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Navassa: Property, Sovereignty, and the Law of the Territories

ABSTRACT. The United States acquired its first overseas territory—Navassa Island, near Haiti—by conceptualizing it as a kind of property to be owned, rather than a piece of sovereign territory to be governed. The story of Navassa shows how competing conceptions of property and sovereignty are an important and underappreciated part of the law of the territories—a story that continued fifty years later in the *Insular Cases*, which described Puerto Rico as “belonging to” but not “part of” the United States.

Contemporary scholars are drawn to the sovereignty framework and the public-law tools that come along with it: arguments about rights and citizenship geared to show that the territories should be recognized as “part of” the United States. But it would be a mistake to completely reject the language and tools of property and private law, which can also play a role in dismantling the colonial structure—so long as it is clear that the relevant entitlements lie with the people of the territories. Doing so can help conceptualize the harms of colonialism in different ways (not only conquest, but unjust enrichment), and can facilitate the creation of concrete solutions like negotiated economic settlements, litigation against colonial powers, and the possibility of auctions for sovereign control.

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INTRODUCTION

The U.S. territories and the concepts with which scholars, judges, and lawyers address them are suspended in a netherworld: the unincorporated territories “belong[] to” but are not “part of” the United States, as the Supreme Court held in the *Insular Cases*.¹ This legal no man’s land has continuing consequences for the millions of Americans living in the territories, and it also presents fundamental challenges for those attempting to understand, let alone unwind, the United States’s colonial legacy.² What are the territories? The contemporary debate proceeds in the language of public law, but federal authority over the territories derives from the Property Clause.³ What role might private law play in resolving their status?

In this Article, we show how the present state of affairs is partially traceable to confusion and manipulation of the concepts of property (“belonging to”) and sovereignty (“part of”), and that each has a potentially important role to play going forward. The trajectory of debate about the territories’ status has moved

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1. *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (describing Puerto Rico as “a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution”).
 2. See, e.g., José A. Cabranes, *Some Common Ground*, in *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION* 39, 40-41 (Christina Duffy Burnett [Ponsa-Kraus] & Burke Marshall eds., 2001) (“Speaking plainly and honestly about our history requires us to acknowledge, without rancor and without embarrassment, that *colonialism* is a simple and perfectly useful word to describe a relationship between a powerful metropolitan state and a poor overseas dependency that does not participate meaningfully in the formal lawmaking processes that shape the daily lives of its people.”); Juan R. Torruella, *The Insular Cases: A Declaration of Their Bankruptcy and My Harvard Pronouncement*, in *RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE* 61, 74 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015) (“It is now an unassailable fact that what we have in the United States-Puerto Rico relationship is government without the consent or participation of the governed. I cannot imagine a more egregious civil rights violation, particularly in a country that touts itself as the bastion of democracy throughout the world. This is a situation that cannot, and should not, be further tolerated.”).
 3. U.S. CONST. art. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .”). The analogy between sovereignty over territory and ownership of real property is thus unavoidable with regard to the law of the territories, whatever one thinks of it more broadly in international law. Compare JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 192 (2019) (arguing that the analogy “appears more useful than it really is,” and drawing a firm distinction between *imperium* and *dominium*), with JUSTIN DESAUTELS-STEIN, *THE RULE OF RACIAL IDEOLOGY: ON BORDERS, EXCLUSION, AND THE RISE OF POSTRACIAL XENOPHOBIA* 30 (forthcoming 2022) (on file with authors) (“[T]he relation between sovereignty and property is more useful than we tend to think, precisely because we tend to link *imperium* with sovereignty and *dominium* with individual right.”).

from the former conception to the latter, and for understandable reasons. Nations historically used property concepts to justify conquest while avoiding the duties and obligations of governance, as the case of the U.S. territories painfully illustrates.⁴ The contemporary question is thus seen as one of public law and governance, as are the suggested remedies: arguments about citizenship, rights, and sovereignty. These arguments are powerful and essential, but incomplete, because the property framework also contains tools that can help clarify and resolve the territories' legal status. The challenge therefore is not to reject the tools of property—concepts like ownership, economic incentive, transfer, and payment—but to reforge them for the tasks at hand: self-determination, economic justice, negotiation, and reparations.

Sovereignty and property are among the most contested and ambiguous terms in legal thought, and we do not purport to offer new or certain definitions of them here. But we do think that they invoke different broad families of concepts, generally tracking the distinction—again, blurry and contestable—between public and private law. As Martti Koskenniemi puts it, “Sovereignty and property form a typical pair of legal opposites that while apparently mutually exclusive and mutually delimiting, also completely depend on each other. Their relationship greatly resembles the equally familiar contrast between the ‘public’ and the ‘private,’ or ‘public law’ and ‘private law.’”⁵ The division between private and public law, in turn, can generally be thought of as “a naturalized law of things on the one side and a politicized law of power on the other.”⁶ Broadly speaking, our argument is that the law of the territories—not unlike, say, takings law⁷ or the debate over reparations⁸—rewards close consideration of both public- and

4. See *infra* notes 246–247 and accompanying text.

5. Martti Koskenniemi, *Sovereignty, Property and Empire: Early Modern English Contexts*, 18 THEORETICAL INQUIRIES L. 355, 388 (2017).

6. DESAUTELS-STEIN, *supra* note 3, at 29.

7. See, e.g., Richard A. Epstein, *The Common Law Foundations of the Takings Clause: The Disconnect Between Public and Private Law*, 30 *TOURO L. REV.* 265, 265 (2014) (“[T]he Supreme Court treats its takings jurisdiction as if it were contained in a sealed container, whose key premises are matters of public law, to be decided by Justices who have often only a passing knowledge of the private law concepts on which I believe all public law deliberations must ultimately rest. This disconnect between the public and private law dooms the former to intellectual incoherence because of its disregard of the latter.”). Though we do not pursue the analogy here, the Takings and Property Clauses of the Constitution—the latter being the root of the law of the territories—similarly bring together private- and public-law concepts.

8. As Adrienne D. Davis notes, “Over the [past] two decades, the private law model has become somewhat of an outlier in reparations discussions, largely set aside in favor of broader, more explicitly political approaches,” but “even with its doctrinal limits, the private law, corrective justice approach yields some significant benefits as a discursive framework for grappling with

private-law concepts. The language of property, for example, can help recognize and even remedy political and social phenomena that might not immediately register as private-law issues.⁹ As we see it, the argument that a territory is entitled to statehood resonates in public law;¹⁰ an argument that damages are owed for the wrongful taking of a territory, however, might resonate more in private-law concepts like restitution and unjust enrichment.¹¹

To illustrate the significance of the property and sovereignty frameworks and set the stage for evaluating them, we begin with the story of a single overseas territory—the oldest of all the U.S. territories,¹² and in that sense the place where the story of U.S. imperialism began: Navassa,¹³ a sunbaked and uninhabitable rock buried under a million tons of bird droppings, and located roughly forty

reparations.” Adrienne D. Davis, *The Coxford Lecture: Corrective Justice and Reparations for Black Slavery*, 34 CAN. J.L. & JURIS. 329, 330 (2021). For contributions taking a private-law approach to reparations, see, for example, Symposium, *The Jurisprudence of Slavery Reparations*, 84 B.U. L. REV. (2004); and Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24:1 B.C. THIRD WORLD L.J. 81 (2004).

9. See, e.g., Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1024 (2009) (noting that “[t]hrough property law historically has been used to legitimize the conquest of indigenous lands, indigenous groups worldwide are now employing this same body of law to lay claim to their own cultural resources” and defending an account of cultural property); Brittany Farr, *Breach by Violence: The Forgotten History of Sharecropper Litigation in the Post-Slavery South*, 69 UCLAL. REV. (forthcoming 2022) (on file with authors) (showing how some Black sharecroppers in the post-slavery South were able to leverage property and tort claims to achieve a measure of legal remedy for violence when public-law remedies like criminal law and civil-rights legislation were unavailable); Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1709, 1714 (1993) (arguing that “rights in property are contingent on, intertwined with, and conflated with race”).
10. It is also an argument that we support and have made elsewhere. See Joseph Blocher & Mitu Gulati, *Puerto Rico and the Right of Accession*, 43 YALE J. INT’L L. 229 (2018).
11. For a suggestion that Haiti might have such a claim, see *infra* notes 288–291 and accompanying text. See generally HANOCH DAGAN, UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES (1997) (exploring the relevance of unjust enrichment as a remedy for territorial takings).
12. Roy F. Nichols, *Navassa: A Forgotten Acquisition*, 38 AM. HIST. REV. 505, 510 (1933) (“To the general public Navassa is still as obscure as it always has been, but nevertheless it remains the oldest of our islands whether possessions or ‘appurtenances.’”).
13. The French and Haitian Creole spellings are “La Navasse” and “Lanavaz,” respectively. As our story and critique are largely internal to U.S. law and legal sources, we follow the spelling conventionally employed in the United States.

miles from Haiti,¹⁴ which also claims the island.¹⁵ Beginning with an unoccupied and seemingly minor territory helps us isolate and grasp conceptual threads that run through the treatment of inhabited territories like Puerto Rico. Pulling on those threads can unravel a lot of colonial fabric.

The United States acquired Navassa in 1857, pursuant to the Guano Islands Act,¹⁶ which gave the President power to recognize as appurtenances to the United States any islands discovered and mined for guano by U.S. citizens.¹⁷ The Act also explicitly provided that the United States need not retain the islands once mining was complete.¹⁸ The underlying framework was in that sense one familiar to property law: the incentive structure was commercial, the mode of acquisition was Lockean,¹⁹ and nothing in the Act committed the United States

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14. Nichols describes it as “a barren isle, shaped like an oyster shell, about a square mile in area, formed of volcanic limestone and so filled with holes as to have the appearance of a petrified sponge.” Nichols, *supra* note 12, at 507; see also Kevin Underhill, *The Guano Islands Act*, WASH. POST.: THE VOLOKH CONSPIRACY (July 8, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/08/by-kevin-underhill-the-guano-islands-act/> [https://perma.cc/WU5Y-2G5T] (reviewing recent litigation over Navassa and saying that “[t]he real question [is] why anybody in his right mind would want Navassa Island, a waterless hellhole from which all the dung has already been mined”).
 15. For a detailed evaluation of Haiti’s claim, see Fabio Spadi, *Navassa: Legal Nightmares in a Biological Heaven?*, IBRU BOUNDARY & SEC. BULL., Autumn 2001, at 125 (“[T]here seems to be an even balance between the two claimants’ legal positions. Or, at least, the knot is so tight that probably no one can successfully untie it by pulling just one strand at a time.”). Our view is that Haiti’s claim is strong enough to merit compensation. See Joseph Blocher & Mitu Gulati, *The U.S. Stole Billions from Haiti. It’s Time to Give It Back.*, SLATE (Sept. 14, 2021, 2:26 PM), <https://slate.com/news-and-politics/2021/09/the-united-states-owes-haiti-reparations.html> [https://perma.cc/Z6KR-QA5X].
 16. Act of Aug. 18, 1856, ch. CLXIV, 11 Stat. 119 (codified as amended at 48 U.S.C. § 1411 (2018)).
 17. 48 U.S.C. § 1411 (2018) (“Whenever any citizen of the United States discovers a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and takes peaceable possession thereof, and occupies the same, such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States.”).
 18. 48 U.S.C. § 1419 (2018) (“Nothing in this chapter contained shall be construed as obliging the United States to retain possession of the islands . . . after the guano shall have been removed from the same.”). This section is titled “Right to abandon islands.” *Id.*
 19. The familiar Lockean proviso – echoed in the language of the Guano Islands Act, *supra* note 17 – validates the property claims of those who mix their labor with an unowned resource while leaving as much and as good for others. Recent scholarship in the political theory of territoriality has explored Lockean theories of sovereign territory. See, e.g., David Miller, *Property and Territory: Locke, Kant, and Steiner*, 19 J. POL. PHIL. 90, 90–93 (2011) (describing the individualist Lockean theory of sovereign territory associated with Hillel Steiner and others); Cara Nine, *A Lockean Theory of Territory*, 56 POL. STUD. 148, 154–55 (2008) (defending a “collectivist Lockean theory” under which “the state acquires territorial rights in much the same way that individuals acquire property rights” (emphasis added)).

to actually govern the islands. This approach might be contrasted with a sovereignty-type framework in which new territory becomes part of a nation-state whose borders are insulated from change.²⁰ In fact, the United States, like many imperial powers at the time, often explicitly resisted sovereignty—in part because of the obligations that it might entail.²¹

The story of Navassa is thus in part a story of a colonial power using the concepts of property and sovereignty to its advantage, and thereby relegating the island—like Puerto Rico and the other unincorporated territories—to the status of a “disembodied shade.”²² But even as the dust was settling on the *Insular Cases* and the United States was fighting a war over the status of its largest territory (the Philippines), U.S. legal scholars were exploring—and complicating—the conceptual relationship between property and sovereignty.²³ That ongoing exploration and the law of the territories have much to learn from each other.

Contemporaneously, international law was moving away from the property framework, making it incumbent upon colonial powers to treat their territories

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20. See *infra* notes 255-257 and accompanying text (discussing the international legal principle of *uti posseditis*, which favors existing borders). We use sovereignty and property as animating concepts because—despite their blurry edges—they are legal concepts and, we argue here, central to the law and rhetoric surrounding the territories. But the basic themes of control and change could be captured by other terminology as well, as in Sam Erman’s recent exploration of what he calls “status manipulation.” Sam Erman, *Truer U.S. History: Race, Borders, and Status Manipulation*, 130 *YALE L.J.* 1188, 1192 (2021) (reviewing DANIEL IMMERWAHR, *HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES* (2019)) (“Status is a legal classification that relates people or places to politics while assigning them a condition or position. It . . . generally presents as fixed and enduring. By contrast, manipulation involves purposeful change . . .”). In Erman’s terminology, our goal here is to focus on ensuring that the proper parties—that is, the people of the territories—have control over that manipulation.
21. See *infra* Section II.A (chronicling the State Department’s statements throughout the late 1800s and early 1900s equivocating about—and even denying—U.S. sovereignty over Navassa).
22. *Downes v. Bidwell*, 182 U.S. 244, 372 (1901) (Fuller, C.J., dissenting).
23. See *infra* Section II.B. The classic reference is Morris R. Cohen, *Property and Sovereignty*, 13 *CORNELL L.Q.* 8 (1927-1928). For a recent discussion, see 18 *THEORETICAL INQUIRIES L.* (2017), which compiles papers presented at a 2015 conference on “Sovereignty and Property,” including contributions by Eyal Benvenisti, Jean L. Cohen, Hanoch Dagan & Avihay Dorfman, Sergio Dellavalle, Larissa Katz, Martti Koskenniemi, Thomas W. Merrill, Katharina Pistor, Arthur Ripstein, Joseph William Singer, Laura S. Underkuffler, and Jeremy Waldron. Of course, the relationship between concepts like sovereignty and property—and their rough Roman-law analogues of *imperium* and *dominium*—were also of interest to earlier legal thinkers contemplating or attempting to justify colonialism. See generally KEN MACMILLAN, *SOVEREIGNTY AND POSSESSION IN THE ENGLISH NEW WORLD: THE LEGAL FOUNDATIONS OF EMPIRE, 1576-1640* (2006) (describing how the English utilized elements of Roman common law to legally justify their colonial expansion); Martti Koskenniemi, *Empire and International Law: The Real Spanish Contribution*, 61 *TORONTO L.J.* 1 (2011) (noting the role of Spanish legal scholars in pioneering the use of private-rights doctrine as it related to colonial expansion).

as something other than possessions to be conquered, exploited, or bartered for economic gain.²⁴ By the middle of the nineteenth century, this development, combined with the rise of the principle of self-determination, helped precipitate a wave of decolonization worldwide.²⁵

But shifting to a public-law frame that treats sovereignty as both an obligation and a given obscures other possible solutions. Governance arrangements became more a product of status than of contract.²⁶ This reification of sovereign territory is an implication of territorial sovereignty, and – with limited and contestable exceptions for self-determination²⁷ or humanitarian intervention²⁸ – it obscures the degree to which borders and sovereign territory are man-made contingencies that can and sometimes should be voluntarily changed.²⁹ Part of our goal here is to unsettle those assumptions and to suggest how private-law concepts like entitlement and transfer might be adapted to unwind the colonial structures they were once used to build. For generations, Western powers used

24. See *infra* Section II.B.

25. See ROBERT ALDRICH & JOHN CONNELL, *THE LAST COLONIES* 113 (1998).

26. See *infra* notes 271-274 and accompanying text (discussing Henry Maine's famous dictum); see also Erman, *supra* note 20, at 1192 ("Status poses as immemorial and permanent despite always being constructed and reconstructed – an apt metaphor for a nation that endlessly violates its ideals without rejecting them."); Tayyab Mahmud, *Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars Along the Afghanistan-Pakistan Frontier*, 36 *BROOK. J. INT'L L.* 1, 48 (2010) ("Every established order tends to produce . . . the naturalization of its own arbitrariness." (quoting PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* 164 (Richard Nice trans., 1977))).

27. See International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights art. 1, Dec. 19, 1966, 999 U.N.T.S. 171; W. OFUATEY-KODJOE, *THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW* 147 (1977) ("Today, there is no doubt that self-determination, as defined in U.N. and general international practice, is a principle of international law which yields a right to self-government that can be claimed legitimately by *bona fide* dependent peoples.").

28. For a broad overview, see generally *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY (Dec. 2001), <https://www.globalr2p.org/wp-content/uploads/2019/10/2001-ICISS-Report.pdf> [<https://perma.cc/MUT6-E2RM>]. For a collection of criticism, see *CRITICAL PERSPECTIVES ON THE RESPONSIBILITY TO PROTECT: INTERROGATING THEORY AND PRACTICE* (Philip Cunliffe ed., 2011).

29. See, e.g., ALBERTO ALESINA & ENRICO SPOLAORE, *THE SIZE OF NATIONS* 1-2 (2003) (criticizing international economists for taking borders as a given); TIMOTHY WILLIAM WATERS, *BOXING PANDORA: RETHINKING BORDERS, STATES, AND SECESSION IN A DEMOCRATIC WORLD* (2020) (questioning the value of stable borders and advocating a more robust right of secession); Nancy Birdsall, *The True True Size of Africa*, *CTR. FOR GLOB. DEV.* (Nov. 11, 2010), <http://www.cgdev.org/blog/true-true-size-africa> [<https://perma.cc/G5QC-MPM5>] (noting that Africa's "economic size" is roughly equivalent to that of Chicago plus Atlanta, which is "why Africa's leaders wish they could overcome the politics of sovereignty and eliminate the cost of all those borders – something the Europeans have been working on for half a century").

private-law tools to exploit and profit from their colonies. Surely it requires some justification now to tell those colonies that the same tools are unavailable to them—that they, having enriched the metropolises, cannot pursue arguments of unjust enrichment; or that they, having been treated like property, cannot now choose to transfer or sell their territory. The conceptual and practical obstacles are considerable, and we address some of them below,³⁰ but that is not reason enough to reject the effort, especially considering that the tools of public law have significant complications of their own.³¹

In fact, powerful and wealthy nations continue to use private-law tools to wring benefits from sovereign territories, for example by entering into long-term leases for military bases,³² or through large-scale industrial and public-works projects that have the effect of projecting sovereign authority abroad.³³ This private-law toolkit—including concepts like contract (only possible once one has established entitlements) and damages—can be used to help the territories as well. This would not mean treating territories as “belonging to” the United States, subject to barter or trade as Congress sees fit.³⁴ That notion should be rejected not because it involves property, but because it gives the entitlement to the wrong party—to the United States, rather than to the people of

30. See *infra* Part III.

31. Some complications, in fact, are basically identical, like deciding *who* gets to approve either a sale of territory or a transition to independence, or what the threshold for approval should be.

32. The lease for Diego Garcia is a prominent and controversial example. See Marwaan Macan-Markar, *Mauritius Makes Play for Future with US Base on Diego Garcia*, NIKKEI ASIA (Nov. 18, 2020, 3:06 PM JST), <https://asia.nikkei.com/Editor-s-Picks/Interview/Mauritius-makes-play-for-future-with-US-base-on-Diego-Garcia> [<https://perma.cc/4P7E-G394>].

33. See Lauren Frayer, *In Sri Lanka, China's Building Spree Is Raising Questions About Sovereignty*, NPR (Dec. 13, 2019, 10:02 AM), <https://www.npr.org/2019/12/13/784084567/in-sri-lanka-chinas-building-spree-is-raising-questions-about-sovereignty> [<https://perma.cc/DUzZ-WKDD>]; see also Aziz Rana, *How We Study the Constitution: Rethinking the Insular Cases and Modern American Empire*, 130 YALE L.J.F. 312, 327 (2020) (“[G]lobal realities suggested a new mode of international engagement. Rather than directly controlling territory, the United States would assert constant economic and military power abroad.”).

34. On this point, Christina Ponsa-Kraus has persuasively argued that the Supreme Court’s decisions in the *Insular Cases* “stood for the proposition that the acquisition of a territory by the United States could be followed by its separation from the United States . . . [creating] a constitutional doctrine of territorial deannexation.” Christina Duffy Burnett [Ponsa-Kraus], *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 802 (2005); see also Blocher & Gulati, *supra* note 10, at 235 (arguing that international law would not, and should not, allow this).

the territories.³⁵ If colonial powers could, and in some ways still do, use sovereignty as a valuable asset, why can't colonized people do the same now that the asset is theirs?

Getting clear about this entitlement helps illuminate the possibilities for what we have elsewhere described as a “market for sovereign control.”³⁶ Sovereign control has been ceded, traded, gifted, leased, and otherwise transferred between nations for centuries. Sometimes those transfers have been coercive or exploitative; other times they have been voluntary and welfare-enhancing. What is generally missing, however, is a good legal mechanism for transfers of sovereignty beyond the context of former colonies becoming independent (which, it should be noted, many do not want).³⁷ Sir Hersch Lauterpacht noted that “[t]he part of international law upon which private law has engrafted itself most deeply is that relating to acquisition of sovereignty over land, sea, and territorial waters.”³⁸ But less attention has been paid to the use of private law in divesting territory.

35. We argue this point at greater length in Joseph Blocher & Mitu Gulati, *A Market for Sovereign Control*, 66 DUKE L.J. 797 (2017). But we draw on elements of earlier thinking, including luminaries like Emer de Vattel:

Some have dared to advance this monstrous principle, that the conqueror is absolute master of his conquest, — that he may dispose of it as his property . . . and hence they derive one of the sources of despotic government. But, disregarding such writers, who reduce men to the state of transferable goods or beasts of burthen, — who deliver them up as the property or patrimony of another man, — let us argue on principles countenanced by reason and conformable to humanity.

3 EMMERICH DE VATTEL, *THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS*, ch. XIII, § 201, at 388 (Joseph Chitty ed., Philadelphia, T. & J.W. Johnson & Co. 1867) (1758).

36. Blocher & Gulati, *supra* note 35, at 801. For a sampling of scholarship exploring these points, as well as offering critiques, see generally John F. Coyle, *Friendly and Hostile Deals in the Market for Sovereign Control: A Response to Professors Blocher and Gulati*, 66 DUKE L.J. ONLINE 37 (2017); Anna Gelpern, *Cinderella Sovereignty*, 67 DUKE L.J. ONLINE 65 (2017); Karen Knop, *A Market for Sovereignty? The Roles of Other States in Self-Determination*, 54 OSGOODE HALL L.J. 491 (2017); and W. Mark C. Weidemaier, *A (Very Thin) Market for Sovereign Control*, 66 DUKE L.J. ONLINE 67 (2017).
37. See *infra* notes 264-266 and accompanying text; see also Joseph Blocher & Mitu Gulati, *Forced Secessions*, 80 L. & CONTEMP. PROBS. 215, 233-36 (2017) (arguing that the right of self-determination encompasses a right to remain part of the empire).
38. H. LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF LAW (WITH SPECIAL REFERENCE TO INTERNATIONAL ARBITRATION)* pt. II, ch. III, § 37, at 91 (1927); see also ANDREW FITZMAURICE, *SOVEREIGNTY, PROPERTY AND EMPIRE, 1500-2000*, at 213 (2014) (“From the moment a nation has taken possession of a territory in right of first occupier, and with the design to establish themselves for the future, [it] become[s] the absolute and sole proprietor[] of

One way to conceptualize the issue is as a question of allocating a valued resource—sovereign control over physical territory. In other contexts, the law assigns clear property rights, protects them, and lets parties bargain their way to mutual advantage, with appropriate constraints.³⁹ Creating a market for sovereign control, then, would mean assigning property rights in sovereign control and permitting them to be traded. It would mean moving borders to fit people, rather than people to fit borders,⁴⁰ subject to various limitations.⁴¹ But none of that is possible without clarity regarding the underlying entitlements. That is the focus of this Article.

Part I tells the story of Navassa, and how “the droppings of birds played an important role in the history of U.S. imperialism.”⁴² This historical account serves not only to give Navassa the attention it deserves in the law of the territories, but also to show how it—like the other unincorporated territories—ended up being treated as both property and sovereign territory, albeit without the benefits of either categorization.

Part II embeds this story in broader developments in legal thought and international law, beginning with Morris Cohen’s observation that seemingly obvious differences between property and sovereignty tend to blur the more deeply one thinks about them.⁴³ In the case of the territories, that ambiguity was central both to the *Insular Cases* and to the interpretations of State Department lawyers. And yet, however blurry, the line remains significant, as contemporaneous developments in international law demonstrate. In particular, the move away from property-law concepts—long a staple of international law, especially with regard

it . . .” (quoting 3 G.F. VON MARTENS, *THE LAW OF NATIONS: BEING THE SCIENCE OF NATIONAL LAW, COVENANTS, POWER, ETC. FOUNDED UPON THE TREATIES AND CUSTOMS OF MODERN NATIONS IN EUROPE*, ch. I, § 1, at 67 (William Cobbett 4th ed., William Cobbett trans., London 1829) (1789))).

39. Paul B. Stephan, *Blocher, Gulati, and Coase: Making or Buying Sovereignty?*, 66 *DUKE L.J. ONLINE* 51, 51 (2017).
40. *Western Sahara, Advisory Opinion*, 1975 I.C.J. 12, 122 (Oct. 16) (Dillard, J., concurring) (“It is for the people to determine the destiny of the territory . . .”); G.A. Res. 1541 (XV), at 29 (Dec. 15, 1960) (explaining that self-determination could lead to secession and the formation of a new state, association of a territory with an existing state, or integration of a territory into an already-existing state).
41. Blocher & Gulati, *supra* note 35, at 840-42.
42. LARRY GARA, *THE PRESIDENCY OF FRANKLIN PIERCE* 149 (1991).
43. See Justin Desautels-Stein, *The Realist and the Visionary: Property, Sovereignty, and the Problem of Social Change*, in *CONTINGENCY IN INTERNATIONAL LAW: ON THE POSSIBILITY OF DIFFERENT LEGAL HISTORIES* 77, 79 (Ingko Venzke & Kevin Jon Heller eds., 2021) (“[W]e should realise that we are dipping into the deepest reservoirs of our legal order, spaces in which property and sovereignty share a common language. At this grammatical depth, our liberal conceptions of property ownership and sovereign right blur.” (footnote omitted)).

to the acquisition of territory⁴⁴—and toward an emphasis on sovereignty has tended to cement the status quo, including existing colonial structures.

In Part III, using Navassa as an illustration, we argue that some aspects of the property paradigm should be recovered, and that they stand to help the U.S. territories and other colonial possessions. We explore three specific implications: negotiated economic settlements, litigation against colonial powers, and the possibility of auctions for sovereign control. The last of these, in particular, means adapting the property framework from uninhabited territories like Navassa to inhabited territories like Puerto Rico. By focusing on a small, uninhabited, and seemingly minor island, rather than mounting another attack on the *Insular Cases*, our goal is not to avoid the broader questions of democracy and the law of the territories, but to isolate and develop one particular theme: the use and potential promise of private-law concepts like property.

I. THE STORY OF NAVASSA

Law-of-the-territories scholarship understandably tends to focus on inhabited territories like Puerto Rico, where millions of American citizens still lack full voting rights. But to fully understand U.S. imperialism—and the conceptual confusion that enabled it and continues to haunt the people of the territories—we have to start fifty years earlier than the *Insular Cases* and on a much smaller scale.⁴⁵ Indeed, we might want to go back centuries, to when seabirds first started depositing the excrement that would eventually accumulate—especially on hot, uninhabited, rainless islands—into rock-hard layers many feet deep. The territorial American empire began with efforts to use law to justify the acquisition of this bounty. Consideration of that story, and especially Navassa Island, our oldest territory, brings contested and changing conceptions of property and sovereignty to the forefront.

A. *The Flag Follows Enterprise*

In the first half of the 1800s, the Western world discovered what people indigenous to South America had long known: guano is an extraordinary natural fertilizer.⁴⁶ This made it particularly valuable to American farmers on the East

44. See *infra* notes 50–55 and accompanying text.

45. In keeping with the focus of this Special Issue, our focus is on the territories, not other forms of U.S. imperialism.

46. See GREGORY T. CUSHMAN, *GUANO AND THE OPENING OF THE PACIFIC WORLD: A GLOBAL ECOLOGICAL HISTORY* (2013) (providing a detailed history of guano and its importance in the mid-

Coast, who were facing soil exhaustion and increasing competition from newly-acquired Western territories.⁴⁷ Peru, whose islands were blessed with massive deposits of the stuff, dominated the market.⁴⁸ U.S. farmers, seeking better terms, turned to their government.⁴⁹

But how to get a cheap domestic source of guano? Historical models suggested that the answer could involve a combination of private enterprise and governmental conquest. From colonial charters⁵⁰ to the British East India Company,⁵¹ intermingling of private and public interests had long been an engine for acquiring valuable resources and territory. Governments regularly created, supported, or recognized their citizens' "private" property claims—intertwining sovereignty and property in ways that expanded both.⁵² Sir Edward Coke said of North American colonization that "[t]he ends of private gain are concealed

nineteenth century); see also Paul F. Johnston, *The Smithsonian and the 19th Century Guano Trade: This Poop Is Crap*, NAT'L MUSEUM OF AM. HIST. (May 31, 2017), <https://americanhistory.si.edu/blog/smithsonian-and-guano> [<https://perma.cc/K5N3-MTDV>] (describing how the world powers were all importing guano as early as the 1840s).

47. See ROY F. NICHOLS, *ADVANCE AGENTS OF AMERICAN DESTINY* 157 (1956); JIMMY M. SKAGGS, *THE GREAT GUANO RUSH: ENTREPRENEURS AND AMERICAN OVERSEAS EXPANSION* 2-3 (1994).
48. On the impact of the guano boom on Peru and its finances, see Catalina Vizcarra, *Guano, Credible Commitments, and Sovereign Debt Repayment in Nineteenth-Century Peru*, 69 J. ECON. HIST. 358 (2009).
49. See SKAGGS, *supra* note 47, at 11; Christina Duffy Burnett [Ponsa-Kraus], *The Edges of Empire and the Limits of Sovereignty: American Guano Islands*, 57 AM. Q. 779, 783 (2005). Since U.S. intervention would lead to labor practices that have been analogized to slavery, see *infra* notes 141-148, 165 and accompanying text, it is also worth noting that "[t]he Peruvians solved their labor problems by a variety of heinous methods, including kidnapping and slavery," especially of Chinese peasants lured onto ships where they "sometimes found themselves shackled below deck, not unlike slavery-bound Africans." Brennen Jensen, *Poop Dreams*, BALT. CITY PAPER (Feb. 21, 2001), <http://faculty.webster.edu/corbetre/haiti/miscopic/navassa/poop.htm> [<https://perma.cc/CFB6-BN7B>].
50. See Koskenniemi, *supra* note 5, at 361 (arguing that "[t]he English state in the sixteenth century was much weaker than its Continental rivals" and thus "enlist[ed] the economic interests of the noble and mercantile classes" through privateering and monopoly charters).
51. See Philip J. Stern, "Bundles of Hyphens": *Corporations as Legal Communities in the Early Modern British Empire*, in *LEGAL PLURALISM AND EMPIRES, 1500-1850*, at 21, 24 (Lauren Benton & Richard J. Ross eds., 2013) (noting that because of the sophistication of the English corporation, "[t]he early modern English 'state' was . . . a composite of agents, networks, and 'grids of power' that operated within, aside, and sometimes in conflict with the sovereign Crown").
52. The most notorious example of this was King Leopold II's barbaric rule of the Congo Free State, which he simultaneously ruled and *owned* until, as the result of the century's first major international human-rights campaign, he was forced to sell sovereign control to Belgium. We explore those horrors—which were unfolding nearly contemporaneously with the story we tell here—and lessons for international law in Joseph Blocher & Mitu Gulati, *Transferable Sovereignty: Lessons from the History of the Congo Free State*, 69 DUKE L.J. 1219 (2020).

under cover of planting a Colony.”⁵³ John Locke, architect of colonial constitutions, wrote that “[t]he great and chief end . . . of men’s uniting into commonwealths and putting themselves under government is the preservation of their property.”⁵⁴ It is unsurprising, then, that Locke’s approach to the colonies was to establish such rules as would lead to expansion over new territory and would draw “the greatest conveniences of life . . . from it.”⁵⁵

Such models were still being employed in the late 1800s. Chartered-company governments owned roughly three-quarters of British territory acquired in Sub-Saharan Africa at that time,⁵⁶ just as the United States was taking its first imperial steps. In other instances, private actors established business interests abroad and then called on their home governments to protect them when those interests were threatened, thereby drawing sovereign power into property disputes in distant territories.⁵⁷

The United States was drawn into the guano islands and thus into empire by the latter method. Throughout the early 1850s, enterprising sea captains began writing to Secretary of State Daniel Webster (by then somewhat addled by age and ill health, and also possibly conflicted by guano-related personal business interests),⁵⁸ asking whether certain islands in the Pacific might be “rightfully taken by a citizen of the United States.”⁵⁹ In one prominent case, Webster wrote back that “it may be considered the duty of this government to protect citizens of the United States who may visit the Lobos islands for the purpose of obtaining guano.”⁶⁰

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53. BARBARA ARNEIL, *JOHN LOCKE AND AMERICA: THE DEFENCE OF ENGLISH COLONIALISM* 68 (1996).
54. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 184 (Thomas I. Cook ed., Hafner Publ’g Co. 1947) (1690).
55. *Id.* at 137.
56. STEVEN PRESS, *ROGUE EMPIRES: CONTRACTS AND CONMEN IN EUROPE’S SCRAMBLE FOR AFRICA* 219 (2017) (citing Hartmut Pogge von Strandmann, *The Purpose of German Colonialism, or the Long Shadow of Bismarck’s Colonial Policy*, in *GERMAN COLONIALISM: RACE, THE HOLOCAUST, AND POSTWAR GERMANY* 193, 202 (Volker Langbehn & Mohammad Salama eds., 2011)).
57. See, e.g., PRESS, *supra* note 56, at 65 (“The court at Madrid had insisted since the days of Hernán Cortés that European powers must hold sovereignty over any provinces acquired by *conquistadores* overseas.”). For an explanation of this phenomenon, see generally NOEL MAURER, *THE EMPIRE TRAP: THE RISE AND FALL OF U.S. INTERVENTION TO PROTECT AMERICAN PROPERTY OVERSEAS, 1893-2013* (2013).
58. NICHOLS, *supra* note 47, at 162-66.
59. SKAGGS, *supra* note 47, at 22.
60. *Id.* at 23. For a detailed accounting of these petitions, see NICHOLS, *supra* note 47, at 162-82. There is an interesting historical analogy here to the Stuart-era practice of petitions seeking “letters patent” for overseas affairs. See MACMILLAN, *supra* note 23, at 80-89.

Acting on this implicit promise, U.S. citizens began to claim islands, mostly in the Pacific, and set up mining operations.⁶¹ Sometimes they were confronted or evicted by agents of other countries claiming sovereignty over what the captains insisted was *terra nullius*.⁶² For many years, these disputes were presented to Congress in the form of petitions for redress of grievances – essentially, applications for private bills.⁶³ This approach proved scattershot, however, and pressure developed for a more regularized process governed by statute.⁶⁴

Here, too, historical and contemporary practice provided some models for how property and sovereignty claims could essentially leverage one another. The first of the Federal Homestead Acts was on the horizon – it would be passed in 1862, granting property rights in midwestern and western lands to heads of households or twenty-one-year-old men who agreed to live on and farm the land.⁶⁵ By rewarding those who mixed their labor with this supposedly unclaimed territory, the Acts used a basic Lockean model to incentivize both private-property claims and the expansion of national sovereignty.⁶⁶ The guano islands would eventually be acquired under similar theories.

American “discoverers” of the guano islands had an ally in the Senate who shared their desire for global commercial expansion and was willing to treat sovereign territory like real estate.⁶⁷ As Secretary of State, first under Abraham Lin-

61. SKAGGS, *supra* note 47, at 22-31.

62. NICHOLS, *supra* note 47, at 162-82.

63. SKAGGS, *supra* note 47, at 31. At least one such petition was filed by the Coopers regarding Navassa before the initial application for title was eventually recognized in 1859. *Id.* at 102-03. For a broader history of petitioning, see Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 *YALE L.J.* 1538 (2018).

64. NICHOLS, *supra* note 47, at 183 (“Guano prospecting was introducing a new type of exasperation into the relations between government and private enterprise. . . . The guano operators began to demand some law which would create procedures not dependent upon the whims of Secretaries.”).

65. Homestead Act of 1862, ch. 75, 12 Stat. 392, *repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 702, 90 Stat. 2743, 2787.

66. *Cf.* PAUL FRYMER, *BUILDING AN AMERICAN EMPIRE: THE ERA OF TERRITORIAL AND POLITICAL EXPANSION* 72 (2017) (“Land policies were particularly critical in enabling the government to overcome the weaknesses of a federal state by incentivizing and strategically privatizing an ‘armed occupation’ of citizens to settle and secure territory.”).

67. *See* WALTER STAHR, *SEWARD: LINCOLN’S INDISPENSABLE MAN 497-502* (2012) (describing William H. Seward’s role not only in laying the foundations for acquiring Hawaii and building the Panama Canal, but also in making an effort to buy British Columbia).

coln and later Andrew Johnson, William H. Seward would engineer the purchase of Alaska from Russia for \$7.2 million in 1867⁶⁸—derisively known by some as “Seward’s Icebox.”⁶⁹ But before that, as economist and historian of the guano islands Jimmy M. Skaggs puts it, he acquired “Seward’s Outhouse.”⁷⁰

In 1856, then-Senator Seward shepherded the passage of the Guano Islands Act.⁷¹ Skaggs explains that the Act’s “impact was far reaching and its consequences largely unforeseen. For certain its first effect was to demonstrate conclusively that in the United States, flag follows enterprise.”⁷² The text of the Act, which is still on the books, declares:

Whenever any citizen of the United States discovers a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and takes peaceable possession thereof, and occupies the same, such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States.⁷³

It goes on to grant “[t]he discoverer, or his assigns . . . the exclusive right of occupying such island, rocks, or keys, for the purpose of obtaining guano, and of selling and delivering the same to citizens of the United States.”⁷⁴

Some critics of the Act, invoking the tradition of sovereign support for citizens’ property claims described above,⁷⁵ suggested that the Act unnecessarily restated the existing rules. Senator John P. Hale of New Hampshire asked “why a special rule is endeavored to be inserted here, by way of this act of Congress, in relation to guano islands? . . . [T]he Government will undoubtedly enforce, at

68. The United States paid Russia \$7.2 million for Alaska. See Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of All the Russias to the United States of America art. VI, Russ.-U.S., Mar. 30, 1867, 15 Stat. 539. That same year, Seward successfully encouraged the Department of the Navy to take possession of Midway Island. SKAGGS, *supra* note 47, at 115.

69. SKAGGS, *supra* note 47, at 56.

70. *Id.*

71. Act of Aug. 18, 1856, ch. 164, 11 Stat. 119 (codified at 48 U.S.C. § 1411 (2018)).

72. SKAGGS, *supra* note 47, at 66; see also NICHOLS, *supra* note 47, at 201 (“[T]he pursuit of guano had started the United States on the road to acquiring possessions not within the bounds of contiguous continental territory. . . . [T]he first small beginnings of empire had been made at Navassa in the West Indies and on the coral reefs of the Pacific.”).

73. 48 U.S.C. § 1411 (2018).

74. *Id.* § 1414.

75. See *supra* notes 63-67 and accompanying text.

all times, the rights of discoverers of any of its citizens to any undiscovered land which they may discover.”⁷⁶

Seward replied by carefully distinguishing between the property-like interests covered by the Act and the sovereignty-like interests it disclaimed: “The object of the bill, then, is to favor and encourage certain American discoverers . . . to seek out, and to appropriate to the uses of the United States, under the authority of law, other deposits than those of the State of Peru.”⁷⁷ He took pains to emphasize that “[t]here is no temptation whatever for the abuse of authority by the establishment of colonies or any other form of permanent occupation there,” and that “the bill itself . . . provides whenever the Guano should be exhausted, or cease to be found on the islands, they should revert and relapse out of the jurisdiction of the United States.”⁷⁸ He stressed that the bill allowed no “prospect for dominion” and that it was “framed so as to embrace only these more ragged rocks . . . which are fit for no dominion.”⁷⁹

The theme that emerged – and that remains central to the law of the territories – was a cake-without-the-calories approach to colonialism: the United States would reap the benefits of these far-flung territories without taking on the obligations of sovereign governance. From the beginning, then, American colonialism has been premised on the power to manage and alter boundaries, not simply to expand them.⁸⁰ Indeed, the Guano Islands Act provided that nothing in it should be construed as “obliging the United States to retain possession of the islands . . . after the guano shall have been removed from the same.”⁸¹ The Act was only a means of guaranteeing the extraction of valuable resources – not

76. SKAGGS, *supra* note 47, at 58 (quoting Senator John P. Hale). This principle of discovery, it should be noted, was not asserted with quite as much gusto when the opposing sovereign was, say, Great Britain. *Id.* at 106 (“It apparently mattered little . . . that circumstances surrounding Verd key [claimed by the British] were remarkably similar to those regarding Navassa, where the United States had cavalierly brushed aside Haitian claims.”); *id.* at 127 (“Interestingly, however reluctant the U.S. government might have been to relinquish control of Caribbean appurtenances to sister American republics, it almost never disputed ownership with Great Britain once it became aware of English counterclaims, as with Morant keys.”). It has often been rejected by U.S. courts when the party asserting discovery does so contrary to the federal government’s interests. Adam Clanton, *The Men Who Would Be King: Forgotten Challenges to U.S. Sovereignty*, 26 UCLA PAC. BASIN L.J. 1, 7-15 (2008) (showing executive and judicial rejection of private claims regarding “discovery” of Atlantis, Isle of Gold, and Grand Capri Republic – would-be micronations off the coast of Florida – and yet acceptance of similar claims, favored by the U.S. government, in the case of Swains Island in the South Pacific).

77. SKAGGS, *supra* note 47, at 59 (quoting Senator William H. Seward).

78. Burnett [Ponsa-Kraus], *supra* note 49, at 785-86 (quoting Senator William H. Seward).

79. DANIEL IMMERWAHR, *HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES* 52 (2019) (quoting Senator William H. Seward).

80. Burnett [Ponsa-Kraus], *supra* note 49, at 781.

81. 48 U.S.C. § 1419 (2018).

of expanding territorial sovereign empire. As one claimant put it in 1863, in the course of seeking Secretary Seward's help in negotiating a settlement with the British regarding a disputed guano island in the Caribbean, he did "not desire to occupy the Sombrero Key one day after ceasing shipments of guano . . . [for] permanent occupation of the island by any power or person would be absurd."⁸²

One particularly significant phrase in the Act is its declaration that covered islands are to be considered as "appertaining" to the United States.⁸³ That odd word—blurring the line between property and sovereignty—originates with Seward's initial proposals,⁸⁴ which also contained references to "sovereignty," "territory," and "territorial domain," all of which were eventually stripped out.⁸⁵ As historian Daniel Immerwahr explains, "It was an obscure word, appertaining, as if the law's writers were mumbling their way through the important bit. But the point was this: those islands would, in some way, belong to the country."⁸⁶ A later State Department memorandum would describe the term as "deft, since it carries no precise meaning and lends itself readily to circumstances and the wishes of those using it."⁸⁷ Indeed.

The concept of appurtenance came to play a more prominent role in the law of the territories when the Supreme Court made it central to the reasoning of the *Insular Cases*.⁸⁸ As Justice White put it in *Downes v. Bidwell*:

The result of what has been said is that whilst in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the

82. SKAGGS, *supra* note 47, at 92 (quoting Secretary William H. Seward).

83. 48 U.S.C. § 1411 (2018).

84. SKAGGS, *supra* note 47, at 57.

85. Burnett [Ponsa-Kraus], *supra* note 49, at 784 (quoting early drafts of the Guano Islands Act); *see also* NICHOLS, *supra* note 47, at 183-84 (quoting an 1856 proposal to Congress, on behalf of some guano-island captains, which would have given the "right of sovereignty and eminent domain of, to and over the same").

86. IMMERWAHR, *supra* note 79, at 51-52.

87. SKAGGS, *supra* note 47, at 57 (quoting, with modification, OFF. OF THE LEGAL ADVISER, U.S. DEP'T OF STATE, THE SOVEREIGNTY OF ISLANDS CLAIMED UNDER THE GUANO ACT AND OF THE NORTHWEST HAWAIIAN ISLANDS MIDWAY AND WAKE 317 (Aug. 9, 1932), <https://evols.library.manoa.hawaii.edu/handle/10524/54209> [<https://perma.cc/2ACC-7WS8>]).

88. Burnett [Ponsa-Kraus], *supra* note 49, at 794 ("In perhaps the most concrete sign of its lasting influence, the act's unusual terminology for describing the relationship between guano islands and the United States would return for an encore in the better known episode of American overseas territorial expansion at the end of the nineteenth century.").

United States in a domestic sense, because the island has not been incorporated into the United States, but was merely appurtenant thereto as a possession.⁸⁹

In keeping with this mostly property-based terminology, the theory of acquisition in the Act is recognizably Lockean. This was the same basic logic that had earlier been used in *Johnson v. M'Intosh*⁹⁰ to justify the expropriation of Native land in the continental United States. And the Supreme Court would later invoke it in an 1890 opinion (discussed in more detail below⁹¹), upholding the Act's application to Navassa itself:

By the law of nations, recognized by all civilized States, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and when citizens or subjects of one nation, in its name, and by its authority or with its assent, take and hold actual, continuous and useful possession . . . of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired.⁹²

Reliance on a concept of *terra nullius*—whether to support claims of property, or sovereignty, or both—made it essential to identify whether a given island was indeed “unoccupied.” And had there been any desire to take this requirement seriously, one can imagine that guano-island entrepreneurs would have to demonstrate, with evidence and in open proceedings, the validity of their property claims. That did not happen.⁹³ The result, by the State Department's own later reckoning,⁹⁴ was frequent overstatement regarding lands having been “discovered.”

89. *Downes v. Bidwell*, 182 U.S. 244, 341-42 (1901) (White, J., concurring).

90. 21 U.S. (8 Wheat.) 543, 567-71 (1823); Jedediah Purdy, *Property and Empire: The Law of Imperialism in Johnson v. M'Intosh*, 75 GEO. WASH. L. REV. 329, 336 n.36 (2007).

91. See *infra* Section I.C.

92. *Jones v. United States*, 137 U.S. 202, 212 (1890).

93. NICHOLS, *supra* note 47, at 202 (“American adventurers were none too learned in their international law nor too careful in their searches of title. Many of the dots they claimed to be uninhabited and unclaimed by other sovereignties, very soon appeared to have owners.”).

94. See *infra* notes 226-244 and accompanying text.

B. *Navassa and Haiti's Claim*

More than 100 rocks, islands, and outcroppings would eventually be claimed under the Guano Islands Act,⁹⁵ but Navassa has the distinction of being the first.⁹⁶

In the summer of 1857, one year after the Guano Islands Act was enacted, American Peter Duncan claimed to have discovered the island, describing it as “covered with small shrubs upon the surface, beneath which is a deposit of phosphatic guano, varying in depth from one to six feet, and estimated in quantity at one million of tons.”⁹⁷ Duncan sought the exclusive rights promised under the Act, which he would eventually receive and transfer to the Navassa Phosphate Company (NPC).⁹⁸

The claim did not go unchallenged. Before Duncan's petition had even been recognized under the Act,⁹⁹ Haitian Emperor Faustin-Élie Soulouque sent warships to proclaim sovereignty over the island and demand an end to American mining¹⁰⁰ – or at least that the work continue only under Haitian authority.¹⁰¹ The American enterprise at that point was being run by the Cooper family, who had received Duncan's not-yet-perfected claim. Likely recognizing that Navassa was not quite as unclaimed as Duncan had asserted, the Coopers had preemptively asked the Secretary of State for protection.¹⁰²

The historical record shows no evidence of any investigation by the U.S. government at that time into whether Haiti or any other nation had a better claim

95. Underhill, *supra* note 14. Most of these were claimed in the Act's first few decades. Nichols, *supra* note 12, at 506 (“Under the authority of this act, between 1856 and 1885 some seventy islands and groups of islands were recognized as appertaining to the United States.”).

96. NICHOLS, *supra* note 47, at 189-90 (“In this humble fashion, the American nation took its first step into the path of imperialism; Navassa, a guano island, was the first noncontiguous territory to be announced formally as attached to the republic.”).

97. *Jones*, 137 U.S. at 205 (quoting a memorial addressed to the Secretary of State by Peter Duncan).

98. *Id.* at 206.

99. Recognition took a while because Duncan apparently failed to file either the certificate of peaceable possession or the required bond. Nichols, *supra* note 12, at 507.

100. Jacqueline Charles, *Did the US Steal an Island Covered in Bird Poop from Haiti? A Fortune Is in Dispute*, MIA. HERALD (Nov. 26, 2020), <https://www.msn.com/en-us/news/us/did-the-us-steal-an-island-covered-in-bird-poop-from-haiti-a-fortune-is-in-dispute/ar-BB1bojka> [https://perma.cc/KZ5C-TB5T].

101. SKAGGS, *supra* note 47, at 100. Skaggs suggests that Haiti's intervention was spurred by a Jamaican partner of Cooper's – a person named Ramos – who suggested that Haiti lease the island to him. *Id.*

102. *Id.*

to Navassa—nor, for that matter, whether Duncan or the Coopers had even perfected a claim under the Guano Islands Act.¹⁰³ That said, given that there had been a global rush for guano for at least two decades at the time, it beggars belief that anyone thought Haiti—an impoverished nation, suffering under such an immense debt burden in the 1850s that it had to ask for a debt moratorium—would not have wanted an island rich in such a valuable asset.¹⁰⁴

But the United States was too desperate for this “white gold” to be overly concerned with any competing Haitian claims. President Millard Fillmore devoted a full paragraph of his 1850 State of the Union address to the issue of bird droppings, declaring that “it is the duty of the Government to employ all the means properly in its power for the purpose of causing that article to be imported into the country at a reasonable price. Nothing will be omitted on my part toward accomplishing this desirable end.”¹⁰⁵

So instead of investigating the Duncan-Cooper claim that Navassa was unclaimed or abandoned, Secretary of State Lewis Cass directed the U.S. Navy to protect it. Cass’s letter is often treated as early evidence of American sovereignty over the island (the Supreme Court would later cite it),¹⁰⁶ but the phrasing emphasizes that the Navy was sent to protect the economic interests of private citizens, not necessarily the sovereign territory of the United States:

The President being of the opinion that any claim of the Haytian government to prevent citizens of the United States from removing guano from

103. OFF. OF THE LEGAL ADVISER, U.S. DEP’T OF STATE, THE SOVEREIGNTY OF GUANO ISLANDS IN THE CARIBBEAN SEA 379 (Sept. 30, 1932), <https://evols.library.manoa.hawaii.edu/handle/10524/54209> [<https://perma.cc/KBB4-98DM>] (“After the Secretary of State had requested the Navy to send a warship to Navassa it was discovered that neither Cooper nor Duncan had filed the bond prescribed by the Guano Act.” (emphasis added)).

104. As the price of independence in 1825, France imposed a 150-million-franc debt on Haiti—an amount equal to roughly 300% of Haiti’s gross domestic product at the time—which stunted Haiti’s growth for decades to come. See Simon Henochsberg, *Public Debt and Slavery (1760-1915)*, at 26-27 (Dec. 2016) (master’s dissertation, Paris School of Economics), <http://piketty.pse.ens.fr/files/Henochsberg2016.pdf> [<https://perma.cc/ZWK8-S9QA>]; Liliana Obregón, *Empire, Racial Capitalism and International Law: The Case of Manumitted Haiti and the Recognition Debt*, 31 LEIDEN J. INT’L L. 597, 611 (2018) (“Commentary from the time of the indemnity viewed it not as a recognition of sovereignty, but rather as an imposition upon Haiti as well as a form of surrender.”). For a sense of the value that these deposits of guano would have yielded Haiti at the time, see Richard Sicotte, Catalina Vizcarra & Kirsten Wandschneider, *Military Conquest and Sovereign Debt: Chile, Peru and the London Bond Market, 1876-1890*, 4 CLIOMETRICA 293, 294-96 (2010), which describes how this asset impacted sovereign borrowing abilities at the time in Latin America.

105. *President Millard Fillmore, 1850 State of the Union Address* (Dec. 2, 1850), PRESIDENTIALRHETORIC.COM, <http://www.presidentialrhetoric.com/historicspeeches/fillmore/stateoftheunion1850.html> [<https://perma.cc/4APZ-P7B7>].

106. See *Jones v. United States*, 137 U.S. 202, 218 (1890).

the Island of Navassa is unfounded[,] . . . directs that you will cause a competent force to repair to that island, and will order the officer in command thereof to protect citizens of the United States in removing guano therefrom against any interference from authorities of the government of Hayti.¹⁰⁷

The United States was asserting and protecting economic interests, without actually claiming Navassa to be “part of” the nation.

At the same time, the United States was careful to reject Haiti’s competing claim of sovereignty—thus effectively denying Navassa the opportunity to be “part of” any nation. The commander of the U.S.S. *Saratoga*, finding that the Haitians had already left Navassa, followed them to Port-au-Prince and left a message with Haiti’s foreign minister to the effect that his ship had been sent “to look after the interests of an American company” and that “the enlightened government of Hayti” might wish to “revoke any orders” that violated “the rights of this company.”¹⁰⁸ The Commander wrote:

I hereby caution all persons of any government whatever, who may visit Navassa, to abstain from the slight interference with you, on pain of the displeasure of my Government and its prompt retributive action The Government is determined to extend to you that protection to which your Company under the laws of our country, is entitled.¹⁰⁹

While Haiti did not dare test the might of the U.S. Navy, its foreign minister replied that the island was “part of the Haytian empire; that it was originally ceded to this government by the French.”¹¹⁰ That point was further emphasized by Benjamin C. Clark, Haiti’s commercial agent in New York (lacking diplomatic relations with the United States, Haiti had no ambassador in Washington), who asked that the United States end “the infringement on the rights of Hayti involved in the unauthorized occupancy of Navasa [sic] Island by citizens of the United States.”¹¹¹ An Assistant Secretary of State declined, citing the Guano Islands Act as evidence of the U.S. government’s right to keep the island, but also noting that “the act does not make it obligatory upon the Government to retain

107. *Id.*

108. SKAGGS, *supra* note 47, at 101.

109. OFF. OF THE LEGAL ADVISER, *supra* note 103, at 379.

110. SKAGGS, *supra* note 47, at 102.

111. *Id.* at 102; *see also* NICHOLS, *supra* note 47, at 189 (claiming that “the Emperor was not disposed to get into trouble with the United States” and “contented himself with filing a protest through the Haitian commercial agent in the United States, B.C. Clark”).

permanent possession of the Island.”¹¹² Skaggs reads this as an attempt to “soften the blow,” since it implied “that once the guano was gone the United States would renounce its claim to the place.”¹¹³ Such a renunciation has yet to emerge.

Part of the reason the United States so quickly dismissed Haiti’s claim was likely that the United States barely recognized it as a sovereign, despite the fact that Haiti had been independent for more than a half century at the time Navassa was claimed.¹¹⁴ Demonstrating the disdain with which the United States viewed Haitian sovereignty at the time, a prominent newspaper suggested at one point that Haiti itself be annexed for “fun and amusement.”¹¹⁵ Official recognition of Haiti did not come until 1864, after southern senators had departed to the Confederacy.¹¹⁶ Eight years later (and again a year after that), Haiti issued formal protests against the U.S. occupation of Navassa—“supported by documentary

112. OFF. OF THE LEGAL ADVISER, *supra* note 103, at 382; SKAGGS, *supra* note 47, at 102.

113. SKAGGS, *supra* note 47, at 102. Later entreaties from Clark were simply ignored. KAREN SALT, *THE UNFINISHED REVOLUTION: HAITI, BLACK SOVEREIGNTY AND POWER IN THE NINETEENTH-CENTURY ATLANTIC WORLD* 145-47 (2019).

114. For discussions of the reactions to the Haitian revolution in the Western world, see, for example, THOMAS BENDER, *A NATION AMONG NATIONS: AMERICA’S PLACE IN WORLD HISTORY* 108 (2006), which describes heated debates among Adams, Jefferson, Hamilton, and others regarding support for the Haitian revolution; ROBIN BLACKBURN, *THE AMERICAN CRUCIBLE: SLAVERY, EMANCIPATION AND HUMAN RIGHTS* 222-79 (2013); JULIA GAFFIELD, *HAITIAN CONNECTIONS IN THE ATLANTIC WORLD: RECOGNITION AFTER REVOLUTION* 17-60 (2015); and Tim Matthewson, *Jefferson and the Nonrecognition of Haiti*, 140 *PROC. OF THE AM. PHIL. SOC’Y* 22, 22-38 (1996). See also MALICK W. GHACHEM, *THE OLD REGIME AND THE HAITIAN REVOLUTION* 309-13 (2012) (explaining how some Americans believed the Haitian revolution was evidence that emancipation movements led to economic disaster and violence and worried that the entry of slaves from Haiti would spread “the Haitian revolutionary ‘contagion’ throughout the American plantation states” (quoting EDWARD BARLETT RUGEMER, *THE PROBLEM OF EMANCIPATION: THE CARIBBEAN ROOTS OF THE AMERICAN CIVIL WAR* 43 (2008))).

115. Ken Lawrence, *Navassa Island: The U.S.’s 160-year Forgotten Tragedy*, *HIST. NEWS NETWORK* (May 5, 2019), <https://historynewsnetwork.org/article/171898> [<https://perma.cc/TAF2-BTUA>] (quoting James Gordon Bennett, editor of the *New York Herald*—the nation’s largest daily newspaper—writing in 1850 in support of a plan to “annex Hayti, before Cuba” and that doing so “would be a source of fun and amusement, ending in something good for the reduction of the island to the laws of order and civilization. . . . St. Domingo will be a State in a year, if our cabinet will but authorize white volunteers to make slaves of every negro they can catch when they reach Hayti”). Note that even Bennett seemed to assume that such acquired territory would be destined for statehood.

116. See CHARLES F. HOWLAND, *AMERICAN RELATIONS IN THE CARIBBEAN: A PRELIMINARY ISSUE OF SECTION I OF THE ANNUAL SURVEY OF AMERICAN FOREIGN RELATIONS* 117 (1929) (noting that “[p]ro-slavery sentiment was strong enough in the nation and in Congress to prevent recognition of Haitian independence” until then and that “[t]he southern representatives and their sympathizers were bitterly opposed to the recognition of negro republics, both because of their belief that this would acknowledge the equality of the black, and because after 1840 they thought to make the Caribbean an outpost slave colony”).

evidence” in the words of a 1932 State Department report summarizing the dispute.¹¹⁷ Per that report:

The Secretary of State answered the first protest on December 31, 1872. He summarized the bases for the Haitian claim as follows: Discovery of the Island by Columbus; Spanish conquest, and the Franco-Spanish Treaty ceding to France part of St. Domingo; the Declaration of Independence of Haiti of 1803; the Ordinance of 1825 issued by Charles X of France recognizing the independence of the Island of St. Domingo; the Treaty of 1828 with Haiti in which France relinquished all claim to the Island; and, finally, half a century of peaceable, uninterrupted possession by Haiti.¹¹⁸

In response, the Secretary of State claimed that there had been no “actual occupation” prior to 1857, nor had Haiti “attempted to enforce any of its revenue laws in Navassa.”¹¹⁹ At most, then, Haiti had “a claim to a constructive possession, or rather to a right of possession; but, in contemplation of international law, such claim of a right to possession is not enough to establish the right of a nation to exclusive territorial sovereignty.”¹²⁰ Notably, by the time these words were written in 1932, the United States was basically embracing the territorial sovereignty that Seward and others had long disclaimed.¹²¹

U.S. warships patrolled Haitian waters between 1857 and 1915, essentially ignoring Haitian sovereignty over those waters.¹²² And for all of President Woodrow Wilson’s pronouncements about the need to give former colonies the right of self-determination,¹²³ the United States effectively took over Haiti during his administration¹²⁴—ostensibly because U.S. assets needed protection—and

117. OFF. OF THE LEGAL ADVISER, *supra* note 103, at 384.

118. *Id.* at 385.

119. *Id.*

120. *Id.* at 386; *see also* Guano Islands, 1 HACKWORTH DIGEST, ch. IV, § 77, at 513 (noting the 1872 and 1873 letters, which were also quoted in 1915 when the Minister of Haiti entered another formal protest); Spadi, *supra* note 15, at 115 (describing the countries as “anchored to their original positions” following the 1872-73 letters).

121. *See infra* notes 179-187 and accompanying text.

122. *See* WILLIAM EASTERLY, THE WHITE MAN’S BURDEN: WHY THE WEST’S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD 330-31 (2006).

123. *See* Allen Lynch, *Woodrow Wilson and the Principle of “National Self-Determination”*: A Reconsideration, 28 REV. INT’L STUD. 419, 422-29 (2002).

124. This hypocrisy is described in James Weldon Johnson, *Self-Determining Haiti*, NATION (Aug. 28, 1920), <https://www.thenation.com/article/archive/self-determining-haiti> [<https://perma.cc/FC7H-WHHC>].

would control it more or less directly until 1934.¹²⁵ Since then, with a few exceptions, the United States has supported a variety of dictators and kleptocrats in Haiti.¹²⁶

Haiti, for its part, has never renounced its claim to Navassa. Roughly two dozen of Haiti's constitutions – including the current one – claim Navassa as an inalienable part of the country.¹²⁷ The U.S. press noted Haiti's constitutional claim when the question of Navassa's sovereignty was working its way up to the Supreme Court in the late 1880s.¹²⁸ Notably, in some instances, U.S. representatives in Haiti pressured the Haitian Foreign Office to head off such constitutional amendments.¹²⁹

The United States, meanwhile, has ignored repeated Haitian demands that the island be returned,¹³⁰ and under current conditions Haiti seems unlikely to press its claim.¹³¹ Our inquiries suggest that there was a point, during René Prével's presidency roughly two decades ago, when a U.S. law firm was tasked with analyzing whether a legal claim could be brought against the United States.¹³² But that Haitian government and subsequent ones have decided not to litigate

125. See Off. of the Historian, *U.S. Invasion and Occupation of Haiti, 1915-34*, U.S. DEP'T OF STATE, <https://history.state.gov/milestones/1914-1920/haiti> [<https://perma.cc/Z8N9-JVXM>].

126. See Vanessa Buschsluter, *The Long History of Troubled Ties Between Haiti and the US*, BBC NEWS (Jan. 16, 2010, 1:14 PM GMT), <http://news.bbc.co.uk/2/hi/8460185.stm> [<https://perma.cc/5Y3Y-44PB>].

127. Larry Rohter, *Port-au-Prince Journal; Whose Rock Is It? And, Yes, the Haitians Care*, N.Y. TIMES (Oct. 19, 1998), <https://www.nytimes.com/1998/10/19/world/port-au-prince-journal-whose-rock-is-it-and-yes-the-haitians-care.html> [<https://perma.cc/G96G-2BZ9>] (asserting that all but one of Haiti's twenty-four constitutions have done so); Spadi, *supra* note 15, at 115 (asserting that all since 1856 have done so).

128. Edwin D. Dickinson, *The Law of Nations as National Law: "Political Questions,"* 104 U. PA. L. REV. 451, 458 n.18 (1956) ("The latest reports from the West Indies declare that the newly-adopted Constitution of Hayti declares that the Black Republic has jurisdiction over Navassa, and the action of Counsel Waring [counsel for Jones] is to determine the question of jurisdiction." (alteration in original) (quoting *Jurisdiction in Navassa*, N.Y. TIMES (Nov. 3, 1889), <https://timesmachine.nytimes.com/timesmachine/1889/11/03/106210557.html> [<https://perma.cc/DQ6U-XMVP>])).

129. See Guano Islands, 1 HACKWORTH DIGEST, ch. IV, § 77, at 515.

130. See SKAGGS, *supra* note 47, at 202.

131. See Jensen, *supra* note 49 ("Forty miles away, Haiti has essentially stopped clamoring for control of Navassa, and its government is unlikely to press the issue in the near future, says Miami lawyer Ira Kurzban, Haiti's legal [counsel] in the United States.").

132. Email from Ira Kurzban, Former Couns. to Haiti, to Mitu Gulati, Professor of L., Univ. of Virginia Sch. of L. (April 24, 2021) (on file with authors).

the matter, while still maintaining that Navassa belongs to Haiti and was unjustly taken.¹³³ If we take seriously the property model that the United States asserted through the Guano Islands Act—one in which the law protects rightful ownership and enables welfare-enhancing transfers—Haiti would have had a better ability to assert its claim in either U.S. domestic courts or international tribunals. Under the sovereignty model, the United States has little need or incentive to credibly demonstrate the value it supposedly places on the island. But in the property framework, the question is how to settle and resolve conflicting claims, including through the equivalent of damages—just as it would be between two private parties disputing a piece of land.¹³⁴ In the case of Navassa, that could mean negotiating some form of compensation with Haiti. And, as the next Section begins to show, the Supreme Court’s treatment of Navassa does not preclude, and in fact enables, precisely that kind of negotiation.

C. *Navassa in the Supreme Court*

Roy F. Nichols notes in his history of American empire that the guano islands “raised constitutional as well as diplomatic questions. For many years any definition of the nature of the sovereignty and responsibilities of the United States, if any, was neatly side-stepped.”¹³⁵ As explained above, Haiti has as yet been unable to force a direct legal evaluation of the ownership question in any tribunal, domestic or foreign. But through the back door, and without Haitian involvement, the matter did come before the U.S. Supreme Court in 1890.¹³⁶ And, like Haiti’s claim to Navassa, the odds were stacked against the lawyers who attempted to question the U.S. claim.

133. The matter garnered enough attention in 1998 that U.S. Ambassador Timothy Carney felt the need to defend U.S. sovereignty over Navassa in a speech in Port-au-Prince. See *Haiti Disputes U.S. Claims . . .*, WEBSTER’S NEWS ARCHIVES (Sept. 14, 1998), <http://faculty.webster.edu/corbetre/haiti/miscopic/navassa/dispute.htm> [<https://perma.cc/5ULR-FKSU>].

134. See Blocher & Gulati, *supra* note 35, at 816-23 (theorizing the use of a market mechanism to resolve disputes over sovereign territory).

135. NICHOLS, *supra* note 47, at 207.

136. Interestingly, in the following term, the Court heard another case involving Navassa. In *Duncan v. Navassa Phosphate Co.*, 137 U.S. 647 (1891), the Court rejected a claim for dower at common law filed by the widow of Duncan (the original claimant of the island). The Court concluded that her interest was an estate at will, *see id.* at 652, unlike the lower court, whose opinion—issued before *Jones*—had rejected her claim on the basis that the Guano Islands Act did not give the United States or its citizens any domain over guano islands, *see Grafflin v. Nevassa Phosphate Co.*, 35 F. 474, 475 (C.C.D. Md. 1888) (cited in OFF. OF THE LEGAL ADVISER, *supra* note 103, at 389).

The case was *Jones v. United States*,¹³⁷ and as with the *Insular Cases* ten years later, the question of U.S. sovereignty over Navassa arose indirectly and was resolved in much the same manner. The specific legal question in *Jones* was whether U.S. citizens working on Navassa could be charged with murder.¹³⁸ But, much like in other territories litigation, that question quickly led the Court into fundamental questions about the scope of empire.¹³⁹ It has been said that *Jones* “lays the basis for the legal foundation for the U.S. empire because it establishes the constitutionality of the fact that the United States can claim overseas territory.”¹⁴⁰ And yet, the *Jones* litigation also brought public attention to the horrific conditions on the island and, in so doing, contributed to its transformation.

Guano mining was dangerous, degrading work,¹⁴¹ and the work on Navassa was no exception. In the 1860s, with labor hard to find, the Coopers contracted with Maryland’s governor for convict labor, and may even have engaged with Antonio Pelletier, who was later executed in Haiti for participating in the slave trade.¹⁴² But matters were little better for those who “freely” entered into contracts to work there.¹⁴³

In fact, the issue of slavery in the territories—and specifically the guano islands—was a matter of some debate, thanks in part to a 1900 *Yale Law Journal*

137. 137 U.S. 202 (1890).

138. See *id.* at 211.

139. See *id.* at 211–14. For the most recent example of this phenomenon, see *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020), where the Justices seemed to go out of their way to avoid the *Insular Cases* in the course of deciding whether the method of selecting the members of the Financial Oversight and Management Board for Puerto Rico violated the Appointments Clause. And yet, Justice Sotomayor’s concurring opinion seemed to take a position on Puerto Rico’s status. See Christina D. Ponsa-Kraus, *Political Wine in a Judicial Bottle: Justice Sotomayor’s Surprising Concurrence in Aurelius*, 131 YALE L.J.F. 101, 101–02 (2020).

140. Dave Davies, *The History of American Imperialism, from Bloody Conquest to Bird Poop*, NPR (Feb. 18, 2019, 1:27 PM), <https://www.npr.org/2019/02/18/694700303/the-history-of-american-imperialism-from-bloody-conquest-to-bird-poop> [<https://perma.cc/2JF5-DYMS>] (quoting Daniel Immerwahr).

141. See IMMERWAHR, *supra* note 79, at 53 (“Guano mining . . . was arguably the single worst job you could have in the nineteenth century.”); SKAGGS, *supra* note 47, at 159 (“No nineteenth-century job . . . was as difficult, dangerous, or demeaning as shoveling either feces or phosphates on guano islands.”).

142. SKAGGS, *supra* note 47, at 103.

143. Jensen, *supra* note 49 (“African-Americans were virtually enslaved on [Navassa], decades after the Civil War.”). For a broader account of involuntary servitude after emancipation, see DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008).

article.¹⁴⁴ Borrowing a page from British and French imperial strategy towards slavery (banning it on the mainland, but allowing it in the colonies), the article argued that the Thirteenth Amendment did not completely forbid slavery in newly-acquired territories, which at that time included the Philippines, Puerto Rico, and Guam.¹⁴⁵ The argument sparked objections in the press.¹⁴⁶ And the following year, in *Downes v. Bidwell* (famous as part of the *Insular Cases* and discussed in more detail below),¹⁴⁷ the Supreme Court held that the Thirteenth Amendment did indeed apply to those “places subject to the jurisdiction of the United States but which are not incorporated into it, and hence are not within the United States in the completest sense of those words.”¹⁴⁸

Such debates were ethereal for those living and working on Navassa in the 1880s, where conditions were abysmal and workers had no real recourse against abuse. The Supreme Court would later note in *Jones* that the population “on the island consisted of 137 colored laborers of said company, and 11 white officers or superintendents, all residents of the United States.”¹⁴⁹ The white superintendents were, for all intents and purposes, governing their fellow citizens. Indeed, the situation on Navassa was a striking illustration of Cohen’s point that property law allows private individuals to exert sovereign authority over others.¹⁵⁰ It was this exercise of authority – and the concomitant lack of U.S. sovereignty – that would eventually trouble President Benjamin Harrison and help precipitate the end of operations on Navassa.¹⁵¹

144. See Paul R. Shipman, *Webster on the Territories*, 9 YALE L.J. 185 (1900). Although the law-of-the-territories scholarship in the pages of the *Harvard Law Review* in the prior two years is undoubtedly more influential (and bemoaned), see *infra* note 204 and sources cited therein, the *Yale Law Journal* contributed its share of lamentable articles to the debate as well. See, e.g., Talcott H. Russell, *Results of Expansion*, 9 YALE L.J. 239, 244 (1900) (“To apply the jury system and the ordinary methods of administering law, and popular institutions, to nations like the Tagals and Negritos [both Philippine ethnic groups] is utterly impossible. If we are to *own* these countries, we must *own* them as masters and the natives must be subjects simply and not citizens.” (emphasis added)). The author seems to be the son of Skull and Bones founder William Huntington Russell and a descendant of Noadiah Russell, an original founder and trustee of Yale College.

145. Shipman, *supra* note 144, at 190-91.

146. Skaggs notes that the editors of the *New York Sun* objected strenuously, pointing to the guano islands as places “subject to our jurisdiction when the Thirteenth Amendment was adopted, and under the specific provision of that amendment neither slavery nor involuntary servitude, except as a punishment for crime, could Constitutionally exist in them.” SKAGGS, *supra* note 47, at 197 (quoting *The Lesson of the Humble Guano Islands*, N.Y. SUN, Nov. 8, 1900, at 6).

147. See *infra* notes 204-226 and accompanying text.

148. 182 U.S. 244, 336-37 (1901) (White, J., concurring).

149. *Jones v. United States*, 137 U.S. 202, 206 (1890) (quoting an indictment).

150. See *infra* notes 198-200 and accompanying text.

151. See *infra* notes 165-170 and accompanying text.

The flashpoint seems to have come on the morning of September 14, 1889.¹⁵² Charles Wesley Roby, the island's superintendent of mines, cursed and threatened a worker named Edmund Francis, who fought back with a cutting bar, knocking Roby unconscious.¹⁵³ Roby was taken for treatment, but the disturbance grew, and soon more than 100 laborers had gathered outside the gate of a superintendent's house.¹⁵⁴ Throughout the day, shouts and rock-throwing gave way to exchanges of gunfire. Some of the white superintendents were killed, and a group of Black workers were charged with murder.¹⁵⁵

Through the Brotherhood of Liberty, an organization aimed at ameliorating racial discrimination, community members raised funds to mount a defense, hiring Joseph Davis and Everett Waring, two of the first Black men admitted to practice in Baltimore, as their lawyers.¹⁵⁶ They argued, among other things, that the defendants were not subject to suit because Navassa, having never legally been acquired, was simply not part of the United States and thus not subject to its laws.¹⁵⁷

The argument did not make it far with the Supreme Court. The Justices unanimously concluded that "the President, exercising the discretionary power conferred upon him by the Constitution and laws, was satisfied that the Island of Navassa was not within the jurisdiction of Hayti, or of any foreign government."¹⁵⁸ The recognition of *de facto* sovereignty was, the Justices held, a political question beyond the ability of courts to resolve.¹⁵⁹

152. SKAGGS, *supra* note 47, at 178-90 (summarizing testimony in the five separate trials carried out in 1889 and 1890).

153. *Id.* at 178-79.

154. *Id.* at 179.

155. See Dan Fesperman, *A Man's Claim to Guano Knee-Deep in Bureaucracy: Island Fortune in Fertilizer Has Baltimore Connection*, BALT. SUN (July 19, 1998), <https://www.baltimoresun.com/news/bs-xpm-1998-07-19-1998200032-story.html> [<https://perma.cc/72PR-AR3K>] (describing how Roby and the defendants were portrayed in the press).

156. For detail on the lawyers involved and the context, see David S. Bogen, *The Forgotten Era*, 19 MD. BAR J. 10, 10-11 (1986); J. CLAY SMITH, JR., *EMANCIPATION: THE MAKING OF THE BLACK LAWYER 1844-1944*, at 144-45 (1993); and Bruce Thompson, *The Civil Rights Vanguard: The NAACP and the Black Community in Baltimore, 1931-1942*, at 28 (1996) (Ph.D. dissertation, University of Maryland) (ProQuest).

157. SKAGGS, *supra* note 47, at 186.

158. *Jones v. United States*, 137 U.S. 202, 223 (1890).

159. See Anthony J. Colangelo, "De Facto Sovereignty": *Boumediene and Beyond*, 77 GEO. WASH. L. REV. 623, 648 (2009) (calling *Jones* "[t]he first opinion specifically to state that *de facto* sovereignty is a political question"). As Christina Duffy Ponsa-Kraus notes, *Jones* "suggested that the United States had extended 'sovereignty' over Navassa (when it deferred to the political branches' determination of 'who is the sovereign, *de jure* or *de facto*, of a territory')." Burnett [Ponsa-Kraus], *supra* note 49, at 793.

[I]f the executive, in his correspondence with the government of Hayti, has denied the jurisdiction which it claimed over the Island of Navassa, the fact must be taken and acted on by this court as thus asserted and maintained; it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong; it is enough to know that in the exercise of his constitutional functions he has decided the question.¹⁶⁰

This meant that courts could not deny the NPC's claim to Navassa under the Guano Islands Act and, thus, that the defendants were subject to prosecution in U.S. courts.¹⁶¹ For our purposes, though, the key sentiment expressed by the Court was that the islands acquired under the Act were "in the possession of the United States."¹⁶² That distinction is traceable to the Guano Islands Act and would later become central to the *Insular Cases*, as we explore in more detail below.¹⁶³

And yet the Supreme Court's treatment of Navassa as a possession also left the door open for potential remedies. For ill and potentially for good, Congress can do things vis-à-vis territories (possessions) that it cannot do vis-à-vis states (sovereign territory). Consider the following from Felix Frankfurter, who was working on Territorial Affairs in the War Department in 1914:

The form of the relationships between the United States and unincorporated territory is solely a problem of statesmanship. History suggests a great diversity of relationships between a central government and dependent territory. The present day shows a great variety in actual operation. One of the great demands upon inventive statesmanship is to help evolve new kinds of relationship[s] so as to combine the advantages of

160. *Jones*, 137 U.S. at 221; see also *id.* at 212 ("Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government."); Colangelo, *supra* note 159, at 649 ("*Jones* therefore stands for the rule that sovereignty determinations, whether 'de jure or de facto,' are exclusively political and that the courts take notice of those determinations as made by the political branches.")

For a critique of the opinion, see Dickinson, *supra* note 128, at 456-59, which argues that "the only question which could be denominated 'political'" was the President's denial of Haiti's claim, and that "there was nothing properly called 'political'" in "the constitutionality of the statute" or "whether Navassa had been considered as appertaining to the United States pursuant to the legislation of Congress."

161. *Jones*, 137 U.S. at 223-24.

162. *Id.* at 204.

163. See *infra* notes 204-226 and accompanying text.

local self-government with those of a confederated union. Luckily, our Constitution has left this field of invention open.¹⁶⁴

Frankfurter was writing of the inhabited territories, but the point about “statesmanship” applies even more clearly to uninhabited territories like Navassa. Congress could not, for example, return Texas to Mexico. But it could return Navassa to Haiti. We will further examine such possibilities in Part III. But first, we return to Navassa’s story.

D. *The End of Commerce on Navassa: The Flag Flies Alone*

Although *Jones* represented a loss for Waring and his legal team, the case did contribute to the end of the NPC’s misrule in Navassa. Coverage of the case helped bring attention to the appalling working conditions on the island, inspiring President Harrison to write to the Secretary of the Navy, “In view of the evidence developed in the trial of the Navas[s]a . . . rioters, I am inclined to believe that there is something worthy of investigation . . . I do not intend that any system of slavery shall be maintained on that island.”¹⁶⁵ Effectively – and in keeping with our focus here – Harrison was troubled that the NPC, having only private-property interests, was operating as if Navassa were beyond the sovereignty of the United States (which, ironically, would have vindicated the defendants in *Jones*). He expressed concern that “the rioters were ‘American citizens’ who had been working ‘within American territory’” and yet outside of the protection of the U.S. government.¹⁶⁶ “It is inexcusable that American laborers should be left within our own jurisdiction without access to any Government officer or tribunal for their protection and the redress of their wrongs.”¹⁶⁷

President Harrison sent a delegation to investigate the situation, which confirmed that an American worker, “Fred Carter (a [B]lack man from Washington, D.C.),” had been denied passage home after his term of work was complete.¹⁶⁸ In an article on May 14, 1891, the *New York Times* reported “[s]laves under our

164. José Trías Monge, *Injustice According to Law: The Insular Cases and Other Oddities*, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION, *supra* note 2, at 226, 235 (quoting *Mora v. Torres*, 113 F. Supp. 309, 319 (D.P.R. 1953)); *see also* *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1876 (2016) (describing Puerto Rico’s commonwealth status as a “prime example[]” of Congress’s “broad latitude to develop innovative approaches to territorial governance”).

165. SKAGGS, *supra* note 47, at 191.

166. IMMERWAHR, *supra* note 79, at 55; *see also id.* (noting that President Harrison “worried that the Navassa Phosphate Company had turned part of the United States into its own corporate fiefdom, governed not by law, but by corporate regulations”).

167. OFF. OF THE LEGAL ADVISER, *supra* note 103, at 391 (quoting President Harrison).

168. SKAGGS, *supra* note 47, at 191.

flag,” drawing attention to Carter’s situation and other labor problems on the island.¹⁶⁹ Partly in response, Harrison commuted the sentences of the *Jones* defendants from death to – of all things – hard labor for life.¹⁷⁰

Soon enough, the NPC faced its own form of reckoning. The island was evacuated in 1898 during the Spanish-American War,¹⁷¹ and the company soon ceased its operations.¹⁷² Although Navassa still had its guano, the development of inorganic fertilizers and the discovery of phosphate deposits in the continental United States undermined the value of Navassa’s supply.¹⁷³ A small crew of workers returned to the island, mostly to maintain it.¹⁷⁴ And, as Skaggs put it,

When this last Navassa work crew reportedly reached the mainland about June 12, 1901, for all practical purposes the great guano rush in the United States ended. No island, rock, or key claimed under the Guano Act was subsequently worked by Americans, although several of them – rediscovered by the U.S. government – were later occupied and exploited for other purposes.¹⁷⁵

That last point is an important and ongoing part of the story. Under the terms and rationale of the Guano Islands Act, the conclusion of mining operations

169. *Slaves Under Our Flag: A Strike at the Navassa Phosphate Island*, N.Y. TIMES, May 14, 1891, at 9, reprinted in SKAGGS, *supra* note 47, at 194.

170. DENNIS PATRICK HALPIN, *A BROTHERHOOD OF LIBERTY: BLACK RECONSTRUCTION AND ITS LEGACIES IN BALTIMORE, 1865-1920*, at 88 (2019). Explaining the pardon, President Harrison emphasized the theme of sovereignty: “They were American citizens under contracts to perform labor upon specified terms within American territory removed from any opportunity to appeal to any court or public officer for redress of any injury or the enforcement of any civil right. Their employers were, in fact, their masters.” *Id.*

171. OFF. OF THE LEGAL ADVISER, *supra* note 103, at 392. Ironically, that war marked the territorial apex of U.S. empire. See BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* 216 (2006) (“[T]he United States never encompassed as large an area as it did between March 1899 and May 1902.”).

172. Jensen, *supra* note 49.

173. *Id.*

174. *See id.* (noting that the United States built and “manned” a lighthouse on Navassa). In March of that year, the wife of Navassa’s superintendent wrote to the Department of State asking that a naval vessel be sent to rescue her husband and the island’s remaining workers, who she feared were starving. The dispatched naval vessel – remarkably named the USS *Mayflower* – reported that the men were all right. SKAGGS, *supra* note 47, at 197.

175. SKAGGS, *supra* note 47, at 197.

meant that the islands could be deannexed.¹⁷⁶ And some guano islands did indeed slip away in such a fashion.¹⁷⁷ But for others, new reasons to assert control emerged—not to protect private-property interests, but essentially to exercise the sovereign authority that Seward had disclaimed. For example, many of the islands proved valuable as government airstrips, especially in the vast Pacific.¹⁷⁸

Navassa was put to use in a different way. As the D.C. Circuit would observe nearly a century later,¹⁷⁹ “[i]n 1913, Congress sanctioned the termination of guano mining interests on Navassa Island by appropriating \$125,000 for the construction of a lighthouse.”¹⁸⁰ Especially in anticipation of the Panama Canal’s opening in 1914, there was some concern that Navassa could prove to be a dangerous obstacle to shipping.¹⁸¹ Haiti again objected, calling the project an “invasion of the sovereign rights of the Republic of Haiti on the island.”¹⁸² A 1932 State Department report provides a remarkable account of Haiti’s complaint and the United States’s dismissive response:

When the Haitian Government learned that the Department of Commerce was erecting a light on Navassa, it entered a formal protest The Secretary of State replied that the present administration of

176. 48 U.S.C. § 1419 (2018) (specifically noting the power of the United States to deannex islands once the guano had been removed from them).

177. See Davies, *supra* note 140 (“The United States still does control and own—has sovereignty over some of those guano islands. Some of them, interestingly, it sort of forgets about. Once the guano is scraped clean, it allows Britain and France to gain control over them.” (quoting Daniel Immerwahr)).

178. *Unoccupied Territories: The Outlying Islands of America’s Realm*, CTR. FOR LAND USE INTERPRETATION, <https://clui.org/section/unoccupied-territories-outlying-islands-americas-realm-0> [<https://perma.cc/W2T7-PQ2T>] (describing runways on many of the islands acquired under the Act, including Midway Atoll, Baker Island, Johnson Atoll, and Howland Island). Amelia Earhart disappeared on her way to Howland Island. See *Howland Island: About the Refuge*, U.S. FISH & WILDLIFE SERV. (Feb. 18, 2014), https://www.fws.gov/refuge/Howland_Island/about.html [<https://perma.cc/VDA9-HUUV>].

179. Navassa’s status is *still* disputed, as at least one industrious citizen continues to pursue a claim under the Guano Islands Act. For decades now, a California-based “treasure hunter,” Bill Warren, has been claiming the island, which he says he purchased from a descendant of one of its final inhabitants. Charles, *supra* note 100. Warren also argues that “[n]othing in the Guano Act said you couldn’t use it on an island that had been already mined,” so he has filed the requisite “‘affidavit of discovery, occupation, and possession’ with the State Department.” Jensen, *supra* note 49.

180. Warren v. United States, 234 F.3d 1331, 1336 (D.C. Cir. 2000).

181. Lawrence, *supra* note 115 (“Anticipating substantially increased maritime traffic after the Panama Canal opening in 1914, some naval authorities feared that in stormy weather Navassa would become a dangerous hazard to navigation. In 1913 Congress authorized construction of a lighthouse on the island.”).

182. SKAGGS, *supra* note 47, at 201.

Haiti had never been formally recognized by the United States, so that it was not necessary for the latter to take official notice of the protest as requested.¹⁸³

It bears reiterating that this dismissal came more than a half century after Haiti had been officially recognized by the United States.

Three years later, President Woodrow Wilson declared that the United States would only use the island for a lighthouse and prohibited private claims to occupy the island for any other purpose.¹⁸⁴ Furthermore, he declared that “Navassa is now under the sole and exclusive jurisdiction of the United States and out of the jurisdiction of any other Government.”¹⁸⁵ As we describe below, the “now” in that sentence is significant—the State Department itself had long disclaimed U.S. sovereignty over Navassa.¹⁸⁶ But “[s]ince the date of the proclamation by President Wilson the Department of State has uniformly declared that Navassa Island forms a part of the territory of the United States.”¹⁸⁷

President Wilson’s stance on Navassa is noteworthy in light of his advocacy for self-determination—the power of “peoples” to decide their own national affiliation.¹⁸⁸ Despite professing support for self-determination and sympathy for colonized peoples, Wilson showed neither in his dealing with Haiti. In 1915, he sent the U.S. Marines to take over the island, removing large amounts of currency for “safekeeping” and ensuring the election of a pro-U.S. (but otherwise unpopular) president.¹⁸⁹ It was also under Wilson that the United States purchased the U.S. Virgin Islands from Denmark in 1917¹⁹⁰—the last direct, outright

183. OFF. OF THE LEGAL ADVISER, *supra* note 103, at 401-02 (citing Letter from Solon Ménos, Haitian Minister to U.S., to Robert Lansing, Sec’y of State (July 5, 1915) (811.822.8)).

184. SKAGGS, *supra* note 47, at 201.

185. *Id.* at 201.

186. See *infra* notes 230-237 and accompanying text.

187. Guano Islands, 1 HACKWORTH DIGEST, ch. IV, § 77, at 514.

188. See Allen Lynch, *Woodrow Wilson and the Principle of ‘National Self-Determination’: A Reconsideration*, 28 REV. INT’L STUD. 419, 419-22 (2002).

189. Off. of the Historian, *supra* note 125 (“As a result of increased instability in Haiti in the years before 1915, the United States heightened its activity to deter foreign influence In 1915, Haitian President Jean Vilbrun Guillaume Sam was assassinated and the situation in Haiti quickly became unstable. In response, President Wilson sent the U.S. Marines to Haiti to prevent anarchy.”).

190. The United States purchased the Danish West Indies from Denmark, in the process ceding U.S. claims to portions of Greenland. See Convention Between the United States and Denmark for Cession of the Danish West Indies, Den.-U.S., Aug. 4, 1916, 39 Stat. 1706.

sale of sovereignty in world history¹⁹¹—and, more important for our story, another territory whose predominantly darker-skinned inhabitants did not then, and do not today, have rights equal to those on the mainland.¹⁹²

The Navy established a radio station on Navassa after World War I.¹⁹³ The lighthouse was automated in 1929, and, during World War II, the island became the site of both a reconnaissance unit and a rescue launch designed to defend against German submarines.¹⁹⁴ Today, even the lighthouse is defunct, and the island is administered as a wildlife refuge controlled by the U.S. Fish and Wildlife Service.¹⁹⁵

As the Guano Islands Act demonstrates, sovereignty has often followed property claims. Might property claims also help unwind sovereignty? To understand if, why, and how, we must consider in greater depth the relationship between the two concepts—a topic of considerable interest to contemporaneous scholars, though their contributions have not been connected to the law of the territories.

II. WHY NAVASSA MATTERS: RECENTERING SOVEREIGNTY AND PROPERTY

In 1927, right between when the Supreme Court handed down the last of the *Insular Cases*¹⁹⁶ and when Congress passed the Philippines Independence Act (which put in motion the release of the United States's largest colony),¹⁹⁷ Morris Cohen wrote his classic *Property and Sovereignty*.¹⁹⁸ It opens with the sly observation, “Property and sovereignty, as every student knows, belong to entirely

191. See *If States Traded Territory: A Country Market*, ECONOMIST: THE WORLD IF (May 16, 2016, 6:46 PM), <http://worldif.economist.com/article/12138/country-market> [https://perma.cc/S28X-LPMD] (identifying this as “the last time a country has directly sold control over territory to another”). Interestingly, the first attempt to purchase the islands was by none other than William Seward in 1867. THOMAS A. BAILEY, A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE 361-63 (1958) (noting “Seward’s attempt to buy the Danish West Indies (Virgin Islands), which boasted an excellent naval-base harbor on St. Thomas”).

192. As with Puerto Rico, residents of the U.S. Virgin Islands are considered citizens, but cannot vote in federal elections. See *Goodwin v. Fawkes*, 67 V.I. 104, 109 (2016).

193. Lawrence, *supra* note 115.

194. *Id.*

195. *Id.*

196. See *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Ocampo v. United States*, 234 U.S. 91 (1914).

197. Philippine Independence Act, Pub. L. No. 72-311, Ch. 11, 47 Stat. 761 (1933), amended by Philippine Independence Act, Pub. L. No. 73-127, Ch. 84, 48 Stat. 456 (1934).

198. Cohen, *supra* note 23.

different branches of the law”¹⁹⁹ – one dealing with private law and the other public law. Cohen proceeded to demolish that distinction, demonstrating “the actual fact that dominion over things is also imperium over our fellow human beings.”²⁰⁰

Cohen’s essay remains a touchstone in legal theory²⁰¹ – the “foundational text” for analyzing the relationship between property and sovereignty.²⁰² But unlike the public-law scholarship that preceded and helped shape the *Insular Cases*,²⁰³ the insights of private law and theory have not been mined in scholarship on the law of the territories.

Drawing on the story of Navassa laid out above, Section II.A shows that the relationship between property and sovereignty was central to the treatment of the territories from the passage of the Guano Islands Act all the way through the *Insular Cases* and, crucially, the evolving views of the State Department’s Office of the Legal Adviser. The line between the concepts was not and is not bright, but it is nonetheless immensely consequential. Supreme Court Justices and State Department lawyers treated it as meaningful, and toggled between the two frames in ways that served the interest of the mainland United States.

In Section II.B, we turn to the general – and contemporaneous – shift in international law from thinking about territory as property to treating it as an immutable part of the sovereign. This broad shift brought with it some desirable legal rules, for example by requiring colonial powers to take on the burdens as well as the benefits of governance and ownership – what the United States had tried to avoid with the territories.

And yet other elements of that shift threatened to freeze existing colonial structures in place, such as the principles of territorial sovereignty and *uti posseditis*, which favor governmental maintenance of existing boundaries and thus make it harder to unwind the status of the U.S. territories and other lingering colonies throughout the world. As Part III argues, recovering some aspects of the property conception can illuminate arguments and concrete remedies that might not be visible or available under the sovereignty framework.

199. *Id.* at 8.

200. *Id.* at 13. See also H.L.A. HART, *ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY* 183 (1982) (describing a holder of property rights as a “small-scale sovereign”).

201. For a recent discussion, see *supra* note 23 and sources cited therein.

202. Thomas W. Merrill, *Property and Sovereignty, Information and Audience*, 18 *THEORETICAL INQUIRIES L.* 417, 419 (2017).

203. See sources cited *infra* note 204.

A. *Navassa and the Law of the Territories: How the Insular Cases and the State Department Manipulated the Categories of Sovereignty and Property*

Discussions of the law of the territories tend to focus on the *Insular Cases*. Those decisions were both influenced by scholarship—principally five articles published in the *Harvard Law Review* in 1898 and 1899 by luminaries like C.C. Langdell, Abbot Lawrence Lowell, and James Bradley Thayer²⁰⁴—and have been subject to scholarly examination ever since, especially in recent years.

In the *Insular Cases*, the Supreme Court drew a line between incorporated territories, which are “part of” the United States, and unincorporated territories, which “belong[] to” it.²⁰⁵ “Incorporated” territories are on their way to statehood and hence subject to the restrictions of the Constitution; “unincorporated” territories are not.²⁰⁶ The latter category includes not only Puerto Rico, but the Northern Mariana Islands, Guam, the U.S. Virgin Islands, American Samoa, and the guano islands.²⁰⁷ As Chief Justice Fuller put it in his dissent in *Downes v. Bidwell*, the most famous of the *Insular Cases*, “the contention [of the majority opinion] seems to be that if an organized and settled province of another sovereignty is acquired by the United States, Congress has the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period.”²⁰⁸ And Sanford Levinson has argued that the *Insular Cases*,

should be placed not only in the context of American expansionism, but also within the sadly rich history of American racism or, perhaps more to

204. See, e.g., Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291 (1898); Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393 (1899); C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365 (1899); James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464 (1899); Abbott Lawrence Lowell, *The Status of Our New Possessions—A Third View*, 13 HARV. L. REV. 155 (1899); see also *Developments in the Law—The U.S. Territories*, 130 HARV. L. REV. 1616, 1617 (2017) (noting the influence of these articles and calling it a “time this journal might rather forget”); Sam Erman, *Accomplices of Abbott Lawrence Lowell*, 131 HARV. L. REV. F. 105, 105-06 (2018) (acknowledging the influence of the *Harvard Law Review* articles, and positing that “Lowell was only one member of a broader set of influential nonjudicial actors”).

205. *Downes v. Bidwell*, 182 U.S. 244, 287 (1901).

206. Edward C. Carter, III, *The Extra-Territorial Reach of the Privilege Against Self Incrimination or Does the Privilege “Follow the Flag?”*, 25 S. ILL. U. L.J. 313, 320 (2001).

207. The uninhabited atoll of Palmyra “enjoys the curious distinction of being the only American jurisdiction outside the fifty states and the District of Columbia to which the U.S. Constitution applies ‘in its entirety.’ This is because Palmyra possess a unique legal status within the framework of U.S. law: it is the only ‘incorporated’ territory of the United States.” Burnett [Ponsa-Kraus], *Edges of Empire*, *supra* note 49, at 779.

208. *Downes*, 182 U.S. at 372 (Fuller, C.J., dissenting).

the point, the history of American “ascriptivism,” the view that to be a “true American,” one had to share certain racial, religious, or ethnic characteristics.²⁰⁹

But it was years earlier in *United States v. Jones* that the Supreme Court upheld the validity of the Guano Islands Act and declared that the question of de facto sovereignty was a matter of presidential concern that was not for the courts to second guess.²¹⁰ That holding, as described above, laid the foundation for American empire. And indeed, *Downes* would later cite *Jones* as evidence of the country’s power to acquire overseas territory.²¹¹ *Jones* thus deserves a greater share of the attention recently given to the *Insular Cases*, not only because it provided a legal basis for the acquisition of overseas territories, but also because it illuminates how frames of property and sovereignty can be used and abused.

Jones and the Guano Islands Act on which it was based were the channels by which the conceptual ambiguity between sovereignty and property found its way into the *Insular Cases* and was used to assert U.S. control without the accompanying obligations of governance. Consider the concept of “appurtenance,” which continues to haunt the law of the territories. As noted above, that legal concept – seemingly borrowed from the common law of property²¹² – was written into the Guano Islands Act, rather than (as earlier drafts of the Act would have it) “sovereignty.”²¹³ The Supreme Court relied on the concept in *Jones* and then again, a decade later, in the *Insular Cases*.²¹⁴

The blurring and manipulation of property and sovereignty frameworks allowed the United States to project sovereign authority abroad, but property-like authority domestically. For domestic purposes, the fact that the United States owned the territories meant that the people of those territories had little political control over their fates. For external purposes, the fact that the United States simultaneously also had sovereignty meant that no foreign sovereign could merge with the territory and grant its people greater rights.

209. Sanford Levinson, *Why the Canon Should Be Expanded to Include the Insular Cases and the Saga of American Expansionism*, 17 CONST. COMMENTARY 241, 257 (2000).

210. See *supra* Section I.D.

211. *Downes*, 182 U.S. at 304-06 (White, J., concurring) (incorporating *Jones* into a broader history of the United States’s territorial acquisitions and the legal justifications for them).

212. *Appurtenance*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining appurtenance as “[s]omething that belongs or is attached to something else; esp., something that is part of something else that is more important,” and noting that the term “in former times at least was generally employed in deeds and leases”) (quoting 1 H.C. UNDERHILL, A TREATISE ON THE LAW OF LANDLORD AND TENANT § 291, at 442-43 (1909)).

213. See *supra* notes 83-84 and accompanying text.

214. *Downes*, 182 U.S. at 306-07.

In the case of Navassa, this meant denying Haiti's claim to sovereignty without actually making a competing claim of U.S. sovereignty. It is a state of affairs well-captured by the *Insular Cases*' phrase "foreign . . . in a domestic sense"²¹⁵ — not fully a part of the United States and yet also effectively "domestic in a foreign sense," since the United States would not permit other nations to claim (or for that matter offer) sovereignty over the island.²¹⁶ After all, from the perspective of an imperial power, maintaining an exclusive option to exercise sovereignty is even more valuable than actually doing so, given the concomitant obligations. If it were truly "belonging to," then other would-be buyers could make bids, as with other forms of property. In her legal history of the relationship between the American-claimed guano islands and the United States, Christina Duffy Ponsa-Kraus emphasizes this point: "[T]he United States acquired territory and projected American power, to be sure, but all the while U.S. officials insisted on disclaiming sovereignty, and on denying that such places had become part of the 'territorial domain' of the United States."²¹⁷

Of course, the story is also one of simple racism, both within the courts and in the executive branch — a manifestation of the "white man's burden."²¹⁸ Presi-

215. *Id.* at 341.

216. See Erman, *supra* note 20, at 1223 (noting "the novel status that these [guano] islands were to occupy: within U.S. control vis-à-vis other nations, yet untouched by such domestic consequences of annexation as the extension of constitutional rights"). It is worth noting that in 1870, President Ulysses S. Grant and his Secretary of State, Hamilton Fish, tweaked and expanded the Monroe Doctrine, such that "hereafter no territory on this continent shall be regarded as subject to transfer to a European power." GEORGE C. HERRING, FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776, at 259 (2008) (internal quotations omitted).

217. Burnett [Ponsa-Kraus], *supra* note 49, at 781.

218. "White Man's Burden" is Rudyard Kipling's poem about the Philippine-American War, which exhorts the United States to take colonial control of the Philippines, while warning about the pitfalls of imperial expansion. See Int'l Herald Trib., 1899: *Kipling's Plea: In Our Pages: 100, 75, and 50 Years Ago*, N.Y. TIMES: OPINION (Feb. 4, 1999), <https://www.nytimes.com/1999/02/04/opinion/IHT-1899kiplings-plea-in-our-pages100-75-and-50-years-ago.html> [<https://perma.cc/SM3G-5FTN>] ("An extraordinary sensation has been created by Mr. Rudyard Kipling's new poem, 'The White Man's Burden,' just published in a New York magazine. It is regarded as the strongest argument yet published in favor of expansion."). Senator "Pitchfork" Benjamin R. Tillman famously read a portion of the poem in Congress in the course of arguing that the United States should *not* take over this land of uncivilized peoples. Tillman said, among other things:

Those peoples are not suited to our institutions. They are not ready for liberty as we understand it. They do not want it. Why are we bent on forcing upon them a civilization not suited to them and which only means in their view degradation and a loss of self-respect, which is worse than the loss of life itself?

32 CONG. REC. 1,532 (1899) (statement of Sen. Benjamin R. Tillman).

dent Theodore Roosevelt praised “the expansion of the peoples of white, or European, blood” into the lands of “mere savages.”²¹⁹ William McKinley’s 1900 platform justified American expansion as aimed at conferring the “blessings of liberty and civilization upon all the rescued peoples.”²²⁰ As for the Supreme Court—the same basic lineup of Justices that decided *Plessy v. Ferguson*²²¹—Puerto Rico and the other new territories were “inhabited by alien races,” such that governing them “according to Anglo-Saxon principles, may for a time be impossible.”²²²

Because the guano islands—including Navassa—were largely uninhabited, the virulent racism that animated so much of the United States’s imperial project was not prominent in discussions of the islands’ status, except with regard to competing claims from countries like Haiti.²²³ But when opponents of imperial expansion quailed at the prospect of sharing citizenship with the people of, for example, the Philippines, the solution was to treat the islands partially as property. Casting inhabited territories as possessions denied their residents the same rights and status as those on the mainland—precisely because they were seen as less civilized.²²⁴ As the Justices said in an earlier case: “The people of the United

219. President Theodore Roosevelt, Speech, *Expansion of the White Races* (Jan. 18, 1909).

220. *Republican Party Platform of 1900*, AM. PRESIDENCY PROJECT (June 19, 1900), <https://www.presidency.ucsb.edu/documents/republican-party-platform-1900> [<https://perma.cc/24YU-ZEC5>]; see also Christina Duffy Burnett [Ponsa-Kraus] & Burke Marshall, *Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented*, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION AND THE CONSTITUTION, *supra* note 2, at 1, 4 (“The election of 1900 largely turned upon the so-called issue of Imperialism.” (quoting Frederic R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823, 823 (1926))); José A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans*, 127 U. PA. L. REV. 391, 395 (1978) (“The expansion of American power and influence precipitated a great national debate on imperialism, a debate that moved the nation for several years before and after the Spanish-American war and dominated the presidential election campaign of 1900.”).

221. 163 U.S. 537 (1896).

222. *Downes v. Bidwell*, 182 U.S. 244, 287 (1901); see also Doug Mack, *The Strange Case of Puerto Rico*, SLATE (Oct. 9, 2017, 5:45 AM), <https://slate.com/news-and-politics/2017/10/the-insular-cases-the-racist-supreme-court-decisions-that-cemented-puerto-ricos-second-class-status.html> [<https://perma.cc/XD72-EFAF>] (arguing that the *Insular Cases* were “built on the same racist worldview” as *Plessy*).

223. See *supra* notes 114-126 and accompanying text.

224. See, e.g., Russell, *supra* note 144, at 239 (referring to the inhabitants of newly acquired territories as “at such a low stage of human development as to be beyond the pale of constitutional guarantees. Though belonging in some sense to the United States, they cannot be for a moment considered as citizens of the United States”).

States, as sovereign owners of the National Territories, have supreme power over them and their inhabitants.”²²⁵

Combining this with the holding of *Jones*—that the determination of sovereignty is one for the political branches—gave enormous power to nonjudicial actors to figure out both whether a territory was subject to U.S. power and how that power would be exercised. For the guano islands, the contemporary foundational analysis would come in the form of an exhaustive State Department report that was, in a sense, the executive branch’s analogue to the *Insular Cases*.²²⁶

In 1931, the U.S. Department of State Office of the Legal Adviser was established, with Green Hackworth as the first Legal Adviser.²²⁷ The very next year, the Office released a nearly 1,000-page report titled *Sovereignty of Islands Claimed Under the Guano Act and of the Northwestern Hawaiian Islands, Midway and Wake*.²²⁸ The report is remarkable for many reasons, not least its clear-eyed accounting of the United States’s fundamentally ambiguous claims of sovereignty over Navassa and other guano islands. It is also a damning indictment of the guano islands enterprise in general. Indeed, the report calls for the Guano Islands Act to be repealed, “since the demand for guano has largely disappeared, and since the provisions of the Act have created opportunities for fraud and dishonest speculation with which the State Department has been wholly unable to cope.”²²⁹

For our purposes, the State Department’s self-accounting illustrates in practical terms the conceptual malleability and overlap that Cohen and other legal theorists identified between the concepts of property and sovereignty. In the words of the report, “before 1925 no unequivocal assertion of complete sovereignty was made” to any guano island. To the contrary, “there were a number of denials of sovereignty.”²³⁰ The report here points to the Department’s own prior representations, including an 1873 statement to the Postmaster General that the United States “possesses no sovereign or territorial rights over the islands,” a 1904 statement to the Commerce and Labor Department that U.S. jurisdiction

225. *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885).

226. *Cf.* Erman, *supra* note 204, at 111-13 (emphasizing the importance of executive-branch actors in shaping the principles laid out in the *Insular Cases*).

227. The *Digest of International Law*—familiar to scholars researching historical questions in international law—is commonly known as “Hackworth.”

228. The relevant section is titled “The Sovereignty of Guano Islands in the Caribbean Sea”. Its introduction notes, optimistically, “It is to be hoped that the information here set forth will enable the United States to determine the islands in the Caribbean Sea over which it now claims or may legally claim, sovereignty, and the bases for such claims.” OFF. OF THE LEGAL ADVISER, *supra* note 103, at 374.

229. *Id.* at 149 (“The Sovereignty of the Islands of Roucador, Quito Seno, Serrana, and Seranilla.”).

230. *Id.* at 325-26 (“The Swan Islands Case.”).

extended “solely for the purpose of extracting guano,” and a 1917 statement to the Department of the Navy that “this Government has taken no steps to extend its own sovereignty” over the guano islands.²³¹

The turning point seems to have come in a dispute with Honduras regarding the Swan Islands, which were of interest to the U.S. Navy. In 1924, Secretary of State and future Chief Justice Hughes asked Attorney General John G. Sargent to investigate the matter. A 1918 opinion of the Acting Attorney General had concluded that the Swans had never been acquired under the Guano Islands Act. But Sargent—pointing to an 1863 proclamation by Secretary Seward—concluded to the contrary “that the sovereignty of the United States attached to said islands as of that date.”²³² Prior to Sargent’s statement, the State Department had “a wavering uncertainty—an uncertainty which characterized the attitude of this government with respect to all guano islands.”²³³ But “[a]fter that opinion[,] sovereignty was claimed” in the Swans and elsewhere.²³⁴

The story of Navassa diverges a bit from those of the other guano islands, though it, too, begins with outright denials of sovereignty. In 1905, W.S. Carter wrote to the State Department asking if he might purchase the island from the United States, to which the Department replied unequivocally, “this Government possesses no territorial sovereignty over the Island of Navassa.”²³⁵ Instead, the Department employed the now-familiar “appurtenance” terminology. Replying to a 1906 letter asking whether Navassa was still under U.S. jurisdiction, the Department of State said, “Navassa Island has not been stricken from the list of guano islands appertaining to the United States under these Acts.”²³⁶

By this time, the island was no longer being mined for guano, and plans were being developed to build a lighthouse there. Answering an inquiry about the latter in 1907, the State Department was even more equivocal, denying even that the island “belong[ed]” to the United States, while maintaining that it “is in a position to assert full sovereignty”:

[I]t does not appear that the United States has surrendered its jurisdiction over Navassa Island under the guano acts, and . . . so far as is known to the Department, neither Haiti nor any other power has attempted to

231. *Id.* at 326.

232. SKAGGS, *supra* note 47, at 205-06 (quoting *Sovereignty Over Swan Islands*, 34 Op. Att’y Gen. 507, 515 (1925)).

233. *Id.* at 206 (quoting OFF. OF THE LEGAL ADVISER, *supra* note 103, at 325).

234. *Id.*

235. OFF. OF THE LEGAL ADVISER, *supra* note 103, at 396 (“The Sovereignty of the Guano Islands in the Carribean Sea.”).

236. *Guano Islands*, 1 HACKWORTH DIG. INT’L L., ch. IV, § 77, at 512.

assert sovereignty over the island because of any supposed abandonment thereof by the United States.

However, assuming that this Government still has jurisdiction over Navassa Island under the guano acts, it would seem that the Government itself has interpreted such jurisdiction to be so limited that it cannot be claimed that this or other guano islands “belong” to the United States, within the meaning of section 4660 R.S., or that the United States exercises “jurisdiction” over them within the meaning of R.S. 4661; so that there is no present authority to erect a light-house thereon by virtue of R.S. 4653-4680 defining the authority of the Light-House Board and providing for the erection of light-houses under its direction.

Nevertheless, it would appear that internationally speaking this Government is in a position to assert full sovereignty over Navassa Island should such action be deemed desirable, and that no other government could reasonably object to such assertion.²³⁷

This explanation neatly encapsulates the netherworld that continues to ensnare Navassa and other territories. One important and often overlooked aspect of this limbo is a denial of opportunities to affiliate with other nations.²³⁸ In effect, the territories have neither the right of voice (in determining how they are governed by the current sovereign) nor the right to exit (in determining whether they shall stay in the current relationship, to the extent their welfare is being ignored).²³⁹ In economic terms, they are denied the option value of being able to change their current status.

What eventually broke the logjam for Navassa was domestic pressure—the United States itself needed a clearer answer as to whether the island “belong[ed] to” or was “part of” the country. In the State Department’s telling, “[e]vidently the Commerce Department grew tired of this procedure”²⁴⁰ and, in 1913, Congress appropriated \$125,000 for the construction of a lighthouse on Navassa.²⁴¹

237. *Id.*

238. There is an analogy here to the legal rule forbidding American Indians from selling Native land to anyone but the federal government, Eric Kades, *The Dark Side of Efficiency: Johnson v. M’Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1105 & n.167 (2000), or from affiliating with other nations. See Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1042-43 (2014).

239. Guy-Uriel Charles & Luis Fuentes Rohwer, *No Voice, No Exit, but Loyalty? Puerto Rico and Constitutional Obligation*, 26 MICH. J. RACE & L. 133, 136-37 (2021).

240. OFF. OF THE LEGAL ADVISER, *supra* note 103, at 399.

241. Act of Oct. 22, 1913, ch. 32, 38 Stat. 224.

As noted above, President Wilson’s 1916 proclamation in connection with that lighthouse is generally regarded as resolving the ambiguity—from then on, Navassa was considered subject to U.S. sovereignty.²⁴²

Still, ambiguity persisted. In a 1927 letter, the Department referred to Navassa as one of the “possessions of the United States, outside the territorial boundaries of the United States.”²⁴³ And in a 1933 article, Roy F. Nichols—citing a 1932 correspondence from Acting Secretary of State W.R. Castle—concluded that the Act,

as interpreted by the State Department was not intended to invest the United States with sovereignty over any of these guano islands and the proclamation simply stated that the Secretary of State recognized the fact that the island was being occupied in the name of the United States. Presumably the legal status of the island was that of an “appurtenance” rather than a “possession.”²⁴⁴

In short, the conceptual confusions and paradoxes at the heart of the *Insular Cases*—the distinction between incorporated territories (“part of”) and unincorporated territories (“belong to”)—also appear in the records of the political actors that *Jones* charged with resolving them. The use and abuse of property and sovereignty frames by courts and State Department lawyers demonstrates precisely why it is important to be clear about the consequences that flow from each—the distinction between property and sovereignty is fuzzy, but it matters. Cohen’s goal was not to steer attention away from the distinction between property and sovereignty, but to show how they—like private and public law more broadly²⁴⁵—are deeply imbricated. The challenge is to identify which tools from which framework are up to the relevant tasks.

B. From Property to Sovereignty in International Law (and Back Again?)

While courts and the State Department were fumbling with the concepts of property and sovereignty in the context of the U.S. territories, parallel developments were afoot in international legal thought. Broadly speaking, international law began in various ways to reject the treatment of territories and colonies as

242. See *supra* notes 184-187 and accompanying text.

243. 1 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 514-15 (1940).

244. Nichols, *supra* note 12, at 508 (citing Letter from W.R. Castle, Acting Secretary of State, to Roy Nichols (Sept. 1, 1932)). The same letter from Castle is cited in HACKWORTH, *supra* note 243, at 515.

245. Koskenniemi, *supra* note 5, at 361-66; see also DESAUTELS-STEIN, *supra* note 3, at 29 (exploring the relationship between property and sovereignty).

property, instead requiring that imperial powers accept the responsibilities of sovereignty. This development both confirmed the importance of the distinction and also contributed, we suspect, to the modern tendency to avoid the language of private law when discussing territories and colonies.

By treating them as property, colonial powers wrung economic advantage out of their far-flung territories without ever accepting them (and, more significantly, their people) as “part of” the metropole, to borrow the language of the *Insular Cases*. As Martti Koskenniemi explains, “greed and the wish for exploitation without administrative and policy costs had led European countries to employ hypocritical techniques of annexation without sovereignty.”²⁴⁶ Doing so allowed imperial powers to expropriate value from the overseas territories without imposing obligations to care for the people there or, worse, have those people come over to the mainland and claim rights.²⁴⁷

Little wonder, then, that human-rights lawyers in the 1920s and 1930s rejected the notion of colonies as possessions, arguing that they should instead be treated as subject to the sovereignty of their colonizers.²⁴⁸ Notably, private-law theorists operating in Cohen’s wake have similarly argued that sovereignty carries with it a kind of good-governance requirement that property appears to lack. Arthur Ripstein, for example, argues that

The most important difference between [property and sovereignty] . . . is that sovereignty has an internal norm, which restricts the purposes for which it may be exercised, because the sovereign is supposed to rule on behalf of, and for the sake of the people; property, by

246. MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960*, at 151 (2004).

247. See, e.g., *id.* at 124-52 (describing the “protectorates” in Africa); Eric A. Posner, *The Limits of Limits*, *NEW REPUBLIC* (May 5, 2010), <https://newrepublic.com/article/74824/the-limits-limits-o> [<https://perma.cc/F94S-UC32>] (describing U.S. relationships with Cuba and other territories); see also Bradley R. Simpson, *Self-Determination, Human Rights, and the End of Empire in the 1970s*, 4 *HUMAN* 239, 251 (2013) (describing the conditions under which Australia gave independence to Nauru and Papua New Guinea); E. Tendayi Achiume, *Migration as Decolonization*, 71 *STAN. L. REV.* 1509, 1533-39 (2019) (describing the effects of colonial imperialism).

Sam Erman has argued that an analogous development in domestic law—the Reconstruction Constitution’s expansion of citizenship and rights—paused U.S. annexation of territories for much of the late 1800s. See Sam Erman, “*The Constitutional Lion in the Path*”: *The Reconstruction Constitution as a Restraint on Empire*, 91 *S. CAL. L. REV.* 1197, 1198-1203 (2018).

248. See KOSKENNIEMI, *supra* note 246, at 109-10; see also PRESS, *supra* note 56, at 249 (arguing that the “view of territory as a simple commodity . . . certainly looked incongruous with dominant themes of the nineteenth century: expanded civil freedoms, democratization, nationalism, parliamentarization”).

contrast, has no internal norm. The owner of property can use it for any purpose whatsoever, subject only to external restrictions.²⁴⁹

But “[f]ar from owning its subjects, in the exercise of official power a legitimate sovereign is required to act on behalf of its subjects.”²⁵⁰ Larissa Katz similarly argues that “all conceptions of public authority – certainly Fullerian, Kantian or Razian accounts – have a conception of public justification.”²⁵¹ One sees similar arguments in the recent push for a fiduciary understanding of governance.²⁵²

But such sovereignty-based rules may have significant costs for colonized peoples and other sometimes-marginalized populations. One is the basic principle of territorial sovereignty which, with some very narrow potential exceptions,²⁵³ gives nations the power to exclude all outsiders. When governments oppress their own people, or reject the needs of the tens of millions of refugees fleeing such oppression, invocations of territorial sovereignty are often treated as a trump card.²⁵⁴

Another principle that receives somewhat less attention is that of *uti possidetis juris*, which operates to keep sovereign borders in place, even when those borders

249. Arthur Ripstein, *Property and Sovereignty: How to Tell the Difference*, 18 THEORETICAL INQUIRIES L. 243, 244 (2017).

250. *Id.* at 248; see also *id.* at 255 (“A sovereign does not own its subjects; although they are in its charge, it is not in charge of them.”).

251. Larissa Katz, *Property’s Sovereignty*, 18 THEORETICAL INQUIRIES L. 299, 323 (2017); see also RICHARD JOYCE, *COMPETING SOVEREIGNTIES* 4 (2013) (arguing that this justification obligation extends only to the community for which the sovereignty claims authority to speak); Anna Stiliz, *Nations, States, and Territory*, 121 ETHICS 572, 578 (2011) (arguing that states “have territorial rights because their jurisdiction serves the interests of their subjects”).

252. See, e.g., EVAN FOX-DECENT, *SOVEREIGNTY’S PROMISE: THE STATE AS FIDUCIARY* 28-30 (2011); Laura S. Underkuffler, *Property, Sovereignty, and the Public Trust*, 18 THEORETICAL INQUIRIES L. 329, 343 (2017).

253. See *supra* notes 27-28 and sources cited therein (discussing self-determination and humanitarian intervention).

254. See Joseph Blocher & Mitu Gulati, *Competing for Refugees: A Market-Based Solution to a Humanitarian Crisis*, 48 COLUM. HUM. RTS. L. REV. 53 (2016).

were drawn by colonial administrators with no real regard for underlying realities or popular preferences.²⁵⁵ Whereas a property conception would more readily enable transfer and change, *uti possidetis* reflects a “bias . . . towards stability”²⁵⁶ that is often defended on the basis that it will prevent violent conflict.²⁵⁷

And yet, international law has never been able to rid itself entirely of the principles and challenges of property and private law. This is partly because governments can and do still own property, some of it inhabited. In U.S. law, the constitutional basis for this proprietary power is the Property Clause²⁵⁸—the same enumerated authority that gives Congress control over Puerto Rico, Guam, Navassa, and the like. As we have explored in other work,²⁵⁹ current international law and relations involve innumerable voluntary transfers of territory between states—including leases and other transactions that directly or indirectly

255. Frontier Dispute (Burk. Faso/Mali), Judgment, 1986 I.C.J. 554, ¶ 20 (Dec. 22); see generally Stuart Elden, *Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders*, 26 SAIS REV. INT’L AFFS. 11, 11 (2006) (identifying “territorial preservation of existing boundaries” as a central tenet of the international-political system); Malcolm Shaw, *The Heritage of States: The Principle of Uti Possidetis Today*, 67 BRIT. Y.B. INT’L L. 75, 76 (1996) (“The principle of *uti possidetis juris* developed as an attempt to obviate territorial disputes by fixing the territorial heritage of new States at the moment of independence and converting existing lines into internationally recognized borders, and can thus be seen as a specific legal package, anchored in space and time, with crucial legitimating functions.”).

256. R.Y. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 70 (1963) (“[T]he bias of the existing law is towards stability This is right, for the stability of territorial boundaries must always be the ultimate aim.”).

257. Frontier Dispute (Burk. Faso/Mali), Judgment, 1986 I.C.J. 554 ¶¶ 19, 26 (Dec. 22) (recognizing the conflict between *uti possidetis* and self-determination, and concluding that maintenance of the status quo was “the wisest course” so as to “prevent the . . . stability of new States being endangered by fratricidal struggles”). The wisdom of this course is debatable, given the prevalence of border conflicts. See JOHN AGNEW, *GEOPOLITICS: RE-VISIONING WORLD POLITICS* 102 (Derek Gregory & Linda McDowell eds., 1998); PAUL K. HUTH, *STANDING YOUR GROUND: TERRITORIAL DISPUTES AND INTERNATIONAL CONFLICT* 69-103 (1996) (discussing the prevalence of territorial disputes).

258. U.S. CONST. art. IV, § 3, cl. 2.

259. See generally Blocher & Gulati, *A Market*, *supra* note 35 (exploring the voluntary exchange of sovereign territory).

limit or transfer sovereign control.²⁶⁰ These are market transactions, with sovereignty itself the resource being transferred. They blur the lines between public and private law.²⁶¹

C. *Decolonization and its Discontents*

The central tensions of sovereignty and property thus stubbornly persist, not only as a problem for legal theory but for practical, daily governance in the U.S. territories and beyond. There is no single solution to these challenges—to accounting for self-determination in a world of territorial sovereignty²⁶² or to theorizing nations' control over resources. We argue in the following Part that one potential path forward is to recover some aspects of the property framework. International law was right to reject the notion that colonies are property of their colonizers. But treating them as sovereign territory either of the colonizer—“part of” in the language of the *Insular Cases*—or as fully independent are not the only options, practically or conceptually. Instead, we can shift the entitlement: the

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260. Jochen von Bernstorff, *The Global 'Land-Grab', Sovereignty and Human Rights*, 2 ESIL REFLECTIONS, Oct. 18, 2013, at 1, 3, https://esil-sedi.eu/wp-content/uploads/2013/10/ESIL-Reflections-von-Bernstorff_o.pdf [<https://perma.cc/DB2C-HYSH>] (noting that when governments enter into large-scale land deals with foreign investors, “territorial sovereignty is affected for instance if large parts of the territory [are] leased to foreign governments for a period of 99 years, which is a standard clause in these land deals”).
261. The privatization debate involves some of the same themes, though with sovereign control changing hands between public and private actors. See generally MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD (2002) (exploring increasing privatization in spheres formerly dominated by governments); Symposium, *Public Values in an Era of Privatization*, 116 HARV. L. REV. 1211 (2003) (presenting various viewpoints and topics dealing with privatization); Symposium, *New Forms of Governance: Ceding Public Power to Private Actors*, 49 UCLA L. REV. 1687 (2002) (addressing increasing privatization).
262. Michael P. Scharf, *Earned Sovereignty: Juridical Underpinnings*, 31 DENV. J. INT'L L. & POL'Y 373, 373 (2003) (“[T]he defining issue in international law for the 21st century is finding compromises between the principles of self-determination and the sanctity of borders.” (quoting Lorie M. Graham, *Self-Determination for Indigenous Peoples After Kosovo: Translating Self-Determination “Into Practice” and “Into Peace,”* 6 ILSA J. INT'L & COMPAR. L. 455, 465 (2000))); see ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 190 (1995) (“In the case of such transfers, the States involved are duty-bound to ascertain the wishes of the population concerned, by means of a referendum or plebiscite, or by any other appropriate means that ensure a free and genuine expression of will. It follows, of course, that any interstate agreement that is contrary to the will of the population concerned would fall foul of the principle of self-determination.” (footnote omitted)); Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177, 201-02 (1991); cf. Sergio Delavalle, *The Dialectics of Sovereignty and Property*, 18 THEORETICAL INQUIRIES L. 269, 280 (2017) (“At the dawn of the nineteenth century, the crisis of the dynastic conception of sovereignty brought about a redefinition of the notion in order to include a more active participation of the governed. As a result, political sovereignty gave way to popular sovereignty.”).

territories and colonies own their sovereignty, and they should be able to decide – as with other valuable legal rights – whether to keep or transfer that power of sovereign control.

Our goal in doing so is to approach decolonization as an ongoing process, one that is not only about legal rights and political status, but about entitlements and corrective justice. It is remarkable that “[i]n no more than two decades between the 1950s and 1970s, vast colonial empires that had taken centuries to assemble almost totally disappeared. All the colonial powers witnessed, and sometimes expedited and encouraged, the disintegration of their global realms.”²⁶³ But it would be a mistake, we think, to celebrate uncritically this disintegration – and even the transformation of colonies into independent countries – as if granting sovereignty and independence to former colonies were all that justice requires. There is good reason to think that, in many cases, the granting of independence was a boon to the colonizers – who wanted to shed their territories, having extracted what value they could²⁶⁴ – and opposed by the colonized,²⁶⁵ who had (and have) a wide range of practical reasons to prefer their current status.²⁶⁶

Political self-determination is a crucial part of this process, but it is only part. After all, in the alternate narrative of decolonization just described, the colonial powers used the tools of private law to acquire and extract value from their colonies, and then flipped to a public-law frame (political independence) when doing so was in their economic interests. The latter is a welcome development, to

263. ALDRICH & CONNELL, *supra* note 25, at 113.

264. THOMAS PAKENHAM, *THE SCRAMBLE FOR AFRICA: WHITE MAN’S CONQUEST OF THE DARK CONTINENT FROM 1876 TO 1912*, at 673 (1991) (“[A]n irreversible change had occurred in the world’s attitude to colonies in the twenty-seven years since the end of the First World War. . . . Both the men of God and the men of business had begun to see that formal empire was counter-productive.”).

265. See ALDRICH & CONNELL, *supra* note 25, at 246 (“Although it has been argued that, especially in the British case, precipitous decolonization was a result of ‘every remaining dependency . . . impatiently demanding equal independence and receiving it in very short order’, in fact, the converse was often true, and not only in the smallest colonies.”).

266. See *Id.* at 164 (“In every contemporary territory, powerful reasons exist for choosing continued political ties with metropolitan powers; they range from concerns over security (from local civil or political unrest rather than external aggression), to dependence on transfer payments (in various forms) and access to migration opportunities.”); GERT OOSTINDIE & INGE KLINKERS, *DECOLONISING THE CARIBBEAN: DUTCH POLICIES IN A COMPARATIVE PERSPECTIVE* 217 (2003) (“As far as Westminster was concerned, all of the former British colonies had to go. The fact that at present a handful of Caribbean ‘Overseas Territories’ still come under the sovereignty of the United Kingdom should not, therefore, be attributed to the ardent wishes of Westminster, but rather to the stubbornness with which these islands have refused to accept independence.”).

be sure – at least where it’s preferred by the colonies themselves – but it effectively allows the colonial powers to benefit economically on both ends, while leaving unaddressed the harm of the initial taking and period of exploitation. A private-law-based vision of corrective justice, “with its emphasis on vindicating property entitlements and disgorging ill-gotten gains,”²⁶⁷ adds another lens that makes other harms more visible and potentially subject to redress. As Adrienne Davis notes – considering the possibility of private law approaches to Black reparations – [a]lthough corrective justice is often criticized for its conservatism, that is, its concern with restoring initial entitlements, paradoxically, because of its emphasis on the economics of justice, corrective justice may be more susceptible to economic justice than other doctrinal discourses.²⁶⁸

In short, we do not suppose that the primary wrong of colonialism was the taking of property without justification, nor that compensation alone would make colonies whole. And we are attentive to the concern that thinking in terms of private law might be taken to distort or even trivialize the harms of colonialism – an argument sometimes made against private-law approaches to Black reparations.²⁶⁹ But it is important to grapple with the role of private law not only in acquiring colonies, but in understanding the relevant entitlements, harms, and potential remedies. Navassa, being an unoccupied territory, makes those themes particularly legible, since there are no individual rights holders on the island. And, as we explore in the following Part, the private-law frame has broad implications even for inhabited territories.

III. FROM PROPERTY TO STATUS TO CONTRACT: PRIVATE-LAW PRINCIPLES IN THE LAW OF THE TERRITORIES

In the 1850s, as the Guano Islands Act was being conceptualized and enacted,²⁷⁰ Henry Sumner Maine was delivering lectures at London’s Inns of the

267. Davis, *supra* note 8, at 338.

268. *Id.*

269. See, e.g., Davis, *supra* note 8, at 337 (noting the concern that employing “monetary compensatory principles . . . legitimates and normalizes economic relief for injuries inflicted, the flip side of a variant of commodification anxiety that can pervade reparations discourse”); Anthony J. Sebok, *Reparations, Unjust Enrichment, and the Importance of Knowing the Difference Between the Two*, 58 N.Y.U. ANN. SURV. AM. L. 651, 656–57 (2003) (arguing that reliance on an unjust enrichment framing could undermine the push for reparations, which should be focused on distinct moral harms).

270. See *supra* Section II.A.

Court that would become the basis of his opus, *Ancient Law*.²⁷¹ That work is most famous for the dictum that “the movement of the progressive societies has hitherto been from status to contract.”²⁷² To be sure, Maine was writing in a different context and about different legal developments;²⁷³ our goal here is simply to focus on the potentially liberating power of the freedom to enter into one’s preferred arrangements. Might that freedom be the underlying goal for the law of the territories, rather than any particular status? And what are the risks?²⁷⁴

Our goal is to analyze the concepts of sovereignty and property to show that the latter can help illuminate issues of incentive, transferability, unjust enrichment, and negotiation that the sovereignty framework obscures, to the distinct detriment of the world’s lingering colonies. To make this concrete, we close with three possible ways in which conceptualizing sovereignty as property—and as owned by colonized people themselves—might facilitate the ongoing project of decolonization, including in the United States.

First, the property framework can better enable negotiated economic settlements for lingering colonies or other forms of contested sovereign territory.²⁷⁵ As the stories of Navassa and countless other territories and colonies demonstrate, the current map of sovereign control represents no immutable facts about the world—sovereign control (largely demarcated by national borders) can and sometimes should change. Thinking about sovereignty as a potentially transferable entitlement—a kind of property—opens up possibilities for negotiation that

271. HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* (J.H. Morgan ed., J.M. Dent & Sons Ltd. 1917) (1861). For an explanation of the work’s influence, see J.H. Morgan, *Introduction to id.* at vii, which argues that *Ancient Law*’s “epoch-making influence may not unfitly be compared to that exercised by Darwin’s *Origin of Species*.”

272. *Id.* at 101.

273. Maine was exploring the move from ancient law’s focus on families—each member of which was subject to the absolute control of the head—to the “liberation” of individuals to assume and exert their own powers and responsibilities. Katharina Isabel Schmidt, *Henry Maine’s “Modern Law”: From Status to Contract and Back Again?*, 65 *AM. J. COMPAR. L.* 145, 146–52 (2017).

274. Indeed, Maine’s own “account of primitive society would be used to justify the conscious retreat from freedom of contract and the defense of custom under the rubric of indirect rule” in the British colonies. KARUNA MANTENA, *ALIBIS OF EMPIRE: HENRY MAINE AND THE ENDS OF LIBERAL IMPERIALISM* 17 (2010).

275. Blocher & Gulati, *supra* note 35, at 815–19, 830–32 (describing other disputes over islands and how a property-like framework could help resolve them).

are disfavored under the sovereignty framework, with its commitment to stability and discomfort with commodification.²⁷⁶

In the particular case of Navassa, the United States might recognize that Haiti has, at the least, a plausible conflicting claim. To resolve that claim (to quiet title, in effect) the United States could pay restitution to the Haitian people. The payment could be in money—tens of billions of dollars, according to our back-of-the-envelope calculation.²⁷⁷ But it could also take the form of visas and a stop to the ongoing deportations of those seeking refugee status.²⁷⁸ The point is to get back to thinking in terms of exchanging valued resources or, for that matter, disgorging ill-gotten gains or remedying unjust enrichment.²⁷⁹

Some of the guano islands were divested in roughly this fashion—effectively returning to a basic model of negotiation and transfer. For example, the Swan Islands dispute, which inspired Attorney General Sargent to make his aggressive claim of sovereignty,²⁸⁰ was eventually resolved at President Nixon’s insistence in 1972 with an “accord whereby the United States would acknowledge Honduran sovereignty over the Swans without totally abandoning its property.”²⁸¹ And that same year, the United States disclaimed sovereignty of three other islands, in effect legitimizing Colombia’s claim to them, “provided that fishing privileges of American citizens about these places would not be restricted.”²⁸²

276. See, e.g., Stacie E. Goddard, *Trump Just Said Buying Greenland Would Be a ‘Large Real Estate Deal.’ He’s Making a Dangerous Mistake*, WASH. POST (Aug. 17, 2019), <https://www.washingtonpost.com/politics/2019/08/17/why-denmark-wont-sell-off-greenland> [https://perma.cc/ZB4R-9L4X] (describing the modern move away from the commodified understanding of sovereignty); E. Tendayi Achiume, *The Fact of Xenophobia and the Fiction of State Sovereignty: A Reply to Blocher & Gulati*, 1 COLUM. HUM. RTS. L. REV. ONLINE 1 (2017), <http://hrlr.law.columbia.edu/files/2018/07/ETendayiAchiumeTheFactofX-1.pdf> [https://perma.cc/3W8N-ZEJW].

277. Blocher & Gulati, *supra* note 15 (conservatively estimating the restitutionary payments owed at between \$10 and \$260 billion).

278. Joe Parkin Daniels, ‘Who Wouldn’t Want Out?’ Migrants Deported to Haiti Face Challenge of Survival, GUARDIAN (Oct. 13, 2021, 6:30 PM, ET), <https://www.theguardian.com/global-development/2021/oct/13/haiti-migrants-deported-survival> [https://perma.cc/ZR8V-HRLH].

279. Again, there is a parallel to the debate over reparations. See Dennis Klimchuk, *Unjust Enrichment and Reparations for Slavery*, 84 B.U. L. REV. 1257, 1259 (2004) (“[T]he moral-expressive content of the claim in unjust enrichment gets the wrong of slavery exactly right.”); Hanoch Dagan, *Restitution and Slavery: On Incomplete Commodification, Intergenerational Justice, and Legal Transitions*, 84 B.U. L. REV. 1139, 1143 (2004) (“[L]aw’s treatment of mundane claims for restitution for wrongful enrichment and of ordinary cases of legal transition incorporate important lessons that can, and indeed should inform the settlement of such difficult social issues as the current debate on Slavery reparations.”).

280. See *supra* notes 232–234 and accompanying text.

281. SKAGGS, *supra* note 47, at 208.

282. *Id.* at 203.

A second possibility under the property framework would be for the international legal system to use the laws governing private enterprise in contexts where sovereign actors have either chosen the private-enterprise model or failed to live up to the justifications underlying the public-law model and the immunities it provides.

The evolution of the law on sovereign immunity in the United States illustrates this possibility. For much of U.S. history, foreign states were exempt from litigation in domestic courts as a matter of comity. This changed in the mid-twentieth century, with state-owned companies from the communist states engaging in private-market activities while simultaneously claiming sovereign immunity.²⁸³ The result was that, starting in 1952 with the Tate Letter, the United States moved away from “absolute” immunity to “restrictive” immunity in those cases where the foreign state was behaving less like a sovereign and more like a private actor.²⁸⁴ This view was then put into statute in the United States (and later in the United Kingdom) with the passage of the Foreign Sovereign Immunities Act of 1976.²⁸⁵ Foreign sovereigns were entitled to immunity, but not if they chose to act as private actors.²⁸⁶ In the latter situation, the rules governing private actors – including domestic court oversight and legal liability – apply.

How might a private-law property model apply to the controversy over Navassa? Imagine a domestic court concluding that since the United States itself treated the guano islands as property, the usual rules of property law should apply. De facto sovereignty might be a political question, but whether a person or entity has sufficiently asserted control over a piece of unclaimed property is bread-and-butter common law for courts to decide.²⁸⁷ Haiti would presumably emphasize continuity and contingency (essentially that the island falls within the

283. See, e.g., Winston P. Nagan & Joshua L. Root, *The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the U.N. Charter, and the Application of Modern Communications Theory*, 38 N.C. J. INT'L L. & COM. REGUL. 375, 410-17 (2013).

284. Looking beyond the United States, one finds that the practice of deeming sovereign immunity waived when the sovereign was acting in a private commercial capacity goes back much earlier, at least to 1873. See *id.* at 410.

285. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-11).

286. 28 U.S.C. § 1605(a) (2018); see also Lee C. Buchheit, *The Role of the Official Sector in Sovereign Debt Workouts*, 6 CHI. J. INT'L L. 333, 338-39 (2005) (explaining that the Foreign Sovereign Immunities Act of 1976 restricted sovereign immunity for foreign-sovereign borrowers).

287. This language from a guano islands case could easily be taken from a property casebook:

The sufficiency of actual and open possession of property is to be judged in the light of its character and location. It is hard to conceive of a more isolated piece of land than Palmyra, one of which possession need be less continuous to form the basis of a claim.

United States v. Fullard-Leo, 331 U.S. 256, 279-80 (1947) (footnotes omitted).

natural territorial unity of Haiti), which would be set against “the acquisitive prescription by the US, notwithstanding the internal inconsistency of its approach over time.”²⁸⁸ On this model, the United States would have to grapple directly with Haiti’s claim to the island, just as it would (sovereign immunity aside) if it had taken private property from a private actor. And resolution of that claim could take many forms, from the return of the property to the payment of damages – familiar tools of private law – or even the grants of visas or citizenship.²⁸⁹

Treating grabs of sovereign control as property takings brings attention to more examples of colonial harm that beg for recompense. More egregious than the taking of Navassa was the U.S. occupation of Haiti between 1915 and 1934.²⁹⁰ Driven by a combination of U.S. financial and geopolitical interests, virulent racism and a disregard for the welfare of the Haitians, the United States took control of Haiti until it no longer suited its interests.²⁹¹ Conceptualizing the occupation as the taking of Haiti’s property by the United States, and assuming the illegality of that taking, one might ask: How much is owed for the unlawful taking?

Given the long history of how the territories have been treated by their colonial-era masters, it is natural to wonder how plausible it is that legal arguments can make any difference. Here, we take heart from the recent Chagos litigation.²⁹² There, not one but three international tribunals have given Mauritius an extraordinary victory against the United Kingdom (and, in effect, the United States) in its claims that some of its islands were improperly taken a half century ago and that the failure to return them amounts to incomplete decolonization – a matter over which the U.N. General Assembly has authority.²⁹³

288. Spadi, *supra* note 15, at 125 (identifying these as the strongest arguments on either side).

289. See Amanda Frost, *Reparative Citizenship*, 26 CITIZENSHIP STUD. (forthcoming 2022) (on file with authors).

290. See *supra* notes 122–125 and accompanying text.

291. There are many accounts of this horrific occupation. See, e.g., LAURENT DUBOIS, *HAITI: THE AFTERSHOCKS OF HISTORY* 204–64 (2012); Peter James Hudson, *The National City Bank of New York and Haiti, 1909–1922*, 115 RADICAL HIST. REV. 91 (2013); Stephen Pampinella, “*The Way of Progress and Civilization*”: Racial Hierarchy and US State Building in Haiti and the Dominican Republic (1915–1922), 6 J. GLOB. SEC. STUD. 1 (2021).

292. See THE INTERNATIONAL COURT OF JUSTICE AND DECOLONISATION: NEW DIRECTIONS FROM THE CHAGOS ADVISORY OPINION (Thomas Burri & Jamie Trinidad eds., 2021); Philippe Sands, *Britain Holds on to a Colony in Africa, with America’s Help*, N.Y. TIMES (Apr. 1, 2021) [hereinafter Sands, *Africa*], <https://www.nytimes.com/2021/04/01/opinion/uk-mauritius-china-us.html> [<https://perma.cc/M9HD-LFWH>]; Philippe Sands, *Britain’s Colonial Legacy on Trial at the Hague*, N.Y. REV. (June 23, 2020), <https://www.nybooks.com/daily/2020/06/23/britains-colonial-legacy-on-trial-at-the-hague> [<https://perma.cc/G3XQ-BHW2>].

293. Sands, *Africa*, *supra* note 292.

What if Mauritius and the people of Chagos were now permitted to ask a range of other nations how much they would pay to have use of the archipelago?²⁹⁴ The United Kingdom would have to bid, just like the other suitors (e.g., the United States), in order to keep its military base on Diego Garcia, the largest island in the Chagos Archipelago.²⁹⁵ And maybe, as a result, borders would change. But, if the prospect of that change would yield greater benefits for the people of Mauritius and Chagos, why not?

Third, and along those same lines, consider the possibility of sovereignty auctions – opportunities for inhabited territories to accept bids from other nations wishing to integrate them into their sovereign territory. These auctions would be the choice of the people because the entitlement – sovereignty itself – is theirs to retain or transfer as they wish. Under current practice, by contrast, the power to determine transfer of sovereignty is assumed to rest with the same colonial powers that have long asserted possession over these territories and their inhabitants while simultaneously keeping them at arm's length. Current international law permits such sales, and indeed, many accounts suggest that the residents of the territory need not give their consent.²⁹⁶ That suggestion makes little sense if we take seriously the notion that the era of colonialism is over.

294. To be clear, we think that the people of Chagos would *also* have to agree to allow other nations to use the archipelago. Blocher & Gulati, *supra* note 35, at 817. But the standard understanding of international law is actually *less* restrictive and would not require such approval. 1 LASSA OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW 684 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) (“The hardship involved for the inhabitants of the territory who remain and lose their old citizenship and are handed over to a new sovereign whether they like it or not, created a movement in favour of the claim that no cession should be valid until the inhabitants had by a plebiscite given their consent to the cession. . . . But it cannot be said that international law makes it a condition of every cession that it should be ratified by a plebiscite.” (footnotes omitted)).

295. See Blake Herzinger, *The Power of Example: America's Presence in Diego Garcia*, INTERPRETER (Feb. 15, 2021), <https://www.lowyinstitute.org/the-interpreter/power-example-american-presence-diego-garcia> [<https://perma.cc/Y3UC-EB3K>] (recommending the United States to enter a lease with Mauritius).

296. OPPENHEIM, *supra* note 294, at 684; see also Steven R. Ratner, *Land Feuds and Their Solutions: Finding International Law Beyond the Tribunal Chamber*, 100 AM. J. INT'L L. 808, 811 (2006) (“[S]tates generally are free to agree on the disposition of disputed . . . territory . . . as they see fit. . . . [S]tates are still under no general duty to consult . . . the population of a disputed territory with respect to its future status.”); cf. Seokwoo Lee, *Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and a Modest Proposal*, 16 CONN. J. INT'L L. 1, 10 (2000) (“If the territory is to be disposed of by collective dispositive powers, it seems equitable that the collective dispositive powers exercise such a right of disposition by giving adequate consideration to any existing claims to the territory held by a previously dispossessed state.”).

Consider President Donald Trump’s suggestion that the United States give Puerto Rico to Denmark in return for Greenland.²⁹⁷ The idea is preposterous, but it is important to be clear about why. What Trump and his advisers got wrong was not the idea of transfer, but the holders of the relevant entitlements. The decision to sell – like the broader right of self-determination – lies with the people of Greenland and Puerto Rico, not Denmark (which rightly disclaimed any such authority)²⁹⁸ and the United States. A private-law property model allows the true owners to collaborate with those who could generate maximal value. For Greenland, that might be the United States. But the United States would have to pay Greenlanders for agreeing to a merger, and the price could be a substantial combination of rights and money, especially if other bidders turned out to be interested.²⁹⁹ Greenland offers a location of strategic value to the world’s superpowers, and it was Chinese interest that spurred Trump’s claim, so we know there would be interested bidders.³⁰⁰

Now, imagine applying this model to the populated U.S. territories such as Guam, the Virgin Islands, and American Samoa. They all bring considerable value to the United States – often of the military kind, but also relating to fishing rights and possibilities for deep-sea mining. An auction would help the territories capture that value and could perhaps help make up for years of economic and social underdevelopment relative to the mainland.³⁰¹ Maybe the threat of market competition would encourage the mainland to pay the price for having vassal states. Imagine, for example, each one of the 50,000 or so inhabitants of

297. See Tarisai Ngangura, *Ex-Staffer: Trump Wanted to Trade “Dirty Puerto Rico” for Greenland*, VANITY FAIR (Aug. 19, 2020), <https://www.vanityfair.com/news/2020/08/ex-staffer-trump-wanted-to-trade-dirty-puerto-rico-for-greenland> [<https://perma.cc/DR5P-WKJL>]; see also Iben Fejerskov Larsen, “While We Owe Much to America I Do Not Feel that We Owe Them the Whole Island of Greenland” 10 (2021) (M.A. Thesis, Aalborg University), https://projekter.aau.dk/projekter/files/422788714/FejerskovLarsen_thesis_2021.pdf [<https://perma.cc/5HU7-DRT5>] (researching “President Trump’s proposal to purchase Greenland”).

298. See Selena Simmons-Duffin, *What Do Greenlanders Think of Trump’s Interest in Buying Greenland?*, NPR (Aug. 23, 2019), <https://www.npr.org/sections/goatsandsoda/2019/08/23/753479744/what-do-greenlanders-think-of-trumps-interest-in-buying-greenland> [<https://perma.cc/MS9Y-ZZZZ>].

299. See Joseph Blocher & Mitu Gulati, *Sure, Trump Can Buy Greenland. But Why Does He Think It’s Up to Denmark?*, POLITICO MAG. (Aug. 23, 2019), <https://www.politico.com/magazine/story/2019/08/23/donald-trump-greenland-purchase-sovereignty-denmark-227859> [<https://perma.cc/9CPN-TE4R>].

300. See Aaron Mehta & Valerie Insinna, *Greenland’s Not For Sale, But It Is Strategically Important*, DEF. NEWS (Aug. 16, 2019), <https://www.defensenews.com/global/europe/2019/08/16/greenlands-not-for-sale-but-it-is-strategically-important> [<https://perma.cc/XCZ2-GZQ5>].

301. On the relative underdevelopment of the territories as compared to the U.S. mainland, see Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CALIF. L. REV. 1249, 1264-81 (2019).

American Samoa—an important military location³⁰²—being offered a million dollars, a European Union passport, and a house on the French Riviera to have their island ally with the European Union instead of the United States. What might China pay? Or Russia? Or the United States, if it had to compete instead of just asserting sovereignty? For that matter, what about the Native American territories, historically conceptualized as “domestic dependent nations” under a supposedly benevolent trust relationship with Congress?³⁰³ How much better would the United States treat the tribes if they had the right to choose the nation with which they affiliate?

Innumerable devils lurk in the details of such a plan, including figuring out who specifically must approve it (a supermajority of the territory’s population, surely, but what percent and who counts in the population?), what forms of compensation should be favored or permitted, whether or under what conditions the territory’s current political affiliate can veto the deal, and so on. We have sketched some answers in prior work.³⁰⁴ In general, we would require approval from the impacted region (in this case, Chagos) and the parent nation (in this case, Mauritius), except where the parent nation is oppressing or denying equal rights to the people of the region, in which case we argue that the region’s own right of self-determination becomes primary. We would rely on a mixture of property and liability rules, giving

price-setting power to three different parties, depending on how well a region is governed: to the parent nation and region in cases of good governance, to the region itself in cases of outright oppression or genocide, or to the global community (with a right of review through a court like the ICJ) in cases of governance that denies representation or equal rights.³⁰⁵

In any event, we cannot elaborate all of those details here, so we cannot completely dispel the devils. But neither do we think that they should be an insurmountable deterrent. After all, territories—in the United States and elsewhere—are already governed by a multiplicity of legal regimes. As Puerto Rico’s recent

302. David Overson, *Army Reserve Established Pacific Stronghold in American Samoa*, U.S. ARMY RSRV. (Apr. 29, 2019), <https://www.usar.army.mil/News/News-Display/Article/1827056/army-reserve-established-pacific-stronghold-in-american-samoa> [https://perma.cc/Z5FF-HJET] (“American Samoa has historically played a pivotal role in the security of the Pacific.”).

303. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831); Hope M. Babcock, *A Civic-Republican Vision of “Domestic Dependent Nations” in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinigorated, and Re-empowered*, 2005 UTAH L. REV. 443, 470-71.

304. See Blocher & Gulati, *supra* note 35, at 816-23.

305. *Id.* at 818-19 (footnotes omitted).

experience has shown, it is complicated to answer even seemingly binary questions like whether the people of Puerto Rico prefer statehood.³⁰⁶ Should only those living on the island have a vote? What turnout is required?

The auction model is simply one possibility opened up by the property frame. Our point here is not that certain transfers should happen or even to suggest how they should happen. Rather, the point is to clarify what might flow from recognizing that territories and other colonies own their sovereignty. Doing so opens up the possibility of private-law-style remedies to the persistence of U.S. colonialism. Establishing that entitlement would allow for negotiated settlements and transfers drawing on private-law models—deconstructing the colonial framework with the same tools used to make it.

There are practical obstacles to the full effectuation of these moves, and one might ask whether the colonized can really use the tools of the colonizer in pursuit of decolonization or whether those tools are even practicable. We have elaborated and addressed some of what we think are the most serious objections in prior work,³⁰⁷ and we do not think that the language of private law is some kind of panacea. But neither are we satisfied with what public law and arguments about sovereignty have been able to deliver; after more than a century, the *Insular Cases* remain good law and the United States maintains its colonies. Our goal here is to bring more legal tools to bear in the ongoing project of decolonization.

CONCLUSION

Sovereignty and property “have always operated together so as to create the structure of power that is, at any moment, the real government of the world.”³⁰⁸ It follows that any attempt to understand empire or the role of territoriality in political theory must face those concepts squarely. We have tried to do so here, and to show how doing so might have benefits for broader debates in the law of the territories.

306. See, e.g., Christina D. Ponsa-Kraus, *The Battle Over Puerto Rico's Future*, VERFASSUNGSBLOG (Apr. 21, 2021), <https://verfassungsblog.de/the-battle-over-puerto-ricos-future> [<https://perma.cc/9JFC-ZUQM>]. Puerto Rico's experience is hardly unique. See Ashley Westerman, *New Caledonia Might Be About to Break from France. Here's Why the World Is Watching*, NPR (Dec. 11, 2021), <https://www.npr.org/2021/12/11/1063074122/new-caledonia-might-break-from-france-in-third-independence-referendum-on-sunday> [<https://perma.cc/S6EP-7Q5A>] (describing difficulties surrounding New Caledonia's referendum on independence from France).

307. Blocher & Gulati, *supra* note 35, at 823-42 (describing and addressing the four strongest critiques of a market for sovereign control—those rooted in war, colonialism, antidemocracy, and impossibility—as well as some caveats and complications).

308. Koskenniemi, *supra* note 5, at 389.

As for Navassa, economic value – the thing that justified its initial acquisition through the property framework of the Guano Islands Act – is long gone. The island is not even open to the public.³⁰⁹ What remains is sovereignty alone: the governing authority originally brought to the island to protect private-property claims. The “dominion” that the Act’s drafters said was no part of it,³¹⁰ and which the United States long disclaimed,³¹¹ is now all it has left. As in countless other far-flung colonies and territories, it is the residue of an economically motivated empire that is no longer economically valuable. The sovereignty framework cements the status quo, in which the United States refuses to relinquish property to Haiti or even meaningfully negotiate some kind of settlement. Reckoning with the United States’s lingering colonies requires the full array of legal tools, including the private-law concepts used to build the empire in the first place.

309. U.S. FISH & WILDLIFE SERV., NAVASSA: NATIONAL WILDLIFE REFUGE, <https://www.fws.gov/southeast/pubs/facts/navassa.pdf> [<https://perma.cc/6NPU-MP35>] (“The refuge is closed to the public. Access is extremely hazardous.”).

310. *See supra* notes 78-79 and accompanying text.

311. *See supra* notes 226-237 and accompanying text.