GEOGRAPHIC AND LINGUISTIC BELONGING: A PREREQUISITE FOR FULL CONSTITUTIONAL RIGHTS

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Abstract

Despite widespread pressure, the Supreme Court has not overruled the *Insular Cases*, a set of cases the Court decided between 1901-1922 which are infamous for their racist rhetoric and their determination that the Constitution should not apply in full to all Americans. Serving as part and parcel of the Anglo-Saxon colonialist project, these cases helped generate a conception of American "belonging" that excludes non-white or non-English-speaking individuals. Today, this legacy manifests through discriminatory border protection policies and perpetuations of

an English linguistic supremacy, both which serve to denigrate Latine individuals and which leave them with more tenuous access to justice. While overruling the *Insular Cases* is long overdue, the ethno-racialized system of exclusion that they perpetuated is so deeply entrenched into our society that departing from the cases' deplorable legal precedents today would not suffice to prove that the country has abandoned their divisive norms.

Introduction

The "anticanon" refers to a collection of "deplorable" Supreme Court cases[1] that have been widely condemned in the legal community. Scholars include these cases in the anticanon, not because "[t]here is consensus within the legal community that the cases are wrongly decided," but rather, as Jamal Greene explains, because "there is disagreement, even irreconcilable disagreement, as to *why*."[2] Greene continues: "This feature of anticanon cases is indispensable, as it enables multiple sides of contemporary constitutional arguments to use the anticanon as a rhetorical trump,"[3] meaning anticanon cases may be cited negatively to advance various—even divergent—legal arguments.[4] Yet, with little exception, they are only cited negatively. However, not all cases generally thought of as "deplorable" are relegated to the anticanon. Some remain a part of mainstream judicial reasoning, and Greene's characterization of the anticanon suggests that those non-anticanon deplorable cases typically meet at least one of the following criteria: 1) they remain

[1] The anticanon includes *Dred Scott v. Sandford*, *Plessy v. Ferguson*, *Lochner v. New York*, and *Korematsu v. United States*. Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 380 (2011); *see also* Sherally Munshi, *"The Court of the Conqueror": Colonialism, the Constitution, and the Time of Redemption* (September 1, 2019), *in* Law's Infamy: Understanding the Canon of Bad Law, 50, 77 (Austin Sarat et al. eds.) (NYU Press 2021).

[2] Greene, *supra* note 1, at 384 (emphasis added).

[3] *Id*.

[4] For example, while justices spanning the ideological spectrum scorn *Plessy v. Ferguson*, conservative justices deploy Justice Harlan's famous line from dissent that "[t]here is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens," Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), to advance the proposition that any race-based classifications are pernicious, including as part of affirmative action plans. *See* Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 772 (2007) (Thomas, J., concurring). Others criticize that argument, asserting instead that "colorblindness, as a constitutional ideal . . . misidentifies race-consciousness as the source of racial inequality, [and] leaves structural racism unexamined and unavailable for redress." Munshi, *supra* note 1 at 78.

controlling precedent, 2) they have not earned a consensus as to their erroneousness; 3) they do not represent a departed-from principle that litigators and judges can caution against, when urging distinct contemporary arguments. The *Insular Cases*, a collection of cases decided between 1901 and 1922,[5] meet all three criteria. They are disgraceful because of their racist rhetoric and exclusive conception of rights,[6] yet they are still controlling;[7] they are regarded by many—but not by all—as wrongly decided;[8] and the country has not abandoned the divisive and racialized

[5] *See* Ballentine v. United States, No. CIV. 1999–130, 2001 WL 1242571, at *5 n.11 (D.V.I. Oct. 15, 2001) ("[N]ine Supreme Court cases decided in 1901 make up the core *Insular Cases: DeLima v. Bidwell,* 182 U.S. 1 (1901); *Goetze v. United States,* 182 U.S. 221 (1901); *Crossman v. United States,* 182 U.S. 221 (1902); *Dooley v. United States,* 182 U.S. 222 (1901) (*Dooley I*); *Armstrong v. United States,* 182 U.S. 243 (1901); *Downes v. Bidwell,* 182 U.S. 244 (1901); *Huus v. New York & Porto Rico Steamship Co.,* 182 U.S. 392 (1901); *Dooley v. United States,* 183 U.S. 151 (1901) (*Dooley II*); and *Fourteen Diamond Rings v. United States,* 183 U.S. 176 (1901). A second set of cases, decided between 1903 and 1914, further developed the *Insular Cases: Hawaii v. Mankichi,* 190 U.S. 197 (1903); *Gonzales v. Williams,* 192 U.S. 1 (1994); *Kepner v. United States,* 195 U.S. 100 (1904); *Dorr v. United States,* 195 U.S. 138 (1904); *Mendezona v. United States,* 195 U.S. 158 (1904); *Rassmussen v. United States,* 197 U.S. 516 (1905); *Trono v. United States,* 199 U.S. 521 (1905); *Grafton v. United States,* 206 U.S. 333 (1907); *Kent v. Porto Rico,* 207 U.S. 113 (1907); *Kopel v. Bingham,* 211 U.S. 468 (1909); *Dowdell v. United States,* 221 U.S. 325 (1911); *Ochoa v. Hernandez,* 230 U.S. 139 (1913); *Ocampo v. United States,* 234 U.S. 91 (1914). The series culminated in 1922 with *Balzac v. Porto Rico,* 258 U.S. 298 (1922).").

[6] *See infra* note 17 and accompanying text.

[7] *See, e.g.*, United States v. Vaello Madero, 142 S. Ct. 1539, 1554 (2022) (holding that it was constitutional to deny social welfare benefits to an individual on the basis that he moved to Puerto Rico, based on the premise from the *Insular Cases* that the Constitution can apply differently in "unincorporated Territories like Puerto Rico") (Gorsuch, J., concurring); Tuaua v. United States, 788 F.3d 300, 302 (D.C. Cir. 2015) (holding that the Fourteenth Amendment Citizenship Clause does not apply to unincorporated territories, thereby leaving American Samoa residents without birthright citizenship). In so holding, *Tuaua* left American Samoa as the only U.S. territory without birthright citizenship. Natasha Frost, *The Only U.S. Territory Without U.S. Birthright Citizenship*, N.Y. TIMES (Nov. 25, 2022), https://www.nytimes.com/2022/11/25/world/merican/merican-samoa-birthright-citizenship.html [https://perma.cc/9XFM-7RVK]; *see also* 8 U.S.C. §§ 1402, 1406(b), 1407(b) (providing for birthright citizenship in Puerto Rico, the U.S. Virgin Islands, and Guam, respectively); Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Mar. 24, 1976, 90 Stat. 263 (codified as 48 U.S.C. § 1801 (2006)), art. III § 302(a) (providing for birthright citizenship in the Northern Mariana Islands).

[8] *See infra* notes 90–92 and accompanying text for widespread agreement that the *Insular Cases* were wrongly decided; *cf. Developments in the Law – American Samoa and the Citizenship Clause: A Study in Insular Cases Revisionism*, 130 HARV. L. REV. 1680, 1680–91 (2017) (presenting a "revisionist argument" that "repurpose[s]" the *Insular Cases* "to protect indigenous cultures from a procrustean application of the federal Constitution," and citing *Tuaua v. United States* as a case where the court decided not "to impose citizenship by judicial fiat—where doing so requires us to override the democratic prerogatives of the American Samoan people themselves") (quoting *Tuaua*, 788 F.3d at 302). *But see* Rose Cuison

conception of Anglo-Saxon American "belonging" that they perpetuated.[9] That these deplorable cases are not in the anticanon evidences that they continue to pollute our legal system and the societal norms that germinate from it.

The *Insular Cases* determined for the first time how to apply the U.S. Constitution to the territories the U.S. acquired in the Spanish-American War of 1898.[10] *Downes v. Bidwell*, one of the best-known of the *Insular Cases*, held that the Constitution does not automatically apply to the territories, explaining that for the territories to be subject to U.S. jurisdiction does not make them "of the United States," meaning they are not "a part of the American family."[11] In *Bidwell*, the Court presumed that it had the power to prescribe those terms based in part on *Johnson v. M'Intosh*, a prior, infamous case in which the Court justified the colonization of indigenous lands with violently racist imperialist philosophies and declared, "The title by conquest is acquired and maintained by force. The conqueror prescribes its limits."[12] Whereas the *Bidwell* Court applied the Constitution in full to territories that the U.S. sought to incorporate as states, such as Alaska, it applied only "fundamental" constitutional rights to the others, absent a congressional statute conferring a fuller slate of rights.[13] U.S.

Villazor, *Problematizing the Protection of Culture and the Insular Cases*, 131 Harv. L. Rev. F. 127, 140 (2018) (responding to the aforementioned argument by pointing to its limiting principles—including the "inflexible racial-versus-political analytical framework" the Court uses for evaluating laws meant to protect indigenous groups—and urging caution against it).

[9] *See* Villazor, *supra* note 8, at 137 (discussing today's manifestations of the unincorporated territories' "marginalization and invisibility" rooted in the *Insular Cases*, such as the disparate hurricane relief that the U.S. provided to Puerto Rico as compared to Texas and Florida, and evidence of public perceptions that "Puerto Rico is not part of the United States").

[10] *See* Downes v. Bidwell, 182 U.S. 244, 279 (1901).

[11] 182 U.S. 244, 278-79 (1901); *id.* at 339 (White, J., concurring).

[12] *Id.* at 281 (quoting Johnson v. M'Intosh, 21 U.S. 543, 583 (1823)). The *Bidwell* Court relied on that precedent when considering the colonization of the unincorporated territories, presuming that imperialists had "not only the power to govern such territory, but [also] to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the 'American empire.'" *Id.* at 281.

[13] *Bidwell*, 182 U.S. at 280; *Developments in the Law - American Samoa and the Citizenship Clause*, *supra* note 8, at 1681 (explaining that, for example, "residents of the Philippines did not enjoy the jury trial right unless Congress saw fit to confer it by statute"). "But the Court, with one exception, [the Due Process Clause], did not specifically name these fundamental, always applicable rights in any actual holding during the crucial years American colonial policy was being established." Andrew Kent, *The Jury and Empire: The Insular Cases and the Anti-Jury Movement in the Gilded Age and Progressive Era*, 91 S. Cal. L. Rev. 375, 380 (2018).

citizenship was not deemed fundamental[14]—for example, Puerto Rico did not gain birthright citizenship until the Jones Act in 1917[15]—nor could citizenship trigger access to full constitutional rights.[16] The *Insular Cases* are infamous for their white supremacist and colonialist rhetoric. For instance, the *Bidwell* Court referred to residents in various U.S. territories as "alien races," "savage," and incapable of being governed by "the administration of government and justice, according to Anglo-Saxon principles," due to their different "religion[s], customs, laws, methods of taxation, and modes of thought."[17]

Bidwell, which was decided by the same Justices who decided *Plessy v. Ferguson*[18]—a noxious blow to Reconstruction and an anticanon case[19]—reflects the same skepticism about the ability of Puerto Ricans to govern themselves that white southerners espoused about Black people during Reconstruction.[20] Coming eleven years after the Massacre at

[14] *Bidwell*, 182 U.S. at 283.

[15] 8 U.S.C. § 1402.

[16] Balzac v. Porto [sic] Rico, 258 U.S. 298, 309 (1922) (clarifying that the 1917 conferral of birthright citizenship to Puerto Rico did not grant the island other constitutional rights, saying, "It is locality that is determinative of the application of the Constitution, in such matters as judicial procedure, and not the status of the people who live in it").

[17] *Bidwell*, 182 U.S. at 287, 313. Again, the Court drew from its language in *M'Intosh*, which, in justifying the colonization of Native Americans, described them as "fierce savages" "with whom it was impossible to mix, and who could not be governed as a distinct society . . . ." 21 U.S. at 590; *see also* Munshi, *supra* note 1, at 62–63 (discussing how Justice Marshall, in the *M'Intosh* majority decision, portrayed conquest as "inevitable," and "necessary," "as if by some unyielding organic process rather than as a result of concerted national policy"). Further, in the 1900 congressional debate over whether to accord constitutional protections to Puerto Rico, its people were described as follows: "They are of the Latin race, and are of quick and excitable tempers, but they are at the same time patient, docile, frugal, and most of them industrious." José Morín, *A Separate and Inferior Race*, *in* THE LATINO/A CONDITION: A CRITICAL READER 123, 127 (Richard Delgado & Jean Stefancic eds., 2d ed. 2010).

[18] With the exception of Justice Field, who served on the *Plessy* Court but retired in 1897 and was replaced by Justice McKenna prior to the 1901 *Bidwell* decision, the same Justices that decided *Plessy* decided *Bidwell*: Chief Justice Fuller, and Associate Justices Harlan, Gray, Brewer, Brown, Shiras, White, and Peckham. *Plessy v. Ferguson*, Oyez, https://www.oyez.org/cases/1850-1900/163us537 (last visited May 8, 2023); *Downes v. Bidwell*, Justia, https://supreme.justia.com/cases/federal/us/182/244/ (last visited May 8, 2023).

[19] *See* Greene, *supra* note 1, at 380.

[20] According to the Dunning School of Reconstruction, "depicted in popular works like Birth of a Nation and scholarly works by white historians, Reconstruction had been an ignominious failure — proof that blacks couldn't be trusted to participate in American democracy." Robert Greene II, *The Legacy of Black Reconstruction*, JACOBIN (Aug. 27, 2018), https://jacobin.com/2018/08/web-du-bois-black-reconstruction-civil-rights. "This view was challenged, most forcefully in 1935 in historian W.E.B. DuBois' classic work 'Black Reconstruction,' which argued that . . . the period's failures were largely because

Wounded Knee which "marked the end of the Indian Wars,"[21] the *Insular Cases* helped usher in the expansion of the Anglo-Saxon colonial project beyond U.S. continental boundaries to offshore lands.[22]

The *Insular Cases*' two-tiered conception of citizenship survives to this day, perpetuating the subordination the Court judicially created[23] and producing other perverse outcomes.[24] At the time of the *Insular Cases*, the Court created this notion of U.S.-belonging to cultivate and disseminate its racist Anglo-Saxon imperialist principles.[25] Today, the

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Reconstruction didn't go far enough." Chris Kromm, *Fables of the Reconstruction: Why Clinton's Comments About Southern History Matter*, Facing South (Jan. 28, 2016), https://www.facingsouth.org/2016/01/fables-of-the-reconstruction-why-clintons-comments.

[21] Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. Rev. 591, 628 (2009).

[22] *See* Munshi, *supra* note 1, at 72 (quoting Abbott Lawrence Lowell, *The Status of Our New Possessions—A Third View*, 13 Harv. L. Rev. 155, 171 (1899); Laura Gomez, *Manifest Destinies: The Making of the Mexican American Race*, at 45 (New York: New York University Press, 2007)) (emphasis added) (the *Bidwell* Court embraced the "third space" argument that "the United States' overseas territories might occupy the sort of 'third space' to which Indians, and later, Mexicans living in annexed territories, had been consigned—neither inside nor outside the United States but 'so *acquired* as not to form a *part of* the United States'").

[23] *See* Morín, *supra* note 17, at 123 ("The colonization of Puerto Rico by the United States has played a direct role in causing Puerto Ricans to come to the United States, not as 'immigrants,' but under a second-class form of citizenship."); Rivera-Burgos, *infra* note 24, at 2 n.4 (referencing the *Insular Cases*, and explaining that "[i]n the aftermath of Hurricane Maria, many politicians and commentators have suggested that the inadequate response by the federal government to the disaster is a function of race, language, and Puerto Rico's ambiguous status as *belonging to*, but not being *part of*, the American political community"); *see generally* Frances Negrón-Muntaner, *The Crisis in Puerto Rico Is a Racial Issue. Here's Why*, The Root (Oct. 12 2017), https://www.theroot.com/the-crisis-in-puerto-rico-is-a-racial-issue-here-s-why-1819380372.

[24] For example, a U.S. citizen can lose rights by simply moving to Puerto Rico, *see United States v. Vaello Madero*, 142 S. Ct. 1539, 1556 (2022) (holding it was constitutional to deny Puerto Rican individual social welfare benefits on the basis that he moved to Puerto Rico), and "[d]espite having been American citizens for over 100 years, the 3.5 million Puerto Ricans who live on the island have less political influence over the island's fate than those who live on the U.S. mainland (about 5 million)" in part because "[t]he former cannot vote in national elections, do not have a voting member of Congress, and do not have access to certain economic support or protections provided to U.S. states." Viviana Rivera-Burgos, *Language, Skin Tone, and Attitudes toward Puerto Rico in the Aftermath of Hurricane Maria*, Am. Pol. Sci. Rev. 1, 1–2 (2022). Individuals born in American Samoa, by virtue of not having birthright U.S. citizenship, also confront puzzling features of their legal status as U.S. nationalists. For example, "In 2018, a woman born in American Samoa ran as a Republican state House candidate in Hawaii, before learning that she was ineligible to run or even to vote. American Samoans serving as officers in the U.S. Army suddenly found that unless they underwent naturalization, they would be demoted." Frost, *supra* note 7.

[25] *See* Christina D. Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 Yale L.J. 2449, 2455 (2022) ("The unincorporated

U.S. continues to value how much one "belongs" in the U.S. more than their personhood,[26] as evidenced by it conferring weaker legal protections when its Anglo-Saxon nationalist interests—in enforcing geographic boundaries by policing its borders and in maintaining the supremacy of the English language—are implicated.

In this Article, I consider the injurious legacy of the racialized judicial innovation that an individual's rights can vary according to how much they "belong" to the Anglo-Saxon U.S. polity, a construct anchored largely—albeit not solely—in the *Insular Cases*. In particular, I argue that today, the U.S. closely safeguards 1) its territorial sovereignty—as constructed, an inherently ethno-racialized conception, and 2) its idea of English linguistic supremacy as an instrument of exclusion,[27] both at the expense of citizens' legal rights and access to remedies.[28] As evidenced by recent Fourth Amendment jurisprudence[29] and Court decisions vindicating English-only restrictions,[30] our legal system has undercut minority rights in furtherance

territory was a judicial innovation designed for the purpose of squaring the Constitution's commitment to representative democracy with the Court's implicit conviction that nonwhite people from unfamiliar cultures were ill-suited to participate in a majority-white, Anglo-Saxon polity."); *Developments in the Law - American Samoa and the Citizenship Clause*, *supra* note 8, at 1681 ("[T]he Insular Cases were originally conceived as instruments of American expansion in the era of Manifest Destiny . . ."); Martha Minow, *Preface*, RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE at vii (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015) ("When the Supreme Court reached its judgments in the Insular Cases, prevailing governmental attitudes presumed white supremacy and approved of stigmatizing segregation.")

[26] *See generally* Victor C. Romero, *Expanding the Circle of Membership by Reconstructing the 'Alien': Lessons from Social Psychology and the "Promise Enforcement Cases,"* 32 U. MICH. J.L. REFORM 1 (1998) (discussing how the membership/personhood dichotomy applies to undocumented immigrants' rights); *see generally* Rivera-Burgos, *supra* note 24 (studying how a "foreignness-Americanness" paradigm can affect policies).

[27] *See* Rivera-Burgos, *supra* note 24, at 6 ("[T]he English language remains a central component of American identity" and "language—and the English language's status as the quintessentially American language—is perhaps the strongest indicator of one's foreignness or Americanness"); Richard Delgado, *The Law of the Noose: A History of Latino Lynching*, 44 HARV. C.R.-C.L. L. REV. 297, 308, 312 (discussing how "the English-Only movement has been gaining force," having "spr[u]ng up around the time that Latino immigration increased and gained national attention," and how "English-Only orthodoxy" is like a noose that restricts Latines and "operates as a highly coercive sorting mechanism" between those that "belong" and those that do not).

[28] Although I focus, primarily, on Puerto Ricans and Mexicans/Mexican-American histories, the use of legal doctrine to question "belonging" is not limited to those groups. Moreover, note that research for this Article was completed in April 2023.

[29] *See infra* Part IB.

[30] *See infra* Part II.

of these two interconnected values, infecting our social fabric with prejudicial norms.[31] The *Insular Cases*, by manufacturing this legacy and retaining their vitality in our current legal system, remain not "the main drama in the story of constitutional redemption," but the "unchanging architecture of colonial sovereignty often relegated to the backdrop."[32]

I. Geographic "Belonging"

By granting full constitutional protections only to Puerto Rican citizens inhabiting the mainland U.S., the Court in the *Insular Cases* created an "insider-outsider" territorial paradigm, with fewer rights for "outsiders." This holding continues to affect Puerto Rican litigants. For example, in April 2022, the Court held in *United States v. Vaello Madero* that because Congress has not extended all federal benefits to Puerto Rico, Jose Luis Vaello Madero was required to cede his welfare when he moved from New York to Puerto Rico.[33] This liminality, however, also affects Latines in the mainland U.S., and it has deeper roots, some which presaged the *Insular Cases* and the ethno-racialized conception of American sovereignty that they seeded.[34]

A. *The Ethno-Racialized Conception of U.S. Territorial Sovereignty – A Brief History*

The U.S. has been encroaching on minorities' rights to further its territorial sovereignty ambitions since the advent of its Anglo-Saxon imperialist project, long before the *Insular Cases.*[35] In the 1823 landmark case *Johnson v. M'Intosh*, the Supreme Court asserted that Britain, by "discover[ing] and tak[ing] possession of" the Virginia colonies, conferred upon the U.S. a "sovereignty" right so powerful that it gained "an exclusive right to extinguish the Indian title of occupancy."[36] Integral to this colonizing power was the consensus that Native Americans were

[31] In turn, these judicial outcomes perpetuate the Anglo-Saxon conception of belonging. *See* Rivera-Burgos, *supra* note 24 ("Americans have also perceived Puerto Ricans as a foreign or quasi-foreign, migrant group due to their linguistic and cultural differences, as well as the island's territorial and political separation from the U.S. polity.").

[32] Munshi, *supra* note 1, at 54.

[33] United States v. Vaello Madero, 142 S. Ct. 1539, 1542 (2022).

[34] *See* Austin Sarat et al., Law's Infamy: Understanding the Canon of Bad law (New York Univ. Press 2021).

[35] *See id.* at 7 (noting that, in the name of "sovereignty," the government has deprived foreigners of constitutional rights through "cases starting in 1823 with *Johnson v. M'Intosh* and extending through 2018 with *Trump v. Hawaii*").

[36] *See* Johnson v. M'Intosh, 21 U.S. 543, 577, 586–87 (1823).

"an inferior race of people, without the privileges of citizens,"[37] a plainly bigoted philosophy that the *Insular Cases* later relied on to justify the colonization of—and the application of a tiered national membership system to—the territories.[38]

Moreover, at the conclusion of the Mexican-American War in 1848, the Treaty of Guadalupe Hidalgo gave the approximately 75,000 Mexicans living in newly-annexed territory the option of becoming U.S. citizens.[39] But the U.S. maintained its racial superiority by reducing them to second-class citizenship:[40] it "den[ied] them the right to vote" and explicitly declined to grant them full constitutional rights,[41] and it deprived them of property through insurmountable administrative and financial hurdles for Mexican ranch owners to retain ownership,[42] "fraudulent deprivation of their ancestral lands,"[43] and "violations of the Treaty of Guadalupe Hidalgo" itself.[44] White Americans viewed the Mexican-

[37] *Id.* at 569. Seven years after *M'Intosh*, in 1830, "Congress passed the Indian Removal Act, beginning the forced relocation of thousands of Native Americans in what became known as the Trail of Tears." *May 28, 1830 CE: Indian Removal Act*, NATIONAL GEOGRAPHIC (May 19, 2022), https://education.nationalgeographic.org/resource/indian-removal-act [https://perma.cc/3JU8-5T2P].

[38] *See* Kent, *supra* note 13 and accompanying text; *see also* Munshi, *supra* note 1, at 72 ("Lawmakers drew on the history of federal Indian policy to fashion a mode of imperial governance in the overseas territories, according to which constitutional provisions and protections were suspended indefinitely.").

[39] Morín, *supra* note 17, at 127.

[40] *See* Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 975–76 (1995) (quoting Cong. Globe, 30th Cong., 1st Sess., 98 (1848) (remarks of Sen. Calhoun)) (explaining that "[t]he imperative of establishing and preserving a pure white government still ran strong when Anglos first encountered Mexicans" and quoting Senator John Calhoun's 1848 Senate-floor protest against U.S. annexation of Mexican lands: "[W]e have never dreamt of incorporating into our Union any but the Caucasian race – the free white race. To incorporate Mexico, would be the very first instance of the kind of incorporating an Indian race . . .").

[41] Morín, *supra* note 17, at 127–28.

[42] *See* Jeremy Rosenberg, *How Rancho Owners Lost Their Land and Why That Matters Today*, KCET (Apr. 16, 2012), https://www.kcet.org/history-society/how-rancho-owners-lost-their-land-and-why-that-matters-today [https://perma.cc/NF94-ELGX].

[43] Delgado, *supra* note 27, at 309 n.78 (citing RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 155, 309-20 (Juan F. Perea et al. eds., 2d ed. 2007)).

[44] *Id.* at 309 n.79 (citing RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 155, 296–302 (Juan F. Perea et al. eds., 2d ed. 2007)); *see also The Treaty of Guadalupe Hidalgo*, Native American Net Roots (Apr. 17, 2015), https://www.amazon.com/Manifest-Destinies-Making-Mexican-American/dp/0814732054 [https://perma.cc/KMF6-XMW8] ("As with many of its treaties, the United States tended to ignore any provisions which might be inconvenient.").

American War as "a racial clash," epitomized by then-Secretary of State James Buchanan's assertion that "our race of men can never be subjected to the imbecile and indolent Mexican race."[45]

Throughout the 1800s, "racist assumptions inherent in the notion of the 'White Man's Burden,' together with 'Manifest Destiny,' provided the requisite justification for Anglo-American territorial conquests and domination."[46] The white supremacy embedded in America's conception of sovereignty persisted in the nineteenth and twentieth centuries, throughout which "Latin Americans were openly and continually depicted as inferior and racialized 'others,' who were prone to uncivilized behavior, and undeserving of self-government."[47] The *Insular Cases*, by applying these century-old tropes in creating a territories-mainland U.S. constitutional paradigm, solidified and embedded in U.S. law the nationalist notion that "America" is Anglo-Saxon at its core. They continued the long-standing imperialist process of subordinating non-Anglo-Saxon communities when expanding the U.S.'s borders, encompassing them—yet fundamentally *excluding* them—in the U.S. These legacies from the *Insular Cases* that remain imprinted on contemporary constitutional jurisprudence can be seen in recent Fourth Amendment decisions.

B. *Modern Territorial Sovereignty: Patrolling the Border*

The U.S.'s overzealousness in patrolling the U.S.-Mexico border has revealed perhaps one of the most potent modern manifestations of the age-old ethno-racialized conception of sovereignty, in the form of insider-outsider conceptions of the Fourth Amendment.[48] The Supreme Court established that Congress has broad powers over immigration-related matters in the *Chinese Exclusion Cases*,[49] "justif[ying] its deference to Congress by adopting its characterization of Chinese immigration as an 'invasion,' and furnishing the emergent plenary power doctrine with what

[45] Gregory Rodriguez, *Absolut Canard*, L.A. Times (Apr. 14, 2008), https://www.latimes.com/archives/la-xpm-2008-apr-14-oe-rodriguez14-story.html [https://perma.cc/7F8E-MAY7].

[46] Morín, *supra* note 17, at 124.

[47] *Id.* at 126.

[48] *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) ("'[T]he people' seems to have been a term of art employed in select parts of the Constitution . . . . [I]t suggests that 'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.").

[49] *See generally* Ping v. U.S., 130 U.S. 581, 604 (1889), known as a Chinese Exclusion Case.

has proven to be an especially durable rationale for immigrant exclusion: 'national security.'"[50] In the context of (southern) border enforcement, however, the Court would be asked to determine to what degree this power is subject to the Fourth Amendment's limits,[51] designed to prevent "arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals."[52] Specifically, the Fourth Amendment forbids "unreasonable searches and seizures," and requires that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[53] However, the Court has drastically weakened the Fourth Amendment's protections, in part by racializing them, in the U.S. border-enforcement context.

First, the Supreme Court has failed to characterize racial profiling as "unreasonable," even when federal immigration officers blatantly discriminate against Latines. In *United States v. Brignoni-Ponce*, the Court considered the legality of a traffic stop in which Border Patrol agents pulled over Brignoni-Ponce solely because he and his two passengers "appeared to be of Mexican descent," and they arrested all three.[54] The Court held that appearing to be of Mexican descent could be a "relevant factor," albeit not the *sole* basis, for determining whether to stop a motorist and question them on their legal status,[55] without acknowledging anywhere in its decision that Brignoni-Ponce was a U.S. citizen, and—perhaps ironically—Puerto Rican.[56] Just one year later, in *United States v. Martinez-Fuerte*, the Supreme Court held that Border Patrol agents did not violate the Fourth Amendment when operating a fixed checkpoint for vehicles near the border without a judicial warrant, and that they could "refer motorists selectively to a secondary inspection area," for questions about citizenship and immigration status, "*even if it be assumed that such referrals were made largely on the basis of apparent*

[50] Munshi, *supra* note 1, at 70.

[51] *See Ping*, 130 U.S. at 604 ("The power[] to . . . admit subjects of other nations to citizenship, [is a] sovereign power[], restricted in [its] exercise only by the constitution itself.").

[52] United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976).

[53] U.S. CONST. amend. IV.

[54] 422 U.S. 873, 875 (1975).

[55] *Id.* at 887.

[56] *See generally id.*; *see also* Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brinoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1012 (2010) (Brignoni-Ponce was Puerto Rican, one passenger was Guatemalan, and the other was Mexican).

Mexican ancestry."[57] Through these rulings, the Court impliedly reinforced that to be American is to be "white." Moreover, although one of the touchstones for determining whether a Fourth Amendment seizure has occurred, as a threshold matter, is whether "a reasonable person would have believed that he was not free to leave," the Supreme Court in *INS v. Delgado* held that a factory raid in Southern California was not a seizure although armed Immigration and Nationalization Service (INS) agents systematically questioned each worker about their immigration status while other armed INS agents remained stationed near the factory exits.[58] Justice Brennan, concurring in part and dissenting in part in *Delgado*, expressed his concern that raids like these were ripe for discriminatory abuse and Fourth Amendment violations against U.S. citizens, given that "[l]arge numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are [undocumented]."[59] He warned that the Court was "becom[ing] so mesmerized" by the problem of illegal immigration that it was "too easily allow[ing] Fourth Amendment freedoms to be sacrificed."[60]

Whether law enforcement officers believe they are racially profiling Latine people to carry out immigration enforcement in good faith is inapposite. The tendency to racially profile Latine people does not derive from empirically justified methods for effective immigration enforcement.[61] Instead, it derives from an instinct that has been nurtured since the 1800s and given the Supreme Court's imprimatur in the *Insular Cases* that constitutional rights may wither when stacked against territorial sovereignty interests. Even if "Border Patrol officers may use racial stereotypes as a proxy for illegal conduct without being subjectively aware of doing so,"[62] the Supreme Court has perpetuated a "conspicuous lack of awareness of this history [which] provides fertile ground for [the preservation of forms of] prejudice and discrimination that inhibit

[57] *Martinez-Fuerte*, 428 U.S. at 562–63 (emphasis added).

[58] INS v. Delgado, 466 U.S. 210, 215 (1984).

[59] *Id.* at 234 n.4 (Brennan, J., concurring in part and dissenting in part).

[60] *Id.* at 239–40 (Brennan, J., concurring in part and dissenting in part).

[61] *See id.* at 241 n.9 (Brennan, J., concurring in part and dissenting in part) ("Perhaps the Judiciary should not strain to accommodate the requirements of the Fourth Amendment to the needs of a system which at best can demonstrate only minimal effectiveness . . . .").

[62] Alfredo Mirandé, *Is There a "Mexican Exception" to the Fourth Amendment?*, 55 Fl. L. Rev. 265, 389 (citing *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1450 (9th Cir. 1994)).

the realization of full and equal rights and justice for Latinos/as."[63] In its Fourth Amendment immigration enforcement cases, the Court has clearly elevated its goal of protecting the border and keeping out those who do not "belong" at the expense of the individual rights of its citizens and the putative constitutional norm of racial equality.

Worse yet, the Court has severely curtailed the tools that citizens have for enforcing their Fourth Amendment rights. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* in 1971, the Supreme Court recognized that citizens have an inherent constitutional entitlement to redress constitutional violations by suing federal officials for damages in their personal capacity in federal court.[64] *Bivens* concerned a Fourth Amendment claim against FBI narcotics agents who entered and searched an apartment without a warrant and arrested a man without probable cause. In establishing that the civil suit could proceed against the federal officials, the *Bivens* Court extolled a famous justice principle from *Marbury v. Madison*: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[65] *Bivens* left a carve-out from this right, however, noting that in some cases there may be "special factors counseling hesitation in the absence of affirmative action by Congress," such that the Court should not allow a cause of action to proceed.[66] And in *Ziglar v. Abassi* in 2017, the Court dealt what some deemed a "final blow" to the *Bivens* remedy:[67] it counseled that courts should hesitate to allow the *Bivens* remedy in new contexts, even those deemed "new" based on differences as minute as defendants' federal employment category[68]—before exploring potential special factors.[69]

Hernandez v. Mesa reinforced how fatal these decisions were to Fourth Amendment *Bivens* suits. In *Mesa*, the parents of a 15-year-old

[63] Morín, *supra* note 17, at 123.

[64] 403 U.S. 388, 396 (1971).

[65] *Id.* at 397 (quoting Marbury v. Madison, 5 U.S. 137, 163 (1803)).

[66] *Id.* at 396. For example, In *F.D.I.C. v. Meyer*, a bank officer filed a Due Process *Bivens* suit against the Federal Savings and Loan Insurance Corporation, and the Court held that the cause of action could not proceed against the federal agency, in part because it deemed "federal fiscal policy" to be a special factor for which corresponding decisions should be left up to Congress. 510 U.S. 471, 486 (1994).

[67] *See generally* Christian Patrick Woo, *The "Final Blow" to Bivens? An Analysis of Prior Supreme Court Precedent and the Ziglar v. Abassi Decision*, 42 OHIO N.U. L. REV. 511 (2017).

[68] Ziglar v. Abbasi, 582 U.S. 120, 135 (2017).

[69] *Id.* at 139–40.

child who was fatally shot by Border Patrol agents across the U.S.-Mexico border while he was playing a game just south of the border filed suit against the agents.[70] The *Mesa* Court barred the cause of action. It found that the Fourth Amendment excessive force claim fell into the *Bivens* carve-out by implicating two special factors: "foreign relations" and the "national security implications" of regulating agents' conduct at the border.[71] And, applying *Abassi*, it reasoned that the claim arose in a new context since the cross-border shooting was different from prior Fourth Amendment *Bivens* cases.[72] Paradoxically, the Court analyzed the *Mesa* facts broadly when likening its "national security" implications to those of a drastically different case that concerned a "system of military discipline,"[73] yet it scrutinized the case narrowly in its "new context" analysis, readily finding that prior *Bivens* cases presented different facts.

Finally, in *Egbert v. Boule* in 2022, the Supreme Court put Fourth Amendment *Bivens* claims into yet a tighter straightjacket by implying that the Court should forego the "new context" assessment entirely and consider a heightened "special factors" consideration alone. The Court wrote that "this two-step inquiry often resolves to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy."[74] Arguably hammering the final nail to the *Bivens* coffin, the *Egbert* Court said, plainly, "[p]ermitting suit against a Border Patrol agent presents national security concerns that foreclose *Bivens* relief."[75]

In sum, not only has the Court repeatedly failed to treat prejudicial conduct against Latine people in border-enforcement cases as constitutionally-prohibited conduct, but it has also virtually eliminated Latine people's tools for even *contesting* violative conduct.[76] In doing so,

[70] Hernandez v. Mesa, 140 S. Ct. 735, 737 (2020).

[71] *Id.* at 747.

[72] *Id.* at 743–44 (quoting *Abbasi*, 582 U.S. at 140) ("A claim may arise in a new context even if it is based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized," and "[t]here is a world of difference between [prior] claims and petitioners' cross-border shooting claims, where 'the risk of disruptive intrusion by the Judiciary into the functioning of other branches' is significant").

[73] *Id.* at 746–47 (referencing Chappell v. Wallace, 462 U.S. 296 (1983) and United States v. Stanley, 483 U.S. 669 (1987)).

[74] Egbert v. Boule, 142 S. Ct. 1792, 1798 (2022).

[75] *Id.* at 1798.

[76] Although cases like *Abassi*, *Mesa*, *and Boule* do not expressly limit Latines' rights, they will likely have an outsized impact on Latine individuals. First, Latine populations are more concentrated in border states. According to the Pew Research Center in 2022, "California,

it emphasizes the very Congressional powers the Fourth Amendment is supposed to constrain, as well as territorial sovereignty interests.[77] The Court has long allowed the U.S. to exclude foreigners in the name of sovereignty,[78] yet these more recent cases allow it to place a presumption of foreignness on Latine people who are in fact citizens.[79] The judicial imprimatur to racial profiling has led to "intentional[] and systematic[] discriminat[ion] against Latinos" including by "detain[ing] and search[ing] Latinos on the roads, in their homes, and in their workplaces without legal justification for doing so."[80] In effect, Fourth Amendment rights and remedies are more tenuous for Latines regardless of citizenship, and the absence of consequences for federal agents who wrongly treat them as foreigners makes that conflation a self-fulfilling prophecy. Again, Latines' personal rights—here, against unreasonable searches

Texas and Florida hold about half of the U.S. Latino population," which comprises about 19 percent of all Americans. Cary Funk & Mark Hugo Lopez, *A Brief Statistical Portrait of U.S. Hispanics*, PEW RSCH. CTR. (June 14, 2022), https://www.pewresearch.org/science/2022/06/14/a-brief-statistical-portrait-of-u-s-hispanics [https://perma.cc/WG9M-US9T]. Second, "warrantless searches and seizures of persons who are 'Mexican looking' are commonplace and extend well beyond the limits of the Border." Mirandé, *supra* note 62, at 368.

[77] *Cf.* Romero, *supra* note 26, at 17 (explaining how, where national membership is not at stake, nor does the government in the case enjoy Congress' plenary powers, it becomes harder to subordinate "rights to equal personhood" to "governmental claims").

[78] Ping v. United States, 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.").

[79] *See, e.g.*, Miriam Jordan, *In Rare Victory, Immigrants Prevail in Suit over Meat Plant Raid*, N.Y. TIMES (Feb. 27 2023), https://www.nytimes.com/2023/02/27/us/meat-plant-raid-immigrants-tennessee.html?searchResultPosition=1 [https://perma.cc/GW4V-Z6YG] ("In April 2018, armed agents with the Homeland Security Department and the Internal Revenue Service burst into the Southeastern Provision meatpacking plant in Bean Station, a rural town in northeastern Tennessee, and rounded up all but one Latino worker, including at least one U.S. legal resident and one American citizen. The only exception was a man who had hidden in a freezer."); Ray Stern, *Sheriff Joe Arpaio's Office Commits Worst Racial Profiling in U.S. History, Concludes DOJ Investigation*, PHOENIX NEW TIMES (Dec. 15, 2011), https://www.phoenixnewtimes.com/news/sheriff-joe-arpaios-office-commits-worst-racial-profiling-in-us-history-concludes-doj-investigation-6655328 [https://perma.cc/6VLR-XQ6V] (describing how Maricopa County law enforcement officials searched the home of a "legal U.S. resident and his U.S. citizen son," without their consent or a warrant, and "detained them for an hour before being released without any citation").

[80] Press Release, Dep't of Just., Department of Justice Files Lawsuit in Arizona Against Maricopa County, Maricopa County Sheriff's Office, and Sheriff Joseph Arpaio (May 10, 2012); *see also* Stern, *supra* note 79 ("Arpaio oversaw the worst pattern of racial profiling by a law enforcement agency in U.S. history, a DOJ expert concluded.").

and seizures—are subordinated to the country's ethno-racialized interests.[81] Not only can discrimination alone produce humiliation, indignity, and fear, but further, leaving these violations unremedied perpetuates the notion that Latines are outsiders to the U.S. and its legal safeguards. In the words of anthropologist Renato Rosaldo: "By a psychological and cultural mechanism of association all Latinos are thus declared to have a blemish that brands us with the stigma of being outside the law. We always live with that mark indicating that whether or not we belong in this country is always in question."[82]

II. LINGUISTIC "BELONGING"

Another manifestation of the *Insular Cases*' incorporation of Anglo-Saxon colonial norms into American legal tradition is the idea that Americans "are, or should be, English-speaking."[83] This philosophy of English supremacy functions as a proxy for enforcing the political and geographic boundaries and resulting insider-outsider paradigm discussed in Part I. In reality, the U.S. "is a product of many different streams of immigration, ethnicities, and tongues."[84] Latines have a historical presence in the U.S., during which they have struggled for civil rights and equal dignity, enduring a "history of colonialism and oppression" that included land seizures in the Southwest during the 19th century, and Jim Crow laws—and even lynching—in the 20th century.[85] For many Latines, even those who speak English and "become[] assimilated into American society, [their] native language remains an important manifestation of [their] ethnic identity and a means of affirming links to [their] original culture."[86] However, developed in tandem with the value of territorial

[81] For example, in 2018, the federal government "used the pretext" of an investigation into a company owner's potential tax evasion to conduct a work-site raid, inflicting "racial profiling and excessive force" against Latine-presenting individuals presumed to be undocumented immigrants. *Id.* Federal agents dubbed the raid "The Great American Steak Out." *Id.*

[82] RENATO ROSALDO, LATINO CULTURAL CITIZENSHIP: CLAIMING IDENTITY, SPACE, AND RIGHTS 31 (William V. Flores & Rina Benmayor eds., 1997).

[83] Andrea Freeman, *Linguistic Colonialism: Law, Independence, and Language Rights in Puerto Rico*, 20 TEMP. POL. & CIV. RTS. L. REV. 179, 196 (2010–2011); *see also* Perea, *supra* note 40 (citing The Federalist No. 2, at 91 (John Jay) (Isaac Kramnick ed., 1988)) (explaining that federalist John Jay's "wish for America, that it be a homogeneous, white, English-speaking Anglo society, was widely shared by the Framers of the Constitution and other prominent leaders" in the late 18th century).

[84] Delgado, *supra* note 27, at 309.

[85] *Id.* at 309.

[86] Garcia v. Spun Steak Co., 13 F.3d 296, 298 (9th Cir. 1993) (Reinhardt, J., dissenting from

sovereignty,[87] the conception of linguistic supremacy has likewise been elevated to the detriment of individuals' access to justice, encouraging the deleterious, cyclical treatment of Latines as outsiders[88] and provoking vile displays of bigotry.[89] In particular, the U.S. has used linguistic guardrails to exclude Latines from juries; additionally, English-only standards have passed muster in Title VII and Title VI suits even when Latines are clearly disadvantaged, exposing those statutes' structural and functional insufficiencies in enabling litigants to remedy language discrimination.

A. *Jury Exclusions*

Even Puerto Rico—where Spanish is the first and only language of the majority of the population—is defenseless against ongoing linguistic reinforcements of its colonial status, legitimized in part by the *Insular Cases*. Under the Jury Service and Selection Act, one cannot serve on a federal district court's jury if they are "unable to read, write, and understand the English language."[90] In Puerto Rico, where businesses, schools, newspapers, and radio stations tend to be operated in Spanish and 95.2 percent of the population speaks Spanish at home,[91] the English language requirement "excludes approximately eighty percent of the district's population from federal jury service and renders the remaining pool relatively homogenous with regard to class and education levels."[92]

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denial of reh'g en banc).

[87] The U.S. reinforced the linguistic and territorial sovereignty components of its Anglo-Saxon imperialist vision in tandem. For example, "[s]tatehood was withheld from New Mexico for over sixty years because of Congress' unwillingness to grant statehood to a predominantly Spanish-speaking territory populated by Mexican people." Perea, *supra* note 40, at 978–79.

[88] *See* Delgado, *supra* note 27, at 308 (English-Only laws "send[] signals" about "who belongs to America"); Perea, *supra* note 40, at 965–66 ("The mere sound of Spanish offends and frightens many English-only speakers, who sense in the language a loss of control over what they regard as 'their' country. Spanish also frightens many Latinos, for it proclaims their identity as Latinos, for all to hear. The Latino's fear is rational. Spanish may subject Latinos to the harsh price of difference in the United States: the loss of a job, instant scapegoating, and identification as an outsider.").

[89] For example, a white woman in 2019, upon hearing a general manager of a Mexican restaurant—a U.S. citizen of Mexican origin—speak Spanish, screamed at him, "English is our first language, so you need to speak English," "Get the f--- out of my country," and "I got raped by illegal aliens . . . F---ing rapist." Nicole Acevedo, *White Customer at Mexican Restaurant Swears at Spanish-Speaking Manager*, NBC NEWS (Feb. 19, 2019), https://www.nbcnews.com/news/latino/white-customer-mexican-restaurant-swears-spanish-speaking-manager-n973191 [https://perma.cc/ZBW3-9TJ6].

[90] 28 U.S.C.A. § 1865(b)(2) (West 2023).

[91] Freeman, *supra* note 83, at 185.

[92] *Id.* at 181, 183 ("[E]ighty percent of Puerto Ricans identify themselves as unable to

Numerous plaintiffs have brought Sixth Amendment challenges to this rule, given that the constitutional right to trial by jury requires that a jury represent "a fair cross section of the community."[93] However, the First Circuit—which includes Puerto Rico—has repeatedly rejected these constitutional challenges on the ground that the nation's interest in English judicial proceedings supersedes the steep impact that the rule has on Puerto Ricans' ability to sit on juries.[94] Additionally, although the First Circuit has recognized "that most jurors, and even judges, in Puerto Rico may be more comfortable speaking in Spanish than in English," it requires that Puerto Rico's federal court proceedings be conducted in English, warning that if the District of Puerto Rico fails to "be faithfully committed to the English language requirement," it "risks disassociating itself from the rest of the federal judiciary."[95] Contrary to the First Circuit's formalistic approach, scholars have suggested that a Puerto Rico court could both make its proceedings more accessible through the use of Spanish *and* also remain integrated with the broader federal judicial system, by simply "interpret[ing] the record from Spanish to English for the First Circuit's use on appeal."[96]

This exclusionary status quo is enabled by a historical willingness to deny U.S. communities full access to jury rights if they are deemed outsiders, which is again rooted largely in the *Insular Cases*[97] and which

communicate effectively in English.").

[93] 28 U.S.C.A. § 1861 (West 2023); Taylor v. Louisiana, 419 U.S. 522 527 (1975) (citing Smith v. Texas, 311 U.S. 128, 130 (1940)). Whereas in many circuits, courts evaluating similar challenges grapple with "whether the proper point of comparison [to the jury composition] is the whole or the jury-eligible population," that threshold question is inapposite in Puerto Rico: given the island is "almost entirely populated by Spanish speakers," its jury-eligible population is already a small, privileged segment of society, so its Sixth Amendment cases "have focused entirely on whether significant national interests justify the *conceded* exclusion of the majority of the population from jury service." Freeman, *supra* note 83, at 182 (emphasis added).

[94] *See, e.g.*, Miranda v. United States, 255 F.2d 9, 16 (1st Cir. 1958); United States v. Benmuhar, 658 F.2d 14, 20 (1st Cir. 1981); United States v. Aponte-Suárez, 905 F.2d 483, 492 (1st Cir. 1990); United States v. González-Vélez, 466 F.3d 27, 40 (1st Cir. 2006) (reasoning based on "the overwhelming national interest served by the use of English in a United States court").

[95] United States v. Rivera-Rosario, 300 F.3d 1, 20 (1st Cir. 2002).

[96] Freeman, *supra* note 83, at 202.

[97] *See* Dorr v. United States, 195 U.S. 138, 148 (1904) (holding "the right to trial by jury" is not "a fundamental right which goes wherever the jurisdiction of the United States extends"); Balzac v. Porto [sic] Rico, 258 U.S. 298, 309 (1922) (clarifying Puerto Rico did not have the right to trial by jury).

endures through time and beyond the territories.[98] Whether or not the English-only rules pertaining to federal proceedings and jury participation in Puerto Rico are *deliberate* attempts to exclude Puerto Ricans from exercising political rights writ-large, the willful exclusion of such a dominant percentage of Puerto Rican society from juries, often treated as a central part of civic belonging, continues to "relegate the island to a status of linguistic colonialism."[99]

The Court has further reinforced that political participation in juries can be denied based on one's linguistic abilities. In *Hernandez v. New York*, a prosecutor excluded Spanish-speaking jurors on the basis that he doubted whether they would "accept the interpreter as the final arbiter of what was said by each of the witnesses."[100] The Supreme Court held that "[w]hile the prosecutor's criterion for exclusion . . . might have *resulted* in the disproportionate removal of prospective Latino jurors, it is proof of racially discriminatory *intent* or *purpose* that is required to show a violation of the Equal Protection Clause."[101] With this ruling, the Court arguably invited future trial lawyers to use language exclusion as a proxy for racial exclusion. At best, the Court overlooked the fact that language has historically been used as a proxy for intentional discrimination that would violate the Equal Protection Clause:

> The history of Mexican Americans' exclusion from juries, however—and the history of Mexican Americans and Jim Crow in the Southwest more broadly—demonstrates that state officials have been describing their discriminatory practices in terms of language and culture for most of the twentieth century, even when they were engaging in fairly explicit racial discrimination.[102]

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[98] *See* Norris v. State of Alabama, 294 U.S. 587, 598–99 (1954) (recognizing that Black people were systematically excluded from jury duty despite being qualified to serve, thereby reversing a denial of a motion to quash a Black person's indictment); Hernandez v. State of Texas, 347 U.S. 475, 479–82 (1954) (recognizing that Mexican people were systematically excluded from jury duty despite being qualified to serve, and reversing a denial of a motion to quash a Black person's indictment).

[99] Freeman, *supra* note 83, at 201.

[100] Hernandez v. New York, 500 U.S. 352, 356 (1991).

[101] *Id.* at 353 (emphasis added).

[102] Ariela J. Gross, *"The Caucasian Cloak": Mexican Americans and The Politics of Whiteness in the Twentieth-Century Southwest*, 95 GEO. L.J. 337, 339 (2007); *see also* Garcia v. Spun Steak Co., 13 F.3d 296, 298 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of reh'g en banc) ("History is replete with language conflicts that attest, not only to the crucial

Limiting jury access based on the Spanish language—whether to the plurality of Puerto Rico's residents or to mainland-U.S. Latines—deprives them of the crucial opportunity to directly participate "in the dispensing of justice and the preventing of it from falling entirely into the hands of the executive or of a separate and closed caste."[103]

B. *English-Only Rules and Inadequate Title VII and Title VI Protections*

The use of language as a medium for political and civil exclusion in the public realm, including in law enforcement[104]—given judicial imprimatur by the Court—is present also in the everyday realm of interpersonal and economic relationships.[105] Indeed, not a day goes by without a Latine person being lambasted for speaking Spanish.[106] And, during the 2016 Republican primaries, then-candidate Donald Trump took it a step further by criticizing presidential candidate Jeb Bush for speaking Spanish "because the United States is a country 'where we speak English, not Spanish.'"[107] Given this backdrop, not surprisingly, Latine

importance of language to its speakers, but also to the widespread tactic of using language as a surrogate for attacks on ethnic identity.").

[103] Albert W. Dzur, *Democracy's "Free School": Tocqueville and Lieber on the Value of the Jury*, 38 Political Theory 603, 615 (2010) (citing Francis Lieber, 2 Manual of Political Ethics 405 (Theodore D. Woolsey, ed., 2nd ed. Philadelphia: J.B. Lippincott, 1875).

[104] *See* NBC News, *Border Patrol Stops Two Women in Montana For Speaking Spanish*, YouTube (May 21, 2018), https://www.youtube.com/watch?v=jKk7syTWGdM (Border Patrol agent explains to two women that he asked for their identifications because they were speaking Spanish in a convenience store in a state that is "predominantly English-speaking").

[105] Delgado, *supra* note 27, at 312 ("English-Only laws and practices . . . inhibit adults in the ordinary business of work and conversation, and convey the message that outsiders are not welcome unless they behave according to standards set by others.").

[106] *See, e.g.*, Jessica Dominguez, *Reporter Mom Told to "Speak English" Becomes Subject of Her Own Story After Tweet Goes Viral*, ABC 7 News (Aug. 27, 2018), https://abc7news.com/local-mom-speak-english-park-strangers-words/4070212/#:~:text=SOCIETY-,Reporter%20mom%20told%20to%20'speak%20English'%20becomes%20subject%20of%20her,story%20after%20tweet%20goes%20viral&text=A%2016%2Dyear%20veteran%20Los,English%2C%22%20a%20stranger%20demanded [https://perma.cc/T9LA-FF4J] (stranger demands that Salvadorian woman speak English after hearing her talk to her five-year-old daughter in Spanish at a park); Faith Karimi and Eric Levenson, *Man to Spanish Speakers at New York Restaurant: "My Next Call is to ICE,"* CNN (May 17, 2018), https://www.cnn.com/2018/05/17/us/new-york-man-restaurant-ice-threat/index.html (man in New York "berate[s] employees and customers for speaking Spanish" in a restaurant, and says, "My guess is they're not documented. So my next call is to ICE to have each one of them kicked out of my country").

[107] Nick Gass, *Trump Explains Why He Attacked Bush for Speaking Spanish*, Politico (Sept. 16, 2015), https://www.politico.com/story/2015/09/2016-gop-debate-donald-trump-jeb-bush-spanish-213748.

plaintiffs also face significant barriers when seeking judicial recourse for language discrimination through Title VII—covering employment discrimination[108]—as well as Title VI—covering entities that receive federal funding.[109] Moreover, both provisions of the Civil Rights Act of 1964 prohibit discrimination on the basis of *national origin*, a category ill-suited for protecting litigants facing discrimination for not speaking English.

In the employment context, lower courts have endorsed the age-long philosophy of English linguistic supremacy.[110] Although business necessities may justify speak-English-only rules in certain circumscribed scenarios,[111] "language may be used as a covert basis for national origin discrimination."[112] Invidious intent is often implicit: "[t]he less the apparent justification for mandating English, the more reasonable it is to infer hostility toward employees whose ethnic group or nationality favors another language,"[113] and disparate impacts may serve as evidence of discriminatory intent.[114] Additionally, where an English-only policy has "no apparent legitimate purpose" at all, the policy *itself*—and not just its effects—may evoke hostility towards workers.[115] Finally, even where discrimination is not intended, an English-only policy applied at all times may "create an atmosphere of inferiority, isolation, and intimidation based on national origin which could result in a discriminatory working environment."[116] However, in *Garcia v. Spun Steak Co.*, the

[108] 42 U.S.C. § 2000(e).

[109] 42 U.S.C. § 2000(d).

[110] *See* Garcia v. Gloor, 618 F.2d 264, 268, 272 (5th Cir. 1980) (rule requiring an employee to speak only English while on the job did not constitute discrimination based on national origin, in part because the employee was bilingual); *see also* Perea, *supra* note 40, at 986 (referencing *Gloor*, 609 F.2d at 161) ("The original opinion, however, contained language suggesting that the judges were simply reinforcing their view of the proper dominance of English.").

[111] *Compare Gloor*, 618 F.2d at 267 ("[P]amphlets and trade literature were in English and were not available in Spanish, so it was important for employees to be fluent in English apart from conversations with English-speaking customers.") *with* Maldonado v. City of Altus, 433 F.3d 1294, 1308 (10th Cir. 2006) ("[A] jury could find that there were no substantial work-related reasons for the policy (particularly if it believed Plaintiffs' evidence that the policy extended to nonwork periods), suggesting that the true reason was illegitimate.")).

[112] *Gloor*, 618 F.2d at 272.

[113] *City of Altus*, 433 F.3d at 1305.

[114] *Id.* at 1308; *see also* Washington v. Davis, 426 U.S. 229, 242 (1976) (applying the same principle to race, explaining that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another").

[115] *City of Altus*, 433 F.3d at 1304–05.

[116] 29 C.F.R. § 1606.7(a).

Ninth Circuit ruled against plaintiffs' Title VII action, holding that an employer could legally prohibit its employees from speaking any non-English language while working, including those who spoke English poorly or did not speak it at all.[117] In its amicus brief to the court, the Equal Employment Opportunity Commission (EEOC) reported that "the undisputed facts of this case constitute[d] a prima facie violation of Title VII, thus requiring Spun Steak to produce some business justification for the English-only rule."[118] The EEOC also explained that one's primary language "is often an essential national origin characteristic" and that "speaking Spanish was not a matter of individual preference, but the primary means of communicating for a large number of [Defendant's] Hispanic employees, and the sole means for some."[119] Despite the EEOC's guidance and its factual findings that the company president had yelled at workers to "go back to [their] own country," the Ninth Circuit held that the Spanish-speaking employees "presented no evidence other than conclusory statements that the policy ha[d] contributed to an atmosphere of 'isolation, inferiority or intimidation,'" declining to find discrimination on the basis of national origin.[120] By upholding the English-only rule, without even requiring the employer to show a business justification, the majority "subverted one of the basic goals of Title VII of the Civil Rights Act of 1964, the elimination of discrimination on the basis of national origin."[121]

The Court has also eroded the possibility for plaintiffs to seek recourse for language discrimination through Title VI, by requiring proof of discriminatory intent. In *Alexander v. Sandoval* in 2001, the Supreme Court considered a Title VI disparate impact class action against the Alabama Department of Public Safety for administering its driver's license examinations in English only.[122] The Eleventh Circuit below had found that the policy "significantly impact[ed] Alabama residents of foreign descent, in both an adverse and disproportionate manner;"[123]

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[117] 998 F.2d 1480 (9th Cir. 1993).

[118] Brief of the EEOC as Amicus Curiae at 12, 17, Garcia v. Spun Steak Co., 13 F.3d 296 (9th Cir. 1993) (No. 91–16733).

[119] *Id.* at 16–17.

[120] *Id.* at 28; *Spun Steak Co.*, 998 F.2d at 1489.

[121] *Spun Steak Co.*, 13 F.3d at 296–97 (Reinhardt, J., dissenting from denial of reh'g en banc). The majority also "virtually ignore[d]" the deference owed to the EEOC, arguably superseding the EEOC's expert guidance with its own policy preferences. *Id.* at 302.

[122] Alexander v. Sandoval, 532 U.S. 275, 275 (2001).

[123] Sandoval v. Hagan, 197 F.3d 484, 508 (11th Cir. 1999), *rev'd*, 532 U.S. 275 (2001). In part,

finding for the plaintiffs, that court rejected the defendants' contention that because "language never ha[d] been held to be a proxy for national origin for purposes of proving intentional discrimination," their discriminatory language policy could not constitute a disparate impact based on national origin.[124] However, the Supreme Court reversed the Eleventh Court's judgment, basing its decision not on a substantive assessment of the discrimination, but on a procedural holding that "there is no private right of action to enforce disparate-*impact* regulations promulgated under Title VI" in the first place.[125]

In sum, plaintiffs face great procedural and substantive obstacles to attaining civil recourse through Title VII and Title VI for language-based discrimination. Stereotypes based on language are unlikely to pass muster in court as innately discriminatory, and successfully showing that they are a proxy for *intentional* discrimination—which is the only viable route for Title VI suits, since private disparate *impact* claims are barred—is an even more difficult task. Moreover, under either Title VII or Title VI, discrimination against non-English speakers would need to be recognized as discrimination on the basis of national origin. Even if courts show a willingness to do so, such classification is fundamentally harmful for Latines in the broader context: it reifies the assumption that speaking a language other than English signifies that a person is an outsider or foreigner, and it in fact requires litigants who were born in the U.S. to "define *themselves* as having a foreign national origin and as outsiders not belonging to the American community."[126] Additionally, bootstrapping plaintiffs into a pre-existing protected class can perpetuate erasure, by falling short of recognizing the prejudice as the plaintiff actually experiences it.[127] For courts to recognize discrimination against

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the court relied on the fact that whereas Alabama offered accommodations for groups like "disabled and deaf" drivers as well as illiterate English speakers, it did not offer any for non-English speaking applicants. *Id.*

[124] *Id.*

[125] *Sandoval*, 532 U.S. at 275 (emphasis added).

[126] Perea, *supra* note 40, at 989 (emphasis added). According to Pew Research Center in 2019, 67.3 percent of Latines in the U.S. were born in the U.S. Funk & Lopez, *supra* note 76.

[127] *See* Perea, *supra* note 40, at 983–4 ("Discrimination is more likely to occur against persons because of the perceptible manifestations of ethnic distinction, ethnic traits, than because of the often imperceptible fact of national origin."); *see also id.* at 985 (by failing to address the unsuitableness of the "national origin" category, "legislators, the courts, commentators, and casebooks have created Latino, and more generally, ethnic invisibility by silence"). For an analogous discussion, on the shortcomings for non-binary litigants resulting from *Bostock v. Clayton*'s treatment of transgender discrimination as sex discrimination, see

non-English speakers as a harm worthy of constitutional and statutory protections would achieve the most justice; it would address, head-on, the historically-entrenched English linguistic supremacy that—like territorial sovereignty—has contributed to the U.S.'s willingness to undercut racial minorities' constitutional rights.[128]

Conclusion: Rethinking "Belonging"

The Latine population in the U.S. has grown to 6.1 million as of 2020, making it the "second largest racial or ethnic group, behind White Americans."[129] As of 2019, 61.5 percent of the U.S. Latine population reported having Mexican roots, with the second largest group, Latines with Puerto Rican roots, composing 9.7 percent of the U.S. Latine population.[130] However, Latines remain under the cloud of the *Insular Cases* and the concept of liminality that these cases pioneered: that a citizen's full enjoyment of their constitutional rights is conditional on their fully "belonging" in the U.S., which is defined by ethno-racialized metrics. Today, an individual's access to justice may at times depend less on their personal entitlement to constitutional rights and more so on how well they and their legal claims align with the U.S.'s fundamental interests in territorial sovereignty and the supremacy of the English language. Courts are less willing to vindicate individuals' procedural and substantive rights when doing so may challenge the U.S.'s ability to safeguard its Anglo-Saxon national identity.

Recognition that the *Insular Cases* were racist and imperialistic appears to be widespread,[131] as exemplified by Justice Neil Gorsuch's assertion that they "have no foundation in the Constitution and rest instead on racial stereotypes," are "shameful," and "deserve no place in our law."[132] Yet, despite mounting pressure on the Supreme Court to overturn these cases, including from influential legal voices like the

A. Russell, Bostock v. Clayton County*: The Implications of a Binary Bias*, 106 Cornell L. Rev. 1601 (2021).

[128] *See* Perea, *supra* note 40, at 988 ("[O]ur national interest in English . . . is an interest in control and exclusion. It is an interest consistent with the Framers' plan for a white and English-speaking country.").

[129] Funk & Lopez, *supra* note 76.

[130] *Id.*

[131] Kent, *supra* note 13 ("Most contemporary scholarship about the Insular Cases and the doctrine of territorial incorporation sees them as examples of discrimination, domination, and denial of rights.").

[132] United States v. Vaello Madero, 142 S. Ct. 1539, 1554 (2022).

American Bar Association[133] the Supreme Court has not seized the opportunity to overrule them.[134]

Nonetheless, even if our highest Court were to vacate this precedent, the *Insular Cases* would be unlikely to qualify for the anticanon due to their enduring stain on our legal system. Cleansing the U.S. of the legacy left by the *Insular Cases*—and our country's other Anglo-Saxon imperialist decisions that preceded them—would require more than a "feigned dissolution," the Court's act of "overrul[ing] a precedent because of the negative connotations it has acquired, without disassembling its component philosophies or methods."[135] While it is a long overdue necessity for the Supreme Court to overrule the *Insular Cases*,[136] it must also undertake a serious examination of how it balances constitutional interests against sovereignty interests. Only if our nation unlearns the tendency to view rights as secondary to conceptions of belonging—whether territorial, linguistic, or otherwise—can all citizens enjoy the full and fair protections that our constitutional system of justice is meant to offer.

[133] *See e.g.*, Rafael Bernal, *Supreme Court Faces New Pressure to Reconsider Racist 'Insular Cases*,' THE HILL (Aug. 10, 2022, 5:11 PM), https://thehill.com/latino/3596288-supreme-court-faces-new-pressure-to-reconsider-racist-insular-cases/ [https://perma.cc/B7NU-NHJY]; Letter from ACLU to Cong. (Nov. 25, 2019), https://www.aclu.org/sites/default/files/field_document/aclu_insular_cases_letter_11.25.2019.pdf [https://perma.cc/4SXN-RJAD]; Letter from C.R. Groups to Just. Dep't (Feb. 10, 2022), https://www.naacpldf.org/wp-content/uploads/Civil-Rights-Groups-Ltr-to-DOJ-re-Insular-Cases_02.10.2022_final.pdf [https://perma.cc/Z45Z-3PVY].

[134] The Supreme Court denied certiorari in Fitisemanu v. United States, a case with which the Court could have overruled its "shameful" precedent to recognize full constitutional rights for residents of American Samoa, as well as those in Puerto Rico and the other territories who have not enjoyed full constitutional rights for over a century. 143 S. Ct. 362 (2022).

[135] SARAT, *supra* note 34, at 121 (providing, as a prototypical example of "feigned dissolution," the Court's decision to overturn *Korematsu v. United States*—the case that justified Japanese internment during World War II—within the context of *Trump v. Hawaii*, the case that allowed for President Trump's Muslim ban and thus embraced a similar racist ethos from *Korematsu*).

[136] While overruling the *Insular Cases* would not "resolve the political status of the territories, which the Court cannot do," it could at least "end the proposition that the unincorporated territories exist in a nearly extraconstitutional zone." Ponsa-Kraus, *supra* note 25, at 2540.