

ESSAY

BORDER BRUTALISM

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ABSTRACT

*Concepts like freedom and liberty motivate Americans on the global stage. This has racial implications past and present. Exploring these arguments, this Essay: (1) reviews Greg Grandin's *The End of the Myth: From the Frontier to the Border Wall in the Mind of America* and (2) proposes a framework to identify law's place in these motivations. *The End of the Myth* argues that frontier myths inspired expansion west and then overseas. While this was seen as innately positive, it also downplayed racism. Now, the idea of the border drives Americans and motivates their leaders. With border brutality policies, a new myth responds to domestic pessimism. This border myth treats racism as an inevitable reality.*

*This Essay proposes a "Brutal Framework" to examine law's role in this racialization. It identifies how law informs geopolitics, racial consequences, public limits, and policies. In particular, this Essay analyzes judicial rulings regarding borders and admission (*Trump v. Hawaii*), court powers (*DHS v. Thuraissigiam*), and violence (*Hernández v. Mesa*) as examples that provide rationales and normative footing for the border myth. This Essay describes the utility of the Framework beyond these examples. A Framework that moves away from studying security, immigration, economics, and policymaking as separate silos and sees race as a domestic and international issue.*

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I. INTRODUCTION

Americans have always had a keen and inspired sense of their place in the world. Popular sayings remind us of this. “Go west young man” urged settlers into territory occupied by Native Americans or México in the nineteenth century.¹ “A splendid little war” evoked pride in new overseas possessions (e.g., Puerto Rico and the Philippines), creating a global empire after the Spanish-American War in 1898.² “Be all you can be” encouraged personal growth through joining the military after disillusionment with the Vietnam War.³ These figurative places—a conquered West, far reaching overseas, and a source of pride— hit deeper than a

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1. The source of this slogan is unclear. It referred to area now the Midwest. Later, it inspired settlers further west. It is attributed to Horace Greeley or to J.B.L. Soule. See Stephen J. Taylor, “Go West, Young Man”: the Mystery Behind the Famous Phrase, HOOSIER STATE CHRONICLES (July 9, 2015), <https://blog.newspapers.library.in.gov/go-west-young-man-the-mystery-behind-the-famous-phrase/> [https://perma.cc/8LE4-WWT2]; Mark Boardman, *Go West, Young Man?*, TRUE WEST MAGAZINE (June 2015), <https://truwestmagazine.com/article/go-west-young-man/> [https://perma.cc/Y228-33DN].

2. This statement is from Ambassador John Hay’s Letter to President Theodore Roosevelt dated July 27, 1898. See Library of Congress, *John Milton Hay*, THE WORLD OF 1898: SPANISH AMERICAN WAR, (June 22, 2011), <https://www.loc.gov/rr/hispanic/1898/hay.html> [https://perma.cc/6B5J-GF5P].

3. This was a recruitment slogan for the U.S. Army from 1981 to 2001. See Tom Evans, *All We Could Be: How an Advertising Campaign Helped Remake the Army*, ARMY HISTORY, <https://armyhstory.org/all-we-could-be-how-an-advertising-campaign-helped-remake-the-army/> [https://perma.cc/C7UG-67X4].

distinct political past intrinsic to Independence in 1776. American exceptionalism thrives from these conceptual localities.

These memories galvanize but they carry important racial implications that are largely erased from national narratives.⁴ Said simply, American national narratives emphasize ideals of manifest destiny and overseas military necessities to downplay the racial violence intrinsic to expansion. This has become a species of inattention, beginning with the American Indian Wars to control “the West” and continuing through the War on Terror and its “longest war” in Afghanistan. African American, Native American, Mexican, Asian, Caribbean, Pacific Islander populations, and more communities in the Global South have been forced to confront this inattention. Their experiences describe stories of loss, suffering, and self-governance denied. They starkly contrast triumphant tales of democracy, capitalism, individual rights, and freedom that fueled Americans’ reach.

This mythos and slogans like “Make America Great Again”⁵ capture the central themes of Greg Grandin’s book *The End of the Myth: From the Frontier to the Border Wall in the Mind of America*.⁶ Grandin discusses how Americans saw their global role driven by concepts deemed innately positive, born from the Enlightenment and American Independence in the eighteenth century.⁷ He also demonstrates how loss and disillusion overseas now shape American sentiments.⁸ President Donald Trump’s obsessions with

4. For this Essay, “racial implications” result from “legitimation and corroboration of social organization as natural by reference to [race]” and they “permeate social structures.”, See CEDERIC J. ROBINSON, *BLACK MARXISM 2* (Univ. of N.C. 2000)(1983). Similarly, “racial implications” and “racial consequences” are the same thing. “Racialization” is the process by which this occurs.

5. While Donald Trump claims to have coined this saying, it was first used in President Ronald Reagan’s election campaign in 1980. . See Emma Margolin, “*Make America Great Again*”- *Who Said It first?*, NBCNEWS (Sept. 9, 2016), <https://www.nbcnews.com/politics/2016-election/make-america-great-again-who-said-it-first-n645716> [<https://perma.cc/S7XD-CE68>].

6. GREG GRANDIN, *THE END OF THE MYTH: FROM THE FRONTIER TO THE BORDER WALL IN THE MIND OF AMERICA* (2019).

7. See *id.* at 7, 116, 269–70.

8. See *id.* at 8.

American carnage⁹ and a border wall¹⁰ manifest this political trend labeled “border brutality” by Grandin.¹¹ *The End of the Myth* is one of many recent books explaining American power and its global place amidst conflict, autocracy, racial violence, and the declining legitimacy of leaders worldwide. Some books concentrate on politics,¹² international relations,¹³ or race¹⁴ to analyze America’s place. However, Grandin explains the interplay between race relations and America’s foreign relations by emphasizing ideas in national history, their evolution, and their consistency.¹⁵ This emphasis delivers a message that needs to be understood. It shows how Americans view the United States three decades after the Cold War and two decades into the War on Terror.

This detailed book contends that two myths drive Americans: the frontier myth and the border myth. The frontier myth was the historic need to expand influence in North America and then

9. President Donald Trump, *Inaugural address: Trump’s full speech*, CNN (Jan. 21, 2017), <https://www.cnn.com/2017/01/20/politics/trump-inaugural-address/index.html> [<https://perma.cc/UX5J-MH2D>] (stating “This American carnage stops right here and stops right now”).

10. See GRANDIN, *supra* note 6, at 149; see also Ron Nixon and Linda Qiu, *Trump’s Evolving Words on the Wall*, NY TIMES, (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/us/politics/trump-border-wall-immigration.html> [<https://perma.cc/3T3N-Q87Q>] (discussing how Trump’s interests in the border wall changed).

11. See GRANDIN, *supra* note 6, at 166.

12. See, e.g., WILLIAM G. HOWELL & TERRY M. MOE, *PRESIDENTS, POPULISM, AND THE CRISIS OF DEMOCRACY* (2020); Charles A. Kupchan, *ISOLATIONISM: A HISTORY OF AMERICA’S EFFORTS TO SHIELD ITSELF FROM THE WORLD* (2020); STEPHEN SKOWRONEK ET AL., *PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE* (2021).

13. See, e.g., HAL BRANDS, *THE TWILIGHT STRUGGLE: WHAT THE COLD WAR TEACHES US ABOUT GREAT-POWER RIVALRY TODAY* (2022); G. JOHN IKENBERRY, *A WORLD SAFE FOR DEMOCRACY: LIBERAL INTERNATIONALISM AND THE CRISES OF GLOBAL ORDER* (2020); MICHAEL MANDELBAUM, *THE FOUR AGES OF AMERICAN FOREIGN POLICY: WEAK POWER, GREAT POWER, SUPERPOWER, HYPERPOWER* (2022); STEPHEN WERTHEIM, *TOMORROW, THE WORLD: THE BIRTH OF U.S. GLOBAL SUPREMACY* (2020); ALI WYNE, *AMERICA’S GREAT-POWER OPPORTUNITY: REVITALIZING U.S. FOREIGN POLICY TO MEET THE CHALLENGES OF STRATEGIC COMPETITION* (2022).

14. See, e.g., ASHLEY JARDINA, *WHITE IDENTITY POLITICS* (2019); ERIC KAUFMANN, *WHITESHIFT: POPULISM, IMMIGRATION, AND THE FUTURE OF WHITE MAJORITIES* (2019); JONATHAN M. METZL, *DYING OF WHITENESS: HOW THE POLITICS OF RACIAL RESENTMENT IS KILLING AMERICA’S HEARTLAND* (2019).

15. For an expansive history of these ideas with selections from primary sources, see ANDREW BACEVICH ED., *IDEAS AND AMERICAN FOREIGN POLICY: A READER* (2018). For the historical influence of these ideas, see Robert Zoellick, *AMERICA IN THE WORLD: A HISTORY OF U.S. DIPLOMACY AND FOREIGN POLICY* (2020).

overseas.¹⁶ The border myth ends talk of optimistic frontiers and taps into various forms of racism, to shape current politics.¹⁷ Racism, including its violence and subordination, impacts both myths. For most of American history, frontier mindsets of hope and progress downplayed racism and extremism, pushing them to geographic edges, deflecting them overseas, or painting them as necessary wrongs.¹⁸ The myth was that freedom, stability, and capitalism moved West and abroad with American presence. Ever since colonies became states, notions of expansion provided a safety valve from confronting racism's domestic tensions which were evident in the politics of slavery, migration, and civil rights.¹⁹ Presently, a border myth invites racism—its hatreds, disenfranchising, and violence—as a more accepted element of American politics.²⁰ Grandin shows how figurative frontiers have closed, consequently extremism now turns inward.²¹ Border brutality gives these sentiments political force.

The End of the Myth has garnered wide acclaim with a Pulitzer Prize for nonfiction and impressive reviews in the popular press,²²

16. See GRANDIN, *supra* note 6, at 2 (stating no myth is more powerful in American history), 7 (referring to the “promise of boundlessness”), 116 (describing the frontier as a “national myth”).

17. See *id.* at 8–9.

18. See *id.* at 7, 95, 269–70.

19. See *id.* at 270.

20. See *id.* at 248, 264, 275.

21. See *id.* at 7.

22. See, e.g., Jedediah Britton-Purdy, *Infinite Frontier*, NATION, Apr. 2019, at 27; Francisco Cantu, *Boundary Conditions*, NEW YORKER, Mar. 2019, at 73; Edward Dolnick, *Go West: How A Love Of The Wild And Boundless Frontier Shaped America—And Why That Love Is Now Gone*, N.Y. TIMES BOOK REV. (Mar. 17, 2019), <https://www.nytimes.com/2019/03/15/books/review/end-myth-greg-grandin.html> [<https://perma.cc/XMG6-CSSF>]; Ben Ehrenreich, *The End of the Myth by Greg Grandin review – American can no longer run from its past*, GUARDIAN (July 31, 2019), <https://www.theguardian.com/books/2019/jul/31/the-end-of-the-myth-by-greg-grandin-review> [<https://perma.cc/R9QR-4RKD>]; Carolyn Kellog, *Review: America's drive west was once destiny – Now it's a wall*, L.A. TIMES (Mar. 2, 2019), <https://www.latimes.com/books/la-ca-jc-end-of-the-myth-review-20190221-story.html> [<https://perma.cc/GH54-H3ZL>].

from multiple disciplines,²³ and from activists.²⁴ Its appeal lies in emphasizing the frontier myth's continuity over centuries *and* its gradual unraveling, which has become impossible to ignore after Trump-era policies on migration, trade, alliances, and global threats such as viral pandemics and climate change. Grandin describes the resulting policies as border brutality motivated by national pessimism.²⁵ Border brutality develops when American expansion can no longer offset domestic tensions. *The End of the Myth* is an indispensable description of American inspirations on the world stage. It offers as an eye-opening history of the present. There is a great deal to unpack in its sophisticated fusing of domestic and international analysis along with cultural and economic explanations. Unfortunately, legal audiences have yet to effectively incorporate its arguments or predictions into legal scholarship.

This Essay argues that legal scholars interested in race should follow Grandin's arguments for three reasons: myths influence laws, laws change borders, and the book implicitly points to a framework to isolate these influences and changes. First, *The End of the Myth* explains how ideas, such as the frontier or the need for overseas wars, and their context shape the law's role in American society. Ideologies sustain political, economic, and cultural actors, and these factors eventually impact the law. The book shows what fuels doctrinal development and how norms and institutions contribute to racialization. Myths and mythmaking are intrinsically

23. See, e.g., Laura Briggs, *What Is the United States?*; Daniel Immerwahr, *How to Hide an Empire: A History of the Greater United States*; Greg Grandin, *The End of the Myth: From Frontier to the Border Wall in the Mind of America*, 48 *REVS. AM. HIST.* 457 (2020); Richard W. Coughlin, *From the Frontier to the Border: Empire of Borders*, 11 *CROSSINGS: J. MIGRATION & CULTURE* 105 (2020); Brant W. Ellsworth, *The End of the Myth: From the Frontier to the Border Wall in the Mind of America*, *CULTURAL ANALYSIS*, Sept. 2019, at R1; Amy Greenberg, *The End of the Myth: From the Frontier to the Border Wall in the Mind of America* by Greg Grandin, 44 *AM. INDIAN Q.* 483 (2020); Ivan Ibarguán, *The End of the Myth: From the Frontier to the Border Wall in the Mind of America*, 107 *J. AM. HIST.* 715 (2020); Benjamin H. Johnson, *Greg Grandin. The End of the Myth: From the Frontier to the Border Wall in the Mind of America*, 125 *AM. HIST. REV.* 1012 (2020); Jill Leovy, *Continental Drift: Westward Expansion Delayed a Needed National Reckoning*, *AM. SCHOLAR*, Mar. 2019, at 113.

24. See, e.g., Gavin Jacobson, *Empire State of Mind: The Evolution of the American Frontier* 148 *NEW STATESMAN* 5477 (2019); Christine Mathias, *The Frontier Closes In*, 66 *DISSENT* 214 (2019); Ben Terrall, *Greg Grandin and the End of the Myth*, *NACLA* (Nov. 12, 2019), <https://nacla.org/news/2019/11/12/greg-grandin-myth-review> [<https://perma.cc/X344-J5CH>].

25. See GRANDIN, *supra* note 6, at 11.

connected to the public legitimacy that leaders seek. Grandin's lessons illuminate what is at stake today: if American law can remedy racial tensions (versus entrenching majority rule), and whether the United States works with overseas partners, rather than unilaterally. Popular motivations—the notion of a frontier—pushed the United States from a group of small colonies to a global power. Future leaders will face similar popular demands as world powers shuffle and threats cross national lines. Grandin predicts the border myth as the future's popular motivation. In preparing for tomorrow, scholars of immigration, national security, and constitutional law can benefit from *The End of the Myth's* deft analysis of popular ideas, their popular appeal, and their impact on norms, institutions, and governance in the United States.

Second, *The End of the Myth* points to racial implications developing from contemporary legal debates at our borders. As a legal preview, this Essay picks up where the book stops; for instance, the start of the Trump presidency in 2017. The Essay examines Supreme Court decisions since 2017 on law's contributions to border brutality. By interpreting American authority at the border, these court cases ask if legal protections should be cut off at our national boundary. Supreme Court rulings illustrate this trend by addressing the border²⁶ and foreign national admission (*Trump v. Hawaii*, 2018),²⁷ judicial review for noncitizens (*DHS v. Thuraissigiam*, 2020),²⁸ and killings by border agents (*Hernández v. Mesa*, 2020).²⁹ These decisions point to more limited judicial roles when reviewing border policies. For example, the Court fashioned legal norms that defer to discriminate, distort history and legal claims, and focus on abstract threats versus violence, respectively. The Supreme Court has similarly examined how border management comes into conflict with Congress or

26. For this Essay, "the border" refers to one of two things: (1) the physical place where persons enter domestic American jurisdiction or (2) the legal determination that noncitizens are permitted to seek admission into American jurisdiction at the port of entry. It does not refer to the border as something intrinsic to alienage. Accordingly, in this Essay, "the border" does not refer to determinations that noncitizens can remain in the United States or can be removed per deportability grounds, (e.g., Immigration and Nationality Act (INA) 237(a), 8 U.S.C. § 1227), or determinations of what rights, privileges, or protections noncitizens enjoy once inside domestic jurisdiction.

27. 138 S. Ct. 2392.

28. 140 S. Ct. 1959.

29. 140 S. Ct. 735.

states with wall construction (*Trump v. Sierra Club* and others, 2020-21)³⁰ and turning asylum seekers away (*Biden v. Texas*, 2022).³¹ In all these cases, the Justices answered a simple question: do new realities require less individual rights protections at the border? This effectively asked whether border brutality is required? These rulings offer early illumination for border brutality's doctrinal path. These illuminations point to concepts consistent with border mythologies described by Grandin.

Third, *The End of the Myth* inspires a framework ("Brutal Framework") to identify the law's contribution to this border brutality and how it is racialized. This framework specifically identifies four factors: geopolitics, racial consequences, public limits, and policies needed to carry out security and material objectives.³² Each of these factors is explained more fully below. First, geopolitics view events and actors overseas, including migrants, as potential threats.³³ Second, racial consequences result from prejudice and racial hierarchy.³⁴ Third, public limits refer to how legal resolutions are justified by constraining resources or rights.³⁵ Lastly, policies delineate how geopolitics and public limits

30. The Supreme Court did not block the construction of the border wall. See *Trump v. Sierra Club*, 140 S. Ct. 2620 (2020) (Breyer, J., dissenting) (describing this decision before court proceedings as "operat[ing], as a final judgment"). In 2021, as the Supreme Court prepared for proceedings, the Biden Administration reversed the prior administration's position. See *c.f.* *Biden v. Sierra Club*, 20-138, Order List, (Feb. 3, 2021), 592 U.S. https://www.supremecourt.gov/orders/courtorders/020321zr_6jfl.pdf [<https://perma.cc/52BA-S6TX>]. But lower courts ruled against the Trump administration using funds, appropriated by Congress, to construct the border wall, see *Sierra Club v. Trump*, 977 F.3d 853 (9th Cir. 2020) (based on the National Emergencies Act); *California v. Trump*, 963 F.3d 926 (9th Cir. 2020) (based on the Department of Defense Appropriations Act); *Sierra Club v. Trump*, 963 F.3d 874 (9th Cir. 2020) (same). See *c.f.* *U.S. House of Rep. v. Mnuchin*, 976 F.3d (D.C. Cir. 2020) (finding the House of Representative has standing to sue based on the Constitution's Appropriations Clause).

31. 142 S. Ct. 1098.

32. *The End of the Myth* does not present this as a framework. This Essay adapts a framework from its description of the border wall as border brutality, see GRANDIN, *supra* note 6, at 272.

33. For migration and border control, geopolitics include policies directed at enemies, that seek legitimacy, or that function as bottom-up foreign relations, see Kramer, *infra* note 92; Gabaccia, *infra* note 92.

34. Racial consequences develop from social forces that are structural and that naturalize distinctions. See ROBINSON, *supra* note 4.

35. See discussion *infra* Part II.B.

inform governmental action and lead to racial consequences.³⁶ The factors of this Brutal Framework illustrate how laws add to a border myth and they identify the racial implications of this process. The Framework shows how the doctrinal rulings intensify border brutality policies and the conceptual motivations of this border myth. These factors show how legal reasoning can justify brutality by capitalizing on national security fears, xenophobia, and economic justifications.

This Framework offers many benefits. With it, legal scholars interested in race can move away from examining security, immigration, economics, and policymaking as separate silos. Instead, this approach considers the influence of these factors while analyzing legal reasoning and racial consequences together. Race is not merely a domestic issue since international developments can have racialized impacts. More importantly, this method illuminates the law's role in racialization when policies are devised as neutral or when they lack the intent to discriminate. Expanded upon below, an application of the Framework indicates that the Supreme Court deferred to discriminate in *Trump v. Hawaii*, distorted the past and present to exclude in *Thuraissigiam*, and prioritized abstract threats versus border violence in *Hernández*.³⁷ Seen doctrinally, these decisions reinterpret judicial roles at the border. Viewed under a framework lens, these rulings emphasize geopolitics and public limits to justify border policies with racial consequences. These three cases suggest that judicial rulings add normative footing to border brutality and strengthen contemporary border myths.

The Brutal Framework provides a powerful tool to examine a developing future. Legal developments now shape tomorrow's race relations through migration, security, and foreign policies. *The End of the Myth* reminds us that similar trends in history—manifest destiny, overseas military campaigns, and anti-migrant movements—inspired fundamental legal changes.³⁸ Pointing to

36. These policies prohibit foreigner admission in *Trump v. Hawaii*, bar habeas at the border in *Thuraissigiam*, and eliminate accountability for border violence in *Hernández*. See discussion *infra* Parts II.A, II.B, II.C.

37. See discussion *infra* Parts II.A, II.B, II.C.

38. This Essay describes the frontier myth (past) to help make sense of a border myth's potential legal role (future). For another perspective examining this racialization as settler colonialism, see AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* (2014); NATSU

these reminders, this Essay argues that legal scholars should study our conceptual past to make sense of current evolutions. Immigration, national security, and constitutional law scholarship can move to incorporate this dynamic approach to race and notions of national identity. Race is never far from American myths, policies, or legal disputes. Racial contests can simultaneously be about admission (immigration), protection (security), public limits (economics), and governmental ordering (constitutional law). *The End of the Myth* points to an analytical framework to unpack these overlapping influences.

To build on these arguments, this Essay has three parts. Part I summarizes the central claims in *The End of the Myth* and demonstrates the significance that law plays in Grandin's long story and the Framework it inspires. Part II offers a preliminary example of the Brutal Framework applied to Supreme Court disputes on the border since 2017. This shows how geopolitics, racial consequences, and public limits justify policies with legal reasoning focused on the border. Here, border brutality addresses: noncitizen entry,³⁹ habeas privileges at the border,⁴⁰ and border killings.⁴¹ These decisions effectively reinterpret court roles at the border to defer and discriminate, distort to exclude, and ignore violence, respectively.⁴² The Framework suggests methods to pinpoint the interrelations between law, race, and notions about American power. The Conclusion emphasizes the Framework's utility and points to suggestions from *The End of the Myth* to address border brutality.

TAYLOR SAITO, *SETTLER COLONIALISM, RACE AND THE LAW: WHY STRUCTURAL RACISM PERSISTS* (2020).

39. See *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

40. See *DHS v. Thuraissigiam*, 140 S. Ct. 1959 (2020).

41. See *Hernández v. Mesa*, 140 S. Ct. 735 (2020).

42. Due to concerns for space, this Essay does not analyze *Trump v. Sierra Club* and *Biden v. Texas*. Future framework applications can identify law's racialization in the conflicts between border management and Congress, or the states. The rulings in *Trump v. Sierra Club* and other cases addressed statutes governing funds appropriated by Congress and the Constitution's Appropriations Clause, see *Biden v. Texas*, 142 S. Ct. 1098 (2022) (addressing immigration statutes and Executive powers over foreign relations).

II. LEGAL LESSONS FROM TWO MYTHS

*God created war so that Americans would learn geography*⁴³
- Mark Twain

The End of the Myth provides an easy to digest yet thorough examination of concepts central to how Americans see their place in the world. Put simply, it describes frontiers that encapsulate hope and positivity and borders that justify limits in recognition of closed frontiers.⁴⁴ Accordingly, American myths emphasize a frontier or a border. These two myths frame racial strife in the United States. In the past, hope and progress justified the racist consequences as they were a product of frontier mindsets. Now, border brutality highlights how racism persists in policy choices.⁴⁵ Grandin's approach reflects his expertise in Latin American and transnational history, and historically informed current analysis.⁴⁶ In addition to numerous award-winning history books,⁴⁷ he is a columnist for *The Nation*. Reviews for *The End of the Myth* have been generally positive, including similar praises from this Essay. However, some critiques note that Grandin should have given more attention to specific groups⁴⁸ or that some explanations should have focused on society or the State.⁴⁹ Others

43. This is attributed to the book *THE INNOCENTS ABROAD* from 1868. *See Quotes: Mark Twain's American brand of humor*, L.A. TIMES (May 14, 2015), <https://www.latimes.com/la-et-mark-twain-quotes-20150513-htmstory.html> [<https://perma.cc/P3LU-Y3JF>]; *see also* MARK TWAIN, *THE INNOCENTS ABROAD: GOD CREATED WAR SO THAT AMERICANS WOULD LEARN GEOGRAPHY* (Wanderlust 2014).

44. *See* GRANDIN, *supra* note 6, at 7, 8.

45. *See id.* at 272.

46. *See, e.g.*, GREG GRANDIN, *EMPIRE'S WORKSHOP: LATIN AMERICA, THE UNITED STATES, AND THE RISE OF THE NEW IMPERIALISM* (2006) (explaining how US foreign policy on Latin America in the early and mid-twentieth century provided invaluable lessons for the War on Terror after 2001); GREG GRANDIN, *KISSINGER'S SHADOW: THE LONG REACH OF AMERICA'S MOST CONTROVERSIAL STATESMAN* (2016) (describing how Henry Kissinger's view of exceptionalism and militarism, influence contemporary perspectives); *Slavery, and American Racism, Were Born in Genocide*, THE NATION, Jan. 20, 2020 (using Martin Luther King Jr.'s writings on American expansion to examine recent debates on racism in US history, such as the 1619 Project).

47. *See, e.g.*, *FORDLANDIA: THE RISE AND FALL OF HENRY FORD'S FORGOTTEN JUNGLE CITY* (2010); *KISSINGER'S SHADOW: THE LONG REACH OF AMERICA'S MOST CONTROVERSIAL STATESMAN* (2015); *THE EMPIRE OF NECESSITY: SLAVERY, FREEDOM AND DECEPTION IN THE NEW WORLD* (2015).

48. *See* Greenberg, *supra* note 23 (noting different explanations for Indigenous communities and the relationship between *uti possidetis* doctrine and communal lands).

49. *See* Johnson, *supra* note 23.

disagree with the subtleties in Grandin's approach.⁵⁰ This Essay focuses on the legal aspects of the book's convincing story. This section does two things: summarizes the book's central arguments and describes the legal significance, past and future, of these arguments.

A. Two American Myths: Race Downplayed and then Overtly Played

Grandin describes the influence exerted by the notion of a frontier, which drove territorial expansion after 1776, for overseas colonies since 1898 and with foreign wars thereafter.⁵¹ Each of these trends fueled and required racial violence while also supporting economic expansion under the guise of liberty and freedom. Violence was exacted on Native Americans, African Americans, Mexicans, Asians, and populations overseas. This long story starts with colonial tensions in 1763 when the British Crown closed off the colonists from westward expansion to the Appalachian Mountains.⁵² Driving west was one of the motivations behind independence. Initially, frontier mindsets aimed at westward continental expansion but as the twentieth century began, these sentiments inspired American expansion off the continent with military campaigns and colonial possessions. The United States still rules over these colonies (e.g., Puerto Rico, Guam, Virgin Islands, American Samoa, and Northern Mariana Islands). American inspirations shifted overseas and worldwide, as recent as with War on Terror campaigns.⁵³ A mental drive to go

50. H-Diplo provides a detailed set of reviews and a response from Grandin. They examine: Confederate symbols and white supremacy after the Korean War (from Lloyd Gardner), a focus on the "career of great men" (from Amy C. Offner), and whether American expansion and its limits are different compared to other empires (from Daniel Sargent). See George Fujii, *H-Diplo Roundtable XXII-2 on Grandin*, H-DIPLO (Sept. 14, 2020), <https://networks.h-net.org/node/28443/discussions/6426674/h-diplo-roundtable-xxii-2-grandin-end-myth-frontier-border-wall> [<https://perma.cc/6XF9-TMEY>].

51. See GRANDIN, *supra* note 6, at 23–24, 134, 144, 211.

52. See *id.* at 17.

53. For the domestic economics, beginning with reforms in the 1980s, that contributed to War on Terror efforts, see *id.* at 5–6. These campaigns promised to "extend frontiers of freedom" but failures in the occupation of Afghanistan and Iraq contributed to racism in the Republican Party. See *id.* at 254–255. Grandin finds similarities in this disillusion overseas with contemporary vigilantism (the Minuteman Project) on the border and violent White Supremacy after World War I and the Vietnam War, see *id.* at 256–257.

West and then overseas, whether as settlers, invaders, or occupiers, was key.

For Americans, the frontier became a “state of mind” and a “national myth.”⁵⁴ It served as an ideological guidepost, in contrast to “frontier’s” literal translation of *frontera* in Spanish, which means a boundary.⁵⁵ Most countries have boundaries, not endless frontiers. With the ideals of increasing territorial control and bringing democracy to new places, the frontier became a “proxy for liberation” and signaled “promises of modern life itself.”⁵⁶ Hope fueled expansion, which extended sovereignty but also “promis[ed] that the brutality” in violence would be “transformed into something noble.”⁵⁷ These arguments are consistent with ones raised by many historians, common ever since Frederick Turner’s Frontier Thesis was offered in 1893.⁵⁸

Grandin distinguishes his frontier arguments in two important ways: first, by incorporating domestic tensions and foreign policies after 1898, and second by describing trends after the Cold War. He argues that the frontier provided a “safety valve” for socio-economic and racial tensions experienced domestically.⁵⁹ As an example, Martin Luther King Jr. said that the frontier “allowed the United States to avoid a true reckoning with its social problems, such as economic inequality, racism, crime and punishment, and violence.”⁶⁰ The option to push west and then overseas became a worn path to avoid confronting domestic socio-economic pressures. Initially, pressures sought land to farm and live. Tensions persisted and became the central question of the

54. *Id.* at 116.

55. *Id.* at 47, 116. For how the meaning of frontier is different in Latin American history compared to US history, see Alistair Hennessy, “The Frontier in Latin American History”, in *LES PHÉNOMÈNES DE FRONTIÈRE DANS LES PAYS TROPICAUX: TABLE RONDE ORGANISÉE EN L’HONNEUR DE PIERRE MONBEIG 9-23* (Paris: Éditions de l’IHEAL, 1981). For the specific complexities of translating *frontera*, frontier, and border, see Fabricio Prado, *The Fringes of Empires: Recent Scholarship on Colonial Frontiers and Borderlands in Latin America*, 10 *HISTORY COMPASS*, 318-19 (2012).

56. *Id.* at 3.

57. *Id.* at 269-70.

58. See FREDERICK JACKSON TURNER, THE SIGNIFICANCE OF THE FRONTIER IN AMERICAN HISTORY, S. MISC. DOC. NO. 53-104, at 197-227 (2d Sess. 1894). For its role in the Frontier Myth, see GRANDIN, *supra* note 6, at, 113-18, 168-71. For critical and transnational examinations of the Frontier Thesis, see Ramón Gutiérrez and Elliott Young, *Transnationalizing Borderlands History*, 41 *W. HIST. Q.* 27 (Spring 2010).

59. See GRANDIN, *supra* note 6, at 270.

60. *Id.* at 4.

nineteenth century: if slavery would be permitted in the Western United States? The following century, strains changed and sought relief from conditions created by industrial, migration, commercialization, and urbanization. Tensions were racial. Territorial enlargement “waged race war[s] outward” against Mexicans, Native Americans, and African Americans.⁶¹ Expansion pushed “racism and extremism to the fringe” and “redirect[ed] passions outward.”⁶² The frontier myth permitted Americans to avoid confronting the country’s “foundation paradox”: the promise of political freedom and the reality of racial subjugation.⁶³ Eventually, this changed and frontiers could not provide a safety valve.

Borders negate frontiers.⁶⁴ Grandin emphasizes that to understand current hostility to migrants, we should look at the history of the United States-México border.⁶⁵ Here reality and frontiers collide as the “repository” of racism.⁶⁶ Last century, Mexican labor escaped violence and economic ruin to migrate north during and soon after the Mexican Revolution in 1910–18.⁶⁷ In 1924, the Border Patrol was created, becoming “a vanguard of race vigilantism.”⁶⁸ In the Southwest, violence, persecution, and lynching were means to enforce the border.⁶⁹ The first barriers were erected after 1945, with chain link fences recycled from camps used to detain Japanese and Japanese American civilians in the United States during World War II.⁷⁰

Currently, a border myth replaces the frontier myth. Put simply, the border myth acknowledges that the frontier is closed with the “safety valve shut.”⁷¹ America’s “horizon is not limitless; not all can share in its wealth” and policies “should reflect this reality.”⁷² As a good historian, Grandin provides macro explanations, engaging details, and particular stories to show how

61. *Id.* at 95.

62. *Id.* at 7.

63. *Id.* at 138.

64. *See id.* at 166.

65. *See id.*

66. *Id.*

67. *See id.* at 159–60, 163.

68. *Id.* at 163.

69. *See id.* at 160–65.

70. *See id.* at 200.

71. *Id.* at 9, 270.

72. *Id.* at 8.

disillusionment and nativism was rejuvenated in the United States, which was all symbolized in Trump's presidential campaign in 2015, but brewing for decades.⁷³ Border policies started under President Bill Clinton in 1992, through overseas wars after 2001, and the Great Recession of 2008 provides vital context to contrast the allure of frontier ideals.⁷⁴ Extremism now focuses inward and domestically.

If frontiers carried hope, borders now engender the opposite. Historically, Americans saw themselves as exceptional, but with border mindsets they are "trapped by history" and "prisoners of the past."⁷⁵ *The End of the Myth* explains that to make sense of the border myth, we should examine the history of race relations on the United States-México border.⁷⁶ A wall at this political boundary symbolizes the myth's popular appeal. Recent politics illustrate that announcing a border wall and talking about it is far more effective than its actual completion. With this lens, problems far from boundaries with México are seen as part of larger trends. The border myth results in the "nationalization of border brutality or border-fiction of national politics."⁷⁷ In this context, ideals clash with racial realities. This confluence of popular motivations, focused on the border, no longer impacts just the Southwest, where Mexican, Mexican American, and Indigenous communities long faced border cruelty.

With border brutality, the United States can no longer pretend to be in a limitless world where "everyone can be free"- and instead it enforces this "reality through, cruelty, domination, and racism."⁷⁸ The country increasingly defines itself as what it hates.⁷⁹ Grandin describes this ethos as race realism that rejects liberal multilateral orders, diversity (versus Anglo-Saxonism), and the idea that all persons have a place to enjoy and participate in prosperity.⁸⁰

73. *See id.* at 2, 232-33.

74. *Id.* at 244-45, 255-71.

75. *Id.* at 9.

76. *See id.* at 166.

77. *Id.*

78. *Id.* at 275.

79. *See id.* at 248 (explaining how migrants, whether refugees or workers displaced by NAFTA, now face hatred versus hope upon entering the United States).

80. *Id.* at 264.

B. Looking for Law's Role in Myths (Past and Future)

The End of the Myth is a history of the impact of popular ideas, but law is never far from its central arguments. It confidently explains the role that law plays in frontier myths. The book explains how doctrines gain prominence, the judiciary exerts its political and racial influence, executive agencies enforce racial policies, and treaties demarcate boundaries. There is a great deal in *The End of the Myth* to make lawyers rethink their assumptions. This continues Grandin's work on similar legal fronts regarding: sovereignty as conceived by American and Latin American liberalism,⁸¹ genocide in Guatemala,⁸² slave rebellions and independence movements in the Western Hemisphere,⁸³ and sovereignty in United States-Latin America foreign policies.⁸⁴

This Essay argues that law is central to developing the frontier's role in foreign relations and racial histories.⁸⁵ *The End of the Myth* points to this from early in American history.⁸⁶ Grandin explains that the Treaty of Paris of 1783, recognizing American independence, set a guidepost, for domestic eyes tempted to cross Mississippi River demarcations.⁸⁷ These desires became international since Spain controlled lands west of the river and South of the former colonies.⁸⁸ In the Constitution, states ceded claims to western lands in exchange for federal administration of these territories to prepare them to become states.⁸⁹ Rising out of formerly British territories, the new nation inherited "setter lust" for land, promising clashes with Indigenous sovereignty.⁹⁰ The

81. See Greg Grandin, *The Liberal Traditions in the Americas: Rights, Sovereignty, and the Origins of Liberal Multilateralism*, 117 *AMERICAN HISTORICAL REVIEW* 68 (2012).

82. See Greg Grandin, *Combining Historical and Legal Methods in Understanding Guatemala's 1981-1983 Genocide*, in ROBERT GELLATELY AND BEN KIERNAN ED., *THE SPECTER OF GENOCIDE: MASS MURDER IN HISTORICAL PERSPECTIVE* (2012).

83. See *THE EMPIRE OF NECESSITY*, *supra* note 47.

84. See Greg Grandin, *Beyond the Four Freedoms: Obama and Sovereignty*, 42 *NACLA REPORT ON THE AMERICAS* 27-9 (2009).

85. For an examination law's role in extending and maintaining the frontier, see PAUL FRYMER *BUILDING AN AMERICAN EMPIRE: THE ERA OF TERRITORIAL AND POLITICAL EXPANSION* (2017).

86. See GRANDIN, *supra* note 6, at 14-23 (describing the drive West during the eighteenth century).

87. See GRANDIN, *supra* note 6, at 24-25.

88. See GRANDIN, *supra* note 6, at 24-26.

89. See *id.* at 35 (referring to the Constitution's Property Clause).

90. See *id.* at 49.

United States assumed treaty obligations made between Britain and Indigenous communities.⁹¹

Legal descriptions continue to the present. Specific to slavery, the Constitution supported legal doctrines that favored slave owners' demands, such as nullification, state sovereignty, and state rights.⁹² The Indian Removal Act of 1830 provided a federal military means to push Native Americans out of southern states, with the effect of opening demand for slave labor.⁹³ In 1898, the North and South reconciled powerful Civil War and Reconstruction tensions to go to war with Spain, igniting adventurism and producing imperial possessions.⁹⁴ In a series of disputes known as the *Insular Cases*, the Supreme Court reconciled notions of republican governance in the Constitution with geopolitical demands to govern non-white communities overseas.⁹⁵ Similar explanations of law's contributions proceed, covering twentieth century trends like world wars, the New Deal, civil right reforms, and interventions overseas.⁹⁶ In sum, law has a recurring and influential function in the frontier myth.

The End of the Myth explains how a border myth developed with legal details marking key steps.⁹⁷ This Essay argues that the book offers analytical factors, a framework, useful to pinpoint law's contribution to border brutality. Importantly, Grandin does this best in describing Trump's border wall as:

a monument to disenchantment, to a kind of brutal geopolitical realism; racism was never transcended; there's not enough to go around; the global economy will have winners and losers; not all can sit at the table; and government policies should be organized around accepting these truths.⁹⁸

91. *See id.* at 48.

92. *See id.* at 57.

93. *See id.* at 38–39, 83.

94. *See id.* at 142.

95. The most noted *Insular Cases* are *Downes v. Bidwell*, 182 U.S. 244 (1901), *Dorr v. United States*, 195 U.S. 138 (1904), and *Balzac v. Porto Rico*, 258 U.S. 298 (1922). For descriptions of their legacy, *see* Aziz Rana, *How We Study the Constitution: Rethinking the Insular Cases and Modern American Empire*, *YALE L. J. F.* 312 (Nov. 15, 2020); EDIBERTO ROMÁN, *THE OTHER AMERICAN COLONIES* (2006).

96. *See* GRANDIN, *supra* note 6, at 128, 179–80, 202–04.

97. *See id.* at 261 (describing border militias); 261 (relating impressions of migrant “surges” with Executive policies); 268 (explaining how federal immigration enforcement reaches far beyond the physical border).

98. *Id.* at 272.

Accordingly, border brutality exhibits four factors: geopolitical realism, racial consequences, needed limits, and resulting policies. Here, Grandin explains the motivational appeal of a border wall. This Essay argues that this dynamic examination is valuable in helping to make sense of the present. For this Essay these factors, used by Grandin to describe motivations for a border wall, suggest a framework.

The Brutal Framework tracks how legal reasoning shapes border brutality. First, geopolitical realism contrasts frontier notions of universal hope and positivity. This mindset emphasizes that Americans and the United States face threats and contests, requiring engaged responses. Overseas tensions or foreign aggression will impact domestic realities. With this mindset, events taking place at the border spark anxiety, including something felt far from the Southwestern United States. Along this vein, historians explain the geopolitical and foreign relations significance of migration to the United States.⁹⁹

Second, racial consequences persist. Benevolent foreign campaigns cannot offset persistent racialization.¹⁰⁰ Reforms, especially in the mid-twentieth century, could not transcend racism.¹⁰¹ Border Brutalism policies are not deterred by racist implications, seeing them as inevitable.

Third, there are public limits. Capitalism and global economics do not provide enough for everyone to benefit.¹⁰² These limitations incentivize Americans to maximize their gains and minimize their losses, even at the expense of neighbors, allies, or those in need. Opportunities are scarce and Americans must confront this in governmental terms. From this viewpoint, policies receptive to migrants should change.

Fourth, government policies should reflect these factors. Policies should be organized with the assumptions that contests are endemic, racism cannot be solved since it will exist, and

99. Paul A. Kramer explains that migration impacts geopolitics in six ways: labor, colonization, trade in goods and ideas, legitimacy sought by governments, relations between allies, and policies directed at enemies, see *The Geopolitics of Mobility: Immigration Policy and American Global Power in the Long Twentieth Century*, 123 *AM. HIST. REV.* 403 (2018). Donna R. Gabaccia describes migration as bottom-up foreign relations, see *FOREIGN RELATIONS: AMERICAN IMMIGRATION IN GLOBAL PERSPECTIVE* (2012).

100. See GRANDIN, *supra* note 6, at 272.

101. See *id.* at 273.

102. See *id.* at 272.

scarcity creates winners and losers on the global scale. Put simply, the Framework shows that border brutality is comprised of geopolitics, racial consequences, and public limits. Expanded upon below, scholars can identify law's contribution to border brutality by isolating the influence these factors have on judicial reasoning focused on border policies.

These factors illuminate what law contributes to border myths. This Essay argues that legal disputes add to border brutality. This happens when courts examine border policies through reasoning that emphasizes geopolitics, racial consequences, and public limits. As such, this Framework offers a powerful analytical blueprint to examine policies *and* identify what determines their legality or illegality.

In this sense, Grandin's analysis of the past and the present suggests a lens to examine the future. *The End of the Myth* shows how the law (e.g., treaties, court decisions, statutes, and doctrines) provides influential elements in sustaining and adapting the frontier myth.¹⁰³ Masterfully, Grandin tells a story that brings out the law's significance with examinations of context, continuity, and change. Next, he details the border myth's birth. This Essay argues that the motivations for a border wall suggest a framework to track law along a conceptually brutal path. Described next, this path so far covers borders in the form of entry for foreign nationals, habeas privileges, and border violence. These disputes redefine the judicial roles at the border. But later applications of the brutal framework could analyze the racial consequences of border disputes between the Executive and Congress and the Executive and the states, evident in disputes about wall construction and rejecting asylum seekers, respectively.

III. BORDER BRUTALISM'S LEGAL PATH

*They don't build walls because they hate the people on the outside, but because they love the people on the inside.*¹⁰⁴

-Donald Trump

103. See, e.g., *id.* at 25, 35, 49, 57, 59, 95, 163, 191, 225, 263.

104. *Donald Trump's border wall speech - full*, GUARDIAN (Jan. 8, 2019), <https://www.theguardian.com/us-news/2019/jan/09/donald-trumps-border-wall-speech-in-full> [<https://perma.cc/F67M-LUJJ>].

Borders plays an ambivalent role in American law, physically emblematic of international tensions, but never entirely stable. Since early foreign relations disputes, during the Chinese Exclusion era, borders have been cast in stark exclusionary terms.¹⁰⁵ The legal story is that political authority belongs to Congress and the Executive to devise and implement border policies, respectively. Called the Plenary Power doctrine, it precludes many basic constitutional protections for non-citizens especially at the border. it persists.¹⁰⁶ It informs domestic policing, far from borders, with racial consequences for decades.¹⁰⁷ In domestic matters, law enforcement agencies point to legal justifications in border or immigration authorities to evade controls on the use of force, targeting, and detention.

But US law also interprets the border in more malleable terms. At times, courts have relaxed plenary power perspectives to interpret that isolated constitutional protections apply at the border.¹⁰⁸ Similarly, Executive powers to completely close the border are not entirely established in law.¹⁰⁹ Scholars study this ambivalence, which is a simultaneous quality of exclusion and change.¹¹⁰ Legal borderlands perspectives argue that borders are not just sovereign boundaries but that their context, racial and gendered consequences, and institutional fissures explain how borders change.¹¹¹ They argued that scholars need to closely read on-the-ground facts and non-legal settings to notice the actual

105. See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

106. See Peter Spiro, *International Decisions: Trump v. Hawaii*, 113 AM. J. INT'L L. 109, 114 (2018); Ernesto Hernández-López, *Kiyemba, Guantánamo, and Immigration Law: An Extraterritorial Constitution in a Plenary Power World*, 2 UC IRVINE L. REV. 194 (2012) (explaining how plenary reasoning limits extraterritorial habeas).

107. See generally Jennifer M. Chacón, *Border Exceptionalism in the Era of Moving Borders*, 38 FORDHAM URB. L.J. 129 (2010).

108. For how the Supreme Court has used canons of avoidance to limit plenary powers as applied to some detentions at the border, see Ernesto Hernández-López, *Sovereignty migrates in U.S. and Mexican law: Transnational Influences in Plenary Power and Non-Intervention*, 40 VANDERBILT J. TRANS'L L. 1345 (2007).

109. See CONG. RSCH. SERV., LSB10283, CAN THE PRESIDENT CLOSE THE BORDER? RELEVANT LAWS AND CONSIDERATION (2019).

110. See LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* (2006) (describing legal limits as rigid and hard when aliens enter the United States and less so once they have entered).

111. See LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS (Mary L. Dudziak & Leti Volpp eds., 2006).

impact of borders.¹¹² Change happens on the border. Grandin reminds us that noncitizens, Mexican Americans, and Indigenous communities bear the harms of enforcement.¹¹³ Steven Bender explains how the effects of this history limit the scope of cross-border cooperation, caught between security and economic demands.¹¹⁴

Against this backdrop, there is new research energy looking at the racialized influence that law has on American borders. This reacts to rising nativism. New works on borders examine this from litigation, policy, decolonial, critical race, immigration law, and international law perspectives.¹¹⁵ These works tell us that determinations by border patrol, customs, and immigration agents, along with judges and policy makers are racialized.

This Essay argues that these inquiries should incorporate Grandin's suggestions about the future, informed by examinations of the past. Put simply, the Brutal Framework analyzes legal reasoning *and* racial consequences as mutually influenced by national security fears, xenophobia, and economic justifications. This approach is powerful for many reasons. It permits scholars to avoid silos created by legal doctrines (e.g., immigration, criminal, national, security, or constitutional). It identifies law's role in racialization when policies are seen as neutral or without any intent to discriminate. It is transnational by looking at policy motivations as international and domestic. Race is not just a domestic issue, to be examined for Americans and only after

112. *See id.*

113. *See* GRANDIN, *supra* 6. at 166.

114. *See generally* STEVEN BENDER, RUN FOR THE BORDER: VICE AND VIRTUE IN U.S.-MEXICO BORDER CROSSINGS 1-2 (N.Y. Univ. Press 2012).

115. Kevin Johnson tracks racial motivations and racial consequences of immigration and border policies. *See, e.g., Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L. J. 1111, 1119 (1998); *Bringing Racial Justice to Immigration Law*, 116 NORTHWESTERN L. REV. ONLINE 1 (2021). For race and borders, *see* Sherally Munshi, *Unsettling the Border*, 67 UCLA L. REV. 1720 (2021) (proposing a settler colonialism lens); Tendayi Achiume, *Racial Borders*, 110 GEORGETOWN L. J. 445 (2022) (presenting borders as structured by imperial legal orders that privilege Whiteness); Jayashri Srikantiah and Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STANFORD L. REV. ONLINE 197 (2019) (suggesting ways race can inform Equal Protection claims and case theories in immigration litigation); Jaya Ramji-Nogales, *This Border is Called My Skin*, in MATIANGAI SIRLEAF ED., RACE AND NATIONAL SECURITY forthcoming (2023) (arguing immigration law relies on "foreignness" in race, religion, and language to discriminate).

migrants enter. Likewise, international developments do not escape racialization. Prejudices look beyond national boundaries.

Below, an early application of the framework shows what law provides to border brutality and how it aids border myth motivations. This application indicates that in border cases since 2017, the Supreme Court deferred to discriminate in *Trump v. Hawaii*,¹¹⁶ distorted the past and present to exclude in *Thuraissigiam*,¹¹⁷ and prioritized abstract threats over border violence in *Hernández*.¹¹⁸ Doctrinally these decisions reinterpreted court roles at the border. Viewed with a brutal lens, they emphasized geopolitics and public limits to justify border policies. Explained below, this has significant racial consequences. In basic terms, these disputes addressed entry, habeas powers, and border violence. Through these cases, the court adds to border brutality by allowing: deference to discriminate, misaligning history, and eliminating a cause of action, respectively. Taken together, they pointed to three means to fortify border myths. They emphasized domestic needs and imposed legal limits with deference, distortions, and evading accountability for violence.

A. *Deferring to Discriminate*

Judicial deference adds to border brutality, providing a legal means to downplay discrimination and its effects. *Trump v. Hawaii* exemplifies this.¹¹⁹ Here, a 5-4 majority of the Court found it legal to prohibit the entry for foreign nationals from Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen.¹²⁰ The border policy at issue was an Executive Proclamation (“Proclamation”) suspending admission pursuant to section 212 (f) of the Immigration and

116. *Trump v. Hawaii*, 138 S. Ct. 2392, 2409 (2018); *See infra* notes 105–24 and accompanying text.

117. *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1959 (2020). *See infra* notes 125–45 and accompanying text.

118. *Hernández v. Mesa*, 140 S. Ct. 735, 740–41 (2020). 140 S. Ct. at 740–41. *See infra* notes 146–172 and accompanying text.

119. For doctrinal implications of the case, *see Trump v. Hawaii*, 132 HARV. L. REV. 327 (2018). *See also* Cristina M. Rodríguez, *Trump v. Hawaii and the Future of Presidential Power over Immigration*, AM. CONST. SOC’Y (Nov. 28, 2018), <https://www.acslaw.org/analysis/acs-supreme-court-review/trump-v-hawaii-and-the-future-of-presidential-power-over-immigration> [https://perma.cc/YD6F-M7UW] (examining its impacts on executive power).

120. PROCLAMATION NO. 9645, 82 Fed. Reg. at 45, 161 (Sept. 24, 2017).

Nationality Act (“INA”).¹²¹ President Trump devised this ban responding to domestic anxieties over terrorism threats, promising this since early in the election campaign.¹²² He issued the initial entry ban a week after taking office in 2017.¹²³ The Supreme Court ruled on the matter the next year, upholding nationality-based admission restrictions, enacted pursuant to Executive orders.¹²⁴ Here, legal reasoning worked in the service of geopolitical realism, public limits, and racialized implications. An application of the Brutal Framework shows that the ruling characterized the Proclamation as neutral to allow policies that fortify the border at the cost of discrimination.

Adding to a border myth, the Proclamation showed how domestic fears spur policies that mostly impact foreigners. The Court saw geopolitical realities as requiring deference for policies regarding the entry of noncitizens. It saw no judicial role in questioning Executive choices to ban admission.¹²⁵ The Court deferred to the executive on this geopolitical matter, rendering the proclamation legal. The Proclamation reasoned that persons from specific countries were a security risk merely because they were from those countries.¹²⁶ This warranted blanket refusal to admit them. The Supreme Court reasoned that deference to Executive authority is necessary in matters related to national security and foreign relations.¹²⁷ The ruling was not limited to the Executive managing security risks.¹²⁸ Instead, it approved the use of Section 212 (f) of the INA as an unfettered power for the Executive.¹²⁹

121. 8 U.S.C. § 1182(f).

122. As a candidate, Trump first promised a ban in December of 2015. See Jenna Johnson, *Trump Calls for ‘Total and Complete Shutdown of Muslims Entering the United States’*, WASH. POST Dec. 7, 2015, <https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/> [<https://perma.cc/9F56-R2D5>]. This is seen as the genesis of the travel ban enacted in 2017. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018); Zolan Kanno-Youngs, *Trump Administration Adds Six Countries to Travel Ban*, N.Y. TIMES Jan. 31, 2020, <https://www.nytimes.com/2020/01/31/us/politics/trump-travel-ban.html> [<https://perma.cc/42TL-WJ97>].

123. Exec. Order No. 13769, 82 FED. REG. at 8,977 (Jan 27, 2017).

124. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2403 (2018).

125. See *id.* at 2408.

126. See *id.* at 2408-09.

127. See *id.* at 2409, 2418-19, 2421.

128. See Spiro, *supra* note 106, at 113.

129. See *id.*

Seen in Brutal Framework terms, through the Proclamation, foreigners faced additional public limits. The Proclamation reduced who can enter the United States, even if they had an authorized visa or had entered legally before.¹³⁰ This closed the border off with a broad blanket action specific to certain nationalities. The Court's deference decision resulted in the Executive being able to limit entry based on nationality.

Debates in *Trump v. Hawaii* explicitly questioned if the Court's decision should consider discriminatory consequences. For the majority, the answer was no.¹³¹ The dissenting opinion disagreed and looked to animus and the effects of discrimination.¹³² They focused on Muslims since Trump had argued for entry bans for Muslims.¹³³ The opinion of the Court emphasized that the Proclamation was neutral, was not focused on religion, and was not discriminatory.¹³⁴ If it was neutral then it lacked any animus or intent to discriminate. As such, it reasoned that there was no violation of statutory or constitutional law.¹³⁵ The Proclamation did not apply to most of the world's Muslim population, and it only applied to a set of Muslim countries.¹³⁶ The Court saw Trump's disparaging statements about Islam and Muslims from his election campaign or from his advisors as irrelevant to questions about whether the Proclamation was discriminatory.¹³⁷

In a nod to racial animus, the Court overruled the *Korematsu* decision, which legally approved wartime detention of Japanese and Japanese American civilians during World War II.¹³⁸ However, this missed the mark. Those policies were also claimed to be facially neutral then and the Court in *Korematsu* also overlooked

130. See PROCLAMATION NO. 9645, *supra* 120 at sec. 2. (suspending entry for nationals of identified countries), sec. 3 (applying suspension for aliens outside the United States, who do not have a diplomatic visas or a similar visa exception, or who do not qualify for entry with a travel documents such as advanced parole). EXEC. ORDER NO. 13769 suspended entry, except for those travelling on diplomatic and other similar visas for multilateral organizations, see EXEC. ORDER NO. 13769, *supra* 123 at 8978.

131. See *Trump v. Hawaii*, 138 S. Ct. at 2410, 2415, 2421.

132. See *id.* at 2433 (Sotomayor, J., dissenting).

133. See *id.* at 2417-18, 2419, 2423.

134. See *id.* at 2418, 2421.

135. See *id.* at 2414 (referring to 8 U.S.C. § 1152(a)(1)(A)—barring discrimination based on nationality in issuing visas—and the Constitution's First Amendment).

136. See *id.* at 2421.

137. See *id.* at 2417-18, 2419, 2423.

138. See *id.* at 2423 (referring to *Korematsu v United States*, 323 U.S. 214 (1944)).

the effect of an Executive Order mandating detention.¹³⁹ As a precedent blind spot, *Trump v. Hawaii* disavows *Korematsu* as good law but fails to see the parallel—in animus and effects—between proclamations mandating detention and banning entry. Legal scholars argue that *Trump v. Hawaii* purports to overturn *Korematsu* without any real effect.¹⁴⁰ This emboldened rationale for detaining noncitizens and limiting their rights through executive claimed geopolitical necessity.

The *Trump v. Hawaii* decision effectively permitted religious discrimination in favor of legal deference to the executive branch to supported an entry ban as a policy. It ignored the motivations for the ban and its effects. This executive action is particularly concerning because it only applies to Muslims. Immigration law has plenty of statutory reasons (e.g., terrorism, criminal, national security, and foreign policy risk,) to refuse issuance of an overseas visa to enter the United States.¹⁴¹ These same reasons are also applied at the port of entry, where noncitizens are required to be admitted.¹⁴² But the Court’s opinion did not analyze why nationality could be a valid reason to bar entry.¹⁴³ The dissenting opinion raised these arguments regarding the Proclamation’s discriminatory motivation and its effects by arguing that immigration law and the Constitution prohibit discrimination based on religion.¹⁴⁴

In brutal border terms, the majority of the Court chose to not question or check these categorical bars to admission based on nationality but chose instead to defer. This hands-off approach was pursued despite the animus in the order’s motivation and its

139. See *id.* at 2448 (Sotomayor, J., dissenting) (identifying similar logic between *Korematsu* and the majority).

140. See Neal Kumar Katyal, *Trump v. Hawaii: How the Supreme Court Simultaneously Overturned and Revived Korematsu*, 128 YALE L. J. F. 641, 649 (Jan. 30, 2019) (arguing the ruling’s unbounded trust in the Executive allows for replicating *Korematsu*); Harold Hongju Koh, *Trump v. Hawaii: Korematsu’s Ghost and National Security Masquerades*, JUST SEC. 2018, <https://www.justsecurity.org/58615/trump-v-hawaii-korematsu-ghost-national-security-masquerades/> [<https://perma.cc/2L5F-GYX4>] (arguing both decisions achieve similar ends).

141. 8 U.S.C § 1182 (discussing grounds covering criminal, security, illegal entrant, immigration violator, unlawful presence).

142. See *id.*

143. See *Trump v. Hawaii*, 138 S. Ct. at 2421–22 (deferring to “legitimate” national security and not examining nationality).

144. See *id.* at 2433, 2435, 2438 (Sotomayor, J., dissenting).

effects. It had a racialized effect. Professor Sahar Aziz has illustrated how American legal protections for religious freedom took a back seat to national security policies that targeted Muslims and viewed them with suspicion.¹⁴⁵ The result was the “racial Muslim.”¹⁴⁶ The legal reasoning in *Trump v. Hawaii* helped close off the border since then. It served as a greenlight for later Presidential efforts to prohibit foreigner entry without fear of being struck by courts. The result has been more uses of INA 212(f) to bar entry for a variety of reasons and for nationals of various countries.¹⁴⁷ These entry bans refer to justifications including viral transmission risks, domestic jobs, and public expenses for uninsured.¹⁴⁸ Even if later Presidents, like Joe Biden, repeal these measures, American courts have the doctrinal means to find them legal as a matter of executive authority.

B. *Distorting to Exclude in the Future*

Distortions about past and present legal protections bolster border brutality, providing justifications to limit rights. With a cold and an imprecise story, the Court in *Thuraissigiam* closed the border to judicial review, which was traditionally afforded by habeas corpus.¹⁴⁹ Contained in the Constitution’s Suspension Clause, habeas corpus provides release from unlawful detention.¹⁵⁰ This case regards an asylum seeker detained soon after their unauthorized entry.¹⁵¹ When caught, Vijayakumar

145. See SAHAR F. AZIZ, *THE RACIAL MUSLIM: WHEN RACISM QUASHES RELIGIOUS FREEDOM* 4 (2021).

146. See *id.* at 4–5 (describing this category as racial-religion hierarchy and functions structurally).

147. This includes Executive Orders with justifications based on foreign policy and national security, asylum, public health, public costs, and labor market impact reasons. For a description of these recent bans, what nationalities are covered, and the history of these bans. See see BEN HARRINGTON & THERESA A. REISS, CONG. RSCH. SERV., LSB10458, *PRESIDENTIAL ACTIONS TO EXCLUDE ALIENS UNDER INA § 212(f) 3* (2020).

148. See *id.*

149. See *Thuraissigiam*, 140 S. Ct. at 1959.

150. US CONST. art. I, § 9, cl. 2

151. For more doctrinal examination, see *Department of Homeland Security v. Thuraissigiam*, 134 HARV. L. REV. 410 (2020). For analysis of what *Thuraissigiam* means for judicial review and xenophobic immigration policy, see Jennifer M. Chacón, *Stranger Still: Thuraissigiam and the Shrinking Constitution*, AM. CONST. SOC’Y (Feb 3, 2021), <https://www.acslaw.org/stranger-still-thuraissigiam-and-the-shrinking-constitution/> [https://perma.cc/UMJ8-PLHU].

Thuraissigiam requested asylum, a right afforded in immigration and international refugee law.¹⁵² Border agents quickly started removal proceedings, to exclude him from the United States. To stop this, Thuraissigiam filed a writ of habeas, leading to a dispute about court powers at the border. In policy terms, the case asked: if a streamlined process at the border to remove noncitizens, called Expedited Removal,¹⁵³ could be reviewed by a habeas court? The Court said no since aliens did not historically have this habeas right when the Constitution was written in 1789.¹⁵⁴ An application of the brutal factors to *Thuraissigiam* points to how misaligned legal perspectives support a view of borders as geopolitical fronts and a public expense. Described below, this has racialized impacts.

The *Thuraissigiam* decision showed how border myths look to the past to exclude in the future. Its reasoning misrepresented two issues: habeas history and Thuraissigiam's requested remedy. The Court found that habeas could not be used in this scenario to stop unlawful detention.¹⁵⁵ It found that executive detention was authorized because there was an illegal entry into the United States.¹⁵⁶ It explained that Expedited Removal procedures applied to illegal entries and that these procedures authorized detention.¹⁵⁷ The Court reasoned that habeas could only apply now in 2020 if aliens had habeas rights in 1789 to specifically challenge this kind of detention (e.g., pursuant to Expedited Removal).¹⁵⁸

First, this distorts the history of habeas and serves border myths by naturalizing legal limits. In 2001, the Supreme Court ruled aliens in immigration detention had habeas privileges, at least to the same levels as they applied in 1789.¹⁵⁹ This operated

152. See *Thuraissigiam*, 140 S. Ct. at 1967. For descriptions of Thuraissigiam claim for asylum and his personal history, see Ashoka Mukpo, *From Being Tortured in Sri Lanka to the U.S. Supreme Court*, ACLU (Feb. 24, 2020), <https://www.aclu.org/news/immigrants-rights/from-being-tortured-in-sri-lanka-to-the-u-s-supreme-court> [<https://perma.cc/2B3J-64KL>].

153. 8 U.S.C. § 1225(b).

154. See *Thuraissigiam*, 140 S. Ct. at 1969.

155. See *id.* at 1983.

156. See *id.*

157. See *id.* at 1964–65 (describing detention for inadmissible aliens and Expedited Removal for aliens lacking “valid entry documents,” presence requirements in the United States, and designated subject to these procedures by the Secretary of Homeland Security).

158. See *id.* at 1969, 1971.

159. *I.N.S. v. St. Cyr*, 533 U.S. 289, 301 (2001).

as a floor for how habeas should be applied “at a minimum.”¹⁶⁰ For nearly the next two decades, courts including the Supreme Court have applied this standard for habeas review in multiple contexts for aliens in immigration detention, including detention outside national borders and specific to asylum requests.¹⁶¹

The *Thuraissigiam* Court instead applied habeas privileges as rigidly as they were applied in 1789. The Court compared old apples (e.g., common law habeas) to a fruit that did not exist then (e.g., detention pursuant to statutes). It viewed a complex set of agency proceedings, from border agents and immigration judges, as excluded from historical habeas practice. It did the same for a noncitizen’s right to request asylum in the United States. Neither of these legal mechanisms existed in the eighteenth century.¹⁶² Helping border brutality, the Court effectively misaligned the past to justify a desired interpretation of the present. In a colloquial sense, they said this right did not specifically exist centuries ago; hence, aliens cannot enjoy it now despite the law’s evolution since then. In figurative sense, a distorted version of history detains law at the border presently.

Second, the Court confounded what *Thuraissigiam* requested. *Thuraissigiam* asked for an interview by a Homeland Security officer to determine if he had a credible fear of persecution upon returning to Sri Lanka, his home country.¹⁶³ This interview was guaranteed by immigration law as part of asylum proceedings.¹⁶⁴ *Thuraissigiam* argued that when this interview was first conducted, the officer did not follow procedures mandated by Homeland Security agency regulations.¹⁶⁵ His habeas petition was for a district court to review if his detention was legal given the deficiencies in the initial interview.¹⁶⁶ It was a simple request for the officer to follow legally obligated asylum procedures, and

160. *Id.* at 301 (quoting *Felker v. Turpin*, 518 U.S. 651, 664 (1996)).

161. For an overview of habeas in immigration detention, see Peter Margulies, *Boundaries of Habeas*, 34 *GEORGETOWN IMMIGR. L. J.* 405, 423 (2020); see also Ernesto Hernández-López, *Detaining ISIS: Habeas and the Phantom Menace*, 71 *OKL. L. REV.* 1109, 1125–42 (2019) (explaining how courts extend habeas to noncitizens and then undue this in response to political demands).

162. See *Thuraissigiam*, 140 S. Ct. at 1970, 1972–73.

163. See *id.* at 1994 (Sotomayor, J., dissenting).

164. See *id.* at 1968.

165. See *id.* at 1990–91 (Breyer, J., concurring); *id.* at 1994 (Sotomayor, J., dissenting).

166. See *id.*

something that asylum-seekers are entitled to through American and international law. If they were followed and if later an Immigration Judge, part of an entirely distinct proceeding, approved asylum, then Thuraissigiam could submit a permanent resident petition to remain in the country. However, the Court argued that Thuraissigiam's request for habeas review was to enter and stay permanently in the United States.¹⁶⁷ Habeas was interpreted as inapplicable for aliens at the border trying to remain in the country. Aiming at this tale, the Court found that aliens could not historically use habeas to remain in the country.

Thuraissigiam's distortions build on our Framework factors: demanding public limits, seeing border crossings as geopolitical threats, and racializing refugees. Specific to public limits, the opinion of the Court began by describing resources needed by asylum proceedings and border controls.¹⁶⁸ Before delving into legal reasoning with respect to judicial roles, the history of habeas, and asylum regulations, the Court started its story by emphasizing the demand to reduce public expenses at the border.¹⁶⁹ Alien detention and removal proceedings require excessive resources. For this reason, Congress created Expedited Removal proceedings and Homeland Security devised credible fear interview procedures. Given these, habeas proceedings derail these border policies that emphasize decreasing costs and resource use. From this position, Thuraissigiam's entry was painted as a threat that violated border security. He did not have a visa and did not pass through a port of entry, but refugee law allowed asylum requests once a refugee was inside the United States.¹⁷⁰ On one level, there was a border crossing and on another there was an asylum request. However, in *Thuraissigiam*, the Court emphasized the former and effectively ignored the later. Adding another tool for border myths, the Court focused on border crossing and not the rights afforded to asylum seekers. This tool distorts.

167. *See id.* at 1963, 1971.

168. *See id.* at 1964, 1966–67.

169. *See id.* at 1964.

170. For a description of asylum procedures for arriving aliens, including for those arriving at the border without entry documents, *see* BEN HARRINGTON, CONG. RSCH. SERV., R46755, THE LAW OF ASYLUM PROCEDURE AT THE BORDER: STATUTES AND AGENCY IMPLEMENTATION (2021).

Thuraissigiam's asylum claim pointed to how racialized consequences operate on various levels for refugees. On one level, racial animus drove him to the United States.¹⁷¹ He sought refuge as a member of the Tamil community.¹⁷² Tamils have long been persecuted in Sri Lanka where tensions led to a decades long civil war and Tamil suppression.¹⁷³ On a global level, the host country's legal systems invariably view refugees through a racialized lens.¹⁷⁴ Host countries see these migrants as unfairly using national resources and submitting claims only to gain residency. In the United States, this discrimination has a long history along race and religion lines and it continues.¹⁷⁵

In sum, brutal factors—public limits, geopolitical lens, and race—work in unison to contribute to a border myth. The *Thuraissigiam* Court signed off on a brutal policy eliminating habeas powers at the border. This reasoning used distorted stories (for habeas histories and actual habeas requests) and perspectives of asylum that demanded limits were geopolitical and racialized.

C. *Eyeing Hypothetical Threats, to Overlook Border Violence*

Focused on abstract threats, border brutality gains the means to evade accountability for killings by border agents. *Hernández* did this by eliminating claims to damages for constitutional violations occurring at the US-México boundary.¹⁷⁶ Essentially stating that courts should not interfere with border issues, the Court ruled against a Mexican family and in favor of a

171. For Thuraissigiam's story, see Mukpo, *supra* note 152.

172. See *id.*

173. For a brief history of this persecution, see Hannah Ellis-Petersen, *Tamils Fear Prison and Torture in Sri Lanka, 13 Years After Civil War Ended*, *THE GUARDIAN*, Mar. 26, 2022, <https://www.theguardian.com/world/2022/mar/26/tamils-fear-prison-and-torture-in-sri-lanka-13-years-after-civil-war-ended> [<https://perma.cc/WH7A-P4UU>].

174. See Tendayi Achiume, *Race, Refugees and International Law*, in *OXFORD HANDBOOK OF INTERNATIONAL REFUGEE LAW 1-3* (Cathryn Costello, Michelle Foster, and Jane McAdam eds., 2021).

175. See Laura E. Alexander, *How Race and Religion Have Always Played a Role in Who Gets Refuge in the US*, *THE CONVERSATION* (Apr. 28, 2022, 8:21 AM), <https://theconversation.com/how-race-and-religion-have-always-played-a-role-in-who-gets-refuge-in-the-us-181700> [<https://perma.cc/7ABH-PRJ8>].

176. See *Hernández v. Mesa*, 140 S. Ct. 735, 740–41 (2020).

border agent who shot and killed the family's teenage son.¹⁷⁷ The petitioners argued that their son was playing in México when the agent shot across the border and killed him, thereby violating the Fourth and Fifth Amendments of the Constitution.¹⁷⁸ In policy terms, the ruling found that foreign relations and national security concerns preclude the requirement that agents pay damages for killing foreign nationals on either side of the border, whether there is evidence they were trying to cross or not.¹⁷⁹ Such damages were permitted to victims when law enforcement violated an individual's constitutional right. Approved by the Supreme Court, such causes of actions are known as "Bivens claims."¹⁸⁰ An application of the Brutal Framework to *Hernández* shows how the Court eliminated legal claims for civilians. This ruling was guided by abstract concerns for geopolitics and the judiciary's influence.¹⁸¹ This is racialized given border violence trends by border agents presently and historically. Specific to the border, this eliminated policies that penalize law enforcement, deter shootings, and remedy injustices.

From a border myth mindset, the *Hernández* Court viewed the international boundary as intrinsically implying foreign relations concerns like diplomacy with México and national security threats such as drug trading, smuggling, and border crossings.¹⁸² From this viewpoint, the Court approved a brutal border policy that reflected geopolitics implicit in diplomacy and security, limiting applicable law, and racial consequences of killing Mexicans.

Geopolitics stood out in this ruling. In legal terms, it emphasized that border agents represent executive authority. Most importantly, it viewed unauthorized border crossings as a

177. *See id.* at 740, 750 (affirming a lower court ruling that special factors—including national security, foreign affairs, and extraterritorial nature of the claims—preclude *Bivens* remedies).

178. *See id.* at 740.

179. *See id.* at 744.

180. *Bivens v. Six Unknown Names Agents*, 403 U.S. 388 (1971); *See Hernández v. Mesa*, 134 HARV. L. REV. 550 (2020) (describing the Hernandez family requests as "Biven claims").

181. For more doctrinal examination of this case and its long litigation road, *see Hernández v. Mesa*, 140 S. Ct. 735, 740–41 (2020). For an explanation of what it means in term of rights and remedies, *see* Andrew Kent, *Hernandez v. Mesa: Questions Answered and Questions Avoided*, AM. CONST. SOC'Y (Feb 3, 2021), <https://www.acslaw.org/hernandez-v-mesa-questions-answered-and-questions-avoided/> [<https://perma.cc/6E36-C33B>].

182. *See Hernández*, 140 S. Ct at 746.

geopolitical risk, which implicitly impacted foreign relations and national security.¹⁸³ The Court saw the judiciary as precluded from meddling in these matters because the border was a significant sign of cooperation between the United States and México.¹⁸⁴ A judicial ruling risked derailing sensitive policy matters like drug trafficking, human smuggling, and other national security concerns. Legal liability for an agent would disrupt such policy matters.¹⁸⁵ The Court found the cross-border nature of the Hernández request as “meaningfully different” from standard *Bivens* damages.¹⁸⁶

The Court misapplied the law for a number of reasons. First, diplomacy asked for the opposite of the Court’s ruling. México requested, via diplomatic negotiations and in court papers, that the agent be subjected to a *Bivens* claims to remedy the wrong he committed.¹⁸⁷ It argued that damages would permit the United States to meet its international obligations when a civilian was killed.¹⁸⁸ Second, the killing of a boy in México by an agent in the United States did not implicate the geopolitical threats the Court raised. American courts and policymakers could, when appropriate, separate various bilateral concerns. Border cooperation has continued as the two countries disagreed on narcotics, multilateral, environmental, economic, labor, trade, and so many other policies. The dissent noted that courts adjudicate border issues continually, involving illicit and smuggling activities, while the Executive’s foreign affairs authority is not disrupted.¹⁸⁹ Here, the Court decided to be hands-off by granting the deference that the Executive asks for. In this light, the law could allow the killing of Mexicans by American agents on the US side without any damages. The border reality is that the boy’s actions did not implicate foreign relations or national security when he was shot

183. *See id.* at 743–44, 746, 749 (focusing on border crossings, noting impacts on foreign relations, explaining the significance of preventing illegal entry of people and goods, and relating border controls with national security).

184. *See id.* at 744.

185. *See id.*

186. *See id.* at 743–44; *see also id.* at 739 (finding “distinctive characteristics of cross-border shooting claims”).

187. *See id.* at 745.

188. *Id.* (citing INT’L CONV. CIVIL & POLIT. RIGHTS, (Dec. 19, 1966), art. 6(1), 99 U.N.T.S. 174).

189. *See Hernández*, 140 S. Ct at 758 (Ginsburg, J., dissenting).

from the United States. The brutal legal reality is that border agents can point to foreign relations and national security to shield their liability.¹⁹⁰ Here, a Mexican was killed, did not get justice, and border enforcement enjoyed court-approved immunity.

In a doctrinal sense, the *Hernández* Court emphasized public limits at this border, despite effective immunity for agents and lack of justice for the family. This came in the form of rolling back Bivens claims. The Court justified this action because Bivens actions are a judicially created cause of action.¹⁹¹ The Constitution, statutes, or regulations do not mention Bivens claims. Instead, the Supreme Court devised this doctrine to deter rogue law enforcement actions with the hope that financial accountability by officers (e.g., border enforcement agents) would deter them from abuse, shootings and killings.¹⁹² The Court noted that the Department of Justice had investigated these matters internally, which supported its decision not to extend Bivens liability.¹⁹³ The practical reality is that shootings at the border are frequent,¹⁹⁴ and they have not been deterred or controlled by internal mechanisms, which in this case was Department of Justice investigations. The dissenting opinion emphasized that the point of Biven claims is to make the agent accountable for his wrongdoings.¹⁹⁵ These claims try to control agent action, which is what the Hernández family sought. In this light, the agent being far from or near the border is irrelevant. For a Bivens claim, the objective is responding to negligence or a rogue officer; here, it was the killing of civilian. With a border brutal approach, the *Hernández* Court reasoned that because this took place at the border, there cannot be liability for an officer. In their eyes, there were geopolitical tensions at stake at the boundary. Adding to a border myth, the judiciary shaped a muted influence for itself.

The legal reasoning in *Hernández* has resulted in predictable racial consequences. In present terms, the Court noted it is powerless, while generally agreeing with the facts the officer shot

190. *See id.* at 744, 746, 750.

191. *See id.* at 741, 749.

192. *See id.* at 756 (Ginsburg, J., dissenting).

193. *See id.* at 740.

194. *See id.* at 759–60 (Ginsburg, J., dissenting).

195. *See id.* at 757.

and killed the boy.¹⁹⁶ This left the family with no remedy. What is not described, but is painfully overlooked, is how common it is for border agents to be responsible for fatalities and shootings. For instance, in ten years, from 2010 to 2020, border agents have shot six persons.¹⁹⁷ All of the victims were Mexicans.¹⁹⁸ Moreover, there have been over 245 fatal encounters with the border patrol since 2010,¹⁹⁹ including thirty-five deaths in 2020, fifty-eight deaths in 2021, and forty deaths in 2022.²⁰⁰ That is forty or more fatalities per year since the *Hernández* decision. Reality shows that Mexicans are the most common victims of this violence by American agents and such occurrences are not isolated. In this light, the Court washed its hands clean of this inquiry and allowed the Executive to use national security and foreign relations arguments to find the officer not liable. Here, the contrary was true. Effective immunity negatively impacts foreign relations with México. México argued this. There was no indication that the shooting victim raised any security threat. Adding to a border myth, the court clearly saw abstract notions (in constitutional executive powers) to protect immunity but would not review long-term deadly trends that disproportionately impacted Mexicans.

In a more historical sense, the México-United States border manifests centuries of racial animosity and extremism. In a figurative sense, Hernández was on one side and Mesa was on another side. The victim had no legal protection, while the shooter enjoyed impunity. The border was the result of a war, started by the United States citing a civilizing mission while materially

196. Andrew Kent describes the only undisputed facts are that Sergio Hernández was killed on México's side of the border by U.S. Border Patrol Agent Jesus Mesa Jr. who shot his gun while on the United States side of the border. *See Hernández v. Mesa*, 137 S. Ct. 2003, 2005 (2017) (per curiam).

197. *See* Cross-Border Shootings by Border Patrol Since 2010, S. BORDER CMTYS. COALITION (Feb. 26, 2020), https://www.southernborder.org/_cross-border-shootings-by-border-patrol [<https://perma.cc/F3SU-BDV3>] (providing details including victim nationality and age; incident specifics, and information resources for the 2010 and 2020 period).

198. *Id.* (identifying Mexican nationals and complaints by México).

199. *See* Fatal Encounters with CBO, S. BORDER CMTYS. COALITION (Oct. 10, 2022), https://www.southernborder.org/deaths_by_border_patrol [<https://perma.cc/86XB-TTBC>] (providing victim identity if disclosed, their nationality and age; incident specifics; and links to official information).

200. *See id.*

desiring territory to the Pacific Ocean.²⁰¹ Federal border patrols began early last century by attracting White Supremacists to join their ranks.²⁰² Currently, border agent efforts continue this racial division of White enforcement and communities of color subject to all sort of capture, detention, abuse, and family separation. The most recent image was border agents chasing and drawing whips at Haitians.²⁰³

In racial terms, Mesa and Hernández represent a long line of racial extremism being dispositive over Mexicans, Mexican Americans, and Native Americans at the border. Here, centuries ago a frontier myth resulted in lost Mexican and Indigenous sovereignties. With reasoning like in *Hernández*, brutal policies add to a border myth. For this agent and boy, the legal issue focused on damages. In *Hernández*, the court started a legal path to shield immunity at the border. In sum, seen in doctrinal terms, *Hernández* emphasized the abstract threats intrinsic to geopolitics at the border between two countries. Seen in a framework lens, this ignored actual and common place deaths at the border, which executive agent were responsible for.

IV. CONCLUSION

Popular concepts like liberty and freedom drive foreign relations *and* shape race relations in the United States since the country's foundation. *The End of the Myth* expertly presents this as a long story of frontier myths, motivated by hope and expansion, that transformed into a border myth.²⁰⁴ Domestic pessimism inspires the border myth and its consequential border brutality policies.²⁰⁵ *The End of the Myth* shows law's recurring role in frontier and border myths since the country's beginnings as a collection of small colonies to evolving into a global power to its

201. For history of the border, its demarcations, and American economic interests in this process, see Grandin *supra* note 6, at 149–56. For how law and race contributed to this, see Juan F. Perea, *A Brief History of Race and the U.S.-Mexican Border*, 51 UCLA L. REV. 284, 295, 302, (2003).

202. See GRANDIN, *supra* note 6, at 162–65.

203. See Eileen Sullivan and Zolan Kanno-Youngs, *Images of Border Patrol's Treatment of Haitian Migrants Prompt Outrage*, N.Y. TIMES, (Oct. 19, 2020), <https://www.nytimes.com/2021/09/21/us/politics/haitians-border-patrol-photos.html> [<https://perma.cc/LZ6C-8XVH>].

204. See GRANDIN, *supra* note 6, at 7, 116, 269–70.

205. See *id.* at 8.

ongoing disillusion with foreign wars and globalized trade.²⁰⁶ This Essay argues that legal scholars should follow these analytical suggestions. Popular ideas influence lawmaking, legal interpretation, and institutions. Calls to “Make America Great Again”²⁰⁷ and build a “big, beautiful wall”²⁰⁸ echo racial and nativist tensions from past mindsets. But now, the animosity aims inward and domestically.

To unpack these developing forces, this Essay proposes a “Brutal Framework” to identify law’s role in border brutality. It pinpoints four factors: geopolitics, racial implications, public limits, and consequential policies.²⁰⁹ This Essay analyzes borders and: noncitizen admission in *Trump v. Hawaii*, judicial powers in *Thuraissigiam*, and violence in *Hernández*. The Framework shows how these cases offer conceptual rationales and normative footing that aid a border myth.

The Brutal Framework offers a powerful methodology to examine law’s contribution to an evolving border myth. With it, legal scholars move away from studying security, migration, economics, and policymaking as separate trends. It shows race is a domestic *and* international issue. Future Framework applications can unpack racial consequences of conflicts between government branches, like with border wall construction,²¹⁰ and between states and federal authority over border management and foreign affairs, as with the Remain in Mexico program.²¹¹

The Framework also points to law’s place in solutions. Grandin argues that a border myth forces Americans to choose between barbarism or social rights.²¹² Foreign relations, migration, and border policies already push these choices. Recent efforts use exclusions at the border to: address domestic labor

206. See discussion *supra* Part II.B.

207. See Margolin, *supra* note 5.

208. For how the description “big, beautiful wall” symbolizes Trump plans, see Lucy Rodgers & Dominic Bailey, *Trump Wall: How Much Has He Actually Built?*, BBC NEWS, (Oct. 31, 2020), <https://www.bbc.com/news/world-us-canada-46824649> [<https://perma.cc/XER4-SBRL>]; Shane Bauer, *What Is the Status of Trump’s ‘Big, Beautiful Wall?’*, N.Y. TIMES, (Sept. 25, 2020), <https://www.nytimes.com/2020/07/02/books/review/14-miles-dw-gibson.html> [<https://perma.cc/ZV2G-L2DM>].

209. See GRANDIN, *supra* note 6, at 272.

210. See discussion of these lower court decisions, *supra* note 30.

211. See discussion of *Biden v. Texas*, 142 S. Ct. 1098 (2022).

212. See GRANDIN, *supra* note 6, at 276.

challenges,²¹³ screen for affluent foreign nationals,²¹⁴ and apply public health exclusions beyond pandemic responses.²¹⁵ In a similar vein, immigration policy protects privileges with work, travel, and education benefits, sparking domestic resentment, especially when these efforts help those who have been out of status since childhood.²¹⁶ An examination of all of these and other examples suggest racial consequences appear when law: acts as a geopolitical instrument, determines resource allocations, or defers to elected political authority (i.e., popular approval). Said simply, on many fronts, legal reasoning works in the service of border brutality.

In sum, *The End of the Myth* offers a descriptive tour de force specific to what motivates Americans and the racial consequences of these inspirations. This tale spans national history from liberated colonies in the late eighteenth century to endless wars of liberation since 2001. This Essay picks up where history reaches the present. It proposes a framework to identify law's role in a

213. Entry has been barred for specific categories of foreign workers. *See* Suspension of Entry of Immigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak, PROCLAMATION NO. 10014, 85 FED. REG. 23,441 (Apr. 22, 2020) (revoked by PROCLAMATION 10,149, 86 FED. REG. 11,847 (Mar. 1, 2021)).

214. Entry has been barred for noncitizens who could not prove they had health insurance. *See* Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System, in Order to Protect the Availability of Healthcare Benefits for Americans, PROCLAMATION NO. 9945, 84 FED. REG. 53,991 (Oct. 4, 2019) (revoked by PROCLAMATION 10209, 86 FED. REG. 27,015 (May 14, 2021)).

215. This refers to "Title 42" of the Public Health Service Act, 42 U.S.C. §§ 265, 268 (1944). For its application in COVID responses, under Trump and Biden administrations, and its impact on nearly 2 million noncitizens, *see* John Grimlach, *Key facts about Title 42, the Pandemic Policy that has Reshaped Immigration Enforcement at US-Mexico border*, PEW RSCH. CTR (Apr. 27, 2022), <https://www.pewresearch.org/fact-tank/2022/04/27/key-facts-about-title-42-the-pandemic-policy-that-has-reshaped-immigration-enforcement-at-u-s-mexico-border/> [<https://perma.cc/WLA6-RPEA>]. *See* Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 FED. REG. 17,060 (Mar. 20, 2020); Order Suspending Introduction of Persons from a Country Where a Communicable Disease Exists, 85 FED. REG. 16,567 (Mar. 20, 2020).

216. This refers to the DACA program (Deferred Action for Childhood Arrivals). Kevin Johnson explains how the Supreme Court overlooks racial animus evident in challenging DACA, given nearly ninety percent of its recipients are Latinx. *See Systemic Racism in the U.S. Immigration Laws*, 97 INDIANA L.J. 1455, 1477 (2022). For DACA criticism, *see* Lora Ries, *DACA May Help "Dreamers," but Illegal Immigration Hurts U.S. Workers, Taxpayers and Wages*, HERITAGE FOUND.: COMMENT. IMMIGR. (Oct. 14, 2020), <https://www.heritage.org/immigration/commentary/daca-may-help-dreamers-illegal-immigration-hurts-us-workers-taxpayers-and> [<https://perma.cc/VPA4-SUQR>].

border myth conceptually and how it contributes to tensions dividing Americans.