

# THE YALE LAW JOURNAL

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## Truer U.S. History: Race, Borders, and Status Manipulation

*How to Hide an Empire: A History of the Greater United States*

BY DANIEL IMMERWAHR

FARRAR, STRAUS & GIROUX, 2019

**ABSTRACT.** In *How to Hide an Empire*, Daniel Immerwahr “storms the citadel” of U.S. history in a gripping retelling that places empire and its hiding at the heart of the American experiment. Aware that further absences also haunt U.S. history, he invites successors to catalog them to produce yet-truer histories of the United States. This Review takes up the invitation. It sketches out a legal history of race and borders in the United States in which indigeneity, race, slavery, and immigration join empire on center stage. Like Immerwahr’s, this history is of shameful and self-obscurating events. Unlike Immerwahr’s, it centers on the ways that law accomplished and hid the wrongs done. The crucial mechanism is “status manipulation,” a term in deliberate tension with itself. Status presents as a fixed, enduring legal classification that relates people and places to polities. By contrast, manipulation involves purposeful change. Hence, as used here, “status manipulation” combines apparent continuity and actual change as it achieves subordination from the shadows. Status is thus posed as immemorial and permanent despite always being constructed and reconstructed—an apt metaphor for a nation that has endlessly violated its ideals without rejecting them.

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## INTRODUCTION

Daniel Immerwahr's *How to Hide an Empire*<sup>1</sup> reached bookshelves during the 400th anniversary of the arrival of African slaves in Virginia.<sup>2</sup> It is a fitting coincidence for a book devoted to teaching Americans that their country has always been fundamentally imperial. Virginia of 1619 was a colony in the English empire. Its geographic bounds were measured in lands lost by the Algonquian.<sup>3</sup> Lifetimes would pass before the American Revolution, the United States, and the U.S. Constitution arose. Yet, here in utero, were the original sins of the United States: colonial modes of governance, racialized chattel slavery, and continental American Indian dispossession. It was empire that laid the foundation on which the United States would be built, notwithstanding the intervening revolt against British imperial rule. The ensuing near-quarter millennium has seen the United States emerge as both the world's longest-continuing national experiment in democracy and the planet's most powerful empire.

Immerwahr's aim is nothing short of placing the U.S. empire at the center of mainstream U.S. history. The project is ambitious, worthwhile, and successful. Making U.S. sovereignty and similar forms of U.S. control his touchstone, he "aims to show what U.S. history would look like if the 'United States' meant the 'Greater United States,'" not just the states and Washington, D.C.<sup>4</sup> By constitutional definition, these are places whose inhabitants are subject to a federal authority in which they have no formal governance role.<sup>5</sup> Racism underlies the second-class status. Immerwahr tells the story masterfully, mixing humor and poignancy with a sense of wonder into a gripping account.

And yet, . . . 1619.

While this is not a book that makes many mistakes, it is a book that does not do everything. Slavery is largely absent from Immerwahr's account, notwithstanding his ambition to produce a U.S. history that gives empire, racism, and borders their due. The lacuna is partly a result of his focus on lands outside of states. This focus leads to similarly limited attention to interrelated dynamics involving stateside racism, immigration, and the experiences of Indigenous

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1. DANIEL IMMERWAHR, *HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES* (2019).
  2. *The 1619 Project*, N.Y. TIMES (Sept. 4, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html> [<https://perma.cc/N8MR-GMZG>].
  3. ETHAN A. SCHMIDT, *THE DIVIDED DOMINION* 63-100 (2014).
  4. IMMERWAHR, *supra* note 1, at 16.
  5. See U.S. CONST. art. I, § 2, cl. 1; art. I, § 3, cl. 1; art. II, § 1, cl. 3; art. IV, § 3, cl. 2.

people who no longer hold territory. Also missing is sustained attention to the legal dynamics that thoroughly structure much of what Immerwahr describes. Unlike legal historians before and since,<sup>6</sup> Immerwahr lays emphasis elsewhere. He pays legal matters little mind.

It is a mark of the book's richness that Immerwahr welcomes critics to "identify various omissions" that "can be collectively taken as a game plan for how the field might move forward."<sup>7</sup> His is a truer account with lofty and perhaps inevitably unfulfilled ambitions that create opportunities for yet-truer successors.

In that spirit, this Book Review sketches out a revised Immerwahr account, one that engages head on with the broader legal history of race and borders in the United States. Doing so requires starting with the original American sins: dispossession of American Indians and racial chattel slavery. Both haunt the national character still. Formal empire and immigration have also brought aliens within U.S. borders, and they too have been sites of racist exclusion.<sup>8</sup> In every case, law helped accomplish and hide the wrongs done. This is fitting, given that the American ideals of democracy, liberty, equality, and rule of law have also been key causes of willful national blindness to bad U.S. acts.

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6. For a multiregion sampling of recent and upcoming work in English, see generally FAHAD AHMAD BISHARA, *A SEA OF DEBT: LAW AND ECONOMIC LIFE IN THE WESTERN INDIAN OCEAN, 1780–1950* (2017); LI CHEN, *CHINESE LAW IN IMPERIAL EYES: SOVEREIGNTY, JUSTICE, AND TRANSCULTURAL POLITICS* (2015); MALICK W. GHACHEM, *THE OLD REGIME AND THE HAITIAN REVOLUTION* (2012); JESSICA MARGLIN, *ACROSS LEGAL LINES: JEWS AND MUSLIMS IN MODERN MOROCCO* (2016); MITRA SHARAFI, *LAW AND IDENTITY IN COLONIAL SOUTH ASIA: PARSİ LEGAL CULTURE, 1772–1947* (2014); WILL SMILEY, *FROM SLAVES TO PRISONERS OF WAR: THE OTTOMAN EMPIRE, RUSSIA, AND INTERNATIONAL LAW* (2018); Bianco Premo & Yanna Yannakakis, *A Court of Sticks and Branches: Indian Jurisdiction in Colonial Mexico and Beyond*, 124 *AM. HIST. REV.* 28 (2019); and ELIZABETH THORNBERRY, *IMAGINING AFRICAN LAW: BLACK INTELLECTUALS AND THE POLITICS OF CUSTOM IN SOUTH AFRICA, 1880–1927* (forthcoming). For compelling work focused on the United States specifically, see generally, among plentiful examples, LANNY THOMPSON, *IMPERIAL ARCHIPELAGO: REPRESENTATION AND RULE IN THE INSULAR TERRITORIES UNDER U.S. DOMINION AFTER 1898* (2010); Gregory Evans Dowd, *Domestic, Dependent Nations: The Colonial Origins of a Paradox*, in *BACKCOUNTRY CRUCIBLES: THE LEHIGH VALLEY FROM SETTLEMENT TO STEEL* 125 (Jean R. Soderlund & Catherine S. Parzynski eds., 2008); K-Sue Park, *Money, Mortgages, and the Conquest of America*, 41 *LAW & SOC. INQ.* 1006 (2016); and many sources cited *infra*.
  7. Daniel Immerwahr, *Response*, in *H-DIPLO ROUNDTABLE XXI-17*, at 16 (2019), <https://hdiplo.org/to/RT21-17> [<https://perma.cc/J3PF-SMHR>].
  8. A full account would also address the domestic racism that immigrants, colonial subjects, and their descendants have faced in the United States. For reasons of space, because of the special place of anti-Black racism in U.S. history, and because of my own need to devote further attention to the role of sex and gender in the dynamics that I describe, see *infra* note 107, this Review largely leaves other forms of domestic racism to future work.

A crucial mechanism in the shameful and self-obscurating U.S. history of race and borders has been what I term “status manipulation.” The term is in deliberate tension with itself. Status is a legal classification that relates people or places to politics while assigning them a condition or position. It indicates belonging (or its absence), carries official consequences, and generally presents as fixed and enduring. By contrast, manipulation involves purposeful change: the craftsperson’s triumph in transforming raw materials into beautiful and useful objects or the con artist’s malevolent genius at making the improbable appear certain.<sup>9</sup> While U.S. legal history is full of legal innovators who sought a better world, this Review’s focus is on oppressors who distorted law for objectionable ends. Hence, as used here, status manipulation combines apparent continuity and actual change to achieve subordination from the shadows. Status poses as immemorial and permanent despite always being constructed and reconstructed—an apt metaphor for a nation that endlessly violates its ideals without rejecting them.

### I. EMPIRE STORMS MAINSTREAM U.S. HISTORY.

Three arguments animate *How to Hide an Empire*: (1) The United States has always been an empire; (2) it has almost always obscured that reality; and (3) for the better part of a century, technology and standardization have allowed the United States to remain imperial while shedding distant lands. Immerwahr dramatically frames his first claim: “From the day the treaty securing independence from Britain was ratified, right up to the present, [the United States has] been a collection of states *and territories*. It’s been a partitioned country, divided into two sections, with different laws applying in each.”<sup>10</sup> Yet, this house divided has stood for centuries and received repeated additions. The U.S. imperial project has been stunningly successful at accruing global power. What began as a country pasted to North America’s eastern seaboard, barely able to establish and maintain independence, transformed into the world’s sole superpower.

The realization of America’s will to power came in stages: (i) the transcontinental empire, (ii) the noncontiguous empire, and (iii) the pointillist empire.

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9. These manipulations rest on indeterminacy in legal meaning. For a retrospective overview of the critical legal studies incarnation of the indeterminacy thesis, see Mark Tushnet, *Survey Article: Critical Legal Theory (Without Modifiers) in the United States*, 13 J. POL. PHIL. 99, 108 (2005). On empire and legal indeterminacy, see, for example, LAUREN BENTON & LISA FORD, *RAGE FOR ORDER: THE BRITISH EMPIRE AND THE ORIGINS OF INTERNATIONAL LAW, 1800-1850*, at 85-116 (2016).

10. IMMERWAHR, *supra* note 1, at 10.

The transcontinental empire stretched from the Founding through the closing of the frontier. During these years, white land hunger drove relentless expansion of U.S. borders and control across the continent. No matter that American Indians already occupied the lands; dispossession, betrayal, and extermination were tools ready to hand. The result was settler colonialism, as white settlers from the east slowly occupied and displaced (or killed) Indigenous inhabitants. As the nineteenth century wound down, U.S. control was firmly established from coast to coast.

Expansion of U.S. control over noncontiguous territories slowly began in the mid-nineteenth century, with the United States asserting exclusive rights to the resources of small, uninhabited oceanic specks known as Guano Islands. Then came the 1867 acquisition of Alaska, geographically enormous but sparsely populated. The fever pitch arrived as a result of the U.S. victory over Spain in the War of 1898, which occasioned the annexation of Hawai'i, Puerto Rico, Guam, and the Philippines. These new acquisitions differed from prior ones. They were racially heterogeneous and densely populated, hence poor candidates for settler colonialism by mainland whites seeking numerical dominance.<sup>11</sup> As a result, they were generally not envisioned as future states.<sup>12</sup> Their value came from their strategically located ports and extractive resources, such as fertilizer and sugar.<sup>13</sup> Rather than replace or integrate inhabitants of the newly acquired territories, the United States held and ruled them.

Then—suddenly—the expansion of U.S. governance over new territories exploded and collapsed. First, victory in World War II transformed the United States into an occupying power for millions upon millions of people around the globe.<sup>14</sup> Indeed, the postwar United States briefly governed more people by occupation and colonialism than it had mainland U.S. citizens.<sup>15</sup> Almost as quickly, the United States abandoned its relationships of occupation and colonial rule, making exceptions only for certain dispersed specks of territory. Some of these specks were formally within U.S. sovereignty: Puerto Rico, the Northern

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11. Alaska and the Guano Islands, which were sparsely or not at all populated and remote from the contiguous United States, proved unappealing for large-scale settler colonialism. IMMERWAHR, *supra* note 1, at 10, 17, 51-56, 78-79, 283.

12. Only Hawai'i eventually became a state. *Id.* at 11.

13. See, e.g., CÉSAR J. AYALA, AMERICAN SUGAR KINGDOM: THE PLANTATION ECONOMY OF THE SPANISH CARRIBEAN, 1989-1934, at 1 (1999); SAM ERMAN, ALMOST CITIZENS: PUERTO RICO, THE U.S. CONSTITUTION, AND EMPIRE 21, 28 (2018); IMMERWAHR, *supra* note 1, at 46-58, 63, 81; APRIL MERLEAUX, SUGAR AND CIVILIZATION: AMERICAN EMPIRE AND THE CULTURAL POLITICS OF SWEETNESS 29 (2015).

14. IMMERWAHR, *supra* note 1, at 17.

15. *Id.* at 226.

Mariana Islands, Guam, the Virgin Islands, and American Samoa.<sup>16</sup> Others remained subject to extensive U.S. control: Guantánamo Bay, overseas U.S. military bases, and, until recently, the Panama Canal Zone.<sup>17</sup> Through new technologies, the United States projected imperial power across a global grid anchored by mere pinpricks of land.<sup>18</sup> The pointillist empire had arrived.

It is a convincing story, this portrait of the ever-imperial United States. But Immerwahr aims for more. He wants you to ask, “How did I miss that?” Hence his title, which puts *Empire* behind *How to Hide* it. And his dedication to the “uncounted,” rather than the disempowered.<sup>19</sup> He is quick to reassure his reader that it’s not you who is to blame, it’s the U.S. empire and its willful blindspot as to its true nature:

One of the truly distinctive features of the United States’ empire is how persistently ignored it has been. . . . The British weren’t confused as to whether there was a British Empire. . . . France didn’t forget that Algeria was French. It is only the United States that has suffered from chronic confusion about its own borders.<sup>20</sup>

Early in the twentieth century, the British had elaborate, official celebrations of Empire Day in which children looked at maps of British overseas holdings.<sup>21</sup> By contrast, Americans celebrated Flag Day, an occasion for U.S. children to contemplate a banner that “had a star for each state but no symbol for territories.”<sup>22</sup>

Immerwahr’s point is that the American public sees a version of their nation in which authoritative voices have carefully obscured U.S. empire. This was literally the case in the lead-up to Pearl Harbor, when many atlases by publishers such as Rand McNally listed Hawai’i as “foreign.”<sup>23</sup> In 1910, the U.S. Census undertook a similar erasure by omitting territorial populations from most of its aggregate data, which it described as encompassing the “United

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16. *Id.* at 11, 229, 392-94.

17. *Id.* at 11, 113, 355-90.

18. *Id.* at 18.

19. *Id.* at v.

20. *Id.* at 18-19. *But cf.*, e.g., BERNARD PORTER, *THE ABSENT-MINDED IMPERIALISTS: EMPIRE, SOCIETY, AND CULTURE IN BRITAIN 2-4* (2006); FRANCOIS WEIL, *HOW TO BE FRENCH: NATIONALITY IN THE MAKING SINCE 1789*, at 53 (2008) (“[E]ntry into full nationality remained virtually closed to Muslim natives of Algeria.”).

21. IMMERWAHR, *supra* note 1, at 111.

22. *Id.* at 111-12.

23. *Id.* at 12-13.

States proper.”<sup>24</sup> U.S. textbooks and U.S. history overviews often do little better, treating empire as a chapter that starts with the War of 1898 and ends soon after.<sup>25</sup> Such excisions can be dramatic: history textbooks rarely cover World War II in the Philippines, even though it was “by far the most destructive event ever to take place on U.S. soil.”<sup>26</sup>

The reason for the distortion of U.S. history is American exceptionalism, the notion that the United States is distinguished by its enduring commitments to such anti-imperial tenets as liberalism, democracy, and freedom.<sup>27</sup> As Immerwahr is quick to clarify, it is not the truth of this view, but rather the belief in it, that leads to obfuscation:

The country perceives itself to be a republic, not an empire. It was born in an anti-imperialist revolt and has fought empires ever since, from Hitler’s Thousand-Year Reich and the Japanese Empire to the “evil empire” of the Soviet Union. It even fights empires in its dreams. *Star Wars*, a saga that started with a rebellion against the Galactic Empire, is one of the highest-grossing film franchises of all time.

This self-image of the United States as a republic is consoling, but it’s also costly.<sup>28</sup>

This is a cost that has been disproportionately borne by imperial subjects. Yet as Immerwahr points out, for the empire itself, self-denial has brought resilience.

The work of hiding the U.S. empire has become easier since World War II, as the United States swapped governance of well over one hundred million noncitizens for its modern pointillist approach to territorial control. To explain the shift, Immerwahr points to advances in logistics, synthetics, communications technologies, and transportation, combined with global uptake of the English language and of U.S. weights, measures, and the like.<sup>29</sup> Together, these shifts in technologies and standards permitted the United States to project its power globally by connecting small points scattered across the planet. The conclusion is born of substantial original research, as reflected in Immerwahr’s (happily abandoned) ambition to write a book that would be “eight hundred

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24. *Id.*

25. *Id.* at 14.

26. *Id.* at 212.

27. *Id.* at 19; cf. LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* 3-10 (1955).

28. See IMMERWAHR, *supra* note 1, at 19.

29. *Id.* at 17, 262-90.



pages and solely about infrastructure in the Second World War.”<sup>30</sup> Still, the final eighty years of Immerwahr’s nearly two-and-a-half-century account occupy nearly sixty percent of the volume’s pages. The contribution here to historians’ understanding of the postwar U.S. empire amply justifies the academic attention that the project has received.<sup>31</sup> Yet scholarly contributions are not the book’s *raison d’être*.

Immerwahr’s second major contribution, while not necessarily new to historians in the field, has the capacity to reorient entirely his general readership. While academia is enjoying a harvest season of scholarship on the long and too-often-hidden reality of the U.S. empire, the broader American public is only starting to take note.<sup>32</sup> Immerwahr seeks to remedy this oversight by synthesizing existing scholarship into an overview of the centrality of empire to U.S. history. And he succeeds in doing so in a form that influential and educated general readers may be inclined to consume.<sup>33</sup>

The amount of knowledge that Immerwahr accrued to write *How to Hide an Empire* is breathtaking. The book spans centuries, situates the United States as one empire in a world of others, and explains how technology, economics, and politics have all helped drive that history. Among the many topics that the book covers, the one that I know best is the first three decades of U.S. rule in Puerto Rico. Even here, Immerwahr found telling details and illuminating stories that were new to me. He has been commendably thorough in consuming

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30. *Id.* at 486.

31. See generally Paul A. Kramer, *How Not to Write the History of U.S. Empire*, 42 *DIPLOMATIC HIST.* 911 (2018) (criticizing Immerwahr for using an overly territorial definition of empire, for too uncritically adopting historical actors’ terminology, for collapsing together diverse forms of sovereignty, for discounting existing work on U.S. empire, and for prioritizing the history of the United States over the histories of colonies and transnational domains); H-DIPLO ROUNDTABLE XXI-17, *supra* note 7 (raising a variety of concerns, including some to which I return below).

32. See, e.g., Michael Cox, *Empire by Denial? Debating US Power*, 35 *SECURITY DIALOGUE* 228, 229 (2004) (describing Americans’ disinclination to see their nation as an empire and noting exceptions); Michael Ignatieff, *The American Empire; The Burden*, *N.Y. TIMES MAG.* (Jan. 5, 2003), <https://www.nytimes.com/2003/01/05/magazine/the-american-empire-the-burden.html> [<https://perma.cc/G8NU-SQ9T>] (forming part of the mainstream debate since the 9/11 attacks over whether the United States is an empire). On the harvest season, see the appendix to Kramer, *supra* note 31, at 924-31.

33. I had planned here to give a sense of Immerwahr’s accomplishment by listing his reviews, interviews, op-eds, and best-books list mentions in mainstream outlets, but the result stretched across pages. For some highlights, see his curriculum vitae. Daniel Immerwahr, *Curriculum Vitae*, *Nw. U.*, <https://faculty.wcas.northwestern.edu/daniel-immerwahr/CV.pdf> [<https://perma.cc/FK4G-AGYK>].

and acknowledging the material on which he relies.<sup>34</sup> In short, his volume provides an excellent point of entry into the literature on U.S. empire.

Immerwahr's reason for unmasking the U.S. empire is political. Empire hurts people. Too few people notice, in part because the U.S. history that Americans learn eschews empire. Happily, what Americans learn of U.S. history can be changed. Immerwahr puts it this way:

Recently, thousands in Puerto Rico . . . died as a result of the 2017 hurricanes . . . . [T]he deaths were caused in large part by Washington's longstanding neglect, a neglect clearly enabled by the fact that most mainlanders know and care very little about the overseas territories. I want that to change . . . .

. . . .

. . . [T]his question of transforming mainstream U.S. history has an analogue in far earlier debates about African-American history. For decades, scholars of [B]lack life in the United States insisted, against considerable resistance, that . . . their subject . . . held the power to reshape U.S. history. They won that argument conclusively . . . . A recent national survey that asked . . . [for] the "most famous Americans in history," not counting presidents and first ladies, found that the top three—Martin Luther King Jr., Rosa Parks, and Harriet Tubman—were African American.

. . . [Such] storming the citadel of mainstream U.S. history . . . need not and should not be our only objective, but in my view it's an essential one.<sup>35</sup>

Precisely.

Having spent the better part of two decades studying the history of the U.S. empire in Puerto Rico, I agree with Immerwahr on every count. Puerto Ricans suffer because mainlanders ignore them. Residents have long nicknamed their home the "forgotten island."<sup>36</sup> I used to begin conference talks by reminding audiences that Puerto Rico was part of the United States. While doing research, I repeatedly heard this joke: a Puerto Rican archivist urgently asks a researcher from the mainland what is being said about the island there, to which her hapless interlocutor stutteringly responds, "Er, well, nothing." Less funny are the consequences.

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34. IMMERWAHR, *supra* note 1, at 485-87.

35. Daniel Immerwahr, *Writing the History of the Greater United States: A Reply to Paul Kramer*, 43 *DIPLOMATIC HIST.* 397, 402-03 (2019).

36. See, e.g., NEMESIO R. CANALES, *PALIQUES 111* (Univ. of P.R. Press 1952) (1915).

Like Job, Puerto Rico has suffered an accumulation of privations that defy earthly logic. Its poverty rate is more than double that of Mississippi, the poorest state in the Union.<sup>37</sup> A debt crisis had already crippled the island before the hurricane and federal nonresponsiveness decimated it.<sup>38</sup> Then, in an eerily apt metaphor for Puerto Rico's colonial condition, earthquakes so damaged buildings that people slept outside their homes.<sup>39</sup>

Immerwahr recognizes that accurate histories alone will not cure the ills of empire any more than the successes of scholars of Black history eliminated the need for Black Lives Matter. But public understanding of the problem is an important step. As an engaging narrative history of the United States that puts empire at its core, *How to Hide an Empire* is a smashing success. It is a fast-moving, episodic page-turner that carries the reader from the American Revolution to the present day. The volume is beautifully written and edited, shorn of wasted words and jam-packed with captivating turns of phrase. Its pages overflow with rich characters and fascinating anecdotes. Some are familiar, such as Teddy Roosevelt's Rough Riders and Douglas MacArthur's triumphant return to the Philippines.<sup>40</sup> Others less so. I had never before read of the tragic violence that shadowed a future president of the Philippines during the U.S. reconquest of Manila:

In four days, Elpidio Quirino had lost eight members of his family, including his wife, his mother-in-law, and three of his five children. A woman who saw him at the end of this remembers Quirino staggering around Manila in his undershirt, smeared with mud, a vacant stare in his eyes — a latter-day Lear.<sup>41</sup>

The passage is classic Immerwahr: heart-wrenching facts, vivid description, telling details, and a literary metaphor that pulls it all together.

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37. *Quick Facts: Mississippi; Puerto Rico*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/MS,PR/LFE305218> [<https://perma.cc/7UY5-7FCH>].

38. See Lauren Lluveras, *Puerto Rico Has Not Recovered from Hurricane Maria*, CONVERSATION (Sept. 18, 2018, 4:28 PM EDT), <https://theconversation.com/puerto-rico-has-not-recovered-from-hurricane-maria-103288> [<https://perma.cc/UK3R-ACVY>]; Laura Sullivan, *Blackout in Puerto Rico: How Puerto Rico's Debt Created a Perfect Storm Before the Storm*, NAT'L PUB. RADIO (May 2, 2018, 7:10 AM ET), <https://www.npr.org/2018/05/02/607032585/how-puerto-ricos-debt-created-a-perfect-storm-before-the-storm> [<https://perma.cc/Y83W-QYJ4>].

39. Frances Robles, *Months After Puerto Rico Earthquakes, Thousands Are Still Living Outside*, N.Y. TIMES (Mar. 1, 2020), <https://www.nytimes.com/2020/03/01/us/puerto-rico-earthquakes-fema.html> [<https://perma.cc/N46V-AAWG>].

40. IMMERWAHR, *supra* note 1, at 67-71, 201-12.

41. *Id.* at 210.

And yet, the experience of reading *How to Hide an Empire* was for me akin to the many pleasures and occasional frustrations of a conversation with a charming and cultivated interlocutor. It is a book that rewards readers steeped in culture, both high and low. In addition to Shakespeare, Immerwahr alludes to musical theater (“Gruening’s Gilbert and Sullivan-style adventures in the Pacific”);<sup>42</sup> neo-impressionist painting (the United States “put down the imperialist’s paint roller and picked up the pointillist’s brush”);<sup>43</sup> and the newspaper funny pages (“One can almost see the cartoon sweat-bullets popping out from their faces as they wrestled with what position to take vis-à-vis Outer Mongolia, Northern Bukovina, Chinese Turkestan, British Borneo, French Somaliland, Jubaland, or Subcarpathian Ruthenia—all places that appeared on their agendas.”).<sup>44</sup>

The resulting account is erudite, ironic, and restrained. It has something to teach even sophisticated scholars in the field. And it contains a strong moral sensibility without becoming preachy. But as the deaths, tortures, betrayals, subjections, rights denials, and hypocrisies mounted, I ached for Immerwahr to abandon his scholarly distance and condemn the outrages that he chronicles in passionate terms. Instead, he trusts the facts to enrage readers. In my case, they did.

There are also deeper absences within the book. These undergird the ease of the narrative, which succeeds in its self-proclaimed mission to reach new readers and expand their national self-conception by offering to them the fruits of the new scholarship of empire. But these absences also beg crucial questions. What has been the impulse for hiding empire? What were the mechanisms by which it has been hidden? What else have these reasons and methods caused the United States to shunt from view? The answers, I think, include law, the manipulation of status, and the ways that both have masked U.S. sins involving race and borders. It is to these and related omissions that we now turn.

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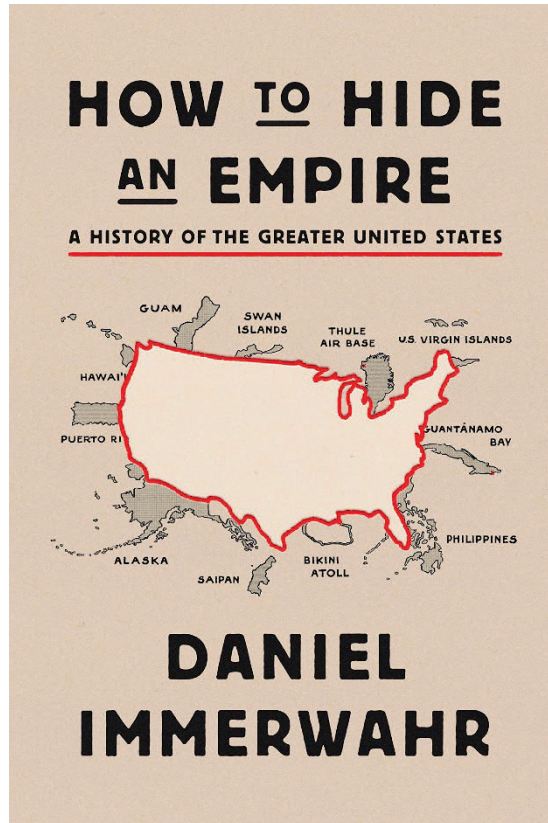
42. *Id.* at 344.

43. *Id.*

44. *Id.* at 220-21.

## II. WHAT'S MISSING?

FIGURE 1.  
COVER FOR *HOW TO HIDE AN EMPIRE*



The cover for *How to Hide an Empire* (Figure 1) depicts U.S. territories half-obscured behind the contiguous United States. It is a powerful image of Americans' willingness to ignore the plain-view reality that the United States is an empire. As a parent, I was also reminded of toddlers playing hide-and-go-seek badly. There's Puerto Rico's head peeking out from behind the couch; Alaska's socks are visible beneath the hem of the curtain.

But why were the colonies the only ones invited to play? Reams of scholarship attest to the centrality to U.S. history of such topics as indigeneity, sex, labor, gender, slavery, race, and immigration, all of which also often peek out from the corners of popular U.S. histories. One answer is don't judge a book by its cover. Immerwahr devotes substantial space to the nineteenth-century dis-

possession of American Indians. He is also sensitive to certain similarities between anti-Black racism and colonial subjection. But sex, labor, gender, slavery, and immigration receive glancing treatment. The inattention to slavery, the post-dispossession American Indian experience, immigration, and (to a lesser degree) Jim Crow and its aftermath is particularly striking given that Immerwahr tells his story of empire in terms of borders, race, and materialism.

If we change the question from what was hidden to who did the hiding, then the hide-and-seek metaphor gives way. U.S. territories did not obscure themselves from alert mainlanders. Quite the opposite. Powerful stateside forces caused the territories to recede from view. Chief among these was law. Americans' constitutional commitments to democracy, liberty, and equality provided a central motive. The manipulability of status supplied an effective means.

#### A. *Multitudes, Uncounted Still*

Immerwahr's choice of topics is partly a result of his "mantra to follow the territory," and thereby reveal "just how important U.S.-controlled areas outside of the states . . . have been."<sup>45</sup> The approach proves only partly successful. Yes, following territory does reveal important chapters in U.S. history that involve U.S.-controlled areas outside of the states. One comes early: the account of U.S. westward expansion as a form of settler colonialism that satisfied white land hunger at American Indians' expense. But the method does not reveal the full extent of the importance of U.S. territorial empire. As Immerwahr turns to the twentieth and twenty-first centuries, his focus shifts to Indigenous communities that retained ancestral lands in Alaska and American Samoa.<sup>46</sup> But what of the post-dispossession histories of the Native communities that he first described? Their members have remained within the United States, responding to, persevering within, and constituting the American experience in ways importantly shaped by empire.<sup>47</sup> Moreover, the imperial past continues to cause

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45. Immerwahr, *supra* note 7, at 16.

46. *Id.* at 154-55, 178-85.

47. See, e.g., PHILIP J. DELORIA, *INDIANS IN UNEXPECTED PLACES* 4-7 (2004); Katherine A. Spilde, *Creating a Political Space for American Indian Economic Development: Indian Gaming and American Indian Activism*, in *LOCAL ACTIONS: CULTURAL ACTIVISM, POWER, AND PUBLIC LIFE IN AMERICA* 71, 72-75 (Melissa Checker & Maggie Fishman eds., 2004); Jeff J. Corntassel & Richard C. Witmer, II, *American Indian Tribal Government Support of Office-Seekers: Findings from the 1994 Election*, 34 *SOC. SCI. J.* 511, 511-25 (1997); Pub. Health Prof'ls Gateway, *Tribal Reservations*, *CTRS. FOR DISEASE CONTROL* (Dec. 21, 2018), <https://www.cdc.gov/tribal/tribes-organizations-health/tribes/reservations.html> [<https://perma.cc/2K4K-J6V8>].



enormous harm, especially if measured by what otherwise would have been. The extent of that damage is evident in American Indians' staggeringly low share of wealth, political power, valuable land, population, and everything else in the United States.<sup>48</sup>

Surprisingly, Immerwahr's mantra to follow the territory does not frequently bring his book into extended contact with women, gender analysis, labor, or capital.<sup>49</sup> He has little to say about how masculinity, femininity, and familial metaphors undergirded imperial ideology, even when recounting Woodrow Wilson's comparisons of African Americans and colonized peoples to children or the testosterone-charged mythology that surrounded the exploits in Cuba of future President Teddy Roosevelt and his Rough Riders.<sup>50</sup> So too with labor and capital, notwithstanding the myriad late nineteenth- and early twen-

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48. *E.g.*, C. Jay L. Zagorsky, *Native Americans' Wealth*, in *WEALTH ACCUMULATION AND COMMUNITIES OF COLOR IN THE UNITED STATES* 133, 133-34 (Jessica Gordon Nembhard & Ngina Chiteji eds., 2006); Matthew Snipp, *The Size and Distribution of the American Indian Population: Fertility, Mortality, Migration, and Residence*, 16 *POPULATION RES. & POL'Y REV.* 61, 89-91 (1997); Donald Warne & Denise Lajimodiere, *American Indian Health Disparities: Psychosocial Influences*, 9/10 *SOC. & PERSONALITY PSYCHOL. COMPASS* 567, 567-68 (2015); see *Indian Lands of Federally Recognized Tribes of the United States*, BUREAU INDIAN AFFAIRS (June 2016), <https://www.bia.gov/sites/bia.gov/files/assets/public/webteam/pdf/idci-028635.pdf> [<https://perma.cc/7EBG-3J97>]; Tina Norris, Paula L. Vines & Elizabeth M. Hoeffel, *The American Indian and Alaska Native Population 2010*, U.S. CENSUS BUREAU (Jan. 2012), <https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf> [<https://perma.cc/6BRG-HWJM>]; Katie Reilly, *Democrats in Kansas, New Mexico Become First Native American Women Elected to Congress*, *TIME MAG.* (Nov. 6, 2018), <https://time.com/5446593/sharice-davids-deb-haaland-first-native-american-woman-congress> [<https://perma.cc/XB9W-8Y7U>].
49. Immerwahr, *supra* note 7, at 16 (acknowledging the absence of capital and discussing reasons for excluding material that would have expanded his engagement with sex and gender); Rebecca Tinio McKenna, *Review*, in *H-DIPLO ROUNDTABLE XXI-17*, at 9, <https://hdiplo.org/to/RT21-17> [<https://perma.cc/J3PF-SMHR>] (noting the absence of women, gender analysis, and capital).
50. *See, e.g.*, GAIL BEDERMAN, *MANLINESS AND CIVILIZATION: A CULTURAL HISTORY OF GENDER AND RACE IN THE UNITED STATES 1880-1917* (1996); LAURA BRIGGS, *REPRODUCING EMPIRE: RACE, SEX, SCIENCE, AND U.S. IMPERIALISM IN PUERTO RICO* (2002); KRISTIN L. HOGANSON, *CONSUMERS' IMPERIUM: THE GLOBAL PRODUCTION OF AMERICAN DOMESTICITY, 1865-1920* (2007); KRISTIN L. HOGANSON, *FIGHTING FOR AMERICAN MANHOOD: HOW GENDER POLITICS PROVOKED THE SPANISH-AMERICAN AND PHILIPPINE-AMERICAN WARS* (1998); ELAINE TYLER MAY, *HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA* (1988); EILEEN J. SUÁREZ FINDLAY, *IMPOSING DECENCY* (1999); THOMPSON, *supra* note 6, at 144-46 (analyzing Wilson's infantilization of colonial peoples); LAURA WEXLER, *TENDER VIOLENCE: DOMESTIC VISIONS IN AN AGE OF U.S. IMPERIALISM* (2000); Arnaldo Testi, *The Gender of Reform Politics: Theodore Roosevelt and the Culture of Masculinity*, 81 *J. AM. HIST.* 1509 (1995); cf. FRANCIS PAUL PRUCHA, *THE GREAT FATHER* (1986) (describing how the relationship between tribes and the federal government was repeatedly compared to that between a father and his children).

tieth-century ways that U.S. control outside of states was a means for the government and U.S. corporations to secure cheap labor.<sup>51</sup> As another reviewer noted, the book “is relatively quiet on topics like education, domesticity,” “sexuality,” and the “tutelary schemes and the intimate realm” of U.S. empire.<sup>52</sup>

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51. In the U.S.-governed Panama Canal Zone, the early twentieth-century construction of the Panama Canal was a lethal affair. As many as 15,000 arrivals died amid conditions repeatedly compared to slavery. JULIE GREENE, *THE CANAL BUILDERS: MAKING AMERICA’S EMPIRE AT THE PANAMA CANAL* 131-39 (2009); see also Joan Flores-Villalobos, *The Silver Women: Gender, Labor, and Migration at the Panama Canal* (unpublished manuscript) (on file with author). At around the same time, U.S. fruit businesses worked hand in hand with the U.S. government to establish control over huge fruit-producing regions in Central America and then to impose racialized labor exploitation there. JASON M. COLBY, *THE BUSINESS OF EMPIRE: UNITED FRUIT, RACE, AND U.S. EXPANSION IN CENTRAL AMERICA* (2011). The U.S. empire also provided mainland labor organizations a theater in which to experiment and transform. The preeminent U.S. labor organization when Puerto Rico was annexed was the American Federation of Labor (AFL), which discriminated against workers of color, prioritized so-called skilled workers, opposed imperialism, and eschewed politics. ERMAN, *supra* note 13, at 66-67; 3 PHILIP S. FONER, *HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES* 219, 233-46, 268-70 (1973); MARC KARSON, *AMERICAN LABOR UNIONS AND POLITICS, 1900-1918*, at x, 20-21, 132, 135, 137-41, 149 (1958); DAVID MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865-1925*, at 5-6 (1987); David Montgomery, *Workers’ Movements in the United States Confront Imperialism: The Progressive Era Experience*, 7 J. GILDED AGE & PROGRESSIVE ERA 7, 14 (2008). See generally WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991); CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960* (1985). This was decades before the formation of the United Farm Workers on the mainland, yet the AFL was soon organizing Puerto Rican agricultural workers and supporting their massive strikes. ERMAN, *supra* note 13, at 68, 98-105, 135-41, 153-54; DIONICIO NODÍN VALDÉS, *ORGANIZED AGRICULTURE AND THE LABOR MOVEMENT BEFORE THE UFW: PUERTO RICO, HAWAII, CALIFORNIA* 25-106 (2011). By the mid-teens, labor leaders in Puerto Rico and at the AFL were working directly with the U.S. government to form a Pan-American Federation of Labor that would bring Latin American labor movements within the AFL’s and the U.S. government’s spheres of influence. ERMAN, *supra* note 13, at 154-57; SINCLAIR SNOW, *THE PAN-AMERICAN FEDERATION OF LABOR* (1964).
52. Oliver Charbonneau, *Review by Oliver Charbonneau, University of Glasgow*, in H-Diplo Roundtable XXI-17, at 4 (Nov. 25, 2019) (reviewing IMMERWAHR, *supra* note 1) <https://hdiplo.org/to/RT21-17> [<https://perma.cc/J3PF-SMHR>]; see, e.g., MARGARET COOK ANDERSEN, *REGENERATION THROUGH EMPIRE: FRENCH PRONATALISTS AND THE COLONIAL SETTLEMENT IN THE THIRD REPUBLIC* (2015); LAURA BRIGGS, *SOMEBODY’S CHILDREN: THE POLITICS OF TRANSRACIAL AND TRANSNATIONAL ADOPTION* (2012); Brooke Newman, *Interracial Marriage in the Atlantic World*, in OXFORD BIBLIOGRAPHIES (2018), <https://www.oxfordbibliographies.com/view/document/obo-9780199730414/obo-9780199730414-0279.xml> [<https://perma.cc/Y829-2YP3>]. Immerwahr’s book may be quiet on topics that Charbonneau mentions, but it is not silent. For instances where Immerwahr does address sex and gender, see IMMERWAHR, *supra* note 1, at 41-42, 164, 225-26, 248-51, 305.



Women's suffrage and its relationship to U.S. territories also receives scant attention.<sup>53</sup>

It is Immerwahr's strategy for storming the citadel of mainstream U.S. history that imposes the blinders. In response to reviews identifying his omissions, Immerwahr explains that his narrative frame, the focus required to reach general readers, and his commitment to the military, political, and material explanations necessitated "hard choices."<sup>54</sup> He has shaped his narrative frame around traditional tellings of U.S. history, from the Founding until today. And such accounts often attribute causation to large-scale forces such as war, politics, and materialism—and to the elite, non-Indigenous, mainland men who most often wielded power within those domains.<sup>55</sup> But also implicit in Immerwahr's approach is the judgment that general readers are more likely to accept empire as central to the American experience if it is inserted into an otherwise mainstream U.S. history. In other words, too many uncounteds in the book ruins its brunt. I hope that is wrong, for to sacrifice either for the other is a hard choice indeed.

I find it a shame that Immerwahr did not display (even) more faith in his ability to lead his readers down unfamiliar paths. He has a great nose for telling episodes and a sharp pen when describing them. He considered dedicating a chapter to the anthropologist Margaret Mead, who wrote "a high-profile book about American Samoa without disclosing that she was describing a U.S. colony."<sup>56</sup> I wish he had.

By way of contrast with his approach to gender, Immerwahr places racism at the heart of *How to Hide an Empire*.<sup>57</sup> Nonetheless, he barely mentions slavery and immigration as factors in U.S. empire. Consider, however, what fitting bookends the pair would make for an account of U.S. race, borders, and empire from 1776 until today. Across the first seventy-five years of the nation's life, slavery was its defining controversy.<sup>58</sup> Because territories would become states

53. See REBECCA J. MEAD, *HOW THE VOTE WAS WON: WOMAN SUFFRAGE IN THE WESTERN UNITED STATES, 1868-1914* (2004); MARÍA DE FÁTIMA BARCELÓ MILLER, *LA LUCHA POR EL SUFRAGIO FEMENINO EN PUERTO RICO 1896-1935* (1997); ALLISON L. SNEIDER, *SUFFRAGISTS IN AN IMPERIAL AGE: U.S. EXPANSION AND THE WOMAN QUESTION, 1870-1929* (2008).

54. Immerwahr, *supra* note 7, at 17.

55. *Cf. id.* (contending that these forces really are the fundamental drivers, confirming his emphasis on "military, political, and material history rather than intellectual history" and shifts in ideology, and describing the latter as a "second-order effect").

56. *Id.* at 18.

57. IMMERWAHR, *supra* note 1, at 12.

58. See, e.g., 1 WILLIAM W. FREEHLING, *THE ROAD TO DISUNION* (1990); ELIZABETH R. VARON, *DISUNION!: THE COMING OF THE AMERICAN CIVIL WAR, 1789-1859* (2008).

that could upset the Senate's balance on the issue, politicians fiercely contested the question of which territories would be slave and which would be free.<sup>59</sup> A vast historiography attests that western expansion ultimately served as a catalyst for the Civil War.<sup>60</sup>

During the past seventy-five years, immigration controls have undergirded the U.S. pairing of massive global power with scarce overseas territory. The world that has resulted is one of increasing numbers of migrants fleeing from ethnic and religious strife, tyranny, impoverishment, environmental catastrophe, and more.<sup>61</sup> Yet the United States has been remarkably insulated from this human tragedy. Almost by necessity, migrants commence their journeys outside the pointillist U.S. empire. U.S. immigration policies then keep it that way, routing migrants elsewhere and denying entry to many who do arrive.<sup>62</sup>

The inattention reflects Immerwahr's focus on similarities between racism within and beyond territories to the relative exclusion of inquiry into their deeper relationships. Immerwahr echoes much traditional U.S. history by treating anti-Black prejudice as archetypical. He then announces that U.S. racism transcended the divide between states and colonies and motivated subordination of many inhabitants of U.S. lands outside of states. In his words:

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59. See, e.g., FREEHLING, *supra* note 58; VARON, *supra* note 58; Ariela Gross, *Slavery, Anti-Slavery, and the Coming of the Civil War*, in 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 280-312 (Michael Grossberg & Christopher Tomlins eds., 2008).
60. A classic example is DAVID M. POTTER, *THE IMPENDING CRISIS, 1848-1861* (Don E. Fehrenbacher ed., 1976).
61. For just one indicator, see *Global Trends: Forced Displacement in 2017*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES 6 fig.1 (2018), <https://www.unhcr.org/5b27be547.pdf> [<https://perma.cc/Z4VA-MDYU>].
62. For this paragraph, see E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509 (2019), which observes and criticizes the injustice of colonial powers creating problems and then barring victims from entry; Paul A. Kramer, *The Geopolitics of Mobility: Immigration Policy and American Global Power in the Long Twentieth Century*, 2018 AM. HIST. REV. 393, which treats immigration restrictions and imperial policy as mutually constitutive and provides examples of the United States sponsoring violence in countries from which it then refused migrants; Alejandro Portes, *Unauthorized Immigration and Immigration Reform: Present Trends and Prospects*, in 2 UNAUTHORIZED MIGRATION: ADDRESSING THE ROOT CAUSES: RESEARCH ADDENDUM 887, 890 (1990), which states, "The countries which supplied the large contingents necessary to create present-day [Spanish-origin] ethnic communities were, each in its time, targets of the expansionist pattern of the regionally hegemonic power"; Chantal Thomas, *Mapping Global Migration Law, or the Two Batavias*, 111 AM. J. INT'L L. UNBOUND 504, 506 (2018), which notes how U.S. trade agreements open borders to U.S. goods, sometimes decimating local markets, but rarely allowing displaced local workers to seek work in the United States; and Ellen D. Wu, *It's Time to Center War in U.S. Immigration History*, 2 MOD. AM. HIST. 215 (2019).

[T]he histories of African Americans and colonized peoples are tightly connected . . . . The racism that had pervaded the country since slavery engulfed the territories, too . . . .

What getting the Greater United States in view reveals is that race has been even *more* central to U.S. history than is usually supposed. It hasn't just been about [B]lack and white, but about Filipino, Hawaiian, Samoan, and Chamoru (from Guam), too, among other identities. Race has not only shaped lives, it's shaped the country itself – where the borders went, who has counted as “American.”<sup>63</sup>

The ambition of the vision is decidedly modest. African Americans serve as a metonym for stateside racial diversity. Looking to the territories reveals racism against other populations. All of this mattered. But why and how goes largely unexamined. Immerwahr presents no rich explanation of how underlying forces link together colonialism and heterogeneous racial subordinations outside of the territories.

This lack of interest in explanations can be frustrating given Immerwahr's knack for spotting revelatory evidence. By the time I finished *How to Hide an Empire*, Immerwahr's stray sentences concerning anti-Black discrimination had convinced me that if Jim Crow had a shadow, it would be the U.S. empire. As he notes, the discrimination that defined each was eerily similar: “Like African Americans, colonial subjects were denied the vote, deprived of the rights of full citizens, called ‘nigger,’ subject to dangerous medical experiments, and used as sacrificial pawns.”<sup>64</sup>

The enemies overlapped too. Between 1896 and 1902, the Supreme Court used similar logic to greenlight Jim Crow and colonial empire. When the blockbuster film *The Birth of a Nation* (1915)<sup>65</sup> lionized the Ku Klux Klan, romanticized slavery, and vilified Reconstruction, President Woodrow Wilson gushed about it and then “virtually reenacted the plot . . . by sending the marines to the [B]lack republic of Haiti to wrest control from the ‘unstable’ government.”<sup>66</sup> Decades later, “champions of Jim Crow” opposed statehood for Hawai'i.<sup>67</sup>

The victims of the regimes responded in similar ways. African Americans and Filipinos joined U.S. war efforts against foreign adversaries to lay claim to

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63. IMMERWAHR, *supra* note 1, at 11-12.

64. *Id.*

65. THE BIRTH OF A NATION (David W. Griffith Corp. 1915).

66. IMMERWAHR, *supra* note 1, at 117.

67. *Id.* at 240-41.

domestic rights and belonging.<sup>68</sup> Puerto Ricans and African Americans sought to escape local adversity through massive internal migrations north.<sup>69</sup>

African Americans and colonial subjects saw the resemblances: “The [B]lack soldiers in the Philippines . . . connected the racism that pervaded the war [against Filipino nationalists] to the racism they had just left at home. . . .”<sup>70</sup> So did Filipino soldiers, who “issued propaganda suggesting that [B]lack soldiers might be better off switching sides.”<sup>71</sup> And though Immerwahr declines to explore the links, he sees them clearly too:

Empire isn’t just landgrabs, though. What do you call the subordination of African Americans? In W.E.B. Du Bois’s eyes, [B]lack people in the United States looked more like colonized subjects than like citizens. Many other [B]lack thinkers, including Malcolm X and the leaders of the Black Panthers, have agreed.<sup>72</sup>

Decolonization and the Civil Rights Movement also marched in time. Hawai‘i became a state five years after *Brown v. Board of Education* (1954)<sup>73</sup> and six years before the Voting Rights Act of 1965.<sup>74</sup> As Immerwahr observes, it was the “first time [that] the logic of white supremacy had not dictated which parts of the Greater United States were eligible for statehood.”<sup>75</sup>

Immerwahr’s evidence suggests that racism outside the territories was as stitched to empire by law as was Peter Pan to his shadow by Wendy Darling. Consider the many legal references just in the paragraphs above: slavery, immigration law, disfranchisement, rights denials, Jim Crow, statehood, *Brown, Plessy*,<sup>76</sup> and the *Insular Cases*. Law and racial hierarchy make fitting partners, for both are tools and justifications for subordination that operate by way of comparisons. As we will see, law advances Immerwahr’s story in another way too. Just as the Darling parents hid Peter’s shadow in the dresser, law concealed empire within doctrinal ambiguity.

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68. *Id.* at 183.

69. *Id.* at 251.

70. *Id.* at 96.

71. *Id.*

72. *Id.* at 14.

73. 347 U.S. 483 (1954).

74. Pub. L. No. 89-110, 79 Stat. 437 (1965); IMMERWAHR, *supra* note 1, at 240.

75. IMMERWAHR, *supra* note 1, at 240.

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

*B. Law's Palpable Absence*

Law lurks everywhere in *How to Hide an Empire*, animating and actuating the impulse of the United States to hide.<sup>77</sup> Immerwahr is right that one reason that the United States denies its imperial nature is because it conceives itself to be an anti-imperial republic. No less important is its self-conception as a constitutional democracy. Americans may dream of republics, but they revere their written Constitution, with its decidedly nonimperial commandments of individual rights, formal equality, and democratic structures embodied by rule of law.<sup>78</sup> As the nation's secular faith, law is an authority to which Americans have looked when their nation's constitutional ideas have collided with its imperial realities.<sup>79</sup> And legal status manipulations have provided succor by producing ambiguity and obfuscation.<sup>80</sup> None of this is Immerwahr's focus, yet it is visible even in the episodes that Immerwahr selects as frames for the entire project.

Immerwahr's book opens with President Franklin Delano Roosevelt preparing his "day of infamy" speech following the December 7, 1941 lightning strike by the Japanese in the Pacific.<sup>81</sup> Here is a line from the initial draft with Roosevelt's pencil edits marked: "Japanese air squadrons had commenced bombing in Hawaii and the Philippines Oahu."<sup>82</sup> For Immerwahr, the alteration is a microcosm of the consequentiality and invisibility of the U.S. empire:

Roosevelt was trying to tell a clear story: Japan had attacked the United States. But he faced a problem. *Were* Japan's targets considered "the United States"? Legally, yes, they were indisputably U.S. territory. But . . . [p]olls taken slightly before the attack show that few in the

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77. Cf. Austin Sarat, ". . . *The Law Is All Over*": Power, Resistance, and the Legal Consciousness of the Welfare Poor, 2 YALE J.L. & HUMAN. 343, 344 (1990) (describing how law is an immediate, visible, and repeatedly encountered consequential presence in the transactions and lives of the welfare poor).

78. On the Constitution as a sacred text, see, for example, Robert A. Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455 (1984); Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); and Sanford Levinson, "The Constitution" in *American Civil Religion*, 1979 SUP. CT. REV. 123, 123-24 (1979).

79. See, e.g., ERMAN, *supra* note 13. On law as civil religion, see, for example, Cover, *supra* note 78; Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290 (1937); and Levinson, *supra* note 78, at 123-24.

80. See, e.g., ERMAN, *supra* note 13; Katrina Quisumbing King, *The Political Uses of Ambiguity: Statecraft and U.S. Empire in the Philippines, 1898-1946* (Aug. 17, 2018) (unpublished Ph.D. dissertation, University of Wisconsin-Madison).

81. IMMERWAHR, *supra* note 1, at 3-7.

82. *Id.* at 5.

continental United States supported a military defense of [the Philippines].

Consider how similar events played out more recently. On August 7, 1998, al-Qaeda launched simultaneous attacks on U.S. embassies . . . . Hundreds died (mostly Africans) . . . . But though those embassies were outposts of the United States, there was little public sense that the country *itself* had been harmed. . . .

An embassy is different from a territory, of course. Yet a similar logic held. . . .<sup>83</sup>

Legal status figures in the passage as an ineffectual impediment to empire: the formal fact that the Philippines was a U.S. territory did not alter the mainland public's judgment that the Philippines was outside the United States. But that analysis obscures how status manipulations underlay the judgments themselves.

The U.S. territory of the Philippines and the U.S. embassies in Africa both lay at the margins of the United States, occupying anomalous statuses, neither fully in nor fully out. The Philippines was a so-called unincorporated U.S. territory pursuant to Supreme Court doctrine that marked it as inferior and denied its population full constitutional rights and any promise of statehood.<sup>84</sup> U.S. embassies sat on foreign soil, bastions of U.S. control outside of U.S. sovereignty.<sup>85</sup> International law protected them against invasion and their officials against arrest or prosecution by host governments.<sup>86</sup> By treating the Philippines and U.S. embassies as peripheral to the United States, the mainland public did not reject the law of the matter; they reinforced it.<sup>87</sup>

83. *Id.* at 6.

84. *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Downes v. Bidwell*, 182 U.S. 244 (1901); ERMAN, *supra* note 13; JOSÉ TRÍAS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* (1997); JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* (1985).

85. See, e.g., Kishan S. Rana, *Embassies, Permanent Missions and Special Missions*, in *THE SAGE HANDBOOK OF DIPLOMACY* 149 (Costas M. Constantinou, Pauline Kerr & Paul Sharp eds., 2016).

86. See, e.g., Vienna Convention on Diplomatic Relations, art. 22.1, *passim*, Apr. 18, 1961, 23 U.S.T. 3227; U.S. DEP'T OF STATE, OFFICE OF FOREIGN MISSIONS, *DIPLOMATIC AND CONSULAR IMMUNITY: GUIDANCE FOR LAW ENFORCEMENT AND JUDICIAL AUTHORITIES* (Aug. 2018).

87. Immerwahr adds, “[P]laces like the Philippines and Puerto Rico were territories, [but] they were territories of a different sort. Unlike the western territories, they weren’t obviously slated for statehood. Nor were they widely understood to be integral parts of the nation.” IMMERWAHR, *supra* note 1, at 8. Again, the passive voice obscures judicial authorship. “Integral” and the lack of any expectation of statehood are straight out of the most influential of the opinions in the landmark case on the constitutionality of empire. See *Downes*, 182 U.S. at

Indeed, legal status lit President Roosevelt's way as he perfected his remarks casting the Japanese bombings as attacks on the United States. As Immerwahr notes, newspapers and federal officials initially announced bombings of Manila, Hawai'i, Honolulu, Guam, and the Philippines.<sup>88</sup> None of these framings placed either the United States or an archetypically American locale front and center.<sup>89</sup> In a radio address the night of the attack, Eleanor Roosevelt described the "bombing of our citizens in Hawaii and the Philippines."<sup>90</sup> It was an improvement, for "our" and "citizens" spoke to the United States self-conception as a single "we the people."<sup>91</sup> But the phrasing contradicted the administration's policy classifying most Filipinos as noncitizen U.S. nationals.<sup>92</sup> President Roosevelt bettered the First Lady's phrasing by replacing "citizen" with "American."<sup>93</sup> By the time he made his line edit deemphasizing the Philippines, he was already describing the casualties as "American naval and military forces," "[v]ery many American lives," and "American ships."<sup>94</sup> With its obvious association to the noun *American*, the adjective tied together place, people, ships, and forces under a single national moniker in a way that United States could not. It was conventional to speak of Americans and American people, but

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287-344 (White, J., concurring). While it is not obvious that these traits distinguished the Philippines from Hawai'i, legal statuses self-evidently did. Congress had collectively naturalized Hawaiians but not Filipinos, whom the Supreme Court has also not recognized as U.S. citizens. See *Toyota v. United States*, 268 U.S. 402 (1925); ERMAN, *supra* note 13, at 51. By contrast, only the Philippines was unincorporated territory whose inhabitants received less than full constitutional rights. See *People of Puerto Rico v. Shell Co.*, 302 U.S. 253, 257 (1937); *Balzac*, 258 U.S. at 298; *Dorr v. United States*, 195 U.S. 138 (1904). Of course, the unincorporated territory has its own history suffused with racism, politics, and the like. But one need not elevate chicken or egg to see law's consequential role.

88. IMMERWAHR, *supra* note 1, at 5.

89. *Id.* at 5-7.

90. *Id.* at 5 (quoting Eleanor Roosevelt, Radio Address on the Attack on Pearl Harbor (Dec. 7, 1941)).

91. U.S. CONST. pmb1.

92. On noncitizen U.S. nationality and the Philippines, see Veta Schlimgen, *The Invention of "Noncitizen American Nationality" and the Meanings of Colonial Subjecthood in the United States*, 89 PAC. HIST. REV. 317 (2020).

93. See Franklin D. Roosevelt, Annotated Draft of Proposed Message to Congress Requesting Declaration of War Against Japan (Dec. 7, 1941), <https://catalog.archives.gov/id/593345> [<https://perma.cc/YTF3-422Q>] (on file with the National Archives, National Archives Identifier 593345).

94. *Id.*



not of United Statesers or U.S. people. Conversely, the noun embedded in the United States was states, precisely what the attacked islands were not.<sup>95</sup>

*How to Hide an Empire* concludes with a string of episodes illustrating the importance to the United States today of empire and associated status sophistry. Consider the tiny island of Saipan, an unincorporated U.S. territory that until recently had a billion-dollar garment industry built on exemptions from U.S. tariffs, minimum-wage laws, and lobbying rules.<sup>96</sup> It manufactured clothing cheaply, imported them freely, and kept Congress from doing anything about it, all through legal promiscuity: “[F]or the purposes of labor law, the Northern Marianas wasn’t part of the United States. For the purpose of trade it was. And for the purposes of lobbying regulations, it was a foreign government.”<sup>97</sup>

The story is similar for the War on Terror. When U.S. officials sought to detain people indefinitely beyond the reach of the courts, they turned to a space that was outside U.S. sovereignty but subject to total U.S. control. The takeaway was what “John Yoo had discovered in Guantánamo Bay: empire is still around, and places with anomalous legal statuses can be extremely useful.”<sup>98</sup>

Deliberate ambiguity concerning status also lies at the heart of Immerwahr’s observation in his final paragraph that even today “[c]olonialism hovers in the background of politics at the highest level” in the United States.<sup>99</sup> He is referring to disputes over the circumstances in which a person born outside of a state satisfies the constitutional requirement that the president be a “natural born citizen.”<sup>100</sup> The issue arose for the 1964 Republican nominee for president, Barry Goldwater, who was born in the Territory of Arizona.<sup>101</sup> It arose again in 2008 for John McCain, who was born in the Panama Canal Zone in 1936, which at the time was a space within Panamanian sovereignty that was subject to complete U.S. control.<sup>102</sup> Immerwahr suggests that the question remains open because neither man won the White House. But law also actively

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95. The need for the linguistic sleight of hand that swapped “U.S. citizen” out for “American” dated to the start of the overseas U.S. empire in the late nineteenth century. Immerwahr notes that the same years saw an explosion in use of the term “America” for “United States” in reaction to the realization that the new territories would not necessarily ever become states. IMMERWAHR, *supra* note 1, at 75-77.

96. IMMERWAHR, *supra* note 1, at 391.

97. *Id.* at 393.

98. *Id.* at 394.

99. *Id.* at 400.

100. *Id.* at 394.

101. *Id.*

102. *Id.* at 11, 394-95.



maintains the uncertainty through justiciability doctrines that require courts to defer to political decision makers in some circumstances.<sup>103</sup>

Barack Obama faced the issue too. Though he was born in the State of Hawai'i, political enemies claimed that he was born in Kenya, then relocated to the United States: "Factually, there was nothing to support this. But culturally, it registered" for those to whom "a mixed-race man named Barack Hussein Obama born on a Pacific island just *seemed* foreign."<sup>104</sup> By contrast, McCain's running mate Sarah Palin did not face similar lies about her attachment to the nation, even though she had encouraged an Alaskan independence movement partly rooted in claims by Indigenous peoples.<sup>105</sup>

Given Immerwahr's focus on borders, race, structured power, and obfuscation, it is fitting that *How to Hide an Empire* concludes with an ambiguous constitutional provision drawing together empire, stateside racism, migrations across national lines, and indigeneity. It is no necessary sin that his book does not fully attend to all these important dynamics. Immerwahr's project is generative. He welcomes scholars to detail and remedy his omissions. It is in that spirit that I turn to a yet-truer U.S. history of the United States.

### III. TOWARD YET-TRUER U.S. HISTORY

What follows is a historical sketch of how legal status has driven and expressed shifting, self-obscuring U.S. dynamics concerning race and borders.<sup>106</sup> Immerwahr provides my jumping-off point. I bring law to bear on key moments of his account, thereby revealing the crucial roles that manipulations of status have played in the elaboration and obfuscation of empire. I then describe ways that these dynamics crossed, and thereby linked, the domains of empire, indigeneity, slavery, stateside racism, and immigration.<sup>107</sup> My chronology bears

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103. The political question doctrine is one example. See, e.g., Jamal Greene, *Rule Originalism*, 116 COLUM. L. REV. 1639, 1700-03 & n.395 (2016); Daniel P. Tokaji, *The Justiciability of Eligibility: May Courts Decide Who Can Be President?*, 107 MICH. L. REV. FIRST IMPRESSIONS 31, 33-40 (2008).

104. IMMERWAHR, *supra* note 1, at 397.

105. *Id.* at 395.

106. On linking color lines, borders, and empire, see generally Katrina Quisumbing King, *Recentering U.S. Empire: A Structural Perspective on the Color Line*, 5 SOC. RACE & ETHNICITY 11 (2019).

107. As I argue in Part II, any U.S. history of status ambiguity, race, borders, and willful blindness to illiberalism must encompass sex, gender, labor, and capital. An ocean of studies attests that such statuses as wife, woman, ward, child, household, employer, corporation, bound laborer, servant, employee, and union were subjects of fierce debates, structured by

a rough resemblance to Immerwahr’s tripartite account. I open with western continental expansion and slavery. I then turn to Reconstruction and its decline, the noncontiguous empire, and the rise of immigration exclusions. I conclude with the pointillist empire, amorphous Native sovereignty, ubiquitous immigration-status uncertainty, and color-blind constitutionalism.

A. *The Founding to the Second Founding*

1. *All Statuses Lead to Native Dispossession.*

Immerwahr’s account of U.S. western expansion features the dispossession of Cherokees from their lands in Georgia as an exemplar of how law gave way to insatiable white land hunger. As Immerwahr tells it, Georgia enacted laws to make it impossible for the Cherokee to remain and then the “Supreme Court declared Georgia’s actions unconstitutional. But high-court rulings meant little in the face of the squatter onslaught. . . . Much of this was plainly illegal, but the Cherokees had little recourse” and were soon forced to accept removal west.<sup>108</sup>

But law and the Supreme Court were neither unambiguously partial to the Indians’ cause nor impotent in Indian affairs. American Indians, federal actors, and state officials all recognized the consequentiality of legal status. As Immerwahr notes, the “Washington administration, unable to either ignore or dislodge the Cherokees, had signed a treaty with them and had appeared to accept the prospect of ‘civilized’ Cherokees joining the United States as citizens.”<sup>109</sup> Although such treaties were far from ironclad guarantees of Indigenous rights, they did have meaning. That was why the parties negotiated them, and why states reacted with horror to the guarantees that they provided to Indians within state borders.<sup>110</sup> Years later, President Andrew Jackson sought to press the Cherokees and Choctaws by threatening forced removal and promising permanent western lands walled off from whites.<sup>111</sup> He expended political capital to

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race and borders and crucial to the construction of them, and mechanisms of subordination and obfuscation. I am still struggling with how those stories fit with the throughline I sketch out below. As a result, the pages that follow leave sex, gender, and labor largely to the side. It is this parallel between Immerwahr’s omissions and the limits of my current thinking that underlays my expository choice to elaborate my proposal by adding law to Immerwahr’s account.

108. IMMERWAHR, *supra* note 1, at 37–38.

109. *Id.* at 37.

110. See, e.g., Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1073 (2014).

111. IMMERWAHR, *supra* note 1, at 39.

secure legislation in 1830 that let him make such an offer to the Choctaws, which they accepted.<sup>112</sup> When the Cherokees held out, Jackson secured new legislation—transforming nearly half of the total U.S. land mass into Indian Country.<sup>113</sup>

The North Star of the antebellum Supreme Court's American Indian jurisprudence was white supremacy.<sup>114</sup> During Chief Justice Marshall's tenure, federal aggrandizement was also a goal.<sup>115</sup> Those principles explain the Cherokee Removal decisions. After the Cherokee failed to rally the president or Congress to their side, they turned to the federal courts for a federal injunction to restrain Georgia's onerous laws. But in *Cherokee Nation v. Georgia* (1831),<sup>116</sup> the Court declined to be drawn into the conflict with the federal government. It acknowledged that the Constitution permitted it to hear cases against states by foreign nations, but denied that the Cherokee Nation qualified. In Chief Justice Marshall's words for the Court, the tribes held the status of "domestic dependent nations . . . in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian."<sup>117</sup>

A year later, the Court seemingly reversed course on the status of American Indian polities, but in a way that benefited the federal government without impeding settler colonialism. *Worcester v. Georgia* (1832)<sup>118</sup> involved a white U.S. citizen from Vermont, Samuel Worcester, who challenged his Georgia conviction for being present on Cherokee land without a license. Again defending federal power, the Court classified the tribes "as distinct political communities, having territorial boundaries, within which their authority is exclusive."<sup>119</sup> The

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112. See An Act to Provide for an Exchange of Lands with the Indians Residing in Any of the States or Territories, and for their Removal West of the River Mississippi (Indian Removal Act), Pub. L. No. 21-148, § 2, 4 Stat. 411, 412 (1830); A Treaty of Perpetual Friendship, Cession and Limits (Treaty of Dancing Rabbit Creek), Choctaw Nation-U.S., art. II, Sept. 27, 1830, 7 Stat. 333; Ethan Davis, *An Administrative Trail of Tears: Indian Removal*, 50 AM. J. LEGAL HIST. 49 (2008). The circumstances of the acceptance left much to be desired. See, *id.* at 67 (noting how U.S. commissioners made "veiled threats" and "played a game of divide and conquer").

113. IMMERWAHR, *supra* note 1, at 38-40.

114. ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 47-70 (2005).

115. On this longstanding interpretation and a revision, see H. Jefferson Powell, *Reimagining the Marshall Court*, 87 MICH. L. REV. 1527, 1529-34 (1989), which reviews G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE (1988).

116. 30 U.S. (5 Pet.) 1 (1831).

117. *Id.* at 17.

118. 31 U.S. (6 Pet.) 515 (1832).

119. *Id.* at 557.

Cherokee now had enough sovereignty for the Court to rule that the Supremacy Clause barred Georgia's attempt to "interfere forcibly with the relations established between the United States and the Cherokee nation."<sup>120</sup>

The Court's two major subsequent antebellum Indian cases further manipulated Native nations' status while promoting white supremacy. *United States v. Rogers* (1846)<sup>121</sup> raised the question whether murders in Indian Territory could be prosecuted in federal courts, even when committed by or against whites. Writing for the majority, Chief Justice Taney upheld federal power at the expense of Native sovereignty: "The native tribes . . . have never been acknowledged or treated as independent nations."<sup>122</sup> Then, in *Dred Scott v. Sandford* (1857),<sup>123</sup> Chief Justice Taney resurrected Native sovereignty to argue that African Americans held a uniquely degraded status at the Founding: American Indians "were yet a free and independent people" who were "governed by their own laws" and possessed of governments that the United States "treated as foreign Governments, as much so as if an ocean had separated the red man from the white."<sup>124</sup>

Widening the aperture beyond the Supreme Court confirms that the U.S. approach to Native status was a strategy of "heads we win, tails you lose." To oversimplify only slightly, federal power repeatedly won, while states, free African Americans, squatters, and foreign empires all lost. Consider the Constitutional Convention. On one side were those who sought to treat American Indians as national wards by protecting them from provocations by states and squatters that caused needless and counterproductive conflicts. Partisans of this view had big victories: the Indian Commerce Clause, federal treaties within the Supremacy Clause, a bar on state treaties, and federal control over the western territories. On the other side were those who cast American Indians as foreign enemies to be defeated and dispossessed. Proponents of this view also did not depart empty-handed. The new national government was capable of amassing enormous military power that could be turned against Indigenous peoples. Georgia ratified the Constitution specifically to secure such assistance in its conflicts with Creek Indians.<sup>125</sup>

Once operational, the new U.S. government sought to box out both states and foreign governments from American Indian relations by proposing a new

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120. *Id.* at 561.

121. 45 U.S. (4 How.) 567 (1846).

122. *Id.* at 572.

123. 60 U.S. (19 How.) 393 (1856).

124. *Id.* at 403-04.

125. In support of this paragraph, see Ablavsky, *supra* note 110, at 1035-45, 1049-50, 1067-71.

status for Native peoples: sovereigns without territorial sovereignty. As sovereigns, tribes were subjects of international law, which meant treaty relations. Because states were not allowed to enter into treaties, the approach tilted power toward the federal government. At the same time, federal officials declared Native nations to be subject to U.S. territorial sovereignty, hence unable to alienate lands (except to the U.S. national government) or enter into foreign alliances. Again, the approach strengthened the federal government. It impeded foreign empires from enlisting Native nations as allies in disputes over U.S. borderland. It also forbade Native land sales to either foreign empires or the states of the Union.<sup>126</sup>

The U.S. officials who termed tribes' unequal position as "qualified sovereignty" understood the status to impose only narrow limits of Native self-rule.<sup>127</sup> But Native leaders knew that such limits could be expanded.<sup>128</sup> And expand they did, until the Supreme Court declared in *Lone Wolf v. Hitchcock* (1903)<sup>129</sup> that the federal government had "plenary" power in its relations with tribes. This long nineteenth century of what Immerwahr terms "continental-scale apartheid" was a core part of one of America's original sins: Native dispossession.<sup>130</sup> The other original sin is slavery, which status manipulations by the early United States also buttressed.

## 2. Manipulating Status in the Service of Slavery

Expanding the scene to include slavery leaves status planted firmly on center stage. The action remains familiar too, with Black bodies replacing Indian

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126. In support of this paragraph, see *id.* at 1042-43; Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1063-75 (2015), which explains that historical actors used the term "territorial title" for what many today would label "territorial sovereignty." The status of sovereigns without territorial sovereignty faced foreign opposition. The War of 1812 saw the British and certain Indian nations cooperating against the United States. See *id.* at 1078.

127. Ablavsky, *supra* note 126, at 1078; see also *id.* at 1061-82. On the U.S. approach to American Indians before the Civil War, see generally PRUCHA, *supra* note 50, at 1-122; and Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 385-427 (1993).

128. See Ablavsky, *supra* note 126, at 1061-82.

129. 187 U.S. 553, 565 (1903); see also *United States v. Kagama*, 118 U.S. 375 (1886) (describing broad federal authority over American Indians); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 62 (2002) ("*Kagama* ushered in the high plenary power era of U.S. Indian law.").

130. IMMERWAHR, *supra* note 1, at 38-39.

polities as the objects of status manipulations that were often to their detriment. But when the curtain falls, the dramas have come to different resolutions. Native dispossession and subjugation did not end as a result of the Civil War. Slavery did.

The opening act of the United States was the Constitution. As Derrick Bell has observed, it had a contradiction at its core: a republic dedicated to human equality and inalienable rights that entrenched and protected racial chattel slavery.<sup>131</sup> The anti-Black racism that animated this contradiction persisted in every state and territory before (and beyond) the Civil War.<sup>132</sup> Nonetheless, the specific inconsistency between slavery and liberal democracy grew more conspicuous, contested, and regional as Northern states undertook gradual emancipation and the South doubled down on human bondage.<sup>133</sup>

Rising tensions over slavery often found expression in disputes over the status of Black bodies that had crossed the borders of slave states onto free soil. Abolitionists publicized cases of free Northerners of African descent being kidnaped into slavery, as Solomon Northrup famously experienced.<sup>134</sup> Doing so was a way to highlight the hypocrisy of slaveowners' claims to the mantle of law. As Rebecca Scott has observed, the entire edifice of slavery rested on forgetting its origins: trace title in any human back far enough and you reach the moment of enslavement, a fundamentally illegitimate act.<sup>135</sup> In some cases, the illegitimate act was quite recent. Despite the importation of enslaved people being outlawed in the United States by 1807,<sup>136</sup> the trade continued illegally.<sup>137</sup>

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131. See DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 26-50 (1987).

132. The classic account of anti-Black racism in the North before the Civil War is LEON F. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860* (1961). On antebellum African Americans' struggles for citizenship and the many obstacles that they faced, see generally MARTHA S. JONES, *BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA* (2018).

133. See, e.g., DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 74-112 (1978); JOANNE POPE MELISH, *DISOWNING SLAVERY: GRADUAL EMANCIPATION AND "RACE" IN NEW ENGLAND, 1780-1860*, at 84-119 (1998); see also sources cited *supra* notes 58-60.

134. See generally SOLOMON NORTHUP, *TWELVE YEARS A SLAVE: NARRATIVE OF SOLOMON NORTHUP, A CITIZEN OF NEW-YORK, KIDNAPPED IN WASHINGTON CITY IN 1841, AND RESCUED IN 1853* (1853).

135. See Rebecca J. Scott, "She . . . Refuses to Deliver Up Herself as the Slave of Your Petitioner": *Émigrés, Enslavement, and the 1808 Louisiana Digest of the Civil Laws*, 24 *TUL. EUR. & CIV. L. F.* 115 (2009).

136. See Act Prohibiting Importation of Slaves, ch. 22, § 1, 2 Stat. 426 (1807).

The United States even acceded to illegal enslavements, such as when U.S. officials designated some refugees from the Haitian Revolution as slaves, despite the fact that all had been present for Haiti's general emancipation.<sup>138</sup>

People held in bondage who fled to free states became flashpoints in the sectional slavery debate. They occupied a status of no man's land—living as free, shadowed by the prospect of forcible return to slavery. That threat existed because slaveholders at the Constitutional Convention had won the inclusion of the Fugitive Slave Clause, which dictated that escapees in the North be “delivered up on Claim of” their former master.<sup>139</sup> The 1793 Fugitive Slave Act confirmed that slavers could engage in self-help to seize escapees.<sup>140</sup> To the outrage of slavery's advocates, many escapees nonetheless remained free because Northern states denounced the national law and ostentatiously declined to enforce it.<sup>141</sup> Abolitionists actively impeded its operation,<sup>142</sup> and both escapees and their allies exploited the fact that there existed no easy way in free states to distinguish escapees from other African Americans.<sup>143</sup> Slavery's defenders thus won a major victory in the 1850 Fugitive Slave Act that strengthened the process for enlisting federal help and impeded counterclaims such as mistaken identity.<sup>144</sup> It was a victory that came at a cost, however: the amplification of sectional tensions.

Controversy also surrounded the status of people held in bondage who reached free states without fleeing. As the sectional divide hardened, such individuals increasingly held conflicting statuses: free here, slave there. During the early Republic, Northern and Southern state legal systems avoided such results

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137. See Anthony E. Kaye, *The Second Slavery: Modernity in the Nineteenth-Century South and the Atlantic World*, 75 J. SOUTHERN HIST. 627, 632-45 (2009).

138. See Rebecca J. Scott, *Paper Thin: Freedom and Re-Enslavement in the Diaspora of the Haitian Revolution*, 29 LAW & HIST. REV. 1061 (2011).

139. U.S. CONST. art. IV, § 2, cl. 3.

140. Fugitive Slave Act, ch. 7, § 3, 1 Stat. 302 (1793); see also *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

141. See, e.g., *Prigg*, 41 U.S. 539; THOMAS D. MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1861*, at 1 (1974).

142. See, e.g., STEVEN LUBET, *FUGITIVE JUSTICE: RUNAWAYS, RESCUERS, AND SLAVERY ON TRIAL* (2010); STACEY M. ROBERTSON, *HEARTS BEATING FOR LIBERTY: WOMEN ABOLITIONISTS IN THE OLD NORTHWEST 161-82* (2010).

143. See, e.g., ERIC FONER, *GATEWAY TO FREEDOM: THE HIDDEN HISTORY OF AMERICA'S FUGITIVE SLAVES* 46 (2015) (describing how the existence of a large free Black community in New York “made it easier for fugitive slaves to blend into the city”). Conversely, of course, the distinction between kidnaping a free person and returning an escapee to bondage was often “paper thin.” See Scott, *supra* note 138; see also Scott, *supra* note 135.

144. Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462.



by mutual accommodation. Northern states permitted sojourns within their borders by Southern slave owners accompanied by their slaves.<sup>145</sup> To this extent, Northern states enforced the law of slavery within their borders. But when sojourns ripened into resettlements, those held in bondage gained a freedom that both Northern and Southern courts would recognize.<sup>146</sup> Here, the law of freedom penetrated the South. By the end of the antebellum era, such comity had vanished. Northern states treated as free all who reached their lands lawfully (i.e., without triggering the Fugitive Slave Clause).<sup>147</sup> Southern states treated such travels as legally irrelevant. A slave who left the state was an out-of-state slave, full stop.<sup>148</sup> According to the Supreme Court's decision in *Strader v. Graham* (1851),<sup>149</sup> the status of such an individual depended entirely on the law of the state in which that person happened to be, regardless of where that person had previously been.

The infamous Supreme Court case *Dred Scott* (1857)<sup>150</sup> featured a variation on the problem of sojourning. Years earlier, the people who held Dred Scott and his family in bondage caused them to enter territories in which Congress had barred slavery. The putative slave owners then brought Scott and his family to the slave state of Missouri.<sup>151</sup> The question before the Court was whether Missouri law could treat the Scotts as slaves even if they would have been treated as legally free in the territories. An answer in the affirmative required a modest extension of *Strader* to cover the laws of free territories as well as those of free states.<sup>152</sup> But the Court was not inclined to decide the case on so narrow a ground.

Instead, the *Dred Scott* decision recast the status of U.S. citizens and U.S. territories to shore up slavery. Citizenship was the opening act, relevant because Scott's case was only appropriate for federal court if he and the man who claimed him as a slave were citizens of different states.<sup>153</sup> That required decid-

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145. See, e.g., PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 70 (1981); Kempes Schnell, *Anti-Slavery Influence on the Status of Slaves in a Free State*, 50 J. NEGRO HIST. 257, 260-65 (1965); Note, *American Slavery and the Conflict of Laws*, 71 COLUM. L. REV. 74, 87-92 (1971).

146. See sources cited *supra* note 145.

147. *Id.*

148. *Id.*

149. 51 U.S. 82 (1851).

150. *Scott v. Sandford* (*Dred Scott*), 60 U.S. (19 How.) 393 (1857).

151. *Id.* at 397-98.

152. *Id.* at 452-53.

153. U.S. CONST. art. III, § 2, cl. 1; *Dred Scott*, 60 U.S. at 400, 402, 426-27.



ing whether free African Americans could be citizens, a choice that set U.S. ideals against racist U.S. realities. The conflict had grown starker as slave states entrenched racial slavery—hardening lines between white and Black, stripping free Black people of rights, and narrowing the intra-racial line between slave and free.<sup>154</sup> As a matter of technical legal categories, inferior rights were consistent with citizenship, as women and children regularly experienced.<sup>155</sup> But Americans idealized citizenship as a front of rights, freedom, democracy, participation, and belonging.<sup>156</sup> That vision was hard to square with the degraded position of many free African Americans in the slave states. Conversely, denying citizenship to free African Americans meant accepting that seemingly life-long Americans were aliens, or admitting that the American Revolution against monarchical Great Britain had produced subjects as well as citizens.<sup>157</sup> For years, courts had deployed evasion to manage the tension.<sup>158</sup> Now the Court faced it head-on and declared that African Americans were universally incompetent to be U.S. citizens.<sup>159</sup> The American experiment in democracy had (again) made a decisive choice to value slavery above its own ideals.

Next came the *Dred Scott* decision's main act: territories. These were the white-hot center of the debate over slavery. Territories were future states. Free territories today meant a national balance of power tilted toward freedom to-

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154. A poignant consequence of the narrowing line between slavery and freedom for people of African descent in the South was voluntary enslavement. See EMILY WEST, *FAMILY OR FREEDOM: PEOPLE OF COLOR IN THE ANTEBELLUM SOUTH* (2012).

155. See, e.g., HOLLY BREWER, *BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY* (2005); LINDA K. KERBER, *WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA* (1980). The Constitution entitles every citizen “to all Privileges and Immunities of Citizens in the several States.” U.S. CONST. art. IV, § 2, cl. 1. But what those privileges and immunities were remained unclear. See AUSTIN ALLEN, *ORIGINS OF THE DRED SCOTT CASE: JACKSONIAN JURISPRUDENCE AND THE SUPREME COURT, 1837-1857*, at 122-23 (2006). If they encompassed only the right to be treated as someone else like you (e.g., Black or female), then the clause presented little difficulty. But if the privileges and immunities were substantive, then citizenship for free African Americans would undermine slavery by bringing such rights to free African Americans in the slave states.

156. Sam Erman, *An “Unintended Consequence”*: *Dred Scott Reinterpreted*, 106 MICH. L. REV. 1157, 1162 (2008) (reviewing ALLEN, *supra* note 155).

157. See JONES, *supra* note 132, at 26; Erman, *supra* note 156, at 1160-61; see also Brief of Citizenship Scholars as Amici Curiae in Support of Plaintiffs-Appellees and Affirmance at 17-22, *Fitisemanu v. United States*, Nos. 20-4017 & 20-4019 (10th Cir. May 12, 2020) (describing how U.S. jurisprudence before the Civil War repudiated the category of “denizen” as a status intermediate to alien and citizen).

158. FEHRENBACHER, *supra* note 133, at 64-71; Erman, *supra* note 156, at 1164.

159. *Dred Scott*, 60 U.S. (19 How.) 393, 426-27 (1857).

morrow. The mirror opposite was true for slavery. For decades, the competing sides in Congress had compromised on slave status in the territories, permitting slavery in some territories while banning it in others.<sup>160</sup> With *Dred Scott*, the Court kicked the legs out from under this approach. The decision emphasized that territories could only be acquired as future states and that, in the interim, Americans there retained their constitutional rights to be free from certain congressional actions.<sup>161</sup> Asserting that “the right of property in a slave is distinctly and expressly affirmed in the Constitution,” the Court concluded that the Constitution denied Congress the power to eliminate property interests in people.<sup>162</sup> Though some ambiguity remained as to whether territorial legislatures could bar slavery instead, the decision’s primary effect was to inflame the underlying conflict that exploded into the Civil War.<sup>163</sup>

*B. The Second Founding to World War II*<sup>164</sup>

The Civil War and Reconstruction together constituted a second Founding of the United States, this time built upon constitutional principles of freedom, equality, rights, inviolable union, federal preeminence, and democracy. The Civil War wiped away slavery, defeated secession, and vastly increased federal power. During the Reconstruction that followed, congressional statutes, constitutional amendments, and Black political participation brought citizenship, antidiscrimination guarantees, protections against disfranchisement, and privileges and immunities to former slaves and myriad others.

Improbably, Immerwahr treats these earth-shattering events as largely irrelevant to what he identifies as the logic of the nineteenth-century U.S. empire: “Combine a republican commitment to equality with an accompanying commitment to white supremacy, and this is what you got: a rapidly expanding empire of settlers that fed on land but avoided incorporating people. Uninhab-

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160. See Act of May 26, 1790, ch. 14, 1 Stat. 123; Act of Aug. 7, 1789, ch. 8, 1 Stat. 50; ALEXANDER TESIS, *WE SHALL OVERCOME: A HISTORY OF CIVIL RIGHTS AND THE LAW* 65-82 (2008); cf. Barry R. Weingast, *Political Stability and Civil War: Institutions, Commitment, and American Democracy*, in ROBERT H. BATES, AVNER GREIF, MARGARET LEVI, JEAN-LAURENT ROSENTHAL & BARRY R. WEINGAST, *ANALYTIC NARRATIVES* 148, 154 tbl.4.1 (1998) (illustrating the admission of states in slave-free pairs into the 1840s).

161. *Dred Scott*, 60 U.S. at 446-51.

162. *Id.* at 451-52.

163. For an argument that *Dred Scott* was a step toward something like popular sovereignty in the territories, see ALLEN, *supra* note 155, at 178-79.

164. In this Section, and without further citation, I draw upon ERMAN, *supra* note 13, including several phrasings therein.

ited guano islands—those were fine. But all of Mexico or Nicaragua? No.”<sup>165</sup> But this logic proves too much and too little. The United States was not resolutely averse to controlling lands inhabited by substantial populations of color. Indeed, the nation had a long history of doing so, including slavery, Jim Crow, and the extirpation of American Indians. And commitments to (white man’s) democracy and white supremacy could be reconciled, for they long had been. Nor does the logic explain the chronology of U.S. expansion. Before 1867, the United States had never gone fifteen years between annexations. Formal expansion of U.S. borders then stopped for more than thirty years. In 1898, formal expansion relaunched with a vengeance, starting with the very Hawaiian islands that the United States had recently declined to annex.<sup>166</sup>

1. *The Decline of the Reconstruction Constitution as a Restraint on Empire*

As I have written elsewhere,<sup>167</sup> the answer to the annexation puzzle is status and its manipulation. The reason that annexations stopped was because the Civil War and Reconstruction Amendments produced a new constitutional regime. I term this new regime the “Reconstruction Constitution.” Its provisions included near-universal citizenship with expanded rights, and eventual statehood. Specifically, the Citizenship Clause of the Fourteenth Amendment guaranteed that all Americans (other than American Indians) were citizens, regardless of race. The spirit of the Privileges or Immunities Clause of the Fourteenth Amendment pointed to all citizens enjoying substantial rights that potentially included voting rights. The Fifteenth Amendment reinforced such interpretations. Portions of the *Dred Scott* decision not repudiated by the Reconstruction Amendments declared that the Bill of Rights was fully applicable to the territories and that the Constitution did not permit territories to be acquired as perpetual colonies rather than as future states. And the equal-footing doctrine meant that those states would enjoy permanent, full equality once admitted.<sup>168</sup> As a result, to annex lands with nonwhite inhabitants was to confront the prospect of having to acknowledge those inhabitants as rights-holding citizens in lands that would one day become states. Instead, the U.S. government ceased

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165. IMMERWAHR, *supra* note 1, at 78.

166. Immerwahr provides reasons that are either epiphenomena (“the heady rush that gripped the country in 1898”), *id.* at 79, or inadequate to explain why annexation was disfavored before it was favored (“empire, once seized, was hard to drop;” “economic benefits;” and “Manifest Destiny”), *id.* at 81.

167. Sam Erman, “*The Constitutional Lion in the Path*”: *The Reconstruction Constitution as a Restraint on Empire*, 91 S. CAL. L. REV. 1197, 1198–1203 (2018).

168. U.S. CONST. art. IV, § 3, cl. 1.

expanding its borders as an imperial strategy for thirty years. As one ardent expansionist complained, “[A]ny project of extending the sphere of the United States, by annexation or otherwise, is met by the constitutional lion in the path.”<sup>169</sup>

Status and the extent of its malleability were also crucial to the resumption of annexation in 1898. It provided reasons to think that the lion’s jaws could be avoided. One reason involved an antebellum workaround to the normal rule that sovereignty accompanied control. The Guano Islands Act of 1856<sup>170</sup> permitted the President to designate as “appertaining to the United States” unclaimed, uninhabited islands on which U.S. citizens discovered the valuable fertilizer guano.<sup>171</sup> As Immerwahr observes, “[I]t was an obscure word, appertaining, as if the law’s writers were mumbling their way through the important bit.”<sup>172</sup> Just so. The mumbling directed attention away from the novel status that these islands were to occupy: within U.S. control vis-à-vis other nations, yet untouched by such domestic consequences of annexation as the extension of constitutional rights.<sup>173</sup> The Act had passed only after proponents clarified that the presidential declarations would not raise the “prospect of dominion.”<sup>174</sup> Then, in the early 1890s, the Supreme Court ratified this hybrid space by recognizing the “exclusive jurisdiction” of the United States over such islands while extending them only the rights that would accompany U.S. citizens when traveling outside of civilized nations.<sup>175</sup> As jurists quickly perceived, the

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169. A. T. MAHAN, *THE INTEREST OF AMERICA IN SEA POWER, PRESENT AND FUTURE* 257 (Bos., Little Brown & Co. 1898).

170. Guano Islands Act of 1856, ch. 164, 11 Stat. 119 (codified at 48 U.S.C. §§ 1411-1419 (2018)).

171. IMMERWAHR, *supra* note 1, at 47-52.

172. *Id.* at 51-52.

173. See Christina Duffy Burnett, *The Edges of Empire and the Limits of Sovereignty: American Guano Islands*, 57 *AM. Q.* 779 (2005).

174. IMMERWAHR, *supra* note 1, at 52.

175. *Jones v. United States*, 137 U.S. 202, 224 (1890); see also *Duncan v. Navassa Phosphate Co.*, 137 U.S. 647, 650-51 (1891). My interpretation in *Almost Citizens* emphasizes that the islands were not entirely annexed, entirely foreign, entirely subject to the Constitution, nor entirely free from the jurisdiction of the government that the Constitution created. ERMAN, *supra* note 13. Hence, I disagree with Immerwahr’s claim that “by 1863, the government had annexed fifty-nine islands” pursuant to the legislation. IMMERWAHR, *supra* note 1, at 53. Similarly, I do not join Immerwahr in seeing a “thundering presidential endorsement of a principle that . . . [these] remote . . . islands were . . . part of the United States” when President Benjamin Harrison declared that “[i]t is inexcusable that American laborers should be left within our own jurisdiction without access to any Government officer or tribunal for their protection.” *Id.* at 56. Nor do I agree that these events “established that the borders of the United States needn’t be confined to the continent.” *Id.*

principle was capable of extension, perhaps even to permit some annexed territories to remain beyond the reach of the Reconstruction Constitution.

By 1898, the Reconstruction Constitution was in retreat. Individual rights had declined and state and federal power had grown across three decades of official interactions with American Indians, people of Chinese descent, aliens, those beyond U.S. borders, and members of other disfavored communities. African Americans had suffered the worst setbacks. The Civil War had initially resulted in the stunning status transformation of slaves into citizens. Afterward, a Republican Party very different than that of today dominated the federal government. Its members pursued a Reconstruction policy aimed at recasting the nation as a republic with formal equality among self-governing male citizens. Their far-reaching statutory and constitutional innovations could credibly be argued to have imbued former slaves' citizenship with expansive "privileges" and "immunities," and with equal civil and political rights. By voting in large numbers and winning numerous political offices, African Americans became a key wing of the Republican Party, able to advance their own interests while also creating incentives for their party to defend their rights and participation.<sup>176</sup>

Nonetheless, legal and political counterassaults soon began relentlessly hollowing out African Americans' status as citizens. In the *Slaughter-House Cases* (1872),<sup>177</sup> the Supreme Court essentially renounced judicially enforceable privileges and immunities of U.S. citizenship where race discrimination was not involved. Other decisions limited federal antidiscrimination enforcement to voting and to instances where states either interfered with civil rights or failed to prevent such interference. Democrats were the party of white supremacy at the time, and they unleashed unprecedented domestic terror and voter fraud. These actions succeeded in suppressing Black turnout, and thereby progressively weakened African Americans' ability to rally Republican majorities in Washington to their defense. Then in 1893, Democrats won control of the political branches and repealed Reconstruction-era voting-rights laws en masse. Most elected Republicans had all but abandoned African Americans by the time that the Supreme Court greenlighted Jim Crow in *Plessy v. Ferguson* (1896).<sup>178</sup> There, the Court upheld a segregation law transparently intended to be part of a system of racial caste. The majority explained its decision with the (disingenuous) denial that the segregation law "stamps the colored race with a badge of

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176. XI WANG, *THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE AND NORTHERN REPUBLICANS, 1860-1910* (1997).

177. 83 U.S. (16 Wall.) 36, 73-81 (1872).

178. 163 U.S. 537 (1896).

inferiority.”<sup>179</sup> A final nail would come a few years later in *Giles v. Harris* (1903).<sup>180</sup> With this decision, the Justices would uphold state disfranchisement of African Americans by declaring themselves powerless to intervene when “the great mass of the white population” in a state “intends to keep the [B]lacks from voting.”<sup>181</sup> African Americans remained citizens, but their status had been so emptied of content that one international lawyer described it as offering less than the status of subject brought in other empires.<sup>182</sup>

By contrast, the restraints that the Reconstruction Constitution imposed on empire remained standing in 1898. Yet they had grown brittle. A naval war that demanded ports and a defeated empire with island colonies to cede were all that was needed to test the lion, as became clear when the War of 1898 brought renewed annexations. By 1900, U.S. borders extended across Hawai‘i, Puerto Rico, Guam, and the Philippines.

## 2. *New Statutes to Make the Constitution Safe for Empire*

Empire builders prevented the extension of the Reconstruction Constitution to the new colonies by erasing the land itself from the Republic at law. Two maps from Immerwahr’s introduction illustrate the shift:

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179. *Id.* at 551.

180. 189 U.S. 475 (1903).

181. *Id.* at 488.

182. Sam Erman, *Meanings of Citizenship in the U.S. Empire: Puerto Rico, Isabel Gonzalez, and the Supreme Court, 1898 to 1905*, 27 J. AM. ETHNIC HIST. 5, 18 (2008).

**FIGURE 2.**  
**MAP OF THE CONTIGUOUS FORTY-EIGHT STATES AND WASHINGTON, D.C.**



The map above (Figure 2) is of the contiguous forty-eight states and Washington, D.C. It is the nation's so-called "logo map," because it is instantly recognizable as a visual metonym for the United States.<sup>183</sup> The map below (Figure 3) shows what Immerwahr terms the Greater United States.

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<sup>183</sup> IMMERWAHR, *supra* note 1, at 8.

**FIGURE 3.**  
**MAP OF THE "GREATER UNITED STATES"**



This map (Figure 3) is from 1941 and contains the many territories that were then under U.S. sovereignty.<sup>184</sup> The fact that the logo map has remained the dominant map of the United States for the last century makes it an apt symbol for Immerwahr's subject: the U.S. empire that dares not speak its name. From the vantage of the early twentieth century, however, a different puzzle is visible. Consider these three additional maps (Figures 4-6): one from 1793, one from 1856, and one from 1899, respectively.

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184. *Id.* at 9.



FIGURE 4.  
ALTERNATIVE U.S. MAP FROM 1793<sup>185</sup>



185. William Faden, *The United States of North America, with the British Territories and Those of Spain: According to the Treaty of 1784*, LIBR. CONGRESS (Feb. 11, 1793), <https://www.loc.gov/item/98685647> [<https://perma.cc/JR7Q-CQM2>].

FIGURE 5.  
ALTERNATIVE U.S. MAP FROM 1856<sup>186</sup>

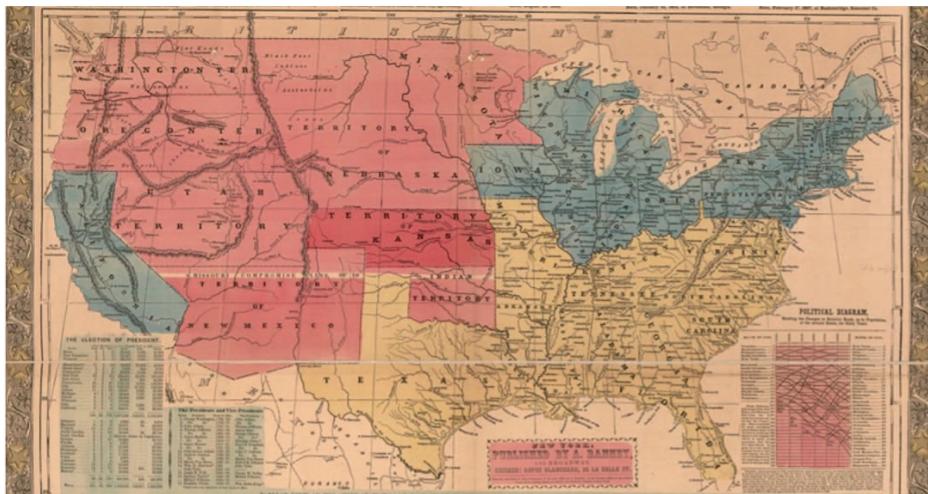
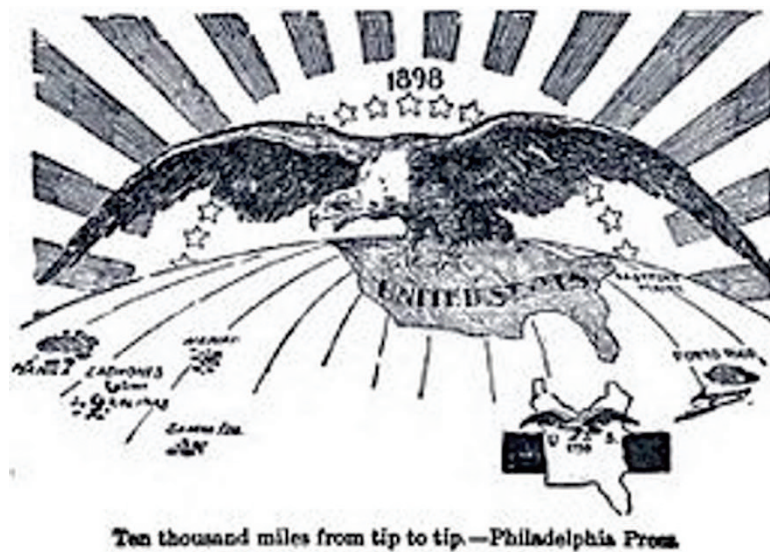


FIGURE 6.  
ALTERNATIVE U.S. MAP FROM 1899<sup>187</sup>



186. Adolphus Ranney & Rufus Blanchard, *National Political Map of the United States*, LIBR. CONGRESS (1856), <https://www.loc.gov/item/2012586609> [<https://perma.cc/SV78-9MC5>].

187. *EXCITING EXPERIENCES IN OUR WARS WITH SPAIN AND THE FILIPINOS* 272 (Marshall Everett ed., 1900).

These maps all include territories as well as states, a vision consistent with the understanding that the Reconstruction Constitution promised citizenship, rights, and statehood as far as U.S. borders extended.<sup>188</sup> This was the result that expansionists sought to avoid. Their method was to invent a vague, new constitutional status of place that severed the connection between sovereignty and the Reconstruction Constitution. Its success was visually evident in the logo maps that soon supplanted those that included all U.S. territory.<sup>189</sup>

Tellingly, the Supreme Court's rollout of the novel constitutional status of unincorporated territory was defined by racism and delay. The doctrine's author was Justice White, who aimed to meet the ostensible "danger of racial and social questions" that the new colonies posed.<sup>190</sup> It took another two decades for the full Court to declare unequivocally that the existence of unincorporated territory was binding doctrine. In the interim, the Court inched toward adoption using an array of stratagems: dicta, minority opinions, narrow holdings, underdefined terms, hazy reasoning, bracketing of questions, and apparent openness to novel approaches.

Though the doctrine reached a relative resting place in the 1920s, it remained fundamentally unsettled. The Court declared that inhabitants of the new unincorporated territories received only fundamental constitutional guarantees, but even today it is unclear which individual rights can be withheld.<sup>191</sup>

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188. The portrayals were consistent with the Reconstruction Constitution, but not caused by it, at least in the case of the antebellum maps that preceded it.

189. IMMERWAHR, *supra* note 1, at 112.

190. Frederic R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823, 832 (1926).

191. See ERMAN, *supra* note 13, at 241 n.31. Immerwahr does a nice job pointing out how the Court positioned Puerto Rico and the Philippines as places that were neither fully in nor fully out and that received less than full constitutional rights. But he overstates the point when he suggests that the Constitution has had no application or provided no rights in unincorporated territories and when he declares that "a citizen on the mainland has a constitutional right to trial by jury, but when the citizen travels to Puerto Rico, the right vanishes." IMMERWAHR, *supra* note 1, at 85-86. That was true in 1922, but intervening Supreme Court decisions render that conclusion doubtful. See *Reid v. Covert*, 354 U.S. 1, 1-2 (1957) (invalidating a U.S. citizen's conviction abroad by U.S. authorities where a jury trial was denied). Immerwahr is also mistaken that Washington was able to ignore slavery in parts of the Philippines because the "Insular Cases established that the Thirteenth Amendment didn't apply to the Philippines." IMMERWAHR, *supra* note 1, at 104; see MICHAEL SALMAN, *THE EMBARRASSMENT OF SLAVERY: CONTROVERSIES OVER BONDAGE AND NATIONALISM IN THE AMERICAN COLONIAL PHILIPPINES* 92 (2001) (relaying that in 1902 "Taft agreed that the Thirteenth Amendment must apply to the Philippines"); see also U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction."). Indeed, the arch-imperialist lawyer Elihu Root contended

The Court has strongly suggested that it will permit unincorporated territories to be denied statehood indefinitely, but the political-question doctrine probably requires that result even for incorporated territories.<sup>192</sup> In a signal of openness to the possibility that colonial subjects were noncitizen U.S. nationals, *Gonzales v. Williams* (1904) declared that Puerto Ricans were not aliens, while expressly reserving the question of whether they were citizens.<sup>193</sup> This left islanders with an “incongruous status,” according to the Puerto Rican plaintiff in the case, Isabel Gonzalez.<sup>194</sup> Yet the Supreme Court’s silence has remained, even as the noncitizen U.S. national has found their way into agency policy and congressional statutes.<sup>195</sup>

Such manipulations and evasions of the status of the colonies and their populations were crucial to obscuring the U.S. empire from view.<sup>196</sup> The Court’s unwillingness to ratify imperial governance gave officials reason to find ways to extend U.S. control without further stretching U.S. borders. Rather than evacuate sovereignty of its obligations, officials sought to invest nonsovereignty with control. As Immerwahr relates, the means was gunboat diplomacy. The United States took over the finances of neighbors, pressured them into one-sided treaties and constitutional provisions, threatened them with military action, and invaded and occupied them, all without extending U.S. sovereign-

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that the Thirteenth Amendment was the exception that proved the rule of constitutional inapplicability. ERMAN, *supra* note 13, at 41.

192. See Sam Erman, *Citizens of Empire: Puerto Rico, Status, and Constitutional Change*, 102 CALIF. L. REV. 1181, 1238 (2014).

193. 192 U.S. 1, 12 (1904).

194. Isabel Gonzalez, Letter to the Editor, *Sauce for Goose and Gander*, N.Y. TIMES, Aug. 5, 1905, at 6.

195. See, e.g., 8 U.S.C. § 1101(a)(29) (2018); *Tuaua v. United States*, 951 F. Supp. 2d 88, 90 (D.D.C. 2013). Immerwahr is incorrect when he writes, “The Fourteenth Amendment grants citizenship to ‘all persons born or naturalized in the United States, and subject to the jurisdiction thereof,’ but the Insular Cases had established that this didn’t apply to unincorporated territories.” IMMERWAHR, *supra* note 1, at 395; see also *Fitisemanu v. United States*, 426 F. Supp. 3d 1155 (D. Utah 2019) (applying Supreme Court doctrine to hold that the Fourteenth Amendment requires U.S. citizenship for people born in unincorporated U.S. territories).

196. Cf. James T. Campbell, Note, *Island Judges*, 129 YALE L.J. 1888, 1938 (2020) (“In obscuring the persisting status distinctions among federal judges, the administrative arms of the judiciary distort the history and institutional reality of the federal judiciary. This obfuscation reinforces what Daniel Immerwahr has called the defining feature of the U.S. empire in modern world history: its ability to remain hidden from the mainland political consciousness.” (citing IMMERWAHR, *supra* note 1, at 1-18)).



ty.<sup>197</sup> A 1903 treaty with Panama that exemplified the approach gave the United States “all the rights, power, and authority” in the Panama Canal Zone as “if it were the sovereign of the territory.”<sup>198</sup> The United States pursued similar strategies in Cuba, Honduras, the Dominican Republic, Guatemala, Costa Rica, Mexico, and Haiti.<sup>199</sup> The only annexation by the United States between 1900 and World War II was of the Virgin Islands, in 1917.<sup>200</sup>

As to the unincorporated territories, political officials and bureaucrats took the Court’s reticence as license to act.<sup>201</sup> In 1917, Congress collectively naturalized Puerto Ricans without extending them full constitutional rights, territorial incorporation, extensive self-government, or any promise of statehood.<sup>202</sup> It did so on the recommendation of the War Department’s law officer, a young Felix Frankfurter. He counseled Congress that whatever it did regarding status and rights, “the Supreme Court will respect such exercise.”<sup>203</sup> The Reconstruction Constitution no longer restrained empire, even though the Court had never renounced it.

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197. See, e.g., DAVID HEALY, DRIVE TO HEGEMONY: THE UNITED STATES IN THE CARIBBEAN, 1898-1917 (1988); PETER JAMES HUDSON, BANKERS AND EMPIRE: HOW WALL STREET COLONIZED THE CARIBBEAN (2017); DANA G. MUNRO, INTERVENTION AND DOLLAR DIPLOMACY IN THE CARIBBEAN, 1900-1921 (1964); MARY A. RENDA, TAKING HAITI: MILITARY OCCUPATION AND THE CULTURE OF U.S. IMPERIALISM, 1915-1940 (2001); EMILY S. ROSENBERG, FINANCIAL MISSIONARIES TO THE WORLD: THE POLITICS AND CULTURE OF DOLLAR DIPLOMACY, 1900-1930 (1999).

198. Convention Between the United States and the Republic of Panama for the Construction of a Ship Canal, Pan.-U.S., art. III, Nov. 18, 1903, 33 Stat. 2234, 2235 [hereinafter Hay-Bunau-Varilla Treaty].

199. IMMERWAHR, *supra* note 1, at 114.

200. *Id.*

201. In this light, consider Immerwahr’s report of how the “decennial census report duly noted the territorial population up front, but then quietly dropped them from nearly all calculations that followed. As the 1910 report explained, those statistics covered ‘the United States proper’ only. *The United States proper* wasn’t a legal term, but census officials expected that everyone would understand.” IMMERWAHR, *supra* note 1, at 13. One reason they would understand was that judicial decisions had created a framework for thinking of such lands as outside the national core. Deliberate judicial vagueness was also behind the license that census officials felt they had to invent the new term and category.

202. Jones-Shafroth Act, Pub. L. No. 64-368, 39 Stat. 951 (1917).

203. Letter from Felix Frankfurter to the Sec’y of War (Mar. 11, 1914) (quoted in *Civil Government for Porto Rico: Hearings on S. 4604 Before the S. Comm. on Pacific Islands and Porto Rico*, 63d Cong. 24 (1914)).

### 3. *Doctrinal Cross-Pollination of Subordination*

Similar status manipulations animated the subordination of African Americans, American Indians, and immigrants during these years. The cause was doctrinal cross-pollination; jurists took up innovations from one doctrinal domain and deployed them in others.<sup>204</sup> Citizenship was one example. Jurists often held incompatible notions of citizenship. All knew that the *Slaughter-House Cases* (1872) had vitiated the Fourteenth Amendment's guarantee of the "privileges or immunities" of citizenship, leaving African Americans few judicially enforceable citizenship rights.<sup>205</sup> But jurists still celebrated the status as a treasure beyond compare and associated it with rights, autonomy, and political membership. The opposing visions of citizenship soon became a recipe for subordination.

The Dawes Act (1887) and successor laws justified impositions on American Indians with reference to the conception of citizenship as a treasure.<sup>206</sup> By prescribing naturalization and private-land ownership for American Indians, these laws proposed to transform American Indians from dependent wards of the federal government into independent, rights-bearing U.S. citizens.<sup>207</sup> But the cost of transformation was high: loss of Indigenous culture and dispossession of tribal lands.<sup>208</sup>

Subjection of the colonies came to rest on both notions of citizenship. In 1900, War Department lawyer Charles Magoon influentially echoed the logic

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204. Another similarity linking the four domains is the extent to which subordination remained out of view of Congress and courts as a result of being or becoming the domain of agencies (American Indians, colonized populations, and immigrants) or of state officials (African Americans). See, e.g., ERMAN, *supra* note 13, at 113 (colonies); ERIKA LEE, *AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882-1943* (2003) (immigrants); LUCY E. SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* (1995) (immigrants); Desmond King & Robert C. Lieberman, *Finding the American State: Transcending the 'Statelessness' Account*, 40 *POLITY* 368, 376-377 (2008) (African Americans); Karen R. Merrill, *In Search of the "Federal Presence" in the American West*, 30 *W. HIST. Q.* 449 (1999) (American Indians); Erich Steinman, *Settler Colonial Power and the American Indian Sovereignty Movement: Forms of Domination, Strategies of Transformation*, 117 *AM. J. SOC.* 1073, 1097 (2012) (American Indians); Louis Anthes, Note, *The Island of Duty: The Practice of Immigration Law on Ellis Island*, 24 *N.Y.U. REV. L. & SOC. CHANGE* 563 (1998) (immigrants).

205. 83 U.S. (16 Wall.) 36 (1872).

206. Dawes Act of 1887, ch. 119, 24 Stat. 388; see also ERMAN, *supra* note 13, at 171 n.20 (collecting sources).

207. See ERMAN, *supra* note 13, at 171 n.20.

208. For a classic account, see generally FREDERICK E. HOXIE, *A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920* (1984).

behind the Dawes Act. He contended that citizenship carried such “great powers, rights, privileges, and immunities” that it could not be extended to the inhabitants of the new colonies.<sup>209</sup> When the first *Insular Cases* concerning the constitutionality of empire reached the Court, lead plaintiffs’ counsel Frederic Coudert sought to press back against empire with the opposite vision of citizenship. Addressing the institution that greenlit Jim Crow and Black disenfranchisement, he foregrounded precedents denying that the Fourteenth Amendment guaranteed broad citizenship rights.<sup>210</sup> U.S. citizenship could be safely extended because it guaranteed fewer rights than other empires’ colonial subjects received, he argued.<sup>211</sup> The Court did not take up Coudert’s argument, but Congress soon did. It collectively naturalized Puerto Ricans into a status much like the hybrid subject-citizen status that Coudert had described. Puerto Rico’s elected representative in Washington, Luis Muñoz Rivera, complained that this “inferior class” of citizenship only served to make Puerto Rico “perpetually a colony, a dependency.”<sup>212</sup>

When Congress declared all American Indians to be U.S. citizens in 1924,<sup>213</sup> the citizenship provided was also of an inferior class. In *United States v. Celestine* (1909)<sup>214</sup> and *United States v. Nice* (1916),<sup>215</sup> the Supreme Court had noted Indians’ putative lack of capacity to manage their own affairs and decided that federal guardianship over them could survive citizenship. As a result, collective naturalization brought American Indians neither full rights nor independence from the Indian Office.<sup>216</sup>

When it came to reducing immigration from Southern and Eastern Europe and from Japan, U.S. officials turned to a different kind of status manipulation: invention. To avoid the political difficulties of too expressly singling out new

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209. CHARLES E. MAGOON, REPORT ON THE LEGAL STATUS OF THE TERRITORY AND INHABITANTS OF THE ISLANDS ACQUIRED BY THE UNITED STATES DURING THE WAR WITH SPAIN, CONSIDERED WITH REFERENCE TO THE TERRITORIAL BOUNDARIES, THE CONSTITUTION, AND LAWS OF THE UNITED STATES, S. DOC. NO. 56-234, at 71 (1900).

210. ERMAN, *supra* note 13, at 52, 81-83.

211. *Id.* at 83.

212. *A Civil Government for Porto Rico: Hearing on H.R. 13818 Before the H. Comm. on Insular Affairs*, 63d Cong. 54 (1914) (statement of Hon. Luis M. Rivera, Resident Comm’r of Puerto Rico).

213. See Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253, 253.

214. 215 U.S. 278, 290-91 (1909).

215. 241 U.S. 591, 598-99 (1916).

216. ERMAN, *supra* note 13, at 149 nn.12-13 (collecting sources). For a more modern instance of cross-pollination involving American Indians, see Gregory Ablavsky, *Sovereign Metaphors in Indian Law*, 80 MONT. L. REV. 11 (2019).

immigrants from Southern and Eastern Europe as racial inferiors, nativists instead sought a legislative formula that ostensibly treated all nationalities equally.<sup>217</sup> In 1921, Congress enacted national immigration quotas that were proportional to the percentage of foreign-born persons in the United States who hailed from each nation.<sup>218</sup> Doing so was neutral enough to pass but not discriminatory enough to satisfy the restrictionists.<sup>219</sup> They proposed instead to use the 1890 census.<sup>220</sup> But that choice was too transparently motivated by bias against Southern and Eastern Europeans.<sup>221</sup> Instead, the National Origins Act of 1924 achieved a similar result by switching the denominator from immigrant to citizen. The Act used current population numbers and envisioned immigrant flows that would mirror the ethnic makeup of the full nation, not just its foreign born.<sup>222</sup> But where an immigrant generally had a single nation of origin, an entirely new status of ethnic proportions had to be created for other Americans. Here, U.S. immigration policy entered into an analytic disaster area. To handle intermarriage, shifting political boundaries in Europe, and inconsistent and incomplete data, officials embraced blood quantum and admitted to making some “rather arbitrary assumptions” that did “violence to the facts.”<sup>223</sup> They submitted their final results with the provision that they “neither individually nor collectively are expressing any opinion on the merits or demerits of this system of arriving at the quotas.”<sup>224</sup> But the process had served its function: unleashing and obscuring targeted racial discrimination.

The National Origins Act used a different invention to formalize the exclusion of Japanese immigrants. In 1907, the United States faced domestic political pressure to restrict Japanese immigration and foreign-relations pressure not to offend the Japanese Empire’s sensitivity to racial slights.<sup>225</sup> To achieve both the result and plausible deniability, Japan and the United States entered the so-

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217. MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 21-22 (2004).

218. Emergency Quota Act, Pub. L. No. 67-5, 42 Stat. 5 (1921).

219. NGAI, *supra* note 217, at 21-22.

220. Johnson Reed Act, Pub. L. No. 67-47, 42 Stat. 153 (1924); NGAI, *supra* note 217, at 22-23.

221. NGAI, *supra* note 217, at 21-22.

222. *Id.*; *cf. id.* at 26-27 (noting how most people of color were excluded from these calculations).

223. *Id.* at 32-35, 285 n.38 (quoting Joseph Hill, Memorandum for the Secretary 3 (June 21, 1926) (on file with Administrative Census Records, file 15, box 1, Memoranda and Notes [of Joseph Hill])).

224. *Id.* at 35, 285 n.45 (quoting Letter from Frank Kellogg, William Whiting & James Davis to the President (Feb. 26, 1929), S. DOC. NO. 70-259 (1929)).

225. ROGER DANIELS, *THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION* 40-45 (1977).



called Gentleman's Agreement, pursuant to which Japan would limit the migration in lieu of the United States doing so.<sup>226</sup> But then growing U.S. domestic political pressure to bar Japanese entry outright led the United States to do so itself in 1924.<sup>227</sup> Again the mechanism was indirect, excluding all "ineligible for citizenship."<sup>228</sup> The phrase was in reference to a 1790 congressional statute that authorized naturalization for "white person[s]."<sup>229</sup> Like all racial categories, white was not self-defining.<sup>230</sup> Repeated disputes over its meaning produced contrary outcomes and inconsistent reasoning.<sup>231</sup> The Supreme Court finally settled the question whether Japanese were white (concluding that they were not) in 1922,<sup>232</sup> just before passage of the Act slammed the door shut on their entry.

World War II upended the attempt to wall off Japan from the United States. The cause of the upheaval was shifts in the status of territory. First, Japanese forces blasted their way into U.S. territory and seized the Philippines.<sup>233</sup> Then the tide turned, and the entire population of Japan emerged from the war subject to U.S. governance.<sup>234</sup> Another stage in the U.S. empire had begun.

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226. NGAI, *supra* note 217, at 39.

227. *See generally* DANIELS, *supra* note 225, at 79-105.

228. National Origins Act, Pub. L. No. 68-139, 43 Stat. 153, 159, 162, 168 (1924); NGAI, *supra* note 217, at 48-49.

229. *See* Naturalization Act of 1790, Pub. L. No. 1-3, ch. III, § 1, 1 Stat. 103, 103. An 1870 amendment permitted people of African descent or nativity to naturalize too. *See* Naturalization Act of 1870, Pub. L. No. 41-254, ch. CCLIV, § 7, 16 Stat. 254, 256.

230. *See, e.g.*, LAURA E. GÓMEZ, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE* (2007); ARIELA GROSS, *WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA* (2008); IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996).

231. *See, e.g.*, HANEY LÓPEZ, *supra* note 230; NGAI, *supra* note 217, at 39-47; Gregg Cantrell, "Our Very Pronounced Theory of Equal Rights to All": Race, Citizenship, and Populism in the South Texas Borderlands, 100 J. AM. HIST. 663, 663-65 (2013).

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

233. IMMERWAHR, *supra* note 1, at 187-94.

234. *Id.* at 17.

C. *Postwar America*

1. *Status Severing: Empire and American Indians*

The United States emerged from World War II governing more people outside of states than within them. Yet today, that ratio has fallen twenty-five-fold.<sup>235</sup> As Immerwahr marvels:

[I]f you looked up at the end of 1945 and saw a U.S. flag overhead, odds are that you weren't seeing it because you lived in a state. You were more likely colonized or living in occupied territory. . . .

. . . .

. . . [Then] the United States . . . did something highly unusual: [it] won a war and *gave up* territory[,] . . . setting free its largest colony (the Philippines) [and] folding up its occupations. It didn't annex any land in the war's aftermath. . . .

. . . Today, all U.S. overseas territory, including base sites, comprises an area smaller than Connecticut.<sup>236</sup>

Even where the United States retained territories outside of states, it sought to cloak them in the garb of self-determination. Thus it was that Puerto Rico, the largest and most populous U.S. territory, voted to become a U.S. commonwealth.<sup>237</sup> Despite the new name for their island's status, Puerto Ricans were still subject to the authority of a government in which they had no votes.<sup>238</sup> But the referendum in favor of the change "was enough to round Puerto Rico up to 'self-governing' for the purposes of the United Nations," which meant removal from the U.N. list of non-self-governing territories.<sup>239</sup> Immerwahr explains both processes with little reference to law. Instead, he foregrounds the growth of synthetics, technology, standards, English fluency, telecommunications, transportation, and the like, as well as the rise, especially in Puerto Rico's case, of global anticolonialism.

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<sup>235</sup> *Id.* at 229.

<sup>236</sup> *Id.* at 226-30.

<sup>237</sup> *Id.* at 256-57.

<sup>238</sup> *Id.* at 257.

<sup>239</sup> *Id.*

But focus on the manipulation of status, and the picture looks quite different.<sup>240</sup> To start, the “unusual” postwar U.S. decision to abandon formal colonialism becomes instead ongoing U.S. eagerness to sever obligations of sovereignty from the control that sovereignty characteristically brought.<sup>241</sup> Since 1900, nonjudicial U.S. officials had gained wide latitude in governing territories already within U.S. borders. Simultaneously, the United States imposed control far and wide beyond U.S. borders without annexing anywhere but the U.S. Virgin Islands, a small land mass with few people.<sup>242</sup> By World War II, the United States was close to jettisoning the vast majority of its colonial subjects by granting the Philippines independence.<sup>243</sup>

In Puerto Rico, the United States sought to sever power from duty through recourse to a novel, indeterminate status: commonwealth. As Immerwahr notes, by the time of the referendum on which Puerto Ricans voted in 1952, independence and statehood were off the table.<sup>244</sup> The status held by Native nations had never been on it.<sup>245</sup> The only remaining place-based status of constitutional moment was territory, which carried no sovereignty, brought no say in national government, and was subject to plenary congressional control.<sup>246</sup> Seen this way, none of these fundamental matters were at issue in the decision to have a commonwealth. Immerwahr describes the referendum this way: “It just

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240. Where I focus on law, Sarah Miller-Davenport nominates ideology as the missing explanatory variable in Immerwahr’s analysis. See Sarah Miller-Davenport, *Review by Sarah Miller-Davenport*, in H-DIPLO ROUNDTABLE XXI-17, at 13 (2019).

241. On sovereignty as a contested, ambiguous, varied, and shifting concept, see, for example, LAUREN BENTON, *A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES, 1400-1900* (2010).

242. See BUREAU OF THE CENSUS, DEP’T OF COMMERCE, *CENSUS OF THE VIRGIN ISLANDS OF THE UNITED STATES NOVEMBER 1, 1917*, at 8; FRANKLIN K. VAN ZANDT, *BOUNDARIES OF THE UNITED STATES AND THE SEVERAL STATES: GEOLOGICAL SURVEY PROFESSIONAL PAPER 909*, at 23-41 (1976).

243. See Philippines Independence Act, Pub. L. No. 73-127, 48 Stat. 456 (1934). Of course, if the United States retained Alaska and Hawai’i as territories, they would have dwarfed Connecticut geographically. But that was just a coincidence of geography. Alaska held fewer than 100,000 people in 1940. As for Hawai’i, Puerto Rico dwarfed it in size and population.

244. IMMERWAHR, *supra* note 1, at 256.

245. *Id.*

246. See, e.g., U.S. CONST. art. I, § 2, cl. 1, 3; *id.* art. I, § 3, cl. 1; *id.* art. I, § 8, cl. 3; *id.* art. II, § 1, cl. 3; *id.* art. III, § 2, cl. 1; *id.* art. IV, § 3, cl. 1-2; *id.* art. V; *id.* amend. XIV, § 2; *cf.* *id.* art. I, § 8, cl. 17 (“District”); *id.* amend. XIII, § 1 (“place subject to [the United States’] jurisdiction”); *id.* amend. XXI, § 2 (“Possession”).

asked them if, within the confines of their existing colonial relationship to the mainland, they'd prefer a new constitution" for their territory.<sup>247</sup>

To give a sheen of self-determination to Puerto Ricans' choice between colonialisms, U.S. officials equivocated as to the balance of sovereignty, obligation, and control that the territory's new commonwealth status established between the island and the mainland. The key word was "compact."<sup>248</sup> The preamble to the congressional enabling act authorizing a commonwealth constitution declared itself "adopted in the nature of a compact."<sup>249</sup> The commonwealth constitution then located its powers "within the terms of the compact agreed upon between the people of Puerto Rico and the United States."<sup>250</sup> To convince the United Nations to remove Puerto Rico from the list of non-self-governing territories, the U.S. delegate classified the new legal regime as "provisions of a compact of a bilateral nature whose terms may be changed only by common consent."<sup>251</sup> The implication was that Puerto Rico had gained a sort of sovereignty that the United States lacked the legal authority to eliminate.

The new arrangement worked best when U.S. officials tiptoed around it. For Puerto Rico to actually hold sovereignty that Congress could not reclaim would violate the constitutional rule that a prior congress may generally not bind a future one as a result of a novel constitutional status. Rather than clarify matters, the courts and political branches for many years studiously maintained the ambiguity.<sup>252</sup> One method was to choose their words carefully. Here is the Supreme Court in 1982: "Puerto Rico, like a state, is an autonomous political entity, 'sovereign over matters not ruled by the Constitution.'"<sup>253</sup> Another strat-

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247. IMMERWAHR, *supra* note 1, at 257.

248. See Christina D. Ponsa-Kraus, *Political Wine in a Judicial Bottle: Justice Sotomayor's Surprising Concurrence in Aurelius*, 130 YALE L.J.F. 101 (2020) (containing citations to key expositions of compact theory).

249. Puerto Rico Federal Relations Act, ch. 446, § 1, 64 Stat. 319, 319 (1950).

250. P.R. CONST. art. I, § 1.

251. Press Release No. 1802, Mission at the United Nations N.Y. (Nov. 3, 1953), in 3 FOREIGN RELATIONS OF THE UNITED STATES, 1952-1954, UNITED NATIONS AFFAIRS 1456, 1457 (statement by the Honorable Frances P. Bolton, United States Representative in Committee Four on Puerto Rico).

252. On the political branches maintaining the ambiguity, see Erin F. Delaney & Christina D. Ponsa-Kraus, *Fantasy Island*, YALE J. INT'L L. ONLINE (May 19, 2018), <https://www.yjil.yale.edu/fantasy-island> [<https://perma.cc/PM2P-ATGR>], which identifies the 2016 creation by Congress of the Federal Oversight and Management Board for Puerto Rico in 2016 as the "breaking point" for the notion that congressional action was consistent with the compact theory. On the Supreme Court, see Samuel Issacharoff, Alexandra Bursak, Russell Rennie & Alec Webley, *What Is Puerto Rico?*, 94 IND. L.J. 1, 19 (2019).

253. *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982).

egy was to avoid decisions that clearly contravened the notion of a compact and associated sovereignty.<sup>254</sup>

Recent years have seen federal officials abandon studied evasion to treat Puerto Rico as a peripheral space subject to U.S. whim. Though the shift was years in the making,<sup>255</sup> its arrival was made obvious by the lackluster federal responses to Hurricane Maria and the island's debt crisis. As a result, the case has grown stronger for a rare point of agreement among many advocates of statehood and independence in Puerto Rico: the island cannot be other than a colony until one of their two visions is realized.<sup>256</sup>

Justice Sotomayor has responded to the narrowing space for ambiguity by suggesting a manipulation of her own: recognition by the Supreme Court of a previously unarticulated, anticolonial, pro-self-government, quasi-sovereign constitutional status for Puerto Rico.<sup>257</sup> But so far, no five Justices are willing to ratify or reject this view.<sup>258</sup> If such equivocation persists, the validity of Justice Sotomayor's view will be uncertain. Her attempt to clarify the sovereign status of Puerto Rico will instead have reincarnated its fundamental equivocality.<sup>259</sup>

Puerto Rico's status limbo has much in common with that of Native nations, which also engage in substantial governance pursuant to an indefinite mix of congressional grace and sovereign prerogative. The modern framework is the Indian Reorganization Act of 1934,<sup>260</sup> which authorized tribes to adopt

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254. Hence, Justice Kagan's careful treading in her opinion for the Court in *Puerto Rico v. Sanchez Valle*: "Truth be told, however, 'sovereignty' in this context does not bear its ordinary meaning. For whatever reason, the test we have devised to decide whether two governments are distinct for double jeopardy purposes overtly disregards common indicia of sovereignty." 136 S. Ct. 1863, 1870 (2016).

255. See Brief of Respondents at 31-32, *Sanchez Valle*, 136 S. Ct. 1863 (No. 15-108); Issacharoff, Bursak, Rennie & Webley, *supra* note 252, at 12-19, 23-24, 33; Caros Iván Gorrín Peralta, *Puerto Rico and the United States at the Crossroads*, in RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE 192-94 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015).

256. For just one recent example, see Kevin McClintock Batista, *Nueva Generación Estadista en el Congreso*, EL NUEVO DÍA (July 17, 2020), <https://blogs.elnuevodia.com/con-igual-patriotismo/2020/07/17/nueva-generacion-estadista-en-el-congres> [<https://perma.cc/XJM2-42Q7>].

257. *Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1671-83 (2020) (Sotomayor, J., concurring).

258. *Id.*

259. See Ponsa-Kraus, *supra* note 248, at 109.

260. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended in scattered sections of 25 U.S.C.).

constitutions, reaffirmed tribal sovereignty, ended allotment in favor of preserving tribal lands, and offered Native self-government within Native territories.<sup>261</sup> Today, there are hundreds of federally recognized Native nations.<sup>262</sup> Government-to-government relations between recognized tribes and all levels of U.S. government are now commonplace and normative.<sup>263</sup> Native nations engage in extensive, sophisticated governance.<sup>264</sup> Yet, the Indian Reorganization Act was no panacea.<sup>265</sup> Federal authorities wielded substantial influence as tribes drafted constitutions. The finished products only took effect upon the approval of the Secretary of the Interior.<sup>266</sup> Today, tribes exist within the territorial borders of states that continue to challenge Native authority.<sup>267</sup> Moreover, the nature of Native sovereignty remains contested, while Congress's plenary power over Indian affairs is as clear as that over territorial matters.<sup>268</sup>

A major distinction between ambiguous Puerto Rican sovereignty and ambiguous Native sovereignty is possible alternatives. Proponents of statehood or independence for Puerto Rico envision the island's current status as a species of purgatory, suffering that will culminate in the keys to the kingdom of robust sovereignty. By contrast, U.S. dispossession of American Indians appears to have passed the point of no return to robust sovereignty. For the foreseeable

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261. *Id.*; Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1802, 1813-14 (2019).

262. Blackhawk, *supra* note 261, at 1814. On terminations of recognition, see generally Kenneth R. Philp, *Termination: A Legacy of the Indian New Deal*, 14 W. HIST. Q. 165 (1983).

263. Blackhawk, *supra* note 261, at 1813-14.

264. *Id.* at 1814.

265. See Robert A. Williams, Jr., "The People of the States Where They Are Found Are Often Their Deadliest Enemies": *The Indian Side of the Story of Indian Rights and Federalism*, 38 ARIZ. L. REV. 981, 985-86 (1996).

266. Indian Reorganization Act of 1934, ch. 576, § 16, 48 Stat. 984, 987 (codified as amended at 25 U.S.C. § 5123(a) (2018)); see also DAVID E. WILKINS & SHELLY HULSE WILKINS, *DISMEMBERED: NATIVE DISENROLLMENT AND THE BATTLE FOR HUMAN RIGHTS* 45-47 (2017) (describing federal officials' influence during tribal constitution drafting, while expressing skepticism of the claim by some scholars that federal officials typically presented tribes with a pre-written model constitution from which to work); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 275 (discussing the significance of a requirement that Native nations gain federal approval before changing a legal rule).

267. See, e.g., Williams, *supra* note 265.

268. For examples of contested aspects of Native sovereignty, see Blackhawk, *supra* note 261, at 1835-38; Maggie Blackhawk, *On Power & Indian Country*, WOMAN & LAW. 39, 49 (2020); and Seth Davis, *American Colonialism and Constitutional Redemption*, 105 CALIF. L. REV. 1751, 1802-06, *passim* (2017).

future, neither statehood nor independence is a realistic possibility.<sup>269</sup> Indeed, the most likely alternative to amorphous Indigenous sovereignty may be displacement by aggrandized state sovereigns.<sup>270</sup> A comparative glance abroad confirms the lack of robust forms of sovereignty for Indigenous peoples and casts U.S. policy more sympathetically. The United States is unique among the world's governments in recognizing the inherent, preconstitutional sovereignty of Native nations.<sup>271</sup> This leads Maggie Blackhawk to celebrate status limbo. Even as injuries continue to accumulate upon American Indians, “[r]ecognition of inherent tribal sovereignty . . . has helped mitigate the realities of American colonialism.”<sup>272</sup> Inescapable colonialism has made amorphous sovereignty welcome.

By contrast, amorphous nonsovereignty lies at the heart of the U.S. choice to eschew much colonial governance and instead use military bases to bolster the global projection of U.S. power. As Immerwahr observes, that choice is how Secretary of Defense Donald Rumsfeld could plan the invasion of Iraq while declaring that Americans are “not a colonial power” and “don’t take our force and go around the world and try to take other people’s real estate.”<sup>273</sup> But such islands of U.S. control within oceans of foreign sovereignty can quickly grow unstable, as illustrated by the various decisions of the Philippines, Saudi Arabia, Uzbekistan, and Kyrgyzstan to withdraw their consent to U.S. military bases.<sup>274</sup> Bases within sovereign states of the Union provide no complete solution. States can use their pull in national politics to shutter bases, as occurred in

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269. *But cf.* J. Kēhaulani Kauanui, *Precarious Positions: Native Hawaiians and U.S. Federal Recognition*, in *RECOGNITION, SOVEREIGNTY STRUGGLES, AND INDIGENOUS RIGHTS IN THE UNITED STATES: A SOURCEBOOK* 311, 324 (Amy E. Den Ouden & Jean M. O’Brien eds., 2013) (describing advocates of Hawaiian independence who oppose federal recognition of Native Hawaiians as an Indigenous people because they believe that such recognition would make subsequent Hawaiian independence more difficult).

270. I thank Greg Ablavsky for this insight.

271. Blackhawk, *supra* note 268, at 42.

272. Blackhawk, *supra* note 261, at 1017–21; *see also* Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 *YALE L.J.* 1012 (2015) (defending Native sovereignty from incremental erosion and frontal attack in the courts); Seth Davis, *American Colonialism and Constitutional Redemption*, 105 *CALIF. L. REV.* 1751 (2017) (preferring sovereignty to trust doctrine); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 *HARV. L. REV.* 381, 440 (1993) (“[F]ederal Indian law is about institutional survival as well—the perpetuation of the oldest continuous sovereigns on this continent.”).

273. IMMERWAHR, *supra* note 1, at 385.

274. *Id.* at 386–87.



Hawai‘i and Puerto Rico (via its diaspora in New York).<sup>275</sup> U.S. military planners have consequently sometimes gravitated toward Guam, which is within U.S. sovereignty but not its own sovereign, and so involves no negotiations with foreign nations or lawmakers in Washington.<sup>276</sup> But that strategy secures control at the expense of expanding colonialism; Guam’s incapacity has already landed it a place on the United Nations’ list of non-self-governing territories.<sup>277</sup> Complete control absent any sovereign obligations has proved elusive.

The closest that the United States has come to severing sovereignty and control is also the subject of one of Immerwahr’s key examples: the search for a place to house detainees during the so-called War on Terror. The failure of the attempt is an instance of the United States rejecting a transparently imperialistic status manipulation in favor of one that obscured the U.S. empire even as it buttressed it. In the wake of the September 11 attacks, the Bush Administration sought a location in which it would be answerable to no law, foreign or domestic.<sup>278</sup> To avoid interference by foreign governments, from foreign laws, or from domestic judicial review, officials lit on Guantánamo Bay, which was subject to the “complete jurisdiction and control” of the executive, yet formally outside U.S. sovereignty.<sup>279</sup> For over a century, the Supreme Court had declined to define the extent to which control could be extended without triggering obligations of sovereignty.<sup>280</sup> But when the Bush Administration sought to eliminate that ambiguity in favor of total control with no consequences, the Court balked. It reinstated ambiguity by relocating it, much as Justice Sotomayor has tried to do with putative Puerto Rican sovereignty.<sup>281</sup> First, in *Boumediene v. Bush* (2008),<sup>282</sup> the Justices rejected the Administration’s position that it could do whatever it wanted with no judicial review. Then, in subsequent years, the Justices declined to clarify what limits did exist. They simply left matters with lower courts, which were relatively sympathetic to the execu-

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275. *Id.* at 387.

276. *Id.*

277. See *Non-Self-Governing Territories*, UNITED NATIONS, <https://www.un.org/dppa/decolonization/en/nsqt> [<https://perma.cc/AEN8-C6N4>].

278. IMMERWAHR, *supra* note 1, at 388.

279. *Id.* at 389.

280. The key prior precedent was *Johnson v. Eisentrager*, 339 U.S. 763 (1950), in which the Supreme Court determined that U.S. civil courts did not have jurisdiction over prisoners being held in Allies-administered Germany.

281. See *Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1671-83 (2020) (Sotomayor, J., concurring).

282. 553 U.S. 723 (2008).



tive branch.<sup>283</sup> Tellingly, no detainee has yet left Guantánamo Bay as a result of a judicial order that the government continued to contest.<sup>284</sup>

## 2. *Status Forgetting: Immigration and Racial Caste*

To see the pointillist empire as a way to secure sovereignty's benefits without incurring its costs is to move immigration law to the center of the story. A major problem with extending U.S. sovereignty beyond state borders has been the conflict between U.S. ideals of democracy and rights, and the contrary reality of governance over colonial subjects. The U.S. imperial impulse has been to obscure the conflict, rather than to solve it. This is the pointillist empire's strong suit. U.S. power and control still extend far beyond the fifty states and still have tremendous impact on the people they encounter. But because of the attachment of people to places, those affected are mostly now categorized as foreigners, unable even to claim the imperial protection that is the colonial subject's due.<sup>285</sup> At a time when desperate migrations are an increasingly common feature of the world that the United States has played a key role in creating, the operation of U.S. immigration law is ever more central to that of empire.<sup>286</sup> Fittingly, immigration law is also beset with status ambiguity.

A defining trait of immigration today is status indeterminacy. It is not always clear whether a person is in the United States without authorization, whether someone unlawfully present may become lawfully present, what consequences can follow if that person does not achieve an adjustment of status,

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283. See Linda Greenhouse, Opinion, *A Court Just Slammed the Guantánamo Gate Shut*, N.Y. TIMES (Sept. 10, 2020), <https://www.nytimes.com/2020/09/10/opinion/guantanamo-due-process.html> [<https://perma.cc/RS9P-GEGC>].

284. *Id.* (reporting that in cases involving Guantánamo detainees, the “D.C. Circuit in fact has never affirmed a grant of habeas that the government contested”).

285. See Kramer, *supra* note 62, at 403; cf. Achiume, *supra* note 62, at 1563 (declaring U.S. restrictions on immigration from the “Third World” inconsistent with its place among the “central beneficiaries of neocolonial empire, wielding power and influence within and through neocolonial, transnational economic and political institutions to their benefit, and at the expense of the Third World”); Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134 *passim* (2014) (describing a similar process of externalizing the consequences of the projection of U.S. power abroad: limits on the transmission of U.S. citizenship to children born outside the United States to the U.S. men who then made up the vast majority of Americans abroad).

286. See HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 54-55 (2014); Achiume, *supra* note 62, at 1563-66; Kramer, *supra* note 62, at 403, 431-36.

and to what extent such consequences will be pursued or abated.<sup>287</sup> This confusion is functional. The U.S. economy depends on the labor of unauthorized immigrants.<sup>288</sup> Employers are often able to prevent workers' mass removal.<sup>289</sup> Yet restrictionists demand that such "aliens" be formally excluded.<sup>290</sup> As Hiroshi Motomura encapsulates, "Unauthorized migrants are often accused of breaking the law, but the real threat to the rule of law comes from the system as a whole."<sup>291</sup> That is because "Congress can enact no more than a system that looks good on paper but is designed to acquiesce in significant levels of non-compliance"<sup>292</sup> through "selective admissions, selective enforcement, and vast unpredictable and inconsistent discretion."<sup>293</sup> The result is a system that draws workers across the border as unauthorized immigrants, then threatens to forget U.S. complicity in the creation and maintenance of that status when deportation looms.<sup>294</sup>

A similar process of status-forgetting infects the legal framework for addressing the legacies of slavery and Jim Crow. For centuries, the United States and its predecessor colonies maintained brutal systems of racial caste, in which being Black meant occupying a distinct and degraded status.<sup>295</sup> The legacies of those historical evils include overt racism by individuals, but also cycles of disadvantage and self-perpetuating structures of racism.<sup>296</sup> This is one lesson of

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287. MOTOMURA, *supra* note 286, at 13-14, 20-30.

288. *Id.* at 49.

289. *Id.*

290. *Id.* at 49-50.

291. *Id.* at 22.

292. *Id.* at 49.

293. *Id.* at 192; *see id.* at 46-55.

294. One can tell a similar story about status manipulation, refugees, and asylum. *See* Hiroshi Motomura, *The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age*, 105 CORNELL L. REV. 457, 479-95 (2020).

295. Among a vast literature, see, for example, ALEJANDRO DE LA FUENTE & ARIELA J. GROSS, *BECOMING FREE, BECOMING BLACK: RACE, FREEDOM, AND LAW IN CUBA, VIRGINIA, AND LOUISIANA* (2020); RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017); REBECCA J. SCOTT, *DEGREES OF FREEDOM: LOUISIANA AND CUBA AFTER SLAVERY* (2005); and C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955).

296. Among many examples, see ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016); and DARIA ROITHMAYR, *REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE* (2014).

the recent experience with Black Lives Matter,<sup>297</sup> disproportional Black COVID-19 mortality,<sup>298</sup> and widening Black/white wage gaps.<sup>299</sup> Another is that these festering, regenerating, and unrecompensed historical wrongs call out for remedy. Or so one might think.

Instead, the Supreme Court hinders solutions. According to Supreme Court doctrine, a violation of constitutional equal protection requires an evil act and a villainous actor. Forbidden discrimination is limited to overt racial classifications, acts undertaken with discriminatory purposes, and policies that flaunt their concern with racial outcomes.<sup>300</sup> Other dynamics that reinforce Black subordination are beyond the reach of equal protection.<sup>301</sup> Worse, they are often also beyond the power of any government to address directly. Policies that remedy the history of Jim Crow and slavery by expressly benefitting African Americans are themselves banned as illegal racial classifications.<sup>302</sup> The government may only help a person who was herself the victim of a specific, identifiable, and qualifying act of racism.<sup>303</sup>

The Court's entrenchment of Black disadvantage rests on hiding the roots of the inequality. Consider Chief Justice Roberts's oft-quoted and fundamentally ambiguous declaration: "The way to stop discrimination on the basis of

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297. See MAPPING POLICE VIOLENCE, <https://mappingpoliceviolence.org> [<https://perma.cc/6NFC-4GYT>].

298. Gregorio A. Millett, Austin T. Jones, David Benkeser, Stefan Baral, Laina Mercer, Chris Beyrer, Brian Honermann, Elise Lankiewicz, Leandro Mena, Jeffrey S. Crowley, Jennifer Sherwood & Patrick S. Sullivan, *Assessing Differential Impacts of COVID-19 on Black Communities*, 47 ANNALS EPIDEMIOLOGY 37, 37, 39 tbl.1 (2020); Eboni G. Price-Haywood, Jeffrey Burton, Daniel Fort & Leonardo Seoane, *Hospitalization and Mortality Among Black Patients and White Patients with COVID-19*, 382 NEW ENG. J. MED. 2534, 2536-37 tbl.1 (2020).

299. Elise Gould, *Black-White Wage Gaps Are Worse Today than in 2000*, ECON. POL'Y INST.: WORKING ECON. BLOG (Feb. 27, 2020, 5:34 PM EST), <https://www.epi.org/blog/black-white-wage-gaps-are-worse-today-than-in-2000> [<https://perma.cc/7AJR-58CJ>].

300. See Sam Erman & Gregory M. Walton, *Stereotype Threat and Antidiscrimination Law: Affirmative Steps to Promote Meritocracy and Racial Equality in Education*, 88 S. CAL. L. REV. 307, 339-43, 350-77 (2015); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 494-97 (2003).

301. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976); see also Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

302. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989). Though short lived, the Court did briefly commit itself to dismantling what Jim Crow had wrought. See, e.g., *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 438 (1968) (contemplating the history of school segregation and declaring that "racial discrimination would be eliminated root and branch").

303. See *Croson*, 488 U.S. at 498-506.

race is to stop discriminating on the basis of race.”<sup>304</sup> On the one hand, it makes a big promise: all discrimination will end if the narrow band that the Constitution allows is eliminated. On the other hand, it is syllogistic: stopping stops. Both claims are ridiculous. The first is far too broad. Were intentional discrimination to end, the centuries of accrued inequities would remain. The second is trivial. The power of the sentence is its deliberate confusion of what the Fourteenth Amendment prohibits with all possible race discrimination. That confusion rests on a disingenuous act of forgetting. Blackness was long a disadvantageous status because government action made it so. Refusing to acknowledge official color lines does not undo the harms done. Nor is it meant to. The power of the politics of colorblindness is its capacity to conceal national obligations that would otherwise urgently demand recompense.<sup>305</sup> From that perspective, the Chief Justice’s ambiguity is a feature, not a bug.

## CONCLUSION

This Review is a sketch in two senses. It is a brief outline that seeks to lay out a view of U.S. legal history in broad, simple strokes. It is also my rough plan for embarking on a thorough account of how status manipulations have linked together empire, slavery, racism, immigration, and indigeneity. The two functions are related—the first is only worthwhile if the second can succeed. Conversely, any consideration fatal to the latter would also doom the former. In that spirit, I conclude by addressing some key challenges: omissions, ambition, and framing.

As simplifications that set complex endeavors in motion, plans are necessarily incomplete. Mine shunts aside key topics, including gender, sex, labor, and capital. And while status manipulation lies at the heart of my argument, it receives only the loose definition of identification of some of its component tensions and pieces, not a rigorous delineation of its boundaries.<sup>306</sup> These

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304. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion).

305. See Ariela Gross, *A Grassroots History of Colorblind Conservative Constitutionalism*, 44 L. & SOC. INQUIRY 58 (2019); Cedric Merlin Powell, *Critiquing Neutrality: Critical Perspective on Schools, the First Amendment, and Affirmative Action in a “Post-Racial” World*, 52 U. LOUISVILLE L. REV. 105, 108 (2013); Erika Wilson, *The Great American Dilemma: Law and the Intransigence of Racism*, 20 CUNY L. REV. 513 (2017); Siegel, *supra* note 301.

306. By placing status at the center of an account that stretches from the Founding until today, I join scholars who do not see U.S. history as progressing toward liberalism by way of transformation from “*Status to Contract*.” HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 170 (Cosimo,

choices reflect the limits of my research and thinking to date, not a denial of the centrality of these topics and concepts. Nor do contingency, agency, and intentionality get their due in the long and broad history recounted here. Instead, my sketch steps back to focus on central sins of the American past. The result is U.S. history that looks almost like a single, vast conspiracy against the nation's have-nots. A more thorough account would also occasionally zoom in with a more sympathetic eye. Doing so would reveal modestly situated people who experienced and navigated law and sometimes influentially shaped it, tragic developments that no one intended, and a complex mixture of gains and setbacks that often seems to defy directionality.<sup>307</sup> Careful study of all these dynamics will surely alter and hopefully strengthen this Review's argument. Research, contemplation, and feedback may also help me spot and respond to other omissions I have yet to see.

Writing a compelling history of numerous communities, places, and institutions across recent centuries precludes any principal reliance on primary research. Any such account must be largely synthetic, bounded in its reach by the extent of others' work in the area. Fortunately, historians of indigeneity, slavery, race, immigration, and empire are in the midst of an incredible outpouring of increasingly interconnected scholarship.<sup>308</sup>

I opened this Review by proposing a revised Immerwahrian account that would accept and expand the U.S. history frame. I'll close with a word on the costs and benefits of tracking the chronology and geography of U.S. constitutional history. Paul Kramer warns that pegging studies to U.S. borders can "advance unacknowledged U.S. nationalist purposes."<sup>309</sup> I agree. As I have asserted elsewhere, such histories obscure important legal dynamics that have spanned national borders and timelines, existed outside the United States, and operated

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Inc. 2005) (1861); see, e.g., AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION (1998).

307. For a classic article underlying this now-paradigmatic approach to legal history, see generally Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

308. See generally SVEN BECKERT, EMPIRE OF COTTON: A GLOBAL HISTORY (2015); WALTER JOHNSON: THE BROKEN HEART OF AMERICA: ST. LOUIS AND THE VIOLENT HISTORY OF THE UNITED STATES (2020); KUNAL M. PARKER, MAKING FOREIGNERS: IMMIGRATION AND CITIZENSHIP LAW IN AMERICA, 1600-2000 (2015); AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM (2010); WENDY WARREN, NEW ENGLAND BOUND: SLAVERY AND COLONIZATION IN EARLY AMERICA (2017); Jodi A. Byrd, Alyosha Goldstein, Jodi Melamed & Chandan Reddy, *Predatory Value: Economies of Dispossession and Disturbed Relationalities*, 135 SOC. TEXT 1 (2018); Cleveland, *supra* note 129.

309. Kramer, *supra* note 31, at 921.

with little reference to the Constitution.<sup>310</sup> Yet I also agree with Immerwahr on the potential power of harnessing the influence and visibility of mainstream U.S. history.<sup>311</sup> The authority and prestige of U.S. constitutional history is visible in how it shapes lawyers' training;<sup>312</sup> legal historians' and legal academics' scholarship;<sup>313</sup> the shows that reach TKTS, Fandango, and Netflix;<sup>314</sup> judicial reasoning and political rhetoric;<sup>315</sup> and patriotism and national self-conception.<sup>316</sup> I seek to access that prestige and authority when I propose that race and subordination belong at the center of such histories. If the citadel can be transformed as a result, I will judge the tradeoff to have been worthwhile.

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310. See, e.g., ERMAN, *supra* note 13. One obvious example of central concern to my argument is the history of slavery in the United States, which stretches far earlier than 1789 and rests on status manipulations that spanned the Atlantic World. For a hint at the possibilities of broader chronological and geographic lenses, see DE LA FUENTE & GROSS, *supra* note 295; and SCOTT, *supra* note 295.

311. IMMERWAHR, *supra* note 1, at 402.

312. See generally RANDY E. BARNETT & JOSH BLACKMAN, *CONSTITUTIONAL LAW: CASES IN CONTEXT* (3d ed. 2018); PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR & REVA B. SIEGEL, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* (7th ed. 2018); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* (6th ed. 2019); GEOFFREY R. STONE, LOUIS MICHAEL SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET & PAMELA S. KARLAN, *CONSTITUTIONAL LAW* (8th ed. 2018).

313. See generally Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 *COLUM. L. REV.* 915 (2018); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 *FORDHAM L. REV.* 545 (2006); Jack N. Rakove, *Two Foxes in the Forest of History*, 11 *YALE J.L. & HUMAN.* 191 (1999); G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 *VA. L. REV.* 485 (2002).

314. See, e.g., *GIDEON'S TRUMPET* (Hallmark Hall of Fame Productions 1980); *MARSHALL* (Chestnut Ridge Productions 2017); *LIN-MANUEL MIRANDA, HAMILTON* (The Public Theater 2015); *RBG* (CNN Films 2018); *HEIDI SCHRECK, WHAT THE CONSTITUTION MEANS TO ME* (Hayes Theater 2019).

315. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570 (2008); David Pozen, Eric Talley & Julian Nyarko, *Republicans and Democrats Are Describing Two Different Constitutions*, *ATLANTIC* (June 2, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/democrats-and-republicans-have-different-constitutions/590005> [<https://perma.cc/934V-C7QV>].

316. See, e.g., Hendrik Hartog, *The Constitution of Aspiration and "the Rights That Belong to Us All,"* 74 *J. AM. HIST.* 1013 (1987); *Constitution Day*, *NAT'L CONST. CTR.*, <https://constitutioncenter.org/learn/civic-calendar/constitution-day-civic-holiday> [<https://perma.cc/SFJ7-MBZ2>].