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Teaching Racial and Social Justice in the Immigration Law Survey Course

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**TEACHING RACIAL AND SOCIAL JUSTICE IN THE
IMMIGRATION LAW SURVEY COURSE**

KEVIN R. JOHNSON*

ABSTRACT

This article makes the case for integrating racial and social justice in teaching the immigration law survey course. Part I briefly highlights the systemic injustices generated by the operation of the contemporary U.S. immigration laws and their enforcement. Part II considers the benefits of teaching immigration law through a racial and social justice lens. Such an approach is especially appropriate in light of the fact that immigration law and policy disproportionately impact vulnerable immigrants of color from the developing world. Part III discusses an immigration law casebook designed for a racial and social justice approach to teaching the course.

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INTRODUCTION

A law review symposium on the teaching of U.S. immigration law and policy could not be more timely. Since publication of the first immigration law casebook in 1985, the field has matured.¹ Moreover, contemporary events, such as the Russian invasion of Ukraine resulting in an exodus of refugees from that country,² have brought considerable national attention to immigration law and enforcement, with student interest in the subject having grown significantly in recent years. Keeping immigration in the headlines and sparking controversy, discussion, and debate, the administration of President Donald J. Trump pursued a full array of controversial aggressive immigration enforcement measures. Those initiatives included, but were not limited to:

- the proposed construction of a wall spanning the U.S./Mexico border;³
- a “zero tolerance” approach to undocumented immigrants;⁴
- the controversial policy of separating migrant children from their parents in immigrant detention;⁵
- the “Remain in Mexico” policy requiring asylum seekers from Central America to await decision on their claims in Mexico;⁶
- a proposed public charge rule designed to limit the ability of noncitizens of modest means to immigrate to the United States;⁷ and

1. See, e.g., T. ALEXANDER ALEINIKOFF & DAVID A. MARTIN, *IMMIGRATION: PROCESS AND POLICY* (1st ed. 1985). This casebook has seen many subsequent editions. Today, there is a full array of excellent immigration law casebooks on the market.

2. See Sara Chodosh, Zach Levitt & Gus Wezerek, *Ukraine’s Refugee Crisis is Unprecedented: The Response Must Be Too*, N.Y. TIMES (May 13, 2022), <https://www.nytimes.com/interactive/2022/03/15/opinion/ukraine-refugee-crisis.html> [<https://perma.cc/F6FB-N488>].

3. See Robert Farley, *Trump’s Border Wall: Where Does It Stand?*, FACTCHECK.ORG (updated Feb. 16, 2021), <https://www.factcheck.org/2020/12/trumps-border-wall-where-does-it-stand/> [<https://perma.cc/HLD9-D8TZ>].

4. See WILLIAM A. KANDEL, CONG. RSCH. SERV., R45266, *THE TRUMP ADMINISTRATION’S “ZERO TOLERANCE” IMMIGRATION ENFORCEMENT POLICY 1* (updated Feb. 2, 2021) (“On May 7, 2018 . . . the Department of Justice . . . implemented a ‘zero tolerance’ policy toward illegal border crossing, both to discourage illegal migration into the United States and to reduce the burden of processing asylum claims that Trump Administration officials contended are often fraudulent.”).

5. See Miles Parks, Scott Detrow & Kelsey Snell, *Trump Signs Order to End Family Separations*, NPR (June 20, 2018), <https://www.npr.org/2018/06/20/621798823/speaker-ryan-plans-immigration-votes-amid-doubts-that-bills-can-pass> [<https://perma.cc/W3QD-2348>].

6. See *Biden v. Texas*, 142 S. Ct. 2528 (2022) (holding that the Biden administration had lawfully moved toward dismantling President Trump’s controversial “Remain in Mexico” policy).

7. See *Inadmissibility on Public Charge Grounds: Implementation of Vacatur*, 86 Fed. Reg. 14221 (Mar. 15, 2021) (announcing President Biden’s rescission of the Trump administration’s public charge rule).

- the ban on the admission of noncitizens from a group of nations predominantly populated by Muslims adopted in the name of national security.⁸

One did not need to be especially knowledgeable about the intricacies of those policies to appreciate their widespread racial and social justice impacts.⁹

In vigorously and consistently supporting tough immigration measures, President Trump, unlike any other modern president, regularly disparaged immigrants of particular races and national origins. Kicking off his presidential campaign by decrying Mexican immigrants as “criminals” and “rapists,”¹⁰ he later proclaimed that the United States should not be admitting noncitizens from “s— countries” such as El Salvador and Haiti.¹¹ President Trump’s sustained verbal assaults on Mexicans, Salvadorans, Haitians, Muslims, Asians, and other noncitizens left no doubt that race was at the heart of his thinking about immigrants and immigration. His sustained advocacy for building a border wall powerfully symbolized the overall goal of the Trump administration of keeping Latina/o noncitizens out of the United States as well as removing as many as possible from the country. In light of the fact that Latina/os comprise more than ninety percent of the noncitizens, including long-term lawful permanent residents, deported year in and year out, the racial impacts of immigration enforcement are undeniable.¹²

Acting in more measured fashion than President Trump and without the frequent crude verbal attacks on immigrants, the Biden administration generally has sought to narrow the immigration enforcement priorities of the U.S. government. Both ends of the political spectrum, however, have vigorously criticized his policies.¹³ Moreover, the courts have not always been receptive to

8. See *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (rejecting legal challenges to President Trump’s Muslim ban).

9. See generally Rose Cuison-Villazor & Kevin R. Johnson, *The Trump Administration and the War on Immigration Diversity*, 54 WAKE FOREST L. REV. 575, 575 (2019) (analyzing the adverse impacts on noncitizens of color of the Trump administration’s assortment of immigration policies).

10. See Carolina Moreno, *9 Outrageous Things Donald Trump Has Said About Latinos*, HUFFINGTON POST (Aug. 31, 2015; updated Nov. 9, 2016), https://www.huffpost.com/entry/9-out-outrageous-things-donald-trump-has-said-about-latinos_n_55e483a1e4b0c818f618904b [https://perma.cc/KVR4-2TS4].

11. Ryan Teague Beckwith, *President Trump Called El Salvador, Haiti “Shithole Countries:” Report*, TIME (Jan. 11, 2018) (quoting President Trump’s remarks to several members of Congress and government officials), <https://time.com/5100058/donald-trump-shithole-countries/> [https://perma.cc/KXV3-S3YH].

12. See Kevin R. Johnson, *Trump’s Latinx Repatriation*, 66 UCLA L. REV. 1444, 1447–48, 1470 (2019) (characterizing President Trump’s aggressive immigration enforcement efforts as amounting to a modern-day effort at a mass repatriation of Latina/os).

13. See Alexander Nazaryan, *Biden Angers Both Left and Right with New Immigration Policy*, YAHOO! NEWS (Jan. 10, 2023), <https://news.yahoo.com/biden-angers-both-left-and-right-with->

the Biden administration's efforts to roll back President Trump's immigration enforcement initiatives.¹⁴ For example, one federal district court enjoined President Biden from reinstating the original policy of accepting initial applications for Deferred Action for Childhood Arrivals ("DACA") and only permitted applications for renewal of DACA relief, thus severely limiting the number of beneficiaries (almost all of whom are noncitizens of color) of the policy.¹⁵ Congress has failed to intervene. Despite widespread recognition among Democratic and Republican leaders that the U.S. immigration laws need drastic reform, Congress time and again has failed to pass meaningful reform legislation and appears unlikely to do so in the foreseeable future.¹⁶

More than twenty years ago, Professor George Martínez identified a burgeoning paradigm shift in immigration law scholarship toward an increased focus on race and racism in the analysis.¹⁷ Race since then has emerged as a standard frame for analyzing immigration law and policy matters. Such an approach makes eminent sense in light of the racially disparate impacts of immigration enforcement and the fact that contemporary public debate over immigration frequently reveals deep racial antipathies. Latina/o and Asian American civil rights groups readily appreciate the racial undertones of the

new-immigration-policy-173142110.html [https://perma.cc/93XQ-YCMZ]; Sabrina Rodriguez, *It's Not Just Republicans. Everyone's Mad at Biden Over Migration*, POLITICO (Sept. 21, 2021), <https://www.politico.com/news/2021/09/21/migration-biden-border-troubles-513370> [https://perma.cc/RL2A-DY6S].

14. See, e.g., *United States v. Texas*, 143 S. Ct. 51, 51 (2022) (granting certiorari to review the case, but refusing to stay a lower court injunction barring the implementation by the Biden administration of a guidance narrowing enforcement of the U.S. immigration laws from the aggressive approach pursued by the Trump administration); *Biden v. Texas*, 142 S. Ct. 2528, 2548 (2022) (allowing, after much litigation, President Biden to dismantle President Trump's "Remain in Mexico" policy that requires asylum seekers to remain in Mexico while their claims are being decided); *Louisiana v. Ctrs. for Disease Control & Prevention*, Case No. 6:22-CV00885, 2022 U.S. Dist. LEXIS 91296, at *1, *23 (W.D. La. May 20, 2022) (enjoining the attempt by President Biden to lift the Title 42 order issued by the Trump administration barring immigrant admissions into the United States on COVID-19 grounds).

15. See *Texas v. United States*, 549 F. Supp. 3d 572, 624 (S.D. Texas 2021). In 2020, the Supreme Court rejected the Trump administration's effort to rescind the Deferred Action for Childhood Arrivals ("DACA") policy, which President Obama put into place in 2012. See *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1896 (2020). Despite the adverse ruling, the Trump administration refused to accept new DACA applications but only would accept applications for renewals by noncitizens who previously had been granted relief. See text accompanying note & note 15.

16. See Zachary Snowdon Smith, *Comprehensive Immigration Reform has 'Zero' Chance this Year, Key Senate Democrat Repeatedly Says*, FORBES (May 1, 2022; updated May 3, 2022), <https://www.forbes.com/sites/zacharysmith/2022/05/01/comprehensive-immigration-reform-has-zero-chance-this-year-key-senate-democrat-says/?sh=18ba89ee8798> [https://perma.cc/QR75-6SZP].

17. See George A. Martínez, *Race and Immigration Law: A Paradigm Shift?*, 2000 U. ILL. L. REV. 517, 517-18 (2000).

national debate and the racial consequences of the nation's treatment of immigrants.¹⁸ Moreover, anti-Black racism is evident in the history of interdiction and detention of Haitian asylum seekers¹⁹ and, more recently, the deeply disturbing 2021 video clip of armed Border Patrol officers on horseback chasing Black asylum seekers from Haiti along the U.S./Mexico border.²⁰

Racism was a defining characteristic of immigration enforcement long before the presidency of Donald J. Trump. Especially when viewed through contemporary eyes, U.S. immigration law and its enforcement historically have raised many serious racial and social justice concerns. For example, although not well-known among the general American public today,²¹ Congress's blatantly racist treatment of Chinese immigrants in the 1800s remains a deeply disturbing chapter of U.S. history.²²

In contrast to the hey-day of Chinese—which Congress later expanded to Asian—exclusion, color-blindness and race-neutrality often dominate modern immigration laws and policies. Consequently, the tools for contemporary enforcement of racial borders often obfuscate the systemic racism embedded in immigration law and allow for plausible deniability of claims that the laws and their enforcement are racist. As I previously observed, “[t]he U.S. immigration laws [today] readily provide color-blind, facially neutral proxies that are often

18. See, e.g., Suzanne Gamboa, *Latino, Asian Groups Appeal Census Ruling, Citing New Evidence*, NBC NEWS (June 4, 2019), <https://www.nbcnews.com/news/latino/latino-asian-groups-appeal-census-ruling-citing-new-evidence-n1013766> [<https://perma.cc/F2R3-LKW6>] (reporting on the opposition of Latina/o and Asian American civil rights groups to the addition of a question about U.S. citizenship to the 2020 Census because of fears that it might discourage immigrants from participating in the Census and result in an undercount of the U.S. population). The Supreme Court ultimately rejected as unlawful the Trump administration's proposed addition of a citizenship question to the Census. See *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2584 (2019).

19. See, e.g., *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993) (rejecting challenges to the U.S. Coast Guard's interdiction on the high seas of asylum seekers fleeing political, economic, and social upheaval and returning them to Haiti before allowing them to apply for asylum in the United States). See generally *USA: "They Did Not Treat Us Like People": Race and Migration-Related Torture and Other Ill-Treatment of Haitians Seeking Safety in the USA*, AMNESTY INT'L (2022), <https://www.amnesty.org/en/documents/amr36/5973/2022/en/> [<https://perma.cc/8G95-TUCY>] (documenting U.S. government's mistreatment of Haitians).

20. See Marjorie Cohn, *Biden's Expulsion of Haitian Migrants Is Racist, Illegal—and Trumpian*, TRUTHOUT (Oct. 2, 2021), <https://truthout.org/articles/bidens-expulsion-of-haitian-migrants-is-racist-illegal-and-trumpian/> [<https://perma.cc/43BJ-VD3C>].

21. See Michael Luo, *The Forgotten History of the Purging of Chinese from America*, NEW YORKER (Apr. 22, 2021), <https://www.newyorker.com/news/daily-comment/the-forgotten-history-of-the-purging-of-chinese-from-america> [<https://perma.cc/ZFY6-S3UF>].

22. See generally BETH LEW-WILLIAMS, *THE CHINESE MUST GO: VIOLENCE, EXCLUSION AND THE MAKING OF THE ALIEN IN AMERICA* (2018) (recounting the history of the virulent and widespread hatred and political animosity directed at Chinese immigrants in the United States in the late 1800s); BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY 1850–1990* (1993) (analyzing the impacts of U.S. immigration law and policy on the evolution of the Asian American community in the United States).

conveniently employed by groups that, among other things, seek to target for immigration investigation, enforcement, and prosecution of persons of particular races and classes, specifically working-class Latina/os.”²³

In light of that background, this article makes the case for the integration of racial and social justice sensibilities into the teaching fabric of the immigration law survey course. Part I briefly summarizes the historical and modern racial and social justice implications of U.S. immigration law and its enforcement. Part II discusses the tangible benefits of teaching immigration law through a racial and social justice lens. That approach fits almost naturally because so many of the cases—as a cursory reading of the case names and decisions suggest—involve immigrants of color from the developing world, where the demand for immigration to the United States is at its highest. Part III identifies an immigration law casebook literally tailor-made for a racial and social justice approach to teaching immigration law.

I. SOCIAL JUSTICE AND IMMIGRATION LAW

Immigration law and its enforcement cry out for a vigorous discussion of racial and social injustice. Relatively early in the immigration law survey course, many, perhaps most, instructors cover the history of the Chinese exclusion laws in 18th century America. That rich history includes *Chae Chan Ping v. United States* (The Chinese Exclusion Case) (1889),²⁴ in which the Supreme Court rejected a constitutional challenge to a rabidly anti-Chinese immigration law popularly known as the Chinese Exclusion Act. With Congress possessing absolute, denominated by the Court as “plenary,” power over the immigration laws, the plenary power doctrine announced by the Court in that decision to this day bars constitutional review of congressional immigration judgments as well as many enforcement measures pursued by the Executive Branch.

The legal doctrine of *The Chinese Exclusion Case*, and the issue of judicial review, arise regularly in a wide range of modern immigration cases. The availability of judicial review is at the core of contemporary immigrant

23. Kevin R. Johnson, *A Case Study of Color-Blind Rhetoric: The Racially Disparate Impacts of Arizona’s S.B. 1070 and the Failure of Comprehensive Immigration Reform*, 1 L.J. FOR SOC. JUST. 3, 5 (2011).

24. 130 U.S. 581, 581 (1889); see Raquel E. Aldana, *Taming Immigration Trauma*, 44 CARDOZO L. REV. 387, 393 (2022) (“At the turn of the nineteenth century, during a time of virulent racist, anti-Chinese sentiment in the United States, the U.S. Supreme Court, with few exceptions, validated highly suspect federal laws targeting long-term lawful [immigrants], including some who claimed U.S. citizenship.”) (footnote omitted). For analysis of the continuing impacts of *The Chinese Exclusion Case*’s restrictions on judicial review of the constitutionality of contemporary U.S. immigration laws and policies, see Kevin R. Johnson, *Systemic Racism in the U.S. Immigration Laws*, 97 IND. L.J. 1455, 1469–77 (2022).

detention,²⁵ expedited or summary removal without Due Process, and border enforcement generally, to name a few prominent examples. In fact, the Supreme Court in 2020 applied an unvarnished version of the plenary power doctrine to reject constitutional challenges to the summary expulsion without Due Process of an asylum seeker apprehended on U.S. soil.²⁶ “Prior to [that decision], the Supreme Court consistently suggested that individuals within U.S. borders are entitled to . . . procedural due process rights with regard to their entry and their right to remain in the country, while those outside the country generally are not.”²⁷

Similarly, racial profiling in immigration enforcement resembles that which long has plagued criminal law enforcement. However, surprisingly enough, the Supreme Court in fact has encouraged racial profiling in the enforcement of the immigration laws while—consistent with modern constitutional law and public opinion—condemning it in ordinary criminal law enforcement.²⁸ Because of the stark racial disparities in modern criminal law enforcement, the removals of immigrants based on criminal offenses have stark disparate racial impacts on Latina/o and Black noncitizens.²⁹

25. See, e.g., *Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827, 1827 (2022) (holding that a provision of the immigration statute does not require periodic judicial review of noncitizen detention and remanding the case to the court of appeals to decide the constitutionality of the statutory provision); *Jennings v. Rodriguez*, 138 S. Ct. 830, 830 (2018) (to the same general effect).

26. See *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1983 (2020) (rejecting constitutional challenges to the expedited removal of an asylum seeker from Sri Lanka apprehended in the United States near the U.S./Mexico border). For criticism of the decision, see Daniel Kanstroom, *Deportation in the Shadows of Due Process: The Dangerous Implications of DHS v. Thuraissigiam*, 50 SW. L. REV. 342 (2021); Gerald Neuman, *The Supreme Court’s Attack on Habeas Corpus in DHS v. Thuraissigiam*, JUST SEC. (Aug. 25, 2020), <https://www.justsecurity.org/72104/the-supreme-courts-attack-on-habeas-corpus-in-dhs-v-thuraissigiam/> [<https://perma.cc/E5Z2-E645>].

27. Diana G. Li, Note, *Due Process in Removal Proceedings after Thuraissigiam*, 74 STAN. L. REV. 793, 803 (2022) (footnote omitted).

28. Compare *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 886–87 (1975) (permitting, consistent with the Fourth Amendment, the reliance by Border Patrol officers on the perceived “Mexican appearance” of a person as one factor in an immigration stop), with *Whren v. United States*, 517 U.S. 806, 813 (1996) (emphasizing that “the constitutional basis for objecting to intentionally discriminatory application of laws [by police officers] is the Equal Protection Clause” of the Fourteenth Amendment). See generally KELLY LYTLE HERNANDEZ, *MIGRA!: A HISTORY OF THE U.S. BORDER PATROL* (2010) (documenting the history of discrimination by the U.S. Border Patrol against persons of Mexican ancestry, U.S. citizens as well as immigrants); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1026–27 (2010) (reviewing how Supreme Court decisions in different ways have facilitated racial profiling in immigration and criminal law enforcement).

29. See Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L.J. 599, 647–48 (2015). For a case study of *Moncrieffe v. Holder*, 569 U.S. 184 (2013), a criminal removal matter involving a Black lawful permanent resident convicted

Despite its dramatic inconsistency with modern constitutional doctrine, *The Chinese Exclusion Case*, which established the norm of no review of the constitutionality of the immigration laws and policies, remains settled law.³⁰ True, the Supreme Court at times has wavered in its application of the most potent version of the plenary power doctrine and occasionally applied a slightly diluted form to immigration laws and policies.³¹ One of the enduring legacies of *The Chinese Exclusion Case* and its many progeny is that systemic racism is deeply embedded in the fabric of modern U.S. immigration law and enforcement.³²

While the immunity from constitutional review has remained largely unchanged, the groups of immigrants subject to discrimination under immigration law and policy have evolved over time. For example, while discrimination against Asian noncitizens dominated the U.S. immigration laws and their enforcement from the late 1800s through 1965,³³ that has been largely replaced in the modern era with discrimination against Latina/o noncitizens. That shift is exemplified by the Immigration Act of 1965's removal of the remnants of Asian exclusion from the comprehensive immigration statute combined with the imposition for the first time in U.S. history of numerical limits on immigration from Latin America.³⁴

of possession of a small amount of marijuana after an apparent instance of racial profiling by police in a traffic stop, see Kevin R. Johnson, *Racial Profiling in the War on Drugs Meets the Immigration Removal Process: The Case of Moncrieffe v. Holder*, 48 U. MICH. J.L. REFORM 967 (2015).

30. See generally Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) (analyzing the significance of the survival of the plenary power doctrine created by *The Chinese Exclusion Case* and how the immunity of immigration law and policy from constitutional review permits racial discrimination in the modern U.S. immigration laws and their enforcement).

31. See Alina Das, *Administrative Constitutionalism in Immigration Law*, 98 B.U. L. REV. 485, 498 (2018); Jill E. Family, *Threats to the Future of the Immigration Class Action*, 27 WASH. U. J.L. & POL'Y 71, 100 (2008).

32. See generally REECE JONES, *WHITE BORDERS: THE HISTORY OF RACE AND IMMIGRATION IN THE UNITED STATES FROM CHINESE EXCLUSION TO THE BORDER WALL* (2021) (reviewing the lengthy history of racism in U.S. immigration law and policy); ERIKA LEE, *AMERICA FOR AMERICANS: A HISTORY OF XENOPHOBIA IN THE UNITED STATES* (2019) (analyzing repeated xenophobic episodes in U.S. history).

33. See Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965) (eliminating the remnants of the Chinese exclusion laws from the omnibus immigration statute); see also Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 279 (1996) (analyzing the significant increase in immigration to the United States from Asia following passage of the 1965 Act).

34. See Kevin R. Johnson, *The Beginning of the End: The Immigration Act of 1965 and the Emergence of the Modern U.S.-Mexico Border State*, in *THE IMMIGRATION AND NATIONALITY ACT OF 1965: LEGISLATING A NEW AMERICA* 116–70 (Gabriel J. Chin & Rose Cuison Villazor eds., 2015) (analyzing critically the adverse impacts of the imposition of numerical limits by the Immigration Act of 1965 on immigration from Latin America).

Consistent with these observations, it should not be surprising that race features prominently in the contemporary national debate over immigration law and its enforcement. Race also contributes significantly to the volatility and divisiveness of that debate. President Trump's racist rants about immigrants drew the attention—and, at times, support—of many Americans. At the same time, the attacks no less than terrified many Latina/os and Asian Americans, U.S. citizens as well as noncitizens, who deeply feared the Trump administration's bold and relentless immigration enforcement measures.³⁵

Students today have demanded the integration of racial justice into the law school curriculum. Many law schools have responded. Growing numbers now require students to take classes that touch on racial injustice.³⁶ The American Bar Association, which accredits law schools, has prodded those efforts by requiring education in racial justice.³⁷ Although one might wonder whether racial justice truly is relevant to the teaching of some survey courses, such as civil procedure,³⁸ the basic immigration law course easily lends itself to extensive discussion of racial and social justice. The cases and controversies make it crystal clear that the ordinary operation of the modern immigration laws disproportionately affect people of color from the developing world. As a consequence, immigrant rights advocates frequently pursue the equivalent of racial justice reform agendas, with eliminating racism at the center of their efforts to change immigration law and policy.

II. THE BENEFITS OF TEACHING IMMIGRATION LAW THROUGH A SOCIAL JUSTICE LENS

By focusing on racial and social justice, the instructor in the immigration law survey course may explain how blatant and widespread racism influenced the passage and enforcement of the Chinese exclusion laws. That, of course, probably comes across in most courses. However, racism also remains firmly embedded in the contemporary color-blind, race-neutral immigration laws.

35. See Miriam Jordan & Caitlin Dickerson, *As Trump Threatens Deportations, Immigrant Communities Brace for New Arrests*, N.Y. TIMES (June 18, 2019), <https://www.nytimes.com/2019/06/18/us/immigration-raids-fear-families.html> [<https://perma.cc/Z5X2-WU76>].

36. See, e.g., Andrew Cohen, *Moving Forward: Faculty Approves Race and Law Course Requirement in Order to Graduate*, BERKELEY L. (Feb. 18, 2022), <https://www.law.berkeley.edu/article/faculty-approves-race-and-law-course-requirement/#:~:text=Order%20to%20Graduate-,Moving%20Forward%3A%20Faculty%20Approves%20Race%20and%20Law,Requirement%20in%20Order%20to%20Graduate&text=Starting%20with%20the%20entering%20J.D.,law%20in%20order%20to%20graduate> [<https://perma.cc/V9UK-TVDM>].

37. See Karen Sloan, *U.S. Law Students to Receive Anti-Bias Training After ABA Passes New Rule*, REUTERS (Feb. 14, 2022), <https://www.reuters.com/legal/legalindustry/us-law-students-receive-anti-bias-training-after-aba-passes-new-rule-2022-02-14/> [<https://perma.cc/S3UX-GK84>].

38. For a collection of essays premised on the idea that the law of civil procedure has profound racial and social justice impacts, see A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES 3 (Brooke Coleman et al. eds., 2022).

Because of the color-blind nature of those laws, racism today is more difficult to detect than the unabashed racism of yesteryear. Efforts can—and should—be made to demonstrate to students the racial foundations of contemporary U.S. immigration law and policy that lead to racially disparate outcomes.

Teaching the immigration law survey course through a racial and social justice lens has many advantages over an exclusively nuts-and-bolts approach. To begin with, much of modern immigration law is statutory; coaxing students to carefully read and apply statutes is much easier said than done.³⁹ On the other hand, analyzing the racial and social justice impacts of the application of the immigration statute provides an attractive way to analyze many immigration cases and immigration laws and policy generally. Identification of divergences between outcomes generated by the application of the statute and what might be seen as socially fair and just results, can lead to robust class discussions and much-needed dialogue. Besides reinforcing a feature of immigration law that sparks student interest in the course, a racial and social justice approach helps tie the materials into the contemporary national debates over immigration and immigration reform.

I previously have written about how experience in the law school immigration clinic in which law students provide legal assistance to immigrants can help inculcate a social justice consciousness in law students.⁴⁰ In a similar fashion, the immigration law survey course can raise student awareness of gaps between just and unjust outcomes for immigrants. This part of the article identifies some of the concrete benefits of integrating racial and social justice into the course.

A. *Tying Together the Immigration Law Course*

It is an understatement to say that the Immigration and Nationality Act (“INA”),⁴¹ the comprehensive immigration law passed by Congress in 1952 and frequently amended since then, is a challenging, and all-too-often deeply perplexing, statute. As one court put it, “[w]ith only a small degree of hyperbole, the immigration laws have been termed ‘second only to the Internal Revenue

39. See Judith Welch Wegner, *Reframing Legal Education’s “Wicked Problems,”* 61 RUTGERS L. REV. 867, 909 (2009) (noting the formidable challenges facing instructors in teaching law students to carefully read and apply statutes). A resurgence in scholarly attention to statutory interpretation, see, e.g., WILLIAM N. ESKRIDGE JR., JAMES J. BRUDNEY & JOSH CHAFETZ, *LEGISLATION AND STATUTORY INTERPRETATION* (3d ed. 2022); Robert A. Katzmann, *Statutes*, 87 N.Y.U. L. REV. 637, 660 (2012), has brought attention to teaching students the appropriate ways to interpret statutes, see, e.g., Jack Stark, *Teaching Statutory Law*, 44 J. L. ED. 579, 579–82 (1994).

40. See Kevin R. Johnson & Amagda Pérez, *Clinical Legal Education and the U.C. Davis Immigration Law Clinic: Putting Theory into Practice and Practice into Theory*, 51 SMU L. REV. 1423, 1426–27 (1998).

41. Immigration and Nationality Act, Pub. L. No. 89-236, 79 Stat. 911 (1952) (as amended).

Code in complexity.”⁴² Another court compared the U.S. immigration laws to “King Minos’s labyrinth in ancient Crete.”⁴³ Instructors find that the INA’s amazing complexity makes the immigration law survey course an extremely difficult one to teach. Although conveying the intricacies of the INA in the course is obviously vitally important, an overarching theme can help make sense of the seemingly disparate threads of the course. It also can help maintain student interest and engagement in the details of the interpretation and application of the immigration statute.

Moreover, one must avoid a myopic focus on the textual intricacies and interpretation of the immigration statute and implementing regulations, which invariably change over time. Few, if any, students or instructors can commit to memory the incredible complexities of the INA. By focusing students on the racial and social justice implications of the application of the statute and court decisions, the professor can anchor the class and bring together the many seemingly disconnected statutory and other threads of immigration law and policy. At the same time, linking developments in immigration law and policy to larger trends in U.S. society facilitates the ability of students to better understand and appreciate the curious, and often erratic, evolution of immigration law and policy.

B. Historical and Contemporary Systemic Racism

Throughout U.S. history, racial discrimination has been at the core of the history of developments in U.S. immigration law.⁴⁴ The exclusion of Chinese and later the vast majority of immigrants from Asia, the Mexican guest worker program known as the Bracero Program,⁴⁵ the mass deportation campaign directed at Mexican immigrants officially named “Operation Wetback” in 1954,⁴⁶ and many other examples immediately come to mind.

Although some might instinctively think that racism is an unfortunate chapter from the history books, racism remains part and parcel of contemporary U.S. immigration law and its enforcement. As mentioned above, systemic racism pervades modern immigration law. Examples abound, including President Trump’s Muslim ban, the family separation policy primarily directed at Central Americans, and many more.⁴⁷ Modern discrimination is often, although not always, accomplished through color-blind and race-neutral means. One glaring example drives the point home: the per country caps that create

42. *Castro-O’Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1988) (citation omitted).

43. *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977).

44. *See supra* note 32 (citing authorities).

45. *See generally* KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* (1992) (analyzing critically the Bracero Program).

46. *See* RICHARD DELGADO ET AL., *LATINOS AND THE LAW: CASES AND MATERIALS* 437–40 (2d ed. 2021).

47. *See supra* text accompanying notes 2–12.

years-long—in some instances decades-long—lines for admission for immigrants of color from Mexico and some nations in Asia (specifically China, India, and the Philippines) and much shorter ones for noncitizens from other (whiter) nations mostly in the Western world.⁴⁸ Some saw racism as the explanation for the world’s welcoming response to refugees from Ukraine compared to those from Syria and other nations populated by people of color.⁴⁹

Contemporary efforts to remove systemic racism in U.S. society as a whole directly lead one to the question of how to eliminate it from the U.S. immigration laws and their enforcement. That task poses most daunting questions, with answers in many, if not most, instances far from self-evident. Tapping into the strong student interest in racial justice, makes class discussions of reform strategies and possibilities rich and rewarding.

C. *Litigation, Activism, and Law Reform*

Judicial review of the constitutionality of immigration laws and policies in the modern era is at best uncertain and inconsistent. Due in no small part to the legacy of *The Chinese Exclusion Case*, courts frequently have done precious little to apply the U.S. Constitution to protect the rights of immigrants.⁵⁰ Congress also has limited, and in some instances barred, judicial review of many immigration decisions.⁵¹ As a result, social justice lawyers often struggle to protect the rights of noncitizens, including in class action lawsuits seeking to

48. See Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. REV. 77, 120 (2017) (“Uniform per-county ceiling limits on immigrant admissions require nationals of Mexico or the Philippines to wait ten to fourteen years longer than applicants from other countries for certain categories of visas.”) (footnote omitted); Bernard Trujillo, *Immigrant Visa Distribution: The Case of Mexico*, 2000 WIS. L. REV. 713, 715–16 (2000) (reviewing the unfairness to Mexican immigrants of the operation of the contemporary U.S. visa system, which places an annual limit on the number of immigrants admitted from a nation).

49. See Philip Marcelo, *In U.S.’s Welcome to Ukrainians, African Refugees See Racial Bias*, PBS NEWS HOUR (Apr. 1, 2022), <https://www.pbs.org/newshour/politics/in-u-s-s-welcome-to-ukrainians-african-refugees-see-racial-bias> [<https://perma.cc/GEC7-F3Y7>].

50. See, e.g., *Patel v. Garland*, 142 S. Ct. 1614, 1627–28 (2022) (interpreting a provision of the immigration statute as precluding the federal courts from reviewing fact findings by the immigration court in a removal case); see also Carrie L. Rosenbaum, *(Un)Equal Immigration Protection*, 50 SW. L. REV. 231, 231 (2021):

The Supreme Court’s recent ruling in *Department of Homeland Security (DHS) v. Regents* [140 S. Ct. 1891 (2020)], in which a plurality rejected an Equal Protection challenge to President Trump’s rescission of the Deferred Action for Childhood Arrivals (“DACA”) policy,] exposes the equal protection doctrine’s failure to reach one of the most entrenched systems of racial oppression in the United States—immigration law.

51. See, e.g., Immigration and Nationality Act (INA) § 236(e), 8 U.S.C. § 1226(e) (barring judicial review of discretionary decisions made by the U.S. government to detain, release, or grant or deny bond to noncitizens in removal proceedings).

reform immigration laws and policies.⁵² The immigration law course thus provides the instructor with an ideal opportunity to discuss strategies employed by social justice lawyers and the special challenges that they face in reforming the immigration system. Such an approach also adds to student awareness of the difficulty of securing meaningful reform through litigation.

In light of the limits on constitutional review, political action at this time is the most likely avenue to transform immigration law and its enforcement.⁵³ The difference in approaches of Presidents Trump and Biden offer a contemporary, and clear-cut, example of how presidential elections can result in seismic shifts in immigration enforcement policies and priorities. The challenges of political action, especially because immigrants (unless naturalized U.S. citizens) cannot vote, as well as the deeply divisive nature of the issue among the general public, make meaningful legislative change extraordinarily difficult and worthy of class discussion.

III. A CASEBOOK FOR TEACHING RACIAL AND SOCIAL JUSTICE IN IMMIGRATION LAW

With Bill Ong Hing and Jennifer Chacón doing the lion's share of the work, I contributed to an immigration law casebook *Immigration Law and Social Justice*.⁵⁴ Designed for the immigration law survey course, it approaches immigration law and policy from a public interest and social justice perspective. Along with cases and statutory materials, the casebook collects client examples, article excerpts, questions, and hypotheticals. These materials are designed to provide the basic framework for immigration law, but also to engage students with the larger social, political, and economic context necessary to understand, for example, the many forces resulting in migration of people to the United States, as well as the very human impacts of the enforcement of immigration law and policy. Through examples, notes, and questions that raise social, racial, and political issues surrounding immigrant admission, removals, and relief from

52. See, e.g., *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 549 (9th Cir. 1990) & *infra* text accompanying notes 65–66 (affirming district court injunction in class action challenging the mass detention of Central American asylum seekers); *Mendez Rojas v. Johnson*, 305 F. Supp. 3d 1176, 1176 (W.D. Wash. 2018) (holding that the U.S. government denied the due process rights of asylum seekers by failing to provide adequate notice of the one-year deadline for applying for asylum and granting class-wide injunctive relief). Congress has limited the use of class actions to challenge certain immigration decisions. See, e.g., *Garland v. Gonzalez*, 142 S. Ct. 2057, 2057 (2022) (holding that INA § 242(f)(1), 8 U.S.C. § 1252(f)(1) bars class-wide injunctive relief with respect to certain immigration decisions).

53. See Kevin R. Johnson, *Bringing Racial Justice to Immigration Law*, 116 NW. U. L. REV. ONLINE 1, 19 (2021).

54. See generally BILL ONG HING, JENNIFER M. CHACÓN & KEVIN R. JOHNSON, *IMMIGRATION LAW AND SOCIAL JUSTICE* (2d ed. 2022) [hereinafter *IMMIGRATION LAW AND SOCIAL JUSTICE*].

removal, as well as discussion of strategies pursued by social justice lawyers, *Immigration Law and Social Justice* advances student understanding of the creative approaches employed by social justice lawyers seeking to meaningfully reform the immigration system.

The casebook by design offers a racial and social justice approach to teaching immigration law. Chapter Two of *Immigration Law and Social Justice* is entitled “The Immigration Social Justice Lawyer” and offers detailed examples of “Rebellious Lawyering” in immigration law.⁵⁵ The chapter finds inspiration in Gerald Lopez’s path-breaking scholarship on lawyering for social change.⁵⁶ The casebook offers the example of the Immigrant Legal Resource Center,⁵⁷ a highly successful support network for front-line legal service providers. Chapter Two also includes a section on “Race and Race-Conscious Lawyering,”⁵⁸ which identifies for students how social justice lawyers seek to address the racism at the foundation of modern immigration law and policy.

In considering the enforcement of the immigration laws, Chapter Ten (“Enforcement”) in *Immigration Law and Social Justice*⁵⁹ necessarily highlights for students issues of racial and social justice and provides cases and materials that highlight troubling issues of racism.⁶⁰ Mass, if not indiscriminate, detention has been the subject of litigation for generations and poses a formidable challenge for reform to immigrant rights lawyers.⁶¹ With systematic racial impacts,⁶² mass detention remains a pressing legal issue at the center of litigation and will likely continue to be one for the indefinite future. To introduce students to the social justice issues implicated by immigrant detention, Chapter Nine (“The Detention Nightmare”)⁶³ includes materials on immigrant detention and its deeply troubling consequences. With congressional authorization, Presidents from 1996 to the present have increasingly used immigrant detention as a

55. *Id.* at 83–136.

56. *Id.* at 83. *See generally* GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* (1992) (analyzing the progressive practice of law for social change that the author characterizes as “rebellious lawyering”).

57. *See* IMMIGRATION LAW AND SOCIAL JUSTICE, *supra* note 54, at 113–29.

58. *Id.* at 136–55.

59. *Id.* at 729–86.

60. *See, e.g., id.* at 779–82 (excerpting Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577, 599–600 (2012)), 744–79 (excerpting *United States v. Brignoni-Ponce*, 422 U.S. 873, 873 (1975) and other decisions that allow Border Patrol officers to consider race as a factor in making an immigration stop).

61. *See, e.g.,* *Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827, 1827 (2022) (holding that a provision of the immigration statute did not require a periodic bond hearing for the noncitizen in immigration detention and remanding the case to the court of appeals to decide the constitutionality of the provision in question); *Jennings v. Rodriguez*, 138 S. Ct. 830, 830 (2018) (to the same effect).

62. *See* Carrie L. Rosenbaum, *Systemic Racism and Immigration Detention*, 44 SEATTLE U. L. REV. 1125 (2021) (analyzing these impacts).

63. *See* IMMIGRATION LAW AND SOCIAL JUSTICE, *supra* note 54, at 625–727.

method for enforcing the U.S. immigration laws and seeking to deter future migration.⁶⁴ The growing use of detention, in turn, has increased the perplexing and recurring fundamental legal questions raised in litigation, such as whether judicial review is allowed to scrutinize administrative decisions to detain immigrants.

Immigrant detention litigation implicates the life and liberty of immigrants and presents challenging issues about social justice lawyering. Chapter Fourteen (“Judicial Review”)⁶⁵ includes an extended excerpt from *Orantes-Hernandez v. Thornburgh*,⁶⁶ a major impact case in which a court of appeals affirmed a far-reaching and detailed district court injunction designed to remedy the systematic denial of legal rights, including the right to representation by counsel, to Central American asylum-seekers held in immigrant detention. Despite litigation for decades, and a seeming victory for Central American immigrants in *Orantes-Hernandez*, challenges to the mass detention of Central Americans continue unabated. The *Orantes-Hernandez* litigation thus raises serious questions about the actual positive social justice impact that an impact case can have. It essentially illustrates the inherent limits of litigation, and the enforcement of court rulings, in securing systemic reform.

Similarly, the *Flores* case⁶⁷ brought by immigrant rights lawyers resulted in a settlement in the 1990s that continues to govern the detention (and release) of migrant children, including many young people of color from Mexico and Central America.⁶⁸ Chapter Fourteen of *Immigration and Social Justice*⁶⁹ discusses the *Flores* case as an example of successful, creative, and visionary social justice lawyering. Such lawyering has required continued judicial oversight and interest.

64. See generally CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA’S OBSESSION WITH LOCKING UP IMMIGRANTS* (2019) (analyzing critically the dramatic increase in the U.S. government’s detention of noncitizens in the enforcement of the immigration laws).

65. IMMIGRATION LAW AND SOCIAL JUSTICE, *supra* note 54, at 1117–87.

66. 919 F.2d 549, 549 (9th Cir. 1990).

67. See *Reno v. Flores*, 507 U.S. 292, 292 (1993) (rejecting a legal challenge to the detention of migrant children and remanding the case for further proceedings that ultimately ended in a settlement of the case).

68. See Kevin R. Johnson, *The Flores Settlement: A 1985 Case That Sets the Rules for How Government Can Treat Migrant Children*, CONVERSATION (June 27, 2019), <https://theconversation.com/the-flores-settlement-a-1985-case-that-sets-the-rules-for-how-government-can-treat-migrant-children-119501> [<https://perma.cc/JLD6-LXQN>].

69. See IMMIGRATION LAW AND SOCIAL JUSTICE, *supra* note 54, at 1158–59.

CONCLUSION

From the perspective of persons interested in racial and social justice, the immigration law survey course is nothing less than an amazingly rich class to teach. Reviewing the basic legal doctrine for students is obviously important. However, it is far too easy for a class to get bogged down in the quicksand of the many nooks-and-crannies of the Immigration and Nationality Act and lose sight of the bigger racial and social justice picture. An overarching racial and social justice theme helps to make that picture clear and to pull together the course's seemingly disparate threads. It further requires students to grapple with the fundamental fairness of the operation of immigration laws and their enforcement, as well as how Congress might overhaul the laws to achieve more just results. Ultimately, a racial and social justice approach provides nothing less than an ideal theme for the course and is likely to spark greater student passion for immigration law and policy.

