THE YALE LAW JOURNAL FORUM

NOVEMBER 2, 2020

How We Study the Constitution: Rethinking the *Insular Cases* and Modern American Empire

Aziz Rana

ABSTRACT. Few American law classes actually teach the *Insular Cases*. This Essay argues that this is due to a profound lacuna in mainstream constitutional study—the failure to adequately confront the extent to which the United States from its founding has been a project of empire. In part, for this reason, the field tends to have little to say about perhaps the key defining legal-political development of the American twentieth century: the country's rise from regional player to the world's dominant power. In exploring these omissions, the Essay highlights the place of the *Insular Cases* as a central ideological and institutional hinge between two modes of American imperial authority: settler conquest and global primacy. The Essay then reflects on what it would mean to take seriously the continuing role of colonialism in constitutional life as well as what lessons should be drawn for the study of constitutional law.

INTRODUCTION: CONSTITUTIONAL FORMALISM AND THE ANTI-IMPERIAL NARRATIVE

On December 10, 1898, the United States signed the Treaty of Paris, which formally ended the Spanish-American War. Initially begun over the future status of Cuba, the concluding treaty left the United States with a wide-ranging overseas empire, extending from the Caribbean to East Asia.[1] Article I of the Treaty relinquished Spanish sovereignty over Cuba and gave the United States occupation authority under international law. Article II handed over sovereignty of Puerto Rico and Guam to the United States, while under Article III, Spain ceded

1. Treaty of Peace Between the United States and Spain, Spain-U.S., Dec. 10, 1898, T.S. No. 343; *see* JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 23 (1985).

the Philippine Islands to the United States for twenty-million dollars. These were transformative developments in the growth of American empire. Excluding the Alaska Purchase in 1867 and the uninhabited Guano Islands, before the 1890s all American territories had been contiguous. But with these new possessions—not to mention Hawaii's annexation that same year—the United States had now clearly entered the European scramble for far-flung colonial lands. In the wake of the Treaty of Paris, the United States further acquired eastern Samoa in 1900 through a treaty with Great Britain and Germany, and the Panama Canal in 1903 after an American intervention in Colombia.[2]

In effect, the Spanish-American War symbolized the United States's emergence onto the international stage as a significant global military and economic force. It also led directly to the country's first major overseas war of occupation—a critical forerunner to later conflicts, from Vietnam to Iraq. In the Philippines, American military and political officials confronted a defiant and anticolonial independence movement—one committed at all costs to the end of U.S. rule on the islands.[3] U.S. officials were loath to accede to local independence demands and saw the islands in the Pacific as a key strategic possession in American efforts to extend economic and political influence to China and East Asia.[4] But by the time President Theodore Roosevelt unilaterally declared the insurgency in the Philippines over on July 4, 1902,[5] the price of what was supposed to have been a relatively simple pacification project had become staggering: 4,000 U.S. soldiers were dead, as well as approximately 50,000 Filipino troops, not to mention upwards of a quarter-million Filipino civilians.[6] Events there would have a lasting impact on how American politicians and officials conceived of the U.S. role in the world going forward.

Both overseas expansion and anticolonial resistance raised foundational questions regarding what the appropriate legal framework should be for how new territorial possessions were governed. Such questions reached the Supreme Court in 1901, as it began issuing a series of landmark decisions collectively known as the *Insular Cases*. The most well-known of the *Insular Cases* was *Downes v. Bidwell* and involved Congress's power to impose special import duties

2. Sarah Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 208 (2003).

3. PAUL A. KRAMER, THE BLOOD OF GOVERNMENT: RACE, EMPIRE, THE UNITED STATES, & THE PHILIPPINES 152 (2006).

4. *Id.* at 17.

5. *Id.* at 154.

6. *Id.* at 157.

on goods from Puerto Rico, given the Constitution's requirement of uniform duties throughout the United States.[7] The Court split 5-4 in voting to uphold the constitutionality of the measure.[8] In the process, the Court established the legality of Congress's right to create a distinct and permanent legal status in which not all constitutional protections applied to Puerto Rico or to other overseas territories. Given the Philippines backdrop, ultimately at stake in these opinions was the broader matter of whether the United States could constitutionally maintain colonial dependencies throughout the world. Did any legal distinction exist between the United States's discretionary power and that of its European imperial rivals? At an even deeper level, to what extent were such dependencies either genuine breaks from longstanding U.S. practice or continuous with the historic path of American continental expansion? The way that judges and government officials resolved these questions shone a profound light on the structural ties in American state formation between constitutionalism and empire. Such legal-political choices also set the basic ideological and institutional terms for what would later become the American Century.

Yet, today, few American law classes actually teach the *Insular Cases*. In fact, most of the dominant scholarly accounts of American constitutional development pay little to no attention to either the cases or to the global events surrounding them, including what happened in the Philippines. Intuitively, this would seem surprising. If someone were to ask you to explain the legal-political dynamics of the first two decades of the twenty-first century and you never mentioned the second Iraq War, there would be a massive hole in your analysis. The war and its fallout undermined the credibility of party establishment figures, greatly influenced the 2008 Democratic presidential primary, and heightened the conditions that led politically to the ideological fractures of the Trump era. Security excesses abroad also placed real pressure on the constitutional constraints that were supposed to contain presidential power. More generally, the war played an important role in exacerbating the constitutional dysfunctions that have shaped recent years.[9] Similarly, to tell the story of the early twentieth century and to ignore American overseas expansion, with its brutal fallout in the Philippines, would be to leave a massive hole in any plausible account of the legal-political dynamics of that era.

And yet, it is not simply that early twentieth-century accounts of constitutional development ignore the *Insular Cases*; explanations of recent history by

7. U.S. CONST. art. I, § 8, cl. 1.

8. Downes v. Bidwell, 182 U.S. 244, 244 & n.1 (1901).

9. For more on recent political crises in the United States, including the role of the second Iraq War, see generally Aziz Rana, *Goodbye, Cold War*, N+1 MAG., Winter 2018, https://nplusonemag.com/issue-30/politics/goodbye-cold-war [https://perma.cc/DVQ3-N89X].

and large overlook the Iraq War too. Why is this the case? Focusing in particular on the *Insular Cases*, I argue that this oversight is a product of the basic scholarly orientation towards the American constitutional project. Most constitutional analysis ignores one of the defining features of American legal-political reality—the fact that the United States has from the founding been a project of empire. And it does so for two interrelated reasons. First, the classic view of American constitutional law has long been the very opposite—namely, that the United States is at root an anti-imperial legal project. This is because, so the argument goes, the overwhelming approach from the Founding towards administering new territories has been to place acquisitions on a path to statehood, in which the Constitution would eventually follow the flag. Under such a reading, practices in places like Puerto Rico or the Philippines were historical anomalies.[10] They embodied a momentary deviation—during a particular era of global colonial land grabs—from the traditions of American republicanism. Thus, while the *Insular Cases* may be significant for those that have lived on U.S. territories, they do not suggest anything constitutive about the American constitutional project at home or the general dynamics of American global power.

Second, American constitutional law is almost always presented as a story of the 'domestic' nation. Some of this is an inevitable product of the case law itself. Most rulings interpreting key pieces of constitutional text unsurprisingly revolve around matters raised within the continental United States. More generally, in a world of nation-states, a nationalist frame enjoys a natural quality as the instinctive way for members of a political community to conceive of their identities. The plaintiffs and defendants in constitutional disputes largely understand themselves as citizens contesting practices internal to their own nation, one largely defined by the borders of the familiar fifty states.

What consequences flow from this pervasive assumption that the United States is not a legal-political project of empire, either today or in the general past? For starters, it means that since overseas territories such as Puerto Rico are viewed as essentially relics from a bygone era, there is no need to tell the story of American constitutional development the way one might tell that of a European power like Britain. It would make little sense to construct an account of British constitutional history that focused exclusively on case law and political struggles wholly internal to England and ignored Britain's footprint in Asia and Africa, let alone Ireland. But one can do that with the United States because overseas power can be treated largely as a matter of foreign-policy statesmanship, irrelevant to the basic construction of the federal state. For that reason, constitutional law—

10. *See, e.g.*, GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY (2004); Sanford Levinson, *Why the Canon Should Be Expanded to Include the* Insular Cases *and the Saga of American Expansionism*, 17 CONST. COMMENT. 241 (2000).

again, as it is primarily taught—tends to have virtually nothing to say about yet another key development for the United States over the course of the twentieth century: the country's rise from regional player to the world's dominant power. One would imagine that such a shift would have significant implications for the structure and organization of the constitutional state.

In this Essay, I defend the importance of the *Insular Cases*—and the events that surrounded them—to American constitutional development. I do so by contesting the heavily formalistic anti-imperial reading of the American legal-political structure and by situating transformations in imperial practice at the center of constitutional life. This analysis draws from some of my other work, particularly my readings of the decisions in a previous book, *The Two Faces of American Freedom*,[11] and in a forthcoming book, *Rise of the Constitution*.[12] Part I begins by demonstrating the deeply imperial dimensions of much of the anti-annexationist argument during the *Insular Cases*. In reality, the central debate at the time was not whether to become an "empire," but rather the extent to which the existing terms of settler-colonial expansion were compatible with twentieth-century realities. Part II then explores how defenders of global assertiveness, including on the Supreme Court, viewed greater discretionary authority in the central state as a significant legal-political mechanism for both preserving and adapting classic notions of American external power. Part III continues by highlighting how the *Insular Cases*—and the events in the Philippines surrounding them—provide an essential transitional moment in imperial logic, setting the stage for the American Century. Finally, in conclusion, I offer two reflections on what the preceding analysis suggests about the relationship today between colonialism and American constitutionalism, as well as about the study of constitutional law.

I. SETTLER EMPIRE AND CONTESTING VISIONS OF AMERICAN POWER

Above all, the reason why the *Insular Cases* should be an essential component of constitutional-law instruction is because engagement with them highlights the structuring nature of empire for American legal institutions and ideology. In order to appreciate this, it is essential to first take a step back and recognize the extent to which the long American experience can best be understood as that of a settler society.[13] From the earliest days of colonization, what would become the

11. AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM (2010).

12. AZIZ RANA, RISE OF THE CONSTITUTION (forthcoming 2020).

13. *See* RANA, *supra* note 11, at 8 ("Technically, settler societies are characterized by substantial and long-lasting imperial populations, which seek to transplant home country ways to the new environment.").

United States was above all an outpost Anglo-European rule in the non-European world—sharing many qualities in common with projects like the French in Algeria or the English in Ireland, Australia, and South Africa.

In fact, American commentators often view aspects of national history to be uniquely homegrown, when in fact they are present to varying degrees in numerous other settler societies. Among others, these qualities include greater equality within the settler colony than in the imperial metropole or home country; a cultural sense of being "chosen" as a racial, ethnic, or religious community for a historical mission; a greater emphasis on militarism due to perceived threats from indigenous and foreign populations; and, finally, a wariness of metropolitan social and political customs which are depicted at times as corrupt or decadent.[14]

But what made the American variation distinctively imperial—why I have referred to the United States as a "settler empire"[15]—concerns the essential role of continuous territorial conquest to internal economic and political development. Anglo-European settlers carried to North America a belief that the guiding ideological purpose of the national project was to make widely available to insiders a vision of freedom involving participatory political structures and broad access to land and property.[16] All of this underscored the extent to which settlers took for granted that their legal and political institutions were meant to do two things simultaneously. First, they were supposed to provide racially-defined members with the emancipatory conditions of self-government and economic independence. And second, to support this overarching project, these institutions were designed to extract much-needed land and labor from Native and nonsettler groups, in the latter case particularly enslaved African persons and their descendants.[17] This meant that European Americans long presumed that the basic engine of internal republican freedom and economic prosperity was

14. For more on historical examples and the common traits of transplanted settler communities, see generally EXCLUSIONARY EMPIRE: ENGLISH LIBERTY OVERSEAS, 1600-1900 (Jack P. Greene ed., 2010); LISA FORD, SETTLER SOVEREIGNTY: JURISDICTION AND INDIGENOUS PEOPLE IN AMERICA AND AUSTRALIA, 1788-1836 (2010); MICHAEL MANN, THE DARK SIDE OF DEMOCRACY: EXPLAINING ETHNIC CLEANSING (2004); LORENZO VERACINI, SETTLER COLONIALISM: A THEORETICAL OVERVIEW (2010); PATRICK WOLFE, TRACES OF HISTORY: ELEMENTARY STRUCTURES OF RACE (2016); and Caroline Elkins & Susan Pedersen, *Settler Colonialism: A Concept and Its Uses*, *in* SETTLER COLONIALISM IN THE TWENTIETH CENTURY 1 (Caroline Elkins & Susan Pederson eds., 2005). For more on the specific limitations of traditional historical and theoretical scholarship on American political identity, see especially JODI A. BYRD, TRANSIT OF EMPIRE: INDIGENOUS CRITIQUES OF COLONIALISM (2011); and GLEN SEAN COULTHARD, RED SKIN, WHITE MASKS: REJECTING THE COLONIAL POLITICS OF RECOGNITION (2014).

15. RANA, *supra* note 11, at 3.

16. *Id.* at 50-55.

17. For an overview of the ideologies of the American settler empire, see *id*. at 12-14.

territorial growth and, therefore, Indigenous conquest. Indeed, conquest was often embraced as the key social experience cohering disparate European migrants into a single people. For the famed early twentieth-century historian Frederick Jackson Turner, "[m]ovement" was nothing less than the "dominant fact"[18] of the American experience, a point Teddy Roosevelt echoed even more pointedly when he declared, "The winning of the West was the great epic feat in the history of our race."[19]

Crucially, rather than undermining the settler imperial dynamics of collective life, the fact that all territory was supposed to be on a path to statehood highlighted them. The U.S. settler empire was systematically organized around efforts to claim Indigenous territory exclusively for insider communities, with territory repeatedly described as virgin or empty.[20] Moreover, as historians Caroline Elkins and Susan Pedersen note, the primary approach to the local population was driven less by the desire "to govern [I]ndigenous peoples or to enlist them in their economic ventures than to seize their land and push them beyond an ever-expanding frontier of settlement."[21] This fact partly explains why Americans today rarely conceive of themselves as "settlers."[22] As scholar Patrick Wolfe notes, the basic logic of U.S. settler ideology was not the exploitation of Indigenous groups, but rather that of Native elimination.[23] This elimination did not merely take the form of violence against local communities or the dissolution of Indigenous political and economic practices.[24] It also meant that settlers sought to replace Native society as such and to "erect[] a new colonial society on the expropriated land base."[25] The vision of Indigenous territory as empty land was part and parcel of settler efforts to transform themselves into 'Natives' and to escape the very category of colonialism.

Thus, the formal presumption that all territory should eventually become a state in the Union was constitutively joined to this effort to demographically transform the North American landmass. As new land was settled by Anglo-Europeans and fully incorporated — economically and culturally — into the broader

18. FREDERICK JACKSON TURNER, THE FRONTIER IN AMERICAN HISTORY 37 (1986).

19. Theodore Roosevelt, *Manhood and Statehood*, *in* THE STRENUOUS LIFE: ESSAYS AND ADDRESSES 245, 254 (1902).

20. *See* RANA, *supra* note 11, at 33-37.

21. Elkins & Pedersen, *supra* note 14, at 2.

22. *See generally* Aziz Rana, *Colonialism and Constitutional Memory*, 5 U.C. IRVINE L. REV. 263 (2015).

23. Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RES. 387, 387 (2006).

24. *Id.* at 388.

25. *Id.*

society, it gained equal legal status. This process both ensured internal political equality and participation to those included as insiders, as well as the steady displacement of Native peoples. For our purposes, all of this also underscores the profound limits of the traditional way of reading the *Insular Cases*—namely as a legal debate between anti-annexationists who were anti-imperialists and pro-annexationists who were pro-imperialists. Under this reading, anti-annexationists were opponents of the American empire as such because they "rejected the notion of the United States as a country that could conquer territory and govern it indefinitely at the behest of Congress."[26] Yet, this scholarly interpretation obscures the extent to which the formal presumption of statehood was itself a central feature of how decentralized settler control over Indigenous land proceeded. In other words, as an anti-annexationist, it would be perfectly consistent to oppose overseas expansion through congressional discretion and nonetheless strongly back Native expropriation, ethno-racial hierarchy, and the established terms of the existing settler empire.

Indeed, the extent to which formally equal territorial status was closely bound to a demographic and legal-political project of white-settler supremacy is highlighted by the fact that Chief Justice Roger Taney's 1857 opinion in *Dred Scott v. Sandford* was perhaps the defining nineteenth-century judicial expression of the claim that the Constitution must follow the flag.[27] Today, *Dred Scott* is remembered as the Supreme Court's reviled defense of slavery and racial subordination. Chief Justice Taney infamously wrote of the legal status of Black people: "They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect."[28] Thus, Taney declared that African Americans, whether or not enslaved, were entirely outside the state's social compact and that the settler political community maintained an inherent and complete power to control them as a dependent population.

But crucially, Taney's opinion defended racial subordination in part through claims that Congress did not enjoy discretionary power in the territories and was instead bound by constitutional constraints. The case itself raised the constitutionality of the Missouri Compromise, which prohibited slavery in the northern portion of the Louisiana Purchase. According to Taney, the Compromise was il-

26. Levinson, *supra* note 10, at 256.

27. 60 U.S. (19 How.) 393 (1857).

28. *Id.* at 407.

legal because the Constitution extended to all the territories and denied Congress the power to outlaw slavery.[29] As the Court declared, while the Constitution granted Congress the power to govern the territories as the necessary by-product of acquisition, this 'implied' authority had to be exercised in keeping with constitutional norms and did not allow for the plenary prohibition of slavery.[30] Since enslaved persons were deemed private property, congressional interference with slaveholding rights amounted to an infringement of the white settler's Fifth Amendment Due Process Clause.[31]

In effect, the idea that the Constitution followed the flag combined a critique of colonial dependencies with an aggressive defense of racial domination. The worry with giving Congress such unchecked power was not about what it might mean for nonwhite peoples on newly acquired land, whether Black workers or Indigenous peoples. Rather, Taney's fear concerned how such power could undermine established methods of settler expansion. These methods required equal statehood and limits on congressional authority *precisely* to preserve local white demographic and political supremacy over the project of territorial conquest and settlement. The classic presumption of eventual statehood assumed that no new possessions were to be incorporated on a permanent footing of inequality. But this view about the formal status of a territory did not mean that effectively conquered or dependent populations were treated as equals. For outsider groups, like enslaved workers or Native communities, settlers followed the example of other European empires and established complex and stratified modes of colonial rule over subject groups—all to the end of protecting settler land interests and political control.[32]

Indeed, a key reason to read the *Insular Cases* is the extent to which they highlight precisely the settler-imperial politics of longstanding territorial practices. This is because a driving focus of many anti-annexationists—legal opponents of global expansion—was that overseas empire was actually a break from settler practices of colonization. The earlier wave of continental empire remade North America as a white society, dispossessing Indian nations and steadily incorporating new land into the Union on grounds of equal statehood.[33] New possessions like Hawaii, given its smaller Indigenous population and significant white-settler presence—already nearly twenty percent of the overall population

29. *See id.* at 455, 464.

30. *Id.* at 450-51.

31. *Id.*

32. For more on *Dred Scott* as the culmination of a settler legal imagination with respect to expansion and membership, see RANA, *supra* note 11, at 167-72.

33. For more on the law and practice of North American settlement, see generally *id.* at 99-175.

in 1900[34]—could one day be incorporated on these classic expansionist terms. But most overseas territories, especially vast and distant ones with large, diverse populations, simply would never be colonized in this way due to the impossibility of extensive American migration. Writing in the *Harvard Law Review* in 1898, Carman Randolph was particularly worried about the implications of the Philippines for granting Congress the power to hold distant territories as formal dependencies. Maintaining the Philippines as a colony entailed ruling over a racially distinct people under conditions in which the territory could not be transformed demographically—and therefore politically—into a truly white polity. As he concluded, "[t]he United States . . . ought not to annex a country evidently and to all appearances irredeemably unfit for statehood because of the character of its people and where climactic conditions forbid the hope that Americans will migrate to it in sufficient numbers to elevate its social conditions and ultimately justify its admission as a State."[35]

Above all, what such arguments underscored was the extent to which, for many anti-annexationists, their opposition stemmed not from a rejection of empire per se. Rather, those like Randolph worried about how global expansion threatened American racial identity and actually cut against established frameworks of conquest. To further drive home the point, the central Supreme Court decision that critics of annexation relied on to question the constitutionality of colonial dependencies was none other than *Dred Scott*. Chief Justice Melville Fuller, a longtime Democratic Party figure and the 1860 campaign manager for Stephen Douglas, made *Dred Scott* a centerpiece of his own dissent in 1901's *Downes v. Bidwell*, quoting extensively and positively from Taney's opinion.[36] For modern readers, the idea that decades after the Civil War, Justices would still be citing *Dred Scott* as good precedent may come as a shock. But the use of *Dred Scott* by Chief Justice Fuller, who too had been part of the "separate but equal" majority in the Supreme Court's 1896 *Plessy v. Ferguson* decision,[37] speaks to how anti-annexationism often reinforced—rather than subverted—entrenched racial hierarchies. For Fuller, giving Congress the power to establish different legal regimes for different territories created the potential, as Taney had feared, that white settlers would be subject to discretionary violence if they moved overseas. And keeping these possessions potentially undermined the ethno-racial assumptions about who was properly American at all.

---

34. *The Population of Hawai'i by Race/Ethnicity: U.S. Census 1900-2010*, NATIVE HAWAIIAN DATA BOOK, www.ohadatabook.com/T01-03-11u.pdf [https://perma.cc/5FJ3-94AN].

35. Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291, 304 (1898).

36. 182 U.S. 244, 360-61 (1901) (Fuller, C.J., dissenting).

37. 163 U.S. 537 (1896).

II. CONSTITUTIONALIZING GLOBAL EXPANSION

Ultimately, the *Insular Cases* marked the legal defeat of the classic approach to territorial settlement and government. But again, they should not be thought of as a temporary victory of imperialism over the longstanding tradition of American anti-imperialism. Significantly, supporters and even many opponents of overseas annexation imagined themselves as carrying on the settler project. Such opponents tended to emphasize the necessity of actual settlement and demographic transformation — and therefore the related belief that the Constitution should follow the flag. Supporters focused instead on the motivating reasons behind continental imperial expansion, especially goals of internal economic prosperity and independence. In this way, they also saw themselves as preserving the driving settler mission, but at a moment of real ideological and structural transition in the United States.

For pro-annexationists and defenders generally of global power, established settler practices no longer addressed the problems of the times. By the turn of the twentieth century, the closing of the frontier meant that there were no new Native lands to claim and thus soon no new property to divide among those included as settlers. At the same time, the rise of industrialization and corporate consolidation created a dramatically altered economic landscape, one that regimented work life and heightened class inequalities and, in the process, threatened key notions of self-rule and economic independence.[38] Pro-annexationists hoped that overseas interventionism would create a sense of shared purpose within settler society, something that internal class conflicts were increasingly undermining. At the same, a broader global footprint would ensure access to new markets, serving a function similar to that of earlier continental expansion. That footprint would provide outlets for American products and spur industrial growth, together facilitating internal economic prosperity.[39] Speaking on April 10, 1899 before the Hamilton Club in Chicago, Teddy Roosevelt highlighted how the new call to empire carried forward the country's earlier frontier expansionism, which had done so much to forge national identity. Although it might be impossible for Americans to settle other continents as they once did North America, he argued that European Americans through colonial rule in places like Puerto Rico and the Philippines could still do "our fair share of the world's work" and "strive in good faith to play a great part in the world."[40] Such actions would spur material progress at home, relieve domestic class pressure by turning con-

38. *See generally* RANA, *supra* note 11, at 176-235.

39. *See* RANA, *supra* note 12 (manuscript at ch. 3) (on file with author).

40. Theodore Roosevelt, *The Strenuous Life*, *in* THE STRENUOUS LIFE, *supra* note 19, at 6, 7.

flict outward, and ultimately provide Americans with the sense of national mission missing from collective life. All of this was consciously presented as an updating rather than a repudiation of the old settler principles, even if it required diverging from the one assumption that as a formal legal matter the Constitution must follow the flag.

By the time key *Insular Cases* like *Downes v. Bidwell* were decided at the Supreme Court, President William McKinley, a central public face of both the Spanish-American War and the annexationist position, had won reelection. The Court thus issued its opinions at a moment in which more and more politicians—not to mention the public generally—seemed to accept that the earlier settler account may no longer be tenable. Indeed, one can read the *Insular Cases* as embodying an emerging conventional wisdom of the need both for greater global authority and a new legal statecraft conducive to the flexible exercise of such power. Justice Edward White's concurrence in *Downes*, which over time became the constitutional law generally promulgated by these cases, underscored just such developments.

Justice White's concurrence[41] drew from an article also published in the *Harvard Law Review* by Abbott Lawrence Lowell that proposed an incorporation theory of territorial acquisition.[42] For White, the realities of American global possessions meant confronting anew perhaps the perennial issue historically facing collective life: how should the United States govern conquered and subordinated communities, who settlers—given their ethno-racial judgments—refused to include as equals within the political body? According to him, the United States's rise as an international power required a new adaptation, one that altered elements of the classic legal relationship between settlers, territorial governance, and colonized peoples. His solution was what became known as the incorporation theory. Justice White argued that treaties of annexation established either incorporated or unincorporated territories, the latter of which left to congressional determination the ultimate status of the new possession. This allowed the political community to assess which conquered lands should be treated as integral to the United States and worthy of full constitutional equality and which should be held indefinitely as colonial dependencies.

In essence, Justice White revised the basic settler account of how territorial governance and imperial subjectship fit together. Under the classic terms of settler empire, since Anglo-European colonists would eventually claim the land on the frontier, any period of congressional oversight had to be limited and the new

41. *See Downes*, 182 U.S. at 307-08 (White, J., concurring).

42. *See* Abbott Lawrence Lowell, *The Status of Our New Possessions—A Third View*, 13 HARV. L. REV. 155 (1899); Sam Erman, *Accomplices of Abbott Lawrence Lowell*, 131 HARV. L. REV. F. 105 (2018).

territory eventually incorporated as a state on equal footing. At the same time, such oversight nonetheless could be applied indefinitely to nonsettler communities — those imperial subjects organized by whichever structures of authority were most conducive to order. Now, however, white settlement was not an option with overseas possessions, and consequently the premise of equal territorial treatment no longer held. This meant that — just as its nonwhite population could be ruled as dependent subjects — the territory as a whole could be shaped based on internal needs by a discretionary congressional authority. In this way, White extended the basic colonial duality in American life — between settlers and nonsettlers — to territorial governance itself.

But critically, White accepted the anti-annexationist worry that creating permanent dependencies across the nonwhite world may overstretch the state and even undermine the ethno-racial identity of the American polity. For this reason, he was also increasingly concerned with how the Court could establish constitutional arrangements that provided a workable framework for the end of U.S. rule in a particular colony, once U.S. interests and regional stability were assured. Here again, incorporation theory provided a much-needed legal-political path forward. It created a legal regime by which the United States could hold unincorporated territories until the need for imperial supervision waned and local sovereignty could be reestablished on grounds consistent with the internal goals of American settler society.[43] No doubt thinking as well of the Filipino example, White reasoned, "Would not the war, even if waged successfully, be fraught with danger if the effect of occupation was to necessarily incorporate an alien and hostile people into the United States?"[44]

For White, this ultimate decision about whether to incorporate new possessions was a question best left to the political branches as they pursued the nation's goals on the world stage. If the judiciary were to declare conquered land "incorporated," this would undermine Congress's ability to decide later that permanent inclusion and full constitutional protections were inappropriate. In his view, the realities and needs of global expansion required both developing dual structures of territorial governance and providing the political branches the full capacity to make judgements about how to impose these structures. According to legal historian Christina Ponsa-Kraus, arguments about incorporation created a federal process for "territorial deannexiation."[45] They allowed Justice White to maintain the premise of constitutional protections within what he called the real

43. *See* Christina Duffy Burnett [Ponsa-Kraus], *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797 (2005).

44. *Downes*, 182 U.S. at 307-08 (White, J., concurring).

45. *See* Burnett [Ponsa-Kraus], *supra* note 43, at 799-800.

"American family"[46] of equal states, while holding colonial dependencies abroad during a period of necessary but hopefully finite tutelage. Again, White's constitutional adaptations carried forward the basic legal duality within settler institutions, separating between a protected realm of free internal citizens and a colonial one of dependent subjects. Yet, despite this consistency, White nonetheless rejected *Dred Scott*'s approach, with its single framework for territorial governance, as too inflexible; it was unable to meet new global needs and to ensure peace at the edges of a far-flung empire.

As a consequence, the *Insular Cases* are best viewed as setting the legal foundations for what would become a new vision of empire, one we today most closely identify with the American Century. As the next Part explores, this vision was both continuous with, and a break from, the settler past. Above all, what opinions such as Justice White's highlighted was that for the United States to effectively exercise a truly global presence it would need a far more systematically expanded and unconstrained central state. Thus, one way to read the *Insular Cases* as a whole is that they helped to set the course for this legal-political development: the *Downes* Court placed the capacities of the federal government on an equal footing with those exercised by imperial Europe. White and others concluded that the national government could legitimately claim all powers necessary for the application of global authority, including creating distinct regimes of territorial governance depending on political judgements about order and security. The United States had always been an instantiation of European empire. Still, the conditions of settler colonization significantly differentiated the structure of American statecraft from that of European powers, emphasizing decentralized and local frontier management. But under the revised constitutional terms of the early twentieth century, there was little to distinguish either the global ambitions or the expansionist legal frameworks guiding the United States from those of Britain or France.

III. THE TURN TO AN INCLUSIVE POLITICS OF AMERICAN PRIMACY

Engaging with the *Insular Cases* thus provides critical insights into central transformations in settler ideological and institutional practice during the early twentieth century. But beyond that, it also allows us to appreciate how basic constitutional adjustments helped set the stage for the increasingly dominant form of American power in the twentieth century—what I call U.S. imperial primacy. Today, U.S. citizens tend not to see their country in a story of demographic displacement and settler conquest. They also do not understand themselves as overseeing a global set of colonial dependencies. In many ways, this is because of the

46. *Downes*, 182 U.S. at 339 (White, J., concurring).

set of ideological choices made by governing elites about the basic direction of power in the wake of both the Spanish-American War and the *Insular Cases*.

As Justice White himself noted, while it might be politically necessary for the federal government to have the discretionary power to pursue a global footprint, this did not mean that it was always strategically wise to maintain foreign colonies. Indeed, more and more defenders of annexation, including to some extent Teddy Roosevelt himself,[47] concluded that actually trying to replicate Britain or France would be unwise. To begin with, the United States had appeared on the global stage at a decidedly late moment, after the most valuable colonial possessions had already had been claimed. This fact limited the usefulness of direct possessions as a symbol of national power or as a means for asserting American global dominance. Moreover, the experience of actually trying to hold dependencies following the Spanish-American War also cautioned against future colonizing adventures.

Atrocities on both sides marred the fighting in the Philippines, with the American army resorting to the large-scale use of torture as well as the construction of "reconcentration camps."[48] Rural populations were forcibly garrisoned as part of what historian Paul Kramer describes as a policy aimed at "the deliberate annihilation of the rural economy"[49] through "the destruction of villages," "the burning of rice stores," and "the killing of livestock"[50]—all of which led to mass starvation, disease, and death. Stories about the U.S. Army's atrocities circulated throughout the American press and even led to a Senate investigation initiated by Massachusetts Republican George Frisbie Hoar in the first half of 1902.[51] The result was an environment at home in which critics like Mark Twain, who had always been wary of annexation, wondered aloud, "why[] we have got into a mess, a quagmire from which each fresh step renders the difficulty of extrication immensely greater."[52] To underscore the point, Roosevelt's declaration of an end to hostilities was itself in Kramer's words, "a beleaguered fiction that broke down

47. *See* KRAMER, *supra* note 3, at 356–57. Roosevelt even came to believe that the annexation of the Philippines was a folly. He privately remarked that the colony had become the American "heel of Achilles." *Id.* at 356.

48. *Id.* at 152.

49. *Id.*

50. *Id.* at 157.

51. *Id.* at 146.

52. *Mark Twain, the Greatest American Humorist, Returning Home, Talks at Length to the World*, N.Y. WORLD, Oct. 14, 1900, at 3, *reprinted in* MARK TWAIN: THE COMPLETE INTERVIEWS 351 (Gary Scharnhorst ed., 2006).

in unflattering reversals: by 1905, parts of the provinces of Batangas, Cebu, Bohol, Samar, Cavite, and Albay would be returned to military authority due to continued Filipino resistance."[53]

In a sense, this reality spoke not only to the United States's late arrival as a colonial power but also to the increasingly transformed nature of international relations at the dawn of the twentieth century. The era witnessed the beginning of sustained anticolonial resistance across the globe, of which events in the Philippines embodied only one example. As the great African American activist, writer, and critic W.E.B. Du Bois declared of the new age, "T[he] problem of the twentieth century is the problem of the color-line,—the relation of the darker to the lighter races of men in Asia and Africa, in America and the islands of the sea."[54] What Du Bois presaged was the coming demise of formal colonial empires, a development that defined the world order by the mid-century. But even at this earlier moment, nonwhite political assertiveness emphasized the pitfalls of being ensnared in expensive and costly colonial wars.

In this way, global realities suggested a new mode of international engagement. Rather than directly controlling territory, the United States would assert constant economic and military power abroad. It would open new markets for American domestic goods and intervene wherever chaos supposedly threatened U.S. interests. Over time, it became increasingly clear that such primacy—within the Western Hemisphere and then eventually across the world—did not require extensive colonial dependencies and was justified in the name of global self-government and stability. It drew from classic European colonial discourses the notion that American supervision and tutelage was essential to the proper exercise of local self-rule. The thought became that the United States, even if not formally the political sovereign, nonetheless provided a benevolent hand steering weaker and later decolonizing nations in peaceful and prosperous directions.

Crucially, this transition in imperial understanding had two striking effects. To begin with, it cast American power in a far more inclusive light than the traditional terms of settler politics. Defenders of global expansion had been confronted at home by anti-annexationist arguments premised on race and xenophobia. And abroad, they increasingly faced a rising nonwhite world profoundly opposed to explicit white supremacy.[55] All of this led politicians and government officials to stress the universal benefits of American primacy—the commitment to a world order of formally sovereign and equal polities. And for the United

53. KRAMER, *supra* note 3, at 154.

54. W. E. BURGHARDT DU BOIS, THE SOULS OF BLACK FOLK: ESSAYS AND SKETCHES 23 (Fawcett Publications 1961) (1903).

55. *See generally* RANA, *supra* note 12 (describing the antiracist politics of twentieth-century independence movements across Asia and Africa).

States to create such a world — of self-governing, constitutionally-respectful, and capitalist nation-states — as Justice White himself implied in *Downes*, war-making and coercive control could not be lasting features of the international order. Of course, the stated commitment to local sovereignty did not mean that expansionists were unprepared for tutelage to fail and thus for American authority to reassert itself on the ground. Still, the logic of U.S. power — the focus on establishing liberal constitutionalism and market capitalism — as well as both global realities and the stringent ethnonationalism of domestic opponents shifted the emphasis toward a more inclusive international vision.

Second, this transition in imperial understanding made the previous debates over annexation moot. As the twentieth century proceeded, both sides, by and large, could agree on the aim of American power, which involved imposing order on a disordered globe, and on its means, consisting of economic expansion as a general rule and the application of military force where necessary. In many ways, governing elites increasingly saw the future of American global power as an extension of the long-standing Monroe Doctrine, introduced in 1823 by President Monroe during his seventh State of the Union Address to Congress.[56] Under the doctrine, any attempts by European states to colonize land in the Americas or to develop spheres of influence would be seen by the United States as acts of aggressions justifying intervention. This foreign-policy approach sought to undermine two checks on American power in the region. The first was the continuing commitment of European empires to sustain an economic and political monopoly over Latin America. The second consisted of efforts by local governments to close their doors to U.S. business or to limit external supervision of their economies. In effect, the Monroe Doctrine imagined American imperium as an economic and military sphere of influence, in which international stability was profoundly wedded to the promotion of American commerce with non-European societies.

During much of the nineteenth century, this account of economic expansionism stood side-by-side with the more dominant picture of empire as settler conquest. Yet, with the end of the frontier and in the context of destructive efforts to create formal dependencies (especially as illustrated in the Philippines), the Monroe Doctrine increasingly articulated the rise of American global assertiveness. It came to be associated with an "open door" foreign policy, and especially with Secretary of State John Hay's 1899 and 1900 notes on U.S. relations with

56. For more on the Monroe Doctrine and its twentieth-century variation, see RANA, *supra* note 11, at 284-90; and 2 JAMES TULLY, PUBLIC PHILOSOPHY IN A NEW KEY: IMPERIALISM AND CIVIC FREEDOM 133 (2008). *See generally* ERNEST MAY, THE MAKING OF THE MONROE DOCTRINE (1992) (exploring how domestic politics dictated the content, creation, and meaning of the Monroe Doctrine).

China.[57] It also underscored a critical new logic for American interventionism. Since capitalist markets required specific institutional arrangements in non-European countries, continual interference to transform local societies into mirror images of the United States were justified.[58] The United States therefore enjoyed an international police power to replace existing modes of authority with institutional structures marked by centralized political and economic power, private property, and wage labor.

In a sense, the American imperial experiment in Puerto Rico and the Philippines (not to mention Guam and other territories) became both a model for the future as well as the historical artifact more commonly presented. On the one hand, U.S. officials chose not to pursue further colonial possessions. But on the other hand, the 1898 experience spoke to the importance of imagining American power in terms of creating a stable world of self-governing republics. And the *Insular Cases* were a significant moment in constitutionalizing an aggressive foreign policy organized through a centralized state. They bestowed on the federal government far greater discretionary power. While *Downes* largely located such power in congressional hands,[59] the practice of continuous and increased interventionism steadily shifted this authority to the presidency. In effect, the new imperial politics of American primacy laid the groundwork for an expansive executive, which could act flexibly abroad to quell disorder and impose capitalist democracy. Eventually, against the backdrop of World War II and the Cold War, the perceived need for permanent action led to the entrenchment of a massive new national security framework, complete with a peacetime structure for gathering intelligence, the elevation of the policymaking responsibility of military officers, and the dramatic growth of executive agencies tasked with issues of defense.[60] As a result, by the mid-twentieth century, an increasingly unified administrative apparatus had replaced the relatively decentralized institutions of nineteenth century settler expansion. If the United States did not possess a European-style colonial empire, it nonetheless developed an analogous bureaucratic infrastructure in pursuing its own global ambitions.

---

57. For more on the connections between the Monroe Doctrine and the idea of an "open door," see William Appleman Williams's still-foundational text, THE TRAGEDY OF AMERICAN DIPLOMACY (1959).

58. RANA, *supra* note 11, at 284-90.

59. 182 U.S. 244, 286 (1901).

60. *See* DOUGLAS T. STUART, CREATING THE NATIONAL SECURITY STATE: A HISTORY OF THE LAW THAT TRANSFORMED AMERICA 7-9 (2008) (summarizing the goals and results of the 1947 National Security Act).

CONCLUSION: IMPLICATIONS FOR CONSTITUTIONAL POLITICS AND CONSTITUTIONAL STUDY

Returning to the *Insular Cases* thus provides two critical insights about the nature of the American constitutional project and about how constitutional law has largely been studied in recent decades. On the constitutional project more generally, to the extent that commentators engage with the settler-colonial past, the overwhelming tendency is to treat this past as a previous historical period. Slavery and land expropriation may have been evils from an earlier era, but, especially over the course of the twentieth century, American legal practice and political identity fundamentally shifted to that of a more liberal and inclusive nation. There may be sins that have to be addressed, but, under this view, it is a basic mistake to think of the country still in settler terms.

Such a profound shift no doubt has occurred, and the United States of today is not the United States of the nineteenth century. Nonetheless, the *Insular Cases* highlight the deep continuities between the presumptive settler past and civic present. The legal decisions and political events around the Spanish-American War and the war in the Philippines offer critical connective tissue between the two defining logics of American empire — settler conquest and global primacy. They highlight how, as the basic ideological and institutional terms of American life changed, these changes still projected into the future key elements of the settler foundations. There are populations that continue to this day to experience direct colonial subjugation, from Native peoples throughout the country to local communities specifically in the territories. The post-1898 debates around annexation and the meaning of American international authority also illustrate continuities — even under profoundly revised ideological terms — with respect to who actually wields economic, political, and cultural power. For all the changes, the *Insular Cases* and the emerging terms of global assertiveness spoke to how classically privileged American insiders were able to preserve their basic institutional status within the society — one that increasingly embodied a completed settler project — while at the same time asserting greater dominance abroad. This means that those two driving logics of empire cannot be thought of as distinct historical periods: colonial settlement followed by the American Century. They are deeply interlinked and fold into one another rather than marking clear breaks or ruptures in time.

Indeed, one way to think about the persistence of Puerto Rico and other territories as colonial dependencies even in the twenty-first century is that they emphasize how the country's driving legal and political identity may have shifted from a settler to a liberal or civic nation, but the roots still persist. As protests in

the summer of 2020 underscore,[61] the country has never properly confronted its colonial infrastructure or its imperial legacies, whether at home or abroad.[62] Thus, any frank engagement with the nation's constitutional project requires a colonial assessment. As a matter of constitutional reform, this means ending the colonial status of all the existing territorial dependencies, in line with the genuine political desires of local and self-determining communities. More generally, what is needed in the present is a constitutional conversation that includes the types of policies that have been the heart of independent movements abroad—from sharing sovereignty with Native peoples and land return to reparations, systematic wealth redistribution, structural reforms to state security and policing apparatuses, truth commissions, and providing judicial avenues for the remedy of colonial crimes. These concluding paragraphs are not the appropriate setting to assess the practicality or wisdom of each of the above policies, let alone the particular form that they could take. But, for our purposes, what is interesting is that such reforms—alongside the writing of new constitutions entirely—have been essential to the constitutional politics of anticolonial struggles elsewhere.[63] Yet, only at rare moments[64]—whatever the potential problems of transplantation from the Global South to the U.S. context—have any of these reforms even been genuinely discussed in this country. Moreover, the main thrust of American constitutional study largely ignores all of them as relevant to the conceiving of the legal-political order.

Therefore, the effort to link American constitutionalism and the American empire necessarily also requires assessing the field of constitutional law itself. In

---

61. *See generally* Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/Q59W-5D3W].

62. *See, e.g.*, Rana, *supra* note 22, at 264-69; Aziz Rana, *Race and the American Creed: Recovering Black Radicalism*, N+1 MAG., Winter 2016, https://nplusonemag.com/issue-24/politics/race-and-the-american-creed [https://perma.cc/9XLU-WF7R].

63. Productive comparative case studies in two different settler settings are South Africa and New Zealand, countries that have each struggled with what an actual colonial accounting might entail. On South Africa, see generally GARY JEFFREY JACOBSOHN, CONSTITUTIONAL IDENTITY 117-25 (2010); Makau wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 81-83 (1997); and the edited volume *After the Thrill Is Gone: A Decade of Post-Apartheid South Africa*, 103 SOUTH ATLANTIC Q. 589 (2004), which helpfully explores the constraints on genuine anticolonial transformation, even in contexts of explicit rupture and conscious decolonization. On New Zealand, particularly the legal-political recovery of the 1840 Treaty of Waitangi between the Crown and the Indigenous community for contemporary purposes, see generally CLAUDIA ORANGE, THE TREATY OF WAITANGI 246-54 (1987).

64. For attempts by Black radical organizations like the Black Panthers to place anticolonial accounting on the political agenda, see, for example, Rana, *supra* note 22, at 277-86.

many ways, the modern field is deeply bound up with the rise of the United States to superpower status. For much of American history, law schools did not treat the study of the U.S. Constitution as an important part of their curriculum, let alone their mission. Harvard Law School Dean Christopher Columbus Langdell's curricular and pedagogical model, which spread in the late nineteenth century and became the standard across elite law schools, focused especially on private common law—subjects like contracts, torts, and property—through a case-method analysis of appellate judicial decisions. If offered at all, constitutional law was almost always an upper-level elective.[65] It was only in the late 1920s and 1930s that constitutional law became a required course at most law schools.[66] This move was part of a general recognition of the centrality of the modern administrative state to legal practice, and so went along with a growth in public law offerings as a whole, particularly administrative law.[67] But even so, given law school's primary focus, "Legal luminaries during the first half of the twentieth century, Roscoe Pound . . . , Karl Llewellyn . . . and others," as Mark Graber notes, were "best known for their writings" on private common law subjects, and "[t]he most celebrated work of legal scholarship during the decades before the Second World War, Benjamin Cardozo's *The Nature of the Judicial Process* (1921), [was] devoted almost entirely to how justices make decisions in nonconstitutional cases."[68]

In fact, it was only during the Cold War that the constitutional scholar emerged as perhaps the law school's preeminent public face. As Graber writes of the contrast before and after World War II, "Legal luminaries during the second half of the twentieth century [were] best known for their constitutional analysis" with "virtually all law professors with any name recognition outside of law . . . scholars of" the Constitution.[69] As I explore in *Rise of the Constitution*,[70] there were various reasons for this development. Among them, public constitutional discussion and analysis increasingly moved from a matter of institutional

65. *See* ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 40 & 49 n.43 (Lawbook Exchange 2001) (1983); Richard K. Neumann, Jr., *Osler, Langdell, and the Atelier: Three Tales of Creation in Professional Education*, 10 LEGAL COMM. & RHETORIC 151, 172 (2013).

66. Neumann, *supra* note 65, at 172.

67. See Robert W. Gordon, *The Geologic Strata of the Law School Curriculum*, 60 VAND. L. REV. 339, 350 (2013).

68. Mark A. Graber, *Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship*, 27 LAW & SOC. INQ. 309, 318 (2002) (reviewing LUCAS A. POWE, THE WARREN COURT AND AMERICAN POLITICS (2000)).

69. *Id.*

70. *See generally* Rana, *supra* note 22 (exploring the modern rise of constitutional veneration in the twentieth century—especially against the backdrop of growing American global authority—and how veneration has influenced the boundaries of popular politics).

design—whether to drastically reform the judiciary or have a Senate at all—to a relatively narrow concern with court cases and textual interpretation, the natural expertise of the lawyer. But one of the features of this shift was that the field gained preeminence within the legal academy at just the time that the United States consolidated its own global standing as a world hegemon. And not surprisingly, the constitutional law professor that came of age during the early Cold War tended to take as given and even to embrace the existing terms and overall legitimacy of this hegemony.

Thus, it is not just that constitutional practice needs to assess the broader society's colonial infrastructure. To the extent that scholarship remains bound to the analysis and disputes of Cold War constitutional theory, moving beyond those constricting parameters is equally key. This means that constitutional law must expand its "canon,"[71] as Sanford Levinson called for two decades ago, to cases that highlight the continuing imperial logics of collective life. But in a sense, the present moment—marked by institutional dysfunction and popular discontent—speaks to the need for scholars to approach their work with far greater creativity than simply adding new cases at the margins. The field must engage with matters well beyond the debates driven by twentieth-century judges and the conditions that Cold War constitutional theory—and by extension the American Century—set for "judicially managed reform."[72] We currently have a mode of constitutional study that largely takes for granted the version of U.S. legal-political design and the rights discourse cemented during the American Century. It rarely reflects on, especially in the classroom, how either came to be and mostly treats established structures as almost natural and inevitable political objects. Of course, constitutional scholars have a responsibility to teach students how to operate as lawyers in a courtroom and thus on the terms presented by the existing law. But to a profound extent, constitutional law is not just the technical training of lawyers. It has also become a central repository for the country's broader cultural memory and consciousness about its legal-political processes and institutions.

This latter reality underscores the need for a new mode of analysis, one no longer the product of that very American Century and so capable of critically assessing existing institutional and ideological terms. What is the actual relationship between the structure of the constitutional state and the exercise of colonial rule at home and abroad? What are the strengths and limitations of judicially-managed reform as a mechanism for actual colonial accounting? Despite the fact that the study of the Constitution is supposed to be about foundational

71. Levinson, *supra* note 10.

72. SANFORD LEVINSON & JACK M. BALKIN, DEMOCRACY AND DYSFUNCTION 12 (2019).

matters of legal-political life, in truth fundamental questions about the basic organization of American state and economy have played only a minor role in the mainstream of the field. Any serious grappling as a constitutional matter with the realities of U.S. imperial power requires ending this evasion once and for all.

Aziz Rana is the Richard and Lois Cole Professor of Law at Cornell Law School. *Many thanks to Ayoub Ouederni and the editors of the* Yale Law Journal *for the invitation to join this Collection and for their excellent editorial assistance.*