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Home Rule: Equitable Justice in Progressive Chicago and the Philippines

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Abstract

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The evolution of the US justice system has been predominantly parsed as the rule of law and Atlantic crossings. This essay considers courts that ignored, disregarded, and opposed the law as the United States expanded across the Pacific. I track Progressive home rule enthusiasts who experimented with equity in Chicago and the Philippines, a former Spanish colony. Home rule was imbued with double meaning, signifying local self-governance and the parental governance of domestic dependents. Spanish and Anglo American courts have historically invoked equity, a Roman canonical heritage, to more effectively administer domestic dependents and others deemed lacking in full legal capacity, known as *alieni juris* or of another's right. Thomas Aquinas described equity as the virtue of setting aside the fixed letter of the law to expediently secure substantive justice and the common good. In summary equity proceedings, juryless courts craft discretionary remedies according to the dictates of conscience and alternative legal traditions—such as natural law, local custom, or public policy—rather than the law's letter. Equity was an extraordinary Anglo American legal remedy, an option only when common law remedies were unavailable. But the common law was notably deficient in the guardianship of *alieni juris*. Overturning narratives of equity's early US demise, I document its persistent jurisdiction over quasi-sovereign populations, at home and abroad. Equity, I argue, is a fundamental attribute of US state power that has facilitated imperial expansion and transnational exchange.

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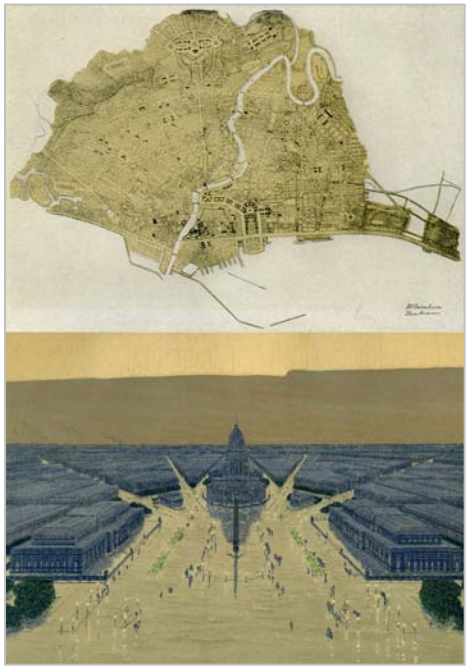
HOME RULE: EQUITABLE JUSTICE IN PROGRESSIVE CHICAGO AND THE PHILIPPINES

Progressive home rule enthusiasts recast insular and municipal governance at the turn of the twentieth century. These twinned initiatives are oddly segregated in scholarly studies, particularly given their mutual reliance on juryless courts. Home rule was imbued with double meaning, signifying local self-governance and the parental governance of domestic dependents. As the *Monthly Religious Magazine* observed, a parent must make his will felt to establish home rule, but the subtle, irresistible powers of a loving mother were more effective than inflexible rules.[1] Spanish and Anglo American courts have historically invoked equity, a Roman canonical heritage, to more effectively administer domestic dependents and others lacking full legal capacity, known as *alieni juris* or of another's right. Thomas Aquinas described equity as the virtue of setting aside the fixed letter of the law to expediently secure substantive justice and the common good.[2] In summary equity proceedings, juryless courts craft discretionary remedies according to the dictates of conscience and alternative legal traditions—such as natural law, local custom, or public policy—rather than the law's letter.



Daniel H. Burnham, Plans for Manila and Chicago, *Plan of Chicago* (1909).

Equity poses a central paradox in a nation committed to the rule of law and the equality

[1] "Home Influences," *The Monthly Religious Magazine* (June 1862): 341. Irish nationalists coined home rule as a political slogan in 1870. David Thornley, "The Irish Conservatives and Home Rule, 1869-73," *Irish Historical Studies* 11, no. 43 (March 1959): 200-222.

[2] Aquinas' discussion focuses on epieikeia, which he explicitly equates with equity: "Epieikeia—we call it equity." Thomas Aquinas, *Summa Theologica*, I-II, q. 96, a. 6; II-II, q. 120, a. 1.

of sovereign individuals. It is virtually undocumented as a distinctive US state and territorial jurisdiction synonymously known as chancery, in keeping with what William Novak has described as the strangely self-denying and extraordinary power of the American state.[3] The court was decried as an imperial jurisdiction in the nascent United States, where it inspired constitutional provisions for civil and criminal jury trials.[4] According to Morton Horwitz, antebellum state codes marked the "final and complete emasculation of Equity as an independent

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[3] William J. Novak, "Police Power and the Hidden Transformation of the American State," in *Police and the LIberal State*, ed. Markus D. Dubber and Mariana Valverde (Stanford: Standford University Press, 2008), 55-56. The historical literature on English equity is voluminous, but its US counterpart is decidedly less well known. There are general studies of equity jurisprudence, equity in the American colonies and Michigan territory, nineteenth-century code reforms that merged law and equity, equity's role in the federal suppression of labor disputes, and the equitable underpinnings of twentieth-century civil procedure. An economic study of Delaware's chancery is the only apparent scholarship documenting a distinctive US state jurisdiction. See especially John H. Langbein, Renée Lettow Lerner, and Bruce P. Smith, *History of the Common Law: The Development of Anglo-American Legal Institutions* (New York: Aspen Publishers, 2009). Amalia D. Kessler, "Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial," *Cornell Law Review* 90 (2004-5): 1181-1276. Stephen N. Subrin, "How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective," *University of Pennsylvania Law Review* 135, no. 4 (April 1987): 909-1002. William E. Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge: Harvard University Press, 1991). Peter Charles Hoffer, *The Law's Conscience: Equitable Constitutionalism in America* (Chapel Hill: University of North Carolina Press, 1990). Morton J. Horwitz, *The Transformation of American Law 1780-1860* (Cambridge: Harvard University Press, 1977). Stanley N. Katz, "The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century," in *Law in American History*, ed. Donald Fleming and Bernard Bailyn, *Perspectives in American History* (Cambridge: Charles Warren Center for Studies in American History, 1971), v.5, 257-284. William Wirt Blume, "Chancery Practice on the American Frontier: A Study of the Records of the Supreme Court of Michigan Territory, 1805-1836," *Michigan Law Review* 59, no. 1 (1960): 49-96. Solon Dyke Wilson, "Courts of Chancery in the American Colonies," in *Select Essays in Anglo-American Legal History*, ed. Association of American Law Schools (Boston: Little, Brown, and Company, 1908 (1884)), v.2, 779-809. William T. Quillen and Michael Hanrahan, "A Short History of the Delaware Court of Chancery 1792-1992," *Delaware State Courts* [website] (Delaware Judicial Information Center, 1993 [cited 25 July 2008]); available from http://courts.state.de.us/Courts/Court%20of%20Chancery/?history.htm.

[4] Although chancery was the object of sustained and intense opposition in northern British colonies, there was less antipathy towards the court in southern colonies. Katz, "The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century," 257-326. Kessler, "Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial," 1202-1204, 1237. See also Albert W. Alschuler and Andrew G. Deiss, "A Brief History of the Criminal Jury in the United States," *University of Chicago Law Review* 61 (1994): 871-87.

source of legal standards" and "the end of a separate, equitable system of substantive justice."[5] Yet equity was redeemed by the 1930s, when it was statutorily recognized as the default jurisdiction in civil courts nationwide. Equity's resurrection has been characterized as a revolutionary development and a transatlantic project that opened a new rights frontier.[6]

This essay, by contrast, explores equity's persistent jurisdiction over *alieni juris* as the United States expanded across the Americas and the Pacific. Following an introduction to home rule, I focus on the coevolution of equitable courts in Chicago and the Philippines during the early years of the twentieth century. I track US lawmakers who created model juryless insular and municipal courts, voyaging back and forth across the Pacific, and comparing notes on the mainland. I underscore the overlapping and comparative nature of these projects, which drew on Spanish and Anglo American precedent, rather than ascribing causation. Inverting narratives of equity's early US demise, I argue that the court has fundamentally informed the governance of *alieni juris*—at home and abroad—since the founding of the new republic.[7] Moving beyond transatlantic crossings, I reclaim equity as a pastoral lingua franca that has facilitated imperial expansion and transnational exchange.

Commonly described as an English heritage, equity is an ancient legal concept elaborated by Roman canonists in chancery—the governmental machinery of the medieval papacy and

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[5] Horwitz, *The Transformation of American Law 1780-1860*, 265. Morton J. Horwitz, *The Transformation of American Law 1870-1960* (New York: Oxford University Press, 1992), 17.

[6] Subrin, "How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective," 910-913, 922. See also Langbein, Lerner, and Smith, *History of the Common Law: The Development of Anglo-American Legal Institutions*, 377-395. Kessler, "Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial," 1225. Abram Chayes, "The Role of the Judge in Public Law Litigation," *Harvard Law Review* 89, no. 7 (May 1976): 1292. Owen M. Fiss, *The Civil Rights Injunction* (Bloomington: Indiana University Press, 1978). Hoffer, *The Law's Conscience: Equitable Constitutionalism in America*, 1-6, 180-198.

[7] Bartholomew H. Sparrow, *The Insular Cases and the Emergence of American Empire* (Lawrence: University Press of Kansas, 2006). Christina Duffy Burnett and Burke Marshall, *Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution* (Durham: Duke University Press, 2001).

emerging states across Christian Europe.[8] Progressive historian Charles Cunningham observed that Manila's *real audiencia chancillería,* like all of Spain's New World courts, was explicitly designed to preserve the order and practices of Iberian chanceries, including the oldest and most important of Castile's royal courts.[9] Like Manila's *chancillería,* Chicago's Cook County chancery was an administrative judiciary that conducted inquisitorial pre-trial investigations and juryless summary hearings. According to Chancellor Murray Tuley, who presided as Chief Justice of Cook County's circuit court from 1880 to 1905, equity applied some rules analogous to the common law, but not the common law itself. Instead, it ignored, disregarded, or utterly opposed the law, refusing to recognize any form that interfered with "exact justice between man and man."[10]

Chicago and the Philippines were epicenters for Progressive experimentation with equity jurisprudence. They shared a common demographic: large and diverse populations of foreign extraction. The so-called Metropolis of the West—the fastest growing city in the hemisphere—looked to expanding US markets in Asia to sustain its explosive and globally unprecedented growth.[11] US officials in the Philippines—the largest and most strategically important insular

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[8] Reginald L. Poole, *Lectures on the History of the Papal Chancery down to the Time of Innocent III* (Cambridge: Cambridge University Press, 1915), 2. Joseph R. Strayer, *On the Medieval Origins of the Modern State* (Princeton: Princeton University Press, 1970), 34.

[9] *Recopilación de leyes de los Reinos de las Indias* (1681), 2-15-17. Cited in Charles H. Cunningham, *The Audiencia in the Spanish Colonies as Illustrated by the Audiencia of Manila (1583-1800)* (Berkeley: University of California Press, 1919), 19. Richard L. Kagan, *Lawsuits and Litigants in Castile 1500-1700* (Chapel Hill: University of North Carolina Press, 1981), 165-209. See also Antonio Angel Ruiz Rodríguez, *La Real Chancillería de Granada en el Siglo XVI* (Granada: Diputación Provincial de Granada, 1987). Brian P. Owensby, *Empire of Law and Indian Justice in Colonial Mexico* (Stanford: Stanford University Press, 2008).

[10] Murray F. Tuley, "Equity Maxims," *Chicago Legal News* 35 (15 August 1903): 437.

[11] *Chicago of To-Day, The Metropolis of the West,* (Chicago: Acme Publishing and Engraving Co., 1892). Walter Nugent, "Demography," *The Electronic Encyclopedia of Chicago,* Chicago Historical Society, 2004. Available at http://www.encylopedia.chicagohistory.org. Henry C. Morris, "Some Effects of Outlying Dependencies upon the People of the United States," *Proceedings of the American Political Science Association* 3 (1907): 196-201.

colony as the gateway to Asia—looked to Chicago for expertise in metropolitan administration. Both colony and metropole were serviced by long-standing chanceries, and both were sites for the most extensive judicial reconstructions of the Progressive Era. Although juryless US insular courts sparked heated national debate, Chicago jurists developed model juryless courts—in consultation with former Philippine Governor William Howard Taft—that were adopted nationwide.[12]

Judicial experimentation in Chicago and the Philippines has received separate consideration.[13] Path-breaking studies of Chicago's 1899 Juvenile Court and 1906 Municipal Court are essential for an understanding of equitable justice in the Progressive Era, but they are described as novel tribunals, and equity is only referenced in passing.[14] Taft explicitly associated insular court procedure with equity. Despite the rhetoric of Anglo Saxon superiority that accompanied US expansion, American lawmakers were impressed with—and acknowledged the influence of—the sophisticated system of judicially administered municipalities they discovered in former Spanish colonies. Taft spearheaded a campaign for equitable mainland courts in 1905, calling for the elimination of juries in criminal as well as civil courts. [15] As US President and Chief Justice, he sought judicial amenities he had enjoyed as a governor general presiding over an imperial *chancillería*. The disconnect between Taft's judicial initiatives is particularly

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[12] Michael Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago* (Cambridge: Cambridge University Press, 2003).

[13] See especially Anna Leah Fidelis T. Castañeda, "Spanish Structure, American Theory: The Legal Foundations of a Tropical New Deal in the Philippine Islands, 1898-1935," in *Colonial Crucible: Empire in the Making of the Modern American State*, ed. Alfred W. McCoy and Francisco A. Scarano (Madison: University of Wisconsin Press, 2009), 365-374.

[14] Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago*. David S. Tanenhaus, *Juvenile Justice in the Making* (Oxford: Oxford University Press, 2004).

[15] William H. Taft, "The Administration of Criminal Law," *Yale Law Journal* XV, no. 1 (November 1905): 1-17. Note that Taft's call to arms preceded the more widely cited Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," *The American Lawyer* 14 (1906): 445-451.

striking, given his acknowledged status as a key figure in the reconstruction of insular and mainland courts.[16]

Reconnecting home rule in Chicago and the Philippines reveals equity as a fundamental attribute of US state power. The rule of law in a nation of sovereign individuals includes the prerogative to set aside the law's letter for those with differential legal rights. This prerogative was statutorily recognized in the 1938 Federal Rules of Civil Procedure, the culmination of Taft's decades long campaign. Stephen Subrin has noted that the underlying philosophy of the rules, and the procedural choices they embodied, were almost universally drawn from equity rather than the common law. Following their adoption, approximately half of the states adopted almost identical rules, and the remainder bears their impress.[17] The long road to the federal rules has been described as an academic project, a transatlantic rationalizing of judicial procedure that fostered civil rights initiatives.[18] Equity's increasing visibility in the twentieth-century United States must also be understood as a product of US imperial expansion and the coercive administration of *alieni juris*.

Home Rule

"What, now, do we mean by the term home rule?" queried leading Progressive home rule theorist Frank Goodnow. A perennial touchstone for a well-ordered society, home rule encompassed multiple and competing visions of what was ultimately a question of sovereignty.

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[16] Peter G. Fish, "William Howard Taft and Charles Evans Hughes: Conservative Politicians as Chief Judicial Reformers," *The Supreme Court Review* 1975 (1975): 123-145. Alpheus Thomas Mason, *William Howard Taft: Chief Justice* (New York: Simon and Schuster, 1964). Sparrow, *The Insular Cases and the Emergence of American Empire*.

[17] Subrin, "How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective," 910-912, 922.

[18] Langbein, Lerner, and Smith, *History of the Common Law: The Development of Anglo-American Legal Institutions*, 377-395. Subrin, op. cit. Chayes, "The Role of the Judge in Public Law Litigation," 1292. Fiss, *The Civil Rights Injunction*. Hoffer, *The Law's Conscience: Equitable Constitutionalism in America*, 1-6, 180-198.

"The supremacy of the law of the family should not be forgotten," noted a US treatise on domestic relations, "we come under the dominion of this law at the moment of birth…whether we will or not."[19] The family household was the central institution in Spanish civil law, historically comprehending all those persons—wives, minors, wards, free laborers, and slaves—subject to the control of the *paterfamilias* as *alieni juris*. A treatise for US students studying the law of the insular possessions noted that the category of the *alieni juris* was "as important to-day as it ever was, and of constant consideration in the practice of the law."[20]

The sovereign authority to protect family members lacking a *paterfamilias* was a particular concern of the Roman Catholic Church. According to canon law, the Church was to succor widows and orphans above all, as the essence of doing justice. The canonists elaborated the concept of equity as they asserted a jurisdiction over widows, orphans and other *miserabiles personae*—an ambiguous and every-growing category of the disadvantaged—when justice was unavailable in the temporal forum. The spiritual courts could consider the substantial rights of parties to a dispute, guided by the dictates of conscience rather than the law's letter. According to Aquinas, conscience was the human faculty for discerning natural law, the "light of reason" illuminated by God's will. Although all men possessed an innate understanding of natural law, they required assistance from God and his priesthood to make this knowledge sufficiently clear and constant.[21] Over time, the ranks of the *miserabiles* came to include poor and ignorant

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[19] James Schouler, *A Treatise on the Law of the Domestic Relations: Embracing Husband and Wife, Parent and Child, Guardian and Ward, Infancy, and Master and Servant* (Boston: Little, Brown, 1895 (1870)), 9.

[20] Sheldon Amos, *The History and Principles of the Civil Law of Rome* (London: Kegan Paul, Trench & Co., 1883), 258. William Wirt Howe, *Studies in the Civil Law and its Relations to the Law of England and America with References to the Law of Our Insular Possessions* (Boston: Little, Brown, and Company, 1905 (1896)), 62.

[21] J. Duncan M. Derrett, "Justice, Equity and Good Conscience," in *Changing Law in Developing Countries*, ed. J.N.D. Anderson (London: George Allen & Unwin Ltd, 1963), 122. Hessel E. Yntema,

country folk, captives, servants and manumitted slaves, scholars, the clergy, prostitutes, prodigals, and even cities.[22]

Taking a cue from the canonists, the Spanish crown exercised its discretion and juridically assimilated New World Indians as royal *miserabiles* following protracted debates over their protective care.[23] To better administer indigenous affairs, the crown established r*eal audiencia chancillerías*—the key to the Spanish empire—that blended religious and royal authority. Like the spiritual courts, *real audiencia chancillerías* were vested with broad discretionary powers, including the prerogative to invoke *equidad*. The 1583 articles establishing Manila's *audiencia* created a special tribunal for Indians that could recognize indigenous rites, customs, and practices. Plaintiffs testified before an inquisitorial administrative bureaucracy of specialized court personnel, including a salaried *protector de indios*, scribes, interpreters, and judicial advisors who prepared a final decision for the court. To ensure that legal technicalities or procedural steps would not obscure the truth, indigenous court hearings were to be conducted with summary rather than full legal process. Judges were expected to issue prompt decisions, reducing or eliminating fees.[24]

"Equity in the Civil Law and the Common Law," *The American Journal of Comparative Law* 15, no. 1/2 (1966-1967): 64. Maria Drakopoulou, "Law and the Sacred: Equity, Conscience and the Art of Judgment as Ius Aequi et Boni," *Law/Text/Culture* 5 (2000).

[22] Richard H. Helmholz, *The Spirit of Classical Canon Law* (Athens: University of Georgia Press, 1996), 118-124. Derrett, "Justice, Equity and Good Conscience," 122. Woodrow Borah, *Justice by Insurance: The General Indian Court of Colonial Mexico and the Legal Aides of the Half-Real* (Berkeley: University of California Press, 1983), 12.

[23] Borah, *Justice by Insurance: The General Indian Court of Colonial Mexico and the Legal Aides of the Half-Real*, 79-95. Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004), 17-18.

[24] Cunningham, *The Audiencia in the Spanish Colonies as Illustrated by the Audiencia of Manila (1583-1800)*, 22-25, 48-53. For a discussion of *equidad*, see Charles R. Cutter, *The Legal Culture of Northern New Spain 1700-1810* (Albuquerque: University of New Mexico Press, 1995), 34-35, 39-40, 43, 131, 142.

The abusive parental authority of Spanish friars was invoked in passion plays that helped spark the 1896 Philippine Revolution. Mother Spain had subjected her child "Filipinas" to corrupt friar rule, surrendering her right to reciprocal loyalty.[25] Vicente Rafael has attributed the emergence of the nationalist movement to friars who interpreted or disregarded royal law in furtherance of God's will, undermining crown authority.[26] Attorney Apolinario Mabini, a key nationalist theoretician, accused the Spanish and the Americans of violating natural law and usurping the sovereignty of the people, whose precepts were "orders from divine reason dictated to the human conscience." For Mabini, the Revolution was an exercise of the Filipino sovereignty to decide the exceptional. [27]

Cook County's chancery was born in the 1787 Northwest Territory—the federal government's first experiment in colonial administration—where the protection of French habitants was cited as a justification for establishing an equity jurisdiction. The Declaration of Independence had denounced Britain's provision for juryless trials and French civil law in the western provinces, and the Northwest Ordinance guaranteed trial by jury and judicial proceedings according to the common law, to "forever remain unalterable, unless by common consent." The first territorial governor emphasized that judges were "clothed with a common-law jurisdiction…restrictive of any powers in equity."[28] Nevertheless, territorial judges secured equity powers within a year, citing the impossibility of "protecting the persons and securing the

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[25] Reynaldo Clemeña Ileto, *Pasyon and Revolution: Popular Movements in the Philippines, 1840-1910* (Quezon City: Ateneo de Manila University Press, 1979). Cited in Paul A. Kramer, *The Blood of Government: Race, Empire, the United States, & the Philippines* (Chapel Hill: University of North Carolina Press, 2006), 77.

[26] Vicente L. Rafael, "The Afterlife of Empire: Sovereignty and Revolution in the Philippines," in *Colonial Crucible: Empire in the Making of the Modern American State*, ed. Alfred W. McCoy and Francisco A. Scarano (Madison: University of Wisconsin Press, 2009), 342-352.

[27] Rafael, "The Afterlife of Empire: Sovereignty and Revolution in the Philippines," 342-352. See also Carl Schmitt, *Political Theology* (Chicago: University of Chicago Press, 1985 (1922)).

[28] *The Laws of the Northwest Territory 1788-1800*, ed. Theodore Calvin Pease, vol. XVII, Law Series vol. I, *Collections of the Illinois State Historical Library* (Springfield: Illinois State Historical Library, 1925), 525-6.

property" of the French natives.[29] A Chicago treatise noted that chancery's jurisdiction in the state of Illinois "was, it seems, inherent." Although the 1818 state constitution was silent on the subject, "yet from the first these courts exercised the jurisdiction."[30]

A spectrum of distinctive equity jurisdictions—including chanceries, probate, surrogate, and county courts—adopted equity procedure and retained jurisdiction in all US states and territories over *alieni juris*, or what became known as domestic relations law, classically described by Tapping Reeve as the law of baron and femme, parent and child, guardian and ward, and master and servant.[31] A Progressive treatise underscored equity's undiminished influence even in model code states such as California.[32] Equity jurisdictions were established in US extraterritorial courts in Asia to adjudicate disputes between aliens and US subjects, by treaty beginning in 1830, and by federal statute by 1860.[33] Consular officials might submit a case involving "legal perplexities" to two or three advisors, but their opinions were non-binding.[34] No juror ever took oath in the 1906 United States Court for China, according to a US attorney who

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[29] Judges Parsons and Varnum to Governor St. Clair, Marietta, 31 July 1788. *The St. Clair Papers*, ed. William Henry Smith, 2 vols. (Cincinnati: Robert Clarke & Co, 1882), v. 2, p 69-78.

[30] The Illinois Supreme Court recognized chancery's jurisdiction in *Mahar v. O'Hara*, 9 Ill. 424 (1847). Edward Judson Hill, *Chancery Jurisdiction and Practice* (Chicago: E.B. Myers and Company, 1873), 5-6.

[31] For the powers, jurisdiction, and persistence of these tribunals, see Tapping Reeve, *The Law of Baron and Femme, of Parent and Child, Guardian and Ward, Master and Servant, and of the Powers of Courts of Chancery* (New York: Banks, Gould, 1846 (1816)). Charles C. Bonney, "The Powers of Non-Resident Guardians, and Incidentally the Authority of the Probate Court," *Chicago Legal News* 1 (26 December 1868): 102. Schouler, *A Treatise on the Law of the Domestic Relations: Embracing Husband and Wife, Parent and Child, Guardian and Ward, Infancy, and Master and Servant*. Walter C. Tiffany, *Handbook on the Law of Persons and Domestic Relations* (St. Paul: West Publishing Co., 1896).

[32] John Norton Pomeroy, *A Treatise on Equity Jurisprudence, as Administered in the United States of America*, 3 vols. (San Francisco: A.L. Bancroft and Company, 1881). John Norton Pomeroy, *The "Civil Code" in California* (New York: Bar Association, 1885), 6, 57, 62.

[33] See, for example, Treaty of Constantinople (1830) and Treaty of Wang Hiya (1844) in *Treaties and Other International Agreements of the United States of America 1776-1949*, ed. Charles I. Bevans (Washington, D.C.: Department of State, 1972), v. 10, p. 619, 647. *Revised Statutes of the United States*, (Washington: Government Printing Office, 1878), 787-794.

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practiced there.[35] As an international law treatise noted, "it is discretion, and not International Law, according to which the members of the Family of Nations deal with such States as still remain outside that family."[36]

Chancellor Tuley disparaged the common law as only suitable for a semi-barbarous people and totally inadequate for advanced civilizations.[37] At the turn of the twentieth century, common law suits began with the intricate adversarial art of pre-trial pleadings. A convoluted legal swordplay involving allegations, objections, denials, and evasions, pleadings narrowed a dispute to an issue, a single point of contention.[38] Following oral testimony in an open court, juries determined the outcome of an issue; judges played a relatively limited role in the proceedings. Cases were frequently lost on technical grounds due to countless arcane pleading rules. Common law courts could only award financial remedies for past harms in civil disputes.[39]

Cook County's chancery was vested with substantial discretionary powers over *alieni juris*, including married women, orphans, minors, wards, servants, apprentices, and the elusive category of persons declared *non compotes mentis*—the feeble-minded, insane, inebriates, spendthrifts, or religionists suffering from undue influence. In contrast with common law courts, in which a litigant could claim certain rights, equity was "a matter of grace" available only at the option of the court.[40] Plaintiffs testified before an inquisitorial bureaucracy of specialized court personnel—chancery masters, assistant masters, notaries, stenographers, and accountants—who collected and transcribed all oral and written evidence relevant to a dispute, a process known as

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[35] Linebarger, "China's Mixed Courts," p. 14.
[36] Lassa Oppenheim, *International Law: A Treatise*, 2 vols. (London: Longmans, Green and Co., 1905), v. 1, 34-35. Cited in Anghie, *Imperialism, Sovereignty and the Making of International Law*, 91.
[37] Murray F. Tuley, "Equity Maxims," *Chicago Legal News* 35 (8-15 August 1903): 427.
[38] Sabin D. Puterbaugh, *Puterbaugh's Chancery Pleading and Practice* (Chicago: Callaghan, 1888). Sabin D. Puterbaugh, *Puterbaugh's Common Law Pleading and Practice* (Chicago: Callaghan, 1888).
[39] Lawrence M. Friedman, *A History of American Law* (New York: Simon & Schuster, 2005 (1973)), 22.
[40] Hill, *Chancery Jurisdiction and Practice*, 3.

discovery. The master prepared a written case summary for the chancellor, appending his recommendation for a final decree.[41] The chancellor established his own rules for the summary, juryless hearings, in which equity maxims, court precedent, and conscience guided his decision-making process. Chancellor Tuley described the maxims as fundamental principles lacking the authority of a statute, which were never cited as common law precedents.[42] The chancellor's final decree could specify preventive remedies, compelling behavior by injunction, and masters might be assigned to continue oversight of a case.[43]

The boundary between chancery's temporal and spiritual authority was insufficiently clear and constant in the Progressive United States. A late nineteenth-century equity treatise argued that conscience had evolved as a civil standard in Anglo American courts, governed by an orderly system of equitable principles, rules, and doctrines. Equity rested on the truths of moral law—a code of divine origin—but the chancellor was no longer "governed by his own interpretation of the divine morality."[44] According to Chancellor Tuley, the morality of a court of equity was "not the morality of the world" but "higher, broader, and purer than that which prevails among men." If the law failed to redress a grievance, equity would illuminate the case "like words of Holy Writ." The administration of equity depended upon the moral purity and conscience of the chancellor, who must leave personality, prejudices, and all human frailties behind him as he ascended the bench. No moral code had ever exceeded the "sublime, pervading, inherent purity" of chancery's maxims, excepting "the teachings of the man who spoke as never

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[41] John Greene Henderson, *Chancery Practice with Especial Reference to the Office and Duties of Masters in Chancery* (Chicago: T.H. Flood and Co., 1904), 556-562.
[42] Tuley, "Equity Maxims," 428.
[43] For example, see *Buda Foundry Co. v Columbian Celebration Co.*, 1 Ill. C. C. 398 (1903)., 1 Ill. C. C. 398 (1903).
[44] Pomeroy, *A Treatise on Equity Jurisprudence, as Administered in the United States of America,* v.1, 48, 53, 57-58.

man spoke before."[45]

Women were the largest category of dependents subject to equity's jurisdiction. Chancery heard litigation relating to married women's separate property—unrecognized by the common law—and marital disputes involving abuse, infidelity, desertion, non-support, separation, or divorce. Women often faced far-reaching decisions in probate courts concerning their children and property following the loss of a spouse through death, marital breakup, or his commitment for bankruptcy or drunkenness.[46] Restrictions on a married woman's right to her earnings or property could limit her ability to serve as a legal guardian to her children, and remarriage might terminate her rights as their natural guardian.[47] Legal guardians in Illinois were required to give bond, with good security, for a sum *double* the amount of a minor's real and personal estate. If a husband died intestate, the most that a widow could expect from jointly owned property, real and personal, would be a share *equal* to that of her children.[48]

Probate court officials had a vested interest in the close regulation of familial affairs, a fee-based service that could consume the better part of small estates.[49] Even if the deceased left nothing but debts, family members might be charged to void their liability in a court hearing that required attorneys, court fees, and the posting of legal notice in newspapers, on the city's

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[45] Tuley, "Equity Maxims," 436-438.
[46] Frederic B. Crossley, *Courts and Lawyers of Illinois* (Chicago: American Historical Society, 1916), 166. *An Act to Establish a Uniform System of Bankruptcy Throughout the United States*, 30 Stat. L. 544, (1898). "Habitual Drunkards," *Chicago Legal News* 1 (1 May 1869): 246.
[47] Mary Ann Mason, *From Father's Property to Children's Rights* (New York: Columbia University Press, 1994), 64-68.
[48] Bonney, "The Powers of Non-Resident Guardians, and Incidentally the Authority of the Probate Court," 102. "Law Made By Man, For Man," *Chicago Legal News* 1 (10 April 1869): 220. "Ticknor Divorce -- Custody of the Children," *Chicago Legal News* 1 (19 December 1868): 89-90. *Hannah A. McMurphy vs. Boyles et al, Executors*, 1 Chicago Legal News 50 (1869)..
[49] Estate of Harriet Spoffard, Insane. County Court of Cook County case no. 4-7043 (1888-1912), Archives of the Clerk of the Circuit Court of Cook County, Richard J. Daley Center, Chicago [hereafter CCCC Archives].

bridges, and at the offices of justices of the peace.[50] Ongoing court supervision followed the appointment of a guardian. Widows regularly petitioned Cook County's probate court for permission to purchase everyday necessities such as food, rent, clothing, or child care, with their children's inheritances.[51] Legal expenses for a court filing following one $8.85 shopping spree totaled $10.[52] Undoubtedly many guardians did not bother to file court reports, but family members or concerned neighbors could and did compel court accountings, and guardians who failed to comply faced prison sentences for criminal contempt.[53]

Equitable courts were a powerful model for women, particularly Chicago women attorneys, the largest such cohort in the world during the Progressive Era.[54] Several were members of the first national professional organization for women at law, which was christened the Equity Club. Equity appealed to devout first-generation women lawyers, such as Equity Club member Lettie Burlingame, who pledged to acknowledge "No object but country. No umpire but conscience. No guide but Christ."[55] Women attorneys commonly specialized in probate, which involved behind-the-scenes negotiations rather than courtroom litigation, a controversial role.[56] They also published "law made easy" guides emphasizing equitable remedies, offered law lectures for non-professionals, and assumed positions at the helm of key local, national, and

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[50] Estate of Charles Weiman, case no. 4-180 (1872) and Estate of Matthew Wells, file no. 2-180 (1872), County Court of Cook County. CCCC Archives.
[51] Lester C. Thorn et al, minors, Probate Court of Cook County case no. 5-7070 (1900). Daniel O'Day et al, minors, Probate Court of Cook County case no. 8-7070 (1900). Anton Barthelmes, minor, Probate Court of Cook County case no. 4-7070 (1900-1903). CCCC Archives.
[52] Emily Gnadt, minor. Probate Court of Cook County case no. 9-7042 (1900-1913). CCCC Archives.
[53] Hilda Lichthardt et al, minors, Probate Court of Cook County case no. 2-7070 (1898-1911). CCCC Archives. "The Norton-Clark Case," *Chicago Tribune* (30 October 1866): 4. "The Clark-Norton Case," *Chicago Tribune* (2 December 1866): 4.
[54] James B. Bradwell, "Women Lawyers of Illinois," *Chicago Legal News* 41 (2 June 1900): 339-341, 344-346. Virginia G. Drachman, *Sisters in Law: Women Lawyers in Modern American History* (Cambridge: Harvard University Press, 1998), 255.
[55] Lettie Lavilla Burlingame, *Lettie Lavilla Burlingame: Her Life Pages, Stories, Poems and Essays* (Joliet: J.E. Williams, 1895), 315, 322.
[56] Drachman, *Sisters in Law: Women Lawyers in Modern American History*, 258.

international organizations.[57] Attorney Mary Bartelme, appointed Cook County Public Guardian in 1897, was key to the development of Cook County's internationally influential Juvenile Court.[58] Hull-House founder Jane Addams was an ardent champion of Chancellor Tuley.[59] Together with Tuley and a Chicago rabbi, she served on an equitable state arbitration court to resolve a Special Order Clothing Makers dispute.[60]

Equity suffused Progressive visions of municipal home rule. Leading theoretician Frank Goodnow derided the Anglo American rule of law that subjected municipal authorities to oppressive state legislatures. The Illinois constitution insisted on treating all counties, towns, and cities as if they were equal, ignoring the peculiar needs of large cities like Chicago. Such general laws failed to discriminate, were too inelastic, too strict a construction of power to accommodate a rapidly advancing civilization. The cure, he concluded, was to recapture the broad delegation of discretionary power vested in the medieval metropolis, distinguishing a sphere of municipal autonomy beyond the control of state legislatures. To achieve this, citizens must be educated to take responsibility for local self-government.[61] The Chicago Public Library stocked a municipal

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[57] Lelia Josephine Robinson, *The Law of Husband and Wife* (Boston: Lee and Shepard, 1889). Mary A. Greene, *The Woman's Manual of Law* (New York: Silver, Burdett and Co., 1902). "Day Law Class for Women," *Chicago Legal News* 39 (27 October 1906): 91. Virginia G. Drachman, *Women Lawyers and the Origins of Professional Identity in America: The Letters of the Equity Club, 1887-1890* (Ann Arbor: University of Michigan Press, 1993), 170, 211-213, 229, 235-238, 241-246, 249, 251-255. *Women Building Chicago 1790-1990*, ed. Rima Lunin Schultz and Adele Hast (Bloomington: Indiana University Press, 2001), 537-538, 560-562, 922-924.

[58] Bartelme served as an assistant judge as Cook County's first female Circuit Court judge on the Juvenile Court. "Chicago Woman's Family of 350 Children," *Chicago Tribune* (31 May 1903): A3. Tanenhaus, *Juvenile Justice in the Making*.

[59] Jane Addams, "Judge Murray F. Tuley," in *The Excellent Becomes the Permanent* (New York: The MacMillan Company, 1932), 73-80.

[60] "Tailors End Their War," *Chicago Tribune* (1 February 1903): 7. "Order Union Doors Open," *Chicago Tribune* (1903 4-30): 3.

[61] Frank J. Goodnow, "Municipal Home Rule," *Political Science Quarterly* 21, no. 1 (March 1906): 77-90. Frank J. Goodnow, "Municipal Home Rule," *Political Science Quarterly* 10, no. 1 (March 1895): 1-21. Frank J. Goodnow, *Municipal Home Rule: A Study in Administration* (New York: Macmillan, 1895), 1, 233, 272.

reading room with Goodnow publications to prepare unschooled natives.[62]

The US Supreme Court established a sphere of federal autonomy in 1901, ruling that the Constitution might or might not be applicable beyond the several states. Congress was vested with the authority to create municipal organizations as it deemed best for US territories, to deprive the inhabitants of representative government "if it is considered just to do so" and to change such local governments "at discretion." A broad delegation of power was necessary to resolve the status of the islands and alien insular inhabitants differing in their religion, customs, laws, and modes of thought. The administration of government and justice according to Anglo Saxon principles "may for a time be impossible."[63]

Like the movement for Philippine independence, Chicago's campaign for municipal sovereignty took shape as a political theology. At the city's 1893 World's Parliament of Religions and subsequent mass meetings, British journalist William T. Stead—an outspoken Irish home rule enthusiast—urged Chicagoans to form a Civic Church and regenerate the state by establishing the kingdom of heaven among men.[64] Stead invoked the authority and corporate organization of the Roman Catholic Church as a model for municipal reform. If Christ came to Chicago, Stead exhorted, His greatest disappointment would be the impotence of His own church, which lacked an empowered central executive and an effective ecclesiastical organization.[65] The first place He would go would be to the Catholic Church, where the Archbishop, as a divinely appointed commander-in-chief, enjoyed the spiritual authority of a

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[62] *Municipal Government*, (Chicago: Chicago Public Library, 1905).
[63] *Downes v. Bidwell*, 182 U.S. 244 (1901).
[64] Joseph O. Baylen, "Stead, William Thomas," *Oxford Dictionary of National Biography* [electronic database] (Oxford University Press, 2004 [cited 11 July 2007]); available from http://www.oxforddnb.com/view/article/36258. William T. Stead, "The Civic Church," in *The World's Parliament of Religions*, ed. John Henry Barrows (Chicago: The Parliament Publishing Company, 1893), 1209-1215.
[65] William T. Stead, *If Christ Came to Chicago!* (Chicago: Laird & Lee, 1894), 272-3.

worldwide hierarchy. Drawing instruction from this example, Christ would then turn His steps to Chicago's City Hall, where He would establish His kingdom here and now.[66] The Civic Church, later renamed the Civic Federation, initiated Chicago's home rule campaign for a new city charter to liberate the municipality from the tyranny of the Illinois state legislature.

The Civic Federation petitioned Chancellor Tuley to establish a new framework for municipal government in 1900 as Taft formulated plans for civil government in the Philippines. The chancellor initially opposed the home rule campaign, arguing that Chicago, like the Philippines, was not yet capable of self-government; there were times when the state was needed to check evil tendencies in its municipal child.[67] But the Federation persuaded him to join the initiative, placing him in charge of enabling legislation for a new city charter and planning for a new municipal court.[68] Tuley specialized in the law of municipal corporations, which fell under chancery's jurisdiction, and was the author of the state city and village act.[69]

Specialists in the professionalizing fields of law, political science, and anthropology compared notes on urban and insular administration at the University of Chicago, which encouraged comparative studies.[70] Ernst Freund, a Goodnow student, was the leading force in the intellectual development of the law school, where he introduced courses on international and

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[66] Stead, *If Christ Came to Chicago!* , 81.
[67] "Home Rule is Attacked," *Chicago Tribune* (19 March 1899): A6. See also Murray F. Tuley, *McKinley and the Philippines. Imperialism* (Chicago: The Iroquois Club, 1900).
[68] Hiram T. Gilbert, *New Municipal Court System: Address Delivered before the Union League Club of Chicago* (Chicago: 1906). Hiram Gilbert, "New Municipal Court System," *Chicago Legal News* 38 (28 April 1906): 296. John P. Wilson Jr., "John P. Wilson, 1844-1922" unpublished manuscript, n.d., University of Chicago D'Angelo Law Library, Chicago, 8. Hiram T. Gilbert, *The Municipal Court of Chicago* (Chicago: The Author, 1928), 19.
[69] "Move for Town Consolidation," *Chicago Tribune* (2 June 1900): 9. Ernst Freund, "Some Legal Aspects of the Chicago Charter Act of 1907," *Illinois Law Review* 2, no. 7 (February 1908): 428.
[70] See also Courtney Johnson, "Understanding the American Empire: Colonialism, Latin Americanism, and Professional Social Science, 1898-1920," in *Colonial Crucible: Empire in the Making of the Modern American State*, ed. Alfred W. McCoy and Francisco A. Scarano (Madison: University of Wisconsin Press, 2009), 175-190.

administrative law.[71] He also served as a legal advisor to Chicago's home rule movement and drafted legislation for the new city charter with Columbia alum Charles Merriam, Chicago's first professor of political science.[72] The university appointed Alleyne Ireland Colonial Commissioner to the Far East, where he completed a comparative study of European and US dependencies, including "institutions of local self-government."[73] Ireland's appointment was intended to promote Chicago's advantages for training Asian colonial advisors; a number of Filipino and Chinese students completed graduate studies there.[74] Philippine administrator David Barrows, who studied with Goodnow, Freund, and Chicago anthropologist Frederick Starr, returned to the university in 1902 to facilitate planning for a Bureau of Non-Christian tribes, and to secure workers and cooperation for its ethnological research.[75]

Municipal and insular administrators compared notes at the first annual meeting of the American Political Science Association at the University of Chicago in 1904, over which Goodnow presided.[76] Philippine Commissioner Bernard Moses observed that the Spanish empire, organized as a network of municipalities, was the most completely unified and systematized of any nation. The organization of Filipinos in towns had been essential to their

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[71] Paul D. Carrington, "Freund, Ernst," *American National Biography Online* [electronic database] (Oxford University Press, 2000 [cited 1 April 2010]); available from http://www.anb.org/articles/11/11-00314.html. Finding Aid, Ernst Freund Papers, Special Collections Research Center, University of Chicago Library.

[72] Freund, "Some Legal Aspects of the Chicago Charter Act of 1907," 427. Mark G. Schmeller, "Merriam, Charles E.," *American National Biography Online* [electronic database] (Oxford University Press, 2000 [cited 1 April 2010]); available from http://www.anb.org/articles/14/14-00408.html. Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago*, 33.

[73] Alleyne Ireland, *The Far Eastern Tropics: Studies in the Administration of Tropical Dependencies* (Westminster: Archibald Constable & Co., Ltd., 1905), v.

[74] "Will Tell of University of Chicago in the Far East," *Chicago Tribune* (8 March 1902): 7. "Oriental Alumni Meet," *The University of Chicago Magazine* 11, no. 1 (November 1918): 320. Far Eastern American Bar Association, *Twenty Years in the Judiciary* (Shanghai: 1922), 46. "Mr. Hu I-ku (Wenfu Yiko Hu)," in *Who's Who in China* (Shanghai: China Weekly Review, 1925), 369-70.

[75] David P. Barrows, letter to Frederick Starr, 15 January 1902, box 1, folder Letters by Barrows, 1892-1910. David P. Barrows Papers, The Bancroft Library, University of California, Berkeley.

[76] *Proceedings of the American Political Science Association* 1 (1904).

civilization, creating an administrative system that impressed their minds with a Roman legal order. The United States had built its colonial administration in the Philippines on Spanish foundations, he noted, rather than English or Dutch precedents.[77] Another discussant noted that the tyranny of an arbitrary court had driven the decentralization of power in both the early US republic and the insular possessions. US governmental functions had been divided to protect against the abuses of irresponsible officers, effectively rendering each division impotent. But once a state had attained complete political responsibility, he reasoned, its citizens need not fear the consolidation of power.[78]

Discretionary governance was a theme at paired sessions on municipal and insular administration at the 1904 St. Louis Louisiana Purchase Exposition, which promoted the US Philippine intervention.[79] An insular administrator underscored the need for careful psychological and social studies of the various races in US territories. No single artificial system of governance was applicable to a multiform society; divergence from standards was absolutely essential for colonial administration.[80] Jane Addams attributed urban failings to repressive legislation and governance by one set pattern "whether it fits or not." Enlightened self-government required "the most careful research into those early organizations of village communities, folkmotes, and *mirs*, those primary cells of both social and political

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[77] Bernard Moses, "Colonial Policy with Reference to the Philippines," *Proceedings of the American Political Science Association* 1, no. 1 (1904): 90-95, 100, 103, 106.
[78] William A. Schaper and F.A. Cleveland, "Discussion," *Proceedings of the American Political Science Association* 1 (1904): 177-184.
[79] Kramer, *The Blood of Government: Race, Empire, the United States, & the Philippines*, 237-9.
[80] Paul S. Reinsch, "The Problems of Colonial Administration," in *Congress of Arts and Science, Universal Exposition, St. Louis, 1904*, ed. Howard J. Rogers (Boston: Houghton, Mifflin and Company, 1906), v. VII, 408-409.

organization."[81] At the exposition's Universal Congress of Lawyers and Jurists, Chicago lawmakers joined native US insular judges—including Philippine Supreme Court Justice Cayetano Arellano—to consider the history and efficacy of various systems of jurisprudence.[82] Ernst Freund presented a paper on the law's evolution, which he described as a gradual, covert process that was difficult to trace. Equity and legal fictions, Freund noted, often accomplished silent revolutions.[83]

Courts were central to plans for reconstructing insular and municipal governance, including Chicago architect Daniel Burnham's commissioned blueprints for Manila and Chicago. For Manila, Burnham envisioned a Hall of Justice dominating the skyline—"majestic, venerable, and sacred"—that would compel respect, conferring a "moral effect."[84] A Chicago civic center was to imbue urban natives with the knowledge that "obedience to law is liberty." Construction proceeded rapidly in Manila, unhampered by cumbersome democratic processes or local opposition.[85] In Burnham's Chicago plan, an extended chapter on "Legal Implications" underscored the power of courts to overcome "rigid constitutional restraints" that might impede implementation. Chicago should be endowed with broad powers of local self-government, the plan recommended, but if the home rule campaign for a new city charter should fail, courts could compel the uncompensated appropriation of property "to preserve and promote the public

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[81] Jane Addams, "Problems of Municipal Administration," in *Congress of Arts and Science, Universal Exposition, St. Louis, 1904*, ed. Howard J. Rogers (Boston: Houghton, Mifflin and Company, 1906), v. VII, 435,444.
[82] *Official Report of the Universal Congress of Lawyers and Jurists*, (St. Louis: Executive Committee of the Universal Exposition, 1905).
[83] Ernst Freund, "Jurisprudence and Legislation," in *Congress of Arts and Science, Universal Exposition, St. Louis, 1904*, ed. Howard J. Rogers (Boston: Houghton, Mifflin and Company, 1906), v. XII, 619-621.
[84] Daniel H. Burnham, "Report on Improvement of Manila," in *Report of the Philippine Commission* (Washington: Government Printing Office, 1906), 627, 632-3.
[85] Thomas S. Hines, "The Imperial Façade: Daniel H. Burnham and American Architectural Planning in the Philippines," *The Pacific Historical Review* 41, no. 1 (February 1972): 50-51.

welfare."[86]

Insular Courts

The first directive of Taft's 1900 Philippine Commission was to establish municipal governments, offering natives an opportunity to manage their local affairs "to the fullest extent of which they are capable."[87] Commissioner Moses observed that an important step in preparing a rude people for a higher stage of cultivation was the destruction of ancient social forms and prejudices. The Church had exerted such a leveling influence in the Philippines, he noted, sweeping away old traditions and habits, and leaving an unencumbered field on which new governmental organizations might be established. Although barbarous peoples might assume the form rather than the spirit of civilized life, a gradual understanding of the spirit would come through the observance of forms.[88] US lawmakers arriving in the Philippines prepared for a second leveling: a Spanish system of administration had to be swept away, Spanish laws modified, and a new government built from the ground up.[89]

The Taft commission set up shop in Manila's *ayuntamiento*, the seat of Spanish municipal governance. As on the mainland, comparative colonial studies were the order of the day. Cayetano Arellano, a law professor who had served on both the Spanish *audiencia* and its provisional US counterpart under military rule, supplied detailed information on the history of the Spanish colonial administration and its judicial system, which was published as a US

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[86]Daniel H. Burnham and Edward H. Bennett, *Plan of Chicago*, ed. Charles Moore (Chicago: Great Books Foundation, 2009 (1909)), 116, 127-9, 131, 155.

[87] William McKinley, "Instructions of the President to the Philippine Commission, April 7, 1900" in *Reports of the Philippine Commission, the Civil Governor and the Heads of the Executive Department of the Civil Government of the Philippine Islands*, (Washington: Bureau of Insular Affairs, 1904), 1-11.

[88] Moses, "Colonial Policy with Reference to the Philippines," 88-116. L.S. Rowe, "The Reorganization of Local Government in Cuba," *Proceedings of the American Political Science Association* 1, no. 1 (1904): 164-175.

[89] Lebbeus R. Wilfley, "The New Philippine Judiciary," *Ohio Law Bulletin* 49-412 (1904): 407.

government report.[90] Taft stocked the commissioners' library with an international array of historical, political, and ethnographic studies, and the US Justice Department forwarded materials from the administration of Louisiana Territory.[91]

Appointed Civil Governor in 1901, Taft enjoyed what home rulers on the mainland could only dream of—the powers of a Spanish governor-general, preserved under the military administration.[92] Philippine administrator David Barrows emphasized this continuity in an *American Historical Review* article, describing the office as "one of the disturbing but great and magnetic positions" necessary for controlling the political future of tropical peoples. Americans had long been prejudiced against delegating centralized administrative control to a single executive, he acknowledged, but "the abiding influence of the office of governor-general under Spain" had happily prevented diffusion of such control in the Philippines. Although US insular administrators initially disparaged the failure of their Spanish predecessors to separate governmental functions, the US governors-general and their commissioners were vested with broad judicial, legislative, and executive powers. Taft was officially designated Civil Governor, but he revived the Spanish title Governor-General for his successors, placing the office on "a parity of dignity with that of other colonial empires of first importance."[93]

Taft's commission initially expressed their legislative will in minute detail, Barrows

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[90] Cayetano S. Arellano, "Historical Resumé of the Administration of Justice in the Philippine Islands," in *Report of the United States Philippine Commission* (Washington: Government Printing Office, 1901), Exhibit J.

[91] Taft to Charles C. Soule, Boston Book Co., 15 April 1900, 23 April 1900, William H. Taft, *William H. Taft Papers* (Washington: Library of Congress, 1969), reel 30. Henry Hoyt to Taft, 25 October 1900, 15 January 1901, 6 July 1901, 13 August 1901, Taft, *William H. Taft Papers*, reels 30, 33.

[92] Castañeda, "Spanish Structure, American Theory: The Legal Foundations of a Tropical New Deal in the Philippine Islands, 1898-1935," 365-374.

[93] David P. Barrows, "The Governor-General of the Philippines Under Spain and the United States," *The American Historical Review* 21, no. 2 (January 1916): 289, 301, 306. Castañeda, "Spanish Structure, American Theory: The Legal Foundations of a Tropical New Deal in the Philippine Islands, 1898-1935."

wrote, but soon realized that such rigidity imposed constant amendment. Instead, they developed a discretionary "ordinance power," confining statutes to a bare declaration of principles or policy, a practice "too little understood in America." Although the commissioners originally specified that all legislation would be disseminated in Spanish and English for public comment, they were not bound by this provision if the public good required "speedy enactment," a clause invoked on nearly all legislative acts.[94] In anticipation of the convening of a 1907 Philippine Assembly, the elected Filipino house of a bicameral legislature, the Philippine Commission issued a number of acts conferring broad powers on the governor-general "in explicit expectation that the legislative power would thereafter be exercised less freely."[95]

Taft and his commissioners rebuilt the Philippine court system with guidance from Cayetano Arellano, who was appointed chair of the committee formulating plans for the judiciary, and subsequently served as chief justice of the Philippine Supreme Court.[96] Resurrecting an older Spanish judicial tradition, Taft reestablished gubernatorial authority over the insular judiciary. As Arellano noted in his commission report, the Spanish governor-general had presided over the *audiencia* until 1861, when an attempt was made to separate governmental functions, appointing a Bureau of Justice in his place.[97] Taft also established the gubernatorial authority to appoint, transfer, or remove all judicial officials, an authority originally vested in the

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[94] "An Act Prescribing the Order of Procedure by the Commission in the Enactment of Laws [No. 6]*,"Annual Reports of the War Department for the Fiscal Year Ended June 30, 1901. Public Laws and Resolutions Passed by the Philippine Commission*, (Washington: Government Printing Office, 1901), 20-21. See also the 1898-1904 commission acts creating the judicial system in file 770-68, box 103, entry 150, Record Group 350 Bureau of Insular Affairs, National Archives and Record Administration, College Park, Maryland.

[95] Barrows, "The Governor-General of the Philippines Under Spain and the United States," 306-307.

[96] "Chief Justice Cayetano S. Arellano," *Supreme Court E-Library* [website] (2004 [cited 1 May 2010]); available from http://elibrary.judiciary.gov.ph/index2.php?justicetype=Chief%20Justice.

[97] Arellano, "Historical Resumé of the Administration of Justice in the Philippine Islands," Exhibit J, p. 269-70. "Chief Justice Cayetano S. Arellano," *Supreme Court E-Library*.

Philippine Commission.[98]

Taft's administrative judiciary retained a Bureau of Justice, which supervised lower court officials and compiled detailed judicial statistics.[99] Under the direction of the attorney general, court clerks completed an annual statistical report of judicial business on prescribed forms—a long-established Spanish practice—that were compiled and analyzed for the Philippine Commission.[100] In the *Illinois Law Journal*, John Wigmore—dean of Northwestern University Law School—praised Philippine Attorney General Ignacio Villamor's 1903-8 judicial statistics on crime in the archipelago as far superior to anything published in the United States, and a model for American courts.[101] Forty pages of statistics in Villamor's report analyzed crimes against public order and morals for a single year, with proposed methods for their future suppression. [102]

According to Manila Judge Charles Lobingier, US first instance judges arriving in the archipelago were initially prejudiced against everything Spanish, but were soon amazed by the comprehensiveness of Spanish legal codes, unlike "the lawless science of our law." The thirteenth-century Spanish *Siete Partidas* was "by far the most valuable legal monument" since

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[98] United States. War Department. Division of Insular Affairs, *Report of the United States Philippine Commission to the Secretary of War for the Period from December 1, 1900, to October 15, 1901* (Washington: Government Printing Office, 1901), 77. "An Act providing for the organization of courts in the Philippine Islands [No. 136]" in *Annual Reports of the War Department for the Fiscal Year Ended June 30, 1901. Public Laws and Resolutions Passed by the Philippine Commission*, 290, 298, 301.

[99] "Bureau of Justice" (1915). US Bureau of Insular Afffairs, Record Group 350, Entry 95, v. 358, p. 411. National Archives and Records Administration, College Park, MD. Wilfley, "The New Philippine Judiciary," 410.

[100] "An Act providing for the organization of courts in the Philippine Islands [No. 136]" in *Annual Reports of the War Department for the Fiscal Year Ended June 30, 1901. Public Laws and Resolutions Passed by the Philippine Commission*, 303.

[101] Ignacio Villamor, *Criminality in the Philippine Islands* (Manila: Bureau of Printing, 1909), 9-10.

[102] John H. Wigmore, "A Model Report on Crime from an Attorney-General's Office," *Journal of the American Institute of Criminal Law & Criminology* 4 (1913-1914): 479-480. See John H. Wigmore Papers, folder 23, box 121, series 17/20, Northwestern University Archives, Evanston, Illinois.

the Justinian code, and the 1899 *Código Civil* was superior even to the French *Code Napoleon*.[103] There was never any serious proposal to undo these great works of the Spanish legislators, he noted.[104] "A despot uproots the tree; a wise monarch prunes its branches," he quoted from the *Partidas*.[105] Lobingier published prolifically on the blending of Spanish and Anglo American legal systems in legal and popular periodicals, including Stead's *Review of Reviews*.[106] Streams of ideas flowing from Europe and America were converging in cosmopolitan Manila, according to the jurist.[107] The discovery of the unappreciated Spaniard was "one of the far-reaching consequences" of the Spanish-American war: Americans had as much to gain from Spanish law as the Filipinos from US jurisprudence.[108]

John Wigmore facilitated this judicial stream. A former professor at Tokyo's Keio University, Wigmore had a special interest in comparative law.[109] He corresponded with native and US Philippine jurists, encouraging them to submit articles to the journals he edited, and arranged for Filipino students to study law at Northwestern University.[110] George Malcolm,

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[103] George A. Malcolm, "A Glance at Philippine Legal Sources and Institutions" (1920). Occasional Addresses and Articles, Box 10, Vol. II. George A. Malcolm Papers, Bentley Historical Library, University of Michigan, Ann Arbor. Charles Sumner Lobingier, "Blending Legal Systems in the Philippines," *Law Quarterly Review* 21 (1905): 401. Charles Sumner Lobingier, "A Spanish Object-Lesson in Code-Making," *Yale Law Journal* 16, no. 6 (April 1907): 415-416. Charles Sumner Lobingier, "Las Siete Partidas and its Predecessors," *California Law Review* 1, no. 6 (September 1913): 493.

[104] Charles Sumner Lobingier, "Civil Law Rights Through Common-Law Remedies," *The Juridical Review* 20 (1908-9): 98.

[105] Lobingier, "Las Siete Partidas and its Predecessors," 495.

[106] Far Eastern American Bar Association, *Twenty Years in the Judiciary*. Lobingier's *Review of Reviews* article (September 1905) also appeared as Lobingier, "Blending Legal Systems in the Philippines," 401-407.

[107] Lobingier, "Civil Law Rights Through Common-Law Remedies," 97.

[108] Lobingier, "A Spanish Object-Lesson in Code-Making," 416.

[109] Finding aid, John H. Wigmore Papers, Series 17/20, Northwestern University Archives, Evanston, Illinois (subsequently referenced as JHW Papers).

[110] Selected articles include George R. Harvey, "The Administration of Justice in the Philippine Islands," *Illinois Law Review* 9, no. 2 (June 1914): 73-97. Ignacio Villamor, "Propensity to Crime," *Journal of the American Institute of Criminal Law & Criminology* (1915-1916): 729-745. Charles Sumner Lobingier, "Judicial Superintendent in China," *Illinois Law Review* 12, no. 6 (1917-1918): 403-408. See also John H.

Dean of the University of the Philippines College of Law and a Philippine Supreme Court Justice, was a regular correspondent. Wigmore published a series of articles by Malcolm in the *Illinois Law Review* documenting the ongoing relevance of Spanish civil, Mohammedan, Roman canon, and Malay customary law in US insular court decisions.[111] Malcolm chastised Wigmore for omitting references to Philippine decisions in his definitive treatise on evidence; Wigmore's second edition included decisions for the Philippines, Puerto Rico, Alaska, and the United States Court for China.[112] Manila first instance Judge Charles Lobingier was also a frequent correspondent, supplying Wigmore with studies of Philippine customary and Chinese family law.[113]

The problem with Spanish law, Taft emphasized, was one of procedure rather than substance. The Spanish code of civil procedure caused substantial delays in the administration of justice, he noted, particularly in its provisions for appeal. Litigants could challenge the competency of judicial officers on the grounds of undue friendship or hostility to either party or his counsel. Appeals were taken from every ruling of the court, Taft complained, and it was possible to keep a case in the *audiencia* for years and years on matters that did not relate to its merits. [114] But Taft had no quibble with one Spanish procedural provision—juryless courts. Soon

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Wigmore to George A. Malcolm, 30 September 1916, box 90, folder 5, JHW Papers. Wigmore's Filipino law students, who included Philippine Supreme Court Chief Justice Jose Abad Santos, are referenced in John H. Wigmore to George A. Malcolm, 18 December 1928, box 90, folder 5, JHW Papers.

[111] George A. Malcolm, "Philippine Law," *Illinois Law Review* 11 (1916-1917): 331-350. George A. Malcolm, "Philippine Law [Concluded]," *Illinois Law Review* 12, no. 6 (1917-1918): 387-401.

[112] George A. Malcolm to JHW, 4 October 1920, box 90, folder 5, JHW Papers. John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 5 vols. (Boston: Little, Brown, and Company, 1923).

[113] Charles Lobingier and JHW correspondence, 20 June 1913, 23 January 1914, 19 March 1914, 7 May 1914, 9 June 1914, 16 July 1914, 8 September 1920, 5 November 1920, 1 October 1923, 20 March 1931, box 88, folder 3, JHW papers.

[114] United States. Congress. Senate. Committee on Philippines, *Affairs in the Philippine Islands* (Washington: Government Printing Office, 1902), HRG-1902-PPS-0001, p. 281, 283, 304. United States.

after his 1900 arrival in the Philippines, Taft began lobbying US Supreme Court Justice John Harlan to deny due process rights in the archipelago. “The question of a right of trial by jury and by indictment,” and the extension of tariff laws to generate income for the insular government, “are of course the two points which will most affect us in our work.”[115]

Taft’s commission completed work on a new code of civil procedure in 1901, submitting a draft for review to Spanish and Filipine attorneys, and members of the American Bar Association (ABA). Reviewer comments were reportedly incorporated, “materially promoting” the code’s usefulness.[116] The code vested the Philippine Supreme Court with the authority to establish procedural rules for all insular courts—a reform that Taft and the ABA would spend decades lobbying for on the mainland. And like their sixteenth-century Spanish predecessors, who preserved the order and practices of Iberian *chancillerías*, Taft’s commission specified summary judicial proceedings “analogous to those in a court of equity.”

California’s code of civil procedure was cited as the “true legal precedent” for the 1901 Philippine code.[117] The impact of the California code, even in its home state, was open to question. California jurist John Pomeroy, author of a hefty three-volume equity treatise, published a scathing critique of his state code.[118] Replete with uncertainties and inconsistencies,

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War Department. Division of Insular Affairs, *Report of the United States Philippine Commission to the Secretary of War for the Period from December 1, 1900, to October 15, 1901*, 75.

[115] Taft to John Harlan, 22 September 1900, 27 December 1900, 7 January 1901, 25 June 1901. *William H. Taft Papers*, reels 30, 463, 464.

[116] United States. War Department. Division of Insular Affairs, *Report of the United States Philippine Commission to the Secretary of War for the Period from December 1, 1900, to October 15, 1901*, 86. United States. Congress. House of Representatives, "An Act Providing a Code of Procedure in Civil Actions and Special Proceedings in the Philippine Islands [No. 190]," in *Annual Reports of the War Department for the Fiscal Year Ended June 30, 1901. Public Laws and Resolutions Passed by the Philippine Commission.* (Washington: Government Printing Office, 1901), sec. 6, p. 426.

[117] Lobingier, "Civil Law Rights Through Common-Law Remedies," 99.

[118] Gunther A. Weiss, "The Enchantment of Codification in the Common-Law World," *Yale Journal of International Law* 25 (2000): 505-506. Weiss, "The Enchantment of Codification in the Common-Law

he wrote, the code demanded judicial interpretation. The great majority of cases decided by California courts relied on principles of law and equity omitted from the code and left untouched by codification, he noted. In construing the code, Pomeroy concluded, courts should proceed upon the assumption that the settled rules of law and equity were not changed but re-enacted "in all their force and with all their effect."[119]

Equitable courts could readily accommodate Spanish civil and criminal law, which both international law and McKinley's presidential directive specified for retention "so far as they are compatible with the new order of things."[120] In the *Illinois Law Review*, Philippine Supreme Court Justice George Malcolm affirmed that laws closely interlaced with religion, sentimental feelings, or family relations were generally not superseded in the archipelago.[121] US domestic relations law paled in comparison with far-reaching Spanish provisions for governing persons. The 1889 *Código Civil* elaborated natural, civil, and juridical personhood; legitimate and illegitimate birth; relations between adopters and the adopted; familial consent for marriage; rights and obligations between husband and wife; parental power; and the selection of guardians by court-appointed family councils.[122] The Spanish civil law zealously guarded the rights of minors and orphans, wrote a US first instance judge, was "infinitely more liberal" in providing for wives and widows, and "far less fruitful of litigation" than US state law.[123] A Filipino jurist noted that Anglo Americans had acquired their adoption law from Spanish colonies in the

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World," 515. Pomeroy, *A Treatise on Equity Jurisprudence, as Administered in the United States of America*.

[119] Pomeroy, *The "Civil Code" in California*, 6, 57, 62.

[120] James H. Blount, "Some Legal Aspects of the Philippines," *The American Lawyer* 14 (1906): 495.

[121] Malcolm, "Philippine Law," 333-4.

[122] Clifford Stevens Walton, *The Civil Law in Spain and Spanish-America* (Washington, D.C.: W.H. Lowdermilk & Co., 1900).

[123] W.F. Norris, "The Criminal Code of the Philippines," *Green Bag* 15 (1903): 435.

Americas.[124]

Although the US civil code expressly repealed all preexisting procedural codes, US jurists experimented with Spanish remedies.[125] To begin with, the insular administration did not supply Anglo American legal reference materials for judges in the provinces. Chicagoan Paul Linebarger, a first instance judge for Batangas, shipped his personal law library to the archipelago when he learned of the omission.[126] Others likely relied on the Filipino judges they had replaced, as did Judge James Blount, whose predecessor served as his clerk.[127] And the repeal of Spanish procedure was not as sweeping as the US code implied, Lobingier admitted. Spanish procedure was more appropriate for primitive conditions in the interior, he noted, and for Filipino justices of the peace. Although Taft claimed to have introduced equitable injunctions and special proceedings for estates, Lobingier explained that existing Spanish remedies were nearly identical to these US provisions. Spanish procedure for securing equitable liens, he added, offered a more comprehensive remedy than US law. Finally, a US "relief clause" permitted the enforcement of rights conferred by Spanish law that were unrecognized by the United States. In all contested cases, the court could grant a plaintiff "any relief consistent with the case made by the complaint and supported by the evidence and embraced within the issue." For example, the US code had abolished a Spanish procedure that allowed a natural child to compel

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[124] Serafin P. Hilado, "A Comparative Study of the Adoption Law under the Spanish Civil Code and the Code of Civil Procedure," *Philippine Law Journal* 4, no. 9 (April 1918): 313.

[125] United States. Congress. House of Representatives, "An Act Providing a Code of Procedure in Civil Actions and Special Proceedings in the Philippine Islands [No. 190]," sec. 795, p. 580.

[126] Paul Wentworth Linebarger, Letter to Col. Clarence R. Edwards, Division of Insular Affairs, 19 June 1901. File 2513-27, Entry 5, Record Group 350, Records of the Bureau of Insular Affairs, National Archives and Records Administration, College Park. Government of the Philippine Islands Executive Bureau, Letter to Chief of the Bureau of Insular Affairs, 1 October 1906. File 2513-50, Entry 5, Record Group 350, Records of the Bureau of Insular Affairs, National Archives and Records Administration, College Park.

[127] James H. Blount, "The Founding of Civil Government of the Philippines," *The Green Bag* 20 (1908): 363.

acknowledgment from a parent, yet the relief clause provided ample remedy.[128]

In an attempt to limit civil and criminal litigation, US lawmakers abolished Spanish provisions for challenging the competency of judicial officers. But multiple suits were brought challenging Lobingier and other first instance judges under the extraordinary US remedies of mandamus—seeking to compel performance of a judicial act—and prohibition—commanding an inferior court to cease a prosecution.[129] The code of civil procedure stipulated that higher courts could reverse the judgments of subordinate tribunals for fraud, mistake, or accident—keywords for invoking equity's jurisdiction.[130] Gubernatorial pardons and paroles also enhanced the judicial system's discretionary capacity. David Barrows reported that although neither Congress nor the Philippine Commission had ever directly bestowed this power on the governor-general, it had been retained from the military governor's authority. "The pardoning power is one of immense delicacy and political importance," he noted, and had been liberally used by all governors-general.[131]

Lobingier and Taft proudly pointed to the Filipino embrace of extraordinary US remedies that had no equivalent in Spanish procedure, particularly habeas corpus.[132] In a case that was not looked upon with favor by US officials, the Manguianes of Mindoro Province petitioned the Philippine Supreme Court for habeas corpus to protest their confinement to a reservation, citing constitutional religious freedom protections. The creation of reservations for the non-Christian

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[128] Lobingier, "Civil Law Rights Through Common-Law Remedies," 100-102, 105-6.
[129] For examples, see *Jose V.L. Gonzaga*, G.R. No. L-1005 (1902). *Domingo Hernaez Y Salinas v. W.F. Norris*, G.R. No. 1034 (1903). *Felix Fanlo Aznar v. W.F. Norris*, G.R. No. 1326 (1904). *Jose Castaño v. Charles S. Lobingier*, G.R. No. L-3378 (1906). *Chan-Suangco v. Charles S. Lobingier*, G.R. No. L-7953 (1912).
[130] United States. Congress. House of Representatives, "An Act Providing a Code of Procedure in Civil Actions and Special Proceedings in the Philippine Islands [No. 190]," Sec. 148, 513, p. 451, 520.
[131] Barrows, "The Governor-General of the Philippines Under Spain and the United States," 308-309.
[132] Lobingier, "Civil Law Rights Through Common-Law Remedies," 102-103.

Manguianes was underwritten by a 1902 Philippine Commission act providing for local governance in Mindoro. The constant aim of the provincial governor, the act affirmed, should be to facilitate the "knowledge and experience necessary for successful local popular government." Towards this end, supervision and control of the uncivilized Manguianes could include their relocation to bring them under municipal governance. Provincial officials subsequently ordered the confinement of the Manguianes for their own protection, as well as that of the valuable public forests in which they roamed.[133]

The Philippine Supreme court cited Spanish precedent, the authority of self-governing municipalities, and equitable principles to deny the Manguianes' petition. Sixteenth-century Spanish precedent had established that Indios could be concentrated into towns and reservations for instruction in the Sacred Catholic Faith and the evangelical law, to the end that they might live in a civilized manner. An 1881 decree had reaffirmed that it was a "duty to conscience" to help backward races grasp the moral and material advantages of living in towns under the protection of the law. The Philippine court noted that the designation "non-Christian" was not religious in intent; rather it was a geographical reference to those who lived apart from settled communities. Invoking the equitable responsibility of guardians to their wards, the court also emphasized that it did not want to interfere with the decision of local Filipino authorities. Although theoretically, all men were created equal, practically, the axiom was not precisely correct. Public policy must be flexible; distinctions must be made according to the dictates of sound reason and a true sense of justice. If the government did not take proactive measures, the Manguianes would commit crimes and make depredations, or be subjected to abusive involuntary servitude. The "national conscience" required that the Manguianes be taught "that

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[133] *Rubi et al v. Provincial Board of Mindoro,* G.R. No. L-14078 (1919).

the object of the government is to organize them politically into fixed and permanent communities."[134]

Municipal Courts

Taft called for the elimination of criminal juries in mainland courts in 1905, following his appointment as Roosevelt's Secretary of War. Americans were narrowly prejudiced in favor of the common law, he noted, touting one of the most useful benefits of territorial expansion: the opportunity for US jurists to compare Spanish and Anglo-Saxon law. Taft criticized the *caveat emptor* spirit of the common law—that every man must look after himself—and praised the Spanish civil law, which required individuals to treat each other "with more equity, with more morality…there is more of paternalism in the civil law—more care for the subject by the government." Constitutional guarantees for civil and criminal jury trials had outlived their usefulness on the continent, he argued. A "fetish…worshipped without reason," jury trials diminished the power of the court, returning verdicts that resembled the vote of a town meeting rather than "the sharp, clear decision of the tribunal of justice." Taft recommended that all US courts adopt equity procedure "derived from the canon law and ecclesiastical courts," eliminating juries, replacing courtroom testimony with written depositions, and abolishing the right of criminal appeal, leaving only the court's power to pardon.[135]

Taft's address generated heated national debate. The *Albany Law Journal* called for an instant repudiation.[136] Taft's attack, announced the *Boston Globe,* vindicated fears that colonial rule would subvert constitutional safeguards on the mainland. Although Americans might be

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[134] *Rubi et al v. Provincial Board of Mindoro*.
[135] Taft, "The Administration of Criminal Law," 1-17. The address was republished in William Howard Taft, *Present Day Problems: A Collection of Addresses Delivered on Various Occasions* (New York: Dodd, Mead, 1908).
[136] "The Administration of the Criminal Law," *The Albany Law Journal* 67, no. 8 (August 1905): 247.

indifferent to the denial of due process rights in the Philippines, they would resent any attempt to impair this fundamental safeguard of American liberty on the mainland.[137] The *New York Times* was more sanguine: there was no imminent danger to a citizen on trial with a watchful press, intelligent community, and open court sessions, and no reason to maintain a system of law "designed for the perils of star chamber days."[138] The national Christian *Outlook* supported Taft: anarchy rather than autocracy was the peril threatening liberty.[139] The *Chicago Tribune* affirmed that the jury was a fetish of state legislators and the criminal's safeguard against punishment, but noted that Cook County's judges were "not ready to subscribe to the Taft theory."[140]

Members of Cook County's bar and bench bitterly contested proposed restrictions on civil jury trials in a 1905 bill replacing justice of the peace courts—a centuries-old Anglo American tradition—with a Municipal Court of Chicago. The bill, sponsored by the Civic Federation, eliminated civil juries unless demanded in writing and paid for in advance.[141] Chancellor Tuley had temporarily initiated juryless common law proceedings several years earlier in Cook County's courts, when backlogged cases greatly exceeded docket capacity. The Illinois General Assembly had approved this experiment, which provided for the waiving of jury rights, summary proceedings, and the elimination of appeals, until the state increased the number of judges.[142] The experiment was in keeping with the sentiments of an anonymous Chicago jurist

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[137] "Mr. Taft's Reaction," *Boston Daily Globe* (1 July 1905): 6. "A Grave Blunder," *Boston Daily Globe* (17 July 1905): 6.
[138] "Jerome with Taft on the Criminal Law," *New York Times* (28 June 1905): 16.
[139] "Mr. Taft on Our Criminal Law," *Outlook* (15 July 1905): 661.
[140] "Judges Praise the Jury," *Chicago Tribune* (28 June 1905): 9. "The Degenerating Jury System," *Chicago Tribune* (29 June 1905): 8.
[141] Gilbert, *The Municipal Court of Chicago*, 25-27, 220. Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago*.
[142] Gilbert credited Tuley and chancery attorneys John P. Wilson and John S. Miller with the court's design. Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago*, xxi-xxxix, 32, 36-37. Gilbert, *New Municipal Court System: Address Delivered before the Union League Club of Chicago*.

who published a critique of the jury in a celebratory 1896 history of the Chicago bar and bench: "Lawyers, strike off the jury law from the statutes! Reorganize the judiciary, making good men and good lawyers the sole judges in civil and criminal cases."[143]

Tuley's Municipal Court plan incorporated essential elements of equity's form and function, with important limitations. Cook County masters in chancery were to be *ex-officio* masters in the administrative judiciary, supplemented by a bureaucracy of investigative clerks. Summary pleadings eliminated "the particularity required in a declaration at common law." Justices were vested with the discretionary power to regulate procedure "as they may deem necessary or expedient for the proper administration of justice." But Tuley's design retained juries for criminal trials at state expense. He also limited the court's equity jurisdiction: justices could only try equity suits transferred by a Cook County judge. Tuley's long-standing Cook County organizational hierarchy informed the court's administration: a chief justice presided over a bench of associate justices, assigning them to branch courts, and controlling the court dockets. But he invested Chicago's electorate with the power to designate a municipal chief justice. Tuley's tenure as chief justice had been secured by his peers on the Cook County bench.[144]

Tuley, a leading Democrat, played a critical role securing passage of the Municipal Court bill, the only home rule legislation to win voter approval; the bill for a new city charter

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Gilbert, "New Municipal Court System," 296. Gilbert, *The Municipal Court of Chicago*, 19. A Wilson memoir, penned by his son, also credits Tuley, Wilson, and Miller with the court's design, and does not mention Gilbert. John P. Wilson Jr., "John P. Wilson, 1844-1922", 8. "Judge Tuley Memorial Services," *Chicago Legal News* 38, no. 23 (20 January 1906): 177.

[143] "The Jury System and its Personnel," *Industrial Chicago: The Bench and Bar*, (Goodspeed Publishing Company, 1896), 432.

[144] Gilbert, *The Municipal Court of Chicago*, 408-10, 412-13, 416, 424, 428, 432.

failed in 1907.[145] Chicago Federation of Labor delegates, downstate legislators, and seventy-two Cook County jurists derided the proposed tribunal as a "rich man's court," protesting the jury fee. The jurists introduced a counter bill reinstating civil jury trials at state expense. Tuley's name was invoked to quiet suspicious downstate legislators, and the chancellor personally addressed Cook County lawmakers, arguing that the court was intended as a "poor man's tribunal." Superior judges would mete out justice by the same process as in the highest courts, and cases would not "be rushed through or disposed of" without regard to the real facts. It was true, he conceded, that litigants would be charged a substantial fee for a jury trial, but the court could waive this expense for the poor.[146] The bill took an unexpected turn in the Illinois General Assembly when legislators provided for the waiver of jury trials in both civil and non-felony criminal cases, an addition attributed to Cook County's Republican party.[147] Tuley voiced his regret that he had ever given his time to the cause before he died in December 1905, a month after Chicago's electorate approved the bill.[148]

The first Municipal Court bench—all but one a Republican—took their 1906 oaths in an eighteenth-century Illinois courthouse, a fixture under French, English, and American rule. Prior to its reconstruction in Chicago, the courthouse had been exhibited at the Louisiana Purchase Exposition. Olson announced that the Municipal Court's first object would be equal justice for

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[145] Freund, "Some Legal Aspects of the Chicago Charter Act of 1907," 427-439.

[146] Gilbert, *The Municipal Court of Chicago*, 27, 441-460. "Charter Meets Big Adversary," *Chicago Tribune* (26 January 1905): 4. "Tuley Defends New Court Bill," *Chicago Tribune* (6 February 1905): 5. The original Municipal Court bill provided that the civil jury fee of poor litigants could be waved at the court's discretion in cases involving more than $500; no waiver was specified in cases involving less than $500. Gilbert, *The Municipal Court of Chicago*, 433-435.

[147] Gilbert, *The Municipal Court of Chicago*, 27-28, 482.

[148] Robert McMurdy, "The Law Providing for a Municipal Court in Chicago," *Chicago Legal News* 38 (28 July 1906): 401. "People Revere Tuley's Memory," *Chicago Tribune* (1 January 1906): 9.

"poor and ignorant litigants."[149] In a 1908 letter to Taft, Olson wrote "your recent utterances concerning the need of reforms in the administration of justice lead me to think that you might be interested in the organization of the Municipal Court of Chicago. It is a unique development in the history of American jurisprudence, and we believe was based on many of the ideas to which you have given voice."[150]

Taft elaborated his agenda for equitable court reform during his 1908 Presidential campaign. Cheap and speedy justice was necessary, he declared, to prevent popular protest over inequalities in the distribution of wealth, emphasizing his concern for the poor man. "We cannot, of course, dispense with the jury system" but every means by which litigants "may be induced voluntarily to avoid the expense, delay, and burden of jury trials ought to be encouraged." Courts should adopt simplified equity procedure and be empowered to determine their own rules. In the Philippines, Taft noted, judges had been induced to clear their dockets quickly by requiring monthly caseload reports. He also urged limits on appeals, recalling Spanish procedures that had kept Philippine plaintiffs "stamping in the vestibule of justice until time had made justice impossible." Although some argued that the poor should be allowed appeals to the highest tribunal, in truth, "there is nothing which is so detrimental to the interests of the poor man."[151]

Olson publicized the Municipal Court as the fulfillment of Taft's judicial vision and the application of simple business principles. Olson's 1910 article "The Proper Organization and

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[149] "Installation of Municipal Court Judges," *Chicago Legal News* 39, no. 17 (8 December 1906): 138. "New City Court Begins Activity," *Chicago Tribune* (12 December 1906): 2. George Fiedler, *The Illinois Law Courts in Three Centuries 1673-1973* (Berwyn: Physicians' Record Company, 1973), 123-4. Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago*, 45-46.

[150] Harry Olson, Municipal Court of Chicago, to William H. Taft, 4 August 1908. Taft, *William H. Taft Papers*, reel 90.

[151] William H. Taft, "Delays and Defects in the Enforcement of Law in This Country," *The North American Review* 187 (June 1908): 631. William H. Taft, "The Delays of the Law," *Yale Law Journal* 18 (1908): 28-39. Taft, "The Delays of the Law," 30, 32-33, 35-38. William H. Taft, "Inequalities in the Administration of Justice," *The Green Bag* 20 (1908): 441-448.

Procedure of a Municipal Court" invoked Taft's call for the elimination of undue delay. The municipal justices, he noted, had adopted procedural reforms urged by Taft's presidential commission.[152] A *World's Work* article on the court featured the story of a thief arrested at eleven o'clock, tried without a jury, and jailed by noon the same day. Olson was described as the manager of a unique corporate body with "singular and great powers" serviced by nearly 250 bailiffs, clerks and their assistants. The court was "master of its own rules of practice" and had eliminated superfluous procedural details. Jury trials comprised less than two percent of court business, and successful appeals had been limited to less than a tenth of one percent. To encourage the efficient administration of justice, judges were required to submit audited monthly caseload reports, which were compiled in statistical reports. Abbreviated court records were filed in card catalog drawers. The Municipal Court, the article concluded, "has made justice cheap, speedy, and final."[153]

Olson's public identification with Taft coincided with significant state reductions in the Municipal Court's criminal jurisdiction and discretionary powers. The transfer of Cook County cases—the only source of equity suits—was ruled unconstitutional in 1907.[154] The municipal jurisdiction over any crime punishable by both a fine and imprisonment was whittled away beginning in 1908; jurisdiction over petit and grand larceny was eliminated by 1910. Larceny of any amount—even a fifteen dollar petit larceny—was constitutionally defined as an "infamous crime" and required a grand jury indictment, as those convicted lost the right to vote, hold public office, or serve as a juror. The Municipal Court did conduct preliminary investigations for all

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[152] Harry Olson, "The Proper Organization and Procedure of a Municipal Court," *Proceedings of the American Political Science Association* 7 (1910): 78, 88.
[153] William Bayard Hale, "A Court that Does Its Job," in *The World's Work: A History of Our Time* (New York: Doubleday, Page & Company, 1910), 12695-12703.
[154] Gilbert, *The Municipal Court of Chicago*, 249-250. *William A. Miller v. The People of the State of Illinois*, 230 Ill. 65 (1907).

felonies committed in Chicago, but was then required to bind them over to Cook County courts for a grand jury indictment and trial.[155] The court's procedural rules were interpreted and revised by the state Supreme Court, which held that rules prescribed by the legislature for similar circuit court proceedings were binding.[156] In 1911, the Supreme Court ruled that the court's abbreviated system of record keeping was an "unintelligible jumble" and a violation of the constitutional requirement for preserving judicial proceedings in the English language.[157]

Lacking an equity jurisdiction and the power of injunction, the Municipal Court justices relied on a long-standing—and legally controversial—procedural device for enhancing judicial power and discretion: parol, or the suspension of a criminal sentence prior to sentencing.[158] Despite parole's limited statutory basis for adult offenders, it had been practiced irregularly for decades in Chicago and beyond. [159] In 1884, Tuley noted that he differed "with all, or nearly all of the judges" on the Cook County bench, as well as elsewhere in the United States, who exercised the prerogative to suspend criminal sentences when they believed circumstances merited intervention. The basis of their claim was the benefit of clergy practiced in England, which they cited as a common law precedent.[160] In 1917, it was revealed that federal judges nationwide had been equitably suspending criminal sentences since the 1860s—also based on

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[155] *The People v. E.W. Dada*, 141 Ill. App. 557 (1908).. *The People v. John B. Glowacki*, 236 Ill. 612 (1908). *The People of the State of Illinois v. Jennie Russell*, 245 Ill. 268 (1910). *The People ex rel. Harry Melton v. John L. Whitman*, 243 Ill. 471 (1910)..

[156] Olson, "The Proper Organization and Procedure of a Municipal Court," 83. Gilbert, *The Municipal Court of Chicago*, ix, 38, 272-276.

[157] *Stein v. Meyers*, 253 Ill. 199 (1911). Gilbert, *The Municipal Court of Chicago*, 350. See also Roscoe Pound, "The Administration of Justice in the Modern City," *Harvard Law Review* 26, no. 4 (February 1913): 326.326

[158] Carter H. White, "Some Legal Aspects of Parole," *Journal of Criminal Law and Criminology* 32, no. 6 (March-April 1942): 601.

[159] Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago*, 89. "An Act Providing for a System of Probation," in *The Revised Statutes of the State of Illinois* (Chicago: Chicago Legal News, 1912), ch. 38, §509a-q. Cecil Leeson, *The Probation System* (London: P.S. King & Son, 1914, 1914), 4-6.

[160] *People v. Archer Carroll*, 2 Ill. C.C. 170 (1884).

claims of benefit of clergy—leading to a presidential pardon of 5,000 persons, one of the largest wholesale acts of clemency in the United States.[161]

Justice MacKenzie Cleland, a devout Moody Bible Institute trustee, made extensive use of parole to augment a religious mission to the city's poor before it was statutorily approved. The Moody Bible Institute, at the vanguard of the emerging twentieth-century fundamentalist movement, trained "gap-men" to stand between the laity and the ministry, committed to living and declaring the word of God.[162] Cleland played a prominent role in a massive religious revival that coincided with the Municipal Court's opening, presiding at a lawyers' night service—organized with seventeen other judges—where he led jurists in a hymn written by a local attorney.[163] Continuing the revival as a "new gospel in criminology" in his city courtroom, Cleland invited ministers and temperance advocates to share his courtroom bench, and Sunday school students to observe the proceedings.[164] Imposing a criminal sentence on offenders—who typically lacked legal representation—Cleland then vacated his judgment, ordering them to stay sober, support their families, and report to evening "family receptions" under threat of a heavy fine or imprisonment. A volunteer corps of businessmen served as parole officers, keeping watch "in a friendly way" over an assigned family.[165] "The great Apostle said to us" remarked Cleland

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[161] Frank W. Grinnell, "The Common Law History of Probation: An Illustration of the 'Equitable Growth' of Criminal Law," *Journal of Criminal Law and Criminology* 32, no. 1 (1941): 15-34.

[162] A.P. Fitt, "Record of the Annual Meeting of the Moody Bible Institute" (10 September 1907). Secretary's Minutes and Charter By Laws of the Moody Bible Institute of Chicago, 1900-1921. Trustee Records, Moody Bible Institute Archives, Chicago, 62. "M'Kenzie Cleland, Former Judge, Dead at Home," *Chicago Tribune* (14 February 1924): 7.

[163] "Revivals Grow in Fervor," *Chicago Tribune* (9 January 1907): 4. "3,000 Converted in Eight Weeks," *Chicago Tribune* (1907): 7. "Torrey Talks to Lawyers," *Chicago Tribune* (7 November 1907): 3.

[164] "Husbands to be Paroled," *Chicago Tribune* (31 January 1907): 1. "Judge Paroles 50; Wives are Happy," *Chicago Tribune* (2 February 1907): 1. "Men on Parole as Model Husbands," *Chicago Tribune* (16 February 1907): 3. McKenzie Cleland, "The New Gospel in Criminology" (undated, c. 1908). Chicago IL. "Censures "Pull" as Aid to Crime," *Chicago Tribune* (24 June 1907): 7.

[165] Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago*, 66. "Husbands to be Paroled," *Chicago Tribune* (31 January 1907): 1.

in explanation of his mission, "overcome evil with good."[166] When an Illinois Supreme Court Justice questioned the legality of Cleland's public and pervasive use of parole—involving 1200 defendants in a single year—he was relegated to a civil jurisdiction.[167]

Following the Cleland controversy, Chief Justice Olson and the municipal bench turned to statutory initiatives to expand their shrinking jurisdiction, blending judicial, executive, and legislative powers. Penning a law to legalize parole, they also invaded equity's traditional jurisdiction over domestic affairs, criminalizing men who failed to adequately support their families, women found in a house of ill-fame, or children who attended nickel theaters, considered a cause of juvenile crime.[168] Olson drafted unsuccessful state bills in 1909, 1913, and 1914 to abolish the requirement for grand jury indictments in all criminal prosecutions other than treason or murder. [169] He also drafted a bill to raise the jury fee in 1914, explaining to a fellow jurist that it was necessary to keep this fee high "to discourage demands for jury trial." The court was much more capable of judging the credibility of a witness than a jury, he explained, and "the few cases tried by a jury accounts for the capacity and vast volume of business in our court."[170] Despite Olson's interest in promoting efficiency, his court did not facilitate the scheduling of jury trials, as it discouraged lawyers from requesting them.[171]

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[166] McKenzie Cleland, "The New Gospel in Criminology" (1908). Draft manuscript, box 2, folder 12, Municipal Court of Chicago Collection, Chicago Historical Society, Chicago.
[167] Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago*, 66. Gilbert, *The Municipal Court of Chicago*, 444. "New City Court Begins Activity," 2. "Judge Cleland Vents Wrath," *Chicago Tribune* (14 January 1908): 1.
[168] Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago*, 148, 185. "Traces Crime to Nickel Theater," *Chicago Tribune* (14 April 1907): 3.
[169] "Rehearing Asked by Olson," *Chicago Tribune* (23 April 1910): 5. "Agree on New Court Bill," *Chicago Tribune* (27 March 1909): 13. "Dunne will Veto City Court Bill," *Chicago Tribune* (25 June 1913): 2. "Explains New City Court Act," *Chicago Tribune* (20 March 1914): 14.
[170] Harry Olson to George Wentworth Carr, 19 February 1913, folder 1/7, box 1, series 1/14, Harry Olson Papers, Northwestern University Archives, Evanston, Illinois.
[171] Harry Olson to Judson F. Going, 2 October 1909, folder 5, box 3, Municipal Court of Chicago Collection, Chicago History Museum, Chicago, Illinois.

The governance of *alieni juris* proved the most potent devise for expanding the Municipal Court's jurisdiction. Turning the tables on traditional probate courts, women assumed primary responsibility for investigating men in a 1911 Court of Domestic Relations, dedicated to adjudicating wrongs against women and children. Jane Addams and Hull-House activists organized as the Juvenile Protective Agency convinced Chief Justice Olson to create the tribunal by deploying his discretionary power to establish branch courts. Specialized jurisdictions for prostitutes and young adult males followed shortly thereafter.[172]

Women managed the day-to-day business of Chicago's domestic courts, assuming the inquisitorial role of the chancery masters who remained at their Cook County posts. Serving as salaried court personnel and voluntary "protective officers," they fanned out over the city to investigate working-class homes and communities. Taking the inquisitorial process to a new level, women referred litigants for medical inspections and psychological examinations in the city's Psychopathic Laboratory, initially established by a wealthy JPA feminist to "study the souls of children." If a suspected feeble-minded person was charged with a felony, the municipal judges could file a continuance to keep the case in their jurisdiction. Approximately a thousand new inmates were committed each year to state institutions for the insane or feebleminded, even if they had not been convicted of an offense.[173]

Taft continued to press judicial reform as President and Chief Justice of the Supreme Court. In a 1910 congressional message, Taft emphasized the need to cheapen, simplify, and expedite judicial procedure. "I am strongly convinced that the best method of improving judicial procedure at law," he argued, "is to empower the Supreme Court to do it through the medium of the rules of the court, as in equity." In consultation with Taft, the ABA developed a plan for

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[172] Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago*, 120, 133-4, 174-5, 208-210.
[173] Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago*, 241-277.

procedural reform, invoking the Municipal Court of Chicago as a model of efficiency before a federal congressional committee considering their proposal.[174] The committee considered Taft's 1905 article on criminal court reform when discussing appeal limits. Following Taft's 1921 appointment as Chief Justice, he won congressional approval to create an administrative judicial council, modeled on his Philippine Bureau of Justice, which crafted procedural rules, collected judicial statistics, and considered judicial reforms. Olson and Taft were solicited as founding members of the Chicago based American Judicature Society in 1913, in which they collaborated with leading jurists on model plans for municipal, state, and federal reforms.[175]

In 1934, Congress passed an enabling act authorizing the Supreme Court to create uniform federal rules of civil procedure for US district courts. Chicagoan Edgar Tolman, who had served as a special federal chancery master, drafted what became the 1938 Federal Rules of Civil Procedure for a Supreme Court advisory committee.[176] The right to trial by jury in civil suits was preserved, but only if demanded quickly, and in writing. The advisory committee noted that jury trials were "expensive and dilatory—perhaps even anachronistic."[177] A Chicago treatise explicating the new federal rules noted that they would be familiar to many members of the bar, as being substantially those urged by Taft and the ABA for over twenty years.[178]

Conclusions

The comparative study of municipal and colonial administration was a paradigmatic Progressive

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[174] *Hearing Before the Committee on the Judiciary January 12, 1910 on the Bill H.R. 14552 to Regulate Judicial Procedure, Etc.*, (Washington: Government Printing Office, 1910), 6, 33-34.
[175] Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago*, 107, 285. Letter from William Howard Taft et al, 11 February 1914, Judge Harry Olson Papers, box 2, folder 2/2, Northwestern University Archives, Evanston, Illinois.
[176] "Tolman Named Special Master in Insull Cases," *Chicago Tribune* (2 June 1933): 20.
[177] James Alger Fee, "The Proposed New Rules for Uniform Procedure in the Federal District Courts," *Oregon Law Review* 16 (February 1937): 108, 114-115.
[178] Palmer D. Edmunds, *Federal Rules of Civil Procedure*, 2 vols. (Chicago: Callaghan and Company, 1938), iv, 9.

project. Reconnecting insular and municipal home rule reveals equity as a foundational attribute of US governance at home and abroad. Equity embodied a pastoral heritage, an imperial imperative, and what has been described as the essential attribute of sovereignty: the power to define and decide the exceptional.[179] As Vicente Raphael has observed, it is the sovereign who, in founding the law, gives to himself the license to operate both inside and outside of it.[180] To define who is and who is not in possession of full legal capacity, and to set aside the law's letter when adjudicating *alieni juris*, was an essential act of sovereignty. The 1938 Federal Rules of Civil Procedure officially inscribed equity as a judicial prerogative, but they are better understood as a belated acknowledgement and expansion of a fundamental state power, rather than a revolutionary transformation.

Examining home rule through a binocular lens reframes the geographic context of US judicial development, which has been predominantly parsed in terms of Atlantic crossings. Progressive lawmakers studied European legal orders, and participated in a rich transatlantic exchange. But they acquired extensive hands-on experience reconstructing courts as the United States expanded across the Americas and Asia. Equity served as a pastoral lingua franca in former Spanish territories, facilitating judicial experimentation and transnational exchange. Drawing on Spanish and Anglo American legal tradition, Progressive lawmakers drafted a blueprint for twentieth-century court reform.

Barbara Welke has argued that highly particularized understandings of legal personhood—shaped by race, gender, and physical ability—have shaped the American legal and

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[179] Schmitt, *Political Theology*.
[180] Rafael, "The Afterlife of Empire: Sovereignty and Revolution in the Philippines," 342.

constitutional order.[181] Equity provided a mechanism for the discretionary governance of populations with an increasingly diverse array of legal rights. It was also a powerful device for addressing disparities in legal personhood, particularly for Progressive women and, following the passage of the 1938 federal rules, black civil rights activists. Facilitating a departure from statutory constraints, equity empowered human beings—the ultimate expression of local self-governance—both before and behind the bench. Equity's paradoxical potential, its troubling and beneficial consequences for human liberty, are finally those of human nature.

[181] Barbara Young Welke, *Law and the Borders of Belonging in the Long Nineteenth Century United States* (Cambridge: Cambridge University Press, 2010).