A TRANSPACIFIC CONSTITUTION: THE BRITISH AMERICAN COLONIAL ORIGINS OF US IMPERIAL CONSTITUTIONALISM IN THE PHILIPPINES*

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ABSTRACT

This Essay argues that the constitutional framework of US colonial rule in the Philippines can be traced to that of British rule in the American colonies. Drawing from the concept of the "transatlantic constitution" developed by Mary Sarah Bilder, the existence of a "transpacific constitution" is shown, first, by comparing and contrasting British and American imperial legal agents and institutions, and arguing that the American institution of the Insular Government in the Philippines finds its origins in the US territories and ultimately in the British Empire's colonial governments in America. Second, this Essay examines how the Supreme Court of the United States, in legitimating the American imperial constitution in the Insular Cases, mirrored the British imperial constitution. The dynamic of the "transpacific constitution" is illustrated in cases appealed from the Philippine Supreme Court to the US Supreme Court.

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INTRODUCTION

On August 1, 1899, a Wall Street lawyer by the name of Elihu Root took up the post of Secretary of War of the United States.[1] Handpicked by President William McKinley to replace the ineffectual Russell Alger, Root's appointment came at a pivotal moment in American history when the United States acquired its insular colonies in the wake of its war and victory over Spain.[2] Having decided to keep the Philippines for the United States, McKinley needed a legal expert rather than a military man to oversee the administration of colonial affairs and to develop the United States' colonial policy.[3] "[S]o I went to perform a lawyer's duty upon the call of the greatest of all our clients, the Government of our country," said Root of his new assignment.[4] In one of his letters to Attorney General John Griggs, Root quipped: "I think the main feature of the change I am making is the formation of a new law firm of 'Griggs and Root, legal advisers to the President, colonial business a specialty.'"[5] And to prepare for this daunting task, Root did what any lawyer would: he hit the books.[6] In one of his letters, he said,

> The first thing I did after my appointment […] was to make out a list of a great number of books which cover in detail both the practice and the principles of many forms of colonial government under the English law, and I am giving to them all the time I can take from my active duties.[7]

According to Root's biographer, the renowned international lawyer Philip Jessup, "[a] list of fifteen such works is in Root's files; they all deal with English colonial policy and practice."[8] Jessup does not specify which

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[1] Rene Escalante, *Elihu Root and the Pacification of the Philippines, 1899-1903*, 42 PHILIPPINIANA SACRA 397, 402 (2007).

[2] *Id.* at 401.

[3] *Id.* at 401–02.

[4] PHILIP JESSUP, ELIHU ROOT: 1845–1909 215 (1964).

[5] *Id.* at 219.

[6] Escalante, *supra* note 1, at 402–03.

[7] JESSUP, *supra* note 4, at 300.

[8] *Id.*

books Root consulted, but it is clear that this neophyte colonial administrator looked to the example of the greatest imperial power of the age: the British Empire. "[W]e'd got [sic] to take the lessons we could get from the colonial policy of other countries, especially Great Britain, and to apply it to the peculiar situation arising from the fundamental principles of our own government," said Root to Jessup.[9] The "peculiar situation," of course, was that unlike Great Britain, the United States was a republic, not a monarchy, and that imperialism was seen as antithetical to American aspirations and constitutional commitment to liberty.[10] Steeped in the law and its predilection for categorizing, this high-powered corporate litigator-turned-cabinet official attempted to square the circle of an American Empire.

The study of British colonial practice was not an approach that was unique to Root. In January 1899, less than a month before hostilities broke out between American and Filipino troops, McKinley announced the formation of the First Philippine Commission, or the "Schurman Commission," named after its head, Cornell University President Jacob Schurman.[11] The Schurman Commission was intended to be a fact-finding mission to gather data on the ground and ascertain conditions in the newly-acquired colony.[12] It also took it upon itself to ascertain the best type of government for the Philippines by looking at the examples of the British colonies.[13] "The example of Great Britain, who has been brilliantly successful in governing dependent peoples, has suggested a colonial form of government for the Philippines," reported the Schurman Commission.[14] Indeed, on the subject of reforming the antiquated Spanish court system in the Philippines, the Schurman Commission had been advised by Montague Kirkwood, a British lawyer and colonial bureaucrat, on the need for a "simplified legal procedure in colonial governance" following the experience of other British possessions.[15] But looking to the examples of British rule in

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[9] *Id.* at 345.

[10] On the acrimonious political debates that followed the United States' turn to empire, *see* MICHAEL PATRICK CULLINANE, LIBERTY AND AMERICAN ANTI-IMPERIALISM: 1898-1909 (2012).

[11] George Harvey, *The Administration of Justice in the Philippine Islands*, 1 PHIL. L.J. 330, 331–32 (1915).

[12] *Id.*

[13] LEIA CASTAÑEDA ANASTACIO, THE FOUNDATIONS OF THE MODERN PHILIPPINE STATE: IMPERIAL RULE AND THE AMERICAN CONSTITUTIONAL TRADITION IN THE PHILIPPINE ISLANDS, 1898-1935 69–70 (2016).

[14] 1 PHILIPPINE COMMISSION, REPORT OF THE PHILIPPINE COMMISSION TO THE PRESIDENT.: JANUARY 31, 1900 [hereinafter "Schurman Report"] 103–04 (1900).

[15] Clara Altman, *Courtroom Colonialism: Philippine Law and U.S. Rule, 1898-1935*, 63–64 (Aug. 2014) (unpublished Ph.D. dissertation, Brandeis University).

Malaya, India, Egypt, Canada, Australia, South Africa, and Hong Kong, the Schurman Commission came to the conclusion that neither the model of the British protectorate nor the British colony were suitable for American rule in the Philippines.[16] Instead, the Schurman Commission looked to the US territorial form of government ("Territorial Form") first outlined by Thomas Jefferson as its template for the Insular Government in the Philippines.[17]

Curiously, the report of the Schurman Commission did not consider one type of British colony that could have furnished another model for American colonial rule: the thirteen British North American colonies prior to the American Revolution. In the age before Jefferson, the thirteen colonies had been a site of experimentation in colonial governance by an ascendant British Empire. From the Puritans' Massachusetts Bay Colony to William Penn's Quaker community in Philadelphia to the prosperous colony of the Virginia Company in the South, each exhibited a different type of colonial governance as viewed from London.[18]

Significantly, law was an important mediating force through which British rule in North America was imposed, practiced, negotiated, and contested. A number of scholars have tried to make sense of the important role played by law in Britain's colonial enterprise. Mary Sarah Bilder develops the concept of a "transatlantic constitution" to describe how the principles of divergence and repugnance were simultaneously deployed in conflicts regarding the application of English law in North America.[19] For Jack Greene, the colonies' conflicting understanding of their own local constitutional order and the customary imperial constitution by which Britain stitched together its various dominions.[20] In line with this, John Phillip Reid argues that the American Revolution was in reality a constitutional dispute. one between a vision of customary law espoused by colonial Whigs who sought to reclaim their "birthright" as Englishmen on the one hand, and the possible loss or curtailment of such customary law,

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[16] Schurman Report, at 99, 102, 104–05.

[17] *Id.* at 106; CASTAÑEDA ANASTACIO, *supra* note 13*,* at 70.

[18] For a brief overview of early colonial America, *see* DAVID REYNOLDS, AMERICA, EMPIRE OF LIBERTY: A NEW HISTORY OF THE UNITED STATES 21–34 (2009).

[19] MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE 2–3 (2004).

[20] JACK GREENE, THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION ix (2011).

based on a prescriptive Parliamentary legislative supremacy imposed from the center, on the other hand.[21]

Could these 17th and 18th century debates have seeped into the legal (sub)consciousness of American administrators, such as Root and the Schurman Commission, as they were devising US colonial policy for the Philippines? In other words, did America's colonial experience under Britain and the American Revolution influence the United States' own subsequent practice of colonialism? How did issues of constitutionalism and empire during America's late colonial and revolutionary era impact and structure constitutional arguments surrounding American imperialism? This Essay examines whether US imperial constitutionalism could be fairly traced to constitutional practices and ruptures occasioned by British imperialism in America and the American revolutionaries' subsequent revolt. By comparing and contrasting British and US imperial legal agents and institutions, and closely reading the Insular Cases and select cases appealed from the Philippine Supreme Court to the Supreme Court of the United States, this Essay hopes to contribute to the literatures of Philippine constitutional history, American constitutional history, and the history of the American Empire.

The literature on the specific question of the British influence on American legal colonialism in the Philippines is quite thin. Leia Castañeda Anastacio's pioneering monograph, THE FOUNDATIONS OF THE MODERN PHILIPPINE STATE: IMPERIAL RULE AND THE AMERICAN CONSTITUTIONAL TRADITION IN THE PHILIPPINE ISLANDS, 1898-1935, gestures toward this project by likening the US Insular Government in the Philippines to the British North American colonial administrations, even as the US Territorial Form favored by Root was grafted onto a Spanish colonial administrative apparatus.[22] Beyond the legal historiography, Paul Kramer explores the construction of an Anglo-Saxon racial ideology derived from extensive Anglo-American linkages and the example set by the British Empire to justify American imperialism at the end of the 19th century.[23] On the other hand, Julian Go attributes the creation of a "liberal exceptionalism" by the American Empire partially to the traditional colonial practices of the British

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[21] JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 5 (2013 abridged ed.).

[22] *See* CASTAÑEDA ANASTACIO, *supra* note 13, at 64–65, 151, 263.

[23] Paul Kramer, *Empires, Exceptions, and Anglo-Saxons: Race and Rule between the British and U.S. Empires, 1880–1910*, *in* THE AMERICAN COLONIAL STATE IN THE PHILIPPINES: GLOBAL PERSPECTIVES 46 (Julian Go & Anne Foster eds., 2003).

and other European colonial empires.[24] For his part, A.G. Hopkins' monumental reinterpretative study, AMERICAN EMPIRE: A GLOBAL HISTORY, situates the United States' insular empire alongside the British and other European empires in a story that traces Western imperial development from the expansion of the military-fiscal state to the rise of modern capitalism, globalization, and US hegemony.[25]

Other historians, on the other hand, have adopted the Schurman Commission's way of thinking by comparing American rule in the Philippines with British rule elsewhere. Thomas Metcalf juxtaposes elements of American colonialism with those of the British Raj, such as their divergent approaches to education policy and their similar treatment of indigenous peoples.[26] Turning to British Egypt, Patrick Kirkwood shows how an ideology of "political Anglo-Saxonism" drew from British experience and pervaded intra-American debates between the "tutelage" and "distinct caste" approaches to colonial governance, emphasizing the influence of British imperial administrator Lord Cromer and the British "Veiled Protectorate" of Egypt on elite American officialdom in the Philippines.[27]

Thus, while Castañeda Anastacio hints that US overseas colonialism finds its origins in the British North American colonial experience, Kramer, Go, Metcalf, and Kirkwood (and to some extent, Hopkins) focus on British-American imperial convergence at the turn of the 19th century. This shows a gap in the legal historiography: while it is relatively well-known how US overseas colonialism took its cue from contemporaneous British imperial practice, its roots in colonial and revolutionary America remain unexplored. This is surprising, given that the paradox of American overseas colonialism precisely turns on the United States' own colonial past and subsequent break from the British Empire. Accordingly, this Essay attempts to fill this gap by digging deeper into how America's own colonial history may reveal antecedents to US empire as far back as the 17th century.

This Essay proceeds in two parts. Part I studies the beginnings of American territorial governance of the Philippines, tracing this to the early British American colonies and US territories. Part II reads the *Insular Cases*

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[24] Julian Go, *The Provinciality of American Empire: 'Liberal Exceptionalism' and U.S. Colonial Rule, 1898-1912*, 49 COMPAR. STUD. SOC'Y & HIST. 74, 85–86 (2007).

[25] A.G. HOPKINS, AMERICAN EMPIRE: A GLOBAL HISTORY 6–7 (2018).

[26] Thomas Metcalf, *From One Empire to Another: The Influence of the British Raj on American Colonialism in the Philippines*, 3 AB IMPERIO 25, 25–27 (2012).

[27] Patrick Kirkwood, *"Lord Cromer's Shadow": Political Anglo-Saxonism and the Egyptian Protectorate as a Model in the American Philippines,* 27 J. WORLD HIST. 1, 14 (2016).

and suggests the existence of a "transpacific constitution," similar to the British transatlantic constitution, to describe America's imperial constitution vis-à-vis its largest insular possession, the Philippines. The transpacific constitution in action is then examined through a review of the appellate practice of cases brought from the Philippine Supreme Court to the Supreme Court of the United States.

I. US TERRITORIES, BRITISH AMERICAN COLONIES

The establishment of American civil government in the Philippines is a familiar episode in Philippine history. The United States acquired the Philippines by cession from Spain under the Treaty of Paris of 1898 following the Spanish-American War.[28] After a brief interlude of military rule, and even as the US army sought to quell the "insurrection" of Filipino republican forces fighting for their independence, American colonial agents instituted a civil government with William Howard Taft as the first civil Governor-General.[29] The US Congress had passed a series of organic acts, first in 1902, and then in 1916, that would establish the framework of America's Insular Government in the Philippines.[30]

Traditionally, these organic acts have been seen in Philippine history as representing the progressive democratization and Filipinization of American rule in the Philippines. On this sliding scale of decreasing American control, power would gradually be devolved to Filipino politicians and shared with them by their American overlords. Thus, under the Philippine Organic Act of 1902, or the Cooper Act, legislative power would be lodged in a bicameral body consisting of the Philippine Commission (heretofore the all-powerful, governing body in the Philippines) and the Philippine Assembly.[31] Initially, the Philippine Commission had "functioned as both cabinet and legislature" and represented the summit of "appointive positions" available to Filipinos (three Filipinos customarily sat on the

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[28] PATRICIO ABINALES & DONNA AMOROSO, STATE AND SOCIETY IN THE PHILIPPINES 113 (2017 ed.).

[29] *Id.* at 118–19.

[30] CASTAÑEDA ANASTACIO, *supra* note 13, at 63–64, 94. For the early years of American rule in the Philippines, *see* ABINALES & AMOROSO, *supra* note 28, at 117–47; LUIS FRANCIA, A HISTORY OF THE PHILIPPINES: FROM INDIOS BRAVOS TO FILIPINOS 137–66 (2010); *and* LEWIS GLEECK, THE AMERICAN HALF-CENTURY, 1898-1946 49–244 (1984).

[31] Philippine Organic Act of 1902 [hereinafter "Cooper Act"], 32 Stat. 691, § 7 (1902).

Philippine Commission vis-à-vis an American majority).[32] With the advent of the Philippine Assembly, where Filipinos would be elected to national positions for the first time, a new "central arena for locally based power" had opened, and a new system was instituted which Filipino elites would soon learn to exploit.[33]

Apart from national level politics, American-style representative democracy began to take root at the local level as well. Even before the passage of the Cooper Act, municipal and provincial elections were held in areas under firm American rule.[34] But despite being inspired by the New England township model for democratizing the existing *barrio* system, the Philippine Commission worked on the Spanish model (sans the hated *fraile* of the *ancien régime*) and enacted a new Municipal Code that nevertheless retained property and literacy requirements for the exercise of the right to vote.[35]

Yet, on the whole, American tutelage in democracy and representative government would go hand-in-hand with promises of eventual independence. The Philippine Autonomy Act of 1916, or the Jones Law, thus took this a step further with the creation of an all-Filipino Legislature composed of a Senate and House of Representatives to be elected by the Filipino populace,[36] evidently patterned after the Congress of the federal government of the United States. A form of government more firmly grounded on American-style separation of powers thus took root under the Jones Law, with the Washington-appointed American Governor-General being vested with "supreme executive power."[37] This new organic act bolstered the American policy of Filipinization in other ways, too. Aside from the abolishment of the American-dominated Philippine Commission, a new rule that required nearly all executive agencies to have a Filipino at the helm also served to weaken the power of the Governor-General.[38] Moreover, a new Council of State was created under the auspices of the Democratic Governor-General Francis Burton Harrison "to harmonize the executive and legislative departments."[39]

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[32] CASTAÑEDA ANASTACIO, *supra* note 13, at 55.

[33] ABINALES & AMOROSO, *supra* note 28, at 137.

[34] *Id.* at 135.

[35] CASTAÑEDA ANASTACIO, *supra* note 13, at 50–51.

[36] Philippine Autonomy Act of 1916 [hereinafter "Jones Law"], 39 Stat. 545, §§ 12–14.

[37] § 21.

[38] ABINALES & AMOROSO, *supra* note 28, at 140.

[39] *Id.*

In short, traditional historiography sees the establishment of civil government in the Philippines as an *ad hoc* scheme instituted by American colonial agents to further their "civilizing" mission of training Filipinos in republicanism, democracy, and self-rule. The tension between American rule and the indeterminate prospect of independent nationhood helps explain the historiographical preoccupation with the legislative history of these organic acts and their effects on Philippine governance.[40]

Yet it is important to remember that these organic acts did not exist in a historical vacuum. The US Congress has historically used the legislative medium of the organic act to effectively rule the territories (i.e. political units that had not yet achieved statehood) of the United States by decree. The creation of distant governments thus has a long pedigree in American Empire and its "constitution" as a polity, dating back to the American revolutionary era. As Onuf points out, the "American Revolutionaries also used the word 'constitution' to describe the organic acts—charters, covenants, or compacts—that originally gave political life to their communities."[41]

The paradigmatic document here is the 1787 Northwest Ordinance, the legislative measure passed by the anemic Confederation Congress providing the framework for the creation of new states to be incorporated into the Union after hurdling predetermined levels of organization and white settlement.[42] As the newly independent United States expanded westward, at first beyond the Appalachian Mountains and later on across the Mississippi after Jefferson's Louisiana Purchase, the new territories were organized as proto-states with functional governments meant to ensure that the settlement of the vast new land would proceed in an orderly fashion.[43] The Northwest Ordinance was thus the Confederation Congress' first legal tool to implement this broad vision. Yet, in settling the new lands, the newly independent Americans, ideologically committed though they were to

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[40] *See, e.g.*, J.A. Robertson, *The Effect in the Philippines of the Senate "Organic Act"*, 6 J. RACE DEV. 370, 377–78 (1916).

[41] PETER ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE xviii (1987 ed.).

[42] Ordinance for the Government of the Territory of the United States North-West of the River Ohio § 14, art. 5 (1787), *available at* https://www.archives.gov/milestone-documents/northwest-ordinance. This is also referred to as the Northwest Ordinance. *See also* ONUF, *supra* note 41.

[43] *See* GREGORY ABLAVSKY, FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES (2021).

republicanism, could not shake off their British imperial heritage. Instead, they sought to continue this imperial heritage on their own terms. For Onuf, the key to understanding the Northwest Ordinance as the blueprint for American Empire and territorial governance is to see "Revolutionary Americans [as] imperialists who made war against the British imperial government and finally, with great reluctance, declared independence."[44] And as Onuf crucially notes, "[i]n creating new communities, Congress was simply following British precedent."[45]

When the Schurman Commission looked to contemporaneous British colonial models, it was thus following a distinguished tradition of Anglo-American imperial practice. Although it ultimately settled on the US Territorial Form as its recommended model for the Insular Government, as opposed to the British crown colony or self-governing colony, it bears noting that the Territorial Form is itself traceable to British colonial governance. A closer look at US territorial and British American colonial precedents will therefore shed light on how the Insular Government in the Philippines unfolded as an extension of Anglo-American empire in the Asia-Pacific.

The Schurman Commission did not look to the Northwest Ordinance in making its recommendation for the establishment of the Insular Government. Instead, it recommended that the Insular Government be patterned after the Territorial Form under the Louisiana Government Bill of 1804 ("Louisiana Government Bill") with certain modifications.[46] The Louisiana Government Bill was part of a series of territorial ordinances that followed the Northwest Ordinance as the United States acquired more land to the west. When Jefferson negotiated the purchase by the United States of the Louisiana territory from Napoleonic France, the acquisition virtually doubled the size of the United States.[47] Under the Louisiana Government Bill, executive power was lodged in the territorial governor, who was to be assisted by a secretary.[48] Legislative power was shared by the territorial governor and a legislative council composed of "thirteen of the most fit and discreet persons [of] the territory," all of whom were appointed by the President of the United States.[49] The Schurman Commission believed,

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[44] PETER ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE xiv (2019 ed.).

[45] *Id.* at xxx.

[46] Schurman Report, *supra* note 14, at 106–11; CASTAÑEDA ANASTACIO, *supra* note 13, at 70.

[47] REYNOLDS, *supra* note 18, at 81–82.

[48] Louisiana Government Bill of 1804, 2 Stat. 283 §§ 2–3 (1804).

[49] § 4.

however, that "it will be safe and desirable […] to extend to the Filipinos larger liberties of self-government than Jefferson approved of for the inhabitants of Louisiana," and that Filipinos "should be permitted to elect at least the members of the lower branch of the Territorial legislature."[50] Accordingly, the Schurman Commission "earnestly recommend[ed]" that the Insular Government have "an elected lower house with an upper house half elected and half nominated."[51]

The Schurman Commission was later replaced by the Second Philippine Commission headed by William Howard Taft (also known as the "Taft Commission"), with the broader mandate of instituting American colonial rule under a civil government, and thus quickly becoming "the colony's highest governing body."[52] As the primary agent of "colonial state building," the Taft Commission (the same Philippine Commission that would later on serve as an upper chamber in sharing legislative power with the Philippine Assembly) spearheaded reforms such as the creation of a civil service and a system of free public education with English as the medium of instruction.[53]

In one of its annual reports, the Taft Commission made similar recommendations as to the form of territorial government that the new American colonial state should assume. For the Taft Commission, the Insular Government "should consist of a civil governor, of a legislative council, and of a popular assembly chosen by a limited electorate."[54] Moreover, "[t]he governor should have the modified veto power. The legislative council, to consist of Americans and Filipinos, should be created by appointment of the [US] President. The popular assembly should not exceed 30 in number, to be elected from districts."[55] While the territorial legislature would have the power to pass laws, "an absolute veto power, as in the case of the Territories, should be reserved to the President or Congress."[56] The Taft Commission further recommended that there be "two

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[50] Schurman Report, *supra* note 14, at 109.

[51] *Id.* at 111.

[52] CASTAÑEDA ANASTACIO, *supra* note 13, at 47–48.

[53] ABINALES & AMOROSO, *supra* note 28, at 119–22.

[54] PHILIPPINE COMMISSION (1900–1916), REPORTS OF THE PHILIPPINE COMMISSION, THE CIVIL GOVERNOR AND THE HEADS OF THE EXECUTIVE DEPARTMENTS OF THE CIVIL GOVERNMENT OF THE PHILIPPINE ISLANDS (1900-1903)/BUREAU OF INSULAR AFFAIRS, WAR DEPARTMENT [hereinafter "Report of the Philippine Commission (1900–1903)"] 145 (1904).

[55] *Id.* at 146.

[56] *Id.*

delegates to represent the interests of these islands and the Filipino people before Congress and the Executive at Washington."[57]

The recommendations of the Schurman and Taft Commissions, the Louisiana Government Bill, and the Philippine Organic Acts of 1902 and 1916 , thus share some common themes. First, the territory or insular colony should be ruled by a governor to be appointed by the President. Second, depending on the territorial inhabitants' capacity for liberty and self-rule, the legislative assembly (typically the lower house) should at least be partly popular, i.e. elected by the people. Third, there was to be no strict separation of powers between the executive and legislative, there often being a "council" of sorts headed by the governor, and that would either have full legislative power or be charged with assisting the governor in passing laws under its "advice and consent" powers. Also, heeding the Taft Commission's recommendation, both Philippine organic acts provided for "two resident commissioners to the United States" to be elected by the Philippine Legislature.[58] To quote Castañeda Anastacio, this

> [S]electing [of] the territorial vehicle was a case of form following function. Originally designed to prepare territories for statehood, territorial government seemed equally congenial to the task of training insular inhabitants for independent nationhood. For if Congress administered the Islands like territories, then jurisprudence suggested that it could calibrate both the character and extent of native participation within the institutions that served as the classroom for colonial democracy. Also capable of adjustment were the nature and strength of native entitlements based on what best suited their level of civilization and what was necessary to further advance them toward the liberal democratic ideal.[59]

Certainly, this view represents the traditional narrative of American colonial state-building as geared toward the eventual creation of an independent republican nation. Through McKinley's "benevolent imperialism"[60] and the creation of an "exceptional empire,"[61] the Philippines would emerge as a republican state on equal status with, though not one of, the states of the Union. In this telling, the Territorial Form—the essential

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[57] *Id.* at 147.

[58] Cooper Act, § 8; Jones Law, § 20. *See also* CASTAÑEDA ANASTACIO, *supra* note 13, at 146.

[59] CASTAÑEDA ANASTACIO, *supra* note 13, at 70–71.

[60] *Id.* at 17.

[61] *Id.* at 25. *See also* Go, *supra* note 24, at 99.

preparatory step for American statehood—was the key ingredient to gradual progression toward self-rule. This distinctly American style of government in the Philippines led Paul Hutchcroft to observe that Jeffersonian ideals and a "general suspicion of government authority" found its way in the decentralizing impulses of the Insular Government.[62] David Barrows, an American colonial bureaucrat in the Philippines and Taft appointee, confirms this in his remark: "The American Commissioners had in view the American country as a model, and were impressed with the evils of 'centralization' and 'autocracy.'"[63]

And yet, the American empire was not so exceptional. The form of the Insular Government embodied in the Philippine organic acts was redolent, not merely of the experience of the early US territories, but also of the American colonies under British rule. Not yet quite like the independent republican states of Jefferson's dreams,[64] the American colonial state in the Philippines is best seen within the larger imperial heritage and framework that originated from the British colonies in North America, and of which the US Territorial Form was a direct descendant. The imaginary territorial West envisioned by government officials of the early American Republic—"peopled by orderly, industrious settlers, connected to the old states by common interests and loyalties, and busily contributing to the national wealth and welfare"[65]—made the Territorial Form an unlikely, even bizarre, candidate for establishing American rule of the Philippine Islands in distant Asia. Given this, if the importation of the territorial paradigm was a case of "form following function," as Castañeda Anastacio puts it,[66] then the functions could not have been more different. Thus, beyond the image of an enlightened American Republic guiding its Filipino wards in its own democratic traditions, American colonialism in the Philippines should be seen as an extension of the Americans' heritage as British subjects, ultimately leading to their revolutionary struggle to vindicate their rights as Englishmen.

The British legacy was not lost on some American contemporaries. "Free government by the people, which grew up in England, and was carried to America, and has been growing there better and better for three hundred

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[62] Paul Hutchcroft, *The Hazards of Jeffersonianism: Challenges of State Building in the United States and Its Empire, in* COLONIAL CRUCIBLE: EMPIRE IN THE MAKING OF THE MODERN AMERICAN STATE 387–88 (Alfred McCoy & Francisco Scarano eds., 2009).

[63] ABINALES & AMOROSO, *supra* note 28, at 135.

[64] *See* PETER ONUF, JEFFERSON AND THE VIRGINIANS: DEMOCRACY, CONSTITUTIONS, AND EMPIRE 117–154 (2018).

[65] ONUF, *supra* note 44, at xxiii.

[66] CASTAÑEDA ANASTACIO, *supra* note 13, at 70–71.

years, has been planted in the Philippines," declared Dudley McGovney, an American teacher who taught in the Normal School in the Philippine Islands.[67] The project of transplanting free government is the essence of the English connection, and not the sole preserve of the American Revolution. As Greene reminds, the idea of a limited government under the rule of law and the consent of the people were the fundamental norms of the customary English constitution.[68] When the decades following the Glorious Revolution saw parliamentary supremacy gradually erode these earlier norms as the organizing principle of English constitutionalism, American colonists rose up in arms to reclaim their customary rights as Englishmen.[69]

The fiscal strains brought about by the Seven Years' War on the British Empire meant that legislative coercion from London to exact revenue from the North American colonies became the logical outcome of parliamentary supremacy. The American Revolution was therefore a struggle to reject such an intolerable interpretation of the imperial constitution and to revindicate their ancient liberties.[70] Seen in this light, the transplantation of American democracy in the Philippines was not the result of the exceptional republican project that had begun with the American Revolution. Perhaps the real legacy of the American Revolution in the Philippines was the creation of the Philippine resident commissioners in the US Congress, a signal rejection of the British theory of virtual representation in the new republican world.[71] But even the republican ideal of actual representation, from which the revolutionary cry of "no taxation without representation" derives its force,[72] had limited mileage in this American colonial office, since although the Philippine resident commissioners would be present in Congress, they had no voting powers.

American colonial governance in the Philippines was thus deeply rooted in English tradition, though fraught as that tradition was in intra-imperial disputes. In other words, American rule in the Philippines was the product of an earlier era, for which Anglo-American colonists yearned before they became revolutionaries. However, in the case of American rule in the

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[67] DUDLEY MCGOVNEY, CIVIL GOVERNMENT IN THE PHILIPPINES 160 (1903).

[68] JACK GREENE, NEGOTIATED AUTHORITIES: ESSAYS IN COLONIAL POLITICAL AND CONSTITUTIONAL HISTORY 25–26 (1994).

[69] *Id.* at 27.

[70] GREENE, *supra* note 20, at 67, 85.

[71] GORDON WOOD, POWER AND LIBERTY: CONSTITUTIONALISM IN THE AMERICAN REVOLUTION 14–16 (2021). On the colonial Whig, and eventually, Republican, rejection of virtual representation, *see id.* at 10–31.

[72] *Id.* at 12.

Philippines, their roles were reversed, with the Americans stepping into the shoes of their British lords. This also meant that the decentralizing practices and the devolution of governmental power implemented by the Philippine Commission (as when they blended the Spanish *barrio* system with the aspects of New England town governments)[73] did not stem merely from Jefferson's ideal of the ward republic being replicated in the Philippines, as Hutchcroft suggests.[74] Rather, the ideological origins of American democracy in Philippine municipal and provincial governments go as far back as the Glorious Revolution in the 17th century and the overthrow of the Stuart kings and their centralizing tendencies.[75]

The British-American colonial influence is also evident in the structure of the Insular Government. As noted, the institutions of the American Governor-General and the Philippine Legislature were based on the territorial governor and the territorial assembly created by the Louisiana Government Bill. However, these too were ultimately drawn from British colonial precedents in the 17th and 18th centuries, with the most significant being that of the colonial assembly. "The rise of the representative assemblies was perhaps the most significant political and constitutional development in the history of Britain's overseas empire before the American Revolution," says Greene.[76] Just as the all-Filipino Philippine Legislature established by the Jones Law came to mirror the US Congress, so too did the colonial assemblies come to incarnate the English House of Commons as "local parliaments"—embodying the principle of popular representation, while the unelected governor represented the king.[77]

Although the relative power of the colonial legislatures varied in each colony, they all shared common characteristics and were ultimately shaped by the same relationship with the British metropolitan power.[78] The Massachusetts lower house of assembly has "had a strong tradition of legislative supremacy."[79] The Pennsylvania house was roughly of equal power, while "[t]he South Carolina Commons and New York House of

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[73] CASTAÑEDA ANASTACIO, *supra* note 13, at 50.

[74] Hutchcroft, *supra* note 62, at 377, 384.

[75] GREENE, *supra* note 68, at 90. On the effects of the Glorious Revolution on the empire, *see id.* at 78–92.

[76] *Id.* at 163.

[77] *Id.* at 35. *See also* LEONARD WOODS LABAREE, ROYAL GOVERNMENT IN AMERICA: A STUDY OF THE BRITISH COLONIAL SYSTEM BEFORE 1783 172, 214 (1958).

[78] GREENE, *supra* note 68, at 169.

[79] *Id.* at 166.

Assembly were only slightly less powerful."[80] The Virginia House of Burgesses was momentarily suspended when the Virginia Company dissolved in 1624, but was eventually called to order again, inaugurating the "elective legislature" as a fixture of the royal provinces.[81] Under the overarching framework of British dominion, the popular colonial assemblies "represented a movement for autonomy in local affairs."[82] Centuries later, this institution would be reproduced in the early form of the Insular Government, where the Philippine Assembly was designed as the popularly elected and completely indigenous counterweight to the Governor-General and the Philippine Commission, which came to represent the interests of their American principals in Washington.[83]

The American Governor-General of the Philippines, an office patterned after the US territorial governor, is himself a direct descendant of the British royal governors in colonial America. When Arthur St. Clair became the first American governor of the Northwest Territory, his insistence on the settlers' "subjecthood" (as opposed to American "citizenship") and his exercise of quasi-monarchical prerogative aroused tensions and comparisons with the royal governors of the former British colonies.[84] And while the lower houses of the colonial legislatures were the popular element of government and represented the interests of the colonists, the royal governor embodied the king's prerogative.[85] Indeed, "[t]he royal governor was the most important agent of the home government in the administration of the colonies."[86] While the sovereignty of the British monarch following the Glorious Revolution came to be seen as in tandem with Parliament, and therefore legislative power could only be exercised by the king-in-Parliament,[87] this dynamic was also seen in the royal governor who was also "head of the local legislature" and wielded the power of the absolute veto.[88] Importantly, he was also "commander in chief" of the army and all military forces in the colony, and could declare martial law with the advice and consent of the council.[89]

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[80] *Id.* at 167.
[81] LABAREE, *supra* note 77, at 172.
[82] GREENE, *supra* note 68, at 172.
[83] *See* ABINALES & AMOROSO, *supra* note 28, at 134.
[84] ONUF, *supra* note 41, at 69–72.
[85] LABAREE, *supra* note 77, at 172.
[86] *Id.* at 37.
[87] GREENE, *supra* note 68, at 27.
[88] LABAREE, *supra* note 77, at 99.
[89] *Id.* at 107.

Thus, this office neatly paralleled and anticipated that of the Governor-General of the Philippines, who held supreme executive power and much more besides. Writing in 1916, David Barrows describes how the Insular Governor-General had come to accumulate a substantial "ordinance power" as he shared legislative responsibility with the Philippine Commission.[90] The pardoning power was also part of his inherent powers, originating not from an express grant of the US Congress nor of the Philippine Commission but, as Barrows surmises, being the vestigial power of the military governor.[91] And among his formidable powers was that of declaring martial law and suspending civil rights with the concurrence of the Philippine Commission.[92]

These inherent powers, however, did not ultimately stem from the military governor, an office which preceded the establishment of civil government in the Philippines. Barrows could have looked even further back. The very idea of an inherent military power vested in a governor and delegated from an imperial center can essentially be traced back to the prerogative power of the king. The king's prerogative to, among others, call out troops and declare martial law, was one of the "latent powers of the king."[93] As Lisa Ford points out, the martial law power of the royal governor was especially feared in colonial Boston.[94] And crucially, the governor's role as agent of imperial control meant that whoever filled the post could not come from the colonies. Although some royal governors were provincials, these were often distinguished men who had proven their loyalty to the Crown, and the majority of royal governors were Englishmen coming from the metropolitan center.[95] Thus, true to form, no Filipino ever served as Governor-General of the Philippines, and the post was always filled by an American appointed by the President of the United States.

But perhaps the most striking resemblance between the British colonial governments in America and the Insular Government in the Philippines is their quasi-parliamentary form. During the first two decades of American rule in the Philippines, the Insular Government never adopted the strict tripartite system of separation of powers that characterized the

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[90] David Barrows, *The Governor-General of the Philippines under Spain and the United States*, 21 AM. HIST. REV. 288, 306–07 (1916).

[91] *Id.* at 308–09.

[92] *Id.* at 305.

[93] LISA FORD, THE KING'S PEACE: LAW AND ORDER IN THE BRITISH EMPIRE 35 (2021).

[94] *Id.* at 52.

[95] LABAREE, *supra* note 77, at 38.

federal government of the United States. That only came in 1916 when the Jones Law abolished the Philippine Commission and created the bicameral Legislature consisting of a Senate and House of Representatives.[96] Prior to this, executive and legislative power were shared by the Governor-General, the Philippine Commission, and the Philippine Assembly.[97]

In this respect, the Philippine Commission came to resemble the provincial councils of colonial America. The royal councils acted as both a counterweight to the royal governor and as his advisory board.[98] As these councils had advice and consent power, it can be said that they had the purpose of preventing the royal governor from having unfettered discretion in ruling the colony.[99] For example, the Governor-General could not appoint judges of the Courts of First Instance without the advice and consent of the Philippine Commission.[100]

In its legislative capacity, the Philippine Commission operated as an upper house comparable to the House of Lords in London, just as the lower house popular assemblies resembled the House of Commons.[101] Similarly, the Philippine Commission initially "functioned as both cabinet and legislature" of the Insular Government.[102] And even after the Philippine Commission was phased out, the seamless melding of executive and legislative power lingered on in Filipino attempts to gain power. As Castañeda Anastacio discusses extensively, the new Philippine Legislature "invaded the executive department by creating hybrid executive-legislative administrative bodies, significantly, the Council of State and the Board of Control,"[103] with the Council of State, in fact, becoming an informal "super-cabinet."[104]

This blurring of executive and legislative power, coupled with the segregation of offices between Americans and Filipinos, often produced a volatile situation in Philippine colonial politics, reflecting the dynamics of colonial politics in British North America. The so-called "Board of Control cases" became a judicial contest between American Governor-General

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[96] Jones Law, § 12.
[97] *See* Barrows, *supra* note 90, at 307.
[98] LABAREE, *supra* note 77, at 134.
[99] *See id.*
[100] Cooper Act, § 9.
[101] *Id.* at 134–35.
[102] CASTAÑEDA ANASTACIO, *supra* note 13, at 55.
[103] *Id.* at 165.
[104] *Id.* at 174.

Leonard Wood and Filipino legislators over the legality of the Board of Control, "a joint executive-legislative body tasked with managing government corporations."[105]

Money was an especially sore point. In colonial America, the legislative assemblies wielded the power of the purse, particularly with respect to the origination of revenue bills, appropriations, and the payment of salaries to the royal governors.[106] In the Philippines, this British precedent set the stage for a power struggle between American officeholders and elected Filipino legislators in their first taste of power under colonial democracy. For instance, the Philippine Commission vetoed a salary bill passed by the Philippine Assembly that would have equalized the salaries of Americans and Filipinos in government.[107] But more importantly, the Philippine Assembly tried to wrest the power of the purse by explicitly appealing to the Anglo-American practice of revenue bills exclusively emanating from the lower house.[108] Sergio Osmeña, Speaker of the Philippine Assembly, had to resort to invoking British precedent since the Cooper Act was silent on the exclusive origination of revenue measures.[109] These battles over colonial finance were, of course, not new; the provincial assemblies also struggled with British royal officials over precisely these issues.[110] And in truth, these parliamentary struggles also reflected the ladder-climbing of provincial elites in a sort of colonial *cursus honorum*. The provincial councils of colonial America were often populated by the preeminent men of the upper socio-economic strata of the colonies.[111] Similarly, the Philippine Assembly was "representative of a traditional aristocracy," the vehicle of the traditional Filipino elite vying for political power in the new American order, and consequently many of the Filipino delegates were "young, aristocratic, and well-educated."[112]

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[105] *Id.* at 220.

[106] LABAREE, *supra* note 77, at 270.

[107] CASTAÑEDA ANASTACIO, *supra* note 13, at 144–45.

[108] *Id.* at 145–46. *See also* Frank Jenista, *Conflict in the Philippine Legislature: The Commission and the Assembly from 1907 to 1913*, *in* COMPADRE COLONIALISM: STUDIES IN THE PHILIPPINES UNDER AMERICAN RULE 88 (Norman Owen ed., 1971).

[109] CASTAÑEDA ANASTACIO, *supra* note 13, at 145–46.

[110] LABAREE, *supra* note 77, at 270–71.

[111] GREENE, *supra* note 68, at 173.

[112] Jenista, *supra* note 108, at 78, 82.

II. THE MAKINGS OF A TRANSPACIFIC CONSTITUTION

If elements of the US Insular Government in the Philippines could be traced to the British royal governments in colonial America, what then of the Insular Government's relations with the metropolitan center in Washington? The United States' turn to overseas insular colonialism in the wake of the Spanish-American War of the late 19th century has traditionally been regarded as an aberration. To be sure, the project of westward, continent-wide imperial expansion has always been implicit in Jefferson's fantasy of an American "empire of liberty,"[113] but the prospect of ruling distant tropical islands uncongenial to white settlement unsettled the whole nation. That the United States would join the ranks of Europe's imperial powers was seen as a gross betrayal of its republican ideals, and led unlikely allies such as labor organizer Samuel Gompers, business magnate Andrew Carnegie, and renowned writer Mark Twain to coalesce under the big tent Anti-Imperialist League that was established in 1898.[114] Anti-imperialism was salient enough to come to define the 1900 presidential election that saw the defeat of anti-imperialist Democratic candidate William Jennings Bryan and the re-election of Republican William McKinley,[115] who famously prayed to Almighty God on deciding whether to annex the Philippines.[116] Not lacking in divine sanction, America's transpacific Manifest Destiny and practice of overseas colonialism was ultimately legitimated by the US Supreme Court in its decisions in the Insular Cases.[117]

The United States' insular colonialism would thus appear to be a peculiarly American innovation, sanctioned by the US Constitution and legitimated by the US Supreme Court. The Insular Cases themselves seem to be a remarkable contortion of the US Constitution. In a different context and a different era, the US Supreme Court, speaking through Chief Justice Roger Taney, said in the infamous 1856 *Dred Scott v. Sanford* decision (which barred US citizenship to African-Americans and ruled that the federal government could not validly prohibit slavery in the territories) that the United States did not have the power to rule indefinitely over colonies over which the US Congress could exercise limitless power and which were not on the path to statehood.[118] However, when the time came half a century

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[113] *See* ONUF, *supra* note 64.

[114] CULLINANE, *supra* note 10, at 3.

[115] *Id.* at 1–2.

[116] CASTAÑEDA ANASTACIO, *supra* note 13, at 17.

[117] *Id.* at 87. *See* CULLINANE, *supra* note 10, at 93–114; BARTHOLOMEW SPARROW, THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE 4 (2006).

[118] Dred Scott v. Sandford, 60 U.S. 393, 446 (1856).

later that distant islands populated by non-whites came under the power of the United States, the Supreme Court redeployed the same racial animus to come to a substantive reversal of the *Dred Scott* dictum, as the Insular Cases stood for the proposition that the United States could indefinitely possess distant territories to which the US Constitution would not entirely apply. In the Insular Cases, the new Incorporation Doctrine created the artificial distinction between the incorporated territories of the American continent that were on the path to joining the Union, and the unincorporated territories that were not.[119] Thus, the United States could rule its territories like the Philippines under the Territories Clause of the US Constitution, with the Congress of the United States possessing unbridled power to legislate.[120] As Sparrow puts it, "[t]he new tropical territories were thereby a part of the United States, but not entirely so. And their inhabitants had some constitutional protections, just not all of them."[121] When Elihu Root first learned of the US Supreme Court's decisions in the Insular Cases, he summed it up more memorably: "as near as I can make out the Constitution follows the flag—but doesn't quite catch up with it."[122]

But was such a doctrine merely the product of an *ad hoc* imperialist interpretation of the US Constitution? Or was it an echo of Britain's own imperial constitution, deep in America's colonial past? It appears that the United States had its own imperial constitution—not to be conflated with the text of the federal US Constitution, but to be seen in a broader sphere—that was first articulated in the Insular Cases, mirroring aspects of the British imperial constitution of colonial America. Drawing on Bilder's concept of a transatlantic constitution,[123] this Essay calls America's imperial constitution the "transpacific constitution," as it applied to the Philippines.

In outlining this transpacific constitution, the origins of the transatlantic constitution are worth recalling. What distinguishes the British Constitution is that it was unwritten and thus defied precise definition, as opposed to the written US Constitution.[124] This also meant though, as Greene points out, that the British constitution was a fertile arena for dispute and negotiation between Crown and colonies in the first centuries of the existence of the British Empire.[125] It was a gradual process during which,

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[119] SPARROW, *supra* note 117, at 5–6.
[120] CASTAÑEDA ANASTACIO, *supra* note 13, at 87.
[121] SPARROW, *supra* note 117, at 5.
[122] JESSUP, *supra* note 4, at 348.
[123] BILDER, *supra* note 19, at 2.
[124] GREENE, *supra* note 68, at 25–26.
[125] GREENE, *supra* note 20, at 19.

prior to the crises of the late 1700s, an imperial constitution distinct from the British constitution emerged, and under which American colonists navigated their rights in tension with metropolitan pretensions of the prerogative to legislate.[126] For Greene, the post-Glorious Revolution settlement had produced three distinct constitutions: (i) the British constitution that governed the British Isles; (ii) the colonial constitutions or charters of the American colonies; and (iii) the ambiguous, if largely customary, imperial constitution that governed relations between London and the colonies.[127] This echoes the claim of James Madison that the final dispute leading to the American Revolution arose from the fact that the revolutionaries lived in a single empire which they believed did not have, or ought not to have, a single legislative authority.[128]

The debate over the British imperial constitution did not just take place through pamphlets and lengthy speeches. As the embodiment of a specifically *legal* culture, the imperial constitution especially came to life in the courts. For Bilder, the imperial constitution was a transatlantic constitution that was most visible in the appellate practice between the Anglo-American colonies and the British metropolitan center.[129] Examining cases appealed from the colonies, primarily Rhode Island, to the Privy Council in London, Bilder posits that the concepts of divergence and repugnance were the organizing principles of this transatlantic constitutional order.[130] Where Rhode Island was permitted to deviate from the precepts of English law to accommodate local customs and conditions, the Privy Council justified on the basis of divergence. In contrast, where London demanded strict uniformity and exacted conformity to English law, the Privy Council invalidated local acts on the basis of their repugnance to the laws of England.[131] The Privy Council, in effect, reserved a veto power over colonial legislation, and even required that copies of colonial statutes be sent to London for review.[132] For Bilder, this imperial dynamic helps explain the later rise of state-federal constitutional relations of the new United States and the idea of federal supremacy.[133]

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[126] *Id.* at 50–54.

[127] *Id.* at 53–54.

[128] *Id.* at 187, *citing* James Madison, *Notes on the Resolutions, 1799–1800*, *in* 6 THE WRITINGS OF JAMES MADISON 373 (Gaillard Hunt ed. 1900).

[129] BILDER, *supra* note 19, at 73.

[130] *Id.*

[131] *Id.* at 82.

[132] *Id.* at 55.

[133] *Id.* at 8.

A little over a hundred years after the American Revolution, several aspects of this British imperial constitution were articulated, in one form or another, by the US Supreme Court in the Insular Cases. There is no universally agreed canon comprising the Insular Cases,[134] but two key decisions help illustrate their dominant themes.

The first and perhaps most important case is *Downes v. Bidwell*. In this case, the plaintiff S.B. Downes & Co. paid duties under protest to the New York collector of customs for oranges imported from Puerto Rico (another of the United States' newly acquired insular territories).[135] At issue was the validity of a provision of the Foraker Act, which established a civil government in Puerto Rico, imposing a duty for the importation of products from foreign countries.[136] The Uniformity Clause under Article I, Section 8 of the US Constitution requires that "all duties, imposts, and exercises shall be uniform throughout the United States."[137] The question therefore was whether Puerto Rico was part of the United States for the revenue clauses of the US Constitution to apply.[138]

The US Supreme Court upheld the duties provision of the Foraker Act and ruled that Puerto Rico "is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution."[139] For customs purposes, then, Puerto Rico was considered a foreign country to which not all provisions of the Constitution applied. Or, in the muddled formulation of Justice White's concurring opinion,

> while in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession.[140]

Furthermore, the US Supreme Court distinguished those aspects of the Constitution embodying certain natural rights, such as freedom of religion,

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[134] *But see* SPARROW, *supra* note 117 for a comprehensive overview.
[135] Downes v. Bidwell, 182 U.S. 244, 247 (1901).
[136] *Id.* at 247–48.
[137] *Id.* at 249.
[138] *Id.*
[139] *Id.* at 287.
[140] *Id.* at 341–42 (White, *J.*, *concurring*).

freedom of speech, and other personal liberties, which theoretically would apply to the inhabitants of the territories, as opposed to those "artificial or remedial rights," such as those of citizenship, suffrage, and jury trials, which would not apply.[141]

The other case is *Dorr v. United States*, which dealt squarely with the application of the right to jury trial under the US Constitution to the Philippines. This decision stemmed from a criminal case for libel filed by Benito Legarda, a Filipino member of the Philippine Commission, against newspapermen Dorr and O'Brien.[142] The US Supreme Court ruled that the right to a jury trial did not extend automatically to the Philippines despite being a territory of the United States, and that an act of Congress was required to establish a right to jury trial in the Philippines.[143] Citing its previous ruling in *Kepner v. United States*, the US Supreme Court reasoned that President McKinley's Instructions to the Philippine Commission evinced an intent to withhold the right to jury trial because "the civilized portion of the islands had a system of jurisprudence founded upon the civil law, and the uncivilized parts of the archipelago were wholly unfitted to exercise the right of trial by jury."[144] Not being a fundamental right, the right to jury trial did not apply *ex proprio vigore* to the Philippines without implementing legislation.[145]

Faint echoes of the British imperial constitution are discernible in these cases. The first and foundational one is the distinction between metropolis and colony, or between domestic and foreign. One dimension of this was already alluded to in Part I, namely that of the United States establishing a separate territory ruled by the Insular Government in the Philippines through a series of organic acts in the same way that Britain established colonies in America through their colonial charters. But in establishing territories or colonies which are juridically distinct from the mother country, the question of applicable law arises.

Bilder's TRANSATLANTIC CONSTITUTION offers the English decision in Calvin's Case as an example of the dilemma faced by English courts in applying the laws of England to other realms.[146] The case concerned the property rights of the so-called *postnati,* or Scots born after James I became

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[141] *Id.* at 282.
[142] Dorr v. United States, 195 U.S. 138, 149 (1904).
[143] *Id.*
[144] *Id.* at 145.
[145] *Id.* at 148.
[146] BILDER, *supra* note 19, at 35–40.

King of England and Scotland.[147] In this case, English jurist Edward Coke developed a framework which differentiated the conquered realms under English sovereignty based on whether they were "infidel" or "Christian." Under this framework, the king had unlimited power to legislate in the former, but was constrained by Parliament in the latter.[148] This was thus an interpretation of whether the English common law operated outside England and applied to foreigners.[149]

The same type of reasoning is evident in the Insular Cases. Though not exactly hinged on the duality between infidel and Christian territories (although the Court in *Dorr* alludes to this by placing importance on the difference between the "civilized" and "uncivilized" parts of the Philippines), the US Supreme Court invented an insular territorial framework that hitherto did not exist. By distinguishing between the "incorporated" and "unincorporated" territories of the United States, the US Supreme Court dealt with a similar question of how to deal with lands and people that were foreign, but not quite. And the answer is precisely what makes the United States an empire: that the unincorporated territories would not be entitled to the same level of constitutional protections as the incorporated states of the Union.

This question of applicable law and the resulting answer turned on another aspect of the British imperial constitution that found its way in the Insular Cases: the importance of natural and customary law. To recall, Reid emphasizes that Anglo-American patriots, when they made an argument under the British imperial constitution, were essentially appealing to an unwritten constitution of customary rights.[150] And when that failed, colonial Whigs had ultimate recourse to a natural law discourse to counter the positivist constructions of Parliament.[151] And as Onuf explains, their "natural rights ideology" buttressed their claims that their colonial charters had constitutional significance in the face of royal authority.[152]

In this regard, the US Supreme Court channeled the American revolutionaries' natural rights talk when they decided the Insular Cases. Beyond elaborating on an unwritten constitutional distinction between incorporated and unincorporated territories, the Supreme Court

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[147] *Id.* at 36.
[148] *Id.* at 36–37.
[149] *Id.* at 35–36.
[150] REID, *supra* note 21, at 10–13.
[151] *Id.* at 92.
[152] ONUF, *supra* note 41, at xxx.

distinguished those natural rights which applied to the insular colonies (such as freedom of religion) and those artificial rights that did not (such as US citizenship and the right to jury trial). But rather than advocating for an expansion, or at least the preservation, of individual civil liberties as Englishmen, the overtly imperial US Supreme Court used natural rights talk to deny the insular colonies some of the guarantees of the US Constitution.

And lastly, the Insular Cases legitimated the American imperial version of the colonial Whigs' *bête noire* and the very bone of contention of the imperial debate: parliamentary supremacy. The US Supreme Court's robust interpretation of the Territories Clause of the US Constitution meant that under the Insular Doctrine, in Castañeda Anastacio's words, "Congress was a virtual despot in unincorporated territories like the Philippine Islands, because it was the complete and unrivaled sovereign."[153] Not constrained by either the restriction on enumerated powers under Article I, Section 8 of the US Constitution, and only partially constrained by the Bill of Rights, Congress was king. Or rather, Congress was Parliament.

The Insular Cases legitimated congressional supremacy in the insular territories just as London pushed for parliamentary supremacy in the Anglo-American colonies on the eve of the Revolution. Just as Parliament ruled by legislative fiat and eroded the American colonists' customary rights as Englishmen guaranteed by the Magna Carta and their colonial charters, so too did the US Congress rule and legislate for the Philippine Islands without, and oftentimes against, Filipino consent. By the stroke of a pen, the US Supreme Court sanctioned their own republican version of parliamentary supremacy that their revolutionary forebears so hated.

The US imperial constitutionalism articulated in the Insular Cases thus bears the principal hallmarks of the transatlantic British imperial constitution: (i) the creation of separate colonies or territories through organic acts and their legal distinction from the mother country; (ii) the importance of unwritten, customary norms and the appeal to natural law; and (iii) legislative sovereignty imposed from the metropolitan center.

Furthermore, just like the transatlantic constitution described by Bilder, the principles of divergence and repugnance were also of fundamental importance. Similar to how the Privy Council in London sought the right to review colonial statutes in America, the Philippine organic acts required that all laws passed by the Insular Government be reported to the US Congress,

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[153] CASTAÑEDA ANASTACIO, *supra* note 13, at 87.

which reserved "the power and authority to annul the same."[154] In this regard, the *Dorr* case offers an important example of divergence in which the US Supreme Court declined to extend the right to jury trial in the Philippines on account of differences in local customs and conditions. Because the Philippines had a civil law system inherited from Spain, the Court reasoned that jury trial would not be appropriate for the local system unaccustomed to that type of procedure of Anglo-Saxon origin. Thus, the differences between the civil law and common law systems, as well as implicit assumptions of civilizational and racial competence,[155] justified the divergence from this purportedly fundamental right.

On the other hand, the principle of repugnance under the US imperial constitution was on display in *Springer v. Government of the Philippine Islands,* a case appealed from the Philippine Supreme Court to the US Supreme Court. The case involved the National Coal Company and the National Bank, two government corporations created under Philippine statutes.[156] Their legislative charters each provided that the power to vote stock therein and elect their directors would be lodged, not only in the Governor-General, but also in the Board of Control which consisted of the Governor-General, the Senate President, and the Speaker of the House of Representatives.[157] The Insular Government brought an action for *quo warranto* to challenge the election of some of the directors. The US Supreme Court affirmed the decision of the Philippine Supreme Court in invalidating the Board of Control. The US Supreme Court reasoned that under the Jones Law, executive power is lodged exclusively in the Governor-General, and thus the Board of Control did not have the power to elect directors to government corporations, since it was composed of members of the legislature.[158] The US Supreme Court stated that "the Organic Act, following the rule established by the American Constitutions, both state and federal, divides the government into three separate departments—the legislative, executive, and judicial" and that "this separation and the consequent exclusive character of the powers conferred upon each of the three

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[154] Cooper Act, § 86; Jones Law, § 19(c).

[155] For a broader account linking the denial of the right to jury trial in the colonies to the "anti-jury" sentiment in domestic US politics, *see* Andrew Kent, *The Jury and Empire: The Insular Cases and the Anti-Jury Movement in the Gilded Age and Progressive Era*, 91 S. CAL. L. REV. 375 (2018).

[156] Springer v. Gov't. of the Phil. Is., 277 U.S. 189, 197–98 (1928).

[157] *Id.* at 198.

[158] *Id.* at 205–08.

departments is basic and vital—not merely a matter of governmental mechanism."[159]

For Castañeda Anastacio, the *Springer* case represents the victory of American Governor-General Leonard Wood in his struggle for power with up-and-coming Filipino politicians Manuel Quezon and Manuel Roxas, as well as the predominance of liberal and classical formalist legal thinking in the colonies during progressive, *Lochner* era America.[160] But viewed from the lens of America's imperial transpacific constitution, the outcome can be interpreted as the US Supreme Court turning to the logic of repugnance rather than divergence. As mentioned, the Jones Law imported the federal government's tripartite separation between executive, legislative, and judicial powers in the Philippines and applied it to the Insular Government. Although the Organic Act was distinct from the US Constitution, and theoretically could have permitted the existence of the Board of Control on account of differences in local conditions, the US Supreme Court chose not to deviate from the federal understanding of executive and legislative powers. For the US Supreme Court, the principle of separation of powers—even as applied to a far-flung colony and not to the federal government—was "basic and vital," and thus could not be deviated from. In short, the Board of Control was repugnant to the very essence of US constitutionalism.

III. CONCLUSION

When the Schurman Commission turned to the Territorial Form as the model for the Insular Government in the Philippines, that choice seemed strange in the light of the history of US territorial expansion and settlement. As Onuf noted, since the Territorial Form was the precursor to statehood, that form did not serve the purpose of "administering large 'native' and hopelessly un-American populations" in the insular colonies, in contrast with the "constitutionally and culturally American" inhabitants of the territories soon to be part of the Union.[161] The British origins of the American transpacific constitution hopefully sheds light on this conundrum.

When the American empire reached the other end of the Pacific Ocean, it was clear that the Philippines would not become a part of the

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[159] *Id.* at 201.

[160] CASTAÑEDA ANASTACIO, *supra* note 13, at 229–30, 239.

[161] Peter Onuf, *Territories and Statehood*, *in* III ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY: STUDIES OF THE PRINCIPAL MOVEMENTS AND IDEAS 1302–03 (Jack Greene ed. 1984).

United States. Thus, the Territorial Form was adapted to the new colonial reality but in modified form. The Philippine organic acts and the Insular Cases created a version of US territoriality that essentially reverted to its British American colonial origins, in a new American imperial constitution characterized by the same malleable, undefined, customary British constitution fought over between London and the Anglo-American colonists which culminated in an intra-imperial revolt against parliamentary supremacy. The continuity of this new transpacific constitution with its British past confirms Onuf's interpretation of Jefferson's vision of empire: "The history of American empire, Jefferson suggested, was continuous across regime change."[162]

Elihu Root grasped this when he instinctively looked to British precedents for his new imperial assignment. Thus, perhaps unbeknownst to them, blinded as they were by American exceptionalism, the neophyte imperialists of the Schurman and Taft Commissions were copying the British after all.

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[162] ONUF, *supra* note 64, at 129.