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Introduction

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U.S. immigration law is a complex system of rules, regulations, and practices involving multiple agencies and actors. Understanding the U.S. immigration system requires not only knowledge of the vast body of immigration law judicial opinions but also familiarity with the historical, political, and social context surrounding such opinions. The overt and implicit biases that pervade immigration law and influence the actors in the immigration system inflict all manner of harms on noncitizens, their families, and their communities. Moreover, the system's rampant discrimination and intentional subordination of noncitizens undermine the country's commitment to equality and justice for all.

This is not a story confined to the nativist nineteenth century. Recent public revelations have exposed persistent draconian immigration practices, such as migrant family separation, the exclusion and removal of asylees and refugees to unsafe countries of origin, and prolonged mandatory detention in deplorable conditions. While the Trump administration's anti-immigrant rhetoric grabbed headlines, the preceding Obama administration deported record-breaking numbers of noncitizens. The Biden administration continues some of the harsh policies of its predecessors, underscoring the fiction that a new presidential administration can "fix" this country's immigration system.

The inhumane federal regulation of immigration perseveres, justified by a canon of U.S. Supreme Court jurisprudence that authorizes the exclusion of foreigners for virtually any reason, including the pretexts of national security, health and public safety, and the protection of American jobs. This case law establishes and sustains an immigration regime that denies noncitizens the promise of welcome in a land of supposed opportunity. For immigrants already in the United States, the Court has no reservations about making rules about their treatment that would be unacceptable if applied to U.S. citizens. Noncitizens confront diminished access to legal protections in the workplace, detention settings, and immigration court proceedings, to name a few. Only in rare cases has the Supreme Court held that noncitizens in certain settings, such as undocumented children in public schools or immigrants facing criminal prosecution, were entitled to constitutional

rights. As a result, the dominant immigration law paradigm favors government sovereignty – through the exercise of detention, deportation, and exclusion – to determine who belongs in our national community and what rights they hold while here.

This book envisions a different kind of immigration jurisprudence. A feminist version of immigration law could foster a country where diverse newcomers readily flourish with dignity. Given the human suffering caused by the immigration system, it is time to reconsider the norms that drive immigration policies and practices. Feminist reasoning values the perspectives of outsiders, exposes the deep-rooted bias in the legal opinions of courts, and illuminates the effects of ostensibly neutral policies that create and maintain oppression and hierarchy. This book seeks to add depth and social relevance to U.S. Supreme Court immigration law decisions while prioritizing critical feminist and race concerns in the redesign of immigration law.

In the spirit of the original volume, *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (Cambridge University Press, 2016), we asked authors to rewrite foundational Supreme Court immigration opinions and present reimagined doctrinal and normative perspectives through a feminist lens. These new opinions confront and tear down the troubling pillars of existing immigration doctrine and lay a new foundation, grounded in a feminist vision of justice. Their approaches are as diverse as they are inspirational. The rewritten opinions shed new light on judicial decision-making by resisting dominant paradigms. The related commentaries consider the historical, social, and political circumstances in which the original opinions were decided.

This volume began with several conversations with the founding editors of the series in which they passed on to us the process and goals of the *Feminist Judgments* project. These conversations provided a conceptual, yet flexible, framework that helped us to assemble a diverse advisory panel of widely recognized immigration scholars, with whom we consulted on the selection of the U.S. Supreme Court immigration opinions featured in this volume. We finalized a list of fourteen opinions far reaching in their implications for noncitizens.

Collectively, this volume undertakes an analytic approach that we call critical immigration legal theory.[1] At their core, the chapters interrogate the ways in which immigration law constructs and sustains subclasses of people based on gender, race, class, and other historically oppressed identities. In so doing, they employ a variety of feminist approaches that embrace anti-subordination theory, are intersectional and anti-essentialist, and closely align with critical race theory. In particular, this critical study of immigration law elucidates the current doctrine's role in reifying white patriarchy via the regulation of noncitizens. If the approaches collected

[1] Kathleen Kim, Kevin Lapp, & Jennifer J. Lee, *Critical Immigration Legal Theory* (Aug. 20, 2022) (unpublished manuscript) (on file with authors).

here were integrated in future judicial opinions and discussions on immigration policy, they could help to bring this country's immigration system in harmony with a multicultural democracy.

SUPREME COURT IMMIGRATION JURISPRUDENCE

The U.S. Supreme Court immigration opinions examined and rewritten in this volume are well known in the canon of immigration jurisprudence. They represent a thoughtful and thorough curation of Supreme Court opinions from the early foundations of immigration law to twenty-first century developments in immigration law addressing the rights of immigrants in deportation proceedings or detention, state versus federal immigration regulation, and the rights of undocumented workers and children. These opinions also tackle the interaction of immigration law with other areas such as criminal law, education law, labor law, and administrative law.

The dominant immigration law paradigm of federal supremacy and noncitizen subordination emerged from a line of Supreme Court decisions that began in 1875, wherein the Court pronounced immigration policy and regulation to be an exclusive function of federal governmental control.[2] The timing of these foundational immigration opinions coincided with the end of Reconstruction. Post-Civil War efforts to fully realize the citizenship and rights of newly freed slaves faced a swift and strong backlash. White supremacy succeeded in abruptly ending Reconstruction and fed new energy into xenophobic attacks against Chinese, other Asian migrants, and Mexican migrants, who had filled the U.S. demand for low to no cost labor following the formal end of chattel slavery. Indeed, the long-term residence of a growing number of Chinese laborers prompted this country's first immigration laws, meant to exclude and remove Chinese and Asian migrants along explicit gendered and racialized terms.[3] The Page Act, enacted in 1875, prohibited the entry of migrants from China "and other oriental countries." It rendered Asian women as prostitutes, inherently immoral and debase, and therefore unfit to enter the United States. The law portrayed Asian men as taking jobs away from white Americans and, like Asian women, inherently criminal and unable to assimilate to white America.

Such xenophobia continued well into the 1920s, when the Court denied citizenship to Asian immigrants on the basis that they could not readily integrate with Europeans to be considered "free white persons" under the Naturalization Act.[4] The Undesirable Aliens Act of 1929 criminalized illegal reentry for the purpose of expelling Mexican agricultural workers in the United States after the growing season and harvest. Supreme Court opinions addressing these laws deliberately

[2] Chy Lung v. Freeman, 92 U.S. 275, 280 (1875).
[3] Nishimura Ekiu v. United States, 142 U.S. 651, 659–60 (1892); United States v. Wong Kim Ark, 169 U.S. 649, 653 (1898); Mae Ngai, The Chinese Question: The Gold Rushes and Global Politics 149–50 (2021).
[4] United States v. Bhagat Singh Thind, 261 U.S. 204, 214–15 (1923).

reinforced white patriarchal supremacy by defending government efforts to eliminate the migration and integration of non-white persons.

The Supreme Court upheld the validity of exclusionary immigration restrictions like the Page Act, the Chinese Exclusion Acts, and others, through what became known as the plenary power doctrine. This doctrine designates the political branches of the federal government as having exclusive authority to regulate immigration. It commands that neither states nor the judiciary may interfere in the authority of Congress and the Executive over immigration matters. This power was not explicitly enumerated anywhere in the Constitution. Rather, the Court justified the plenary power doctrine by inferring extraconstitutional principles that invoked the inherent power of a sovereign nation to protect its borders in the name of national security.

Via the plenary power doctrine, the Court granted the federal government unfettered discretion in determining immigration enforcement priorities and practices. Following World War II, the government deployed that power to uphold legislation and immigration agency decisions that targeted Communists. In a series of cases, the Court held that excluding noncitizens from entry to the United States without a hearing, and without ever disclosing the basis for the decision to exclude, did not violate the Constitution.[5] Rather, the Court concluded that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." At the same time, it made it clear that discrimination against noncitizens in favor of citizens did not violate the Constitution.[6]

Beginning in the 1980s, federal immigration law increasingly criminalized migration by prohibiting the employment of undocumented workers, expanding the grounds for deporting longstanding lawful permanent residents ("green card" holders), and creating mandatory detention for certain immigrants subject to removal.[7] The resources devoted to surveilling the border and enforcing immigration laws in the country's interior vastly expanded. At the same time, immigration enforcement became increasingly punitive through the expanded use of immigrant detention and a militarization of border security.[8]

U.S. Supreme Court jurisprudence endorsed this enforcement regime over the rights of immigrant children, families, and workers. The Court, for example, refused to consider whether the government had violated the equal protection doctrine by racially discriminating against Black Haitian asylees in the 1980s who

[5] United States ex. rel. Knauff v. Shaughnessy, 338 U.S. 537, 546–47 (1950); Shaughnessy v. United States ex. rel. Mezei, 345 U.S. 206, 214–15 (1953), Kleindienst v. Mandel, 408 U.S. 753, 769 (1972).

[6] Mathews v. Diaz, 426 U.S. 67, 80 (1976).

[7] Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359; Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

[8] Adam Goodman, The Deportation Machine: America's Long History of Expelling Immigrants 167–68 (2020).

fled persecution by the authoritarian Duvalier government. The Haitian asylum seekers were immediately incarcerated, a sudden reversal of longstanding policy that had allowed all immigrants seeking asylum to await disposition of their asylum claims inside the United States. The Court, however, found the government's actions nondiscriminatory.[9] In another case, the Court refused to scrutinize the government's detention of children. It declined to consider the best interest of the child when detaining unaccompanied children fleeing persecution from Central America in the 1980s and 1990s.[10] The Court also held that immigration enforcement goals superseded the labor organizing rights of undocumented workers under the National Labor Relations Act. An undocumented worker who suffered illegal retaliation by his employer for exercising his labor rights could not recover full labor remedies because his employment violated federal immigration law.[11]

Notwithstanding the Supreme Court's typical deference to the federal government's plenary power, the Court has recognized limited constitutional rights of noncitizens in narrow circumstances. These include the procedural due process rights of a long-time lawful permanent resident with significant ties to the United States[12] and the Sixth Amendment's guarantee that noncitizen criminal defendants receive effective assistance of counsel, including guidance on the immigration consequences of certain plea deals.[13] Other decisions have found that undocumented children have the right to attend public school under the Equal Protection Clause,[14] and that substantive due process requires that detained immigrants must receive a bond hearing every six months if there is no country to which they can be deported in the foreseeable future.[15]

While it is difficult to discern a unifying rationale for the constitutional protections afforded by these seemingly outlier cases, their influence has been limited to the circumstances under which they arose. The Court, for example, has declined to further recognize the substantive due process rights of detained immigrants awaiting their deportation.[16] For immigrants subjected to prolonged detention during the pendency of their deportation hearings, the Court has held that federal immigration law did not require periodic six-month bond hearings.[17] Moreover, undocumented immigrants as a class have not succeeded in gaining equal protection rights except for children in public schools.[18]

[9] Jean v. Nelson, 472 U.S. 846, 854–55 (1985).
[10] Reno v. Flores, 507 U.S. 292, 315 (1993).
[11] Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 151–52 (2002).
[12] Landon v. Plasencia, 459 U.S. 21, 34 (1982).
[13] Padilla v. Kentucky, 559 U.S. 356, 374 (2010).
[14] Plyler v. Doe, 457 U.S. 202, 221–22 (1982).
[15] Zadvydas v. Davis, 533 U.S. 678, 701 (2001).
[16] Demore v. Kim, 538 U.S. 510, 527–28 (2003).
[17] Jennings v. Rodriguez, 138 S. Ct. 830, 844 (2018).
[18] Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 Duke L.J. 1723, 1734 (2010).

Curiously, the plenary power doctrine has strengthened federal preemption challenges to invalidate state anti-immigrant policies that obstruct federal jurisdiction over immigration. In 1984, California's enactment of Proposition 187, which denied access to public services by undocumented immigrants, triggered a wave of similar anti-immigrant efforts by states and localities.[19] Thereafter, multiple states and localities enacted anti-immigrant laws purportedly in response to the perceived failure of the federal government to control unauthorized migration. These laws, such as Arizona's S.B. 1070 enacted in 2010, were designed to create inhospitable living conditions for immigrants to encourage their self-deportation.[20] Relying on the plenary power doctrine, the Supreme Court invalidated Arizona's infamous "show me your papers" mandate that sought to criminalize undocumented status.[21] It found that such state efforts unconstitutionally preempted exclusive federal jurisdiction over the enforcement of immigration law.[22]

The Court's deference to the political branches on immigration matters legitimizes an immigration regime that, because of politics and noncitizens' lack of a right to vote, enables the othering of noncitizens. Today, the plenary power doctrine remains alive and well in U.S. Supreme Court decisions that address immigration matters. In the 2018 case, *Trump* v. *Hawaii*, the Court recited the plenary power doctrine in upholding the constitutionality of the Trump administration's third attempt at an Executive Order, which had been initially premised on prohibiting the entry of immigrants from Muslim-majority countries.[23] The overt discriminatory intent of the Executive Order to ban noncitizens based on their race, national origin, and religion would have drawn heightened judicial scrutiny under the equal protection doctrine in non-immigration matters. Yet the Court reiterated:

> For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a fundamental sovereign attribute exercised by the government's political departments largely immune from judicial control. Because decisions in these matters may implicate relations with foreign powers, or involve classifications defined in the light of changing political and economic circumstances, such judgments are frequently of a character more appropriate to either the Legislature or the Executive.

Consequently, the immigration system continues to maintain a racialized hierarchy that determines who gets in and is allowed to remain, while inflicting serious harms by separating families, incarcerating immigrants in deplorable conditions, and exploiting undocumented workers. In a recent decision addressing the Trump administration's rescission of the Deferred Action for Childhood Arrivals (DACA)

[19] 1994 Cal. Legis. Serv. Proposition 187.
[20] S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).
[21] Arizona v. United States, 567 U.S. 387, 416 (2012).
[22] Kerry Abrams, *Plenary Power Preemption*, 99 Va. L. Rev. 601, 610 (2013).
[23] Trump v. Hawaii, 138 S. Ct. 2392, 2418–20 (2018).

program, the Court declined to consider plaintiffs' claims of discrimination.[24] DACA provided deportation relief for hundreds of thousands of young immigrants brought to the United States as children. While the Court reinstated the program on procedural grounds, it refused to contend with the ample evidence of explicit racial animus that may have motivated DACA's revocation.

The Court's avoidance of the racialized ways in which the federal government discriminates against noncitizens of color is emblematic of its treatment of immigration matters generally. Rather than invalidate the subordination of noncitizens, the Court has strengthened an immigration enforcement system that deprives noncitizens of protections against arrest, detention, and deportation. Consequently, social and political movements for immigrants' rights often look well beyond the courts for reimagining the immigration law system.

FEMINIST JUDGMENTS

Confronted with this canon of U.S. Supreme Court opinions, we asked contributing authors to reimagine these opinions through a feminist lens, broadly conceived. Although bound by the precedent and facts that informed the original Supreme Court cases, authors were free to reach different outcomes. Some authors chose to draft a new majority opinion reaching a new result. Others penned a concurrence to address issues ignored by the majority. A few drafted a new dissent. Accompanying each rewritten opinion is a commentary that contextualizes the original opinion and discusses the interventions raised by the rewrite. As a result, this volume engages an innovative analytical approach that highlights the interventions that critical feminist reasoning can bring to reshape the current immigration legal regime.

A. *Contributing Authors*

To encourage maximum inclusivity in our roster of contributing authors for this volume, we publicized an open solicitation. We reviewed submissions from interested authors and selected those with a variety of backgrounds who endeavored to apply critical perspectives to the designated cases.

The contributing authors bring considerable knowledge and insight to each opinion addressed in this volume. The authors are experts in immigration law and other substantive legal areas, such as criminal law, workplace rights, administrative law, critical race theory, and civil rights. They represent a diverse range of prominent legal voices in the field of immigration law. They include law professors who teach immigration law and run legal clinics that work directly with immigrants and their communities. Others are from outside the academy and at the forefront of the fight

[24] Dep't of Homeland Sec. v. Regents of Univ. of Cal., 140 S. Ct. 1891, 1915–16 (2020).

for immigrant rights. Indeed, some authors served as counsel or filed amicus briefs in the cases included here. These authors have grappled with the opinions in this volume as legal advocates and thought leaders, whose incisive analyses bring a new vision to these U.S. Supreme Court immigration law opinions.

B. *Critical Approaches*

While we refrained from asking authors to adopt a specific feminist theoretical framework, the chapters in this volume collectively embody critical immigration legal theory. They reach beyond basic doctrinal knowledge of immigration law to contest the fundamental presumptions that the immigration system makes about who belongs in our national community. Notwithstanding their diversity, the authors share some common approaches in the feminist rewriting of their opinions. Many opinions apply a feminist anti-subordination framework by illuminating how entrenched systems of power maintain a structural hierarchy over noncitizens. Others engage in feminist storytelling by focusing on the lived experiences of diverse noncitizens whose lives lay at the heart of the legal decisions decided in their name. Some embrace feminist anti-essentialism by considering the social, historical, and political context of such opinions not only to contest immigrant stereotyping but also to wrestle with the inherent complexities of each situation. These approaches closely align with other critical theories, such as critical race theory, by exposing and challenging deep-rooted biases in immigration law based on race, class, and gender.

Like other critical theories, critical immigration legal theory also has a praxis dimension that aims to transform the immigration system.[25] Given the background of these authors as movement lawyers, clinicians, activists, and immigrants themselves, their chapters reflect the practice of those actively seeking a better world. Some opinions fundamentally expand the scope of noncitizen rights to enter and remain in the United States. Other opinions identify the collateral consequences of seemingly "immigrant friendly" opinions that result in further subordinating noncitizens by reinforcing stereotypes. Still others replace immigration enforcement concerns with communal values such as inclusivity, equity, and relational bonds. As many of the authors are engaged in the fight for immigrant rights, they have become intimately familiar with their clients' interactions within the immigration law system.[26] Bolstered by such experience, the commentaries and rewritten opinions provide space for reimagining how the law can and should resist the structural determinism of the Supreme Court's immigration law jurisprudence.

[25] *See* Richard Delgado & Jean Stefancic, Critical Race Theory: An Introduction 3 (3d ed. 2017).

[26] *See* Wendy A. Bach & Sameer M. Ashar, *Critical Theory and Clinical Stance*, 26 Clinical L. Rev. 81, 91 (2019).

1. Anti-Subordination

Most of the opinions in this volume undertake an anti-subordination examination of immigration jurisprudence, which contends with the ways in which immigration law structurally oppresses noncitizens of color. Feminist legal theory is rooted in a commitment not just to equality, but to anti-subordination. Anti-subordination feminism recognizes the social oppression of certain groups.[27] According to this framing, "it is inappropriate for certain groups in society to have subordinated status because of their lack of power in society as a whole."[28] As such, the concept of power is central to an anti-subordination critique. There is arguably no greater power than the power to make and enforce law. For much of U.S. history, that power was exclusively held by white men in the role of legislators, judges, and law enforcers. As law makers and enforcers who lived middle or upper class lives, they enshrined their own supremacy and codified, or imposed through the exercise of their power, the subordination of women, people of color, the poor, and outsiders.

This subordination was often intentional and explicit, but not always. Feminist scholars realize that at first glance, many laws appear neutral and can be justified by reasonable concerns. Upon closer scrutiny, however, those same laws may reveal sexist, racist, classist, or other repugnant motivations and embody powerful mechanisms of discrimination and devaluation. Critical race theorists have similarly argued about the shortcomings of facially neutral laws that have had a devastating impact on the economic, political, and social lives of Black people and other people of color.[29]

Immigration law maintains a racialized and gendered regime premised on white patriarchal supremacy that subordinates noncitizens of color and constrains their ability to enter, remain in, and become full political members of, the United States. Other marginalized identities exacerbate this subordination. Undocumented immigrants, for example, lack political membership as well as lawful status in the country. Undocumented immigrants of color who are women, LGBTQ+ and in poverty experience additional axes of systemic inequality.

The subordination of noncitizens results from blindness or acquiescence to the traditional power structure that dominates cases involving noncitizens. For over a century, the U.S. Supreme Court has accepted this. The Court upheld the constitutionality of explicit anti-Chinese immigration laws by granting the Executive and Congress with virtually unfettered power to govern the entry and removal of

[27] Kathryn M. Stanchi, Linda L. Berger & Bridget Crawford, *Introduction to the U.S. Feminist Judgments Project*, *in* Feminist Judgments: Rewritten Opinions of the United States Supreme Court 3, 19 (2016).

[28] Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. Rev. 1003, 1007 (1986).

[29] Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331, 1378 (1988).

noncitizens. Further, facially neutral immigration regulations make it difficult to challenge the discriminatory impact of such rules. Prior to the Immigration and Nationality Act (INA) of 1965, for example, the United States had explicit racial quotas for immigration admissions. The INA of 1965 supplanted those racial quotas with seemingly neutral immigration admission criteria. Yet today's immigration system still enables a racialized hierarchy that prevents the legal admission of certain immigrants from India, China, Mexico, Central America, and the Philippines. Immigration policies and practices disproportionately harm noncitizens of color. Approximately ninety-five percent of deportees are Latino.[30] And although only seven percent of noncitizens in the United States are Black, they comprise twenty percent of those facing deportation based on criminal grounds.[31] Without proof of intentional discrimination, the law of equal protection does not generally provide redress. Even when there is evidence of discriminatory intent, such as with the Trump Administration's travel ban targeting Muslim immigrants, the Court has chosen to ignore it in the immigration context.

Given this history of structural racism, it is not surprising that anti-subordination analysis is prominent throughout the rewritten opinions in this volume. In *Chy Lung v. Freeman*, the first case in U.S. history with a Chinese plaintiff, Professor Stewart Chang rewrites the majority opinion to reject the overt racism of a California immigration statute that discriminated against Chinese and Asian women on equal protection grounds, rather than deferring to the federal government's plenary power over immigration. Professor Jonathan Weinberg rewrites the majority opinion in *Wong Kim Ark*, to uplift the Fourteenth Amendment's anti-subordination promise of territorial birthright citizenship to the children of the formally enslaved to the U.S. born children of noncitizens of color. Professor Joy Kanwar's dissent in *United States v. Thind* critiques the ways in which the immigration system explicitly maintained white supremacy through its naturalization regime. Professor Shoba Sivaprasad Wadhia's concurrence in *Plyler v. Doe* and Professor Kati Griffith's majority opinion in *Hoffman Plastic v. NLRB*, focus on recognizing and remedying the subordination of undocumented immigrants in the context of education or the workplace. Professor Marissa Montes's dissent in *Padilla v. Kentucky* demands that the obligations of criminal defense counsel under the Sixth Amendment take into account the racism, classism, sexism and overall discrimination that plague our criminal system. These authors highlight the ways in which race is intertwined with the subordination of immigrants.

[30] *Detention, Deportation, and Devastation: The Disproportionate Effect of Deportations on the Latino Community*, Mexican Am. Legal Def. & Educ. Fund (May 2014), www.maldef.org/assets/pdf/DDD_050614.pdf.

[31] Juliana Morgan-Trostle et al., *The State of Black Immigrants, Part II: Black Immigrants in the Mass Criminalization System*, Black All. for Just Immigration & N.Y.U. L. Immigrant Rts. Clinic (Sept. 28, 2016), https://nyf.issuelab.org/resource/the-state-of-black-immigrants-part-ii-black-immigrants-in-the-mass-criminalization-system.html.