. The default rule is three units of credit for an SAW and two for “substantial” or “non-substantial” seminar papers. I might award an additional unit to papers that undertake significant empirical work.

I expect that by weeks 12 and 13 (April 19 and 26), some of you will have progressed far enough with your seminar papers for me to assign the drafts and for you to present them in class. (If not, we shall discuss other topics and readings for those weeks). This can be a valuable experience and improve your papers, so I urge you to aim to do this.

Credit-Fail Option and Grading: Any students who wish to take the seminar on a 2-unit credit-fail basis may do so. To receive the ungraded credit, however, they must (1) attend all seminar sessions, (2) do all of the assigned reading, and (3) write a short (6-8 pp.) review of a course-relevant but unassigned book or other writing of their choice – but to be agreed upon with me -- for distribution to the class by the end of the semester. (For students taking this option, the only excuses for absence from class are serious illness or death in the family). Students who meet these conditions may switch to the credit-fail option at any time during the course. For those seeking a grade, I shall place greatest weight on the quality of the final paper but also take into account a student's readiness to present a paper in class and the quality (not quantity) of class participation.

Guest speaker: I have invited Kris Kobach, YLS '95, to speak to the class on March 22 in connection with our consideration of deportation and detention issues. A University of Missouri, Kansas City law professor, Kris was a senior advisor to the Attorney General on these and other issues during the first Bush administration and ran unsuccessfully for Congress in 2004.

Reading assignments for the first two weeks, and a topical outline for the rest of the course, follow.

Week 1 (January 25, 2005): Introduction to the Immigration System (Structure and justifications)

Legomsky, Immigration and Refugee Policy and Law (4th ed.) Overview 1-10; chap. 3-1 to 3-13; chap. 1, pp. 1-14 to 1-26, 1-63 to 1-65

Schuck, 4-11, 139-48

Schuck, Diversity in America: Keeping Government at a Safe Distance (2003), 75-106

Week 2 (February 1): General legal principles and the “plenary power doctrine”

Schuck, 19-81

Legomsky, chap. 2-6 to 2-51, 2-74 to 2-78 (*Zadvydas*), 2-106 to 2-111

T. Alexander Aleinikoff, Semblances of Sovereignty: the Constitution, the State, and American Citizenship (2002), 11-38

Week 3 (February 8): Admissions: law

Week 4 (February 15): Admissions: policy

Week 5 (February 22): Citizenship: acquisition by birth, naturalization, and descent

Week 6 (March 1): Citizenship: plural citizenships; loss of citizenship; federal systems

Weeks 7 and 8 (March 8, 22): Deportation and relief from deportation; detention; judicial review

Weeks 9 and 10 (March 29 and April 5): Refugee and asylum law

Week 11 (April 12): Equal protection: welfare, language, labor rights

Weeks 12 and 13 (April 19 and April 26): Student papers

Week 14 (May 3): The future

Weeks 3 and 4 (February 8 and 15): Admissions: law and policy

Review Legomsky, 3-1 to 3-13

Legomsky, 3-13 to 3-28, 3-33 to 3-59, 3-63 to 3-75, 3-78 to 3-95

Schuck, *Diversity in America*, pp. 123-31

Legomsky, 4-1 to 4-4, 4-49 to 4-54

Legomsky, 6-7 to 6-12, 6-16 to 6-22, 6-30 to 6-42

Legomsky, 5-1 to 5-28

Optional: Schuck chapter on *Kleindienst v. Mandel* in *Immigration Stories* (forthcoming)

Schuck, *Citizens, Strangers, and In-Betweens*, 326-58

Christopher Jencks, "Who Should Get In?" *N.Y. Rev. of Books*, Nov. 29 and Dec. 20, 2001

Michael J. Trebilcock, "The Law and Economics of Immigration Policy," *5 Am. L. & Econ. Rev.* 271 (2003) - focus on 296-313

Week 5 (February 22): Citizenship: acquisition by birth, naturalization, and descent

T.H. Marshall, "Citizenship and Social Class"

Legomsky, 3d ed., 1169-74

INA, Secs. 301, 312-13, 316, 320-22, 331-32, 334, 337

Schuck, *Citizens, Strangers, and In-Betweens*, 163-214

Legomsky, 1223-38

Legomsky, 1199-1219

Schuck, "Whose Membership Is It, Anyway? Comments on Gerald Neuman," 35 Virginia J. Int'l L., 321 (1994)

Shweta Govindarajan, "Criticism Puts Citizenship Oath Revision on Hold," L.A. Times, Sept. 18, 2003, A13

Schuck, "Citizenship after 9/11: Continuity and Change," in Schuck, *Meditations of a Militant Moderate: Cool Essays on Hot Topics* (forthcoming, 2005)

Marc Lacey, "600 Ugandans Struggle for Recognition by Israel as Jews," N.Y. Times, Feb. 19, 2003, A8

Steven Erlanger, "Latvia Amends Harsh Citizenship Law That Angered Russia," N.Y. Times, July 24, 1994, p. 3

Some questions:

1. Should we understand citizenship as something more than the legal rules governing its acquisition, loss, privileges and obligations? Why have social reformers -- T.H. Marshall, for example -- always used the rhetoric of "full" or "equal" citizenship to support their positions?
2. How liberal has U.S. citizenship law been? Does/should it have the same legal and normative significance today that it traditionally had? If not, what has changed and how does/should that bear on citizenship? Is what I call the "reevaluation of citizenship" desirable? Has 9/11 affected your view on this?
3. Suppose that a female terrorist were brought to the U.S. for trial and had a child while in custody. Would/should the child be a birthright citizen under the Citizenship Clause?
4. What standard should govern constitutional review of *jus sanguinis* statutes (see Legomsky, 1199-1202)?
5. Should the requirements for naturalization be changed -- for example, by repealing the renunciation oath, altering the English language requirement, or changing the archaic language?
6. Should the Constitution be amended to permit citizens born abroad (e.g., Arnold Schwarzenegger) to be President? Does the Constitution require that birthright, naturalized, and *jus sanguinis* citizens be treated alike in all other respects, or can/should Congress differentiate among them as to certain rights or obligations?

Week 6 (March 1): Citizenship: comparative perspectives; plural citizenships; loss of citizenship; federal systems

Patrick Weil, "Access to Citizenship: A Comparison of Twenty-Five Nationality Laws, in Aleinikoff & Klusmeyer, eds. *Citizenship Today: Global Perspectives and Practices* (2001)

Renwich McLean, "Spain Begins Offering Residency Papers to Unlawful Immigrants," N.Y. Times, Feb. 8, 2005, at A3

"Rolling Up the Welcome Mat," *The Economist*, Feb. 12, 2005, p. 55

Schuck, *Citizens, Strangers, and In-Betweens*, 217-47

INA Secs. 340, 349

“DOJ Readies to Deport Demnanjuk Again,” 82 Interpreter Releases 230 (Jan. 31, 2005)
Legomsky, 1238-75
Vicki C. Jackson, “Citizenship and Federalism,” in *Citizenship Today*, supra
Optional: Schuck, “Citizenship in Federal Systems,” 48 *Am. J. Comparative L.* 195-226
(2000)

Questions:

1. What are the sources and implications of the growing convergence that Weil perceives among national citizenship laws?
2. Should the U.S. repeal the renunciation oath in Sec. 337? Should it amend the oath, and if so, how? Do I or Legomsky have the better of the argument discussed beginning on p. 242 of my book?
3. Consider Sec. 349(a). Do you agree with the “intent to relinquish” test of *Afroyim* and *Terrazas*? Are there any acts, short of treason, that Congress can rebuttably presume evince the requisite intent?
4. After *Kungys v. U.S.* (Legomsky, 1240), precisely what must the government show in order to de-naturalize a citizen? In particular, what is “a natural tendency to influence” the decision?
5. In light of Jackson’s comparative analysis, should American federalism’s treatment of citizenship issues be altered? Is our system optimal in this respect?

Week 7 (March 8): Deportation and relief from deportation

Legomsky, pp. 7-1 to 7-61 and 8-1 to 8-50
Legomsky, 3d ed., pp. 630-38 and 2003 Supplement pp. 76-82; 641-43; 652-67; 681-701; 721-55; 837-47 and 2003 Supplement pp. 88-90
Optional: Nancy Morawetz chapter on *St. Cyr*, in Schuck & Martin, eds., *Immigration Stories* (forthcoming, Foundation Press, 2005)

Week 8 (March 22): Detention

Padilla v. Commander C.T. Hanft in D.S.C., Feb. 28, 2005
Margaret H. Taylor, “Dangerous by Decree: Detention Without Bond in Immigration Proceedings,” forthcoming 50 *Loyola L. Rev.* 149 (2005)
Office of Inspector General, U.S. Dept. Of Justice, “The Immigration and Naturalization Services’s Removal of Aliens Issued Final Orders,” Feb. 2003
Kris Kobach, “State and Local Authority to Enforce Immigration Law,” *Center for Immigration Studies*, June 2004
Rachel Swarns, “Program’s Value in Dispute As a Tool to Fight Terrorism,” *N.Y. Times*, Dec. 21, 2004, A21
Cam Simpson, “Aspiring Politician at Center of Policy,” *Chicago Trib.*, Nov. 16, 2003, p. 21

Weeks 9 and 10 (March 29 and April 5): Refugee and asylum law

1951 Refugee Convention and 1967 Protocol – Statutory Supp. at 847-70
 Legomsky, 3d ed., 849-52, 858-66, 872-86, 892-915, 921-38 and relevant pages from 2003 Supp.
 Optional: David A. Martin, “*Abankwa, Kasinga*, and the Dilemmas of Political Asylum,” in Schuck & Martin, *Immigration Stories* (forthcoming, 2005)
 Legomsky, 3d ed., 955-73, 975-82, 989-96, 1003-07, 1028-38 and relevant pages from 2003 Supp.
 69 Fed. Reg. 48877-81 (Aug. 11, 2004) (expanding expedited removal)
 David A. Martin, “Two Cheers for Expedited Removal in the New Immigration Laws,” 40 Va. J. Int’l L. 673, 682-703 (2000)
 Legomsky, 3d ed., 1061-79, 1100-08 and relevant pages from 2003 Supp.
 H.R. 418, Section 101, pending in U.S. Senate, pp. 1-11
 Michele R. Pistone & Philip G. Schrag, “The New Asylum Rule: Improved But Still Unfair,” 16 Geo. Imm. L.J. 1, 32-76 (2001) (skim)
 U.S.-Canadian “Agreement re Asylum Claims Made at Land Borders,” 79 Interpreter Releases 1446 (Sept. 23, 2002) (went into effect in December 2004)
 “Ninth Circuit to Hear Gay Asylum Case,” 81 Interpreter Releases 1689-90 (Dec. 6, 2004)
 Nina Bernstein, “Kennedy Airport Is Called the Toughest for Asylum,” N.Y. Times, Feb. 10, 2005, B1
 Schuck, *Citizens, Strangers, and In-Betweens*, 293-325

Some questions:

1. When the U.S. decides which refugees in the camps to select for resettlement from overseas, which criteria should it use? Should it favor those it thinks will serve our foreign policy and ideological interests?
2. Does/should existing asylum law favor those who tend to be comparatively privileged in their societies of origin if they are the ones most likely to be persecuted on political grounds? Under what circumstances, if any, should economic deprivation qualify as an asylum ground?
3. How much doctrinal work does/should the phrase “on account of” do in resolving asylum claims? How can the claimant prove this? What is the interaction between this requirement and the definition of the persecuted group?
4. Does a practice -- FGM or infanticide, for example -- constitute persecution if it is almost universally accepted as normative by a society but not by an individual member of that society who applies for asylum?
5. Under Sec. 235(b), can the inspector at the airport sit back and wait for noncitizens to indicate a well-founded fear, or must she inform them of their right to apply for asylum? Which course is preferable as a policy matter?

6. How should one analyze the Ninth Circuit case described in the assigned Interpreter Releases article? Are there circumstances under which one should not qualify for asylum if one could have concealed the characteristic that subjects one to possible persecution?
7. If enacted, how would H.R. 418 change the legal situation of asylum claimants?
8. Read the U.S.-Canadian agreement, which just went into effect, and Legomsky's analysis at (2003 Supp. at 155-62). Are such agreements consistent with both the letter and spirit of the 1951 Convention, especially Art. 33?

Week 11 (April 12): Equal protection and labor issues

Legomsky, 3d ed., 1135-68 and 2003 Supplement, pp. 173-5
 Schuck, *Citizens, Strangers, and In-Betweens*, 32-4, 61-2, 149-60
 Proposition 187 (reproduced in statutory supplement, pp. 841-6)
 Gerald L. Neuman, "Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection," 42 *U.C.L.A. L. Rev.* 1425 (1995)
Aliessa v. Novello, 96 N.Y.2d 418 (2001)
 Janofsky, "Burden Grows for Southwest Hospitals," *N.Y. Times*, Apr. 14, 2003, at A14
Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137 (2002)
Optional: Fisk & Wishnie chapter on *Hoffman Plastic* in *Immigration Stories* (forthcoming)
 "Justice Department Fowl," *Wall St. J.*, Mar. 28, 2003, at A12 (editorial)
 "Federal Reserve Allows Creditors to Consider Applicants' Immigration Status," *Interpreter Releases*, Mar. 24, 2003, at 450

1. Review Neuman's various arguments for heightened constitutional scrutiny for undocumented aliens. How would you challenge them? Do you agree with my analysis of *Plyler*?
2. In *Aliessa*, why does the court decide the case under both the state and federal constitutions? What legal consequences should flow from the term "needy" in Article 17? Does the court's analysis adequately consider existing distinctions in means-tested entitlement programs like Medicaid? Is the court's reliance on *Graham* convincing? Are the federal statutes in the two cases analogous? Should federal pre-emption apply here rather than equal protection analysis? How should the costs of health care for undocumented aliens be handled?
3. Is *Hoffman Plastic Compounds* an appropriate case for the application of Chevron deference? What is left of *Sure-Tan*? Is Breyer correct that *Hoffman* actually undermines federal labor policy?

Week 12 (April 19): Equal protection (continued)

In addition to reviewing the assigned reading for Week 11, please read Schuck, *Citizens, Strangers, and In-Betweens*, pp. 54-57, which I inadvertently omitted from the assignment for

Week 11. I plan to focus our discussion next week on *Plyler, Aliessa*, the differences between the equal protection and preemption approaches, whether as a policy matter immigrants should be eligible for other public benefits, and if so, why, which immigrants, and which benefits. If we have time, we'll also discuss *INS v. St. Cyr* (Legomsky 737, assigned for Week 7), with Rebecca Smullin, who is researching this area, as our special resource. If not, we'll discuss *St. Cyr*, and judicial review more generally, in our final class (May 2), along with other readings that I'll assign for that class.

Week 14 (May 3): The Future

St. Cyr opinion (in Legomsky, previously assigned)

Schuck, Citizens, Strangers, and In-Betweens, 67-81

Schuck, "Law and the Study of Migration," in Migration Theory: Talking Across the Disciplines (C. Brettell & J. Hollifield, eds., 2000), pp. 187, 191-200

Schuck, "Immigrants' Legal and Political Incorporation in the United States after 9/11: Two Steps Forward, One Step Back," draft dated 4/28/05 (to be published in a conference volume) (some of the discussion borrows from my earlier work that you have read; feel free to skim it)

Questions:

1. What are Scalia's principal critiques of the majority opinion in *St. Cyr*? How, if at all, does the majority meet those critiques? Does the holding of *St. Cyr* apply to all of the jurisdiction-stripping provisions of Section 242?
2. Beyond the plenary power doctrine, discussed earlier in the course, does our system of immigration law pose any distinctive problems for judicial review?
3. What do you make of my suggestion, in the Migration Theory chapter, that there is an optimal level of illegal immigration and that perhaps we are approximately at that level? If this suggestion is correct, does that justify our existing enforcement system, or does it leave plenty of room for criticism and reform? If the latter, which reforms seem most important to consider?
4. Do you agree with the fairly optimistic view of our post-9/11 immigration policy that I present in the draft paper? If not, why not?