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

I. INTRODUCTION

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

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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, 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” or an “anomalous legal zone,” with “legal rules” fundamental to larger policies “locally suspended” in a geographic area. Since 1903, the United States has leased base territory from Cuba for an indefinite period. 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, Haitians, 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.


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].


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


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, Hajiauxbar Abdulghupur, Saidullah Khalik, Ahmed Mohamed, and Abdul Razak. For specific information and documents concerning their detention, see, e.g., The Guantánamo 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), Apr. 26, 2010, available at http://www.royalgazette.com/rg/Article/article.jsp?articleId=7da4d27300300a&sectionId=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/ALeqM51z5PF3FdBDZedUa1lGoRn6lYV5aFQ; 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&sectionId=60.


the Court vacated the appellate judgment and remanded the case. 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. 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.” This theme asks how the Obama Administration, led by the first American president of color, may bring change that reflects critical legal values. 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


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


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


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.


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). 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.

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. 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, 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


26. See VINE, supra note 24, at 216 n. 8.
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. 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. Determinations that populations are (or are not) sovereign are embedded in cultural exclusions in international law. 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. 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

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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.” 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.” 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.”

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.” 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,” and these frontiers act as “fluctuating zone[s] of interaction between the imperial centre and its peripheries.” 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.

Jurisprudence on overseas authority, such as GTMO detention cases or the Insular Cases, 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. 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. Empires develop elaborate administrative, legal, political, and military infrastructure to secure this. 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.
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”).
42. COLÁS, supra note 23, at 71.
43. Id.
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. 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. 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. 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. 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. This approach avoids examinations that may be solely material or cultural. 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. 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. 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.

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

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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).

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. 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.

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. The United States did not fight the War of 1898 for humanitarian objectives, such as an independent Cuba, spreading democracy, or even the discredited myth of “Remember the Maine,” but

54. Lloyd C. Gardner, Foreword, to id.
instead for economic and diplomatic self-interests overseas.\textsuperscript{57} Emily Rosenberg describes how American economic values and culture inspired its goal of expansion and conformity abroad from 1890 through 1945.\textsuperscript{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 \textit{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{62}

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\textsuperscript{59} See AMY KAPLAN & DONALD E. PEASE, \textit{Introduction} to \textit{CULTURES OF UNITED STATES IMPERIALISM} 3 (Amy Kaplan & Donald Pease eds., 1993).
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\textsuperscript{61} See generally DIPESH CHAKRABARTY, \textit{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”).
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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. 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.”

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 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


67. See LAEBER 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

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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).


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. 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, 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. 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. With such


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); Efren 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. 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. 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. 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.

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. 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 Graffon 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 LAEBER, 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.”).


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. 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. 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.

The most serious crisis was the Panic of 1893, which lasted three years. 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.
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. To continue with the pace of production, American industrialists and financial interests eagerly sought new markets. Protectionism abroad, in the form of domestic or imperial authority, invariably limited American access to many locations.

Foreign policies were needed to open new markets. 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.

Geopolitics of the period spurred expansionary motives. Americans

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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.).

focusing 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. 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. 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. This facilitated commerce, secured ocean transports, and,
if needed, moved troops to peripheral locations. 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, 1 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 important 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,


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.
constitutinalism 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-
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).

(1966) (defining “sovereignty” as the “final and absolute political authority”).

107. See generally ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING

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.\footnote{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.} Ironically, Cubans achieved measurable success after 1895 without American military input because Afro-Cubans were included in military leadership.\footnote{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 Hist. 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.} 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.\footnote{Cf. Aguilar, supra note 109, at 245 (describing the events leading to the signing of the peace treaty and American relations with Cuba afterward).} 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.\footnote{See generally Louis Perez, Cuba Under the Platt Amendment (1991).} 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.\footnote{See id. at 42-47 (discussing the events that led to the creation of the Platt Amendment); see also Pedro Capo-Rodriguez, The Platt Amendment, 17 A.M. 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 A.M. 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).} This led to a 1903 lease for the base at Guantánamo Bay.\footnote{U.S.-Cuba Feb. 1903 Lease, supra note 5.} A 1934 treaty eliminated the Amendment’s
other sovereignty checks, but it affirmed that for an indefinite period the United States would be able to occupy Guantánamo.\textsuperscript{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.\textsuperscript{117} Occupation authorities forbade Afro-Cubans from voting.\textsuperscript{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.\textsuperscript{119} The United States declared a “right to intervene” in Cuba and on multiple occasions sent its troops to the island.\textsuperscript{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.”\textsuperscript{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

\begin{footnotes}
\item[116] \textit{U.S.-Cuba 1934 Treaty, supra} note 5.
\item[117] See \textit{Fuente & Casey, supra} note 111, 226 (covering the history of suffrage rights in Cuba after the U.S. occupation).
\item[118] See \textit{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, \textit{Race and Black Mobilization in Colonial and Early Independent Cuba: A Comparative Perspective}, \textit{44 ETHNOHISTORY} 53, 53 (1997) (presenting how Cuban racial distinctions in the law were similar to a U.S. two-tier system).
\item[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 . . . .” \textit{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.” \textit{Id.} at art. VII; see also \textit{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).
\item[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. \textit{See generally} Lester H. Woolsey, \textit{The New Cuban Treaty}, \textit{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).
\item[121] \textit{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).
\end{footnotes}
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. 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.” 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.”

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.” Blacks in Cuba are “absolutely black,” “not thick lipped,” with European features, and superior regarding “capacity and efficiency.” 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.” Both mulattoes imitate. In the United States they imitate Anglo-Saxon custom and “naturally aspire to participate in government,” while in Cuba this is not the case. 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.

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

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122. See id. at 258-64 (discussing these and other metaphors that were employed by Americans to justify imperialism).
124. Id. at 156, 158.
125. Id. at 149-50, 153.
126. Id. at 154.
127. Id.
128. Id.
129. Id.
130. Id.
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.”

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. These legal relationships, created in Cuba and elsewhere, were analogized to parent and child or master and slave. 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. 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.

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