
THE JURY AND EMPIRE: THE *INSULAR CASES* AND THE ANTI- JURY MOVEMENT IN THE GILDED AGE AND PROGRESSIVE ERA

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This Article argues that there was an important causal link, to date unrecognized, between the widespread dissatisfaction with the jury in the United States during the Gilded Age and Progressive era among many elite lawyers and judges and choices by U.S. policymakers and jurists about colonial governance in Puerto Rico and the Philippines. The story starts with the Insular Cases—landmark Supreme Court decisions from the early twentieth century holding that jury rights and some other constitutional guarantees did not apply in Puerto Rico and the Philippines until and unless Congress had taken decisive action to “incorporate” the territories into the union, which it never did. The conventional wisdom among scholars is that the Supreme Court in these decisions shamefully ratified the U.S. government’s discrimination and domination over the peoples of newly-acquired colonies. Racism and cultural chauvinism are blamed as primary causal factors.

The Article shows that Congress, the executive, the courts, and local legislatures in the Philippines and Puerto Rico granted almost every single right contained in the Constitution to the territorial inhabitants, with the exception of the jury. While racism was present and causally important, it

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is also true that U.S. governance in the territories was not a project of wholesale discrimination. Motivations, goals, and outcomes were complex. Protection of rights of local inhabitants was a key concern of U.S. policymakers. But the jury was considered a unique case, different than other rights.

To understand why the jury was thought uniquely unsuited for the new U.S. colonies, this Article fills out an under-appreciated history of the jury in the mainland United States during the Gilded Age and Progressive Era. Many histories of the jury skip from the adulation of the institution at the Founding to the Warren and Burger Courts' decisions over 150 years later that racial and gender discrimination in jury service were unconstitutional and that the criminal petit jury was a fundamental right. But the late nineteenth and early twentieth centuries saw severe criticism of the jury by elite lawyers, the newly-created bar associations in big cities, the reformist press, and progressive movement leaders. Many states cut back on jury rights at the time. And the Supreme Court then held that states should not be forced to "straight jacket" themselves, in the Court's words, to the common law procedure of old England that was found in the Bill of Rights, but should be free to experiment with more efficient criminal and civil procedure. Leaders of the anti-jury movement in the United States were also leading policymakers for colonial issues in Puerto Rico and the Philippines, notably William Howard Taft. Many of the same arguments against the jury were made in both contexts. Linking the anti-jury movement to the legal and political decision-making about colonial governance of the new territories helps enrich our understanding of both.

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INTRODUCTION

As a result of the 1898 war against Spain, the United States annexed the Spanish colonies of the Philippines, Puerto Rico, and Guam and temporarily occupied Cuba.¹ Independent of the war, in 1898 the United States also annexed the nation of Hawaii.² According to Supreme Court historian Charles Warren, “by far the most important fact in the Court’s history,”³ during the ensuing decade was a series of decisions known colloquially as the *Insular Cases*. Starting in 1901, the *Insular Cases* addressed the legal status of new overseas possessions and their peoples under the U.S. Constitution and statutes.

The primary *Insular Cases* asked whether constitutional and statutory provisions concerning tariffs and the use of juries in criminal cases were applicable to newly-annexed islands.⁴ These questions were the occasion

1. Treaty of Peace, Spain-U.S., arts. I, II & III, Dec. 10, 1898, 30 Stat. 1754.

2. Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, 30 Stat. 750 (1898).

3. 3 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 430 (1922).

4. The term, *Insular Cases*, includes nine cases decided in 1901 concerning tariffs or shipping between the United States and territories seized from Spain. *See generally* Fourteen Diamond Rings, 183 U.S. 176 (1901) (deciding whether a state of insurrection rendered goods imported from the

for the Supreme Court's involvement in a contentious national debate about whether the Constitution allowed the United States to have an empire—that is, whether the Constitution allowed the United States to annex extra-continental territory unlikely ever to be admitted to statehood and to govern with fewer constitutional limitations than on the mainland.⁵ The metaphor used to describe the debate was whether “the Constitution followed the flag” in the Philippines and Puerto Rico—the two territories on which the debate centered.⁶ For several years, no legal issue received greater attention in Congress, the Executive Branch, and the Supreme Court.

By 1905, a majority of the Court agreed upon a framework for deciding whether the Constitution followed the flag: the doctrine of

Philippines after cession to the United States as imported from a “foreign country” under U.S. tariff laws); *Dooley v. United States*, 183 U.S. 151 (1901) (deciding whether a statutory tariff on goods imported from the mainland United States into Puerto Rico after the cession violated the Constitution's Export Clause); *Huus v. N.Y. & Porto Rico S.S. Co.*, 182 U.S. 392 (1901) (deciding whether a vessel entering New York harbor from Puerto Rico was engaged in foreign trade or the domestic coasting trade under U.S. federal and New York statutes); *Downes v. Bidwell*, 182 U.S. 244 (1901) (deciding whether the Uniformity Clause of the Constitution invalidated a statutory tariff on trade between post-cession Puerto Rico and U.S. states, where no tariff existed on trade between U.S. states); *Armstrong v. United States*, 182 U.S. 243 (1901) (deciding whether a U.S. military tariff could be imposed on goods imported into Puerto Rico from the mainland United States, before the treaty of cession); *Dooley v. United States*, 182 U.S. 222 (1901) (deciding whether a U.S. military tariff could be imposed on goods imported into Puerto Rico from mainland United States before and after the treaty of cession); *Goetze v. United States*, 182 U.S. 221 (1901) (deciding whether goods imported from Puerto Rico and Hawaii after cession to the United States were from a “foreign country” under U.S. tariff laws); *De Lima v. Bidwell*, 182 U.S. 1 (1901) (deciding whether goods imported from Puerto Rico after cession to the United States were from a “foreign country” under U.S. tariff laws). A series of cases concerning jury rights is also typically included. *See generally* *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (reviewing the constitutionality of a Puerto Rican court criminal conviction not employing a grand jury or trial jury); *Dowdell v. United States*, 221 U.S. 325 (1911) (same, but for the Philippines); *Rasmussen v. United States*, 197 U.S. 516 (1905) (reviewing the constitutionality of a misdemeanor trial in Alaskan territory before a jury of only six); *Dorr v. United States*, 195 U.S. 138 (1904) (reviewing the constitutionality of a felony conviction in a Philippine court after cession to the United States obtained with a mandatory bench jury); *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (reviewing the constitutionality of a felony conviction in Hawaii after cession to the United States obtained without grand jury indictment and with a trial jury numbering only nine).

5. *See, e.g.*, JOSÉ A. CABRANES, *CITIZENSHIP AND THE AMERICAN EMPIRE* 4 (1979); OWEN M. FISS, 8 *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910* 228–29 (1993); KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* 76–86 (2009).

6. *See* Andrew Kent, Boumediene, *Munaf* and the Supreme Court's Misreading of the Insular Cases, 97 *IOWA L. REV.* 101, 108 (2011) [hereinafter Kent, Boumediene].

territorial incorporation.⁷ Under this doctrine, the Court held that some constitutional guarantees did not automatically follow the flag—specifically those requiring tariff uniformity and the use of petit and grand juries.⁸ These—and perhaps other—other constitutional provisions would be applicable only if the territory had not only been annexed but had also been further “incorporated” into the United States—that is, deemed an integral and permanent part of the union by Congress, even if not yet granted statehood.⁹ The Court examined the treaty ceding the Spanish territories and subsequent congressional actions to determine that Puerto Rico and the Philippines were “unincorporated.”¹⁰ They “belonged to” but were not fully “part of” the United States.¹¹ Therefore, their inhabitants were held to be entitled to fewer constitutional rights and guarantees than others living in the United States proper and in its incorporated territories, such as Oklahoma, Hawaii, and Alaska.

The key decisions about constitutional jury rights came in the *Hawaii v. Mankichi* case of 1903 concerning Hawaii (prior to its incorporation into the union), *Dorr v. United States* in 1904 from the Philippines (never incorporated and soon declared by the President and Congress to be destined for ultimate independence), *Rasmussen v. United States* in 1905 from Alaska (after its incorporation into the union), and *Balzac v. Porto Rico* in 1922 from Puerto Rico (reaffirming that Puerto Rico was not incorporated and, hence, constitutional jury rights did not apply, even after

7. *See id.*

8. *See id.*; U.S. CONST. art. I, § 8, cl. 1 (“[A]ll Duties, Imposts and Excises shall be uniform throughout the United States”); *id.* art. III, § 2, cl. 3 (“The Trial of all crimes . . . shall be by Jury”); *id.* amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury”); *id.* amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury”); *id.* amend. VII (“In suits at common law . . . the right of trial by jury shall be preserved”).

9. *See Rasmussen*, 197 U.S. at 519–20 (White, J.) (stating that incorporation theory was adopted in *Dorr* and applying it to the case of Alaskan territory); *Dorr*, 195 U.S. at 142–43 (seeming to adopt incorporation theory); *Mankichi*, 190 U.S. at 218–19 (White, J., concurring, joined by McKenna, J.) (reiterating incorporation theory); *Downes*, 182 U.S. at 288–93, 299–300, 341–42 (White, J., McKenna, J. & Shiras, J. concurring) (setting out the incorporation theory). *See generally* Christina Duffy Burnett [Ponsa-Kraus], *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973, 982–83 (2009) [hereinafter Burnett, *A Convenient Constitution*] (summarizing the doctrine).

10. *See Rasmussen*, 197 U.S. at 520–22; *Dorr*, 195 U.S. at 142–44; *Downes*, 182 U.S. at 341–42 (White, J., concurring).

11. Burnett, *A Convenient Constitution*, *supra* note 9, at 983 (quoting *Downes*, 182 U.S. at 319, 326 (White, J., concurring)).

Congress granted citizenship in 1917).¹²

In the initial decisions settling upon the incorporation doctrine, the Court did not clearly decide the status of other constitutional rights in unincorporated territories besides jury guarantees and tariff uniformity. For instance, could Congress abridge the freedom of speech or take property for public purposes without paying compensation in Puerto Rico and the Philippines? In the early *Insular Cases*, the Court indicated that trial by jury and indictment by grand jury were “not fundamental”¹³ and, in various dicta, opined that certain “fundamental” constitutional rights *would* be applicable everywhere that U.S. sovereignty reigned.¹⁴ But the Court, with one exception, did not specifically name these fundamental, always-applicable rights in any actual holding during the crucial years American colonial policy was being established.¹⁵

Starting immediately after these decisions were first issued in 1901, and continuing to the present, the *Insular Cases* and the doctrine of territorial incorporation have been subjected to withering attack. The rights of residents of all U.S. territories and commonwealths—Puerto Rico, Guam, American Samoa, the U.S. Virgin Islands, and the Northern Marianas—continue to be framed by constitutional doctrines of the 1899–

12. *Balzac v. Porto Rico*, 258 U.S. 298, 304–05 (1922); *Rasmussen*, 197 U.S. at 519–20; *Dorr*, 195 U.S. at 148; *Mankichi*, 190 U.S. at 218. *See also* *Ocampo v. United States*, 234 U.S. 91, 98 (1914) (holding the Grand Jury Clause not applicable in Philippines); *Dowdell*, 221 U.S. at 332 (holding no constitutional right to jury trial in the Philippines). Also, in a case arising from the temporary U.S. military occupation of Cuba, the Court held that the Constitution would not be violated by extraditing a fugitive from the United States to Cuba where he would be tried for embezzlement in a judicial system that lacked “trial by jury.” *Neely v. Henkel*, 180 U.S. 109, 122–23 (1901).

13. *Dorr*, 195 U.S. at 148 (holding that “the right to trial by jury” is not “a fundamental right which goes wherever the jurisdiction of the United States extends” and so need not be granted in the Philippines); *Mankichi*, 190 U.S. at 218 (“[W]e place our decision of this case upon the ground that the two rights alleged to be violated in this case [grand jury and petit jury under Fifth and Sixth Amendments] are not fundamental in their nature, but concern merely a method of procedure . . .”).

14. *See* *Dorr*, 195 U.S. at 144–45; *Downes*, 182 U.S. at 277, 280, 282–83 (Brown, J.); *id.* at 298 (White, J., concurring).

15. The exception was the Due Process Clause. *See* *Balzac*, 258 U.S. at 312–13 (stating in dictum that constitutional due process “had from the beginning full application in the Philippines and Porto Rico”); *Ochoa v. Hernandez y Morales*, 230 U.S. 139, 153–54 (1913) (implying that the Constitution’s Due Process Clause would limit congressional legislation for Puerto Rico); *Santiago v. Noguera*, 214 U.S. 260, 268 (1909), *aff’g* 2 P.R. Fed. Rep. 467, 488 (1907) (finding that constitutional due process was applicable in Puerto Rico); *United States v. Heinszen*, 206 U.S. 370, 386 (1907) (seeming to imply that the Due Process Clause limited congressional legislation for the Philippines).

1905 period, holding that only fundamental constitutional rights apply.¹⁶ The institutional and legal trajectory of the independent Philippine state—which has been troubled, to say the least—was set by U.S. rule and shaped decisively by the *Insular Cases*. The *Insular Cases* have also been used to decide the legal status of persons held outside U.S. sovereignty but under U.S. control.¹⁷ Criticism of the *Insular Cases* has only gathered force over time because constitutional rules that treat some population groups worse than others, especially when there are racial or ethnic differences between minority and majority, have been ill-favored at least since *Brown v. Board of Education*¹⁸ and the civil rights revolution.¹⁹

Most contemporary scholarship about the *Insular Cases* and the doctrine of territorial incorporation sees them as examples of discrimination, domination, and denial of rights. Scholarship charges that the Supreme Court allowed the U.S. government to “totally disregard the Constitution in governing the newly acquired territory.”²⁰ And most critics identify racism and cultural chauvinism as the dominant factors driving the Court’s and the political branches’ supposed decisions to deny individual rights and disregard the Constitution in the unincorporated territories.²¹

Although I have joined the many commentators in finding that aspects of the Justices’ reasoning in the *Insular Cases* was “frankly racist,”²² and

16. See *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1863–68 (2016) (examining *Insular Cases* and other precedents to determine if Puerto Rico and the U.S. government are the same sovereign for purposes of the Double Jeopardy Clause); *Tuaua v. United States*, 788 F.3d 300, 300–02 (D.C. Cir. 2015) (applying the *Insular Cases* precedents to decide if the Fourteenth Amendment Citizenship Clause applies in American Samoa); *Igartua v. United States*, 626 F.3d 592, 592–94 (1st Cir. 2010) (examining the *Insular Cases* and other precedents to determine whether residents of Puerto Rico have a constitutional right to be represented in the U.S. House of Representatives).

17. See *Boumediene v. Bush*, 553 U.S. 723, 756–59 (2008) (Guantanamo Bay); *Munaf v. Geren*, 553 U.S. 674, 695–96 (2008) (Iraq).

18. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

19. See, e.g., Bartholomew H. Sparrow, *The Centennial of Ocampo v. United States: Lessons from the Insular Cases*, in *RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE* 39, 57 (Gerald L. Neuman & Tomiko Brown Nagin eds., 2015) (noting that the “discrimination” allowed by the *Insular Cases* against residents of unincorporated territories “seems greatly outdated . . . [i]n an era when the United States has deeply eroded, if not eliminated, de jure discrimination on the basis of race, ethnicity, gender, and religion”).

20. Owen J. Lynch, *The U.S. Constitution and Philippine Colonialism: An Enduring and Unfortunate Legacy*, in *THE COLONIAL CRUCIBLE: EMPIRE IN THE MAKING OF THE MODERN AMERICAN STATE* 353, 364 (Alfred W. McCoy & Francisco A. Scarano eds., 2009).

21. See *infra* notes 76–80 and accompanying text.

22. Andrew Kent, *Citizenship and Protection*, 82 *FORDHAM L. REV.* 2115, 2128 (2014)

although the same can be said for the statements of members of Congress and the executive branch involved in insular policy, this Article argues, contrary to the consensus in scholarship, that the explanatory power of racism and cultural chauvinism is somewhat limited *on the important issue of which individual rights were accorded to the inhabitants of unincorporated territories*. As discussed below, during the period 1900–1917, the residents of Puerto Rico and the Philippines were granted by statute every individual right found in the U.S. Constitution, with the exception of the Second Amendment right to bear arms, the Third Amendment prohibition on quartering soldiers in private homes in peacetime, and, in the Philippines, the rights to a jury trial and grand jury indictment.²³ A story which focuses only on a presumed intent by U.S. decision makers to dominate, discriminate, and deny rights to the people of Puerto Rico and the Philippines needs revision. If we are not to miss the forest for the trees, it is notable how many rights were granted.

Putting aside constitutional tariff rules, the irrelevant Third Amendment, and the Second Amendment, which almost no one discussed,²⁴ it turns out that jury guarantees were the only rights which U.S. policymakers in Washington actually wanted to withhold from residents of unincorporated territories. After early endorsements of Congress and the executive branch in their view that the Constitution did not require access to a jury²⁵ or compliance with the Export and Uniformity Clauses regarding tariffs, the Supreme Court never again held that a single other constitutional right was inapplicable.²⁶

[hereinafter Kent, *Citizenship*].

23. A table comparing rights (1) guaranteed by the Constitution in the States and (2) in the incorporated territories, compared with (3) the rights protected by congressional statute, local law, or judicial decision in the Philippines and Puerto Rico is found *infra* in Appendix A. The Supreme Court decreed that rights granted in congressional statutes would be interpreted to have the same meaning as analogously-worded U.S. constitutional rights. *See* *Trono v. United States*, 199 U.S. 521, 529 (1905); *Kepner v. United States*, 195 U.S. 100, 124 (1904).

24. Starting in January 1899, there was a bloody armed insurrection against U.S. rule in the Philippines that did not fully end until 1905. Banditry was widespread in rural areas there. Very few people appear to have thought that guaranteeing a right to bear arms was a good idea. William Howard Taft, a key U.S. policymaker on colonial issues, argued that a broad right to bear arms was not wise in the mainland United States, either. *See* Bishop Potter, *Ex-Gov. Taft Upholds Rule of Philippines*, N.Y. TIMES, Apr. 22, 1904, at 5.

25. In later cases, the Court stated in dicta that the Seventh Amendment civil jury right was not applicable in unincorporated territory. *See* *Puerto Rico v. Shell Co.*, 302 U.S. 253, 258 (1937); *Balzac v. Porto Rico*, 258 U.S. 298, 304–05 (1922).

26. Christina Duffy Burnett [Ponsa-Kraus], *Untied States: American Expansion and Territorial*

Since the jury trial is the right that U.S. policymakers in the three branches actively worked to withhold, a search for causal explanations for U.S. governance and policy toward the Philippines and Puerto Rico on the issues of individual rights and legal procedure must focus on the jury.

Racism and cultural chauvinism of U.S. policymakers undoubtedly played a role in deciding that the jury was not necessary or appropriate in Puerto Rico and especially the Philippines. The Supreme Court suggested that the Philippines contained many “uncivilized” inhabitants, in the course of holding that the Constitution did not require the use of a criminal petit jury in a felony case there.²⁷ William Howard Taft, a key policymaker—first in the executive branch and then on the Supreme Court—made public arguments against introduction of the jury trial in the Philippines that sound culturally chauvinistic to modern ears. He wrote, for example, that 90% of Filipinos “or more are densely ignorant, superstitious, and subject to imposition of all sorts.”²⁸ Echoing the racialized social Darwinism of the day, Puerto Ricans, and particularly Filipinos, were often derided by U.S. policymakers as mere children in the art of self-government, who would need extensive tutoring before they were fit to participate fully in Anglo-Saxon institutions.²⁹

But the wider context in which the decisions to restrict the use of juries were reached shows a very different set of ideologies, goals, and motivations were also—not instead, but also—at work. Merits-based views about the proper working of the justice system, the specific defects of juries, the desire to allow experimentation with legal procedure, and the need for law to be in harmony with the habits and traditions of the people were also significant factors in setting U.S. policy toward juries in Puerto Rico and the Philippines.

This Article takes a new view of the *Insular Cases*, by contextualizing the decision to withhold jury rights in the colonial dependencies by

Deannexation, 72 U. CHI. L. REV. 797, 812 n.69 (2005) [hereinafter Burnett, *Untied States*]. In fact, the Court has held that a number of important constitutional provisions are in effect in Puerto Rico. See *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 339 (1986) (First Amendment); *Torres v. Puerto Rico*, 442 U.S. 465, 471 (1979) (Fourth Amendment); *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores De Otero*, 426 U.S. 572, 599–601 (1976) (Equal Protection).

27. See, e.g., *Dorr v. United States*, 195 U.S. 138, 145 (1904).

28. William H. Taft, *Civil Government in the Philippines*, OUTLOOK, May 31, 1902, at 315.

29. See, e.g., STUART CREIGHTON MILLER, “BENEVOLENT ASSIMILATION”: THE AMERICAN CONQUEST OF THE PHILIPPINES, 1899–1903, at 134 (1982); JOSÉ TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD 33 (1997).

reference to a contemporaneous movement by elite lawyers in the metropole—the mainland United States—to restrict the use of the jury, to empower courts, to simplify procedure, and to streamline litigation. This broader, domestic context for colonial policy is found by examining the activities of elite lawyers and judges in the courts and in their new bar associations that emerged in the latter part of the nineteenth century, the upper-class reform movements in cities like New York, and the work of progressive legal academics and political scientists concerned with promoting efficient, non-corrupt government. This context is also seen in Supreme Court case law holding that the new Fourteenth Amendment should not shackle states to ancient common law procedure, like the jury rules in the Bill of Rights, but should be interpreted to allow procedure to be flexibly adapted to the needs of the times. Histories of the jury in America tend to skip from the Founding to modern times, neglecting the period of intellectual ferment and institutional reform that this Article covers.

This Article proceeds in five main parts. Part I briefly reviews the current state of scholarship on the *Insular Cases*. Part II shows how many elite lawyers had, in the last decades of the nineteenth century and first decade of the twentieth, become thoroughly disenchanted with the jury. This was a stunning reversal. At the Founding, the jury had been universally lauded.³⁰ It was one of the few individual rights to be protected in the original Constitution (in Article III). And three provisions of the Bill of Rights protected the jury. Blackstone's description of the jury as the palladium—the safeguard—of liberty³¹ was frequently intoned.³² Tocqueville's famous description of the jury in *Democracy in America* (1835) as an essential educational tool for American democratic self-government was widely believed and repeated.³³

But by the later part of the nineteenth century, the grand jury and the petit jury in both civil and criminal cases were heavily criticized. Many states were reforming their judicial procedure to eliminate some jury rights. This was part of a larger reform movement focusing on delay and excessive

30. See, e.g., SUJA A. THOMAS, *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES* 58–68 (2016).

31. 4 WILLIAM BLACKSTONE, *COMMENTARIES* 343–52.

32. See, e.g., *THE FEDERALIST* NO. 83, at 543 (Alexander Hamilton); *SPEECH OF MR. INGERSOLL ON THE JUDICIARY, DELIVERED IN THE CONVENTION OF PENNSYLVANIA ON THE FIRST OF NOVEMBER 1837*, at 16 (Harrisburg, Packer, Barrett & Parke 1837).

33. See, e.g., *Juries and Jurymen*, *WORCESTER DAILY SPY*, June 28, 1884, at 2; *Adelphio Union—Mr. Phillips's Lecture*, *LIBERATOR*, Mar. 19, 1847, at 47.

procedural technicality that was perceived to be bogging down both the civil and criminal justice systems. Lawyers who were central to U.S. policy in the new insular possessions—men like Taft and Elihu Root—were at the same time prominent critics of mainland legal procedure, including the jury.

Part III shows how the U.S. Supreme Court’s jurisprudence under the new Fourteenth Amendment adopted much of the perspective of anti-jury reformers. The Court refused to interpret the Constitution to “straightjacket”³⁴ the states with the common law procedural rights like the jury and grand jury that the U.S. Constitution mandated for the federal government. The Court praised the spirit of progressive reform of procedure that it saw in the states and even predicted that if a territory with a civil law tradition came into the union, it would make sense to allow that territory to keep their time-worn legal institutions and procedures intact. This latter point reflected the widespread view of elite lawyers at the time that law worked best, and was most legitimate, when it remained consistent with the habits, customs, and views of the people.

Part IV traces the beginnings of U.S. rule in the Philippines, the reform of legal procedure by the U.S. military and U.S. executive, and the debates about whether the Constitution followed the flag there. It shows that the executive branch and Congress extended by executive order and then statute essentially all individual rights that were contained in the U.S. Constitution except jury rights. And it shows how leading administration policymakers, Taft and Root, made the same arguments against the use of the jury for Filipinos as were made in the mainland at the same time.

Part V turns to Puerto Rico, which took a very different path than the Philippines. Washington gave local decision makers much greater leeway in Puerto Rico, and the local legislature and courts took the lead in crafting protections for individual rights. As in the Philippines, essentially every right enjoyed in the mainland as a limit on the federal government was, by statute or judicial interpretation, granted to the people of Puerto Rico. But unlike in the Philippines, the jury was used too but only to try criminal cases. Even when given full sway to legislate rights for themselves in more recent years, Puerto Ricans have not constitutionalized the civil or grand jury.

* * *

Before turning to the argument, it makes sense to pause briefly to

34. *Twining v. New Jersey*, 211 U.S. 78, 101 (1908).

introduce two main characters who played significant roles in U.S. colonial policy and in the procedural reform movement in the mainland.

Before he became president of the United States (1909–1913) and chief justice of the United States (1921–30), William Howard Taft already had extensive government service. He was appointed at age twenty-nine to the Ohio superior court bench by Governor Joseph Foraker, later an influential U.S. Senator on colonial policy.³⁵ When Taft was only thirty-two, Foraker pushed President Harrison to put him on the U.S. Supreme Court. Harrison opted to make Taft the Solicitor General of the United States. Harrison soon moved Taft to a judgeship on the Sixth Circuit, where he stayed until another Ohio politician, President McKinley, asked Taft in January 1900 to lead a commission to establish civil government in the Philippines, then in insurrection against the United States.

Taft remained in Washington through the spring of 1900, when the administration and Congress were debating the form of government and constitutional status of Puerto Rico. Taft then left for the Philippines, and managed his commission so satisfactorily that he was appointed the first civil governor of the Philippines in summer 1901, when the insurrection had been largely quelled. Taft held the post until the end of 1903, and then came back to Washington to be the Secretary of War—the office that President McKinley had made the overseer of all U.S. colonial policy. Taft had been in Washington the previous year, to testify and lobby Congress, and speak to the press and public, about the form of civil government to create for the Philippines. Taft was a self-described progressive conservative.³⁶ As Chief Justice, Taft wrote the *Balzac* opinion in 1922, solidifying the territorial incorporation doctrine into U.S. law and the rule that constitutional jury rights were not protected in unincorporated territories.

Elihu Root was, like Taft, a progressive conservative and one of the most respected lawyers in the nation. Root began his career as a private lawyer in New York City after the Civil War, amassing a lucrative practice of influential clients such as Jay Gould, Chester Arthur, and E.H. Harriman.³⁷ When he became president, Arthur appointed Root the U.S.

35. For Taft's biography, see generally JONATHAN LURIE, WILLIAM HOWARD TAFT: THE TRAVAILS OF A PROGRESSIVE CONSERVATIVE (2012); 1 & 2 HENRY F. PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT: A BIOGRAPHY (1939).

36. See DAVID HENRY BURTON, TAFT, HOLMES, AND THE 1920S COURT: AN APPRAISAL 127 (1998) (quoting Taft).

37. On Root's career, see generally 1 & 2 PHILLIP C. JESSUP, ELIHU ROOT (1938); RICHARD W. LEOPOLD, ELIHU ROOT AND THE CONSERVATIVE TRADITION (1954).

Attorney for the Southern District of New York (1883–85). Root resumed his private law practice and became a civic leader, involved in leadership roles in the Union League Club, New York City-based reform organizations, and bar associations, relatively new organizations which elite lawyers had begun forming to press their views on regulation of the legal profession and the judiciary. Root’s reform work was of the good government variety, focused on reducing corruption and improving state and local government services like schools and police. In summer 1899, President McKinley overrode Root’s objection that he knew “nothing about war . . . nothing about the military” to make him Secretary of War, telling Root that now that the war was over and problems of peace were most pressing, he needed “a lawyer to direct the government of these Spanish islands.”³⁸ Root and Taft quickly became the McKinley administration’s leaders on colonial policy. After turning over the Secretary of War post to Taft in 1904, Root became President Roosevelt’s Secretary of State. He later served as U.S. Senator from New York.

I. SCHOLARSHIP ON THE *INSULAR CASES*

For several decades, scholarship about the *Insular Cases* has been uniformly critical. Proceeding normatively, many commentators, myself included, have argued that the best understanding of U.S. republicanism and our constitutional tradition is that all persons within the sovereign limits of the United States should have equal rights and equal legal status.³⁹

Descriptive or interpretive scholarship has also been highly critical. Many critics charge the Court in the *Insular Cases* with inventing a “novel”⁴⁰ constitutional “innovation,”⁴¹ “a hitherto unexisting difference

38. 1 JESSUP, *supra* note 37, at 215.

39. See Kent, *Citizenship*, *supra* note 22, at 2128; Andrew Kent, *Disappearing Legal Black Holes and Converging Domains: Changing Individual Rights Protection in National Security and Foreign Affairs*, 115 COLUM. L. REV. 1029, 1029–68 (2015). See also Rogers M. Smith, *The Insular Cases, Differentiated Citizenship, and Territorial Statuses in the Twenty-First Century*, in RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE, *supra* note 19, at 103–04 (noting “powerful strains [of political theory] insisting that the citizens of republics must be equal before the law, possessed of identical bundles of basic rights and duties”).

40. BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* 5 (2006). See also Jaime B. Fuster, *The Origins of the Doctrine of Territorial Incorporation and its Implications Regarding the Power of the Commonwealth of Puerto Rico to Regulate Interstate Commerce*, 43 REV. JUR. U. P.R. 259, 263 (1974).

41. T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE AND AMERICAN CITIZENSHIP* 81 (2002). See also Gerald L. Neuman, *Whose Constitution?*, 100

between ‘incorporated’ and ‘unincorporated’ territories,”⁴² that was self-consciously crafted to facilitate imperial expansion without making the peoples of the new possessions U.S. citizens.⁴³ It is undeniable that the Court wanted to leave it to the political branches to determine whether to make the new insular possessions permanent parts of the union and their people citizens. The Court spoke with candor about the desire to facilitate experimentation with imperial expansion.⁴⁴ Given strong public support for the McKinley administration, the well-established and frequently exercised power to acquire territory via treaty,⁴⁵ and the textually-granted constitutional powers of Congress over naturalization, governance of territories, and admission of new States⁴⁶—powers understood from the nineteenth century until the present to be plenary in nature—the Court’s decisions to defer to Congress and the executive branch on issues of political status, political rights, and citizenship were perhaps inevitable. But the recent legacy of the Fourteenth Amendment’s repudiation of *Dred Scott v. Sandford*⁴⁷ on the issues of citizenship and equal rights in the United States, seemingly reaffirmed in a 1898 Supreme Court decision that birthright citizenship knew no distinctions of race, ethnicity, or parentage,⁴⁸ still led many commentators, both then and now, to hope that the Court would repudiate colonialism and unequal citizenship.⁴⁹

For a variety of reasons, the 1898 decisions of the McKinley administration to accept cession from Spain of Puerto Rico and Guam were not particularly controversial.⁵⁰ But substantial segments of the American

YALE L.J. 909, 957–60 (1991).

42. Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases*, 65 REV. JUR. U. P.R. 225, 327 (1996).

43. See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 212 (2002); Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 6 (2004); Ramos, *supra* note 42, at 327.

44. See, e.g., *Downes v. Bidwell*, 182 U.S. 244, 286–87 (1901).

45. The Treaty Clause of the Constitution could be used for “any matter which is properly the subject of negotiation with a foreign country.” *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890).

46. See U.S. CONST. art. I, § 8, cl. 4; *id.* art. IV, § 3.

47. See generally *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

48. *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898).

49. Sam Erman, *Citizens of Empire: Puerto Rico, Status, and Constitutional Change*, 102 CALIF. L. REV. 1181, 1194–95 (2014).

50. Puerto Rico was relatively close to the United States, had largely welcomed U.S. intervention, was strategically located along sea lanes vital to controlling a future isthmian canal, and could provide a good naval base. Monroe Doctrine concerns also counseled in favor of ejecting Spain

public strongly opposed annexation of the Philippines—an enormous archipelago of over 3,000 islands, located half-way around the world, with a population of somewhere between seven and ten million people.⁵¹ Racism, xenophobia, and cultural chauvinism were prominent reasons for this opposition.⁵² Filipinos were widely portrayed in the American press as dark-skinned, culturally inferior savages.⁵³ George Vest, a Democratic Senator from Missouri and leading anti-expansionist, wrote just prior to the vote on ratifying the annexation treaty that “[t]he idea of conferring American citizenship upon the half-civilized, piratical, muck-running inhabitants of [the Philippines] . . . and creating a State of the Union from such materials, is . . . absurd and indefensible.”⁵⁴ On the other hand, some proponents of annexation viewed rule over the Philippines in racial terms; these proponents viewed it as an opportunity for “English-speaking and Teutonic peoples” to become “the master organizers of the world”⁵⁵ and uplift supposedly benighted “lesser races.”

Public and congressional resistance to acquiring the Philippines only increased when the Filipino insurgents, who had earlier fought Spain, attacked U.S. forces at Manila in February 1899, just as the U.S. Senate

from a major possession near the United States. See RAYMOND CARR, *PUERTO RICO: A COLONIAL EXPERIMENT* 25–28, 31 (1984); CABRANES, *supra* note 5, at 31–34. Tiny Guam was an afterthought. See Kent, Boumediene, *supra* note 6, at 119.

51. See JOHN MORGAN GATES, *SCHOOLBOOKS AND KRAGS: THE UNITED STATES ARMY IN THE PHILIPPINES, 1898–1902*, at 7 (1973); ERIC T. L. LOVE, *RACE OVER EMPIRE: RACISM AND U.S. IMPERIALISM, 1865–1900*, at 161 (2004); ROBERT D. RAMSEY III, *SAVAGE WARS OF PEACE: CASE STUDIES OF PACIFICATION IN THE PHILIPPINES, 1900–1902*, at 2–3 (2007).

52. See, e.g., CABRANES, *supra* note 5, at 40–41; MILLER, *supra* note 29, at 15, 26; STANLEY KARNOW, *IN OUR IMAGE: AMERICA’S EMPIRE IN THE PHILIPPINES* 137 (1989). But some leading anti-imperialists and critics of U.S. policy in the Philippines, such as Mark Twain, Senator George Frisbie Hoar of Massachusetts, and lawyer Moorfield Storey, the first president of the NAACP, held progressive views on race. See ROGER DANIELS, *COMING TO AMERICA* 271 (2d ed. 2002) (discussing Hoar’s views); 2 WALTER LAFEBER, *THE CAMBRIDGE HISTORY OF AMERICAN FOREIGN RELATIONS: THE AMERICAN SEARCH FOR OPPORTUNITY, 1865–1913*, at 52–53, 162 (1993) (discussing Twain’s and Storey’s views).

53. See, e.g., Mark S. Weiner, *Teutonic Constitutionalism: The Role of Ethno-Juridical Discourse in the Spanish-American War*, in *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION* 48, 55 (Christina Duffy Burnett [Ponsa-Kraus] & Burke Marshall eds., 2001).

54. G.G. Vest, *Objections to Annexing the Philippines*, 168 N. AM. REV. 112, 112 (1899).

55. PAUL A. KRAMER, *THE BLOOD OF GOVERNMENT: RACE, EMPIRE, THE UNITED STATES, AND THE PHILIPPINES* 2 (2006) (quoting Sen. Albert Beveridge).

was set to vote on the treaty of peace and annexation.⁵⁶ The treaty was nevertheless approved by the Senate, but the Senate passed a resolution stating future U.S. policy toward the Philippines: no “incorporation” of Filipinos into the American body politic and no “permanent annex[ation]” of the islands.⁵⁷

The Philippines was quickly considered a major headache by U.S. policymakers because of a bloody rebellion that began in early 1899; it was also generally assumed to be destined for ultimate independence due to the perceived impossibility of ever assimilating it.⁵⁸ As litigation of the first *Insular Cases* proceeded through the lower federal courts, the Democratic Party platform of 1900 announced that “[t]he Filipinos cannot be citizens without endangering our civilization.”⁵⁹ Christina Ponsa-Kraus has shown that anxiety that the United States remain constitutionally free to grant independence to the Philippines and its “alien” population⁶⁰ was a crucial driver of U.S. colonial policy, including on the Supreme Court; many, including key Supreme Court Justices like Edward Douglass White, were concerned that it would be impossible to do this if the Constitution were fully extended to the Philippines.⁶¹

Thus, I have joined the many commentators who find that aspects of the Justices’ reasoning in the *Insular Cases* were racist and that racism and cultural chauvinism drove the actions of important political leaders,

56. See GATES, *supra* note 51, at 40–42, 76–77; LAFEBER, *supra* note 52, at 163.

57. S. JOURNAL, 55th Cong., 3d. Sess. 1284 (1899) (giving advice and consent to ratification of the treaty); 32 CONG. REC. 1846 (1899) (floor vote on McEnery resolution).

58. See, e.g., VEDASTO JOSE SAMONTE, THE AMERICAN SYSTEM OF COLONIAL ADMINISTRATION 144 (1925).

59. THOMAS HUDSON MCKEE, THE NATIONAL CONVENTIONS AND PLATFORMS OF ALL POLITICAL PARTIES, 1789 TO 1900, at 333 (3d rev. ed. 1900).

60. *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (opinion of Brown, J.) (discussing the need for U.S. government flexibility when faced with “possessions . . . inhabited by alien races, differing from us in religion, customs, laws”); *id.* at 313 (White, J., concurring) (desiring to avoid a constitutional rule that would allow “incorporation of alien races” into the union against the wishes of Congress).

61. See Burnett, *Untied States*, *supra* note 26, at 853–70. See also CABRANES, *supra* note 5, at 50 (noting that Justice White intended the incorporation doctrine to allow the United States to grant independence to the Philippines); JULIUS W. PRATT, AMERICA’S COLONIAL EXPERIMENT: HOW THE UNITED STATES GAINED, GOVERNED, AND IN PART GAVE AWAY A COLONIAL EMPIRE 163–65 (1950) (same). President Wilson announced that it was U.S. policy to grant independence to the Philippines. See 51 CONG. REC. 34, 75 (1913). See also Philippine Autonomy (Jones) Act, ch. 416, Pub. L. No. 64-240, 39 Stat. 545, 545 pmb. (1916) (endorsing independence through a congressional act).

especially among anti-expansionists in the Democratic Party.⁶² Racial considerations undoubtedly influenced U.S. policy-making both during the debate about whether to annex the Philippines and also during the constitutional litigation that resulted in the doctrine of territorial incorporation. This was the height of the Jim Crow-*Plessy* era⁶³ on the Supreme Court and the country at large. Racism deeply permeated American life and thought.

I concur with the current scholarly consensus on this score. But when the discussion turns to questions of individual rights and of how the territories would actually be governed, the received wisdom in much of the current scholarship needs revision. The dominant theme is that U.S. policymakers made conscious choices to purposefully treat residents of the new insular possessions worse than residents of the mainland.

Many commentators, accepting the framing that U.S. rule was one of domination and denial of rights, have asserted that the *Insular Cases* broke with a “settled understanding” of extending all constitutional rights to residents of U.S. territories.⁶⁴ But more recent revisionist scholarship has noted first that, even within the States of the Union, not all constitutional provisions were everywhere applicable—for instance, the Bill of Rights had not been incorporated as a limit on state governments at the time of the *Insular Cases* and Article III guarantees of judicial independence never applied in territorial courts.⁶⁵ Second, scholars have also noted that the Supreme Court’s pre-1901 case law about individual constitutional rights in the mainland territories actually vacillated among different propositions,⁶⁶ with only the *Insular Cases* themselves settling the matter in favor of the view that the full Constitution (to the extent applicable), including jury rights, protected U.S. territories only once they were incorporated by Congress.⁶⁷

The doctrine that residents of the new unincorporated territories have fewer individual constitutional rights drives much of the criticism of the

62. See, e.g., LOVE, *supra* note 51, at 181–93; Kent, *Citizenship*, *supra* note 22, at 2128; Kent, Boumediene, *supra* note 6, at 119 n.68, 128 n.110.

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

64. Gerald L. Neuman, *Constitutionalism and Individual Rights in the Territories*, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 182, 184 (Christina Duffy Burnett [Ponsa-Kraus] & Burke Marshall eds., 2001).

65. See Burnett, *Untied States*, *supra* note 26, at 821–23, 837–38, 850.

66. See Cleveland, *supra* note 43, at 207; Burnett, *Untied States*, *supra* note 26, at 824–32.

67. See Burnett, *Untied States*, *supra* note 26, at 832.

Insular Cases and the political decisions underlying them. In the *Insular Cases*, say many critics, the Court allowed the U.S. government to “totally disregard the Constitution in governing the newly acquired territory,”⁶⁸ and “govern . . . without extending constitutional rights to the residents.”⁶⁹ This is overstated; as noted in the Introduction, the Court held that the Due Process Clause and other fundamental rights apply in Puerto Rico and the Philippines.⁷⁰ A related criticism is that the Court held in the *Insular Cases* that “the Constitution nominally applied, albeit in skeletal form” and the incorporated territories were “largely in an extraconstitutional zone.”⁷¹ The end result is that the people of unincorporated territories are understood to have had “limited rights”⁷² and were “unprotected by many fundamental constitutional guarantees.”⁷³ The Court, Congress, and the executive left the unincorporated territories as “coloni[es] . . . totally subordinated and subject to the mercy of Congress.”⁷⁴ This too is overstated and in need of revision. First by executive order, and then by statute and judicial decisions, residents of the two territories came to possess almost all of the same rights as the U.S. Constitution provided, with the exception of the Second and Third Amendments and the partial exception of jury rights.⁷⁵

Commentators identify racism and cultural chauvinism as the

68. Lynch, *supra* note 20, at 364.

69. Noah Feldman, *When Judges Make Foreign Policy*, N.Y. TIMES MAG., Sept. 28, 2008, at A50. To the same effect, see LEIA CASTAÑEDA ANASTACIO, THE FOUNDATIONS OF THE MODERN PHILIPPINE STATE: IMPERIAL RULE AND THE AMERICAN CONSTITUTIONAL TRADITION IN THE PHILIPPINE ISLANDS, 1898–1935, at 8 (2016) (stating that in unincorporated territory like the Philippines, “the US Constitution’s force was moral rather than legal”); Pedro A. Malavet, *Reparations Theory and Postcolonial Puerto Rico: Some Preliminary Thoughts*, 13 BERKELEY LA RAZA L.J. 387, 402 (2002) (“In the *Insular Cases*, resolved at the beginning of the twentieth century by the U.S. Supreme Court, the [Territorial] clause was interpreted to give to the federal government almost unfettered authority over the territories and territorial residents.”); Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1091 (2004) (describing the holding of the *Insular Cases* as “the Constitution does not apply in so-called unincorporated territories”).

70. See *supra* notes 13–15 and accompanying text.

71. Cleveland, *supra* note 43, at 237–38.

72. EDIBERTO ROMÁN, THE OTHER AMERICAN COLONIES 56 (2006).

73. Rogers M. Smith, *The Bitter Roots of Puerto Rican Citizenship*, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 373, 380 (Christina Duffy Burnett [Ponsa-Kraus] & Burke Marshall eds., 2001).

74. EFRÉN RIVERA RAMOS, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO 88 (2001).

75. See *infra* notes 245–46, 269–80, 313–15, 345 (all concerning the Philippines); *infra* notes 398–418 (concerning Puerto Rico). See also *infra* Appendix A (summarizing this data).

dominant factors driving the Court's and the political branches' decisions to subordinate the residents of the unincorporated territories, to give them a second-class status, and to deny them constitutional rights.⁷⁶ The *Oxford Companion to the Supreme Court*, for example, states that the majority position in the *Insular Cases* was "largely racially motivated."⁷⁷ Akhil Amar has quipped that the Court "refused, in a series of decisions known as the *Insular Cases*, to extend the benefit of jury trials to brown-skinned folk in various island territories."⁷⁸ Judge Juan Torruella has charged that "obvious racial biases" drove the Court in deciding *Balzac* on the lack of constitutional jury rights in Puerto Rico and other unincorporated territories.⁷⁹ Other commentators on the jury decisions agree.⁸⁰

Framing the *Insular Cases* solely in terms of discrimination, subordination, and racism, as so much contemporary scholarship does, is not inaccurate, but it is incomplete. Other important variables, motivations, and contexts are ignored when this frame is the sole lens through which the cases and the government's decision-making is viewed. The remainder of this Article supplies additional context—an additional lens through which to understand judicial and political policymaking about individual rights in Puerto Rico and the Philippines.

76. See, e.g., RAMOS, *supra* note 74, at 113 (identifying "obvious racism" motivating the Court in the *Insular Cases*); 2 MELVIN I. UROFSKY, *A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 491 (1988) (stating that the "common thread" running through *Insular Cases* was "the racism that permeated the nation"); Carlos R. Soltero, *The Supreme Court Should Overrule the Territorial Incorporation Doctrine and End One Hundred Years of Judicially Condoned Colonialism*, 22 CHICANO-LATINO L. REV. 1, 3 (2001) (stating that the *Insular Cases* were decided in the way they were "to a large extent because of the race and non-Anglo-Saxon national origin of the majority of the people living in those places"); Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 286 (2007) (stating that the "skewed outcome" of the *Insular Cases* "was strongly influenced by racially motivated biases and by colonial governance theories that were contrary to American territorial practice and experience").

77. Walter F. Pratt, Jr., *Insular Cases*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 500 (Kermit L. Hall et al. eds., 2d ed. 2005).

78. Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 71–72 (2000).

79. Torruella, *supra* note 76, at 326.

80. See, e.g., Soltero, *supra* note 76, at 24 (stating that the Court's reasoning in *Balzac* constituted "legal rationalizations for perpetuating colonialism"); Alan Tauber, *The Empire Forgotten: The Application of the Bill of Rights to U.S. Territories*, 57 CASE W. RES. L. REV. 147, 169 (2006) (stating that language in Supreme Court cases about deferring to local preferences and civil law traditions was "obviously false" and "a thin veil with which to hide the blatant racism utilized in the Court's opinions").

II. DISENCHANTMENT WITH THE JURY AND OTHER “NON-PROGRESSIVE, DELAY-PRODUCING” LEGAL PROCEDURES

Crucial context for the decision to specifically withhold the jury—among all of the other rights the common law and U.S. Constitution provided—from incorporated insular territories can be found in a reform movement in the United States. Several decades in the making, this movement, led by elite lawyers and civic reformers, sought to reduce court delays, unjustified acquittals of criminals, and unfair civil verdicts against corporations, by reforming the system of grand and petit juries.

There were dramatic changes made in legal procedure, both civil and criminal, in the latter part of the nineteenth and early twentieth centuries. It was an era, as the Supreme Court put it, in which many states were experimenting to find “simpler and more expeditious forms of administering justice,”⁸¹ more in tune with the needs of a “quick and active age.”⁸²

A. THE CASE FOR REFORM

In a widely discussed address to the 1905 graduating class at Yale Law School, Taft excoriated “the administration of the criminal law in all the states in the Union” as “a disgrace to our civilization.”⁸³ Then Secretary of War under President Theodore Roosevelt, Taft oversaw U.S. policy and governance in the new insular possessions. He had replaced Elihu Root, who stayed in the cabinet as Secretary of State.

By the turn of the twentieth century, there was a widespread perception among many politicians, academics, and elite lawyers—including Taft and Root—that crime rates were rising and that the criminal justice system was skewed too far in favor of protecting individual rights, thus allowing the guilty to go free.⁸⁴ In his famous “disgrace to our

81. *Holden v. Hardy*, 169 U.S. 366, 383–84 (1898).

82. *Hurtado v. California*, 110 U.S. 516, 529–30 (1884).

83. William H. Taft, *The Administration of Criminal Law*, 15 YALE L.J. 1, 11 (1905) [hereinafter Taft, *Administration*].

84. See, e.g., Frederick Bausman, *Are Our Laws Responsible for the Increase of Violent Crime?*, 31 ANN. REP. A.B.A. 489, 490, 494 (1908); James W. Garner, *Crime and Judicial Inefficiency*, 29 ANNALS AM. ACAD. POL. & SOC. SCI. 161, 164 (1907); Taft, *Administration*, *supra* note 83, at 11; Hans Teichmueller, *Judge and Jury*, 30 AM. L. REV. 710, 715 (1896); George H. Williams, *Abolition of the Jury System*, 9 LAW NOTES 150, 152 (1905); Van Buren Denslow, *Homicides, American and Southern*, SOC. ECONOMIST, Mar. 1895, at 35. It appears that overall crimes rates were not in fact rising at this time. See KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 178–79* (1989) (noting

civilization” speech,⁸⁵ Taft told his Yale audience that there was no longer “certainty of punishment” for criminals.⁸⁶ Protections for defendants have been extended and elaborated, posing “greater obstacles in the conviction of the guilty.”⁸⁷ Root agreed,⁸⁸ as did Oliver Wendell Holmes who wrote, in a dissenting opinion for the Supreme Court joined by Justices White and McKenna, that “[a]t the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny.”⁸⁹ Justices Holmes, White, and McKenna voted with the majorities in the *Insular Cases*, *Mankichi*, and *Dorr*, about the jury.

New York City lawyer Everett Wheeler, a civic reformer and one of the founders of the American Bar Association (“ABA”), argued that the severity of punishments at common law created criminal procedure rules that were too protective of defendants and let “myriads of criminals . . . escape just punishment;” instead, the principal object of the system should be to “protect the innocent members of society” from criminals.⁹⁰ James Bryce, a well-informed observer of U.S. government and society, found that American “criminal justice . . . is accused of being slow, uncertain, and unduly lenient” because of the “soft-heartedness of juries” and “cumbrous and highly technical procedure.”⁹¹ Alfred Conkling Coxe, a federal judge in New York, complained that “notorious criminals” frequently escaped punishment because of legal technicalities and multiple layers of review.⁹² *Harper’s Weekly* thought that “[t]he whole procedure of

that crime rates fell dramatically in the decades after the Civil War). But some research suggests that homicide rates spiked upward at the end of the nineteenth century. See ERIC H. MONKKONEN, *POLICE IN URBAN AMERICA, 1860–1920*, at 77 (1981) (analyzing homicide arrest rates in large urban areas); Douglas Lee Eckberg, *Estimates of Early Twentieth-Century U.S. Homicide Rates: An Econometric Forecasting Approach*, 32 *DEMOGRAPHY* 1, 10–12 (1995) (examining state-wide rates of violent death).

85. The speech was widely covered in the popular and legal press. See, e.g., *The Jury System in the United States and its Extension to the Philippines*, 19 *HARV. L. REV.* 224, 224 (1906); *Exercises at Yale*, *DALLAS MORNING NEWS*, June 27, 1905, at 2.

86. Taft, *Administration*, *supra* note 83, at 12.

87. *Id.*

88. Root saw a widespread sense that law was “so voluminous and complicated as to be beyond the comprehension of plain men” and “the chances of injustice succeeding and of the criminal escaping are so great that judgment has little terror for the wrong doer.” Elihu Root, *The Layman’s Criticism of the Lawyer*, 26 *GREEN BAG* 471, 472 (1914) (reprinting Root’s address to the ABA annual meeting).

89. *Kepner v. United States*, 195 U.S. 100, 134 (1904) (Holmes, J., dissenting).

90. Everett P. Wheeler, *Reform in Criminal Procedure*, 4 *COLUM. L. REV.* 356, 356 (1904).

91. 2 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 581–82 (2d rev. ed. 1908).

92. Alfred C. Coxe, *The Law’s Delay*, 1 *CORNELL L.J.* 62, 65 (1894) [hereinafter Coxe, *Law’s Delay*]. See also *Crime Goes Unpunished: Andrew D. White Presents Startling Statistics*, *N.Y. TIMES*,

criminal law seem[ed] to be devised in order to give the defendant every opportunity to evade justice,” and that there were many “abuses of the criminal law in the interest of criminals.”⁹³ Roscoe Pound criticized criminal procedure for “look[ing] chiefly at individual rights” instead of “the rights of society,” and worried that “society is not protected, crimes are not punished, and lawlessness is general.”⁹⁴ Supreme Court Justice David Brewer was so concerned with “tardy justice” that failed to “secure protection to the public” from criminals that he used the occasion of his address to the ABA annual convention in 1895 to call for the elimination of appeals in criminal cases.⁹⁵ To his Yale audience, Taft unfavorably compared the common law’s preference for “the utmost liberty of the individual” with the Roman-based civil law system’s “greater anxiety that the state should be protected against crime.”⁹⁶

American critics saw severe problems with the course of justice not just on the criminal side of the docket, but in civil cases as well. The civil justice system was routinely said to be filled with undue delay and expense as well as frequent miscarriages of justice. The ABA formed a blue ribbon “Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation,” staffed by Roscoe Pound, Everett Wheeler, and other prominent academics and elite lawyers.⁹⁷ Articles on the causes and consequences of “Law’s Delay”—a Shakespearean phrase that had become proverbial⁹⁸—filled the periodicals read by elite lawyers and academics, as well as general circulation newspapers, focusing on both civil and criminal law.⁹⁹ New York State, to

Apr. 11, 1896, at 1 (presenting the same points from Andrew D. White of Cornell).

93. Victor Rousseau, *Lawless New York: Experts’ Opinions on the Causes of the Crimes that Clog the Courts and Break Down the Machinery of Justice, Part III*, HARPER’S WKLY., Jan. 2, 1909, at 17; *Some Abuses of Criminal Law*, HARPER’S WKLY., May 11, 1895, at 433.

94. Roscoe Pound, *Inherent and Acquired Difficulties in the Administration of Punitive Justice*, 4 PROC. AM. POL. SCI. ASS’N 222, 222 (1907) [hereinafter Pound, *Inherent*].

95. David J. Brewer, *A Better Education the Great Need of the Profession*, 18 ANN. REP. A.B.A. 441, 448–49 (1895) [hereinafter Brewer, *Education*].

96. Taft, *Administration*, *supra* note 83, at 2.

97. *See Report of the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation*, 31 ANN. REP. A.B.A. 542, 542 (1908).

98. “The law’s delay was one of those things which suggested suicide to Hamlet.” Alfred Russell, *Avoidable Causes of Delay and Uncertainty in Our Courts*, *The Annual Address Before the American Bar Association* (Aug. 27, 1891). *See* WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK*, act. 3, sc. 1, line 71, at 70 (George Lyman Kittredge ed., 2008).

99. *See, e.g.,* Coxe, *Law’s Delay supra* note 92, at 62; Thomas F. Hargis, *The Law’s Delay*, 140 N. AM. REV., 309, 309 (1885); Talcott H. Russell, *The Law’s Delay*, 2 YALE L.J. 95, 105 (1893);

pick one example, convened a special “Commission on the Law’s Delay”¹⁰⁰ chaired by Wheeler Peckham, a Wall Street lawyer, nominee to the Supreme Court, special prosecutor against Tammany Hall, and brother of a Supreme Court Justice.¹⁰¹ Pound gave a much-noted speech to the ABA in 1905 severely criticizing many aspects of the civil litigation system, notably procedural technicality, complexity, and delay.¹⁰²

There was widespread agreement—among elite, conservative reformers like Taft, Simeon Baldwin (Yale law professor, president of the ABA, and future governor of Connecticut), and Root, as well as more left-leaning progressives in the academy and professions—that both the criminal and civil justice systems were burdened by what Pound called a “hypertrophy of procedure.”¹⁰³ According to Pound, procedure was “cumbersome, dilatory, [and] needlessly technical [in] character as a whole,” with an “excessive number of safeguards, loopholes, and mitigating agencies.”¹⁰⁴

Reforms took many shapes. A frequent complaint was that appellate courts too often reversed in jury trial cases on technical issues, without regard to whether the ultimate result was substantively correct.¹⁰⁵ This issue affected both the civil and criminal dockets and ultimately prompted the enactment of harmless-error statutes at the federal level and in a

William H. Taft, *The Delays of the Law*, 18 YALE L.J. 28, 38 (1908) [hereinafter Taft, *Delays*]; *The Law’s Delay*, PHILADELPHIA INQUIRER, July 15, 1896, at 6; *The Law’s Delay the Fault of the Law*, DAILY PICAYUNE (New Orleans), Oct. 27, 1894, at 4; *Topics of the Time: The Causes of the Law’s Delay*, CENTURY, June 1885, at 328. Thomas F. Hargis was a Kentucky lawyer and former chief justice of a state court of appeals. Talcott H. Russell was a Yale law professor and New Haven attorney. For an example of Root’s contributions to this literature, see Elihu Root, *The Reform of Procedure*, 11 THE BRIEF 223, 229–30 (1911).

100. *The Law’s Delay Report*, N.Y. TIMES, Jan. 17, 1904, at 6.

101. See *Wheeler Hazard Peckham*, ALBANY LAW SCHOOL, <http://www.albanylaw.edu/about/history/Pages/Wheeler-Hazard-Peckham.aspx>, (last visited Apr. 11, 2018).

102. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ANN. REP. A.B.A. 395, 408–09 (1906) [hereinafter Pound, *Causes*]. On Pound’s influence, see WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937*, at 191–94 (1998).

103. ROSCOE POUND, *CRIMINAL JUSTICE IN AMERICA* 161 (1930) [hereinafter POUND, *CRIMINAL*] (speaking of late nineteenth century criminal procedure).

104. *Id.* at 160. Accord ELIHU ROOT, *Reforms in Judicial Procedure: A Statement Before the Committee on the Judiciary of the House of Representatives*, February 27, 1914, in *ADDRESS ON GOVERNMENT AND CITIZENSHIP* 467, 468 (Robert Bacon & James Brown Scott eds., 1916) (complaining of “systems of practice in which justice is tangled in the net of form”).

105. See, e.g., Pound, *Causes*, *supra* note 102, at 413.

number of states, prohibiting appellate reversal unless substantial rights were affected or a miscarriage of justice had occurred.¹⁰⁶ As a remedy for delays and to achieve various social goals, municipal court systems in cities like Chicago were substantially redesigned and simplified by progressives.¹⁰⁷ Arbitration started to be used more frequently by members of trade associations to resolve disputes, and reformers began to recommend statutes to insulate arbitral judgments from collateral review by courts.¹⁰⁸ Intermediate appellate courts were added by a number of states to reduce docket pressure on state high courts.¹⁰⁹ The equity side of trial courts' jurisdiction—where the judge sat without a jury—became more prominent, and equitable remedies and procedures were used more aggressively.¹¹⁰

B. DISSATISFACTION WITH THE JURY TRIAL IN A “QUICK AND ACTIVE AGE”

The jury was excoriated by many elite lawyers and reformers as the cause of delay, expense, injustice, and uncertainty.¹¹¹ Justice Brewer wrote in 1902:

[t]oday [the jury] has become the object of attack and criticism. By not a few it is thought to have outlived its usefulness; they believe that it is the part of wisdom to abolish it entirely and to substitute some other mode of trial,—more, as alleged, in harmony with the spirit of the age.¹¹²

Judge Coxe observed that the “defects of the jury system” are “so serious that many thoughtful men have advocated its abolition altogether.”¹¹³ A Baton Rouge attorney told the ABA that the failure of

106. See John M. Greabe, *The Riddle of Harmless Error Revisited*, 54 HOUS. L. REV. 59, 66–68 (2016). For an example discussing the need for such statutes, see Root, *The Reforms of Procedure supra* note 104, at 431, 441.

107. See MICHAEL WILLRICH, *CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO* 58 (2003).

108. See IMRE STEPHEN SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* 9–10, 80–88 (2013).

109. HALL, *supra* note 84, at 227–28.

110. See Daniel R. Ernst, *Law and American Political Development, 1877–1938*, 26 REVS. AM. HIST. 205, 211 (1998); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 918–26, 957–58 (1987).

111. See DENNIS HALE, *THE JURY IN AMERICA: TRIUMPH AND DECLINE* 146–47, 162 (2016).

112. David J. Brewer, *The Jury*, 5 INT'L MONTHLY 1, 1 (1902) [hereinafter Brewer, *The Jury*].

113. Alfred C. Coxe, *The Trials of Jury Trials*, 1 COLUM. L. REV. 286, 288 (1901) [hereinafter Coxe, *Trials*].

juries to convict the obviously guilty has created “a system of jury-made lawlessness.”¹¹⁴ According to a Boston attorney, “[t]hat there are grave defects in the present [jury] system is undeniable, and there are many who believe that, because of these defects, the system itself, at least in criminal cases, is worthless.”¹¹⁵ “The jury system is destroying the law,” opined a prominent Texas attorney.¹¹⁶

Criticism of the jury became pronounced around the time of the Civil War and increased as the nineteenth century went on.¹¹⁷ The roots of this criticism went deep. Starting in the early nineteenth century, judges, lawyers, and legislators, taking a newly-professionalized view of the legal system, had begun to tentatively cabin some of the jury’s power. The view that juries had the right to decide questions of both law and fact began to be challenged, especially on the civil side.¹¹⁸ Commercial lawyers, abetted by judges interested in stability and predictability in the law, began to use procedural devices in civil cases—such as the special case, which permitted a judge to decide the case based on a stipulated set of facts—to take some decision-making away from the jury.¹¹⁹ Judges started reversing civil verdicts they found contrary to the weight of the evidence, a procedure “hardly known in American law” before the end of the eighteenth century.¹²⁰ These were reforms driven by elites. But there were also jury reforms that proceeded from other impulses and parts of the population. During the heyday of Jacksonian democracy, there were debates in a number of states about getting rid of the grand jury, with “critics charging that secret proceedings in criminal matters were contrary to the spirit of the new nation’s democratic institutions.”¹²¹

In the decades after the Civil War, anti-jury sentiment became more

114. Thomas J. Kernan, *The Jurisprudence of Lawlessness*, 29 ANN. REP. A.B.A. 450, 450 (1906). Accord M. Romero, *The Anglo-Saxon and Roman Systems of Criminal Jurisprudence*, 8 GREEN BAG 410, 412 n.1 (1896) (quoting a Fort Worth attorney who complained to the Texas Bar Association that “our criminal law and procedure . . . is a stench in the nostrils of every honest and law-abiding man”).

115. F.J. Cabot, *Is Trial by Jury, in Criminal Cases, a Failure?*, in 33 THE ARENA, 510, 510 (B.O. Flower ed., 1905).

116. Hal W. Greer, *Should Trial by Jury Be Abolished?*, 42 AM. L. REV. 192, 199 (1908).

117. See Renée Lettow Lerner, *The Rise of Directed Verdict: Jury Power in Civil Cases Before the Federal Rules of 1938*, 81 GEO. WASH. L. REV. 448, 486–87 (2013) [hereinafter Lerner, *Directed Verdict*].

118. HALL, *supra* note 84, at 107.

119. *Id.* at 107–08.

120. *Id.* at 108.

121. *Id.* at 172.

widespread. Dennis Hale has described how the jury was conceived in the Founding and Antebellum Periods as an elite institution staffed by propertied men of above-average intellect, character, and judgment; but as the nineteenth century progressed and universal manhood suffrage and universal jury service (for white males) became the norm, many elites lost respect for the institution.¹²²

In an era of high immigration from southern and eastern Europe, intense industrialization and urbanization, economic dislocation and labor strife, populist attacks on big business, corrupt machine politics, and growing popularity of radical left-wing politics in both the prairie and the city,¹²³ the increasing aversion to the jury from elite lawyers and other members of the genteel and professional classes—often white Anglo-American Protestants—coincided with their more general concerns about the excesses of democracy, the untrustworthy masses, and, in William Wiecek's words, “[f]ear of disorder and social disintegration.”¹²⁴

It became widely thought that the “better” men in the community did not serve on juries¹²⁵ and that jurors were “occasionally obstinate or corrupt,” “not always competent to fully understand or fairly dispose of the true issues raised and facts presented,” and too prone to “ignorance, partiality, or prejudice.”¹²⁶ *The Nation* opined that juries were frequently “twelve extremely illiterate or half-witted men,” and “nobody but the criminals and the ‘jury fixers’ are interested in the continuance of the present state of things.”¹²⁷ According to a prominent Indiana attorney, many think that “the jury, as at present constituted, is totally unfit for the

122. HALE, *supra* note 111, at 140–42.

123. See, e.g., FISS, *supra* note 5, at 37–40 (noting many of these trends); WIECEK, *supra* note 102, at 64–70 (same).

124. WIECEK, *supra* note 102, at 79. See also Lerner, *Directed Verdict*, *supra* note 117, at 487 (diagnosing causes of dissatisfaction with the jury).

125. See, e.g., Charles O. Bates, *Juries and Jury Trials*, 4 AM. LAW. 18, 21 (1896); *Good Juries*, N.Y. TIMES, Jan. 6, 1898, at 8.

126. William K. Townsend, *The Threatened Annihilation of the Judge-and-Jury System*, FORUM, Sept. 1896, at 107. *Accord* State v. Albee, 61 N.H. 423, 427 (1881); A.T. Brewer, *The Jury System—Objections to It*, 5 MICH. L.J. 50, 52 (1896) [hereinafter Brewer, *The Jury System*]; Cabot, *supra* note 115, at 510; Coxe, *Law's Delay*, *supra* note 92, at 63; George W. Alger, *American Discontent with Criminal Law*, OUTLOOK, June 15, 1907, at 321.

127. *Our Jury System*, NATION, May 9, 1895, at 357. See also *Reform of Our Jury System*, NATION, June 30, 1887, at 546 (stating that the jury system “puts the decision of questions of the utmost importance, involving even life itself, into the hands of men whom in private life no intelligent person would think of consulting on any subject of moment”).

work they are to perform; that they are men untrained in the law, for the most part unaccustomed to weighing and balancing evidence and judging of the truthfulness of witnesses.”¹²⁸ Even the U.S. Supreme Court criticized “ignorance . . . passion or prejudice” that sometimes influenced jury verdicts.¹²⁹

Elite American lawyers and progressive reformers routinely criticized American jurors for, in the words of George Alger of the New York Bar, “lack of respect for [the] law as law.”¹³⁰ As Pound described American juries at the turn of the twentieth century, they too often had “pioneer or frontier” attitudes toward criminal justice and were thus “predisposed to release the accused.”¹³¹ Taft told the Civic Forum in New York City in 1908 that “[a]nother cause of the inefficiency in the administration of the criminal law [in the United States] is the difficulty of securing jurors properly sensible of the duty which they are summoned to perform.”¹³²

Changes in the legal profession likely contributed to the jury’s loss of

128. Orville C. McLaughlin, *Trial by Jury*, 64 ALBANY L.J. 286, 289 (1902). For a similar argument, see E.W. McGraw, *Is the Jury System a Failure?*, CALIFORNIAN, May 1881, at 412. Edward McGraw was a U.S. attorney in Oregon Territory and then a prominent San Francisco lawyer.

129. *Pleasants v. Fant*, 89 U.S. (1 Wall.) 116, 121 (1874) (cited in Renée Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 WM. & MARY BILL RTS. J. 811, 849 (2014) [hereinafter Lerner, *Originalism*]). See also *Hayes v. Missouri*, 120 U.S. 68, 70 (1887) (endorsing the peremptory challenge, which “[e]xperience has shown [to be] one of the most effective means to free the jury-box from men unfit to be there,” especially in communities where there are difficulties “securing intelligent and impartial jurors”). For other claims that jurors could not understand complex matters, especially commercial, see Brewer, *The Jury System*, *supra* note 126, at 51; S.M. Bruce, *The Jury System*, 40 AM. L. REV. 222, 236 (1906); Coxe, *Trials*, *supra* note 113, at 291–92; John C. Dodge, *Trial by Jury in Civil Suits*, 48 ATLANTIC MONTHLY, July 1881, at 9, 14; McGraw, *supra* note 128, at 412; *The Jury System and Its Defects*, N.Y. TIMES, Sept. 25, 1867, at 4.

130. Alger, *supra* note 126, at 321.

131. POUND, CRIMINAL, *supra* note 103, at 125. See also Pound, *Inherent*, *supra* note 94, at 236 (criticizing “jury-lawlessness”). Pound was not alone in making this criticism. See Thomas A. Green, *Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice*, 93 MICH. L. REV. 1915, 1946 (1995) (noting that “fin de siècle . . . jurists roundly criticized the jury from many angles, including importantly that institution’s supposed adherence to ‘frontier justice’”). See generally WIECEK, *supra* note 102, at 79 (noting the concerns at this time by Supreme Court justices and other legal elites about “diminished respect for law”).

132. William H. Taft, *Delays and Defects in the Enforcement of the Law in this Country*, 187 N. AM. REV. 851, 857–59 (1908) [hereinafter Taft, *Defects*]. See also *Our Judges Lack Power, Says Taft*, N.Y. TIMES, May 14, 1911, at 16 (reporting on Taft opining that the administration of the criminal law in the United States was hampered because people have “lighter regard for law and its enforcement” than is necessary).

popularity. The leaders of the Bar and the best compensated lawyers had previously been generalists who specialized in trial practice and oratory before judges and juries. But as the nineteenth century advanced, many lawyers, especially the very successful ones, were “actually more men of business, negotiators, managers of corporate enterprises and the like, than lawyers,” as Alfred Russell told the ABA in 1891.¹³³ As the twentieth century approached, the bar associations in big cities like New York were often led by the new breed of corporate lawyers. And in civil cases, “[b]usiness and [its] lawyers were convinced that juries were incorrigibly plaintiff-minded.”¹³⁴ Oliver Wendell Holmes, then a justice on the Supreme Judicial Court of Massachusetts, concurred.¹³⁵ The new breed of corporation lawyer was more likely to fear the jury—for bias against corporate clients, for uncertainty and unpredictability, and for delay—than venerate it and make his living pleasing it, as earlier Bar leaders had.¹³⁶

Criticism of the jury often coincided with support for good government reform causes.¹³⁷ Organs of liberal, reformist thought like *The Nation* and *Harper's Weekly* were frequent jury critics. Politicization and corruption in the administration of justice were a frequent theme of many anti-jury voices. Many leaders of bar associations, who were often anti-jury, were also “active in urban reform movements and in Mugwump state and national movements.”¹³⁸ Preferring the expert judge over the popular jury was also in keeping with the respect for specialization and expertise

133. RUSSELL, *supra* note 98, at 4. Russell had been the U.S. district attorney in Detroit and then was a successful business lawyer and bar leader in that city. On the transition in legal practice from courtroom advocate to counselor, see WAYNE K. HOBSON, *THE AMERICAN LEGAL PROFESSION AND THE ORGANIZATIONAL SOCIETY, 1890–1930*, at 36–37, 67, 141–42 (Harold Hyman & Stuart Bruchey, eds., 1986); JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 297–308* (1950).

134. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 353 (3d ed. 2005). See also, e.g., John W. Hinsdale, *The Jury System*, 9 OKLA. L.J. 169, 170–71 (1910); *Is Our Jury System a Failure?*, N.Y. TIMES, July 8, 1906, at SM1. Hinsdale was president of the North Carolina Bar Association.

135. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466–68 (1897). See also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 116 (1992) (situating Holmes in a latter-nineteenth century style of legal thought that, among other things, decried “the arbitrary character of juries and . . . their penchant for favoring the noncorporate plaintiff”).

136. See, e.g., Russell, *supra* note 98, at 11 (stating that the civil jury had “outgrown its usefulness” and was probably “the chief cause, of delay and uncertainty in our courts”).

137. See generally JOHN G. SPROAT, “THE BEST MEN”: LIBERAL REFORMERS IN THE GILDED AGE (1968) (discussing elite reform movements and reformers of that period).

138. HOBSON, *supra* note 133, at 221. See also *id.* at 257.

held by the burgeoning progressive movement.¹³⁹

Also driving concern about the jury, on the criminal rather than civil side, was the growing concern, noted in Section II.A, about serious crime and the perception that juries frequently acquitted wrongdoers.¹⁴⁰ In addition, courts' dockets were increasingly crowded in the late nineteenth century.¹⁴¹ Merit-based concerns about the delays and costs of both the criminal and civil justice systems, noted in Section II.B, seem to have been powerful causal factors driving criticism of the jury.

Juries were also thought to be an anachronism in two senses. First, the historical reason for the jury was said to be the people protecting themselves against corrupt, biased, or tyrannical agents of government—paradigmatically, agents of absolutist kings. Men like Taft and Edson Sunderland—a Michigan professor who would go on to be a principal drafter of the Federal Rules of Civil Procedure—wrote that in a country where judges were either elected by the people or appointed by democratically-elected officials and where government tyranny was not thought to exist, the original justification for the jury no longer obtained.¹⁴² Blackstone had called the jury the palladium—the safeguard—of liberty.¹⁴³ But “[i]n the United States, there is no need of this palladium.”¹⁴⁴

Second, the jury—ancient, slow, inefficient, and costly—was out of tune with the times. As Judge Coxe put it, “[t]rial by petit jury in its present form is wholly unsuited to the needs of a busy and progressive age.”¹⁴⁵ A

139. See WILLRICH, *supra* note 107, at xxxii, 82; Charles M. Haar & Michael Allan Wolf, Commentary, *Euclid Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158, 2182–83 (2002).

140. See *supra* notes 84–96 and accompanying text.

141. Lerner, *Directed Verdict*, *supra* note 117, at 490.

142. See, e.g., Hinsdale, *supra* note 134, at 170; McGraw, *supra* note 128, at 412; Edson R. Sunderland, *The Inefficiency of the American Jury*, 13 MICH. L. REV. 302, 306 (1915); Taft, *Administration*, *supra* note 83, at 3–4; Edward A. Thomas, *Shall the Jury System Be Retained?*, FORUM, Mar. 1887, at 102.

143. BLACKSTONE, COMMENTARIES, *supra* note 31, at *343–52.

144. Brewer, *The Jury System*, *supra* note 126, at 53. Mark Twain, an acerbic critic of juries, famously poked fun at this obscure and constantly intoned metaphor. See 1 MARK TWAIN, *ROUGHING IT* 358 (Hamlin Hill ed., Penguin Books 1981). The original palladium was a statue of Pallas Athena on which the safety of Troy was said to depend, which of course made it a tempting target for theft by wily Odysseus.

145. Coxe, *Law's Delay*, *supra* note 92, at 63. See also *Against the Jury*, BOS. DAILY ADVERT., Aug. 28, 1891, at 1 (“The modern inventions which have so greatly quickened the transportation of persons and property, the transmission of intelligence and all business operations, inspire the public

Chicago lawyer called it “a relic of a by-gone era.”¹⁴⁶ Juries were said to make the justice system more “expensive” and “cumbersome” and the cause of much delay.¹⁴⁷ As a leading Florida lawyer told the ABA, “[m]odern life seeks results and demands that these results shall be quickly attained, in order that its energies may be released to accomplish more results. It likes accuracy, but it is perfectly content that some accuracy may be sacrificed to obtain speed.”¹⁴⁸ Modern life moved, as Justice Brewer put it, with “the hot haste of a Kansas cyclone.”¹⁴⁹ And in such an age, the jury was a “non-progressive, delay-provoking institution.”¹⁵⁰

Another factor, though certainly of lesser importance than others, may have been a newly positive view of the Roman-derived civil law tradition, which historically had eschewed the jury. For centuries, dating back before Independence, it had been a staple of American rhetoric to assert that the common law was superior to the civil law. There were always dissenters of course. The early nineteenth century Supreme Court Justice Joseph Story, for example, deeply appreciated the civil law.¹⁵¹ In the latter part of the nineteenth century, this appreciation became more widespread. Paralleling positive comments by Taft and other colonial administrators in the government after 1898—who engaged deeply with the Spanish civil law legal systems in Cuba, the Philippines, and Puerto Rico—the excellence of the civil law was discussed in law reviews and bar magazines.¹⁵² There was often a caveat, however, that civil law—notably Spanish—criminal procedure needed reform to better protect against abuses by government.¹⁵³

with the belief that the movements of lawyers and judges can and should be hastened.”).

146. Harvey Storck, *The Jury System*, 29 ALBANY L.J. 424, 425 (1884).

147. Coxe, *Law's Delay*, *supra* note 92, at 63. Accord William A. Blount, *The Struggle for Simplification of Legal Procedure: The Goals and Its Attainment*, 36 ANN. REP. A.B.A. 456, 463–64 (1913); Brewer, *The Jury System*, *supra* note 126, at 51; Taft, *Defects*, *supra* note 132, at 851; Alger, *supra* note 126, at 321; Editorial, *The Obsolete Jury System*, WKLY. TRIB.: SALT LAKE CITY, June 16, 1887, at 4; Townsend, *supra* note 126, at 107. In 1899, the U.S. Supreme Court approved the expansion of justice of the peace civil jurisdiction in the District of Columbia by noting that the legislature must be given discretion to act “with a view to prevent unnecessary delay and unreasonable expense” of jury trials. *Capital Traction Co. v. Hof*, 174 U.S. 1, 44 (1899).

148. Blount, *supra* note 147, at 458.

149. Brewer, *Education*, *supra* note 95, at 446–47.

150. Bruce, *supra* note 129, at 236.

151. See R.H. Helmholz, *Use of the Civil Law in Post-Revolutionary American Jurisprudence*, 66 TUL. L. REV. 1649, 1653, 1666–67 (1992).

152. See William Hale Beckford, *The Spanish Civil Code*, 49 AM. L. REG. 89, 89–90 (1901); Charles S. Lobingier, *Blending Legal Systems in the Philippines*, 21 L.Q. REV. 401, 401–02 (1905).

153. See, e.g., William Wirt Howe, *Roman and Civil Law in America*, 16 HARV. L. REV. 342, 357

Somewhat similarly, many lawyers pointed out that judges competently and fairly decided factual questions in cases on equity, admiralty, and probate dockets, suggesting that laypeople had no monopoly on fact-finding ability.¹⁵⁴

Driven by this great mix of factors, jury reform or abolition was intensely debated at the end of the nineteenth century and beginning of the twentieth. Newspapers began to report frequently on debates about reform or abolition of juries.¹⁵⁵ Law reviews and other elite magazines were filled with articles with titles like “Should Trials by Jury Be Abolished.”¹⁵⁶ Speakers at the ABA and state and local bar associations incessantly debated whether the jury system should stay or go.¹⁵⁷ At the time, bar associations were largely comprised of elite, urban lawyers.¹⁵⁸ Satirical magazines poked fun at juries and jurors.¹⁵⁹ Political scientists wrote papers and held conferences about the jury’s weaknesses. Law reformers like Pound focused on the jury as a major part of the reason for law’s failures.¹⁶⁰ As one law journal put it in the 1890s:

(1903); James H. MacLeary, *The Administration of Justice in Porto Rico*, 7 ILL. L. REV. 77, 84 (1912); Alfred F. Sears Jr., *The Common Law and the Civil Law*, 5 AM. LAW. 305, 306 (1897).

154. See, e.g., Dodge, *supra* note 129, at 14; McGraw, *supra* note 128, at 412; Russell, *supra* note 98, at 13.

155. See, e.g., *Against the Jury*, *supra* note 145, at 1; *English and American Jury Systems*, DAILY EVENING BULL. (S.F.), Aug. 24, 1889, at 2; *The Constitutional Jury*, DALL. MORNING NEWS, May 12, 1890, at 4; *The Grand-Jury: Leading Lawyers Discuss the Merits of the Institution*, ST. LOUIS REPUBLIC, Nov. 16, 1890, at 4; *Trial by Jury*, NEW HAVEN EVENING REG., Apr. 9, 1896, at 4; *Would Abolish Grand Jury: Magistrate Cornell’s Criticism Aroused by a Case Settled Out of Court*, N.Y. TIMES, Aug. 28, 1909, at 6.

156. John Freeman Baker, *Should Trials by Jury Be Abolished*, 66 ALB. L.J. 307, 307 (1904). See also Robert Y. Hayne, *Shall the Jury System Be Abolished?*, 4 N. AM. REV. 348, 348 (1884); Lawrence Irwell, *The Case Against Jury Trials in Civil Actions*, 54 CENT. L.J. 243, 243 (1902); George Lawyer, *Should the Grand Jury System Be Abolished*, 15 YALE L.J. 178, 178 (1905); Albert Stickney, *Is the Jury System a Failure?*, CENTURY, Nov. 1882, at 124.

157. See, e.g., Henry Clay Caldwell, *Trial by Judge and Jury*, 33 AM. L. REV. 321, 321 (1899) (reprinting a speech to the annual meeting of the Missouri State Bar Association by a U.S. circuit judge); Joseph H. Choate, *Trial by Jury*, 6 AM. LAW. 325, 325 (1898) (reprinting a speech by the ABA’s president to that group’s annual meeting).

158. See Robert W. Gordon, *The American Legal Profession, 1870–2000*, in 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: THE TWENTIETH CENTURY AND AFTER (1920–) 73, 75–77 (Michael Grossberg & Christopher Tomlins, eds., 2008); HOBSON, *supra* note 133, at 217, 230–34.

159. See, e.g., Morris Waite, *The Jury System*, PUCK, Apr. 16, 1890, at 118.

160. Pound, *Causes*, *supra* note 102, at 401 (discussing civil jury); Pound, *Inherent*, *supra* note 94, at 235–36 (discussing criminal jury).

There is probably no question more frequently mooted at present in the realm of legal discussion than that of the reform or abolition of jury trials. . . . [I]t has been as liberally treated by the lay press as by legal journals and lawyers themselves. . . . There is hardly a bar association meeting held nowadays at which the reform or abolition of the jury system is not made the occasion of animated and often heated discussion.¹⁶¹

All phases and aspects of the jury system were panned. In addition to general criticism of grand juries and petit juries in civil and criminal cases, the unanimity requirement, for instance, was widely criticized, particularly in civil matters. It was said to produce delays by creating mistrials, gave a veto to one obstinate, “corrupt,” or “stupid” man,¹⁶² and was contrary to the voting rules used in other American institutions.¹⁶³ Some supported getting rid of unanimity in criminal as well as civil cases.¹⁶⁴

C. JURY REFORM AT THE STATE LEVEL

The “quick and active age,” as the U.S. Supreme Court called it, was filled with “progressive growth and wise adaptation” of old procedure “to new circumstances and situations.”¹⁶⁵ There were great changes made in both in civil and criminal procedure, many focused on the jury.

Coming out of the Founding period, in essentially all states, both civil and criminal juries were constitutionally guaranteed. But starting in the

161. Note, *Should Jury Trials Be Abolished?*, 3 MICH. L.J. 169, 172 (1894).

162. Rufus B. Smith, *The Failure of the Administration of the Law in Civil Cases in Ohio*, Address Before the Cincinnati Bar Association (Jan. 21, 1896), in COLUMBUS, OHIO WEEKLY LAW BULL. PRINT 15 (1896). See also *Trial by Jury*, N.Y. TIMES, June 1, 1871, at 4 (stating that the unanimity rule “puts it in the power of one stupid or prejudiced person to block the course of justice altogether”).

163. See, e.g., A. Caperton Braxton, *The Civil Jury*, Address Before the New York State Bar Association (Dec. 12, 1903), in TWENTY-SEVENTH ANN. MEETING: PROC. OF THE N.Y. ST. B. ASS'N 45, 45–55 (1903); Coxe, *Trials*, supra note 113, at 292; Robert Earl, *Reforms in Jury Trials*, 63 ALBANY L.J. 10, 11 (1901); Hargis, supra note 99, at 314; McLaughlin, supra note 128, at 286–89.

164. See, e.g., Bates, supra note 125, at 21; *Our Jury System: Views of Ex-President Hayes*, 25 J. PRISON DISCIPLINE 81, 81 (1890). See also *The Cronin Verdict*, 33 HARPER'S WKLY., Dec. 28, 1889, at 1030 (decrying the “miscarriage of justice through the requirement of unanimity in the jury” in a criminal case). Interestingly, Root opposed removing the unanimity requirement in civil cases at the 1894 New York State constitutional convention, arguing that the people of the state were not discontented with the existing jury system. See Elihu Root, *Trial by Jury: Address Before New York State Constitutional Convention of 1894*, July 17, 1894, in ADDRESS ON GOVERNMENT AND CITIZENSHIP 121–22 (Robert Bacon & James Brown Scott eds., 1916)[hereinafter Root, *Trial by Jury*].

165. *Hurtado v. California*, 110 U.S. 516, 529–30 (1884).

mid-nineteenth century, many states altered their constitutions to allow parties to waive jury trial in civil cases.¹⁶⁶ During the era of the *Insular Cases*, most states and the federal courts did not allow criminal defendants to waive a jury trial and be tried by the bench.¹⁶⁷

By the first decade of the twentieth century, about one quarter of U.S. states had abolished grand juries as a means of initiating prosecutions.¹⁶⁸ Sixteen states—the newer western states comprising a majority of them—allowed juries to be fewer than the twelve people required by the common law and the U.S. Constitution (for federal courts).¹⁶⁹ Fourteen states—again, a majority of them being the western ones—had abolished the rule of unanimity for civil jury verdicts.¹⁷⁰ At least three states had abolished it for criminal juries.¹⁷¹

Colorado's 1876 constitution, for instance, did not guarantee a civil jury.¹⁷² Louisiana's new constitution of 1898 both failed to guarantee a civil jury trial and allowed the legislature to have criminal cases tried by the bench alone if the penalty were something less than death or imprisonment for a term of years at hard labor.¹⁷³ Louisiana, which had a system derived from the civil law as result of being a French and Spanish

166. See Lerner, *Originalism*, *supra* note 129, at 821 n.58.

167. See S. Chesterfield Oppenheim, *Waiver of Trial by Jury in Criminal Cases*, 25 MICH. L. REV. 695, 700 (1927); Stephen A. Siegel, *The Constitution on Trial: Article III's Jury Trial Provision, Originalism, and the Problem of Motivated Reasoning*, 52 SANTA CLARA L. REV. 373, 421 (2012). Justice Henry Brown of the Supreme Court criticized this rigidity. See HENRY B. BROWN, JUDICIAL INDEPENDENCE, A PAPER READ AT THE MEETING OF THE AMERICAN BAR ASSOCIATION 9–10 (Philadelphia, Dando Printing & Pub. Co. 1889) [hereinafter BROWN, JUDICIAL INDEPENDENCE].

168. Henry B. Brown, *The Administration of the Jury System*, 17 GREEN BAG 623, 623 (1905) [hereinafter Brown, *Administration*]. See generally Donald A. Dripps, *The Fourteenth Amendment, the Bill of Rights, and the (First) Criminal Procedure Revolution*, 18 J. CONTEMP. LEGAL ISSUES 469, 477–94 (2009) (discussing state-level grand jury reforms in the nineteenth century).

169. John Burton Phillips, *Modifications of the Jury System*, 16 GREEN BAG 514, 519 (1904). See also ROBERT VON MOSCHISKER, TRIAL BY JURY 292–94 (1922).

170. Brown, *Administration*, *supra* note 168, at 623; Ben B. Lindsey, *The Unanimity of Jury Verdicts and the Recent Law Abolishing Same*, 2 LEGAL ADVISER 389, 389–91 (1899); Phillips, *supra* note 169, at 514. See also MOSCHISKER, *supra* note 169, at 295–96; Lerner, *Originalism*, *supra* note 129, at 822 n.59.

171. Ben B. Lindsey, *The Unanimity of Jury Verdicts*, 5 VA. L. REG. 133, 135–36 (1899). See also Lerner, *Originalism*, *supra* note 129, at 822 n.60.

172. See COLO. CONST., art. II, § 23 (1876) (making “inviolable” “the right of trial by jury . . . in criminal cases” but not civil).

173. LA. CONST., art. IX (1898). See also *id.* art. CXVI (allowing non-unanimous jury verdicts in non-capital criminal cases where the punishment is imprisonment at hard labor).

colony, was the home state of U.S. Supreme Court Justice Edward Douglass White, the driving force behind the doctrine of territorial incorporation in the *Insular Cases*.

Other changes during this era included state and federal courts expanding the power of judges in civil cases to take cases away from juries by directing verdicts.¹⁷⁴ Contempt orders issued to enforce injunctions became a popular way for conservative federal judges to stop labor strikes, in part, because it avoided juries who might sympathize with strikers if criminal or civil actions were brought at law.¹⁷⁵

D. RESISTANCE TO JURY REFORM

As noted in Section II.A, there were calls for judges to preside over trials without the jury in civil cases at common law, including by Taft in his widely-covered 1905 Yale speech.¹⁷⁶ And some reformers even urged the same method for criminal cases.¹⁷⁷ For instance, George H. Williams, former U.S. Senator, U.S. Attorney General, and judge, urged “the total abolition of jury trials in all our courts.”¹⁷⁸

But at the same time as the jury was being criticized and reformed, pro-jury measures were also being urged and adopted.¹⁷⁹ The jury in late nineteenth century America was, as Lawrence Friedman observed, “lionized” as well as deeply “mistrusted.”¹⁸⁰ According to Friedman, the average member of the public would “nod in solemn agreement” with high-

174. See Lerner, *Directed Verdict*, *supra* note 117, at 473.

175. See William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1160–61, 1180–81 (1989). Taft defended this avoidance of the jury because juries introduced “delay,” “uncertainties and digressions and prejudices.” William H. Taft, *Labor and Capital*, Address Before the Cooper Institute (Jan. 10, 1908), in WILLIAM H. TAFT, PRESENT DAY PROBLEMS: A COLLECTION OF ADDRESSES DELIVERED ON VARIOUS OCCASIONS 241, 270–71 (1908).

176. Taft, *Administration*, *supra* note 83, at 6. See also, e.g., Robert B. Tripp, *Ought There Not to Be Changes in the Law with Reference to Jury Trials in Civil Cases*, in REPORT OF THE EIGHTH ANNUAL MEETING OF THE SOUTH DAKOTA BAR ASSOCIATION 94, 107–08 (1908); Brewer, *Jury*, *supra* note 126, at 51–54; Coxe, *Trials*, *supra* note 113, at 291–92; *Against the Jury*, *supra* note 145, at 1.

177. See, e.g., Brewer, *The Jury System*, *supra* note 126, at 51–54; Michael S. Loeb, *An Outline of a New System of Trial by Jury*, 7 AM. LAW. 335, 335 (1899); Thomas, *supra* note 142, at 102; *Jury Reform*, DAILY PICAYUNE (New Orleans), Feb. 15, 1887, at 4; *The Constitutional Jury*, DALL. MORNING NEWS, May 12, 1890, at 4.

178. Williams, *supra* note 84, at 150.

179. See Lerner, *Directed Verdict*, *supra* note 117, at 505 (“At the turn of the century, opinion among certain judges and legal commentators started to shift in favor of greater jury autonomy.”).

180. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 249–53 (1993).

minded paeans of “the wonders and the fairness” of the traditional jury system, while at the same time wanting “an efficient, effective system” of criminal justice that reliably convicted “dangerous criminals.”¹⁸¹

Differing views often tracked a class divide. Members of the elite corporate bar and academics were generally on the anti-jury side, while many of the pro-jury voices were populist reformers in the old Jacksonian mold, small-scale trial lawyers, and state legislators. But some proponents of the old-time jury rules were also the leading lights of the bar. Joseph Choate—one of the country’s most prominent lawyers, a leader of anti-Tweed reform in New York, and ambassador to Great Britain from 1899–1905—used his annual address as president-elect of the ABA to extol the virtues of the jury and denounce reform proposals.¹⁸² Dwight Foster, former Massachusetts Attorney General and Supreme Judicial Court Justice and son of a Federalist U.S. Senator, enumerated all the many “[a]dvantages of the Jury System” for the *North American Review*’s highbrow audience.¹⁸³

The modal elite lawyer—if such a person could have been found and polled—probably favored real but not far-reaching reform of the jury. Supreme Court Justice Brewer, for example, castigated “[t]he impatient radical” who promotes far-reaching changes in the jury and spoke in favor of limiting voir dire, abolishing unanimity, and permitting juries of fewer than twelve persons “where lighter offences are charged or the amount in controversy is small.”¹⁸⁴ Judge Coxe called it “idle to advocate the abolition of trial by jury” because the jury’s foundations are too deep in law and history of the people.¹⁸⁵ But he thought that civil cases “involving commercial transactions, expert knowledge, careful mathematical calculations, or the consideration of long and intricate accounts” could be tried to the court alone and that the rule of unanimity should be abolished.¹⁸⁶ George Washington Biddle of Philadelphia extolled the jury in criminal and tort cases in his address to the ABA, but advocated that

181. *Id.* at 250–51.

182. *See* Choate, *supra* note 157, at 326–27. In addition to Choate, Henry Clay Caldwell, a federal appellate judge praised the jury in a public address. For an example of the judge praising the jury, *see* Henry Clay Caldwell, *Trial by Judge and Jury*, 33 AM. L. REV. 321, 334 (1899) (reprinting an address by a federal appellate judge to the annual meeting of the Missouri State Bar Association calling “indisputable” the “immense superiority” of the jury “to any other mode of trial in criminal cases”).

183. Dwight Foster, *Advantages of the Jury System*, 135 N. AM. REV. 447, 447 (1882).

184. Brewer, *The Jury*, *supra* note 112, at 2, 4, 6.

185. Coxe, *Trials*, *supra* note 113, at 289.

186. *Id.* at 291–92.

contract cases be tried to panels of three jurors, selected from the better men in the community.¹⁸⁷ Justice Henry Brown thought the criminal jury was “the best method yet devised for the determination of criminal cases,” but that the unanimity rule should be abolished and that the jury trial was not “well adapted to certain classes of [civil] cases.”¹⁸⁸

Resistance to reform of the jury was likely caused in part by a deep-seated Burkean conservatism about law and society that was common among elite lawyers of that era. The reigning worldview of many lawyers has been called classical legal orthodoxy, which held, among other things, that law “must be the product of the ideas and life of the people over which it dominates; it must spring from the soil.”¹⁸⁹ According to the influential treatise writer and judge, Thomas Cooley, “the common reason of the people”¹⁹⁰ or the “settled conviction of the people as to what the rule of right and conduct should be” were the only legitimate sources of law.¹⁹¹ Habit and custom were thus the most important foundations of law.¹⁹²

These views were second nature to elite lawyers of that generation, such as Root and Taft. This view did not exclude reform; it simply meant that reform should try as far as possible to respect a people’s underlying traditions and habits. More than any other legal right that a litigant might invoke, the right to the jury—the right to call upon an institution which constantly and by design brought lay persons into responsible governance roles—necessarily required a close correspondence between law and

187. George W. Biddle, Vice President of the American Bar Association, *An Inquiry into the Proper Mode of Trial*, Annual Address Delivered Before the American Bar Association (Aug. 20, 1885).

188. BROWN, *JUDICIAL INDEPENDENCE*, *supra* note 167, at 24–25. Another prominent, elite lawyer who recognized the validity of some criticism, but defended the fundamental soundness of the jury was John F. Dillon. He was a state supreme court justice, U.S. circuit judge, Columbia and Yale law professor, president of the ABA, prominent author, and private attorney. *See* JOHN F. DILLON, *THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA: BEING A SERIES OF LECTURES DELIVERED BEFORE YALE UNIVERSITY* 121–26, 131–32 (Boston, Little, Brown & Co. 1894).

189. JOHN NORTON POMEROY, *AN INTRODUCTION TO MUNICIPAL LAW* 209 § 349 (2d ed., S.F., Bancroft-Whitney Co. 1886).

190. Thomas M. Cooley, *The Administration of Justice in the United States of America in Civil Cases*, 2 MICH. L.J. 341, 342 (1893).

191. Thomas M. Cooley, *Labor and Capital Before the Law*, 139 N. AM. REV. 503, 503 (1884). On these aspects of the thought of Cooley and Pomeroy, *see* Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era*, 78 N.Y.U. L. REV. 239, 259–61 (2003).

192. *See* WIECEK, *supra* note 102, at 99–100; Stephen A. Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 WISC. L. REV. 1431, 1458, 1496, 1519 (1990).

society. Judges and lawyers alone cannot administer the jury right. The jury could only work if it “spr[an]g from the soil.”¹⁹³ In the United States it did; the jury was viewed by many as a time-honored rite of citizenship and a hallowed protector of liberties. Reform of such an entrenched institution should only occur if serious problems required it.

For thorough-going critics of the jury, skepticism of the jury often accompanied deep faith in judges. Many reforms concerning the jury were explicitly designed to empower judges, such as allowing more directed verdicts in civil cases and permitting parties to waive jury trials. Men like Taft and Root spoke frequently in favor of strong, independent judges who should be unhampered by legislatures in the setting of judicial procedure.¹⁹⁴ But important elements in American society had for some time been pushing in the opposite direction: to increase the power of juries and reduce the power of judges. Starting in about the 1890s, “progressive and populist officials and journalists had been clamoring for judicial recall” in places where judges were not elected.¹⁹⁵ A large number of states adopted rules prohibiting judges from commenting to the jury on the evidence.¹⁹⁶ During the nineteenth century, by statute or constitutional provision, twenty states prohibited this.¹⁹⁷ By judicial decision, another fifteen states adopted the same rule.¹⁹⁸ Some states went further and prohibited judges from charging the jury orally; instead, they were limited to approving written charges offered by lawyers and forwarding them to the jury.¹⁹⁹

These rules were anathema to people like Root and Taft. The latter complained that “[t]he institution of trial by jury has come to be regarded as fetish to such an extent that state legislatures have exalted the power of

193. POMEROY, *supra* note 189, § 349.

194. See, e.g., William H. Taft, *The Attacks on the Courts and Legal Procedure*, 5 KY. L.J. 3, 5–6 (1916). On the other hand, by the end of the nineteenth century in at least eighteen states, the legislature had codified criminal procedure. See David Dudley Field, *American Progress in Jurisprudence*, 44 AM. L. REG. & REV. 541, 549 (1896).

195. JED HANDELSMAN SHUGERMAN, *THE PEOPLE’S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* 162 (2012).

196. See Renée Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV. 195, 241–42 (2000).

197. Sunderland, *supra* note 142, at 307–08.

198. *Id.* at 308 n.32.

199. See *Our Judges Lack Power, Says Taft*, N.Y. TIMES, May 14, 1911, at 16. See also Alger, *supra* note 126, at 324.

the jury and diminished the power of the court.”²⁰⁰ The result, he said, is that “the questions, both of law and fact, are largely left to the untutored and undisciplined action of the jury, influenced only by the contending arguments of counsel.”²⁰¹ Echoing Taft, Justice Henry Brown of the Supreme Court—author of *Mankichi* and part of the majority in *Dorr*, the key *Insular Cases* holding that juries were not constitutionally required in unincorporated territories—complained that “[t]he tendency of modern legislation has been to belittle the functions of the court, and to make of the jury a kind of fetish.”²⁰²

The debates between these competing views about the merits of juries versus judges played out in Congress, the executive branch, and the new insular governments when the United States set about reforming the judicial systems of Puerto Rico and the Philippines. As will be seen, the views of elite lawyers who were skeptical of the jury were the decisive ones.

III. JURY RIGHTS IN SUPREME COURT CASE LAW FROM THE MAINLAND

During the period of ferment and reform in legal procedure and jury practices, the Supreme Court began to confront arguments by litigants that state-level procedural reforms that departed from the baselines of the common law and the federal Bill of Rights were unconstitutional under the new Fourteenth Amendment. The Court’s responses to these arguments created a set of precedents that were crucial to the resolution of the *Insular Cases* concerning jury rights, undercutting any contention that racism and notions of cultural inferiority can fully explain the *Mankichi-Dorr-Balzac* line of *Insular Cases*, in which the Court held that jury rights were not constitutionally guaranteed in unincorporated territories.²⁰³

In the late nineteenth and early twentieth centuries, the Supreme Court

200. Taft, *Administration*, *supra* note 83, at 12.

201. *Our Judges Lack Power, Says Taft*, *supra* note 199, at 16. *The Nation* criticized this type of legislation as an attempt “to emasculate the court.” *The Week*, NATION, Oct. 29, 1896, at 320.

202. Brown, *Administration*, *supra* note 168, at 624. Brown gave an address to the ABA in 1889 arguing that statutes empowering juries might be unconstitutional infringements on the traditional power of judges. See BROWN, JUDICIAL INDEPENDENCE, *supra* note 167, at 10–17.

203. Christina Ponsa-Kraus has previously argued that the fact that the Supreme Court interpreted the Fourteenth Amendment to allow states to limit or deny traditional jury rights “undermines the standard account of the *Insular Cases*, with its claim that the Constitution applied in full in incorporated places—which, of course, included the states first and foremost—and not in unincorporated places.” Burnett, *Untied States*, *supra* note 26, at 838.

rejected the view that is today called “incorporation” of the Bill of Rights: that the Fourteenth Amendment’s Privileges and Immunities Clause and Due Process Clause had the effect of requiring that states comply with the provisions of the Bill of Rights.²⁰⁴ This modern use of the term, incorporation, is different than how it was used in the *Insular Cases*, in which it meant Congress acting to make a territory an integral and permanent part of the United States, thus fully extending the Constitution to it.²⁰⁵

The Court ruled repeatedly that the Fourteenth Amendment did not require states to adopt the Bill of Rights’ rules concerning juries, specifically grand juries²⁰⁶ and civil petit juries in suits at common law.²⁰⁷ Justice John Marshall Harlan, the strongest opponent of the territorial incorporation doctrine in the *Insular Cases*, was the only Justice who persistently dissented in these Fourteenth Amendment cases denying jury rights.²⁰⁸

Since all states by their own constitutions required criminal petit juries, the Supreme Court never had the opportunity to squarely decide

204. The one exception was the principle that private property could not be taken for public use without just compensation. *See Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 236 (1897).

205. *See supra* note 9 and accompanying text.

206. *See, e.g., Lem Woon v. Oregon*, 229 U.S. 586, 589–90 (1913); *Maxwell v. Dow*, 176 U.S. 581, 584–85 (1900); *Bolln v. Nebraska*, 176 U.S. 83, 86 (1900); *Hodgson v. Vermont*, 168 U.S. 262, 272–73 (1897); *McNulty v. California*, 149 U.S. 645, 648 (1893); *Hurtado v. California*, 110 U.S. 516, 538 (1884).

207. *See, e.g., Kennard v. Louisiana ex rel. Morgan*, 92 U.S. 480, 483 (1875) (upholding a statute that provided that disputes as to who was entitled to hold judicial office would be tried to a court not a jury); *Walker v. Sauvinet*, 92 U.S. 90, 93 (1875) (upholding a statute that provided that a judge would decide facts in a civil case if the jury was deadlocked). During this period, the Court also rejected the claim that Sixth and Seventh Amendment jury rights applied to trials in state courts. *See Brooks v. Missouri*, 124 U.S. 394, 397 (1888) (concerning the Sixth Amendment); *Edwards v. Elliott*, 88 U.S. (1 Wall.) 532, 557 (1874) (concerning the Seventh Amendment). This reiterated the holding from *Barron v. Mayor of Baltimore*, 32 U.S. (1 Pet.) 243, 250 (1833), that the Bill of Rights provided “security against the apprehended encroachments of the general government—not against those of the local governments.”

208. Justice Harlan dissented alone in *Hurtado*, *Bolln*, and *Maxwell*. *See also* *Brown v. New Jersey*, 175 U.S. 172, 177 (1899) (rejecting a Fourteenth Amendment challenge to a struck jury statute—a method of impaneling jurors—with Justice Harlan being the sole Justice to concur, rather than join the majority opinion); *Hayes v. Missouri*, 120 U.S. 68, 68 (1887) (rejecting a Fourteenth Amendment challenge to a statute regarding peremptory challenges of jurors, with Justice Harlan being the sole dissenter).

whether this was required, though it stated several times in dicta that it was not.²⁰⁹ “[T]he requirement of due process does not deprive a State of the power to dispense with jury trial altogether,” the Court stated.²¹⁰ In another case, the Court opined that it would not violate the Fourteenth Amendment if a state “should see fit to adopt the civil law and its method of procedure.”²¹¹ In yet a different case, the Court presciently stated that the United States “[i]n the future growth of the nation . . . may see fit to annex territories whose jurisprudence is that of the civil law,” and that the Fourteenth Amendment would allow, if such a territory “enter[ed] the Union” as a state, for its “traditions, laws, and systems of administration [to remain] unchanged.”²¹² Although some civil law jurisdictions in Europe had introduced jury trials in some criminal cases by the late nineteenth century,²¹³ the leading characteristic of civil law criminal procedure was an inquisitorial judicial role that did not use a jury for fact-finding.²¹⁴ In addition to this dicta, the Court did squarely hold that it did not violate the Fourteenth Amendment for states to provide, in criminal cases, waiver of jury trials,²¹⁵ juries of fewer than the twelve persons required by common law and the Sixth Amendment,²¹⁶ or for a judge to decide on the grade of the offense after a defendant pleaded guilty to murder.²¹⁷

In these cases upholding the constitutionality of states’ departures from historical jury practices, there were several important strands of reasoning. First was a textual argument. The Fifth Amendment Due Process Clause was not understood to require any jury rights since those rights were separately provided in other Constitutional provisions.²¹⁸ To

209. See, e.g., *Maxwell*, 176 U.S. at 594, 596.

210. *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912).

211. *Missouri v. Lewis*, 101 U.S. 22, 31 (1879).

212. *Holden v. Hardy*, 169 U.S. 366, 389 (1898). Though the decision contained much dicta about jury rights and judicial procedure, the merits question concerned the constitutionality of an eight-hour workday statute. Thus, Justice Harlan joined the majority opinion, and two strong defenders of property rights and liberty of contract, Justices Peckham and Brewer, were the only dissenters.

213. See Francis Lieber, *The Unanimity of Juries*, 15 AM. L. REG. 727, 728–29 (1866); Taft, *Administration*, *supra* note 83, at 5.

214. Justice Henry Brown told the ABA in 1889 that the states had “undoubted power to modify or curtail the right of trial by jury, or even to abolish it altogether.” BROWN, JUDICIAL INDEPENDENCE, *supra* note 167, at 11.

215. *Hallinger v. Davis*, 146 U.S. 314, 324 (1892).

216. *Maxwell v. Dow*, 176 U.S. 581, 602–04 (1900).

217. *Hallinger*, 146 U.S. at 324.

218. These other provisions include, for example, Article III, § 2, the Sixth Amendment (criminal petit jury), the Seventh Amendment (civil petit jury for cases at common law), and the Grand Jury

read the Due Process Clause as an additional guarantor of jury rights would violate the non-surplusage canon.²¹⁹ Therefore, the identically-worded Due Process Clause of the new Fourteenth Amendment should not be read to incorporate jury requirements either.²²⁰

Second was a historical argument. Due process had been understood to require only that judicial procedures follow the “law of the land”—the standing law of the jurisdiction, whatever it was—as long a few core requirements were met: notice and an opportunity to be heard before an impartial tribunal of competent jurisdiction.²²¹ No more was required. Sometimes the Court would say, instead of enumerating the core requisites of notice and the like, that Due Process prevents states from violating “those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.”²²² This understanding that the jury trial was a mere mode of procedure and not a fundamental right was soon applied by the Court in the somewhat different setting of the *Insular Cases*.²²³

As for the Privileges and Immunities Clause of the Fourteenth Amendment, the Court adhered to its holding in the *Slaughter-House Cases* (1873)²²⁴ that the privileges or immunities of U.S. citizenship protected by the clause had nothing to do with ordinary judicial procedure, but rather included such things as the right “to demand the care and protection of the General Government over his life, liberty[,] and property when on the high seas or within the jurisdiction of a foreign government.”²²⁵

A vitally important part of the Court’s reasoning in these cases was a

Clause of the Fifth Amendment.

219. See *Hurtado v. California*, 110 U.S. 516, 535–36 (1884).

220. See *id.*

221. *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912). See also *Maxwell*, 176 U.S. at 595; *Holden v. Hardy*, 169 U.S. 366, 389–90 (1898); *Hurtado*, 110 U.S. at 533–35; *Davidson v. New Orleans*, 96 U.S. 97, 105 (1877); *Kennard v. Louisiana ex rel. Morgan*, 92 U.S. 480, 483 (1875); *Walker v. Sauvinet*, 92 U.S. 90, 93 (1875).

222. *In re Kemmler*, 136 U.S. 436, 448 (1890). See also *Brown v. New Jersey*, 175 U.S. 172, 175 (1899) (“The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution.”).

223. Also, in 1891, the Court held that a murder trial of a seaman on an American-flagged vessel in a U.S. consular court in Japan was not unconstitutional for depriving the accused of a grand jury indictment and a trial by jury. See *Ross v. McIntyre (In re Ross)*, 140 U.S. 453, 453, 461 (1891).

224. See *Slaughter-House Cases*, 83 U.S. (1 Wall.) 36, 74–80 (1872).

225. *Maxwell*, 176 U.S. at 590–91.

desire to allow state-level experimentation and reform of procedure, including jury practices. In its 1884 *Hurtado v. California* decision holding that the Fourteenth Amendment did not require states to use grand juries, the Court noted that “in this quick and active age,” “progressive growth and wise adaptation to new circumstances and situations” was desirable in criminal procedure.²²⁶ In its 1898 *Holden v. Hardy* decision holding that criminal juries of fewer than the historic twelve members did not violate the Fourteenth Amendment, the Court opined at length about the need for “progressive” growth and flexibility.²²⁷ “[T]he law is, to a certain extent, a progressive science;” “in some of the States[,] methods of procedure, which at the time the [U.S.] constitution was adopted were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary.”²²⁸

A number of states, the Court noted, had abolished grand juries and the rule of jury unanimity in civil cases.²²⁹ The U.S. Constitution was “to a large extent inflexible and exceedingly difficult of amendment,”²³⁰ and so its criminal procedure provisions in the Bill of Rights were likely permanent. But the Court did not want to use the Fourteenth Amendment to apply the Bill of Rights to the states and hence “to deprive the States of the power to so amend their laws as to make them conform to the wishes of the citizens.”²³¹ In short, states should be free to choose what the Court called “simpler and more expeditious forms of administering justice” than what the Bill of Rights required in federal court.²³² In a 1908 case, the Court declared that “the procedure of the first half of the seventeenth century”

226. *Hurtado*, 110 U.S. at 529–31.

227. *Holden v. Hardy*, 169 U.S. 366, 385–86 (1898).

228. *Id.*

229. *Id.* at 386–87.

230. *Id.* at 387.

231. *Id.* See also *Bolln v. Nebraska*, 176 U.S. 83, 88–89 (1900) (“[T]he Fourteenth Amendment was not intended to curtail the powers of the states to so amend their laws as to make them conform to the wishes of their citizens, to changed views of administration, or to the exigencies of their social life.”); *Brown v. New Jersey*, 175 U.S. 172, 175 (1899) (“The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law . . . [I]t may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary.”).

232. *Holden*, 169 U.S. at 383–84. See Gerard N. Magliocca, *Why Did the Incorporation of the Bill of Rights Fail in the Late Nineteenth Century?*, 94 MINN. L. REV. 102, 106 (2009) (showing that “lawyers at this time drew a sharp distinction between substantive rights, which were fundamental and unalterable, and procedural forms, which were subject to improvement and should not be constitutionally fixed”).

should not be “fastened upon the American jurisprudence like a straightjacket, only to be unloosed by constitutional amendment,” because this would render state law “incapable of progress or improvement.”²³³

In these cases, the Court was reflecting, more than leading, elite opinion about the need to facilitate reform of legal procedure and, in particular, jury practice. And as demonstrated in Part II above, skepticism about juries and a desire for fundamental procedural reform were widespread in the late nineteenth and early twentieth centuries—including among Supreme Court Justices.²³⁴

IV. THE JURY AND OTHER INDIVIDUAL RIGHTS IN THE PHILIPPINES

The executive, and later Congress, introduced fundamental reforms in the Philippines to better protect individual rights, not only, but especially in the criminal justice process. However, the jury was not introduced. Although there was racism and cultural chauvinism among American policymakers, there is significant evidence that the U.S. government was *also* proceeding in a good faith effort to introduce the legal system that would best conform to the traditions and customs of the people of the Philippines, while protecting fundamental rights. In *Dorr*, the Supreme Court would ratify Washington’s decision to omit the jury, while granting most other rights found in the Constitution to residents of the Philippines.

A. THE PERIOD OF MILITARY-EXECUTIVE GOVERNMENT

Early in the period of U.S. military rule, which started in 1898, a fact-

233. *Twining v. New Jersey*, 211 U.S. 78, 101 (1908) (citation omitted). Holmes put the general point—that law should be allowed to change and adapt to present needs—more acerbically when he wrote that “[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.” Holmes, *supra* note 135, at 469.

234. Even though it has incorporated most provisions of the Bill of Rights against the states via the Fourteenth Amendment’s Due Process Clause, the modern Supreme Court has not incorporated the grand jury or civil jury guarantees. *See McDonald v. Chicago*, 561 U.S. 742, 765 n.13 (2010). It has incorporated the right to a jury trial in criminal cases. *Id.* at 766 n.14. The modern Court’s case law about incorporation of the common law and the Sixth Amendment’s unanimity and twelve-person rules in criminal cases is complex. *See generally* *Burch v. Louisiana*, 441 U.S. 130 (1979) (holding unconstitutional the use of a non-unanimous six-person jury); *Ballew v. Georgia*, 435 U.S. 223 (1978) (holding unconstitutional the use of a five-person unanimous jury); *Apodaca v. Oregon*, 406 U.S. 404 (1972) (upholding the use of a twelve-person jury which may convict 10–2); *Johnson v. Louisiana*, 406 U.S. 356 (1972) (upholding the use of a twelve-person jury which may convict 9–3); *Williams v. Florida*, 399 U.S. 78 (1970) (upholding the use of a unanimous six-person jury).

finding group was created by President McKinley and sent to the Philippines. The group, led by Jacob Schurman, the president of Cornell University, ultimately recommended in January 1900 that the United States institute an American “scheme [of territorial] government” like the one used in Louisiana in 1804, but with greater local self-government.²³⁵ The Schurman Commission further recommended that Congress provide by statute that “no law shall be valid which is inconsistent with the Constitution and laws of the United States,” and that criminal and civil jury trials be introduced.²³⁶ But different plans were being made in Washington.

Soon after he was appointed Secretary of War, Elihu Root released in November 1899 a public report setting forth the administration’s legal policy toward the islands. Root’s report announced that “the people of the islands have no right . . . to assert a legal right under the provisions of the constitution which was established for the people of the United States themselves and to meet the conditions existing upon this continent.”²³⁷ Any U.S. military or executive officials who had taken the position that the Constitution was applicable in the new territories were overruled. Also implicitly overruled was the Schurman Commission, whose final report recommending application of the Constitution in the Philippines was then under preparation.

Root told a correspondent that one of his fundamental premises was that “the basis upon which we should proceed in these islands is to be found in the customs and business and social life of the islanders themselves,” and not in “the common law”—on which the criminal procedure guarantees of the Bill of Rights were based—which is “the customs, etc., of New England or Nebraska.”²³⁸

Root also opined in his 1899 report that:

The people of the ceded islands have acquired a moral right to be treated by the United States in accordance with the underlying principles of justice and freedom which we have declared in our Constitution, and which are the essential safeguards of every individual against the powers of government, not because those provisions were enacted for them, but because they are essential limitations inherent in the very existence of

235. 1 REPORT OF THE PHILIPPINE COMMISSION TO THE PRESIDENT, S. DOC. NO. 56-138, at 109 (1900) [hereinafter SCHURMAN COMMISSION REPORT].

236. *Id.* at 107.

237. ELIHU ROOT, REPORT OF THE SECRETARY OF WAR, ANNUAL REPORTS OF THE WAR DEPARTMENT, H.R. DOC. NO. 56-2, at 24 (1899) [hereinafter ROOT, REPORT].

238. 1 JESSUP, *supra* note 37, at 346.

the American Government. . . . [The people] are entitled to demand that they shall not be deprived of life, liberty, or property without due process of law, that private property shall not be taken for public use without [just] compensation, that no law shall be passed impairing the obligation of contracts, etc., because our nation has declared these to be the rights belonging to all men. . . . It is impossible that there should be any delegation of power by the people of the United States to any legislative, executive, or judicial officer which should carry the right to violate these rules toward anyone anywhere.²³⁹

Root's enunciation of fundamental limitations on the power of government closely paralleled the fundamental rights protected by then-current U.S. constitutional law. Both the federal government and the states were bound to provide due process of law,²⁴⁰ and the Supreme Court had just two years earlier held that due process is violated if a state government takes private property for public use without paying just compensation.²⁴¹ The same rule bound the federal government through the Fifth Amendment's Takings Clause.

Root recommended that insular governments should be created "subject to limitations prescribed by Congress of the same character as the constitutional limitations generally imposed upon our state legislatures."²⁴² Because U.S. state constitutions generally paralleled the federal Bill of Rights in their limitations upon government, Root was in effect recommending a statutory bill of rights. He praised "[t]he civil code established by Spain for Cuba, Porto Rico, and the Philippines" as "an excellent body of laws, adequate in the main, and adapted to the customs and conditions of the people."²⁴³ Reform was needed in procedure, however, "[i]n order to secure a good administration of the laws."²⁴⁴

In April 1900, President McKinley appointed a second Philippine Commission to actually institute civil government. His orders to the Commission, which were published in the press, required the Commission to create a government that conformed as much as possible to the Filipino's own "customs, . . . habits, and even their prejudices," but also to "certain great principles of government which have been made the basis of our governmental system, which we deem essential to the rule of law and the

239. ROOT, REPORT, *supra* note 237, at 24–25.

240. See U.S. CONST., amends. V, XIV.

241. See *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 236 (1897).

242. ROOT, REPORT, *supra* note 237, at 27.

243. *Id.* at 29.

244. *Id.* at 30.

maintenance of individual freedom.”²⁴⁵ There should be no surprise that this tracked the views of Root and Taft, for they were the authors, with Root writing the first draft.²⁴⁶ The instructions document then continued in the same vein as Root’s 1899 report had; the President ordered the Commission to create a government which, at every level, division, or branch, respected “inviolable rules”:

That no person shall be deprived of life, liberty, or property without due process of law; that private property shall not be taken for public use without just compensation; that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense; that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted; that no person shall be put twice in jeopardy for the same offense or be compelled in any criminal case to be a witness against himself; that the right to be secure against unreasonable searches and seizures shall not be violated; that neither slavery nor involuntary servitude shall exist except as punishment for crime; that no bill of attainder or ex post facto law shall be passed; that no law shall be passed abridging the freedom of speech or of the press or of the rights of the people to peaceably assemble and petition the government for a redress of grievances; that no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed.²⁴⁷

Taft was proud of the document because, he said, it “secured to the Philippine people all the guaranties of our Bill of Rights except trial by jury and the right to bear arms.”²⁴⁸ The document did not state that the Constitution itself protected the Filipino people. Root had previously opined that the Constitution itself—as distinguished from the inviolable, great moral principles of free government found in it—did not apply in the new territories.²⁴⁹ And Root’s view had become the official position of the

245. WILLIAM MCKINLEY, *THE PRESIDENT’S INSTRUCTIONS TO THE COMMISSION*, reprinted in *ANNUAL REPORTS OF THE WAR DEPARTMENT, PUBLIC LAWS AND RESOLUTIONS PASSED BY THE PHILIPPINE COMM’N 8* (1901) [hereinafter MCKINLEY, *INSTRUCTIONS*].

246. 1 PRINGLE, *supra* note 35, at 182.

247. MCKINLEY, *INSTRUCTIONS*, *supra* note 245, at 8–9.

248. 1 PRINGLE, *supra* note 35, at 182–83 (citation omitted).

249. 1 JESSUP, *supra* note 37, at 345.

executive branch.²⁵⁰

In the meantime, the U.S. army had been busy fighting an insurrection in the Philippines. After the United States more or less destroyed a traditional military organization led by Filipino general Emilio Aguinaldo in 1899, a second phase of the insurgency began—a guerrilla war in remote areas of the archipelago.²⁵¹ Starting in late 1900, U.S. tactics became increasingly harsh, including waterboarding for interrogation, the summary execution of captured insurgents, and collective punishment of villages that harbored them.²⁵² But the core parts of the Philippines, where about 75 percent of the population lived, were quiet, and the U.S. government moved to establish civilian rule there.

The army in the Philippines almost immediately decided that it must reform the administration of justice. Spanish criminal procedure—a civil law product—effectively put the burden of proof on the criminal defendant, required the defendant to give testimony, and had limited mechanisms for procuring testimony of defense witnesses.²⁵³ During the inquisitorial or “sumario” phase of a criminal proceeding, witnesses selected by the government were interviewed in secret and outside the presence of the accused or defense counsel.²⁵⁴ The resulting transcripts were used as evidence in the judicial finding of guilt or innocence.²⁵⁵ Hearsay was “freely admitted,” while family and employees of the accused were barred from testifying.²⁵⁶ Lengthy pre-conviction detentions—sometimes lasting years—were common.²⁵⁷ In the view of many American lawyers who went

250. See, e.g., *Held by Mr. M’Kinley: Views of the President as to Trade with Islands*, WASH. POST, Feb. 18, 1900, at 1 (reporting the president’s view that “Congress is not bound by the limitations of the Constitution when it enters upon the task of legislating” for Puerto Rico and the Philippines).

251. See GRAHAM A. COSMAS, *AN ARMY FOR EMPIRE* 312–16 (1994). See also DAVID J. SILBEY, *A WAR OF FRONTIER AND EMPIRE: THE PHILIPPINE-AMERICAN WAR, 1899–1902*, at 130–34 (2007).

252. SILBEY, *supra* note 251, at 157–80. See also BENJAMIN ALLEN COATES, *LEGALIST EMPIRE: INTERNATIONAL LAW AND AMERICAN FOREIGN RELATIONS IN THE EARLY TWENTIETH CENTURY* 49 (2016).

253. W.F. Norris, *The Criminal Code of the Philippines*, 15 GREEN BAG 433, 433 (1903). William Norris was a judge in the Court of First Instance in the Philippines.

254. LT. COL. E.H. CROWDER, *REPORT OF THE SECRETARY TO THE U.S. MILITARY GOVERNOR IN THE PHILIPPINE ISLANDS*, ANNUAL REPORTS OF THE WAR DEPARTMENT, H.R. DOC. NO. 56-2, at 5 (1900) [hereinafter CROWDER, REPORT].

255. *Id.*

256. *Id.*

257. *Id.* at 19. See also Charles Sumner Lobingier, *Civil Law Rights Through Common-Law Remedies: A Resume of the Progress of Legal Fusion in the Philippines*, 20 JURID. REV. 97, 103 (1908);

to the Philippines, the criminal process under the Spanish codes and rules was so lengthy and “red tape was so interminable as to amount practically to a denial of justice.”²⁵⁸ “[T]he impecunious accused was thought to have no chance as against the law’s delay.”²⁵⁹ The paper requirement of a speedy trial was “universally abused,” and no remedy similar to habeas corpus existed.²⁶⁰ Widespread corruption by Spanish-era judges and other officials was alleged.²⁶¹ Judges were not independent of the executive.²⁶²

The military introduced many familiar American concepts to reform criminal procedure, but not the jury. General Orders 58 (“G.O. 58”) was issued in April 1900 under the authority of the commanding general and U.S. military governor in the Philippines.²⁶³ The order remained, even after civil authority took over from military, the Philippines’ “Code of Criminal Procedure.”²⁶⁴ By design, G.O. 58 was simple and brief. There was “a crying need” for a “simpler and speedier” mode of criminal procedure, as former Nebraska law professor turned Philippine judge Charles Lobingier put it.²⁶⁵ An Army lawyer in the Philippines noted that G.O. 58 eschewed technicalities found in U.S. law and called it “nothing less than a declaration of war on the time-fortified, justice-thwarting technicalities and methodism of common law criminal procedure.”²⁶⁶ Procedure under G.O.

Lebbeus R. Wilfley, *The New Philippine Judiciary*, 178 N. AM. REV. 730, 732 (1904). Lobingier was a professor of law at the University of Nebraska and then a judge of the Court of First Instance in the Philippines (1904–14). Wilfley was a Missouri attorney who served as Attorney General of the Philippines (1901–06).

258. James H. Blount, *Some Legal Aspects of the Philippines*, 14 AM. LAW. 495, 495 (1906) [hereinafter Blount, *Legal Aspects*]. Accord Wilfley, *supra* note 257, at 732. Blount served in the U.S. Army in Cuba and the Philippines, and then was a judge on the Court of First Instance in the Philippines (1901–05). He became a strong critic of U.S. colonial policy there. See *The American Occupation of the Philippines, 1898–1912*, 2 J. POL. ECON. 171, 171–72 (1913) (reviewing a book by James H. Blount).

259. Lobingier, *supra* note 257, at 98.

260. CROWDER, REPORT, *supra* note 254, at 18.

261. Norris, *supra* note 253, at 435. See also William H. Taft, *The People of the Philippine Islands*, INDEPENDENT, May 8, 1902, at 1091 [hereinafter Taft, *People*].

262. Wilfley, *supra* note 257, at 732.

263. REPORT OF MAJOR-GEN. OTIS, OFFICE OF THE U.S. MILITARY GOVERNOR IN THE PHILIPPINE ISLANDS, GENERAL ORDERS NO. 58 (1900) [hereinafter GENERAL ORDERS NO. 58].

264. See, e.g., *United States v. Laguna*, 17 PHIL. REP. 532, 532 (S.C., Dec. 20, 1910).

265. Lobingier, *supra* note 257, at 98–99.

266. William M. Connor, *Philippine Public Law and Its Constitutional Relation to the United States*, 10 VA. L. REV. 257, 263 (1924).

58 proved in practice “simplified and highly effective.”²⁶⁷ At a time when “public opinion, led by thoughtful men of the legal profession” are, in the United States, demanding “radical procedural reform in the field of criminal law,” the Philippine example was thought to be instructive.²⁶⁸

G.O. 58 announced a great number of familiar rights for criminal defendants. Defendants had a right to notice of the nature of the offense charged, personal presence and assistance of counsel “at every stage of the proceedings,” to be confronted in court by any adverse witnesses, and to compulsory process for securing attendance of defense witnesses.²⁶⁹ Any competent person could be a defense witness.²⁷⁰ There was a privilege against self-incrimination and its associated ban on drawing adverse inferences from the failure of the defendant to testify.²⁷¹ Trials had to be “speedy and public.”²⁷² The defendant was “presumed to be innocent until the contrary [was] proved” beyond a “reasonable doubt.”²⁷³ At arraignment, a defendant was told of his right to counsel and, if “unable to employ counsel, the court [was required to] assign counsel to defend him.”²⁷⁴ This supplemented an 1899 general order of the military governor establishing a procedure for appointment of counsel for indigent defendants, which also prohibited appointed counsel from demanding any fees from those who “have the right to be defended as a poor persons.”²⁷⁵ G.O. 58 protected against double jeopardy.²⁷⁶ All offenses were bailable except capital crimes “when proof of guilt [was] evident or the presumption of guilt [was] strong,” as found by the court at a preliminary examination.²⁷⁷ The right of habeas corpus was guaranteed to “[e]very person unlawfully imprisoned or restrained of his liberty under any

267. *Id.*

268. *Id.* at 257.

269. GENERAL ORDERS NO. 58, *supra* note 263, §§ 6, 15(1), 15(2), 15(5), 15(6).

270. *Id.* § 55.

271. *Id.* §§ 15(3), 15(4).

272. *Id.* § 15(7).

273. *Id.* § 57. *See also id.* § 59 (“the burden of proof of guilt shall be upon the prosecution”).

274. *Id.* § 17.

275. OFFICE OF THE U.S. MILITARY GOVERNOR IN THE PHILIPPINE ISLANDS, GENERAL ORDERS NO. 47, *as reprinted in* INDEX TO GENERAL ORDERS AND CIRCULARS ISSUED FROM THE OFFICE OF THE U.S. MILITARY GOVERNOR IN THE PHILIPPINE ISLANDS (1899). In 1924, a U.S. judge advocate general reported that the Philippine bar had admirably performed its duty to provide free representation to the indigent. *See Connor, supra* note 266, at 278.

276. GENERAL ORDERS NO. 58, *supra* note 263, §§ 27–28.

277. *Id.* § 63.

pretence whatever.”²⁷⁸ Search warrants could only issue under oath if probable cause were established and had to satisfy Fourth Amendment-type particularity requirements.²⁷⁹ When the civilian government took over civil authority from the military governor, the Philippine Commission, headed by Taft, left the Army’s criminal procedure code intact.²⁸⁰

B. DECISION-MAKING ABOUT THE JURY IN THE PHILIPPINES

Root and Taft, supported by President McKinley, had already decided and implied in the Instructions document of spring 1900 that the jury would not be introduced in the Philippines. But a significant period of fact-finding and debate was still to come, as both the Schurman Commission and then a second Philippine Commission headed by Taft held extensive hearings in the Philippines. Meanwhile, the U.S. Congress debated what kind of organic act of government it should create for the islands. If there had been very strong support for the jury in either the Philippines or Washington DC, things might have turned out differently. But there was not.

American officials were not being pressed hard for jury trial by the Filipinos they consulted during the early years when the key choices about legal architecture and extension of the Constitution were first made. In 1900, a group of “[t]he most influential and honorable natives,” identified as leaders of a nascent “Autonomy Party,” indicated to the Schurman Commission that they did not oppose introduction of a legal code lacking jury rights.²⁸¹ A Spanish lawyer who had relocated to Manila about twelve years before the Americans came, told the Schurman Commission that he thought jury trials would be desirable in criminal but not civil cases, and was concerned that “the people would have to be educated to be fit to serve as jurymen.”²⁸² But a leading Filipino lawyer in the islands, Cayetano Arrellano y Lonzón, who was chief justice of the Philippine Supreme Court

278. *Id.* § 77.

279. *Id.* §§ 97, 99.

280. Blount, *Legal Aspects*, *supra* note 258, at 496; F.C. Fisher, *Some Peculiarities of Philippine Criminal Law and Procedure*, 19 VA. L. REV. 33, 33 (1932).

281. *For Filipino Autonomy: Native Would Form Territories to Become States Later*, N.Y. TIMES, Dec. 21, 1900, at 5.

282. 2 SCHURMAN COMMISSION REPORT, *supra* note 235, at 56. Pedro A. Paterno, a mestizo (mixed Spanish-Filipino parentage) who had served as an informal interlocutor between Spanish officials and Filipino insurgents in 1897 and 1898, *see* TEODORO A. AGONCILLO, HISTORY OF THE FILIPINO PEOPLE 184 (8th ed. 1990), created in 1898 a plan for a Filipino autonomous government under Spanish sovereignty that included a jury trial right. *See* 1 SCHURMAN COMMISSION REPORT, *supra* note 235, at 229–30 ex. VII.

from 1901 to 1920, was of the view that Filipinos were not ready for jury trial.²⁸³ In 1902, Taft, who had been in the Philippines for about a year by that time, asserted that U.S. policymakers, who had been holding hearings and conducting fact-finding, had “found no person desiring [trial by jury] at present even among the people of the Islands.”²⁸⁴ Filipino lawyers seemed to favor some procedural reform, but did not want a wholesale uprooting of the civil law system to which they were accustomed.²⁸⁵

The first organized and active political party after the American takeover, the Federal Party, which mainly represented pro-American elites and was co-founded by Arrellano, held conventions and published detailed policy recommendations and party platforms starting in 1900. It did not advocate the adoption of the jury trial.²⁸⁶ Spain had introduced the criminal jury at home in the late nineteenth century, but had refused to extend the institution to its colonies like Puerto Rico and the Philippines.²⁸⁷ This could have been a source of complaint by Filipinos, if they desired the jury trial, but it does not seem to have been. In 1898, a revolutionary Filipino Congress wrote a constitution for their proclaimed independent state. This Malolos Constitution mostly copied constitutional guarantees found in

283. “Even among that class of persons in these Islands who are fairly well educated, I do not believe that we could expect them to have the stability of judgment which would be necessary for them to pass fairly and justly upon questions that a jury would have to decide.” HEARINGS BEFORE THE SECRETARY OF WAR AND THE CONGRESSIONAL PARTY ACCOMPANYING HIM TO THE PHILIPPINE ISLANDS 104 (1905).

284. Taft, *People*, *supra* note 261, at 1103.

285. See Clara Altman, *Courtroom Colonialism: Philippine Law and U.S. Rule, 1898–1935* (Aug. 2014) (unpublished Ph.D. dissertation, Brandeis University).

286. See MANIFESTO OF THE FEDERAL PARTY (1905). Its 1900 platform, for example, called for “Individual rights, liberties and guaranties of person, property and domicile, together with freedom of conscience and absolute separation of church and state.” *Id.* at 19. Its 1905 Manifesto contained recommendations on “The Administration of Justice,” including “[r]eform of the law of criminal procedure, declaring inadmissible as proof against the accused any confession.” *Id.* at 13–14. That a call for a jury trial did not make it into the 1905 Manifesto is interesting because of press reports that “[t]he convention of the Federal party has decided to petition Congress to authorize Secretary of War Taft on his arrival in Manila to institute trial by jury.” *Demands for Philippines: Liberal Party for Trial by Jury and Tariff Reduction*, N.Y. TIMES, June 4, 1905, at 4.

287. In mainland Spain, the government introduced the criminal jury in 1872, suspended it in 1875, and restored it in 1888; it was never introduced in the Philippines. See Brief of the Solicitor General for the United States at 14, *Kepner v. United States*, 195 U.S. 100 (1904) (No. 244), *Dorr v. United States*, 195 U.S. 138 (1904) (No. 583), and *Mendezona v. United States*, 195 U.S. 158 (1904) (No. 584) (joint brief) [hereinafter Brief of the Solicitor General].

constitutions of civil law countries and did not contain a jury trial right.²⁸⁸

During the early years when U.S. policy was being set, Taft spoke repeatedly to Congress and the U.S. public against the jury trial in the Philippines. Senator Henry Cabot Lodge of Massachusetts, the administration leader on the issue in the U.S. Senate, credited Taft with persuading the Senate Committee on the Philippines that the jury trial was not at that time appropriate for the Philippines.²⁸⁹ As Taft noted, “the population has had no experience with the jury system.”²⁹⁰ This was a very important point for Taft, Root, and other elite lawyers whose worldview was shaped by the reigning classical legal orthodoxy. The jury did not “spring from the soil;”²⁹¹ the Philippines had been an autocratic society with essentially no self-government by the people and an inquisitorial, judge-controlled, paper-based legal system.²⁹²

Taft, who we have seen in mainland U.S. issues was a strong believer in judges, repeated in his many public statements that U.S. efforts had created a robust insular court system and that issues of both fact and law could be appealed to the Supreme Court of the Philippines in any case.²⁹³ He pointed out that, at most, 10 percent of the population could speak or write Spanish (the then-language of the judicial system) and referred to the remaining 90 plus percent as “densely ignorant, very superstitious, very timid and with most indifferently developed political ideas of any kind.”²⁹⁴

288. See AGONCILLO, *supra* note 282, at 206–08; Joaquin G. Bernas, *Filipino Consciousness of Civil and Political Rights*, 25 PHILIPPINE STUD. 163, 167–68 (1977). A constitution drafted by other Filipino revolutionaries, for the so-called Republic of Negros (Negros was one of the islands in the archipelago), did contain the right to criminal and civil jury trial. See 1 SCHURMAN COMMISSION REPORT, *supra* note 235, at 204.

289. 35 CONG. REC. 6078, 6082 (1902). The Republican-led Senate voted down an amendment by Senator Patterson (D-Colo.) to require by statute jury trial in the Philippines. See *Philippine Bill Passes the Senate*, N.Y. TIMES, June 4, 1902, at 1.

290. *Affairs in the Philippine Islands: Hearings Before the Comm. on the Philippines*, 57th Cong. 304 (1902).

291. POMEROY, *supra* note 189, § 349.

292. By contrast, the jury was deeply rooted in the soil in mainland America. When Root opposed changing the civil jury unanimity requirement at the 1894 New York State constitutional convention, see *supra* note 164 and accompanying text, he stated that “the existing condition of things” should not be changed based on “theory,” but rather reformers should “proceed cautiously, slowly, holding on to that which is good, and changing only when we are certain that a change will be an improvement.” Root, *Trial by Jury*, *supra* note 164, at 121.

293. Potter, *supra* note 24, at 5.

294. Taft, *People*, *supra* note 261, at 1100. See also *Affairs in the Philippine Islands*, *supra* note

Taft's most commonly voiced explanation for opposing the jury in the Philippines concerned the people's attitudes toward the government. He believed uneducated Filipinos:

have too great respect for the local authority of the wealthy or educated men owning land in their neighborhood. They are subject, therefore, to being led by the misrepresentations and threats of ambitious or unprincipled agitators of the better class. They have no idea of government except that of the absolute rule of somebody over them.²⁹⁵

He was referring to the outsized influence of a class of people often called caciques, local leaders who were generally landowners, employers, social arbiters, and political bosses rolled into one.²⁹⁶ Even among the educated class, Taft opined, "there is not yet developed that sense of impartial justice which a people must have in some slight degree in order to make it safe that there should be a popular tribunal like that of a jury."²⁹⁷ As Taft explained in 1904, "[i]t is the failure to identify themselves with the Government as part of it, and as responsible for its proper administration, that renders the great body of the Filipino people at present unfit for complete self-government and the introduction of the system of jury trial."²⁹⁸ Without a "sense of responsibility for the government" and "identification with the government," jurors "are certain always to release the prisoner and to sympathize with him in the prosecution against him."²⁹⁹ Sometimes Taft expressed this thought in the racialized language of his era:

Manifestly such a tribunal [the jury] would have no place among an ignorant people, or indeed, even among a people who are somewhat educated, if they have not inculcated in them a sense of responsibility for, and of sharing in, the government. Such people are likely to prove unworthy jurors and to be affected in all their verdicts by their emotions and by every other motive than that which should control them, to wit: the well-being of society. It is this sense of justice which is implanted

290, at 283 (reporting Taft's testimony that "[n]inety per cent of the people are so ignorant that they could not sit on the jury to begin with and understand anything that would be adduced").

295. Taft, *People*, *supra* note 261, at 1101.

296. In the early years of U.S. rule, caciques were said to have used their longstanding power and control over local courts "to oppress the poor, collect usurious debts, punish enemies, reward friends, win elections, and in general control the community." Bonifacio Salamanca, *The Filipino Reaction to American Rule, 1901–1913* (1965) (unpublished Ph.D. dissertation, Yale Univ.).

297. Taft, *People*, *supra* note 261, at 1103.

298. *Taft Tells of Our Duty in Philippines*, N.Y. TIMES, Aug. 12, 1904, at 7.

299. WILLIAM H. TAFT, SPECIAL REPORT OF SECRETARY OF WAR TO THE PRESIDENT ON THE PHILIPPINES 41 (1908).

naturally in the Anglo-Saxon breast, but which is absent in the Porto Rican and the Filipino.³⁰⁰

Taft did not usually revert to racial essentialism, however, to explain his position on the inadvisability of the jury. He indicated to the Senate that he believed it was “the character of Spanish justice heretofore”—an arbitrary and corrupt system that gave the Filipino people no role in self-government—that explained their purported inability to identify themselves with the government and the well-being of society generally.³⁰¹ In another instance, Taft stated that “the reason we don’t give them jury trial is because the people have not yet the sense of governmental responsibility, without which jury trial is a farce.”³⁰²

In his discussion of the jury system for Filipinos, Taft was repeating almost exactly the criticisms of jurors and the jury system in the United States that he, Root, Pound, and other elite lawyers and progressive academics had so often voiced.³⁰³ It is hard to escape the conclusion that, when the politics and constitutional law applicable to the situation gave lawyers like Taft a relatively free hand to devise a justice system in the Philippines, they instituted the kind of system they would have liked to see in the mainland United States: no juries, strong judges, and simple, efficient procedure. The framing premise of Taft’s famous “disgrace to our civilization” speech about the failures of American criminal justice was that Americans would benefit, as Taft had, by closer acquaintance with the civil law tradition and its different, more efficient methods of judicial procedure.³⁰⁴

C. CONGRESS’S 1902 ORGANIC ACT

As the insurrection in the Philippines began to resolve in 1901, the U.S. Congress considered enacting an organic act creating a civil government. During the legislative process leading to the Organic Act, some opposition (Democratic and Populist) politicians objected to the lack of provision for the jury in the Philippines.³⁰⁵ Some of this criticism may

300. Taft, *Administration*, *supra* note 83, at 7.

301. *Affairs in the Philippine Islands*, *supra* note 290, at 304.

302. *Philippines Policy Discussed by Taft*, N.Y. TIMES, Oct. 25, 1904, at 6 (reporting Taft’s speech to the Union League Club of Brooklyn).

303. *See supra* Part II.

304. Taft, *Administration*, *supra* note 83, at 11. Taft praised the Filipino judiciary and procedure in comparison with mainland American ones in other speeches. *See* Taft, *Defects*, *supra* note 132, at 853.

305. *See, e.g.*, 34 CONG. REC. S6,148 (1902) (statement of Sen. Patterson); 34 CONG. REC. S7,759

have been sincere; however, as noted above, many opponents of the administration's colonial policy were motivated by racism and xenophobia³⁰⁶ and raised constitutional issues solely for the strategic purpose of making it difficult to retain the Philippines as an American possession.

Congress enacted the so-called Philippine Bill (Philippine Organic Act) in July 1902.³⁰⁷ The act ratified the president's creation of the Philippine Commission, which possessed executive and legislative powers and was headed by a civil governor (then Taft).³⁰⁸ The act also provided that, two years after the rebellion ended, elections would be held for a general assembly to serve as the lower house of the legislature, while the Philippine Commission would constitute the upper legislative house and, at the same time, continue serving as the executive cabinet of the governor.³⁰⁹ The Philippine Supreme Court, courts of first instance, and municipal courts were continued.³¹⁰ And the U.S. Supreme Court was given jurisdiction over final decisions of the Philippine Supreme Court, including in cases which any "right, or privilege" under "the Constitution . . . [was] involved."³¹¹

The Organic Act specifically disclaimed application of the U.S. Constitution in the Philippines.³¹² But the Act included an extensive statutory bill of rights that largely duplicated the exact wording of the individual rights provisions of the U.S. Constitution.³¹³ There was no mention of rights to a grand jury or petit jury. The Second and Third

(1902) (statement of Rep. Norton); 34 CONG. REC. S7,773 (1902) (statement of Rep. Neville).

306. See *infra* notes 52–54, 62 and accompanying text.

307. Philippine Organic Act, ch. 1369, 32 Stat. 691 (1902).

308. *Id.* § 1.

309. See *id.* §§ 6–7.

310. *Id.* § 9.

311. *Id.* § 10.

312. During the period of post-Civil War westward expansion in North America, Congress had enacted a framework statute providing that "[t]he Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States." See REVISED STATUTES OF THE UNITED STATES, PASSED AT THE FIRST SESSION OF THE FORTY-THIRD CONGRESS 1873–74 § 1891 (Washington, Gov. Printing Office 1875). Although it "organized" the Philippines in the Organic Act, Congress expressly provided that Section 1891, which presumptively extended the Constitution to the territories, "shall not apply to the Philippine Islands." Philippine Organic Act § 1.

313. See Philippine Organic Act § 5.

Amendments were omitted.³¹⁴ And there were a few rights provided for that were not found in the U.S. Constitution, namely a guarantee of bail in all but capital cases and a ban on imprisonment for debt.³¹⁵ Early on, the U.S. Supreme Court decreed that provisions of the statutory bill of rights in the Organic Act would be interpreted to have an identical scope to analogous provisions of the U.S. Constitution.³¹⁶

D. THE *MANKICHI* AND *DORR* CASES: JURY IS NOT
CONSTITUTIONALLY REQUIRED IN UNINCORPORATED TERRITORY

The first *Insular Cases* concerning jury rights reached the U.S. Supreme Court in 1903 and 1904. The first case, *Hawaii v. Mankichi*, concerned a criminal conviction obtained in 1899 in the local courts of Hawaii, without a grand jury and with a non-unanimous petit jury, during the time between the U.S. annexation of the island in 1898 and Congress's act in 1900 formally incorporating it into the union and extending the Constitution.³¹⁷ Both the Court and the executive branch were aware that this case would likely set the constitutional rule applicable to the unincorporated territories of Puerto Rico and the Philippines.

The U.S. brief to the Supreme Court first stressed policy—did the Supreme Court want to release every criminal convicted during that interregnum period simply because the ordinary Hawaiian justice system remained in place pending Congress's actions?³¹⁸ On the constitutional question, the government conceded that under *Downes v. Bidwell*, the leading *Insular Case* from 1901, “there are certain limitations of the Constitution which apply to every place subject to the jurisdiction of the United States.”³¹⁹ So the U.S. government was not arguing that Hawaiians lacked constitutional rights from the moment of annexation.

Instead, the Solicitor General relied on the Supreme Court case law

314. See *id.* A Takings Clause was also omitted, but its functional equivalent was found in the insular civil procedure code. See VICENTE G. SINCO, PHILIPPINE GOVERNMENT AND POLITICAL LAW 443 (3d rev. ed. 1934).

315. Philippine Organic Act § 5. For a summary chart comparing statutory protections in the Philippines to provisions in the U.S. Constitution, see *infra* Appendix A.

316. See *Kepner v. United States*, 195 U.S. 100, 121–22 (1904). The Supreme Court of the Philippines had held the same thing the prior year. See *United States v. Colley*, 3 PHIL. REP. 58, 58 (S.C., Dec. 12, 1903).

317. *Hawaii v. Mankichi*, 190 U.S. 197, 197 (1903).

318. See Brief of the Solicitor General for the United States at 5–6, *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (No. 512).

319. *Id.* at 21. See also *Downes v. Bidwell*, 182 U.S. 244, 244 (1901).

arising under the Fourteenth Amendment, which had held that U.S. state governments were not mandated by the Due Process Clause or the Privileges and Immunities Clause to use petit juries or grand juries, since those were “not fundamental” rights, but mere methods of procedure.³²⁰ The rule for Hawaii prior to incorporation into the union should, the United States argued, be the same as it was for U.S. states.

The Court sided with the U.S. government. Citing its case law that held that the Fourteenth Amendment did not require U.S. states to use grand juries or twelve-man criminal petit juries, the Court held that the jury rights asserted “are not fundamental in their nature, but concern merely a method of procedure.”³²¹ The Court also determined that, by annexing Hawaii, Congress had not intended to “imperil[] the peace and good order of the islands” by holding all criminal convictions without a grand jury or twelve-man petit jury to be unconstitutional.³²² Justice White concurred on the ground that the mere annexation had not incorporated Hawaii into the union and the jury rights that would be required once incorporation occurred, in 1900, were not yet in force in 1899 when Mr. Mankichi was tried and convicted.³²³

The next year brought the case *Dorr v. United States* from the Philippines, which would determine whether the lack of a criminal jury trial in territorial courts violated the Constitution.³²⁴ The U.S. brief was measured and merits-based, like the brief in *Mankichi*. The Solicitor General repeated arguments made by Taft, Root, and others: Trial by jury is “entirely unknown” to Filipinos.³²⁵ Instead, they have a bench trial system which is “time-honored,” “familiar to the people,” and “perfectly adequate to all the demands of justice.”³²⁶ Unlike in Spanish times, the Solicitor General wrote, the judiciary is independent and the people have all modern criminal procedure protections except jury rights.³²⁷

The U.S. brief then deployed the same argument as in *Mankichi*: since jury rights were declared “not fundamental” and not required for U.S.

320. See *id.* at 21–25 (citing *Maxwell v. Dow*, 176 U.S. 581 (1900)); *Bolln v. Nebraska*, 176 U.S. 83 (1900); *Brown v. New Jersey*, 175 U.S. 172 (1899). See also *supra* Part III.

321. *Mankichi*, 190 U.S. at 218, 244.

322. *Id.* at 214.

323. See *id.* at 219–20 (White, J., concurring).

324. *Dorr v. United States*, 195 U.S. 138, 138 (1904).

325. See Brief of the Solicitor General, *supra* note 287, at 27.

326. *Id.*

327. *Id.* at 27–28.

states, the same rule should apply in unincorporated territories. The *Holden* and *Hurtado* decisions, discussed in Part III, were quoted at length.³²⁸ It was *Holden* in which the Court had presciently stated, in February 1898, just weeks before the Spanish-American War started, that the United States “[i]n the future growth of the nation . . . may see fit to annex territories whose jurisprudence is that of the civil law” and that the Constitution should be interpreted to allow, if such a territory “enter[ed] the Union” as a state, for its “traditions, laws[,] and systems of administration [to remain] unchanged.”³²⁹ This passage had also been quoted as the conclusion of the Attorney General’s main brief to the Court in the 1901 *Insular Cases*.³³⁰

The United States’ brief in *Dorr* did make an ethnocentric and patronizing comment: jury trial should not be required for a “heterogeneous population bred to a different method [of trial] and containing many primitive tribes inhabiting remote and unsettled districts.”³³¹ But the bulk of the argument proceeded along merits-based lines, noting the need to keep legal institutions tied to the customs of a people, the non-fundamental nature of the jury protection, and the need to allow criminal procedure to depart from a common law baseline when circumstances showed that other methods would be more efficient.

The Court sided with the United States again. In *Dorr*, the Court confirmed that the Philippines was unincorporated territory, where only “fundamental” constitutional rights applied.³³² Quoting *Mankichi*, the Court reiterated that the jury and grand jury were not fundamental rights, but mere methods of procedure.³³³ The Court found that the President and Congress had decided not to extend jury rights to the Philippines because “the civilized portion of the islands had a system of jurisprudence founded upon the civil law,” which did not use juries, while “the uncivilized parts of the archipelago were wholly unfitted to exercise the right of trial by jury.”³³⁴ The Court rejected any argument that a bench trial—joined with

328. *See id.* at 28–30.

329. *Holden v. Hardy*, 169 U.S. 366, 389 (1898).

330. Brief for the United States at 224–25, *Goetze v. United States*, 182 U.S. 221 (1901) (No. 340), *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901) (No. 419) (joint brief), reprinted in *THE INSULAR CASES: COMPRISING THE RECORDS, BRIEFS, AND ARGUMENTS OF COUNSEL IN THE INSULAR CASES OF THE OCTOBER TERM, 1900, IN THE SUPREME COURT OF THE UNITED STATES INCLUDING THE APPENDIXES THERETO* 137 (1901).

331. Brief of the Solicitor General, *supra* note 287, at 30.

332. *See Dorr v. United States*, 195 U.S. 138, 142–43, 146–47 (1904).

333. *See id.* at 144–45.

334. *Id.* at 145. The phrase “uncivilized” was generally used synonymously with “non-Christian”

every criminal procedure right in the U.S. Constitution except the jury, as provided by G.O. 58 and the Congress's Organic Act—was not “an adequate and efficient method of protecting the rights of the accused.”³³⁵

E. SUBSEQUENT DEBATE IN THE PHILIPPINES ABOUT THE JURY

In the first years of U.S. rule, the lack of jury in the Philippines was protested in the United States by Democrat politicians, anti-imperialists, and some U.S. citizens living in the Philippines.³³⁶ Notably, in the period 1902–1920, all of the cases heard by the Philippine Supreme Court in which litigants demanded jury rights involved U.S. citizens temporarily or permanently relocated there.³³⁷

As a kind of sop to those who advocated the use of petit juries, the Philippine Commission introduced the use of lay “assessors;” at the request of parties in civil and criminal trials, two lay people could be selected by the judge to hear evidence and give non-binding opinions on the facts to the trial judge.³³⁸ But as one judge reported in 1914, based on his experience on the Philippine bench since 1901, that right “has rarely been exercised.”³³⁹ And according to the judge, “[n]ever in the islands’ history have property and life been more secure than today throughout the breadth of the islands,” “nor has justice been so equitably administered.”³⁴⁰

There was some native Filipino advocacy in favor of the jury trial, but upon examination, it appears to be rather insignificant. In 1907, the

to refer to the eight to ten percent of the Filipino population that was not Catholic. Among this group were the Muslim Moros of the island of Mindanao, as well as some tribal peoples of remote areas who were still living more or less as they had for millennia. See, e.g., Manuel L. Quezon, *The Right of the Philippines to Independence*, 1 FILIPINO PEOPLE, no. 2, 1912, at 1, 2–5.

335. *Dorr*, 195 U.S. at 146.

336. See Wilfley, *supra* note 257, at 733–34.

337. See generally *United States v. Grafton*, 6 PHIL. REP. 55 (1906) (requesting a criminal jury); *United States v. Carrington*, 5 PHIL. REP. 725 (1906) (same); *United States v. Dorr*, 2 PHIL. REP. 269 (1903) (same); *United States v. Kepner*, 1 PHIL. REP. 397 (1902) (same); *United States v. Crozier*, 5 PHIL. REP. 621 (1906) (same); *Oehlers v. Hartwig*, 5 PHIL. REP. 487 (1906) (requesting a civil jury). The *Ocampo* case, which appears to have involved native Filipino defendants, is sometimes said to have involved a claim for constitutional jury rights, but what the criminal defendants actually argued was that the failure to be given a pretrial, preliminary examination by a magistrate violated their due process rights under the Philippine Organic Act of 1902. See *United States v. Ocampo*, 18 Phil. 1, 37 (1910).

338. See *Affairs in the Philippine Islands*, *supra* note 290, at 282 (1902) (statement of William H. Taft); Wilfley, *supra* note 257, at 734–35.

339. *Philippine Judge Tells Conditions*, MORNING OREGONIAN, May 27, 1914, at 15.

340. *Id.*

Nacionalista Party won a majority of seats in the new lower house of the Philippine Assembly. The Philippine Commission was still the upper house of the legislature, so the bicameralism requirement gave it a veto over bills from the Assembly. The Nacionalista Party advocated “independence, freedom to carry arms, jury trials, [and] a readjustment of the native members of the Philippine Commission so as to give the Nationalists representation on the commission.”³⁴¹ The Nacionalista-dominated Assembly passed a jury bill in 1908, which was promptly vetoed by a unanimous Commission. James Le Roy, who spent several years in the Philippines as a secretary to the Commission, reported that:

[t]here is some agitation in the islands for jury trial, and it found expression in the first session of the Assembly. It is, however, political in character; some Filipinos who have vague ideas about the workings of jury trial advocate it, because they suppose it to be an essential accompaniment of self-government and therefore desire it as a new “political right” for their people.³⁴²

This view—though rather ungenerous—seems plausible given the clearly problematic jury bill that was produced by the Assembly.³⁴³

From what I can learn, no other jury bill was introduced in the insular legislature during the time period under consideration. According to one mainland American who was a judge in a Philippine court of first instance, “[t]here is today [1913] no demand from any important sources in the islands for the establishment of the jury system.”³⁴⁴ When Congress revisited the question of civil rights of Filipinos in what became the Jones

341. *The Filipino Elections*, N.Y. TIMES, Aug. 4, 1907, at 3.

342. James A. Le Roy, *Philippine Problems After Ten Years' Experience*, 5 PROC. AM. POL. SCI. ASS'N 203, 211 (1908).

343. The vetoed bill would have given each provincial government the right to select a slate of ten to twenty-five permanent jurors. 2 JOURNAL OF THE PHILIPPINE COMMISSION, BEING THE FIRST SESSION AND A SPECIAL SESSION OF THE FIRST PHILIPPINE LEGISLATURE 232 (1908). From this slate, the criminal defendant would select one juror and the victim or complainant would select another; neither the prosecution nor the court had any say in the matter. The two jurors would decide the facts in the criminal trial, and would be paid handsomely for each day of service. *Id.* The Commission's report on its veto said that such a system “could result only in disaster to the proper, equitable, and impartial administration of justice. . . . [T]he judicial department, which is above the smoke and the noise of political battle . . . is deprived of one of its most essential powers in the administration of justice—namely, the selection of jurors—and is made subservient to the provincial board of each province, which might be tempted to select jurors willing to aid them in perpetuating their political power.” *Id.*

344. Arthur F. Odlin, *American Courts in the Orient*, 47 AM. L. REV. 321, 332 (1913). Odlin was a judge on the Court of First Instance in the Philippines and, later, a U.S. district judge in Puerto Rico.

Act of 1916, the suggestion of some U.S. congressmen that jury trial should be extended to the Philippines was opposed with the assistance of the Filipino Resident Commissioner, Manuel Quezon, the most powerful politician in the islands. He based his objection “on the fact that under the Philippine legal system the Filipinos had never had occasion to exercise the right of jury trials, and that in certain backward communities in the Islands it would be very difficult to secure qualified jurors.”³⁴⁵

The individual rights provisions of the Philippine Organic Act were repeated in the 1916 Jones Act (Philippines), and jury rights were again omitted.³⁴⁶ The sponsor of the legislation, Representative William Jones, a Virginia Democrat and chairman of the Committee on Insular Affairs, stated that Congress was pleased with the Philippine court system as it was, and would defer to the Filipino legislature to decide whether to introduce the jury trial.³⁴⁷ He added that “there is no demand on the part of the Filipinos for jury trials. There has been none on the part of the Filipino bar.”³⁴⁸

Mainland Americans who worked in the Philippines often praised the Philippine judicial system and administration of justice for having “greater d[i]spatch, economy, and efficiency than in the States.”³⁴⁹ According to one writer, the “facility and economy in the administration of justice in the Philippines is due in large measure . . . to the fact that justice is administered by the judge alone without the intervention of a jury.”³⁵⁰ A Texas attorney who spent over a decade practicing in Philippine courts unqualifiedly endorsed non-jury trials: “I believe that fewer innocent men suffer and less guilty ones go free in the Philippines than in [the United States],” he claimed.³⁵¹ The jury system “is slow, unreliable and does not gain the same results.”³⁵²

345. VICENTE G. SINCO, *PRINCIPLES OF PHILIPPINE CONSTITUTIONAL GOVERNMENT* 275 (1927).

346. Philippine Autonomy (Jones) Act, *supra* note 61.

347. *The Debate on the Jones Bill*, FILIPINO PEOPLE, Nov. 1914, at 10.

348. *Id.* at 22.

349. A. Sidney Lanier, *The Judicial System in the Philippines*, OUTLOOK, Jan. 31, 1914, at 274. *See also* D. R. WILLIAMS, *THE UNITED STATES AND THE PHILIPPINES* 121 (1924) (praising Filipino courts for their “simplified procedure, civil and criminal . . . where rich and poor fared alike”). Williams, an American lawyer, became a judge in a lower court in the Philippines and then an attorney in private practice in Manila.

350. Lanier, *supra* note 349, at 274.

351. *Texas Court System Behind Philippines*, FORT WORTH STAR-TELEGRAM, Sept. 18, 1912, at 7.

352. *Id.*

In 1934, Congress authorized the Philippines to draft its own constitution, as a step toward independence after a transitional period.³⁵³ The 1935 Constitution contained a bill of rights, but no right to a jury.³⁵⁴ The Philippine Constitutional Convention had reached “consensus that the Philippine judicial system did not require this provision [jury trial] to safeguard the rights of the individual.”³⁵⁵

V. THE JURY AND OTHER INDIVIDUAL RIGHTS IN PUERTO RICO

Although they were both unincorporated territories and thus subject to the same constitutional rules, Puerto Rico and the Philippines were treated very differently by U.S. policymakers from the beginning. The prospect of permanently annexing and assimilating the Philippines into the union was anathema to large segments of the American public. But as noted, it was widely assumed that Puerto Rico would become a permanent part of the United States. Unlike in the Philippines, there was no rebellion against U.S. rule in Puerto Rico. Puerto Rico was relatively close to the United States. And in 1900, the U.S. Census declared that a majority of the population was “white,” which no doubt helped a very racially-conscious American public feel more comfortable about Puerto Rico’s connection to the United States.³⁵⁶

As a result of these and other differences, Puerto Rico was governed with a much lighter hand from Washington than was the Philippines. Starting in 1900, an elected Puerto Rican legislative assembly wielded real political power. While U.S. policymakers still argued that Puerto Rico was unincorporated territory and that constitutional jury rights were not applicable there, they did not object much when the jury was introduced in Puerto Rico from the outset by local judicial and legislative action. As in the Philippines, the local population was protected by almost all of the same rights found in the U.S. Constitution, but via statute or rule, rather than direct application of the Constitution itself.

A. THE PERIOD OF U.S. ARMY RULE

The U.S. Army ruled Puerto Rico from 1898 until the spring of 1900,

353. See Philippine Independence (Tydings–McDuffie) Act, Pub. L. No. 73–127, 48 Stat. 456 (1934).

354. See generally CONST. (1935) (Phil.).

355. Robert Aura Smith, *The Philippine Bill of Rights*, 4 FAR E.Q. 170, 179 (1945).

356. See CABRANES, *supra* note 5, at 31.

when a congressionally-created civil government was inaugurated.³⁵⁷ In Puerto Rico, the U.S. military government found “great difficulties and delays attendant upon criminal and civil trials”³⁵⁸—just as it had in the Philippines. The Army engaged in a limited reorganization of the insular court system, leaving a supreme court, five district courts, and a municipal court in each town.³⁵⁹ Lawyers of the U.S. military found that many charged with crimes, even petty ones, languished in jail for long periods of time without trial; there were also many complaints of arrests without charges and illegally severe punishments by the insular courts.³⁶⁰

For a time after U.S. rule began, the government was still largely staffed by Spanish-era officials.³⁶¹ The U.S. Army Judge Advocate in Puerto Rico recommended immediate reform of criminal procedure, requiring, among other things, that all trials be public, that trials for petty theft be conducted within three days of arrest, and that defendants have compulsory process to secure their witnesses.³⁶² But the holdover justice ministry in Puerto Rico opposed these reforms, so the U.S. military took another route and introduced habeas corpus.³⁶³ A military order vested the power to issue the writ of habeas corpus in insular courts, which were still staffed by holdover judges from the prior regime, U.S. military commissions, and post commanders.³⁶⁴ Some Spanish-era judges and executive officials informed U.S. officials that they agreed with many of the Army’s criticisms of the criminal procedure and the plans to reform it.³⁶⁵ The military considered it important to replicate the American system on the island, whereby the courts are “absolutely independent of all executive interference or control.”³⁶⁶

357. See PRATT, *supra* note 61, at 184.

358. REPORT OF BRIG. GEN. GEO. W. DAVIS, U.S.V., ON CIVIL AFFAIRS OF PUERTO RICO 26 (1900).

359. *Id.* at 29.

360. G.N. LIEBER, REPORT OF THE JUDGE-ADVOCATE-GEN., ANNUAL REPORTS OF THE WAR DEPARTMENT, H.R. DOC. NO. 56-2, at 123, 134–35 (1899) [hereinafter LIEBER, REPORT].

361. MONGE, *supra* note 29, at 31–32.

362. See LIEBER, REPORT, *supra* note 360, at 135.

363. *Id.*

364. *Id.* at 136–37. See also REPORT OF BRIG. GEN. GEO. W. DAVIS, *supra* note 358, at 27–28.

365. HENRY K. CARROLL, REPORT ON THE ISLAND OF PORTO RICO 296, 311–12 (Washington, Gov. Printing Office 1899).

366. LIEBER, REPORT, *supra* note 360, at 141.

B. CONGRESSIONAL AND INSULAR LEGISLATION

1. The Foraker Act for Puerto Rico

Starting in 1899, Congress began considering what form of government to enact for Puerto Rico and what its constitutional status would be. In January 1900, the commanding general of Puerto Rico, George Davis, told the Senate that he was opposed to “a radical change” in the legal codes of Puerto Rico. He believed that:

[T]he attempt to utilize the jury system in Puerto Rico should not now be made. They have no conception of it, and can have none for many years, it seems to me. I think it would be imprudent to attempt to establish the grand jury and petit jury and trial by jury throughout these municipalities and remote districts in that ignorant population.³⁶⁷

The military governors and Root agreed that Puerto Ricans were not yet fit for self-government. “[I]t is a matter not of intellectual apprehensions,” Root announced, “but of character and of acquired habits of thought and feeling.”³⁶⁸

President McKinley appointed a three-member Insular Commission to travel to Puerto Rico to gather facts and make recommendations. Like the Schurman Commission in the Philippines, the Insular Commission proved to be out-of-step with the views of U.S. policymakers. It recommended entirely abrogating Spanish era laws and extending in its place the common law, the U.S. Constitution, and U.S. statutes to the extent “locally applicable.”³⁶⁹ While proposing no jury in insular courts, it recommended the creation of a separate federal court with a jury in felony criminal cases and on demand by either party in civil cases.³⁷⁰ Henry G. Curtis, the chairman of the Insular Commission, told the Senate in January 1900 that his Commission thought that “the people were not ready” for jury trial; it would be a “farce” to impose jury trial in Puerto Rico with its “ignorant

367. *Industrial and Other Conditions of the Island of Puerto Rico, and the Form of Government Which Should Be Adopted for It: Hearings on S. 2264 Before the Comm. on Pacific Islands and Puerto Rico*, 56th Cong. 79 (1900) (statement of Brig. Gen. George W. Davis, U.S.A., Military Governor of Puerto Rico).

368. ARTURO MORALES CARRIÓN, *PUERTO RICO: A POLITICAL AND CULTURAL HISTORY* 149 (1983).

369. REPORT OF THE U.S. INSULAR COMMISSION TO THE SECRETARY OF WAR UPON INVESTIGATIONS MADE INTO THE CIVIL AFFAIRS OF THE ISLAND OF PORTO RICO WITH RECOMMENDATIONS 61–62 (Gov. Printing Office 1899).

370. *Id.* at 63–65.

peons.”³⁷¹

A more sympathetic account of the Puerto Rican people was produced by Henry K. Carroll, who was sent by President McKinley as a special Treasury Department agent and commissioner to investigate conditions in the island and make recommendations.³⁷² During his meetings with numerous Puerto Rican judges and lawyers in 1898 and 1899, Carroll acted as a kind of proselytizer for the extension of the Constitution, the jury system, and U.S. citizenship; his official report recommended all these measures.³⁷³ Some, but not all, of Carroll’s interlocutors agreed with him. Herminio Diaz, the Secretary of Justice under Spanish rule, favored jury trial for serious crimes.³⁷⁴ Alfredo Arnaldo, a judge in the court of first instance at Arecibo, strongly favored the jury because the Spanish penal system, particularly its procedure, “could not be worse” and, “as we are entering a period of more upright administration of justice, the people should administer their own justice.”³⁷⁵ Alfredo Aguayo, a judge in the court of first instance at Ponce, also favored the jury as part of a larger criminal procedure reform to end abuses like incommunicado detention and secret trials.³⁷⁶ But the senior judge under the old regime, Chief Justice José Servero Quiñones, testified to Carroll that the people were not “sufficiently well educated” for the jury system, and that he preferred factfinding by “trained legal criterion” conducted by professional judges.³⁷⁷ Carroll replied that, “[t]here are many in the United States who agree with you that the judges, who are trained lawyers and who are generally impartial men, are more likely to give a correct judgment in many criminal cases than a jury.”³⁷⁸ Other witnesses before Carroll agreed with Quiñones.³⁷⁹

In spring 1900, after a long period of debate—most of it behind the

371. *Hearings on S. 2264*, *supra* note 367, at 97 (statement of Henry G. Curtis, Member, Insular Comm.).

372. Carroll had a doctorate in law, worked as a journalist and editor at *The Independent* for many years, and held senior positions in Methodist Church and missionary organizations.

373. *See* CARROLL, *supra* note 365, at 63–64 (recommending jury in criminal cases and “certain classes of civil suits”); *id.* at 290, 293, 298 (favorably describing the U.S. jury system to Puerto Rican officials and other witnesses).

374. *Id.* at 288.

375. *Id.* at 296–98.

376. *Id.* at 311–12.

377. *Id.* at 290.

378. *Id.* at 291.

379. *See, e.g., id.* at 307.

scenes—Congress enacted an organic act for Puerto Rico, popularly known by the name of its Senate sponsor, Taft’s Ohio patron, Joseph Foraker.³⁸⁰ Consistent with the prevailing view of Root, Taft, and other elite lawyers imbued with classical legal orthodoxy that law should conform as far as possible to the traditions and customs of a people, Foraker’s committee announced its purpose “[t]o avoid as far as possible radical changes in the laws,” but to “make such modifications and alterations as are necessary to dispense with the most objectionable features of Spanish government and judicial administration.”³⁸¹

The Foraker Act created an insular government composed of: a governor appointed by the president, with advice and consent of the U.S. Senate; a ten-member executive council, which also functioned as the upper house of the insular legislature, again, appointed by the president with advice and consent of the Senate, but limited by the stipulation that at least five members of the council “shall be native inhabitants of Porto Rico;” and an elected house of delegates, the lower house of the legislative assembly.³⁸²

A United States district court for the district of Puerto Rico was created. It was an Article I court (no life tenure for the judge), granted the same jurisdiction as district and circuit courts sitting on the mainland, and directed to “proceed therein in the same manner as a circuit court.”³⁸³ The Supreme Court soon read this provision as requiring that the U.S. district court in Puerto Rico follow the procedure of U.S. circuit courts to mandate the use of grand juries and petit juries in civil and criminal cases.³⁸⁴ Therefore, grand juries, civil juries, and criminal juries were used there from the beginning.³⁸⁵ As Christina Ponsa-Kraus has noted, the Supreme Court never held that constitutional jury rights were inapplicable in the

380. Organic (Foraker) Act of 1900, ch. 191, 31 Stat. 77.

381. See JOSEPH FORAKER, TEMPORARY CIVIL GOVERNMENT FOR PORTO RICO, S. REP. NO. 56-249, at 1 (1900) [hereinafter FORAKER, COMMITTEE REPORT].

382. Foraker Act § 18.

383. *Id.* § 34.

384. See *Crowley v. United States*, 194 U.S. 461, 467 (1904). *Accord* *Martinez v. Valdes*, 10 P.R. Fed. Rep. 449, 455–56 (1918).

385. Rules 37–38, RULES OF THE UNITED STATES COURT FOR THE DISTRICT OF PORTO RICO, reprinted in 1 P.R. Fed. Rep. 1, 19. See *United States v. Cruz*, 1 P.R. Fed. Rep. 445, 445 (1902) (grand jury and criminal petit jury); *Siebert v. Vivoni*, 4 P.R. Fed. Rep. 111, 111 (1908) (civil jury). See also Act of June 25, 1906, Pub. L. No. 59-293, ch. 3542, 34 Stat. 466, 466 (Congress providing that “the juries for said court [U.S. district court in Puerto Rico] shall always be selected and drawn in accordance with the laws of Congress regulating the same in the United States courts”).

federal court in Puerto Rico.³⁸⁶ The Foraker Act also gave the district court the power to issue writs of habeas corpus “in all cases in which the same are grantable by the judges of the district and circuit courts of the United States.”³⁸⁷

The local court system, as reorganized by the U.S. military, was continued in force by the Foraker Act, with a Supreme Court, several district courts, and local or municipal courts. The Supreme Court had the same authority to issue writs of habeas corpus as did the United States district court. The Foraker Committee approved of how U.S. military reforms had “greatly simplified” the judicial system and made it “more effective and less expensive.”³⁸⁸

The Foraker Act did not speak to whether the Constitution was applicable in Puerto Rico, but it did grant the U.S. Supreme Court jurisdiction to review judgments in cases arising in the U.S. district court or the insular Supreme Court, in which a claimed right under the Constitution, a U.S. treaty, or a congressional statute was denied.³⁸⁹ There was no bill of rights in the Foraker Act.

Senator Foraker had initially favored including a provision extending the Constitution to Puerto Rico and granting citizenship to its residents.³⁹⁰ As Judge José Cabranes has shown, the bill was changed due to concerns expressed by the administration and some members of Congress that U.S. government actions for Puerto Rico would be taken as precedents for the Philippines.³⁹¹ While American policymakers and much of the public were comfortable with keeping Puerto Rico permanently, the opposite was the case with the Philippines, so the provisions extending the Constitution and granting citizenship were removed.³⁹² Senators stated that the Constitution “is not suited to the Porto Rican people,” and “not necessary” for them.³⁹³

386. See Burnett, *Untied States*, *supra* note 26, at 849.

387. Foraker Act § 35.

388. FORAKER, COMMITTEE REPORT, *supra* note 381, at 3.

389. Foraker Act § 34.

390. *Government of Porto Rico*, WASH. POST, Jan. 4, 1900, at 4; *Rules for Porto Rico*, WASH. POST, Jan. 28, 1900, at 5; *Government of Puerto Rico*, N.Y. TIMES, Jan. 28, 1900, at 4. See also CABRANES, *supra* note 5, at 22–23.

391. CABRANES, *supra* note 5, at 23–24, 28–29, 31, 38, 50. See also Erman, *supra* note 49, at 1197.

392. See FORAKER, COMMITTEE REPORT, *supra* note 381, at 4–6. See generally COMM. ON WAYS & MEANS, TO REGULATE THE TRADE OF PUERTO RICO, AND FOR OTHER PURPOSES, H.R. REP. NO. 56-249 (1900).

393. *Rules for Porto Rico*, WASH. POST, Jan. 28, 1900, at 5.

“Some of the Senators expressed the opinion that the natives of the island were not yet prepared for jury trials.”³⁹⁴

The Foraker Committee report asserted that “it is within the constitutional power of Congress to either extend or withhold the Constitution . . . as it may deem advisable.”³⁹⁵ Congress “is not bound, for instance, to require trial by jury in criminal cases, nor in civil suits at common law.”³⁹⁶ Although the Constitution was not applicable, the Foraker Committee opined—along the lines that Root had—that Congress was nevertheless bound by certain “restraints and prohibitions,” so that it could not establish religion, prohibit its free exercise, impair the obligation of contracts, pass ex post facto laws or bills of attainder, allow slavery, abridge the freedom of speech, or take property without due process.³⁹⁷

2. The Puerto Rico Legislative Assembly

Unlike in the Philippines, where Congress itself crafted a bill of rights, the new government of Puerto Rico was left to decide for itself what rights to protect by statute. From its first moments, the Puerto Rico Legislative Assembly took important actions to secure the civil rights of the inhabitants. The first act it passed gave criminal defendants the right to demand a jury trial for any capital crime and any charge carrying a sentence of two or more years of imprisonment.³⁹⁸ This was a narrower right than what the U.S. Constitution provided because only petty offenses are excepted from the criminal jury requirement of the Sixth Amendment and Article III.³⁹⁹ The jury measure was advocated by President McKinley’s appointee as the first governor of Puerto Rico, Charles Allen, in his inaugural address:

I believe you will find it expedient to adopt the institution of trial by jury without great delay. It will be a radical innovation, yet will carry with it the weight of generations of experience in lands where the liberty of the citizen i[s] most sacredly guarded. That the people may study its

394. *Id.*

395. FORAKER, COMMITTEE REPORT, *supra* note 381, at 6.

396. *Id.* at 9 (citation omitted).

397. *Id.* at 11.

398. *See* An Act to Establish Trial by Jury in Porto Rico, C.B. 1, §§ 1–6 (1901), *reprinted in* THE ACTS AND RESOLVES OF THE FIRST LEGISLATIVE ASSEMBLY OF PORTO RICO 1–2 (1901). *See also* *Porto Rican Bills Passed: First Measure Was One to Establish Jury Trials*, N.Y. TIMES, Jan. 17, 1901, at 5 (noting that the jury measure was the first act passed).

399. *See* *Schick v. United States*, 195 U.S. 65, 68–69 (1904); *Callan v. Wilson*, 127 U.S. 540, 552, 557 (1888).

operation, it occurs to me that it may well be restricted for a time to criminal cases where the charge against the accused requires, if he is convicted, long term in the penitentiary, or capital punishment. With a prudent law for the selection of the jury, so as to insure jury panels which include good citizens who have tangible material interests in the government, I believe great good will follow from the experiment.⁴⁰⁰

Washington policymakers did not veto this move by Allen. The reach of the jury right was later changed slightly, when it was made applicable to felony cases—crimes punishable by death or imprisonment in the penitentiary.⁴⁰¹ All other crimes were misdemeanors. In 1919, the Assembly extended jury rights to misdemeanors.⁴⁰² Therefore, from 1919, Puerto Rican courts guaranteed almost precisely the same criminal petit jury rights as mainland federal courts.

In a January 1901 criminal procedure reform statute, the 1902 “Act to Define the Rights of the People,” and the 1902 Code of Criminal Procedure, the Puerto Rico Assembly granted most of the same rights as were found in the U.S. Constitution and mainland case law interpreting it.⁴⁰³ The First and Fourth Amendments to the U.S. Constitution were duplicated.⁴⁰⁴ A twelve-person unanimous jury was guaranteed in felony cases.⁴⁰⁵ The defendant was presumed innocent, and charges were required to be proved beyond a reasonable doubt.⁴⁰⁶ There were protections against double jeopardy, a privilege against self-incrimination, a compulsory process right, a speedy and public trial, a venue or vicinage requirement, and the right to confront witnesses.⁴⁰⁷ There was a presentment

400. Charles H. Allen, Address to the Two Branches of the Legislature of Porto Rico 10 (Dec. 4, 1900). Allen, a businessman and Republican politician, served in the Massachusetts legislature, the U.S. House for two terms, and as Assistant Secretary of the Navy from 1898–1900, at which time he was appointed the first civilian governor of Puerto Rico.

401. See *Balzac v. Porto Rico*, 258 U.S. 298, 302–05 (1922).

402. See *id.* at 303; PABLO BERGA Y PONCE DE LEON, *EL JURADO EN PUERTO RICO* 22 (1929) (Spanish text).

403. An Act Concerning Procedure in Jury Trials, C.B. 7 (1901), reprinted in *ACTS AND RESOLVES OF THE FIRST LEGISLATIVE ASSEMBLY OF PORTO RICO* 112 (1901); An Act to Define the Rights of the People, reprinted in *REVISED STATUTES AND CODES OF PORTO RICO* 274–75 (1902); An Act to Establish a Code of Criminal Procedure for Porto Rico (1902), reprinted in *REVISED STATUTES AND CODES OF PORTO RICO* 621 (1902).

404. An Act to Define the Rights of the People §§ 1–4, *supra* note 403, at 274–75.

405. Code of Criminal Procedure of Porto Rico §§ 178, 185, *supra* note 403, at 660–61.

406. *Id.* § 236.

407. *Id.* §§ 6–8, 11, 448.

requirement and a right to presence at trial for felonies.⁴⁰⁸ The Code of Criminal Procedure provided a habeas guarantee.⁴⁰⁹ Procedural protections for treason prosecutions found in Article III of the U.S. Constitution were codified.⁴¹⁰ The statutory right to counsel was supplemented by a provision that said: “[i]f the defendant appears for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of counsel.”⁴¹¹ If the defendant “desires and is unable to employ counsel, the court must assign counsel to defend him.”⁴¹² This right to appointed counsel for the indigent went well beyond what the U.S. Constitution was understood to require at the time.

The 1902 Civil Code of Puerto Rico protected against retroactive impairment of vested rights—very similar to what the Contracts Clause did.⁴¹³ Both the federal district court and the Supreme Court of Puerto Rico held that the Contracts Clause itself, or a fundamental principle of general law providing the same protection, were in force in Puerto Rico.⁴¹⁴ In a 1903 statute, the Legislative Assembly mirrored the core provisions of the Takings Clause of the Fifth Amendment.⁴¹⁵

Not every constitutional right from the mainland was duplicated by local statute in Puerto Rico. There were no “due process” or “equal protection” provisions. With minor exceptions that came later, there was no grand jury used in insular courts.⁴¹⁶ Nor was there a civil jury in insular

408. *Id.* §§ 132, 179.

409. *Id.* § 469. *See also id.* § 471 (listing courts which may grant writs of habeas corpus); *id.* § 483 (specifying grounds for habeas relief).

410. An Act Concerning Procedure in Jury Trials § 64, *supra* note 403, at 124–25.

411. Code of Criminal Procedure of Porto Rico § 141, *supra* note 403, at 652.

412. *Id.*

413. *Cintrón v. Banco Territorial y Agrícola*, 15 P.R.R. 495, 520 (1909) (quoting Civil Code of Porto Rico § 3) (“Laws shall not have retroactive effect unless they expressly so decree. In no case shall the retroactive effect of a law operate to the prejudice of rights acquired under previous legislative action.”).

414. *Quiñones v. Castello*, 16 P.R. 467, 476–77 (1910); *Compagnie des Sucreries de Puerto Rico v. Ponce & Guyama R.R.*, 2 P.R. Fed. Rep. 176, 180–81 (1906); *Battistini v. Crosas*, 1 P.R. Fed. Rep. 62, 64–65 (1903).

415. An Act to Provide for the Condemnation of Private Property for the Purposes and Under the Conditions Therein Named, §§ 3, 10–13, *reprinted in* ACTS AND RESOLUTIONS OF THE FIRST SESSION OF THE SECOND LEGISLATIVE ASSEMBLY OF PORTO RICO 50 (1903).

416. In 1919, the Legislative Assembly provided that all felonies “shall be prosecuted by indictment of the Grand Jury.” An Act Establishing the Grand Jury § 1 (1919), *in* ACTS AND

courts. There was no local statute paralleling the Ex Post Facto or the Bill of Attainder Clauses. The Second, Third, Eighth, and Thirteenth Amendments to the U.S. Constitution had no local statutory analogues. As in all other U.S. territories, the independence of judges in Puerto Rico was not protected by guaranteed life tenure.⁴¹⁷

A few of the omissions were irrelevant—there was no chance that soldiers were going to be quartered in private homes or that slavery was going to be introduced in Puerto Rico. Most of the other omissions were supplied by judicial decision. Puerto Rico courts, for instance, affirmed and expressly endorsed by the U.S. Supreme Court on two occasions, held that the Constitution's due process protections were in force in Puerto Rico from the time that the United States took sovereignty over the island.⁴¹⁸ Retroactive laws that prejudiced rights granted under previous statutes were invalid.⁴¹⁹

Later, in the 1917 Jones Act, which granted U.S. citizenship to Puerto Ricans, Congress enacted a bill of rights which covered the spectrum of rights protected by the U.S. Constitution, omitting only the Second Amendment right to bear arms, the Third Amendment no-quartering rule, and the jury guarantees.⁴²⁰ Several important rights in the Jones Act (Puerto Rico) went beyond what the U.S. Constitution conferred. Bail was guaranteed except in capital cases, imprisonment for debt was outlawed, as was child labor, and workers were guaranteed an eight-hour day.⁴²¹ A summary chart comparing statutory and judicial protections in the Puerto Rico to provisions in the U.S. Constitution is found in Appendix A.

C. EXPERIENCE WITH JURY TRIALS IN PUERTO RICO DURING THE ERA OF THE *INSULAR CASES*

The jury system in the U.S. district court in Puerto Rico—grand jury

RESOLUTIONS OF THE SECOND SESSION OF THE NINTH LEGISLATURE OF PORTO RICO 302 (1919). This was almost wholly repealed in 1925, leaving only a “felony charged against a public officer by reason of acts done by him in the performance of his duties” to be initiated by grand jury. *People v. Cardona*, 50 P.R.R. 104, 110 (1936).

417. Congress established the Federal District Court for the District of Puerto Rico under Article III in 1966. *See generally* Act of Sept. 12, 1966, Pub. L. 89–571, 80 Stat. 764.

418. *See Hernandez v. J. Ochoa y Hermano*, 5 P.R. Fed. Rep. 463, 477–80 (1910), *aff'd* 230 U.S. 139 (1913); *Santiago v. Nogueras*, 2 P.R. Fed. Rep. 467, 488 (1907), *aff'd* 214 U.S. 260 (1909).

419. *Cintrón v. Banco Territorial y Agrícola*, 15 P.R. 495, 519 (1909).

420. *See Jones–Shafroth Act*, ch. 145, § 2, Pub. L. 64–368, 39 Stat. 951, 951–52 (1917).

421. *Id.*

and petit jury in civil and criminal cases, on the same terms as in the mainland—seemed to work well. Judge William Holt (1900–04) found that Puerto Rican jurors “performed as fairly, honestly and efficiently as jurors acting in the United States,” and noted that “Porto Ricans favor” the use of juries.⁴²² The only prominent complaint came from judges concerned about the difficulty of procuring qualified jurors. English was the official language of the federal court system, and in the early years after the American takeover, relatively few native Puerto Ricans spoke it fluently enough.⁴²³

There were more issues with the criminal petit jury in the local courts, where the vast majority of legal business was handled. Criminal defendants charged with felonies had the right to elect whether to be tried by a jury or judge. In the first seven months that the jury was available, only ten defendants elected it.⁴²⁴ It seems that, naturally enough, Puerto Rican criminal defendants and lawyers preferred the system with which they were familiar, bench trials.⁴²⁵

In his 1903 annual report, the Attorney General of Puerto Rico called trial by jury “very disappointing.”⁴²⁶ He reported that many thought “the lawyers themselves are the most serious obstacles in the way of jury trials.”⁴²⁷ He concluded that “[i]t is a mistake to suppose that the people of Porto Rico are so lacking in either education or judgment as to be unable to furnish an abundance of competent jurors. The exact opposite is true.”⁴²⁸ The problem, rather, was hundreds of years of Spanish authoritarianism had not given the people the proper “political training” to serve as a neutral arbiter between the state and the accused, capable of understanding and weighing the interests of both sides.⁴²⁹ This was the same point Taft made in arguing against use of the jury in the Philippines.

422. William H. Holt, *The Jury System*, 67 ALBANY L.J. 298, 299–300 (1905).

423. *Id.* at 300.

424. JAMES S. HARLAN, ANNUAL REPORT TO THE ATTORNEY-GENERAL OF THE UNITED STATES., 1 OPINIONS OF THE ATTORNEY-GENERAL OF PORTO RICO TO THE GOVERNOR, THE HEADS OF DEPARTMENTS, THE JUDICIARY AND OTHER OFFICIALS 237, 246 (1903).

425. See L[EO] S. ROWE, THE UNITED STATES AND PORTO RICO 202 (1904); *Porto Rico Prosperous*, N.Y. TIMES, Sept. 13, 1903, at 7.

426. WILLIS SWEET, REPORT OF THE ATTORNEY-GENERAL, THIRD ANNUAL REPORT OF THE GOVERNOR OF PORTO RICO TO THE PRESIDENT OF THE UNITED STATES 72, 80 (1903).

427. *Id.* at 81.

428. *Id.* at 80.

429. *Id.* at 80–81.

The crux of the problem seemed to be that mainland American officials—for decades, both the governor and attorney general were from the mainland, appointed by the president of the United States⁴³⁰—thought that Puerto Rican juries acquitted the guilty too frequently. For the year from July 1, 1902 to June 30, 1903, 188 jury trials were held, out of 1,245 felony cases.⁴³¹ The acquittal rate was just over 49%.⁴³² Since jury trials were only held in felony cases,⁴³³ it was often allegedly-guilty murderers and others charged with serious crimes who were going free. The next year, the governor reported that the jury system was not yielding “very satisfactory results.”⁴³⁴ The acquittal rate in jury trials for that year was nearly 53%.⁴³⁵ By way of comparison, acquittal rates in jury trials in New York County at the same time averaged in the high 30s.⁴³⁶ As discussed in Part II, Taft, Root, and many other elite lawyers and academics thought the acquittal rates in the mainland United States were scandalously high. The rate in Puerto Rico—perhaps as much as 50% higher than the rate in the mainland, if New York County is representative—a big assumption—surely troubled American policymakers. These facts may account for why Taft to use his 1905 “disgrace” speech to declare that the jury trial in Puerto Rico was a “failure.”⁴³⁷

But within a few years, the acquittal rate in jury trials in Puerto Rican

430. Permanent governors of Puerto Rico came from the mainland until 1946. See HISPANIC AMERICANS IN CONGRESS, 1822–2012, at 6, 376 (Matthew A. Wasniewski et al. eds., 2013) (discussing Gov. Jesús T. Piñero). A native Puerto Rican was the appointed attorney general from 1919–1923, but he clashed with the governor and was followed in office by mainland-born attorneys general for two decades. See TRUMAN R. CLARK, PUERTO RICO AND THE UNITED STATES, 1917–1933, at 60, 68–72 (1975) (discussing Att’y-Gen. Salvador Mestre).

431. WILLIS SWEET, REPORT OF THE ATTORNEY-GENERAL, *supra* note 426, at 88.

432. *Id.*

433. See *supra* note 405.

434. WILLIAM H. HUNT, FOURTH ANNUAL REPORT OF THE GOVERNOR OF PORTO RICO 9, 25 (1904). Many Puerto Ricans—most of whom were Roman Catholics—had conscientious scruples against the death penalty and would either be disqualified from serving on juries in capital cases, making it harder to procure a jury at all, or would acquit if they did serve. *Id.* See generally BERGA Y PONCE DE LEON, *supra* note 402.

435. See WILLIAM H. HUNT, FOURTH ANNUAL REPORT OF THE GOVERNOR OF PORTO RICO, *supra* note 434, at 51, 59.

436. See Arthur Train, *Sensationalism and Jury Trials*, 25 EVERYBODY’S MAG., July–Dec. 1911, at 337, 337 (1901: 38%; 1902: 45%; 1903: 39%; 1904: 42%; 1905: 38%; 1906: 35%; 1907: 31%; 1908: 32%; 1909: 34%; 1910: 34%).

437. Taft, *Administration*, *supra* note 83, at 5.

local courts had declined substantially.⁴³⁸ The legislature accepted the attorney general's recommendation to enact a statute clarifying that judges had the power to comment and instruct juries on the judge's view of the evidence. In 1911, the attorney general reported to the War Department that the jury system had submitted "a most remarkable showing."⁴³⁹ He told the *New York Times* that:

In some respects [Puerto Ricans] are far ahead of any State here. For instance, there is never in Porto Rico any complaint—as there is almost universally here—of the law's delays. We don't have law's delays in Porto Rico. All cases are tried expeditiously and with even-handed justice in all the courts of the island, and protracted litigation is almost unknown.⁴⁴⁰

He ascribed the success to reforms that lawyers like Taft and Root had urged on the mainland for years: a harmless error statute, preventing "[a] mere technicality" from causing reversal, and the new statute "allowing a Judge to comment on the evidence and to sum up the case to the jury."⁴⁴¹ Juries in Puerto Rico, he concluded, generally "decide quickly and justly."⁴⁴² As noted in Section V.B.2, in 1919, the Assembly extended criminal petit jury rights to misdemeanor defendants. The right was codified in the Puerto Rico Constitution when it became a commonwealth in 1952. That constitution does not, however, guarantee a grand jury or civil jury.

D. *MURATTI, TAPIA, AND BALZAC*: THE SUPREME COURT REITERATES THAT THE JURY IS NOT CONSTITUTIONALLY REQUIRED

After the 1917 Jones Act extended U.S. citizenship to most Puerto Ricans and enacted a bill of rights that omitted the jury, litigants in Puerto Rican courts moved to reconsider the applicability of *Dorr* and *Mankichi*, arguing that Puerto Rico should now be considered an incorporated

438. The acquittal rates for jury trials in the fiscal years ending 1909, 1910, and 1911 were 36%, 33%, and 33%, respectively. See HENRY M. HOYT, REPORT OF THE ATTORNEY-GENERAL, 9 WAR DEPARTMENT ANNUAL REPORTS, H.R. DOC. NO. 61-103, at 73, 79 (1909); FOSTER V. BROWN, REPORT OF THE ATTORNEY-GENERAL, 4 WAR DEPARTMENT ANNUAL REPORTS, H.R. DOC. NO. 61-1002, at 205 (1910); FOSTER V. BROWN, REPORT OF THE ATTORNEY GENERAL, REPORT OF THE GOVERNOR OF PORTO RICO TO THE SECRETARY OF WAR 255, 255 (1911).

439. FOSTER V. BROWN, REPORT OF THE GOVERNOR OF PORTO RICO TO THE SECRETARY OF WAR *supra* note 438 at 255.

440. *Porto Rico Happy Under Our Rule*, N.Y. TIMES, Mar. 20, 1912, at 6.

441. *Id.*

442. *Id.*

territory and that the U.S. Constitution, therefore, required the same jury rights in local courts as it did in mainland federal courts. This argument was plausible because the Supreme Court had held that citizenship for inhabitants of Alaska was an important indicium of that territory's incorporation, which had made the Sixth Amendment jury right applicable there.⁴⁴³

In April 1917, the U.S. District Court for the District of Porto Rico granted a writ of habeas corpus directing that Carlos Tapia be released from custody of the local courts of San Juan, where he had been charged by information with assault with intent to kill.⁴⁴⁴ In a lengthy and learned opinion, the judge held that because Puerto Rico had been incorporated into the Union, the Grand Jury Clause of the Fifth Amendment applied in the local courts.⁴⁴⁵ He placed principal reliance on the Jones Act's grant of citizenship.⁴⁴⁶ Three months later, in the case of an accused murderer Jose Muratti, the Supreme Court of Puerto Rico agreed that the Grand Jury Clause applied in local courts because Puerto Rico had been incorporated by the Jones Act.⁴⁴⁷

Both cases were taken to the U.S. Supreme Court. The U.S. government argued there that the grand jury was "unsuited to the needs and habits of the people," and, hence, would cause "injustice and provoke disturbance rather than to aid the orderly administration of justice."⁴⁴⁸ The government quoted *Holden's* discussion of the desirability of allowing a territory with a civil law system of procedure to maintain "its traditions, laws, and systems of administration unchanged."⁴⁴⁹ And although the local legislature had the power to enact legislation for the grand jury, the civil petit jury, or the criminal petit jury in some classes of cases, the government brief's noted that Puerto Rico's representatives had not done so.⁴⁵⁰ There were no racist or chauvinistic comments about the people of Puerto Rico in the U.S. briefing.

The brief continued that grand and petit juries had been repeatedly

443. *Rasmussen v. United States*, 197 U.S. 516, 522–23 (1905).

444. *In re Tapia*, 9 P.R. Fed. Rep. 452, 455–56 (D.P.R. 1917).

445. *Id.* at 494.

446. *Id.* at 492–95.

447. *Muratti v. Foote*, 25 P.R. 527, 529–30, 541 (1917).

448. Brief for the People of Porto Rico at 4, *Porto Rico v. Tapia*, 245 U.S. 639 (1918) (No. 534), *Porto Rico v. Muratti*, 245 U.S. 639 (1918) (No. 647) (joint brief).

449. *Id.* at 6 (quoting *Holden v. Hardy*, 169 U.S. 366, 389 (1898)).

450. *Id.* at 17.

held to be “matters of procedure” rather than “fundamental” rights.⁴⁵¹ The grant of citizenship in the Jones Act did not show congressional intent to incorporate Puerto Rico into the Union; rather, it occurred within a month of the declaration of war on Germany, and “[i]t was highly important to remove any cause of ill feeling in Porto Rico and to encourage the loyalty of its citizens.”⁴⁵² Other provisions of the Jones Act (Puerto Rico) showed an intent not to incorporate and fully extend the Constitution: for example, the provision of a statutory bill of rights which omitted the grand and petit jury.⁴⁵³

The Supreme Court summarily reversed in *Porto Rico v. Tapia*, citing *Mankichi, Dorr*, and other *Insular Cases*,⁴⁵⁴ thus voiding the lower court’s holding that Puerto Rico was incorporated and constitutional jury rights were applicable. The Court then summarily reversed in *Porto Rico v. Muratti*, citing *Tapia*.⁴⁵⁵

But the issue of whether the Jones Act (Puerto Rico) had effected incorporation and therefore extended constitutional jury rights to Puerto Rico did not go away. Jesus Balzac, a newspaper editor, was charged by information in 1918 in a local Puerto Rican court with criminal libel, a misdemeanor. He demanded a jury trial under the Sixth Amendment to the U.S. Constitution.⁴⁵⁶ The Supreme Court of Puerto Rico upheld the local law’s denial of the jury for misdemeanors—only felony defendants had a statutory right to jury trial under then-existing Puerto Rican law—by citing *Muratti* and *Tapia*.⁴⁵⁷

At the U.S. Supreme Court, the government treated the issue as settled. A government lawyer submitted a perfunctory brief, saying that *Muratti* and *Tapia* foreclosed Balzac’s argument about incorporation and jury rights.⁴⁵⁸ Taft, now Chief Justice of the United States Supreme Court, affirmed for a unanimous Court.⁴⁵⁹ The Court reiterated that constitutional jury rights under the Fifth, Sixth, and Seventh Amendments “do not apply

451. *Id.* at 4 (citation omitted).

452. *Id.* at 13.

453. *Id.* at 18–27.

454. *Porto Rico v. Tapia*, 245 U.S. 639, 639 (1918) (per curiam).

455. *Porto Rico v. Muratti*, 245 U.S. 639, 639–40 (1918) (per curiam).

456. *Porto Rico v. Balzac*, 28 P.R. 139, 140 (1920).

457. *Id.*

458. Brief for the People of Porto Rico at 6–12, *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (Nos. 178 & 179).

459. *Balzac*, 258 U.S. at 298–314.

to territory belonging to the United States which has not been incorporated into the Union.”⁴⁶⁰ The Jones Act had not effected incorporation of Puerto Rico into the Union, despite the grant of citizenship, because, among other reasons, the statutory bill of rights had omitted the grand jury and petit jury, showing congressional intent not to fully apply the Constitution.⁴⁶¹ The Court was careful to note, however, that fundamental constitutional rights, including the Due Process Clause, “had from the beginning full application in . . . Porto Rico.”⁴⁶²

As support for its holding, the Court opined that the jury system requires “a conscious duty of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at once to acquire.”⁴⁶³ Congress must have determined—wisely, Taft suggested—that “Porto Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin.”⁴⁶⁴ This passage certainly contains a whiff of a patronizing chauvinism, but there is more going on than that.

Taft was expressing, somewhat allusively, views that were second nature to him and other elite lawyers who came to the bar during the era of classical legal orthodoxy and became disenchanted with the jury. Law and legal institutions must “spring from the soil” and conform to people’s habits and customs if they are to work well. Making the jury work well was actually quite difficult, even in the mainland United States, where it had existed for centuries. As discussed in Section II above, the jury had fallen into disrepute among elite lawyers of Taft’s era. One should even be warier of the jury, Taft and others thought, in a formerly civil law jurisdiction that had no traditions of jury service or other kinds of popular self-government.

CONCLUSION

Many commentators have found that the Court’s decisions in the Insular jury cases—holding in *Mankichi*, *Dorr*, *Balzac* and other cases that constitutional jury rights were not fundamental and not applicable in

460. *Id.* at 304–05 (citing *Dorr v. United States*, 195 U.S. 138, 145 (1904), *Hawaii v. Mankichi*, 190 U.S. 197 (1903), *Downes v. Bidwell*, 182 U.S. 244 (1901)).

461. *Id.* at 306.

462. *Id.* at 313.

463. *Id.* at 310.

464. *Id.*

unincorporated territory—must have been motivated by extra-legal views sounding in racism and cultural chauvinism. Those factors certainly played a role in policymaking by U.S. officials during the era of the *Insular Cases*. But on the issue of the jury and other criminal procedure rights, there were other considerations as well. In the *Insular Cases* about the jury, a majority of the Court agreed with the U.S. government and with the anti-jury movement in the mainland that jury trials were an outdated, inefficient, ineffective means of fact-finding and that U.S. officials and local legislatures in the territories should be left free of constitutional shackles so they could experiment and adjust criminal and civil procedure to the needs of their particular polities. In addition, it was very important to U.S. policymakers that the jury was not natively rooted in either Puerto Rico or the Philippines—those territories had unreconstructed civil law procedure during their long periods under Spanish rule. And they had lacked any other tradition of popular involvement in self-government. Given these considerations, U.S. policymakers decided not to import the jury, which was viewed as an institution in serious trouble even in the United States where it had existed for centuries and was buttressed by a long tradition of popular self-government.

By arguing that U.S. policymakers who thought that jury rights should not be extended to the Philippines and Puerto Rico were motivated by honestly and widely-held views about procedural efficiency and problems with the jury, I do not mean to suggest that racism or cultural chauvinism were not present. They were. And by casting U.S. governance of those territories in a positive light as far as individual procedural rights were concerned, I do not mean to slight the real grievances that the people of both territories have had—and in the case of Puerto Rico, still have—about U.S. rule. My goal, rather, is to provide a broader, more contextual picture of the decision-making of U.S. policymakers in order to better illuminate their values, preconceptions, objectives, and actions. This broader view shows a concerted effort to protect individual rights in the territories by U.S. policymakers, but a deep skepticism about the value of the jury as a means of doing that.

When Taft, Root, and others who were critical of the jury were opposing its extension to the Philippines and Puerto Rico, they were often making the exact same arguments at the exact same time about the failure of trial by jury in the United States. The fact that jury rights were embedded in U.S. and state constitutions, and in the history and imagination of the American people, made many would-be jury reformers despair that they could never be eliminated in the United States. For rock-

ribbed conservatives like Root, the historical and traditional roots of the jury in the mainland were reason alone to be very wary of reform there. Therefore, the focus of anti-jury reformers in the mainland was generally to tinker on the margins—for example, by getting rid of the twelve-person rule or the rule of unanimity. But where U.S. officials had a freer hand to design a legal system without the constitutional, emotional, and historical constraints they faced in the mainland, they were able to curtail, as in Puerto Rico, or entirely eliminate, as in the Philippines, the use of the jury.

APPENDIX

TABLE 1. Federally-Protected Fundamental Rights, Mainland^a and Unincorporated Territories (1900–1920)

<i>Rights</i>	<i>Mainland</i>		<i>Puerto Rico</i>			
			<i>Military or executive order</i>	<i>Local legislation</i>	<i>Congressional statute</i>	<i>Court decision</i>
Freedom of speech	1 st Am.	...		Act to Define Rights of People (1901) ^b	Jones Act (1917) ^c	...
Freedom of the press	1 st Am.	...		Act to Define Rights	Jones Act	1 st Am. applicable ^d
Right to petition	1 st Am.	...		Act to Define Rights	Jones Act	...
Right to assemble	1 st Am.	...		Act to Define Rights	Jones Act	...
Free exercise of religion	1 st Am.	...		Act to Define Rights	Jones Act	1 st Am. applicable ^e
No establishment of religion	1 st Am.	...		Act to Define Rights	Jones Act	1 st Am. applicable ^f
Right to bear arms	2 ^d Am.	...	...	...	...	...
No quartering of soldiers in peacetime	3d Am.	...	...	...	...	...
No unreasonable searches or seizures	4 th Am.	...		Act to Define Rights	Jones Act	In U.S. district court and insular courts, 4 th Am. applicable ^g

<i>Rights</i>	<i>Mainland</i>	<i>The Philippines</i>			
		<i>Military or executive order</i>	<i>Local legislation</i>	<i>Congressional statute</i>	<i>Court decision</i>
Freedom of speech	1 st Am.	President's Instructions to Second Philippine Commission (1900) ^h	...	Organic Act (1902); ⁱ Autonomy Act (1916) ^j	...
Freedom of the press	1 st Am.	Pres. Instructions	...	Organic Act; Autonomy Act	...
Right to petition	1 st Am.	Pres. Instructions	...	Organic Act; Autonomy Act	...
Right to assemble	1 st Am.	Pres. Instructions	...	Organic Act; Autonomy Act	...
Free exercise of religion	1 st Am.	Pres. Instructions	...	Organic Act; Autonomy Act	...
No establishment of religion	1 st Am.	Pres. Instructions	...	Organic Act; Autonomy Act	...
Right to bear arms	2 ^d Am.	...	...	...	...
No quartering of soldiers in peacetime	3 ^d Am.	...	...	...	...
No unreasonable searches or seizures	4 th Am.	Pres. Instructions	...	Organic Act; Autonomy Act	...

<i>Rights</i>	<i>Mainland</i>		<i>Puerto Rico</i>			
			<i>Military or executive order</i>	<i>Local legislation</i>	<i>Congressional statute</i>	<i>Court decision</i>
Probable cause and warrant particularity	4 th Am.	...		Act to Define Rights; Code of Criminal Procedure (1902) ⁶	Jones Act	In U.S. district court, 4 th Am. applicable ^l
Grand jury for capital or infamous crimes	5 th Am.	...		Act of June 18, 1919 (repealed 1925)	...	In U.S. Dist. Ct. since 1900. ^m No constitution requirement in insular courts. ⁿ
Double jeopardy	5 th Am.	...		Act of Jan. 31, 1901; ^o Crim. Pro Code	Jones Act	In U.S. district court, 5 th Am. may be applicable ^p
No compelled self-incrimination	5 th Am.	...		Act of Jan. 31, 1901; Crim. Pro Code	Jones Act	In U.S. district court, 5 th Am. applicable; ^q maybe so in insular courts ^r
Due process of law	5 th Am.	...		...	Jones Act	5 th Am. applicable ^s
Just compensation for public takings	5 th Am.	...		Act of Mar. 12, 1903 ^t	Jones Act	...

<i>Rights</i>	<i>Mainland</i>	<i>The Philippines</i>			
		<i>Military or executive order</i>	<i>Local legislation</i>	<i>Congressional statute</i>	<i>Court decision</i>
Probable cause and warrant particularity	4 th Am.	General Orders No. 58 (1900) ^u	...	Organic Act; Autonomy Act	...
Grand jury for capital or infamous crimes	5 th Am.	...	...	...	...
Double jeopardy	5 th Am.	Pres. Instructions; G.O. 58	...	Organic Act; Autonomy Act	...
No compelled self-incrimination	5 th Am.	Pres. Instructions; G.O. 58	...	Organic Act; Autonomy Act	...
Due process of law	5 th Am.	Pres. Instructions; G.O. 58	...	Organic Act; Autonomy Act	Since Due Process Clause is in force in Puerto Rico, according to US Supreme Court, it is also applicable in the Philippines ^v
Just compensation for public takings	5 th Am.	Pres. Instructions	Civil Code	Autonomy Act	...

<i>Rights</i>	<i>Mainland</i>	<i>Puerto Rico</i>			
		<i>Military or executive order</i>	<i>Local legislation</i>	<i>Congressional statute</i>	<i>Court decision</i>
Speedy trial	6 th Am.	...	Crim. Pro. Code	Jones Act	In U.S. district court, 6 th Am. applicable ⁶⁰
Public trial	6 th Am.	...	Crim. Pro. Code	Jones Act	In U.S. district court, 6 th Am. applicable ⁶¹
Personal presence at trial	6 th Am. (inferred)	...	Crim. Pro. Code (felonies)	Jones Act	...
Petit jury in criminal cases	6 th Am. (non-petty offenses)	US Provisional Court (1899–1900) (non-petty offense)	Act of Jan. 21, 1901 (felonies only in insular courts); Act of 1919 (misdemeanors)	...	In U.S. district court since 1900. ⁶² Sixth Am. inapplicable in insular courts. ⁶³
Trial in district where crime committed	6 th Am. & Article III	...	Crim. Pro. Code	...	In U.S. district court, 6 th Am. applicable ⁶⁴
Unanimous verdict	6 th Am.	...	Act of Jan. 31, 1901; Crim. Pro. Code	...	Guaranteed in U.S. district court, but not by 6 th Am.
Notice of charges	6 th Am.	...	Crim. Pro. Code	Jones Act	...
Right to confront witnesses	6 th Am.	...	Crim. Pro. Code	Jones Act	...
Compulsory process	6 th Am.	...	Crim. Pro. Code	Jones Act	...

<i>Rights</i>	<i>Mainland</i>	<i>The Philippines</i>			
		<i>Military or executive order</i>	<i>Local legislation</i>	<i>Congressional statute</i>	<i>Court decision</i>
Speedy trial	6 th Am.	Pres. Instructions; G.O. 58	Act No. 612 of Phil. Commission	Organic Act; Autonomy Act	...
Public trial	6 th Am.	Pres. Instructions; G.O. 58	...	Organic Act; Autonomy Act	
Personal presence at trial	6 th Am. (inferred)	G.O. 58	...	Organic Act; Autonomy Act	
Petit jury in criminal cases	6 th Am. (non-petty offenses)	...	...	...	...
Trial in district where crime committed	6 th Am. & Article III	...	...	...	...
Unanimous verdict	6 th Am.	...	...	...	...
Notice of charges	6 th Am.	Pres. Instructions; G.O. 58	...	Organic Act; Autonomy Act	...
Right to confront witnesses	6 th Am.	Pres. Instructions; G.O. 58	...	Organic Act; Autonomy Act	Perhaps 6 th Am. applicable ^{bb}
Compulsory process	6 th Am.	Pres. Instructions; G.O. 58	...	Organic Act; Autonomy Act	...

<i>Rights</i>	<i>Mainland</i>	<i>Puerto Rico</i>			
		<i>Military or executive order</i>	<i>Local legislation</i>	<i>Congressional statute</i>	<i>Court decision</i>
Assistance of counsel—if able to pay	6 th Am.	...	Crim. Pro. Code	Jones Act	...
Assistance of counsel—state paid for indigent	In capital and treason cases, by statute	...	Crim. Pro. Code	...	In U.S. district court, 6 th Am. requires ^{cc}
Petit jury in suits at common law	7 th Am.	In U.S. Provisional Court (1899-1900)	...	...	In U.S. district court since 1900 (applying Foraker Act and Rev. Stat. § 648) ^{dd}
No excessive bail	8 th Am.	...	...	Jones Act	...
No excessive fines	8 th Am.	...	...	Jones Act	...
No cruel and unusual punishments	8 th Am.	...	...	Jones Act	...
No ex post facto laws	Article I	...	...	Jones Act	...
No bills of attainder	Article I	...	...	Jones Act	...
Habeas corpus	Article I	...	Crim. Pro. Code	Foraker Act (1900); Jones Act	...
No impairing obligation of contracts	n/a	...	Civil Code ^{ee}	Jones Act	Contracts Clause ^{ff} or general principles of law ^{gg}

<i>Rights</i>	<i>Mainland</i>	<i>The Philippines</i>			
		<i>Military or executive order</i>	<i>Local legislation</i>	<i>Congressional statute</i>	<i>Court decision</i>
Assistance of counsel—if able to pay	6 th Am.	Pres. Instructions; G.O. 58	...	Organic Act; Autonomy Act	...
Assistance of counsel—state paid for indigent	In capital and treason cases, by statute	G.O. 58	...	...	...
Petit jury in suits at common law	7 th Am.	...	...	...	...
No excessive bail	8 th Am.	Pres. Instructions	...	Organic Act; Autonomy Act	...
No excessive fines	8 th Am.	Pres. Instructions	...	Organic Act; Autonomy Act	...
No cruel and unusual punishments	8 th Am.	Pres. Instructions	...	Organic Act; Autonomy Act	...
No ex post facto laws	Article I	Pres. Instructions	...	Organic Act; Autonomy Act	...
No bills of attainder	Article I	Pres. Instructions	...	Organic Act; Autonomy Act	...
Habeas corpus	Article I	G.O. 58	...	Organic Act; Autonomy Act	...
No impairing obligation of contracts	n/a	...	...	Organic Act; Autonomy Act	...

<i>Rights</i>	<i>Mainland</i>	<i>Puerto Rico</i>			
		<i>Military or executive order</i>	<i>Local legislation</i>	<i>Congressional statute</i>	<i>Court decision</i>
No slavery or involuntary servitude	13 th Am.	...	...	Jones Act	...
Equal protection of the laws		...	...	Jones Act	Constitution applicable ^{hh}
Two witnesses in treason cases	Article III	...	Act of Jan. 31, 1901	...	...
Judges with life tenure and salary protection	Article III	...	...	...	...
Gov't Burden/proof beyond a reasonable doubt	Common law	...	Act of Jan. 31, 1901; Crim. Pro. Code	...	Also by court decision ⁱⁱ
Strict construction of penal statutes/void for vagueness		...	...	...	By court decision ^{jj}
Only legislature can create crimes		...	...	...	By court decision ^{kk}
No child labor		...	...	Jones Act	...
No imprisonment for debt		...	...	Jones Act	...
Right to bail (except capital cases)		...	...	Jones Act	...
Women vote	19 th Am. (1920)	...	...	...	Rejected by court ^{ll}
Eight-hour workday		...	...	Jones Act	...

<i>Rights</i>	<i>Mainland</i>	<i>The Philippines</i>			
		<i>Military or executive order</i>	<i>Local legislation</i>	<i>Congressional statute</i>	<i>Court decision</i>
No slavery or involuntary servitude	13 th Am.	Pres. Instructions	...	Organic Act; Autonomy Act	...
Equal protection of the laws		...	...	Organic Act; Autonomy Act	...
Two witnesses in treason cases	Article III	...	...	...	...
Judges with life tenure and salary protection	Article III	...	...	...	...
Gov't Burden/proof beyond a reasonable doubt	Common law	G.O. 58	...	...	Also by court decision ^{mm}
Strict construction of penal statutes/void for vagueness		...	...	...	...
Only legislature can create crimes		...	...	...	By court decision ^{mm}
No child labor		...	...	...	...
No imprisonment for debt		...	...	Organic Act; Autonomy Act	...
Right to bail (except capital cases)		...	...	Organic Act; Autonomy Act	...
Women vote	19 th Am. (1920)	...	...	...	...
Eight-hour workday		...	...	...	...

^a Until provisions of the Bill of Rights were incorporated against the U.S. states via the Due Process Clause of the Fourteenth Amendment, almost all of the constitutional protections listed here for the mainland were protections against the federal government only.

^b An Act to Define the Rights of the People, *supra* note 403.

^c Jones-Shafroth Act, *supra* note 420.

^d See *Siebert v. Vivoni*, 4 P.R. Fed. Rep. 111, 112–13 (D.P.R. 1908); *Pettingill v. Zeno Gandia*, 4 P.R. Fed. Rep. 383, 393–94 (D.P.R. 1908), *rev'd on other grounds*, 222 U.S. 452 (1912).

^e See *Ex parte Bird*, 5 P.R.R. 241, 261–62 (1904).

^f See *Díaz-Caneja v. Marxuach*, 8 P.R.R. 458, 461–62 (1905).

^g See *Coan v. Lopez Antongiorgi*, 10 P.R. Fed. Rep. 438, 439–44 (D.P.R. 1918); *People of Porto Rico v. Fajardo Cardona*, 8 P.R. Fed. Rep. 277, 2 (D.P.R. 1916); *Ex parte Bird*, 5 P.R.R. 241, 261–62 (P.R. 1904).

^h MCKINLEY, INSTRUCTIONS, *supra* note 245.

ⁱ Philippine Organic Act, § 5.

^j Philippine Autonomy (Jones) Act, *supra* note 61.

^k An Act to Establish a Code of Criminal Procedure for Porto Rico, *supra* note 403.

^l See *Coan v. Lopez Antongiorgi*, 10 P.R. Fed. Rep. 438, 439–44 (D.P.R. 1918); *People of Porto Rico v. Fajardo Cardona*, 8 P.R. Fed. Rep. 277, 277 (D.P.R. 1916).

^m See, e.g., *United States v. Villanua*, 4 P.R. Fed. Rep. 341, 341–43 (D.P.R. 1908); *United States v. Cruz*, 1 P.R. Fed. Rep. 445, 445 (1902) (grand jury used).

ⁿ See *Balzac v. Porto Rico*, 258 U.S. 298, 304–05 (1922); *Porto Rico v. Tapia*, 245 U.S. 639, 639 (1918) (per curiam); *Dorr v. United States*, 195 U.S. 138 (1904).

^o An Act Concerning Procedure in Jury Trials, *supra* note 403.

^p See *In re Cardona*, 10 P.R. Fed. Rep. 40, 45–46, 50, 53, 61–62 (D.P.R. 1917); *United States v. Fernandez*, 1 P.R. Fed. Rep. 453, 454 (D.P.R. 1903).

^q See *United States v. Rivera*, 8 P.R. Fed. Rep. 401, 403 (D.P.R. 1916); *In re Decker*, 1 P.R. Fed. Rep. 381, 383 (D.P.R. 1902).

^r See *People v. Morales*, 14 P.R.R. 227, 240 (1908) (citing *Ex parte Spies*, 123 U.S. 131 (1887), a Fifth Amendment Self-Incrimination Clause case); *People v. Kent*, 10 P.R.R. 325, 349 (1906) (seeming to assume that the Self-Incrimination Clause of the Fifth Amendment is applicable, but noting that the same principle is found in the Code of Criminal Procedure).

^s See *Hernandez v. J. Ochoa y Hermano*, 5 P.R. Fed. Rep. 463, 477–80 (1910), *aff'd* 230 U.S. 139 (1913); *Santiago v. Noguerras*, 2 P.R. Fed. Rep. 467, 488 (1907), *aff'd* 214 U.S. 260 (1909); *Compagnie des Sucreries de Puerto Rico v. Ponce & Guyama R.R. Co.*, 2 P.R. Fed. Rep. 176, 180–81 (1906).

^t An Act to Provide for the Condemnation of Private Property for the Purposes and Under the Conditions Therein Named, *supra* note 415.

^u GENERAL ORDERS NO. 58, *supra* note 263.

^v See *Ochoa v. Hernandez y Morales*, 230 U.S. 139, 139 (1913); *Santiago v. Noguerras*, 214 U.S. 260, 260 (1909). See also *Endencia v. Loalhati*, G.R. No. L-3787, 9 PHIL. REP. 177, 183 (1907) (stating that the requirement of “due process” before property is deprived is part of the “fundamental constitution of every civilized country”).

^w See *People of Porto Rico v. Fajardo Cardona*, 8 P.R. Fed. Rep. 277, 279–81 (D.P.R. 1916).

^x See *id.*

^y See, e.g., *United States v. Reyes*, 4 P.R. Fed. Rep. 69 (D.P.R. 1907); *United States v. Cruz*, 1 P.R. Fed. Rep. 445 (D.P.R. 1902).

^z See *Balzac v. Puerto Rico*, 258 U.S. 298, 304–05 (1922); *Dorr v. United States*, 195 U.S. 138 (1904).

^{aa} See *Fajardo Cardona*, 8 P.R. Fed. Rep. at 279–81.

^{bb} See *United States v. Virrey*, G.R. No. L-12901, 37 PHIL. REP. 623–24 (1918) (stating that admission of dying declarations must be done cautiously because criminal defendants have confrontation rights under the common law, the U.S. Constitution, and the Philippine Organic Act).

^{cc} See *United States v. Rivera*, 1 P.R. Fed. Rep. 439, 440 (D.P.R. 1901).

^{dd} The civil jury was used “regularly” in the U.S. district court since the Foraker Act. *Martinez v. Valdes*, 10 P.R. Fed. Rep. 449, 454 (1918). For examples, see *Siebert v. Vivoni*, 4 P.R. Fed. Rep. 111 (1908); *Elkins v. People of Porto Rico*, 5 P.R. Fed. Rep. 243 (D.P.R. 1909). Federal courts at times

implied that the Seventh Amendment required this, *see* *United States v. Thirty Quarts of Roederer Champagne*, 8 P.R. Fed. Rep. 585, 586 (D.P.R. 1916); at other times, they pointed to a statute governing process in federal courts, *see* *F. Carrera & Hermano v. Font, Gamundi & Co.*, 70 F.2d 999, 1001 (1st Cir. 1934), or stated that the Foraker Act impliedly required a civil jury, *see* *Martinez*, 10 P.R. Fed. Rep. at 455–56.

^{ee} *See* *Cintrón v. Banco Territorial y Agrícola*, 15 P.R.R. 495, 519–20 (1909).

^{ff} *See* *Compagnie des Sucreries de Puerto Rico v. Ponce & Guyama R.R.*, 2 P.R. Fed. Rep. 176, 180–81 (1906).

^{gg} *See* *Quiñones v. Castello*, 16 P.R. 467, 476–77 (1910); *Battistini v. Crosas*, 1 P.R. Fed. Rep. 62, 64–65 (1903).

^{hh} *See* *Ex parte Bird*, 5 P.R.R. 241, 261–62 (1904).

ⁱⁱ For U.S. district court cases, *see, e.g.*, *United States v. Sierra*, 8 P.R. Fed. Rep. 12, 14 (D.P.R. 1915); *United States v. Reyes*, 4 P.R. Fed. Rep. 69, 71 (D.P.R. 1907); *United States v. Cruz*, 1 P.R. Fed. Rep. 445, 446 (1902).

^{jj} *See* *United States v. Escobar*, 9 P.R. Fed. Rep. 253, 260 (D.P.R. 1916).

^{kk} *See id.* at 257–58 (D.P.R. 1916); *United States v. Alvarez*, 8 P.R. Fed. Rep. 260, 261 (D.P.R. 1915).

^{ll} Although it came after the time period covered by this table, I should note the decision of the Puerto Rico Supreme Court holding that the Nineteenth Amendment did not apply there. *See* *Morales v. Board of Registration*, 33 P.R.R. 76, 89–90 (1924).

^{mm} *United States v. Navarro*, G.R. No. 1272, 3 PHIL. REP. 143, 143–44 (1904); *United States v. Reyes*, G.R. No. L-1374, 3 PHIL. REP. 3 (1903).

ⁿⁿ *See* *United States v. Luling*, G.R. No. L-11162, 34 PHIL. REP. 725, 725 (1916).