

A Positive Immigration Agenda for Racial Justice

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Tagged as : [Immigration](#)

Date : July 7, 2021

Kevin Johnson, [Bringing Racial Justice to Immigration Law](#), 116 **Nw. U.L. Rev.** 1 (2021).

Since the summer of 2020, Americans have been having more explicit discussions about racial hierarchy in the United States and the role of law enforcement in maintaining such hierarchy. Kevin Johnson's forthcoming essay, *Bringing Racial Justice to Immigration Law*, brings that conversation to immigration law. Johnson argues that Congress, but ultimately the Supreme Court, needs to explicitly address the racial animus that has motivated the structure of immigration law in the United States. Through an examination of immigration history, the emergence of a robust immigrant rights movement, and the significant backlash from the Trump Administration, Johnson demonstrates that a positive agenda for immigration reform is required in order for the country to move towards a more just immigration system, rather than simply reverting to the pre-Trump immigration system, which was not a model for justice.

Johnson's essay begins by mapping the racially discriminatory foundations of immigration law and the minimal role that courts have played in acknowledging and remedying such discrimination. The essay then discusses the emergence of the robust immigrant rights movement despite the fact that non-citizens are not eligible to vote. A response to the growth of the immigrant rights movement was a backlash by the Trump Administration. The next section of the essay explores the efforts undertaken by the Trump Administration to "maintain and reinforce the racial caste quality of the immigration system." (P. 3.) The essay ends with an appreciation for the immigrant rights movement, and the claim that the goals sought by the movement will only be "meaningful, lasting, and truly transformative" if the Supreme Court jurisprudence shifts to require robust constitutional review of immigration laws and "allows the courts to serve as a check on racial animus." (P. 3.)

Bringing Racial Justice to Immigration Law is a timely and important piece because it draws attention to the role of racial animus in the structure of U.S. immigration law. Scholars often recount the xenophobic concerns that have motivated the country's immigration law, but it is rarely referred to as feature of the system. Rather it is examined as a bug. Johnson's piece requires readers to rethink that analysis.

Acknowledging the structural challenges within U.S. immigration law leads Johnson to highlight two important features of a positive immigrant rights agenda. The first is legislative reform because at present it is "likely the only way to attempt to bring greater racial justice for immigrants." (P. 11.) Congress could enact the DREAM Act, comprehensive immigration reform, and reform the immigration bureaucracy. These would bring about important changes that would positively impact the lives of millions of individuals. However, Johnson explains that these types of reforms will be vulnerable to the goals and perspectives of the next political majority because courts exercise such minimal review of substantive immigration law.

Therefore the second claim is that the Supreme Court must require "constitutional review of the immigration laws and allow[] the courts to serve as a check on racial animus." (P. 3.) As Johnson details in his essay, the Supreme Court established an extremely deferential standard of review for immigration cases in the 1800s that limits the courts from reviewing substantive challenges to immigration laws, particularly in the area of Equal Protection challenges. Therefore the political branches can, and have, enacted immigration restrictions rooted in racial animus and the courts have failed to acknowledge the racial animus or strike down the laws or policies. As Johnson explains, "[t]he immigration laws' immunity from constitutional review encourage Congress to act on its worst instincts and prevent a dialogue between

the judicial, legislative, and executive branches about the constitutional constraints on immigration law and policy.” (Pp. 12-13.) Meaningful change within immigration law will require substantive changes to the law, but also significant changes in the role of the courts as a check on the political branches.

As Congress considers the various immigration bills before it, it is important to remember that “[w]ithout constitutional constraints, the nation can expect repeated episodes of anti-immigrant sentiment fueled by racial animus, with the Trump presidency simply making the most recent and extreme one.” (P. 13.)

Cite as: Angela Banks, *A Positive Immigration Agenda for Racial Justice*, JOTWELL (July 7, 2021) (reviewing Kevin Johnson, *Bringing Racial Justice to Immigration Law*, 116 *Nw. U.L. Rev.* 1 (2021)), <https://lex.jotwell.com/a-positive-immigration-agenda-for-racial-justice/>.