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New Territorialism and Old Territorialism

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ESSAY

NEW TERRITORIALISM AND OLD TERRITORIALISM

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INTRODUCTION

The theme of this symposium is the "new territorialism" in the U.S. Supreme Court's recent decisions. The reach of the United States' jurisdiction over conduct and entities physically situated outside the geographic bounds of the United States has recently cropped up in a wide range of areas, including personal jurisdiction over foreign corporations for ordinary torts[1] and human rights abuses,[2] constitutional habeas jurisdiction over Guantanamo Bay in

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1 *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2855 (2011) (finding no personal jurisdiction in tort lawsuit concerning accident in France); J. McIntyre Mach. Ltd. v. Nicastro, 131 S. Ct. 2780, 2786 (2011) (finding no personal jurisdiction in a tort lawsuit against an English manufacturer).

2 *See* Daimler AG v. Bauman, 134 S. Ct. 746, 750–51 (2014) (finding no jurisdiction in suit against Daimler for human rights violations occurring in Argentina against Argentine citizens).

Cuba,[3] and the application of federal statutes to conduct abroad.[4] Many observers, including most of the contributors to this symposium,[5] have discerned in these decisions a renewed emphasis on territory as a limiting principle for legal authority.

Territorialism is, of course, not "new" in the law, and thus one interesting question is how the "new" territorialism compares to the "old" territorialism. This Essay explores the issue through the lens of a set of important cases about territoriality from the first decade of the twentieth century—*American Banana Co. v. United Fruit Co.*[6] and the *Insular Cases*.[7] In *American Banana*, the Court announced what has come to be known as the presumption against extraterritoriality in the application of federal statutes; in the *Insular Cases*, the Court determined that the Constitution does not always "follow the flag" and concluded that inhabitants of the territories acquired by the United States in the Spanish-American War of 1898 were not entitled to a full panoply of constitutional rights.[8]

This Essay situates these cases in the broader social and political context of debates in the early twentieth century about American foreign policy, imperialism, and law. This Essay also explores the curious fact that one prominent lawyer—Moorfield Storey (more famous as the first president of the NAACP)—was involved in both sets of cases, first as a leader of the Anti-Imperialist Society criticizing the Court's

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3 *See* Boumediene v. Bush, 553 U.S. 723, 732 (2008).

4 *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1662 (2013) (rejecting recognition of cause of action under the Alien Tort Statute in lawsuit against foreign corporations for aiding and abetting human rights violations in Nigeria); Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2875 (2010) (determining that § 10(b) of the Securities and Exchange Act does not provide a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges).

5 *See, e.g.*, John C. Coffee, Jr., *Extraterritorial Financial Regulation: Why E.T. Can't Come Home*, 99 CORNELL L. REV. 1259 (2014); Juliet M. Moringiello & William J. Reynolds, *The New Territorialism in the Not-So-New Frontier of Cyberspace*, 99 CORNELL L. REV. 1415 (2014); Louise Weinberg, *What We Don't Talk About When We Talk About Extraterritoriality:* Kiobel *and the Conflict of Laws*, 99 CORNELL L. REV. 1471 (2014).

6 213 U.S. 347 (1909).

7 There is not universal agreement on which cases fall within the rubric of the "Insular Cases," but most scholars include the seven cases decided on May 27, 1901: De Lima v. Bidwell, 182 U.S. 1 (1901); Goetze v. United States, 182 U.S. 221 (1901); Crossman v. United States, 182 U.S. 221 (1901); Dooley v. United States (*Dooley I*), 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Huus v. New York & Porto Rico Steamship Co., 182 U.S. 392 (1901); as well as two cases decided on December 2, 1901: Dooley v. United States (*Dooley II*), 183 U.S. 151 (1901), and Fourteen Diamond Rings v. United States, 183 U.S. 176 (1901).

8 *Am. Banana Co.*, 213 U.S. at 356 ("[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."); *see, e.g.*, *Dooley I*, 182 U.S. at 230–31 ("We . . . do not look to the Constitution or political institutions of the conquerer, for authority to establish a government for the [conquered] territory . . . during its military occupation, nor for the rules by which the powers of such government are regulated and limited.").

refusal to extend constitutional protections in the *Insular Cases* and then as a lawyer for the United Fruit Company arguing against extraterritorial application of U.S. antitrust laws to that company's actions in Central America.[9] Together, the Supreme Court's decisions in these cases represent the resolution, at a particular moment in time, of recurring legal and political debates over forms of empire and the role of public and private actors in the projection of power across territory (a controversy that dates to the exploits of the great trading companies of the early modern period and continues today).

The *Insular Cases* suggested a legal framework for colonial occupation of distant lands by the United States, a prospect alarming to those at the time who thought empire was inconsistent with the basic character of a democratic republic. But in the end, the territories in those cases remained exceptional, and the United States never made a habit of permanently occupying new foreign territories as a colonial power.[10] Instead, the United States chose to exercise its extraterritorial influence through business, diplomacy, and military force—including episodes of transient military occupation.[11] The literal holding of *American Banana* about the territorial scope of the antitrust statutes was eventually eroded by later decisions, but the presumption against extraterritoriality that the case relied upon has had continuing influence. The path chosen in these cases ultimately helped preserve America's vision of itself as a republic, not an empire, but had consequences that were perhaps not fully anticipated.[12]

The decisions in *American Banana* and the *Insular Cases* are more than historical curiosities, for the Supreme Court relied upon the legal theories these cases developed in its recent decisions in two of the "new territorialism" cases: *Kiobel v. Royal Dutch Petroleum Co.* and *Boumediene v. Bush.* In *Kiobel*, the majority applied the presumption against extraterritoriality to find that claims against foreign corporations for human rights abuses in Nigeria were not cognizable in U.S. courts under the Alien Tort Statute (ATS).[13] In *Boumediene*, the Court cited the *Insular Cases* in concluding that the privilege of habeas

9 *See Am. Banana Co.*, 213 U.S. at 352 (identifying Storey as a writer of *United Fruit*'s brief); WILLIAM B. HIXSON, JR., MOORFIELD STOREY AND THE ABOLITIONIST TRADITION 67 (1972) (noting Storey's criticism of the Supreme Court's decision in the *Insular Cases*).

10 *See* BARTHOLOMEW H. SPARROW, THE *INSULAR CASES* AND THE EMERGENCE OF AMERICAN EMPIRE 230–31 (2006) (describing the American transition from possessing new territory to working with supportive regimes).

11 *See id.* ("It was more convenient for both the White House . . . and for U.S. companies trading with or investing in foreign countries, to use diplomatic, economic, and military levers to effect their objectives rather than to annex new areas . . . .").

12 *See id.* at 252–53 (describing the view of the United States as a "'Federal Empire'—that is, one ruled by the component states and their representatives").

13 *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013).

corpus, though perhaps not all constitutional rights, applied to detainees in U.S. custody at Guantanamo.[14]

As at the turn of the last century, *Boumediene*, like the *Insular Cases*, is the liminal case, of symbolic importance in America's conception of itself, but of relatively minor practical significance because of the few territories and people to which it attaches. Guantanamo, the Court's analysis suggests, is almost *sui generis*.[15] On the other hand *Kiobel*, like *American Banana*, represents a broader and more significant theory of American regulatory power in the world, one which appropriately rejects the idea of an empire even of law. But that theory comes at the expense of oversight and accountability for the conduct of powerful, but nominally private, transnational actors that operate outside the territorial bounds of any one government. Over the course of the twentieth century, colonial empires rooted in control of territory were appropriately rejected in both international law and politics.[16] But the system of international law focused on statehood and territoriality—a system that itself developed in the context of colonial empire—remains and poses its own problems. Private transnational actors fit awkwardly into the system of public international law, while continued reliance on notions of territoriality in private international law can leave such actors poorly and unevenly regulated by national governments as well.[17] While excessive national extraterritorial regulation of transnational conduct has costs in terms of economic efficiency and development, underregulation also has costs. The muddled jurisprudence of the Supreme Court's "new territorialism" is ungrounded in coherent principle and seems unlikely to aid in achieving the optimal regulation of transnational conduct.

I
Territorialism, Now and Then

A. The "New Territorialism"

1. Boumediene

Following the terrorists attacks of September 11, 2001 and the ensuing armed conflict in Afghanistan, the U.S. government's decision to detain certain prisoners at the U.S. naval base in Guantanamo unleashed a tide of litigation related to the legal status of this small bit of land and the people on it.[18] The American military base at Guantanamo has peculiar legal status, remaining formally part of Cuba but

14 *See* Boumediene v. Bush, 553 U.S. 723, 759 (2008).

15 *See id.* at 753–54.

16 *See, e.g.*, *infra* notes 45–47 and accompanying text.

17 *See infra* Part II.

18 *See, e.g.*, *Boumediene*, 553 U.S. at 732 (holding that Habeas Suspension Clause of Constitution applies to detainees at Guantanamo Bay); Rasul v. Bush, 542 U.S. 466, 470

controlled entirely by the United States under a perpetual lease (which itself arose out of the settlement of issues concerning the United States' occupation of Cuba at the end of the Spanish-American war).[19] Comforted by earlier precedents indicating that the base's location outside the territorial United States would exclude it from the jurisdiction of U.S. federal courts,[20] the government initially asserted that Guantanamo was essentially a law-free zone.[21] In 2004, the Supreme Court found in *Rasul v. Bush* that the federal habeas statute covered persons detained at Guantanamo.[22] Following congressional efforts to withdraw the habeas statute's application, in *Boumediene* the Court determined that the Guantanamo prisoners had a constitutional right to habeas protected by the Habeas Suspension Clause.[23]

In *Boumediene,* the Court took a pragmatic and functional approach to determining the territorial reach of the Suspension Clause.[24] The Court began by reviewing the parties' arguments about the historical scope of habeas jurisdiction in English courts and observed that "the evidence as to the geographic scope of the [habeas] writ at common law [is] informative, but . . . not dispositive."[25] Finding no clear answer in the history, the Court indicated that it would not look mechanically at formal territorial sovereignty but functionally at the "degree of control the Nation asserts over foreign territory."[26]

In canvassing the relevant precedents, the Court took particular note of the *Insular Cases*, which (as noted) had concerned the application of various constitutional provisions to the island territories acquired by the United States in the Spanish-American War of 1898.

(2004) (holding that federal courts have jurisdiction over habeas petitions brought by foreign nationals detained at Guantanamo Bay under general habeas statute).

19 *See Boumediene*, 553 U.S. at 753.

20 *See* Johnson v. Eisentrager, 339 U.S. 763, 778 (1950) (determining that U.S. federal courts should not review challenges to war crimes convictions of German prisoners of war held and convicted by U.S. military in occupied Germany for violations of law of war in China). *Cf.* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 188 (1993) ("Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested.").

21 *See Boumediene*, 553 U.S. at 739 (describing the government's argument that noncitizens designated as enemy combatants and detained in territory outside the borders of the United States have no constitutional rights and no right to habeas corpus).

22 542 U.S. 466, 480 (2004).

23 U.S. CONST. art. 1, § 9, cl. 2.

24 *See Boumediene*, 553 U.S. at 764 ("[Q]uestions of extraterritoriality turn on objective factors and practical concerns, not formalism.").

25 *Id.* at 748.

26 *Id.* at 754; *see also id.* at 770–71 ("It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution. But the cases before us lack any precise historical parallel.").

The *Boumediene* Court explained that, while

> noting the inherent practical difficulties of enforcing all constitutional provisions "always and everywhere," . . . the Court devised in the *Insular Cases* a doctrine that allowed it to use its power sparingly and where it would be most needed. This century-old doctrine informs our analysis in the present matter.[27]

Which is another way of saying that no entirely coherent principle undergirds the odd zig-zag of rights recognized in the *Insular Cases* and that the Court would again be stingy about explaining the rationale for its decision, lest the precedent prove too much in future cases. Ultimately, the Court made sparing use of its power in *Boumediene*. It answered a very narrow question, finding only that the Suspension Clause applied to Guantanamo—and leaving open numerous other questions such as what other constitutional provisions might apply to Guantanamo (for example, criminal trial rights) and whether the Suspension Clause applied to other places where the U.S. military was involved in the detention of prisoners (for example, in Afghanistan).[28] Since *Boumediene*, the lower courts have struggled with these issues,[29] but the Supreme Court has declined to hear further cases. Thus, *Boumediene* stands as an important symbolic decision but one of uncertain practical importance in a world where the United States holds very little territory in the way it holds Guantanamo.

2. Kiobel

Kiobel v. Royal Dutch Petroleum Co. involved claims that Shell (in the form of Dutch and British parent corporations and their Nigerian subsidiary) had aided and abetted human rights violations by the Nigerian government in the territory of Nigeria. The plaintiffs in the case, who had received asylum and were residing in the United States, brought suit against Shell in federal court in New York under the ATS. They alleged that the Nigerian government had engaged in arbitrary detention, killings, torture, and other crimes against humanity in suppressing the activities of the Movement for the Survival of the Ogoni People, which had protested against Shell's petroleum extraction operations in the Ogoni region of the Niger Delta.[30] A divided majority

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27 *Id.* at 759 (citation omitted).

28 *See id.* at 770–71 (examining details and context of U.S. control over Guantanamo before determining that Habeas Suspension Clause applies there).

29 *See, e.g.*, Maqaleh v. Hagel, 738 F.3d 312, 317 (D.C. Cir. 2013) (holding that Habeas Suspension Clause did not extend to foreign nationals held by U.S. military at base in Afghanistan).

30 Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1662 (2013). For a general discussion of violence associated with extractive industries, see Robert Dufresne, *The Opacity of Oil: Oil Corporations, Internal Violence, and International Law*, 36 N.Y.U. J. INT'L L. & POL.

of the Second Circuit held that "offenses against the law of nations (*i.e.*, customary international law) for violations of human rights can be charged against States and against individual men and women but not against juridical persons such as corporations."[31] The Second Circuit majority found that the "subjects of international law" are primarily states and that "[t]he singular achievement of international law since the Second World War has come in the area of human rights, where the subjects of customary international law—*i.e.*, those with international rights, duties, and liabilities—now include not merely *states*, but also *individuals*," but *not* juridical persons such as corporations.[32] In the Second Circuit's view, corporations are largely invisible to international law, except in a few instances where states have made the choice through specific treaties explicitly to apply rules of conduct to corporations.[33]

When the Supreme Court initially agreed to hear the case, the main issue appeared to be Shell's argument that international human rights law applied only to states and natural persons, not corporations—a question of public international law.[34] But at the first oral argument in the case, the Court seemed ill-inclined to answer this question (perhaps lest it appear too greatly to favor corporations by granting them rights but not responsibilities).[35] The Court thus turned its attention to an issue raised in amicus briefs about the territorial scope of the ATS—a question of what is classically termed private international law, or conflict of laws.[36] The Court set the case down for additional briefing and reargument on "whether and under

331, 332–33 (2004). Dufresne notes that "[b]eyond oil-motivated interstate use of force, the petroleum industry is also entangled in another form of violence, generally involving small-scale episodic and highly localized operations. This form of violence is located on or around resource exploitation concessions. It is aimed at keeping or gaining control over these resources, repressing manifestations of local discontent in the resource-rich areas and along transportation routes, or at extorting money by conducting nuisance operations involving kidnapping or vandalism." Dufresne suggests that greater attention be paid to "situations in which the violent struggle for the control of the resource-based economy is not framed in statal terms, but rather takes place within a state's borders, without challenging that state's formal title to the territory."

31 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 120 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659 (2013).

32 *Id.* at 118.

33 *Id.* at 138 (discussing various international treaties that apply rules of conduct to corporations, but suggesting that such treaties have limited value in the context of evaluating human rights obligations).

34 *See* Brief for Respondents at 2–3, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2012/01/4573517_1_10-1491-Kiobel-v.-Royal-Dutch-Petroleum-Co.-Brief-for-Respondents-AS-FILED.pdf.

35 *Cf.* Citizens United v. FEC, 558 U.S. 310 (2010) (recognizing a corporate free speech right).

36 Transcript of Oral Argument at 7, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491).

what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."[37]

Following reargument, the Court held in favor of Shell, ruling that claims cognizable under the ATS must "touch and concern the territory" of the United States, though the Court left ambiguous the ways in which claims might do that.[38] In so holding, the Court accepted arguments based "primarily on a canon of statutory interpretation known as the presumption against extraterritorial application," which provides that "'[w]hen a statute gives no clear indication of an extraterritorial application, it has none,'"[39] and purportedly reflects the "'presumption that United States law governs domestically but does not rule the world.'"[40] This anti-imperialist language perhaps unconsciously evokes the rhetoric of the Court in *American Banana* itself, though the Court noted that the ATS, as a jurisdictional statute, does not fit squarely within the canon against extraterritoriality because it does not "directly regulate conduct or afford relief"; but the Court nevertheless found that the principles underlying the canon of interpretation should similarly constrain courts considering causes of action that can be brought under the ATS.[41] Noting that "[o]n these facts, all the relevant conduct took place outside the United States" and that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application," the Court observed that "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices."[42] Accordingly, the Court held that "petitioners' case seeking relief for violations of the law of nations occurring outside the United States is barred."[43]

In concurrence, Justice Kennedy observed that "[t]he opinion for the Court is careful to leave open a number of significant questions

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37 Order for Additional Briefing and Reargument of Case, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2012/03/10-1491-order-rearg-3-5-12.pdf.

38 *Kiobel*, 133 S. Ct. at 1669.

39 *Id.* at 1664 (quoting Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2878 (2010)).

40 *Id.* (quoting Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007)).

41 *Id.*

42 *Id.* at 1669.

43 *Id.*

regarding the reach and interpretation of the Alien Tort Statute" and that

> [o]ther cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the [Torture Victim Protection Act] nor by the reasoning and holding of today's case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.[44]

Left largely unexplored in the majority opinion was the fact that the conduct-regulating norms at issue in the case were based on public international law and not confined to the territory of any one nation.

B. The "Old Territorialism"

The *Boumediene* and *Kiobel* cases are oddly similar to another set of cases a century earlier—the *Insular Cases* and the *American Banana* case. The connection between these sets of cases is not merely a matter of factual similarity but also a matter of legal precedent, for as noted these earlier cases are, in fact, the key precedents for the doctrines on which the later cases rely. This subpart explores the social, legal, and political context of the earlier cases to gain insight into the view of territoriality and empire that they exemplified, while the final Part suggests implications of this view for today.

1. *The* Insular Cases

At the dawn of the twentieth century, one of the most contentious issues in American politics was whether America should expand to occupy and govern territories over the seas and, if so, what the legal status of those territories should be.[45] Given that the United States began its political life as a set of colonies breaking free from empire and claiming the right to self-governance, the issue was closely entangled with the country's conception of itself and its political commit-

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44 *Id.* (Kennedy, J., concurring). Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, concurred in the result. They would not have relied on the presumption against extraterritoriality, given that it "'rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters,'" and the ATS "was enacted with 'foreign matters' in mind." *Id.* at 1672 (Breyer, J., concurring) (citation omitted).

45 *See* 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, 208–09, 230–39 (2002) (discussing the role of debates over imperialism in the reelection of President William McKinley in 1900 and the *Insular Cases*, noting that the Court concluded "that the status of [U.S.] territories was largely a political question dedicated to Congress and that only fundamental constitutional protections applied . . . [which] left the governance of U.S. overseas territories largely in an extraconstitutional zone").

ments.[46] The Spanish-American War of 1898 began in connection with support for Cuban independence from Spain but ended with the United States in possession of not only Cuba (to which the United States promised and ultimately gave formal independence in 1902—though retaining a variety of powers including the perpetual lease over Guantanamo under a 1903 agreement) but also the Philippines, Guam, and Puerto Rico.[47]

Unlike the former territories of the western part of the North American continent, these island territories were not destined for statehood, based on the political elite's perception of their geography, racial composition, and culture.[48] Opponents of this foreign policy viewed the occupation of these islands as an unwise foray by the United States into building a colonial territorial empire like those of European nations.[49] Opposition crystallized around trying to block ratification of the peace treaty granting the territory of the Philippines to the United States. A group called the Anti-Imperialist League led the campaign and had as members many prominent figures including former president Grover Cleveland, wealthy industrialist Andrew Carnegie, Stanford University president David Starr Jordan, labor leader Samuel Gompers, author Mark Twain, and prominent Boston lawyer Moorfield Storey—to whom this Essay will return shortly.[50]

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46 *See, e.g.*, KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 4 (2009) ("At stake . . . was the self-conception of the United States as a constitutional republic."); Cleveland, *supra* note 45, at 166–67 (noting that, initially, "the United States' recent experience as colonial subjects made international law principles of colonial governance particularly abhorrent to American political ideology" and discussing international political and legal thought on colonialism from Blackstone in the seventeenth century through Oppenheim in the early twentieth century).

47 *See* Cleveland, *supra* note 45 at 208–12 ("In 1899, the United States acquired the Insular territories of Puerto Rico, Guam, and the Philippines, and established a protectorate over Cuba as a result of the Spanish American War . . . . The Spanish-American War had been fought ostensibly to liberate the Cuban people from the abhorrent conditions under which they were held by Spain . . . .").

48 *See id.* at 208–11 (noting that the elites of the 1890s considered the inhabitants of "far-flung territories" to be "culturally and racially inferior" and that the Senate passed a resolution stating that the treaty with Spain would not lead to statehood for the Philippines).

49 *See, e.g.*, RAUSTIALA, *supra* note 46, at 4 (discussing the imperialist/anti-imperialist debate surrounding the 1900 presidential election); William Jennings Bryan, *Mr. Bryan's Speech of Acceptance at Military Park, Indianapolis, Ind., Aug. 8, 1900*, *in* OFFICIAL PROCEEDINGS OF THE DEMOCRATIC NATIONAL CONVENTION HELD IN KANSAS CITY, MO., JULY 4TH, 5TH, AND 6TH, 1900, at , 205–27 (1900) [hereinafter DEMOCRATIC NATIONAL CONVENTION] (speaking against imperialism resulting from the Spanish-American War in a speech concerning the Philippines).

50 *See Anti-Imperialist League Collected Records, 1899–1919*, SWARTHMORE COLLEGE PEACE COLLECTION (June 23, 2010), http://www.swarthmore.edu/library/peace/CDGA.A-L/anti-imperialistleague.htm (providing a historical background of the Anti-Imperialist League); *infra* Part I.B.2.

Despite this vocal opposition, the U.S. Senate narrowly approved the treaty annexing the Philippines in February 1899.[51] But the opponents of territorial annexation would not so easily give up, and the debate continued through the next presidential election in 1900. Indeed, the issue was a central focus of the election, with the Democratic challenger William Jennings Bryan opposing the incumbent Republican William McKinley's expansionist foreign policy.[52] The Democratic Party platform in that year stated:

> We hold that the Constitution follows the flag, and denounce the doctrine that an Executive or Congress deriving their existence and their powers from the Constitution can exercise lawful authority beyond it, or in violation of it. . . . [I]mperialism abroad will lead quickly and inevitably to despotism at home.[53]

In the end, McKinley won the election and the United States kept hold of its new islands. Soon thereafter, the Supreme Court considered a set of cases that would come to be known as the *Insular Cases*, concerning the application of the Constitution to the newly acquired territories.[54] This sequence of events prompted one political satirist to famously observe that "no matter whether th' constitution follows th' flag or not, th' supreme coort follows th' iliction returns."[55]

In one of the most important decisions,[56] *Downes v. Bidwell*, the Supreme Court considered a challenge under the Constitution's Uniformity Clause[57] to the collection of duties on imports from Puerto Rico to New York. By a vote of five to four, the Court rejected the challenge. The majority conceived of Puerto Rico as "a territory ap-

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51 *See The Philippine-American War, 1899–1902*, U.S. DEP'T OF STATE, OFFICE OF THE HISTORIAN (last visited Mar. 25, 2014), http://history.state.gov/milestones/1899-1913/war (discussing Senate ratification of the treaty for the annexation of the Philippines in the context of the Philippine-American War).

52 *See, e.g.*, RAUSTIALA, *supra* note 46, at 4; Bryan, *supra* note 49, at 205–27.

53 *Second Day, Afternoon Session, Platform*, *in* DEMOCRATIC NATIONAL CONVENTION, *supra* note 49, at 113–14.

54 *See generally* SPARROW, *supra* note 10, at 79–110 (recounting the debate over application of U.S. constitutional provisions to new U.S. territories acquired after the Spanish-American War).

55 FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS 26 (1906); *see also* William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 87 (1993) (quoting Finley Peter Dunne's character Mr. Dooley).

56 *See* Christina Duffy Burnett (Ponsa) & Burke Marshall, *Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented*, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 1, 7 (Christina Duffy Burnett (Ponsa) & Burke Marshall eds., 2001) ("*Downes v. Bidwell* [is] generally considered the most important of the *Insular Cases* . . . ."). Christina Duffy Ponsa was previously known as Christina Duffy Burnett. *See Christina Duffy Ponsa*, COLUMBIA LAW SCHOOL (last visited Mar. 26, 2014), http://www.law.columbia.edu/fac/Christina_Ponsa.

57 The Clause provides that "all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. CONST. art. I, § 8, cl. 1.

purtenant and belonging to the United States, but not a part of the United States," cautioning that "[a] false step at this time might be fatal to the development of what Chief Justice Marshall called the American Empire."[58] As Justice White put it in a concurring opinion, Puerto Rico was "foreign to the United States in a domestic sense."[59]

Reflecting the other side of the debate, in dissent, Justice Harlan argued:

> We heard much in argument about the "expanding future of our country." It was said that the United States is to become what is called a "world power;" and that if this Government intends to keep abreast of the times and be equal to the great destiny that awaits the American people, it *must* be allowed to exert all the power that other nations are accustomed to exercise. My answer is, that the fathers never intended that the authority and influence of this nation should be exerted otherwise than in accordance with the Constitution.[60]

In the end, the Court attempted to weave a middle course between the full application of the Constitution to the island territories and no application at all, carving out the idea of different categories of territory that would be accorded different treatment pursuant to a functional rather than a formal approach to sovereignty. For example, in *De Lima v. Bidwell*,[61] the Court held that Puerto Rico was not a foreign country under the U.S. Tariff Act of 1897.[62] Decisions in the other cases similarly zigged and zagged through technical issues of statutory and constitutional law, carving out a unique status for the islands. Three years later, in *Dorr v. United States*, which concerned the right to jury trial in the Philippines, the Court explained that "[t]he limitations which are to be applied in any given case involving territorial government must depend upon the relation of the particular territory to the United States, concerning which Congress is exercising the power conferred by the Constitution."[63] The Court in *Dorr* found that the right to jury trial did not extend to the Philippines, suggesting that while the jury trial right, by its nature, was not suitable for all places and people,

> "Congress in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Consti-

58 Downes v. Bidwell, 182 U.S. 244, 287, 286 (1901).

59 *Id.* at 341 (White, J., concurring).

60 *Id.* at 386 (Harlan, J., dissenting).

61 182 U.S. 1 (1901).

62 *Id.* at 200.

63 Dorr v. United States, 195 U.S. 138, 142 (1904).

> tution from which Congress derives all its powers, than by any express and direct application of its provisions."[64]

Collectively, observers suggest that "[t]he Court's rulings authorized the McKinley administration to retain territories without incorporating them into the United States—in effect, sanctioning the colonization of Puerto Rico, Hawaii, and the Philippines."[65] According to the standard account of the *Insular Cases*, the decisions "served the turn-of-the-century American imperialist agenda" by stretching "a republican Constitution to embrace a colonial empire."[66]

But, this reading of the cases—while perhaps correct as a doctrinal matter—is overly narrow in terms of the cases' ultimate effects in reality. Without meaning to diminish the experiences of the residents of the Philippines, Puerto Rico, and Guam, in the end America's experiment with territorial colonialism was limited and did not extend much beyond these islands. While temporarily occupying other territories from time to time, the United States did not in the end pursue territorial occupation as a major component of its approach to interacting with the rest of the world. Instead of being a late adopter of the slowly dying form of colonialism that had characterized European empires, the United States chose to pursue economic engagement often through private business enterprises (coupled with occasional military intervention and diplomatic pressure, sometimes in support of American business interests).[67] This strategy had many advantages,

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64 *Id.* at 146 (quoting Mormon Church v. United States, 136 U.S. 1, 44 (1890)).

65 Krishanti Vignarajah, *The Political Roots of Judicial Legitimacy: Explaining the Enduring Validity of the* Insular Cases, 77 U. CHI. L. REV. 781, 796 (2010); *see also* JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 118–33 (1985) (discussing the politico-legal consequences of the *Insular Cases*); Jose A. Cabranes, *Puerto Rico: Colonialism as Constitutional Doctrine*, 100 HARV. L. REV. 450, 458–59 (1986) (reviewing TORRUELLA, *supra*: ("[T]he power of Congress to govern 'territories' . . . was not necessarily constrained in the 'unincorporated' territories . . . by the constitutional limitations that automatically applied to the states and to the 'incorporated' territories . . . .").

66 Christina Duffy Burnett (Ponsa), Untied *States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 800–01 (2005). Duffy Ponsa disagrees with the standard account, instead arguing that:

> [T]he epochal significance of the cases lies in their careful creation of a new kind of U.S. territory: a domestic territory that could be governed temporarily, and then later, if necessary, be relinquished. This was no small matter for Americans contemplating a global demesne, since the Civil War had, not so long before, inscribed in blood the indivisibility of the Union; in the *Insular Cases*, the Supreme Court ensured that this costly principle would not bind America to its colonial periphery. In sum, the *Insular Cases* installed a doctrine of territorial deannexation in American constitutional jurisprudence, and in doing so they created the conditions of possibility for an American experiment with colonial governance.

Id. at 797.

67 *See* Erik Gartzke & Dominic Rohner, *The Political Economy of Imperialism, Decolonization and Development*, 41 BRITISH J. POL. SCI. 525, 526 (2011) (discussing the shift from territorial colonialism to a new form of expansion involving "dynamics of systemic structure, military technology and economic development").

both practical and symbolic, but also disadvantages. One of those disadvantages was that, because of the importance of territoriality as a legal concept, conduct that took place outside the territory of the United States, especially conduct by private transnational actors, sometimes escaped meaningful legal regulation. The *American Banana v. United Fruit Co.* case illustrates this problem. Ironically, the triumph of anti-imperialist rhetoric in the courts helped preserve the United States of America as a republic, but it also helped create the so-called "banana republics" in Latin America.

2. *Moorfield Storey: Anti-Imperialist, Civil Rights Activist, and Corporate Lawyer*

One of the members of the Anti-Imperialist League—and eventually its chairman—was a man named Moorfield Storey, on whom this Essay will briefly focus. His involvement in both the *Insular Cases* and *American Banana* encapsulates the views of a particular segment of elite American society at the dawn of the twentieth century and reflects the compromise approach to empire suggested above, a classically liberal approach that well-suited America in the twentieth century.

Storey was a prominent lawyer from an old Boston family, born in 1845 and educated at Harvard.[68] He was well known in the profession and served as President of the American Bar Association in 1896.[69] He had complex political views. On the one hand, his views were similar to those of many conservative businessman of the day, supporting the gold standard, free trade, *laissez-faire* policies, and *Lochner*-era legal doctrines of freedom of contract and property rights.[70] At the same time, his parents had been ardent abolitionists,[71] and he spoke often of the influence of the abolitionist movement on his view of civic life.[72] He is perhaps best remembered today as the first president of the National Association for the Advancement of Colored People (NAACP) and the lawyer who argued many of the civil rights organization's cases in the Supreme Court in the 1910s and early 1920s. For example, as one of the lawyers for the NAACP in *Buchanan v. Worley*, he persuaded the Supreme Court that a city ordinance prohibiting

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68 *See Moorfield Storey*, LIBRARY OF CONG., http://www.loc.gov/exhibits/naacp/founding-and-early-years.html#obj11 (last visited Aug. 20, 2014).

69 *See id.*

70 *See* HIXSON, *supra* note 9, at 155–56 (discussing Storey's sympathies with Progressive reform alongside his distrust of federal regulation).

71 *See id.* at 192 ("By his own account, at least, Storey's mother was an outright abolitionist."); M.A. DEWOLFE HOWE, PORTRAIT OF AN INDEPENDENT: MOORFIELD STOREY, 1845–1929, at 22–23 (1932) (discussing Storey's youth).

72 *See, e.g.*, HIXSON, *supra* note 9, at 43.

the sale of land to African-Americans violated the freedom of contract guaranteed by the Fourteenth Amendment.[73]

Though his abolitionist forbearers had been Republicans, Storey was something of an independent. Indeed, in 1900 he ran for Congress as a third-party independent candidate, on the platform "'that every man under the jurisdiction of the United States is entitled by law to no less and no greater rights than we of Massachusetts hold.'"[74] As one newspaper editor noted in connection with his failed candidacy, Storey had declared himself "'against the Republicans on such questions as expansion and protection and against the Democrats on silver, suppression of the colored vote, reconstruction of the Supreme Court and the other populistic ideas which have found approval in the last two Democratic platforms.'"[75] Though true to his complex ideals, Storey's views found few matches among voters and he won only seven percent of the vote.[76]

Storey was active in the Anti-Imperialist League from the moment of its inception. He served as vice president of the New England Anti-Imperialist League and eventually president of the American Anti-Imperialist League beginning in 1905.[77] Like other members of the League, Storey thought that the maintenance of territorial empire was inconsistent with the basic tenets of American self-governance and was likely to destroy the republican fabric of the nation.[78] Unlike some others, however, Storey self-consciously linked a concern with racial discrimination at home and abroad, seeing connections between the treatment of Filipinos, African Americans, and inhabitants of Latin America.[79] In respect to the rights of inhabitants of the Philippines, he said:

> We insist that constitutional liberty shall be the inalienable right of every man who owes allegiance to our flag; that freedom shall belong to man and not to place; that our Constitution shall be no respecter of persons, colors, or races; that it shall recognize the equal rights of all.[80]

Moreover, Storey argued:

> No man of anti-slavery antecedents can fail to regard with horror the treatment of the colored race in the South and the attempt to disfranchise them. . . . While, however, the President and the Republican Party are denying the doctrine of human equality which

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73 *See* Buchanan v. Warley, 245 U.S. 60, 82 (1917).
74 HIXSON, *supra* note 9, at 41.
75 *Id.*
76 *Id.*
77 *Id.* at 50–51.
78 *See id.* at 59.
79 *Id.* at 46.
80 *Id.* at 67.

> the party was formed to maintain, and are justifying conquest and despotic methods in the Philippines and Porto Rico by the argument that the inhabitants of these islands are unfit for freedom because of their race or color, it is only to be expected that the same doctrines will be applied at home.[81]

Both Storey himself and the Anti-Imperialist League were critical of the Supreme Court's decisions in the *Insular Cases*. Moreover, in connection with the Anti-Imperialist League, Storey coauthored a report on abuses by American troops in the Phillipines, including use of water-boarding.[82] Storey was also retained to represent a criminal defendant named Adolphus Coulson in his appeal to the Supreme Court raising the issue of application of the Fifth and Sixth Amendments to persons in territories controlled by the United States.[83] Storey's client, Coulson, was a West Indian laborer working on the construction of the Panama Canal.[84] Coulson confessed to poisoning his wife with arsenic after a dispute with his mistress and was sentenced to death by the Second Judicial Court for the Canal Zone.[85] Coulson contested his conviction, arguing that he was entitled to a jury trial under the Fifth and Sixth Amendments of the Constitution. The Supreme Court of the Canal Zone rejected his appeal, citing the recent Supreme Court decision in *Dorr v. United States* denying a jury trial to a resident of the Philippines.[86] The power of the United States to acquire territory, the Court reasoned, includes the authority "to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in . . . [the] 'American Empire.'"[87] A delegation of congressmen from the United States was in the Canal Zone when the decision was announced. They were "known as 'sticklers for the rights of the Constitution'" and hired Storey to represent Coulson.[88] Even in Storey's able legal hands, however, the suit was unsuccessful as the Supreme Court dismissed the case "for want of jurisdiction."[89]

While many historians have suggested that the division between those who favored American occupation of foreign territories and

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81 *Id.* at 112.

82 MOORFIELD STOREY & JULIAN CODMAN, SECRETARY ROOT'S RECORD: "MARKED SEVERITIES" IN PHILIPPINE WARFARE (1902).

83 *See* Coulson v. Gov't of the Canal Zone, 212 U.S. 553, 553 (1908); *see also* JULIE GREENE, THE CANAL BUILDERS: MAKING AMERICA'S EMPIRE AT THE PANAMA CANAL 267 (2009) (discussing the lawyers' argument that the *Coulson* trial violated the Fifth Amendment right to due process and the Sixth Amendment right to a jury).

84 GREENE, *supra* note 83, at 267.

85 *Id.*

86 *Id.* at 268.

87 *Id.* (alteration in original) (citation omitted).

88 *See id.*

89 Coulson v. Gov't of the Canal Zone, 212 U.S. 553, 553 (1908).

Anti-Imperialists was "over political control, both sides favoring economic penetration,"[90] in reality the views of both sides were more complex. Storey, for example, was actually opposed to American investment in the Philippines, doubting the motives of investors and fearing the potential for exploitation and delayed independence.[91] At the same time, other members of the Anti-Imperialist League, such as Andrew Carnegie, favored private economic engagement in foreign territories and believed that unfettered access to markets would be more easily pursued without territorial colonialism.[92]

Storey's "advocacy on behalf of the Filipinos turned his attention to other areas of American policy, such as Latin America," where by then "more sophisticated techniques of control were being developed that avoided territorial annexation and relied instead on financial control and military intervention."[93] Storey, for example, opposed U.S. military intervention in Mexico to defend the property and security of American business interests there. Instead, he advocated for a new rule of international law that:

> [T]he citizens of every country understood that if they go into another they must submit themselves to the government of that country, and take the justice which that country affords, that they cannot claim in the country which they are visiting greater rights than the citizens of that country themselves have.[94]

Having advocated for this position independently as a product of his anti-imperialist views, Storey was a natural choice to defend the interests of the Boston-based United Fruit Company in a Supreme Court case seeking to avoid extraterritorial application of American antitrust laws to the company's conduct in Latin America.

3. *The* United Fruit Company

The classic statement of the presumption against extraterritorial application of federal statutes is the Supreme Court's 1909 decision in *American Banana Co. v. United Fruit Co.*[95] Writing for the Court in that case, Justice Holmes held that the Sherman Antitrust Act did not apply to the conduct of the Boston-based United Fruit Company in Latin America. In the course of the decision, Holmes pronounced the general rule that "in case of doubt . . . any statute [should be construed]

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90 HIXSON, *supra* note 9, at 65.

91 *Id.*

92 *See generally id.* (noting that despite the tendency of historians to view both imperialists and anti-imperialists as favoring international economic penetration, Moorfield Storey at times expressed opposition to economic investment and not just territorial and political control).

93 *Id.* at 51.

94 *Id.* at 77 (citation omitted).

95 213 U.S. 347 (1909).

to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power."[96] While the specific holding of *American Banana* with respect to the Sherman Antitrust Act was eroded by later decisions applying that particular statute extraterritorially, the core of its holding on the statutory presumption against extraterritoriality has come back with full force in recent decisions including *Kiobel* and *Morrison v. National Australian Bank Ltd.*

Most legal scholars discussing the presumption against extraterritoriality briefly mention the colorful facts of *American Banana*, but almost none pay sustained attention to the context of the case.[97] This is surprising because the United Fruit Company is one of the most famous—and controversial—multinational corporations in world history.[98] From its inception in 1899 to its corporate demise a century later, the company influenced economic and political life in a broad swath of Latin American countries. In Latin American, it was sometimes referred to as *El Pulpo*, the octopus, reflecting the tentacle-like reach of its influence.[99] It bribed governments, held vast territories under its near-exclusive control, orchestrated coups, killed labor organizers, and demanded the cooperation of armies.[100] The Nobel Prize–winning Chilean poet Pablo Neruda thought the company important enough to feature a poem about it in his *Canto General*, a poetic history of Latin America:

> When the trumpet blared everything
> on earth was prepared,
> and Jehovah distributed the world
> to Coca-Cola Inc., Anaconda,
> Ford Motors and other entities:
> United Fruit Inc.
> reserved for itself the juiciest,
> the central seaboard of my land,

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96 *Id.* at 357.

97 *See, e.g.*, John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 366 n.95 (2010) (describing only *American Banana*'s ultimate claim before discussing the presumption against extraterritoriality).

98 *See, e.g.*, BANANA WARS: POWER, PRODUCTION, AND HISTORY IN THE AMERICAS (Steve Striffler & Mark Moberg eds., 2003) (detailing the cultural, political, economic, and agricultural processes involved in banana production in the Caribbean and Latin America); MARCELO BUCHELI, BANANAS AND BUSINESS: THE UNITED FRUIT COMPANY IN COLOMBIA, 1899–2000 (2005) (constructing a general and business history of the United Fruit Company using company records); PETER CHAPMAN, BANANAS: HOW THE UNITED FRUIT COMPANY SHAPED THE WORLD (2007) (overviewing the rise, operations, and ultimate fall of the United Fruit Company); CHARLES DAVID KEPNER & JAY HENRY SOOTHILL, THE BANANA EMPIRE: A CASE STUDY OF ECONOMIC IMPERIALISM (1967) (discussing the United Fruit Company's actions in Central America during the early twentieth century); THOMAS P. MCCANN, AN AMERICAN COMPANY: THE TRAGEDY OF UNITED FRUIT (1976) (narrating author's experience as an employee of United Fruit Company).

99 CHAPMAN, *supra* note 98, at 7–8.

100 *See id.* at 3.

> America's sweet waist.
> It rebaptized its lands
> the "Banana Republics[]" . . .[101]

Another Nobel laureate, Gabriel García Márquez, named the fictional town in his seminal novel, *One Hundred Years of Solitude,* "Macondo" after a United Fruit plantation and included in the novel a fictionalized version of the United Fruit Company's 1928 massacre of labor protestors in Colombia.[102]

In short, the United Fruit Company looms large in the collective imagination of the region. It is thus a felicitous coincidence—or, I would suggest, not a coincidence at all—that the presumption against extraterritoriality was announced in a case involving the very corporation viewed by many observers as the pernicious embodiment of a particular form of economic and private—rather than sovereign, public, and territorial—imperialism.

But when complicated, idealistic Moorfield Storey took the case, he used it as a platform to advance his vision of *anti*-imperialism—one that tried to provide respect to the territorial sovereignty of other nations. Storey's was a well-meaning, classically liberal vision, but one that neglected to foresee the potential harm that unregulated and unaccountable business enterprises could inflict in a transnational context of weak and dysfunctional states and no coordinated international regulation of private actors.[103]

As Justice Holmes summarized the allegations of the *American Banana* complaint, the United Fruit Company's basic business strategy involved monopoly control over the market for bananas:

> [T]he defendant [United Fruit Company], with intent to prevent competition and to control and monopolize the banana trade, bought the property and business of several of its previous competitors, with provision against their resuming the trade, made contracts with others, including a majority of the most important, regulating the quantity to be purchased and the price to be paid, and acquired a controlling amount of stock in still others. For the same purpose it organized a selling company, of which it held the stock, that by agreement sold at fixed prices all the bananas of the combining parties. By this and other means it did monopolize and restrain the trade and maintained unreasonable prices.[104]

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101 Pablo Neruda, *United Fruit Co.*, *in* CANTO GENERAL 179 (Jack Schmitt trans., 1991).

102 GABRIEL GARCÍA MÁRQUEZ, ONE HUNDRED YEARS OF SOLITUDE 9 (Gregory Rabassa trans., 1998); *see also* CHAPMAN, *supra* note 98, at 3 (noting Márquez's use of the historical strike in his novel).

103 Thanks to my colleague Bob Gordon for pointing out to me the puzzle of Moorfield Storey's role in the case.

104 Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 354 (1909).

The dispute that eventually reached the Supreme Court concerned United Fruit's efforts, with the help of various Latin American governments, to exclude a competing banana company. As the Court's opinion notes,[105] the controversy began when a man named McConnell purchased a banana plantation in a disputed border region of Colombia (which would soon become part of Panama, once that country declared its independence). As soon as United Fruit learned of McConnell's project, the company demanded that he either combine with them or cease his involvement in the banana business. Ignoring its threats, McConnell began building a railroad from the plantation to the coast, in order to get his bananas to port for shipment to the United States. Two months later—allegedly at the United Fruit Company's urging—the governor of Panama ordered that the nation of Costa Rica be allowed to administer the territory through which the railroad was to run, notwithstanding an arbitration pursuant to treaty awarding that land to Colombia. The Costa Rican government, under the influence of the United Fruit Company, then proceeded to thwart the construction of the railroad.

Under the guidance of President Theodore Roosevelt (who hoped for control over the planned canal that would cut through the territory of Panama), the United States abetted the coup d'état that precipitated Panamanian independence in November 1903. (Moorfield Storey, in his role with the Anti-Imperialist League, gave a speech denouncing the United States's role in the Panamanian coup as a further example of unfortunate imperialist conduct.)[106] In June 1904, McConnell sold his operation to the American Banana Company, an upstart rival based in New Orleans.[107] It proved not to be a good investment for the American Banana Company, for by July, Costa Rican military forces (again, allegedly acting at the request of the United Fruit Company) seized the plantation and stopped construction of the railroad.[108]

The battle then turned to the courts, as American Banana sued United Fruit in the United States under the Sherman Antitrust Act. Eventually the case reached the Supreme Court, where Moorfield Storey (along with colleagues) appeared as counsel for United Fruit.[109] Storey's arguments were consistent with his broader anti-imperialist commitments and framed the case as involving imperialism in the ap-

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105 *Id.*

106 Moorfield Storey, The Recognition of Panama, Address at the Massachusetts Reform Club (Dec. 5, 1903), *in* MOORFIELD STOREY, THE RECOGNITION OF PANAMA 3 (1904).

107 *Am. Banana Co.*, 213 U.S. at 354.

108 *Id.* at 354–55.

109 *See id.* at 352 (listing Moorfield Storey as counsel for the defendant, United Fruit Company).

plication of American antitrust law to the conduct of even an American corporation overseas.

The opinion for the Court was assigned to Justice Oliver Wendell Holmes.[110] As part of social life in upper-class Boston, Holmes was apparently friends with Storey, who was part of the same informal debating club.[111] But regardless of any social ties, Holmes seemingly accepted and incorporated some of Storey's anti-imperialist arguments into his opinion. Calling the plaintiff's position "startling," Holmes explained that:

> No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive. . . . But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.[112]

Moreover, Holmes asserted,

> For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.[113]

In this case, Holmes continued,

> [N]ot only were the acts of the defendant in Panama or Costa Rica not within the Sherman Act, but they were not torts by the law of the place and therefore were not torts at all, however contrary to the ethical and economic postulates of that statute. The substance of the complaint is that, the plantation being within the *de facto* jurisdiction of Costa Rica, that state took and keeps possession of it by virtue of its sovereign power. But a seizure by a state is not a thing that can be complained of elsewhere in the courts.[114]

In conclusion, Holmes announced the rule now known as the presumption against extraterritoriality: "The foregoing considerations would lead in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. 'All

110 *See id.* at 359.

111 *See* HIXSON, *supra* note 9, at 32.

112 *Am. Banana Co.*, 213 U.S. at 355–56 (citations omitted).

113 *Id.* at 356 (citations omitted).

114 *Id.* at 357–58. Here the Court cited *Underhill v. Hernandez*, 168 U.S. 250 (1897), concerning the so-called Act of State doctrine.

legislation is *prima facie* territorial.'"[115] *American Banana*, then, is a decision rooted in a particular kind of liberal anti-imperialist thought. While notions of territoriality were not novel or unprecedented in conflict of laws doctrine,[116] the particular articulation of them in this case—and thus the formulation of the presumption against extraterritoriality—was steeped in the context of early twentieth century anti-imperialism. Ironically, however, by placing the emphasis on formal territorial and public sovereignty, the decision enabled multinational corporations like United Fruit—nominally private actors—to exercise and abuse strong de facto power in regions with underdeveloped public authority. Laissez-faire conceptions of the dichotomy between state and market, combined with this naïve kind of anti-imperialism, turned out to have pernicious effects.

Unfettered by antitrust laws or other constraining regulations, the United Fruit Company itself was able to extend and maintain its monopoly not only over American Banana's lands but also eventually throughout broad swaths of the territory of Latin America, thereby creating the so-called "banana republics."[117] The company gained a reputation for corruption and violence in its efforts to control local governments and maintain its monopoly.[118] Had Moorfield Storey foreseen the abuses that would be carried out by the United Fruit Company, then Storey the anti-imperialist, the civil rights activist, and the corporate lawyer might not have been able to so easily coexist.

II
Corporations and Accountability

In fact, the role of United Fruit in Latin America was not unprecedented in international relations. In an earlier period, European nations had also outsourced empire to business enterprises. An important predecessor of the modern business corporation was the joint stock company, which flourished with European exploration, trade, and expansion in the seventeenth century.[119] When the Netherlands granted the Dutch East India Company (also known as the *Vereenigde Oost-Indische Compagnie* or "VOC") a monopoly on trade with Asia in 1602, the Amsterdam stock exchange grew up to facilitate

115 *Id.* at 357.

116 *See, e.g.*, The Antelope, 23 U.S. (10 Wheat.) 66, 122 (1825) ("No principle of general law is more universally acknowledged, than the perfect equality of nations. . . . It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone."); *id.* at 123 ("The Courts of no country execute the penal laws of another . . . .").

117 *See* Bucheli, supra note 98, at 3.

118 *See supra* note 98 and accompanying text.

119 *See* Larry Neal, The Rise of Financial Capitalism: International Capital Markets in the Age of Reason 44–45 (1990).

the sale of shares in the company.[120] Queen Elizabeth had granted a similar monopoly to the English East India Company two years earlier.[121] In the early modern period, chartered trading companies of this sort were numerous: the Royal African Company, the Dutch West India Company, the French East India Company, the Portuguese East India Company, the Virginia Company, the Massachusetts Bay Company, the Hudson's Bay Company, and the Real Compañia de Comercio de Barcelona, to name just a few. These companies played such an essential role in European expansion that the "early modern European overseas empires . . . more often than not were pioneered and governed not by states alone but in cooperation and competition with a medley of companies and corporations, *conquistadores*, explorers, privateers, proprietors, and itinerant merchant, family, and religious networks."[122]

Obviously, the trading companies served an economic function, engaging in the purchase, transportation, and sale of goods. The proceeds enriched investors, and sometimes the governments of the countries that had chartered them. Moreover, their economic structure was of a particular form. Monopoly was the name of the game in this period. Economic historian and theorist Emma Rothschild has described the ways in which the economic and colonial structures varied by geographic region. In America, "each empire attempted to exclude the merchants of all other nations from its own colonies" while in the East Indies "the empires attempted to exclude all merchants other than those of a single, privileged company."[123]

But the trading companies often served a governance function as well, acting "in a dual capacity, as commercial organizations as well as bearers of sovereign powers delegated to them in their charters."[124] In so doing, they exercised what we would view today as unusual combinations of public and private functions. As one political scientist observes, "[w]ith these curious institutions, all analytical distinctions—between the economic and political, nonstate and state, property rights and sovereignty, the public and private—broke down."[125]

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120 *See* STEPHEN R. BOWN, MERCHANT KINGS: WHEN COMPANIES RULED THE WORLD 27 (2009).

121 PHILIP J. STERN, THE COMPANY-STATE: CORPORATE SOVEREIGNTY AND THE EARLY MODERN FOUNDATIONS OF THE BRITISH EMPIRE IN INDIA 7 (2011). When founded, the company was originally called the "Governor and Company of Merchants of London, Trading into the East-Indies." *Id.*

122 *Id.* at 10.

123 Emma Rothschild, *Global Commerce and the Question of Sovereignty in the Eighteenth-Century Provinces*, 1 MOD. INTELL. HIST. 3, 9 (2004).

124 C.H. ALEXANDROWICZ, AN INTRODUCTION TO THE HISTORY OF THE LAW OF NATIONS IN THE EAST INDIES 27 (1967).

125 JANICE E. THOMSON, MERCENARIES, PIRATES, AND SOVEREIGNS: STATE-BUILDING AND EXTRATERRITORIAL VIOLENCE IN EARLY MODERN EUROPE 32 (1994).

The Dutch East India Company's charter, for example, gave it authority "'to make war, conclude treaties, acquire territories and build fortresses,'"[126] and the English East India Company exercised similar powers. As the same scholar notes, "[t]hese companies made treaties with each other and with foreign governments, governed subjects of their home states, raised armies, and even coined their own money."[127] The governors-general of the companies in India even set up "quasi-royal courts on the Asian pattern."[128]

In his recent book, historian Philip Stern describes the English East India Company as a hybrid entity: a "company-state."[129] Stern argues that not just the East India Company, but other trading companies like it, were

> far more than intermediary bodies or outsourced, privatized extensions of the state. In early modern parlance, they were themselves forms of "commonwealth," bodies politic responsible for governing over the economic, political, religious, and cultural life of those under their charge, with their own claims to property, rights, and immunities at law that generated claims to jurisdiction, allegiance, and subjects and citizens.[130]

Scholars Lauren Benton and Richard J. Ross suggest that "[c]orporations were not only economic entities." Corporations "oversaw religion, justice, and education; they conducted diplomacy and fought wars; and at times they spawned a 'public sphere' that provided a focus for sociability and allegiance."[131] Moreover, the work of these scholars suggests that "[e]mphasizing the resemblance of overseas companies to a commonwealth writ small questions the conventional hierarchical distinction between supposedly superior states and dependent corporations."[132]

As Stern notes, the carrying out of governance functions by trading companies in the context of empire was hardly aberrational in light of the understanding of the corporate form at the time: "[w]hile today the term [corporation] perhaps most immediately calls to mind an economic firm, a corporation as a legal and political idea was far broader and far more public in its nature" in the early modern period, when corporations formed the basis for "cities and

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126 *Id.* at 10–11.

127 *Id.* at 11 (citations omitted).

128 ALEXANDROWICZ, *supra* note 124, at 37.

129 STERN, *supra* note 121, at 6.

130 Philip J. Stern, *"Bundles of Hyphens": Corporations as Legal Communities in the Early Modern British Empire*, *in* LEGAL PLURALISM AND EMPIRES, 1500–1850, at 21 (Lauren Benton & Richard J. Ross eds., 2013).

131 Lauren Benton & Richard J. Ross, *Jurisdiction, Sovereignty, and Political Imagination in the Early Modern World*, *in* LEGAL PLURALISM AND EMPIRES, *supra* note 130, at 7.

132 *Id.*

towns[,] . . . churches and religious organizations, schools, learned societies, hospitals, charity organizations, professional and voluntary associations," as well as business enterprises.[133]

Examining the practice not only in India, but also in the Western Hemisphere, Stern concludes that "corporate and proprietary government was the rule, not the exception, in shaping the early English Atlantic plantation and promoting and protecting its legal and political integrity."[134] In the seventeenth and eighteenth centuries, then, companies were a common tool in the construction of European empire.[135]

As Emma Rothschild explains, "disputes over sovereignty and global commerce in the 1760s and 1770s" were tied up with perceptions of trading companies and their impact. She writes:

> The economists of the time, including Turgot, Mirabeau, Dupont de Nemours, Baudeau and Adam Smith, were also intensely interested in the merchant sovereigns of the French, English and Dutch East India companies, and in the new colonial ventures of the post-Seven Years War period. . . . [Their] writings on global connections were the occasion for some of their most profound reflections on the political consequences of laissez-faire, on theories of sovereignty, on the difficulties of transporting information or instructions over very large distances, and on the changing relationships between power, law and commerce. The disputes over long-distance commerce provide an interesting insight . . . into ways of thinking which were at the same time scientific and administrative, global and provincial.[136]

Adam Smith, of course, was particularly critical of the monopolies that had been granted to the trading companies: "[o]f all the expedients that can well be contrived to stunt the natural growth of a new colony, that of an exclusive company is undoubtedly the most effectual."[137] Moreover, he contended, the vesting of sovereign power in the companies was a further disaster, for companies could never manage a country in the best interests of its residents as a whole. As Smith explained:

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133 Stern, *supra* note 130, at 22.

134 Philip Stern, *Corporate Virtue: The Languages of Empire in Early Modern British Asia*, 26 RENAISSANCE STUD. 510, 512 (2012).

135 *See* Stern, *supra* note 130, at 27–28.

136 Rothschild, *supra* note 123, at 3.

137 ADAM SMITH, WEALTH OF NATIONS 156 (Andrew Skinner ed., Penguin Books 1999) (1776); *see also* Emma Rothschild & Amartya Sen, *Adam Smith's Economics*, *in* THE CAMBRIDGE COMPANION TO ADAM SMITH 319, 342 (Knud Haakonssen ed., 2006) (summarizing Smith's arguments against exclusive company rule of colonies); Sankar Muthu, *Adam Smith's Critique of International Trading Companies: Theorizing "Globalization" in the Age of Enlightenment*, 36 POL. THEORY 185 (2008).

> [A] company of merchants are, it seems, incapable of considering themselves as sovereigns, even after they have become such. Trade, or buying in order to sell again, they still consider as their principal business, and by a strange absurdity regard the character of the sovereign as but an appendix to that of the merchant . . . . Their mercantile habits draw them in this manner . . . to prefer upon all ordinary occasions the little and transitory profit of the monopolist to the great and permanent revenue of the sovereign . . . .[138]

It was this set of perverse incentives that led the Dutch to burn large portions of the spice crop to avoid reducing prices at which they could sell them in Europe.[139] In summary, Smith suggested, "[a]s sovereigns their interest is exactly the same with that of the country which they govern," but "[a]s merchants their interest is directly opposite to that interest."[140] The problem, in Smith's view, was not just that the state was meddling in the marketplace or that trading companies enjoyed state-granted monopolies; it was that the trading companies pervasively used their economic and political power to distort the functioning of government.[141] And government by corporation was not good government.[142]

The point is not that corporations (or capitalism itself) are somehow bad. Rather, the point is that both public and private international law have not adequately grappled with the problem of transnational regulation of large multinational corporations, and that part of the reason for this failure is the heavy reliance of both fields on concepts of territoriality and state-centric sovereignty. What I mean to suggest with this brief foray into history is not that history provides any answer, but rather that this is not a new issue; it is quite an old one that has been resolved at different times and places in different ways, but that still evades a completely satisfactory solution.

Corporations are today considered quintessentially private actors.[143] Yet many of the largest corporations economically dwarf smaller states. Royal Dutch Shell Petroleum, for example, had revenues in 2012 of $484 billion, making it the number one company on Fortune's Global 500 list.[144] Indeed, to return to the scene of the

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138 SMITH, *supra* note 137, at 222–23.

139 *Id.* at 220.

140 *Id.* at 223.

141 *See* Muthu, *supra* note 137, at 188–89.

142 Of course, Marxist thinkers also took a dim view of the role of corporations in empire. *See, e.g.*, VLADIMIR LENIN, IMPERIALISM, THE HIGHEST STAGE OF CAPITALISM (1917). But, as Smith's writings show, one can be basically in favor of capitalism and yet concerned about the status and regulation of corporations in global governance.

143 *See* Joel Slawotsky, *Corporate Liability in Alien Tort Litigation*, 1 VA. J. INT'L LAW ONLINE 27, 29 (2011) (noting the "general presumption that a corporation should be treated as any other private actor").

144 *See Global 500: Our Annual Ranking of the World's Largest Corporations*, CNN MONEY, http://money.cnn.com/magazines/fortune/global500/2012/full_list/ (last visited Apr. 1,

events in the *Kiobel* case, Nigeria has a gross domestic product (GDP) of $262 billion dollars, slightly more than half of Shell's annual revenues.[145] According to the World Bank's 2012 listing of countries by GDP, 165 countries had a GDP *smaller* than Shell's annual revenues.[146] Some 65 corporations on the Fortune list had annual revenues of $100 billion or more, while only 60 nations had a GDP in 2012 in excess of $100 billion.[147] Some 365 corporations had annual revenues in excess $20 billion, while 102 countries had a GDP of less than that amount.[148] Obviously, these statistics are influenced by the fact that there are a large number of relatively small nations; the wealth of corporations cannot match that of large economic powers like the United States, the European Union, or China. But these statistics highlight the oddity of a central feature of international law: all states are, in theory, equal subjects of international law. Corporations are not. And territoriality is one of the defining features of statehood.[149] States, no matter how weak and small, are bound to and defined by territory; corporations are not. The resurgence of territoriality in private international law through cases like *Kiobel* is another instantiation of the same basic problem.[150] The two questions in *Kiobel*—whether corporations are in some sense "subjects" of public international law (in the form of human rights law) and the extraterritorial application of the ATS—are not unrelated but are actually two sides of the same coin. What is the basic structure of the international order?

2014). Gross revenues and GDP may not be the most comparable of measures, but I do not intend an exact comparison. I am making a broad-textured argument that does not depend on literal comparability.

145 *GDP Data,* WORLD BANK, http://data.worldbank.org/indicator/NY.GDP.MKTP.CD (last visited Apr. 1, 2014); *see also* CNN MONEY, *supra* note 144 (listing Shell's annual revenue for 2012). *Cf.* Carol R. Goforth, *"A Corporation Has No Soul"—Modern Corporations, Corporate Governance, and Involvement in the Political Process*, 47 HOUS. L. REV. 617, 618 (2010) (noting similar statistics for 2009).

146 WORLD BANK, *supra* note 145. Twenty-four countries had GDP equal to or greater than Shell's revenues.

147 Gross domestic product is the value of all final goods and services produced in a country in a given year. *See, e.g.*, Glossary, WORLD BANK, http://www.worldbank.org/depweb/english/beyond/global/glossary.html#34 (last visited Apr. 1, 2014).

148 *See* CNN MONEY, *supra* note 144; WORLD BANK, *supra* note 145.

149 *See, e.g.*, JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 128 (8th ed. 2012) (listing "defined territory" as one of several legal criteria of statehood).

150 *Cf.* Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law,* 1991 SUP. CT. REV. 179, 181, 184 (1991) (criticizing the Supreme Court's revival of the *American Banana* presumption against extraterritoriality in *EEOC v. Arabian American Oil Co. (Aramco)*, 499 U.S. 244 (1991), and suggesting that "the world in which a presumption against extraterritoriality made sense is gone—and for good reasons").

Experience shows, sadly, that any kind of concentrated and unregulated power—even if in nominally private form—can be dangerous.[151] Add to this the classic legal realist point that formal legal categories (like the focus on territories under the power of a particular sovereign) can obscure actual power and political dynamics underlying a given dispute. In a legal world governed by territorial formalism, entities (like corporations) that lack corporeal and territorial forms can too easily escape necessary regulation. Just as the *American Banana* decision a century ago helped facilitate the United Fruit Company's unwholesome dominance of Latin America, the *Kiobel* decision threatens to leave corporations unaccountable for their conduct today. The new territorialism looks a lot like the old territorialism, and that is, indeed, unfortunate. At the dawn of a new century, these problems deserve new and better solutions.

151 *Cf.* THE FEDERALIST NO. 51, at 281 (James Madison) (J.R. Pole ed., 2005) ("This policy of supplying by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power; where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interest of every individual may be a centinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the state.").