HOW TO KEEP AN EMPIRE: A LEGAL ANALYSIS OF THE MAINTENANCE OF UNEVEN POWER RELATIONS IN THE *INSULAR CASES*

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I. INTRODUCTION

The *Insular Cases* are indeed running amok as Christina Ponsa-Kraus recently declaimed.[1] A series of cases decided by the U.S. Supreme Court between 1901 and 1922, the *Insular Cases*, were inspired by the kind of overt racism that any conscionable American should find reprehensible.[2] And yet, this Article posits that the *Insular Cases*, racism notwithstanding, cannot be overruled given their vitality in American jurisprudence—they rationalize the irreconcilability of the American colonial project with American constitutionalism. American colonies are not perceived as constitutional colonies, they are regarded as extra constitutional zones where it is left up to Congress to exercise plenary authority to determine which rights apply. This is the basis of the *Insular Cases*, and similar to cases like *Dred Scott*[3] and *Plessy*,[4] the *Insular Cases* provide legal justification for the United States' political system, as it actively promotes uneven power relations in its domestic and overseas colonial spheres. Convinced of its own moral rectitude in perfecting the ideals of a republican

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1. Christina Duffy Ponsa-Kraus, *The* Insular Cases *Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2512–24 (2022).

2. *See* Willie Santana, *The New* Insular Cases, 29 WM. & MARY J. RACE GENDER & SOC. JUST. 435, 437 (2023); Colleen Walsh, *Reexamining the* Insular Cases*. Again.*, HARV. L. BULL., Spring 2024, at 26, 28.

3. Dred Scott v. Sandford, 60 U.S. (1 How.) 393 (1857).

4. Plessy v. Ferguson, 163 U.S. 537 (1896).

form of government, the United States needs justification for its continued colonization of places such as Guam, the U.S. Virgin Islands, and Puerto Rico. As such, the *Insular Cases* serve as a moral palliative to the American conscience because their continuing validity relies on the proposition that there is some legal merit to the indefinite colonization of the territories and their unequal treatment under the law.

In this context, law, writ large, is a colonial tool in service of building the colonizers' house. The legal history of American colonial power exists for and is informed by political agendas that continue to shape the national narrative in ways that make law, and the forms that law takes—courts, judges, opinions, legislations, etc.—complicit with colonial violence within the territories that to this day maintain an ambivalent relationship to the United States.[5] The law sets forth seemingly independent, unbiased, objective standards as the basis of its normative operation and so we misrecognize the law as having the power to vindicate individual or group rights. We believe that law exists independently from social constructs and therefore is not only divorced from but is *a priori* to these social constructs. With this thought in mind, we give credence to the law as operating free from the influence of the social and political realms when in reality the law is constituted by and deeply imbricated in both. Contrary to popular belief, the law as we conceive of it in the United States is not wholly objective, neutral and unbiased; rather, it reflects the social habits and customs of the nation in which it operates. When viewed through this lens, the *Insular Cases* are appealing because of the social and cultural narrative of America that shapes the authoritative pronouncements set forth in these opinions.

To explore this phenomenon of American territorial jurisprudence being informed by social constructs, the Article will examine the legal narratives set forth in two Supreme Court cases that lent the weight of their legal authority to the American political agenda to inaugurate and maintain territories: *Johnson*

5. James T. Campbell, Aurelius*'s Article III Revisionism: Reimagining Judicial Engagement with the* Insular Cases *and "The Law of the Territories*," 131 YALE L.J. 2542, 2585–86 (2022) (citing SAM ERMAN, ALMOST CITIZENS: PUERTO RICO, THE U.S. CONSTITUTION, AND EMPIRE 158 (2019) (declaring that "ambiguity has been the handmaiden of empire")).

v. M'Intosh[6] and *Downes v. Bidwell.*[7] The two opinions describe two types of territories that are characterized as being part of the United States for some purposes, but not for others: the domestic Indian territory and the overseas islands; both are insular areas that contain smaller populations that are socially and geographically isolated enough to be out of sight, and therefore out of mind, of the general American populace.[8]

This Article hopes to demonstrate that the *Insular Cases* remain indispensable to American constitutional law jurisprudence, much the same way that *Johnson* and its progeny are vital to the concept of federal Indian law. Indian Country and the territories alike are neither foreign nor domestic, but instead they are American spaces that are "foreign to the United States in a domestic sense."[9] Indeed, the authority for Congress to deal with the Indians is the same as that for the Insular areas—it is derived from the same source of power, the Territories Clause in the Third Section of Article Four of the U.S. Constitution.[10] Under the plenary power of the Territories Clause, the territories exist in a state of dependence, subject to the sovereignty of the United States because they are comprised of a class of inhabitants with diminutive rights, that will not be accepted by the American polity as "fully citizens."[11]

I also add a semiotic gloss to my case analysis by arguing that the law is less a manifestation of the observance of the civilizing aims of colonialism, and more a vindication of the legal signs that validate the political agenda of a colonial sovereign. A "sign" consists of a signifier and signified, where the signifier is the form of an expression and the signified is the content of the expression.[12] A semiotic approach to the law requires an uncoupling of the perceived neutrality of the law from the institutionalized "interpretive communities" on behalf of whom it speaks because, the law is never neutral.[13] In analyzing *Downes* and *Johnson*, this

6. Johnson v. M'Intosh, 21 U.S. (1 Wheat.) 543 (1823).
7. Downes v. Bidwell, 182 U.S. 244 (1901).
8. *Id.* at 341–42; *Johnson*, 21 U.S. at 589.
9. *Downes,* 182 U.S. at 342.
10. U.S. CONST. art. IV, § 3, cl. 2; *Downes*, 182 U.S. at 290–91.
11. *Johnson,* 21 U.S. at 568–69.
12. Harold Anthony Lloyd, *How to Do Things with Signs: Semiotics in Legal Theory, Practice, and Education*, 55 U. RICH. L. REV. 861, 863 (2021).
13. Douglas J. Goodman, *Approaches to Law and Popular Culture*, 31 L. & SOC. INQUIRY 757, 758 nn.2–3 (2006).

Article demonstrates that there is a dimension to American law that is tied to an American social history, a history that has always been, and continues to be, concerned with an imperial agenda to meet the material and economic needs of the nation through colonial expansion.

Within the republic of America, we like to believe that the law acts as a check on state power. In *Downes*, much like *Johnson*, the law defers to the Congress to determine the social and cultural status of the people of the territories in relation to the American empire that they have been forced to join.[14] That status was, and continues to be, one in which Territories are under the absolute control of America and can only exercise self-governance to the extent granted by the State.[15]

The colonial territory of mainland America was acquired by discovery and conquest of the Indians. The overseas territories were acquired by purchase and cession by treaty. Cession, like the doctrine of discovery, is simply one member of the imperial interpretive community acknowledging a common signifier of meaning with respect to the transfer of land from European power to another. The venerable Juan R. Torruella, former Chief Judge of the U.S. Court of Appeals for the First Circuit, has lambasted the *Insular Cases* as "wrongly decided" and in contravention of "established doctrine that was based on sound constitutional principles, substituting binding jurisprudence with theories that were unsupported in our traditions or system of government and which were specifically created to meet the political and racial agendas of the times."[16] As Judge Torruella rightly noted, those cases were premised on ideas that were historically unprecedented and constitutionally unauthorized, namely "that the United States could hold territories and their inhabitants in a colonial status indefinitely."[17] Yet, ironically, the *Insular Cases* continue to have precedential value because of the Supreme Court's refusal to overturn them despite some of the current Justices voicing their concerns about the fundamental and shameful flaws inherent in

14. *See Downes*, 182 U.S. at 280.

15. Sarah M. Kelly, *Toward Self-Determination in the U.S. Territories: The Restorative Justice Implications of Rejecting the* Insular Cases, 28 MICH. J. RACE & L. 109, 139–40 (2023).

16. Juan R. Torruella, *The* Insular Cases: *The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 346 (2007).

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

the holdings based on the "ugly racial stereotypes, and the theories of social Darwinists."[18]

In *Vaello-Madero*, Justice Neil Gorsuch noted that since no party requested that the *Insular Cases* be overruled in order to resolve the equal protection challenge in that case, the issue would go unaddressed until another day of reckoning.[19] That day of reckoning seemed to present itself in the case of *Fitisemanu v. United States*, but the Supreme Court declined to grant certiorari to review claims of Petitioners who challenged the Tenth Circuit's holding that the *Insular Cases* provided an unworkable analysis of constitutional law applied to deny constitutional citizenship to American Samoans.[20] Given the reluctance of the U.S. Supreme Court to overturn the *Insular Cases*, lower federal courts continue to rely on the cases and their progeny to deny fundamental rights to people living in the Territories.

As Ponsa-Kraus and other scholars have noted, people in the Territories are also relying on these cases as a way to protect cultural distinctiveness, traditional culture, and the diverse cultural practices that have shaped their political and social existences prior to American colonization.[21] Perhaps the Supreme Court's reluctance stems from what Rose Cuison Villazor has noted so cogently, that since:

> conventional frameworks appear to be hostile to laws that may be viewed as protective of the rights of indigenous groups, the *Insular Cases* seem to be, at this juncture, the primary means through which some territorial peoples might be able to push for protection of certain cultural and political rights that they believe they would not be able to achieve under traditional constitutional analysis.[22]

The observation of Cuison Villazor draws attention to the tension between two seemingly competing set of rights: constitutional guarantees for all American citizens under equal

18. United States v. Vaello Madero, 142 S. Ct. 1539, 1554 (2022) (Gorsuch, J., concurring) (roundly criticizing the *Insular Cases*).

19. *Id.* at 1556.

20. Petition for a Writ of Certiorari at 24–26, Fitisemanu v. United States, 1 F.4th 862 (10th Cir. 2021) (No. 21-1394).

21. Addie C. Rolnick, *Indigenous Subjects*, 131 YALE L.J. 2652, 2740–42 (2022); Rose Cuison Villazor, *Problematizing the Protection of Culture and the* Insular Cases, 131 HARV. L. REV. F. 127, 145 (2018).

22. Villazor, *supra* note 21, at 145.

protection principles, versus cultural preservation in the face of ongoing American imperialism in the Territories. This debate between constitutional exceptionalism and cultural accommodation results in a deceptive dichotomy between some scholars and jurists, on the one hand, declaring that the *Insular Cases must* be overruled because of racism, and those on the other hand, claiming that the cases *must not* be overruled because of cultural protectionism.[23] The *Insular Cases will not* be overruled for the simple fact that they continue to serve a normative existential function for the America imperial project, which continues the tradition of colonization and dispossession that has long marked the apotheosis of power for imperialists in every civilization. This normative existential function is founded on the premise that the authority of the American legal system is established and constituted by institutions of power, which in turn shape the social and political circumstances in which they came about. Part II of this Article examines this concept further. Part III analyzes *Johnson v. McIntosh* to demonstrate how the law participates in a communicative enterprise that is supported by a system of politically motivated signs. Part IV applies a similar analysis to *Downes v. Bidwell*. Part V contains short concluding observations about the future of the *Insular Cases*.

II. AMERICAN LAW IN SERVICE OF AMERICAN EMPIRE

The Article's use of words such as "imperialism" and "imperialists" is deliberate. It is meant to invoke concepts of one group's conquest and colonization of the property, the actual geographic territory, of another group. Colonization is a violent process through which one country or people, supposing itself to be culturally superior, acquires land by force, disrupts the social norms of the land's inhabitants, and imposes different cultural values on those inhabitants because they are considered to be inferior.[24] If we focus on the role that American courts have played

23. *Compare* Ponsa-Kraus, *supra* note 1, at 2524–25 (arguing that the Supreme Court should unambiguously overrule the *Insular Cases* due to their racist and imperialist nature), *with* Villazor, *supra* note 21, at 145 (arguing that the *Insular Cases* are vital for some territorial people to protect their cultural and political rights that are unaccounted for under a traditional constitutional analysis).

24. *See, e.g.*, Tayyab Mahmud, *Colonialism and Modern Constructions of Race: A Preliminary Inquiry*, 53 U. MIA. L. REV. 1219, 1220 (1999) (arguing colonialism is a relationship of domination and difference).

in the colonial process, it becomes apparent that one function of the law is to provide the organizing principles that authorize and legitimize the acquisition of additional geographic spaces to support the American desire for power based on territorial expansion.

The narrative of national development has always included imperialistic ambitions to expand America's global influence. But while we are aware of the soft politics of imperialism, like militarism and international aid, through which the United States exerts its influence throughout the globe, we tend to ignore that there is a concomitant hard politics of imperialism that must be supported by the possession of, and exertion of power, over actual land located in various contiguous and non-contiguous geographical spaces.[25]

In *How to Hide an Empire*, Daniel Immerwahr presents an insightful and gripping recapitulation of both the hard and the soft kinds of American imperial history.[26] Immerwahr explains that America's need to collect territories and possessions began as early as the 1850s, when the United States began acquiring states and annexing territories for reasons such as mining guano on islands located in the Caribbean and the Pacific.[27] Like Immerwahr, Professor Thomas McCormick of the Wisconsin School of Diplomatic History has also capaciously catalogued American imperialistic maneuvers in a fascinating and comprehensive historical review of American territorial expansion policy beginning as early as 1803 in North America and ending in the 1890s with American acquisition of overseas territories.[28]

Immerwahr and McCormick's analyses are fascinating, but neither goes far enough to locate the start of the American

25. *See How Did the United States Become a Global Power?*, COUNS. ON FOREIGN RELS. https://education.cfr.org/learn/reading/how-did-united-states-become-global-power (Feb. 14, 2023).

26. *See generally* DANIEL IMMERWAHR, HOW TO HIDE AN EMPIRE: *A HISTORY OF THE GREATER UNITED STATES* (2019) (providing an in-depth look at the United States quest for empire that resulted in legal borders wherein territories made up nearly a fifth of the greater land area of America by the time of the Second World War). This fascinating read helps to re-shape the meaning of American history and geography by understanding the role of empire in making the United States a major world player; an empire acknowledged by the *Downes* Court as incidental to sovereignty.

27. *Id.* at 51–53.

28. *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, 63–65 (Alfred W. McCoy & Francisco A. Scarano eds., 2009).

yearning for colonies. As with all imperialists, commercial expansion must ride in on colonial expansion. Accordingly, this Article argues that American imperialism was an already existing desire at the time of the founding of the nation spurred on by visions of how to become a great nation—a united and improved version of Europe that could wield economic power by controlling land that would open foreign markets to American ideology and goods.[29] American colonization began with the original settler colonies and expanded with the westward push to appropriate contiguous territory within North America. The fact that the land being acquired was contiguous makes the effort look less like a part of a colonial project or imperialistic agenda. Nevertheless, as McCormick puts it nicely, this "landed colonization" was only the first wave of American territorialization, that "started with the American Revolution itself, which was not only a war against empire but a war" to acquire lands and seaports for Americans to transport their produce and primary commodities to Asian and European markets.[30]

The European colonial project resulted in the founding of the original thirteen settler colonies in what would eventually become the United States of America. Looking specifically at the Western European model that dominated the Renaissance and Enlightenment periods, we understand colonization as the process of "discovering" and settling territory in the "new" world under the auspices of Christianization, civilization, and of course, capitalism.[31] Many scholars like McCormick have commented on the paradox of America being a former colony then itself becoming a colonial power.[32] Such a comment rests on the American characterization of its founding narrative as the colonized throwing off the yoke of the colonizer to become a nation of free people. This narrative, however, is a mischaracterization of the American origin story because it elides the stark reality that from its inception, the United States itself was already a colony divided into "us" and "them"—the Settler colonizer versus the Indigene colonized.

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29. *Id.* at 69.

30. *Id.* at 64.

31. Neil Lazarus, *What Postcolonial Theory Doesn't Say*, 53 RACE & CLASS 3, 18 (2011) (citing ROBERT BARTLETT, THE MAKING OF EUROPE: CONQUEST, COLONIZATION, AND CULTURAL CHANGE 950–1350, at 313–14 (Penguin Books 1994) (1993)).

32. McCormick, *supra* note 28, at 63.

To support such a claim, one need look no further than the Declaration of Independence, which proclaims the end of British despotism and tyrannical rule over a people who suffered abuses and usurpations to the detriment of "Life, Liberty, and the pursuit of Happiness."[33] Tellingly though, even in this revered national foundational document readers are reminded of the fact that the "one people" of the colonies that are referenced, are only the white settlers.[34] The native Indian landowners who these settlers encountered as the original owners of land are reduced to being "Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions."[35] When viewed through the lens of colonialism, the Declaration of Independence clues in the reader that there was a preexisting historical social formation of a colonial relationship between the Indians and the Europeans. That relationship had its genesis in the initial conquest of the indigenous population which, in turn, was shaped by America's avowed desire to "push for a continental American empire" that moved away from the Atlantic settlements and pushed westward towards the Pacific in this period.[36]

As an offshoot, a protégé, of Europe, the United States has done better than its forebears in not only building an empire, but in maintaining one as part of its national agenda. There are arguably multiple iterations of American colony acquisition in service of empire building. The second iteration is the acquisition of insular areas overseas, which is tackled in Part IV. The first iteration, though, focuses primarily on the expansion of the original North American colonies through well-established imperial norms. The fundamental building block of empire is land. The next step in empire building is to justify the appropriation of land to support the colonial enterprise by applying a legal framework of property rights that becomes the vehicle through which to authorize only European recognized social relations over

33. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

34. *See id.*; *Civil Rights in the Constitution & New Republic*, NAT'L PARK SERV., https://www.nps.gov/subjects/civilrights/crconstitution.htm (last visited Dec. 22, 2024).

35. THE DECLARATION OF INDEPENDENCE para. 29 (U.S. 1776).

36. *See* Robert J. Miller, *American Indians, the Doctrine of Discovery, and Manifest Destiny*, 11 WYO. L. REV. 329, 339 (2011) (discussing Thomas Jefferson's push to expand America by facilitating the 1803 Louisiana Purchase, and the 1803–1806 Lewis and Clark expedition aimed at the Oregon country).

land.[37] This is the blueprint set forth in *Johnson v. M'Intosh*, when American settler colonial expansion was supported by a legal narrative that purported to resolve competing claims of title while using the opportunity to validate European-derived land use that was considered most efficient and therefore most economically valuable.[38] In the next Part, we examine how that blueprint was executed.

III. BUILDING THE FIRST EMPIRE

America has always been clear about its alignment with Western European notions of how to build an empire by acquiring colonies. The strategies utilized to acquire colonies on the North American continent include expropriation of Indian land and extermination of the Indians. The seminal case of *Johnson v. M'Intosh* navigates these strategies and finds itself giving credence to settler appropriation of Indian land by relying on jurisprudence that did not have definite precedential value prior to being articulated in the case.[39] As Justice Marshall frames the inquiry, what is "the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of" the federated states of America.[40] To answer his own inquiry, Marshall draws on laws of society, laws of the nation in which the land lies, and "those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations" that have been adopted in America.[41]

At the risk of being highly reductive to the complex field of semiotics in order to make a larger point about Marshall's opinion, this Article invokes Saussure's concept of signs as the building blocks of language to argue that there was a legal discourse of property—the doctrine of discovery—that was specific to the Europeans, which is the doctrine that Marshall is going to use to sanction settler colonization of the "new world."[42] Saussure defines

37. *See* Allan Greer, *Commons and Enclosure in the Colonization of North America*, 117 AM. HIST. REV. 365, 379 (2012).

38. *See* Johnson v. M'Intosh, 21 U.S. (1 Wheat.) 543, 592, 604–05 (1823).

39. *See id.* at 592.

40. *Id.* at 572.

41. *Id.*

42. FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS 66–67 (Charles Bally & Albert Sechehaye eds., Wade Baskin trans. 1959).

a sign as being composed of a "*signifier*"—the *form* which the sign takes, and the "*signified*"—the *concept* it represents.[43] The relationship between the signifier and the signified is referred to as "signification"—the creation of meaning, which is what is meant when the word in a phrase such as "legal signification" is used.[44] A sign is arbitrary, it has no universal or intrinsic meaning other than that which is created in, validated by, and exchanged among a community of speakers.[45] Signs evolve from the association of signifiers with signified within a particular group of people who share a common cultural language so that they can agree on what a given sign means.[46] To put it another way, signification becomes the meaning of any sign; it is found in the association created between the signifier and the signified, an object and its referent, by a particular interpretive community.[47]

Colonizing European powers had an interpretive community in common that gave them the legal language of "discovery" to legitimize the political demands for territorial expansion in the new world.[48] Embedded in that language was the presumption that Europeans were Christians who would leave Europe, the known world, and find unknown lands within which non-European, non-Christians lived.[49] To justify the taking of land from non-European, non-Christians, the discoverers employed the language of the law to support the political endeavor and supplant whatever other forms of social relations were being performed in these spaces.[50]

The semiotic concept of signifier and signified helps us to understand how we shape language by imbuing words, symbols, gestures, and sounds with meaning that is created within, and understood by, a particular community. Saussure is instructive in the analysis of the *Johnson* case where Justice Marshall is inspired by his particular interpretive community to accord no legal significance to the title that derives from Indians whose

43. *Id.* at 67.
44. *See id.* at 114.
45. *Id.* at 67–68.
46. *Id.* at 67.
47. *Id.* at 67, 114.
48. David P. Waggoner, *The Jurisprudence of White Supremacy*: Inter Caetara, Johnson v. M'Intosh *and* San Antonio Independent School District v. Rodriguez, 44 SW. L. REV. 749, 750–51 (2015).
49. *See id.* at 750–52.
50. *See id.*

relationship to land is expressed differently than the settlers' relationship.[51] Marshall gives the Indian title a meaning that is consistent with the interpretive community of colonizers, of which Marshall is a part, and which he will choose to represent, a community in which Indian title has absolutely no meaning at all:

> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.[52]

Property law is the law of rights in land. European property locates rights in land based on the social relations that are performed over a given space.[53] For this reason, property law includes performative aspects so that there can be no doubt as to ownership, and the concomitant type of social relationship that is being prioritized.[54] This helps to explain traditions such as the livery of seisin that was the ritual performed when land was conveyed from one owner to another. Acts of "discovery" rely on similar performative antics as signifiers of the legal world out of which the settler operates. Discovery gets its force from the legal signification granted to the acts of appropriation that are performed from the moment of departure from Europe until the discoverer's arrival in the target space.[55] First the discoverer ensures that he has the blessing, spiritually and metaphorically speaking, from religiously motivated legal texts, such as the papal bulls, that were used to "regulate European Christian contacts with the newly discovered lands in order to . . . prevent conflict

51. Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 87 (1985).

52. Johnson v. M'Intosh, 21 U.S. (1 Wheat.) 543, 574 (1823).

53. *See* Robert J. Miller & Olivia Stitz, *The International Law of Colonialism in East Africa: Germany, England, and the Doctrine of Discovery*, 32 DUKE J. COMPAR. & INT'L L. 1, 5–6 (2021).

54. Rose, *supra* note 51, at 84–85.

55. Robert J. Miller, *The Doctrine of Discovery: The International Law of Colonialism*, 5 INDIGENOUS PEOPLES' J.L. CULTURE & RESISTANCE 35, 39 (2019).

between expanding European empires by defining boundaries between" their spheres of influence in the "new world."[56] Next, the discoverer sets forth under the aegis of a particular sovereign to sail to find land that is heretofore uncharted by any other "Christian" European nation.[57] Once these new lands are reached, the discoverer makes a landing and claims an inchoate title for his sovereign supporter by planting a flag in the soil.[58] Title is crystallized by physical occupation of the land and engaging in actions that solidify a possessory interest in the space.[59]

It is in this type of property signification, as grounded in a specifically European social relation to land that gets transformed into the legal concept called "discovery." As Carol Rose so aptly puts it, within the system of legal signification, the doctrine is "the articulation of a specific vocabulary . . . and [a] shared set of symbols that gives significance and form to what might seem the quintessentially individualistic act: the claim that one has by 'possession,' separated from oneself property from the great commons of unowned things."[60]

Given that Indian social relation to land was visibly different from the European social relation, the nascent American state had to find a legal principle that would have the authority to dictate which relation would prevail.[61] Through an application of the legal concept of discovery, the political and social desires of the Euro-American colonizer are realized in the inevitable violence that ensues when the Indians refuse to give up their land.[62] Confident in their military might and convinced of the correctness of the signification that they have created, the imperialist settler ultimately enforces the law by subduing the Indian under the premise that European property laws, their social relations to land, are legally significant and carry political weight in America.

Johnson is one of the earlier American cases where the law puts its imprimatur on a particular set of signs and thereby validates the political will of the audience for whom those signs are

56. James Muldoon, *Spiritual Freedom–Physical Slavery: The Medieval Church and Slavery*, 3 AVE MARIA L. REV. 69, 86–87 (2005); Waggoner, *supra* note 48, at 750.
57. Waggoner, *supra* note 48, at 756.
58. Miller & Stitz, *supra* note 53, at 5, 30, 43.
59. *Id.* at 5–6; Miller, *supra* note 36, at 333.
60. Rose, *supra* note 51, at 88.
61. *Id.* at 87.
62. *See* Waggoner, *supra* note 48, at 757, 760.

significant.[63] Thus, one of the earliest examples of American law performing American politics is in the area of territorial expansionism, a political concept that gets enshrined in law—namely that "[d]iscovery is the foundation of title"[64]—which legitimizes social and political violence against Indians in their native lands. Once *Johnson* sets up that framework, it then goes on to explain the inevitable violence that must undergird and defend European property signification in the form of conquest of the Indians via war.[65] Hence, how do colonizers reinforce meaning? By violence:

> But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.
>
> What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighborhood, and exposing themselves and their families to the perpetual hazard of being massacred.[66]

Property law is founded on the principle that land is the basis for economic development and growth. The first step, arguably, in American empire building is to acquire property by wresting both contiguous and non-contiguous territory to ensure the spread of American products and power. Under the doctrine of discovery, this is easy enough for America to do because the push for contiguous property gets easier once we discount Indian title and decimate Indian populations. In the context of non-contiguous property, though, much of the new world had been already, similarly discovered, so America would have to contest those prior

63. Rose, *supra* note 51, at 87–88.
64. *Id.* at 87 (quoting Johnson v. M'Intosh, 21 U.S. 543, 567 (1823)).
65. *Johnson*, 21 U.S. at 590.
66. *Id.*

claims of title under a legal approach to property that was common in their interpretive community.[67] The means by which America achieved this end was thorough the concept of conquest and cession as discussed in the next Part where the Article analyzes *Downes v. Bidwell* and its impact on *Insular Case* jurisprudence. The *Insular Cases* that dispossess Territories are the functional equivalent of the *Johnson* case used to dispossess Indians, and in fact, it can be argued that the American policy with respect to Indians as domestic dependent nations where American laws would not apply uniformly, provided the basis for the constitutional exceptionalism approach that continues to be deployed in American territories that are treated as "foreign in a domestic sense."

IV. BUILDING THE SECOND EMPIRE

The United States has always been an empire but is one that dramatically changed in the 1890s during its golden age of imperialism that culminated in the Spanish-American war.[68] Spain's empire was the outgrowth of the politico-legal paradigm outlined earlier: discovery, occupation, and extinguishment of native rights through conquest and domination of the native peoples of its colonies.[69] After the Spanish-American war, the same law of conquest gave America the right to extinguish the ownership rights of Spain via the Treaty of Paris and assert its

67. *Id.* at 575–76. Marshall noted that:

> The States of Holland also made acquisitions in America, and sustained their right on the common principle adopted by all Europe. They allege, as we are told by Smith, in his History of New-York, that Henry Hudson, who sailed, as they say, under the orders of their East India Company, discovered the country from the Delaware to the Hudson, up which he sailed to the 43d degree of north latitude; and this country they claimed under the title acquired by this voyage. Their first object was commercial, as appears by a grant made to a company of merchants in 1614; but in 1621, the States General made, as we are told by Mr. Smith, a grant of the country to the West India Company, by the name of New Netherlands.
>
> The claim of the Dutch was always contested by the English; not because they questioned the title given by discovery, but because they insisted on being themselves the rightful claimants under that title. Their pretensions were finally decided by the sword.

Id.

68. McCormick, *supra* note 28, at 63–64; *see also* 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, 35 (Alfred W. McCoy & Francisco A. Scarano eds., 2009).

69. *Johnson*, 21 U.S. at 573–74.

own fee simple ownership over the island, which was later solidified by occupancy in the form of military bases.[70]

With the overseas acquisitions America had fewer property transfer complications because there was no problem of competing titles between the colonizer and the colonized. In the case of the insular areas, America acquired its land from another European power that already understood the legal signification of the doctrine of conquest and cession.[71] Unlike the battles (legal and otherwise) between Indians and settlers that challenged settler title to vast swaths of North America, the conquest of overseas territory was effectuated with relative ease because Spain already knew the legal implications of signing the Treaty of Paris and thereby conveying title to its property interests in the Caribbean and Pacific.[72] As such, the United States could straight away engage in the performance of possession that was already acceptable to and understood by other Europeans who traded in the same legal signs: hoist the flag and set up occupancy to demonstrate its new title ownership of the land.[73]

In the cession of Spanish colonies, legal signification within an interpretive community is implicated in a Euro-American discourse of property that acknowledges a Treaty as a legal document by which to accomplish transfer of ownership of land from one colonial power to another. But what happens to the property rights of the people who have been transferred along with the land? The second paragraph of Section Eight of the Treaty provides that coextensive with the Spanish cession of property, is the obligation that private property rights be protected:

> In conformity with the provisions of Articles I, II, and III of this treaty, Spain relinquishes in Cuba, and cedes in Porto Rico and other islands in the West Indies, in the island of Guam, and in the Philippine Archipelago, all the buildings, wharves, barracks, forts, structures, public highways and other immovable property which, in conformity with law, belong to the public domain, and as such belong to the Crown of Spain.
>
> And it is hereby declared that the relinquishment or cession, as the case may be, to which the preceding paragraph refers, can

70. *See* McCormick, *supra* note 28, at 73–74.
71. *Id.* at 63.
72. *See Johnson*, 21 U.S. at 584.
73. McCormick, *supra* note 28, at 63.

> not in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded, or of private individuals, of whatsoever nationality such individuals may be.[74]

The issue of who owns the territories finds a solution in the general sense that private property rights that were recognized by the Spanish Crown continue to allow for ownership by governments, institutions, and individual citizens.[75] In the larger technical sense, however, those private property rights are contingent, subject to a right of reversion that is held by the American sovereign that has paramount title as the ultimate owner of all lands within its jurisdiction.[76] But there is a different kind of property besides land that people in the territories lose under the continuing colonial relationship: the property of being a respected and equal member of the American polity.

The question of participation in the polity was a difficult one for the *Downes* court and was the subject of vigorous social and intellectual debates about how to integrate the insular areas given that their populations and historical trajectories appeared to be different from the states and territories connected to mainland America.[77] The difficulty arose over the broader question as framed by Justice Henry Billings Brown of whether "the Constitution extend[ed] of [its] own force to our newly acquired territories."[78] Now before we get into Justice Brown's answer to that broad question, it is worth noting that to have to ask the question in the first place presupposes that there are geographic limits to the Constitution. That there would even be a limit in the first instance goes to the argument that law, rather than being the neutral check and balance on government as we suppose, tends to respond to the command of the sovereign that law substantiates, rather than regulates political actions.

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74. Treaty of Peace Between the United States and Spain, Spain-U.S., art. VIII, Dec. 10, 1898, 30 Stat. 1754.

75. *Id.*

76. *See id.*

77. Downes v. Bidwell, 182 U.S. 244, 279–80 (1901).

78. *Id.* at 248.

The Constitution is a document laden with symbolism and signification for the nation and all Americans should "appreciate the large scope of this great charter of our national life," as *Insular Case* intellectual James Bradley Thayer explains in his 1899 *Harvard Law Review* article examining what to do with America's new insular possessions.[79] Bali and Rana also categorize the Constitution as the distinguishing feature of American politics and the fulfillment of Enlightenment principles of liberty and self-government, wherein government is governed by the law.[80] Accordingly, one of the features of the American Constitution, specifically, and constitutional government, generally, is that there should be an independent judiciary wherein the rule of law acts as a check on the power of the state.

In the imperial context, however, the judiciary finds itself complicit with the government and surrenders the rule of law to become the weapon of a sovereign who has absolute title to conquered territory and therefore, absolute power to say what the law of the conquered space is. This complicity is at the heart of the reason why the *Insular Cases* came into being and continue to have precedential value. If Justice Brown shares Thayer's sentiments, at least with respect to the Constitution, then it makes sense to wonder about the territorial limits of the American founding document. Recalling that Law, writ large, encapsulates a whole range of social and political relations, the question assumes that the social relations in the territories are not at the mature stage of political development so that the full blessings of a "republican form of government" vis-à-vis the Constitution may be extended to

79. James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464, 468–69 (1899).

80. Asli Bâli & Aziz Rana, *Constitutionalism and the American Imperial Imagination*, 85 U. CHI. L. REV. 257, 265–66 (2018) (noting that the feature that most distinguished the American political project from old-world Europe was the Constitution). Specifically, Bâli and Rana explained that:

> Whereas European communities were the product of feudalism as well as political and religious absolutism, the Constitution highlighted the extent to which the American experiment had been built from its founding on an effort to fulfill Enlightenment principles. . . . [T]he federal Constitution above all "developed here in America a new estimate of human values, and this has led to a new understanding of life." Contrasting European monarchical despotism with American commitments to liberty and self-government . . . the American colonists sought to "prevent forever the recurrence of absolutism in *every* form, whether official or popular, whether of dominant individuals or of popular majorities," thereby producing the "original and distinctive contribution of the American mind to political theory . . . that there should be *nothing* in government that is not governed *by law.*"

Id. (quoting DAVID JAYNE HILL, AMERICANISM: WHAT IT IS, at viii, 27 (D. Appleton 1916)).

them automatically with cession from the Spanish Crown.[81] Justice Brown's actual answer to the above query conforms to our assumption when we read the actual text of the opinion:

> Indeed, the practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect that the Constitution is applicable to territories acquired by purchase or conquest, only when and so far as Congress shall so direct. Notwithstanding its duty to "guarantee to every state in this Union a republican form of government" (art. 4, § 4), by which we understand, according to the definition of Webster, "a government in which the supreme power resides in the whole body of the people, and is exercised by representatives elected by them," Congress did not hesitate, in the original organization of the territories . . . to establish a form of government. . . .
>
> We are also of opinion that the power to acquire territory by treaty implies, not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the "American empire.[82]

As Brown explicates, "The Constitution itself does not answer the question. Its solution must be found *in the nature of the government* created by that instrument, *in the opinion* of its contemporaries, *in the practical construction* put upon it by Congress, and *in the decisions of this court*."[83]

The fact that legal precedent comes fourth in a line of authorities for how to decide the question goes to the heart of the argument about the law's complicity with the social and political realms to maintain uneven power relations. *Downes* relies on many other social and political precedents—everything but the law—to support the ultimate holding that the Constitution does not extend to the new insular possessions until Congress says it does.[84] As such, quite early in the opinion, *Downes* naturally concludes that nowhere in the 1777 Articles of Confederation, or the Constitution of 1787, or even in the *Dred Scott* case can it be inferred that territories were considered a part of the United States since America has long exercised its power to establish

81. *Downes*, 182 U.S. at 279.
82. *Id.* at 278–80.
83. *Id.* at 250 (emphasis added).
84. *Id.* at 251–58, 286–87.

territorial governments in consequence of the right to acquire territory.[85]

Territories are simply not subject to a blanket application of all constitutional provisions and protections, especially when they are "unincorporated territories."[86] The doctrine of incorporated territories is set forth in Justice White's concurrence in *Downes* where he observes that while Puerto Rico is not a foreign country in an international sense, it is foreign in a domestic sense because it is not incorporated into the United States and is merely an appurtenant possession.[87] Relying on the language of the Treaty of Paris, Justice White notes that the treaty provided that the civil and political status of the native inhabitants shall be determined by Congress.[88] Accordingly, Justice White inventively concluded that the tax at issue in *Downes* was properly levied because the territory was not made a part of the United States by the express terms of the treaty.[89]

The doctrine of unincorporated territories operates similarly to the doctrine of discovery in that it only makes sense to an interpretive community that utilizes legal language to assist in dispossessing territorial peoples. Ultimately, understanding that the insular Territories are the spoils of war, lands ceded by treaty after conquest, helps to elucidate *Downes*'s holding that the American empires does not wish to integrate foreign people—they only manage them. After all, the colonies had a similar status under the Spanish regime,[90] so why should America change the status quo for people who already were accustomed to the colonial arrangement? The *Insular Cases* continue to be a part of our jurisprudence, because the Court, writ large, is emblematic of the law, an establishment shaped by American empire in which it works and to which it is beholden for its legitimacy as an institution that has the power to structure social relations.

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85. *Id.* at 249–50.

86. Cesar A. Lopez-Morales, *Making the Constitutional Case for Decolonization: Reclaiming the Original Meaning of the Territory Clause*, 53 COLUM. HUM. RTS. L. REV. 772, 781 (2022).

87. *Downes*, 182 U.S. at 341–42 (White, J., concurring).

88. *Id.* at 340; *see also* Joel Andrews Cosme Morales, *Palmyra Atoll: America's 51st State?*, 49 S.U. L. REV. 97, 144 (2021) (arguing that the doctrine of incorporation was derived from "judicial inventiveness outside the spirit of the Constitution").

89. *Downes*, 182 U.S. at 347–48.

90. Fradera, *supra* note 68, at 35–37, 46–47; Johnson v. M'Intosh, 21 U.S. 543, 574 (1823).

While John Marshall touted judicial independence and declared that it is the province of the court to say what the law is,[91] such declarations obscure the reality that the American legal system often acts as a functionary of the state used to implement social agendas that are shaped by political expediencies. Most of the analysis surrounding the *Insular Cases* contends that the doctrine grew out of the political need for the United States to find ways to deal with the non-white population of the lands that were conquered in the Spanish American war.[92] That need remains today.

V. THE EMPIRE CONTINUES

Colonialism is a question of power in which the colonizer asserts his authority on the world stage by maintaining colonies to show for dominance, command of a vast empire, and control of the resources of that empire. Within the American imaginary there is a sense that land is colonized so that the settler can perform his identity as seen in the representations of white settlers expanding westward and southward to pursue their fortunes and increase their power—at the expense of the constitutional rights of the territories. The doctrine of discovery and the cession of insular areas that are in a perennial legal status of being "unincorporated" continue to support this colonial mission for America.

To conclude, the *Insular Cases* will not be overruled. Maybe it is because people in the Territories register as something "other than" American; they are people who automatically read as "foreign" with their speech, language, and customs shaped by life on tropical islands in the Pacific and Caribbean. Perhaps it is because of the dictates of federalism, the reservation of power in the states, where the Supreme Court believes that there are more than enough actors with which America must contend about the meaning of the Constitution. Perhaps it is because the Supreme Court does not wish to add any new voices to the political; especially those voices of people who represent a threat to the existential narrative of racialized greatness that America projects on the world. No matter the reason, or reasons, the *Insular Cases* and all territorial jurisprudence make it clear to Americans who

91. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
92. *See* Ponsa-Kraus, *supra* note 1, at 2455.

hail from the Territories that they should not rely on the law to vindicate their rights as citizens because legal language continues to sanction inequality based on the politics of geography.

Thayer said it best when he referenced a "valuable and accurate statement" about the *Insular Cases* made in *Harper's Monthly* in January of 1899 by Professor Hart, a "learned and indefatigable professor of history at Harvard."[93] Truly, the "United States, for more than a century, 'has been a great colonial power without suspecting it.'"[94] Thayer then goes on to note "that the conception of a colony is," as Professor Hart points out, a:

> tract of territory subordinate to the inhabitants of a different tract of country, and ruled by authorities wholly or in part responsible to the main administration, instead of to the people of their own region. Great distance . . . is not necessarily involved, nor physical separation from the home country, nor the exercise of arbitrary control, nor the presence of an alien and inferior race.[95]

Specifically, Thayer explains Professor Hart's view that:

> The important thing about colonies is the co-existence of two kinds of government, with an ultimate control in one geographical region, and dependence in the other; and since 1784 there has never been a year when in the United States there has not been, side by side, such a ruling nation and such subject colonies; only we choose to call them "territories."[96]

The *Insular Cases* may be wrong, but they were not necessarily wrongly decided if we understand that America continues to need territories to protect American commercial interests and domination abroad. Whatever symbolic value there may be to the overruling of the *Insular Cases*, the ultimate political decision about the Territories rests with the colonial power, not the courts, that rules those territories. As Cesar Lopez-Morales bluntly argues, overruling the *Insular Cases* "will not remove many, if not most, of the obstacles that territorial residents face on a daily basis in their incessant pursuit for justice and equality."[97] Or, more

93. Thayer, *supra* note 79, at 474.
94. *Id.*
95. *Id.*
96. *Id.*
97. Lopez-Morales, *supra* note 86, at 811.

succinctly as Ponsa-Kraus writes, even if the *Insular Cases* were overruled, the Territories would continue to be Territories.[98] Perhaps this is why the Supreme Court abstains from addressing the issue altogether. If Congress has chosen to maintain the colonial status quo with the Territories, then the Court does not need to make a legal determination by overruling the *Insular Cases* because what may be changed *de jure* will continue *de facto*.

98. Ponsa-Kraus, *supra* note 1, at 2538.