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Guantánamo as Outside and Inside the U.S.: Why is a Base a Legal Anomaly?

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GUANTÁNAMO AS OUTSIDE AND INSIDE THE U.S.: WHY IS A BASE A LEGAL ANOMALY?

ERNESTO HERNÁNDEZ-LÓPEZ*

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I. INTRODUCTION

This Essay describes how the United States Naval Station at Guantánamo Bay, Cuba (“Guantánamo” or “GTMO”)¹ developed simultaneously outside and inside the scope of American law. While base territory has been firmly under American control since troops landed on

* Associate Professor of Law, Chapman University School of Law, previous versions of this Essay were presented on the panel “Movies and Multiracial Imaginaries: Identity and Sovereignty Between Legal Borders” of the LatCrit XIV Annual Conference held at the American University Washington College of Law, at University of Melbourne, Valparaiso University Law School, and at Chapman University, and meetings of the Law and Society Association, International Studies Association, and International Law Association. The author thanks Eric Dominguez, Asal Nadjarzadehshiraz, and Sara Naheedy for their helpful research assistance and Chapman University School of Law for its support. The greater part of this Essay was written in the Spring of 2010; as such, some developments may change how many detainees remain in Guantánamo.

1. This Essay refers to the U.S. Naval Station at Guantánamo Bay, Cuba as “Guantánamo” or “GTMO.” The U.S. Navy uses the acronyms “GTMO” or “Gitmo.” See U.S. Naval Station at Guantanamo Bay, Cuba Website, <http://www.cnic.navy.mil/Guantanamo/index.htm> (last visited June 1, 2010).

June 10, 1898,² it has also been excluded from the rights and protections in the Constitution and international law. GTMO is referred to as a “legal black hole”³ or an “anomalous legal zone,” with “legal rules” fundamental to larger policies “locally suspended” in a geographic area.⁴ Since 1903, the United States has leased base territory from Cuba for an indefinite period.⁵ It is surrounded by the sovereign territory of Cuba—originally an American protectorate from 1898 to 1934 and presently a foreign policy rival since 1961. This location illustrates the fragility of GTMO’s legal jurisdiction, where rights are both protected and instead denied. Cubans,⁶ Haitians,⁷ and suspected terrorists have been detained at the base undoubtedly *inside* American jurisdiction, yet *outside* the domestic legal realm where their rights would be protected. Since 2002, nearly 800 men have been detained on the base, far from their homes and sites of capture, and without access to constitutional rights or international humanitarian and human rights law.⁸

2. See U.S. LIBRARY OF CONG., *Today in History: June 10*, <http://lcweb2.loc.gov/ammem/today/jun10.html> (examining the history of Guantánamo with historical photography).

3. See Johan Steyn, Twenty-Seventh F.A. Mann Lecture, Guantánamo Bay: The Legal Black Hole, in STATEWATCH (Nov. 25, 2003) <http://www.statewatch.org/news/2003/nov/guantanamo.pdf>; Clive Stafford Smith, *America’s Black Hole*, L.A. TIMES, Oct. 5, 2007, at A27.

4. Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1201 (1996) [hereinafter Neuman, *Anomalous Zones*].

5. See Agreement Between the United States and Cuba for the Lease of Lands for Coaling for Naval Stations, U.S.-Cuba, Feb. 16–23, 1903, T.S. No. 418, art. III [hereinafter U.S.-Cuba Feb. 1903 Lease]. A 1934 treaty between the United States and Cuba makes U.S. base occupation in effect indefinite. It states that for the lease period to end, one of two things must occur: (1) the United States stops occupying the base; or (2) Cuba and the United States mutually agree to stop the occupation. Accordingly, base occupation only stops when the United States chooses so. See Treaty Between the United States of America and Cuba Defining Their Relations, U.S.-Cuba, May 29, 1934, 48 Stat. 1682 [hereinafter U.S.-Cuba 1934 Treaty].

6. See JANA K. LIPMAN, GUANTÁNAMO: A WORKING-CLASS HISTORY BETWEEN EMPIRE AND REVOLUTION 87-93 (2009) (describing events from the 1950s when American military used base jurisdiction to detain Cubans).

7. From 1991 to 1993, the United States detained various Haitian and Cuban asylum seekers at the base. These experiences raised legal issues concerning whether the Constitution and international law checked base authority. See also Cuban-Am. Bar. Ass’n v. Christopher, 43 F.3d 1412, 1430 (11th Cir. 1995); Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498, 1506 (11th Cir. 1995) (finding constitutional rights do not apply to asylum detainees); Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1236, 1242 n.19 (2d Cir. 1992) (finding constitutional claims for asylum detainees probably succeeding in court); Haitian Ctrs. Council, Inc. v. Sale, 823 F. Supp. 1028, 1042 (E.D.N.Y. 1993) (holding that the due process clause of the Fifth Amendment applies to the United States Naval Base at Guantánamo, later vacated); Gerald L. Neuman, *Closing the Guantánamo Loophole*, 50 LOY. L. REV. 1, 3-5, 42-44 (2004) [hereinafter Neuman, *Closing the Guantánamo Loophole*]; Neuman, *Anomalous Zones*, *supra* note 4, at 1197–1201, 1228-30. See generally Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 158-59 (1993) (rejecting challenges to detention authority).

8. It is estimated that 779 persons have been detained at the base since January

GTMO exemplifies “*outsiders inside*,” referring to detainees who are simultaneously outside the protection of American law yet inside American jurisdiction. Most dramatic of these prisoners are Uighur Turkic Muslims from China, detainees whom the United States no longer classifies as enemy combatants and yet remain on the base for years.⁹ Kept at a different site from other detainees, they are not free to leave the base. They are not returned to China for fear that they would be subjected to torture or human rights abuse. For years now, five Uighur detainees remain as literally *outsiders inside*.¹⁰ After years of diplomatic efforts, some were transferred to Albania, Bermuda, and others states; more recently, others were transferred to Palau and Switzerland.¹¹ On October 8, 2008, District Court Judge Ricardo M. Urbina ordered the then remaining seventeen Uighur detainees released into the United States.¹² However, following that decision two circuit courts of appeals decisions barred that release.¹³ The Supreme Court granted certiorari in October 2009, and in March 2010

2002; the majority of these have been released or transferred. As of June 29, 2010, 181 detainees remain at GTMO. See The Guantanamo Docket: Detainees Held, N.Y. TIMES (2010), <http://projects.nytimes.com/guantanamo/detainees/held>; see also *Names of the Detained in Guantanamo Bay, Cuba*, WASH. POST (2010), <http://projects.washingtonpost.com/guantanamo>; BROOKINGS INST., THE CURRENT DETAINEE POPULATION OF GUANTÁNAMO: AN EMPIRICAL STUDY (Dec. 16, 2008 & Oct. 21, 2009) available at http://www.brookings.edu/reports/2008/1216_detainees_wittes.aspx.

9. See *Parhat v. Gates*, 532 F.3d 834, 837 (D.C. Cir. 2008). See generally Caprice L. Roberts, *Rights, Remedies, & Habeas Corpus – The Uighurs, Legally Free While Actually Imprisoned*, 24 GEO. IMMIGR. L.J. 1 (2009).

10. The New York Times reports that as of September 1, 2010, these five detainees have been held at Guantánamo for at least eight years. They include: Yusef Abbas, Hajiakbar Abdulghupur, Saidullah Khalik, Ahmed Mohamed, and Abdul Razak. For specific information and documents concerning their detention, see, e.g., The Guantanamo Docket: Yusef Abbas, N.Y. TIMES, Sept. 1, 2010, <http://projects.nytimes.com/guantanamo/detainees/275-yusef-abbas>.

11. Twenty-two Uighurs were brought to the base. Five were resettled in Albania, four in Bermuda, two in Switzerland, and six in Palau. See Tony Mauro, *Supreme Court Orders New Briefing in Uighur Case*, NAT'L LAW J., Feb. 16, 2010 <http://www.law.com/jsp/article.jsp?id=1202443274487>; see also Amanda Dale, *US judge 'Scoffs' as he suggests Bermuda as possible destination for more Uighurs*, THE ROYAL GAZETTE (Bermuda), Ap. 26, 2010, available at <http://www.royalgazette.com/rg/Article/article.jsp?articleId=7da4d273003000a§ionId=60>. Uighurs relocated to Palau and Bermuda argue their status there remain an anomaly without the right to travel or without citizenship. See Bernadette Carreon, Uighur refugees plead to leave Pacific Island, AM. FREE PRESS, Jan. 14, 2010, available at <http://www.google.com/hostednews/afp/article/>

[ALeqM5iz5PF3FdBzhDua1GoRn6lYV5haFQ](http://www.google.com/hostednews/afp/article/ALeqM5iz5PF3FdBzhDua1GoRn6lYV5haFQ); Sam Strangeways, UK will not issue passports to the Uighur Four – Gozney, ROYAL GAZETTE (Bermuda), Jan. 11, 2010, available at <http://www.royalgazette.com/rg/Article/article.jsp?articleId=7da65ab30030005§ionId=60>.

12. See *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33, 37 (D.D.C. 2008).

13. See *Kiyemba v. Obama*, 561 F.3d 509, 516 (D.C. Cir. 2009).

the Court vacated the appellate judgment and remanded the case.¹⁴ On May 28th, 2010, the circuit court reinstated its initial 2009 decision with additional facts concerning resettlement offers. This leaves the detainees, who do not accept their re-settlement offers, on the base, unable to leave and waiting for the Supreme Court to grant certiorari again or for the Administration to negotiate another re-settlement offer. As of September 1, 2010, their fate remains sealed *inside* base jurisdiction but *outside* rights protection, with five of them contesting their relocation to Palau.¹⁵ Judge Urbina was a keynote speaker at the LatCrit XIV Conference, for which this Essay is written.

This Essay comments on the conference's theme of "*Outsiders Inside: Critical Outsider Theory and Praxis in the Policymaking of the New American Regime*."¹⁶ This theme asks how the Obama Administration, led by the first American president of color, may bring change that reflects critical legal values.¹⁷ Legal debates about the base ask: "is detention (il)legal," "do detainees have rights," and "does the Constitution reach the detainees?" From a more historical and contextual light, Guantánamo presents myriad critical race themes, including issues such as: racial subjugation (Cuba's population is primarily non-Anglo—Latino, Black, and mixed-race); the resulting infractions of Cuban sovereignty (including the Platt Amendment of 1902, military interventions such as the Bay of Pigs, and the indefinite base occupation); and the denial of human rights to detained non-Anglos (first with past detentions of Haitians and Cubans, and now with War on Terror detainees). While President Obama plans to end base detentions, this critical context is reified with continued base

14. See *Kiyemba v. Obama*, 130 S. Ct. 1235 (Mar. 1, 2010) (remanding to determine if further proceedings are needed, for five Uighur detainees who have not accepted resettlement offers); see also OFF. SOLICITOR GENERAL, U.S. DEPT. JUSTICE, *Re: Jamal Kiyemba v. Barack H. Obama, S.Ct. No. 08-1234*, SCOTUSBLOG (Feb. 19, 2010), <http://www.scotusblog.com/wp-content/uploads/2010/02/SG-Kiyemba-letter-2-19-10.pdf> (reporting five Uighur detainees remain at the base out of an initial 22 detainees and 14 original petitioners and that the remaining Uighurs should receive resettlement offers). But see Robert Barnes, *Supreme Court dismisses case involving resettlement of Guantanamo detainees*, WASH. POST, Mar. 2, 2010, at A05; P. Sabin Willet, *Re: Kiyemba v. Obama, No. 08-1234*, SCOTUSBLOG (Feb. 19, 2010), <http://www.scotusblog.com/wp-content/uploads/2010/02/Uighurs-letter-brief-2-19-10.pdf> (arguing that resettlement offers represent government methods to avoid review of detention cases and that separation of power problems persist since the judiciary cannot provide a remedy); Lyle Denniston, *Kiyemba back to lower court Circuit Court*, SCOTUSBLOG, Mar. 1, 2010, <http://www.scotusblog.com/2010/03/kiyemba-back-to-lower-court/>.

15. See Dale, *supra* note 11; see also *supra* text accompanying note 14.

16. See LatCrit, *LatCrit XIV Annual Conference Theme, Outsiders Inside: Critical Outsider Theory and Praxis in the Policymaking of the New American Regime*, <http://www.law.du.edu/latCrit/ACXIV.htm>.

17. See *id.* (including critical values such as "internationalism and global-mindedness," "human rights and multidimensional diversity," antidiscrimination, and interrogating assumptions in racial, gender, and sexual orientation terms).

occupation despite decades of Cuban protests.

Building on these issues, this Essay offers a theoretical illumination on why GTMO has anomalous jurisdictional borders. “Borders” are presented as legal constructs demarcating who and what is inside state authority, but potentially outside rights protections.¹⁸ They encapsulate the base as a “legal black hole.” These outside and inside qualities are referred to as an “anomaly.”¹⁹ GTMO’s anomaly stems from a 1903 agreement between the United States and Cuba to lease the base. The agreement affirms that Cuba has “ultimate sovereignty” over the base while the United States has “complete jurisdiction and control.”²⁰ In other words, the United States lacks de jure sovereignty over base territory but has control and complete jurisdiction, while Cuba is ultimately sovereign over base territory. For American law, GTMO borders constructively demarcate what rights protections exist (or not) inside the base. It has been argued that constitutional rights require presence in United States sovereign territory—in other words, not at an overseas base.²¹ At times, American law clarifies what rights protections exist within this anomaly, most recently regarding habeas corpus and prisoner of war rights.²²

This Essay asks: why was the base crafted as a legal anomaly? It offers two preliminary suggestions: first, that American imperial sensibilities since the creation of this base required anomaly and, second, that the current anomaly is an extension of this history. Paraphrasing Alejandro

18. See Mary L. Dudziak & Leti Volpp, *Introduction to LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS* 1, 1-17 (Mary L. Dudziak & Leti Volpp eds., 2006) (describing borderlands as geographic spaces with “ideological ambiguity” permitting “both repression and liberation” and borders as expressions of power, territory, and identity).

19. Gerald Neuman describes GTMO as an anomalous legal zone, with “legal rules” fundamental to larger policies “locally suspended” in a geographic area. See Neuman, *Anomalous Zones*, *supra* note 4, at 1197, 1201; Neuman, *Closing the Guantánamo Loophole*, *supra* note 7, at 3-5, 42-44.

20. U.S.-Cuba Feb. 1903 Lease, *supra* note 5, art. III.

21. *E.g.*, MEMORANDUM FROM PATRICK F. PHILBIN AND JOHN C. YOO, DEPUTY ASSISTANT ATTORNEYS GEN., OFFICE OF LEGAL COUNSEL, U.S. DEP’T OF JUSTICE, TO WILLIAM J. HAYNES II, GEN. COUNSEL, U.S. DEP’T OF DEF., POSSIBLE HABEAS JURISDICTION OVER ALIENS HELD IN GUANTANAMO BAY, CUBA, IN THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 29-37 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter O.L.C. Memorandum]. See generally Brief for Respondent, *Boumediene v. Bush*, 553 U.S. 723 (2008) (Nos. 06-1195 & 06-1196).

22. See *Boumediene v. Bush*, 553 U.S. 723, 723 (2008) (holding noncitizen detainees on the base may invoke habeas corpus rights in the U.S. Constitution’s Suspension Clause); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (finding military commissions applied by the George W. Bush administration to base detainees as inconsistent with the Uniform Code of Military Justice and 1949 Geneva Conventions); *Rasul v. Bush*, 542 U.S. 466 (2004) (holding noncitizen base detainees are protected by statutory habeas corpus rights); Neuman, *Closing the Guantánamo Loophole*, *supra* note 7 at 1, 38, 42-44 (describing how U.S. law has determined rights are protected on the base regarding refugee, criminal law, and civil statutory rights)

Colás's works on empire's material, cultural, and political attributes, this Essay defines empire as metropolitan rule subordinating overseas populations. This requires an expansion of territory under political rule (lacking any identified limit), the protection of resource markets (to sustain consumption and expansion), and an ideology of superiority (to legitimize expansion).²³ To support these objectives, the base had to be an anomaly existing both "inside and outside" domestic and international jurisdictions. The contrary would clearly delineate full U.S. or Cuban sovereignty over base territory. Throughout history, base functions have capitalized on this anomaly between sovereignties.²⁴

Since 1898, the base has served imperial objectives of territorial and economic expansion and cultural superiority. The law serves a vital facilitating role by providing flexible determinations of jurisdiction, deferring to political authority in foreign relations with the effect of protecting overseas markets, and reinforcing assumptions of American superiority.²⁵ Examining this past illuminates the spatial, economic, and cultural context of American extraterritoriality. Present engagement overseas is not limited to GTMO. The situation in Iraq and Afghanistan, along with overseas bases in over ninety countries,²⁶ suggests American extraterritoriality may only expand.

Three points summarize this Essay's thesis. First, spatially, Guantánamo's anomaly facilitates flexible control of base terrain by limiting public obligations to protect individual rights. In order to execute imperial authority over the base, Guantánamo had to be anomalous. With this structure in place, the United States could extend its control of overseas territory and Caribbean waterways without limits posed by sovereignty. This flexibility was advantageous for American foreign relations. Jurisprudence on extraterritorial authority, such as the *Insular Cases* (1901-1920), reflects these flexible borders, as well as the denial of full

23. ALEJANDRO COLÁS, *EMPIRE* 5 (2007). For a more elaborate description of GTMO and empire, using Colás' approach of empire as space, markets, and culture, see Ernesto Hernández-López, *Guantánamo as a "Legal Black Hole": A Base for Expanding Space, Markets, and Culture*, 45 U.S.F. L. REV. (forthcoming 2010) (manuscript on file with author) [hereinafter Hernández-López, *Legal Blackhole*].

24. DAVID VINE, *ISLAND OF SHAME: THE SECRET HISTORY OF THE U.S. MILITARY BASE ON DIEGO GARCIA* 190 (2009).

25. See *infra* III:A-C (describing GTMO's history and empire as space, markets, and culture), see also Hernández-López, *Legal Black Hole*, *supra* note 23. For examples of deference to the political branches in foreign relations, see *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 319-21 (1936); Walter LaFeber, *The "Lion in the Path": The U.S. Emergence as a World Power*, 101 POL. SCI. Q. 705, 714 (1986) [hereinafter LaFeber, *Lion*]; Walter LaFeber, *The Constitution and United States Foreign Policy: An Interpretation*, 74 J. AM. HIST. 695 (1987) [LaFeber, *Constitution*]; Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 649-54 (2002).

26. See VINE, *supra* note 24, at 216 n. 8.

constitutional rights of residents of these territories.²⁷

Second, economically, the base supports the protection of resource markets. It bolstered the U.S. “Sphere of Influence” (1898-1934) objectives regarding Cuba, the Caribbean, and the Panama Canal. It provided strategic support for military interventions in Cuba, the Dominican Republic, Nicaragua, and Haiti.²⁸ Interventions protected American investments, deterring future non-payments or recuperating funds owed to investors. As the first American overseas base, Guantánamo was key to American security policies in the region and remains so today.

Third, culturally, the base promotes an ideology of American superiority with manipulations of sovereignty and consequential race-based exclusions. Base borders are set referring to sovereignty, with Cuba denied full sovereignty.²⁹ Determinations that populations are (or are not) sovereign are embedded in cultural exclusions in international law.³⁰ Cubans as a Hispanic, black, and mixed-race population could not be fully sovereign or self-governing, as historically the “family of nations” rejected the idea that non-Europeans could be fully sovereign. This happened with the Treaty of Paris of 1898, which ceded Cuba to the United States from Spain, the American occupation from 1898-1902, and the Platt Amendment requiring a base in Cuba.³¹ The base is a product of the denial of sovereignty to Cubans by U.S. policies and international law.

Part II of this Essay defines empire, combining critical theory’s material and cultural interpretations. This contextualizes why Guantánamo was created and how anomaly’s function adapts over time. Part III relates this theory with GTMO’s legal history overseas in terms of space, economics, and culture. Subsection III.A describes the base facilitating American expansion without any defined limit, Subsection II.B presents how market

27. See, e.g., *Downes v. Bidwell*, 182 U.S. 244, 287 (1901).

28. See MARION E. MURPHY, *THE HISTORY OF GUANTÁNAMO BAY 1494-1964*, (U.S. Navy 1964) (1953), available at <https://www.cnic.navy.mil/Guantanamo/AboutGTMO/gtmohistgeneral/gtmohistmurphy/gtmohistmurphyvoll/gtmohistmurphyvollindex>.

29. The Platt Amendment required Cuba to provide a base and GTMO became this base. The lease agreements and treaty affirmed that this limit Cuba’s sovereignty while avoiding American sovereignty. See U.S.-Cuba Feb. 1903 Lease, *supra* note 5; Ernesto Hernández-López, *Boumediene v. Bush and Guantánamo, Cuba: Does the “Empire Strike Back?”*, 61 SMU L. REV. 117, 153-167 (2009).

30. See generally ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2004) (examining how post-colonial notions of sovereignty, stemming from the cultural differences between European and non-European cultures, have shaped modern day international law).

31. See LOUIS PEREZ, *CUBA UNDER THE PLATT AMENDMENT 29-31* (1991) (illuminating that the “neutral intervention” of the United States in to the war between Spain and Cuba was intended to end the claims of Spanish and Cuban sovereignty while asserting U.S. dominance in the region).

protections are integral to the base after the War of 1898, and Subsection III.C offers a cultural reading of its role in supporting American superiority. Part IV concludes by identifying how this history, in terms of space, markets, and culture, reflects a condition of “outside and inside” in the United States.

II. EMPIRE IN TERRITORIAL EXPANSION, WEALTH-CREATION, AND CULTURAL SUPERIORITY

To contextualize why the United States established and maintained a base in Cuba after 1898, this Part provides a working definition of empire. Exploring the theory of empire and the history behind the base accomplishes three things. First, it explains why an overseas presence was needed militarily, economically, and geopolitically, and how this required anomaly. Second, the base shaped normative reasoning in international law (i.e., sovereignty and imperial influence for the United States, Spain, and Cuba), American law (i.e., checks or deference for political authority in foreign relations, economic policy, and territorial acquisition), and Cuban law (i.e., Cuba’s constitution and treaties with the United States). Third, this begins to paint a picture of how culture, economics, and political change helped craft the law’s role in GTMO’s anomaly and American extraterritoriality. These assumptions appear in how the law—individual rights, public obligations and constitutional ordering—facilitated these relations. These insights motivate Part III’s methodology of pinpointing how the law reinforced the United States’ imperial role in GTMO’s past.

Colás explains that empires require “combinations of territorial organization, modes of wealth-creation and distribution, and dynamics of cultural self-understanding.”³² In *Empire*, he offers a conceptual and comparative analysis of empires in world history to identify specific modes of social organization that result in a state “that successfully expands from a metropolitan [center] across various territories in order to dominate diverse populations.”³³ Essential to this analysis is identifying what factors influence the development of metropolitan/center and periphery/subordinate relationships reflective of an empire. By examining diverse empires such as Rome after 27 B.C., Han China from 24-220 A.D., Spain after 1492, the fourteenth century Ottoman Empire, and the late nineteenth century British empire, Colás identifies three features required by empire: “empire as space,” “empire as market,” and “empire as culture.”³⁴

32. See COLÁS, *supra* note 23, at 5.

33. See *id.* at 28.

34. *Id.*

First, empires need borders that are neither closed nor limited, but are boundless and benefit from sophisticated notions of what is “inside” and “outside.”³⁵ The opposite would be a sovereign state with finite borders and without control over another population’s sovereignty. Empires have “frontiers and boundaries, but no external borders,”³⁶ and these frontiers act as “fluctuating zone[s] of interaction between the imperial centre and its peripheries.”³⁷ In order to justify how empires govern populations outside the metropole and control territory outside the domestic, empires require these flexible borders. Empires develop ornate political and legal instruments delineating what is outside and inside.³⁸

Jurisprudence on overseas authority, such as GTMO detention cases³⁹ or the *Insular Cases*,⁴⁰ offer a sophisticated way to demarcate an empire’s borders. This facilitates empire as space. When imperial governments face protracted litigation in locations near the boundaries of governmental authority overseas, the judiciary becomes a conduit for negotiating the values implicit in overseas authority.⁴¹ These disputes develop at geographic locations where sovereign authority changes or political boundaries are demarcated, such as GTMO.

Second, empires use markets (the exchange of land, labor, and goods) to exploit the periphery for the center’s economic benefit.⁴² Empires develop elaborate administrative, legal, political, and military infrastructure to secure this.⁴³ This capacity to move enormous quantities of resources, people, and ideas and to conduct state administration with consistency is impressive. The relationship between “empire as space” and “empire as markets” is mutually reinforcing and guarantees control of territory and

35. *See id.* at 19.

36. *See id.*

37. *See id.* at 29.

38. *See id.* at 21.

39. *See generally* Hernández-López, *Legal Black Hole*, *supra* note 23.

40. *See infra* III:C. *See generally* BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* 215 (2006) (characterizing congressional action and Supreme Court decisions during this era to have created new classifications for territories which allowed the United States to hold territories “at arm’s length, apart from the American polity”).

41. This perspective follows the paths set by Lauren Benton. *See generally* LAUREN BENTON, *LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400-1900* (2002); Lauren Benton, *Constitutions and Empires*, 31 *LAW & SOC. INQUIRY* 177 (2006); Lauren Benton, *Colonial Law and Cultural Difference: Jurisdictional Politics and the Formations of the Colonial State*, 41 *COMP. STUD. SOC’Y & HISTORY* 563-88 (1999). Similarly, Nasser Hussain draws similar analogies. *See* NASSER HUSSAIN, *THE JURISPRUDENCE OF EMERGENCY: COLONIALISM AND THE RULE OF LAW* (2003); Nasser Hussain, *Beyond Norm and Exception: Guantánamo*, 33 *CRITICAL INQUIRY* 734 (2007).

42. COLÁS, *supra* note 23, at 71.

43. *Id.*

resources. Empires secure long-distance markets not just through exploitation overseas, but also by systems of taxation, customs duties, privateering, and monopolies with specific public and private law instruments.⁴⁴ The ways empires employ market protections, be they for gold, oil, labor, manufactured goods, or control of sea or land, is key to their control over these markets.

Third, empires develop cultural understandings, often racial, gendered, or religious, to justify why a metropolitan power subordinates and controls populations.⁴⁵ Empires require a collective cultural identity, which provides reasoning for why one population is subordinate and/or why another is superior. Colás highlights how empires use the notion of civilization and the process of racialization to justify authority.⁴⁶ These concepts identify a person's place in the imperial order. Imperial authority must classify or make ornate and distinct delineations between racial groups. These distinctions may result in contradictions, such as claiming universal liberal rights or popular sovereignty while preserving race-based exclusions.⁴⁷ Establishing collective identities and communal understandings about how the larger world is organized is key to preserving the empire.

By examining how empires configure their territorial organization, use markets to sustain overseas rule, and develop cultural understandings, Colás adds to traditional definitions of empires.⁴⁸ This approach avoids examinations that may be solely material or cultural.⁴⁹ Stated in simple terms, culture, economics, and political organization are all influential for empire. Colás' focus on three features highlights how material (i.e., markets and state involvement), political (i.e., geographic organization of authority), and cultural (i.e., collective understanding of the larger world) aspects all contribute to empire. Critical scholars comment on how a mere cultural analysis overlooks material concerns, such as class, access to capital or resources, political power, poverty, modes of production, and

44. *See id.*

45. *See id.* at 29-30, 116-57.

46. *See id.* at 26.

47. *See id.* at 128.

48. *See id.* at 11 (referring to Michael Doyle's definition of an empire as "a relationship, formal or informal, in which one state controls the effective political sovereignty of another political society"); *see also*, MICHAEL W. DOYLE, *EMPIRES* 45 (1986) (asserting that empire is both a formal and informal relationship by which one state establishes sovereignty over another). Edward Said defines imperialism as "the practice, the theory, and the attitudes of a dominating metropolitan center ruling a distant territory." Said distinguishes this from colonialism which is a consequence of empire "implanting settlements in distant territory." EDWARD SAID, *CULTURE AND IMPERIALISM* 9 (1993).

49. *C.f.* Susan Marks, *Empire's Law*, 10 *IND. J. GLOBAL LEGAL STUD.* 449 (2003) (emphasizing the cultural, economic, and political aspects of empire).

commerce.⁵⁰ Similar criticisms are made about scholarship focusing solely on economic and material concerns, while overlooking how race, gender, religion, identity, and communal values influence empire or law's normativity.⁵¹ This Essay is influenced by LatCrit's historic engagement with examining not only how empire creates racial divisions and essentialized narratives, but also in its examination of history's influence in lawmaking, transnationalism, and regional foci on borderlands, the Caribbean, or the American West.⁵²

For the 19th and 20th centuries, U.S. foreign relations in the Western Hemisphere are often described as the story of empire-building, referring to: continental expansion conquering Mexican and Native-American territory before the Civil War; extension beyond the continent after 1898

50. See, e.g., Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757 (2003) (reviewing CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al., eds., 2002)); Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 121 (2003) (reviewing CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al., eds.) (2002) and DERRICK BELL, *ETHICAL AMBITION: LIVING A LIFE OF MEANING AND WORTH* (2002)). But see Angela P. Harris, *The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 771-74 (1994); Kevin R. Johnson, *Roll Over Beethoven: "A Critical Examination of Recent Writing About Race"*, 82 TEX. L. REV. 717 (2004).

51. See generally Patrick Wolfe, *History and Imperialism: A Century of Theory, from Marx to Postcolonialism*, 102 AM. HIST. REV. 388 (1997) (describing how theories of empire, with Marxist, dependency, post-colonial or globalization foci vary between the significance attributed to material versus ideological or cultural explanations).

52. See, e.g., GILBERT PAUL CARRASCO, *LATINOS IN THE UNITED STATES: INVITATION AND EXILE, IN IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* 190 (Juan F. Perea ed., 1997); Keith Aoki, *One Hundred Years of Solitude: The Alternate Futures of LatCrit Theory*, 54 RUTGERS L. REV. 1031 (2002); José A. Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391 (1978); Antonia Darder, *Schooling and the Empire of Capital: Unleashing the Contradictions*, 50 VILL. L. REV. 847, 847 (2005); Berta Hernandez-Truyol, Angela Harris & Francisco Valdes, *Beyond The First Decade: A Forward-Looking History Of Latcrit Theory, Community And Praxis*, 17 BERKELEY LA RAZA L.J. 169 (2006); Pedro A. Malavet, *The Past, Present and Future of the Puerto Rico-U.S. Colonial Relationship: Vieques, Transculturation, and Reparations: Reparations Theory and Postcolonial Puerto Rico: Some Preliminary Thoughts*, 13 BERKELEY LA RAZA L.J. 387 (2002); Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1 (2000); Ediberto Román, *Empire Forgotten: The United States's Colonization of Puerto Rico*, 42 VILL. L. REV. 1119 (1997); Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437 (2002); Ediberto Román, *Reparations and the Colonial Dilemma: The Insurmountable Hurdles and Yet Transformative Benefits*, 13 BERKELEY LA RAZA L.J. 369 (2002); E. San Juan, Jr., *Post-Colonialism and the Question of Nation-State Violence*, 78 DENV. U. L. REV. 887 (2001); Charles R. Venator Santiago, *Foreword: Countering Kulturkampf Politics Through Critique And Justice Pedagogy*, 50 VILL. L. REV. 749 (2005); Sylvia R. Lazos Vargas, *History, Legal Scholarship, and LatCrit Theory: The Case of Racial Transformations Circa the Spanish American War, 1896-1900*, 78 DENV. U. L. REV. 921 (2001).

with the colonies of Puerto Rico, Guam, the Virgin Islands, and the Philippines; 20th century military interventions, protectorates, and investments in Cuba, Nicaragua, the Dominican Republic, Panama, Honduras, and Mexico and the acquisition of Pacific colonies in Samoa, Northern Mariana Islands, Micronesia, Marshall Islands, and Palau; Cold War efforts against economic nationalism and “soviet influence;” and the effectively forced implementation of neo-liberal economic policies, such as the Washington Consensus, in the 1990s. Since few of these examples reflect de jure American control of a population, these identifications require conceptual frameworks of empire as something other than formal colonialism.

Scholarship on U.S. foreign relations as empire provides rich and varied analytical frameworks, inspiring questions about how law and empire-building mutually re-enforce one another. William Appleman Williams presented the “Tragedy of American Diplomacy” as how economic objectives, coupled with the military means to enforce these objectives, and a willingness to impose American ideals abroad, masked foreign policy “neutrality,” initiated with the “Open Door” policy of the 1890s.⁵³ The idea that economic frontiers were “no longer coextensive” with territorial frontiers encapsulated Williams’ perspective on why American empire expanded during the fall of formal European colonialism and consequent decolonization, two world wars, and a Cold War.⁵⁴

The United States expansion after 1898 was motivated by perceived necessity to find overseas markets; alliances between private and public interests; ideologies on frontiers, jingoism, Anglo-superiority, and protestant missionaries; and the need to participate in global imperial competition.⁵⁵ The United States did not fight the War of 1898⁵⁶ for humanitarian objectives, such as an independent Cuba, spreading democracy, or even the discredited myth of “Remember the Maine,” but

53. See generally WILLIAM APPLEMAN WILLIAMS, *THE TRAGEDY OF AMERICAN DIPLOMACY* (Norton 2009) (1988).

54. Lloyd C. Gardner, *Foreword*, to *id.*

55. See also DAVID HEALY, *U.S. EXPANSIONISM: THE IMPERIALIST URGE IN THE 1890S* 48 (1970) (describing how ideas on markets, China, virtue, civilization, race, barbarism, commerce, etc. inspired public and political discourse seeking an empire) [hereinafter HEALY, *EXPANSIONISM*]. See generally WALTER LAFEVER, *THE NEW EMPIRE: AN INTERPRETATION OF AMERICAN EXPANSION, 1860-1898* (1998) [hereinafter LAFEVER, *NEW EMPIRE*].

56. This Essay prefers the term “War of 1898” versus the Spanish-American War, since the War encompassed much more than just Spain and the United States. See generally Sylvia L. Hilton, *Democracy Beats the “Disaster” Complex: Spanish Interpretations of the Colonial Crisis*, 12 OAH MAG. HIST., 11-17 (1998); Thomas G. Paterson, *U.S. Intervention in Cuba, 1898: Interpreting the Spanish- American-Cuban-Filipino War*, 12 OAH MAG. HIST. 5 (1998).

instead for economic and diplomatic self-interests overseas.⁵⁷ Emily Rosenberg describes how American economic values and culture inspired its goal of expansion and conformity abroad from 1890 through 1945.⁵⁸ After the Cold War, literary, post-colonial, gender, and American studies influences intensified the examination of empire. Amy Kaplan and Donald E. Pease in *Cultures of United States Imperialism* presented the concept that empire was heavily absent in American culture and that gender, race, and class, as cultural constructions, contested imperial projects throughout foreign relations history.⁵⁹ Ann Laura Stoler suggests examining how United States empire influences the “intimate aspects of life,” such as “sex, sentiment, domestic, arrangement, and child rearing.”⁶⁰ These various perspectives illuminate empire’s influence in American history.

Often to identify empire’s influence, one must isolate how current perspectives and present contexts frame how that past is presented. As Dipesh Chakrabarty explains the vital task is to read history against its grain and to identify how current law and international relations reflect prior contests.⁶¹ For this Essay, most vivid in this regard are the varying interpretations of the War of 1898, the Platt Amendment, GTMO’s creation and occupation, the Cuban Revolution of 1959, and Cold War in the Americas.⁶²

57. See generally Walter LaFeber, *The American Search for Opportunity*, in HISTORY OF AMERICAN FOREIGN RELATIONS VOL. II, 234-35 (Warren I. Cohen ed., 1993) [hereinafter LaFeber, *Opportunity*].

58. See generally EMILY S. ROSENBERG, SPREADING THE AMERICAN DREAM: AMERICAN ECONOMIC & CULTURAL EXPANSION 1890-1945 (1982).

59. See AMY KAPLAN & DONALD E. PEASE, *Introduction* to CULTURES OF UNITED STATES IMPERIALISM 3 (Amy Kaplan & Donald Pease eds., 1993).

60. Ann Laura Stoler, *Tense and Tender Ties: The Politics of Comparison in North American History and (Post) Colonial Studies*, in HAUNTED BY EMPIRE: GEOGRAPHIES OF INTIMACY IN NORTH AMERICAN HISTORY 23 (Ann Laura Stoler ed., 2006)

61. See generally DIPESH CHAKRABARTY, PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE 42-43 (2000) (arguing history should be examined by not prioritizing European or “modern perspectives” and thereby ignoring voices from the “periphery”).

62. See generally CLOSE ENCOUNTERS OF EMPIRE: WRITING THE CULTURAL HISTORY OF U.S.-LATIN AMERICAN RELATIONS (Gilbert M. Joseph et al. eds., 1998); IN FROM THE COLD: LATIN AMERICA’S NEW ENCOUNTER WITH THE COLD WAR (Gilbert M. Joseph et al. eds., 2008); LOUIS A. PÉREZ JR., THE WAR OF 1898: THE UNITED STATES & CUBA IN HISTORY & HISTORIOGRAPHY (1998).

III. GTMO'S PAST: A BASE FOR EMPIRE'S SPACE, MARKETS, AND CULTURE

A. Expanding Space and Flexible Borders with the Platt Amendment and Insular Cases

With base territory severed from legal obligations implicit in sovereignty, GTMO expands American authority by distancing the base from checks in Cuban, American, and international law. GTMO supports expansion with flexible and adaptable control, reflecting "empire as space." The base itself, in addition to legal interpretations of extraterritorial authority, provides flexibility vital to military control of an overseas location. The base becomes space outside the domestic continent but within American control. The United States needed expansion and flexible control for this first overseas base to protect its regional influence, territorial acquisitions, and regional investments. As U.S. foreign policy relied less on military intervention and Cold War anxieties were born, flexibility bolstered the base's role in patrolling Cuba and the region. Recently, this flexible control has supported a policy of detention distanced from checks known to apply domestically and in third states. Serving foreign policy missions, American foreign relations have capitalized on GTMO's anomaly for over a century, choosing the base because of its location and legal malleability. Base anomaly is expressed in American law on extraterritoriality.⁶³

American judicial interpretations of the Constitution and international law in the *Insular Cases* (1901-1920), which concern the spoils of the War of 1898, including extraterritorial governance of Guam, Puerto Rico, and the Philippines, point to this flexibility in extraterritorial authority. These cases affirm flexible control overseas in two ways. First, they endorse overseas authority.⁶⁴ The locations in question are not part of any state within the United States. This severs popular sovereignty and constitutional authority from territorial control and supports political authority with limited rights protections. Second, these cases clarify that when governing overseas, congressional authority and Executive enforcement, i.e., the political branches, are less encumbered.⁶⁵ The military in GTMO or customs collection in the *Insular Cases* may operate

63. See KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* 6 (2009) (explaining that extraterritoriality, through colonialism or state-consent and with military or regulatory objectives, may serve to manage legal differences between sovereignties).

64. See SPARROW, *supra* note 40, at 215 (characterizing the decisions in the *Insular Cases* as an endorsement of the United States' emergence as an international power).

65. *Id.*

free from many domestic constitutional checks.

The United States occupied Cuba from 1898 to 1902. Then the Platt Amendment, included in the Cuban Constitution and the 1903 Reciprocity Treaty, checked Cuban sovereignty and facilitated American interference in Cuban sovereign powers such as foreign relations, economic debt, and territorial integrity. The Amendment required Cuba to sell or lease lands to the United States for a base, which resulted in GTMO.⁶⁶ Avoiding constitutional checks and tempering foreign sovereignty, the Platt Amendment, like the *Insular Cases*, justified and supported “empire as space,” by providing flexible legal reasoning to expand authority geographically. LaFeber describes the Amendment as “neatly solving the political burdens or the economic competition” implicit in annexation while also allowing Cuban independence and providing GTMO as a “safeguard for American interests in the Caribbean.”⁶⁷

While the *Insular Cases* do not completely sever the Constitution from overseas authority, their doctrine implicitly endorses flexible control overseas. American authority may expand geographically, fostering geopolitical and economic objectives, without legal limits applied domestically. Flexibility appears in the Incorporation Doctrine, the distinction of fundamental rights from individual rights protections, and the functional-based test for deciding what constitutional provisions apply. All of these legitimize authority overseas and, more importantly, provide legal justification for extending control with fewer limits than for domestic authority.

The Supreme Court began crafting a constitutional doctrine flexible enough to support overseas authority in *De Lima v. Bidwell*⁶⁸ in 1901, the first of the *Insular Cases*. While these cases initially addressed taxation and tariffs and, later, individual civil and criminal rights, they provide a sustained judicial interpretation on extraterritoriality sanctioning expansion. They regard the political issue of whether the Constitution applies overseas to territories within American sovereignty that were not states, not contiguous to the states, and not destined for statehood. The political dilemma posed is: does the Constitution follow the flag? This was a matter of extreme importance since American political identity was built on certain premises, including that the Constitution was the source of political authority, limited government, checks and balances between branches, and

66. An Act Making Appropriations for the Support of the Army for the Fiscal Year Ending June 13, 1902, ch. 803, para. VII, 31 Stat. 895, 898 (1902), Arts. I, II, III, IV, and VII (limiting Cuban foreign relations and economic powers and requiring Cuba provide a foreign base within its territory).

67. See LAFEBER NEW EMPIRE, *supra* note 55, at 416.

68. 182 U.S. 1, 2 (1901).

that individuals governed were represented by the Constitution and the institutions and laws it created. Somehow, separating the Constitution (legal rule used in the states) from the flag (American sovereignty) would be a remarkable change in legal thinking. To avoid this, flexibility was needed. It permitted authority to expand geographically yet conceptually inside American legality.

With the *Insular Cases*, the Court did not fully separate overseas authority from the Constitution. Its flexible approach was to find that the Constitution was operative extraterritorially but that not all provisions had full effect in unincorporated territories, such as those not planned to become states, unlike continental territories that became states. This approach became the Incorporation Doctrine, providing a conceptual line to determine when all or some constitutional provisions had effect. The Court reasoned that provisions that “withheld all power” from Congress did apply.⁶⁹ The Uniformity Clause,⁷⁰ which seeks uniform revenue collection, did not apply to tariffs from Puerto Rican imports.⁷¹ The Court held that only “fundamental” individual rights applied in Puerto Rico and the Philippines and that trial by jury was not such a right.⁷² The *Insular Cases* supported an adaptable and less formal reading of constitutionalism, permitting policymakers to increasingly govern overseas possessions.

The flexibility was doctrinal. Owen Fiss described Justice White’s decision in *Downes* as “disruptive and somewhat out of character.” He added that the decision resulted in a balancing of “constitutive” theories prioritizing enumerated governmental powers and territorial acquisitions, congressional freedom and checks, and imperial impulses and their dissidents. However, Fiss noted that the decision lacked specific definitions and had an “occult” quality.⁷³ The decision’s flexibility reflects a national identity. Christina Burnett explains that the *Insular Cases* provided the nation with a temporary way to govern and, if needed, relinquish the territories.⁷⁴ American society was apprehensive of more

69. See U.S. CONST. art. I, § 8 (providing Congress with the power to “collect Taxes, Duties, Imposts and Excises . . . but all Duties, Imposts and Excises shall be uniform throughout the United States”).

70. See *id.*

71. See *Downes v. Bidwell*, 182 U.S. 244, 277-78 (1901) (describing the inquiry necessary to determine the meaning of uniform).

72. See *Balzac v. Porto Rico*, 258 U.S. 298, 310, 312-13 (1922) (affirming that constitutional due process does apply to Puerto Rico and the Philippines; although the *Insular Cases* affirmed that only some of the Constitution did apply, the Court reasoned that Congress could statutorily provide for many of these same rights).

73. Owen M. Fiss, *The American Empire?*, in *HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOL. VIII: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910* 245 (Stanley N. Katz ed., 1993) (noting that White’s “genius for compromise,” which qualified him for the chief justiceship, was not manifest in this decision).

74. Christina Duffy Burnett, *United States: American Expansion and Territorial*

territorial extensions, colonies, and consequent political or military responses such as the Civil War or Reconstruction. Plenary powers over new territorial acquisitions provided the United States with a legal construct to exclude non-Anglo-Saxon cultures from full constitutional and sovereign protections.⁷⁵ The *Insular Cases* provided the legal justifications for “empire as space.”

B. A Base Protects Regional Markets and Global Power After 1898

Strategically placed, GTMO’s location explains how a military outpost instrumentally protected American markets overseas. At the eastern end of Cuba’s south coast and next to a major Caribbean entryway, GTMO has served “empire as markets.” First, it provided regional, geopolitical, and naval protection, serving American foreign policy in the Caribbean and Central America. Following 1898, referred to as the “Gunboat” and “Dollar” diplomacy periods,⁷⁶ American economic objectives overseas were to find and protect new markets, particularly in terms of supply markets for domestic consumption and demand markets for American services and products.

At an overseas base, the first for the United States, naval ships could refuel, receiving coal without returning to domestic ports or finding a friendly foreign port.⁷⁷ The U.S. Navy could patrol waters far from domestic shores but close to essential sea paths and territorial and economic disputes in the Caribbean and Central America.⁷⁸ With such

Deannexation, 72 U. CHI. L. REV. 797 (2005).

75. See EDIBERTO ROMÁN, *THE OTHER AMERICAN COLONIES: AN INTERNATIONAL AND CONSTITUTIONAL LAW EXAMINATION OF THE UNITED STATES’ NINETEENTH AND TWENTIETH CENTURY ISLAND CONQUESTS* (2006) (presenting how *Downes* limitations regarding “Anglo-Saxon principles” on government were applied to territories after Puerto Rico); Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases* (1901-1922) 65 REV. JUR. U.P.R. 225, 284-92 (1996) (relating *Insular Cases* jurisprudence and colonial governance with contemporary and pre-1898 racist ideology); see also Vargas, *supra* note 52, at 933-42 (presenting how the War of 1898 was vital to law and race, then and now).

76. See EMILY S. ROSENBERG, *FINANCIAL MISSIONARIES TO THE WORLD: THE POLITICS AND CULTURE OF DOLLAR DIPLOMACY, 1900-1930* (1999) (describing U.S. foreign policies during the “Dollar Diplomacy” period, seeking American management of foreign states’ financial and economic policies, spreading American values, and avoiding military interventions or empire if possible, and providing a base for the Bretton Woods system).

77. See SPARROW, *supra* note 40, at 65 (describing Alfred Thayer Mahan’s view that a stronger navy requires new naval refueling stations); see also LaFeber, *Lion*, *supra* note 25, at 714 (1986) (relating American foreign policy after 1898 with Alfred Thayer Mahan’s naval power theories, constitutional reinterpretation, and centralized of military power).

78. See Robert Freeman Smith, *Latin America, the United States and the European Powers, 1830-1930*, in *THE CAMBRIDGE HISTORY OF LATIN AMERICA*, VOL. IV c. 1870-1930 83, 94-95 (Leslie Bethell ed. 1984) (identifying the military and economic vitality of the area).

stations, American naval power competed with European navies.⁷⁹ These military capabilities protected U.S. interests abroad, such as economic investments and territorial acquisitions, and provided *realpolitik* influence with world powers and neighboring states.⁸⁰ France, the United Kingdom, Netherlands, and Denmark exerted economic influence and/or *de jure* political control in the hemisphere, while Germany and Japan increasingly looked to the region to supply primary materials.⁸¹ Since the early nineteenth century, American foreign objectives in the region were to contain and exclude European interference. GTMO also facilitated keeping an eye on the Cuban protectorate.⁸²

Public debates during this period, before and after 1898, illustrate the significance of overseas markets for the U.S. economy, national identity, and American politics.⁸³ Overseas economics and their impact on daily life fueled public discourse. Debates included the following topics: silver versus gold as the currency standard; whether the Constitution follow the flag; “imperialists” versus “anti-imperialists;” populist and rural interests versus industrialists and urbanites; and civilizing missions in interventions in the Philippines, Cuba, China, the Dominican Republic, Haiti, Nicaragua, and Mexico. Both geopolitics (control of locations territorial or oceanic) and economics (need for supply and demand markets) fueled these debates.

Domestic perspectives on the importance of overseas markets explain a significant part of American motives to enter the War of 1898. The United States’ interests in Cuba and the Dominican Republic had been developing for decades. In April 1898, the United States declared war on Spain, with

79. Cf. MICHAEL J. STRAUSS, *THE LEASING OF GUANTANAMO BAY* 4-40 (2009) (describing how world powers used leases, such as in extraterritorial bases or ports, to exert economic and military influence overseas); George Grafton Wilson, *Leased Territories*, 34 AM. J. INT’L L. 703 (1940) (examining how leases permitted world powers a way to avoid sovereign control overseas but exercise influence, with examples of American leases in Cuba, Panama, and Nicaragua and leases of other states in Asia and Africa).

80. LaFeber argues that the United States regarded its control of Guantánamo, Hawai’i and the Philippines “as [a] strategic means” to protect economic objectives. See LAFEBER, *NEW EMPIRE*, *supra* note 55, at 411.

81. See, e.g., *id.* at 98 (“The United States was not the only country taking an increased interest in Latin America at the turn of the century.”).

82. Cf. DAVID F. HEALY, *THE UNITED STATES IN CUBA 1898-1902: GENERALS, POLITICIANS, AND THE SEARCH FOR POLICY* (1963); PETER MACALISTER-SMITH, 3 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 382 (1992) (describing Guantánamo’s creation during U.S. imperialism and how bases were the “starting point of colonial expansion”); Kal Raustiala, *The Geography of Justice*, 73 *FORDHAM L. REV.* 2501, 2535, 2545 (2005) (describing the base’s creation and its lease terms as “remnants of the age of empire”).

83. See DAVID M. PLETCHER, *THE DIPLOMACY OF TRADE AND INVESTMENT: AMERICAN ECONOMIC EXPANSION IN THE HEMISPHERE, 1865-1900* (1998) (presenting the importance of business and economic interests in supporting American expansion, highlighting that these concerns were not uniform or systematically planned in favor of empire).

President McKinley urging reluctant members of Congress that overseas events were intimate to American security and prosperity.⁸⁴ By year's end, the United States had troops in China protecting Western investments threatened by the Boxer rebellion, colonial possession of Puerto Rico, Guam, and the Philippines, occupation authority in Cuba, and secure possession of Hawai'i. The United States possessed territories in Asia, the Pacific Ocean, and the Caribbean Sea, establishing military capabilities in all of these regions. With this military, territorial, and economic power, the United States competed with empires of the day.

The domestic push for such decisive expansion by 1898 is explained in economic and geopolitical motives.⁸⁵ Dramatic economic growth and domestic industrialization led to a series of recessions after 1873, caused by new technologies in transport, power, and mechanization disrupting diverse economic sectors. Steam power, coal, iron, steel, railroads, factories, and oceanic shipping made myriad economic activities more efficient and productive. Expanded commercial influence brought goods and services to populations and locations that previously had limited economic access. More traditional and less modern practices were displaced by industrialization, commercialization, and new ease in transport. The social and political effects of these economic crises were strikes, riots, and popular mobilization. Public discourse repeatedly commented on and expressed how all these changes affected domestic life, whether it was in depressed agrarian sectors or congested urban economies.⁸⁶

The most serious crisis was the Panic of 1893, which lasted three years.⁸⁷ It was feared that industrialization led to oversupply and insufficient domestic demand markets for products. Speculation bubbles in railroads and financing resulted in impressive shocks to capital supply and labor sources throughout the United States, leading to bank runs, falling agriculture sales, and population pushes westward in search of

84. See LaFeber, *Opportunity*, *supra* note 57, at 144.

85. See Thomas McCormick, *From Old Empire to New: The Changing Dynamics and Tactics of American Empire*, in COLONIAL CRUCIBLE: EMPIRE IN THE MAKING OF THE MODERN AMERICAN STATE, 63, 66-74 (Alfred W. McCoy & Francisco A. Scarano eds., 2009) (describing how economic changes, financial panics in 1873, 1884, and 1893, and socio-economic unrest contributed to a general sentiment supporting empire).

86. See generally Emily Rosenberg, SPREADING THE AMERICAN DREAM: AMERICAN ECONOMIC AND CULTURAL EXPANSION, 1890-1945 (1982) [hereinafter ROSENBERG, SPREADING THE AMERICAN DREAM]; Walter LaFeber, *The American View of Decolonization, 1776-1920: An Ironic Legacy*, in THE UNITED STATES AND DECOLONIZATION: POWER AND FREEDOM 30 (David Ryan & Victor Pungong eds., 2000); LaFeber, *Opportunity*, *supra* note 57; LAFEBER, NEW EMPIRE, *supra* note 55, at 408; William Appleman Williams, *A Survey of Territory*, reprinted in A WILLIAM APPLEMAN WILLIAMS READER 276 (Henry W. Berger ed., 1992).

87. See LaFeber, *Opportunity*, *supra* note 57, at 103.

employment. These disruptions, primarily over-production caused by modernization, were seen as causing the Panic, leaving a lasting impression on political discourse of the period.

Overseas markets were presented as ameliorating these problems by securing access and international influence amidst rising global tensions. International markets included demand for American products and services and supply for domestic consumption and production.⁸⁸ To continue with the pace of production, American industrialists and financial interests eagerly sought new markets.⁸⁹ Protectionism abroad, in the form of domestic or imperial authority, invariably limited American access to many locations.⁹⁰

Foreign policies were needed to open new markets.⁹¹ This could be achieved with a range of options, such as territorial control, diplomatic negotiation and agreement, and military power. Latin America, mostly the Caribbean and Central America, became the United States's "sphere of influence." European empires in the region were decreasing after 1898, and many states in the region had been formally independent since the mid-nineteenth century. Because they lacked capital for large industrial or commercial projects, they became attractive prospects for American interests in agriculture, mining, financial services, and railroads.⁹²

Geopolitics of the period spurred expansionary motives. Americans

88. See LAFEBER, *NEW EMPIRE*, *supra* note 55, at 408 (describing that American interests in expansion were primarily to "acquire markets for the glut of goods pouring out of highly mechanized factories and farms," which "differed fundamentally" from European empires).

89. See HEALY, *EXPANSIONISM*, *supra* note 55, at 159-69 (describing the "glut" theory of overproduction and how overseas markets in China, Europe, or Latin America could offset this economic crisis).

90. See SPARROW, *supra* note 40, at 57-59, 64-69 (explaining that American economic expansion faced the problems of tariff's prohibitive costs and this influenced U.S. imperialists to seek the attainment of more territorial possessions and avoid legal checks on commerce).

91. See McCormick, *supra* note 85 at 74-77 (A great deal of American foreign economic policy efforts focused on "open door," in theory permitting investors not just from an imperial state but from any country to benefit from equal access to foreign markets.).

92. Cf. GREG GRANDIN, *EMPIRE'S WORKSHOP: LATIN AMERICA, THE UNITED STATES, AND THE RISE OF NEW IMPERIALISM* 11-33 (2006) (examining the economic and geopolitical motives of U.S. foreign policy in the Caribbean and Central America in the early twentieth century); JOHN MASON HART, *EMPIRE AND REVOLUTION: THE AMERICANS IN MEXICO SINCE THE CIVIL WAR* (2002) (providing a detailed and exhaustive analysis of American influence, economic and political, in Mexico); JOSEPH ET AL., *CLOSE ENCOUNTERS OF EMPIRE*, *supra* note 62 (offering a series of essays describing various examples of U.S.-Latin American relations from diverse regions in Latin America); Robert Freeman Smith, *Latin America, the United States and the European Powers, 1830-1930*, in *THE CAMBRIDGE HISTORY OF LATIN AMERICA*, VOL. IV c. 1870 to 1930 (Leslie Bethell ed., 1984) (describing how the United States increased its influence in the region after 1898 while European influence decreased).

favoring expansion, known as “imperialists,” viewed the continent and the domestic market as insufficient to supply the resources for a modern economy or to meet the demands of what could be produced.⁹³ Overseas markets were needed for these and because they were disappearing in their own right, U.S. expansion was desperately needed. Historically powerful European empires such as Great Britain and France, along with emerging powers like Germany, Russia, and Japan jockeyed around the globe to secure territorial and oceanic control. Global resources supplying industrialization and modern consumption were regarded as limited. Late nineteenth century and early twentieth century wars across the Middle East, Africa, and Central, South, and East Asia presented opportunities to secure control of overseas markets. In the eyes of domestic imperialists, the United States was in a particularly vulnerable position with territory limited to the continent, excluding Alaska.

With its refueling function, GTMO intimately expresses “empire as market.” Market protection motives led to the base when the United States became Cuba’s protector. The base was the product of the economically-motivated expansion in 1898 and the Platt Amendment, which required the creation of the base three years later. GTMO supported naval and military power needed for informal empire, as opposed to the base being part of a formal overseas colony.⁹⁴ As a base and refueling station, Guantánamo represented a larger shift in overseas policies to focus on limited territorial control of ports and bases in the service of naval power and patrolling sea transportation.⁹⁵ This facilitated commerce, secured ocean transports, and, if needed, moved troops to peripheral locations.⁹⁶ It reflected a twentieth century focus on limited but strategic holdings to avoid the expense of colonies and territorial acquisition overseas. Traditional colonial expenses were increasingly draining, implying administrative, diplomatic, and military costs. But the domestic benefits of colonies were mostly geopolitical and economic. European and American interests in inter-

93. See SPARROW, *supra* note 40, at 68-69 (describing the revolution in economic theory that viewed expansion as essential for the survival of American capitalism).

94. See John Gallagher & Ronald Robinson, *The Imperialism of Free Trade*, 6 *ECON. HIST. REV.* 1 (1953) (outlining the most influential analysis of how “free-trade” policies sustain informal empires); Warren Kimball, *Foreword* to *THE UNITED STATES AND DECOLONIZATION: POWER AND FREEDOM XIV* (David Ryan & Victor Pungong eds., 2000) (describing the “informal empire” as allowing for “the exercise of power without formal political control); see also William Roger Louis & Ronald Robinson, *The Imperialism of Decolonization*, 22 *J. IMPERIAL COMMONWEALTH HIST.* 462, 495 (1994) (describing the rise of informal empire as the British empire falls and U.S. power rises in the twentieth century).

95. See LAFEBER *NEW EMPIRE*, *supra* note 55, at 411 (presenting Guantánamo, Hawai’i, and the Philippines as strategically important to protect American markets overseas).

96. See SPARROW, *supra* note 40, at 65-69.

oceanic canal projects, such as in Nicaragua, Panama, and the Sinai Peninsula, reflected increasing geopolitical importance.

Overseas bases were key to informal empires. Informal imperialism implied *de jure* independence or shared sovereignty of a nation but with overwhelming economic and military influence from an imperial state. This effectively forced unequal treaties and concessions from one state to an imperial power. With troops stationed there, supporting naval power and protecting markets, bases like GTMO were stepping-stones from formal to informal empire.⁹⁷

Providing the capacity to refuel, overseas bases served the new technologies of iron steam ships, becoming military advantages for industrialized nations. These power and shipping capacities had the potential to take navies across the globe at much faster and reliable speeds, but they required re-fueling. The leading proponent of naval power, overseas bases, and their influence in commerce was Alfred Thayer Mahan.⁹⁸ Mahan predicted not only the geopolitical necessity of investing in naval power and overseas bases but also the significant barrier the Constitution posed for this.⁹⁹ Overseas bases permitted navies to operate far from home, providing protection for markets and geopolitical gains of controlling strategic locations. Great Britain moved to lease or occupy strategic locations, such as Hong Kong, Egypt, Gibraltar, Singapore, and Arabian Peninsula ports, where the protection of intercontinental transport was most needed.¹⁰⁰ The United States did the same with GTMO, Puerto Rico, the Virgin Islands, Panama, Hawai'i, the Philippines, Aleutian Islands, and Guam, and temporarily with occupations in Haiti, the Dominican Republic, and Nicaragua. Accordingly, as an overseas, base GTMO protected American markets overseas, served informal empire's

97. *See id.* at 233.

98. *See id.* at 65 (identifying Alfred Thayer Mahan as the most influential writer on this subject, and advocating for increased naval power across the globe and the acquisition of bases to support this power).

99. LaFeber, *Lion*, *supra* note 25, at 714 (explaining the historic precedent set by President McKinley in which the president would intervene abroad despite not receiving congressional authorization).

100. *Cf.* LAUREN BENTON, *A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES 1400-1900* (2010) (describing how European states developed control of sea routes and strategic territorial locations to support their extraterritorial control). For descriptions of the variety of leases, bases, protectorates, and semi-sovereign spaces of historic empires, see WILLIAM EDWARD HALL, *A TREATISE ON INTERNATIONAL LAW* 30-31 (A. Pearce Higgins ed., 8th ed. 2001); MACALISTER-SMITH, *supra* note 82 (describing overseas bases in international law); LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* §§ 92-94 (H. Lauterpacht ed., 8th ed. 1955); *id.* § 94a (examining the British Commonwealth nations); Geddes W. Rutherford, *Spheres of Influence: An Aspect of Semi-Suzerainty*, 20 AM. J. INT'L L. 300 (1926) (providing a survey and analysis of how "Spheres of Influence" are supported by overseas bases and partial sovereignty with United Kingdom and American examples).

objective of geopolitical control without colonies, and reflected the cutting-edge in naval power.

C. GTMO's Cultural Assumptions: Sovereignty Checked Indefinitely

GTMO reflects “empire as culture.” The base benefits from ideologies of superiority, with cultural justifications for checking Cuban sovereignty. These values frame legal anomaly, support American power, and avoid sovereign obligations and Cuba’s sovereignty. With reasoning that non-Anglo and non-European populations could not be sovereign or self-governed, American policies checked Cuban sovereignty with the Platt Amendment, military interventions, and the base. Legal instruments creating Guantánamo, such as the Treaty of Paris to the 1934 U.S.-Cuba treaty, limit Cuba’s de jure and territorial sovereignty.¹⁰¹

As Colás explains, empires use cultural understandings to justify how metropolitan power subordinates populations abroad. These understandings classify populations based on race or between the civilized and not civilized. Most obvious is that late nineteenth century notions of cultural superiority fueled an emerging American national identity as a world power and consequent regional interventions. While interventionist foreign policies took on myriad forms, they relied on assumptions that American values were needed or that self-interest required American action. Various examples in the Western Hemisphere and in Asia show the United States exercising its influence, military, *realpolitik*, and soft power over foreign states.¹⁰² Values expressing superiority in terms of democracy, liberalism, self-government, free trade, humanitarian duty, and Protestantism shaped these policies.¹⁰³

Cultural distinctions gained political significance as the American empire grew in territory and population. Culture became extremely importance for questions of imperial governance and domestic imperialist/anti-imperialists debates. The reasoning of the *Insular Cases* rested on assumptions that Puerto Ricans and Filipinos, because of their culture, could not understand legal concepts, such as rights, from Anglo-Saxon culture.¹⁰⁴ Cultural reasoning ordered how populations, territories,

101. See Christina Duffy Burnett, *United States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 806 (2005).

102. See generally GREG GRANDIN, *EMPIRE'S WORKSHOP: LATIN AMERICA, THE UNITED STATES, AND THE RISE OF NEW IMPERIALISM* (2006); LaFeber, *Constitution*, *supra* note 25, at 695; LaFeber, *Lion*, *supra* note 25, at 714; Smith, *supra* note 78, 92-94.

103. See generally ROSENBERG, *SPREADING THE AMERICAN DREAM*, *supra* note 86; HEALY, *EXPANSIONISM*, *supra* note 55.

104. See Ramos, *supra* note 85, at 286 (describing the belief that the tropic region was incapable of self-governance).

and individuals were represented in American government. U.S. constitutionalism rested on principles such as states participating in the determination of a central government with citizens voting for state and federal leaders. The Platt Amendment and the *Insular Cases* effectively separated American overseas power from de jure sovereign territory and incorporation as states. Citizenship was correspondingly denied to individuals from these periphery locations, as it was historically for Native- and African-American populations.¹⁰⁵

For empires, cultural reasoning offered similar adaptability in terms of sovereignty and international law. Sovereignty was respected not only as the final authority over a territory but also as an acknowledgment by other sovereigns in the international system of sovereign status for that authority.¹⁰⁶ Certain populations, because of race, were deemed incapable of being sovereign and were thus unrepresented and without protection in the international system.¹⁰⁷ Protection could be attained if a metropolitan power colonized or established a protectorate over the population.¹⁰⁸ Otherwise, these populations could be attacked or conquered under international law. The delineation between sovereign and non-sovereign was achieved by cultural distinction, distinguishing populations that were not Christian, European, or Anglo (for the Western Hemisphere) as non-sovereign. A state needed sovereignty to be independent in the international system.

This legal discourse shaped the U.S.-Cuba relationship after 1898. Cultural distinction is most powerfully reflected in how the United States solely negotiated the Treaty of Paris with Spain, not only with Cubans left out of negotiations but also with Spain ceding its colony to the United States.¹⁰⁹ Cubans were viewed as incapable of self-government. Cubans

105. See Christina Duffy Burnett, "*They Say I Am Not an American*". . . : *The Non-Citizen National and the Law of American Empire*, 48 VA. J. INT'L L. 659, 662 (2008); Josep M. Fradera, *Reading Imperial Transitions: Spanish Contraction, British Expansion, and American Irruption*, in COLONIAL CRUCIBLE: EMPIRE IN THE MAKING OF THE MODERN AMERICAN STATE 34 (Alfred W. McCoy & A. Scarano eds., 2009) (explaining how amidst imperial rivalries and competition, tensions of political equality and representation encumbered empires after the nineteenth century); Patrick Wolfe, *Race and Citizenship*, OAH MAG. HIST., Oct. 2004, at 66-71 (describing how in various multi-racial post-colonial societies—United States, Brazil, and Australia—race would be used to continue social inequality when citizenship was increasingly inclusive).

106. See F.H. HINSLEY, SOVEREIGNTY 26 (2d ed., Cambridge Univ. Press 1986) (1966) (defining "sovereignty" as the "final and absolute political authority").

107. See generally ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW 3 (2004).

108. See *id.* at 87-90.

109. See Luis E. Aguilar, *Cuba c. 1860-1940*, in 5 THE CAMBRIDGE HISTORY OF LATIN AMERICA 229, 244 (Leslie Bethell ed., 1984) (noting that American troops were already occupying Cuba during treaty negotiations and that no Cuban representatives were present at the signing of the treaty).

had been involved in multiple, protracted, and violent struggles for independence since 1865, with the United States watching closely. While some Americans wanted to annex Cuba as early as the 1840s, by the end of the century the racial factor, both in Cuba's mixed-race population and the domestic wounds from reconstruction, inhibited decisive action.¹¹⁰ Ironically, Cubans achieved measurable success after 1895 without American military input because Afro-Cubans were included in military leadership.¹¹¹ Fearing Cuban rebels would win independence and leave the United States with no control and a non-European sovereign in close proximity, the United States entered the war in April 1898. This was after Cubans had been fighting for decades, and their victory was near. Four months later, the United States negotiated Spain's surrender and in the process acquired a substantial empire.¹¹² Cubans were excluded from sovereignty negotiations and left hoping for either incorporation into the United States or independence.

In 1902, Cuba became an American protectorate under the Platt Amendment, until a 1934 bilateral treaty abrogated its most egregious provisions.¹¹³ Consistent with protectorate status, the Platt Amendment tempered Cuba's sovereignty, making it neither fully independent nor a formal colony. Included in Cuba's constitution and the 1903 Treaty of Reciprocity, the Platt Amendment required Cuba to lease, sell, or provide the United States with land for a base.¹¹⁴ This led to a 1903 lease for the base at Guantánamo Bay.¹¹⁵ A 1934 treaty eliminated the Amendment's

110. Cuba was most vividly on the American political radar. By mid-1898, President McKinley was bound by Congress' Teller Amendment in the Declaration of War on Spain, precluding any annexation Cuba. For this reason the Treaty ceded Cuba to the United States and then after occupation it was made a protectorate. The Treaty affirmed American sovereignty over Puerto Rico, Guam, and the Philippines.

111. *Accord* ADA FERRER, *INSURGENT CUBA: RACE, NATION, AND REVOLUTION, 1868-1985* 143 (1999) [hereinafter FERRER, *INSURGENT CUBA*]; Ada Ferrer, *Rustic Men, Civilized Nation: Race, Culture, and Contention on the Eve of Cuban Independence*, 78 *HISP. AM. HIST. REV.* 663, 665-66 (1998) [hereinafter Ferrer, *Rustic Men*] (presenting how Cuban independence discourses incorporated non-whites by 1895 but after independence Cuban civic exclusion focused on cultural and social distinctions). *See generally* Alejandro de la Fuente & Matthew Casey, *Race and the Suffrage Controversy in Cuba, 1898-1901* in *COLONIAL CRUCIBLE*, *supra* note 105, at 222-23.

112. *Cf.* Aguilar, *supra* note 109, at 245 (describing the events leading to the signing of the peace treaty and American relations with Cuba afterward).

113. *See generally* LOUIS PEREZ, *CUBA UNDER THE PLATT AMENDMENT* (1991).

114. *See id.* at 42-47 (discussing the events that led to the creation of the Platt Amendment); *see also* Pedro Capo-Rodríguez, *The Platt Amendment*, 17 *AM. J. INT'L L.* 761, 763 (1923) (providing an excerpt from President McKinley's speech to Congress asking for authorization to secure peace between Cuba and Spain); Commentary, *The Origin and Purpose of the Platt Amendment*, 8 *AM. J. INT'L L.* 565, 586 (1914) (detailing the adoption of the Platt Amendment and the military changes that took place in Cuba immediately after).

115. *U.S.-Cuba Feb. 1903 Lease*, *supra* note 5.

other sovereignty checks, but it affirmed that for an indefinite period the United States would be able to occupy Guantánamo.¹¹⁶

This sovereignty exclusion is littered with the law's cultural distinction of assumptions of American superiority. First, with occupation, Afro-Cubans lost their right to vote, which Spanish and Cuban authorities had previously allowed.¹¹⁷ Occupation authorities forbade Afro-Cubans from voting.¹¹⁸ They insisted American experiences informed the best choice for Cuba. Second, the terms of American withdrawal, namely the Platt Amendment, explicitly reasoned that Cubans could not be trusted with sovereignty and that American input was needed.¹¹⁹ The United States declared a "right to intervene" in Cuba and on multiple occasions sent its troops to the island.¹²⁰ American advantage was expressed in control over Cuban debt. It was feared that if this were not supervised, debt default would cause European intervention in Cuba, threatening American security.

American positions on Cuba from before the War of 1898 and afterwards expressed an "imperial ethos."¹²¹ Public discourse and foreign policies viewed Cuba in perspectives from which United States foreign policy articulates a moral imperative over Cuba, tries to dominate its affairs, and

116. *U.S.-Cuba 1934 Treaty*, *supra* note 5.

117. *See* Fuente & Casey, *supra* note 111, 226 (covering the history of suffrage rights in Cuba after the U.S. occupation).

118. *See id.* at 222-23 (showing how Afro-Cubans had suffrage rights before U.S. occupation, which the United States eliminated by relying on cultural assumptions of self-governance); *see also* Aline Helg, *Race and Black Mobilization in Colonial and Early Independent Cuba: A Comparative Perspective*, 44 *ETHNOHISTORY* 53, 53 (1997) (presenting how Cuban racial distinctions in the law were similar to a U.S. two-tier system).

119. Specifically, the Amendment's Article III states, "Cuba consents that the United States may exercise a right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty . . ." *U.S.-Cuba 1934 Treaty*, *supra* note 5. Article VII states that the United States could maintain Cuban independence, protect the people of Cuba, and for American defense, "Cuba [would] sell or lease to the United States lands necessary for coaling or naval stations at certain specified points to be agreed upon with the President of the United States." *Id.* at art. VII; *see also* DAVID HEALY, *DRIVE TO HEGEMONY* 54 (1988) (describing the dissent against American intervention in Cuba and the campaign that formed to pacify fears of American interference).

120. After the 1898-1902 occupation ended, the United States intervened in Cuba in multiple ways, e.g., with military occupation from 1906 to 1909, troops quelling insurrection in 1912 and 1917, troops stationed during World War I, and military pressure during financial and political reforms from 1921 to 1923. *See generally* Lester H. Woolsey, *The New Cuban Treaty*, 28 *AM. J. INT'L L.* 528, 531 (1934) (describing the various American occupations of Cuba after the 1898-1902 occupation: from 1906 to 1909, troops quelling insurrection in 1912 and 1917, troops stationed during World War I, and military pressure during financial and political reforms from 1921 to 1923).

121. *See* LOUIS PEREZ, *CUBA IN THE AMERICAN IMAGINATION: METAPHOR AND IMPERIAL ETHOS* 8, 258 (2008) (defining imperial ethos as the notion that America had in its charge other countries that it was responsible for nurturing and protecting).

acts out self-interest. Americans and their foreign policy paint Cuba in metaphors such as the woman (beautiful, white, and needing United States support), a “ripe fruit” so close to American shores and influence, the naive or restless child (cast in black and diminutive imagery), and an ungratefully rebellious savage.¹²² On one level these images present how Cuba was viewed with demeaning and racist assumptions. They similarly affirm how foreign policies reflect assumptions of U.S. superiority, by painting the United States as savior, teacher, guardian, or civilizing agent.

A brief examination of statements from policymakers of the day presents these cultural assumptions. In 1901, Senator Orville Platt, who proposed the infamous amendment, explained that Cuba’s “social, racial, and economic conditions” do not support self-government and that Cuba suffers from an “inevitable race problem.”¹²³ He added that the United States is an independent “guarantor” of Cuba, obligated by “self-interest and duty” whose “friendly advice and guidance” is “the real hope for a free Cuba.”¹²⁴ He describes “Spaniards” as being endowed with “commercial instincts and characteristics of the Jew” and the issues of “color” for “blacks” and “mixed bloods” in Cuba as less important than “social distinction.”¹²⁵ Blacks in Cuba are “absolutely black,” “not thick lipped,” with European features, and superior regarding “capacity and efficiency.”¹²⁶ The Cuban “mulatto compares less favorably” with their counterparts in the United States. This is due to blood and custom; Cuban “mulattos” have a mixture of “Spaniard and negro” while Americans have a mix of “Anglo-Saxon and negro.”¹²⁷ Both mulattoes imitate.¹²⁸ In the United States they imitate Anglo-Saxon custom and “naturally aspire to participate in government,” while in Cuba this is not the case.¹²⁹ There, they are “docile” and only politically concerned “under a sense of wrong and injustice” when “emotions are excited,” helping them become “good fighter[s],” which helped during the War.¹³⁰

Secretary Root, the legal architect of American imperial efforts, argued full sovereignty for these “backwards people” was impossible even far in

122. *See id.* at 258-64 (discussing these and other metaphors that were employed by Americans to justify imperialism).

123. *See* Orville H. Platt, *Our Relation to the People of Cuba and Porto Rico*, 18 ANNALS AMER. ACAD. POLIT. & SOC. SCI. 145, 148-49, 153, 156, 158 (Jul. 1901).

124. *Id.* at 156, 158.

125. *Id.* at 149-50, 153.

126. *Id.* at 154.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

the future.¹³¹ A fear was that “uncivilized” nations would create instability for world powers, feeding the propensity for violence and war. The United States had a duty to stop this. In 1899, he described his pride in the accomplishments of Cuban occupation, including teaching Cubans “how to live clean and orderly lives,” “the simple elements of civil government,” “how to go back to work, to earn their living,” and “how to become self-governing citizens of a free state.”¹³²

The legal consequence of these cultural assumptions was a trustee relationship evident in Cuba’s status as a protectorate. Rudyard Kipling’s 1899 poem about the “White Man’s Burden,” commenting on the United States and the Philippines, presents these assumptions in empire.¹³³ These legal relationships, created in Cuba and elsewhere, were analogized to parent and child or master and slave.¹³⁴ They were the product of contemporary ideologies on the United States’ place in the world, influencing a decisive desire to expand as an empire. These include Frederick Jackson Turner’s suggestion that the United States needed a new frontier, central to national identity that had begun to disappear once the Pacific Ocean was reached; Josiah Strong’s missionary charge for Christians to convert populations abroad; and Mahan’s emphasis on naval power and controlling sea passages with overseas bases, specifically Guantánamo, to protect markets and spread the pacifying influence of commerce.¹³⁵ These views rested on racial ideologies of the time. American leaders were influenced by ideas of “Teutonic” origins, claiming descendents of Germania, such as Anglo-Saxons, possessed unique abilities for legal order and other races did not.¹³⁶

IV. CONCLUSION

Legal anomaly on the base was needed for imperial objectives in American foreign relations after 1898. This Essay illuminates how

131. See HEALY, EXPANSIONISM, *supra* note 52, at 151 (quoting JESSUP, ELIHU ROOT, VOL. 1, 378-79 (1938)).

132. *Id.* (quoting ROOT, MILITARY AND COLONIAL POLICY OF THE UNITED STATES; ADDRESSES AND REPORTS 11-12 (Robert Bacon & James Brown Scott eds., 1970)).

133. See RUDYARD KIPLING, *The White Man’s Burden: The United States & The Philippine Islands, 1899*, in RUDYARD KIPLING’S VERSE: INCLUSIVE EDITION, 1885-1918 371 (1919).

134. See FISS, *supra* note 73, at 245 (explaining that the only way the United States could justify its relationship with countries like the Philippines and Puerto Rico was to take a paternalistic approach).

135. See LAFEBER, NEW EMPIRE, *supra* note 55, at 61, 66, 72, 88 (1998) (detailing the different theories of the authors regarding colonization by the United States).

136. Mark Weiner, *Teutonic Constitutionalism: The Role of Ethno-Juridical Discourse in the Spanish-American War*, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 48, 49 (Christina Duffy Burnett & Burke Marshall eds., 2001).

anomaly suited “empire as space, markets, and culture.” Mixing material and cultural interpretations of empire and overseas authority, this Essay raises valuable questions on how the law contributes to empire-building. In spatial terms, the base is a manifestation of American extraterritoriality. Being outside American and Cuban sovereignty, but within American control and jurisdiction, the base expands the geographic space of American influence. Its legal borders are flexible, adaptable, and without limit. The Platt Amendment confirmed this American influence over Cuba without making it a formal colony. The Amendment required Cuba to provide the United States with a base. This became GTMO, with the anomaly of Cuba’s “ultimate sovereignty” and the United States’s “complete jurisdiction and control” over the base.

In economic terms, the base allowed the United States to protect its regional markets and assert global influence after 1898. The base supported invasions in Cuba, the Dominican Republic, Haiti, and Nicaragua, and the patrolling of the Caribbean. GTMO permitted American naval power to protect inter-continental trade and exert geopolitical influence on the seas. Avoiding formal colonies and expanding geopolitical influence, these were cutting-edge achievements for the time, for regional foreign relations and domestic economics. In cultural terms, the base reflects how Cuban sovereignty was denied through foreign relations with the United States. Cultural assumptions premised on race, Cubans as a latino, black, and mixed-race populations, and Anglo-Saxon superiority influenced American attitudes about Cubans. They were viewed as unable to self-govern, thus they could not be fully sovereign. Legal instruments such as the Treaty of Paris, the Platt Amendment, and lease agreements are all outgrowths of these assumptions. Their provisions on sovereignty express these racist and cultural assumptions. The base is a remnant of not only empire and history, but also the assumptions that Cubans were inferior.

Accordingly viewed in historical and contextual terms, the base’s “legal black hole” appears to have a consistent purpose. Taking Colás’s interpretation of “empire as space, markets, and culture,” GTMO’s legal anomaly clearly benefits American expansion by avoiding possible checks in American, Cuban, and international law. This historic description of anomaly explains why detainees appear as “*outsiders inside*” American law with regard to individual rights protections and judicial review. They are at the legal peripheries of American jurisdiction that is clearly intended to be extraterritorial. Rights protections overseas may not be clear or even legally denied, but American power overseas remains unquestioned. This explains why popular discourse rarely questions why the United States has a base in Cuban territory, even though the United States and Cuba lack formal diplomatic relations.

This Essay describes the past to motivate inquiry about the present. Guantánamo has been presented as a “legal black hole,” with its anomaly being an imperial objective since 1898. Since 2002 nearly 800 men have been detained on the base as “*outsiders inside*,” that is, outside rights protections in American and international law but inside American jurisdiction.¹³⁷ This is only possible with Guantánamo’s legal anomaly. While the detainee population has decreased to 176,¹³⁸ the most dramatic cases have been detainees who were found to be no longer unlawful enemy combatants, but not free to leave the base.¹³⁹ The plight of the Uighur detainees illustrates this “*outsiders inside*” dilemma, posing enormous questions for their future and potential freedom and how law may remedy or instead perpetuate these injustices. Recent litigation about detainees from Algeria and Russia, no longer found to be unlawful combatants and waiting for release, shows anomaly clouds their future.¹⁴⁰ Meanwhile, on July 12, 2010, the five Uighur detainees petitioned the Circuit Court for an en banc hearing to reconsider a new fact-finding hearing.¹⁴¹ This comes after the circuit court rejected a prior motion for such a fact-finding hearing on May 28 and District Judge Urbina, LatCrit XIV keynote speaker, ordered their release from GTMO on October 8, 2009. They remain as *outsiders inside*, after being held at the base for over eight years. President

137. *Names of the Detained in Guantanamo Bay, Cuba*, *supra* note 8.

138. The New York Times reports that as of July 26, 2010, 176 detainees remain at the base. See *The Guantánamo Docket: Detainees Held*, *supra* note 8.

139. See Hussain, *supra* note 41, 744 (noting that many individuals detained at Guantanamo Bay have never been close to a battlefield and therefore could not be enemy combatants).

140. See Order, *Belbacha v. Copeman* (Jan. 3, 2010, D.C. Cir.) available at <http://www.scotusblog.com/wp-content/uploads/2010/06/CA-Belbacha-order-6-3-10.pdf> (denying a petition for an en banc hearing); *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-0442 (TFH) and Civil Action No. 05-2349 (RMC), 2010 WL 1539845 (Apr. 19, 2010, D.D.C.); Lyle Denniston, “*Kiyemba II*,” *back again?: Algerian detainee’s new plea*, SCOTUSBLOG, Apr. 28, 2010, available at <http://www.scotusblog.com/2010/04/kiyemba-ii-back-again/>. See generally Lyle Denniston, *Major fight brews on Munaf: The other 2008 detainee ruling*, SCOTUSBLOG, July 1, 2010, available at <http://www.scotusblog.com/2010/07/analysis-major-fight-brews-on-munaf/> (describing the series of district court orders to release and bar relocation, district court order for the Department of State in court, the Court of Appeals orders to the district court, and the arguments developed from *Kiyemba II* and *Munaf v. Geren*, and providing links to orders and notice of appeal); Nancy Talanian, *Guantánamo Uighurs Are Not Alone*, HUFFINGTON POST, Apr. 22, 2010, <http://www.huffingtonpost.com/nancy-talanian/guantamo-uighurs-are-not-b-547548.html> (explaining that lawyers were “unable to find out what Belbacha [a detainee] is supposed to have done” that brought on his sentence).

141. See *Kiyemba v. Obama* (Nos. 08-5424, 08-5425, 08-5426, 08-5427, 08-5428, 08-5429), Petition for Rehearing En Banc, (D.C. Cir. July 12, 2010) available at www.scotusblog.com/wp-content/uploads/2010/Kiyemba-I-en-banc-petition-7-12-10.pdf. See generally Lyle Denniston, U.S.: Guantanamo habeas working Uighurs’ new challenge opposed, SCOTUSBLOG, (Aug. 2, 2010) available at www.scotusblog.com/2010/08/u-s-guantanamo-habeas-working.

Obama promised to end base detentions within a year of January 23, 2009, yet 176 men still remain over a year and half later. In conclusion, to make sense of what assumptions and context facilitate such a pervasive black hole, keeping *outsiders inside*, this Essay examines the base's history and anomaly's role in it.