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## An Early Tragedy of Comparative Constitutionalism: Frank Goodnow and the Chinese Republic

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# AN EARLY TRAGEDY OF COMPARATIVE CONSTITUTIONALISM: FRANK GOODNOW AND THE CHINESE REPUBLIC

Jedidiah Kroncke<sup>†</sup>

*Abstract:* This article recovers a lost episode in the neglected early history of comparative constitutionalism in the United States. In 1913, pioneering comparative lawyer Frank Goodnow went to China to assist the new Chinese Republic in the writing of its first constitution. Goodnow's mission reflected the growing interest of the United States in China's legal development in this era, and his constitution-writing project won broad support from the U.S. legal profession. Goodnow's tenure ultimately generated great controversy when he advised China's leaders to adopt a constitutional monarchy rather than continue on as a republic. This article describes this controversy and how the international engagement of the United States was increasingly shaped in the early twentieth century by the attempted export of U.S. legal models as a presumptively altruistic mechanism of modernization. Goodnow's allegiance to comparative legal science agitated against this more parochial view of legal internationalism, and in the end he was excommunicated from U.S. foreign policy affairs.

More broadly, this article shows how the early history of comparative constitutionalism in the United States had its roots in the early twentieth century discourse on colonial administration. Goodnow and other U.S. lawyers of the era turned to indirect engagements with foreign legal reform only after the popular rejection of colonialism that had been constitutionally sanctioned by the now infamous *Insular Cases*. This article further argues that these colonial roots and Goodnow's feckless misadventure in China hold key lessons for today's comparative constitutionalists. It provides a vivid example of how the technocratic illusion of engaging in depoliticized legal reform abroad is self-defeating and untenable. Further, it warns against the inherent tensions between a methodologically coherent comparative law and the desire to export U.S. constitutional models abroad, and how such tensions can undercut clear-sighted understanding of foreign legal developments.

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## I. INTRODUCTION

In 1996, the American Political Science Association (“APSA”) inaugurated the first annual Frank Johnson Goodnow Award for distinguished service.<sup>1</sup> The award was meant to “recognize distinguished service to the profession and the Association, not necessarily a career of scholarship.”<sup>2</sup> This distinction between scholarship and service has to be considered with some irony, as Goodnow was not only a preeminent comparative lawyer, but also can be considered the founding figure in study of administrative law in the United States.<sup>3</sup> Though Goodnow’s many institutional accomplishments were also significant, it is nevertheless true that his place in U.S. legal history is dim at best. While history is replete with significant and novel thinkers whose work and influence are lost to the vagaries of time, unraveling Goodnow’s particular fate has little to do with his work on domestic U.S. law, but is instead tied to one of the earliest chapters in U.S. comparative constitutionalism.<sup>4</sup>

This early chapter in U.S. comparative constitutionalism took place in the 1910s where many today might least expect it—China. While Goodnow had risen in the ranks of Progressive legal scholars early in his career, he found himself at mid-career spending several years participating in a new and fervent U.S. interest in the new Chinese Republic formed in 1911. In fact, in the opening decades of the early twentieth century, China had emerged as a key site within a newly emerging vision of U.S. law’s international influence. Rejecting the colonial impulses regnant in the expansionist wave of the late 1890s and the Supreme Court’s pro-colonialism decisions in the infamous *Insular Cases*, the United States instead embraced new forms of ostensibly consensual engagement with foreign legal development—the groundwork of what today would be called “law and development.”<sup>5</sup> Goodnow was one of a

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<sup>1</sup> Goodnow’s service to APSA as an organization was significant; he was the organization’s first president in 1903. Frederic A. Ogg, *Frank Johnson Goodnow*, 34 AM. POL. SCI. REV. 114, 114 (1940).

<sup>2</sup> *Id.*

<sup>3</sup> See Eliza Wing-Yee Lee, *Political Science, Public Administration, and the Rise of the American Administrative State*, 55 PUB. ADMIN. REV. 539 (1995); Laurence Lynn, *Restoring the Rule of Law to Public Administration*, 69 PUB. ADMIN. REV. 803 (2009).

<sup>4</sup> The interest in comparative constitutionalism in America has been growing over the past two decades. See generally Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771. (1997); Sujit Choudry, *Globalization in Search of Justification*, 74 IND. L.J. 819 (1999); Ruth Bader Ginsburg, *The Value of Comparative Perspective in Judicial Decision-Making*, 74 REV. JUR. U.P.R. 213 (2005); Vicki Jackson, *Constitutional Comparison*, 119 HARV. L. REV. 109 (2005); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1998).

<sup>5</sup> See Brian Tamanaha, *The Primacy of Society and the Failures of Law and Development*, 44 CORNELL INT’L L.J. 209 (2011); David Trubek & Mark Galanter, *Scholars in Self-Estrangement*, 4 WIS. L. REV. 1062 (1974).

generation of legal scholars who had first imagined their international careers as colonial administrators, but who suddenly found themselves running reform projects alongside sovereign foreign governments, under both private and public aegis. Amid this sea change, Goodnow turned his gaze from reforming the United States' constitution to reshaping China's.

The turn of the twentieth century was a turbulent time for U.S. society, and the opening decade of the twentieth century was transformative for the U.S. legal profession. Many of the great works of U.S. legal history have grappled with the wide-ranging effects that industrialization, urbanization, immigration, and a host of other social developments wrought for U.S. lawyers.<sup>6</sup> These developments eventually reshaped not only the basic ways in which U.S. lawyers were educated and trained, but also the scope of their participation in this era of rapid legal and political transformation in the U.S.<sup>7</sup>

While the domestic stories of these transformations have been well studied, the international dimensions of these changes have only recently become the subject of serious inquiry. As Goodnow's story reveals, U.S. lawyers played a key role in the early internationalization of U.S. society, and a role that more often than not intertwined with the increasing prominence of lawyers domestically. The demise of Goodnow's career as a leading member of this new U.S. international legal elite illustrates the shifts that the U.S. legal community was undergoing in its orientation to foreign legal systems at this time.

The fusion of new ideas about legal science and the professionalization of U.S. law had cascading effects across the United States. In the international arena, these changes helped produce the image of the U.S. lawyer as a foreign reformer who was working to bring the advancements of U.S. law to the rest of the world. This noble image unified U.S. lawyers across the political and legal spectrum.<sup>8</sup> Concurrently, the idea that U.S. law could bring the influence of putatively its greatest achievement—the Constitution—to foreign nations garnered broad appeal.<sup>9</sup> Yet, this idea of

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<sup>6</sup> See generally Morton J. Horwitz, *The Transformation in American Law, 1870-1960* (1992); James W. Hurst, *The Growth of American Law: The Law Makers* (1950).

<sup>7</sup> See *infra* notes 50-52 and accompanying text.

<sup>8</sup> Jedidiah Kroncke, *Law & Development as Anti-Comparative Law*, 45 VAND. J. TRANSNAT'L L. (forthcoming 2012).

<sup>9</sup> THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* 160 (1999) (noting that "[t]he image of an American constitutional scholar heading off to foreign lands with copies of the U.S. Constitution in his or her briefcase, to help constitutionally underdeveloped foreigners, is somehow a familiar one"); see also Paul Carrington, *Writing Other People's Constitutions*, 33 N.C.J. INT'L L. & COM. REG. 167 (2007). For an overview of the mid-twentieth century decline of American comparative constitutionalism, see David Fontana, *The Rise and Fall of Comparative Constitutional Law in the Postwar Era*, 36 YALE J. INT'L L. 17 (2011).

export was still grounded in many of the same evolutionary and paternalistic assumptions that had structured the U.S. legal community's now often forgotten focus on colonial administration during the late 1890s and early 1900s.

Moreover, the idea of the United States as an aggressive exporter of legal knowledge and institutions abroad was vigorously contested in the early twentieth century as the nation gradually emerged from its nineteenth-century status as a neophyte in international legal affairs. At this time, the popularity of comparative methods was at an all-time high in U.S. law, as many legal scholars embraced a vibrant transatlantic exchange of legal knowledge and ideas.<sup>10</sup> While the rise and decline of the transatlantic dimensions of this exchange has been chronicled before,<sup>11</sup> scholarship to date has overlooked the fact that comparativists such as Goodnow were being simultaneously drawn to efforts to reshape the legal systems of non-Western nations such as China. Recapturing this development is crucial, as after World War II such export efforts would serve as the blueprint for U.S. law's relationship to Western and non-Western foreign legal systems alike. Just like Goodnow himself, U.S. law slowly traded legal comparativism for the export of U.S. legal institutions and ideas in the international legal arena.<sup>12</sup>

However, instead of serving as an exemplar of this new turn, Goodnow's mission to write the Chinese constitution did not inaugurate a grand beginning to U.S. comparative constitutionalism, but instead was deemed a great and notorious failure. Goodnow's actual impact on Chinese constitutional development was ephemeral and he ultimately became associated with an attempt to transform the Chinese Republic into a constitutional monarchy.<sup>13</sup> Ironically, Goodnow's deep commitment to comparative legal science helped to facilitate this failure and placed him deeply at odds with the U.S. legal elite who had sponsored his trip. Goodnow's unwavering belief that his expertise could generate depoliticized legal solutions to contentious Chinese problems inevitably rendered his attempt to influence Chinese constitutionalism ineffective. Yet, this faith also led him to believe that constitutional monarchy was objectively best suited for China, an idea that conflicted with the emerging notion that

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<sup>10</sup> Duncan Kennedy, *Three Globalizations of Law and Legal Thought, in THE NEW LAW AND ECONOMIC DEVELOPMENT* (David M. Trubek & Alvaro Santos eds., 2006); David S. Clark, *The Modern Development of Comparative Law*, 55 AM. J. COMP. L. 587 (2007).

<sup>11</sup> The classic work on the transatlantic exchange of this era is DANIEL T. RODGERS, *ATLANTIC CROSSINGS* (1998).

<sup>12</sup> See Kroncke, *supra* note 8.

<sup>13</sup> See *infra* Part IV.

“Americanization” was the inherent goal of U.S. participation in foreign legal reform.

As a result, following Goodnow’s return from China, he was effectively excommunicated from international affairs. His excommunication exposed the fact that U.S. law had begun to dramatically shift away from comparative law as an intellectual enterprise for domestic consumption to an export-oriented view of international engagement. Further, his excommunication exposed how both stateside defenses and criticisms of Goodnow’s work served to warp U.S. perceptions of foreign legal development that were premised on the shared assumption that the U.S. could and should influence the direction of Chinese legal development.

Quite directly then, this early episode of failed comparative constitutionalism contains crucial lessons and questions for today’s new wave of comparative constitutions. It forcefully presents basic questions about the very nature of their enterprise and what ends such work ultimately serves.

To elucidate these claims and present the details of Goodnow’s life as a comparative constitutionalist, this article proceeds in three parts. Part II outlines Goodnow’s rise to prominence in Progressive legal circles as a comparative legal scholar and discusses the significance of his appointment as constitutional adviser to China in this early era of the internationalization of U.S. law. Part III details Goodnow’s actual tenure as adviser and analyzes the root causes of both his failure to influence Chinese constitutionalism and his attempts to shape U.S. perceptions of Chinese legal development. Part IV shows how Goodnow’s endorsement of constitutional monarchy for China received a mixed but ultimately negative response in the United States, while also illustrating how his belief in depoliticized legal expertise led him to be manipulated by China’s failed monarchist, Yuan Shikai. The article concludes by arguing that Goodnow’s failure as a comparativist is more than just a minor historical chapter in an important transitional period in the legal history, but rather presents a set of probative lessons for today’s newly emerging and enthusiastic comparative constitutionalists.

## II. FRANK GOODNOW AND THE EARLY HISTORY OF COMPARATIVE CONSTITUTIONALISM IN THE UNITED STATES

It is fitting to begin with the fact that there is no official biography of Frank Goodnow. Given his prominence as a leading intellectual and institutional actor of his day, this omission is instantly telling. At the same

time, his fame in his day makes the general outline of his life easy to recover.<sup>14</sup>

A. *The Making of a Comparative Legal Star*

Frank Johnson Goodnow was born in Brooklyn, New York in 1859. The son of a successful entrepreneur, his career developed as a product of his personal passions, as he never required income from regular employment. He graduated from Amherst College in 1879 and subsequently moved to Columbia University, where he earned his L.L.B. in 1882. After a brief stint in a law office, he was offered the opportunity to teach administrative law at Columbia. Indicative of the cosmopolitanism of the era, he was given this opportunity with the condition that he travel to Europe for further study. As such, before beginning at Columbia in 1884, he studied at the Ecole Libre des Sciences Politiques in France and the University of Berlin in Germany.<sup>15</sup>

Goodnow's early career reflected the shifting terrain of U.S. legal study and education. While he had received post-graduate training in law, his appointment at Columbia was in the recently-established political science department, not in a dedicated law school. Furthermore, before he became a full professor, he completed a separate doctorate in political science beyond his L.L.B. He was resistant to the then-nascent Langdellian revolution in legal education that sought to segregate the university study of law based on a professional post-graduate model, although he would eventually hold a joint appointment with Columbia's law school.<sup>16</sup>

Goodnow's early focus was on administrative law. He was among the early pioneers whose work in this field was largely ignored by law schools, who viewed administrative law as in tension with the common law tradition.<sup>17</sup> Goodnow's first major publication came in 1886, titled *The Executive and the Courts*.<sup>18</sup> In this article, he presaged one of the emerging issues of governance that would come to define debates over administrative law in the U.S.: the tension between a juridical rule of law and the authority of scientific expertise.<sup>19</sup>

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<sup>14</sup> Biographical information on Frank Goodnow is derived from various sources present in the archives at Johns Hopkins University. FRANK JOHNSON GOODNOW PAPERS MS. 3 (Special Collection, Milton S. Eisenhower Library, Johns Hopkins University) [hereinafter GOODNOW PAPERS].

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See Christopher Langdell, *Teaching Law as a Science*, 21 AM. L. REV. 145 (1887); Marcia Speziale, *Langdell's Concept of Law as Science*, 5 VT. L. REV. 1 (1980).

<sup>18</sup> Frank J. Goodnow, *The Executive and the Courts*, 1 POL. SCI. Q. 533 (1886).

<sup>19</sup> See Lynn, *supra* note 3.



Goodnow's 1893 publication, *Comparative Administrative Law*, catapulted him into the firmament of Progressive-era thought.<sup>20</sup> At the time of its publication, this work was by far the most systematic treatment of administrative law as a coherent subject of scholarly inquiry ever produced, and it remains a monument of comparative legal analysis. He drew on a wide range of sources to compare the rising U.S. administrative state with those of France, England, and Germany. Emblematic of his broad general methodological gaze, the scope of his empirical references included Prussia, Holland, and, significantly, the separate legal traditions of individual U.S. states. He delved deeply into not only theory but also the function of administrative law within these distinct legal systems, and avoided the seductive pitfall of comparative textualism. While he saw that all societies faced common challenges in governance, he understood that each legal system not only attempted to solve pragmatic problems but did so through solutions that aspired to express very different political values.

Essential to understanding Goodnow's comparative work was that he saw himself as a participant in the trans-Atlantic intellectual world. Many have cited the early twentieth century as the great flowering of comparative law when foreign legal ideas had a wide-ranging impact on U.S. law.<sup>21</sup> It was indeed a time when U.S. reformers felt free to use European examples as the basis for U.S. legal reforms.<sup>22</sup> Thus, at this time comparative law was not solely the isolated study of foreign legal systems by specialized scholars, but was seen as a broader commitment to comparative methods throughout legal scholarship that aimed to produce actionable knowledge for domestic reform.<sup>23</sup>

Moreover, Goodnow's comparative work showed no parochial favoritism, and he was dispassionate in his analysis of what he saw as the flaws of U.S. law. He truly believed in a universal social science, one to which no existing assumption or institution was sacrosanct or beyond analysis. Goodnow also possessed the characteristic Progressive belief in the potential for social progress to be promoted through the application of expert knowledge, and he firmly believed that his scientific work was in the public

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<sup>20</sup> FRANK J. GOODNOW, *COMPARATIVE ADMINISTRATIVE LAW* (1893).

<sup>21</sup> See John F. Witt, *Crystal Eastman and the Internationalist Beginnings of American Civil Liberties*, 54 *DUKE L.J.* 705, 710 n 15 (2004).

<sup>22</sup> See RODGERS, *supra* note 11; Kennedy, *supra* note 10.

<sup>23</sup> See, e.g., WOODROW WILSON, *THE STUDY OF ADMINISTRATION* 4 (1886) (Stating that "[w]hy should we not use such parts of foreign contrivances as we want, if they be in any way serviceable? We are in no danger of using them in a foreign way. We borrowed rice, but we do not eat it with chopsticks.").

interest.<sup>24</sup> In sum, he made it very clear that the study of law should be, like all legal analysis, part of an inherently comparative science.<sup>25</sup> In this respect, Goodnow should be considered a founding scholar of modern U.S. comparative law.<sup>26</sup>

The strength of Goodnow's commitment to comparative law led him into controversial territory in his day, as his vigorous critique of existing U.S. legal and political institutions rankled more conservative sensibilities. Yet, the social tumult of his era was one in which active political engagement could be coupled with the contemplation of quite significant deviations from what was then considered to be the traditional Anglo-American legal heritage of the United States. In his 1899 review of Henry Jones Ford's *The Rise and Growth of American Politics*, Goodnow praised the unwritten constitutionalism of England and claimed that England's recent innovations in governance were due to the comparative advantage they enjoyed from not being bound by "a written constitution not susceptible of easy amendment."<sup>27</sup>

Goodnow would again express a deep critique of U.S. institutions in his 1900 treatise *Politics and Administration*.<sup>28</sup> There he claimed that U.S. governance was captured by party politics rather than by popular will; with an irony soon to be revealed, he criticized the power politics of party leaders using the villainous archetype of "the Boss."<sup>29</sup> He repeatedly invoked a need to critically emulate England,<sup>30</sup> and drew examples from many nations, including a call for the adoption of Australian balloting procedures.<sup>31</sup>

A few years later, Goodnow would publish another book wherein he critiqued the notion that the Anglo-American legal tradition rejected his own reform agenda as foreign and unwelcome.<sup>32</sup> He claimed that such a discourse

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<sup>24</sup> See LISA ANDERSON, *PURSuing TRUTH, EXERCISING POWER: SOCIAL SCIENCE AND PUBLIC POLICY IN THE 21ST CENTURY* (2003); ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877-1920*, 1 (1967) (describing the "new scientific gospel").

<sup>25</sup> GOODNOW, *supra* note 20, at iv (stating that "this knowledge can be obtained only by study, and by comparison of our own with foreign administrative models").

<sup>26</sup> Fellow hybrid law professor-political scientist Thomas Reed Powell commented on *Comparative Administrative Law* after Goodnow's passing, saying "[b]y means of this survey he was enabled to set the stakes for the field of American administrative law and to work out the boundaries within which a distinct branch of legal science was to develop." Ogg, *supra* note 1, at 116.

<sup>27</sup> Frank J. Goodnow, *Book Review*, 14 POL. SCI. Q. 156 (1899).

<sup>28</sup> FRANK J. GOODNOW, *POLITICS AND ADMINISTRATION* 198 (1900).

<sup>29</sup> *Id.* (stating "the political storm centre in the U.S. is therefore not in the government, but in the party").

<sup>30</sup> "Let us follow her examples, not so much in attempting any exact imitation of what she has done, as in adopting her frame of mind and in evincing the same willingness which she has shown, to adapt her governmental system to changed conditions." *Id.* at 263.

<sup>31</sup> *Id.* at 241-42.

<sup>32</sup> FRANK J. GOODNOW, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES* (1905).

elided the functional purpose of law in favor of an atavistic worship of the past as success and failure were found everywhere in the human world.<sup>33</sup>

During this era, the ascendancy of Progressive legal thought was far from universal or uncritically accepted, but Goodnow's perspective was becoming the norm among a range of U.S. elites who were emboldened by a kindred sense of scientific possibility, if not always-careful erudition.

*B. The Early Twentieth Century Internationalization of U.S. Law*

Goodnow's deep critiques of U.S. law were developed during a time when U.S. lawyers were at the center of vibrant arguments over the proper shape of the United States' increasingly prominent role in international relations. Prior to the early twentieth century, the often grand rhetorical statements about the exceptional nature of U.S. law had been tightly constrained by the United States' practical status as a fledging postcolonial nation. In the eighteenth and nineteenth centuries, U.S. lawyers had been more interested in gaining a sense of parity and respect in the arena of international law than popular rhetorical assertions concerning the United States' exceptional legal character might otherwise misleadingly represent.<sup>34</sup> While U.S. lawyers had long trumpeted U.S. law in foreign contexts, especially the achievement of the United States Constitution,<sup>35</sup> it was not until the turn of the twentieth century that the United States as a nation was able to confidently assert its exceptional legal character in the form of an active foreign policy overseas.<sup>36</sup>

Basic questions about the shape of modern U.S. internationalism were placed center stage during the 1890s in the aftermath of the Spanish-American War and the acquisition of foreign territories outside of the United States' continental bounds.<sup>37</sup> Americans fiercely debated whether the U.S. republican tradition was compatible with forms of European colonial empire

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<sup>33</sup> *Id.*

<sup>34</sup> See Daniel J. Hulsebosch & David M. Golove, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010).

<sup>35</sup> See GEORGE A. BILLIAS, *AMERICAN CONSTITUTIONALISM HEARD ROUND THE WORLD, 1776-1989* (2009).

<sup>36</sup> Scholars of American foreign policy have long noted that idealized versions of American history are normatively structured and are offered as carrying implied lessons for foreign nations. See RUSSELL L. HANSON, *THE DEMOCRATIC IMAGINATION IN AMERICA: CONVERSATIONS WITH OUR PAST* 424 (1985); WALTER L. HIXSON, *THE MYTH OF AMERICAN DIPLOMACY* 8 (2008).

<sup>37</sup> See SALLY MERRY, *COLONIZING HAWAII* (1999); ARTHUR POWER DUDDEN, *THE AMERICAN PACIFIC* (1992); EFREN RIVERA RAMOS, *THE LEGAL CONSTRUCTION OF IDENTITY* (2001); EDIBERTO ROMAN, *THE OTHER AMERICAN COLONIES* (2006).

from which many had long tried to distance the country.<sup>38</sup> These debates were resolved constitutionally in the *Insular Cases*, a series of hotly contested decisions whereby the Supreme Court legitimated the acquisition of colonial territories.<sup>39</sup> In fact, one of the often forgotten aspects of this era was how strong the support for colonialism was among U.S. lawyers.<sup>40</sup>

However, the United States did not take the path of colonial empire following the Spanish-American War. Instead, the outcome of the political contest over the issues of colonialism left U.S. foreign policy primarily embracing other forms of indirect and consensual engagement with foreign legal systems. While many, like Goodnow, had seen the compatibility of legal science with forms of colonial administration, they had to adapt quickly to foreign legal reform work predicated on a very different form of engagement, one dictated by the eventual victors in the political battle over expansionism. These victors, generally associated with Woodrow Wilson's presidential administration, favored a view of indirect, yet still eminently paternalistic, foreign engagement that overtly eschewed colonialism.<sup>41</sup>

Thus, while many early internationalists had focused their energies on developing colonial administrations for the newly acquired U.S. territories, the U.S. government and a swath of private organizations began to fund efforts to shape foreign legal development fully divorced from the usurpation of local sovereignty.<sup>42</sup> From the outset, such work was cloaked with language intended to differentiate the U.S. lawyer abroad from his colonial European, especially British, counterpart.<sup>43</sup> Historian Paul Carrington has cataloged many of these early efforts, capturing how legal reform projects became tied

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<sup>38</sup> See AMY KAPLAN, *THE ANARCHY OF EMPIRE IN THE MAKING OF U.S. CULTURE* 7 (2005); Roger Bresnahan, *Islands in Our Minds*, in *REFLECTION ON ORIENTALISM* 57 (Warren Cohen ed., 1983); see generally, *EXPORTING DEMOCRACY* (Abraham Lowenthal ed., 1991). For the formal policy against colonial language in the Philippines, see YVES DEZALAY & BRYANT GARTH, *ASIAN LEGAL REVIVALS LAWYERS IN THE SHADOW OF EMPIRE* ch. 6 (2010); STANLEY KARNOW, *IN OUR IMAGE* (1989).

<sup>39</sup> Most of these new territories had various "Organic Acts" which provided a constitutional infrastructure. Citizens in these territories resurrected old constitutional questions about the rights of foreign citizens under American jurisdiction abroad. See *Ross v. United States*, 140 U.S. 453 (1891); see generally JAMES KERR, *THE INSULAR CASES* (1982); BARTHOLOMEW SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* (2006).

<sup>40</sup> See, e.g., Simeon Baldwin, *The Historic Policy of the US as to Annexation*, 12 HARV. L. REV. 390 (1894); John Burgess, *How May the U.S. Govern its Extra-Continental Territory?*, 14 POL. SCI. Q. 1 (1899); Christopher Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365 (1898); James Thayer, *Our New Possessions*, 12 HARV. L. REV. 464 (1898); Carman Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291 (1898).

<sup>41</sup> DEZALAY & GARTH, *supra* note 38.

<sup>42</sup> See generally Kroncke, *supra* note 8.

<sup>43</sup> Legal reform was an original British justification for colonialism. See HANS S. PAWLISCH, *SIR JOHN DAVIES AND THE CONQUEST OF IRELAND* (1985); MARTIN CHANOCK, *LAW, CUSTOM AND SOCIAL ORDER* (1985); NICHOLAS B. DIRKS, *THE SCANDAL OF EMPIRE* (2006); BERNARD PORTER, *EMPIRE AND SUPEREMPIRE* (2006).

to the growing presence of U.S. lawyers across the globe.<sup>44</sup> Furthermore, this era witnessed the near domination of U.S. foreign policy by lawyers who, while often divided on issues of international law, shared a common belief in the role of U.S. lawyers as foreign reformers.<sup>45</sup>

The rapid proliferation of U.S. engagements with foreign legal reform at this time was intrinsically tied to the main idea that animated Goodnow's work: that law was best understood as a scientific enterprise. Often linked at this time to popular theories of legal evolution,<sup>46</sup> many U.S. lawyers expressed great confidence that not only could law be used instrumentally to effect social change at home, but that the universality of legal science could achieve the same ends abroad. These new instrumentalist views of law used the presumption of scientific validity to argue that legal development was best considered the province of legal expertise rather than of political deliberation and process.<sup>47</sup>

The notion of law as legal science had profound effects on U.S. law and transformed the U.S. legal profession at the turn of the twentieth century.<sup>48</sup> The authority and legitimacy of law as a distinct science led to fundamental changes in U.S. legal education,<sup>49</sup> the development of modern bar associations,<sup>50</sup> and nationalized legal practice.<sup>51</sup> Yet still, no aspect of U.S. law was seen as more central than its Constitution.<sup>52</sup>

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<sup>44</sup> PAUL CARRINGTON, *SPREADING AMERICA'S WORD* 1 (2005) (describing those who have "striven to make the governments and laws of other peoples more like their own").

<sup>45</sup> Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era*, 78 N.Y.U. L. REV. 239 (2003) [hereinafter *Gilded Age*]; Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: The Twenty Years' Crisis*, 77 S. CAL. L. REV. 583 (2004) [hereinafter *Twenty Years' Crisis*].

<sup>46</sup> See, e.g., LEWIS HENRY MORGAN, *ANCIENT SOCIETY* (1877); BROOK ADAMS, *THE LAW OF CIVILIZATION AND DECAY* (1896); see also Steven Wilf, *The Invention of Legal Primitivism*, 10 THEORETICAL INQUIRIES IN L. 485 (2009).

<sup>47</sup> See ROBERT WIEBE, *THE SEARCH FOR ORDER* 1 (1967) (describing the "new scientific gospel"); see also Anderson, *supra* note 24.

<sup>48</sup> See generally RICHARD L. ABEL, *AMERICAN LAWYERS* 43-44 (1989); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 526 (2005).

<sup>49</sup> See generally WILLIAM LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN LEGAL EDUCATION* (1994); Howard Schweber, *The "Science" of Legal Science: The Model of Natural Sciences in Nineteenth-Century American Legal Education*, 17 LAW & HIST. REV. 1 (1999).

<sup>50</sup> Edward Gee & Donald Jackson, *American Legal Education and the Bar: Hand in Hand or Fist in Glove?*, 4 LEARNING & L. 34 (1977); Thomas Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 36 (1983); Harry Frist, *Competition in the Legal Education Industry*, 52 N.Y.U. L. REV. 311 (1978).

<sup>51</sup> See William Novak, *The Legal Origins of the American State*, in *LOOKING BACK AT LAW'S CENTURY* 267 (Austin Sarat, Bryant Garth, & Robert A. Kagan eds., 2002). The nationalization of legal practice centered in urban, corporate law firms nevertheless coexisted with the continued fragmentation and localization of American law inherent in the American commitment to federalism. See ALISON LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010).

<sup>52</sup> See Carrington, *supra* note 9.

The sum force of these shifts was the emergence of a new popular image of “American lawyers” and of the institutions that produced them. Even though many of these developments in U.S. law were hotly contested at the time,<sup>53</sup> the allure of law as an apolitical exertion of expertise eventually consumed the profession.<sup>54</sup> While there was, and still is, a great deal of underlying diversity in U.S. legal practice, a newly standardized template could be offered up abroad as to what constituted the prototypical U.S. lawyer.

C. *From Colonial Administrator to Comparative Constitutionalist*

During the first decade of the twentieth century, Goodnow’s star continued to steadily rise.<sup>55</sup> It was at this time that his relationship with Woodrow Wilson and other leading legal scholars garnered him the first presidency of APSA, then a leading center for the study of international and comparative law. At the same time, he founded the *Internationale de Droit Public*. In 1906, he was named Dean of the Political Science Department at Columbia and was selected as a member of a range of increasingly influential academic societies. His influence outside of academia also expanded rapidly. He became the first Chairman of the Institute of Governmental Research (later the Brookings Institute), and he was invited to serve on the boards of other such “think tanks.” He traveled to England for the National Civic Federation’s Commission on Public Ownership, and in 1911 he was recruited by President Taft to serve on his Commission on Efficiency and Economy.

Goodnow’s success as a public and private institutional actor did not dull his scholarly activity. Turning from his early focus on administrative law, he came to increasingly focus on constitutional reform. In 1911, he published *Social Reform and the Constitution*, in which he directly singled out the U.S. Constitution as a relic that hindered social progress.<sup>56</sup> Furthermore, Goodnow claimed that the Bill of Rights was emblematic of this anachronistic state, as

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<sup>53</sup> See generally WILLIAM JOHNSON, *SCHOOLED LAWYERS: A STUDY IN THE CLASH OF PROFESSIONAL CULTURES* 177 (1978).

<sup>54</sup> MORTON HORWITZ, *TRANSFORMATIONS IN AMERICAN LAW, 1780-1860*, 256 (1977) (arguing that “the desire to separate law and politics has always been a central aspiration of the American legal profession”); see also Robert Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57 (1984).

<sup>55</sup> As mentioned above, biographical information about Frank Goodnow comes from primary source materials located in the archives of Johns Hopkins University. GOODNOW PAPERS, *supra* note 14.

<sup>56</sup> FRANK J. GOODNOW, *SOCIAL REFORM AND THE CONSTITUTION* v (1911) (asserting that the purpose of the work is “to ascertain . . . to what extent the Constitution of the United States in its present form is a bar to the adoption of the most important social reform measures which have been made parts of the reform program of the most progressive peoples of the present day”).

it was created for “eighteenth-century conditions, and has therefore no regard for existing social needs.”<sup>57</sup>

Goodnow also made clear in *Social Reform and the Constitution* his deep concern that the traditional structure of U.S. federalism was out of step with social reality: “the experience of the civilized world since our constitution was adopted is opposed to a system of federal government which fixes unalterably in accordance with some political theory of universal application the jurisdiction of national and state governments.”<sup>58</sup> Leaving no sacred ground unprofaned, Goodnow ended the book with a spirited critique of judicial review in much the anti-Lochnerite fashion of the day.<sup>59</sup> This won him few new supporters in the emerging professional legal academy, but it increased his esteem among the new Wilsonian establishment.<sup>60</sup>

Critically, Goodnow renewed his emphasis on a cosmopolitan comparativism, and he placed parochialism and civilizational development squarely at odds. He rejected most of his critics as being inherently anti-scientific:

For one reason or another the people of the United States came soon to regard with an almost superstitious reverence the document into which this general scheme of government was incorporated, and many considered, and even now consider, that scheme, as they conceive it, to be the last word which can be said as to the proper form of government—a form believed to be suited to all times and conditions.<sup>61</sup>

Overlooked in previous studies, Goodnow’s interest in domestic constitutional reform was at the same time comingled with a deep, decade-long interest in the study of colonial administration.<sup>62</sup> Like the host of U.S.

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<sup>57</sup> *Id.* at 17.

<sup>58</sup> *Id.* at 13.

<sup>59</sup> For a revisionist update on the politics of Lochner, see DAVID BERNSTEIN, REHABILITATING LOCHNER (2011).

<sup>60</sup> The standard accounts of Goodnow’s scholarship instead usually emphasize his work on municipal governance as the new ground he broke during this early decade. See AXEL SCHAFER, AMERICAN PROGRESSIVES AND GERMAN SOCIAL REFORM 98 (2000).

<sup>61</sup> GOODNOW, *supra* note 56, at 9-10. Thus, he concluded that the rise of the administrative state was a scientific inevitability given a rational approach to legal development—and that dissent would only retard America’s participation in the “orderly and progressive development, which we regard as characteristic of modern civilization.” *Id.* at 359.

<sup>62</sup> Schmidt makes passing reference to Goodnow in his study of Paul Reinsch’s career, as a leading Progressive scholar-lawyer and colonial administrator, noting that Goodnow was critical of Reinsch’s 1905 work COLONIAL ADMINISTRATION. See Brian Schmidt, *Paul S. Reinsch & the Study of Imperialism and Internationalism*, in IMPERIALISM AND INTERNATIONALISM IN THE DISCIPLINE OF INTERNATIONAL RELATIONS 63 (David Long & Brian Schmidt eds., 2005).

reformers across the political spectrum who had leapt to undertake reform in the United States' post-1898 territories, Goodnow had become entranced by the notion that his scientific expertise could not only regenerate the United States, but also foreign legal systems. In unambiguous terms, Goodnow's early interest presumed that America was to become a colonial power following the constitutional basis for empire established in the *Insular Cases*. Inherent in this position was Goodnow's adoption of strong evolutionary presumptions that helped mediate the tensions between his comparativism and his universalism.<sup>63</sup>

In fact, following the larger relationship between Progressive thought and U.S. colonial administration, Goodnow appears to have spent the majority of the decade prior to his appointment in China applying his general methods and insights outside of the United States.<sup>64</sup> Between 1902 and 1909, Goodnow lectured widely on colonial administration and traveled to a number of U.S. territories. He corresponded with an array of colonial officials including Samuel Grover, then Treasurer of Puerto Rico. Many of his early interactions with other members of the American Political Science Association, such as Westel Willoughby and Woodrow Wilson himself, were in dialogue over their various roles in colonial administration.<sup>65</sup>

It is likely that Goodnow's deep interest in colonial administration has remained overlooked due to the fact that none of his own works on the subject were ever published. In fact, the only available copies of his writings on colonial administration are stored in his personal archive at Johns Hopkins University, and even today there is no extant scholarly reference to these writings. Nevertheless, the quantity of material Goodnow produced in this vein is quite significant. He wrote two papers on U.S. dependencies that survive today, *The U.S. System of Governing Dependencies*<sup>66</sup> and *Governing Dependencies: The Philippines*.<sup>67</sup> These articles are characteristic of Goodnow's broader research in that they draw on a comparative analysis of

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<sup>63</sup> "[I]t is believed that the real political institutions of different peoples at the same stage of intelligence and morality will show a great similarity, even where the external forms of government appear very different. This similarity is due . . . to the fact that after all man is man everywhere at all times, and that all political organizations of men must therefore have ultimately the same ends, and must adopt in a general way the same methods for their satisfaction." GOODNOW, *supra* note 28, at 7.

<sup>64</sup> Goodnow is listed by Anderson as a key example of the transnational mutualism of Progressive-era reform work. ANDERSON, *supra* note 24, at 19-20.

<sup>65</sup> Personal correspondence of Frank J. Goodnow. See GOODNOW PAPERS, *supra* note 14.

<sup>66</sup> Frank J. Goodnow, *The U.S. System of Governing Dependencies*, GOODNOW PAPERS, *supra* note 14.

<sup>67</sup> Frank J. Goodnow, *Governing Dependencies: The Philippines*, GOODNOW PAPERS, *supra* note 14.



the various “American dependencies” while outlining the way in which new territory was acquired under the *Insular Cases*.

Even more striking, however, is the fact that Goodnow had prepared a massive treatise titled “History and Principles of Colonial Administration.”<sup>68</sup> This work incorporated the lectures that he had given in the prior decade and covered the colonial experience of every major European power. The scope of Goodnow’s analysis was broadly historical and included an analysis of the settlement of the U.S. colonies and the earliest English colonial experiences in Africa and India. It is here that he made clear the evolutionary context of his worldview, establishing a clear bridge between the civilizing legitimation of European colonialism and the U.S. administration of its dependencies.<sup>69</sup> More generally, it was in the colonial context that he first contemplated the wholesale re-creation of a constitutional order and began to draw on his comparative constitutional work to imagine shaping foreign legal development abroad.

In these writings, Goodnow placed the science of administration, both domestic and foreign, as beyond morality. Colonialism, for him, was just another social process that should be analyzed scientifically outside of moral judgment. He was most critical of Dutch colonialism because he believed that it was far too unscientific in its attempt to assimilate too quickly what he saw as a culturally backwards people to European norms of law and governance.<sup>70</sup>

Goodnow’s colonial writings place his invitation to serve as a legal adviser in China in an entirely new context. It was not solely his intellectual stature or personal associations that led to his appointment. Instead, by 1912 Goodnow was set to become a leading expert on colonial administration. As U.S. law turned increasingly away from colonialism and towards the more indirect, presumptively acolonial, methods of engagement abroad, the colonial thought of the era, Goodnow’s included, was largely swept under the proverbial intellectual rug.

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<sup>68</sup> Frank Goodnow, *History and Principles of Colonial Administration*, GOODNOW PAPERS, *supra* note 14.

<sup>69</sup> Of note, in this entire manuscript only one reference to China can be found: “If they have obtained a high degree of civilization, they will be enabled to wage war successfully against the invaders. If their civilization is not so high, the mere fact that they are adapted to the existing conditions, will enable them to labor so much more cheaply than the invaders, that no great laboring population will be imported into the colony.” The citation referencing China does not appear directly in the text, but simply as a hand-written side-note in the left-hand column, “China.” *Id.*

<sup>70</sup> While many of Goodnow’s exemplary methodological qualities as a comparativist are on display in his writings on colonial administration, he never gives equal weight to the conditions and traditions in colonial territories—only the European and American practices are noted.

D. *The Carnegie Endowment and Writing China's Constitution*

As great as interest in Chinese legal development has been in recent years,<sup>71</sup> it is almost completely forgotten that China was at the center of U.S. internationalism during the early twentieth century.<sup>72</sup> It was a time when the new U.S. confidence of the era coincided with the increasingly dire political instability plaguing China. For decades, the Qing Dynasty in China had been wracked by international and domestic turmoil and it began to fully collapse in 1911. Inspired by an unplanned revolt in China's Hebei province, local leaders throughout China declared their independence from the Qing and began calling for a Chinese Republic in what has been called the Xinhai Revolution. Suddenly, expatriate Chinese intellectual Sun Yat-Sen was thrown into the U.S. spotlight as the presumptive leader of what many thought would be an U.S.-inspired regime. Even though China was in fact tangential to U.S. economic and military interests in 1911,<sup>73</sup> Americans became fascinated by the prospect that China was committed to emulating the United States.

China's potential "Americanization" so entranced Americans primarily due to the influence of the U.S. missionary movement. The U.S. missionary movement that grew out of the late nineteenth-century U.S. religious revival quickly became the United States' first organized institutional presence abroad.<sup>74</sup> It secured its presence and broad popularity through a well-organized public relations infrastructure, and as the United States became increasingly involved in international affairs at the turn of the twentieth century, it was missionaries who shaped U.S. views of the world outside of Europe.<sup>75</sup> Nowhere had the missionary influence on U.S. life been more manifest than in its great focus on China, which had long been the centerpiece of U.S. missionary prestige and fundraising campaigns.<sup>76</sup>

Moreover, the U.S. missionary leadership served as a crucial vanguard for popularizing the idea of indirect, non-colonial Americanization of foreign countries. The long-standing missionary vision of transplanting U.S.

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<sup>71</sup> See generally STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* (2000); RANDALL PEERENBOOM, *CHINA'S LONG MARCH TOWARD RULE OF LAW* (2002).

<sup>72</sup> See MICHEL HUNT, *THE SPECIAL RELATIONSHIP* (1983); CAROLA MCGIFFERT, *CHINA IN THE AMERICAN POLITICAL IMAGINATION* (2003).

<sup>73</sup> HUGH DEANE, *GOOD DEEDS & GUNBOATS: TWO CENTURIES OF AMERICAN-CHINESE ENCOUNTERS* 38-39 (1990).

<sup>74</sup> See generally WILLIAM G. MCLOUGHLIN, *REVIVALS, AWAKENINGS AND REFORM* (1978).

<sup>75</sup> See, e.g., CHRISTIANITY IN CHINA (Daniel H. Bays ed., 1996); see also THE MISSIONARY ENTERPRISE IN CHINA AND AMERICA (John Fairbank ed., 1974); JAMES REED, *THE MISSIONARY MIND AND AMERICAN EAST ASIAN POLICY* (1983).

<sup>76</sup> See KENNETH SCOTT LATOURETTE, *A HISTORY OF CHRISTIAN MISSIONS IN CHINA* (1929).

institutions abroad to stimulate democratic and capitalist development appealed to both the non-interventionist and humanitarian veins in U.S. politics.<sup>77</sup> Particular to law, U.S. missionaries, often trained in both law and theology,<sup>78</sup> had long argued for the catalytic power of transplanting U.S. legal institutions abroad.<sup>79</sup>

Thus, the christening of China as a republic drew the attention of U.S. lawyers who carried forth this missionary spirit as they sought to demonstrate U.S. law's ability to spur liberalization and economic development abroad.<sup>80</sup> Consequently, many lawyers focused on advancing Sino-U.S. relations as the best example for showcasing the United States' new humanitarian legal internationalism.<sup>81</sup>

Yet, for all the fanfare that the new Chinese Republic received in the United States, in reality, Chinese politics suffered from deep regional fragmentation.<sup>82</sup> Sun Yat-Sen and his revolutionary supporters, organized as the Guomindang Party ("GMD"), were primarily situated in southern China. Standing in the north, and still commanding China's only modern army, was General Yuan Shikai and the remnants of the Qing regime. Within a year, the new government agreed to replace Sun Yat-Sen with Yuan as the President of the Republic.<sup>83</sup> The weakness of the nominally unified government led to an ongoing period of great instability.<sup>84</sup>

As a result of this instability, the Taft administration was initially hesitant to recognize the new Republic, and most European nations saw the new regime as too unstable.<sup>85</sup> However, expressions of sympathy in the

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<sup>77</sup> See Kroncke, *supra* note 8.

<sup>78</sup> See, e.g., RALPH R. COVELL, W.A.P. MARTIN: PIONEER OF PROGRESS IN CHINA (1978).

<sup>79</sup> For an earlier American effort to shape Chinese legal education by Harvard law professor Warren Seavey, see DONALD KING, A HARVARD LAW SCHOOL PROFESSOR 17 (2005). Contemporaneous with Goodnow there were efforts to export American legal education and bar associations to China. See Alison Conner, *The Comparative Law School of China*, in UNDERSTANDING CHINA'S LEGAL SYSTEM 235 (Stephen Hsu ed., 2004); Xu Xiaoqun, *Between State and Society, Between Professionalism and Politics: The Shanghai Bar Association in Republican China*, 24 TWENTIETH CENTURY CHINA 1 (1998). On the public front, the creation of extraterritorial courts in China was initially seen as a way to influence Chinese legal development. See Teemu Ruskola, *Colonialism Without Colonies*, 71 LAW & CONTEMP. PROBS. 217; EILEEN SCULLY, BARGAINING WITH THE STATE FROM AFAR (2001).

<sup>80</sup> Part of the treaty signed after the Boxer Rebellion at the turn of the twentieth century involved American support for Chinese legal reform. MCGIFFERT, *supra* note 72, at 33.

<sup>81</sup> JERRY ISRAEL, PROGRESSIVISM AND THE OPEN DOOR 91 (1971).

<sup>82</sup> See, e.g., Frederic McCormick, *Present Conditions in China*, 22 NAT'L. GEOGRAPHIC MAG. 1120 (1911).

<sup>83</sup> See generally STEPHEN MACKINNON, POWER & POLITICS IN LATE IMPERIAL CHINA (1980). For a critical view of Chinese politics from the era, see STEPHEN KING-HALL, WESTERN CIVILIZATION AND THE FAR EAST (1924).

<sup>84</sup> MACKINNON, *supra* note 83.

<sup>85</sup> See Meribeth Cameron, *American Recognition Policy toward the Republic of China*, 2 PAC. HIST. REV. 214, 214-30 (1933); Clarence Davis, *Financing Imperialism*, 56 BUS. HIST. REV. 236 (1983).

United States for the Chinese Revolution became far less complicated once Woodrow Wilson was elected President in 1912.<sup>86</sup> Wilson rejected Taft's more conservative diplomatic strategy towards China and withdrew the United States from the international banking consortium which had been leveraging loans for political influence. He then quickly and unilaterally granted recognition to the Chinese Republic.<sup>87</sup> Here, Wilson's moves again reflected the deep influence that religious and missionary thought had upon his views of law and foreign affairs.<sup>88</sup>

Wilson was explicit in his view that the United States was neither an empire nor a colonial power, and he saw the U.S. opportunity in China as a prime demonstration of this truth. Wilson claimed that when Americans were abroad that "they must first take the disciplines of law" and "seek to serve, not subdue, the world."<sup>89</sup> Moreover, Wilson believed that the Constitution was a divinely inspired covenant with God and the United States' crowning legal achievement.<sup>90</sup>

Not coincidentally, Yuan Shikai's rise to the Presidency of the Republic was tied to his singular ability to manipulate foreign powers for his domestic advantage.<sup>91</sup> He recognized the character of the United States' infatuation with China,<sup>92</sup> and was able to secure the admiration of key members of Wilson's administration.<sup>93</sup> Moreover, Yuan specifically convinced Wilson that he sought U.S. tutelage.<sup>94</sup> In this vein, Yuan was quick to begin work on a Chinese Constitution in order to help establish the international legitimacy

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<sup>86</sup> PAUL A. VARG, *MISSIONARIES, CHINESE, AND DIPLOMATS* 169 (1958).

<sup>87</sup> See WARREN COHEN, *THE CHINESE CONNECTION* 46, 197 (1978). For an overview of the international politics of recognition, see MADELEINE CHI, *CHINA DIPLOMACY* (1970).

<sup>88</sup> Wilson had a deep teleological faith in the global expansion of democracy, and saw China as the first demonstration of America's leading role in the process. See generally LLOYD E. AMBROSIUS, *WOODROW WILSON AND THE AMERICAN DIPLOMATIC TRADITION* (1987). Wilson was a trained lawyer and leading political scientist, but he was also deeply embedded in the evangelical community. See generally JOHN BLUM, *WOODROW WILSON & THE POLITICS OF MORALITY* (1956); TIEN-YI LI, *WOODROW WILSON'S CHINA POLICY* (1952).

<sup>89</sup> AMBROSIUS, *supra* note 88, at 10-11.

<sup>90</sup> *Id.*

<sup>91</sup> This is the general conclusion of MACKINNON, *supra* note 83. Characteristically, Yuan had been critical of the international banking consortium's effect on Chinese independence, but at the same time secured an international loan to finance his own army. See TANG LEANG-LI, *THE INNER HISTORY OF THE CHINESE REVOLUTION* 109-14 (1930).

<sup>92</sup> Yuan repeatedly invoked Christianity in his diplomatic work—famously asking Americans to pray for the success of the young Republic. EREZ MANELA, *THE WILSONIAN MOMENT* 107 (2007). See also PAUL HUTCHONS, *CHINA'S REAL REVOLUTION* 155 (1924).

<sup>93</sup> William Jennings Bryan sent a book on Thomas Jefferson to Yuan to help in his putative effort to produce a "United States of China." Jerry Israel, *For God, For China, and For Yale*, 75 AM. HIST. REV. 805 (1970).

<sup>94</sup> LEANG-LI, *supra* note 91, at 6.

of his regime.<sup>95</sup> To help showcase his constitutional project to the United States, he turned to the Carnegie Endowment for International Peace (“CEIP”).

The Endowment, a subsidiary arm of the Carnegie Foundation, was founded in 1910, and it reflected the dream of its founder, Andrew Carnegie, that international legal cooperation could lead to world peace. Carnegie selected Elihu Root as the first President of the Endowment, along with trustees who were luminaries in U.S. politics. Jonathan Zasloff has argued that Root’s views represented a more traditional understanding of U.S. participation in international law that rejected much of the idealism of men like Carnegie and Wilson.<sup>96</sup> Yet, a great deal of Root’s other work at the Endowment was guided by a belief in the new view of the U.S. lawyers as foreign legal reformer.<sup>97</sup> As a result, while Root and Wilson did have very different views of international law, their views of the United States’ role in Chinese legal reform were in fact quite consonant. Here, the Foundation’s work exemplified the type of private, civil society reformism to which almost all U.S. lawyers gave their support.<sup>98</sup>

One of Root’s first acts as President of the Carnegie Foundation was to send Endowment trustee and Harvard President Charles Eliot to China in 1912 to advise Yuan on his selection of U.S. legal advisers to assist with the writing of the Chinese Constitution.<sup>99</sup> In China, Eliot met with Yuan and convinced him that it would be better for the Endowment to vet advisers on his behalf. In this way, Frank Goodnow became formally introduced to Chinese affairs.

After Eliot returned to the CEIP, the Endowment quickly conferred with Eliot, Wilson and other trustees. Nicholas Murray Butler, then Columbia’s President and CEIP board member, wrote in support of Goodnow that “he is the best possible person because he unites the highest type of legal scholarship with experience in affairs.”<sup>100</sup> Wilson was another founding member of APSA, and he had cited *Comparative Administrative Law*

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<sup>95</sup> See Hulsebosch & Golove, *supra* note 34, at 1061-66.

<sup>96</sup> Root’s views on international law and foreign policy are the extended focus of Zasloff, *Gilded Age*, *supra* note 45.

<sup>97</sup> See FRANK A. NINKOVICH, *THE DIPLOMACY OF IDEAS* 55 (1981).

<sup>98</sup> The Endowment did engage in the study of public international law related to China, especially treaty revisions. See, e.g., *CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, TREATIES AND AGREEMENTS WITH AND CONCERNING CHINA* (1929).

<sup>99</sup> The importance of the Endowment as an informal extension of the American government was immediately apparent. William Jennings Bryan initially had objected to Eliot, as “Eliot was a Unitarian and did not believe in the divinity of Christ, and the new Chinese civilization was founded upon the Christian movement there.” LI, *supra* note 88, at 17.

<sup>100</sup> NOEL H. PUGACH, PAUL S. REINSCH: OPEN DOOR DIPLOMAT IN ACTION 502 (1979).

throughout his own scholarly work, having called Goodnow “one of the most lucid of our [U.S.] writers.”<sup>101</sup> Goodnow’s appointment ultimately represented the new consensus on legal foreign reform abroad, as there could likely have been no greater domestic critic of Goodnow’s legal scholarship than Root. Root not only rejected the positions taken in Goodnow’s scholarly work, but in many other contexts he would have considered Goodnow’s Progressive legal views decidedly “un-American.”<sup>102</sup> However, with little dispute, in 1913 the CEIP extended to Goodnow a three-year contract, at a lucrative \$13,000 per annum salary, to travel to China and serve as Yuan Shikai’s legal adviser and shape the drafting of a new constitution.<sup>103</sup>

Goodnow, like many Americans of this time, possessed a basic familiarity with Chinese affairs. In fact, during the summer of 1903 he had traveled to China and Japan.<sup>104</sup> Given his renown, international scholars often approached him for advice, and he corresponded with members of the Chinese Legation in Berlin over the study of U.S. administrative law.<sup>105</sup> Although little is known about their relationship, Goodnow was also a mentor to V. K. Wellington Koo at Columbia prior to Wellington Koo’s storied diplomatic career for China.<sup>106</sup>

Yet, Goodnow clearly did not have a robust academic or intellectual knowledge of China.<sup>107</sup> At first blush, his belief in the universality of human governance made it less analytically pressing that he obtain a deep knowledge of China’s cultural particularities. Nevertheless, his knowledge of China fell far short of the standard he had held himself to in his previous work. Furthermore, his acceptance of CEIP’s offer reflected what would eventually become the most telling quality of his tenure in China: his shared presumption that the technocratic expertise that was transforming the United States could also transform China.

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<sup>101</sup> Phillip J. Cooper, *The Wilsonian Dichotomy in Administrative Law*, in *POLITICS AND ADMINISTRATION: WOODROW WILSON AND AMERICAN PUBLIC ADMINISTRATION* 87 (Jack Rabin & James S. Bowman eds., 1984).

<sup>102</sup> See *Gilded Age*, *supra* note 45; *Twenty Years’ Crisis*, *supra* note 45.

<sup>103</sup> GOODNOW PAPERS, *supra* note 14.

<sup>104</sup> Letter from Goodnow to S.P. Orth, Esq. (Oct. 1, 1903), in GOODNOW PAPERS, *supra* note 14. The Goodnow Papers also include a receipt from a Hong Kong tailor indicating Goodnow made several such purchases after the trip.

<sup>105</sup> Letter from Ching Yen, Esq. to Goodnow (Apr. 17, 1906), in GOODNOW PAPERS, *supra* note 14.

<sup>106</sup> STEPHEN G. CRAFT, *V. K. WELLINGTON KOO AND THE EMERGENCE OF MODERN CHINA* 39-40 (2004).

<sup>107</sup> Eliot had little issue with Goodnow’s limited knowledge of Chinese law. He even told his contacts in China that Goodnow was an expert on French law, which was in fact what Yuan’s government had requested. *THE CORRESPONDENCE OF G.E. MORRISON* 100 (Lo Hui-Min ed., 1978). But the CEIP viewed China much as APSA did, as “a sizable proportion of its leading lights” in both organizations were “poised for [their] first great contribution to the exportation of modernization.” ERNEST P. YOUNG, *THE PRESIDENCY OF YUAN SHIH’K’AI* 173 (1977).

Goodnow was not unreflective about his own lack of knowledge about China. He wrote to Eliot prior to leaving for China about his “ignorance of Chinese conditions.”<sup>108</sup> Nor was he shy about this fact. In a statement to the *New York Times* about his appointment, he said, “I have been to China . . . but only to its outskirts. I have not been into the interior, and when I was there I was only a casual visitor. I really cannot say what the scope of my prospective task is to be.”<sup>109</sup> But this evaluation of his own ignorance did little to dampen his initial enthusiasm.<sup>110</sup>

Goodnow’s appointment was greeted with enthusiasm both publicly and privately. John Burgess wrote to his former student with great pride and in the lofty sentiment of the era: “It is a great opportunity, and I have the feeling that you may be able to be to the China of today what Confucius was to it in the hoary past.”<sup>111</sup> Another long-time lawyer correspondent wrote to Goodnow that “I am greatly pleased to see that the opportunity of the generation in constitutional building has been offered you.”<sup>112</sup> Newspaper commentaries used similar language. One clipping Goodnow kept for himself claimed that “China will be a vast gainer by listening to his counsel” and “[h]is work at Peking will be in the highest sense a duty to humanity and to civilization.”<sup>113</sup> Not surprisingly, then, several ambitious individuals tried to join Goodnow in what was obviously an elite posting.<sup>114</sup>

It is interesting to note that the Chinese government characterized Goodnow’s appointment in much less grandiose terms. At the time of his initial appointment, James Scott, secretary of the CEIP, wrote to Goodnow

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<sup>108</sup> REED, *supra* note 75, at 84.

<sup>109</sup> *Untitled Article*, N.Y. TIMES, Mar. 14, 1913, in GOODNOW PAPERS, *supra* note 14, at 4.

<sup>110</sup> In a revealing exchange prior to his trip, Goodnow corresponded with William Walz. Walz was a law professor and he had served as an adviser to the Japanese government. He urged Goodnow to embrace his appointment, invoking the basic presumptions of the new internationalism. Walz claimed that there were “great opportunities for usefulness offered to an American in such a position in the cause of the Far East” and that “your mission to the Middle Kingdom is certain to be a success not only because you will inherit the good will that goes to the American generally by reason of the just and wise policy of the U.S. in the East, but also by reason of your special qualifications for the post of adviser.” William Walz to Goodnow, Mar. 28, 1913, GOODNOW PAPERS, *supra* note 14. In a reply to Walz, Goodnow claimed, “I have very little acquaintance personally with the East and it is a great comfort to me to read what you have written.” Letter from Goodnow to Walz (Apr. 1, 1913), in GOODNOW PAPERS, *supra* note 14.

<sup>111</sup> Letter from John Burgess to Goodnow (Mar. 2, 1913), in GOODNOW PAPERS, *supra* note 14.

<sup>112</sup> Letter from S.P. Orth to Goodnow (May 25, 1913), in GOODNOW PAPERS, *supra* note 14.

<sup>113</sup> Uncited Newspaper, *Brooklyn to Peking via Columbia*, GOODNOW PAPERS, *supra* note 14. The article also makes mention of Goodnow’s lack of specific Chinese expertise. It reconciles this with the claim that “It is perhaps true that not all administrative methods good for the U.S. would be good for an Oriental people. It is certain that many of our methods need only be examined to show their adaptability to China’s needs.”

<sup>114</sup> There is a long but mundane correspondence over the salary of Goodnow’s eventual aide in China. See Letter from Victor Hugo Duras to Goodnow (Mar. 22, 1913), in GOODNOW PAPERS, *supra* note 14. Others also wrote to Goodnow offering their services.

that “[t]he Minister adds that the duties of the adviser will be advisory rather than constructive, the Chinese intending to prepare their own constitution and desiring an adviser to revise and modify the instrument so as to make it consistent in all its parts.”<sup>115</sup> This marginalizing of foreign advisers was characteristic of China’s regimes throughout the post-1911 era. However, this significant detail was drowned out in the otherwise laudatory language that celebrated Goodnow’s imminent impact on China.<sup>116</sup> Thus, in contrast to Goodnow’s traditional portrayal as a casual neophyte, Goodnow arrived in China armed with a decade of colonial study and a popular mandate that saw it as his mission to help China progress to the ranks of civilized nations.

### III. GOODNOW’S COMPARATIVE CONSTITUTIONALISM AS APPLIED SCIENCE

#### A. *Comparative Constitutionalism as Scientific Enterprise*

Goodnow arrived in Beijing in early May of 1913. It is unclear whether he ever left Beijing, but from the beginning he and his wife were a hot commodity in expatriate and governmental social circles.<sup>117</sup> From his records, he seems to have spent most of his time reading, and he formed few lasting personal connections during his tenure.<sup>118</sup> If his personal letters are any indication, much of his life was more concerned with mundane daily life than any grand reform agenda.<sup>119</sup> Goodnow’s contact with the Chinese government included periodic meetings with Yuan and an official affiliation with the Bureau of Legislation, an advisory body attached to Yuan’s Cabinet. He had no formal relations with Parliament upon his arrival, as they had not been consulted about his appointment.<sup>120</sup>

On the ground, Goodnow’s life was functionally mediated by the U.S. missionary community, and it was Charles Eliot’s missionary contacts in China that formed the basis of Goodnow’s personal network in China.<sup>121</sup>

<sup>115</sup> Letter from James Brown Scott to Goodnow (Feb. 21, 1913), in GOODNOW PAPERS, *supra* note 14.

<sup>116</sup> In contrast to Japanese involvement, foreigners in China were never allowed to hold governmental positions and were never allowed to claim authorship of any government legal documents. Skinner Turner, *Extraterritoriality in China*, 10 BRIT. Y.B. INT’L. L. 63 (1929).

<sup>117</sup> Goodnow’s papers at Johns Hopkins University are replete with social invitations to various banquets and other social engagements from this time. GOODNOW PAPERS, *supra* note 14.

<sup>118</sup> This is an inference from the noticeable lack of correspondence with China residents after 1914, save those mentioned herein. GOODNOW PAPERS, *supra* note 14.

<sup>119</sup> Like almost every reformer to visit China, Goodnow complained about the lack of amenities in Beijing. Also, as a legal side note, advisers including Goodnow were always concerned with managing the taxation of their foreign salaries. See Letter from David Goodnow to Goodnow (Jan. 7, 1914), in GOODNOW PAPERS, *supra* note 14.

<sup>120</sup> GOODNOW PAPERS, *supra* note 14.

<sup>121</sup> Letter from Charles Eliot to Goodnow (Mar. 18, 1913), in GOODNOW PAPERS, *supra* note 14.



Goodnow also developed a personal relationship with the first resident Methodist minister in China, James Bashford.<sup>122</sup> Later, Goodnow would relate to others that whatever particular knowledge he eventually gained about China was primarily drawn from missionary sources.<sup>123</sup>

Goodnow's spirits were buoyant during his first months in China. He agreed to teach a course on constitutional law at Beijing University in the fall. He began giving lectures, which would be routinely published in both English-language and Chinese newspapers. It was at this point that he seemed most content concerning his influence on Chinese developments: "The result is that I am getting considerable publicity for my views, which was what I was after."<sup>124</sup> His most significant correspondence during his time abroad was with Nicholas Butler, who served as his primary contact at CEIP and for whom Goodnow served as a conduit of direct information about Chinese political developments.<sup>125</sup>

During this time, Goodnow busied himself with a range of distinctive academic writings on China. One of the areas that attracted a great deal of his interest was the reform of the Chinese educational system<sup>126</sup> and the development of professional academies for Chinese civil servants.<sup>127</sup> Blending various models emerging in the United States, Goodnow's legal curriculum combined comparative humanistic and technical subjects as well as a specialized tract for judges.<sup>128</sup> He even had time to research an article on Marco Polo<sup>129</sup> and another on the history of printing in China.<sup>130</sup>

It was also during this time that Goodnow began to explicitly tackle the larger task of applying his legal ideas to the Chinese context.<sup>131</sup> True to his

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<sup>122</sup> Letter from James Bashford to Goodnow (Apr. 4, 1916), in GOODNOW PAPERS, *supra* note 14.

<sup>123</sup> Letter from Nicholas Butler to Goodnow (July 7, 1913) and Letter from Goodnow to Mossgrave, (Dec. 23, 1918), in GOODNOW PAPERS, *supra* note 14. Goodnow cited seminal missionary texts on China throughout his papers and articles.

<sup>124</sup> Letters from Goodnow to Nicholas Butler (Nov. 2 and Dec. 12, 1913), in GOODNOW PAPERS, *supra* note 14.

<sup>125</sup> Letter from Nicholas Butler to Goodnow (May 26, 1913), in GOODNOW PAPERS, *supra* note 14. The value of this information has to be considered in light of the lack of telephone communication and the quite high expense of telegraphs during this era. Butler also had his assistant, Harry Haskell, send clippings to Goodnow of how his trip and Chinese affairs more generally were reported in the American press.

<sup>126</sup> In one of his essays reprinted in the expatriate press, *Modern Education Ideals*, Goodnow drew a sharp contrast between the literary character of the traditional Confucian exam system and the scientific methodology he associated with modern Western education. Frank J. Goodnow, *Modern Education Ideals*, 1913, GOODNOW PAPERS, *supra* note 14.

<sup>127</sup> Frank J. Goodnow, *The Education of a Chinese Official*, GOODNOW PAPERS, *supra* note 14.

<sup>128</sup> *Id.*

<sup>129</sup> Frank J. Goodnow, *Marco Polo and His Times*, GOODNOW PAPERS, *supra* note 14.

<sup>130</sup> Frank J. Goodnow, *Developments of Printing in China*, GOODNOW PAPERS, *supra* note 14.

<sup>131</sup> In an unpublished piece, Goodnow tried to differentiate his support of centralization and administrative power from what he called the "Asiatic autocratic principle." Frank J. Goodnow, *The*

comparative methods, he contemplated a hybrid government that “combines the Asiatic idea of strength with the European idea of popular cooperation.”<sup>132</sup> Yet, few of these ideas made it into any of his published work except his emphasis on strong property rights as a core component of Western prosperity.<sup>133</sup> It is apparent from these writings that Goodnow planned to use his experience in China to enhance the stature of his own ideas at home. In this respect, he was participating in the transnational flow of intellectual capital that Progressives drew from foreign work.<sup>134</sup>

The bulk of Goodnow’s initial work in China was focused on the Chinese Constitution. The first official material he produced in his capacity as an adviser was a critique of the legislature’s draft constitution. Ever the proponent of centralized power, Goodnow claimed that the draft gave too few powers to the President. He based his position on the fact that China was not a homogenous country and thus not suited to parliamentary rule. In this way, Goodnow expressed his characteristic belief in the universality of government, though he had little familiarity with Chinese politics or political traditions. Echoing the conclusions of his work on colonial administration, he also used the Chinese example to criticize the transplantation of English parliamentary rule to a variety of countries.<sup>135</sup> Throughout his comparative constitutional work in China, Goodnow repeatedly invoked his critique of a strict adherence to the juris-centric interpretation of the common law and the rigidity of the U.S. Constitution.<sup>136</sup>

Feeling that his early advice had not been heeded by the legislature, Goodnow quickly took the initiative to write his own draft constitution.<sup>137</sup> This draft emphasized a strong executive power while devolving less power to the provinces, mirroring his distaste for federalism.

Shortly after Goodnow’s arrival, Yuan’s regime became embroiled in conflict; after Yuan suppressed the rebellion, he purged the parliament. In the wake of this rebellion, Yuan grew far more interested in Goodnow’s

*Contributions . . . Asiatic Peoples Have Made to the Political Development of the Human Race*, 1913, GOODNOW PAPERS, *supra* note 14.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> See generally JERRY ISRAEL, *PROGRESSIVISM AND THE OPEN DOOR* 91 (1971). For two recent case studies, see PAUL A. KRAMER, *THE BLOOD OF GOVERNMENT* (2006); ALFRED W. MCCOY, *POLICING AMERICA’S EMPIRE* (2009).

<sup>135</sup> Frank Goodnow, *Criticism of the Draft Constitution*, 1913, GOODNOW PAPERS, *supra* note 14.

<sup>136</sup> In one such article, Goodnow cited his work on municipal organization as the basis for a plan to reorganize the provincial structure of the Chinese political system, thus creating the system he hoped to see in America where sub-national units became the local enactors of central dictates and did not possess overlapping spheres of sovereignty. Frank Goodnow, *Administrative Reform in China*, PEKING GAZETTE, Jan. 31, 1914.

<sup>137</sup> Letter from Goodnow to Nicholas Butler (June 26, 1913), in GOODNOW PAPERS, *supra* note 14.

constitutional ideas. During this time, Goodnow continued to write about China's optimal constitutional structure, emphasizing the need for executive power in light of China's lack of strong class interests.<sup>138</sup> He also argued for the utility of an advisory council to Yuan, not as a true legislative body, but rather as a representative body to popularize his decisions.<sup>139</sup>

Under Yuan's shadow, in early 1914 a new constitution was adopted that actually incorporated a great deal of Goodnow's draft.<sup>140</sup> The text was replete with claims of equality, privacy, and various liberal freedoms.<sup>141</sup> At the same time, it gave the president the power to confer "titles of nobility,"<sup>142</sup> and clearly recognized the primacy of state power, including language that rights existed "within the limits of the statutes" and "in accordance with the provisions of law and ordinance" and "not in conflict with . . . discipline of the Army and Navy."<sup>143</sup> Similarly, the Constitution called for government transparency but added that "when . . . it is considered that publicity may be prejudicial to peace and order, or to public morality, secrecy may be observed."<sup>144</sup> Moreover, whatever aspirations the Constitution expressed, there were certainly many leaders in China who doubted Yuan's support for its more aspirational implementation.<sup>145</sup>

### B. *Comparative Legal Science and the Primacy of Local Politics*

Goodnow's early constitutional work in China was greeted with the same broad enthusiasm as his appointment. George Morrison, Yuan's first foreign political adviser from Australia, wrote to Charles Eliot soon after Goodnow's arrival "[y]our selection has given universal satisfaction. Professor Goodnow arrived here a few days ago and has immediately won the regard of everyone whom he has met whether Chinese or foreign."<sup>146</sup>

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<sup>138</sup> Frank J. Goodnow, *The Parliament of the Republic of China*, 1914, in GOODNOW PAPERS, *supra* note 14.

<sup>139</sup> Frank J. Goodnow, *Dr. Goodnow's Memorandum on Advisory Council*, in GOODNOW PAPERS, *supra* note 14.

<sup>140</sup> THE CONSTITUTIONAL COMPACT OF THE CHUNG HUA MIN KUO (Sao-Ke Sze & T.Y. Lo trans., 1914).

<sup>141</sup> *Id.* arts. 4-13.

<sup>142</sup> *Id.* art. 27.

<sup>143</sup> *Id.* art. 5.

<sup>144</sup> *Id.* art. 47.

<sup>145</sup> JHENG OUYANG, MODERNIZATION OF CHINESE LAW DURING THE EARLY REPUBLICAN PERIOD 24 (1993). In a March 1914, telegram sent to Yuan by a number of military governors and chief civil officers, questions were raised about judicial reform as "judicial independence is certainly expressed in the spirit of the constitution . . . however, it has to be carried out by taking into account the financial ability of the nation," *Id.*

<sup>146</sup> THE CORRESPONDENCE OF G.E. MORRISON, *supra* note 107, at 451; *see also* George Morrison, *Comment*, THE NATION, Aug. 29, 1912.

Morrison also reinforced the importance of the CEIP's sponsorship of Goodnow, claiming that Yuan was a steadfast supporter of Wilson's new administration.<sup>147</sup>

Newspaper reporting about Goodnow's efforts was equally consistent and continued to glamorize his work. The *Baltimore Evening Post* claimed that he was "making China's new law" and reprinted his review of the provisional constitution in full.<sup>148</sup> Jeremiah Jenks, another leading Progressive intellectual and then President of New York University, lauded Goodnow's work in the *New York Times* and claimed that his advice had led to Yuan's decision to adopt an U.S.-style Cabinet.<sup>149</sup> In these accounts, Goodnow, although a private citizen under the employ of the Chinese government, was nevertheless portrayed as an agent of U.S. interests, with Jenks claiming that "in turning to Washington and the American plan for guidance, Yuan Shikai once more demonstrates the great wisdom, the true democracy of this Moses of Cathay."<sup>150</sup>

Goodnow quickly became a leading "China expert" in the United States. The major luminaries of Sino-U.S. relations who came through Beijing during this time invariably met with him. William Rockhill, the famed U.S. diplomat, visited Goodnow and praised his work as the cause of greater order and stability in China.<sup>151</sup> John Rockefeller wrote to Goodnow asking him to be a board member on the Rockefeller Foundation's China Medical Board, which was the Foundation's first major project in China.<sup>152</sup>

The most notable deviations from this broad endorsement of Goodnow were primarily personal and private. One friend made the uncharacteristic statement that "[w]e need men like you over here more than they do in China. Those 'Chinese' have forgotten things about the philosophy of life that we haven't yet learned."<sup>153</sup> Goodnow and his wife corresponded frequently with their children, and his son David repeatedly queried his father as to whether he would be staying the full three years.<sup>154</sup>

However, as well received as Goodnow's appointment was at home, and as productive as he was as a scholar during his early tenure, the popular image of his work in China fell far short of reality. It was during this period

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<sup>147</sup> THE CORRESPONDENCE OF G.E. MORRISON, *supra* note 107, at 451.

<sup>148</sup> *Making China's New Law*, BALTIMORE EVENING SUN, Dec. 11, 1914.

<sup>149</sup> Jeremiah Jenks, *Republican Government in China*, BALTIMORE EVENING SUN, May 6, 1914.

<sup>150</sup> *Id.*

<sup>151</sup> *Mr. Rockhill on China*, PEKING DAILY NEWS, 1914, GOODNOW PAPERS, *supra* note 14.

<sup>152</sup> Letter from John Rockefeller to Goodnow (Dec. 7, 1914), in GOODNOW PAPERS, *supra* note 14. Rockefeller felt that Goodnow's relationship with Yuan would help the Foundation secure property rights in China for the Foundation's new administrative center.

<sup>153</sup> Letter from DePrey to Goodnow (July 1914), in GOODNOW PAPERS, *supra* note 14.

<sup>154</sup> Letter from David Goodnow to Goodnow (Jan. 7, 1914), in GOODNOW PAPERS, *supra* note 14.

that Wilson withdrew from the international banking consortium that had been organized during the Taft Administration to make loans to Yuan's regime. Although part of Wilson's self-perceived non-imperial stance towards China, Yuan had used funding from the consortium to suppress the southern rebellion, and Goodnow felt that Wilson's withdrawal weakened his position as an adviser.<sup>155</sup>

Concurrently, Goodnow's developing evaluation of legal reform under Yuan is revealed in his correspondence with Nicholas Butler. Exhibiting a clear public/private split, what Goodnow disclosed to Butler in his private letters was in sharp contrast to his public writings and claims. Early on, Goodnow's sense of empowerment in China gave rise to an imagined ease of reform implementation which made the known complexities of reform in the United States appear, at first blush, burdensome by comparison. However, even at his most optimistic, Goodnow could never provide evidence that his legal reform ideas were being considered and instead solely asserted that he believed that his ideas had important supporters.<sup>156</sup>

Goodnow's personal correspondence clearly reveals that his early optimism quickly gave way to frustration. Writing to Butler, Goodnow claimed that, "as I look at it these Chinese have hardly the faintest idea of what a constitution is. They do not, I think, even know what law is."<sup>157</sup> Finding the country far more unstable than he had expected, Goodnow lamented that "China is incoherent" and even when he submitted his draft constitution he was agnostic as to whether it "may go into the waste paper basket."<sup>158</sup>

Goodnow's dissatisfaction with China ebbed and flowed, but gradually deepened over time. A month after he submitted his draft constitution he told Butler, "My work is somewhat in a lull at present. A 'lull' in China is a full stop. They are always at a lull according to our ideas."<sup>159</sup> No doubt motivated by the fact that the Chinese did not move to implement his ideas, Goodnow claimed that in China "individualism has been so rampant that they do not seem to have any conception of social obligation."<sup>160</sup> Significantly, he

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<sup>155</sup> Letter from Goodnow to Nicholas Butler (Feb. 26, 1914), in GOODNOW PAPERS, *supra* note 14.

<sup>156</sup> *Id.*

<sup>157</sup> Letter from Goodnow to Nicholas Butler (June 26, 1913), in GOODNOW PAPERS, *supra* note 14.

<sup>158</sup> *Id.*

<sup>159</sup> Letter from Goodnow to Nicholas Butler (July 7, 1913), in GOODNOW PAPERS, *supra* note 14.

<sup>160</sup> *Id.* Here the Progressive-era emphasis on collective action reversed the traditional Western critique of Chinese culture and law as too collectively oriented. *But cf.* Teemu Ruskola, *Legal Orientalism*, 10 MICH. L. REV. 179 (2002).

cited the political instability in China as a reason to believe that “constitution-making has really ceased to have any practical political importance.”<sup>161</sup>

He told Butler that Yuan had expressed little interest in having students trained in Western political science, and that even among the intellectual classes China was totally disorganized.<sup>162</sup> He further confided to Butler several critiques of academic freedom under Yuan, commenting on the ejection of students and professors from Chinese universities on political grounds.<sup>163</sup>

Goodnow’s lack of direct participation in Chinese politics helps explain why he was so prolific a writer in this short period of time. Not five months after his arrival, he was spending most of his time preparing his academic lectures. Again, he was hardly sanguine about the utility of his efforts as “the lectures are rather elementary, but that makes little difference as nobody over here knows anything, about constitutional or, indeed, about any other kind of law.”<sup>164</sup> He also made several notes as to his annoyance with the various “fool statements” made by his Chinese audiences.<sup>165</sup> Yet, Goodnow continued to contemplate what the CEIP could do with its interest in China.<sup>166</sup>

It was early in 1914 when Goodnow was approached to become Dean of the Johns Hopkins University (“JHU”). JHU was a leading prototype for the modern U.S. university and a central hub for the elite of Wilson’s Progressive cohort. The international circulation of political and intellectual capital in the era was evident in how announcements of Goodnow’s deanship often cited his China experience as a key asset.<sup>167</sup> Goodnow accepted the offer with little hesitation. However, his desire to terminate his China contract more than two years early was initially met with resistance by the trustees of the CEIP.<sup>168</sup> Butler continued to urge Goodnow to stay in China

<sup>161</sup> Letter from Goodnow to Nicholas Butler (Aug. 13, 1913), in GOODNOW PAPERS, *supra* note 14.

<sup>162</sup> Letter from Goodnow to Nicholas Butler (Jan. 2, 1914), in GOODNOW PAPERS, *supra* note 14.

<sup>163</sup> Letter from Goodnow to Nicholas Butler (Aug. 16, 1913), in GOODNOW PAPERS, *supra* note 14.

<sup>164</sup> Letter from Goodnow to Nicholas Butler (Nov. 2, 1913), in GOODNOW PAPERS, *supra* note 14.

<sup>165</sup> *Id.*

<sup>166</sup> Goodnow told Butler about his ideas for reorganizing Chinese education, and suggested that an independent research institution could be funded to promote public education. Letter from Goodnow to Nicholas Butler (Dec. 12, 1913), in GOODNOW PAPERS, *supra* note 14.

<sup>167</sup> Albert Shaw’s *The American Review of Reviews*, a leading journal of the transatlantic Progressive community, stated that “[s]ome experience away from home helps us appreciate the value of our capable Americans . . . [Goodnow] had to have his experience at a distant post in order that his strength and fitness might be more apparent.” *Dr. Goodnow for the Johns Hopkins*, 49 AM. REV. OF REV. 400 (1914).

<sup>168</sup> Eliot’s personal interest in Goodnow’s project led him to actively oppose early termination. Butler relayed a telegraph which Eliot had sent: “Shortening Goodnow’s contract for any reason except demonstrated sickness injurious to China America Carnegie Trustees and himself (STOP) consent of China no mitigation of injury presidency of Hopkins no justification (STOP) Doubts about his own serviceableness and achievements good reason for staying not for going (STOP) hope you advise him to stick tight.” Letter from Nicholas Butler to Goodnow (Jan. 27, 1914), in GOODNOW PAPERS, *supra* note 14.

because he worried that his departure would have a negative impact on the U.S. image in China. He also told Goodnow that “some of the businessmen here feel that American prestige in the East is at stake in your carrying your work through to the end.”<sup>169</sup>

Yet Goodnow was adamant. He told Butler that “[t]he Carnegie Endowment’s nominee is in danger of becoming merely a charge upon the strained finances of the country and is not fulfilling any useful purpose.”<sup>170</sup> In a February 16, 1914 letter to Butler, Goodnow released the full fury of his dissatisfaction with his time in China. He felt that the parliament was hostile to his presence and “either refused or neglected to admit me to its deliberations or to ask my advice.”<sup>171</sup> He said explicitly that the Chinese had no desire to liberalize or democratize:

Young China has lost control, the old ideas of Chinese absolutism are now in the ascendancy, the prospect of adopting a constitution on western lines has been set back for perhaps 25 years; indeed such a constitution may never be adopted” and “whatever course China did take,” it would “be little if any influenced by foreign advice.”<sup>172</sup>

Goodnow also highlighted how rising Chinese nationalism complicated the work of advisers as “frequent complaints appear in the press of the heavy and useless expense of foreign advisers.”<sup>173</sup> He rejected the notion that he was doing anything of particular service to America, or that his appointment by the Chinese government was solely to secure recognition for the regime. Summarily, he noted that many in China knew that “[t]he appointment of foreign advisers is thought often to be due to their desire to please the foreign nation concerned.”<sup>174</sup> Perhaps part of Goodnow’s aggravated sense of alienation was the fact that members of Yuan’s regime, who claimed to be happy with, but seemingly indifferent to, his work displayed little resistance to his leaving. One official actually gave the opinion that Goodnow would be more useful to China as President of JHU than as a legal adviser.<sup>175</sup>

In his last letter to persuade the CEIP to release him, Goodnow roundly condemned the Chinese government and the Chinese people. He claimed

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<sup>169</sup> Letter from Nicholas Butler to Goodnow (Feb. 2, 1914), in GOODNOW PAPERS, *supra* note 14.

<sup>170</sup> Letter from Goodnow to Nicholas Butler (Feb. 16, 1914), in GOODNOW PAPERS, *supra* note 14.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

that, “[t]here is so much graft and corruption, so much ignorance on the part of the mass of the people, and so little practical common sense on the part of about all the leaders here except the President.”<sup>176</sup> He also repeated his claim that “the importance of the position of adviser to this government is greatly exaggerated” because the Chinese had a “total lack of any idea of law.”<sup>177</sup> In no uncertain terms, he asserted that this rendered foreign advisers all but useless in China:

My feeling was and is that the Chinese, the experience of all the advisers here would seem to show, have really no serious intention of following the advice of their advisers, unless that advice agrees with their own conclusions. Indeed, they regard their advisers as almost entirely ornamental in character and seldom let us know what is really going on. All we do is to write essays which are translated into Chinese and then what happens to them Heaven only knows.<sup>178</sup>

The ultimate consequence of this state of affairs, Goodnow concluded, was that any objective advice he gave would only be used to justify further government power grabs:

This will not be because I am in favor of absolutism even for China, but because my advice will be asked with regard to some one point while the general problem will not be presented to me. I am, thus, in favor of a strong executive, which they know. I have already and undoubtedly in the future will be asked to write opinions on that point and have already given and will give opinions in favor of it . . . . I am therefore being forced into the position of, to use the words of Admiral Tsai, assisting to centralize the power of Yuan. This I do not altogether like. For, although I believe that what China needs at the present time is the strong arm, I would like to see the Chinese making the attempt at any rate to establish a form of government which may in the future develop along western lines.<sup>179</sup>

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<sup>176</sup> Letter from Goodnow to Nicholas Butler (Feb. 26, 1914), in GOODNOW PAPERS, *supra* note 14.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> Letter from Goodnow to Nicholas Butler (Feb. 16, 1914), in GOODNOW PAPERS, *supra* note 14.



Butler and the other trustees of the CEIP eventually consented to Goodnow's desire to leave China and become president of JHU. Nevertheless, he agreed to stay through the summer of 1914, solely at Yuan's personal request.<sup>180</sup> Even when the 1914 provisional constitution containing many of his ideas was adopted, Goodnow was unmoved. He told Butler that the constitution in fact gave too much power to Yuan and that in the end "the Chinese will not live up to any constitution that they adopted. It is not in them. They have no conception of the rule of law. They have no courts worthy of the name."<sup>181</sup> Yet for all his protests, Goodnow agreed to stay on nominally as Yuan's adviser even after he returned to the United States.<sup>182</sup>

### C. *From Comparative Lawyer to Expert Propagandist*

Goodnow returned to the United States at the end of the summer of 1914 to begin what would become a quite successful tenure as President of JHU. What is striking about his activity in the following year is that he continued to publically support Yuan, in both journalistic and academic publications. He did not publicly claim that his mission had been in vain nor did he question his own particular expertise. He continued to draw on his experience in China as intellectual capital to bolster his own ideas at home and he continued to give his personal allegiance to Yuan as the savior of an otherwise dysfunctional society. As a result, as critical as he was of China privately, publically he was unable to accept the failure of his good intentions and technocratic ambitions. In fact, at Yuan's personal behest, Goodnow returned to Beijing for six weeks during the summer of 1915.<sup>183</sup>

During this year stateside, Goodnow's quick departure from China provided fodder to those who had been critical of Wilson's approach to China.<sup>184</sup> Many were quick to point out the authoritarian nature of Yuan's actions and contested formal diplomatic recognition of his regime. However,

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<sup>180</sup> Goodnow's letters to Butler after his release continued to be acerbic in tone. He seemed upset that news of his leaving was always met with feigned sadness by Chinese officials whose estimation of him could clearly be inferred from the fact that "they do not adopt any of my concrete suggestions nor do they ask my advice." Letter from Goodnow to Nicholas Butler (Apr. 24, 1914), in GOODNOW PAPERS, *supra* note 14.

<sup>181</sup> Letter from Goodnow to Nicholas Butler (May 18, 1914), in GOODNOW PAPERS, *supra* note 14.

<sup>182</sup> Letter from Goodnow to Nicholas Butler (June 17, 1914), in GOODNOW PAPERS, *supra* note 14.

<sup>183</sup> GOODNOW PAPERS, *supra* note 14.

<sup>184</sup> Goodnow was aggressively critical of Sun Yat-Sen and others opposed to Yuan's regime: "Young China still resolutely shuts its eyes to the actual facts of Chinese life," and in their blindness they had committed "treasonable conspiracy in support of the rebellion." Frank Goodnow, *The Adaptation of a Constitution to the Needs of a People*, 5 PROC. ACAD. POL. SCI. 27, 32 (1914).

Goodnow was quick to respond to such criticisms and shortly after his return he began to play an active role in Yuan's courting of international favor.

Goodnow was frequently quoted in both the local *Baltimore Evening Sun* and the *New York Times* responding to criticisms of Yuan. In his comments, he would often emphasize the Japanese example where legal change in Asia was gradual and led by strong central leadership.<sup>185</sup> Goodnow publicly admitted that Yuan had no real checks on his power, but he called attention to Yuan's moral virtue and fostered the image of Yuan as a defiant modernizer.<sup>186</sup> Thus, by implication, whatever actions Yuan took were justifiably necessary to pave the way for a permanent constitution that would eventually be expressive of some form of representative, democratic assembly.

Throughout his public addresses and academic writings, Goodnow clearly affirmed the idea that China would soon "Westernize" and asserted the superior efficiency of Western forms of governance over those of the East.<sup>187</sup> He phrased these legal claims in broad scientific terms, citing evidence from Chinese natural science, demographics, economic structure, and agriculture.<sup>188</sup> He used the authority of an objective legal science to shield himself from normative arguments about what China should be doing, and the claim that a proper analysis of Chinese legal development was one divorced from morality.<sup>189</sup>

In this way, Goodnow never refrained from claiming that his work in China was based on his scientific evaluations as a comparativist.<sup>190</sup> He recurrently presented Yuan as a reluctant wielder of power, whose hand was forced by exigent circumstance. To this end, Goodnow repeated his earlier critique of the first draft constitution as "framed with little regard to Chinese conditions" and "based on the theory that a constitution itself would exercise a controlling influence on political action regardless of the conditions and

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<sup>185</sup> "Of course it is true, that the President has wide powers under the Constitution . . . [t]his constitution it is to be remembered, is still a provisional Constitution, adopted for the purpose of permitting transition with safety and as little friction as possible from the autocratic Government of the past to some form of representative government based upon European ideas." *Goodnow Commends China Constitution*, N.Y. TIMES, June 22, 1914.

<sup>186</sup> *Goodnow Praises Yuan*, N.Y. TIMES, Aug. 30, 1914.

<sup>187</sup> Frank Goodnow, *Reform in China*, 9 AM. POL. SCI. REV. 210 (1915).

<sup>188</sup> "The adoption of what may be called the scientific method of the conduct of life . . . may, however, be said to be the most important contribution of the European to human progress." *Id.* at 216.

<sup>189</sup> "We are not here concerned with the ethical character of European policy towards China during the past century. It may be just as unethical as many Europeans have claimed. It may be just as detestable as its Chinese opponents deem it to be. But it is none the less true that Chinese opposition to it has both failed to prevent its adoption, and has plunged China into a pit from which the country is endeavoring now with great difficulty to extricate itself." *Id.* at 211.

<sup>190</sup> Goodnow, *supra* note 184.

traditions of the people to which it applied.”<sup>191</sup> He gave Yuan credit for “Western” educational reform during his time in Tianjin and the creation of a “modern army.”<sup>192</sup> He described Yuan as being only “comparatively conservative” when opposed to the “radical and theoretical.”<sup>193</sup>

When specifically addressing Chinese law, Goodnow gave faint praise to “Oriental idealism”<sup>194</sup> but claimed that basic rule of law principles, even judicial independence, were far more important to Asia’s future.<sup>195</sup> Goodnow told his audience that the “absence of the rule of law” in China was demonstrated by the limited power of central law to modify the unruly and undisciplined nature of the Chinese people.<sup>196</sup> Thus, while “China’s attitude toward the introduction of Western ideas has been for the most part one of hostility,”<sup>197</sup> this “is an attitude which must and will be abandoned.”<sup>198</sup>

Goodnow believed that China had traditionally been “the home of *laissez-faire*.”<sup>199</sup> This independence and legacy of freedom was for him a hindrance to progress, not a foundation for liberty. Thus, when it came to the role of law in Chinese daily life, “laws and edicts have been issued to supplement the force of moral precept and customary usage has usually been deemed expedient to convince those affected by them of the reasonableness of the action proposed to be taken.”<sup>200</sup> This lack of social coordination formed the basis for his claim that Yuan’s empowerment was simply the scientifically observable outgrowth of Chinese conditions.<sup>201</sup> His central example was corporate law, which he cast as an essentially cooperative act where law and social morality must mutually reinforce each other.<sup>202</sup>

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<sup>191</sup> *Id.* at 31.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* This faint praise is in the context of China’s role as a fallen, intermediary civilization crucial to the larger shift towards evolutionary thought in international law: “Of course it is true that from an idealistic rather than a materialistic point of view the West may not be superior to the East. It may also be that in the long course of centuries the vaunted superiority of the West to the East may not be so evident if it may be said to exist at all. But it is certainly true that the immediate future will mark the further, even if temporary, victory of Western ideals.” See generally MARTTI KOSHKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS* (2004); ANTONY ANGHIE, *IMPERIALISM, SOVERINGTY AND THE MAKING OF INTERNATIONAL LAW* (2005).

<sup>195</sup> Goodnow, *supra* note 187, at 222.

<sup>196</sup> *Id.* at 215.

<sup>197</sup> *Id.* at 211.

<sup>198</sup> *Id.* at 209.

<sup>199</sup> “Not accustomed to yielding obedience to arbitrary authority . . . [the Chinese] must as a whole be convinced of the desirableness of unaccustomed action before they will take it.” *Id.* at 215.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 216.

<sup>202</sup> “[In the West] there has been an independent and reasonably upright judicial system to which the shareholders of companies might have recourse in case their rights under the law were violated; in the second place, largely because of the existence of such courts, a spirit of trusteeship, of fiduciary obligation,

In fact, much of Goodnow's specific claims about Chinese law were generally well received by the U.S. legal community. Simeon Baldwin, a founding member and one-time President of the American Bar Association who had also taken on the Directorship of the Association's Bureau of Comparative Law, specifically cited Goodnow's work as an ideal of comparative work and his analysis of China's financial institutions as a "searching inquiry."<sup>203</sup>

Goodnow also used his version of Chinese affairs to highlight his own critique of the inflexible and "superstitious" presumptions of U.S. legal parochialism, now casting it as not only harmful to the U.S. domestically but to China as well.<sup>204</sup> Goodnow used critiques of his work in China which supported Republicanism to reaffirm his claim that U.S. parochialism was a hindrance to an expert evaluation of China, and support his anti-formalist critique of comparative constitutionalism.<sup>205</sup>

Goodnow turned this anti-parochialism to the aid of Yuan by arguing that bad news had to be interpreted with an eye to the gradual, teleological progression of China as it shed the backward elements of its history. He knew it was "of course somewhat disconcerting to the ardent republican who regards a republic as a government of the people, by the people and for the people" but reminded his reader that "China has never really known any sort of government but personal government in accordance with immemorial custom."<sup>206</sup> As such, "the problems of the present are rather those of efficiency and stability than of liberty and popular government."<sup>207</sup> Goodnow sought herein to accommodate Chinese culture within a universal frame:

It is extremely doubtful whether any real progress in the direction of constitutional government in China will be made by a too violent departure from past traditions, by the attempt, in

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has grown up among the people which has prevented the misuse of their position by the officers of companies for selfish, including family, interests." *Id.* at 220.

<sup>203</sup> Simeon Baldwin, Annual Address of the Director of the Bureau of Comparative Law, Aug. 18, 1915, in AMERICAN BAR ASSOCIATION, REPORT OF THE THIRTY-EIGHTH ANNUAL MEETING 886, 893. (1915).

<sup>204</sup> "[I]t is nevertheless true that in the United States probably more than elsewhere there still lingers the belief in political principles of universal application, regardless of the economic and social conditions obtaining in particular countries and of the history and peculiar traditions of those countries. The existence of these ideas and their disastrous effects upon constructive political work have been brought most forcibly to my attention during the past year as a result of the experience which it has been my good fortune to have in connection with the attempts made in China to frame a constitution for its new republican government." Goodnow, *supra* note 184, at 29.

<sup>205</sup> Frank J. Goodnow, *The Actual Working of the Chinese Republic*, N.Y. TIMES, Dec. 13, 1914.

<sup>206</sup> *Id.* at 35. See also John Gunnell, *The Founding of the APSA*, 100 AM. POL. SCI. REV. 508 (2006).

<sup>207</sup> Frank J. Goodnow, *Dr. Goodnow's Comments on the New Constitution*, 1 CHINESE REV. 167 (1914).

order to apply a general political theory, to establish a form of government, which, while suited to other countries, does not take into account the peculiar history of China and the social and economic conditions of the country.<sup>208</sup>

Goodnow turned to this form of argument to support the power the current Chinese constitutional had vested in Yuan using the language of emergency power: “The adoption of the rule of law and the protection of private rights” is thus important in “ordinary times.”<sup>209</sup> Superficially, he supported freedom of speech in China as “only where the press has a reasonable freedom that private rights are protected and that progress in popular government is possible.”<sup>210</sup> However, he issued the caveat that this was acceptable “provided [that] such criticism does not take the form of seditious utterance.”<sup>211</sup> Again, the essential circularity of his argument was only resolved when he assumed the inevitability of teleological progress: “China’s lack of discipline and her disregard of individual rights make it probable that a form of government which has many of the earmarks of absolutism must continue until she develops greater submission to political authority, greater powers of social cooperation and greater regard for private rights.”<sup>212</sup>

Goodnow buttressed these claims with sharp challenges to the expertise of outside critics by drawing on his experience as an adviser. He stated that “no one therefore who is not acquainted with the ins and outs of Chinese political life can sit in judgment upon the particular acts of the President in the great struggle which he has been conducting with such consummate skill during the past two or three years.”<sup>213</sup> In contrast, based on his experience he could confidently “express an opinion as to the general result” that Yuan was “bringing order out of disorder”<sup>214</sup> and “endeavoring to lead China into the paths of constitutional government as fast as her faltering steps will permit.”<sup>215</sup> Thus, in practical terms, he held that only a rare intermediary figure like himself could correct both Chinese and U.S. misconceptions and then divine the truth of where Chinese law was and should be going.

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<sup>208</sup> Goodnow, *supra* note 184, at 37.

<sup>209</sup> Goodnow, *supra* note 187, at 222.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 217.

<sup>213</sup> Goodnow, *supra* note 184, at 37.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 37-38.

As a result, Goodnow felt at ease making abstract concessions to “Chinese traditions and history” and the “peculiarities of Chinese life” that shape a “Chinese problem” while at the same time dismissing his Chinese opponents as “denationalized” consumers of a naively idealized Western republicanism who sought to crudely “copy Europe.”<sup>216</sup> Pro-republican U.S. and European critics would also need to recognize that until “the social and economic conditions are quite different from what they are at present and bear a closer resemblance to the conditions of the West, it is useless to expect that a political organization based upon the conditions of the West can be advantageously adopted in China.”<sup>217</sup>

This framework situated Goodnow in the role of universal critic.<sup>218</sup> He could declare that “China should be careful both to guard against the enthusiasm of the recent convert to new ideas” while at the same time arguing that his critical expertise was needed as “[China] should also endeavor to avoid the mistakes of which Europeans have been guilty and, in the new life which will spring up in the country, attempt to remedy those defects of Western civilization the existence of which the most ardent admirer of the West will not deny.”<sup>219</sup>

Goodnow’s writings thus reflected the mutualistic pattern between him and Yuan, with Yuan gaining propaganda support and Goodnow drawing on his tenure in China to bolster his intellectual stature and promote his personal views in the United States.

#### IV. THE NEW AGE FOR U.S. LAW AND GOODNOW’S FALL FROM GRACE

##### A. *The Transgression of Monarchy over Republicanism*

The supreme confidence that marked Goodnow’s public discourse continued to belie the deep cynicism revealed in his personal letters. Notwithstanding his frustrating experience in China, he could not let go of the ideas that he knew what China needed and that there was something he could do to move it in the direction he divined necessary. He had quickly learned

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<sup>216</sup> Goodnow, *supra* note 187, at 218.

<sup>217</sup> *Id.* at 224.

<sup>218</sup> The domination of this process by foreign experts in China was yet another inevitable, if transitory, reality, motivating his support for extraterritoriality: “As Chinese capital accumulates, and as Chinese judicial institutions improve, it may be possible to place less reliance on the foreigner and to subject all persons in the country to the Chinese courts, but until such time it would seem to be useless to expect any great development of the country’s resources . . . In the meantime the Chinese people will have to be patient . . . They will undoubtedly be assisted in their efforts by the change in social conditions which the adoption of Western institutions will bring about.” *Id.* at 219, 223.

<sup>219</sup> *Id.* at 211.

that he could not bypass Chinese politics, but he still saw a role for himself in it. The lynchpin in his thinking was his relationship with Yuan.

The source of Goodnow's loyalty to Yuan is not initially obvious, but it was immediately clear upon his arrival in China. In his first letter to Butler in May of 1913, he claimed that "[Yuan Shikai] struck me as a man of great force and withal quite genial and kindly."<sup>220</sup> He would repeat this sentiment throughout his personal letters in which he was at his most honest: "I may be wrong, but I think he is honestly desirous of saving his country . . . He thinks that this can be done only through what is practically autocratic government and I am inclined to think he is right."<sup>221</sup> Yet, Yuan more often than not ignored Goodnow's advice, and late in Goodnow's stay in China Yuan became more distant. Goodnow even harbored suspicions about Yuan's eldest son: "Either the young man has taken quite a fancy to me or the President is using this way to find out what my views are."<sup>222</sup>

It is clear throughout both Goodnow's public and private writings that Yuan served as a logically necessary liminal figure for Goodnow. Although Yuan was Chinese, but he was perceived by Goodnow not to be "Chinese" in the ways that Goodnow believed stunted China's legal development. Goodnow felt Yuan was incapable of producing the expert knowledge that he could generate, but that Yuan recognized his expertise and authority. In this light, he took Yuan's exceptional personal qualities and used them as the medium through which his expert knowledge would be actuated in China.

When Goodnow returned to China in the summer of 1915, he produced for Yuan a new comparative memorandum on republicanism and monarchy. Ironically, this final act as legal adviser played out much as his earlier letters foreshadowed.

The memo to Yuan that Goodnow produced would soon overshadow the entirety of his career's earlier work and arguably remains his most famous piece of writing. Titled simply *Monarchy or Republic?*,<sup>223</sup> what came to be referred to as the "Goodnow Memo" ("Memo") laid out the argument for constitutional monarchy in China. Just a few short pages, the Memo distills the various claims that Goodnow had already made in his earlier writings. He reiterated that "the form of government which a country possesses is for the most part determined by the necessities of practical life" and "seldom, if

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<sup>220</sup> Letter from Goodnow to Nicholas Butler (May 18, 1913), in GOODNOW PAPERS, *supra* note 14.

<sup>221</sup> Letter from Goodnow to Nicholas Butler (Feb. 26, 1914), in GOODNOW PAPERS, *supra* note 14.

<sup>222</sup> Letter from Goodnow to Nicholas Butler (June 17, 1914), in GOODNOW PAPERS, *supra* note 14.

<sup>223</sup> Frank J. Goodnow, *Monarchy or Republic?*, in U. S. DEP'T OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1915, 53-58 (1924).

ever . . . the result of the conscious choice of the people of that country.”<sup>224</sup> He made clear in this assessment that the republican system in China was a failure, and that any sober-minded comparative constitutional analysis would yield the same conclusion.<sup>225</sup>

Goodnow’s language in support of monarchy is equally straightforward: “It is of course not susceptible of doubt that a monarchy is better suited than a republic to China.”<sup>226</sup> He focused on the inherent stability of the monarchical system, which he claimed was required for China to resist foreign subordination. In an obvious defense and approval of Yuan, Goodnow compared the current state of affairs in China to the aftermath of the American Revolution, when “had General Washington had the desire to become a monarch himself he would probably have been successful.”<sup>227</sup> He then claimed that where “the intelligence of whose people is not high . . . a republican form of government . . . generally leads to the worst form of government, namely, that of the military dictator.”<sup>228</sup> He discusses the “living stream of continuous internal disturbance” in Latin America as his primary examples.<sup>229</sup>

Goodnow set out conditions for the transition to a monarchy under Yuan, emphasizing orderly succession, and warned that “the government will never develop the necessary strength unless it has the cordial support of the people.”<sup>230</sup> Goodnow claimed that his advice should be shared by “those who have the welfare of China at heart.”<sup>231</sup>

Prior to the production of the Memo, Yuan had been contemplating declaring himself monarch for at least a year.<sup>232</sup> Late in 1914, he began to participate in rituals traditionally performed by the Chinese emperor. He was supported by his conservative allies who favored stability for commerce and international negotiation and who had grown weary of trying to appease his political opponents in southern China. The delivery of Goodnow’s memo was seized upon as a tool for publicly justifying the move. Yuan’s supporters

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<sup>224</sup> *Id.* at 53.

<sup>225</sup> *Id.* at 57 (“The intelligence of the great mass of its people is not high, owing to the lack of schools. The Chinese have never been accorded much participation in the work of government. The result is that the political capacity of the Chinese people is not large. The change from autocratic to republican government made four years ago was too violent to permit the entertainment of any very strong hopes of its immediate success.”).

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 55.

<sup>228</sup> *Id.* at 57.

<sup>229</sup> *Id.* at 55-56.

<sup>230</sup> *Id.* at 58.

<sup>231</sup> *Id.* at 57.

<sup>232</sup> YOUNG, *supra* note 107, at 173.



organized what is now known as the Peace Planning Society or, as then transliterated, Chou An-Hui. Yuan bought Western newspaper space to circulate the Memo and legitimate his move internationally.<sup>233</sup>

In the United States, Goodnow's support of Yuan's move was widely cited. In a *New York Times* article, *Yuan Now Plans to Be Emperor*, Yuan was quoted as having considered monarchy only after he was "urged by [Professor] Goodnow."<sup>234</sup> The article also mentioned that the Memo's authority rested in the fact that "[a]s Professor Goodnow is a citizen of a republic, he is more competent to make such a statement than others."<sup>235</sup> Goodnow was portrayed as a close ally to Yuan, having "secured the confidence of Yuan Shih-kai by advice given during former critical times."<sup>236</sup> As Goodnow intended, Yuan is portrayed as a reluctant unifier, initially agnostic in respect to the issue of monarchy: "A certain doctor gave me an exhaustive dissertation on the advantages and disadvantages accruing from monarchical and republican governments. I answered him that, being the [p]resident of a republic, I was in no position to discuss the question."<sup>237</sup>

Goodnow was also quoted as assenting to this use of his Memo, as he "did not mind his name being used by the Monarchists if it would assist in the peaceful promotion of a monarchy and the welfare of China."<sup>238</sup> In a follow-up article just two days later, he issued the caveat that the turn to monarchy "should be made acceptable to both the thinking people of China and the foreign powers."<sup>239</sup>

The circulation of the Memo caused a backlash in China. It drew fierce criticism from a range of leading Chinese intellectuals, including former monarchists Liang Qichao and Kang Youwei. Goodnow's Memo was attacked in China on many grounds, most notably on its omission of any account of the actual instability of various monarchical regimes of the era. Nonetheless, this initial backlash did not stop Yuan from officially laying claim to the throne in December 1915.

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<sup>233</sup> See JAMES E. SHERIDAN, *CHINA IN DISINTEGRATION: THE REPUBLICAN ERA IN CHINESE HISTORY: 1912-1949* (1975).

<sup>234</sup> *Yuan Now Plans to Be Emperor*, N.Y. TIMES, Aug. 16, 1915, at 1.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Monarchy in China as Soon as Yuan Dares*, N.Y. TIMES, Aug. 18, 1915.

### B. *The Shifting Tide of U.S. Legal Internationalism*

Traditionally, scholars have cast domestic U.S. reaction to Yuan's establishment of a monarchy as being one of universal disapproval.<sup>240</sup> Indeed, there were many contemporaries who moved without hesitation to vilify Goodnow after Yuan's move. A representative example was the widely cited book, *The Fight for the Republic in China*, written in 1917 by Bertram Weale, a long-time traveler and commentator on Chinese affairs. Weale pointed out that Goodnow's claims about China were based on his isolated experience in Beijing and he chided Goodnow for rarely leaving the capital.<sup>241</sup> Weale further asserted that the true leaders of China were "nonplussed by the insouciance displayed by the peripatetic legal authority,"<sup>242</sup> and he criticized Goodnow's claims about the "low political knowledge" of the Chinese people.<sup>243</sup> Weale rejected out of hand the notion that any foreigner should question China's movement towards introducing modern political institutions, criticizing "the utter levity of those who should have realized from the first that the New China is a matter of life and death to the people, and that the first business of the foreigner is to uphold the new beliefs."<sup>244</sup> He reproduced a tract by a prominent Chinese scholar who argued that it was wrong to interpret Yuan's move as legitimate, and equally wrong to take the conservatives' ideas and "now suddenly make a fetish of them because they have come out of the mouth of a foreigner."<sup>245</sup>

Tellingly, Beale also referenced more conservative elements in U.S. politics and painted Goodnow with an anti-American brush. Beale stated that Goodnow "[specializes] in that department known as Administrative Law which has no place, fortunately, in Anglo-Saxon conceptions of the State."<sup>246</sup>

Condemnation of Goodnow was also fueled by the growing international network of GMD supporters.<sup>247</sup> Tang Shaoyi, another Columbia University graduate, had served as the first President of the Republic under Yuan, but left before Goodnow's arrival—having been quickly dissatisfied

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<sup>240</sup> Noel Pugach asserts this view in his review of Goodnow's time in China, claiming that "the conclusions drawn by contemporaries were either that Goodnow had been duped by the monarchists or that he approved of and aided the movement." Noel Pugach, *Embarrassed Monarchist*, 42 PAC. HIST. REV. 499 (1973).

<sup>241</sup> WEALE, *supra* note 223, at 174.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 189.

<sup>244</sup> *Id.* at 190.

<sup>245</sup> *Id.* at 196.

<sup>246</sup> *Id.* at 66 n.1.

<sup>247</sup> Yung-chen Chiang, *Chinese Students Educated in the US and the Emergence of Chinese Orientalism in the Early 20th Century*, 1 TAIWAN J. E. ASIAN STUD. 74 (2004).

with Yuan's authoritarian ways. Tang told the *New York Times* that "Dr. Goodnow was used simply as a tool. He is a great scholar, a professor, a citizen of a great republic, but he was duped by the monarchist faction, because he did not have a real insight into the situation."<sup>248</sup>

Yet condemnation of Goodnow was far from universal. A Columbia University colleague, William Shepherd, reviewed Weale's book and made a much more dispassionate analysis of Goodnow's work. He noted that Weale was "distinctly belligerent in his attitude toward Dr. Goodnow" and that "the kind of 'advice' that he is alleged to have given [does] not seem easily refutable."<sup>249</sup> Shepherd did find that the Goodnow Memo, as presented by Weale, "certainly does find strange misconceptions in it of English and Spanish-American history in its applicability to Chinese conditions."<sup>250</sup> However, Shepherd defended Goodnow's credentials and noted the growing relevance of his expertise in common law systems.<sup>251</sup>

Reaction to Yuan's ascension and Goodnow's role were decidedly mixed in the U.S. press. Editorials in U.S. and British newspapers friendly to the Republican movement were critical of Goodnow, including his own local *Baltimore Sun*.<sup>252</sup> But other newspapers, from the *New York Times* to the *Washington Post*, found no problem with Goodnow's recommendation.<sup>253</sup> Within China itself, many U.S. business interests still favored the stability of monarchy, and Goodnow was defended in the pro-commerce *Journal of the American Asiatic Association*.<sup>254</sup> At the time, many legal scholars and lawyers connected to China came to Goodnow's defense. Firebrand extraterritorial U.S. Court for China Judge Lebbeus Wilfley defended Yuan and Goodnow, claiming that both were making an honest effort to build a responsible government.<sup>255</sup>

Most of these defenses, however, did make it clear that, whatever Goodnow's recommendations were, in the end China would follow the United States' lead. Paul Reinsch, still Minister to China, claimed that Goodnow was

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<sup>248</sup> *Yung Shih Kai Denounced by Former Premier*, N.Y. TIMES, May 21, 1916.

<sup>249</sup> William Shepherd, *Review*, 33 P. SCI. Q. 287, 289 (1918).

<sup>250</sup> *Id.* at 290.

<sup>251</sup> *Id.*

<sup>252</sup> *Dr. Goodnow's Recommendation of a Monarchy for China*, BALTIMORE SUN, Oct. 8, 1915, at 6.

Many British newspapers invoked this language in holding Goodnow as an American to a higher standard: "[The GMD] had a right to expect American sympathy and aid if not official support in their noble endeavors to gain political freedom . . . we earnestly hope the Chinese people will have an opportunity to prove that Dr. Goodnow is wrong." *A Fortunate Death*, THE INDEPENDENT, June 19, 1916.

<sup>253</sup> *Why China May Change*, L.A. TIMES Aug. 19, 1915, at 15; *Yuan Now Plans to be Emperor*, N.Y. TIMES, Aug. 17, 1915, at 1; *Yuan Wants Empire*, WASH. POST, Aug. 17, 1915, at 1.

<sup>254</sup> *Current Comment*, 15 J. AM. ASIATIC ASSOC. 257-58 (1915).

<sup>255</sup> *Yung Shih Kai, Emperor of China*, N.Y. TIMES, Aug. 22, 1915.

innocent of charges of complicity, though insisting that Goodnow was not consulted in the decision to declare monarchy.<sup>256</sup> Reinsch further asserted that Goodnow's emphasis on fostering a gradual movement to elections and democracy was prudent given the circumstances, and that U.S. audiences should understand that Goodnow still felt that China would eventually follow the United States' lead.<sup>257</sup>

As such, Goodnow continued to be approached as a China expert for a time after the Memo was issued. One lawyer told Goodnow that he still referred questions about China to Goodnow because "[Goodnow] knew more about China than any other man in the U.S."<sup>258</sup> Thomas Millard, likely then the most famous U.S. journalist of the Far East, asked Goodnow to comment on a draft of one of his early books even though Millard was himself a long-time loyalist to Yuan's foes.<sup>259</sup> Moreover, Goodnow was still invited to give lectures on China, including for business interests such as Bethlehem Steel.<sup>260</sup> He also continued his work on the China Medical Board and participated in various reports on foreign educational systems commissioned by the Association of American Universities.<sup>261</sup> He even received requests to make comments on papers about colonial administration.<sup>262</sup>

This diversity of reaction notwithstanding, the negative reaction that had the greatest impact on Goodnow's career was that rendered by the dissatisfied members of the CEIP and the larger Wilsonian foreign policy elite. Wilson was known to have been embarrassed by Goodnow's association with the monarchist movement, and Eliot and the other members of the CEIP clearly expressed their displeasure with Goodnow when he attempted to leave his post. Goodnow himself had stated that he anticipated such trouble from on high when he returned from his 1915 trip.<sup>263</sup> In contrast to his Progressive cohorts who remained involved in foreign affairs, over time Goodnow was blacklisted by members of the foreign policy establishment at

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<sup>256</sup> PAUL S. REINSCH, *AN AMERICAN DIPLOMAT IN CHINA* 47 (1922).

<sup>257</sup> *Id.* at 31.

<sup>258</sup> Letter from Mossgrave to Goodnow (Dec. 17, 1918), in *GOODNOW PAPERS*, *supra* note 14.

<sup>259</sup> Letter from Thomas Millard to Goodnow (June 11, 1919), in *GOODNOW PAPERS*, *supra* note 14. Millard would later himself become a political adviser to the GMD after its consolidation of urban China in the late 1920s.

<sup>260</sup> Letter from M.J. Scammell to Goodnow (Jan. 22, 1919), in *GOODNOW PAPERS*, *supra* note 14.

<sup>261</sup> Letter from Goodnow to George Wan, Esq. (June 4, 1918), in *GOODNOW PAPERS*, *supra* note 14. This letter discusses Goodnow's work on a "Report on Oriental Education Institutes." As President of Johns Hopkins University, Goodnow would serve on various other committees evaluating foreign educational systems.

<sup>262</sup> Letter from Goodnow to Maximo M. Kalaw, Esq. (1919), in *GOODNOW PAPERS*, *supra* note 14. This letter referred to a paper on self-government in the Philippines.

<sup>263</sup> REINSCH, *supra* note 256, at 31.

the vanguard of the internationalism that Goodnow had resisted in message, if not in medium.

The fact that those who were so disappointed with Goodnow's tenure failed to foresee the controversy that arose from his involvement defies explanation. From the very outset, the institutional parties involved in bringing him to China and the broader U.S. public saw him as a distinctly U.S. agent. Yet he resisted the characterization, claiming at various times that he carried no U.S. "mandate or mission for this country."<sup>264</sup> Most acutely, any brief familiarity with Goodnow's work should have given warning that he had little identification with U.S. law, even if he considered himself a republican citizen.

Progressives of the era evidently did not consider the possibility that Goodnow would carry his faith in expert science to such an extent that it would lack any conscious normative or national character. For Goodnow, it was important that Chinese law go wherever science would take it. In contrast, Americans had long projected an idealized image of their governmental system as appropriate for China, where liberty, order, and efficiency could all peacefully coexist.

The expectation that U.S. influence should be "Americanizing" first, and carried out by any particular method second, can be seen in the complete lack of global commentary on the role of Yuan's Japanese legal adviser at the time, professor of international law at Waseda University, Ariga Nagao. Nagao, like Goodnow, was an eminent legal scholar in Japan, continuing the long tradition of international law professors coming from Japan to China as legal advisers. Furthermore, Nagao was Japan's leading colonial theorist and his work on behalf of Japan was understood within a very different national discourse on China.<sup>265</sup> Thus, like Goodnow, Nagao felt that a republic was inappropriate for China and he worked with Goodnow throughout the monarchist affair. Yet, few ever questioned Nagao's role in the affair and his recommendations generated little backlash in Japan or elsewhere.<sup>266</sup>

Woodrow Wilson professed great faith in Yuan Shikai, much as Goodnow did, and shared Goodnow's belief in the need for the tutelage of the United States to gradually educate the Chinese masses.<sup>267</sup> But if U.S. influence turned China from republicanism to monarchism, it would be a murkier claim for men like Wilson to believe that this was a movement

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<sup>264</sup> *Dr. Goodnow Goes to China*, N.Y. TIMES, June 11, 1915.

<sup>265</sup> ALEXIS DUDDEN, JAPAN'S COLONIZATION OF KOREA 65-72 (2005).

<sup>266</sup> Japan had direct colonial aspirations in China and Nagao's writings were not used by Yuan as global propaganda. YOUNG, *supra* note 107, at 170.

<sup>267</sup> LI, *supra* note 88, at 6.

towards Americanization. True, Goodnow still held fast to a general faith in evolutionary progress, but he held a much longer-term view than the emerging U.S. vision of a globe fully democratized in a few decades. Notably, Goodnow never actually made any connection between Christianity and his general study of law, much less his specific mission to China.<sup>268</sup>

Goodnow's aversion to the incorporation of religion in his work is exactly why he was lionized in an unpublished paper by Japan scholar Kenneth Pyle, written in 1960 when Pyle was in the early stages of his doctoral studies.<sup>269</sup> Pyle portrayed Goodnow as a realistic bulwark against unbridled U.S. idealism: "In America the advent of Republicanism in China was greeted by an outpouring of naïve and self-righteous enthusiasm."<sup>270</sup> Pyle locates the negative reaction to Goodnow in the intertwining of Christianity and democracy in the American consciousness of the era, noting that "many believed that the prospects for diffusion of the Gospel in China have been greatly enhanced by the advent of the Republic."<sup>271</sup> Pyle valorized Goodnow's commitment to science, which undermined the "proselytizing zeal which sought to bring the democratic and Christian values of American civilization to China."<sup>272</sup>

Nevertheless, the fallout at the time from Yuan's bid for emperor became that Goodnow was removed from Chinese affairs and international affairs more broadly. Yet, he retained some lingering personal ties to the foreign policy establishment. He helped arrange for Westel Willoughby to succeed him as legal adviser to Yuan in 1915, and, notably, Willoughby did consult Goodnow after Willoughby's own resignation for another replacement.<sup>273</sup> Goodnow even maintained his family ties to China as his daughter married John V. A. MacMurray, who later would serve as Minister to China and as the first Director of the Page School at JHU. There is also some evidence that he maintained correspondence with at least one prominent Chinese family. Moreover, for years Goodnow would pepper his speeches at

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<sup>268</sup> In an unpublished paper on the educational work of the Presbyterian Church, Goodnow clearly segregated his analysis of the educational activities of the Church from any specifically Christianizing influence. Frank Goodnow, *Higher Educational Work of the Presbyterian Church*, GOODNOW PAPERS, *supra* note 14. Another clear clue comes from his writing on the colonial Philippines. Here he claimed that the natives were "not only non-Christian in religion but almost totally uncivilized." Frank Goodnow, *Governing Dependencies: The Philippines*, GOODNOW PAPERS, *supra* note 14.

<sup>269</sup> Kenneth Pyle, *Professor Goodnow and the Chinese Republic*, Jan. 19, 1960, GOODNOW PAPERS, *supra* note 14.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> Goodnow to Westel Willoughby (Jan. 27, 1917), in GOODNOW PAPERS, *supra* note 14. Goodnow recommended political science professor James Reeve of Michigan and Harvard law professor Munroe Smith.

JHU with references to the humanistic Chinese educational tradition, though primarily again as stark relief to the pragmatism of JHU.

It is impossible to ignore the stark contrast between Goodnow's status within the larger political and intellectual foreign policy establishment before and after his term as legal adviser in China. First, Goodnow's work on colonial administration was never published and his participation in the early phase of Progressive Era foreign policy has been all but forgotten. In large part, Goodnow's academic production nearly ceased *in toto* when he became president of JHU. Although such a high-profile administrative position certainly could have preoccupied him, it seems unlikely that he would simply put aside a nearly complete manuscript and a sustained fifteen-year interest from sheer distraction. He gave a series of lectures in 1917 on his experience in China; however, it was a decade before these lectures were published.<sup>274</sup>

Goodnow published two books in the two years after his return, but neither of them focused on China or international affairs.<sup>275</sup> Only one was comparative in nature; *Principles of Constitutional Government* was simply a collection of the lectures he had presented in 1913 at Beijing University.<sup>276</sup> The text makes clear that in China Goodnow did not present U.S. law, but instead his own views of global comparative constitutionalism, expanded only by the inclusion of South African examples and an approving aside on Japanese modernization.<sup>277</sup> He included his trademark critique of the "religious creed" of the rule of law and judicial independence in the United States,<sup>278</sup> of the persistence of federalism,<sup>279</sup> and then took swipes at natural law and social contract theory before declaring to his Chinese audience that "[t]he American conception is in a way an obstacle to progressive development."<sup>280</sup> Goodnow mentioned China in the lectures only twice, and even then only in a relativistic nod to the fact that "the wonderful civilization which has developed in China is in no small degree due to the fact that there has existed in the China of the past one great state" and a brief comparison of

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<sup>274</sup> FRANK J. GOODNOW, *CHINA: AN ANALYSIS* (1926).

<sup>275</sup> See FRANK J. GOODNOW, *THE AMERICAN CONCEPTION OF LIBERTY AND GOVERNMENT* vii-viii (1916).

<sup>276</sup> FRANK J. GOODNOW, *PRINCIPLES OF CONSTITUTIONAL GOVERNMENT* (1916).

<sup>277</sup> "The fact that the Japanese constitution has been practically unamended during the last 27 years of its life is a tribute both to the ability of those who drafted it and to the political genius of the people who are governed by it." Kenneth Pyle, *Professor Goodnow and the Chinese Republic*, Jan. 19, 1960. GOODNOW PAPERS, *supra* note 14.

<sup>278</sup> GOODNOW, *supra* note 276, at 225.

<sup>279</sup> *Id.* at 231 (arguing that "[federalism's] disadvantages are becoming every day more pronounced as the social and economic conditions of the country have been becoming more centralized, but as yet no method has been devised for remedying the evil").

<sup>280</sup> *Id.* at 269.

the Chinese Revolution, not in popular fashion to the American Revolution, but to the Civil War.<sup>281</sup>

Goodnow's only other publication for the next decade was an article in the *Columbia Law Review* on the League of Nations.<sup>282</sup> Interestingly, this article shows that he was clearly dubious of the capacity of international legal institutions to achieve peace: "[internationalists] will still cling to the ideals of the Roman Empire with its universal peace. They will at the same time forget that that Empire was the result of conquest."<sup>283</sup> This critique has to be considered with some irony in light of Goodnow's relationship with the Carnegie Endowment, an organization that predicated its work on the establishment of peace through international law.<sup>284</sup>

Another indicator of Goodnow's isolation from the foreign-policy establishment is that during these years he made few, if any, new contacts in foreign affairs. Furthermore, he was not invited to join any additional institutional aspects of international Progressivism. He did continue to serve on the China Medical Board, but this was likely due to JHU's prominence as a medical research center.

More direct evidence of this isolation comes from his personal correspondence, which reveals that several individuals tried to contact Goodnow privately about his China experience and were roundly rebuffed. An aspiring legal adviser to China asked Goodnow if he had any copies of his Memorandum. Goodnow claimed to have none.<sup>285</sup> A lawyer-missionary of the era, Thomas Rambaut, asked Goodnow for a copy of the Chinese Constitution, which he believed Goodnow wrote.<sup>286</sup> Goodnow again said that he had no copies and clearly stated that he was not involved in the writing of the document.<sup>287</sup> Even when his colleague William Shepherd was writing a defensive review of Weale's book, which was critical of Goodnow, Goodnow claimed that he could not find his Memo or any document related to his time in China—nor should Shepherd expect to find it elsewhere.<sup>288</sup>

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<sup>281</sup> *Id.* at 18-19.

<sup>282</sup> Frank J. Goodnow, *Former Plans for a League of Nations*, 20 COLUM. L. REV. 51 (1920).

<sup>283</sup> *Id.* at 67.

<sup>284</sup> Goodnow gave some weight in the article to hopes for a peaceful future through international law: "The development of the system of international law, which was so marked a characteristic of the century preceding the war, has unquestionably provided a soil most favorable for the growth of the idea at the foundation of the League of Nations. The setback, which many of the principles of that law have suffered during the war, can be regarded as only temporary." *Id.* at 66.

<sup>285</sup> Letter from Joshua Bae, Esq. to Goodnow (Apr. 10, 1919), in GOODNOW PAPERS, *supra* note 14.

<sup>286</sup> Letter from Thomas Rambaut to Goodnow (Mar. 19, 1919), in GOODNOW PAPERS, *supra* note 14.

<sup>287</sup> Letter from Goodnow to Rambaut (Mar. 23, 1919), in GOODNOW PAPERS, *supra* note 14.

<sup>288</sup> Letter from William R. Shepherd to Goodnow (Mar. 23, 1918), in GOODNOW PAPERS, *supra* note 14.



There is evidence that Goodnow attempted to defend his actions in China to other established foreign policy elites, though with little success. While still in China, he had tried to persuade George Morrison of his good intentions, but Morrison knew of Goodnow's private views and found them transparent and "most explicit."<sup>289</sup> Joseph Clarke, a former Irish Nationalist turned Rockefeller Foundation man in Asia, recounted how even though Clarke found Goodnow quite agreeable personally, Goodnow had also tried unsuccessfully to convince Far Eastern expatriates that Yuan's ambitions were ultimately democratic.<sup>290</sup> Goodnow even tried to absolve himself when corresponding with Reinsch much later in 1921, claiming not Yuan's good intentions but Goodnow's own impotence.<sup>291</sup>

Eventually, Goodnow shifted his focus to his duties at JHU where he became widely known for his attempt to remodel U.S. general undergraduate education based on European models. After his retirement in 1929, he resumed many of the activities he had undertaken during the first decade of the twentieth century, such as lecturing on administrative law and participating in public affairs, but solely on the state and municipal level in Maryland.<sup>292</sup>

Goodnow would briefly return to the arena of Chinese affairs near the end of his term as President of JHU. Ten years after he presented his last public lectures on China, they were reprinted in 1927 in a volume entitled *China: An Analysis*. Strangely, the book is rife with natural science references and reads more like an extended *National Geographic* article than a treatise written by a once renowned comparative lawyer.<sup>293</sup> When he did mention law, he simply stated that the traditional Chinese legal system "for centuries has not been a good one."<sup>294</sup> Notably, he mentioned Yuan's regime only in passing, describing the reversion to monarchy as "natural" given ineluctable social forces.<sup>295</sup>

Reviews of the book were primarily positive.<sup>296</sup> Stanford professor and East Asian diplomatic historian Payson Treat, who himself had written on

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<sup>289</sup> LO, *supra* note 107, at 451.

<sup>290</sup> JOSEPH CLARKE, *JAPAN AT FIRST HAND* 439 (1918).

<sup>291</sup> PUGACH, *supra* note 100, at 505.

<sup>292</sup> GOODNOW PAPERS, *supra* note 14.

<sup>293</sup> GOODNOW, *supra* note 274, at 5.

<sup>294</sup> *Id.* at 88. Goodnow stated this though he demonstrated some understanding of the private nature of most judicial activity in rural China and the pre-existing use of sophisticated credit instruments. *Id.* at 159-60.

<sup>295</sup> *Id.* at 240.

<sup>296</sup> The modest success of the book prompted Goodnow to write an article version. Frank J. Goodnow, *The Geography of China*, NAT'L. GEOGRAPHIC MAG., June 1927, at 661. Goodnow briefly discusses in the article the difficulty of judicial reform in traditional China.

Chinese constitutional development prior to Goodnow's trip, wrote a review that, notwithstanding the non-legal focus of *China*, was published in an international law journal. Treat called the book a trove of accurate generalizations written "with, on the whole, striking success."<sup>297</sup> A. E. Zucker, a leading scholar of Chinese theatre, praised the book and claimed that China should once again listen to Goodnow's advice.<sup>298</sup> Fellow political scientist Harold Quigley judged the book as a thorough primer on Chinese life, although he mentioned the curious omission of Goodnow's own experience.<sup>299</sup>

For a brief time after the publication of *China*, Goodnow started receiving a few China-related invitations. In 1928, Secretary of State Frank Kellogg invited him to again become a delegate to the Permanent International Commission between China and America, an invitation Goodnow quickly accepted.<sup>300</sup> Walter Mallory, then Executive Director, asked him to give a speech at the Council on Foreign Relations on the GMD.<sup>301</sup> Interestingly, Goodnow actually resisted the invitation, worried that his presence would upset the GMD representatives who would be present.<sup>302</sup>

It is possible that some in the U.S. foreign policy establishment had actually come to soften their views of Goodnow after the GMD had spent a decade struggling to unify China after Yuan's regime collapsed. At the outset of the decade there was also a decline in U.S. enthusiasm for the Guomindang in light of the growing Soviet influence within the Party. In the 1920s, one member of the Far Eastern American Bar Association even spoke highly of Goodnow in retrospect, saying that he was not a propagandist for Yuan but had spoken honestly to the recalcitrant Chinese.<sup>303</sup> The only hint of the relevance of China's fortunes on Goodnow's temporary rehabilitation is a negative one. In 1928, after Chiang Kaishek led the GMD's Northern Expedition to successfully unify urban China, Goodnow once again disappeared from China-related public affairs.

It would be many years before anyone would mention Goodnow's China mission other than briefly.<sup>304</sup> When he died in 1939, he was lionized for the success of his presidency at JHU and for his early role in the

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<sup>297</sup> Payson J. Treat, Book Review, 21 AM. J. INT'L L. 195 (1927).

<sup>298</sup> A.E. Zucker, Book Review, BALTIMORE EVENING SUN, April 10, 1926.

<sup>299</sup> Harold Quigley, Book Review, 20 AM. POL. SCI. REV. 679 (1926).

<sup>300</sup> Letter from Frank Kellogg to Goodnow (Feb. 21, 1928), in GOODNOW PAPERS, *supra* note 14.

<sup>301</sup> Letter from Walter Mallory to Goodnow (Feb. 4, 1929), in GOODNOW PAPERS, *supra* note 14.

<sup>302</sup> Letter from Goodnow to Walter Mallory (Feb. 5, 1929), in GOODNOW PAPERS, *supra* note 14.

<sup>303</sup> Ralph Frost, *Has Extraterritoriality Outlived Its Usefulness?*, 6 A.B.A. J. 224, 235 (1920) (stating that "[a] man like Dr. Goodnow, who advised honestly and candidly, was not wanted").

<sup>304</sup> See, e.g., HAROLD VINACKE, MODERN CONSTITUTIONAL DEVELOPMENT IN CHINA 183 (1920); EU-KWANG KWANG, THE POLITICAL RECONSTRUCTION OF CHINA (1922).

development of administrative legal science. His time in China was mentioned tersely in his obituaries, save Nicholas Butler's quote in the *New York Times* that "[i]t isn't every day that a man is called to help mold a nation."<sup>305</sup> Most subsequent histories of the era noted the "Goodnow Memo" in the traditional fashion, and one of the few pre-1949 studies of GMD law mistakenly cited Goodnow as having attempted to bring Chinese law in line with Anglo-American tradition.<sup>306</sup>

Coupled with the initial diversity of reactions to his memo, Goodnow's blacklisting reveals the shifting shape of U.S. legal internationalism in this era. While some still shared the same colonial assumptions upon which Goodnow had begun his career, and believed that reformism was a poor substitute for the direct transplantation of U.S. legal institutions abroad, others were hesitant about the need for U.S. intervention abroad, especially after the tragedy of World War I.<sup>307</sup> Herein Goodnow was clearly a transitional figure. He believed in the ability of a depoliticized legal expertise to shape development abroad, but he had not fully adopted the Americanizing presumption in which Wilson and others believed. While America would become increasingly involved in Chinese affairs in the following decades, Goodnow's allegiance to comparative legal science would be uniformly absent from the work of those who embraced the Americanizing line.<sup>308</sup>

### C. *The Inevitable Pitfalls of Eliding Politics Abroad*

With every passing decade, Goodnow's scholarly and popular reputation declined. Ultimately, the rise of the Chinese Communist Party ("CCP") in 1949 shifted Sino-U.S. relations away from decades of ever increasing idealism about China's potential Americanization.<sup>309</sup> The atmosphere in the United States after 1949 became one of recrimination and blame as China turned from emulator to enemy. Chinese studies, subjected for many years to political witch-hunts during the McCarthy era,<sup>310</sup> emerged

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<sup>305</sup> Nicholas Butler, *Dr. Frank J. Goodnow*, N.Y. TIMES, Nov. 17, 1939.

<sup>306</sup> Meredith P. Gilpatrick, *The Status of Law and Lawmaking Procedure Under the Koumintang 1925-46*, 10 FAR E.Q. 38, 39 (1950).

<sup>307</sup> LI, *supra* note 88, at 147-48.

<sup>308</sup> Kroncke, *supra* note 8.

<sup>309</sup> See Philip Beidler, *China Magic: America's Great Reality Hiatus, 1948-73*, 47 MICH. Q. REV. 1513 (2008) (noting the almost magical quality to the massive blotting-out of America's decades of fascination with China's Americanization); see also ARCHIBALD T. STEELE, *THE AMERICAN PEOPLE AND CHINA* 57 (1966) (describing how idealistic assumptions about China have lost validity).

<sup>310</sup> See STEELE, *supra* note 309, at 40-41; HAROLD ISSACS, *THE TRAGEDY OF THE CHINESE REVOLUTION* 319 (1951).

from 1949 set on explaining why the United States had “lost” China.<sup>311</sup> Native historians were joined in this analysis by a flow of expatriate Chinese intellectuals who had fled the mainland. Whatever absolution Goodnow’s reputation had earned in the prior decades quickly faded, and he, once again, became an easy target for recrimination.

In his 1961 biography of Yuan, Chinese expatriate historian Jerome Chen repeated the trope that Goodnow was simply a well-intentioned but naïve interlocutor.<sup>312</sup> Chen gave credit to Goodnow for reminding Yuan of the eventual necessity of establishing “something in the nature of a representative parliament.”<sup>313</sup> He recognized that Goodnow was chosen as an adviser for China because of his then-eminent stature but “Goodnow, like so many U.S. reformers, expected too much from militarists and warlords, who did not understand or respect individual rights and constitutional government.”<sup>314</sup> Another biographer of Yuan in the 1970s, Ernest Young, cast Goodnow not as naïve but as rigid and unyielding in his thinking.<sup>315</sup> Young was also critical of the fact that Goodnow did not resign immediately when Yuan cracked down on the GMD.<sup>316</sup>

Of all the accounts of Goodnow’s mission, Noel Pugach’s presents itself as the most even-handed. Pugach casts Goodnow as yet another example of a misbegotten Westerner mucking about in the mess of Chinese domestic affairs.<sup>317</sup> At the same time, Pugach was sympathetic to Goodnow’s claim that he was misquoted and manipulated by Chinese officials<sup>318</sup> and noted that Goodnow persuaded the Peace Planning Society to make a public statement that he did not support them—though only in the Chinese press.<sup>319</sup>

Historians would also differ in their assessments of the impact of the Goodnow Memo.<sup>320</sup> While James Sheridan’s classic diagnosis of Chinese Republican-era politics gave Goodnow’s influence little weight,<sup>321</sup> in sharp

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<sup>311</sup> See, e.g., ANTHONY KUBEK, *HOW THE FAR EAST WAS LOST* (1962); see also FORREST DAVIS & ROBERT HUNTER, *THE RED CHINA LOBBY* (1963).

<sup>312</sup> JEROME CHEN, *YUAN SHI-KAI 167-68* (2d ed. 1972).

<sup>313</sup> Pugach, *supra* note 240, at 507.

<sup>314</sup> *Id.* at 511.

<sup>315</sup> See YOUNG, *supra* note 107, at 174 (“[Goodnow’s] functionalism became, in practice, an instrument for justifying a flight from liberalism.”).

<sup>316</sup> *Id.*

<sup>317</sup> Pugach, *supra* note 240, at 499.

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 513.

<sup>320</sup> More interesting is that no one except Pugach seems to recognize the quite clear distinction between Goodnow’s private and public writings. Even Pugach ultimately falls back on the explanatory catch-all of hubris: “Goodnow expected to leave his mark; he believed that he had something to teach the Chinese whether or not they agreed or wanted to hear it.” PUGACH, *supra* note 240, at 516.

<sup>321</sup> SHERIDAN, *supra* note 233, at 50.

contrast, Xu Guoqi's 2005 history of China's role in World War I attributes catalytic responsibility to Goodnow for Yuan's turn to monarchy.<sup>322</sup> Goodnow's full fall from grace can be seen in a 1995 law review article that describes him as simply "a middle-aged American law professor" who had "stoked and garbed with quasi-legitimacy" the ambitions of the "megalomaniacal" Yuan Shikai.<sup>323</sup>

For strikingly similar reasons, mention of Goodnow in Chinese discourse today is equally dismissive, if not outright hostile. A *China Daily* article in 1998 repeated the CCP line that characterized Yuan as a victim of the imperialist American.<sup>324</sup> Yet, in the growing diversity of contemporary Chinese academic discourse, one can find a range of disagreement about the significance of Goodnow's role in the era.<sup>325</sup>

Judging Goodnow as an individual personality, however, misses entirely how novel his role as foreign legal reformer was in U.S. circles.<sup>326</sup> Goodnow was in fact distinctive as the first U.S. practitioner of modern legal science to arrive in China with the belief that he had the capacity to directly influence Chinese political development, and do so in a private manner wholly apart from any official governmental sanction. Thus, Goodnow's tenure in China was the first major modern test of the non-colonial articulation of Americanization abroad through law, and, significantly, by an ostensibly private actor. Far removed from the lofty controversies of the *Insular Cases*, here was Goodnow, a single man thousands of miles from America, carrying the collective belief that U.S. legal expertise could be transformative without any form of coercion.

Goodnow's belief in technocratic legal expertise differed from those whom his memo disappointed only in its comparative coherence. While Wilson and others rejected the nature of Goodnow's conclusions, they all agreed that China was a place to, in Young's words, "test theories and offer the special wisdom of Western social science."<sup>327</sup> Despite his own

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<sup>322</sup> XU GUOQI, CHINA AND THE GREAT WAR 238 (2005).

<sup>323</sup> Piero Tozzi, *Constitutional Reform of Taiwan: Fulfilling a Chinese Notion of Democratic Sovereignty?*, 64 FORDHAM L. REV. 1193, 1226-27 (1995).

<sup>324</sup> Yan Lin, *Epstein's China History Corrects Distortions*, CHINA DAILY, June 10, 1998.

<sup>325</sup> Compare Zheng Qiongmei, *Goodnow and the Hongxian Monarchy*, 15 J. WUHAN U. TECH. 86 (2002) with Huang Ling-jun, *Goodnow's Political Ideas Revealed in Two Papers*, 23 J. CEN. S. U. NATION 33 (2003).

<sup>326</sup> At the time, it was mainly progressive internationalists who found Goodnow's Memo objectionable in their quest to link foreign technocratic reform to democratization. Most American officials in China at the time also vastly overestimated the strength of Yuan's regime, and even many foreign-educated Chinese elites believed resistance to Yuan would be "wholly academic." See Zi Zhongyun, *The Impact and Clash of Ideologies*, 6 J. CONT. CHINA 531, 539 (1997).

<sup>327</sup> YOUNG, *supra* note 107, at 172.

frustrations over his tenure in China, Goodnow never seemed to contemplate that he could not apply his preexisting expertise to China; moreover, his critics never challenged him on methodical grounds. His greatest struggle arose when no one in Chinese politics took his expertise seriously. His comparative cosmopolitanism had its virtues, but its methodological universality was simply not compatible with the parochialism of his sponsors.<sup>328</sup>

Goodnow's story, then, highlights exactly how this strange alchemy of legal science and parochialism would contribute to the eventual decline of comparative law in U.S. legal and political discourse. One cannot employ a rigorous comparative legal science informed by the full range of global empirical sources that recursively leads to the conclusion that the legal system of a particular nation is universally functional, much less normatively desirable. It is impossible to reconcile such divergent commitments unless one presumes as a self-evident fact that the system to be universalized is always at the evolutionary vanguard—an empirical presumption that renders null the necessity of a truly scientific analysis to begin with. Nevertheless, it was just such an evolutionary presumption that undergirded the notion that U.S. foreign legal reform should always be Americanizing. Ultimately, there is essentially no new comparative legal knowledge when every legal culture is headed in a predetermined direction that remains consistently defined by a single legal culture's experience.

Yet, while Goodnow's allegiance to legal science saved him from the contradictions of exporting U.S. law as a scientific process, the cosmopolitanism of his comparative constitutional methodology did not save him because of his current belief in the depoliticized production of scientific knowledge. Goodnow was seduced by the allure of foreign reform held as an arena of depoliticized expert knowledge.<sup>329</sup> It made no difference that Goodnow did not believe himself to be an agent of U.S. republicanism, as this only contributed to his ultimate belief that he was a culturally neutral agent who could transform a foreign nation through the application of his personal expertise and good intentions.

It was exactly this presumption of technocratic neutrality that was the foundational component of Goodnow's own failure. He did not fail because

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<sup>328</sup> One article defended Goodnow's expertise even after Yuan had made bid for the monarchy, citing Goodnow's work about the universal science of governance as the basis for the appropriateness of his attempt to modernize China. See Frank J. Goodnow, *How the World Governs Itself*, N.Y. TIMES, Aug. 13, 1916.

<sup>329</sup> For a contemporary articulation of the faith in depoliticized international legal knowledge, see ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004). For a contrasting view, see DAVID KENNEDY, *THE DARK SIDES OF VIRTUE* (2004).

of the character of his intentions or the relative sophistication of his expertise. It was his own self-confidence and the ends to which he defended his actions and Yuan that made his actual impact on Chinese constitutionalism meaningless. Thus, he can be rightly criticized for the stark public/private split in his writings, the self-serving and one-sided use of China to support his broader intellectual agenda, and that his experience abroad compelled him to undertake little personal or intellectual re-evaluation.

This depoliticized concept was all the more significant as the controversy about Goodnow's support of Yuan and his recommendation of constitutional monarchy was never, in fact, about his expertise, but about his politics. He had even been warned by his friend Charles Bigelow that he should be wary of this faith in depoliticized legal expertise prior to his trip to China, noting that "that an illiberal and reactionary government cannot dispense with a constitutional adviser any more than the large corporations here who intend to disregard the law start out without the best lawyer of the land in their cabinet."<sup>330</sup> In the end, Goodnow's skill and commitment as a comparativist could not save him from his faith in his ability to separate knowledge from power and this led him to run afoul of politics on both sides of the Pacific.

The power of this faith is shown in that Goodnow himself had decades earlier made a strong argument for the professionalization and standardization of the Foreign Service. He argued that people posted abroad should have a strong particular knowledge of the politics of their host country.<sup>331</sup> In his own writings on educational reform in China, he noted that his curriculum for public administration should be suffused with local knowledge, as "the official can be successful in the circumstances of China only with the evaluation that he is in touch with the life of the people with whom he has to work."<sup>332</sup> Even more striking is that he repeated in many of his writings his fear that Chinese educated abroad would become denationalized and out of touch with Chinese concerns. But like so many other technocrats to follow, he did little to actually learn about Chinese affairs outside of his very narrow Beijing environment.<sup>333</sup> For all his later study of Chinese topics, he was always far removed from learning about the most important aspect of Chinese society for any legal reformer: Chinese politics. He lacked insight into or any critical understanding of Chinese politics and so committed the cardinal sin of failing to consider its actors as capable, calculating agents.

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<sup>330</sup> YOUNG, *supra* note 107, at 174.

<sup>331</sup> Frank J. Goodnow, *Book Review*, 1 POL. SCI. Q. 343, 344 (1886).

<sup>332</sup> See Goodnow, *supra* note 127.

<sup>333</sup> JAMES C. THOMSON, *WHILE CHINA FACED WEST* 4 (1969).

## V. CONCLUSION

Upon final review, Goodnow's tenure in China tells us little about China during this era, except that many in China cared little for U.S. pretensions even if they made use of them in international politics. Goodnow's failure did little to disturb such pretensions, as the actual fate of Chinese Republicanism was of far less material importance to U.S. foreign affairs than the symbolic affirmation of the United States' presumed new role in legal reform abroad.

Comparativists like Goodnow led the U.S. legal community to increasingly view foreign law as a site of applied rather than critical inquiry. There was little place for voices coming from China itself that could raise new or novel questions about U.S. constitutionalism. With some irony, there was ultimately no place for Goodnow's voice either, as his place in history became defined by the fact that he did not fully follow the soon to be well-hewn script of Americanization that would become the basis for foreign legal reform work.

His time in China did not have any significant impact on Sino-U.S. relations after Yuan's fall, and in time the other U.S. advisers who followed Goodnow would work not to disturb the agendas and assumptions of the sponsors that praised their work.<sup>334</sup> In fact, no U.S. legal adviser's failure in China would ever be seen as necessitating a revision of the vision of U.S. law he or she sought to export, and this would in later decades become true for U.S. lawyers all across the globe.<sup>335</sup>

By matter of contrast, consider the critique of Goodnow presented by Sudhindra Bose after Goodnow's 1915 address to APSA. Bose was an Indian-born political scientist who was an ardent promoter of democracy, both as an anti-fascist and anti-communist, yet also a critic of Europe and the United States' disruptive, if well-intentioned, impact on Asia. Consequently, Bose found in Goodnow's speech the curious but characteristic tension of describing Asian societies on one hand as inscrutable—"Occidental people find no end of difficulty in understanding and interpreting our Oriental laws, customs, and institutions"—while on the other hand presenting a confident, historically short-sighted judgment on Asian societies as definitely passive.<sup>336</sup> Bose pointed out that Goodnow was attempting to reform China without a self-critical position that recognized the internal turmoil still present in the

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<sup>334</sup> These include Westel and William Willoughby, both past Presidents of APSA, and William Denis, one-time President of the American Society of International Law.

<sup>335</sup> See Kroncke, *supra* note 8.

<sup>336</sup> Sudhindra Bose, *Remarks on President Goodnow's Paper*, 9 AMER. POL. SCI. REV. 224-25 (1915).



United States itself during the era, or the relatively young age of the U.S. republic.<sup>337</sup>

Bose's ultimate critique of Goodnow struck precisely at the Americanizing presumption: "We in the East ask only one thing of the West. It is this—that you of the West stay away from us and our problems: leave us to solve our own problems, to work out our own destinies, while you spend your time looking after yours. The greatest good you can do us, the lasting benefit you can confer on us, is to let us alone."<sup>338</sup> Bose clearly identified the shared paternalistic and evolutionary presumptions of European colonialism and the new forms of presumptively acolonial U.S. legal reform work. Goodnow's early view of his work as part and parcel of an U.S. colonial administration reflects how many of the theoretical and empirical assumptions about foreign legal systems did not in fact change even as U.S. foreign legal reformers asserted their respect for local sovereignty.

Goodnow's failure thus brings to the forefront the core question of what exactly the aims of comparative constitutionalism, or any form of comparative law, should be.<sup>339</sup> Goodnow himself traded comparativism as a mechanism for stimulating domestic legal reform for an externally-oriented process meant to stimulate foreign legal reform.<sup>340</sup> Goodnow's story exposes how such foreign reform work was premised on a one-way export of knowledge that in large part removed U.S. law from international legal exchange. Even for Goodnow's Chinese interlocutors, he did little to enhance their understanding of the quite-contested and lively debates about constitutionalism alive in U.S. law during this era, but instead left them with failed idealizations and bitterness.<sup>341</sup>

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<sup>337</sup> *Id.* at 226 ("Some of the Oriental nations have shown incompetency . . . we are sincerely sorry for them. But I have been informed on good authority that there are also many countries in the West which are not above the charges of graft and corruption. Are we to believe now that the Western nations have proved their inability for representative governments?").

<sup>338</sup> *Id.* at 224-25. Obviously, this was an evaluation that was far from widely shared, and after the meeting Bose left Washington to return to Iowa, far from the halls of American internationalism.

<sup>339</sup> For a related and relevant critique of modern comparative constitutionalism, see David Fontana, *Book Review*, 56 AM. J. COMP. L. 1085 (2008) (citing the "imperialism" of American comparative constitutional law that projects its own assumptions on foreign constitutional arrangements and problems).

<sup>340</sup> For classic articulations of the proper use of comparative law in domestic debates, see Otto Kahn-Freund, *The Use and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974); Eric Stein, *Uses, Misuses—And Nonuses of Comparative Law*, 72 NW. U. L. REV. 198, 216 (1977). For critiques of contemporary American comparative law, see Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411 (1985); RETHINKING THE MASTERS OF COMPARATIVE LAW (Annelise Riles ed., 2001).

<sup>341</sup> For contemporary analogs to disillusionment from the presentation of unworkable idealizations of American law abroad, see Yash Ghai, *Law, Development and African Scholarship*, 50 MOD. L. REV. 750 (1987); Jeffrey Kahn, *The Search for the Rule of Law in Russia*, 37 GEO. J. INT'L L. 353 (2006); Jorge Esquirol, *Continuing Fictions of Latin American Law*, 55 FLA. L. REV. 41 (2003); Marc Galanter & Jayanth

As we consider the lessons that Goodnow's story holds for contemporary concerns, this marginalization of comparative law in domestic debates seems far more problematic today as we face a global world of ever increasing challenges that is a far cry from the rapid expansion of U.S. influence in the early twentieth century.

While some may seek to dismiss Goodnow as unusually naïve or hubristic, it is important to remember that he was not only a singularly brilliant scholar, but also perhaps the most outstanding comparative lawyer of his generation. As comparative constitutionalism once again becomes an increasingly popular subject of debate in U.S. law, we would do well to reflect upon the lessons implicit and explicit in Goodnow's story. Especially relevant in an age of increasing globalization and new and emergent constitutional regimes, Goodnow's actual tenure as adviser also demonstrates how confidence in comparative legal science and depoliticized expertise can often exacerbate the impact of local politics rather than bypass them. We should be wary of an overly fervent commitment to legal science that conceives of comparative constitutionalism as solely an applied field of reform abroad.<sup>342</sup>

Further, the need to project U.S. foreign reform work as successful for domestic audiences and sponsors presses reformers to misrepresent, with well-intentioned but warping optimism, the actual shape of foreign legal developments.<sup>343</sup> The highly symbolic stature of constitutionalism makes it especially ripe for the often only merely self-gratifying invocation of broad allusions and sweeping symbolic formalism.

Thus, we need to pay critical attention to three claims that still have seductive allure in today's debates about comparative constitutionalism. First, that there are "universal" principles to which all modern constitutions should adhere.<sup>344</sup> Second, that textual analysis of constitutional provisions is sufficient for any analysis of a concrete system of constitutional practice.<sup>345</sup>

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K. Krishnan, *Debased Informalism*, in *BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW* 107 (Erik Jensen & Thomas Heller eds., 2003); Timothy Frye, *Keeping Shop*, in *ASSESSING THE VALUE OF LAW IN TRANSITION ECONOMIES* (Peter Murrell ed., 2001). For a modern call for such openness, see John K.M. Ohnesorge, *Developing Development: Law and Development Orthodoxies and the Northeast Asian Experience*, 28 U. PA. J. INT'L ECON. L. 219 (2007).

<sup>342</sup> See Paul W. Kahn, *Comparative Constitutionalism in a New Key*, 101 MICH. L. REV. 2677 (2003).

<sup>343</sup> See Kroncke, *supra* note 8.

<sup>344</sup> For such general optimism about the presence of constitutional universals, see Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129 (2005); Ruth Teitel, *Comparative Constitutional Law in a Global Age*, 117 HARV L. REV. 2570 (2004).

<sup>345</sup> For a critique of formalism in comparative constitutionalism, see Jeffrey A. Redding, *Constitutionalizing Islam: Theory and Pakistan*, 44 VIR. J. INT'L L. 759 (2004).

Third, and most generally, we should be wary of our own exuberance and our proclaimed expertise in assessing foreign constitutional needs.<sup>346</sup>

Moreover, although the historic influence of the U.S. Constitution abroad is well-documented, we need to recognize that much of its influence has been felt indirectly through emulation and dialogue, not imposition and outright advocacy.<sup>347</sup> This point is even more pressing as we face a world where our own Constitution and constitutional debates are rapidly waning.<sup>348</sup> At a time when our own constitutional politics is as rancorous as ever, we should remember that simple assertion of constitutional exceptionalism is a poor substitute for exemplification of good, and perhaps again innovative, constitutional practice.

Recovering Goodnow's story is but one chapter in a grander narrative that describes an era of U.S. involvement in foreign constitution writing. Notably, this is a narrative that has been understudied, even forgotten, or, much worse, mythologized.<sup>349</sup> In sum, as much as anyone may disagree with Goodnow's own view on constitutionalism, if we seek to recapture the vibrant cosmopolitanism with which a younger Goodnow sought to energize U.S. law, then we would do well to weigh this era and his own history against the ever-seductive allure of shaping others instead of reshaping ourselves.<sup>350</sup>

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<sup>346</sup> Note any of the recent American-led engagements with constitutional reform abroad in the last decade, rarely staffed by local experts or with local input.

<sup>347</sup> See generally CONSTITUTIONALISM AND RIGHTS (Louis Henkin & Albert J. Rosenthal eds., 1990); GEORGE A. BILLIAS, AMERICAN CONSTITUTIONALISM HEARD ROUND THE WORLD, 1776-1989 (2009).

<sup>348</sup> See David Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. (forthcoming 2012) (demonstrating empirically the declining citation of American constitutional law abroad). See generally Wiktor Osiatynsky, *Paradoxes of Constitutional Borrowing*, 1 INT'L J. CONST. L. 244 (2003); Heinz Klug, *Model and Anti-Model: The United States Constitution and the "Rise of World Constitutionalism"*, 2000 WIS. L. REV. 597 (2000).

<sup>349</sup> The post-World War II involvement of Americans in the Japanese and West German legal reconstruction projects are the key twentieth century examples. Deconstruction of the triumphalist accounts of such applied constitutional interventions is classic and on-going. For Japan, see generally KYOKO INOUE, MACARTHUR'S JAPANESE CONSTITUTION (1991); LAWRENCE BEER & JOHN MAKI, FROM IMPERIAL MYTH TO DEMOCRACY (2002). For West Germany, see generally PATRICK JACKSON, CIVILIZING THE ENEMY (2006); Erich Hahn, *U.S. Policy on a West German Constitution*, in AMERICAN POLICY AND THE RECONSTRUCTION OF WEST GERMANY (Jeffrey Diefendorf et al. eds., 1993).

<sup>350</sup> For possible solutions to reviving a more coherent comparativism in the American legal community, see Fontana, *supra* note 9, at 50-67; Kroncke, *supra* note 8.