

**ASSUMING ACCENT:
RECOGNIZING THE INTERSECTION OF
RACE AND NATIONAL ORIGIN IN
TITLE VII DISCRIMINATION**

EUN HEE HAN*

Recent years have unsettled Asian Americans' sense of belonging in America, either in the street or in the workplace. Epithets related to the COVID-19 pandemic that proliferated in 2020 and after demonstrated that Asian Americans are still subject to the perpetual foreigner stereotype—the unfounded assumption of a foreign national origin that can arise as the assumption of an accent before one speaks. At the same time, rebukes to “speak English” or clearly after one speaks reflect the model minority stereotype—the expectation that Asian Americans should diligently work to assimilate to dominant speech norms to gain success. Both stereotypes reflect national origin and racial biases. In the workplace, both stereotypes are present in mistreatment directed at Asian Americans for their assumed foreign accents or actual speech.

Title VII prohibits workplace discrimination related to a plaintiff's belonging in a protected class: race, color, religion, sex, or national origin. When plaintiffs claim they were not hired, mocked, or otherwise discriminated against because of their accents, courts tend to focus on accents as being intertwined with national origin. However, this Article argues that

* Associate Professor of Law, Legal Practice, Georgetown Law. Many thanks to Dorothy Brown, Erin Carroll, Nakita Cuttino, Ariel Eckblad, Janel George, Amy Griffin, Tiffany Jeffers, Sherri Lee Keene, Susan McMahon, Naomi Mezey, Saleema Snow, Neel Sukhatme, Maria Termini, and Katherine Vukadin. Thank you also to colleagues at the 2024 AALS LWRR Works-in-Progress Program, the 2024 Legal Writing Professors of Color: Writing as Resistance Scholarship Workshop hosted by the William S. Boyd School of Law at UNLV, and the 2024 Workshop for AAPI-MENA Women in the Legal Academy hosted by William & Mary Law School. Special thanks to Tyler Bates, Chelsea Clayton, Renée Cordio, Breanna de Vera, Milan Gacioch, Hannah Holden, Lily Li, Chloe Miracle-Rutledge, and Cheyenne Green for research assistance, plus the incredible team at the University of Colorado Law Review for the care and respect you gave to this Article. Last but not least, thank you to Adam, Liberty, and Truth for creating space and time for me to write and also to Ashlynn for the read.

such analysis overlooks the salience of race and how it intersects with national origin for Asian American plaintiffs, specifically through the perpetual foreigner and model minority stereotypes. The ultimate effect is that Title VII jurisprudence largely ignores how discrimination plays out for Asian Americans and silences their experiences. To address the reality of how accent-based discrimination against Asian Americans operates, this Article proposes that Title VII law incorporate a modified intersectional approach to recognize that accent-based discriminatory conduct implicates, at the least, both national origin and race.

INTRODUCTION	64
I. ACKNOWLEDGING ACCENT, RACE, AND ORIGIN	73
A. Complicating Accent and Origin.....	74
B. Racially Stereotyping Asian Americans.....	78
C. Assuming Accent for Asian Americans	84
II. LINKING ACCENT AND NATIONAL ORIGIN UNDER TITLE VII.....	92
A. Invoking Title VII.....	92
B. Forming Accent's Link to National Origin.....	99
C. Weaving the Link into Precedent	102
III. RECOGNIZING STEREOTYPE AND INTERSECTIONALITY AS TO ACCENT	104
A. Critiquing the Accent-National Origin Link.....	105
B. Applying Accent's Link to National Origin.....	112
1. Linking Accent Solely to National Origin.....	112
2. Focusing on Race.....	117
3. Blurring National Origin and Race.....	119
4. Beginning to Recognize Race and National Origin in Tandem	122
C. Addressing Assumptions and Stereotypes.....	124
D. Proposing a Modified Intersectionality	128
CONCLUSION.....	131

INTRODUCTION

Anti-Asian sentiment exacerbated by the COVID-19 pandemic shattered any sense of belonging that Asian American individuals might have had in America, on the streets or in the

workforce.¹ The indiscriminate aiming of vitriol, and even violence, at anyone who perpetrators raced as Asian American proved we are still subject to the “perpetual foreigner” racial stereotype that imagines Asian Americans to be other than American based on an assumed foreign birthplace or allegiance.² At the same time, Asian Americans are set up against a “model minority” stereotype that falsely positions Asian Americans as adjacent to whiteness, imagines Asian American success to be attainable through diligence, casts Asian Americans as nonassertive and deferential, and penalizes imperfection as a refusal to assimilate.³ The effect of the model minority stereotype

1. See Anti-Chinese Rhetoric Tied to Racism Against Asian Americans, STOP AAPI HATE (June 17, 2020), <https://stopaapihate.org/2020/06/17/anti-chinese-rhetoric-tied-to-racism-against-asian-americans> [https://perma.cc/EC35-PRKY]; Jennifer Y. Kim & Zhida Shang, *No, I Do Not Belong: How Asian American and Asian Canadian Professionals Defy and Counter Workplace Racial Violence during COVID-19*, 61 J. MGMT. STUD. 888, 896, 906 (2024) (describing how racialized workplace interactions during the COVID-19 pandemic affected Asian Americans’ and Asian Canadians’ sense of belonging), <https://onlinelibrary.wiley.com/doi/10.1111/joms.12898> [https://perma.cc/FWH4-AUTM].

2. The term “race” is used as a verb to signify an imposed process. See John A. Powell, *The Racing of American Society: Race Functioning as a Verb before Signifying as a Noun*, 15 MINN. J. L. & INEQ. 99, 104–08, 113 (1997), <https://scholarship.law.umn.edu/lawineq/vol15/iss1/5> [https://perma.cc/G9SF-EGJT]. The perpetual foreigner stereotype, alternately labeled as perpetual foreigner syndrome, is the notion that such individuals are not American and instead from elsewhere. The stereotype applies to multiple minority groups, including Asian Americans, and is considered a racial stereotype, but it also implicates assumptions about national origin. See ROSINA LIPPI-GREEN, *ENGLISH WITH AN ACCENT: LANGUAGE, IDEOLOGY, AND DISCRIMINATION IN THE UNITED STATES* 385–86 (2d ed. 2012); FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 79–84 (2002) (discussing how questioning of those with Asian faces manifests as the questions “Where are you from?” and “Where are you really from?”); Jasmine B. Gonzales Rose, *Color-Blind but Not Color-Deaf: Accent Discrimination in Jury Selection*, 44 N.Y.U. REV. L. & SOC. CHANGE 309, 325–26 (2020) (noting that “Asian Americans and Latinxs are perceived to be foreign, irrespective of whether they are native-born or immigrants,” which affects how they are perceived to speak); Rosa Kim & Katrina Lee, *Asian American Inclusion in Legal Academia*, MICH. ST. L. REV.: MSLR F. (Mar. 31, 2022), <https://www.michiganstatelawreview.org/vol-2021-2022/2022/3/28/asian-american-inclusion-in-legal-academia> [https://perma.cc/CEA7-U3LX] (noting the othering of Asians and Asian Americans).

3. The model minority stereotype, also labeled the model minority myth, is the notion that Asian Americans are able to achieve success in America through a focus on education, family values, and a diligent work ethic. Also associated with the model minority stereotype are the notions of being unassuming, deferential, or not assertive. See Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of “Foreignness” in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71 (1997); LIPPI-GREEN, *supra* note 2, at 386–91 (discussing the perpetual foreigner

is to discount Asian Americans' racial experience, silencing it. Together, the perpetual foreigner and model minority stereotypes interact to create conditions for how Asian American individuals should exist in America, including as to their speech.

Before proceeding, it is important to note that the Asian and Asian American labels describe a diverse group of peoples with a range of identities.⁴ Unfortunately, the stereotypes treat Asian Americans as a monolithic group, discounting such diversity.⁵ For the sake of current discussion, I broadly use the term "Asian American" for the remainder of this Article to include anyone in the United States who would claim that identity, regardless of

and model minority stereotypes' impact on linguistic subordination, frequently manifested as irritation or mockery); William Petersen, *Success Story, Japanese-American Style*, N.Y. TIMES (Jan. 9, 1966), <https://www.nytimes.com/1966/01/09/archives/success-story-japaneseamerican-style-success-story-japaneseamerican.html> [<https://perma.cc/N5LW-RYYR>] (describing Japanese Americans as having succeeded in the U.S. because of diligence, family values, and a focus on education); Tracy Lachica Buenavista et al., *Contextualizing Asian American Education Through Critical Race Theory: An Example of U.S. Pilipino College Student Experiences*, NEW DIRECTIONS FOR INSTITUTIONAL RSCH., no. 142, Summer 2009, at 70 (noting the model minority stereotype "supports the idea that racial and ethnic communities can overcome challenges associated with minority status and persevere despite inequalities in America"); Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 38 (1994) (noting the characterization of being "nonassertive and deferential" associated with the model minority stereotype).

4. See NEIL G. RUIZ ET AL., PEW RSCH. CTR., DIVERSE CULTURES AND SHARED EXPERIENCES SHAPE ASIAN AMERICAN IDENTITIES 2, 8, 11 (2023), https://www.pewresearch.org/wp-content/uploads/sites/20/2023/05/RE_2023.05.08_Asian-American-Identity_Report.pdf [<https://perma.cc/5ATR-4HQG>] (estimating Asian Americans to make up 7 percent of the U.S. population, within which 54 percent are immigrants, and further noting that Asian American individuals in the U.S. identify using ethnic labels alone or in combination with "American," identify solely as American, use the labels Asian or Asian American, or use labels reflecting region such as South Asian); Abby Budiman & Neil G. Ruiz, *Key Facts About Asian Origin Groups in the U.S.*, PEW RSCH. CTR. (Apr. 29, 2021), <https://www.pewresearch.org/short-reads/2021/04/29/key-facts-about-asian-origin-groups-in-the-u-s> [<https://perma.cc/B848-JZ6D>].

5. See, e.g., Saito, *supra* note 3, at 90 ("The monolithic image of success also lumps all Asian Americans together . . ."); see also, e.g., Sabrina Tavernise & Richard A. Opiel Jr., *Spit on, Yelled at, Attacked: Chinese-Americans Fear for Their Safety*, N.Y. TIMES (June 2, 2020), <https://www.nytimes.com/2020/03/23/us/chinese-coronavirus-racist-attacks.html> [<https://perma.cc/VUE7-T6JD>] ("As the coronavirus upends American life, Chinese-Americans face a double threat. Not only are they grappling like everyone else with how to avoid the virus itself, they are also contending with growing racism in the form of verbal and physical attacks. Other Asian-Americans—with families from Korea, Vietnam, the Philippines, Myanmar and other places—are facing threats too, lumped together with Chinese-Americans by a bigotry that does not know the difference.").

citizenship status or the timeline of their arrival. This is not intended to collapse the identities of a large and diverse group. Instead, it is compelled by the need to expose the practice of how Asian Americans are treated as a monolith when subject to discrimination.

Labeling a speaker as having an accent identifies the speaker as an “other.” For an Asian American speaker, being labeled as having an accent is a frequent way the perpetual foreigner and model minority stereotypes are applied. Both stereotypes can work in tandem, defying logic. For example, in August 2019, an Alabama judge, who himself had a regional accent, nevertheless spoke in a caricatured Asian accent after seeing a potential juror who appeared Asian American in court.⁶ Regardless of the fact that prospective jurors must be U.S. citizens,⁷ the perpetual foreigner stereotype was applied to the Asian American juror via the assumption of foreignness, specifically foreign accent, despite the lack of any indication that they in fact uttered any speech.⁸ In other words, the juror was stereotyped based on perceived racial appearance even before speaking, a phenomenon linguists label “reverse linguistic stereotyping.”⁹ The model minority stereotype was applied more insidiously through the

6. See Sakshi Venkatraman, *Alabama Judge Suspended After Mocking Asian Accent in the Courtroom*, NBC NEWS (July 8, 2022, at 3:52 PM), <https://www.nbcnews.com/news/asian-america/alabama-judge-suspended-mocking-asian-accent-courtroom-rcna37181> [<https://perma.cc/45VN-NAQV>] (reporting on the judge’s suspension by state Judicial Inquiry Commission); Howard Koplowitz, *Alabama Judge Who Called Kay Ivey ‘Gov. MeMaw,’ Mocked Asians and Cursed to Return from Suspension*, ADVANCE LOC. (Oct. 27, 2022, at 3:28 PM), <https://www.al.com/news/mobile/2022/10/alabama-judge-who-called-kay-ivey-gov-memaw-mocked-asians-and-cursed-to-return-from-suspension.html> [<https://perma.cc/MH4D-7AW3>] (reporting on the judge’s return to the bench and noting that the judge “made an inappropriate remark about everyone in court being able to speak ‘English’ when he saw a potential juror who appeared to be of Asian descent”); NBC 15, *Mobile Circuit Court Judge Suspended; Facing Demeanor, Abuse Of Authority Charges – NBC 15 WPXI*, at 1:28 (YouTube, June 16, 2022), <https://www.youtube.com/watch?v=H-lJLsaCjxM> [<https://perma.cc/2SWS-UFW8>] (brief interview clip indicating a regional accent).

7. ALA. CODE §12-16-60(a)(1) (1978) (requiring that a prospective juror be a U.S. citizen).

8. See Venkatraman, *supra* note 6.

9. Okim Kang & Katherine Yaw, *Social Judgement of L2 Accented Speech Stereotyping and Its Influential Factors*, 45 J. MULTILINGUAL & MULTICULTURAL DEV. 921, 923 (2021) (defining reverse linguistic stereotyping as when “listeners ascribe stereotyped characteristics to speech (i.e. listeners hear a nonstandard accent where none may be present, for example) based on social information about the speaker’s identity”).

assumption that the juror would remain nonassertive and thus not create conflict by raising a protest. Media reports about the incident did not even quote or cite to the juror's own impression of the experience.

As another example, in February 2025, during a joint press conference with Indian Prime Minister Narendra Modi, President Donald Trump asked an Indian journalist to speak louder, then cut off the journalist's question saying, "I can't understand a word he's saying. It's the accent."¹⁰ Again, the perpetual foreigner stereotype was applied via casting the question as entirely unintelligible based on foreign accent, despite the question being ultimately recorded on the transcript.¹¹ And again, the model minority stereotype was applied through the assumption the reporter would remain deferential and further through the underlying assumption that the reporter should have worked more diligently to assimilate his speech.

Linguists have studied similar ways that the perpetual foreigner and model minority stereotypes, which invoke race and national origin, are applied to speakers through assumptions about accent. As in the juror's experience, the perception that an individual is Asian American based on their outward appearance creates the assumption that the individual will speak English with an accent, if not another language entirely, based on the perpetual foreigner presumption that they are from elsewhere, even before they speak. Once an Asian American individual does speak, per linguists, they are heard as having an accent or as having more of a deleterious accent than they do, similar to the journalist's experience.¹² Under the model minority

10. Geoff Earle, *Moment Trump Stunningly Admits He Can't 'Understand a Word' from Foreign Reporter at Press Conference*, DAILY MAIL, <https://www.dailymail.co.uk/news/article-14396053/moment-trump-admits-misunderstanding-foreign-reporter-press-conference-7-22.html> [https://perma.cc/34HZ-ELPV] (last updated Feb. 14, 2025, at 4:43 AM); THE WHITE HOUSE, *President Trump Hosts a Press Conference with Prime Minister Narendra Modi*, at 18:20–18:30 (YouTube, Feb. 13, 2025), <https://www.youtube.com/watch?v=B1TBAbMnevs> [https://perma.cc/FTX8-DHLZ].

11. *Press Conference: Donald Trump and Narendra Modi of India Hold A Press Event—February 13, 2025*, ROLL CALL, <https://rollcall.com/factbase/trump/transcript/donald-trump-press-conference-joint-narendra-modi-india-february-13-2025> [https://perma.cc/P6PV-NFAC] (recording the initial question as "Thank you, Mr. President. People in India will naturally welcome your decision to extradite Tahawwur Rana to India . . .").

12. Donald L. Rubin, *Nonlanguage Factors Affecting Undergraduates' Judgments of Nonnative English-Speaking Teaching Assistants*, 33 RSCH. HIGHER EDUC. 511, 512–13 (1992); Okim Kang & Donald L. Rubin, *Reverse Linguistic*

stereotype, not having an imagined standard American English accent then becomes a personal failure to assimilate that reflects the speaker's lack of worth or diligence.¹³ The framing of accent as the speaker's personal failure excuses the listener of bias or the responsibility to attempt to understand.

Asian Americans also experience the perpetual foreigner and model minority stereotypes through accent-based mistreatment in the workplace. An employee or potential employee subject to accent-based mistreatment in the workplace can claim discrimination under Title VII of the Civil Rights Act of 1964, which makes it unlawful for an employer to discriminate against employees or potential employees on the basis of their belonging in a protected class: "race, color, religion, sex, or national origin."¹⁴ Under Title VII, as related to accent, plaintiffs have alleged not being hired or promoted based on the assertion that the plaintiff's accent, or perceived accent, makes them unable to communicate well.¹⁵ Plaintiffs have also alleged mockery of real or assumed accents, stereotype-based harassment related to speech, name-calling, or other conduct.¹⁶ Title VII claims involving accent can reflect the same racial and national origin-based perpetual foreigner and model minority stereotypes linguists have studied. However, courts have focused on accents as being "inextricably intertwined" with national origin, based on legislative assumptions related to foreign accents as characteristic of

Stereotyping: Measuring the Effect of Listener Expectations on Speech Evaluation, 28 J. LANGUAGE & SOC. PSYCH. 441 (2009).

13. See, e.g., Brenda D. Gibson, *We Speak the Queen's English: Linguistic Profiling in the Legal Profession*, 88 BROOK. L. REV. 601, 616 (2023) (defining accent bias as "a belief that those with even the slightest accent are somehow unacceptably different, i.e., less intelligent than those who speak unaccented English and not worthy of the opportunities available to unaccented English speakers").

14. See 42 U.S.C. § 2000e-2(a) (1991) ("It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.").

15. See *Fragante v. Honolulu*, 888 F.2d 591, 599 (9th Cir. 1989) (describing accent as having a "deleterious effect" on ability to communicate).

16. See *Ki v. Svnicki*, No. GJH-20-130, 2021 WL 3857855, at *2 (D. Md. Aug. 30, 2021) (mockery of "Asian accents"); *EEOC v. Lindsay Ford L.L.C.*, No. TDC-19-2636, 2021 WL 5087851 at *2-7 (D. Md. Nov. 2, 2021) (mockery of "Indian and other Asian accents," name calling, and derogatory comments).

national origin groups.¹⁷ With limited exceptions in recent years,¹⁸ courts have resisted analyzing the interplay of national origin and race in accent-based discrimination cases or struggled to do so, sometimes inadvertently perpetuating stereotypes.

Other scholars have critiqued the prevailing assumptions embedded in Title VII accent jurisprudence. Legal scholar Mari Matsuda, as part of her groundbreaking scholarship, first applied a critical race theory lens to how accent-based discrimination is addressed under Title VII, arguing that Title VII law reflects structural subordination in society and ultimately advocating for an antisubordination approach.¹⁹ Legal scholar Jasmine Gonzales Rose emphasizes how accent-based discrimination plays out as racial, ethnic, and national origin-based discrimination that implicates Titles VI and VII of the Civil Rights Act of 1964, equal protection under the Fourteenth and Fifth Amendments, and the fair cross-section requirement of the Sixth

17. See *Fragante*, 888 F.2d at 596 (“Accent and national origin are obviously inextricably intertwined in many cases”); *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1195 (9th Cir. 2003) (quoting *Fragante*, 888 F.2d at 596 to note that “[a]ccent and national origin are obviously inextricably intertwined in many cases” and acknowledging “[t]he close relationship between language and national origin”); *EEOC v. Teleservices Mktg. Corp.*, 405 F. Supp. 2d 724, 729 (E.D. Tex. 2005); *Iyoha v. Architect of the Capitol*, 927 F.3d 561, 567 (D.C. Cir. 2019); 137 CONG. REC. S15485 (1991) (citing *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 614 (1987) to note that “[c]haracteristics that identify national origin groups are ethnic characteristics such as language, speech accent, culture, ancestry, birthplace, and certain physical characteristics”); *Fair Employment Practices Act: Hearing on S. 2048 Before the Subcomm. of the S. Comm. on Educ. and Lab.*, 78th Cong. 72 (1944) (statement of Arnold Aronson, Chairman, Div. of Emp., Chi. Council Against Racial and Religious Discrimination) (stating in support of civil rights legislation, “Are we to say: ‘You are good enough to fight and die for our cause, but your skin color, or nose angle, or *foreign accent* says you are not good enough for an equal chance at a job when that cause is won?’”) (emphasis added).

18. For example, in *Ki v. Svnicki*, 2021 WL 3857855, at *6 (citing *Meng v. Ipanema Shoe Corp.*, 73 F. Supp. 2d 392, 398 (S.D.N.Y. 1999) (claim for wrongful termination based on “race/national origin (Chinese)”), a colleague subjected plaintiff DaBin Ki, described as “an Asian-American woman,” to persistent mockery of Asian accents and the stereotyped short stature of Asian-Americans, and additionally berated her in an “intimidating and threatening manner.” *Id.* The U.S. District Court for the District of Maryland, in an unpublished opinion, determined that Ki had sufficiently alleged discriminatory hostile work environment based on race to defeat summary judgment, but in doing so relied on disparate treatment discrimination cases that considered accent as related to national origin. *Id.* Considered together, the precedent demonstrates doctrinal ambivalence.

19. Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1394–1403 (1991) (noting that whether an accent is considered normal or desirable reflects distribution of power in society and arguing for linguistic tolerance).

Amendment, including in the jury selection context.²⁰ Legal scholar Brenda Gibson explored speech- and writing-based biases against people of color, using as one example heightened critique of Black lawyers' and law students' speech and writing.²¹ Other legal scholars have, as a result, called for Title VII jurisprudence to consider other impacts of accent-based exclusion, focus on ethnicity rather than national origin,²² or carve out a range of jobs in which oral communication is essential to encourage judicial scrutiny when oral communication is not essential.²³

This Article similarly critiques Title VII jurisprudence, with a focus on the Asian American experience. This Article argues that despite linguists having long understood accent as affected by social features, including race and origin,²⁴ the law tends to view Title VII accent discrimination through a reductive accent-national origin lens. The flaw in the Title VII doctrine's consideration of accent as "inextricably intertwined" with a non-U.S. national origin²⁵ is that the link ignores the salience of race, even though accent lays in the shadow of both the perpetual foreigner and model minority stereotypes, which are racial stereotypes that also implicate national origin. As a result, courts struggle to address the interplay of race and national

20. See Gonzales Rose, *supra* note 2, at 337–46; Jasmine B. Gonzales Rose, *Race Inequity Fifty Years Later: Language Rights Under the Civil Rights Act of 1964*, 6 ALA. C.R. & C.L. L. REV. 167 (2014) [hereinafter *Race Inequity Fifty Years Later*]. Though not the focus of this article, other legal scholars such as Cheryl I. Harris have further discussed how Title VII jurisprudence interacts with the Equal Protection Clause of the Fourteenth Amendment. See generally Cheryl I. Harris, *Limiting Equality: The Divergence and Convergence of Title VII and Equal Protection*, 2014 U. CHI. LEGAL F. 95 (2014).

21. See generally Gibson, *supra* note 13.

22. See Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 832–39 (1994) (defining national origin as "the nation of one's birth" and ethnicity as "physical and cultural characteristics that make a social group distinctive" and arguing that discrimination more likely arises from perception of ethnic traits than because of national origin); Carlo A. Pedrioli, *Respecting Language as Part of Ethnicity: Title VII and Language Discrimination at Work*, 27 HARV. J. ON RACIAL & ETHNIC JUST. 97 (2011).

23. Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365, 393–94 (2006).

24. LIPPI-GREEN, *supra* note 2, at 76.

25. See *Fragante v. Honolulu*, 888 F.2d 591, 596 (9th Cir. 1989); see also, e.g., *Bell v. Home Life Ins. Co.*, 596 F. Supp. 1549, 1555 (M.D.N.C. 1984) ("[I]f plaintiff could prove that he had been discriminated against because of his accent, he would establish a *prima facie* case of national origin discrimination.").

origin for Asian Americans in discriminatory practice and can even passively perpetuate these stereotypes. The broader effect of Asian American speaker stereotypes being woven into the law is that it discounts and silences the complexity of Asian Americans' racial experience.²⁶ Ultimately, the accent-national origin link holds Asian Americans to an invisible standard of native-born, unaccented English speech that has traditionally correlated with white speakers despite the linguistic truism that no such unaccented speech exists.²⁷ A different approach is needed: one that recognizes when stereotypes are present and that addresses the intersection of race and national origin.

The Article will proceed in three parts. Part I defines accent and highlights linguistics scholarship on how accent-based prejudice plays out for Asian American speakers in ways that reflect the model minority and perpetual foreigner stereotypes. Part II describes how the legislature and circuit courts interpreting the law in disparate treatment cases formed the accent-national origin link in Title VII jurisprudence. Part III argues that the link is reductive and has been inconsistently applied by courts. At best, the accent-national origin link fails to address the complexity of accent-based mistreatment of Asian American plaintiffs. At worst, the link passively perpetuates the model minority and perpetual foreigner stereotypes. To address the complexity of accent-based discriminatory treatment, Part III then proposes a two-pronged approach for future cases, consisting of: (1) judicial recognition of how national origin and racial stereotypes affect assumptions about or perceptions of accent;²⁸ and (2)

26. See, e.g., Ethan Kutlu, Mehrgol Tiv, Stefanie Wulff, & Debra Titone, *The Impact of Race on Speech Perception and Accentedness Judgements in Racially Diverse and Non-Diverse Groups*, 43 APPLIED LINGUISTICS, 867, 869 (2022) (noting “whiteness is often attested to being the prototypical look for a typical *native* English speaker”).

27. See Matsuda, *supra* note 19 (noting we all have accents); Rosina Lippi-Green, *Accent, Standard Language Ideology, and Discriminatory Pretext in the Courts*, 23 LANGUAGE SOC'Y 163, 165–70 (1994) (explaining that all people have accents); EDWARD FINEGAN & JOHN R. RICKFORD, *LANGUAGE IN THE USA: THEMES FOR THE TWENTY-FIRST CENTURY* 6, 39–40 (2004) (noting that no two people speak the same); see also Univ. of Pa. Linguistics Lab'y, *TELSUR PROJECT*, https://www.ling.upenn.edu/phono_atlas/home.html [<https://perma.cc/5FTZ-5K39>] (mapping phonological differences in U.S. English by region).

28. See, e.g., Su Yeong Kim et al., *Accent, Perpetual Foreigner Stereotype, and Perceived Discrimination as Indirect Links Between English Proficiency and Depressive Symptoms in Chinese American Adolescents*, 47 DEVELOPMENTAL PSYCH. 289 (2011); see also, e.g., Guillermo Wated & Juan I. Sanchez, *The Role of Accent as*

modified intersectionality.²⁹ This Article concludes with the hope that unlinking accent from national origin will challenge the passive perpetuation of the model minority and perpetual foreigner stereotypes in accent-based discrimination cases under Title VII, with possible results that make Title VII jurisprudence more equitable not just to Asian Americans but any plaintiff of color.

I. ACKNOWLEDGING ACCENT, RACE, AND ORIGIN

For Asian Americans, one way that race affects daily life is through racial stereotypes, such as the perpetual foreigner and model minority stereotypes, which affect listeners' expectations about a speaker's speech or accent once a listener races a speaker as Asian American.³⁰ This Part will examine the complexity of how accent and speech, racial stereotypes, and national origin interact. Section I.A will define the term "accent" and discuss its significance as a label to designate an "other." Section I.B will describe the perpetual foreigner and model minority stereotypes that apply in complex, and at times conflicting, ways to individuals raced as Asian American. Section I.C will explain how linguists have already recognized the impact of stereotypes and assumptions about national origin and race for accent and speech, including the phenomenon of reverse linguistic stereotyping.³¹

a Work Stressor on Attitudinal and Health-Related Work Outcomes, 13 INT'L J. STRESS MGMT. 329 (2006).

29. See *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1562 (9th Cir. 1994) ("[W]hen a plaintiff is claiming race and sex bias, it is necessary to determine whether the employer discriminates on the basis of that combination of factors, not just whether it discriminates against people of the same race or of the same sex.").

30. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 330 (1987) (noting that "[r]acism is in large part a product of the unconscious" that is ubiquitous and universal in American culture); see also Dorothy A. Brown, *Fighting Racism in the Twenty-First Century*, 61 WASH. & LEE L. REV. 1485, 1487 (noting the "pervasiveness of racism in American society"); WU, *supra* note 2 (discussing the Asian American racial experience, including the frequent question, "where are you from?"); Chew, *supra* note 3, at 33 (describing being asked "where are you from?" and being complimented on a lack of accent when first meeting people).

31. Kang & Yaw, *supra* note 9.

A. *Complicating Accent and Origin*

To label a speaker as having an accent is complicated because the term “accent” has little concrete definition in linguistics.³² Other terms are more concrete, like “dialect,” which is technically a systematic variation of a language with its own “morphological structures, syntax, lexicon, and semantics.”³³ Accent, in contrast, is context-dependent, serving as “a loosely defined reference to sets of distinctive differences over geographic or social space, most usually phonological and intonation features.”³⁴ Every speaker has an individual accent because all spoken language has variance,³⁵ even though this fact is not frequently acknowledged in law.³⁶ Although, fundamentally, accent is how words sound when uttered by a speaker, listeners generalize from each speaker’s accent meanings about geography or socially constructed features such as wealth, education, race, and ethnicity.³⁷

The label “accent” functions to identify the “other.”³⁸ There is no single standard accent in the United States,³⁹ but the label

32. See LIPPI-GREEN, *supra* note 2, at 44 (explaining that for linguists, the term “accent” “has no technical or specific meaning,” but to the extent linguists define accent, it is used to identify stress in words or prosodic features in speech); John Baugh, *Linguistic Profiling*, in BLACK LINGUISTICS: LANGUAGE, SOCIETY, AND POLITICS IN AFRICA AND THE AMERICAS 155, 155 (Arnetha Ball et al. eds., 2003) (noting that accent variation is based on “prosody, phonetics, and phonology”); Kang & Yaw, *supra* note 9, at 921 (noting that “accent is often limited to represent phonological differences in speech characteristics”).

33. LIPPI-GREEN, *supra* note 2, at 46.

34. Lippi-Green, *supra* note 27, at 165.

35. LIPPI-GREEN, *supra* note 2, at 7 (noting “[v]ariation is intrinsic to all spoken language . . .”); see also Kang & Yaw, *supra* note 9, at 921 (“[E]veryone can hold an accent to some extent regardless of his/her first language (L1) status, as accent can be community or individual specific.”).

36. *But see, e.g.*, *Fragante v. Honolulu*, 699 F. Supp. 1429, 1431 (D. Haw. 1987) (stating that “[e]veryone has an accent,” a statement that was dropped from the Ninth Circuit’s decision on appeal).

37. LIPPI-GREEN, *supra* note 2, at 45 (“Gender, race, ethnicity, income, religion – these and other social identities are often clearly marked by means of choice between linguistic variants.”).

38. See Lippi-Green, *supra* note 27, at 165 (“[A]ccent is how *the other* speaks.”).

39. See Henri T. Maindidze et al., *A Meta-Analysis of Accent Bias in Employee Interviews: The Effects of Gender and Accent Stereotypes, Interview Modality, and Other Moderating Features*, INT’L J. SELECTION & ASSESSMENT, Jan. 23, 2025, at 1, 2, <https://doi.org/10.1111/ijsa.12519> [<https://perma.cc/V2M2-QX9H>] (“At a foundational level, however, the *standard* accent for a given region is one that is characteristic of the majority of people in that location, with all other accents spoken by people in that region termed *non-standard*.”); see also Reid Wilson, *What Dialect*

“Standard American” or “Standard English” is used to designate speech that sounds like the American English commonly associated with schools, the workplace, and news broadcasts.⁴⁰ An individual listening to American English might designate the speaker as nonstandard by labeling the speaker as having an accent associated with a geographic United States region: the South, Northeast, Midwest, or West Coast.⁴¹ At times, some have been favored; others can be disfavored or become a source of differential treatment, as recognized with varieties of Southern accents.⁴²

American English speakers might similarly label other native English speakers, specifically those speaking English forms prevalent in other areas of the world, as having an accent and may place them on a hierarchy that favors some over others. Linguistic studies have shown that varieties of language associated with more socially powerful groups are associated with higher prestige, or more favored.⁴³ Varieties of language

Do You Speak? A Map of American English, WASH. POST: GOVBEAT, (Dec. 2, 2013), <https://www.washingtonpost.com/blogs/govbeat/wp/2013/12/02/what-dialect-to-do-you-speak-a-map-of-american-english> [<https://archive.ph/tO170>] (mapping regional variations in American English); *Yale Grammatical Diversity Project English in North America*, YALE UNIV., <https://ygdp.yale.edu> [<https://perma.cc/7269-6RSD>] (mapping American English varieties based on survey results).

40. Yale Grammatical Diversity Project English in North America: FAQ, YALE UNIV., <https://ygdp.yale.edu/faq> [<https://perma.cc/BX68-BYTU>].

41. The exact number of accents in the U.S. differs based on who is categorizing them and how, but accents tend to reflect geography. At times, accent can also result from a speaker using a particular language variety, or dialect. See William Labov et al., *THE ATLAS OF NORTH AMERICAN ENGLISH: PHONETICS, PHONOLOGY AND SOUND CHANGE* (2006); MARGINS OF ERROR: *Do I Sound Funny to You?* at 08:12–09:07 (CNN, May 3, 2022), <https://www.cnn.com/audio/podcasts/margins-of-error/episodes/64c98de7-5422-4f7e-8fef-ae860174d926> [<https://perma.cc/XE4A-CTEK>] (in the podcast, Nicole Holliday, a linguistics professor, estimates the number of accents in the U.S. as between three and twenty-five, while William Labov, a sociolinguist, identifies nine major accent varieties based on region, including New York City, Southeast, Western, and others); WIRED, *Accent Expert Gives a Tour of U.S. Accents – (Part One)* (YOUTUBE, Jan. 21, 2021), https://www.youtube.com/watch?v=H1KP4ztKK0A&ab_channel=WIRED [<https://perma.cc/VYH3-3RVY>] (a video series in which a dialect coach identifies forty accents, some of which overlap with dialects such as Gullah Geechee).

42. See, e.g., Destiny Peterson, *In the Thick of Thick Accents: Employment Discrimination and the Appalachian Accent*, 22 APPALACHIAN J.L., no. 2, 2023, at 1, <https://appalachian.scholasticahq.com/article/74188-in-the-thick-of-thick-accents-employment-discrimination-and-the-appalachian-accent> [<https://perma.cc/QC6M-RJZL>]; see also, e.g., *Gonzales Rose*, *supra* note 2, at 319 (discussing differences in how accents are favored or disfavored in ways that reflect race).

43. See Marko Dragojevic, Fabio Fasoli, Jennifer Cramer & Tamara Rakić, *Toward a Century of Language Attitudes Research: Looking Back and Moving*

associated with minority groups, such as foreign accents, are associated with lower prestige.⁴⁴ Title VII law itself includes cases of employers disfavoring accents from other countries, including countries where English is an official language.⁴⁵ For example, in *EEOC v. West Customer Management Group, LLC*, the plaintiff was born in Jamaica, where English is an official language, and his first and only language was English, yet he was rejected from a customer service position because of his accent.⁴⁶

American English speakers may also label second language speakers of English as “accented” to mark them as “other.” To label a second language speaker of English as “accented” may reference what the listener hears as “the carryover of native language phonology and intonation into a target language.”⁴⁷ For example, labeling a native Korean speaker who speaks English as a second language as “accented” may simply highlight that some of the speaker’s vowel or consonant sounds in English are similar to those in Korean, rather than indicating that the speaker has a systematic accent. More generally, labeling any speaker as “accented” may collapse various speech features such as phonology, intonation, syntax, dialect, and even proficiency

Forward, 40 J. LANGUAGE & SOC. PSYCH. 60, 63 (2021) (noting that in the aggregate, linguistic studies show “high prestige varieties” tend to be majority group or standard varieties).

44. See *id.* (noting “low prestige varieties” include “minority group languages, nonstandard varieties—namely those that diverge from codified norms, including most regional and ethnic dialects and foreign accents—and other forms linked to stigmatized groups.”).

45. See, e.g., *Fragante v. Honolulu*, 888 F.2d 591, 593 (9th Cir. 1989) (noting plaintiff’s “heavy Filipino accent”); CONST. 1987, art. XIV, § 7 (Phil.) (“For purposes of communication and instruction, the official languages of the Philippines are Filipino and, until otherwise provided by law, English.”); *Jiminez v. Mary Washington Coll.*, 57 F.3d 369, 372, 374, 375, 380 (4th Cir. 1995) (reversing a district court finding of race and national origin discrimination when a college gave the plaintiff, a professor from Trinidad, a one-year terminal contract rather than tenure consideration based on the professor’s poor evaluations from students that included statements such as, “[h]ire a professor who speaks English,” in combination with not completing his Ph.D., without investigating other students’ allegations that the poor evaluations were based on the professor’s race and national origin).

46. *EEOC v. W. Customer Mgmt. Grp.*, 899 F. Supp. 2d 1241, 1246, 1251 (N.D. Fla. 2012) (“[Plaintiff] Roberts was born in Jamaica and graduated from high school there. He moved to the United States in 1989 and became a United States citizen in 1999. His first and only language is English, but he speaks with an accent.”).

47. Lippi-Green, *supra* note 27, at 165.

and fluency into one label meant to indicate otherness from some assumed norm.⁴⁸

Thus, while accent is complex and context-driven, lay usage of the term “accent” often collapses that complexity and functions to label a speaker as from a socially constructed group that is other from the listener, rather than identify a technical linguistic phenomenon.⁴⁹ Common usage that interchanges the labels “accent” and “dialect,” for example, blurs concepts and demonstrates that any variance might be labeled as one or the other by a non-linguist.⁵⁰ This Article will use “accent” to mean any speech variance, falling short of speaking another language,

48. See, e.g., LIPPI-GREEN, *supra* note 2, at 44–46 (suggesting the consideration of “*standard language* and *non-accent* as myths” and the notion of a standard American English accent as an “abstraction”); see also, e.g., John McWhorter, *What’s a Language, Anyway?*, ATLANTIC: GLOBAL (Jan. 19, 2016), <https://www.theatlantic.com/international/archive/2016/01/difference-between-language-dialect/424704> [<https://perma.cc/7CM2-NERM>] (“In popular usage, a language is written in addition to being spoken, while a dialect is just spoken.”); *Bhella v. England*, 91 F. App’x 835, 846 (4th Cir. 2004) (including allegations that plaintiff’s supervisor and colleagues labeled her as speaking “broken English” in addition to mocking her accent).

49. See GOOGLE, “Accent”, 360,000,000 results (Nov. 25, 2025), <https://www.google.com/search?q=accent+definition> [<https://perma.cc/93DP-UNHV>] (A Google definition that is likely popularly accessible and sourced from Oxford Languages defines accent, considered in the context of use of spoken language to communicate ideas (as opposed to stressing a term, punctuation mark, or musical tool), as “a distinctive mode of pronunciation of a language, especially one associated with a particular nation, locality, or social class.” By this definition, accent is alluded to as characteristic of some kind of grouping by collective politics or national identity, geography, or economic circumstances.); see also *Accent*, MERRIAM-WEBSTER: DICTIONARY, <https://www.merriam-webster.com/dictionary/accent#dictionary-entry-1> [<https://perma.cc/VKT8-SLP3>] (indicating that accentedness can be either a group or individual characteristic, and potentially a choice, by defining accent as a “distinctive manner of expression . . . such as . . . a way of speaking typical of a particular group of people and especially of the natives or residents of a region” or “an individual’s distinctive or characteristic inflection, tone, or choice of words”); *Accent*, FREE DICTIONARY, <https://www.thefreedictionary.com/accent> [<https://perma.cc/W8BB-FKHM>] (beginning to imply accent is outside the norm, and other or potentially foreign, by defining it as a “characteristic pronunciation,” such as “determined by the regional or social background of the speaker” or “determined by the phonetic habits of the speaker’s native language carried over to his or her use of another language”).

50. See, e.g., Chi Luu, *Does Your Accent Make You Sound Smarter?*, BBC: NEWS (May 22, 2017), <https://www.bbc.com/worklife/article/20170523-does-your-accent-make-you-sound-smarter> [<https://perma.cc/F2R9-RXTT>] (containing the term “accent” in the title but referring to both “accent” and “dialect” within the article to denote the way in which people speak and referring to African American English, Chicago English, and Standard American English as accents).

in the way the term is used broadly by laypersons and in much Title VII jurisprudence.⁵¹

B. Racially Stereotyping Asian Americans

This Article addresses the role of the model minority and perpetual foreigner stereotypes on how Asian Americans experience accent-based discrimination.⁵² Both stereotypes have previously been examined by scholars, such as Robert Chang, Pat K. Chew, Claire Jean Kim, Natsu Taylor Saito, Frank H. Wu, and others, yet these stereotypes continue to serve as poles for Asian American existence.⁵³ Together, these stereotypes reduce Asian-appearing people to a set of assumed traits, take away their agency to choose how to identify in American society, and foster differential treatment or conflicting expectations in ways that blur race and national origin.⁵⁴

First, the model minority stereotype is based on the notion that Asian Americans as a group have achieved and can achieve success in America through hard work, prioritizing educational

51. See discussion *infra* Part III on how courts use a lay meaning of accent.

52. Of course, there are a multiplicity of stereotypes that affect Asian-appearing individuals in the U.S. These stereotypes may be applied in praxis on a spectrum or interact with other stereotypes such as those related to gender. See, e.g., Shoba Sivaprasad Wadhia & Margaret Hu, *Decitizenizing Asian Pacific American Women*, 93 U. COLO. L. REV. 325, 334 (2022) (discussing gender-related sexual stereotypes that impact Asian-appearing individuals). There may also be stereotyped identities used to distinguish sub-groups within a larger group. See, e.g., Karen Pyke & Tran Dang, “*FOB*” and “*Whitewashed*”: *Identity and Internalized Racism Among Second Generation Asian Americans*, 26 QUALITATIVE SOCIO. 147 (2003) (discussing the use of “*FOB*” and “*whitewashed*” labels as distinctions within Asian-appearing groups).

53. See Ilhyung Lee, *COVID-19 and the Continuing Asian American Moment: Narratives from the Midwest*, 10 WAKE FOREST L. REV. ONLINE 149, 164–65 (2020), <https://www.wakeforestlawreview.com/2020/11/covid-19-and-the-continuing-asian-american-momentnarratives-from-the-midwest> [https://perma.cc/U5PY-NS8B] (discussing Asian American othering during the COVID-19 pandemic and observing the “societal perception of Asian Americans as perpetual foreigners, regardless of their citizenship, place of birth, or length of years stateside, who are othered and will always be viewed, not as Americans, but as Asian Americans, and who, as members of the ‘model minority,’ do not suffer from discrimination.”).

54. Other aspects of identity, such as ethnicity or aspects of gender, may be blurred as well, though they are not the current focus of this paper. See generally KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006) (discussing downplaying disfavored traits); Pedrioli, *supra* note 22, at 98 (discussing ethnicity); Wadhia & Hu, *supra* note 52.

achievement, deference to authority, and assimilation.⁵⁵ Legal scholars consider a 1966 *New York Times* article by William Petersen describing the Japanese American experience as a catalyst for the current model minority myth.⁵⁶ In the article, Petersen, a sociology professor at the University of California at Berkeley, described Japanese Americans as successful based on relatively high levels of education, low delinquency rates, and economic gains despite challenges such as ineligibility to own property, inability to naturalize as American citizens, and internment during World War II.⁵⁷ The article had a complex impact: on the surface, it extolled the accomplishments of Japanese Americans and highlighted the challenges Japanese Americans had faced; beneath the surface, it critiqued other minority groups and positioned Asian Americans against them.⁵⁸ Political scientist and Asian American studies scholar Claire Jean Kim recognized such racial triangulation as a first harm of the model minority stereotype.⁵⁹ A second harm of the model minority stereotype is that it reflects the assumption that Asian Americans have a monolithic experience despite the differences in wealth, education, social resources, and lived experiences of Asian American subgroups.⁶⁰ The stereotype thus collapses

55. See, e.g., Petersen, *supra* note 3; see also, e.g., WU, *supra* note 2, at 40 (noting that Asian Americans as a group “are said to be intelligent, gifted in math and science, polite, hard working, family oriented, law abiding, and successfully entrepreneurial,” which can serve as a detriment to serious consideration of Asian Americans’ civil rights issues); Chew, *supra* note 3, at 24 (describing the model minority stereotype as the “belief that Asian Americans, through their hard work, intelligence, and emphasis on education and achievement have been successful in American society.”).

56. See, e.g., WU, *supra* note 2, at 59–62 (discussing the model minority myth as having origins as far back as the nineteenth century with the use of Chinese laborers in the U.S. but originating in its modern form with Petersen); Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 POL. & SOC’Y 105, 119–120 (1999) (noting the model minority myth as first appearing in the Petersen article and later similarly applying to Chinese Americans who were characterized as focused on “education, diligence, family solidarity, discipline, self-sufficiency, respect for authority, thriftiness, and morality”).

57. See generally Petersen, *supra* note 3.

58. *Id.* at 41 (for example, noting that “the Japanese in Japan and Japanese Americans respond similarly to psychological tests of ‘achievement orientation,’ and both are in sharp contrast to lower-class Americans,” and specifically identifying white Americans and Black Americans).

59. See generally Kim, *supra* note 56.

60. See Chew, *supra* note 3, at 27 (discussing the diversity of Asian American immigrants and asserting that, “[b]ecause no monolithic ‘Asian American’ or ‘Asian American experience’ exists, one cannot attribute a monolithic ‘model minority’ image to it”); WU, *supra* note 2, at 49 (arguing for rejection of the model minority

Asian Americans' diversity of identities, essentializing them, and takes away Asian Americans' agency to choose and form identities. Third and finally, the model minority stereotype creates an assumption and expectation that Asian Americans will be successful and faults individuals for failure.⁶¹

Applied to speech, the model minority stereotype similarly collapses the diversity of speech variation and instead makes having a Standard American accent seem normatively attainable and desirable. For example, the *New York Times* article's description of second-generation Japanese American immigrant children's lack of accents⁶² and third-generation Japanese Americans' loss of fluency in their heritage language⁶³ reflected the expectation that Asian Americans assimilate by performing neutrally accented, or Standard American, speech to gain success per the "Success Story" title of the article. Somewhat more subtle in Petersen's article was the assumption that Asian Americans are expected to bear the losses of accent or heritage language as costs of assimilation.⁶⁴ The greater impact of making the Standard American accent seem attainable and desirable is that Asian Americans are expected, and therefore pressured, to labor to perform unaccented, model minority speech.⁶⁵

stereotype because it is "a gross simplification," is used for harmful racial comparison to Black Americans, and "is abused both to deny that Asian Americans experience racial discrimination and to turn Asian Americans into a racial threat").

61. For example, not performing a Standard American accent can mean not being hired for a job. See *generally* *Fragante v. Honolulu*, 888 F.2d 591, 593 (9th Cir. 1989); *EEOC v. W. Customer Mgmt. Grp.*, 899 F. Supp. 2d 1241, 1251 (N.D. Fla. 2012).

62. Petersen, *supra* note 3 (positing as a reason for higher delinquency rates of second-generation immigrants that "[t]he American-born child speaks English without an accent, the thesis goes, and is probably preparing for a better job and thus a higher status than his father's," which diminishes parental authority).

63. *Id.* ("Most can speak a little Japanese, but very few can read more than a few words.").

64. See, e.g., Grace MyHyun Kim, *Challenging Native Speakerism in Literacy Research and Education*, 52 J. LITERACY RSCH. 368, 370 (2020) ("Linguistic assimilation is part and parcel of the [model minority myth]; it reproduces Whiteness by hinging the belonging and success of AAPI and other non-dominant communities on performing standard English—often at the divestment of other languages that are meaningful to them.").

65. See, e.g., Shalini Shankar, *Speaking like a Model Minority: "FOB" Styles, Gender, and Racial Meanings Among Desi Teens in Silicon Valley*, 18 J. LINGUISTIC ANTHROPOLOGY 268 (2008) (observing performance of and distancing from model minority speech in high school teen groups); MARY BUCHOLTZ, *Styles and Stereotypes: Laotian American Girls' Linguistic Negotiation of Identity*, in BEYOND YELLOW ENGLISH: TOWARD A LINGUISTIC ANTHROPOLOGY OF ASIAN PACIFIC

Pressure to perform up to the model minority stereotype can lead to stress or other detrimental mental health effects in addition to the actual loss of heritage language noted in Petersen's article.⁶⁶ In laboring to perform to the model minority stereotype, some Asian Americans may also bear financial cost in the form of time spent practicing language, or even paying for accent reduction programs.⁶⁷

The second stereotype conditioning Asian American existence is that of the perpetual foreigner. The perpetual foreigner stereotype is actualized and applied through the assumption that people who are raced as Asian American are either not American at all or that their identities are more foreign than "American."⁶⁸ The viewer thus defines and frames Asian Americans through their Asian-ness, which is perceived as otherness.⁶⁹ In contrast to the assimilation assumption in the model minority stereotype, the perpetual foreigner stereotype broadly creates an opposite assumption of otherness: exoticism, deficiency in personal or moral standards, or even threat, as demonstrated by rhetoric equating being Chinese with virulence during the COVID-19 pandemic.⁷⁰ As applied to speech, the perpetual foreigner stereotype creates the assumption of

AMERICA 21 (Angela Reyes & Adrienne Lo eds., 2009) (studying attempts by two Laotian American girls to perform to and against model minority speech).

66. Arpana Gupta, Frederick T. L. Leong & Dawn M. Szymanski, *The "Model Minority Myth": Internalized Racialism of Positive Stereotypes as Correlates of Psychological Distress, and Attitudes Toward Help-Seeking*, 2 ASIAN AM. J. PSYCH. 101, 104 (2011) (observing that the model minority stereotype can harm Asian Americans by creating a pressure to succeed and unrealistic expectations, which then can cause stress to meet expectations or distress if one is unable to meet the expectations).

67. See Vijay A. Ramjattan, *Racializing the Problem of and Solution to Foreign Accent in Business*, 13 APPLIED LINGUISTICS REV. 527, 528, 535–40 (2019) (discussing for-profit accent reduction services aimed at immigrant professionals).

68. See, e.g., Robert S. Chang, *The Invention of Asian Americans*, 3 U.C. IRVINE L. REV. 947, 954 (2013) (arguing that as a consequence of judicial and legislative decisions made during the Chinese Exclusion era, Chinese and Chinese American individuals became associated with foreignness, which expanded to cover other groups seeking to immigrate to the United States from the Asian continent); see also, e.g., WU, *supra* note 2, at 79–129.

69. See generally Chew, *supra* note 3.

70. See, e.g., Neil G. Ruiz, Carolyne Im & Ziyao Tian, PEW RSCH. CTR., DISCRIMINATION EXPERIENCES SHAPE MOST ASIAN AMERICANS' LIVES 60–65 (2023), <https://www.pewresearch.org/race-and-ethnicity/2023/11/30/discrimination-experiences-shape-most-asian-americans-lives> [<https://perma.cc/859B-4HW6>].

deficient English language ability that appears through labeling Asian Americans as accented.⁷¹

The model minority and perpetual foreigner stereotypes are not consistently tied to a specific nation of origin for Asian Americans. Even historically, when differential treatment began with a link to a particular national origin, it quickly expanded and has been applied racially to Asian Americans, blurring any distinction between national origin and race.⁷² For example, legal scholar Robert S. Chang has noted that “foreignness and the associated traits of mendacity, inscrutability, disloyalty, and unassimilability,” were first attributed to “the Chinese body” then expanded to other Asians and Asian Americans.⁷³

Race and national origin have intertwined for Asian Americans throughout U.S. judicial history in ways that evoke both the model minority and perpetual foreigner stereotypes. Looking briefly beyond Title VII and accent, scholars have addressed the salience of both national origin via the place of one’s birth and racial categorization to Asian Americans in U.S. Supreme Court cases ranging from naturalization to internment. For example, in *Ozawa v. United States*,⁷⁴ a U.S. resident applied for naturalized U.S. citizenship but was deemed ineligible based on his “having been born in Japan and being of the Japanese race.”⁷⁵ Takao Ozawa attempted to argue his conformity with whiteness in contrast to Black Americans and Native Americans in a kind of prelude to the model minority stereotype’s phenomenon of triangulation.⁷⁶ Ultimately, he could not naturalize as a U.S.

71. Chew, *supra* note 3, at 35 (describing a personal experience of being approached in the grocery store “by another customer, a middle-aged, stylishly dressed white woman who apparently needed some help locating something. She politely asked me in the slow cadence and animated tone that adults reserve for speaking to babies and foreigners, ‘DO . . . YOU . . . SPEAK . . . ENGLISH?’”).

72. See, e.g., Sharon C. Goto, Gilbert C. Gee & David T. Takeuchi, *Strangers Still? The Experience of Discrimination Among Chinese Americans*, 30 J. CMTY. PSYCH. 211, 212 (2002) (noting that such stereotypes also overlook diversity of experiences and the notion that Asian-appearing people may also be subject to discrimination).

73. Chang, *supra* note 68, at 953–57 (providing examples that touch on national origin, like exclusion of “persons of Chinese ancestry,” citizenship via immigration restrictions related to specific countries, and race-based restrictions and categorization that have come to form a “racial understanding of Asian Americanness rather than an ethnic notion”).

74. *Ozawa v. United States*, 260 U.S. 178 (1922).

75. *Id.* at 189.

76. *Id.* at 189, 195 (the court acknowledged, in particular, that Ozawa had lived in the U.S. for twenty years, “was a graduate of the Berkeley, Cal., high school, had

citizen because he was not Caucasian based on the “science of ethnology” and therefore not a “free white person” per the perpetual foreigner stereotype.⁷⁷ Ozawa’s Japanese national origin overlapped with his non-white race to preclude him from U.S. citizenship. In *United States v. Thind*, an Indian national similarly attempted to argue his conformity with whiteness, but the Supreme Court decided that though Bagat Singh Thind would have been classified as Caucasian at the time, he was not a “white person” as would be commonly understood by laypersons.⁷⁸ Thus, Asian Americans are not raced as white, and applying the same legal analysis to Asian Americans as used for white plaintiffs may miss part of the Asian American experience. Instead, race and national origin intersect and were blurred together in *Ozawa* and *Thind*.

Internment of Japanese Americans during World War II likewise invoked national origin and race, blurring any distinction between the two concepts for Asian American groups. Internment was nominally based on Japan being Japanese American citizens’ birthplace or the birthplace of their ancestors, no matter how long Japanese Americans had been in the United States per the perpetual foreigner stereotype, and yet the opinion in *Korematsu v. United States* discussed both Japanese ancestry, or national origin, and race.⁷⁹ Overall, courts have long blurred race and national origin in legal treatment of Asian Americans; Title VII is an outlier for its jurisprudence that separates race and national origin for Asian Americans, as discussed in this Article.

The model minority and perpetual foreigner stereotypes have not ebbed, and in fact, seemed revitalized during and after the COVID-19 pandemic. Only a few years ago, politicians flung about anti-Asian rhetoric such as calling COVID-19 the “China virus” and “Kung flu,” and those who heard such rhetoric were

been nearly three years a student in the University of California, had educated his children in American schools, his family had attended American churches and he had maintained the use of the English language in his home,” and further noted that the appellant’s argument urged for an interpretation of “free white person” eligible for naturalization should be interpreted by its original “purpose of excluding the black or African race and the Indians then inhabiting this country”).

77. *Id.* at 196–98.

78. *United States v. Thind*, 261 U.S. 204, 206, 215 (1923); see also Joy Kanwar, *Stories from the Negative Spaces: United States v. Thind and the Narrative of (Non)Whiteness*, 74 *MERCER L. REV.* 801 (2023) (further examining the significance of race in *Thind*).

79. *Korematsu v. United States*, 323 U.S. 214, 237 (1944).

more inclined to view Asian Americans as foreign, or not American at all, based on their racial appearance.⁸⁰ In 2023, the Pew Research Center found that “78% of Asian [American] adults have been treated as a foreigner in some way, even if they are U.S. born,” with such treatment including experiences in which a stranger “has told them to go back to their home country, acted like they can’t speak English, criticized them for speaking a language other than English in public, or mispronounced their name.”⁸¹ Though acting like someone cannot speak English is nominally distinct from assuming an accent, it falls in the spectrum of mistreatment related to speech and language, given the layperson’s conflation of accent, other language features, and at times fluency.⁸² Overall, such anti-Asian public rhetoric during and after the pandemic correlated with a rise in aggregate bias against Asian Americans—increased perceptions of Asian Americans’ foreignness, in turn, fueled hostilities toward Asian Americans.⁸³

C. *Assuming Accent for Asian Americans*

A rise in aggregate bias against a group such as Asian Americans can impact who is hired or how Asian Americans are treated in the workplace based on assumptions and stereotypes.⁸⁴ One default speech assumption is that a well-spoken native speaker of American English should have no accent or a Standard American accent, and a native speaker of American

80. Jennifer Lee & Tiffany J. Huang, *Reckoning with Asian America*, 372 SCIENCE 1, 8 (2021).

81. Ruiz, Im, & Tian, *supra* note 70, at 9. For more on the impact of mispronouncing names in particular, see Eun Hee Han, *What to Learn From Pandemic Teaching? Our Student’s Names*, 69 J. LEGAL EDUC. 816 (2020).

82. Ruiz, Im, & Tian, *supra* note 70, at 12–13 (reporting, for example, that “41% of immigrants and 34% of U.S.-born adults say people have acted if they don’t speak English” even for “Asian adults whose families have lived in the U.S. for multiple generations”).

83. See, e.g., Sean Darling-Hammond et al., *After “The China Virus” Went Viral: Racially Charged Coronavirus Coverage and Trends in Bias Against Asian Americans*, 47 HEALTH EDUC. & BEHAV. 870, 875–76 (2020) (finding that the assumption that Asian Americans are more foreign than American rose beginning on March 8, 2020 as measured by the implicit association tests administered by Project Implicit).

84. See, e.g., Kim, *supra* note 56, at 127 (“Asian Americans who have achieved positions of authority or leadership routinely confront accusations that their foreignness makes them unfit for their jobs.”).

English is often imagined as white.⁸⁵ In contrast, minority speakers are assumed to have accents that make their speech deficient for the workplace.⁸⁶ For example, legal scholar Jasmine Gonzales Rose argues that racial discrimination manifests against people of color, including Latine individuals, via language discrimination which includes mistreatment based on either actual or perceived limited English proficiency, actual or perceived Spanish-English bilingualism, and actual or perceived accent.⁸⁷ A similar phenomenon occurs for Asian Americans who are vulnerable to negative treatment related to assumptions about speech activated by the model minority and perpetual foreigner stereotypes, which blur national origin and race.

For speakers raced as Asian American, both the model minority and perpetual foreigner stereotypes work in tandem as to speech. According to linguists Joyhanna Yoo, Cheryl Lee, Andrew Cheng, and Anusha Anand, Asian Americans face

85. See Ryuko Kubota, *Confronting Epistemological Racism, Decolonizing Scholarly Knowledge: Race and Gender in Applied Linguistics*, 41 APPLIED LINGUISTICS 712, 715 (2020) (noting a widespread “hegemony of whiteness associated with native speakerism” in the example of English language education and that native speakers are assumed to have a standard accent or be “accentless”); see also Hilary Parsons Dick, *Language and Migration to the United States*, 40 ANN. REV. ANTHROPOLOGY 227, 230–31 (2011) (noting a construction of English as a de facto U.S. national language, which is then imbued with an idea of purity that perpetuates the notion of a single correct standard, referenced by Parsons Dick as a “monoglot standard”); Kutlu et al., *supra* note 26, at 868–69 (noting “whiteness is often attested to being the prototypical look for a typical *native* English speaker,” and distinguishing inner circle varieties such as American English, Australian English, British English, and Canadian English that were associated with settler colonialism against outer circle English varieties that were spread through imperial expansion); Andrew Cheng & Steve Cho, *The Effect of Ethnicity on Identification of Korean American Speech*, 6 LANGUAGES, no. 4, Nov. 9, 2021, at 1, 5, <https://doi.org/10.3390/languages6040186> [<https://perma.cc/YG7J-298Y>] (“In the context of the United States, where White speakers are a majority, having ‘no accent’ can be equated in many minds as being a White, native-born American . . .”).

86. See generally Gibson, *supra* note 13.

87. See Gonzales Rose, *Race Inequity Fifty Years Later*, *supra* note 20, at 172, 209–11 (further arguing that one way in which racism against Latine people is expressed is through “the assumption that, based on their race, minority persons are not ‘American’” despite the fact that “many targets of language discrimination are native born, multigenerational, and even indigenous Americans,” and arguing that Title VII law perpetuates the problem by linking language-based discrimination to national origin rather than race); see also, e.g., Pedrioli, *supra* note 22, at 98 (noting, too, in the context of Spanish speakers, “[r]egardless of where Spanish-speaking individuals were born or whether they are U.S. citizens, employers discursively construct such individuals ‘as “foreign” or “un-American”’) (quoting Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 278 (1992)).

conflicting forms of racialization due to the two stereotypes: While, as discussed in Petersen's *New York Times* article, the model minority myth creates the expectation that Asian Americans become assimilated speakers of Standard American English,⁸⁸ the perpetual foreigner stereotype at the same time associates Asian Americans with speaking accented or "broken" English, "Yellow English," or only Asian languages.⁸⁹ Per Yoo, Lee, Cheng, and Anand, as a result, "the linguistic practices of Asian Americans are simultaneously perceived as sufficient yet deficient, authentic yet inauthentic."⁹⁰

Such conflicting perceptions of language can be triggered just by appearance.⁹¹ For example, one Asian American lawyer noted anecdotally that she had collaborated with a client many times on the phone.⁹² When they met in person, the client was surprised to find out the lawyer was Asian American because she had "no" accent, demonstrating an assumed tie between accent and perceived race.⁹³ The lawyer stated, "When you have a face like ours, we're . . . supposed to speak with an accent. Well, I do speak with an accent, it happens to be a Texas accent."⁹⁴ There are other everyday examples⁹⁵ related to the expectation

88. Petersen, *supra* note 3.

89. Joyhanna Yoo et al., *Asian American Racialization & Model Minority Logics in Linguistics*, 152 DÆDALUS 130, 138 (2023).

90. *Id.*

91. See Chew, *supra* note 3, at 19, 33 (asserting that Asian appearance is all that is needed to provoke discrimination and that "[w]hen people first meet me, it is not unusual for them to comment, 'You speak so well, you don't have an accent,' intending their observation to be a compliment. 'Where are you from?' they continue, expecting my response to be a more foreign and exotic place than Texas or Pennsylvania."); cf. Sherally Munshi, "You Will See My Family Became So American": Toward a Minor Comparativism, 63 AM. J. COMPAR. L. 655 (2015) (discussing how subsequent to *United States v. Thind*, visual appearance became significant to the legal discussions of race, as demonstrated in the denaturalization case of Dinshah P. Ghadiali).

92. Frank Ready, 'Shouldn't You Have an Accent?': Some American Asians Face Racism Among Legal Professionals, LAW.COM (Mar. 31, 2021, at 5:57 PM), <https://www.law.com/international-edition/2021/03/31/shouldnt-you-have-an-accent-some-asians-face-racism-among-legal-professionals> [<https://perma.cc/97CZ-WEBZ>].

93. *See id.*

94. *Id.*

95. See, e.g., Jeremy Hau Lam et al., *In the End, There Is No Such Thing as Unconscious Racism: CRT/Asian American Crit Counterstories by Undergraduate Students During the Pandemic*, 22 CULTURAL STUD. CRITICAL METHODOLOGIES 44, 47 (2022) (presenting the stories and reflections of Asian American undergraduate students during the pandemic, including a reflection by one author, Katrina Le, that "I was as fluent as any of my White classmates at the English language. While

of accent even just in the field of law, including the Alabama judge's use of a caricatured Asian accent to ask a potential jury if they spoke English after seeing an Asian American jury member,⁹⁶ despite the fact that the potential juror did not speak.⁹⁷

Thus, an individual may be perceived to have limited fluency, an accent, or more of an accent than they do when raced as Asian American.⁹⁸ Once a listener assumes and subsequently labels a speaker as "accented," the listener might also assume the speaker to be less intelligible, even though accent does not correlate directly to intelligibility.⁹⁹ Linguist Ron Thomson has clarified that intelligibility is a listener's ability to "correctly recognize individual words" in a speaker's speech.¹⁰⁰ Comprehensibility refers to how much effort listeners have to make to understand the speaker and can be affected by grammatical and

Vietnamese was my first language, I grew up learning English. Yet, my third-grade teacher kept insisting that I needed to get English as a Second Language tutoring, even after my parents repeatedly ensured I did not need it at parent-teacher conferences. I even doubted my own abilities with the English language. The irony is I now regret forgetting so much of the Vietnamese language."); *see also, e.g.*, Baugh, *supra* note 32, at 182 (describing a former Senator attributing an inaccurate and stereotypically Asian accent to Judge Lance Ito); Robert S. Chang & Adrienne D. Davis, *Making Up is Hard to Do: Race/Gender/Sexual Orientation in the Law School Classroom*, 33 HARV. J. L. & GENDER 1, 54 (2010) (recounting the experience of a third-generation Japanese American professor from southern California who received a student evaluation commenting on her "foreign" accent after teaching the student for a full semester).

96. Kathryn Rubino, *Self-Styled 'Judge Hard-Ass' Removed from Duty*, ABOVE THE LAW, (June 29, 2022, at 4:46 PM), <https://abovethelaw.com/2022/06/self-styled-judge-hard-ass-removed-from-duty> [<https://perma.cc/Y2HN-KPXA>]; Gabriel Tynes, *Alabama Judge Returns to Bench After Suspension for Insensitive Remarks*, COURTHOUSE NEWS SERV. (Oct. 27, 2022), <https://www.courthousenews.com/alabama-judge-returns-to-bench-after-suspension-for-insensitive-remarks> [<https://perma.cc/65UX-E6MX>] (noting the judge asked if all of the jurors spoke "Engrish," caricaturing pronunciation).

97. Complaint at 7, *In re James T. Patterson*, Circuit Judge, Mobile County, AL, No. 62 (Ala. Ct. of the Judiciary June 15, 2022) ("When addressing a jury pool on August 19, 2019, Judge Patterson, while using an Asian accent, asked the jury pool if everyone spoke 'Engrish.' The jury pool included an Asian American."). This is despite the fact the judge himself spoke with an accent. *See* NBC 15, *supra* note 6 (brief interview clip indicating a non-standard, regional accent).

98. *See* Kang & Yaw, *supra* note 9, at 922 ("It is possible that when listeners maintain certain stereotypes about a speaker's social identity or ethnicity, they may not be able to objectively evaluate a speaker's accent.").

99. *Id.* at 921 ("[A]ccent is not directly proportional to intelligibility itself.").

100. RON THOMSON, *Measurement of Accentedness, Intelligibility, and Comprehensibility*, in ASSESSMENT IN SECOND LANGUAGE PRONUNCIATION 11, 14 (Okim Kang & April Ginther eds., 2017).

vocabulary errors.¹⁰¹ Thomson poses that in addition to intelligibility or comprehensibility, what may be at play when listeners react to an accent is the concept of acceptability, or whether the listener will tolerate the accent or be irritated by it.¹⁰² Thus, being designated as “other” can intermix with assumptions about competence that exclude accented speakers from employment or other opportunities.¹⁰³

Linguists have long established that these stereotypes do impact communication because of listener bias.¹⁰⁴ Linguists Donald L. Rubin and Okim Kang ran several studies in response to students’ critiques that they had trouble understanding graduate teaching assistants who were non-native English speakers.¹⁰⁵ Rubin’s initial study involved participants seeing an image of a speaker who either appeared to be a white woman or an ethnically Chinese woman and then listening to recorded speech.¹⁰⁶ When they believed they were listening to an Asian-appearing teaching assistant, participants perceived more of an accent and exhibited worse listening comprehension skills, even for the same speech, and even when the speech was in a type of American English accent.¹⁰⁷ In other words, participants assumed accents or more of an accent based on their own held stereotypes related to the speakers’ appearance, engaging in what

101. *Id.* at 15.

102. *Id.* at 21 (“Several variables that may contribute to the acceptability of a particular speakers’ accent include the listeners’ linguistic and cultural backgrounds, their personal experiences with particular accents, their upbringings, their global tolerance for others, and their personalities.”).

103. Anne-Sophie Deprez-Sims & Scott B. Morris, *Accents in the Workplace: Their Effects During a Job Interview*, 45 INT’L J. PSYCH. 417, 423 (2010) (finding in conjunction with a study of hireability of candidates with U.S. Midwestern, French, or Colombian accents, that “decisionmaker[s] are likely to view persons with different accents as different from themselves, and consequently to evaluate them negatively”).

104. Rubin, *supra* note 12, at 519 (“[P]articipants stereotypically attributed accent differences—differences that did not exist in truth—to the instructors’ speech. Yet more serious, listening comprehension appeared to be undermined simply by identifying (visually) the instructor as Asian.”); *see also* Okim Kang, Donald Rubin & Stephanie Lindemann, *Mitigating U.S. Undergraduates’ Attitudes Toward International Teaching Assistants*, 49 TESOL Q. 681, 684, 700 (2015) (recognizing still-existing effects of linguistic stereotyping, and finding that measures to anticipate linguistic stereotyping, such as having students work with international teaching assistants in structured exercises, worked to mitigate linguistic stereotyping).

105. *See* Rubin, *supra* note 12, at 512; Kang & Rubin, *supra* note 12; Yuracko, *supra* note 23, at 400 (discussing the Rubin study).

106. Rubin, *supra* note 12, at 514–27.

107. *Id.* at 519.

sociolinguists call “reverse linguistic stereotyping.”¹⁰⁸ Stereotypes and assumptions held by the listener then actually impacted their ratings of the speaker’s communicative ability and overall competence.¹⁰⁹

Rubin noted the assumption students held in common was that the Asian-appearing speakers should “bear the onus for poor classroom communication” and additionally “undergo transformation in the North American mold,” rather than both sides sharing the communicative burden.¹¹⁰ Kang and Rubin later replicated the study with male Caucasian or Asian-appearing faces and it led to the same result of lower listening comprehension for the same recorded speech, based solely on listeners perceiving the speaker as Asian via an image of the speaker.¹¹¹

To be fair, a speaker of Asian appearance can indeed have an accent—whether it be a regional one or a foreign one—or express other subtle auditory cues to a listener.¹¹² And accented speech can take effort to understand if a listener is unfamiliar with it.¹¹³ For example, one study found some evidence that monolingual English speakers used different parts of the brain to process Korean-accented speech spoken by an Asian-appearing speaker, compared to native-accented speech by a white speaker, resulting in overall lower ratings of Korean-accented speakers’ clarity.¹¹⁴ However, listeners can become used to

108. Kang & Yaw, *supra* note 9, at 923 (defining reverse linguistic stereotyping as when “listeners ascribe stereotyped characteristics to speech (i.e. listeners hear a nonstandard accent where none may be present, for example) based on social information about the speaker’s identity”).

109. Rubin, *supra* note 12, at 512; *see also* Kang & Yaw, *supra* note 9 (finding listeners who had experience with other languages, had studied abroad, or who had friends who spoke other languages rated accented speech more favorably than listeners who did not have similar experiences; listeners who tended to dislike other language speakers also tended to rate their speech negatively).

110. Rubin, *supra* note 12, at 512.

111. *See generally* Kang & Rubin, *supra* note 12 (describing the results as similar to Rubin’s original study).

112. *See generally* Cheng & Cho, *supra* note 85 (finding some support for the idea that listeners can accurately identify some recorded speech as being uttered by Korean American speakers).

113. *See, e.g.*, Marko Dragojevic et al., *The Fluency Principle: Why Foreign Accent Strength Negatively Biases Language Attitudes*, 84 COMMC’N MONOGRAPHS 385, 389 (2017) (acknowledging that an accent different from the listener’s can be more difficult for the listener to process, but highlighting the significance of the degree of accent for understandability and arguing that stronger accents lead to more negative language attitudes).

114. Han-Gyol Yi, Rajka Smiljanic & Bharath Chandrasekaran, *The Neural Processing of Foreign-Accented Speech and Its Relationship to Listener Bias*, 8

accents. The authors of the study also found that the neural efficiency of processing Korean-accented speech was impacted by listeners' underlying biases as measured by the Implicit Association Test and took care to note that listeners can adjust to foreign-accented speech with exposure, time, or training.¹¹⁵ A different study using a similar data set demonstrated the ongoing impact of visual perception and biases; the authors there found that monolingual native American English speakers had more difficulty processing a native Korean speaker's accent when shown an image of an Asian face than when listening to the audio only.¹¹⁶

The above studies demonstrate that perception of race, rather than just national origin, influences stereotypes that negatively affect Asian Americans' speech. These negative effects can occur regardless of Asian Americans' actual birthplace. In one study of U.S.-born and non-U.S.-born Chinese American adolescents, researchers hypothesized that speaking English with an accent would lead to the adolescents being treated as foreign.¹¹⁷ In turn, the adolescents would perceive that they were being treated as foreign and suffer depressive symptoms.¹¹⁸ Overall, adolescents who self-reported accents reported more instances of being treated as foreign, and U.S.-born adolescents who self-reported weaker accents reported fewer instances in which they felt they were perceived as foreign.¹¹⁹ However, researchers acknowledged that "birthplace was not related to foreigner stereotype experience," meaning that even being U.S.-born did not wholly inure Chinese American adolescents from being

FRONTIERS HUM. NEUROSCIENCE, art. 768, Oct. 8, 2014, at 1, 6 (using functional magnetic resonance imaging to study monolingual native English speakers' processing of Korean-accented and native English-accented English sentences perceived in video or audio-only recordings).

115. See *id.* at 1–2. The Implicit Association Test measures how much a test-taker associates a concept such as an Asian American individual with a perception, such as good or studious, to indicate the test-taker's ultimate attitudes or biases. *About the IAT*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/iat-details.html> [<https://perma.cc/CWS5-Q4RH>].

116. Han-Gyol Yi et al., *Reduced Efficiency of Audiovisual Integration for Nonnative Speech*, 134 J. ACOUSTICAL SOC'Y AM., no. 5, Nov. 2013, at 1, 6 (assessing the impact of visual cues on speech intelligibility in an atmosphere with background noise).

117. Kim et al., *supra* note 28, at 292–93.

118. *Id.*

119. *Id.* at 294.

treated as perpetual foreigners and suffering depressive symptoms as a result.¹²⁰

The application of the perpetual foreigner and model minority stereotypes can deprive Asian Americans of the agency to use spoken language to negotiate their own identities. Style, which a layperson may confuse with accent, is a way of speaking that a speaker intentionally adopts as a means of personal expression and to associate with a social group.¹²¹ A study of South Asian American teens in a Silicon Valley high school contrasted upper-middle-class teens' performance as monolingual model minority speakers against second- and third-generation middle-class teens' use of style via "English, Punjabi, Desi Accented English, hip-hop lexicon and lyrics, as well as Spanish and California slang" in complex ways to differentiate their identities.¹²² For the latter teens adopting a style, how they spoke was an intentional choice to express their identities.¹²³ The teens' intentional differentiation from model minority speech, however, left them vulnerable to racial judgments by listeners outside of their social group, such as teachers.¹²⁴ Teachers were more likely to perceive the students as lacking English fluency, reflecting the constraint to perform that the model minority stereotype imposes.¹²⁵ Another linguistic anthropologist studying interactions at a high school in the San Francisco Bay Area observed a teen who aimed for the Standard English spoken by her friendship group of "nerdy European American girls" to distance herself from other Laotian Americans at the school.¹²⁶ She was not wholly accepted in her friendship group, however, as she was also subject to teasing for aspects of her nonnative speech and behavior.¹²⁷ For Asian American students, performing model minority speech was a norm that required labor, but not doing so easily swung them back into perpetual foreignness rather than a different, chosen identity.

120. *See id.* at 295.

121. *See* Shankar, *supra* note 65, at 269; BUCHOLTZ, *supra* note 65 (defining style as "the use of linguistic structures to index social positioning").

122. *See* Shankar, *supra* note 65, at 273.

123. *Id.* at 282–84 (noting that rather than seeing such students as fluent English speakers who code switch, the teacher perceived them instead as potentially not speaking English well or in need of reform).

124. *Id.*

125. *Id.*

126. BUCHOLTZ, *supra* note 65, at 34–35, 37.

127. *Id.* at 34–37.

Overall, what is apparent is that the model minority and perpetual foreigner stereotypes are activated by racial perception but also implicate assumptions about national origin.¹²⁸ Together, race and national origin assumptions impact treatment of speakers. While accent-based discrimination is generally prohibited under Title VII, as explored in Part II, Title VII law does not include a clear mechanism to address the interplay of race and national origin via stereotypes when it comes to Asian Americans and accent.

II. LINKING ACCENT AND NATIONAL ORIGIN UNDER TITLE VII

Accent and national origin have been closely linked since the inception of Title VII based on legislative assumptions that have carried through into Title VII jurisprudence.¹²⁹ Section I.A begins with a broad overview of how Title VII law is invoked. Section II.B identifies how the accent-national origin link first appeared as legislative assumptions that foreign-born individuals speak with accents, reflecting the perpetual foreigner stereotype, and the more implicit assumption of speakers' eventual assimilation, reflecting the model minority stereotype. Section II.C then describes how legislators' assumptions wove through key early precedent and amending legislation, forming a default link between accent and the protected class of national origin.

A. *Invoking Title VII*

Title VII prohibits workplace discrimination rooted in animus against a person's "race, color, religion, sex, or national origin."¹³⁰ Thus, claiming discrimination under Title VII hinges on a plaintiff first invoking their membership in a listed protected class.¹³¹ Broadly, a plaintiff must then establish some

128. See Ruiz, Im & Tian, *supra* note 70, at 16, 20 (reporting, for example, survey results that 57 percent of Asian Americans, born in the U.S., have been called offensive names, versus 30 percent Asian immigrants). The report also notes that U.S.-born Asian Americans are slightly more likely to report they have been subject to discriminatory treatment based on race, at 65 percent versus 55 percent. *Id.*

129. See, e.g., EEOC Decision No. AL 68-1-155E, 1 Fair Empl. Prac. Cas. (BNA) 921, 921 (1969) (finding a job applicant was eliminated "on the basis of his appearance and manner of speaking peculiar to his national origin").

130. 42 U.S.C. § 2000e-2(a) (1991).

131. *Id.* (making it unlawful for an employer to discriminate against an employee or applicant for employment "because of such individual's race, color, religion, sex, or national origin"); *accord* *Fragante v. Honolulu*, 888 F.2d 591, 595 (9th

link between the alleged discriminatory conduct and their belonging in the protected class. In other words, the discriminatory conduct must have occurred because the perpetrator has an animus against members of the plaintiff's protected class. A plaintiff claiming mistreatment related to accent tends to trigger a national origin-based discrimination analysis by courts,¹³² even though courts have at times acknowledged that accent can also relate to race¹³³ and that national origin and race can overlap, to be discussed later in Section III.B. of this Article.¹³⁴

Cir. 1989) (noting in describing plaintiff's burden to establish a prima facie case of accent-based discrimination that plaintiff "must show . . . that he has an identifiable national origin").

132. See, e.g., *Fragante*, 888 F.2d at 595–96 (noting in describing plaintiff's burden to establish a prima facie case of accent-based discrimination that plaintiff "must show . . . that he has an identifiable national origin," and further, that "[a]ccent and national origin are obviously inextricably intertwined in many cases"); *Madiebo v. Div. of Medicaid*, 2 F. Supp. 2d 851, 855 (S.D. Miss. 1997) (acknowledging that national origin is often confused with race, yet noting that accent and national origin are inextricably intertwined, and thus "an individual who is discriminated against because of the characteristics of his speech has a cause of action pursuant to the prohibition of national origin discrimination in Title VII") (citing *Ang v. Procter & Gamble Co.*, 932 F.2d 540 (6th Cir. 1991) and *Fragante*, 888 F.2d at 591); *Jimenez v. Mary Washington Coll.*, 57 F.3d 369, 374–81 (4th Cir. 1995) (addressing claims by plaintiff, a Black professor from Trinidad, of disparate treatment based on race and on national origin, and the court discussing critiques of plaintiff's speech, such as "Hire a professor who speaks English," as related to ethnicity and thus national origin, and critiques about plaintiff's ability to exert control over his classroom as related to race); *Bravo v. Am. Honda Fin. Corp.*, No. 3:10-CV-00064-FDW, 2010 WL 2572862, at *2–3 (W.D.N.C. June 24, 2010) (describing plaintiff's alleged disparate treatment based on national origin, race, and sex, which the district court disaggregated, addressing first her national origin claim, then race, then sex); *Daniel v. T&M Prot. Res. L.L.C.*, No. 13 Civ. 4384, 2018 WL 3621810 (S.D.N.Y. July 19, 2018) (separating out the analysis into facts that it seemed to view as related to each protected class, in a claim alleging hostile work environment based on race, sexual orientation, and national origin); *National Origin Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/national-origin-discrimination> [<https://perma.cc/DH8K-F9RX>] ("National origin discrimination involves treating people (applicants or employees) unfavorably because they are from a particular country or part of the world, because of ethnicity or accent, or because they appear to be of a certain ethnic background (even if they are not).").

133. See, e.g., *Lolonga-Gedeon v. Child & Fam. Servs.*, No. 08-CV-00300A(F), 2014 U.S. Dist. LEXIS 184022, at *60 (W.D.N.Y. Oct. 28, 2014) (citing *Shao v. City Univ. of N.Y.*, No. 12-cv-1566, 2014 U.S. Dist. LEXIS 140125, at *5, *12 (S.D.N.Y. Sept. 30, 2014)) (finding disparate treatment based on accent can indicate race and national origin discrimination).

134. See, e.g., *Vill. of Freeport v. Barrella*, 814 F.3d 594, 607 (2d Cir. 2016) (acknowledging that claims based on race and national origin "may substantially overlap or even be indistinguishable") (quoting *Deravin v. Kerik*, 335 F.3d 195, 201 (2d Cir. 2003)).

A plaintiff who believes they are a victim of workplace discrimination must first file a discrimination charge with the EEOC or an applicable state agency.¹³⁵ After such exhaustion of administrative remedies, the plaintiff may file a claim in federal court. In federal court, the plaintiff can choose to assert a claim based on a group or individual discrimination theory. Disparate impact, for example, is a group-based claim that a policy or rule negatively impacted multiple persons who share a protected class.¹³⁶ Disparate impact has been used in cases involving English-only rules that apply to a group of speakers.¹³⁷ Given the individualized nature of accent, however, this Article focuses on individual discrimination claims, such as disparate treatment and hostile work environment, rather than disparate impact.

Title VII supports several distinct individual discrimination claims, of which disparate treatment and hostile work environment have been frequently invoked in accent-based discrimination cases. A disparate treatment claim centers on the theory

135. See 42 U.S.C. §§ 2000e-5(a)–(e) (2009); *Filing a Charge of Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/filing-charge-discrimination> [<https://perma.cc/4P2G-T59V>]; *Oviedo v. Wash. Metro. Area Transit Auth.*, 948 F.3d 386, 392 (D.C. Cir. 2020) (“Before suing under . . . Title VII, an aggrieved party must exhaust his administrative remedies by filing a charge of discrimination with the EEOC within 180 days of the alleged discriminatory incident.”) (quoting *Washington v. Wash. Metro. Area Transit Auth.*, 160 F.3d 750, 752 (D.C. Cir. 1998)); *Bourgeois v. U.S. Coast Guard*, 151 F. Supp. 3d 726, 731 (W.D. La. 2015) (discussing exhaustion of administrative remedies for federal employees).

136. See 42 U.S.C. § 2000e-2(k) (1991) (incorporating Civil Rights Act of 1991 amendments providing guidelines for the burden of proof in disparate impact cases); Civil Rights Act of 1991, Pub. L. No. 102-155, § 3 105 Stat. 1071 (noting a purpose of the Act as “to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964”). *But see*, Exec. Order No. 14281, 3 C.F.R. 14281 (Apr. 23, 2025), *Restoring Equality of Opportunity and Meritocracy* (“It is the policy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil rights laws, and basic American ideals.”); *cf.* *Alexander v. Sandoval*, 532 U.S. 275 (2001) (generally limiting a private right of action for disparate impact claims under Title VI, but not pursuant to Title VII).

137. *Garcia v. Gloor*, 618 F.2d 264, 266, 270–72 (5th Cir. 1980) (concluding an employer’s rule prohibiting Spanish from being spoken unless used to communicate with customers did not disproportionately impact Hispanic American employees, and particularly the plaintiff, a bilingual English and Spanish speaker who, in the court’s view, could “readily observe” the rule but chose to disregard it). *But cf.* *EEOC v. Wisconsin Plastics, Inc.*, 186 F.Supp.3d 945, 947 n.1 (E.D. Wis. 2016) (noting parties did not assert disparate impact when the employer laid off thirty-eight employees, twenty-eight of whom were of Hmong or Hispanic descent, because of “their inability to speak English,” and in which both the EEOC and individual intervening plaintiffs brought discrimination claims).

that an individual employee was treated differently than others based on membership in a protected class.¹³⁸ Harassment through subjection to a hostile work environment is another individual claim.¹³⁹ Disparate treatment or hostile work environment can be asserted separately, or multiple claims may be brought as part of a plaintiff's discrimination case.¹⁴⁰

A plaintiff can support an individual discrimination claim based on direct or circumstantial evidence.¹⁴¹ Direct evidence is incontrovertible evidence that a decisionmaker acted based on animus; courts frequently describe the standard as one in which no inference is necessary to conclude discrimination has occurred.¹⁴² An example would be the use of a derogatory term for members of a protected class or disparaging comments about a plaintiff's accent made close, or proximate, in time to an adverse employment action.¹⁴³ If a plaintiff shows direct evidence that

138. Retaliation for engaging in a protected activity also centers on individuals but is outside the focus of this Article. *See generally* 42 U.S.C. § 2000e-3 (1972).

139. *See* 42 U.S.C. § 2000e-2(a) (2025) (making it unlawful for an employer to “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin”); *Delgado v. City of Stamford*, No. 3:11-cv-01735-VAB, 2015 U.S. Dist. LEXIS 148038, at *74 (D. Conn. Nov. 2, 2015) (noting “terms, conditions, or privileges of employment” language in Title VII relates to disparate treatment generally, which includes disparate treatment via creating a hostile work environment) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

140. *See, e.g.*, *Pathak v. FedEx Trade Networks T & B Inc.*, 329 F. Supp. 3d 1263, 1274–75 (D. Colo. 2018) (asserting nine claims, under Title VII, 42 U.S.C. §1981, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Family Medical Leave Act, and the Colorado Worker’s Compensation Act, including discrimination based on race and national origin under Title VII and retaliation under Title VII); *see also, e.g.*, *Shao v. City Univ. of N.Y.*, 2014 U.S. Dist. LEXIS 140125, at *1 (S.D.N.Y. Sept. 30, 2014) (asserting discrimination based on race, national origin, and gender, retaliation, and hostile work environment under Title VII, 42 U.S.C. §§ 1981 and 1983, the New York State Constitution, and the New York State Human Rights Law).

141. *See, e.g.*, *EEOC v. Teleservices Mktg. Corp.*, 405 F. Supp. 2d 724, 728 (E.D. Tex. 2005); *Wallace v. Performance Contractors., Inc.*, 57 F.4th 209, 217 (5th Cir. 2023); *Thompson v. Fresh Prods., L.L.C.*, 985 F.3d 509, 522 (6th Cir.); *Towery v. Miss. Cnty. Ark. Econ. Opportunity Comm’n, Inc.*, 1 F.4th 570, 573 (8th Cir. 2021); *Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1217 (10th Cir. 2013).

142. *See, e.g.*, *Shalom v. Payless Shoesource Worldwide, Inc.*, 921 F. Supp. 2d 470, 484 (D. Md. 2013) (citing *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 284 (4th Cir. 2004)); *Bourgeois v. U.S. Coast Guard*, 151 F. Supp. 3d 726, 736–38 (W.D. La. 2015) (noting, for example, that using a derogatory term can serve as at least some direct evidence of discriminatory animus).

143. *See Bourgeois*, 151 F. Supp. 3d at 734–38 (discussing the direct versus circumstantial evidence standards and concluding the plaintiff demonstrated “at least some direct evidence of discrimination based upon national origin” because a

an employer or potential employer took an action because of discriminatory animus, or was in part or substantially motivated by a discriminatory animus,¹⁴⁴ the evidentiary burden immediately moves to the employer to show the action was not due to the discriminatory animus.¹⁴⁵ In other words, the employer must show that the same action would have been taken regardless of any discriminatory animus.¹⁴⁶

When a plaintiff proceeds on a disparate treatment claim based on circumstantial evidence, courts frequently use a three-part analytical framework under *McDonnell Douglas Corp. v. Green*, either in response to a defendant-employer's motion for summary judgment or outright, anticipating a summary judgment motion.¹⁴⁷ First, under the framework, a court will

supervisor used a derogatory term for those of Acadian or Cajun descent, which the court determined to be a national origin group, proximate in time to denial of pay increases and the denial of plaintiff's request to work a second job); *Bacchus v. Price*, No. GJH-17-1511, 2018 U.S. Dist. LEXIS 124131, at *6 (D. Md. July 25, 2018) (acknowledging that, depending on context, statements about accent when explaining an adverse employment action can serve as direct evidence of discrimination or merely show concern about an ability to communicate, in a case involving a native English speaker from Guyana who was told she had a "language barrier" due to her accent).

144. The motivating factor rule is referenced in some circuits as a mixed-motive theory. *See, e.g.*, *Liberman v. Brady*, 926 F. Supp. 1197, 1202 (E.D.N.Y. 1996) ("If the plaintiff is able to produce evidence to establish that an illegitimate factor played a motivating or substantial role in the challenged employment decision, the defendant is then given an opportunity to prove an affirmative defense, namely, that the defendant 'would have reached the same decision as to [the employee's employment] even in the absence of the' impermissible factor.") (quoting *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977) and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

145. *See, e.g.*, *Bourgeois*, 151 F. Supp. 3d at 734 (citing *Brown v. E. Miss. Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989))).

146. *Id.*

147. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *see, e.g.*, *Montes v. Greater Twin Cities Youth Symphonies*, 540 F.3d 852, 857–58 (8th Cir. 2008) (applying the framework to an unlawful termination claim based on race or national origin); *see also, e.g.*, *Fragante v. Honolulu*, 888 F.2d 591, 594–96 (9th Cir. 1989) (applying the framework to a national origin-based disparate treatment claim related to failure to hire). *But see* *Tynes v. Fla. Dep't of Juv. Just.*, 88 F.4th 939, 944–47 (11th Cir. 2023) (critiquing overemphasis of the *McDonnell Douglas* framework to assess whether there is enough evidence to prove an employment discrimination claim at the summary judgment stage, and asserting that it is enough to consider whether there is a "convincing mosaic" of circumstantial evidence is simply enough evidence for a reasonable factfinder to infer intentional discrimination in an employment action" involving a claim of race or sex discrimination) (quoting *Jenkins v. Nell*, 26 F.4th 1243, 1250 (11th Cir. 2022)).

assess whether a plaintiff can establish a prima facie case of discrimination. Second, the court will consider whether the employer can “articulate some legitimate, nondiscriminatory reason” for the adverse employment action.¹⁴⁸ Finally, the court will determine whether the plaintiff can show that the employer’s proffered reason was not the actual reason and instead was cover for discrimination based on animus against a protected class.¹⁴⁹

For a disparate treatment claim, the first or prima facie case stage of *McDonnell Douglas* involves four elements. A disparate treatment plaintiff must show that they: (1) belong to a protected class; (2) are qualified for the employment position in question; (3) were subject to an adverse employment action; and (4) were treated less favorably than a similarly situated individual or individuals not part of the plaintiff’s protected class.¹⁵⁰ A plaintiff can alternatively establish a more general prima facie case of discrimination by showing, for the fourth element, circumstances that support an inference of discrimination based on a plaintiff’s membership in the protected class.¹⁵¹ Of the four elements listed above, this Article focuses on the requirement that a plaintiff show they belong to a protected class.

If the plaintiff establishes a prima facie case of discrimination, at the second stage of the *McDonnell Douglas* framework the employer must “articulate some legitimate, nondiscriminatory reason” for the adverse employment action.¹⁵² As to speech features such as accent, employers responding to disparate

148. *McDonnell Douglas Corp.*, 411 U.S. at 802; *see also, e.g.,* *Iyoha v. Architect of the Capitol*, 927 F.3d 561, 566 (D.C. Cir. 2019) (“The employer must then come forward with a legitimate reason for the challenged action.”).

149. *See, e.g., Iyoha*, 927 F.3d at 566.

150. *See, e.g., Fonseca v. Sysco Food Servs. of Ariz., Inc.*, 374 F.3d 840, 847 (9th Cir. 2004); *see also, e.g., Ghosh v. S. Ill. Univ.*, 331 F. Supp. 2d 708, 726 (C.D. Ill. 2004).

151. *McDonnell Douglas Corp.*, 411 U.S. at 802; *see also* *Kho v. N.Y. & Presbyterian Hosp.*, 344 F. Supp. 3d 705, 719–20 (S.D.N.Y. 2018) (applying the McDonnell-Douglas burden-shifting framework to a national origin-based disparate treatment claim involving a supervisor critiquing plaintiff’s accent); *see also, e.g., Fonseca*, 374 F.3d at 847 (describing the elements to establish a prima facie case of discrimination based on disparate treatment, and noting that the fourth element can include more favorable treatment for similarly situated employees “or other circumstances surrounding the adverse employment action give rise to an inference of discrimination.”) (quoting *Peterson v. Hewlett Packard Co.*, 358 F.3d 599, 604 (9th Cir. 2004)).

152. *McDonnell Douglas Corp.*, 411 U.S. at 802; *see also, e.g., Iyoha*, 927 F.3d at 566

treatment claims have been allowed to assert the affirmative defense that certain communicative expectations are bona fide occupational qualifications, or in other words, necessary for the job.¹⁵³ After the employer has met its burden, at the third stage of the *McDonnell Douglas* framework the plaintiff must show the employer's proffered reason was not the actual reason and instead was a cover for discrimination based on animus against a protected class.¹⁵⁴

For harassment or hostile work environment claims, courts have at times applied the *McDonnell Douglas* framework and at times bypassed it depending on the exact nature of the claim.¹⁵⁵ A detailed analysis of these variations is outside the scope of this Article. Instead, the focus of this Article is the requirement that the plaintiff show, whether at the summary judgment stage or to prove hostile work environment, that the allegedly hostile conduct is related to plaintiff's belonging in a protected class.¹⁵⁶ Beyond this protected class requirement, courts analyzing

153. 42 U.S.C. §2000e-2(e) (defining a bona fide occupational qualification as one that is "reasonably necessary to the normal operation of that particular business or enterprise"); see, e.g., *Fragante v. Honolulu*, 888 F.2d 591, 594 (9th Cir. 1989) (affirming the district court's determination that the ability to "communicate effectively with the public" was a bona fide occupational qualification that the employee lacked due to his accent); see also, e.g., *Kho*, 344 F. Supp. 3d at 719–20 (finding termination was not due to national origin related disparate treatment when a supervisor criticized plaintiff Kho's accent given Kho's multiple work improvement plans and performance reviews identifying communication as an area for improvement, especially as "her language skills were reasonably related to her job performance").

154. See, e.g., *Iyoha*, 927 F.3d at 566.

155. See *Clay v. United Parcel Serv., Inc.*, 501 F.3d 695, 706 (6th Cir. 2007) (noting the framework does apply to hostile work environment claims); *Matthews v. Corning Inc.*, 77 F. Supp. 3d 275, 292 (W.D.N.Y. 2014) (noting the framework does not apply to hostile work environment claims); *Johnson v. Booker T. Washington Broad. Serv., Inc.*, 234 F.3d 501, 511 (11th Cir. 2000) (declining to apply the *McDonnell Douglas* framework to a sexual harassment case on the reasoning that sexual harassment cases "have evolved quite separately from other Title VII cases"); *Lewis v. Forest Pharms., Inc.*, 217 F. Supp. 2d 638, 653 (D. Md. 2002) (noting the framework does not apply to hostile work environment claims because "[t]here simply is no legitimate business justification for severe or pervasive sexual harassment").

156. See, e.g., *EEOC v. WC&M Enters., Inc.*, 496 F.3d 393, 399 (5th Cir. 2007) (identifying five elements of a hostile work environment claim as: (1) plaintiff's membership in a protected class; (2) unwelcome harassment; (3) harassment being related to plaintiff's protected class; (4) effect on a term, condition, or privilege of employment; and (5) employer knowledge of the harassment and failure to promptly remedy it); see also, e.g., *Bhella v. England*, 91 F. App'x 835, 845 (4th Cir. 2004) (identifying four elements as: (1) unwelcome conduct; (2) related to protected class; (3) severe or pervasive so as to alter the plaintiff's conditions of employment and create an abusive work environment; and (4) imputability to the employer).

hostile work environment claims have focused on whether the plaintiff can show the workplace is “permeated with ‘discriminatory intimidation, ridicule, and insult . . . that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment,’” and that there is some basis for holding the employer liable for allowing the environment.¹⁵⁷

Overall under Title VII, there is a consistent requirement that any alleged disparate treatment or hostile conduct be linked to a plaintiff’s membership in a protected class. Part of the role of legal decision-makers has been to define each protected class and what characteristics are related to each protected class. For Title VII cases involving accent-based discrimination, legislative assumptions and key early precedent formed a link between accent and national origin.

B. Forming Accent’s Link to National Origin

Accent’s formed link to national origin reflects assumptions made by legislators throughout civil rights legislative history. The accent-national origin link is not explicitly supported by the statutory language of Title VII, either as passed in the Civil Rights Act of 1964 or amended through the Civil Rights Act of 1991. As passed in 1964, Title VII defined terms such as person, employer, employment agency, labor organization, employee, commerce, and industry affecting commerce.¹⁵⁸ However, it did not define “national origin”¹⁵⁹ or “accent,” did not make explicit why accent should relate only to national origin, and did not identify the ways in which accent-based discrimination takes place. Thus, the legislature did not create a formal starting point for courts to analyze accent-based discrimination claims.

Instead, examining the discussions of the terms “accent” and “national origin” in the legislative history of attempted

157. *Levitant*, 625 F. Supp. 2d at 97 (quoting *Howley v. Town of Stratford*, 217 F.3d 141, 153 (2d Cir. 2000)). See generally *WC&M Enters., Inc.*, 496 F.3d (not addressing *McDonnell Douglas*); *Zayadeen v. Abbott Molecular, Inc.*, No. 10 C 4621, 2013 WL 361726, at *8 (N.D. Ill. Jan. 30, 2013).

158. See Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701(a)–(h), 78 Stat. 241, 253–55.

159. *Kanaji v. Children’s Hosp. of Phila.*, 276 F. Supp. 2d 399, 401 (E.D. Pa. 2003) (“Nowhere does Congress or the agency charged with administering Title VII, the Equal Employment Opportunity Commission (‘EEOC’), define ‘national origin.’”).

precursors to civil rights legislation, the 1964 Act, and even subsequent legislation demonstrates informal, colloquial references to both terms that could allow stereotypes and assumptions to seep into the analysis of Title VII claims involving accent. Legislators discussed the term “national origin,” included throughout the language of the 1964 Act from its inception,¹⁶⁰ as “the country from which you or your forebears came,” but did not formally define “national origin” as a term.¹⁶¹ Its main significance was that it designated a protected class distinct from the other protected classes listed in Title VII.¹⁶²

Like “national origin,” legislators did not define “accent.”¹⁶³ Instead, colloquial references to accent appeared in various ways in the legislative history of Title VII and its precursors. One example was the flawed argument made during debates related to civil rights in public accommodations that accent, appearance, prices, and race should be logical customer preferences.¹⁶⁴ Those

160. Unlike the term “sex,” which was debated after the bill was introduced. *See generally*, 110 CONG. REC. 1957, 1961 (Feb. 5, 1964) (debating *the Civil Rights Act of 1963*). *See also, e.g.*, Gonzales Rose, *Race Inequity Fifty Years Later*, *supra* note 20, at 209 (observing that most of the legislative history discussion addressed racial discrimination against Black Americans, without “much consideration to either the substance or the scope of the term ‘national origin,’ much less to language . . .”).

161. 110 CONG. REC. 2549 (Feb. 8, 1964) (statement of Rep. Roosevelt) (stating additionally, “You may come from Poland, Czechoslovakia, England, France, or any other country”).

162. *Id.* (statement of Rep. Roosevelt) (“‘National origin’ has nothing to do with the color of one’s pigment.”); *Id.* (statement of Rep. Dent) (“National origin, of course, has nothing to do with color, religion, or the race of an individual. A man may have migrated here from Great Britain and still be a colored person.”); 110 CONG. REC. 2265 (Feb. 6, 1964) (statement of Rep. Dowdy) (“[R]ace, color, religion, and national origin does not apply to a white person, it does not apply to a person who may be of the Christian religion, it does not apply to any native born citizen of the United States.”).

163. *See, e.g.*, *Bell v. Home Life Ins. Co.*, 596 F. Supp. 1549, 1553 (M.D.N.C. 1984) (noting that Title VII does not define national origin but pointing to its definition in *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973) as the birthplace of one or one’s ancestors and the EEOC Guidelines as including place of origin and “physical, cultural or linguistic characteristics of a national origin group”).

164. *Civil Rights—Public Accommodations: Part 2, Hearing on S.1732 Before the S. Comm. on Com.* 88th Cong. 920 (1963) (statement of Hon. Farris Bryant, Governor of Fla.) (arguing that a customer for a hotel “can stop and go in, and when he sees the owner he can decide he does not like him because he does not like his mustache, or his accent, or his prices, or his race, or his other customers. He can turn around after he has gone in and observed what is there and walk out for any reason And if the traveler is free not to buy because he does not like the owner’s mustache, accent, prices, race, other customers, or for any or no reason, the owner of the property ought to have the same freedom. That, it seems to me, is simple

advocating against civil rights legislation likely sought to diminish the importance of protections against racial discrimination by bundling the terms “accent,” “appearance,” “prices,” and “race” together; they also, as a result, demonstrated the assumption that “accent” is a commonly understood term, rather than a technical term that needed definition. Other examples of colloquial references to the term “accent” highlighted regional affiliations. Generally, the notion of accent as a regional feature reflected familiarity and experience with southern American¹⁶⁵ or New York¹⁶⁶ accents, implying the reality of accents being common in America. Despite accents being common, the baseline assumption seemed to be that the problematic accents would be “foreign” accents, per the perpetual foreigner stereotype.¹⁶⁷ Some non-legislators advocating for legislation even assumed “foreign” accents would eventually assimilate into American accents, per the model minority stereotype.¹⁶⁸

justice.”); 110 CONG. REC. 7750–51 (April 13, 1964) (statement of Sen. Holland) (re-reading Governor Bryant’s statement).

165. See, e.g., *Fair Employment Practices Act: Hearing on S. 2048*, supra note 17, at 215 (statement of Broadus Mitchell, Acting Chairman, Post-War World Council, New York, N.Y.) (“I would like to appear, Senator, as a southerner. My father is a Mississippian. My mother was a South Carolinian. I was born in Kentucky and I have lived all my life until 5 years ago below the Mason-Dixon line. My accent has been somewhat contaminated in the more recent years.”); see also, e.g., *Civil Rights Part II: Hearing on H.R. 3157 Before the Subcomm. No. 5 of H. Comm. on Judiciary*, 88th Cong. 988, 989 (1963) (statement of Hon. Robert McClory, Rep. Ill.) (describing the experience in his home state, Illinois, of enacting state-level civil rights legislation and generally supporting federal legislation: “Now, in referring to the situation in Illinois, I would like to point out that the State is both a ‘northerly’ and a ‘southerly’ State. They grow cotton in the southern portion and speak with accents similar to those we encounter below the Mason-Dixon line, while in the northern part of Illinois we are truly an industrial-type State.”).

166. *Antidiscrimination in Employment: Hearing on S. 984 Before the Subcomm. of the Comm. on Lab. and Pub. Welfare*, 80th Cong. 523, 525 (1947) (statement of Col. Charles I. Schottland, Nat’l Exec. Dir., Jewish War Veterans of the U.S.) (referencing a Black American soldier in Normandy with a Brooklyn accent).

167. See, e.g., *Fair Employment Practices Act: Hearing on S. 2048*, supra note 17 (statement made in discussion related to World War II military service of Black Americans, Japanese Americans, and those of Mexican, Filipino, Polish, or Italian descent, as well as those of Jewish or Catholic faith).

168. See, e.g., *Antidiscrimination in Employment, Hearing Before the S. Comm. on Labor and Public Welfare*. 83rd Cong. 304 (1954) (statement of Dr. Alfred McClung Lee, New London, Conn., President, Unitarian Fellowship for Social Justice) (observing as part of a statement advocating for civil rights legislation that American-born children of various ancestry and racial backgrounds playing near Manhattan’s City Hall assimilated as to speech, stating, “When you close your eyes and just listen to them talk with each other, it is impossible to differentiate between their dialects. They all speak the same dialect. Their skin colors and hair textures

C. *Weaving the Link into Precedent*

Assumptions about national origin and accent were then woven into Title VII precedent and amending legislation. In 1973, noting that Title VII's legislative history was "quite meager" in defining the term national origin, the United States Supreme Court, in *Espinoza v. Farah Manufacturing Co.*, nevertheless reflected the meager legislative history by defining national origin as "the country where a person was born, or, more broadly, the country from which his or her ancestors came."¹⁶⁹ Though the aim was to clarify who the national origin class encompassed, the reference to ancestors leads to the question of whether Title VII plaintiffs are meant to be identified by their ancestors perpetually, per the perpetual foreigner stereotype. Then in 1980, the District Court for the Western District of Louisiana decided *Roach v. Dresser Industrial Valve & Instrument Division*.¹⁷⁰ Though *Roach* did not involve accent, it did involve the protected classes, and the court highlighted Title VII's "meager" legislative history related to the term "national origin" as implying the existence of clear boundaries between each protected class, stating, "The legislative history enunciates that a person's national origin has nothing to do with color, religion, or race."¹⁷¹

Clear boundaries between each protected class then allowed for courts to link accent to one protected class. In 1989, in *Fragante v. City and County of Honolulu*, the U.S. Court of Appeals for the Ninth Circuit stated, "Accent and national origin are obviously inextricably intertwined in many cases."¹⁷² Then, in

are racial matters, but their language and religion and emotional balance and many other things about their behavior they have learned").

169. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88–89 (1973) (finding denial of employment based on lack of U.S. citizenship was not a national-origin based violation of Title VII because alienage status is distinct from one's birthplace or the birthplace of one's ancestors).

170. 494 F. Supp. 215 (W.D. La. 1980).

171. *Id.* at 216 (finding "a native born American of Acadian descent" could pursue a national origin-based discriminatory termination claim). Though not cited in the opinion, the court seems to be referring to discussion in the House related to the term "national origin." See 110 CONG. REC. 2549 (1964) (statement of Rep. John H. Dent) ("National origin, of course, has nothing to do with color, religion, or the race of an individual."); *id.* (statement of Rep. James Roosevelt) ("May I just make very clear that 'national origin' means national. It means the country from which you or your forebears came from.").

172. 888 F.2d 591, 596 (9th Cir. 1989).

1991 the U.S. Court of Appeals for the Sixth Circuit in *Ang v. Procter & Gamble* relied on both *Roach* and *Espinoza* to support its decision that the plaintiff's pursuit of a national origin-based discrimination claim related to accent did not support later arguments based on race.¹⁷³ The Sixth Circuit further acknowledged, citing *Fragante*, that “accent and national origin are inextricably intertwined.”¹⁷⁴ Thus, what was noted as meager legislative history from the 1964 Act helped courts form a link between accent and national origin, plus a distinction between national origin and other protected classes.

Legislators then discussed accent and national origin more directly in legislative sessions related to the Civil Rights Act of 1991 but still did not define either term in statutory language. For example, Senators Dennis DeConcini and Edward M. Kennedy discussed their understanding that “‘national origin discrimination’ is discrimination based upon characteristics common to a specific ethnic group, such as . . . linguistic characteristics—including language and speech accent.”¹⁷⁵ In the same Senate session, as part of a discussion of the Supreme Court's decision in a Section 1981 case,¹⁷⁶ Senator DeConcini referred to Asian Americans as a racial group.¹⁷⁷ These

173. *Ang v. Procter & Gamble Co.*, 932 F.2d 540 (6th Cir. 1991). Specifically, the court determined that the plaintiff had only exhausted administrative remedies as to his national origin discrimination claim when he had filed a charge with the EEOC that was administered by the Ohio Civil Rights Commission, *id.* at 545; he had not indicated discrimination based on race when filing his claim, so had not exhausted administrative remedies as to race, and the fact that Mr. Ang had counsel made the court's liberal construction of his claim unnecessary, *id.* at 546.

174. *Id.* at 549 (quoting *Fragante*, 888 F.2d at 591).

175. 137 CONG. REC. S15485 (1991) (“The Court in *St. Francis College* demonstrated that when Congress enacted this statute it intended to protect from discrimination a wide variety of groups that were then considered racial groups but are now considered national origin or ethnic minority groups. Characteristics that identify national origin groups are ethnic characteristics such as language, speech accent, culture, ancestry, birthplace, and certain physical characteristics.”).

176. *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 614 (1987) (Brennan, J., concurring) (quoting the operative language from 29 C.F.R. § 1606.1 (1986) that national origin discrimination includes employment discrimination based on the linguistic characteristics of a national origin group).

177. 137 CONG. REC. S15485 (1991) (statement of Sen. DeConcini) (“Congress needs to clearly recognize that section 1981 prohibits intentional national origin discrimination as well as racial discrimination in accordance with the *St. Francis College* decision. National origin groups such as Hispanics and racial groups such as native Americans and Asian-Americans have suffered from institutional segregation and discrimination, [sic] and were intended to be covered under section 1981.”).

discussions seemed to blur national origin and race, and even ethnicity.¹⁷⁸ However, the discussions maintained the perpetual foreigner stereotype through the assumption that specific ethnic groups or people sharing a national origin would continue to share an accent.

Overall, legislators who did not define national origin and accent could be viewed as rational given the terms' shifting meanings. However, because legislators provided no definitions, courts had to define and set the parameters of Title VII accent-related discrimination. Courts did so through the same accent-national origin link that "inextricably intertwined" the two, perpetuating problems that require even more examination.

III. RECOGNIZING STEREOTYPE AND INTERSECTIONALITY AS TO ACCENT

Inextricably intertwining accent with national origin poses particular problems for Asian Americans. As discussed in Part I of this Article, assumptions about national origin and race intersect in the Asian American experience. If courts focus on an accent-national origin link they can fail to recognize how assumptions about race and national origin intertwine, and thus fail to recognize how discrimination is experienced by Asian Americans.¹⁷⁹ Section III.A argues, through a new critique of *Fragante*, that framing a plaintiff as having an accent because of their national origin centers the plaintiff's national origin and inadvertently validates the perpetual foreigner and, paradoxically, the model minority stereotypes. Section III.B demonstrates how courts have struggled to apply the accent-national origin link, which obfuscates courts' ability to consider other forms of animus, such as race. Section III.C discusses how the link contributes to bias in how law treats language, as argued by other scholars, and silences the experience of Asian Americans. Finally, Section III.D proposes an approach that recognizes the

178. Though none of these terms were defined, national origin seems to refer to birthplace of one or one's ancestors. Race seems to refer to social and politically constructed groups such as: "American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander; and White." *Section 15 Race and Color Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination#II> [<https://perma.cc/BV6T-24Y2>]. Ethnicity seems to refer to cultural group identity. *See id.*

179. *See* discussion *supra* Part I.

intersectionality of national origin and race for accent-related cases.

A. *Critiquing the Accent-National Origin Link*

Fragante v. City and County of Honolulu, with its recognition of accent and national origin as “inextricably intertwined,” has become leading precedent for analyzing accent-based discrimination claims.¹⁸⁰ *Fragante* has previously been framed as a story of a plaintiff facing language-based subordination, as told in rich detail using critical race methodology by legal scholar and professor Mari J. Matsuda.¹⁸¹ In this Article, it is revisited as a case that inadvertently perpetuates stereotypes that target Asian Americans: While Professor Matsuda masterfully discussed the story of the plaintiff Manuel T. Fragante and bias writ large, there is more to say about how the courts’ decisions in the case narrowed the lens for considering accent that ties back to the perpetual foreigner and model minority stereotypes.

In *Fragante*, the plaintiff Manuel T. Fragante claimed the Honolulu Department of Motor Vehicles failed to hire him despite his top civil service written examination score because of his accent, and thus discriminated against him based on national origin, race, and age.¹⁸² Fragante had been interviewed for ten to fifteen minutes for the position.¹⁸³ His interviewers’ notes included, “Very pronounced accent, difficult to understand” and “Heavy Filipino accent. Would be difficult to understand over telephone.”¹⁸⁴ A later written recommendation endorsing two other candidates and ranking Fragante third out of the interviewed candidates noted, “Retired Phillipine (sic) army officer speaks with very pronounced accent which is difficult to understand. He has 37 years of experience in management and administration and appears more qualified for professional rather than clerical work. However, because of his accent, I would not recommend him for this position.”¹⁸⁵ In a letter explaining Fragante’s rejection from the position, one of the interviewers¹⁸⁶

180. 888 F.2d at 596.

181. See Matsuda, *supra* note 19.

182. *Fragante v. Honolulu*, 699 F. Supp. 1429, 1430–31 (D. Haw. 1987).

183. *Id.* at 1430.

184. *Id.* at 1431.

185. *Id.* (alteration in original).

186. *Id.* at 1430–31 (quoting George Kuwahara, the assistant licensing administrator).

stated the selected candidates “were both superior in their verbal communication ability” and because clerks “were constantly dealing with the public . . . the ability to speak clearly is one of the most important skills required for the position.”¹⁸⁷

The district court addressed Fragante’s speech in detail in its decision, quoting a statement by a socio- and ethnolinguistics professor that “[e]veryone has an accent. It is merely a manner of pronunciation, often linked to national origin.”¹⁸⁸ The court further qualified, “listeners stop listening to Filipino accents, resulting in a breakdown of communication.”¹⁸⁹ This statement should have indicated the need to examine the role of listener bias, but the court only noted the linguistic complexity in Hawai’i instead.¹⁹⁰ The district court then made conflicting statements about Fragante’s accent, noting that he had “extensive verbal communication skill in English,” but also that “Fragante, in fact, has a difficult manner of pronunciation,” that he “would often not respond directly to the questions as propounded,” and that he “maintain[ed] much of his military bearing.”¹⁹¹ Overall, the district court determined that Fragante’s rejection from the position was supported by the bona fide occupational qualification “of being able to communicate clearly and effectively with an often contentious general public” and was not disparate treatment stemming from “any discriminatory intent or motive.”¹⁹²

Fragante appealed to the U.S. Court of Appeals for the Ninth Circuit, which described Fragante’s allegation as being one of discriminatory non-hiring because of his national origin.¹⁹³ The Ninth Circuit affirmed the district court’s decision, stating that Fragante was not hired because of “the deleterious *effect* of his Filipino accent on his ability to communicate

187. *Id.* at 1431.

188. *Id.*

189. *Id.*

190. *Id.* at 1431–32. In doing so, it planted the possible interpretation that listener bias is justified or rational, flying directly in the face of civil rights legislative history demonstrating intense skepticism of exactly the same kind of bias, or stated differently, preferencing, as to race.

191. *Id.* at 1431–32; *see also* Matsuda, *supra* note 19, at 1337–38 (adding that during the District Court trial, a linguist testified on behalf of Mr. Fragante that he spoke grammatically correct, standard English, with an accent, and that any nonprejudiced speaker of English would have no trouble understanding him, and further noting that those present in the courtroom, including the judge, opposing counsel, and court reporter, understood Mr. Fragante’s responses to questioning).

192. *Fragante*, 699 F. Supp. at 1432.

193. *Fragante v. Honolulu*, 888 F.2d 591, 593 (9th Cir. 1989).

orally, not merely because he had such an accent.”¹⁹⁴ As part of its discussion, the Ninth Circuit stated, “Accent and national origin are obviously inextricably intertwined in many cases,” which is now cited frequently in Title VII cases involving accent-based discrimination.¹⁹⁵

An even closer reading of the district court’s and Ninth Circuit’s decisions demonstrates several ways the courts either failed to address or inadvertently perpetuated the perpetual foreigner and model minority stereotypes. First, both decisions were structured in a way that centered Fragante’s non-U.S. birthplace or national origin. The district court described Fragante in the third paragraph of its opinion as a “United States citizen of Philippines national origin” who had been born in Manila in 1921;¹⁹⁶ the Ninth Circuit in addressing Fragante’s appeal stated that “[i]n April 1981, at the age of sixty, Fragante emigrated from the Philippines to Hawaii” in the second paragraph of the decision.¹⁹⁷ Thus, Fragante’s non-U.S. national origin was mentioned early in each decision to describe the plaintiff, a structure frequently used in Title VII cases. Such a structure centers the plaintiff’s non-U.S. origin, framing the rest of the discussion in light of their foreignness, in contrast to an imagined American. Thus, as Professor Carlo A. Pedrioli has discussed, that imagined “American” becomes an ideograph “employed narrowly to marginalize members of minority groups.”¹⁹⁸ The framing of foreignness first reinforces the ideograph by inviting the reader of an opinion, such as a lawyer or later judge, to view the remainder of the opinion through the lens of the perpetual foreigner stereotype.

A second failure was that despite the district court’s acknowledgement of a technical definition of accent, both it and the Ninth Circuit then ultimately relied on lay understanding of accent, and thus did not disrupt lay stereotypes related to Asian Americans and accent. First, the district court cited a socio- and ethnolinguistics professor’s statement that “[e]veryone has an accent. It is merely a manner of pronunciation, often linked to national origin.”¹⁹⁹ By including this language in its decision,

194. *Id.* at 599.

195. *Id.* at 596.

196. *Fragante*, 699 F. Supp. at 1429.

197. *Fragante*, 888 F.2d at 593.

198. Pedrioli, *supra* note 22, at 109.

199. *Fragante*, 699 F. Supp. at 1431.

the court initially recognized that accent technically relates only to pronunciation. However, the district court qualified that “listeners stop listening to Filipino accents, resulting in a breakdown of communication.”²⁰⁰ The Ninth Circuit also characterized Fragante’s accent as the cause of deficiencies in his oral communication skills, which had a “deleterious effect . . . on his ability to communicate orally.”²⁰¹ Together, the two courts in effect conflated accent and communication skills and left in place the notion that having a non-Standard American English accent is a deficiency.²⁰² The result is formal preference for a Standard American English accent over a non-standard or foreign accent.

The ultimate reliance on lay understanding of accent has broader implications. Based on the use of lay understanding above, judges might make language assessments on their own or allow jurors to do so without any expert, technical input. In *EEOC v. West Customer Management Group, LLC*, for example, a plaintiff was not hired based on his “thick accent,” and the EEOC in fact filed a complaint alleging discriminatory non-hiring based on accent and national origin.²⁰³ The EEOC consulted as an expert witness a speech pathologist who “concluded that [the plaintiff’s] speech and accent pose no barrier to his ability to communicate effectively.”²⁰⁴ The district court excluded the speech pathologist’s expert testimony on the ability to communicate on the rationale that “[d]etermining whether Roberts’s speech was intelligible is the type of common-sense determination that an untrained layman is qualified to make intelligently without the aid of an expert” and thus could be accomplished by an average juror.²⁰⁵ The assumption here seems to be that no technical evaluation of the actual communicative impact of accent is needed on the record or to help inform jurors. Instead, the court implied that listeners’ subjective impressions are enough

200. *Id.*

201. *Id.* at 593, 598–99 (emphasis in original).

202. In fact, the Ninth Circuit’s summary of the District Court opinion states, “The court also found that defendant’s failure to hire Fragante was explained by his *deficiencies* in the area of oral communication, not because of his national origin.” *Id.* at 593 (emphasis added).

203. 899 F. Supp. 2d 1241 (N.D. Fla. 2012).

204. *Id.* at 1251, 1255 (N.D. Fla. 2012).

205. *Id.* See generally Brandon Dimapasoc, Note, *Presuming Disparate Treatment: A Solution to Title VII’s Doctrinal Puzzle of Accent Discrimination*, 71 UCLA L. REV. 698 (2024) (discussing court deference to employer assertions that an accent interferes with effective job performance and addressing *EEOC v. W. Customer Mgmt. Grp., L.L.C.* in more detail).

to determine whether a speaker can be understood. However, the prevalence of the perpetual foreigner stereotype implies that if subjective impressions are used for Asian American speakers or others, similar bias as noted in linguist Rubin's study of listeners' accent perception would appear. In other words, the untrained layman listener, if provided no other information, might assume an accent or assume more of an accent than actually present.

A third failure in the district court and Ninth Circuit decisions is the maintenance of an unequally allocated communicative burden. The statement by the district court in *Fragante* noted above, that "listeners stop listening to Filipino accents, resulting in a breakdown of communication,"²⁰⁶ should have indicated that communicative breakdown at least partly results from the listener and the listener's held stereotypes, not necessarily from the speaker's actual accent or pronunciation of words. However, the district court remained silent on the listener bias towards Filipino accents, only noting the linguistic complexity in Hawai'i, rather than disrupting it.²⁰⁷ In doing so, it planted the possible interpretation that public, lay bias is justified or rational, flying directly in the face of civil rights legislative history demonstrating intense skepticism of exactly the same kind of bias or preferencing as to race. Further, the Ninth Circuit also emphasized the need for a clerk to communicate "in a manner which the public can understand," thus legitimizing the notion that the public cannot in fact understand accented speakers and does not need to try;²⁰⁸ the burden to assimilate falls on the accented speaker. In other words, Asian Americans must perform model minority speech in the workplace.

Other choices in the decisions allowed the perpetuation of the model minority and perpetual foreigner stereotypes. The district court made conflicting statements about *Fragante's* accent, noting both his verbal skills in English but simultaneously his shortcomings in pronunciation, answering questions, and "military bearing."²⁰⁹ The decision did not question the disparity between *Fragante's* written examination score of 96 that led to him being ranked as the top applicant, "extensive verbal

206. *Fragante v. Honolulu*, 699 F. Supp. 1429, 1431 (D. Haw. 1987).

207. *Id.* at 1432.

208. *Fragante*, 888 F.2d at 597.

209. See sources cited *supra* note 191 and accompanying text.

communication skill in English,” and in-person interview.²¹⁰ On the surface, Fragante’s treatment reflected exactly the same kind of phenomenon identified in labor leader Dolores C. Huerta’s 1961 testimony to Congress that minority candidates would pass written civil service exams but fail oral examinations.²¹¹ Looking further, the Ninth Circuit not addressing the disparity between the written examination score and interview in the decision demonstrates another failure to disrupt the assumption of model minority diligence and academic performance: Fragante’s top written examination score was taken for granted. Further, the court’s reference to Fragante not answering questions directly and his military bearing hews uncomfortably close to the notion of inscrutability associated with the racial stereotype of the perpetual foreigner.²¹²

Ultimately, the Ninth Circuit provided language in *Fragante* presumably to provide at least a nod to potential bias, but that had the effect of justifying not finding bias:

Accent and national origin are obviously inextricably intertwined in many cases. It would therefore be an easy refuge in this context for an employer unlawfully discriminating against someone based on national origin to state falsely that it was not the person’s national origin that caused the employment or promotion problem, but the candidate’s inability to measure up to the communications skills demanded by the job. We encourage a very searching look by the district courts at such a claim.

210. *Fragante*, 699 F.Supp. at 1430–32.

211. *Equal Employment Opportunity Part 1: Hearings Before the Spec. Subcomm. on Lab. of the H. Comm. on Educ. and Lab.*, 87th Cong. 473 (1961) (statement of Dolores C. Huerta, Community Service Organization, Inc.). Dolores C. Huerta, who later co-founded the United Farm Workers Ass’n, testified that “[a]lthough civil service tests are given, the oral examinations eliminate those of the minorities who pass the written tests,” with examples including a Black American woman whose oral examination disqualified her from a higher-level position despite a high written examination score, a civil engineer “of Mexican ancestry, who received the highest mark in a promotional examination, but was flunked on the oral,” and a “clerk of Japanese ancestry that has worked for years in the State capitol and failed twice on the oral examinations.” *Id.*

212. See, e.g., ASK A HISTORIAN: *Why Have Asian Americans Often Been the Target of Xenophobic and Racist Attacks During Disease Outbreaks?* (U. Wis. Madison Dept. Hist., May 26, 2020).

An adverse employment decision may be predicated upon an individual's accent when—but only when—it interferes materially with job performance. There is nothing improper about an employer making an *honest* assessment of the oral communications skills of a candidate for a job when such skills are reasonably related to job performance.²¹³

The full passage surrounding the Ninth Circuit's "inextricably intertwined" language sets up a means to avoid grappling with stereotyping by casting communication as a valid employer concern²¹⁴ and defending it as a bona fide occupational qualification.²¹⁵ Overlaying any other analysis is the limitation that accent only has to do with national origin, and not any other protected class. Communicative ability, however, is not race-neutral, especially in light of the fact that there is also an assumption of an unaccented Standard American English that skews white.²¹⁶ In other words, "lacks communication skills" or negative comments about an accent, actual or perceived, can easily be interpreted in some cases as "does not sound white." Overall, the accent-national origin link most concretely articulated in *Fragante* has not aligned with what courts have had to address in practice.

213. *Fragante*, 888 F.2d at 596–97.

214. *See, e.g.*, *EEOC v. W. Customer Mgmt. Grp., L.L.C.*, 899 F. Supp. 2d 1241, 1254–55 (N.D. Fla. 2012).

215. *See Fragante*, 888 F.2d at 596–97. The Eleventh Circuit has also explained that "an employee's heavy accent or difficulty with spoken English can be a legitimate basis for adverse employment action where effective communication skills are reasonably related to job performance." *Tseng v. Fla. A&M Univ.*, 380 F. App'x 908, 909 (11th Cir. 2010). *But see Akouri v. State of Fla. Dep't of Transp.*, 408 F.3d 1338, 1348 (11th Cir. 2005) (finding direct evidence of national origin discrimination where a supervisor turned down a Lebanese plaintiff for a promotion, stating the white co-workers were "not going to take orders from you, especially if you have an accent").

216. *See Kutlu et al., supra* note 26, at 868–69 (noting "whiteness is often attested to being the prototypical look for a typical *native* English speaker," and distinguishing inner circle varieties such as American English, Australian English, British English, and Canadian English that were associated with settler colonialism against outer circle English varieties that were spread through imperial expansion); Cheng & Cho, *supra* note 85, at 5 ("In the context of the United States, where White speakers are a majority, having 'no accent' can be equated in many minds as being a White, native-born American.").

B. Applying Accent's Link to National Origin

Courts have continued to rely on *Fragante's* language that “accent and national origin are inextricably intertwined,” but the accent-national origin link has both failed to address how discrimination against Asian Americans presents, as addressed in Part I of this Article, and has been difficult for courts to apply in practice, as will be addressed here.²¹⁷ In light of the legislative history and precedent noted in Part II, however, courts have struggled to set new precedent as to the role of racial animus in accent-based discrimination cases. Even for courts that have begun to recognize that accent is also salient to race, much of this discourse has taken place in unpublished cases at the federal district court level or even in footnotes, creating little authoritative, consistent precedent.²¹⁸ The struggle to apply the accent-national origin link has led to various approaches: (1) linking accent only to national origin and thus keeping the protected classes distinct; (2) addressing only race; (3) blurring national origin and race; or (4) aggregating conduct related to protected classes. Overall, the lack of consistent approach demonstrates a struggle to apply the accent-national origin link and a struggle to grapple with the reality that discriminatory conduct can be based on national origin animus, racial animus, or both.

1. Linking Accent Solely to National Origin

Courts have frequently continued to default to the accent-national origin link, but the link oversimplifies the complexity of discriminatory animus against Asian Americans and pigeonholes Asian Americans into a place adjacent to whiteness, per the model minority stereotype—a place in which Asian Americans do not quite fit. *Bourgeois v. U.S. Coast Guard* serves as a useful example for considering issues that arise from a sole focus on national origin.²¹⁹ There, plaintiff John Bourgeois, a

217. *Ang v. Procter & Gamble Co.*, 932 F.2d 540, 549 (6th Cir. 1991) (quoting *Fragante*, 888 F.2d at 596).

218. *See Odima v. Westin Tucson Hotel Co.*, 991 F.2d 595, 602 (9th Cir. 1993) (Fernandez, J., concurring) (noting accent “is often a stand-in for race or origin”). *But see Keeler v. Brenntag Specialties, Inc.*, 177 F. Supp. 3d 1021, 1025 (S.D. Tex. 2016) (evaluating an employer’s motion for summary judgment on a section 1981 claim, and denying summary judgment on the basis that it was “plausible” that a workplace comment about accent “was based on racial animus”).

219. *Bourgeois v. U.S. Coast Guard*, 151 F. Supp. 3d 726 (W.D. La. 2015).

civilian employee for the Coast Guard, alleged discrimination based on national origin when a supervisor refused to shake his hand, denied bonuses, made comments about Bourgeois's intelligence, and made comments about Bourgeois's accent sounding "unprofessional."²²⁰ Bourgeois argued he was part of a national origin group, Acadian, "because his ancestors were from Acadia and/or Nova Scotia and migrated to South Louisiana."²²¹ Though those of Acadian descent have a complex history, they would likely be considered white by a racially conscious listener.²²²

The district court determined persons of Acadian descent were a protected national origin group because they "have a distinctive linguistic pattern and accent, as well as a distinct culture that sets them apart,"²²³ relying on analysis in *Roach* that people of Acadian descent constitute a national origin group.²²⁴ The court considered the plaintiff's testimony as to his parents' ancestry, the plaintiff's surname that the court associated with his Acadian background, and the plaintiff's linguistic characteristics enough to defeat the defendant employer's motion for summary judgment, which asserted the plaintiff did not belong in a protected class.²²⁵

Bourgeois presents its own set of embedded assumptions, which are like and unlike those in *Fragante*. First is the assumed link between accent and national origin that is alike in both cases, reflected in the court citing to the language originally from *Fragante* that "national origin is deemed to be inextricably intertwined with an individual's accent."²²⁶ The second assumption, different from *Fragante*, is that a Southern, Acadian

220. *Id.* at 728–29.

221. *Id.* at 734. The court introduced the plaintiff's national origin in the third paragraph of the decision, in the second paragraph of the Facts section, as "plaintiff alleges he is a member of the protected class of 'native born American of Acadian descent.'" *Id.* at 729.

222. See Sylvie Dubois and Barbara M. Horvath, *Creoles and Cajuns: A Portrait in Black and White*, 78 AM. SPEECH 192, 192 (2003) ("Cajuns are descendants of Acadians from the province of Nova Scotia in Canada who originally settled in Louisiana between 1765 and 1785. They were French-speaking white people who had to struggle economically to survive and culturally to gain acceptance.").

223. *Bourgeois*, 151 F. Supp. 3d at 735.

224. *Roach v. Dresser Indus. Valve & Instrument Div.*, 494 F. Supp. 215, 218 (W.D. La. 1980).

225. *Bourgeois*, 151 F. Supp. 3d at 736.

226. *Id.* at 735 (quoting *Madiebo v. Div. of Medicaid*, 2 F. Supp. 2d 851, 855 (S.D. Miss. 1997) (citing *Fragante v. Honolulu*, 888 F.2d 591, 596 (9th Cir. 1989))).

American accent is unquestionably intelligible and has no bearing on communicative ability, implied by the absence of any discussion of communicative skills. Granted, the district court's description of the parties' arguments did not include an allegation by the employer that Bourgeois was difficult to understand, but the court did quote a thirty-six line passage on the connection between accent and national origin that directly discussed the potential impact of accent on communication skills without addressing Bourgeois's communication skills.²²⁷ Bourgeois's accent, in other words, had no bearing on communication, unlike Fragante's "foreign" accent that impeded communication.²²⁸ Fragante's accent, in fact, allowed for the employer's deployment of the bona fide occupational qualification defense, a defense the employer did not bring up in *Bourgeois*. The final assumption in *Bourgeois* is that national origin can remain salient over centuries, given the court's reliance on *Roach*, which grounded that plaintiff's national origin in French colonists who arrived in the colony of "Acadia" in 1604 and intermarried with Scottish colonists who arrived in 1620 to the colony, renamed "Nova Scotia" at that point.²²⁹ The implication for Asian Americans is that their national origin, or assumed foreignness, will be forever salient and centered, even if discrimination against Asian Americans is complex in practice.

Even when claims have been more complex, courts have at times recalibrated accent-related claims to fall solely under national origin, entrenching an accent-national origin link that does not address the complexity of accent-based discrimination for minority plaintiffs and that, in particular, avoids addressing race.²³⁰ In the case *In re Rodriguez*, the plaintiff claimed race-based discrimination and retaliation under Michigan's Civil Rights Act when he was not promoted because of his accent.²³¹ The case rose to the U.S. Court of Appeals for the Sixth Circuit based on diversity jurisdiction, and the court applied a

227. *See id.*

228. *Fragante*, 888 F.2d at 593, 598–99.

229. *Roach*, 494 F. Supp. at 217.

230. *See, e.g.*, *Nguyen v. Unified Gov't of Wyandotte Cnty./Kansas City*, No. 16-2654-JAR, 2018 WL 587231, at *21 (D. Kan. Jan. 29, 2018) (finding, on plaintiff's claim of discriminatory non-promotion based on race or national origin, that comments about plaintiff's Vietnamese accent making him difficult to understand could be considered national origin animus by a jury, given "accent and national origin are generally inextricably intertwined," and not explicitly addressing race).

231. *In re Rodriguez*, 487 F.3d 1001, 1007–09 (6th Cir. 2007).

Title VII framework.²³² The plaintiff included as evidence his resignation letter stating that the employer had not addressed his concerns about being discriminated against based on his race, which he stated was Hispanic American.²³³ In a footnote on plaintiff's racial discrimination claim, the Sixth Circuit noted that national origin might be more appropriate, but that the two overlap.²³⁴ The court cited to language from Justice Brennan's concurrence in *Saint Francis Coll. v. Al-Khazraji*,²³⁵ a case involving the right to make and enforce contracts under 42 U.S.C. § 1981, that under Title VII ethnicity and national origin overlap.²³⁶ However, the Sixth Circuit solely referenced national origin discrimination in the remainder of its decision, thus maintaining an accent-national origin link.²³⁷

Another example of a court linking accent solely to national origin is *Pathak v. Fedex Trade Networks T & B Inc.*, in which the plaintiff alleged, among other claims, race and national origin discrimination via failure to promote.²³⁸ The U.S. District Court for the District of Colorado considered a supervisor's comment that the plaintiff was not promoted due to his Indian accent as potential evidence of national origin discrimination.²³⁹ However, it considered comments about Asian people's tendency to be late and that Asian people develop cold sores two paragraphs later as potentially race-based discrimination.²⁴⁰ Overall, the court denied the employer's motion for summary

232. *Id.* at 1007.

233. *Id.* at 1006.

234. *Id.* at 1006, n.1 (noting that claims of discrimination on the bases of race and national origin overlap, as thus "[f]or the sake of clarity and consistency, Rodriguez's discrimination claim is hereinafter characterized as one based upon national origin").

235. *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 614 (1987) (Brennan, J., concurring) (specifying that birthplace on its own is not race-based discrimination, covered under the 42 U.S.C. § 1981 right to "make and enforce contracts . . . as is enjoyed by white citizens," but that ancestry and ethnicity are covered and that, in the Title VII context, ancestry and ethnicity overlap and fall under national origin).

236. *Rodriguez*, 487 F.3d at 1006 n.1.

237. *Id.* at 1009; *see also* JENNY R. YANG, CHAIR, U.S. EQUAL EMP. OPPORTUNITY COMM'N, NO. 915.005, EEOC ENFORCEMENT GUIDANCE ON NATIONAL ORIGIN DISCRIMINATION (2016) (identifying Hispanic as an ethnic or national origin group).

238. *Pathak v. FedEx Trade Networks T & B Inc.*, 329 F. Supp. 3d 1263, 1277–79 (D. Colo. 2018).

239. *Id.* at 1279 ("[C]omments regarding a plaintiff's accent may constitute circumstantial evidence of discrimination based on national origin.") (quoting *Zokari v. Gates*, 561 F.3d 1076, 1090 (10th Cir. 2009)).

240. *See id.* at 1280 (describing the comments as potential evidence of racially hostile treatment).

judgment on the Title VII disparate treatment discrimination claim because there were “triable issues of fact” as to race and national origin discrimination, but separated national origin and race.²⁴¹

The facts of some hostile work environment cases similarly demonstrate that courts attempt to divide up such harassment into neat categories even when those who perpetuate discriminatory harassment do not do so on a single axis. In *Daniel v. T&M Protection Resources LLC*, for a claim alleging hostile work environment based on race, sexual orientation, and national origin, the U.S. District Court for the Southern District of New York separated out the analysis into facts that it seemed to view as related to each protected class, despite the conduct occurring together.²⁴² Under the heading “National Origin Harassment,” the court described a supervisor speaking to the plaintiff in a mock British English accent based on perceiving the plaintiff, who was from St. Vincent and the Grenadines, as English, saying statements to the plaintiff like “go back to England,” and singing in a stereotypically calypso manner.²⁴³ It separately described under the heading of “Racial Harassment” references to the plaintiff being Black.²⁴⁴

There are two possible harms implicated by an analytical approach that solely links accent to national origin, like the approach used in *Bourgeois*, *In re Rodriguez*, *Pathak*, and *Daniel*. First, artificially parsing out some conduct as related to national origin creates a smaller subset of relevant discriminatory conduct, or evidence, thus weakening the discrimination claim. Considering national origin-based and race-based conduct together would necessitate considering more evidence at once. Second, solely focusing on national origin for a non-white plaintiff oversimplifies the discriminatory conduct. For an Asian American plaintiff, focusing solely on national origin would perpetuate the perpetual foreigner stereotype by centering the plaintiff’s presumed foreign birth. Focusing solely on national origin for an Asian American plaintiff would also treat the plaintiff like a white plaintiff for whom national origin is the only consideration, thus perpetuating the model minority stereotype by

241. *Id.* at 1289.

242. *Daniel v. T&M Prot. Res. L.L.C.*, No. 13 Civ. 4384, 2018 WL 3621810, at *24–30 (S.D.N.Y. July 19, 2018).

243. *Id.* at *27–28.

244. *Id.* at *24–27.

positioning Asian Americans adjacent to whiteness and silencing the experience of being discriminated against on multiple axes.

2. Focusing on Race

Another way courts have demonstrated the struggle to apply the notion from *Fragante* that accent and national origin are “inextricably intertwined” is by solely focusing on race. Solely focusing on race can also oversimplify discriminatory conduct, similar to the sole focus on national origin. Courts have at times focused on race when accent-related conduct is a small part of a series of acts and not related to a plaintiff’s own speech. For example, in *Ki v. Svnicki*, the U.S. District Court for the District of Maryland, in an unpublished opinion, determined that a reasonable jury could find that an Asian American woman was subject to a hostile work environment based on race when a colleague “repeatedly mocked Asian accents” by mimicking them, repeatedly made remarks about the height of Asian Americans, including looking under tables for Asian American coworkers, and berated the plaintiff while standing over her.²⁴⁵ None of the facts stated that the plaintiff herself had an accent. The colleague’s conduct emphatically demonstrates that the practice of harassment aimed at Asian Americans continues to invoke the perpetual foreigner stereotype through mocking of accent and the model minority stereotype through the expectation that the plaintiff would passively accept being berated. The court, however, only explicitly acknowledged that negative Asian American stereotypes include stereotypes about height.²⁴⁶ It did not address the assumption of accent or mimicry as accent- or speech-based stereotyping and thus forewent the opportunity to disrupt the stereotype that Asian Americans speak with some imagined Asian accent.

The court did conclude that “[m]ocking or making derogatory comments regarding a colleague’s accent is explicitly

245. *Ki v. Svnicki*, No. GJH-20-130, 2021 WL 3857855 at *1–2 (D. Md. Aug. 30, 2021).

246. *Id.* at *9 (“According to Plaintiff,” a colleague heard another colleague whose conduct was alleged to be harassing “make statements that were derogatory or involved negative stereotypes, including some regarding height,” and had heard that the harassing colleague “made derogatory statements specifically about Asian females” in the past).

race-based conduct.”²⁴⁷ The conclusion reflected a choice of race as the applicable protected class instead of national origin, and thus maintained a distinction between them without stating why. Thus, the court avoided addressing the interplay of race and national origin, despite relying on cases that demonstrated ambiguity as to that interplay. For example, the court cited *Meng v. Ipanema Shoe Corp.* for the proposition that discriminatory conduct related to a plaintiff’s Chinese accent supported “racial/national origin discrimination for being an Asian woman,” and *Iyoha v. Architect of the Capitol* for the proposition that “a foreign accent and national origin are often intertwined.”²⁴⁸ As to race, the court cited other precedent for the proposition that race relates to physical characteristics such as height.²⁴⁹ Importantly, the court appropriately noted the significance of context, but it did not explain how the context should be considered.²⁵⁰ Additionally, as noted above, the court’s opinion remains an unpublished one and thus of limited precedential weight.²⁵¹

Overall, as noted in Section II.B.1 above, the focus solely on race creates a smaller subset of relevant discriminatory conduct for a court to consider as related to the discrimination claim and oversimplifies the discriminatory conduct. These effects can

247. *Id.* at *6.

248. *Id.* (citing *Meng v. Ipanema Shoe Corp.*, 73 F. Supp.2d 392, 398 (S.D.N.Y. 1999) and *Iyoha v. Architect of the Capitol*, 927 F.3d 561, 567 (D.C. Cir. 2019)).

249. *See id.* (citing *Zapata v. IBP, Inc.*, 162 F.R.D. 359, 360 (D. Kan. 1995) (“Race suggests . . . human physical characteristics like skin and hair color, body size, and facial features typical of persons of a particular culture or social background.”) and *Shipley v. Dugan*, 874 F. Supp. 933, 941 n.6 (S.D. Ind. 1995) (referencing physical characteristics)).

250. *See id.* at *7 (quoting *Strothers v. City of Laurel, Md.*, 895 F.3d 317, 328 (4th Cir. 2018) (“In determining whether offensive conduct can be attributed to discrimination against the employer’s race or other protected status, courts must view the behavior in light of the social context surrounding the actions.”)).

251. *See* FED. R. APP. P. 32.1(a) (“A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent,’ or the like; and (ii) issued on or after January 1, 2007.”); *Decision & Post Decision: Opinion and Judgment*, U.S. CT. OF APP. FOR THE FOURTH CIR. (June 2025), https://www.ca4.uscourts.gov/AppellateProcedureGuide/Decision_Post-Decision/APG-opinionandjudgment.html [<https://perma.cc/CV2D-P3MV>] (allowing citation to unpublished opinions issued on or after January 1, 2007 but remaining silent on the weight of such authority); Amy J. Griffin, *Problems with Authority*, 97 ST. JOHN’S L. REV. 113, 133–37 (2023) (discussing the practice of issuing unpublished opinions and how they are “not to be deemed binding precedent”).

impact not just Asian American plaintiffs but others, such as Marie Laurent-Workman, a plaintiff who alleged a hostile work environment when a coworker made repeated comments to her about how Black Americans speak, mocked her speech, and screamed at the plaintiff.²⁵² The plaintiff alleged hostile work environment on the basis of race, color, national origin, and gender; the U.S. Court of Appeals for the Fourth Circuit concluded without addressing national origin that the plaintiff “pled a plausible claim for a race-based hostile work environment.”²⁵³ Given the various kinds of discriminatory conduct potentially involved in cases such as *Laurent-Workman* and *Ki*, it seems Title VII law should explicitly recognize that conduct could be discriminatory as to race, national origin, or both.

3. Blurring National Origin and Race

A third way courts have struggled to apply the accent-national origin link is by blurring national origin and race or leaving the issue unsettled. For example, in *Lolonga-Gedeon v. Child & Family Services*, the Magistrate Judge’s Report and Recommendation to the U.S. District Court for the Western District of New York acknowledged the possibility of the influence of racial animus when the plaintiff alleged disparate treatment based on her race, color, and national origin, in a case involving a supervisor who stated a dislike of plaintiff’s accent.²⁵⁴ The decision defined national origin discrimination as including mistreatment based on the plaintiff having the linguistic characteristics of a national origin group,²⁵⁵ then asserted, “Furthermore, an adverse employment action tied to an employee’s accent has been held to support claims for discrimination based on both

252. Brief of Appellant in *Laurent-Workman v. Wormuth*, 2021 WL 4843777, at *3, *15, *49-51 (July 20, 2021). (asserting plaintiff identified as a female Black American of Haitian descent and presenting the argument that plaintiff was subject to a hostile work environment based on race, color, national origin, and gender).

253. See *Laurent-Workman v. Wormuth*, 54 F.4th 201, 207, 211–12 (4th Cir. 2022).

254. *Lolonga-Gedeon v. Child & Fam. Servs.*, No. 08-CV-00300A(F), 2014 WL 12726638, at *5, *10, *19 (W.D.N.Y. Oct. 28, 2014) Plaintiff alleged: (1) discriminatory termination when her employer cited a lack of required education credentials that were only identified two weeks before her termination; (2) retaliation; and (3) hostile work environment. *Id.*

255. *Id.* at *11 (citing *Altman v. N.Y.C. Dep’t of Educ.*, 06-CV-6319, 2007 WL 1290599, at *4 (S.D.N.Y. May 1, 2007)).

national origin and race.”²⁵⁶ In support of the assertion, the court cited *Shao v. City University of New York*,²⁵⁷ but *Shao* supports only by implication because the court only explicitly acknowledged a comment about accent related to the plaintiff’s heritage.

In *Shao*, the plaintiff claimed discrimination, retaliation, and hostile work environment based on race, gender, and national origin.²⁵⁸ Specifically, “Plaintiff contend[ed] that she was denied training opportunities and ultimately terminated because of her gender and Chinese ancestry and heritage.”²⁵⁹ The court in *Shao* determined that a supervisor’s statement, “I hated you from the first day because of your accent,” followed by a termination letter, could be considered direct evidence of discrimination based on animus towards the plaintiff’s “Chinese heritage.”²⁶⁰ At the end of the opinion, the court denied the defendant employer’s motion for summary judgment on the plaintiff’s race, national origin, and gender discrimination claims, but the court did not directly state that a comment about the plaintiff’s accent implicated race and national origin.²⁶¹

As to *Lolonga-Gedeon* itself, in which the plaintiff had alleged disparate treatment based on race, color, and national origin, the magistrate judge determined two legal issues in response to the defendant employer’s summary judgment motion: that the plaintiff had established a prima facie case of discrimination, and that there was an issue of material fact as to whether the plaintiff was treated differently “based on the fact of Plaintiff’s race and national origin as manifested by Plaintiff’s accent” when terminated, in comparison to a white colleague who was “indisputably white and spoke with [no] noticeable foreign accent.”²⁶² The court’s language continues to demonstrate the assumption that accents are always foreign and more connected to national origin than race, even when race is salient.²⁶³

256. *Id.* at *17 (citing *Shao v. City Univ. N.Y.*, No. 12-CV-1566, 2014 WL 5038389, at *5, *12 (S.D.N.Y. Sep. 30, 2014)).

257. *Id.* (citing *Shao*, 2014 WL 5038389, at *5, *12).

258. *Shao*, 2014 WL 5038389, at *3.

259. *Shao*, 2014 WL 5038389, at *3.

260. *Id.* at *5.

261. *Id.* at *12. No further case history is publicly available after the 2014 decision.

262. *Lolonga-Gedeon v. Child & Fam. Servs.*, No. 08-CV-00300A(F), 2014 WL 12726638 at *15 (W.D.N.Y. Oct. 28, 2014).

263. *See id.* at *11.

In fact, the court acknowledged, “Plaintiff, as an African-American born in Zaire, Africa, whose native language is French, is a member of three classes, including race, color and national origin.”²⁶⁴ However, it noted that national origin discrimination includes discrimination based on the “linguistic characteristics of a national group,”²⁶⁵ linking accent and national origin, and used the language that “[a]ccent and national origin are obviously inextricably intertwined.”²⁶⁶

Later, the opinion addressed the plaintiff’s accent, which it “attributed to Plaintiff’s national origin,” and also addressed comments about the plaintiff being Black, which it attributed to race.²⁶⁷ Ultimately, as to the disparate treatment claim, the court determined it was possible that the evidence was “sufficient to support a reasonable jury’s determination that the real reason Plaintiff’s employment was terminated was because of her ethnic-based accent, race and color.”²⁶⁸ Put together, the various statements related to accent continue to demonstrate that despite courts’ attempts to nod to the salience of national origin and race when it comes to accent, there is an overall ambivalence as to accent’s link to race²⁶⁹ and a continuing link between accent national origin, under Title VII.²⁷⁰

264. *Id.*

265. *Id.* (quoting *Altman v. N.Y.C. Dep’t of Educ.*, No. 06 CV 6319, 2007 WL 1290599, at *4 (S.D.N.Y. May 1, 2007)).

266. *Id.* (citing *Rivera v. Baccarat, Inc.*, 10 F. Supp. 2d 318, 324 (S.D.N.Y. 1998)).

267. *Id.* at *17.

268. *Id.* at *18.

269. *See, e.g.*, *Odisho v. U.S. Bancorp, Inc.*, No. 16 C 11121, 2019 WL 3318180, at *7–8 (N.D. Ill. July 24, 2019) (finding that a reasonable jury could conclude comments about plaintiff’s “Middle Eastern background,” English language ability, and communication skills demonstrate national origin discrimination, and that the same “language-based circumstantial evidence she has offered could allow a reasonable jury to find [the supervisor’s] conduct was racially motivated as well”). *Cf., e.g.*, *Wesley v. Palace Rehab. & Care Ctr., L.L.C.*, 3 F. Supp. 3d 221 (D.N.J. 2014) (noting that under Section §1981 accent-based discrimination could relate to either national origin or racial discrimination depending on context of the alleged discriminatory conduct); *Keeler v. Brenntag Specialties, Inc.*, 177 F. Supp. 3d 1021, 1022–25 (S.D. Tex. 2016) (finding that a supervisor’s comments about “employees with thick accents who are not born in the United States” could plausibly demonstrate racial animus).

270. *See, e.g.*, YANG, *supra* note 237 (equating a “national origin group” with an “ethnic group” through use of the disjunctive “or” between both terms).

4. Beginning to Recognize Race and National Origin in Tandem

Finally, there has been nascent recognition that protected classes can interact, which acknowledges the reality that discriminatory conduct occurs together, though there are still various approaches. In *EEOC v. Lindsay Ford*,²⁷¹ a supervisor at an automobile dealership subjected the plaintiff, who the court described as a man of South Asian descent born in India, to repeated imitation of Indian and South Asian accents, name-calling such as references to plaintiff as “a creepy brown person,” name-calling related to intelligence, sexual comments, physical groping, and derogatory statements about South Asian or Middle Eastern customers.²⁷² The court addressed these facts together as related to harassment and altogether determined there was enough evidence to support the plaintiff’s hostile work environment claim based on race, national origin, and sex to defeat the defendant employer’s motion for summary judgment.²⁷³ However, the decision also noted a genuine dispute of material fact to defeat summary judgment on whether the harassment “was based on race *or* national origin,” with the use of the conjunctive “and” in one location and the disjunctive “or” in another, creating ambiguity.²⁷⁴ Overall, the invocation of eeriness, intelligence, and even sexualization is reminiscent of aspects of the perpetual foreigner stereotype and exoticization of Asian-appearing individuals. The U.S. District Court for the District of Maryland’s partial recognition that facts related to race, national origin, and even sex work in tandem seems like a more realistic approach to analyzing accent-based discrimination claims that addresses the intersection of stereotypes and discriminatory treatment across Title VII’s protected classes.

Some district courts in the Second Circuit recognize the possibility of aggregating, or considering all together, evidence of harassment related to different protected classes in hostile work environment cases to buttress the claim that the conduct created a hostile work environment rather than being merely

271. *EEOC v. Lindsay Ford L.L.C.*, No. TDC-19-2636, 2021 WL 5087851 (D. Md. Nov. 2, 2021).

272. *Id.* at *1–5.

273. *Id.* at *7.

274. *Id.* at *5 (emphasis added).

offensive.²⁷⁵ Aggregation would indirectly allow for a link of accent-based mistreatment with another protected class. In *Duarte v. St. Barnabas Hospital*, the plaintiff Ruth Rojas Duarte was a clinician in the hospital's child services program whom the district court for the Southern District of New York described as "a Hispanic woman who has—from birth—suffered from a hearing disability . . ."²⁷⁶ The plaintiff alleged, among other conduct, that supervisors commented on her hearing, corrected and mocked her pronunciation, and told her to "go back to Ecuador."²⁷⁷ The court concluded that the plaintiff's hostile work environment claims based on national origin (mockery of plaintiff's accent) and hearing disability were supported by enough evidence, combined together, to defeat the employer hospital's motion for summary judgment.²⁷⁸ In support, the district court cited precedent for the proposition "that 'different forms of harassment may exacerbate each other,'"²⁷⁹ thus making harassment related to one protected class worse when occurring with harassment related to another protected class.²⁸⁰

275. See *Duarte v. St. Barnabas Hosp.*, 265 F. Supp. 3d 325, 349 (S.D.N.Y. 2017).

276. *Id.* at 331.

277. *Id.* at 333–34.

278. *Id.* at 347–51 (rejecting, however, plaintiff's disparate treatment claim, plaintiff's hostile work environment claim based on gender, and plaintiff's hostile work environment claim based on race).

279. *Id.* at 349 (quoting *Donahue v. Asia TV USA Ltd.*, 208 F. Supp. 3d 505, 517 (S.D.N.Y. 2016)); see also *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 571–72 (2d Cir. 2000) (citing *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987) (recognizing that a trial court can aggregate race-based evidence of harassment with sex-based evidence of harassment to determine pervasiveness for a hostile work environment claim).

280. *Id.* (citing *Boggs v. Die Fliedermaus, L.L.P.*, 286 F. Supp. 2d 291, 298 (S.D.N.Y. 2003) (noting that racial harassment could exacerbate sexual harassment)). See also *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 571–72 (2d Cir. 2000) (determining, in a case involving racial epithets and a supervisor backing plaintiff into a wall, that a jury could find the "racial harassment exacerbated the effect of his sexually threatening behavior and vice versa" but not reaching the question of whether evidence of racial hostility could be aggregated with evidence of sexual hostility because the plaintiff had enough evidence to support a racial harassment claim and, separately, a sexual harassment claim); *Weiss v. Husted Chevrolet*, No. 05-4230, 2009 WL 2132444, at *8 (E.D.N.Y. July 13, 2009) (declining to aggregate evidence of hostile work environment based on disability and sex with a hostile work environment claim based on religion because the religion claim was "patently inadequate" and did not have a nexus to the other forms of harassment alleged, but recognizing that "in close cases evidence of one type of harassment may arguably be used to sustain a claim of another type of harassment"); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1412–17 (10th Cir. 1987) (upholding the lower court's rejection of a racial harassment claim but remanding for determination on whether there

Overall, however, no single approach has become controlling, so in the meantime, accent tends to remain “inextricably intertwined” with national origin with a few exceptions,²⁸¹ even though there is, at times, such a fine line as to national origin and race²⁸² that even plaintiffs may be unsure which protected class to invoke when filing a Title VII discrimination claim.²⁸³

C. Addressing Assumptions and Stereotypes

It is clear that Title VII jurisprudence does not align with discriminatory praxis and needs to evolve. Other scholars have previously recognized that Title VII jurisprudence inadequately addresses claims related to accent and language, and this Article builds on the breadth of that past scholarship by exploring in depth how Title VII jurisprudence inadequately recognizes how Asian Americans experience accent-based discrimination. Those other scholars created the foundation for this current work. Legal scholar Mari Matsuda applied a critical race theory lens to accent-based discrimination analysis that highlighted the role of accent discrimination as a recognizable form of discrimination “rooted in a culture of dominance fundamentally at odds with the creed of this nation,” proposed that courts enhance their

was a pervasive discriminatory employment atmosphere based on considering evidence on racial treatment combined with evidence on sexual harassment); Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)History*, 95 B.U. L. REV. 713, 729 (2015) (critiquing *Hicks v. Gates Rubber Co.* for implying evidence of race and sex discrimination “were ‘additive’ rather than inextricably intertwined, mutually reinforcing, and manifest in particular stereotypes, epithets, and abuses directed toward female employees of color”).

281. See *Odima v. Westin Tucson Hotel*, 53 F.3d 1484, 1490–92, 1493 (9th Cir. 1995) (affirming damages for race and national origin discrimination when candidate described by the court as a “well-qualified black Nigerian applicant” rejected for internal transfers described by employer as having a “heavy accent,” told to “go back to Africa” and also to “go to a black business to look for a job”).

282. See *Wesley v. Palace Rehab. & Care Ctr.*, 3 F. Supp. 3d 221, 229 (D.N.J. 2014) (reviewing how 42 U.S.C. § 1981, largely considered to address race only, considers ancestry or ethnic characteristics as related to race, but not birthplace, while Title VII considers ancestry with national origin); *Yul Chu v. Miss. State Univ.*, 592 F. App’x 260, 264–66 (5th Cir. 2014) (assuming *arguendo* when plaintiff alleged that colleagues mocked his accent that the conduct was “related to his race or national origin” but finding ultimately that the plaintiff failed to establish a *prima facie* case of discrimination under Title VII) (emphasis added).

283. *Bravo v. Am. Honda Fin. Corp.*, No. 3:10-cv-00064-FDW, 2010 WL 2572862, at *2 (W.D.N.C. June 24, 2010) (describing a plaintiff who listed her race and national origin as “Hispanic” as “unsure whether to classify Hispanic as national origin or race”).

analytical scrutiny when employers assert some version of the defense that English fluency is a bona fide occupational qualification in response to a claim of accent-based discrimination, and ultimately advocated for linguistic pluralism.²⁸⁴ Legal scholar Jasmine Gonzales Rose argued that language-based discrimination, especially as to prohibitions on speaking other languages like Spanish, is in practice race-based discrimination for people of color.²⁸⁵ Carlo Pedrioli, another legal scholar, argued that language relates to ethnicity and that ethnicity should be a protected class given how language rules marginalize members of minority ethnic groups.²⁸⁶

Legal scholar and professor Brenda D. Gibson, taking the discussion one step further, demonstrated how attitudes towards language, including accent, demonstrate implicit biases.²⁸⁷ Professor Gibson and other scholars have recognized that Title VII's protections against discrimination are flawed in the space of language and accent because the current approach to accent ignores how assumptions related to accent demonstrate bias and discrimination on multiple fronts beyond national origin. In fact, listeners might assume racial, ethnic, economic, or other characteristics beyond what Title VII simply labels as national origin.²⁸⁸ As Professor Gibson has pointed out,

284. Matsuda, *supra* note 19, at 1385, 1403 (using a critical race lens to identify issues with the application of Title VII protections against discrimination to accent bias, particularly in the case of Manuel Fragante, the plaintiff in *Fragante v. Honolulu*, who was denied a job at the Honolulu Department of Motor Vehicles based on his "heavy Filipino accent," despite otherwise high qualifications for the role).

285. Gonzales Rose, *Race Inequity Fifty Years Later*, *supra* note 20.

286. Pedrioli, *supra* note 22, at 109 ("The assumption is that those 'who differ ethnically from unstated norms of [White] American identity' come from somewhere other than the United States. According to this viewpoint, Whites, who often speak only English, are from the United States, but non-Whites, who may use other languages, originate from elsewhere. Apparently, White individuals never came from other countries. The consequence is rhetorical marginalization of members of minority ethnic groups.") (alteration in original). *But see* YANG, *supra* note 237 (seeming to use the terms "national origin group" and "ethnic group" interchangeably).

287. Gibson, *supra* note 13.

288. LIPPI-GREEN, *supra* note 2, at 15 ("The fact is, the variety of English a person speaks, highly regarded or stigmatized, standard-like or vernacular, cannot predict the quality and effectiveness of any given utterance or that person's worth as a communicator. What can be predicted is the fact that listeners will make assumptions about the speaker on the basis of language markers that signal alliance to certain social groups, primarily those having to do with race, ethnicity, and economic factors."); Matsuda, *supra* note 19, at 1363 (noting that accent is a societal

it is assumed that those who speak in a nonstandard manner “are somehow less competent or less entitled to opportunities and resources than those who do,”²⁸⁹ an assumption that has “been used to stratify our educational systems and limit the success of many minoritized people,” including those in the legal profession.²⁹⁰ Thus, according to Professor Gibson, the term “non-standardized English speaker[]” can include speakers of English as a second language and Black Americans who are native speakers of English.²⁹¹

The assumptions and biases recognized above have a function, which is to reflect and purposefully or inadvertently maintain a societal hierarchy. Speakers who conform to an expectation of “correct,” “neutral,” or “pure”²⁹² speech are assumed to be educated and competent; “non-standardized English speakers”²⁹³ are perceived to be incorrect users of a language, and are assumed to have failed in some way to assimilate into American society,²⁹⁴ or even have engaged in a moral failing²⁹⁵ that aligns

and cultural creation that situates people socially); Gonzales Rose, *supra* note 2, at 319 (noting accent is “a social and racialized construction”).

289. Gibson, *supra* note 13, at 602–03.

290. *Id.* at 603.

291. *Id.* at 602 n.4.

292. Hilary Parsons Dick refers to the “monoglot standard” as one which is imbued with an idea of purity; this monoglot standard aligns with what Rosina Lippi-Green refers to as a standard English ideology. The perpetuation of one correct standard then perpetuates a hierarchy of language. *See* Parsons Dick, *supra* note 85, at 231.

293. Gibson, *supra* note 13, at 602.

294. *See* Parsons Dick, *supra* note 85, at 229–30 (“The U.S. narrative as a country of immigrants, for instance, relies on a chronotype of purity and fixity in which migrants are portrayed as an undifferentiated mass that moves unilinearly into the United States, adopting ‘U.S. culture,’ a framing that erases the specific political economies that both draw people into the United States and encourage them to forge transnational ties.”).

295. *Id.* at 231.

with a listener's prejudices.²⁹⁶ It is one more way in which "citizenship [is] conditioned on performance" in America.²⁹⁷

In other words, there is an unequal allocation of assumption. Because the term "accent" symbolizes otherness, the practice of labeling a speaker as having an accent creates two foils in a disparate treatment case: the idealized, unaccented, generally white standard and the minoritized other. The accent label brings with it the assumptions that the speaker in fact has a foreign accent, that the accent is likely detrimental to communication, and that, as a result, the speaker will be less effective at their job.

As applied to the practice of accent-based discrimination directed at Asian Americans, race and national origin overlap, and their very overlap can generate animus. For example, legal scholar Vinay Harpalani has pointed out that early immigrants from China and Japan were indiscriminately racially labeled as the "Yellow Peril" regardless of their actual national origins, a label that reflects the perpetual foreigner stereotype.²⁹⁸ Hate-related incidents during the pandemic and post-pandemic also demonstrate an extreme version of the overlap of race and national origin through what news media labeled racial slurs such as "the Chinese Virus" or being told to "go back to China" directed at Asian Americans who likely would point to various national identities, including an American one.²⁹⁹ These

296. Accent bias is also not just an American problem. It arises in amongst British English speakers and English speakers globally. See, e.g., Stephen Smith, *Why People Change the Way They Speak*, BBC: NEWS, (Apr. 17, 2013), <https://www.bbc.com/news/av/uk-22183566> [<https://perma.cc/DFJ6-6LER>]; Luu, *supra* note 50; Monica Pitrelli & Goh Chiew Tong, *Passed Over for Another Business Opportunity? It May Be Because of Your Accent*, CNBC, <https://www.cnbc.com/2023/07/27/passed-over-for-another-business-opportunity-it-may-be-your-accent-.html> [<https://perma.cc/523T-YX69>] (last updated July 28, 2023, at 1:39 AM) (quoting a speaker who cited incidents of coworkers stating they could not understand the speaker, "It's not my . . . English. It's my accent being used as a weapon against me . . .").

297. Munshi, *supra* note 91, at 692.

298. Vinay Harpalani, *Can "Asians" Truly Be Americans?*, 27 WASH. & LEE J. C.R. & SOC. JUST. 559, 561 (2021) (citing GARY OKIHIRO, MARGINS AND MAINSTREAMS: ASIANS IN AMERICAN HISTORY AND CULTURE 141–47 (1994)).

299. Sarah Moon & Claire Colbert, *Attack on Asian American Man in LA's Koreatown Being Investigated as a Hate Crime*, CNN, <https://www.cnn.com/2021/02/26/us/asian-american-man-attack-koreatown-los-angeles-trnd/index.html> [<https://perma.cc/BKX5-BAAG>] (last updated Feb. 26, 2021, at 8:12 PM) (describing an attack on a Korean American man that started with attackers stating, "You have the Chinese Virus, go back to China"); see also Li Zhou, *The Long History of Anti-Asian Hate in America, Explained*, VOX

statements, too, reflect the perpetual foreigner stereotype and the model minority stereotype of Asian Americans being nonassertive, as discussed in this Article's introduction. Given that national origin and race similarly intersect and activate the perpetual foreigner and model minority stereotypes in accent-based discrimination cases, a modified intersectional approach would align more directly with the praxis of discrimination than the accent-national origin link.

D. Proposing a Modified Intersectionality

Discrimination is a complex problem, and there cannot be a single, easy solution that will fix Title VII jurisprudence. What I advance in this Article is a first step. As that first step to address the complexity of discrimination in practice, and especially the interplay of national origin and racial animus against Asian Americans, I propose courts adopt a modified intersectionality to address the confluence of national origin and race's relevance to accent-based discrimination cases, particularly for Asian Americans. To apply a modified intersectionality, I ask courts to explicitly recognize two phenomena. First, for Asian Americans, the accusation that a speaker has an accent, and even the perception of an accent, may be stereotype-driven, as addressed in Part I of this Article. Second, when it comes to accent, race and national origin intersect in Title VII discrimination cases. It is useful to address briefly here the overarching theory of intersectional discrimination because it drives the above proposal.

The theory of intersectional discrimination is frequently attributed to Kimberlé Crenshaw, who argued that discrimination is complex and does not take place on a single axis.³⁰⁰ Crenshaw

<https://www.vox.com/identities/2020/4/21/21221007/anti-asian-racism-coronavirus-xenophobia> [<https://perma.cc/LMW9-SCXB>] (last updated Mar. 5, 2021, at 3:45 PM) (noting that "vitriol toward Chinese Americans was driven by explicit racism," among other factors, not specifically national origin).

300. See generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. L. F. 139 (1989); See also Zillah Eisenstein, *Combahee River Collective Statement*, COMBAHEE RIVER COLLECTIVE (1978), https://americanstudies.yale.edu/sites/default/files/files/Keyword%20Coalition_Readings.pdf [<https://perma.cc/6L9W-V4MF>] (asserting the position that the major systems of oppression on the basis of race, sex, sexual orientation, and class are "interlocking" and arguing that it is "difficult to separate race from class from sex oppression because in our lives they are most often experienced simultaneously").

stated that Black women, for example, can suffer a unique form of discrimination: “double-discrimination” that combines the effects of being Black and the effects of being a woman.³⁰¹ Subsequently, scholars have expanded on intersectionality and argued for its application to race, gender, and national origin-related discrimination, including in the context of violence against Asian American women.³⁰² Because the common theme with intersectionality scholarship is that it addresses the confluence of race and gender, any subsequent application of intersectionality theory in practice should not detract from the importance of recognizing those marginalized on race and gender intersections.

Courts have recognized some intersection for an individual who belongs in multiple protected classes, albeit in various ways, and largely for circumstances involving race and gender.³⁰³ For example, in *Jefferies v. Harris County Community Action Association*, a race- and sex-based disparate treatment case, the U.S. Court of Appeals for the Fifth Circuit recognized that the use of “or” in Title VII’s list of protected classes showed legislators’ intent to cover employment discrimination related to “any or all” of the protected classes and should necessitate consideration of the plaintiff’s combined characteristics of being a Black woman.³⁰⁴ In *Lam v. University of Hawai‘i*, the Ninth Circuit also acknowledged intersectionality, stating that “when a plaintiff is claiming race *and* sex bias, it is necessary to determine whether the employer discriminates on the basis of that *combination* of factors, not just whether it discriminates against people of the same race or of the same sex.”³⁰⁵ In *Jeffers v.*

301. Crenshaw, *supra* note 300, at 149; *see also* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

302. *See, e.g.*, Virginia W. Wei, *Asian Women and Employment Discrimination: Using Intersectionality Theory to Address Title VII Claims Based on Combined Factors of Race, Gender, and National Origin*, 37 B.C. L. REV. 771, 797 (1996); *see also, e.g.*, Caitlin Ramiro, *After Atlanta: Revisiting the Legal System’s Deadly Stereotypes of Asian American Women*, 29 ASIAN AM. L.J. 90, 120–24 (2022) (advocating for using intersectionality as a framework to dispel harmful stereotypes about Asian American women throughout the legal system, including under Title VII).

303. *See generally* Mayeri, *supra* note 280 (providing a more comprehensive overview of the history of intersectionality, intersectionality scholarship, and how intersectionality is addressed in Title VII case law).

304. *Jefferies v. Harris Cnty. Cmnty. Action Ass’n*, 615 F.2d 1025, 1032, 1035 (5th Cir. 1980) (addressing plaintiff who alleged discriminatory failure to promote and discriminatory termination on the basis of race and sex, plus retaliatory termination).

305. *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1562 (9th Cir. 1994).

Thompson,³⁰⁶ the plaintiffs were able to rely on the idea of composite protection.³⁰⁷ There, the plaintiff alleged discriminatory failure to promote “because of her race, her gender, her race-and-gender, or her age” in the U.S. District Court for the District of Maryland.³⁰⁸ The court seemed to recognize the intersectional claim, noting that the plaintiff “established a *prima facie* case of composite, race-and-gender discrimination because [the employer] did not promote an African-American woman.”³⁰⁹ However, it then addressed some facts as not relevant to race-and-gender discrimination, but only to race.³¹⁰ Thus, overall, it should be acknowledged that courts’ application of intersectionality theory has been inconsistent.

However, intersectionality comes closest to describing the kind of discrimination that occurs in cases involving accent. In cases involving accent-based discrimination, like cases involving race and gender-based discrimination, plaintiffs have alleged discrimination based on their belonging in multiple protected classes.³¹¹ The social science studies addressed in Part I of this Article demonstrate that considerations beyond just national origin, such as race, affect how listeners react to speakers. Cases involving accent mockery plus name-calling and derogatory statements like *Lindsay Ford* demonstrate that discrimination occurs on multiple bases that include not just national origin but also race. Cases like *Ki* that involve accent mimicry and references to Asian American stereotypes like height demonstrate that race is salient for Asian Americans. And cases like *Fragante*, which focus on how an accent caused by national origin has detrimental effects on communication, and *Bourgeois*, which examine national origin but do not discuss any effects of an

306. See generally *Jeffers v. Thompson*, 264 F. Supp. 2d 314 (D. Md. 2003).

307. See YANG, *supra* note 237, at Section II.C.2. (defining intersectional discrimination as discrimination resulting from the “combination of two or more protected bases”).

308. *Jeffers*, 264 F. Supp. 2d at 325.

309. *Id.* at 327.

310. See *id.* at 328 (addressing a statement that a supervisor would not promote many Black employees as indicating bias against Black Americans only, not Black women, even though it was made to a Black woman).

311. See *Shalom v. Payless Shoesource Worldwide, Inc.*, 921 F. Supp. 2d 470, 479 (D. Md. 2013) (alleging disparate treatment based on race, national origin, and gender); *EEOC v. Lindsay Ford L.L.C.*, No. TDC-19-2636, 2021 WL 5087851, at *1–5 (D. Md. Nov. 2, 2021) (alleging hostile work environment based on race, national origin, and gender); YANG, *supra* note 237, at Section II.C. (recognizing that a Title VII can claim discrimination on multiple bases).

accent on communication, demonstrate that the model minority and perpetual foreigner stereotypes underlie treatment of Asian Americans in ways that are different from white plaintiffs because of the interplay of race and national origin. Thus, there is no reason to solely focus on national origin or analyze national origin animus, racial animus, or any other animus separately. One kind of animus is not severable from another.

A full recognition of both proposals to recognize the stereotypes related to race and national origin in accent cases and to recognize their interaction with each other and possibly other protected classes would require courts to add two parts to their opinions. First, courts should identify any stereotypes implicated by the various protected classes a plaintiff claims membership in, or by the combination of them, at that current point in time. For example, the model minority and perpetual foreigner stereotypes addressed in this Article are key stereotypes related to accent. Second, and likely concurrently, courts should recognize that accent relates to more than national origin. Thus, a replacement for the “[a]ccent and national origin are obviously inextricably intertwined in many cases” language from *Fragante*³¹² might be:

Accent is intertwined with national origin, race, and stereotypes related to either or both combined. Accent, speech patterns, or other linguistic features may also relate to other protected classes.

Then, for a disparate treatment claim, a court could scrutinize whether alleged discriminatory employment actions overlapped with such stereotypes. For a hostile work environment claim, a court could examine how conduct related to stereotypes impacted the working environment in totality. Overall, either analysis would fall closer to recognizing how discrimination occurs for Asian Americans.

CONCLUSION

This Article calls for a modified intersectional approach to Title VII accent cases. Courts deciding Title VII claims of accent-based discrimination are currently hindered by the idea

312. *Fragante v. Honolulu*, 888 F.2d 591, 596 (9th Cir. 1989).

that accent and national origin are “inextricably intertwined,” which leads to inconsistent approaches such as a sole focus on national origin, a sole focus on race, or a struggle to address both without a guiding framework. Using an intersectional approach would provide that framework and better respond to the interaction of national origin and racial stereotypes that Asian Americans experience when they are labeled as “accented.” More certainly needs to be said as to the contours of an intersectional approach to accent-based discrimination claims in future work. The purpose of this work, though, is to ask courts to begin contemplating a modified intersectional approach by recognizing that stereotypes can be salient in discriminatory practice and that such stereotypes can invoke multiple protected classes. This first step, I hope, will preserve the significance of prioritizing race and gender intersectionality as initially contemplated in that theory. A modified intersectional approach to addressing Asian Americans’ accent discrimination claims seems attainable and urgent in a post-COVID 19 pandemic era in which we witnessed the spread of vitriol against Asian Americans.