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University of Denver (Colorado Seminary) College of Law

2001

**LENGTH:** 19548 words

**ARTICLE:** LACRIT V SYMPOSIUM; CLASS IN LATCRIT: THEORY AND PRAXIS I A WORLD OF ECONOMIC INEQUALITY; THE POSTCOLONIAL RELATIONSHIP & LATCRIT; History, Legal Scholarship, and LatCrit Theory: The Case of Racial Transformations Circa the Spanish American War, 1896-1900

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**BIO:**

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**[\*921]**

The period from 1896 to 1900, the period prior to, during, and immediately following the Spanish American War, which became known to Americans as the "splendid little war,"<sup>n1</sup> was a momentous time. An in-depth study of this five-year period--the events leading to the Spanish American War, the War itself and its aftermath--yields a rich and deep understanding of themes at the core of LatCrit theory. This is a key turning point in racial formation of Latino/as,<sup>n2</sup> American foreign policy,<sup>n3</sup> and **[\*922]** American democracy.<sup>n4</sup> The U.S. abandoned its isolationist stance, and awkwardly embraced its "duty and obligation" as a "benevolent" world power.<sup>n5</sup> Thus, the United States became an equal among European imperialist countries like Great Britain, Germany and France, which were already carving up Africa, Asia, and the Pacific and subjecting these peoples to the colonialist experience.<sup>n6</sup> Some would argue that the Spanish American War is the pivotal historical event for LatCrit theory.

Part I provides a historical brief of the Spanish American War, and describes the many ways that the Spanish American War is just not dead history, but continues to impact Puerto Rico and Guam, native Hawaiians, the Philippines, Cuba, and Latin America. Part II discusses just how important the Spanish American War is to the issues that concern the LatCrit enterprise. Part III generally discusses the importance of historical analysis to the understanding of the construction of race. Part IV sets forth how LatCrit can contribute to the historiography of the Spanish American War, and in turn, Part V looks at what the project of studying the **[\*923]** Spanish American War can contribute to LatCrit. This enterprise offers the possibility that LatCrit could build better interracial and interethnic coalitions because such historical

work could lead to better intellectual empathy for other Latino/a subgroups. But as well, Spanish American War historiography can offer a centering axis to this project of LatCrit.

Finally Part IV applies the same critical lens to LatCrit that the prior parts of this article applied to American historiography. LatCrit and Critical Race Theory (CRT), as well, can be said to take a disciplinary perspective overly preoccupied with race. A balance can be struck if LatCrit theorists have greater awareness of the perspectives inherent to the race theoretic efforts and the analysis of American historians.

#### I. A Brief History of the Spanish American War

The Spanish American War was the last war of the Nineteenth Century, and augured the Twentieth Century, which historians call the American Century. n7 On April 15, 1898, Congress enacted a resolution declaring it necessary for the United States to intervene in Cuba's second war of independence against Spain, n8 which had broken three years earlier. n9 Cuba, along with Puerto Rico, were the only colonies remaining of the old Spanish empire in Latin America. n10 From 1808 to 1826, the old Spanish empire declined as Latin America's desire for nationhood and self-determination gave rise to the Latin American notions stretching from Mexico to Chile. n11 Spain, determined not to lose what was left of its [\*924] empire, instituted repressive measures. The Spanish military recognized that the Cuban revolutionary war was in effect a guerilla war. n12 The revolutionaries hid in the hills and engaged the Spanish only in skirmishes. n13 It was also a class war waged mostly by the middle class criollo leaders and destitute sugar cane and field workers. n14 The Spanish military determined that the best way to fight the revolutionary force's guerilla tactics was to "re-concentrate" Spanish farmers and sugar cane field workers, deemed sympathetic to the guerillas, in garrisons located in major Cuban cities. n15 This "reconcentrado" program was repressive and cruel, even by standards of the day, and resulted in rampant starvation and disease. It is estimated that anywhere from 200,000 to onehalf million Cubans died as a result. n16

Americans were appalled at the Spanish measures. n17 In addition, the Cuban revolutionaries had waged an effective campaign for their cause [\*925] in the press and Congress. n18 Accordingly, there was great sympathy for their fight for independence. Cuban revolutionaries counted on support in the U.S. Congress. n19 From the beginning of the reconcertrado program, U.S. Congressional war hawks attempted to muster the majority necessary to declare war. But President William McKinley, having lived through the Civil War, n20 from the moment of his inauguration, was committed to a diplomatic resolution. n21 McKinley applied himself assiduously to preventing war, using his diplomatic skills, experience and knowledge of Congress to maneuver a compromise. n22

However, events overtook McKinley's appeals for temperance. First, the U.S. press, then with a strong jingoistic bias, n23 reported verbatim [\*926] the indiscreet and disdainful comments of the principal Spanish diplomat negotiating with McKinley, Dupuy de Lome. n24 He ridiculed McKinley and bragged that the Spanish would eventually get the better of him. Americans were enraged, McKinley was embarrassed, and de Lome was recalled during a crucial time in the negotiations. n25 Then, riots broke out in Havana and American citizens residing there asked the U.S. embassy for protection from what was depicted as rampant lawlessness. n26 With the consent of Spain, McKinley sent the U.S.S Maine to Havana. n27 This ship mysteriously was sunk barely a few days after arriving, and it gave the war its motto, "Remember the Maine." n28

If the Spanish American War had been limited to these events, this war would be only an interesting interlude in United States history. It would exemplify two things. First, as described above, how events can overtake players committed to a peaceful resolution of conflict. Second, how a once-powerful nation, Spain, permitted itself to be drawn into an armed conflict knowing that it might well be "el gran desastre" (the great disaster). n29 Spain was in no position to fight this War, yet pride, the desire to hold onto the glory of the past, and civic unrest at home drove Spain into this effort. n30 Spain's military arsenal was antiquated, its military [\*927] forces stretched thin after centuries of defending an empire that spanned the

globe. n31 By contrast, the United States, in spite of being at the beginning of the recovery of the Nation's second worst depression, the 1893 bust, had recently expanded and modernized its Navy. n32

Rather, this War is significant because of its consequences. The Treaty of Paris of 1898 best crystallizes this. The Treaty signed by Spain and the United States on December 10, 1898, and approved by the U.S. Senate in March 17, 1899, n33 took one month longer to negotiate than the War took to fight. n34 The approval of the Treaty was tenaciously fought in the United States by a coalition of anti-imperialists, Republican traditionalists and Democrats. n35 The victory in the Senate was in doubt even on the date of the roll call. The Treaty passed by only two votes cast by Senators who changed their mind that very day-- thanks to McKinley's arm-twisting. n36

The Treaty was many things at once. First, it was a document ending the war. As such, it outlined the spoils the United States would claim as indemnity. From the beginning of the negotiation, the United States declared [\*928] Puerto Rico its own as a "war indemnity." n37 Cuba was not available since the United States had committed itself to Cuba's independence. n38

Second, the Treaty was a document of expansion. Under the Treaty, the United States would become sovereign over territories spanning half the globe. Spain ceded the Philippines, Guam, and Puerto Rico and transferred "occupation" of Cuba to the United States. n39

Third, this was a political document. McKinley calculated just how far he could go in breaking with traditional U.S. isolationism, as he and the US peace commission negotiated the Treaty. n40 The peace commissioners were a political coalition, reflecting the conflicting views of the Senate, and included moderates, isolationists and expansionists. n41 The process of negotiation, which included feedback from the commissioners, internal Cabinet discussions, negotiations with Congressional leaders, and the citizen feedback McKinley received from his fall speaking tour in the Midwest influenced his stance on expansionism. n42 Towards the [\*929] end of the negotiations, McKinley had determined to aggressively seek U.S. possession of the Philippines, as well as the smaller Pacific Islands and Puerto Rico. n43

Most importantly, the Treaty redefined the democratic polity and de jure U.S. citizenship in racial and cultural terms. While the United States desired to hold on to lands spanning half the globe, no political leader--neither annexionist nor the antiimperialist--envisioned that the racially and culturally foreign peoples who inhabited the ceded nations, Filipinos, Guamanians, and Puerto Ricans, would one day join the American body politic as full and equal citizens. At best, some saw a long period of tutelage at the end of which these peoples would be ready for democratic self-governance. n44 This was a radical departure from earlier expansionist ventures. In the earlier Treaty of Guadalupe Hidalgo, executed at the conclusion of the U.S.-Mexico War of 1848, Mexican citizens, who had resided in the ceded territories--now the American Southwest, California, and Colorado--could elect to become American citizens. The Treaty of Guadalupe Hidalgo guaranteed that Mexicans who remained on ceded lands would have full de jure citizenship rights as Americans. n45 By contrast, the Treaty of Paris makes no such provision. Instead, the Treaty of Paris provided that the Spanish citizens of the ceded territories who elected to remain in the territories following the cession to the United States would have only such civil rights as Congress would determine. n46

This was a purposeful departure from earlier treaty commitments, n47 and it can be understood as the United States' first step to colonialism [\*930] and empire. While in the case of the Treaty of Guadalupe Hidalgo, LatCrit theorists and American historians have shown that subsequent interpretations of this treaty's citizenship provisions and its implementing legislation vastly undermined the rights of ex-Mexican citizens, n48 in the Treaty of Paris, there was no pretense that the United States would grant citizenship rights and privileges to these foreign peoples equivalent to those then held by white men.

The choices were well understood by politicians and the public. There were three possibilities that were proposed and debated. First, as proposed by the anti-imperialists, the United States could forego annexation. n49 Second, as proposed by various senators, as well as William Jennings Bryan, McKinley's

presidential opponent in the elections of 1896 and 1900, the United States could annex these nations, and pre-commit to their independence. n50 Third, as provided by the Treaty of Paris, the United States could annex these nations, and expand its borders. n51 However, this path would mean that these foreign peoples were to be [\*931] relegated to outsider status--neither part of the U.S. polity, nor free to follow their own national destiny.

Only the first option would have been consistent with the Americans' civic democratic traditions and their civic principles. The second option would not have expressly broken with America's civic commitment to consent of the governed or departed from its anti-colonial traditions. The United States chose the third option, which broke de jure and expressly with its prior democratic precedents and civic rhetoric in the Declaration of Independence that all men possessed an "inalienable right" to self-rule. n52

During the key period of 1899 to 1900, no clear consensus arose on what path would be appropriate. The United States, nonetheless, embarked on a colonialist path, choosing to annex lands and rule over peoples that had not consented to its rule. Filipinos had clearly expressed their desire for nationhood, and took up arms against the United States on the eve of the vote on the Treaty of Paris when it became clear that the United States had no intent of honoring Filipino independence. n53 As for Puerto Ricans, no plebiscite was ever conducted as to whether Puerto Rico consented to be governed by the United States. Instead, the United States relied on Puerto Ricans' acclamation and support of General Miles's invasion army. n54 That support was precipitated by Miles's promise to bring to Puerto Ricans "protection, not only to yourselves but to your property, . . . prosperity, and . . . the immunities and blessings of the [\*932] liberal institution of our government." n55 The revolutionary movement was split over the wisdom of aligning Puerto Rico's nationalist's ambitions with the United States. n56 Some desired to remain part of Spain under the Autonomous Charter of 1898, which gave Puerto Rico greater rights of self determination and representation. n57 While others, like journalist Luis Munoz Rivera, who would eventually create the party supporting the current Commonwealth status, saw the path to eventual independence in an association with the United States. n58

The Spanish American War also triggered the annexation of Hawaii. In July 1898, as the War was being fought, the United States annexed the newly formed Republic of Hawaii, n59 a state formed by the coup d'etat of White planters against the traditional monarchy of the Hawaiian Kingdom. n60 Only five years earlier, President Grover Cleveland had withdrawn [\*933] a treaty of annexation because he believed that "the overthrow," "revolt" and other "remarkable features of the transaction" should be strongly condemned. n61 Nevertheless, McKinley's Republican platform called for annexation, but the treaty stalled in the Senate. n62 With the Spanish American War, McKinley lobbied for annexation as necessary for the war effort.

As a result of these events, the United States became master of half the globe, acquiring sovereignty over the Philippines, Guam, Hawaii, Puerto Rico, and Cuba and subjecting to its control more than nine million dark skinned peoples of other cultures and races--Malays, Hawaiians, Puerto Ricans, and Cubans. n63 In addition, the United States ousted the last significant European presence from the American hemisphere three quarters of a century after the declaration of the Monroe doctrine.

## II. Spanish American War Lives On

The repercussions of this "Splendid Little War" continue to influence the development of countries which were and are ruled under American style colonialism, and U.S. foreign relations with Latin American and Pacific countries, have been forever altered due to the influence of this war.

### A. Puerto Rico and Guam.

Currently, Puerto Rico and Guam continue to be de jure US territories, existing civically outside the U.S. body politic as "unincorporated territories." This term, which seems to be an oxymoron, was invented by the U.S. Supreme Court in a series of opinions known as the Insular [\*934] Cases, n64 the first decided

three years following the Spanish American War. In the Insular Cases, the Court attempted to define the status of the insular territories as political jurisdictions co-existing within the federal union. To be an "unincorporated territory," the Court declared, was to be "subject to U.S. sovereignty," but at the same time, be "foreign in a domestic sense." n65

The repercussions of this ruling are great. n66 As prominent Puerto Rican jurists and LatCrit theorists, Ediberto Roman, Efren Rivera Ramos, Pedro Malavet, and Carlos Venator Santiago have argued, this de jure location outside the polity accounts for these citizens' second-class, "subordinated" citizenship. n67 From the perspective of representative democracy, de jure standing as outsiders means that Puerto Ricans, Samoans, and Guamanians are not entitled to representation in Congress. n68 [\*935] Neither do they vote in the election of the President. n69 Rather, as "unincorporated territories," the insular territories are subject to the plenary power of Congress, as well as exempt from the protections of the Uniformity Clause which requires that all states be treated the same. n70 This has two repercussions. First, U.S. citizens residing in Puerto Rico and Guam are entitled to only those social benefits that Congress deems adequate, which may be less or more than benefits given to citizens of other states. n71 Thus, citizens of Puerto Rico, Guam, and Samoa always have received less in food stamps, welfare, and social security, and the protections of the Federal minimum wage have also been restricted. n72 Also, because the Uniformity Clause does not apply, these territories have been subject to special customs and tariff treatment. n73 With few exceptions this singular treatment has reflected the interests of the states, which are represented in Congress, rather than those of the insular territories. n74 [\*936]

Second, U.S. citizenship of those born in the territories is something less than the citizenship of those born in the states. A 1997 House Report took the novel, but reasoned, position that the U.S. citizenship of those born in unincorporated territories can be revoked by Congress at any time because it is a "statutory citizenship" and subject to the will of Congress. n75 Supreme Court case law has been highly deferential to Congressional exercises of plenary power under the territorial clause. n76 Thus, the position taken by the House Report, although at present no other branch of government has followed it, could very well become the official view of the U.S. government in the future.

Finally, under the Insular Cases, the constitutional protections of residents of Puerto Rico, Guam and Samoa are subject to ad hoc constructions by the judiciary. Under the Insular Cases, the U.S. Constitution applies to unincorporated territories; however, insular citizens are entitled to only those rights that U.S. courts deem to be "fundamental." n77 Although the Court in modern times has determined that these "fundamental" rights are largely coterminous with constitutional rights under the Fifth and Fourteenth Amendments, n78 this doctrine supports potential carve outs of basic constitutional rights on the basis of insular territorial residence anytime a majority of the Court would so determine.

#### B. Hawaii.

The annexation of Hawaii denied native Hawaiians their right to self-determination. As *Rice v. Cayetano* n79 illustrates, the United States constitutional system, as interpreted by the Rehnquist Court, does not accommodate group rights of peoples whose country was effectively "stolen." [\*937] Consequently, native Hawaiians, Hawaiians, and Congress are struggling to fit this "square peg " (native Hawaiian self-determination) into a round hole (the Federal system). Making complete restitution to native Hawaiians would turn modern Hawaii upside down. New economics would rule. Property rights to the most expensive and desirable resort properties would revert back to native Hawaiians. New laws, particularly land use rules, would have to be reconceived. Yet for most Hawaiians, the continuing disenfranchisement and neglect of native Hawaiians should be resolved. n80

#### C. The Philippines.

Filipinos' aspirations towards self-government would not be honored either by the Treaty of Paris or the United States' subsequent colonial administration of the Philippines. n81 The U.S.-Filipino war, which

broke out on the eve of the approval of the Treaty of Paris, was bloody and cruel and would eventually be recorded as among the most brutal and ruthless wars that the United States has ever waged. n82

The American colonial rule would extend past World War II. n83 Filipinos were never U.S. citizens but instead were U.S. "nationals," clearly existing outside the polity in a state of tutelage towards their independence. n84 However, U.S. tutelage failed to result in a self-sustaining economy and healthy civic governance. Instead, U.S. colonial administration formed the foundation for hierarchical local governance. Anglo-assimilated elites and American expatriates ruled in colonial governance, and economic decision making tended to benefit American companies' interests, not the lower classes who needed to rely on a strong local economy. n85 For some, this legacy accounts for the Marcos dictatorship, today's ongoing guerrilla warfare, and the diaspora of Filipino workers who emigrate to find adequate work. n86 [\*938]

#### D. Cuba.

As established by the Treaty of Paris, from 1898 until 1934, Cuba was under U.S. "tutelage"--neither independent nor a colony, but in transition towards independence. Under U.S. tutelage, instead of leading to a robust democratic tradition and a self-sustaining economy, Cuba became what some have called a "dependent nation." n87 As in the case of the Philippines, American tutelage and American style capitalism fostered lopsided distributions of wealth, creating a millionaire class who owned sugar plantations and rum manufacturing, while a worker class suffered under the back breaking work of sugar cultivation. n88 Today, economically, Cuba continues to be a single crop economy, and its current economic woes can be traced to this dependency. n89 Civically, Cuba became a dependent nation under the Platt Amendment, n90 which conditioned Cuban independence because the U.S. reserved to itself the right of intervention if contrary to U.S. interest. n91 But U.S. influence in Cuba's internal affairs has been more far reaching than anything the Platt Amendment could have wrought. After Cuban independence, the U.S. supported the Batista dictatorship, reasoning that his governance was stable and not contrary to U.S. interests which included U.S. capital, mainly U.S. sugar. n92 Many argue that the Spanish American War, since it led to U.S. foreign policy that supported the excesses of the Batista regime, including his neglect of Cuban workers' welfare, was the necessary precursor to the Castro revolution. n93 [\*939]

#### E. U.S. Foreign Relations in Latin America.

In addition, Robert Beisner, David Healy, and Michael Hunt have argued that the United States foreign policy in Latin America has been heavily influenced by the U.S.-Spanish War. n94 It has encouraged the United States to look at Latin American sovereignty as subject to what the United States deems to be in its best interests. Thus, the United States has intervened, sometimes recklessly, in the internal democratic governance of these countries. n95

### III. History and LatCrit Enterprise

Clearly, the Spanish American War is highly relevant to the LatCrit enterprise. This relevance is not simply limited to current effects described in Part I, but as well the detailed study of history can yield important insights into how race operates in society and law.

A LatCrit and CRT theorist has at her disposal an analytical arsenal that includes how race operates as a psychological framework (cognitive), n96 how privileged knowledges and the practices of institutions can marginalize minorities' ways of knowing and being (structural and poststructural), n97 how ideology "normalizes" racial attitudes (sociology and cultural studies), n98 and how race becomes a mode of class stratification and class conflict (Marxist or Neo-Marxist analysis). n99 As the [\*940] contributions to this LatCrit Symposium demonstrate, in LatCrit, as is true of CRT, no single theoretical framework dominates or preempts. Rather, the many approaches that theorists apply to analyze race co-exist and complement each "other."

The analysis of history is another valuable approach to the study of race. As the recent *Race and Races* casebook by Professors Juan Perea, Richard Delgado, Angela Harris, and Stephanie Wildman explains, history can be "essential in understanding the situations faced by minority groups today." n100 As this and other projects show, n101 history describes the evolution of a racial group's standing in American society today--how it came to be that a particular group did not successfully "melt" into the melting pot that is American culture today and remained distinctly a racial other.

As well, history is an important tool in retrieving, critiquing, and understanding law. Law is a backward looking discipline because legal rules are anchored to precedent. The legal process disciplines lawyers by demanding that they amply justify any departures from past rules. n102 By looking at history, lawyers can better understand the origin of rules and determine whether precedent should continue to be followed. Rules can lose their "common sense;" their origins may be long forgotten and reflect values and attitudes that are very different from those which are part of the present. n103 Archival recovery of legal rules' origins is important to CRT and LatCrit theorists, because much of this critique is centered in uncovering the racial origins of precedent, and making present day arguments as to why these rules should be changed. n104 [\*941]

For example, former Chief Justice of the Puerto Rico Supreme Court, Jose Trias Monge, as well as Circuit Judges Juan Torruella and Jose Cabranes have forcefully critiqued the doctrines that construct Puerto Rico's *de jure* second-class citizenship. n105 Professor Efred Rivera Ramos adds to the literature by carefully tracing the influence of ideology of expansionism and Anglocentrism in the development of the *Insular Cases*. n106 Professor Ediberto Roman's work links the second class citizenship status of Puerto Rico over the last one hundred years to racial and Anglocentric views. n107 He attributes "Congress's nativist and xenophobic fears" and "historical obsession with remaining Anglo and with social Darwinism" as central to the development, through legislation and case law, of Puerto Rico's present *de jure* second class status. n108 Professor Juan Perea argues that racial views toward dark skinned, non Anglo Saxon races were a key component in the "racial conquest" of the Southwest under the US-Mexico War of 1848 and the Spanish American War. n109 Professor Perea helps the reader focus on how racial ideas have had a key role in America's geographical expansion and how law and legal instruments, such as the Treaty of Paris and the *Insular Cases*, legitimized this "racial conquest." n110

These works make important contributions because they establish how racial attitudes impacted upon past precedent and how they continue to affect current policies and laws. Subsequent formalist applications of precedent create as, Efred Rivera Ramos notes, a socio-historical reality that legitimizes, reifies and sustains Puerto Rico's outsider status. n111 Associate [\*942] Dean Kevin Johnson notes that work focusing on Puerto Rican's racialization experiences, both current and historical, is a much needed component of the LatCrit enterprise. n112

#### IV. What LatCrit Can Contribute to Historiography of the Spanish American War

LatCrit's overall project of taking a "stance against subordination" n113 contains a historical component. For postcolonial theorist Gayatri Spivak, a commitment to anti-subordination involves recovering "silenced" historical narratives, "not to recover a lost consciousness, but to see . . . our view of history which is a very different view. . . . We see the way in which narratives compete with each other, which one rises, which one falls, who is silent, and the itinerary of the silencing rather than the retrieval." n114

As discussed in Part II, the Spanish-American War continues to have a great impact on the peoples of the Philippines, Guam, Hawaii, Puerto Rico and Cuba. Yet, American historiography has not paid enough attention to how the Spanish American War altered the nationalist trajectory of Puerto Ricans, native Hawaiians, Guamanians, and Filipinos and instead, recast them into subordinated civic positions. LatCrit's predisposition to look at historical events from an anti-subordination lens means that LatCrit scholars intuitively bring to this enterprise skepticism and an outsider's perspective. LatCrit theorists' initial instinct is to ask those very questions that American historians have not asked with sufficient frequency and to look

at those sources, for example, the archives of the "losers," that American historians may not have sufficiently used.

A LatCrit theorist would ask the hard questions that probe into how the dynamics of race and subordination affected the established events of the Spanish American War. Why did the United States not recognize the Cuban and Filipino revolutionary governments from the inception of the Spanish American War--a war fought purportedly to support democracy in Cuba? How did the McKinley administration get away with this politically, when prior to the War, the Cuban independence movement had [\*943] enjoyed wide support in Congress? Why did the U.S. forces invade Puerto Rico at a moment when the Spanish American War was practically won and when the Congressional declaration of war clearly stated that the U.S. was intervening on behalf of Cuban independence fighters? Why did the Treaty of Paris--a document negotiated for a longer period than the war was fought--not provide for full citizenship rights of the people of the conquered territories? Such questions examine the Spanish American War with a latter day 20/20 understanding of how these events have shaped the subordinated status, both de jure and culturally, of racial minorities.

LatCrit theorists have begun to answer these questions. For example, Carlos Venator Santiago analyzes the construction of Puerto Rican "race" through the civic de jure regimes imposed by the United States in the early stages of colonial administration, as well as under Puerto Rico's local legislative acts. n115 He asks how did the Foraker Act, Jones Act, and local legislative enactments from 1900 to 1917 construct race for Puerto Ricans, and how, in turn, did these concepts of race affect de jure constructions of citizenship. n116 In the longer work on which this essay is based, my co-author and I assess to what extent racial attitudes impact the key decisions made during the Spanish American War and attempt to answer some of the questions posed above. n117 We also focus on legal actions and the role that these played in fixing a de jure second class racial citizenship in what had been a closely disputed and deeply divisive civic debate. n118

Work such as this revisits historical events and reinterprets historical documents. Some might argue that this work is repetitive, echoing Louis Perez's historiographical critique, n119 because in effect, such research goes over ground already covered previously by American historians. However, LatCrit work examines the historical evidence from a different interpretive pose, focusing on the historical development of racial formation and racial and cultural subordination. This is a new effort, which is being paralleled within American historical research n120 and by Puerto Rican jurists and researchers, n121 traces the development of and transitions in national identity, culture, and race. Although work has begun, much remains to be done. Thus, LatCrit theorists could contribute "a great deal" to this effect [\*944]

#### V. What the Study of the Spanish American War Can Contribute to LatCrit

The process of research is not a one-way relationship; rather, it is a mutual relationship. The researcher changes as she begins to understand her own history, or she may find empathy as she begins to understand the narrative of what had previously been an "other." Accordingly, the study of the Spanish American War can contribute to the LatCrit project, as discussed below in Part V.A, by helping to build a solid base for coalitions within different LatCrit communities, and in Part V.B, by developing a better understanding of the ideological and racial subordination that impacts upon LatCrit communities.

##### A. Spanish American War Historiography and Interracial Coalition Building

LatCrit theorists, like other Americans, have absorbed traditional retellings of American history. However, in order to understand those at the "bottom of the well," n122 LatCrit theorists must transcend the "American" part of their hyphenated identities. n123 To understand this period is to know why this period remains traumatic and part of the present for Cubans, Cuban Americans, Puerto Ricans, Filipinos, Guamanians, and native Hawaiians and haunts Latin American sovereignty. For these peoples, the Spanish American War is not a footnote but remains a crucial turning point in their national histories. As LatCrit

scholars, we need to understand the emotion and continuing impact that the cry of Jose Marti, "Patria o Muerte" (Country or Death), Cuba's nationalist poet and revolutionary martyr, continues to bring to the breast of Cubans and Cuban Americans, and why native Hawaiians continue to chant the prayer of Queen Lili'uokalani, the last reigning monarch of the Kingdom of Hawaii.

Psychologists have begun to understand that knowledge is both affective and intellectual. n124 In studying the many single events that make up this key period, LatCrit scholars can begin to know "subordination" with a kind of personal knowledge that transcends the intellectual and [\*945] combines it with empathy. n125 Understanding the loss and pain that these groups relate back to the acts that accompanied the Spanish American War is the first step to constructing the interracial alliances about which LatCrit writes a great deal but needs to do more. Perhaps only through this kind of empathy, both intellectual and affective, can true interracial alliances within LatCrit be formed.

#### B. The Spanish American War as a Centering Axis for LatCrit Analyses

Latin American post-colonial theorist, Walter D. Mignolo makes

the strongest case possible for the significance of the Spanish American War when he asserts that this war is the lynchpin to understanding the racialization of Latinos/as in the United States, and U.S. relations with Latin America. n126 The Anglocentric, Protestant framework that McKinley and other politicians developed to justify and rationalize the Spanish American War reconfigured the "world imaginary," according to Walter D. Mignolo. n127 What were Hispanic and Catholic went from being powerful and quintessentially modern to being powerless, backward, and the colonized. n128

McKinley's Protestant "civilizing mission" towards the people of the Caribbean and the Pacific, which required teaching them the rubrics of democratic self governance and, to a great extent, Protestantism, n129 displaced the Sixteenth Century's Spanish Catholic Kings' *encomienda* to Catholicize the New World. n130 Mignolo argues that this ideology produced by the Spanish American War now shapes the "historicostructural dependency" of "coloniality of power," which continues to influence events in the United States, Latin America and the world. n131 "Coloniality of power" in today's world implies the hegemony of Anglocentrism in which new "dominated populations, in their assigned identities, are subjected to Anglocentric hegemony as a way of knowing." n132 This Anglocentric historicostructural legacy organizes the modern versus [\*946] the colonial. n133 This binary implies that an Anglocentric way of knowing distinguishes between what is modern and colonial, what needs to be modernized and what has already reached this plateau of development, and what is valuable and what is not. This logic of modernity influences modern global economic organization. n134

Historians generally agree that the Spanish American War provided a new value system for a more modern United States, one that progressed from parochial interests to a global power. n135 The Spanish American War, if one has not yet grown tired of the term, marks an internal paradigmatic shift as well. n136 As cultural historians and the longer work on which this essay is based argue, the Spanish American War reconstituted the collective self as powerful, superior, and virtuous. n137 Pride in being American translated into notions of superiority over a badly defeated Spain; McKinley's appeal to "duty and obligation" meant providing "help" to the new tropical peoples only available through American largesse and genius. n138 In *The War with Spain*, Henry Cabot Lodge, the paradigmatic Anglo Saxonist, sums up a new sense of self and nationhood: "Then the war note rang through the land, and with dazzled eyes at first, and then with ever clearer and steadier gaze, they saw that in the years of isolation and self-absorption they had built up a great world power. . . [\*947] Suddenly came the awakening to the great fact that they had founded an empire . . . ." n139

Furthermore, this evolution of superior self-identity took place at a time when racial constructs were in flux and Whiteness was under pressure. In post-reconstruction, Black Americans failed to find racial equality. Rather, Whites had tired of the difficult task of eliminating caste, and they acquiesced, albeit

sometimes uncomfortably, to new modes of class and racial subordination and stratification, which were particularly severe in the South. n140 Cultural ideas about race increasingly crept into how Whiteness was constructed. The backlash against massive immigration of European ethnics played into White Anglo Saxonist prejudices, which were now framed against a White relational other-European ethnic immigrants. n141 Those who were firmly White and American were those who could claim old English and Anglo Saxon stock. The White ethnic others were the Irish, racialized as ape-like, drunken and unruly, n142 the Jews with racial traits of "vulgar ostentation," n143 and the Slavs, half-Asian and half-Caucasian, who were the dupes of unscrupulous labor contracts that undermined American wages. n144 Yet, in relation to Blacks and Indians, these ethnic groups were White enough. n145

Not surprisingly, the new national self-identity and world order constructed after the Spanish America War came to be measured against the "tropical peoples" of the new insular territories, another racial "other." As the United States wrestled with the significance of annexing so large [\*948] a geographical territory filled with nine million foreign peoples, new racial thinking began to take shape, made more palatable and transparent by President McKinley's presidential rhetoric. McKinley argued that retaining control of the Philippines was a duty, and only this alternative would avoid a bloody civil war. n146 "Obligations" to a "higher and nobler civilization" n147 made it necessary for the United States to annex the Philippines and Puerto Rico, in spite of these country's nationalist ambitions, and maintain them under tutelage until they had sufficiently learned the ways of American democracy. n148 Under McKinley's rendition of the "White Man's Burden," n149 the Nation, civically privileged and responsible for ensuring the triumph of "civilized" (Anglocentric) norms, was following the mandates of Providence n150 and obeying Christian-like obligations to the civilized world. This rhetoric made it possible to argue that this imperialist experiment was not in the pursuit of commercial ambitions n151 or a response to racial attitudes towards those widely regarded as "barbarians." n152 Nonetheless, McKinley's "benevolent assimilation" imports [\*949] racial attitudes, because only if these "wards" were racially and culturally lesser peoples would it be logical for the United States to tutor the theretofore unknown, but racially different.

As literary critic Eric Cheyfitz observes, the colonizer writes the script in non-racial terms, n153 and, in this case, "the civilized teach the non-civilized." Nonetheless, this script carries racial effects, "White Anglo Saxons teach the dark skinned barbarians." The racial script is unstated; nevertheless, the spoken text is loaded with racial subtext. The public rhetorical vehicle, because it is devoid of explicit racial references and instead appeals to self virtue and abnegation, can preserve the self-delusion of racial innocence and virtue. n154 This racial construction, which subtly denigrates non-Anglo Saxon cultures in non-racial terms, is a dynamic that continues with us today. Whiteness is transparent and innocent, supported by assumptions of Anglo cultural superiority and privilege. n155 Thus, the American psyche maintains distance from the consequences of its own colonialist acts through the rhetorical constructs that preserve American innocence devised originally by McKinley.

Walter Mignolo would understand this cultural ideological conversion locally, as well as globally. Mignolo argues that the new racial and cultural thinking formed after the Spanish American War recast past events, including the U.S.-Mexico War of 1848, Mexican Americans, Mexicans, along the racial Anglocentric lines. n156 In contrast, historian David Weber and Chicano sociologist Rodolfo Acuna, among others, view pre-existing racial attitudes towards Indians and Catholics as providing the ideological framework for the racialization of Mexico and Mexicans. n157 Further, Mignolo argues, as have historians Michael Hunt, [\*950] David Healy, and Robert Beisner, that the cultural ideology and national identity developed during the Spanish American War accounts for the heavy handed treatment of Latin America after 1900 and the too frequent interventions in Latin America's internal affairs. n158

Mignolo's thesis, even if not in agreement with the established wisdom of Chicano scholars, provides an overarching structure that connects the present effects of the Spanish American War described in Part II. n159 These events could be said to be related only through a common history; however, Mignolo provides a new understanding that makes it possible to see that Anglo Saxonism and its relational converse, Hispanic

inferiority, form a common ideology that continues to shape both local and global subordination. n160 As Professor Lisa Iglesias has noted, it is possible "to seek the commonalities of oppressions without collapsing . . . distinct histories into one false norm . . . and the payoff is a new perspective. . . ." n161

## VI. Turning the Critical Eye Inward

In this Part, I turn the critical eye inward and discuss the criticisms that can be leveled at LatCrit theorists' approach to the analysis of the Spanish American War. This Part continues the process of self-criticism and self-reflection that the LatCrit II, III and IV Forewords by Professors Frank Valdes, Lisa Iglesias and Associate Dean Kevin Johnson have argued is an integral part of LatCrit methodology. n162

Part VI.A posits that the LatCrit enterprise is culturally and racially positioned in much the same way that Part IV argued that American historiography on the Spanish American War is culturally and racially positioned. Part VI.B addresses the question of how LatCrit theorists should address the problem of the positioned analyst. [\*951]

### A. The LatCrit Analyst as a "Positioned" Researcher

The LatCrit analyst, like the traditionally minded historian, is a positioned subject in the manner that Rosaldo and Geertz describe, because, first, she is positioned within the field as a race theorist, and second, the approach of her discipline, the law, also influences her analysis of historical events.

#### 1. Field Positionality: LatCrit is Culturally and Racially Positioned

LatCrit, as well as Critical Race Theory, is "positioned" n163 within the legal field. These jurisprudential approaches analyze legal issues by focusing on how racial dynamics function in legal contexts. n164 For example, in the study of the Spanish American War, LatCrit analyst could be said to choose a theory of racial formation as the theoretical framework that she believes best explains these historical events. n165 Historical facts are then interpreted through a "race" lens. These culled historical facts are used to "prove" the initial premise that some form of racial framework shaped the subsequent events related to the Spanish American War. The analyst links seeming unrelated events, and this linking shows the systemic existence of the racial formation framework. As justified in *Race and Races*, by organizing "seemingly unrelated law" and historical events around a racial premise, they "come together." n166 The results of such analysis are linear, continuous, and coherent.

This exercise can be said to be circular, because the analyst, as anthropologist Renato Rosaldo describes, comes to the subject with her own cultural perspective, through which she filters what she observes and evaluates. n167 The work of sociologist Pierre Bourdieu, a cultural sociologist, also emphasizes that the researcher can distort social scientific work because the researcher may project either "animosity" or "enchantment" to her understandings of how a discipline functions. n168 [\*952]

Sometimes the interest of the researcher manifests itself by selective presentation of historical facts and events in a way that best "proves" a thesis. History then becomes straightforward. Such critique could be leveled at an interpretation, such as that of Professor Juan Perea, that racial attitudes toward dark skinned others underlie the "racial conquest" of the U.S.-Mexico War and the Spanish American War. n169 Similarly, it could also be said, to apply Professor Roman's emphasis on Anglocentrism as the central motivation in a century of doctrinal development and legislative enactments that have led to Puerto Rico's present de jure second-class status. n170 As well, Professor Rivera Ramos' explanation that the "ideology of expansion" was the primary influence in the Insular Cases n171 could be said to focus on only one of the many ongoing dynamics changing American attitudes towards the rest of the world.

Such work is very much what LatCrit encourages and builds upon, because LatCrit, like CRT, endeavors to reveal how seemingly neutral laws and political acts embody racial bias. n172 For readers who cannot see racial privilege because it operates in transparent ways or do not believe that racism exists because it is located in the past, such an approach can make it possible "to make . . . connections among race, history,

and legal doctrine." n173 This is because American culture is itself "positioned," as anthropologists Rosaldo and Geertz emphasize. n174 In particular, American culture contains a quality that analysts capture under the rubric of cultural ideology. n175 This dynamic permits those living within this culture to ignore, or minimize, the racial injustices of the past, while preserving the myth that the positive and self-affirming qualities, like fairness, merit, and exceptionality are intrinsic to American culture and have always dominated. n176 In spite of collective amnesia or repudiation of past racial [\*953] politics, past ideologies live in the present, because cultural ideology has "a life of its own." n177 Yet, as historian Michael Hunt observes, "race powerfully shaped the way the nation dealt with other peoples by its grip on the thinking of the men who debated and determined policy, by its influence over the press, and by its hold on the electorate." n178

Nonetheless, practitioners of LatCrit, like their counterparts in CRT, must recognize that their fields stake a position. CRT and LatCrit stake an approach that is culturally and racially positioned, which I will refer to as field positionality. Admittedly there is great variation in how individual practitioners understand and apply CRT and LatCrit. n179 Nonetheless, there is a commonality. First, these are fields of cultural critique, because at the center of this work is an ongoing effort to show how mainstream cultural norms maintain racial inequality. Second, these fields share a commitment to viewing the world through a racial lens in order to uncover how laws are racially unjust. n180 As Bourdieu notes, all systemic theoretical frameworks within a discipline imply a viewpoint, even if "the intention is abolishing one's viewpoint," n181 and even if they claim their approach furthers social justice.

## 2. Disciplinary Positionality: Law's Troubled Relationship with History

A second set of perspective issues, which I refer to as "disciplinary positionality," affects LatCrit work, as well. This is the perspective that legal scholars in general bring to historical work.

The vast majority of legal scholars who "do" history are not trained as historians. For this reason, Judge Richard Posner is openly skeptical of whether judges and legal scholars can perform competent historical-legal [\*954] analysis. n182 Posner advises that history not be used to inform legal analysis unless a historical fact is uncontroverted in the historical field. n183 Further, Posner believes that the use of history is dangerous, because it encourages judges and scholars to duck difficult questions by referring to some questionable historical explanation. n184 Professor Mark Tushnet and Judge Harry Edwards view attempts by legal analysts to "do" history as typically arrogant, and more notable for the slipshod nature of the effort than for its scholarly merit. n185

With notable exceptions, it is generally true that legal scholars do not "do" history, rather they use it for their own purposes. Chief Justice Warren famously observed that "we, of course, venerate the past, but our focus is on the problems of the day and the future as far as we can foresee it." n186 By contrast, the ideal within the discipline of history is to ascertain the past as best as possible, without injecting "presentist" values or perspective. n187 The task is to provide as accurate a rendition of past events as is possible. Historians pride themselves in allowing the data to speak to the analyst. Historians "do" history by inductive reasoning, examining individual documents, deciphering the why of individual events, plowing through key debates, and piecing events into a coherent policy. This is what constitutional legal scholar Bruce Ackerman has described as a "no nonsense, original source" style. n188

The positive of this painstaking approach is that, first, the "proof" of a conclusion is being laid out as the historian works through the material; and second, that the material itself yields nuances and leads to avenues of [\*955] investigation previously unforeseen. Only after examining voluminous data do historians move on to construct a thesis, or more encompassing observations.

The negative of this approach is that too many disjointed facts may not yield an overarching thesis that is coherent. n189 The New York Times has recently reported that historians are increasingly recognizing that sweeping synthesis and elegant narratives by historians are rare today. n190 Posner argues that focus on the

past may yield perspectives that are overly tied to the past. They may either no longer be relevant to present day concerns or overly glorify a past that robs present day actors of the ability to move beyond old conflicts and hurts to address constructively present day problems. n191

On the other hand, legal scholars' methods are not as careful as historians' methods. As already intimated, many legal scholars "do" history by "picking and choosing" historical data and historiographical analysis that is best suited for his or her "present day viewpoint." There are notable exceptions, as for example, Professor Michael McConnell's historical work on the Fourteenth Amendment that leads him to conclude that *Brown v. Board of Education* was rightly decided based on the history of the enactment of the Fourteenth Amendment. n192 Further, legal scholars, may take shortcuts in their historical research. There are few incentives for legal scholars who "do" history to "get their hands dirty" by dipping into the archives themselves. Secondary sources are widely used. The reasons are twofold. First, this is accepted within the legal academic discipline. Second, this may well be necessary. Primary research tends to be time consuming. Given the ongoing "publish or perish" pressures of modern academia, the use of secondary sources expedites publication.

This combination of presentist agenda and short cut historical methods can be an explosive mix. As historian and legal analyst Laura Kalman notes, legal scholars can "appropriate historians for advocacy purposes, permitting the present to overwhelm the past." n193 It has even been argued that legal scholars (or courts) are just plain wrong on their historical facts. Worse, the lack of peer-edited journals in law means that a legal [\*956] scholar can always publish a well-written article, even if it is based on "history" that is rubbish.

#### B. Addressing the Conundrum of Positionality

How to respond to these issues? Should legal scholars abandon history? Part III made the case that understanding history is an important part of the LatCrit project. This Part takes the position that the answer is to understand the critiques and readjust approaches to historical work, just as American historians have used internal critiques to reassess their approaches to the analysis of the Spanish American War. Part VI.B.1 addresses the issues of what I have called field positionality, and Part VI.B.2 addresses disciplinary positionality. Part VI.B.1 takes the position that the LatCrit researcher should, first, be self aware of her perspective and undertake self-scrutiny to raise her awareness of her perspective, assumptions, as well as interests in undertaking research. Part VI.B.2 argues that the researcher should also ground her work by using traditional historical methods, such as archival research. A LatCrit researcher's conclusions should not only be persuasive, she should also be able to conclude that her interpretation is both fair and reasonable.

##### 1. Addressing Field Positionality: The Struggle for Objectivity

The racial and cultural positionality of LatCrit and other similar approaches was described in Part VI.A.I as a position of cultural critique. Academic traditionalists have reacted by arguing that such critiques destabilize the practices that traditional scholars have customarily used to measure academic product, what is "truth" and what is "good" in scholarship. For example, David Harlan in *The Degradation of History* laments the impact of postmodern thought on historical practice. n194 Harlan asks, "What now becomes of the 'historical fact' . . . ?" n195 Harlan states that "the overwhelming abundance of possible contexts and perspectives, the ease with which we can skip from one to another, and the lack of any overarching meta-perspective from which to evaluate the entire coagulated but wildly proliferating population of perspectives--all this means that the historical fact, once the historian's basic atomic unit, has jumped its orbit and can now be interpreted in any number of contexts, from a virtually unlimited range of perspectives." n196 He concludes that this kind of questioning eliminates any "hope of acquiring stable, reliable, objective interpretations of the past." n197

Within the legal academe, Professors Farber and Sherry echo this view. In *Beyond All Reason*, they argue that CRT only seeks to [\*957] "expose" racial "pathologies." n198 They accuse CRT theorists of refusing to reason because they view "reason as a political entity" designed to ensconce racism, sexism, and homophobia. n199 Farber and Sherry also charge that critical theorists believe that justice is merely a "rhetorical device." n200 They question critical scholars' commitment to academic values, claiming that these "radicals . . . have relatively little interest in the nuances of philosophical theories," are "sloppy scholars" and are "paranoid in style and rigid." n201

What is at play here is a fundamental schism. It is what Thomas Kuhn describes as an irresolvable paradigm gap. n202 John Rawls calls this "diversity of reasonable comprehensive . . . doctrines that . . . is a permanent feature of the public culture of democracy." n203 Although Rawls and Kuhn come to this kind of problem from very different perspectives and disciplines, both respond to this problem by recommending that engagement continue between perspectives. n204

Engagement, however, cannot occur without self-awareness. Bourdieu calls this process the struggle for objectivity. n205 Self-awareness, for Bourdieu, means as well that the social researcher must understand her social motivations and interests that are involved in her intellectual practice. n206 He observes that academics, as producers of cultural knowledge, have an interest in what kind of knowledge is produced. n207 That interest may be a larger group interest, such as, for example, a leftist political agenda, or it could be personal, such as a researcher's personal desire for status within her profession. n208

The process of self-criticism, then, first entails asking questions that uncover what, if any, are the underlying interests of the researcher. She should ask: Why is she undertaking this study? How does this study [\*958] affect me? Does this study enhance my status? By understanding if we ourselves are invested in an outcome, we can begin to obtain the objectivity necessary to uncover "true" social facts.

The second step for the LatCrit analyst is to be self-conscious of the assumptions brought to the research. Rosaldo writes that the researcher constantly must consider her position and the subject's, never losing sight of the dynamics of relative dominance and subordination. n209 For historian Peter Novick, the analyst must recognize the social, political, cultural, and professional context of the past as well as the present. n210 Legal feminists and postmodernists have framed this dilemma in terms of an analyst accepting that her viewpoint and assumptions may not be the "truth." n211

Starting with a higher awareness of unstated assumptions and that one's working theoretical premises are subject to contest engrains higher self-skepticism that produces more care in the reasoning process. If the researcher constantly keeps in mind that her own positions are contestable, the analyst will spend more effort in substantiating and justifying her own positions, findings, and conclusions. In another context, I have advocated a form of reasoning based on John Rawls' concept of "reciprocity" n212 in which actors, who understand that their position may not be the absolute truth and is contestable, reason with each other according to an ethic that justifies "their actions by giving reasons that the other will understand and reasonably accept." n213 Reciprocity means participants "hold each other in enough regard that each would justify their actions by giving reasons that the other will understand and reasonably accept." n214 [\*959]

As applied to scholarly research, this method requires the researcher to ask whether her conclusions "make sense" from opposite perspectives. The researcher would ask if someone else could reasonably accept her position and assumptions, even if that person does not share the researcher's views or assumptions. The researcher may well not be able to convince that imaginary adversary; however, she can engage the opposition viewpoint. The researcher must consciously justify her choice of parameters, provide sufficient evidence to rebut the other viewpoint, and show how her chosen use of historical evidence and methods does not tilt the evidence and her conclusions.

It must be acknowledged, nonetheless, that this proposed method remains imperfect. Bourdieu warns that adopting a self-critical position does not mean that the researcher escapes positionality. n215 In a similar

vein, Geertz and Rosaldo acknowledge that the observer can never fully abandon the power she exercises. n216 We only partially escape from ideological frameworks in which one is invested. n217 However, acknowledging that positionality is inescapable does not necessarily lead to weaker analysis or less critical positions. Rather, it only means that critique is undertaken with care. Particularly for fields like LatCrit and CRT, which are fields of cultural critique, such care is important because critique, as Bourdieu warns, can be another tool for gaining power and status. n218 A researcher can enhance her own status within a discipline or field by criticizing others, for research can be undertaken for the purpose of showing why my chosen theoretical framework is "true" or "neutral"--in Bourdieu's terminology, legitimately produces social knowledge while yours does not. n219

## 2. Addressing Disciplinary Positionality: Anchoring Critical Perspectives with Historical Methods

Part VI.A.2 identified the disciplinary positionality affecting LatCrit as the presentist viewpoint that characterizes all legal analysis. The legal field practices law by examining the rules in the present, questioning whether current applications preserve the values of law, rationality, predictability, and fairness. Yet the law is not an entirely presentist discipline, although some fields within law, like the law and economics school, would argue that this should be so. n220 The common law method [\*960] means that history is always relevant to the endeavor of assessing and reassessing the adequacy of present day rules. On the other side of the ledger, historians' disciplinary positionality is a commitment to a historical viewpoint. Like lawyers, historians cannot abandon the essence of their discipline.

Nonetheless, the schism between law's presentist concerns and history's attention to historical facts is not as great as it seems, because this seeming disciplinary divergence is increasingly blurring. First, historians have always recognized that presentist viewpoints play a role in their discipline. For example, in 1958 historian C. Vann Woodward made the familiar argument that historical lessons should be relevant to the present. History should not be "something unpleasant that happens to other people," but instead, it should serve to teach about ideals, values, and principles. "America . . . desperately needs criticism from historians of her own who can penetrate the legend without destroying the ideal, who can dispel the illusion of pretended virtue without denying the genuine virtues." n221

Second, historians are increasingly viewing their mission of ascertaining the "facts" as more of an interpretive mission rather than an objectivist one. In *That Noble Dream*, historian Peter Novick posits that the objectivist creed is an ideal; "truth" and absolute objectivity is not attainable. n222 In spite of David Harlan's lament, Novick does not see infinite interpretations as the result of recognition that absolute objectivity is no longer possible. Rather, Novick, while emphasizing the uncertainty of the enterprise of historical research, also anchors the historian in the discipline's traditional values because he urges a healthy regard for the process of proof, based both in empiricism and reason. n223 Novick describes a process of accepting that there are various interpretations for a set of data; however, empiricism, verification, and careful historical methods limit what interpretations are plausible. n224 The researcher, who is often plagued by gaps in archival documents and conflicting possible motivations, presents the most reasonable and fair interpretation of the data, knowing that there may well be other competing interpretations that [\*961] have just as much of a legitimate claim as does her own. n225 The reader determines plausibility based on the historian's persuasiveness.

This is a pragmatist position. It implicitly recognizes that a complete, coherent meta-narrative may not be a plausible goal, either for history or for law. The whole story might have to be told in piecemeal fashion or alternatively, acknowledging the tentative nature of such a meta-narrative. At times, sources may just refuse to yield clearcut answers. Conclusions, therefore, can be fuzzy, equivocal, and tentative. One way to contend with these limitations is, as Novick suggests, for historians to be more "self-conscious" about their work and engage with contemporary and past interpretations. n226

This self-reflective pragmatist viewpoint shows the way for a better methodology for legal scholars. Legal scholars should understand that history is both a social science and an empirical method. In metaphorical

terms, history can be understood as an impressionist tapestry: it consists of a series of interpretations--often multiple and sometimes fuzzy--based on piece-meal facts--the data that historians have been able to recover from the past. History understood in this way invites the legal scholar to view any single historian's work as just one argument in a series of multiple persuasive arguments. Therefore, it might be unwise to "pick and choose" just one or two historians for dressing up a legal viewpoint. Rather, the legal scholar's use of historians' efforts requires that the legal researcher contextualize that historian's work. Is this interpretation reasonable? Is this conclusion hotly contested or highly plausible, according to other historians' work?

To answer these questions requires first, that the legal researcher understand how that particular historian's work fits into work already done. No historical researcher stands on her own, just as no legal scholar stands alone. By situating individual historian's work, the legal researcher can better understand to what extent that viewpoint is contestable, how well substantiated that particular viewpoint is and has been in the past, and how much this historian departs from the established historiography. This allows the legal researcher the possibility of discovering historical work, which remains unacknowledged within the discipline of history, and yet maintain the necessary skepticism to evaluate whether a particular work is well-researched and grounded.

Second, the legal researcher should ground her interpretation of history and her own work by "getting her hands dirty" in the archives. Looking at only secondary interpretative works will seldom be basis enough to evaluate other's research. Primary research makes it possible for the legal researcher to assess for herself which historical interpretation [\*962] is reasonable, what avenues to pursue, what research remains to be done. Moreover, as Guadalupe Luna advocated at the LatCrit II conference, primary research enables the analyst to hear the stories that are buried in the original documents.

What I advocate here is born of my own experience in researching the Spanish-American War. I began this project by asking a legal question: What had been the motivations of the negotiators of the Treaty of Paris when they had purposefully excluded Puerto Ricans and Guamanians from full citizenship status, in stark departure to the provisions of the Treaty of Guadalupe? As a LatCrit scholar, I assumed that racial motivations had played a large role in this determination. Thus, I came to this research with the field and disciplinary positionality described in this Part. Expecting to find the "smoking gun" of racial motivation and racial bias, I began examining historical archives, the McKinley presidential papers, contemporaneous commentary, and the Congressional debates. However, this research did not discover any smoking gun--such smoking guns, I suspect, never do exist. Instead, I was confronted with evidence and documents that supported the claims of innocent racial attitudes and moral civic virtue that early American historiography had viewed as the "true" motivations for this war. Documents directly showing the private thinking processes of the important key actors were scarce, and while public documents that claimed racial innocence were plentiful, they deserved to be viewed skeptically.

Instead, the process of examining primary research and consulting the old and new historiography made it possible to develop a more complex understanding of racial formation. n227 Instead, the influence of racial attitudes is highly integrated with other dynamics. The development of a new national identity, born in competition with other world powers, was at the core of the racial construction of the peoples of the insular territories. Aspirations of major world standing caused political leaders to push the United States toward the annexionist position, even though from the popular standpoint it is not clear that expansionism ever enjoyed wide support. Although annexation was hotly debated at the time, what joined all factions were the racial and cultural attitudes that made it inconceivable to accept the peoples of the new insular territories as co-citizens. The exclusion of these dark-skinned peoples from citizenship in the Treaty of Paris was no accident, but neither was their relegation to a de jure second class citizenship limbo clearly intended. Rather, the construction of a racially tiered citizenship was the result of an incremental process, at first ambivalent, then more resolute as time passed and colonial policies became increasingly hidden from national consciousness. McKinley's presidential rhetoric of racial innocence and national virtue, [\*963] the Supreme Court's politically pragmatic decision making, and the eventual routineness of colonial

administration, all played a role in normalizing de jure second-class racial citizenship for the residents of the insular territories.

This research has opened my eyes as to how tentative interpretations of racial formation should be. The researcher must be wary of systemic approaches because they oversimplify. Moreover, the legal researcher's presentist viewpoint and deductive reasoning can easily eliminate the fuzziness and ambiguity that are inherent to historical research enterprises. Race, as Professor Francisco Valdes emphasizes, is highly complex, "weblike" and multi-dimensional.<sup>n28</sup> It may well be that the dynamics of race, class, culture, history, social cognition, and social group formation may be too complex to be captured by overarching frameworks.

Finally, digging into dusty archives has its benefits. As Guadalupe Luna reminds us, these documents can "speak to us." Hopefully, we will listen.

#### FOOTNOTE-1:

n1 This was Secretary of State John Hay's aphorism for the war. One of the better known popular history books used this as its title. See Frank Freidel, *The Splendid Little War* (1958).

n2 See generally Juan F. Perea et al., *Race and Races: Cases and Resources for A Diverse America* 326-55 (2000) (linking racial tiering of citizenship for Puerto Ricans with the Spanish American War); Rubin F. Weston, *Racism in U.S. Imperialism: The Influence of Racial Assumptions on American Foreign Policy 1893-1946* (1972) (attitude that would permeate dealings with the peoples of the insular possessions had been shaped through White America's experience with, and treatment of, the Native Americans, the Chinese, the Japanese, the African Americans); Juan F. Perea, *Fulfilling Manifest Destiny: Conquest, Race and the Insular Cases*, in "Foreign in a Domestic Sense": Puerto Rico, American Expansion and the Constitution (Christina Burnett & Burke Marshall eds.) (forthcoming Duke Press) [hereinafter *Manifest Destiny & Conquest*]; Walter L. Williams, *United States Indian Policy and the Debate over Philippine Annexation: Implications for the Origins of American Imperialism*, 66 *J. Am. Hist.* 810 (1980) (linking racial tiering of citizenship of the insular territories with the legal doctrines developed with respect to the American Indians); Carlos Venator Santiago, *Towards the Legal Genealogy of the Construction of Race in Puerto Rico* (unpublished manuscript, on file with author).

n3 Several of the leading books on the Spanish American War focus on the link between the transformation of national identity and foreign policy. See generally Robert L. Beisner, *From the Old Diplomacy to the New 1865-1900* (1975) [hereinafter *Beisner, Diplomacy*]; H. W. Brands, *Bound to Empire: The United States and the Philippines* (1992) [hereinafter *Brands, Empire*]; H. W. Brands, *The Reckless Decade: America in the 1890s* (1995); John Dobson, *Reticent Expansionism: The Foreign Policy of William McKinley 19* (1988); Philip S. Foner, *The SpanishCuban American War and the Birth of American Imperialism 1895-1902* 2 Vols. (1972); David Healy, *Drive to Hegemony: The United States in the Caribbean 1898* (1988); David Healy, *US Expansionism: The Imperialist Urge in the 1890s* (1970); Walter LaFeber, *The New Empire: An Interpretation of American Expansion, 1860-1898* (1963); Ernest R. May, *Imperial Democracy: The Emergence of America as a Great Power* (2d ed. 1991); H. Wayne Morgan, *America's Road to Empire: The War with Spain and Overseas Expansion* (1965); John L. Offner, *An Unwanted War: The Diplomacy of the United States and Spain over Cuba, 1895-1898* 113 (1992).

n4 See generally Jose A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans* 7 (1979); Jose Trias Monge, *Puerto Rico: The Trials of the Oldest Colony in the World* 3 (1997); Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (1998); Juan Torruella, *The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal* (1985); Hon. Jose A. Cabranes, *Puerto Rico: Colonialism as Constitutional Doctrine*, [100 Harv. L. Rev. 450, 455 \(1986\)](#) (book review); Sylvia R. Lazos Vargas & Petra DeWitt, *One Hundred Years of Solitude for the Tropical Peoples of the Insular Territories: Transformations of National Identity, Race and Citizenship, 1896-1900* (forthcoming); Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, [6 Mich. J. Race & L. 1 \(2000\)](#); Efren Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, [65 Rev. Jur. U.P.R. 225 \(1996\)](#); Ediberto Roman, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, [26 Fl. St. U L. Rev. 1 \(1998\)](#); Ediberto Roman, *Empire Forgotten: The United States' Colonization of Puerto Rico*, [42 Vill. L. Rev. 1119 \(1997\)](#); Roger Smith, *The Bitter Roots of Puerto Rican Citizenship* (forthcoming 2000) ("the Spanish-American War was an unjust, unprovoked, and racist war of aggression by the United States"); Mark Stuart Weiner, *Race Citizenship and Culture in American Law, 1883-1954: EthnoJuridical Discourse from Crow Dog to Brown v. Board of Education* (Ph.D. dissertation, Yale 1998). Tellingly, Alexander Bickel's well-known essay arguing that the moral justification of democracy is based on the consent of the governed has not a word about US governance of native Hawaiians, Puerto Rico, Guam and American Samoa, against their consent. See Alexander M. Bickel, *The Morality of Consent* (1975).

n5 See *infra* Parts I & II.

n6 It is no accident that colonial studies classics are rooted in the European colonial experience. See Frantz Fanon, *The Wretched of the Earth* (1963); Albert Memmi, *The Colonizer and the Colonized* (1957); Edward Said, *Culture and Imperialism* (1993).

n7 Henry Luce originally coined this phrase. See Henry Luce, *The American Century* (1941); see also Ivan Musicant, *Empire by Default: The Spanish American War and the Dawn of the American Century* (1998); David Traxel, *1898: The Birth of the American Century* (1998).

n8 See Joint Resolution for the recognition of the independence of the people of Cuba, demanding that the Government of Spain relinquish its authority and government in the Island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect. J. Res. 24, 55th Cong. (2d Sess.), 30 Stat. 738, 739 (1898). The message sent by Congress advocated "neutral intervention . . . to stop the war" 31 Cong. Rec. 3885-91 (Apr. 15, 1898).

n9 On February 25, 1895, Juan Gualberto Gomez, leader of the Cuban independence military forces, began the war in the western provinces of Cuba with the Grito de Baire. In 1897, also in the west of the island, Pachin Martin called upon Puerto Ricans to commence its war of independence with the Grito de Yauco. In Puerto Rico, the Spanish were able to quickly quell the rebellion, but in Cuba, the revolutionary military forces were stronger and more numerous and the Spanish were unable to defeat the ragtag revolutionaries. Jose Marti, Cuba's revolutionary hero, always envisioned that Cuba and Puerto Rico would be liberated together from Spanish rule. Musicant, *supra* note 7, at 48 (1998); Fernando Pico, *Historia General de Puerto Rico* 218-19 (1988).

n10 See generally David Bushnell & Neil Macaulay, *The Emergence of Latin America in the Nineteenth Century* (2nd ed., 1994). This desire to hold on to the remains of the Spanish empire loomed large in the events triggering the Spanish American War. *Id.* at 263-64.

n11 See generally Bushnell & Macaulay, *supra* note 10 (emphasizing a selective liberalism as the dominant ideology for the Latin American independence experience); Richard Graham, *Independence in Latin America* (2nd ed., 1972) (places the independence movement of Spanish and Portuguese colonies in the context of the rise of industrial capitalism, rising democratic idealism, and transformations in social relationships); John Lynch, *The Spanish American Revolutions, 1808-1826* (2d ed., 1986) (views the revolutionary outbreak as the culmination of a long process of alienation from Spain and the growing awareness of nationality, consciousness of culture, and jealousy of own resources).

n12 Cuban revolutionaries had fought a resolute and savvy guerilla war, exacting casualties from the Spaniards, and disappearing when outnumbered them. See Foner, *supra* note 3, at 35-118; Louis A Perez, Jr., *Cuba Between Empires, 1878-1902* 53-56 (1982) [hereinafter Perez, Cuba]. The second Spanish commander, General Valeriano Weyler, sent to quell the Cuban independence movement in 1896, initiated a strategy of fighting "war with war." Offner, *supra* note 3, at 129.

n13 Rural peasants provided cover and material support. It became "a war without a clearly identifiable enemy." Perez, Cuba, *supra* note 12, at 51; Musicant, *supra* note 7, at 50-66.

n14 The Cuban insurrection was made up of mostly landless field workers. See Foner, *supra* note 3, at 98-118; Perez, Cuba *supra* note 12, at 53-56. The Spanish depicted the Cuban military General Maceo, as a "crude, Barbaric, caudillo de negros who delighted in practices forbidden by the rules of civilized warfare and sought a black republic of Cuba, headed by himself." Musicant, *supra* note 7, at 66. Maceo managed to outwit the Spanish generals and the superior equipped Spanish army for more than three and a half years, until the Americans intervened. *Id.* at 64-67.

n15 Weyler's response to the guerilla war was to imprison the mostly agrarian Cuban population into reconcentrados, the equivalent of concentration camps, where they suffered disease and starvation. Perez, Cuba, *supra* note 12, at 51; see also Foner, *supra* note 3, at 77, 110-118, 130-33.

n16 Official reports put the number of reconcentrados at 500,000 and estimated that by December 1897, 200,000 had died, and at least that many were starving. Foner, *supra* note 3, at 115. Offner quotes a variety of figures: the Cuban revolutionary government headed by Blanco estimated 300,000 dying or starving; a Boston merchant reported to Congress that the island's total deaths equaled 500,000. Offner, *supra* note 3, at 111-12. The Hearst papers, carrying headlines like, "Blood on the Doorsteps," reported that 400,000 to 500,000 Cubans had died. Freidel, *supra* note 1, at 4.

n17 As is widely known, the press played a prominent role in sensationalizing the events leading to the Spanish American War. The Hearst papers bragged that they had manufactured the War. See *infra* note 23. As well, eye witness narratives of the Cuban reconcentrados were an important catalyst. In particular, Senator Proctor gave a detailed report to the Senate of his unofficial trip to Cuba, which caused great commotion:

All the country people in the four western provinces, about 400,000 in number . . . under Weyler's order . . . were driven into this towns and these are the reconcentrados. They were the peasantry. . . . It is but fair to say that the normal condition of these people . . . was not high . . . but . . . satisfactory. . . . Torn from their homes, with foul earth, foul air, foul water, and food or

none, what wonder that one-half have died and that one-quarter of the living are so diseased that they can not be saved? The physicians say these cases are hopeless . . . the sight of them makes an appeal stronger than words.

351 Cong. Rec. 2916-17 (March 17, 1898).

n18 Perez emphasizes that Jose Marti's exile in New York was well spent making the case for the Cuban independence movement in widely read American newspapers. See Perez, *Cuba*, supra note 12, at 14-5, 45, 90-1, 94-5.

n19 The Cuban independence movement was influential in garnering support in the U.S. Congress. Senators argued that the revolutionary junta be recognized as the duly constituted sovereign of the Cuban people prior to U.S. intervention. This was prevented by the McKinley administration. Historian Perez argues that the McKinley administration opposed this because they wanted U.S. control over Cuba, and some inside the administration believed that the insurgents were a motley minority that would not be able to self govern effectively. Perez, *Cuba*, supra note 12, at 166, 170-71, 173.

n20 Dobson, supra note 3, at 19 ("McKinley's own experiences in the Civil War made him very reluctant to draw the United States into any conflict.").

n21 In his first inaugural address, McKinley made the case for diplomacy:

It will be our aim to pursue a firm and dignified foreign policy, which shall be just, impartial, ever watchful of our national honor, and always insisting upon the enforcement of the lawful rights of American citizens everywhere. Our diplomacy should seek nothing more and accept nothing less than is due us. We want no wars of conquest; we must avoid the temptation of territorial aggression. War should never be entered upon until every agency of peace has failed; peace is preferable to war in almost every contingency. Arbitration is the true method of settlement of international as well as local or individual differences.

McKinley Inaugural Address, March 1897.

n22 Modern historiography gives largely a favorable account of McKinley's efforts. See Lewis L. Gould, *The Spanish American War and President McKinley* (1980) (highly favorable view); May, supra note 3 (detailed accounting of the back and forth, depicting events as overtaking diplomacy); Offner, supra note 3 (detailing diplomatic efforts and portraying McKinley as determined to avoid war). But see Musicant, supra note 7, at 178 (McKinley was "paralyzed by indecision").

n23 Hearst was to call the Spanish American war "The New York Journal's war." Freidel, supra note 1, at 5. The Spanish American War was the first war in which newspapers and magazines were able to publish authentic photographs of war action. See Harper's *Pictorial History of the War with Spain* (1899) (also containing explanatory text); James Wyman, *Joseph Pulitzer and his World* (1941); David Jay Gervich, *Leslie's Weekly's Pictorial Coverage of the Spanish American War* (M.A. Thesis, University of Missouri-Columbia, 1970) (surveying Leslie's photo journalism). Much modern historiography on the Spanish American war has been aimed at rebutting the claim that the 1898 war was manufactured by the yellow press, and positing instead that more complex motivations were at heart. See sources cited supra note 3.

n24 Dupuy de Lome, was the key Spanish diplomat. The letter, published in the American press, reads in part:

Besides the natural and inevitable coarseness with which he repeats all that the press and public opinion of Spain have said of Weyler, it shows once more that McKinley is weak and

catering to the rabble and, besides, a low politician who desires to leave a door open to himself and to stand well with the jingoes of his party. Nevertheless, as a matter of fact it will depend on ourselves whether he will prove adverse to us.

Dupuy de Lome to Canalejas (undated), reprinted in Foner, *supra* note 3, at 232-33.

n25 Foner, *supra* note 3, at 232-33; May, *supra* note 3, at 135-37; Offner, *supra* note 3, at 116-19.

n26 Offner, *supra* note 3, at 94-100. Offner offers the view that while Madrid believed the reforms to be working, Washington slowly came to the conclusion that Spain could no longer control the situation in Cuba. Further, the administration worried that the rioting threatened American lives and property. *Id.* at 100; see also Dobson, *supra* note 3, at 52.

n27 The official purpose of the U.S.S. Maine's visit to Havana was a courtesy call. The U.S. consul had voiced concern over the safety of American residents when the January 1897 riots broke out in Havana. McKinley appears to have weighed the risks involved in sending a battleship into such a volatile situation. Freidel, *supra* note 1, at 4; May, *supra* note 3, at 135-37. Offner reports that DuPuy de Lome saw the stationing of the Maine as a means of appeasing U.S. Congressional pro-war sentiment. See Offner, *supra* note 3, at 113.

n28 The headline of a New York paper read "Maine Explosion Caused by Bomb or Torpedo? Capt. Sigsbee, in a suppressed dispatch to the State Department says the accident was made possible by an Enemy." *The World* (Feb. 17, 1898) at 1, reprinted in Freidel, *supra* note 1, at 6.

n29 See Sebastian Balfour, *The End of the Spanish Empire, 1898-1923* 11, 12 n.3 (1997).

n30 See generally May, *supra* note 3 (asking why did Spain go to war under the circumstances); Musicant, *supra* note 7 (noting Spanish efforts to avoid war, particularly the Canovas government); Offner, *supra* note 3, at 86-100 (detailing events motivating Spanish diplomacy).

n31 For the view that the War was not as one-sided in favor of the United States as it would seem, see generally Balfour, *supra* note 29. Spain had about 200,000 soldiers in Cuba and 30,000 in the Philippines, but they often fought at a numerical disadvantage because they were scattered in small garrisons. See Graham A. Cosmas, *An Army for Empire: The United States Army in the Spanish-American War* 238 (2nd ed., 1994) (1971) (more than 20,000 Spanish soldiers in the Philippines, 13,000 of them in Manila, versus 12,000 *revolucionarios*, and 8,000 U.S. troops around the city). In Santiago de Cuba, the only region on the island invaded by the U.S. Army, 8,000 Spaniards were besieged by up to 20,000 Americans and 4,000 Cuban rebels. *Id.* at 230. The 8,000 Spanish regulars in Puerto Rico were outnumbered 2-to-1 by up to 17,000 U.S. troops. *Id.* at 234, 236. Foner, *supra* note 3, at 135, 137 (various historians dispute the number of Spanish troops in Cuba in early 1898, ranging from a low 70,000 combatants to 278,457 of all classes, including regulars from Spain and volunteers and irregulars from the island, versus 30,000 rebels).

n32 LaFeber, *supra* note 3, at 121-27 (describing the funding of \$ 50 million requested by the McKinley administration for modernizing the US Navy). See generally May, *supra* note 3 (reporting on contemporary commentary that Theodore Roosevelt as US Assistant Secretary of the Navy had been largely responsible for the winning of the War because of his efforts in modernizing the Navy).

n33 Treaty of Paris, Dec. 10, 1898, U.S.-Spain, 30 Stat. 1754 (1898), T.S. No. 343.

n34 The Treaty of Paris setting forth the terms of peace was negotiated in Paris from August 12 to December 15, 1898. It took three weeks, from July 26 to August 12, 1898 to negotiate the protocol for cease fire and peace negotiation. See Brian P. Damiani, *Advocates of Empire: William McKinley, the Senate and American Expansion, 1898-1899* 23-29 (1987); Offner, *supra* note 3, at 209-23. On the other hand, the War consisted of three major battles fought from May to July 1898. Roosevelt wrote in private correspondence that he regretted that the War had not lasted long enough.

n35 See generally Robert L. Beisner, *Twelve Against Empire, the Anti-Imperialists, 1898-1900* (2d ed. 1985) [hereinafter Beisner, *Anti-Imperialists*]; Damiani, *supra* note 34, at 120-202.

n36 Henry Cabot Lodge, *Ratification of the Treaty*, in *Harper's Pictorial History of the War with Spain* 430 (1899).

n37 "Instructions of the Peace Commissioners," p. 7, Sep. 16, 1898, Reel 85, Series 5, Messages, William McKinley Papers, Washington: Library of Congress, 1961 [hereinafter WMK]. The stage was set, however, in the negotiation for a peace protocol in which the United States made that claim, and Spain was forced to accept it. Damiani, *supra* note 34, at 25-29.

n38 The Teller Amendment to the Joint Resolution declaring War provided:

Resolved that the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction or control over said Island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the Island to its people.

J. Res. 24, 55th Cong. (2d Sess.), 30 Stat. 738, 739 (1898).

n39 In Article I of the Treaty of Paris, Spain "relinquishes all claim of sovereignty over and title to Cuba." Treaty of Paris, Dec. 10, 1898, U.S.-Spain, Art. I, 30 Stat. 1754 (1898), T.S. No.343. According to contemporaneous diplomatic history, Spain insisted on the term "occupation" rather than "possession." Elbert J. Benton, *International Law and Diplomacy of the Spanish-American War* (1908).

n40 Dobson, *supra* note 3, at 108, 110-111 (calling McKinley a "wiley sic politician" who had already adopted "the open door" policy to the Orient as the "administration's guiding principle").

n41 Senators Cushman K. Davis of Michigan and William P. Frye of Maine and New York Tribune publisher/editor Whitelaw Reid were proclaimed expansionists. Democrat Senator George Gray of Delaware held well-known isolationist views, and William Rufus Day, the president of the commission, was a moderate expansionist. See Whitelaw Reid, *Making Peace With Spain: The Diary of Whitelaw Reid, September-December 1898* 26-27, 239-42 (H. Wayne Morgan, ed. 1965); see also Damiani, *supra* note 34, at 29-32 (McKinley chose the commission "shrewdly" and, for political reasons, rejected Henry Cabot Lodge's bid to be on the Commission); Stuart Creighton Miller, "Benevolent Assimilation:" American Conquest of the Philippines, 1899-1903 20 (1982) (arguing that McKinley chose a "shrewdly balanced commission"); David F. Trask, *The War With Spain in 1898* 435-36 (1981) ("At the outset . . . the majority . . . favored a 'large policy.'").

n42 Dobson, *supra* note 3, at 109, 112 (seeing purpose of the tour to "create the impression of popular support" and, thus, providing McKinley with confidence in his expansionist policy); Miller, *supra* note 41, at 14-16 (arguing that McKinley "was a reluctant imperialist," and that his decisions "had more to do with a shift of popular opinion as reflected in the press than with the counsel of Lodge or Hay"); Trask, *supra* note 41, at 441, 444 (arguing that McKinley took

several "grudging" steps "toward territorial expansion" as he gained more information and also in response to "the outbursts of popular expansionist sentiment.").

n43 Benton, *supra* note 39, at 243 (by late October 1898, "the President had become the staunchest supporter of territorial expansion"); Damiani, *supra* note 34, at 23-24 (in February 1898, McKinley was willing to settle War with only Cuba at stake; in May, McKinley stipulated that Spain could keep the Philippines; by July, McKinley insisted that Spain could not retain the Philippines).

n44 This idea was the position of the McKinley colonial administrators. See Elihu Root, *The Principles of Colonial Policy: Port Rico, Cuba and the Philippines*, in *The Military and Colonial Policy of the United States: Addresses and Reports* (Robert Bacon & James Brown Scott eds., 1970) (Report of the Secretary of War for 1899).

n45 Art. IX of the Treaty of Guadalupe Hidalgo provides that Mexican citizens who remained in the ceded territories and did not elect to retain Mexican citizenship "be incorporated into the Union of the United States, and be admitted at the proper time (to be judged by the congress of the United States) to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution."

n46 The Treaty of Paris, Article IX, provided that the inhabitants of the Philippines, Puerto Rico and Guam, had only such "civil rights and political status . . . as shall be determined by the Congress." Treaty of Paris, Dec. 10, 1898, U.S.-Spain, 30 Stat. 1754 (1898), T.S. No. 343.

n47 Cf. Abbot Lowell, *The Status of Our New Possessions --A Third View*, 13 *Harv. L. Rev.* 155, 155-170, 171 (1899) ("All the treaties for the acquisition of territory on the continent of North America have therefore provided that the people should be incorporated to the Union, or admitted to the rights of citizens."). Professor Lowell, political science professor, and later president at Harvard, provides an excellent analysis of this purposeful exclusion of citizenship rights. Because this departure was purposeful, he argued that the terms Congress intended to be "unincorporated." This was to be the theoretical basis for the Court's subsequent unincorporated territories doctrine. See Gerald L. Neuman, *Whose Constitution?* [100 \*Yale L. J.\* 909, 959-60 \(1991\)](#) (Lowell's "distinction between two kinds of acquired territories . . . based on a political decision to make them part of the United States, would eventually persuade a majority of the Supreme Court").

n48 See Guadalupe T. Luna, *Chicana/Chicano Land Tenure in the Agrarian Domain: On The Edge Of A "Naked Knife,"* [4 \*Mich. J. Race & L.\* 39 \(1998\)](#); Guadalupe T. Luna, *En El Nombre De Dios Todo-Poderoso: The Treaty Of Guadalupe Hidalgo and Narrativos Legales*, 5 *Sw. J.L. & Trade Am.* 45 (1998); Guadalupe T. Luna, *On the Complexities of Race: The Treaty of Guadalupe Hidalgo and Dred Scott v. Sandford*, [53 \*U. Miami L. Rev.\* 691 \(1999\)](#).

n49 This idea is the "pure" anti-imperialist position. See George S. Boutwell, *Isolation and Imperialism*, in *The Crisis of The Republic* (1900) (as President of the AntiImperialist League, setting forth the argument against annexation of these territories); Jim Zwick, *Mark Twains' Opposition to United States Imperialism: A Centennial Perspective'* (describing Twain's long time opposition to annexation and the US-Filipino War); see also William Jennings Bryan, *Bryan on Imperialism* (1900). Jennings Bryan would later change his mind and argue that the Treaty should be approved, meaning that the United State should first annex the territories and determine their future later. This last minute change of heart is credited for the Treaty's victory in the Senate. *Id.* at 195-96 (reporting on Bryan's switching positions); see Beisner, *Anti-Imperialists*, *supra* note 35, at 157-58 (opining that Bryan's support for the Treaty must have influenced some of the sixteen Democrat and pro-silver Senators who voted for ratification);

Brands, *Empire*, supra note 3, at 34 (reporting that Republican Senator Hoar called Brian "the most thoroughly guilty man in the United States of the wrong of this whole Philippine business").

n50 This idea came to be the compromise position of the anti-imperialists, particularly George F. Hoar, a respected Republican Senator from Boston, and Jennings Bryan. Bryan proposed that the U.S. ratify peace and that, later, Congress make explicit U.S. intent to establish stable governments in Cuba, Puerto Rico, and the Philippines. Savannah, Georgia Interview Dec. 13, 1898 in Bryan, supra note 49, at 5-6. Hoar supported the amendment to the Treaty proposed by Democrat Augustus Bacon of Georgia that would have provided that the United States would not exercise permanent control over the Philippines and would provide independence when these islands had "a stable and independent government." Beisner, *Anti-Imperialists*, supra note 35, at 151-57.

n51 McKinley would argue that only this option was open to the United States, and that the first and second options were a dereliction of duty, to withdraw would precipitate a "civil war of endless . . . slaughter" and "invite foreign intervention." Instructions of Peace Commissioners, at 5-6, Sept. 16, 1898, Reel 85, Series 5, Messages, WMK.

n52 See Boutwell, supra note 49. In his inaugural speech as President of the Anti-Imperialist League, Boutwell eloquently set forth this position.

A beaten foe has no right to transfer a people whose consent has not been asked, and a free republic has no right to hold in subjection a people so transferred. . . . As solemnly as a people could, we announced the war to be solely for humanity and freedom, without a thought, desire, or purpose of gain to ourselves; all that we sought has been accomplished in Cuba's liberation. Shall we now prove false to our declaration and seize by force islands thousands of miles away whose peoples have not desired our presence and whose will we have not asked? Whatever islands we take must be annexed or held in vassalage to the Republic. Either course is dangerous. . . .

Id. Beisner calls "conservatism" this attention to core civic values and contends that although many anti-imperialists held racist views and feared racial "mixing," it is this civic concern that lies at the core of the anti-imperialist movement. See Beisner, *AntiImperialists*, supra note 35, at 237-38.

n53 The Philippine-American war commenced on February 4, 1899 as Aguinaldo, the leader of the revolutionary forces, asserted that he had done "everything possible to avoid armed conflict, in the hope of securing our independence through peaceful means . . . ." Did McKinley or expansionists manipulate its outbreak? No evidence seems to be available. Clearly the timing is auspicious since some Senators felt more compelled to vote for the Treaty once the United States was at war. See Brands, *Empire*, supra note 3, at 49; Miller, supra note 41, at 57.

n54 See Benton, supra note 39, at 243 (no plebiscite necessary because Puerto Ricans had welcomed Miles's forces). Damiani reports that Spain knew of Puerto Ricans' support for the U.S. military invasion and that this fact dissuaded the Spanish negotiators from insisting that Puerto Rico not be a war indemnity. See Damiani, supra note 34, at 22-25.

n55 General Miles invaded Puerto Rico on July 25, 1898. Miles declared when he landed in Puerto Rico:

We have not come to make war upon the people of a country that for centuries has been oppressed, but on the contrary to bring you protection, not only to yourselves but to your property, to promote your prosperity, and to bestow upon you the immunities and blessing of

the liberal institution of our government . . . . This is not a war of devastation but one to vie all to within the control of its military and naval forces the advantages and blessing of enlightened civilization. We come bearing the banner of freedom . . . the fostering arm of a nation of free people, whose greatest power is in justice and humanity for all those living within its fold.

Proclamation by General Nelson A. Miles to the People of Puerto Rico, quoted in 144 Cong. Rec. S9041 (1998) (remarks Sen. Bob Graham, D-Fl); see also Arturo Morales Carrion, *Puerto Rico: A Political and Cultural History* 132 (1983) (calls this declaration "psychological warfare");

n56 Autonomists were fragmented between a vision of an independent country and affiliation with Spain with local home rule, and all variations in between these two models. See Pico, *supra* note 9, at 216-19.

n57 The Autonomous Charter covering Cuba and Puerto Rico was signed on November 19, 1898, and granted Puerto Rico representation in the Spanish parliament. The Puerto Rico junta had actively negotiated with Spain. Consequently, the Autonomous charter was viewed as a good result in Puerto Rico since it provided rights of citizenship equivalent to those of other Spanish citizens. See Carrion, *supra* note 55, at 133-35; Jose Trias Monge, *I Historia Constitucional de Puerto Rico* (1980); Musicant, *supra* note 7, at 169.

n58 See Carrion, *supra* note 55, at 207; Pico, *supra* note 9, at 216-17. Luis Munoz Rivera, as a nonvoting Resident Commissioner to Congress, would later, in 1917, oppose the Jones Act granting U.S. citizenship to Puerto Ricans, asking that this "mass naturalization project" be postponed for several years. Congress passed the bill over his objection and without a plebiscite. Monge, *supra* note 4, at 73.

n59 Annexation was effectuated by a joint resolution adopted by Congress on July 7, 1898, known as the Newlands Resolution. Resolution No. 55, Newlands Resolution, July 7, 1898, 30 Stat. 750.

n60 In 1893, White planters organized an armed overthrow of the Hawaiian Kingdom, then headed by Queen Lili'uokalani, in which the military assistance offered the U.S. Minister of Foreign Affairs, John L. Stevens, was instrumental. On July 17, 1893, those who orchestrated the overthrow formed the Provisional Government and organized the Republic of Hawaii with Robert Dole, an American planter, as President. President Grover Cleveland rejected this government's bid for annexation to the United States, pointing to the lawlessness of the actions of both John Stevens and the American planters. Ernest May writes that Cleveland was not opposed to the annexation of Hawaii on expansionist grounds, but morally opposed the actions of the planters. See May, *supra* note 3, at 20-23, 267 (2nd ed. 1991). See generally Thomas J. Osborne, *Empire Can Wait: American Opposition to Hawaiian Annexation, 1893-1898* (1981).

n61 The President's message declared that "the overthrow" and "revolt" that had "dethroned" the monarchy, and other "remarkable features of the transaction" made it his "duty . . . to withdraw the treaty of annexation" from consideration by the Senate. See President's Message To Congress Relating to the Hawaiian Islands (Pres. Grover Cleveland). House Exec. Doc. No. 47, 2d Sess., 53d Cong., 1893-94 at iii-xvi.

n62 While McKinley was in office in June 17, 1897, the United States signed a treaty of annexation with the plantercontrolled Hawaii Republic, while Queen Lili'uokalani was under house arrest. McKinley submitted the treaty to the Senate, where prolonged debate stalled passage. Only after the Spanish American developed did the logjam break and Congress annexed Hawaii because of its "military importance." See LaFeber, *supra* note 3, at 366-70.

n63 The Twelfth Census of the United States, Supplementary Analysis and Derivative Table 20 (1906) (reports the following population counts: Philippine Islands 7,635,426; Puerto Rico 953,243; and Guam 9,000); Robert C. Schmitt, *Demographic Statistics of Hawaii, 1778-1965* 12, 74-5 (1968) (the Hawaiian 1896 census reported a population of 109,020 of which 39,504 were full or part Hawaiian, 19,382 Chinese, and 22,329 Japanese); U.S. Bureau of the Census, *Cuba: Population, History and Resources, 1907* 132, 143 (1909) (the 1899 Cuban census reported a population of 1,572,797 of which 505,443 were categorized as "colored").

n64 The Insular Cases consist of [De Lima v. Bidwell, 182 U.S. 1 \(1901\)](#); [Goetze v. United States, 182 U.S. 221 \(1901\)](#); [Dooley v. United States, 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 and Porto Rico Steamship Co., 182 U.S. 392 \(1901\)](#); [Dooley v. United States, 183 U.S. 151 \(1901\)](#); and [The Diamond Rings v. United States, 183 U.S. 176 \(1901\)](#). Some authors group the decisions decided between 1903 and 1914 as well. See [Hawaii v. Mankichi, 190 U.S. 197 \(1903\)](#); [Gonzalez v. Williams, 192 U.S. 1 \(1904\)](#); [Kepner v. United States, 195 U.S. 100 \(1904\)](#); [Dorr v. United States, 195 U.S. 138 \(1904\)](#); [Mendezona v. United States, 195 U.S. 158 \(1904\)](#); [Rasmussen v. United States, 197 U.S. 516 \(1905\)](#); [Trono v. United States, 199 U.S. 521 \(1905\)](#); [Grafton v. United States, 206 U.S. 333 \(1907\)](#); [Kent v. Porto Rico, 207 U.S. 113 \(1907\)](#); [Kopel v. Bingham, 211 U.S. 468 \(1909\)](#); [Dowdell v. United States, 221 U.S. 325 \(1911\)](#); [Ochoa v. Hernandez, 230 U.S. 139 \(1913\)](#); [Ocampo v. United States, 234 U.S. 91 \(1914\)](#). Finally, [Balzac v. Porto Rico, 258 U.S. 298 \(1922\)](#), not decided until after the Jones Act was passed and Puerto Ricans were granted U.S. citizenship, is also to some analysts part of the Insular Cases.

n65 [Downes, 182 U.S. at 341-342](#) (White, J., concurring) (a territory is not foreign to the United States in an international sense but is foreign in a domestic sense). The White concurrence was adopted by the Court in [Dorr v. United States, 195 U.S. 138 \(1904\)](#), and [Balzac v. Porto Rico, 258 U.S. 298 \(1922\)](#).

n66 For critique of the Insular Cases, see T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 *Const. Comment.* 15, 22 (1994) (current jurisprudence based on Insular Cases is "startling and troubling"); Torruella, *supra* note 4, at 3, 5 (doctrine of incorporation, the doctrine of "separate and unequal" and "anachronistic remnants of the stone age of American constitutional law" that are comparable with "*Plessy v. Ferguson* in permitting disparate treatment of a discrete group of citizens."); Monge, *supra* note 4 (the Court erred by not following the elder Justice Harlan's lead); Neuman, *supra* note 47, at 979 (1991) ("No persuasive normative basis for the Insular Cases has been put forward"); Ramos, *supra* note 4 (Insular Cases demonstrate ideological and racial bias); Roman, *Alien-Citizen Paradox*, *supra* note 4, at 23 (doctrine of incorporation is "morally illegitimate constitutional principle").

n67 See *infra* notes 105-110 and accompanying text.

n68 This applies as well to the other U.S. territories, the U.S. Virgin Islands and the other U.S. Commonwealth, American Samoa. See generally Arnold H. Leibowitz, *Defining Status* 140-55 (1989). Congress has granted Puerto Rico increasing degrees of local rule but never allowed for representation at the federal level, authorizing instead only a nonvoting resident delegate in the House of Representatives. Initially, Puerto Rico was governed as a colony, under the Foraker Act, under which Puerto Rico was ruled by a Governor appointed by the President of the United States, and the Governor had the power to veto legislation adopted by the local legislature and to appoint judges. Foraker Act, ch. 191, § § 17, 31, 33, 31 Stat. 77, 81, 83-84 (1900) (repealed 1917). The 1917 Jones Act extended U.S. citizenship to residents of Puerto

Rico and provided for local election of both houses of the legislature. Puerto Rico Organic Act of 1917 (Jones Act), Pub. L. No. 64368, § 36, 39 Stat. 951, 963 (1917). In 1950, Congress enacted Public Law 600, "in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption." PL 600 is the foundation of the current Commonwealth status, and permits Puerto Rico to have a local Constitution, subject to veto by the U.S. Congress, and to elect its Governor. Act of July 3, 1950, Pub. L. No. 600, ch. 446, 64 Stat. 319, 319 (1950).

n69 The Puerto Rican government litigated this issue in federal court and lost. [De la Rosa v. United States](#), 107 F. Supp.2d 140 (D.P.R. 2000), rev'd and vacated by 229 F.3d 80 (2000). See also [Igartua De La Rosa v. United States](#), 32 F.3d 8, 10 (1st Cir. 1994) (challenging the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff-1 et seq., under which a Puerto Rican citizen who moves to a state, registers to vote, and then moves to a foreign country can continue to vote for president where she was last domiciled but not if she returns to Puerto Rico); [Attorney Gen. of Guam v. United States](#), 738 F.2d 1017 (9th Cir. 1984) (holding that American citizens living in Guam cannot vote for the President).

n70 U.S. Const. art. I, § 8, cl. 1. The Uniformity Clause provides that "all duties, imposts, and excises shall be uniform throughout the United States." Id. The territorial clause provides that Congress shall have the power to make "all needful Rules and Regulations respecting the Territory . . . belonging to the United States." U.S. Const. art. IV, § 3, cl. 2.

n71 [Downes v. Bidwell](#), 182 U.S. 244, 278-79 (1901) (concluding that because territories are not constitutional equivalents to states, they are subject to greater congressional control); [The Diamond Rings](#), 183 U.S. 176, 181-82 (1901) (construing broadly the Territorial Clause of the Constitution and refusing to limit Congress's legislative power over the American territories).

n72 See [Harris v. Rosario](#), 446 U.S. 651 (1980) (per curiam) (rejecting constitutional challenge to Congress's decision to offer lower level of assistance in federal public benefit program to Puerto Rico than that offered states); [Califano v. Torres](#), 435 U.S. 1 (1978) (per curiam) (upholding requirement that federal disability benefits are payable only to residents over the fifty states and the District of Columbia).

n73 See [Dooley v. United States](#), 182 U.S. 222, 235-36 (1901) (holding that Puerto Rico became part of the United States for purposes of tariffs); [Armstrong v. United States](#), 182 U.S. 243, 244 (1901) (holding that tariff duties on goods imported from Puerto Rico were proper prior to cession by treaty); [Huus v. New York & Porto Rico S.S. Co.](#), 182 U.S. 392, 397 (1901) (holding that steamship trade between New York and Puerto Rico came under U.S. trade laws).

n74 For example, under the Jones Act, Puerto Rico must use U.S. marine transport. While in the 1900s, the U.S. was competitive in prices charged, in current markets U.S. transport is inordinately costly. The imposition of this requirement works to a great disadvantage to Puerto Rico manufacturers, who have argued that the Jones Act makes Puerto Rico non-competitive.

n75 H.R. Rep. 105-131, pt. 1, at 13-14 (Under the Jones Act, Congress extended statutory United States citizenship to residents of Puerto Rico, but less than equal civil rights. "The current United States citizenship of persons born in Puerto Rico is created and defined by Congress in the exercise of its Territorial Clause power and in implementation of Article IX of the Treaty of Paris.").

n76 See, e.g., [Harris](#), 446 U.S. at 651 (holding that Congress may reimburse less to Puerto Rico for Aid to Families with Dependent Children than to the states, and may treat Puerto Rico differently from states so long as there is a rational basis for discrimination). Professor Aleinikoff criticizes the Court's one page and a half per curiam decision issued without full

briefing or oral argument and its rational basis "review." "The Court is surely correct that residents of Puerto Rico pay no federal income tax and that funding Puerto Rico at the level of the states would cost the federal treasury more. [However,] the arguments supplied in support of the statute are rational by not being crazy." Aleinikoff, *supra* note 66, at 22-23.

n77 [Dorr v. United States, 195 U.S. 138, 146 \(1904\)](#). This latter rule held whether or not the territorial population had been granted U.S. citizenship. [Balzac v. Porto Rico, 258 U.S. 298, 308-10 \(1922\)](#).

n78 See, e.g., [Torres v. Puerto Rico, 442 U.S. 465 \(1979\)](#) (Fourth Amendment search and seizure); [Posadas de Puerto Rico Assoc. v. Tourism Co., 478 U.S. 328 \(1986\)](#) (First Amendment, commercial speech); [Rodriguez v. Popular Democratic Party, 457 U.S. 1 \(1982\)](#) (voting rights); [Examining Bd. of Eng'rs, Architects, & Surveyors v. Flores de Otero, 426 U.S. 572, 599-601 \(1976\)](#) (equal protection); *Schneider v. Colegio de Abogados*, cert. denied, [502 U.S. 1029 \(1992\)](#) (right of association).

n79 [528 U.S. 495 \(2000\)](#).

n80 See generally Hawai'i Poll: Ka Huliau Time of Change, HONOLULU Advertiser, May 28-June 2, 2000; June 4, 2000 (series based on poll data and interviews of native Hawaiians' views on self determination movement post *Rice v. Cayetano*), available at <http://www.honoluluadvertiser.com/specials/hawaiipoll/>.

n81 See Miller, *supra* note 41, at 268; Brands, *Empire*, *supra* note 3, at 51.

n82 For passionate accountings by Americans, see Brands, *Empire*, *supra* note 3; Stanley Karnow, *In our Image: America's Empire in the Philippines* 79 (1989); Miller, *supra* note 41.

n83 The Philippines gained official independence on July 4, 1946. Brands, *Empire*, *supra* note 3, at 227. He calls it the "transition from formal to informal imperialism." *Id.* at 353.

n84 See generally James D. Sobredo, *From American "Nationals" to the "Third Asiatic Invasion": Racial Transformation and Filipino Exclusion (1989-1934)* (Ph.D. dissertation, Berkeley 1998).

n85 This is Brand's main argument. See Brands, *Empire*, *supra* note 3, at 345-46; see also Miller, *supra* note 41, at 263-65, 269.

n86 See E. San Juan, Jr., *From Exile to Diaspora* (1998); Brands, *Empire*, *supra* note 3, at 347, 353-54.

n87 Jules R. Benjamin, *The United States and the Origins of the Cuban Revolution* 61 (1990) [hereinafter Benjamin, *Revolution*] (noting that Cuba was neither independent nor under colonial rule, but under "tutelage"). See generally Jules Robert Benjamin, *The United States and Cuba: Hegemony and Dependent Development, 1880-1934* (1974) [hereinafter Benjamin, *Hegemony*] (arguing that hegemonic relationship between United States and Cuba was selfperpetuating).

n88 Benjamin, *Hegemony*, *supra* note 87, at 52, 57, 183-4; Benjamin, *Revolution*, *supra* note 87, at 52-91. The Baccardi family, owners of Baccardi, manufacturers of rum, is an example of this millionaire class.

n89 Benjamin, *Hegemony*, *supra* note 87, at 187-8.

n90 21 Stat. 897-98. The Platt Amendment gave the U.S. the right to intervene as it wished to protect Cuba's independence and to limit the Cuban debt.

n91 The United States invoked the Platt Amendment on several occasions to mold Cuban society, limit the power of radicals, and to preserve stability. Benjamin, Hegemony, *supra* note 87, at 141-42, 149.

n92 Benjamin, Revolution, *supra* note 87, at 95, 121 (Washington had confidence in Batista because "he had eliminated the radical nationalist and revolutionary socialist threats of the early 1930s[,] . . . had restored coveted stability to the island," and assured "that United States interests would be respected").

n93 Benjamin, Revolution, *supra* note 87, at 128132; Louis A. Perez Jr., Incurring A Debt of Gratitude: 1898 and the Moral Sources of United States Hegemony in Cuba, 104 *Am. Hist. Rev.* 387, 394 (1999).

n94 Beisner, Diplomacy, *supra* note 3, at 137; Healy, *supra* note 3, at 248; Michael Hunt, Ideology and U.S. Foreign Policy 131-32 (1987).

n95 Hunt, *supra* note 94, at 166-67 (continuing the practices of "pretensions to dominance and tutelage" and justifying counter revolutionary practices as necessary to maintain "desired stability in Latin America").

n96 See, e.g., Jody Armour, Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit, [83 Calif. L. Rev. 733 \(1995\)](#); Charles R. Lawrence III, The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism, [39 Stan. L. Rev. 317 \(1987\)](#).

n97 See, e.g., Kimberle Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, [101 Harv. L. Rev. 1331, 1357-58 \(1988\)](#); Alan David Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 *Minn. L. Rev.* 1049 (1978); George A. Martinez, Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience, 1930-1980, [27 U.C. Davis L. Rev. 555 \(1994\)](#).

n98 The corpus of my work falls in this category. See, e.g., Sylvia R. Lazos Vargas, Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity, [58 Md. L. Rev. 150, 160-183 \(1999\)](#) [hereinafter Democracy & Inclusion]; Sylvia R. Lazos Vargas, Deconstructing Homogeneous Americanus: The White Ethnic Narrative and Its Exclusionary Effect, [72 Tulane L. Rev. 1493, 1546-54 \(1998\)](#); Sylvia R. Lazos Vargas, Judicial Review of Initiatives and Referendums in which Majorities Vote on Minorities' Democratic Citizenship, [60 Ohio St. L. J. 399, 462-73 \(1999\)](#); see also Dorothy Roberts, Killing the Black Body: Race, Reproduction, and the Meaning of Liberty (1997); Kevin R. Johnson, "Melting Pot" or "Ring of Fire"? Assimilation and the Mexican-American Experience, [85 Cal. L. Rev. 1259 \(1997\)](#).

n99 See, e.g., Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (1987); Richard Delgado, *The Coming Race War?* (1996); Michael Omi & Howard Winant, *Racial Formation in the United States: From the 1960s to the 1990s* (2d ed. 1994).

n100 See Perea, Race and Races, *supra* note 2, at 2. This casebook devotes one-third of its enterprise to the exploration of the history of the major racial and ethnic minority groups in the United States.

n101 Guadalupe Luna's work on the U.S.-Mexico War is a prime example of other historical LatCrit projects. See *supra* note 48.

n102 See Owen Fiss, The Death of Law?, [72 Cornell L. Rev. 1, 10 \(1986\)](#) ("What I see is not the unconstrained power of the justices to give vent to their desires and interests, but rather public officials situated within a profession, bounded at every turn by the norms and

conventions that define and constitute that profession. There is more to judging than simply confronting the bare words of the fourteenth amendment. . . .").

n103 This is both a concern of traditional scholars and those with a "crit" bent. For example, the critique of the Insular Cases by Judge Torruella and Professors Aleinikoff and Neuman focuses on the inconsistencies of the Court's reasoning and the "thin" rationales. See supra note 66 and accompanying text. By contrast, Perea, Rivera Ramos and Roman argue that these cases should be overturned because they are based on racial attitudes accepted in the past but no longer sustainable. See infra notes 106-10 and accompanying text.

n104 Constitutional scholars and jurists debate whether the Constitution should be interpreted by only referring to the four corners of this text, see Antonin Scalia, *A Matter of Interpretation* (1997), or whether they should refer to norms derived from the US Constitution and general democratic principles. See Thomas Grey, *Do We Have an Unwritten Constitution?* (1975); Ronald Dworkin, *Taking Rights Seriously* (1977).

n105 The books written by these jurists are significant contributions. See Cabranes, supra note 4 (analyzing the legislative and judicial processes that accorded Puerto Ricans' second class citizenship and relating to how racial attitudes and cultural Anglocentrism impacted these decisions); Monge, supra note 4 (long time supporter of Commonwealth status critiquing both doctrine and the politics of Commonwealth status); Torruella, supra note 4 (surveying the development of "separate and unequal" unincorporated territories doctrine).

n106 Rivera Ramos calls this the "ideology of expansion":

The discourse of the Insular Cases incorporated many of the notions that constituted what I have termed the "ideology of expansion". First of all, it was overtly racist. . . . [Second,] is the notion that the peoples of the new territories were incapable of self-government. Moreover, that they were not fit to become full-fledged members of the American polity, with a right to participate in its government.

Ramos, supra note 4, at 288-90.

n107 Roman, *Alien-Citizen Paradox*, supra note 4; Roman, *Empire*, supra note 4.

n108 Roman, *Alien-Citizen Paradox*, supra note 4, at 32.

n109 Perea, supra note 2, at 15-19.

n110 *Id.*

n111 Professors Perea, Roman, and Ramos make this important point. See Perea, supra note 2, at 15-19; Roman, *Alien-Citizen Paradox*, supra note 4, at 18. Ramos explains:

Creating a subject involves a process of reification: that is, constructing a category that acquires the quality of an object. . . . The particularities of the realities which the category is intended to represent fade away as they are subsumed in the universal quality of the category. In a sense, the particular realities exist no more. . . . In this case, the "reality" created was that of the "unincorporated territory." It did not have any existence before the cases were decided. But the authoritative pronouncement of the Court brought it into existence . . . .

Ramos, supra note 4, at 304.

n112 Kevin R. Johnson, *Puerto Rico, Puerto Ricans, and LatCrit Theory: Commonalties and Differences Between Latino/a Experiences*, 6 *Mich. J. Race & L.* (2000).

n113 See Francisco Valdes, *LatCrit: A Conceptual Overview*, excerpted from Francisco Valdes, *Critical Race Theory: Histories, Crossroads, Directions* (manuscript on file with the author).

n114 Gayatri Chakravorty Spivak, *The PostColonial Critic: Interviews, Strategies, Dialogues* 31-32 (1990).

n115 See Venator Santiago, *supra* note 2.

n116 *Id.*

n117 See Lazos & DeWitt, *supra* note 4.

n118 *Id.*

n119 See Perez, *supra* note 12.

n120 See *infra* notes 135, 137, 140-41.

n121 See *supra* note 105.

n122 See Derrick Bell, *Faces at the Bottom of the Well: The Permanence of Racism* (1992); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 *Harv. C.R.-C.L. L. Rev.* 323 (1987).

n123 For writings on Latino/as as "hyphenated" or "borderland" identities, see Ilan Stavans, *The Hispanic Condition: Reflections on Culture and Identity in America* 18-19 (1995); Renato Rosaldo, *Culture and Truth: The Remaking of Social Analysis*, at 196-217 (2d ed. 1993) (Chapter 9, *Border Crossings*); Gloria Anzaldúa, *Borderlands La Frontera: The New Mestiza* 21 (1987).

n124 See Robert S. Root-Bernstein & Michele Root-Bernstein, *Sparks of Genius: The Thirteen Thinking Tools of the World's Most Creative People* (1999).

n125 Philosopher Edmund Husserl proposed that by focusing on the act of "experiencing something," rather than on the thing being experienced, one could produce a new kind of knowledge more relevant to the human experience that went beyond scientific knowledge. Edmund Husserl, *Cartesian Meditations: An Introduction to Phenomenology* (Dorion Cairns trans., Martinus Nijhoff, The Hague 4th impression 1970).

n126 See Walter D. Mignolo, *Local Histories/Global Designs* 31-32 (2000).

n127 *Id.* at 32.

n128 *Id.* at 52-53.

n129 McKinley was a devout Protestant during an age of renewed missionary efforts. See Miller, *supra* note 41, at 24. Historian Creighton Miller argues that McKinley was "sincere" in his belief that it was America's duty to uplift and civilize Filipinos. See *id.*

n130 See generally Benjamin B. Ringer & Elinor R. Lawless, *Race - Ethnicity and Society* (1989); Kenneth L. Karst & Keith S. Rosenn, *Law and Development in Latin America* (1975).

n131 See Mignolo, *supra* note 126, at 53-54.

n132 *Id.* at 53 (drawing upon Foucault's subordinated knowledges and Ribeiro's subaltern knowledges).

n133 See *id.* at 33.

n134 See generally *id.* at 54-57.

n135 The sources cited in footnote 3 suggest that the Spanish American War was a major event for United States national identity and foreign policy. See also Healy, *supra* note 3 (connecting foreign policy and new cultural and racial attitudes); May, *supra* note 3 (transformation of the United States into a new world power) Musicant, *supra* note 7 (emphasizing military aspects); Trask, *supra* note 41. Of course, authors emphasize different aspects of transformation. For example, Hunt's analysis focuses on the relationship between a collective self identity based on racial and cultural superiority and a more interventionist foreign policy: See Hunt, *supra* note 94, at 11-12 (discussing three core ideas relevant to foreign affairs; (1) the American future was defined as an active quest for national greatness; (2) new racial hierarchies; and (3) revolutions in Latin America were not acceptable because they could develop in dangerous directions). Petra DeWitt, and I elaborate on the themes focusing on new racial constructions and how these affected discussions of civic principles and eventually evolved into new legal constructions of *de jure* second class citizenship. See generally, Lazos & DeWitt, *supra* note 4.

n136 Robert Beisner catalogues the many ways that the Spanish American War represents a "paradigm shift" in foreign policy and national identity. See generally Beisner, *Diplomacy*, *supra* note 3.

n137 The cultural historians have taken the lead in developing this view of the subtle racial political rhetoric that accompanied the approval of the Treaty of Paris and the annexation of the insular territories. See generally Hunt, *supra* note 94; Healy, *supra* note 3; Beisner, *Anti-Imperialists*, *supra* note 3; Miller, *supra* note 41; Lazos & DeWitt, *supra* note 4.

n138 During the fall and winter of 1898 and 1899, McKinley stated that the "mandate of duty" included "freedom from oppression and the maintenance of human rights" not just through war but also through "guidance and protection." "Speech at Auditorium," Atlanta, Dec. 15, 1898, Reel 82, Series 4, WMK; "Speech at Banquet," Savannah, Georgia, Dec. 17, 1898, Reel 82, Series 4, WMK. He explained that "the genius of American civilization is understood in the remotest corners of the earth to be . . . wise, beneficent, . . . and capable of conferring the blessings of unselfish leadership." "Speech at Auditorium," Atlanta, Dec. 15, 1898, Reel 82, Series 4, WMK.

n139 Henry Cabot Lodge, *The War with Spain* 234 (1899). Lodge continues,

now men saw that the long connection, ever growing closer, with the Hawaiian Islands had not been chance; that the culmination of the annexation movement in the very year of the Spanish War was not accident, but that it all came from the instinct of the race .. and that Americans, and none else, must be the masters of the cross-roads of the Pacific.

*Id.* at 235.

n140 On Black-White racial formation circa the Spanish American War, see generally W. E. B. Dubois, *The Soul of Black Folks* (1902); Michael Goldfield, *The Color of Politics: Race and the Mainsprings of American Politics* (1997) (politics and history); Richard Kluger, *Simple Justice* (1986) (legal); C. Vann Woodward, *The Strange Career of Jim Crow* (3d ed. 1974) (political scientist).

n141 Historian Matthew Jacobson provides an in depth view of the tiering of Whiteness at the turn of the century Matthew Frye Jacobson, *Whiteness of a Different Color: European Immigrants and the Alchemy of Race* (1998); see also Lewis H. Carlson & George A. Colburn, *In Their Place: White America Defines Her Minorities, 1850-1950* (1972).

n142 The analysis of racializing of the Irish at the turn of the century, and how they "became white" is now plentiful. See generally Hunt, *supra* note 94, at 52 (focusing on racializing and stereotyping); Noel Ignatiev, *How the Irish Became White* (1995) (emphasizing labor and class struggles); Jacobson, *Whiteness & Immigrants*, *supra* note 141 (using cartoons); Roediger, *supra* note 125 (becoming White by excluding Blacks).

n143 See generally Jacobson, *Whiteness*, *supra* note 141, at 123-35, 164-67.

n144 See Hunt, *supra* note 94, at 52. Slavs were particularly disliked because of their role as scabs in labor strikes of the steel and coal mines. See John Hingham, *Strangers in the Land: Patterns of American Nativism 1800-1925* 102105 (1972).

n145 Jacobson's work is particularly strong in making this duality clear. See generally Jacobson, *Whiteness & Immigrants*, *supra* note 141.

n146 "Abandoning" the insular territories would mean leaving them in a state of anarchy and handing them over to "endless war and slaughter, and inviting foreign intervention." "Not Delivered," Speech dated Oct. 1899, Reel 83, Series 4, WMK.

n147 On his tour of western cities during the fall of 1898, McKinley stated that "territorial expansion is not . . . always necessary to national achievement." However, McKinley thought there had to "be a constant movement toward a higher and nobler civilization." And "in our present situation, duty and duty alone should prescribe the boundary of our responsibilities." "For humanity's sake, we must accept all obligations which . . . duty and honor imposed upon us." "Speech of President McKinley at the Banquet in the Auditorium," Chicago Illinois, Oct. 19, 1898, Reel 82, Series 4, Speeches, WMK.

n148 In these speeches, McKinley referred to the duty of the United States as not shirking its responsibility toward those in need of the nation's wisdom, especially those who had become the "wards" of the United States. "Speech at Banquet of Ohio Society," Mar. 3, 1900, Reel 83, Series 4, Speeches, WMK.

n149 Rudyard Kipling's poem, "The White Man's Burden," was first published in the United States in February, 1899, as the battle for ratification of the Treaty of Paris raged in the Senate. In a passage, Kipling described the duty of Anglo Saxons to serve the needs of "new caught, sullen peoples, half devil, half child" who inhabited the lands coming "under the influence of western civilization." Rudyard Kipling, "The White Man's Burden" (1899).

n150 No matter how grave the problems or how embarrassing the situation, "they must be met with courage and wisdom and we must follow duty. The genius of the nation, its freedom, its wisdom, its humanity, its courage, its justice, favored by Divine Providence, will make it equal every task and the master of every emergency." "Speech at Trans-Mississippi and International Exposition," Omaha, Nebraska, Oct. 12, 1898, p. 22 of Speech, Reel 82, Series 4, Speeches, WMK.

n151 The extent to which commercial ambition motivated the Spanish American War has been the subject of heated debate between Marxist historians and the "realist" historians. Compare LaFeber, *supra* note 3 (arguing that the War was motivated by expansionist commercial ambition and that McKinley was on board even prior to his election) with Beisner, *Diplomacy*, *supra* note 3, at 22-23 (1975) (arguing that LaFeber's thesis that there was a unified policy by business interests for economic expansionism is overstated; but agreeing that the urge for creating increasing markets was a key element of the impetus for the war). But see Freidel *supra* note 1, at 15 (representing an earlier view in categorically stating that Wall Street was not behind the War, rather it was fought for moral and humanitarian reasons).

n152 See generally Matthew Frye Jacobson, *Barbarian Virtues: The United States Encounters Foreign Peoples at Home and Abroad, 1876-1917* (2000).

n153 See Eric Cheyfitz, *The Poetics of Imperialism: Translation and Colonization from The Tempest to Tarzan* 3-6 (1991).

n154 Id.

n155 See *Critical White Studies* (Richard Delgado & Jesu Stefancic eds. 1997).

n156 See Mignolo, *supra* note 126, at 32; see also discussion *supra* Part V.B. and accompanying text.

n157 Historian David Weber argues that White Southerners who settled in Texas already regarded Mexicans as racial others given the amount of intermixing of White and indigenous blood. As well, the animosity felt towards Mexicans was derivative of English antipathy towards the Spanish and Catholicism. As a result, Americans' prevailing attitude towards Mexicans was that they were "indolent, ignorant, bigoted, cheating, dirty, blood-thirsty, cowardly half-breeds." David J. Weber, *Introduction to Foreigners in their Native Land: Historical Roots of the Mexican Americans* 59-60 (David J. Weber ed., 1973) (citing contemporaneous accounts). Acuna's work views the Mexican American War as part of an internal racial conquest motivated largely by pre-existing racial attitudes, the ideology of manifest destiny and Americans' greed for land. See Rodolfo Acuna, *Occupied America: A History of Chicanos* 13-21 (3d ed. 1988). Rodolfo Alvarez has argued that if a social system and economic structure have been racialized because of historical, social, economic, and class dynamics, new entrants will become "incorporated into an already thoroughly structured, thoroughly defined, social situation." See Rodolfo Alvarez, *The Unique Psycho-Historical Experience of the Mexican-American People*, 52 *Soc. Sci. Q.* 15, 20-21 (1971). Tomas Almaguer and Neil Foley associate the development of racial attitudes in the Southwest as being more closely linked to the conflict over control of lands, and with an eventual occupational stratification that relegated Mexican and Mexican Americans to labor and field labor. Tomas Almaguer, *Racial Faultlines: The Historical Origins of White Supremacy in California* (1994); Neil Foley, *The White Scourge* (1998).

n158 See discussion *supra* notes 35-39 and accompanying text.

n159 See discussion Part V.B.

n160 See Sylvia R. Lazos Vargas, *Globalization or Global Subordination?: LatCrit Links the Global to the Local and the Local to Global*, [33 U.C. Davis L. Rev. 1429 \(2000\)](#) (explaining that understanding local racial dynamics informs how to understand global subordination and vice versa).

n161 Elizabeth M. Iglesias, *Foreword: Identity, Democracy, Communicative Power, Inter/National Labor Rights and the Evolution of LatCrit Theory and Community*, [53 U. Miami L. Rev. 575, 592 \(1999\)](#); see also Elizabeth M. Iglesias, *Out of the Shadow: Marking Intersections In and Between Asian Pacific American Critical Legal Scholarship and Latina/o Legal Theory*, [40 B.C. L. Rev. 349, 358 \(1998\)](#).

n162 Francisco Valdes, *Foreword: Under Construction --LatCrit Consciousness, Community, and Theory*, [85 Cal. L. Rev. 1087 \(1997\)](#) (LatCrit II); Iglesias, *Foreword*, *supra* note 161, at 58 (LatCrit III); Kevin R. Johnson, *Foreword Celebrating LatCrit Theory: What are We Going to Do When the Music Stops?* [33 U.C. Davis L. Rev. 753 \(2000\)](#). (LatCrit IV).

n163 By the term "positions," I mean that the theorist holds a cultural position (which includes all aspects of identity and class) that inevitably influences how she analyzes her subject). See discussion *infra* notes 167, 174-75, 181 and accompanying text.

n164 See Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at the Century's End* 224-229 (1995) (stating how CRT fits into other jurisprudential approaches that currently dominate law).

n165 See e.g., Perea, *Manifest Destiny & Conquest*, *supra* note 2, at 1 (stating more specifically, Juan Perea uses Albert Memmi's post colonial thesis that racism is a necessary justification for nakedly aggressive military conquests and expansions); Ramos, *supra* note 4, at 285-88 (Professor Efrén Rivera Ramos develops a complex theoretical framework of "ideology of expansion" into which he incorporates cultural ideological hierarchies (Anglocentrism), pre-existing racial beliefs towards Indians and blacks, class hierarchies effected by capitalist institutions and markets, and traditional American beliefs in manifest destiny).

n166 See Perea, *Race and Races*, *supra* note 2, at 3.

n167 See Rosaldo, *supra* note 123, at 168-195 (Chapter 8, *Subjectivity in Social Analysis*).

n168 See Pierre Bourdieu, *Homo Academicus* 1-25 (Peter Collier trans., 1988) (Chapter 1, *A Book for Burning?*) (demonstrating the work of Bourdieu can not be easily classified, nonetheless, his work is clearly aligned with Max Weber's views of institutional legitimacy and status, concepts of the symbolic power of language developed by speech act theorists, and Foucault's post-structural notions of privileged knowledges and their relationship to power). See generally David Swartz, *Culture & Power: The Sociology of Pierre Bourdieu* (1997).

n169 See Perea, *Manifest Destiny & Conquest*, *supra* note 2, at 2 ("The proximity, the resources, the economic opportunities, the wealth, and the strategic value of lands makes them desirable. But the darker skin of the inhabitants of those desirable lands has led to conquest.").

n170 See *supra* note 107 and accompanying text.

n171 See *supra* note 106 and accompanying text.

n172 See *supra* part III.

n173 See Perea, *Race and Races*, *supra* note 2, at 3.

n174 See *supra* note 163 and discussion *supra* note 167 and accompanying text.

n175 See Clifford Geertz, *Ideology as a Cultural System*, in *The Interpretation of Cultures: Selected Essays by Clifford Geertz* 193-233 (1973) (Chapter 8 *Ideology As a Cultural System*) (arguing that the function of ideology is to provide authoritative concepts that render culture meaningful, the images by which it can be sensibly grasped); see also Rosaldo, *supra* note 123, at 30 ("Ideology often makes cultural facts appear natural, social analysis attempts to reverse the process. It dismantles the ideological in order to reveal the cultural, a peculiar blend of objective arbitrariness . . . and subjective taken-for-grantedness (it's only common sense - how could things be otherwise?)."); Elisabeth Young-Bruehl, *The Anatomy of Prejudices* 97 (1996) (emphasizing the unconscious level at which ideology functions; it (i) operates against self-consciousness and thereby avoids rigorous reasoned examination, and (ii) protects against revealing internal contradictions because they are pervasive and self-reinforcing).

n176 Sociologist Jeffery Praeger describes ideology as follows:

Ideology comes to be mistaken for reality. The images that are evoked concerning racial groups come to be the prism through which observation of the real social world is conducted.

Only the passage of time and the emergence of new understandings reveal how previous efforts to comprehend differences . . . serve to justify and, in a limited sense, legitimate inequity. . . . Any racial ideology is inadequate so far as it cannot comprehend the individual in the groups. What stands for explanation at the ideological levels easily dissolves when confronted with social reality. . . . Ideology . . . represents the dominant, more or less culturally universal scheme by which social order is understood and explained.

Jeffrey Praeger, *American Ideology as Collective Representation*, 5 *Ethnic Racial Stud.* 98, 101 (1984); see also Lazos, *Homogeneous*, *supra* note 98, at 1567-72 .

n177 See Hunt, *supra* note 94, at 12. ("Ideological constructs, which culture not only inspires but also sustains and constrains, as serving as a fount for an instructive and reassuring sense of historical place, as an indispensable guide to an infinitely complex and otherwise bewildering present, and as a basis for moral action intended to shape a better future.")

n178 *Id.* at 52.

n179 See discussion *supra* notes 96-99 and accompanying text.

n180 See e.g., discussion *supra* Part IV (showing how such a perspective can contribute a great deal to historical analysis of the Spanish American War).

n181 Bourdieu, *supra* note 168, at 6.

n182 See Richard A. Posner, *Past-Dependency, Pragmatism and Critique of History in Adjudication and Legal Scholarship*, [67 \*Chi. L. Rev.\* 573 \(2000\)](#).

n183 [Id. at 573](#).

n184 [Id. at 583](#).

n185 See Mark A. Tushnet, *Constitutional Scholarship: What Next?*, [67 \*Chi. L. Rev.\* 573 \(1992\)](#) (observing that legal scholars believe that they can enter any other discipline on the basis of their generalized intelligence and interest yet eschew the necessity of having to go through the long period of apprenticeship) (statement of Professor Tushnet) ("[It is the] professor as astrophysicist assumption" because the law professor assumes that she "can read a physics book over the weekend and send a rocket to the moon on Monday."); see also Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, [91 \*Mich. L. Rev.\* 34 \(1992\)](#); Mark A Tushnet, *Interdisciplinary Legal Scholarship: The Case Of History-In-Law* [71 \*Chi.-Kent L. Rev.\* 909 \(1996\)](#).

n186 See Arthur S. Miller, *The Elusive Search for Values in Constitutional Interpretation*, 6 *Hastings Const. L.Q.* 487, 499 (1979) (quoting Chief Justice Warren).

n187 See Peter Novick, *That Noble Dream: 'The Objectivity Question' and the American Historical Profession* 1-2 (1988) (describing this as the "objectivist creed" and applying the insights of Geertz and other cultural anthropologist and sociologist; Novick posits that the objectivist creed is not achievable); see also Laura Kalman, *The Strange Career of Legal Liberalism* 170-85 (1996); Daniel R. Ernst, *The Critical Tradition in the Writing of American Legal History*, [102 \*Yale L.J.\* 1019 \(1993\)](#); Jane Larson & Clyde Spillenger, *That's Not History: The Boundaries of Advocacy and Scholarship*, 12 *Pub. Historian* 33, 38 (1990) (pointing out that such objectivity is aspirational, and "fairness and credibility" may be a more achievable goal).

n188 See 1 Bruce Ackerman, *We The People: Foundations* 219 (1991).

n189 See Kalman, *supra* note 187, at 183 (calling this "contextual antiquarianism").

n190 See David Oshinsky, *The Humpty Dumpty of Scholarship: American History Has Broken in Pieces. Can It Be Put Together Again?*, N.Y. Times, Aug. 26, 2000, at B9.

n191 See Posner, *supra* note 182, at 578 (citing Friedrich Nietzsche, "History in the Service and Disservice of Life") ("Too much history, or history of the wrong kind . . . fans emotions that impede achievement."); see also Kalman, *supra* note 187, at 334 n.32 (quoting C. Vann Woodward as calling this "the built-in obsolescence of the lessons taught by historians").

n192 Michael W. McConnell, *Originalism and the Desegregation Decisions*, [81 Va. L. Rev. 947 \(1995\)](#) (noting similar criticisms have been leveled at the civic republicanism movement, particularly Bruce Ackerman's interpretation of constitutive moments when the "people" change the meaning of the Constitution through political action).

n193 See Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, [66 Fordham L. Rev. 87, 103 \(1997\)](#).

n194 See David Harlan, *The Degradation of American History* (1997).

n195 *Id.* at xxii.

n196 *Id.*

n197 *Id.*

n198 Daniel A. Farber & Suzanna Sherry, *Beyond All Reason: The Radical Assault on Truth in American Law* 25 (1997). See also Arthur Austin, *The Empire Strikes Back: Outsiders and the Struggle over Legal Education* (1998).

n199 Farber & Sherry, *supra* note 198, at 25.

n200 *Id.* at 24-25 (citing Bell's view that "law . . . and . . . courts are 'instruments for preserving the status quo' and only 'periodically and unpredictably' serve as a 'refuge of oppressed people'").

n201 *Id.*

n202 See Thomas S. Kuhn, *Structure of Scientific Revolutions* (3d ed. 1996).

n203 John Rawls, *Political Liberalism* 36 (paperback ed. 1996). Rawls presupposes that participants in society will always disagree because incompatible philosophies are the natural result of human reason. "Diversity of reasonable comprehensive . . . doctrines found in modern . . . societies is not a mere historical condition that may soon pass away; it is a permanent feature of the public culture of democracy." *Id.*

n204 Kuhn, *supra* note 202, at 202-03; Rawls, *supra* note 203, at 36-37.

n205 Bourdieu, *supra* note 168, at 6.

n206 *Id.*

n207 *Id.* at 1-25 (Chapter 1, *A Book for Burning?*) (providing an in-depth discussion of this concept).

n208 *Id.* (providing additional discussion).

n209 Rosaldo, *supra* note 123, at 168-95 (Chapter 8, *Subjectivity in Social Analysis*) (discussing how culture and their "positioned subjects" are laced with power and power in turn is shaped by cultural forms. Like form and feeling culture and power are inextricably

intertwined. In discussing forms of social knowledge, both of analysts and of human actors, one must consider their social positions).

n210 Novick, *supra* note 187, at 11-12, 628.

n211 See Martha Minow, *Making All The Difference: Inclusion, Exclusion and American Law* 376 (1990) ("The perspective of those who are labeled 'different' . . . is a corrective lens, another partial view, not the absolute truth."). See generally Katharine T. Bartlett, *Feminist Legal Methods*, [103 Harv. L. Rev. 829, 884 \(1990\)](#) ("if truth is understood as partial and contingent, each individual or group can approach its own truths with a more honest, self-critical attitude about the value and potential relevance of other truths."); [Lazos, \*Democracy & Inclusion\*, \*supra\* note 98](#), at 211 ("To include [minorities' viewpoints] requires that we abandon certainty that our own 'truths' . . . are the universal truth, and open ourselves to the possibility that the 'truth' we have come to accept is contestable."); Martha Minow, *The Supreme Court, 1986 Term Foreword: Justice Engendered*, [101 Harv. L. Rev. 10 \(1987\)](#) (arguing that judges should be aware of their unstated point of reference when assessing others).

n212 Cf. [Lazos, \*Democracy & Inclusion\*, \*supra\* note 98](#), at 206-33 (discussing how a judge can avoid racial positionality when judging racial issues).

n213 Rawls, *supra* note 203, at xliv.

n214 *Id.* at 137.

n215 See Bourdieu, *supra* note 168, at 6.

n216 See Geertz, *supra* note 175, at 27; see also Rosaldo, *supra* note 123, at 168-195 (Chapter 8, *Subjectivity in Social Analysis*) (discussing the observer's power).

n217 Bourdieu, *supra* note 168, at 6.

n218 *Id.* at 20-24.

n219 *Id.*

n220 For example, Posner argues that the legal method constrains but that judges nonetheless manipulate outcomes. Posner proposes to reconcile the gap between law's indeterminacy and judges' need to appear neutral "by turning law into something else - economics perhaps." Richard A. Posner, *The Problems of Jurisprudence* 124-25 (1990); see also Posner, *supra* note 182 (arguing that history should not be used in law unless it is uncontroverted).

n221 C. Vann Woodward, *The Burden of Southern History*, Presidential Address before the Southern Historical Association (1953) (1960), reprinted in *Chron. High. Ed.*, Jan. 14, 2000, at B11.

n222 Novick, *supra* note 187, at 2, 10, 584.

n223 *Id.*

n224 Novick uses the example of Robert W. Fogel & Stanley L. Engerman, *Time on the Cross: The Economics of American Negro Slavery* (1974) who used empirical evidence to support their argument that slavery was an economically viable labor system. *Id.* at 588-89.

n225 See Larson & Spillenger, *supra* note 187.

n226 See Novick, *supra* note 187, at 17.

n227 See Lazos & DeWitt, *supra* note 4.

n228 See Francisco Valdes, Piercing Webs of Power: Identity, Resistance and Hope In LatCrit Theory and Praxis, [33 U.C. Davis L. Rev. 897 \(2000\)](#) (understanding that racial dynamics are made up of multiple processes that can be interrelated and mutually reinforcing).