Teutonic Constitutionalism: The Role of Ethno-Juridical Discourse in the Spanish-American War

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Jurisprudence is the general part of adjudication, silent prologue to any decision at law.—Ronald Dworkin, Law’s Empire

There are people in the world who do not understand any form of government . . . [and] must be governed.—Sen. Albert J. Beveridge, “Our Philippine Policy”

In the following discussion, I examine the ideological foundations of the Spanish-American War—and the subsequent legal decisions that established the peculiar constitutional status of the island of Puerto Rico—from a perspective broadly influenced by the emerging scholarly movement known as the cultural studies of law. Scholars associated with the cultural studies of law seek to use the multidisciplinary methods associated with British and American cultural studies in their analysis of legal history and contemporary legal issues. One of the special concerns of cultural studies is the social and political analysis of rhetoric, and I address that concern here through an analysis of the rhetoric of citizenship. ¹ Specifically, I argue that the global American empire that emerged after 1898, and in whose shadow the people of Puerto Rico continue to live today, was based on a discrete type of civic language. I call this civic language “ethno-juridical discourse.” ² Ethno-juridical discourse was a way of characterizing the proper boundaries of civic life in which the concepts of race and law were mutually constitutive; it was a normative political idiom in which the questions “What is race?” and “What is law?” were fundamentally interconnected. This language drew upon two seemingly distinct vocabularies for its lexicon, that of jurisprudence and that of anthropology, blending them in such a way that the two were indistinguishable from one another. I believe ethno-juridical discourse has been a fundamental though previously unrecog-
Alfonso XII in 1885, the country fell under the regency of the child princess Maria Cristina of Austria, and was governed by the rule of caciquismo, which one scholar describes as "a system of scheming and manipulations which enabled the political bosses . . . in alliance with the wealthy landowners, military leaders and government officials to rule the state for their own personal advantage."6 Caught between a glorious past and its banal present, Spain fell under a "curious mood of self deception," in which any symbol of its self-ascribed national greatness, no matter how small or dubious, assumed high place in Spanish identity. Within this political universe, the colonies of Puerto Rico, the Philippines, and, most importantly, Cuba, played a special role as emblems of a yearning for national power and renown. They were said to be "living proof that God's blessing continued to shine on Spain's imperial status."7 As living proof of God's blessings often do, this symbolic role belied actual conditions of exploitation—relations of extractive colonial rule that led some Cubans to rebel for independence in the late 1860s, beginning in the poor and underdeveloped province of Oriente. This revolt failed to spread across the island as a whole, and the fighting ended in 1878 with the signing of a truce brokered by Spanish General Arsenio Martinez Campos, who offered a variety of concessions to the rebels. These concessions were never fulfilled, however, and in the 1890s the independence movement resurfaced once more, this time under the leadership of José Marti, who established the Cuban Revolutionary Party in 1892 and launched a new fight for Cuba libre in 1895.

This renewed rebellion drew brutal resistance from the Spanish military. With the failure of the Cuban peace, Spain replaced General Campos with General Valeriano Weyler y Nicolau, a highly professional soldier of German descent who had developed a "reputation for ruthlessness" in earlier campaigns in Cuba and Catalonia.8 With 200,000 troops against approximately 20,000 to 30,000 Cuban rebels, General Weyler undertook a variety of measures in his counterinsurgency campaign. Among the most prominent were, first, the use of specialized trenches approximately six hundred feet in width, filled with "trees, boulders, barbed wire and explosives" and guarded by "forts, towers and blockhouses," to surround Cuban towns and divide Cuban revolutionary forces from each other.9 The second, more notorious action, for which Weyler is remembered today, was the first widespread use of "reconcentration camps" as a pacification strategy. In his attempt to combat rebel forces, General Weyler "emptied the countryside of people, crops and livestock" and relocated Cuban civilians en masse to detention centers. By modern estimates, at least 100,000 Cubans died as a result of reconcentration, though assessments at the time put that number at 400,000. Characterized by its direct effect on civilians, General Weyler's campaign aroused international outrage and earned him the nickname "butcher." Neither trenches nor reconcentration, however, fulfilled Spanish hopes. As one military historian suggested recently, "Weyler should instead have taken the offensive, leaving the trochas behind and pursuing insurgents ruthlessly until they were pushed to the point of total exhaustion."10 Whatever the moral merits of this proposed course of action, the rebels were gaining ground. While Spain attempted to concede a certain degree of home rule to Cuba in 1897, the die already had been cast. Spain was engaged in a total war with revolutionaries who made a reasonable claim that their opponents were engaged in systematic acts of lawlessness.

Many Americans were deeply moved by the struggle of Cubans for independence, and provided the rebels with financial and political support. There were a variety of reasons for American sympathy with the cause of Cuba libre. For one, Americans themselves were the symbolic descendants of a revolution and could claim as part of their republican heritage the cause of movements for national independence everywhere. The nation also was still torn by sectional strife between North and South, and it required a common cause that could provide a measure of reconciliation by helping to wash the "bloody shirt." Materially, some Americans feared what Cuban unrest might mean for the economic and political health of the United States. Still others, men like Josiah Strong, were animated by a Protestant sense of mission and a hatred of Catholic monarchy. One might say, in other words, that American investment in the Cuban Revolution was overdetermined. Within this emotional context, after repeated attempts by Presidents Grover Cleveland and William McKinley to escape direct military confrontation, the United States threw itself into war against Spain in 1898 after the well-known explosion of the Maine, driven forward by popular outcry against Spanish aggression. The stated purpose of the war was to free Cuba from Spanish domination, though the conflict had much further-reaching consequences. In a brief contest the United States quickly overtook Spain in Cuba, Puerto Rico, and the Philippines, finally bringing the fighting to an end with the Treaty of Paris, which ceded a variety of island colonies to the American nation. Congress soon began to reform the Spanish legal system with which the largely dark-skinned inhabitants of these islands had been governed, and to replace it with American law to impose social and economic order.

Senator Henry Cabot Lodge was one of the primary architects of Ameri-
can foreign policy during this period, and he was one of the most vociferous voices calling for the United States to enter the war with Spain. Born in 1850, Lodge began his political career in the Massachusetts state legislature in the early 1880s, moving to the federal House of Representatives in 1887 and ultimately winning a seat in the United States Senate in 1893. Lodge, a Republican, had a special interest in foreign affairs and was a longtime member of the Senate Foreign Relations Committee. Like his friend Theodore Roosevelt, then Assistant Secretary of the Navy, he was a disciple of Alfred Thayer Mahan. In his celebrated work *The Influence of Sea Power upon History*, Mahan argued that naval power was the central component of international political influence, and that the United States should look outward and develop an overseas empire like those of great European states. As a member of Congress during the Republican McKinley administration, Lodge was able to put Mahan's teachings into practice as an outspoken advocate of American expansion. Lodge's imperial designs were bitterly opposed by his colleague Senator George Hoar of Massachusetts, as well as Senator Eugene Hale of Maine and other anti-imperialist Republicans. This diverse group of men, on the whole, considered overseas expansion to be fundamentally at odds with the spirit of the American nation, which itself had revolted against colonial domination; they believed that the development of an empire would undermine the very nature of American political identity. Still, it was Lodge who ultimately won the ear of the president, helping persuade the more cautious McKinley to declare war on Spain even if the Spanish were willing to make concessions to Cuba or the United States. In this respect, one might describe Lodge as the individual subjective place from which the historical lever of Archimedes moved the geopolitical world.

Those who supported the Spanish-American War did so for a variety of reasons. To understand what the hostilities meant for Lodge in particular, however—and to understand the place of ethno-juridical discourse within the drive toward conflict and the adjudication of the constitutional claims arising from its outcome—it is important to keep in mind a sense of historical periodization. Specifically, it is necessary to recall that the late nineteenth century in the United States was an era of economic and state modernization, similar to that undergone approximately thirty years earlier in western Europe and England, and that the war was a national event that materially advanced this historical movement. When I use the term *modernization*, I refer loosely to Max Weber's discussion of the development of formal, rational, bureaucratic state procedures under capitalism, the growth of a thoroughgoing concern for legal process and neutral administration. But more importantly, I refer to a variety of phenomena that characterized what scholars once called the Progressive Era: the consolidation of national unity, the concentration of domestic wealth, the construction of a professional state apparatus, and the creation of new market outlets for surplus capital. Specifically, I refer to the militant assertion of an overarching American racial identity, the rise of the trusts, the construction of expert reform organizations and civil service bureaucracies, and the quest for foreign markets overseas. Studies of these phenomena reveal the many ways in which, in the late nineteenth and early twentieth centuries, the United States became a distinctively modern nation.

The Spanish-American War was very much a part of this progressive shift. First, the war offered an occasion for national unity at home, healing sectional divisions across the Mason-Dixon, providing a common cause around which a shared national racial identity might be constructed from a fragmented sense of political self. Second, the war brought the United States onto the world stage, creating an overseas empire for a nation previously limited to its own continental territorial boundaries. It launched the United States on its career as a global power. Third, the war fueled industrial economic development and formed the basis for the further concentration of domestic capital through the expansion of global markets. By opening Cuba, Puerto Rico, the Philippines, and various Pacific regions to commercial exploitation—by providing coaling stations for ships on their way to Asian ports, particularly those of China—the war offered an outlet for surplus capital generated at home. Finally, the war required the central administration of colonial peoples through the creation of a complex bureaucratic state apparatus. In the wake of the Treaty of Paris, a group of non-Anglo peoples came under the direct military and civil authority of the United States government, and the nation was forced to construct rational bureaucratic procedures and administrative agencies for maintaining an efficient peace. In these and other respects, the war not only was driven by the symbolic and emotional issues of national liberation, not only was a fight against monarchical Spain, but also participated in and was guided by the creation of a distinctly modern form of social and economic life. It was a war that brought the United States into the twentieth century, a conflict whose historical energies were directed forward, into the coming era.

The modernizing or "progressive" nature of the war is significant for understanding Lodge, because the senator from Massachusetts was hardly representative of the new nation America would become. He instead was a
figure from the past, born into an old, distinguished line of Boston Brahmins, a class that had played an enormous role in national life in previous years but that was becoming increasingly marginal as a cultural and political force. Lodge was born in May of 1850, under the roof of a “granite mansion, in the best part of residential Boston.” “No other infant who put in a first appearance that day,” writes one Lodge biographer, “did so in more propitious circumstance.” By the very pedigree of his familial heritage, Lodge was guaranteed “wealth, social position, intellectual stimulation, even a healthy body and reasonably good looks.”19 Lodge’s father was a prominent Boston merchant with a stern and rigid cast of mind. His mother, Anna Cabot, who doted on him, sprang from an old and venerated New England family. Her grandfather, Federalist George Cabot, had been elected to the United States Senate and was a close associate of George Washington, Alexander Hamilton, and John Adams. The family itself lived within the highest ranks of Boston society, and its home was the site of visits by Charles Sumner, Henry Wadsworth Longfellow, Francis Parkman, William Prescott, John Motley, Charles Bancroft, and Louis Agassiz. Lodge’s upbringing was typical of this elite social class. He attended grade school with the sons of the Bigelows, Cabots, and Parkmans, and later studied at a “private Latin school” with the Chadwicks and the Lymans. He came to know and love Shakespeare, watching Edwin Booth in Julius Caesar and Hamlet; he grew patriotic for the Union during the Civil War, though he did not become unduly rash or abolitionist in his sentiments; he traveled to Europe with servant and tutor in tow; he enrolled in Harvard College.

Lodge’s relation to his family history was deeply reverent, and indeed verged on a form of ancestor worship.20 After spending several years at Harvard as a self-described mediocre student, in 1871 Lodge launched a career as a scholar, critic, and essayist writing about the past in which his ancestors had played such an important role.21 In addition to writing this ancestral hagiography, Lodge also served as an assistant editor at the prestigious North American Review, where he published numerous articles on topics of patriotic concern, also contributing to the Nation and the Atlantic. His book-length works during this period present a similar mien. Within only a few years, the prolific young Bostonian published A Short History of the English Colonies in America, a biography of Alexander Hamilton, a biography of Daniel Webster, an edited volume of The Federalist, a life of George Washington, and various collections of essays on civic themes (much later, in the early 1920s, he and Theodore Roosevelt would publish the equally representative work Hero Tales from American History; or the
term institutions often being used as a synonym for law during the period. Under Adams's direction, Lodge spent long hours carefully reading German, Anglo-Saxon, and Latin legal texts, drinking deeply from the highly retrospective and historical subject toward which his teacher had steered him, Anglo-Saxon land law.25

Lodge's work was published as "The Anglo-Saxon Land Law" in Essays in Anglo-Saxon Law, a volume to which Adams contributed an essay titled "The Anglo-Saxon Courts of Law" and Lodge's fellow students offered "The Anglo-Saxon Family Law" and "The Anglo-Saxon Legal Procedure." The volume makes for curious reading. Merely glancing through it, one notes immediately that it is exceptionally recondite in character, if not dusty and parched.26 Lodge said as much himself many years later, partly in an effort to distance himself from the life of the mind with which he contrasted his later political career. "I doubt if I could have selected a drier subject," he noted ruefully. The process of writing a dissertation, he complained, "was not inspiring, it was in fact inexpressably dreary, and I passed a depressing winter so far as my own labors were concerned. I seemed to be going nowhere and to be achieving nothing. I led a solitary life, except for my immediate family, and I found it a doleful business struggling with the laws and customs of the Germanic tribes, without any prospect, so far as I could see, of either reward or result."27 Still, despite such objections, Lodge's dissertation was deemed important enough to merit extended analysis by Frederick Pollock (he was deeply critical of Lodge's work, though he thought it showed "much ingenuity"), and the project indeed revealed ample and admirable evidence of the German methods of social science in which Adams had taken care to school his students.28

Anglo-Saxon land law was a relatively underdeveloped subject in Lodge's day, and the basic purpose of his project was therefore theoretically modest. He hoped simply to classify the various forms of landholding among ancient Anglo-Saxons and trace their changes over time. This was what one might call basic empirical work. Still, there also was a larger purpose behind Lodge's dissertation, one appropriate to a man deeply reverent of familial heritage and to a practitioner of a kind of family history. This was to bolster respect for the English common law and thereby strengthen the ideological foundations of the American political order. Encouraging reverence for American politics through a dry study of ancient German landholding may seem like a dubious proposition, but it is important to understand that the common law at the time was thought to have developed directly from the law of the Anglo-Saxons before the Norman invasion, and that its spirit in turn was said to find its highest expression in the political institutions of the United States. In this regard, Lodge's work took part in a larger debate among late-nineteenth-century legal scholars between those who revered the Romanized Normans and their way of life and those who favored Teutons. While Lodge was himself partly descendant from Huguenots and so appreciated the Norman position, he generally sided with the Teutonists. "Free from the injurious influence of the Roman and Celtic peoples," Lodge wrote in his dissertation, "the laws and institutions of the ancient German tribes flourished and waxed strong on the soil of England. . . . Strong enough to resist the power of the church in infancy, stronger still to resist the shock of Norman invasion, crushed then, but not destroyed, by foreign influence, the great principles of Anglo-Saxon law, ever changing and assimilating, have survived in the noblest work of the race,—the English common law."29

The idea that the greatest English and American political institutions derived from ancient Germany was highly popular in the late nineteenth century, forming the basis of what is known as the Teutonic origins thesis of American government.30 Advanced by an array of writers and associated with John Burgess at Columbia and Herbert Baxter Adams at Johns Hopkins, the Teutonic origins thesis asserted that Americans were to play a unique role in world history because they were the spiritual and institutional descendants of the free and strong warrior peoples described in the writings of Tacitus, those hardy men and women who shunned gold, avoided pompous ostentation, and were steadfast in battle.31 In particular, like the Teutons of the Germania, the English and Anglo-American people were understood to be specially endowed with a racial genius for law. They were thought to have the basic self-discipline necessary for political liberty and to have an innate capacity for state-building and the maintenance of legality. The Teutonic origins thesis held a dominant place in the social sciences in the years that Henry Adams taught "Medieval Institutions" and Henry Cabot Lodge pored over his Latin texts. Despite its prominence, however, contemporary scholarship on the theory tends to fall short in a critical respect. With the exception of Richard Cosgrove, historians have not done quite enough to stress the ways in which the Teutonic origins thesis formed a scholarly narrative not just about racial development but also about legal history, and that it was based firmly on the work of legal historians and anthropologists.32 This professional class, from Coke to Maine to Vinogradoff to Maitland, the intellectual forebears of contemporary legal academicians, were critical in helping generate the academic belief
that white Anglo-Americans were a people especially capable of law and government. 33

I use the terms legal history and anthropology somewhat interchangeably in describing the academic origins of the Teutonic thesis, and the conflation is deliberate. Around the time of the Spanish-American War, the social sciences generally were just beginning to become professionalized, and the boundaries between the disciplines were not so clear as they would become later in the twentieth century. 34 This was true of anthropology, which frequently produced works with historical ambitions, and also of history, which often referred to the anthropology of aboriginal peoples in its narrative and analysis. The link between these two seemingly distinct areas of knowledge was a central unifying idea: that of progressive social evolution. The link, that is, was the study of the laws that guided societies in their growth toward more complex and rule-bound forms of self-government—and in the case of the Teutonic thesis in particular, the evolution of the open-air councils, folk-moots, and early parliamentary capacities that fed into the creation of the ordered state. One need only think of the titles of two books of the preceding era to perceive the points at which the two disciplines overlapped: Henry Maine's Ancient Law of 1861 and Henry Morgan's Ancient Society of 1877, the first a classic work of legal history that relied heavily on anthropological data and analysis, the second a classic work of anthropology whose main focus was the law (and whose author was a New York corporations lawyer). 35 One also might think of Albert Kocourek and John Henry Wigmore's extraordinary edited series Evolution of Law, an important set of books published in the 1910s but that drew the majority of its scholarly material from the late nineteenth century, from the work of legal historians, such as Maine, and anthropologists and ethnological jurisprudents, such as John Wesley Powell and Joseph Kohler. 36

One also might turn in this regard to the words of Lodge's teacher Henry Adams, writing in Essays in Anglo-Saxon Law. Himself an admirer of the Romanized Normans, Adams nevertheless advanced historical ideas essentially congruent to those of the Teutonic origins theory to which Lodge even more explicitly subscribed. Describing ancient Germanic society and the place of the modern legal historian in uncovering its present-day symbolic, ethno-juridical meaning, Adams mustered more than his usual eloquence. "The long and patient labors of German scholars," he writes in "The Anglo-Saxon Courts of Law," "seem to have now established beyond dispute the fundamental historical principle, that the entire Germanic family, in its earliest known stage of development, placed the administration of law, as it placed the political administration, in the hands of popular assemblies composed of the free, able-bodied members of the commonwealth." 37 Adams continues:

This great principle is, perhaps, from a political point of view, the most important which historical investigation has of late years established. It gives to the history of Germanic, and especially English, institutions a roundness and philosophic continuity, which add greatly to their interest, and even to their practical value. The student of history who now attempts to trace, through two thousand years of vicissitudes and dangers, the slender thread of political and legal thought, no longer loses it from sight in the confusion of feudalism . . . but follows it safely and firmly back until it leads him out upon the wide plains of northern Germany, and attaches itself at last to the primitive popular assembly, parliament, law-court, and army in one; which embraced every free man, rich or poor, and in theory at least allowed equal rights to all. Beyond this point it seems unnecessary to go. The State and Law may well have originated here. 37

In the eyes of many, including Lodge the young doctoral candidate, America originated here as well. And from those wide plains of northern Germany, the United States received its special destiny, to bring to those peoples of the world sitting in darkness the law of a nation whose racial genius was jurisprudential—whose innate, Teutonic ethno-juridical abilities lay in the construction and administration of modern bureaucratic governance. 38

Teutonic ethno-juridical discourse bears some similarity to other forms of ethno-juridical discourse, especially those used to characterize the racial abilities of Native Americans, but there are at least two ways in which Teutonic ethno-juridical rhetoric is historically unique. 39 The first concerns the nature of what dark-skinned peoples were said to lack. In the ethno-juridical characterization of Native Americans, for instance, Indians were described primarily as a race incapable of holding title to land, and the concept of fee simple absolute was described as peculiarly Euro-American in character. Conversely, the specific point of racial contrast in Teutonic ethno-juridical rhetoric is the state. In Teutonic ethno-juridical systems, Anglo-Saxon peoples are characterized ethno-juridically, above all, by their capacity for state-building. They are described as a people with a special genius for advancing efficient administration, and the state itself is seen as Anglo-Saxon in character. At the same time, dark-skinned others are described as incapable of living within an ordered society and thus existing in a status of
essential criminality. The second significant difference between Teutonic ethno-juridical rhetoric and other forms of ethno-juridical discourse lies in its vision of racial intractability. In other forms of ethno-juridical discourse, those describing Native Americans, for instance, racial character is subject to change, sometimes indeed to rapid transformation (thus American Indians in the late nineteenth century were seen as potentially capable of assimilating into the larger white American legal community). In Teutonic ethno-juridical discourse, racial-legal character lacks all plasticity. Racial groups are understood to have ethno-juridical qualities anchored in the very depths of their individual and collective souls. While not explicitly genetic, Teutonic ethno-juridical discourse suggests that race is innate and cannot change over the course of a lifetime or even over the course of a century. In contrast to other ethno-juridical systems, Teutonic ethno-juridical discourse advances a vision of permanent racial-legal hierarchy.

In this respect, Teutonic ethno-juridical rhetoric is evident not only in those works of anthropological legal history that advanced the notion that Anglo-Saxon peoples were uniquely endowed with law—a positive assertion—but also in those works advancing the conjoint proposition, a negative corollary, that darker races were incapable of legal order, that they were slavish children living in earlier stages of evolutionary development. This was particularly the case with what were known as the Malay people of the Philippines, who were considered to be governed not so much by law as by opinion and caprice, who were thought to be racially incapable of the order necessary to live under the rule of a state, a view ultimately derived from Johann Friedrich Blumenbach’s “On the Natural Variety of Mankind.” It is in this sense that the Teutonic origins thesis was not just racially self-aggrandizing but also actvily, destructively racist, an extreme form of what Robert Cover has called the jurispathic. As Kocourek and Wigmore write in their Evolution of Law, “The greatest productive value of an inquiry into the juridical life of remote ages and of arrested developments lies in providing an indispensable standard by which the processes of human reason, so far as they enter the sphere of legal evolution, are guided and corrected.” More dramatically, Daniel Brinton, president of the American Association for the Advancement of Science and a primary opponent of Franz Boas’s theories of race and culture, in 1896 called on anthropology to become the handmaiden of government by proclaiming, “[T]here is in some stocks and some smaller ethnic groups a peculiar mental temperament, which has become hereditary and general, of a nature to disqualify them for the atmosphere of modern enlightenment... an inborn morbid tendency, constitutionally recreant to the codes of civilization, and therefore technically criminal.” For Brinton, in a very practical sense, peoples without law were peoples outside of America, a people to remain apart.

This was the intellectual atmosphere in which Lodge lived, and he brought varying shades of these ideas with him to the Senate, in his formulation of American imperialist policy, his discussion of the character and capability of the dark-skinned peoples the United States came to dominate, and in his analysis of the appropriate administrative measures to be taken by colonial rulers in insular governance. Examining Lodge’s work in Congress, one finds him consistently expressing a Teutonic ethno-juridical vision—and one finds just how deeply his political concerns were driven by a Teutonic racial worldview. In an 1896 speech on immigration restriction, for instance, Lodge argued that race “is something deeper and more fundamental than anything which concerns the intellect.” “When we speak of a race,” he proclaimed, “... we mean the moral and intellectual characters, which in their association make the soul of a race, and which represent the product of all its past, the inheritance of all its ancestors, and the motives of all its conduct. The men of each race possess an indestructible stock of ideas, traditions, sentiments, modes of thought, an unconscious inheritance from their ancestors, upon which argument has no effect.” The greatest race of all, of course, was the Anglo-Saxon, “descended from the Germanic tribes whom Caesar fought and Tacitus described.” Storming in waves across the channel into England, these various tribes, over centuries, “were welded together and had made a new speech and a new race, with strong and well-defined qualities, both mental and moral.” Lodge wished to restrict immigration, because it would degrade this Anglo-Saxon purity, would erode the racial “motives” of which the United States system of government indeed was just a single expression. “Mr. President,” announced Lodge, “more precious even than forms of government are the mental and moral qualities which make what we call our race. While those stand unimpaired all is safe. When those decline all is imperiled.”

Lodge’s discussion of Philippine policy followed a similar line of argument. When discussing the question of whether the United States should annex the Philippine islands and rule their inhabitants as a colonial power, for instance, Lodge turned to the fundamental racial motives animating Philippine society and to an ethno-juridical consideration of the nature of race itself. “The capacity of a people for free and representative government is not in the least a matter of guesswork,” argued Lodge in 1900, two years after the Treaty of Paris had ended Spanish-American hostilities.”
forms of government to which nations or races naturally tend may easily be discovered from history." Echoing Adams's discussion in Essays in Anglo-Saxon Law, Lodge continued: "You can follow the story of political freedom and representative government among the English-speaking people back across the centuries until you reach the Teutonic tribes emerging from the forests of Germany and bringing with them forms of local self-government which are repeated today in the pure democracies of the New England town meeting." This historical perspective revealed not simply the permissibility but the need for American colonial power. "The tendencies and instincts of the Teutonic race which, running from the Arctic Circle to the Alps, swept down upon the Roman Empire, were clear at the outset," Lodge stated with blunt facticity. "Yet the individual freedom and the highly developed forms of government in which these tendencies and instincts have culminated in certain countries and under the most favorable conditions have been the slow growth of nearly fifteen hundred years." "You can not change race tendencies in a moment," Lodge warned. "[The] theory, that you could make a Hottentot into a European if you only took possession of him in infancy and gave him a European education among suitable surroundings, has been abandoned alike by science and history as grotesquely false. . . . We know what sort of government the Malay makes when he is left to himself." 48

In this respect, Lodge's ethno-juridical views were common to other imperialists as well, for instance to his colleague Albert J. Beveridge, whom Theodore Roosevelt described as having "views on public matters [that] are almost exactly yours and mine." 49 Filipinos, proclaimed Beveridge, "are not yet capable of self-government. How could they be? They are not a self-governing race. . . . What alchemy will change the oriental quality of their blood, in a year, and set the self-governing currents of the American pouring through their Malay veins?" 50 Anglo-Saxons, on the other hand, for Beveridge, were uniquely capable of state-building. The Anglo-Saxon people "is the most self-governing but also the most administrative of any race in history," he argued. "Our race is, distinctly, the exploring, the colonizing, the administrative force of the world." American imperialist policy, for Beveridge, thus arose "not from necessity, but from irresistible impulse, from instinct, from racial and unwritten laws inherited from our fore-fathers." 51 Indeed, even more so than Lodge, Beveridge believed that the U.S. Constitution was merely a single intellectual expression of Anglo-Saxon racial character. In arguing that the Constitution granted Congress ex-

tremely broad powers in the administration of colonial peoples, for instance, Beveridge asserted that the seemingly limiting provisions of the Bill of Rights should be read in light of what he called Anglo-Saxon "institutions," the fundamental ethno-juridical character of Americans as a race. "Institutional law is older, deeper, and as vital as constitutional law," argued Beveridge. He proclaimed:

Our Constitution is one of the concrete manifestations of our institutions; our statutes are another; decisions of our courts are another; our habits, methods and customs as a people and a race are still another. . . . It is our institutional law which, flowing like our blood through the written Constitution, gives that instrument vitality and power of development. Our institutions were not established by the Constitution. Institutional law existed before the Constitution. . . . Partisanship shrieks "imperialism," and asks where we find words to prevent the development of a czar [in the Philippines]. . . . I find it in the speech of the people; in the maxims of liberty; in our blood; in our history; in the tendencies of our race. 52

When reading ethno-juridical arguments such as those of Beveridge and Lodge, it is important to keep in mind that they represented anything but the strange, antiquated opinions of a passing time. They instead were the arguments of a people who considered themselves to be the forces of progress, opinions that were legitimated by one of the most modern groups of the early twentieth century, anthropological social scientists. For Lodge, it was the academic teachings of this new class, ensconced though it might have been in seemingly removed university life, that enabled his own personal modernization—a modernization that at the national, political level was based on a break with the civic tradition that Senators Hoar and Hale so admired: the notion that if the United States ever acquired an overseas colonial empire, it would forfeit its very identity.

Progressive Anglo-Saxon Interpretation in the Insular Cases

The United States, of course, did acquire that empire, and when it did, American jurists faced a series of pressing constitutional questions—questions that reenacted Lodge's own personal drama of modernization at the level of legal doctrine. Here I turn to the Insular Cases, and particularly to the case of Downes v. Bidwell, decided in 1901. With the conclusion of the Treaty of Paris on December 10, 1898, and the exchange of formally ratified
agreements between Spain and the United States on April 11, 1899, the American national government found itself in a new geopolitical position. By the terms of the treaty, Spain had agreed to “relinquish” its sovereignty over Cuba, thus remaining accountable for prewar debts to the island while at the same time enabling the United States to establish a military protectorate in Havana; it had ceded its victors outright the islands of Puerto Rico and Guam; and for the sum of twenty million dollars, it had “sold” to the United States the islands of the Philippines. The American government took somewhat different approaches to each of its new acquisitions. Despite the desire of many imperialists, it did not annex Cuba directly but instead extended it a form of semisovereignty, first ruling it through military force, then through a form of economic colonialism following the transfer of power to a new government under President Tomás Estrada Palma. To Puerto Rico and Guam, the United States granted a liminal status still operative today. And in the Philippines, the source of the greatest geopolitical difficulty after 1898, the United States established itself as an ultimate sovereign power, incurring the resentment of many Filipinos, who began a protracted struggle against their American guardians. Despite this general diversity of approach, in each of its new possessions American actions shared one basic commonality: The United States instituted a series of wide-ranging reforms of social engineering, paying special attention to replacing the Spanish legal system with which the insular territories had been governed and replacing that system with American law.53

Until the Spanish-American War, the history of United States expansion had been a continuous one. In 1787, the nation grew to include the Northwest Territories. The Louisiana Purchase of 1803 extended the boundaries of the United States across the Mississippi. Texas became a part of the nation in 1845. Mexico ceded its lands in the West and Southwest in 1848 and 1853. Washington and Oregon joined the nation in 1853 and 1859 respectively. Alaska was purchased in 1866. According to one scholar, throughout this continuous expansion, the United States was guided by a “pattern of territorial development” outlined already in the Northwest Ordinance.54 The ordinance outlined three basic steps in the acquisition of a territory. The first, which lasted from one to eight years, was that of federal plenary control, in which Congress appointed a governor, along with judiciary and other governmental officers, and assumed a strong hand in decision making for the region. The second period included the ability of territorial residents to elect their own legislature and form a constitution (the governor of the territory, however, was still appointed by Congress, with the ability to over-turn the efforts of the legislative body). The final stage outlined by the Ordinance was statehood, the creation of an independent government within the federal system. This pattern of territorial transformation, in which a territory was acquired, briefly ruled under federal plenary control, and then granted statehood, was definitively broken in 1898. Whereas the territories of the western United States always had been conceived as being destined for eventual membership in the Union, such was not the case with Guam, Puerto Rico, and, especially, the Philippines. None of these insular possessions was considered a possible candidate for statehood in the foreseeable future. With the Treaty of Paris, the United States thus broke a pattern of republican territorial acquisition and entered into a truly imperial phase of its national political development.

Among the many reasons the insular possessions were not perceived to be destined for statehood, one played a central role: a sense of Anglo-Saxon racial superiority. Shared by imperialists and anti-imperialists alike, the belief in the racial inferiority of residents of the insular territories, especially Filipinos, was common wisdom. There were exceptions to this general rule, but for the most part, popular knowledge seems to have associated the Philippines in particular with the basest forms of savagery, especially with the head-hunting of the Ilongots, Igorots, and Ifugaos.55 Significantly, this perception of Filipinos as racially inferior was explicitly ethno-juridical in character, focused on native inability for life within an ordered state. Indeed, in this regard, the society of traditional Filipino peoples aroused much interest as a kind of ethno-juridical curio. “Every Igorot barrio has its judicial body of old men, who dispose of all cases from petty theft to murder,” wrote one commentator, in a work whose staccato presentation suggests its myopia. “Most penalties take the form of a fine payable in cattle, or other property. Trial by ordeal is commonly practiced. The podung, or bloody test, consists in boring holes in the scalps of the suspect and his accuser. The verdict goes to the one who bleeds the least. When one of a number of persons is believed to be a criminal, each of them is given a mouthful of dry rice to chew. After mastication this is spat out upon the hands of the judges and he whose mass exhibits the least saliva is deemed convicted, in accordance with their proverb, which says, 'A guilty man has a dry mouth.'56" In this respect, in accordance with the views of legal scholars of the day, the natives of the Philippines were held to be in the very early stages of the development of criminal law and in the construction of an absolute legal sovereign, with its attendant willingness to submit to state command.57
Such ethno-juridical assertions were present not only in popular writings but also in official government anthropology. When the United States began to govern the Philippines, it commissioned a series of studies to gather data that might be of use in insular administration, undertaking a general ethnographic survey of the islands.58 The Taft Commission itself was headed by William Howard Taft, who met with the high praise of Theodore Roosevelt and Justice Henry Billings Brown, author of the opinion of the Court in Downes.59 Among the products of the Commission’s survey were Albert E. Jenks’s “Bontoc Igorot,” William A. Reed’s “The Igorotes of Zambales,” Emerson Christie’s study of native languages, Otto Scheerer’s “Notes on the Nabaloi Dialect of Benguet,” E. Y. Miller’s “A Brief Report on the Bataks of Paragua,” and a translation by N. M. Saleeby of “33 manuscripts, in part originals and in part copies” on the “History and Laws of the Moros” (“a knowledge of Moro law, customs, and ideas, such as these translations will afford,” asserted the Commission, “should be very useful in dealing with the Moro tribes”).60 These studies deserve future detailed analysis, though that cannot be my purpose here.61 Suffice it to say that, while many were strictly factual, revealing great scholarly care,62 some included descriptions of native peoples, especially those living in small-scale tribes, that rested on the same vision of racial hierarchy that animated popular accounts of the region. “It is universally conceded,” stated the Commission, for example, “that the Negritos of to-day are the disappearing remnants of a people which once populated the entire archipelago. They are, physically, weaklings of low stature, with black skin, closely-curling hair, flat noses, thick lips, and large, clumsy feet. In the matter of intelligence they stand at or near the bottom of the human series, and they are believed to be incapable of any considerable degree of civilization or advancement.”63

It was in this ethno-juridical context that the Supreme Court heard the series of disputes that together would be known as the Insular Cases, especially the case of Downes v. Bidwell. The specific legal questions of the dispute in Downes revolved around the Uniformity Clause of Article I, section 8 of the U.S. Constitution, which requires that “all Duties, Imports and Excises shall be uniform throughout the United States.”64 While the case included a variety of legal and factual complexities not worth discussing here, the basic issue the Court faced was relatively straightforward: Was Puerto Rico part of the “United States” or not? If the Court held that the Foraker Act indeed made Puerto Rico part of the United States by establishing a civil government on the island, then Downe’s oranges were exempt from the collector’s tariff, because the imposition of duties on goods arriving from Puerto Rico would violate the Uniformity Clause. It would be an unconstitutional use of federal power to place duties on imports arriving from one part of the United States to another, analogous to the federal government today placing special duties on goods arriving from California to New York. On the other hand, if Puerto Rico were a “foreign country,” despite the Foraker Act, then duties placed on goods arriving from Puerto Rico fell under the legitimate power of Congress, and the New York customs agent could have his way. In this interpretive reading, the Foraker Act could be understood as both establishing a civil government on the island of Puerto Rico under ultimate American control, yet at the same time imposing duties on the region as a territory that was not part of the United States itself.

At one level, then, Downes was a case about money. As always in great constitutional matters, however, the issue at stake was far more general than the financial, a question much broader than whether the Foraker Act imposed duties on merchandise imported to New York from San Juan, broader indeed than questions about the Uniformity Clause. As Justice Brown noted in the opinion of the Court, the primary query was whether the revenue clauses of the Constitution “extend of their own force to our newly acquired territories.” In other words, the question was whether Congress could rule those regions America acquired in 1898 without regard to the revenue provisions of fundamental U.S. law unless it explicitly intended to be bound by that law when it established insular civil governments.65 This was a significant issue, in fact even more significant than at first appears. For behind Justice Brown’s question implicitly lay an even larger one: whether any, all, some, or none of the protections afforded by the Constitution extended to the new American territories, particularly to those that might never become states. If it were found that the Uniformity Clause did not apply as a matter of legal course to congressional legislation concerning Puerto Rico, for instance, then what of trial by jury? Could Congress create a system of justice for Puerto Rico, the Philippines, or Guam that failed to provide for this symbolically central right of the Anglo-American legal order? Just how free a hand could the United States take in the administration of its possessions? In fact, the issues in Downes were weightier still, for behind all these questions lay the most fundamental query of all, a question of civic identity: to what extent were the people of the insular territories members of the American nation, a community bound together by a shared commitment to live under liberal constitutional principles? Would these dark-skinned people automatically be entitled to the basic protections of
the founding political document of the United States, or would they live, potentially forever, under the plenary power of Congress? Would they have a legal status one typically does not associate with American republican principles: the status not of citizens but of subjects?

In adjudicating *Downes*, the Court, which was intensely divided among various factions, broke along two basic constitutional lines: what one might call judicial traditionalists and judicial modernists. The outspoken traditionalist on the Court was John Marshall Harlan of Kentucky, the great dissenter, author of the lone minority opinion in *Plessy v. Ferguson*. The traditionalist position essentially asserted, in words of the day, that the Constitution "follows the flag," that all provisions of the Constitution extend by their own force, or *ex proprio vigore*, into areas over which the United States exercises its civil control. For Harlan, the decision whether or not to acquire territories that included alien races could be made in any way Congress chose, but once those territories were acquired, the Constitution applied to them completely. No distinctions could be made between territories and states in this regard. "The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty," wrote Justice Harlan, "and hold them as mere colonies or provinces,—the people inhabiting them to enjoy only such rights as Congress chooses to accord to them,—is wholly inconsistent with the spirit and genius, as well as with the words, of the Constitution." After all, argued Justice Harlan, how could Congress not be bound by the Constitution in the administration of its new possessions, when it was the Constitution that created and granted those administrative powers, and in fact created the Congress itself? The threat feared most by the traditionalists in this regard was simple, and does not require extensive elaboration: It was the threat of tyranny. It was the threat that without the full force of the Constitution, Congress could maintain territories such as Puerto Rico and the Philippines indefinitely, and that it would maintain them, as described by another dissenter, Chief Justice Fuller, "like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period," subjected entirely to Congress's own will.

The traditionalists relied on a number of arguments to advance their views, some of which were political in nature. Those who would become imperialists under the U.S. Constitution, they asserted, should consider the consequences before they acted, for the fundamental law of the United States would be interpreted strictly no matter what the changing geopolitical circumstances. "Whether a particular race will or will not assimilate with our people," wrote Justice Harlan, "and whether they can or cannot with safety to our institutions be brought within the operation of the Constitution, is a matter to be thought of when it is proposed to acquire their territory by treaty. A mistake in the acquisition of territory, although such acquisition seemed at the time to be necessary, cannot be made the ground for violating the Constitution or refusing to give full effect to its provisions." Traditionalists also relied on a line of precedent suggesting that the term "United States" in the Constitution denotes both states and territories, rather than merely formal members of the Union. This position was suggested by Chief Justice Marshall in *Loughborough v. Blake*. There, in a case concerning an action of trespass to contest congressional ability to impose a direct tax on the District of Columbia, the Court upheld congressional authority, in dicta defining the "United States" broadly. "The power then to lay and collect duties, imposts, and excises," wrote Chief Justice Marshall, "may be exercised, and must be exercised throughout the United States. Does this term designate the whole, or any particular portion of the American empire?" "Certainly," he continued, "this question can admit of but one answer. It is the name given to our great republic, which is composed of both States and territories." In the eyes of the traditionalists, Chief Justice Marshall's assertion that the term "United States" in the Constitution was wide and encompassing served as a general restraint on American power overseas.

For the judicial modernists, however, the traditionalist concern that Congress might maintain its insular possessions "like a disembodied shade" was precisely the point. The modernists included Justice Edward Douglass White and Justice Henry Billings Brown, author of the majority opinion in *Plessy* and a man whose autobiography begins, "I was born of a New England Puritan family in which there has been no admixture of alien blood for two hundred and fifty years." Brown was born in 1836 in South Lee, Massachusetts, generally described as a small manufacturing village. Brown's father operated saw and flour mills there, and later moved to Stockbridge and, in 1849, to Ellington, Connecticut. Brown enrolled in Yale College in 1852, at the age of sixteen, and graduated in 1856, along with his eventual colleague on the Supreme Court, Justice David Brewer. After legal studies at Yale and Harvard, Brown moved to Detroit and embarked on a successful legal career, working as U.S. deputy marshal and U.S. attorney for the Eastern District of Michigan. He later entered private practice and developed a specialty in shipping and admiralty law. Brown was a staunchly Republican unionist, and in 1875 he was appointed to become a federal district judge by President Ulysses S. Grant. A nationally respected expert in
the difficult field of admiralty law, and a successful professor at the University of Michigan, Brown was appointed to the U.S. Supreme Court by President Benjamin Harrison in 1890. He was known to be an agreeable jurist, well liked by his colleagues, and judicious in temperament. Assuming office upon the death of Justice Samuel Miller, known for his blend of liberal state-building and racial bigotry, Justice Brown in many respects maintained the views of his predecessor.

Looking forward into the coming century, both Justice Brown and his fellow modernists were concerned that too strict an adherence to the Constitution and too limited a reading of congressional powers would hinder the United States in its ability to act within a new world order. For modernists, the issue in the Insular Cases was not simply that of the revenue clauses, or even the Bill of Rights; it was the future expansion and progressive development of the United States itself. "Patriotic and intelligent men may differ widely as to the desireableness of this or that acquisition," asserted Justice Brown, "but this is solely a political question. We can only consider this aspect of the case so far as to say that no construction of the Constitution should be adopted which would prevent Congress from considering each case upon its merits." "A false step at this time," he continued, "might be fatal to the development of what Chief Justice Marshall called the American empire. Choice in some cases, the natural gravitation of small bodies toward large ones in others, the result of a successful war in still others, may bring about conditions which would render the annexation of distant possessions desirable." Take a case of discovery," wrote Justice White in his concurring opinion in Downes, offering an example of the negative potential consequences of the views advanced by Justice Harlan. "Citizens of the United States discover an unknown island, peopled with an uncivilized race, yet rich in soil, and valuable to the United States for commercial and strategic reasons. Clearly, by the law of nations, the right to ratify such acquisition and thus to acquire the territory would pertain to the government of the United States. Can it be denied that such right could not be practically exercised if the result would be... the immediate bestowal of citizenship on those absolutely unfit to receive it?" The judicial modernists, then, were caught in a contradiction. Like Lodge, they perceived the new world the United States was about to enter. On the other hand, like Lodge's enemies in the Senate, judicial traditionalists had raised the fear that departing from strict constitutional construction could lead to tyranny and so undermine national self-definition. Significantly, both Justice Brown's and Justice White's solutions to this conundrum strongly relied on Teutonic ethno-juridical discourse, the ethno-juridical vision of the Teutonic origins thesis. Indeed, for Justice Brown, the solution to the Downes case seemed almost simple: the residents of the insular territories, in effect, were not entitled to the guarantees of the Constitution because they were a racially alien people incapable of maintaining Anglo-Saxon notions of law—because they fell outside the bounds of the American ethno-juridical order. According to Justice Brown, there might be an extremely limited number of universally applicable personal rights, to which the people of Puerto Rico or the Philippines perhaps might be entitled. But on the whole, most guarantees of the Constitution, he believed, were simply "remedial rights which are peculiar to our own system of jurisprudence." The greatest portion of American constitutional law, that is, applied only to a very limited group of people. When Congress legislated for dark-skinned others, therefore, it could not be bound by a document written for white Englishmen over one hundred years ago: the document applied only to a superior civilization that had reached a higher stage of social development. When the United States acquires new possessions "inhabited by alien races," Justice Brown wrote, "differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice according to Anglo-Saxon principles may for a time be impossible." This was the negative corollary to the Teutonic origins thesis.

Justice Brown disposed of Justice Harlan's concern that such a view could lead to tyranny in a similar manner, invoking the positive principles of the Teutonic origins thesis. Specifically, Justice Brown believed, as Lodge had noted in the Senate, that "more precious even than forms of government are the mental and moral qualities which make what we call our race." And like Lodge and Beveridge, he argued that the Constitution ultimately was merely a single, non-necessary expression of the Anglo-Saxon racial genius for law—that beneath the Constitution lay the more fundamental racial principles of what Beveridge called "institutional law," the ethno-juridical spirit passed down to Anglo-Saxon peoples from Tacitus's Germanic tribes. In their administration of islands overseas, the American people in Justice Brown's view thus would be restricted by the innate ideals they carried in their blood, ideals that were foundational to and in fact superseded the Constitution itself. "Grave apprehensions of danger are felt by many eminent men," wrote Justice Brown in Downes. "a fear lest an unrestrained possession of power on the part of Congress may lead to unjust and oppressive legislation in which the natural rights of territories, or their inhabitants, may be engulfed in a centralized despotism. These
fears, however, find no justification." "There are certain principles of natural justice inherent in the Anglo-Saxon character," he explained, "which need no expressions in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests." This is to say that Justice Brown disposed of the concerns of the traditionalists, those who relied on a strict reading of the Constitution for their vision of national identity, by asserting that any action undertaken by an Anglo-Saxon American government overseas was ipso facto within the bounds of a transcendent, racially based legal order.78

Although Justice White's opinion differed in some respects from Justice Brown's, and was more sophisticated in its reasoning, it too found its basis in Teutonic ethno-juridical principles—and indeed, in this regard Justice White sought to grant Congress even greater control over its insular affairs than did his modernist colleague.79 Making a distinction between "incorporated," "unincorporated," and foreign territories, Justice White argued along lines advanced by Abbott Lawrence Lowell in the Harvard Law Review, proclaiming that the Constitution applied only to those territories Congress explicitly had "incorporated" into the Union.80 This became known as the "doctrine of territorial incorporation," a judicial principle first fully accepted by the Court in Dorr v. United States (1904).81 The Dorr case involved the great Anglo-Saxon right of trial by jury in criminal cases, and posed the question of whether that right extended to the Philippine archipelago. The Court held that, because the Philippines had not been explicitly incorporated into the American constitutional order, trial by jury was not guaranteed. It held, in other words, that a right symbolically central to Anglo-Saxon claims of racial superiority did not apply to dark-skinned peoples, because those peoples were viewed as unfit by nature for participation in American civic life. Trial by jury was not guaranteed, because Filipinos as a race were thought to be incapable of law itself. Note, again, that for Justice White, as for Justice Brown, as for Henry Cabot Lodge, it was a seemingly antiquated racial worldview that allowed the constitutional contradictions of twentieth-century imperial expansion to be overcome. If the Spanish-American War and the desire for territories overseas created a gap between state ambition and fundamental principles, between modernizing, progressive will and traditional constitutional standards, that gap was bridged at the level of jurisprudence by the social scientific notion of Teutonic legality. It was bridged by what one might call Teutonic constitutionalism, a method of ethno-juridical legal decision making that was as modern as the world it helped to bring about.

Conclusion: Death, Law, and the Philippines

I wish to conclude this chapter by briefly exploring one aspect of the ideological significance of Teutonic constitutionalism, moving forward a short period of time to the immediate aftermath of the Spanish-American War, to the Philippines.82 After ratifying the Treaty of Paris, the United States began to face a long, protracted struggle with the native inhabitants of those islands, who previously had been engaged in a movement for national independence against Spain. This was an independence movement the United States chose to resist as well, and it endured the consequences of that choice by undergoing the very ideological reversal feared by so many anti-imperialists. That is, the United States switched places with Spain and became a power working against forces of national political liberation. Ideology, like dreams in Freudian psychoanalysis, also operates through a process of reversal, positing the very negation of the social world it conceals, and this was evident in the relation between the ethno-juridical language and the military reality of the Philippine conflict. Because for all the references to the Anglo-Saxon genius for law made during the Spanish-American and Philippine-American wars—whether in the formation of imperialist policy, in the adjudication of claims arising from imperial expansion, or in the writings of men in the armed forces83—American soldiers in the Philippines, in fact, came to shed many of the restraints of the civilization to which they so often referred and engaged with "surprising alacrity" in what historian Stuart Miller calls a "penchant for lawlessness."84 This was especially the case on the island of Samar, the "most vicious, and certainly the most controversial, campaign of the Philippine War," the site of Magellan's landing in 1521 and of Douglas MacArthur's in 1944.85 Over the course of 1902, Americans at home were treated to repeated news reports of the terrible cruelty inflicted on Filipinos by the American military: rape, the burning of villages, the indiscriminate murder of civilians, the killing of the wounded, the use of the water cure as a form of torture. These were crimes of war, and indeed the Philippine conflict came to a conclusion through what most agreed was an illegal act, in which high-ranking American military officers dressed in enemy uniform and daringly infiltrated enemy headquarters, capturing the commander of the Philippine forces, General Aguinaldo.86 In the Philippines, Americans often seemed very much like their own worst image of the Malay savage: a people without law.87

Naturally, against the harsh words from critics such as Moorfield Storey, there were a variety of attempts to justify or explain away such behavior. For
instance, the Roosevelt Administration asked for assistance from Yale University's distinguished professor Theodore S. Woolsey, son of the illustrious Theodore Dwight Woolsey, for whom the university named Woolsey Hall (one can still walk through Woolsey Hall today and gaze upon moving plaques commemorating men who died in the Philippine Insurrection, including on the island of Samar). Woolsey was a central academic defender of the Philippine-American War and an expert in international law. In regard to the capture of General Aguinaldo, Woolsey counseled the Administration that the United States was not at war with "a civilized power," and that because Aguinaldo "was not a signatory of the Hague Convention . . . there was no obligation on the part of the United States Army to refrain from using the enemy's uniforms for the enemy's deception." On the other hand, noted Woolsey, Filipinos were bound to follow the rules of the Hague Convention since they were fighting a civilized power and a signatory of that agreement. The strategy used by Americans in capturing Aguinaldo, in other words, was illegal "only with a lawful belligerent." 88

The task of justifying military illegals similarly fell to Henry Cabot Lodge, who managed to become chair of a controversial Senate committee investigating U.S. war atrocities. 89 Lodge stacked the hearings with witnesses friendly to the Administration, but in the context of repeated reports of brutality from American soldiers who had seen it firsthand, even these witnesses seemed to undermine the very position they were brought to support through the wide gaps they displayed between rhetoric and reality. For instance, beginning his testimony with what he called his "ethnological premises," a close variant of the Teutonic origins thesis, the notorious General Arthur MacArthur gave this characterization of the conflict. "Many thousands of years ago," proclaimed MacArthur, "our Aryan ancestors raised cattle, made a language, multiplied in numbers, and overflowed. By due process of expansion to the west they occupied Europe, developed arts and sciences, and created a great civilization, which, separating into innumerable currents, inundated and fertilized the globe with blood and ideas, the primary basis of human progress, incidentally crossing the Atlantic and thereby reclaiming, populating, and civilizing a hemisphere." "The broad actuating laws which underlie all these wonderful phenomena," continued MacArthur, "are still operating with relentless vigor and have recently forced one of the currents of this magnificent Aryan people across the Pacific—that is to say, back almost to the cradle of its race—thus initiating a [new] stage of progressive social evolution. . . . [T]he human race, from time immemorial, has been propagating its higher ideals by a succession of intellectual waves, one of which is now passing, through our mediumship, beyond the Pacific, and carrying therewith everything that is implied by the beautiful flag which is a symbol of our nationality." "We are now living," glorified MacArthur, "in a heroic age of human history." 90 The grim statistics of the war, and the thousands of Filipino dead, suggested very much the opposite.

Soon after General MacArthur gave his testimony, Albert Beveridge, instructed by Lodge, closed the Senate investigation over a storm of protest, 29 but not before Lodge's witnesses thus revealed in retrospect one of the central functions of Teutonic ethno-juridical discourse in an age of modernization: the rhetorical elision of violence and the concealment of death. This was a concealment in which the academic forebears from whom contemporary legal academics descend—J.D.-Ph.D. candidates at Harvard, professors of international law at Yale, the variety of legal historians and anthropologists writing and teaching during this brutal period of state development—played a terribly unfortunate role.

Notes

1 For an approach to law and rhetoric that has influenced this analysis, see Peter Goodrich, Legal Discourse: Studies in Linguistics, Rhetoric, and Legal Analysis (1987).
2 I develop the concept of ethno-juridical discourse in greater detail in "Race, Citizenship, and Culture in American Law, 1883–1954: Ethno-Juridical Discourse from Crow Dog to Brown v. Board of Education" (Ph.D. diss., Yale University, 1998). In my analysis, I am centrally guided by Rogers M. Smith, Civic Ideals: Conflicting Visions of Citizenship in U.S. History (1997). According to Smith, throughout American history political leaders of varying ideological stripes have employed "engaging, reassuring, inspiring, often intoxicating" stories or "civic myths" to explain and justify racial, ethnic, and sex-based ascriptive limits to American national belonging. Political leaders have used these myths "to explain why persons form a people, usually indicating how a political community originated, who is eligible for membership, who is not and why, and what the community's values and aims are." Ibid. at 33. Ethno-juridical discourse can be understood as one type of civic myth.
3 In this respect, the role of ethno-juridical discourse in debates concerning national identity has been similar to that of what Fredric Jameson calls an "ideologeme," the smallest unit of class ideology in culture, or what Claude Lévi-Strauss, in his classic structuralist analysis of myth, more prominently called "mythemes." See Fredric Jameson, The Political Unconscious: Narrative as a Socially Symbolic Act (1981), at 87. On mythemes, see Claude Lévi-Strauss, The View from Afar, trans. Joachim Neugroschel and Phoebe Hoss (1985), at 144–47.
obvious is their lawlessness,” writes Lodge, “their disregard of the rights of others, especially of others about whom they are not informed, and as they know only money, their information is limited. I do not mean by this to say merely that they are arrogant; that is an old characteristic of the type. I use the word ‘lawless’ in its exact sense. They pay no regard to the laws of the land or the laws and customs of society if the laws are in their way.”

25 For Adams’s approach to the seminar, see Ernest Samuels, The Young Henry Adams (1948), at 247–58.
27 Lodge, supra note 19, at 239.
28 Frederick Pollock, The Land Laws, the English Citizen (1883), at 90–96. Lodge dодges Pollock’s rather stern criticism of his scholarly presentism in Early Memories, ibid. at 263. “Years after Sir Frederick Pollock sent me his book on ‘Land Laws,’ and I found in it a note discussing some opinion which I had expressed in my essay on ‘The Anglo-Saxon Land Law.’ So completely had I been drawn to other subjects and other interests that every vestige of knowledge of what I had myself written had been swept away, and I stared in blank ignorance at my own statement.”
33 Among other scholarly studies of the period, see George Laurence Gomme, Primitive Folk-Moats; or, Open-Air Assemblies in Britain (1880); Frederic Sebohm, Tribal Custom in Anglo-Saxon Law (1911 [1902]); and John M. Stearns, ed., The Germans and Developments of the Laws of England, Embracing the Anglo-Saxon Laws Extant . . . (1889). See also Henry Sumner Maine, Lectures on the Early History of Institutions, 6th ed. (1893 [1874]), 225–305.
34 See Ross, supra note 24.
35 Henry Sumner Maine, Village-Communities of the East and West, 2d ed. (1872); Lewis Henry Morgan, Ancient Society, Classics of Anthropology, ed. Ashley Morgan, intro. Elisabeth Tinker (1985 [1881]).
38 On the transformation of the Teutonic origins thesis between 1855 and 1850, from a descriptive statement of the nature of Anglo-Saxon law to a prescriptive theory advocating Anglo-Saxon world domination, see Horsman, supra note 30, at 62–77.
I examine the ethno-juridical characterization of Native Americans in Weiner, supra note 2, at 72–126. See Thomas Bendyshe, ed. and trans., The Anthropological Treatises of Johann Friedrich Blumenbach (1865).


Ibid. at 2819.

Ibid. at 2818. For Lodge, these descendants included not only successive waves of Germans and Danes, but Normans as well, who in Lodge's view were Germanic people who spoke French.

Ibid. at 2820.

Congress Rec., 56th Cong., 1st sess. (March 7, 1900): 2621.


Beveridge, ibid. at 106–7.

See generally a fascinating study which has influenced my own analysis, Winfred Lee Thompson, The Introduction of American Law in the Philippines and Puerto Rico, 1898–1905 (1989). For a study of social engineering in the Philippines paying special attention to educational issues, see Glenn Anthony May, Social Engineering in the Philippines: The Aims, Execution, and Impact of American Colonial Policy, 1900–1934 (1986). See also Peter W. Stanley, A Nation in the Making: The Philippines and the United States, 1899–1921 (1974), at 81–138. For a contemporary description of activities, see, e.g., United States Philippine Commission [Schurman Commission], Report (December 1901) (Washington: GPO, 1901), at 76–91. See also Philippine Commission, Report (January 1900) (Washington: GPO, 1900), at 122–26, 137–41. "And so it has come to pass," stated James T. Young at the eleventh annual meeting of the American Academy of Political and Social Science, "that we Americans went into the Spanish tropics as the political champions of oppressed peoples, with the Declaration in one hand, the United States Constitution in the other and something of a halo round our heads, but we have folded up the Declaration for possible future use and laid aside our halo to settle down to the business task of building railroads, introducing law and order, putting up telegraph poles, settling people on the farms, studying the possibilities of the soil, developing new crops, digging harbors, paving streets, suppressing disease and building school houses. We went to the tropics to preach political liberty and remained to work." James T. Young, remarks at the eleventh annual meeting of the American Academy of Political and Social Science, in The Annals of the American Academy of Political and Social Science, 30 (1907): 138.


For an important view on the development of criminal law at the time, see Richard R. Cherry, Lectures on the Growth of Criminal Law in Ancient Communities (1890).

These surveys also formed the basis for a large exhibition about the Philippines at the Louisiana Purchase Exposition of 1904. See Philippine Commission, Report of the Philippine Exposition Board (Washington: Bureau of Insular Affairs, War Department, 1905). See especially Albert E. Jenkins, "Ethnological Exhibit," ibid., at 19–20, and photographs, passim.


It would be particularly important in such a study to consider the relation of U.S. ethnographic surveys to the expansion of American commercial interests. One anthropologist working for the Commission asserted that Secretary of the Interior Dean Conant Worcester had "given a large amount of valuable and accurate information to inquiring manufacturers and explorers relative to the lines of goods suitable for the Philippines." Ibid. at 79. On Worcester, see Arthur S. Pier, American Apostles to the Philippines (1950), at 69–84.

For a related classification of the Court, see Frederic R. Coudert, "The Evolution of the Doctrine of Territorial Incorporation," Columbia Law Review 26 (1926): 833, at 845–26, which divides the body into "fundamentalists and modernists," as well as "strict constructionists" and "opportunists" or "laitudinarians.

Plessy, 163 U.S. (1896).

Downes, 182 U.S. at 380 (Harlan, J., dissenting).

Ibid. at 372 (Fuller, C. J., dissenting).

Ibid. at 384 (Harlan, J., dissenting).


Downes, 182 U.S. at 286.

Ibid. at 306 (White, J., concurring). According to Coudert, based on a conversation after the conclusion of the case, Justice White "was much preoccupied with the danger of racial and social questions" in his decision-making process. Coudert, supra note 66, at 832.

Downes, 182 U.S. at 282.

Ibid. at 287.


Downes, 182 U.S. at 280. Responding to this Teutonic ethno-juridical assertion, Justice Harlan wrote in ibid. at 381: "The wise men who framed the Constitution, and the patriotic people who adopted it, were unwilling to depend for their safety upon what, in the opinion referred to, is described as 'certain principles of natural justice inherent in Anglo-Saxon character, which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their interests.' They proceeded upon the theory—the wisdom of which experience has vindicated—that the only safe guarantee against governmental oppression was to withhold or restrict the power to oppress. They well remembered that Anglo-Saxons across the ocean had attempted, in defiance of law and justice, to trample upon the rights of Anglo-Saxons on this continent, and had sought, by military force, to establish a government that could at will destroy the privileges that inher in liberty.

Not surprisingly, therefore, Theodore Roosevelt and Justice White held each other in high political regard. On the close policy relationship between Theodore Roosevelt and Justice White, see Theodore Roosevelt to E. D. White (October 19, 1903) and E. D. White to Theodore Roosevelt (1907), Theodore Roosevelt Papers, supra note 59.


Dorr v. United States, 193 U.S. 138 (1904). Similar and related holdings were later expressed in the remainder of the Insular Cases, including Rassmussen v. United States, 197 U.S. 516 (1905) and Downell v. United States, 221 U.S. 325 (1911).


See, e.g., The Story of Our Wonderful Victories Told by Dewey, Schelley, Wheeler, and Other Heroes: A True History of Our War with Spain by the Officers and Men of Our Army and Navy (1899), at 509–608. For one soldier's less than patriotic view, see the anonymous "For Future Reference," ibid. at 531–32. See also William R. Wood, "The Saxons," ibid. at 554, for a more patriotic exemplar.

Stuart Creighton Miller, "Benevolent Assimilation": The American Conquest of the Philippines, 1899–1903 (1982), at 187. I have been especially influenced by Miller's work in my analysis.


On the raid and the man who led it, see Pier, supra note 61, at 13–28.


Miller, supra note 84, at 169–70.

Ibid. at 212–18, 239–45.


Miller, supra note 84, at 245.